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CYCLOPEDIA

OF

LAW AND PROCEDURE

WILLIAM MACK

EDITOR-IN-CHIEF

VOLUME XVII

NEW YORK

THE AMERICAN LAW BOOK COMPANY

LONDON: BUTTERWORTH & CO., 12 BELL YARD

1905

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J. B. LYON COMPANY
PRINTERS AND BINDERS
ALBANY, N. Y.

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3. *Ownership*, 821
4. *Pedigree*, 822

CROSS-REFERENCES

[See 16 Cyc. 834–946]

XI. OPINION.*

A. In General — 1. Rule of Exclusion Stated. Reasoning is the proper function of judge, jury, and counsel. It is not part of the normal function of a witness. He is to state facts rather than his opinions.[37] The inference that a fact

37. "Opinion," in this connection, designates: (1) Inferences formed either by direct reaction from sensation or, more remotely, by the exercise of judgment upon original data; (2) results reached by the mind from consideration of propositions submitted to it; and (3) conclusions reached by blending these mental processes.

"Matters of opinion," in the sense of debatable propositions of fact, as to which certainty is unattainable, are also excluded. The conclusion, inference, or judgment of a witness may well relate to the existence of a fact whose ascertainment is as definitely possible as any other. "The essential idea of opinion seems to be that it is a matter about which doubt may reasonably exist, as to which two persons can without absurdity think differently. The existence of an object before the eyes of two persons would not be a matter of opinion, nor would it be a matter of opinion that twice two are four. But when testimony is divided or uncertain the existence of a fact may become doubtful and, therefore, a matter of opinion." Lewis Authority in Matters of Opinion, c. 1, § 1, note.

Uncertainty not covered.—The term "opinion," as used in the law of evidence, does not as a rule connote the lack of certainty or fixity in mental conviction which it frequently does in more colloquial use. Such a use of the word is, however, frequent in the cases, where a statement is at times rejected as "opinion" when the real objection is that the evidence is not relevant because a witness is not really stating anything from knowledge but merely hazarding a guess.

Alabama.— Cummins *v.* State, 58 Ala. 387.

Maine.— Lime Rock Bank *v.* Hewett, 50 Me. 267; Palmer *v.* Pinkham, 33 Me. 32.

Michigan.— Reid *v.* Ladue, 66 Mich. 22, 32 N. W. 916, 11 Am. St. Rep. 462; Bissell *v.* Starr, 32 Mich. 297.

New York.— Cook *v.* Brockway, 21 Barb. 331; Fry *v.* Bennett, 3 Bosw. 200; People *v.* Holfelder, 5 N. Y. St. 488.

Ohio.—Arcade Hotel Co. *v.* Wiatt, 44 Ohio St. 32, 4 N. E. 398, 58 Am. Rep. 785.

Texas.— Kansas Gulf Short Line R. Co. *v.* Scott, 1 Tex. Civ. App. 1, 20 S. W. 725.

Virginia.— Tyler *v.* Sites, 90 Va. 539, 19 S. E. 174.

Wisconsin.— Wood *v.* Chicago, etc., R. Co., 40 Wis. 582.

Among phrases introducing this measure of uncertainty are those denoting:

Approximation.— Hopper *v.* Beck, 83 Md. 647, 34 Atl. 474.

Belief.— Mobile Furniture Commission Co. *v.* Little, 108 Ala. 399, 19 So. 443; Brewer *v.* Watson, 71 Ala. 299, 46 Am. Rep. 318; Collins *v.* Com., 25 S. W. 743, 15 Ky. L. Rep. 691; Salmon *v.* Feinour, 6 Gill & J. (Md.) 60; Hodges *v.* Hodges, 2 Cush. (Mass.) 455; Berg *v.* Parsons, 90 Hun (N. Y.) 267, 35 N. Y. Suppl. 780; Schrader *v.* Schrader, (Pa. 1888) 14 Atl. 434; Conde *v.* State, 33 Tex. Cr. 10, 24 S. W. 415; Bagley *v.* Mason, 69 Vt. 175, 37 Atl. 287; House *v.* House, 102 Va. 235, 46 S. E. 299.

Consideration.— Yanke *v.* State, 51 Wis. 464, 8 N. W. 276.

Expectation.— Hager *v.* National German-American Bank, 105 Ga. 116, 31 S. E. 141.

Guessing.— Spurlock *v.* Com., 20 S. W. 1095, 14 Ky. L. Rep. 605 (reckoned); Johnson *v.* Hovey, 98 Mich. 343, 57 N. W. 172.

Impression.— Thus a witness is not permitted to state his "impression," unless it is shown to have been derived from recollection (Rounds *v.* McCormick, 11 Ill. App. 220; Ingram *v.* Croft, 7 La. 82; Humphries *v.* Parker, 52 Me. 502; Lewis *v.* Brown, 41 Me. 448; People *v.* Dowd, 127 Mich. 140, 86 N. W. 546; Lovejoy *v.* Howe, 55 Minn. 353, 57 N. W. 57; Selden *v.* Bank of Commerce, 3 Minn. 166; Bank of Commerce *v.* Selden, 1 Minn. 340; Kingsbury *v.* Moses, 45 N. H. 222; State *v.* Thorp, 72 N. C. 186 ("best impression"); McRae *v.* Morrison, 35 N. C. 46; Crowell *v.* Western Reserve Bank, 3 Ohio St. 406; Plymouth Coal Co. *v.* Kommiskey, 116 Pa. St. 365, 9 Atl. 646; Duvall *v.* Darby, 38 Pa. St. 56; State *v.* Wilson, 9 Wash. 16, 36 Pac. 967; Wilson *v.* Smith, 13 Yerg. (Tenn.) 379; *In re* De Gottardi, 114 Fed. 328; Pilcher *v.* U. S., 113 Fed. 248, 51 C. C. A. 205); but a claim to any element of recollection whatever admits the evidence of an impression (Franklin *v.* Macon, 12 Ga. 257).

Judgment.— Huntsville Belt Line, etc., R. Co. *v.* Corpening, 97 Ala. 681, 12 So. 295.

Supposition.— What a witness "supposed" is not competent. Hall *v.* State, 40 Ala. 698; Ward *v.* Reynolds, 32 Ala. 384 (value); Menifee *v.* Higgins, 57 Ill. 50; State *v.* King, 22 Iowa 1, 96 N. W. 712; Orr *v.* Cedar Rapids, etc., R. Co., 94 Iowa 423, 62 N. W. 851; Cumberland Telephone, etc., Co. *v.* Odeneal, (Miss. 1899) 26 So. 966 ("naturally suppose"); Hoitt *v.* Moulton, 21 N. H. 586; Weber *v.* Kingsland, 8 Bosw. (N. Y.) 415); except where the fact is relevant *per se* (Irish-American Bank *v.* Ludlum, 49 Minn. 255, 51 N. W. 1047).

Thought.— Territory *v.* McKern, 3 Ida. 15, 26 Pac. 123; Sterling Bridge Co. *v.* Pearl, 80 Ill. 251; Ohio, etc., R. Co. *v.* Stein, 140 Ind. 61, 39 N. E. 246; Roziene *v.* Ball, 51 Iowa 328, 1 N. W. 668; State *v.* Nolan, 48 Kan. 723, 29 Pac. 568, 30 Pac. 486; Collins *v.* Com., 25 S. W. 743, 15 Ky. L. Rep.

* By Charles F. Chamberlayne. Revised and edited by Wm. Lawrence Clark.

exists because a witness has formed in his mind by a process of reasoning an affirmative impression as to its existence is in most connections excluded.[38] "A witness is to state facts, not inferences, and the court can draw no inferences which the facts as proved do not justify."[39] The mere use, however, of phrase-

691; Humphries *v.* Parker, 52 Me. 502; Lund *v.* Tyngsborough, 9 Cush. (Mass.) 36; Barre *v.* Reading City Pass. R. Co., 155 Pa. St. 170, 26 Atl. 99; McClure *v.* State, (Tex. Cr. App. 1899) 53 S. W. 111; Harrison *v.* State, (Tex. Cr. App. 1894) 25 S. W. 284; McFarlane *v.* Howell, 16 Tex. Civ. App. 246, 43 S. W. 315; Goldman *v.* Com., 100 Va. 865, 42 S. E. 923.

On the contrary, firmness in the mental tenure with which an inference or judgment is held may be stated by the witness. State *v.* Duncan, 116 Mo. 288, 22 S. W. 699; Missouri, etc., R. Co. *v.* Sledge, (Tex. Civ. App. 1895) 30 S. W. 1102.

38. *Alabama.*— Boland *v.* Louisville, etc., R. Co., 106 Ala. 641, 18 So. 99; Richardson *v.* Stringfellow, 100 Ala. 416, 14 So. 283; Gregory *v.* Walker, 38 Ala. 26; Thomas *v.* De Graffenreid, 27 Ala. 651; Jones *v.* Hatchett, 14 Ala. 743.

Arkansas.— Dickerson *v.* Johnson, 24 Ark. 251.

Florida.— Chaires *v.* Brady, 10 Fla. 133.

Georgia.— Kendrick *v.* Central R., etc., Co., 89 Ga. 782, 15 S. E. 685; Keener *v.* State, 18 Ga. 194, 63 Am. Dec. 269; Mealing *v.* Pace, 14 Ga. 596; Berry *v.* State, 10 Ga. 511.

Illinois.— Brink's Chicago City Express Co. *v.* Kinnare, 168 Ill. 643, 48 N. E. 446; Evans *v.* Dickey, 117 Ill. 291, 7 N. E. 263; Iglehart *v.* Jernegan, 16 Ill. 513.

Iowa.— McCormick Harvesting Mach. Co. *v.* Brower, 88 Iowa 607, 55 N. W. 537; Roebling's Sons Co. *v.* Merchants' Union Barb-Wire Co., 78 Iowa 608, 41 N. W. 569, 43 N. W. 759.

Kansas.— Cherokee, etc., Coal, etc., Co. *v.* Dickson, 55 Kan. 62, 39 Pac. 691; Parsons *v.* Lindsay, 26 Kan. 426; Da Lee *v.* Blackburn, 11 Kan. 190; Marshall *v.* Weir Plow Co., 4 Kan. App. 615, 45 Pac. 621.

Kentucky.—American Acc. Co. *v.* Fidler, 35 S. W. 905, 18 Ky. L. Rep. 161; Self *v.* Self, 1 Ky. L. Rep. 356.

Louisiana.— McConnell *v.* New Orleans, 15 La. Ann. 410; Kræutler *v.* U. S. Bank, 11 Rob. 213; Mechanics', etc., Bank *v.* Walton, 7 Rob. 451; Fleming *v.* Hill, 17 La. 1; Harris *v.* Allnutt, 12 La. 465.

Massachusetts.— Robbins *v.* Atkins, 168 Mass. 45, 46 N. E. 425; McGuerty *v.* Hall, 161 Mass. 51, 36 N. E. 682; Barts *v.* Morse, 126 Mass. 226.

Minnesota.— Lovejoy *v.* Howe, 55 Minn. 353, 57 N. W. 57; Lowry *v.* Harris, 12 Minn. 255; Selden *v.* Bank of Commerce, 3 Minn. 166.

Missouri.— Hurt *v.* St. Louis, etc., R. Co., 94 Mo. 255, 7 S. W. 1, 4 Am. St. Rep. 374; Wetherell *v.* Patterson, 31 Mo. 458; Sparr *v.* Wellman, 11 Mo. 230; Ford *v.* St. Louis, etc., R. Co., 63 Mo. App. 133; Madden *v.* Missouri, etc., R. Co., 50 Mo. App. 666.

New Hampshire.— Hoitt *v.* Moulton, 21 N. H. 586.

New Jersey.— Berckmans *v.* Berckmans, 16 N. J. Eq. 122.

New Mexico.—Territory *v.* Claypool, (1903) 71 Pac. 463.

New York.— People *v.* Barber, 115 N. Y. 475, 22 N. E. 182; People *v.* Sharp, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. Rep. 851; Hollis *v.* Wagar, 1 Lans. 4; Guitermann *v.* Liverpool, etc., Mail Steamship Co., 9 Daly 119.

North Carolina.— Burwell *v.* Sneed, 104 N. C. 118, 10 S. E. 152; State *v.* Starnes, 94 N. C. 973; Bailey *v.* Poole, 35 N. C. 404.

Ohio.—A. H. Pugh Printing Co. *v.* Yeatman, 22 Ohio Cir. Ct. 584, 12 Ohio Cir. Dec. 477; The Albatross *v.* Wayne, 16 Ohio 513.

Pennsylvania.— Manayunk Bldg. Soc. *v.* Holt, 184 Pa. St. 572, 39 Atl. 293; Given *v.* Albert, 5 Watts & S. 333.

South Carolina.— Rapley *v.* Klugh, 40 S. C. 134, 18 S. E. 680.

Tennessee.— Saunders *v.* City, etc., R. Co., 89 Tenn. 130, 41 S. W. 1031.

Texas.—Schmick *v.* Noel, 72 Tex. 1, 8 S. W. 83; Houston, etc., R. Co. *v.* Smith, 52 Tex. 178; Haynie *v.* Baylor, 18 Tex. 498; International, etc., R. Co. *v.* Armstrong, 4 Tex. Civ. App. 146, 23 S. W. 236.

Utah.— Ganaway *v.* Salt Lake Dramatic Assoc., 17 Utah 37, 53 Pac. 830; Saunders *v.* Southern Pac. R. Co., 15 Utah 334, 49 Pac. 646; Hamer *v.* Ogden First Nat. Bank, 9 Utah 215, 33 Pac. 941.

Vermont.— Weeks *v.* Lyndon, 54 Vt. 638.

Virginia.— Tyler *v.* Sites, 90 Va. 539, 19 S. E. 174.

Wisconsin.— Veerhusen *v.* Chicago, etc., R. Co., 53 Wis. 689, 11 N. W. 433; Luning *v.* State, 2 Pinn. 215, 1 Chandl. 178, 50 Am. Dec. 153.

United States.— Hinds *v.* Keith, 57 Fed. 10, 6 C. C. A. 231.

England.— Mansell *v.* Clements, L. R. 9 C. P. 139.

See 14 Cent. Dig. tit. "Criminal Law," § 1034 *et seq.*; 20 Cent. Dig. tit. "Evidence," § 2149 *et seq.*

That is not matter of opinion, a knowledge of which may be derived from the declarations of others. Olds *v.* Powell, 10 Ala. 393.

The existence of an opinion may be independently relevant, for example, to impeach a witness. Ledford *v.* Ledford, 95 Ind. 283.

Strict enforcement required.— It has been held that the general rule that witnesses must state facts rather than conclusions should be strictly followed; and that whenever it is doubtful whether a case falls under the rule or one of its exceptions the wise course is to place it under the rule. Kiesel *v.* Sun Ins. Office, 88 Fed. 243, 31 C. C. A. 515.

39. Berckmans *v.* Berckmans, 16 N. J. Eq. 122. "A fact known to the witness, though only from his own consciousness, and which may be pertinent to the issue, is admissible,

ology appropriate to the expression of an inference is not conclusive that the witness is stating one, or exercising his judgment. The language may merely be the witness' way of saying that he is not speaking with entire certainty.[40] While the general proposition above stated as to the exclusion of opinion is undoubted,[41] its operation, in particular cases, is complicated by several modifying and at times controlling considerations. These will be found, upon their examination in detail, to be, in general terms, as follows: (1) The inference, conclusion, or judgment is competent in proportion as it is shown to be simple, reflex, or instructive, and is, on the contrary, rejected according as it is found to involve the element of mental operation, whether the reasoning is induction or deduction, or a combination of the two. (2) A particular conclusion, inference, or judgment is excluded where the jury are capable of reasoning on the matter to a tenable conclusion; and is received where they cannot do so, either (a) because they have no adequate major premise of experience, or (b) because they cannot, from inability to gather or adequately weigh, at their true probative value, the facts into a reasonable satisfactory minor premise. (3) The conclusion, inference, or judgment is accepted where it relates to a fact which is collateral or relatively unimportant; and

but not when to such fact is added the exercise of the judgment upon its relation to other facts and an opinion upon such combination is expressed." Schmick *v.* Noel, 72 Tex. 1, 4, 8 S. W. 83. "The general rule is well settled that the province of a witness is to state facts, and that of the jury is to draw conclusions from them." Musick *v.* Latrobe, 184 Pa. St. 375, 39 Atl. 226. To the same effect see Perry *v.* Graham, 18 Ala. 822; Largan *v.* Central R. Co., 40 Cal. 272.

40. Hallahan *v.* New York, etc., R. Co., 102 N. Y. 194, 6 N. E. 287; Harpending *v.* Shoemaker, 37 Barb. (N. Y.) 270. Should the latter, in the opinion of the judge, appear to be the case the evidence may be received (Hunter *v.* Helsley, 98 Mo. App. 616, 73 S. W. 719); the form of statement being unimportant (Stone *v.* Com., 181 Mass. 438, 63 N. E. 1074, prophecy); and although the witness expresses unwillingness to swear to the accuracy of his statement (Lewis *v.* Freeman, 17 Me. 260).

Instances of this use of language are frequently found where a witness employs, directly, or in some modified form, the following phrases:

"*Believes.*"— Elliott *v.* Dyche, 80 Ala. 376; Turner *v.* McFee, 61 Ala. 468; Head *v.* Shaver, 9 Ala. 791; Pottkamp *v.* Buss, (Cal. 1896) 46 Pac. 169; Gentry *v.* McMinnis, 3 Dana (Ky.) 382; Griffin *v.* Brown, 2 Pick. (Mass.) 304; State *v.* Freeman, 72 N. C. 521; Terrell *v.* Russell, 16 Tex. Civ. App. 573, 42 S. W. 129; Columbia Bank *v.* McKenny, 2 Fed. Cas. No. 874, 3 Cranch C. C. 361; Wilson *v.* McClean, 30 Fed. Cas. No. 17,819, 1 Cranch C. C. 465. When a witness states his belief in a fact, he is entitled to state his reasons for believing so. Thomas *v.* State, 27 Ga. 287; State *v.* Reitz, 83 N. C. 634, tracks of accused.

"*Best of judgment.*"— Alabama Great Southern R. Co. *v.* Hill, 93 Ala. 514, 9 So. 722, 30 Am. St. Rep. 65.

"*Best recollection*" states a sufficient degree of definiteness. Jockers *v.* Borgman, 29 Kan. 109, 44 Am. Rep. 625.

"*Considers.*"— Ward *v.* Reynolds, 32 Ala. 384; Prior *v.* Diggs, (Cal. 1892) 31 Pac. 155; Richards *v.* Knight, 78 Iowa 69, 42 N. W. 584, 4 L. R. A. 453; Com. *v.* Thompson, 3 Dana (Ky.) 301; De Graw *v.* Emory, 113 Mich. 672, 72 N. W. 4; Galveston, etc., R. Co. *v.* Parrish, (Tex. Civ. App. 1897) 43 S. W. 536.

"*Expects.*"— Hunter *v.* Helsley, 98 Mo. App. 616, 73 S. W. 718.

"*Guesses.*"— Hunter *v.* Helsley, 98 Mo. App. 616, 73 S. W. 719.

"*Has an impression.*"— Harris *v.* Fitzgerald, 75 Conn. 72, 52 Atl. 315.

"*Has an opinion.*"—Hallahan *v.* New York, etc., R. Co., 102 N. Y. 194, 6 N. E. 287.

"*Judges.*"— Campbell *v.* New York Fidelity, etc., Co., 109 Ky. 661, 60 S. W. 492, 22 Ky. L. Rep. 1295; People *v.* Eastwood, 14 N. Y. 562.

"*Should say.*"— White *v.* Van Horn, 159 U. S. 3, 15 S. Ct. 1027, 40 L. ed. 55.

"*Supposes.*"— State *v.* Porter, 34 Iowa 131.

"*Thinks.*"—Prior *v.* Diggs, (Cal. 1892) 31 Pac. 155; Harris *v.* Fitzgerald, 75 Conn. 72, 52 Atl. 315; Clinton *v.* Howard, 42 Conn. 294; Doe *v.* Biggers, 6 Ga. 188; Kirsher *v.* Kirsher, 120 Iowa 337, 94 N. W. 846; State *v.* Porter, 34 Iowa 131; Willis *v.* Quimby, 31 N. H. 485; Hoitt *v.* Moulton, 21 N. H. 586; Blake *v.* People, 73 N. Y. 586; Voisin *v.* Commercial Mut. Ins. Co., 60 N. Y. App. Div. 139, 70 N. Y. Suppl. 147; Snell *v.* Moses, 1 Johns. (N. Y.) 96; La Rue *v.* St. Anthony, etc., Elevator Co., (S. D. 1903) 95 N. W. 292; Texas, etc., R. Co. *v.* Crockett, 27 Tex. Civ. App. 463, 66 S. W. 114; Galveston, etc., R. Co. *v.* Parrish, (Tex. Civ. App. 1897) 40 S. W. 191; Hewett *v.* Currier, 63 Wis. 386, 23 N. W. 884.

"*Understands.*"— Lockett *v.* Mims, 27 Ga. 207; Printup *v.* Mitchell, 17 Ga. 558, 63 Am. Dec. 258.

41. Brown *v.* State, 55 Ark. 593, 18 S. W. 1051; Muldowney *v.* Illinois Cent. R. Co., 36 Iowa 462. And see the other cases cited *supra*, note 38.

is rejected where the fact sought to be established is either in issue or so material thereto as to involve the substantial rights of the parties to a jury trial.[42]

2. Discretion of Court. For reasons connected with the historical development of the rule, the court exercises a wide administrative discretion in receiving the mental conclusions of witnesses, particularly the judgments of skilled witnesses testifying as experts.[43] Thus the judge may properly limit the number of such witnesses,[44] the range of the examination, either on direct[45] or cross-examination,[46] liability to comment for failure to call,[47] and the like.[48] The judge may prevent repetition of a question already fully answered.[49]

3. Judge Acting as a Jury. When an issue of fact is before the judge, either on *voir dire*[50] or when sitting as a jury, the rule is the same as in jury trials, viz., that evidence of inferences, conclusions, or judgments is not admissible when the facts can be stated and the judge is fully able to deal with them.[51] Indeed the judge may be especially fitted to deal with the precise point on which evidence is offered.[52] On the other hand it has been considered that the court may call in experts to aid its own deliberations;[53] and is unlikely to be misled by the inference of a witness whose qualifications he understands.[54]

4. Requirements For Admissibility — a. Relevancy — (i) *General Rule.* The conditions under which opinion evidence is admissible, however varied in other respects, present the common feature that they require (1) that the evidence offered should aid the jury in its work of decision, and (2) that the evidence should

42. See the sections following and the cases there cited.

43. Best evidence required.— It is within the function of the court to reject evidence, which, although from a source capable of aiding the jury, is not the best source of this assistance within the power of the party relying on it to produce. Russell *v.* State, 53 Miss. 367. See, generally, *infra*, XV.

Judicial cognizance.— The court may decline, in its discretion, to receive expert evidence to an effect which it judicially knows to be false, e. g. that cigars are drugs or medicines (Com. *v.* Marzynski, 149 Mass. 68, 21 N. E. 228), or that riding on a "cow catcher" or pilot of an engine is as safe as riding on top of a freight car (Warden *v.* Louisville, etc., R. Co., 94 Ala. 277, 11 So. 276, 14 L. R. A. 552). The judge is not required to hear evidence as to matters of law (Merchants', etc., Sav. Bank *v.* Cross, 65 Minn. 154, 67 N. W. 1147, custom of bankers), as the general law merchant (Hogan *v.* Reynolds, 8 Ala. 59), as to the meaning of well known words (Goodwin *v.* State, 96 Ind. 550, monomania), or as to other matters of which it must or does take judicial cognizance. See, generally, *supra*, II.

44. Fraser *v.* Jennison, 42 Mich. 206, 3 N. W. 882; Powers *v.* McKenzie, 90 Tenn. 167, 182, 16 S. W. 559, where it is said: "Manifestly, a trial Judge must have some control over the dispatch of business in his court, and some discretion respecting the number of witnesses he will hear upon a specific line of inquiry incident to a case. This conceded, it follows, from the essential nature of the juridical connection of inferior and appellate courts, that the latter will not reverse the ruling of the former, originating in the exercise of this discretion, unless it has been abused and it can be seen that this abuse has resulted in injury. The value and convincingness of expert testimony in arriving at the truth in this case are not so clear and evident that the Court can see that the Chancellor abused his authority in limiting the number of experts to five on each side." See, generally, Witnesses.

45. Aurora *v.* Hillman, 90 Ill. 61; Davis *v.* U. S., 165 U. S. 373, 17 S. Ct. 360, 41 L. ed. 750, holding that after a witness has once qualified himself as an expert, and given his own professional opinion in reference to what he has seen or heard, or upon hypothetical questions, it is then within the court's discretion to limit further interrogatories as to what other scientific men have said on such matters, or in respect to the general teachings of science thereon.

46. Stroh *v.* South Covington, etc., R. Co., 78 S. W. 1120, 25 Ky. L. Rep. 1868. See, generally, Witnesses.

47. McKeim *v.* Foley, 170 Mass. 426, 49 N. E. 625.

48. See, generally, Trial; Witnesses.

49. Aurora *v.* Hillman, 90 Ill. 61.

50. Shepard *v.* Pratt, 16 Kan. 209, search for document.

51. Lazarus *v.* Metropolitan El. R. Co., 69 Hun (N. Y.) 190, 23 N. Y. Suppl. 515, referee.

52. The Attila, 5 Quebec 340.

A judge in admiralty may consider that he would receive "no benefit whatever" from the opinion of nautical men as to a proper speed of a sailing vessel in particular waters during a fog. The Attila, *supra*.

53. Folkes *v.* Chadd, 3 Dougl. 157, 26 E. C. L. 111, nautical experts. See also *infra*, XI, J, 3.

54. Barnum *v.* Bridges, 81 Cal. 604, 22 Pac. 924.

be necessary for that purpose. Relevancy is, properly speaking, a condition of the application of the exclusionary rule itself — an irrelevant opinion not being rejected primarily because it is an opinion but because it is irrelevant[55] — rather than a condition of the admissibility of evidence received as an exception to the rule excluding opinion. The practice of treating relevancy as a condition of receiving opinion evidence is, however, a convenient one and has become inveterate.[56]

(II) *Adequate Knowledge and Capacity.* The element of relevancy which is of special importance in connection with statements of inferences, conclusions, or judgments, is that the declarant should be possessed of adequate knowledge regarding the subject-matter to which his declaration relates;[57] and this must be affirmatively shown, by the proponent of the evidence.[58] If the witness is offered as to a fact, the court must be able at least to assume that he knows it.[59] If the point covered by the testimony is an inference from observation or from the existence of any other state of consciousness, the court must be able to assume that the witness has adequate data on which to base the inference and the necessary mental equipment to enable him to draw it. If a conclusion is offered it can logically be only the conclusion of one who is competent to draw it.[60] Whether the subject of the evidence be fact, inference, or conclusion, knowledge must be shown or assumed proportionate to the requirements of the particular fact, inference, or conclusion.[61] Mere opportunity for acquiring the requisite knowledge is not suffi-

55. See *supra*, VII, A, 1.

56. Louisville, etc., R. Co. *v.* Brinckerhoff, 119 Ala. 606, 24 So. 892; Crawford *v.* Birkins, 16 Colo. App. 532, 66 Pac. 687; Manayunk Fifth Mut. Bldg. Soc. *v.* Holt, 184 Pa. St. 572, 39 Atl. 293; Preston *v.* Hilburn, (Tex. Civ. App. 1898) 44 S. W. 698.

57. *Alabama.*— Stein *v.* Burden, 24 Ala. 130, 60 Am. Dec. 453.

Arkansas.— Little Rock, etc., R. Co. *v.* Allister, 62 Ark. 1, 34 S. W. 82.

California.— San Diego Land, etc., Co. *v.* Neale, 88 Cal. 50, 25 Pac. 977, 11 L. R. A. 604.

Connecticut.— Hayden *v.* Fair Haven, etc., R. Co., 76 Conn. 355, 56 Atl. 613; Taylor *v.* Monroe, 43 Conn. 36.

Delaware.— Creswell *v.* Wilmington, etc., R. Co., 2 Pennew. 210, 43 Atl. 629.

Illinois.— McCormick Harvesting Mach. Co. *v.* Burandt, 37 Ill. App. 165.

Indiana.— Louisville, etc., R. Co. *v.* Berry, 9 Ind. App. 63, 35 N. E. 565, 36 N. E. 646.

Kansas.— Atchison, etc., R. Co. *v.* Sage, 49 Kan. 524, 31 Pac. 40.

Massachusetts.— Zinn *v.* Rice, 161 Mass. 571, 37 N. E. 747.

Missouri.— Guffey *v.* Hannibal, etc., R. Co., 53 Mo. App. 462.

Pennsylvania.— Dooner *v.* Delaware, etc., Canal Co., 164 Pa. St. 17, 30 Atl. 269; Lineoski *v.* Susquehanna Coal Co., 157 Pa. St. 153, 27 Atl. 577.

Wisconsin.— Veerhusen *v.* Chicago, etc., R. Co., 53 Wis. 689, 11 N. W. 433.

United States.— Chateaugay Ore, etc., Co. *v.* Blake, 144 U. S. 476, 12 S. Ct. 731, 36 L. ed. 510.

See 20 Cent .Dig. tit. "Evidence," § 2196 *et seq.* And see the other cases cited *infra*, XI, A, 4, a, (III).

The qualification should relate to the precise matter, as to which the inference or judgment is asked. Qualification for something else is not sufficient. Dore *v.* Babcock, 72 Conn. 408, 44 Atl. 736.

Qualifications of witnesses as to particular matters see *infra*, XI, B, C, D, E, F, G, I.

58. *Colorado.*— Denver, etc., R. Co. *v.* Smock, 23 Colo. 456, 48 Pac. 681.

Connecticut.— Nichols *v.* Turney, 15 Conn. 101.

Illinois.— Pennsylvania Co. *v.* Swan, 37 Ill. App. 83.

Kansas.— Atchison, etc., R. Co. *v.* Mason, 4 Kan. App. 391, 46 Pac. 31.

Kentucky.— Lockridge *v.* Fesler. 37 S. W. 65, 18 Ky. L. Rep. 469.

New Hampshire.—Page *v.* Parker, 40 N. H. 47.

New Mexico.— Illinois Silver Min., etc., Co. *v.* Raff, 7 N. M. 336, 34 Pac. 544.

A claim to knowledge may, however, in the discretion of the court (Minnesota Belt-Line R., etc., Co. *v.* Gluck, 45 Minn. 463, 48 N. W. 194) be deemed a *prima facie* qualification, the basis of the alleged knowledge being first ascertained on cross-examination (Goodwine *v.* Evans, 134 Ind. 262, 33 N. E. 1031) by relevant questions (Pennsylvania, etc., Canal, etc., Co. *v.* Roberts, 2 Walk. (Pa.) 482).

59. Any other rule would involve useless expenditure of time. On the other hand to require in all cases that knowledge should be affirmatively proved would involve the same result.

60. Campbell *v.* Cayey, 59 N. Y. App. Div. 621, 69 N. Y. Suppl. 859, indebtedness. The province of the expert is rather in reasons than in descriptive facts. Smith *v.* Brooklyn, 32 N. Y. App. Div. 257, 52 N. Y. Suppl. 983.

61. Difference in qualification.— In all cases that a witness should be trustworthy (assuming that he is telling the truth and correctly understood) it must appear (1)

cient,[62] in the absence of facts which raise a satisfactory inference that the observer had sufficient capacity to coördinate his observations into relevant knowledge.[63] But extended opportunities for observation may well produce a special skill, denied to ordinary persons, even in the absence of special study.[64] A test of the qualifications of the witness so far as relates to facts, inferences, or conclusions is furnished by the requirement, noted hereafter, that the witness should on his direct examination state the facts observed by him or any other basis of his inference or conclusion.[65] Such a requirement serves three useful purposes: (1) It determines the extent and accuracy of the witness' powers of observation; (2) exhibits the

that the witness had sufficient opportunities of becoming acquainted with the facts, and (2) the capacity of drawing a suitable inference, conclusion, or judgment. It is evident, however, that where the matter is one of common observation or patent facts, the element of opportunity for observation is of superior importance and capacity, being practically a universal predicate, is of subsidiary moment; while in proportion as the element of reasoning increases, in conclusion or judgment the qualification of capacity becomes of superior importance, especially in matters of a technical or scientific nature, while the element of observation is reduced to a minimum in the same measure. See the cases in the notes following.

The test is not whether the court would believe the evidence offered but whether the witness has sufficient experience on a suitable subject to qualify him to give an opinion which shall be of value to the jury. It is not apparent credibility but capability that is the turning point. Probably this is meant by the supreme court of Nebraska in saying that "courts cannot establish a standard by which to measure expert witnesses. If they show that they have practical skill or scientific knowledge and experience as to matters under investigation, they are competent to testify." Sioux City, etc., R. Co. *v.* Finlayson, 16 Nebr. 578, 20 N. W. 860, 49 Am. Rep. 724. It is not required that an expert witness stand at the head of his class to make his evidence admissible. His preliminary examination must show such knowledge of the subject as will enable him to speak with intelligence. The jury will determine the value of his opinion from the knowledge which he shows himself to possess. Com. *v.* Williams, 105 Mass. 62; Gleckler *v.* Slavens, 5 S. D. 364, 59 N. W. 323.

62. *Alabama.*— McLean *v.* State, 16 Ala. 672.

Massachusetts.— Lincoln *v.* Barre, 5 Cush. 590.

Mississippi.— Caleb *v.* State, 39 Miss. 721, gun-shot wounds.

New Hampshire.—Page *v.* Parker, 40 N. H. 47; Marshall *v.* Columbian Mut. F. Ins. Co., 27 N. H. 157; Pickard *v.* Bailey, 26 N. H. 152; Concord R. Co. *v.* Greely, 23 N. H. 237; Robertson *v.* Stark, 15 N. H. 109; Beard *v.* Kirk, 11 N. H. 397; Rochester *v.* Chester, 3 N. H. 349.

New Jersey.— Wheeler, etc., Mfg. Co. *v.* Buckhout, 60 N. J. L. 102, 36 Atl. 772; Koccis *v.* State, 56 N. J. L. 44, 27 Atl. 800.

Oregon.— State *v.* Barrett, 33 Oreg. 194, 54 Pac. 807.

Texas.— Missouri, etc., R. Co. *v.* Baker, (Civ. App. 1902) 68 S. W. 556.

Wisconsin.— Luning *v.* State, 2 Pinn. 215, 1 Chandl. 178, 52 Am. Dec. 153.

See 20 Cent. Dig. tit. "Evidence," § 2196 *et seq.*

A worker in soapstone may not be qualified to testify as an expert as to the qualities of the stone or how the lower workings in a quarry will probably compare with the upper. "For aught that is shown in the case, he might have been a mere day laborer, mechanically performing the task assigned him; scarcely more intelligent than the material on which he wrought, and hardly better qualified to give an opinion of the qualities of that material than the tools he employed in working it. He was not, therefore, shown to possess that scientific or actual knowledge of the subject in relation to which he was inquired of, which made his opinions competent evidence; and they were improperly admitted." Page *v.* Parker, 40 N. H. 47, 60.

The truth of the basis of alleged fact upon which the inference of the observer or the judgment of the expert rests constitutes a test of the evidentiary value of the inference or judgment of coördinate importance with the subjective qualifications of the witness. Foster *v.* Dickerson, 64 Vt. 233, 24 Atl. 253. See also *infra*, XI, I.

63. Kirkpatrick *v.* Snyder, 33 Ind. 169; Cothran *v.* Knight, 45 S. C. 1, 22 S. E. 596; Webster *v.* White, 8 S. D. 479, 66 N. W. 1145; Clardy *v.* Callicoate, 24 Tex. 170; Gulf, etc., R. Co. *v.* Hughes, (Tex. Civ. App. 1895) 31 S. W. 411.

64. Wheeler, etc., Mfg. Co. *v.* Buckhout, 60 N. J. L. 102, 36 Atl. 772. A clerk who certified to the genuineness of some three thousand signatures a year is competent to testify, without special study, on a question of the genuineness of a particular signature. Wheeler, etc., Co. *v.* Buckhout, 60 N. J. L. 102, 36 Atl. 772. "The rule being that mere opportunity will not change an ordinary observer into an expert, and that special skill will not entitle a witness to give an expert opinion when the subject is one where the opinion of an ordinary observer is admissible or where the jury is capable of forming its own conclusion from facts susceptible of proof in common form." Koccis *v.* State, 56 N. J. L. 44, 47, 27 Atl. 800.

65. *Arkansas.*— St. Louis, etc., R. Co. *v.* Jones, 59 Ark. 105, 26 S. W. 595.

reasoning qualities of the witness; and (3) separates the element of inference from that of observation and indicates how large a proportion of each enters into the total result. In a sense such a statement further qualifies the witness to testify, where the mental process does not relate to a matter involving technical skill and training.

(III) *QUALIFICATIONS* — (A) *In General.* The qualifications of a witness as to knowledge and capacity must be established, as facts, to the reasonable satisfaction of the trial court,[66] whose finding will not be reviewed except in case of

Illinois.— Cairo, etc., R. Co. *v.* Woosley, 85 Ill. 370.

Indiana.— Chicago, etc., R. Co. *v.* Kern, 9 Ind. App. 505, 36 N. E. 381.

Iowa.— Eslich *v.* Mason City, etc., R. Co., 75 Iowa 443, 39 N. W. 700.

Massachusetts.— Sexton *v.* North Bridgewater, 116 Mass. 200.

Minnesota.— Minnesota Belt-Line R., etc., Co. *v.* Gluek, 45 Minn. 463, 48 N. W. 194; Sherman *v.* St. Paul, etc., R. Co., 30 Minn. 227, 15 N. W. 239.

Missouri.— Springfield, etc., R. Co. *v.* Calkins, 90 Mo. 538, 3 S. W. 82.

New York.— Rochester, etc., R. Co. *v.* Budlong, 6 How. Pr. 467.

Texas.— Dallas, etc., R. Co. *v.* Day, 3 Tex. Civ. App. 353, 22 S. W. 538.

Wisconsin.— Parks *v.* Wisconsin Cent. R. Co., 33 Wis. 413.

Stating basis of inference as to particular matters see *infra*, XI, B, C, D, E, F, G, I.

A broad indulgence has been suggested to the effect that whenever the judgment of a skilled observer would be admissible without his reasons, the inference of the unskilled witness would be competent, upon stating them. See St. Louis, etc., R. Co. *v.* Jones, 59 Ark. 105, 26 S. W. 597.

If the basis of fact is claimed to be in part illegal, the remedy of the aggrieved party is to ask for a ruling restricting the inference to the portion which is legally relevant. It is not ground for excluding the entire inference. Smalley *v.* Iowa Pac. R. Co., 36 Iowa 571.

66. *Alabama.*— Tullis *v.* Kidd, 12 Ala. 648.

Arkansas.— St. Louis, etc., R. Co. *v.* Lyman, 57 Ark. 512, 22 S. W. 170.

California.— Heintz *v.* Cooper, (1896) 47 Pac. 360; Howland *v.* Oakland Consol. St. R. Co., 110 Cal. 513, 42 Pac. 983; Fairbank *v.* Hughson, 58 Cal. 314.

Connecticut.— Palmer *v.* Hartford Dredging Co., 73 Conn. 182, 47 Atl. 125; Barber *v.* Manchester, 72 Conn. 675, 45 Atl. 1014; Osborne *v.* Troup, 60 Conn. 485, 23 Atl. 157.

District of Columbia.— Bradley *v.* District of Columbia, 20 App. Cas. 169; Lansburgh *v.* Wimsatt, 7 App. Cas. 271.

Florida.— Davis *v.* State, 43 Fla. 32, 32 So. 822.

Illinois.— Metropolitan West Side El. R. Co. *v.* Dickenson, 161 Ill. 22, 43 N. E. 706; Ohio, etc., R. Co. *v.* Webb, 142 Ill. 404, 32 N. E. 527; Ohio, etc., R. Co. *v.* Schmidt, 47 Ill. App. 383.

Indiana.— Jenney Electric Co. *v.* Branham, 145 Ind. 314, 41 N. E. 448, 33 L. R. A. 395.

Maine.— Marston *v.* Dingley, 88 Me. 546, 34 Atl. 414; Berry *v.* Reed, 53 Me. 487.

Massachusetts.— Bowen *v.* Boston, etc., R. Co., 179 Mass. 524, 61 N. E. 141; Flaherty *v.* Powers, 167 Mass. 61, 44 N. E. 1074; Ouillette *v.* Overman Wheel Co., 162 Mass. 305, 38 N. E. 511; Perkins *v.* Stickney, 132 Mass. 217; Chandler *v.* Jamaica Pond Aqueduct Corp., 125 Mass. 544; Tucker *v.* Massachusetts Cent. R. Co., 118 Mass. 546; Hawks *v.* Charlemont, 110 Mass. 110; Gossler *v.* Eagle Sugar Refinery, 103 Mass. 331; Emerson *v.* Lowell Gaslight Co., 6 Allen 146, 83 Am. Dec. 621.

Michigan.— Prentis *v.* Bates, 93 Mich. 234, 53 N. W. 153, 17 L. R. A. 494; Ives *v.* Leonard, 50 Mich. 296, 15 N. W. 463; McEwen *v.* Bigelow, 40 Mich. 215.

Minnesota.— Martin *v.* Courtney, 75 Minn. 255, 77 N. W. 813; Peterson *v.* Johnson-Wentworth Co., 70 Minn. 538, 73 N. W. 510; Beckett *v.* Northwestern Masonic Aid Assoc., 67 Minn. 298, 69 N. W. 923; Sneda *v.* Libera, 65 Minn. 337, 68 N. W. 36.

Missouri.— Helfenstein *v.* Medart, 136 Mo. 595, 36 S. W. 863, 37 S. W. 829, 38 S. W. 294; Benjamin *v.* Metropolitan St. R. Co., 50 Mo. App. 602; Gates *v.* Chicago, etc., R. Co., 44 Mo. App. 488.

Nebraska.— Schmuck *v.* Hill, 2 Nebr. (Unoff.) 79, 96 N. W. 158.

New Hampshire.— Pattee *v.* Whitcomb, 72 N. H. 249, 56 Atl. 459; Boardman *v.* Woodman, 47 N. H. 120; Jones *v.* Tucker, 41 N. H. 546.

New Mexico.— Lynch *v.* Grayson, 5 N. M. 487, 25 Pac. 992.

New York.— Van Wycklen *v.* Brooklyn, 118 N. Y. 424, 24 N. E. 179; Slocovich *v.* Orient Mut. Ins. Co., 108 N. Y. 56, 14 N. E. 802; Nelson *v.* Sun Mut. Ins. Co., 71 N. Y. 453 [*affirming* 40 N. Y. Super. Ct. 417]; Brunnemer *v.* Cook, etc., Co., 89 N. Y. App. Div. 406, 85 N. Y. Suppl. 954, holding that in particular cases the court may properly shut off further inquiry as to competency at any time.

North Dakota.— State *v.* Barry, 11 N. D. 428, 92 N. W. 809.

Oregon.— Farmers', etc., Nat. Bank *v.* Woodell, 38 Oreg. 294, 61 Pac. 837, 65 Pac. 520.

Pennsylvania.— Allen's Appeal, 99 Pa. St. 196, 44 Am. Rep. 101; Delaware, etc., Steam Towboat Co. *v.* Starrs, 69 Pa. St. 36.

Rhode Island.— Howard *v.* Providence, 6 R. I. 514.

South Carolina.— Virginia-Carolina Chemical Co. *v.* Kirven, 57 S. C. 445, 35 S. E. 745.

manifest mistake.[67] Indeed the finding has even been held not to be subject to

Tennessee.— Powers *v.* McKenzie, 90 Tenn. 167, 16 S. W. 559.

Utah.— Wright *v.* Southern Pac. R. Co., 15 Utah 421, 49 Pac. 309.

Vermont.— State *v.* Ward, 39 Vt. 225.

Virginia.— Richmond Locomotive Works *v.* Ford, 94 Va. 627, 27 S. E. 509.

United States.— Chateaugay Ore, etc., Co. *v.* Blake, 144 U. S. 476, 12 S. Ct. 731, 36 L. ed. 510; Montana R. Co. *v.* Warren, 137 U. S. 348, 11 S. Ct. 96, 34 L. ed. 681; New York Mut. F. Ins. Co. *v.* Alvord, 61 Fed. 752, 9 C. C. A. 623; U. S. *v.* Kilpatrick, 16 Fed. 765.

Canada.— Cain *v.* Uhlman, 20 Nova Scotia 148, 8 Can. L. T. 373.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1034 *et seq.*, 1064 *et seq.*; 20 Cent. Dig. tit. "Evidence," §§ 2196 *et seq.*, 2343 *et seq.*

Questions of law and fact.— "The rule determining the subjects upon which experts may testify, and the rule prescribing the qualifications of experts, are matters of law; but whether a witness, offered as an expert, has those qualifications, is a question of fact, to be decided by the court at the trial." Jones *v.* Tucker, 41 N. H. 546, 548. See also Dole *v.* Johnson, 50 N. H. 452.

The scope of cross-examination as to qualification is largely within the discretion of the judge. Andre *v.* Hardin, 32 Mich. 324. See, generally, WITNESSES.

67. *California.*—People *v.* Goldsworthy, 130 Cal. 600, 62 Pac. 1074 (holding that it is no test that the upper court would have done differently); People *v.* McCarthy, 115 Cal. 256, 258, 46 Pac. 1073 ("where the evidence is so lacking as to leave no just room for question that the discretion has been improperly exercised"); Howland *v.* Oakland Consol. St. R. Co., 110 Cal. 513, 42 Pac. 983. The ruling "will not be reversed for a mere difference of opinion. The decision must clearly appear to be wrong." People *v.* Schmitt, 106 Cal. 48, 39 Pac. 204.

Colorado.— Germania L. Ins. Co. *v.* Ross-Lewin, 24 Colo. 43, 51 Pac. 488, 65 Am. St. Rep. 215.

Connecticut.— Unless the evidence is incompetent or insufficient the trial court is sustained. Hygeia Distilled Water Co. *v.* Hygeia Ice Co., 70 Conn. 516, 40 Atl. 534; State *v.* Main, 69 Conn. 123, 37 Atl. 80, 61 Am. St. Rep. 30, 36 L. R. A. 623.

District of Columbia.— Raub *v.* Carpenter, 17 App. Cas. 505, error of law or fact. A finding clearly erroneous will be reversed. Bradley *v.* District of Columbia, 20 App. Cas. 169.

Florida.— The finding is reversed only when "clearly against the evidence or founded on some error in law." Davis *v.* State, 44 Fla. 32, 32 So. 822.

Indiana.— The discretion of the trial court is final on the point of qualification "when there is some evidence of that qualification, and the trial court has not abused that discretion." Buckeye Mfg. Co. *v.* Woolley Foundry, etc., Works, 26 Ind. App. 7, 58 N. E. 1069. See also Jenney Electric Co. *v.* Branham, 145 Ind. 314, 41 N. E. 448, 33 L. R. A. 395; Ft. Wayne *v.* Coombs, 107 Ind. 75, 7 N. E. 743. Where there is "no evidence at all tending to prove that the witness is qualified to testify as an expert," the action may be reversed. Ft. Wayne *v.* Coombs, 107 Ind. 75, 7 N. E. 743.

Louisiana.— State *v.* Mathis, 106 La. 263, 30 So. 834.

Maine.— Marston *v.* Dingley, 88 Me. 546, 34 Atl. 414. The decision of the presiding judge on a question of the qualifications of an expert "is usually final"; but "in extreme cases, where a serious mistake has been committed through some accident, inadvertence, or misconception, his action may be reviewed." Fayette *v.* Chesterville, 77 Me. 28, 33, 52 Am. Rep. 741.

Maryland.—Dashiell *v.* Griffith, 84 Md. 363, 35 Atl. 1094.

Massachusetts.—"Unless it appears upon the evidence to have been erroneous, or to have been founded upon some error in law" (Perkins *v.* Stickney, 132 Mass. 217; Lawrence *v.* Boston, 119 Mass. 126; Com. *v.* Sturtivant, 117 Mass. 122, 19 Am. Rep. 401. See also Prendible *v.* Connecticut River Mfg. Co., 160 Mass. 131, 35 N. E. 675; Campbell *v.* Russell, 139 Mass. 278, 1 N. E. 345), or unless, upon a report of all the evidence before the judge, it plainly appears that the decision was not justified by the facts found (Hawks *v.* Charlemont, 110 Mass. 110), the finding is sustained.

Minnesota.— Beckett *v.* Northwestern Masonic Aid Assoc., 67 Minn. 298, 69 N. W. 923.

Missouri.— Naughton *v.* Stagg, 4 Mo. App. 271.

New Jersey.— New Jersey Zinc, etc., Co. *v.* Lehigh Zinc, etc., Co., 59 N. J. L. 189, 35 Atl. 915.

New York.— The ruling is sustained unless "against the evidence or wholly or mainly without support in the facts which appear." Slocovich *v.* Orient Mut. Ins. Co., 108 N. Y. 56, 14 N. E. 802; Woodworth *v.* Brooklyn El. R. Co., 22 N. Y. App. Div. 501, 48 N. Y. Suppl. 80; Conkling *v.* Manhattan R. Co., 12 N. Y. Suppl. 846.

North Carolina.— Blue *v.* Aberdeen, etc., R. Co., 117 N. C. 644, 23 S. E. 275.

North Dakota.— State *v.* Barry, 11 N. D. 428, 92 N. W. 809, not reversed except in case of abuse.

Pennsylvania.— The result will not be disturbed if it appears that the witness offered had any claim to the character (Delaware, etc., Steam Towboat Co. *v.* Starrs, 69 Pa. St. 36); or unless incompetency is clearly manifest (Stevenson *v.* Ebervale Coal Co., 203 Pa. St. 316, 52 Atl. 201).

Tennessee.— Powers *v.* McKensie, 90 Tenn. 167, 16 S. W. 559.

Texas.— Gulf, etc., R. Co. *v.* Norfleet, 78 Tex. 321, 14 S. W. 703.

Utah.— Wright *v.* Southern, etc., R. Co.,

review.[68] Examination as to qualification of a witness to state an inference, conclusion, or judgment should not be limited by narrow and stringent rules.[69] The necessary qualification may be affirmatively shown on the direct examination of the witness,[70] aided where necessary by any facts brought out on cross-examination,[71] and

15 Utah 421, 49 Pac. 309; People *v.* Hopt, 4 Utah 247, 9 Pac. 407.

Vermont.— The decision is conclusive, unless it appears from the evidence to have been erroneous or founded on an error in law. Maughan *v.* Burns, 64 Vt. 316, 23 Atl. 583; Wright *v.* Williams, 47 Vt. 222.

Virginia.— Richmond Locomotive Works *v.* Ford, 94 Va. 627, 27 S. E. 509, holding that the finding of qualification will not be reversed unless the contrary clearly appears.

United States.—"Unless clearly erroneous" the ruling stands. Chateaugay Ore, etc., Co. *v.* Blake, 144 U. S. 476, 12 S. Ct. 731, 36 L. ed. 510; Congress, etc., Spring Co. *v.* Edgar, 99 U. S. 645, 25 L. ed. 487. The decision of the trial judge is "generally conclusive." Bradford Glycerine Co. *v.* Kizer, 113 Fed. 894, 51 C. C. A. 524; New York Mut. F. Ins. Co. *v.* Alvord, 61 Fed. 752, 9 C. C. A. 623. See also St. Louis, etc., R. Co. *v.* Bradley, 54 Fed. 630, 4 C. C. A. 528.

Canada.— Courts of appellate jurisdiction reverse the action of the lower courts if erroneous. Cain *v.* Uhlman, 20 Nova Scotia 148, 8 Can. L. T. 373.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1034 *et seq.*, 1064 *et seq.*; 20 Cent. Dig. tit. "Evidence," §§ 2196 *et seq.*, 2343 *et seq.*

Prejudice must be affirmatively shown to secure reversal. Powers *v.* McKenzie, 90 Tenn. 167, 16 S. W. 559. See *supra*, XI, A, 2.

An incomplete qualification by direct may be cured on cross-examination. Hough *v.* Grants Pass Power Co., 41 Oreg. 531, 69 Pac. 655.

Weight for the jury.— By declaring the competency of a witness, the court does not guarantee his credibility; and the entire weight of the statement of an observer, however skilled, lies with the jury. Jones *v.* Erie, etc., R. Co., 151 Pa. St. 30, 25 Atl. 134, 31 Am. St. Rep. 722, 17 L. R. A. 758. See *infra*, XI, J.

68. *New Hampshire.*— Dole *v.* Johnson, 50 N. H. 452; Jones *v.* Tucker, 41 N. H. 546.

North Carolina.— State *v.* Cole, 94 N. C. 958.

Oregon.— State *v.* Murray, 11 Oreg. 413, 5 Pac. 55.

Rhode Island.— Sarle *v.* Arnold, 7 R. I. 582.

Vermont.— Wright *v.* Williams, 47 Vt. 222.

Contra.— Wiggins *v.* Wallace, 19 Barb. (N. Y.) 338, 340, where the court said: "It is said that the justice must be the judge whether the witness is competent to testify as an expert; so he must; and yet, if he misjudges, it is as much an error as if he misjudges on any other question. It is not a question of discretion for the justice, where his judgment is conclusive." And see the other cases cited *supra*, note 68.

69. Leopold *v.* Van Kirk, 29 Wis. 548. But see Chicago City R. Co. *v.* Handy, 208 Ill. 81, 69 N. E. 917.

70. *California.*— Reed *v.* Drais, 67 Cal. 491, 8 Pac. 20.

Illinois.— Chicago, etc., R. Co. *v.* Springfield, etc., R. Co., 67 Ill. 142; McCormick Harvesting Mach. Co. *v.* Burandt, 37 Ill. App. 165 [*affirmed* in 136 Ill. 170, 26 N. E. 588]; Pennsylvania Co. *v.* Swan, 37 Ill. App. 83.

Kansas.— Sandwich Mfg. Co. *v.* Nicholson, 32 Kan. 666, 5 Pac. 104, reaping machine.

Kentucky.— Cobb *v.* Wolf, 96 Ky. 418, 29 S. W. 303, 16 Ky. L. Rep. 591.

Massachusetts.— Campbell *v.* Russell, 139 Mass. 278, 1 N. E. 345; Rich *v.* Jones, 9 Cush. 329.

Missouri.— Gates *v.* Chicago, etc., R. Co., 44 Mo. App. 488.

New Hampshire.—Page *v.* Parker, 40 N. H. 47.

New York.— Haslam *v.* Adams Express Co., 6 Bosw. 235.

Texas.— Half *v.* Curtis, 68 Tex. 640, 5 S. W. 451.

Virginia.— Mendum *v.* Com., 6 Rand. 704.

West Virginia.— Sebrell *v.* Barrows, 36 W. Va. 212, 14 S. E. 996.

It is error to admit the evidence of an expert not so qualified (Lee *v.* Clute, 10 Nev. 149), even though his qualifications have been shown at a former trial between the same parties (Philadelphia F. Assoc. *v.* Merchants' Nat. Bank, 52 Vt. 83).

A witness cannot testify as to the details of his professional practice. Horne *v.* Williams, 12 Ind. 324.

71. Crich *v.* Williamsburg City F. Ins. Co., 45 Minn. 441, 48 N. W. 198.

In civil cases it has been held in some jurisdictions that counsel have no right to cross-examine the proposed witness on *voir dire*, but may do so by the direction of the judge, who may, on the other hand, with or without good ground, refuse to permit cross-examination at that stage. Ft. Wayne *v.* Coombs, 107 Ind. 75, 7 N. E. 743; Finch *v.* Chicago, etc., R. Co., 46 Minn. 250, 48 N. W. 915; Sarle *v.* Arnold, 7 R. I. 582; *In re* Gorkow, 20 Wash. 563, 56 Pac. 385. The rule is otherwise in New York (Walter *v.* Hangen, 71 N. Y. App. Div. 40, 75 N. Y. Suppl. 683; Woodworth *v.* Brooklyn El. R. Co., 22 N. Y. App. Div. 501, 48 N. Y. Suppl. 80), and it is said in other states that the better practice is to permit cross-examination on *voir dire* (*In re* Gorkow, 20 Wash. 563, 56 Pac. 385). The right to reasonable cross-examination as to the qualifications of an expert witness exists in full force at a subsequent stage, i. e., the regular cross-examination of the witness. Davis *v.* State, 35 Ind. 496, 9 Am. Rep. 760; Jaeckel *v.* David, 34 Misc. (N. Y.) 791, 69 N. Y. Suppl. 998. The rule is the same where the witness first testified

relevant[72] evidence is admissible for that purpose.[73] In deciding upon qualifications the court may, in addition to the examination conducted by the proponent, himself examine the witness,[74] or ascertain his qualifications from the evidence of others;[75] not, however, including, in case of a skilled witness, the judgment of another skilled witness,[76] or the reputation of the witness proposed as an expert.[77] A witness is not necessarily qualified because he claims to be;[78] nor, on the other hand, is he excluded, if in fact qualified, because he himself thinks that he is not,[79] even where he is a party to the suit.[80]

(B) *Ordinary Witness.* The ordinary observer — the "man in the street" — is qualified if it affirmatively appears to the presiding judge that he has had sufficient opportunities for drawing the inference which he proposes to state,[81]

as an expert on redirect examination. Titus *v.* Gage, 70 Vt. 13, 39 Atl. 246.

72. Pennsylvania R. Co. *v.* Connell, 127 Ill. 419, 20 N. E. 89.

73. Citizens' Gas Light, etc., Co. *v.* O'Brien, 118 Ill. 174, 8 N. E. 310; Wright *v.* Schnaier, 35 Misc. (N. Y.) 37, 70 N. Y. Suppl. 128; Charleston Bridge Co. *v.* The John C. Sweeney, 55 Fed. 536.

74. Tullis *v.* Kidd, 12 Ala. 648.

75. Tullis *v.* Kidd, 12 Ala. 648; People *v.* Holmes, 111 Mich. 364, 69 N. W. 501. But see Forcheimer *v.* Stewart, 73 Iowa 216, 32 N. W. 665, 35 N. W. 148.

Evidence of more highly qualified witnesses is admissible to show how much skill and experience are necessary, in a particular connection, to qualify a witness to testify as an expert. Mason *v.* Phelps, 48 Mich. 126, 11 N. W. 413, 837.

76. Brabo *v.* Martin, 5 La. 275; Langston *v.* Southern Electric R. Co., 147 Mo. 457, 48 S. W. 835; Williams *v.* Pappleton, 3 Oreg. 139.

77. People *v.* Holmes, 111 Mich. 364, 69 N. W. 501; Thompson *v.* Ish, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552; Laros *v.* Com., 84 Pa. St. 200. The opinion of a skilled witness must be based upon his personal knowledge and not rest on inferences derived from the existence of his reputation. People *v.* Holmes, *supra.*

78. Snyder *v.* State, 70 Ind. 349; Staats *v.* Hausling, 22 Misc. (N. Y.) 526, 50 N. Y. Suppl. 222. It has been held, however, to be *prima facie* sufficient that he makes the claim. Washington *v.* Cole, 6 Ala. 212; Atchison, etc., R. Co. *v.* Sage, 49 Kan. 524, 31 Pac. 140; Scandell *v.* Columbia Constr. Co., 50 N. Y. App. Div. 512, 64 N. Y. Suppl. 232; State *v.* Wilcox, 132 N. C. 1120, 44 S. E. 625; State *v.* Behrman, 114 N. C. 797, 19 S. E. 220, 25 L. R. A. 449; Bartell *v.* State, 106 Wis. 342, 82 N. W. 142; Preeper *v.* Reg., 15 Can. Supreme Ct. 401.

79. *Alabama.*— Louisville, etc., R. Co. *v.* Sandlin, 125 Ala. 585, 28 So. 40.

District of Columbia.— Horton *v.* U. S., 15 App. Cas. 310.

Iowa.— Christman *v.* Pearson, 100 Iowa 634, 69 N. W. 1055.

Kansas.— Walker *v.* Scott, 10 Kan. App. 413, 61 Pac. 1091.

Massachusetts.— Com. *v.* Williams, 105 Mass. 62; Haverhill Loan, etc., Assoc. *v.* Cronin, 4 Allen 141; Webber *v.* Eastern R. Co., 2 Metc. 147.

New Hampshire.— Boardman *v.* Woodman, 47 N. H. 120.

Tennessee.— Hall *v.* State, 6 Baxt. 522.

Texas.— Crow *v.* State, 33 Tex. Cr. 264, 26 S. W. 209.

Virginia.— Nuckolls *v.* Com., 32 Gratt. 884.

Washington.— State *v.* Boyce, 24 Wash. 514, 64 Pac. 719.

A witness called as an expert cannot be asked on cross-examination whether he considers himself as good a judge of the matter in dispute as other witnesses who have been called as experts. Haverhill Loan, etc., Assoc. *v.* Cronin, 4 Allen (Mass.) 141.

Where the disclaimer of knowledge is all the evidence of qualification in the case, the witness should be rejected. Frederickson *v.* State, 44 Tex. Cr. 288, 70 S. W. 754; Wehner *v.* Lagerfelt, 27 Tex. Civ. App. 520, 66 S. W. 221.

When the court has ruled that he is competent, the opinion of the witness on his own competency is immaterial. Boardman *v.* Woodman, 47 N. H. 120.

80. Standefer *v.* Aultman, etc., Machinery Co., (Tex. Civ. App. 1904) 78 S. W. 552.

81. *Iowa.*— McMahon *v.* Dubuque, 107 Iowa 62, 77 N. W. 517, 70 Am. St. Rep. 143, state of repair of house.

Kansas.— Atchison, etc., R. Co. *v.* Chance, 57 Kan. 40, 45 Pac. 60.

Maine.— Fayette *v.* Chesterville, 77 Me. 28, 52 Am. Rep. 741.

Maryland.— Waters *v.* Waters, 35 Md. 531.

Massachusetts.— May *v.* Bradlee, 127 Mass. 414.

Michigan.— People *v.* Kinney, 124 Mich. 486, 83 N. W. 147.

Missouri.— State *v.* Williamson, 106 Mo. 162, 17 S. W. 172.

New Hampshire.— Challis *v.* Lake, 71 N. H. 90, 51 Atl. 260; Carpenter *v.* Hatch, 64 N. H. 573, 15 Atl. 219; Wheeler *v.* Blandin, 22 N. H. 167.

New Jersey.— Koccis *v.* State, 56 N. J. L. 44, 27 Atl. 800.

New York.— Slocovich *v.* Orient Mut. Ins. Co., 108 N. Y. 56, 14 N. E. 802; Haggerty *v.* Brooklyn City, etc., R. Co., 6 Abb. N. Cas. 129.

Pennsylvania.—Austin *v.* Austin, 4 Pa. Co. Ct. 368.

and the capacity necessary to make and state it.[82] Where the statement therefore is largely one of fact, or the ground of necessity compelling the admission is that the jury cannot draw the inference themselves because the facts cannot be fully stated, the qualification of the witness consists, not in skill or special experience, but in the fact that he has had satisfactory data.[83] Naturally such an observer cannot testify, as an expert — that is, on an assumption of the truth of certain facts.[84] In a certain class of cases special experience has been acquired by residence in a given locality or other fortuitous circumstances which has conferred a degree of skill in drawing a probable inference from particular phenomena which

Texas.— Galveston, etc., R. Co. *v.* Pitts, (Civ. App. 1897) 42 S. W. 255.

Utah.— People *v.* Hopt, 4 Utah 247, 9 Pac. 407.

Wisconsin.— Strong *v.* Stevens Point, 62 Wis. 255, 22 N. W. 425.

United States.— Manufacturers' Acc. Indemnity Co. *v.* Dorgan, 58 Fed. 945, 7 C. C. A. 581, 22 L. R. A. 620; Harrison *v.* Rowan, 11 Fed. Cas. No. 6,141, 3 Wash. 580.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1034 *et seq.*, 1064 *et seq.*; 20 Cent. Dig. tit. "Evidence," §§ 2196 *et seq.*, 2343 *et seq.* See also *infra*, XI, B, C.

82. *Alabama.*— McDonald *v.* Wood, 118 Ala. 589, 24 So. 86.

Arkansas.— McClintock *v.* Lary, 23 Ark. 215.

Illinois.— Grand Lodge B. of R. T. *v.* Randolph, 186 Ill. 89, 57 N. E. 882; Cooper *v.* Randall, 59 Ill. 317.

Indiana.— Cook *v.* Fuson, 66 Ind. 521.

Kansas.— Ft. Scott *v.* Canfield, 46 Kan. 322, 26 Pac. 697.

Kentucky.— Flynn *v.* Louisville R. Co., 110 Ky. 662, 62 S. W. 490, 23 Ky. L. Rep. 57.

Massachusetts.— Gilmore *v.* Mittineague Paper Co., 169 Mass. 471, 48 N. E. 623; Greenfield First Nat. Bank *v.* Coffin, 162 Mass. 180, 38 N. E. 414; Nelson *v.* Boston, etc., R. Co., 155 Mass. 356, 29 N. E. 586.

Michigan.—Detzur *v.* B. Stroh Brewing Co., 119 Mich. 282, 77 N. W. 948, 44 L. R. A. 500.

Minnesota.— Conrad *v.* Swanke, 80 Minn. 438, 83 N. W. 383; Burnett *v.* Great Northern R. Co., 76 Minn. 461, 79 N. W. 523.

New York.—Teerpenning *v.* Corn Exch. Ins. Co., 43 N. Y. 279.

Oregon.— Stamper *v.* Raymond, 38 Oreg. 16, 62 Pac. 20; Zachary *v.* Swanger, 1 Oreg. 92.

Pennsylvania.— Wallace *v.* Jefferson Gas Co., 147 Pa. St. 205, 23 Atl. 416.

Texas.— Baldridge, etc., Bridge Co. *v.* Cartrett, 75 Tex. 628, 13 S. W. 8; East Line, etc., R. Co. *v.* Scott, 68 Tex. 694, 5 S. W. 501.

Virginia.— Holleran *v.* Meisel, 91 Va. 143, 21 S. E. 658.

West Virginia.—Hood *v.* Maxwell, 1 W. Va. 219.

See 20 Cent. Dig. tit. "Evidence," §§ 2196 *et seq.*, 2343 *et seq.* See also *infra*, XI, B, C.

"For testimony, nothing further is in general required than opportunity of observation, ordinary attention and intelligence, and veracity. Almost every person of sound mind, who has reached a certain age, is a credible witness as to matters which he has observed, and as to which he has no immediate interest in deception or concealment." Lewis Authority in Matters of Opinion, c. 3, § 5.

The value of the inference depends upon the facts on which it rests. Its competency, however, is not measured by this standard; an inference of little value may nevertheless be competent. If any material facts at all are stated by the witness warranting the inference that he has sufficient knowledge to form an opinion, it is the duty of the court to permit it to go to the jury for whatever it may be worth. Goodwin *v.* State, 96 Ind. 550.

83. Chicago, etc., R. Co. *v.* Ingersoll, 65 Ill. 399 (a guess is incompetent); Illinois Cent. R. Co. *v.* Behrens, 106 Ill. App. 471.

The interest of the witness, especially difficult of detection, even by the witness himself, in connection with this class of evidence, is a factor in the exercise of this discretion. The greater the interest of the witness the less reason exists to apprehend that the inference will be of value. Patrick *v.* Howard, 47 Mich. 40, 10 N. W. 71. "If a person was present at any event, so as to see or hear it; if he availed himself of his opportunity, so as to take note of what passed; if he had sufficient mental capacity to give an accurate report of the occurrence; and if he is not influenced by personal favour, or dislike, or fear, or hope of gain, to misreport the fact; or if, notwithstanding such influence, his own conscience and moral or religious principles, or the fear of public opinion, deters him from mendacity, such a person is a credible witness." Lewis Authority in Matters of Opinion, c. 3, § 1.

Court passing upon qualification of witness.— Upon principle, where the evidence is as to the existence of a fact and not of professional, scientific, or trade knowledge, no reason is perceived why the court should pass upon the qualifications of the witness. Prentis *v.* Bates, 93 Mich. 234, 53 N. W. 153, 17 L. R. A. 494. The practice is, however, to do so, as in case of an expert. People *v.* Youngs, 151 N. Y. 210, 45 N. E. 460; Dauphin *v.* U. S., 6 Ct. Cl. 221; and other cases in the preceding notes.

84. Cook *v.* Fuson, 66 Ind. 521; Zachary *v.* Swanger, 1 Oreg. 92. See also *infra*, XI, C, 1, c.

Unsworn statements are excluded, as in case of other witnesses, when used as a basis for the inference. Scull *v.* Wallace, 15 Serg. & R. (Pa.) 231; Lester *v.* Pittsford, 7 Vt. 158.

is denied to the casual observer.[85] It has seemed best to regard such a person as a witness qualified by observation rather than as skilled by experience — a designation reserved for capacity for judgment acquired in some trade or calling not commonly shared or readily acquired by men in general.

(c) *Skilled Witness* — (1) In General. Where the ground for receiving an inference, conclusion, or judgment is that it relates to such a subject-matter that the jury require the aid of an experience outside their own, the evidence must be furnished by a "skilled witness."[86] Such a witness may be qualified either

85. *Colorado.*— Denver, etc., R. Co. *v.* Pulaski Irrigating Ditch Co., 19 Colo. 367, 35 Pac. 910.

Connecticut.— Porter *v.* Pequonnoc Mfg. Co., 17 Conn. 249.

Iowa.— Willitts *v.* Chicago, etc., R. Co., 88 Iowa 281, 55 N. W. 313, 21 L. R. A. 608; Dunn *v.* Chicago, etc., R. Co., 58 Iowa 674, 12 N. W. 734.

Maine.— Cottrill *v.* Myrick, 12 Me. 222.

Maryland.— Hartford County Com'rs *v.* Wise, 71 Md. 43, 18 Atl. 31.

Michigan.— Pettibone *v.* Smith, 37 Mich. 579.

Nebraska.— Lincoln, etc., R. Co. *v.* Sutherland, 44 Nebr. 526, 62 N. W. 859.

Nevada.— McLeod *v.* Lee, 17 Nev. 103, 28 Pac. 124.

Texas.— Gulf, etc., R. Co. *v.* Richards, 83 Tex. 203, 18 S. W. 611; Gulf, etc., R. Co. *v.* Locker, 78 Tex. 279, 14 S. W. 611; International, etc., R. Co. *v.* Klaus, 64 Tex. 293; Ethridge *v.* San Antonio, etc., R. Co., (Civ. App. 1897) 39 S. W. 204; Galveston, etc., R. Co. *v.* Daniels, 9 Tex. Civ. App. 253, 28 S. W. 548, 711; Gulf, etc., R. Co. *v.* Haskell, 4 Tex. Civ. App. 550, 23 S. W. 546.

Vermont.— Dean *v.* McLean, 48 Vt. 412, 21 Am. Rep. 130.

United States.— St. Louis, etc., R. Co. *v.* Bradley, 54 Fed. 630, 4 C. C. A. 528.

See 20 Cent. Dig. tit. "Evidence," §§ 2196 *et seq.*, 2343 *et seq.* See also *infra*, XI, B, C.

Illustrations.— A resident on a stream may state that a dam has been raised too high to be safe (Porter *v.* Pequonnoc Mfg. Co., 17 Conn. 249); how it would be affected by several dry seasons (Pettibone *v.* Smith, 37 Mich. 579); the proper way to float logs down it (Dean *v.* McLean, 48 Vt. 412, 21 Am. Rep. 130); whether a freshet was extraordinary (Minnequa Springs Imp. Co. *v.* Coon, 10 Wkly. Notes Cas. (Pa.) 502); which channel it would take if unobstructed (Winter *v.* Fulstone, 20 Nev. 260, 21 Pac. 201, 687); the likelihood of finding the body of a person drowned in it (Travelers' Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18); that a railroad bridge or embankment has caused the water to set back (Ethridge *v.* San Antonio, etc., R. Co., (Tex. Civ. App. 1897) 39 S. W. 204); that a culvert in a railroad embankment was or was not of sufficient capacity to carry off accumulated water in time of freshets (McPherson *v.* St. Louis, etc., R. Co., 97 Mo. 253, 10 S. W. 846); that a dam was or was not properly constructed (Porter *v.* Pequonnoc Mfg. Co., 17 Conn. 249; Minnequa Springs Imp. Co. *v.* Coon, 10 Wkly. Notes Cas. (Pa.) 502); or what would be the effect on certain land of raising the waters of a stream (Walker *v.* Davis, 83 Mo. App. 374). One who has lived for several years near a cañon may testify whether a freshet was usual or extraordinary. Galveston, etc., R. Co. *v.* Daniels, 9 Tex. Civ. App. 253, 28 S. W. 548, 711.

Special skill may be needed in certain connections, even in case of residents in a neighborhood (Central R., etc., Co. *v.* Kent, 84 Ga. 351, 10 S. E. 965, sufficiency of an embankment); and in such cases the evidence has been rejected (Kansas City, etc., R. Co. *v.* Cook, 57 Ark. 387, 21 S. W. 1066).

86. *Alabama.*— Prince *v.* State, 100 Ala. 144, 14 So. 409, 46 Am. St. Rep. 28; Rash *v.* State, 61 Ala. 89; Mitchell *v.* State, 58 Ala. 417; Merkle *v.* State, 37 Ala. 139.

Arkansas.— Daniel *v.* Guy, 19 Ark. 121.

California.— People *v.* Lemperle, 94 Cal. 45, 29 Pac. 709; People *v.* Marseiler, 70 Cal. 98, 11 Pac. 503.

Colorado.— Germania L. Ins. Co. *v.* Ross-Lewin, 24 Colo. 43, 51 Pac. 488, 65 Am. St. Rep. 215.

Connecticut.— Osborne *v.* Troup, 60 Conn. 485, 23 Atl. 157.

Georgia.— Boswell *v.* State, 114 Ga. 40, 39 S. E. 897; Walker *v.* Fields, 28 Ga. 237.

Illinois.— Siebert *v.* People, 143 Ill. 571, 32 N. E. 431; Schmidt *v.* Peoria M. & F. Ins. Co., 41 Ill. 295; Lake Erie, etc., R. Co. *v.* Helmericks, 38 Ill. App. 141; Citizens' Gaslight, etc., Co. *v.* O'Brien, 15 Ill. App. 400.

Indiana.— Isenhour *v.* State, 157 Ind. 517, 62 N. E. 40, 87 Am. St. Rep. 228.

Iowa.— Lee *v.* Agricultural Ins. Co., 79 Iowa 379, 44 N. W. 683; Kilbourne *v.* Jennings, 38 Iowa 533; Donaldson *v.* Mississippi, etc., R. Co., 18 Iowa 280, 87 Am. Dec. 391.

Kansas.— Missouri Pac. R. Co. *v.* Finley, 38 Kan. 550, 16 Pac. 951; Broquet *v.* Tripp, 36 Kan. 700, 14 Pac. 227; Manhattan, etc., R. Co. *v.* Stewart, 30 Kan. 226, 2 Pac. 151; Rouse *v.* Youard, 1 Kan. App. 270, 41 Pac. 426.

Kentucky.— Paducah St. R. Co. *v.* Graham, 15 Ky. L. Rep. 748.

Maine.— Hutchins *v.* Ford, 82 Me. 363, 19 Atl. 832; Fayette *v.* Chesterville, 77 Me. 28, 52 Am. Rep. 741; State *v.* Watson, 65 Me. 74.

Massachusetts.— Emerson *v.* Lowell Gaslight Co., 6 Allen 146, 83 Am. Dec. 621; Com. *v.* Rich, 14 Gray 335.

(1) by professional, scientific, or technical training, or (2) by practical experience in some field of human activity conferring on him an especial knowledge not shared by men in general.[87] In either connection, however, superior qualification is

Michigan.— Lewis *v.* Bell, 109 Mich. 189, 66 N. W. 1091; American Cushman Telephone Co. *v.* Noble, 98 Mich. 67, 56 N. W. 1100; Wickes *v.* Swift Electric Light Co., 70 Mich. 322, 38 N. W. 299; People *v.* Millard, 53 Mich. 63, 18 N. W. 562; Brownell *v.* People, 38 Mich. 732.

Minnesota.— Peteler Portable R. Mfg. Co. *v.* Northwestern Adamant Mfg. Co., 60 Minn. 127, 61 N. W. 1024; Stevens *v.* Minneapolis, 42 Minn. 136, 43 N. W. 842; Payson *v.* Everett, 12 Minn. 216.

Mississippi.— Russell *v.* State, 53 Miss. 367; Merchants' Wharf-Boat Assoc. *v.* Wood, (1887) 3 So. 248.

Missouri.— Fuchs *v.* St. Louis, 167 Mo. 620, 67 S. W. 610, 57 L. R. A. 136; State *v.* Crisp, 126 Mo. 605, 29 S. W. 699.

New Hampshire.— Dole *v.* Johnson, 50 N. H. 452.

New Jersey.— Bergen Neck R. Co. *v.* Point Breeze Ferry, etc., Co., 57 N. J. L. 163, 30 Atl. 584, 31 Atl. 724; Convery *v.* Conger, 53 N. J. L. 468, 22 Atl. 43, 549; Jones *v.* Mechanics' F. Ins. Co., 36 N. J. L. 29, 13 Am. Rep. 405.

New York.— Piehl *v.* Albany R. Co., 162 N. Y. 617, 57 N. E. 1122; Nelson *v.* Sun Mut. Ins. Co., 71 N. Y. 453; Higbie *v.* Guardian Mut. L. Ins. Co., 53 N. Y. 603; Hochstrasser *v.* Martin, 62 Hun 165. 16 N. Y. Suppl. 558.

North Carolina.— Otey *v.* Hoyt, 47 N. C. 70; State *v.* Allen, 8 N. C. 6, 9 Am. Dec. 616.

Ohio.— Koons *v.* State, 36 Ohio St. 195.

Pennsylvania.— Fraim *v.* National F. Ins. Co., 170 Pa. St. 151, 32 Atl. 613, 50 Am. St. Rep. 753; Lineoski *v.* Susquehanna Coal Co., 157 Pa. St. 153, 27 Atl. 577; Ardesco Oil Co. *v.* Gilson, 63 Pa. St. 146.

Texas.— Dane *v.* State, 36 Tex. Cr. 84, 35 S. W. 661; Heacock *v.* State, 13 Tex. App. 97; International, etc., R. Co. *v.* Malone, 1 Tex. App. Civ. Cas. § 232.

West Virginia.— McKelvey *v.* Chesapeake, etc., R. Co., 35 W. Va. 500, 14 S. E. 261.

Wisconsin.— Soquet *v.* State, 72 Wis. 659, 40 N. W. 391; Luning *v.* State, 2 Pinn. 284, 1 Chandl. 264.

United States.— New York, etc., Min. Syndicate, etc. *v.* Fraser, 130 U. S. 611, 9 S. Ct. 665, 32 L. ed. 1031; Erhardt *v.* Ballin, 55 Fed. 968, 5 C. C. A. 363; U. S. *v.* Kilpatrick, 16 Fed. 765.

See 14 Cent. Dig. tit. "Criminal Law," § 1064 *et seq.*; 20 Cent. Dig. tit. "Evidence," § 2343 *et seq.* And see the other cases in the notes following. See also *infra*, XI, B, 2; XI, C, 9, b, (III), (B), (3), (b), cc; XI, D, G.

"Skilled observer" in this connection is used to designate the witness who testifies as to his inference, conclusion, or judgment, not because the jury, if they had his experience, could not draw the same inference, but because they suffer under the specific difficulty that if every fact observed could be correctly placed before them they could not draw a reasonable inference from them. The term does not extend to a witness who states an inference from facts observed by him because these facts cannot for some reason be given in evidence in their entirety and proper relations; although the observer does in point of fact possess special skill in the matter. In other words the term designates the possession of a required experience. See the cases cited *supra*, this note.

87. See the cases hereinafter more specifically cited. "A witness' opinion is admissible as evidence, not only where scientific knowledge is required to comprehend the matter testified about, but also where experience and observation in the special calling of the witness give him knowledge of the subject in question beyond that of persons of common intelligence." Little Rock, etc., R. Co. *v.* Shoecraft, 56 Ark. 465, 466, 20 S. W. 272, and other cases more specifically cited hereafter.

Illustrative instances.— It is not necessary that the skilled witness should ever have had much or indeed any opportunity in his own experience to test the accuracy of his judgment.

Alabama.— Mitchell *v.* State, 58 Ala. 417, poisoning.

Colorado.— Germania L. Ins. Co. *v.* Ross-Lewin, 24 Colo. 43, 51 Pac. 488, 65 Am. St. Rep. 215, cyanide of potassium.

Georgia.— Boswell *v.* State, 114 Ga. 40, 39 S. E. 897; Jackson *v.* Boone, 93 Ga. 662, 20 S. E. 46.

Illinois.— Siebert *v.* People, 143 Ill. 571, 32 N. E. 431, poisoning.

Indiana.— Isenhour *v.* State, 157 Ind. 517, 62 N. E. 40, 87 Am. St. Rep. 228, effects of formaldehyde.

Massachusetts.— Childs *v.* O'Leary, 174 Mass. 111, 54 N. E. 490 (blasting); Hardiman *v.* Brown, 162 Mass. 585, 39 N. E. 192; Finnegan *v.* Fall River Gas Works Co., 159 Mass. 311, 34 N. E. 523.

Michigan.— Hall *v.* Murdock, 114 Mich. 233, 72 N. W. 150, elevator device.

Missouri.— Helfenstein *v.* Medart, 136 Mo. 595, 36 S. W. 863, 37 S. W. 829, 38 S. W. 294.

New Hampshire.— State *v.* Wood, 53 N. H. 484, abortion.

North Carolina.— State *v.* Wilcox, 132 N. C. 1120, 44 S. E. 625; State *v.* Sheets, 89 N. C. 543.

Texas.—Fordyce *v.* Moore, (Civ. App. 1893) 22 S. W. 235.

Contra.— The requirement, however, has apparently been made. Graney *v.* St. Louis, etc., R. Co., 157 Mo. 666, 57 S. W. 276, 50 L. R. A. 153; Bradford Glycerine Co. *v.* Kizer, 113 Fed. 894, 51 C. C. A. 524, explosion of nitro-glycerine.

If the witness has seen an illustrative instance, even before he became skilled in the subject (Zoldoske *v.* State, 82 Wis. 580, 52 N. W. 778), he may state it as serving "to

obtained where the two unite in the same person. Thus the man of scientific or professional attainments is a more valuable witness if he has practised his calling;[88] and it is equally true that he who practises an art or calling gains by having studied the principles of the science on which its practice is based.[89] No more precise rule can be laid down on the minutiæ of qualification further than that the capacity must be shown to be commensurate with the reasonable requirements called for by the nature of the subject-matter. As the element of reasoning becomes greater, stringency in the requirements of qualification is proportionately increased. It is not necessary that a witness should qualify as to the possession of the ordinary knowledge which his occupation connotes. It will be assumed in practical administration that members of a profession, trade, or calling, after a reasonable length of time,[90] have the knowledge common to persons so engaged;[91] and that one appointed to office has the technical skill required to discharge its duties.[92] On the other hand it is not required that the witness, if otherwise qualified, should be a member of the calling to which his evidence relates.[93] Nor is there any assumption that a witness is skilled in a subject

show more clearly the value and weight of his opinion" (Parker *v.* Johnson, 25 Ga. 576; State *v.* Hinkle, 6 Iowa 380; Donahoe *v.* New York, etc., R. Co., 159 Mass. 125, 34 N. E. 87); but he cannot state facts of a particular case claimed to be analogous to the one at bar (People *v.* Holmes, 111 Mich. 364, 69 N. W. 501), as that others have simulated certain symptoms (Gulf, etc., R. Co. *v.* Brown, 16 Tex. Civ. App. 93, 40 S. W. 608). The witness may state that he could do certain acts in a practical way of which he possesses knowledge in a theoretical. Childs *v.* O'Leary, 174 Mass. 111, 54 N. E. 490.

Some slight experience in a matter does not necessarily entitle a witness to be heard. If he has but little general intelligence (Broquet *v.* Tripp, 36 Kan. 700, 14 Pac. 227), or lacks knowledge of some essential fact (Stevens *v.* Minneapolis, 42 Minn. 136, 43 N. W. 842), his evidence may be rejected.

88. "In order that a person should be eminent in a learned profession, it is necessary that he should combine a knowledge of its principles, with that judgment, tact, dexterity and promptitude of applying them to actual cases which are derived from habits of practice. The like may be said of persons conversant in the constructive arts, as architects and engineers, of the military and naval services, agriculturists, gardeners, manufacturers of different sorts, etc." Lewis Authority in Matters of Opinion, c. 3, § 7, cl. 1.

89. "The practical man who has studied the theory of the subject in which he is employed, combines that tact which results from experience, with the knowledge of general principles. He is not only imbued with the theory, but has learned to apply it in practice and he has acquired the facility, promptitude, correctness and confidence of judgment which result from habit and experience in the practical application of a sound theory; in the use of an art founded upon a matured science." Lewis Authority in Matters of Opinion, c. 3, § 8.

90. Otey *v.* Hoyt, 47 N. C. 70. "In practical questions, experience which implies time, is indispensable." Lewis Authority in Matters of Opinion, c. 3, § 10.

91. *Alabama.*— Tullis *v.* Kidd, 12 Ala. 648, 650, where it is said: "One who exercises an art, or trade, is supposed to be acquainted with it."

Georgia.— Von Pollnitz *v.* State, 92 Ga. 16, 18 S. E. 301, 44 Am. St. Rep. 72, physician.

Illinois.— Siebert *v.* People, 143 Ill. 571, 32 N. E. 431, physician.

Iowa.—State *v.* Cole, 63 Iowa 695, 17 N. W. 183, physician.

Louisiana.— Williams *v.* Landry, 47 La. Ann. 5, 16 So. 591, nurse.

Massachusetts.— Hardiman *v.* Brown, 162 Mass. 585, 39 N. E. 192, physician.

Missouri.— Seckinger *v.* Philiber, etc., Mfg. Co., 129 Mo. 590, 31 S. W. 957 (physician); Turner *v.* Hoar, 114 Mo. 335, 21 S. W. 737 (architect).

New Hampshire.— Blodgett Paper Co. *v.* Farmer, 41 N. H. 398.

New Jersey.— Castner *v.* Sliker, 33 N. J. L. 95, physician.

Pennsylvania.—Ardesco Oil Co. *v.* Gilson, 63 Pa. St. 146, 151, where it is said: "An expert, as the word imports, is one having had experience."

Texas.— Ft. Worth, etc., R. Co. *v.* Thompson, 75 Tex. 501, 12 S. W. 742.

Virginia.— Livingston *v.* Com., 14 Gratt. 592.

Wisconsin.— Lowe *v.* State, 118 Wis. 641, 96 N. W. 417 (graduate of medical college); Allen *v.* Voje, 114 Wis. 1, 89 N. W. 924 (licensed physician).

United States.— Union Pac. R. Co. *v.* Novak, 61 Fed. 573, 9 C. C. A. 629.

See 14 Cent. Dig. tit. "Criminal Law," § 1064 *et seq.*; 20 Cent. Dig. tit. "Evidence," § 2343 *et seq.*

92. Ashe *v.* Lanham, 5 Ind. 434, county surveyor.

93. *Iowa.*—Christman *v.* Pearson, 100 Iowa 634, 69 N. W. 1055.

Massachusetts.— Fowler *v.* Middlesex County Com'rs, 6 Allen 92.

because he is engaged in a business where knowledge of it would be eminently useful.[94]

(2) Testimony as to Facts. Only a witness skilled by experience in the subject-matter of an inquiry can testify as to facts known only to such experienced persons.[95]

(3) Testimony as to Inferences From Sensation. A witness may properly testify to an inference from observed facts fully intelligible only to one skilled in a profession, trade, or calling, when, in the opinion of the presiding justice, he has the skill and experience accurately to observe the phenomena presented to him, and the technical capacity to coördinate them into a reasonable inference.[96] The requirements are more severe than those required in him who is merely asked to state a fact which is a mere matter of knowledge. Adequate faculties of both observation and inference must be shown.[97]

(4) Testimony as an "Expert." The necessary professional or technical qualifications of one who is asked to testify as to a judgment formed upon hypothetically stated facts are directed to the element of reasoning and capacity to deduce a correct inference, the ability to observe accurately and to report truly being of minor importance. One who testifies as an expert must be shown to be equipped with the special skill or knowledge necessary to make his formation of a judgment a fact of probative value.[98] It is not ground for excluding the evidence that the

New York.— Van Deusen *v.* Young, 29 Barb. 9.

Pennsylvania.—Ardesco Oil Co. *v.* Gilson, 63 Pa. St. 146.

Texas.— Nations *v.* Love, (Civ. App. 1894) 26 S. W. 232.

94. Paducah St. R. Co. *v.* Graham, 5 Ky. L. Rep. 748; People *v.* Millard, 53 Mich. 63, 18 N. W. 562; Fuchs *v.* St. Louis City, 167 Mo. 620, 67 S. W. 610, 57 L. R. A. 136; Piehl *v.* Albany R. Co., 162 N. Y. 617, 57 N. E. 1122.

Chemistry and medicine.—Experts in chemistry are not necessarily experts in medicine, nor *vice versa.* People *v.* Millard, 53 Mich. 63, 18 N. W. 562.

An undertaker will not be assumed to be qualified to speak on physiological questions. People *v.* Millard, 53 Mich. 63, 18 N. W. 562.

95. Osborne *v.* Troup, 60 Conn. 485, 23 Atl. 157; Baxter *v.* Chicago, etc., R. Co., 104 Wis. 307, 80 N. W. 644. See also *infra,* XI, B, 2.

A trained nurse is not competent to testify as to the symptoms of disease. Osborne *v.* Troup, 60 Conn. 485, 23 Atl. 157.

96. *Kentucky.*— American Acc. Co. *v.* Fiddler, (1896) 36 S. W. 528.

Massachusetts.— Zinn *v.* Rice, 161 Mass. 571, 37 N. E. 747, cause of pneumonia.

Michigan.— Evans *v.* People, 12 Mich. 27, type of disease.

Missouri.— Wagner *v.* Jacoby, 26 Mo. 530; Stonam *v.* Waldo, 17 Mo. 489, symptoms of injured cattle.

New York.— Pfau *v.* Alteria, 23 Misc. 693, 52 N. Y. Suppl. 88.

Texas.— Houston, etc., R. Co. *v.* Smith, 52 Tex. 178.

Wisconsin.— Lunning *v.* State, 2 Pinn. 215, 1 Chandl. 178, 52 Am. Dec. 153.

See 14 Cent. Dig. tit. "Criminal Law," § 1064 *et seq.*; 20 Cent. Dig. tit. "Evidence," § 2343 *et seq.* See also *infra,* XI, A, 4, c, (II), (B); XI, D.

"For all purposes of philosophical observation, a knowledge of the proper science and a peculiar training of the senses, are requisite, and therefore that a witness who possesses these qualifications is far more credible than one who is destitute of them." Lewis Authority in Matters of Opinion, c. 3, § 3.

97. See the cases in the preceding note.

98. *California.*— Grigsby *v.* Clear Lake Water Works Co., 40 Cal. 396.

Colorado.— McGonigle *v.* Kane, 20 Colo. 292, 38 Pac. 367.

Georgia.— Berry *v.* State, 10 Ga. 511.

Illinois.— Wight Fire-Proofing Co. *v.* Poczekai, 130 Ill. 139, 22 N. E. 543; National Gas Light, etc., Co. *v.* Miethke, 35 Ill. App. 629.

Indiana.— Hinds *v.* Harbou, 58 Ind. 121.

Maine.— Caven *v.* Bodwell Granite Co., 97 Me. 381, 54 Atl. 851.

Massachusetts.— Boston, etc., R. Corp. *v.* Old Colony, etc., R. Corp., 3 Allen 142; Bierce *v.* Stocking, 11 Gray 174.

Michigan.—American Cushman Tel. Co. *v.* Noble, 98 Mich. 67, 56 N. W. 1100; Daniels *v.* Mosher, 2 Mich. 183.

Mississippi.— Merchants' Wharf-Boat Assoc. *v.* Wood, (1887) 3 So. 248.

New York.— Ferguson *v.* Hubbell, 97 N. Y. 507, 49 Am. Rep. 544.

Pennsylvania.— Wells *v.* Leek, 151 Pa. St. 431, 25 Atl. 101.

Tennessee.— Powers *v.* McKenzie, 90 Tenn. 167, 16 S. W. 559.

Texas.— Ft. Worth, etc., R. Co. *v.* Thompson, 75 Tex. 501, 12 S. W. 742; International, etc., R. Co. *v.* Malone, 1 Tex. App. Civ. Cas. § 232.

Vermont.— Wright *v.* Williams, 47 Vt. 222.

West Virginia.— State *v.* Musgrave, 43 W. Va. 672, 28 S. E. 813.

Wisconsin.— Luning *v.* State, 2 Pinn. 284, 1 Chandl. 264, 52 Am. Dec. 153.

witness bases his statements in whole or in part upon his reading,[99] provided that the reading can be assumed to have been assimilated in the mind and constitutes part of a general knowledge,[1] adequate to enable the witness to form a reasonable opinion of his own.[2] There is therefore no assumption that a witness is skilled in a subject because he has studied it.[3] The skill required of a witness to qualify him as an expert is by no means necessarily of a scientific nature. It may be of the most severely practical kind, provided it be on a matter not within the knowledge of men in general or capable of being readily placed there with a sufficient approximation to accuracy.[4]

b. Necessity — (I) *In General.* It is not sufficient for admissibility that the inference, conclusion, or judgment offered should be relevant. It must be for some reason necessary to receive it. Parties appeal in legal disputes as to matters of fact to the experience and judgment of the jury.[5] It is the administrative duty of the court to see to it that the parties have the benefit of that appeal. The danger involved in receiving evidence of a witness' inference, conclusion, or judgment is lest the jury may substitute it for their own.[6] Where this danger is not presented or must be encountered, an inference, conclusion, or judgment, if a relevant fact, may properly be received.[7] The danger does not exist, where the statement is substantially one of fact, whether recognized by or known to a skilled or unskilled witness,[8] provided that the fact is not distinctly within the ultimate

See 20 Cent. Dig. tit. "Evidence," § 2343 *et seq.* See also *infra*, XI, G; XI, I, 3; XI, J, 3.

"**The value of the expert testimony** . . . depends largely on the extent of the experience or study of the witness. The greater the experience or knowledge, the greater is the value of the opinion resting upon it." Wells *v.* Leek, 151 Pa. St. 431, 438, 25 Atl. 101.

Questions compounded of scientific opinion and propositions not scientific may be rejected. Luning *v.* State, 2 Pinn. (Wis.) 284, 1 Chandl. (Wis.) 264, 52 Am. Dec. 153.

99. *California.*— Healy *v.* Visolia, etc., R. Co., 101 Cal. 585, 36 Pac. 125.

Georgia.— Jackson *v.* Boone, 93 Ga. 662, 20 S. E. 46; Central R. Co. *v.* Mitchell, 63 Ga. 173, mostly derived from books.

Michigan.— Brown *v.* Marshall, 47 Mich. 576, 11 N. W. 392, 41 Am. Rep. 728.

North Carolina.— Melvin *v.* Easley, 46 N. C. 386, 62 Am. Dec. 171, holding that the opinion of the skilled witness may to some degree be founded upon books.

South Carolina.— State *v.* Terrell, 12 Rich. 321.

Texas.—Fordyce *v.* Moore, (Civ. App. 1893) 22 S. W. 235.

But see *contra*, Luning *v.* State, 2 Pinn. (Wis.) 284, 1 Chandl. (Wis.) 264, 52 Am. Dec. 153.

See 20 Cent. Dig. tit. "Evidence," § 2344. See also *infra*, XI, G, 1.

1. Carter *v.* State, 2 Ind. 617; State *v.* Hinkle, 6 Iowa 380, tests for strychnine. "If the subject be extensive — if it be one of the great departments into which human knowledge is divided — a careful study of it, continued for several years, or even for a large part of a life, combined with frequent mediation, and. if possible, personal observation, is requisite to enable a man to understand it thoroughly and to treat it with a sound and comprehensive judgment." Lewis Authority in Matters of Opinion, c. 3, § 7, cl. 1.

2. People *v.* Thacker, 108 Mich. 652, 66 N. W. 562, poisoning.

3. Paducah St. R. Co. *v.* Graham, 15 Ky. L. Rep. 748.

No standard exists by which to determine the qualifications of an expert witness. If it appears that he is *prima facie* qualified to testify, the court may allow his testimony to go to the jury, allowing the adverse party to cross-examine as to his qualifications, and leaving to the jury the duty of determining the weight of the testimony. Ft. Wayne *v.* Coombs, 107 Ind. 75, 7 N. E. 743; Ardesco Oil Co. *v.* Gilson, 63 Pa. St. 146. See *infra*, XI, I, 3; XI, J, 3.

4. Hershaw *v.* Wright, 115 Mass. 361; Ft. Worth, etc., R. Co. *v.* Thompson, 75 Tex. 501, 12 S. W. 742. The opinion of a pork packer as to the danger to fresh hams of spoiling on being shipped by freight in "warm, muggy, weather" from Milwaukee to Boston is competent. Kershaw *v.* Wright, 115 Mass. 361. "All persons, . . . who practice a business or profession which requires them to possess a certain knowledge of the matter in hand, are experts, so far as expertness is required." Vander Donckt *v.* Thellusson, 8 C. B. 812, 825, 19 L. J. C. P. 12, 65 E. C. L. 812, per Maule, J.

5. State *v.* Hull, 45 W. Va. 767, 32 S. E. 240.

6. Hames *v.* Brownlee, 63 Ala. 277; Robertson *v.* Stark, 15 N. H. 109. "The verdict should express the jury's own independent conclusion from the facts and circumstances in evidence, and not be the echo of the opinions of witnesses, perhaps not unbiased." Hames *v.* Brownlee, 63 Ala. 277, 278.

7. See the cases cited in the following notes.

8. See *infra*, XI, B.

province of the jury.[9] The danger must be encountered under two conditions, for reasons inherent in the limitations of the tribunal and the witnesses through whom the evidence must be presented. (1) The first situation admitting the evidence is where the average witness cannot state and the average juror cannot coördinate into a reasonable mental result the sensations produced on the witness' mind by a number of minute and interblending phenomena.[10] (2) The second situation is presented where the tribunal by whose experience the case is to be determined has no sufficient experience on the subject, and the necessary qualifications for dealing with the subject cannot within the time available be conferred on the jury by the parties or their witnesses.[11] The jury must therefore, on certain subjects, be guided by the judgment on the facts in evidence of persons possessing relevant experience superior to their own.[12] Where no necessity for encountering the danger referred to is shown to the satisfaction of the court the evidence will be rejected.[13] Thus it has been held to be unnecessary to rely upon the inferences of witnesses as to a fact when all doubt has been[14] or may be[15] set at rest by the use of the senses, either directly[16] or through the use of plans[17] or photographs.[18]

(II) *Competency of Jury Excludes.* When all relevant facts can be or have been introduced before the jury, and the latter are able to deduce a reasonable inference from them, no reason exists for receiving opinion evidence, and it is inadmissible.[19] "The governing rule deduced from the cases permitting the

9. See *infra*, XI, A, 4, c.

10. Missouri, etc., Telephone Co. *v.* Vandevort, 67 Kan. 269, 72 Pac. 771; Clark *v.* Baird, 9 N. Y. 183. Opinion evidence may be received, where it is the best that can be had, or where the circumstances cannot be produced or described to the jury. Missouri, etc., Telephone Co. *v.* Vandevort, *supra*. See *infra*, XI, B, 1.

11. See *infra*, XI, A, 4, b. "It is not because a man has a reputation for superior sagacity, and judgment, and power of reasoning, that his opinion is admissible; if so, such men might be called in all cases, to advise the jury, and it would change the mode of trial. But it is because a man's professional pursuits, his peculiar skill and knowledge in some department of science, not common to men in general, enable him to draw an inference, where men of common experience, after all the facts proved, would be left in doubt." New England Glass Co. *v.* Lovell, 7 Cush. (Mass.) 319, 321.

A corollary is that it is error to authorize the jury to reject as untrue the statement of an expert merely because it is not confirmed by their experience and observation. Louisville, etc., R. Co. *v.* Malone, 109 Ala. 509, 20 So. 33.

12. See *infra*, XI, B, 2; XI, C, D, E.

13. Barker *v.* Lawrence Mfg. Co., 176 Mass. 203, 57 N. E. 366.

The finding will not be reversed except in case of manifest error. Barker *v.* Lawrence Mfg. Co., 176 Mass. 203, 57 N. E. 366.

14. Southern Kansas R. Co. *v.* Robbins, 43 Kan. 145, 23 Pac. 113; Smith *v.* Mutual Ben. L. Ins. Co., 173 Mo. 329, 72 S. W. 935; Gates *v.* Chicago, etc., R. Co., 44 Mo. App. 488 (effect of fire on grass); Harvey *v.* U. S., 18 Ct. Cl. 470.

15. Stephens *v.* Gardner Creamery Co., 9 Kan. App. 1883, 57 Pac. 1058.

16. Where the fact is one cognizable by any ordinary observer and the inferences from it may be drawn by the jury themselves, before whom it is produced for inspection, no statement by a witness as to his inferences are necessary and therefore such evidence is rejected. Com. *v.* Sturtivant, 117 Mass. 122, 19 Am. Rep. 401; Dillard *v.* State, 58 Miss. 368. But the evidence is competent where the appearance of the article has changed since the witness made his examination. Com. *v.* Sturtivant, *supra* (blood rubbed off); Cole *v.* Lake Shore, etc., R. Co., 95 Mich. 77, 54 N. W. 638 (witness shamming). See also Congdon *v.* Howe Scale Co., 66 Vt. 255, 29 Atl. 253. And see *infra*, XIII.

Letters stand in a somewhat similar position. As they can be produced to the jury, a witness is not permitted to characterize them as "evasive." Kellogg *v.* Frazier, 40 Iowa 502.

17. Schwede *v.* Hemrich, 29 Wash. 124, 69 Pac. 643.

18. Closser *v.* Washington Tp., 11 Pa. Super. Ct. 112.

19. *Alabama.*— Alabama Mineral R. Co. *v.* Jones, 114 Ala. 519, 21 So. 507, 62 Am. St. Rep. 121; Nichols *v.* State, 100 Ala. 23, 14 So. 539 (possible to see a pistol alleged to have been concealed); Reeves *v.* State, 96 Ala. 33, 11 So. 296; Carney *v.* State, 79 Ala. 14 ("acted like a lover").

Arkansas.— Fordyce *v.* Lowman, 62 Ark. 70, 34 S. W. 255; Brown *v.* State, 55 Ark. 593, 18 S. W. 1051.

California.— Sappenfield *v.* Main St., etc., R. Co., 91 Cal. 48, 27 Pac. 590; Shafter *v.* Evans, 53 Cal. 32; Enright *v.* San Francisco, etc., R. Co., 33 Cal. 230.

Connecticut.— Irving *v.* Shethar, 71 Conn. 434, 42 Atl. 258 (keeping of set of books); Rowland *v.* Fowler, 47 Conn. 347; Taylor *v.* Monroe, 43 Conn. 36.

opinions of witnesses is that the subject must be one of science or skill or one of which observation and experience have given the opportunity and means of

Florida.— Mann *v.* State, 23 Fla. 610, 3 So. 207.

Georgia.— Sumner *v.* Sumner, 118 Ga. 590, 45 S. E. 509; Milledgeville *v.* Wood, 114 Ga. 370, 40 S. E. 239; Georgia R., etc., Co. *v.* Hicks, 95 Ga. 301, 22 S. E. 613.

Illinois.— Illinois Steel Co. *v.* Mann, 197 Ill. 186, 64 N. E. 328 (probability of falling in walking on an uneven floor); Wight Fire-Proofing Co. *v.* Poczekai, 130 Ill. 139, 22 N. E. 543; Chicago *v.* McGiven, 78 Ill. 347; McMahan *v.* Swain, 106 Ill. App. 392 (negligence in leaving an awning down in charge of a clerk too weak to raise it); Phenix Ins. Co. *v.* Miles, 89 Ill. App. 58; Chicago City R. Co. *v.* Smith, 69 Ill. App. 69; Gilbert *v.* Kuppenheimer, 67 Ill. App. 251 (purchase unusual); National Gas Light, etc., Co. *v.* Miethke, 35 Ill. App. 629.

Indiana.— Green *v.* State, 154 Ind. 655, 57 N. E. 637 (quantity and quality of moonlight); Blanchard-Hamilton Furniture Co. *v.* Colvin, 32 Ind. App. 398, 69 N. E. 1032 (duty of workman operating a particular machine); Elkhart, etc., R. Co. *v.* Waldorf, 17 Ind. App. 29, 46 N. E. 88; Louisville, etc., R. Co. *v.* Berry, 9 Ind. App. 63, 35 N. E. 565, 36 N. E. 646.

Iowa.— Frick *v.* Kabaker, 116 Iowa 494, 90 N. W. 498 (comparing items on two separate accounts); Creager *v.* Johnson, 114 Iowa 249, 86 N. W. 275; Belair *v.* Chicago R. Co., 43 Iowa 662; Way *v.* Illinois Cent. R. Co., 40 Iowa 341; Muldowney *v.* Illinois Cent. R. Co., 36 Iowa 462.

Kansas.— Atchison, etc., R. Co. *v.* Chance, 57 Kan. 40, 45 Pac. 60.

Kentucky.— N. N. & M. V. R. Co. *v.* Wilson, 16 Ky. L. Rep. 262.

Maine.—Pulsifer *v.* Berry, 87 Me. 405, 32 Atl. 986; Mayhew *v.* Sullivan Min. Co., 76 Me. 100.

Maryland.— Metropolitan Sav. Bank *v.* Manion, 87 Md. 68, 39 Atl. 90; Davis *v.* State, 38 Md. 15.

Massachusetts.— Welch *v.* New York, etc., R. Co., 176 Mass. 393, 57 N. E. 668; Connelly *v.* Hamilton Woolen Co., 163 Mass. 156, 39 N. E. 787; Higgins *v.* Dewey, 107 Mass. 494, 9 Am. Rep. 63; White *v.* Ballou, 8 Allen 408; New England Glass Co. *v.* Lowell, 7 Cush. 319.

Michigan.—Atherton *v.* Bancroft, 114 Mich. 241, 72 N. W. 208; Prentis *v.* Bates, 88 Mich. 567, 50 N. W. 637; Smith *v.* Sherwood Tp., 62 Mich. 159, 28 N. W. 806, whether a hole calculated to frighten horse.

Minnesota.— Hubachek *v.* Hazzard, 83 Minn. 437, 86 N. W. 426; Sneda *v.* Libera, 65 Minn. 337, 68 N. W. 36; Sowers *v.* Dukes, 8 Minn. 23.

Missouri.— Lee *v.* Knapp, 155 Mo. 610, 56 S. W. 458; Dammann *v.* St. Louis, 152 Mo. 186, 53 S. W. 932 (how long a condition had existed); Benjamin *v.* Metropolitan St. R. Co., 133 Mo. 274, 34 S. W. 590; Hurt *v.* St. Louis, etc., R. Co., 94 Mo. 255, 260, 7 S. W. 1, 4 Am. St. Rep. 374 (where it is said: "A witness . . . testifying merely as to matters with which the jury may well be supposed to be as conversant as himself, and as capable of drawing a correct conclusion, is not allowed to give an opinion"); Laytham *v.* Agnew, 70 Mo. 48; Gavisk *v.* Pacific R. Co., 49 Mo. 274; Rosenheim *v.* America Ins. Co., 33 Mo. 230; Blumenthal *v.* Roll, 24 Mo. 113.

Nebraska.— Missouri Pac. R. Co. *v.* Fox, 56 Nebr. 746, 77 N. W. 130; Atchison, etc., R. Co. *v.* Lawler, 40 Nebr. 356, 58 N. W. 968.

New Hampshire.— Spear *v.* Richardson, 34 N. H. 428; Patterson *v.* Colebrook, 29 N. H. 94; Marshall *v.* Columbian Mut. F. Ins. Co., 27 N. H. 157; Concord R. Co. *v.* Greely, 23 N. H. 237; Rochester *v.* Chester, 3 N. H. 349.

New Jersey.— New Jersey Traction Co. *v.* Brabban, 57 N. J. L. 691, 32 Atl. 217.

New York.— Gardner *v.* Friederich, 163 N. Y. 568, 57 N. E. 1110; Parish *v.* Baird, 160 N. Y. 302, 54 N. E. 724; Van Wycklen *v.* Brooklyn, 118 N. Y. 424, 24 N. E. 179; Ferguson *v.* Hubbell, 97 N. Y. 507, 49 Am. Rep. 544; Hart *v.* Hudson River Bridge Co., 84 N. Y. 56; Steinbach *v.* La Fayette F. Ins. Co., 54 N. Y. 90 [*affirming* 12 Hun 641]; Morehouse *v.* Mathews, 2 N. Y. 514; White *v.* Cazenovia, 77 N. Y. App. Div. 547, 78 N. Y. Suppl. 985; Ward *v.* Troy, 55 N. Y. App. Div. 192, 66 N. Y. Suppl. 925 (possibility that a sewer cover will tip before slipping); Miller *v.* Erie R. Co., 34 N. Y. App. Div. 217, 54 N. Y. Suppl. 606 (that the effect of painting was to cover defects); Green *v.* Hornellsville, etc., R. Co., 24 N. Y. App. Div. 434, 48 N. Y. Suppl. 576 (sufficiency of fence); Smith *v.* Brooklyn, 32 N. Y. App. Div. 257, 52 N. Y. Suppl. 983; Roe *v.* New York, 56 N. Y. Super. Ct. 298, 4 N. Y. Suppl. 447 (effect of rain on a street); Carradine *v.* Hotchkiss, 55 N. Y. Super. Ct. 190, 13 N. Y. St. 295; People *v.* Bodine, 1 Den. 281; Norman *v.* Wells, 17 Wend. 137; Gibson *v.* Williams, 4 Wend. 320.

North Carolina.— Cogdell *v.* Wilmington, etc., R. Co., 132 N. C. 852, 44 S. E. 618 (strength of plank); De Berry *v.* Carolina, etc., R. Co., 100 N. C. 810, 6 S. E. 723.

Ohio.— Ohio, etc., Torpedo Co. *v.* Fishburn, 61 Ohio St. 608, 56 N. E. 457, 76 Am. St. Rep. 437; Crowell *v.* Western Reserve Bank, 3 Ohio St. 406; Brandon *v.* Lake Shore, etc., R. Co., 17 Ohio Cir. Ct. 705, 8 Ohio Cir. Dec. 642.

Oregon.— Fisher *v.* Oregon Short Line R. Co., 22 Oreg. 533, 30 Pac. 425, 16 L. R. A. 519.

Pennsylvania.— Seifred *v.* Pennsylvania R. Co., 206 Pa. St. 399, 55 Atl. 1061; Siegler *v.* Mellinger, 203 Pa. St. 256, 52 Atl. 175, 93 Am. St. Rep. 767 (dangerous condition of a place); Reese *v.* Clark, 198 Pa. St. 312, 47 Atl. 994; Ryder *v.* Jacobs, 182 Pa. St. 624, 38 Atl. 471 (how a simple account was kept); Graham *v.* Pennsylvania R. Co., 139 Pa. St. 149, 21 Atl. 151, 12 L. R. A. 293;

knowledge, which exists in reasons rather than descriptive facts, and therefore cannot be intelligently communicated to others not familiar with the subject so as to possess them with a full understanding of it."[20] Ordinary standards of con-

Forbes *v.* Caruthers, 3 Yeates 527; Underhill *v.* Wynkoop, 15 Pa. Super. Ct. 230; Salsberg *v.* Dallas, 10 Kulp 47 (dangerous character of highway at a given point). See also Blauvelt *v.* Delaware, etc., R. Co., 206 Pa. St. 141, 55 Atl. 857, time in which train would pass given space where its speed was proven.

South Carolina.— Easler *v.* Southern R. Co., 59 S. C. 311, 37 S. E. 938, sufficient time to alight from train.

Texas.— Radam *v.* Capital Microbe Destroyer Co., 81 Tex. 122, 16 S. W. 990, 26 Am. St. Rep. 783; Cooper *v.* State, 23 Tex. 331; Clay *v.* State, 41 Tex. Cr. 653, 56 S. W. 629; St. Louis Southwestern R. Co. *v.* Ball, 28 Tex. Civ. App. 287, 66 S. W. 879; Chicago, etc., R. Co. *v.* Long, 26 Tex. Civ. App. 601, 65 S. W. 882; Gulf, etc., R. Co. *v.* Bell, 24 Tex. Civ. App. 579, 58 S. W. 614, that cars would under certain conditions appear to be clear of the track.

Vermont.— Magoon *v.* Before, 73 Vt. 231, 50 Atl. 1070; Brown *v.* Doubleday, 61 Vt. 523, 17 Atl. 135; Stowe *v.* Bishop, 58 Vt. 498, 3 Atl. 494, 56 Am. Rep. 569; Carpenter *v.* Corinth, 58 Vt. 214, 2 Atl. 170; Campbell *v.* Fair Haven, 54 Vt. 336; Crane *v.* Northfield, 33 Vt. 124.

Virginia.— Southern R. Co. *v.* Mauzy, 98 Va. 692, 37 S. E. 285 (best and safest way of loading car wheels); Guarantee Co. of North America *v.* Lynchburg First Nat. Bank, 95 Va. 480, 28 S. E. 909.

Washington.— Clum *v.* Barkley, 20 Wash. 103, 54 Pac. 962.

West Virginia.— State *v.* Hull, 45 W. Va. 767, 32 S. E. 240; State *v.* Musgrave, 43 W. Va. 672, 28 S. E. 813; Overby *v.* Chesapeake, etc., R. Co., 37 W. Va. 524, 16 S. E. 813; Welch *v.* Franklin Ins. Co., 23 W. Va. 288.

Wisconsin.— Selleck *v.* Janesville City, 104 Wis. 570, 80 N. W. 644, 76 Am. St. Rep. 892, 47 L. R. A. 691; Crouse *v.* Chicago, etc., R. Co., 104 Wis. 473, 80 N. W. 752; Trapp *v.* Druecker, 79 Wis. 638, 48 N. W. 664; Wiltse *v.* Tilden, 77 Wis. 152, 46 N. W. 234; Neilson *v.* Chicago, etc., R. Co., 58 Wis. 516, 17 N. W. 310; Oleson *v.* Tolford, 37 Wis. 327; Luning *v.* State, 2 Pinn. (Wis.) 215, 1 Chandl. (Wis.) 178, 52 Am. Dec. 153. "The jury should not be influenced by the opinion of anyone who is not more competent to form one than themselves." Veerhusen *v.* Chicago, etc., R. Co., 53 Wis. 689, 694, 11 N. W. 433.

United States.— Milwaukee, etc., R. Co. *v.* Kellogg, 94 U. S. 469, 25 L. ed. 256; Ft. Pitt Gas Co. *v.* Evansville Contract Co., 123 Fed. 63, 59 C. C. A. 281; W. J. Lemp Brewing Co. *v.* Ort, 113 Fed. 482, 51 C. C. A. 317 (holding that what would have been the result under certain circumstances, if the driver of a wagon had made a certain turn, was a matter of common knowledge); Manufacturers' Acc. Indemnity Co. *v.* Dorgan, 58 Fed. 945, 7 C. C. A. 581, 22 L. R. A. 620; U. S. *v.* Willard, 28 Fed. Cas. No. 16,698, 1 Paine 539.

England.— Ramadge *v.* Ryan, 9 Bing. 333, 2 L. J. C. P. 7, 2 Moore & S. 421, 23 E. C. L. 604; Carter *v.* Boehm, 3 Burr. 1905.

Canada.— Cain *v.* Uhlman, 20 Nova Scotia 148, 8 Can. L. T. 373.

See 14 Cent. Dig. tit. "Criminal Law," § 1034 *et seq.*; 20 Cent. Dig. tit. "Evidence," § 2149 *et seq.*

Competency of jury as to particular matters see *infra*, XI, B, C, D, E, G.

20. Schwander *v.* Birge, 46 Hun (N. Y.) 66, 69. To the same effect see Georgia R., etc., Co. *v.* Hicks, 95 Ga. 301, 22 S. E. 613; Toledo, etc., R. Co. *v.* Conroy, 68 Ill. 560; Benjamin *v.* Metropolitan St. R. Co., 133 Mo. 274, 34 S. W. 590; Ferguson *v.* Hubbell, 97 N. Y. 507, 49 Am. Rep. 544; Scattergood *v.* Wood, 79 N. Y. 263, 35 Am. Rep. 515.

"The true test of the admissibility of such testimony is not whether the subject matter is common or uncommon, or whether many persons or few have knowledge of the matter; but it is whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions founded on such knowledge or experience any aid to the court or the jury in determining the questions at issue." Taylor *v.* Monroe, 43 Conn. 36, 44. Whenever the matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it; or in other words when it so far partakes of the nature of a science or trade as to require a previous habit or experience or study, in order to the attainment of a knowledge of it, the opinion of experts is admissible. On the other hand if the matter is not such as to require any peculiar habits or study in order to qualify a person to understand it then such evidence is not material. Davis *v.* State, 38 Md. 15. "The witness was asked, 'What would be the effect of sixteen feet of pipe held at one end on a stick, if one man let go; what would be the result to the man on the ladder, if he had the pipe on his shoulder as described?' He was further asked, what in his opinion caused the pipe to fall. We do not think these matters involve any of the mysteries of any particular science, trade or craft. The plumber was doubtless an expert touching matters involved in his particular trade, but these matters, concerning which an expression of opinion from him was then invoked, though bearing some slight relation to the plumber's trade, are simply the ordinary happenings and events of life, concerning which any man of reasonable intelligence from his own observation would be able to speak with as much precision as the most expert plumber."

duct,[21] of safety or danger,[22] comfortable endurance[23] or human ability in a customary connection,[24] the operation of well known natural laws,[25] the application of force in a familiar form,[26] the common characteristics of animals and what is likely to frighten[27] or otherwise injure them,[28] or what, on the other hand, may be approached by them with safety,[29] and methods of doing business which involve no special training,[30] are within this rule. So also the existence of social

Georgia R., etc., Co. *v.* Hicks, 95 Ga. 301, 306, 22 S. E. 613.

"In applying circumstantial evidence, which does not go directly to the fact in issue, but to facts from which the fact in issue is to be inferred, the jury have two duties to perform; first, . . . to ascertain the truth of the fact to which the evidence goes, and thence to infer the truth of the fact in issue. This inference depends on experience. . . Now when this experience is of such a nature that it may be presumed to be within the common experience of all men of common education, moving in the ordinary walks of life, there is no room for the evidence of opinion; it is for the jury to draw the inference." New England Glass Co. *v.* Lovell, 7 Cush. (Mass.) 319, 321.

21. Hall *v.* Goodson, 32 Ala. 277 (that whipping was cruel); Stone *v.* Denny, 4 Metc. (Mass.) 151 (whether an important omission could have been accidental).

22. Edwards *v.* Worcester, 172 Mass. 104, 51 N. E. 447 (highway); Locke *v.* International, etc., R. Co., 25 Tex. Civ. App. 145, 60 S. W. 314 (drive safely between certain obstructions).

23. Metropolitan Sav. Bank *v.* Manion, 87 Md. 68, 39 Atl. 90, opening windows in the wall of a stable containing a number of horses.

24. Clay County *v.* Redifer, 32 Ind. App. 93, 69 N. E. 305, how long it will take to assess a township for taxation and how much of the work can be done in a day.

25. Johnson *v.* Louisville, etc., R. Co., 104 Ala. 241, 16 So. 75, 53 Am. St. Rep. 39 (effect of alcoholic drunkenness); Holmes *v.* State, 100 Ala. 80, 14 So. 864 (whether a hoe could kill a man within striking distance); Cooper *v.* Mills County, 69 Iowa 350, 28 N. W. 633 (action of currents); Hughes *v.* Muscatine County, 44 Iowa 672 (buoyancy of water).

26. *Alabama.*— Golson *v.* State, 124 Ala. 8, 26 So. 975, whether a bullet hole in a door exhibited to the jury was made from within or from without.

California.— Richardson *v.* Eureka, 96 Cal. 443, 31 Pac. 458, plastering cracks from settling of building.

Illinois.— Chicago, etc., R. Co. *v.* Lewandowski, 190 Ill. 301, 60 N. E. 497 (whether one struck by a train going at a given speed can live); Hellyer *v.* People, 186 Ill. 550, 58 N. E. 245 (whether a train of a given momentum could have struck a man and inflicted so little visible injury).

Iowa.— Weane *v.* Keokuk, etc., R. Co., 45 Iowa 246.

Kentucky.— Paducah St. R. Co. *v.* Graham, 15 Ky. L. Rep. 748, fall from car.

Maine.— Boothby *v.* Lacasse, 94 Me. 392, 47 Atl. 916, course of fire under influence of wind, etc.

Michigan.—Passmore *v.* Passmore, 60 Mich. 463, 27 N. W. 601, loosening of leaves in a book.

Mississippi.— Majors *v.* State, (1904) 35 So. 825, deadly nature of a weapon.

Missouri.— Winters *v.* Hannibal, etc., R. Co., 39 Mo. 468.

New York.— Rawls *v.* American Mut. L. Ins. Co., 27 N. Y. 282, 84 Am. Dec. 280, injury to health by intoxication.

West Virginia.— Welch *v.* Franklin Ins. Co., 23 W. Va. 288, destructive quality of fire.

See 14 Cent. Dig. tit. "Criminal Law," § 1034; 20 Cent. Dig. tit. "Evidence," § 2149 *et seq.*

27. Barber *v.* Manchester, 72 Conn. 675, 45 Atl. 1014 (holding that the admissibility of such evidence is largely a matter of discretion); Baltimore, etc., Turnpike Road *v.* State, 71 Md. 573, 18 Atl. 884; Ouverson *v.* Grafton, 5 N. D. 281, 65 N. W. 676.

28. Brewster *v.* Weir, 93 Ill. App. 588, whether a horse died of overdriving.

29. Kauffman *v.* Maier, 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124; Connelly *v.* Hamilton Woolen Co., 163 Mass. 156, 39 N. E. 787.

30. *Illinois.*— Illinois Cent. R. Co. *v.* People, 143 Ill. 434, 33 N. E. 173, 19 L. R. A. 119, regular passenger train.

Iowa.— Baldwin *v.* St. Louis, etc., R. Co., 68 Iowa 37, 25 N. W. 918 (piling lumber); Moore *v.* Chicago, etc., R. Co., 65 Iowa 505, 22 N. W. 650, 54 Am. Rep. 26 (qualifications of baggage-master); Williams *v.* Niagara F. Ins. Co., 50 Iowa 561 (adjusting insurance losses).

Maryland.— Stumore *v.* Shaw, 68 Md. 11, 11 Atl. 360, 6 Am. St. Rep. 412, freighting.

Massachusetts.— Flynn *v.* Boston Electric Light Co., 171 Mass. 395, 50 N. E. 937 (stringing wires through trees); Perkins *v.* Augusta Ins., etc., Co., 10 Gray 312, 71 Am. Dec. 654 (nautical).

New York.— Rawls *v.* American Mut. L. Ins. Co., 27 N. Y. 282, 84 Am. Dec. 280, noninsurability of a habitual drunkard.

Oregon.— Nutt *v.* Southern Pac. R. Co., 25 Oreg. 291, 35 Pac. 653, unloading tiles.

Texas.— McKay *v.* Overton, 65 Tex. 82, ordinary bookkeeping.

Vermont.— Brown *v.* Doubleday, 61 Vt. 523, 17 Atl. 135, piling bark.

See 20 Cent. Dig. tit. "Evidence," § 2149 *et seq.*

Simple trade inferences rejected.— If the inference is one which the man of ordinary intelligence can draw, it is not material that it relates to a matter of a trade or calling. Georgia R., etc., Co. *v.* Hicks, 95 Ga. 301,

customs,[31] inferences drawn from ordinary resemblances,[32] and in general whatever any one may observe for himself and reach a reasonable conclusion with regard to it [33] may be decided by a jury without the assistance of any experience other than their own. It does not follow, because a witness is duly qualified and the general subject is a proper one, that his judgment can be asked on any branch of the inquiry. The precise point of each individual inquiry must be beyond the intelligence of an average jury, and "so far partake of the nature of a science as to require a course of previous habit or study in order to an attainment of a knowledge of them." [34] The specific decisions under this general rule turn too frequently upon the facts of the particular case to warrant an attempt at exact classification.[35] If the jury, although presumably devoid at the beginning of a trial of experience concerning a subject-matter, can be so informed during its progress as to reach an accurate conclusion, the subject is not one for an inference, conclusion, or judgment,[36] and the evidence may be excluded in the discretion of the court.[37]

e. Province of Jury — (i) *In General.* Although an inference or conclusion be in the main a mere statement of a fact, and therefore under ordinary circumstances not amenable to the rule excluding "opinion evidence," the parties may, by involving the fact within the distinctive field of the jury's operation, place it within the mischief of intruding upon the jury's province, against which the opinion evidence rule was intended to provide.[38] To protect this right the court will exclude so far as possible [39] the inference, conclusion, or judgment of witnesses where they cover the final inference as to the existence of a fact in issue,[40]

22 S. E. 613; and other cases cited in the preceding note.

31. Compton *v.* Bates, 10 Ill. App. 78, suitable female apparel.

32. Knoll *v.* State, 55 Wis. 249, 12 N. W. 369, 42 Am. Rep. 704, whether two specimens of hair were from the same head.

33. *Alabama.*— Troy Fertilizer Co. *v.* Logan, 90 Ala. 325, 8 So. 46, capacity to manage employees.

Kentucky.— Wright *v.* Com., 72 S. W. 340, 24 Ky. L. Rep. 1838.

Massachusetts.— Hovey *v.* Sawyer, 5 Allen 554, highest part of a hill.

Missouri.— Golding *v.* Golding, 6 Mo. App. 602, habitual drunkenness.

New Jersey.— New Jersey Traction Co. *v.* Brabban, 57 N. J. L. 691, 32 Atl. 217 (ability to stand on a wooden leg); Koccis *v.* State, 56 N. J. L. 44, 27 Atl. 800 (understand English).

New York.— McCall *v.* Moschcowitz, 10 N. Y. Civ. Proc. 107.

34. Wight Fire-Proofing Co. *v.* Poczekai, 130 Ill. 139, 22 N. E. 543; People *v.* Barber, 115 N. Y. 475, 22 N. E. 182; Fairchild *v.* Bascomb, 35 Vt. 398.

35. "No rule, however, can be made so precise as to include all cases, and each question as it arises must be determined by the application of general principles to the particular inquiry involved in the case before the court." Van Wycklen *v.* Brooklyn, 118 N. Y. 424, 429, 24 N. E. 179. The number of decisions "may be said not only to have become legion, but legion against legion." Graham *v.* Pennsylvania Co., 139 Pa. St. 149, 158, 21 Atl. 151, 12 L. R. A. 293.

36. *Illinois.*— Batchelor *v.* Union Stock Yard, etc., Co., 88 Ill. App. 395 (safety of brakeman); National Gas Light, etc., Co. *v.* Meithke, 35 Ill. App. 629 (cause of an explosion).

Iowa.— Muldowney *v.* Illinois Cent. R. Co., 36 Iowa 462, danger in coupling cars.

Massachusetts.— Higgins *v.* Dewey, 107 Mass. 494, 9 Am. Rep. 63.

Missouri.— Benjamin *v.* Metropolitan St. R. Co., 50 Mo. App. 602.

Nebraska.— Read *v.* Valley Land, etc., Co., 66 Nebr. 423, 92 N. W. 622.

New Hampshire.— Nourie *v.* Theobald, 68 N. H. 564, 41 Atl. 182, dangerous nature of taking down a building.

New York.— Roberts *v.* New York El. R. Co., 128 N. Y. 455, 28 N. E. 486, 13 L. R. A. 499; Ferguson *v.* Hubbell, 97 N. Y. 507, 49 Am. Rep. 544; Cole *v.* Fall Brook Coal Co., 87 Hun 584, 34 N. Y. Suppl. 572; Davis *v.* New York, etc., R. Co., 69 Hun 174, 23 N. Y. Suppl. 358.

Vermont.— Brown *v.* Doubleday, 61 Vt. 523, 17 Atl. 135 (packing bark); Fraser *v.* Tupper, 29 Vt. 409.

West Virginia.— Sebrell *v.* Barrows, 36 W. Va. 212, 14 S. E. 996.

United States.— Patten *v.* U. S., 15 Ct. Cl. 288, factor's outlays.

37. Middlebury Bank *v.* Rutland, 33 Vt. 414; and other cases above cited.

38. See *supra*, XI, A, 4, b.

39. See *supra*, XI, A, 2.

40. *Alabama.*— Anderson *v.* State, 104 Ala. 83, 16 So. 108 (inducement in seduction); Nichols *v.* State, 100 Ala. 23, 14 So. 539 (pistol visible); Helton *v.* Alabama Midland R. Co., 97 Ala. 275, 12 So. 276; Smith *v.* State, 55 Ala. 1 (known intemperance); Montgomery, etc., R. Co. *v.* Edmonds, 41 Ala. 667; Weaver *v.* Alabama Coal Min. Co., 35

or of facts which are highly material to the issue,[41] as the credibility of material

Ala. 176 (cause of collision); Johnson *v.* State, 35 Ala. 370 (money obtained honestly); Harris *v.* State, 31 Ala. 362.

Arkansas.— Benson *v.* Files, 70 Ark. 423, 68 S. W. 493; Lindauer *v.* Delaware Mut. Safety Ins. Co., 13 Ark. 461.

California.— People *v.* Wright, 93 Cal. 564, 29 Pac. 240; Conner *v.* Stanley, 67 Cal. 315, 7 Pac. 723.

Colorado.— Old *v.* Keener, 22 Colo. 6, 43 Pac. 127.

Illinois.— People *v.* Lehr, 196 Ill. 361, 63 N. E. 725 (what constitutes "practising medicine"); Collinsville *v.* Eichmann, 108 Ill. App. 655; Ohio, etc., R. Co. *v.* Atteberry, 43 Ill. App. 80.

Indiana.— Johnson *v.* Anderson, 143 Ind. 493, 42 N. E. 815; Hamrick *v.* State, 134 Ind. 324, 327, 34 N. E. 3, where it is said as to mental incapacity: "It is the very question to be passed upon by the jury."

Iowa.— Evans *v.* Elwood, 123 Iowa 92, 98 N. W. 584 (acted in self-defense); A. A. Cooper Wagon, etc., Co. *v.* Barnt, 123 Iowa 32, 98 N. W. 356 (ownership of property); Ward *v.* Dickson, 96 Iowa 708, 65 N. W. 997; Miller *v.* Boone County, 95 Iowa 5, 63 N. W. 352; Butler *v.* Chicago, etc., R. Co., 87 Iowa 206, 54 N. W. 208; Smith *v.* Hickenbottom, 57 Iowa 733, 11 N. W. 664; Muldowney *v.* Illinois Cent. R. Co., 39 Iowa 615; Pelamourges *v.* Clark, 9 Iowa 1.

Kansas.— Cherokee, etc., Min. Co. *v.* Dickson, 55 Kan. 62, 39 Pac. 691; State *v.* Myers, 54 Kan. 206, 38 Pac. 296, insolvency of bank.

Kentucky.— Ætna L. Ins. Co. *v.* Kaiser, 115 Ky. 539, 74 S. W. 203, 24 Ky. L. Rep. 2454 (suicide); Smith *v.* Com., 6 B. Mon. 21 (disorderly house).

Michigan.— Furbush *v.* Maryland Casualty Co., 131 Mich. 234, 91 N. W. 135, 100 Am. St. Rep. 605 (suicide or murder?); McHugh *v.* Fitzgerald, 103 Mich. 21, 61 N. W. 354.

Minnesota.—Nininger *v.* Knox, 8 Minn. 140.

Missouri.— Walton *v.* Kansas City, etc., R. Co., 40 Mo. App. 544.

Montana.— State *v.* Giroux, 19 Mont. 147, 47 Pac. 798, which of two parents was better qualified for the custody of children.

Nebraska.— Chicago, etc., R. Co. *v.* Holmes, (1903) 94 N. W. 1007; Read *v.* Valley Land, etc., Co., 66 Nebr. 423, 92 N. W. 622.

New York.—Van Wycklen *v.* Brooklyn, 118 N. Y. 424, 24 N. E. 179; People *v.* Barber, 115 N. Y. 475, 22 N. E. 182; People *v.* Muller, 96 N. Y. 408, 48 Am. Rep. 635 (obscenity of a photograph); Gutwillig *v.* Zuberbier, 41 Hun 361; Weber *v.* Kingsland, 8 Bosw. 415; Heroy *v.* Van Pelt, 4 Bosw. 60; Blum *v.* Manhattan R. Co., 1 Misc. 119, 20 N. Y. Suppl. 722; Link *v.* Sheldon, 18 N. Y. Suppl. 815; Doty *v.* Stanton, 2 N. Y. Suppl. 417; Union Mills First Nat. Bank *v.* Clark, 1 N. Y. Suppl. 724. See also People *v.* Murphy, 101 N. Y. 126, 4 N. E. 326, 54 Am. Rep. 661.

North Carolina.— Pfifer *v.* Carolina Cent. R. Co., 122 N. C. 940, 29 S. E. 578; Smith *v.* Smith, 117 N. C. 326, 23 S. E. 270.

North Dakota.— Tetrault *v.* O'Connor, 8 N. D. 15, 76 N. W. 225, who was in possession.

Ohio.— Ohio Oil Co. *v.* McCrory, 14 Ohio Cir. Ct. 304, 7 Ohio Cir. Dec. 344 (whether a well produces gas in paying quantities); Sell *v.* Ernsberger, 8 Ohio Cir. Ct. 499, 4 Ohio Cir. Dec. 100.

Pennsylvania.— Omensetter *v.* Kemper, 6 Pa. Super. Ct. 309, 41 Wkly. Notes Cas. 501.

South Dakota.— State *v.* Stevens, 16 S. D. 309, 92 N. W. 420, bank insolvent.

Texas.— Schmick *v.* Noel, 72 Tex. 1, 8 S. W. 83 (good faith); Terry *v.* State, (Cr. App. 1903) 72 S. W. 382 (who fired shot); San Antonio, etc., R. Co. *v.* Morgan, 24 Tex. Civ. App. 58, 58 S. W. 544 (child old enough to avoid a danger); Pioneer Sav., etc., Co. *v.* Peck, 20 Tex. Civ. App. 111, 49 S. W. 160; Bugbee Land, etc., Co. *v.* Brents, (Civ. App. 1895) 31 S. W. 695; German Ins. Co. *v.* Pearlstone, 18 Tex. Civ. App. 706, 45 S. W. 832.

Utah.— Saunders *v.* Southern Pac. Co., 15 Utah 334, 49 Pac. 646.

Wisconsin.— Veerhusen *v.* Chicago, etc., R. Co., 53 Wis. 689, 11 N. W. 433; Wylie *v.* Wausau, 48 Wis. 506, 4 N. W. 682; Mellor *v.* Utica, 48 Wis. 457, 4 N. W. 655.

England.— Rex *v.* Wright, R. & R. 339.

Canada.— Courser *v.* Kirkbride, 23 N. Brunsw. 404; Key *v.* Thomson, 13 N. Brunsw. 224.

See 14 Cent. Dig. tit. "Criminal Law," § 1035 *et seq.*; 20 Cent. Dig. tit. "Evidence," § 2186 *et seq.*

The public utility of a proposed highway cannot be stated by a witness. Thompson *v.* Deprez, 96 Ind. 67; Dillman *v.* Crooks, 91 Ind. 158; Loshbaugh *v.* Birdsell, 90 Ind. 466.

When the evidence of a fact in issue is circumstantial the jury may fairly be assumed to be capable, in a majority of cases, of drawing a reasonable inference for themselves. Ætna L. Ins. Co. *v.* Kaiser, 115 Ky. 539, 74 S. W. 203, 24 Ky. L. Rep. 2454.

41. *Alabama.*— Orr *v.* State, 117 Ala. 69, 23 So. 696, danger from an assault.

Connecticut.— Brennan *v.* Berlin Iron Bridge Co., 74 Conn. 382, 50 Atl. 1030, whose duty it was to pile up timber.

Delaware.— Wilcox *v.* Wilmington City R. Co., 2 Pennew. 157, 44 Atl. 686, earning capacity.

Georgia.— Lowman *v.* State, 109 Ga. 501, 34 S. E. 1019, on an issue of self-defense whether the time had arrived for accused "either to run or fight."

Illinois.— Chicago, etc., R. Co. *v.* Kuckkuck, 197 Ill. 304, 64 N. E. 358, character of dogs in an action for injuries received from vicious dogs.

Iowa.— Suddeth *v.* Boone, 121 Iowa 258, 96 N. W. 853 (in an action for a nuisance caused by discharge of a sewer, whether filter beds would benefit plaintiff); Thayer *v.* Smoky Hollow Coal Co., 121 Iowa 121, 96 N. W. 718 (probable interval between slate

witnesses,[42] including the habit of truth-telling[43] or exaggeration,[44] and the probative effect of their evidence;[45] the damage caused by certain acts;[46] defects in an alley,[47] bridge,[48] car,[49] dock,[50] highway,[51] railroad track,[52] sidewalk,[53] or street;[54] the actual operation of any cause for which liability is claimed;[55] or the possibility

becoming loose in the roof of the entry to a mine and its dropping); State *v.* Reinheimer, 109 Iowa 624, 80 N. W. 669 (pregnancy in seduction).

Louisiana.— State *v.* Parce, 37 La. Ann. 268, sufficient time.

Michigan.— Mack *v.* Cole, 130 Mich. 84, 89 N. W. 564, opportunity.

Missouri.— Dammann *v.* St. Louis, 152 Mo. 186, 53 S. W. 932 (sufficiency of repairs); State *v.* Pratt, 121 Mo. 566, 26 S. W. 556.

Nebraska.— Martin *v.* Connell, 3 Nebr. (Unoff.) 240, 91 N. W. 516 (to whom money was due); Jensen *v.* Halstead, 61 Nebr. 249, 85 N. W. 78 (full disclosure to counsel in an action for malicious prosecution).

New York.— People *v.* Smith, 172 N. Y. 210, 64 N. E. 814 (conduct natural); Ferguson *v.* Hubbell, 97 N. Y. 507, 49 Am. Rep. 544; Squire *v.* Press Pub. Co., 58 N. Y. App. Div. 362, 68 N. Y. Suppl. 1028 (resemblance of plaintiff to an alleged libelous picture); Rowley *v.* Parsons, 45 N. Y. App. Div. 174, 61 N. Y. Suppl. 392 (made overpayments).

North Carolina.—State *v.* McLaughlin, 126 N. C. 1080, 35 S. E. 1037, similarity of two statements.

Ohio.— Seville *v.* State, 49 Ohio St. 117, 30 N. E. 621, 15 L. R. A. 516, whether a pugilistic encounter was a fight.

Pennsylvania.— Reiter *v.* McJunkin, 194 Pa. St. 301, 45 Atl. 46, "recognized division line."

Texas.— Haynie *v.* Baylor, 18 Tex. 498 (cause of fire); Galveston, etc., R. Co. *v.* English, (Civ. App. 1900) 59 S. W. 626 (a switch safer with or without a light).

Vermont.— State *v.* Gorham, 67 Vt. 365, 31 Atl. 845, suspicious circumstances.

United States.— Northern Pac. R. Co. *v.* Hayes, 87 Fed. 129, 30 C. C. A. 576, speed of train.

See 14 Cent. Dig. tit. "Criminal Law," § 1035 *et seq.*; 20 Cent. Dig. tit. "Evidence," § 2186 *et seq.*

When the fact is merely relevant the inference may be competent. Ohio, etc., Torpedo Co. *v.* Fishburn, 61 Ohio St. 608, 56 N. E. 457, 76 Am. St. Rep. 437.

42. Tullis *v.* Kidd, 12 Ala. 648; Gibbs *v.* State, (Tex. Cr. App. 1892) 20 S. W. 919.

43. Bailey *v.* Chapman, 15 Tex. Civ. App. 240, 38 S. W. 544 ("liar and thief"); State *v.* Roller, 30 Wash. 692, 71 Pac. 718.

44. People *v.* Webster, 59 Hun (N. Y.) 398, 13 N. Y. Suppl. 414, symptoms of insanity.

45. *Connecticut.*— Lovell *v.* Hammond Co., 66 Conn. 500, 34 Atl. 511.

Georgia.—McElhannon *v.* State, 99 Ga. 672, 26 S. E. 501, point to guilt of accused.

Illinois.— Inland Printer Co. *v.* Economical Half Tone Supply Co., 99 Ill. App. 8.

Michigan.— Strudgeon *v.* Sand Beach, 107 Mich. 496, 65 N. W. 616, sufficient to support a verdict.

Missouri.— Holleman *v.* Cabanne, 43 Mo. 568, where it is held that witnesses cannot give their judgment upon the truth of a statement by another witness, although they may do the same thing in effect by denying the fact stated.

New York.— Van Bokkelen *v.* Berdell, 130 N. Y. 141, 29 N. E. 254; People *v.* Barber, 115 N. Y. 475, 22 N. E. 182; Loveless *v.* Manhattan R. Co., 57 N. Y. Super. Ct. 3, 35 N. Y. Suppl. 185.

46. See *infra*, XI, A, 4, c, (II).

47. Musick *v.* Latrobe, 184 Pa. St. 375, 39 Atl. 226.

48. Bliss *v.* Wilbraham, 8 Allen (Mass.) 564 (comparative repair); McDonald *v.* State, 127 N. Y. 18, 27 N. E. 358 (safe); Baldridge, etc., Bridge Co. *v.* Cartrett, 75 Tex. 628, 13 S. W. 8; Shelley *v.* Austin, 74 Tex. 608, 12 S. W. 753 (dangerous).

49. Dooner *v.* Delaware, etc., Canal Co., 164 Pa. St. 17, 30 Atl. 269.

50. Marcy *v.* Sun Mut. Ins. Co., 11 La. Ann. 748.

51. *Massachusetts.*—Edwards *v.* Worcester, 172 Mass. 104, 51 N. E. 447.

New York.— Ivory *v.* Deerpark, 116 N. Y. 476, 22 N. E. 1080; White *v.* Cazenovia, 77 N. Y. App. Div. 547, 78 N. Y. Suppl. 985, log frightening horses.

Ohio.— Stillwater Turnpike Co. *v.* Coover, 26 Ohio St. 520.

Rhode Island.— Yeaw *v.* Williams, 15 R. I. 20, 23 Atl. 33.

Vermont.— Lester *v.* Pittsford, 7 Vt. 158.

Wisconsin.— Griffin *v.* Willow, 43 Wis. 509; Kelley *v.* Fond du Lac, 31 Wis. 179.

The comparative danger of two places in a highway is not deemed a proper subject for the testimony of a witness. Ivory *v.* Deerpark, 116 N. Y. 476, 22 N. E. 1080.

52. Louisville, etc., R. Co. *v.* Tegner, 125 Ala. 593, 28 So. 510; Roberts *v.* Chicago, etc., R. Co., 78 Ill. App. 526.

53. *Iowa.*—Barnes *v.* Newton, 46 Iowa 567.

Kansas.— Topeka *v.* Sherwood, 39 Kan. 690, 18 Pac. 933; Holton *v.* Hicks, 9 Kan. App. 179, 58 Pac. 998, area.

Michigan.— Detzur *v.* Stroh Brewing Co., 119 Mich. 282, 77 N. W. 948, 44 L. R. A. 500; Girard *v.* Kalamazoo, 92 Mich. 610, 52 N. W. 1021.

Missouri.— Eubank *v.* Edina, 88 Mo. 650; Bradley *v.* Spickardsville, 90 Mo. App. 416.

Texas.— Lentz *v.* Dallas, 96 Tex. 258, 72 S. W. 59.

Wisconsin.— Gordon *v.* Sullivan, 116 Wis. 543, 93 N. W. 457.

54. Baker *v.* Madison, 62 Wis. 137, 22 N. W. 141, 583.

55. *Alabama.*— Louisville, etc., R. Co. *v.* Landers, 135 Ala. 504, 33 So. 482; Johnson *v.* Ballew, 2 Port. 29, undue influence.

of doing certain crucial acts.[56] The same is true where the question is as to what was the intent or intention.[57]

District of Columbia.— National Union *v.* Thomas, 10 App. Cas. 277, suicide.

Illinois.— Toledo, etc., R. Co. *v.* Conroy, 68 Ill. 560; Roberts *v.* Chicago, etc., R. Co., 78 Ill. App. 526.

Indiana.— Chicago, etc., R. Co. *v.* Ross, 24 Ind. App. 222, 56 N. E. 451.

Iowa.— Collins *v.* Chicago, etc., R. Co., 122 Iowa 231, 97 N. W. 1103, gate sufficient to turn cattle.

Kansas.— Missouri, etc., Telephone Co. *v.* Vandevort, 67 Kan. 269, 72 Pac. 771.

Michigan.— Jones *v.* Portland, 88 Mich. 598, 50 N. W. 731, 16 L. R. A. 437; Tice *v.* Bay City, 78 Mich. 209, 44 N. W. 52; Dundas *v.* Lansing, 75 Mich. 499, 42 N. W. 1011, 13 Am. St. Rep. 457, 5 L. R. A. 143; Cook *v.* Johnston, 58 Mich. 437, 25 N. W. 388, 55 Am. Rep. 703, fire.

Minnesota.— Vant Hul *v.* Great Northern R. Co., 90 Minn. 329, 96 N. W. 789 (defect in a hammer); Briggs *v.* Minneapolis St. R. Co., 52 Minn. 36, 53 N. W. 1019 (cause of death).

Missouri.— Nash *v.* Dowling, 93 Mo. App. 156, defect in tool.

New York.— People *v.* Barber, 115 N. Y. 475, 22 N. E. 182; Van Zandt *v.* Mutual Ben. L. Ins. Co., 55 N. Y. 169, 14 Am. Rep. 215 (melancholia); Winters *v.* Naughton, 91 N. Y. App. Div. 80, 86 N. Y. Suppl. 439 (weakness of bank); Burns *v.* Farmington, 31 N. Y. App. Div. 364, 52 N. Y. Suppl. 229 (timber liable to frighten horses).

Rhode Island.— Ennis *v.* Little, 25 R. I. 342, 55 Atl. 884, fracture in eye-bolt.

Texas.— San Antonio, etc., R. Co. *v.* Woodley, 20 Tex. Civ. App. 216, 49 S. W. 691.

Vermont.— Moore *v.* Haviland, 61 Vt. 58, 17 Atl. 725 ("whistling" in horses); Davis *v.* Fuller, 12 Vt. 178, 36 Am. Dec. 334 (flowing back).

56. *Colorado.*— Shapter *v.* Pillar, 28 Colo. 209, 63 Pac. 302, transacting business properly.

Indiana.— Jones *v.* State, 71 Ind. 66 (deceased seeing defendant); Insurance Co. of North America *v.* Osborn, 26 Ind. App. 88, 59 N. E. 181 (removing goods from building).

Iowa.— State *v.* Carpenter, (1904) 98 N. W. 775 (observing a ravishment); Urdangen *v.* Doner, 122 Iowa 533, 98 N. W. 317 (hearing a given conversation); State *v.* Vincent, 24 Iowa 570, 95 Am. Dec. 753 (identifying a head).

Louisiana.— State *v.* Moore, 52 La. Ann. 605, 26 So. 1001.

Michigan.— People *v.* Morrigan, 29 Mich. 4, possibility to commit robbery in manner charged.

Missouri.— Graney *v.* St. Louis, etc., R. Co., 157 Mo. 666, 57 S. W. 276, 50 L. R. A. 153.

New York.— Dittman *v.* Edison Electric Illuminating Co., 87 N. Y. App. Div. 68, 83 N. Y. Suppl. 1078 (discovering a defect in a belt by means of a reasonable inspection); Galligan *v.* Metropolitan St. R. Co., 33 Misc. 87, 67 N. Y. Suppl. 180 (first crossed the point of intersection).

Texas.— Bath *v.* Houston, etc., R. Co., (Civ. App. 1904) 78 S. W. 993, receipt of cotton in good order.

Utah.— Mathews *v.* Daly-West Min. Co., 27 Utah 193, 75 Pac. 722, whether a man may state that he was going to shut down a mill for repairs for a given time.

The possibility of committing rape upon a mature female is not a subject for the testimony of a skilled witness.

California.— People *v.* Benc, 130 Cal. 159, 62 Pac. 404. *Compare*, however, People *v.* Baldwin, 117 Cal. 244, 49 Pac. 186.

Iowa.— State *v.* Peterson, 110 Iowa 647, 82 N. W. 329.

Massachusetts.— Lawlor *v.* Wolff, 180 Mass. 448, 62 N. E. 973.

Minnesota.— See State *v.* Teipner, 36 Minn. 535, 32 N. W. 678.

Missouri.— State *v.* Dusenberry, 112 Mo. 277, 20 S. W. 461.

New Jersey.— Cook *v.* State, 24 N. J. L. 843.

New York.— Woodin *v.* People, 1 Park. Cr. 464.

See, however, People *v.* Clark, 33 Mich. 112. And see, generally, RAPE.

57. *Alabama.*— Baldwin *v.* Walker, 94 Ala. 514, 10 So. 391; Harrison *v.* State, 78 Ala. 5; Armor *v.* State, 63 Ala. 173; Oxford Iron Co. *v.* Spradley, 51 Ala. 171; Clement *v.* Cureton, 36 Ala. 120; Peake *v.* Stout, 8 Ala. 647; Planters', etc., Bank *v.* Borland, 5 Ala. 531.

California.— Tait *v.* Hall, 71 Cal. 149, 12 Pac. 391.

Florida.— Hodge *v.* State, 26 Fla. 11, 7 So. 593.

Georgia.— Carey *v.* Moore, 119 Ga. 92, 45 S. E. 998; Gardner *v.* State, 90 Ga. 310, 17 S. E. 86, 35 Am. St. Rep. 202; Fundy *v.* State, 30 Ga. 400; Hawkins *v.* State, 25 Ga. 207, 71 Am. Dec. 166.

Illinois.— Treat *v.* Merchants' L. Assoc., 198 Ill. 431, 64 N. E. 992, 92 Am. St. Rep. 270 [*reversing* 98 Ill. App. 59]; Walker *v.* People, 133 Ill. 110, 24 N. E. 424, where it was held that what the witness "thought" the intention was is still more objectionable. See also Cihak *v.* Klekr, 117 Ill. 643, 7 N. E. 111 [*reversing* 17 Ill. App. 124].

Iowa.— Dutton *v.* Seevers, 89 Iowa 302, 56 N. W. 398; Carey *v.* Gunnison, 51 Iowa 202, 1 N. W. 510. But see Starr *v.* Stevenson, 91 Iowa 684, 60 N. W. 217.

Michigan.— Fowler *v.* Gilbert, 38 Mich. 292, defraud.

Minnesota.— State *v.* Pierce, 85 Minn. 101, 88 N. W. 417; State *v.* Scott, 41 Minn. 365, 43 N. W. 62, insane delusion.

New Jersey.—Farrington *v.* Minturn, (Sup. 1904) 57 Atl. 269.

New York.— People *v.* Barber, 115 N. Y.

(II) *Damages* — (A) *When Opinion Is Rejected.* Except as is hereafter shown, the amount of damage a party has suffered by the taking of his land for a railroad,[58] elevated railroad,[59] or highway;[60] by an injury to his person,[61] or to his personal[62] or real[63] property, or by the breach of a contract,[64] cannot be stated

475, 22 N. E. 182; Manufacturers', etc., Bank *v.* Koch, 105 N. Y. 630, 12 N. E. 9; Dwight *v.* Badgley, 60 Hun 144, 14 N. Y. Suppl. 498; People *v.* De Graff, 1 Wheel. Cr. 203.

North Carolina.— Wolf *v.* Arthur, 112 N. C. 691, 16 S. E. 843; State *v.* Vines, 93 N. C. 493, 53 Am. Rep. 466.

North Dakota.— Witte Mfg. Co. *v.* Reilly, 11 N. D. 203, 91 N. W. 42.

Oklahoma.— Devore *v.* Territory, 2 Okla. 562, 37 Pac. 1092.

South Carolina.— Simmons Hardware Co. *v.* Greenwood Bank, 41 S. C. 177, 19 S. E. 502, 44 Am. St. Rep. 700.

Texas.— Lister *v.* Campbell, (Civ. App. 1898) 46 S. W. 876; Anglin *v.* Barlow, (Civ. App. 1898) 45 S. W. 827; Seay *v.* Fennell, 15 Tex. Civ. App. 261, 39 S. W. 181 (good faith); New York Mut. L. Ins. Co. *v.* Hayward, (Civ. App. 1894) 27 S. W. 36, 12 Tex. Civ. App. 392, 34 S. W. 801; Jones *v.* State, 30 Tex. App. 345, 17 S. W. 544. See also Gabel *v.* Weisensee, 49 Tex. 131. But *compare* Harrison *v.* State, (Cr. App. 1894) 25 S. W. 284.

Vermont.— Chelsea Nat. Bank *v.* Isham, 48 Vt. 590, good faith.

Wisconsin.— Rindskopf *v.* Myers, 77 Wis. 649, 46 N. W. 818 (good faith); McKesson *v.* Sherman, 51 Wis. 303, 8 N. W. 200; Central Bank *v.* St. John, 17 Wis. 157.

United States.— Rucker *v.* Bolles, 80 Fed. 504, 25 C. C. A. 600.

See 14 Cent. Dig. tit. "Criminal Law," § 1037; 20 Cent. Dig. tit. "Evidence," §§ 2157, 2221.

That a person by reason of intoxication was incapable of forming a specific intent is also incompetent. Armor *v.* State, 63 Ala. 173.

58. *Alabama.*— Montgomery, etc., R. Co. *v.* Varner, 19 Ala. 185.

Georgia.— Brunswick, etc., R. Co. *v.* McLaren, 47 Ga. 546.

Illinois.— Metropolitan West Side El. R. Co. *v.* Dickinson, 161 Ill. 22, 43 N. E. 706, elevated.

Indiana.— Baltimore, etc., R. Co. *v.* Johnson, 59 Ind. 247; Evansville, etc., Straight Line R. Co. *v.* Stringer, 10 Ind. 551; Evansville, etc., Straight Line R. Co. *v.* Fitzpatrick, 10 Ind. 120.

Iowa.— Britton *v.* Des Moines, etc., R. Co., 59 Iowa 540, 13 N. W. 710.

Kansas.— Chicago, etc., R. Co. *v.* Woodward, 48 Kan. 599, 29 Pac. 1146; Chicago, etc., R. Co. *v.* Neiman, 45 Kan. 533, 26 Pac. 22; Ottawa, etc., R. Co. *v.* Adolph, 41 Kan. 600, 21 Pac. 643.

Missouri.— Union Elevator Co. *v.* Kansas City Suburban Belt R. Co., (Sup. 1896) 33 S. W. 926.

Nebraska.— Burlington, etc., R. Co. *v.* White, 28 Nebr. 166, 44 N. W. 95; Blakeley *v.* Chicago, etc., R. Co., 25 Nebr. 207, 40 N. W. 956; Northeastern Nebraska R. Co. *v.* Frazier, 25 Nebr. 53, 40 N. W. 609; Republican Valley R. Co. *v.* Arnold, 13 Nebr. 485, 14 N. W. 478; Fremont, etc., R. Co. *v.* Ward, 11 Nebr. 597, 10 N. W. 524.

New Jersey.— Laing *v.* United New Jersey R., etc., Co., 54 N. J. L. 576, 25 Atl. 409, 33 Am. St. Rep. 682; Thompson *v.* Pennsylvania R. Co., 51 N. J. L. 42, 15 Atl. 833, where it was held that the injury to property from smoke, noise, and stench caused by the running of railroad trains near by is not a matter calling for the opinion of experts.

New York.— McGean *v.* Manhattan R. Co., 117 N. Y. 219, 22 N. E. 957 (rental value); Pratt *v.* New York Cent., etc., R. Co., 77 Hun 139, 28 N. Y. Suppl. 463.

Ohio.— Cleveland, etc., R. Co. *v.* Ball, 5 Ohio St. 568; Atlantic, etc., R. Co. *v.* Campbell, 4 Ohio St. 583, 64 Am. Dec. 607.

Pennsylvania.— Watson *v.* Pittsburgh, etc., R. Co., 37 Pa. St. 469.

Texas.— Boyer *v.* St. Louis, etc., R. Co., (Civ. App. 1903) 72 S. W. 1038.

See 20 Cent. Dig. tit. "Evidence," § 2288.

59. Flynn *v.* Kings County El. R. Co., 3 N. Y. App. Div. 254, 38 N. Y. Suppl. 204.

60. Hagaman *v.* Moore, 84 Ind. 496; Logansport *v.* McMillen, 49 Ind. 493; Roberts *v.* Brown County, 21 Kan. 247.

61. Muldraughs Hill, etc., Co. *v.* Maupin, 1 Ky. L. Rep. 404; Whipple *v.* Rich, 180 Mass. 477, 63 N. E. 5; Tenney *v.* Rapid City, (S. D. 1903) 96 N. W. 96; De Wald *v.* Ingle, 31 Wash. 616, 72 Pac. 469, 96 Am. St. Rep. 927.

62. St. Louis, etc., R. Co. *v.* Jacobs, 70 Ark. 401, 68 S. W. 248 (cattle); Tootle *v.* Kent, 12 Okla. 674, 73 Pac. 310; Ft. Worth, etc., R. Co. *v.* Ward, 2 Tex. Civ. App. 598, 21 S. W. 607 (cattle).

63. St. Louis, etc., R. Co. *v.* Hall, 71 Ark. 302, 74 S. W. 293 (fire); Parish *v.* Baird, 160 N. Y. 302, 54 N. E. 724; Wilson *v.* Southern R. Co., 65 S. C. 421, 43 S. E. 964 (fire).

64. *Alabama.*— Young *v.* Cureton, 87 Ala. 727, 6 So. 352.

Arkansas.— Pierson *v.* Wallace, 7 Ark. 282.

Georgia.— Foote, etc., Co. *v.* Malony, 115 Ga. 985, 42 S. E. 413; Gilbert *v.* Cherry, 57 Ga. 128.

Illinois.— Linn *v.* Sigsbee, 67 Ill. 75 (practice of medicine); Keith *v.* Bliss, 10 Ill. App. 424.

Indiana.— Bissell *v.* Wert, 35 Ind. 54; Mitchell *v.* Allison, 29 Ind. 43.

Iowa.— Barron *v.* Collenbaugh, 114 Iowa 71, 86 N. W. 53, not to reëngage in livery business.

Minnesota.— Steinbauer *v.* Stone, 85 Minn. 274, 88 N. W. 754.

Missouri.— Birney *v.* Wabash, etc., R. Co., 20 Mo. App. 470.

by a witness.[65] The rule has also been applied even where the witness is the plaintiff

New York.— Avery *v.* New York Cent., etc., R. Co., 121 N. Y. 31, 24 N. E. 20; Morehouse *v.* Matthews, 2 N. Y. 514; Francis *v.* Campbell, 68 N. Y. App. Div. 287, 74 N. Y. Suppl. 246; Thompson *v.* Dickhart, 66 Barb. 604; Whitney *v.* Taylor, 54 Barb. 536; Ellsler *v.* Brooks, 54 N. Y. Super. Ct. 73 (employment as actress); Whiteside *v.* Connolly, 21 Misc. 19, 46 N. Y. Suppl. 940 [*affirming* 20 Misc. 711, 44 N. Y. Suppl. 1134]; Manning *v.* Maas, 2 Misc. 266, 21 N. Y. Suppl. 959; Decker *v.* Myers, 31 How. Pr. 372.

Ohio.— Shepherd *v.* Willis, 19 Ohio 142.

Oregon.— U. S. *v.* McCann, 40 Oreg. 13, 66 Pac. 274.

Utah.—Lashus *v.* Chamberlain, 5 Utah 140, 13 Pac. 361.

Wisconsin.— Churchill *v.* Price, 44 Wis. 540.

United States.— Memphis *v.* Brown, 20 Wall. 289, 22 L. ed. 264.

See 20 Cent. Dig. tit. "Evidence," § 2289.

65. *Alabama.*— Trammell *v.* Ramage, 97 Ala. 666, 11 So. 916; Hames *v.* Brownlee, 63 Ala. 277; Donnell *v.* Jones, 13 Ala. 490, 48 Am. Dec. 59.

Arkansas.— St. Louis, etc., R. Co. *v.* Law, 68 Ark. 218, 223, 57 S. W. 258 (where the court said: "It is not, as a general rule, permissible for a witness to estimate the damages a party has sustained by the doing or omitting to do a particular act. That is not a fact, but a matter of opinion, to be deduced from competent evidence by the court or jury trying the issues of fact"); Little Rock, etc., R. Co. *v.* Haynes, 47 Ark. 497, 1 S. W. 774.

Colorado.— Old *v.* Keener, 22 Colo. 6, 43 Pac. 127.

Georgia.— Woodward *v.* Gates, 38 Ga. 205.

Illinois.— Birmingham F. Ins. Co. *v.* Pulver, 126 Ill. 329, 18 N. E. 804, 9 Am. St. Rep. 598.

Indiana.— Pittsburgh, etc., R. Co. *v.* Hixon, 79 Ind. 111; Noah *v.* Angle, 63 Ind. 425; Bissell *v.* Wert, 35 Ind. 54; New Albany, etc., R. Co. *v.* Huff, 19 Ind. 315; Evansville, etc., Straight Line R. Co. *v.* Cochran, 10 Ind. 560; Louisville, etc., R. Co. *v.* Sparks, 12 Ind. App. 410, 40 N. E. 546; Toledo, etc., R. Co. *v.* Jackson, 5 Ind. App. 547, 32 N. E. 793.

Iowa.— Harrison *v.* Iowa Midland R. Co., 36 Iowa 623; Cannon *v.* Iowa City, 34 Iowa 203; Russell *v.* Burlington, 30 Iowa 262; Grinnell *v.* Mississippi, etc., R. Co., 18 Iowa 570; Whitmore *v.* Bowman, 4 Greene 148; Thomas *v.* Isett, 1 Greene 470.

Kansas.— Atchison, etc., R. Co. *v.* Wilkinson, 55 Kan. 83, 39 Pac. 1043; Sharon Town Co. *v.* Morris, 39 Kan. 377, 18 Pac. 230; Atchison, etc., R. Co. *v.* Snedeger, 5 Kan. App. 700, 49 Pac. 103.

Louisiana.— Bonner *v.* Copley, 15 La. Ann. 504.

Minnesota.— Sowers *v.* Dukes, 8 Minn. 23.

Missouri.— Watkins *v.* St. Louis, etc., R. Co., 44 Mo. App. 245; Kennedy *v.* Holladay, 25 Mo. App. 503; White *v.* Stoner, 18 Mo. App. 540.

Nebraska.— Read *v.* Valley Land, etc., Co., 66 Nebr. 423, 92 N. W. 622; Piper *v.* Woolman, 43 Nebr. 280, 61 N. W. 588; Burlington, etc., R. Co. *v.* Schluntz, 14 Nebr. 421, 16 N. W. 439.

New York.— Beardsley *v.* Lehigh Valley R. Co., 142 N. Y. 173, 36 N. E. 877; Roberts *v.* New York El. R. Co., 128 N. Y. 455, 28 N. E. 486, 13 L. R. A. 499; Green *v.* Plank, 48 N. Y. 669; Marcly *v.* Shults, 29 N. Y. 346; Van Deusen *v.* Young, 29 N. Y. 9; Charman *v.* Hibbler, 31 N. Y. App. Div. 477, 52 N. Y. Suppl. 212; Burditt *v.* New York Cent., etc., R. Co., 71 Hun 361, 24 N. Y. Suppl. 1137; Newton *v.* Fordham, 7 Hun 58; Simons *v.* Monier, 29 Barb. 419; Dolittle *v.* Eddy, 7 Barb. 74; Harger *v.* Edmonds, 4 Barb. 256; Hudson *v.* Caryl, 2 Thomps. & C. 245; Duff *v.* Lyon, 1 E. D. Smith 536; Rauch *v.* New York, etc., R. Co., 2 N. Y. Suppl. 108; Lincoln *v.* Saratoga, etc., R. Co., 23 Wend. 425, services.

Ohio.— Columbus, etc., R. Co. *v.* Gardner, 45 Ohio St. 309, 13 N. E. 69; Alexander *v.* Jacoby, 23 Ohio St. 358.

Oregon.— Burton *v.* Severance, 22 Oreg. 91, 29 Pac. 200.

Texas.— Galveston, etc., R. Co. *v.* Wesch, 85 Tex. 593, 22 S. W. 957 [*reversing* (Civ. App. 1893) 21 S. W. 62]; Taylor *v.* Long, (Sup. 1891) 16 S. W. 1084; Houston, etc., R. Co. *v.* Burke, 55 Tex. 323, 40 Am. Rep. 808; Clardy *v.* Callicoate, 24 Tex. 170; Gulf, etc., R. Co. *v.* Burroughs, 27 Tex. Civ. App. 422, 66 S. W. 83; Gulf, etc., R. Co. *v.* White, (Civ. App. 1895) 32 S. W. 322; Ft. Worth, etc., R. Co. *v.* Ward, 2 Tex. Civ. App. 598, 21 S. W. 607; Thompson *v.* Miller, 1 Tex. App. Civ. Cas. § 1109; Lee *v.* Wilkins, 1 Tex. Unrep. Cas. 287.

Washington.— Ferguson *v.* Tobey, 1 Wash. Terr. 275.

Wisconsin.— Blair *v.* Milwaukee, etc., R. Co., 20 Wis. 262.

See 20 Cent. Dig. tit. "Evidence," § 2283 *et seq.*

Benefits in mitigation of damages (Hagaman *v.* Moore, 84 Ind. 496; Shaw *v.* Charlestown, 2 Gray (Mass.) 107; Purdy *v.* Manhattan R. Co., 3 Misc. (N. Y.) 50, 22 N. Y. Suppl. 943) and the absence of damage (Mobile Furniture Commission Co. *v.* Little, 108 Ala. 399, 19 So. 443; McGregor *v.* Brown, 10 N. Y. 114) stand in the same position.

Elements of damage may be stated by the witnesses. Stewart *v.* Lanier House Co., 75 Ga. 582; Dougherty *v.* Stewart, 43 Iowa 648; Republican Valley R. Co. *v.* Linn, 15 Nebr. 234, 18 N. W. 35; Seamans *v.* Smith, 46 Barb. (N. Y.) 320; Bloomfield, etc., Natural Gas-light Co. *v.* Calkins, 1 Thomps. & C. (N. Y.) 549, sinking and maintaining drain. But witnesses called to testify as to the amount of damage caused by taking land for a railroad cannot express opinions as to the separate items of damage to the land not

himself,[66] and even where the estimate is made at the request of a judge sitting as a jury.[67] The sufficient reasons for the rejection are that this is precisely the point upon which the jury are to pass,[68] and that the statement is often rather a conclusion than an estimate and involves establishing or using a legal standard of liability,[69]

taken. *In re* New York, etc., R. Co., 29 Hun (N. Y.) 609. It has been held that the elements of value cannot be so stated, although the distinction seems a fine one. Packard *v.* Bergen Neck R. Co., 54 N. J. L. 553, 25 Atl. 506, uses to which land is adapted.

The relative damage caused by two acts cannot be stated. Bath *v.* Houston, etc., R. Co., (Tex. Civ. App. 1904) 78 S. W. 993, handling cotton for two or three days by a railroad company as compared to exposure for three months in the open air.

Additional reasons for rejection.— Where the statement is not so much an inference or estimate as a conclusion based in part upon unsworn statements, additional reason is furnished for rejecting it. Johnson *v.* Beaney, 9 Ill. App. 64. Additional objection also exists to receiving a question which cannot be covered by a single answer (Michigan Southern, etc., R. Co. *v.* McDonough, 21 Mich. 165, 4 Am. Rep. 466), or where the matter is largely one of conjecture (Friedenwald *v.* Baltimore, 74 Md. 116, 21 Atl. 555, ladies using street; Chesapeake, etc., Telephone Co. *v.* Mackenzie, 74 Md. 36, 21 Atl. 690, 28 Am. St. Rep. 219; Harpending *v.* Shoemaker, 37 Barb. (N. Y.) 270, amount of a crop; Devlin *v.* New York, 4 Misc. (N. Y.) 106, 23 N. Y. Suppl. 888, profit under a contract). The possibility of procuring or the actual introduction into the case of better evidence also conduces to the rejection of the conclusion. Lewis *v.* Burlington Ins. Co., 71 Iowa 97, 32 N. W. 190.

66. *Alabama.*— Trammell *v.* Ramage, 97 Ala. 666, 11 So. 916.

Arkansas.— St. Louis, etc., R. Co. *v.* Jones, 59 Ark. 105, 26 S. W. 595; Little Rock, etc., R. Co. *v.* Haynes, 47 Ark. 497, 1 S. W. 774.

California.—Razzo *v.* Varni, (1889) 21 Pac. 762.

Georgia.— Central R. Co. *v.* Senn, 73 Ga. 705; Central R., etc., Co. *v.* Kelly, 58 Ga. 107; Gilbert *v.* Cherry, 57 Ga. 128, contract.

Idaho.— Axtell *v.* Northern Pac. R. Co., (1903) 74 Pac. 1075.

Illinois.— Chicago, etc., R. Co. *v.* Roberts, 35 Ill. App. 137 (wife's services); Keith *v.* Bliss, 10 Ill. App. 424 (contract).

Indiana.— Ohio, etc., R. Co. *v.* Nickless, 71 Ind. 271; Baltimore, etc., R. Co. *v.* Stoner, 59 Ind. 579; Ross *v.* Stockwell, 19 Ind. App. 86, 49 N. E. 50, breach of covenant in lease.

Iowa.— Lewis *v.* Burlington Ins. Co., 71 Iowa 97, 32 N. W. 190, tornadoes.

Kansas.— Atchison, etc., R. Co. *v.* Wilkinson, 55 Kan. 83, 39 Pac. 1043; Upcher *v.* Oberlender, 50 Kan. 315, 31 Pac. 1080; Tefft *v.* Wilcox, 6 Kan. 46.

Massachusetts.— Whipple *v.* Rich, 180 Mass. 477, 63 N. E. 5.

Michigan.— Howell *v.* Medler, 41 Mich. 641, 2 N. W. 911.

Missouri.— Hurt *v.* St. Louis, etc., R. Co., 94 Mo. 255, 7 S. W. 1, 4 Am. St. Rep. 374 (loss of child's services); Williams *v.* Dent Iron Co., 30 Mo. App. 662; Smith *v.* Young, 26 Mo. App. 575 (seduction); Birney *v.* Wabash, etc., R. Co., 20 Mo. App. 470 (contract).

Nebraska.— Lincoln, etc., R. Co. *v.* Sutherland, 44 Nebr. 526, 62 N. W. 859; Wellington *v.* Moore, 37 Nebr. 560, 56 N. W. 200; Burlington, etc., R. Co. *v.* Beebe, 14 Nebr. 463, 16 N. W. 747.

New York.— Avery *v.* New York Cent., etc., R. Co., 121 N. Y. 31, 24 N. E. 20 (contract); Green *v.* Plank, 48 N. Y. 669.

Oklahoma.— Tootle *v.* Kent, 12 Okla. 674, 73 Pac. 310.

Oregon.— U. S. *v.* McCann, 40 Oreg. 13, 66 Pac. 274, breach of contract.

South Dakota.— Tenney *v.* Rapid City, (1903) 96 N. W. 96; Webster *v.* White, 8 S. D. 479, 66 N. W. 1145.

Texas.—Landrum *v.* Wells, 7 Tex. Civ. App. 625, 26 S. W. 1001, mental suffering.

Vermont.— Bain *v.* Cushman, 60 Vt. 343, 15 Atl. 171.

Washington.— De Wald *v.* Ingle, 31 Wash. 616, 72 Pac. 469, 96 Am. St. Rep. 927.

Wisconsin.— Churchill *v.* Price, 44 Wis. 540, contract.

See 20 Cent. Dig. tit. "Evidence," § 2283 *et seq.* But see *infra*, XI, C, 4, t.

67. Manning *v.* Maas, 2 Misc. (N. Y.) 266, 21 N. Y. Suppl. 959; Norman *v.* Wells, 17 Wend. (N. Y.) 136, covenant.

68. *Illinois.*— Chicago, etc., R. Co. *v.* Springfield, etc., R. Co., 67 Ill. 142.

Iowa.— Hartley *v.* Keokuk, etc., R. Co., 85 Iowa 455, 52 N. W. 352.

Kansas.— Chicago, etc., R. Co. *v.* Muller, 45 Kan. 85, 25 Pac. 210; Wichita, etc., R. Co. *v.* Kuhn, 38 Kan. 675, 17 Pac. 322.

Michigan.— Matter of First St., 58 Mich. 641, 26 N. W. 159.

Nebraska.— Fremont, etc., R. Co. *v.* Marley, 25 Nebr. 138, 40 N. W. 948, 13 Am. St. Rep. 482 (crops); Fremont, etc., R. Co. *v.* Lamb, 11 Nebr. 592, 10 N. W. 493; Fremont, etc., R. Co. *v.* Whalen, 11 Nebr. 585, 10 N. W. 491.

New York.— Schermerhorn *v.* Tyler, 11 Hun 549; Richardson *v.* Northrup, 66 Barb. 85.

Texas.— Gulf, etc., R. Co. *v.* White, (Civ. App. 1895) 32 S. W. 322; Gulf, etc., R. Co. *v.* Wright, 1 Tex. Civ. App. 402, 21 S. W. 80.

Utah.— Andreson *v.* Ogden Union R., etc., Co., 8 Utah 128, 30 Pac. 305.

See 20 Cent. Dig. tit. "Evidence," § 2283 *et seq.*

Punitive damages are even more clearly within the special function of the jury. Chandler *v.* Bush, 84 Ala. 102, 4 So. 207.

69. Louisville, etc., R. Co. *v.* Sparks, 12 Ind. App. 410, 40 N. E. 546 (crops); De Witt

knowledge,[70] motive, or purpose,[71] or other mental state of a person;[72] whether a person is liable civilly[73] or criminally;[74] whether a contract has been performed;[75]

v. Barly, 17 N. Y. 340; Morehouse *v.* Mathews, 2 N. Y. 514; Norman *v.* Wells, 17 Wend. (N. Y.) 136.

70. Bailey *v.* State, 107 Ala. 151, 18 So. 234; Bank of Commerce *v.* Selden, 1 Minn. 340; Union Pac. R. Co. *v.* O'Brien, 161 U. S. 451, 16 S. Ct. 618, 40 L. ed. 766 [*affirming* 49 Fed. 538, 1 C. C. A. 354].

71. *Alabama.*— Mobile Furniture Commission Co. *v.* Little, 108 Ala. 399, 19 So. 443; Garrett *v.* Trabue, 82 Ala. 227, 3 So. 149; McCormick *v.* Joseph, 77 Ala. 236; Baker *v.* Trotter, 73 Ala. 277; Herring *v.* Skaggs, 62 Ala. 180, 34 Am. Rep. 4; Cox *v.* Whitfield, 18 Ala. 738; Peake *v.* Stout, 8 Ala. 647.

California.— Tait *v.* Hall, 71 Cal. 149, 12 Pac. 391.

Connecticut.— Lovell *v.* Hammond Co., 66 Conn. 500, 34 Atl. 511.

Illinois.— Hoehn *v.* Chicago, etc., R. Co., 152 Ill. 223, 38 N. E. 549; Cihak *v.* Klekr, 117 Ill. 643, 7 N. E. 111 [*reversing* 17 Ill. App. 124]; Ames *v.* Snider, 69 Ill. 376; Ryan *v.* Potwin, 60 Ill. App. 637.

Iowa.— Starr *v.* Stevenson, 91 Iowa 684, 60 N. W. 217; Carey *v.* Gunnison, 51 Iowa 202, 1 N. W. 510; Locke *v.* Sioux City, etc., R. Co., 46 Iowa 109.

Massachusetts.— Goodale *v.* Worcester Agricultural Soc., 102 Mass. 401; Lee *v.* Wheeler, 11 Gray 236.

Minnesota.— Lowry *v.* Harris, 12 Minn. 255.

Missouri.— Rimel *v.* Hayes, 83 Mo. 200.

Nebraska.— Lacey *v.* Central Nat. Bank, 4 Nebr. 179. *Compare* Cressler *v.* Rees, 27 Nebr. 515, 43 N. W. 363, 20 Am. St. Rep. 691.

New York.— Manufacturers', etc., Bank *v.* Koch, 105 N. Y. 630, 12 N. E. 9; Bayliss *v.* Cockcroft, 81 N. Y. 363; Dwight *v.* Badgley, 60 Hun 144, 14 N. Y. Suppl. 498; Filkins *v.* Baker, 6 Lans. 516; Clussman *v.* Merkel, 3 Bosw. 402; Everitt *v.* New York Engraving, etc., Co., 14 Misc. 580, 35 N. Y. Suppl. 1097; Western Nat. Bank *v.* Flannagan, 14 Misc. 317, 35 N. Y. Suppl. 848; Douglass *v.* Leonard, 17 N. Y. Suppl. 591 [*reversing* 14 N. Y. Suppl. 274].

North Carolina.— Wolf *v.* Arthur, 112 N. C. 691, 16 S. E. 843.

Pennsylvania.— Heath *v.* Slocum, 115 Pa. St. 549, 9 Atl. 259.

South Carolina.—Simmons Hardware Co. *v.* Greenwood Bank, 41 S. C. 177, 19 S. E. 502, 44 Am. St. Rep. 700.

Tennessee.— Girdner *v.* Walker, 1 Heisk. 186.

Texas.— Gabel *v.* Weisensee, 49 Tex. 131; Hurlbut *v.* Boaz, 4 Tex. Civ. App. 371, 23 S. W. 446.

Utah.— Watson *v.* Butterfield Min. Co., 24 Utah 222, 66 Pac. 1067.

Wisconsin.—McKesson *v.* Sherman, 51 Wis. 303, 8 N. W. 200; Flanders *v.* Cottrell, 36 Wis. 564; Central Bank *v.* St. John, 17 Wis. 157.

See 20 Cent. Dig. tit. "Evidence," §§ 2157, 2221.

72. Chicago, etc., R. Co. *v.* Kuckkuck, 197 Ill. 304, 64 N. E. 358 ("any reason to suppose"); Wabash R. Co. *v.* Smillie, 97 Ill. App. 7 (reliance).

Where interest does not exclude a witness a defendant may state in an action for malicious prosecution that he was not influenced by malice. Autry *v.* Floyd, 127 N. C. 186, 37 S. E. 208.

73. Quincy Gas, etc., Co. *v.* Bauman, 104 Ill. App. 600 [*affirmed* in 203 Ill. 295, 67 N. E. 807]; Sheldon *v.* Bigelow, 118 Iowa 586, 92 N. W. 701; Sisson *v.* Yost, 12 N. Y. Suppl. 373; Berryhill *v.* McKee, 1 Humphr. (Tenn.) 31.

74. *Arkansas.*— Jones *v.* State, 58 Ark. 390, 24 S. W. 1073.

California.— People *v.* Storke, 128 Cal. 486, 60 Pac. 1090.

Georgia.— Owensby *v.* State, 96 Ga. 433, 23 S. E. 422; Allen *v.* State, 9 Ga. 492.

Louisiana.— State *v.* Robertson, 111 La. 35, 35 So. 375.

Michigan.— People *v.* Row, (1904) 98 N. W. 13.

Missouri.— Garrett *v.* State, 6 Mo. 1.

New York.— People *v.* McLaughlin, 13 Misc. 287, 35 N. Y. Suppl. 73.

South Dakota.— State *v.* Wilson, 4 S. D. 535, 57 N. W. 338.

Texas.—Debbs *v.* State, 43 Tex. 650; Thompson *v.* State, 42 Tex. Cr. 140, 57 S. W. 805; Prince *v.* State, (App. 1892) 20 S. W. 582; Campbell *v.* State, 30 Tex. App. 645, 18 S. W. 409; Jones *v.* State, 30 Tex. App. 426, 17 S. W. 1080; Tillery *v.* State, 24 Tex. App. 251, 5 S. W. 842, 5 Am. St. Rep. 882.

Washington.— State *v.* Coella, 3 Wash. 99, 28 Pac. 28.

See 14 Cent. Dig. tit. "Criminal Law," § 1036.

Acts which would not have been done except on the theory that a certain person was guilty of an offense, are not, if otherwise relevant, rendered inadmissible by reason of the implication of guilt. People *v.* Ward, 105 Cal. 335, 38 Pac. 945; Hill *v.* State, 37 Tex. Cr. 415, 35 S. W. 660; Kirk *v.* State, (Tex. Cr. App. 1896) 37 S. W. 440; Campbell *v.* State, 30 Tex. App. 645, 18 S. W. 409. On the other hand evidence of the doing of acts which is relevant in criminal cases merely because it contains an implication of an opinion of the guilt of the accused is incompetent. Thompson *v.* State, 42 Tex. Cr. 140, 57 S. W. 805.

75. La Fayette R. Co. *v.* Tucker, 124 Ala. 514, 27 So. 447; Githens *v.* McDonnell, 24 Ind. App. 395, 56 N. E. 855; Zimmerman *v.* Conrad, (App. 1903) 74 S. W. 139; A. J. Anderson Electric Co. *v.* Cleburne Water, etc., Co., 23 Tex. Civ. App. 328, 57 S. W. 575 (electric light plant); German Ins. Co. *v.* Pearlstone, 18 Tex. Civ. App. 706, 45 S. W. 832.

whether the provisions of a will have been followed;[76] or whether any other fact exists upon which the decision of the issue must turn.[77] Putting a fact in issue or involving it with the issue may prevent the jury from receiving a simple inference. So doing cannot give the jury power to coördinate minute and numerous facts or confer on them additional experience. Therefore when, as in case of appraising damages or other connections within the specific function of the jury, the facts cannot be placed before the jury, the inference, conclusion, or judgment is competent.[78] For the same reasons a general statement that a skilled witness is never permitted to state an inference, conclusion, or judgment on a fact within the province of the jury to form[79] would be much too sweeping.[80] In many cases the inferences, conclusions, and judgments of witnesses are received on the precise point covered by the jury's investigation, as abundantly appears later in treating of this subject.[81]

(B) *When Opinion Is Received.* Where an estimate of damage is merely a short way of stating a difference in the value of property, a witness who could estimate the difference in value may state the damages,[82] whether there has been

76. McFarland *v.* McFarland, 177 Ill. 208, 52 N. E. 281.

77. See the cases in the preceding notes.

78. Bee Pub. Co. *v.* World Pub. Co., 59 Nebr. 713, 82 N. W. 28; Lazarus *v.* Ludwig, 45 N. Y. App. Div. 486, 61 N. Y. Suppl. 365. See *supra*, XI, A, 4, b.

79. National Gas Light, etc., Co. *v.* Miethke, 35 Ill. App. 629; Hamrick *v.* State, 134 Ind. 324, 34 N. E. 3; Summerlin *v.* Carolina, etc., R. Co., 133 N. C. 550, 45 S. E. 898; Wolf *v.* Arthur, 112 N. C. 691, 16 S. E. 843. See also Rex *v.* Wright, R. & R. 339.

80. *Indiana.*— Indiana Bituminous Coal Co. *v.* Buffey, 28 Ind. App. 108, 62 N. E. 279, sufficiency of pulley.

Massachusetts.— Leslie *v.* Granite R. Co., 172 Mass. 468, 52 N. E. 542; Poole *v.* Dean, 152 Mass. 589, 591, 26 N. E. 406, where it was held that the mere fact that the expert is drawing an inference as to the precise point on which the jury must eventually pass "if everything else is eliminated except that upon which the witness is competent to give an opinion," is not sufficient to exclude the question, i. e., provided that the invasion of the jury's province stops there and does not extend to passing upon the probative effect of the evidence, connecting an inference as to the credibility of witnesses, etc.

New York.— Littlejohn *v.* Shaw, 159 N. Y. 188, 53 N. E. 810; Van Wycklen *v.* Brooklyn, 118 N. Y. 424, 24 N. E. 179; Cornish *v.* Farm Buildings F. Ins. Co., 74 N. Y. 295; Bellinger *v.* New York Cent. R. Co., 23 N. Y. 42.

Texas.— International, etc., R. Co. *v.* Mills, (Civ. App. 1903) 78 S. W. 11; Galveston, etc., R. Co. *v.* Bohan, (Civ. App. 1898) 47 S. W. 1050.

Wisconsin.— Daly *v.* Milwaukee, 103 Wis. 588, 79 N. W. 752.

United States.— Eastern Transp. Line *v.* Hope, 95 U. S. 297, 24 L. ed. 477; Western Coal, etc., Co. *v.* Berberich, 94 Fed. 329, 36 C. C. A. 364; Baltimore Fireman's Ins. Co. *v.* J. H. Mohlman Co., 91 Fed. 85, 33 C. C. A. 347.

81. See *infra*, XI, B *et seq.*

82. *Arkansas.*— Fayetteville, etc., R. Co. *v.* Combs, 51 Ark. 324, 11 S. W. 418; Texas, etc., R. Co. *v.* Kirby, 44 Ark. 103.

California.— Siskiyou County *v.* Gamlich, 110 Cal. 94, 42 Pac. 468.

Illinois.— Pike *v.* Chicago, 155 Ill. 656, 40 N. E. 567; Eberhart *v.* Chicago, etc., R. Co., 70 Ill. 347; Rockford, etc., R. Co. *v.* McKinley, 64 Ill. 338; Cooper *v.* Randall, 59 Ill. 317.

Indiana.— Lafayette *v.* Nagle, 113 Ind. 425, 15 N. E. 1; Evansville, etc., Straight Line R. Co. *v.* Cochran, 10 Ind. 560, 561 (where the court said: "There is manifestly a difference in stating the value of an article as a fact, and giving an opinion as to the amount of unliquidated or consequential damages"); Terre Haute, etc., R. Co. *v.* Walsh, 11 Ind. App. 13, 38 N. E. 534; Brandenburg *v.* Hittel, (Sup. 1894) 37 N. E. 329; Chicago, etc., R. Co. *v.* Kern, 9 Ind. App. 505, 36 N. E. 381.

Iowa.— Dalzell *v.* Davenport, 12 Iowa 437.

Kentucky.— M. & B. S. R. Co. *v.* Urban, 10 Ky. L. Rep. 1061.

Maine.— Snow *v.* Boston, etc., R. Co., 65 Me. 230.

Massachusetts.—Blaney *v.* Salem, 160 Mass. 303, 35 N. E. 858; Patch *v.* Boston, 146 Mass. 52, 57, 14 N. E. 770; Sexton *v.* North Bridgewater, 116 Mass. 200; Swan *v.* Middlesex County, 101 Mass. 173, 178 (where the court said: "The witnesses, being competent to testify to the value of the land affected before and after the alteration of the highway, might testify to the simple question of arithmetic which of those two values was the greater, in other words, whether the petitioners' estate was benefited or injured," and to what extent); Shattuck *v.* Stoneham Branch R. Co., 6 Allen 115; Vandine *v.* Burpee, 13 Metc. 288, 46 Am. Dec. 733.

Minnesota.— Sigafoos *v.* Minneapolis, etc., R. Co., 39 Minn. 8, 38 N. W. 627; Cedar Rapids, etc., R. Co. *v.* Ryan, 36 Minn. 546, 33 N. W. 35; Sherwood *v.* St. Paul, etc., R. Co., 21 Minn. 127; Curtis *v.* St. Paul, etc., R. Co., 20 Minn. 28; St. Paul, etc., R. Co. *v.* Murphy, 19 Minn. 500; Lehemicke *v.* St. Paul, etc., R. Co., 19 Minn. 464; Simmons *v.* St. Paul, etc., R. Co., 18 Minn. 184; Goodell *v.* Ward, 17 Minn. 17.

any damage,[83] or, on the other hand, an affirmative gain;[84] or whether any compensation in money could afford redress.[85] Where other elements of damage may properly enter into the jury's judgment, the witness is restricted to stating his estimate of the values under the different conditions shown or assumed to exist in the case.[86] Instances of the application of the rules stated above are furnished by cases involving the diminution in value of real estate by the lay-out and construction of dams,[87] drains,[88] streets and highways,[89] pipe-lines,[90] railroads,[91]

Missouri.— St. Louis, etc., R. Co. *v.* St. Louis Union Stock Yard Co., 120 Mo. 541, 25 S. W. 399; Nevada, etc., R. Co. *v.* De Lissa, 103 Mo. 125, 15 S. W. 366; Springfield, etc., R. Co. *v.* Calkins, 90 Mo. 538, 3 S. W. 82; Missouri Fire Clay Works *v.* Ellison, 30 Mo. App. 67.

New York.— Witmark *v.* New York El. R. Co., 149 N. Y. 393, 44 N. E. 78 (where it was held that a question which elicits a reply based on a mere arithmetical calculation is not objectionable as calling for expert testimony); Nellis *v.* McCarn, 35 Barb. 115; Camp *v.* Pulver, 5 Den. 48.

Oklahoma.— Diebold Safe, etc., Co. *v.* Holt, 4 Okla. 479, 46 Pac. 512.

Pennsylvania.— Michael *v.* Crescent Pipe Line Co., 159 Pa. St. 99, 28 Atl. 204. See also White Deer Creek Imp. Co. *v.* Sassaman, 67 Pa. St. 415; Watson *v.* Pittsburgh R. Co., 37 Pa. St. 469.

Texas.— Houston, etc., R. Co. *v.* Knapp, 51 Tex. 592; Union, etc., R. Co. *v.* Woods, (Civ. App. 1895) 31 S. W. 237.

Wisconsin.— Snyder *v.* Western Union R. Co., 25 Wis. 60.

See 20 Cent. Dig. tit. "Evidence," § 2283. And see *infra*, XI, C, 4, t.

Conjecture is excluded. Wesson *v.* Washburn Iron Co., 13 Allen (Mass.) 95, 90 Am. Dec. 181.

83. Sewell *v.* Chicago Terminal Transfer R. Co., 177 Ill. 93, 52 N. E. 302; Beck *v.* Pennsylvania, etc., R. Co., 148 Pa. St. 271, 23 Atl. 900, 33 Am. St. Rep. 822; Pittsburgh Southern R. Co. *v.* Reed, (Pa. 1886) 6 Atl. 838.

84. Sexton *v.* North Bridgewater, 116 Mass. 200; Milwaukee, etc., R. Co. *v.* Eble, 3 Pinn. (Wis.) 334, 4 Chandl. (Wis.) 68.

85. Gillman *v.* Florida Cent., etc., R. Co., 53 S. C. 210, 31 S. E. 224.

86. *California.*— Abbott *v.* Southern Pac. R. Co., 109 Cal. 282, 41 Pac. 1099.

Iowa.— Harrison *v.* Iowa Midland R. Co., 36 Iowa 623.

Kansas.— Leroy, etc., R. Co. *v.* Ross, 40 Kan. 598, 20 Pac. 197, 2 L. R. A. 217.

Nebraska.— Omaha *v.* Kramer, 25 Nebr. 489, 41 N. W. 295, 13 Am. St. Rep. 504.

New Mexico.— New Mexican R. Co. *v.* Hendricks, 6 N. M. 611, 30 Pac. 901.

New York.— Richardson *v.* Northrup, 66 Barb. 85, where it was said: "The word 'damages' may mean, in an action of tort, much more than value, even when the value of property constitutes the principal element of damages."

Rhode Island.— Tingley *v.* Providence, 8 R. I. 493.

United States.— Laflin *v.* Chicago, etc., R. Co., 33 Fed. 415.

See 20 Cent. Dig. tit. "Evidence," § 2287 *et seq.*

87. Chandler *v.* Jamaica Pond Aqueduct Corp., 125 Mass. 544.

88. Yost *v.* Conroy, 92 Ind. 464, 47 Am. Rep. 156.

89. *California.*— Siskiyou County *v.* Gamlich, 110 Cal. 94, 42 Pac. 468.

Indiana.— Brandenburg *v.* Hittel, (Sup. 1894) 37 N. E. 329; Goodwine *v.* Evans, 134 Ind. 262, 33 N. E. 1031; Hire *v.* Kniseley, 130 Ind. 295, 29 N. E. 1132.

Kansas.— Topeka *v.* Martineau, 42 Kan. 387, 22 Pac. 419, 5 L. R. A. 775.

Massachusetts.— Beale *v.* Boston, 166 Mass. 53, 43 N. E. 1029; Sexton *v.* North Bridgewater, 116 Mass. 200; Dwight *v.* Hampden County Com'rs, 11 Cush. 201.

Missouri.— Taylor *v.* Jackson, 83 Mo. App. 641, change of grade.

See 20 Cent. Dig. tit. "Evidence," § 2288.

90. Swank *v.* Carnegie Natural Gas Co., 5 Pa. Super. Ct. 371, 40 Wkly. Notes Cas. 490.

91. *Arkansas.*— Springfield, etc., R. Co. *v.* Rhea, 44 Ark. 258.

District of Columbia.— Trook *v.* Baltimore, etc., R. Co., 3 MacArthur 392.

Illinois.— Keithsburg, etc., R. Co. *v.* Henry, 79 Ill. 290; Galena, etc., R. Co. *v.* Haslam, 73 Ill. 494.

Indiana.— Evansville, etc., Straight Line R. Co. *v.* Cochran, 10 Ind. 560.

Iowa.— Esclich *v.* Mason City, etc., R. Co., 75 Iowa 443, 39 N. W. 700; Smalley *v.* Iowa Pac. R. Co., 36 Iowa 571.

Massachusetts.— Shattuck *v.* Stoneham Branch R. Co., 6 Allen 115.

Minnesota.— Emmons *v.* Minneapolis, etc., R. Co., 41 Minn. 133, 42 N. W. 789 (effect of lack of fencing on rental value); Sherman *v.* St. Paul, etc., R. Co., 30 Minn. 227, 15 N. W. 239; Lehmicke *v.* St. Paul, etc., R. Co., 19 Minn. 464; Colvill *v.* St. Paul, etc., R. Co., 19 Minn. 283; Grannis *v.* St. Paul, etc., R. Co., 18 Minn. 194; Simmons *v.* St. Paul, etc., R. Co., 18 Minn. 184; Winona, etc., R. Co. *v.* Waldron, 11 Minn. 515, 88 Am. Dec. 100.

Missouri.— Nevada, etc., R. Co. *v.* De Lissa, 103 Mo. 125, 15 S. W. 366.

New Jersey.— Pennsylvania, etc., R. Co. *v.* Root, 53 N. J. L. 253, 21 Atl. 285.

New York.— Rochester, etc., R. Co. *v.* Budlong, 10 How. Pr. 289.

Pennsylvania.— Beck *v.* Pennsylvania, etc., R. Co., 148 Pa. St. 271, 23 Atl. 900, 33 Am. St. Rep. 822; Pittsburgh Southern R. Co. *v.* Reed, (1886) 6 Atl. 838; Brown *v.* Corey, 43 Pa. St. 495, under ground.

Washington.— Seattle, etc., R. Co. *v.* Gilchrist, 4 Wash. 509, 30 Pac. 738.

See 20 Cent. Dig. tit. "Evidence," § 2288.

sewers,[92] and the like. The same is true of cases involving diminution in value by the creation of nuisances;[93] by waste,[94] or other injuries,[95] or by encumbrances;[96] and of cases involving damage to animals,[97] crops,[98] or other personal property,[99] by breach of contract,[1] or by injury to the person.[2] The difficulty of stating minute constituent facts may make it necessary to receive such evidence of damages,[3] the

The elements of damage may be detailed by the witness, although deductions of common sense and observation are blended with the more primary facts. Stertz *v.* Stewart, 74 Wis. 160, 42 N. W. 214; Milwaukee, etc., R. Co. *v.* Eble, 3 Pinn. (Wis.) 334, 4 Chandl. (Wis.) 68. No allowance can be made for an element of damage, the effect of which the witness is unable to separate from that of other elements. Chicago, etc., R. Co. *v.* Hall, 8 Ill. App. 621. A specification of the elements of damage may be sought also upon cross-examination. *In re* Bloomfield, etc., Natural Gas-light Co., 1 Thomps. & C. (N. Y.) 549.

92. Taft *v.* Com., 158 Mass. 526, 33 N. E. 1046; Wilson *v.* Scranton City, 141 Pa. St. 621, 21 Atl. 779.

93. *Connecticut.*— Kearney *v.* Farrell, 28 Conn. 317, 73 Am. Dec. 677, smells.

Illinois.— Crohen *v.* Ewers, 39 Ill. App. 34 (drainage of surface water on land); Chicago, etc., R. Co. *v.* Schaffer, 26 Ill. App. 280 (overflow).

Indiana.— Louisville, etc., R. Co. *v.* Sparks, 12 Ind. App. 410, 40 N. E. 546, overflow.

Massachusetts.— Hosmer *v.* Warner, 15 Gray 46 (back-water from mill-dam); Vandine *v.* Burpee, 13 Metc. 288, 46 Am. Dec. 733 (injury to vegetation caused by smoke from brick-kilns).

West Virginia.— Hargreaves *v.* Kimberly, 26 W. Va. 787, 53 Am. Rep. 121, overflow.

See 20 Cent. Dig. tit. "Evidence," § 2285.

94. Ferguson *v.* Stafford, 33 Ind. 162.

95. *Arkansas.*— St. Louis, etc., R. Co. *v.* Jones, 59 Ark. 105, 26 S. W. 595, fire.

Illinois.— Cairo, etc., R. Co. *v.* Woosley, 85 Ill. 370.

Indiana.— Terre Haute, etc., R. Co. *v.* Walsh, 11 Ind. App. 13, 38 N. E. 534 (where it was held that a farmer whose land has been injured by fire may state what outlay would be necessary to put the drainage in condition); Chicago, etc., R. Co. *v.* Kern, 9 Ind. App. 505, 36 N. E. 381 (fire); Chicago, etc., R. Co. *v.* Smith, 6 Ind. App. 262, 33 N. E. 341 (fire).

Iowa.— Brooks *v.* Chicago, etc., R. Co., 73 Iowa 179, 34 N. W. 805, fire.

New Hampshire.— Carter *v.* Thurston, 58 N. H. 104, 42 Am. Rep. 584, trespass.

South Carolina.— Dent *v.* South-Bound R. Co., 61 S. C. 329, 39 S. E. 527, fire.

See 20 Cent. Dig. tit. "Evidence," § 2285 *et seq.*

96. Wetherbee *v.* Bennett, 2 Allen (Mass.) 428.

97. *Alabama.*— Johnson *v.* State, 37 Ala. 457, shooting a mule.

California.— Polk *v.* Coffin, 9 Cal. 56.

Indiana.— Bowlus *v.* Brier, 87 Ind. 391, horses.

Michigan.— Laird *v.* Snyder, 59 Mich. 404, 26 N. W. 654, overdriving a horse.

Missouri.— Missouri, etc., R. Co. *v.* Hall, 87 Fed. 170, 32 C. C. A. 146, cattle.

Oklahoma.— Coyle *v.* Baum, 3 Okla. 695, 41 Pac. 389.

Texas.— Missouri Pac. R. Co. *v.* Harmonson, (App. 1890) 16 S. W. 539 (cattle); Galveston, etc., R. Co. *v.* Botts, (Civ. App. 1902) 70 S. W. 113.

98. Watry *v.* Hiltgen, 16 Wis. 516.

99. New York, etc., R. Co. *v.* Grand Rapids, etc., R. Co., 116 Ind. 60, 18 N. E. 182 (car); Wells *v.* Cone, 55 Barb. (N. Y.) 585 (boat); Diebold Safe, etc., Co. *v.* Holt, 4 Okla. 479, 46 Pac. 512 (fire-proof safe).

1. *Massachusetts.*— Eldredge *v.* Smith, 13 Allen 140, fishing voyage.

Minnesota.— Marsh *v.* Webber, 16 Minn. 418, sale of diseased animals.

North Carolina.— Sikes *v.* Paine, 32 N. C. 280, 51 Am. Dec. 389, contract to repair.

South Carolina.— Jenkins *v.* Charleston St. R. Co., 58 S. C. 373, 36 S. E. 703.

Texas.— Stark *v.* Alford, 49 Tex. 260.

Wisconsin.— Salvo *v.* Duncan, 49 Wis. 151, 4 N. W. 1074.

See 20 Cent. Dig. tit. "Evidence," § 2289.

A matter of arithmetic.— Where the damages are practically the result of a deduction of certain fixed expenses from a definite contract price, the element of reasoning is largely eliminated and the evidence competent upon general principles. Jenkins *v.* Charleston St. R. Co., 58 S. C. 373, 36 S. E. 703.

"Best evidence."— Where from the nature of the inquiry a witness' estimate as to damages is the best available evidence, it will be received, although conjecture is of necessity a large factor in any estimate. Cleveland, etc., R. Co. *v.* Wood, 90 Ill. App. 551, failure to stop trains at plaintiff's hotel.

2. Oliver *v.* Columbia, etc., R. Co., 65 S. C. 1, 43 S. E. 307; Gillman *v.* Florida, etc., R. Co., 53 S. C. 210, 31 S. E. 224.

3. *California.*— Woodbeck *v.* Wilders, 18 Cal. 131.

Illinois.— Ottawa Gaslight, etc., Co. *v.* Graham, 35 Ill. 346; Chicago, etc., R. Co. *v.* Schaffer, 26 Ill. App. 280.

Iowa.—Knapp, etc., Co. *v.* Barnard, 78 Iowa 347, 43 N. W. 197 (carrying over stock of dry-goods to next season); Chambers *v.* Brown, 69 Iowa 213, 28 N. W. 561 (profit under a coal lease).

Minnesota.— Lommeland *v.* St. Paul, etc., R. Co., 35 Minn. 412, 29 N. W. 119, crops.

Pennsylvania.— White Deer Imp. Co. *v.* Sassaman, 67 Pa. St. 415; Pennsylvania R. Co. *v.* Henderson, 51 Pa. St. 315 (where it was held that the length of time a child would probably be useful to his family may

offset of benefits,[4] or as to the effect of any injuries which can "be best expressed by the damage they cause."[5]

(III) *Negligence.* The issue of negligence can in most cases well be determined by the judgment of a jury and the inference, conclusion, or judgment of witnesses is rejected.[6] This rule has been applied, for example, to the question

be stated); Kellogg *v.* Krauser, 14 Serg. & R. 137, 16 Am. Dec. 480.

Vermont.— Clifford *v.* Richardson, 18 Vt. 620, where it was held that in an action for damages for the loss of the use of a mill, due to the unskilful manner in which the machinery was put in, the opinion of competent witnesses may be received as to the amount of work that would have been performed by the mill while it was useless.

See 20 Cent. Dig. tit. "Evidence," § 2285 *et seq.*

Where the facts observed by the witness can be reproduced and made palpable in the concrete to the jury, the estimate of damage is excluded. Vandine *v.* Burpee, 13 Metc. (Mass.) 288, 46 Am. Dec. 733; Cothran *v.* Knight, 45 S. C. 1, 22 S. E. 596; Jones *v.* Fuller, 19 S. C. 66, 45 Am. Rep. 761; Bain *v.* Cushman, 60 Vt. 343, 15 Atl. 171; Murphy *v.* Fond du Lac, 23 Wis. 365, 99 Am. Dec. 181. See *supra*, XI, A, 4, b.

4. Hayes *v.* Ottawa, etc., R. Co., 54 Ill. 373, depot near land.

5. Jones *v.* Fuller, 19 S. C. 66, 45 Am. Rep. 761; Gulf, etc., R. Co. *v.* Vancil, 2 Tex. Civ. App. 427, 21 S. W. 303. "The witnesses whose testimony was objected to, were not strangers who were called upon to express an abstract opinion as to the amount of damages which a lady would sustain by the breach of promise of marriage, but they were intimate acquaintances, who knew well the social position of the plaintiff, her temperament and disposition, and all her surroundings, and from the knowledge thus acquired they formed their estimate of the damages which she had sustained. It is difficult to conceive how it would have been possible for these witnesses to state all the various facts, or reproduce in language the condition of things, upon which they based their estimates, so as to make the same palpable to the minds of the jury. How could they express in language the degree of sensibility of the lady, or the numerous other impalpable things which went to make up their estimate of the amount of damages which she had sustained?" Jones *v.* Fuller, 19 S. C. 66, 70, 45 Am. Rep. 761.

6. *Arkansas.*— Fordyce *v.* Edwards, 65 Ark. 98, 44 S. W. 1034.

California.— Redfield *v.* Oakland Consol. St. R. Co., 112 Cal. 220, 43 Pac. 1117; Fogel *v.* San Francisco, etc., R. Co., (1895) 42 Pac. 565; Sappenfield *v.* Main St., etc., R. Co., 91 Cal. 48, 27 Pac. 590; Shafter *v.* Evans, 53 Cal. 32; Gambert *v.* Hart, 44 Cal. 542.

Connecticut.— Morris *v.* East Haven, 41 Conn. 252.

Florida.— Camp *v.* Hall, 39 Fla. 535, 22 So. 792.

Georgia.— Parker *v.* Georgia Pac. R. Co., 83 Ga. 539, 10 S. E. 233; East Tennessee, etc., R. Co. *v.* Wright, 76 Ga. 532; Central R. Co. *v.* De Bray, 71 Ga. 406.

Illinois.— Hopkins *v.* Indianapolis, etc., R. Co., 78 Ill. 32; McMahan *v.* Swain, 106 Ill. App. 392.

Indiana.— Brunker *v.* Cummins, 133 Ind. 443, 32 N. E. 732; Albion *v.* Hetrick, 90 Ind. 545, 46 Am. Rep. 230; Louisville, etc., R. Co. *v.* Berry, 9 Ind. App. 63, 35 N. E. 565, 36 N. E. 646.

Iowa.— Duer *v.* Allen, 96 Iowa 36, 64 N. W. 682.

Kansas.— Insley *v.* Shire, 54 Kan. 793, 39 Pac. 713, 45 Am. St. Rep. 308; Chicago, etc., R. Co. *v.* Clonch, 2 Kan. App. 728, 43 Pac. 1140.

Maine.— Hill *v.* Portland, etc., R. Co., 55 Me. 438, 92 Am. Dec. 601.

Massachusetts.— Whitman *v.* Boston El. R. Co., 181 Mass. 138, 63 N. E. 334; Twomey *v.* Swift, 163 Mass. 273, 39 N. E. 1018; McGuerty *v.* Hall, 161 Mass. 51, 36 N. E. 682.

Michigan.— Clinton *v.* Root, 58 Mich. 182, 24 N. W. 667, 55 Am. Rep. 671.

Minnesota.— Bergquist *v.* Chandler Iron Co., 49 Minn. 511, 52 N. W. 136; Mantel *v.* Chicago, etc., R. Co., 33 Minn. 62, 21 N. W. 853.

Missouri.— Gavisk *v.* Pacific R. Co., 49 Mo. 274, 277 (where the court said: "To have permitted this question would have been to take the case from the jury and submit it to the witness"); Madden *v.* Missouri Pac. R. Co., 50 Mo. App. 666.

New York.— Davis *v.* New York, etc., R. Co., 69 Hun 174, 23 N. Y. Suppl. 358; McLean *v.* Schuyler Steam Tow-Boat Line, 52 Hun 43, 4 N. Y. Suppl. 790; Schwander *v.* Birge, 46 Hun 66; Gerbig *v.* New York, etc., R. Co., 22 N. Y. Suppl. 21; Pratt *v.* Mosetter, 9 N. Y. Civ. Proc. 351; Rogers *v.* Rhodeback, 5 N. Y. Leg. Obs. 334.

North Carolina.— Tillett *v.* Norfolk, etc., R. Co., 118 N. C. 1031, 24 S. E. 111.

Ohio.— National Malleable Casting Co. *v.* Luscombe, 9 Ohio Cir. Ct. 680, 6 Ohio Cir. Dec. 801.

Oregon.— Chan Sing *v.* Portland, 37 Oreg. 68, 60 Pac. 718; Johnston *v.* Oregon Short Line R. Co., 23 Oreg. 94, 31 Pac. 283; Fisher *v.* Oregon Short Line, etc., R. Co., 22 Oreg. 533, 30 Pac. 425, 16 L. R. A. 519.

Texas.— Sonnefield *v.* Mayton, (Civ. App. 1897) 39 S. W. 166 (where it was held that a witness cannot state as a standard of conduct what he would himself have done under certain circumstances); St. Louis, etc., R. Co. *v.* Nelson, 20 Tex. Civ. App. 536, 49 S. W. 710.

Vermont.— Stowe *v.* Bishop, 58 Vt. 498, 3 Atl. 494, 56 Am. Rep. 569 (leaving horse without hitching); Fraser *v.* Tupper, 29 Vt. 409.

whether a bridge,[7] road,[8] roadway,[9] sidewalk,[10] track,[11] or other place,[12] machinery,[13] mechanical appliance,[14] rate of speed,[15] situation,[16] or other thing or collection or combination of things is safe or dangerous.[17] The rule has also been applied to the question whether certain conduct of a person was careful[18] or

Wisconsin.— Seliger *v.* Bastian, 66 Wis. 521, 29 N. W. 244; Mellor *v.* Utica, 48 Wis. 457, 4 N. W. 655; Oleson *v.* Tolford, 37 Wis. 327.

See 20 Cent. Dig. tit. "Evidence," § 2248 *et seq.*

Even on cross-examination such evidence is incompetent. Hamilton *v.* Rich Hill Coal Min. Co., 108 Mo. 364, 18 S. W. 977.

7. Murray *v.* Woodson County, 58 Kan. 1, 48 Pac. 554; Shelley *v.* Austin, 74 Tex. 608, 12 S. W. 753.

8. District of Columbia *v.* Haller, 4 App. Cas. (D. C.) 405; Rowe *v.* Baltimore, etc., R. Co., 82 Md. 493, 33 Atl. 761; Harris *v.* Clinton Tp., 64 Mich. 447, 31 N. W. 425, 8 Am. St. Rep. 842; Yeaw *v.* Williams, 15 R. I. 20, 23 Atl. 33.

9. Brown *v.* Cape Girardeau Macadamized, etc., Road Co., 89 Mo. 152, 1 S. W. 129.

10. District of Columbia *v.* Haller, 4 App. Cas. (D. C.) 405; Chicago *v.* McGiven, 78 Ill. 347; Lindley *v.* Detroit, 131 Mich. 8, 90 N. W. 665; Atherton *v.* Bancroft, 114 Mich. 241, 72 N. W. 208; Metz *v.* Butte, 27 Mont. 506, 71 Pac. 761.

11. Street R. Co. *v.* Nolthenius, 40 Ohio St. 376 (street railway); Couch *v.* Charlotte, etc., Co., 22 S. C. 557; Southern Kansas R. Co. *v.* Cooper, (Tex. Civ. App. 1903) 75 S. W. 328; Childress *v.* Chesapeake, etc., R. Co., 94 Va. 186, 26 S. E. 424.

12. Smuggler Union Min. Co. *v.* Broderick, 25 Colo. 16, 53 Pac. 169, 71 Am. St. Rep. 106 (stope of a mine); Winters *v.* Naughton, 91 N. Y. App. Div. 80, 86 N. Y. Suppl. 439 (trench); Sullivan *v.* Rome, 86 N. Y. App. Div. 107, 83 N. Y. Suppl. 554; Siegler *v.* Mellinger, 203 Pa. St. 256, 52 Atl. 175, 93 Am. St. Rep. 767.

13. *Indiana.*—Indiana Bituminous Coal Co. *v.* Buffey, 28 Ind. App. 108, 62 N. E. 279, pulley.

Iowa.— This is the rule for additional reasons where the jury have had the benefit of the use of a model. Sprague *v.* Atlee, 81 Iowa 1, 46 N. W. 756.

Massachusetts.— Gleason *v.* Smith, 172 Mass. 50, 51 N. E. 460.

New Jersey.— Bergen County Traction Co. *v.* Bliss, 62 N. J. L. 410, 41 Atl. 837, block system of signals.

New York.— Harley *v.* Buffalo Car. Mfg. Co., 142 N. Y. 31, 36 N. E. 813 [*reversing* 20 N. Y. Suppl. 354], belt fasteners.

Texas.— Ft. Worth, etc., R. Co. *v.* Thompson, 2 Tex. Civ. App. 170, 21 S. W. 137.

Vermont.— Houston *v.* Brush, 66 Vt. 331, 29 Atl. 380, derrick.

14. *Alabama.*— Birmingham R., etc., Co. *v.* Baylor, 101 Ala. 488, 13 So. 793, switch.

California.— Luman *v.* Golden Ancient Channel Min. Co., 140 Cal. 700, 74 Pac. 307.

Colorado.—Colorado Coal, etc., Co. *v.* Lamb, 6 Colo. App. 255, 40 Pac. 251, switch.

Connecticut.— Chamberlain *v.* Platt, 68 Conn. 126, 35 Atl. 780, railroad station.

Illinois.— Meyer *v.* Meyer, 86 Ill. App. 417 (set screw on a collar on shaft); Kolb *v.* Sandwich Enterprise Co., 36 Ill. App. 419 (trap-door).

Indiana.— Cleveland, etc., R. Co. *v.* De Bolt, 10 Ind. App. 174, 37 N. E. 737, cattle-guard.

Kansas.— Murray *v.* Woodson County Com'rs, 58 Kan. 1, 48 Pac. 554; Junction City *v.* Blades, 1 Kan. App. 85, 41 Pac. 677.

Michigan.— Girard *v.* Kalamazoo, 92 Mich. 610, 52 N. W. 1021, road.

Minnesota.— Freeberg *v.* St. Paul Plow-Works, 48 Minn. 99, 50 N. W. 1026.

Rhode Island.— Yeaw *v.* Williams, 15 R. I. 20, 23 Atl. 33, switch.

United States.— Hunt *v.* Kile, 98 Fed. 49, 38 C. C. A. 641, rope.

See 20 Cent. Dig. tit. "Evidence," § 2256 *et seq.*

15. Alabama Great Southern R. Co. *v.* Hall, 105 Ala. 599, 17 So. 176; Eckington, etc., R. Co. *v.* Hunter, 6 App. Cas. (D. C.) 287; Louisville, etc., R. Co. *v.* Gobin, 52 Ill. App. 565; Fisher *v.* Oregon Short Line, etc., R. Co., 22 Oreg. 533, 30 Pac. 425, 16 L. R. A. 519.

16. *Iowa.*— Langhammer *v.* Manchester, 99 Iowa 295, 68 N. W. 688, sidewalk.

Michigan.— Detzur *v.* B. Stroh Brewing Co., 119 Mich. 282, 77 N. W. 948, 44 L. R. A. 500.

Pennsylvania.— Platz *v.* McKean Tp., 178 Pa. St. 601, 36 Atl. 136, sluice in a highway.

Texas.— Mayton *v.* Sonnefield, (Civ. App. 1898) 48 S. W. 608.

Wisconsin.— Miles *v.* Stanke, 114 Wis. 94, 89 N. W. 833.

17. *Illinois.*— Meyer *v.* Meyer, 86 Ill. App. 417.

Iowa.— Sprague *v.* Atlee, 81 Iowa 1, 46 N. W. 756, gauge of saw.

Massachusetts.— Gleason *v.* Smith, 172 Mass. 50, 51 N. E. 460.

Missouri.— Koons *v.* St. Louis, etc., R. Co., 65 Mo. 592.

New York.— Winters *v.* Naughton, 91 N. Y. App. Div. 80, 86 N. Y. Suppl. 439.

South Carolina.— Couch *v.* Charlotte, etc., R. Co., 22 S. C. 557.

Texas.— Shelley *v.* Austin, 74 Tex. 608, 12 S. W. 753; Southern Kansas R. Co. *v.* Cooper, (Civ. App. 1903) 75 S. W. 328; Mayton *v.* Sonnefield, (Civ. App. 1898) 48 S. W. 608.

Wisconsin.— Miles *v.* Stanke, 114 Wis. 94, 89 N. W. 833, danger to plate glass under an awning to leave the awning down in a storm.

See 20 Cent. Dig. tit. "Evidence," § 2248 *et seq.*

18. *Alabama.*— Louisville, etc., R. Co. *v.* Bouldin, 110 Ala. 185, 20 So. 325, ordinary care.

careless.[19] And it has been applied to other questions as to conduct; as whether it was cautious,[20] dangerous,[21] "in the line of duty,"[22] necessary,[23] negligent,[24] proper,[25]

Georgia.— Printup *v.* Patton, 91 Ga. 422, 18 S. E. 311; Central R., etc., Co. *v.* Ryles, 84 Ga. 420, 11 S. E. 499, backing cars.

Iowa.— Fitch *v.* Mason City, etc., Traction Co., 116 Iowa 716, 89 N. W. 33 (where it was held that it is equally objectionable to ask whether doing a certain act carefully would not have avoided an occurrence for which damages are claimed); Duer *v.* Allen, 96 Iowa 36, 64 N. W. 682 (all possible care); Whitsett *v.* Chicago, etc., R. Co., 67 Iowa 150, 25 N. W. 104; Hatfield *v.* Chicago, etc., R. Co., 61 Iowa 434, 16 N. W. 336.

Kansas.— Dow *v.* Julien, 32 Kan. 576, 4 Pac. 1000.

New York.— Pike *v.* Bosworth, 7 N. Y. St. 665; Rogers *v.* Rhodeback, 5 N. Y. Leg. Obs. 334, ordinary care.

Texas.— De Walt *v.* Houston, etc., R. Co., 22 Tex. Civ. App. 403, 55 S. W. 534; Ft. Worth, etc., R. Co. *v.* Thompson, 2 Tex. Civ. App. 170, 21 S. W. 137, ordinary care.

See 20 Cent. Dig. tit. "Evidence," § 2248.

19. Louisville, etc., Consol. R. Co. *v.* Berry, 9 Ind. App. 63, 35 N. E. 565, 36 N. E. 646; Seese *v.* Northern Pac. R. Co., 39 Fed. 487.

20. Mayfield *v.* Savannah, etc., R. Co., 87 Ga. 374, 13 S. E. 459.

21. Teall *v.* Barton, 40 Barb. (N. Y.) 137; Bridger *v.* Asheville, etc., R. Co., 25 S. C. 24; Atchison, etc., R. Co. *v.* Myers, 63 Fed. 793, 11 C. C. A. 439 (coupling cars); Seese *v.* Northern Pac. R. Co., 39 Fed. 487.

22. Grand Rapids, etc., R. Co. *v.* Ellison, 107 Ind. 234, 20 N. E. 135; Allen *v.* Burlington, etc., R. Co., 57 Iowa 623, 11 N. W. 614; Louisville, etc., R. Co. *v.* Bowen, 39 S. W. 31, 18 Ky. L. Rep. 1099.

23. *Indiana.*— Chicago, etc., R. Co. *v.* Cummings, 24 Ind. App. 192, 53 N. E. 1026, blowing whistle.

Massachusetts.— Nowell *v.* Wright, 3 Allen 166, 80 Am. Dec. 62, handling of draw-bridge.

Michigan.— Clark *v.* Detroit Locomotive Works, 32 Mich. 348, examining steamer.

New York.— Lane *v.* New York Cent., etc., R. Co., 93 N. Y. App. Div. 40, 86 N. Y. Suppl. 947, establishing rules to prevent a particular accident.

Texas.— International, etc., R. Co. *v.* Armstrong, 4 Tex. Civ. App. 146, 23 S. W. 236; Missouri Pac. R. Co. *v.* Burnett, 3 Tex. App. Civ. Cas. § 236.

United States.— New York Electric Equipment Co. *v.* Blair, 79 Fed. 896, 25 C. C. A. 216, precautions in hoisting pipe.

See *infra*, XI, E, 2, b.

24. *Georgia.*— Dowdy *v.* Georgia R. Co., 88 Ga. 726, 16 S. E. 62.

Iowa.— Metropolitan Nat. Bank *v.* Commercial State Bank, 104 Iowa 682, 74 N. W. 26; McKean *v.* Burlington, etc., R. Co., 55 Iowa 192, 7 N. W. 505.

Kentucky.— Pepper *v.* Planters Nat. Bank, 5 Ky. L. Rep. 85.

Maine.— Pulsifer *v.* Berry, 87 Me. 405, 32 Atl. 986.

Massachusetts.— Gilmore *v.* Mittineague Paper Co., 169 Mass. 471, 48 N. E. 623 (where it was held that a further reason is furnished where the witness is not shown to have had suitable knowledge); Simmons *v.* New Bedford, etc., Steamboat Co., 97 Mass. 361, 93 Am. Dec. 99.

Missouri.— Koons *v.* St. Louis, etc., R. Co., 65 Mo. 592.

New York.— Schneider *v.* Second Ave. R. Co., 133 N. Y. 583, 30 N. E. 752 (insufficient); McDonald *v.* State, 127 N. Y. 18, 27 N. E. 358; Murtaugh *v.* New York Cent., etc., R. Co., 49 Hun 456, 3 N. Y. Suppl. 483; Crofut *v.* Brooklyn Ferry Co., 36 Barb. 201; Taylor *v.* Monnot, 4 Duer 116.

Pennsylvania.— Livingston *v.* Cox, 8 Watts & S. 61, attorney.

Wisconsin.— Wood *v.* Chicago, etc., R. Co., 51 Wis. 196, 8 N. W. 214, leaving lamp burning.

United States.— Inland, etc., Coasting Co. *v.* Tolson, 139 U. S. 551, 11 S. Ct. 653, 35 L. ed. 270 [*affirming* 6 Mackey (D. C.) 39], where it was held that it is not error to exclude the testimony of a boat officer, introduced as an expert, who had never been at a wharf on which plaintiff was standing when a boat in making a landing struck the pier and injured him, upon the question whether it was a safe place to stand while a boat was making a landing, because the question requires no expert knowledge or training, and hence the opinions of witnesses are inadmissible.

See 20 Cent. Dig. tit. "Evidence," § 2248 *et seq.*

25. *Alabama.*—Alabama Great Southern R. Co. *v.* Tapia, 94 Ala. 226, 10 So. 236.

California.— Fogel *v.* San Francisco, etc., R. Co., (1895) 42 Pac. 565.

Georgia.— Brush Electric Light, etc., Co. *v.* Wells, 103 Ga. 512, 30 S. E. 533; Printup *v.* Patton, 91 Ga. 422, 18 S. E. 311; Hudson *v.* Georgia Pac. R. Co., 85 Ga. 203, 11 S. E. 605.

Illinois.— Springfield *v.* Coe, 166 Ill. 22, 46 N. E. 709; Hopkins *v.* Indianapolis, etc., R. Co., 78 Ill. 32; Metropolitan Nat. Bank *v.* Commercial State Bank, 104 Iowa 682, 74 N. W. 26; Duer *v.* Allen, 96 Iowa 36, 64 N. W. 682; Scott *v.* Hogan, 72 Iowa 614, 34 N. W. 444 (good caution); Burns *v.* Chicago, etc., R. Co., 69 Iowa 450, 30 N. W. 25, 58 Am. Rep. 227; Baldwin *v.* St. Louis, etc., R. Co., 68 Iowa 37, 25 N. W. 918 (piling of lumber); Jeffrey *v.* Keokuk, etc., R. Co., 56 Iowa 546, 9 N. W. 884; Bills *v.* Ottumwa, 35 Iowa 107 (safe).

Kansas.— Atchison, etc., R. Co. *v.* Chance, 57 Kan. 40, 45 Pac. 60, distance between hand-cars.

Kentucky.— Louisville, etc., R. Co. *v.* Milliken, 51 S. W. 796, 21 Ky. L. Rep. 489.

Massachusetts.— McGuerty *v.* Hall, 161 Mass. 51, 36 N. E. 682; White *v.* Ballou, 8 Allen (Mass.) 408.

prudent,[26] reasonable,[27] professionally skilful,[28] safe,[29] usual,[30] or unusual;[31] and whether such conduct constituted good management,[32] or omitted anything.[33] The exclusion is subject to the proviso that the material facts can be placed before the jury.[34] The same rule is naturally applied with even greater strictness where the inference is a more reasoned one; as whether sufficient time was afforded for the doing of an act;[35] whether a workman,[36] driver,[37] engineer,[38] motorman,[39]

New York.— Schneider *v.* Second Ave., etc., R. Co., 133 N. Y. 583, 30 N. E. 752; Rawls *v.* American Mut. L. Ins. Co., 27 N. Y. 282, 84 Am. Dec. 280; Winters *v.* Naughton, 91 N. Y. App. Div. 80, 86 N. Y. Suppl. 439 (proper construction); Tibbits *v.* Phipps, 30 N. Y. App. Div. 274, 51 N. Y. Suppl. 954; Hankins *v.* Watkins, 77 Hun 360, 28 N. Y. Suppl. 867; Regner *v.* Glens Falls, etc., R. Co., 74 Hun 202, 26 N. Y. Suppl. 625 (no unnecessary force); Mauer *v.* Ferguson, 17 N. Y. Suppl. 349 (put up right).

Oregon.— Johnston *v.* Oregon Short Line R. Co., 23 Oreg. 94, 31 Pac. 283.

Pennsylvania.— North Pennsylvania Co. *v.* Kirk, 90 Pa. St. 15, nothing possible omitted.

Texas.— St. Louis, etc., R. Co. *v.* Jones, (Sup. 1890) 14 S. W. 309; Missouri, etc., R. Co. *v.* Miller, 8 Tex. Civ. App. 241, 27 S. W. 905.

Utah.—Black *v.* Rocky Mountain Bell Telephone Co., 26 Utah 451, 73 Pac. 514.

Wisconsin.— Lawson *v.* Chicago, etc., R. Co., 64 Wis. 447, 24 N. W. 618, 54 Am. Rep. 634 (dangerous); Eaton *v.* Woolly, 28 Wis. 628.

United States.— Motey *v.* Pickle Marble, etc., Co., 74 Fed. 155, 20 C. C. A. 366, reasonably safe.

See 20 Cent. Dig. tit. "Evidence," § 2248 *et seq.*

26. *Alabama.*— Warden *v.* Louisville, etc., R. Co., 94 Ala. 277, 10 So. 276, 14 L. R. A. 552.

Arkansas.— Fordyce *v.* Edwards, 65 Ark. 98, 44 S. W. 1034, where it was held that the opinions of witnesses as to what a prudent man would do under certain circumstances are inadmissible.

California.— Redfield *v.* Oakland Consol. St. R. Co., 112 Cal. 220, 43 Pac. 1117, electric car with one man.

Illinois.— Wabash, etc., R. Co. *v.* Pratt, 15 Ill. App. 177, shipping hogs.

Iowa.—Duer *v.* Allen, 96 Iowa 36, 64 N. W. 682; Campbell *v.* Rusch, 9 Iowa 337.

Massachusetts.— Higgins *v.* Dewey, 107 Mass. 494, 9 Am. Rep. 63.

Missouri.— Greenwell *v.* Crow, 73 Mo. 638.

New York.— Keller *v.* New York Cent. R. Co., 2 Abb. Dec. 480, 24 How. Pr. 172, safer.

Pennsylvania.— Card *v.* Columbia Tp., 191 Pa. St. 254, 43 Atl. 217.

Tennessee.— Bruce *v.* Beall, 99 Tenn. 303, 41 S. W. 445 (use of elevator cables beyond seven years); Lawrence *v.* Hudson, 12 Heisk. 671 (leaving 'bus on slope of hill).

Texas.— Sonnefield *v.* Mayton, (Civ. App. 1897) 39 S. W. 166; International, etc., R. Co. *v.* Kuehn, 2 Tex. Civ. App. 210, 21 S. W. 58, safe.

Vermont.— Bemis *v.* Central Vermont R. Co., 58 Vt. 636, 3 Atl. 531; Stowe *v.* Bishop, 58 Vt. 498, 3 Atl. 494, 56 Am. Rep. 569, leaving horse unhitched.

Wisconsin.— Waupaca Electric Light, etc., R. Co. *v.* Milwaukee Electric R., etc., Co., 112 Wis. 469, 88 N. W. 308.

United States.— Hinds *v.* Keith, 57 Fed. 10, 6 C. C. A. 231, partnership with stranger.

See 20 Cent. Dig. tit. "Evidence," § 2248 *et seq.*

A custom cannot be proved in such a connection. So doing would amount, at best, merely to evidence of the opinions of those who used it as to the propriety of the conduct covered by the custom. Redfield *v.* Oakland Consol. St. R. Co., 112 Cal. 220, 43 Pac. 1117.

27. *Alabama.*— Eureka Co. *v.* Bass, 81 Ala. 200, 8 So. 216, 6 Am. Rep. 152.

Maine.— Hill *v.* Portland, etc., R. Co., 55 Me. 438, 92 Am. Dec. 601, blowing steam whistle.

New York.— Cramer *v.* Slade, 66 N. Y. App. Div. 59, 73 N. Y. Suppl. 125.

Vermont.— Oakes *v.* Weston, 45 Vt. 430.

Canada.— Smith *v.* Mason, 1 Ont. L. Rep. 594.

28. Hoener *v.* Koch, 84 Ill. 408 (malpractice); Woeckner *v.* Erie Electric Motor Co., 187 Pa. St. 206, 41 Atl. 28 (motorman).

29. Kelpy *v.* Triest, 76 N. Y. Suppl. 742.

The safety in using a given animal is within the rule. Noble *v.* St. Joseph, etc., R. Co., 98 Mich. 249, 57 N. W. 126, horse.

30. Fordyce *v.* Lowman, 62 Ark. 70, 34 S. W. 255.

31. Seese *v.* Northern Pac. R. Co., 39 Fed. 487.

32. McNair *v.* Stewart, 24 N. Brunsw. 471.

33. Springfield Consol. R. Co. *v.* Puntenney, 101 Ill. App. 95 (such a question amounts merely to whether due care has been used); Carpenter *v.* Eastern Transfer Co., 71 N. Y. 574; Jeffries *v.* Seaboard Air Line R. Co., 129 N. C. 236, 39 S. E. 836. But see *contra*, Steinberg *v.* Schlesinger, 84 N. Y. Suppl. 522.

34. See the cases in the preceding notes.

35. Texas, etc., R. Co. *v.* Lee, 22 Tex. Civ. App. 174, 51 S. W. 351, 57 S. W. 573, to alight from train.

36. Wilson *v.* Reedy, 33 Minn. 503, 24 N. W. 191; Boettger *v.* Scherpe, etc., Iron Co., 136 Mo. 531, 38 S. W. 298; Stoll *v.* Daly Min. Co., 19 Utah 271, 57 Pac. 295, engineer.

37. Rowe *v.* Such, 134 Cal. 573, 66 Pac. 862, 67 Pac. 760.

38. Hicks *v.* Southern R. Co., (S. C. 1901) 38 S. E. 725.

39. Langston *v.* Southern Electric R. Co., 147 Mo. 457, 48 S. W. 835.

or other person was competent for the work in which he was engaged; or was or was not habitually negligent.[40] For like reasons a witness, even the actor himself,[41] cannot state his inference as to the existence of contributory negligence[42] or whether a person was or was not in the exercise of due care;[43] or what would constitute reasonable care under given circumstances.[44]

(iv) *Harmless Error.* If a statement of inference, conclusion, or judgment is accompanied by an enumeration of the facts on which it is based, the error, if any, is usually harmless; as the jury can estimate the true probative value of the statement. Thus, where a witness states, merely by way of summary or introduction, his mental induction or deduction from facts which he gives in detail, the error does not furnish cause for reversing a judgment.[45] By a

40. Mosnat *v.* Chicago, etc., R. Co., 114 Iowa 151, 86 N. W. 297 (careful, prudent, and cautious engineer); Hicks *v.* Southern R. Co., (S. C. 1901) 38 S. E. 725, 866.

41. *Georgia.*— Mayfield *v.* Savannah, etc., R. Co., 87 Ga. 374, 13 S. E. 459; Hudson *v.* Georgia Pac. R. Co., 85 Ga. 203, 11 S. E. 605.

Illinois.— Springfield *v.* Coe, 166 Ill. 22, 46 N. E. 709; Sterling Bridge Co. *v.* Pearl, 80 Ill. 251; Litchfield *v.* Anglim, 83 Ill. App. 55.

New York.— Hankins *v.* Watkins, 77 Hun 260, 28 N. Y. Suppl. 867.

North Carolina.— Phifer *v.* Carolina, etc., R. Co., 122 N. C. 940, 29 S. E. 578.

Ohio.— Circleville *v.* Sohn, 20 Ohio Cir. Ct. 368, 11 Ohio Cir. Dec. 193.

Texas.— Schmick *v.* Noel, 72 Tex. 1, 8 S. W. 83; Missouri, etc., R. Co. *v.* Miller, 8 Tex. Civ. App. 241, 27 S. W. 905.

42. *Alabama.*— Louisville, etc., R. Co. *v.* Bouldin, 110 Ala. 185, 20 So. 325; Warden *v.* Louisville, etc., R. Co., 94 Ala. 277, 10 So. 276, 14 L. R. A. 552.

Florida.— Camp *v.* Hall, 39 Fla. 535, 22 So. 792.

Georgia.— Mayfield *v.* Savannah, etc., R. Co., 87 Ga. 374, 13 S. E. 459; Hudson *v.* Georgia Pac. R. Co., 85 Ga. 203, 11 S. E. 605; Parker *v.* Georgia Pac. R. Co., 83 Ga. 539, 10 S. E. 233; Central R. Co. *v.* De Bray, 71 Ga. 406.

Illinois.— Pennsylvania Co. *v.* Conlan, 101 Ill. 93; Sterling Bridge Co. *v.* Pearl, 80 Ill. 251.

Indiana.— Albion *v.* Hetrick, 90 Ind. 545, 46 Am. Rep. 230.

Iowa.— Whitsett *v.* Chicago, etc., R. Co., 67 Iowa 150, 25 N. W. 104; Allen *v.* Burlington, etc., R. Co., 57 Iowa 623, 11 N. W. 614.

Kansas.— Monroe *v.* Lattin, 25 Kan. 351.

Maine.— Bunker *v.* Gouldsboro, 81 Me. 188, 16 Atl. 543.

Massachusetts.— Simmons *v.* New Bedford, etc., Steamboat Co., 97 Mass. 361, 93 Am. Dec. 99.

Missouri.— Madden *v.* Missouri Pac. R. Co., 50 Mo. App. 666.

New York.— McCarragher *v.* Rogers, 120 N. Y. 526, 24 N. E. 812; Murtaugh *v.* New York, etc., R. Co., 49 Hun 456, 3 N. Y. Suppl. 483; Radman *v.* Haberstro, 1 N. Y. Suppl. 561.

Ohio.— National Malleable Castings Co. *v.* Luscombe, 9 Ohio Cir. Ct. 680, 6 Ohio Cir. Dec. 801.

Oregon.— Johnston *v.* Oregon, etc., R. Co., 23 Oreg. 94, 31 Pac. 283.

Texas.— Schmick *v.* Noel, 72 Tex. 1, 4, 8 S. W. 83 (where the court said: "This is an assumption by the witness to pass upon the very questions submitted with proper instructions to the jury"); International, etc., R. Co. *v.* Armstrong, 4 Tex. Civ. App. 146, 23 S. W. 236.

Utah.—Black *v.* Rocky Mountain Bell Telephone Co., 26 Utah 451, 73 Pac. 514.

Wisconsin.— Lawson *v.* Chicago, etc., R. Co., 64 Wis. 447, 24 N. W. 618, 54 Am. Rep. 634; Mellor *v.* Utica, 48 Wis. 457, 4 N. W. 655.

United States.— Bradford Glycerine Co. *v.* Kizer, 113 Fed. 894, 51 C. C. A. 524.

See 20 Cent. Dig. tit. "Evidence," § 2250.

43. *Alabama.*— Louisville, etc., R. Co. *v.* Bouldin, 110 Ala. 185, 20 So. 325.

Arkansas.— Fordyce *v.* Lowman, 62 Ark. 70, 34 S. W. 255.

Georgia.— Central R. Co. *v.* De Bray, 71 Ga. 406.

Illinois.— Chicago, etc., R. Co. *v.* Morando, 108 Ill. 576; Hopkins *v.* Indianapolis, etc., R. Co., 78 Ill. 32.

Minnesota.— Bergquist *v.* Chandler Iron Co., 49 Minn. 511, 52 N. W. 136; Goodsell *v.* Taylor, 41 Minn. 207, 42 N. W. 873, 16 Am. St. Rep. 700, 4 L. R. A. 673 (where it was held that whether the appearance of certain machinery would suggest caution to a person of reasonable caution is a conclusion to be drawn by the jury); Mantel *v.* Chicago, etc., R. Co., 33 Minn. 62, 21 N. W. 853.

Missouri.— Gutridge *v.* Missouri Pac. R. Co., 94 Mo. 468, 7 S. W. 476, 4 Am. St. Rep. 392.

North Carolina.— Phifer *v.* Carolina Cent. R. Co., 122 N. C. 940, 29 S. E. 578.

Pennsylvania.— Beardslee *v.* Columbia Tp., 188 Pa. St. 496, 41 Atl. 617, 68 Am. St. Rep. 883.

Wisconsin.— Seliger *v.* Bastian, 66 Wis. 521, 29 N. W. 244.

See 20 Cent. Dig. tit. "Evidence," § 2250.

It is merely a verbal change to ask whether certain occurrences would have happened if due care had been used. Pacheco *v.* Judson Mfg. Co., 113 Cal. 541, 45 Pac. 833, crack in iron machinery discovered.

44. Ashley Wire Co. *v.* Mercier, 61 Ill. App. 485.

45. *Alabama.*— Evans *v.* State, 120 Ala. 269, 25 So. 175.

parity of reasoning the same result follows in a reversed case, as where a proper question as to inference is excluded, while all the facts are stated.[46] The result is the same where the jury, upon the undisputed evidence, must have reached the same conclusion as the witness,[47] or where opinion evidence is admitted on a point which the jury are entirely competent to decide, in accordance with general experience, and the jury follow it.[48] There is an equal absence of apparent prejudice where the inference of an unskilled witness is admitted on a subject which does not require scientific knowledge,[49] or the judgment of an expert witness is rejected as to a matter not of a technical or scientific nature;[50] or where the erroneously admitted statement is not misleading.[51] The same is true where the

California.— Williams *v.* Long, 139 Cal. 186, 72 Pac. 911; Townsend *v.* Briggs, (1893) 32 Pac. 307.

Georgia.— Wise *v.* State, 100 Ga. 68, 25 S. E. 846; Gress Lumber Co. *v.* Coody, 99 Ga. 775, 27 S. E. 169, knowledge.

Illinois.— Mead *v.* Altgeld, 136 Ill. 298, 26 N. E. 388.

Indiana.— Pennsylvania Co. *v.* Frund, 4 Ind. App. 469, 30 N. E. 1116.

Iowa.—Wendel *v.* Mallory Commission Co., 122 Iowa 712, 98 N. W. 612 (authorized certain acts); Miller Brewing Co. *v.* De France, 90 Iowa 395, 57 N. W. 959; Hoadley *v.* Hammond, 63 Iowa 599, 19 N. W. 794; State *v.* Stickley, 41 Iowa 232.

Kansas.— Topeka *v.* Sherwood, 39 Kan. 690, 18 Pac. 933; Hutchinson *v.* Van Cleve, 7 Kan. App. 676, 53 Pac. 888.

Michigan.— Detroit *v.* Brennan, 93 Mich. 338, 53 N. W. 525; Langworthy *v.* Green Tp., 88 Mich. 207, 215, 50 N. W. 130, in which it was held that where a witness, after stating "fully and succinctly, . . . the facts upon which he bases that conclusion," testified that he was driving "as carefully as a man could," there was "no presumption of prejudice."

Minnesota.—Finley *v.* Chicago, etc., R. Co., 71 Minn. 471, 74 N. W. 174, driving carefully.

Missouri.— State *v.* Williamson, 106 Mo. 162, 17 S. W. 172; Hoffman *v.* Metropolitan St. R. Co., 51 Mo. App. 273.

New York.— La Rue *v.* Smith, 153 N. Y. 428, 47 N. E. 796 (map shows certain points); Levy *v.* Huwer, 80 N. Y. App. Div. 499, 81 N. Y. Suppl. 191; Lazarus *v.* Metropolitan El. R. Co., 69 Hun 190, 23 N. Y. Suppl. 515; Dolittle *v.* Eddy, 7 Barb. 74.

Pennsylvania.— Miller *v.* Windsor Water Co., 148 Pa. St. 429, 23 Atl. 1132.

Rhode Island.— McGarrity *v.* New York, etc., R. Co., 25 R. I. 269, 55 Atl. 718.

Texas.— Smith *v.* Eckford, (Sup. 1891) 18 S. W. 210; Glass *v.* Wiles, (Sup. 1890) 14 S. W. 225; Hartgraves *v.* State, (Cr. App. 1897) 39 S. W. 661; Navarro *v.* State, 24 Tex. App. 378, 6 S. W. 542; San Antonio, etc., R. Co. *v.* MacGregor, 2 Tex. Civ. App. 586, 22 S. W. 269.

Vermont.— Brown *v.* Swanton, 69 Vt. 53, 37 Atl. 280.

Compelling an answer of this description on cross-examination is not error. Levy *v.* Huwer, 176 N. Y. 612, 68 N. E. 1119.

That a witness, however, has stated an incompetent conclusion does not entitle him to state the facts on which it is based. One who has stated that when he saw the driver of a wagon whip up his horses and noticed the proximity of the car he knew that there was bound to be a collision cannot insist on stating why he says that. Price *v.* Charles Warner Co., 1 Pennew. (Del.) 462, 42 Atl. 699.

The error is rendered harmless where an inference is admitted and all the facts are subsequently put in evidence (Olson *v.* O'Connor, 9 N. D. 504, 84 N. W. 359, 81 Am. St. Rep. 595), or where a witness not at first properly qualified is at a later stage of the trial shown to possess the necessary qualifications and repeats his evidence (State *v.* Foster, 136 Mo. 653, 38 S. W. 721).

Where the conclusion is one which the jury are called upon to draw, the error may be prejudicial. Seifred *v.* Pennsylvania R. Co., 206 Pa. St. 399, 55 Atl. 1061.

46. Amsden *v.* Parmelee, 177 Mass. 522, 59 N. E. 113; Gardner *v.* Friederich, 25 N. Y. App. Div. 521, 49 N. Y. Suppl. 1077; *In re* McArthur, 12 N. Y. Suppl. 822; Chicago, etc., R. Co. *v.* Long, 26 Tex. Civ. App. 601, 65 S. W. 882.

47. *Alabama.*— Miller *v.* State, 107 Ala. 40, 19 So. 37.

Illinois.— Central R. Co. *v.* Allmon, 147 Ill. 471, 35 N. E. 725.

Michigan.— Hanish *v.* Kennedy, 106 Mich. 455, 64 N. W. 459.

Minnesota.—Larson *v.* Lombard Invest. Co., 51 Minn. 141, 53 N. W. 179.

Mississippi.—Rogers *v.* Kline, 56 Miss. 608, 31 Am. Rep. 389.

Tennessee.— Young *v.* Cowden, 98 Tenn. 577, 40 S. W. 1088.

48. People *v.* Durrant, 116 Cal. 179, 48 Pac. 75; Fisher *v.* Oregon Short Line, etc., R. Co., 22 Oreg. 533, 30 Pac. 425, 16 L. R. A. 519; State *v.* Norris, 27 Wash. 453, 67 Pac. 983.

Where the witness testifies contrary to general experience and carries the jury with him the "injury is apparent." People *v.* Durrant, 116 Cal. 179, 48 Pac. 75.

49. Gulf, etc., R. Co. *v.* Steele, 29 Tex. Civ. App. 328, 69 S. W. 171.

50. Benedict *v.* Fond du Lac, 44 Wis. 495, civil engineer on sufficiency of sidewalk.

51. Cushman *v.* Carbondale Fuel Co., 116 Iowa 618, 88 N. W. 817 (corrected by other evidence); Atchison, etc., R. Co. *v.* Brassfield, 51 Kan. 167, 32 Pac. 814; Fonda *v.* St. Paul City R. Co., 77 Minn. 336, 79 N. W. 1043

same[52] or another[53] witness has testified to the same effect or on the same subject[54] without objection; or where the answer is, as it were, immaterial as covering a question of law,[55] or is favorable to the excepting party.[56]

5. Forms of Opinion. The distinction between fact, inference, conclusion, and judgment is one of degree; showing an increasing proportion of the element of reasoning involved in the statement. Simple statements of fact imply merely the degree of reasoning implied in perception and naming. Inference from observation or sensation presents, in its necessary or intuitive result on the mind, a minimum of the reasoning faculty. A conclusion, based in part on observation and in part upon more complex mental phenomena derived from other sources, as a rule more largely embodies the element of reasoning, while in case of judgment, as that of an "expert," upon facts assumed to be true, the entire mental process is one of reasoning. Inference and conclusion are equally based upon sensation or other states of consciousness. In the case of inference these are immediate and dominant. Conclusion is rather a composite blending of inferences, the original basis of which there is often great difficulty in stating. As the direct sensations, often individually trivial, have occurred, they have been mentally drawn to a hypothesis previously formed as the result of earlier experience in corroboration of the inferences to which such experience has given rise.[57]

B. Statements of Fact — 1. In General. Much effort is expended by judges and counsel during the trial of causes in inducing a witness to state precisely the individual impressions received through his senses rather than the inference or "opinion" which the mind has formed as a result of these sensations.[58] This in the last analysis is a distinction which in many cases it is absolutely impossible to draw.[59]

(no dispute as to facts); Sallee *v.* St. Louis, 152 Mo. 615, 54 S. W. 463.

A question as to the judgment of an expert upon the testimony of a certain witness which states also hypothetically all the facts testified by that witness may be answered without prejudicial error. Gates *v.* Fleischer, 67 Wis. 504, 30 N. W. 674.

52. Monahan *v.* Kansas City Clay, etc., Co., 58 Mo. App. 68.

53. Hoffman *v.* Metropolitan St. R. Co., 51 Mo. App. 273.

54. Burrell *v.* Gates, 112 Mich. 307, 70 N. W. 574.

55. Southern R. Co. *v.* Posey, 124 Ala. 486, 26 So. 914, duty of certain persons.

56. *Massachusetts.*—Lucas *v.* New Bedford, etc., R. Co., 6 Gray 64, 66 Am. Dec. 406.

Missouri.— McGowen *v.* West, 7 Mo. 569, 38 Am. Dec. 468.

New York.— People *v.* Call, 1 Den. 120, 43 Am. Dec. 655.

Pennsylvania.—Brown *v.* Caldwell, 10 Serg. & R. 114, 13 Am. Dec. 660.

Vermont.— Foster *v.* Dickerson, 64 Vt. 233, 24 Atl. 253; State *v.* Kibling, 63 Vt. 636, 22 Atl. 613; Sampson *v.* Warner, 48 Vt. 247; Wheelock *v.* Moulton, 13 Vt. 430.

57. "There is one class of cases in particular, which may be referred to as illustrating our habit of entertaining opinions without any accurate memory of their grounds. That is, the estimates which we form of the characters of persons either in private or public life; our progress of a man's character is derived from observing a number of successive acts, forming in the aggregate his general course of conduct. Now in proportion as our opportunities for observation are multiplied, our judgment is likely to be correct, but the facts from which our ultimate opinion is collected are so numerous, and often so trivial in themselves, that however sound the opinion may be, a large part of them necessarily soon vanish from the memory." Lewis Authority in Matters of Opinion, c. 2, § 4.

Difference in mental process.— The inference of the observer is that which a jury draws when the evidence is received by them from inspection. See *infra*, XIII. The judgment of the expert, properly so called, is the same as that which the jury forms upon evidence furnished by the statements of documents or witnesses. It follows that the hypothetical question must be confined to the "expert." Wichita *v.* Coggshall, 3 Kan. App. 540, 43 Pac. 842; Titus *v.* Gage, 70 Vt. 13, 39 Atl. 246.

58. Baxter *v.* Abbott, 7 Gray (Mass.) 71, 79 (where on an issue of sanity, the court said: "All lawyers know how difficult it is to try issues of sanity with the restrictions as to matters of opinion already existing; how hard it is to make witnesses distinguish between matters of fact and opinion on this subject; between the conduct and traits of character they observe, and the impression which that conduct and those traits create, or the mental conclusion to which they lead the mind of the observer. If it were a new question, I should be disposed to allow every witness to give his opinion, subject to cross-examination upon the reasons upon which it is based, his degree of intelligence, and his means of observation. It is at least unwise to increase the existing restrictions."

59. Healy *v.* Visalia, etc., R. Co., 101 Cal. 585, 589, 36 Pac. 125. "The border line be-

The most simple statement of fact involves an element of coördination, induction, or inference — the merger of observation into perception under the influence of experience.[60] Success in drawing a definite line between fact and inference, in cases of observation, consists in deciding correctly, in any given case, how far down the scale of involution of the less into the more complicated fact a witness can fairly be required to go with advantage to the jury, for inference and fact will frequently be found so blended that it is necessary to admit or reject both.[61] Certain general rules, however, have been established, as to positive inferences from sensation. Where the inference is so usual, natural, or instinctive as to accord with general experience,[62] its statement is received as substantially one of a fact — part of the common stock of knowledge;[63] especially if the fact inferred is collateral and not one within the distinctive field of the jury's investigation.[64] An example is furnished where the witness identifies and names familiar phenomena observed by him;[65] such as alcohol,[66] blood,[67] chloro-

tween fact and opinion is often very indistinct, and the statement of a fact is frequently only an opinion of the witness. Impressions or sensations caused by external objects are not susceptible of exact reproduction or description in words, nor do they affect every individual alike, and the judgment or opinion of the witnesses by whom they have been experienced is the only mode by which they can be presented to a jury." Healy *v.* Visalia, etc., R. Co., *supra.* "In almost every act of our perceiving faculties observation and inference are intimately blended. What we are said to observe is usually a compound result, of which one tenth may be observation and the remaining nine tenths inference." Mills Logic, bk. 4, c. 1, § 2.

60. "When, however, the judgment is of so simple a kind as to become wholly unconscious and the interpretation of the appearances is a matter of general agreement, the object of sensation may be considered a fact." Lewis Authority in Matters of Opinion, c. 1, § 1.

61. Auberle *v.* McKeesport, 179 Pa. St. 321, 36 Atl. 212; Graham *v.* Pennsylvania Co., 139 Pa. St. 149, 21 Atl. 151, 12 L. R. A. 293.

62. Hanna *v.* Barker, 6 Colo. 303; Graham *v.* Pennsylvania Co., 139 Pa. St. 149, 21 Atl. 151, 12 L. R. A. 293; International, etc., R. Co. *v.* Anchonda, (Tex. Civ. App. 1903) 75 S. W. 557.

63. "It is true that even the simplest sensations involve some judgment: when a witness reports that he saw an object of a certain shape and size, or at a certain distance, he describes something more than a mere impression on his sense of sight, and his statement implies a theory and explanation of the bare phenomenon. When, however, this judgment is of so simple a kind as to become wholly unconscious, and the interpretation of the appearances is a matter of general agreement, the object of sensation may, for our present purpose, be considered a fact." Lewis Authority in Matters of Opinion, c. 1, § 3. And see the following cases:

Alabama.— Birmingham R., etc., Co. *v.* Ellard, 135 Ala. 433, 33 So. 276.

Georgia.— Turner *v.* State, 114 Ga. 421, 40 S. E. 308, "tried."

Massachusetts.— Robinson *v.* Fitchburg, etc., R. Co., 7 Gray 92.

Missouri.— State *v.* Buchler, 103 Mo. 203, 15 S. W. 331.

New Hampshire.— Currier *v.* Boston, etc., R. Co., 34 N. H. 498.

New York.— People *v.* Gonzalez, 35 N. Y. 49; Shepard *v.* Metropolitan El. R. Co., 48 N. Y. App. Div. 452, 62 N. Y. Suppl. 977 [*affirmed* in 169 N. Y. 160, 62 N. E. 151], use of streets.

Where a witness testifies to his personal knowledge it is "just as competent to prove a fact directly in issue, as one incidentally involved." Walsh *v.* Washington Mar. Ins. Co., 32 N. Y. 427, 443.

64. See *supra,* XI, A, 4, c.

65. Morris *v.* State, 124 Ala. 44, 27 So. 336 ("something like bluing"); Dabney *v.* State, 113 Ala. 38, 21 So. 211, 59 Am. St. Rep. 92 ("powder burns"); Mayberry *v.* State, 107 Ala. 64, 18 So. 219 (pistol).

66. Sebastian *v.* State, 44 Tex. Cr. 508, 72 S. W. 849.

67. *California.*— People *v.* Loui Tung, 90 Cal. 377, 27 Pac. 295; People *v.* Bell, 49 Cal. 485.

Georgia.— Thomas *v.* State, 67 Ga. 460.

Idaho.— State *v.* Rice, 7 Ida. 762, 66 Pac. 87.

Maine.— State *v.* Knight, 43 Me. 11.

Massachusetts.— Com. *v.* Sturtivant, 117 Mass. 122, 19 Am. Rep. 401.

Mississippi.— Dillard *v.* State, 58 Miss. 368.

Missouri.— State *v.* Robinson, 117 Mo. 649, 23 S. W. 1066.

New York.— People *v.* Burgess, 153 N. Y. 561, 47 N. E. 889; People *v.* Deacons, 109 N. Y. 374, 16 N. E. 676; Greenfield *v.* People, 85 N. Y. 75, 39 Am. Rep. 636; People *v.* Gonzalez, 35 N. Y. 49 (holding that the evidence is as primary as that of the chemist, although entitled to less weight); People *v.* Greenfield, 23 Hun 454.

Utah.— People *v.* Thiede, 11 Utah 241, 39 Pac. 837.

Vermont.— State *v.* Bradley, 67 Vt. 465, 32 Atl. 238.

form,[68] gin,[69] lager beer,[70] whisky,[71] hair,[72] hard-pan,[73] etc. The statement may still remain one substantially of fact, although one of some complexity;[74] as in the case of a statement as to a system of church government;[75] that a person held a certain office,[76] or controlled certain premises;[77] or that a paper was abstracted from the files of a public office,[78] provided the mental process which immediately gives rise to the statement has been one of coördinating separate facts into one more complicated rather than the deduction or induction of a new fact by a process of reasoning, as in the case of a statement as to the result of an examination of books, records, and the like.[79] Where numerous impressions of a more primary order are in common experience blended into a composite fact of more complex but still inevitably recognizable nature, the fact has been designated "collective."[80]

2. Skilled Witness — a. General Rule. Persons constantly engaged in any line

West Virginia.— State *v.* Welch, 36 W. Va. 690, 15 S. E. 419.

In Florida it is held that an unskilled witness cannot testify that certain stains were blood, but may state their existence and color. Gantling *v.* State, 40 Fla. 237, 23 So. 857.

68. Miller *v.* State, (Tex. Cr. App. 1899) 50 S. W. 704, smell.

69. Com. *v.* Timothy, 8 Gray (Mass.) 480.

70. Com. *v.* Moinehan, 140 Mass. 463, 5 N. E. 259.

71. Marschall *v.* Laughran, 47 Ill. App. 29; Com. *v.* Dowdican, 114 Mass. 257; Johnson *v.* State, (Tex. Cr. App. 1900) 55 S. W. 818.

That one could smell whisky all over the house is the statement of a fact. Marschall *v.* Laughran, 47 Ill. App. 29.

72. Com. *v.* Dorsey, 103 Mass. 412.

73. Currier *v.* Boston, etc., R. Co., 34 N. H. 498.

74. Southern Cotton-Oil Co. *v.* Wallace, (Tex. Civ. App. 1899) 54 S. W. 638, that one was a foreman.

Prevalence of disease.— A witness need not be an expert to testify to the prevalence of health or sickness in a neighborhood. Evans *v.* People, 12 Mich. 27.

75. Bird *v.* St. Mark's Church, 62 Iowa 567, 17 N. W. 747.

76. State *v.* Haskins, 109 Iowa 656, 80 N. W. 1063, 77 Am. St. Rep. 560, 47 L. R. A. 223.

77. Woodstock Iron Co. *v.* Roberts, 87 Ala. 436, 441, 6 So. 349, holding that a witness may state that a person entered upon certain premises "and thereafter controlled them." "Control," says the court, "is a statement of collective facts, involving management and acts of ownership."

78. Pope *v.* Anthony, 29 Tex. Civ. App. 298, 68 S. W. 521, land-office.

79. Where books, records, papers, and entries are so voluminous that the jury cannot reach a correct conclusion as to amounts or other results, a skilled witness may testify as to the result of his examination of books present in court for inspection.

Indiana.— Culver *v.* Marks, 122 Ind. 554, 23 N. E. 1086, 17 Am. St. Rep. 377, 7 L. R. A. 489.

Iowa.— Frick *v.* Kabaker, 116 Iowa 494, 90 N. W. 498 (summary of footings); State *v.* Brady, 100 Iowa 191, 69 N. W. 290, 62 Am. St. Rep. 560, 36 L. R. A. 693.

Minnesota.— State *v.* Clements, 82 Minn. 434, 85 N. W. 229, balances or summaries.

Nebraska.— Bartley *v.* State, 53 Nebr. 310, 73 N. W. 744.

New York.— Howard *v.* McDonough, 77 N. Y. 592; Von Sachs *v.* Kretz, 72 N. Y. 548; McCormick *v.* Pennsylvania Cent. R. Co., 49 N. Y. 303.

North Carolina.— Daniels *v.* Fowler, 123 N. C. 35, 31 S. E. 598.

Texas.—Forke *v.* Homann, (Civ. App. 1896) 39 S. W. 210.

Original records on file.— This is true even when the original records are on the files of a public office. Doland *v.* Grand Valley Irr. Co., 28 Colo. 150, 63 Pac. 300, holding that witnesses who stated that they had ascertained the total number of owners of certain water-rights and had compared their names with those signed to a certain agreement might testify that two thirds of the owners had signed.

80. *Alabama.*— Shafer *v.* Hausman, 139 Ala. 237, 35 So. 691 (what an agreement was); Murphy *v.* State, 118 Ala. 137, 23 So. 719 (purports to be a copy); Shrimpton *v.* Brice, 109 Ala. 640, 20 So. 10 (account correct); Johnson *v.* State, 100 Ala. 55, 14 So. 627 (title to land); Birmingham Mineral R. Co. *v.* Wilmer, 97 Ala. 165, 11 So. 886 ("unusually hard jerk"); Reeves *v.* State, 96 Ala. 33, 11 So. 296 (trying to fight); Louisville, etc., R. Co. *v.* Watson, 90 Ala. 68, 8 So. 249 (more force than necessary); Lewis *v.* State, 49 Ala. 1 ("trying to get away"). See also South Alabama, etc., R. Co. *v.* McLendon, 63 Ala. 266; Avary *v.* Searcy, 50 Ala. 54; Raisler *v.* Springer, 38 Ala. 703, 82 Am. Dec. 736.

Connecticut.— Carney *v.* Hennessey, 74 Conn. 107, 49 Atl. 910, 92 Am. St. Rep. 199, 53 L. R. A. 699 (occupied land); Clinton *v.* Howard, 42 Conn. 294 (new object in highway likely to frighten horses).

Georgia.— Ball *v.* Mabry, 91 Ga. 781, 18 S. E. 64, jolt.

Illinois.— Western Stone Co. *v.* Muscial, 196 Ill. 382, 63 N. E. 664, 89 Am. St. Rep. 325 (duties of a master's foreman); Swan *v.* Gilbert, 67 Ill. App. 236 (insolvency).

Missouri.— Guffey *v.* Hannibal, etc., R. Co., 53 Mo. App. 462, unusual jar.

New York.— Voisin *v.* Commercial Mut. Ins. Co., 60 N. Y. App. Div. 139, 70 N. Y. Suppl. 147, "purchased" goods.

of human activity not universally known almost inevitably possess knowledge of certain facts not usually known,[81] which should be received on ordinary principles, unless clearly within the distinctive province of the jury, or unless the statement bulks largely in the element of reasoning or that of conjecture.[82] Instances of the admission of this class of facts are extremely numerous.[83] It is not necessary that the skill should be along desirable or even moral lines,[84] nor that the matter should not be one of ordinary use and frequency, provided a particular inference regarding it is outside the scope of the general knowledge of the community as represented by the jury.[85] No reason is perceived why such a witness should be spoken of as an expert;[86] although persons competent to testify as experts are as a rule possessed of such facts, so far as relates to their specialty,[87] and the witness is frequently so designated.[88] The fact offered must be relevant,[89] and to be entitled to weight greater than that accorded to the statement of the ordinary observer should be beyond the experience of an average member of the community.[90] One sufficiently acquainted with any trade or calling is competent to testify as to what was the "state of the art" at a given time;[91] for example, whether a certain device possesses novelty.[92] The more unusual properties of matter may be stated by any one familiar with them.[93]

Texas.— Texas, etc., R. Co. *v.* Mortensen, 27 Tex. Civ. App. 106, 66 S. W. 99, train under control.

81. Knowledge of witness see *supra*, XI, A, 4, a, (II), (III).

82. See the cases cited in the notes following. A skilled witness may testify as to the result of his personal investigations. Green *v.* Ashland Water Co., 101 Wis. 258, 77 N. W. 722, 70 Am. St. Rep. 911, 43 L. R. A. 117.

Time is not conclusive in this connection. A short experience may qualify the witness. Haymaker *v.* Adams, 61 Mo. App. 581, a month.

Qualifications of witness see *supra*, XI, A, 4, a, (II), (III).

83. The subjects to which this class of evidence is applicable are not confined to classed and specified professions. McFadden *v.* Murdock, L. R. 1 C. L. 211, 15 Wkly. Rep. 1079. Experience in any walk in life, not presumably shared by the average jury, may be the subject of testimony. The range of such testimony is unlimited, except so far as controlled by the sound discretion of the court in insisting upon the requisite conditions. Emerson *v.* Lowell Gaslight Co., 6 Allen (Mass.) 146, 83 Am. Dec. 621; Folsom *v.* Concord, etc., R. Co., 68 N. H. 454, 38 Atl. 209; Lake Erie, etc., R. Co. *v.* Mulcahy, 16 Ohio Cir. Ct. 204, 9 Ohio Cir. Dec. 82; Gulf, etc., R. Co. *v.* Duvall, 12 Tex. Civ. App. 348, 35 S. W. 699. The witness is not allowed to state what relation the facts which he is called upon to recite bear to the controversy between the parties or how they affect the issues on trial. Lake Erie, etc., R. Co. *v.* Mulcahy, *supra*.

84. A gambler may show how card tricks are operated and how much chance of winning a tyro would have. Hall *v.* State, 6 Baxt. (Tenn.) 522. One skilled in it may explain the game of "keno." Nuckolls *v.* Com., 32 Gratt. (Va.) 884.

85. See *infra*, XI, B, 2, b–u.

86. State *v.* Melvern, 32 Wash. 7, 72 Pac. 489.

The witness may be compelled by virtue of a subpœna to state a professional or scientific fact as well as any other. Larimer County *v.* Lee, 3 Colo. App. 177, 32 Pac. 841.

87. Emerson *v.* Lowell Gaslight Co., 6 Allen (Mass.) 146, 148, 83 Am. Dec. 621. "One who is an expert may not only give opinions, but may state general facts which are the result of scientific knowledge, or professional skill." Emerson *v.* Lowell Gaslight Co., *supra*.

A major premise.— Evidently general facts of technical knowledge or experience constitute in many instances part of the premise of the expert's judgment. Anderson *v.* Illinois Cent. R. Co., 109 Iowa 524, 80 N. W. 561, tools used in an employment.

88. Cottrill *v.* Myrick, 12 Me. 222; Shields *v.* State, 149 Ind. 395, 49 N. E. 351.

89. Teall *v.* Barton, 40 Barb. (N. Y.) 137; Wynn *v.* Central Park, etc., R. Co., 14 N. Y. Suppl. 172.

90. Sanders *v.* State, 94 Ind. 147.

91. Winans *v.* New York, etc., R. Co., 21 How. (U. S.) 88, 100, 16 L. ed. 68, where it is said: "Experts may be examined to explain terms of art, and the state of the art, at any given time. They may explain to the court and jury the machines, models or drawings exhibited. They may point out the difference or identity of the mechanical devices involved in their construction. The maxim of '*cuique in suâ arte credendum*' permits them to be examined as to questions of art or science peculiar to their trade or profession." The fact seems especially important in patent causes. Burton *v.* Burton Stock-Car Co., 171 Mass. 437, 50 N. E. 1029. See PATENTS.

92. Haley *v.* Flaccus, 193 Pa. St. 521, 44 Atl. 566, glass presses. See PATENTS. It is not necessarily fatal to the admissibility of such evidence that it covers the precise point to be passed upon by the tribunal. Tillotson *v.* Ramsay, 51 Vt. 309.

93. Standard Oil Co. *v.* Tierney, 96 Ky. 89, 27 S. W. 983, 16 Ky. L. Rep. 327, illuminating oil.

b. Agriculture.[94] Persons engaged in agriculture may testify to facts generally known in the agricultural world, such as the proper time[95] or method[96] for conducting various farming operations, the average yield of given crops,[97] what constitutes a proper fence,[98] or definite probabilities in farming.[99] They may state what acts are prudent under given circumstances,[1] or the effect of certain forces or operations upon land.[2]

c. Building Trades.[3] The proper manner of conducting ordinary building operations,[4] the "life,"[5] strength,[6] and other characteristics of building materials,[7] including their adaptability for certain purposes,[8] and the effect produced upon them by decay,[9] heat,[10] or a particular act[11] may be stated by a witness skilled in the particular line involved in the inquiry,[12] unless the fact be one within the special function of the jury.[13] What forms of construction would be covered by a certain designation may be stated for like reasons by a competent builder.[14]

d. Cattle and Stock Raising and the Care or Use of Domestic Animals.[15] Witnesses experienced[16] in cattle-raising may state facts generally known in the business.[17] Thus they may state facts with regard to their diseases,[18] unsoundness,[19] or pedigree;[20] the effects of a designated treatment;[21] or the usual method of

94. See also *infra*, XI, D, 2; XI, G, 2, b.

95. Farmers', etc., Nat. Bank *v.* Woodell, 38 Oreg. 294, 61 Pac. 837, 65 Pac. 520, thinning sugar beets.

96. Thresher *v.* Gregory, (Cal. 1895) 42 Pac. 421, packing fruit.

97. Farmers', etc., Bank *v.* Woodell, 38 Oreg. 294, 61 Pac. 837, 65 Pac. 520.

98. Louisville, etc., R. Co. *v.* Spain, 61 Ind. 460.

99. Folsom *v.* Concord, etc., R. Co., 68 N. H. 454, 38 Atl. 209.

1. Krippner *v.* Biebl, 28 Minn. 139, 9 N. W. 671 (burning stubble in dry time); Wells *v.* Eastman, 61 N. H. 507 (burning brush in high wind); Ferguson *v.* Hubbell, 26 Hun (N. Y.) 250 (proper time to set fire).

2. Pennsylvania Co. *v.* Hunsley, 23 Ind. App. 37, 54 N. E. 1071 (fire on muck land); Swanson *v.* Keokuk, etc., R. Co., 116 Iowa 304, 89 N. W. 1088 (fire on a hedge); Bradley *v.* Iowa Cent. R. Co., 111 Iowa 562, 82 N. W. 996 (fire on meadow).

3. See also *infra*, XI, D, 3; XI, G, 2, c.

4. Caven *v.* Bodwell Granite Co., 97 Me. 381, 54 Atl. 851 (building coal stage); Rockland First Cong. Church *v.* Holyoke Mut. F. Ins. Co., 158 Mass. 475, 33 N. E. 572, 35 Am. St. Rep. 508. 19 L. R. A. 587 (removing paint); Linch *v.* Paris Lumber, etc., Elevator Co., 80 Tex. 23, 15 S. W. 208 (constructing buildings).

5. Morgan *v.* Freemont County, 92 Iowa 644, 61 N. W. 231 (timbers); McConnell *v.* Osage City, 80 Iowa 293, 45 N. W. 550, 8 L. R. A. 778 (timber); Ferguson *v.* Davis County, 57 Iowa 601, 10 N. W. 906 (white oak timber); Blank *v.* Livonia Tp., 79 Mich. 1, 44 N. W. 157 (bridge stringer); Bush *v.* Delaware, etc., R. Co., 166 N. Y. 210, 59 N. E. 838 (stringers in a wooden bridge).

6. Callan *v.* Bull, 113 Cal. 593, 45 Pac. 1017.

7. Kuhn *v.* Delaware, etc., R. Co., 92 Hun (N. Y.) 74, 36 N. Y. Suppl. 339, hemlock.

8. Kuhn *v.* Delaware, etc., R. Co., 92 Hun (N. Y.) 74, 36 N. Y. Suppl. 339, scaffolding.

9. Morgan *v.* Fremont County, 92 Iowa 644, 61 N. W. 231, bridge.

10. Dixon *v.* Wachenheimer, 9 Ohio Cir. Ct. 401, 6 Ohio Cir. Dec. 380.

11. Brady *v.* Norcross, 174 Mass. 442, 54 N. E. 874, cutting upright.

12. A carpenter not otherwise specially qualified cannot state the effects upon a building of the concussion of blasting one hundred feet below the surface. *In re* Thompson, 12 N. Y. Suppl. 182.

13. Cramer *v.* Slade, 66 N. Y. App. Div. 59, 73 N. Y. Suppl. 125, reasonable construction. See *supra*, XI, A, 4, c.

14. Mead *v.* Northwestern Ins. Co., 7 N. Y. 530, brick houses. See BUILDERS AND ARCHITECTS, 6 Cyc. 1.

15. See also *infra*, XI, D, 4; XI, G, 2, d.

16. Witnesses not showing the possession of adequate experience are to be rejected. St. Louis, etc., R. Co. *v.* Edwards, 26 Kan. 72; Lockridge *v.* Fesler, 37 S. W. 65, 18 Ky. L. Rep. 469. See also *supra*, XI, A, 4, a, (II), (III).

17. Dunham *v.* Rix, 86 Iowa 300, 53 N. W. 252; Folsom *v.* Concord, etc., R. Co., 68 N. H. 454, 38 Atl. 209; Ft. Worth, etc., R. Co. *v.* Greenhouse, 82 Tex. 104, 17 S. W. 834; Cabaness *v.* Holland, 19 Tex. Civ. App. 383, 47 S. W. 379 (number of herd as indicated by colors branded); New York, etc., R. Co. *v.* Estill, 147 U. S. 591, 612, 13 S. Ct. 444, 37 L. ed. 292; Missouri Pac. R. Co. *v.* Hall, 66 Fed. 868, 14 C. C. A. 153.

Province of jury.— Where the fact is really an inference which the jury may well draw for themselves, the evidence offered may be excluded. Tyler *v.* State, 11 Tex. App. 388, how long it takes to gather cattle. See *supra*, XI, A, 4, b.

18. Men familiar with the breeding of cattle may state conditions likely to cause abortion. New York, etc., R. Co. *v.* Estill, 147 U. S. 591, 13 S. Ct. 444, 37 L. ed. 292.

19. Moore *v.* Haviland, 61 Vt. 58, 17 Atl. 725.

20. Fleming *v.* McClaflin, 1 Ind. App. 537, 27 N. E. 875.

21. Cooke *v.* Kansas City, etc., R. Co., 57 Mo. App. 471 (holding that farmers, cattle dealers, stock feeders, and traders are com-

butchering.[22] Stock raisers may state facts familiar in their art.[23] Persons familiar with the use of horses and other domestic animals may state relevant facts not generally known as to their habits[24] or handling.[25]

e. Chemistry and Physiology.[26] A competent[27] witness may testify as to relevant chemical or physiological facts.[28] A chemist in stating that the corpuscles in the blood of man are larger than those in the blood of some animals,[29] whether writing can be removed by chemicals without discoloring the paper,[30] or the properties of gases[31] is testifying to a fact. That it is not generally known does not make him an "expert."[32]

f. Ecclesiastical Affairs. The testimony of a bishop of the protestant episcopal church showing the organization of a parish and its admission into a diocesan convention, although possibly objectionable as secondary evidence, states matters of fact, and cannot properly be excluded as opinion evidence.[33]

g. Engineering.[34] An engineer may state relevant facts connected with his profession; for example, what constitutes a bridge and its abutments,[35] what is customary bridge construction,[36] the proper method of doing certain work,[37] the natural laws affecting the flow of water in alluvial streams,[38] the proper grade of a railroad,[39] or the result of scientific computations.[40] An electrical engineer can state whether under given circumstances a person would receive an electric shock,[41] or the proper height at which to string electric wires across highways.[42]

h. Foreign and Interstate Law.[43] Any person who, in the opinion of the court of the forum acting under the general rules established in that jurisdiction, is qualified to do so,[44] may testify regarding the existence and nature of a provi-

petent to testify as to the effect of a stampede on the general appearance and market value of fat cattle); Proctor *v.* Irvin, 22 Mont. 547, 57 Pac. 183 (hard driving in calving season); Ft. Worth, etc., R. Co. *v.* Greenhouse, 82 Tex. 104, 17 S. W. 834 (shrinkage in weight attributable to delay in feeding); Southern Pac. Co. *v.* Arnett, 111 Fed. 849, 50 C. C. A. 17 (delay in transportation); Missouri Pac. R. Co. *v.* Hall, 66 Fed. 868, 14 C. C. A. 153 (how much cattle would probably shrink in weight from improper handling by a carrier).

22. Taylor *v.* State, (Tex. Cr. App. 1897) 42 S. W. 285.

23. Dunham *v.* Rix, 86 Iowa 300, 53 N. W. 252 (holding that horsemen may state that a stallion's testicles hang lower in warm than in cold weather); Fitzgerald *v.* Evans, 49 Minn. 541, 52 N. W. 143 (the persistence in the offspring of certain defects).

24. Folsom *v.* Concord, etc., R. Co., 68 N. H. 454, 38 Atl. 209, holding that one acquainted with horses may state their probable conduct under certain circumstances, *e. g.*, when brought near moving trains.

25. Lockridge *v.* Fesler, 37 S. W. 65, 18 Ky. L. Rep. 469, proper way for livery men to halter and hitch horses.

26. See also *infra*, XI, D, 5.

27. **The witness must show familiarity with the subject under investigation.** Shufeldt *v.* Searing, 59 Ill. App. 341 (explosion of dust); Citizens' Gaslight, etc., Co. *v.* O'Brien, 15 Ill. App. 400 (gases at top of gas-works); Otey *v.* Hoyt, 47 N. C. 70 (effect of chemicals on ink). See *supra*, XI, A, 4, a, (II), (III).

An official license without adequate knowledge will not qualify a chemist. Dane *v.* State, 36 Tex. Cr. 84, 35 S. W. 661.

28. Birmingham Nat. Bank *v.* Bradley, 116 Ala. 142, 23 So. 53; People *v.* Dole, 122 Cal. 486, 55 Pac. 581, 68 Am. St. Rep. 50; State *v.* Knight, 43 Me. 11; St. Louis Gaslight Co. *v.* Philadelphia American F. Ins. Co., 33 Mo. App. 348.

29. State *v.* Knight, 43 Me. 11, 27.

30. Birmingham Nat. Bank *v.* Bradley, 116 Ala. 142, 23 So. 53; People *v.* Dole, 122 Cal. 486, 55 Pac. 581, 68 Am. St. Rep. 50.

31. St. Louis Gaslight Co. *v.* Philadelphia American F. Ins. Co., 33 Mo. App. 348, illuminating.

32. See the cases in the preceding note; and *supra*, XI, B, 1.

33. Bird *v.* St. Mark's Church, 62 Iowa 567, 17 N. W. 747.

34. See also *infra*, XI, D, 7; XI, G, 2. f.

35. Union Pac. R. Co. *v.* Clopper, 131 U. S. appendix cxcii, 26 L. ed. 243.

36. Hart *v.* Hudson River Bridge Co., 84 N. Y. 56.

37. Clark *v.* Babcock, 23 Mich. 164, boring salt wells.

38. Ohio, etc., R. Co. *v.* Nuetzel, 143 Ill. 46, 32 N. E. 529 [*reversing* 43 Ill. App. 108].

39. Scott *v.* Astoria R. Co., 43 Oreg. 26, 72 Pac. 594, 99 Am. St. Rep. 710, 62 L. R. A. 543.

40. Moelering *v.* Smith, 7 Ind. App. 451, 34 N. E. 675, the quantity of stone in a wall.

41. Ludwig *v.* Metropolitan St. R. Co., 71 N. Y. App. Div. 210, 75 N. Y. Suppl. 667.

42. Houston, etc., R. Co. *v.* Hopson, (Tex. Civ. App. 1902) 67 S. W. 458.

43. See also *infra*, XI, B, 2, j; XI, D, 9; XI, G, 2, h. And see EVIDENCE, 16 Cyc. 886.

44. Baltimore Consol. Real Estate, etc., Co. *v.* Cashow, 41 Md. 59 (attorney); Phelps *v.* Town, 14 Mich. 374 (banker rejected); Hall *v.* Costello, 48 N. H. 176, 2 Am. Rep. 207;

sion of the unwritten law of a foreign country[45] or sister state of the American

Watson *v.* Walker, 23 N. H. 471; Concha *v.* Murrieta, 40 Ch. D. 543, 60 L. T. Rep. N. S. 798 (advocates practising in the courts of the country); Bristow *v.* Sequeville, 5 Exch. 275, 14 Jur. 674, 19 L. J. Exch. 289; Dalrymple *v.* Dalrymple, 2 Hagg. Cons. 54; *In re* Dost Aly Khan, 6 P. D. 6, 49 L. J. P. & Adm. 78, 29 Wkly. Rep. 80; *In re* Pearn, 1 P. D. 70, 45 L. J. P. & Adm. 31, 33 L. T. Rep. N. S. 705, 24 Wkly. Rep. 143. "In proof of the laws of a foreign country, the testimony of any person, whether a professed lawyer or not, who appears to the court to be well informed on the point, is competent." Hall *v.* Costello, 48 N. H. 176, 179, 2 Am. Rep. 207. The inference of an unskilled witness would be irrelevant. City Sav. Bank *v.* Kensington Land Co., (Tenn. Ch. App. 1896) 37 S. W. 1037.

Mode of proving law see also EVIDENCE, 16 Cyc. 886.

Not properly an expert.— Little propriety as a rule exists for speaking of one who knows the existence of a foreign law or what it means as an "expert." The practice, however, is frequent (Jackson *v.* Jackson, 82 Md. 17, 33 Atl. 317, 34 L. R. A. 773) and receives color from the fact that the court examines into the qualifications of the witness in both cases, and for much the same reason; although in this case it is merely an application of the ordinary rule that one who offers to state a fact must be shown or assumed to know it. The witness testifies more nearly as an expert when he undertakes to apply the requirements of the foreign law to the facts of a particular case, giving thereby his inference. See *infra*, this section.

Qualifications of witnesses to foreign law. — In England it is not sufficient that the witness, however learned, has studied the foreign law at a university in a country other than that whose law is in question (Bristow *v.* Sequeville, 5 Exch. 275, 14 Jur. 674, 19 L. J. Exch. 289; *In re* Bonelli, 1 P. D. 69, 45 L. J. P. & Adm. 42, 34 L. T. Rep. N. S. 32, 24 Wkly. Rep. 255), or has merely studied it outside the country (*In re* Bonelli, *supra*; Cartwright *v.* Cartwright, 26 Wkly. Rep. 684), has frequently studied it on appeal cases before the privy council, or even acted under it on several occasions (Reg. *v.* Savage, 13 Cox C. C. 178, Scotch marriage). Practical experience in the law of the foreign country is needed. Hence an attorney or an attorney-general, although not a lawyer (Picton's Case, 30 How. St. Tr. 226, 806), an ambassador (*In re* Dost Aly Khan, 6 P. D. 6, 49 L. J. P. & Adm. 78, 29 Wkly. Rep. 80), or a vice-consul (Lacon *v.* Higgins, D. & R. N. P. 38, 16 E. C. L. 425, 3 Stark. 178, 3 E. C. L. 643, 25 Rev. 779) of the country, are deemed sufficiently qualified. But professional witnesses are not the only ones so regarded. Vander Donckt *v.* Thellusson, 8 C. B. 812, 19 L. J. C. P. 12, 65 E. C. L. 812 (a merchant of Belgium who has been commissioner of stocks in Brussels may testify as to the law of Belgium as to the presentation of notes); Sussex Peerage Case, 11 Cl. & F. 85, 8 Jur. 795, 8 Eng. Reprint 1034 (a Roman catholic bishop, with the office of coadjutor to a vicar apostolic is a skilled witness as to the matrimonial law of Rome). In matters of ecclesiastical law the English courts of equity may require that a case be stated for the opinion of civilians. Hurst *v.* Beach, 5 Madd. 351, 21 Rev. Rep. 304 [*followed* in that respect in Sayre *v.* Cramp, 2 Wkly. Rep. 438].

A fortiori a claim to knowledge is not sufficient. McKenzie *v.* Gordon, 1 Nova Scotia Dec. 153.

In the United States one who has studied the foreign law as an intended profession (Dauphin *v.* U. S., 6 Ct. Cl. 221, France), or has, as an attorney of the court of the former, examined the foreign law for the purposes of a particular case (Temple *v.* Pasquotank County, 111 N. C. 36, 15 S. E. 886, Maryland), or has acted under it (Pickard *v.* Bailey, 26 N. H. 152, magistrate; Dauphin *v.* U. S., 6 Ct. Cl. 221, legal adviser to French legation), or who has made extensive examinations into the subject on which he proposes to speak (Barber *v.* Mexico International Co., 73 Conn. 587, 48 Atl. 758), or who has been graduated by an institution of learning which required a knowledge of such law (Dauphin *v.* U. S., 6 Ct. Cl. 221, University of Paris), or who is (Baltimore Consol. Real Estate, etc., Co. *v.* Cashow, 41 Md. 59, New York; Sierra Madre Constr. Co. *v.* Brick, (Tex. Civ. App. 1900) 55 S. W. 521), or has been (Union Cent. L. Ins. Co. *v.* Caldwell, 68 Ark. 505, 58 S. W. 355, Ohio) a practising attorney of the country or state in question is competent. Mere general study is not necessarily sufficient. Banco De Sonora *v.* Bankers' Mut. Casualty Co., (Iowa 1903) 95 N. W. 232, holding that a study of the Justinian code does not qualify a person to testify as to a provision in the law of Mexico. The witness need not be a lawyer by profession. Hall *v.* Costello, 48 N. H. 176, 2 Am. Rep. 207. Sufficient acquaintance with the law of the foreign jurisdiction to show relevancy is alone required. People *v.* McQuaid, 85 Mich. 123, 48 N. W. 161 (minister on marriage); State *v.* Behrman, 114 N. C. 797, 19 S. E. 220, 25 L. R. A. 449. See, however, People *v.* Lambert, 5 Mich. 349, 72 Am. Dec. 49, holding that mere acquaintance with the law of a state incidental to enforcing it as a policeman is not enough.

The witness may refresh his memory or correct or confirm his opinion by reference to books recognized as authority in the foreign jurisdiction. Sussex Peerage Case, 11 Cl. & F. 85, 8 Jur. 793, 8 Eng. Reprint 1034. But the law is to be taken from his evidence. Nelson *v.* Bridport, 8 Beav. 527, 10 Jur. 871. And while a skilled witness is of superior authority to written documents containing the law he may refresh his memory by examining them. Sussex Peerage Case, *supra*.

45. *Connecticut.*— Dyer *v.* Smith, 12 Conn. 384, France.

Union;[46] the existence of a written law in a foreign country[47] or sister state,[48] and the construction given to it by the courts of the foreign country[49] or sister state;[50]

Iowa.— Crafts *v.* Clark, 38 Iowa 237, Cuba.
New Hampshire.—Hall *v.* Costello, 48 N. H. 176, 2 Am. Rep. 207 (Canada); Pickard *v.* Bailey, 26 N. H. 152 (Canada).
New York.— Matter of Roberts, 8 Paige 446, France.
North Carolina.— Temple *v.* Pasquotank County, 111 N. C. 36, 15 S. E. 886, Cuba.
Texas.— Sierra Madre Constr. Co. *v.* Brick, (Civ. App. 1900) 55 S. W. 521, Mexico.
United States.— Ennis *v.* Smith, 14 How. 400, 14 L. ed. 472 (France); U. S. *v.* Gardiner, 25 Fed. Cas. No. 15,186*a*, 2 Hayw. & H. 89; Dauphin *v.* U. S., 6 Ct. Cl. 221 (France).
England.— De Bodes' Case, 8 Q. B. 208, 55 E. C. L. 208 (France); *In re* Dost Aly Khan, 6 P. D. 6, 49 L. J. P. & Adm. 78, 29 Wkly. Rep. 80 (Persia); Concha *v.* Murrieta, 40 Ch. D. 543, 60 L. T. Rep. N. S. 798 (Peru); Cocks *v.* Purday, 2 C. & K. 269, 61 E. C. L. 269 (Louisiana); Sussex Peerage Case, 11 Cl. & F. 85, 114, 8 Jur. 793, 8 Eng. Reprint 1034 (Rome); Mostyn *v.* Fabrigas, 1 Cowp. 161, 174 (Spain); Reg. *v.* Povey, 6 Cox C. C. 83, Dears. C. C. 32, 17 Jur. 120, 22 L. J. M. C. 19, 1 Wkly. Rep. 40; Bremer *v.* Freeman, 1 Deane Eccl. Rep. 192 (France); Picton's Case, 30 How. St. Tr. 226, 806, 864 (Spain).
Canada.— Rice *v.* Gunn, 4 Ont. 579; Arnold *v.* Higgins, 11 U. C. Q. B. 446, New York.
See 20 Cent. Dig. tit. "Evidence," §§ 2327, 2354.

46. *Alabama.*— Walker *v.* Forbes, 31 Ala. 9, Pennsylvania.
Arkansas.— Union Cent. L. Ins. Co. *v.* Caldwell, 68 Ark. 505, 58 S. W. 355 (Ohio); Barkman *v.* Hopkins, 11 Ark. 157.
Georgia.— Chattanooga, etc., R. Co. *v.* Jackson, 86 Ga. 676, 13 S. E. 109.
Illinois.— Milwaukee, etc., R. Co. *v.* Smith, 74 Ill. 197.
Iowa.— Greasons *v.* Davis, 9 Iowa 219.
Kansas.— Palmer *v.* Hudson River State Hospital, 10 Kan. App. 98, 61 Pac. 506.
Kentucky.—Tyler *v.* Trabue, 8 B. Mon. 306.
Louisiana.— Taylor *v.* Swett, 3 La. 33, 22 Am. Dec. 156.
Maryland.—Jackson *v.* Jackson, 82 Md. 17, 33 Atl. 317, 34 L. R. A. 773; Baltimore Consol. Real Estate, etc., Co. *v.* Cashow, 41 Md. 59 (New York); Wilson *v.* Carson, 12 Md. 54.
Massachusetts.—Mowry *v.* Chase, 100 Mass. 79, Rhode Island.
Nebraska.—Barber *v.* Hildebrand, 42 Nebr. 400, 60 N. W. 594.
New Hampshire.— Kennard *v.* Kennard, 63 N. H. 303.
New Jersey.— Title Guarantee, etc., Co. *v.* Trenton Potteries Co., 56 N. J. Eq. 441, 38 Atl. 422.
New York.— Genet *v.* Delaware, etc., Canal Co., 13 Misc. 409, 35 N. Y. Suppl. 147.
Pennsylvania.— Dougherty *v.* Snyder, 15 Serg. & R. 84, 16 Am. Dec. 520.
Rhode Island.— Barrows *v.* Downs, 9 R. I. 446, 11 Am. Rep. 283, New York.
Texas.— State *v.* De Leon, 64 Tex. 553.
See 20 Cent. Dig. tit. "Evidence," §§ 2327, 2354.

The answer must be sufficiently specific to be relevant. Clardy *v.* Wilson, 24 Tex. Civ. App. 196, 58 S. W. 52.

Where the evidence is conflicting the court may examine text-books or decisions as to the meaning of the foreign law. Rice *v.* Gunn, 4 Ont. 579.

47. Short *v.* Kingsmill, 7 U. C. Q. B. 350.

48. Love *v.* McElroy, 106 Ill. App. 294; People *v.* McQuaid, 85 Mich. 123, 48 N. W. 161; Brady *v.* Palmer, 19 Ohio Cir. Ct. 687, 10 Ohio Cir. Dec. 27.

Books and printed matter.—The rule is not abrogated where a statute permits printed copies of written laws to be received as *prima facie* evidence. Brady *v.* Palmer, 19 Ohio Cir. Ct. 687, 10 Ohio Cir. Dec. 27. A contrary view has, however, been held to the effect that the medium of proof provided by the statute constitutes the "best evidence," and must be used unless good excuse is shown. Johnson *v.* Hesser, 61 Nebr. 631, 85 N. W. 894. Where the evidence is received the documents must affirmatively be shown to be authentic either by direct proof (Mexican Nat. R. Co. *v.* Ware, (Tex. Civ. App. 1900) 60 S. W. 343, holding that pamphlets in Spanish purporting to be a regulation of Mexican railroads are not evidence of the laws of that country in the absence of evidence of authenticity) or unless the documents purport to be printed by government authority in a manner sufficient to satisfy the statutory requirements of the court of the forum (Mexican Nat. R. Co. *v.* Ware, *supra*).

Foundation for deposition.— Where it is sought to introduce the evidence of a witness skilled in the foreign laws as a deposition, the proper foundation must be laid for it. Love *v.* McElroy, 106 Ill. App. 294.

49. Barrows *v.* Downs, 9 R. I. 446, 11 Am. Rep. 283; Mexican Nat. R. Co. *v.* Slater, 115 Fed. 593, 53 C. C. A. 239; Concha *v.* Murrieta, 40 Ch. D. 543, 60 L. T. Rep. N. S. 798, Peru.

50. *Alabama.*— Walker *v.* Forbes, 31 Ala. 9, Louisiana.
Connecticut.— Dyer *v.* Smith, 12 Conn. 384, Rhode Island.
Iowa.— Crafts *v.* Clark, 38 Iowa 237 (Pennsylvania); Greasons *v.* Davis, 9 Iowa 219.
Kentucky.— Barker *v.* Brown, 33 S. W. 833, 17 Ky. L. Rep. 1172.
New Hampshire.— Jenne *v.* Harrisville, 63 N. H. 405.
New Jersey.— Title Guarantee, etc., Co. *v.* Trenton Potteries Co., 56 N. J. Eq. 441, 38 Atl. 422, New York.
Ohio.— Smith *v.* Bartram, 11 Ohio St. 690, Pennsylvania.
Pennsylvania.— Bollinger *v.* Gallagher, 163

the effect[51] or propriety[52] of acts done under it; or as to the existence of a rule of practice in the country[53] or state.[54]

i. Insurance.[55] Witnesses of special experience in the insurance business,[56] whether in its life,[57] fire, or accident branches,[58] may state technical facts commonly known to those engaged in the business, as, the increase of hazard which

Pa. St. 245, 29 Atl. 751, 43 Am. St. Rep. 791, Maryland.

See 20 Cent. Dig. tit. "Evidence," §§ 2327, 2354.

Qualification.— The judgment of the witness as to the construction of a statute enacted by a country cannot control the statute itself, and decisions of the courts of that country as to its meaning. China, etc., Bank *v.* Morse, 168 N. Y. 458, 61 N. E. 774, 85 Am. St. Rep. 676, 56 L. R. A. 139.

Translation.— The evidence of the skilled witness is competent and peculiarly appropriate when the copy of the law submitted to the court of the forum is in the form of a translation. Mexican Nat. R. Co. *v.* Slater, 115 Fed. 593, 53 C. C. A. 239.

Function of court.— The court may examine the laws and documents which have been referred to by the skilled witnesses as a correct statement of the law, "not as evidence *per se*, but as part of the testimony of the witness." Concha *v.* Murrieta, 40 Ch. D. 453, 60 L. T. Rep. N. S. 798, per Lopes, L. J. The duty of saying what an instrument means, e. g., the duty of construction, still rests on the presiding justice of the court of the forum, although the work of interpretation has been discharged by witnesses skilled in the foreign laws or languages. Stearine, etc., Co. *v.* Heintzmann, 17 C. B. N. S. 56, 10 Jur. N. S. 881, 11 L. T. Rep. N. S. 272, 112 E. C. L. 56; Di Sora *v.* Phillipps, 10 H. L. Cas. 624, 33 L. J. Ch. 129, 2 New Rep. 553, 11 Eng. Reprint 1168.

The actual state of the law upon a particular subject may be the resultant of many facts of which the written law is but one; and possibly therefore taken alone a misleading one. "Properly speaking," said Lord Denman, in De Bode's Case, 8 Q. B. 208, 55 E. C. L. 208, law of France, "the nature of such evidence is, not to set forth the contents of the written law, but its effect and the state of the law resulting from it. The mere contents, indeed, might often mislead persons not familiar with the particular system of law: the witness is called upon to state what law does result from the instrument." This position of the English courts, that the proper evidence of a foreign law is the testimony of a witness skilled in it was reached by overruling a series of earlier cases to the effect that the law might be proved by a properly authenticated copy of the written law. Lacon *v.* Higgins, D. & R. N. P. 38, 16 E. C. L. 425, 3 Stark. 178, 3 E. C. L. 643, 25 Rev. Rep. 779. And it is now held that the book containing the written law cannot be read to the jury but must be proved by a witness. Darby *v.* Ouseley, 1 H. & N. 1, 2 Jur. N. S. 497, 25 L. J. Exch. 227, 4 Wkly. Rep. 463, doctrines of the Roman church.

Where the meaning of the statute is plain or where no construction has been given it the evidence will be rejected. Molson's Bank *v.* Boardman, 47 Hun (N. Y.) 135; Geoghegan *v.* Atlas Steamship Co., 16 Daly (N. Y.) 229, 10 N. Y. Suppl. 121; Hennessey *v.* Farrelly, 13 Daly (N. Y.) 468. Testimony of a lawyer of another state as to what, in the opinion of lawyers there, should be the construction of a statute of that state is not admissible where the language of the statute is plain and there has been no decision of the courts of that state upon the point in controversy. Hennessey *v.* Farrelly, 13 Daly (N. Y.) 468.

51. Badische Anilin, etc., Fabrik *v.* Klipstein, 125 Fed. 543, incorporation.

52. Baltimore Consol. Real Estate, etc., Co. *v.* Cashow, 41 Md. 59, New York.

53. Patterson *v.* Kennedy, 122 Mich. 343, 81 N. W. 91 (Canada); U. S. *v.* Gardiner, 25 Fed. Cas. No. 15,186*a*, 2 Hayw. & H. 89.

It is not necessary to use reported cases for the purpose. Patterson *v.* Kennedy, 122 Mich. 343, 81 N. W. 91.

54. Barkman *v.* Hopkins, 11 Ark. 157; Crafts *v.* Clark, 38 Iowa 237; Mowry *v.* Chase, 100 Mass. 79.

55. See also *infra*, XI, D, 8; XI, G, 2, g.

56. Such experience must be affirmatively shown in order that a witness may testify as to technical facts. Pepper *v.* Planters' Nat. Bank, 5 Ky. L. Rep. 85, unoccupied buildings. Witnesses other than those so equipped are rejected. Lee *v.* Agricultural Ins. Co., 79 Iowa 379, 44 N. W. 683; Brooklyn First Baptist Church *v.* Brooklyn F. Ins. Co., 28 N. Y. 153, permanent policy. See also *supra*, XI, A, 4, a (II), (III). Thus a layman cannot testify as to the expectancy of life in case of a person of drinking habits. Atchison, etc., R. Co. *v.* Snedeger, 5 Kan. App. 700, 49 Pac. 103; Perrette *v.* Kansas City, 162 Mo. 238, 62 S. W. 448.

57. Shover *v.* Myrick, 4 Ind. App. 7, 30 N. E. 207; Fry *v.* New York Provident Sav. L. Assur. Soc., (Tenn. Ch. App. 1896) 38 S. W. 116.

Expectancy of life is a proper subject for the evidence of persons skilled in life insurance. Chicago, etc., R. Co. *v.* Neff, 25 Ind. App. 107, 56 N. E. 927; Clark County Cement Co. *v.* Wright, 16 Ind. App. 630, 45 N. E. 817; Shover *v.* Myrick, 4 Ind. App. 7, 30 N. E. 207; Rowley *v.* London, etc., R. Co., L. R. 8 Exch. 221, 42 L. J. Exch. 153, 29 L. T. Rep. N. S. 180, 21 Wkly. Rep. 869. The witness may use the American mortality tables or other standard compilations in connection with his testimony. Shover *v.* Myrick, 4 Ind. App. 7, 30 N. E. 207.

58. See the cases cited in the notes following.

is due to the fact that a building is unoccupied[59] or is near a railroad;[60] or whether a fact in marine[61] or other insurance is material to the risk.[62]

j. Legal Profession.[63] Members of the legal profession, and others acquainted with the conduct of the affairs with which it deals[64] may state facts connected with it.[65] The necessity for receiving this evidence is especially great when the legal terms employed are those of a foreign system of jurisprudence and are in a language foreign to the forum.[66]

k. Manufacturing.[67] Those experienced in manufacturing pursuits may state facts within their knowledge concerning them;[68] the disease-producing effects of certain manufacturing occupations,[69] that certain lines of manufacturing usually classed as dangerous are safe, under stated conditions;[70] the proper method of doing certain manufacturing work;[71] and the effect of acts not so recognized.[72]

l. Mechanics.[73] Those persons who are skilled in mechanical matters[74] are competent to testify as to relevant[75] facts which are familiar in the mechanic arts.[76] Such facts may be simple and involve little of the element of reasoning; as for example the action of natural laws,[77] the limits of ordinary observation,[78]

59. Traders' Ins. Co. *v.* Catlin, 163 Ill. 256, 45 N. E. 255, 35 L. R. A. 595; Cornish *v.* Farm Buildings F. Ins. Co., 74 N. Y. 295 [*affirming* 10 Hun 466]. *Contra,* Southern Mut. Ins. Co. *v.* Hudson, 115 Ga. 638, 42 S. E. 60; Kirby *v.* Phœnix Ins. Co., 9 Lea (Tenn.) 142.

The expression of the result of experience as to increase in hazard implied in raising the premium rate is received, although it is not conclusive. Traders' Ins. Co. *v.* Catlin, 163 Ill. 256, 45 N. E. 255, 35 L. R. A. 595.

60. Harrington *v.* St. Paul, etc., R. Co., 17 Minn. 215.

61. Leitch *v.* Atlantic Mut. Ins. Co., 66 N. Y. 100; Hawes *v.* New England Mut. Mar. Ins. Co., 11 Fed. Cas. No. 6,241, 2 Curt. 229.

62. See *infra,* XI, D, 7.

63. See *supra,* XI, B, 2, h; *infra,* XI, D, 9; XI, G, 2, h.

64. Qualification see *supra,* XI, B, 2, h, note 44. And as to qualification generally see *supra,* XI, A, 4, a, (II), (III).

65. Thompson *v.* Boyle, 85 Pa. St. 477; Vilas *v.* Downer, 21 Vt. 419; Stanton *v.* Embrey, 93 U. S. 548, 23 L. ed. 983. An attorney at law may testify what price is usually charged for services of an attorney such as were rendered in a given case. Thompson *v.* Boyle, *supra*; Vilas *v.* Downer, *supra*; Stanton *v.* Embrey, *supra.*

66. Columbia *v.* Cauca Co., 106 Fed. 337.

67. See also *infra,* XI, D, 10; XI, G, 2, i.

68. Birmingham Furnace, etc., Co. *v.* Gross, 97 Ala. 220, 12 So. 36 (holding that witnesses familiar with iron furnaces may state that "some men can stand more gas than others"); Weber Wagon Co. *v.* Kehl, 139 Ill. 644, 29 N. E. 714 (where it was held that persons operating a particular machine may state that as the result of its operation a hard-wood floor becomes slippery and a soft-wood one does not).

Witnesses having experience in a general branch of manufacturing, but without experience as to the specific matter involved in the inquiry (Fraim *v.* National F. Ins. Co., 170 Pa. St. 151, 32 Atl. 613, 50 Am. St. Rep. 753, gasoline in silver-plating), and *a fortiori* those not having even a general experience (Merchants Wharf-Boat Assoc. *v.* Wood, (Miss. 1887) 3 So. 248), may be rejected. See *supra,* XI, A, 4, a, (II), (III).

69. Fox *v.* Peninsular White Lead, etc., Works, 92 Mich. 243, 52 N. W. 623, paris green.

70. Judson *v.* Giant Powder Co., 107 Cal. 549, 40 Pac. 1020, 48 Am. St. Rep. 146, 29 L. R. A. 718, holding that a witness may if properly qualified testify that the operations of a powder mill, when properly conducted, are free from explosion.

71. Neubauer *v.* Northern Pac. R. Co., 60 Minn. 130, 61 N. W. 912 (constructing ice tongs); Wiggins *v.* Wallace, 19 Barb. (N. Y.) 338 (burning tiles).

72. Wiggins *v.* Wallace, 19 Barb. (N. Y.) 338, burning tiles.

73. See also *infra,* XI, D, 11; XI, G, 2, j.

74. Dyas *v.* Southern Pac. Co., 140 Cal. 296, 73 Pac. 972 (engineer); Pullman's Palace-Car Co. *v.* Harkins, 55 Fed. 932, 5 C. C. A. 326 (machinist). The witness must be qualified either technically or by experience. Bradley *v.* District of Columbia, 20 App. Cas. (D. C.) 169. See also *supra,* XI, A, 4, a, (II), (III).

75. Parlett *v.* Dunn, 102 Va. 459, 46 S. E. 467 (holding that a person's own practice in guying up a derrick was irrelevant); Richmond Locomotive Works *v.* Ford, 94 Va. 627, 27 S. E. 509 (holding that how certain other persons perform a particular operation in mechanics is not competent).

76. See the cases in the notes following.

77. Where familiarity with the effects of such laws is not a qualification in the absence of evidence of scientific knowledge of the laws themselves. State *v.* Watson, 65 Me. 74 (holding that a fireman for example is not qualified to state the effects of wind upon fire and of fire in creating its own current of wind); Woods *v.* Allen, 18 N. H. 28 (where it is held that a millwright cannot testify as to the cause of anchor-ice in a particular channel).

78. Silveira *v.* Iversen, 128 Cal. 187, 60 Pac. 687 (detection of defects in a rope); International, etc., R. Co. *v.* Collins, (Tex. Civ. App. 1903) 75 S. W. 814 (holding that,

the lightness[79] or the tensile[80] or other strength of materials[81] or appliances,[82] under what strain they are at a given time,[83] or how their strength is affected by given imperfections;[84] or the facts may be more complicated without losing their essential character as facts; as where the witness states the cause of observed phenomena,[85] the dangers attendant upon the use of particular machinery,[86] or the prosecution of certain lines of business;[87] how injuries from these dangers can be prevented;[88] how mechanic operations should be conducted;[89] the physical effects of certain mechanical devices;[90] the result of specific

where a witness was qualified as an expert, a question asking his opinion whether a defect in a brakestaff could have been ascertained by proper inspection was not objectionable as calling for a conclusion).

79. People *v.* Goldsworthy, 130 Cal. 600, 62 Pac. 1074, aluminum.

80. *Kentucky.*— Claxton *v.* Lexington, etc., R. Co., 13 Bush (Ky.) 636, iron hook.

Maine.— Caven *v.* Bodwell Granite Co., 97 Me. 381, 54 Atl. 851, in which it was held that a carpenter and builder, as such, is not competent to testify as to strength of and strain upon wire rope.

Massachusetts.— Murphy *v.* Marston Coal Co., 183 Mass. 385, 67 N. E. 342.

New Hampshire.— Little *v.* Head, etc., Co., 69 N. H. 494, 43 Atl. 619, iron hook.

New York.— Favo *v.* Remington Arms Co., 67 N. Y. App. Div. 414, 73 N. Y. Suppl. 788, holding that only one skilled in the matter can testify as to the strength of the metal in a gun.

81. McFaul *v.* Madera Flume, etc., Co., 134 Cal. 313, 66 Pac. 308 (relative strength of wrought and cast iron in machinery); Caven *v.* Bodwell Granite Co., 97 Me. 381, 54 Atl. 851 (wood and iron); Boettger *v.* Scherpe, etc., Iron Co., 124 Mo. 87, 27 S. W. 466 (timber).

82. Louisville, etc., R. Co. *v.* Berkey, 136 Ind. 181, 35 N. E. 3 (coupling pin); Prendible *v.* Connecticut River Mfg. Co., 160 Mass. 131, 35 N. E. 675 (staging); Lau *v.* Fletcher, 104 Mich. 295, 62 N. W. 357 (saw); Stanwick *v.* Butler-Ryan Co., 93 Wis. 430, 67 N. W. 723 (stringer).

83. Caven *v.* Bodwell Granite Co., 97 Me. 381, 54 Atl. 851.

84. Boettger *v.* Scherpe, etc., Iron Co., 124 Mo. 87, 27 S. W. 466, knot.

85. What caused a building or portion of one to collapse may be stated. Tremblay *v.* Mapes-Reeve Constr. Co., 169 Mass. 284, 47 N. E. 1010; Quigley *v.* H. W. Johns Mfg. Co., 26 N. Y. App. Div. 434, 50 N. Y. Suppl. 98.

86. Charter Gas-Engine Co. *v.* Kellam, 79 N. Y. App. Div. 231, 79 N. Y. Suppl. 1019 (gasoline engine); Pullman's Palace-Car Co. *v.* Harkins, 55 Fed. 932, 5 C. C. A. 326 (holding that an experienced machinist may state that rapidly revolving shafting is "a very harmless looking thing to an ignorant man").

87. Judson *v.* Giant Powder Co., 107 Cal. 549, 40 Pac. 1020, 48 Am. St. Rep. 146, 29 L. R. A. 718, powder mill.

88. Richardson *v.* Douglas, 100 Iowa 239, 69 N. W. 530 (prevent sparks from a threshing-machine); Sawyer *v.* J. M. Arnold Shoe Co., 90 Me. 369, 38 Atl. 333 (dogs of an elevator gate); Baltimore, etc., Road *v.* Leonhardt, 66 Md. 70, 5 Atl. 346.

89. *California.*— Dyas *v.* Southern Pac. Co., 140 Cal. 296, 73 Pac. 972, the proper balancing of derricks, the effect of the breaking of a pivot on an evenly balanced derrick, and whether the fall of a derrick mast would fracture the pivot.

Massachusetts.— Leslie *v.* Granite R. Co., 172 Mass. 468, 52 N. E. 542, handling heavy stones with a derrick.

Minnesota.—Nutzmann *v.* Germania L. Ins. Co., 78 Minn. 504, 81 N. W. 518, hydraulic elevator.

New York.— Scheider *v.* American Bridge Co., 78 N. Y. App. Div. 163, 79 N. Y. Suppl. 634 (guying derrick); Oties *v.* Cowles Electric Smelting, etc., Co., 4 Silv. Supreme 274, 7 N. Y. Suppl. 251 (erecting derrick).

Utah.— Fritz *v.* Western Union Tel. Co., 25 Utah 263, 71 Pac. 209 (stringing telephone wires); Palmquist *v.* Mine, etc., Supply Co., 25 Utah 257, 70 Pac. 994 (loading boilers).

Virginia.— Parlett *v.* Dunn, 102 Va. 459, 46 S. E. 467 (usual method of putting up a hoisting apparatus); Richmond Locomotive Works *v.* Ford, 94 Va. 627, 27 S. E. 509 (moving heavy wheels).

Conjectural estimates as to whether an experienced lineman engaged in running electric wires would under certain conditions have deemed a certain precaution necessary in order to insure that the current has been cut off (Dallas Electric Co. *v.* Mitchell, (Tex. Civ. App. 1903) 76 S. W. 935) or inferences which come within the specific province of the jury (Dallas Electric Co. *v.* Mitchell, *supra*, duty of an electric line foreman. See *supra*, XI, A, 4, c) have been rejected.

90. Planters' Mut. Ins. Co. *v.* Rowland, 66 Md. 236, 7 Atl. 257 (burr and roller mills); Bearden *v.* State, 44 Tex. Cr. 578, 73 S. W. 17.

Facts as to firearms.— Testimony by a skilled witness is admissible to show to what extent shot from a muzzle-loading shotgun will scatter at various distances (Bearden *v.* State, 44 Tex. Cr. 578, 73 S. W. 17; State *v.* Malvern, 32 Wash. 7, 72 Pac. 489), how far firearms of a certain caliber will powder-burn (Long *v.* Travellers' Ins. Co., 113 Iowa 259, 85 N. W. 24; Head *v.* State, 40 Tex. Cr. 265, 50 S. W. 352, pistol), as to probable effects of gas generated by the explosion of gunpowder in the discharge of a gun as dependent on proximity (Long *v.* Travellers' Ins. Co., *supra*), or whether a bullet loses weight by going through a human body (Dugan *v.* Com., 102 Ky. 241, 43 S. W. 418, 19 Ky. L. Rep. 1273, physician).

defects;[91] and in general what certain appearances would indicate to an observer experienced or skilled in mechanical trades.[92] He may even state a conclusion regarding the sufficiency of mechanical devices for certain purposes.[93]

m. Medicine and Surgery.[94] A witness who is shown to the satisfaction of the court to be a competent physician,[95] surgeon,[96] or veterinary[97] may state facts known to qualified members of his profession;[98] as the effect,[99] extent,[1] and

91. Slack *v.* Harris, 200 Ill. 96, 65 N. E. 669 [*affirming* 101 Ill. App. 527], loosening bolts.

92. Dallas Electric Co. *v.* Mitchell, (Tex. Civ. App. 1903) 76 S. W. 935, cut-off box to an experienced electrical lineman.

93. *Colorado.*— McGonigle *v.* Kane, 20 Colo. 292, 38 Pac. 367, elevator.

Indiana.— Sievers *v.* Peters Box, etc., Co., 151 Ind. 642, 50 N. E. 877, 52 N. E. 399 (elevator); Consolidated Stone Co. *v.* Williams, 26 Ind. App. 131, 57 N. E. 558, 84 Am. St. Rep. 278 (derrick).

Iowa.— Stomme *v.* Hanford Produce Co., 108 Iowa 137, 78 N. W. 841, elevator cables.

Massachusetts.— Lang *v.* Terry, 163 Mass. 138, 39 N. E. 802, derrick.

New Jersey.— Excelsior Electric Co. *v.* Sweet, 57 N. J. L. 224, 30 Atl. 553, device for raising electric lights.

New York.— Charter Gas-Engine Co. *v.* Kellam, 79 N. Y. App. Div. 231, 79 N. Y. Suppl. 1019.

Texas.— Austin Rapid Transit R. Co. *v.* Groethe, (Civ. App. 1895) 31 S. W. 197, raising cars.

94. See also *infra*, XI, D, 12; XI, G, 2, k.

95. Thompson *v.* Bertrand, 23 Ark. 730; Hook *v.* Stovall, 26 Ga. 704; Siebert *v.* People, 143 Ill. 571, 32 N. E. 431, graduate of medical college.

It is always necessary that adequate knowledge *quoad* the subject-matter be shown to the satisfaction of the court. See *supra*, XI, A, 4, a, (II), (III). Where the injury is alleged to be due to an unusual cause, with which a physician is not necessarily brought in contact by experience or reading, special knowledge is required. Emerson *v.* Lowell Gaslight Co., 6 Allen (Mass.) 146, 83 Am. Dec. 621, holding that a physician is not necessarily competent to state the effect of illuminating gas upon the human system.

Students of medicine may, if they feel competent to do so, testify as to facts of medical science, although they have not practised professionally. Tullis *v.* Kidd, 12 Ala. 648; Murphy *v.* Murphy, 65 S. W. 165, 23 Ky. L. Rep. 1460, effect of alcoholism on the will power.

Non-professional witnesses in the absence of special study or experience are incompetent (Osborne *v.* Troup, 60 Conn. 485, 23 Atl. 157, nurse; Com. *v.* Farrell, 187 Pa. St. 408, 41 Atl. 382, undertaker's assistants), but one of an allied profession may testify in relevant medical connections (Citizens' Gaslight, etc., Co. *v.* O'Brien, 19 Ill. App. 231, holding that a professor of chemistry may state the effect of coal gas upon the human system; State *v.* Cook, 17 Kan. 392, toxicologist).

96. Johnson *v.* Winston, (Nebr. 1903) 94 N. W. 607; Crites *v.* New Richmond, 98 Wis. 55, 73 N. W. 322; Kelly *v.* U. S., 27 Fed. 616. It is not necessary to show experience in special cases in order to qualify a surgeon to testify as an expert. Kelly *v.* U. S., 27 Fed. 616.

Such facts may be elicited on cross-examination, where its scope permits a party to elicit facts at this stage for his own case. Rowell *v.* Lowell, 11 Gray (Mass.) 420.

97. Grayson *v.* Lynch, 163 U. S. 468, 16 S. Ct. 1064, 41 L. ed. 230.

Practical experience sufficient and required. — Persons not veterinaries, but having had long and extensive practical experience in the diseases of animals, may testify as to the symptoms of a given disease (Pearson *v.* Zehr, 138 Ill. 48, 29 N. E. 854, 32 Am. St. Rep. 113; Johnson *v.* Moffett, 19 Mo. App. 159; Nations *v.* Love, (Tex. Civ. App. 1894) 26 S. W. 232) or injury (State *v.* Sheets, 89 N. C. 543, poison).

A physician, although he has never treated an animal for a given sickness, may state its effects. State *v.* Sheets, 89 N. C. 543.

Insufficient qualification.— Reading (Missouri Pac. R. Co. *v.* Finley, 38 Kan. 550, 16 Pac. 951; Rouse *v.* Youard, 1 Kan. App. 270, 41 Pac. 426) or even editing a stock journal (Dole *v.* Johnson, 50 N. H. 452), listening to the evidence of skilled witnesses (Missouri Pac. R. Co. *v.* Finley, *supra*), or observing their methods of treatment (Rouse *v.* Youard, *supra*) are not adequate qualifications.

Statutes.— Qualification may be controlled by statute. McCann *v.* Ullman, 109 Wis. 574, 85 N. W. 493, construing Rev. St. (1898) § 1492*f*, as amended by Laws (1899), c. 82.

98. On cross-examination it is proper to ask the witness as to any relevant cognate facts, and to reject such a question is error. Titus *v.* Gage, 70 Vt. 13, 39 Atl. 246, "turn of life."

Specialists may be required where the court feels the qualifications of the proposed witness to be insufficient to make his statement of fact helpful to the jury. Emerson *v.* Lowell Gaslight Co., 6 Allen (Mass.) 146, 83 Am. Dec. 621, illuminating gas.

99. Powers *v.* Mitchell, 77 Me. 361 (concussion of spine); State *v.* Knight, 43 Me. 11 (distinction between stains made by human and other blood); Johnson *v.* Winston, (Nebr. 1903) 94 N. W. 607.

1. State *v.* Miller, 9 Houst. (Del.) 564, 32 Atl. 137 (recognizability of human blood); State *v.* White, 76 Mo. 96 (delivery in standing position); People *v.* Osmond, 138 N. Y. 80, 33 N. E. 739 (holding that a qualified witness may state whether a mental state correspond-

tendency[2] of professional knowledge regarding any disease; what ligaments a particular surgical operation severs;[3] what are the vital parts of the body;[4] symptoms of a given disease or injury in body[5] or mind,[6] the usual period for recovery,[7] and the chance that it will occur;[8] what certain medical facts indicate;[9] the effects commonly produced by age,[10] death,[11] disease,[12] drugs,[13] emotions,[14] injury,[15]

ing to certain symptoms is known to medical science); Hartung *v.* People, 4 Park. Cr. (N. Y.) 319 (possibility of determining from a *post mortem* examination when a discovered inflammation was caused); Baldi *v.* Metropolitan Ins. Co., 18 Pa. Super. Ct. 599 (difficulty of diagnosis).

2. Powers *v.* Mitchell, 77 Me. 361.

3. Johnson *v.* Winston, (Nebr. 1903) 94 N. W. 607.

4. Sebastian *v.* State, 41 Tex. Cr. 248, 53 S. W. 875.

5. *Maryland.*— Baltimore, etc., Co. *v.* Cassell, 66 Md. 419, 7 Atl. 805, 59 Am. Rep. 175.

Minnesota.— Johnson *v.* Northern Pac. R. Co., 47 Minn. 430, 50 N. W. 473.

New York.— Cole *v.* Fall Brook Coal Co., 159 N. Y. 59, 53 N. E. 670; Gregory *v.* New York, etc., R. Co., 55 Hun 303, 8 N. Y. Suppl. 525; Stephens *v.* People, 4 Park. Cr. 396, arsenical poisoning.

Pennsylvania.— Coyle *v.* Com., 104 Pa. St. 117, self-abuse.

West Virginia.— Bowen *v.* Huntington, 35 W. Va. 682, 14 S. E. 217, syphilis.

Canada.— Napier *v.* Ferguson, 18 N. Brunsw. 415.

Animals are in the same position. Grayson *v.* Lynch, 163 U. S. 468, 10 S. Ct. 1064, 41 L. ed. 230, Texas fever.

6. U. S. *v.* Guiteau, 1 Mackey (D. C.) 498, 47 Am. Rep. 247 (holding that it is not error for an alienist to say that a certain trait is a vice rather than an indication of insanity); State *v.* Reddick, 7 Kan. 143; State *v.* Meyers, 99 Mo. 107, 121, 12 S. W. 516 (where the court said: "Physicians may be examined as to the nature and effect of disease; the effects of particular poisons upon the human system; the effect of particular treatment, and generally as to insanity in its various indications and manifestations").

Insanity.— Whether a certain act (Williams *v.* State, (Fla. 1903) 34 So. 279, delusional; State *v.* Reddick, 7 Kan. 143) or idea (People *v.* Goldsworthy, 130 Cal. 600, 62 Pac. 1074, portable boiler of aluminum) is characteristic of insanity is a proposition within the rule.

7. Morton *v.* Zwierzykowski, 192 Ill. 328, 61 N. E. 413; Collins *v.* Janesville, 111 Wis. 348, 87 N. W. 241, 1087, chronic inflammation of joint.

8. Morton *v.* Zwierzykowski, 192 Ill. 328, 61 N. E. 413, union of broken bones under given conditions.

9. State *v.* Wilcox, 132 N. C. 1120, 44 S. E. 625, absence of water from stomach.

10. Lord *v.* Beard, 79 N. C. 5.

11. Supreme Tent K. of M. of W. *v.* Stensland, 206 Ill. 124, 68 N. E. 1098, 99 Am. St. Rep. 137 (discoloration from strangulation); State *v.* Vincent, 24 Iowa 570, 95 Am. Dec. 753; State *v.* Moxley, 102 Mo. 374, 14 S. W. 969, 15 S. W. 556 (holding that one not a physician but who has prepared many corpses for burial may testify as to the lack of rigidity in the neck of a deceased person).

12. Murphy *v.* Murphy, 65 S. W. 165, 23 Ky. L. Rep. 1460 (alcoholism); Smith *v.* Emery, 11 N. Y. App. Div. 10, 42 N. Y. Suppl. 258 (smallpox).

13. *Illinois.*— Siebert *v.* People, 143 Ill. 571, 32 N. E. 431, arsenic.

Indiana.— Isenhour *v.* State, 157 Ind. 517, 62 N. E. 40, 87 Am. St. Rep. 228, formaldehyde.

New Hampshire.— Rochester *v.* Chester, 3 N. H. 349.

Pennsylvania.—Mertz *v.* Detweiler, 8 Watts & S. 376.

South Carolina.— State *v.* Green, 48 S. C. 136, 26 S. E. 234, poisoning.

Washington.— State *v.* Robinson, 12 Wash. 491, 41 Pac. 884, morphine.

West Virginia.— State *v.* Perry, 41 W. Va. 641, 24 S. E. 634, chloroform.

Wisconsin.— Gates *v.* Fleischer, 67 Wis. 504, 30 N. W. 674.

14. State *v.* Maier, 36 W. Va. 757, 15 S. E. 991, love and jealousy.

15. *California.*— Healy *v.* Visalia, etc., R. Co., 101 Cal. 585, 36 Pac. 125, blow.

Illinois.— Lake Erie, etc., R. Co. *v.* Wills, 39 Ill. App. 649, holding that witness may be asked whether the effects of an injury are necessarily painful.

Iowa.— Sanders *v.* O'Callaghan, 111 Iowa 574, 82 N. W. 969, pain of dog bite.

Kentucky.— Muldraughs Hill, etc., Turnpike Co. *v.* Maupin, 1 Ky. L. Rep. 404, rupture.

New Hampshire.— State *v.* Greenleaf, 71 N. H. 606, 54 Atl. 38, falling on head from a height.

New York.— Young *v.* Johnson, 123 N. Y. 226, 25 N. E. 363 (whether a first act of sexual intercourse would be apt to be fruitful in the absence of consent); Washburn *v.* National Acc. Soc., 10 N. Y. Suppl. 366 (instantaneous death).

North Carolina.— State *v.* Morgan, 95 N. C. 641, holding that such a witness may state the means by which death may be produced in a human being and leave no marks upon the body.

Wisconsin.— Crites *v.* New Richmond, 88 Wis. 55, 73 N. W. 322, sprain.

Canada.— Napier *v.* Ferguson, 18 N. Brunsw. 415.

See 20 Cent. Dig. tit. "Evidence," § 2337.

An ordinary observer is not competent to state the effect of gunshot wounds (State *v.* Justus, 11 Oreg. 178, 8 Pac. 337, 50 Am. Rep. 470), or what injury, if any, a woman in a given stage of pregnancy would suffer from

poison,[16] or a surgical operation upon the body[17] or mind,[18] but not on the moral nature;[19] conditions of gestation;[20] what certain symptoms indicate[21] or certain medical terms cover.[22] Definite possibilities[23] or probabilities, as that a given disease or injury will induce other troubles,[24] will be permanent,[25] followed by recovery,[26] or require a certain length of time[27] may be classified as facts, provided that no especial exercise of the reasoning faculty is involved. Subjects with which an average jury may fairly be assumed to be already familiar cannot be stated.[28]

n. Mercantile Affairs.[29] A witness acquainted with mercantile affairs,[30] wholesale or retail,[31] may testify as to the usual mode of doing business,[32] the effect of changes in temperature on perishable articles,[33] the percentage of loss caused

the sudden jolting of a car (Murray *v.* Salt Lake City R. Co., 16 Utah 356, 52 Pac. 596).

16. *Colorado.*— Germania L. Ins. Co. *v.* Ross-Lewin, 24 Colo. 43, 51 Pac. 488, 65 Am. St. Rep. 215, cyanide of potassium.

Illinois.— Shorb *v.* Webber, 89 Ill. App. 474 (liquor); Citizens' Gaslight, etc., Co. *v.* O'Brien, 19 Ill. App. 231 (coal gas).

Kansas.— State *v.* Cook, 17 Kan. 392.

Michigan.— Brown *v.* Marshall, 47 Mich. 576, 11 N. W. 392, 41 Am. Rep. 728.

New York.—People *v.* Schewe, 29 Hun 122, 1 N. Y. Cr. 360 (whether the human stomach can hold enough beer to intoxicate); Stephens *v.* People, 4 Park. Cr. 396 (arsenic).

The operation of poison upon animals may be stated. State *v.* Sheets, 89 N. C. 543; Coyle *v.* Baum, 3 Okla. 695, 41 Pac. 389.

17. Morton *v.* Zwierzykowski, 192 Ill. 328, 61 N. E. 413, union of bones; and other cases cited in the preceding notes.

18. State *v.* Reddick, 7 Kan. 143; Murphy *v.* Murphy, 65 S. W. 165, 23 Ky. L. Rep. 1460 (will power); Clark *v.* Com., 63 S. W. 740, 23 Ky. L. Rep. 1029, holding that physician may testify that the shock and mental anguish incidental to the performance of an abortion would be greater in case of a single than of a married woman.

19. People *v.* Royal, 53 Cal. 62 (indecent liberties); State *v.* Robinson, 12 Wash. 491, 41 Pac. 884 (effect of morphine on veracity).

20. People *v.* Johnson, 70 Ill. App. 634; Alsop *v.* Bowtrell, Cro. Jac. 541; Buller *v.* Crips, 6 Mod. 29.

21. Louisville, etc., R. Co. *v.* Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; Kelly *v.* Erie Tel., etc., Co., 34 Minn. 321, 25 N. W. 706; Dilleber *v.* Home L. Ins. Co., 87 N. Y. 79.

22. Bonart *v.* Lee, (Tex. Civ. App. 1898) 46 S. W. 906, "medical treatment."

23. In general, whether a certain force or other cause may produce a given physical result (Baker *v.* State, 30 Fla. 41, 11 So. 492; Wabash Western R. Co. *v.* Friedman, 41 Ill. App. 270; Flaherty *v.* Powers, 167 Mass. 61, 44 N. E. 1074; Seckinger *v.* Philibert, etc., Mfg. Co., 129 Mo. 590, 31 S. W. 957; Cole *v.* Fall Brook Coal Co., 87 Hun (N. Y.) 584, 34 N. Y. Suppl. 572; Block *v.* Milwaukee St. R. Co., 89 Wis. 371, 61 N. W. 1101, 46 Am. St. Rep. 849, 27 L. R. A. 365) may be stated; but not, it has been held, that they will do so (Wabash Western R. Co. *v.* Friedman, 41 Ill. App. 270 [*reversed* on other points in 146 Ill. 583, 30 N. E. 353, 34 N. E. 1111]).

24. Jacksonville Southeastern R. Co. *v.* Southworth, 32 Ill. App. 307 (spinal trouble); Lago *v.* Walsh, 98 Wis. 348, 74 N. W. 212.

25. *Illinois.*— Girard Coal Co. *v.* Wiggins, 52 Ill. App. 69; Lake Erie, etc., R. Co. *v.* Wills, 39 Ill. App. 649.

Iowa.— Sanders *v.* O'Callaghan, 111 Iowa 574, 82 N. W. 969, dog bite.

New York.—Maher *v.* New York Cent., etc., R. Co., 20 N. Y. App. Div. 161, 46 N. Y. Suppl. 847; Reynolds *v.* Niagara Falls, 81 Hun 353, 30 N. Y. Suppl. 954.

Oklahoma.— Coyle *v.* Baum, 3 Okla. 693, 41 Pac. 389.

United States.— Reed *v.* Pennsylvania R. Co., 56 Fed. 184.

26. Jackson *v.* Boone, 93 Ga. 662, 20 S. E. 46; Cole *v.* Lake Shore, etc., R. Co., 95 Mich. 77, 54 N. W. 638.

27. Western Union Tel. Co. *v.* Church, 3 Nebr. (Unoff.) 22, 90 N. W. 878, 57 L. R. A. 905, child-birth.

28. McPherrin *v.* Jennings, 66 Iowa 622, 24 N. W. 242, liability of horses to sudden death.

29. See also *infra*, XI, D, 13; XI, G, 2, l.

30. Knowledge, rather than compliance with statutory regulation, is the test of qualification. Downing *v.* State, 66 Ga. 110. And such knowledge must as usual be commensurate to the fact stated. Lorsch *v.* U. S., 119 Fed. 476, holding that a dealer in genuine precious stones cannot testify as to the commercial uses of artificial ones. As to qualification see *supra*, XI, A, 4, a, (II), (III).

31. Sexton *v.* Lamb, 27 Kan. 426; McFadden *v.* Murdock, L. R. 1 C. L. 211, 15 Wkly. Rep. 1079, grocer.

32. Atwater *v.* Clancy, 107 Mass. 369 (examining case of goods); Commercial Bank *v.* Union Bank, 19 Barb. (N. Y.) 391 (transferring commercial paper); Crane *v.* Fry, 126 Fed. 278, 61 C. C. A. 260 (logging business).

33. St. Louis Southwestern R. Co. *v.* Elgin Condensed Milk Co., 175 Ill. 557, 51 N. E. 911, 67 Am. St. Rep. 238 [*affirming* 74 Ill. App. 619] (condensed milk); Wilson *v.* F. C. Linde Co., 47 N. Y. App. Div. 327, 62 N. Y. Suppl. 69 (apples).

Suitable storage.— A dealer in any commodity may well be presumed as a matter of experience to know what kind of place is

thereby,[34] or in other ways;[35] the general duties of clerks or officers engaged in mercantile occupations;[36] the effect of certain acts upon mercantile credit;[37] what qualities render an article merchantable,[38] or within a certain trade designation;[39] what tests are applied in grading commodities;[40] or the symbols or ciphers used in a given business.[41]

o. Mining.[42] Facts of mining may be stated by those experienced in the business;[43] as the proper way of doing mining work,[44] the duties of particular employees,[45] or what workings are profitable.[46]

p. Natural History. An ethnologist may state the marks distinguishing different races of mankind.[47] One acquainted with them may state the habits of fish;[48] and in stating the *habitat* of certain animals a naturalist is merely stating a fact.[49]

q. Nautical Matters.[50] Nautical men of experience may state facts pertaining to their calling; for example the practical effect of natural conditions,[51] the effect of swells made by a large vessel upon a small one heavily laden,[52] the limits of vision,[53] the proper way of doing certain acts,[54] or the duties of the officers or crew under certain conditions.[55] Such a witness may properly state as facts the

necessary for its proper preservation. Rust *v.* Eckler, 41 N. Y. 488.

34. Sexton *v.* Lamb, 27 Kan. 426, holding that persons in the ice business may testify what percentage is usually lost by melting while being handled.

35. McFadden *v.* Murdock, L. R. 1 C. L. 211, 15 Wkly. Rep. 1079, where it was said that a retail grocer may state what is a fair percentage to allow for loss in weighing out a large bulk in small quantities.

36. Pepper *v.* Planters Nat. Bank, 5 Ky. L. Rep. 85, cashier.

37. MacLaren *v.* Cochran, 44 Minn. 255, 46 N. W. 408, holding that an expert in the business of negotiating securities may testify that the dishonor of a promissory note by the maker will depreciate the market value of other notes of the same maker, given for the same consideration, but not yet matured.

38. Austin *v.* Hartwig, 49 N. Y. Super. Ct. 256, sauerkraut.

39. Wagar Lumber Co. *v.* Sullivan Logging Co., 120 Ala. 558, 24 So. 949 (merchantable lumber); Pollen *v.* Le Roy, 10 Bosw. (N. Y.) 38; Nordlinger *v.* U. S., 115 Fed. 828.

40. Downing *v.* State, 66 Ga. 110, kerosene.

41. Foley *v.* Abbott, 66 Ga. 115.

42. See also *infra*, XI, D, 15; XI, G, 2, m.

43. Grant *v.* Varney, 21 Colo. 329, 40 Pac. 771; Acme Coal Co. *v.* Kusnir, 71 Ill. App. 446 (where it was held that experienced miners are competent to testify that there is no method known to miners by which the danger arising from falling stones can be entirely obviated); Diamond Block Coal Co. *v.* Edmonson, 14 Ind. App. 594, 73 N. E. 242 (how far a cage will drop before it can be caught); Beaman *v.* Martha Washington Min. Co., 23 Utah 139, 63 Pac. 631 (operation of a "skip" out of an incline shaft).

44. McNamara *v.* Logan, 100 Ala. 187, 14 So. 175 (whether a certain width between the cars and wall is safe); Grant *v.* Varney, 21 Colo. 329, 40 Pac. 771 (roofing up a mine); Monahan *v.* Kansas City Clay, etc., Co., 58 Mo. App. 68 (timbering a mine); Ohio, etc., Torpedo Co. *v.* Fishburn, 61 Ohio St. 608, 56 N. E. 457, 76 Am. St. Rep. 437 (proper time for blasting).

45. Eureka Block Coal Co. *v.* Wells, 29 Ind. App. 1, 61 N. E. 236, 94 Am. St. Rep. 259, boss.

46. Wilson *v.* Harnette, (Colo. Sup. 1904) 75 Pac. 395.

47. Daniel *v.* Guy, 19 Ark. 121, negro and white man.

48. Lewis *v.* Hartford Dredging Co., 68 Conn. 221, 35 Atl. 1127 (holding that one skilled in the cultivation of oysters may state what is suitable material to spread over a sticky river bottom to "catch a set" of floating spawn); Smith *v.* People, 46 Ill. App. 130 (what would form an obstacle to their passage); Cottrill *v.* Myrick, 12 Me. 222 (holding that a witness may state whether fish will ascend a certain stream).

49. State *v.* McIntosh, 109 Iowa 209, 80 N. W. 349 (wolf); Cottrill *v.* Myrick, 12 Me. 222 (holding that observation of these habits may entitle the observer to the character of an expert, the means of knowledge not being open to the community generally).

50. See also *infra*, XI, D, 16; XI, G, 2, n.

51. Price *v.* Hartshorn, 44 N. Y. 94, 4 Am. Rep. 645; Walsh *v.* Washington Mar. Ins. Co., 32 N. Y. 427; Western Ins. Co. *v.* Tobin, 32 Ohio St. 77; Folkes *v.* Chadd, 3 Dougl. 157, 26 E. C. L. 111.

52. Eastern Transp. Line *v.* Hope, 95 U. S. 297, 299, 24 L. ed. 477, where the court said: "We entertain no doubt that those who are accustomed to the responsibility of command, and whose lives are spent on the ocean, are qualified as experts to prove the practical effect of cross-seas and heavy swells, shifting winds and sudden squalls."

53. Case *v.* Perew, 46 Hun (N. Y.) 57, 10 N. Y. St. 811, how far a light can be seen.

54. Walker *v.* Protection Ins. Co., 29 Me. 317 (abandoning wreck); Price *v.* Powell, 3 N. Y. 322 (stowing cargo); Fenwick *v.* Bell, 1 C. & K. 312, 47 E. C. L. 312; Malton *v.* Nesbit, 1 C. & P. 70, 12 E. C. L. 51 (conduct of officers).

55. Sills *v.* Brown, 9 C. & P. 601, 38 E. C. L. 351, captain.

usages of navigation,[56] what goods are classed as inflammable,[57] the possibility of certain occurrences,[58] or that a certain class of vessels leaks.[59]

r. Railroads.[60] A person who is shown to the satisfaction of the court to be experienced in railroad operation,[61] whether in its track,[62] freight,[63] or passenger[64] departments, may state facts commonly known in the business,[65] including those relating to the apparatus employed in drawing[66] or stopping trains;[67] the duties of engineers,[68] brakemen,[69] or other train hands;[70] and how these should be[71] or usually are[72] performed. And he may state details as to practical operations,[73]

56. The Alaska, 33 Fed. 107.

57. A. J. Tower Co. *v.* Southern Pac. Co., 184 Mass. 472, 69 N. E. 348, oil clothes.

58. Louisville Ins. Co. *v.* Monarch, 99 Ky. 578, 36 S. W. 563, 18 Ky. L. Rep. 444, striking an obstacle without notice to persons on board.

59. Western Ins. Co. *v.* Tobin, 32 Ohio St. 77.

60. See also *infra*, XI, D, 18; XI, G, 2, o.

61. The experience need not have been gained on the particular railroad to which the testimony relates. Conway *v.* Fitzgerald, 70 Vt. 103, 39 Atl. 634. Where knowledge is common throughout the community, as regarding the proper construction of cattle-guards, the evidence of a skilled witness is not required. New York, etc., R. Co. *v.* Zumbaugh, 12 Ind. App. 272, 39 N. E. 1058; Swartout *v.* New York Cent., etc., R. Co., 7 Hun (N. Y.) 571.

62. Kerns *v.* Chicago, etc., R. Co., 94 Iowa 121, 62 N. W. 692; Walker *v.* Lake Shore, etc., R. Co., 104 Mich. 606, 62 N. W. 1032, road-master.

63. Vicksburg, etc., R. Co. *v.* Stocking, (Miss. 1892) 13 So. 469 (regular and special freight rates); Price *v.* Richmond, etc., R. Co., 38 S. C. 199, 17 S. E. 732.

64. Union Pac. R. Co. *v.* Novak, 61 Fed. 573, 9 C. C. A. 629, engineer.

65. And see the other cases cited in the notes following.

66. Baltimore, etc., R. Co. *v.* Elliott, 9 App. Cas. (D. C.) 341 (where an experienced witness was permitted to state how far a "draw head" in good repair would move); McDonald *v.* Michigan Cent. R. Co., 108 Mich. 7, 65 N. W. 597 (holding that an engineer may state the ability of a cross bar, if sound, to resist a certain shock).

67. Louisville, etc., R. Co. *v.* Binion, 107 Ala. 645, 18 So. 75 (where a witness testified that a stuck brake "will let off suddenly"); Price *v.* Richmond, etc., R. Co., 38 S. C. 199, 17 S. E. 732.

68. Galveston, etc., R. Co. *v.* Brown, (Tex. Civ. App. 1900) 59 S. W. 930.

69. *Alabama.*—Culver *v.* Alabama Midland R. Co., 108 Ala. 330, 18 So. 827 (holding that a competent witness may state the proper position of a brakeman under particular circumstances); Helton *v.* Alabama Midland R. Co., 97 Ala. 275, 12 So. 276.

Iowa.— Quinlan *v.* Chicago, etc., R. Co., 113 Iowa 89, 84 N. W. 960; Reifsnyder *v.* Chicago, etc., R. Co., 90 Iowa 76, 57 N. W. 692; Burns *v.* Chicago, etc., R. Co., 69 Iowa 450, 30 N. W. 25, 58 Am. Rep. 227.

Ohio.— Cincinnati, etc., R. Co. *v.* Smith, 22 Ohio St. 227, 10 Am. Rep. 729.

South Carolina.— Price *v.* Richmond, etc., R. Co., 38 S. C. 199, 17 S. E. 732.

Texas.— Missouri, etc., R. Co. *v.* Baker, (Civ. App. 1900) 58 S. W. 964.

See 20 Cent. Dig. tit. "Evidence," § 2323.

70. Schlaff *v.* Louisville, etc., R. Co., 100 Ala. 377, 14 So. 105; Missouri Pac. R. Co. *v.* Mackey, 33 Kan. 298, 6 Pac. 291 (firemen); Missouri Pac. R. Co. *v.* Fox, 60 Nebr. 531, 83 N. W. 744; Price *v.* Richmond, etc., R. Co., 38 S. C. 199, 17 S. E. 732.

Qualification of witness.— Where there is no evidence that the witness is properly qualified his statement may properly be rejected. Born *v.* Philadelphia, etc., R. Co., 198 Pa. St. 409, 48 Atl. 263.

71. *Alabama.*— Birmingham Mineral R. Co. *v.* Harris, 98 Ala. 326, 13 So. 377, stopping trains.

Iowa.— Kerns *v.* Chicago, etc., R. Co., 94 Iowa 121, 62 N. W. 692 (pilot-bar coupling); Reifsnyder *v.* Chicago, etc., R. Co., 90 Iowa 76, 57 N. W. 692.

Michigan.— Walker *v.* Lake Shore, etc., R. Co., 104 Mich. 606, 62 N. W. 1032, how high a brakeman swings his lantern.

Pennsylvania.— Lewis *v.* Seifert, 116 Pa. St. 628, 11 Atl. 514, 2 Am. St. Rep. 631, passing trains on single-track road.

South Carolina.— Price *v.* Richmond, etc., R. Co., 38 S. C. 199, 17 S. E. 732, make up train.

Tennessee.— Louisville, etc., R. Co. *v.* Reagan, 96 Tenn. 128, 33 S. W. 1050, undo couplings.

Texas.— Houston, etc., R. Co. *v.* Cowser, 57 Tex. 293 (usual caution); International, etc., R. Co. *v.* Martinez, (Civ. App. 1900) 57 S. W. 689 (operating hand-car); Texas Mexican R. Co. *v.* King, 14 Tex. Civ. App. 290, 37 S. W. 34 (made coupling in usual way).

Utah.— Wright *v.* Southern Pac. Co., 15 Utah 421, 49 Pac. 309, running locomotives.

See 20 Cent. Dig. tit. "Evidence," § 2323.

72. Miller *v.* Illinois Cent. R. Co., 89 Iowa 567, 57 N. W. 418.

73. Prosser *v.* Montana Cent. R. Co., 17 Mont. 372, 43 Pac. 81, 30 L. R. A. 814; Galveston, etc., R. Co. *v.* Robinett, (Tex. Civ. App. 1899) 54 S. W. 263 (train orders); Smith *v.* Canada Pac. R. Co., 34 Nova Scotia 22 (holding that a conductor on a railroad train who for thirteen years has been accustomed to the motion of the cars is competent, although he has never had any experience on an engine, to testify as to how far the manner in which the engineer man-

the road-bed,[74] or rolling-stock;[75] whether certain operations are safe[76] or dangerous;[77] the comparative danger involved in two methods of doing the work[78] or employing different devices for the same purpose;[79] and what in general is the proper function of railroad appliances,[80] the observed effect of certain acts,[81] or the faculties requisite for doing them.[82] Such a witness may state facts more nearly resembling conclusions, as whether certain acts are necessary;[83] whether it would be possible to stop a train[84] or do other acts,[85] or that certain

ages his engine affects the lurch or motion of the train).

74. Kelly *v.* Southern Minnesota R. Co., 28 Minn. 98, 9 N. W. 588 (how planks are laid at a highway crossing); State *v.* Toledo R., etc., Co., 24 Ohio Cir. Ct. 321 (side-track); Ft. Worth, etc., R. Co. *v.* Wilson, 3 Tex. Civ. App. 583, 24 S. W. 686 (whether a road-bed was properly constructed).

75. *Nebraska.*— Missouri Pac. R. Co. *v.* Fox, 60 Nebr. 531, 83 N. W. 744, construction.

New York.— Peck *v.* New York Cent., etc., R. Co., 165 N. Y. 347, 59 N. E. 206 (whether sparks of a given size or live coals to a given distance could have been thrown from an engine in proper condition); Jamieson *v.* New York, etc., R. Co., 162 N. Y. 630, 57 N. E. 1113 (how far a locomotive in good condition throws sparks).

Ohio.— Pittsburg, etc., R. Co. *v.* Sheppard, 56 Ohio St. 68, 46 N. E. 61, 60 Am. St. Rep. 732, holding that a builder of cars may testify as to the value of the hammer test as a means of detecting breaks in car wheels.

Texas.— Missouri, etc., R. Co. *v.* St. Clair, 21 Tex. Civ. App. 345, 51 S. W. 666, width of medium-sized coal-car.

Wisconsin.— Paulson *v.* State, 118 Wis. 89, 94 N. W. 771, locomotive.

76. *Alabama.*— Mobile, etc., R. Co. *v.* George, 94 Ala. 199, 10 So. 145.

Indiana.— New York, etc., R. Co. *v.* Grand Rapids, etc., R. Co., 116 Ind. 60, 18 N. E. 182; Chicago, etc., R. Co. *v.* Grimm, 25 Ind. App. 494, 57 N. E. 640, running train backward.

Kentucky.— Louisville, etc., R. Co. *v.* Scott, 108 Ky. 392, 56 S. W. 674, 22 Ky. L. Rep. 30, 50 L. R. A. 381, running with coach ahead of engine.

New York.— Flanagan *v.* New York, etc., R. Co., 83 Hun 522, 32 N. Y. Suppl. 84, opening gates.

Texas.— Galveston, etc., R. Co. *v.* Ford, 22 Tex. Civ. App. 131, 54 S. W. 37.

77. Schlaff *v.* Louisville, etc., R. Co., 100 Ala. 377, 14 So. 105 (riding on the edge of cars); Mobile, etc., R. Co. *v.* George, 94 Ala. 199, 10 So. 145; Louisville, etc., R. Co. *v.* Frawley, 110 Ind. 18, 9 N. E. 594 (coupling).

78. Schlaff *v.* Louisville, etc., R. Co., 100 Ala. 377, 14 So. 105; Mobile, etc., R. Co. *v.* George, 94 Ala. 199, 10 So. 145.

79. Galveston, etc., R. Co. *v.* Hughes, 22 Tex. Civ. App. 134, 54 S. W. 264, blocked and unblocked switches.

80. Chicago, etc., R. Co. *v.* Kreig, 22 Ind. App. 393, 53 N. E. 1033 (holding that a skilled witness may testify how large a spark must be to be seen from a given distance); McDonald *v.* Michigan Cent. R. Co., 108 Mich. 7, 65 N. W. 597 (push bar); Carley *v.* New York, etc., R. Co., 1 N. Y. Suppl. 63 (spark-arresters).

81. Louisville, etc., R. Co. *v.* Banks, 132 Ala. 471, 31 So. 573; Louisville, etc., R. Co. *v.* Binion, 107 Ala. 645, 18 So. 75; Louisville, etc., R. Co. *v.* Mothershed, 97 Ala. 261, 12 So. 714, holding that a conductor may state the effect of running a car over a switch improperly set.

82. Richmond, etc., R. Co. *v.* Greenwood, 99 Ala. 501, 14 So. 495, holding that a witness may state whether a one-armed brakeman is as good for the work as one having two arms.

83. Louisville, etc., R. Co. *v.* Binion, 107 Ala. 645, 18 So. 75 (stuck brake lets off violently and suddenly); Louisville, etc., R. Co. *v.* Illinois Cent. R. Co., 174 Ill. 448, 51 N. E. 824 (switch-men and signals).

84. *Alabama.*— Alabama Great Southern R. Co. *v.* Linn, 103 Ala. 134, 15 So. 508, stopped as soon as possible.

Iowa.— Grimmell *v.* Chicago, etc., R. Co., 73 Iowa 93, 34 N. W. 758.

Michigan.— Detroit, etc., R. Co. *v.* Van Steinburg, 17 Mich. 99.

Missouri.— Eckert *v.* St. Louis, etc., R. Co., 13 Mo. App. 352.

New York.— Mott *v.* Hudson River R. Co., 8 Bosw. 345.

North Carolina.— Cox *v.* Norfolk, etc., R. Co., 126 N. C. 103, 35 S. E. 237.

United States.— Union Pac. R. Co. *v.* Novak, 61 Fed. 573, 9 C. C. A. 629, where evidence was received as to whether one brakeman could stop a particular train.

See 20 Cent. Dig. tit. "Evidence," § 2323.

Qualification of witness.— Experience in connection with the stopping of trains is necessary to render the evidence competent. Igo *v.* Chicago, etc., R. Co., 38 Mo. App. 377, section hand incompetent.

85. *Iowa.*— Whitsett *v.* Chicago, etc., R. Co., 67 Iowa 150, 25 N. W. 104.

Minnesota.— Kolsti *v.* Minneapolis, etc., R. Co., 32 Minn. 133, 19 N. W. 655, lock turntables.

New York.— Frace *v.* New York, etc., R. Co., 68 Hun 325, 22 N. Y. Suppl. 958.

Ohio.— Bellefontaine, etc., R. Co. *v.* Bailey, 11 Ohio St. 333, prevent accident.

Vermont.— Conway *v.* Fitzgerald, 70 Vt. 103, 39 Atl. 634, capacity of freight cars for carrying logs.

United States.— Union Pac. R. Co. *v.* Novak, 61 Fed. 573, 9 C. C. A. 629, one brakeman control a gravel train.

See 20 Cent. Dig. tit. "Evidence," § 2323.

things should happen.[86] He may testify as to what are the probabilities with regard to certain occurrences.[87] Where a fact in railroad matters is known to a person not connected with the business, the latter may state it,[88] provided he be shown to possess adequate knowledge; mere opportunity for general observation is not sufficient.[89]

s. Street Railways.[90] Persons who are shown to the satisfaction of the court to be skilled in operating street railways may state facts generally known among persons,[91] although the experience of the witness was not acquired on the railway to which his testimony relates.[92] The general officers,[93] if qualified, as well as the operating force, conductors,[94] drivers,[95] or motor men,[96] may testify to the duties of these employees and other facts relating to the operation of the road;[97] the incidental dangers and the possibility of stopping cars[98] or doing other

86. Davidson *v.* St. Paul, etc., R. Co., 34 Minn. 51, 24 N. W. 324 (spark throwing); Jamieson *v.* New York, etc., R. Co., 162 N. Y. 630, 57 N. E. 1113 (door in spark-arrester opening after being once closed); Frace *v.* New York, etc., R. Co., 68 Hun (N. Y.) 325, 12 N. Y. Suppl. 958 (holding that such a witness may state whether a locomotive equipped with a suitable spark-arrester could have emitted sparks of a certain size).

Province of jury.— Where the possibility relates to a matter as to which the jury can be fully informed, as whether a brakeman could displace the rod of the brake if the pin had remained in it, or whether a pin could be lost on the road in the absence of accident or use of the brake, the evidence will be rejected. Bailey *v.* Rome, etc., R. Co., 55 Hun (N. Y.) 509, 8 N. Y. Suppl. 780.

87. Gulf, etc., R. Co. *v.* Matthews, 28 Tex. Civ. App. 92, 66 S. W. 588, 67 S. W. 788, holding that the question of whether a train, on striking a man standing or walking on the track, would throw him or run over him, and whether or not it would be more apt to run over him if he were lying on the track, is peculiarly within the knowledge of locomotive engineers and other persons familiar with such accidents, and hence is a proper subject for expert testimony.

88. Missouri Pac. R. Co. *v.* Mackey, 33 Kan. 298, 6 Pac. 291 (yard duties of firemen); Chesapeake, etc., R. Co. *v.* Stephens, 15 Ky. L. Rep. 815 (stopping distance of trains); Detroit, etc., R. Co. *v.* Van Steinburg, 17 Mich. 99 (holding that a mail agent who has been traveling regularly for two years on the cars is a competent witness to express an opinion as to the rate of speed at which a train should be running when near a station in order to stop at the usual stopping-place there); Robertson *v.* Wabash, etc., R. Co., 84 Mo. 119 (stopping distance).

89. Manhattan, etc., R. Co. *v.* Stewart, 30 Kan. 226, 2 Pac. 151; Mammerberg *v.* Metropolitan St. R. Co., 62 Mo. App. 563; Gourley *v.* St. Louis, etc., R. Co., 35 Mo. App. 87.

90. See *infra*, XI, D, 19; XI, G, 2, p.

91. One not shown to be duly qualified is rejected. North Kankakee St. R. Co. *v.* Blatchford, 81 Ill. App. 609 (use of fenders); Barry *v.* Second Ave. R. Co., 1 Misc. (N. Y.) 502, 20 N. Y. Suppl. 871 (master mechanic rejected). See *supra*, XI, A, 4, a, (II), (III).

The instances of observation which form a basis for the knowledge of the witness may be stated (Chicago City R. Co. *v.* McLaughlin, 146 Ill. 353, 34 N. E. 796); and it must appear not only that the witness has had sufficient experience, but also that he has had adequate data on which to found a reasonable inference in the particular instance (Geist *v.* Detroit City R. Co., 91 Mich. 446, 51 N. W. 1112; Hoffman *v.* Metropolitan St. R. Co., 51 Mo. App. 273). See *supra*, XI, A, 4, a, (II), (III).

92. Traver *v.* Spokane St. R. Co., 25 Wash. 225, 65 Pac. 284.

Experience on steam railroads.— Where the operations are analogous one experienced by work on steam railroads may testify as to street railways. Maxwell *v.* Wilmington City R. Co., 1 Marv. (Del.) 199, 40 Atl. 945 (use of sand); Atlanta R., etc., Co. *v.* Monk, 118 Ga. 449, 45 S. E. 494 (effect of curves on speed).

93. Laufer *v.* Bridgeport Traction Co., 68 Conn. 475, 37 Atl. 379, 37 L. R. A. 533, holding that the president and inspector of an electric street railway may testify as to proper management of an electric car.

94. Watson *v.* Minneapolis St. R. Co., 53 Minn. 551, 55 N. W. 742; Mammerberg *v.* Metropolitan St. R. Co., 62 Mo. App. 563. See also Blondel *v.* St. Paul City R. Co., 68 Minn. 284, 68 N. W. 1079.

95. Chicago City R. Co. *v.* McLaughlin, 146 Ill. 353, 34 N. E. 796; Czezewzka *v.* Benton-Bellefontaine R. Co., 121 Mo. 201, 25 S. W. 911.

96. Tholen *v.* Brooklyn City R. Co., 10 Misc. (N. Y.) 283, 30 N. Y. Suppl. 1081; Traver *v.* Spokane St. R. Co., 25 Wash. 225, 65 Pac. 284, within what distance car may be stopped.

97. Czezewzka *v.* Benton-Bellefontaine R. Co., 121 Mo. 201, 25 S. W. 911, holding that a street-car driver may testify where the driver of such a car ought to stand.

98. *California.*— Howland *v.* Oakland Consol. St. R. Co., 110 Cal. 513, 42 Pac. 983.

Delaware.— Maxarle *v.* Wilmington City R. Co., 1 Marv. 199, 40 Atl. 945, use of sand.

Illinois.— Chicago City R. *v.* McLaughlin, 146 Ill. 353, 34 N. E. 796, driver.

Minnesota.— Watson *v.* Minneapolis St. R. Co., 53 Minn. 551, 55 N. W. 742, conductor.

Missouri.— Mammerberg *v.* Metropolitan St. R. Co., 62 Mo. App. 563, conductor.

common acts;[99] or as to the value for street-railway purposes of certain designated appliances.[1]

t. Trade Customs. The existence, at a time sufficiently near to be relevant,[2] of a custom in any particular trade, art, or calling,[3] or in any office,[4] or that of a foreign law arising from custom,[5] may be a fact[6] which may be stated by any one who is found by the court[7] to possess adequate knowledge,[8] although the witness shows no special skill,[9] fails to testify with entire certainty,[10] or bases his statement in part upon information furnished by others.[11]

u. Trade Terms. Persons familiar with any art, calling, trade, etc.,[12] may

New York.— O'Neill *v.* Dry Dock, etc., R. Co., 59 N. Y. Super. Ct. 123, 15 N. Y. Suppl. 84 [*affirmed* in 129 N. Y. 125, 29 N. E. 84, 26 Am. St. Rep. 512] (driver); Tholen *v.* Brooklyn City R. Co., 10 Misc. 283, 30 N. Y. Suppl. 1081, motor man.

Washington.— Traver *v.* Spokane St. R. Co., 25 Wash. 225, 65 Pac. 284.

See 20 Cent. Dig. tit. "Evidence," § 2322.

An inference by one who has never been a motor man as to the time within which a car can be stopped will not support a verdict. Mulligan *v.* Third Ave. R. Co., 61 N. Y. App. Div. 214, 70 N. Y. Suppl. 530.

99. Chicago City R. Co. *v.* McLaughlin, 146 Ill. 353, 34 N. E 796; Geist *v.* Detroit City R. Co., 91 Mich. 446, 51 N. W. 1112; Watson *v.* Minneapolis St. R. Co., 53 Minn. 551, 55 N. W. 742; Mammerberg *v.* Metropolitan St. R. Co., 62 Mo. App. 563.

1. Ashtabula Rapid Transit Co. *v.* Dagenbach, 11 Ohio Cir. Dec. 307, life-guards.

2. Hale *v.* Gibbs, 43 Iowa 380.

3. *Georgia.*— Horan *v.* Strachan, 86 Ga. 408, 12 S. E. 678, 22 Am. St. Rep. 471.

Illinois.— Wilson *v.* Bauman, 80 Ill. 493, architect.

Iowa.— Thayer *v.* Smoky Hollow Coal Co., 121 Iowa 121, 96 N. W. 718; Taylor *v.* Star Coal Co., 110 Iowa 40, 81 N. W. 249, custom in a mining district.

Louisiana.— Suarez *v.* Duralde, 1 La. 260, architect.

Massachusetts.— Gorham *v.* Gross, 125 Mass. 232, 28 Am. Rep. 234 (flues in party-walls); Page *v.* Cole, 120 Mass. 37 (selling milk routes by the can); Atwater *v.* Clancy, 107 Mass. 369 (buying tobacco by sample); Luce *v.* Dorchester Mut. F. Ins. Co., 105 Mass. 297, 7 Am. Rep. 522 (extra premium for non-occupancy).

New York.— Hart *v.* Brooklyn, 31 N. Y. App. Div. 517, 52 N. Y. Suppl. 113 (symbols on a plan indicating materials to be used in filling, etc.); Hugg *v.* Shank, 52 Hun 612, 4 N. Y. Suppl. 929, 17 N. Y. Civ. Proc. 128 (carpenter); Hobby *v.* Dana, 17 Barb. 111 (insurance hazard); Van Doren *v.* Jelliffe, 1 Misc. 354, 20 N. Y. Suppl. 636 (commissions of real-estate brokers); Pratt *v.* Mosetter, 9 N. Y. Civ. Proc. 351 (care of consigned goods).

Ohio.— State *v.* Ampt, 6 Ohio Dec. (Reprint) 699, 7 Am. L. Rec. 469, charge for legal services.

Rhode Island.— Evans *v.* Commercial Mut. Ins. Co., 6 R. I. 47, treating "bundles of rods" as "bar iron."

Tennessee.— Fry *v.* New York Provident Sav. L. Assur. Soc., (Ch. App. 1896) 38 S. W. 116.

Texas.— Galveston, etc., R. Co. *v.* Collins, 31 Tex. Civ. App. 70, 71 S. W. 560, locomotive inspection.

Vermont.— King *v.* Woodbridge, 34 Vt. 565.

England.— Adams *v.* Peters, 2 C. & K. 723, 61 E. C. L. 723, course of business among bankers in London.

See 20 Cent. Dig. tit. "Evidence," §§ 2255, 2325, 2353.

4. Worcester *v.* Northborough, 140 Mass. 397, 5 N. E. 270, clerk.

5. Taylor *v.* Swett, 3 La. 33, 22 Am. Dec. 156 (marriage custom in sister state); Mostyn *v.* Fabrigas, 1 Cowp. 161.

6. A conclusion of law as to its existence is incompetent. Mills *v.* Hallock, 2 Edw. (N. Y.) 652; Austin *v.* Williams, 2 Ohio 61. See *infra*, XI, F.

7. Price *v.* White, 9 Ala. 563; Haslam *v.* Adams Express Co., 6 Bosw. (N. Y.) 235.

8. Hamilton *v.* Nickerson, 95 Mass. 351; Edwards *v.* Davidson, (Tex. Civ. App. 1904) 79 S. W. 48.

The effect of a custom upon a given contract is a conclusion of law which the witness is not at liberty to state. Haskins *v.* Warren, 115 Mass. 514; Ford *v.* St. Louis, etc., R. Co., 63 Mo. App. 133, holding that a witness cannot testify that a custom is so general and uniform as to create a presumption of the knowledge of it.

9. Wilson *v.* Bauman, 80 Ill. 493.

10. The witness may state a belief derived from the conduct of his own business. Hamilton *v.* Nickerson, 13 Allen (Mass.) 351.

11. King *v.* Woodbridge, 34 Vt. 565.

12. Possession of such experience is a condition precedent to admissibility (Webb *v.* Mears, 45 Pa. St. 222; Evans *v.* Commercial Mut. Ins. Co., 6 R. I. 47; Butte, etc., Consol. Min. Co. *v.* Montana Ore Purchasing Co., 121 Fed. 524, 58 C. C. A. 634. See *supra*, XI, A, 4, a, (II), (III)), and the judge's finding on the point will not as a rule be disturbed (Hygeia Distilled Water Co. *v.* Hygeia Ice Co., 70 Conn. 516, 40 Atl. 534). A retail trader of large transactions may, however, know more about wholesale terms than a wholesale merchant doing a smaller business. Nordlinger *v.* U. S., 115 Fed. 828.

"Experts."— Such witnesses have been spoken of as "experts." Wilder *v.* De Cou, 26 Minn. 10, 1 N. W. 48; Winans *v.* New

state whether a word or phrase used in it has acquired a technical meaning, and if so what it is[13] in any place where the significance is relevant.[14] The terms need not be technical, scientific, or ambiguous in themselves.[15]

C. Inference From Sensation; Ordinary Witness — 1. In General — a. Positive Inferences. Direct inference from observation or other states of consciousness may involve a larger element of reasoning faculty than is involved in the statement of a fact. This happens in a simple way, where a witness goes beyond the instinctive, automatic and, as it were, reflex mental impression which is implied in naming objects and testifies, as he may, to their form,[16] color,[17]

York, etc., R. Co., 21 How. (U. S.) 88, 100, 16 L. ed. 68. Little reason exists for such a use of the term unless every witness testifying to a fact, the knowledge of which is confined to a limited class, is to be so designated. There would seem equal propriety in speaking of a foreigner interpreting his own language to the court as an "expert." Di Sora *v.* Phillipps, 10 H. L. Cas. 624, 33 L. J. Ch. 129, 2 New Rep. 553, 11 Eng. Reprint 1168.

Relevancy of fact.— The fact to be proved must be relevant. Healy *v.* Brandon, 66 Hun (N. Y.) 515, 21 N. Y. Suppl. 390.

13. *California.*— Myers *v.* Tibbals, 72 Cal. 278, 13 Pac. 695, marble cutters.

Georgia.— Featherston *v.* Rounsaville, 73 Ga. 617, fully cured hams.

Illinois.— Elgin City *v.* Joslyn, 136 Ill. 525, 26 N. E. 1090 ("mason work"); Reed *v.* Hobbs, 3 Ill. 297.

Indiana.— Niagara F. Ins. Co. *v.* Greene, 77 Ind. 590, "reasonable time."

Iowa.— Iowa State Sav. Bank *v.* Black, 91 Iowa 490, 59 N. W. 283, "cash that ought to be in the bank."

Louisiana.— Barber Asphalt Pav. Co. *v.* Howcott, 109 La. 692, 33 So. 734 (running foot); Livingston *v.* Heeran, 9 Mart. (La.) 656 ("frente al rio"); Morgan *v.* Livingston, 6 Mart. (La.) 19.

Massachusetts.— Whitney *v.* Boardman, 118 Mass. 242, "with all faults."

Michigan.— Skelton *v.* Fenton Electric Light, etc., Co., 100 Mich. 87, 58 N. W. 609, smoke-stack.

Minnesota.—Cargill *v.* Thompson, 57 Minn. 534, 59 N. W. 638; Wilder *v.* De Cou, 26 Minn. 10, 1 N. W. 48, "race-way."

Missouri.— Heyworth *v.* Miller Grain, etc., Co., 174 Mo. 171, 73 S. W. 498; Gaunt *v.* Pries, 21 Mo. App. 540, "merchantable measurement" of lumber.

Nebraska.— Paxton *v.* State, 59 Nebr. 460, 81 N. W. 383, 80 Am. St. Rep. 689 [*citing* Lancashire Ins. Co. *v.* Callahan, 68 Minn. 277, 71 N. W. 261, 64 Am. St. Rep. 475; Stetson *v.* New Orleans City Bank, 2 Ohio St. 167].

New Jersey.— Wallace *v.* Leber, 55 N. J. L. 195, 47 Atl. 430, sugar trade.

New York.— Nelson *v.* Sun Mut. Ins. Co., 71 N. Y. 453 [*affirming* 40 N. Y. Super. Ct. 417] ("port risk"); Colwell *v.* Lawrence, 38 N. Y. 71 [*affirming* 38 Barb. 643, 24 How. Pr. 324]; Pollen *v.* Le Roy, 30 N. Y. 549; Downs *v.* Sprague, 1 Abb. Dec. 550, 2 Keyes 64 (gas fixtures); Woodruff *v.* Klee, 47 N. Y. App. Div. 638, 62 N. Y. Suppl. 350 (ornamental plastering); Child *v.* Sun Mut. Ins. Co., 3 Sandf. 26 (whaling voyage); Highton *v.* Dessau, 19 N. Y. Suppl. 395 ("mason work"); Cassidy *v.* Fontham, 14 N. Y. Suppl. 151 (fitting ranges not "plumbing"); Astor *v.* Union Ins. Co., 7 Cow. 202 ("furs").

Oregon.— Williams *v.* Poppleton, 3 Oreg. 139.

Pennsylvania.— Carey *v.* Bright, 58 Pa. St. 70, colliery.

Tennessee.— Fry *v.* Provident Sav. L. Assur. Soc., (Ch. App. 1896) 38 S. W. 116, "participating policy."

Texas.— Kelly *v.* Robb, 58 Tex. 377 ("saw timber"); Texas, etc., R. Co. *v.* Mortensen, 27 Tex. Civ. App. 106, 66 S. W. 99 ("having his train under control"); Galveston, etc., R. Co. *v.* Robinett, (Civ. App. 1899) 54 S. W. 263 (train orders); Bonart *v.* Lee, (Civ. App. 1898) 46 S. W. 906 ("medical treatment" does not include extraordinary surgical operations); Missouri, etc., R. Co. *v.* Crane, 13 Tex. Civ. App. 426, 35 S. W. 797.

Wisconsin.— Johnson *v.* Northwestern Nat. Ins. Co., 39 Wis. 87, "loading off shore."

United States.— Winans *v.* New York, etc., R. Co., 21 How. 88, 16 L. ed. 68; U. S. *v.* Breed, 24 Fed. Cas. No. 14,638, 1 Sumn. 159 ("loaf sugar"); Nordlinger *v.* U. S., 115 Fed. 828; Cauca Co. *v.* Colombia, 113 Fed. 1020, 51 C. C. A. 604 (technical terms in foreign language); Erhardt *v.* Ballin, 55 Fed. 968, 5 C. C. A. 363 ("hemmed handkerchiefs").

See 20 Cent. Dig. tit. "Evidence," § 2326.

14. Germania F. Ins. Co. *v.* Francis, 52 Miss. 457, 24 Am. Rep. 674.

15. Whitney *v.* Broadman, 118 Mass. 242; Erhardt *v.* Ballin, 55 Fed. 968, 5 C. C. A. 363, "unhemmed handkerchiefs."

The meaning of familiar words of fixed definition in the vernacular cannot be proved in this way. Goodwin *v.* State, 96 Ind. 550, "monomania."

16. Davis *v.* State, 126 Ala. 44, 28 So. 617 (tracks); Morrisette *v.* Canadian Pac. R. Co., 76 Vt. 267, 56 Atl. 1102 (two-throw railroad switch).

17. Terry *v.* State, 118 Ala. 79, 23 So. 776; State *v.* Buchler, 103 Mo. 203, 15 S. W. 331, where the court said: "A witness is allowed to testify that an object is red in order to distinguish it from other colors. This is nothing more than an impression produced upon his mind upon examination of the object, but he testifies about a subject, upon which common experience and knowledge have

freshness,[18] location,[19] or obvious properties,[20] strength,[21] and the like of material objects as recognized by the ordinary action of the senses.[22] In much the same way a witness may state simple inferences drawn by him from his own conscious subjective sensations, as to his physical condition,[23] mental state,[24] or financial

qualified him to speak; what facts could he state that would give the idea of red as the color of the object."

18. People *v.* Loui Tung, 90 Cal. 377, 27 Pac. 295 (blood); Thomas *v.* State, 67 Ga. 460 (blood); Jackson *v.* U. S., 102 Fed. 473, 42 C. C. A. 452 (cartridges).

19. McDonald *v.* Wood, 118 Ala. 589, 24 So. 86 (city boundaries); Carter *v.* Clark, 93 Me. 225, 42 Atl. 398 (holding that a witness may state whether certain lines will inclose a given lot).

20. Carson *v.* State, 69 Ala. 235 (liquor intoxicating); Merkle *v.* State, 57 Ala. 139 (holding that a witness who had frequently drunk fermented liquors and is able to distinguish them by their taste, although not having any special knowledge of the science of chemistry, is qualified to testify that a particular liquor which he has tasted is or is not fermented); Currier *v.* Boston, etc., R. Co., 34 N. H. 498.

21. Gerbig *v.* New York, etc., R. Co., 27 N. Y. Suppl. 594.

22. Merkle *v.* State, 37 Ala. 139 (taste); Marschall *v.* Laughran, 47 Ill. App. 29 (smell).

23. *California.*— Roche *v.* Redington, 125 Cal. 174, 57 Pac. 890.

Iowa.— Wray *v.* Warner, 111 Iowa 64, 82 N. W. 455 (cured of rupture); Ferguson *v.* Davis County, 57 Iowa 601, 10 N. W. 906 (broken ribs).

Maryland.— Sellman *v.* Wheeler, 95 Md. 751, 54 Atl. 512.

Michigan.— Lindley *v.* Detroit, 131 Mich. 8, 10, 90 N. W. 665 (where the statements, "I attribute the headaches to the injury in my back. It runs right up my back and up the back of my head," were held competent); Holman *v.* Union St. R. Co., 114 Mich. 208, 72 N. W. 202 (no displacement of womb).

Missouri.— Dolan *v.* Moberly, 17 Mo. App. 436, displacement of womb.

New York.— Cass *v.* Third Ave. R. Co., 20 N. Y. App. Div. 591, 47 N. Y. Suppl. 356 (impaired ability to work); Creed *v.* Hartman, 8 Bosw. 123.

Texas.— Atchison, etc., R. Co. *v.* Click, (Civ. App. 1895) 32 S. W. 226.

24. *Alabama.*— Birmingham R., etc., Co. *v.* Jackson, 136 Ala. 279, 34 So. 994 (not aware); Mobile Electric Lighting Co. *v.* Elder, 115 Ala. 138, 21 So. 983 (dissatisfaction).

Florida.— Lane *v.* State, 44 Fla. 105, 32 So. 896, belief.

Georgia.— Alexander *v.* State, 118 Ga. 26, 44 S. E. 851.

Iowa.— Fitzgibbon *v.* Chicago, etc., R. Co., 119 Iowa 261, 93 N. W. 276 (belief); Yeager *v.* Spirit Lake, 115 Iowa 593, 88 N. W. 1095 (expectancy).

Kentucky.— Starr *v.* Com., 97 Ky. 193, 30 S. W. 397, 16 Ky. L. Rep. 843, belief.

Maryland.— Archer *v.* State, 45 Md. 33, expectation of the reasons for it.

Missouri.— Rimel *v.* Hayes, 83 Mo. 200; Loewer *v.* Sedalia, 77 Mo. 431; Wheeler *v.* Chestnut, 95 Mo. App. 546, 69 S. W. 621, reliance.

Nebraska.— Cressler *v.* Rees, 27 Nebr. 515, 43 N. W. 363, 20 Am. St. Rep. 691.

New Hampshire.— Hale *v.* Taylor, 45 N. H. 405.

New York.— Bayliss *v.* Cockcroft, 81 N. Y. 363; Thorn *v.* Helmer, 4 Abb. Dec. 408, 2 Keyes 27; King *v.* Fitch, 2 Abb. Dec. 508, 1 Keyes 432; People *v.* Sully, Sheld. 17 (reliance); Ely *v.* Padden, 13 N. Y. St. 53 (belief).

North Carolina.— Autry *v.* Floyd, 127 N. C. 186, 37 S. E. 208, absence of malice.

North Dakota.— State *v.* Tough, 12 N. D. 425, 96 N. W. 1025, intent.

Ohio.— Grever *v.* Taylor, 53 Ohio St. 621, 42 N. E. 829, influenced.

Pennsylvania.— Frame *v.* William Penn Coal Co., 97 Pa. St. 309.

Rhode Island.— Charbonnel *v.* Seabury, 23 R. I. 543, 51 Atl. 208, reliance.

Texas.— Harrison *v.* State, (Cr. App. 1894) 25 S. W. 284 (thought); Dallas Electric Co. *v.* Mitchell, (Civ. App. 1903) 76 S. W. 935 (belief); Rice *v.* Melott, (Civ. App. 1903) 74 S. W. 935 (knowledge); Mayers *v.* McNeese, (Civ. App. 1902) 71 S. W. 68 (intention); Fox *v.* Robbins, (Civ. App. 1902) 70 S. W. 597 (intention); International, etc., R. Co. *v.* Newburn, (Civ. App. 1900) 60 S. W. 429 (thought he had time).

Wisconsin.— Strasser *v.* Goldberg, 120 Wis. 621, 98 N. W. 554 (reliance); Yerkes *v.* Northern Pac. R. Co., 112 Wis. 184, 88 N. W. 33, 88 Am. St. Rep. 961.

United States.— Rucker *v.* Bollers, 80 Fed. 504, 25 C. C. A. 600, intention.

Cross-examination as to relevant mental state is permitted. Montgomery *v.* State, (Tex. Cr. App. 1903) 77 S. W. 788, knowledge. See, generally, WITNESSES.

Grounds of rejection.— Irrelevancy is frequently the real ground for rejecting evidence of the mental state of the witness (Laster *v.* Blackwell, 128 Ala. 143, 30 So. 663; Manchester F. Assur. Co. *v.* Feibelman, 118 Ala. 308, 23 So. 759, whom witness thought he was dealing with; Mobile Furniture Commission Co. *v.* Little, 108 Ala. 399, 19 So. 443; Tubins *v.* District of Columbia, 21 App. Cas. (D. C.) 267, difficulty in distinguishing; Carey *v.* Moore, 119 Ga. 92, 45 S. E. 998, intention with which an act was done; Colborn *v.* Fry, 23 Ind. App. 485, 55 N. E. 621; Corn Exch. Bank *v.* Schuttleworth, 99 Iowa 536, 68 N. W. 827, whose property a receiver "considered" that a certain note was; Downing *v.* Buck, (Mich. 1904) 98 N. W. 388, undisclosed purpose; Carr *v.* State, 23 Nebr. 749, 37 N. W. 630;

condition.[25] It follows that when a witness is injured he may testify as to his pain[26] or symptoms,[27] or as to the general effect of the injuries upon his mind or body, so far as his knowledge on the subject enables him to go, although he cannot draw technical inferences as the existence of internal trouble,[28] the effect on health,[29] whether the injuries are permanent,[30] and the like.

b. Negative Inferences. The inference that something did not exist because one who could have done so did not notice it may be designated a negative inference. In proportion as the mental process is of the necessary intuitive nature characteristic of a mere statement of fact, as for example where it is clearly shown, either directly[31] or by relevant facts,[32] that if a certain event had occurred or fact existed the witness must have observed it, the evidence is received,[33] and the observing witness is permitted to state in connection with such proof the probability[34] or certainty that he would have heard,[35] seen,[36] or in other ways observed an alleged occurrence had it actually taken place.[37] On the other hand, where the inference is largely the result of reason, it should be rejected, both in civil[38] and criminal[39] cases.

c. Reason For Admissibility. In most instances a witness is permitted to state other than intuitive inference from his sensations, because he can state the exact photographic effect on his mind only in that way. This is more nearly true of appearances than of acts.[40] In general if constituent impressions are so many,[41]

Boyd *v.* New York Security, etc., Co., 176 N. Y. 556, 613, 68 N. E. 1114, knowledge of any lien given to any one on a particular fund; Jensen *v.* McCormick, 26 Utah 142, 72 Pac. 630; State *v.* Kilburn, 16 Utah 187, 52 Pac. 277; Holtz *v.* State, 76 Wis. 99, 44 N. W. 1107. See EVIDENCE, 16 Cyc. 1131); although the evidence may be also objectionable as tending to prove character (People *v.* Foglesong, 116 Mich. 556, 74 N. W. 730; Bennett *v.* State, 39 Tex. Cr. 639, 48 S. W. 61, dangerous man; Underwood *v.* State, 39 Tex. Cr. 409, 46 S. W. 245; State *v.* Porter, 16 Utah 192, 52 Pac. 175; State *v.* Kilburn, 16 Utah 187, 52 Pac. 277; House *v.* House, 102 Va. 235, 46 S. E. 299. See EVIDENCE, 16 Cyc. 1263). Rejections have at times been based on the ground that the statement was an inference. Com. *v.* Daniels, 2 Pars. Eq. Cas. (Pa.) 332. A person cannot testify to his own mental unsoundness. O'Connell *v.* Beecher, 21 N. Y. App. Div. 298, 47 N. Y. Suppl. 334.

25. Chenault *r.* Walker, 14 Ala. 151, what a person is "worth."

26. North Chicago St. R. Co. *v.* Cook, 145 Ill. 551, 33 N. E. 958; O'Brien *v.* Chicago, etc., R. Co., 89 Iowa 644, 57 N. W. 425; Wright *v.* Ft. Howard, 60 Wis. 119, 18 N. W. 750, 50 Am. Rep. 350.

27. Bloomington *v.* Schrock, 17 Ill. App. 40, labor pains. A skilled observer may state his own symptoms. Chicago, etc., R. Co. *v.* Lambert, 119 Ill. 255, 10 N. E. 219, statement by physician that he is paralyzed.

28. Lombard, etc., Pass. R. Co. *v.* Christian, 124 Pa. St. 114, 16 Atl. 628.

29. Monongahela Water Co. *v.* Stewartson, 96 Pa. St. 436.

30. Price *r.* Charles Warner Co., 1 Pennew. (Del.) 462, 42 Atl. 699; Atlanta St. R. Co. *v.* Walker, 93 Ga. 462, 21 S. E. 48; Baltimore, etc., Turnpike Co. *v.* Cassell, 66 Md. 419, 7 Atl. 805, 59 Am. Rep. 175; Pfau *v.* Alteria, 23 Misc. (N. Y.) 693, 52 N. Y. Suppl. 88.

31. Com. *v.* Cooley, 6 Gray (Mass.) 350.

32. State *v.* Kidd, 89 Iowa 54, 56 N. W. 263.

33. Maynard *r.* People, 135 Ill. 416, 25 N. E. 740; State *r.* Kidd, 89 Iowa 54, 56 N. W. 263; State *v.* Dillon, 74 Iowa 653, 38 N. W. 525.

34. Pittsburgh, etc., R. Co. *v.* Story, 104 Ill. App. 132.

35. Maynard *v.* People, 135 Ill. 416, 25 N. E. 740; Chicago, etc., R. Co. *v.* Dillon, 24 Ill. App. 203 [*affirmed* in 123 Ill. 570, 15 N. E. 181, 5 Am. St. Rep. 559] (signal given); Crane *r.* Michigan Cent. R. Co., 107 Mich. 511, 65 N. W. 527 (signals given); Casey *r.* New York Cent., etc., R. Co., 6 Abb. N. Cas. (N. Y.) 104 (bell rung); Galveston, etc., R. Co. *v.* Duelm, (Tex. Civ. App. 1893) 23 S. W. 596 (signal given).

36. Cochran *r.* Miller, 13 Iowa 128 (medicine administered); Territory *v.* Clayton, 8 Mont. 1, 19 Pac. 293; State *v.* Avery, 44 N. H. 392.

37. **Where all the facts are before the jury** the inference will be rejected. Com. *r.* Cooley, 6 Gray (Mass.) 350. See *supra*, XI, A, 4, b, c.

38. East Tennessee, etc., R. Co. *r.* Watson, 90 Ala. 41, 7 So. 813; Marcott *v.* Marquette, etc., R. Co., 49 Mich. 99, 13 N. W. 374, whether a locomotive whistle could have been blown without being heard.

39. Bolling *r.* State, 54 Ark. 588, 16 S. W. 658.

The reasons for rejection are stronger in proportion as the conclusion is based on the use of the reasoning faculty. Tiller *v.* State, 96 Ga. 430, 23 S. E. 825.

40. In this connection the inability of memory to recall the observations of an extended conversation seems almost as potential as the difficulty of stating accurately recent or fully remembered facts. De Witt *r.* Barly, 9 N. Y. 371.

41. *Alabama.*—Mayberry *v.* State, 107 Ala. 64, 18 So. 219, looked like a pistol.

interwoven, subtle,[42] or illusive[43] as to prevent proper presentation to the jury or suitable coördination by them, the witness may state his inference[44] or conclusion[45] preceding[46] or otherwise accompanying it by a detailed enumeration of

Colorado.— Denver, etc., R. Co. *v.* Pulaski Irrigating Ditch Co., 19 Colo. 367, 35 Pac. 910.

Connecticut.— Sydleman *v.* Beckwith, 43 Conn. 9; Clinton *v.* Howard, 42 Conn. 294, 308 (where the court said, speaking of the alarm of a horse: "The fright is the result of a combination of form, color and relative position, which would elude the effort of any witness clearly and fully to describe"); Porter *v.* Pequonnoc Mfg. Co., 17 Conn. 249; Morse *v.* State, 6 Conn. 9.

Illinois.— Charter *v.* Graham, 56 Ill. 19; Salem *v.* Webster, 95 Ill. App. 120; Carter *v.* Carter, 37 Ill. App. 219 [*affirmed* in 152 Ill. 434, 28 N. E. 948, 38 N. E. 669].

Indiana.— Sievers *v.* Peters Box, etc., Co., 151 Ind. 642, 50 N. E. 877, 52 N. E. 399.

Iowa.— Pelamourges *v.* Clark, 9 Iowa 1.

Kansas.— Atchison, etc., R. Co. *v.* Miller, 39 Kan. 419, 18 Pac. 486; Parsons *v.* Lindsay, 26 Kan. 426; State *v.* Folwell, 14 Kan. 105.

Louisiana.— Baillie *v.* Toronto Western Assur. Co., 49 La. Ann. 658, 21 So. 736.

Massachusetts.— Com. *v.* Kennedy, 170 Mass. 18, 48 N. E. 770 (sales not common); Com. *v.* Sturtivant, 117 Mass. 122, 19 Am. Rep. 401.

South Carolina.— Jones *v.* Fuller, 19 S. C. 66, 45 Am. Rep. 761.

See 20 Cent. Dig. tit. "Evidence," § 2149 *et seq.*

42. Holland *v.* Zollner, 102 Cal. 633, 36 Pac. 930, 37 Pac. 231.

43. Holland *v.* Zollner, 102 Cal. 633, 36 Pac. 930, 37 Pac. 231, transitory and evanescent.

44. *California.*— Holland *v.* Zollner, 102 Cal. 633, 36 Pac. 930, 37 Pac. 231.

Kansas.— State *v.* Folwell, 14 Kan. 105, 110, where the court said: "Duration, distance, dimension, velocity, etc., are often to be proved only by the opinion of witnesses, depending, as they do, on many minute circumstances which cannot fully be detailed by witnesses."

Massachusetts.— Com. *v.* Sturtivant, 117 Mass. 122, 19 Am. Rep. 401.

Michigan.— Prentis *v.* Bates, 93 Mich. 234, 53 N. W. 153, 17 L. R. A. 494.

Missouri.— Eyerman *v.* Sheehan, 52 Mo. 221.

Nebraska.— Russell *v.* State, 66 Nebr. 497, 92 N. W. 751.

New York.— De Witt *v.* Barly, 17 N. Y. 340.

North Carolina.— Clary *v.* Clary, 24 N. C. 78.

Ohio.— Cleveland, etc., R. Co. *v.* Ullom, 20 Ohio Cir. Ct. 512, 11 Ohio Cir. Dec. 321.

Pennsylvania.— Beardslee *v.* Columbia Tp., 5 Lack. Leg. N. 290, road dangerous.

Vermont.— Bates *v.* Sharon, 45 Vt. 474; Cavendish *v.* Troy, 41 Vt. 99.

United States.— Baltimore, etc., R. Co. *v.* Rambo, 59 Fed. 75, 8 C. C. A. 6.

See 20 Cent. Dig. tit. "Evidence," § 2149 *et seq.*

45. *Connecticut.*— Clinton *v.* Howard, 42 Conn. 294, stone pile liable to frighten horses.

Illinois.— Carter *v.* Carter, 152 Ill. 434, 28 N. E. 948, 38 N. E. 669, where it was held that in a divorce case a witness who in an adjoining room at a hotel heard certain words and other sounds on the other side of a door may state that in his opinion an act of sexual intercourse was being there committed.

Iowa.— Lacy *v.* Kossuth County, 106 Iowa 16, 75 N. W. 689 (financial condition); State *v.* Brown, 86 Iowa 121, 53 N. W. 92 (kept company).

Minnesota.— Yanish *v.* Tarbox, 57 Minn. 245, 59 N. W. 300, correspondence of flat to premises.

New York.— People *v.* Eastwood, 14 N. Y. 562; Dewitt *v.* Barley, 9 N. Y. 371, 390 (where the court said: "It would be a hopeless task for the most gifted person, to clothe in language all the minute particulars, with their necessary accompaniments and qualifications, which have led to the conclusion which he has formed"); People *v.* Greenfield, 23 Hun (N. Y.) 454 (where it was said that if the question, instead of being whether a substance was blood, had been whether it was the blood of a human being or some other animal, the known difficulty of distinguishing between the two, without resorting to scientific or professional tests for that purpose, would perhaps have been sufficient to sustain an objection to the evidence without proof of such difficulty, but as the case stood the evidence objected to referred to a common matter of which an ordinary witness could speak).

Texas.— Barrett *v.* Eastham, 28 Tex. Civ. App. 189, 67 S. W. 198 (returned loan paid for piece of land); Galveston, etc., R. Co. *v.* Brown, (Tex. Civ. App. 1900) 59 S. W. 930 (holding that a conductor might testify that he "had control" of a train); San Antonio, etc., R. Co. *v.* Lynch, (Tex. Civ. App. 1897) 40 S. W. 631 (where it was held that a witness may state that it was a common thing for passengers to ride on the freight trains of defendant company); Texas-Mexican R. Co. *v.* King, 14 Tex. Civ. App. 290, 37 S. W. 34 (where it was held that a witness may state that a brakeman undertook to make a coupling "in the usual manner").

Vermont.— Cavendish *v.* Troy, 41 Vt. 99.

See 20 Cent. Dig. tit. "Evidence," § 2149 *et seq.*

A mere characterization of a person in a moral aspect has been rejected. Com. *v.* Mullen, 150 Mass. 394, 23 N. E. 51, lying.

46. State *v.* Knight, 43 Me. 11; Baltimore, etc., Co. *v.* Cassell, 66 Md. 419, 7 Atl. 805, 59 Am. Rep. 175; Com. *v.* Sturtivant, 117 Mass. 122, 19 Am. Rep. 401; People *v.* Greenfield, 23 Hun (N. Y.) 454.

such facts as permit of individual statement.[47] The facts given serve: (1) To show the adequacy of the witness' knowledge[48] and his powers and opportunities for observation;[49] (2) to test the reasonableness of the inference drawn from the basis shown;[50] and (3) to separate so far as possible the element of constituent fact from that of inference; sustaining a somewhat similar relation to the inference of the percipient witness that the hypothetical question bears to the judgment of the expert.[51] It follows that a directly percipient witness cannot testify on the basis of hypothetically stated facts established by the evidence of other witnesses.[52] It follows also under the general rule that where the inference from

47. *Alabama.*— Birmingham R., etc., Co. *v.* Baylor, 101 Ala. 488, 13 So. 793; Shook *v.* Pate, 50 Ala. 91 (correctness of survey); Stubbs *v.* Houston, 33 Ala. 555; Powell *v.* State, 25 Ala. 21; Andrews *v.* Jones, 10 Ala. 460.

California.— Healy *v.* Visalia, etc., R. Co., 101 Cal. 585, 36 Pac. 125.

Connecticut.— Clinton *v.* Howard, 42 Conn. 294; Porter *v.* Pequonnoc Mfg. Co., 17 Conn. 249.

Georgia.— Atlanta Consol. St. R. Co. *v.* Bagwell, 107 Ga. 157, 33 S. E. 191; Augusta, etc., R. Co. *v.* Dorsey, 68 Ga. 228; Ford *v.* Kennedy, 64 Ga. 537; Berry *v.* State, 10 Ga. 511.

Indiana.— Carthage Turnpike Co. *v.* Andrews, 102 Ind. 138, 1 N. E. 364, 52 Am. Rep. 653; Colee *v.* State, 75 Ind. 511; Leach *v.* Prebster, 39 Ind. 492.

Iowa.— State *v.* Felter, 25 Iowa 67.

Kansas.— U. S. Express Co. *v.* Anthony, 5 Kan. 490.

Kentucky.— N. N. & M. V. Co. *v.* Wilson, 16 Ky. L. Rep. 262.

Mississippi.— Torrance *v.* Hurst, Walk. 403.

Nebraska.— Schlencker *v.* State, 9 Nebr. 241, 1 N. W. 857.

New York.— Hardenburgh *v.* Cockroft, 5 Daly 79.

Pennsylvania.— *Ex p.* Springer, 4 Pa. L. J. Rep. 188.

South Carolina.— Hicks *v.* Southern R. Co., 63 S. C. 559, 41 S. E. 753; Bridger *v.* Asheville, etc., R. Co., 25 S. C. 24.

Texas.— San Antonio, etc., R. Co. *v.* Parr, (Civ. App. 1894) 26 S. W. 861.

Vermont.— Morse *v.* Crawford, 17 Vt. 499, 44 Am. Dec. 349.

See 20 Cent. Dig. tit. "Evidence," § 2292.

"The admissibility of the evidence rests upon three necessary conditions: 1. That the witness detail to the jury, so far as he is able, the facts and circumstances upon which his opinion is based, in order that the jury may have some basis by which to judge of the value of the opinion. 2. That the subject-matter to which the testimony relates cannot be reproduced and described to the jury precisely as it appeared to the witness at the time. And 3. That the facts upon which the witness is called upon to express his opinion are such as men in general are capable of comprehending and understanding. When these conditions have been complied with or fulfilled in a given case, the court must then pass upon the question whether the witness had the opportunity and means of inquiry, and was careful and intelligent in his observation and examination. It is not the mere qualification of the witness, but the extent and thoroughness of his examination, the specific facts to which the inquiry relates and the general character of those facts, as affording to one, having his opportunity to judge, the requisite means to form an opinion." People *v.* Hopt, 4 Utah 247, 253, 9 Pac. 407.

Cross-examination.— The facts may, however, be called for upon cross-examination (Steiner *v.* Tranum, 98 Ala. 315, 13 So. 365; Woodstock Iron Co. *v.* Roberts, 87 Ala. 436, 6 So. 349; Bennett *v.* Fail, 26 Ala. 605; Lund *v.* Tyngsborough, 9 Cush. (Mass.) 36; People *v.* Greenfield, 23 Hun (N. Y.) 454); the witness testifying to a mere synopsis of the facts, leaving the opposite party to develop on cross-examination the basis of the inference (People *v.* Driscoll, 9 N. Y. St. 820; Fulcher *v.* State, 28 Tex. App. 465, 13 S. W. 750). Under the rule, "when the opinion is the mere shorthand rendering of facts, then the opinion can be given, subject to cross-examination as to the facts upon which it is based," evidence that, after the shooting, the deceased spoke to and "identified" defendant as the man who shot him is competent and not a mere expression of opinion. Fulcher *v.* State, 28 Tex. App. 465, 13 S. W. 750.

Facts not stated.— Where an essential fact is not stated (People *v.* Smith, 172 N. Y. 210, 64 N. E. 814), *a fortiori*, where no constituent facts are given (Pioneer Sav., etc., Co. *v.* Peck, 20 Tex. Civ. App. 111, 49 S. W. 160), the inference will be rejected.

48. See, generally, as to knowledge of witness, *supra*, XI, A, 4, a, (II), (III). The witness is not permitted to add to the facts from his previous knowledge, although experience necessarily plays an important part in determining the inference itself. State *v.* Stickley, 41 Iowa 232.

49. See *supra*, XI, A, 4, a, (II), (III).

50. Hunt *v.* Hunt, 3 B. Mon. (Ky.) 575; Sloan *v.* Maxwell, 3 N. J. Eq. 563; Eaton *v.* Rice, 8 N. H. 378.

51. See *infra*, XI, H, 2.

52. *Alabama.*— Ragland *v.* State, 125 Ala. 12, 27 So. 983.

Connecticut.— Sydleman *v.* Beckwith, 43 Conn. 9; Dunham's Appeal, 27 Conn. 192.

Illinois.— Pittard *v.* Foster, 12 Ill. App. 132.

Michigan.— Sagar *v.* Hogmire, (1896) 66 N. W. 327.

New York.— Paige *v.* Hazard, 5 Hill 603.

sensation is not a quasi-necessary one, as in the ordinary case of a fact,[53] and the sensations from which the inference is drawn can be placed before the jury with satisfactory completeness,[54] and these facts in turn can be properly coördinated by the jury,[55] no necessity is shown for accepting such an inference and it is accordingly rejected.[56]

2. Appearance — a. Animate Objects — (i) *In General.* A witness may, after enumerating such as he can of the constituent facts,[57] state the effect on his mind of the numerous phenomena which constitute the impression of appearance, whether of animate or inanimate objects, it being affirmatively shown that the

Ohio.— Hayes *v.* Smith, 62 Ohio St. 161, 56 N. E. 879.

Pennsylvania.— Rambler *v.* Tryon, 7 Serg. & R. 90, 10 Am. Dec. 444.

Texas.— Cannon *v.* State, 41 Tex. Cr. 467, 56 S. W. 351.

53. See *supra*, XI, B.

54. *Alabama.*—Parker *v.* Mise, 27 Ala. 480, 62 Am. Dec. 776; Hatchett *v.* Gibson, 13 Ala. 587.

Arkansas.— Little Rock Traction, etc., Co. *v.* Nelson, 66 Ark. 494, 52 S. W. 7.

Georgia.— Brush Electric Light, etc., Co. *v.* Wells, 103 Ga. 512, 30 S. E. 533.

Illinois.— West Chicago St. R. Co. *v.* Fishman, 169 Ill. 196, 48 N. E. 447; Pulver *v.* Rochester German Ins. Co., 35 Ill. App. 24.

Indiana.— Sievers *v.* Peters Box, etc., Co., 151 Ind. 642, 50 N. E. 877, 52 N. E. 399; Carthage Turnpike Co. *v.* Andrews, 102 Ind. 138, 1 N. E. 364, 52 Am. Rep. 653; Elkhart, etc., R. Co. *v.* Waldorf, 17 Ind. App. 29, 46 N. E. 88.

Iowa.— Parkhurst *v.* Masteller, 57 Iowa 474, 10 N. W. 864.

Kansas.— Atchison, etc., R. Co. *v.* Mason, 4 Kan. App. 391, 46 Pac. 31.

Maryland.— Tucker *v.* State, 89 Md. 471, 43 Atl. 778, 44 Atl. 1004, 46 L. R. A. 181 (life endangered); Baltimore, etc., Turnpike Road *v.* Leonhardt, 66 Md. 70, 5 Atl. 346.

Massachusetts.— Parker *v.* Boston, etc., Steamboat Co., 109 Mass. 449.

Michigan.— Coller *v.* Porter, 88 Mich. 549, 50 N. W. 658.

Mississippi.— Louisville, etc., R. Co. *v.* Natchez, 67 Miss. 399, 7 So. 350.

Missouri.—Madden *v.* Missouri Pac. R. Co., 50 Mo. App. 666.

New York.— Van Wycklen *v.* Brooklyn, 118 N. Y. 424, 24 N. E. 179; Voisin *v.* Commercial Mut. Ins. Co., 62 Hun 4, 16 N. Y. Suppl. 410.

Oregon.— State *v.* Barrett, 33 Oreg. 194, 54 Pac. 807.

Pennsylvania.— Musick *v.* Latrobe, 184 Pa. St. 375, 39 Atl. 226; Auberle *v.* McKeesport, 179 Pa. St. 321, 36 Atl. 212; Cookson *v.* Pittsburg, etc., R. Co., 179 Pa. St. 184, 36 Atl. 194; Graham *v.* Pennsylvania Co., 139 Pa. St. 149, 21 Atl. 151, 12 L. R. A. 293, railroad platform.

Texas.—Robinson *v.* State, (Cr. App. 1900) 57 S. W. 811.

United States.— Manufacturers' Acc. Indemnity Co. *v.* Dorgan, 58 Fed. 945, 7 C. C. A. 581, 22 L. R. A. 620.

See 20 Cent. Dig. tit. "Evidence," § 2149 *et seq.* See also *supra*, XI, A, 4, b.

55. *Georgia.*— Parker *v.* Chambers, 24 Ga. 518.

Illinois.— North Kankakee St. R. Co. *v.* Blatchford, 81 Ill. App. 609.

Kansas.— Parsons *v.* Lindsay, 26 Kan. 426.

Maryland.—Baltimore, etc., Turnpike Road *v.* Leonhardt, 66 Md. 70, 5 Atl. 346.

Massachusetts.— New England Glass Co. *v.* Lovell, 7 Cush. 319.

Michigan.— Ireland *v.* Cincinnati, etc., R. Co., 79 Mich. 163, 44 N. W. 426.

Oregon.— State *v.* Mims, 36 Oreg. 315, 61 Pac. 888, advantage in fight.

South Carolina.— State *v.* Taylor, 57 S. C. 483, 35 S. E. 729, 76 Am. St. Rep. 575, ability to hear.

Vermont.— Clifford *v.* Richardson, 18 Vt. 620.

See 20 Cent. Dig. tit. "Evidence," § 2149 *et seq.* See also *supra*, XI, A, 4, b.

Facts not within experience of men in general.— It is not material that the facts stated are those observed by skilled or trained witnesses and are so far removed from the experience of men in general that a jury could not presumably draw the correct inference if these facts could have been placed before them exactly as observed by the witness. Pennsylvania Co. *v.* Conlan, 101 Ill. 93 (switch-men); Koccis *v.* State, 56 N. J. L. 44, 27 Atl. 800; Lund *v.* Masonic L. Assoc., 81 Hun (N. Y.) 287, 30 N. Y. Suppl. 775.

Where the jury cannot coördinate the facts it is not necessary to state them. Virginia-Carolina Chemical Co. *v.* Kirven, 57 S. C. 445, 35 S. E. 745.

56. See the cases cited *supra*, notes 54, 55.

On the other hand, it has been said that one acquainted with the material facts of a case and their surroundings may testify, regardless of whether able to qualify as an expert or not, by stating the reasons for his inference. Killian *v.* Augusta, etc., R. Co., 78 Ga. 749, 3 S. E. 621; Augusta, etc., R. Co. *v.* Dorsey, 68 Ga. 228, holding that the opinion of one who is not an expert, together with his reasons therefor, is competent as to any question upon which an expert would be allowed to give an opinion without his reasons.

57. *District of Columbia.*— District of Columbia *v.* Haller, 4 App. Cas. 405.

Georgia.— Southern L. Ins. Co. *v.* Wilkinson, 53 Ga. 535 (health); Riggins *v.* Brown, 12 Ga. 271; Crawford *v.* Andrews, 6 Ga. 244.

Indiana.— Cleveland, etc., R. Co. *v.* Gray, 148 Ind. 266, 46 N. E. 675 (health); Louisville, etc., R. Co. *v.* Holzapple, 12 Ind. App. 301, 38 N. E. 1107 (health).

witness had adequate opportunities for observation,[58] that the constituent facts cannot be fully placed before the jury,[59] and that the ultimate fact is relevant to the issue.[60]

(II) *Bodily Condition.* A witness may state the apparent physical condition of a man[61] or of cattle,[62] horses,[63] or other animals;[64] or as to what are more distinctly inferences from animate bodily phenomena, as the existence of a state of

New York.— Thompson *v.* Hall, 45 Barb. 214, insolvency.

South Carolina.— Seibles *v.* Blackwell, 1 McMull. 56.

Tennessee.— Morton *v.* Moore, 3 Head 480.

Texas.— Galloway *v.* San Antonio, etc., R. Co., (Civ. App. 1903) 78 S. W. 32.

Vermont.— Richardson *v.* Hitchcock, 28 Vt. 757; Sherman *v.* Blodgett, 28 Vt. 149.

See 20 Cent. Dig. tit. "Evidence," § 2292.

58. Hopkins *v.* Bowers, 111 N. C. 175, 16 S. E. 1. See *supra*, XI, A, 4, a, (II), (III).

59. Cleveland, etc., R. Co. *v.* Gray, 148 Ind. 266, 46 N. E. 675. See *supra*, XI, A, 4, b.

60. Spangler *v.* State, 41 Tex. Cr. 424, 55 S. W. 326. See *supra*, XI, A, 4, a.

61. *Alabama.*— Birmingham R., etc., Co. *v.* Franscomb, 124 Ala. 621, 27 So. 508 (weak); Terry *v.* State, 118 Ala. 79, 23 So. 776 (neck broken); Burton *v.* State, 107 Ala. 108, 18 So. 284 (looked paler than usual).

California.— People *v.* Barney, 114 Cal. 554, 47 Pac. 41, holding that a person not a physician could say whether, when she examined a child, there was a hymen.

District of Columbia.— Metropolitan R. Co. *v.* Martin, 15 App. Cas. 552.

Florida.— Fields *v.* State, (1903) 35 So. 185; Mitchell *v.* State, 43 Fla. 584, 31 So. 242; Higginbotham *v.* State, 42 Fla. 573, 29 So. 410, 89 Am. St. Rep. 237.

Illinois.— West Chicago St. R. Co. *v.* Fishman, 169 Ill. 196, 48 N. E. 447; Chicago City R. Co. *v.* Van Vleck, 143 Ill. 480, 32 N. E. 262, where it is held that witnesses who are not experts are competent to testify whether a person with whom they are familiarly associated is in good or bad health, has good or bad sight and hearing, is lame or has the natural use of his limbs, and also whether on certain occasions he was unconscious.

Iowa.— Reininghaus *v.* Merchants' L. Assoc., 116 Iowa 364, 89 N. W. 1113; Hertrich *v.* Hertrich, 114 Iowa 643, 87 N. W. 689, 89 Am. St. Rep. 389; Wimber *v.* Iowa Cent. R. Co., 114 Iowa 551, 87 N. W. 505; State *v.* Wright, 112 Iowa 436, 84 N. W. 541; O'Brien *v.* Chicago, etc., R. Co., 89 Iowa 644, 57 N. W. 425.

Kansas.— Topeka *v.* Griffey, 6 Kan. App. 920, 51 Pac. 296.

Maryland.— Baltimore, etc., Turnpike Co. *v.* Cassell, 66 Md. 419, 7 Atl. 805, 59 Am. Rep. 175.

Massachusetts.— O'Neil *v.* Hanscom, 175 Mass. 313, 56 N. E. 587, broken down, nervous, incoherent, etc.

Minnesota.— Hall *v.* Austin, 73 Minn. 134, 75 N. W. 1121 (pale); Tierney *v.* Minneapolis, etc., R. Co., 33 Minn. 311, 23 N. W. 229, 53 Am. Rep. 35.

New York.— Linsday *v.* People, 63 N. Y. 143 (turned pale); Farrell *v.* Metropolitan St. R. Co., 51 N. Y. App. Div. 456, 64 N. Y. Suppl. 709; Corbett *v.* Troy, 53 Hun 228, 6 N. Y. Suppl. 381; Sherman *v.* Oneonta, 21 N. Y. Suppl. 137; Staring *v.* Western Union Tel. Co., 11 N. Y. Suppl. 817.

Ohio.— Myers *v.* Lucas, 16 Ohio Cir. Ct. 545, 8 Ohio Cir. Dec. 431.

Tennessee.— Norton *v.* Moore, 3 Head 480.

Vermont.— Tenney *v.* Smith, 63 Vt. 520, 22 Atl. 659; State *v.* Ward, 61 Vt. 153, 17 Atl. 483, turned pale.

See 20 Cent. Dig. tit. "Evidence," §§ 2167, 2197, 2238.

Comparative condition.— A witness may state an inference as to the bodily condition in some relevant particular of one person as compared to that of another. Brownell *v.* People, 38 Mich. 732, strength. It has been held, however, that the relative strength of two persons cannot be stated by one who has never seen the matter tested but judges entirely from appearances. Stephenson *v.* State, 110 Ind. 358, 11 N. E. 360, 59 Am. Rep. 216.

Facts of physical condition.— He may testify to the existence of mere facts, as the physical development (Allen's Appeal, 99 Pa. St. 196, 44 Am. Rep. 101) of a child (Hubbard *v.* State, 72 Ala. 164; Jackson *v.* State, 29 Tex. App. 458, 16 S. W. 247, skeleton that of a child) or fœtus (Gray *v.* Brooklyn Heights R. Co., 72 N. Y. App. Div. 424, 76 N. Y. Suppl. 20, similarity to another fœtus), that a child is a "cripple" (Illinois, etc., R. Co. *v.* Bandy, 88 Ill. App. 629), or as to indications of race (Hare *v.* Board of Education, 113 N. C. 9, 18 S. E. 55, African blood; Hopkins *v.* Bowers, 111 N. C. 175, 16 S. E. 1, mixed blood; State *v.* Jacobs, 51 N. C. 284). An expert may be required to state from observation the exact proportion of negro blood. Hare *v.* Board of Education, *supra*.

62. People *v.* Machado, (Cal. 1900) 63 Pac. 66 ("slunk calf"); Grayson *v.* Lynch, 163 U. S. 468, 479, 16 S. Ct. 1064, 41 L. ed. 230 (symptoms of Texas fever).

63. *Alabama.*— East Tennessee, etc., R. Co. *v.* Watson, 90 Ala. 41, 7 So. 813.

Indiana.— House *v.* Fort, 4 Blackf. 293.

Michigan.— Rogers *v.* Ferris, 107 Mich. 126, 64 N. W. 1048.

New Hampshire.— State *v.* Avery, 44 N. H. 392; Spear *v.* Richardson, 34 N. H. 428; Willis *v.* Quimby, 31 N. H. 485; Patterson *v.* Colebrook, 29 N. H. 94.

New York.— Harris *v.* Panama R. Co., 36 N. Y. Super. Ct. 373.

Vermont.— State *v.* Ward, 61 Vt. 153, 17 Atl. 483.

64. Rarden *v.* Cunningham, 136 Ala. 263, 34 So. 26, mule blind.

apparent health,[65] or, on the other hand, the existence of a state of apparent sickness or disease.[66] Such an observer may also state a change in apparent condition,[67]

65. *Alabama.*— Barker *v.* Coleman, 35 Ala. 221; Wilkinson *v.* Moseley, 30 Ala. 562; Bennett *v.* Fail, 26 Ala. 605.

California.— Robinson *v.* Exempt Fire Co., 103 Cal. 1, 36 Pac. 955, 42 Am. St. Rep. 93, 24 L. R. A. 715.

District of Columbia.—Metropolitan R. Co. *v.* Martin, 15 App. Cas. 552.

Georgia.— Southern L. Ins. Co. *v.* Wilkinson, 53 Ga. 535; Brown *v.* Lester, Ga. Dec. 77.

Illinois.— Chicago City R. Co. *v.* Van Vleck, 143 Ill. 480, 32 N. E. 262; Salem *v.* Webster, 95 Ill. App. 120 [*affirmed* in 192 Ill. 369, 61 N. E. 323]; Ashley Wire Co. *v.* McFadden, 66 Ill. App. 26.

Indiana.— Cleveland, etc., R. Co. *v.* Gray, 148 Ind. 266, 46 N. E. 675; Louisville, etc., R. Co. *v.* Holsapple, 12 Ind. App. 301, 38 N. E. 1107.

Iowa.— State *v.* Wright, 112 Iowa 436, 84 N. W. 541; Bever *v.* Spangler, 93 Iowa 576, 61 N. W. 1072.

Massachusetts.— Parker *v.* Boston, etc., Steamboat Co., 109 Mass. 449.

New Hampshire.— Spear *v.* Richardson, 34 N. H. 428.

New York.— Cannon *v.* Brooklyn City R. Co., 9 Misc. 282, 29 N. Y. Suppl. 722.

Pennsylvania.— Baldi *v.* Metropolitan Ins. Co., 18 Pa. Super. Ct. 599, where it was held that the jury should be cautioned as to the weight to be given such evidence.

Texas.— Morrison *v.* State, 40 Tex. Cr. 473, 51 S. W. 358.

Vermont.— Billings *v.* Metropolitan L. Ins. Co., 70 Vt. 477, 41 Atl. 516 (sound health); State *v.* Ward, 61 Vt. 153, 181, 17 Atl. 483; Stowe *v.* Bishop, 58 Vt. 498, 3 Atl. 494, 56 Am. Rep. 569; Knight *v.* Smythe, 57 Vt. 529; Bates *v.* Sharon, 45 Vt. 474; Crane *v.* Northfield, 33 Vt. 124.

Wisconsin.— Smalley *v.* Appleton, 70 Wis. 340, 35 N. W. 729.

See 20 Cent. Dig. tit. "Evidence," §§ 2167, 2197, 2238.

The actual state of health is a matter for the inference of skilled persons. Reid *v.* Piedmont, etc., Ins. Co., 58 Mo. 421; Bell *v.* Morrisett, 51 N. C. 178; Lush *v.* McDaniel, 35 N. C. 485, 37 Am. Dec. 566; Monroeville *v.* Weihl, 13 Ohio Cir. Ct. 689, 6 Ohio Cir. Dec. 188.

66. *Alabama.*— Dominick *v.* Randolph, 124 Ala. 557, 24 So. 481; South, etc., R. Co. *v.* McLendon, 63 Ala. 266, 276 (where the court said that the evidence that a person seemed to be suffering during the time, "was not able to return," "was not able to use her arm a large part of the time for several months," "the left wrist . . . [broken] like the bone had slipped off the joint," "looked bad," "was disabled by the fall," etc., "are but facts, or, at most, conclusions of fact; awkwardly expressed sometimes, it is true; still, we find in them nothing to which a witness may not testify"); Fountain *v.* Brown, 38 Ala. 72; Stone *v.* Watson, 37 Ala. 279; Barker *v.* Coleman, 35 Ala. 221; Wilkinson *v.* Moseley, 30 Ala. 562 (where an ordinary observer was allowed to testify that a certain female slave was "sick," "had fever," "was pregnant," etc.); Milton *v.* Rowland, 11 Ala. 732.

Arkansas.— Thompson *v.* Bertrand, 23 Ark. 730.

California.—Robinson *v.* San Francisco Exempt F. Co., 103 Cal. 1, 36 Pac. 955, 42 Am. St. Rep. 93, 24 L. R. A. 715.

Illinois.— Salem *v.* Webster, 192 Ill. 369, 61 N. E. 323; Chicago City R. Co. *v.* Van Vleck, 143 Ill. 480, 32 N. E. 262; Shawneetown *v.* Mason, 82 Ill. 337, 25 Am. Dec. 321.

Iowa.— State *v.* McKnight, 119 Iowa 79, 93 N. W. 63 (fever); Bever *v.* Spangler, 93 Iowa 576, 61 N. W. 1072.

Michigan.— Elliott *v.* Van Buren, 33 Mich. 49, 20 Am. Rep. 668.

Minnesota.— Hall *v.* Austin, 73 Minn. 134, 75 N. W. 1121.

Missouri.— State *v.* Harris, 150 Mo. 56, 51 S. W. 481.

New Hampshire.— Willis *v.* Quimby, 31 N. H. 485, diseased condition of horse's foot.

New York.— Corbett *v.* Troy, 53 Hun 228, 6 N. Y. Suppl. 381; Duntzy *v.* Van Buren, 5 Hun 648, rupture.

Ohio.— Lake Shore, etc., R. Co. *v.* Gaffney, 9 Ohio Cir. Ct. 32, 6 Ohio Cir. Dec. 94.

Texas.— Abee *v.* Bargas, (Civ. App. 1901) 65 S. W. 489, paralyzed.

United States.— Grayson *v.* Lynch, 163 U. S. 468, 16 S. Ct. 1064, 41 L. ed. 230, Texas fever.

See 20 Cent. Dig. tit. "Evidence," §§ 2167, 2197, 2238.

In Massachusetts a rule of academic strictness seems to have been adopted. An observer may state that a person looked sick but not that he was sick. Ashland *v.* Marlborough, 99 Mass. 47.

Nature and probable result of sickness.— The real nature of the sickness (Dominick *v.* Randolph, 124 Ala. 557, 27 So. 481; Shawneetown *v.* Mason, 82 Ill. 337, 25 Am. Rep. 321) or its probable result (Dean *v.* State, 89 Ala. 46, 8 So. 38, permanent injury; Blackman *v.* Johnson, 35 Ala. 252, death) may demand additional scientific knowledge on the part of the witness to make his statement as to it relevant.

67. *District of Columbia.*— District of Columbia *v.* Haller, 4 App. Cas. 405.

Maryland.— Baltimore, etc., Co. *v.* Cassell, 66 Md. 419, 432, 7 Atl. 805, 59 Am. Rep. 175, where the court said: "If ordinary individuals could not judge of a person's health from his appearance and symptoms, it would be impossible to know when it was necessary to call in a physician. If a man received a blow from a heavy bludgeon on his lower limbs, certainly an unlearned person, who observed the occurrence, could testify that after the infliction of the blow his appearance

whether the charge is from sickness to health,[68] or from health to sickness,[69] or from bad to worse,[70] or from worse to better.[71] He may also infer and state that a person's ability to help himself,[72] or his faculties,[73] or the use of his limbs[74] or other parts of his body,[75] or his earning capacity[76] has or has not been

was that of a crippled man, but not before. The testimony shows that the plaintiff was thrown down a declivity and after the accident could not walk, but was carried home, and certainly any one who then saw him was competent to say whether his appearance was that of a disabled man or one in a sound condition of health."

Massachusetts.— Parker *v.* Boston, etc., Steamboat Co., 109 Mass. 449.

Missouri.— Sampson *v.* Atchison, etc., R. Co., 57 Mo. App. 308, eyes.

New York.— King *v.* Second Ave. R. Co., 75 Hun 17, 26 N. Y. Suppl. 973 (walk); Webb *v.* Yonkers R. Co., 51 N. Y. App. Div. 194, 64 N. Y. Suppl. 491; Harris *v.* Panama R. Co., 36 N. Y. Super. Ct. 373.

Texas.— St. Louis Southwestern R. Co. *v.* Brown, (Civ. App. 1902) 69 S. W. 1010; Atchison, etc., R. Co. *v.* Click, (Civ. App. 1895) 32 S. W. 226; Fordyce *v.* Moore, (Civ. App. 1893) 22 S. W. 235 (walk).

West Virginia.— Lawson *v.* Conaway, 37 W. Va. 159, 16 S. E. 564, 38 Am. St. Rep. 17, 18 L. R. A. 627.

Precise point for jury.— An inference as to bodily condition, otherwise competent, may be rejected if it is upon the precise point to be passed upon by the jury. Dunham *v.* Rix, 86 Iowa 300, 53 N. W. 252, stallion. See *supra*, XI, A, 4, c.

68. Salem *v.* Webster, 192 Ill. 369, 61 N. E. 323; Harris *v.* Panama R. Co., 36 N. Y. Super. Ct. 373, horse.

69. *Alabama.*— Littleton *v.* State, 128 Ala. 31, 29 So. 390, family way.

Indiana.— Miller *v.* Dill, 149 Ind. 326, 49 N. E. 272, "family way."

Maryland.— Baltimore, etc., Turnpike Co. *v.* Cassell, 66 Md. 419, 432, 7 Atl. 805, 59 Am. Rep. 175.

Massachusetts.— Com. *v.* Thompson, 159 Mass. 56, 36 N. E. 1111 ("family way"); Parker *v.* Boston, etc., Steamboat Co., 109 Mass. 449, 451 (where a witness was permitted to state that plaintiff, in an action for personal injuries, was "decidedly worse than she was two months after the accident" and that she was "not able to do so much work as before").

New Hampshire.— Taylor *v.* Grand Trunk R. Co., 48 N. H. 304, 2 Am. Rep. 229. lamer.

South Dakota.— Fallon *v.* Rapid City, (1904) 97 N. W. 1009.

Washington.— Peterson *v.* Seattle Traction Co., 23 Wash. 615, 63 Pac. 539, 65 Pac. 543, 53 L. R. A. 586, where it was held that testimony of lay witnesses, the wife and acquaintances of one injured in a collision, that before the accident he was a healthy-looking man, a strong laborer, and since then he looked thin and pale, was more quiet in manner, and did not hear so well; that he came home after the accident in an excited condition and complained of pain in his head and back, was not objectionable as being expert opinion evidence.

70. *Alabama.*— *In re* Carmichael, 36 Ala. 514, mentally.

Illinois.— Salem *v.* Webster, 192 Ill. 369, 61 N. E. 323.

Indiana.— Louisville, etc., R. Co. *v.* Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197.

Massachusetts.— Com. *v.* Brayman, 136 Mass. 438; Parker *v.* Boston, etc., Steamboat Co., 109 Mass. 449.

New York.— King *v.* Second Ave. R. Co., 75 Hun 17, 26 N. Y. Suppl. 973.

Texas.— Galloway *v.* San Antonio, etc., R. Co., (Civ. App. 1903) 78 S. W. 32.

71. Salem *v.* Webster, 192 Ill. 369, 61 N. E. 323.

72. Salem *v.* Webster, 192 Ill. 369, 61 N. E. 323.

73. Chicago, etc., R. Co. *v.* Van Vleck, 143 Ill. 480, 32 N. E. 262 (hearing); Will *v.* Mendon, 108 Mich. 251, 66 N. W. 58 (feeling); Adams *v.* People, 63 N. Y. 621 (eyesight); Chicago, etc., R. Co. *v.* Long, 26 Tex. Civ. App. 601, 65 S. W. 882 (seeing and hearing).

74. *Illinois.*— Chicago, etc., R. Co. *v.* Van Vleck, 143 Ill. 480, 32 N. E. 262, lame.

Michigan.— Will *v.* Mendon, 108 Mich. 251, 66 N. W. 58 (numb); Harris *v.* Detroit City R. Co., 76 Mich. 227, 42 N. W. 1111 (arm).

New York.— McSwyny *v.* Broadway, etc., R. Co., 4 Silv. Supreme 495, 7 N. Y. Suppl. 456.

Texas.— Missouri, etc., R. Co. *v.* Wright, 19 Tex. Civ. App. 47, 47 S. W. 56, inability to walk.

Wisconsin.— Collins *v.* Janesville, 111 Wis. 348, 87 N. W. 241, 1087 (walking); Keller *v.* Gilman, 93 Wis. 9, 66 N. W. 800.

75. Chicago, etc., R. Co. *v.* Long, 26 Tex. Civ. App. 601, 65 S. W. 882, head.

76. *California.*— Healy *v.* Visalia, etc., R. Co., 101 Cal. 585, 36 Pac. 125, could do housework before injury but not subsequently.

Georgia.— Chattanooga, etc., R. Co. *v.* Huggins, 89 Ga. 494, 15 S. E. 848.

Illinois.— West Chicago St. R. Co. *v.* Fishman, 169 Ill. 196, 48 N. E. 447; Ashley Wire Co. *v.* McFadden, 66 Ill. App. 26; Chicago, etc., R. Co. *v.* Arnol, 46 Ill. App. 157.

Michigan.— Langworthy *v.* Green Tp., 88 Mich. 207, 50 N. W. 130.

New York.— Cass *v.* Third Ave. R. Co., 20 N. Y. App. Div. 591, 47 N. Y. Suppl. 356. But see Eldridge *v.* Atlas Steamship Co., 58 Hun 96, 11 N. Y. Suppl. 468.

West Virginia.— Lawson *v.* Conaway, 37 W. Va. 159, 16 S. E. 564, 38 Am. St. Rep. 17, 18 L. R. A. 627.

Wisconsin.— Conrad *v.* Ellington, 104 Wis. 367, 80 N. W. 456; Keller *v.* Gilman, 93 Wis. 9, 66 N. W. 800.

See, however, Spears *v.* Mt. Ayr, 66 Iowa 721, 24 N. W. 504, where the admission of

impaired.[77] Such an observer may also state the obvious condition [78] and visible effect [79] of particular injuries; or give inferences from mere transient physical appearances; as that a person or animal was nervous,[80] suffering,[81] tired,[82] uneasy,[83] under the influence of drugs, as morphine [84] or intoxicants.[85] An observer may summarize the impression created by the appearance of a person or animal as related to æsthetic or artistic standards; as pleasing, nice-looking, or otherwise;[86]

such evidence while deemed erroneous was not regarded as prejudicial.

77. Blackman *v.* Johnson, 35 Ala. 252; Barker *v.* Coleman, 35 Ala. 221; Adams *v.* People, 63 N. Y. 621 (eyesight good); St. Louis Southwestern R. Co. *v.* McDowell, (Tex. Civ. App. 1903) 73 S. W. 974; St. Louis Southwestern R. Co. *v.* Brown, 30 Tex. Civ. App. 57, 69 S. W. 1010 (crippled); Baker *v.* Madison, 62 Wis. 137, 22 N. W. 141, 583 (farming).

78. Weber *v.* Creston, 75 Iowa 16, 39 N. W. 126; Craig *v.* Gerrish, 58 N. H. 513 (inflamed); Gulf, etc., R. Co. *v.* Ross, 11 Tex. Civ. App. 201, 32 S. W. 730.

79. *Alabama.*— Terry *v.* State, 120 Ala. 286, 25 So. 176 (where a witness was permitted to state of a person that "the flesh moved and it appeared that the skull was broken or crushed"); McKee *v.* State, 82 Ala. 32, 2 So. 451 (wound).

California.— People *v.* Gibson, 106 Cal. 458, 39 Pac. 864; Healy *v.* Visalia, etc., R. Co., 101 Cal. 585, 36 Pac. 125; Bland *v.* Southern Pac. R. Co., 65 Cal. 626, 4 Pac. 672.

Florida.— Pittman *v.* State, 25 Fla. 648, 6 So. 437, length, depth, and direction of wounds.

Illinois.— Chicago, etc., R. Co. *v.* George, 19 Ill. 510, 71 Am. Dec. 239, necessity for medical attendance.

Indiana.— Goshen *v.* England, 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253, broken leg.

Iowa.— Winter *v.* Central Iowa R. Co., 80 Iowa 443, 45 N. W. 737.

Missouri.— Sampson *v.* Atchison, etc., R. Co., 57 Mo. App. 308, eyes.

New York.— Sloan *v.* New York Cent. R. Co., 45 N. Y. 125; James *v.* Ford, 16 Daly 126, 9 N. Y. Suppl. 504; Doyle *v.* Manhattan R. Co., 13 N. Y. Suppl. 536, eye.

Texas.— Pilcher *v.* State, 32 Tex. Cr. 557, 25 S. W. 24 (bruises); Thomas *v.* State, (Cr. App. 1903) 74 S. W. 36; Graham *v.* State, 28 Tex. App. 582, 13 S. W. 1010 (made with rough, hard substance); Summers *v.* State, 5 Tex. App. 365, 32 Am. Rep. 573 (fracture of skull).

Wounds by firearms.— A witness of common observation and knowledge may state the nature (People *v.* Gibson, 106 Cal. 458, 39 Pac. 864; Morris *v.* State, 30 Tex. App. 95, 16 S. W. 757) and position (Balls *v.* State, (Tex. Cr. App. 1897) 40 S. W. 801) of bullet or gunshot wounds; but he will not be permitted to draw technical inferences from their appearance (Rash *v.* State, 61 Ala. 89, range of balls; Mitchell *v.* State, 38 Tex. Cr. 170, 41 S. W. 816), as that deceased was shot (Monk *v.* State, 27 Tex. App. 450, 11 S. W. 460) or as to the effect of gunshot wounds (State *v.* Justus, 11 Oreg. 178, 8 Pac. 337, 50 Am. Rep. 470), even in case of one who has had practical experience in battles of the Civil war (Rash *v.* State, *supra*).

80. Travelers' Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18 (looked wild and excited); Dimick *v.* Downs, 82 Ill. 570; O'Brien *v.* Chicago, etc., R. Co., 89 Iowa 644, 57 N. W. 425; Webb *v.* Yonkers R. Co., 51 N. Y. App. Div. 194, 64 N. Y. Suppl. 491.

81. *California.*— Green *v.* Pacific Lumber Co., 130 Cal. 435, 62 Pac. 747, a nurse may testify to complaints of pain or suffering.

Illinois.—Cicero, etc., St. R. Co. *v.* Priest, 190 Ill. 592, 60 N. E. 814; Chicago, etc., R. Co. *v.* Martin, 112 Ill. 16; Chicago, etc., R. Co. *v.* Randolph, 101 Ill. App. 121 [*affirmed* in 199 Ill. 126, 65 N. E. 142] (nervous, weak, in misery, nauseated, feeble, in distress, sore, in pain, etc.); Ashley Wire Co. *v.* McFadden, 66 Ill. App. 26; Girard Coal Co. *v.* Wiggins, 52 Ill. App. 69.

Minnesota.— Isherwood *v.* H. L. Jenkins Lumber Co., 87 Minn. 388, 92 N. W. 230; Hall *v.* Austin, 73 Minn. 134, 75 N. W. 1121.

New York.— McSwyny *v.* Broadway, etc., R. Co., 4 Silv. Supreme 495, 7 N. Y. Suppl. 456.

Ohio.— Shelby *v.* Clagett, 46 Ohio St. 549, 22 N. E. 407, 5 L. R. A. 606.

Texas.— Gulf, etc., R. Co. *v.* Reagan, (Civ. App. 1896) 34 S. W. 796; Western Union Tel. Co. *v.* Carter, (Civ. App. 1892) 20 S. W. 834 (weak and suffering).

Wisconsin.— Werner *v.* Chicago, etc., R. Co., 105 Wis. 300, 81 N. W. 416; Heddles *v.* Chicago, etc., R. Co., 77 Wis. 228, 46 N. W. 115, 20 Am. St. Rep. 106.

United States.— Baltimore, etc., R. Co. *v.* Rambo, 59 Fed. 75, 8 C. C. A. 6.

Canada.—Hepenstal *v.* Merritt, 33 N. Brunsw. 91.

82. State *v.* Marceaux, 50 La. Ann. 1137, 24 So. 611 (as if he had no sleep); State *v.* Ward, 61 Vt. 153, 17 Atl. 483 (horse).

83. Angus *v.* State, 29 Tex. App. 52, 14 S. W. 443.

84. Burt *v.* Burt, 168 Mass. 204, 46 N. E. 622; Endowment Rank K. of P. *v.* Allen, 104 Tenn. 623, 58 S. W. 241.

Familiarity must be shown with operation of the drug. Rupe *v.* State, 42 Tex. Cr. 477, 61 S. W. 929.

85. See *infra*, XI, C, 6.

86. *Alabama.*— East Tennessee, etc., R. Co. *v.* Watson, 90 Ala. 41, 7 So. 813, gracefulness of movement.

California.— People *v.* Monteith, 73 Cal. 7, 14 Pac. 373.

Georgia.— Pierce *v.* State, 53 Ga. 365; Choice *v.* State, 31 Ga. 424.

Illinois.— Aurora *v.* Hillman, 90 Ill. 61; Parker *v.* Parker, 52 Ill. App. 333.

Iowa.— Childs *v.* Muckler, 105 Iowa 279, 75 N. W. 100; Bever *v.* Spangler, 93 Iowa

but he cannot be permitted to state how such appearances affect the moral sense.[87]

(III) *MENTAL CONDITION.* An observer may testify as to appearances indicative of mental condition and his inference from them;[88] or that a given condition of mind on one occasion resembled that observed on another,[89] or has changed;[90] or that a person observed was conscious[91] or unconscious.[92]

(IV) *MENTAL STATE.* A witness with adequate intelligence and opportunities for observation may testify as to the *indicia* of the operation of emotion; as that an animal looked "fierce,"[93] or "sulky rather than frightened";[94] that a person appeared to be afraid,[95] angry,[96] cross,[97] "mad,"[98] ferocious,[99] despondent,[1] "kinder worried,"[2] "felt pretty bad,"[3] disgusted,[4] excited,[5] surprised,[6] or manifested other mental operations;[7] that a disposition impressed him as happy and contented,[8] or

576, 61 N. W. 1072; State *v.* Huxford, 47 Iowa 16.

Maine.— Stacey *v.* Portland Pub. Co., 68 Me. 279.

Massachusetts.— Gahagan *v.* Boston, etc., R. Co., 1 Allen 187, 79 Am. Dec. 724.

Michigan.— Cook *v.* Standard L., etc., Ins. Co., 84 Mich. 12, 47 N. W. 568; Fraser *v.* Jennison, 42 Mich. 206, 3 N. W. 882, eccentric.

Minnesota.— McKillop *v.* Duluth St. R. Co., 53 Minn. 532, 55 N. W. 739.

New Hampshire.— State *v.* Pike, 49 N. H. 399, 6 Am. Rep. 533.

New Jersey.— Castner *v.* Sliker, 33 N. J. L. 95.

New York.— Felska *v.* New York Cent., etc., R. Co., 152 N. Y. 339, 46 N. E. 613; People *v.* Packenham, 115 N. Y. 200, 21 N. E. 1035; People *v.* Eastwood, 14 N. Y. 562.

87. People *v.* Muller, 96 N. Y. 408, 48 Am. Rep. 635, obscene photograph.

88. *Alabama.*— Burney *v.* Torrey, 100 Ala. 157, 14 So. 685, 46 Am. St. Rep. 33.

Florida.— Higginbotham *v.* State, 42 Fla. 573, 29 So. 410.

Iowa.— State *v.* Wright, 112 Iowa 436, 84 N. W. 541 (absent-minded); O'Brien *v.* Chicago, etc., R. Co., 89 Iowa 644, 57 N. W. 425.

Maryland.— Townshend *v.* Townshend, 7 Gill 10.

Massachusetts.— Hewitt *v.* Taunton St. R. Co., 167 Mass. 483, 46 N. E. 106 (average intelligence); Barker *v.* Comins, 110 Mass. 477.

Texas.— Galloway *v.* San Antonio, etc., R. Co., (Civ. App. 1903) 78 S. W. 32.

89. Stallings *v.* State, (Tex. Cr. App. 1901) 63 S. W. 127. See *infra*, XI, C, 9, a.

90. Clark *v.* Clark, 168 Mass. 523, 47 N. E. 510 (failed in mental capacity); Galloway *v.* San Antonio, etc., R. Co., (Tex. Civ. App. 1903) 78 S. W. 32.

91. Pennsylvania Co. *v.* Newmeyer, 129 Ind. 401, 28 N. E. 860; Galloway *v.* San Antonio, etc., R. Co., (Tex. Civ. App. 1903) 78 S. W. 32.

The facts on which the inference rests must first be stated. Pennsylvania Co. *v.* Newmeyer, 129 Ind. 401, 28 N. E. 860; Galloway *v.* San Antonio, etc., R. Co., (Tex. Civ. App. 1903) 78 S. W. 32.

92. Chicago City R. Co. *v.* Van Vleck, 143 Ill. 480, 32 N. E. 262.

93. Mattison *v.* State, 55 Ala. 224, dog.

94. Whittier *v.* Franklin, 46 N. H. 23, 88 Am. Dec. 185, horse.

95. Thornton *v.* State, 113 Ala. 43, 21 So. 356, 59 Am. St. Rep. 97 ("looked frightened"); State *v.* Tighe, 27 Mont. 327, 71 Pac. 3. The inference has been rejected in Alabama. Lewis *v.* State, 96 Ala. 6, 11 So. 259, 38 Am. St. Rep. 75.

96. *Alabama.*—Linnehan *v.* State, 116 Ala. 471, 22 So. 662; Miller *v.* State, 107 Ala. 40, 19 So. 37; Reeves *v.* State, 96 Ala. 33, 11 So. 296 ("looked like they were trying to fight"); Jenkins *v.* State, 82 Ala. 25, 2 So. 150 ("anger, or bad temper, can be proved in no other way").

Iowa.— State *v.* Wright, 112 Iowa 436, 84 N. W. 541; State *v.* Shelton, 64 Iowa 333, 20 N. W. 459.

Missouri.— State *v.* Buchler, 103 Mo. 203, 15 S. W. 331.

Montana.— State *v.* Tighe, 27 Mont. 327, 71 Pac. 3, "a shorthand rendering of fact."

Texas.— Catlett *v.* State, (Cr. App. 1901) 61 S. W. 485.

97. State *v.* Crafton, 89 Iowa 109, 56 N. W. 257.

98. State *v.* Utley, 132 N. C. 1022, 43 S. E. 820; State *v.* Edwards, 112 N. C. 901, 17 S. E. 521.

99. State *v.* Buchler, 103 Mo. 203, 15 S. W. 331.

1. State *v.* McKnight, 119 Iowa 79, 93 N. W. 63.

2. State *v.* Bradley, 64 Vt. 466, 24 Atl. 1053.

3. State *v.* Hudson, 50 Iowa 157.

4. Fritz *v.* Western Union Tel. Co., 25 Utah 263, 71 Pac. 209.

5. State *v.* Houston, 78 Ala. 576, 56 Am. Rep. 59; Williams *v.* State, (Ark. 1891) 16 S. W. 816; Dimick *v.* Downs, 82 Ill. 570, nervous, excited, or calm.

6. Jackson *v.* State, 44 Tex. Cr. 259, 70 S. W. 760.

7. State *v.* Wright, 112 Iowa 436, 84 N. W. 541 (seemed to be in his usual frame of mind); Culver *v.* Dwight, 6 Gray (Mass.) 444 (looked as if she felt very sad); Allen *v.* State, 8 Tex. App. 67 (seemed interested); Western Union Tel. Co. *v.* Carter, (Tex. Civ. App. 1892) 20 S. W. 835 (sorrow and grief).

8. Morrison *v.* State, 40 Tex. Cr. 473, 51 S. W. 358.

a state of mind as natural,[9] or as related in a particular way to that of another person.[10] While a temporary mental state has been rejected,[11] a change in habitual mental attitude may be stated.[12]

(v) *Pecuniary Condition.* The witness may go further and state his inference, from appearances, as to a person's financial condition;[13] as for example that he is destitute,[14] in need of assistance,[15] insolvent,[16] or solvent;[17] or what is the probable amount of his professional income.[18]

b. Inanimate Objects. Where the attempt to describe the appearance of an object would involve the statement of a number of details, the observer may state the effect produced by them on his mind, as to some relevant characteristic.[19] The witness may describe an object as affected by fire,[20] or as affected by force,[21]

9. State *v.* Wright, 112 Iowa 436, 84 N. W. 541.

10. Brownell *v.* People, 38 Mich. 732, testimony as to the relative temper of defendant and deceased in a prosecution for murder.

11. McAdory *v.* State, 59 Ala. 92 (downcast); Johnson *v.* State, 17 Ala. 618.

12. Johnson *v.* State, 17 Ala. 618, from habitual liveliness to silence.

13. Starr *v.* Stevenson, 91 Iowa 684, 60 N. W. 217; Iselin *v.* Peck, 2 Rob. (N. Y.) 629; Hard *v.* Brown, 18 Vt. 87.

Personal knowledge essential.— Stix *v.* Keith, 85 Ala. 465, 5 So. 184; Iselin *v.* Peck, 2 Rob. (N. Y.) 629.

The actual financial condition cannot be stated. That is a mere conclusion. Massey *v.* Walker, 10 Ala. 288. Actual insolvency cannot be shown even by the evidence of a skilled bookkeeper. Persse, etc., Paper Works *v.* Willett, 1 Rob. (N. Y.) 131. Facts must be stated if the court is to find a *prima facie* case. Brundred *v.* Paterson Mach. Co., 4 N. J. Eq. 294.

14. Autauga County *v.* Davis, 32 Ala. 703; Bever *v.* Spangler, 93 Iowa 576, 61 N. W. 1072; Davis *v.* Davis, 20 Tex. Civ. App. 310, 49 S. W. 726, "had nothing."

15. Sloan *v.* New York Cent. R. Co., 45 N. Y. 125.

16. *Alabama.*—Royall *v.* McKenzie, 25 Ala. 363.

Georgia.— Riggins *v.* Brown, 12 Ga. 271; Crawford *v.* Andrews, 6 Ga. 244.

New Jersey.— Brundred *v.* Paterson Mach. Co., 4 N. J. Eq. 294.

New York.— Thompson *v.* Hall, 45 Barb. 214.

Vermont.—Richardson *v.* Hitchcock, 28 Vt. 757; Sherman *v.* Blodgett, 28 Vt. 149.

17. Watterson *v.* Fuellhart, 169 Pa. St. 612, 32 Atl. 597.

18. State *v.* Cecil County Com'rs, 54 Md. 426, dentist. The inference is entirely from observation. The testimony of "experts" is inadmissible. State *v.* Cecil County Com'rs, 54 Md. 426.

19. *Alabama.*—Mayberry *v.* State, 107 Ala. 64, 67, 18 So. 219, where the court said: "It is difficult to conceive any mode in which this evidential fact [saw something that looked like a pistol] could be communicated to the jury, if a witness observing it, could not declare the effect produced on his mind; or if he could not express the opinion that the impression was that of a pistol. The witness was subjected to cross-examination, and if a particular description of the impression was deemed necessary, it could have been elicited, and it may be, the weight of the evidence lessened or destroyed; but of itself the evidence was admissible."

California.— Grunwald *v.* Freese, (1893) 34 Pac. 73, rope.

Georgia.— Atlanta Consol. St. R. Co. *v.* Beauchamp, 93 Ga. 6, 19 S. E. 24 (thought); Robinson *v.* Woodmansee, 80 Ga. 249, 4 S. E. 497.

Iowa.— Hollenbeck *v.* Marion, 116 Iowa 69, 89 N. W. 210, water in stream sticky, nasty, and filthy.

Minnesota.— Osborne *v.* Marks, 33 Minn. 56, 22 N. W. 1, machine.

New York.— Dubois *v.* Baker, 30 N. Y. 355, erasures, etc.

Texas.— Gulf, etc., R. Co. *v.* Colbert, (Civ. App. 1895) 31 S. W. 332 (car defective); Tyler Southeastern R. Co. *v.* Rasberry, 13 Tex. Civ. App. 185, 34 S. W. 794 (bolts rust-eaten).

Vermont.— Clifford *v.* Richardson, 18 Vt. 620.

Wisconsin.— Reynolds *v.* Shanks, 23 Wis. 307, wall.

United States.— Follett *v.* Rose, 9 Fed. Cas. No. 4,900, 3 McLean 332, traces of seal.

Diseases of vegetable life may be stated by any one familiar therewith who has observed the vegetation affected. State *v.* Main, 69 Conn. 123, 37 Atl. 80, 61 Am. St. Rep. 30, 36 L. R. A. 623, peach yellows.

Relevancy of the fact to be proved is essential to admissibility. Moffatt *v.* State, 35 Tex. Cr. 257, 33 S. W. 344. See *supra*, XI, A, 4, a.

Inferences of skilled observers from inspection of documents see *infra*, XI, D, 6.

20. James *v.* State, 104 Ala. 20, 16 So. 94 (jugs); People *v.* Manke, 78 N. Y. 611; Union Pac. Co. *v.* Gilland, 4 Wyo. 395, 34 Pac. 953. Whether a witness who merely observed that a certain piece of paper was burned could testify that "it had the appearance of being wadding shot from a gun" has seemed to the New York court of appeals to state so much of a "border question" that they declined to reverse, in a capital case, the action of an inferior court granting a new trial on account of its admission. People *v.* Manke, *supra*.

21. Fort *v.* State, 52 Ark. 180, 11 S. W. 959, 20 Am. St. Rep. 163; Illinois Cent. R.

impact,[22] mud,[23] water,[24] or other substances. He may state any change in appearance observed by him,[25] or the fact that there is none;[26] where an object stood when struck;[27] or that two things appear similar.[28] Where the fact is not directly in issue,[29] or the jury cannot judge of the matter for themselves,[30] a percipient witness may state that a boat landing,[31] bridge,[32] car,[33] crossing,[34] machinery,[35] railroad platform[36] or other structure,[37] or a highway,[38] railroad track,[39] side-

Co. *v.* Behrens, 208 Ill. 20, 69 N. E. 796, holding that a witness might state with regard to the parts of a boiler recently exploded that "they looked like the threads were drawn out of the sheets or boiler," "looked like there was a fresh break," etc.

The order in which several applications of force took place may be stated. Fort *v.* State, 52 Ark. 180, 11 S. W. 959, 20 Am. St. Rep. 163.

Where the inference is a negative one, as that no force was exerted, as in squeezing out mud, the statement seems to be one of fact. Dean *v.* New York, 45 N. Y. App. Div. 605, 61 N. Y. Suppl. 374. See also *supra*, XI, C, 1, b.

22. People *v.* Mitchell, 94 Cal. 550, 29 Pac. 1106 (cartridge had been inserted); People *v.* Fanshawe, 65 Hun (N. Y.) 77, 19 N. Y. Suppl. 865, 8 N. Y. Cr. 326 (bed looked as if slept in); State *v.* Ward, 61 Vt. 153, 17 Atl. 483; State *v.* Welch, 36 W. Va. 690, 15 S. E. 419 (head on a bed). The impressions made on one object by another, as a track of a sleigh-runner (State *v.* Ward, 61 Vt. 153, 17 Atl. 483), the imprint of a foot or foot-gear (James *v.* State, 104 Ala. 20, 16 So. 94; Com. *v.* Pope, 103 Mass. 440) of different sizes (Littleton *v.* State, 128 Ala. 31, 29 So. 390), by a shoulder (Watkins *v.* State, 89 Ala. 82, 8 So. 134), by the feet of animals (Chicago, etc., R. Co. *v.* Legg, 32 Ill. App. 218; Craig *v.* Wabash R. Co., 121 Iowa 471, 96 N. W. 965), or collision with a locomotive (Seagel *v.* Chicago, etc., R. Co., 83 Iowa 380, 49 N. W. 990), or between two vessels (Patrick *v.* The J. Q. Adams, 19 Mo. 73) may be stated by the inference of the observing witness; and as to the mode of progression (Smith *v.* State, 137 Ala. 22, 34 So. 396, walking, running; Chicago, etc., R. Co. *v.* Legg, 32 Ill. App. 218, stock running or walking; Craig *v.* Wabash R. Co., 121 Iowa 471, 96 N. W. 965, jumping).

23. State *v.* Marceaux, 50 La. Ann. 1137, 24 So. 611.

24. State *v.* Marceaux, 50 La. Ann. 1137, 24 So. 611; Com. *v.* Sturtivant, 117 Mass. 122, 19 Am. Rep. 401.

25. Gallagher *v.* Williamson, 23 Cal. 331, 83 Am. Dec. 114.

26. Allen B. Wrisley Co. *v.* Burke, 203 Ill. 250, 67 N. E. 818; Yeager *v.* Spirit Lake, 115 Iowa 593, 88 N. W. 1095 (sidewalk); Pratt *v.* Mosetter, 9 N. Y. Civ. Proc. 351.

27. Fanning *v.* Long Island R. Co., 2 Thomps. & C. (N. Y.) 585.

28. People *v.* Mitchell, 94 Cal. 550, 29 Pac. 1106.

29. In proportion as the element of reasoning enters into the inference it involves the province of the jury and should be excluded. Baltimore Fireman's Ins. Co. *v.* J. H. Mohlman Co., 91 Fed. 85, 33 C. C. A. 347; Kiesel *v.* Sun Ins. Office, 88 Fed. 243, 31 C. C. A. 515. See *supra*, XI, A, 4, e.

30. See *supra*, XI, A, 4, b.

31. Louisville, etc., Mail Co. *v.* Mossberger, 13 Ky. L. Rep. 927.

32. Ryan *v.* Bristol, 63 Conn. 26, 27 Atl. 309; Taylor *v.* Monroe, 43 Conn. 36; Dunham's Appeal, 27 Conn. 192; Jessup *v.* Osceola County, 92 Iowa 178, 60 N. W. 485; Beardslee *v.* Columbia Tp., 5 Lack. Leg. N. (Pa.) 290.

33. Betts *v.* Chicago, etc., R. Co., 92 Iowa 343, 60 N. W. 623, 54 Am. St. Rep. 558, 26 L. R. A. 248.

34. Martin *v.* Baltimore, etc., R. Co., 2 Marv. (Del.) 123, 42 Atl. 442.

35. Sievers *v.* Peters Box, etc., Co., 151 Ind. 642, 50 N. E. 877, 52 N. E. 399 (worn gearing); Huizega *v.* Cutler, etc., Lumber Co., 51 Mich. 272, 16 N. W. 643; Hutchinson Cooperage Co. *v.* Snider, 107 Fed. 633, 46 C. C. A. 517 (practicability and safety of machine).

36. James *v.* Johnson, 12 Ill. App. 286; Graham *v.* Pennsylvania Co., 139 Pa. St. 149, 21 Atl. 151, 12 L. R. A. 293, holding that a witness who has observed a railroad platform may with propriety be asked to state from his knowledge of it and in connection with the facts observed whether it was "a safe platform upon which to alight from trains."

37. McNerney *v.* Reading City, 150 Pa. St. 611, 25 Atl. 57 (area-way); Bridger *v.* Asheville, etc., R. Co., 25 S. C. 24 (turn-table).

38. *Connecticut.*—Dean *v.* Sharon, 72 Conn. 667, 45 Atl. 963; Ryan *v.* Bristol, 63 Conn. 26, 27 Atl. 309; Taylor *v.* Monroe, 43 Conn. 36; Clinton *v.* Howard, 42 Conn. 294.

Illinois.— Alexander *v.* Mt. Sterling, 71 Ill. 366.

Iowa.— Kelleher *v.* Keokuk, 60 Iowa 473, 15 N. W. 280.

Kansas.— Parsons *v.* Lindsay, 26 Kan. 426, street crossing.

Maryland.— Baltimore, etc., Turnpike Co. *v.* Cassell, 66 Md. 419, 7 Atl. 805, 59 Am. Rep. 175; Baltimore, etc., Turnpike Road *v.* Crowther, 63 Md. 558, 1 Atl. 279.

Massachusetts.— Lund *v.* Tyngsborough, 9 Cush. 36.

Pennsylvania.— Kitchen *v.* Union Tp., 171 Pa. St. 145, 33 Atl. 76.

Particular knowledge of the subject-matter has been required. Junction City *v.* Blades, 1 Kan. App. 85, 41 Pac. 677. See *supra*, XI, A, 4, a, (II), (III).

39. Louisville, etc., R. Co. *v.* Tegner, 125 Ala. 593, 28 So. 510; Alabama Mineral R. Co. *v.* Jones, 114 Ala. 519, 21 So. 507, 62 Am. St. Rep. 121; Missouri Pac. R. Co. *v.* Jarrard, 65 Tex. 560; San Antonio, etc., R.

walk,[40] or other place[41] was dangerous[42] or safe;[43] which is the safer of two places;[44] and whether a storage place is suitable for a given purpose.[45] He may state what was the actual condition of inanimate objects observed by him,[46] and whether it was similar in certain instances[47] and was sound[48] or unsound,[49] or such as to endanger life.[50] It is essential that the evidence relate to a time when the fact inferred would have been competent.[51]

3. Conduct — a. Animals. The conduct[52] or habits[53] of animals, and the emotions of which they are in whole or in part a reaction[54] may be stated, in a shorthand way, by one who has observed it. Where all the facts can be placed before the jury so as to enable them to form a reasonable inference, the conclusion of the witness is an intrusion on their function and is excluded.[55]

b. Human Conduct. Conduct itself, being a series of facts occurring in suc-

Co. *v.* Parr, (Tex. Civ. App. 1894) 26 S. W. 861.

40. District of Columbia *v.* Haller, 4 App. Cas. (D. C.) 405; Atherton *v.* Bancroft, 114 Mich. 241, 72 N. W. 208; McNerney *v.* Reading City, 150 Pa. St. 611, 25 Atl. 57; Heman Constr. Co. *v.* O'Brien, 81 Mo. App. 639, holding that the inference of an observer was necessarily the "best evidence" of the fact.

41. Kitchen *v.* Union Tp., 171 Pa. St. 145, 33 Atl. 76.

42. *Alabama.*— Louisville, etc., R. Co. *v.* Tegner, 125 Ala. 593, 28 So. 510; Alabama Mineral R. Co. *v.* Jones, 114 Ala. 519, 21 So. 507, 62 Am. St. Rep. 121.

Connecticut.—Ryan *v.* Bristol, 63 Conn. 26, 27 Atl. 309.

Iowa.— Jessup *v.* Osceola County, 92 Iowa 178, 60 N. W. 485.

Massachusetts.— Lund *v.* Tyngsborough, 9 Cush. 36.

Pennsylvania.— Kitchen *v.* Union Tp., 171 Pa. St. 145, 33 Atl. 76; McNerney *v.* Reading City, 150 Pa. St. 611, 25 Atl. 57; Beatty *v.* Gilmore, 16 Pa. St. 463, 55 Am. Dec. 514.

Texas.— San Antonio, etc., R. Co. *v.* Parr, (Civ. App. 1894) 26 S. W. 861.

43. *Connecticut.*—Dean *v.* Sharon, 72 Conn. 667, 45 Atl. 963 (reasonably safe); Taylor *v.* Monroe, 43 Conn. 36.

Iowa.— Betts *v.* Chicago, etc., R. Co., 92 Iowa 343, 60 N. W. 623, 54 Am. St. Rep. 558, 26 L. R. A. 248; Kelleher *v.* Keokuk, 60 Iowa 473, 15 N. W. 280.

Kentucky.— Louisville, etc., Mail Co. *v.* Mosseberger, 13 Ky. L. Rep. 927.

Maryland.— Baltimore, etc., Co. *v.* Cassell, 66 Md. 419, 7 Atl. 805, 59 Am. Rep. 175; Baltimore, etc., Turnpike Road *v.* Crowther, 63 Md. 558, 1 Atl. 279.

Texas.— Missouri Pac. R. Co. *v.* Jarrard, 65 Tex. 560.

44. Cookson *v.* Pittsburgh, etc., R. Co., 179 Pa. St. 184, 36 Atl. 194.

45. Rust *v.* Eckler, 41 N. Y. 488.

46. Brown *v.* Owosso, 130 Mich. 107, 89 N. W. 568 (sidewalk); Conklin *v.* Redemeyer-Hollister Commission Co., 86 Mo. App. 190 (size and condition of onions).

47. Yeager *v.* Spirit Lake, 115 Iowa 593, 88 N. W. 1095.

48. *Georgia.*—Crawford *v.* Georgia Pac. R. Co., 86 Ga. 5, 12 S. E. 176.

Illinois.— Illinois Cent. R. Co. *v.* Foulks, 191 Ill. 57, 60 N. E. 890, potatoes.

Indiana.— Consolidated Stone Co. *v.* Williams, 26 Ind. App. 131, 57 N. E. 558, 84 Am. St. Rep. 278, rope strong enough to bear a given strain.

Iowa.—Brooks *v.* Sioux City, 114 Iowa 641, 87 N. W. 682.

Michigan.— Merkle *v.* Bennington Tp., 68 Mich. 133, 35 N. W. 846, good repair.

49. Johnson *v.* Detroit, etc., R. Co., (Mich. 1904) 97 N. W. 760 (defect in cattle-guard); Merkle *v.* Bennington Tp., 68 Mich. 133, 35 N. W. 846 (that a bridge was a "very poor, shackly bridge"); Reynolds *v.* Van Beuren, 10 Misc. (N. Y.) 703, 31 N. Y. Suppl. 827 (holding, however, that whether wood is rotten or not is a matter of common knowledge and not subject to expert testimony).

A fine distinction.— In an action against a city for injuries caused by an alleged defective sidewalk, it was held proper to refuse evidence of plaintiff's witness that the walk was in bad condition and yet admit evidence by defendant that the walk was in good and sound condition, since to state that the walk was defective was to announce a conclusion, while to say that it was sound was to state a fact. Brooks *v.* Sioux City, 114 Iowa 641, 87 N. W. 682.

50. Perry *v.* State, 110 Ga. 234, 36 S. E. 781, stick capable of causing death. The subjective ability of the witness so to use it is not relevant. Swanner *v.* State, (Tex. Cr. App. 1900) 58 S. W. 72.

51. Wolscheid *v.* Thome, 76 Mich. 265, 43 N. W. 12.

52. Sydleman *v.* Beckwith, 43 Conn. 9 (that a horse was safe and kind); Lynch *v.* Moore, 154 Mass. 335, 28 N. E. 277; Noble *v.* St. Joseph, etc., R. Co., 98 Mich. 249, 57 N. W. 126; State *v.* Avery, 44 N. H. 392 (that a witness never saw anything obstinate or vicious about a horse).

53. Snow *v.* Price, 1 Tex. App. Civ. Cas. § 1342.

54. Whittier *v.* Franklin, 46 N. H. 23, 26, 88 Am. Dec. 185, holding that a witness may state that a horse appeared "sulky" rather than "frightened" at the time of an accident; the court saying: "It is matter of common observation alone."

55. Whittier *v.* Franklin, 46 N. H. 23, 88 Am. Dec. 185. See *supra*, XI, A, 4, b, c.

cessive periods of time, does not offer quite the same resistance to presentation by narrative that meets an attempt to describe phenomena which coexist in point of time. To reproduce conduct, however, presents much the same difficulty and therefore follows the same rule. The witness may summarize human conduct by stating the effect which it produced on his mind,[56] its manner,[57] and he may state its

56. *Alabama.*— Linnehan *v.* State, 116 Ala. 471, 22 So. 662 (cursed); Bynon *v.* State, 117 Ala. 80, 23 So. 640, 67 Am. St. Rep. 163 (that a man and woman lived as husband and wife; or that a man held out a woman as his wife); Prince *v.* State, 100 Ala. 144, 14 So. 409, 46 Am. St. Rep. 28 (perspiring freely); Spiva *v.* Stapleton, 38 Ala. 171 ("managed pretty well").

Georgia.— Turner *v.* State, 114 Ga. 421, 40 S. E. 308, "tried."

Illinois.— Chicago, etc., R. Co. *v.* Martin, 112 Ill. 16 (holding that a physician may state whether a sickness is "feigned"); Greenup *v.* Stoker, 8 Ill. 202 (courted).

Iowa.— Kuen *v.* Upweir, 98 Iowa 393, 67 N. W. 374, understood English.

Michigan.— Lewis *v.* Emery, 108 Mich. 641, 66 N. W. 569.

Nebraska.—Missouri Pac. R. Co. *v.* Palmer, 55 Nebr. 559, 76 N. W. 169.

South Carolina.— Trimmels *v.* Thomson, 41 S. C. 125, 19 S. E. 291, deciding that witnesses may state whether a man in ordering work to be done did anything different from what might be expected of one ordering it for himself.

Texas.— Tollett *v.* State, (Cr. App. 1901) 60 S. W. 964 (turned to run); Taylor *v.* State, (Cr. App. 1900) 56 S. W. 753; Gerick *v.* State, (Cr. App. 1898) 45 S. W. 717 (threaten); Bruce *v.* State, 31 Tex. Cr. 590, 21 S. W. 681 (shuddered).

Washington.— Sears *v.* Seattle Consol. St. R. Co., 6 Wash. 227, 33 Pac. 389, 1081.

See 14 Cent. Dig. tit. "Criminal Law," § 1034 *et seq.*; 20 Cent. Dig. tit. "Evidence," § 2248 *et seq.*

Where the circumstances are unusual, e. g., contemplation of suicide, such testimony has been rejected by reason of the difficulty of fixing a standard of conduct with which to compare that in question. New York Mut. L. Ins. Co. *v.* Hayward, (Tex. Civ. App. 1894) 27 S. W. 36.

57. *Alabama.*—White *v.* State, 103 Ala. 72, 16 So. 63 (speaking with his usual intelligence); Reeves *v.* State, 96 Ala. 33, 11 So. 296 ("talking mad"); Alabama Great Southern R. Co. *v.* Frazier, 93 Ala. 45, 9 So. 303, 30 Am. St. Rep. 28 (pleasant); State *v.* Houston, 78 Ala. 576, 56 Am. Rep. 59 (excited); Ray *v.* State, 50 Ala. 104 (jesting); Raisler *v.* Springer, 38 Ala. 703, 82 Am. Dec. 736 (insulting).

Arkansas.— Green *v.* State, 64 Ark. 523, 43 S. W. 973 (person did not seem to know what she was about); St. Louis, etc., R. Co. *v.* Brown, 62 Ark. 254, 35 S. W. 225 (insulting).

Florida.— Sylvester *v.* State, (1903) 35 So. 142.

Illinois.— Cicero, etc., R. Co. *v.* Richter, 85 Ill. App. 591, childish.

Indiana.— Pittsburgh, etc., St. R. Co. *v.* Martin, 157 Ind. 216, 61 N. E. 229, promptly.

Iowa.— Smith *v.* Hickenbottom, 57 Iowa 733, 11 N. W. 664, childish.

Kansas.—State *v.* Stackhouse, 24 Kan. 445, on good terms.

Nebraska.— Schlencker *v.* State, 9 Nebr. 241, 243, 246, 1 N. W. 857, where, on a murder trial, the issue being the insanity of the prisoner, witnesses in his favor were allowed to testify that "on the day of the murder, and for some time previous, the prisoner had acted 'strangely;' that he had 'no work,' was 'drinking,' 'had nothing to eat,' 'was not in his right mind,' 'was excited,' 'walked hastily,' 'acted queer,' 'tried to run against us,' 'acted funnier than he ever did before,' 'looked kind of fierce,' 'had fits,' 'was drinking day of tragedy,' 'looked as if he was dreaming, as if there was something on his mind,' etc." The government, in rebuttal, was allowed to introduce statements of witnesses that they had "seen the prisoner at different periods before the homicide and on the same day. 'He seemed perfectly sane,' 'he walked straight enough,' 'his face looked natural,' 'he appeared to be all right,' 'saw him on the witness stand about the last day of September; he was a little excited, but nothing peculiar in his action at all; should say he was sane from his general appearance, etc.'"

New York.— Blake *v.* People, 73 N. Y. 586, friendly.

North Carolina.— State *v.* Edwards, 112 N. C. 901, 17 S. E. 521, "in fun."

Oregon.— State *v.* Saunders, 14 Oreg. 300, 12 Pac. 441, "shot me like a dog."

Rhode Island.— Wilson *v.* New York, etc., R. Co., 18 R. I. 598, 29 Atl. 300, careful.

South Carolina.—Trimmier *v.* Thomson, 41 S. C. 125, 19 S. E. 291, like an owner.

Texas.— Bennett *v.* State, 39 Tex. Cr. 639, 48 S. W. 61 ("kinder mad"); Powers *v.* State, 23 Tex. App. 42, 5 S. W. 153 (insulting); Rutherford *v.* St. Louis, etc., R. Co., 28 Tex. Civ. App. 625, 67 S. W. 161 (polite and courteous, or otherwise).

Wisconsin.— Boorman *v.* Northwestern Mut. Relief Assoc., 90 Wis. 144, 62 N. W. 924, gloomy, sullen, and quarrelsome.

United States.— Northern Pac. R. Co. *v.* Urlin, 158 U. S. 271, 15 S. Ct. 840, 39 L. ed. 977, careful.

See 14 Cent. Dig. tit. "Criminal Law," § 1034 *et seq.*; 20 Cent. Dig. tit. "Evidence," § 2248 *et seq.* See also *supra*, XI, C, 2, a, (III).

The evidence has been rejected where the estimate involves a large proportion of the personal mentality or morality of the observer (Brinkley *v.* State, 89 Ala. 34, 8 So. 22, 18 Am. St. Rep. 87, indecent dancing), as whether a person is a "careful driver," it

object,[58] and the emotions,[59] influence,[60] or other causes from which he infers it took place, and what relations they indicate between two persons.[61] The inference as to conduct may be stated in the form of the existence of habits,[62] including sobriety[63] or intoxication,[64] or characteristic traits of the actor.[65] He may measure conduct observed by him by the standard of care,[66] correct performance,[67] honorable dealing,[68] mechanical skill,[69] necessity,[70] propriety,[71] or safety.[72] The facts upon which the inference is based should be stated by the witness.[73]

being "merely the expression of a naked opinion" (Morris *v.* East Haven, 41 Conn. 252), or where it characterizes a person or a statement from a moral standpoint (Com. *v.* Mullen, 150 Mass. 394, 23 N. E. 51, lying. See *supra*, XI, B, 2, a, (IV)), or where the evidence too obviously intrudes upon the province of the jury (Kendall *v.* Limberg, 69 Ill. 355; State *v.* Evans, 122 Iowa 174, 97 N. W. 1008, temper of a crowd; Messner *v.* People, 45 N. Y. 1; Calvert *v.* State, 14 Tex. App. 154; Lumbkin *v.* State, 12 Tex. App. 341. See *supra*, XI, A, 4, b, c). That a person's manner was "very childish" has been rejected as a merely ambiguous and indefinite opinion. Baltimore Safe Deposit, etc., Co. *v.* Berry, 93 Md. 560, 49 Atl. 401.

58. Gault *v.* Sickles, 85 Iowa 266, 52 N. W. 206; Com. *v.* Galavan, 9 Allen (Mass.) 271, listening. A defendant may testify that plaintiff's husband "was attending to her business for her when she did not attend to it herself." Gault *v.* Sickles, 85 Iowa 266, 52 N. W. 206.

59. Culver *v.* Dwight, 6 Gray (Mass.) 444, sadness. See *supra*, XI, C, 2, a, (IV). The inference may be rejected where it nearly concerns the function of the jury. See *supra*, XI, A, 4, b, c. Thus a statement of the female on a prosecution for seduction that accused treated her "very affectionately" is inadmissible as stating a conclusion. State *v.* Brown, 86 Iowa 121, 53 N. W. 92.

60. *In re* Goldthorp, 94 Iowa 336, 62 N. W. 845, 58 Am. St. Rep. 400; O'Connor *v.* Madison, 98 Mich. 183, 57 N. W. 105.

61. State *v.* Marsh, 70 Vt. 288, 40 Atl. 836, intimate.

62. State *v.* David, 25 Ind. App. 297, 58 N. E. 83, easily awakened from sleep.

Evidence of habitual conduct is most often admitted when there is no evidence of what the actual conduct was. Swift *v.* Zerwick, 88 Ill. App. 558.

63. Stanley *v.* State, 26 Ala. 26; Mitchell *v.* State, 43 Fla. 584, 31 So. 242; Beal *v.* Robeson, 30 N. C. 276.

64. *Illinois.*— Gallagher *v.* People, 120 Ill. 179, 11 N. E. 335.

Iowa.— Rafferty *v.* Buckman, 46 Iowa 195.

Kentucky.— Smith *v.* Smith, 11 Ky. L. Rep. 859.

Texas.— Galveston, etc., R. Co. *v.* Davis, (Civ. App. 1898) 45 S. W. 956.

England.— Alcock *v.* Royal Exch. Assur. Co., 13 Q. B. 292, 13 Jur. 445, 18 L. J. Q. B. 121, 66 E. C. L. 292.

See *infra*, XI, C, 6.

65. Illinois Cent. R. Co. *v.* Ashline, 171 Ill. 313, 49 N. E. 521 (careful); Swift *v.* Zerwick, 88 Ill. App. 558 (careful); Louisville, etc., R. Co. *v.* Miller, 141 Ind. 533, 37 N. E. 343 (industrious); Pearl *v.* Omaha, etc., R. Co., 115 Iowa 535, 88 N. W. 1078 (industrious); Galveston, etc., R. Co. *v.* Davis, (Tex. Civ. App. 1898) 45 S. W. 956 (of an engineer that he would pull a train downhill as fast as he could turn a wheel). Terrell *v.* Russell, (Tex. Civ. App. 1897) 42 S. W. 129 (careless, unskilled, and reckless).

Conclusions.— Such an inference, however, is frequently rejected as a conclusion. That one is a careful driver (Morris *v.* East Haven, 41 Conn. 252), and that a certain person could not be influenced "by any power on earth" (Smith *v.* Smith, 117 N. C. 348, 23 S. E. 270), have been regarded as conclusions, especially where the constituent facts are not given (Ardmore Coal Co. *v.* Bevil, 61 Fed. 757, 10 C. C. A. 41).

66. Wilson *v.* New York, etc., R. Co., 18 R. I. 598, 29 Atl. 300. See the other cases in the preceding note.

67. Shook *v.* Pate, 50 Ala. 91; McKarsie *v.* Citizens' Bldg., etc., Assoc., (Tenn. Ch. App. 1899) 53 S. W. 1007, sale in exact accordance with an advertisement.

68. Greville *v.* Chapman, 5 Q. B. 731, Dav. & M. 553, 8 Jur. 189, 13 L. J. Q. B. 172, 48 E. C. L. 731.

69. Buckalew *v.* Tennessee Coal, etc., Co., 112 Ala. 146, 20 So. 606 (superintendent is competent); State *v.* Baldwin, 36 Kan. 1, 12 Pac. 318 (cutting out door panel); Lewis *v.* Emery, 108 Mich. 641, 66 N. W. 569.

70. Storrie *v.* Grand Trunk Elevator Co., (Mich. 1903) 96 N. W. 569, go under a gate in discharge of duty.

71. Pittsburgh, etc., R. Co. *v.* Martin, 157 Ind. 216, 61 N. E. 229; Funderburk *v.* State, (Tex. Cr. App. 1901) 64 S. W. 1059, whipping immoderate.

72. Robinson *v.* Waupaca, 77 Wis. 544, 46 N. W. 809.

73. *Georgia.*— Jones *v.* Grogan, 98 Ga. 552, 25 S. E. 590.

Illinois.— Greenup *v.* Stoker, 8 Ill. 202.

Indiana.— Louisville, etc., R. Co. *v.* Miller, 141 Ind. 533, 37 N. E. 343.

Massachusetts.—Leonard *v.* Allen, 11 Cush. 241, holding that where defendant, in an action of slander, used "certain expressions, gestures, and intonations of voice," the witnesses after describing them as well as possible may state the impression as to who and what was meant.

Michigan.— Storrie *v.* Grand Trunk Elevator Co., (1903) 96 N. W. 569.

Cross-examination.— The constituent facts of such an inference may be sought on cross-examination. Fuller *v.* State, 117 Ala. 36, 23 So. 688.

4. ESTIMATES — a. In General. The court, in discharging its administrative function of securing for the jury the best evidence fairly available, may well, where accurate measurements, weights, or other applications of standards to phenomena are available, reject the estimate of a witness in such matters.[74] While, however, as is said by the supreme court of Illinois, that, of course, would be the very best kind of evidence, from the nature of things it is absolutely necessary that a lower grade of evidence should be admissible.[75]

b. Ability. Evidence that a person could or could not do any particular act, as hear,[76] see,[77] or otherwise perceive[78] a given object,[79] endure the effects of a

74. Rothchild *v.* New Jersey Cent. R. Co., 163 Pa. St. 49, 29 Atl. 702. And see Blauvelt *v.* Delaware, etc., R. Co., 206 Pa. St. 141, 55 Atl. 857.

75. Pennsylvania Co. *v.* Carlan, 101 Ill. 93, 101.

76. *Alabama.*— Birmingham R., etc., Co. *v.* Mullen, 138 Ala. 614, 35 So. 701; Rollins *v.* State, 136 Ala. 126, 34 So. 349; McVay *v.* State, 100 Ala. 110, 14 So. 862. But *compare* East Tennessee, etc., R. Co. *v.* Watson, 90 Ala. 41, 7 So. 813.

Connecticut.— Burnham *v.* Sherwood, 56 Conn. 229, 14 Atl. 715.

Illinois.— Chicago, etc., R. Co. *v.* Dillon, 123 Ill. 570, 15 N. E. 181, 5 Am. St. Rep. 559 [*affirming* 24 Ill. App. 203].

Michigan.—Crane *v.* Michigan Cent. R. Co., 107 Mich. 511, 65 N. W. 527, where the court said that to ask a witness whether he could have heard a railroad signal, if given, is merely equivalent to asking him whether he was within hearing distance.

New York.— Seeley *v.* New York Cent., etc., R. Co., 8 N. Y. App. Div. 402, 40 N. Y. Suppl. 866; Stever *v.* New York Cent., etc., R. Co., 7 N. Y. App. Div. 392, 39 N. Y. Suppl. 944. But see McLaughlin *v.* Webster, 141 N. Y. 76, 35 N. E. 1081 (where, in case of a conversation, the distances were fully described to the referee and the court held that the referee could draw the conclusion as well as the witness); Hardenburg *v.* Cockroft, 5 Daly 79.

Texas.— Galveston, etc., R. Co. *v.* Duelm, (Civ. App. 1893) 23 S. W. 596.

See 20 Cent. Dig. tit. "Evidence," §§ 2159, 2232.

Contra.— There have been decisions to the contrary (Raymond *v.* Glover, 122 Cal. 471, 55 Pac. 398 (conversation); Hammond, etc., Electric R. Co. *v.* Spyzehalski, 17 Ind. App. 7, 46 N. E. 47; Urdangen *v.* Doner, 122 Iowa 533, 98 N. W. 317; Eskridge *v.* Cincinnati, etc., R. Co., 89 Ky. 367, 12 S. W. 580, 11 Ky. L. Rep. 557; McGeary *v.* Old Colony R. Co., 21 R. I. 76, 41 Atl. 1007), especially where the inference requires skill of a technical nature or lies near the issue in the case (Wheeler *v.* State, 112 Ga. 43, 37 S. E. 126).

Whether a person actually did hear is excluded as a conclusion. Dyer *v.* Dyer, 87 Ind. 13.

77. *Alabama.*— Kansas City, etc., R. Co. *v.* Weeks, 135 Ala. 614, 34 So. 16; Louisville, etc., R. Co. *v.* Stewart, 128 Ala. 313, 29 So. 562; Alabama Great Southern R. Co. *v.* Linn, 103 Ala. 134, 15 So. 508; Birmingham Mineral R. Co. *v.* Harris, 98 Ala. 326, 13 So. 377 (where the question whether there is curve enough to prevent an observer from seeing along the track at that point is spoken of as "a visible and certain physical fact"); East Tennessee, etc., R. Co. *v.* Watson, 90 Ala. 41, 7 So. 813.

California.— Innis *v.* The Senator, 4 Cal. 5, 60 Am. Dec. 577.

Colorado.— Colorado Mortg., etc., Co. *v.* Rees, 21 Colo. 435, 42 Pac. 42.

Illinois.— Cleveland, etc., R. Co. *v.* Moss, 89 Ill. App. 1, holding that the question is merely as to the existence of a fact.

Indiana.— Indianapolis St. R. Co. *v.* Robinson, 157 Ind. 414, 61 N. E. 936.

Iowa.— Brown *v.* Sioux City, etc., R. Co., 94 Iowa 369, 62 N. W. 737; State *v.* Kidd, 89 Iowa 54, 56 N. W. 263. But see Coates *v.* Burlington, etc., R. Co., 62 Iowa 486, 17 N. W. 760.

Maryland.— Richardson *v.* State, 90 Md. 109, 44 Atl. 999.

Massachusetts.— Barker *v.* Lawrence Mfg. Co., 176 Mass. 203, 57 N. E. 366.

Missouri.— Hoffman *v.* Metropolitan St. R. Co., 51 Mo. App. 273.

New York.— Case *v.* Perew, 46 Hun 57, light on shore from harbor. A question as to whether a structure in front of premises occupied by a witness "cuts off any light" from the premises calls for a fact and not an opinion. Nordlinder *v.* Manhattan R. Co., 77 Hun 311, 28 N. Y. Suppl. 361.

North Carolina.— State *v.* McDowell, 129 N. C. 523, 39 S. E. 840; Burney *v.* Allen, 127 N. C. 476, 37 S. E. 501, testator could have seen the witnesses to his will in a certain room.

United States.— Andersen *v.* U. S., 17 U. S. 481, 18 S. Ct. 689, 42 L. ed. 1116; Chicago, etc., R. Co. *v.* Chambers, 68 Fed. 148, 15 C. C. A. 327.

But see Central R. Co. *v.* De Bray, 71 Ga. 406; Hermes *v.* Chicago, etc., R. Co., 80 Wis. 590, 50 N. W. 584, 27 Am. St. Rep. 69.

See 20 Cent. Dig. tit. "Evidence," §§ 2158, 2268, 2328.

Trained observer.— The inference may be by a trained observer, as for example a civil engineer. Chicago, etc., R. Co. *v.* Chambers, 68 Fed. 148, 15 C. C. A. 327.

78. Hammond, etc., Electric R. Co. *v.* Spyzehalski, 17 Ind. App. 7, 46 N. E. 47; Western Union Tel. Co. *v.* Carven, 15 Tex. Civ. App. 547, 39 S. W. 1021.

79. McVay *v.* State, 100 Ala. 110, 14 So. 862; Buchanan *v.* State, 109 Ala. 7, 19 So. 410 (identify goods by quality and color);

given exposure,[80] or estimate accurately the speed at which a train or other object is moving[81] or within what distance it can be stopped[82] may be admissible as a statement of inference from observation;[83] provided that the fact itself is relevant,[84] that the constituent facts cannot adequately be placed before the jury,[85] and that the witness had suitable opportunities for observation.[86] The physical possibility that an object could have produced a given result,[87] or that a man[88] or gang of men,[89] a machine,[90] manufacturing establishment,[91] or a mechanical device, as a bridge,[92] ditch,[93] or drain,[94] sewer,[95] or sluice[96] is capable of doing a certain thing or a given amount of work,[97] may be stated for much the same reason.[98]

c. Age. Age is provable by the inference of any competent observing witness. This is true both in the case of human beings, whether they be adults,[99]

Western Union Tel. Co. *v.* Drake, 14 Tex. Civ. App. 601, 38 S. W. 632 (direct a person).

80. Birmingham Furnace, etc., Co. *v.* Gross, 97 Ala. 220, 12 So. 36, some men can stand more furnace gas than others can.

81. Gulf, etc., R. Co. *v.* Duvall, 12 Tex. Civ. App. 348, 35 S. W. 699, where it is said that witnesses may testify from experience and observation that a person standing on a railroad track cannot tell with accuracy the speed of a train coming toward him on a straight track.

82. Fonda *v.* St. Paul City St. R. Co., 77 Minn. 336, 79 N. W. 1043 (street-car); Norfolk R., etc., Co. *v.* Corletto, 100 Va. 355, 41 S. E. 740 (car).

83. Colorado Mortg., etc., Co. *v.* Rees, 21 Colo. 435, 42 Pac. 42, where it is said that such evidence "is not the expression of an opinion."

84. Chicago, etc., R. Co. *v.* O'Sullivan, 143 Ill. 48, 32 N. E. 398. See *supra*, XI, A, 4, a, (I).

85. Raymond *v.* Glover, 122 Cal. 471, 55 Pac. 398; Blauvelt *v.* Delaware, etc., R. Co., 206 Pa. St. 141, 55 Atl. 857. See *supra*, XI, A, 4, b.

86. Lake Erie, etc., R. Co. *v.* Juday, 19 Ind. App. 436, 49 N. E. 843 (control horse); Pridmore *v.* State, (Tex. Cr. App. 1898) 44 S. W. 177. See *supra*, XI, A, 4, (A), (II), (III).

87. State *v.* Knight, 43 Me. 11, 130, that a razor could have made a particular wound.

88. Kuen *v.* Upmier, 98 Iowa 393, 67 N. W. 374, speak English intelligently.

89. Allen *v.* Murray, 87 Wis. 41, 57 N. W. 979.

90. McCormick Harvesting Mach. Co. *v.* Cochran, 64 Mich. 636, 31 N. W. 561 (harvester); Sprout *v.* Newton, 48 Hun (N. Y.) 209, 15 N. Y. St. 699 (holding that observation of a similar machine may be sufficient).

91. Paddock *v.* Bartlett, 68 Iowa 16, 25 N. W. 906 (pork-packing); Burns *v.* Welch, 8 Yerg. (Tenn.) 117 (sawmill).

92. Hartford County Com'rs *v.* Wise, 71 Md. 43, 18 Atl. 31.

93. Frey *v.* Lowden, 70 Cal. 550, 11 Pac. 838; Denver, etc., R. Co. *v.* Pulaski Irrigating Ditch Co., 19 Colo. 367, 35 Pac. 910 (irrigation ditch); Alsop *v.* Adams, 10 Ky. L. Rep. 362.

94. Denver, etc., R. Co. *v.* Pulaski Irrigating Ditch Co., 19 Colo. 367, 370, 35 Pac. 910 (where it was said: "It is insisted by counsel for appellant that the testimony was inadmissible, because the mere opinion of witnesses who were not experts. While the general rule is that the opinion of a witness is inadmissible except when the inquiry involves a question of skill or science, and the witness possesses a peculiar knowledge of the subject, acquired by study or experience, there are well recognized exceptions to the rule, and among these exceptions are instances which involve a description or estimate of magnitude, size, dimension, velocity, value, etc., and when, from the nature of the subject under investigation, it is difficult or impossible to state with sufficient exactness, or in detail, the facts, with their surroundings, in such a manner as to produce upon the minds of the jury the impression that a personal observation has produced upon the mind of the witness. In such cases it is permissible for the witness who has had the benefit of personal examination to supplement the statement of facts detailed by him with his opinion or conclusion. Such testimony is not an opinion in its ordinary sense, which is an inference as to what will follow from a given state of facts, but rather the statement of a result that has happened and is observable as an existing condition"); Osten *v.* Jerome, 93 Mich. 196, 199, 53 N. W. 7 (where it was said: "It was proper for the witness to express an opinion upon the subject, as no amount of description would so fully possess the jury of the situation; nor was it a question calling for expert testimony; it was but another way of describing the capacity of the ditch").

95. Indianapolis *v.* Huffer, 30 Ind. 235.

96. Brown *v.* Swanton, 69 Vt. 53, 37 Atl. 280.

97. Frey *v.* Lowden, 70 Cal. 550, 11 Pac. 838 (discharge water); Alsop *v.* Adams, 10 Ky. L. Rep. 362; Sprout *v.* Newton, 48 Hun (N. Y.) 209; Long *v.* McCauley, (Tex. Sup. 1887) 3 S. W. 689.

98. The inference must be the result of personal observation. Kansas City, etc., R. Co. *v.* Cook, 57 Ark. 387, 21 S. W. 1066. Its weight may be tested upon cross-examination. McCormick Harvesting Mach. Co. *v.* Cochran, 64 Mich. 636, 31 N. W. 561.

99. *Alabama.*— Winter *v.* State, 123 Ala. 1, 26 So. 949.

Indiana.— Benson *v.* McFadden, 50 Ind. 431.

minors,[1] or children,[2] and in the case of animals[3] or inanimate objects.[4] The witnesses should state facts observed and used by them as the basis of the inference,[5] and they must be shown to have had adequate opportunities of observation.[6] Where the person is present in court or the object may be inspected by the jury, or if, for any cause, all the constituent facts can be placed before them, the estimate is unnecessary and should therefore be rejected.[7]

d. Area. Superficial area, as the number of acres in a given territory[8] and superficial space in general,[9] may be estimated by one suitably qualified who has observed it, provided the tract is shown to have been correctly identified to the witness.[10]

e. Cause or Effect.[11] A witness, provided he is shown to be duly qualified, may state in the form of an inference the cause of a certain natural result,[12]

Kansas.— State *v.* Grubb, 55 Kan. 678, 41 Pac. 951.

Massachusetts.—Com. *v.* O'Brien, 134 Mass. 198.

Missouri.—Elsner *v.* Supreme Lodge K. & L. of H., 98 Mo. 640, 11 S. W. 991; State *v.* Douglass, 48 Mo. App. 39.

New York.— De Witt *v.* Barly, 17 N. Y. 340.

Texas.— Earl *v.* State, 44 Tex. Cr. 467, 72 S. W. 175; Danley *v.* State, (Cr. App. 1903) 71 S. W. 958; Bice *v.* State, 37 Tex. Cr. 38, 38 S. W. 803; Jones *v.* State, 32 Tex. Cr 108, 22 S. W. 149; Garner *v.* State, 28 Tex. App. 561, 13 S. W. 1004; St. Louis Southwestern R. Co. *v.* Bowles, (Civ. App. 1903) 72 S. W. 451.

See 14 Cent. Dig. tit. "Criminal Law," § 1043½; 20 Cent. Dig. tit. "Evidence," § 2236.

Contra.— Valley Mut. L. Assoc. *v.* Teewalt, 79 Va. 421.

1. Louisville, etc., R. Co. *v.* Frawley, 110 Ind. 18, 9 N. E. 594 (holding that how old a boy appeared to be at a certain time may be admissible); State *v.* Bernstein, 99 Iowa 5, 68 N. W. 442; Com. *v.* O'Brien, 134 Mass. 198; State *v.* Douglass, 48 Mo. App. 39; Bice *v.* State, 37 Tex. Cr. 38, 38 S. W. 803; Jones *v.* State, 32 Tex. Cr. 110, 22 S. W. 149; Simpson *v.* State, (Tex. Cr. App. 1903) 77 S. W. 819.

Age an essential element of offense.— On a criminal case where the age of the accused is an essential element of the offense "it would be too perilous" to admit the inference. Martin *v.* State, 90 Ala. 602, 8 So. 858, 24 Am. St. Rep. 844.

2. People *v.* Johnson, 70 Ill. App. 634; McFadden *v.* Benson, Wils. (Ind.) 527; Stewart *v.* Anderson, 111 Iowa 329, 82 N. W. 770; Bice *v.* State, 37 Tex. Cr. 38, 38 S. W. 803.

The inquiry must be confined to the effect of the observed appearances upon the mind of the witness himself and cannot be so extended as to cover the witness' opinion as to what would be the effect of those appearances on the minds of others. A question as to whether, "from physical appearance," a certain person was a minor or appeared "so to a person of ordinary observation" was held to have been improperly admitted. Koblenschlag *v.* State, 23 Tex. App. 264, 4 S. W. 888.

3. Clague *v.* Hodgson, 16 Minn. 329, sheep.

4. Standefer *v.* Aultman Machinery Co., (Tex. Civ. App. 1904) 78 S. W. 552 (thresher old and worn out); Baker *v.* Sherman, 71 Vt. 439, 46 Atl. 57 (holding that the counting of rings in a block of wood, to determine how many years before the marks on the tree from which it was taken were made, is a matter of expert testimony).

5. *Connecticut.*— Morse *v.* State, 6 Conn. 9, holding that the mere opinion of a witness respecting the age of a person, from his appearance, unacccompanied by the facts on which that opinion is founded, is inadmissible.

Indiana.— Benson *v.* McFadden, 50 Ind. 431.

Kansas.— State *v.* Grubb, 55 Kan. 678, 41 Pac. 951.

Massachusetts.—Com. *v.* O'Brien, 134 Mass. 198.

Missouri.— Elsner *v.* Supreme Lodge K. & L. of H., 98 Mo. 640, 11 S. W. 991; State *v.* Douglass, 48 Mo. App. 39.

Texas.— Bice *v.* State, 37 Tex. Cr. 38, 38 S. W. 803; Garner *v.* State, 28 Tex. App. 561, 13 S. W. 1004; Clark *v.* State, 28 Tex. App. 189, 12 S. W. 729, 19 Am. St. Rep. 817.

See 14 Cent. Dig. tit. "Criminal Law," § 1043½; 20 Cent. Dig. tit. "Evidence," §§ 2236, 2295. See also *supra*, XI, A, 4, a, (II).

6. Hartshorn *v.* Metropolitan L. Ins. Co., 55 N. Y. App. Div. 471, 67 N. Y. Suppl. 13, holding that knowledge of color of hair and strength and activity of the person is not a sufficient qualification. See *supra*, XI, A, 4, a, (II), (III).

7. State *v.* Robinson, 32 Oreg. 43, 48 Pac. 357. See *supra*, XI, A, 4, b, c.

8. Bennett *v.* Meehan, 83 Ind. 566, 43 Am. Rep. 78; Dashiel *v.* Harshman, 113 Iowa 283, 85 N. W. 85.

9. International, etc., R. Co. *v.* Satterwhite, 19 Tex. Civ. App. 170, 47 S. W. 41.

10. Holcombe *v.* Munson, 103 N. Y. 682, 61 N. E. 443.

11. See also *infra*, XI, C, 4, j.

12. *Arkansas.*— St. Louis, etc., R. Co. *v.* Yarborough, 56 Ark. 612, 20 S. W. 515.

Connecticut.—Clinton *v.* Howard, 42 Conn. 294.

Illinois.— Ohio, etc., R. Co. *v.* Long, 52 Ill. App. 670.

Indiana.— Indianapolis St. R. Co. *v.* Robinson, 157 Ind. 414, 61 N. E. 936.

injury,[13] sickness,[14] death,[15] or other occurrence.[16] It merely reverses the statement to say that a witness may equally well infer that given phenomena are the effect of a designated cause;[17] what has been its effect;[18] and under what conditions it will manifest its existence.[19] He may even, where the inference is a simple one,[20] testify as to what would have been the effect under

Iowa.— Barry *v.* Farmers' Mut. Hail Ins. Assoc., 110 Iowa 433, 81 N. W. 690 (hail injuring grain); Yahn *v.* Ottumwa, 60 Iowa 429, 15 N. W. 257.

Kentucky.— N. N. & M. V. R. Co. *v.* Wilson, 16 Ky. L. Rep. 262.

Michigan.— Laird *v.* Snyder, 59 Mich. 404, 26 N. W. 654, mud on buggy.

Missouri.— White *v.* Farmers' Mut. F. Ins. Co., 97 Mo. App. 590, 71 S. W. 707, death by lightning.

Nevada.— McLeod *v.* Lee, 17 Nev. 103, 28 Pac. 124.

New York.— Wintringham *v.* Hayes, 144 N. Y. 1, 38 N. E. 999, 43 Am. St. Rep. 725; Dwyer *v.* Buffalo Gen. Electric Co., 20 N. Y. App. Div. 124, 46 N. Y. Suppl. 874, electric spark.

South Carolina.—Virginia-Carolina Chemical Co. *v.* Kirvin, 57 S. C. 445, 35 S. E. 745, decay of cotton bolls.

Texas.—International, etc., R. Co. *v.* Klaus, 64 Tex. 293; Hickey *v.* State, (Tex. Cr. App. 1903) 76 S. W. 920 (hole in hat made by bullet); Texas, etc., R. Co. *v.* Wooldridge, (Civ. App. 1901) 63 S. W. 905 (burning of buildings); Gulf, etc., R. Co. *v.* John, 9 Tex. Civ. App. 342, 29 S. W. 558 (accident); Galveston, etc., R. Co. *v.* Daniels, 9 Tex. Civ. App. 253, 28 S. W. 548, 711 (fall of a bridge); Gulf, etc., R. Co. *v.* Haskell, 4 Tex. Civ. App. 550, 23 S. W. 546.

Wyoming.— Union Pac. R. Co. *v.* Gilland, 4 Wyo. 395, 34 Pac. 953, fire.

See 20 Cent. Dig. tit. "Evidence," §§ 2275 *et seq.*, 2334 *et seq.*

Illustrations.— That a certain culvert (St. Louis, etc., R. Co. *v.* Bradley, 54 Fed. 630, 4 C. C. A. 528) or dam (St. Louis, etc., R. Co. *v.* Yarborough, 56 Ark. 612, 20 S. W. 515; Blood *v.* Light, 31 Cal. 115; Ohio, etc., R. Co. *v.* Long, 52 Ill. App. 670; N. N. & M. V. R. Co. *v.* Wilson, 16 Ky. L. Rep. 262; McLeod *v.* Lee, 17 Nev. 103, 28 Pac. 124; Gulf, etc., R. Co. *v.* Locker, 78 Tex. 279, 14 S. W. 611; International, etc., R. Co. *v.* Klaus, 64 Tex. 293; Gulf, etc., R. Co. *v.* Haskell, 4 Tex. Civ. App. 550, 23 S. W. 546) caused an overflow, that injuries to a yacht are due to "ordinary wear and tear" (Wintringham *v.* Hayes, 144 N. Y. 1, 38 N. E. 999, 43 Am. St. Rep. 725), or that certain appearances frightened a horse (Clinton *v.* Howard, 42 Conn. 294, 307; Yahn *v.* Ottumwa, 60 Iowa 429, 15 N. W. 257; Stone *v.* Pendleton, 21 R. I. 332, 43 Atl. 643) are legitimate instances of this form of inference, by reason of the absence of any undue influence of the element of reasoning.

13. Perry *v.* State, 87 Ala. 30, 6 So. 425 (red hot iron); Georgia R. Co. *v.* Bryans, 77 Ga. 429 (cars going too fast); Horan *v.* Chicago, etc., R. Co., 89 Iowa 328, 56 N. W. 507 (slipping).

14. Suddeth *v.* Boone, 121 Iowa 258, 96 N. W. 853 (that smell of sewer outlet made witness sick); Pullman Palace Car Co. *v.* Smith, 79 Tex. 468, 14 S. W. 993, 23 Am. St. Rep. 356, 13 L. R. A. 215.

15. Everett *v.* State, 62 Ga. 65; State *v.* Smith, 22 La. Ann. 468.

16. Brock *v.* State, (Tex. Cr. App. 1898) 44 S. W. 516, fight.

17. *Alabama.*— Louisville, etc., R. Co. *v.* Sandlin, 125 Ala. 585, 28 So. 40, passing of trains on a curve.

California.— People *v.* Brotherton, 47 Cal. 388, chemical on writing.

Connecticut.— Kearney *v.* Farrell, 28 Conn. 317, 73 Am. Dec. 677, holding that a witness may state that the effluvia from a certain privy and pig-sty necessarily rendered plaintiff's house uncomfortable as a place of abode.

Iowa.— Seagel *v.* Chicago, etc., R. Co., 83 Iowa 380, 49 N. W. 990, collision with a locomotive.

South Dakota.— State *v.* Isaacson, 8 S. D. 69, 65 N. W. 430, death from poison.

Texas.— Galveston, etc., R. Co. *v.* Daniels, 9 Tex. Civ. App. 253, 28 S. W. 548, 711, freshet.

West Virginia.— Taylor *v.* Baltimore, etc., R. Co., 33 W. Va. 39, 10 S. E. 29, deposit in a stream.

See 20 Cent. Dig. tit. "Evidence, §§ 2281, 2337.

18. *Alabama.*— Louisville, etc., R. Co. *v.* Stewart, 128 Ala. 313, 29 So. 562 (confined to bed; never recovered); O'Grady *v.* Julian, 34 Ala. 88.

Arizona.— Cole *v.* Bean, 1 Ariz. 377, 25 Pac. 538, use of intoxicating liquor.

California.— Bell *v.* Shultz, 18 Cal. 449.

Indiana.— Williamson *v.* Yingling, 80 Ind. 379.

Iowa.— Brooks *v.* Chicago, etc., R. Co., 73 Iowa 179, 34 N. W. 805, fire.

Maryland.— Law *v.* Scott, 5 Harr. & J. 438.

Massachusetts.—Toland *v.* Paine Furniture Co., 179 Mass. 501, 61 N. E. 52.

Michigan.— Marcott *v.* Marquette, etc., R. Co., 49 Mich. 99, 13 N. W. 374 (strangers in an engine cab); Underwood *v.* Waldron, 33 Mich. 232 (water wasting masonry); Pierce *v.* Pierce, 38 Mich. 412 (intoxication).

New York.— Rose *v.* Stewart, 77 Hun 306, 28 N. Y. Suppl. 318, to diminish light.

But see Walker *v.* Fuller, 29 Ark. 448, holding that a witness should not be allowed to testify that in consequence of certain acts he lost credit and had to cease business.

See 20 Cent. Dig. tit. "Evidence," §§ 2281, 2337.

19. Miller *v.* State, 107 Ala. 40, 19 So. 37, nearness for powder scorching.

20. Where the inference is not a common one, and no special knowledge is shown it is

different conditions;[21] what will be the probable future effect;[22] and whether the result is constant upon the cause.[23] The inference should be the result of personal observation,[24] and not distinctly the deduction of a process of reasoning,[25] conjecture,[26] or inability to reach any positive conclusion.[27] It is further necessary that the facts cannot be fully placed before the jury,[28] that the witness shall state such facts as he can,[29] and that he shall be possessed of sufficient knowledge on the subject to make his inference an aid to the jury.[30]

f. Cost or Expense. A witness qualified by observation may state the cost of doing certain work[31] or reaching given results of a common nature,[32] provided

rejected. Marshall *v.* Bingle, 36 Mo. App. 122.

21. Gulf, etc., R. Co. *v.* Richards, 83 Tex. 203, 18 S. W. 611, railroad construction.

22. West *v.* State, 71 Ark. 144, 71 S. W. 483 (nuisance on health); Pennsylvania Co. *v.* Mitchell, 124 Ind. 473, 24 N. E. 1065; Bennett *v.* Meehan, 83 Ind. 566, 43 Am. Rep. 78 (drainage); Rochester, etc., R. Co. *v.* Budlong, 6 How. Pr. (N. Y.) 467 (railroad layout).

23. Doan *v.* Willow Springs, 101 Wis. 112, 76 N. W. 1104, jolt from a rock in highway.

24. Lawrence *v.* Mycenian Marble Co., 1 Misc. (N. Y.) 105, 20 N. Y. Suppl. 698; Lineoski *v.* Susquehanna Coal Co., 157 Pa. St. 153, 27 Atl. 577.

25. Faribault *v.* Sater, 13 Minn. 223, state of another's mind.

26. *Maryland.*— Law *v.* Scott, 5 Harr. & J. 438.

Michigan.— Kelley *v.* Detroit, etc., R. Co., 80 Mich. 237, 45 N. W. 90, 20 Am. St. Rep. 514.

Nebraska.— Piper *v.* Woolman, 43 Nebr. 280, 61 N. W. 588, libel.

New York.— Fry *v.* Bennett, 3 Bosw. 200, libel.

Pennsylvania.— Richards *v.* Richards, 37 Pa. St. 225.

Texas.— Middlebrook *v.* Zapp, 79 Tex. 321, 15 S. W. 258, execution on credit.

Mere probability and likelihood as to what would be apt to have a certain effect (Johnson *v.* Ballew, 2 Port. (Ala.) 29, excites fear; Burns *v.* Farmington, 31 N. Y. App. Div. 364, 52 N. Y. Suppl. 229, frighten a horse; Cooper *v.* Overton, 102 Tenn. 211, 52 S. W. 183, 73 Am. St. Rep. 864, 45 L. R. A. 591, attracted children to a pond), or probably did so (Miller *v.* Miller, 187 Pa. St. 572, 41 Atl. 277, caused ill feeling), may be excluded.

27. Patterson *v.* Colebrook, 29 N. H. 94. But see Pullman Palace Car Co. *v.* Smith, 79 Tex. 468, 14 S. W. 993, 23 Am. St. Rep. 356, 13 L. R. A. 215, holding that a plaintiff could, after stating the facts attending an accident, state that she knew of no cause for her sickness except the attendant exposure.

28. *Arkansas.*— St. Louis, etc., R. Co. *v.* Yarborough, 56 Ark. 612, 20 S. W. 515.

Illinois.— Rockford *v.* Hildebrand, 61 Ill. 155.

Louisiana.— Holland *v.* Cammett, 5 La. Ann. 705.

Michigan.— Marcott *v.* Marquette, etc., R. Co., 49 Mich. 99, 13 N. W. 374.

Missouri.— Muff *v.* Wabash, etc., R. Co., 22 Mo. App. 584.

New York.— Allen *v.* Stout, 51 N. Y. 668.

See 20 Cent. Dig. tit. "Evidence," § 2275 *et seq.* See *supra*, XI, A, 4, b.

29. Bennett *v.* Meehan, 83 Ind. 566, 43 Am. Rep. 78; Horan *v.* Chicago, etc., R. Co., 89 Iowa 328, 56 N. W. 507; Pullman Palace Car Co. *v.* Smith, 79 Tex. 468, 14 S. W. 993, 23 Am. St. Rep. 356, 13 L. R. A. 215; Gulf, etc., R. Co. *v.* Locker, 78 Tex. 279, 14 S. W. 611; International, etc., R. Co. *v.* Klaus, 64 Tex. 293; Galveston, etc., R. Co. *v.* Daniels, 9 Tex. Civ. App. 253, 28 S. W. 548, 711; Union Pac. R. Co. *v.* Gilland, 4 Wyo. 395, 34 Pac. 953. Otherwise the evidence is inadmissible. Pennsylvania Co. *v.* Mitchell, 124 Ind. 473, 24 N. E. 1065.

30. Blood *v.* Light, 31 Cal. 115; Underwood *v.* Waldron, 33 Mich. 232; Atkins *v.* Manhattan R. Co., 57 Hun (N. Y.) 102, 10 N. Y. Suppl. 432; Harris *v.* Panama R. Co., 3 Bosw. (N. Y.) 7; Wallace *v.* Jefferson Gas Co., 147 Pa. St. 205, 23 Atl. 416. And see Gulf, etc., R. Co. *v.* Hepner, 83 Tex. 136, 18 S. W. 441. See also *supra*, XI, A, 4, a, (II), (III). Otherwise the evidence will be rejected (Kight *v.* Metropolitan R. Co., 21 App. Cas. (D. C.) 494, the cause of flashes attending the blowing out of a fuse box in an electric car; Shaw *v.* Susquehanna Boom Co., 125 Pa. St. 324, 17 Atl. 426, ice jam), as where an ordinary observer offers to state the cause of a disease (Dushane *v.* Benedict, 120 U. S. 630, 7 S. Ct. 696, 30 L. ed. 810, smallpox) or death (American Acc. Co. *v.* Fidler, 35 S. W. 905, 18 Ky. L. Rep. 161; International, etc., R. Co. *v.* Kuehn, 11 Tex. Civ. App. 21, 31 S. W. 322).

One not technically skilled may state whether a wound was made with a blunt or a cutting instrument (People *v.* Sullivan, (Cal. 1885) 8 Pac. 520), but not to what caused a given state of health (State *v.* Ogden, 39 Oreg. 195, 65 Pac. 449).

Where the inference is a usual one, the necessary knowledge may be assumed. Murphy *v.* New York Cent. R. Co., 66 Barb. (N. Y.) 125.

31. Terre Haute, etc., R. Co. *v.* Crawford, 100 Ind. 550 (railroad filling); Thompson *v.* Keokuk, etc., R. Co., 116 Iowa 215, 89 N. W. 975 (restoring meadow).

32. Cunningham *v.* Cunningham, 75 Conn. 64, 52 Atl. 318 (to board and clothe a wife and child); Tucker *v.* Massachusetts Cent. R. Co., 118 Mass. 546 (carrying on business under changed conditions).

that sufficient constituent facts are stated [33] and the witness is shown to be capable of drawing a reasonable inference.[34]

g. Dimensions. An observer may state his estimate of size, including height, depth, breadth, thickness, and width,[35] and any change in these or other dimensions.[36] The statement is merely one of fact as to which any person who has applied the measurements may testify,[37] with weight proportionate to his age and experience.[38] But where all dimensions and other material facts can be placed before a jury with exactness a witness will not be permitted to state his inference.[39]

h. Direction. A witness may state as a fact the direction in which motion takes place;[40] as for example the point from which a carriage seemed to come,[41] or the starting point of a fire,[42] or the direction in which force is applied,[43] or from which a sound proceeds.[44]

i. Distance. An estimate of distance, when the facts on which it is based are too numerous for detailed statement, is admissible as amounting to stating the fact in the only way in which it can be stated in the absence of accurate measurement.[45] The limitation, in point of distance, of human vision of objects under

33. Dowd *v.* Krall, 32 Misc. (N. Y.) 252, 65 N. Y. Suppl. 797.

34. Crane Co. *v.* Columbus Constr. Co., 73 Fed. 984, 20 C. C. A. 233, laying gas-pipe. See also Cooper *v.* Randall, 59 Ill. 317 (cost of constructing a building); Forbes *v.* Howard, 4 R. I. 364 (cost of fitting up theater).

35. *Massachusetts.*— Hovey *v.* Sawyer, 5 Allen 554, holding that it does not require a highway surveyor to testify what is the highest point of a hill.

New Hampshire.— Eastman *v.* Amoskeag Mfg. Co., 44 N. H. 143, 82 Am. Dec. 201.

South Dakota.— Vermillion Artesian Well, etc., Co. *v.* Vermillion, 6 S. D. 466, 61 N. W. 802.

Vermont.— Morrisette *v.* Canadian Pac. R. Co., 76 Vt. 267, 56 Atl. 1102, two-throw switch.

Washington.— State *v.* Nordstrom, 7 Wash. 506, 35 Pac. 382, holding that a shoemaker may state that a certain boot will fit a given foot.

36. Romack *v.* Hobbs, (Ind. Sup. 1892) 32 N. E. 307, ditch.

37. Busch *v.* Kilborne, 40 Mich. 297, unprofessional log scaler.

38. Busch *v.* Kilborne, 40 Mich. 297.

39. Lake Erie, etc., R. Co. *v.* Juday, 19 Ind. App. 436, 49 N. E. 843; Kummer *v.* Christopher, etc., R. Co., 20 N. Y. Suppl. 116; International, etc., R. Co. *v.* Kuehn, 2 Tex. Civ. App. 210, 21 S. W. 58. See *supra*, XI, A, 4, b.

40. State *v.* Shinborn, 46 N. H. 497, 88 Am. Dec. 224.

41. State *v.* Shinborn, 46 N. H. 497, 88 Am. Dec. 224.

42. Union Pac. R. Co. *v.* Gilland, 4 Wyo. 395, 34 Pac. 953.

43. *Indiana.*— Ohio, etc., R. Co. *v.* Wrape, 4 Ind. App. 108, 30 N. E. 427, cattle struck.

Maine.— State *v.* Knight, 43 Me. 11.

Massachusetts.— Com. *v.* Sturtivant, 117 Mass. 122, 19 Am. Rep. 401, where it was said: "It would seem to be within the knowledge of men in general, when looking at the effects of a blow upon a solid body, to determine from the external marks and indications, if any exist, the direction from which it came. In the great majority of cases, these indications are distinct and plain, and to observe them is within the constant experience of men. Take the case of a heavy body striking on the ground. A falling shot or fragment of rock leaves a very different mark, according as it strikes the ground vertically or at an angle; and if at an angle, the general direction from which it came would be apparent to the common eye. In like manner, a contusion on an upright surface might plainly indicate the direction of the blow. Suppose the panel of a carriage door is broken in by a collision; different appearances would follow from a horizontal blow delivered at right angles, than from a blow from the front or rear, from above or below. Such appearances the common observer can detect, some more accurately and clearly than others, but it is presumed to be within the power of all; and the opinion of an expert, who has experimented by blows on similar surfaces, and is learned in the law of forces, is not necessary or required. If the panel itself is introduced to the jury, they are competent and able to decide the question. If it cannot be, the witness who saw it may describe, as well as he can, what he saw, and state the conclusion he formed at the time."

Missouri.— Patrick *v.* The J. Q. Adams, 19 Mo. 73, where, in a collision case, it was held that a passenger, after describing the injury done plaintiff's boat, might testify as to the impression thereby made upon his mind as to the position in which the boats came together.

Ohio.— The Clipper *v.* Logan, 18 Ohio 375.

Texas.— Spangler *v.* State, 42 Tex. Cr. 233, 61 S. W. 314, the angle a bullet made.

44. Com. *v.* Best, 180 Mass. 492, 62 N. E. 748 (shots); State *v.* Shinborn, 46 N. H. 497, 88 Am. Dec. 224.

45. *Alabama.*— Hames *v.* Brownlee, 63 Ala. 277, where it was said: "There are certainly instances, and things, in which opinion is so intimately blended with, and a part of the fact to be proved, that the opinion can-

given conditions is in like manner a fact.[46] One with any sufficient experience on the subject may state the range of reflection of a locomotive head-light,[47] the distance a moving body had gone,[48] how far it would "knock" an obstacle,[49] or the distance within which it could be stopped[50] or could pass another.[51] Such a witness may apply other standards and estimate whether a distance is adequate or too great for a given purpose,[52] or is safe.[53]

j. Force. The estimate of causation[54] may take the form of stating the effect of a force; as of stating whether a person could continue in a sitting or standing position, after the force was applied;[55] the strength of a force,[56] whether force

not be excluded without substantially excluding the fact also, a fact which may be an important element in the formation of the verdict. This is true when the testimony relates to what are sometimes called 'conclusions of fact,' such as identity, distance, velocity, duration, etc.; and in not a few other instances."

Arkansas.— St. Louis, etc., R. Co. *v.* Brown, 62 Ark. 254, 35 S. W. 225 (distance train had run by a station); St. Louis, etc., R. Co. *v.* Thomason, 59 Ark. 140, 26 S. W. 598.

California.— People *v.* Gleason, 127 Cal. 323, 59 Pac. 592; People *v.* Alviso, 55 Cal. 230.

Illinois.— Illinois, etc., R. Co. *v.* Swisher, 53 Ill. App. 411.

New Hampshire.— Eastman *v.* Amoskeag Mfg. Co., 44 N. H. 143, 82 Am. Dec. 201; Hackett *v.* Boston, etc., R. Co., 35 N. H. 390.

South Dakota.— Vermillion Artesian Well, etc., Co. *v.* Vermillion, 6 S. D. 466, 61 N. W. 802.

Texas.— Kipper *v.* State, (Cr. App. 1903) 77 S. W. 611; San Antonio, etc., R. Co. *v.* Griffith, (Civ. App. 1902) 70 S. W. 438; International, etc., R. Co. *v.* Satterwhite, 19 Tex. Civ. App. 170, 47 S. W. 41.

United States.— Gulf, etc., R. Co. *v.* Washington, 49 Fed. 347, 1 C. C. A. 286.

See 20 Cent. Dig. tit. "Evidence," §§ 2203, 2268.

The preliminary fact that a witness knows the distance between two points is *a fortiori* admissible. Neely *v.* State, (Tex. Cr. App. 1900) 56 S. W. 625.

The distance to which a locomotive headlight throws forward a light is a matter of fact which any observer may state. St. Louis, etc., R. Co. *v.* Thomason, 59 Ark. 140, 26 S. W. 598; Olson *v.* Oregon Short Line R. Co., 24 Utah 460, 68 Pac. 148.

A mere guess is excluded. Rothchild *v.* New Jersey Cent. R. Co., 163 Pa. St. 49, 29 Atl. 702.

Witness not an expert.— A witness testifying to an estimate of distance is not an "expert." Illinois, etc., R. Co. *v.* Swisher, 53 Ill. App. 411.

46. *Alabama.*— East Tennessee, etc., R. Co. *v.* Watson, 90 Ala. 41, 7 So. 813.

California.— Posachane Water Co. *v.* Standart, 97 Cal. 476, 32 Pac. 532.

Illinois.— Illinois Cent. R. Co. *v.* Swisher, 53 Ill. App. 411.

Iowa.— State *v.* Kidd, 89 Iowa 54, 56 N. W. 263.

New Hampshire.— State *v.* Shinborn, 46 N. H. 497, 501, 88 Am. Dec. 224, where it was said: "It came within that class of cases where evidence is received from necessity, arising from the impossibility of stating those minute characteristics of appearance, sound, and the like, which, nevertheless, may lead the mind to a satisfactory conclusion, and be reasonably reliable in judicial investigations. Among instances of this class, forming an exception to the general rule, is the proof of identity in a great variety of cases; such as the identity of person, handwriting, animals, and inanimate objects; and so where the identity is detected by the ear, or by the sound of the human voice, of a musical instrument, the discharge of a pistol, and the like. In the same class are opinions as to distances, size, weight and age. In these and an infinite variety of other cases, the conclusion is drawn from evidence addressed to the eye or ear or both, and which, from its very nature, cannot be described to another. If it could be, so as to enable a jury to decide, then the necessity of receiving the opinion, if it may be so called, would not exist, and the opinion should not be received."

United States.— Gulf, etc., R. Co. *v.* Washington, 49 Fed. 347, 1 C. C. A. 286.

But see Hermes *v.* Chicago, etc., R. Co., 80 Wis. 590, 50 N. W. 584, 27 Am. St. Rep. 69.

Experiments.—The witness need never have made an experiment. Illinois, etc., R. Co. *v.* Swisher, 53 Ill. App. 411.

47. St. Louis, etc., R. Co. *v.* Thomason, 59 Ark. 140, 26 S. W. 598.

48. St. Louis, etc., R. Co. *v.* Brown, 62 Ark. 254, 35 S. W. 225, train.

49. Georgia Cent. R. Co. *v.* Bond, 111 Ga. 13, 36 S. E. 299.

50. As a railroad train for example. Mott *v.* Hudson River R. Co., 8 Bosw. (N. Y.) 345; Harmon *v.* Columbia, etc., R. Co., 32 S. C. 127, 10 S. E. 877, 17 Am. St. Rep. 843.

51. Fulsome *v.* Concord, 46 Vt. 135, wagons.

52. International, etc., R. Co. *v.* Clark, (Tex. Civ. App. 1902) 71 S. W. 587 [*reversed* on another point in 96 Tex. 349, 72 S. W. 584].

53. Culver *v.* Alabama Midland R. Co., 108 Ala. 330, 18 So. 827.

54. See *supra*, XI, C, 4, e.

55. Healy *v.* Visalia, etc., R. Co., 101 Cal. 585, 36 Pac. 125; Ball *v.* Mabry, 91 Ga. 781, 18 S. E. 64.

56. Stout *v.* Pacific Mut. L. Ins. Co., 130 Cal. 471, 62 Pac. 732 (blow heavy or light);

has been applied,[57] and in what order of succession;[58] and its general nature, as that of natural forces or intelligent design.[59] An unskilled witness cannot state a technical inference, as how far a moving train under given conditions will knock a man, except by giving the facts on which his conclusion is based.[60]

k. Grade. In the absence of accurate measurements a person of adequate knowledge and judgment may state the grade of a ditch,[61] hill,[62] or railroad track.[63]

l. Location. The location of a certain building,[64] object,[65] or sound[66] may be inferred by a witness.

m. Number. A witness may estimate the number of animals,[67] articles,[68] or persons[69] observed by him, provided that his inference is founded upon adequate data.[70] If not so based the evidence cannot be deemed relevant.[71]

n. Profit and Loss. A witness with sufficient knowledge acquired by observation may estimate the profit derived from conducting a certain business.[72]

o. Quality. A witness shown to be familiar from observation with the quality of articles[73] may state his estimate of what it is,[74] as it existed at any time sufficiently near to be relevant.[75] He may also state that a similarity in quality exists;[76] and he may state his inference as to whether the quality observed con-

McPherson *v.* St. Louis, etc., R. Co., 97 Mo. 253, 10 S. W. 846 (storm); State *v.* Greenleaf, 71 N. H. 606, 54 Atl. 38.

57. Fort *v.* State, 52 Ark. 180, 11 S. W. 959, 20 Am. St. Rep. 163; State *v.* Greenleaf, 71 N. H. 606, 54 Atl. 38.

58. Fort *v.* State, 52 Ark. 180, 11 S. W. 959, 20 Am. St. Rep. 163.

59. State *v.* Rainsbarger, 71 Iowa 746, 31 N. W. 865, accident.

60. Georgia Cent. R. Co. *v.* Bond, 111 Ga. 13, 36 S. E. 299.

61. Posachane Water Co. *v.* Standart, 97 Cal. 476, 32 Pac. 532.

62. Galveston, etc., R. Co. *v.* Ford, 22 Tex. Civ. App. 131, 54 S. W. 37.

63. Galveston, etc., R. Co. *v.* Ford, 22 Tex. Civ. App. 131, 54 S. W. 37; Olson *v.* Oregon Short Line R. Co., 24 Utah 460, 68 Pac. 148.

64. Shea *v.* Muncie, 148 Ind. 14, 46 N. E. 138, within city limits.

65. Nesbit *v.* Crosby, 74 Conn. 554, 51 Atl. 550, wagon.

66. People *v.* Chin Hane, 108 Cal. 597, 41 Pac. 697, within the house.

67. Sabine, etc., R. Co. *v.* Brousard, 69 Tex. 617, 7 S. W. 374 (stock); Albright *v.* Corley, 40 Tex. 105 (stock).

68. Logs (Thornton *v.* Savage, 120 Ala. 449, 25 So. 27; Clink *v.* Gunn, 90 Mich. 135, 51 N. W. 193; Hodson *v.* Goodale, 22 Oreg. 68, 29 Pac. 70), ties (Pope *v.* Ramsey, 78 Mo. App. 157), or stripes received by a slave (Hall *v.* Goodson, 32 Ala. 277). See also Eastman *v.* Amoskeag Mfg. Co., 44 N. H. 143, 82 Am. Dec. 201.

69. Fowler *v.* Fowler, 111 Mich. 676, 70 N. W. 336, holding that a witness may state the average number of farm hands employed during a given time.

70. Hodson *v.* Goodale, 22 Oreg. 68, 29 Pac. 70; Sabine, etc., R. Co. *v.* Brousard, 69 Tex. 617, 7 S. W. 374. See *supra*, XI, A, 4, a.

71. Baltimore Union Pass. R. Co. *v.* Baltimore, 71 Md. 405, 18 Atl. 917. See *supra*, XI, A, 4, a.

72. Dennis *v.* Dennis, 15 Md. 73, farming.

A mere calculation based on an examination of documents and evidence (Carpenter *v.* Leonard, 3 Allen (Mass.) 32; Rider *v.* Ocean Ins. Co., 20 Pick. (Mass.) 259) or from general knowledge of a business (Bartlett *v.* Decreet, 4 Gray (Mass.) 111) as to the existence of a profit is inadmissible.

73. *Alabama.*— Thornton *v.* Savage, 120 Ala. 449, 25 So. 27, trees as timber.

California.— Grunwald *v.* Freese, (1893) 34 Pac. 73, old wire rope.

Delaware.— Townsend *v.* Bonwill, 5 Harr. 474, crops.

Illinois.—Sallwasser *v.* Hazlitt, 18 Ill. App. 243, illustrated catalogues.

Indiana.— Myers *v.* Murphy, 60 Ind. 282; Jeffersonville R. Co. *v.* Lanham, 27 Ind. 171, railroad ties.

Missouri.— Werner *v.* O'Brien, 40 Mo. App. 483, tobacco.

New Hampshire.— Eastman *v.* Amoskeag Mfg. Co., 44 N. H. 143, 82 Am. Dec. 201.

Canada.— Blouin *v.* Québec, 16 Quebec Super. Ct. 303, provisions.

A skilled witness is not required. Grunwald *v.* Freese, (Cal. 1893) 34 Pac. 73. On the other hand the evidence of an inference by such an observer will not be excluded. Werner *v.* O'Brien, 40 Mo. App. 453.

74. Townsend *v.* Bonwill, 5 Harr. (Del.) 474.

Skilled witnesses may state qualities in matter of which they alone are competent to infer the existence. Thus a well digger may state that a certain layer of soil is impervious to water (Buffum *v.* Harris, 5 R. I. 243), or one skilled in that particular may state whether two pieces of cloth are of the same quality and texture (People *v.* Lovren, 119 Cal. 88, 51 Pac. 22, 638).

One who has been in the habit for years of paying for certain articles is not thereby rendered competent to testify as to their quality. Perkins *v.* Stickney, 132 Mass. 217, coal.

75. Werner *v.* O'Brien, 40 Mo. App. 483.

76. Taylor Cotton-Seed Oil, etc., Co. *v.* Pumphrey, (Tex. Civ. App. 1895) 32 S. W. 225, meal.

forms to a given standard, as that prescribed by a contract,[77] merchantable,[78] or established by a sample.[79]

p. Quantity. A witness may state his estimate of quantity, either absolute,[80] comparative,[81] or as deemed requisite for a future result,[82] provided that he appears to possess sufficient knowledge[83] and data[84] on which to ground an inference,[85] and that he shows this by stating the facts on which his inference is based.[86] The knowledge must be commensurate with the nature of the subject-matter;[87] but where knowledge is general a specialist is not required, although such an inference would have greater weight.[88]

q. Speed. An observer may state his estimate of the apparent speed of moving objects, as animals,[89] a dummy engine,[90] an electric,[91] or hand[92] car, a car-

77. Pacific Coast Elevator Co. *v.* Bravinder, 14 Wash. 315, 44 Pac. 544, wheat.

78. Littlejohn *v.* Shaw, 159 N. Y. 188, 53 N. E. 810, gambier.

79. Grunwald *v.* Freese, (Cal. 1893) 34 Pac. 73; Sallwasser *v.* Hazlitt, 18 Ill. App. 243.

80. *Alabama.*— Bass Furnace Co. *v.* Glasscock, 82 Ala. 452, 2 So. 315, 60 Am. Rep. 748, coal.

Iowa.— Noe *v.* Chicago, etc., R. Co., 76 Iowa 360, 41 N. W. 42, water.

Michigan.— Isaacs *v.* McLean, 106 Mich. 79, 64 N. W. 2 (hay); Clink *v.* Gunn, 90 Mich. 135, 51 N. W. 193 (logs).

New York.— Frantz *v.* Ireland, 66 Barb. 386 (lumber); Townsend *v.* Brundage, 4 Hun 264, 6 Thomps. & C. 527 (apples).

Pennsylvania.—Vulcanite Pav. Co. *v.* Ruch, 147 Pa. St. 251, 23 Atl. 555, paving.

Texas.— Texas, etc., R. Co. *v.* Hays, 2 Tex. App. Civ. Cas. § 390, lumber.

Vermont.— Brown *v.* Swanton, 69 Vt. 53, 37 Atl. 280, dirt.

See 20 Cent. Dig. tit. "Evidence," §§ 2267, 2329.

81. Howard *v.* City F. Ins. Co., 4 Den. (N. Y.) 502.

82. Rembert *v.* Brown, 14 Ala. 360 (corn); Ah Tong *v.* Earle Fruit Co., 112 Cal. 679, 45 Pac. 7 (fruit).

83. Wheeler *v.* Blandin, 24 N. H. 168. See *supra*, XI, A, 4, a, (II), (III).

84. Clink *v.* Gunn, 90 Mich. 135, 51 N. W. 193 (calculation); Holcombe *v.* Munson, 103 N. Y. 632, 9 N. E. 443 (wood). Unless this is shown the evidence is inadmissible. Birmingham F. Ins. Co. *v.* Pulver, 27 Ill. App. 17; Cook *v.* Brockway, 21 Barb. (N. Y.) 331. See *supra*, XI, A, 4, a, (II), (III).

85. **It is not objectionable** that the witness has made calculations or measurements. Vulcanite Pav. Co. *v.* Ruch, 147 Pa. St. 251, 23 Atl. 555.

86. Woodward *v.* Gates, 38 Ga. 205.

87. Thomas *v.* Kenyon, 1 Daly (N. Y.) 132, holding that to state the quantity of rain which fell on a roof of a given area, the inquiry being scientific, only a witness familiar with the scientific laws governing the subject is competent.

88. Sickles *v.* Gould, 51 How. Pr. (N. Y.) 22.

89. Nesbit *v.* Crosby, 74 Conn. 554, 51 Atl. 550.

90. Highland Ave., etc., R. Co. *v.* Sampson, 112 Ala. 425, 20 So. 566.

91. *California.*— Johnsen *v.* Oakland, etc., Electric R. Co., 127 Cal. 608, 60 Pac. 170.

District of Columbia.— Eclaigton, etc., R. Co. *v.* Hunter, 6 App. Cas. 287.

Illinois.— Potter *v.* O'Donnell, 199 Ill. 119, 64 N. E. 1026; West Chicago St. R. Co. *v.* Dedloff, 92 Ill. App. 547.

Michigan.— Mertz *v.* Detroit Electric R. Co., 125 Mich. 11, 83 N. W. 1036.

Nebraska.—Mathieson *v.* Omaha St. R. Co., (1902) 92 N. W. 639.

New York.— Fisher *v.* Union R. Co., 86 N. Y. App. Div. 365, 83 N. Y. Suppl. 694; Garduhn *v.* Union R. Co., 50 N. Y. App. Div. 602, 64 N. Y. Suppl. 210; Kitay *v.* Brooklyn, etc., R. Co., 23 N. Y. App. Div. 228, 48 N. Y. Suppl. 982; Strauss *v.* Newburgh Electric R. Co., 6 N. Y. App. Div. 264, 39 N. Y. Suppl. 998.

Ohio.— Toledo Electric St. R. Co. *v.* Westenhuber, 22 Ohio Cir. Ct. 67, 12 Ohio Cir. Dec. 22.

Washington.— Sears *v.* Seattle Consol. St. R. Co., 6 Wash. 227, 33 Pac. 389, 1081, too high to stop.

United States.— Robinson *v.* Louisville R. Co., 112 Fed. 484, 50 C. C. A. 357.

But *compare* Citizens' St. R. Co. *v.* Spahr, 7 Ind. App. 23, 33 N. E. 446.

See 20 Cent. Dig. tit. "Evidence," §§ 2202, 2270.

Qualifications of witness.—On a mere showing that a person had for twenty years the common experience of a city man traveling on street-cars, he was not competent to give an opinion as to the speed of a car, based on the noise at a distance of more than one hundred and twenty feet. Campbell *v.* St. Louis, etc., R. Co., 175 Mo. 161, 75 S. W. 86. And see Robinson *v.* Louisville R. Co., 112 Fed. 484, 50 C. C. A. 357.

Mathematical calculation.— Where the statement is not an estimate based upon adequate observation and capacity for coördination, but is arrived at merely as the result of a mathematical calculation made after the event, it is inadmissible. Mathieson *v.* Omaha St. R. Co., (Nebr. 1903) 97 N. W. 243.

92. Kansas City, etc., R. Co. *v.* Crocker, 95 Ala. 412, 11 So. 262; Evansville, etc., R. Co. *v.* Crist, 116 Ind. 446, 19 N. E. 310, 9 Am. St. Rep. 865, 2 L. R. A. 450; Haworth

riage,[93] or a railroad train,[94] and of its speed as compared to other modes of motion,[95] or the speed of the same or similar bodies at other times.[96] Such a witness is not

v. Kansas City Southern R. Co., 94 Mo. App. 215, 68 S. W. 111.

Qualification of witness.—One whose knowledge of speed is based on that of horses is not a competent witness. Mott *v.* Detroit, etc., R. Co., 120 Mich. 127, 79 N. W. 3.

93. Brown *v.* Swanton, 69 Vt. 53, 37 Atl. 280.

94. *Alabama.*— Louisville, etc., R. Co. *v.* Stewart, 128 Ala. 313, 29 So. 562; Highland Ave., etc., R. Co. *v.* Sampson, 112 Ala. 425, 20 So. 566; Alabama Great Southern R. Co. *v.* Hall, 105 Ala. 599, 17 So. 176; Kansas City, etc., R. Co. *v.* Webb, 97 Ala. 157, 11 So. 888; Kansas City, etc., R. Co. *v.* Crocker, 95 Ala. 412, 11 So. 262.

Arkansas.— St. Louis, etc., R. Co. *v.* Brown, 62 Ark. 254, 35 S. W. 225.

District of Columbia.— Eckington, etc., R. Co. *v.* Hunter, 6 App. Cas. 287.

Georgia.— Atlanta, etc., R. Co. *v.* Strickland, 116 Ga. 439, 42 S. E. 864; Ball *v.* Mabry, 91 Ga. 781, 18 S. E. 64.

Illinois.— Chicago, etc., R. Co. *v.* Gunderson, 174 Ill. 495, 51 N. E. 708; Illinois Cent. R. Co. *v.* Ashline, 171 Ill. 313, 49 N. E. 521; Chicago, etc., R. Co. *v.* Johnson, 103 Ill. 512; Pennsylvania Co. *v.* Conlan, 101 Ill. 93.

Indiana.— Louisville, etc., R. Co. *v.* Hendricks, 128 Ind. 462, 28 N. E. 58.

Iowa.— Pence *v.* Chicago, etc., R. Co., 79 Iowa 389, 44 N. W. 686.

Kansas.— Missouri Pac. R. Co. *v.* Hildebrand, 52 Kan. 284, 34 Pac. 738; State *v.* Folwell, 14 Kan. 105.

Kentucky.— Louisville, etc., R. Co. *v.* Ramsey, 3 Ky. L. Rep. 385.

Massachusetts.— Com. *v.* Malone, 114 Mass. 295.

Michigan.— Thomas *v.* Chicago, etc., R. Co., 86 Mich. 496, 49 N. W. 547; Guggenheim *v.* Lake Shore, etc., R. Co., 66 Mich. 150, 33 N. W. 161; Detroit, etc., R. Co. *v.* Van Steinburg, 17 Mich. 99.

Missouri.— Walsh *v.* Missouri Pac. R. Co., 102 Mo. 582, 14 S. W. 873, 15 S. W. 757; Covell *v.* Wabash R. Co., 82 Mo. App. 180.

Nebraska.— Union Pac. R. Co. *v.* Ruzicka, 65 Nebr. 621, 91 N. W. 543; Chicago, etc., R. Co. *v.* Clark, 26 Nebr. 645, 42 N. W. 703.

New Hampshire.— Stone *v.* Boston, etc., R. Co., 72 N. H. 206, 55 Atl. 359; Nutter *v.* Boston, etc., R. Co., 60 N. H. 483.

New York.— Flanagan *v.* New York Cent., etc., R. Co., 173 N. Y. 631, 66 N. E. 1108 [*affirming* 70 N. Y. App. Div. 505, 75 N. Y. Suppl. 225]; Waldele *v.* New York Cent., etc., R. Co., 4 N. Y. App. Div. 549, 38 N. Y. Suppl. 1009; Scully *v.* New York, etc., R. Co., 80 Hun 197, 30 N. Y. Suppl. 61; Northrup *v.* New York, etc., R. Co., 37 Hun 295.

Ohio.— Baltimore, etc., R. Co. *v.* Van Horn, 21 Ohio Cir. Ct. 337, 12 Ohio Cir. Dec. 106; Baltimore, etc., R. Co. *v.* Stoltz, 18 Ohio Cir. Ct. 93, 9 Ohio Cir. Dec. 638; Ashtabula Rapid Transit Co. *v.* Dagenbach, 11 Ohio Cir. Dec. 307.

Pennsylvania.—Barre *v.* Reading City Pass. R. Co., 155 Pa. St. 170, 26 Atl. 99.

Texas.— Galveston, etc., R. Co. *v.* Wesch, 85 Tex. 593, 22 S. W. 957; Gulf, etc., R. Co. *v.* Bell, 24 Tex. Civ. App. 579, 58 S. W. 614; Galveston, etc., R. Co. *v.* Huebner, (Civ. App. 1897) 42 S. W. 1021; Galveston, etc., R. Co. *v.* Sullivan, (Civ. App. 1897) 42 S. W. 568; Campbell *v.* Warner, (Civ. App. 1894) 24 S. W. 703.

Utah.— Chipman *v.* Union Pac. R. Co., 12 Utah 68, 41 Pac. 562.

Virginia.— Norfolk, etc., R. Co. *v.* Tanner, 100 Va. 379, 41 S. E. 721.

Washington.— Sears *v.* Seattle Consol. St. R. Co., 6 Wash. 227, 33 Pac. 389, 1081.

West Virginia.—McVey *v.* Chesapeake, etc., R. Co., 46 W. Va. 111, 32 S. E. 1012.

Wisconsin.— Ward *v.* Chicago, etc., R. Co., 85 Wis. 601, 55 N. W. 771.

See 20 Cent. Dig. tit. "Evidence," §§ 2202, 2270.

The weight of the evidence is affected by the fact that the witness is not specially skilled in railroad matters (Stone *v.* Boston, etc., R. Co., 72 N. H. 206, 55 Atl. 359; Robinson *v.* Louisville R. Co., 112 Fed. 484, 50 C. C. A. 357), or was not in a position to know the fact (Gulf, etc., R. Co. *v.* Bell, 24 Tex. Civ. App. 579, 58 S. W. 614). But while technical training may add to the probative weight of the inference (Brown *v.* Rosedale St. R. Co., (Tex. App. 1890) 15 S. W. 120, engineers, firemen, etc.), it cannot be ruled, as matter of law, that the railroad man's opinion is entitled to the greater weight (Louisville, etc., R. Co. *v.* Gobin, 52 Ill. App. 565).

A witness is not excluded because he does not know the number of rods or feet which constitute a mile (Ward *v.* Chicago, etc., R. Co., 85 Wis. 601, 55 N. W. 771), or even though the witness may characterize his estimate as a "guess" (Louisville, etc., R. Co. *v.* Orr, 121 Ala. 489, 26 So. 35. *Compare supra*, XI, A, 1, note 37) or may say that a train is going fast or slow, although he cannot tell how fast or slow it was going (Illinois Cent. R. Co. *v.* Ashline, 171 Ill. 313, 49 N. E. 521; Overtoom *v.* Chicago, etc., R. Co., 80 Ill. App. 515).

Estimate from force of collision.— A plaintiff, who has not seen a train coming cannot estimate its speed from the force of the blow which he receives. Northern Pac. R. Co. *v.* Hayes, 87 Fed. 129, 30 C. C. A. 576.

95. Kansas City, etc., R. Co. *v.* Crocker, 95 Ala. 412, 11 So. 262, speed of car as compared to the speed with which a man could walk.

96. Ball *v.* Mabry, 91 Ga. 781, 18 S. E. 64; Mertz *v.* Detroit Electric R. Co., 125 Mich. 11, 83 N. W. 1036; Guggenheim *v.* Lake Shore, etc., R. Co., 66 Mich. 150, 33 N. W. 161; Toledo St. R. Co. *v.* Westenhuber, 22 Ohio Cir. Ct. 67, 12 Ohio Cir. Dec. 22, electric cars.

an expert and need not have the training of one,[97] although he characterizes the rate of speed as dangerous,[98] "fast,"[99] "high,"[1] "very fast,"[2] "reckless,"[3] or "unusual,"[4] or judges of it by hearing rather than sight,[5] or applies other standards than distance traversed as related to time, as that of safety.[6] The witness should state the facts upon which he bases his inference,[7] and must be shown to have had adequate facilities for observation[8] and to have improved them,[9] although his claim to knowledge may be accepted as a *prima facie* qualification,[10] and knowledge of time and distance are alone required.[11]

r. Temperature. A witness, in estimating temperature, either in a general way,[12] or in connection with a given event, as the freezing of potatoes,[13] is merely stating a fact.

s. Time and Duration. The point of time[14] and its duration, either generally[15] or between two events,[16] is a matter of fact which a witness may state in the form

97. Louisville, etc., R. Co. *v.* Ramsey, 3 Ky. L. Rep. 385; Thomas *v.* Chicago, etc., R. Co., 86 Mich. 496, 49 N. W. 547; Detroit, etc., R. Co. *v.* Van Steinburg, 17 Mich. 99, 104 (where it was said: "Any intelligent man, who has been accustomed to observe moving objects, would be able to express an opinion of some value upon it, the first time he ever saw a train in motion. The opinion might not be so accurate and reliable as that of one who had been accustomed to observe, with time-piece in hand, the motion of an object of such size and momentum; but this would only go to the weight of the testimony, and not to its admissibility"); Chicago, etc., R. Co. *v.* Clark, 26 Nebr. 645, 42 N. W. 703; Waldele *v.* New York Cent., etc., R. Co., 4 N. Y. App. Div. 549, 38 N. Y. Suppl. 1009; Scully *v.* New York, etc., R. Co., 80 Hun (N. Y.) 197, 30 N. Y. Suppl. 61.

Qualifications of observer.— Observation and a knowledge of time and distance is all that are necessary to an inference (Chicago, etc., R. Co. *v.* Gunderson, 174 Ill. 495, 51 N. E. 708 (familiar); Detroit, etc., R. Co. *v.* Van Steinburg, 17 Mich. 99), although the statements of others may assist in constituting the basis of the inference (Thomas *v.* Chicago, etc., R. Co., 86 Mich. 496, 49 N. W. 547).

"Sound mind and judgment" have been suggested as additional requirements. Chicago, etc., R. Co. *v.* Clark, 26 Nebr. 645, 42 N. W. 703.

One who has timed trains is a competent witness. Thomas *v.* Chicago, etc., R. Co., 86 Mich. 496, 49 N. W. 547.

98. Lockhart *v.* Litchtenthaler, 46 Pa. St. 151. But see Alabama Great Southern R. Co. *v.* Hall, 105 Ala. 599, 17 So. 176.

99. Illinois Cent. R. Co. *v.* Ashline, 171 Ill. 313, 49 N. E. 521; Ehrmann *v.* Nassau Electric R. Co., 23 N. Y. App. Div. 21, 48 N. Y. Suppl. 379; Galveston, etc., R. Co. *v.* Huebner, (Tex. Civ. App. 1897) 42 S. W. 1021.

1. Black *v.* Burlington, etc., R. Co., 38 Iowa 515.

2. Johnsen *v.* Oakland, etc., Electric R. Co., 127 Cal. 608, 60 Pac. 170; Galveston, etc., R. Co. *v.* Huebner, (Tex. Civ. App. 1897) 42 S. W. 1021. A witness may state that a given rate of speed is not fast. Texas, etc., R. Co. *v.* Crockett, 27 Tex. Civ. App. 463, 66 S. W. 114.

That a car was going "as fast as it could" requires a skilled observer. Pfeiffer *v.* Chicago City R. Co., 96 Ill. App. 10.

3. Galveston, etc., R. Co. *v.* Wesch, (Tex. Civ. App. 1893) 21 S. W. 62.

"Terrible speed" is not admissible as there is no measure except that of the witness. Chicago City R. Co. *v.* Wall, 93 Ill. App. 411.

4. Johnsen *v.* Oakland, etc., Electric R. Co., 127 Cal. 608, 60 Pac. 170; Galveston, etc., R. Co. *v.* Duelm, (Tex. Civ. App. 1893) 23 S. W. 596.

5. Van Horn *v.* Burlington, etc., R. Co., 59 Iowa 33, 12 N. W. 752; Missouri Pac. R. Co. *v.* Hildebrand, 52 Kan. 284, 34 Pac. 738.

6. Hamilton *v.* Rich Hill Coal Min. Co., 108 Mo. 364, 18 S. W. 977; Houston City St. R. Co. *v.* Richart, (Tex. Civ. App. 1894) 27 S. W. 918.

7. Union Pac. R. Co. *v.* Ruzicka, 65 Nebr. 621, 91 N. W. 543.

8. Muth *v.* St. Louis, etc., R. Co., 87 Mo. App. 422.

Passengers riding on a train have been held not to be competent to estimate the rate of speed at which it is traveling. Grand Rapids, etc., R. Co. *v.* Huntley, 38 Mich. 537, 31 Am. Rep. 321. The evidence, however, has been received. Johnsen *v.* Oakland, etc., Electric R. Co., 127 Cal. 608, 60 Pac. 170; Galveston, etc., R. Co. *v.* Wesch, (Tex. Civ. App. 1893) 21 S. W. 62.

9. Mathieson *v.* Omaha St. R. Co., 3 Nebr. (Unoff.) 743, 92 N. W. 639.

10. Missouri Pac. R. Co. *v.* Hildebrand, 52 Kan. 284, 34 Pac. 738.

11. Omaha Street R. Co. *v.* Larson, (Nebr. 1903) 97 N. W. 824.

12. Leopold *v.* Van Kirk, 29 Wis. 548.

13. Curtis *v.* Chicago, etc., R. Co., 18 Wis. 312.

14. Campbell *v.* State, 23 Ala. 44. A witness may state the time at which an event occurred, although his basis of knowledge is an automatic registering device. State *v.* McDaniel, 39 Oreg. 161, 65 Pac. 520.

15. State *v.* Casey, 44 La. Ann. 969, 11 So. 583; Kipper *v.* State, (Tex. Cr. App. 1903) 77 S. W. 611; International, etc., R. Co. *v.* Satterwhite, 19 Tex. Civ. App. 170, 47 S. W. 41.

16. *Alabama.*— Campbell *v.* State, 23 Ala. 44.

of an estimate. One possessed of adequate knowledge may properly estimate the length of time required for certain usual acts [17] or occurrences.[18]

t. Value — (i) *In General.* An observer, after detailing such facts as fairly exhaust his power of statement may, if sufficiently familiar with property to make his inference relevant,[19] state his estimate of its value.[20] Where the property has no market value,[21] this is practically the only available method of proof.[22] The evidence may properly relate to a time prior [23] or subsequent to that involved in the controversy, provided the court regards the period as not too remote to be relevant, the length of the interval within these limits merely affecting the weight of the evidence.[24] Absence of value may be shown in the same way, although the negative statement is rather a fact than an estimate.[25]

Georgia.— Atlanta, etc., R. Co. *v.* Strickland, 116 Ga. 439, 42 S. E. 864, short time.

Louisiana.— State *v.* Southern, 48 La. Ann. 628, 19 So. 668, killing and discovery.

Massachusetts.— Bayley *v.* Eastern R. Co., 125 Mass. 62.

Minnesota.— McGrath *v.* Great Northern R. Co., 80 Minn. 450, 83 N. W. 413.

17. Terre Haute *v.* Hudnut, 112 Ind. 542, 13 N. E. 686 (to make repairs); Western Union Tel. Co. *v.* Drake, 14 Tex. Civ. App. 601, 38 S. W. 632 (to deliver a telegram).

18. International, etc., R. Co. *v.* Kuehn, 2 Tex. Civ. App. 210, 21 S. W. 58, crossing highway.

19. Clark *v.* Baird, 9 N. Y. 183.

20. *Alabama.*— Rawles *v.* James, 49 Ala. 183; Ward *v.* Reynolds, 32 Ala. 384.

Illinois.— Ohio, etc., R. Co. *v.* Long, 52 Ill. App. 670.

Indiana.— Holten *v.* Lake County, 55 Ind. 194.

Iowa.— Anson *v.* Dwight, 18 Iowa 241.

Maine.— Warren *v.* Wheeler, 21 Me. 484.

Massachusetts.— Taft *v.* Com., 158 Mass. 526, 33 N. E. 1046; Swan *v.* Middlesex County, 101 Mass. 173; Dwight *v.* Hampden County Com'rs, 11 Cush. 201; Blanchard *v.* Fitchburg R. Co., 8 Cush. 280; Vandine *v.* Burpee, 13 Metc. 288, 46 Am. Dec. 733.

Missouri.— Mathews *v.* Missouri Pac. R. Co., 142 Mo. 645, 44 Pac. 802; Thomas *v.* Mallinckrodt, 43 Mo. 65.

New York.— Clark *v.* Baird, 9 N. Y. 183.

Pennsylvania.— Kellogg *v.* Krauser, 14 Serg. & R. 137, 16 Am. Dec. 480.

Rhode Island.— Forbes *v.* Howard, 4 R. I. 364.

Wisconsin.— Hutchinson *v.* Brown, 33 Wis. 465.

See 20 Cent. Dig. tit. "Evidence," §§ 2162, 2215 *et seq.*, 2271 *et seq.*, 2285 *et seq.*, 2303, 2330 *et seq.*

Discretion of court.— Whether, when a witness has stated all the elements of a man's property he can be further asked to state as an inference from these facts how much he is "worth" is said to be discretionary with the court. Middlebury *v.* Rutland, 33 Vt. 414, 431.

General or expert knowledge.— Estimating value is "on the border line between the domain of general and expert knowledge." Ewing *v.* Goode, 78 Fed. 442.

Other methods of proving value see Evidence, 16 Cyc. 1133.

21. See *infra*, XI, C, 4, t, (III), (D), (5).

Even where there is strictly speaking no market value the estimate of the witness is largely controlled by what would be the fair price of the property if a market could be found for it; and in considering what such price would be, the value of similar articles, the cost of these when new, the amount of depreciation in use, and the like may affect the estimate of the witness or of the jury; the ultimate standard still being what a fair-minded purchaser would be willing to give and a fair-minded seller be willing to take. Filson *v.* Territory, 11 Okla. 351, 67 Pac. 473. This standard is frequently spoken of as "market value." It has even been said that one who testifies generally to the value of an article in common use will be assumed to have testified to its market value. Filson *v.* Territory, *supra*.

22. Ohio, etc., R. Co. *v.* Long, 52 Ill. App. 670, 674 (where it is said: "The law has no other standard to fix the value, as a fact, than the opinions of witnesses, . . . except it might be in case of property that had a standard value"); Erd *v.* Chicago, etc., R. Co., 41 Wis. 65.

23. Johnston *v.* Farmers' F. Ins. Co., 106 Mich. 96, 64 N. W. 5, holding that where there is evidence that a stock of goods has not deteriorated, evidence of its value several years before is competent. But it has been held that evidence of the value of land before a road was projected is not admissible. Texas, etc., R. Co. *v.* Cella, 42 Ark. 528.

24. Paden *v.* Goldbaum, (Cal. 1894) 37 Pac. 759; Doane *v.* Garretson, 24 Iowa 351; Central Branch Union Pac. R. Co. *v.* Andrews, 37 Kan. 162, 14 Pac. 509; Sanford *v.* Shepard, 14 Kan. 228; Greenfield First Nat. Bank *v.* Coffin, 162 Mass. 180, 38 N. E. 444.

The evidence has been rejected (Burke *v.* Beveridge, 15 Minn. 205, a year), especially where the knowledge is acquired *post litem motam* (Kansas City, etc., R. Co. *v.* Dawley, 50 Mo. App. 480).

25. Morris, etc., Coal Co. *v.* Delaware, etc., R. Co., 190 Pa. St. 448, 42 Atl. 883, holding that where a pile of culm on the claimant's land was taken by a railroad company under its right of eminent domain for use as ballast, evidence is admissible that at the time it was taken culm had no market value and was

It has been intimated that the existence of better evidence may exclude an estimate.[26]

(II) *BASIS OF OPINION*—(A) *In General.* A witness as to value will be permitted and may be required to detail the facts upon which his estimate, inference, conclusion, or judgment is based,[27] whether as to the value of real[28] or personal[29] property or services,[30] even if the facts relied on are incompetent to affect value in the particular case,[31] including the elements of damage[32] or value.[33] In like manner a skilled witness testifying as an expert may give the reasons for his judgment.[34] The basis may include the result of inquiries made of others,[35] or the facts of relevant sales known to the witness.[36] An estimate not so fortified may be rejected, as the reliability of the estimate cannot be determined.[37] It is not material that the witness acquired his knowledge of the value of the property in question subsequent to its loss.[38] Where, in the opinion of the trial judge the basis of fact is insufficient, the estimate will be rejected.[39] Where it is received

given away by its owners in order to get rid of it.

26. Williams *v.* Hersey, 17 Kan. 18; Sanford *v.* Shepard, 14 Kan. 228.

27. *Arkansas.*— Arkansas Midland R. Co. *v.* Griffith, 63 Ark. 491, 39 S. W. 550; Little Rock Junction R. Co. *v.* Woodruff, 49 Ark. 381, 5 S. W. 792, 4 Am. St. Rep. 51, holding that an owner should be allowed to put in evidence all facts which a vendor would adduce if he were attempting a private sale.

Illinois.— Chicago Sanitary Dist. *v.* Loughran, 160 Ill. 362, 43 N. E. 359.

Indiana.— Holten *v.* Lake County, 55 Ind. 194.

Iowa.— Doud *v.* Mason City, etc., R. Co., 76 Iowa 438, 41 N. W. 65, holding that evidence that the land across which a railroad right of way is located contains coal is admissible to show the market value of the land as an entirety, and for purposes for which it might be available in the future, although the coal itself is not appropriated.

Minnesota.— Burger *v.* Northern Pac. R. Co., 22 Minn. 343.

Mississippi.— Board of Levee Com'rs *v.* Nelms, 82 Miss. 416, 34 So. 149.

Missouri.— St. Louis Terminal R. Co. *v.* Heiger, 139 Mo. 315, 40 S. W. 947; Tate *v.* Missouri, etc., R. Co., 64 Mo. 149.

Montana.— Root *v.* Butte, etc., R. Co., 20 Mont. 354, 51 Pac. 155, holding, in an action against a railroad company for damages to property not taken, evidence of diversion of travel from the street on which plaintiff's property fronts is admissible, but only as bearing on the depreciation in value caused by the diversion.

Pennsylvania.— Brown *v.* Corey, 43 Pa. St. 495.

See 20 Cent. Dig. tit. "Evidence," §§ 2274, 2303.

Evidence of particular transactions in the way of sales or offers for the *locus* or adjoining lands has been rejected, although offered on direct evidence as the basis of the witness' opinion. Central Pac. R. Co. *v.* Pearson, 35 Cal. 247.

28. *Illinois.*— Illinois, etc., R. Co. *v.* Von Horn, 18 Ill. 257.

Massachusetts.— Dickenson *v.* Fitchburg, 13 Gray 546.

New York.— Gordon *v.* Kings County El. R. Co., 23 N. Y. App. Div. 51, 48 N. Y. Suppl. 382.

Pennsylvania.— Brown *v.* Corey, 43 Pa. St. 495.

United States.— Hawes *v.* Warren, 119 Fed. 978.

See 20 Cent. Dig. tit. "Evidence," § 2303; and other cases in the preceding note.

29. Western Home Ins. Co *v.* Richardson, 40 Nebr. 1, 58 N. W. 597; Rodee *v.* Detroit F. & M. Ins. Co., 74 Hun (N. Y.) 146, 26 N. Y. Suppl. 242; and other cases *supra*, note 27.

"A description of the property, its character and qualities," is competent. Whipple *v.* Walpole, 10 N. H. 130.

30. Storms *v.* Lemon, 7 Ind. App. 435, 34 N. E. 644; McPeters *v.* Ray, 85 N. C. 462.

31. Chicago Sanitary Dist. *v.* Loughran, 160 Ill. 362, 43 N. E. 359.

32. Cram *v.* Chicago, 94 Ill App. 199.

33. Rodee *v.* Detroit F. & M. Ins. Co., 74 Hun (N. Y.) 146, 26 N. Y. Suppl. 242.

34. Cram *v.* Chicago, 94 Ill. App. 199.

35. Jones *v.* Snyder, 117 Ind. 229, 20 N. E. 140; Stone *v.* Covell, 29 Mich. 359.

36. See *infra*, XI, C, 4, t, (II), (B).

37. *Arkansas.*— Arkansas Midland R. Co. *v.* Griffith, 63 Ark. 491, 39 So. 550; St. Louis, etc., R. Co. *v.* Lyman, 57 Ark. 512, 22 S. W. 170.

Illinois.— Chicago, etc., R. Co. *v.* Calumet Stock Farm, 96 Ill. App. 337 [*affirmed* in 194 Ill. 9, 61 N. E. 1095, 88 Am. St. Rep. 68], trotting horse.

New York.— Phillips *v.* Terry, 3 Abb. Dec. 607, 3 Keyes 313, 1 Transcr. App. 235, 5 Abb. Pr. N. S. 327.

Texas.— Ft. Worth, etc., R. Co. *v.* Hurd, (Civ. App. 1894) 24 S. W. 995.

United States.—Hawes *v.* Warren, 119 Fed. 978.

38. Merrill *v.* Grinnell, 30 N. Y. 594, holding that a foreign immigrant may state the value of the contents of his trunk lost on the voyage, although the standards of value to which he testifies were acquired by subsequent residence in the country to which he was traveling.

39. Lynch *v.* Troxell, 207 Pa. St. 162, 56 Atl. 413 (damages in flowing land); Bailey

under circumstances disclosing plain lack of relevancy the judgment will be reversed.[40]

(B) *Similar Property.* Estimates as to the value of property, real[41] or personal,[42] similar to that whose value is involved in the inquiry may be competent,[43] when made by those personally acquainted with such property.[44] On the other hand a witness may show himself qualified to testify as to the value of specific property by knowledge of the value of similar property,[45] real[46] or per-

v. Mill Creek Coal Co., 20 Pa. Super. Ct. 186; Eastern Texas R. Co. *v.* Scurlock, (Tex. Sup. 1904) 78 S. W. 490; Cameron Mill, etc., Co. *v.* Anderson, (Tex. Civ. App. 1904) 78 S. W. 971 (services of nurse); The Conqueror, 166 U. S. 110, 17 S. Ct. 510, 41 L. ed. 937; Glasier *v.* Nichols, 112 Fed. 877.

40. Chicago, etc., Electric R. Co. *v.* Mawman, 206 Ill. 182, 69 N. E. 66.

41. *Massachusetts.*— Teele *v.* Boston, 165 Mass. 88, 4 N. E. 506.

Michigan.— Thompson *v.* Moiles, 46 Mich. 42, 8 N. W. 577.

Missouri.— Thomas *v.* Mallinckrodt, 43 Mo. 58.

New York.— Jarvis *v.* Furman, 25 Hun 391.

North Carolina.— Morrison *v.* Watson, 101 N. C. 332, 7 S. E. 795, 1 L. R. A. 833.

Pennsylvania.— Brown *v.* Corey, 43 Pa. St. 495; North Chester Borough *v.* Eckfeldt, 1 Mona. 732.

Wisconsin.— Stolze *v.* Manitowoc Terminal Co., 100 Wis. 208, 75 N. W. 987.

See 20 Cent. Dig. tit. "Evidence," § 2217 *et seq.*

In Kansas it has been suggested that the direct evidence of the witness should be confined to the property in question, his knowledge of the value of similar property being relevant only on cross-examination to test the knowledge and competency of the witness. Kansas City, etc., R. Co. *v.* Vickroy, 46 Kan. 248, 26 Pac. 698.

One who has merely heard of sales is not thereby qualified. Thompson *v.* Moiles, 46 Mich. 42, 8 N. W. 577; Michael *v.* Crescent Pipe Line Co., 159 Pa. St. 99, 28 Atl. 204; Curtin *v.* Nittany Valley R. Co., 135 Pa. St. 20, 19 Atl. 740; Pittsburgh, etc., R. Co. *v.* Robinson, 95 Pa. St. 426; Galbraith *v.* Philadelphia Co., 2 Pa. Super. Ct. 359.

42. Atchison, etc., R. Co. *v.* Harper, 19 Kan. 529 (colt); Mathews *v.* Stewart, 44 Mich. 209, 6 N. W. 633; Perry *v.* Jefferies, 61 S. C. 292, 39 S. E. 515, wood cut on adjoining lot. But to establish the value of a colt by evidence that it resembles another and then prove the value of the second "would furnish an imaginary rather than an actual basis for recovery." Atchison, etc., R. Co. *v.* Harper, 19 Kan. 529.

43. See also EVIDENCE, 16 Cyc. 1138, 1141.

44. See the cases cited above.

45. Decker *v.* Myers, 31 How. Pr. (N. Y.) 372; Leiby *v.* Clear Spring Water Co., 205 Pa. St. 634, 55 Atl. 782; and other cases cited in the notes following.

46. *California.*— San Diego Land, etc., Co. *v.* Neale, 78 Cal. 63, 20 Pac. 372, 3 L. R. A. 83.

Illinois.— Davis *v.* Northwestern El. R. Co., 170 Ill. 595, 48 N. E. 1058.

Indiana.— Lafayette *v.* Nagle, 113 Ind. 425, 15 N. E. 1.

Iowa.— Ball *v.* Keokuk, etc., R. Co., 74 Iowa 132, 37 N. W. 110.

Kansas.— Chicago, etc., R. Co. *v.* Brunson, 43 Kan. 371, 23 Pac. 495; Chicago, etc., R. Co. *v.* Dill, 41 Kan. 736, 21 Pac. 778.

Kentucky.—Paducah *v.* Allen, 63 S. W. 981, 23 Ky. L. Rep. 701.

Louisiana.— Remy *v.* Municipality No. 2, 12 La. Ann. 500.

Massachusetts.—Conness *v.* Com., 184 Mass. 541, 69 N. E. 341; Butchers' Slaughtering, etc., Assoc. *v.* Com., 169 Mass. 103, 47 N. E. 599; Pinkham *v.* Chelmsford, 109 Mass. 225; Russell *v.* Horn Pond Branch R. Corp., 4 Gray 607.

Minnesota.— Papooshek *v.* Winona, etc., R. Co., 44 Minn. 195, 46 N. W. 329.

Mississippi.— Board of Levee Com'rs *v.* Dillard, 76 Miss. 641, 25 So. 292.

Missouri.— Union Elevator Co. *v.* Kansas City Suburban Belt R. Co., (Sup. 1896) 33 S. W. 926.

New York.— Woodruff *v.* Imperial F. Ins. Co., 83 N. Y. 133; Clark *v.* Baird, 9 N. Y. 183; Hewlett *v.* Saratoga Carlsbad Spring Co., 84 Hun 248, 32 N. Y. Suppl. 697; Pecksport Connecting R. Co. *v.* West, 45 N. Y. Suppl. 644; Shepard *v.* New York El. R. Co., 15 N. Y. Suppl. 175.

North Carolina.— Morrison *v.* Watson, 101 N. C. 332, 7 S. E. 795, 1 L. R. A. 833.

Pennsylvania.— Smith *v.* Pennsylvania R. Co., 205 Pa. St. 645, 55 Atl. 768; Leiby *v.* Clear Spring Water Co., 205 Pa. St. 634, 55 Atl. 782; Michael *v.* Crescent Pipe Line Co., 159 Pa. St. 99, 28 Atl. 204; McElheny *v.* McKeesport, etc., Bridge Co., 153 Pa. St. 108, 25 Atl. 1021; Curtin *v.* Nittany Valley R. Co., 135 Pa. St. 20, 19 Atl. 740; Pittsburgh, etc., R. Co. *v.* Robinson, 95 Pa. St. 426; Hanover Water Co. *v.* Ashland Iron Co., 84 Pa. St. 279; Pennsylvania, etc., Co. *v.* Bunnell, 81 Pa. St. 414; North Chester Borough *v.* Eckfeldt, 1 Mona. 732; Trussell *v.* Western Pennsylvania Gas Co., 20 Pa. Super. Ct. 423; Galbraith *v.* Philadelphia Co., 2 Pa. Super. Ct. 359; Myers *v.* Schuylkill River East Side R. Co., 5 Pa. Co. Ct. 634; Pittsburg, etc., R. Co. *v.* Robinson, 38 Leg. Int. 22.

Texas.— Gulf, etc., R. Co. *v.* Necco, (Sup. 1892) 18 S. W. 564; Galveston, etc., R. Co. *v.* Polk, (Civ. App. 1894) 28 S. W. 353.

Vermont.— Wead *v.* St. Johnsbury, etc., R. Co., 66 Vt. 420, 29 Atl. 631.

United States.— Carpenter *v.* Robinson, 5 Fed. Cas. No. 2,431, Holmes 67.

sonal,[47] or an estate in land,[48] including knowledge acquired through buying[49] or selling[50] such property, or even by having been present at such sales or purchases,[51] provided the time is sufficiently near and the conditions sufficiently similar to show relevancy.[52] To come within the rule, land must present a similarity in all essential conditions, although it need not be adjacent.[53] As in other cases involving remoteness, what lands are sufficiently near and sufficiently similar, to aid a jury in determining the value of the land in question is a matter for the sound discretion of the court;[54] and the evidence may in such discretion be rejected,[55] espe-

See 20 Cent. Dig. tit. "Evidence," § 2217 *et seq.*

47. *Alabama.*— Alabama Great Southern, etc., R. Co. *v.* Moody, 92 Ala. 279, 9 So. 238. And see Louisville Jeans Clothing Co. *v.* Lischkoff, 109 Ala. 136, 19 So. 436.

Colorado.— Thatcher *v.* Kaucher, 2 Colo. 698.

Connecticut.— Beach *v.* Clark, 51 Conn. 200.

Georgia.— Central R. Co. *v.* Wolff, 74 Ga. 664.

Illinois.— Lycoming F. Ins. Co. *v.* Jackson, 83 Ill. 302, 25 Am. Rep. 386; Walker *v.* Bernstein, 43 Ill. App. 568.

Iowa.— State *v.* Tennebom, 92 Iowa 551, 61 N. W. 193; Humphrey *v.* Young, 92 Iowa 126, 60 N. W. 213; Latham *v.* Shipley, 86 Iowa 543, 53 N. W. 342; Acrea *v.* Brayton, 75 Iowa 719, 38 N. W. 171.

Kansas.— Atchison, etc., R. Co. *v.* Huitt, 1 Kan. App. 788, 41 Pac. 1051.

Maine.— Haskell *v.* Mitchell, 53 Me. 468, 89 Am. Dec. 711.

Massachusetts.— Brady *v.* Brady, 8 Allen 101; Haskins *v.* Hamilton Mut. Ins. Co., 5 Gray 432.

Michigan.— Johnston *v.* Farmers' F. Ins. Co., 106 Mich. 96, 64 N. W. 5; Richter *v.* Harper, 95 Mich. 221, 54 N. W. 768; Browne *v.* Moore, 32 Mich. 254.

Minnesota.— Berg *v.* Spink, 24 Minn. 138.

Missouri.— Fry *v.* Estes, 52 Mo. App. 1.

New York.— Woodruff *v.* Imperial F. Ins. Co., 83 N. Y. 133; Smith *v.* Hill, 22 Barb. 656; Phillips *v.* McNab, 16 Daly 150, 9 N. Y. Suppl. 526; Haan *v.* Metropolitan St. R. Co., 34 Misc. 523, 69 N. Y. Suppl. 888; Decker *v.* Myers, 31 How. Pr. 372; Brill *v.* Flagler, 23 Wend. 354.

South Dakota.— Johnson *v.* Gilmore, 6 S. D. 276, 60 N. W. 1070, cattle.

Texas.— Allen *v.* Carpenter, 66 Tex. 138, 18 S. W. 347; Texas, etc., R. Co. *v.* Virginia Ranch, etc., Co., (Sup. 1887) 7 S. W. 341; Missouri, etc., R. Co. *v.* Cocreham, 10 Tex. Civ. App. 166, 30 S. W. 1118; International, etc., R. Co. *v.* Searight, 8 Tex. Civ. App. 593, 28 S. W. 39.

But see Beard *v.* Kirk, 11 N. H. 397.

See 20 Cent. Dig. tit. "Evidence," § 2218.

48. Cluck *v.* Houston, etc., R. Co., (Tex. Civ. App. 1904) 79 S. W. 80, rental value.

49. *Colorado.*— Union Pac., etc., R. Co. *v.* Williams, 3 Colo. App. 526, 34 Pac. 731, horses.

Massachusetts.— Brady *v.* Brady, 8 Allen 101, horses and carriages.

Michigan.— Mason *v.* Partrick, 100 Mich. 577, 59 N. W. 239 (horses); Richter *v.* Harper, 95 Mich. 221, 54 N. W. 768 (curiosities and animals for museum).

Minnesota.— Papooshek *v.* Winona, etc., R. Co., 44 Minn. 195, 46 N. W. 329 (real property); Burger *v.* Northern Pac. R. Co., 22 Minn. 343 (hay).

New York.— Woodruff *v.* Imperial F. Ins. Co., 83 N. Y. 133 (houses); Rademacher *v.* Greenwich Ins. Co., 75 Hun 83, 27 N. Y. Suppl. 155 (clothing and furniture); Phillips *v.* McNab, 16 Daly 150, 9 N. Y. Suppl. 526 (second-hand furniture); Haan *v.* Metropolitan St. R. Co., 34 Misc. 523, 69 N. Y. Suppl. 888 (wagons).

Pennsylvania.— Pittsburg, etc., R. Co. *v.* Robinson, 38 Leg. Int. 22, real property.

South Dakota.— Johnson *v.* Gilmore, 6 S. D. 276, 60 N. W. 1070, cattle.

See 20 Cent. Dig. tit. "Evidence," § 2218.

50. *Alabama.*— Alabama Great Southern R. Co. *v.* Moody, 92 Ala. 279, 9 So. 238, cattle.

Illinois.—Davis *v.* Northwestern El. R. Co., 170 Ill. 595, 48 N. E. 1058, real property.

Massachusetts.— Brady *v.* Brady, 8 Allen 101, horses and carriages.

Minnesota.— Papooshek *v.* Winona, etc., R. Co., 44 Minn. 195, 46 N. W. 329, real property.

New York.— Woodruff *v.* Imperial F. Ins. Co., 83 N. Y. 133 (houses); Phillips *v.* McNab, 16 Daly 150, 9 N. Y. Suppl. 526 (second-hand furniture); Haan *v.* Metropolitan St. R. Co., 34 Misc. 523, 69 N. Y. Suppl. 888 (wagons).

South Dakota.— Johnson *v.* Gilmore, 6 S. D. 276, 60 N. W. 1070, cattle.

A fortiori a general dealer in goods may testify as to their value. Johnson *v.* Gilmore, 6 S. D. 276, 60 N. W. 1070.

51. Continental Ins. Co. *v.* Horton, 28 Mich. 173; Phillips *v.* McNab, 16 Daly (N. Y.) 150, 9 N. Y. Suppl. 526, second-hand furniture.

52. See the cases cited in the preceding notes.

53. Warren *v.* Wheeler, 21 Me. 484; Brown *v.* Corey, 43 Pa. St. 495.

54. Amory *v.* Melrose, 162 Mass. 556, 39 N. E. 276; Phillips *v.* Marblehead, 148 Mass. 326, 19 N. E. 547; Tucker *v.* Massachusetts Cent. R. Co., 118 Mass. 546.

55. Huntington *v.* Attrill, 118 N. Y. 365, 23 N. E. 544.

In Michigan the court holds that the price of land in one's own neighborhood or in the vicinity where he deals in it are subjects on which "all intelligent persons in those positions may be supposed to inform themselves." Stone *v.* Covell, 29 Mich. 359, 362.

cially when other and better evidence can be or has been produced at the hearing.[56] In a clear case the exercise of this discretion may be reviewed.[57] Proof of the value of property by showing that of adjacent property is in effect circumstantial evidence.[58] The weight of the evidence is for the jury.[59]

(III) *QUALIFICATIONS* — (A) *In General.* In most instances an owner is deemed qualified by that relationship to testify to the value of common classes of property,[60] although experience will enhance the weight of his estimate.[61] The primary qualification of other witnesses is adequate acquaintance with that class of property,[62] whether personal[63] or real.[64] Trading in property of that

In Missouri it is merely necessary that the witness should state that he knows the property and its value. Union Elevator Co. *v.* Kansas City Suburban Belt R. Co., 135 Mo. 353, 375, 33 S. W. 926, 36 S. W. 1071.

56. Atchison, etc., R. Co. *v.* Harper, 19 Kan. 529.

57. Atchison, etc., R. Co. *v.* Harper, 19 Kan. 529; Jarvis *v.* Furman, 25 Hun (N. Y.) 391.

58. Warren *v.* Wheeler, 21 Me. 484.

59. Jones *v.* Erie, etc., R. Co., 151 Pa. St. 30, 25 Atl. 134, 31 Am. St. Rep. 722, 17 L. R. A. 758; Brown *v.* Corey, 43 Pa. St. 495; Carpenter *v.* Robinson, 5 Fed. Cas. No. 2,431, Holmes 67. "The value of their opinions will depend on the extent of their familiarity with surrounding property and the prices asked and paid for it, but this is for the jury to determine." Jones *v.* Erie, etc., R. Co., *supra.*

60. See *infra*, XI, C, 4, t, (III), (B).

61. Haan *v.* Metropolitan St. R. Co., 34 Misc. (N. Y.) 523, 69 N. Y. Suppl. 888. See also *infra*, XI, C, 4, t, (III), (B).

62. *Illinois.*— Ohio, etc., R. Co. *v.* Taylor, 27 Ill. 207.

Massachusetts.— Shaw *v.* Charlestown, 2 Gray 107.

Missouri.— Tate *v.* Missouri, etc., R. Co., 64 Mo. 149; Schaaf *v.* Fries, 77 Mo. App. 346.

Montana.— Holland *v.* Huston, 20 Mont. 84, 49 Pac. 390.

New Jersey.— Elvins *v.* Delaware, etc., Tel., etc., Co., 63 N. J. L. 243, 43 Atl. 903, 76 Am. St. Rep. 217.

New York.— Bedell *v.* Long Island R. Co., 44 N. Y. 367, 4 Am. Rep. 688.

Oklahoma.— Robinson *v.* Peru Plow, etc., Co., 1 Okla. 140, 31 Pac. 988.

South Dakota.— State *v.* Montgomery, (1903) 97 N. W. 716 (hogs); Enos *v.* St. Paul F. & M. Ins. Co., 4 S. D. 639, 57 N. W. 919, 46 Am. St. Rep. 796.

See 20 Cent. Dig. tit. "Evidence," § 2215 *et seq.*; and other cases in the notes following. See also *infra*, XI, C, 4, t, (III), (C)-(E).

Extent of knowledge.— "There is no rule of law, and there can be none, defining how much a witness shall know of property before he can be permitted to give an opinion of its value. He must have some acquaintance with it sufficient to enable him to form some estimate of its value, and then it is for the jury to determine how much weight to attach to such estimate." Bedell *v.* Long Island R. Co., 44 N. Y. 367, 370, 4 Am. Rep. 688.

Deduced value.— A witness may testify to a value deduced from that of other property with which the witness as well as the general community is familiar. For example the value of flour, given the price of wheat. Hood *v.* Maxwell, 1 W. Va. 219. As to other similar property see *supra*, XI, C, 4, t, (II), (B).

Knowledge of actual sales is not needed. Greeley County *v.* Gebhart, (Nebr. 1902) 89 N. W. 753.

Not an expert.— To qualify a witness it is not necessary to show that he has had experience in buying and selling the class of property under investigation. Such a requirement involves a confusion of thought. To testify as an expert requires familiarity with the values of that kind of property, and the experience necessary to classification by quality, etc., and this must be affirmatively shown. But in most cases to testify from observation to value the only requirement is familiarity with the property itself. Ohio, etc., R. Co. *v.* Taylor, 27 Ill. 207; Continental Ins. Co. *v.* Horton, 28 Mich. 173; Willison *v.* Smith, 60 Mo. App. 469; and other cases cited *infra*, XI, C, 4, t, (III), (C).

63. Continental Ins. Co. *v.* Horton, 28 Mich. 173; Willison *v.* Smith, 60 Mo. App. 469 (furniture); Robinson *v.* Peru Plow, etc., Co., 1 Okla. 140, 31 Pac. 988; and other cases in the preceding note. See also *infra*, XI, C, 4, t, (III), (C)-(E).

64. Warren *v.* Wheeler, 21 Me. 484; Swan *v.* Middlesex County, 101 Mass. 173; Whitman *v.* Boston, etc., R. Co., 7 Allen (Mass.) 313; Shattuck *v.* Stoneham Branch R. Co., 6 Allen (Mass.) 115; Dwight *v.* Hampden County Com'rs, 11 Cush. (Mass.) 201; Clark *v.* Baird, 9 N. Y. 183; Smith *v.* Pennsylvania R. Co., 205 Pa. St. 645, 55 Atl. 768; Jones *v.* Erie, etc., R. Co., 151 Pa. St. 30, 25 Atl. 134, 31 Am. St. Rep. 722, 17 L. R. A. 758; Kellogg *v.* Krauser, 14 Serg. & R. (Pa.) 137, 16 Am. Dec. 480; Hewitt *v.* Pittsburg, etc., R. Co., 19 Pa. Super. Ct. 304; and other cases in the second preceding note. See also *infra*, XI, C, 4, t, (III), (C)-(E).

A claim by a witness to knowledge, although not unqualified (Bell *v.* Keach, 3 Ky. L. Rep. 520, "guessing;" Johnston *v.* Farmers' F. Ins. Co., 106 Mich. 96, 64 N. W. 5; Bischoff *v.* Schulz, 5 N. Y. Suppl. 757, "something;" Harris *v.* Schuttler, (Tex. Civ. App. 1893) 24 S. W. 989, "tolerably"), as to the value of real (Union Elevator Co. *v.* Kansas City Suburban Belt R. Co., (Mo. Sup. 1896) 33 S. W. 926; and cases following) or personal (State *v.* Montgomery, (S. D. 1903) 97 N. W. 716, hogs; and cases following) prop-

description is an element of qualification.[65] Whatever the qualification is alleged to be sufficiency of knowledge on the part of the witness is a preliminary question of fact for the decision of the trial judge.[66] In any specific instance the exercise of administrative discretion is apt to be a resultant of certain main considerations: (1) The nature of the property; (2) the opportunity for observation enjoyed by the witness; (3) his capacity for forming a reasonable inference; and (4) ability to procure probative evidence. In proportion as the property is common in its nature the number of qualified witnesses will increase.[67] Other conditions being equal a witness is valuable to the jury in proportion to his opportunities for observation, past experience, and ability to coördinate his knowledge into a reasonable conclusion.[68] The evidence is most freely received where the facts upon which an estimate is based cannot be placed before the jury or are of a nature beyond ordinary experience, and where more cogent evidence is not available.[69]

(B) *Owner* — (1) PERSONAL PROPERTY. The owner of chattels is qualified

erty, has been deemed to establish, in the absence of conflicting evidence, a *prima facie* qualification (Wichita R. Co. *v.* Kuhn, 38 Kan. 104, 16 Pac. 75; Central Branch Union Pac. R. Co. *v.* Andrews, 37 Kan. 162, 14 Pac. 509; Browne *v.* Moore, 32 Mich. 254; Union Elevator Co. *v.* Kansas City Suburban Belt R. Co., (Mo. 1896) 33 S. W. 926; St. Louis, etc., R. Co. *v.* St. Louis Union Stock Yards Co., 120 Mo. 541, 25 S. W. 399; Bowne *v.* Hartford F. Ins. Co., 46 Mo. App. 473; Southeastern Nebraska R. Co. *v.* Frazier, 25 Nebr. 53, 40 N. W. 609; Sioux City, etc., R. Co. *v.* Weimer, 16 Nebr. 272, 20 N. W. 349; Smith *v.* Hill, 22 Barb. (N. Y.) 656; Moore *v.* Chicago, etc., R. Co., 78 Wis. 120, 47 N. W. 273), leaving the fact of actual knowledge to be tested upon cross-examination (Bowne *v.* Hartford F. Ins. Co., 46 Mo. App. 473; Moore *v.* Chicago, etc., R. Co., 28 Wis. 120, 47 N. W. 273), the evidence remaining unaffected as evidence if the opportunity for cross-examination is declined and by consequence the basis of the claim is not disclosed (Wilson *v.* Harnette, (Colo. Sup. 1904) 75 Pac. 395). Probably such an assumption would obtain only in case of matters within the general range of experience. A witness may be deemed qualified although he cautiously disclaims entire familiarity (Johnson *v.* Farmers' F. Ins. Co., 106 Mich. 96, 64 N. W. 5, "very nearly" knows; Harris *v.* Schuttler, (Tex. Civ. App. 1893) 24 S. W. 989, tolerably acquainted; Stolze *v.* Manitowoc Terminal Co., 100 Wis. 208, 75 N. W. 987, somewhat familiar); but if the witness expressly denies any knowledge on the subject he is incompetent (Clausen *v.* Tjenagel, 91 Iowa 285, 59 N. W. 277).

That the estimate is made by one who has been a public officer, as an assessor, charged with the duty of appraising property may be an adequate qualification. Muskeget Island Club *v.* Nantucket, 185 Mass. 303, 70 N. E. 61.

65. Muskeget Island Club *v.* Nantucket, 185 Mass. 303, 70 N. E. 61. See also *supra*, XI, C, 4, a, (II), (B).

66. *Florida.*—Sullivan *v.* Lear, 23 Fla. 463, 2 So. 846, 11 Am. St. Rep. 388.

Illinois.— Chicago, etc., R. Co. *v.* Calumet Stock Farm, 96 Ill. App. 337.

Massachusetts.— Shattuck *v.* Stoneham Branch R. Co., 6 Allen 115; Paine *v.* Boston, 4 Allen 168.

Minnesota.— Lehmicke *v.* St. Paul, etc., R. Co., 19 Minn. 464.

New York.— Bedell *v.* Long Island R. Co., 44 N. Y. 367, 4 Am. Rep. 688; Smith *v.* Holbrook, 16 Alb. L. J. 33.

When action of court reviewed.— A ruling admitting witnesses as to value will not be reviewed except in case of a total lack of knowledge or palpable abuse of discretion. Fox *v.* Cox, 20 Ind. App. 61, 50 N. E. 92. Every reasonable assumption will be indulged in favor of the reasonableness of the finding (Kent Furniture Mfg. Co. *v.* Ransom, 46 Mich. 416, 9 N. W. 454; Stevens *v.* Benton, 39 How. Pr. (N. Y.) 13); and it is no ground in itself for reversal that the appellate court thinks that the finding might with greater propriety have been the other way (Conness *v.* Com., 184 Mass. 341, 69 N. E. 341). It has even been said that the action of the court is not reviewable (Taylor *v.* Roger Williams Ins. Co., 51 N. H. 50; Dole *v.* Johnson, 50 N. H. 452); but in most states the rule is otherwise, and the action of the lower court will be reviewed and the judgment reversed in case of clear abuse of discretion (Seurer *v.* Horst, 31 Minn. 479, 18 N. W. 283; Murphy *v.* Murphy, 22 Mo. App. 18).

67. Jones *v.* Erie, etc., R. Co., 151 Pa. St. 30, 48, 25 Atl. 134, 31 Am. St. Rep. 722, 17 L. R. A. 758, where it is said: "The value of a house or a piece of ground is a subject upon which all persons familiar with the property who have formed an opinion are competent to speak." It is otherwise of a trotting horse. Chicago, etc., R. Co. *v.* Calumet Stock Farm, 96 Ill. App. 337.

68. There is reason for thinking that the better and more consistent rule would be to admit the evidence as to value of any one acquainted with the property, which is mainly a question of fact, leaving in all cases to the jury the question of weight as tested by the entire examination. Springfield F. & M. Ins. Co. *v.* Payne, 57 Kan. 291, 46 Pac. 315; Carpenter *v.* Robinson, 5 Fed. Cas. No. 2,431, Holmes 67.

69. Atchison, etc., R. Co. *v.* Harper, 19 Kan. 529; Lines *v.* Alaska Commercial Co., 29 Wash. 133, 69 Pac. 642, value of piano at Nome, Alaska.

by reason of that relationship to give his estimate of their value.[70] Thus it has been held that he may state the value of his building materials,[71] carriages, wagons, etc.,[72] horses,[73] cattle,[74] or other domestic or farm animals,[75] clothing,[76] crops, whether standing or severed,[77] farm implements,[78] household furniture,[79]

70. *Colorado.*— Union Pac., etc., R. Co. *v.* Williams, 3 Colo. App. 526, 34 Pac. 731.

Illinois.— Sinamaker *v.* Rose, 62 Ill. App. 118.

Iowa.— Thomason *v.* Capital Ins. Co., 92 Iowa 72, 61 N. W. 843; Tubbs *v.* Garrison, 68 Iowa 44, 25 N. W. 921.

Massachusetts.—Shea *v.* Hudson, 165 Mass. 43, 42 N. E. 114.

Michigan.— Ruppel *v.* Adrian Mfg. Co., 96 Mich. 455, 55 N. W. 995.

Minnesota.—McLennan *v.* Minneapolis, etc., Elevator Co., 57 Minn. 317, 59 N. W. 628.

Nebraska.—Western Home Ins. Co. *v.* Richardson, 40 Nebr. 1, 58 N. W. 597.

New York.— Rademacher *v.* Greenwich Ins. Co., 75 Hun 83, 27 N. Y. Suppl. 155.

Pennsylvania.— Betz *v.* Hummel, 10 Pa. Cas. 313, 13 Atl. 938.

Wisconsin.— Whiting *v.* Mississippi Valley Manufacturers' Mut. Ins. Co., 76 Wis. 592, 45 N. W. 672.

See 20 Cent. Dig. tit. "Evidence," § 2218 *et seq.*

In Illinois the early rule prohibited parties from testifying to the value of the contents of packages lost by a common carrier. Illinois Cent. R. Co. *v.* Copeland, 24 Ill. 332, 76 Am. Dec. 749; Davis *v.* Michigan Southern, etc., R. Co., 22 Ill. 278, 74 Am. Dec. 151.

Other qualifications by experience or training which would enhance the weight of the estimate may be stated. Osborne *v.* State, (Tex. Civ. App. 1900) 56 S. W. 53, pricing, ownership of similar articles, general familiarity.

71. Thorn *v.* Sutherland, 25 Hun (N. Y.) 435.

72. Shea *v.* Hudson, 165 Mass. 43, 42 N. E. 114; Whitfield *v.* Whitfield, 40 Miss. 352; Haan *v.* Metropolitan St. R. Co., 34 Misc. (N. Y.) 523, 69 N. Y. Suppl. 888; Missouri, etc., R. Co. *v.* Peay, 7 Tex. Civ. App. 400, 26 S. W. 768, holding that the driver may do so.

The depreciation in value caused by a collison may be stated. Shea *v.* Hudson, 165 Mass. 43, 42 N. E. 114.

73. *Colorado.*— Union Pac., etc., R. Co. *v.* Williams, 3 Colo. App. 526, 34 Pac. 731.

Iowa.— Leek *v.* Chesley, 98 Iowa 593, 67 N. W. 580; Humphrey *v.* Young, 92 Iowa 126, 60 N. W. 213.

Kansas.— Atchison, etc., R. Co. *v.* Bartlett, 2 Kan. App. 167, 43 Pac. 284, colt.

Massachusetts.—Shea *v.* Hudson, 165 Mass. 43, 42 N. E. 114.

Michigan.— Connell *v.* McNett, 109 Mich. 329, 67 N. W. 344; Mason *v.* Partrick, 100 Mich. 577, 59 N. W. 239.

Mississippi.— Whitfield *v.* Whitfield, 40 Miss. 352.

Oklahoma.— Coyle *v.* Baum, 3 Okla. 695, 41 Pac. 389.

Oregon.— Chaperon *v.* Portland General Electric Co., 41 Oreg. 39, 67 Pac. 928.

See 20 Cent. Dig. tit. "Evidence," §§ 2218, 2219.

74. Leek *v.* Chesley, 98 Iowa 593, 67 N. W. 580; Atchison, etc., R. Co. *v.* Bartlett, 2 Kan. App. 167, 43 Pac. 284; Emerson *v.* Bigler, 21 Mont. 200, 53 Pac. 621; Missouri, etc., R. Co. *v.* Hall, 87 Fed. 170, 32 C. C. A. 146; St. Louis, etc., R. Co. *v.* Edwards, 78 Fed. 745, 24 C. C. A. 300.

75. *Alabama.*— Rawles *v.* James, 49 Ala. 183, mule.

Iowa.— Anson *v.* Dwight, 18 Iowa 241, dog.

Mississippi.— Whitfield *v.* Whitfield, 40 Miss. 352, mules and oxen.

Missouri.— Cantling *v.* Hannibal, etc., R. Co., 54 Mo. 385, 14 Am. Rep. 476, mule.

New York.—Brill *v.* Flagler, 23 Wend. 354, dog.

76. State *v.* Hathaway, 100 Iowa 225, 69 N. W. 449; Printz *v.* People, 42 Mich. 144, 3 N. W. 306, 36 Am. Rep. 437; Merrill *v.* Grinnell, 30 N. Y. 594; Rademacher *v.* Greenwich Ins. Co., 75 Hun (N. Y.) 83, 27 N. Y. Suppl. 155; Gulf, etc., R. Co. *v.* Vancil, 2 Tex. Civ. App. 427, 21 S. W. 303.

77. *Alabama.*— American Oak Extract Co. *v.* Ryan, 112 Ala. 337, 20 So. 644.

Arkansas.— St. Louis, etc., R. Co. *v.* Lyman, 57 Ark. 512, 22 S. W. 170.

Colorado.— Chicago, etc., R. Co. *v.* Larsen, 19 Colo. 71, 34 Pac. 477; Union Pac., etc., R. Co. *v.* Williams, 3 Colo. App. 526, 34 Pac. 731.

Indiana.— Burke *v.* Howell, 14 Ind. App. 296, 42 N. E. 952.

Minnesota.—McLennan *v.* Minneapolis, etc., Elevator Co., 57 Minn. 317, 319, 59 N. W. 628 (where it is said: "It must be assumed that a farmer raising and selling crops knows their market value"); Byrne *v.* Minneapolis, etc., R. Co., 29 Minn. 200, 12 N. W. 698 (growing grass); Burger *v.* Northern Pac. R. Co., 22 Minn. 343.

South Dakota.— Ochsenreiter *v.* George C. Bagley Elevator Co., 11 S. D. 91, 75 N. W. 822, growing flax.

Texas.— Galveston, etc., R. Co. *v.* Polk, (Civ. App. 1894) 28 S. W. 353 (grass in a pasture); Galveston, etc., R. Co. *v.* Rheiner, (Civ. App. 1894) 25 S. W. 971.

See 20 Cent. Dig. tit. "Evidence," §§ 2218, 2219.

Where the crops are merely part of the general value of the land taken the court may in its discretion reject the evidence. Jurada *v.* Cambridge, 171 Mass. 144, 50 N. E. 537.

78. Fry *v.* Estes, 52 Mo. App. 1; Robinson *v.* Peru Plow, etc., Co., 1 Okla. 140, 31 Pac. 988.

79. *Illinois.*— Sinamaker *v.* Rose, 62 Ill. App. 118.

Indiana.— Frederick *v.* Sault, 19 Ind. App. 604, 49 N. E. 909, piano.

stock of goods,[80] or other articles,[81] although the knowledge is recently acquired[82] and is based in part upon the result of inquiries made of experts and others.[83] He is even permitted to estimate the value of property of an intangible nature, such as the good-will of a business.[84]

(2) REAL ESTATE. The owner of real estate is assumed to possess sufficient acquaintance with it to estimate the value of the property,[85] or of the right to use it.[86] He may also state the effect of a taking or other change in condition,[87] and may, where the matter is one of mere subtraction or easy calculation, state the damage or cost of repair,[88] although such an owner would not be qualified to state what such value would be if it belonged to someone else,[89] and although the property may be of an unusual nature.[90]

Iowa.— Names *v.* Union Ins. Co., 104 Iowa 612, 74 N. W. 14; Thomason *v.* Capital Ins. Co., 92 Iowa 72, 61 N. W. 843; Tubbs *v.* Garrison, 68 Iowa 44, 25 N. W. 921.

Michigan.— Erickson *v.* Drazkowski, 94 Mich. 551, 54 N. W. 283.

Missouri.— Bowne *v.* Hartford F. Ins. Co., 46 Mo. App. 473.

New York.— Rademacher *v.* Greenwich Ins. Co., 75 Hun 83, 27 N. Y. Suppl. 155.

See 20 Cent. Dig. tit. "Evidence," § 2218.

80. Western Home Ins. Co. *v.* Richardson, 40 Nebr. 1, 58 N. W. 597; Walker *v.* Collins, 50 Fed. 737, 1 C. C. A. 642.

81. Ruppel *v.* Adrian Mfg. Co., 96 Mich. 455, 55 N. W. 995 (carving from a unique design); Betz *v.* Hummel, 10 Pa. Cas. 313, 13 Atl. 938 (beer cooler); Osborne *v.* State, (Tex. Cr. App. 1900) 56 S. W. 53 (bicycle).

82. Merrill *v.* Grinnell, 30 N. Y. 594.

83. Merrill *v.* Grinnell, 30 N. Y. 594; Whiting *v.* Mississippi Valley Mfg. Mut. Ins. Co., 76 Wis. 592, 45 N. W. 672.

84. White *v.* Jones, 79 N. Y. App. Div. 373, 79 N. Y. Suppl. 583, 12 N. Y. Annot. Cas. 277.

85. *Alabama.*— Hudson *v.* State, 61 Ala. 333.

California.— Spring Valley Water-Works *v.* Drinkhouse, 92 Cal. 528, 28 Pac. 681.

Illinois.— Sinamaker *v.* Rose, 62 Ill. App. 118.

Indiana.— Terre Haute, etc., R. Co. *v.* Walsh, 11 Ind. App. 13, 38 N. E. 534; Chicago, etc., R. Co. *v.* Kern, 9 Ind. App. 505, 36 N. E. 381.

Iowa.— Leek *v.* Chesley, 98 Iowa 593, 67 N. W. 580.

Kansas.— Kansas Cent. R. Co. *v.* Allen, 24 Kan. 33.

Maine.— Snow *v.* Boston, etc., R. Co., 65 Me. 230.

Massachusetts.—Shea *v.* Hudson, 165 Mass. 43, 42 N. E. 114; Lincoln *v.* Com., 164 Mass. 368, 41 N. E. 489; Blaney *v.* Salem, 160 Mass. 303, 35 N. E. 658; Patch *v.* Boston, 146 Mass. 52, 14 N. E. 770; Shattuck *v.* Stoneham Branch R. Co., 6 Allen 115. In this state such evidence is to be confined exclusively to the subject in reference to which damages are claimed. The owner of adjoining land cannot testify to its value. Wyman *v.* Lexington, etc., R. Co., 13 Metc. 316.

Michigan.— Ruppel *v.* Adrian Mfg. Co., 96 Mich. 455, 55 N. W. 955.

Minnesota.— McLennan *v.* Minneapolis, etc., Elevator Co., 59 Minn. 317, 59 N. W. 628; Hayden *v.* Albee, 20 Minn. 159; Derby *v.* Gallup, 5 Minn. 119, 134, where it is said: "From the nature of the case the jury must ordinarily form their opinion as to the value of property more or less from the opinion of witnesses, as it would often be difficult, if not impossible, to make such statement of facts in regard to the value, as would suffice to enable them to form a correct judgment, and the presumption is, that the owner of property is better acquainted with its value than a stranger. The evil sought to be prevented, by the rule excluding opinions, will rarely prove of serious consequence, in cases of this nature, from the admission of such evidence."

Nebraska.— Chicago, etc., R. Co. *v.* Shafer, 49 Nebr. 25, 68 N. W. 342; Western Home Ins. Co. *v.* Richardson, 40 Nebr. 1, 58 N. W. 597; Sioux City, etc., R. Co. *v.* Weimer, 16 Nebr. 272, 20 N. W. 349; Burlington, etc., R. Co. *v.* Schluntz, 14 Nebr. 421, 16 N. W. 439.

New York.— Rademacher *v.* Greenwich Ins. Co., 75 Hun 83, 27 N. Y. Suppl. 155.

Ohio.— Atlantic, etc., R. Co. *v.* Campbell, 4 Ohio St. 583, 64 Am. Dec. 607.

Pennsylvania.— Galbraith *v.* Philadelphia Co., 2 Pa. Super. Ct. 359.

South Dakota.— Ochsenreiter *v.* George C. Bagley Elevator Co., 11 S. D. 91, 75 N. W. 822; Enos *v.* St. Paul F. & M. Ins. Co., 4 S. D. 639, 57 N. W. 919, 46 Am. St. Rep. 796.

See 20 Cent. Dig. tit. "Evidence," §§ 2217, 2219.

86. Ish *v.* Marsh, 1 Nebr. (Unoff.) 864, 96 N. W. 58. But see Randall *v.* U. S. Leather Co., 72 N. Y. App. Div. 317, 76 N. Y. Suppl. 82, holding that it was error to permit an owner to testify as to the "usable value" of his premises, it appearing that he used the phrase as something more than rental value, as the usable value, if competent at all, was a question for the jury.

87. Kansas Cent. R. Co. *v.* Allen, 24 Kan. 33; Shattuck *v.* Stoneham Branch R. Co., 6 Allen (Mass.) 115; Atlantic, etc., R. Co. *v.* Campbell, 4 Ohio St. 583, 64 Am. Dec. 607.

88. Terre Haute, etc., R. Co. *v.* Walsh, 11 Ind. App. 13, 38 N. E. 534, repair drainage.

89. The degree of his competency is for the jury. Ish *v.* Marsh, 1 Nebr. (Unoff.) 864, 96 N. W. 58.

90. Hudson *v.* State, 61 Ala. 333 (mill); Hayden *v.* Albee, 20 Minn. 159 (ford).

(3) SERVICES. A witness may place a value upon his own services,[91] including agricultural services, as those of a farmer,[92] and domestic services, as those of a housekeeper[93] or nurse.[94] But it has been held that where he has no regular occupation or salary it is error to permit him to state the "fair and reasonable value of his time."[95]

(c) *Ordinary Witness* — (1) PERSONAL PROPERTY. A witness, although other than the owner, whose actual knowledge is proved or can be assumed, as in case of common articles, but not otherwise,[96] may state the value of personal

91. *Dakota.*— Edwards *v.* Fargo, etc., R. Co., 4 Dak. 549, 33 N. W. 100.

Illinois.— Chicago, etc., R. Co. *v.* Bivans, 142 Ill. 401, 32 N. E. 456 [*affirming* 42 Ill. App. 450].

Indiana.— Wahl *v.* Shoulders, 14 Ind. App. 665, 43 N. E. 458.

Kansas.— Carter *v.* Christie, 1 Kan. App. 604, 42 Pac. 256.

Michigan.— Fowler *v.* Fowler, 111 Mich. 676, 70 N. W. 336.

New York.— Mercer *v.* Vose, 67 N. Y. 56, 58, where it is said by Earl, J.: "I can conceive of no case where one who has himself rendered a service to another, when he will not be competent to give evidence of its value. Knowing the precise nature of the service rendered, he must have some knowledge of its value, and he is thus competent to give his opinion. It may not be worth much. Its weight, however, is for the jury."

See 20 Cent. Dig. tit. "Evidence," § 2216.

Adequate knowledge even on the part of a plaintiff has been required, where the service is one of an unusual nature. Story *v.* Maclay, 3 Mont. 480, ox-train transportation.

92. Arkansas Midland R. Co. *v.* Griffith, 63 Ark. 491, 39 S. W. 550; Loucks *v.* Chicago, etc., R. Co., 31 Minn. 526, 18 N. W. 651.

93. Fowler *v.* Fowler, 111 Mich. 676, 70 N. W. 336.

94. Storms *v.* Lemon, 7 Ind. App. 435, 34 N. E. 644; Missouri, etc., R. Co. *v.* Palmer, 55 Nebr. 559, 76 N. W. 169.

95. Whipple *v.* Rich, 180 Mass. 477, 63 N. E. 5.

96. *Alabama.*— Alabama Great Southern R. Co. *v.* Moody, 92 Ala. 279, 9 So. 238; Winter *v.* Montgomery, 79 Ala. 481; Ward *v.* Reynolds, 32 Ala. 384.

Georgia.— Hook *v.* Stovall, 30 Ga. 418.

Illinois.— Cooper *v.* Randall, 59 Ill. 317 (building); Ohio, etc., R. Co. *v.* Taylor, 27 Ill. 207; Frederick *v.* Case, 28 Ill. App. 215, furnace.

Indiana.— Toledo, etc., R. Co. *v.* Smith, 25 Ind. 288.

Iowa.— Clausen *v.* Tjernagel, 91 Iowa 285, 59 N. W. 277 (stock of goods); Allen *v.* Kirk, 81 Iowa 658, 47 N. W. 906.

Michigan.— Johnston *v.* Farmers' F. Ins. Co., 106 Mich. 96, 64 N. W. 5 (soda fountain); Erickson *v.* Drazkowski, 94 Mich. 551, 54 N. W. 283 (household furniture); Guest *v.* New Hampshire F. Ins. Co., 66 Mich. 98, 33 N. W. 31; Browne *v.* Moore, 32 Mich. 254; Continental Ins. Co. *v.* Horton, 28 Mich. 173.

Minnesota.— Stickney *v.* Bronson, 5 Minn. 215, successive witnesses whose joint testimony is relevant.

Missouri.— Schaaf *v.* Fries, 77 Mo. App. 346 (stock); Willison *v.* Smith, 60 Mo. App. 469; Bowne *v.* Hartford F. Ins. Co., 46 Mo. App. 473; Murphy *v.* Murphy, 22 Mo. App. 18.

Montana.— Holland *v.* Huston, 20 Mont. 84, 49 Pac. 390.

Nebraska.— Smith *v.* Chadron First Nat. Bank, 45 Nebr. 444, 63 N. W. 796 (stock of goods); Dunbar *v.* Briggs, 13 Nebr. 332, 14 N. W. 414.

New York.— Bedell *v.* Long Island R. Co., 44 N. Y. 367, 4 Am. Rep. 688 (house); Teerpenning *v.* Corn Exch. Ins. Co., 43 N. Y. 279 (stock of goods); Smith *v.* Hill, 22 Barb. 656; Campbell *v.* Campbell, 54 N. Y. Super. Ct. 381; Dixon *v.* La Farge, 1 E. D. Smith 722; Bischoff *v.* Schulz, 5 N. Y. Suppl. 757.

Rhode Island.— Forbes *v.* Howard, 4 R. I. 364, theater fittings.

South Dakota.— Enos *v.* St. Paul F. & M. Ins. Co., 4 S. D. 639, 57 N. W. 919, 46 Am. St. Rep. 796.

Texas.— Harris *v.* Schuttler, (Civ. App. 1893) 24 S. W. 989.

Virginia.— Wadley *v.* Com., 98 Va. 803, 35 S. E. 452, bonds.

United States.— Clarion First Nat. Bank *v.* Jones, 21 Wall. 325, 22 L. ed. 542.

See 20 Cent. Dig. tit. "Evidence," §§ 2215, 2218.

The extent of the knowledge, if sufficient is shown to make the inference probative, affects the weight of the testimony only. Chicago, etc., R. Co. *v.* Kendall, 49 Ill. App. 398; Doane *v.* Garretson, 24 Iowa 351; Kenton Ins. Co. *v.* Adkins, 12 Ky. L. Rep. 291; Continental Ins. Co. *v.* Horton, 28 Mich. 173; Bowne *v.* Hartford F. Ins. Co., 46 Mo. App. 473; Baum *v.* Bosworth, 68 Wis. 196, 31 N. W. 744. But as a general rule the purchase (Chandler *v.* Parker, (Kan. Sup. 1902) 70 Pac. 368, hogs, horses, and cattle; Continental Ins. Co. *v.* Horton, 28 Mich. 173; Meyerson *v.* Hartford F. Ins. Co., 16 Misc. (N. Y.) 286, 38 N. Y. Suppl. 112; Betz *v.* Hummel, 10 Pa. Cas. 313, 13 Atl. 938, beer cooler; Houston, etc., R. Co. *v.* Charwaine, 30 Tex. Civ. App. 633, 71 S. W. 401), or even presence at a purchase (Continental Ins. Co. *v.* Horton, 28 Mich. 173. And see Enos *v.* St. Paul F. & M. Ins. Co., 4 S. D. 639, 57 N. W. 919, 46 Am. St. Rep. 796), of the articles in question has been deemed a sufficient qualification. Knowledge of intrinsic value derived from information received through correspondence is rejected. Wadley *v.* Com., 98 Va. 803, 35 S. E. 452, bonds. Less stringency in qualification is applied as the article is one in common use (Tuttle *v.*

property;[97] such as farm or domestic animals,[98] carriages,[99] crops,[1] houses[2] or

Cone, 108 Iowa 468, 79 N. W. 267, bicycles), a skilled witness not being required in such cases (Filson *v.* Territory, 11 Okla. 351, 67 Pac. 473). See *infra*, this section, note 13.

97. *Alabama.*— Rawles *v.* James, 49 Ala. 183.

Florida.— Sullivan *v.* Lear, 23 Fla. 463, 2 So. 846, 11 Am. St. Rep. 388, franchise.

Georgia.— Central R. Co. *v.* Wolff, 74 Ga. 664.

Illinois.— Cooper *v.* Randall, 59 Ill. 317; Ohio, etc., R. Co. *v.* Taylor, 27 Ill. 207; Chicago, etc., Co. *v.* Calumet Stock Farm, 96 Ill. App. 337.

Indiana.— Fox *v.* Cox, 20 Ind. App. 61, 50 N. E. 92.

Iowa.— Clausen *v.* Tjernagel, 91 Iowa 285, 59 N. W. 277; Anson *v.* Dwight, 18 Iowa 241.

Kansas.— Springfield F. & M. Ins. Co. *v.* Payne, 57 Kan. 291, 46 Pac. 315; Atchison, etc., R. Co. *v.* Harper, 19 Kan. 529.

Maryland.— Archer *v.* State, 45 Md. 33, cigarettes.

Michigan.— Johnston *v.* Farmers' F. Ins. Co., 106 Mich. 96, 64 N. W. 5; Erickson *v.* Drazkowski, 94 Mich. 551, 54 N. W. 283; Browne *v.* Moore, 32 Mich. 254; Continental Ins. Co. *v.* Horton, 28 Mich. 173.

Minnesota.— Kronschnable *v.* Knoblauch, 21 Minn. 56.

Mississippi.— Whitfield *v.* Whitfield, 40 Miss. 352.

Missouri.— Willison *v.* Smith, 60 Mo. App. 469; Bowne *v.* Hartford F. Ins. Co., 46 Mo. App. 473.

Montana.— Holland *v.* Huston, 20 Mont. 84, 49 Pac. 390.

Nebraska.—Western Home Ins. Co. *v.* Richardson, 40 Nebr. 1, 58 N. W. 597.

New York.— Bedell *v.* Long Island R. Co., 44 N. Y. 367, 4 Am. Rep. 688; Teerpenning *v.* Corn Exch. Ins. Co., 43 N. Y. 279; Smith *v.* Hill, 22 Barb. 656; Rogers *v.* Ackerman, 22 Barb. 134; Moore *v.* Baylis, 10 N. Y. Suppl. 62; Bischoff *v.* Schulz, 5 N. Y. Suppl. 757.

Oklahoma.— Robinson *v.* Peru Plow, etc., Co., 1 Okla. 140, 31 Pac. 988.

Rhode Island.— Forbes *v.* Howard, 4 R. I. 364.

South Dakota.— Enos *v.* St. Paul F. & M. Ins. Co., 4 S. D. 639, 57 N. W. 919, 46 Am. St. Rep. 796. See also State *v.* Montgomery, (1903) 97 N. W. 716.

Texas.— Harris *v.* Schuttler, (Civ. App. 1893) 24 S. W. 989.

West Virginia.— Hood *v.* Maxwell, 1 W. Va. 219.

See 20 Cent. Dig. tit. "Evidence," §§ 2215, 2218.

Relative value may be stated by a witness who is ignorant of actual value. Kronschnable *v.* Knoblauch, 21 Minn. 56.

98. *Alabama.*— Alabama Great Southern R. Co. *v.* Moody, 92 Ala. 279, 9 So. 238 (thoroughbred bull); Rawles *v.* James, 49 Ala. 183.

Illinois.— Ohio, etc., R. Co. *v.* Taylor, 27 Ill. 207; Ohio, etc., R. Co. *v.* Irwin, 27 Ill. 178 (cow); Chicago, etc., R. Co. *v.* Calumet Stock Farm, 96 Ill. App. 337 (trotting horse); Chicago, etc., R. Co. *v.* Kendall, 49 Ill. App. 398 (horses).

Kansas.— Kennett *v.* Fickel, 41 Kan. 211, 21 Pac. 93 (horses); Atchison, etc., R. Co. *v.* Harper, 19 Kan. 529.

Maine.— Haskell *v.* Mitchell, 53 Me. 468, 89 Am. Dec. 711, horse.

Michigan.— Mason *v.* Partrick, 100 Mich. 577, 59 N. W. 239 (horse); Laird *v.* Snyder, 59 Mich. 404, 26 N. W. 654 (horses); Browne *v.* Moore, 32 Mich. 254.

Mississippi.— Whitfield *v.* Whitfield, 40 Miss. 352, cow.

Missouri.— Fry *v.* Estes, 52 Mo. App. 1.

Montana.— Holland *v.* Huston, 20 Mont. 84, 49 Pac. 390.

New York.— Bischoff *v.* Schulz, 5 N. Y. Suppl. 757; Brill *v.* Flagler, 23 Wend. 354, well broken setter dog.

South Dakota.— State *v.* Montgomery, (1903) 97 N. W. 716, hogs.

Texas.— Texas, etc., R. Co. *v.* Virginia Ranch, etc., Co., (Sup. 1887) 7 S. W. 341, jack.

See 20 Cent. Dig. tit. "Evidence," § 2218.

Witness need not be an expert.— It is not necessary to call a drover or a butcher to prove the value of a cow. Rawles *v.* James, 49 Ala. 183; Ohio, etc., R. Co. *v.* Irvin, 27 Ill. 178. See also Whitfield *v.* Whitfield, 40 Miss. 352. See *infra*, this section, note 13.

99. Beach *v.* Clark, 51 Conn. 200; Missouri Pac. R. Co. *v.* Peay, 7 Tex. Civ. App. 400, 26 S. W. 768.

1. *Colorado.*— Chicago, etc., R. Co. *v.* Larsen, 19 Colo. 71, 34 Pac. 477 (grass); Union Pac., etc., R. Co. *v.* Williams, 3 Colo. App. 526, 34 Pac. 731.

Indiana.— Burke *v.* Howell, 14 Ind. App. 296, 42 N. E. 952 (hay); Huber *v.* Beck, 6 Ind. App. 484, 33 N. E. 985.

Kentucky.— Bell *v.* Keach, 3 Ky. L. Rep. 520.

Minnesota.—McLennan *v.* Minneapolis, etc., Elevator Co., 57 Minn. 317, 59 N. W. 628.

Missouri.— Fry *v.* Estes, 52 Mo. App. 1.

Montana.— Porter *v.* Hawkins, 27 Mont. 486, 71 Pac. 664, hay.

Texas.— Galveston, etc., R. Co. *v.* Polk, (Civ. App. 1894) 28 S. W. 353 (grass); International, etc., R. Co. *v.* Searight, 8 Tex. Civ. App. 593, 28 S. W. 39 (grass).

See 20 Cent. Dig. tit. "Evidence," § 2218.

2. Lycoming F. Ins. Co. *v.* Jackson, 83 Ill. 302, 25 Am. Rep. 386; Springfield F. & M. Ins. Co. *v.* Payne, 57 Kan. 291, 46 Pac. 315; Kenton Ins. Co. *v.* Adkins, 12 Ky. L. Rep. 291; Bedell *v.* Long Island R. Co., 44 N. Y. 367, 4 Am. Rep. 688. *Compare* Murphy *v.* Murphy, 22 Mo. App. 18, holding that it was error to allow a witness who had merely looked at the outside of a house and who took no measurements and knew nothing as to how it was finished inside to give an opin-

other buildings,[3] farming or other implements,[4] household goods,[5] money,[6] stocks of goods,[7] wearing apparel,[8] and other articles.[9] He may also state any change in the value of animals[10] or articles in general[11] caused by specific injuries;[12]

ion as to its value. But see O'Keefe *v.* St. Francis' Church, 59 Conn. 551, 22 Atl. 325.

A carpenter can testify to the value of a house. Bedell *v.* Long Island R. Co., 44 N. Y. 367, 4 Am. Rep. 688.

3. Cooper *v.* Randall, 59 Ill. 317; Atchison, etc., R. Co. *v.* Huitt, 1 Kan. App. 788, 41 Pac. 1051 (barn); Porter *v.* Hawkins, 27 Mont. 486, 71 Pac. 664 (barn).

4. Continental, etc., Ins. Co. *v.* Horton, 28 Mich. 173; Fry *v.* Estes, 52 Mo. App. 1; Robinson *v.* Peru Plow, etc., Co., 1 Okla. 140, 31 Pac. 988.

5. *Illinois.*— Sinamaker *v.* Rose, 62 Ill. App. 118.

Iowa.—Houghtaling *v.* Chicago Great Western R. Co., 117 Iowa 540, 91 N. W. 811; Colby *v.* W. W. Kimball Co., 99 Iowa 321, 68 N. W. 786 (piano); Thomason *v.* Capitol Ins. Co., 92 Iowa 72, 61 N. W. 843.

Michigan.— Erickson *v.* Drazkowski, 94 Mich. 551, 54 N. W. 283; Continental Ins. Co. *v.* Horton, 28 Mich. 173.

Missouri.— Willison *v.* Smith, 60 Mo. App. 469; Bowne *v.* Hartford F. Ins. Co., 46 Mo. App. 473.

Nebraska.— Omaha Auction, etc., Co. *v.* Rogers, 35 Nebr. 61, 52 N. W. 826.

New York.— Rademacher *v.* Greenwich Ins. Co., 75 Hun 83, 27 N. Y. Suppl. 155; Smith *v.* Hill, 22 Barb. 656 (stove); Phillips *v.* McNab, 16 Daly 150, 9 N. Y. Suppl. 526; Meyerson *v.* Hartford F. Ins. Co., 16 Misc. 286, 38 N. Y. Suppl. 112.

Rhode Island.— Forbes *v.* Howard, 4 R. I. 364, theater fittings.

Texas.— Harris *v.* Schuttler, (Civ. App. 1893) 24 S. W. 989.

Wisconsin.— Stolze *v.* Manitowoc Terminal Co., 100 Wis. 208, 75 N. W. 987.

See 20 Cent. Dig. tit. "Evidence," § 2218.

A dealer in second-hand furniture need not be called to testify as to the value of household goods. Sinamaker *v.* Rose, 62 Ill. App. 118; Harris *v.* Schuttler, (Tex. Civ. App. 1893) 24 S. W. 989; Stolze *v.* Manitowoc Terminal Co., 100 Wis. 208, 75 N. W. 987.

6. Ward *v.* Tucker, 7 Wash. 399, 3 Pac. 126, 1086, English money.

7. *Alabama.*— Louisville, etc., Co. *v.* Lischkoff, 109 Ala. 136, 19 So. 436.

Iowa.— Clausen *v.* Tjernagel, 91 Iowa 285, 59 N. W. 277; Doane *v.* Garretson, 24 Iowa 351.

New York.— Teerpenning *v.* Corn Exch. Ins. Co., 43 N. Y. 279.

Oklahoma.— Robinson *v.* Peru Plow, etc., Co., 1 Okla. 140, 31 Pac. 988.

South Dakota.— Enos *v.* St. Paul F. & M. Ins. Co., 4 S. D. 639, 57 N. W. 919, 46 Am. St. Rep. 796.

Texas.— Allen *v.* Carpenter, 66 Tex. 138, 18 S. W. 347 (saloon); Harris *v.* Schuttler, (Civ. App. 1893) 24 S. W. 989 (where a witness who was "tolerably" well acquainted with a stock of goods was held competent to testify to their value).

Wisconsin.— Baum *v.* Bosworth, 68 Wis. 196, 31 N. W. 744.

Contra.—Taylor *v.* Roger Williams Ins. Co., 51 N. H. 50.

See 20 Cent. Dig. tit. "Evidence," § 2218.

One acquainted with the cost mark and selling price of a stock of goods is competent to testify as to their value. Enos *v.* St. Paul F. & M. Ins. Co., 4 S. D. 639, 57 N. W. 919, 46 Am. St. Rep. 796.

Inference as to valuation by witness.— Where a witness states the value of a stock of goods as they lay in a store, the inference is that his valuation was of the bulk. Halff *v.* Goldfrank, (Tex. Civ. App. 1899) 49 S. W. 1095.

In New Hampshire special skill is required in a witness who testifies to the aggregate value of a stock of goods. Taylor *v.* Roger Williams Ins. Co., 51 N. H. 50.

8. Houghtaling *v.* Chicago Great Western R. Co., 117 Iowa 540, 91 N. W. 811; Mish *v.* Wood, 34 Pa. St. 451.

9. *Alabama.*— Ward *v.* Reynolds, 32 Ala. 384, slaves.

Colorado.— Thatcher *v.* Kaucher, 2 Colo. 698, whisky.

Georgia.— Central R. Co. *v.* Wolff, 74 Ga. 664, jewelry.

Indiana.— Fox *v.* Cox, 20 Ind. App. 61, 50 N. E. 92, mill machinery.

Michigan.— Johnston *v.* Farmers' F. Ins. Co., 106 Mich. 96, 64 N. W. 5, soda fountain.

New York.— Sands *v.* Sparling, 82 Hun 401, 31 N. Y. Suppl. 251 (ordinary board); Borst *v.* Crommie, 19 Hun 209 (support and clothing).

Pennsylvania.— Ardesco Oil Co. *v.* Gibson, 63 Pa. St. 146.

Texas.— Orient Ins. Co. *v.* Moffatt, 15 Tex. Civ. App. 385, 39 S. W. 1013, dry-goods.

Washington.— Lines *v.* Alaska Commercial Co., 29 Wash. 133, 69 Pac. 642, piano in Alaska.

See 20 Cent. Dig. tit. "Evidence," § 2218.

10. Laird *v.* Snyder, 59 Mich. 404, 26 N. W. 654 (overdriving); Perine *v.* Interurban St. R. Co., 43 Misc. (N. Y.) 70, 86 N. Y. Suppl. 479 (horse); Bischoff *v.* Schulz, 5 N. Y. Suppl. 757 (depreciation in value of horse by reason of being foundered).

11. New York, etc., R. Co. *v.* Grand Rapids, etc., R. Co., 116 Ind. 60, 18 N. E. 182, car before and after repairing.

12. A statement of damages may be an epitome of the difference in value; and while as a rule the witness, in order that his statement should be relevant, must have known the value before the change, it has been deemed sufficient that he can infer with reasonable certainty what it must have been. Perine *v.* Interurban St. R. Co., 43 Misc. (N. Y.) 70, 86 N. Y. Suppl. 479, veterinary

although the witness is not an expert and possesses no skill and experience beyond that common to the community at large.[13]

(2) Real Estate. In like manner the value of real estate,[14] or value of any

as to damage to a horse. See also *supra*, XI, A, 4, c, (II).

13. *Alabama.*— Rawles *v.* James, 49 Ala. 183; Ward *v.* Reynolds, 32 Ala. 384.

Georgia.— Central R. Co. *v.* Wolff, 74 Ga. 664.

Illinois.— Ohio, etc., R. Co. *v.* Taylor, 27 Ill. 207; Ohio, etc., R. Co. *v.* Irvin, 27 Ill. 78.

Indiana.— Fox *v.* Cox, 20 Ind. App. 61, 50 N. E. 92.

Kansas.— Springfield F. & M. Ins. Co. *v.* Payne, 57 Kan. 291, 46 Pac. 315.

Michigan.— Continental Ins. Co. *v.* Horton, 28 Mich. 173.

Mississippi.— Whitfield *v.* Whitfield, 40 Miss. 352.

Missouri.— Willison *v.* Smith, 60 Mo. App. 469; Bowne *v.* Hartford F. Ins. Co., 46 Mo. App. 473.

Montana.— Holland *v.* Huston, 20 Mont. 84, 49 Pac. 390.

Oklahoma.— Filson *v.* Territory, 11 Okla. 351, 67 Pac. 473.

Texas.— Harris *v.* Schuttler, (Civ. App. 1893) 24 S. W. 989.

West Virginia.—Hood *v.* Maxwell, 1 W. Va. 219, value of wheat per bushel, estimated on the basis of the price of flour per barrel.

See 20 Cent. Dig. tit. "Evidence," § 2218.

Contra as to machinery. Winter *v.* Burt, 31 Ala. 33.

14. *Arkansas.*— St. Louis, etc., R. Co. *v.* Anderson, 39 Ark. 167.

California.— San Diego Land, etc., Co. *v.* Neale, 78 Cal. 63, 20 Pac. 372, 3 L. R. A. 83.

Colorado.—Wilson *v.* Harnette, (Sup. 1904) 75 Pac. 395.

Florida.— Orange Belt R. Co. *v.* Craver, 32 Fla. 28, 13 So. 444.

Illinois.— Johnson *v.* Freeport, etc., R. Co., 111 Ill. 413. See also Cooper *v.* Randall, 59 Ill. 317.

Indiana.— Evansville, etc., R. Co. *v.* Fettig, 130 Ind. 61, 29 N. E. 407; Jones *v.* Snyder, 117 Ind. 229, 20 N. E. 140; Frankfort, etc., R. Co. *v.* Windsor, 51 Ind. 238.

Kansas.— Kansas City, etc., R. Co. *v.* Headrick, 41 Kan. 71, 21 Pac. 227; Kansas City, etc., R. Co. *v.* Orr, 41 Kan. 70, 21 Pac. 227; Kansas City, etc., R. Co. *v.* Baird, 41 Kan. 69, 21 Pac. 227; Kansas City, etc., R. Co. *v.* Ehret, 41 Kan. 22, 20 Pac. 538; Le Roy, etc., R. Co. *v.* Crum, 39 Kan. 642, 18 Pac. 944; Le Roy, etc., R. Co. *v.* Hawk, 39 Kan. 638, 18 Pac. 943, 7 Am. St. Rep. 566; Wichita, etc., R. Co. *v.* Kuhn, 38 Kan. 104, 16 Pac. 75; Central Branch Union Pac. R. Co. *v.* Andrews, 37 Kan. 162, 14 Pac. 509; Roberts *v.* Brown County, 21 Kan. 247.

Kentucky.— Bell *v.* Keach, 3 Ky. L. Rep. 520.

Maine.— Warren *v.* Wheeler, 21 Me. 484.

Massachusetts.— Muskeget Island Club *v.* Nantucket, 185 Mass. 303, 70 N. E. 61; Conness *v.* Com., 184 Mass. 541, 69 N. E. 341; Pinkham *v.* Chelmsford, 109 Mass. 225; Swan *v.* Middlesex County, 101 Mass. 173; Whitman *v.* Boston, etc., R. Co., 7 Allen 313; Shattuck *v.* Stoneham Branch R. Co., 6 Allen 115; Russell *v.* Horn Pond Branch R. Corp., 4 Gray 607; Shaw *v.* Charlestown, 2 Gray 107; Dwight *v.* Hampden County Com'rs, 11 Cush. 201; Walker *v.* Boston, 8 Cush. 279.

Minnesota.— Papooshek *v.* Winona, etc., R. Co., 44 Minn. 195, 46 N. W. 329; Lehmicke *v.* St. Paul, etc., R. Co., 19 Minn. 464.

Missouri.— Union Elevator Co. *v.* Kansas City Suburban Belt R. Co., (Sup. 1896) 33 S. W. 926; St. Louis, etc., R. Co. *v.* St. Louis Union Stock Yards Co., 120 Mo. 541, 25 S. W. 399; Tate *v.* Missouri, etc., R. Co., 64 Mo. 149.

Montana.— Montana R. Co. *v.* Warren, 6 Mont. 275, 12 Pac. 641 [*affirmed* in 137 U. S. 348, 11 S. Ct. 96, 34 L. ed. 681].

Nebraska.— Greeley County *v.* Gebhardt, 2 Nebr. (Unoff.) 661, 89 N. W. 753; Northeastern Nebraska R. Co. *v.* Frazier, 25 Nebr. 53, 40 N. W. 609; Sioux City, etc., R. Co. *v.* Weimer, 16 Nebr. 272, 20 N. W. 349.

New York.— Clark *v.* Baird, 9 N. Y. 183; *In re* Rochester, 40 Hun 588. See also Bedell *v.* Long Island R. Co., 44 N. Y. 367, 4 Am. Rep. 688, house.

Pennsylvania.— McElheny *v.* McKeesport, etc., Bridge Co., 153 Pa. St. 108, 25 Atl. 1021; Jones *v.* Erie, etc., R. Co., 151 Pa. St. 30, 25 Atl. 134, 31 Am. St. Rep. 722, 17 L. R. A. 758; Curtin *v.* Nittany Valley R. Co., 135 Pa. St. 20, 19 Atl. 740; Brown *v.* Corey, 43 Pa. St. 495, 506 (where the court said: "The value of real estate which has not been offered in market is often a very difficult question. It belongs to that class of facts which exclude direct evidence to prove them, being such as are either necessarily or usually imperceptible by the senses, and therefore incapable of the ordinary means of proof"); Kellogg *v.* Krauser, 14 Serg. & R. 137, 16 Am. Dec. 480; Hewitt *v.* Pittsburg, etc., R. Co., 19 Pa. Super. Ct. 304; Galbraith *v.* Philadelphia Co., 2 Pa. Super. Ct. 359.

Texas.— San Antonio, etc., R. Co. *v.* Ruby, 80 Tex. 172, 15 S. W. 1040.

Wisconsin.— Stolze *v.* Manitowoc Terminal Co., 100 Wis. 208, 75 N. W. 987; Moore *v.* Chicago, etc., R. Co., 78 Wis. 120, 47 N. W. 273.

United States.— Montana R. Co. *v.* Warren, 137 U. S. 348, 11 S. Ct. 96, 34 L. ed. 681 [*affirming* 6 Mont. 275, 12 Pac. 641]; Carpenter *v.* Robinson, 5 Fed. Cas. No. 2,431, Holmes 67.

See 20 Cent. Dig. tit. "Evidence," §§ 2217, 2219.

Not an expert.— Such a witness cannot testify as an expert to an inference as to the probable effect of a sluiceway, based upon a

interest[15] or element of value[16] therein; or its rental value[17] or the right to use it;[18] even though the real estate is in an unusual and speculative form, as a quarry,[19] an ore bank or vein,[20] or an undeveloped "prospect" in mineral lands,[21] may be estimated by one acquainted with the value of that class of property who has seen the land,[22] and who is possessed of adequate opportunities for observation[23] and the requisite ability to make a reasonable inference.[24] The knowledge as to the class of property which is required is such as is demanded by the nature of the

supposed knowledge of geographical conditions, rainfall, etc., over a large area of country. Kansas, etc., R. Co. *v.* Cook, 57 Ark. 387, 21 S. W. 1066; Chicago, etc., R. Co. *v.* Donelson, 45 Kan. 18, 25 Pac. 584.

15. Gerkins *v.* Kentucky Salt Co., 67 S. W. 821, 23 Ky. L. Rep. 2415 (lease of oil well); Avery *v.* New York Cent., etc., R. Co., 2 N. Y. Suppl. 101 (leasehold).

16. Elvins *v.* Delaware, etc., Tel., etc., Co., 63 N. J. L. 243, 43 Atl. 903, 76 Am. St. Rep. 217, shade and ornamental trees. *Compare* Gulf, etc., R. Co. *v.* Burroughs, 27 Tex. Civ. App. 422, 66 S. W. 83, holding that the opinion of witnesses that pear trees added nothing to the value of the soil was incompetent.

Where an enumeration of items of value is unnecessary and tends unduly to enhance an estimate of value the evidence may be rejected. Jurada *v.* Cambridge, 171 Mass. 144, 50 N. E. 537.

17. Norwalk *v.* Blanchard, 56 Conn. 461, 16 Atl. 242 (mill); Avery *v.* New York Cent., etc., R. Co., 2 N. Y. Suppl. 101.

18. Manning *v.* Fitch, 138 Mass. 273 (milk farm); Cornell *v.* Dean, 105 Mass. 435 (pasturage).

19. Chicago Sanitary Dist. *v.* Loughran, 160 Ill. 362, 43 N. E. 359.

20. Wilson *v.* Harnette, (Colo. Sup. 1904) 75 Pac. 395 (vein in a mine); Hanover Water Co. *v.* Ashland Iron Co., 84 Pa. St. 279.

21. Montana R. Co. *v.* Warren, 137 U. S. 348, 11 S. Ct. 96, 34 L. ed. 681 [*affirming* 6 Mont. 275, 12 Pac. 641].

22. The knowledge requisite to qualify a witness to testify to his opinion of the value of lands may either be acquired by the performance of official duty, as by a county commissioner or selectman, whose duty it is to lay out public ways, or by an assessor, whose duty it is to ascertain the value of lands for the purpose of taxation; or it may be derived from knowing of sales and purchases of other lands in the vicinity, either by the witness himself or by other persons. Whitman *v.* Boston, etc., R. Co., 7 Allen (Mass.) 313; Fowler *v.* Middlesex County Com'rs, 6 Allen (Mass.) 92; Dickenson *v.* Fitchburg, 13 Gray (Mass.) 546; Russell *v.* Horn Pond Branch R. Corp., 4 Gray (Mass.) 607.

Evidence of the value per acre of the land may be received (Schuster *v.* Chicago Sanitary Dist., 177 Ill. 626, 52 N. E. 855; Pingery *v.* Cherokee, etc., R. Co., 78 Iowa 438, 43 N. W. 285), there being definite proof as to the number of acres involved (Ball *v.* Keokuk, etc., R. Co., 71 Iowa 306, 32 N. W. 354).

The value of special features, as a fishing-ground (Boston, etc., R. Co. *v.* Montgomery, 119 Mass. 114), or of unusual property (Clark *v.* Rockland Water Power Co., 52 Me. 68, mill), can be testified only by one acquainted with that class of property; but the value of usual features, as that of certain trees to a farmer as a shelter and windbreak (Andrews *v.* Youmans, 82 Wis. 81, 52 N. W. 23) or for fruit (Bradshaw *v.* Atkins, 110 Ill. 323; Latham *v.* Brown, 48 Kan. 190, 29 Pac. 400; Chicago, etc., R. Co. *v.* Mouriquand, 45 Kan. 170, 25 Pac. 567), may be stated by any one familiar with the property itself.

23. Snodgrass *v.* Chicago, 152 Ill. 600, 38 N. E. 790; White *v.* Hermann, 51 Ill. 243, 99 Am. Dec. 543; Frankfort, etc., R. Co. *v.* Windsor, 51 Ind. 238; Lyman *v.* Boston, 164 Mass. 99, 41 N. E. 127; Amory *v.* Melrose, 162 Mass. 556, 39 N. E. 276; Whitman *v.* Boston, etc., R. Co., 7 Allen (Mass.) 313; Fowler *v.* Middlesex County Com'rs, 6 Allen (Mass.) 92; Avery *v.* New York Cent., etc., R. Co., 2 N. Y. Suppl. 101.

It is not necessary that a real-estate broker should live in the neighborhood of the land whose value he is stating (Lyman *v.* Boston, 164 Mass. 99, 41 N. E. 127) or ever have made a sale there (Amory *v.* Melrose, 162 Mass. 556, 39 N. E. 276).

One is not competent to testify to the value of land who has never seen the property or been in the neighborhood (Westlake *v.* St. Lawrence County Mut. Ins. Co., 14 Barb. (N. Y.) 206; Mewes *v.* Crescent Pipe Line Co., 170 Pa. St. 364, 369, 32 Atl. 1082, 1083; Pittsburgh, etc., R. Co. *v.* Vance, 115 Pa. St. 325, 8 Atl. 764); but lack of knowledge of actual sales (Chicago, etc., R. Co. *v.* Blake, 116 Ill. 163, 4 N. E. 488) affects only the weight of the evidence.

24. Central Pac. R. Co. *v.* Pearson, 35 Cal. 247; Swan *v.* Middlesex County, 101 Mass. 173; Smith *v.* Holbrook, 16 Alb. L. J. 33; Gallagher *v.* Kemmerer, 144 Pa. St. 509, 22 Atl. 970, 27 Am. St. Rep. 673; Pittsburgh, etc., R. Co. *v.* Robinson, 95 Pa. St. 426; State Line R. Co. *v.* Playford, 10 Pa. Cas. 467, 14 Atl. 355. An inference based entirely upon incompetent matters may be rejected. San Diego Land, etc., Co. *v.* Neale, 88 Cal. 50, 25 Pac. 977, 11 L. R. A. 604; Michael *v.* Crescent Pipe Line Co., 159 Pa. St. 99, 28 Atl. 204.

Mere opportunity for observation, as by residence in the neighborhood (Reed *v.* Drais, 67 Cal. 491, 8 Pac. 20; Whitney *v.* Boston, 98 Mass. 312; Hyman *v.* Boston Chair Mfg. Co., 59 N. Y. Super. Ct. 116, 13 N. Y. Suppl. 609; Galbraith *v.* Philadelphia Co., 2 Pa.

subject-matter, although it must be actual.[25] A farmer may state the value of farm lands[26] with which he is acquainted,[27] and, even as to farm land, it is not essential that the witness should be a farmer.[28] Change in value may be stated by the witness, whether in the way of increase or by diminution, as by the erection of a nuisance, etc.,[29] in which case, that of diminution, the estimate is frequently,[30] although improperly,[31] put in the form of an estimate of damages.[32] It naturally is necessary that the witness should have been acquainted with the land or other property prior to the change in condition.[33]

(3) SERVICES. A witness who has observed the rendition of services[34] and has a sufficient familiarity with services of that nature to form a reasonable infer-

Super. Ct. 359; Buffum *v.* New York, etc., R. Co., 4 R. I. 221) is not sufficient in itself, although it will be assumed that such witnesses are qualified (Lafayette *v.* Nagle, 113 Ind. 425, 15 N. E. 1; Pennsylvania, etc., R., etc., Co. *v.* Bunnell, 81 Pa. St. 414; Myers *v.* Schuylkill River East Side R. Co., 5 Pa. Co. Ct. 634). The same assumption will be made where a witness shows himself acquainted with other real property in the neighborhood. Santa Ana *v.* Harlin, 99 Cal. 538, 34 Pac. 224; Terre Haute, etc., R. Co. *v.* Jarvis, 9 Ind. App. 438, 36 N. E. 774; Hewlett *v.* Saratoga Carlsbad Spring Co., 84 Hun (N. Y.) 248, 32 N. Y. Suppl. 697; Shepard *v.* New York El. R. Co., 15 N. Y. Suppl. 175; Morrison *v.* Watson, 101 N. C. 332, 7 S. E. 795, 1 L. R. A. 833.

25. Pennock *v.* Crescent Pipe Line Co., 170 Pa. St. 372, 32 Atl. 1085.

26. *Colorado.*— Chicago, etc., R. Co. *v.* Larsen, 19 Colo. 71, 34 Pac. 477.

Kansas.— Chicago, etc., R. Co. *v.* Cosper, 42 Kan. 561, 22 Pac. 634; Leroy, etc., R. Co. *v.* Ross, 40 Kan. 598, 20 Pac. 197, 2 L. R. A. 217.

Massachusetts.— Muskeget Island Club *v.* Nantucket, 185 Mass. 303, 70 N. E. 61.

Michigan.— Stone *v.* Covell, 29 Mich. 359; Wallace *v.* Finch, 24 Mich. 255.

Mississippi.— Board of Levee Com'rs *v.* Dillard, 76 Miss. 641, 25 So. 292, holding that a farmer who had lived for thirty years in the vicinity of the land, and had worked on it, and who testified that it was productive, was competent to testify as to its value.

Missouri.— Anslyn *v.* Frank, 8 Mo. App. 242.

Nebraska.— Greeley County *v.* Gebhardt, 2 Nebr. (Unoff.) 661, 89 N. W. 753.

New York.— Robertson *v.* Knapp, 35 N. Y. 91, 33 How. Pr. 309.

Pennsylvania.— Curtin *v.* Nittany Valley R. Co., 135 Pa. St. 20, 19 Atl. 740; Galbraith *v.* Philadelphia Co., 2 Pa. Super. Ct. 359; Pittsburg Southern R. Co. *v.* Reed, 4 Pa. Cas. 353, 6 Atl. 838.

See 20 Cent. Dig. tit. "Evidence," § 2217.

Unless the witness can state the market, usable, or productive value of a farm, he is incompetent to state how much it has depreciated in value by reason of taking of a portion for railroad use. Ottawa, etc., R. Co. *v.* Fisher, 42 Kan. 675, 22 Pac. 713. See also Chicago, etc., R. Co. *v.* Easley, 46 Kan. 337, 26 Pac. 731.

27. It is immaterial that the witness is at the time of testifying engaged in some other business. Robertson *v.* Knapp, 35 N. Y. 91, 33 How. Pr. (N. Y.) 309.

28. Van Deusen *v.* Young, 29 Barb. (N. Y.) 9.

29. Brennan *v.* Corsicana Cotton-Oil Co., (Tex. Civ. App. 1898) 44 S. W. 588, percentage. See also Wichita, etc., R. Co. *v.* Kuhn, 38 Kan. 104, 16 Pac. 75.

30. Smith *v.* Frio County, (Tex. Civ. App. 1901) 66 S. W. 711, house. See also Smith *v.* Pennsylvania R. Co., 205 Pa. St. 645, 55 Atl. 768.

A jury's verdict may be sustained upon the opinions of witnesses expressed in a general way as to the amount of damage occasioned by the improvement. Gulf, etc., R. Co. *v.* Necco, (Tex. Sup. 1892) 18 S. W. 564.

31. The statement has been rejected. Illinois Cent. R. Co. *v.* Smith, 101 Ky. 203, 61 S. W. 2, 22 Ky. L. Rep. 1655. In Missouri it is held to be the better rule that, on the question of damages from the construction of a railroad, witnesses should state only facts, and leave entirely to the jury the question of the amount of damages; yet the allowing witnesses to testify to the amount of damage is not deemed reversible error. Union Elevator Co. *v.* Kansas City Suburban Belt R. Co., 135 Mo. 353, 36 S. W. 1071.

32. Dallas, etc., R. Co. *v.* Chenault, (Tex. Civ. App. 1890) 16 S. W. 173. See also St. Louis, etc., R. Co. *v.* St. Louis Union Stock Yard Co., 120 Mo. 541, 25 S. W. 399.

33. Shimer *v.* Easton R. Co., 205 Pa. St. 648, 55 Atl. 769.

34. Storms *v.* Lemon, 7 Ind. App. 435, 34 N. E. 644; Loy *v.* Petty, 3 Ind. App. 241, 29 N. E. 788; Nelson *v.* Masterson, 2 Ind. App. 524, 28 N. E. 731; Kent Furniture Mfg. Co. *v.* Ransom, 46 Mich. 416, 9 N. W. 454; Bagley *v.* Carthage, etc., R. Co., 25 N. Y. App. Div. 475, 49 N. Y. Suppl. 718. The witnesses need not live at the place where the services were rendered. Nelson *v.* Masterson, 2 Ind. App. 524, 28 N. E. 731; Kent Furniture Mfg. Co. *v.* Ransom, 46 Mich. 416, 9 N. W. 454.

In the absence of observation, the inference has been rejected. Byrne *v.* Byrne, 47 Ill. 507. Acquaintance with the subject-matter has, however, in certain cases, been deemed sufficient. Jenney Electric Co. *v.* Branham, 145 Ind. 314, 41 N. E. 448, 33 L. R. A. 395; Bowen *v.* Bowen, 74 Ind. 470.

ence as to value[35] may state it.[36] Services under this rule may be of any nature. They may be agricultural, as of a farmer;[37] domestic, as acting as companion,[38] doing housework,[39] keeping house,[40] nursing a sick[41] or insane[42] patient; mercantile, as bookkeeping,[43] selling goods,[44] or preparing patent medicine;[45] professional;[46] trade, as a mill engineer;[47] or transportation.[48] An ordinary witness,

35. *Alabama.*— Thompson *v.* Hartline, 84 Ala. 65, 4 So. 18; Mock *v.* Kelly, 3 Ala. 387.

Arkansas.— Little Rock, etc., R. Co. *v.* Bruce, 55 Ark. 65, 17 S. W. 363.

Dakota.— Edwards *v.* Fargo, etc., R. Co., 4 Dak. 549, 33 N. W. 100.

Illinois.— Byrne *v.* Byrne, 47 Ill. 507; Louisville, etc., R. Co. *v.* Cox, 30 Ill. App. 380, holding that the witness must be shown to have known the usual rate of compensation paid for such services at the time and place where rendered.

Indiana.— Jenney Electric Co. *v.* Branham, 145 Ind. 314, 41 N. E. 448, 33 L. R. A. 395; Bowen *v.* Bowen, 74 Ind. 470; McNeil *v.* Davidson, 37 Ind. 336; Storms *v.* Lemon, 7 Ind. App. 435, 34 N. E. 644; Loy *v.* Petty, 3 Ind. App. 241, 29 N. E. 788.

Massachusetts.— Lewis *v.* Eagle Ins. Co., 10 Gray 508.

Minnesota.— Seurer *v.* Horst, 31 Minn. 479, 18 N. W. 283.

New York.— Scott *v.* Lilienthal, 9 Bosw. 224; Lamoure *v.* Caryl, 4 Den. 370, holding that a farmer cannot state the value of a clerk's services. See also Smith *v.* Kobbe, 59 Barb. 289.

See 20 Cent. Dig. tit. "Evidence," § 2216.

Special knowledge is not required. Hufford *v.* Neher, 15 Ind. App. 396, 44 N. E. 61. But see *contra,* Seurer *v.* Horst, 31 Minn. 479, 18 N. W. 283.

36. *Connecticut.*— O'Keefe *v.* St. Francis' Church, 59 Conn. 551, 22 Atl. 325.

Illinois.— Chicago, etc., R. Co. *v.* Bivans, 142 Ill. 401, 32 N. E. 456 [*affirming* 42 Ill. App. 450].

Indiana.— Jenney Electric Co. *v.* Branham, 145 Ind. 314, 41 N. E. 448, 33 L. R. A. 395; Bowen *v.* Bowen, 74 Ind. 470; Hufford *v.* Neher, 15 Ind. App. 396, 44 N. E. 61; Wahl *v.* Shoulders, 14 Ind. App. 665, 43 N. E. 458; Storms *v.* Lemon, 7 Ind. App. 435, 34 N. E. 644; Loy *v.* Petty, 3 Ind. App. 241, 29 N. E. 788; Nelson *v.* Masterson, 2 Ind. App. 524, 28 N. E. 731.

Kansas.— Kennett *v.* Fickel, 41 Kan. 211, 21 Pac. 93.

Louisiana.— Figuras *v.* Benoist, 11 La. Ann. 683.

Maryland.— Stoner *v.* Devilbiss, 70 Md. 144, 16 Atl. 440.

Massachusetts.— Kendall *v.* May, 10 Allen 59.

Michigan.— Kent Furniture Mfg. Co. *v.* Ransom, 46 Mich. 416, 9 N. W. 454.

Minnesota.— Seurer *v.* Horst, 31 Minn. 479, 18 N. W. 283.

Nebraska.— McDonald *v.* Dodge County, 41 Nebr. 905, 60 N. W. 366.

Nevada.— Alt *v.* California Fig Syrup Co., 19 Nev. 118, 7 Pac. 174.

New York.— Edgecomb *v.* Buckhout, 146 N. Y. 332, 40 N. E. 991, 28 L. R. A. 816; Lewis *v.* Trickey, 20 Barb. 387; Scott *v.* Lilienthal, 9 Bosw. 224; Stevens *v.* Benton, 39 How. Pr. 13.

North Carolina.— McPeters *v.* Ray, 85 N. C. 462.

Texas.— Gonzales College *v.* McHugh, 21 Tex. 256.

Vermont.— Stone *v.* Tupper, 58 Vt. 409, 5 Atl. 387.

See 20 Cent. Dig. tit. "Evidence," § 2216.

37. Loy *v.* Petty, 3 Ind. App. 241, 29 N. E. 788; Harris *v.* Smith, 71 N. H. 330, 52 Atl. 854 (holding that the question of what is a fair price for hauling wood is not a question for expert opinion); McLamb *v.* Wilmington, etc., R. Co., 122 N. C. 862, 29 S. E. 894.

38. Lathrop *v.* Sinclair, 110 Mich. 329, 68 N. W. 248.

39. Boyd *v.* Starbuck, 18 Ind. App. 310, 47 N. E. 1079; Hufford *v.* Neher, 15 Ind. App. 396, 44 N. E. 61.

40. Edgecomb *v.* Buckhout, 146 N. Y. 332, 40 N. E. 991, 28 L. R. A. 816.

41. Wahl *v.* Shoulders, 14 Ind. App. 665, 43 N. E. 458; Storms *v.* Lemon, 7 Ind. App. 435, 34 N. E. 644, 645 (where the court said: "Every man who has arrived at years of maturity must, in the course of nature, have had more or less experience in caring for the sick, or seeing it done; and when one has seen such services, as they are rendered, he is competent to give the facts, and then his opinion as to the value of such services, the weight to be given to the opinion being determined by the jury"); Figuras *v.* Benoist, 11 La. Ann. 683.

42. Kendall *v.* May, 92 Mass. 59.

43. Scott *v.* Lilienthal, 9 Bosw. (N. Y.) 224.

44. Jenney Electric Co. *v.* Branham, 145 Ind. 314, 41 N. E. 448, 33 L. R. A. 395, electric machinery.

45. Alt *v.* California Fig Syrup Co., 19 Nev. 118, 7 Pac. 174.

46. Roche *v.* Baldwin, 135 Cal. 522, 65 Pac. 459, 67 Pac. 903, attorney.

General, undefined knowledge is not a sufficient basis for an inference. An attorney cannot be asked, from what he knows of a certain case, how much he thinks the services of an attorney engaged in it were worth. Williams *v.* Brown, 28 Ohio St. 547.

47. Eagle, etc., Mfg. Co. *v.* Browne, 58 Ga. 240. The officers of a mill who have observed plaintiff's skill and success as engineer of their mill may testify as to the value of his services. Eagle, etc., Mfg. Co. *v.* Browne, *supra.*

48. Little Rock, etc., R. Co. *v.* Bruce, 55 Ark. 65, 17 S. W. 363. One acquainted with

if his qualification is shown, may state the value of the right to use common articles of personal property.[49]

(D) *Skilled Witness* — (1) IN GENERAL. Estimates of value may be given by specially skilled witnesses when such testimony will aid the jury.[50] The determination of the question whether the opinion or judgment of such a witness is calculated to aid the jury is one within the discretion of the court,[51] which will not be reversed except in case of manifest error.[52] The knowledge of the witness must be actual,[53] although he cannot testify to instances of sales,[54] and must be commensurate with the estimate or judgment which he proposes to state.[55] Where special skill or exceptional faculties are required, the witness must be shown to possess them.[56] A guess is not an estimate and should be rejected.[57] But it is not required that the training of the witness should be of a technical nature. It is sufficient that the knowledge is adequate *quoad* the property involved in the inquiry.[58] A farmer, although living at some distance,[59] may state the value of farm lands,[60] or their value as affected by a change in condition.[61] The scope which the examination of the witness may cover is within certain

freight charges may state whether certain charges are reasonable. Little Rock, etc., R. Co. *v.* Bruce, *supra.*

49. Palmer *v.* Smith, 76 Conn. 210, 56 Atl. 516 (holding that where the question is as to the value of the right to use a horse in the retail meat business the inquiry need not be limited to plaintiff's horse); Butler *v.* Mehrling, 15 Ill. 488; Kennett *v.* Fickell, 41 Kan. 211, 21 Pac. 93.

50. Pingery *v.* Cherokee, etc., R. Co., 78 Iowa 438, 43 N. W. 285; Phillips *v.* Marblehead, 148 Mass. 326, 19 N. E. 547; Warren *v.* Spencer Water Co., 143 Mass. 155, 9 N. E. 527; Lawton *v.* Chase, 108 Mass. 238; Stone *v.* Covell, 29 Mich. 359; Ives *v.* Quinn, 7 Misc. (N. Y.) 155, 27 N. Y. Suppl. 251; and other cases cited *infra,* XI, C, 4, t, (III), (D), (2)-(5).

51. Lawrence *v.* Boston, 119 Mass. 126.

52. Phillips *v.* Marblehead, 148 Mass. 326, 19 N. E. 547; Warren *v.* Spencer Water Co., 143 Mass. 155, 9 N. E. 527.

53. Schaaf *v.* Fries, 77 Mo. App. 346; Oregon Pottery Co. *v.* Kern, 30 Oreg. 328, 47 Pac. 917; Michael *v.* Crescent Pipe Line Co., 159 Pa. St. 99, 28 Atl. 204; Gorgas *v.* Philadelphia, etc., R. Co., 144 Pa. St. 1, 22 Atl. 715.

Affirmative proof required.— Such witnesses "should affirmatively appear to have actual personal knowledge of the facts affecting the subject-matter of the inquiry." Michael *v.* Crescent Pipe Line Co., 159 Pa. St. 99, 104, 28 Atl. 204. While a claim to knowledge may be *prima facie* sufficient, in the absence of evidence (see *supra,* XI, A, 4, a, (II)), if the competency of the witness is challenged his qualifications must be proved (Missouri Pac. R. Co. *v.* Coon, 15 Nebr. 232, 18 N. W. 62).

How far special qualification is necessary. It has been held that special skill is not necessary. Shattuck *v.* Stoneham Branch R. Co., 6 Allen (Mass.) 115; Moore *v.* Chicago, etc., R. Co., 78 Wis. 120, 47 N. W. 273. "This is permitted as an exception to the general rule, and not strictly on the ground that such persons are experts; for such an application of the term would greatly extend its signification. The persons who testify are not supposed to have science or skill superior to that of the jurors; they have merely a knowledge of the particular facts in the case which jurors have not. And as value rests merely in opinion, this exception to the general rule that witnesses must be confined to facts, and cannot give opinions, is founded in necessity and obvious propriety." Shattuck *v.* Stoneham Branch R. Co., *supra.* It has on the contrary been required that peculiar qualifications should be shown. Buffum *v.* New York, etc., R. Co., 4 R. I. 221. It is not necessary, in order to estimate the effect on land value of a change in conditions, that a witness should know at what prices land is held in the vicinity. "A man may know the effect on the relative value without being able to fix the actual market price." Dawson *v.* Pittsburgh, 159 Pa. St. 317, 28 Atl. 171.

54. Mantz *v.* Maguire, 52 Mo. App. 136.

55. Babcock *v.* Raymond, 2 Hilt. (N. Y.) 61, holding that an author is a competent witness as to the value of a literary production.

56. "A person cannot be a competent judge of works of art, such as statues, pictures, coins and engravings; or of articles of trade, as horses, wines, plate, &c., without practical observation and experience. In such cases a certain training of the sight is necessary, analogous to the training of the hands and limbs in a mechanical employment or trade requiring bodily dexterity." Lewis Authority in Matters of Opinion, c. 3, § 7.

57. Stephens *v.* Gardner Creamery Co., 9 Kan. App. 883, 57 Pac. 1058, real estate. See *supra,* XI, A, 1, note 37.

58. Ives *v.* Quinn, 7 Misc. (N. Y.) 155, 27 N. Y. Suppl. 251, renting.

59. Lawton *v.* Chase, 108 Mass. 238 (ten to forty miles); Stone *v.* Covell, 29 Mich. 359 (twenty-five miles).

60. Pingery *v.* Cherokee, etc., R. Co., 78 Iowa 438, 43 N. W. 285; Stone *v.* Covell, 29 Mich. 359.

61. Hunter *v.* Burlington, etc., R. Co., 84 Iowa 605, 51 N. W. 64, farm crossing.

limits discretionary with the judge, and his ruling will not be reversed on appeal unless it is shown that his discretion was abused.[62]

(2) Personal Property. Specially skilled witnesses have been required as to the value of articles of personal property which are not in common use; as machinery,[63] museum curiosities,[64] and race-horses;[65] and of property of a special nature, such as a literary production.[66]

(3) Real Estate. A person acquainted with real estate,[67] or an interest in real estate[68] involved in the inquiry,[69] may state his estimate of its value.[70] He may also testify as to the effect upon remaining land of takings[71] for a highway,[72] pipe-line,[73] or railroad.[74] He may also testify as to the effect of takings for a

62. Diedrichs *v.* Northwestern Union R. Co., 47 Wis. 662, 3 N. W. 749.

63. *Alabama.*— Winter *v.* Burt, 31 Ala. 33.

Iowa.— Latham *v.* Shipley, 86 Iowa 543, 53 N. W. 342, second-hand ruling machine.

Massachusetts.— Haskins *v.* Hamilton Mut. Ins. Co., 5 Gray 432.

Minnesota.— Osborne *v.* Marks, 33 Minn. 56, 22 N. W. 1.

Ohio.— Phœnix Mut. F. Ins. Co. *v.* Bowersox, 6 Ohio Cir. Ct. 1, 3 Ohio Cir. Dec. 321.

But see Lamoille Valley R. Co. *v.* Bixby, 57 Vt. 548, where an attorney not skilled in the value of locomotives in general, but who had made an investigation into the value of the locomotive in question, was allowed to testify.

See 20 Cent. Dig. tit. "Evidence," § 2218.

64. Richter *v.* Harper, 95 Mich. 221, 54 N. W. 768.

65. Chicago, etc., R. Co. *v.* Calumet Stock Farm, 96 Ill. App. 337.

66. Babcock *v.* Raymond, 2 Hilt. (N. Y.) 6.

67. *Arkansas.*— Little Rock Junction R. Co. *v.* Woodruff, 49 Ark. 381, 5 S. W. 792, 4 Am. St. Rep. 51.

Indiana.—Indianapolis, etc., R. Co. *v.* Pugh, 85 Ind. 279; Logansport *v.* McMillen, 49 Ind. 493; Chicago, etc., R. Co. *v.* Burden, 14 Ind. App. 512, 43 N. E. 155.

Kansas.— Florence, etc., R. Co. *v.* Pember, 45 Kan. 625, 26 Pac. 1; Wichita, etc., R. Co. *v.* Kuhn, 38 Kan. 104, 16 Pac. 75.

Maine.— Snow *v.* Boston, etc., R. Co., 65 Me. 230.

Maryland.— Baltimore *v.* Smith, etc., Brick Co., 80 Md. 458, 31 Atl. 423.

Massachusetts.— Chandler *v.* Jamaica Pond Aqueduct Corp., 125 Mass. 544; Burt *v.* Wigglesworth, 117 Mass. 302; Dickenson *v.* Fitchburg, 13 Gray 546; Brainard *v.* Boston, etc., R. Co., 12 Gray 407; Shaw *v.* Charlestown, 2 Gray 107; Vandine *v.* Burpee, 13 Metc. 288, 46 Am. Dec. 733.

Missouri.— Mantz *v.* Maguire, 52 Mo. App. 136; Kansas City, etc., R. Co. *v.* Dawley, 50 Mo. App. 480; Missouri Fire Clay Works *v.* Ellison, 30 Mo. App. 67.

Nebraska.— Union Pac. R. Co. *v.* Stanwood, (1904) 98 N. W. 656.

New York.— Bearss *v.* Copley, 10 N. Y. 93; Clark *v.* Baird, 9 N. Y. 183.

Pennsylvania.— Lewis *v.* Springfield Water Co., 176 Pa. St. 230, 35 Atl. 186; Mewes *v.* Crescent Pipe Line Co., 170 Pa. St. 364, 32 Atl. 1082; Gorgas *v.* Philadelphia, etc., R. Co., 144 Pa. St. 1, 22 Atl. 715; State Line R. Co. *v.* Playford, 10 Pa. Cas. 467, 14 Atl. 355; Pittsburg Southern R. Co. *v.* Reed, 4 Pa. Cas. 353, 6 Atl. 838.

Texas.— Gulf, etc., R. Co. *v.* Harmonson, (Civ. App. 1893) 22 S. W. 764; Gulf, etc., R. Co. *v.* Abney, 3 Tex. App. Civ. Cas. § 413.

See 20 Cent. Dig. tit. "Evidence," §§ 2217, 2273.

Under the Louisiana code, although the jury should have a personal knowledge of the value of real estate in the vicinage, and are themselves to act as experts, yet it is proper that they should be aided by the opinions of witnesses, especially if they request it. Remy *v.* Municipality No. 2, 12 La. Ann. 500.

68. Lawrence *v.* Boston, 119 Mass. 126 (lease); Ives *v.* Quinn, 7 Misc. (N. Y.) 155, 27 N. Y. Suppl. 251 (rental value).

69. Acquaintance with other land not necessarily presenting similar elements of value is not a qualification. Metropolitan West Side El. R. Co. *v.* Dickinson, 161 Ill. 22, 43 N. E. 706.

70. See the cases cited in the notes preceding.

71. Chicago, etc., R. Co. *v.* Nix, 137 Ill. 141, 27 N. E. 81.

The relative diminution in value may be stated (Leavenworth, etc., R. Co. *v.* Paul, 28 Kan. 816), even where the witness does not know the absolute value (Dawson *v.* Pittsburgh, 159 Pa. St. 317, 28 Atl. 171).

72. Swan *v.* Middlesex County, 101 Mass. 173; Shattuck *v.* Stoneham Branch R. Co., 6 Allen (Mass.) 115; Dickenson *v.* Fitchburg, 13 Gray (Mass.) 546; West Newbury *v.* Chase, 5 Gray (Mass.) 421; Shaw *v.* Charlestown, 2 Gray (Mass.) 107; Dwight *v.* Hampden County Com'rs, 11 Cush. (Mass.) 201.

73. Mewes *v.* Crescent Pipe Line Co., 170 Pa. St. 364, 32 Atl. 1082; Michael *v.* Crescent Pipe Line Co., 159 Pa. St. 99, 28 Atl. 204.

74. *Arkansas.*—Texas, etc., R. Co. *v.* Kirby, 44 Ark. 103.

California.— Santa Ana *v.* Harlin, 99 Cal. 538, 34 Pac. 224, embankment.

Florida.— Orange Belt R. Co. *v.* Craver, 32 Fla. 23, 13 So. 444, embankment.

Illinois.— Keithsburg, etc., R. Co. *v.* Henry, 79 Ill. 290; Fox *v.* Chicago, etc., Rapid Transit R. Co., 68 Ill. App. 417; Chicago, etc., R. Co. *v.* Howell, 65 Ill. App. 373, embankment.

Indiana.—Ohio Valley R., etc., Co. *v.* Kerth, 130 Ind. 314, 30 N. E. 298; Frankfort, etc., R. Co. *v.* Windsor, 51 Ind. 238 (holding that

sewer,[75] water,[76] or other purposes; what would be the effect upon the value of burning[77] or overflowing,[78] or a change of condition created in any other way,[79] as by the erection of a nuisance,[80] diverting the flow of a stream from it,[81] erecting an elevated railway,[82] raising the grade of a street,[83] operating a street railway,[84] or doing other acts;[85] and what diminution[86] or increase[87] in value, either absolutely or comparatively,[88] such changes would cause; how much such value would have been increased if a contract had been performed,[89] or a railroad had been built,[90] or if the land were drained,[91] or an elevated railroad had not been

it is not necessary that the witness should know of actual sales of such tracts of land); Evansville, etc., Straight Line R. Co. *v.* Cochran, 10 Ind. 560 (embankment).

Kansas.— Chicago, etc., R. Co. *v.* Cosper, 42 Kan. 561, 22 Pac. 634; Wichita, etc., R. Co. *v.* Kuhn, 38 Kan. 104, 16 Pac. 75.

Maine.— Snow *v.* Boston, etc., R. Co., 65 Me. 230.

Massachusetts.— Tucker *v.* Massachusetts Cent. R. Co., 118 Mass. 546; Brainard *v.* Boston, etc., R. Co., 12 Gray 407.

Michigan.— Stone *v.* Covell, 29 Mich. 359, embankment.

Minnesota.— Lehmicke *v.* St. Paul, etc., R. Co., 19 Minn. 464; Derby *v.* Gallup, 5 Minn. 119, embankment.

Missouri.— Union Elevator Co. *v.* Kansas City Suburban Belt R. Co., 135 Mo. 353, 36 S. W. 1071.

New Hampshire.—Concord R. Co. *v.* Greely, 23 N. H. 237.

Pennsylvania.— Jones *v.* Erie, etc., R. Co., 151 Pa. St. 30, 25 Atl. 134, 31 Am. St. Rep. 722, 17 L. R. A. 758; Pennsylvania, etc., R., etc., Co. *v.* Bunnell, 81 Pa. St. 414; Brown *v.* Corey, 43 Pa. St. 495; Watson *v.* Pittsburgh, etc., R. Co., 37 Pa. St. 469; State Line R. Co. *v.* Playford, 10 Pa. Cas. 467, 14 Atl. 355; Pittsburg Southern R. Co. *v.* Reed, 4 Pa. Cas. 353, 6 Atl. 838; Railroad Co. *v.* Medill, 32 Leg. Int. 283.

Texas.— Ft. Worth Compress Co. *v.* Chicago, etc., R. Co., 18 Tex. Civ. App. 622, 45 S. W. 967.

Wisconsin.— Snyder *v.* Western Union R. Co., 25 Wis. 60.

See 20 Cent. Dig. tit. "Evidence," §§ 2217, 2273, 2288.

Knowledge necessary for qualification.— Knowledge of market value has been required. Chicago, etc., R. Co. *v.* Stewart, 50 Kan. 33, 31 Pac. 668. Knowing the consequences which usually follow the construction and operation of railroads is not a sufficient basis for an inference. Elizabethtown, etc., R. Co. *v.* Helm, 8 Bush (Ky.) 681. It is not necessary that the witness should know the location of the grades and cuts of the road as a preliminary to admissibility, although this knowledge or the lack of it may affect the weight of the testimony. Ohio Valley R., etc., Co. *v.* Kerth, 130 Ind. 314, 30 N. E. 298. The weight is, however, unaffected where the witness is proceeding upon a substantially correct basis of fact. Dorlan *v.* East Brandywine, etc., R. Co., 46 Pa. St. 520.

75. Pike *v.* Chicago, 155 Ill. 656, 40 N. E. 567; Taft *v.* Com., 158 Mass. 526, 33 N. E. 1046.

76. Barnett *v.* St. Anthony Falls Water Power Co., 33 Minn. 265, 22 N. W. 535; Lee *v.* Springfield Water Co., 176 Pa. St. 223, 35 Atl. 184.

77. Chicago, etc., R. Co. *v.* Burden, 14 Ind. App. 512, 43 N. E. 155; Chicago, etc., R. Co. *v.* Smith, 6 Ind. App. 262, 33 N. E. 241; Union Elevator Co. *v.* Kansas City Suburban Belt R. Co., 135 Mo. 353, 375, 36 S. W. 1071; Roberts *v.* New York El. R. Co., 128 N. Y. 455, 28 N. E. 486, 13 L. R. A. 499; Moore *v.* Chicago, etc., R. Co., 78 Wis. 120, 47 N. W. 273.

78. Hosmer *v.* Warner, 15 Gray (Mass.) 46; White Deer Creek Imp. Co. *v.* Sassaman, 67 Pa. St. 415; Houston, etc., R. Co. *v.* Knapp, 51 Tex. 592; Gulf, etc., R. Co. *v.* Harmonson, (Tex. Civ. App. 1893) 22 S. W. 764.

Only an expert, it is said, will be allowed to state the amount of damage caused by overflowing land. Sinclair *v.* Roush, 14 Ind. 450.

79. Missouri Fire Clay Works *v.* Ellison, 30 Mo. App. 67, removing machinery.

80. Vandine *v.* Burpee, 13 Metc. (Mass.) 288, 46 Am. Dec. 733 (brick-kiln); Brennan *v.* Corsicana Cotton-Oil Co., (Tex. Civ. App. 1898) 44 S. W. 588; Gauntlett *v.* Whitworth, 2 C. & K. 720, 61 E. C. L. 720.

81. Gallagher *v.* Kingston Water Co., 25 N. Y. App. Div. 82, 49 N. Y. Suppl. 250.

82. Hine *v.* New York El. R. Co., 36 Hun (N. Y.) 293; Jefferson *v.* New York El. R. Co., 11 N. Y. Suppl. 488.

83. Blair *v.* Charleston, 43 W. Va. 62, 26 S. E. 341, 64 Am. St. Rep. 837, 35 L. R. A. 852.

84. Tate *v.* Missouri, etc., R. Co., 64 Mo. 149.

85. McGregor *v.* Brown, 10 N. Y. 114.

86. Brainard *v.* Boston, etc., R. Co., 12 Gray (Mass.) 407; Gordon *v.* Kings County El. R. Co., 23 N. Y. App. Div. 51, 48 N. Y. Suppl. 382.

87. Baltimore *v.* Smith, etc., Brick Co., 80 Md. 458, 31 Atl. 423 (opening street); Shaw *v.* Charlestown, 2 Gray (Mass.) 107 (street).

88. Mine Hill, etc., R. Co. *v.* Zerbe, 2 Walk. (Pa.) 409.

89. Ironton Land Co. *v.* Butchart, 73 Minn. 39, 75 N. W. 749.

90. Blagen *v.* Thompson, 23 Oreg. 239, 31 Pac. 647, 18 L. R. A. 315.

91. Spear *v.* Drainage Com'rs, 113 Ill. 632.

In New York it has on the contrary been held that the opinion of an expert as to what would have been the value of certain land if an elevated railroad had not been

erected.[92] A skilled witness may state relevant facts of experience regarding the effect of certain changes, as the erection of an elevated railroad, upon the value of adjacent property.[93]

(4) SERVICES. A person familiar, although only in a general way,[94] with the value of services rendered, whether agricultural,[95] building,[96] domestic,[97] as board and care,[98] or nursing,[99] mercantile,[1] or professional,[2] may state his judgment as to what it is,[3] provided that the matter is one removed from the knowledge of the general community.[4] It follows that a witness not possessed of special skill or training is not competent.[5] In case of professional services the members of that profession are as a rule competent. Thus an attorney at law is competent to testify as an expert as to the value of the services rendered by another attorney.[6] A

built and operated is incompetent. Roberts *v.* New York El. R. Co., 128 N. Y. 455, 472, 28 N. E. 486, 13 L. R. A. 499, where the court said: "This case is one where the facts which form the basis of opinion can be specified and should be stated, and the inference to be drawn from these facts should be drawn by the court or by the jury."

92. Roosevelt *v.* New York El. R. Co., 57 N. Y. Super. Ct. 438, 8 N. Y. Suppl. 547.

93. Metropolitan West Side El. R. Co. *v.* White, 166 Ill. 375, 46 N. E. 978, holding that where it is sought to condemn real estate for the use of an elevated railroad, witnesses testifying to the effect of such use on the value of the part not taken, but adjacent to that taken, may state their previous experience as to the effect of an elevated railroad on adjacent property as to its rental and market values, but should not be permitted to state how other property was specifically injured.

94. *Dakota.*— Edwards *v.* Fargo, etc., R. Co., 4 Dak. 549, 33 N. W. 100.

Georgia.— Eagle, etc., Mfg. Co. *v.* Browne, 58 Ga. 240.

Illinois.— Heffron *v.* Brown, 155 Ill. 322, 40 N. E. 583.

Indiana.— Johnson *v.* Thompson, 72 Ind. 167, 37 Am. Rep. 152.

Maryland.— Stoner *v.* Devilbiss, 70 Md. 144, 16 Atl. 440.

Texas.— Gonzales College *v.* McHugh, 21 Tex. 256.

Vermont.— Stone *v.* Tupper, 58 Vt. 409, 5 Atl. 387.

See 20 Cent. Dig. tit. "Evidence," § 2216.

Absolute ignorance, when averred by the witness, should exclude the evidence. Smith *v.* Kobbe, 59 Barb. (N. Y.) 289.

Knowledge of the difficulty of obtaining services of the nature in question at a particular time and the price which they then commanded (Figuras *v.* Benoist, 11 La. Ann. 683, nurse in yellow fever epidemic) or the general price of labor (Lewis *v.* Trickey, 20 Barb. (N. Y.) 387) may be sufficient qualifications. An inference based upon mere hearsay has been rejected. Lewis *v.* Eagle Ins. Co., 10 Gray (Mass.) 508. And so of an inference which involves the introduction of elements as to which the witness is not shown and cannot be assumed to have any knowledge. Lewis *v.* Trickey, *supra.*

Weight and credibility are affected by the extent of the witness' acquaintance with the value of services similar to those involved in the inquiry. Gonzales College *v.* McHugh, 21 Tex. 256.

95. Loy *v.* Petty, 3 Ind. App. 241, 29 N. E. 788. See Loucks *v.* Chicago, etc., R. Co., 31 Minn. 526, 18 N. W. 651.

96. O'Keefe *v.* St. Francis' Church, 59 Conn. 551, 22 Atl. 325 (building church); Gonzales College *v.* McHugh, 21 Tex. 256 (stone laying).

97. Fowler *v.* Fowler, 111 Mich. 676, 70 N. W. 336; Miller *v.* Richardson, 88 Hun (N. Y.) 49, 34 N. Y. Suppl. 506.

98. Maughan *v.* Burns, 64 Vt. 316, 23 Atl. 583.

99. Figuras *v.* Benoist, 11 La. Ann. 683; Ryans *v.* Hospes, 167 Mo. 342, 67 S. W. 285; Reynolds *v.* Robinson, 64 N. Y. 589.

1. Parker *v.* Parker, 33 Ala. 459 (superintending business); Greer *v.* Laws, 56 Ark. 37, 18 S. W. 1038 (selling land); Penfield *v.* Sage, 71 Hun (N. Y.) 573, 24 N. Y. Suppl. 994 (hauling and sawing logs); Matter of Benton, 71 N. Y. App. Div. 522, 75 N. Y. Suppl. 859 (managing property).

2. See McNiel *v.* Davidson, 37 Ind. 336 (attorney); McDonald *v.* Dodge County, 41 Nebr. 905, 60 N. W. 366 (civil engineer).

3. See the cases cited in the notes preceding.

4. See *supra*, XI, A, 4, b, c.

5. Little Rock, etc., R. Co. *v.* Bruce, 55 Ark. 65, 17 S. W. 363, freight charges.

6. *Indiana.*— Covey *v.* Campbell, 52 Ind. 157.

Iowa.— Clark *v.* Ellsworth, 104 Iowa 442, 73 N. W. 1023.

Minnesota.— Allis *v.* Day, 14 Minn. 516, where the court said: "Services performed by members of the legal profession in conducting litigation fall, we think, within this principle. There is no fixed standard by which their value can be determined; their value and reasonable price vary with the magnitude and importance of the particular case, the degree of responsibility attaching to its management, the difficulty of the questions involved, the ability and reputation of counsel engaged, the labor bestowed, and other matters which will readily occur to the profession. The experience and knowledge of ordinary jurymen do not qualify them to form an opinion as to the value of services of this kind; the case is not one where the opinions of witnesses should be excluded, because they are no better than the opinions

physician is in a similar position with regard to the value of medical services;[7] and it has been held that others are not competent to testify on the subject.[8]

(5) MARKET VALUE. An estimate of value is admissible only in case a market value does not exist or is not relevant.[9] Where there is a market value, for a relevant use,[10] and it is affirmatively shown[11] or can be assumed[12] that the witness knows what it is,[13] with regard to personal property[14] or real estate,[15] although only as the result of inquiries,[16] or the use of market reports or quotations,[17] prices current,[18] and the like,[19] he should state it[20] as a mere matter of

of the jurymen themselves. On the other hand, practicing lawyers occupy the position of experts as to the questions of this nature; from the character of their business they are not only in the habit of estimating the value of professional services, but they enjoy peculiar advantages for so doing; their opinions of such value should therefore be received, not only because they are qualified to perform them, but because it appears to be impracticable to furnish any more satisfactory evidence."

New York.— Gall *v.* Gall, 27 N. Y. App. Div. 173, 50 N. Y. Suppl. 563; Jackson *v.* New York Cent. R. Co., 2 Thomps. & C. 653.

Ohio.— Williams *v.* Brown, 28 Ohio St. 547.

Washington.— Isham *v.* Parker, 3 Wash. 755, 771, 29 Pac. 835.

7. Ward *v.* Ohio River, etc., R. Co., 53 S. C. 10, 30 S. E. 594.

8. Mock *v.* Kelly, 3 Ala. 387. See, however, McNiel *v.* Davidson, 37 Ind. 336.

9. *Iowa.*— Raridan *v.* Central Iowa R. Co., 69 Iowa 527, 29 N. W. 599 (cornstalks); Daly *v.* W. W. Kimball Co., 67 Iowa 132, 24 N. W. 756 (piano).

Kansas.— St. Louis, etc., R. Co. *v.* Chapman, 38 Kan. 307, 16 Pac. 695, 5 Am. St. Rep. 744.

New Hampshire.— Beard *v.* Kirk, 11 N. H. 397.

Texas.— Gulf, etc., R. Co. *v.* Vancil, 2 Tex. Civ. App. 427, 428, 21 S. W. 303, where the court said: "There was no market value of such property, and in such case opinions of witnesses familiar with the facts, together with the facts and conditions, are admissible, to be judged by the jury in estimating the damages. It would be difficult in cases like this to determine the value of use by a mere statement of the facts. The opinion of a person having a knowledge of the facts would be some evidence, not an absolute guide — not binding upon the jury — but an assistance which would be available in the absence of more reliable proof." But see Dallas, etc., R. Co. *v.* Chenault, (Civ. App. 1890) 16 S. W. 173, where it was held that, although the witnesses stated that they did not know how much the land had decreased in market value, they were properly allowed to testify that in their opinion it had been damaged to a certain amount.

Wisconsin.— Erd *v.* Chicago, etc., R. Co., 41 Wis. 65.

10. Gearhart *v.* Clear Spring Water Co., 202 Pa. St. 292, 51 Atl. 891.

Knowledge of market value for some other purpose does not qualify the witness. Loesch *v.* Koehler, 144 Ind. 278, 41 N. E. 326, 43 N. E. 129, 35 L. R. A. 682.

11. Russell *v.* Hayden, 40 Minn. 88, 41 N. W. 456; Missouri, etc., R. Co. *v.* Truskett, 186 U. S. 480, 22 S. Ct. 943, 46 L. ed. 1259.

A witness who disclaims all knowledge of the market value is rejected. Chicago, etc., R. Co. *v.* Douglass, (Tex. Civ. App. 1903) 76 S. W. 449; Seattle, etc., R. Co. *v.* Gilchrist, 4 Wash. 509, 30 Pac. 738.

12. Cleveland, etc., R. Co. *v.* Patton, 203 Ill. 376, 67 N. E. 804 [*affirming* 104 Ill. App. 550] (owner of horses); McLennan *v.* Minneapolis, etc., Elevator Co., 57 Minn. 317, 59 N. W. 628 (wheat).

Knowledge of price paid is not alone a sufficient qualification to speak as to market value. Houston, etc., R. Co. *v.* Charwaine, 30 Tex. Civ. App. 633, 71 S. W. 401.

13. Berg *v.* Spink, 24 Minn. 138. The estimate must be confined to the precise quality involved in the inquiry. Todd *v.* Warner, 48 How. Pr. (N. Y.) 234.

Knowledge of market value in one market does not qualify a witness to state what it is in another. Greeley *v.* Stilson, 27 Mich. 153.

14. Montgomery St. R. Co. *v.* Hastings, 138 Ala. 432, 35 So. 412 (horse); Missouri, etc., R. Co. *v.* Truskett, 186 U. S. 480, 22 S. Ct. 943, 46 L. ed. 1259 (cattle).

15. Gearhart *v.* Clear Spring Water Co., 202 Pa. St. 292, 51 Atl. 891; Sullivan *v.* Missouri, etc., R. Co., 29 Tex. Civ. App. 429, 68 S. W. 745.

16. Thatcher *v.* Kaucher, 2 Colo. 698; Cleveland, etc., R. Co. *v.* Patton, 203 Ill. 376, 67 N. E. 804 (horses); Kansas City Suburban Belt R. Co. *v.* Norcross, 137 Mo. 415, 38 S. W. 299 (holding that a witness can testify to the value of property if his knowledge of it is derived through the general avenues of information to which the ordinary business man resorts to inform himself of values for the proper conduct of his affairs and to guide his sales and purchases of property like that in controversy); Missouri, etc., R. Co. *v.* Cocreham, 10 Tex. Civ. App. 166, 30 S. W. 1118 (mules).

17. Hudson *v.* Northern Pac. R. Co., 92 Iowa 231, 60 N. W. 608, 54 Am. St. Rep. 550; Rodee *v.* Detroit F. & M. Ins. Co., 74 Hun (N. Y.) 146, 26 N. Y. Suppl. 242.

18. Whitney *v.* Thacher, 117 Mass. 523.

19. Central R., etc., Co. *v.* Skellie, 86 Ga. 686, 12 S. E. 1017; Hoxsie *v.* Empire Lumber Co., 41 Minn. 548, 42 N. W. 476.

20. *Connecticut.*— Ætna Nat. Bank *v.* Charter Oak L. Ins. Co., 50 Conn. 167.

Illinois.— Franklin *v.* Krum, 171 Ill. 378,

fact,[21] and as it exists in any relevant market.[22] A witness who does not know what the market value of property is cannot state how it would be affected by designated acts.[23] On the other hand one who knows such market value may testify as to the increase [24] or diminution [25] caused by certain occurrences, what the occurrences were which occasioned the change,[26] and how the market value will be affected by definite changes in the condition of the property.[27]

(E) *Skilled Witnesses Testifying as Experts* — (1) In General. To apply a monetary standard to property which the witness has not seen demands a widely varying range of qualification, according as the property is within or beyond the range of common experience.[28] In case of articles in common use a standard of value is created in most intelligent minds and no special skill is necessary to make a hypothetical estimate of sufficient probative force to be relevant.[29] But the property must be one which offers some basis for a reasonable judgment. The evidence must be something more than a mere guess or conjecture,[30] and it

49 N. E. 513; Chicago, etc., R. Co. *v.* Mitchell, 159 Ill. 406, 42 N. E. 973.

Iowa.— State *v.* Tennebom, 92 Iowa 551, 61 N. W. 193.

Michigan.— Browne *v.* Moore, 32 Mich. 254, horses.

New Hampshire.— Whipple *v.* Walpole, 10 N. H. 130.

New York.— Woodruff *v.* Imperial F. Ins. Co., 83 N. Y. 133 (house); Avery *v.* New York Cent., etc., R. Co., 2 N. Y. Suppl. 101 (rental value).

21. The element calling for skill in the estimation of market value lies in the classification, grading as to quality, and the like. Missouri, etc., R. Co. *v.* Truskett, 186 U. S. 480, 22 S. Ct. 934, 46 L. ed. 1259, grading cattle.

22. Acrea *v.* Brayton, 75 Iowa 719, 38 N. W. 171; Rodee *v.* Detroit F. & M. Ins. Co., 74 Hun (N. Y.) 146, 26 N. Y. Suppl. 242. See 16 Cyc. 1133.

23. Lawton *v.* Chase, 108 Mass. 238.

24. Milbank *v.* Dennistoun, 10 Bosw. (N. Y.) 382, flour.

25. Winona, etc., R. Co. Waldron, 11 Minn. 515, 83 Am. Dec. 100 (taking for railroad); Kirkendall *v.* Omaha, 39 Nebr. 1, 57 N. W. 752; Ottenot *v.* New York, etc., R. Co., 2 N. Y. Suppl. 722; Missouri, etc., R. Co. *v.* Woods, (Tex. Civ. App. 1895) 31 S. W. 237.

26. Milbank *v.* Dennistoun, 10 Bosw. (N. Y.) 382, flour.

27. Pike *v.* Chicago, 155 Ill. 656, 40 N. E. 567.

28. See also 16 Cyc. 1133.

29. *Indiana.*— Terre Haute, etc., R. Co. *v.* Jarvis, 9 Ind. App. 438, 36 N. E. 774, 775, where the court said: "Ordinarily, it is not required that a witness shall be an expert to entitle his opinion to go to the jury upon the question of the value of the property. If it be made to appear that he is acquainted with the value of the property in the vicinity, his opinion is competent."

Iowa.— Colby *v.* W. W. Kimball Co., 99 Iowa 321, 68 N. W. 786.

Massachusetts.— Whitney *v.* Thacher, 117 Mass. 523, 527 (where the court said: "It is not necessary, in order to qualify one to give an opinion as to values, that his information should be of such a direct character as would make it competent in itself as primary evidence. It is the experience which he acquires in the ordinary conduct of affairs, and from means of information such as are usually relied on by men engaged in business, for the conduct of that business, that qualifies him to testify"); Miller *v.* Smith, 112 Mass. 470.

Michigan.— Continental Ins. Co. *v.* Horton, 28 Mich. 173.

New York.— Bedell *v.* Long Island R. Co., 44 N. Y. 367, 4 Am. Rep. 688; Whitbeck *v.* New York, etc., R. Co., 36 Barb. 644; Nellis *v.* McCarn, 35 Barb. 115.

The courts of New Hampshire have established a different rule, and hold that the value of articles in common use is not an appropriate subject for expert testimony. Robertson *v.* Stark, 15 N. H. 109; Whipple *v.* Walpole, 10 N. H. 130; Peterborough *v.* Jaffrey, 6 N. H. 462; Rochester *v.* Chester, 3 N. H. 349.

30. *Alabama.*— Winter *v.* Montgomery, 79 Ala. 481, value of personalty in a city.

California.— Hastings *v.* The Uncle Sam, 10 Cal. 341, value of time.

Indiana.— Union R. Transfer, etc., Co. *v.* Moore, 80 Ind. 458.

New York.— Reed *v.* McConnell, 101 N. Y. 270, 4 N. E. 718 (value of a contract); Comesky *v.* Postal Tel. Cable Co., 41 N. Y. App. Div. 245, 58 N. Y. Suppl. 467 (holding that opinion evidence is inadmissible to state the damage caused to premises by the erection of telegraph poles); Schule *v.* Cunningham, 14 Daly 404 (wife's services).

North Dakota.— Anderson *v.* Grand Forks First Nat. Bank, 6 N. D. 497, 72 N. W. 916, value of note contingent on solvency.

Texas.— Hernsheim *v.* Babcock, (Sup. 1887) 2 S. W. 880, value of credit.

United States.— Houston, etc., R. Co. *v.* Stern, 74 Fed. 636, 20 C. C. A. 568.

Patent.— The value of the right to use a patent has been held not to be a subject for evidence. Houston, etc., R. Co. *v.* Stern, 74 Fed. 636, 20 C. C. A. 568.

Value of insurance agency.— What the value of an insurance agency business would have been if the renewal premiums had been as represented may be stated. Graves *v.* Kennedy, 119 Mich. 621, 78 N. W. 667.

must not invade the field of the jury's distinctive function.[31] It is especially true, where the facts can be placed fully before the jury and damages are largely speculative, that an expert will not be allowed to speculate for and instead of the jury.[32] No other witnesses can testify as to value on the evidence of another witness.[33]

(2) Personal Property. In case of articles of personal property which are possessed of a special value,[34] as horses[35] or other domestic animals,[36] which are adapted for special purposes, or whose value for any reason is beyond the scope of common experience,[37] persons who have acquired the necessary skill and experience may state upon the evidence of others their conclusion as to value.[38] Such a witness may testify what would be the decrease in value resulting from certain injuries,[39] or the existence of certain faults[40] or defects.[41] As in case of real estate,[42] it is not necessary that the witness' experience should have been of a technical nature. Practical men, trained in the business to which the inquiry relates, are experts for the purpose in hand.[43] An experienced witness may state his judgment as to the value of farm animals[44] or produce,[45] and as to changes in the value due to specified causes.[46]

(3) Real Estate. A skilled witness testifying as an expert if shown to be qualified, may state his judgment as to the effect upon the fee[47] and rental

31. Perrine *v.* Hotchkiss, 58 Barb. (N. Y.) 77; Harris *v.* Roof, 10 Barb. (N. Y.) 489; Kauffman *v.* Babcock, (Tex. Sup. 1887) 2 S. W. 878. See *supra*, XI, A, 4, b, c.

32. Reed *v.* McConnell, 101 N. Y. 270, 4 N. E. 718 (contracts); Kirkman *v.* Kirkman, 26 N. Y. App. Div. 395, 49 N. Y. Suppl. 683 (good-will of a business). See *supra*, XI, A, 4, b, c.

33. Hook *v.* Stovall, 30 Ga. 418; Walker *v.* Bernstein, 43 Ill. App. 568, second-hand furniture.

34. Lawton *v.* Chase, 108 Mass. 238; Cornell *v.* Dean, 105 Mass. 435; Brady *v.* Brady, 8 Allen (Mass.) 101; Beecher *v.* Denniston, 13 Gray (Mass.) 354; Fitchburg R. Co. *v.* Freeman, 12 Gray (Mass.) 401.

35. Toledo, etc., R. Co. *v.* Smith, 25 Ind. 288; Humphrey *v.* Young, 92 Iowa 126, 60 N. W. 213 (thoroughbred stallion); Miller *v.* Smith, 112 Mass. 470 (race-horse); Harris *v.* Panama R. Co., 36 N. Y. Super. Ct. 373 (descent of a thoroughbred stallion).

36. St. Louis, etc., R. Co. *v.* Philpot, (Ark. 1903) 77 S. W. 901 (trained bloodhound of desirable characteristics); State *v.* McKeavitt, 106 Iowa 748, 77 N. W. 325 (ram for breeding purposes); Brill *v.* Flagler, 23 Wend. (N. Y.) 354, 356 (well broken setter dog). These witnesses "are supposed to be better acquainted with the general market value of such animals, than the generality of mankind." Brill *v.* Flagler, *supra*.

37. World's Columbian Exposition *v.* Pasteur-Chamberland Filter Co., 82 Ill. App. 94 (value of advertising spaces); Walker *v.* Bernstein, 43 Ill. App. 568 (second-hand furniture); Cortland Howe Ventilating Stove Co. *v.* Howe, 92 Hun (N. Y.) 113, 36 N. Y. Suppl. 701 (patent right); Reynolds *v.* Weinman, (Tex. Civ. App. 1897) 40 S. W. 560 (old stock of dry-goods). An estimate of what would have been the value of certain property (Houston, etc., R. Co. *v.* Shirley, 89 Tex. 95, 31 S. W. 291, railroad bonds) if certain events had occurred (Houston, etc., R. Co. *v.* Shirley, 89 Tex. 95, 31 S. W. 291, bonds issued), may be stated by a qualified witness.

38. See the cases cited in the notes preceding.

39. San Antonio, etc., R. Co. *v.* Barnett, 27 Tex. Civ. App. 498, 66 S. W. 474; St. Louis, etc., R. Co. *v.* Edwards, 78 Fed. 745, 24 C. C. A. 300, holding that a drover may give his judgment as to the injury to cattle caused by detentions in transit.

40. Miller *v.* Smith, 112 Mass. 470, cribbing in the case of horses.

41. Emrick *v.* Merriman, 23 Ill. App. 24 (diseased udder); Bischoff *v.* Schulz, 5 N. Y. Suppl. 757 (foundered).

42. See *infra*, XI, C, 4, t, (III), (E), (3).

43. See the cases cited in the notes preceding.

44. State *v.* McKeavitt, 106 Iowa 748, 77 N. W. 325 (butcher; speculative buyer); Holland *v.* Huston, 20 Mont. 84, 49 Pac. 390 (teamster as to value of horses); Harris *v.* Panama R. Co., 36 N. Y. Super. Ct. 373 (groom from stock farm as to breed of thoroughbred stallion).

45. Foster *v.* Ward, 75 Ind. 594 (farmer); Lawton *v.* Chase, 108 Mass. 238 (logs); International, etc., R. Co. *v.* Searight, 8 Tex. Civ. App. 593, 28 S. W. 39 (grass).

46. Cooke *v.* Kansas City, etc., R. Co., 57 Mo. App. 471, injury to cattle from stampede.

47. Fox *v.* Chicago, etc., Rapid Transit R. Co., 68 Ill. App. 417 (taking for railroad); St. Louis, etc., R. Co. *v.* Fowler, 113 Mo. 458, 20 S. W. 1069 (railroad); Hunter *v.* Manhattan R. Co., 141 N. Y. 281, 36 N. E. 400 (elevated railroad); Gerber *v.* Metropolitan El. R. Co., 3 Misc. (N. Y.) 427, 23 N. Y. Suppl. 166 (elevated railroad). Evidence of experts as to what would have been the value of property if an elevated road had not been built in front of it is admissible. Werfelman *v.* Manhattan R. Co., 16 Daly (N. Y.) 355, 11 N. Y. Suppl. 66; Johnston

value[48] of real estate of certain changes in condition; what lands would be affected thereby;[49] the cause of a general depreciation in value of real estate in a particular locality;[50] or the proper capitalization of a company owning certain real property or franchises.[51] A mere conjecture is not competent;[52] and for much the same reason his judgment as to the uses to which the land would be put in the near future is inadmissible.[53]

(4) SERVICES. A skilled witness may state in response to hypothetical questions the value of services rendered in his special line,[54] whether professional, as of law[55] or medicine,[56] or the value of the use of a particular article.[57] The evidence elicited should be more than mere guess work.[58] On the other hand a question need not expressly state facts which are necessarily implied;[59] nor need the witness have heard all the evidence on the subject.[60]

(IV) *TESTS OF INFERENCE OR JUDGMENT*—(A) *In General.* The separate elements of value which unite to constitute the basis of the witness' estimate may be investigated.[61] The witness may be asked whether he has not made inconsistent statements at another time.[62] While the price obtained at sales of similar lands is a valuable test, it is not the only one.[63]

(B) *On Cross-Examination.* The scope of cross-examination is largely a matter within the administrative discretion of the presiding justice,[64] and considerable latitude has been permitted.[65] A witness may be examined as to his knowl-

v. Manhattan R. Co., 11 N. Y. Suppl. 68. See also Union Pac. R. Co. *v.* Stanwood, (Nebr. 1904) 98 N. W. 656.

48. Gerber *v.* Metropolitan El. R. Co., 3 Misc. (N. Y.) 427, 23 N. Y. Suppl. 166.

49. St. Louis, etc., R. Co. *v.* Fowler, 113 Mo. 458, 20 S. W. 1069 (holding that, where a railroad is to run through land, a witness may state that the land next to the railroad will be injured, and may point out on a map in evidence to what distance from the railroad the injury would extend); Werfelman *v.* Manhattan R. Co., 16 Daly (N. Y.) 355, 11 N. Y. Suppl. 66 (elevated railroad); Johnston *v.* Manhattan R. Co., 11 N. Y. Suppl. 68 (elevated railroad).

50. Gordon *v.* Kings County El. R. Co., 23 N. Y. App. Div. 51, 48 N. Y. Suppl. 382.

51. Cincinnati *v.* Scarborough, 6 Ohio Dec. (Reprint) 874, 8 Am. L. Rec. 562, turnpike.

52. Butchers' Slaughtering, etc., Assoc. *v.* Com., 169 Mass. 103, 47 N. E. 599, holding that, where land was to be taken for the construction of a sewer, testimony was properly excluded as to what percentage of its value a certain strip was affected by the sewer, where the witness had testified that he did not know the value of the land, but had stated that such strip would be impaired in value by such taking if the portion taken was not adapted for use as a public highway. It is not competent to show what land would be worth in the event the road should run by it or near it. Louisville, etc., R. Co. *v.* Asher, 10 Ky. L. Rep. 1021; Carli *v.* Stillwater, etc., R. Co., 16 Minn. 260.

53. West Chicago St. R. Co. *v.* Chicago, 172 Ill. 198, 50 N. E. 185.

54. *In re* Benton, 71 N. Y. App. Div. 522, 75 N. Y. Suppl. 859.

55. Coonan *v.* Loewenthal, 129 Cal. 197, 61 Pac. 940; Kingsbury *v.* Joseph, 94 Mo. App. 298, 68 S. W. 93.

56. Allison *v.* Parkinson, 108 Iowa 154, 78 N. W. 845 (nursing); McKnight *v.* Detroit, etc., R. Co., (Mich 1904) 97 N. W. 772 (physician).

57. The Conqueror, 166 U. S. 110, 17 S. Ct. 510, 41 L. ed. 937, pleasure yacht.

58. Lindenthal *v.* Hatch, 61 N. J. L. 29, 39 Atl. 662.

59. Clark *v.* Ellsworth, 104 Iowa 442, 73 N. W. 1023, value is where services were rendered.

60. Swanson *v.* Mellen, 66 Minn. 486, 69 N. W. 620.

61. Little Rock Junction R. Co. *v.* Woodruff, 49 Ark. 381, 5 S. W. 792, 4 Am. St. Rep. 51; Union Pac. R. Co. *v.* Stanwood, (Nebr. Sup. 1902) 91 N. W. 191 (holding that to exclude such evidence is error); *In re* Rochester, 20 N. Y. Suppl. 506 (deciding that where witnesses called by the owner have testified that there was clay on the land suitable for the manufacture of brick and mineral paint, and that they do not know of any similar clay in the locality, and have based their valuation in part on these facts, evidence that there is other and better clay in the vicinity is admissible, as well as evidence tending to show that the clay is so common and found in such large quantities that their theories and calculations as to the value of the land based on the presence of clay are erroneous and misleading).

62. Phillips *v.* Marblehead, 148 Mass. 326, 19 N. E. 547.

63. Illinois, etc., R. Co. *v.* Humiston, 208 Ill. 100, 69 N. E. 880.

64. Phillips *v.* Marblehead, 148 Mass. 326, 19 N. E. 547.

65. Relevancy required.— But the question must appear to the presiding justice relevant in some aspect, either as bearing on the issue directly or as tending to determine the weight to be given to the testimony. Roche *v.* Baldwin, 135 Cal. 522, 65 Pac. 459, 67 Pac. 903, excluding in a case relative to the value of an attorney's services a question as to what professional income such a valuation would

edge of the value of adjacent land.[66] One who has testified as to value may be asked as to rental value,[67] or as to what price he paid,[68] received,[69] or would take[70] for the property. An ordinary,[71] or skilled witness,[72] or such a witness testifying as an expert,[73] may be asked as to the basis of his opinion,[74] or any question which tends to control the basis of fact upon which the witness is grounding his estimate or judgment is competent[75] to discredit his sincerity in testifying as he has done[76] or as to the existence of qualifying facts.[77]

(v) *Weight of Evidence.* The probative weight to be accorded to the estimates of witnesses as to value or their statements as to the fact of market value as to property or services with which they are or may become familiar[78] is entirely a matter for the jury,[79] whose action is not controlled by the fact that the evidence of the witnesses is uncontradicted.[80] Neither the judgments of experts[81] nor the inference of observers[82] is to be passively received and blindly followed; but

produce. The court may refuse to allow the cross-examination of a witness as to his opinions or statements concerning the value of land in some other city. Cassidy *v.* Com., 173 Mass. 533, 54 N. E. 249.

66. Snouffer *v.* Chicago, etc., R. Co., 105 Iowa 681, 75 N. W. 501; Brown *v.* Worcester, 13 Gray (Mass.) 31 (where it was decided that, on a hearing for the assessment of damages occasioned by the location of a highway, a witness called to testify to the value of land taken on one side of the highway may be asked on cross-examination concerning the value of land on the opposite side of the way, although the jury have not had their attention called to land on that side); Eno *v.* Manhattan R. Co., 21 N. Y. App. Div. 548, 48 N. Y. Suppl. 516 (holding that where the question is as to the injury to rental value caused by an elevated railroad, and the owner offers evidence in respect to rental value of neighboring properties for a period subsequent to that covered by the proceeding, in order to furnish a basis for computation, the company may on cross-examination show that during such subsequent period the owner had leased the premises for an increased rental).

It is harmless error to exclude such cross-examination. Seattle, etc., R. Co. *v.* Gilchrist, 4 Wash. 509, 30 Pac. 738.

67. Minnesota Belt-Line R., etc., Co. *v.* Gluek, 45 Minn. 463, 48 N. W. 194.

68. Brown *v.* Calumet River R. Co., 125 Ill. 600, 18 N. E. 283.

69. Dorrity *v.* Russell, 7 Bosw. (N. Y.) 539.

70. Eastern Texas R. Co. *v.* Scurlock, (Tex. Sup. 1904) 78 S. W. 490.

71. Chicago, etc., R. Co. *v.* Kendall, 49 Ill. App. 398; Smalley *v.* Iowa Pac. R. Co., 36 Iowa 571; Sater *v.* Burlington, etc., Plank Road Co., 1 Iowa 356; Western Home Ins. Co. *v.* Richardson, 40 Nebr. 1, 58 N. W. 597; Carpenter *v.* Robinson, 5 Fed. Cas. No. 2,431, Holmes 67.

Ignorance affects weight.— The fact that upon cross-examination the witness has but little knowledge on the subject does not render his evidence incompetent. It merely affects its weight. Chicago, etc., R. Co. *v.* Kendall, 49 Ill. App. 398; Fry *v.* Estes, 52 Mo. App. 1.

72. *In re* Jack, 115 Cal. 203, 46 Pac. 1057, real-estate dealer.

73. Com. *v.* Hazlett, 16 Pa. Super. Ct. 534.

74. *In re* Jack, 115 Cal. 203, 46 Pac. 1057.

75. San Juan County *v.* Tulley, 17 Colo. App. 113, 67 Pac. 346; Pierce *v.* Boston, 164 Mass. 92, 41 N. E. 227, holding that a witness who has said that certain lots are in demand may be asked as to one of them which he has had in his hands for sale for a considerable time and why it has not sold.

76. Gilman *v.* Gard, 29 Ind. 291 (holding that one testifying as to the value of work done may be asked for what sum he would do it); Krider *v.* Philadelphia, 180 Pa. St. 78, 36 Atl. 405 (valued land differently as an assessor).

77. Little Rock Junction R. Co. *v.* Woodruff, 49 Ark. 381, 5 S. W. 792, 4 Am. St. Rep. 51 (holding that on a proceeding to condemn land the condemning party should be allowed to make every inquiry which an individual about to buy would feel it in his interest to make); Cincinnati, etc., R. Co. *v.* Mims, 71 Ga. 240.

78. Upon values involved in a highly specialized art, with respect to which a layman can have no knowledge at all, the court and jury must be dependent upon expert evidence; and when there is no such evidence to support an allegation depending upon such a question, there is nothing to justify submitting the issue to the jury. Ewing *v.* Goode, 78 Fed. 442. But a jury has been deemed competent to pass on the value of an attorney's services. Kingsbury *v.* Joseph, 94 Mo. App. 298, 68 S. W. 93; Head *v.* Hargrave, 105 U. S. 45, 26 L. ed. 1028.

79. Johnson *v.* Freeport, etc., R. Co., 111 Ill. 413; Aldrich *v.* Grand Rapids Cycle Co., 61 Minn. 531, 63 N. W. 1115; Ewing *v.* Goode, 78 Fed. 442.

80. Aldrich *v.* Grand Rapids Cycle Co., 61 Minn. 531, 63 N. W. 1115.

81. Beveridge *v.* Lewis, 137 Cal. 619, 67 Pac. 1040, 70 Pac. 1083, 92 Am. St. Rep. 188, 59 L. R. A. 581; Hoyt *v.* Chicago, etc., R. Co., 117 Iowa 296, 90 N. W. 724; St. Louis, etc., R. Co. *v.* Fowler, 142 Mo. 670, 44 S. W. 771; The Conqueror, 166 U. S. 110, 17 S. Ct. 510, 41 L. ed. 937.

82. Johnson *v.* Freeport, etc., R. Co., 111 Ill. 413.

they should be weighed by the jury and judged of in view of all the evidence in the case,[83] including, in case of land, a view, if any was afforded,[84] and the jury's own general knowledge of affairs.[85] It is obvious, however, that the evidence is of weight in proportion to knowledge,[86] and is increased as the knowledge is recent[87] and as there is absence of motive to misrepresent.[88]

u. Weight. Estimates of weight by persons familiar with the property are competent.[89] The limits of the power of an average observer to estimate weight may be stated by a competent witness.[90]

5. Identity and Correspondence. Identity, as of cattle or other animals,[91] a will or other documents,[92] goods,[93] offenses,[94] the accused or other persons,[95] or

83. Johnson *v.* Freeport, etc., R. Co., 111 Ill. 413.

84. *Indiana.*— Terre Haute, etc., R. Co. *v.* Flora, 29 Ind. App. 442, 64 N. E. 648.

Kansas.— Chicago, etc., R. Co. *v.* Drake, 46 Kan. 568, 26 Pac. 1039.

New York.— McGean *v.* Manhattan R. Co., 117 N. Y. 219, 22 N. E. 957; Matter of Guilford, 85 N. Y. App. Div. 207, 83 N. Y. Suppl. 312; Syracuse *v.* Glenside Woolen Mills, 73 Hun 421, 26 N. Y. Suppl. 429; Matter of Public Parks, 53 Hun 280, 6 N. Y. Suppl. 750; Pecksport Connecting R. Co. *v.* West, 45 N. Y. Suppl. 644; *In re* Kings County El. R. Co., 15 N. Y. Suppl. 516, 517; *In re* New York El. R. Co., 8 N. Y. Suppl. 707, 12 N. Y. Suppl. 857; Matter of Buffalo, 1 N. Y. St. 742; Matter of Central Park, 54 How. Pr. 313.

Vermont.— Wead *v.* St. Johnsbury, etc., R. Co., 66 Vt. 420, 29 Atl. 631.

United States.— Shoemaker *v.* U. S., 147 U. S. 282, 13 S. Ct. 361, 37 L. ed. 170.

85. Johnson *v.* Freeport, etc., R. Co., 111 Ill. 413.

86. Lafayette *v.* Nagle, 113 Ind. 425, 15 N. E. 1; Terre Haute, etc., R. Co. *v.* Jarvis, 9 Ind. App. 438, 36 N. E. 774; Lee *v.* Pindle, 12 Gill & J. (Md.) 288; Springfield, etc., R. Co. *v.* Calkins, 90 Mo. 538, 3 S. W. 82.

87. Atty.-Gen. *v.* Cross, 3 Meriv. 524, 17 Rev. Rep. 121.

88. Atty.-Gen. *v.* Cross, 3 Meriv. 524, 17 Rev. Rep. 121.

89. *California.*— Dyas *v.* Southern Pac. Co., 140 Cal. 296, 73 Pac. 972, counter balance on a derrick.

Illinois.— White *v.* Thomas, 39 Ill. 227.

Massachusetts.— Carpenter *v.* Wait, 11 Cush. 257, cattle.

Missouri.— Hunter *v.* Helsley, 98 Mo. App. 616, 73 S. W. 719.

Nebraska.— Filley *v.* Billings, 26 Nebr. 537, 42 N. W. 713.

New York.— People *v.* Wilson, 16 N. Y. Suppl. 583, blue stone.

Texas.— Ft. Worth, etc., R. Co. *v.* Greathouse, 82 Tex. 104, 17 S. W. 834, cattle.

Virginia.— McCormick *v.* Hamilton, 23 Gratt. 561, hogs.

90. New York Mut. L. Ins. Co. *v.* Tillman, 84 Tex. 31, 36, 19 S. W. 294, where the inquiry, "Could a man have any conception as to how much a quarter of a grain or an eighth of a grain of morphine was, if he was not accustomed to handling it," was held proper.

91. Chrisman-Sawyer Banking Co. *v.* Strahorn-Hutton-Evans Commission Co., 80 Mo. App. 438.

92. Thompson *v.* Davitte, 59 Ga. 472.

93. Altman *v.* Young, 38 Mich. 410.

94. State *v.* Maxwell, 51 Iowa 314, 1 N. W. 666. But see Maloney *v.* Dailey, 67 Ill. App. 427.

95. *Alabama.*— Thornton *v.* State, 113 Ala. 43, 21 So. 356, 59 Am. St. Rep. 97; Beavers *v.* State, 103 Ala. 36, 15 So. 616.

Florida.— Roberson *v.* State, 40 Fla. 509, 24 So. 474.

Georgia.— Kent *v.* State, 94 Ga. 703, 19 S. E. 885; Wiggins *v.* Henson, 68 Ga. 819; Goodwyn *v.* Goodwyn, 20 Ga. 600.

Indiana.— Deal *v.* State, 140 Ind. 354, 39 N. E. 930.

Iowa.— State *v.* Seymour, 94 Iowa 699, 63 N. W. 661.

Kentucky.— Gentry *v.* McMinnis, 3 Dana 382.

Massachusetts.— Com. *v.* Kennedy, 170 Mass. 18, 24, 48 N. E. 770 [*citing* Com. *v.* O'Brien, 134 Mass. 198; Com. *v.* Sturtivant, 117 Mass. 122, 19 Am. Rep. 401; Com. *v.* Williams, 105 Mass. 62].

Missouri.— State *v.* Powers, 130 Mo. 475, 32 S. W. 984; State *v.* Howard, 118 Mo. 127, 24 S. W. 41; State *v.* Hopkirk, 84 Mo. 278.

Nebraska.— Pritchett *v.* Johnson, (1903) 97 N. W. 223.

New York.— King *v.* New York Cent., etc., R. Co., 72 N. Y. 607; People *v.* Whigham, 1 Wheel. Cr. 115.

North Carolina.— State *v.* Costner, 127 N. C. 566, 37 S. E. 326; Beverly *v.* Williams, 20 N. C. 378.

Oregon.— State *v.* Welch, 33 Oreg. 33, 54 Pac. 213.

Texas.— Brooks *v.* State, (Cr. App. 1896) 37 S. W. 739.

Vermont.— State *v.* Powers, 72 Vt. 168, 47 Atl. 830, holding that on trial for burglary, where certain witnesses identified defendant as one of the parties seen by them committing the crime, it was not error to refuse to instruct that the testimony of such witnesses was a mere matter of opinion.

Virginia.— Jordan *v.* Com., 25 Gratt. 943.

West Virginia.— State *v.* Harr, 38 W. Va. 58, 63, 17 S. E. 794, where the court said: "It is not a case of 'expert testimony,' but depends upon the observation and knowledge of the particular witness in the given case, no matter what his science, skill or experi-

of things,[96] is an inference which any one may state who shows himself possessed of adequate knowledge.[97] The witness should give also, in accordance with the rule stated in a previous section, the facts upon which the inference is based,[98]

ence may be in the matter of identifying persons. His evidence is competent, the weight being a question for the jury."

See 14 Cent. Dig. tit. "Criminal Law," § 1043; 20 Cent. Dig. tit. "Evidence," §§ 2234, 2294.

Qualifications of witness.— It is indispensable that the estimates of the witnesses be founded on their own personal observation, and not on the testimony of others, or on any hypothetical statement of facts, as is permitted in the case of experts. In some of the cases it is held that the opinions can only be received in connection with facts stated by the witness. In other cases this is not required; as for instance in questions respecting the identity of persons. A witness well acquainted with another usually identifies him without conscious mental effort in the way of comparison or inference. In the absence of striking peculiarities of form or feature the identification may be, and often is, by the mere expression of countenance, which cannot be described. The witness may be correct in his opinion, and yet unable to give a single feature, or color of hair, or eyes, or any particulars as to dress. In such cases the distinction between opinion and fact is so fine that identification is best regarded as a fact, a direct perception of the senses. Ogden *v.* State, 134 Ill. 599, 25 N. E. 755; Aurora *v.* Hillman, 90 Ill. 61; Com. *v.* Dorsey, 103 Mass. 412. Where the inference of identity is merely an act of the reasoning faculty, divorced from direct observation, it is to be rejected. Roziene *v.* Ball, 51 Iowa 328, 1 N. W. 668; Hamaker *v.* Whitecar, 1 Walk. (Pa.) 120; McCamant *v.* Roberts, 80 Tex. 316, 15 S. W. 580, 1054.

Character and weight of testimony.— Positive testimony on the point is not indispensable (Thornton *v.* State, 113 Ala. 43, 21 So. 356, 59 Am. St. Rep. 97, in witness' "best opinion" deemed sufficient; Kent *v.* State, 94 Ga. 703, 19 S. E. 885; State *v.* Seymour, 94 Iowa 699, 63 N. W. 661; State *v.* Howard, 118 Mo. 127, 24 S. W. 41; State *v.* Hopkirk, 84 Mo. 278; People *v.* Whigham, 1 Wheel. Cr. (N. Y.) 115; Beverly *v.* Williams, 20 N. C. 378; State *v.* Harr, 38 W. Va. 58, 17 S. E. 794); but the evidence of those who testify from an inspection with the person before them is entitled to greater weight than the testimony of those who state identifying marks (Brack *v.* Wood, 11 La. Ann. 512). That the figure of the man in question resembled defendant more than any one else known to the witness is competent (State *v.* Costner, 127 N. C. 566, 37 S. E. 326, 80 Am. St. Rep. 809), but a "thought" or "impression" is not sufficient (People *v.* Williams, 1 N. Y. Cr. 336); and that a witness was "satisfied" as to the identity has been excluded (Templeton *v.* Luckett, 75 Fed. 254, 21 C. C. A. 325). That a person "tallied" with a description is a mere conclusion and cannot be stated. Chilton *v.* State, 105 Ala. 98, 16 So. 797.

96. *Alabama.*— Turner *v.* McFee, 61 Ala. 468 (colt); Walker *v.* State, 58 Ala. 393 (wheat).

Colorado.— Askew *v.* People, 23 Colo. 446, 48 Pac. 524, cattle brand.

Georgia.— Wiggins *v.* Henson, 68 Ga. 819.

Iowa.— State *v.* Rainsbarger, 74 Iowa 196, 37 N. W. 153, buggy.

Massachusetts.— Com. *v.* Best, 180 Mass. 492, 62 N. E. 748, team.

New York.— King *v.* New York Cent., etc., R. Co., 72 N. Y. 607, hook.

North Dakota.— Smith *v.* Northern Pac. R. Co., 3 N. D. 555, 58 N. W. 345, locomotive.

Ohio.— Sherlock *v.* Globe Ins. Co., 7 Ohio Dec. (Reprint) 17, 1 Cinc. L. Bul. 26, steamer.

Texas.— Gaines *v.* State, (Cr. App. 1903) 77 S. W. 10 (railroad pay check); Baines *v.* State, 43 Tex. Cr. 490, 66 S. W. 847, 96 Am. St. Rep. 871 (piece of paper).

Utah.— State *v.* Clark, 27 Utah 55, 74 Pac. 119, money.

Vermont.— State *v.* Ward, 61 Vt. 153, 17 Atl. 483, sleigh.

See 14 Cent. Dig. tit. "Criminal Law," § 1040; 20 Cent. Dig. tit. "Evidence," §§ 2234, 2294.

Difficulty in identifying particular articles similar to many in common use, such as money (Gady *v.* State, 83 Ala. 51, 3 So. 429, "looked like" held sufficient; State *v.* Clark, 27 Utah 55, 74 Pac. 119), or pay checks (Gaines *v.* State, (Tex. Cr. App. 1903) 77 S. W. 10), merely, up to a certain point, affects the weight of the evidence.

The evidence is not objectionable either as stating a conclusion or because not the "best evidence." State *v.* Clark, 27 Utah 55, 74 Pac. 119.

97. Roberson *v.* State, 40 Fla. 509, 24 So. 474.

Should the matter be one for the judgment of a skilled witness, one without such qualification will be rejected. Morrissey *v.* People, 11 Mich. 327.

98. *Alabama.*—Thornton *v.* State, 113 Ala. 43, 21 So. 356, 59 Am. St. Rep. 97.

Georgia.— Wiggins *v.* Henson, 68 Ga. 819; Goodwyn *v.* Goodwyn, 20 Ga. 600.

Missouri.— State *v.* Powers, 130 Mo. 475, 32 S. W. 984.

New York.— Eastwood *v.* People, 3 Park. Cr. 25.

Ohio.— Sherlock *v.* Globe Ins. Co., 7 Ohio Dec. (Reprint) 17, 1 Cinc. L. Bul. 26.

United States.— Templeton *v.* Luckett, 75 Fed. 254, 21 C. C. A. 325.

A claim to knowledge has been held to establish a *prima facie* qualification to testify. Turner *v.* McFee, 61 Ala. 468.

That the data for the inference are meager affects only the weight of the evidence (Os-

as a distinctive motion,[99] odor,[1] sound,[2] voice,[3] walk,[4] or other circumstances.[5] The estimate of a witness on analogous inquiries, viz., whether a boot or shoe would make certain tracks,[6] whether two footprints "corresponded,"[7] whether tracks corresponded to certain peculiarities of a person's footprints,[8] or to tracks admitted

good *v.* State, (Tex. Cr. App. 1899) 49 S. W. 94), but one based on no facts will be rejected (Com. *v.* Farrell, 187 Pa. St. 408, 41 Atl. 382). Evidence is admissible that the data are valueless for purposes of identification. Buchanan *v.* State, 109 Ala. 7, 19 So. 410, goods by color and quality.

99. State *v.* Hopkirk, 84 Mo. 278.

1. Walker *v.* State, 58 Ala. 393.

2. State *v.* Rainsbarger, 74 Iowa 196, 37 N. W. 153 (rattle of wheels); Com. *v.* Best, 180 Mass. 492, 62 N. E. 748 (rattle and horse hoofs).

3. *Illinois.*— Ogden *v.* People, 134 Ill. 599, 25 N. E. 755; Aurora *v.* Hillman, 90 Ill. 61.

Indiana.— Deal *v.* State, 140 Ind. 354, 39 N. E. 930.

Massachusetts.— Com. *v.* Hayes, 138 Mass. 185 (stating that the voice may have been heard but once and in the dark, and characterized as "coarse, gruff and very ugly"); Com. *v.* Scott, 123 Mass. 222, 25 Am. Rep. 81; Com. *v.* Williams, 105 Mass. 62.

Missouri.— State *v.* Hopkirk, 84 Mo. 278.

Nebraska.— Pritchett *v.* Johnson, (1903) 97 N. W. 223.

New York.— Wilbur *v.* Hubbard, 35 Barb. 303, 304, where the court said: "I think it possible for persons to identify a dog [sheep-killing, very coarse voice] by merely hearing it bark, without seeing it. Some persons have such peculiar voices that they can be identified by acquaintances, who hear them talk, without seeing them; and it seems reasonable that some dogs may bark in such a manner, and have such singular voices, that they can be identified in the night time by presons who know them well, by merely hearing them bark, without seeing them. If I am right in this conclusion, the question whether the witnesses satisfactorily identified the defendant's dog as one of the two that were in the lot where the sheep were, the night they were wounded and killed and actually did the mischief complained of, was for the jury to determine."

4. Beale *v.* Posey, 72 Ala. 323.

5. Com. *v.* Kennedy, 170 Mass. 18, 48 N. E. 770; Smith *v.* Northern Pac. R. Co., 3 N. D. 555, 58 N. W. 345.

The ground of admissibility lies frequently in the difficulty of stating the facts constituent of the inference. Thornton *v.* State, 113 Ala. 43, 21 So. 356, 59 Am. St. Rep. 97; Hames *v.* Brownlee, 63 Ala. 277; Ogden *v.* People, 134 Ill. 599, 25 N. E. 755; Com. *v.* Kennedy, 170 Mass. 18, 48 N. E. 770; Smith *v.* Northern Pac. R. Co., 3 N. D. 555, 58 N. W. 345; State *v.* Harr, 38 W. Va. 58, 17 S. E. 794. Consequently, where the jury are equally capable of reaching a reasonable conclusion by having the same facts before them, and a question may exist as to the truth of the inference, the statement is rejected. Filer *v.* Smith, 96 Mich. 347, 55 N. W. 999, 35 Am. St. Rep. 603; People *v.* Wilson, 3 Park. Cr. (N. Y.) 199; Templeton *v.* Luckett, 75 Fed. 254, 21 C. C. A. 325.

6. *Alabama.*— James *v.* State, 104 Ala. 20, 16 So. 94; Busby *v.* State, 77 Ala. 66 ("corresponded"); Young *v.* State, 68 Ala. 569. A witness cannot testify that certain tracks in question were the same as some made by defendant, but should merely state the facts showing identity. Terry *v.* State, 118 Ala. 79, 23 So. 776.

Iowa.— State *v.* Moelchen, 53 Iowa 310, 5 N. W. 186.

Massachusetts.— Com. *v.* Pope, 103 Mass. 440.

Missouri.— State *v.* Sexton, 147 Mo. 89, 48 S. W. 452.

North Carolina.— State *v.* Reitz, 83 N. C. 634, 636, where the court said: "If it be competent for him to give his opinion as to the identity of a person, we can see no reason why he may not give it as to the identity of his foot-prints." See also State *v.* Morris, 84 N. C. 756.

Texas.— Baines *v.* State, 43 Tex. Cr. 490, 66 S. W. 847; Weaver *v.* State, 43 Tex. Cr. 340, 65 S. W. 534; Clark *v.* State, (Cr. App. 1894) 26 S. W. 68; McLain *v.* State, 30 Tex. App. 482, 17 S. W. 1092, 28 Am. St. Rep. 934; Rippey *v.* State, 29 Tex. App. 37, 14 S. W. 448; Crumes *v.* State, 28 Tex. App. 516, 13 S. W. 868, 19 Am. St. Rep. 853; Clark *v.* State, 28 Tex. App. 189, 12 S. W. 729, 19 Am. St. Rep. 817.

Vermont.— State *v.* Ward, 61 Vt. 153, 17 Atl. 483.

See 14 Cent. Dig. tit. "Criminal Law," § 1049.

Expert — Measurements.—An expert (State *v.* Reitz, 83 N. C. 634), or exact measurements (Baines *v.* State, 43 Tex. Cr. 490, 66 S. W. 847), are not necessary.

Delay in making a comparison does not exclude the evidence. State *v.* Sexton, 147 Mo. 89, 48 S. W. 452, delay of two or three days.

Province of jury.— Whether a shoe would have made a certain track (Busby *v.* State, 77 Ala. 66), or did make it (Livingston *v.* State, 105 Ala. 127, 16 So. 801; Hodge *v.* State, 97 Ala. 37, 12 So. 164, 38 Am. St. Rep. 145; Riley *v.* State, 88 Ala. 193, 7 So. 149), is a question of fact for the jury. In other words the final inference is for them.

7. Busby *v.* State, 77 Ala. 66; Com. *v.* Pope, 103 Mass. 440.

The inference, on the other hand, has been rejected, as coming within the distinctive province of the jury. Livingston *v.* State, 105 Ala. 127, 16 So. 801.

8. James *v.* State, 104 Ala. 20, 16 So. 94; State *v.* Millmeier, 102 Iowa 692, 72 N. W. 275; Thompson *v.* State, (Tex. Cr. App. 1903)

to have been made by him,[9] or whether certain tracks corresponded with those made by a certain wagon,[10] sleigh,[11] or horse [12] is admissible for similar reasons. In like manner a witness may state whether two pieces of wood came from the same stick or block,[13] or whether the holes in a human body corresponded with those in certain garments.[14]

6. Intoxication. A witness may state whether a person was intoxicated [15] and the extent of his intoxication;[16] and whether he had been drinking [17] or just recovering from a state of drunkenness;[18] but a conclusion as to the capacity of the person in view of his condition is rejected.[19] Facts on which the opinion is

77 S. W. 449. Measurements of tracks are competent evidence upon ordinary principles (Thompson *v.* State, (Tex. Cr. App. 1903) 77 S. W. 449); but the mere size and general configuration of the foot and that the shoe of accused answered the description is not definite enough to enable the witness to state that certain tracks were similar to those of accused (Smith *v.* State, (Tex. Cr. App. 1903) 77 S. W. 453). It seems an unnecessary refinement to permit a witness to state that the tracks and the object claimed to have made them are equal to the same thing, i. e., a certain length, and refuse to allow him to state that these measurements are equal to each other. Terry *v.* State, 118 Ala. 79, 23 So. 776. Where all the facts can be placed before the jury the evidence is unnecessary and is accordingly rejected. State *v.* Green, 40 S. C. 328, 18 S. E. 933, 42 Am. St. Rep. 872; Bluitt *v.* State, 12 Tex. App. 39, 41 Am. Rep. 666. The same result follows where the facts detailed by the witness as being his data are not sufficient to enable him to form a reasonable inference. Grant *v.* State, 42 Tex. Cr. 275, 58 S. W. 1025.

9. Blackman *v.* State, 80 Ga. 785, 7 S. E. 626.

10. State *v.* Folwell, 14 Kan. 105.

11. State *v.* Ward, 61 Vt. 153, 17 Atl. 483.

12. A witness cannot testify as to whether tracks were made by a certain horse (Russell *v.* State, 62 Nebr. 512, 87 N. W. 344; Hester *v.* State, (Tex. Cr. App. 1899) 51 S. W. 932), but he may testify that the horse made tracks similar to those in question (Campbell *v.* State, 23 Ala. 44, holding that the fact that the shoes on the prisoner's horse "seemed to fit in every particular" horse tracks found near the body of deceased is competent; Hester *v.* State, (Tex. Cr. App. 1899, 51 S. W. 932).

13. Com. *v.* Choate, 105 Mass. 451.

14. State *v.* Cushing, 17 Wash. 544, 50 Pac. 512.

Marks by instrument.— A witness cannot state that certain marks were made with a peculiar instrument found in a prisoner's possession. Com. *v.* Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711.

15. *Alabama.*—Dozier *v.* State, 130 Ala. 57, 30 So. 396.

California.— People *v.* Monteith, 73 Cal. 7, 14 Pac. 373.

Georgia.— Pierce *v.* State, 53 Ga. 365; Choice *v.* State, 31 Ga. 424, 467, where Lumpkin, J., said: "Really, no other rule is practicable. If the witness must be confined to a simple narration of facts, how the person leered or grinned, how he winked his eyes, or squinted, how he wagged his head, etc., all of which drunken men do, you shut out, not only the ordinary, but the best mode of obtaining truth."

Illinois.— Dimick *v.* Downs, 82 Ill. 570; Chicago City R. Co. *v.* Wall, 93 Ill. App. 411; Parker *v.* Parker, 52 Ill. App. 333.

Iowa.— State *v.* Cather, 121 Iowa 106, 96 N. W. 722; League *v.* Ehmke, (Iowa 1903) 94 N. W. 938; State *v.* Wright, 112 Iowa 436, 84 N. W. 541; Yahn *v.* Ottumwa, 60 Iowa 429, 15 N. W. 257; State *v.* Huxford, 47 Iowa 16.

Kentucky.— Campbell *v.* New York Fidelity, etc., Co., 109 Ky. 661, 60 S. W. 492, 22 Ky. L. Rep. 1295; Smith *v.* Smith, 11 Ky. L. Rep. 859.

Maine.— Stacy *v.* Portland Pub. Co., 68 Me. 279.

Massachusetts.— Edwards *v.* Worcester, 172 Mass. 104, 51 N. E. 447.

Minnesota.—McKillop *v.* Duluth St. R. Co., 53 Minn. 532, 55 N. W. 739.

New Hampshire.— State *v.* Pike, 49 N. H. 399, 6 Am. Rep. 533.

New Jersey.— Castner *v.* Sliker, 33 N. J. L. 95 [*affirming* 33 N. J. L. 507].

New York.— Felska *v.* New York Cent., etc., R. Co., 152 N. Y. 339, 46 N. E. 613; People *v.* Eastwood, 14 N. Y. 562; People *v.* Gaynor, 33 N. Y. App. Div. 98, 53 N. Y. Suppl. 86; Quinn *v.* O'Keeffe, 9 N. Y. App. Div. 68, 41 N. Y. Suppl. 116; McCarty *v.* Wells, 51 Hun 171, 4 N. Y. Suppl. 672; Marshall *v.* Riley, 38 Misc. 770, 78 N. Y. Suppl. 827; Donoho *v.* Metropolitan St. R. Co., 30 Misc. 433, 62 N. Y. Suppl. 523; People *v.* MacLean, 13 N. Y. Suppl. 677.

Texas.— Stewart *v.* State, 38 Tex. Cr. 627, 44 S. W. 505.

England.— Alcock *v.* Royal Exch. Assur. Corp., 13 Q. B. 292, 13 Jur. 445, 18 L. J. Q. B. 121, 66 E. C. L. 292.

See 14 Cent. Dig. tit. "Criminal Law," § 1046; 20 Cent. Dig. tit. "Evidence," § 2244.

16. State *v.* Cather, 121 Iowa 106, 96 N. W. 722.

17. People *v.* Schorn, 116 Cal. 503, 48 Pac. 495; Chicago City R. Co. *v.* Wall, 93 Ill. App. 411.

18. People *v.* Packenham, 115 N. Y. 200, 21 N. E. 1035.

19. White *v.* State, 103 Ala. 72, 16 So. 63. For a witness to testify that a person was too drunk to know what he was about is a mere conclusion. White *v.* State, *supra.* The evi-

based should be stated,[20] and it should appear that the witness had and could use suitable opportunities for observation,[21] although this rule is not invariable.[22]

7. Mental Condition — a. In General. Probably in no connection is the impossibility of making detailed statement of constituent facts more frequently or completely obvious, and statement of inference therefore competent, than where the subject-matter of the evidence is the mental condition of a designated person;[23] as whether the mind was, at some time sufficiently near to be relevant,[24] bright, and quick,[25] easily impressed,[26] fickle-minded,[27] judicious,[28] rational,[29] simple-minded,[30]

dence, however, has been received. State *v.* Dolan, 17 Wash. 499, 50 Pac. 472.

20. Pierce *v.* State, 53 Ga. 365; League *v.* Ehmke, (Iowa 1903) 94 N. W. 938; Felska *v.* New York Cent., etc., R. Co., 152 N. Y. 339, 46 N. E. 613. Drunkenness is "easy of detection and difficult of explanation." Holland *v.* Zollner, 102 Cal. 633, 36 Pac. 930, 37 Pac. 231. Inconsistent facts may be inquired for on cross-examination. Campbell *v.* New York Fidelity, etc., Co., 109 Ky. 661, 60 S. W. 492, 22 Ky. L. Rep. 1295.

21. Campbell *v.* New York Fidelity, etc., Co., 109 Ky. 661, 60 S. W. 492, 22 Ky. L. Rep. 1295.

22. State *v.* Cather, 121 Iowa 106, 96 N. W. 722.

23. *California.*— Holland *v.* Zollner, 102 Cal. 633, 639, 36 Pac. 930, 37 Pac. 231, where the court said: "The conclusion is reached not as a sequence of knowledge in reference to occult mental conditions, but as a result of observed facts patent to all, concerning which the non-expert is as competent to judge as the trained specialist."

Florida.— Mitchell *v.* State, 43 Fla. 584, 31 So. 242.

Iowa.— Smith *v.* Hickenbottom, 57 Iowa 733, 736, 11 N. W. 664, where the court said: "We can conceive that there was somewhat in his manner and general appearance which impressed the witness, and which she intended to describe, when she said he talked like a child. It is not easy to describe the imbecility of old age. The witness used an illustration. Descriptions are often given in this way. They may be indefinite and inadequate, but they are not usually regarded as expressions of opinion."

Kentucky.— Wright *v.* Com., 72 S. W. 340, 24 Ky. L. Rep. 1838.

New York.— De Witt *v.* Barly, 17 N. Y. 340, 348, where Selden, J., said: "How is it possible to describe in words that combination of minute appearances, upon which a judgment in such cases is formed. The attempt to try such a question, excluding all matter of opinion, would in most cases, I am persuaded, prove entirely futile. . . . A witness can scarcely convey any intelligible idea upon such a question, without infusing into his testimony more or less of opinion. Mental imbecility is exhibited in part by attitude, by gesture, by the tones of the voice, and the expression of the eye and face. Can these be described in language so as to convey, to one not an eye-witness, an adequate conception of their force?"

Texas.— Garrison *v.* Blanton, 48 Tex. 299.

Wisconsin.— Hempton *v.* State, 111 Wis. 127, 86 N. W. 596.

24. *In re* Hull, 117 Iowa 738, 89 N. W. 979; Denning *v.* Butcher, 91 Iowa 425, 59 N. W. 69; Baltimore Safe-Deposit, etc., Co. *v.* Berry, 93 Md. 560, 49 Atl. 401; Ramsdell *v.* Ramsdell, 128 Mich. 110, 87 N. W. 81; Russell *v.* State, 53 Miss. 367.

25. Martin *v.* State, 90 Ala. 602, 8 So. 858, 24 Am. St. Rep. 844.

An inference of a technical nature, as that the controlling impulse of certain conduct was a "delusion" or "irresistible" (Patterson *v.* State, 86 Ga. 70, 12 S. E. 174), or that someone else had a "similar peculiarity" (State *v.* Winter, 72 Iowa 627, 34 N. W. 475; Gehrke *v.* State, 13 Tex. 568; *In re* McCabe, 70 Vt. 155, 40 Atl. 52, paresis; State *v.* So Ho Mc, 1 Wash. 276, 24 Pac. 443, talked like an insane man) cannot be stated by the unskilled observer.

26. Conner *v.* Stanley, 67 Cal. 315, 7 Pac. 723; Vivian's Appeal, 74 Conn. 257, 50 Atl. 797 (easily influenced); Howell *v.* Howell, 59 Ga. 145. *Compare*, however, Michael *v.* Marshall, 201 Ill. 70, 66 N. E. 273.

27. To prove fickle-mindedness, a witness well acquainted with the person, although not an expert, may testify. Mills *v.* Winter, 94 Ind. 329.

28. St. Louis, etc., R. Co. *v.* Shifflet, (Tex. Civ. App. 1900) 56 S. W. 697 [*citing* Carr *v.* State, 24 Tex. App. 562, 7 S. W. 328, 5 Am. St. Rep. 905], discretion of an infant.

29. *In re* Keithley, 134 Cal. 9, 66 Pac. 5; Holland *v.* Zollner, 102 Cal. 633, 36 Pac. 930, 37 Pac. 231; People *v.* Lavelle, 71 Cal. 351, 12 Pac. 226; Paine *v.* Aldrich, 133 N. Y. 544, 547, 30 N. E. 725 (where it was said: "The trial court applied the correct rule in regard to this class of evidence. The witness was a layman and could not properly give an opinion as to the mental capacity of the grantor, or as to whether he was rational or irrational, even when such opinion might be based upon specific acts and conversations, and his personal observations. He could state the acts and conversations of which he had personal knowledge, and then be permitted to say whether, in his judgment, such acts and conversations were rational or irrational, or were those of a rational or irrational person"); People *v.* Packenham, 115 N. Y. 200, 21 N. E. 1035.

30. Johnson *v.* State, 42 Tex. Cr. 618, 62 S. W. 756.

That a person "acted foolish" has been rejected. Wallace *v.* Whitman, 201 Ill. 59, 66 N. E. 311.

stupid,[31] uncertain,[32] weak-minded,[33] without memory,[34] or in some other specified condition.[35] But a statement as to mental capacity to do certain things which, it will be observed, are frequently the precise point in issue, as capacity to execute a deed,[36] make a contract,[37] or a will,[38] transact business,[39] incur criminal liability,[40] or treat a person properly,[41] may not be competent. This is usually the precise point on which the jury are to pass.[42] It has been held that judgment will not be reversed because of the admission of such evidence in the absence of evidence of prejudice.[43]

b. Change in Mental Condition. One with adequate opportunities for observation may state a change, for the worse,[44] or better, in mental condition,[45] or

31. Territory *v.* Padilla, 8 N. M. 510, 46 Pac. 346.

32. Territory *v.* Padilla, 8 N. M. 510, 46 Pac. 346.

33. People *v.* Worthington, 105 Cal. 166, 38 Pac. 689.

34. Johnson *v.* State, 42 Tex. Cr. 618, 62 S. W. 756.

35. Burney *v.* Torry, 100 Ala. 157, 14 So. 685, 46 Am. St. Rep. 33, childish.

36. Langenbeck *v.* Louis, 140 Cal. 406, 73 Pac. 1086; Clum *v.* Barkley, 20 Wash. 103, 54 Pac. 962. The question may be asked upon cross-examination. Dominick *v.* Randolph, 124 Ala. 557, 27 So. 481.

37. Smith *v.* Smith, 157 Mass. 389, 32 N. E. 348; Mills *v.* Cook, (Tex. Civ. App. 1900) 57 S. W. 81. The evidence has been deemed admissible. Whitaker *v.* Hamilton, 126 N. C. 465, 35 S. E. 815.

38. *Illinois.*— Baker *v.* Baker, 202 Ill. 595, 67 N. E. 410.

Massachusetts.— May *v.* Bradlee, 127 Mass. 414, 420, where the court said: "What degree of mental capacity is necessary to the making of a will is a question of law, which was not to be determined by the witness, and as to which he could not be assumed to be informed, unless the legal requisites of testamentary capacity were stated in the interrogatory, or otherwise explained to him. Without some such explanation, it would be impossible to say that the witness, the jury and the judge were not each governed by a different standard in settling the question."

Missouri.— Lorts *v.* Wash, 175 Mo. 487, 75 S. W. 95.

Pennsylvania.— Stokes *v.* Miller, 10 Wkly. Notes Cas. 241.

Rhode Island.—Hopkins *v.* Wheeler, 21 R. I. 533, 45 Atl. 551, 79 Am. St. Rep. 819.

Vermont.— Fairchild *v.* Bascomb, 35 Vt. 398.

The evidence has been received. Steele *v.* Helm, 2 Marv. (Del.) 237, 43 Atl. 153; Jones *v.* Collins, 94 Md. 403, 51 Atl. 398.

39. Torrey *v.* Burney, 113 Ala. 496, 21 So. 348; McGibbons *v.* McGibbons, 119 Iowa 140, 93 N. W. 55; Betts *v.* Betts, 113 Iowa 111, 84 N. W. 975; Smith *v.* Smith, 157 Mass. 389, 32 N. E. 348. This evidence has been received (Turner's Appeal, 72 Conn. 305, 316, 44 Atl. 310 [*citing* Schneider *v.* Manning, 121 Ill. 376, 12 N. E. 267; White *v.* Bailey, 10 Mich. 155; Farrell *v.* Brennan, 32 Mo. 328, 82 Am. Dec. 137; Crowell *v.* Kirk, 14 N. C. 355; Fairchild *v.* Bascomb, 35 Vt. 398]; Neely *v.* Sheppard, 190 Ill. 637, 60 N. E. 922) especially upon cross-examination (*In re* Daniels, 140 Cal. 335, 73 Pac. 1053).

40. People *v.* Lake, 12 N. Y. 358; People *v.* Thurston, 2 Park. Cr. (N. Y.) 49. *Compare* Pflueger *v.* State, 46 Nebr. 493, 64 N. W. 1094; Shults *v.* State, 37 Nebr. 481, 55 N. W. 1080. Whether a person knew the difference between right and wrong may be inquired on cross-examination of an ordinary observer who has testified as to facts tending to show insanity. State *v.* Porter, 34 Iowa 131; State *v.* Leehman, 2 S. D. 171, 49 N. W. 3. And under special circumstances the question has been allowed even upon direct examination. Pflueger *v.* State, 46 Nebr. 493, 64 N. W. 1094; Shults *v.* State, 37 Nebr. 481, 55 N. W. 1080; Ford *v.* State, 40 Tex. Cr. 280, 50 S. W. 350; Carr *v.* State, 24 Tex. App. 562, 7 S. W. 328, 5 Am. St. Rep. 905.

41. Lindsey *v.* White, (Tex. Civ. App. 1901) 61 S. W. 438, where it was held, however, that on the probate of a will, which was contested on the ground of the mental incapacity of the testatrix, where it was shown that testatrix had an insane antipathy to her husband, evidence of a physician that, in his opinion, testatrix was capable of acting intelligently with reference to her husband did not violate the rule that experts cannot express an opinion as to the capacity of the person to do the very thing in issue, as such witness was entitled to testify, in regard to testatrix's delusion as to her husband, that she was sane and intelligent on that subject.

42. McGibbons *v.* McGibbons, 119 Iowa 140, 93 N. W. 55.

An unskilled observer may testify that a given person did not seem to know what he did. Green *v.* State, 64 Ark. 523, 43 S. W. 973.

43. Chickering *v.* Brooks, 61 Vt. 554, 565, 18 Atl. 144.

44. Cicero, etc., St. R. Co. *v.* Richter, 85 Ill. App. 591; Manatt *v.* Scott, 106 Iowa 203, 76 N. W. 717, 68 Am. St. Rep. 293; Nash *v.* Hunt, 116 Mass. 237; Barker *v.* Comins, 110 Mass. 477 (lack of coherence); Parker *v.* Boston, etc., Steamboat Co., 109 Mass. 449. See also New York, etc., R. Co. *v.* Luebeck, 157 Ill. 595, 41 N. E. 897; Com. *v.* Sturtivant, 117 Mass. 122, 19 Am. Rep. 401; Tatham *v.* Wright, 2 Russ. & M. 1, 11 Eng. Ch. 1, 39 Eng. Reprint 295; Eagleton *v.* Kingston, 8 Ves. Jr. 438, 32 Eng. Reprint 425, will-power.

45. West Chicago St. R. Co. *v.* Fishman,

that there has been no change in it.[46] The evidence must be given by witnesses in the usual way. Letters indicative of such opinion are not in themselves competent.[47] The witness, wherever possible, should state the grounds of his inference.[48]

c. Insanity — (1) *In General.* The distinction between deductions by intellectual process of reasoning, from hypothetically stated facts, characteristic of the true "expert," and the inference from observed facts, which are only partially statable, by either an ordinary observer who could not, or by a skilled observer who could if necessary form a judgment as an expert upon hypothetically stated facts, is tested in numerous cases where persons of all degrees of technical training, who have observed the individual in question, are offered as witnesses to testify as to his sanity, and much diversity of opinion has been expressed by courts of equally eminent judicial authority as to whether the inference of an observer, skilled or unskilled, is competent, and if so under what conditions. To a large extent the action of the tribunals of a given state is determined by their opinion as to the probative value of "expert testimony," properly so called.[49] To courts which regard expert testimony or scientific subjects as of exceptional value it is a controlling consideration that the subject of insanity is one of a technical nature,[50] that the popular standard of insanity is not the same as the legal standard,[51] and that special training is needed to appreciate the significance of the facts presented in evidence, while the inference of an observer is frequently colored by his prejudices.[52] Courts whose opinion fails to recognize any special value in expert evidence generally naturally fail to recognize any in this connection.[53] They are impressed with the circumstance that the facts in their entirety frequently elude statement,[54] and that therefore the expert cannot have a complete and accurate basis for his judgment;[55] that many witnesses can make a correct inference easier

169 Ill. 196, 48 N. E. 447; *In re* Normans, 72 Iowa 84, 33 N. W. 374; Com. *v.* Brayman, 136 Mass. 438; Com. *v.* O'Brien, 134 Mass. 198.

46. Hertrich *v.* Hertrich, 114 Iowa 643, 87 N. W. 689, 89 Am. St. Rep. 389.

47. Com. *v.* Brayman, 136 Mass. 438; Wright *v.* Tatham, 7 A. & E. 313, 2 N. & P. 305, 34 E. C. L. 178.

48. Barker *v.* Comins, 110 Mass. 477.

Statement of facts is not indispensable. Manatt *v.* Scott, 106 Iowa 203, 76 N. W. 717, 68 Am. St. Rep. 293.

49. See *infra*, XI, G.

50. Fayette *v.* Chesterville, 77 Me. 28, 34, 52 Am. Rep. 741, where the court said: "There are various forms and kinds of insanity or mental unsoundness, many of which cannot be easily or accurately defined, the subject itself in some of its aspects being beyond the reach of human investigation."

51. Fayette *v.* Chesterville, 77 Me. 28, 52 Am. Rep. 741.

52. Fayette *v.* Chesterville, 77 Me. 23, 52 Am. Rep. 741.

53. Choice *v.* State, 31 Ga. 424, 466 (where Lumpkin, J., said: "As for myself, I would rely as implicitly upon the opinion of practical men, who form their belief from their observation of the appearance, conduct and conversation of a person, as I would upon the opinions of physicians, who testify from facts proved by others, or the opinions even of the keepers of insane hospitals"); Clark *v.* State, 12 Ohio 483, 489, 40 Am. Dec. 481 (where the court said: "Insanity is a disease of the mind; and physicians, with all the science they possess, are as yet like the masses of mankind, without any certain knowledge of the nature of the thing disordered. They know, and all men know, that mind exists. By the results it produces in a healthy state, all men have equal evidence that it is; but what it is, how to fathom, span or define its nature, is what we lack direct facts and analogies to enable us to do. Philosophers and physicians are here upon a level with the common masses of our race, and if wiser upon the subject, it is because they have been more astute and attentive observers").

54. Schlencker *v.* State, 9 Nebr. 241, 250, 1 N. W. 857.

55. Clark *v.* State, 12 Ohio 483, 490, 40 Am. Dec. 481, where the court said: "Doubtless an opinion formed by a person professionally conversant with the disease, upon the same observations, would be the most reliable; but if formed upon any relation of the facts which the observer would be able to give, it would be difficult to say, in many cases, that it would be the safest. A careful daily observer of a person feigning madness would witness innumerable acts, and expressions of countenance, which, with the attending incidents and circumstances, conclusively satisfying him of the fictitious character of the pretended malady, but which he could never communicate to a jury or scientific man, to give them a fair conception of their real importance. From poverty of language, these facts, should a witness attempt to detail them, would necessarily be mixed up with opinions, general or partial, in spite of his best efforts to avoid it. These are things

than they can make a detailed description,[56] that as commonly presented to observation insanity is readily detected, if carried beyond a certain point,[57] and that to reject the inference of an observer with suitable opportunities and faculty for observation is to refuse to consider evidence which is frequently of the highest possible value.[58] Where the evidence of an observer is received he may be required to state the opportunities for observation which he has enjoyed and the facts so far as statable, which have been observed by him and which constitute the basis of his opinion;[59] and if in the opinion of the presiding justice the facts so stated do not render the witness competent to express an opinion he may be excluded.[60]

(II) *Inference From Ordinary Observation*—(A) *When Admissible*—(1) Rule Stated. The inference of a properly qualified, unskilled observer as to the sanity or insanity of a person observed by him is competent in a majority of the American states.[61] The rule in this respect is the same in

well known to all persons which our language only enables us to express by words of comparison — such are the peculiar features of the face, indicating an excitement of the passions, affections and emotions of the mind, as hope, fear, love, hatred, pleasure, pain, etc."

56. Fayette *v.* Chesterville, 77 Me. 28, 52 Am. Rep. 741.

57. Clark *v.* State, 12 Ohio 483, 489, 40 Am. Dec. 481, where the court said: "Every one who associates with his species, acquires, daily, correct knowledge of the natural operations of the human mind, and a capacity to form an opinion, if there should happen to be an aberration from the path of sanity, in any of his constant associates. The ability to form a just conclusion will depend much upon his native intelligence and accuracy of observation."

58. *Connecticut.*— Kimberly's Appeal, 68 Conn. 428, 36 Atl. 847, 57 Am. St. Rep. 101, 37 L. R. A. 261; Grant *v.* Thompson, 4 Conn. 203, 10 Am. Dec. 119.

Maine.— Fayette *v.* Chesterville, 77 Me. 28, 52 Am. Rep. 741.

Massachusetts.— Baxter *v.* Abbott, 7 Gray 71, 79.

North Carolina.— Clary *v.* Clary, 24 N. C. 78, 83.

Ohio.— Clark *v.* State, 12 Ohio 483, 491, 40 Am. Dec. 481, where the court said: "Suppose a case of simulated or real insanity to be tried, in which no scientific person could be had to speak as to any prior and attending conduct or appearances, and when the jury must be left to decide the issue from facts unprofessionally detailed to them by the neighbors and acquaintances of the party. Can it be supposed that they would be more likely to form a correct opinion upon such a statement of facts, unaided by the inferences and impressions made upon the witnesses familiar with the ordinary conduct of the individual, than the opinion of those witnesses, formed upon the same facts, better understood, one step farther removed from uncertainty and misapprehension, and aided and illustrated by many minute acts and expressions, etc., which could never be related? Common sense teaches every person that they could not."

59. See Grant *v.* Thompson, 4 Conn. 203, 209, 10 Am. Dec. 119, where the court said: "The best testimony the nature of the case admits of, ought to be adduced; and on the subject of insanity, in my judgment, it consists in the representation of facts, and of the impressions which they made."

60. Denning *v.* Butcher, 91 Iowa 425, 59 N. W. 69.

61. *Alabama.*— Ragland *v.* State, 125 Ala. 12, 27 So. 983; Dominick *v.* Randolph, 124 Ala. 557, 27 So. 481; Yarbrough *v.* State, 105 Ala. 43, 16 So. 758; Stuckey *v.* Bellah, 41 Ala. 700; Stubbs *v.* Houston, 33 Ala. 555; Florey *v.* Florey, 24 Ala. 241; Norris *v.* State, 16 Ala. 776. The constituent facts should be stated. Yarborough *v.* State, 105 Ala. 43, 16 So. 758. The earlier law excluded all inferences except by medical witnesses. Rembert *v.* Brown, 14 Ala. 360; McCurry *v.* Hooper, 12 Ala. 823, 46 Am. Dec. 280.

Arkansas.— Green *v.* State, 64 Ark. 523, 43 S. W. 973; Shaeffer *v.* State, 61 Ark. 241, 32 S. W. 679; Bolling *v.* State, 54 Ark. 588, 16 S. W. 658.

California.— *In re* Keithley, 134 Cal. 9, 66 Pac. 5; People *v.* McCarthy, 115 Cal. 255, 46 Pac. 1073; Wheelock *v.* Godfrey, 100 Cal. 578, 35 Pac. 317; Carpenter *v.* Bailey, 94 Cal. 406, 29 Pac. 1101; People *v.* Lavelle, 71 Cal. 351, 12 Pac. 226; People *v.* Wreden, 59 Cal. 392; *In re* Brooks, 54 Cal. 471; People *v.* Sandford, 43 Cal. 29. Cal Code Civ. Proc. § 1870, subd. 10, has established the peculiar requirement that the observer in order to testify as to sanity must be an "intimate acquaintance." See People *v.* Barthleman, 120 Cal. 7, 52 Pac. 112. Who comes within the definition is largely within the administrative function of the trial court (People *v.* Hill, 116 Cal. 562, 48 Pac. 711; Wheelock *v.* Godfrey, 100 Cal. 578, 35 Pac. 317); but the requirement relates only to the direct inference of sanity or its absence, and any observer may testify whether a person's appearance at a particular time was rational or irrational (People *v.* Manoogian, 141 Cal. 592, 75 Pac. 177; People *v.* McCarthy, 115 Cal. 255, 46 Pac. 1073; Holland *v.* Zollner, 102 Cal. 633, 36 Pac. 930, 37 Pac. 231. See also Carpenter's Estate, 94 Cal. 406, 29 Pac. 1101), or whether at a particular time he noticed anything strange or peculiar in a given person (People *v.* Arrighini, 122 Cal. 121, 54 Pac. 591).

England, where it has been recognized and applied both in the ecclesiastical

Connecticut.— Hayes *v.* Candee, (1902) 52 Atl. 826 (deed); State *r.* Cross, 72 Conn. 722, 46 Atl. 148; Kimberly's Appeal, 68 Conn. 428, 36 Atl. 847, 57 Am. St. Rep. 101, 37 L. R. A. 261 (witness may be asked whether he has ever noticed anything in testator's conduct to indicate insanity); Shanley's Appeal, 62 Conn. 325, 25 Atl. 245; Sydleman *v.* Beckwith, 43 Conn. 9; Dunham's Appeal, 27 Conn. 192; Kinne *v.* Kinne, 9 Conn. 102, 21 Am. Dec. 732; Grant *v.* Thompson, 4 Conn. 203, 10 Am. Dec. 119. *A fortiori* the witnesses may be asked whether they have observed anything indicating insanity, incoherence, etc. Kimberly's Appeal, 68 Conn. 428, 36 Atl. 847, 57 Am. St. Rep. 101, 37 L. R. A. 261. So of lunacy; the witnesses being required to state the facts on which their inference rests. Grant *v.* Thompson, 4 Conn. 203, 10 Am. Dec. 119. Corroboration by showing that witness treated the person in question in accordance with the inference stated in evidence is inadmissible. Allis *v.* Hall, 76 Conn. 322, 56 Atl. 637.

Florida.— Fields *v.* State, (1903) 35 So. 185; Armstrong *r.* State, 30 Fla. 170, 201, 11 So. 618, 17 L. R. A. 484.

Georgia.— Herndon *r.* State, 111 Ga. 178, 36 S. E. 634 (saw nothing to indicate insanity); Taylor *v.* State, 83 Ga. 647, 10 S. E. 442; Obear *v.* Gray, 73 Ga. 455; Choice *v.* State, 31 Ga. 424, 466, where the court said: "One who has seen and conversed with an insane person, and observed his countenance and behavior, has an impression made upon his mind which is incommunicable. This Court is committed to the rule, that the jury, in such case, is entitled to the benefit of this impression." The witness may state that he has observed nothing to indicate insanity. Herndon *r.* State, 111 Ga. 178, 36 S. E. 634.

Idaho.— State *r.* Shuff, (1903) 72 Pac. 664.

Illinois.— Ring *r.* Lawless, 190 Ill. 520, 60 N. E. 881; New York, etc., R. Co. *v.* Luebeck, 157 Ill. 595, 41 N. E. 897; Jamison *v.* People, 145 Ill. 357, 34 N. E. 486; Keithley *v.* Stafford, 126 Ill. 507, 18 N. E. 740; American Bible Soc. *v.* Price, 115 Ill. 623, 5 N. E. 126; Upstone *v.* People, 109 Ill. 169. The inference must be in connection with and subsequent to and based upon the facts observed by the witness. American Bible Soc. *r.* Price, 115 Ill. 623, 5 N. E. 126.

Indiana.— Blume *v.* State, 154 Ind. 343, 56 N. E. 771; Stumph *r.* Miller, 142 Ind. 442, 41 N. E. 812; Hamrick *v.* State, 134 Ind. 324, 34 N. E. 3; Johnson *r.* Culver, 116 Ind. 278, 19 N. E. 129; Sage *v.* State, 91 Ind. 141; Coffman *v.* Reeves, 62 Ind. 334 (appeared childish); Leach *v.* Prebster, 39 Ind. 492; Doe *v.* Reagan, 5 Blackf. 217, 33 Am. Dec. 466; Mull *r.* Carr, 5 Ind. App. 491, 32 N. E. 591. If adequate opportunities for observation within a reasonable time have been lacking, the evidence is incompetent. Sutherland *r.* Hankins, 56 Ind. 343. The witness cannot state mental incapacity to manage affairs, when this is the precise question for the jury. Hamrick *v.* State, 134 Ind. 324, 34 N. E. 3.

Iowa.— Hertrich *v.* Hertrich, 114 Iowa 643, 87 N. W. 689, 89 Am. St. Rep. 389; Furlong *r.* Carraher, 102 Iowa 358, 71 N. W. 210; Kostelecky *v.* Scherhart, 99 Iowa 120, 68 N. W. 591; *In re* Goldthorp, 94 Iowa 336, 62 N. W. 845, 58 Am. St. Rep. 400; *In re* Norman, 72 Iowa 84, 33 N. W. 374; Smith *v.* Hickenbottom, 57 Iowa 733, 11 N. W. 664. Unless suitable opportunities for observation are shown the evidence will be rejected. Denning *v.* Butcher, 91 Iowa 425, 59 N. W. 69; Hurst *v.* Chicago, etc., R. Co., 49 Iowa 76. Where the person is present as a witness and is fully examined in the presence of the jury, the inferences of other observers as to mental capacity is unnecessary, and is accordingly rejected. Sprague *v.* Atlee, 81 Iowa 1, 46 N. W. 756.

Kansas.— Grimshaw *r.* Kent, 67 Kan. 463, 73 Pac. 92; State *r.* Beuerman, 59 Kan. 586, 53 Pac. 874; Baughman *v.* Baughman, 32 Kan. 538, 4 Pac. 1003.

Kentucky.— Abbott *r.* Com., 107 Ky. 624, 55 S. W. 196, 21 Ky. L. Rep. 1372; Wise *v.* Foote, 81 Ky. 10; Phelps *r.* Com., 32 S. W. 470, 17 Ky. L. Rep. 706; Massie *v.* Com., 24 S. W. 611, 15 Ky. L. Rep. 562; Hite *v.* Com., 20 S. W. 217, 14 Ky. L. Rep. 308.

Louisiana.— Chandler *r.* Barrett, 21 La. Ann. 58, 99 Am. Dec. 701. See also State *r.* Coleman, 27 La. Ann. 691. It is said that the inferences of observers are of "little or no weight." Eloi *r.* Eloi, 36 La. Ann. 563.

Maryland.— Williams *r.* Lee, 47 Md. 321; Waters *v.* Waters, 35 Md. 531, 541; Weems *v.* Weems, 19 Md. 334. But see Townshend *r.* Townshend, 7 Gill 10. Non-expert witnesses who are competent, from their acquaintance and relations with a testator, to give an opinion as to his competency, may be asked if they observed any indication of lack of mind or understanding on testator's part. Jones *r.* Collins, 94 Md. 403, 51 Atl. 398.

Michigan.— People *r.* Casey, 124 Mich. 279, 82 N. W. 883; Sullivan *v.* Foley, 112 Mich. 1, 70 N. W. 322; People *r.* Borgetto, 99 Mich. 336, 58 N. W. 328; Prentis *r.* Bates, 93 Mich. 234, 53 N. W. 153, 17 L. R. A. 494; Keyser *v.* Chicago, etc., R. Co., 66 Mich. 390, 33 N. W. 867; Beaubien *v.* Cicotte, 12 Mich. 459. Suitable opportunities for observation must be proved. Buys *v.* Buys, 99 Mich. 354, 58 N. W. 331.

Minnesota.— The observer may state where a certain person acted as a sane or an insane person. Cannady *r.* Lynch, 27 Minn. 435, 8 N. W. 164.

Mississippi.— Sheehan *r.* Kearney, (1896) 21 So. 41; Reed *r.* State, 62 Miss. 405; Wood *r.* State, 58 Miss. 741; Russell *v.* State, 53 Miss. 367.

Missouri.—State *r.* Bronstine, 147 Mo. 520, 49 S. W. 512; Sharp *r.* Kansas City Cable R. Co., 114 Mo. 94, 20 S. W. 93; State *r.* Williamson, 106 Mo. 162, 17 S. W. 172; State

courts in proceedings involving the question whether a testator was of unsound

v. Meyers, 99 Mo. 107, 12 S. W. 516; State *v.* Bryant, 93 Mo. 273, 6 S. W. 102; State *v.* Erb, 74 Mo. 199; Moore *v.* Moore, 67 Mo. 192; State *v.* Klinger, 46 Mo. 224. The inference must be founded entirely upon the observation of the witness. Appleby *v.* Brock, 76 Mo. 314. For an inference of sanity, no reasons need be assigned. State *v.* Soper, 148 Mo. 217, 49 S. W. 1007.

Montana.— Territory *v.* Roberts, 9 Mont. 121, 22 Pac. 132; Territory *v.* Hart, 7 Mont. 489, 17 Pac. 718.

Nebraska.— Clarke *v.* Irwin, 63 Nebr. 539, 88 N. W. 783; Lamb *v.* Lynch, 56 Nebr. 135, 76 N. W. 428; Hay *v.* Miller, 48 Nebr. 156, 66 N. W. 1115; Pflueger *v.* State, 46 Nebr. 493, 64 N. W. 1094; Shults *v.* State, 37 Nebr. 481, 55 N. W. 1080; Polin *v.* State, 14 Nebr. 540, 16 N. W. 898; Schlencker *v.* State, 9 Nebr. 241, 1 N. W. 857.

Nevada.— State *v.* Lewis, 20 Nev. 333, 22 Pac. 241.

New Hampshire.—Patten *v.* Cilley, 67 N. H. 520, 42 Atl. 47; Carpenter *v.* Hatch, 64 N. H. 573, 15 Atl. 219; Hardy *v.* Merrill, 56 N. H. 227, 22 Am. Rep. 441. Based upon what it afterward termed the "silent unauthentic growth" in Massachusetts of a rule forbidding non-experts to testify to inferences from observation in insanity cases, the supreme court of New Hampshire at first took the position that a long-established and uniform usage forbade the use of such evidence. State *v.* Archer, 54 N. H. 465; State *v.* Pike, 49 N. H. 399, 6 Am. Rep. 533; Boardman *v.* Woodman, 47 N. H. 120; State *v.* Pike, *supra*, however, brought out a strong and learned dissenting opinion from Mr. Justice Doe, which a few years later was adopted by the court in Hardy *v.* Merrill, *supra*, after an instructive review of early authorities and *nisi prius* rulings, and it has since remained the law of the state.

New Jersey.— Genz *v.* State, 58 N. J. L. 482, 34 Atl. 816.

North Carolina.— Smith *v.* Smith, 117 N. C. 326, 23 S. E. 270; State *v.* Potts, 100 N. C. 457, 6 S. E. 657; McRae *v.* Malloy, 93 N. C. 154; Bost *v.* Bost, 87 N. C. 477; McDougald *v.* McLean, 60 N. C. 120; Clary *v.* Clary, 24 N. C. 78.

Ohio.— Clark *v.* State, 12 Ohio 483, 40 Am. Dec. 481. The inference must relate to the time of the examination. Runyan *v.* Price, 15 Ohio St. 1, 86 Am. Dec. 459.

Oklahoma.— Queenan *v.* Territory, 11 Okla. 261, 71 Pac. 218, 61 L. R. A. 324 [*affirmed* in 190 U. S. 548, 23 S. Ct. 762, 47 L. ed. 1175].

Oregon.— State *v.* Fiester, 32 Oreg. 254, 50 Pac. 561.

Pennsylvania.— Com. *v.* Gearhardt, 205 Pa. St. 387, 54 Atl. 1029; Hepler *v.* Hosack, 197 Pa. St. 631, 47 Atl. 847; Com. *v.* Wireback, 190 Pa. St. 138, 42 Atl. 542, 70 Am. St. Rep. 625; Taylor *v.* Com., 109 Pa. St. 262; Pidcock *v.* Potter, 68 Pa. St. 342. 8 Am. Rep. 181; Dickinson *v.* Dickinson, 61 Pa. St. 401; Titlow *v.* Titlow, 54 Pa. St. 216, 93 Am. Dec. 691; Wilkinson *v.* Pearson, 23 Pa. St. 117; Bricker *v.* Lightner, 40 Pa. St. 199; Rambler *v.* Tryon, 7 Serg. & R. (Pa.) 90, 10 Am. Dec. 444; Com. *v.* Smith, 6 Am. L. Reg. 257. The rule, although "gravely questioned" in capital cases, must now be regarded as settled. Com. *v.* Smith, 6 Am. L. Reg. 257. It is essential that the condition of mind sought to be proved should be relevant. Com. *v.* Buccieri, 153 Pa. St. 535, 26 Atl. 228. The mental imbecility cannot be shown circumstantially by evidence that the person in question did not understand the instrument he had executed. Aiman *v.* Stout, 42 Pa. St. 114. A physician may testify as an ordinary observer. Com. *v.* Cressinger, 193 Pa. St. 326, 44 Atl. 433. Witnesses may state whether they have observed any indications of unsound mind. Com. *v.* Cressinger, *supra*.

South Carolina.— Price *v.* Richmond, etc., R. Co., 38 S. C. 199, 17 S. E. 732.

South Dakota.— Halde *v.* Schultz, (1903) 97 N. W. 369.

Tennessee.— Wisener *v.* Maupin, 2 Baxt. 342; Dove *v.* State, 3 Heisk. 348; Gibson *v.* Gibson, 9 Yerg. 329; Jones *v.* Galbraith, (Ch. App. 1900) 59 S. W. 350.

Texas.— Scalf *v.* Collins County, 80 Tex. 514, 16 S. W. 314; Haney *v.* Clark, 65 Tex. 93; Holcomb *v.* State, 41 Tex. 125; Thomas *v.* State, 40 Tex. 60; Williams *v.* State, (Cr. App. 1899) 53 S. W. 859; Williams *v.* State, 37 Tex. Cr. 348, 39 S. W. 687; Missouri, etc., R. Co. *v.* Brantley, (Civ. App. 1901) 62 S. W. 94; Webb *v.* State, 5 Tex. App. 596; McClackey *v.* State, 5 Tex. App. 320. A judgment based on hearsay is inadmissible. Navasota First Nat. Bank *v.* McGinty, 29 Tex. Civ. App. 539, 69 S. W. 495. A person under observation in jail as to sanity need not be warned. Burt *v.* State, 38 Tex. Cr. 397, 40 S. W. 1000, 43 S. W. 344, 39 L. R. A. 305, 330.

Utah.— *In re* Christensen, 17 Utah 412, 53 Pac. 1003, 70 Am. St. Rep. 794, 41 L. R. A. 504.

Vermont.— Foster *v.* Dickerson, 64 Vt. 233, 24 Atl. 253; Westmore *v.* Sheffield, 56 Vt. 239; Hathaway *v.* National L. Ins. Co., 48 Vt. 335; Cram *v.* Cram, 33 Vt. 15; Lester *v.* Pittsford, 7 Vt. 158. But see Hough *v.* Lawrence, 5 Vt. 299. It is not material that the master finds that the basis for the inference is insufficient. Chickering *v.* Brooks, 61 Vt. 554, 18 Atl. 144.

Virginia.— Fishburne *v.* Ferguson, 84 Va. 87, 4 S. E. 575.

Washington.— Sears *v.* Seattle Consol. St. R. Co., 6 Wash. 227, 33 Pac. 389, 1081.

West Virginia.— State *v.* Maier, 36 W. Va. 757, 15 S. E. 991; Dower *v.* Church, 21 W. Va. 23. The facts observed must be detailed to the jury. Dower *v.* Church, *supra*.

Wisconsin.— Lowe *v.* State, 118 Wis. 641, 96 N. W. 417; Crawford *v.* Christian, 102

mind[62] and the common law[63] courts, and in Canada.[64] There is a strong tendency to unanimity in admitting this class of evidence observable in the action of the courts.[65] The witness may be asked whether the person in question is capable of transacting business, it being but a mode of stating the degree of mental weakness.[66]

(2) Basis of Inference. The statement of inference must as a general rule be accompanied by a statement of the facts on which it is founded,[67] includ-

Wis. 51, 78 N. W. 406; Bridge *v.* Oshkosh, 71 Wis. 363, 37 N. W. 409; Burnham *v.* Mitchell, 34 Wis. 117.

United States.— Connecticut Mut. L. Ins. Co. *v.* Lathrop, 111 U. S. 612, 4 S. Ct. 533, 28 L. ed. 536; Charter Oak L. Ins. Co. *v.* Rodel, 95 U. S. 232, 24 L. ed. 433; Parkhurst *v.* Hosford, 21 Fed. 827; Harrison *v.* Rowan, 11 Fed. Cas. No. 6,141, 3 Wash. 580.

See 14 Cent. Dig. tit. "Criminal Law," § 1045; 20 Cent. Dig. tit. "Evidence," § 2242 *et seq.*

62. Wheeler *v.* Alderson, 3 Hagg. Eccl. 574, 603, 606; Dew *v.* Clark, 3 Add. Eccl. 279.

63. Hadfield's Case, 27 How. St. Tr. 1281; Eagleton *v.* Hingston, 8 Ves. Jr. 438, 32 Eng. Reprint 425; Lowe *v.* Jolliffe, 1 W. Bl. 365.

64. Reg. *v.* Waters, 10 Ont. App. 85.

65. "There will now remain scarcely any dissentients among the elder States; and those of recent origin, whose discussions have been based upon the authority of the earlier discussions of some of the older states, which have since abandoned the ground, may also be expected to change." 1 Redfield Wills, c. 4, pp. 2, 145 note 24.

66. Hayes *v.* Candee, (Conn. 1902) 52 Atl. 826.

67. *Alabama.*— Ragland *v.* State, 125 Ala. 12, 27 So. 983; Yarbrough *v.* State, 105 Ala. 43, 16 So. 758; Parsons *v.* State, 81 Ala. 577, 2 So. 854, 60 Am. Rep. 193; Norris *v.* State, 16 Ala. 776. The requirement has not been invariably insisted upon (Caddell *v.* State, 129 Ala. 57, 30 So. 76), for proof of facts from which opportunity for observation may properly be inferred may dispense with formal direct proof of such opportunity (Murphree *v.* Senn, 107 Ala. 424, 18 So. 264, intimate acquaintance).

Arkansas.— Shaeffer *v.* State, 61 Ark. 241, 32 S. W. 679.

California.— *In re* Keegan, 139 Cal. 123, 72 Pac. 828; Holland *v.* Zollner, 102 Cal. 633, 36 Pac. 930, 37 Pac. 231.

Connecticut.— Hayes *v.* Candee, (1902) 52 Atl. 826; State *v.* Cross, 72 Conn. 722, 46 Atl. 148; Turner's Appeal, 72 Conn. 305, 315, 44 Atl. 310 [*citing* Kimberly's Appeal, 68 Conn. 428, 36 Atl. 847, 57 Am. St. Rep. 101, 37 L. R. A. 261; Ryan *v.* Bristol, 63 Conn. 26, 27 Atl. 309; Sydleman *v.* Beckwith, 43 Conn. 9; Cavendish *v.* Troy, 41 Vt. 99; Connecticut Mut. L. Ins. Co. *v.* Lathrop, 111 U. S. 612, 4 S. Ct. 533, 28 L. ed. 536]; Shanley's Appeal, 62 Conn. 325, 25 Atl. 245; Dunham's Appeal, 27 Conn. 192; Grant *v.* Thompson, 4 Conn. 203, 10 Am. Dec. 119.

Delaware.— Lodge *v.* Lodge, 2 Houst. 418.

District of Columbia.— Raub *v.* Carpenter, 17 App. Cas. 505; Taylor *v.* U. S., 7 App. Cas. 27.

Florida.— Armstrong *v.* State, 30 Fla. 170, 11 So. 618, 17 L. R. A. 484.

Georgia.— Herndon *v.* State, 111 Ga. 178, 36 S. E. 634; Welch *v.* Stipe, 95 Ga. 762, 22 S. E. 670 (holding that even a mother cannot testify as to the insanity of a deceased daughter with whom she has resided for years, without stating distinct facts or that her opinion is based upon such facts); Bowden *v.* Achor, 95 Ga. 243, 22 S. E. 254; Wright *v.* State, 91 Ga. 80, 16 S. E. 259; Choice *v.* State, 31 Ga. 424, 466.

Idaho.— State *v.* Hurst, (1895) 39 Pac. 554.

Illinois.— Grand Lodge I. O. M. A. *v.* Wieting, 168 Ill. 408, 48 N. E. 59, 61 Am. St. Rep. 123; New York, etc., R. Co. *v.* Luebeck, 157 Ill. 595, 41 N. E. 897. It is not necessary that the witness should have seen the person transact business. Ring *v.* Lawless, 190 Ill. 520, 60 N. E. 881.

Indiana.— Blume *v.* State, 154 Ind. 343, 56 N. E. 771; Stumph *v.* Miller, 142 Ind. 442, 41 N. E. 812; Pennsylvania Co. *v.* Newmeyer, 129 Ind. 401, 28 N. E. 860; Fiscus *v.* Turner, 125 Ind. 46, 24 N. E. 662; Johnson *v.* Culver, 116 Ind. 278, 19 N. E. 129; Colee *v.* State, 75 Ind. 511; State *v.* Newlin, 69 Ind. 108; Kenworthy *v.* Williams, 5 Ind. 375; Mull *v.* Carr, 5 Ind. App. 491, 32 N. E. 591.

Iowa.— Hertrich *v.* Hertrich, 114 Iowa 643, 87 N. W. 689, 89 Am. St. Rep. 389; Furlong *v.* Carraher, 102 Iowa 258, 71 N. W. 210; Kostelecky *v.* Scherhart, 99 Iowa 120, 68 N. W. 591; *In re* Goldthorp, 94 Iowa 336, 62 N. W. 845, 58 Am. St. Rep. 400; *In re* Norman, 72 Iowa 84, 33 N. W. 374; State *v.* Pennyman, 68 Iowa 216, 26 N. W. 82; Butler *v.* St. Louis L. Ins. Co., 45 Iowa 93; State *v.* Stickley, 41 Iowa 232; Pelamourges *v.* Clark, 9 Iowa 1.

Kansas.— Zirkle *v.* Leonard, 61 Kan. 636, 60 Pac. 318; State *v.* Beuerman, 59 Kan. 586, 53 Pac. 874; Baughman *v.* Baughman, 32 Kan. 538, 4 Pac. 1093; Moors *v.* Sanford, 2 Kan. App. 243, 41 Pac. 1064.

Kentucky.— Abbott *v.* Com., 55 S. W. 196, 21 Ky. L. Rep. 1372.

Louisiana.— State *v.* Smith, 106 La. 33, 30 So. 248.

Maryland.— Brashears *v.* Orme, 93 Md. 442, 49 Atl. 620; Chase *v.* Winans, 59 Md. 475; Kerby *v.* Kerby, 57 Md. 345; Williams *v.* Lee, 47 Md. 321; Waters *v.* Waters, 35 Md. 531. Statement of a sufficient basis of fact is essential to admissibility. Stewart *v.* Redditt, 3 Md. 67.

ing statements made by the person himself, so far as relied upon by the

Massachusetts.— Dickinson *v.* Barber, 9 Mass. 225, 6 Am. Dec. 58; Hathorn *v.* King, 8 Mass. 371, 5 Am. Dec. 106; Buckminster *v.* Perry, 4 Mass. 593; Poole *v.* Richardson, 3 Mass. 330.

Michigan.— People *v.* Casey, 124 Mich. 279, 82 N. W. 883; Lamb *v.* Lippincott, 115 Mich. 611, 73 N. W. 887; Sullivan *v.* Foley, 112 Mich. 1, 70 N. W. 322; O'Connor *v.* Madison, 98 Mich. 183, 57 N. W. 105; White *v.* Bailey, 10 Mich. 155. It is not essential that the witness should be able to describe what he has seen. Prentis *v.* Bates, 93 Mich. 234, 53 N. W. 153, 17 L. R. A. 494.

Minnesota.—Woodcock *v.* Johnson, 36 Minn. 217, 30 N. W. 894; Pinney's Will, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144.

Mississippi.— Sheehan *v.* Kearney, (1896) 21 So. 41, 35 L. R. A. 102; Wood *v.* State, 58 Miss. 741.

Missouri.— State *v.* Bronstine, 147 Mo. 520, 49 S. W. 512; Sharp *v.* Kansas City Cable R. Co., 114 Mo. 94, 20 S. W. 93; State *v.* Williamson, 106 Mo. 162, 17 S. W. 172; State *v.* Erb, 74 Mo. 199; Crowe *v.* Peters, 63 Mo. 429; State *v.* Klinger, 46 Mo. 224; Baldwin *v.* State, 12 Mo. 223; Turner *v.* Kansas City, etc., R. Co. 23 Mo. App. 12.

Nebraska.— Clark *v.* Irwin, 63 Nebr. 539, 88 N. W. 783; Snider *v.* State, 56 Nebr. 309, 76 N. W. 574; Lamb *v.* Lynch, 56 Nebr. 135, 76 N. W. 428; Hoover *v.* State, 48 Nebr. 184, 66 N. W. 1117; Hay *v.* Miller, 48 Nebr. 156, 66 N. W. 1115; Pflueger *v.* State, 46 Nebr. 493, 64 N. W. 1094; Polin *v.* State, 14 Nebr. 540, 16 N. W. 898; Schlencker *v.* State, 9 Nebr. 241, 1 N. W. 857.

Nevada.— State *v.* Lewis, 20 Nev. 333, 22 Pac. 241.

New Jersey.— Hyer *v.* Little, 20 N. J. Eq. 443.

New York.— Paine *v.* Aldrich, 133 N. Y. 544, 30 N. E. 725 [*affirming* 14 N. Y. Suppl. 538]; De Witt *v.* Barly, 17 N. Y. 340; People *v.* O'Donnell, 51 N. Y. App. Div. 115, 64 N. Y. Suppl. 256, 15 N. Y. Cr. 40; De Witt *v.* Barley, 13 Barb. 550; Culver *v.* Haslam, 7 Barb. 314. The inference itself is incompetent in this state. Holcomb *v.* Holcomb, 95 N. Y. 316; Johnson *v.* Cochrane, 91 Hun 165, 36 N. Y. Suppl. 283.

North Carolina.— State *v.* Potts, 100 N. C. 457, 6 S. E. 657; McLeary *v.* Morment, 84 N. C. 235.

Ohio.— Clark *v.* State, 12 Ohio 483, 40 Am. Dec. 481; Kettemann *v.* Metzger, 23 Ohio Cir. Ct. 61; Roush *v.* Wensel, 15 Ohio Cir. Ct. 133, 8 Ohio Cir. Dec. 141; Lore *v.* Truman, 1 Ohio Dec. (Reprint) 510, 10 West. L. J. 250.

Oregon.— State *v.* Fiester, 32 Oreg. 254, 50 Pac. 561.

Pennsylvania.— Com. *v.* Gearhardt, 205 Pa. St. 387, 54 Atl. 1029; Hepler *v.* Hosack, 197 Pa. St. 631, 47 Atl. 847; Com. *v.* Cressinger, 193 Pa. St. 326, 44 Atl. 433; Easton First Nat. Bank *v.* Wirebach, 106 Pa. St. 37; Pidcock *v.* Potter, 68 Pa. St. 342, 8 Am. Rep. 181; Titlow *v.* Titlow, 54 Pa. St. 216, 93 Am. Dec. 691; Bricker *v.* Lightner, 40 Pa. St. 199; Good *v.* Good, 1 Mona. 718; Com. *v.* Pannel, 9 Lanc. Bar 82.

South Carolina.— Scarborough *v.* Baskin, 65 S. C. 558, 44 S. E. 63; Price *v.* Richmond, etc., R. Co., 38 S. C. 199, 17 S. E. 732.

South Dakota.— State *v.* Leehman, 2 S. D. 171, 49 N. W. 3.

Tennessee.— Gibson *v.* Gibson, 9 Yerg. 329.

Texas.— Cockrin *v.* Cox, 65 Tex. 669; Haney *v.* Clark, 65 Tex. 93; Williams *v.* State, (Cr. App. 1899) 53 S. W. 859; Hurst *v.* State, (Cr. App. 1897) 40 S. W. 264; Williams *v.* State, 37 Tex. Cr. 348, 39 S. W. 687; Ellis *v.* State, 33 Tex. Cr. 86, 24 S. W. 894; Missouri, etc., R. Co. *v.* Brantley, 26 Tex. Civ. App. 11, 62 S. W. 94. Not having spoken for a considerable time does not render the evidence inadmissible. Merritt *v.* State, 40 Tex. Cr. 359, 50 S. W. 384, number of years.

Utah.— Ewing *v.* Van Alstine, 26 Utah 193, 72 Pac. 942; *In re* Christensen, 17 Utah 412, 53 Pac. 1003, 70 Am. St. Rep. 794, 41 L. R. A. 504.

Vermont.— Sargent *v.* Burton, 74 Vt. 24, 52 Atl. 72 (conversation); *In re* McCabe, 70 Vt. 155, 40 Atl. 52; Foster *v.* Dickerson, 64 Vt. 233, 24 Atl. 253; Chickering *v.* Brooks, 61 Vt. 554, 563, 18 Atl. 144 (where the court said: "An opinion is not admitted until the basis of the opinion is shown"); State *v.* Hayden, 51 Vt. 296; Hathaway *v.* National L. Ins. Co., 48 Vt. 335, 350 (where the court said: "The fact that such persons did not form their opinion at the time they saw and observed the facts testified to, does not render their opinion inadmissible"); Cram *v.* Cram, 33 Vt. 15; Morse *v.* Crawford, 17 Vt. 499, 44 Am. Dec. 349; Lester *v.* Pittsford, 7 Vt. 158.

Virginia.— Fishburne *v.* Furguson, 84 Va. 87, 4 S. E. 575.

Washington.—Higgins *v.* Nethery, 30 Wash. 239, 70 Pac. 489.

West Virginia.— State *v.* Maier, 36 W. Va. 757, 15 S. E. 991.

Wisconsin.— Crawford *v.* Christian, 102 Wis. 51, 78 N. W. 406; Boorman *v.* Northwestern Mut. Relief Assoc., 90 Wis. 144, 62 N. W. 924; Burnham *v.* Mitchell, 34 Wis. 117.

United States.— Queenan *v.* Oklahoma, 190 U. S. 548, 23 S. Ct. 762, 47 L. ed. 1175 [*affirming* 11 Okla. 261, 71 Pac. 218]; Kilgore *v.* Cross, 1 Fed. 578, 1 McCrary 144.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1045, 1057; 20 Cent. Dig. tit. "Evidence," §§ 2242, 2297.

Lack of bias or interest to misrepresent may be shown. Culver *v.* Haslam, 7 Barb. (N. Y.) 314.

The personal equation of the witness may well be considered. "So different are the forms and habits of observation in different persons" that no general rule can be laid down as to what shall be deemed a sufficient opportunity of observation, other than that in fact it should have enabled the observer to form a belief or judgment thereon. Choice

observer as a basis of his inference,[68] and the party offering such a witness is entitled to insist upon putting in these facts.[69] The rule stated applies whether the observer is a skilled observer or an unskilled one;[70] but it has been held that a lay witness may express his opinion that a person is sane, although not that he is insane, without giving the facts on which he founds his opinion.[71] The facts stated must relate to a time which is sufficiently near to be relevant.[72] Where the facts are not sufficient in the opinion of the court,[73] to give a reasonable basis for an inference,[74]

v. State, 31 Ga. 424; Parkhurst *v.* Hosford, 21 Fed. 827. "It is, however, agreed by the authorities that if the witness shows an acquaintance with the accused, that he has had conversations with him, or that he has had business dealings or social intercourse with him, he may, having stated the facts, express an opinion." Goodwin *v.* State, 96 Ind. 550, 558 [*citing* Stubbs *v.* Houston, 33 Ala. 555; Powell *v.* State, 25 Ala. 21; Colee *v.* State, 75 Ind. 511; Leach *v.* Prebster, 39 Ind. 492; State *v.* Felter, 25 Iowa 67; Schlencker *v.* State, 9 Nebr. 241, 1 N. W. 857; People *v.* Wreden, 12 Reporter 682]. "It is difficult to lay down any exact rule in respect to the amount of knowledge a witness must possess; and the determination of this matter rests largely in the discretion of the trial judge." Montana R. Co. *v.* Warren, 137 U. S. 348, 353, 11 S. Ct. 96, 34 L. ed. 681. To the same effect see Beaubien *v.* Cicotte, 12 Mich. 459.

The circumstances under which the observation took place deserve consideration. Where the person was in a perturbed condition the evidence is entitled to the less weight. Emery *v.* Hoyt, 46 Ill. 258, seeking to avoid payment of a note.

The requirement has been placed so high as to demand that the witnesses state "all the facts as to the conduct, appearance, health and conversation of the deceased, upon which they based their opinions." Butler *v.* St. Louis L. Ins. Co., 45 Iowa 93, 97.

68. People *v.* Shattuck, 109 Cal. 673, 42 Pac. 315; People *v.* Nino, 149 N. Y. 317, 43 N. E. 853; Burt *v.* State, 38 Tex. Cr. 397, 40 S. W. 1000, 43 S. W. 344, 39 L. R. A. 330.

69. McLeary *v.* Norment, 84 N. C. 235, conversations.

70. Hawley *v.* Griffin, (Iowa 1900) 82 N. W. 905.

71. State *v.* Soper, 148 Mo. 217, 235, 49 S. W. 1007, where the court said: "Ordinarily, a lay witness is required, when giving an opinion that such a person is of unsound mind, to give the facts on which he founds that opinion. Not so, however, when he gives expression to an opinion that such person is sane, for in that case the subject of the testimony would not give manifestations of certain eccentricities which usually mark the conduct of mind diseased." See also State *v.* Holloway, 156 Mo. 222, 56 S. W. 734.

72. Hawley *v.* Griffin, (Iowa 1900) 82 N. W. 905.

73. *Arkansas.*— Shaeffer *v.* State, 61 Ark. 241, 32 S. W. 679.

California.— People *v.* Fine, 77 Cal. 147, 19 Pac. 269.

Illinois.— Collins *v.* People, 194 Ill. 506, 62 N. E. 902; Grand Lodge I. O. M. A. *v.* Wieting, 168 Ill. 408, 48 N. E. 59, 61 Am. St. Rep. 123.

Indiana.— Johnson *v.* Culver, 116 Ind. 278, 289, 19 N. E. 129, where the court said: "It is not necessary that the acquaintance of witnesses with the person whose mental condition is in question should be extensive or intimate; it is enough if the acquaintance is such as to enable the witnesses to form some opinion. The value of the opinion will, of course, depend upon the facts on which it rests."

Iowa.— Matter of Hull, 117 Iowa 738, 89 N. W. 979; Denning *v.* Butcher, 91 Iowa 425, 59 N. W. 69.

Kentucky.— Hite *v.* Com., 20 S. W. 217, 14 Ky. L. Rep. 308.

Maryland.— Jones *v.* Collins, 94 Md. 403, 51 Atl. 398.

Michigan.— O'Connor *v.* Madison, 98 Mich. 183, 57 N. W. 105.

New Hampshire.—Patten *v.* Cilley, 67 N. H. 520, 42 Atl. 47.

Oregon.— State *v.* Hansen, 25 Oreg. 391, 35 Pac. 976, 36 Pac. 296.

Pennsylvania.— Com. *v.* Buccieri, 153 Pa. St. 535, 26 Atl. 228.

Texas.— McLeod *v.* State, 31 Tex. Cr. 331, 20 S. W. 749.

Wisconsin.— Crawford *v.* Christian, 102 Wis. 51, 78 N. W. 406.

The rule applies a fortiori where no constituent facts are stated by the witness. Stokes *v.* Miller, 10 Wkly. Notes Cas. (Pa.) 241.

"Intimate acquaintance."— The provision of the California code requiring that the non-expert witness to sanity should be an intimate acquaintance illustrates the doubtful value of legislative definitions in connections where exactness is in the nature of things impossible. It is aptly epitomized by Temple, C., in Carpenter's Estate, 94 Cal. 406, 416, 29 Pac. 1101, where, in speaking of the statute, he says: "Since it requires the drawing of a definite line between things which are separated only by degrees of difference, the rule is and must remain more or less indefinite."

74. Burney *v.* Torrey, 100 Ala. 157, 14 So. 685, 46 Am. St. Rep. 33; Horton *v.* U. S., 15 App. Cas. (D. C.) 310; Alvord *v.* Alvord, 109 Iowa 113, 115, 80 N. W. 306 [*citing In re* Goldthorp, 94 Iowa 336, 62 N. W. 845, 58 Am. St. Rep. 400; Denning *v.* Butcher, 91 Iowa 425, 59 N. W. 69; Lamb *v.* Lippincott, 115 Mich. 611, 73 N. W. 887; People *v.* Borgetto, 99 Mich. 336, 58 N. W. 328; O'Connor *v.* Madison, 98 Mich. 183, 57 N. W. 105]; Baltimore Safe-Deposit, etc., Co. *v.* Berry, 93 Md. 560, 49 Atl. 401 (holding that physical

or sufficient admissible facts are not clearly stated,[75] the witness is incompetent,[76] or his evidence is entitled to but little weight,[77] especially where the witness is interested.[78] It is, however, inconsistent with the theory on which the rule rests — that of inability to state all the facts — to require that all the facts should be stated.[79] This enumeration serves a double purpose. It not only serves, like the hypothetical basis of the expert's opinion, to gauge the value of his inference, but it also serves to show the presiding justice, in applying the preliminary test of competency, as to the opportunities and powers of observation enjoyed by the witness,[80] for it must also affirmatively appear to the satisfaction of the court[81]

debility is not a criterion of mental capacity); Brashears *v.* Orme, 93 Md. 442, 49 Atl. 620.

75. State *v.* Robbins, 109 Iowa 650, 80 N. W. 1061; State *v.* Peel, 23 Mont. 358, 50 Pac. 169, 75 Am. St. Rep. 529. Previous knowledge and hearsay as to the fatal transaction do not constitute satisfactory knowledge. State *v.* Peel, *supra.*

76. *Alabama.*— Dominick *v.* Randolph, 124 Ala. 557, 27 So. 481.

Arkansas.— Shaeffer *v.* State, 61 Ark. 241, 32 S. W. 679.

Connecticut.—Driscoll *v.* Ansonia, 73 Conn. 743, 47 Atl. 718.

Delaware.— Pritchard *v.* Henderson, 3 Pennew. 128, 50 Atl. 217.

District of Columbia.— Raub *v.* Carpenter, 17 App. Cas. 505; Taylor *v.* U. S., 7 App. Cas. 27.

Georgia.— Ryder *v.* State, 100 Ga. 528, 28 S. E. 246, 62 Am. St. Rep. 334, 38 L. R. A. 721. Intimate relationship is not sufficient. Welch *v.* Stipe, 95 Ga. 762, 22 S. E. 670, mother.

Illinois.— Grand Lodge I. O. M. A. *v.* Wieting, 168 Ill. 408, 48 N. E. 59, 61 Am. St. Rep. 123.

Iowa.— Hawley *v.* Griffin, (1900) 82 N. W. 905, holding that in determining the weight of testimony of witnesses who have given their opinions as to whether or not a certain person was insane at a particular time and who have testified to the facts on which their opinions were based, consideration should be given to the intelligence of the witnesses, their means of knowledge, the facts on which their opinions are based and their interest, if any, in the result of the litigation.

Louisiana.— State *v.* Coleman, 27 La. Ann. 691.

Maryland.— Baltimore Safe-Deposit, etc., Co. *v.* Berry, 93 Md. 560, 49 Atl. 401, holding that physical change, grief, and subdued spirits may exist consistently with an unimpaired intellect. Refusal of a person to make a second loan, although he had been repaid the first, on the ground that the proposed lender was without a dollar in the world, although in fact wealthy, is not an adequate basis for an inference of insanity. Baltimore Safe-Deposit, etc., Co. *v.* Berry, *supra.*

Michigan.—Page *v.* Beach, (1903) 95 N. W. 981.

North Dakota.— State *v.* Barry, 11 N. D. 428, 92 N. W. 809.

Pennsylvania.— Com. *v.* Wireback, 190 Pa. St. 138, 42 Atl. 542, 70 Am. St. Rep. 625 (where the inference was insanity from rational acts); Com. *v.* Buccieri, 153 Pa. St. 535, 26 Atl. 228; Easton First Nat. Bank *v.* Wireback, 106 Pa. St. 37.

South Dakota.— Apland *v.* Pott, 16 S. D. 185, 92 N. W. 19.

Texas.— Hickman *v.* State, 38 Tex. 190; Merritt *v.* State, 39 Tex. Cr. 70, 45 S. W. 21.

United States.— Queenan *v.* Oklahoma, 190 U. S. 548, 23 S. Ct. 762, 47 L. ed. 1175.

77. Kinne *v.* Kinne, 9 Conn. 102, 21 Am. Dec. 732; Jones *v.* Perkins, 5 B. Mon. (Ky.) 222; Eldridge *v.* Wilson, 4 Ky. L. Rep. 982; Turner *v.* Cheesman, 15 N. J. Eq. 243; Farnsworth *v.* Noffsinger, 46 W. Va. 410, 33 S. E. 246; Jarrett *v.* Jarrett, 11 W. Va. 584.

No such requirement is made as to the evidence of witnesses who testify to the existence of facts from which a mental condition may be inferred. People *v.* Ellsworth, 127 Cal. 595, 60 Pac. 161.

Uncorroborated by other evidence, such inferences are said to be of no weight whatever (Hunt *v.* Hunt, 3 B. Mon. (Ky.) 575; Lowe *v.* Williamson, 2 N. J. Eq. 82); but the evidence is admissible, although the weight may be but slight (Kettemann *v.* Metzger, 23 Ohio Cir. Ct. 61).

78. Wallace *v.* Harris, 32 Mich. 380.

79. Mull *v.* Carr, 5 Ind. App. 491, 32 N. E. 591.

80. Prentis *v.* Bates, 93 Mich. 234, 53 N. W. 153, 17 L. R. A. 494; Connecticut Mut. L. Ins. Co. *v.* Lathrop, 111 U. S. 612, 621, 4 S. Ct. 533, 28 L. ed. 536, where the court said: "The jury, being informed as to the witness' opportunities to know all the circumstances, and of the reasons upon which he rests his statement as to the ultimate general fact of sanity or insanity, are able to test the accuracy or soundness of the opinion expressed, and thus, by using the ordinary means for the ascertainment of truth, reach the ends of substantial justice."

81. *Illinois.*— Grand Lodge I. O. M. A. *v.* Wieting, 168 Ill. 408, 48 N. E. 59, 61 Am. St. Rep. 123.

Kentucky.— Brown *v.* Com., 14 Bush 398.

Michigan.— O'Connor *v.* Madison, 98 Mich. 183, 187, 57 N. W. 105, where the court said: "Perhaps it would not be a great stretch of discretion if he permitted cross-examination before allowing the opinion to be given."

New Hampshire.— Carpenter *v.* Hatch, 64 N. H. 573, 15 Atl. 219.

Texas.— Thomas *v.* State, 40 Tex. 60; McLeod *v.* State, 31 Tex. Cr. 331, 20 S. W. 749.

In Alabama a witness has been permitted to testify, although unable to assign any basis

that the witness has had adequate opportunities for observation.[82] The only additional requirements made of the witnesses is that they should be "people of good common sense."[83] It is not necessary that the facts detailed as the basis of the opinion suggest the same inference to the tribunal as they do to the witness. The very reason for admitting the inference of the witness is because the facts cannot all be placed before the court.[84]

(3) Function of Judge. It must appear in all instances that the inference is both necessary[85] and relevant,[86] not only because the witness possessed adequate opportunities and faculties for observation,[87] but because the observation took place at a time sufficiently recent in the opinion of the court to make the inference of value to the jury.[88] The exercise of discretion as applied to the various conditions of admissibility in relevancy or necessity will not in general be reversed.[89]

in fact for his inference. Stubbs *v.* Houston, 33 Ala. 555. But see Burney *v.* Torrey, 100 Ala. 157, 173, 14 So. 685, 46 Am. St. Rep. 33, where the court said: "In our judgment the ends of justice require in all cases where the opinion of a non-expert is admissible to show unsoundness of mind, that the facts upon which it is predicated should be stated").

82. *Alabama.*— Yarborough *v.* State, 105 Ala. 43, 16 So. 758.

Arkansas.— Shaeffer *v.* State, 61 Ark. 241, 32 S. W. 679, holding that merely observing on the street is not sufficient.

Connecticut.— Kimberly's Appeal, 68 Conn. 428, 36 Atl. 847, 57 Am. St. Rep. 101, 37 L. R. A. 261; Shanley's Appeal, 62 Conn. 325, 25 Atl. 245.

Florida.— Armstrong *v.* Florida, 30 Fla. 170, 201, 11 So. 618, 17 L. R. A. 484.

Idaho.— State *v.* Shuff, (1903) 72 Pac. 664.

Illinois.— Grand Lodge I. O. M. A. *v.* Wieling, 168 Ill. 408, 48 N. E. 59, 61 Am. St. Rep. 123.

Indiana.— Stumph *v.* Miller, 142 Ind. 442, 41 N. E. 812; Mull *v.* Carr, 5 Ind. App. 491, 32 N. E. 591.

Kansas.—Baughman *v.* Baughman, 32 Kan. 538, 4 Pac. 1003; Moors *v.* Sanford, 2 Kan. App. 243, 41 Pac. 1064.

Michigan.— O'Connor *v.* Madison, 98 Mich. 183, 57 N. W. 105.

Nebraska.— Schlencker *v.* State, 9 Nebr. 241, 1 N. W. 857.

Texas.— Williams *v.* State, 37 Tex. Cr. 348, 39 S. W. 687; McLeod *v.* State, 31 Tex. Cr. 331, 20 S. W. 749, holding that a trial judge who observes a prisoner and thinks his eyes are not similar in appearance to those of insane persons is not a competent witness.

Vermont.— Chickering *v.* Brooks, 61 Vt. 554, 18 Atl. 144.

If abundant opportunity for reasonable observation is shown, a preliminary enumeration of constituent facts has not been required (State *v.* Winter, 72 Iowa 627, 34 N. W. 475; Cotrell *v.* Com., 17 S. W. 149, 13 Ky. L. Rep. 305; State *v.* Lewis, 20 Nev. 333, 22 Pac. 241), and it is sufficient if the evidence of qualification is introduced after the evidence has been received (Jones *v.* Galbraith, (Tenn. Ch. App. 1900) 59 S. W. 350). Where the witnesses are well acquainted with the person in question formal qualifying may be dispensed with, the weight of the evidence being for the jury. Neely *v.* Shephard, 190 Ill. 637, 60 N. E. 922.

83. New York, etc., R. Co. *v.* Luebeck, 157 Ill. 595, 41 N. E. 897.

84. Chickering *v.* Brooks, 61 Vt. 554, 563, 18 Atl. 144.

85. See *supra*, XI, A, 4, b.

86. See *supra*, XI, A, 4, a.

87. See *supra*, XI, A, 4, a, (II), (III).

88. Denning *v.* Butcher, 91 Iowa 425, 59 N. W. 69; Wood *v.* State, 58 Miss. 741.

89. Wheelock *v.* Godfrey, 100 Cal. 578, 584, 35 Pac. 317 (where the court said: "From necessity much must be left to the discretion of the trial court in determining whether or not a given witness is an 'intimate acquaintance' within the purview of the statute. As an abstract proposition the question would seem to be one easily solved. In practice, however, a serious difficulty is met in the incapacity to detail specifically all the minor incidents from which the ultimate fact of an intimate acquaintance is deduced. Many persons cannot describe particulars in detail. A witness, as the result of observation, will determine with great accuracy that a given person is intoxicated, but confine him to a detail of the minute appearances that have led him unerringly up to the fact, and he will often fail most signally. The details of conduct, attitude, tones, gestures, words, expression of eye and face, and abnormal movements have either escaped him or he is unable to draw what may be termed a living picture of what he has seen and what is in reality photographed upon his mind. It is much the same in regard to the lesser details which go to make up the status of an intimate acquaintance, and the court having the witness before it is better able to determine the relation of the parties from the evidence given than can be done from a cold record of the words spoken"); Carpenter's Estate, 79 Cal. 382, 21 Pac. 835; People *v.* Fine, 77 Cal. 147, 19 Pac. 269; People *v.* Levy, 71 Cal. 18, 12 Pac. 791; People *v.* Pico, 62 Cal. 50; Hite *v.* Com., 20 S. W. 217, 17 Ky. L. Rep. 308. In an extreme case, however, the action will be reversed. Clary *v.* Clary, 24 N. C. 78.

(4) SUBSCRIBING WITNESSES. The English rule permitting the attesting witnesses to a will or deed to testify as to the sanity of a testator or grantor at the time of executing the instrument[90] obtains also in many states of the American Union,[91] even in jurisdictions where the inferences of other unskilled observers are rejected.[92]

90. Tatham *v.* Wright, 2 Russ. & M. 1, 11 Eng. Ch. 1, 39 Eng. Reprint 295; Lowe *v.* Jolliffe, 1 W. Bl. 365.

91. *Alabama.*— Walker *v.* Walker, 34 Ala. 469.

Arkansas.— Kelly *v.* McGuire, 15 Ark. 555.

Connecticut.— Barber's Appeal, 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90.

Georgia.— Scott *v.* McKee, 105 Ga. 256, 31 S. E. 183.

Indiana.— Call *v.* Byram, 39 Ind. 499.

Iowa.— Hertrich *v.* Hertrich, 114 Iowa 643, 87 N. W. 689, 89 Am. St. Rep. 389.

Maryland.— Jones *v.* Collins, 94 Md. 403, 51 Atl. 398; Williams *v.* Lee, 47 Md. 321.

Massachusettts.— Needham *v.* Ide, 5 Pick. 510; Poole *v.* Richardson, 3 Mass. 330.

New Jersey.— Pancoast *v.* Graham, 15 N. J. Eq. 294; Turner *v.* Cheesman, 15 N. J. Eq. 243.

New York.— Clapp *v.* Fullerton, 34 N. Y. 190, 90 Am. Dec. 681.

Ohio.— Runyan *v.* Price, 15 Ohio St. 1, 86 Am. Dec. 459, holding that he may give his impression formed subsequently to the execution of the will.

South Carolina.— Kaufman *v.* Caughman, 49 S. C. 159, 27 S. E. 16, 61 Am. St. Rep. 808.

Texas.— Garrison *v.* Blanton, 48 Tex. 299.

See, generally, WILLS.

No special weight attaches to the evidence of the subscribing witness. Burney *v.* Torrey, 100 Ala. 157, 14 So. 685, 46 Am. St. Rep. 33.

Relief from restrictions.— Even in states which hold ordinary observers, in stating their inferences, to strict compliance with certain requirements, the subscribing witness is excused; as from the necessity of stating the facts upon which the inference is based. Lodge *v.* Lodge, 2 Houst. (Del.) 418; Scott *v.* McKee, 105 Ga. 256, 31 S. E. 183; Potts *v.* House, 6 Ga. 324, 50 Am. Dec. 329; Hertrich *v.* Hertrich, 114 Iowa 643, 87 N. W. 689, 89 Am. St. Rep. 389; Robinson *v.* Adams, 62 Me. 369, 16 Am. Rep. 473; Jones *v.* Collins, 94 Md. 403, 51 Atl. 398; Williams *v.* Lee, 47 Md. 321; Titlow *v.* Titlow, 54 Pa. St. 216, 223, 93 Am. Dec. 691 (where the court said: "[But the facts observed may be inquired into, and] facts and circumstances upon which their opinions are grounded, the opinions themselves may be placed before the jury, who, having a knowledge of their groundwork, can judge of their value"); Van Huss *v.* Rainbolt, 2 Coldw. (Tenn.) 139; Gibson *v.* Gibson, 9 Yerg. (Tenn.) 329. To the same effect see Robinson *v.* Adams, 62 Me. 369, 16 Am. Rep. 473; Clapp *v.* Fullerton, 34 N. Y. 190, 90 Am. Dec. 681. *A fortiori* the evidence is received where the facts observed are stated. Cilley *v.* Cilley, 34 Me. 162. No qualification as to opportunities for observation is required of the witness except that he attested the will. Robinson *v.* Adams, 62 Me. 369, 409, 16 Am. Rep. 473, where it was said: "It is the fact of being a witness to the will, that gives this right to ask his opinion of the soundness of mind of the testator. It may be given, although the witness was suddenly called in, and heard only the request to sign and the declaration of its being his last will. It is undoubtedly true that all the facts seen or known by the witness at the time are proper subjects of inquiry by either party, and it is proper that they should be. But it is not legally necessary that all should be detailed by the witness, if not asked by either party, before he can give his opinion. The weight and value of his opinion may depend very much upon his means of observation and knowledge; and if he can give few grounds for his belief or opinion his testimony would, doubtless, have very little weight with the jury. But it is for the parties to bring out from the witness such facts as they deem important, touching the extent of knowledge on which the witness bases his opinion." The witness may also state to an extent usually denied that the decedent possessed testamentary capacity. Jones *v.* Collins, 94 Md. 403, 51 Atl. 398.

Subscribing witnesses to a deed are equally competent as to the sanity of the maker of the instrument. Brand *v.* Brand, 39 How. Pr. (N. Y.) 193. The contrary, however, has been held in Pennsylvania. Dean *v.* Fuller, 40 Pa. St. 474.

The inference of a notary public before whom a deed was executed is of great weight where he is also a skilled alienist. Farnsworth *v.* Noffsinger, 46 W. Va. 410, 33 S. E. 246.

92. Walker *v.* Walker, 34 Ala. 469; Robinson *v.* Adams, 62 Me. 369, 16 Am. Rep. 473; May *v.* Bradlee, 127 Mass. 414; Hewlett *v.* Wood, 55 N. Y. 634; Clapp *v.* Fullerton, 34 N. Y. 190, 90 Am. Dec. 681; Dewitt *v.* Barley, 9 N. Y. 371.

The reasons assigned for so striking an exemption have been various. In Massachusetts it has been said that they were "with the testator when he signed the will and required to notice the state of his mind;" a statement of obviously limited exactness. Needham *v.* Ide, 5 Pick. (Mass.) 510, 511. See also Williams *v.* Spencer, 150 Mass. 346, 348, 23 N. E. 105, 15 Am. St. Rep. 206, 5 L. R. A. 790, where Knowlton, J., said: "The witnesses are chosen by the testator and are thereby, under the law, charged with an important duty in relation to the execution and proof of the will." In New York the admission is rested on the ground of necessity. Clapp *v.* Fullerton, 34 N. Y. 190, 90 Am. Dec. 681.

The only fact which the attesting witness is permitted to state is as to his inference

It is not necessary to the competency of the subscribing witness to a will that he should sustain the will.[93] Nor is his inference conclusive.[94] He may be contradicted[95] or impeached, as by proof of contradictory statements.[96]

(B) *When Inadmissible.* While the consensus of a majority of the American and English jurisdictions admits the inferences as to sanity or insanity which observers draw from the appearance and from the conduct of a particular individual, such is not the universal rule.[97] In certain states, as Maine,[98] Massachusetts,[99]

as to sanity at the time of executing the will. Walker *v.* Walker, 34 Ala. 469; Robinson *v.* Adams, 62 Me. 369, 16 Am. Rep. 473; Williams *v.* Spencer, 150 Mass. 346, 23 N. E. 105, 15 Am. St. Rep. 206, 5 L. R. A. 790; Poole *v.* Richardson, 3 Mass. 330; Clapp *v.* Fullerton, 34 N. Y. 190, 90 Am. Dec. 681. His opinion at the time of the trial is incompetent. Williams *v.* Spencer, 150 Mass. 346, 23 N. E. 105, 15 Am. St. Rep. 206, 5 L. R. A. 790. He cannot testify as to decedent's mental capacity to make a will, that being a question of law (Hall *v.* Perry, 87 Me. 569, 33 Atl. 160, 47 Am. St. Rep. 352), nor can he state an inference formed from observations made since the execution of the will (Williams *v.* Spencer, 150 Mass. 346, 23 N. E. 105, 15 Am. St. Rep. 206, 5 L. R. A. 790), or formed at the time of the execution of a codicil as to testamentary capacity at the time the original will was executed (Melanefy *v.* Morrison, 152 Mass. 473, 26 N. E. 36).

93. Williams *v.* Lee, 47 Md. 321; Garrison *v.* Blanton, 48 Tex. 299.

94. Cilley *v.* Cilley, 34 Me. 162.

95. Lowe *v.* Jolliffe, 1 W. Bl. 365.

96. *In re* Snelling, 136 N. Y. 515, 32 N. E. 1006.

97. **Where the question was as to the sanity of a witness** the inference of an observer has been rejected. Pease *v.* Burrowes, 86 Me. 153, 29 Atl. 1053; Territory *v.* Padilla, 8 N. M. 510, 46 Pac. 346; Reg. *v.* Hill, 5 Cox C. C. 259.

98. Wyman *v.* Gould, 47 Me. 159. An expert only can be permitted to state how a person "appeared" as to soundness of mind. Wyman *v.* Gould, 47 Me. 159. The ruling seems to have been adopted upon slight consideration. Wyman *v.* Gould, *supra.* The rule is restricted to the closest possible limits. In Robinson *v.* Adams, 62 Me. 369, 410, 16 Am. Rep. 473, Kent, J., said: "Certainly nothing less than a distinct expression of the opinion of the witness, given as such opinion directly, comes within our rule." Accordingly it was held in that case that witnesses may properly state in connection with the facts observed that they "did not observe any failure of mind," and that they "observed nothing peculiar." "Mere negations," said the court, "such as stated by these witnesses, do not give to the jury an affirmative opinion. They, at most, state negatively that nothing was observed by them. This is not an opinion of the witness, but had relation to a fact, as to the condition of the person." To the same effect see Fayette *v.* Chesterville, 77 Me. 28, 52 Am. Rep. 741. See also Ware *v.* Ware, 8 Me. 42.

99. McCoy *v.* Jordan, 184 Mass. 575, 69 N. E. 358 (holding that statements that testator's powers seemed to be complete and perfect, and that he was in possession of clear faculties and mental powers were conclusions and not responsive to questions calling for observation of testator's powers of comprehension, memory, etc., and that the direct inference of the witness as to testator's mental capacity was properly rejected); Ratigan *v.* Judge, 181 Mass. 572, 64 N. E. 204; Cowles *v.* Merchants, 140 Mass. 377, 5 N. E. 288 ("well settled law"); Com. *v.* Fairbanks, 2 Allen (Mass.) 511; Com. *v.* Wilson, 1 Gray (Mass.) 337; Needham *v.* Ide, 5 Pick. (Mass.) 510; Dickinson *v.* Barber, 9 Mass. 225, 6 Am. Dec. 58; Hathorn *v.* King, 8 Mass. 371, 5 Am. Dec. 106.

A discredited rule.— The later decisions in Massachusetts indorse the view of Justice Thomas in Baxter *v.* Abbott, 7 Gray 71, 79: "All lawyers know how difficult it is to try issues of sanity with the restrictions as to matters of opinion already existing; how hard it is to make witnesses distinguish between matters of fact and opinion on this subject; between the conduct and traits of character they observe, and the impression which that conduct and those traits create, or the mental conclusion to which they lead the mind. If it were a new question, I should be disposed to allow every witness to give his opinion, subject to cross-examination upon the reasons upon which it is based, his degree of intelligence, and his means of observation. It is at least unwise to increase the existing restrictions." See Com. *v.* Brayman, 136 Mass. 438. Later cases, while not covering the precise point under consideration, are practically, in their reasoning, inconsistent with the recognized rule. For example it has been held that witnesses may state whether there has been "an apparent change in a man's intelligence or understanding, or a want of coherence in his remarks." This is said to be not a matter of opinion, "but of fact, as to which any witness who has had opportunity to observe may testify, in order to put before the court or jury the acts and conduct from which the degree of his mental capacity may be inferred." Barker *v.* Comins, 110 Mass. 477, 487. On an issue as to a testator's mental soundness, a witness who three weeks before the date of the will observed no incoherence of thought in the testator nor anything unusual or singular in respect to his mental condition, may state that fact. McCoy *v.* Jordan, 184 Mass. 575, 69 N. E. 358; Hogan *v.* Roche, 179 Mass. 510, 61 N. E. 57; McConnell *v.* Wildes, 153 Mass. 487, 26 N. E. 1114; Nash *v.* Hunt, 116

and New York,[1] although frequently with increasing reluctance, indicated by a

Mass. 237. A witness may testify that a boy "had no memory, that he was not a bright boy, and had to be told once or twice before he understood, and that sometimes, if you asked him a question, he would answer something else." The court said: "These are matters upon which ordinary people are capable of forming an intelligent opinion, and which do not require an expert to answer them." Laplante *v.* Warren Cotton Mills, 165 Mass. 487, 489, 43 N. E. 294. A statement of the degree of intelligence characteristic of a person may be stated (Hewitt *v.* Taunton St. R. Co., 167 Mass. 483, 46 N. E. 106, that a boy was of average intelligence) or any lack of memory (McCoy *v.* Jordan, 184 Mass. 575, 69 N. E. 358). Much of any remaining force in the rule is removed by a recent line of cases holding that an observer may be asked "whether he had observed any fact which led him to infer that there was any derangement of intellect." Hewitt *v.* Taunton St. R. Co., 167 Mass. 483, 46 N. E. 106; McConnell *v.* Wildes, 153 Mass. 487, 26 N. E. 1114; May *v.* Bradlee, 127 Mass. 414. This is truly said not to be "opinion." But the difference between permitting a witness to state his inference from observed facts as to insanity and allowing him to state whether his observation discloses anything which leads to an inference of insanity seems one of words rather than of ideas. A still further approximation to the general rule obtains to the effect that witnesses who have had suitable opportunities for observation may state as to whether there has been a change in mental powers. Clark *v.* Clark, 168 Mass. 523, 47 N. E. 510; Com. *v.* Brayman, 136 Mass. 438; Barker *v.* Comins, 110 Mass. 477. The fact of how the person in question impressed a witness in the matter of sanity may be elicited on cross-examination. Hogan *v.* Roche, 179 Mass. 510, 61 N. E. 57. For the Massachusetts rule regarding family physicians see *infra*, XI, D, 12, a, (I), (B), (1).

1. Wyse *v.* Wyse, 155 N. Y. 367, 49 N. E. 942; People *v.* Koerner, 154 N. Y. 355, 48 N. E. 730; People *v.* Youngs, 151 N. Y. 210, 45 N. E. 460; People *v.* Strait, 148 N. Y. 569, 42 N. E. 1045; Paine *v.* Aldrich, 133 N. Y. 547, 30 N. E. 725; People *v.* Fish, 125 N. Y. 136, 26 N. E. 319; Holcomb *v.* Holcomb, 95 N. Y. 316; Real *v.* People, 42 N. Y. 270 [*affirming* 55 Barb. 551, 8 Abb. Pr. N. S. 314]; O'Brien *v.* People, 36 N. Y. 276 [*affirming* 48 Barb. 274]; Clapp *v.* Fullerton, 34 N. Y. 190, 90 Am. Dec. 681]; People *v.* O'Donnell, 51 N. Y. App. Div. 115, 64 N. Y. Suppl. 256, 15 N. Y. Cr. 40; *In re* Arnold, 14 Hun (N. Y.) 525 Deshon *v.* Merchants' Bank, 8 Bosw. (N. Y.) 461. A witness cannot state his opinion as to his own mental soundness at a particular time. O'Connell *v.* Beecher, 21 N. Y. App. Div. 298, 47 N. Y. Suppl. 334. *A fortiori* an ordinary observer cannot testify as to sanity from observations made by others. Bell *v.* McMaster, 29 Hun (N. Y.) 272.

The history of the rule in New York is peculiar. The evidence of ordinary observers as to sanity was at first rejected against a strong dissenting opinion by Judge Denio. Dewitt *v.* Barley, 9 N. Y. 371. The reasoning of the dissenting opinion was adopted by the majority in a subsequent hearing of the same case. De Witt *v.* Barly, 17 N. Y. 340. This ruling was again reversed in later cases and the earlier rule restored. See the cases cited *supra* in this note.

Distinctions taken by the New York courts make the rule as a whole difficult of administration, and give apparently undue importance to the form of words; as is indeed necessary where differences lie principally in degree. While a witness may not state as the result of personal observation the opinion formed by him or as to the impressions formed as to whether the subject of his observation was rational or irrational, he may be asked whether the conversations and acts were "those of a rational or an irrational man" (Johnson *v.* Cochrane, 159 N. Y. 555, 54 N. E. 1092; Wyse *v.* Wyse, 155 N. Y. 367, 49 N. E. 942; People *v.* Youngs, 151 N. Y. 210, 45 N. E. 460; People *v.* Strait, 148 N. Y. 566, 42 N. E. 1045; People *v.* Taylor, 138 N. Y. 398, 34 N. E. 275; Paine *v.* Aldrich, 133 N. Y. 544, 30 N. E. 725; People *v.* Packenham, 115 N. Y. 200, 21 N. E. 1035; People *v.* Conroy, 97 N. Y. 62; Johnson *v.* Cochrane, 91 Hun (N. Y.) 165, 36 N. Y. Suppl. 283), and how he was impressed by other acts of the testator in regard to their rational or irrational character (Rider *v.* Miller, 86 N. Y. 507; Hewlett *v.* Wood, 55 N. Y. 634; O'Brien *v.* People, 36 N. Y. 276, 2 Transcr. App. (N. Y.) 5, 3 Abb. Pr. N. S. (N. Y.) 368; Clapp *v.* Fullerton, 34 N. Y. 190, 90 Am. Dec. 681; White *v.* Davis, 62 Hun (N. Y.) 622, 17 N. Y. Suppl. 548; Howell *v.* Taylor, 11 Hun (N. Y.) 214; Yeandle *v.* Yeandle, 13 N. Y. St. 586), and in general as to the impressions which observed phenomena have made on his mind (People *v.* Youngs, *supra*), or whether he noticed anything which indicated insanity (People *v.* Krist, 168 N. Y. 19, 60 N. E. 1057, 15 N. Y. Cr. 532). It was said in Clapp *v.* Fullerton, 34 N. Y. 190, 194, that "when a layman is examined as to facts, within his own knowledge and observation, tending to show the soundness or unsoundness of the testator's mind, he may characterize, as rational or irrational, the acts and declarations to which he testifies. It is legitimate to give them such additional weight as may be derived from the conviction they produced at the time. The party calling him may require it, to fortify the force of the facts, and the adverse party may demand it, as a mode of probing the truth and good faith of the narration. But to render his opinion admissible, even to this extent, it must be limited to his conclusions from the specific facts he discloses. His position is that of an observer, and not of a professional expert. He may testify to the impression produced by what he witnessed; but he is not legally competent

refusal to extend the ruling beyond the precise terms in which it has been stated, it is held that the inference of a non-expert witness as to sanity is inadmissible.[2]

8. Mental State — a. When Inference Is Received. Where the main ingredient in an inference as to the existence of a relevant[3] mental[4] state is the intuitive induction from observed appearances, it amounts in substance to the statement of a fact and is accordingly received,[5] upon a statement by the witness of such

to express an opinion on the general question, whether the mind of the testator was sound or unsound."

A matter of discretion.— The practical inconvenience in attempting to work so technical a set of rules is not permitted to work substantial hardship or injustice on account of the practice of the appellate court in not regarding a technical departure from the strictness of the rules as prejudicial error. Wyse *v.* Wyse, 155 N. Y. 367, 49 N. E. 942. The ultimate result is that the whole matter is largely a matter of discretion.

2. See the cases in the preceding notes.

3. Thompkins *v.* Augusta, etc., R. Co., 21 S. C. 420; Over *v.* Missouri, etc., R. Co., (Tex. Civ. App. 1903) 73 S. W. 535; Morrison *v.* State, 40 Tex. Cr. 473, 51 S. W. 358 (contented and joyous); Hurlbut *v.* Boaz, 4 Tex. Civ. App. 371, 23 S. W. 446 (malicious prosecution). See *infra*, XI, C, 8, b.

4. A distinction is taken as to moral qualities where the inference is rejected. See *supra*, XI, C, 2, a, (II).

5. *California.*—Holland *v.* Zollner, 102 Cal. 633, 639, 36 Pac. 930, 37 Pac. 231, where the court said: "Love, hatred, sorrow, joy, and various other mental and moral operations, find outward expression, as clear to the observer as any fact coming to his observation, but he can only give expression to the fact by giving what to him is the ultimate fact, and which, for want of a more accurate expression, we call opinion. To say that a man acts rational or irrational is but to describe an outward manifestation drawn from observed facts. It is the last analysis, the ultimate fact, deduced from evidentiary facts, coming under observation, but so transitory and evanescent as to be like drunkenness, easy of detection, and difficult of explanation. Such conduct is not so much a matter of judgment as of observation."

Massachusetts.— Com. *v.* Sturtivant, 117 Mass. 122, 19 Am. Rep. 401.

Missouri.— State *v.* Buchler, 103 Mo. 203, 15 S. W. 331, where it was held that evidence is competent that the expression on a prisoner's face at the time of an assault was "anger, ferocity, vulgar hate. The meanest look a mortal man's face could have."

New Hampshire.— Whitman *v.* Morey, 63 N. H. 448, 2 Atl. 899 (favorably inclined); Hardy *v.* Merrill, 56 N. H. 227, 241, 242, 22 Am. Rep. 441 (where the court said as a general rule: "Opinions of witnesses derived from observation are admissible in evidence, when, from the nature of the subject under investigation, no better evidence can be obtained. . And so, also, in the investigation of mental and psychological conditions, — because it is impossible to convey to the mind of another any adequate conception of the truth by a recital of visible and tangible appearances,— because you cannot, from the nature of the case, describe emotions, sentiments, and affections, which are really too plain to admit of concealment, but, at the same time, incapable of description,— the opinion of the observer is admissible from the necessity of the case; and witnesses are permitted to say of a person, 'he seemed to be frightened;' 'he was greatly excited;' 'he was much confused;' 'he was agitated;' 'he was pleased;' 'he was angry.' All these emotions are expressed to the observer by appearances of the countenance, the eye, and the general manner and bearing of the individual,— appearances which are plainly enough recognized by a person of good judgment, but which he cannot otherwise communicate than by an expression of results in the shape of an opinion."

Texas.— Powers *v.* State, 23 Tex. App. 42, 63, 5 S. W. 153.

England.— Dew *v.* Clark, 3 Add. Eccl. 79, 108; Wheeler *v.* Alderson, 3 Hagg. Eccl. 574.

In the English ecclesiastical courts witnesses have been permitted to testify of a testator that he was a man of an irritable and violent temper, exceedingly self-willed, and impatient of contradiction, and had his full share of pride and conceit; he was very precise and exact in his domestic arrangements, and had certainly very high notions of parental authority; if he said to his child that such a thing was to be done, there was no disobeying or contradicting him. Dew *v.* Clark, 3 Add. Eccl. 79, 108. It may be testified that a testatrix "appeared a sensible woman, one that I should call a sharp woman — not to be deceived, and who looked after her own interest." Wheeler *v.* Alderson, 3 Hagg. Eccl. 574.

If all the facts can be stated, the evidence of the inference is inadmissible. See *supra*, XI, A, 4, b.

Statement as to party's own mental state. — It has been held that the same rule applies to a party's statement as to his own motive or other mental state, and that such a statement is to be rejected as an inference. Mobile Furniture Commission Co. *v.* Little, 108 Ala. 399, 19 So. 443; McCormick *v.* Joseph, 77 Ala. 236; Hoehn *v.* Chicago, etc., R. Co., 152 Ill. 223, 38 N. E. 549; Douglass *v.* Leonard, 17 N. Y. Suppl. 591 [*reversing* 14 N. Y. Suppl. 274]; Simmons Hardware Co. *v.* Greenwood Bank, 41 S. C. 177, 19 S. E. 502, 44 Am. St. Rep. 700.

constituent facts as he is able to detail.[6] Among instances of the application of this rule is the expression of the emotions, as affection,[7] anger,[8] anguish,[9] expectation,[10] fear,[11] grief,[12] indifference,[13] or melancholy;[14] and also the existence of

6. Sydleman *v.* Beckwith, 43 Conn. 9, 13 (where the court said: "In all cases it is important, with a view to confirm the opinion, that the witness should be able to state such facts as will show presumptively that his opinion is well founded. But it is not quite correct to say that the opinion of a witness is entitled to consideration only so far as the facts stated by him sustain the opinion, unless the proposition is understood to include among the facts referred to, the acquaintance of the witness with the subject matter and his opportunities for observation. The very basis upon which, as we have seen, this exception to the general rule rests, is that the nature of the subject matter is such that it cannot be reproduced or detailed to the jury precisely as it appeared to the witness at the time"); Cothran *v.* Forsyth, 68 Ga. 560; Marshall *v.* Hanby, 115 Iowa 318, 88 N. W. 801.

7. McKee *v.* Nelson, 4 Cow. (N. Y.) 355, 356, 15 Am. Dec. 384 (where it was held that on an action for breach of promise of marriage plaintiff may ask members of her family whether she was "sincerely attached" to defendant at the time of his desertion, the court saying: "We think the Judge's decision founded in good sense, and in the nature of things. We do not see how the various facts upon which an opinion of the plaintiff's attachment must be grounded are capable of specification, so as to leave it, like ordinary facts, as a matter of inference, to the jury. It is true, as a general rule, that witnesses are not allowed to give their opinions to a jury; but there are exceptions, and we think this one of them. There are a thousand nameless things, indicating the existence and degree of the tender passion, which language cannot specify. The opinion of witnesses on this subject must be derived from a series of instances, passing under their observation, which yet they never could detail to a jury"); State *v.* James, 31 S. C. 218, 9 S. E. 844 (friendly); Trelawney *v.* Coleman, 1 B. & Ald. 90, 2 Stark. 191, 192, 18 Rev. Rep. 438, 3 E. C. L. 372 (where in an action of criminal conversation alleged to have taken place with plaintiff's wife a witness was permitted to testify as to the affection the wife showed for plaintiff, Holroyd, J., being of opinion "that the judgment which the witness had formed, from the anxiety which the wife had expressed concerning her husband, and from her mode of speaking of him during her absence from him was evidence").

8. People *v.* Lilly, 38 Mich. 270; State *v.* Buchler, 103 Mo. 203, 207, 15 S. W. 331 (where the court said: "If the expressions of the countenance of one accused of crime could be seen by, or reproduced before the jury exactly as it was at the time, and immediately before and after the act, there can be no doubt it would have great weight in determining the intent and purpose of the accused, and the motives by which he was actuated; often it would be absolutely convincing. Such being its character, evidence of such expression would certainly be admissible. The general rule, it is true, is, that a witness must testify to facts, and the jury draw its conclusions from these facts. There are, however, manifestations, expressions, and conditions which language, at least of ordinary persons, cannot reproduce. Of such matters a witness is allowed to give the impression produced upon himself. This impression may be very near to an opinion"); State *v.* Edwards, 112 N. C. 901, 15 S. E. 521 ("mad").

9. So of the appearance of mental anguish due to non-delivery of a telegram requesting attendance for dangerous illness of a near relative. Sherrill *v.* Western Union Tel. Co., 117 N. C. 352, 23 S. E. 277, where the court said in substance it was competent therefore to prove that plaintiff seemed to be melancholy or to be suffering severe mental anguish when she was living in his house and constantly associated with him. The appearance of the countenance sometimes at least furnishes far more reliable evidence of mental agony than words, which are often used to give expression to what is feigned, and the impression produced can only be communicated to others as an opinion.

10. State *v.* Thomas, 41 La. Ann. 1088, 6 So. 803, that a witness expected to meet a person at a certain place.

11. Thornton *v.* State, 113 Ala. 43, 21 So. 356, 59 Am. St. Rep. 97 (frightened); State *v.* Houston, 78 Ala. 576, 56 Am. Rep. 59 ("scared"); State *v.* Ramsey, 82 Mo. 133 ("scared — as if he wanted to get away"); State *v.* Shinborn, 46 N. H. 497, 88 Am. Dec. 224; Galveston, etc., R. Co. *v.* Wesch, 85 Tex. 593, 22 S. W. 957 (holding that a passenger on a railroad train in describing the condition of the passengers just prior to an accident should be allowed to state that "all were nervous, apprehensive, and the effects and sensations were those of very fast speed, and what seemed to me reckless speed").

12. Hughes *v.* Nolte, 7 Ind. App. 526, 34 N. E. 745.

13. Com. *v.* Piper, 120 Mass. 185, holding that in a prosecution for murder evidence was competent that the prisoner soon after the murder "took no interest apparently in what was going on; that is, he took no interest in it to ask questions or answer questions."

14. Smith *v.* Hickenbottom, 57 Iowa 733, 11 N. W. 664 ("very much cast down"); Culver *v.* Dwight, 6 Gray (Mass.) 444 (sad). On the other hand it was held in an Alabama case that evidence that a person looked "downcast" was but the opinion of the witness and should not have been admitted. McAdory *v.* State, 59 Ala. 92 [*citing* Gassenheimer *v.* State, 52 Ala. 313; Johnson *v.* State, 17 Ala. 618, 625].

more complicated mental states, as belief or intention,[15] knowledge,[16] or the operation of undue or other influence.[17] The disposition of an animal,[18] as gentle, safe, and kind,[19] or sulky,[20] may be shown in the same way;[21] provided the witness is shown to have had suitable opportunities to form a reasonable conclusion and the capacity to do so.[22]

b. When Inference Is Rejected. Where the inference as to the existence of a mental state is one which is conceived rather than perceived; where it is reached by the aid, in some substantial degree, of the reasoning faculty;[23] or the fact inferred is irrelevant,[24] or in issue,[25] or the observer has no sufficient basis for the inference which he proposes to state,[26] he is not permitted to testify as to the existence of such a state.[27] This is true for example of fear,[28] fraud,[29] good faith,[30]

15. Spencer *v.* Peterson, 41 Oreg. 257, 69 Pac. 519, 1108.

16. Jeffersonville *v.* McHenry, 22 Ind. App. 10, 53 N. E. 183.

17. Marshall *v.* Hanby, 115 Iowa 318, 88 N. W. 801; Pattee *v.* Whitcomb, 72 N. H. 249, 56 Atl. 459; Eagleton *v.* Kingston, 8 Ves. Jr. 438, 450, 32 Eng. Reprint 425.

To refuse an opportunity of cross-examination as to what constitutes the basis of the inference is error. Marshall *v.* Hanby, 115 Iowa 318, 88 N. W. 801.

18. Sydleman *v.* Beckwith, 43 Conn. 9, 13 (where the court said: "Where the disposition of a person or of an animal (as in this case) is to be ascertained, the fact to be proved, being latent, can be ascertained only by symptoms and outward manifestations. If these happen to be very striking they may remain in the memory and can be stated, but in many cases they are very slight in each particular instance, and only the impression of an indefinite number of such appearances remains, resulting in an opinion that the quality or disposition in question exists"); Pioneer Fireproof Constr. Co. *v.* Sunderland, 188 Ill. 341, 58 N. E. 928; Whittier *v.* Franklin, 46 N. H. 23, 88 Am. Dec. 185.

19. Sydleman *v.* Beckwith, 43 Conn. 9.

20. Whittier *v.* Franklin, 46 N. H. 23, 88 Am. Dec. 185, horse.

21. See also *supra*, XI, C, 2, a, (IV).

22. Pattee *v.* Whitcomb, 72 N. H. 249, 56 Atl. 459; San Antonio *v.* Porter, 24 Tex. Civ. App. 444, 59 S. W. 922, holding that the history of a horse's conduct at the time of an accident is not sufficient qualification.

23. State *v.* Houston, 78 Ala. 576, 56 Am. Rep. 59 (holding that the statement of a witness that certain appearances "impressed me with the belief that his robbery was real" was not competent); Manahan *v.* Halloran, 66 Minn. 483, 69 N. W. 619 (appeared afraid and under person's influence); Diefendorf *v.* Thomas, 37 N. Y. App. Div. 49, 55 N. Y. Suppl. 699 (claimed to own land); Reese *v.* Morgan Silver Min. Co., 17 Utah 489, 54 Pac. 759 (knowledge).

24. *Alabama.*— Burns *v.* Campbell, 71 Ala. 271, undisclosed approval.

Illinois.— Cihak *v.* Klekr, 117 Ill. 643, 7 N. E. 111, intention.

Indiana.— Louisville, etc., R. Co. *v.* Goben, 15 Ind. App. 123, 42 N. E. 1116, 43 N. E. 890, knowledge at trial.

Iowa.—Aiken *v.* Chicago, etc., R. Co., 68 Iowa 363, 27 N. W. 281, belief.

Maine.— Soloman *v.* American Mercantile Exch., 93 Me. 436, 45 Atl. 510, 74 Am. St. Rep. 366, purpose.

Massachusetts.—Goodale *v.* Worcester Agricultural Soc., 102 Mass. 401 (reasons); Lee *v.* Wheeler, 11 Gray 236 (reasons).

Missouri.— Rumsey *v.* People's R. Co., 154 Mo. 215, 55 S. W. 615, influence.

New York.— Jennings *v.* Supreme Council Royal Additional Ben. Assoc., 81 N. Y. App. Div. 76, 81 N. Y. Suppl. 90 (reasons); Pope *v.* McGill, 58 Hun 294, 12 N. Y. Suppl. 306 (relied for payment); Moore *v.* New York El. R. Co., 15 Daly 510, 8 N. Y. Suppl. 769, 24 Abb. N. Cas. 74 (reasons).

North Carolina.— Wolf *v.* Arthur, 112 N. C. 691, 16 S. E. 843, fraud, intention, good faith.

Pennsylvania.— Heath *v.* Slocum, 115 Pa. St. 549, 9 Atl. 259, purpose.

Texas.— McKnight *v.* Reed, 30 Tex. Civ. App. 204, 71 S. W. 318, purpose or intention.

25. *Illinois.*— Wabash R. Co. *v.* Smillie, 97 Ill. App. 7, reliance.

Indiana.— Maier *v.* Board of Public Works, 151 Ind. 197, 51 N. E. 233, fraud.

Iowa.— Plano Mfg. Co. *v.* Kautenberger, 121 Iowa 213, 96 N. W. 743, defendant fully understood he owed and was to pay a certain sum.

New Jersey.— Farrington *v.* Minturn, 70 N. J. L. 627, 57 Atl. 269, intention to pay.

Utah.— Watson *v.* Butterfield Min. Co., 24 Utah 222, 66 Pac. 1067 (purpose); Wooley *v.* Maynes, 18 Utah 232, 54 Pac. 833 (purpose).

26. Bush *v.* State, 109 Ga. 120, 34 S. E. 298 (disposition); Jones *v.* Grogan, 98 Ga. 552, 25 S. E. 590 (exercise of undue influence); State *v.* Stockhammer, 34 Wash. 262, 75 Pac. 810 (bitter feeling).

27. See the cases cited in the preceding and following notes.

28. Lewis *v.* State, 96 Ala. 6, 11 So. 259, 38 Am. St. Rep. 75; Poe *v.* State, 87 Ala. 65, 6 So. 378; Manahan *v.* Halloran, 66 Minn. 483, 69 N. W. 619.

29. Maier *v.* Board of Public Works, 151 Ind. 197, 51 N. E. 233; Carey *v.* Gunnison, 51 Iowa 202, 1 N. W. 510; Wolf *v.* Arthur, 112 N. C. 691, 16 S. E. 843.

30. Durrence *v.* Northern Nat. Bank, 117 Ga. 385, 43 S. E. 726; Wolf *v.* Arthur, 112 N. C. 691, 16 S. E. 843.

intention,[31] knowledge,[32] understanding,[33] motive,[34] purpose,[35] reasons,[36] belief,[37] undue or other influence,[38] reliance,[39] and other mental states[40] of another person;[41] the extent of his will power;[42] the nature of his disposition;[43] or what entered into his consciousness by means of hearing, vision, or other faculty.[44]

9. Resemblance — a. In General. Resemblance, like identity,[45] presents such necessity for coördinating the impressions caused by many and often minute and subtle phenomena as to require that a witness be permitted to state his inference;[46]

31. *Alabama.*— Baldwin *v.* Walker, 94 Ala. 514, 10 So. 391; State *v.* Houston, 78 Ala. 576, 56 Am. Rep. 59; Harrison *v.* State, 78 Ala. 5; Clement *v.* Cureton, 36 Ala. 120; Planters', etc., Bank *v.* Borland, 5 Ala. 531.

Illinois.— Cihak *v.* Klekr, 117 Ill. 643, 7 N. E. 111.

Iowa.— Carey *v.* Gunnison, 51 Iowa 202, 1 N. W. 510. But see Starr *v.* Stevenson, 91 Iowa 684, 60 N. W. 217.

New Jersey.— Farrington *v.* Minturn, 70 N. J. L. 627, 57 Atl. 269.

North Carolina.—Wolf *v.* Arthur, 112 N. C. 691, 16 S. E. 843.

Texas.— Hammond *v.* Hough, 52 Tex. 63; McKnight *v.* Reed, 30 Tex. Civ. App. 204, 71 S. W. 318.

32. *Alabama.*—Ashford *v.* Ashford, 136 Ala. 631, 34 So. 10, 96 Am. St. Rep. 82.

Indiana.— Louisville, etc., R. Co. *v.* Goben, 15 Ind. App. 123, 42 N. E. 1116, 43 N. E. 890.

Iowa.— State *v.* Worthen, 111 Iowa 267, 82 N. W. 910.

Minnesota.— Bank of Commerce *v.* Selden, 1 Minn. 340.

New York.— Major *v.* Spies, 66 Barb. 576.

Texas.— International, etc., R. Co. *v.* Bearden, 31 Tex. Civ. App. 58, 71 S. W. 558. But see Gulf, etc., R. Co. *v.* West, (Civ. App. 1896) 36 S. W. 101.

Utah.— Reese *v.* Morgan Silver Min. Co., 17 Utah 489, 54 Pac. 759.

United States.— Union Pac. R. Co. *v.* O'Brien, 161 U. S. 451, 16 S. Ct. 618, 40 L. ed. 766 [*affirming* 49 Fed. 538, 1 C. C. A. 354].

33. Plano Mfg. Co. *v.* Kautenberger, 121 Iowa 213, 96 N. W. 743.

34. *Alabama.*— Peake *v.* Stout, 8 Ala. 647.

California.— Tait *v.* Hall, 71 Cal. 149, 12 Pac. 391.

Illinois.— Ames *v.* Snider, 69 Ill. 376.

Minnesota.—Lowry *v.* Harris, 12 Minn. 255.

New York.— Manufacturers', etc., Bank *v.* Koch, 105 N. Y. 630, 12 N. E. 9; Dwight *v.* Badgley, 60 Hun 144, 14 N. Y. Suppl. 498.

35. *Alabama.*— Cox *v.* Whitfield, 18 Ala. 738.

Illinois.— Ryan *v.* Potwin, 60 Ill. App. 637.

Maine.— Solomon *v.* American Mercantile Exch., 93 Me. 436, 45 Atl. 510, 74 Am. St. Rep. 366.

New York.— Clussman *v.* Merkel, 3 Bosw. 402; Western Nat. Bank *v.* Flannagan, 14 Misc. 317, 35 N. Y. Suppl. 848.

Pennsylvania.— Heath *v.* Slocum, 115 Pa. St. 549, 9 Atl. 259.

Texas.— McKnight *v.* Reed, 30 Tex. Civ. App. 204, 71 S. W. 318.

Utah.— Watson *v.* Butterfield Min. Co., 24 Utah 222, 66 Pac. 1067; Wooley *v.* Maynes, 18 Utah 232, 54 Pac. 833.

Wisconsin.— Wisconsin Cent. Bank *v.* St. John, 17 Wis. 157.

36. *Alabama.*— Southern R. Co. *v.* Shelton, 136 Ala. 191, 34 So. 194.

Maryland.— Salmon *v.* Feinour, 6 Gill & J. 60.

Massachusetts.—Goodale *v.* Worcester Agricultural Soc., 102 Mass. 401; Lee *v.* Wheeler, 11 Gray 236.

New York.— Jennings *v.* Supreme Council Royal Additional Ben. Assoc., 81 N. Y. App. Div. 76, 81 N. Y. Suppl. 90; Filkins *v.* Baker, 6 Lans. 516; Moore *v.* New York El. R. Co., 15 Daly 510, 8 N. Y. Suppl. 769, 24 Abb. N. Cas. 74; Everitt *v.* New York Engraving, etc., Co., 14 Misc. 580, 35 N. Y. Suppl. 1097.

Wisconsin.— Flanders *v.* Cottrell, 36 Wis. 564.

37. Happy *v.* Morton, 33 Ill. 398 (religious belief); Aiken *v.* Chicago, etc., R. Co., 68 Iowa 363, 27 N. W. 281; Faribault *v.* Sater, 13 Minn. 223.

38. Jones *v.* Grogan, 98 Ga. 552, 25 S. E. 590; Manahan *v.* Halloran, 66 Minn. 483, 69 N. W. 619; Rumsey *v.* People's R. Co., 154 Mo. 215, 55 S. W. 615.

39. Wabash R. Co. *v.* Smillie, 97 Ill. App. 7; Pope *v.* McGill, 58 Hun (N. Y.) 294, 12 N. Y. Suppl. 306.

40. *Alabama.*— Burns *v.* Campbell, 71 Ala. 271, approval.

Indiana.— McVey *v.* Blair, 7 Ind. 590, affection.

Minnesota.— Faribault *v.* Sater, 13 Minn. 223, effect of representations.

New York.— Diefendorf *v.* Thomas, 37 N. Y. App. Div. 49, 55 N. Y. Suppl. 699 (claim of ownership); Metz *v.* Luckemeyer, 59 N. Y. Super. Ct. 53, 12 N. Y. Suppl. 550 (dissatisfaction).

Pennsylvania.— Leckey *v.* Bloser, 24 Pa. St. 401, mutual attachment.

South Dakota.— Enos *v.* St. Paul F. & M. Ins. Co., 4 S. D. 639, 57 N. W. 919, 46 Am. St. Rep. 796.

Texas.— Sheffield *v.* Sheffield, 3 Tex. 79, marital relations insupportable.

Washington.— State *v.* Stockhammer, 34 Wash. 262, 75 Pac. 810, bitter feeling.

41. *Compare supra,* XI, C, 2, a, (IV); XI, C, 3, b.

42. Goodwin *v.* State, 96 Ind. 550, control of appetite for liquor.

43. Bush *v.* State, 109 Ga. 120, 34 S. E. 298, violent.

44. Handley *v.* Missouri Pac. R. Co., 61 Kan. 237, 59 Pac. 271.

45. See *supra,* XI, C, 5.

46. Com. *v.* Dorsey, 103 Mass. 412 (that hair resembled that of deceased); Crumes *v.* State, 28 Tex. App. 516, 13 S. W. 868, 19

whether the resemblance is said to exist between persons or things,[47] or between persons and their bust[48] or photograph.[49] By a line of reasoning not very well defined it has been decided that the resemblance of a child to the alleged father cannot be made the subject of direct testimony.[50] In all cases the witness should

Am. St. Rep. 853 (that hair resembled that of defendant's horse). Probably if all points of resemblance could be fully stated a court might with propriety reject the evidence. Thus it has been held that a party had no ground of exception by reason of the exclusion of a question, on cross-examination of an expert in a land damage case, as to whether there was "any topographical resemblance" between certain estates. "It was much better," said the court, "to have the witness describe the two estates than to permit him to express his opinion on their topographical similarity." Lyman *v.* Boston, 164 Mass. 99, 104, 41 N. E. 127.

47. Com. *v.* Dorsey, 103 Mass. 412 (holding that whether certain hairs looked to the naked eye like human hair and resembled those of deceased are facts as to which any observer may testify); State *v.* Ehinger, 67 Ohio St. 51, 65 N. E. 148 (oleomargarine and butter); People *v.* Thiede, 11 Utah 241, 39 Pac. 837 (holding that a witness may properly state that certain stains resembled blood); Abbey *v.* Lill, 5 Bing. 299, 7 L. J. C. P. O. S. 96, 2 M. & P. 534, 15 E. C. L. 591 (holding that the authenticity of a postmark may be decided by the testimony of one who has been in the habit of receiving such letters).

Handwriting as an instance.— The testimony of a non-expert witness as to handwriting may properly be regarded as a statement of resemblances, more or less completely remembered. McDonald *v.* McDonald, 142 Ind. 55, 41 N. E. 336. Even where the testimony is that of a skilled observer by comparison of hands, so called, it is still merely a question of observed resemblance. By the assumption that the standard of comparison is a genuine and fair sample of the disputed handwriting, the intellect is it is true appealed to in a sense. But the evidence is hardly that of an "expert," properly so called, for the essential value of the evidence lies in the detection of subtle differences and resemblances which especially trained or endowed senses of perception have enabled the skilled observer to detect to an extent denied ordinary observers. Crawford Peerage Case, 2 H. L. Cas. 534, 9 Eng. Reprint 1196. Such witnesses, however, are usually spoken of as "experts," and the court determines which witnesses possess the requisite skill to make their inferences of value to the jury. Com. *v.* Williams, 105 Mass. 62. See *infra*, XI, C, 9, b.

48. Schwartz *v.* Wood, 67 Hun (N. Y.) 648, 21 N. Y. Suppl. 1053.

49. Barnes *v.* Ingalls, 39 Ala. 193. Any one who has taken photographs may state whether certain pictures are good likenesses. Barnes *v.* Ingalls, *supra*.

50. Shorten *v.* Judd, 56 Kan. 43, 42 Pac. 337, 54 Am. St. Rep. 587; Keniston *v.* Rowe, 16 Me. 38; Jones *v.* Jones, 45 Md. 144; Eddy *v.* Gray, 4 Allen (Mass.) 435. The argument against admitting the evidence seems to be that the fact is irrelevant and misleading in that while apparently probative it really furnishes a fact too fanciful to be a safe basis for the jury's action, unless they are enabled to act upon the resemblance as real evidence from their own inspection. The Maryland court of appeals announces the prevailing rule in saying: "We all know that nothing is more notional in the great majority of cases. What is taken as a resemblance by one is not perceived by another, with equal knowledge of the parties between whom the resemblance is supposed to exist. Where the parties are before the jury, and the latter can make the comparison for themselves, whatever resemblance is discovered may be a circumstance, in connection with others, to be considered. But to allow third persons to testify as to their notions of the resemblance supposed to exist between parties, would be allowing that to be given as evidence upon which no rational conclusion could be based, but which might readily serve to mislead the jury." Jones *v.* Jones, 45 Md. 144, 152. See BASTARDS, 5 Cyc. 663.

In England the evidence of resemblance has been admitted in certain cases. On a question of *partus suppositio*, the resemblances of the child to a person other than the parent claimed for it may be shown. Hubback Succession 384. It is necessary to notice the questions of the admissibility and force of personal resemblance and native or congenital characteristics as evidence of descent or consanguinity. Lord Mansfield, in the Douglas case, said that he had always considered likeness, as an argument of a child being the son of a parent; in other cases, if there should be a likeness of features, there might be a discriminancy of voice, a difference in the gesture, the smile, and various other things; whereas, a family likeness ran generally through all these; for in everything there was a resemblance, as in features, size, attitude, and action. Accordingly he allowed in his judgment for the appellant considerable weight to the proved resemblance of him and his brother to Sir John Stewart and Lady Jane Douglas, and to their dissimilitude to the other persons whose children they were alleged to be. 2 Coll. Jur. 402. In ejectment, where the question was one of *partus suppositio*, Mr. Justice Heath, following this authority, admitted evidence that defendant bore a strong resemblance to his supposed father, and in summing up, after observing that this evidence had been made light of, said he admitted that resemblance was frequently fanciful, and therefore the jury should be well convinced that it did

accompany his inference with a detailed statement of the facts observed by him so far as practicable;[51] and show suitable opportunities for observation and that they have been utilized;[52] and it is further necessary that the resemblance sought to be shown is a relevant fact,[53] and that it is necessary to prove it in this way.[54] The inference stated must be a summarizing of the facts observed by the witness; he is not permitted to state an inference as to the existence of a consequential fact which the phenomena observed tend to establish. Accordingly, while a witness may state that a certain track made by a boot or shoe "corresponded" with a given track,[55] it is not competent to ask whether defendant's shoe, "run down as it was," "would have made a track" such as was seen on the field.[56] The phenomenal quality of the inference in the two cases seems to differ and the distinction has received an extended, although not always conscious, recognition in the cases.[57] The witness is not allowed to state whether one track mark resembles another with sufficient closeness to deceive a person of ordinary intelligence,[58] although the evidence has been admitted, apparently without objection.[59]

b. Handwriting — (I) *IN GENERAL.* Proof that handwriting, marks, figures,[60] or signs were or were not made by a particular person consists, (1) in direct evidence of witnesses who saw them made,[61] (2) peculiarities in spelling, style, etc.,[62] or (3) inferences of competent observers from resemblances of a disputed writing to a mental standard created by means which the law deems adequate.[63] These

exist, but if they were so convinced it was impossible to have stronger evidence. Day *v.* Day, Huntington Assoc. (1797), Printed Report (3d ed.) 327; Hubback Succession 378.

51. Morse *v.* State, 6 Conn. 9.

52. See *supra*, XI, A, 4, a, (II), (III). It is not objectionable that a scientific observer is asked as to a matter which might have been covered by an unskilled witness. State *v.* Ehinger, 67 Ohio St. 51, 65 N. E. 148.

53. See *supra*, XI, A, 4, a.

54. Where the persons or things between which a resemblance is claimed to exist are before the jury, the inferences of witnesses are incompetent. Filer *v.* Smith, 96 Mich. 347, 55 N. W. 999, 35 Am. St. Rep. 603, resemblance between plaintiff and a certain photograph. See also *supra*, XI, A, 4, b.

55. Busby *v.* State, 77 Ala. 66; Com. *v.* Pope, 103 Mass. 440. See *supra*, XI, C, 5.

56. Busby *v.* State, 77 Ala. 66.

57. See *supra*, XI, C, 5.

58. Radam *v.* Capital Microbe Destroyer Co., 81 Tex. 122, 16 S. W. 990, 26 Am. St. Rep. 783.

59. Williams *v.* Brooks, 50 Conn. 278, 47 Am. Rep. 642; McLean *v.* Fleming, 96 U. S. 245, 24 L. ed. 828.

60. Stone *v.* Hubbard, 7 Cush. (Mass.) 595; Kux *v.* Central Michigan Sav. Bank, 93 Mich. 511, 53 N. W. 828; Sheldon *v.* Benham, 4 Hill (N. Y.) 129, 40 Am. Dec. 271; Norman *v.* Morrell, 4 Ves. Jr. 769, 4 Rev. Rep. 347, 31 Eng. Reprint 398.

61. See *infra*, XI, C, 9, b, (II), (A), (1). "The general rule seems to be, that the best evidence of hand-writing is a witness who actually saw the party write it." Redford *v.* Peggy, 6 Rand. (Va.) 316, 328, per Carr, J.

62. Karr *v.* State, 106 Ala. 1, 17 So. 328; Roe *v.* Roe, 40 N. Y. Super. Ct. 1 (holding that a skilled witness may testify from the "peculiar form of the letters and their peculiar connection" that two documents were written by the same person); Redford *v.* Peggy, 6 Rand. (Va.) 316, 331 (incorrect spelling); Smith *v.* Fenner, 22 Fed. Cas. No. 13,046, 1 Gall. 170.

On a question of identity specimens of handwriting by the person in question may be examined by the jury (Doe *v.* Roe, 16 Ga. 521; Udderzook *v.* Com., 76 Pa. St. 340), although not clearly shown to have been written by him (Bell *v.* Brewster, 44 Ohio St. 690, 10 N. E. 679), a consideration merely affecting the weight of the evidence.

The evidence here considered is intrinsic, and a witness is not at liberty to use past knowledge of and familiarity with the legal attainments, the style and composition of the alleged writer. Throckmorton *v.* Holt, 180 U. S. 552, 21 S. Ct. 474, 45 L. ed. 663.

Although the difference is one of degree proof of identity in the writer by peculiarities in spelling and the like is rather circumstantial evidence than proof of resemblance to a mental standard. "Nothing is clearer than that this is not a mere comparison of hands." Smith *v.* Fenner, 22 Fed. Cas. No. 13,046, 1 Gall. 170, 175. See also *infra*, XI, D, 6.

63. See *infra*, XI, C, 9, b, (II), (A), (2), (3). "Every man's hand-writing has a definite and distinct character, so much so that those familiar with it are, at all times, able to distinguish it from all others. It is this knowledge of hand-writing which forms the basis of reliable testimony on this subject. The witness should have an exampler in his mind, so that upon the presentation of a signature he can say that it corresponds or not with that in his own mind, which, the theory of the law supposes, every witness to have." Kinney *v.* Flynn, 2 R. I. 319, 326. "The theory upon which these expert witnesses are permitted to testify is that handwriting is always in some degree the reflex

qualifications, proof of which is requisite to admissibility,[64] may, in case of an unskilled observer, be established: (1) By seeing the individual in question write;[65] (2) by receiving specimens of his handwriting acknowledged by the writer to be genuine;[66] or (3) in certain jurisdictions by familiarity with his writing acquired in other ways.[67] In case of a skilled observer this standard may be created by a comparison of genuine specimens of the handwriting with that of the document in dispute.[68] As in other connections where resemblance[69] is to be shown, numerous and intangible facts, difficult of detailed statement by the witness or proper coördination by the tribunal, make it necessary that the witness, after proving his qualifications and detailing such of the constituent facts as he can, should be permitted to state, as a method of summarizing all such facts, the impression which they have made on his mind.[70] Much the same rule applies to proof of other facts concerning documents; as whether two specimens are shown circumstantially, as by the existence of various peculiarities in spelling, style and the like, to have been written by the same person.[71] Certainty of statement is not demanded.[72] If, for example, the witness testifies to a belief,[73] or to an "impression,"

of the nervous organization of the writer, which, independently of his will and unconsciously, causes him to stamp his individuality in his writing. I am convinced that this theory is sound." Gordon's Case, 50 N. J. Eq. 397, 422, 26 Atl. 268, per McGill, Ch.

64. Richardson *v.* Stringfellow, 100 Ala. 416, 14 So. 283.

A claim to knowledge of the handwriting is *prima facie* sufficient to entitle the claimant to testify.

Alabama.—Henderson *v.* Montgomery Bank, 11 Ala. 855.

Georgia.— Hughes *v.* Hughes, 72 Ga. 173; Bessman *v.* Girardey, 66 Ga. 18; Bruce *v.* Crews, 39 Ga. 544, 99 Am. Dec. 467.

Illinois.— Ennor *v.* Hodson, 28 Ill. App. 445.

Iowa.— Egan *v.* Murray, 80 Iowa 180, 45 N. W. 563.

Kansas.— Arthur *v.* Arthur, 38 Kan. 691, 17 Pac. 187.

New York.— Stevens *v.* Seibold, 5 N. Y. St. 258.

North Carolina.— Barwick *v.* Wood, 48 N. C. 306. But see Carrier *v.* Hampton, 33 N. C. 307.

Ohio.— McCracken *v.* West, 17 Ohio 16.

Pennsylvania.— Whittier *v.* Gould, 8 Watts 485.

South Carolina.— Stoddard *v.* Hill, 38 S. C. 385, 17 S. E. 138; Pradiere *v.* Combe, 3 Brev. 481, 2 Treadw. 625.

United States.— Goodhue *v.* Bartlett, 10 Fed. Cas. No. 5,538, 5 McLean 186.

The claim is not necessary to admissibility, however, where the fact otherwise appears. Riggs *v.* Powell, 46 Ill. App. 75 [*affirmed* in 142 Ill. 453, 32 N. E. 482].

Cross-examination.— The basis of knowledge may be developed upon cross-examination. Hinchman *v.* Keener, 5 Colo. App. 300, 38 Pac. 611; Moody *v.* Rowell, 17 Pick. (Mass.) 490, 28 Am. Dec. 317; Goodhue *v.* Bartlett, 10 Fed. Cas. No. 5,538, 5 McLean 186.

Authority of officer of corporation.— A witness, on being shown a writing purporting to be signed by an officer of a corporation, may state whether the signature is that of such officer, over the objection that it has not been shown that he was authorized to execute the instrument, proof of his authority not being necessary before proof of the genuineness of his signature. Coney Island, etc., Race Co. *v.* Boyton, 87 N. Y. App. Div. 251, 84 N. Y. Suppl. 347.

65. See *infra*, XI, C, 9, b, (II), (A), (1).

66. See *infra*, XI, C, 9, b, (II), (A), (2).

67. See *infra*, XI, C, 9, b, (II), (A), (3).

68. See *infra*, XI, C, 9, b, (III).

69. See *supra*, XI, C, 9, a.

Detection of forgery or imitation.— The resemblance to which the evidence of the witness is directed is of the disputed document to the mental standard of the person whose writing it purports to be. None but a skilled witness can testify to a resemblance of the writing in an imitated document to the handwriting of the person who is said to have forged it. Neall *v.* U. S., 118 Fed. 699, 56 C. C. A. 31. A skilled observer may so testify (Com. *v.* Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711), giving the reasons of his opinion (Com. *v.* Webster, *supra*). In jurisdictions which reject the inference as to whether a writing is that of the ostensible writer which is gained by comparison that method cannot be used to identify the writer of a feigned or forged document. U. S. *v.* Prout, 27 Fed. Cas. No. 16,094, 4 Cranch C. C. 301.

70. See *infra*, XI, C, 9, b, (II), (III).

71. See *supra*, XI, C, 9, b, (I).

72. Stevens *v.* Seibold, 5 N. Y. St. 258.

73. *Alabama.*— Strong *v.* Brewer, 17 Ala. 706; Hopper *v.* Ashley, 15 Ala. 457.

Colorado.— Atlantic Ins. Co. *v.* Manning, 3 Colo. 224.

Connecticut.— Lyon *v.* Lyman, 9 Conn. 55.

Illinois.— Fash *v.* Blake, 38 Ill. 363.

Maryland.— Smith *v.* Walton, 8 Gill 77.

New York.— Boyle *v.* Colman, 13 Barb. 42.

North Carolina.— Beverly *v.* Williams, 20 N. C. 378.

Pennsylvania.— McNair *v.* Com., 26 Pa. St. 388.

South Carolina.— Horry Dist. Poor Com'rs *v.* Hanion, 1 Nott & M. 554.

strong[74] or otherwise,[75] "opinion,"[76] or "thought;"[77] or states that he perceives a general[78] or strong[79] resemblance, it is sufficient to warrant submitting the evidence to the jury, although the witness declines to "swear" that the fact is as he believes it to be,[80] and although he be in doubt until he refreshes his memory by reference to genuine writings in his possession.[81] Not only the opinion but the reasons for it may be called for, even on direct examination.[82] A witness, however, who purports to testify as to who is the writer of a disputed document must state an inference one way or the other, else he gives nothing which can aid the jury,[83] and evidence which fails to state such an inference should be rejected.[84] Where it is claimed that a certain document is forged, a witness acquainted with the handwriting of the alleged forger may testify that it is in his writing,[85] although he is not also acquainted with the handwriting of the person whose instrument it purports to be.[86]

(II) *QUALIFICATIONS* — (A) *Ordinary Observer* — (1) SEEING PERSON WRITE. A witness who has seen the person in question write,[87] although only on one occasion,[88]

See 20 Cent. Dig. tit. "Evidence," §§ 2211, 2213, 2247.

A witness may be asked whether he would act upon certain signatures if they came to him in an ordinary business transaction. Holmes *v.* Goldsmith, 147 U. S. 150, 13 S. Ct. 288, 37 L. ed. 118 [*affirming* 36 Fed. 484]; U. S. *v.* Larned, 26 Fed. Cas. No. 15,565, 4 Cranch C. C. 312.

74. Hopkins *v.* Megquire, 35 Me. 78.

75. Talbott *v.* Hedge, 5 Ind. App. 555, 32 N. E. 788.

76. Fash *v.* Blake, 38 Ill. 363; State *v.* Harvey, 131 Mo. 339, 32 S. W. 1110; State *v.* Minton, 116 Mo. 605, 22 S. W. 808; Clark *v.* Freeman, 25 Pa. St. 133; Watson *v.* Brewster, 1 Pa. St. 381; Garrells *v.* Alexander, 4 Esp. 37.

77. People *v.* Bidleman, 104 Cal. 608, 38 Pac. 502.

78. Shitler *v.* Bremer, 23 Pa. St. 413. But see *contra*, Wiggin *v.* Plumer, 31 N. H. 251.

79. Moody *v.* Rowell, 17 Pick. (Mass.) 490, 28 Am. Dec. 317.

80. People *v.* Bidleman, 104 Cal. 608, 38 Pac. 502; Rumph *v.* State, 91 Ga. 20, 16 S. E. 104; Hopkins *v.* Megquire, 35 Me. 78; Com. *v.* Andrews, 143 Mass. 23, 8 N. E. 643. There is no objection in inquiring as to the degree of the witnesses' certainty to ask them "whether they would act upon the signatures of the defendants attached to the notes sued on if they came to them in an ordinary business transaction." Holmes *v.* Goldsmith, 147 U. S. 150, 13 S. Ct. 288, 37 L. ed. 118.

81. A confident opinion thus produced, based also upon his having seen the person write many times during a long period, is admissible. Redford *v.* Peggy, 6 Rand. (Va.) 316. See also McNair *v.* Com., 26 Pa. St. 388.

82. Kendall *v.* Collier, 97 Ky. 446, 30 S. W. 1002, 17 Ky. L. Rep. 337; Keith *v.* Lothrop, 10 Cush. (Mass.) 453; Com. *v.* Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; Collier *v.* Simpson, 5 C. & P. 73, 24 E. C. L. 460.

To reject such evidence is error. Kendall *v.* Collier, 97 Ky. 446, 30 S. W. 1002, 17 Ky. L. Rep. 337.

83. Foster *v.* Jenkins, 30 Ga. 476.

84. Farrell *v.* Manhattan R. Co., 83 N. Y. App. Div. 393, 82 N. Y. Suppl. 334; Taylor *v.* Sutherland, 24 Pa. St. 333; Crow *v.* State, 37 Tex. Cr. 295, 39 S. W. 574.

85. Brown *v.* Hall, 85 Va. 146, 7 S. E. 182.

86. Brown *v.* Hall, 85 Va. 146, 7 S. E. 182.

87. *Alabama.*— Nelms *v.* State, 91 Ala. 97, 9 So. 193; Moon *v.* Crowder, 72 Ala. 79.

Arkansas.— Miller *v.* Jones, 32 Ark. 337.

Georgia.— Rumph *v.* State, 91 Ga. 20, 16 S. E. 104.

Illinois.— Riggs *v.* Powell, 142 Ill. 453, 32 N. E. 482; Kelly *v.* Fallon, 108 Ill. App. 108.

Indiana.— Clark *v.* Wyatt, 15 Ind. 271, 77 Am. Dec. 90.

Kentucky.— Kendall *v.* Collier, 97 Ky. 446, 30 S. W. 1002, 17 Ky. L. Rep. 337.

Maine.— Page *v.* Homans, 14 Me. 478.

Maryland.— Smith *v.* Walton, 8 Gill 58.

Missouri.— State *v.* Stair, 87 Mo. 268, 56 Am. Rep. 449.

New Hampshire.— Hoitt *v.* Moulton, 21 N. H. 586. And see Burnham *v.* Ayer, 36 N. H. 182.

New York.— Magee *v.* Osborn, 32 N. Y. 669; Matter of Allemann, 5 N. Y. Suppl. 196, 1 Connoly Surr. 441.

North Carolina.— Ratliff *v.* Ratliff, 131 N. C. 425, 42 S. E. 887; State *v.* Gay, 94 N. C. 814.

North Dakota.— Territory *v.* O'Hare, 1 N. D. 30, 44 N. W. 1003.

Pennsylvania.— Wilson *v.* Van Leer, 127 Pa. St. 371, 17 Atl. 1097, 14 Am. St. Rep. 854; McNair *v.* Com., 26 Pa. St. 388; Power *v.* Frick, 2 Grant 305.

South Carolina.— Horry Dist. Poor Com'rs *v.* Hanion, 1 Nott & M. 554.

Texas.— Hanley *v.* Gandy, 28 Tex. 211, 91 Am. Dec. 315.

Vermont.— *In re* Diggins, 68 Vt. 198, 34 Atl. 696.

See 20 Cent. Dig. tit. "Evidence," § 2213; and other cases in the notes following.

A witness' belief that he has seen the person write and knows his handwriting qualifies him to express an opinion. Fash *v.* Blake, 38 Ill. 363.

88. *Alabama.*— Hopper *v.* Ashley, 15 Ala. 457. And see Nelms *v.* State, 91 Ala. 97, 9 So. 193.

and then only his name,[89] a mark,[90] a cipher letter,[91] or the document in question,[92] may, although not skilled in matters of handwriting,[93] state an inference,[94]

Illinois.— Cross *v.* People, 47 Ill. 152, 95 Am. Dec. 474.

Maryland.— Edelen *v.* Gough, 8 Gill 87; Smith *v.* Walton, 8 Gill 58.

Massachusetts.— Com. *v.* Nefus, 135 Mass. 533; Keith *v.* Lothrop, 10 Cush. 453.

Nevada.— State *v.* Burns, (1904) 74 Pac. 983.

New Hampshire.— Bowman *v.* Sanborn, 25 N. H. 87.

New York.— Hammond *v.* Varian, 54 N. Y. 398.

Ohio.— Brachmann *v.* Hall, 1 Disn. 539, 12 Ohio Dec. (Reprint) 782.

Pennsylvania.— McNair *v.* Com., 26 Pa. St. 388.

Virginia.— Pepper *v.* Barnett, 22 Gratt. 405.

England.— Burr *v.* Harper, 1 Holt 420, 3 E. C. L. 168.

Ante litem motam.— As a rule the writing must have been done *ante litem motam* in order to qualify the witness. Pate *v.* People, 8 Ill. 644; Territory *v.* O'Hare, 1 N. D. 30, 44 N. W. 1003; Reese *v.* Reese, 90 Pa. St. 89, 35 Am. Rep. 634. In Massachusetts, however, it is held that the fact that knowledge of the handwriting is acquired *post litem motam* affects the weight of the evidence only. Keith *v.* Lothrop, 10 Cush. (Mass.) 453. *Compare infra,* note 89.

The witness may refresh his recollection by the use of the document which he saw written (Pepper *v.* Barnett, 22 Gratt. (Va.) 405; Burr *v.* Harper, 1 Holt 420, 3 E. C. L. 168) or other documents known to be genuine (Redford *v.* Peggy, 6 Rand. (Va.) 316), but he must testify independently of the comparison (McNair *v.* Com., 26 Pa. St. 388).

Opportunity for observation.— The witness must have been near enough to see what was written. Brigham v. Peters, 1 Gray (Mass.) 139.

The weight of the evidence is necessarily affected by the frequency or infrequency of the opportunities for observation (Karr *v.* State, 106 Ala. 1, 17 So. 328; Keith *v.* Lothrop, 10 Cush. (Mass.) 453; Lachance *v.* Loeblein, 15 Mo. App. 460; State *v.* Gay, 94 N. C. 814; Cody *v.* Conly, 27 Gratt. (Va.) 313; Pepper *v.* Barnett, 22 Gratt. (Va.) 405; Rogers *v.* Ritter, 12 Wall. (U. S.) 317, 20 L. ed. 417), and by the fact that the witness himself cannot read or write (Foye *v.* Patch, 132 Mass. 105).

89. *Illinois.*— Woodford *v.* McClenahan, 9 Ill. 85.

Nevada.— State *v.* Burns, (1904) 74 Pac. 983.

New Hampshire.— Burnham *v.* Ayer, 36 N. H. 182.

New York.— Hammond *v.* Varian, 54 N. Y. 398.

Vermont.— *In re* Diggins, 68 Vt. 198, 34 Atl. 696.

Virginia.— Pepper *v.* Barnett, 22 Gratt. 405.

United States.— Rogers *v.* Ritter, 12 Wall. 317, 20 L. ed. 217.

England.— Burr *v.* Harper, 1 Holt 420, 3 E. C. L. 168.

See 20 Cent. Dig. tit. "Evidence," § 2210 *et seq.*

Ante litem motam.— The writing must have been made when no motive to misrepresent existed. A writing made in the witness' presence during a recess of court to enable him to testify is not a sufficient qualification. Territory *v.* O'Hare, 1 N. D. 30, 44 N. W. 1003; Reese *v.* Reese, 90 Pa. St. 89, 35 Am. Rep. 634. And in general where the knowledge of handwriting has been acquired since the disputed signature was made. Keith *v.* Lothrop, 10 Cush. (Mass.) 453. *Compare supra,* note 88.

Although the writer deny his signature, the evidence is still competent. Burgess *v.* Burgess, 44 Nebr. 16, 62 N. W. 242; Williams *v.* Deen, 5 Tex. Civ. App. 575, 24 S. W. 536. Even the writer cannot deny his signature, as an expert, unless qualified to do so. Pillard *v.* Dunn, 108 Mich. 301, 66 N. W. 45.

90. Strong *v.* Brewer, 17 Ala. 706.

91. Com. *v.* Nefus, 135 Mass. 533.

92. Woodford *v.* McClenahan, 9 Ill. 85.

93. Moon *v.* Crowder, 72 Ala. 79; Kendall *v.* Collier, 97 Ky. 446, 30 S. W. 1002, 17 Ky. L. Rep. 337; Williams *v.* Deen, 5 Tex. Civ. App. 575, 24 S. W. 536.

94. *Alabama.*— Karr *v.* State, 106 Ala. 1, 7, 17 So. 328 (where the court said: "The testimony is not the highest and most satisfactory kind, but it was competent"); Moon *v.* Crowder, 72 Ala. 79.

Colorado.— Salazar *v.* Taylor, 18 Colo. 538, 33 Pac. 369.

Georgia.— Rumph *v.* State, 91 Ga. 20, 16 S. E. 104, holding that the writing need not be signed.

Illinois.— Riggs *v.* Powell, 142 Ill. 453, 32 N. E. 482; Putnam *v.* Wadley, 40 Ill. 346; Woodford *v.* McClenahan, 9 Ill. 85.

Louisiana.— Morvant's Succession, 45 La. Ann. 207, 12 So. 349; Bradford *v.* Cooper, 1 La. Ann. 325; Jewell *v.* Jewell, 1 Rob. 316.

Maine.— Hopkins *v.* Megquire, 35 Me. 78.

Maryland.— Edelen *v.* Gough, 8 Gill, 87.

Minnesota.— Berg *v.* Peterson, 49 Minn. 420, 52 N. W. 37.

Missouri.— State *v.* Harvey, 131 Mo. 339, 32 S. W. 1110; State *v.* Minton, 116 Mo. 605, 22 S. W. 808.

New Hampshire.— Burnham *v.* Ayer, 36 N. H. 182; Rideout *v.* Newton, 17 N. H. 71.

New Jersey.— West *v.* State, 22 N. J. L. 212.

New York.— Hammond *v.* Varian, 54 N. Y. 398; Bruyn *v.* Russell, 52 Hun 17, 4 N. Y. Suppl. 784 (holding that it is not material that the witness is basing his evidence in large part upon specimens of handwriting not produced); Jackson *v.* Van Deusen, 5 Johns. 144, 4 Am. Dec. 330.

if he has formed one,[95] from the standard so raised in his mind, as to the genuineness of a particular document, although his opinion is the result of comparison,[96] or is strengthened by such comparison,[97] provided that he claims some knowledge or acquaintance with the handwriting of the person acquired by seeing him write.[98] A more stringent rule of qualification has been laid down and "an intelligent acquaintance" with the handwriting has even been insisted upon as a preliminary to receiving the evidence.[99]

(2) Receipt of Documents. It is not essential that the witness should have seen the person in question write.[1] The ordinary witness is permitted to testify on the subject of a person's handwriting from a mental standard created by the receipt of letters or other documents from him;[2] provided (1) that the standard is created *ante litem motam*,[3] and (2) that relevancy is secured and the danger of collateral issues as to the genuine nature of the standard forming documents be removed by an admission, acquiescence, or equivalent action, on the point by the person whose handwriting is in question.[4] These conditions must be shown to have been satisfied by evidence other than that furnished by the documents them-

North Carolina.— Pope *v.* Askew, 23 N. C. 16, 35 Am. Dec. 729.

Ohio.— Hess *v.* State, 5 Ohio 5, 22 Am. Dec. 767; Burnham *v.* Ayer, 3 Ohio Dec. (Reprint) 327.

Pennsylvania.— Wilson *v.* Van Leer, 127 Pa. St. 371, 17 Atl. 1097, 14 Am. St. Rep. 854; Slaymaker *v.* Wilson, 1 Penr. & W. 216.

Texas.— Smith *v.* Caswell, 67 Tex. 567, 4 S. W. 848; Williams *v.* Deen, 5 Tex. Civ. App. 575, 24 S. W. 536.

Virginia.— Pepper *v.* Barnett, 22 Gratt. 405.

Canada.—Reid *v.* Warner, 17 L. C. Rep. 485; Gleeson *v.* Wallace, 4 U. C. Q. B. 245.

See 20 Cent. Dig. tit. "Evidence," § 2210 *et seq.*

95. Putnam *v.* Wadley, 40 Ill. 346; Morvant's Succession, 45 La. Ann. 207, 12 So. 349 (belief); Smith *v.* Walton, 8 Gill (Md.) 77 (belief); Burnham *v.* Ayer, 36 N. H. 182; Hoitt *v.* Moulton, 21 N. H. 586 (belief). See also Wiggin *v.* Plumer, 31 N. H. 251; Bowman *v.* Sanborn, 25 N. H. 87; Hoitt *v.* Moulton, 21 N. H. 586; State *v.* Carr, 5 N. H. 367.

An express disclaimer of an opinion is ground for rejecting the evidence. *In re* Diggins, 68 Vt. 198, 34 Atl. 696. See *supra*, XI, C, 9, b, (I).

96. Hopkins *v.* Simmons, 12 Fed. Cas. No. 6,691, 1 Cranch C. C. 250. And see McNair *v.* Com., 26 Pa. St. 388; Power *v.* Frick, 2 Grant (Pa.) 305; Hanley *v.* Gandy, 28 Tex. 211, 91 Am. Dec. 315. See also *infra*, XI, C, 9, b, (III).

97. Clark *v.* Wyatt, 15 Ind. 271, 77 Am. Dec. 90; Worth *v.* McConnell, 42 Mich. 473, 4 N. W. 198; State *v.* Barnes, (Nev. 1904) 74 Pac. 983 (bank bookkeeper and exchange teller). It has, however, been held proper to reject the inference of the witness so far as based upon a comparison. Remington Paper Co. *v.* O'Dougherty, 81 N. Y. 474.

98. Nelms *v.* State, 91 Ala. 97, 9 So. 193; Wimbish *v.* State, 89 Ga. 294, 15 S. E. 325.

99. Nelms *v.* State, 91 Ala. 97, 9 So. 193; People *v.* Corey, 148 N. Y. 476, 42 N. E. 1066; Magie *v.* Osborn, 1 Rob. (N. Y.) 689; Allen *v.* State, 3 Humphr. (Tenn.) 367.

In Georgia it has been required that the witness should be able to state that "by that means or some other, he knows or would recognize the handwriting of the person who executed it." Wimbish *v.* State, 89 Ga. 294, 15 S. E. 325. And see Smith *v.* Fenner, 22 Fed. Cas. No. 13,046, 1 Gall. 170.

1. Turnipseed *v.* Hawkins, 1 McCord (S. C.) 272. See also Kelly *v.* Fallon, 108 Ill. App. 108; Titford *v.* Knott, 2 Johns. Cas. (N. Y.) 210.

2. *Alabama.*— Campbell *v.* Woodstock Iron Co., 83 Ala. 351, 3 So. 369.

Colorado.— Atlantic Ins. Co. *v.* Manning, 3 Colo. 224.

Georgia.— Rumph *v.* State, 91 Ga. 20, 16 S. E. 104.

Illinois.— Riggs *v.* Powell, 142 Ill. 453, 32 N. E. 482; Kelly *v.* Fallon, 108 Ill. App. 108.

Indiana.— Clark *v.* Wyatt, 15 Ind. 271, 77 Am. Dec. 90.

Louisiana.— Morvant's Succession, 45 La. Ann. 207, 12 So. 349.

Maine.— Page *v.* Homans, 14 Me. 478.

Maryland.— Smith *v.* Walton, 8 Gill 58.

Massachusetts.— Keith *v.* Lothrop, 10 Cush. 453.

Missouri.—Monumental Bronze Co. *v.* Doty, 99 Mo. App. 195, 73 S. W. 234, 78 S. W. 850.

New York.— Titford *v.* Knott, 2 Johns. Cas. 210.

England.— Doe *v.* Suckermore, 5 A. & E. 703, 31 E. C. L. 791.

See 20 Cent. Dig. tit. "Evidence," § 2210 *et seq.*

3. Hynes *v.* McDermott, 82 N. Y. 41, 37 Am. Rep. 538. And see Territory *v.* O'Hare, 1 N. D. 30, 44 N. W. 1003. See also *supra*, XI, C, 9, b, (II), (A), (1), notes 88, 89.

4. Coffey's Case, 4 City Hall Rec. (N. Y.) 52 (paid checks drawn by the person in question); Pope *v.* Askew, 23 N. C. 16, 35 Am. Dec. 729; Cody *v.* Conly, 27 Gratt. (Va.) 313; Flowers *v.* Fletcher, 40 W. Va. 103, 20 S. E. 870. See also Gibson *v.* Trowbridge Furniture Co., 96 Ala. 357, 11 So. 365; Putnam *v.* Wadley, 40 Ill. 346. Acquiescence may relate to the validity of the handwriting of a document already in possession of the witness. Woodford *v.* McClenahan, 9 Ill. 85.

selves.[5] If the documents are of a business nature, it will as a rule be a sufficient acquiescence if they have been acted on as genuine by the person whose handwriting is involved.[6] The case is stronger where both parties act upon the documents constituting the standard.[7] Action by the receiver not shared or communicated to the person whose handwriting the document received purports to bear fails to furnish the requisite proof.[8] The operation of the foregoing administrative rules as to the qualification of witnesses in this connection is illustrated in the course of ordinary business correspondence.[9] A letter which purports to come from a person in reply to a letter previously sent him, although from a different post-office than the one to which the original letter was addressed,[10] is regarded as sufficiently acknowledged, by the person originally addressed as his genuine handwriting.[11] On the contrary a person who has received a letter purporting to

5. Doe *v.* Suckermore, 5 A. & E. 703, 730, 31 E. C. L. 791, per Patterson, J.; Reid *v.* Warner, 17 L. C. Rep. 485.

6. *Delaware.*— State *v.* Spence, 2 Harr. 348, account.

Illinois.— Kelly *v.* Fallon, 108 Ill. App. 108.

Indiana.— Burdick *v.* Hunt, 43 Ind. 381.

Missouri.— Reyburn *v.* Belotti, 10 Mo. 597.

Nebraska.— Violet *v.* Rose, 39 Nebr. 660, 58 N. W. 216.

New York.— Hammond *v.* Varian, 54 N. Y. 398 (note); Sprague *v.* Sprague, 80 Hun 285, 30 N. Y. Suppl. 162 (receipts, etc.); Johnson *v.* Daverne, 19 Johns. 134, 10 Am. Dec. 198 (notes); Taylor *v.* Crowninshield, 5 N. Y. Leg. Obs. 209. See also Titford *v.* Knott, 2 Johns. Cas. 210.

North Carolina.— Gordon *v.* Price, 32 N. C. 385, notes paid.

See 20 Cent. Dig. tit. "Evidence," § 2210 *et seq.*

The mere use of office stationery is not in itself sufficient to entitle a letter presenting this appearance to serve as a standard in the witness' mind. Talbott *v.* Hedge, 5 Ind. App. 555, 32 N. E. 788; Pinkham *v.* Cockell, 77 Mich. 265, 43 N. W. 921; Berg *v.* Peterson, 49 Minn. 420, 52 N. W. 37. There is some little early authority that the stationery is a sufficient identification. Empire Mfg. Co. *v.* Stuart, 46 Mich. 482, 9 N. W. 527.

Subsequent acknowledgment of documents previously sent satisfies the rule. Robinson Consol. Min. Co. *v.* Craig, 4 N. Y. St. 478.

7. *Maine.*— Page *v.* Homans, 14 Me. 478.

Maryland.— Smith *v.* Walton, 8 Gill. 58.

Massachusetts.— Chaffee *v.* Taylor, 3 Allen 598.

Minnesota.— Berg *v.* Peterson, 49 Minn. 420, 52 N. W. 37.

Mississippi.— Southern Express Co. *v.* Thornton, 41 Miss. 216.

New York.— Hammond *v.* Varian, 54 N. Y. 398 (promissory note); Dubois *v.* Baker, 30 N. Y. 355; Robinson Consol. Min. Co. *v.* Craig, 4 N. Y. St. 478.

North Carolina.— Gordon *v.* Price, 32 N. C. 385, paid notes.

Ohio.— Burnham *v.* Ayer, 3 Ohio Dec. (Reprint) 327.

Virginia.— Hanriot *v.* Sherwood, 82 Va. 1; Cody *v.* Conly, 27 Gratt. 313, orders.

United States.— Three Thousand One Hundred and Nine Cases of Champagne, 23 Fed. Cas. No. 14,012, 1 Ben. 241, invoices.

See 20 Cent. Dig. tit. "Evidence," § 2210 *et seq.*

Having "had some business" with a person does not qualify one to testify as to his handwriting. Mapes *v.* Leal, 27 Tex. 345. But having "had frequent transactions" is sufficient. New Orleans City Bank *v.* Foucher, 9 La. 405.

8. Nunes *v.* Perry, 113 Mass. 274; Cunningham *v.* Hudson River Bank, 21 Wend. (N. Y.) 557; State *v.* Allen, 8 N. C. 6, 9 Am. Dec. 616, receipt of bank-notes signed by person as president.

The mere receipt of writings is not evidence that they are in the handwriting of the person from whom they apparently come.

Colorado.— Salazar *v.* Taylor, 18 Colo. 538, 33 Pac. 369.

Indiana.— Talbott *v.* Hedge, 5 Ind. App. 555, 32 N. E. 788.

New Hampshire.— Cochran *v.* Butterfield, 18 N. H. 115, 45 Am. Dec. 363.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Hickman, 28 Pa. St. 318.

Vermont.— National Union Bank *v.* Marsh, 46 Vt. 443.

West Virginia.— Flowers *v.* Fletcher, 40 W. Va. 103, 20 S. E. 870.

See 20 Cent. Dig. tit. "Evidence," § 2210 *et seq.*

9. Page *v.* Homans, 14 Me. 478; and other cases cited in the preceding notes.

10. Violet *v.* Rose, 39 Nebr. 660, 58 N. W. 216.

11. *Alabama.*— Campbell *v.* Woodstock Iron Co., 83 Ala. 351, 3 So. 369.

Colorado.— Atlantic Ins. Co. *v.* Manning, 3 Colo. 224.

Indiana.— Burdick *v.* Hunt, 43 Ind. 381.

Maryland.— Smith *v.* Walton, 8 Gill 58.

Minnesota.— Hoxsie *v.* Empire Lumber Co., 41 Minn. 548, 43 N. W. 476; Melby *v.* Osborne, 33 Minn. 492, 24 N. W. 253.

North Carolina.— McKonkey *v.* Gaylord, 46 N. C. 94.

Pennsylvania.— U. S. *v.* Simpson, 3 Penr. & W. 437, 24 Am. Dec. 331.

Texas.— Ullman *v.* Babcock, 63 Tex. 68.

See 20 Cent. Dig. tit. "Evidence," § 2210 *et seq.*

A prima facie value has been given to the inferences drawn from such evidence in con-

come from A and has answered it and has since received no reply to the answer is not by these facts rendered competent to prove the handwriting of A.[12] It is not indispensable that the witness should be the individual to whom the letters received were addressed. The essential requisite is that the disputed writing should be tested by its resemblance to a document in the genuineness of which the alleged writer has acquiesced.[13] Any person through whose hands the documents indorsed by the alleged writer as authentic have passed, as clerks,[14] may testify; and the qualification has even been extended to any person, although neither the receiver of the documents nor associated in business with him, provided that he has seen such acknowledged documents, and thereby become familiar with the handwriting.[15]

(3) Other Experience. If the witness has in the course of official business,[16] or in any other way,[17] acquired by experience a knowledge of a person's handwriting[18] which in the opinion of the judge makes it probable that he can draw a reasonable inference as to the genuineness of the writing in question from the mental standard so created which is calculated to aid the jury,[19] he may state the

nection with proof of handwriting. Campbell *v.* Woodstock Iron Co., 83 Ala. 351, 3 So. 369.

It is not necessary that the person whose handwriting is involved should be aware with whom he is corresponding (McKonkey *v.* Gaylord, 48 N. C. 94) or that the latter should ever have seen the writer (U. S. *v.* Simpson, 3 Penr. & W. (Pa.) 437, 24 Am. Dec. 331).

12. Webb *v.* Mauro, Morr. (Iowa) 329. But see Gross *v.* Sormani, 50 N. Y. App. Div. 531, 64 N. Y. Suppl. 300.

13. Riggs *v.* Powell, 142 Ill. 453, 32 N. E. 482 [*affirming* 46 Ill. App. 75]; Putnam *v.* Wadley, 40 Ill. 346; Page *v.* Homans, 14 Me. 478; Hammond's Case, 2 Me. 33, 11 Am. Dec. 39.

14. Reyburn *v.* Belotti, 10 Mo. 597. See also Kelly *v.* Fallon, 108 Ill. App. 108; Page *v.* Homans, 14 Me. 478; Titford *v.* Knott, 2 Johns. Cas. (N. Y.) 210.

15. Woodman *v.* Dana, 52 Me. 9; Page *v.* Homans, 14 Me. 478; Berg *v.* Peterson, 49 Minn. 420, 52 N. W. 37; Kinney *v.* Flynn, 2 R. I. 319. *Contra,* Galesburg First Nat. Bank *v.* Hovell, 24 Ill. App. 594.

In case of correspondence in the family on family affairs it has been held that any member of the receiving family acquainted with the facts may testify from a standard formed by the receipt of such letters or other documents, acted upon by all concerned. Tuttle *v.* Rainey, 98 N. C. 513, 4 S. E. 475.

An unskilled witness cannot testify from a standard created by the receipt of documents said by persons other than the alleged writer to be genuine (Goldsmith *v.* Bane, 8 N. J. L. 87), or by seeing documents which are partly genuine and partly forged (Brigham *v.* Peters, 1 Gray (Mass.) 139).

16. Burdell *v.* Taylor, 89 Cal. 613, 26 Pac. 1094 (official documents); Sill *v.* Reese, 47 Cal. 294 (familiarity with signature on official archives, documents in official custody); Amherst Bank *v.* Root, 2 Metc. (Mass.) 522 (clerk of court); Commonwealth Bank *v.* Mudgett, 44 N. Y. 514; Rogers *v.* Ritter, 12 Wall. (U. S.) 317, 20 L. ed. 417 (signature on records).

17. *Colorado.*— Salazar *v.* Taylor, 18 Colo. 538, 33 Pac. 369.

Delaware.— State *v.* Spence, 2 Harr. 348.

Illinois.— Kelly *v.* Fallon, 108 Ill. App. 108.

North Carolina.—Tuttle *v.* Rainey, 98 N. C. 513, 4 S. E. 475 (seeing daily); Jones *v.* Huggins, 12 N. C. 223, 17 Am. Dec. 567 (seen much of it); State *v.* Candler, 10 N. C. 393 (paying notes).

Tennessee.— Powers *v.* McKenzie, 90 Tenn. 167, 16 S. W. 559; Allen *v.* State, 3 Humphr. 367, received and paid bank-notes bearing the signature.

Utah.— Tucker *v.* Kellogg, 8 Utah 11, 28 Pac. 870, seeing canceled checks.

United States.— Neall *v.* U. S., 118 Fed. 699, 56 C. C. A. 31.

England.— Crawford Peerage Case, 2 H. L. Cas. 534, 9 Eng. Reprint 1196, familiarity with ancient manuscript.

See 20 Cent. Dig. tit. "Evidence," §§ 2210 *et seq.*, 2247.

18. Spottiswood *v.* Weir, 80 Cal. 448, 22 Pac. 289; Slaymaker *v.* Wilson, 1 Penr. & W. (Pa.) 216.

19. Ante litem motam.— It must affirmatively appear that the standard was acquired before any dispute as to genuineness arose.

Alabama.— Griffin *v.* State, 90 Ala. 596, 8 So. 670.

Georgia.— Wimbish *v.* State, 89 Ga. 294, 15 S. E. 325, holding that it is immaterial that the witness saw the standard used for comparison written.

Illinois.— Union County Tp. 13 *v.* Misenheimer, 78 Ill. 22, holding that however honest a witness may be an unconscious bias will confirm his preconceived idea.

Missouri.— State *v.* Tompkins, 71 Mo. 613.

New York.— Goodyear *v.* Vosburgh, 63 Barb. 154.

South Carolina.— Weaver *v.* Whilden, 33 S. C. 190, 11 S. E. 686.

Genuineness of documents.—That the documents from which the standard in the witness' mind is formed were genuine must be affirmatively shown. Gibson *v.* Trowbridge Furniture Co., 96 Ala. 357, 11 So. 365; Jar-

inference which he has formed.[20] In case of certain commercial instruments, as bank-notes,[21] bills of exchange,[22] bonds,[23] and the like, genuineness is frequently a conclusion in which inference from resemblance of signatures[24] or other writings to a mental standard plays a part and not always a dominant one; blending with judgments formed by the skilled witness from the character of the paper,[25] the nature of the ink, engraving,[26] printing, and the general appearance of the instrument,[27] or other appearances,[28] into a complex impression as to whether the document is forged or genuine.[29] The court may receive from a competent witness the statement of his entire conclusion in the matter, even though the witness has no knowledge of the handwriting which in part authenticates the instrument which would be sufficient to enable him to testify on that proposition, if it stood alone; the element of resemblance in handwriting does not enter into the inference at all.[30] On the other hand it has been held in general terms that an unskilled observer who has never seen the individual write or corresponded with him is not competent to testify as to his handwriting.[31]

(B) *Skilled Observer.* So far as it is proposed that a witness should testify to an identity of the writer of a disputed document by its resemblance to a mental standard previously created in the methods stated above,[32] the skill of the observer merely affects the weight to be accorded to his inference.[33] Where, however, the genuineness of the standard is established by evidence *dehors* the observer and the latter is asked, as is permitted in some jurisdictions,[34] to compare two documents and infer whether they were written by the same person,

vis *v.* Vanderford, 116 N. C. 147, 21 S. E. 302.

Lapse of time.— A witness may testify to a certain signature being that of the person it purported to be, although he was not acquainted with the person's handwriting till four years after the signature was made; the weight of his testimony being for the jury. Ratliff *v.* Ratliff, 131 N. C. 425, 42 S. E. 887.

The witness need not say he is familiar with a person's handwriting before giving his opinion in the case, if it otherwise sufficiently appears that he is. Riggs *v.* Powell, 142 Ill. 453, 32 N. E. 482.

20. *Alabama.*—Griffin *v.* State, 90 Ala. 596, 8 So. 670. See also Nelms *v.* State, 91 Ala. 97, 9 So. 193; Moon *v.* Crowder, 72 Ala. 79.

California.— Sill *v.* Reese, 47 Cal. 294.

Illinois.— Riggs *v.* Powell, 142 Ill. 453, 32 N. E. 482; Kelly *v.* Fallon, 108 Ill. App. 108.

Indiana.— Clark *v.* Wyatt, 15 Ind. 271, 77 Am. Dec. 90.

Maine.— Hammond's Case, 2 Me. 33, 11 Am. Dec. 39. See also Page *v.* Homans, 14 Me. 478.

Missouri.— State *v.* Minton, 116 Mo. 605, 22 S. W. 808.

South Carolina.— See Turnipseed *v.* Hawkins, 1 McCord 279.

Texas.— Hanley *v.* Gandy, 28 Tex. 211, 91 Am. Dec. 315.

United States.— Rogers *v.* Ritter, 12 Wall. 317, 20 L. ed. 417.

See 20 Cent. Dig. tit. "Evidence," § 2210 *et seq.*

21. *Alabama.*— Johnson *v.* State, 35 Ala. 370, bank teller; exchange broker.

Massachusetts.— Com. *v.* Carey, 2 Pick. 47.

North Carolina.— State *v.* Harris, 27 N. C. 287; State *v.* Candler, 10 N. C. 393.

Ohio.— May *v.* Ohio, 14 Ohio 461, 45 Am. Dec. 548; Hess *v.* State, 5 Ohio 5, 22 Am. Dec. 767.

Vermont.— State *v.* Ravelin, 1 D. Chipm. 295.

See 20 Cent. Dig. tit. "Evidence," § 2210 *et seq.*

22. State *v.* Tutt, 2 Bailey (S. C.) 44, 21 Am. Dec. 508.

23. State *v.* Norton, 76 Mo. 180.

24. Johnson *v.* State, 35 Ala. 370.

25. State *v.* Harris, 27 N. C. 287.

26. State *v.* Johnson, 35 Ala. 370; State *v.* Harris, 27 N. C. 287.

27. State *v.* Harris, 27 N. C. 287. See *infra*, XI, D, 5.

28. State *v.* Ravelin, 1 D. Chipm. (Vt.) 295.

29. Com. *v.* Carey, 2 Pick. (Mass.) 47; State *v.* Norton, 76 Mo. 180; May *v.* Ohio, 14 Ohio 461, 45 Am. Dec. 548; State *v.* Tutt, 2 Bailey (S. C.) 44, 21 Am. Dec. 508.

30. *Alabama.*— Johnson *v.* State, 35 Ala. 370.

Massachusetts.— Com. *v.* Carey, 2 Pick. 47.

North Carolina.—State *v.* Candler, 10 N. C. 393.

Ohio.— May *v.* Ohio, 14 Ohio 461, 45 Am. Dec. 548.

South Carolina.— State *v.* Tutt, 2 Bailey 44, 21 Am. Dec. 508, bank president.

31. Gibson *v.* Trowbridge Furniture Co., 96 Ala. 357, 11 So. 365; Galesburg First Nat. Bank *v.* Hovell, 24 Ill. App. 594; Jarvis *v.* Vanderford, 116 N. C. 147, 21 S. E. 302; Sheldon *v.* Bahner, 4 Pa. Co. Ct. 16.

32. See *supra*, XI, C, 9, b, (II), (A).

33. See *supra*, XI, C, 9, b, (II).

34. See *infra*, XI, C, 9, b, (III), (B), (3), (b).

the evidence of an ordinary observer would be in most cases irrelevant; for it must be affirmatively shown to the reasonable satisfaction of the judge that the witness is sufficiently qualified to make his inference an aid to the jury.[35]

(III) *Comparison of Handwritings*[36]—(A) *In General.* There has been great diversity of opinion as to whether a trained observer, or "expert," as he is called,[37] can be permitted to state, from a mere comparison of two or more specimens of handwriting submitted to him, an inference as to whether they were or were not made by the same person, and also as to whether such a comparison may be made by the jury or court.[38] In some jurisdictions the question has been settled by statute.[39]

(B) *The Rule in the Absence of a Statute*—(1) In England and Canada. In England, prior to the statute of 1854 making such evidence admissible, it had become the established rule in the common-law courts,[40] after some conflict of opinion, that where the writing or signing of a document was disputed, the jury could properly be allowed to compare the disputed document with other documents written or signed by the party and which were already properly in evidence as relevant to the issues raised in the cause, for the purpose of determining the identity of the writer or signer of the disputed document, but that other documents not relevant to the issues could not be proved or introduced in evidence for the purpose of such comparison, and that a witness could not be permitted to state his inference as to the identity of the writer of a disputed document or signature by a mere comparison of the writing with other writings admitted or proved to be genuine, whether such other writings were irrelevant to the issues in the cause and offered merely for the purpose of such comparison or were relevant to the issues and already in evidence,[41] unless he already had knowledge of the person's handwriting from seeing him write or otherwise, and made the com-

35. See *infra*, XI, C, 9, b, (III), (B), (3), (b), cc.

36. Definition.—"All evidence of handwriting, except where the witness sees the document written, is in its nature comparison. It is the belief which a witness entertains upon comparing the writing in question with an exemplar in his mind derived from some previous knowledge." Doe *v.* Suckermore, 5 A. & E. 703, 730, 7 L. J. Q. B. 33, 2 N. & P. 16, W. W. & D. 405, 31 E. C. L. 791. See *supra*, XI, C, 9, b, (I), (II). See also Keyser *v.* Pickrell, 4 App. Cas. (D. C.) 198, 208; Macomber *v.* Scott, 10 Kan. 335, 341; Hicks *v.* Person, 19 Ohio 426, 441. The term is not here used, however, in this broad sense, but in its technical sense. In this sense "comparison of handwriting" has been defined as "a comparison by the juxtaposition of two writings, in order, by such comparison, to ascertain whether both were written by the same person. A method of proof resorted to where the genuineness of a written document is disputed; it consists in comparing the handwriting of the disputed paper with that of another instrument which is proved or admitted to be in the writing of the party sought to be charged, in order to infer, from their identity or similarity in this respect, that they are the work of the same hand." Black L. Dict. See also Burdick *v.* Hunt, 43 Ind. 381, 386; Woodman *v.* Dana, 52 Me. 9, 14; Travis *v.* Brown, 43 Pa. St. 9, 12, 82 Am. Dec. 540; Com. *v.* Smith, 6 Serg. & R. (Pa.) 568, 571; Hanley *v.* Gandy, 28 Tex. 211, 91 Am. Dec. 315.

37. Qualifications of witness see *infra*, XI, C, 9, b, (III), (B), (3), (b), cc.

38. "Probably there is hardly any rule as to the introduction of evidence on which courts express a greater diversity of opinion than that relating to the proof of handwriting by comparison." Gaunt *v.* Harkness, 53 Kan. 405, 409, 36 Pac. 739, 42 Am. St. Rep. 297. See also Keyser *v.* Pickrell, 4 App. Cas. (D. C.) 198, 204; Burdick *v.* Hunt, 43 Ind. 381, 385; Doe *v.* Suckermore, 5 A. & E. 703, 7 L. J. Q. B. 33, 2 N. & P. 16, W. W. & D. 405, 31 E. C. L. 791.

39. See *infra*, XI, C, 9, b, (III), (C).

40. Under the civil law and in the ecclesiastical courts comparison was permitted. Machin *v.* Grindon, 2 Add. Eccl. 91; Robson *v.* Rocke, 2 Add. Eccl. 53; Lock *v.* Denner, 1 Add. Eccl. 353; Saph *v.* Atkinson, 1 Add. Eccl. 162; Doe *v.* Suckermore, 5 A. & E. 703, 7 L. J. Q. B. 33, 2 N. & P. 16, W. W. & D. 405, 31 E. C. L. 791; Beaumont *v.* Perkins, 1 Phillim. 78. See also Fee *v.* Taylor, 83 Ky. 259; Miles *v.* Loomis, 75 N. Y. 288, 31 Am. Rep. 470; Hanriot *v.* Sherwood, 82 Va. 1; Moore *v.* U. S., 91 U. S. 270, 23 L. ed. 346.

41. Griffits *v.* Ivery, 11 A. & E. 322, 9 L. J. Q. B. 49, 3 P. & D. 179, 39 E. C. L. 188; Doe *v.* Suckermore, 5 A. & E. 703, 7 L. J. Q. B. 33, 2 N. & P. 16, W. W. & D. 405, 31 E. C. L. 791; Doe *v.* Newton, 5 A. & E. 514, 6 L. J. K. B. 1, 1 N. & P. 1, W. W. & D. 403, 31 E. C. L. 712; Waddington *v.* Cousins, 7 C. & P. 595, 32 E. C. L. 776; Bromage *v.* Rice, 7 C. & P. 548, 32 E. C. L. 752; Hughes *v.* Rogers, 10 L. J. Exch. 238, 8 M. & W. 123.

parison merely in corroboration of his testimony from such knowledge.[42] In 1854, however, a statute was enacted by which it was provided that "comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute."[43] In Canada the earlier cases followed the common-law rule,[44] but they have been overruled since the English statute and comparison is now allowed.[45]

(2) Reasons For the Rule. "The reasons usually assigned for adherence to this strict rule may be substantially stated as follows: 1. The admission of papers, otherwise irrelevant, would probably raise collateral issues respecting the genuineness of the signatures thereto which might be spun out indefinitely and to the utter confusion of the jury. 2. Opportunity might be given to the party offering the papers to obtain advantage by making an unfair selection of the test signatures."[46]

(3) Rules in the United States — (a) Comparison by Jury or Court. In the United States, in the absence of a statute,[47] most of the courts have adopted the common-law rule that, where a writing is disputed, it may be compared, for the purpose of determining the identity of the writer, by the jury,[48] or by the court

On the trial of an action on a promissory note, in which the question was whether defendant had indorsed it or not, it was held that plaintiff's counsel could not give in evidence a number of other notes bearing defendant's undoubted signature, with a view of having the jury compare the handwriting of those signatures with the indorsement on the note in question; and that the jury could not be allowed to compare anything with the indorsement, except documents otherwise evidence in the case. Bromage *v.* Rice, 7 C. & P. 548, 32 E. C. L. 752. On a question as to the genuineness of handwriting, a jury may compare the document with authentic writings of the party to whom it is ascribed, if such writings are in evidence for other purposes of the cause; but not else. Griffits *v.* Ivery, 11 A. & E. 322, 9 L. J. Q. B. 49, 3 P. & D. 179, 39 E. C. L. 188; Doe *v.* Newton, 5 A. & E. 514, 6 L. J. K. B. 1, 1 N. & P. 1, W. W. & D. 403, 31 E. C. L. 712; Eaton *v.* Jervis, 8 C. & P. 273, 34 E. C. L. 729; Bromage *v.* Rice, 7 C. & P. 548, 32 E. C. L. 752; Griffith *v.* Williams, 1 Cromp. & J. 47; Cobbett *v.* Kilminster, 4 F. & F. 490 note; Doe *v.* Wilson, 10 Moore P. C. 502, 14 Eng. Reprint 581; Solita *v.* Yarrow, 1 M. & Rob. 133.

42. See *infra*, XI, C, 9, b, (III), (B), (3), (b), bb.

43. St. 17 & 18 Vict. 125, § 27. See *infra*, XI, C, 9, b, (III), (C).

44. Fournel *v.* Duvert, 2 Rev. de Lég. 279; Gleeson *v.* Wallace, 4 U. C. Q. B. 245.

45. Reid *v.* Warner, 17 L. C. Rep. 485; Luce *v.* Coyne, 36 U. C. Q. B. 305.

46. Keyser *v.* Pickrell, 4 App. Cas. (D. C.) 198, 205. See also McDonald *v.* McDonald, 142 Ind. 55, 70, 41 N. E. 336 (where the court said in substance: The rule seems to be a reasonable one, and the ground or reason upon which it is founded is that its requirements are necessary in order to avoid the evil of having collateral issues injected into the case, and the minds of the jurors distracted thereby. If the papers or documents are not in evidence, or connected with the cause for some other purpose, and their genuineness is not admitted by the adverse party, then independent proof would be necessary upon the side of the party seeking to sue them as a standard of comparison, to establish their authenticity. This evidence, the opposite party would be entitled to rebut, and thereby the parties would become involved in a collateral issue. This the rule seeks to avoid); Dietz *v.* Grand Rapids Fourth Nat. Bank, 69 Mich. 287, 37 N. W. 220; Jackson *v.* Phillips, 9 Cow. (N. Y.) 94; Tunstall *v.* Cobb, 109 N. C. 316, 14 S. E. 28; Doe *v.* Suckermore, 5 A. & E. 703, 7 L. J. Q. B. 33, 2 N. & P. 16, W. W. & D. 405, 31 E. C. L. 791.

47. See *infra*, XI, C, 9, b, (III), (C).

48. *Arkansas.*— Miller *v.* Jones, 32 Ark. 337.

Colorado.— Bradford *v.* People, 22 Colo. 157, 43 Pac. 1013; Wilber *v.* Eicholtz, 5 Colo. 240.

District of Columbia.— Keyser *v.* Pickrell, 4 App. Cas. 198.

Georgia.— Doe *v.* Roe, 16 Ga. 521.

Illinois.— Rogers *v.* Tyley, 144 Ill. 652, 32 N. E. 393; Brobston *v.* Cahill, 64 Ill. 356; Frank *v.* Taubman, 31 Ill. App. 592.

Indiana.— Swales *v.* Grubbs, 126 Ind. 106, 25 N. E. 877; Shorb *v.* Kinzie, 100 Ind. 429; Chance *v.* Indianapolis, etc., Gravel Road Co., 32 Ind. 472.

Iowa.— Saunders *v.* Howard, 51 Iowa 517, 1 N. W. 708.

Kansas.— Joseph *v.* Eldorado First Nat. Bank, 17 Kan. 256.

Kentucky.— Fee *v.* Taylor, 83 Ky. 259; McAllister *v.* McAllister, 7 B. Mon. 269.

Maryland.— Tome *v.* Parkersburg Branch R. Co., 39 Md. 36, 17 Am. Rep. 540; Williams *v.* Drexel, 14 Md. 566.

Massachusetts.— Com. *v.* Andrews, 143 Mass. 23, 8 N. E. 643.

Michigan.— Vinton *v.* Peck, 14 Mich. 287.

or a referee trying the case without a jury,[49] with other writings which are relevant to the issues in the cause and already in evidence,[50] or which are otherwise before the court as part of the record in the case;[51] but that irrelevant writings

Missouri.— Springer *v.* Hall, 83 Mo. 693, 53 Am. Rep. 598; State *v.* Tompkins, 71 Mo. 613; State *v.* Scott, 45 Mo. 302.

Montana.— Davis *v.* Fredericks, 3 Mont. 262.

New Hampshire.— Bowman *v.* Sanborn, 25 N. H. 87.

New York.— People *v.* Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193; Miles *v.* Loomis, 75 N. Y. 288, 31 Am. Rep. 470; Randolph *v.* Loughlin, 48 N. Y. 456; Van Wyck *v.* McIntosh, 14 N. Y. 439; Shaw *v.* Bryant, 90 Hun 274, 35 N. Y. Suppl. 909; Pontius *v.* People, 21 Hun 328; Glover *v.* New York, 7 Hun 232; Hardy *v.* Norton, 66 Barb. 527; Goodyear *v.* Vosburgh, 63 Barb. 154; Ellis *v.* People, 21 How. Pr. 356.

North Carolina.— State *v.* De Graff, 113 N. C. 688, 18 S. E. 507. *Contra*, Outlaw *v.* Hurdle, 46 N. C. 150.

North Dakota.— Dakota *v.* O'Hare, 1 N. D. 30, 44 N. W. 1003.

South Carolina.— Gable *v.* Rauch, 50 S. C. 95, 27 S. E. 555.

Texas.— Kennedy *v.* Upshaw, 64 Tex. 411; Williams *v.* State, 27 Tex. App. 466, 11 S. W. 481; Cook *v.* Granbury First Nat. Bank, (Civ. App. 1896) 33 S. W. 998.

Wisconsin.— Hazleton *v.* Union Bank, 32 Wis. 34.

United States.— Stokes *v.* U. S., 157 U. S. 187, 15 S. Ct. 617, 39 L. ed. 667; Hickory *v.* U. S., 151 U. S. 303, 14 S. Ct. 334, 38 L. ed. 170; Williams *v.* Conger, 125 U. S. 397, 8 S. Ct. 933, 31 L. ed. 778; Moore *v.* U. S., 91 U. S. 270, 23 L. ed. 346; Brooke *v.* Peyton, 4 Fed. Cas. No. 1,933, 1 Cranch C. C. 96; Dunlop *v.* Silver, 8 Fed. Cas. No. 4,169, 1 Cranch C. C. 27, 1 Cranch 367, 2 L. ed. 139; U. S. *v.* Chamberlain, 25 Fed. Cas. No. 14,778, 12 Blatchf. 390; Medway *v.* U. S., 6 Ct. Cl. 421.

See 20 Cent. Dig. tit. "Evidence," § 2381 *et seq.* See also *infra*, XI, C, 9, b, (III), (B), (3), (a), aa.

49. *Georgia.*— Doe *v.* Hackney, 16 Ga. 521.

Illinois.— Brobston *v.* Cahill, 64 Ill. 356; Northfield Farmers' Tp. Mut. F. Ins. Co. *v.* Sweet, 46 Ill. App. 598, appellate court.

Texas.— Millington *v.* Millington, (Civ. App. 1894) 25 S. W. 320.

United States.— Moore *v.* U. S., 91 U. S. 270, 23 L. ed. 346 (judge of court of claims); Briggs *v.* U. S., 29 Ct. Cl. 178; Medway *v.* U. S., 6 Ct. Cl. 421.

England.— Griffith *v.* Williams, 1 Cromp. & J. 47; Doe *v.* Wilson, 10 Moore P. C. 502, 14 Eng. Reprint 581.

50. See the cases cited in the two preceding notes.

Parts of same document.— As between disputed and genuine parts of a document already in evidence the same rule applies. Hawkins *v.* Grimes, 13 B. Mon. (Ky.) 257; Williams *v.* Drexel, 14 Md. 566; State *v.* Scott, 45 Mo. 302.

The disputed writing.— Under the common-law rule permitting comparison between a disputed writing and genuine writings already properly in evidence for other purposes than comparison, it was not necessary that a disputed writing should be the subject-matter of the issue to be tried. People *v.* Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193.

51. *Colorado.*—Bradford *v.* People, 22 Colo. 157, 43 Pac. 1013.

Delaware.— McCafferty *v.* Heritage, 5 Houst. 220.

Indiana.— Tucker *v.* Hyatt, 144 Ind. 635, 41 N. E. 1047, 43 N. E. 872, where the signature was verified.

Kansas.— Abbott *v.* Coleman, 22 Kan. 250, 31 Am. Rep. 186, signature to depositions.

Kentucky.— Northern Bank *v.* Buford, 1 Duv. 335.

Louisiana.— Sauve *v.* Dawson, 2 Mart. 202, appeal-bond.

Michigan.— Vinton *v.* Peck, 14 Mich. 287, appeal-bond on file in the case.

Missouri.— State *v.* David, 131 Mo. 380, 33 S. W. 28 (holding that where it appeared that the evidence taken at an inquest was reduced to writing and the record thereof containing defendant's testimony with his name subscribed thereto was filed with the clerk, as required by law, and by him produced in court and identified, and was read in evidence without objection, it was a paper in the case for the purpose of comparing it with a signature to a poison record kept by a druggist and claimed by the state to be defendant's, and that the objection to the genuineness of defendant's signature to the inquest comes too late when made for the first time in supreme court); Elsenrath *v.* Kallmeyer, 61 Mo. App. 430 (holding that the affidavit filed by a claimant in the probate court in support of a demand presented for an allowance against the estate of a decedent is to be considered a paper in the cause. Accordingly, if an appeal is taken in the proceeding to the circuit court, a comparison may be instituted, on the trial in that court, between the signature to such affidavit and that to another document whose genuineness is in issue).

North Carolina.— State *v.* Noe, 119 N. C. 849, 25 S. E. 812 (appearance bond); State *v.* De Graff, 113 N. C. 688, 18 S. E. 507; Yates *v.* Yates, 76 N. C. 142.

Texas.— Williams *v.* State, 27 Tex. App. 466, 11 S. W. 481 (signature of defendant to applications for continuances and for attachments); Smith *v.* Chiles, 1 Tex. App. Civ. Cas. § 124 (signature to deposition).

West Virginia.— Tower *v.* Whip, 53 W. Va. 158, 44 S. E. 179, 63 L. R. A. 937.

United States.— Dunlop *v.* Silver, 8 Fed. Cas. No. 4,169, 1 Cranch C. C. 27, 1 Cranch 367, 2 L. ed. 139, bail-bond on file in the case.

cannot be introduced in evidence for the mere purpose of such comparison,[52] except, as is held by some of the courts, although not by all, where their genuineness is not proved but conceded,[53] or the other party is estopped to deny

See 20 Cent. Dig. tit. "Evidence," § 2381 *et seq.* See also *infra*, XI, C, 9, b, (III), (B), (3), (b), aa.

Signature to pleadings.—Some of the courts have held that a party's signature to pleadings in the case should not be permitted to go to the jury for comparison with a disputed signature or writing, as this would permit the party to make evidence in his own favor. Travers *v.* Snyder, 38 Ill. App. 379; Snow *v.* Wiggin, 19 Ill. App. 542; Springer *v.* Hall, 83 Mo. 693, 53 Am. Rep. 598; Doud *v.* Reid, 53 Mo. App. 553 (holding that it was proper to refuse to allow the answer of defendants containing their signatures to a plea of *non est factum* to go to the jury-room as it would permit parties to make up testimony to suit themselves). See also Forbes *v.* Wiggins, 112 N. C. 122, 16 S. E. 905. In other cases the signatures affixed to pleadings have been used as a standard of comparison (Northern Bank *v.* Buford, 1 Duv. (Ky.) 335; Tower *v.* Whip, 53 W. Va. 158, 44 S. E. 179, 63 L. R. A. 937); more readily where the signature is verified (Tucker *v.* Hyatt, 144 Ind. 635, 41 N. E. 1047, 43 N. E. 872). In an action on a promissory note purporting to be made and signed by defendant, but denied by her, her signature to her affidavit of defense filed in the action, being admitted to be genuine, was offered and admitted in evidence in order that the jury might compare the two signatures and determine whether that to the note was or was not genuine also. McCafferty *v.* Heritage, 5 Houst. (Del.) 220.

Affidavits.— In Kernin *v.* Hill, 37 Ill. 209, it was held that an affidavit on file in the case could not be used as a basis of comparison. But see to the contrary Wilber *v.* Eicholtz, 5 Colo. 240; McCafferty *v.* Heritage, 5 Houst. (Del.) 220; Elsenrath *v.* Kallmeyer, 61 Mo. App. 430; State *v.* De Graff, 113 N. C. 688, 18 S. E. 507.

52. *Alabama.*— Griffin *v.* State, 90 Ala. 596, 8 So. 670; Moon *v.* Crowder, 72 Ala. 79; Bestor *v.* Roberts, 58 Ala. 331; State *v.* Givens, 5 Ala. 747; Little *v.* Beazley, 2 Ala. 703, 36 Am. Dec. 431.

Arkansas.— Miller *v.* Jones, 32 Ark. 337.

District of Columbia.— Keyser *v.* Pickrell, 4 App. Cas. 198.

Illinois.— Putnam *v.* Wadley, 40 Ill. 346; Jumpertz *v.* People, 21 Ill. 375; Snow *v.* Wiggin, 19 Ill. App. 542.

Indiana.— White Sewing Mach. Co. *v.* Gordon, 124 Ind. 495, 24 N. E. 1053, 19 Am. St. Rep. 109; Shorb *v.* Kinzie, 100 Ind. 429; Huston *v.* Schindler, 46 Ind. 38; Chance *v.* Indianapolis, etc., Gravel Road Co., 32 Ind. 472; Shank *v.* Butsch, 28 Ind. 19.

Kentucky.—Hawkins *v.* Grimes, 13 B. Mon. 257; McAllister *v.* McAllister, 7 B. Mon. 269.

Louisiana.— State *v.* Fritz, 23 La. Ann. 55.

Maryland.— Tome *v.* Parkersburg Branch R. Co., 39 Md. 36, 17 Am. Rep. 540.

Michigan.— *In re* Foster, 34 Mich. 21; Vinton *v.* Peck, 14 Mich. 287.

Missouri.— Dow *v.* Spenny, 29 Mo. 386; De Arman *v.* Taggart, 65 Mo. App. 82; McCombs *v.* Foster, 62 Mo. App. 303; Doud *v.* Reid, 53 Mo. App. 553; Cameron First Nat. Bank *v.* Stanley, 46 Mo. App. 440; Edmonston *v.* Henry, 45 Mo. App. 346.

New Mexico.— Staab *v.* Jaramillo, 3 N. M. 33, 1 Pac. 170.

New York.—Randolph *v.* Loughlin, 48 N. Y. 456; Commonwealth Bank *v.* Mudgett, 44 N. Y. 514; Van Wyck *v.* McIntosh, 14 N. Y. 439; Glover *v.* New York, 7 Hun 232; Goodyear *v.* Vosburgh, 63 Barb. 154; Morey *v.* Safe-Deposit Co., 34 N. Y. Super. Ct. 154 (referee); Hynes *v.* McDermott, 7 Abb. N. Cas. 98; Jackson *v.* Phillips, 9 Cow. 94; Haskins *v.* Stuyvesant, Anth. N. P. 132.

North Carolina.— Tunstall *v.* Cobb, 109 N. C. 316, 14 S. E. 28; Fuller *v.* Fox, 101 N. C. 119, 7 S. E. 589, 9 Am. St. Rep. 27; Otey *v.* Hoyt, 48 N. C. 407. See also Ratliff *v.* Ratliff, 131 N. C. 425, 42 S. E. 887.

North Dakota.— Territory *v.* O'Hare, 1 N. D. 30, 44 N. W. 1003.

Tennessee.— Franklin *v.* Franklin, 90 Tenn. 44, 16 S. W. 557; Wright *v.* Hersey, 3 Baxt. 42; Clark *v.* Rhodes, 2 Heisk. 206.

Texas.— Collins *v.* Ball, 82 Tex. 259, 17 S. W. 614, 27 Am. St. Rep. 877; Matlock *v.* Glover, 63 Tex. 231; Hanley *v.* Gandy, 28 Tex. 211, 91 Am. Dec. 315; Sheppard *v.* Love, (Civ. App. 1902) 71 S. W. 67; Cook *v.* Granbury First Nat. Bank, (Civ. App. 1896) 33 S. W. 998.

Vermont.— Wilmington Sav. Bank *v.* Waste, (1904) 57 Atl. 241.

Virginia.— Rowt *v.* Kile, 1 Leigh 216.

West Virginia.—State *v.* Koontz, 31 W. Va. 127, 5 S. E. 328; State *v.* Henderson, 29 W. Va. 147, 1 S. E. 225.

Wisconsin.— Hazleton *v.* Union Bank, 32 Wis. 34.

United States.— Hickory *v.* U. S., 151 U. S. 303, 14 S. Ct. 334, 38 L. ed. 170; Williams *v.* Conger, 125 U. S. 397, 8 S. Ct. 933, 31 L. ed. 778; Moore *v.* U. S., 91 U. S. 270, 23 L. ed. 346; U. S. *v.* Jones, 10 Fed. 469, 20 Blatchf. 235; Macubbin *v.* Lovell, 16 Fed. Cas. No. 8,928, 1 Cranch C. C. 184.

See 20 Cent. Dig. tit. "Evidence," § 2381 *et seq.* See also *infra*, XI, C, 9, b, (III), (B), (3), (b), aa.

53. *District of Columbia.*— Keyser *v.* Pickrell, 4 App. Cas. 198.

Indiana.— Swales *v.* Grubbs, 126 Ind. 106, 25 N. E. 877; White Sewing Mach. Co. *v.* Gordon, 124 Ind. 495, 24 N. E. 1053, 19 Am. St. Rep. 109; Burdick *v.* Hunt, 43 Ind. 381.

Michigan.— Dietz *v.* Grand Rapids Fourth Nat. Bank, 69 Mich. 287, 37 N. W. 220.

Missouri.— State *v.* Minton, 116 Mo. 605, 22 S. W. 808; Rose *v.* Springfield First Nat. Bank, 91 Mo. 399, 3 S. W. 876, 60 Am. Rep. 258; De Arman *v.* Taggart, 65 Mo. App. 82;

it,[54] or consents to the comparison,[55] and consent is shown if the papers are admitted without objection.[56] Other courts have held generally, contrary to the common-law rule, that irrelevant writings are admissible for the mere purpose of such comparison if their genuineness is either admitted or proved.[57] In Pennsylvania and South Carolina and perhaps in some of the other states comparison by the jury, whether the other writings are relevant and in evidence or irrelevant, is not allowed as independent proof, but is allowed in aid or corroboration of other evidence of the falsity or genuineness of the disputed writing.[58]

McCombs *v.* Foster, 62 Mo. App. 303; Doud *v.* Reid, 53 Mo. App. 553.

North Carolina.— Ratliff *v.* Ratliff, 131 N. C. 425, 42 S. E. 887, 63 L. R. A. 963; State *v.* Noe, 119 N. C. 849, 25 S. E. 812.

Texas.— Jester *v.* Steiner, 86 Tex. 415, 25 S. W. 411; Eborn *v.* Zimpelman, 47 Tex. 503, 26 Am. Rep. 315; Cannon *v.* Sweet, (Civ. App. 1895) 29 S. W. 947.

Vermont.— Gifford *v.* Ford, 5 Vt. 532.

West Virginia.— State *v.* Henderson, 29 W. Va. 147, 1 S. E. 225.

See 20 Cent. Dig. tit. "Evidence," § 2381 *et seq.* See also *infra,* XI, C, 9, (III), (B), (a), aa; XI, C, 9, (III), (D).

54. Keyser *v.* Pickrell, 4 App. Cas. (D. C.) 198; State *v.* Minton, 116 Mo. 605, 22 S. W. 808; Rose *v.* Springfield First Nat. Bank, 91 Mo. 399, 3 S. W. 876, 60 Am. Rep. 258; State *v.* Noe, 119 N. C. 849, 25 S. E. 812. A plaintiff who brings an action against the executors of a person whose estate is charged with a liability is estopped to deny the execution of the will under which they were appointed and qualified; and the original will, taken from the records of the court, is competent without further proof of its execution, as a basis of comparison in determining the genuineness of the handwriting of testator to the instrument in controversy. Croom *v.* Sugg, 110 N. C. 259, 14 S. E. 748. See also *infra,* XI, C, 9, b, (III), (B), (3), (a), aa; XI, C, 9, b, (III), (D).

55. *Alabama.*— Moon *v.* Crowder, 72 Ala. 79.

Michigan.— People *v.* Gale, 50 Mich. 237, 15 N. W. 99.

New York.— Bronner *v.* Loomis, 14 Hun 341.

Tennessee.— Kannon *v.* Galloway, 2 Baxt. 230.

United States.— Briggs *v.* U. S., 29 Ct. Cl. 178, comparison by court.

See also *infra,* XI, C, 9, b, (III), (B), (3), (a).

Writing at request of other party.— It has been at all times open to a party to ask his opponent, whose handwriting was in dispute, to write in presence of the jury and to submit to them the specimen so obtained as a standard of comparison. Bronner *v.* Loomis, 14 Hun (N. Y.) 341. See *infra,* XI, C, 9, b, (III), (D).

56. Moon *v.* Crowder, 72 Ala. 79; People *v.* Gale, 50 Mich. 237, 15 N. W. 99.

57. *Connecticut.*— Lyon *v.* Lyman, 9 Conn. 55.

Delaware.— McCafferty *v.* Heritage, 5 Houst. 220.

Kansas.— State *v.* Stegman, 62 Kan. 476, 63 Pac. 746; Joseph *v.* Eldorado Nat. Bank, 17 Kan. 256; Macomber *v.* Scott, 10 Kan. 335.

Maine.— State *v.* Thompson, 80 Me. 194, 13 Atl. 892, 6 Am. St. Rep. 172; Chandler *v.* Le Barren, 45 Me. 534.

Massachusetts.— Costelo *v.* Crowell, 139 Mass. 588, 2 N. E. 698; Costello *v.* Crowell, 133 Mass. 352; Richardson *v.* Newcomb, 21 Pick. 315; Moody *v.* Rowell, 17 Pick. 490, 28 Am. Dec. 317; Homer *v.* Wallis, 11 Mass. 309, 6 Am. Dec. 169.

Mississippi.— Coleman *v.* Adair, 75 Miss. 660, 23 So. 369; Garvin *v.* State, 52 Miss. 207; Wilson *v.* Beauchamp, 50 Miss. 24.

New Hampshire.— Carter *v.* Jackson, 58 N. H. 156; State *v.* Hastings, 53 N. H. 452. But see Myers *v.* Toscan, 3 N. H. 47.

Ohio.— Calkins *v.* State, 14 Ohio St. 222.

Texas.— Cannon *v.* Sweet, (Civ. App. 1894) 28 S. W. 718.

Vermont.— Rowell *v.* Fuller, 59 Vt. 688, 10 Atl. 853; State *v.* Ward, 39 Vt. 225; Adams *v.* Field, 21 Vt. 256.

Washington.— See Moore *v.* Palmer, 14 Wash. 134, 44 Pac. 142.

See 20 Cent. Dig. tit. "Evidence," § 2381 *et seq.* See also *infra,* XI, C, 9, b, (III), (B), (3), (a), aa.

58. In Pennsylvania see Rockey's Estate, 155 Pa. St. 453, 26 Atl. 656; Foster *v.* Collner, 107 Pa. St. 305; Berryhill *v.* Kirchner, 96 Pa. St. 489; Aumick *v.* Mitchell, 82 Pa. St. 211; Haycock *v.* Greup, 57 Pa. St. 438; Travis *v.* Brown, 43 Pa. St. 9, 82 Am. Dec. 540 (where it is said in substance: The evidence, however, is merely corroborative. After evidence has been adduced in support of a writing, it can be strengthened by comparing the writing in question with other genuine writings, indubitably such. Beyond this, our cases do not go); Guffey v. Deeds, 29 Pa. St. 378; Callan *v.* Gaylord, 3 Watts 321; Baker *v.* Haines, 6 Whart. 284, 36 Am. Dec. 224; Farmers' Bank *v.* Whitehill, 10 Serg. & R. 110; Ulmer *v.* Gentner, 3 Pennyp. 453; Shannon *v.* Castner, 21 Pa. Super. Ct. 294; Shull *v.* Croft, 1 Del. Co. 387. The act of May 15, 1895 (Pub. Laws 69), making it competent for experts to make comparison between writings, did not change the law allowing the introduction of well authenticated examples of a person's signature for the inspection of the jury. Shannon *v.* Castner, 21 Pa. Super. Ct. 294.

In South Carolina also comparison as an original means of ascertaining the genuineness of handwriting will not be permitted, but when introduced in aid of doubtful proof already offered it may be allowed. Benedict *v.* Flanigan, 18 S. C. 506, 44 Am. Rep. 583.

(b) Comparison by Witnesses — aa. *In General.* In the United States, in the absence of a statute,[59] some of the courts have followed the rule of the common law excluding proof of handwriting by the inference of a witness from a mere comparison of the disputed writing with other writings, even where the other writings are relevant to the issues in the cause and already in evidence.[60] Most of the courts, however, have received such evidence, not only where the writings with which the comparison is made are already in evidence as relevant to the issues,[61] but also where they are otherwise before the court as part of the record

See also Rose *v.* Winnsboro Nat. Bank, 41 S. C. 191, 19 S. E. 487; Graham *v.* Nesmith, 24 S. C. 285; Bennett *v.* Mathewes, 5 S. C. 478. Where there is conflicting testimony as to the genuineness of a signature, comparison of handwriting is admissible, as confirmatory evidence, to enable the jury to decide upon which of the witnesses they could most confide. Robertson *v.* Millar, 1 McMull. 120. Whether the proof is doubtful must be determined in the first instance by the trial judge, and his ruling will not be disturbed unless his error be very patent. Benedict *v.* Flanigan, 18 S. C. 506, 44 Am. Rep. 583.

In New Hampshire also this rule was formerly held. Myers *v.* Toscan, 3 N. H. 47, holding that it cannot be left to a jury to determine the genuineness of a signature to a paper, merely by comparing it with other signatures proved to be genuine; but when witnesses acquainted with the handwriting in question have testified, other signatures proved to be genuine may be submitted to the jury to corroborate or weaken their testimony. This rule, however, has since been abandoned. Carter *v.* Jackson, 58 N. H. 156; State *v.* Hastings, 53 N. H. 452. See *supra*, note 57.

59. See *infra*, XI, C, 9, b, (III), (C).

60. *Alabama.*— State *v.* Givens, 5 Ala. 747.

Maryland.— Herrick *v.* Swomley, 56 Md. 439; Tome *v.* Parkersburg Branch R. Co., 39 Md. 36, 17 Am. Rep. 540; Niller *v.* Johnson, 27 Md. 6.

Pennsylvania.— In this state, prior to the statute of 1895 changing the rule (see *infra*, XI, C, 9, b, (III), (C)), although evidence touching the genuineness of a paper might be corroborated by a comparison to be made by a jury or auditor between that paper and other well authenticated writings of the party (see *supra*, XI, C, 9, b, (III), (B), (3), (a)), mere experts were not permitted to make the comparison, and then to testify to their conclusions from it. Rockey's Estate, 155 Pa. St. 453, 26 Atl. 656; Foster *v.* Collner, 107 Pa. St. 305; Berryhill *v.* Kirchner, 96 Pa. St. 489; Aumick *v.* Mitchell, 82 Pa. St. 211; Haycock *v.* Greup, 57 Pa. St. 438; Travis *v.* Brown, 43 Pa. St. 9, 82 Am. Dec. 540; McNair *v.* Com., 26 Pa. St. 388; Ulmer *v.* Gentner, 3 Pennyp. 453.

Rhode Island.— Kinney *v.* Flynn, 2 R. I. 319.

United States.— Strother *v.* Lucas, 6 Pet. 763, 8 L. ed. 573; Turner *v.* Foxall, 24 Fed. Cas. No. 14,255, 2 Cranch C. C. 324. And see Rogers *v.* Ritter, 12 Wall. 317, 20 L. ed. 417.

In Kentucky the evidence of an expert is excluded so long as the evidence of those personally acquainted with the handwriting is available. Fee *v.* Taylor, 83 Ky. 259, 7 Ky. L. Rep. 248. But a skilled witness, while not competent to state from comparison with documents, in or out of the case, whether a given handwriting is genuine, may still point out to the jury indications, other than resemblances of the handwriting, which tend circumstantially, as it were, to indicate the writer; such as differences in words or letters "or speak of other facts as they appear to him upon the face of a writing." Fee *v.* Taylor, *supra*.

Territorial federal courts follow the rule of the supreme court of the United States (Davis *v.* Fredericks, 3 Mont. 262; Territory *v.* O'Hare, 1 N. D. 30, 44 N. W. 1003), but feel in no way constrained to follow the rule after the admission of the territory into the union (Territory *v.* O'Hare, *supra*).

61. *Colorado.*—Bradford *v.* People, 22 Colo. 157, 43 Pac. 1013; Wilber *v.* Eicholtz, 5 Colo. 240.

District of Columbia.— Keyser *v.* Pickrell, 4 App. Cas. 198.

Illinois.— Himrod *v.* Gilman, 147 Ill. 293, 35 N. E. 373; Rogers *v.* Tyley, 144 Ill. 652, 32 N. E. 393.

Indiana.— McDonald *v.* McDonald, 142 Ind. 55, 41 N. E. 336; Swales *v.* Grubbs, 126 Ind. 106, 25 N. E. 877; Shorb *v.* Kinzie, 100 Ind. 429; Hazzard *v.* Vickery, 78 Ind. 64; Bowen *v.* Jones, 13 Ind. App. 193, 41 N. E. 400.

Kansas.— Abbott *v.* Coleman, 22 Kan. 250, 31 Am. Rep. 186; Macomber *v.* Scott, 10 Kan. 335.

Michigan.— Mallory *v.* Ohio Farmers' Ins. Co., 90 Mich. 112, 51 N. W. 188; Houghton First Nat. Bank *v.* Robert, 41 Mich. 709, 3 N. W. 199.

Missouri.— State *v.* Thompson, 132 Mo. 301, 34 S. W. 31; State *v.* David, 131 Mo. 380, 33 S. W. 28; State *v.* Minton, 116 Mo. 605, 22 S. W. 808; Springer *v.* Hall, 83 Mo. 693, 53 Am. Rep. 598; Elsenrath *v.* Kallmeyer, 61 Mo. App. 430. *Compare* State *v.* Tompkins, 71 Mo. 613.

Montana.— Davis *v.* Fredericks, 3 Mont. 262.

New Hampshire.— State *v.* Shinborn, 46 N. H. 497, 88 Am. Dec. 224; Bowman *v.* Sanborn, 25 N. H. 87.

New York.— Hynes *v.* McDermott, 82 N. Y. 41, 37 Am. Rep. 538; Miles *v.* Loomis, 75 N. Y. 288, 31 Am. Rep. 470; Van Wyck *v.* McIntosh, 14 N. Y. 439; Shaw *v.* Bryant, 90 Hun 374, 35 N. Y. Suppl. 909; Pontius *v.*

in the case,[62] provided the witness is shown to have the qualifications of a skilled observer or expert.[63] Even in the case of irrelevant writings offered in evidence merely for the purpose of comparison by a witness with the disputed writing, some of the courts have received such evidence, contrary to the common-law rule.[64]

People, 21 Hun 328; Goodyear *v.* Vosburgh, 63 Barb. 154; Dubois *v.* Baker, 40 Barb. 556.

North Carolina.— Kornegay *v.* Kornegay, 117 N. C. 242, 23 S. E. 257; Jarvis *v.* Vanderford, 116 N. C. 147, 21 S. E. 302; State *v.* De Graff, 113 N. C. 688, 18 S. E. 507; Tunstall *v.* Cobb, 109 N. C. 316, 14 S. E. 28; Yates *v.* Yates, 76 N. C. 142.

North Dakota.— Territory *v.* O'Hare, 1 N. D. 30, 44 N. W. 1003.

Ohio.— Pavey *v.* Pavey, 30 Ohio St. 600.

Texas.— Jester *v.* Steiner, 86 Tex. 415, 25 S. W. 411; Kennedy *v.* Upshaw, 64 Tex. 411; Eborn *v.* Zimpelman, 47 Tex. 503, 26 Am. Rep. 315; Williams *v.* State, 27 Tex. App. 466, 11 S. W. 481; Mardes *v.* Meyers, 8 Tex. Civ. App. 542, 28 S. W. 693; Smith *v.* Chiles, 1 Tex. App. Civ. Cas. § 124. The reasons for admitting the evidence are reinforced where the element of estoppel enters, as where the party affirming the handwriting has introduced the specimens issued against him. Kennedy *v.* Upshaw, 64 Tex. 411.

Utah.— Durnell *v.* Sowden, 5 Utah 216, 14 Pac. 334.

West Virginia.— Tower *v.* Whip, 53 W. Va. 158, 44 S. E. 179, 63 L. R. A. 937. *Compare* Clay *v.* Robinson, 7 W. Va. 348, 10 W. Va. 49.

Wisconsin.— Pierce *v.* Northey, 14 Wis. 9.

United States.— U. S. *v.* Mathias, 36 Fed. 892; U. S. *v.* Chamberlain, 25 Fed. Cas. No. 14,778, 12 Blatchf. 390.

See 20 Cent. Dig. tit. "Evidence," § 2381 *et seq.*

Parts of same document.— As between disputed and genuine parts of a document already in evidence the same rule applies. A witness whose qualifications are shown may, as on the question of alteration, compare different parts of an instrument in evidence and state his inference as to whether they are in the same handwriting (Hawkins *v.* Grimes, 13 B. Mon. (Ky.) 257; Williams *v.* Drexel, 14 Md. 566; Graham *v.* Spang, (Pa. 1888) 16 Atl. 91), and he may compare two or more signatures and state his inference as to whether they were written by the same person (U. S. *v.* Darnaud, 25 Fed. Cas. No. 14,918, 3 Wall. Jr. 143).

Instruments admitted without objection.— Where the instruments, the signatures to which are thus compared, were for aught that appears in the case offered in evidence for other purposes than comparison, and were received without objection, it cannot be objected upon appeal that they were immaterial for any other purpose, and so could not be used for comparison. Having been received without objection they must be regarded as properly in evidence for all the purposes of the case. Miles *v.* Loomis, 75 N. Y. 288, 31 Am. Rep. 470. See also Pontius *v.* People, 21 Hun (N. Y.) 328. And see *supra*, XI, C, 9, b, (III), (B), (3), (a), text and note 56.

62. *Colorado.*—Bradford *v.* People, 22 Colo. 157, 43 Pac. 1013; Wilber *v.* Eicholtz, 5 Colo. 240.

Kansas.— Abbott *v.* Coleman, 22 Kan. 250, 31 Am. Rep. 186.

Michigan.— Vinton *v.* Peck, 14 Mich. 287.

Missouri.— State *v.* David, 131 Mo. 380, 33 S. W. 28; Elsenrath *v.* Kallmeyer, 61 Mo. App. 430.

North Carolina.— State *v.* Noe, 119 N. C. 849, 25 S. E. 812; State *v.* De Graff, 113 N. C. 688, 18 S. E. 507; Yates *v.* Yates, 76 N. C. 142.

Texas.— Williams *v.* State, 27 Tex. App. 466, 11 S. W. 481; Smith *v.* Chiles, 1 Tex. App. Civ. Cas. § 124.

West Virginia.— Tower *v.* Whip, 53 W. Va. 158, 44 S. E. 179, 63 L. R. A. 937.

United States.— Dunlop *v.* Silver, 8 Fed. Cas. No. 4,169, 1 Cranch C. C. 27, 1 Cranch 367, 2 L. ed. 139.

See 20 Cent. Dig. tit. "Evidence," § 2381 *et seq.* *Compare, supra*, XI, C, 9, b, (III), (B), (3), (a).

Pleadings and affidavits.— As to whether pleadings and affidavits in the case may be used for comparison the cases are in conflict. See *supra*, XI, C, 9, b, (III), (B), (a), text and note 51.

63. See the cases above cited; and *infra*, XI, C, 9, b, (III), (B), (3) (b), cc.

64. *Connecticut.*— Tyler *v.* Todd, 36 Conn. 218.

Georgia.— Goza *v.* Browning, 96 Ga. 421, 23 S. E. 842.

Kansas.— State *v.* Ryno, 68 Kan. 348, 74 Pac. 1114; Holmberg *v.* Johnson, 45 Kan. 197, 25 Pac. 575; Abbott *v.* Coleman, 22 Kan. 250, 31 Am. Rep. 186; Macomber *v.* Scott, 10 Kan. 335. See Gaunt *v.* Harkness, 53 Kan. 405, 36 Pac. 739, 42 Am. St. Rep. 297.

Maine.— State *v.* Thompson, 80 Me. 194, 13 Atl. 892, 6 Am. St. Rep. 172; Woodman *v.* Dana, 52 Me. 9; Withee *v.* Rowe, 45 Me. 571; Chandler *v.* Le Barron, 45 Me. 534. But see Page *v.* Hemans, 14 Me. 478.

Massachusetts.— Costelo *v.* Crowell, 139 Mass. 588, 2 N. E. 698; Costello *v.* Crowell, 133 Mass. 352; Com. *v.* Eastman, 1 Cush. 189, 48 Am. Dec. 596; Richardson *v.* Newcomb, 21 Pick. 315; Moody *v.* Rowell, 17 Pick. 490, 28 Am. Dec. 317.

Minnesota.— Morrison *v.* Porter, 35 Minn. 425, 29 N. W. 54, 59 Am. Rep. 331.

Mississippi.— Roy *v.* Aberdeen First Nat. Bank, (1903) 33 So. 494; Coleman *v.* Adair, 75 Miss. 660, 23 So. 369; Wilson *v.* Beauchamp, 50 Miss. 24; Moye *v.* Herndon, 30 Miss. 110.

New Hampshire.— State *v.* Hastings, 53 N. H. 452; State *v.* Shinborn, 46 N. H. 497, 88 Am. Dec. 224.

Ohio.— Koons *v.* State, 36 Ohio St. 195;

Other courts, in the absence of a statute,[65] have laid down the general rule that such evidence should be rejected,[66] although some of them, as in the case

Pavey *v.* Pavey, 30 Ohio St. 600; Bragg *v.* Colwell, 19 Ohio St. 407; Calkins *v.* State, 14 Ohio St. 222; Hicks *v.* Person, 19 Ohio 426; Murphy *v.* Hagerman, Wright 293.

Texas.— Mardes *v.* Meyers, 8 Tex. Civ. App. 542, 28 S. W. 693.

Vermont.— Rowell *v.* Fuller, 59 Vt. 688, 10 Atl. 853; State *v.* Ward, 39 Vt. 225.

Virginia.— Hanriot *v.* Sherwood, 82 Va. 1.

Washington.— See Moore *v.* Palmer, 14 Wash. 134, 44 Pac. 142.

See 20 Cent. Dig. tit. "Evidence," § 2381 *et seq.*

65. See *infra*, XI, C, 9, b, (III), (C).

66. *Alabama.*— Gibson *v.* Trowbridge Furniture Co., 96 Ala. 357, 11 So. 365; Snider *v.* Burks, 84 Ala. 53, 4 So. 225; Moon *v.* Crowder, 72 Ala. 79; Bishop *v.* State, 30 Ala. 34; State *v.* Givens, 5 Ala. 747.

Arkansas.— Miller *v.* Jones, 32 Ark. 337.

District of Columbia.— Keyser *v.* Pickrell, 4 App. Cas. 198.

Illinois.— Himrod *v.* Gilman, 147 Ill. 293, 35 N. E. 373; Rogers *v.* Tyley, 144 Ill. 652, 32 N. E. 393; Riggs *v.* Powell, 142 Ill. 453, 32 N. E. 482; Bevan *v.* Atlanta Nat. Bank, 142 Ill. 302, 31 N. E. 679; Putnam *v.* Wadley, 40 Ill. 346; Kernin *v.* Hill, 37 Ill. 209; Jumpertz *v.* People, 21 Ill. 375; Pierce *v.* De Long, 45 Ill. App. 462; Gitchell *v.* Ryan, 24 Ill. App. 372.

Indiana.— McDonald *v.* McDonald, 142 Ind. 55, 41 N. E. 336; White Sewing Mach. Co. *v.* Gordon, 124 Ind. 495, 24 N. E. 1053, 19 Am. St. Rep. 109; Walker *v.* Steele, 121 Ind. 436, 22 N. E. 142, 23 N. E. 271; Shorb *v.* Kinzie, 100 Ind. 429; Shorb *v.* Kinzie, 80 Ind. 500; Hazzard *v.* Vickery, 78 Ind. 64; Jones *v.* State, 60 Ind. 241, 244 (where it was said: "If it were necessary to offer reasons in support of an established rule, they would readily occur. The handwriting of a person may change during the course of his life. It may be affected by his health, mood of mind at the time he writes, his haste or leisure in writing, the character of the pen, ink or paper, or other fortuitous circumstances. The testimony of a witness, therefore, founded solely upon comparison, must necessarily be uncertain; to say nothing of the facilities to commit fraud, which a rule to allow proof by comparison would open, if the basis of the comparison was not conceded"); Burdick *v.* Hunt, 43 Ind. 381; Clark *v.* Wyatt, 15 Ind. 271, 77 Am. Dec. 90; Bowen *v.* Jones, 13 Ind. App. 193, 41 N. E. 400; Merritt *v.* Straw, 6 Ind. App. 360, 33 N. E. 657.

Kentucky.— Fee *v.* Taylor, 83 Ky. 259; Hawkins *v.* Grimes, 13 B. Mon. 257; McAllister *v.* McAllister, 7 B. Mon. 269.

Louisiana.— State *v.* Fritz, 23 La. Ann. 55; McDonogh's Succession, 18 La. Ann. 419.

Maryland.— Herrick *v.* Swomley, 56 Md. 439; Tome *v.* Parkersburg Branch R. Co., 39 Md. 36, 17 Am. Rep. 540; Niller *v.* Johnson, 27 Md. 6; Smith *v.* Walton, 8 Gill 77.

Michigan.— People *v.* Parker, 67 Mich. 222, 34 N. W. 720, 11 Am. St. Rep. 578; Houghton First Nat. Bank *v.* Robert, 41 Mich. 709, 3 N. W. 199; *In re* Foster, 34 Mich. 21; Van Sickle *v.* People, 29 Mich. 61; Vinton *v.* Peck, 14 Mich. 287.

Missouri.— State *v.* Thompson, 132 Mo. 301, 34 S. W. 31; State *v.* Minton, 116 Mo. 605, 22 S. W. 808; Rose *v.* Springfield First Nat. Bank, 91 Mo. 399, 3 S. W. 876, 60 Am. Rep. 258; State *v.* Clinton, 67 Mo. 380, 29 Am. Rep. 506; McCombs *v.* Foster, 62 Mo. App. 303; Doud *v.* Reid, 53 Mo. App. 553; Singer Mfg. Co. *v.* Clay, 53 Mo. App. 412; Edmonston *v.* Henry, 45 Mo. App. 346.

Montana.— Davis *v.* Fredericks, 3 Mont. 262.

New York.— Hynes *v.* McDermott, 82 N. Y. 41, 37 Am. Rep. 538; Miles *v.* Loomis, 75 N. Y. 288, 31 Am. Rep. 470; Commonwealth Bank *v.* Mudgett, 44 N. Y. 514; Van Wyck *v.* McIntosh, 14 N. Y. 439; Goodyear *v.* Vosburgh, 63 Barb. 154; Frank *v.* Chemical Nat. Bank, 37 N. Y. Super. Ct. 26; Morey *v.* Safe Deposit Co., 34 N. Y. Super. Ct. 154; People *v.* Spooner, 1 Den. 343, 43 Am. Dec. 672; Wilson *v.* Kirkland, 5 Hill 182; Jackson *v.* Phillips, 9 Cow. 94; Titford *v.* Knott, 2 Johns. Cas. 211; *In re* Merchant, Tuck. Surr. 151; Haskins *v.* Stuyvesant, Anth. N. P. 132.

North Carolina.—Jarvis *v.* Vanderford, 116 N. C. 147, 21 S. E. 302; Tunstall *v.* Cobb, 109 N. C. 316, 14 S. E. 28; Fuller *v.* Fox, 101 N. C. 119, 7 S. E. 589, 9 Am. St. Rep. 27. See also Ratliff *v.* Ratliff, 131 N. C. 425, 42 S. E. 887.

North Dakota.— Territory *v.* O'Hare, 1 N. D. 30, 44 N. W. 1003.

Rhode Island.— Kinney *v.* Flynn, 2 R. I. 319. And see State *v.* Brown, 4 R. I. 528, 70 Am. Dec. 168.

South Carolina.— Graham *v.* Nesmith, 24 S. C. 285; Benedict *v.* Flanigan, 18 S. C. 506, 44 Am. Rep. 583.

Tennessee.— Franklin *v.* Franklin, 90 Tenn. 44, 16 S. W. 557; Wright *v.* Hessey, 3 Baxt. 42; Clark *v.* Rhodes, 2 Heisk. 206.

Texas.— Jester *v.* Steiner, 86 Tex. 415, 25 S. W. 411; Eborn *v.* Zimpelman, 47 Tex. 503, 26 Am. Rep. 315; Hanley *v.* Gandy, 28 Tex. 211, 91 Am. Dec. 315; Sheppard *v.* Love, (Civ. App. 1902) 71 S. W. 67; Cook *v.* Granbury First Nat. Bank, (Civ. App. 1896) 33 S. W. 998. But see Cannon *v.* Sweet, (Civ. App. 1895) 29 S. W. 947; Mardes *v.* Meyers, 8 Tex. Civ. App. 542, 28 S. W. 693.

Utah.— Tucker *v.* Kellogg, 8 Utah 11, 28 Pac. 870.

West Virginia.— Tower *v.* Whip, 53 W. Va. 158, 44 S. E. 179, 63 L. R. A. 937; State *v.* Koontz, 31 W. Va. 127, 5 S. E. 328; State *v.* Henderson, 29 W. Va. 147, 1 S. E. 225; Clay *v.* Robinson, 7 W. Va. 348, 10 W. Va. 49.

Wisconsin.— Hazleton *v.* Union Bank, 32 Wis. 34.

United States.— See Rogers *v.* Ritter, 12 Wall. 317, 20 L. ed. 417; Strother *v.* Lucas,

of comparison by the jury,[67] have held it admissible under exceptional circumstances, as where there is no danger of raising collateral issues because the genuineness of the writings offered for comparison is conceded,[68] or the other party is estopped to deny their genuineness,[69] or where the parties consent to the comparison,[70] or the comparison is merely in corroboration of other evidence of the falsity or genuineness of the writing in dispute.[71] In all cases the witness may and should state the basis of his inference.[72] He may illustrate his evidence to the jury by the aid of a blackboard.[73]

bb. *Comparison to Refresh Memory or in Corroboration of Testimony.* Even under the common-law rule, where a witness testifies as to the genuineness of handwriting, not from comparison merely, but from knowledge derived from having seen the party write or otherwise,[74] he may compare the disputed writing with other writings proved or admitted to be genuine to refresh his memory[75] or in corroboration of his testimony.[76]

cc. *Qualifications of the Witness.* In order that a witness may be allowed to compare two writings or signatures and state an inference as to whether or not they were written by the same person, it must be affirmatively shown[77] to the reason-

6 Pet. 763, 8 L. ed. 573; Turner *v.* Foxall, 24 Fed. Cas. No. 14,255, 2 Cranch C. C. 324; U. S. *v.* Chamberlain, 25 Fed. Cas. No. 14,778, 12 Blatchf. 390.

See 20 Cent. Dig. tit. "Evidence," § 2381 *et seq.*

67. See *supra*, XI, C, 9, b, (III), (B), (3), (b), aa.

68. *Indiana.*— McDonald *v.* McDonald, 142 Ind. 55, 41 N. E. 336; Walker *v.* Steele, 121 Ind. 436, 440, 22 N. E. 142, 23 N. E. 271 (where it is said: "It was well settled by our own decisions that testimony of this character is only competent where the comparison to be instituted is between the writing in question and another writing which is admitted to be in the hand of the person whose instrument the writing in question is claimed to be"); Shorb *v.* Kinzie, 100 Ind. 429; Shorb *v.* Kinzie, 80 Ind. 500; Hazzard *v.* Vickery, 78 Ind. 64; Forgey *v.* Cambridge City First Nat. Bank, 66 Ind. 123; Jones *v.* State, 60 Ind. 241; Huston *v.* Schindler, 46 Ind. 38; Burdick *v.* Hunt, 43 Ind. 381; Chance *v.* Indianapolis, etc., Gravel Road Co., 32 Ind. 472; Bowen *v.* Jones, 13 Ind. App. 193, 41 N. E. 400.

Kansas.— Macomber *v.* Scott, 10 Kan. 335.

Minnesota.— Morrison *v.* Porter, 35 Minn. 425, 29 N. W. 54, 59 Am. Rep. 331.

Missouri.—State *v.* Thompson, 132 Mo. 301, 34 S. W. 31; McCombs *v.* Foster, 62 Mo. App. 303; Elsenrath *v.* Kallmeyer, 61 Mo. App. 430 (undisputed); Singer Mfg. Co. *v.* Clay, 53 Mo. App. 412.

North Carolina.— Tunstall *v.* Cobb, 109 N. C. 316, 14 S. E. 28; Yates *v.* Yates, 76 N. C. 142. See also Ratliff *v.* Ratliff, 131 N. C. 425, 42 S. E. 887.

South Carolina.— Rose *v.* Winnsboro Nat. Bank, 41 S. C. 191, 19 S. E. 487.

Texas.— Cannon *v.* Sweet, (Civ. App. 1895) 29 S. W. 947; Mardes *v.* Meyers, 8 Tex. Civ. App. 542, 28 S. W. 693.

Utah.— Tucker *v.* Kellogg, 8 Utah 11, 28 Pac. 870.

Washington.— Moore *v.* Palmer, 14 Wash. 134, 44 Pac. 142.

See 20 Cent. Dig. tit. "Evidence," § 2381 *et seq.* See *supra*, XI, C, 9, b, (III), (B), (3), (a); *infra*, XI, C, 9, b, (III), (D).

69. *District of Columbia.*— Keyser *v.* Pickrell, 4 App. Cas. 198.

Indiana.— Hazzard *v.* Vickery, 78 Ind. 64.

Missouri.— State *v.* Thompson, 132 Mo. 301, 34 S. W. 31; State *v.* Minton, 116 Mo. 605, 22 S. W. 808; Rose *v.* Springfield First Nat. Bank, 91 Mo. 399, 3 S. W. 876, 60 Am. Rep. 258; McCombs *v.* Foster, 62 Mo. App. 303; Elsenrath *v.* Kallmeyer, 61 Mo. App. 430; Singer Mfg. Co. *v.* Clay, 53 Mo. App. 412.

North Carolina.— State *v.* Noe, 119 N. C. 849, 25 S. E. 812; Tunstall *v.* Cobb, 109 N. C. 316, 14 S. E. 28.

Texas.— Mardes *v.* Meyers, 8 Tex. Civ. App. 542, 28 S. W. 693.

See 20 Cent. Dig. tit. "Evidence," § 2381 *et seq.* See also *supra*, XI, C, 9, b, (III), (B), (3), (a); *infra*, XI, C, 9, b, (III), (D).

70. Moon *v.* Crowder, 72 Ala. 79; Kannon *v.* Galloway, 2 Baxt. (Tenn.) 230; Briggs *v.* U. S., 29 Ct. Cl. 178. See also *supra*, XI, C, 9, b, (III), (B), (3), (a).

71. Graham *v.* Nesmith, 24 S. C. 285; Benedict *v.* Flanigan, 18 S. C. 506, 44 Am. Rep. 583. *Compare supra*, XI, C, 9, b, (III), (B), (3), (a).

72. State *v.* Ryno, 68 Kan. 348, 74 Pac. 1114.

73. McKay *v.* Lasher, 121 N. Y. 477, 24 N. E. 711.

74. See *supra*, XI, C, 9, b, (II), (A).

75. White Sewing Mach. Co. *v.* Gordon, 124 Ind. 495, 24 N. E. 1053, 19 Am. St. Rep. 109. See also McNair *v.* Com., 26 Pa. St. 388.

76. Commonwealth Bank *v.* Haldeman, 1 Penr. & W. (Pa.) 161; Hopkins *v.* Simmons, 12 Fed. Cas. No. 6,691, 1 Cranch C. C. 250; U. S. *v.* Larned, 26 Fed. Cas. No. 15,565, 4 Cranch C. C. 312. See also Clark *v.* Wyatt, 15 Ind. 271, 77 Am. Dec. 90; Power *v.* Frick, 2 Grant (Pa.) 305.

77. Mixer *v.* Bennett, 70 Iowa 329, 30 N. W. 587; Buchanan *v.* Buckler, 8 Ky. L. Rep. 617,

able satisfaction of the judge[78] that the witness is sufficiently qualified as a skilled observer or "expert," as he is called, to make his inference an aid to the jury.[79] This may be done by showing that he has made a special study of handwriting,[80] has given instruction in the art,[81] or has had a large experience in examining handwritings or signatures in the course of his profession or business.[82]

holding that it cannot be assumed that a clerk of a court with a "large acquaintance with handwriting" is sufficiently qualified.

78. "An exception to his decision will rarely be sustained." Com. *v.* Nefus, 135 Mass. 533, 534. See also Powers *v.* McKenzie, 90 Tenn. 167, 16 S. W. 559. Or, as is said in an earlier case, the court's ruling in this particular will not be reversed on appeal unless it is made clearly to appear that it was based upon some erroneous view of legal principles or was not justified by the evidence before the court. Nunes *v.* Perry, 113 Mass. 274. The ruling of the court in permitting a comparison of signatures to be made by one who had been engaged in such clerical pursuits, as cashier of a bank and clerk of court, and who testified that he possessed the faculty of distinguishing handwriting, will not be disturbed on appeal. State *v.* David, 131 Mo. 380, 33 S. W. 28.

Reference to the jury.— It has been suggested that the best way is to leave the question of the skill and capacity of the witness to be determined by the jury who hear him examined. Vinton *v.* Peck, 14 Mich. 287.

79. *Alabama.*— Nelms *v.* State, 91 Ala. 97, 9 So. 193; Griffin *v.* State, 90 Ala. 596, 8 So. 670; Moon *v.* Crowder, 72 Ala. 79.

California.— Spottiswood *v.* Weir, 80 Cal. 448, 22 Pac. 289; Neal *v.* Neal, 58 Cal. 287; Goldstein *v.* Black, 50 Cal. 462, holding that occasionally comparing signatures when disputes have arisen in the course of business is not sufficient.

Connecticut.— Tyler *v.* Todd, 36 Conn. 218.

Indiana.— McDonald *v.* McDonald, 142 Ind. 55, 41 N. E. 336; Forgey *v.* Cambridge City First Nat. Bank, 66 Ind. 123.

Iowa.— Mixer *v.* Bennett, 70 Iowa 329, 30 N. W. 587. A witness does not show himself to be qualified to testify as an expert upon a comparison of handwriting by stating merely that he is a clerk of the courts, without stating also how long he has served in such office. Winch *v.* Norman, 65 Iowa 186, 21 N. W. 511.

Kentucky.— Buchanan *v.* Buckler, 8 Ky. L. Rep. 617.

Maine.— Woodman *v.* Dana, 52 Me. 9; Withee *v.* Rowe, 45 Me. 571.

Massachusetts.— Nunes *v.* Perry, 113 Mass. 274; Marcy *v.* Barnes, 16 Gray 161, 77 Am. Dec. 405.

Michigan.— Vinton *v.* Peck, 14 Mich. 287.

Missouri.— State *v.* David, 131 Mo. 380, 33 S. W. 28; State *v.* Owen, 73 Mo. 440; State *v.* Tompkins, 71 Mo. 613.

Nebraska.— Heffernan *v.* O"Neill, 1 Nebr. (Unoff.) 363, 96 N. W. 244.

New Jersey.— Gordon's Case, 50 N. J. Eq. 397, 421, 26 Atl. 268.

New York.— People *v.* Collins, 57 N. Y. App. Div. 257, 68 N. Y. Suppl. 151, 15 N. Y. Cr. 305; People *v.* Dorthy, 50 N. Y. App. Div. 44, 63 N. Y. Suppl. 592; People *v.* Severance, 67 Hun 182, 22 N. Y. Suppl. 91; McKay *v.* Lasher, 42 Hun 270; People *v.* Spooner, 1 Den. 343, 43 Am. Dec. 672. A witness who was a clerk in chancery, and who testified that he had been accustomed to examine signatures, as to their being genuine, was held not to be entitled to give an opinion as a person skilled in detecting forgeries, whether a signature is genuine or imitated. People *v.* Spooner, *supra.*

North Carolina.— Kornegay *v.* Kornegay, 117 N. C. 242, 23 S. E. 257; Jarvis *v.* Vanderford, 116 N. C. 147, 21 S. E. 302; State *v.* De Graff, 113 N. C. 688, 18 S. E. 507; Yates *v.* Yates, 76 N. C. 142.

Ohio.— Koons *v.* State, 36 Ohio St. 195.

Pennsylvania.— Lodge *v.* Phipher, 11 Serg. & R. 333, holding that a man of business familiar with handwriting is not sufficiently qualified.

South Carolina.— Weaver *v.* Whilden, 33 S. C. 190, 11 S. E. 686. But see to the contrary Benedict *v.* Flanigan, 18 S. C. 506, 44 Am. Rep. 583.

Tennessee.— Powers *v.* McKenzie, 90 Tenn. 167, 16 S. W. 559.

Texas.— Walker *v.* State, 14 Tex. App. 609; Haun *v.* State, 13 Tex. App. 383; Heacock *v.* State, 13 Tex. App. 97; Speiden *v.* State, 3 Tex. App. 156, 30 Am. Rep. 126.

Vermont.— Stevenson *v.* Gunning, 64 Vt. 601, 25 Atl. 697 (mere skill in the use of the microscope is not a sufficient qualification); State *v.* Ward, 39 Vt. 225.

Virginia.— Hanriot *v.* Sherwood, 82 Va. 1.

United States.— U. S. *v.* Mathias, 36 Fed. 892, holding that a person is not qualified to testify as a skilled witness by merely having collected the evidence in the cause.

See 20 Cent. Dig. tit. "Evidence," §§ 2383, 2384.

Disclaimer of skill in comparison has been deemed to require the rejection of the witness. Heacock *v.* State, 13 Tex. App. 97.

80. *Alabama.*— Johnson *v.* State, 35 Ala. 370.

Indiana.— Forgey *v.* Cambridge City First Nat. Bank, 66 Ind. 123.

Nebraska.— Heffernan *v.* O'Neill, 1 Nebr. (Unoff.) 363, 96 N. W. 244.

New York.— Hadcock *v.* O'Rourke, 6 N. Y. Suppl. 549.

Texas.— Heacock *v.* State, 13 Tex. App. 97.

81. Buchanan *v.* Buckler, 8 Ky. L. Rep. 617; Heffernan *v.* O'Neill, 1 Nebr. (Unoff.) 363, 96 N. W. 244.

82. *Alabama.*— Johnson *v.* State, 35 Ala. 370, bank teller and exchange broker.

Colorado.— Bradford *v.* People, 22 Colo. 157, 43 Pac. 1013, bank bookkeeper.

Connecticut.— Lyon *v.* Lyman, 9 Conn. 55, bank cashier.

dd. *Production of Disputed Writing.* By the weight of authority, it is no ground of objection to the testimony of a witness from a comparison of handwritings that the writing in dispute has been lost or destroyed, or for any other reason cannot be produced at the trial, where the witness has seen the writing and his testimony is based on a comparison of his recollection of it with the specimen admitted or proved to be genuine.[83]

(c) *The Rule Under Statutes.* As has been seen in a previous section, a statute was enacted in England in 1854 providing that "comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute."[84] Statutes on the subject, varying more or less in their terms, have also been enacted in many of the United States. They have been enacted in California,[85]

Indiana.— Forgey *v.* Cambridge City First Nat. Bank, 66 Ind. 123, bank manager.

Kansas.— Ort *v.* Fowler, 31 Kan. 478, 2 Pac. 580, 47 Am. Rep. 501, engaging in business which requires frequent comparison of handwritings.

Maine.—Withee *v.* Rowe, 45 Me. 571, treasurer and clerk of a railroad company who has been accustomed to examine signatures upon transfers of stock and upon bank-bills in order to determine their genuineness.

Massachusetts.— Com. *v.* Williams, 105 Mass. 62 (holding that one whose experience is limited to promissory notes may testify as to other documents); Marcy *v.* Barnes, 16 Gray 161, 77 Am. Dec. 405 (photographer accustomed to examine handwriting in connection with his business with a view to detect forgeries).

Missouri.— State *v.* David, 131 Mo. 380, 33 S. W. 28 (cashier of bank and clerk of court); Edmonston *v.* Henry, 45 Mo. App. 346 (a merchant and dealer in commercial paper).

North Carolina.— Kornegay *v.* Kornegay, 117 N. C. 242, 23 S. E. 257 (holding that a witness who testifies that he has been register of deeds for several years and engaged for many years in mercantile business with opportunities for and in the habit of comparing signatures to writings and that he can, by examining and comparing two signatures, tell whether they were made by the same person, sufficiently qualifies himself as an expert); State *v.* De Graff, 113 N. C. 688, 18 S. E. 507 (holding that a witness who testified that he had been for four or five years register of deeds, that he had occasion to examine signatures, that he was frequently called on to prove signatures of deceased persons in the clerk's office, that he used magnifying glasses to detect erasures, and had such experience that he could compare a writing with one known to be genuine and determine the genuineness of the former, was properly qualified as an expert to make such comparison; and also that a witness who testified that he had been a bookkeeper for many years, that he was secretary and treasurer of the city, that it was his duty to compare handwritings to determine which were genuine and which were not, and that he had been in the business fifteen years and his experience had been such that he could compare a paper with one known to be genuine and determine the genuineness of the former was properly qualified); Yates *v.* Yates, 76 N. C. 142 (clerk of court and sheriff).

Texas.— Bratt *v.* State, 38 Tex. Cr. 121, 41 S. W. 622 (bank president); Speiden *v.* State, 3 Tex. App. 156, 30 Am. Rep. 126 (experienced bank tellers).

Vermont.— State *v.* Ward, 39 Vt. 225, bookkeeper and cashier of a firm doing a large mercantile business.

United States.— U. S. *v.* Holtsclaw, 26 Fed. Cas. No. 15,384, Brunn. Col. Cas. 31, 3 N. C. 577, handling bank-bills.

See 20 Cent. Dig. tit. "Evidence," § 2383.

The qualification does not rest upon the calling of the witness (Hyde *v.* Woolfolk, 1 Iowa 159, business man; Sweetser *v.* Lowell, 33 Me. 446) but upon his intelligence and means of knowledge (Hyde *v.* Woolfolk, *supra*). Having seen a person write is not a sufficient qualification, when not relied upon by the witness, to enable him to testify from a comparison with unauthenticated specimens. People *v.* Collins, 57 N. Y. App. Div. 257, 68 N. Y. Suppl. 151, 15 N. Y. Cr. 305. It has even been deemed unnecessary that the witness should possess any special skill. Benedict *v.* Flanigan, 18 S. C. 506, 44 Am. Rep. 583. *Compare*, however, Weaver *v.* Whilden, 33 S. C. 190, 11 S. E. 686.

83. Hammond *v.* Wolf, 78 Iowa 227, 42 N. W. 778; Abbott *v.* Coleman, 22 Kan. 250, 31 Am. Rep. 186; State *v.* Shinborn, 46 N. H. 497, 88 Am. Dec. 224; Koons *v.* State, 36 Ohio St. 195. *Contra*, Bruce *v.* Crews, 39 Ga. 544, 99 Am. Dec. 467 (under a statute which required the writings used for comparison to be submitted to the adverse party before trial and to be given to the jury); Hynes *v.* McDermott, 82 N. Y. 41, 37 Am. Rep. 538; People *v.* Dorthy, 50 N. Y. App. Div. 44, 63 N. Y. Suppl. 592.

84. St. 17 & 18 Vict. c. 125, § 27. See Wilson *v.* Thornbury, L. R. 17 Eq. 517, 43 L. J. Ch. 356; Roupell *v.* Haws, 3 F. & F. 784; Cresswell *v.* Jackson, 2 F. & F. 24; Birch *v.* Ridgway, 1 F. & F. 270.

85. In California it is provided that "evidence respecting the handwriting may also be given by a comparison, made by the wit-

Georgia,[86] Iowa,[87] Kentucky,[88] Louisiana,[89] Missouri,[90] Montana,[91] Nebraska,[92] New

ness or the jury, with writings admitted or treated as genuine by the party against whom the evidence is offered, or proved to be genuine to the satisfaction of the judge." Code Civ. Proc. § 1944. See People *v.* Creegan, 121 Cal. 554, 53 Pac. 1082; Marshall *v.* Hancock, 80 Cal. 82, 22 Pac. 61; Neal *v.* Neal, 58 Cal. 287.

86. In Georgia "other writings, proved or acknowledged to be genuine, may be admitted in evidence for the purpose of comparison by the jury;" but "such other new papers, when intended to be introduced, shall be submitted to the opposite party before he announces himself ready for trial." Code, § 5427. See Axson *v.* Belt, 103 Ga. 578, 30 S. E. 262; Kelly *v.* Keese, 102 Ga. 700, 29 S. E. 591; Little *v.* Rogers, 99 Ga. 95, 24 S. E. 856 (signature by mark); McVicker *v.* Conkle, 96 Ga. 584, 24 S. E. 23; Thomas *v.* State, 59 Ga. 784; Georgia Masonic Mut. L. Ins. Co. *v.* Gibson, 52 Ga. 640; Bruce *v.* Crews, 39 Ga. 544, 99 Am. Dec. 467. The specimen must be submitted to the opposite party before he announces himself ready for trial, as required by the statute. Axson *v.* Belt, 103 Ga. 578, 30 S. E. 262; Georgia Masonic Mut. L. Ins. Co. *v.* Gibson, 52 Ga. 640; Bruce *v.* Crews, 39 Ga. 544, 99 Am. Dec. 467. Although the statute does not so provide in terms, it is held competent to introduce the testimony of experts from a comparison of the writings. Gosa *v.* Browning, 96 Ga. 421, 23 S. E. 842.

87. In Iowa "evidence respecting handwriting may be given by experts, by comparison, or by comparison by the jury, with writings of the same person which are proved to be genuine." Code, § 4620. See Sankey *v.* Cook, 82 Iowa 125, 47 N. W. 1077; Hammond *v.* Wolf, 78 Iowa 227, 42 N. W. 778; Riordan *v.* Guggerty, 74 Iowa 638, 39 N. W. 107; State *v.* Calkins, 73 Iowa 128, 34 N. W. 777; Singer Mfg. Co. *v.* McFarland, 53 Iowa 540, 5 N. W. 739; Saunders *v.* Howard, 51 Iowa 517, 1 N. W. 708; Whitaker *v.* Parker, 42 Iowa 585; Lay *v.* Wissman, 36 Iowa 305; Morris *v.* Sargent, 18 Iowa 90; Baker *v.* Mygatt, 14 Iowa 131; Hyde *v.* Woolfolk, 1 Iowa 159. Where the genuineness of a signature is in issue, it is competent for the person whose signature it purports to be, as well as the adverse party, to introduce in evidence other writings and signatures of his, shown to be genuine, for comparison with the one in dispute, and the fact that a signature so offered was made after the commencement of the action will not render it incompetent, although it may be considered by the jury as affecting its weight. Singer Mfg. Co. *v.* McFarland, *supra.*

88. In Kentucky, in any action or proceeding, civil or criminal, upon a dispute as to the genuineness of the handwriting of a person, other handwritings of such person, although not in the case for any other purpose, may be introduced for the purpose of comparison by witnesses with the writing in dispute; and such writings, and the testimony of witnesses respecting them, may be submitted to the court or jury as evidence concerning the genuineness of the writing in dispute, provided that: (1) The genuineness of such writings shall be proved, to the satisfaction of the judge, by other than opinion evidence; (2) that it be proved, to the satisfaction of the judge, that they were written before any controversy arose as to the genuineness of the writing in dispute, and that no fraud was practised in their selection; (3) that the party proposing to introduce such writings give reasonable notice of his intention to the opposite party, or his attorney, with reasonable opportunity to examine them before the commencement of the trial; (4) that the judge may limit the number of such writings; and (5) that an error of the judge shall be subject to revision and correction in the same manner as if the error had been committed by the court. St. (1903) § 1649. See Birchett *v.* Shelbyville Bank, 13 Ky. 135, 67 S. W. 371, 24 Ky. L. Rep. 66; Andrews *v.* Hayden, 88 Ky. 455, 11 S. W. 428, 10 Ky. L. Rep. 1049; Storey *v.* Louisville First Nat. Bank, 72 S. W. 318, 24 Ky. L. Rep. 1799; Froman *v.* Com., 42 S. W. 728, 19 Ky. L. Rep. 948.

89. In Louisiana proof by comparison is allowed. Rev. Civ. Code, art. 2245. See State *v.* Barrow, 31 La. Ann. 691; McDonogh's Succession, 18 La. Ann. 419; Whitney *v.* Bunnell, 8 La. Ann. 429; Temple *v.* Smith, 7 La. Ann. 562; Clark *v.* Cochran, 3 Mart. 553.

90. In Missouri "comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute." Code (1899), § 4679; Laws (1895), p. 284. See State *v.* Goddard, 146 Mo. 177, 184, 48 S. W. 82; Cook *v.* Strother, 100 Mo. App. 622, 75 S. W. 175.

91. In Montana "evidence respecting the handwriting may also be given by comparison, made by the witness or jury, with writings admitted or treated as genuine by the party against whom the evidence is offered, or proved to be genuine to the satisfaction of the judge." 2 Mont. Codes (1895), § 3235.

92. In Nebraska "evidence respecting handwriting may be given by comparisons made, by experts or by the jury, with writings of the same person which are proved to be genuine." Code Civ. Proc. § 344. See Heffernan *v.* O'Neill, 1 Nebr. (Unoff.) 363, 96 N. W. 244; Madison First Nat. Bank *v.* Carson, 48 Nebr. 763, 67 N. W. 779; Capital Nat. Bank *v.* Williams, 35 Nebr. 410, 53 N. W. 202; Grand Island Banking Co. *v.* Shoemaker, 31 Nebr. 124, 47 N. W. 696; Huff *v.* Nims, 11 Nebr. 363, 9 N. W. 548.

Jersey,[93] New York,[94] Oregon,[95] and Pennsylvania.[96] Such statutes also exist in

93. In New Jersey, in all cases where the genuineness of any signature or writing is in dispute, comparison of the disputed signature or writing with any writing proved to the satisfaction of the court to be genuine, shall be permitted to be made by witnesses; and such writings and the testimony of witnesses respecting the same may be submitted to the court or jury as evidence of the genuineness or otherwise of the signature or writing in dispute; but where the handwriting of any person is sought to be disproved by comparison with other writings, before they can be compared with the signature or writing in dispute, they must, if sought to be used before the court or jury by the party in whose handwriting they are, be proved to have been written before any dispute arose as to the genuineness of the signature or writing in controversy. 2 N. J. Gen. St. (1896) p. 1400, § 19. See Gordon's Case, 50 N. J. Eq. 397, 26 Atl. 268; Yeomans *v.* Petty, 40 N. J. Eq. 495, 4 Atl. 631; Mutual Ben. L. Ins. Co. *v.* Brown, 30 N. J. Eq. 193.

94. In New York it was provided in 1880 that comparison of a disputed writing, with any writing proved to the satisfaction of the court to be genuine, shall be permitted to be made by witnesses in all trials and proceedings, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute. Laws (1880), c. 36, § 1. This was amended in 1888 to read as follows: "Comparison of a disputed writing with any writing proved to the satisfaction of the court to be the genuine handwriting of any person, claimed on the trial to have made or executed the disputed instrument, or writing shall be permitted and submitted to the court and jury in like manner. But nothing within contained shall affect or apply to any action or proceeding heretofore commenced or now pending." Laws (1888), c. 555, § 2; 1 Birdseye Rev. St. p. 1281. See People *v.* Corey, 148 N. Y. 476, 42 N. E. 1066; McKay *v.* Lasher, 121 N. Y. 477, 24 N. E. 711 [*affirming* 50 Hun 383, 3 N. Y. Suppl. 352]; Sudlow *v.* Warshing, 108 N. Y. 520, 15 N. E. 532; Peck *v.* Callaghan, 95 N. Y. 73; Hobart *v.* Verrault, 74 N. Y. App. Div. 444, 77 N. Y. Suppl. 483; Shaw *v.* Bryant, 90 Hun 374, 35 N. Y. Suppl. 909; Sprague *v.* Sprague, 80 Hun 285, 30 N. Y. Suppl. 162; Bruyn *v.* Russell, 52 Hun 17, 4 N. Y. Suppl. 784; Mutual L. Ins. Co. *v.* Suiter, 14 N. Y. Suppl. 404. The original section was not repealed by the act of 1888, but so much of its provisions as were contained in the amendment were continued in force; and an action pending at the time of the amendment was governed by the original statute. Mortimer *v.* Chambers, 63 Hun 335, 17 N. Y. Suppl. 874. Under the statute as amended the submission of writings to a jury must be in connection with the testimony of expert or skilled witnesses in regard to the validity or authorship of the various handwritings; and in the absence of such testimony such writings cannot be submitted to the jury for the purpose of arbitrary comparison by the jurors. People *v.* Pickney, 67 Hun 428, 22 N. Y. Suppl. 118; Glenn *v.* Roosevelt, 62 Fed. 550. The skilled observer, on comparison of the genuine with the disputed writing, can merely state his inference that both were or were not written by the same person. He cannot go further and testify positively as to who wrote the disputed one. People *v.* Severance, 67 Hun 182, 22 N. Y. Suppl. 91. See also Sudlow 4. Warshing, 108 N. Y. 520, 15 N. E. 532. The "disputed writing," with which comparison is permitted is any writing which one party upon the trial seeks to prove as the genuine handwriting of any person and which is not admitted to be such, provided that the writing is not otherwise incompetent. People *v.* Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193. But parallel marks drawn through the signature to a will are not "writings" within the meaning of the statute. *In re* Hopkins, 172 N. Y. 360, 65 N. E. 173, 12 N. Y. Annot. Cas. 55, 92 Am. St. Rep. 746, 65 L. R. A. 95. The statute only allows comparison between the disputed writing and the genuine handwriting of the person purporting to be the writer of the disputed writing. It does not allow comparison of the disputed writing with the writing of some other person. Peck *v.* Callaghan, 95 N. Y. 73; Bruyn *v.* Russell, 52 Hun (N. Y.) 17, 4 N. Y. Suppl. 784.

95. In Oregon evidence respecting handwriting may be given "by a comparison, made by a witness skilled in such matters, or the jury, with writings admitted or treated as genuine by the party against whom the evidence is offered." Hill Annot Laws, § 765. See Munkers *v.* Farmers' Ins. Co., 30 Oreg. 211, 46 Pac. 850; Holmes *v.* Goldsmith, 147 U. S. 150, 13 S. Ct. 288, 37 L. ed. 118 [*affirming* 36 Fed. 484, 13 Sawy. 526, 1 L. R. A. 816]; Green *v.* Terwilliger, 56 Fed. 384. Testimony as to the genuineness of handwriting may be extended to a mark or cross by means of which an illiterate person signed his name, its weight being for the jury. State *v.* Tice, 30 Oreg. 457, 48 Pac. 367.

96. In Pennsylvania, since the statute of 1895, where there is a question as to any simulated or altered document or writing, the opinion of those, called "experts," who have had special experience with or who have pursued special studies relating to documents, handwritings, and alterations thereof is relevant, and it is competent for such experts in giving their testimony to make comparison of documents and comparison of disputed handwriting with any documents or writing admitted to be genuine, or proven to the satisfaction of the judge to be genuine, and the evidence of such experts respecting the same shall be submitted to the jury as evidence of the genuineness or otherwise of the writing in dispute. Pub. Laws (1895), p. 69. This statute, in making

Rhode Island,[97] Tennessee,[98] Texas in criminal cases,[99] and in Wisconsin.[1] These statutes are constitutional.[2] Since they are in derogation of the common law it has been held that they are to be strictly construed.[3] Under these statutes the comparison, whether by the court or jury or by witnesses, may be made with irrelevant as well as relevant writings.[4] The state statutes do not apply in the federal courts in criminal cases,[5] but they are followed in civil cases.[6] Under the statutes, as well as in the absence of a statute,[7] the witness, to enable him to testify from comparison, must be shown to be qualified as a skilled observer or expert.[8]

it competent for experts to make comparison between writings, did not change the law allowing the introduction of well authenticated examples of a person's signature for the inspection of the jury. Shannon *v.* Castner, 21 Pa. Super. Ct. 294. See *supra*, XI, C, 9, b, (III), (B), (3), (a).

97. In Rhode Island comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute. Gen. Laws (1896), c. 244, § 44.

98. In Tennessee comparison of disputed writing or signatures with any writing or signatures proved to the satisfaction of the judge to be genuine is permitted to be made by expert witnesses, and such writing or signatures, and the evidence of expert witnesses respecting the same, may be submitted to the courts and jury as evidence of the genuineness, or otherwise, of the writing or signature in dispute. Code (1896), § 5560. See Powers *v.* McKenzie, 90 Tenn. 167, 16 S. W. 559; Franklin *v.* Franklin, 90 Tenn. 44, 16 S. W. 557. The writings or signatures used as a standard of comparison must be those of the person purporting to have made the disputed writing; those of a person other than the makers and witnesses named in the disputed instrument are not admissible solely for comparison by experts under said statute. Powers *v.* McKenzie, *supra*; Franklin *v.* Franklin, *supra*.

99. In Texas there is no provision for comparison of handwritings in civil cases, but in criminal cases it is provided that "it is competent in every case to give evidence of handwriting by comparison made by experts or by the jury." Code Cr. Proc. art. 794. See Manning *v.* State, 37 Tex. Cr. 180, 39 S. W. 118; Mallory *v.* State, 37 Tex. Cr. 482, 36 S. W. 751, 66 Am. St. Rep. 808; Caldwell *v.* State, 28 Tex. App. 566, 14 S. W. 122; Walker *v.* State, 14 Tex. App. 609; Heacock *v.* State, 13 Tex. App. 97; Rogers *v.* State, 11 Tex. App. 608; Heard *v.* State, 9 Tex. App. 1; Jones *v.* State, 7 Tex. App. 457; Hatch *v.* State, 6 Tex. App. 384; Phillips *v.* State, 6 Tex. App. 364. An expert cannot make a fac-simile of a signature and then have the same and a genuine signature submitted to the jury for the purpose of showing how easily the genuine signature could be counterfeited. Thomas *v.* State, 18 Tex. App. 213.

1. In Wisconsin comparison of a disputed writing with any writing proved to the satisfaction of the court to be the genuine handwriting of any person claimed on the trial to have made or executed the disputed instrument or writing shall be permitted to be made by witnesses, and such writings and evidence respecting them may be submitted to the court or jury. St. (1898) § 4189*a*.

2. The constitutional guaranty of the right to trial by jury is not infringed by the provisions of the statute authorizing comparison of a disputed writing with any writing "proved to the satisfaction of the court to be genuine," since a proper construction of such provision requires the jury to make the ultimate decision concerning the genuineness of the standard with which the disputed writing is compared and leaves to the court only the determination of the preliminary question whether sufficient proof of genuineness has been given to let the papers go to the jury. People *v.* Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193.

3. Franklin *v.* Franklin, 90 Tenn. 44, 16 S. W. 557.

4. *California.*— Marshall *v.* Hancock, 80 Cal. 82, 22 Pac. 61.

Georgia.— Kelly *v.* Keese, 102 Ga. 700, 29 S. E. 591.

Iowa.— Riordan *v.* Guggerty, 74 Iowa 688, 39 N. W. 107; Baker *v.* Wygatt, 14 Iowa 131.

New York.— Peck *v.* Callaghan, 95 N. Y. 73.

Oregon.— Munkers *v.* Farmers' Ins. Co., 30 Oreg. 211, 46 Pac. 850.

Tennessee.— Powers *v.* McKenzie, 90 Tenn. 167, 16 S. W. 559.

United States.— Holmes *v.* Goldsmith, 147 U. S. 150, 13 S. Ct. 288, 37 L. ed. 118, under Oregon statute.

England.— Birch *v.* Ridgway, 1 F. & F. 270. See also Roupell *v.* Haws, 3 F. & F. 784; Creswell *v.* Jackson, 2 F. & F. 24.

5. U. S. *v.* Jones, 10 Fed. 469, 20 Blatchf. 235.

6. Holmes *v.* Goldsmith, 147 U. S. 150, 13 S. Ct. 288, 37 L. ed. 118; Green *v.* Terwilliger, 56 Fed. 384, in both of which cases the Oregon statute was applied.

7. See *supra*, XI, C, 9, b, (III), (B), (3), (b), cc.

8. *California.*— Spottiswood *v.* Weir, 80 Cal. 448, 22 Pac. 289; Neal *v.* Neal, 58 Cal. 287; Goldstein *v.* Black, 50 Cal. 462.

Iowa.— Winch *v.* Norman, 65 Iowa 186, 21

(D) *The Specimen or Standard and Its Authentication.* To authorize the comparison of handwritings either by witnesses or by the jury, and both at common law and under the statutes, it is necessary that the genuineness of the document offered as a standard shall be established either by admission or estoppel, or by proof[9] to the satisfaction of the presiding judge,[10] by clear and positive

N. W. 511; Mixer *v.* Bennett, 70 Iowa 329, 30 N. W. 587.

Missouri.— State *v.* David, 131 Mo. 380, 33 S. W. 28.

Nebraska.— Heffernan *v.* O'Neill, 1 Nebr. (Unoff.) 363, 96 N. W. 244.

New Jersey.— Gordon's Case, 50 N. J. Eq. 397, 26 Atl. 268.

New York.— People *v.* Collins, 57 N. Y. App. Div. 257, 68 N. Y. Suppl. 151, 15 N. Y. Cr. 305; People *v.* Dorthy, 50 N. Y. App. Div. 44, 63 N. Y. Suppl. 592, 14 N. Y. Cr. 545; People *v.* Severance, 67 Hun 182, 22 N. Y. Suppl. 91.

Tennessee.— Powers *v.* McKenzie, 90 Tenn. 167, 16 S. W. 559.

Texas.— Bratt *v.* State, 38 Tex. Cr. 121, 41 S. W. 622; Heacock *v.* State, 13 Tex. App. 97.

See 20 Cent. Dig. tit. "Evidence," §§ 2383, 2384.

What is sufficient qualification see *supra*, XI, C, 9, b, (III), (B), (3), (b), cc. See also *supra*, XI, A, 4, a, (II), (III).

The determination of the trial judge that a witness is qualified to testify as an expert is entitled to great weight, and will not be reversed unless it is clearly erroneous and attended with injury to the party. Powers *v.* McKenzie, 90 Tenn. 167, 16 S. W. 559. See *supra*, XI, C, 9, b, (III), (B), (3), (b), cc.

9. *California.*— Spottiswood *v.* Weir, 80 Cal. 448, 22 Pac. 289.

Connecticut.— Tyler *v.* Todd, 36 Conn. 218.

Georgia.— McVicker *v.* Conkle, 96 Ga. 584, 24 S. E. 23; Bruce *v.* Crews, 39 Ga. 544, 99 Am. Dec. 467.

Indiana.— Shorb *v.* Kinzie, 100 Ind. 429; Merritt *v.* Straw, 6 Ind. App. 360, 33 N. E. 657.

Iowa.— Sankey *v.* Cook, 82 Iowa 125, 47 N. W. 1077; Winch *v.* Norman, 65 Iowa 186, 21 N. W. 511; Wilson *v.* Irish, 62 Iowa 260, 17 N. W. 511; Hyde *v.* Woolfolk, 1 Iowa 159.

Kansas.— Gaunt *v.* Harkness, 53 Kan. 405, 36 Pac. 739, 42 Am. St. Rep. 297.

Louisiana.— Conrad *v.* State Bank, 10 Mart. 700.

Maine.— State *v.* Thompson, 80 Me. 194, 13 Atl. 892, 6 Am. St. Rep. 172.

Massachusetts.— Costello *v.* Crowell, 133 Mass. 352; Com. *v.* Coe, 115 Mass. 481; Nunes *v.* Perry, 113 Mass. 274; Com. *v.* Eastman, 1 Cush. 189, 48 Am. Dec. 596.

Michigan.— People *v.* Cline, 44 Mich. 290, 6 N. W. 671.

Missouri.— Rose *v.* Springfield First Nat. Bank, 91 Mo. 399, 3 S. W. 876, 60 Am. Rep. 258 (the rule applies to cross-examination); Pourcelly *v.* Lewis, 8 Mo. App. 593.

New Hampshire.— State *v.* Hastings, 53 N. H. 452.

New York.— People *v.* Corey, 148 N. Y. 476, 42 N. E. 1066; Farrell *v.* Manhattan R. Co., 83 N. Y. App. Div. 393, 82 N. Y. Suppl. 334; Hobart *v.* Verrault, 74 N. Y. App. Div. 444, 77 N. Y. Suppl. 483; Bruyn *v.* Russell, 52 Hun 17, 4 N. Y. Suppl. 784.

North Carolina.— Jarvis *v.* Vanderford, 116 N. C. 147, 21 S. E. 302.

Ohio.— Koons *v.* State, 36 Ohio St. 195; Pavey *v.* Pavey, 30 Ohio St. 600; Bragg *v.* Colwell, 19 Ohio St. 407.

Pennsylvania.— Baker *v.* Haines, 6 Whart. 284, 36 Am. Dec. 224; Brant *v.* Dennison, 1 Pa. Cas. 62, 5 Atl. 869.

South Carolina.— Desbrow *v.* Farrow, 3 Rich. 382, holding that a letter whose postmark and contents correspond with the identity of the sale which the letter purports to set forth is not sufficiently shown to be genuine.

Texas.— Sartor *v.* Bolinger, 59 Tex. 411; Manning *v.* State, 37 Tex. Cr. 180, 39 S. W. 118; Caldwell *v.* State, 28 Tex. App. 566, 14 S. W. 122; Walker *v.* State, 14 Tex. App. 609; Heacock *v.* State, 13 Tex. App. 97; Heard *v.* State, 9 Tex. App. 1; Hatch *v.* State, 6 Tex. App. 384; Phillips *v.* State, 6 Tex. App. 364; Mardes *v.* Meyers, 8 Tex. Civ. App. 542, 28 S. W. 693.

Vermont.— Rowell *v.* Fuller, 59 Vt. 688, 10 Atl. 853.

West Virginia.— Clay *v.* Robinson, 7 W. Va. 348, holding that the fact that the document purports to be that of the person in question is not sufficient.

United States.— Green *v.* Terwilliger, 56 Fed. 384; Shannon *v.* Fox, 21 Fed. Cas. No. 12,706, 1 Cranch C. C. 133.

See 20 Cent. Dig. tit. "Evidence," § 2381 *et seq.*

Public records.— A justice's signature to his official docket, after proof of genuineness, is admissible for comparison with his alleged signature to a deed, without formal proof that the docket is a public record. Marshall *v.* Hancock, 80 Cal. 82, 22 Pac. 61.

Evidence of circumstances under which standard was written.— Where a paper is introduced in evidence as a basis for a comparison of the handwriting of defendant upon a charge of forgery, evidence explaining the circumstances under which the paper was written should not be received; and where such evidence tends to connect defendant with a previous attempt to commit a similar offense, it is irrelevant and incompetent to establish the present charge. People *v.* Creegan, 121 Cal. 554, 53 Pac. 1082.

10. *California.*— People *v.* Creegan, 121 Cal. 554, 53 Pac. 1082; Marshall *v.* Hancock, 80 Cal. 82, 22 Pac. 61.

Maine.— State *v.* Thompson, 80 Me. 194, 13 Atl. 892, 6 Am. St. Rep. 172.

Massachusetts.— Costelo *v.* Crowell, 139

testimony,[11] so clear, it has been said, that the judge can rule as a matter of law

Mass. 588, 2 N. E. 698; Com. *v.* Coe, 115 Mass. 481; Nunes *v.* Perry, 113 Mass. 274; Richardson *v.* Newcomb, 21 Pick. 315.

New York.— People *v.* Corey, 148 N. Y. 476, 42 N. E. 1066; Hall *v.* Van Vranken, 28 Hun 403, 64 How. Pr. 407.

Tennessee.— Powers *v.* McKenzie, 90 Tenn. 167, 16 S. W. 559.

Vermont.— Rowell *v.* Fuller, 59 Vt. 688, 10 Atl. 853; State *v.* Ward, 39 Vt. 225; Adams *v.* Field, 21 Vt. 256.

See 20 Cent. Dig. tit. "Evidence," § 2386.

The action of the court in admitting a specimen of the handwriting as a standard for comparison will be final and conclusive unless based upon error in law (State *v.* Thompson, 80 Me. 194, 13 Atl. 892, 6 Am. St. Rep. 172; Costelo *v.* Crowell, 139 Mass. 588, 2 N. E. 698), including a manifest failure to apply the exercise of reason to the facts before him (State *v.* Thompson, 80 Me. 194, 13 Atl. 892, 6 Am. St. Rep. 172; Costelo *v.* Crowell, 139 Mass. 588, 2 N. E. 698; Com. *v.* Coe, 115 Mass. 481; Nunes *v.* Perry, 113 Mass. 274). The determination by the court of the question of the genuineness of a written signature upon the evidence of experts, by comparison of handwriting, is entitled, on appeal, to the same consideration as the verdict of a jury. Lay *v.* Wissman, 36 Iowa 305. If positive proof is furnished and there is opposing testimony, the decision of the judge of the question of fact must ordinarily be accepted as conclusive, for the obvious reason that the credibility of the witnesses is an important factor, and of this he has better opportunity to judge than is afforded the appellate court. Shannon *v.* Castner, 21 Pa. Super. Ct. 294, 297.

Leaving question to jury.— It has been held that the jury may be required as a preliminary matter to find in point of fact the genuineness of the document used by them as a standard of comparison. Williams *v.* Conger, 125 U. S. 397, 8 S. Ct. 983, 31 L. ed. 778. The general rule, however, is that the question is for the court. See the cases cited in this and the following note. Under a statute permitting the "comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine," the proof of genuineness is to be addressed to the court as distinguished from the jury. Hall *v.* Van Vranken, 28 Hun (N. Y.) 403, 64 How. Pr. (N. Y.) 407.

11. *California.*— Spottiswood *v.* Weir, 80 Cal. 448, 22 Pac. 289.

Iowa.— Sankey *v.* Cook, 82 Iowa 125, 47 N. W. 1077; Winch *v.* Norman, 65 Iowa 186, 21 N. W. 511 ("direct and positive"); Hyde *v.* Woolfolk, 1 Iowa 159. The phrase "direct and positive" evidence has been judicially interpreted in Sankey *v.* Cook, *supra*, where the court say: "In Hyde *v.* Woolfolk, 1 Iowa 159, it is said 'Two obvious methods of proving the standard are: First, by the testimony of a witness who saw the person write it; and, second, by the party's admission when offered by himself.' It is said that these may not be the only ways of making such proof, but they indicate what is understood by 'positive evidence.'"

Kansas.— State *v.* Stegman, 62 Kan. 476, 63 Pac. 746; Macomber *v.* Scott, 10 Kan. 335.

Massachusetts.— Costello *v.* Crowell, 133 Mass. 352; Com. *v.* Coe, 115 Mass. 481; McKeone *v.* Barnes, 108 Mass. 344; Com. *v.* Eastman, 1 Cush. 189, 48 Am. Dec. 596 "clear and undoubted proof." The paper with which the comparison is to be made must be unquestionably a genuine paper, and that must be shown beyond a doubt. Martin *v.* Maguire, 7 Gray 177.

New York.— Mortimer *v.* Chambers, 63 Hun 335, 17 N. Y. Suppl. 874. The genuineness of writings, which may be used for purposes of comparison with a disputed writing when "proved to the satisfaction of the court to be genuine," must in civil cases be established by a fair preponderance of the evidence, and in criminal cases beyond a reasonable doubt. People *v.* Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193.

Ohio.— Bell *v.* Brewster, 44 Ohio St. 690, 10 N. E. 679; Koons *v.* State, 36 Ohio St. 195; Pavey *v.* Pavey, 30 Ohio St. 600 ("directly to its having been written by the party"); Bragg *v.* Colwell, 19 Ohio St. 407. Where a receipt was offered as a standard of comparison, and a witness testified that defendant gave him a receipt that looked very similar to the one offered, but that he could not positively say it was the identical one offered in evidence, it was held that the evidence was too uncertain to warrant the admission of the paper as a standard. Pavey *v.* Pavey, *supra*.

Pennsylvania.— To authorize the admission of a writing offered as a test or standard, nothing short of proof by a person who saw the party write the paper, or of an admission by the party of its genuineness, or evidence of equal authority, is sufficient. Cohen *v.* Teller, 93 Pa. St. 123; Haycock *v.* Greup, 57 Pa. St. 438 ("proved beyond a reasonable doubt"); Travis *v.* Brown, 43 Pa. St. 9, 82 Am. Dec. 540; Depue *v.* Place, 7 Pa. St. 428. To authorize the admission of a writing offered as a test or standard, under the act of 1895, as well as before its enactment, nothing short of evidence by a person who saw the party write the paper or of an admission by such party of its being genuine or evidence of equal authority is sufficient. Shannon *v.* Castner, 21 Pa. Super. Ct. 294.

Texas.— Jester *v.* Steiner, 86 Tex. 415, 25 S. W. 411; Sartor *v.* Bolinger, 59 Tex. 411; Eborn *v.* Zimpelman, 47 Tex. 503, 26 Am. Rep. 315; Mallory *v.* State, 37 Tex. Cr. 482, 36 S. W. 751, 66 Am. St. Rep. 808; Heacock *v.* State, 13 Tex. App. 97; Heard *v.* State, 9 Tex. App. 1; Hatch *v.* State, 6 Tex. App. 384; Phillips *v.* State, 6 Tex. App. 364; Cannon *v.* Sweet, (Civ. App. 1895) 29 S. W. 947; Mardes *v.* Meyers, 8 Tex. Civ. App. 542, 28 S. W. 693.

Vermont.— State *v.* Ward, 39 Vt. 225; Adams *v.* Field, 21 Vt. 256, clear, direct, and

that the document is genuine.[12] In most of the states the standard cannot be itself authenticated by the inference drawn from resemblance.[13] According to the better opinion these requirements apply to proof of handwriting on cross-examination as well as on direct examination;[14] and signatures stand in the same position

positive testimony. While great care should be taken in determining whether the standard of comparison is genuine, the usual rule as to a fair balance of testimony applies. Rowell *v.* Fuller, 59 Vt. 688, 10 Atl. 853.

Virginia.— Hanriot *v.* Sherwood, 82 Va. 1.

United States.— Green *v.* Terwilliger, 56 Fed. 384, under Oregon statute; "proved beyond all doubt or cavil."

See 20 Cent. Dig. tit. "Evidence," § 2386.

Single witness as against denial of genuineness.— Defendant having denied that he signed a certain letter, said letter is not admissible to prove defendant's signature to a note, on the testimony of one witness that defendant did sign said letter. Cook *v.* Granbury First Nat. Bank, (Tex. Civ. App. 1896) 33 S. W. 998.

A letter received in reply to one sent to the person by whom it purports to have been signed is not sufficiently established as genuine without further proof. McKeone *v.* Barnes, 108 Mass. 344; Desbrow *v.* Farrow, 3 Rich. (S. C.) 382, holding that such is the rule even where postmark and contents confirm the inference from the fact of reply.

A certificate of acknowledgment to a deed does not prove the signature to be genuine. Hyde *v.* Woolfolk, 1 Iowa 159.

The fact of finding it among the papers of a deceased person whose writing it purports to be does not establish a standard of comparison. Farrell *v.* Manhattan R. Co., 83 N. Y. App. Div. 393, 82 N. Y. Suppl. 334.

12. Before the comparison can be made by the expert or jury, the genuineness of the standard writing must be proved, established, and no longer a question of fact in the case. It should be so that the court can say to the jury that the standard as a matter of law is genuine, and leave to the jury the inquiry whether the disputed signature was written by the same hand. Sankey *v.* Cook, 82 Iowa 125, 47 N. W. 1077.

Circumstantial evidence.—In Georgia, where the statute admits as a standard of comparison "other writings proved or acknowledged to be genuine," it is held that such a standard may be circumstantially established. Little *v.* Rogers, 99 Ga. 95, 24 S. E. 856; McVicker *v.* Conkle, 96 Ga. 584, 24 S. E. 23. See also in New York People *v.* Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193; McKay *v.* Lasher, 121 N. Y. 477, 24 N. E. 711 [*affirming* 50 Hun 383, 3 N. Y. Suppl. 352]. See the following note.

13. *Georgia.*— Bruce *v.* Crews, 39 Ga. 544, 99 Am. Dec. 467.

Iowa.— Sankey *v.* Cook, 82 Iowa 125, 47 N. W. 1077; Winch *v.* Norman, 65 Iowa 186, 21 N. W. 511.

Massachusetts.— Com. *v.* Eastman, 1 Cush. 189, 48 Am. Dec. 596.

North Carolina.— Tunstall *v.* Cobb, 109 N. C. 316, 14 S. E. 28.

Ohio.— Sperry *v.* Tebbs, 10 Ohio Dec. (Reprint) 318, 20 Cinc. L. Bul. 181.

Texas.— Jester *v.* Steiner, 86 Tex. 415, 25 S. W. 411 [*affirming* (Civ. App. 1893) 23 S. W. 718]; Eborn *v.* Zimpelman, 47 Tex. 503, 26 Am. Rep. 315. A signature offered as a standard of comparison cannot be proved to be an original and genuine signature merely by the opinion of a witness that it is so, such opinion being derived solely from the witness' general knowledge of the handwriting of the person whose signature it purports to be, but must be an admitted signature, or be established as genuine by undoubted evidence. Phillips *v.* State, 6 Tex. App. 364.

In New York the rule is otherwise. McKay *v.* Lasher, 121 N. Y. 477, 24 N. E. 711 [*affirming* 50 Hun 383, 3 N. Y. Suppl. 352], holding that under the provisions of the New York statute permitting the comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine, the manner of making such proof depends upon the general rules of evidence applicable to the proof of a party's handwriting; and that the comparison is not confined to writings proved by witnesses who saw the party write, but they may be proved by the testimony of witnesses that they were acquainted with the handwriting of the person whose writing is in question, and that those presented for comparison are genuine. In People *v.* Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193, it was held that the genuineness of writings which, when "proved to the satisfaction of the court to be genuine," may be used as standards of comparison with a disputed writing, may be established: (1) By the concession of the person sought to be charged with the disputed writing made at or for the purposes of the trial, or by his testimony; (2) by witnesses who saw the standards written or to whom or in whose hearing the person sought to be charged acknowledged the writing thereof; (3) by witnesses whose familiarity with the handwriting of the person who is claimed to have written the standard enables them to testify to a belief as to its genuineness; (4) or by evidence showing that the reputed writer of the standard has acquiesced in or recognized the same, or that it has been adopted and acted upon by him in his business transactions or other concerns.

14. Tyler *v.* Todd, 36 Conn. 218; Massey *v.* Virginia Farmers' Nat. Bank, 104 Ill. 327; Gaunt *v.* Harkness, 53 Kan. 405, 36 Pac. 739, 42 Am. St. Rep. 297; Rose *v.* Springfield First Nat. Bank, 91 Mo. 399, 3 S. W. 876, 60 Am. Rep. 258; Pierce *v.* Northey, 14 Wis. 9, holding that a party denying the signature to a paper cannot, upon the cross-examination of witnesses who have testified that they know his handwriting and believe the disputed signature to be his, show them papers purport-

as any other handwriting.[15] The genuineness of the standard may be admitted,[16] or established because the person against whom it is offered is estopped to deny it,[17] as where he claims under the document,[18] or because of the character of the writing as an ancient document.[19] In some states the genuineness of the standard, unless it is an ancient document, must be admitted or established by an estoppel,[20] but

ing to be signed by him, the genuineness of which has been neither admitted nor denied, and ask them whether they believe the signature to such papers to be his, for the purpose of impeaching their credibility by their disagreement upon that point, or if they answer in the affirmative, by afterward showing that the signature thus exhibited was written by another person. See also Wilmington Sav. Bank *v.* Waste, (Vt. 1904) 57 Atl. 241.

Contra.— Thomas *v.* State, 103 Ind. 419, 2 N. E. 808 (holding that to test the accuracy of an expert witness, who gives an opinion as to handwriting upon a comparison of a genuine with the disputed writing, he may be asked on cross-examination whether the latter and another writing not admitted to be genuine are in the same handwriting); Browning *v.* Gosnell, 91 Iowa 448, 59 N. W. 340 (holding that witnesses may be tested by having them select genuine from spurious signatures). See also Hoag *v.* Wright, 174 N. Y. 36, 66 N. E. 579 [*reversing* 74 N. Y. Suppl. 1069].

15. Richardson *v.* Newcomb, 21 Pick. (Mass.) 315; Moody *v.* Rowell, 17 Pick. (Mass.) 490, 28 Am. Dec. 317; Homer *v.* Wallis, 11 Mass. 309, 6 Am. Dec. 169.

16. *Delaware.*— McCafferty *v.* Heritage, 5 Houst. 220.

Georgia.— Thomas *v.* State, 59 Ga. 784.

Illinois.— Brobston *v.* Cahill, 64 Ill. 356.

Indiana.— Swales *v.* Grubbs, 126 Ind. 106, 25 N. E. 877.

Iowa.— Riordan *v.* Guggerty, 74 Iowa 688, 39 N. W. 107; Whitaker *v.* Parker, 42 Iowa 585; Lay *v.* Wissman, 36 Iowa 305.

Kansas.— Holmberg *v.* Johnson, 45 Kan. 197, 25 Pac. 575; Macomber *v.* Scott, 10 Kan. 335.

Maine.— State *v.* Thompson, 80 Me. 194, 13 Atl. 892, 6 Am. St. Rep. 172.

Massachusetts.— Com. *v.* Andrews, 143 Mass. 23, 8 N. E. 643.

Michigan.— Dietz *v.* Grand Rapids Fourth Nat. Bank, 69 Mich. 287, 37 N. W. 220.

Minnesota.— Morrison *v.* Porter, 35 Minn. 425, 29 N. W. 54, 59 Am. Rep. 331.

Missouri.— Singer Mfg. Co. *v.* Clay, 53 Mo. App. 412.

Nebraska.— Schmuck *v.* Hill, (1901) 96 N. W. 158.

New Hampshire.— Bowman *v.* Sanborn, 25 N. H. 87.

New York.— Shaw *v.* Bryant, 90 Hun 374, 35 N. Y. Suppl. 909; Hall *v.* Van Vranken, 28 Hun 403, 64 How. Pr. 407.

Ohio.— Bell *v.* Brewster, 44 Ohio St. 690, 10 N. E. 679; Hicks *v.* Person, 19 Ohio 426.

South Carolina.— Rose *v.* Winnsboro Nat. Bank, 41 S. C. 191, 19 S. E. 487.

Texas.— Jester *v.* Steiner, 86 Tex. 415, 25 S. W. 411; Eborn *v.* Zimpelman, 47 Tex. 503, 26 Am. Rep. 315; Mallory *v.* State, 37 Tex. Cr. 482, 36 S. W. 751, 66 Am. St. Rep. 808.

Utah.— Tucker *v.* Kellogg, 8 Utah 11, 28 Pac. 870; Durnell *v.* Snowden, 5 Utah 216, 14 Pac. 334.

Vermont.— State *v.* Ward, 39 Vt. 225; Adams *v.* Field, 21 Vt. 256; Gifford *v.* Ford, 5 Vt. 532.

United States.— Green *v.* Terwilliger, 56 Fed. 384 (Oregon statute); U. S. *v.* Mathias, 36 Fed. 892; Briggs *v.* U. S., 29 Ct. Cl. 178.

See 20 Cent. Dig. tit. "Evidence," § 2381 *et seq.*

Form the result of duress or fraud.— If writings offered as evidence of handwriting are admitted by a party to be his, but he claims that their form is the result of duress or fraud, the proper course is to show such fact for the purpose of affecting their weight. Schmuck *v.* Hill, (Nebr. 1901) 96 N. W. 158.

Calling for and recording document as an admission.— Upon the trial of an action upon a promissory note, plaintiff does not, by reading to the jury a mortgage delivered with the note, and now produced by defendant at plaintiff's request, authorize defendant, without proof of the execution of the mortgage, to submit to the jury the body of the mortgage, and the signatures thereto of defendant and of a subscribing witness, for the purpose of showing by a comparison of hands that the signature of defendant to the note was forged by such subscribing witness; nor, upon proof of the subscribing witness having left the state in order to avoid testifying, to prove his handwriting, for the purpose of such comparison. Martin *v.* Maguire, 7 Gray (Mass.) 177.

17. *Missouri.*— Rose *v.* Springfield First Nat. Bank, 91 Mo. 399, 3 S. W. 876, 60 Am. Rep. 258; Doud *v.* Reid, 53 Mo. App. 553; Singer Mfg. Co. *v.* Clay, 53 Mo. App. 412.

North Carolina.— Tunstall *v.* Cobb, 109 N. C. 316, 14 S. E. 28.

Texas.—Mardes *v.* Meyers, 8 Tex. Civ. App. 542, 28 S. W. 693.

West Virginia.— Tower *v.* Whip, 53 W. Va. 158, 44 S. E. 179, 63 L. R. A. 937.

United States.— Williams *v.* Conger, 125 U. S. 397, 8 S. Ct. 933, 31 L. ed. 778.

18. Himrod *v.* Gilman, 147 Ill. 293, 35 N. E. 373 [*affirming* 44 Ill. App. 516].

19. See *infra*, XI, C, 9, b, (III), (E).

20. *Illinois.*— Putnum *v.* Wadley, 40 Ill. 346.

Indiana.— McDonald *v.* McDonald, 142 Ind. 55, 41 N. E. 336; White Sewing Mach. Co. *v.* Gordon, 124 Ind. 495, 24 N. E. 1053, 19 Am. St. Rep. 109; Walker *v.* Steele, 121 Ind. 436, 22 N. E. 142, 23 N. E. 271; Shorb *v.* Kinzie, 80 Ind. 500; Hazzard *v.* Vickery,

in most states it may be proved.[21] Proof of genuineness is not dispensed with because the writer is dead.[22] Under some of the statutes the writing to be used as a standard must be the genuine handwriting of the person purporting to be the writer of the disputed document, and writings made by other persons, as by the person alleged to have forged the disputed paper, although proved to be genuine, are not admissible.[23] The person whose handwriting is in question cannot be permitted to write something at the trial and offer the specimen so prepared as a standard.[24] A writing specially prepared for the purpose of comparison is not admissible as a standard.[25] But where a signature has been written in

78 Ind. 64; Jones *v.* State, 60 Ind. 241; Bowen *v.* Jones, 13 Ind. App. 193, 41 N. E. 400.

Michigan.— Van Sickle *v.* People, 29 Mich. 61.

Missouri.— State *v.* Thompson, 132 Mo. 301, 34 S. W. 31; De Arman *v.* Taggart, 65 Mo. App. 82; McCombs *v.* Foster, 62 Mo. App. 303; Doud *v.* Reid, 53 Mo. App. 553; Singer Mfg. Co. *v.* Clay, 53 Mo. App. 412.

North Carolina.— Tunstall *v.* Cobb, 109 N. C. 316, 14 S. E. 28. See also Ratliff *v.* Ratliff, 131 N. C. 425, 42 S. E. 887.

Oregon.— Under the statute of this state providing that evidence respecting the handwriting may be given by a comparison with writings admitted or treated as genuine by the party against whom the evidence is offered, an instrument not admitted or treated by defendant as genuine cannot be used for the sole purpose of comparing the handwriting with that of another paper charged to have been forged. State *v.* Tice, 30 Oreg. 457, 48 Pac. 367.

Texas.— Jester *v.* Steiner, 86 Tex. 415, 25 S. W. 411; Eborn *v.* Zimpelman, 47 Tex. 503, 26 Am. Rep. 315.

See 20 Cent. Dig. tit. "Evidence," § 2381 *et seq.* And see *supra*, XI, C, 9, b, (III), (B), (3), (a), (b).

Proof of admission by party.— It is not enough to prove by a witness that the party whose handwriting is in question admitted the genuineness of the writing offered as a basis for comparison. Jones *v.* State, 60 Ind. 241; Van Sickle *v.* People, 29 Mich. 61. The fact that defendant in a deposition had admitted signatures to certain checks as genuine will not preclude him from denying such signatures on a trial in a plea of *non est factum* as to a promissory note; and on such denial such checks cannot be admitted in evidence. McCombs *v.* Foster, 62 Mo. App. 303, 305, where it is said: "Now, here it is true that the defendant admitted under oath, before the trial of this cause, that the signatures to the checks were his signatures, yet he did not admit or concede this at the trial. It is not a play upon the words 'admit' or 'concede,' but is here a question of whether what has taken place will avoid the collateral issue as to whether the signatures are genuine. Though defendant did admit in his deposition, taken before the trial, that the signatures were genuine, that fact did not conclude him on that question. He could still raise the question. He might afterward find he was deceived or was otherwise mistaken. When a party admits out of court a matter as being a fact, while it is evidence against him on an issue as to that fact, it does not prevent him from saying and showing the contrary. So, then, though defendant did admit in his deposition that the signatures were genuine, yet he was not precluded from denying it at the trial, and thus bring on the collateral issue, which the rule aforesaid was designed to avoid."

An admission by the party who seeks to use the writings, although he himself executed them, will not authorize their use, and the testimony of expert witnesses based upon such comparison is not admissible. Shorb *v.* Kinzie, 80 Ind. 500.

21. See *supra*, notes 16, 17. See also *supra*, XI, C, 9, b, (III), (B), (3), (a), (b).

22. McVicker *v.* Conkle, 96 Ga. 584, 24 S. E. 23.

23. Peck *v.* Callaghan, 95 N. Y. 73; Bruyn *v.* Russell, 52 Hun (N. Y.) 17, 4 N. Y. Suppl. 784; Franklin *v.* Franklin, 90 Tenn. 44, 16 S. W. 557.

24. Williams *v.* State, 61 Ala. 33; Com. *v.* Allen, 128 Mass. 46, 35 Am. Rep. 356; King *v.* Donahue, 110 Mass. 155, 14 Am. Rep. 589; McGlasson *v.* State, 37 Tex. Cr. App. 620, 40 S. W. 503, 66 Am. St. Rep. 842 (even though he knows how to write his name only); Hickory *v.* U. S., 151 U. S. 303, 14 S. Ct. 334, 38 L. ed. 170; U. S. *v.* Jones, 10 Fed. 469, 20 Blatchf. 235. See also Gulzoni *v.* Tyler, 64 Cal. 334, 30 Pac. 981; Territory *v.* O'Hare, 1 N. D. 30, 44 N. W. 1003.

A party to an action is not entitled to write his signature in the presence of the jury for the purpose of being compared with a signature purporting to be his, the genuineness of which he denies. King *v.* Donahue, 110 Mass. 155, 14 Am. Rep. 589.

Estoppel.— Where the court permitted a witness, over the objection of defendants, to write his signature in the presence of the jury, for their inspection and comparison with a signature to a chattel mortgage which was claimed to have been forged, and afterward upon cross-examination defendants asked the witness to stand up and write his name in the presence of the jury, and then offered the same in evidence, it was held that defendants could not afterward complain of such evidence. Allen *v.* Gardner, 47 Kan. 337, 27 Pac. 982.

25. Keith *v.* Lothrop, 10 Cush. (Mass.) 453; Bridgman *v.* Corey, 62 Vt. 1, 20 Atl. 273; Hickory *v.* U. S., 151 U. S. 303, 14 S. Ct. 334, 38 L. ed. 170.

open court by the person in question at the request of the opposite party the party calling for the writing may introduce it in evidence.[26] The court will not as a rule order the person whose writing is in question to write in court at the suggestion of the counsel,[27] but it may under exceptional circumstances make the order.[28] A genuine handwriting is not inadmissible as a standard of comparison because it was given by defendant in a criminal case at the request of the public authorities or of an expert employed by them before defendant was arrested or charged with the crime.[29] As aids in making a comparison of writings the court, jury, or witnesses may use magnifying glasses and microscopes.[30] In some cases it has been held that photographic copies and photographic enlarged copies of the disputed and genuine handwritings or signatures may be used as aids in making the comparison by the court, jury, or witnesses,[31] but in other cases similar evidence has been rejected.[32] Traced copies,[33] magnified drawings,[34] or letter-press copies[35] cannot be used. In order that witnesses may state, from a comparison of handwriting, their inference as to the identity of the writer of a

26. Chandler *v.* Le Barron, 45 Me. 534; Bronner *v.* Loomis, 14 Hun (N. Y.) 341. See also Allen *v.* Gardner, 47 Kan. 337, 27 Pac. 982; Sprouse *v.* Com., 81 Va. 374.

27. Smith *v.* King, 62 Conn. 515, 26 Atl. 1059; Houghton First Nat. Bank *v.* Robert, 41 Mich. 709, 3 N. W. 199; Williams *v.* Riches, 77 Wis. 569, 46 N. W. 817. Especially is this true where the original writing was made in a formative period and a considerable interval has since elapsed. Williams *v.* Riches, *supra*.

28. Bradford *v.* People, 22 Colo. 157, 43 Pac. 1013; Smith *v.* King, 62 Conn. 515, 26 Atl. 1059; Huff *v.* Nims, 11 Nebr. 363, 9 N. W. 548, defendant's son claimed to have altered a note.

29. People *v.* Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193, holding that genuine writings of a person on trial for murder by poisoning were not inadmissible as standards of comparison with the handwriting upon a package containing poison which he was alleged to have sent feloniously through the mail, because they were produced at the request of a handwriting expert retained by the police authorities at a time when the inquest into the circumstances of the death was in progress and while defendant was suspected, as he knew, of being the murderer and was under subpœna to testify at the inquest, since he was not in custody and no formal charge had been made against him.

30. White Sewing Mach. Co. *v.* Gordon, 124 Ind. 495, 24 N. E. 1053, 19 Am. St. Rep. 109; Indiana Car Co. *v.* Parker, 100 Ind. 181; Morse *v.* Blanchard, 117 Mich. 37, 75 N. W. 93; Kannon *v.* Galloway, 2 Baxt. (Tenn.) 230.

31. Marcy *v.* Barnes, 16 Gray (Mass.) 161, 77 Am. Dec. 405; Frank *v.* Chemical Nat. Bank, 37 N. Y. Super. Ct. 26; Howard *v.* Russell, 75 Tex. 171, 12 S. W. 525; Rowell *v.* Fuller, 59 Vt. 688, 10 Atl. 853.

Proof of accuracy.— To render photographic enlarged copies admissible they must be accompanied by preliminary proof that they are accurate copies in all respects except as to size and coloring. Marcy *v.* Barnes, 16 Gray (Mass.) 161, 77 Am. Dec. 405; Geer *v.* Missouri Lumber, etc., Co., 134 Mo. 85, 34 S. W. 1099, 56 Am. St. Rep. 489. The affidavit of an officer having custody of the original as a record that the copy is a true and literal exemplification of the original is not sufficient. Geer *v.* Missouri Lumber, etc., Co., *supra*.

32. White Sewing Mach. Co. *v.* Gordon, 124 Ind. 495, 24 N. E. 1053, 19 Am. St. Rep. 109 (holding that it was not error to refuse to submit to the jury for inspection a microscopic enlargement of a disputed signature, where the original was in court and where it was not proposed to compare it with enlarged copies of signatures admitted to be genuine); Tome *v.* Parkersburg Branch R. Co., 39 Md. 36, 17 Am. Rep. 540; Maclean *v.* Scripps, 52 Mich. 214, 17 N. W. 815, 18 N. W. 209 (holding that photographic copies of handwriting are inadmissible where the originals can be had); Vanderslice *v.* Snyder, 4 Pa. Dist. 424. See also Hynes *v.* McDermott, 82 N. Y. 41, 37 Am. Rep. 538 (holding that a comparison of a signature in dispute with photographic copies of other writings, for the purpose of getting an opinion from an expert as to the character of the signature as real or feigned, where the originals from which the copies are made are not brought before the jury and cannot be shown to other witnesses, should not be permitted, at least where there is no proof as to the manner and exactness of the photographic method used); Taylor's Case, 10 Abb. Pr. N. S. (N. Y.) 300 (where it is said that photographs of signatures should not be used as evidence if the original could be produced, and in no case without investigating the refractive power of the lens, the angle at which the original was inclined to the sensitive plate, the accuracy of the focussing, the skill of the operator, and the general method of procedure).

33. Howard *v.* Russell, 75 Tex. 171, 12 S. W. 525.

34. Ulmer *v.* Gentner, 3 Pennyp. (Pa.) 453.

35. Spottiswood *r.* Weir, 66 Cal. 525, 6 Pac. 381; Com. *v.* Eastman, 1 Cush. (Mass.)

disputed document or signature, the specimen used as a standard must be before the court and jury.[36]

(E) *Ancient Documents.* Comparison of hands is almost universally allowed in case of documents at least thirty years old. Such documents are admitted in evidence, without further proof of genuineness, as standards for comparison,[37] when accompanied by possession.[38] Conversely the authenticity of an ancient document may be established by the evidence of skilled observers testifying from resemblance to a mental standard created by juxtaposition or comparison.[39]

(IV) *WEIGHT OF EVIDENCE* — (A) *In General.* A witness who speaks as to handwriting from one qualification is equally competent with one who speaks on the basis of any other, although greater opportunities for observation or continued study of the subject may give the observer superior skill and entitle his opinions to greater weight.[40] An illiterate man or one whose business seldom brings him into contact with writing cannot testify with the same weight as if he were an educated man, accustomed to correspondence and to seeing people write.[41] A party is at liberty to enhance the weight of his evidence by asking a witness for his reasons.[42] The probative force of the evidence is entirely a question for the jury.[43] The court, however, may properly reject evidence not

189, 217, 48 Am. Dec. 596; Cohen *v.* Teller, 93 Pa. St. 123.

36. Hynes *v.* McDermott, 82 N. Y. 41, 37 Am. Rep. 538; People *v.* Dorthy, 50 N. Y. App. Div. 44, 63 N. Y. Suppl. 592, 14 N. Y. Cr. 545.

37. *Georgia.*— Goza *v.* Browning, 96 Ga. 421, 23 S. E. 842.

New York.— Willson *v.* Betts, 4 Den. 201; Jackson *v.* Murray, Anth. N. P. 143.

Pennsylvania.—Sweigart *v.* Richards, 8 Pa. St. 436.

United States.— Strother *v.* Lucas, 6 Pet. 763, 8 L. ed. 573.

England.— Morewood *v.* Wood, 14 East 327 note; Doe *v.* Tarver, R. & M. 141, 21 E. C. L. 719.

See also *infra*, XIV, D.

A letter purporting to have been written more than thirty years ago belongs to the class of instruments known as ancient documents; and, where produced from the family papers of the person to whom it had been addressed, is presumed to have been written by the person by whom it purports to have been written; and the writer and the person addressed being dead, is admissible in evidence without further proof of its authenticity. Bell *v.* Brewster, 44 Ohio St. 690, 10 N. E. 679.

And so as to a pay-roll of a military company in the War of 1812, on which is what purports to be the signature of a soldier to a receipt for pay due him, produced from the archives of the government in the war department at Washington city. Bell *v.* Brewster, 44 Ohio St. 690, 10 N. E. 679.

38. Goza *v.* Browning, 96 Ga. 421, 23 S. E. 842.

39. *Alabama.*— State *v.* Givens, 5 Ala. 747.

Indiana.— Clark *v.* Wyatt, 15 Ind. 271, 77 Am. Dec. 90.

Kentucky.— Fee *v.* Taylor, 83 Ky. 259.

New Jersey.— West *v.* State, 22 N. J. L. 212.

New York.— Willson *v.* Betts, 4 Den. 201; Jackson *v.* Brooks, 8 Wend. 426.

Ohio.— Bell *v.* Brewster, 44 Ohio St. 690, 10 N. E. 679.

Pennsylvania.—Sweigart *v.* Richards, 8 Pa. St. 436.

South Carolina.— Cantey *v.* Platt, 2 McCord 260.

Texas.—Cook *v.* Granbury First Nat. Bank, (Civ. App. 1896) 33 S. W. 998.

Virginia.— Rowt *v.* Kile, 1 Leigh 216.

Wisconsin.— Hazleton *v.* Union Bank, 32 Wis. 34.

United States.— Strother *v.* Lucas, 6 Pet. 763, 8 L. ed. 573; Morewood *v.* Wood, 14 East 327 note; Doe *v.* Tarver, R. & M. 141, 21 E. C. L. 719.

40. The weight and value of positive testimony of a party's handwriting depends upon the frequency with which the witnesses have had occasion to carefully observe the handwriting, and how recent their opportunities of noticing the handwriting have been, and whether or not the witnesses have any interest in establishing the genuineness of the signatures in dispute. Green *v.* Terwilliger, 56 Fed. 384.

41. U. S. *v.* Gleason, 37 Fed. 331.

42. People *v.* Mooney, 132 Cal. 13, 63 Pac. 1070.

43. U. S. *v.* Molloy, 31 Fed. 19. See also Forgey *v.* Cambridge City First Nat. Bank, 66 Ind. 123; Temple *v.* Smith, 7 La. Ann. 562; State *v.* Ward, 39 Vt. 225.

Functions of the jury.— The action of the court in admitting the standard as genuine does not control the action of the jury. They may think otherwise. And it is the right and duty of the jury to judge for themselves. Pinkham *v.* Cockell, 77 Mich. 265, 43 N. W. 921; State *v.* Hastings, 53 N. H. 452; Rowell *v.* Fuller, 59 Vt. 688, 10 Atl. 853; State *v.* Ward, 39 Vt. 225. Both the genuineness of the standard and the weight of the evidence, whether furnished to the jury directly by the resemblance of the disputed writing to that standard (State *v.* Hastings, 53 N. H. 452) or furnished by the inference of the skilled witness (State *v.* Hastings, 53 N. H. 452)

of sufficient probative weight to enable a jury to give a reasonable inference.[44] It has been said that less weight should be given to inferences from familiarity with a person's signature,[45] or from comparison,[46] than to statements of witnesses who speak to matters within their personal observation, and such a feeling is active in the decisions of the courts.[47] It is not error to charge that inferences from comparison are far from satisfactory and should be received with great care and caution.[48] Still, as appears from the many jurisdictions which admit this species of evidence, it has its strong advocates.[49]

(B) *As Affected by Cross-Examination.* The weight to be attached to an expert's opinion may be impaired by showing on cross-examination that he has reached a contrary conclusion on another occasion.[50] He may be tested by showing him part of a writing, concealing the rest, and asking him in whose handwriting is the part shown,[51] in some states by showing other specimens of the handwriting and asking for his inference as to the writer,[52] or whether, assuming these specimens to be genuine, or it being admitted or proved that they are, he still is of the same mind as before;[53] but he cannot be called upon, when his knowledge is based upon a previous acquaintance with the person's handwriting, to pass upon the genuineness of other writings not proved or admitted to be genuine,[54] or to pick out from a number of signatures those which he regards as

is for the jury. Where the defense to an action against the administrator of the maker of a note was *non est factum,* it was error to instruct that the evidence of experts who had testified as to the maker's signature was "intrinsically weak, and ought to be received and weighed by the jury with great caution," as on the weight of the testimony. Coleman *v.* Adair, 75 Miss. 660, 23 So. 369.

Weight is also affected by the fact that the specimen in question was made before the witness knew the handwriting. Ratliff *v.* Ratliff, 131 N. C. 425, 42 S. E. 887, 63 L. R. A. 963.

44. McConnell *v.* Playa de Oro Min. Co., 59 N. Y. Suppl. 368, where a witness testified that he once saw the party sign a paper under circumstances which the party denies.

45. Jackson *v.* Adams, 100 Iowa 163, 69 N. W. 427.

46. Jackson *v.* Adams, 100 Iowa 163, 69 N. W. 427; U. S. *v.* Pendergast, 32 Fed. 198. See also Whitaker *v.* Parker, 42 Iowa 585.

47. Wilson *v.* Keeling, 50 S. W. 539, 20 Ky. L. Rep. 1923 (saw person sign); Card *v.* Moore, 68 N. Y. App. Div. 327, 74 N. Y. Suppl. 18.

On the contrary a witness testifying from comparison may be believed even when his testimony is in direct conflict with the writer himself. Luce *v.* Coyne, 36 U. C. Q. B. 305.

48. State *v.* Van Tassel, 103 Iowa 6, 72 N. W. 497; Jackson *v.* Adams, 100 Iowa 163, 69 N. W. 427 (unsatisfactory); Whitaker *v.* Parker, 42 Iowa 585; Com. *v.* Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596; Ferguson *v.* Hubbell, 97 N. Y. 507, 49 Am. Rep. 544. It "is of the lowest order of evidence and unsatisfactory." Whitaker *v.* Parker, 42 Iowa 585.

49. "Abstractly reasoning upon this kind of proof, it seems plain that a more correct judgment as to the identity of handwriting would be formed by a witness by a critical and minute comparison with a fair and genuine specimen of the party's handwriting, than by a comparison of seen signatures with the faint impressions produced by having seen the party write and even then perhaps under circumstances which did not awaken his attention, hence the greater necessity for such a standard, as without it no possible legal conclusion could be reached." Reid *v.* Warner, 17 L. C. Rep. 485, 491. "In many cases it is more satisfactory to allow a witness to compare the writing in issue with other writings, of unquestioned authority as to genuineness, than it is to compare it with the standard which he may have formed or retained in his mind from a knowledge of the party's handwriting." Green *v.* Terwilliger, 56 Fed. 384.

50. Hoag *v.* Wright, 174 N. Y. 36, 66 N. E. 579, 63 L. R. A. 163.

51. Kirksey *v.* Kirksey, 41 Ala. 626.

52. Thomas *v.* State, 103 Ind. 419, 2 N. E. 808; People *v.* Murphy, 17 N. Y. Suppl. 427.

Use of specimens not genuine on cross-examination see *supra,* XI, C, 9, b, (III), (D).

53. Chester County Nat. Bank *v.* Armstrong, 66 Md. 113, 6 Atl. 584, 59 Am. Rep. 156.

54. *Illinois.*— Massey *v.* Farmers' Nat. Bank, 104 Ill. 327.

Maryland.—Armstrong *v.* Thruston, 11 Md. 148.

Massachusetts.— Bacon *v.* Williams, 13 Gray 525.

Michigan.— Howard *v.* Patrick, 43 Mich. 121, 5 N. W. 84.

New York.— Van Wyck *v.* McIntosh, 14 N. Y. 439.

Tennessee.— Fogg *v.* Dennis, 3 Humphr. 47.

Wisconsin.— Pierce *v.* Northey, 14 Wis. 9.

The test has been permitted in case of a skilled observer, and it has been held that he may be asked to distinguish between a genuine and another signature of a witness (Johnston Harvester Co. *v.* Miller, 72 Mich. 265, 40 N. W. 429, 16 Am. St. Rep. 536),

genuine.[55] The same rule has been applied even where the writing submitted is conceded to be genuine.[56] The answer in any event cannot be shown to be incorrect.[57] The witness may be asked such questions as tend to disclose his opportunities for examining the disputed writing.[58]

10. Sound. A witness may characterize a sound as faint, loud, and the like, and state the direction from which it appeared to come,[59] or state the cause,[60] emotion,[61] or mental condition or state,[62] from which he infers it to have arisen, in such a manner that the statement represents so rudimentary an inference as practically to amount to a statement of fact. The witness may go further and characterize the sound by stating that it had a resemblance to other sounds,[63] or seemed to have been made in or outside a house.[64]

D. Inference From Sensation; Skilled Witness[65] — **1. In General.** That a witness is especially well qualified by training or experience on a particular subject to observe accurately and to draw correct inferences from what he observes does not constitute him an expert.[66] The rule which permits a witness, where the phenomena are numerous and difficult of statement, to testify to their effect

the genuineness of other signatures prepared for the purpose (Browning *v.* Gosnell, 91 Iowa 448, 59 N. W. 340; Hornellsville First Nat. Bank *v.* Hyland, 53 Hun (N. Y.) 108, 6 N. Y. Suppl. 87), or whether a number of specimens were all written by the same person). *Contra*, State *v.* Griswold, 67 Conn. 290, 34 Atl. 1046, 33 L. R. A. 227. And neither the witness nor the opposing counsel is entitled to know what writings will be used for these purposes, or whether they are genuine, or by whom they were written. Travelers' Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18. The matter is within the discretion of the trial judge. Com. *v.* Pettes, 114 Mass. 307. The rule is otherwise under certain statutory provisions. Andrews *v.* Hayden, 88 Ky. 455, 11 S. W. 428, 10 Ky. L. Rep. 1049. See also Gaunt *v.* Harkness, 53 Kan. 405, 36 Pac. 739, 42 Am. St. Rep. 297; Wentz *v.* Black, 75 N. C. 491.

55. Wilmington Sav. Bank *v.* Waste, (Vt. 1904) 57 Atl. 241.

56. Bevan *v.* Atlanta Nat. Bank, 39 Ill. App. 577 [*distinguishing* Melvin *v.* Hodges, 71 Ill. 422].

57. Gaunt *v.* Harkness, 53 Kan. 405, 36 Pac. 739, 42 Am. St. Rep. 297; Van Wyck *v.* McIntosh, 14 N. Y. 439; People *v.* Murphy, 17 N. Y. Suppl. 427; U. S. *v.* Chamberlain, 25 Fed. Cas. No. 14,778, 12 Blatchf. 390.

58. Herrick *v.* Swomley, 56 Md. 439, where witness first saw the writing.

59. State *v.* Shinborn, 46 N. H. 497, 88 Am. Dec. 224.

60. People *v.* Clarke, 130 Cal. 642, 63 Pac. 138, shot-gun.

61. Logan *v.* State, (Tex. Cr. App. 1899) 53 S. W. 694 [*citing* Meyers *v.* State, 37 Tex. Cr. 208, 39 S. W. 111], anger; Rippey *v.* State, 29 Tex. App. 37, 14 S. W. 448; Fulcher *v.* State, 28 Tex. App. 465, 13 S. W. 750; Clark *v.* State, 28 Tex. App. 189, 12 S. W. 729, 19 Am. St. Rep. 856; Powers *v.* State, 23 Tex. App. 42, 5 S. W. 153; Irvine *v.* State, 26 Tex. App. 37, 9 S. W. 55.

62. State *v.* Taylor, 57 S. C. 483, 35 S. E. 729, 76 Am. St. Rep. 575, distress.

63. People *v.* Chin Hane, 108 Cal. 597, 41 Pac. 697 ("sounded like a drum or something deep"); State *v.* Lucy, 41 Minn. 60, 42 N. W. 697 (blow with iron).

64. People *v.* Clarke, 130 Cal. 642, 63 Pac. 138, gunshot.

65. **As to handwriting** see *supra*, XI, C, 9, b, (II), (B); XI, C, 9, b, (III), (B), (3), (b).

66. Betts *v.* Chicago, etc., R. Co., 92 Iowa 343, 60 N. W. 623, 54 Am. St. Rep. 558, 26 L. R. A. 248; Taber *v.* New York El. R. Co., 58 N. Y. Super. Ct. 579, 11 N. Y. Suppl. 584, holding that skilled observers are not within the meaning of a stipulation limiting the number of experts.

Skilled witnesses are frequently spoken of as experts, although testifying to inferences from direct observation. State *v.* Johnson, 66 S. C. 23, 44 S. E. 58; State *v.* Martin, 47 S. C. 67, 25 S. W. 113.

Popular and technical use of term "expert."— Special skill and experience in connection with facts known to or observed by a witness do not constitute him an "expert" within the law of evidence. See the cases cited above. In common, popular use the test of an expert is special experience, regardless of whether his statement concerns facts personally known to him or observed by him, or to his judgment on facts assumed to have been proven by others. All such persons are equally experts in the popular sense. But distinctions in the law of evidence commonly vary according to the differing nature of the testimony offered rather than according to subjective experience of the witness. Following this usual line, the distinction between experts and other witnesses is that the latter testify to facts known to them; experts testify to inferences from facts proved by others. The line is between knowledge and inference; not between special skill or training and its absence. The skilled observer occupies the same position as any other, except that within certain lines he possesses a superior mental equipment which makes his knowledge relevant. See Betts *v.* Chicago, etc., R. Co., 92 Iowa 343, 60 N. W. 623, 54 Am. St. Rep. 558, 26 L. R. A. 248; Faber *v.* New York

upon his mind extends to him.[67] In matters connected with his specialty such a skilled observer may testify as to his inference from facts observed by him for an additional reason which does not apply in case of the ordinary observer, viz., that the bearing of the facts observed and frequently the facts themselves cannot be communicated fully to the jury by reason of being removed from common experience,[68] not primarily because they are numerous and intangible, but because, even if the facts themselves could be correctly placed before the jury, a special knowledge or training, beyond the possession or speedy acquirement of the tribunal, would be needed to coördinate and weigh these facts into an inference of value for the purposes of the case. In many instances, while testimony is confessedly as to a point of fact and based upon observation, it is essential to the weight of the inference that the witness should have had such special training. Among such inferences are those relating to logging[69] and values.[70] The facts relied on by the witness as the ground of his inference must still be stated by him,[71] and where the facts can be fully placed before the jury the evidence will be rejected.[72] A skilled observer may testify, both from observation and as an expert, as to his judgment on hypothetically stated facts.[73] But the two lines of examination are not to be confused. For example the observer when testifying as an expert cannot be asked to make his observation part of the hypothesis,[74] as the hypothetical question would then fail to enumerate a portion of the facts on which the judgment is based.[75] Nor can a witness who has testified on direct as an observer testify on redirect as an "expert."[76]

2. Agriculture.[77] A witness properly qualified in agricultural matters, and who has had adequate opportunities for observation, may state his inferences from observed agricultural phenomena,[78] as what would be the effects of burning over,[79] draining,[80] or irrigating[81] a given piece of land; its availability for farm-

El. R. Co., 58 N. Y. Super. Ct. 579, 11 N. Y. Suppl. 584.

67. Com. *v.* Sturtivant, 117 Mass. 122, 19 Am. Rep. 401.

68. Gerbig *v.* New York, etc., R. Co., 69 Hun (N. Y.) 177 note; Folkes *v.* Chadd, 3 Dougl. 157, 26 E. C. L. 111. A seal engraver may give his opinion whether an impression is or is not a genuine impression from the original seal. Folkes *v.* Chadd, 3 Dougl. 157, 26 E. C. L. 111, per Mansfield, J.

69. Barnes *v.* Heath, 58 N. H. 196.

70. De Witt *v.* Barly, 17 N. Y. 340, 342, where the court said: "A moment's reflection is sufficient to show that, in some cases, to form a correct judgment as to value would require a knowledge of some branch of science, or of some particular art or trade; while in others no such knowledge would be necessary. For instance the value of precious stones, could only be accurately judged of by a lapidary; of drugs and medicines by a druggist, etc.; while to assess the value of a horse, a cow, or an article of household furniture, would require no such peculiar knowledge." See also *supra*, XI, C, 4, t.

71. Porter *v.* Pequonnoc Mfg. Co., 17 Conn. 249.

72. St. Louis, etc., R. Co. *v.* Yarborough, 56 Ark. 612, 20 S. W. 515 [*citing* Brown *v.* State, 55 Ark. 593, 18 S. W. 1051; Fort *v.* State, 52 Ark. 180, 11 S. W. 959, 20 Am. St. Rep. 163; Bennett *v.* Meehan, 83 Ind. 566, 43 Am. Rep. 78; Com. *v.* Sturtevant, 117 Mass. 122, 19 Am. Rep. 401; Baltimore, etc., R. Co. *v.* Schultz, 43 Ohio St. 270, 1 N. E. 324, 54 Am. Rep. 805; Crane *v.* Northfield, 33 Vt. 124; Fraser *v.* Tupper, 29 Vt. 409]. See also *supra*, XI, A, 4, b.

73. State *v.* Wilson, 117 Mo. 570, 21 S. W. 443; Titus *v.* Gage, 70 Vt. 213, 39 Atl. 246.

Hypothetical questions have been permitted on the cross-examination of one who has testified as to the results of observation. Bricker *v.* Lightner, 40 Pa. St. 199. *Contra*, Dunbaun's Appeal, 27 Conn. 192.

74. State *v.* Welsor, 117 Mo. 570, 21 S. W. 443; Seymour *v.* Fellows, 77 N. Y. 178; Bramble *v.* Hunt, 68 Hun (N. Y.) 204, 22 N. Y. Suppl. 842; Carpenter *v.* Blake, 2 Lans. (N. Y.) 206; Foster *v.* Dickenson, 64 Vt. 233, 24 Atl. 253; Johnson *v.* Central Vermont R. Co., 56 Vt. 707.

75. Such blending has been permitted in Wisconsin. Selleck *v.* Janesville, 100 Wis. 157, 75 N. W. 975, 69 Am. St. Rep. 906, 41 L. R. A. 563.

76. Sagar *v.* Hogmire, (Mich. 1896) 66 N. W. 327. *Contra*, Titus *v.* Gage, 70 Vt. 13, 39 Atl. 246.

77. See also *supra*, XI, B, 2, b; *infra*, XI, G, 2, b.

78. Santa Cruz *v.* Enright, 95 Cal. 105, 30 Pac. 197. An agricultural training is needed to make an inference distinctly agricultural relevant. Baltimore, etc., R. Co. *v.* Schultz, 43 Ohio St. 270, 1 N. E. 324, whether fence is sufficient to turn stock.

Value of farm lands, crops, etc., see *supra*, XI, C, 4, t.

79. Bradley *v.* Iowa Cent. R. Co., 111 Iowa 562, 82 N. W. 996.

80. Buffum *v.* Harris, 5 R. I. 243.

81. Ellis *v.* Tome, 58 Cal. 289.

ing purposes,[82] or for the raising of particular crops;[83] its probable yield;[84] and the incidental effect of certain acts.[85] Such a witness may estimate the age of farm animals,[86] and state whether they have received proper treatment;[87] or he may testify as to the injury resulting from certain acts.[88]

3. Building Trades.[89] Witnesses experienced in a building trade[90] may testify in their particular department,[91] as to the cost of a house,[92] or other building,[93] or of repairs thereto;[94] whether a particular person is a good workman;[95] whether a piece of work is well done,[96] and made of good material;[97] whether of sufficient strength for a given purpose,[98] or up to a given standard,[99] or otherwise properly constructed;[1] what would be the effect of a stated cause,[2] or a definite occurrence;[3] whether a bridge would have stood the strain if kept in repair,[4] or when a defect in it began.[5] Sufficient opportunities for observation must be shown.[6]

4. Cattle Raising and Veterinary Skill.[7] Veterinary surgeons, and other persons acquainted with the breeding and care of animals, may state the cause of injuries observed by them and their effects.[8] They may also state the results of

82. Farmers', etc., Nat. Bank *v.* Woodell, 38 Oreg. 294, 61 Pac. 837, 65 Pac. 520, raising sugar beets.

83. Shoemaker *v.* Crawford, 82 Mo. App. 487.

84. Arkansas Midland R. Co. *v.* Griffith, 63 Ark. 491, 39 S. W. 550, gross.

85. Young *v.* O'Neal, 57 Ala. 566, use of particular fertilizer.

86. Clague *v.* Hodgson, 16 Minn. 329, sheep.

87. State *v.* Cook, 75 Conn. 267, 53 Atl. 589, horses.

88. Harpending *v.* Shoemaker, 37 Barb. (N. Y.) 270, improper threshing.

89. See also *supra*, XI, B, 2, c; *infra*, XI, G, 2, c. And see Builders and Architects, 6 Cyc. 102.

90. Line *v.* Mason, 67 Mo. App. 279; Behsmann *v.* Waldo, 38 Misc. (N. Y.) 820, 78 N. Y. Suppl. 1108, architects and mechanical engineers.

No other witness is competent to testify as to a matter distinctly technical (Galveston, etc., R. Co. *v.* Daniels, 1 Tex. Civ. App. 695, 20 S. W. 955, sufficiency of a bridge); as to state the character of certain work (Alexander *v.* Mt. Sterling, 71 Ill. 366, sidewalk; Carroll *v.* Welch, 26 Tex. 147).

The qualifications must be commensurate with the inference which the witness proposes to state. For example, only one acquainted with the effect of the use of heavy machinery can state from his observation whether a building is suitable for it. Huber *v.* Jackson, etc., Co., 1 Marv. (Del.) 374, 41 Atl. 92; Thompson *v.* Worcester, 184 Mass. 354, 68 N. E. 833.

91. Kilbourne *v.* Jennings, 38 Iowa 533.

A painter cannot testify as an expert in regard to the workmanship exhibited in the framing and construction of a building. Kilbourne *v.* Jennings, 38 Iowa 533.

92. Tebbetts *v.* Haskins, 16 Me. 283. See also Enix *v.* Iowa Cent. R. Co., 111 Iowa 748, 83 N. W. 805, where an insurance agent was permitted to make the same estimate.

93. O'Keefe *v.* St. Francis' Church, 59 Conn. 551, 22 Atl. 325, church.

94. Roberts *v.* Boston, 149 Mass. 346, 21 N. E. 668.

95. Major *v.* Spies, 66 Barb. (N. Y.) 576.

96. Bardwell *v.* Conway Mut. F. Ins. Co., 122 Mass. 90; Line *v.* Mason, 67 Mo. App. 279 (good mechanical skill in making cross-arms for telephone poles); Fletcher *v.* Seekell, 1 R. I. 267 (masonry). A witness may testify that one who cut out a panel was well acquainted with the construction of a door. State *v.* Baldwin, 36 Kan. 1, 12 Pac. 318.

97. Indianapolis *v.* Scott, 72 Ind. 196 (recently rotted); Hartford County *v.* Wise, 71 Md. 43, 18 Atl. 31 (bridge).

98. Montgomery *v.* Gilmer, 33 Ala. 116, 70 Am. Dec. 562; Callan *v.* Bull, 113 Cal. 593, 45 Pac. 1017; Fox *v.* Buffalo Park, 163 N. Y. 559, 57 N. E. 1109; Pursley *v.* Edge Moor Bridge Works, 56 N. Y. App. Div. 71, 67 N. Y. Suppl. 719 (support a thirty-ton crane); Cochran *v.* Sess, 49 N. Y. App. Div. 223, 62 N. Y. Suppl. 1088 (walls); Continental Ins. Co. *v.* Pruitt, 65 Tex. 125 (sustain weight).

99. Kreuzberger *v.* Wingfield, 96 Cal. 251, 31 Pac. 109 (contract); Taulbee *v.* Moore, 106 Ky. 749, 51 S. W. 564, 21 Ky. L. Rep. 378 (contract).

1. Behsmann *v.* Waldo, 36 Misc. (N. Y.) 863, 74 N. Y. Suppl. 929 (unprotected furnace pit); Hayes *v.* Southern Pac. Co., 17 Utah 99, 53 Pac. 1001 (railroad car sheds).

2. Ringlehaupt *v.* Young, 55 Ark. 128, 17 S. W. 710 (ground cave); Dixon *v.* Wachenheimer, 9 Ohio Cir. Ct. 401, 6 Ohio Cir. Dec. 380 (heat).

3. Bettys *v.* Denver Tp., 115 Mich. 228, 73 N. W. 138, loosening timbers bracing a bridge.

4. Bonebrake *v.* Huntington County, 141 Ind. 62, 40 N. E. 141.

5. Washington, etc., Turnpike Co. *v.* Case, 80 Md. 36, 30 Atl. 571.

6. Ringlehaupt *v.* Young, 55 Ark. 128, 17 S. W. 710. See Builders and Architects, 6 Cyc. 102.

7. See also *supra*, XI, B, 2, d; *infra*, XI, G, 2, d.

8. Johnson *v.* State, 37 Ala. 457; Polk *v.* Coffin, 9 Cal. 56; Atchison, etc., R. Co. *v.* Mason, 4 Kan. App. 391, 46 Pac. 31, shrinkage of cattle caused by delay in transportation

disease;[9] how a brand reads;[10] whether certain observed phenomena would be sufficient to account for a given result;[11] whether an animal has a given disease;[12] whether she is carrying her young;[13] or whether certain conduct was proper.[14] The witness must state in all cases the basis of his inference.[15]

5. Chemistry.[16] The facts ascertained by chemical analyses[17] of the blood of men[18] or animals,[19] of drugs,[20] of the stomach,[21] viscera,[22] or other parts of the body; or of portions of food or medicine alleged to have been used as the vehicle of poison,[23] may be stated by competent chemists,[24] or by a person accustomed to make accurate analyses of the substance involved in the inquiry.[25]

6. Documents.[26] Persons skilled in the handling[27] and inspection[28] of docu-

Suitable capacity to form and express an inference or judgment is a prerequisite to relevancy. Atchison, etc., R. Co. *v.* Mason, 4 Kan. App. 391, 46 Pac. 31; Schaeffer *v.* Philadelphia, etc., R. Co., 168 Pa. St. 209, 31 Atl. 1088, 47 Am. St. Rep. 884; San Antonio, etc., R. Co. *v.* Barnett, 27 Tex. Civ. App. 498, 66 S. W. 474; Southern Pac. Co. *v.* Arnett, 111 Fed. 849, 50 C. C. A. 17, unfit condition at time of shipment.

9. Slater *v.* Wilcox, 57 Barb. (N. Y.) 604 (horn distemper); Clay *v.* State, 41 Tex. Cr. 653, 56 S. W. 629; Grayson *v.* Lynch, 163 U. S. 468, 16 S. Ct. 1064, 41 L. ed. 230 (Texas fever). Stock men may state whether animals whose skins were produced were slaughtered or had died of disease. Clay *v.* State, 41 Tex. Cr. 653, 56 S. W. 629.

10. Askew *v.* People, 23 Colo. 446, 48 Pac. 524. Whether a brand on a cow is a "picked brand" is a matter of common observation and need not be proved by skilled witnesses. Clark *v.* State, (Tex. Cr. App. 1897) 43 S. W. 522.

11. New York, etc., R. Co. *v.* Estill, 147 U. S. 591, 13 S. Ct. 444, 37 L. ed. 292, abortion.

12. People *v.* Bane, 88 Mich. 453, 50 N. W. 324, blind staggers.

13. Boyer *v.* Chicago, etc., R. Co., 123 Iowa 248, 98 N. W. 764, mare in foal.

14. Peer *v.* Ryan, 54 Mich. 224, 19 N. W. 961, service by stallion.

15. San Antonio, etc., R. Co. *v.* Barnett, 27 Tex. Civ. App. 498, 66 S. W. 474.

16. See also *supra*, XI, B, 2, e.

17. **The jury must be first satisfied** that the subject of the analysis is sufficiently connected with the issue. For example that certain remains only analyzed were those of the deceased (People *v.* Bowers, (Cal. 1888) 18 Pac. 660; State *v.* Cook, 17 Kan. 392, stomach); or that certain food, analyzed for poison, was a part of that of which the deceased partook on the fatal occasion (State *v.* Best, 111 N. C. 638, 15 S. E. 930). The possibility that the articles may have been tampered with does not exclude the evidence. State *v.* Thompson, 132 Mo. 301, 34 S. W. 31; People *v.* Williams, 3 Park. Cr. (N. Y.) 84.

18. State *v.* Knight, 43 Me. 11; Com. *v.* Sturtivant, 117 Mass. 122, 19 Am. Rep. 401; Lindsay *v.* People, 63 N. Y. 143; State *v.* Martin, 47 S. C. 67, 25 S. E. 113.

Incidental indications, as whether a drop of blood came from above or below, may be stated by the witness. Com. *v.* Sturtivant, 117 Mass. 122, 19 Am. Rep. 401.

19. Linsday *v.* People, 63 N. Y. 143, hay.

Human and other blood.— A skilled observer alone is competent to testify to the distinction between the blood of men and that of animals. State *v.* Rice, 7 Ida. 762, 66 Pac. 87.

20. Epps *v.* State, 102 Ind. 539, 1 N. E. 491, bismuth.

21. People *v.* Bowers, (Cal. 1888) 18 Pac. 660; State *v.* Cook, 17 Kan. 392; State *v.* Thompson, 132 Mo. 301, 34 S. W. 31.

22. State *v.* Thompson, 141 Mo. 408, 42 S. W. 949.

It is not necessary that the witness should have been sworn before taking charge of the viscera or analyzing them. State *v.* Thompson, 141 Mo. 408, 42 S. W. 949.

23. People *v.* Williams, 3 Park. Cr. (N. Y.) 84; State *v.* Best, 111 N. C. 638, 15 S. E. 930.

24. Hass *v.* Marshall, (Pa. 1888) 14 Atl. 421, attorney rejected.

Abandonment of profession of a chemist does not necessarily exclude the evidence of an otherwise qualified witness. Haas *v.* Green, 7 Misc. (N. Y.) 176, 27 N. Y. Suppl. 347.

Matters beyond knowledge.— On the other hand a chemist cannot be heard as to matters beyond his technical knowledge; for example to contradict a physician as to a medical matter. People *v.* Hartung, 17 How. Pr. (N. Y.) 151, effects of arsenic.

That an analysis is crude and insufficient affects merely the weight of the evidence. State *v.* Martin, 47 S. C. 67, 25 S. E. 113.

25. Davis *v.* Mills, 163 Mass. 481, 40 N. E. 852 (flour); Com. *v.* Holt, 146 Mass. 38, 14 N. E. 930 (milk).

If little change could with proper treatment have taken place in the quality of an article by lapse of time, an analysis may be received after a considerable interval. Davis *v.* Mills, 163 Mass. 481, 40 N. E. 852.

26. **Handwriting** see *supra*, XI, C, 9, b, (III), (B), (3), (b).

27. Glover *v.* Gentry, 104 Ala. 222, 16 So. 38.

28. *Arizona.*— Charles T. Hayden Milling Co. *v.* Lewis, (1891) 32 Pac. 263.

Colorado.— Hendrix *v.* Gillett, 6 Colo. App. 127, 39 Pac. 896, banker.

Georgia.— May *v.* Dorsett, 30 Ga. 116, bank officer.

ments may state their inferences from the appearance observed by them, for instance, whether a writing is recent,[29] and in general as to its age;[30] whether it was written entirely at one time,[31] or with the same ink,[32] or written with a pen,[33] or on particular paper;[34] whether certain words were altered,[35] canceled,[36] erased,[37] or added after execution,[38] or after a paper was folded;[39] whether a figure has been changed;[40] whether a handwriting is natural or feigned;[41] or whether a document is genuine or forged.[42] They may state the meaning of abbrevia-

Illinois.— Pate *v.* People, 8 Ill. 644, bank officer.

Iowa.— Eisfeld *v.* Dill, 71 Iowa 442, 32 N. W. 420, county auditor, teacher of penmanship, attorneys.

Kentucky.— Watson *v.* Cresap, 1 B. Mon. 195, 36 Am. Dec. 572, merchant.

Mississippi.— Jones *v.* Finch, 37 Miss. 461, 75 Am. Dec. 73, bank-notes.

New York.— Dubois *v.* Baker, 30 N. Y. 355 (bank cashier); Hadcock *v.* O'Rourke, 6 N. Y. Suppl. 549 (order of additions to paper).

North Carolina.— McLeod *v.* Bullard, 84 N. C. 515, made when drunk.

England.— Reg. *v.* Williams, 8 C. & P. 434, 34 E. C. L. 821, engraver.

A party may waive the question of qualification by himself presenting the witness as an expert. Howell *v.* Manwaring, 3 N. Y. St. 454.

29. Eisfeld *v.* Dill, 71 Iowa 442, 32 N. W. 420; Cheney *v.* Dunlap, 20 Nebr. 265, 29 N. W. 925, 57 Am. Rep. 828; Sackett *v.* Spencer, 29 Barb. (N. Y.) 180. But see Williams *v.* Clark, 47 Minn. 53, 49 N. W. 398. The evidence of an ordinary attorney not especially qualified by experience has been excluded. Clark *v.* Bruce, 12 Hun (N. Y.) 271.

30. Eisfeld *v.* Dill, 71 Iowa 442, 32 N. W. 420. Whether a document is written in the style customary at a particular time may be shown. *In re* Tracy, 10 Cl. & F. 154. 8 Eng. Reprint 700.

31. Tally *v.* Cross, 124 Ala. 567, 26 So. 912; Quinsigamond Bank *v.* Hobbs, 11 Gray (Mass.) 250; Ellingwood *v.* Bragg, 52 N. H. 488; McClellan *v.* Duncombe, 52 N. Y. App. Div. 189, 65 N. Y. Suppl. 19, three sittings. But see Phœnix F. Ins. Co. *v.* Philip, 13 Wend. (N. Y.) 81.

In Pennsylvania such evidence has been permitted in corroboration of positive evidence. Fulton *v.* Hood, 34 Pa. St. 365, 75 Am. Dec. 664.

32. Glover *v.* Gentry, 104 Ala. 222, 16 So. 38 (practical experience sufficient); Porell *v.* Cavanaugh, 69 N. H. 364, 41 Atl. 860; Ellingwood *v.* Bragg, 52 N. H. 488; Dubois *v.* Baker, 40 Barb. (N. Y.) 556; Com. *v.* Pioso, 18 Lanc. L. Rev. 27.

33. Com. *v.* Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711.

34. Dubois *v.* Baker, 40 Barb. (N. Y.) 556.

35. *Alabama.*— Birmingham Nat. Bank *v.* Bradley, 108 Ala. 205, 19 So. 791.

Colorado.— Hendrix *v.* Gillett, 6 Colo. App. 127, 39 Pac. 896.

Illinois.— Pate *v.* People, 8 Ill. 644.

Michigan.— Vinton *v.* Peck, 14 Mich. 287, eight dollars to eighty dollars.

New York.— Hadcock *v.* O'Rourke, 6 N. Y. Suppl. 549.

36. Beach *v.* O'Riley, 14 W. Va. 55.

37. *Alabama.*— Birmingham Nat. Bank *v.* Bradley, (1900) 30 So. 546, holding that such a witness may state the effect of acids in erasing words on a paper.

Illinois.— Pate *v.* People, 8 Ill. 644.

Kentucky.—Hawkins *v.* Grimes, 13 B. Mon. 257.

Missouri.— Swan *v.* O'Fallon, 7 Mo. 231, holding that a person skilled in judging handwritings is not therefore competent to give his opinion whether an erasure has been made in an instrument.

New York.— Dubois *v.* Baker, 30 N. Y. 355 [*affirming* 40 Barb. 556].

38. Rass *v.* Sebastian, 160 Ill. 602, 43 N. E. 708 [*affirming* 57 Ill. App. 417]; Hawkins *v.* Grimes, 13 B. Mon. (Ky.) 257; Dubois *v.* Baker, 40 Barb. (N. Y.) 556.

39. Bacon *v.* Williams, 13 Gray (Mass.) 525.

40. Nelson *v.* Johnson, 18 Ind. 329.

41. *Connecticut.*— Lyon *v.* Lyman, 9 Conn. 55.

Indiana.— Cox *v.* Dill, 85 Ind. 334.

Massachusetts.— Moody *v.* Rowell, 17 Pick. 490, 28 Am. Dec. 317.

New York.— People *v.* Hewit, 2 Park. Cr. 20. But see People *v.* Spooner, 1 Den. 343, 43 Am. Dec. 672.

Pennsylvania.—Ulmer *v.* Genter, 3 Pennyp. 453. But see Commonwealth Bank *v.* Haldeman, 1 Penr. & W. 161.

England.— Goodtitle *v.* Braham, 4 T. R. 497.

42. *Georgia.*— Goza *v.* Browning, 96 Ga. 421, 23 S. E. 842; May *v.* Dorsett, 30 Ga. 116, bank-notes.

Indiana.— Miller *v.* Dill, 149 Ind. 326, 49 N. E. 272 (holding, however, that a skilled witness cannot testify that a forger in imitating and disguising handwritings is more particular at the beginning than at the close of the effort); Johnson *v.* State, 2 Ind. 652, bank-notes.

Kentucky.— Watson *v.* Cresap, 1 B. Mon. 195, 36 Am. Dec. 572, bank-notes.

Massachusetts.— Moody *v.* Rowell, 17 Pick. 490, 28 Am. Dec. 317; Com. *v.* Carey, 2 Pick. 47, bank-notes.

Minnesota.— Payson *v.* Everett, 12 Minn. 216, holding that the opinion of the ordinary observer is inadmissible.

Mississippi.— Jones *v.* Finch, 37 Miss. 461, 75 Am. Dec. 73, bank-notes.

New Hampshire.— State *v.* Carr, 5 N. H. 367, bank-notes. Such witnesses need not

tions,[43] and of difficult[44] or elliptical entries[45] or figures;[46] and whether a set of figures, letters, marks, or writings contain an arrangement in cipher, and, if so, what they mean.[47] It is a condition upon the admissibility of this class of evidence that the jury should not be equally able to judge the inferences properly for themselves;[48] and the witness should state the facts on which the inference is based.[49]

7. Engineering and Surveying.[50] An engineer, whether technically trained in the science of engineering[51] or skilled through practical experience in derivative arts,[52] who is acquainted with the laws governing the action of water may state his inference as to the cause of the filling up of a harbor;[53] whether a culvert,[54] embankment,[55] or sewer[56] has been properly constructed; whether an overflow is or is not due to a culvert[57] or dam;[58] what is the cause of the diversion of the waters of a stream;[59] and what will be the effect upon adjoining land of building a dam or reservoir of a given height,[60] or draining the land.[61] Such a witness may state whether certain construction is proper;[62] an engineer may in general state

have seen the signers write. Furber *v.* Hilliard, 2 N. H. 480, bank-notes.

New York.— Lansing *v.* Russell, 3 Barb. Ch. 325.

Ohio.— Hess *v.* State, 5 Ohio 5, 22 Am. Dec. 767 (bank-notes); State *v.* Woodruff, Tapp. 26 (bank-bills).

Pennsylvania.— Lauer *v.* Posey, 15 Pa. Super. Ct. 543, holding that the paper must be produced.

England.— Reg. *v.* Williams, 8 C. & P. 434, 34 E. C. L. 821 (traced over pencil marks); Rex *v.* Cator, 4 Esp. 117; Goodtitle *v.* Braham, 4 T. R. 497.

43. Sheldon *v.* Benham, 4 Hill (N. Y.) 129, 40 Am. Dec. 271.

44. Stone *v.* Hubbard, 7 Cush. (Mass.) 595 (decipher date); Kux *v.* Central Michigan Sav. Bank, 93 Mich. 511, 53 N. W. 828 (bank pass-book); New York Mut. L. Ins. Co. *v.* Baker, 10 Tex. Civ. App. 515, 31 S. W. 1072 (date). But see People *v.* King, 125 Cal. 369, 58 Pac. 19.

45. Sheldon *v.* Benham, 4 Hill (N. Y.) 129, 40 Am. Dec. 271, notary public.

46. Stone *v.* Hubbard, 7 Cush. (Mass.) 595, date.

47. State *v.* Wetherell, 70 Vt. 274, 40 Atl. 728.

48. *California.*— Kruse *v.* Chester, 66 Cal. 353, 5 Pac. 613.

Illinois.— Collins *v.* Crocker, 15 Ill. App. 107, cancellation.

Massachusetts.— Jewett *v.* Draper, 6 Allen 434, holding that the opinion of an expert that certain words were interpolated in a written agreement after the signature, if founded on the situation and crowded appearance of the words, is inadmissible.

New York.— Dresler *v.* Hard, 57 N. Y. Super. Ct. 192, 6 N. Y. Suppl. 500; Johnson *v.* Van Name, 4 N. Y. Suppl. 523; Phœnix F. Ins. Co. *v.* Philip, 13 Wend. 81.

Vermont.— Bridgman *v.* Corey, 62 Vt. 1, 20 Atl. 273, where a witness testified that almost daily for five years he had used a microscope in the examination of handwriting, and that one without experience could not so use it, although he might if he had intelligence and judgment as to the use of the different object glasses, and it was held error to exclude expert testimony showing the appearance of a note under the microscope, although the jurors could use such microscope for themselves.

West Virginia.— Beach *v.* O'Riley, 14 W. Va. 55.

49. May *v.* Dorsett, 30 Ga. 116.

50. See also *supra*, XI, B, 2, g; *infra*, XI, G, 2, f.

51. Pursley *v.* Edge Moor Bridge Works, 168 N. Y. 589, 60 N. E. 1119.

52. Cahill *v.* Baltimore, 93 Md. 233, 48 Atl. 705.

53. Folkes *v.* Chadd, 3 Dougl. 157, 26 E. C. L. 111, holding that in an action of trespass for making an embankment which was alleged to have caused the gradual choking up of a harbor, the opinions of scientific engineers were admitted as to the effect of such an embankment upon the harbor.

54. Baltimore, etc., R. Co. *v.* Hackett, 87 Md. 224, 39 Atl. 510.

55. Bellinger *v.* New York Cent. R. Co., 23 N. Y. 42; Folkes *v.* Chadd, 3 Dougl. 157, 26 E. C. L. 111.

56. Cahill *v.* Baltimore, 93 Md. 233, 48 Atl. 705.

57. St. Louis, etc., R. Co. *v.* Lyman, 57 Ark. 512, 22 S. W. 170; Ohio, etc., R. Co. *v.* Webb, 142 Ill. 404, 32 N. E. 527; Ohio, etc., R. Co. *v.* Schmidt, 47 Ill. App. 383.

A witness not specially skilled by observation or experience is incompetent. Jones *v.* Seaboard Air Line R. Co., 67 S. C. 181, 45 S. E. 188.

58. Texas, etc., R. Co. *v.* Cochrane, 29 Tex. Civ. App. 383, 69 S. W. 984.

59. Covert *v.* Brooklyn, 6 N. Y. App. Div. 73, 39 N. Y. Suppl. 744.

60. Loloff *v.* Sterling, 31 Colo. 102, 71 Pac. 1113; Doud *v.* Guthrie, 13 Ill. App. 653; Ball *v.* Hardesty, 38 Kan. 540, 16 Pac. 808; Chandler *v.* Jamaica Pond Aqueduct Corp., 125 Mass. 544.

61. Buffum *v.* Harris, 5 R. I. 243.

62. Fralich *v.* Barlow, 25 Ind. App. 383, 58 N. E. 271 (street improvement); Missouri Pac. R. Co. *v.* Fox, 60 Nebr. 531, 83 N. W. 744 (road-bed of a railroad); Pursley *v.* Edge Moor Bridge Works, 56 N. Y. App. Div. 71, 67 N. Y. Suppl. 719 [*affirmed* with-

an inference from his observation as to professional facts within the range of his knowledge or experience.[63] A land surveyor is in the same position. He may state the facts regarding a survey[64] as a preliminary to stating his inference from them; as for example that a certain line is shown by the marks to have been run by government surveyors,[65] that marks were fresh and easily identified and utilized;[66] that certain stakes are surveyor's stakes;[67] that a given map is correct;[68] that the field-notes of a survey closed;[69] what is the area of a given piece of land;[70] or what the shadings and marks on a plan indicate.[71]

8. Insurance.[72] An ordinary observer, acquainted with the circumstances, may state whether a certain change in business is more hazardous than that originally insured.[73] But even a skilled witness cannot state what an unambiguous policy means.[74]

9. Legal Matters.[75] A properly qualified member of the legal profession, or one who is connected therewith, may testify to his inference as to professional matters which have come under his observation and which present many details which could not be stated to a jury in detail, or, if so stated, could not be coördinated into a reasonable inference by the aid of any experience in the possession of the average juryman. Of this nature are the value of professional services. An attorney may testify to the value of the services rendered by another attorney to the latter's client, either from the observation furnished by being opposed to him in the case,[76] or in any other way.[77]

10. Manufacturing.[78] Under the rule under consideration, a person familiar with certain machinery may state that it was in repair and "reasonably adapted for the purpose for which it was used,"[79] or where and how long certain machinery has been used.[80] Such a witness may go further and state an inference from his observations, applying other standards, for example, that of safety,[81] or skill, as whether a given individual is a competent workman,[82] or a

out opinion in 168 N. Y. 589, 60 N. E. 1119] (absence of braces in a scaffolding); Bonner *v.* Mayfield, 82 Tex. 234, 18 S. W. 305 (culvert); St. Louis, etc., R. Co. *v.* Johnston, 78 Tex. 536, 15 S. W. 104 (railroad road-bed).

63. McDonald *v.* Dodge County, 41 Nebr. 905, 60 N. W. 366 (cost of a ditch); Gault *v.* Concord R. Co., 63 N. H. 356 (whether a bridge obstructs a stream); Excelsior Electric Co. *v.* Sweet, 57 N. J. L. 224, 30 Atl. 553 (contrivances for suspending electric lights); Brown *v.* Swanton Tp., 69 Vt. 53, 37 Atl. 280 (how far certain material will go in filling a gully).

64. Jackson *v.* Lambert, 121 Pa. St. 182, 15 Atl. 502 (location); Forbes *v.* Caruthers, 3 Yeates (Pa.) 527; Chicago, etc., R. Co. *v.* Chambers, 68 Fed. 148, 15 C. C. A. 327 (lack of obstruction to headlight). The witness need not be a county or government surveyor. Mincke *v.* Skinner, 44 Mo. 92.

65. Brantly *v.* Swift, 24 Ala. 390.

66. Bramlett *v.* Flick, 23 Mont. 95, 57 Pac. 869. A skilled witness is not needed to testify to the appearance of certain works. Vogt *v.* Geyer, (Tex. Civ. App. 1898) 48 S. W. 1100.

67. McGann *v.* Hamilton, 58 Conn. 69, 19 Atl. 376.

68. Barrett *v.* Kelly, 131 Ala. 378, 30 So. 824.

69. Matkins *v.* State, (Tex. Cr. App. 1901) 62 S. W. 911.

70. Belding *v.* Archer, 131 N. C. 287, 42 S. E. 800.

71. Attrill *v.* Platt, 10 Can. Supreme Ct. 425.

72. See also *supra*, XI, B, 2, i; *infra*, XI, G, 2, g.

73. Brink *v.* Merchants', etc., Ins. Co., 49 Vt. 442.

74. Fry *v.* Provident Sav. L. Assur. Soc., (Tenn. Ch. App. 1896) 38 S. W. 116.

75. See also *supra*, XI, B, 2, j; *infra*, XI, G, 2, h.

76. Ottawa University *v.* Parkinson, 14 Kan. 159, 162, where the court said: "We do not understand that he testified as an expert."

77. Brown *v.* Prude, 97 Ala. 639, 11 So. 838; Brown *v.* Huffard, 69 Mo. 305; Morrill *v.* Hershfield, 19 Mont. 245, 47 Pac. 997.

78. See also *supra*, XI, B, 2, k; *infra*, XI, G, 2, a.

79. Alabama Connellsville Coal, etc., Co. *v.* Pills, 98 Ala. 285, 13 So. 135.

80. Merchants', etc., Mut. Ins. Co. *v.* Washington Mut. Ins. Co., 1 Handy (Ohio) 408, 12 Ohio Dec. (Reprint) 209.

81. One acquainted with a certain kind of mechanical work may testify whether the method of doing it in a particular case was dangerous (O'Brien *v.* Lork, 171 Mass. 36, 36 N. E. 458), or whether further precautions were practicable (Peterson *v.* Johnson-Wentworth Co., 70 Minn. 538, 73 N. W. 510).

82. Doster *v.* Brown, 25 Ga. 24, 71 Am. Dec. 153 (millwright); International, etc., R. Co. *v.* Jackson, 25 Tex. Civ. App. 619, 62 S. W. 91.

piece of work is well done.[83] Conversely a person without experience in manufacturing cannot state the proper setting for machinery.[84]

11. **Mechanics.**[85] Although the point covered by the inference is precisely the one on which the tribunal is to pass,[86] the inference of specially skilled observers[87] is frequently employed in determining questions in mechanics, although the witness has received only a practical training,[88] as the cause of defective work by machinery,[89] its condition,[90] construction,[91] design, and adaptability to the work;[92] the reasons for an accident;[93] whether certain construction is economical,[94] safe,[95]

83. Ward *v.* Kilpatrick, 85 N. Y. 413, 39 Am. Rep. 674.

84. Weber Wagon Co. *v.* Kehl, 40 Ill. App. 584, kind of floor.

85. See *supra*, XI, B, 2, 1; *infra*, XI, G, 2, k.

86. *Kentucky.*— Claxton *v.* Lexington, etc., R. Co., 13 Bush 636.

Massachusetts.— Burton *v.* Burton Car Stock Co., 171 Mass. 437, 50 N. E. 1029.

New York.— Ward *v.* Kilpatrick, 85 N. Y. 415, 39 Am. Rep. 674.

Vermont.— Tillotson *v.* Ramsay, 51 Vt. 309.

United States.— Crane Co. *v.* Columbus Constr. Co., 73 Fed. 984, 20 C. C. A. 233; Allen *v.* Blunt, 1 Fed. Cas. No. 216, 3 Story 742; Driskell *v.* Parish, 7 Fed. Cas. No. 4,088, 5 McLean 64.

See also *supra*, XI, A, 4, c.

Instances.— Such a witness may be asked whether two patented mechanical contrivances are identical in principle (Tillotson *v.* Ramsay, 51 Vt. 309; Driskell *v.* Parish, 7 Fed. Cas. No. 4,088, 5 McLean 64) or differ only through the use of mechanical equivalents (Allen *v.* Blunt, 1 Fed. Cas. No. 216, 3 Story 742; Morris *v.* Barrett, 17 Fed. Cas. No. 9,827, 1 Bond 254), whether one mechanical device is inferior to another (Claxton *v.* Lexington, etc., R. Co., 13 Bush (Ky.) 636), whether an invention is useful (Page *v.* Ferry, 18 Fed. Cas. No. 10,662, 1 Fish. Pat. Cas. 298), what its advantages are (Burton *v.* Burton Stock-Car Co., 171 Mass. 437, 50 N. E. 1029), whether a witness is skillful (Ward *v.* Kilpatrick, 85 N. Y. 413, 39 Am. Rep. 674; Crane Co. *v.* Columbus Constr. Co., 73 Fed. 984, 20 C. C. A. 233), whether a piece of work is well done (Ward *v.* Kilpatrick, 85 N. Y. 413, 39 Am. Rep. 674), whether a photographic reproduction is a good specimen of work by that process (Marston *v.* Dingley, 88 Me. 546, 34 Atl. 414), or what the specifications of a patent cover (Burton *v.* Burton Car Stock Co., 171 Mass. 437, 50 N. E. 1029; McCaslin Mach. Co. *v.* McCaslin, 90 Hun (N. Y.) 388, 35 N. Y. Suppl. 746). See, generally, Patents.

If trespass upon the province of the tribunal of fact can be avoided that course will be adopted. McMahon *v.* Tyng, 14 Allen (Mass.) 167 (well-known invention); Waterbury Brass Co. *v.* New York Brass Co., 29 Fed. Cas. No. 17,256, 3 Fish. Pat. Cas. 43.

87. Paul E. Wolff Shirt Co. *v.* Frankenthal, 96 Mo. App. 307, 70 S. W. 378.

The inferences of other witnesses are irrelevant. Healy *v.* Patterson, 123 Iowa 73, 98 N. W. 576, construction of a mechanical appliance.

88. *Maine.*— Hammond *v.* Woodman, 41 Me. 177, 66 Am. Dec. 219.

Massachusetts.— Knight *v.* Overman Wheel Co., 174 Mass. 455, 54 N. E. 890.

Michigan.— Woods *v.* Chicago, etc., R. Co., 108 Mich. 396, 66 N. W. 328, locomotive engineer.

Nebraska.— Sioux City, etc., R. Co. *v.* Finlayson, 16 Nebr. 578, 20 N. W. 860, 49 Am. Rep. 724, boiler-makers.

New York.— *In re* Thompson, 12 N. Y. Suppl. 182, well-borer.

Oklahoma.— Boston *v.* Hewitt, 8 Okla. 401, 58 Pac. 619, well-diggers.

United States.— Campbell *v.* New York City, 81 Fed. 182, holding that the chiefs and foremen of the fire department of a city are sufficiently skilled to testify as to the saving effected by the use of certain improvements in fire apparatus.

Talking about a mechanical matter with mechanics and machinists does not make a witness competent. Wickes *v.* Swift Electric Light Co., 70 Mich. 322, 38 N. W. 299.

If the folly of the answers shows that a witness is unqualified he will be rejected. Turner *v.* Haar, 114 Mo. 335, 21 S. W. 737.

Qualification must be affirmatively established. Cook Brewing Co. *v.* Ball, 22 Ind. App. 656, 52 N. E. 1002 (bicycle gearing); Munroe *v.* Godkin, 111 Mich. 183, 69 N. W. 244.

89. Tufts *v.* Verkuyl, 124 Mich. 242, 82 N. W. 891 (soda-water fountain); Chandler *v.* Thompson, 30 Fed. 38 (sawmill).

90. Alabama Connellsville Coal, etc., Co. *v.* Pitts, 98 Ala. 286, 13 So. 135 (reasonably good); Schweitzer *v.* Citizens' Gen. Electric Co., 52 S. W. 830, 21 Ky. L. Rep. 608; Egan *v.* Dry Dock, etc., R. Co., 12 N. Y. App. Div. 556, 42 N. Y. Suppl. 188, holding that a skilled observer may state the probable length of time during which a corrosion of boiler iron must have existed.

91. Thiel *v.* Kennedy, 82 Minn. 142, 84 N. W. 657, belt shifter.

92. Greenleaf *v.* Stockton Combined Harvester, etc., Works, 78 Cal. 606, 21 Pac. 369.

93. Webster Mfg. Co. *v.* Mulvanny, 168 Ill. 311, 48 N. E. 168; Duntley *v.* Inman, 42 Oreg. 334, 70 Pac. 529, 59 L. R. A. 785; Neidlinger *v.* Yoost, 99 Fed. 240, 39 C. C. A. 494.

94. Campbell *v.* New York City, 81 Fed. 182, fire apparatus.

95. *Illinois.*— Gundlach *v.* Schott, 192 Ill. 509, 61 N. E. 332, 85 Am. St. Rep. 348.

Minnesota.— Olmscheid *v.* Nelson-Tenney Lumber Co., 66 Minn. 61, 68 N. W. 605, operating bolting saw without a carriage attachment.

or done as rapidly as practicable;[96] whether operations are properly[97] or negligently[98] conducted; whether apparatus,[99] machinery,[1] materials,[2] mechanical devices,[3] tools,[4] or water-power[5] are capable of doing certain work, or adapted to a certain purpose;[6] what is required in order to attain a given result;[7] the cause of a given effect;[8] or whether certain repairs are necessary,[9] and what repairs will cost.[10] The witness may and should state the facts on which he bases his inference.[11] One acquainted with mechanical matters and with adequate opportunities for observation may state an inference which more nearly approximates statements of fact; for example, how many horsepower a given engine developed;[12] the construction of a machine;[13] whether a drawing of it

Missouri.— Edwards *v.* Barber Asphalt Pav. Co., 92 Mo. App. 221; Fischer *v.* Edward Heitzberg Packing, etc., Co., 77 Mo. App. 108 (grease tank); Benjamin *r.* Metropolitan St. R. Co., 50 Mo. App. 602, scuttle-hole.

Nebraska.— Sioux City, etc., R. Co. *v.* Finlayson, 16 Nebr. 578, 20 N. W. 860, 49 Am. Rep. 724, boiler.

New York.— Cramer *v.* Slade, 66 N. Y. App. Div. 59, 73 N. Y. Suppl. 125.

96. Stiles *v.* Neillsville Milling Co., 87 Wis. 266, 58 N. W. 411.

97. Eureka Co. *r.* Bass, 81 Ala. 200, 8 So. 216, 60 Am. Rep. 152; Walker *r.* Fields, 28 Ga. 237.

98. Beunk *v.* Valley City Desk Co., 128 Mich. 562, 87 N. W. 793, repair of safety valve.

99. Harvey *r.* Susquehanna Coal Co., 201 Pa. St. 63, 50 Atl. 770, 88 Am. St. Rep. 800, mining apparatus.

1. Alabama Connellsville Coal, etc., Co. *v.* Pitts, 98 Ala. 285, 13 So. 135; Gundlach *v.* Schott, 192 Ill. 509, 61 N. E. 332, 85 Am. St. Rep. 348 [*affirmed* in 95 Ill. App. 110]; Buckeye Mfg. Co. *r.* Woolley Foundry, etc., Works, 26 Ind. App. 7, 58 N. E. 1069; Scattergood *v.* Wood, 79 N. Y. 263, 35 Am. Rep. 515 (cotton gin); Meiners *r.* Steinway, 44 N. Y. Super. Ct. 369 (sawmill).

2. Daly *v.* Lee, 167 N. Y. 537, 60 N. E. 1109 [*affirming* 39 N. Y. App. Div. 188, 57 N. Y. Suppl. 293].

3. An unskilled observer cannot state whether an outlet of a certain width under a railway bed is sufficient. St. Louis, etc., R. Co. *r.* Wright, 57 Ark. 327, 21 S. W. 476.

4. State *v.* Minot, 79 Minn. 118, 81 N. W. 753 (burglar); U. S. *v.* Tarr, 28 Fed. Cas. No. 16,434, 4 Phila. (Pa.) 405 (holding that a witness skilled in such matters may state that a collection of tools, machines, implements, and materials found in defendant's possession are each suitable for counterfeiting and, while separate articles are capable of an innocent use, the collection as a whole can be used for no other purpose).

5. Detweiler *r.* Groff, 10 Pa. St. 376.

6. *Alabama.*— Alabama Connellsville Coal, etc., Co. *r.* Pitts, 98 Ala. 285, 13 So. 135.

California.— Snyder *v.* Holt Mfg. Co., 134 Cal. 324, 66 Pac. 311, sufficiency of nut and bolt.

Minnesota.— Byard *r.* Palace Clothing House Co., 85 Minn. 363, 88 N. W. 998, bundle-carrier system of approved character.

Montana.— Coleman *r.* Perry, 28 Mont. 1, 72 Pac. 42, mangle.

Texas.— Schuwirth *v.* Thumma, (Civ. App. 1902) 66 S. W. 691, "perfect condition."

Vermont.— James *v.* Hodsden, 47 Vt. 127, latch needle.

7. *In re* Thompson, 12 N. Y. Suppl. 182, reach water by boring.

8. Franklin *v.* Com., 105 Ky. 237, 48 S. W. 986, 20 Ky. L. Rep. 1137; Beunk *v.* Valley City Desk Co., 128 Mich. 562, 87 N. W. 793, excessive steam pressure. The evidence is admissible as a matter of special skill, in proportion as the machine is of an exceptional or unusual nature. Bemis *v.* Central Vermont R. Co., 58 Vt. 636, 3 Atl. 531.

Persons especially acquainted with firearms may testify as to the kind of gun by which a wound was inflicted (Franklin *v.* Com., 105 Ky. 237, 48 S. W. 986, 20 Ky. L. Rep. 1137), how lately a cartridge (Orr *v.* State, 117 Ala. 69, 23 So. 696) or gun (Moughon *v.* State, 57 Ga. 102; State *v.* Davis, 55 S. C. 339, 33 S. E. 449; Meyers *v.* State, 14 Tex. App. 35) has been fired; that a piece of newspaper looked like wadding (People *v.* Manke, 78 N. Y. 611), or that a bullet appeared as if fired through a particular kind of rifle (Com. *r.* Best, 180 Mass. 492, 62 N. E. 748). Such witnesses may testify as to the result of experiments as to the hair singeing (State *v.* Asbell, 57 Kan. 398, 46 Pac. 770) and powder marking (State *v.* Asbell, 57 Kan. 398, 46 Pac. 770) produced by firearms at given distances, and how closely a gun will carry shot at given distances (State *v.* Jones, 41 Kan. 309, 21 Pac. 265, gunsmith). An unskilled witness cannot testify whether bullet-holes in a door were made from the inside or outside. Golson *v.* State, 124 Ala. 8, 26 So. 975. Nor does a single experiment qualify a witness to testify as to the effect of pistol shots. Brownell *v.* People, 38 Mich. 732.

9. Cooke *r.* England, 27 Md. 14, 92 Am. Dec. 618, new bolting cloth.

10. Wickes *v.* Swift Electric Light Co., 70 Mich. 322, 38 N. W. 299.

11. State *v.* Davis, 55 S. C. 339, 33 S. E. 449; James *r.* Hodsden, 47 Vt. 127.

12. Blackmore *v.* Fairbanks, 79 Iowa 282, 44 N. W. 548; Schuwirth *v.* Thumma, (Tex. Civ. App. 1902) 66 S. W. 691.

13. Sheldon *v.* Booth, 50 Iowa 209 (threshing machine); Craig *v.* Benedictine Sisters Hospital Assoc., 88 Minn. 535, 93 N. W. 669 (elevator); Kaminski *v.* Tudor Iron Works,

is correct;[14] the condition of a structure;[15] what caused the break in a machine,[16] and whether it was recently done;[17] the strength of materials;[18] or whether a workman is competent,[19] or a danger obvious.[20]

12. Medical and Surgical Matters[21] — **a. In General** — (i) *Admissions* — (a) *Rule Stated.* Inferences from medical or surgical observation take a wide range.[22] The witness, it has been held, may be asked as to bodily[23] or mental[24] conditions and what they indicate;[25] his diagnosis of a disease,[26] as of bodily,[27]

167 Mo. 462, 67 S. W. 221; Huber Mfg. Co. *v.* Hunter, 99 Mo. App. 46, 72 S. W. 484; Murtaugh *v.* New York Cent., etc., R. Co., 49 Hun (N. Y.) 456, 3 N. Y. Suppl. 483 (emery-wheel).

Familiarity with the construction of a machine does not necessarily qualify a witness to speak as to its practical effect. Convery *v.* Conger, 53 N. J. L. 468, 22 Atl. 43, 549.

In the absence of evidence of a change the fact that an examination was made at a period after the important period does not suffice to exclude the evidence. Huber Mfg. Co. *v.* Hunter, 99 Mo. App. 46, 72 S. W. 484.

14. Rex *v.* Hadden, 2 C. & P. 184, 31 Rev. Rep. 658, 12 E. C. L. 517.

15. New York, etc., R. Co. *v.* Ellis, 13 Ohio Cir. Ct. 704, 6 Ohio Cir. Dec. 304, bridge.

16. Camp Point Mfg. Co. *v.* Ballou, 71 Ill. 417.

17. Woods *v.* Chicago, etc., R. Co., 108 Mich. 396, 66 N. W. 328.

18. Louisville, etc., R. Co. *v.* Berkey, 136 Ind. 181, 35 N. E. 3.

19. Postal Tel. Cable Co. *v.* Coote, (Tex. Civ. App. 1900) 57 S. W. 912.

20. Blumenthal *v.* Craig, 81 Fed. 320, 26 C. C. A. 427.

21. See also *supra*, XI, B, 2, m; *infra*, XI, G, 2, k.

22. **Relevancy is a prerequisite.**—The doubt of a medical observer as to incapacity to form a deliberate design is not competent. Sanchez *v.* People, 22 N. Y. 147.

23. *Arkansas.*— Thompson *v.* Bertrand, 23 Ark. 730; Tatum *v.* Mohr, 21 Ark. 349, soundness.

Illinois.— Chatsworth *v.* Rowe, 166 Ill. 114, 46 N. E. 763.

Maine.— State *v.* Smith, 32 Me. 369, 54 Am. Dec. 578, pregnancy.

Massachusetts.— Burt *v.* Burt, 168 Mass. 204, 46 N. E. 622, under influence of morphine.

Minnesota.— Fulmore *v.* St. Paul City R. Co., 72 Minn. 448, 75 N. W. 589, extent of injuries.

New York.— Cowley *v.* People, 8 Abb. N. Cas. 1, child.

An unskilled observer cannot state the sex of a person from an examination of the skeleton. Wilson *v.* State, 41 Tex. 320.

24. See *supra*, XI, B, 2, m.

25. Com. *v.* Lynes, 142 Mass. 577, 8 N. E. 408, 56 Am. Rep. 709 (frequent sexual intercourse); State *v.* Merriman, 34 S. C. 16, 12 S. E. 619 (whether body had been moved).

26. Connecticut Mut. L. Ins. Co. *v.* Ellis, 89 Ill. 516 (delirium tremens); Reininghaus *v.* Merchants' L. Assoc., 116 Iowa 364, 89 N. W. 1113 (liver trouble); Jones *v.* White, 11 Humphr. (Tenn.) 268.

An ordinary observer cannot state with what disease a certain person is afflicted (McLean *v.* State, 16 Ala. 672, fits; Thompson *v.* Bertrand, 23 Ark. 730) or the existence of any physical condition (Boies *v.* McAllister, 12 Me. 308, effects of pregnancy) demanding special knowledge. The same rule applies in case of animals. An unskilled observer cannot testify that a horse had the heaves. Spear *v.* Richardson, 34 N. H. 428. But see Burden *v.* Pratt, 1 Thomps. & C. (N. Y.) 554; Bischoff *v.* Schulz, 5 N. Y. Suppl. 757.

27. *Indiana.*—Goshen *v.* England, 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253 (fracture of bone); Louisville, etc., R. Co. *v.* Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908.

Michigan.— Sterling *v.* Detroit, (1903) 95 N. W. 986; Haines *v.* Lake Shore, etc., R. Co., 129 Mich. 475, 89 N. W. 349; Holman *v.* Union St. R. Co., 114 Mich. 208, 72 N. W. 202.

Minnesota.— Johnson *v.* Northern Pac. R. Co., 47 Minn. 430, 50 N. W. 473.

Missouri.— Squires *v.* Chillicothe, 89 Mo. 226, 1 S. W. 23; Riley *v.* Sparks, 52 Mo. App. 572.

New York.— Mahar *v.* New York Cent., etc., R. Co., 20 N. Y. App. Div. 161, 46 N. Y. Suppl. 847; Griffith *v.* Utica, etc., R. Co., 17 N. Y. Suppl. 692; German *v.* Suburban Rapid-Transit Co., 13 N. Y. Suppl. 897; Murray *v.* Brooklyn City R. Co., 7 N. Y. Suppl. 900.

Tennessee.— Mississippi, etc., R. Co. *v.* Ayres, 16 Lea 725.

Texas.— Missouri, etc., R. Co. *v.* Wright, 19 Tex. Civ. App. 47, 47 S. W. 56; Austin, etc., R. Co. *v.* McElmurry, (Civ. App. 1895) 33 S. W. 249; Sabine, etc., R. Co. *v.* Ewing, 7 Tex. Civ. App. 8, 26 S. W. 638.

Washington.— Miller *v.* Dumon, 24 Wash. 648, 64 Pac. 804 (fracture of bone); Pencil *v.* Home Ins. Co., 3 Wash. 485, 28 Pac. 1031.

Wisconsin.— Collins *v.* Janesville, 111 Wis. 348, 87 N. W. 241, 1087 (strain on ligaments); Crites *v.* New Richmond, 98 Wis. 55, 73 N. W. 322 (severe strain).

General conclusions, not of a scientific nature, may be rejected, even when the witness is a skilled observer. Thus, in an action for personal injuries, it was held not to be error to strike out replies of a physician, testifying for plaintiff, containing statements that plaintiff was a "physical as well as mental wreck," that "he is in that condition of life in which there is no enjoyment of life," and that "there is evidence of constant pain, plenty of it," as being general conclusions.

mental,[28] or nervous[29] symptoms; the stage of development of a disease;[30] the occurrence of a change;[31] what are the causes of an observed condition[32] or of

Sterling *v.* Detroit, (Mich. 1903) 95 N. W. 986.

That the examination is made ex parte does not affect the admissibility of evidence as to its results. Mississippi, etc., R. Co. *v.* Ayres, 16 Lea (Tenn.) 725.

28. *In re* Carmichael, 36 Ala. 514; McAllister *v.* State, 17 Ala. 434, 52 Am. Dec. 180; Toledo, etc., R. Co. *v.* Baddeley, 54 Ill. 19, 5 Am. Rep. 71 (impaired); Haines *v.* Lake Shore, etc., R. Co., 129 Mich. 475, 89 N. W. 349; Pencil *v.* Home Ins. Co., 3 Wash. 485, 28 Pac. 1031.

It is not necessary that the witness should have formed an opinion as to a person's depth of mind. *In re* Carmichael, 36 Ala. 514.

29. Haines *v.* Lake Shore, etc., R. Co., 129 Mich. 475, 89 N. W. 349; Kennedy *v.* Upshaw, 66 Tex. 442, 1 S. W. 308.

30. Paty *v.* Martin, 15 La. Ann. 620; Lush *v.* McDaniel, 35 N. C. 485, 57 Am. Dec. 566.

31. Bomgardner *v.* Andrews, 55 Iowa 638, 8 N. W. 481.

32. *Alabama.*— Patterson *v.* South, etc., Alabama R. Co., 89 Ala. 318, 7 So. 437; Eufaula *v.* Simmons, 86 Ala. 515, 6 So. 47.

Arizona.— Territory *v.* Davis, 2 Ariz. 59, 10 Pac. 359, mental effect of excessive use of intoxicating liquors.

California.— People *v.* Durrant, 116 Cal. 179, 210, 48 Pac. 75.

Illinois.— Chatsworth *v.* Rowe, 166 Ill. 114, 46 N. E. 763; Louisville, etc., R. Co. *v.* Shires, 108 Ill. 617.

Indiana.— Louisville, etc., R. Co. *v.* Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197; Louisville, etc., R. Co. *v.* Holsapple, 12 Ind. App. 301, 38 N. E. 1107.

Iowa.— Armstrong *v.* Ackley, 71 Iowa 76, 32 N. W. 180; Brant *v.* Lyons, 60 Iowa 172, 14 N. W. 227; State *v.* Morphy, 33 Iowa 270, 11 Am. Rep. 122.

Kansas.— It is not necessary that the witness should speak with entire certainty. Roark *v.* Greeno, 61 Kan. 299, 304, 59 Pac. 655 [*citing* Armstrong *v.* Ackley, 71 Iowa 76, 32 N. W. 180; State *v.* Asbell, 57 Kan. 398, 46 Pac. 770; State *v.* Baldwin, 36 Kan. 1, 12 Pac. 318; Rhinehart *v.* Whitehead, 64 Wis. 42, 24 N. W. 401].

Maine.— State *v.* Smith, 32 Me. 369, 54 Am. Dec. 578, pregnancy.

Massachusetts.— Hardiman *v.* Brown, 162 Mass. 585, 39 N. E. 192 (tumor); Com. *v.* Thompson, 159 Mass. 56, 33 N. E. 1111.

Michigan.— The witness may state whether lameness is or is not consistent with certain other facts. Graves *v.* Battle Creek, 95 Mich. 266, 54 N. W. 757, 35 Am. St. Rep. 561, 19 L. R. A. 641.

Missouri.— Robinson *v.* St. Louis, etc., R. Co., 103 Mo. App. 110, 77 S. W. 493, curvature of spine.

New Hampshire.— Nebonne *v.* Concord R. Co., 68 N. H. 296, 44 Atl. 521; Perkins *v.* Concord R. Co., 44 N. H. 223.

New York.— Clegg *v.* Metropolitan St. R. Co., 159 N. Y. 550, 54 N. E. 1089 [*affirming* 1 N. Y. App. Div. 207, 37 N. Y. Suppl. 130]; People *v.* Harris, 136 N. Y. 423, 33 N. E. 65 (overdose of morphine); Wallace *v.* Vacuum Oil Co., 128 N. Y. 579, 29 N. E. 956; Stouter *v.* Manhattan R. Co., 127 N. Y. 661, 27 N. E. 805 [*affirming* 3 Silv. Supreme 413, 6 N. Y. Suppl. 163] (abscess); Turner *v.* Newburgh, 109 N. Y. 301, 16 N. E. 344, 4 Am. St. Rep. 453; Johnson *v.* Steam Gauge, etc., Co., 72 Hun 535, 25 N. Y. Suppl. 689; Matteson *v.* New York Cent., etc., R. Co., 62 Barb. 364 (spinal trouble); O'Neil *v.* Dry Dock, etc., R. Co., 59 N. Y. Super. Ct. 123, 15 N. Y. Suppl. 84 (deafness); Hunter *v.* Third Ave. R. Co., 21 Misc. 1, 46 N. Y. Suppl. 1010; Gibbons *v.* Phœnix, 15 N. Y. Suppl. 410; Pike *v.* Bosworth, 7 N. Y. St. 665; Stephen *v.* People, 4 Park. Cr. 396 (arsenical poisoning). That there is no other possible cause may be stated (Friess *v.* New York Cent., etc., R. Co., 67 Hun 205, 22 N. Y. Suppl. 104), and that certain causes would possibly produce a given result is equally competent (Hunter *v.* Third Ave. R. Co., 20 Misc. 432, 45 N. Y. Suppl. 1044).

North Carolina.— State *v.* Wilcox, 132 N. C. 1120, 44 S. E. 625.

North Dakota.— Tullis *v.* Rankin, 6 N. D. 44, 68 N. W. 187, 66 Am. St. Rep. 586, 35 L. R. A. 449.

South Carolina.— Oliver *v.* Columbia, etc., R. Co., 65 S. C. 1, 43 S. E. 307.

Tennessee.— Endowment Bank O. of K. P. *v.* Steele, 108 Tenn. 624, 69 S. W. 336; Jones *v.* White, 11 Humphr. 268.

Texas.— Shelton *v.* State, 34 Tex. 662; Galveston, etc., R. Co. *v.* Baumgarten, 31 Tex. Civ. App. 253, 72 S. W. 78; St. Louis Southwestern R. Co. *v.* Laws, (Civ. App. 1901) 61 S. W. 498; Tyler Southeastern R. Co. *v.* Wheeler, (Civ. App. 1897) 41 S. W. 517 (shock); Austin, etc., R. Co. *v.* McElmurry, (Civ. App. 1895) 33 S. W. 249.

Vermont.— Gilman *v.* Strafford, 50 Vt. 723.

West Virginia.— Barker *v.* Ohio River R. Co., 51 W. Va. 423, 41 S. E. 148, 90 Am. St. Rep. 808; Bowen *v.* Huntington, 35 W. Va. 682, 14 S. E. 217.

Wisconsin.— Crites *v.* New Richmond, 98 Wis. 55, 73 N. W. 322.

See 20 Cent. Dig. tit. "Evidence," §§ 2312, 2336, 2345.

Closeness of connection felt by the witness to exist between the cause and its effect is an important element in dealing with the relevancy of his evidence. Conjectural sequence is rejected, possibility being an insufficient ground of admissibility. On the other hand a connection showing a slight increase of intimacy in the connection suffices to admit the evidence. Among these are the following: "Apt" (Gulf, etc., R. Co. *v.* Harriett, 80 Tex. 73, 15 S. W. 556), "inclined to think" (Reynolds *v.* Niagara Falls, 81 Hun (N. Y.) 353, 30 N. Y. Suppl. 954), "likely" (Texas Cent. R. Co. *v.* Burnett, 80

a given death;[33] how recent[34] or in what order[35] is the cause of the conditions observed by him; whether certain detailed occurrences would be a natural,[36] possible,[37] probable,[38] or sufficient[39] cause for a certain result; but not whether they actually produced it.[40] And it seems to be well settled that the effect of

Tex. 536, 16 S. W. 320), "opinion" (Reynolds *v.* Niagara Falls, 81 Hun (N. Y.) 353, 30 N. Y. Suppl. 954; Stever *v.* New York Cent., etc., R. Co., 7 N. Y. App. Div. 392, 39 N. Y. Suppl. 944) and "reasonable certainty" (Forde *v.* Nichols, 12 N. Y. Suppl. 922). A witness who declines to go to this length in mental certitude has been rejected. De Soucey *v.* Manhattan R. Co., 15 N. Y. Suppl. 108.

Although the witness himself may be positive, the evidence may be rejected if the court feels that reasonable certainty is outside the possibilities of the situation. Spear *v.* Hiles, 67 Wis. 361, 30 N. W. 511.

33. *Alabama.*—Simon *v.* State, 108 Ala. 27, 18 So. 731 (blow); Mobile L. Ins. Co. *v.* Walker, 58 Ala. 290.

Arkansas.— Ebos *v.* State, 34 Ark. 520, wound.

California.— People *v.* Durrant, 116 Cal. 179, 210, 48 Pac. 75, autopsy.

Iowa.— State *v.* Tippet, 94 Iowa 646, 63 N. W. 445.

Louisiana.— State *v.* Crenshaw, 32 La. Ann. 406, wound.

Maine.— State *v.* Smith, 32 Me. 369, 54 Am. Dec. 578, abortion.

Massachusetts.— Com. *v.* Thompson, 159 Mass. 56, 33 N. E. 1111, abortion.

Michigan.— People *v.* Barker, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501; People *v.* Sessions, 58 Mich. 594, 26 N. W. 291 (abortion); People *v.* Hare, 57 Mich. 505, 24 N. W. 843.

New Hampshire.— State *v.* Greenleaf, 71 N. H. 606, 54 Atl. 38.

New Jersey.— State *v.* Powell, 7 N. J. L. 244.

New York.— People *v.* Benham, 160 N. Y. 402, 55 N. E. 11, 14 N. Y. Cr. 188. The physician may state which of two wounds, each necessarily fatal, actually caused death. Eggler *v.* People, 56 N. Y. 642.

North Carolina.— State *v.* Jones, 68 N. C. 443.

Pennsylvania.— Com. *v.* Crossmire, 156 Pa. St. 304, 27 Atl. 40.

South Carolina.— State *v.* Foote, 58 S. C. 218, 36 S. E. 551.

Texas.— Shelton *v.* State, 34 Tex. 662; Hunter *v.* State, 30 Tex. App. 314, 17 S. W. 414.

Wisconsin.— Boyle *v.* State, 61 Wis. 440, 21 N. W. 289.

That an extended examination was rendered impossible by the condition of the body merely affects the weight of the evidence. People *v.* Barker, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501; Linsday *v.* People, 63 N. Y. 143, holding that this is the "best evidence" of which the case is susceptible.

34. Gran *v.* Houston, 45 Nebr. 813, 64 N. W. 245; Jefferson Ins. Co. *v.* Cotheal, 7 Wend. (N. Y.) 72, 78, 22 Am. Dec. 567 (where the court said: "A physician in many cases cannot so explain to a jury the cause of the death, or other serious injury to an individual, as to make the jury distinctly perceive the connection between the cause and the effect. He may therefore express an opinion that the wound given, or the poison administered, produced the death of the deceased; but in such a case, the physician must state the facts on which his opinion is founded"); Manufacturers' Acc. Indemnity Co. *v.* Dorgan, 58 Fed. 945, 7 C. C. A. 581, 22 L. R. A. 620.

An unprofessional witness may state the same fact. Smith *v.* State, 43 Tex. 643.

That several days have intervened is not material. State *v.* Crenshaw, 32 La. Ann. 406.

35. State *v.* Harris, 63 N. C. 1.

Remote cause stated.— The witness may state the remote as well as the proximate cause, as that a shock resulting from an abortion itself caused death (People *v.* Sessions, 58 Mich. 594, 26 N. W. 291), or that whipping caused pneumonia and pneumonia caused death (State *v.* Chiles, 44 S. C. 338, 22 S. E. 339).

36. Maher *v.* New York Cent., etc., R. Co., 20 N. Y. App. Div. 161, 46 N. Y. Suppl. 847.

37. Chatsworth *v.* Rowe, 166 Ill. 114, 46 N. E. 763 (external injury); United R., etc., Co. *v.* Seymour, 92 Md. 425, 48 Atl. 850; Quinn *v.* O'Keeffe, 9 N. Y. App. Div. 68, 41 N. Y. Suppl. 116 (fall from a carriage); Hunter *v.* Third Ave. R. Co., 21 Misc. (N. Y.) 1, 46 N. Y. Suppl. 1010.

38. Wagner *v.* Metropolitan St. R. Co., 176 N. Y. 610, 68 N. E. 1125; Tracey *v.* Metropolitan St. R. Co., 168 N. Y. 653, 61 N. E. 1135; Mahar *v.* New York Cent., etc., R. Co., 162 N. Y. 633, 57 N. E. 1116; Missouri, etc., R. Co. *v.* Hawk, 30 Tex. Civ. App. 142, 69 S. W. 1037.

39. Dean *v.* Sharon, 72 Conn. 667, 45 Atl. 963; Illinois Cent. R. Co. *v.* Treat, 179 Ill. 576, 54 N. E. 290; Kankakee *v.* Steinbach, 89 Ill. App. 513.

That other causes might also be sufficient is no reason for rejecting the inference. Wagner *v.* Metropolitan St. R. Co., 79 N. Y. App. Div. 591, 80 N. Y. Suppl. 191; Bruss *v.* Metropolitan St. R. Co., 66 N. Y. App. Div. 554, 73 N. Y. Suppl. 256 (cerebral hemorrhage); Moritz *v.* Interurban St. R. Co., 84 N. Y. Suppl. 162.

40. *Alabama.*— Patterson *v.* South Alabama, etc., R. Co., 89 Ala. 318, 7 So. 437.

Iowa.— Brant *v.* Lyons, 60 Iowa 172, 14 N. W. 227.

Kansas.— Chicago, etc., R. Co. *v.* Sheldon, 6 Kan. App. 347, 51 Pac. 808.

Michigan.— Jones *v.* Portland, 88 Mich. 598, 50 N. W. 731, 16 L. R. A. 437; People *v.* Hare, 57 Mich. 505, 24 N. W. 843.

South Carolina.— Riser *v.* Southern R. Co.,

injuries[41] or given conditions,[42] whether certain conduct is consistent with having received them,[43] and whether a given medical operation was necessary[44] may be stated by a sufficiently qualified witness.

(B) *Mental Condition*[45] — (1) Attending Physician. In jurisdictions which admit the testimony of ordinary observers on the question of insanity, it follows *a fortiori* that the evidence of an observer skilled in medicine, such as the average attending physician, is admissible.[46] The skill and training of the witness

67 S. C. 419, 46 S. E. 47; Easler *v.* Southern R. Co., 59 S. C. 311, 37 S. E. 938.

For example while a physician may state the cause of an injury observed by him as having been a fall, he cannot go further and, unless he knows, say that was the precise fall for the injuries resulting from which damages are claimed. Patterson *v.* South Alabama, etc., R. Co., 89 Ala. 318, 7 So. 437. But see McClain *v.* Brooklyn City R. Co., 116 N. Y. 459, 22 N. E. 1062.

Where an opposing expert has stated that certain physical conditions might have produced the phenomena observed by the original witness, the latter may on rebuttal state that these causes did not in point of fact produce them. Hammond, etc., Electric R. Co. *v.* Spyzchalski, 17 Ind. App. 7, 46 N. E. 47, miscarriage.

41. Louisville, etc., R. Co. *v.* Stewart, 128 Ala. 313, 29 So. 562. It is not a valid objection that the inference is stated as a conclusion. Louisville, etc., R. Co. *v.* Stewart, 128 Ala. 313, 29 So. 562.

42. Mahar *v.* New York Cent., etc., R. Co., 162 N. Y. 633, 57 N. E. 1116.

43. Birmingham R., etc., Co. *v.* Ellard, 135 Ala. 433, 33 So. 276.

44. State *v.* McCoy, 15 Utah 136, 49 Pac. 420, abortion.

45. See *supra*, XI, C, 2, a, (III); XI, C, 7; *infra*, XI, G, 2, k, 2.

46. *California.*— Wheelock *v.* Godfrey, 100 Cal. 578, 35 Pac. 317.

Georgia.— Taylor *v.* State, 83 Ga. 647, 10 S. E. 442; Potts *v.* House, 6 Ga. 324, 50 Am. Dec. 329.

Indiana.— Coryell *v.* Stone, 62 Ind. 307.

Iowa.— State *v.* Felter, 25 Iowa 67.

Kentucky.— Phelps *v.* Com., 32 S. W. 470, 17 Ky. L. Rep. 706.

Louisiana.— Chandler *v.* Barrett, 21 La. Ann. 58, 99 Am. Dec. 701.

Maryland.— Jones *v.* Collins, 94 Md. 403, 51 Atl. 398.

Massachusetts.— Baxter *v.* Abbott, 7 Gray 71, 80, where the court said: "To put upon the stand a skilful physician, (and such an one has never understood the bodies of his patients unless he has known also something of their minds, and the action of one upon the other,) to get from the history of his patient, the state of his bodily health, his conversation, conduct, traits of character in sickness and in health, and then to exclude the opinion which, as the result of all, his mind has almost insensibly and necessarily formed; and yet, upon this imperfect history of his patient, to ask a perfect stranger to that patient to give his opinion of mental condition, because he has made mental disease a special study would be to reject the most valuable evidence, for that which, in the nature of things, must be of far less worth. Upon a subject of such intrinsic difficulty, the jury should have the aid and assistance of both."

Missouri.— State *v.* Meyers, 99 Mo. 107, 12 S. W. 516.

North Carolina.— Flynt *v.* Bodenhamer, 80 N. C. 205.

Pennsylvania.— Com. *v.* Buccieri, 153 Pa. St. 535, 26 Atl. 228; Pidcock *v.* Potter, 68 Pa. St. 342, 8 Am. Rep. 181.

Texas.— Pigg *v.* State, 43 Tex. 108; Lindsey *v.* White, (Civ. App. 1901) 61 S. W. 438.

Vermont.— Hathaway *v.* National L. Ins. Co., 48 Vt. 335; Fairchild *v.* Bascomb, 35 Vt. 398.

Virginia.— Fishburne *v.* Ferguson, 84 Va. 87, 4 S. E. 575.

Not an expert.— As in other cases where a skilled witness testifies to facts observed by him and his inference from them, a family physician testifying as to his inference in regard to the insanity of a patient gleaned from his observation is not an "expert." See *supra*, XI, D, 1. This important but much overlooked distinction is admirably stated by the supreme court of Connecticut, in a case where one Nash, not even a physician, had testified as to the sanity of a testatrix, the court said: "It is very true that Mr. Nash had expressed an opinion as to the sanity of the testatrix, but as the opinion of a non-expert it was not, as a mere opinion, admissible or important. We never allow the mere opinion of a witness to go to the jury if objected to, unless the witness is an expert and testifies as such, where the jury from want of experience or observation are unable to draw proper inferences from facts proved. But where a witness speaks from his personal knowledge, and, after stating the facts, adds his opinion upon them, or, in a certain class of cases, gives his opinion without detailing the facts on which it is founded, his testimony is received as founded not on his judgment, but on his knowledge. As for instance, the case of personal identity; where the witness may say that he knows the man, and that the person whom he saw was that man, and he is not obliged, unless requested, to state his height, size, age, complexion, gait, voice and dress. So a witness may state that a certain road is or is not in repair, or that a certain bridge is sound and safe or otherwise, or that a farm or house is worth so much, without going into the particular facts on which he founds his opinion, these facts being known to him personally. He only states in such cases the

merely add to the weight of his testimony in cases involving common types of insanity,[47] and constitute the weight necessary to relevancy in cases where remote or latent forms of mental unsoundness are in question. In certain states, however, the courts of which ordinarily exclude the inference of an unskilled observer, an attending physician is regarded as competent to state the inference drawn by him as to the sanity of his patient,[48] although not specially skilled in the subject,[49] provided that his observation has, in the opinion of the court, been so adequate[50] and recent[51] as to be relevant.[52] The witness is limited to stating the mental effect of observed facts. He cannot go further and apply legal tests of responsibility, for example, as to whether a testator was capable of making a will[53] or taking care of himself and his affairs.[54] Where an attending physician or other especially skilled observer testifies, his evidence, like that of any ordinary observer, should be accompanied with a statement of the facts observed by him, so far as the latter admit of statement, and the value of his conclusion varies with their truth and importance.[55]

(2) Other Skilled Witnesses. A witness competent to testify as an

result of his own observation and knowledge. Wherever the particulars are quite numerous a witness is allowed to testify what he knows as the result of his observation of facts, and thus to testify to the general fact, rather than to recite every circumstance that conduces to that knowledge. This is a rule of convenience which must be applied on trials, unless they are to be indefinitely protracted by a useless minuteness of enquiry. This rule has been very generally, in this country, applied to the case of insanity." Dunham's Appeal, 27 Conn. 192, 197. A family physician cannot testify as an expert in Massachusetts. Com. *v.* Rich, 14 Gray (Mass.) 335. See also De Witt *v.* Barly, 17 N. Y. 340.

Opportunities for observation, although not gained in actual attendance, may qualify a medical witness. People *v.* Lake, 12 N. Y. 358.

47. In many perhaps most cases, at least of testamentary insanity, the facts concern the imbecility of old age rather than any distinct delusion, and so are presumably within the scope of the experience of an ordinary practising physician. Baxter *v.* Abbott, 7 Gray (Mass.) 71.

48. McCurry *v.* Hooper, 12 Ala. 823, 46 Am. Dec. 280; Hall *v.* Perry, 87 Me. 569, 33 Atl. 160, 47 Am. St. Rep. 352; Fayette *v.* Chesterville, 77 Me. 28, 52 Am. Rep. 741; May *v.* Bradlee, 127 Mass. 414; Com. *v.* Rich, 14 Gray (Mass.) 335; Baxter *v.* Abbott, 7 Gray (Mass.) 71; Hathorn *v.* King, 8 Mass. 371, 5 Am. Dec. 106; People *v.* Youngs, 151 N. Y. 210, 45 N. E. 460.

49. Hastings *v.* Rider, 99 Mass. 622.

50. Fayette *v.* Chesterville, 77 Me. 28, 52 Am. Rep. 741. A single examination is not adequate (Fayette *v.* Chesterville, *supra*), but observation covering an extended period of time is not necessary (Hastings *v.* Rider, 99 Mass. 622).

An expert cannot be turned into a family physician by the expedient of having him attend an injured plaintiff *pendente lite* and make a single examination. Fayette *v.* Chesterville, 77 Me. 28, 33, 52 Am. Rep. 741, where the court said: "He stood in a position to be tempted to participate in the prejudices of the party calling him as a witness." But the evidence of an attending physician is competent, although he is not the regular family physician. Hastings *v.* Rider, 99 Mass. 622.

51. Fayette *v.* Chesterville, 77 Me. 28, 52 Am. Rep. 741; Russell *v.* State, 53 Miss. 367; *In re* Arnold, 14 Hun (N. Y.) 525.

52. The witness has been absolved from the necessity of first stating the particular facts on which his inference is based. People *v.* Youngs, 151 N. Y. 210, 45 N. E. 460. The general rule requiring such a statement has, however, been enforced. Scott *v.* Hay, 90 Minn. 304, 97 N. W. 106.

53. *Alabama.*— Walker *v.* Walker, 34 Ala. 469.

Maine.— Hall *v.* Perry, 87 Me. 569, 33 Atl. 160, 47 Am. St. Rep. 352.

Massachusetts.— May *v.* Bradlee, 127 Mass. 414.

Michigan.— White *v.* Bailey, 10 Mich. 155.

Tennessee.— Gibson *v.* Gibson, 9 Yerg. 329.

The evidence has, however, been received. Hastings *v.* Rider, 99 Mass. 622; Stackhouse *v.* Horton, 15 N. J. Eq. 202.

A family physician may be asked whether a testator had "sufficient mental power to comprehend matters of business, such as his relation to property and the proper mode of disposing of the same by will" (Hastings *v.* Rider, 99 Mass. 622), or whether an imbecile person was able to understand his duties toward his wife (St. George *v.* Biddeford, 76 Me. 593). On a will contest on the grounds of testamentary incapacity and undue influence, it is proper to admit testimony of the attending physician of testator that the fact that he had judiciously managed his estate before he made his will tended to show that he was subject to no delusion while making it. Coryell *v.* Stone, 62 Ind. 307.

54. *In re* Rush, 53 N. Y. Suppl. 581.

55. Hastings *v.* Rider, 99 Mass. 622; Clark *v.* State, 12 Ohio 483, 40 Am. Dec. 481.

There is authority to the contrary. Lodge *v.* Lodge, 2 Houst. (Del.) 418; Jones *v.* Collins, 94 Md. 403, 51 Atl. 398.

"expert" upon hypothetically stated facts may observe or examine the party in question, either as a witness on the stand, or under other circumstances affording a suitable opportunity for forming an inference from the facts observed and may state this inference to the jury, together with the facts upon which it is based.[56] A nurse has been held competent to testify as to the mental condition of the patient, with a weight, as compared to the inference of the ordinary observer, enhanced by the semi-medical nature of her employment.[57]

(II) *EXCLUSIONS.* The witness may not testify what specific occurrences actually caused the condition.[58] In like manner, although a medical witness who has observed a practitioner can testify as to what constitutes skill in the profession in such a way as to create an adequate impression on the mind of the jury, he is not at liberty to state whether the practitioner who has come under his observation is as a matter of fact skilful;[59] but if he has observed it he may state the actual mode and effect of his treatment.[60] Where the facts can be placed before the jury with adequate fulness, especially if the inference is upon the precise point in issue,[61] the inference of the witness is rejected.[62] The same result follows where the physician states an inference as to the effect of the conditions observed by him in some connection as to which he is not qualified; for example, as to the insurability of the life affected in a particular way,[63] or an expectancy of life not based on the use of mortality tables.[64] A witness will not be allowed to characterize the injuries observed by him, as that they are "very serious."[65]

b. Basis of Inference. A medical observer should be guided entirely by his professional training and experience in dealing with the observed phenomena.[66] He cannot use as facts in giving his inference the statements of others,[67] although

56. Com. *v.* Buccieri, 153 Pa. St. 535, 26 Atl. 228.

57. Fairchild *v.* Bascomb, 35 Vt. 398.

58. Illinois Steel Co. *v.* Delac, 103 Ill. App. 98 [*affirmed* in 201 Ill. 150, 66 N. E. 245]; Van Deusen *v.* Newcomer, 40 Mich. 90.

59. Leighton *v.* Sargent, 31 N. H. 119, 64 Am. Dec. 323; Boydston *v.* Giltner, 3 Oreg. 118. But see Williams *v.* Poppleton, 3 Oreg. 139.

60. Barber *v.* Merriam, 11 Allen (Mass.) 322.

Irrelevancy is the real ground in many instances for the rejection of this evidence; it by no means necessarily follows that, because a witness is possessed of skill, he exercised it in a particular instance. Boydston *v.* Giltner, 3 Oreg. 118.

Where this reason fails, the rule fails also. Thus, in a civil action for negligence by reason of failure to provide a suitable fire-escape, "one of the surgeons was permitted to testify that, judging from the relative position and the condition of the broken bones, in his opinion the foot of plaintiff's broken leg struck upon a sloping object, that the heel of the foot struck the object before the ball of the foot struck, and that his body was in an upright position when he fell. Johnson *v.* Steam Gauge, etc., Co., 72 Hun (N. Y.) 535, 540, 25 N. Y. Suppl. 689, where Lewis, J., said: "The witness being a surgeon, presumably had a knowledge of the anatomy of the human body, the strength and position of the bones of the leg, not common to laymen, and having had the advantage of a personal examination of the plaintiff's leg after the injury, he was properly allowed to give his opinion as an expert."

61. National Union *v.* Thomas, 10 App. Cas. (D. C.) 277, holding that a physician cannot state whether certain observed appearances lead to the inference that a death was due to suicide. The facts could be placed before the jury and was the very issue they were impaneled to try.

62. Kline *v.* Kansas City, etc., R. Co., 50 Iowa 656; Cook *v.* State, 24 N. J. L. 843, holding that the testimony of medical experts forms no exception to this rule; and a physician or surgeon testifying as such cannot therefore give his opinion on a question which the jury are capable of answering without the aid of professional skill and experience.

63. Rawls *v.* American L. Ins. Co., 36 Barb. (N. Y.) 357.

64. Chicago, etc., R. Co. *v.* Long, 26 Tex. Civ. App. 601, 65 S. W. 882.

65. Stoothoff *v.* Brooklyn Heights R. Co., 50 N. Y. App. Div. 585, 64 N. Y. Suppl. 243.

66. Grand Rapids, etc., R. Co. *v.* Huntley, 38 Mich. 537, 31 Am. Rep. 321; O'Flaherty *v.* Nassau Electric R. Co., 165 N. Y. 624, 59 N. E. 1128; Miller *v.* Dumon, 24 Wash. 648, 64 Pac. 804, X-ray negative taken by himself.

All other facts must be excluded, even though they exist within the knowledge of the witness. Hitchcock *v.* Burgett, 38 Mich. 501. In the absence of evidence to the contrary it will be assumed that he is doing so. Western, etc., R. Co. *v.* Stafford, 99 Ga. 187, 25 S. E. 656.

67. Atchison, etc., R. Co. *v.* Frazier, 27 Kan. 463; Chicago, etc., R. Co. *v.* Sheldon, 6 Kan. App. 347, 51 Pac. 808; Heald *v.* Thing, 45 Me. 392; Foster *v.* New York Fidelity,

medical experts,[68] or members of the family;[69] nor facts of which he is informed,[70] nor the "history of the case."[71] He may, however, regard the complaints[72] or statements[73] of his patient, although made after suit has been brought,[74] or, in a criminal case, after the commission of the crime.[75] The witness should give, with such detail as he can, the facts,[76] including statements made to him[77] by the patient as a basis for treatment,[78] on which he bases his inference, and the symp-

etc., Co., 99 Wis. 447, 75 N. W. 69, 40 L. R. A. 833; Vosburg *v.* Putney, 78 Wis. 84, 47 N. W. 99; Delaware, etc., R. Co. *v.* Roalefs, 70 Fed. 21, 16 C. C. A. 601; U. S. *v.* Faulkner, 35 Fed. 730.

The inference is admissible if all the statements of the patient to the physician are shown to be true. Delaware, etc., R. Co. *v.* Roalefs, 70 Fed. 21, 16 C. C. A. 601.

68. Miller *v.* St. Paul City R. Co., 62 Minn. 216, 64 N. W. 554.

69. Chicago, etc., R. Co. *v.* Sheldon, 6 Kan. App. 347, 51 Pac. 808; Heald *v.* Thing, 45 Me. 392 (wife); Kreuziger *v.* Chicago, etc., R. Co., 73 Wis. 158, 40 N. W. 657.

70. Mitchell *v.* State, 58 Ala. 417 (holding that such information is essential to the inference merely affects its weight); Mitchell *v.* State, 58 Ala. 417; Moore *v.* State, 17 Ohio St. 521; Vosburg *v.* Putney, 78 Wis. 84, 47 N. W. 99.

Where the fact to be proved is part of the basis of the inference, it should be rejected. Moore *v.* State, 17 Ohio St. 521.

71. Atchison, etc., R. Co. *v.* Frazier, 27 Kan. 463; National Cash-Register Co. *v.* Riggs, 22 Misc. (N. Y.) 716, 50 N. Y. Suppl. 35; Vosburg *v.* Putney, 78 Wis. 84, 47 N. W. 99. But see Hunter *v.* Third Ave. R. Co., 21 Misc. (N. Y.) 1, 46 N. Y. Suppl. 1010; St. Louis Southwestern R. Co. *v.* Freedman, 18 Tex. Civ. App. 553, 46 S. W. 101.

72. Louisville, etc., R. Co. *v.* Sandlin, 25 Ala. 585, 28 So. 40 (holding that this is especially relevant where injuries furnish no external indications); Atchison, etc., R. Co. *v.* Frazier, 27 Kan. 463; Fulmore *v.* St. Paul City R. Co., 72 Minn. 448, 75 N. W. 589; Johnson *v.* Northern Pac. R. Co., 47 Minn. 430, 50 N. W. 473; Jones *v.* Chicago, etc., R. Co., 43 Minn. 279, 45 N. W. 444; Hathaway *v.* National L. Ins. Co., 48 Vt. 335.

73. *Illinois.*— Salem *v.* Webster, 192 Ill. 369, 61 N. E. 323.

Michigan.— People *v.* Foglesong, 116 Mich. 556, 74 N. W. 730; Hitchcock *v.* Burgett, 38 Mich. 501, holding that a physician cannot be asked his opinion as to the cause of an injury, judging merely from the condition in which he found the patient, and without any knowledge as to how it took place.

New York.— Fort *v.* Brown, 46 Barb. 366.

Texas.— Newman *v.* Dodson, 61 Tex. 91; Atchison, etc., R. Co. *v.* Click, (Civ. App. 1895) 32 S. W. 226.

United States.— Denver, etc., R. Co. *v.* Roller, 100 Fed. 738, 41 C. C. A. 22, 49 L. R. A. 77, holding that it is not error to permit a physician testifying as an expert to state his opinion as to the nature and cause of the bodily or mental condition of a patient whom he has treated, derived from his own knowledge, his attendance, treatment, and examinations, although based in part on statements of the patient and complaints made at different times as to her pains and sufferings, and in the same connection to give his opinion as to whether the injuries are liable to be permanent.

Contra.— State *v.* Soper, 148 Mo. 217, 49 S. W. 1007; U. S. *v.* Faulkner, 35 Fed. 730.

The witness cannot state the cause which the patient assigned for his condition (Illinois Cent. R. Co. *v.* Sutton, 42 Ill. 438, 92 Am. Dec. 81), nor give the patient's statements as to previous conditions (People *v.* Foglesong, 116 Mich. 556, 74 N. W. 730).

Cross-examination may be so utilized as to reveal to what extent the statement of the patient affects the inference of the observer. Lay *v.* Adrian, 75 Mich. 438, 42 N. W. 959.

74. Austin, etc., R. Co. *v.* McElmurry, (Tex. Civ. App. 1895) 33 S. W. 249; Kansas City, etc., R. Co. *v.* Stoner, 51 Fed. 649, 2 C. C. A. 437.

75. Spivey *v.* State, (Tex. Cr. App. 1903) 77 S. W. 444.

76. Louisville, etc., R. Co. *v.* Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197; Louisville, etc., R. Co. *v.* Holsapple, 12 Ind. App. 301, 38 N. E. 1107; State *v.* Smith, 32 Me. 369, 54 Am. Dec. 578; Hitchcock *v.* Burgett, 38 Mich. 501; White *v.* Bailey, 10 Mich. 155; Johnson *v.* Steam Gauge, etc., Co., 142 N. Y. 152, 40 N. E. 773; Lindsay *v.* People 63 N. Y. 143; Friess *v.* New York Cent., etc., R. Co., 67 Hun (N. Y.) 205, 22 N. Y. Suppl. 104; Matteson *v.* New York Cent. R. Co., 62 Barb. (N. Y.) 364; Jefferson Ins. Co. *v.* Cotheal, 7 Wend. (N. Y.) 72, 22 Am. Dec. 567.

Unless the witness states facts sufficient to enable the jury to judge of the worth of his inference the latter may be rejected. Sullivan *v.* Metropolitan St. R. Co., 63 N. Y. App. Div. 46, 71 N. Y. Suppl. 280; McCabe *v.* Third Ave. R. Co., 22 Misc. (N. Y.) 707, 50 N. Y. Suppl. 34.

77. Salem *v.* Webster, 192 Ill. 369, 61 N. E. 323 [*affirming* 95 Ill. App. 120]; Van Winkle *v.* Chicago, etc., R. Co., 93 Iowa 509, 61 N. W. 929; Cronin *v.* Fitchburg, etc., R. Co., 181 Mass. 202, 63 N. E. 335, 92 Am. St. Rep. 408; Spivey *v.* State, (Tex. Cr. App. 1903) 77 S. W. 444 (insane delusion); Missouri, etc., R. Co. *v.* Johnson, (Tex. Civ. App. 1901) 67 S. W. 769; St. Louis Southwestern R. Co. *v.* Freedman, 18 Tex. Civ. App. 553, 46 S. W. 101 ("history of the case").

78. Statements made with a view to future litigation are irrelevant (Salem *v.* Webster, 95 Ill. App. 120 [*affirmed* in 192 Ill. 369, 61 N. E. 323]; but where a statement relates to bodily condition it is not inadmissible be-

toms which he has observed.[79] If the facts stated do not afford ground for a reasonable inference[80] *a fortiori* where they show that no such inference can be drawn,[81] his evidence will be rejected.

c. Mechanical or Necessary Inferences. Inference is permitted in certain cases to exceed the limits of a mere summary of observed facts, the witness stating the result in his own mind of applying mechanical laws to the medical facts observed by him.[82] He may testify to his inference as to whether certain bruises on the head of deceased could have been made by one blow;[83] whether a wound was made by a blunt, cutting,[84] or deadly[85] instrument, or with what kind of an instrument;[86] and how much force it would take to make it;[87] the course[88] and size[89] of a bullet causing an observed injury; whether a wound could have been self-inflicted,[90] or how it was inflicted;[91] whether by a single blow,[92] or by a person

cause litigation is pending and the physician is examining for the purpose of testifying (Cronin *v.* Fitchburg, etc., R. Co., 181 Mass. 202, 63 N. E. 335, 92 Am. St. Rep. 408; Missouri, etc., R. Co. *v.* Johnson, (Tex. Civ. App. 1901) 67 S. W. 769), and the same is true when there is a change in treatment calculated to influence the jury (Holman *v.* Union St. R. Co., 114 Mich. 208, 72 N. W. 202, use of chloroform), if it was not intended for that purpose (Holman *v.* Union St. R. Co., *supra*.

79. Jacksonville Southeastern R. Co. *v.* Southworth, 32 Ill. App. 307.

A mere conjecture, without basis of fact, is rejected (People's Gas Light, etc., Co. *v.* Porter, 102 Ill. App. 461; Higbee *v.* Guardian Mut. L. Ins. Co., 66 Barb. (N. Y.) 462; People *v.* Rogers, 13 Abb. Pr. N. S. (N. Y.) 370); but that a professional examination has not taken place recently affects only the weight of the evidence (Reininghaus *v.* Merchants' L. Assoc., 116 Iowa 364, 89 N. W. 1113), if the time of actual observation is not too remote to be relevant.

80. People *v.* Marseiler, 70 Cal. 98, 11 Pac. 503; People *v.* Olmstead, 30 Mich. 431; Hunt *v.* State, 9 Tex. App. 166; Sias *v.* Consolidated Lighting Co., 73 Vt. 35, 50 Atl. 554.

81. Prince *v.* State, 100 Ala. 144, 14 So. 409, 46 Am. St. Rep. 28; Manhattan L. Ins. Co. *v.* Beard, 112 Ky. 455, 66 S. W. 35, 23 Ky. L. Rep. 1747.

82. Fort *v.* State, 52 Ark. 180, 11 S. W. 959, 20 Am. St. Rep. 163, and cases cited in the notes following.

83. Com. *v.* Piper, 120 Mass. 185; People *v.* Rogers, 13 Abb. Pr. N. S. (N. Y.) 370.

84. *Alabama.*— Littleton *v.* State, 128 Ala. 31, 29 So. 390.

Iowa.— State *v.* Seymour, 94 Iowa 699, 63 N. W. 661 (club; not a fall); State *v.* Porter, 34 Iowa 131; State *v.* Morphy, 33 Iowa 270, 11 Am. Rep. 122.

Maine.— State *v.* Knight, 43 Me. 11.

Maryland.— Williams *v.* State, 64 Md. 384, 1 Atl. 887.

North Carolina.— State *v.* Wilcox, 132 N. C. 1120, 44 S. E. 625.

Texas.— Sebastian *v.* State, 41 Tex. Cr. 248, 53 S. W. 875; Kirk *v.* State, (Cr. App. 1896) 37 S. W. 440.

Wisconsin.— Carthaus *v.* State, 78 Wis. 560, 47 N. W. 629, club.

85. Sebastian *v.* State, 41 Tex. Cr. 248, 250, 53 S. W. 875 [*citing* Waite *v.* State, 13 Tex. App. 169].

86. Fort *v.* State, 52 Ark. 180, 11 S. W. 959, 20 Am. St. Rep. 163; State *v.* Breaux, 104 La. 540, 29 So. 222. *Contra*, Wilson *v.* People, 4 Park. Cr. (N. Y.) 619.

87. Fort *v.* State, 52 Ark. 180, 11 S. W. 959, 20 Am. St. Rep. 163; People *v.* Fish, 125 N. Y. 136, 26 N. E. 319. The witness cannot be asked how wounds were probably made (State *v.* Rainsbarger, 74 Iowa 196, 37 N. W. 153); nor is his personal, as distinguished from his professional, opinion admissible (Steagald *v.* State, 24 Tex. App. 207, 5 S. W. 853).

88. Rash *v.* State, 61 Ala. 89; Fort *v.* State, 52 Ark. 180, 11 S. W. 959, 20 Am. St. Rep. 163; People *v.* Phelan, 123 Cal. 551, 56 Pac. 424.

Skilled knowledge is needed to enable a witness to state what caused a bullet to deflect after entering the body. People *v.* Yokum, 118 Cal. 437, 50 Pac. 686.

89. People *v.* Wong Chuey, 117 Cal. 624, 49 Pac. 833.

90. State *v.* Lee, 65 Conn. 265, 30 Atl. 1110, 48 Am. St. Rep. 202, 27 L. R. A. 498; State *v.* Knight, 43 Me. 11; People *v.* Wilson, 109 N. Y. 345, 16 N. E. 540; Washburn *v.* National Acc. Soc., 10 N. Y. Suppl. 366. But see State *v.* Bradley, 34 S. C. 136, 13 S. E. 315; State *v.* Senn, 32 S. C. 392, 11 S. E. 292.

91. *Alabama.*— Rash *v.* State, 61 Ala. 89.

California.— People *v.* Durrant, 116 Cal. 179, 48 Pac. 75.

Louisiana.— State *v.* Breaux, 104 La. 540, 29 So. 222.

Maryland.— Davis *v.* State, 38 Md. 15, crowbar.

Pennsylvania.— Com. *v.* Crossmire, 156 Pa. St. 304, 27 Atl. 40.

Texas.— Galveston, etc., R. Co. *v.* Williams, 26 Tex. Civ. App. 153, 62 S. W. 808, injury from outside.

Contra.— State *v.* Rainsbarger, 74 Iowa 196, 37 N. W. 153.

Satisfactory knowledge and facilities for observation must be shown. Taylor *v.* U. S., 7 App. Cas. (D. C.) 27.

92. Com. *v.* Piper, 120 Mass. 185; People *v.* Schmidt, 168 N. Y. 568, 61 N. E. 907.

standing near;[93] and, if so, how near;[94] and the direction of a blow,[95] wound,[96] or flow of blood.[97] The physician's inference is not, it is said, admissible to show the position of the body at the time a wound was received nor the position of the person who inflicted it,[98] as the fact is one as to which a jury may form a reasonable inference,[99] and which is often intimately connected with their function in the cause.[1] The witness may state, usually with increased weight, inferences which more closely approximate mere statements of fact and which therefore might have been reasonably stated by one not specially skilled, as that a stain was made by human blood,[2] the appearance of a child, as related to the period of gestation,[3] or its age;[4] the competency of a nurse;[5] diminished earning capacity,[6] or inability to do certain acts[7] resulting from certain injuries; the existence of pain,[8]

93. State *v.* Asbell, 57 Kan. 398, 46 Pac. 770.

94. People *v.* Hawes, 98 Cal. 648, 33 Pac. 791.

Merely being a physician and with some familiarity with gunshot wounds is not adequate qualification to state how far a pistol was when the fatal shot was fired. People *v.* Lemperle, 94 Cal. 45, 29 Pac. 709.

95. *Dakota.*— Territory *v.* Egan, 3 Dak. 119, 13 N. W. 568.

Georgia.— Perry *v.* State, 110 Ga. 234, 36 S. E. 781, behind.

New York.— Johnson *v.* Steam Gauge, etc., Co., 146 N. Y. 152, 40 N. E. 773 [*affirming* 72 Hun 535, 25 N. Y. Suppl. 689].

Utah.— People *v.* Hopt, 4 Utah 247, 9 Pac. 407.

United States.— Hopt *v.* Utah, 120 U. S. 430, 7 S. Ct. 614, 30 L. ed. 708.

Contra.— McKee *v.* State, 82 Ala. 32, 2 So. 451.

96. Fort *v.* State, 52 Ark. 180, 11 S. W. 959, 20 Am. St. Rep. 163; State *v.* Merriman, 34 S. C. 16, 12 S. E. 619, 35 S. C. 607, 14 S. E. 394; People *v.* Hopt, 4 Utah 247, 9 Pac. 407. A skilled witness may testify as to the range of shot after entering the head. State *v.* Keene, 100 N. C. 509, 6 S. E. 91.

97. Dinsmore *v.* State, 61 Nebr. 418, 85 N. W. 445.

98. *Arkansas.*— Brown *v.* State, 55 Ark. 593, 18 S. W. 1051.

California.— People *v.* Farley, 124 Cal. 594, 57 Pac. 571; People *v.* Milner, 122 Cal. 171, 54 Pac. 833; People *v.* Hill, 116 Cal. 562, 48 Pac. 711; People *v.* Smith, 93 Cal. 445, 29 Pac. 64.

Iowa.— State *v.* Rainsbarger, 74 Iowa 196, 37 N. W. 153.

Louisiana.— State *v.* Fontenot, 50 La. Ann. 537, 23 So. 634, 69 Am. St. Rep. 455.

Maryland.— Davis *v.* State, 38 Md. 15.

Mississippi.— Foster *v.* State, 70 Miss. 755, 12 So. 822; Dillard *v.* State, 58 Miss. 368.

New York.— Johnson *v.* Steam-Gauge, etc., Co., 146 N. Y. 152, 40 N. E. 773; Kennedy *v.* People, 39 N. Y. 245, 6 Transcr. App. 19, 5 Abb. Pr. N. S. 147.

North Carolina.— State *v.* Jones, 68 N. C. 443.

Ohio.— Perkins *v.* State, 5 Ohio Cir. Ct. 597, 3 Ohio Cir. Dec. 292.

Texas.— Cooper *v.* State, 23 Tex. 331; Blain *v.* State, 33 Tex. Cr. 236, 26 S. W. 63; Champ *v.* State, 32 Tex. Cr. 87, 22 S. W. 678; Williams *v.* State, 30 Tex. App. 429, 17 S. W. 1071; Steagald *v.* State, 24 Tex. App. 207, 5 S. W. 853; Hunt *v.* State, 9 Tex. App. 166. See also Thompson *v.* State, 30 Tex. App. 325, 17 S. W. 448.

Contra.— State *v.* Buralli, (Nev. 1903) 71 Pac. 532.

A fortiori an ordinary observer cannot state the same inference. McKee *v.* State, 82 Ala. 32, 2 So. 451; Cooper *v.* State, 23 Tex. 331; Cavaness *v.* State, (Tex. Cr. App. 1903) 74 S. W. 908.

A witness may state that the muzzle of a gun must have been higher than the person shot (State *v.* Merriman, 34 S. C. 16, 12 S. E. 619, 35 S. C. 607, 14 S. E. 394) or covered by his hand (State *v.* Cross, 68 Iowa 180, 26 N. W. 62), and that deceased could not have been in a stooping position when shot (Com. *v.* Lenox, 3 Brewst. (Pa.) 249).

99. People *v.* Farley, 124 Cal. 594, 57 Pac. 571.

In Kentucky it is error to permit a witness to state whether a blow was struck from in front or behind, without a minute description of the wounds given. Parrott *v.* Com., 47 S. W. 452, 20 Ky. L. Rep. 761.

1. Brown *v.* State, 55 Ark. 593, 18 S. W. 1051; Dillard *v.* State, 58 Miss. 368; Perkins *v.* State, 5 Ohio Cir. Ct. 597, 3 Ohio Cir. Dec. 292; Williams *v.* State, 30 Tex. App. 429, 17 S. W. 1071.

Cross-examination.— The question may be asked on cross-examination. State *v.* Sullivan, 43 S. C. 205, 21 S. E. 4.

2. State *v.* Miller, 9 Houst. (Del.) 564, 32 Atl. 137; Com. *v.* Crossmire, 156 Pa. St. 304, 27 Atl. 40.

3. People *v.* Johnson, 70 Ill. App. 634; Young *v.* Makepeace, 103 Mass. 50, full time.

4. State *v.* Smith, 61 N. C. 302. The same inference is covered by the evidence of an ordinary observer. See *supra*, XI, C, 4, c.

5. Ward *v.* St. Vincent's Hospital, 78 N. Y. App. Div. 317, 79 N. Y. Suppl. 1004.

6. Southern Pac. Co. *v.* Hall, 100 Fed. 760. 41 C. C. A. 50, loss of foot for a carpenter.

7. People *v.* Brown, (Cal. 1886) 13 Pac. 222 (make affidavit); Holman *v.* Union St. R. Co., 114 Mich. 208, 72 N. W. 202 (housework).

8. Chicago, etc., R. Co. *v.* Martin, 112 Ill. 16, 1 N. E. 111; Holman *v.* Union St. R. Co., 114 Mich. 208, 72 N. W. 202; Rosevelt *v.* Manhattan R. Co., 59 N. Y. Super. Ct. 197,

and how long it continued;[9] danger to life;[10] the proportion of negro blood in a given person;[11] the results of an autopsy;[12] the symptoms observed by him;[13] the treatment in a given case;[14] whether symptoms are feigned,[15] or could have been feigned;[16] whether a given treatment is usual[17] or necessary;[18] and whether an examination was thorough or superficial.[19]

d. Probabilities. In testifying as to the possible and probable results of certain appearances a medical witness approaches the distinctive field of the expert, properly so called, in proportion as the element of medical reasoning enters into the question. The observer, if shown to be duly qualified may state the probable effects of disease, injury, or other conditions observed by him,[20] including their

13 N. Y. Suppl. 598 [*affirmed* in 133 N. Y. 557, 30 N. E. 1148].

9. Wilkins *v.* Missouri Valley, (Iowa 1903) 96 N. W. 868.

10. Rumsey *v.* People, 19 N. Y. 41.

11. White *v.* Clements, 39 Ga. 232.

12. *Alabama.*— Simon *v.* State, 108 Ala. 27, 18 So. 731, cause of death.

Arkansas.— King *v.* State, 55 Ark. 604, 19 S. W. 110.

Massachusetts.— Com. *v.* Taylor, 132 Mass. 261.

Nevada.— State *v.* Buralli, (1903) 71 Pac. 532.

New York.— People *v.* Schmidt, 168 N. Y. 568, 61 N. E. 907; People *v.* Benham, 160 N. Y. 402, 55 N. E. 11, 14 N. Y. Cr. 188.

Texas.— McConnell *v.* State, 22 Tex. App. 354, 3 S. W. 699, 58 Am. Rep. 647.

Utah.— State *v.* Mortensen, 26 Utah 312, 73 Pac. 562, 633, time since last meal.

That an autopsy took place after indictment and without notice to the accused (King *v.* State, 55 Ark. 604, 19 S. W. 110; State *v.* Leabo, 89 Mo. 247, 1 S. W. 288) or that an official examiner proceeded without statutory authority (Com. *v.* Taylor, 132 Mass. 261) or long after the death (Williams *v.* State, 64 Md. 384, 1 Atl. 887; State *v.* Brooks, 92 Mo. 542, 5 S. W. 257, 330), merely affects the weight of the evidence gleaned from it.

13. Pierson *v.* People, 18 Hun (N. Y.) 239.

14. People *v.* Koerner, 154 N. Y. 355, 48 N. E. 730.

15. *Illinois.*— Chicago Union Traction Co. *v.* Fortier, 205 Ill. 305, 68 N. E. 948; Chicago, etc., R. Co. *v.* Martin, 112 Ill. 16, 1 N. E. 111.

Minnesota.— Harrold *v.* Winona, etc., R. Co., 47 Minn. 17, 49 N. W. 389.

New York.— People *v.* Koerner, 154 N. Y. 355, 48 N. E. 730; Tisdale *v.* Delaware, etc., Canal Co., 4 N. Y. St. 812.

Texas.— Burt *v.* State, 38 Tex. Cr. 397, 40 S. W. 1000, 43 S. W. 344, 39 L. R. A. 305, 330; McGrew *v.* St. Louis, etc., R. Co., (Civ. App. 1903) 74 S. W. 816; Missouri, etc., R. Co. *v.* Wright, 19 Tex. Civ. App. 47, 47 S. W. 56; Austin, etc., R. Co. *v.* McElmurry, (Civ. App. 1895) 33 S. W. 249.

Vermont.— State *v.* Hayden, 51 Vt. 296.

An observer practically skilled may state the same inference. Com. *v.* Wireback, 190 Pa. St. 138, 42 Atl. 542, 70 Am. St. Rep. 625, warden of prison.

The observation may be made during the trial. Burt *v.* State, 38 Tex. Cr. 397, 40 S. W. 1000, 43 S. W. 344, 39 L. R. A. 305, 330.

Disposition to conceal injury.—The witness may go further and state an observed disposition to conceal the extent of actual injury. Plummer *v.* Ossipee, 59 N. H. 55.

The observer cannot use his confidence in the declarant as part of the basis of his inference. Austin, etc., R. Co. *v.* McElmurry, (Tex. Civ. App. 1895) 33 S. W. 249.

16. Missouri, etc., R. Co. *v.* Wright, 19 Tex. Civ. App. 47, 47 S. W. 56.

17. People *v.* Koerner, 154 N. Y. 355, 48 N. E. 730.

18. Missouri, etc., R. Co. *v.* Wright, 19 Tex. Civ. App. 47, 47 S. W. 56, chloroform necessary in an operation.

19. Northern Pac. R. Co. *v.* Urlin, 158 U. S. 271, 15 S. Ct. 840, 39 L. ed. 977.

20. *Alabama.*— Louisville, etc., R. Co. *v.* Stewart, 128 Ala. 313, 29 So. 562.

Illinois.— Springfield Consol. R. Co. *v.* Welsch, 155 Ill. 511, 40 N. E. 1034 (impair ability to work); Illinois Cent. R. Co. *v.* Treat, 75 Ill. App. 327.

Indiana.— Evansville, etc., R. Co. *v.* Crist, 116 Ind. 446, 19 N. E. 310, 9 Am. St. Rep. 865, 2 L. R. A. 450.

Iowa.— State *v.* Ginger, 80 Iowa 574, 46 N. W. 657, fall of pregnant woman.

Massachusetts.— Stone *v.* Com., 181 Mass. 438, 63 N. E. 1074.

Missouri.— Robinson *v.* St. Louis, etc., R. Co., 103 Mo. App. 110, 77 S. W. 493, increase rather than decrease.

New York.— McClain *v.* Brooklyn City R. Co., 116 N. Y. 459, 22 N. E. 1062; Rosenblatt *v.* Joseph M. Cohen House Wrecking Co., 91 N. Y. App. Div. 413, 86 N. Y. Suppl. 801; Walden *v.* Jamestown, 79 N. Y. App. Div. 433, 80 N. Y. Suppl. 65, 12 N. Y. Annot. Cas. 313; Maher *v.* New York Cent., etc., R. Co., 20 N. Y. App. Div. 161, 46 N. Y. Suppl. 847; Quinn *v.* O'Keeffe, 9 N. Y. App. Div. 68, 41 N. Y. Suppl. 116; Penny *v.* Rochester R. Co., 7 N. Y. App. Div. 595, 40 N. Y. Suppl. 172; Clegg *v.* Metropolitan St. R. Co., 1 N. Y. App. Div. 207, 37 N. Y. Suppl. 130; Magee *v.* Troy, 48 Hun 383, 1 N. Y. Suppl. 24, shorten life.

Texas.— Houston Electric Co. *v.* McDade, (Civ. App. 1904) 79 S. W. 100, that unless a dangerous operation is undergone a person's life expectancy is shortened by half is competent.

permanence[21] and liability to recurrence,[22] and the chance of recovery of the person affected.[23]

e. Qualifications of Witness. In order that a witness may be allowed to state an inference from observation[24] as to medical or surgical matters he must be a

Wisconsin.— Rinehart *v.* Whitehead, 64 Wis. 42, 24 N. W. 401.

Probabilities and conjectures.— Probabilities are proper to be considered in reference to an existing physical condition (Quinn *v.* O'Keeffe, 9 N. Y. App. Div. 68, 41 N. Y. Suppl. 116); but that a given condition "sometimes" produces certain results (Blate *v.* Third Ave. R. Co., 16 N. Y. App. Div. 287, 44 N. Y. Suppl. 615), or a statement of what "might" happen (Briggs *v.* New York Cent., etc., R. Co., 177 N. Y. 59, 69 N. E. 223), or other conjectural estimate, should be excluded. A belief that a disability is permanent, although it may possibly improve to an indefinite extent, is too uncertain to be competent. Loudoun *v.* Eighth Ave. R. Co., 16 N. Y. App. Div. 152, 44 N. Y. Suppl. 742.

Degree of impairment.— While a witness is not at liberty to estimate the damages to which an injured person is entitled (see *supra*, XI, A, 4, c, (III)), he may state the degree of impairment of physical ability in any way he can; as that, if he were examining the party for a pension he would allow him one quarter. Muldraugh's Hill, etc., Turnpike Co. *v.* Maupin, 79 Ky. 101. On the contrary, any evidence of the decreased earning power of the injured person has been excluded. Goodhart *v.* Pennsylvania R. Co., 177 Pa. St. 1, 35 Atl. 191, 55 Am. St. Rep. 705.

21. *Colorado.*— Denver Tramway Co. *v.* Reid, 4 Colo. App. 53, 35 Pac. 269.

Illinois.— Toledo, etc., R. Co. *v.* Baddeley, 54 Ill. 19, 5 Am. Rep. 71.

Indiana.— Carthage Turnpike Co. *v.* Andrews, 102 Ind. 138, 1 N. E. 364, 52 Am. St. Rep. 653; Louisville, etc., R. Co. *v.* Holsapple, 12 Ind. App. 301, 38 N. E. 1107.

Iowa.— McDonald *v.* Illinois Cent. R. Co., 88 Iowa 345, 55 N. W. 102.

Massachusetts.— Rowell *v.* Lowell, 11 Gray 420.

Michigan.— Langworthy *v.* Green Tp., 88 Mich. 207, 50 N. W. 130.

New York.— O'Flaherty *v.* Nassau Electric R. Co., 165 N. Y. 624, 59 N. E. 1128; Mahar *v.* New York Cent., etc., R. Co., 162 N. Y. 633, 57 N. E. 1116; Clegg *v.* Metropolitan St. R. Co., 159 N. Y. 550, 54 N. E. 1089; Ayres *v.* Delaware, etc., R. Co., 158 N. Y. 254, 53 N. E. 22 (holding that reasonable certainty is alone required); Wallace *v.* Vacuum Oil Co., 128 N. Y. 579, 27 N. E. 956; Griswold *v.* New York Cent., etc., R. Co., 115 N. Y. 61, 21 N. E. 726, 12 Am. St. Rep. 775; Turner *v.* Newburgh, 109 N. Y. 301, 16 N. E. 344, 4 Am. St. Rep. 453; Walden *v.* Jamestown, 79 N. Y. App. Div. 433, 80 N. Y. Suppl. 65, 12 N. Y. Annot. Cas. 313; O'Flaherty *v.* Nassau Electric R. Co., 34 N. Y. App. Div. 74, 54 N. Y. Suppl. 96; Cass *v.* Third Ave. R. Co., 20 N. Y. App. Div. 591, 47 N. Y. Suppl. 356; Magee *v.* Troy, 48 Hun 383, 1 N. Y. Suppl. 24; Brown *v.* Third Ave. R. Co., 18 Misc. 584, 42 N. Y. Suppl. 700; Coyne *v.* Manhattan R. Co., 16 N. Y. Suppl. 686.

Oklahoma.— Coyle *v.* Baum, 3 Okla. 695, 41 Pac. 389, poison on horses.

Pennsylvania.— Palmer *v.* Warren St. R. Co., 206 Pa. St. 574, 56 Atl. 49, 63 L. R. A. 507; Com. *v.* Buccieri, 153 Pa. St. 535, 26 Atl. 228, effects of epileptic seizure.

Tennessee.— Jones *v.* White, 11 Humphr. 268.

Texas.— San Antonio, etc., R. Co. *v.* Moore, 31 Tex. Civ. App. 667, 72 S. W. 226.

Utah.— Budd *v.* Salt Lake City R. Co., 23 Utah 515, 65 Pac. 486.

Wisconsin.— Curran *v.* A. H. Stange Co., 98 Wis. 598, 74 N. W. 377.

United States.— Denver, etc., R. Co. *v.* Roller, 100 Fed. 738, 41 C. C. A. 22, 49 L. R. A. 77.

A mere conjecture will be excluded. Paty *v.* Martin, 15 La. Ann. 620. "Liability to be bothered" will not support a verdict for damages for a permanent injury. Collins *v.* Janesville, 99 Wis. 464, 75 N. W. 88. Permanence in the effects of injuries "so far as to be capable of any sort of persistent occupation" is not too speculative. Lehigh, etc., R. Co. *v.* Marchant, 84 Fed. 870, 28 C. C. A. 544.

22. Holman *v.* Union St. R. Co., 114 Mich. 208, 72 N. W. 202; Filer *v.* New York Cent. R. Co., 49 N. Y. 42; Penny *v.* Rochester R. Co., 7 N. Y. App. Div. 595, 40 N. Y. Suppl. 174, wound broke out. But see Cole *v.* Lake Shore, etc., R. Co., 95 Mich. 77, 54 N. W. 638.

23. *Colorado.*— Denver Tramway Co. *v.* Reid, 4 Colo. App. 53, 35 Pac. 269.

Illinois.— People *v.* Johnson, 70 Ill. App. 634.

New York.— Strohm *v.* New York, etc., R. Co., 96 N. Y. 305; Johnson *v.* Broadway, etc., R. Co., 2 Silv. Supreme 532, 6 N. Y. Suppl. 113.

Texas.— Robinson *v.* State, (Cr. App. 1901) 63 S. W. 869, wound.

Utah.— Budd *v.* Salt Lake City R. Co., 23 Utah 515, 65 Pac. 486.

United States.— Lehigh, etc., R. Co. *v.* Marchant, 84 Fed. 870, 28 C. C. A. 544.

24. *In re* Vanauken, 10 N. J. Eq. 186.

The fact of observation may be proved by other evidence than that of the observer. Ft. Worth, etc., R. Co. *v.* Stingle, 2 Tex. App. Civ. Cas. § 704.

Time of observation.— Lapse of time since the observations upon which the skilled observer's inference is based does not necessarily render it irrelevant. Peoria, etc., R. Co. *v.* Berry, 17 Ill. App. 47 (holding that it cannot be judicially determined that a medical expert's opinion, given six months after an examination, is incompetent); Missouri Pac. R. Co. *v.* Lovelace, 57 Kan. 195, 45 Pac. 590 (eighteen months too remote); Missouri Pac.

skilled observer, and mere opportunity for observation, without the technical training necessary to coördinate the observations into a conclusion valuable to the jury, is not sufficient.[25] Any practising or duly qualified physician or surgeon is competent.[26] The witness need not necessarily be a specialist,[27] nor need he have a license to practice,[28] or have been examined by a state board.[29] Reading may be a sufficient basis for an inference as to a specific subject,[30] if accompanied by general professional training.[31] A nurse may or may not be qualified to state an inference as to a medical or surgical matter according to the extent of his or her training and experience and the subject of the inference.[32]

R. Co. *v.* Callahan, (Tex. Sup. 1889) 12 S. W. 833 (two years not ground for exclusion); McGovern *v.* Hays, 75 Vt. 104, 53 Atl. 326, 98 Am. St. Rep. 831.

Opinion at time of trial essential.— In an action for physical injuries, the opinion of a physician who examined plaintiff at the time of the injury as to the probability of his recovery was properly excluded, his opinion at the time of the trial being all that was admissible on a direct examination. McGovern *v.* Hays, 75 Vt. 104, 53 Atl. 326.

25. *Arkansas.*—Redd *v.* State, 63 Ark. 457, 40 S. W. 374.

Connecticut.— Osborne *v.* Troup, 60 Conn. 485, 23 Atl. 157.

Iowa.— Stone *v.* Moore, 83 Iowa 186, 49 N. W. 76.

Maine.— Powers *v.* Mitchell, 77 Me. 361.

Maryland.— Dashiell *v.* Griffith, 84 Md. 363, 35 Atl. 1094.

Mississippi.— Caleb *v.* State, 39 Miss. 721.

New Jersey.— Castner *v.* Sliker, 33 N. J. L. 95.

New York.— Hochstrasser *v.* Martin, 62 Hun 165, 16 N. Y. Suppl. 558 (where a "botanic physician" was rejected); Graves *v.* Santway, 2 Silv. Supreme 67, 6 N. Y. Suppl. 892.

An undertaker in the absence of evidence that he is an expert cannot give his opinion on physiological questions. People *v.* Millard, 53 Mich. 63, 18 N. W. 562.

Record evidence not necessary.— Where a statute requires that the witness should have received a diploma from some incorporated medical society or college, or be a member of a county or state medical society, the witness may be examined orally as to his qualifications. McDonald *v.* Ashland, 78 Wis. 251, 47 N. W. 434.

26. *California.*— People *v.* Durrant, 116 Cal. 179, 48 Pac. 75.

Iowa.— Stone *v.* Moore, 83 Iowa 186, 49 N. W. 76, female physician.

Maine.— Powers *v.* Mitchell, 77 Me. 361.

New Jersey.— Castner *v.* Sliker, 33 N. J. L. 95 [*affirmed* in 33 N. J. L. 507].

New York.— Johnson *v.* Steam Gauge, etc., Co., 72 Hun 535, 25 N. Y. Suppl. 689.

North Dakota.— Tullis *v.* Rankin, 6 N. D. 44, 68 N. W. 187, 66 Am. St. Rep. 586, 35 L. R. A. 449.

Virginia.— Livingston *v.* Com., 14 Gratt. 592.

Washington.— Robinson *v.* Marino, 3 Wash. 434, 28 Pac. 752, 28 Am. St. Rep. 50.

Country doctor.— On a matter assumed to be familiar to all medical practitioners *ex vi termini* the statement of a country doctor is as competent as that of a city physician. Bunel *v.* O'Day, 125 Fed. 303, impotency.

Abandonment of practice; Christian science. It is not material that the practitioner has recently abandoned the practice of medicine and now uses "Christian science" as a means of healing the sick. Stone *v.* Moore, 83 Iowa 186, 49 N. W. 76.

Judging of qualifications.— A physician in performing a professional test is not entitled to have his qualifications judged by practitioners of his own school of medicine. Henslin *v.* Wheaton, 91 Minn. 219, 97 N. W. 882, 64 L. R. A. 126, use of X-rays.

27. Castner *v.* Sliker, 33 N. J. L. 95; O'Neil *v.* Dry Dock, etc., R. Co., 59 N. Y. Super. Ct. 123, 15 N. Y. Suppl. 84, deafness. A physician may testify as to an injury to the eyes, although he is neither a surgeon nor an oculist. Castner *v.* Sliker, *supra*.

28. Sebastian *v.* State, 41 Tex. Cr. 248, 53 S. W. 875; Allen *v.* Voje, 114 Wis. 1, 89 N. W. 924.

29. State *v.* Speaks, 94 N. C. 865. Either for general practice or for some position requiring special skill. Lowe *v.* State, 118 Wis. 641, 96 N. W. 417, examiner in lunacy.

30. Hardiman *v.* Brown, 162 Mass. 585, 39 N. E. 192 (tumors); Marshall *v.* Brown, 50 Mich. 148, 15 N. W. 55; State *v.* Wood, 53 N. H. 484; People *v.* Benham, 160 N. Y. 402, 441, 55 N. E. 11, 14 N. Y. Cr. 188 [*citing* People *v.* Rice, 159 N. Y. 400, 54 N. E. 48]; Johnson *v.* Castle, 63 Vt. 452, 21 Atl. 534, power of procreation.

31. Soquet *v.* State, 72 Wis. 659, 40 N. W. 391.

32. Dashiell *v.* Griffith, 84 Md. 363, 35 Atl. 1094; Com. *v.* Gibbons, 3 Pa. Super. Ct. 408, 39 Wkly. Notes Cas. (Pa.) 565. A nurse who has merely attended a patient suffering from the use of morphine, but who has received no medical education nor any training as a nurse, is not qualified to testify as to whether the symptoms in a certain case of mental derangement were those of acute melancholia or of morphine poisoning (Osborne *v.* Troup, 60 Conn. 485, 23 Atl. 157); and in an action against a physician for alleged negligence in the treatment of a bone-felon on a finger, a woman who nursed the patient, and whose only qualification to speak as an expert was that she had nursed some twenty cases of bone-felons, is not competent to testify as to the depth of the incision made by the physician in lancing the finger from mere observation by the witness of the surface appearance of the finger afterward. (Dashiell

Sufficient qualification must also be shown to entitle a witness to state an inference from observation as to diseases of animals.[33]

13. Mercantile Affairs.[34] One experienced in mercantile affairs may state, under the rule, the inference reached by him from his observation regarding a relevant matter;[35] as the character of negotiable paper,[36] or bank-bills,[37] the deterioration of fruit in transportation,[38] the solvency of a bank with the affairs of which the witness is acquainted,[39] and whether it would be practicable to carry on a particular business under given circumstances.[40] A bookkeeper may testify that a set of books submitted to his examination involves no problems in bookkeeping.[41]

14. Military Affairs. Military men of sufficient experience may testify as to the written and unwritten regulations of the army service.[42]

15. Mining.[43] Special experience may authorize the receipt in evidence of an inference as to mining matters;[44] whether an examination for minerals has been thorough;[45] what an examination reveals as to the presence of minerals;[46] and whether or not a mining superintendent is competent to discharge his duties.[47] The witness may state whether certain mining operations would be possible,[48] whether certain appliances are sufficient for their purposes,[49] to what cause cer-

v. Griffith, 84 Md. 363, 35 Atl. 1094). See also Graves *v.* Santway, 2 Silv. Supreme (N. Y.) 67, 6 N. Y. Suppl. 892. An untechnical inference, however, as to what caused the discoloration of a patient's linen may be stated by an experienced nurse. Com. *v.* Gibbons, 3 Pa. Super. Ct. 408, 39 Wkly. Notes Cas. (Pa.) 565. A surgical nurse may testify as to what disease a familiar operation was intended to relieve (Lund *v.* Masonic L. Assoc., 81 Hun (N. Y.) 287, 30 N. Y. Suppl. 775), or any inferences which a person of ordinary intelligence would be capable of drawing (Metropolitan R. Co. *v.* Martin, 15 App. Cas. (D. C.) 552, healthy physical condition as shown by failure of blood to settle). See also State *v.* Dixon, 47 La. Ann. 1, 16 So. 589.

33. Wisecarver *v.* Long, 120 Iowa 59, 94 N. W. 467; White *v.* Farmers' Mut. F. Ins. Co., 97 Mo. App. 590, 71 S. W. 707. A veterinary surgeon is qualified. Moore *v.* Haviland, 61 Vt. 58, 17 Atl. 725. One who has dissected a horse, and who, although not a veterinary surgeon, has testified that from his experience in dissecting horses he is able to say whether the different organs were in a normal condition, should be allowed to give his opinion on such subject. Wisecarver *v.* Long, 120 Iowa 59, 94 N. W. 467. A practising physician not especially familiar with the diseases of stock may state whether certain symptoms presented by an animal are of long standing. Horton *v.* Green, 64 N. C. 64. An unskilled witness cannot testify as to the cause of a death. White *v.* Farmers' Mut. F. Ins. Co., 97 Mo. App. 590, 71 S. W. 707. Practical experience may, however, be entirely sufficient. Farmers familiar with cows may state their inference as to the cause of death. Slater *v.* Wilcox, 57 Barb. (N. Y.) 604.

34. See also *supra*, XI, B, 2, n; *infra*, XI, G, 2, l.

35. Bartley *v.* State, 53 Nebr. 310, 73 N. W. 744 (bookkeeper); Daniels *v.* Fowler, 123 N. C. 35, 31 S. E. 598; Cochran *v.* U. S., 157 U. S. 286, 15 S. Ct. 628, 39 L. ed. 704.

If suitable qualifications are not shown the witness is rejected. Shauer *v.* Alterton, 151 U. S. 607, 14 S. Ct. 442, 38 L. ed. 286; U. S. *v.* Willard, 28 Fed. Cas. No. 16,698, 1 Paine 539.

36. Cochran *v.* U. S., 157 U. S. 286, 15 S. Ct. 628, 39 L. ed. 704, rediscounted note.

37. Keating *v.* People, 160 Ill. 480, 43 N. E. 724, genuine.

38. Fruit Dispatch Co. *v.* Murphy, 90 Minn. 286, 96 N. W. 83.

39. State *v.* Boomer, 103 Iowa 106, 72 N. W. 424.

40. Belding *v.* Archer, 131 N. C. 287, 42 S. E. 800, lumbering.

41. Crusoe *v.* Clark, 127 Cal. 341, 59 Pac. 700.

Skilled evidence is not needed to explain an account which is not ambiguous (Coe *v.* Nash, (Tex. Civ. App. 1897) 40 S. W. 235; Blanchard *v.* Commercial Bank, 75 Fed. 249, 21 C. C. A. 319), or as to whether a set of accounts can be kept in a certain way (Fry *v.* Provident Sav. L. Assur. Soc., (Tenn. Ch. App. 1896) 38 S. W. 116).

42. Bradley *v.* Arthur, 4 B. & C. 292, 6 D. & R. 413, 10 E. C. L. 585.

43. See also *supra*, XI, B, 2, o; *infra*, XI, G, 2, m.

44. Unless adequate qualification is shown the witness' statement is not relevant. Bennett *v.* Morris, (Cal. 1894) 37 Pac. 929; Garfield M. & M. Co. *v.* Hammer, 6 Mont. 53, 8 Pac. 153.

45. Wells *v.* Leek, 151 Pa. St. 431, 25 Atl. 101, coal.

46. Stambaugh *v.* Smith, 23 Ohio St. 584, coal.

47. Buckalew *v.* Tennessee Coal, etc., Co., 112 Ala. 146, 20 So. 606.

48. Bennett *v.* Morris, (Cal. 1894) 37 Pac. 929.

49. Harvey *v.* Susquehanna Coal Co., 201 Pa. St. 63, 50 Atl. 770, 88 Am. St. Rep. 800.

tain appearances point, as cracking,[50] or the effect of certain acts.[51] The facts on which the inference rests should first be stated,[52] and it is inadmissible if all the facts can be placed before the jury and properly coördinated by them.[53] For analogous reasons, inferences as to other operations involving soil caving may be stated by experienced witnesses.[54]

16. Nautical Affairs.[55] Persons skilled in maritime affairs[56] may testify, under the rule, as to their inferences regarding nautical matters.[57] Thus they may state their inference as to the condition of a vessel, as that she was seaworthy,[58] or that the machinery in a steamboat was properly placed;[59] or with regard to her management, as that she did not carry proper lights,[60] was safely moored,[61] or skilfully handled;[62] whether certain defects were obvious;[63] from what direction a blow came;[64] whether a collision could have been prevented;[65] whether a stream is navigable at a given point;[66] or what was the cause of certain occurrences.[67] It is a limitation upon the reception of this as other inferences that the facts cannot be adequately placed before the jury[68] and that the inference is one which his nautical experience gives him the capacity to draw.[69]

17. Photography. A professional photographer may testify as to whether a photograph is well executed.[70] But one who has never seen a sitter cannot testify from an examination of photographs of him that a certain bust is a good likeness.[71]

50. Clark *v.* Willett, 35 Cal. 534, tunneling.

51. Wells *v.* Davis, 22 Utah 322, 62 Pac. 3, develop mining claim.

52. Wells *v.* Leek, 151 Pa. St. 431, 25 Atl. 101.

53. Davis *v.* Shepherd, 31 Colo. 141, 72 Pac. 57; Colorado Coal, etc., Iron Co. *v.* Lamb, 6 Colo. App. 255, 40 Pac. 251. Whether or not a mining shaft had been sunk with a view of concealing the exact location of a vein was not a proper subject for expert testimony and hence a witness could not give his opinion on this subject. Davis *v.* Shepherd, *supra*.

54. Degenhart *v.* Gent, 97 Ill. App. 145, holding that persons who have experience in excavating the earth and in protecting themselves against its caving may have such a peculiar knowledge of the character of soils and of the best methods of protection, not acquired by common experience, as will render them competent as expert witnesses.

55. See *supra*, XI, B, 2, q; *infra*, XI, G, 2, n.

56. *Illinois.*— Ward *v.* Salisbury, 12 Ill. 369, harbor-master.

Massachusetts.— A. J. Tower Co. *v.* Southern Pac. Co., 184 Mass. 472, 69 N. E. 348.

New York.— Tinney *v.* New Jersey Steamboat Co., 5 Lans. 507, 12 Abb. Pr. N. S. 1, agent.

North Carolina.— Sikes *v.* Paine, 32 N. C. 280, 51 Am. Dec. 389, ship carpenter.

Ohio.— The Clipper *v.* Logan, 18 Ohio 375, master, engineer, and builder.

57. Flandreau *v.* Elsworth, 151 N. Y. 473, 45 N. E. 853 (tonnage of a barge); Sikes *v.* Paine, 32 N. C. 280, 51 Am. Dec. 389; The Clipper *v.* Logan, 18 Ohio 375.

Naval constructor.— One who has worked as a ship carpenter may testify concerning the construction of a vessel. Sikes *v.* Paine, 32 N. C. 280, 51 Am. Dec. 389; Anderson *v.* U. S., 170 U. S. 481, 18 S. Ct. 689, 42 L. ed. 1116. Persons who have been about ships as masters and workmen may testify as to the diminished value of a vessel caused by failure to repair her according to contract. Sikes *v.* Paine, 32 N. C. 280, 51 Am. Dec. 389. An agent experienced on the subject may state that a berth was properly constructed. Tinney *v.* New Jersey Steamboat Co., 5 Lans. (N. Y.) 507, 12 Abb. Pr. N. S. (N. Y.) 1.

58. Baird *v.* Daly, 68 N. Y. 547; Beckwith *v.* Sydebotham, 1 Campb. 116, 10 Rev. Rep. 652; Thornton *v.* Royal Exch. Assur. Co., 1 Peake 25.

The ordinary witness is not qualified to state that a floating dock is seaworthy. Marcy *v.* Sun Mut. Ins. Co., 11 La. Ann. 748.

59. Clark *v.* Detroit Locomotive Works, 32 Mich. 348.

60. Weaver *v.* Alabama Coal Min. Co., 35 Ala. 176.

61. Moore *v.* Westervelt, 9 Bosw. (N. Y.) 558.

62. Ward *v.* Salisbury, 12 Ill. 369; Baltimore Elevator Co. *v.* Neal, 65 Md. 438, 5 Atl. 338; Carpenter *v.* Eastern Transp. Co., 71 N. Y. 574.

63. Cook *v.* Castner, 63 Mass. 266.

64. The Clipper *v.* Logan, 18 Ohio 375.

65. Spickerman *v.* Clark, 9 Hun (N. Y.) 133.

66. Chico Bridge Co. *v.* Sacramento Transp. Co., 123 Cal. 178, 55 Pac. 780.

67. Parsons *v.* Manufacturers' Ins. Co., 16 Gray (Mass.) 463, leaking.

68. Rosenheim *v.* American Ins. Co., 33 Mo. 230, seaworthiness.

69. U. S. Mail Line Co. *v.* Carrollton Furniture Mfg. Co., 101 Ky. 658, 42 S. W. 342, 19 Ky. L. Rep. 833, holding that a captain may not testify as to matters not distinctly nautical, as to how certain glass was broken.

70. Barnes *v.* Ingalls, 39 Ala. 193.

71. Schwartz *v.* Wood, 21 N. Y. Suppl. 1053.

18. Railroading.[72] Adequate experience in the occupations connected with the operation of a railroad may qualify a witness to state an inference from numerous facts observed by him in such a connection.[73] Among such witnesses are those connected with the operating department, as baggage-masters,[74] brakemen,[75] conductors,[76] engineers,[77] firemen,[78] and trackmen.[79] Legitimate subjects for such inferences include the cause of certain appearances[80] or occurrences[81] and the possibility of preventing it;[82] whether the condition of the appliances,[83] premises,[84] road-bed,[85] or rolling-stock[86] was proper; whether a fellow servant is competent;[87] and the effect, necessity,[88] possibility,[89] or propriety[90] of doing cer-

72. See also *supra*, XI, B, 2, r; *infra*, XI, G, 2, o.

73. Evidence of suitable experience is a preliminary to admissibility. Dietrichs *v.* Lincoln, etc., R. Co., 13 Nebr. 361, 13 N. W. 624. The basis of the inference should be stated. San Antonio, etc., R. Co. *v.* Waller, 27 Tex. Civ. App. 44, 65 S. W. 210.

74. Lake Shore, etc., R. Co. *v.* Lassen, 12 Ill. App. 659.

75. Helton *v.* Alabama Midland R. Co., 97 Ala. 275, 12 So. 276; Denver, etc., R. Co. *v.* Smock, 23 Colo. 456, 48 Pac. 681; Price *v.* Richmond, etc., R. Co., 38 S. C. 199, 17 S. E. 732; Ft. Worth, etc., R. Co. *v.* Thompson, 75 Tex. 501, 12 S. W. 742.

76. Louisville, etc., R. Co. *v.* Mothershed, 97 Ala. 261, 12 So. 714; Mobile, etc., R. Co. *v.* Blakely, 59 Ala. 471; Grand Rapids, etc., R. Co. *v.* Huntley, 38 Mich. 537, 31 Am. Rep. 321.

77. Alabama Great Southern R. Co. *v.* Linn, 103 Ala. 134, 15 So. 508; Little Rock, etc., R. Co. *v.* Shoecraft, 56 Ark. 465, 20 S. W. 272 (did all he could to prevent an accident); Terrell *v.* Russell, 16 Tex. Civ. App. 573, 42 S. W. 129; Chicago Great Western R. Co. *v.* Price, 97 Fed. 423, 38 C. C. A. 239.

78. Alabama Great Southern R. Co. *v.* Linn, 103 Ala. 134, 15 So. 508 (stop train); Ft. Worth, etc., R. Co. *v.* Thompson, 75 Tex. 501, 12 S. W. 742; Texas Southern R. Co. *v.* Hart, (Tex. Civ. App. 1903) 73 S. W. 833. It is not improper to ask a fireman a question which the engineer could have answered. Texas Southern R. Co. *v.* Hart, *supra*.

79. Ft. Worth, etc., R. Co. *v.* Wilson, 3 Tex. Civ. App. 583, 24 S. W. 686.

80. Galveston, etc., R. Co. *v.* Briggs, 4 Tex. Civ. App. 515, 23 S. W. 503, (Civ. App. 1895) 30 S. W. 933, dents around a draw-head.

81. Ft. Worth, etc., R. Co. *v.* Thompson, 75 Tex. 501, 12 S. W. 742 (derailment); Chicago Great Western R. Co. *v.* Price, 97 Fed. 423, 38 C. C. A. 239 (part of a train).

A newspaper reporter who has been to the scene of many railroad accidents is not competent to state the cause of the one in question. Hoyt *v.* Long Island R. Co., 57 N. Y. 678.

82. Little Rock, etc., R. Co. *v.* Shoecraft, 56 Ark. 465, 20 S. W. 272; Grimmell *v.* Chicago, etc., R. Co., 73 Iowa 93, 34 N. W. 758; Bellefontaine, etc., R. Co. *v.* Bailey, 11 Ohio St. 333; Morisette *v.* Canadian Pac. R. Co., 76 Vt. 267, 56 Atl. 1102, moving switch farther from the track.

83. Birmingham R., etc., Co. *v.* Baylor, 101 Ala. 488, 13 So. 793 (switch secured); Baltimore, etc., R. Co. *v.* Elliott, 9 App. Cas. (D. C.) 341 (coupling).

84. Cross *v.* Lake Shore, etc., R. Co., 69 Mich. 363, 37 N. W. 361, 13 Am. St. Rep. 399, dangerous.

85. Johnson *v.* Detroit, etc., R. Co., (Mich. 1904) 97 N. W. 760 (cattle-guard sufficient); Grand Rapids, etc., R. Co. *v.* Huntley, 38 Mich. 537, 31 Am. Rep. 321 (ties); St. Louis, etc., R. Co. *v.* Johnston, 78 Tex. 536, 15 S. W. 104; San Antonio, etc., R. Co. *v.* Waller, 27 Tex. Civ. App. 44, 65 S. W. 210 (switch); San Antonio, etc., R. Co. *v.* Brooking, (Tex. Civ. App. 1899) 51 S. W. 537 (safe); Ft. Worth, etc., R. Co. *v.* Wilson, 3 Tex. Civ. App. 583, 24 S. W. 686.

The evidence of ordinary observers has been excluded (Grand Rapids, etc., R. Co. *v.* Huntley, 38 Mich. 537, 31 Am. Rep. 321); and on the contrary an unskilled witness has been allowed to testify *quantum valebat* as to the faulty construction of a railway (Langfitt *v.* Clinton, etc., R. Co., 2 Rob. (La.) 217). On the other hand the inference that the road-bed of a railroad had been put in a reasonably safe condition has been rejected as an inference. People *v.* Detroit, etc., Plank-Road Co., 125 Mich. 366, 84 N. W. 290.

86. Denver, etc., R. Co. *v.* Smock, 23 Colo. 456, 48 Pac. 681; Jones *v.* Shaw, 16 Tex. Civ. App. 290, 41 S. W. 690.

87. Houston, etc., R. Co. *v.* Patton, (Tex. Sup. 1888) 9 S. W. 175, brakeman as to engineer.

88. Kansas City, etc., R. Co. *v.* Lackey, 114 Ala. 152, 21 So. 444, backing train.

89. *Alabama.*—Alabama Great Southern R. Co. *v.* Linn, 103 Ala. 134, 15 So. 508, avert collision.

Arkansas.— Little Rock, etc., R. Co. *v.* Shoecraft, 56 Ark. 465, 20 S. W. 272, prevent collision.

Illinois.— Lake Shore, etc., R. Co. *v.* Lassen, 12 Ill. App. 659, carrying baggage on a particular check.

Kentucky.— Vanarsdall *v.* Louisville, etc., R. Co., 65 S. W. 858, 23 Ky. L. Rep. 1666, stop train.

South Dakota.— Olson *v.* Burlington, etc., R. Co., 21 S. D. 326, 81 N. W. 634, pull a pin without being pinched.

Texas.— Terrell *v.* Russell, 16 Tex. Civ. App. 573, 42 S. W. 129.

Stopping train.— A qualified witness may state that a train could have been stopped sooner than it was. Freeman *v.* Travelers' Ins. Co., 144 Mass. 572, 12 N. E. 372.

90. Texas Southern R. Co. *v.* Hart, (Tex. Civ. App. 1903) 73 S. W. 833.

tain railroad acts. Such a witness may testify as to the adequacy of the means employed for stopping trains[91] and protecting stock of the owners of land abutting on the line.[92] The inference may not require the experience of one engaged in the business. That of an experienced traveler may be based upon sufficient knowledge to be relevant;[93] or the inference of the ordinary unskilled observer may concern a matter within the range of common experience, and so be relevant,[94] in connection with facts observed.[95] Otherwise the statement of the ordinary observer is rejected.[96]

19. Street Railways.[97] Persons acquainted[98] with the management, operation, or appliances of a street railway may state inferences which their experience enables them to draw,[99] as whether certain appliances are safe.[1]

20. Transportation. One suitably qualified[2] may state whether certain goods were properly packed[3] or otherwise in suitable condition for shipment;[4] that a certain transaction amounted to a C. O. D. shipment;[5] what would be proper conduct of the carrier under given circumstances;[6] what was the cause of observed injuries to live stock;[7] or the circumstances under which a given transportation could have taken place in safety.[8] But obvious inferences, such as what constitutes a proper covering, cannot be determined by skilled witnesses.[9]

E. Conclusions of Fact — 1. When Excluded — a. In General. A conclusion of fact,[10] as whether certain acts were necessary,[11] possible,[12] prob-

91. Mobile, etc., R. Co. *v.* Blakely, 59 Ala. 471.

92. A farmer with no experience other than that possessed by any farmer near a railroad cannot testify as to the sufficiency of a cattle-guard. Lake Erie, etc., R. Co. *v.* Helmericks, 38 Ill. App. 141.

93. Missouri Pac. R. Co. *v.* Martin, 2 Tex. App. Civ. Cas. § 655, concussion unusual and unnecessary.

94. Missouri Pac. R. Co. *v.* Jurrard, 65 Tex. 560, safety of track.

95. Birmingham R., etc., Co. *v.* Baylor, 101 Ala. 488, 13 So. 793.

96. International, etc., R. Co. *v.* Kuehn, 2 Tex. Civ. App. 210, 21 S. W. 58, possibility of stopping.

97. See *supra*, XI, B, 2, s; *infra*, XI, G, 2, p.

98. Such knowledge must be affirmatively shown; otherwise the evidence is rejected. Sappenfield *v.* Main St., etc., R. Co., 91 Cal. 48, 27 Pac. 590; Foy *v.* Toledo Consol. St. R. Co., 10 Ohio Cir. Ct. 151, 6 Ohio Cir. Dec. 396, possibility of stopping.

99. Fitts *v.* Cream City R. Co., 59 Wis. 323, 18 N. W. 186.

1. Fitts *v.* Cream City R. Co., 59 Wis. 323, 18 N. W. 186, turntable.

2. Some further evidence will be required of the witness' qualification than his mere statement as a witness that he is an expert (Atchison, etc., R. Co. *v.* Sage, 49 Kan. 524, 31 Pac. 140) or is acquainted with the habits of an animal killed in transportation (Texas etc., R. Co. *v.* Weakly, 2 Tex. App. Civ. Cas. § 827, jack).

3. Shriver *v.* Sioux City, etc., R. Co., 24 Minn. 506, 31 Am. Rep. 353; Ft. Worth, etc., R. Co. *v.* Harlan, (Tex. Civ. App. 1901) 62 S. W. 971, properly packed and iced with a given quantity of ice.

4. Southern Pac. Co. *v.* Arnett, 111 Fed. 849, 50 C. C. A. 17, cattle.

5. Davidson *v.* State, (Tex. Cr. App. 1903) 73 S. W. 808.

6. Lindsley *v.* Chicago, etc., R. Co., 36 Minn. 539, 33 N. W. 7, 1 Am. St. Rep. 692, stock suffering from heat.

7. Schaeffer *v.* Philadelphia, etc., R. Co., 168 Pa. St. 209, 31 Atl. 1088, 47 Am. St. Rep. 884 (mules); Southern Pac. Co. *v.* Arnett, 111 Fed. 849, 50 C. C. A. 17.

8. Louisville, etc., R. Co. *v.* Landers, 135 Ala. 504, 33 So. 482, partitions for cattle.

9. Schwinger *v.* Raymond, 105 N. Y. 648, 11 N. E. 952.

10. Moon *v.* State, 68 Ga. 687; Henry *v.* Stewart, 185 Ill. 448, 57 N. E. 190 [*affirming* 85 Ill. App. 170]; Campbell *v.* Wayne Bldg., etc., Assoc., 51 N. Y. App. Div. 611, 64 N. Y. Suppl. 272; Willis *v.* Sims, (Tex. Civ. App. 1900) 57 S. W. 325.

11. *Alabama.*— Birmingham R., etc., Co. *v.* Jackson, 136 Ala. 279, 34 So. 994; Miller *v.* Mayer, 129 Ala. 434, 26 So. 892, sale of all real estate.

Florida.— Jones *v.* State, 44 Fla. 74, 32 So. 793, position.

Michigan.— Berube *v.* Wheeler, 128 Mich. 32, 87 N. W. 50, build bridge.

New York.— New York Cent. Iron Works Co. *v.* U. S. Radiator Co., 174 N. Y. 331, 66 N. E. 967 [*affirmed* in 74 N. Y. Suppl. 1139]; Tolles *v.* Wood, 99 N. Y. 616, 1 N. E. 251; Fleming *v.* Delaware, etc., Canal Co., 8 Hun 358.

North Carolina.— Raynor *v.* Wilmington Seacoast R. Co., 129 N. C. 195, 39 S. E. 821.

Tennessee.— Fry *v.* New York Provident Sav. L. Assur. Soc., (Ch. App. 1896) 38 S. W. 116.

Texas.— Mayton *v.* Sonnefield, (Civ. App. 1898) 48 S. W. 608.

12. *Alabama.*— Western R. Co. *v.* Arnett, 137 Ala. 414, 34 So. 997; Bessemer Land, etc., Co. *v.* Campbell, 125 Ala. 50, 25 So. 793, 77 Am. St. Rep. 17 (do anything more); Ala-

able,[13] proper,[14] sufficient,[15] or voluntary;[16] whether a physical[17] or a mental state, as knowledge[18] or influence,[19] existed; the cause of certain results;[20] to whom credit was given;[21] what was a person's financial condition;[22] or whether danger was presented,[23] and similar inferences reached by aid of the reasoning faculty,[24]

bama Great Southern R. Co. *v.* Linn, 103 Ala. 134, 15 So. 508 (hearing); Bennett *v.* State, 52 Ala. 370 (leave room without knowledge of witness).

Illinois.—Springfield Consol. R. Co. *v.* Puntenney, 200 Ill. 9, 65 N. E. 442 (do anything more); Chicago, etc., R. Co. *v.* O'Sullivan, 143 Ill. 48, 32 N. E. 398 (hearing); Sahlinger *v.* People, 102 Ill. 241 (leave house without knowledge).

Indiana.— Indiana, etc., R. Co. *v.* Hale, 93 Ind. 79 (properly fenced); Insurance Co. of North America *v.* Osborn, 26 Ind. App. 88, 59 N. E. 181 (move goods from a burning building).

Louisiana.— Poutz *v.* Jones, 21 La. Ann. 726.

Massachusetts.— Crowley *v.* Appleton, 148 Mass. 98, 18 N. E. 675; Com. *v.* Collier, 134 Mass. 203, determine percentage of alcohol by taste.

Montana.— Bramlett *v.* Flick, 23 Mont. 95, 57 Pac. 869, locate survey on ground.

New York.— Peck *v.* New York Cent., etc., R. Co., 165 N. Y. 347, 59 N. E. 206, set fires by sparks.

Vermont.— McGovern *v.* Hays, 75 Vt. 104, 53 Atl. 326, anything more.

Contra.— Hoffman *v.* Metropolitan St. R. Co., 51 Mo. App. 273, seeing.

13. *California.*—People *v.* Worden, 113 Cal. 569, 45 Pac. 844.

Illinois.— Wrisley Co. *v.* Burke, 203 Ill. 250, 67 N. E. 818; Coffeen *v.* Lang, 67 Ill. App. 359, would have observed a defect.

Indiana.— Rains *v.* State, 152 Ind. 69, 52 N. E. 450, effect of firearms.

Iowa.— Sachra *v.* Manilla, 120 Iowa 562, 95 N. W. 198.

Louisiana.— State *v.* Austin, 104 La. 409, 29 So. 23, killing brother.

Massachusetts.— Com. *v.* Cooley, 6 Gray 350.

14. Dallas *v.* Sellers, 17 Ind. 479, 79 Am. Dec. 489; Merritt *v.* Seaman, 6 N. Y. 168.

15. *Alabama.*— Miller *v.* Mayer, 124 Ala. 434, 26 So. 892, property to pay debts.

Illinois.— Illinois Cent. R. Co. *v.* Blye, 43 Ill. App. 612 (opportunity); Chicago, etc., R. Co. *v.* O'Brien, 34 Ill. App. 155 (fence).

Indiana.— Bohr *v.* Neuenschwander, 120 Ind. 449, 22 N. E. 416, drain land.

Iowa.— Cahow *v.* Chicago, etc., R. Co., 113 Iowa 224, 84 N. W. 1056; Winch *v.* Baldwin, 68 Iowa 764, 28 N. W. 62, protection to stock.

Michigan.— Cowley *v.* Colwell, 91 Mich. 537, 52 N. W. 73 (fire apparatus); McNally *v.* Colwell, 91 Mich. 527, 52 N. W. 70, 30 Am. St. Rep. 494; Smead *v.* Lake Shore, etc., R. Co., 58 Mich. 200, 24 N. W. 761 (cattle-guard).

Minnesota.— Sowers *v.* Dukes, 8 Minn. 23, fence.

Mississippi.— Kansas City, etc., R. Co. *v.* Spencer, 72 Miss. 491, 17 So. 168, cattle-guards.

South Carolina.— Easler *v.* Southern R. Co., 59 S. C. 311, 37 S. E. 938, time to alight from train.

16. Gabbey *v.* Forgeus, 38 Kan. 62, 15 Pac. 866, forced to sign.

17. People *v.* Barker, 1 N. Y. App. Div. 532, 37 N. Y. Suppl. 555.

18. Roehl *v.* Baasen, 8 Minn. 26; Allen *v.* Rodgers, 70 Hun (N. Y.) 48, 23 N. Y. Suppl. 1071.

19. Peck *v.* Small, 35 Minn. 465, 29 N. W. 69; Kerr *v.* Lumsford, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668.

20. Wright *v.* Com., 72 S. W. 340, 24 Ky. L. Rep. 1838 (any cause); Wittman *v.* New York, 80 N. Y. App. Div. 585, 80 N. Y. Suppl. 1022; Stanley *v.* State, 44 Tex. Cr. 606, 73 S. W. 400 (abortion); Taylor *v.* State, 41 Tex. Cr. 148, 51 S. W. 1106 (wounds and death); Nichols *v.* Oregon Short Line R. Co., 25 Utah 240, 70 Pac. 996 (sleeplessness).

21. Danforth *v.* Carter, 4 Iowa 230; Walker *v.* Moors, 125 Mass. 352; Merritt *v.* Briggs, 57 N. Y. 651; Drew *v.* Longwell, 81 Hun (N. Y.) 144, 30 N. Y. Suppl. 733, 1 N. Y. Annot. Cas. 67.

22. Wolfson *v.* Allen Bros. Co., 120 Iowa 455, 94 N. W. 910.

23. Langhammer *v.* Manchester, 99 Iowa 295, 68 N. W. 688; State *v.* Austin, 104 La. 409, 29 So. 23; Betts *v.* Gloversville, 8 N. Y. Suppl. 795; State *v.* Rhoads, 29 Ohio St. 171; Stillwater Turnpike Co. *v.* Coover, 26 Ohio St. 520.

24. *Alabama.*— Hill *v.* State, 137 Ala. 66, 34 So. 406 (tried to kill); Holmes *v.* State, 136 Ala. 80, 34 So. 180; White *v.* State, 136 Ala. 58, 34 So. 177 (how long dead); Birmingham R., etc., Co. *v.* Ellard, 135 Ala. 433, 33 So. 276 (injurious tendency); Hollis *v.* State, 123 Ala. 74, 26 So. 231; Baker *v.* State, 122 Ala. 1, 26 So. 194; Alabama Great Southern R. Co. *v.* Burgess, 114 Ala. 587, 22 So. 169 (brake applied); Richardson *v.* Stringfellow, 100 Ala. 416, 14 So. 283; Johnson *v.* State, 94 Ala. 85, 10 So. 509 (mistake); Montgomery, etc., R. Co. *v.* Mallette, 92 Ala. 209, 9 So. 363; Bass Furnace Co. *v.* Glasscock, 82 Ala. 452, 2 So. 315, 60 Am. Rep. 748 (mismanaged); State *v.* Houston, 78 Ala. 576, 56 Am. Rep. 59 (robbery a real one); Minniece *v.* Jeter, 65 Ala. 222 (beneficial nature of services); *In re* Carmichael, 36 Ala. 514 (control); Saltmarsh *v.* Bower, 34 Ala. 613 (loan); Rembert *v.* Brown, 14 Ala. 360 (take advantage).

Arkansas.— Joyce *v.* State, 62 Ark. 510, 36 S. W. 908, "cross himself."

California.— Spreckels *v.* Butler, 128 Cal. 645, 61 Pac. 378 (loan); Berliner *v.* Travelers' Ins. Co., 121 Cal. 451, 53 Pac. 922 (payment of premium "excused"); People *v.* Bidleman, 104 Cal. 608, 38 Pac. 502 (man-

cannot be stated by a witness unless a satisfactory reason for admitting it is affirmatively shown. An additional reason for rejecting the conclusion is furaged business); Whitmore *v.* Ainsworth, (1894) 38 Pac. 196; Burlingame *v.* Rowland, 77 Cal. 315, 19 Pac. 526, 1 L. R. A. 829.

Colorado.— Charles *v.* Amos, 10 Colo. 272, 15 Pac. 417.

Connecticut.— Chatfield *v.* Bunnell, 69 Conn. 511, 37 Atl. 1074 (two conversations similar); Lovell *v.* Hammond Co., 66 Conn. 500, 34 Atl. 511 (any ground).

Georgia.— Acme Brewing Co. *v.* Central R., etc., Co., 115 Ga. 494, 42 S. E. 8 (that a possession was notorious); Lowman *v.* State, 109 Ga. 501, 34 S. E. 1019 (time had come to run or fight); Atlanta St. R. Co. *v.* Walker, 93 Ga. 462, 21 S. E. 48 (permanence of injuries); Dowdy *v.* Georgia R. Co., 88 Ga. 726, 16 S. E. 62 (where the court said: "You can show all the facts, and it is for the jury to draw conclusions from the facts"); Travelers' Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18 (death).

Illinois.— Hoehn *v.* Chicago, etc., R. Co., 152 Ill. 223, 38 N. E. 549 (cause of conduct); Johnson *v.* Glover, 121 Ill. 283, 12 N. E. 257 (guaranty); Evans *v.* Dickey, 117 Ill. 291, 7 N. E. 263 ("employed"); German F. Ins. Co. *v.* Grunert, 112 Ill. 68, 1 N. E. 113 (misrepresentation); Fairbury *v.* Rogers, 98 Ill. 554 (sidewalk safe); Illinois Steel Co. *v.* McNulty, 105 Ill. App. 594; Harrison *v.* Trickett, 57 Ill. App. 515 ("object"); Parish *v.* Hendrickson, 50 Ill. App. 329 ("lied").

Indiana.— Dickey *v.* Shirk, 128 Ind. 278, 27 N. E. 733; Crim *v.* Fleming, 123 Ind. 438, 24 N. E. 358 (worthless); Staser *v.* Hogan, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990.

Iowa.— Perry *v.* Clarke County, 120 Iowa 96, 94 N. W. 454 ("without trouble"); State *v.* Pasnau, 118 Iowa 501, 92 N. W. 682 (acting together); Swanson *v.* Keokuk, etc., R. Co., 116 Iowa 304, 89 N. W. 1088; Chew *v.* O'Hara, 110 Iowa 81, 81 N. W. 157 (whom an attorney represented); State *v.* Heacock, 106 Iowa 191, 76 N. W. 654 (libel true); Ward *v.* Dickson, 96 Iowa 708, 65 N. W. 997 ("bought"); Oberholtzer *v.* Hazen, 92 Iowa 602, 61 N. W. 365 (seemed to be manager); McCormick Harvesting Mach. Co. *v.* Brower, 88 Iowa 607, 55 N. W. 537; Spears *v.* Mt. Ayr, 66 Iowa 721, 24 N. W. 504 (sidewalk not good); Locke *v.* Sioux City, etc., R. Co., 46 Iowa 109; Tisdale *v.* Connecticut Mut. L. Ins. Co., 28 Iowa 12.

Kansas.— State *v.* Asbell, 57 Kan. 398, 46 Pac. 770 (results of lawyer's advice); Moyer *v.* Knapp, 9 Kan. App. 226, 59 Pac. 674 (whose money paid a loan).

Massachusetts.— Plunger Elevator Co. *v.* Day, 184 Mass. 130, 68 N. E. 16 (approved); Com. *v.* Burton, 183 Mass. 461, 67 N. E. 419 (seriously injured); O'Donnell *v.* Pollock, 170 Mass. 441, 49 N. E. 745 (kept a dog); Robbins *v.* Atkins, 168 Mass. 45, 46 N. E. 425 (control); Robinson *v.* Fitchburg, etc., R. Co., 7 Gray 92 (only way to do something).

Michigan.— Brown *v.* Kennedy, 131 Mich. 464, 93 N. W. 1073 (fair appearing paper); Dompier *v.* Lewis, 131 Mich. 144, 91 N. W. 152 (how long a hammer had been in the process of chipping); Smaltz *v.* Boyce, 109 Mich. 382, 69 N. W. 21 (that one fire started from another).

Minnesota.— Veum *v.* Sheeran, 88 Minn. 257, 92 N. W. 965; Davis *v.* Hamilton, 88 Minn. 64, 92 N. W. 512 (libel true); Moldenhauer *v.* Minneapolis St. R. Co., 80 Minn. 426, 83 N. W. 381 (better light).

Missouri.— State *v.* Terry, 172 Mo. 213, 72 S. W. 513 (no fault); Shaefer *v.* Missouri Pac. R. Co., 98 Mo. App. 445, 72 S. W. 154 (only injury); Stinde *v.* Blesch, 42 Mo. App. 578.

Nebraska.— Bullard *v.* Laughlin, (1903) 96 N. W. 159; Orcutt *v.* Polsley, 59 Nebr. 575, 81 N. W. 616 (what is covered by an assessment); Burkholder *v.* Fonner, 34 Nebr. 1, 51 N. W. 293 (who sold).

New York.— Ivory *v.* Deerpark, 116 N. Y. 476, 22 N. E. 1080; Nicolay *v.* Unger, 80 N. Y. 54 (sold); Woarms *v.* Becker, 84 N. Y. App. Div. 491, 82 N. Y. Suppl. 1086 (first-class job); Smith *v.* Castle, 81 N. Y. App. Div. 638, 81 N. Y. Suppl 18 (balance of account); United Press *v.* A. S. Abell Co., 79 N. Y. App. Div. 550, 80 N. Y. Suppl. 454 (contract transferred); Vaughn *v.* Strong, 66 Hun 273, 21 N. Y. Suppl. 550; Cole *v.* Roby, 58 Hun 601, 11 N. Y. Suppl. 257 (mistake); Dunn *v.* Ultsch, 2 Misc. 211, 21 N. Y. Suppl. 262 (machine accurate); Sternberger *v.* Metropolitan El. R. Co., 2 Misc. 113, 20 N. Y. Suppl. 857 (used best endeavors); M. S. Huey Co. *v.* Rothfeld, 84 N. Y. Suppl. 883 (doing business in the state); Gibbons *v.* Russell, 13 N. Y. Suppl. 879; Sawyer *v.* Thurber, 14 N. Y. Civ. Proc. 204.

North Dakota.— Fisher *v.* Betts, 12 N. D. 197, 96 N. W. 132 (absence of records); Red River Valley Nat. Bank *v.* Monson, 11 N. D. 423, 92 N. W. 807 (exercise ownership).

Pennsylvania.— Dooner *v.* Delaware, etc., Canal Co., 164 Pa. St. 17, 30 Atl. 269, instructions.

South Carolina.—Rapley *v.* Klugh, 40 S. C. 134, 18 S. E. 680; Meade *v.* Carolina Nat. Bank, 26 S. C. 608, 1 S. E. 419.

Tennessee.— Brown *v.* Odill, 104 Tenn. 250, 56 S. W. 840, 78 Am. St. Rep. 914, 52 L. R. A. 660, engagement broken off.

Texas.— Odom *v.* Woodward, 74 Tex. 41, 11 S. W. 925; Curtis *v.* State, (Cr. App. 1900) 59 S. W. 263 (avoided meeting a certain person); Bennett *v.* State, 39 Tex. Cr. 639, 48 S. W. 61 (investigated everybody); Berry *v.* State, 37 Tex. Cr. 44, 38 S. W. 812 (calf recognizing cow); Petteway *v.* State, 36 Tex. Cr. 97, 35 S. W. 646 (evasion of law); Barnard *v.* State, (Cr. App. 1903) 73 S. W. 957 (shooting not accidental); Houston, etc., R. Co. *v.* Rippetoe, (Civ. App. 1901) 64 S. W. 1016 (cause of accident); Arndt *v.* Boyd, (Civ. App. 1898) 48 S. W. 771 (managing a business); Hintze *v.* Krabbenschmidt, (Civ. App. 1897) 44 S. W. 38 (claimed land); Philadelphia F. Assoc. *v.* Jones, (Civ. App.

nished where it cannot reasonably be reached upon the subsidiary facts claimed to support it,[25] where such facts are themselves the result of inference,[26] or where the conclusion is not a necessary one,[27] or is irrelevant to the inquiry.[28]

b. Suppositions. A mere supposition as to what would have happened if something had occurred which did not,[29] or something had not occurred which

1897) 40 S. W. 44 (connection with a transaction); League *v.* Henecke, (Civ. App. 1894) 26 S. W. 729 (set apart); Marshall *v.* McAllister, 22 Tex. Civ. App. 214, 54 S. W. 1068 (where travelers were "expected" to cross a bridge).

Virginia.—Childress *v.* Chesapeake, etc., R. Co., 94 Va. 186, 26 S. E. 424.

Washington.— Stossel *v.* Van de Vanter, 16 Wash. 9, 47 Pac. 221 (to what reference was made); State *v.* Coella, 8 Wash. 512, 36 Pac. 474 (scuffle).

Wisconsin.— Sell *v.* Mississippi River Logging Co., 88 Wis. 581, 60 N. W. 1065, instructions.

England.— Ramadge *v.* Ryan, 9 Bing. 333, 2 Moore & S. 421, 2 L. J. C. P. 7, 23 E. C. L. 604 (discharged his professional duty); Sills *v.* Brown, 9 C. & P. 601, 38 E. C. L. 351.

The real ground of the exclusion at times is that the evidence is irrelevant. Dlabola *v.* Manhattan R. Co., 15 Daly (N. Y.) 470, 8 N. Y. Suppl. 334; Girdner *v.* Walker, 1 Heisk. (Tenn.) 186.

25. Winterringer *v.* Warder, etc., Co., 1 Nebr. (Unoff.) 413, 414, 95 N. W. 619; Gray *v.* Brooklyn Heights R. Co., 175 N. Y. 448, 67 N. E. 899 [*reversed* in 72 N. Y. App. Div. 424, 76 N. Y. Suppl. 20].

26. Gray *v.* Brooklyn Heights R. Co., 175 N. Y. 448, 67 N. E. 899 [*reversed* in 72 N. Y. App. Div. 424, 76 N. Y. Suppl. 20].

27. Chicago, etc., R. Co. *v.* Holmes, (Nebr. 1903) 94 N. W. 1007.

28. Arnold *v.* Cofer, 135 Ala. 364, 33 So. 539. Where a conclusion is as to the existence of a fact not shown to be within the knowledge of the witness it will not support a verdict. Traders' Ins. Co. *v.* Herber, 67 Minn. 106, 69 N. W. 701.

29. *Alabama.*— Louisville, etc., R. Co. *v.* Banks, 132 Ala. 471, 31 So. 573; Weed *v.* Martin, 89 Ala. 587, 8 So. 132 (credited too large an amount); Garrett *v.* Trabue, 82 Ala. 227, 3 So. 149; Baker *v.* Trotter, 73 Ala. 277; Herring *v.* Skaggs, 62 Ala. 180, 34 Am. Rep. 4; Gibson *v.* Hatchett, 24 Ala. 201 (aperture closed); Otis *v.* Thom, 23 Ala. 469, 58 Am. Dec. 303 (returned to render assistance); Mosely *v.* Wilkinson, 14 Ala. 812 (another physician been called).

Connecticut.— Butler *v.* Cornwall Iron Co., 22 Conn. 335, work been done.

Georgia.— Delegal *v.* State, 109 Ga. 518, 35 S. E. 105; Kendrick *v.* Central R., etc., Co., 89 Ga. 782, 15 S. E. 685, engineer attended to signals.

Illinois.— Phenix Ins. Co. *v.* Mills, 89 Ill. App. 58, opened a door.

Indiana.— Hinshaw *v.* State, 147 Ind. 334, 47 N. E. 157; Reese *v.* Bolton, 6 Blackf. 185; Lake Erie, etc., R. Co. *v.* Juday, 19 Ind. App. 436, 49 N. E. 843.

Kansas.— Kansas Pac. R. Co. *v.* Peavey, 29 Kan. 169, 44 Am. Rep. 630, proper speed.

Kentucky.— James *v.* Hayden, 10 Ky. L. Rep. 534.

Maine.— Bunker *v.* Gouldsboro, 81 Me. 188, 16 Atl. 543.

Maryland.—Tall *v.* Baltimore Steam Packet Co., 90 Md. 248, 44 Atl. 1007, 47 L. R. A. 120 (captain intervened promptly); Scaggs *v.* Baltimore, etc., R. Co., 10 Md. 268.

Massachusetts.—Arnold *v.* Eastman Freight-Car Heater Co., 176 Mass. 135, 57 N. E. 209, inspected staging.

Minnesota.— Hathaway *v.* Brown, 22 Minn. 214.

New York.— People *v.* Rodawald, 177 N. Y. 408, 70 N. E. 1 (known that a person had been in prison); Cosgrove *v.* Metropolitan St. R. Co., 173 N. Y. 628, 66 N. E. 1106 [*affirming* 74 N. Y. App. Div. 166, 77 N. Y. Suppl. 624] (stopped when warned).

Ohio.— Massachusetts L. Ins. Co. *v.* Eshelman, 30 Ohio St. 647.

Pennsylvania.— Murphy *v.* Prudential Ins. Co., 205 Pa. St. 444, 55 Atl. 19; U. S. Telegraph Co. *v.* Wenger, 55 Pa. St. 262, 93 Am. Dec. 751.

South Carolina.— Carson *v.* Southern R. Co., 68 S. C. 55, 46 S. E. 525 (defect in machinery reported); Welch *v.* Clifton Mfg. Co., 55 S. C. 568, 33 S. E. 739.

Texas.— Hilje *v.* Hettich, 95 Tex. 321, 67 S. W. 90 (more light); Willis *v.* McNeill, 57 Tex. 465; Von Diest *v.* San Antonio Traction Co., (Civ. App. 1903) 77 S. W. 632 (conductor could have stopped a car in time if he had been on rear platform of motor car or front platform of the trailer); Gulf, etc., R. Co. *v.* Colbert, (Civ. App. 1895) 31 S. W. 332.

Virginia.— Norfolk, etc., R. Co. *v.* Suffolk Lumber Co., 92 Va. 413, 23 S. E. 737.

Wisconsin.— Hill *v.* American Surety Co., 107 Wis. 19, 81 N. W. 1024, 82 N. W. 691, applied for insurance.

Illustrations.— A witness may testify that if he had received a certain telegram he could and would have done something (Western Union Tel. Co. *v.* Carver, 15 Tex. Civ. App. 547, 39 S. W. 1021, purchase cattle), or that if something had happened (Howland *v.* Oakland Consol. St. R. Co., 115 Cal. 487, 47 Pac. 255, driver been at post; Galloway *v.* San Antonio, etc., R. Co., (Tex. Civ. App. 1903) 78 S. W. 32, signal been observed; International, etc., R. Co. *v.* Newburn, (Tex. Civ. App. 1900) 58 S. W. 542 [*affirmed* in 94 Tex. 310, 60 S. W. 429], had thought differently), certain things would have also occurred. A female plaintiff suing for alienation of her husband's affections may be asked whether her husband could not have lived with her if she had been willing to live on

did,[30] or whether a certain thing could have happened under certain circumstances, which the witness says did not exist,[31] will be rejected as involving too large an element of conjecture, even where the fact would be relevant and not within the province of the jury.

c. Understanding. As the meaning of the language used in a written contract,[32] deed,[33] letter,[34] or other writing[35] is a question for the court, a witness cannot state his understanding of it.[36] As the meaning of common words in the vernacular is within the judicial cognizance of the court and jury,[37] it necessarily follows that a witness will not be allowed to state the meaning of such words,[38]

defendant's (her father-in-law's) farm. Derham *v.* Derham, 125 Mich. 109, 83 N. W. 1005.

30. *Maine.*— Palmer *v.* Pinkham, 33 Me. 32.

Michigan.— Darling *v.* Thompson, 108 Mich. 215, 65 N. W. 754.

New York.— Kochmann *v.* Baumeister, 73 N. Y. App. Div. 309, 76 N. Y. Suppl. 769, how many goods a salesman would have sold if he had not been discharged.

North Carolina.— Cogdell *v.* Wilmington, etc., R. Co., 130 N. C. 313, 41 S. E. 541, person could have stood on a platform if it had not been unsound.

Tennessee.— Cumberland Tel., etc., Co. *v.* Dooley, (Sup. 1903) 72 S. W. 457.

Vermont.— Crane *v.* Northfield, 33 Vt. 124.

Washington.— Martin *v.* Sunset Telephone, etc., Co., 18 Wash. 260, 51 Pac. 376, witness been present.

West Virginia.— Taylor *v.* Baltimore, etc., R. Co., 33 W. Va. 39, 10 S. E. 29.

United States.— L. Bucki, etc., Lumber Co. *v.* Atlantic Lumber Co., 121 Fed. 233, 57 C. C. A. 469.

31. American Express Co. *v.* Risley, 77 Ill. App. 476 (step over something without noticing it); Coffeen *v.* Lang, 67 Ill. App. 359; Tuttle *v.* Lawrence, 119 Mass. 276.

The inference is admissible where the possibility involved depends on obvious natural causes, not involving in excess the element of speculation (G. B. & L. R. Co. *v.* Eagles, 9 Colo. 544, 13 Pac. 696, renting a house; Island Coal Co *v.* Neal, 15 Ind. App. 12, 42 N. E. 953, 43 N. E. 463, propping the roof of a coal mine; Fonda *v.* St. Paul City R. Co., 77 Minn. 336, 79 N. W. 1043; Gosa *v.* Southern R. Co., 67 S. C. 347, 45 S. E. 810, would have heard signals; Western Union Tel. Co. *v.* Mitchell, 91 Tex. 454, 44 S. W. 274, 66 Am. St. Rep. 906, 40 L. R. A. 209), as whether anything could have happened (Barr *v.* Post, 56 Nebr. 698, 77 N. W. 123, not seen if present; Finch *v.* Phillips, 41 Wis. 387, horse had a spavin) and the witness not have known it (see *supra*, XI, C, 4, b), or where there is a definite probability depending upon a few fixed facts, as whether a passenger's attention would not be upon the car which he proposed to take (Pennsylvania R. Co. *v.* Henderson, 51 Pa. St. 315. See *infra*, XI, E, 2, d).

32. *Alabama.*— Crosby *v.* Montgomery, 108 Ala. 498, 18 So. 723.

Connecticut.— Fuller *v.* Metropolitan L. Ins. Co., 70 Conn. 647, 41 Atl. 4.

Iowa.— Chicago University *v.* Emmert, 108 Iowa 500, 79 N. W. 285.

Maryland.— Washington F. Ins. Co. *v.* Davison, 30 Md. 91, "carpenters."

Minnesota.—Cargill *v.* Thompson, 57 Minn. 534, 59 N. W. 638.

Mississippi.— Groton Bridge, etc., Co. *v.* Alabama, etc., R. Co., 80 Miss. 162, 31 So. 739.

Missouri.— Fruin *v.* Crystal R. Co., 89 Mo. 397, 14 S. W. 557, solid rock.

North Carolina.— Richardson *v.* Wilmington, etc., R. Co., 126 N. C. 100, 35 S. E. 235.

33. Jackson *v.* Benson, 54 Iowa 654, 7 N. W. 97; Bennett *v.* Clemence, 6 Allen (Mass.) 10; Frey *v.* Drahos, 6 Nebr. 1, 29 Am. Rep. 353; Ashton *v.* Ashton, 11 S. D. 610, 79 N. W. 1001.

34. Elwell *v.* Walker, 52 Iowa 256, 3 N. W. 64; Baltimore *v.* War, 77 Md. 593, 27 Atl. 85; Clarke *v.* Springfield Second Nat. Bank, 177 Mass. 257, 59 N. E. 121; Girdner *v.* Walker, 1 Heisk. (Tenn.) 186, counseled arrest.

35. *Florida.*— Edwards *v.* Rives, 35 Fla. 89, 17 So. 416.

Georgia.— South Carolina Bank *v.* Brown, Dudley 62.

Iowa.— Barrett *v.* Wheeler, 71 Iowa 662, 33 N. W. 230.

Maryland.— Black *v.* Westminster First Nat. Bank, 96 Md. 399, 54 Atl. 88.

Missouri.— Davidson *v.* Supreme Lodge K. of P., 22 Mo. App. 263, by-laws.

New York.— People *v.* Parr, 42 Hun 313 (libel); R. M. Gilmour Mfg. Co. *v.* Cornell, 26 Misc. 752, 57 N. Y. Suppl. 81 (order for mechanical work).

Pennsylvania.— Woodburn *v.* Farmers', etc., Bank, 5 Watts & S. 447, levy.

Texas.— Thompson-Houston Electric Co. *v.* Berg, 10 Tex. Civ. App. 200, 30 S. W. 454.

36. See the cases cited in the preceding notes.

An interpreter of a foreign document cannot state what he understands it to mean. That is for the court of the forum. Stearine-Kaarsen Fabrick Gonda Co. *v.* Hentzman, 17 C. B. N. S. 56, 10 Jur. N. S. 881, 11 L. T. Rep. N. S. 272, 112 E. C. L. 56.

37. See *supra*, II, B, 17.

The meaning of foreign words or phrases may be proved, as facts, by those acquainted with the language. Colombia *v.* Cauca Co., 113 Fed. 1020, 51 C. C. A. 604.

38. *Alabama.*— Doe *v.* Beck, 108 Ala. 71, 19 So. 802.

California.— People *v.* French, 69 Cal. 169,

figures,[39] phrases,[40] or statements.[41] Nor can a witness state the effect on his mind of a written instrument or what he understood by it,[42] what he understood it to cover,[43] or what was the intention or understanding on which it was executed.[44] Where verbal testimony is admissible to show the contents of a written instrument,[45] the language itself, or the substance of it, should be stated.[46] When this has been done, the witness may state what he understood by it.[47] For analogous reasons a witness cannot give the impression made on him by verbal statements.[48]

10 Pac. 378; People *v.* French, (1885) 7 Pac. 822; People *v.* Moan, 65 Cal. 532, 4 Pac. 545.

Florida.— Dixon *v.* State, 13 Fla. 636, declarations by person accused of crime.

Georgia.— Wylly *v.* Gazan, 69 Ga. 506.

Indiana.— Haxton *v.* McClaren, 132 Ind. 235, 31 N. E. 48; Adams *v.* Main, 3 Ind. App. 232, 29 N. E. 792, 50 Am. St. Rep. 266.

Maine.— Whitman *v.* Freese, 23 Me. 185.

Minnesota.— Berkey *v.* Judd, 22 Minn. 287.

Mississippi.— Rodgers *v.* Kline, 56 Miss. 808, 31 Am. Rep. 389.

New Hampshire.— Atty.-Gen. *v.* Dublin, 38 N. H. 459.

Pennsylvania.— McCue *v.* Ferguson, 73 Pa. St. 333.

England.— Daines *v.* Hartley, 3 Exch. 200, 12 Jur. 1093.

If unable to remember the language itself a witness may state the substance of what was said (Hewitt *v.* Clark, 91 Ill. 605), and he should be required to do so rather than state whether a witness who gives the language is mistaken in his recollection (Johnson *v.* State, 94 Ala. 35, 10 So. 667).

Where a witness uses certain expressions there is no legal objection to inquiring what he means by it (Doe *v.* Beck, 108 Ala. 71, 19 So. 802) or in what sense he uses a word (State *v.* Peel, 23 Mont. 358, 59 Pac. 169, 75 Am. St. Rep. 529, insanity), and a witness can state that he knows what a given expression (Miller *v.* Butler, 6 Cush. (Mass.) 71, 52 Am. Dec. 768; International, etc., R. Co. *v.* Telephone, etc., Co., 69 Tex. 277, 5 S. W. 517, 5 Am. St. Rep. 45, "work" a train) means. See also *supra*, XI, B, 2, u.

39. Harris *v.* Ansonia, 73 Conn. 359, 47 Atl. 672 (forbidding an engineer to state that he should infer from the absence of minutes from the courses run by another engineer fifty years before that fractions had been disregarded, although proof of a custom at that time to disregard fractions would be competent); Kux *v.* Central Michigan Sav. Bank, 93 Mich. 511, 53 N. W. 828.

40. Schwartz *v.* Wilmer, 90 Md. 136, 44 Atl. 1059 ("protest waived"); Harrington *v.* Smith, 138 Mass. 92 (horsepower); Reid *v.* Piedmont, etc., L. Ins. Co., 58 Mo. 421 (family physician); Nashville, etc., R. Co. *v.* Carroll, 6 Heisk. (Tenn.) 347 (obstruction); Fry *v.* New York Provident Sav. L. Assur. Soc., (Tenn. Ch. App. 1896) 38 S. W. 116 ("persistent policy-holder").

41. Lawrence *v.* Thompson, 26 N. Y. App. Div. 308, 49 N. Y. Suppl. 839.

42. *Indiana.*— Wiggins *v.* Holley, 11 Ind. 2.

New York.— Mills *v.* New York Cent., etc., R. Co., 5 N. Y. App. Div. 11, 39 N. Y. Suppl. 280, certificate.

Pennsylvania.— Fox *v.* Foster, 4 Pa. St. 119; Carroll *v.* Miner, 1 Pa. Super. Ct. 439, 38 Wkly. Notes Cas. 194.

South Carolina.— Kibler *v.* Southern R. Co., 62 S. C. 252, 40 S. E. 556, construction of statute.

Texas.— International, etc., R. Co. *v.* Startz, (Civ. App. 1894) 27 S. W. 759, contract.

The general nature and relative importance of written instruments may be given by a witness. Bardin *v.* Stevenson, 75 N. Y. 164.

43. Thurman *v.* State, (Tex. Cr. App. 1904) 78 S. W. 937, what period record of entries of internal revenue collector covered.

44. Garwood *v.* Wheaton, 128 Cal. 399, 60 Pac. 961 (deed); Vaughan Lumber Co. *v.* Martin, (Tex. Sup. 1904) 81 S. W. 1 (deed of trust was intended to provide for particular improvements); Burrows *v.* Rust, (Tex. Civ. App. 1898) 44 S. W. 1019 (deed).

45. **The course may be objectionable** as permitting a witness to prove the contents of a written instrument without sufficiently accounting for the absence of the original. Laster *v.* Blackwell, 128 Ala. 143, 30 So. 663; Mills *v.* New York Cent., etc., R. Co., 5 N. Y. App. Div. 11, 39 N. Y. Suppl. 280. See *infra*, XV.

46. Illinois Steel Co. *v.* Mann, 197 Ill. 186, 64 N. E. 328 (holding that the evidence is competent where the witness is stating rather the substance of what was actually said than his understanding of its effect); Elkhart, etc., R. Co. *v.* Waldorf, 17 Ind. App. 29, 46 N. E. 88; Walker *v.* Camp, 63 Iowa 627, 19 N. W. 802.

47. Daines *v.* Hartley, 3 Exch. 200, 12 Jur. 1093.

48. *Arkansas.*— Little Rock Traction, etc., Co. *v.* Nelson, 66 Ark. 494, 52 S. W. 7.

Georgia.— Du Bose *v.* Du Bose, 75 Ga. 753.

Illinois.— Helm *v.* Cantrell, 59 Ill. 524, alleged admissions of another.

Indiana.— Huxton *v.* McClaren, 132 Ind. 235, 31 N. E. 48.

Iowa.— Dubuque First Nat. Bank *v.* Booth, 102 Iowa 333, 71 N. W. 238; State *v.* Rudd, 97 Iowa 389, 66 N. W. 748; State *v.* Brown, 86 Iowa 121, 53 N. W. 92.

Kansas.— Atchison *v.* King, 9 Kan. 550.

Louisiana.— State *v.* Wright, 41 La. Ann. 605, 6 So. 137.

Maryland.— Elbin *v.* Wilson, 33 Md. 135.

New Hampshire.— Eastman *v.* Martin, 19 N. H. 152.

New York.— Lawrence *v.* Thompson, 26 N. Y. App. Div. 308, 49 N. Y. Suppl. 839; Gutchess *v.* Gutchess, 66 Barb. 483; Cutler *v.* Carpenter, 1 Cow. 81.

In like manner a witness cannot state his inference as to whether the statements of parties at an interview resulted in a contract,[49] or whether there was an understanding between them on a given point,[50] or what the contract is.[51] Nor can the hearer of a statement[52] or conversation[53] testify as to what he or another

Texas.— Gulf, etc., R. Co. *v.* Fox, (Sup. 1887) 6 S. W. 569.

Utah.— State *v.* Kilburn, 16 Utah 187, 52 Pac. 277, meaning of statements by one accused of a crime.

Washington.— State *v.* Anderson, 30 Wash. 14, 70 Pac. 104, meaning of statements by the victim of a homicide.

Substance should be stated, if the witness cannot give the exact language. Green *v.* State, 96 Md. 384, 54 Atl. 104.

The rule cannot be evaded by asking a witness what he had stated to another person as the result of an interview. National Surety Co. *v.* Mabry, 139 Ala. 217, 35 So. 698.

49. *Alabama.*—Fields *v.* Copeland, 121 Ala. 644, 26 So. 491.

Kansas.—Cogshall *v.* Pittsburg Roller Milling Co., 48 Kan. 480, 29 Pac. 591.

Minnesota.— Swanson *v.* Andrus, 84 Minn. 168, 87 N. W. 363, 88 N. W. 252; Peerless Mach. Co. *v.* Gates, 61 Minn. 124, 63 N. W. 260; Lovejoy *v.* Howe, 55 Minn. 353, 57 N. W. 57.

New York.— Case *v.* Hitchcock, 11 N. Y. St. 251.

Pennsylvania.—Smith *v.* Cohen, 170 Pa. St. 132, 32 Atl. 565; Irwin *v.* Nolde, 164 Pa. St. 205, 30 Atl. 246; Canfield *v.* Johnson, 144 Pa. St. 61, 22 Atl. 974.

Vermont.— Wheeler *v.* Campbell, 68 Vt. 98, 34 Atl. 35.

But see Lozier *v.* Graves, 91 Iowa 482, 59 N. W. 285.

50. Miles City First Nat. Bank *v.* Bullard, 20 Mont. 118, 49 Pac. 658, holding that such evidence is not alone sufficient to support a verdict.

51. Ward's Cent., etc., Lake Co. *v.* Elkins, 34 Mich. 439, 22 Am. Rep. 544.

52. *Kansas.*— Atchison *v.* King, 9 Kan. 550, interview.

Maine.— Stacy *v.* Portland Pub. Co., 68 Me. 279.

Massachusetts.— Marcy *v.* Stone, 8 Cush. 4, 54 Am. Dec. 736; Snell *v.* Snow, 13 Metc. 278, 46 Am. Dec. 730, slander.

New York.— Stanley *v.* Pickhardt, 57 N. Y. Super. Ct. 147, 6 N. Y. Suppl. 930.

Pennsylvania.— Irwin *v.* Nolde, 164 Pa. St. 205, 30 Atl. 246.

Texas.— Martin *v.* State, 42 Tex. Cr. 144, 58 S. W. 112.

Vermont.— Linsley *v.* Lovely, 26 Vt. 123.

Wisconsin.— Eaton *v.* White, 2 Pinn. 42.

England.— Daines *v.* Hartley, 3 Exch. 200, 12 Jur. 1093.

Contra.— Foley *v.* Abbott, 66 Ga. 115; Fielder *v.* Collier, 13 Ga. 496; Miles *v.* Roberts, 34 N. H. 245; Maxwell *v.* Warner, 11 N. H. 568; Eaton *v.* Rice, 8 N. H. 378. In New Hampshire, where the understanding merely represents an inference, it is incompetent. Kingsbury *v.* Moses, 45 N. H. 222; Braley *v.* Braley, 16 N. H. 426; Hibbard *v.* Russell, 16 N. H. 410, 41 Am. Dec. 733.

Stating the terms of an oral contract is not necessarily objectionable as amounting to a conclusion. Lozier *v.* Graves, 91 Iowa 482, 59 N. W. 285; Frost *v.* Benedict, 21 Barb. (N. Y.) 247.

When understanding is admissible.— Where the facts cannot be placed before the jury so that they themselves can draw a reasonable inference or where there is more in an interview than mere language, e. g., gestures, tones, expressions, etc. (Leonard *v.* Allen, 11 Cush. (Mass.) 241); or where the witness has stated all the facts he can (Neal *v.* Field, 68 Ga. 534; Phillips *v.* Lindsey, 65 Ga. 139); or where a witness uses the word as synonymous with "agreement" (Saltmarsh *v.* Bower, 34 Ala. 613; Griffin *v.* Isbell, 17 Ala. 184; Moody *v.* Davis, 10 Ga. 403; McCormick *v.* Smith, 127 Ind. 230, 26 N. E. 825; Mallory Commission Co. *v.* Elwood, 120 Iowa 632, 95 N. W. 176; Garrett *v.* Western Union Tel. Co., 92 Iowa 449, 58 N. W. 1064, 60 N. W. 644; House *v.* Howell, 3 Silv. Supreme (N. Y.) 455, 6 N. Y. Suppl. 799; Sherman Oil, etc., Co. *v.* Dallas Oil, etc., Co., (Tex. Civ. App. 1903) 77 S. W. 961); or where the understanding is a fact independently relevant (Pottkamp *v.* Buss, (Cal. 1896) 46 Pac. 169; People *v.* Clark, 106 Cal. 32, 39 Pac. 53, holding that what a Chinese witness understood as to the wishes of certain English-speaking persons who pointed their pistols at him, and then pointed to the door is competent; Fiske *v.* Gowing, 61 N. H. 431; Norris *v.* Morrill, 40 N. H. 395; Farmers' Bank *v.* Saling, 33 Oreg. 394, 54 Pac. 190; Morrison *v.* State, 40 Tex. Cr. 473, 51 S. W. 358; Bertoli *v.* Smith, 69 Vt. 425, 38 Atl. 76; Wheeler *v.* Campbell, 68 Vt. 98, 34 Atl. 35; Hubbard *v.* Moore, 67 Vt. 532, 32 Atl. 465), or where the witness is in effect stating the substance of what was actually said (Illinois Steel Co. *v.* Mann, 197 Ill. 186, 64 N. E. 328), as where, in an action of libel, to indicate who was understood to be intended (Howe Mach. Co. *v.* Souder, 58 Ga. 64), or to explain the special use of a word or phrase (Morrison *v.* State, 40 Tex. Cr. 473, 51 S. W. 358), evidence of it is admissible.

53. *Alabama.*— Larkinsville Min. Co. *v.* Flippo, 130 Ala. 361, 30 So. 358. The evidence is admissible in the absence of objection. Carlisle *v.* Humes, 111 Ala. 672, 20 So. 462.

Illinois.— Grubey *v.* State Nat. Bank, 35 Ill. App. 354.

Indiana.— Diehl *v.* State, 157 Ind. 549, 62 N. E. 51.

New York.—Higgins *v.* Dakin, 86 Hun 461, 33 N. Y. Suppl. 890; Mather *v.* Parsons, 32 Hun 338.

person[54] understood by it. Unless some special reason can be assigned, the observer of a transaction or other factor will not be permitted to state his understanding of its meaning or significance.[55]

2. When Received — a. In General. It is a well-settled rule of evidence that a reason for admitting a conclusion of fact is furnished where the statement is merely a way of stating an obvious fact. A statement of this nature, although in the form of a conclusion, and although some admixture of the exercise of the faculty is presented, is admissible in evidence.[56] A conclusion is usually deemed to contain less than the objectionable *quantum* of reasoning where the single negative fact is stated that nothing of a certain kind was done,[57] that a fact was not

Texas.— Buzard *v.* McAnulty, 77 Tex. 438, 14 S. W. 138. But see Garvin *v.* Gates, 73 Wis. 513, 41 N. W. 621.

Such a statement would be entitled to no weight (Powell *v.* Swan, 5 Dana (Ky.) 1), especially as opposed to evidence of the language used (Livingston *v.* Roberts, 18 Fla. 70).

54. Gorham *v.* Gorham, 41 Conn. 242.

55. *California.*— Lowrie *v.* Salz, 75 Cal. 349, 17 Pac. 232.

Michigan.— McKinnon *v.* Gates, 102 Mich. 618, 61 N. W. 74.

Nebraska.— Lacey *v.* Central Nat. Bank, 4 Nebr. 179.

New York.— People *v.* Sharp, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. Rep. 851.

Texas.— Biering *v.* Wegner, 76 Tex. 506, 13 S. W. 537; Shaw *v.* Gilmer, (Civ. App. 1902) 66 S. W. 679, running of account.

Vermont.— Linsley *v.* Lovely, 26 Vt. 123.

See 20 Cent. Dig. tit. "Evidence," § 2150 *et seq.*

56. *Alabama.*— Shrimpton *v.* Brice, 109 Ala. 640, 20 So. 10 (account correct); Cofer *v.* Scroggins, 98 Ala. 342, 13 So. 115, 39 Am. St. Rep. 54 (improvements of land); Woodstock Iron Co. *v.* Roberts, 87 Ala. 436, 6 So. 349 ("controlled" premises); Street *v.* Sinclair, 71 Ala. 110 (consented); Grey *v.* Mobile Trade Co., 55 Ala. 387, 28 Am. Rep. 729 ("protected"); Cole *v.* Varner, 31 Ala. 244 (made a loan); Wright *v.* Bolling, 27 Ala. 259 (account correct).

California.— Tate *v.* Fratt, 112 Cal. 613, 44 Pac. 1061 (priority of building); Taylor's Estate, 92 Cal. 564, 28 Pac. 603 (completed work according to contract); Bunting *v.* Salz, (1889) 22 Pac. 1132 (exercised ownership).

District of Columbia.— Waters *v.* Anthony, 20 App. Cas. 124, who requested an arrest.

Georgia.— Reynolds *v.* Simpson, 74 Ga. 454, to whom credit was given.

Illinois.—McCormick Harvesting Mach. Co. *v.* Burandt, 136 Ill. 170, 26 N. E. 588 (interference); Illinois River Packet Co. *v.* Peoria Bridge Assoc., 38 Ill. 467 (obstruction to navigation).

Indiana.— Golibart *v.* Sullivan, 30 Ind. App. 428, 66 N. E. 188; Indiana Ins. Co. *v.* Glenn, 13 Ind. App. 534, 40 N. E. 151, made a sale.

Iowa.— Coldren *v.* Le Gore, 118 Iowa 212, 91 N. W. 1066 (had anything to do with an event); State *v.* Brundige, 118 Iowa 92, 91 N. W. 920 (occupation); Roberts *v.* Roberts, 91 Iowa 228, 59 N. W. 25 (agreement); Jamison *v.* Weaver, 81 Iowa 212, 46 N. W. 996 (whether services were rendered under a contract); Smalley *v.* Iowa Pac. R. Co., 36 Iowa 571 (effect of embankments).

Kansas.— Locke *v.* Hedrick, 24 Kan. 763, acted as if in charge.

Louisiana.— State *v.* Williams, 111 La. 205, 35 So. 521, gambling house.

Michigan.— Clark *v.* Lake St. Clair, etc., Ice Co., 24 Mich. 508, obstruction.

Minnesota.— Derosia *v.* Winona, etc., R. Co., 18 Minn. 133, why goods not delivered.

Missouri.— Rosenfeld *v.* Siegfried, 91 Mo. App. 169, result of calculation.

New York.— Nordlinger *v.* Manhattan R. Co., 77 Hun 311, 28 N. Y. Suppl. 361 (cuts off light); Liscombe *v.* Agate, 67 Hun 388, 22 N. Y. Suppl. 126 (gave true statement); Thompson *v.* Vrooman, 66 Hun 245, 21 N. Y. Suppl. 179 (consented); Whyland *v.* Weaver, 67 Barb. 116 (location of a lot); Metropolitan L. Ins. Co. *v.* Schaefer, 16 Misc. (N. Y.) 625, 40 N. Y. Suppl. 984 (turned over all money collected); Van Ingen *v.* Mail, etc., Pub. Co., 14 Misc. 326, 35 N. Y. Suppl. 838; Duryea *v.* Vosburgh, 17 N. Y. Suppl. 742 (whom witness acted for); Applebee *v.* Albany Brewing Co., 12 N. Y. Suppl. 576 (A was "boss").

North Carolina.— State *v.* Mace, 118 N. C. 1244, 24 S. E. 798, where it was held that the expression, "Oh, Lord, they have murdered me for nothing," is not inadmissible as an expression of opinion as to the degree of the homicide.

Pennsylvania.— McNamara *v.* Shorb, 2 Watts 288, improvement "kept up."

Texas.— Sebastian *v.* State, 41 Tex. Cr. 248, 53 S. W. 875 (out of the state); Gonzales *v.* Adoue, (Civ. App. 1900) 56 S. W. 543 [*reversed* on other grounds in 94 Tex. 120, 58 S. W. 951] (insolvency); Western Union Tel. Co. *v.* Drake, 14 Tex. Civ. App. 601, 38 S. W. 632 (well known by canvassing for an office); Supreme Council A. L. of H. *v.* Landers, 23 Tex. Civ. App. 625, 57 S. W. 307 (assessment regularly made).

Vermont.— Blaisdell *v.* Davis, 72 Vt. 295, 48 Atl. 14 (financial condition); Tinkham *v.* Stockbridge, 64 Vt. 480, 24 Atl. 761.

United States.— Farrell *v.* U. S., 110 Fed. 942, 49 C. C. A. 183, exercised control.

See 20 Cent. Dig. tit. "Evidence," § 2149 *et seq.*

57. Brown *v.* State, 124 Ala. 76, 27 So. 250 (threat); Jowell *v.* State, 44 Tex. Cr.

known,[58] or that an event did not occur.[59] Where facts and inferences are blended to an objectionable extent, the statement of fact may still be received if separable from the inferences to which it gives rise in the mind of the witness.[60]

b. Necessity. Whether certain acts,[61] articles,[62] or services[63] were or will be necessary, whether a given position was necessary to a given result,[64] or is shown by a result to have necessarily occurred in a particular way,[65] may be stated by any person of adequate experience.[66]

c. Possibility. One who has observed the phenomena may testify as to whether certain acts,[67] consequences,[68] events,[69] or operations[70] would be possible; or whether any other acts would have been possible,[71] and, if so, what acts;[72] or whether the consequences could have been produced in any other way;[73] provided the facts cannot be fully placed before the jury.[74] Especially is this the case where the matter is one within their special function,[75] and where the

328, 71 S. W. 286 (attack); Boston *v.* McMenamy, 29 Tex: Civ. App. 272, 68 S. W. 201 (claim); Ash *v.* Fidelity Mut. L. Assoc., 26 Tex. Civ. App. 501, 63 S. W. 944 (payment); Philadelphia Fire Assoc. *v.* Jones, (Tex. Civ. App. 1897) 40 S. W. 44 (had nothing to do with a given event); Galveston, etc., R. Co. *v.* Garteiser, 9 Tex. Civ. App. 456, 29 S. W. 939 (bell not rung).

58. State *v.* McDaniel, 39 Oreg. 161, 65 Pac. 520.

59. Paul *v.* Chenault, (Tex. Civ. App. 1900) 59 S. W. 579 (witness never made an abstract); Galveston, etc., R. Co. *v.* Parrish, (Tex. Civ. App. 1897) 43 S. W. 536. The mere fact, however, that the inference is negative does not reduce its statement to one of fact. Stevens *v.* Leonard, 154 Ind. 67, 56 N. E. 27, 77 Am. St. Rep. 446. Accordingly a woman was not allowed to testify that her husband "never let her have a cent." Burleson *v.* Reading, 110 Mich. 512, 68 N. W. 294.

60. Tilden *v.* Gordon, 34 Wash. 92, 74 Pac. 1016.

61. Schaeffer *v.* Anchor Mut. F. Ins. Co., 113 Iowa 652, 85 N. W. 985 (inquiries of an applicant in an insurance policy as the only source of information); Miller *v.* Meade Tp., 128 Mich. 98, 87 N. W. 131 (for a wagon geared in a particular way to begin turning at a certain point in a given locality); Gulf, etc., R. Co. *v.* Richards, 83 Tex. 203, 18 S. W. 611 (taking land).

62. Litton *v.* Wright School Tp., 1 Ind. App. 92, 27 N. E. 329, township supplies.

63. Martin *v.* Southern Pac. Co., 130 Cal. 285, 62 Pac. 515 (medical attendance); Meigs *v.* Buffalo, 7 N. Y. St. 855 (nursing).

64. Jones *v.* State, 44 Fla. 74, 32 So. 793.

65. State *v.* Williams, 111 La. 205, 35 So. 521, how a wounded man must have fallen.

66. Lack of knowledge is sufficient to exclude the evidence. Jones *v.* State, 44 Fla. 74, 32 So. 793.

67. *Alabama.*— Boland *v.* Louisville, etc., R. Co., 106 Ala. 641, 18 So. 99, coupling cars without instructions.

California.— Healy *v.* Visalia, etc., R. Co., 101 Cal. 585, 36 Pac. 125, continuing to stand.

Illinois.— Welch *v.* Miller, 32 Ill. App. 110, recognize sheep.

Iowa.— Funston *v.* Chicago, etc., R. Co., 61 Iowa 452, 16 N. W. 518, turn horses in a given space.

Michigan.— Butterfield *v.* Gilchrist, 63 Mich. 155, 29 N. W. 682.

New York.— Brink *v.* Hanover F. Ins. Co., 80 N. Y. 108 (forwarded proofs of loss earlier); McDermott *v.* Third Ave. R. Co., 44 Hun 107 (pass between); Myer *v.* Brooklyn City R. Co., 10 Misc. 11, 30 N. Y. Suppl. 534 (cross track without collision).

Vermont.— Cavendish *v.* Troy, 41 Vt. 99, live in a certain house.

See 20 Cent. Dig. tit. "Evidence," § 2150 *et seq.*

68. *Alabama.*— Alabama Great Southern R. Co. *v.* Yarbrough, 83 Ala. 238, 3 So. 447, 3 Am. St. Rep. 715, whether a machine could stop when started.

California.— Howland *v.* Oakland Consol. St. R. Co., 115 Cal. 487, 47 Pac. 255, stop car.

Iowa.— Trott *v.* Chicago, etc., R. Co., 115 Iowa 80, 86 N. W. 33, 87 N. W. 722, catching foot in guard rail.

Kentucky.— Vanarsdall *v.* Louisville, etc., R. Co., 65 S. W. 858, 23 Ky. L. Rep. 1666, stop train in given time.

Texas.— Martin *v.* State, 40 Tex. Cr. 660, 51 S. W. 912.

69. Healy *v.* Visalia, etc., R. Co., 101 Cal. 585, 36 Pac. 125, keeping seat during a railroad accident.

70. Baker *v.* Sherman, 71 Vt. 439, 46 Atl. 57, cut off timber.

71. Tanner *v.* Louisville, etc., R. Co., 60 Ala. 621; Little Rock, etc., R. Co. *v.* Shoecraft, 56 Ark. 465, 20 S. W. 272; Brink *v.* Hanover F. Ins. Co., 80 N. Y. 108 (forward proofs earlier); Haggerty *v.* Brooklyn City, etc., R. Co., 61 N. Y. 624; Kehler *v.* Schwenk, 151 Pa. St. 505, 25 Atl. 130, 31 Am. St. Rep. 777. Such a witness is not testifying as an "expert." Baltimore, etc., Co. *v.* Cassell, 66 Md. 419, 7 Atl. 805, 59 Am. Rep. 175.

72. O'Neil *v.* Dry Dock, etc., R. Co., 129 N. Y. 125, 29 N. E. 84, 26 Am. St. Rep. 512, within what distance a driver could stop a truck.

73. Everett *v.* State, 62 Ga. 65.

74. Pulver *v.* Rochester German Ins. Co., 35 Ill. App. 24; Cavendish *v.* Troy, 41 Vt. 99.

75. Buxton *v.* Somerset Potters' Works, 121 Mass. 446.

matter is one with respect to which the witness is competent to form a reasonable inference.[76]

d. Probability. A witness, after stating the facts which are relevant as a basis of his inference and showing adequate familiarity with the subject,[77] may state the effect of these and other facts observed by him upon the probability of the occurrence of a definite event[78] or result,[79] or what would probably happen upon the application of a specified natural force.[80]

e. Sufficiency. A witness with suitable opportunities for observation[81] may state his inference as to the sufficiency or adequacy of means to an end[82] or provision for an object;[83] as light,[84] opportunity,[85] space,[86] or time,[87] afforded for a certain occurrence.

76. Lake Erie, etc., R. Co. *v.* Juday, 19 Ind. App. 436, 49 N. E. 843; Aidt *v.* State, 2 Ohio Cir. Ct. 18, 1 Ohio Cir. Dec. 337; Bluman *v.* State, 33 Tex. Cr. 43, 21 S. W. 1027, 26 S. W. 75. Railroad conductors or engineers are not competent to state whether the appearance and condition of a human body found along the track could have been occasioned by the striking or passing over of a train. Aidt *v.* State, 2 Ohio Cir. Ct. 18, 1 Ohio Cir. Dec. 337. See *infra*, XI, E, 2, e.

One who has not seen an accident is not in a position to illustrate to the jury what he had told the crowd as to how it might have occurred. Chicago, etc., R. Co. *v.* Lee, 16 Ind. App. 215, 46 N. E. 543.

Where the jury are equally competent with the witness to draw the required inference (Munger *v.* Waterloo, 83 Iowa 559, 49 N. W. 1028; Nosler *v.* Chicago, etc., R. Co., 73 Iowa 268, 34 N. W. 850; Bluman *v.* State, 33 Tex. Cr. 43, 21 S. W. 1027, 26 S. W. 75); and especially where the fact is one intimately connected in the particular case with their function (Holmes *v.* State, 100 Ala. 80, 14 So. 864, serious injury from a hoe; State *v.* Punshon, 133 Mo. 44, 34 S. W. 25; Hardin *v.* State, 40 Tex. Cr. 208, 49 S. W. 607), the inference will be rejected.

77. Cole *v.* Bean, 1 Ariz. 377, 25 Pac. 538.

A probability of sequence in a matter of a technical nature, as the future of a wound, cannot be stated by an observer not specially skilled. State *v.* Cross, 68 Iowa 180, 26 N. W. 62.

78. Seals *v.* Edmondson, 71 Ala. 509 (burning of cotton and extinguishment of fire); Travelers' Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18 (recovery of drowned body).

79. Louisville, etc., R. Co. *v.* Sandlin, 125 Ala. 585, 28 So. 40.

80. Chicago, etc., R. Co. *v.* Truitt, 68 Ill. App. 76 (wind); Bram *v.* U. S., 168 U. S. 532, 18 S. Ct. 183, 42 L. ed. 568 (being spattered with blood from certain blows delivered at a person standing at a given distance and a definite relative position).

81. Unless sufficient opportunities for observation and their actual improvement is shown the inference may be rejected. Chamberlain *v.* Platt, 68 Conn. 126, 35 Atl. 780.

82. Cheek *v.* State, 38 Ala. 227 (food for a plantation slave); Porter *v.* Pequonnoc Mfg. Co., 17 Conn. 249; Ball *v.* Mabry, 91 Ga. 781, 18 S. E. 64 (force to throw a man down); Paducah Water Supply Co. *v.* Paducah Lumber Co., 14 Ky. L. Rep. 141 (pressure of water).

83. *Alabama.*— McCreary *v.* Turk, 29 Ala. 244.

Colorado.— Colorado Mortg., etc., Co. *v.* Rees, 21 Colo. 435, 42 Pac. 42.

Connecticut.— Chamberlain *v.* Platt, 68 Conn. 126, 35 Atl. 780; Porter *v.* Pequonnoc Mfg. Co., 17 Conn. 249.

Kansas.— North Missouri R. Co. *v.* Akers, 4 Kan. 453, 96 Am. Dec. 183.

Minnesota.— Armstrong *v.* Chicago, etc., R. Co., 45 Minn. 85, 47 N. W. 459, sufficiency of a stable.

Illustrative instances.— The witness may state whether the crew of a steamer (McCreary *v.* Turk, 29 Ala. 244) or a gang of men (North Missouri R. Co. *v.* Akers, 4 Kan. 453, 96 Am. Dec. 183, drive broken mules) were sufficient to do certain work; or whether the dam on a stream is adequate to control its water (Porter *v.* Pequonnoc Mfg. Co., 17 Conn. 249).

84. Colorado Mortg., etc., Co. *v.* Rees, 21 Colo. 435, 42 Pac. 42 (in a hallway leading to an elevator); Chamberlain *v.* Platt, 68 Conn. 126, 35 Atl. 780.

85. See Illinois Cent. R. Co. *v.* Blye, 43 Ill. App. 612.

86. Kansas City, etc., R. Co. *v.* Lackey, 114 Ala. 152, 21 So. 444; Brunker *v.* Cummins, 133 Ind. 443, 32 N. E. 732 (man to walk); San Antonio *v.* Talerico, (Tex. Civ. App. 1903) 78 S. W. 28 (that a hole in a sidewalk was big enough to admit witness' foot).

87. *California.*— Howland *v.* Oakland Consol. St. R. Co., 115 Cal. 487, 47 Pac. 255.

Illinois.— Ohio, etc., R. Co. *v.* Brown, 49 Ill. App. 40.

Iowa.— Horan *v.* Chicago, etc., R. Co., 89 Iowa 328, 56 N. W. 507.

Kentucky.— Vanarsdall *v.* Louisville, etc., R. Co., 65 S. W. 858, 23 Ky. L. Rep. 1666.

Missouri.— Straus *v.* Kansas City, etc., R. Co., 86 Mo. 421.

New York.— O'Neil *v.* Dry Dock, etc., R. Co., 59 N. Y. Super. Ct. 123, 15 N. Y. Suppl. 84 [*affirmed* in 129 N. Y. 125, 29 N. E. 84, 26 Am. St. Rep. 512], stop team.

Ohio.— Stewart *v.* State, 19 Ohio 302, 53 Am. Dec. 426; Michigan Cent. R. Co. *v.* Waterworth, 21 Ohio Cir. Ct. 495, 11 Ohio Cir. Dec. 621.

South Carolina.— Ward *v.* Charleston City R. Co., 19 S. C. 521, 45 Am. Rep. 794.

f. Utility. A witness of adequate experience may testify as to the utility of certain articles.[88]

F. Conclusions of Law — 1. When Excluded. A witness will not be permitted to intrude upon both the function of the judge and that of the jury by stating a conclusion of law;[89] for example, as to the existence of an agency[90] or other authority,[91] excuse,[92] indebtedness,[93] ownership of real or personal property,[94]

Texas.— Woods *v.* State, (Cr. App. 1903) 75 S. W. 37; St. Louis Southwestern R. Co. *v.* Byers, (Civ. App. 1902) 70 S. W. 558, time for alighting from train.

Wisconsin.— Allen *v.* Murray, 87 Wis. 41, 57 N. W. 979.

For example the witness may state whether there was time enough in which to stop a car (Howland *v.* Oakland Consol. St. R. Co., 115 Cal. 487, 47 Pac. 255), board (Ohio, etc., R. Co. *v.* Brown, 49 Ill. App. 40. But see Madden *v.* Missouri Pac. R. Co., 50 Mo. App. 666), or leave a train (Straus *v.* Kansas City, etc., R. Co., 86 Mo. 421; Ward *v.* Charleston City R. Co., 19 S. C. 521, 45 Am. Rep. 794); escape an attack (Stewart *v.* State, 19 Ohio 302, 53 Am. Dec. 426); examine couplings (Michigan Cent. R. Co. *v.* Waterworth, 12 Ohio Cir. Ct. 495, 11 Ohio Cir. Dec. 621) or a road-bed (Horan *v.* Chicago, etc., R. Co., 89 Iowa 328, 56 N. W. 507); perform a contract (Maier *v.* Evansville, 151 Ind. 197, 51 N. E. 233; Allen *v.* Murray, 87 Wis. 41, 57 N. W. 979); or do any other customary act presenting time limits of approximate definiteness. In Massachusetts such evidence is not admitted where the necessary facts can be otherwise proved. Campbell *v.* Russell, 139 Mass. 278, 1 N. E. 345. But see Curl *v.* Chicago, etc., R. Co., 63 Iowa 417, 16 N. W. 69, 19 N. W. 308 (buy ticket); Madden *v.* Missouri Pac. R. Co., 50 Mo. App. 666 (leave a train); Keller *v.* New York Cent. R. Co., 2 Abb. Dec. (N. Y.) 480, 24 How. Pr. (N. Y.) 172 (leave train).

88. Litten *v.* Wright School Tp., 1 Ind. App. 92, 27 N. E. 329, township supplies.

89. *California.*— Union Sheet Metal Works *v.* Dodge, 129 Cal. 390, 62 Pac. 41, whether a bond was a common-law or statutory bond.

Georgia.— Travelers' Ins. Co. *v.* Thornton, 119 Ga. 455, 46 S. E. 678; Frink *v.* Southern Express Co., 82 Ga. 33, 8 S. E. 862, 3 L. R. A. 482, sufficient evidence.

Kansas.— Olmstead *v.* Koester, 14 Kan. 463.

Louisiana.— Zeringue *v.* White, 4 La. Ann. 301.

Massachusetts.— Barts *v.* Morse, 126 Mass. 226, justification.

Nebraska.— Searles *v.* Oden, 13 Nebr. 344, 14 N. W. 420.

New Jersey.— *Ex p.* Clark, 20 N. J. L. 648, 45 Am. Dec. 394, unlawfully refuses.

New York.— Trenton Potteries Co. *v.* Title Guarantee, etc., Co., 176 N. Y. 65, 68 N. E. 132 (what ought to have been done in issuing an insurance policy); Sentenne *v.* Kelly, 59 Hun 512, 13 N. Y. Suppl. 529 (reasonable time).

Pennsylvania.— Murray *v.* Ellis, 112 Pa. St. 485, 3 Atl. 845 (sufficiency of title); Com. *v.* Giltinan, 64 Pa. St. 100 (articles within inspection law).

Texas.— Houston, etc., R. Co. *v.* McGehee, 49 Tex. 481 (patent improperly issued); Fulcher *v.* White, (Civ. App. 1899) 48 S. W. 881; Bugbee Land, etc., Co. *v.* Brents, (Civ. App.) 31 S. W. 695 (conflict).

Utah.— North Point Consol. Irr. Co. *v.* Utah, etc., Canal Co., 16 Utah 246, 52 Pac. 168, 67 Am. St. Rep. 607, 40 L. R. A. 851 (powers of corporation); Levy *v.* Salt Lake City, 5 Utah 302, 16 Pac. 598 (public ditch).

Vermont.— Clough *v.* Patrick, 37 Vt. 421, course of business.

Wisconsin.— McKesson *v.* Sherman, 51 Wis. 303, 8 N. W. 200, colorable transfer.

England.— Carter *v.* Boehm, 1 W. Bl. 593, 3 Burr. 1905, 1913, whether certain letters should have been disclosed in applying for insurance.

See 20 Cent. Dig. tit. "Evidence," § 2170 *et seq.*

Harmless error.—If a witness merely states a conclusion which amounts to a summary of the effect of his detailed evidence of fact the error, if any, is harmless. It has even been said that the evidence is admissible. Hoadley *v.* Hammond, 63 Iowa 599, 19 N. W. 794.

90. Southern Home Bldg., etc., Assoc. *v.* Winans, 24 Tex. Civ. App. 544, 60 S. W. 825.

91. Stuart *v.* Asher, 15 Colo. App. 403, 62 Pac. 1051; Baxter *v.* Rollins, 99 Iowa 226, 68 N. W. 721; Lipscomb *v.* Houston, etc., R. Co., 95 Tex. 5, 64 S. W. 923, 98 Am. St. Rep. 804, 55 L. R. A. 869.

92. State *v.* Babcock, 25 R. I. 224, 55 Atl. 685.

93. *Alabama.*— Miller *v.* Mayer, 124 Ala. 434, 26 So. 892.

California.— Parker *v.* Otis, 130 Cal. 322, 62 Pac. 571, 927, 92 Am. St. Rep. 56.

Illinois.— Campbell, etc., Co. *v.* Ross, 187 Ill. 553, 58 N. E. 596; Springfield Consol. R. Co. *v.* Welch, 155 Ill. 511, 40 N. E. 1034; Hollst *v.* Bruse, 69 Ill. App. 48; McGeoth *v.* Hooker, 11 Ill. App. 649. A creditor's inference as to indebtedness is not sufficient to sustain a verdict. Campbell, etc., Co. *v.* Boss, *supra*; Hollst *v.* Bruse, *supra*.

Nebraska.— Frederick *v.* Ballard, 16 Nebr. 559, 20 N. W. 870.

Tennessee.— Berryhill *v.* McKee, 1 Humphr. 31.

Canada.— Courser *v.* Kirkbride, 23 N. Brunsw. 404.

Compare Greene *v.* Tally, 39 S. C. 338, 17 S. E. 779; Miller *v.* George, 30 S. C. 526, 9 S. E. 659.

See 20 Cent. Dig. tit. "Evidence," § 2183.

94. *Alabama.*— Wildman *v.* State, 139 Ala. 125, 35 So. 995; Morrisett *v.* Carr, 118 Ala. 585, 23 So. 795.

possession,[95] relation as agent,[96] member of an association,[97] partners,[98] tenant,[99] and the like; responsibility,[1] rights,[2] rules of law,[3] or practice;[4] the regularity and sufficiency of legal process[5] or title;[6] or in general to testify whether a contract

Arkansas.— Benson *v.* Files, 70 Ark. 423, 68 S. W. 493.

Connecticut.— Hamilton *v.* Smith, 74 Conn. 374, 50 Atl. 884, boundaries.

Georgia.— Strickland *v.* Angier, 99 Ga. 272, 25 S. E. 632.

Illinois.— Perkins *v.* Kinsley, 102 Ill. App. 562; Rahe *v.* Baker, 44 Ill. App. 578; Hawkins *v.* Harding, 37 Ill. App. 564.

Iowa.— Corn Exch. Bank *v.* Shuttleworth, 99 Iowa 536, 68 N. W. 827.

Kansas.— Hite *v.* Stimmell, 45 Kan. 469, 25 Pac. 852; Simpson *v.* Smith, 27 Kan. 565; Brown *v.* Cloud County Bank, 2 Kan. App. 352, 42 Pac. 593.

Michigan.— Mains *v.* Webber, 131 Mich. 213, 91 N. W. 172 (certificates of deposit); Montgomery *v.* Martin, 104 Mich. 390, 62 N. W. 578; Webster *v.* Sibley, 72 Mich. 630, 40 N. W. 772.

Mississippi.— Dunlap *v.* Hearn, 37 Miss. 471; Wells *v.* Shipp, Walk. 353.

Nebraska.— Cropsey *v.* Averill, 8 Nebr. 151, securities.

New York.— Richmond *v.* Brewster, 2 N. Y. Suppl. 400; Coats *v.* Dickenson, 5 Alb. L. J. 333.

South Carolina.— Burnett *v.* Crawford, 50 S. C. 161, 27 S. E. 645.

Texas.— Johnston *v.* Martin, 81 Tex. 18, 16 S. W. 550; Cullers *v.* Gray, (Civ. App. 1900) 57 S. W. 305; Scott *v.* Witt, (Civ. App. 1897) 41 S. W. 401; Western Union Tel. Co. *v.* Hearne, 7 Tex. Civ. App. 67, 26 S. W. 478.

See 20 Cent. Dig. tit. "Evidence," § 2171.

95. *Florida.*— Walrous *v.* Morrison, 33 Fla. 261, 14 So. 805, 39 Am. St. Rep. 139.

Illinois.— Huftalin *v.* Misner, 70 Ill. 55.

Maryland.— Thistle *v.* Frostburg Coal Co., 10 Md. 129.

Missouri.— Kendall Boot, etc., Co. *v.* Bain, 46 Mo. App. 581.

New York.— Arents *v.* Long Island R. Co., 156 N. Y. 1, 50 N. E. 422; Parsons *v.* Brown, 15 Barb. 590; Boyle *v.* Williams, 1 Misc. 112, 20 N. Y. Suppl. 727.

See 20 Cent. Dig. tit. "Evidence," § 2172.

Adverse possession.— To permit a witness to testify that a certain possession was actual, open, and notorious would be still more clearly a conclusion of law. This is merely an opinion of the witness on an issue which the jury should settle. Watrous *v.* Morrison, 33 Fla. 261, 14 So. 805, 39 Am. St. Rep. 139.

Where possession is the point in issue, the conclusion of the witness is to be rejected. Thistle *v.* Frostburg Coal Co., 10 Md. 129; Kendall Boot, etc., Co. *v.* Bain, 46 Mo. App. 581.

96. *Alabama.*—Goddard *v.* Garner, 109 Ala. 98, 19 So. 513.

Connecticut.— Young *v.* Newark F. Ins. Co., 59 Conn. 41, 22 Atl. 32.

Indiana.— Jackson *v.* Todd, 56 Ind. 406.

Minnesota.— Larson *v.* Lombard Invest. Co., 51 Minn. 141, 53 N. W. 179.

Missouri.— State *v.* Huff, 161 Mo. 459, 61 S. W. 900, 1104.

Nebraska.— Maurer *v.* Miday, 25 Nebr. 575, 41 N. W. 395.

New York.— Harnickell *v.* Parrott Silver, etc., Min. Co., 1 Silv. Supreme 75, 5 N. Y. Suppl. 112.

United States.— Farrell *v.* U. S., 110 Fed. 942, 49 C. C. A. 183.

See 20 Cent. Dig. tit. "Evidence," § 2175.

97. Wagner *v.* Supreme Lodge K. & L. of H., 128 Mich. 660, 87 N. W. 903.

98. *Alabama.*— Alexander *v.* Handley, 96 Ala. 220, 11 So. 390.

Colorado.— Omaha, etc., Co. *v.* Rucker, 6 Colo. App. 334, 40 Pac. 853.

Illinois.— Bragg *v.* Geddes, 93 Ill. 39.

Iowa.— Williams *v.* Soutter, 7 Iowa 435.

Mississippi.— Atwood *v.* Meredith, 37 Miss. 635.

New York.— Reynolds *v.* Lawton, 62 Hun 596, 17 N. Y. Suppl. 432.

See 20 Cent. Dig. tit. "Evidence," § 2177.

Holding oneself out as a partner is equally a conclusion of law and inadmissible. Reynolds *v.* Lawton, 62 Hun (N. Y.) 596, 17 N. Y. Suppl. 432.

99. Parker *v.* Haggerty, 1 Ala. 632.

1. *Alabama.*— Garey *v.* Meagher, 33 Ala. 630.

Georgia.— Central R. Co. *v.* De Bray, 71 Ga. 406, "own risk."

Illinois.— Hoener *v.* Koch, 84 Ill. 408; Chicago, etc., R. Co. *v.* Springfield, etc., R. Co., 67 Ill. 142, duty to repair.

Iowa.— Shambaugh *v.* Current, 111 Iowa 121, 82 N. W. 497.

Michigan.— Lake Superior Iron Co. *v.* Erickson, 38 Mich. 492, 33 Am. Rep. 423, of witness.

See 20 Cent. Dig. tit. "Evidence," § 2170 *et seq.*

2. Chicago, etc., R. Co. *v.* Kuckkuck, 197 Ill. 304, 64 N. E. 358 (right of public to enter railroad premises); Alexander *v.* Mandeville, 33 Ill. App. 589 (no control); Smyth *v.* Ward, 46 Iowa 339; Steffy *v.* Carpenter, 37 Pa. St. 41 (rights in a way).

3. Shirley *v.* Walker, 31 Me. 541 (pension money); The Clement, 5 Fed. Cas. No. 2,879, 2 Curt. 363 [*affirming* 5 Fed. Cas. No. 2,880, 1 Sprague 257] (maritime law).

4. Gaylor's Appeal, 43 Conn. 82; Roberts *v.* Cooper, 20 How. (U. S.) 467, 15 L. ed. 969, land-office.

5. Faville *v.* State Trust Co., (Iowa 1903) 96 N. W. 1109.

6. *California.*— Wintert *v.* Stock, 29 Cal. 407, 89 Am. Dec. 57, satisfactory title.

Georgia.— Bleckley *v.* White, 98 Ga. 594, 25 S. E. 592, passing of title.

Illinois.— Evans *v.* Gerry, 174 Ill. 595, 51 N. E. 615; Kirkpatrick *v.* Clark, 132 Ill. 342, 24 N. E. 71, 22 Am. St. Rep. 531, 8 L.

was made[7] or upon what consideration;[8] what it means,[9] whether it has been performed,[10] or as to the effect,[11] meaning,[12] or purpose[13] of any other document or words or phrases not ambiguous;[14] the legal result of a transaction or series of

R. A. 511 (legal title); Mead *v.* Altgeld, 33 Ill. App. 373 [*affirmed* in 136 Ill. 298, 26 N. E. 388]; Leahy *v.* Hair, 33 Ill. App. 461.

Kansas.— Stiles *v.* Steele, 37 Kan. 552, 15 Pac. 561, good title.

New York.— Hess *v.* Eggers, 38 Misc. 726, 78 N. Y. Suppl. 1119, no title.

Texas.— Gonzales *v.* Adoue, (Civ. App. 1900) 56 S. W. 543 [*reversed* in 94 Tex. 120, 58 S. W. 951]; Scott *v.* Witt, (Civ. App. 1897) 41 S. W. 401, money.

See 20 Cent. Dig. tit. "Evidence," § 2171.

Even a skilled witness cannot testify as to the validity of a legal title. Evans *v.* Gerry, 174 Ill. 595, 51 N. E. 615.

7. Banks *v.* Gidrot, 19 Ga. 421 (special contract); Stone *v.* Assip, 18 N. Y. Suppl. 441; Canfield *v.* Johnson, 144 Pa. St. 61, 22 Atl. 974; Brown *v.* Finney, 67 Pa. St. 214.

8. Lucas *v.* Beebe, 88 Ill. 427; Warren Deposit Bank *v.* Younglove, 112 Ky. 767, 23 Ky. L. Rep. 1969, 2196, 66 S. W. 749, 67 S. W. 47; Peck *v.* Tingley, 53 Nebr. 171, 73 N. W. 450.

9. *Alabama.*— Crosby *v.* Montgomery, 108 Ala. 498, 18 So. 723.

Georgia.— Freeman *v.* Macon Exch. Bank, 87 Ga. 45, 13 S. E. 160 (indorsement on note); Hill *v.* John P. King Mfg. Co., 79 Ga. 105, 3 S. E. 445.

Illinois.— Sanford *v.* Rawlings, 43 Ill. 92 ("erect a monument"); Chamberlain *v.* Bain, 27 Ill. App. 634.

Indiana.— Williams *v.* Dewitt, 12 Ind. 309.

Massachusetts.— McIsaac *v.* Northampton Electric Lighting Co., 172 Mass. 89, 51 N. E. 524, 70 Am. St. Rep. 244; Ives *v.* Hamlin, 5 Cush. 534.

Michigan.— Clark *v.* Detroit Locomotive Works, 32 Mich. 348.

Missouri.— Ellliott *v.* Sanderson, 16 Mo. 482.

New York.— Clews *v.* New York Nat. Banking Assoc. Bank, 114 N. Y. 70, 20 N. E. 852; Pollock *v.* Morris, 105 N. Y. 676, 12 N. E. 179; Collyer *v.* Collins, 17 Abb. Pr. 467.

Texas.— Smith *v.* Jefferson County, 16 Tex. Civ. App. 251, 41 S. W. 148; Gulf, etc., R. Co. *v.* Shearer, 1 Tex. Civ. App. 343, 21 S. W. 133.

See 20 Cent. Dig. tit. "Evidence," § 2174.

In matters of scientific or mechanic arts it is common and prudent to admit the opinions of experts to explain the contract. Reynolds *v.* Jourdan, 6 Cal. 108. See *supra*, XI, B, 2, u.

10. *Alabama.*— Clark *v.* Ryan, 95 Ala. 406, 11 So. 22.

California.— Wallace *v.* Maples, 79 Cal. 433, 21 Pac. 860.

Iowa.— Jackson *v.* Boyles, 64 Iowa 428, 20 N. W. 746.

New York.— Fisher *v.* Monroe, 17 N. Y. Suppl. 837.

South Dakota.— Erickson *v.* Sophy, 10 S. D. 71, 71 N. W. 758.

11. *Alabama.*—Stuart *v.* Mitchum, 135 Ala. 546, 33 So. 670; Bland *v.* Putman, 132 Ala. 613, 32 So. 616 (deed); Ward *v.* Shirley, 131 Ala. 568, 32 So. 489 (bill of sale).

Connecticut.— Hamilton *v.* Smith, 74 Conn. 374, 50 Atl. 884 (deed).

Illinois.— Rankin *v.* Sharples, 206 Ill. 301, 69 N. E. 9, legal sufficiency of a patent license.

Iowa.— Kelso *v.* Fitzgerald, 67 Iowa 266, 25 N. W. 157.

Michigan.— Althouse *v.* McMillan, 132 Mich. 145, 92 N. W. 941.

Nebraska.— Union State Bank *v.* Hutton, 1 Nebr. (Unoff.) 795, 95 N. W. 1061, as containing conversation.

South Carolina.— Burwell, etc., Co. *v.* Chapman, 59 S. C. 581, 38 S. E. 222 (not a contract but an order); Stepp *v.* National L., etc., Assoc., 37 S. C. 417, 16 S. E. 134 (validity of instrument).

Tennessee.— Page *v.* K. & L. of A., (Ch. App. 1900) 61 S. W. 1068, constitution and by-laws.

Texas.— Huff *v.* Crawford, 89 Tex. 214, 34 S. W. 606 (ownership); Shifflet *v.* Morelle, 68 Tex. 382, 4 S. W. 843 (good title); Benson *v.* Cahill, (Civ. App. 1896) 37 S. W. 1088 (holding that skilled testimony is incompetent so far as the effect can be gathered from the instrument); Hamilton *v.* McAuley, 27 Tex. Civ. App. 256, 65 S. W. 205.

See 20 Cent. Dig. tit. "Evidence," § 2170 *et seq.*

12. *Connecticut.*— Fuller *v.* Metropolitan L. Ins. Co., 70 Conn. 647, 41 Atl. 4.

District of Columbia.— Norment *v.* Fastnaght, 1 MacArthur 515, conveyance.

Iowa.— Centerville Independent School Dist. *v.* Swearingin, 119 Iowa 702, 94 N. W. 206, contract.

New York.— Brendon *v.* Worley, 8 Misc. 253, 28 N. Y. Suppl. 557, by-laws.

Texas.— National Fraternity *v.* Karnes, 24 Tex. Civ. App. 607, 60 S. W. 576, article in defendant's constitution.

United States.— Winans *v.* New York, etc., R. Co., 21 How. 88, 16 L. ed. 68; Corning *v.* Burden, 15 How. 252, 14 L. ed. 683 (patent); Day *v.* Stellman, 7 Fed. Cas. No. 3,690, 1 Fish. Pat. Cas. 487.

The judge being an expert on the subject of the meaning of instruments, even a skilled witness is not allowed to give his conclusion on the subject. McWilliams *v.* Great Spirit Springs Co., 7 Kan. App. 210, 52 Pac. 905, expert attorney.

13. P. P. Emory Mfg. Co. *v.* Rood, 182 Mass. 166, 65 N. E. 58.

14. *Georgia.*— Elliott *v.* Western, etc., R. Co., 113 Ga. 301, 38 S. E. 821, telegraphic order.

transactions;[15] or in any other way to apply a legal standard to the inferences from facts,[16] mental[17] or physical, unless the objection is waived.[18] The existence of a particular legal status cannot be stated as the conclusion of the witness.[19]

Oregon.— Williams *v.* Poppleton, 3 Oreg. 139, pleading.

Pennsylvania.— Simons *v.* Vulcan Oil, etc., Co., 61 Pa. St. 202, 100 Am. Dec. 628 ("original owners"); Ormsby *v.* Ihmsen, 34 Pa. St. 462 (survey).

Texas.— Ginnuth *v.* Blankenship, etc., Co., (Civ. App. 1894) 28 S. W. 828, "taking stock."

Wisconsin.— Monitor Iron Works Co. *v.* Ketchum, 44 Wis. 126, "connected with steam on."

See 20 Cent. Dig. tit. "Evidence," § 2170 *et seq.*

15. *Alabama.*— Wall *v.* Williams, 11 Ala. 826, acquired citizenship.

California.— Pottkamp *v.* Buss, (1896) 46 Pac. 169.

Colorado.— Moffatt *v.* Corning, 14 Colo. 104, 24 Pac. 7, judgment paid.

Florida.— Watrous *v.* Morrison, 33 Fla. 261, 14 So. 805, 39 Am. St. Rep. 139.

Georgia.— Tiller *v.* State, 96 Ga. 430, 23 S. E. 825.

Illinois.— Pittsburg, etc., R. Co. *v.* Reich, 101 Ill. 157 (public highway); Alexander *v.* Mandeville, 33 Ill. App. 589 (hiring for another).

Iowa.— Hicks *v.* Williams, 112 Iowa 691, 84 N. W. 935 (payment); Mead *v.* Hogue, 49 Iowa 703 (exchange); Smyth *v.* Ward, 46 Iowa 339.

Kentucky.— Thompson *v.* Brannin, 94 Ky. 490, 21 S. W. 1057, 15 Ky. L. Rep. 36.

Maryland.— Wheeler *v.* State, 42 Md. 563, keeping gaming table.

Massachusetts.— Brewer *v.* Housatonic R. Co., 107 Mass 277, accepted certain goods.

Minnesota.— Robbins *v.* Legg, 80 Minn. 419, 83 N. W. 379, bonus.

New York.— Boyd *v.* New York Security, etc., Co., 176 N. Y. 556, 613, 68 N. E. 1114 ("know of any lien given by you to anybody" on a certain fund); Brayton *v.* Sherman, 119 N. Y. 623, 23 N. E. 471 (transfer); Boyd *v.* Daily, 85 N. Y. App. Div. 581, 83 N. Y. Suppl. 539 (give lien).

Pennsylvania.— Smith *v.* Cohn, 170 Pa. St. 132, 32 Atl. 565 (full payment); Caldwell *v.* Keating, 18 Pa. Super. Ct. 297 Hassett *v.* Hassett, 5 Pa. Dist. 604, 18 Pa. Co. Ct. 269 (that respondent in a libel for divorce "deserted" the libellant).

South Dakota.— Henry *v.* Taylor, 16 S. D. 424, 93 N. W. 641, marriage.

Texas.— Ratliff *v.* State, (Cr. App. 1899) 49 S. W. 583 (liquor sold); McGlasson *v.* State, 38 Tex. Cr. 351, 43 S. W. 93 (always repudiated); League *v.* Henecke, (Civ. App. 1894) 26 S. W. 729 (set apart).

See 20 Cent. Dig. tit. "Evidence," § 2170.

Abandonment of property or rights is a matter largely of law which cannot be proved by the conclusion of the witness. Lathrop *v.* Central Iowa R. Co., 69 Iowa 105, 28 N. W. 465, street.

Authority of an agent may be a mere matter of legal conclusion. If so it is to be rejected.

Indiana.— Hargrove *v.* John, 120 Ind. 285, 22 N. E. 132.

Iowa.— Baxter *v.* Rollins, 99 Iowa 226, 68 N. W. 721.

Massachusetts.— Providence Tool Co. *v.* U. S. Manufacturing Co., 120 Mass. 35.

New York.— Jaton *v.* Brentwood Hotel Co., 11 Misc. 325, 32 N. Y. Suppl. 131.

Wisconsin.— Roche *v.* Pennington, 90 Wis. 107, 62 N. W. 946.

See 20 Cent. Dig. tit. "Evidence," § 2176.

Gifts.— A witness cannot state that a gift was made. This is a conclusion. He should state how it was made. Carter *v.* Buchannon, 3 Ga. 513.

Regularity in judicial proceedings (Mobley *v.* Breed, 48 Ga. 44, condemnation; Massure *v.* Noble, 11 Ill. 531, partition) or of the papers used in them (Massure *v.* Noble *supra*) cannot be proved by the statement of a witness. It is a conclusion of law.

16. *Illinois.*—Evans *v.* Dickey, 117 Ill. 291, 7 N. E. 263, employment.

Iowa.— Gall *v.* Dickey, 91 Iowa 126, 58 N. W. 1075, forfeiture.

New York.— Western Nat. Bank *v.* Flannagan, 14 Misc. 317, 35 N. Y. Suppl. 848 (authority); Johnson *v.* Crotty, 3 Misc. 270, 22 N. Y. Suppl. 753; Spicer *v.* Snyder, 21 N. Y. Suppl. 157.

Pennsylvania.— Dean *v.* Fuller, 40 Pa. St. 474, undue influence.

Tennessee.— Elrod *v.* Alexander, 4 Heisk. 342, contraband.

See 20 Cent. Dig. tit. "Evidence," § 2170 *et seq.*

17. Among mental states legally relevant are acceptance (Cogshall *v.* Pittsburgh Roller Min. Co., 48 Kan. 480, 29 Pac. 591) and consent (Hopkinson *v.* Jones, 28 Ill. App. 409). Fraud may be a conclusion of law. Half *v.* Curtis, 68 Tex. 640, 5 S. W. 451; Burnham *v.* Walker, 1 Tex. App. Civ. Cas. § 899; Zantzinger *v.* Weightman, 30 Fed. Cas. No. 18,202, 2 Cranch C. C. 478. Good faith is equally a conclusion of law. Wolf *v.* Arthur, 112 N. C. 691, 16 S. E. 843; Chelsea Nat. Bank *v.* Isham, 48 Vt. 590; Hinds *v.* Keith, 57 Fed. 10, 6 C. C. A. 231. And so of malice. Bishop *v.* Bishop, 30 Pa. St. 412 (maliciously deserted); Gabel *v.* Weisensee, 49 Tex. 131; Gimble *v.* Gomprecht, (Tex. Civ. App. 1896) 36 S. W. 781.

18. Sterne *v.* State, 20 Ala. 43.

Evidence irrelevant.— Evidence is at times rejected as a conclusion, when the satisfactory ground of exclusion is that the fact would be irrelevant; as for example whether in doing certain things the actor "considered himself liable." Sturgis First Nat. Bank *v.* Reed, 36 Mich. 263.

19. McCalman *v.* State, 96 Ala. 98, 11 So. 408 (whether a room at a tavern was a

2. When Received. The exercise of the judge's discretion in rejecting such conclusions is guided by two main considerations which may be stated as follows: (1) To what extent legal inference predominates over statement of fact; and (2) how far the conclusion relates to a matter in issue,[20] and so within the distinctive province of the jury.[21] It follows therefore, that where the conclusion offered, although to a certain extent resting upon the application of legal principles, is in main a mere statement of fact, and especially where the subject-matter is only collaterally involved, a witness will be permitted to state it.[22] The rule applies to the fact of agency,[23] gift,[24] indebtedness,[25] ownership,[26] partnership,[27]

private bedroom); Big Lake Special Drainage Dist. *v.* Sand Ridge Highway Com'rs, 199 Ill. 132, 64 N. E. 1094 (whether there was a public road).

20. Alexander *v.* Mandeville, 33 Ill. App. 589; Hite *v.* Stimmell, 45 Kan. 469, 25 Pac. 852.

21. See *infra*, XI, A, 4, c.

22. *Alabama.*— Donehoo *v.* Johnson, 120 Ala. 438, 24 So. 888 (that a deed does not include the land sued for); Compton *v.* Smith, 120 Ala. 233, 25 So. 300 (signed note as surety); Avary *v.* Searcy, 50 Ala. 54 (partition fence); Anderson *v.* Snow, 9 Ala. 247 (that an agreement was made).

Connecticut.— Spencer *v.* New York, etc., R. Co., 62 Conn. 242, 25 Atl. 350, way of necessity.

Illinois.— Knight *v.* Knight, 178 Ill. 553, 53 N. E. 306 ("control"); Paul *v.* Conwell, 51 Ill. App. 582 (was superintendent).

Indiana.— Pennsylvania Co. *v.* Marion, 123 Ind. 415, 23 N. E. 973, 18 Am. St. Rep. 330, 7 L. R. A. 687; Baltes Land, etc., Co. *v.* Sutton, 32 Ind. App. 14, 69 N. E. 179, consideration of an assignment.

Iowa.— Wimber *v.* Iowa Cent. R. Co., 114 Iowa 551, 87 N. W. 505, authority.

Maryland.— Morris *v.* Hazlehurst, 30 Md. 362, 365, the court saying that the law of evidence cannot be safely extended so far as to exclude every question to which the answer might possibly involve a matter of law, and holding that where a witness upon cross-examination was asked if he "had ever authorized any one to waive his discharge under the insolvent laws, or the bar of the Statute of Limitations," the question was admissible.

Michigan.— Bellows *v.* Crane Lumber Co., 119 Mich. 424, 78 N. W. 536, sort logs enumerated in a contract.

New York.— Davis *v.* Peck, 54 Barb. 425, loan was individual.

Texas.— Denison, etc., R. Co. *v.* O'Malley, 18 Tex. Civ. App. 200, 45 S. W. 225, holding that a witness may testify that the only available right of way is over "private property."

See 20 Cent. Dig. tit. "Evidence," § 2170 *et seq.*

23. Agency may be a mere question of fact, a synopsis of conduct, or appearances. If so a witness may state it (Talladega Ins. Co. *v.* Peacock, 67 Ala. 253; Heusinkveld *v.* St. Paul F. & M. Ins. Co., 106 Iowa 229, 76 N. W. 696; Gault *v.* Sickles, 85 Iowa 266, 52 N. W. 206; Knapp *v.* Smith, 27 N. Y. 277; Jennings *v.* Davies, 29 N. Y. App. Div. 227, 51 N. Y. Suppl. 437; Joseph *v.* Struller, 25 Misc. (N. Y.) 173, 54 N. Y. Suppl. 162; Service *v.* Deming Invest. Co., 20 Wash. 668, 56 Pac. 837); leaving the constituent facts to be ascertained on cross-examination (Service *v.* Deming Invest. Co., *supra*).

24. Gifts may be merely a question of fact. Davis *v.* Zimmermann, 40 Mich. 24.

25. Indebtedness may be merely a necessary and obvious fact which a witness may state. Shrimpton *v.* Brice, 109 Ala. 640, 20 So. 10; Plank *v.* Indiana Mut. Bldg., etc., Assoc., 28 Ind. App. 259, 62 N. E. 652; Studebaker Bros. Mfg. Co. *v.* Endon, 50 La. Ann. 674, 23 So. 872; Greene *v.* Tally, 39 S. C. 338, 17 S. E. 779; Miller *v.* George, 30 S. C. 526, 9 S. E. 659.

26. Where the fact of ownership is stated, not as a question of legal title, but as a short method of stating a fact collaterally important and indicative of the coördinated class of acts, residence, exercise of control, etc., which usually attend ownership, a witness may state that he (German-American Ins. Co. *v.* Paul, 2 Indian Terr. 625, 53 S. W. 442; Murphy *v.* Olberding, 107 Iowa 547, 78 N. W. 205) or another (Hunnicutt *v.* Higginbotham, 138 Ala. 472, 35 So. 469, 100 Am. St. Rep. 45; Johnson *v.* State, 100 Ala. 55, 14 So. 627, wife of declarant; Nelson *v.* Iverson, 24 Ala. 9, 60 Am. Dec. 442; Catlin *v.* Frazier, (Conn. 1888) 12 Atl. 871; Muller *v.* Abramson, 25 Misc. (N. Y.) 520, 54 N. Y. Suppl. 1027; Olson *v.* O'Connor, 9 N. D. 504, 84 N. W. 359, 81 Am. St. Rep. 595) owns certain property, real (Pichler *v.* Reese, 171 N. Y. 577, 64 N. E. 441; Townsend *v.* Kennedy, 6 S. D. 47, 60 N. W. 164) or personal (Steiner *v.* Tranum, 98 Ala. 315, 13 So. 365; Daffron *v.* Crump, 69 Ala. 77; Cogley *v.* Cushman, 16 Minn. 397; Casper *v.* O'Brien, 15 Abb. Pr. N. S. (N. Y.) 402). In an action for the conversion of property, witnesses who are personally familiar with the facts on which the ownership of such property is based can testify directly to the ownership of the same, as a fact, although the rule is otherwise where the facts constituting ownership are complex, or are not all within the knowledge of the witnesses, so that the answer as to ownership involves the opinion or conclusion of the witnesses. Olson *v.* O'Connor, 9 N. D. 504, 84 N. W. 359, 81 Am. St. Rep. 595. This is equally true, although the jury may have ultimately to pass on the question. Pichler *v.* Reese, 171 N. Y. 577, 64 N. E. 441.

27. Partnership may be a fact collaterally relevant and so permit of a simple statement.

possession,[28] and the like. A negative statement,[29] as that one gave no authority,[30] had no connection,[31] interest,[32] or title,[33] or offered no inducement,[34] is less apt to involve the use of inference than the corresponding positive assertions, and is consequently more frequently admitted.[35] The witness may accompany his conclusion with a detailed statement of the facts upon which the conclusion of law, so far as one is announced, is based.[36] If a statement is a reasoned conclusion it will be rejected, although it be couched in a negative form.[37]

G. Judgments of Experts — 1. In General — a. Rule Stated. Under the two conditions, relevancy and necessity, above considered,[38] the fact that a witness holds a particular opinion may possess such probative force as will justify a court in admitting it as evidence that the judgment is the proper one to draw from those facts. An expert, as the etymology of the word implies, is one taught by experience. In the law of evidence the secondary meaning attaches that his distinctive experience is one which the jury needs, that is, is not one which the community, as represented by the average jury, shares in common with the witness.[39] The fundamental characteristic of the testimony of an "expert" is not that he states an inference. Many observers do that as well as he.[40] Nor is it that he speaks as to the existence of an inference from facts known only to those experienced in an art, science, trade, or the like. Many skilled observers do the same.[41] The peculiar characteristic of the expert is inference from facts assumed to exist.[42] Probably the earliest use of expert witnesses was for the information

McGrew *v.* Walker, 17 Ala. 824; Hardenburgh *v.* Fish, 61 N. Y. App. Div. 333, 70 N. Y. Suppl. 415. A witness may state who are members of the partnership. Rosenbaum *v.* Howard, 69 Minn. 41, 71 N. W. 823; Gates *v.* Manny, 14 Minn. 21; Walsh *v.* Kelly, 42 Barb. (N. Y.) 98.

28. Possession, where the word is used in the sense of physical occupancy, rather than the right to possession, or any legal aspect of actual or constructive possession directly involved in the inquiry, may be stated as a fact. Wright *v.* State, 136 Ala. 139, 34 So. 233; Steed *v.* Knowles, 97 Ala. 573, 12 So. 75; Morningstar *v.* State. 59 Ala. 30; Knight *v.* Knight, 178 Ill. 553, 53 N. E. 306; Fisher *v.* Bennehoff, 121 Ill. 426, 13 N. E. 150; Boothby *v.* Brown, 40 Iowa 104; Jones *v.* Merrimack River Lumber Co., 31 N. H. 381; Wallace *v.* Nodine, 57 Hun (N. Y.) 239, 10 N. Y. Suppl. 919; Hardenburgh *v.* Crary, 50 Barb. (N. Y.) 32; Rosenthal *v.* Middlebrook, 63 Tex. 333.

29. Peerless Mach. Co. *v.* Gates, 61 Minn. 124, 63 N. W. 260; May *v.* Crawford, 150 Mo. 504, 51 S. W. 693.

30. Lozier *v.* Graves, 91 Iowa 482, 59 N. W. 285.

31. Marcotte *v.* Beaupre, 15 Minn. 152; San Antonio, etc., R. Co. *v.* Brooking, (Tex. Civ. App. 1899) 51 S. W. 537.

32. Florence Land, etc., Co. *v.* Warren, 91 Ala. 533, 9 So. 384; Ware *v.* Morgan, 67 Ala. 461.

33. Norton *v.* Linton, 18 Ala. 690.

34. People *v.* Jackson, 138 Cal. 462, 71 Pac. 566.

35. See the cases in the preceding notes.

36. Talladega Ins. Co. *v.* Peacock, 67 Ala. 253; Tremaine *v.* Weatherby, 58 Iowa 615, 12 N. W. 609; Jones *v.* Merrimack River Lumber Co., 31 N. H. 381.

On cross-examination these facts may also be obtained. Parsons *v.* Brown, 15 Barb. (N. Y.) 590.

37. Spotts *v.* Spotts, 4 Pa. Super. Ct. 448, 40 Wkly. Notes Cas. (Pa.) 340, had not sold land.

38. See *supra*, XI, A, 4, a, b.

39. See *supra*, XI, A, 4, b, (II).

Other definitions do not vary the essential thought. Experts have been described as "men of science" (Folkes *v.* Chadd, 3 Dougl. 157, 26 E. C. L. 111), of "special and peculiar knowledge" (Jones *v.* Tucker, 41 N. H. 546), men "possessed of some particular science or skill" (Beard *v.* Kirk, 11 N. H. 397), "experienced persons" (Peterborough *v.* Jaffrey, 6 N. H. 462), "persons of skill" (Rochester *v.* Chester, 3 N. H. 349), persons "conversant with the subject-matter" (Best Princ. Ev. § 346), and "persons professionally acquainted with the science or practice" (Strickland Ev. 408).

40. See *supra*, XI, C, D.

41. See *supra*, XI, D.

42. Nunes *v.* Perry, 113 Mass. 274; Com. *v.* Williams, 105 Mass. 62. It is unfortunately true that in the popular use of the term, any observer, and especially one skilled in a certain subject is, when testifying on that subject, and especially when testifying as to an inference from facts, termed an "expert." But too many difficulties in the law of evidence center about this very common practice of using a simple term to represent different ideas to render it advisable to continue it, unless strictly necessary. The term "expert" is at present properly applied to a witness specially skilled on a question before the court whose function is to pass judgment upon certain propositions submitted to his intellect. He testifies to the existence of no facts. He observes none. His function is to say what, assuming certain facts to be true, would be his inference from them. He is not understood as taking any position as to

of the court.[43] But since the middle of the seventeenth century the expert has testified, as other witnesses, to the jury.[44] The rules are the same in civil and criminal causes.[45]

b. Basis of Judgment. The party offering an expert is at liberty to reinforce his judgment, even before any attempt is made to discredit or impeach it, by showing the grounds on which it is based,[46] provided that such facts be relevant[47] and admissible for the purpose.[48] Facts so stated do not become evidence in the case.[49] Thus, although one testifying hypothetically to a diminution in value may state the items of his estimate, these items are not evidence of the truth of the facts asserted.[50] Where the evidence does not disclose the existence of sufficient data on which to base a reasonable judgment the witness, *quoad* that judgment, is incompetent.[51] The witness may base his judgment in part upon the result of experiments.[52]

the existence of the facts upon which his hypothetical position is based. Such a person is technically "an expert." Little necessity apparently exists for applying the same term to a witness whose similarity to the expert, properly so called, consists in the fact that he is specially skilled in the subject-matter; who unlike the true expert testifies to the existence of facts themselves and being unable, from the insufficiency of human memory or power of observation and statement, to give other facts existing in connection with and qualifying them, summarizes them by stating what effect they produced upon his mind; usually the only way in which coexisting physical phenomena can be suitably presented in words. See *supra*, XI, C, D.

43. Alsop *v.* Bowtrell, Cro. Jac. 541 (term of gestation); Lib. Assoc. 145, 5 (mayhem).

44. *In re* Cowper, 13 How. St. Tr. 1105, 1123; *In re* Borosky, 9 How. St. Tr. 1, 21; *In re* Pembroke, 6 How. St. Tr. 1309, 1337.

An occasional survival shows itself later, as where Chief Justice Holt calls in two merchants of London as to the law merchant regarding a promissory note of unusual tenor. Buller *v.* Crips, 6 Mod. 30.

45. State *v.* Webb, 18 Utah 441, 56 Pac. 159.

46. *California.*— People *v.* Bird, 124 Cal. 32, 56 Pac. 639; Healy *v.* Visalia, etc., R. Co., 101 Cal. 585, 36 Pac. 125.

Florida.— Williams *v.* State, (1903) 34 So. 279.

Illinois.— Chicago Sanitary Dist. *v.* Loughran, 160 Ill. 362, 43 N. E. 359; Chicago, etc., R. Co. *v.* Cicero, 154 Ill. 656, 39 N. E. 574, value.

Louisiana.— Chandler *v.* Barrett, 21 La. Ann. 58, 99 Am. Dec. 701 (medical men); Brabo *v.* Martin, 5 La. 275.

Maine.— Lewiston Steam Mill Co. *v.* Androscoggin Water Power Co., 78 Me. 274, 4 Atl. 555.

Massachusetts.— Koplan *v.* Boston Gaslight Co., 177 Mass. 15, 58 N. E. 183; Leslie *v.* Granite R. Co., 172 Mass. 468, 52 N. E. 542; Hawkins *v.* Fall River, 119 Mass. 94; Keith *v.* Lothrop, 10 Cush. 453.

Michigan.— Webber *v.* Hanke, 4 Mich. 198.

New York.— King *v.* Second Ave. R. Co., 75 Hun 17, 26 N. Y. Suppl. 973; Wendell *v.* Troy, 39 Barb. 329.

Ohio.— Cincinnati *v.* Scarborough, 6 Ohio Dec. (Reprint) 874, 8 Am. L. Rec. 562.

Pennsylvania.— Brown *v.* Corey, 43 Pa. St. 495, damages.

South Carolina.— Price *v.* Richmond, etc., R. Co., 38 S. C. 199, 17 S. E. 732.

See 20 Cent. Dig. tit. "Evidence," § 2343 *et seq.*

That the grounds of opinion are argumentative does not affect admissibility. People *v.* Bird, 124 Cal. 32, 56 Pac. 639.

47. Bush *v.* Jackson, 24 Ala. 273; Wood *v.* Sawyer, 61 N. C. 251. It is not competent for an expert upon the question of insanity, in giving the reasons upon which his opinion is founded, to repeat the narrations of monomaniacs as to the development of their malady, or of unprofessional nurses as to the conduct of insane persons in their care. Wood *v.* Sawyer, 61 N. C. 251.

48. Parrott *v.* Johnson, 61 Ga. 475.

49. Chicago Sanitary Dist. *v.* Loughran, 160 Ill. 362, 43 N. E. 359; Harris *v.* Schuylkill River East Side R. Co., 141 Pa. St. 242, 21 Atl. 590, 23 Am. St. Rep. 278.

50. Neilson *v.* Chicago, etc., R. Co., 58 Wis. 516, 17 N. W. 310; Hutchinson *v.* Chicago, etc., R. Co., 37 Wis. 582; Snyder *v.* Western Union R. Co., 25 Wis. 60. "This is not distinction without difference; it is a practical and important one." Hutchinson *v.* Chicago, etc., R. Co., 37 Wis. 582, 610.

51. *Maryland.*— Cooke *v.* England, 27 Md. 14, 92 Am. Dec. 618.

Missouri.— Witte Iron Works *v.* Holmes, 62 Mo. App. 372.

Nebraska.— O'Hara *v.* Wells, 14 Nebr. 403, 15 N. W. 722.

North Carolina.— Stevens *v.* West, 51 N. C. 49.

Ohio.— Williams *v.* Brown, 28 Ohio St. 547.

Pennsylvania.— Foster *v.* Collner, 107 Pa. St. 305; Galbraith *v.* Philadelphia Co., 2 Pa. Super. Ct. 359.

Texas.— Lee *v.* Heuman, 10 Tex. Civ. App. 666, 32 S. W. 93.

England.— William Hamilton Mfg. Co. *v.* Victoria Lumber, etc., Co., 26 Can. Supreme Ct. 96.

See 20 Cent. Dig. tit. "Evidence," § 2343 *et seq.*

52. Eidt *v.* Cutter, 127 Mass. 522; Williams *v.* Taunton, 125 Mass. 34; Ingledew *v.* Northern R. Co., 7 Gray (Mass.) 86.

c. Conjecture Excluded. The judgment of an expert must be more than a guess.[53] A tribunal which is called upon to decide a definite issue of fact by the use of the reasoning faculty cannot be aided where no mental certainty is shown by a witness. That a judgment is based upon conjecture shows that little or no aid can be given the jury on this point by witnesses, however skilled, and therefore evidence of it is rejected.[54] The rule is exemplified in the exclusion of

The details of such experiments are not admissible as part of the evidence in chief. Ingledew *v.* Northern R. Co., 7 Gray (Mass.) 86. The details have, however, been received (Williams *v.* Taunton, 125 Mass. 34), where the experiment takes place under conditions as nearly as possible like those in the case (Eidt *v.* Cutter, 127 Mass. 522).

53. *Idaho.*— Kelly *v.* Perrault, 5 Ida. 221, 48 Pac. 45.

Missouri.— Muller *v.* Gillick, 66 Mo. App. 500.

New Hampshire.— Burnham *v.* Ayer, 36 N. H. 182.

New York.— McKerchnie *v.* Standish, 6 N. Y. Wkly. Dig. 433.

Wisconsin.— Nichols *v.* Brabazon, 94 Wis. 549, 69 N. W. 342.

54. *Alabama.*— Montgomery, etc., R. Co. *v.* Mallette, 92 Ala. 209, 9 So. 363; Storey *v.* Union Bank, 34 Ala. 687; Winter *v.* Burt, 31 Ala. 33.

California.— People *v.* Clark, 84 Cal. 573, 24 Pac. 313.

Illinois.— Haish *v.* Munday, 12 Ill. App. 539.

Iowa.— Duree *v.* Chicago, etc., R. Co., 118 Iowa 640, 92 N. W. 890; Kelly *v.* West Bend, 101 Iowa 669, 70 N. W. 726 (whether time spent by an attorney in the preparation of a case for trial was necessary); Evans *v.* Story County, 35 Iowa 126.

Kentucky.— Muldraughs Hill, etc., Turnpike Co. *v.* Maupin, 1 Ky. L. Rep. 404.

Louisiana.— Paty *v.* Martin, 15 La. Ann. 620.

Michigan.— Michaud *v.* Grace Harbor Lumber Co., 122 Mich. 305, 81 N. W. 93.

Minnesota.— Hamberg *v.* St. Paul F. & M. Ins. Co., 68 Minn. 335, 71 N. W. 388.

Missouri.— Muller *v.* Gillick, 66 Mo. App. 500.

New Jersey.— Lindenthal *v.* Hatch, 61 N. J. L. 29, 39 Atl. 662.

New York.— McGean *v.* Manhattan R. Co., 117 N. Y. 219, 22 N. E. 957; Rawls *v.* American L. Ins. Co., 36 Barb. 357; Swenson *v.* Brooklyn Heights R. Co., 15 Misc. 69, 36 N. Y. Suppl. 445; Lewis *v.* Brooklyn El. R. Co., 7 Misc. 286, 27 N. Y. Suppl. 889. See also Quinn *v.* O'Keeffe, 9 N. Y. App. Div. 68, 41 N. Y. Suppl. 116.

Pennsylvania.— Collins *v.* Mechling, 1 Pa. Super. Ct. 594, 38 Wkly. Notes Cas. 235.

Tennessee.— East Tennessee, etc., R. Co. *v.* Lindamood, 111 Tenn. 457, 78 S. W. 99; Endowment Rank K. of P. *v.* Allen, 104 Tenn. 623, 58 S. W. 241.

Texas.— San Antonio *v.* Mackey, 22 Tex. Civ. App. 145, 54 S. W. 33; Lee *v.* Heuman, 10 Tex. Civ. App. 666, 32 S. W. 93; Campbell *v.* State, 10 Tex. App. 560.

Washington.— Martin *v.* Sunset Telephone, etc., Co., 18 Wash. 260, 51 Pac. 376, that if a witness had been present a case would have resulted otherwise.

Wisconsin.— Trapp *v.* Druecker, 79 Wis. 638, 48 N. W. 664.

United States.— Fredrick Mfg. Co. *v.* Devlin, 127 Fed. 71, 62 C. C. A. 53.

What a witness would himself do under similar circumstances is inadmissible. Montgomery, etc., R. Co. *v.* Mallette, 92 Ala. 209, 9 So. 363.

Illustrations.—Whether certain goods could have burned without destroying the floor (Hamberg *v.* St. Paul F. & M. Ins. Co., 68 Minn. 335, 71 N. W. 388), or a well will produce oil in paying quantities (Collins *v.* Mechling, 1 Pa. Super. Ct. 594, 38 Wkly. Notes Cas. (Pa.) 235), what would have been the "fair rental value" of certain premises if an elevated railroad had not been built (McGean *v.* Manhattan R. Co., 117 N. Y. 219, 22 N. E. 957), or the effect of the testimony of an absent witness (Martin *v.* Sunset Telephone, etc., Co., 18 Wash. 260, 51 Pac. 376), how long it should take to try a case (Evans *v.* Story County, 35 Iowa 126), how much a person can improve his handwriting in a given time (McKeone *v.* Barnes, 108 Mass. 344), or for what amount a case could have been settled (Howe *v.* Woolsey, 7 Misc. (N. Y.) 33, 27 N. Y. Suppl. 377) have been held not to be proper subjects of the judgment expert. And where an inventor claimed to have expended one thousand seven hundred hours in perfecting an invention for defendants, evidence of machinists and pattern-makers as to whether a man could profitably spend so many hours on the business was held to have been improperly admitted. The court said: "It is insisted that the trial court erred in admitting this kind of testimony, for the reason that the elements which entered into the question are such that no machinist or pattern-maker could give any opinion which would be of any value to guide the judgment of the jury. It seems to us the objection is well taken, and is insuperable. It is obvious that no person, whether expert or non-expert, can possibly tell or form any reliable opinion as to how many hours of thought and study, of trial and experiment, it might be necessary to devote to the discovery and perfection of a useful invention. An inventive mind might by the study of a few weeks make an invention which would elude the industry and penetration of others for years, and perhaps for life, when engaged on the same subject. What man, however intelligent, could tell in advance or give an opinion as to the time it would be necessary to spend in perfecting the method of trans-

evidence of speculative damages.[55] Evidence of this nature is widely distinguished from that of a definite judgment on ascertained facts where a different one is within the bounds of reason. To ask an expert, for example, what might have been a sufficient cause for an ascertained result is "a very common and very proper mode of scientific investigation,"[56] and, where a definite course of conduct or dealing has become established, an expert may be asked what would probably happen, under a given set of circumstances, in a matter within its purview.[57]

2. Applications of Rule — a. In General. Instances in which the judgment of experts has been received as an aid to the jury are endless in variety.[58] Partly on account of the prominence of the element of discretion in adjudicating on the matter[59] it will be found impossible to reconcile the decisions on the subject with any precise rule or even to formulate such a rule as in principle ought to apply to the decision of each case as it arises.[60] As stated above, the subject must be one in which the experience of the jury does not enable them to form a reasonable judgment without assistance of another's special skill or knowledge.[61] While it is agreed broadly, on the one hand, that matters of art, science, or technical training are proper subjects for expert testimony,[62] and, on the other, that the

mitting messages by means of the telegraph or telephone? A happy thought or inspiration of genius might enable one man to reach the desired result, when others, devoting the closest study and acuteness of intellect to the same investigation for years, would be baffled in their attempts to discover it. Therefore, it seems to us, the question whether or no a man can spend 1,700 hours in making the device shown the witness does not involve professional skill or peculiar knowledge, so as to render the opinions of experts admissible on the question as to the value of the services." Trapp *v.* Druecker, 79 Wis. 638, 640, 48 N. W. 664.

55. Kernochan *v.* New York El. R. Co., 130 N. Y. 651, 29 N. E. 245, 14 L. R. A. 673 [*reversing* 57 N. Y. Super. Ct. 434, 8 N. Y. Suppl. 770]; Schmidt *v.* New York El. R. Co., 2 N. Y. App. Div. 481, 37 N. Y. Suppl. 1100; Sillcocks *v.* New York El. R. Co., 19 N. Y. Suppl. 476; San Antonio *v.* Mackey, 22 Tex. Civ. App. 145, 54 S. W. 33.

Damages by erection of elevated railway.— In an action against an elevated railroad company for damages caused by the construction and operation of defendant's road in the street on which plaintiff's property abuts, it is error to permit an expert witness to testify as to what in his judgment the property would "be worth without the elevated railroad." Sixth Ave. R. Co. *v.* Metropolitan El. R. Co., 138 N. Y. 548, 34 N. E. 400; Gray *v.* Manhattan R. Co., 128 N. Y. 499, 28 N. E. 498 [*affirming* 16 Daly 510, 12 N. Y. Suppl. 542]; Doyle *v.* Manhattan R. Co., 128 N. Y. 488, 28 N. E. 495 [*reversing* 16 Daly 506, 12 N. Y. Suppl. 548]; Wallach *v.* Manhattan El. R. Co., 16 N. Y. Suppl. 156; McGay *v.* Manhattan El. R. Co., 16 N. Y. Suppl. 155.

Damages from apprehension of death.— Expert testimony is inadmissible to prove damages from apprehension of death. Muldraughs Hill, etc., Turnpike Co. *v.* Maupin, 1 Ky. L. Rep. 404.

56. Moyer *v.* New York Cent., etc., R. Co., 98 N. Y. 645.

57. Quinn *v.* O'Keeffe, 9 N. Y. App. Div. 68, 41 N. Y. Suppl. 116; Western Union Tel. Co. *v.* Mitchell, 91 Tex. 454, 44 S. W. 274, 66 Am. St. Rep. 906, 40 L. R. A. 209; Greville *v.* Chapman, 5 Q. B. 731, Dav. & M. 553, 13 L. J. Q. B. 172, 48 E. C. L. 731. A party may testify what his conduct would have been under certain circumstances. Western Union Tel. Co. *v.* Mitchell, 91 Tex. 454, 44 S. W. 274, 66 Am. St. Rep. 906, 40 L. R. A. 209. A witness may state whether a racing club would regard certain conduct sanctioned by their rules as honorable. Greville *v.* Chapman, 5 Q. B. 731, Dav. & M. 553, 13 L. J. Q. B. 172, 48 E. C. L. 731.

58. **It may be conceded** that "the only proper course is to keep the principles steadily in view, and apply it according to the circumstances of each case." Graham *v.* Pennsylvania Co., 139 Pa. St. 149, 161, 21 Atl. 151, 12 L. R. A. 293. See also New England Gloss Co. *v.* Lovell, 7 Cush. (Mass.) 319.

The test has been said to be whether the court will be aided by receiving the evidence. Young *v.* Johnson, 123 N. Y. 226, 25 N. E. 363.

59. See *supra*, XI, A, 2.

60. Muldowney *v.* Illinois Cent. R. Co., 36 Iowa 462, 473, where the court said: "It is doubtful whether all the cases can be harmonized, or brought within any general rule or principle."

61. See *supra*, XI, A, 2, 4, b.

62. Moreland *v.* Mitchell County, 40 Iowa 394; Pelamourges *v.* Clark, 9 Iowa 1; Newmark *v.* Liverpool, etc., F., etc., Ins. Co., 30 Mo. 160, 77 Am. Dec. 608; Hartford Protection Ins. Co. *v.* Harmer, 2 Ohio St. 452, 59 Am. Dec. 684. "In matters of science no other witness can be called." Folkes *v.* Chadd, 3 Dougl. 157, 26 E. C. L. 111.

The necessity for a course of previous study or acquired experience furnishes a rough test of admissibility. Muldowney *v.* Illinois Cent. R. Co., 36 Iowa 462; Clark *v.* Bruce, 12 Hun (N. Y.) 274.

common affairs of daily life are not,[63] there is a wide middle ground where the discretion of different courts has been exercised to an opposite effect, which appellate courts decline to disturb, although very possibly it would have exercised discretion to the opposite effect.[64] A question partly covering a proper subject of expert evidence and in part relating to a matter of common experience may be rejected.[65]

b. Agriculture.[66] In rural communities the operations of the farm may be assumed to be within the experience of the average juror, and therefore the judgment of experienced witnesses or experts as to the quality and probable quantity of farm crops,[67] the sufficiency of the fences,[68] the safe nature of certain acts customary on a farm,[69] the proper times for conducting farming operations, for example, firing fallow[70] or brush;[71] the use of farm animals, such as horses, and their care,[72] are in general rejected. On the other hand one experienced in raising crops may state whether a certain course of treatment of crops is proper,[73] whether milk looked and tasted as if it had been adulterated by adding water,[74] or whether farm buildings are suitable for a given purpose.[75]

c. Building Trades.[76] Witnesses, like architects,[77] builders,[78] contractors,[79] or engineers,[80] who are shown to have adequate experience of the trade at a period which would make their knowledge relevant[81] and to be adequately qualified to form a judgment as to the matter as to which they purport to speak,[82] may testify as to the cost of houses[83] or other structures,[84] and as to the effect,[85] pro-

63. Koccis *v.* State, 56 N. J. L. 44, 27 Atl. 800. Whether a foreigner understands certain English words is not a proper subject for expert testimony. Koccis *v.* State, *supra.* But see *infra,* XI, G, 2, e.

64. See the cases cited under the sections following.

65. Missouri Pac. R. Co. *v.* Fox, 56 Nebr. 746, 77 N. W. 130.

66. See also *supra,* XI, B, 2, b; XI, D, 2.

67. Nebraska Land, etc., Co. *v.* Burris, 10 S. D. 430, 73 N. W. 919. A farmer from his own experience in raising crops on land may testify as to his opinion concerning the probable yield under similar circumstances of similar land belonging to plaintiff. Nebraska Land, etc., Co. *v.* Burris, *supra.*

68. Enright *v.* San Francisco, etc., R. Co., 33 Cal. 230; Sowers *v.* Dukes, 8 Minn. 23.

69. Bills *v.* Ottumwa, 35 Iowa 107, riding on hay.

70. Higgins *v.* Dewey, 107 Mass. 494, 4 Am. Rep. 63; Ferguson *v.* Hubbell, 97 N. Y. 507, 49 Am. Rep. 544; Fraser *v.* Tupper, 29 Vt. 409.

71. Krippner *v.* Biebe, 28 Minn. 139, 9 N. W. 671; Wells *v.* Eastman, 61 N. H. 507.

72. Brink's Chicago City Express Co. *v.* Kinnare, 168 Ill. 643, 48 N. E. 446 (holding that whether a driver of a team could have stopped soon enough to prevent an accident is not a matter of expert testimony); Oakes *v.* Weston, 45 Vt. 430 (overloading).

73. Van Werden *v.* Winslow, 117 Mich. 564, 76 N. W. 87, celery.

74. Lane *v.* Wilcox, 55 Barb. (N. Y.) 615.

75. Armstrong *v.* Chicago, etc., R. Co., 45 Minn. 85, 47 N. W. 459, stable.

76. See also *supra,* XI, B, 2, c; XI, D, 3. And see BUILDERS AND ARCHITECTS, 6 Cyc. 102.

77. Benjamin *v.* Metropolitan St. R. Co., 50 Mo. App. 602; Chamberlain *v.* Dunlop, 5 Silv. Supreme (N. Y.) 98, 8 N. Y. Suppl. 125.

78. Montgomery *v.* Gilmer, 33 Ala. 116, 70 Am. Dec. 562 (mason); Bettys *v.* Denver, 115 Mich. 228, 73 N. W. 138 (bridge); Cobb *v.* St. Louis, etc., R. Co., 149 Mo. 609, 50 S. W. 894 (bridge); Fox *v.* Buffalo Park, 21 N. Y. App. Div. 321, 47 N. Y. Suppl. 788.

79. Joske *v.* Pleasants, 15 Tex. Civ. App. 433, 39 S. W. 586.

80. Bryan *v.* Branford, 50 Conn. 246; Stead *v.* Worcester, 150 Mass. 241, 22 N. E. 893.

81. McEwen *v.* Bigelow, 40 Mich. 215, plumber.

82. Peteler Portable Mfg. Co. *v.* Northwestern Adamant Mfg. Co., 60 Minn. 127, 61 N. W. 1024.

83. Joske *v.* Pleasants, 15 Tex. Civ. App. 433, 39 S. W. 586.

84. Bryan *v.* Branford, 50 Conn. 246; Hart *v.* Brooklyn, 31 N. Y. App. Div. 517, 52 N. Y. Suppl. 113 (reservoir); Fox *v.* Buffalo Park, 21 N. Y. App. Div. 321, 47 N. Y. Suppl. 788 (grand stand).

It is not material that the witness has learned the price of materials from inquiries made to others. Bryan *v.* Branford, 50 Conn. 246.

85. Richardson *v.* Eureka, 110 Cal. 441, 42 Pac. 965 (holding that a competent witness may state that the "settling" of a house would affect the plastering in it); Miller *v.* Shay, 142 Mass. 598, 8 N. E. 419 (stating how much sand a given amount of mortar, made in a particular way, will require); Bettys *v.* Denver Tp., 115 Mich. 228, 73 N. W. 138 (loosening of timbers in a bridge); MacKnight Flintic Stone Co. *v.* New York, 13 N. Y. App. Div. 231, 43 N. Y. Suppl. 139 (whether a cellar would be watertight if built according to certain specifications); Smith *v.* Gugerty, 4 Barb. 614 (holding that a mason may be asked how long it would

priety,[86] safety,[87] or time required for particular operations.[88] The strength of particular forms of construction[89] and whether sufficient for an intended use;[90] the effect of fire on building materials,[91] and the expense of the materials required[92] are proper subjects for an inference of a skilled witness. He may state the probable effect of certain conditions.[93] Where all the facts can be placed before a jury the evidence of an expert is rejected.[94]

d. Cattle Raising.[95] Persons skilled by experience in cattle raising may testify as experts as to what would be the result of given treatment upon stock;[96] as their gain in weight by a season's pasturing under favorable conditions.[97]

e. Common Affairs.[98] Experience, skill, and training may be applied to the common affairs of life. The test of admissibility is not the technical nature of the subject-matter with which the evidence deals, but rather whether the skill or experience of the witness, to whatever subject applied, technical or common, will aid and is necessary to aid the jury.[99] This may happen in connections with which most men are familiar to a certain extent, but all men are not equally conversant to a point where they can necessarily draw, or be taught readily how to draw, a reasonable inference.[1] Of this nature may be the construction,[2] repair,[3] and use[4] of highways, and other ordinary occurrences.[5] Witnesses having large

take to dry the walls of a house so as to render it safe and fit for human habitation).

86. Stead *v.* Worcester, 150 Mass. 241, 22 N. E. 893 (plumbing construction); Bunnell *v.* St. Paul, etc., R. Co., 29 Minn. 305, 13 N. W. 129 (foreman a practical carpenter); Cobb *v.* St. Louis, etc., R. Co., 149 Mo. 609, 50 S. W. 894 (bridge building); Hayes *v.* Southern Pac. R. Co., 17 Utah 99, 53 Pac. 1001 (drain sheds).

87. N. & M. Friedman Co. *v.* Atlas Assur. Co., 133 Mich. 212, 94 N. W. 757 (construction of house); Benjamin *v.* Metropolitan St. R. Co., 50 Mo. App. 602 (holding that an architect may testify as to whether a coal-hole of particular description "was so constructed as to be reasonably safe"); Cramer *v.* Slade, 66 N. Y. App. Div. 59, 73 N. Y. Suppl. 125; Fox *r.* Buffalo Park, 21 N. Y. App. Div. 321, 47 N. Y. Suppl. 788 (grandstand). Where the jury might find from conflicting evidence that an upright supporting a staging which fell rested on brickwork, it was not error to ask an expert whether it would be safe to erect the staging with a corner post resting on a brick ledge, and to give his reasons for his opinion, and as to the liability of the brick ledge to loosen, over objection that there was no evidence that the post rested on brick. Bourbonnais *v.* West Boylston Mfg. Co., 184 Mass. 250, 68 N. E. 232.

88. Chamberlain *v.* Dunlop, 5 Silv. Supreme (N. Y.) 98, 8 N. Y. Suppl. 125, removal of debris.

89. Montgomery *v.* Gilmer, 33 Ala. 116, 70 Am. Dec. 562 (cistern); Prendible *r.* Connecticut River Mfg. Co., 160 Mass. 131, 35 N. E. 675 (scaffolding); Kulas *v.* Libera, 65 Minn. 337, 68 N. W. 36 (cistern wall); Jenks *v.* Thompson, 83 N. Y. App. Div. 343, 82 N. Y. Suppl. 274 (scaffolding).

90. Fox *r.* Buffalo Park, 21 N. Y. App. Div. 321, 47 N. Y. Suppl. 788.

91. N. & M. Friedman Co. *v.* Atlas Assur. Co., 133 Mich. 212, 94 N. W. 757.

92. Wynkoop *v.* Niagara F. Ins. Co., 91 N. Y. 478, 43 Am. Rep. 686.

93. Tremblay *v.* Mapes-Reeve Constr. Co., 169 Mass. 284, 47 N. E. 1010.

94. Turner *v.* Haar, 114 Mo. 335, 21 S. W. 737, defective wall. See also *supra*, XI, A, 4, b.

95. See also *supra*, XI, B, 2, d; XI, D, 4.

96. *Illinois.*— Frambers *v.* Risk, 2 Ill. App. 499.

Maryland.— Baltimore, etc., R. Co. *v.* Thompson, 10 Md. 76.

Montana.— Proctor *v.* Irvin, 22 Mont. 547, 57 Pac. 183.

South Dakota.— Nebraska Land, etc., Co. *r.* Burris, 10 S. D. 430, 73 N. W. 919, crops under irrigation.

Texas.— Ft. Worth, etc., R. Co. *v.* Greathouse, 82 Tex. 104, 17 S. W. 834.

United States.— Missouri Pac. R. Co. *v.* Hall, 66 Fed. 868, 14 C. C. A. 153.

97. Ware Cattle Co. *v.* Anderson, 107 Iowa 231, 77 N. W. 1026.

98. See also *supra*, XI, A, 2, b; XI, G, 2, a.

99. See *supra*, XI, A, 4, b.

1. See *supra*, XI, A, 4, b, c.

2. Taylor *v.* Monroe, 43 Conn. 36, holding that highway builders of experience may state whether a better railing should have been provided for a bridge.

A surveyor as such is not a competent witness. Lincoln *v.* Barre, 5 Cush. (Mass.) 590.

3. Seamons *v.* Fitts, 21 R. I. 236, 42 Atl. 863.

4. Laughlin *v.* Grand Rapids St. R. Co., 62 Mich. 220, 28 N. W. 873; Stowe *v.* Bishop, 58 Vt. 498, 3 Atl. 494, 56 Am. Rep. 569, whether leaving a horse unhitched, under given conditions, is negligent.

5. St. Louis Gaslight Co. *v.* American F. Ins. Co., 33 Mo. App. 348, where it was held that the question as to whether certain phenomena amount to an "explosion" of gas was competent.

experience with horses may give their opinion as to what was the matter with horses alleged to have been injured by mistreatment and overdriving;[6] and one familiar with gambling devices may state for what gaming purpose a certain room and apparatus were used.[7] The ordinary properties of matter in its various forms of solid, liquid, or gaseous may be stated by an experienced witness.[8]

f. Engineering.[9] Engineering is a science, and those acquainted with that department of it to which a given question relates, as engineers, may testify as to their judgment on facts of professional importance submitted to them,[10] so far as relevant.[11] Thus they may testify regarding the action of water, as whether a certain overflow was due to natural causes,[12] to the faulty construction of an embankment or dam,[13] or the improper handling of certain reservoirs;[14] whether wells dug near a stream divert water from it;[15] whether the removal of sand from a lake shore threatens a city with inundation or injures the harbor,[16] or what is the cause of the filling of a harbor.[17] They may state a judgment as to how much more land water would cover if raised to a definitely higher level[18] and whether certain designated work was properly done.[19]

g. Insurance.[20] In many instances the facts of insurance are merely those of common experience, as to which the judgment of a skilled witness is not necessary.[21] Facts connected with accident, fire, life, or marine insurance, which are commonly known in the community, cannot be made the subject of expert evidence;[22] as, in fire insurance, what obviously constitutes an increase of risk,[23] as

6. Woolwine *v.* Bick, 39 Mo. App. 495.

7. Douglass *v.* State, 18 Ind. App. 289, 48 N. E. 9.

8. Logansport, etc., Natural Gas Co. *v.* Coate, 29 Ind. App. 299, 64 N. E. 638, that gas can pass through the earth without discoloring except at the point of escape.

9. See also *supra*, XI, B, 2, g; XI, D, 7.

10. Egger *v.* Rhodes, (Cal. 1894) 37 Pac. 1037, civil and hydraulic.

Where the inference is not a technical one and the jury are quite as capable of drawing an inference as the witness the evidence of it will be unnecessary. Ward *v.* Troy, 55 N. Y. App. Div. 192, 66 N. Y. Suppl. 925, possibility that the iron cover of a cesspool entrance could tip before it slid.

11. Hopper *v.* Empire City Subway Co., 78 N. Y. App. Div. 637, 79 N. Y. Suppl. 907.

12. Ohio, etc., R. Co. *v.* Webb, 142 Ill. 404, 32 N. E. 527; Ohio, etc., R. Co. *v.* Schmidt, 47 Ill. App. 383.

13. Baltimore, etc., R. Co. *v.* Hackett, 87 Md. 224, 39 Atl. 510. Personal acquaintance with the practical effects of one dam will not qualify the observer to state his judgment as to the effect of another. Ellis *v.* Harris, 32 Gratt. (Va.) 684.

14. Akin *v.* St. Croix Lumber Co., 88 Minn. 119, 92 N. W. 537.

15. Van Wycklen *v.* Brooklyn, 3 N. Y. St. 149.

16. Clason *v.* Milwaukee, 30 Wis. 316.

17. Folkes *v.* Chadd, 3 Dougl. 157, 26 E. C. L. 111.

18. Phillips *v.* Terry, 3 Abb. Dec. (N. Y.) 607, 3 Keyes (N. Y.) 313, 1 Transcr. App. (N. Y.) 235, 5 Abb. Pr. N. S. (N. Y.) 327.

19. Finn *v.* Cassidy, 165 N. Y. 584, 59 N. E. 311, 52 L. R. A. 877, excavating under high chimney.

20. See also *supra*, XI, B, 2, i; XI, D, 8.

21. Merchants', etc., Mut. Ins. Co. *v.* Washington Mut. Ins. Co., 1 Handy (Ohio) 408, 12 Ohio Dec. (Reprint) 209; Franklin F. Ins. Co. *v.* Grover, 100 Pa. St. 266; Merchants' Ins. Co. *v.* Dwyer, 1 Tex. Unrep. Cas. 441.

22. Jefferson Ins. Co. *v.* Cotheal, 7 Wend. (N. Y.) 72, 22 Am. Dec. 567; Milwaukee, etc., R. Co. *v.* Kellogg, 94 U. S. 469, 24 L. ed. 256.

23. Joyce *v.* Maine Ins. Co., 45 Me. 168, 71 Am. Dec. 536; Luce *v.* Dorchester Mut. F. Ins. Co., 105 Mass. 297, 7 Am. Rep. 522; Lyman *v.* State Mut. F. Ins. Co., 14 Allen (Mass.) 329; Morris *v.* Farmers' Mut. F. Ins. Co., 63 Minn. 420, 65 N. W. 655, steam in threshing. The same result as if expert testimony were received is accomplished by admitting evidence of the fact that insurance companies, under given circumstances of changed conditions, are in the habit of increasing their premium charges (Planters' Mut. Ins. Co. *v.* Rowland, 66 Md. 236, 7 Atl. 257; Luce *v.* Dorchester Mut. F. Ins. Co., 105 Mass. 297, 7 Am. Rep. 522; Merriam *v.* Middlesex Mut. F. Ins. Co., 21 Pick. (Mass.) 162, 32 Am. Dec. 252; Hobby *v.* Dana, 17 Barb. (N. Y.) 111) not to be considered as a decisive test as to the risk, but as evidence for the jury (Planters' Mut. Ins. Co. *v.* Rowland, *supra*). To hold that an expert cannot state whether certain alterations increase an insurance risk (Lyman *v.* State Mut. F. Ins. Co., 14 Allen (Mass) 329) and permit such a witness to state that insurance companies are in the habit of increasing the premium under the changed conditions seems extremely fine, but the courts of Massachusetts hold the former to be an "opinion," the latter a mere statement of fact (Webber *v.* Eastern R. Co., 2 Metc. (Mass.) 147). The rule is the same in the circuit court of the United States for

leaving a building unoccupied,[24] inclosing a boiler previously detached from the building,[25] putting up adjacent buildings,[26] or a change in use,[27] or whether certain suppressed facts were material to the risk;[28] or, in life-insurance contracts, whether a concealment was on a material point.[29] Where the matter is more technical, as, in fire insurance, whether a certain quantity of wood could have been burned in a certain fire,[30] whether a certain change in use, not obviously dangerous, or the communication of a given fact[31] would increase the premium;[32] or at what premium a given risk could have been placed in other companies;[33] or, in life insurance, that slave-catching is more hazardous than farming,[34] or the value of renewal premiums;[35] or, in marine insurance, the materiality of a given fact

the district of Massachusetts. Hawes *v.* New England Mut. Mar. Ins. Co., 11 Fed. Cas. No. 6,241, 2 Curt. 229.

The weight of authority tends to the employment of expert evidence as to matters of increase of risk. Cornish *v.* Farm Buildings F. Ins. Co., 74 N. Y. 295.

24. Cannell *v.* Phœnix Ins. Co., 59 Me. 582; Luce *v.* Dorchester Mut. F. Ins. Co., 105 Mass. 297, 7 Am. Rep. 522; Mulry *v.* Mohawk Valley Ins. Co., 5 Gray (Mass.) 541, 66 Am. Dec. 380; Rawls *v.* American Mut. L. Ins. Co., 27 N. Y. 282, 84 Am. Dec. 280; Kirby *v.* Phœnix Ins. Co., 9 Lea (Tenn.) 142. A person conversant with real estate cannot be asked respecting the peculiar liability of unoccupied buildings to fire. Cannell *v.* Phœnix Ins. Co., 59 Me. 582; Mulry *v.* Mohawk Valley Ins. Co., 5 Gray (Mass.) 541, 66 Am. Dec. 380. On the contrary the evidence of experts has been received as to the effect of non-occupancy upon the hazard. Cornish *v.* Farm Buildings F. Ins. Co., 74 N. Y. 295. Even where uncontroverted the judgment of experts is not conclusive on the jury. Cornish *v.* Farm Buildings F. Ins. Co., *supra*.

25. Jefferson Ins. Co. *v.* Cotheal, 7 Wend. (N. Y.) 72, 22 Am. Dec. 567.

26. Franklin F. Ins. Co. *v.* Gruver, 100 Pa. St. 266; Merchants' Ins. Co. *v.* Dwyer, 1 Tex. Unrep. Cas. 441. Expert evidence that the actual danger from fire to insured premises is rendered greater by adjacent buildings is inadmissible, as a person cannot be said to be an expert in that which is not and cannot be followed as a business, or in that which must necessarily result from observation of a character so general that it must be common to everyone. Franklin F. Ins. Co. *v.* Gruver, *supra*.

27. Rockland First Cong. Church *v.* Holyoke Mut. F. Ins. Co., 158 Mass. 475, 33 N. E. 572, 35 Am. St. Rep. 508, 19 L. R. A. 587 (use of naphtha); Kircher *v.* Milwaukee Mechanics' Mut. Ins. Co., 74 Wis. 470, 43 N. W. 487, 5 L. R. A. 779.

28. Hartford Protection Ins. Co. *v.* Harmer, 2 Ohio St. 452, 59 Am. Dec. 684; Campbell *v.* Rickards, 5 B. & Ad. 840, 2 L. J. K. B. 204, 2 N. & M. 542, 27 E. C. L. 353; Lindenau *v.* Desborough, 8 B. & C. 586, 15 E. C. L. 290; Durrell *v.* Bederley, Holt N. P. 283, 8 Rev. Rep. 739, 3 E. C. L. 118; Quin *v.* National Assoc. Co., Jones & Carey (Ire.) 316. See also Hill *v.* Lafayette Ins. Co., 2 Mich. 476.

29. New Era Assoc. *v.* Mactavish, (Mich. 1903) 94 N. W. 599; Durrell *v.* Bederley, Holt N. P. 283, 8 Rev. Rep. 739, 3 E. C. L. 118.

Certain English cases have sanctioned the admission of expert testimony on the subject. Rickards *v.* Murdock, 10 B. & C. 527, 21 E. C. L. 225; Berthon *v.* Loughman, 2 Stark. 258, 3 E. C. L. 400.

30. Welch *v.* Franklin Ins. Co., 23 W. Va. 288.

31. Berthon *v.* Loughman, 2 Stark. 258, 3 E. C. L. 400.

32. *Illinois.*— Catlin *v.* Traders' Ins. Co., 83 Ill. App. 40, canning machinery.

Iowa.— Russell *v.* Cedar Rapids Ins. Co., 78 Iowa 216, 42 N. W. 654, 4 L. R. A. 538.

Minnesota.— Harrington *v.* St. Paul, etc., R. Co., 17 Minn. 215, operation of railroad.

Missouri.— Kern *v.* South St. Louis Mut. Ins. Co., 40 Mo. 19.

New Jersey.— Schenck *v.* Mercer County Mut. F. Ins. Co., 24 N. J. L. 447.

Illustrative instances.— On points as to increase of risk, where the inference is not clear and special experience is valuable, for example, whether the erection of certain additions to the insured buildings (Daniels *v.* Hudson River F. Ins. Co., 12 Cush. (Mass.) 416, 59 Am. Dec. 192, partition; Kern *v.* South St. Louis Mut. Ins. Co., 40 Mo. 19, wooden shed; Schenck *v.* Mercer County Mut. F. Ins. Co., 24 N. J. L. 447, adding story), or describing them as a "hotel" instead of a "boarding-house" (Martin *v.* Franklin F. Ins. Co., 42 N. J. L. 46), or the use of naphtha for burning paint from a building (Rockland First Cong. Church *v.* Holyoke Mut. F. Ins. Co., 158 Mass. 475, 33 N. E. 572, 35 Am. St. Rep. 508, 19 L. R. A. 587), or other changes of condition (Traders' Ins. Co. *v.* Catlin, 163 Ill. 256, 45 N. E. 255, 35 L. R. A. 595, use of naphtha; German American Ins. Co. *v.* Steiger, 109 Ill. 254; Roby *v.* American Cent. Ins. Co., 11 N. Y. St. 93, putting in machinery), or the operation of a railroad within a hundred feet of a building (Webber *v.* Eastern R. Co., 2 Metc. (Mass.) 147) constitute such an increase that resort may be had to trained witnesses.

33. Martin *v.* Franklin F. Ins. Co., 42 N. J. L. 46.

34. Hartman *v.* Keystone Ins. Co., 21 Pa. St. 466.

35. Ætna L. Ins. Co. *v.* Nexsen, 84 Ind. 347, 43 Am. Rep. 91.

to the risk,[36] how marine insurance brokers would have construed a particular letter of instructions under given circumstances,[37] that a vessel is a "total loss,"[38] or whether it was negligent to put a steamer close to a tall and inflammable building during the prevalence of a very strong wind blowing against the building,[39] any person shown to be specially experienced on the subject-matter[40] may give his judgment as an expert.[41] It is not necessary that the experience should be that of persons associated with the insurance business. Such persons constitute one class of experts, but any experience presumably supplementary to that of the jury will be received. Thus in matters of fire insurance, persons practically acquainted with the handling of fires, as members of associations for extinguishing fires, may be competent.[42]

h. Legal Matters.[43] A witness acquainted with legal affairs may state whether certain legal services were necessary[44] or what was the law of ejectment on a certain point at a given time.[45] An attorney is not permitted to state what constitutes negligence in a given case.[46]

i. Manufacturing.[47] Facts connected with manufacturing which are within the experience of the general community, as whether rough machinery is more dangerous than smooth when uncovered, are not proper subjects for expert testimony;[48] but on the other hand facts distinctly technical, as whether certain repairs are necessary,[49] what is a proper lacing of belts,[50] or whether there is a latent danger in the operation of certain machinery[51] may be stated by a witness suitably qualified.[52]

j. Mechanics.[53] The mechanic arts frequently present questions for determination by experts,[54] both those trained in the science,[55] and those practically acquainted with mechanical operations.[56] Such witnesses may testify as to whether certain conduct was proper;[57] what would be the dangers, if any,

36. Leitch *v.* Atlantic Mut. Ins. Co., 66 N. Y. 100; McLanahan *v.* Universal Ins. Co., 1 Pet. (U. S.) 170, 7 L. ed. 98. But see *contra*, Campbell *v.* Rickards, 5 B. & Ad. 840, 2 L. J. K. B 204, 2 N. & M. 542, 27 E. C. L. 353.

37. Chapman *v.* Walton, 10 Bing. 57, 2 L. J. C. P. 213, 3 Moore & S. 389, 25 E. C. L. 36.

38. McLain *v.* British, etc., Mar. Ins. Co., 16 Misc. (N. Y.) 336, 38 N. Y. Suppl. 77.

39. Milwaukee, etc., R. Co. *v.* Kellogg, 94 U. S. 469, 24 L. ed. 256.

40. Schmidt *v.* Peoria M. & F. Ins. Co., 41 Ill. 295; Donaldson *v.* Mississippi, etc., R. Co., 18 Iowa 280, 87 Am. Dec. 391; Nelson *v.* Sun Mut. Ins. Co., 71 N. Y. 453 (marine); Hobby *v.* Dana, 17 Barb. (N. Y.) 111.

Merely acting as an insurance agent does not qualify a witness to testify as to matters of distinctly technical knowledge. Stennett *v.* Pennsylvania F. Ins. Co., 68 Iowa 674, 28 N. W. 12; Donaldson *v.* Mississippi, etc., R. Co., 18 Iowa 280, 87 Am. Dec. 391. An experience of six months as agent of a life-insurance company will not qualify a witness to testify as an expert as to an expectation of life at a certain age. Donaldson *v.* Mississippi, etc., R. Co., *supra*.

41. See the cases cited in the preceding notes.

42. Schenck *v.* Mercer County F. Ins. Co., 24 N. J. L. 447.

43. See also *supra*, XI, B, 2, j; XI, D, 9.

44. Artz *v.* Robertson, 50 Ill. App. 27, attorney.

45. Armstrong *v.* Risteau, 5 Md. 256, 59 Am. Dec. 115.

46. Clussman *v.* Merkel, 3 Bosw. (N. Y.) 402.

47. See also *supra*, XI, B, 2, k; XI, D, 10.

48. Kauffman *v.* Maier, 94 Cal. 269, 281, 29 Pac. 481, 18 L. R. A. 124, where the court said: "An answer to the questions did not involve the knowledge of any science or art, and was not the subject of testimony by an expert in machinery."

49. Taylor *v.* French Lumbering Co., 47 Iowa 662.

50. McGar *v.* National, etc., Worsted Mills, 22 R. I. 347, 47 Atl. 1092.

51. Whitaker *v.* Campbell, 187 Pa. St. 113, 41 Atl. 38.

52. Nelson *v.* Wood, 62 Ala. 175. It is not necessary that the expert should be able to do the actual work. One who is at the head of a manufacturing establishment and knows how work should be done may testify as to it. Nelson *v.* Wood, 62 Ala. 175.

53. See also *supra*, XI, B, 2, l; XI, D, 11.

54. Cole *v.* Clarke, 3 Wis. 323.

55. Helfenstein *v.* Medart, 136 Mo. 595, 36 S. W. 863, 37 S. W. 829, 38 S. W. 294.

56. Evarts *v.* Middlebury, 53 Vt. 626, 38 Am. Rep. 707, blacksmith.

No other than a trained or experienced witness is competent to testify as to technical matters. Chicago *v.* Greer, 9 Wall. (U. S.) 726, 19 L. ed. 769, capacity of fire hose.

57. Coburn *v.* Muskegon Booming Co., 72 Mich. 134, 40 N. W. 198, logging.

attending the use of particular machinery,[58] in a particular way,[59] and whether such danger could be removed or modified;[60] whether a certain device is safe,[61] or properly constructed;[62] whether an experiment is fair;[63] how long certain operations would take;[64] what certain effects indicate;[65] the limits of skill or observation;[66] the capability of a machine to accomplish a definite result,[67] its capability for doing work in general,[68] and its relative effectiveness for the purpose as compared with another device;[69] the cause of certain results;[70] whether certain acts were possible[71] or proper;[72] the probable operation of a mechanical device under given conditions;[73] or the cost of machinery.[74] Where the incidents as to which expert testimony is offered are within the range of ordinary knowl-

58. Helfenstein *v.* Medart, 136 Mo. 595, 36 S. W. 863, 37 S. W. 829, 38 S. W. 294 (revolving grindstones); Innes *v.* Milwaukee, 103 Wis. 582, 79 N. W. 783; Pullman's Palace-Car Co. *v.* Harkins, 55 Fed. 932, 5 C. C. A. 326 (revolving shafting). Whether a danger is obvious to an ordinary observer involves an appeal to the experience of the jury (Gilbert *v.* Guild, 144 Mass. 601, 12 N. E. 368), and so whether a boy is a suitable person to put to work on a given machine (McGuerty *v.* Hale, 161 Mass. 51, 36 N. E. 682); but whether an experienced workman would in the exercise of due care have observed a danger not patent to any intelligent person may be stated by the skilled witness (Innes *v.* Milwaukee, 103 Wis. 582, 79 N. W. 783).

A general manager of an electrically equipped street railway who is merely interested in the operation of the road cannot testify as to the liability of fly wheels used in generating the electricity to burst. Piehl *v.* Albany R. Co., 30 N. Y. App. Div. 166, 51 N. Y. Suppl. 755.

59. O'Brien *v.* Look, 171 Mass. 36, 50 N. E. 458.

60. Sawyer *v.* J. M. Arnold Shoe Co., 90 Me. 369, 38 Atl. 333 (dog on an elevator); Lang *v.* Terry, 163 Mass. 138, 39 N. E. 802 (guide rope on derrick); Peterson *v.* Johnson-Wentworth Co., 70 Minn. 538, 73 N. W. 510 (placing a guard).

61. McGonigle *v.* Kane, 20 Colo. 292, 38 Pac. 367 (elevator); Union Show Case Co. *v.* Blindauer, 175 Ill. 325, 51 N. E. 709 [*affirmed* in 75 Ill. App. 358] (elevator); Hall *v.* Murdock, 114 Mich. 233, 72 N. W. 150 (elevator); Lau *v.* Fletcher, 104 Mich. 295, 62 N. W. 357 (saw); Wabash Screen Door Co. *v.* Black, 126 Fed. 721, 61 C. C. A. 639 (pulley).

62. Skinner *v.* E. F. Kerwin Ornamental Glass Co., 103 Mo. App. 650, 77 S. W. 1011 (fan and piping to remove dust); Scandell *v.* Columbia Constr. Co., 50 N. Y. App. Div. 512, 64 N. Y. Suppl. 232 (derrick).

63. Chicago *v.* Greer, 9 Wall. (U. S.) 726, 19 L. ed. 769.

64. Emerson *v.* Lowell Gas Light Co., 3 Allen (Mass.) 410, digging through frozen ground.

65. Parsley *v.* Edge Moor Bridge Works, 56 N. Y. App. Div. 71, 67 N. Y. Suppl. 719 (effect of piledriver with light blow driving piles considerable distance at final strokes); International, etc., R. Co. *v.* Mills, (Tex. Civ. App. 1903) 78 S. W. 11 (jerking of an angle cock in an air hose).

66. Ouillette *v.* Overman Wheel Co., 162 Mass. 305, 38 N. E. 511; St. Louis, etc., R. Co. *v.* Farr, 56 Fed. 994, 6 C. C. A. 211.

Whether a given defect could have been discovered by inspection may be stated. St. Louis, etc., R. Co. *v.* Farr, 56 Fed. 994, 6 C. C. A. 211, weld in a car axle.

67. *California.*— People *v.* Goldsworthy, 130 Cal. 600, 62 Pac. 1074.

Illinois.— Union Show Case Co. *v.* Blindauer, 75 Ill. App. 358, elevator.

Indiana.— Indiana Bituminous Coal Co. *v.* Buffey, 28 Ind. App. 108, 62 N. E. 279, sufficiency of pulley.

Massachusetts.— Hayward *v.* Draper, 3 Allen 551.

Missouri.— Skinner *v.* E. F. Kirwin Ornamental Glass Co., 103 Mo. App. 650, 77 S. W. 1011, defect in fan blower.

68. Read *v.* Barker, 30 N. J. L. 378 (gristmill); Garwood *v.* New York Cent., etc., Co., 45 Hun (N. Y.) 128. The united acquiescence of millwrights in the accuracy of "Leffel's tables," giving the grinding capacity of specified water-power, may be treated as the common knowledge of millwrights and their computations made on the basis of those tables are competent evidence. Garwood *v.* New York Cent., etc., R. Co., *supra.*

69. Hall *v.* Murdock, 114 Mich. 233, 72 N. W. 150.

70. Brownfield *v.* Chicago, etc., R. Co., 107 Iowa 254, 77 N. W. 1038; Hand *v.* Brookline, 126 Mass. 324; Quigley *v.* H. W. Johns. Mfg. Co., 26 N. Y. App. Div. 434, 50 N. Y. Suppl. 98 (collapse of a building); Frederick Mfg. Co. *v.* Devlin, 127 Fed. 71, 62 C. C. A. 53 (whether breakages might be due to the inexpedient use of castings instead of forgings and not to inherent defects in the materials used).

71. Underfeed Stoker Co. *v.* Detroit Salt Co., (Mich. 1904) 97 N. W. 959.

72. Kumberger *v.* Congress Spring Co., 158 N. Y. 339, 53 N. E. 3.

73. Koster *v.* Noonan, 8 Daly (N. Y.) 231 (blast); Evarts *v.* Middlebury, 53 Vt. 626, 38 Am. Rep. 707 (horseshoes for certain use); Maitland *v.* Gilbert Paper Co., 97 Wis. 476, 72 N. W. 1124, 65 Am. St. Rep. 137 (suddenly opening a valve).

74. Hunt Bros. Fruit Packing Co. *v.* Cassiday, 53 Fed. 257, 3 C. C. A. 525.

edge, experience, and observation, and so familiar to the public at large the evidence of the expert is to be rejected as unnecessary.[75]

k. Medical Matters[76] — (i) *In General.* In the field of medical knowledge a wide range of expert testimony is received.[77] A properly qualified physician or surgeon[78] or veterinary[79] may state the present[80] and probable future[81] effects of

75. Flynn *v.* Boston Electric Light Co., 171 Mass. 395, 50 N. E. 937, stringing electric wires.

76. See also *supra*, XI, B, 2, m; XI, D, 12.

77. Chandler *v.* Barrett, 21 La. Ann. 58, 99 Am. Dec. 701; Perkins *v.* Concord R. Co., 44 N. H. 223; Clark *v.* State, 12 Ohio 483, 491, 40 Am. Dec. 481 (where the court said: "Medical testimony is of too much importance to be disregarded. When delivered with caution, and without bias in favor of either party, or in aid of some speculation and favorite theory, it becomes a salutary means of preventing even intelligent juries from following a popular prejudice, and deciding a cause on inconsistent and unsound principles. But it should be given with great care and received with the utmost caution, and, like the opinions of neighbors and acquaintances, should be regarded as of little weight if not well sustained by reasons and facts that admit of no misconstructions, and supported by authority of acknowledged credit"); Reed *v.* Madison, 85 Wis. 667, 56 N. W. 182.

78. People *v.* Rice, 159 N. Y. 400, 54 N. E. 48; Roberts *v.* Johnson, 58 N. Y. 613. It is not material that the witness is not in full practice (Roberts *v.* Johnson, *supra*) or has not a diploma (People *v.* Rice, *supra*), if the judge is satisfied as to his qualifications.

Observation not necessary.— Adams Hotel Co. *v.* Cobb, 3 Indian Terr. 50, 53 S. W. 478.

Reading sufficient.— The necessary qualifications may have been acquired by reading.

California.— Healy *v.* Visalia, etc., R. Co., 101 Cal. 585, 36 Pac. 125.

Georgia.— Jackson *v.* Boone, 93 Ga. 662, 20 S. E. 46.

Michigan.— Brown *v.* Marshall, 47 Mich. 576, 11 N. W. 392, 41 Am. Rep. 728.

North Carolina.—Melvin *v.* Easley, 46 N. C. 386, 62 Am. Dec. 171.

South Carolina.— State *v.* Terrell, 12 Rich. 321.

Texas.— Fordyce *v.* Moore, (Civ. App. 1893) 22 S. W. 235.

The qualification must relate to the precise branch of the medical field involved in the case. State *v.* Simonis, 39 Oreg. 111, 65 Pac. 595 (poisoning); Fairchild *v.* Bascomb, 35 Vt. 398, 410 (where the court said: "If an oculist was called to testify about insanity — we should not deem him admissible").

Graduation; license; specialty.— It is not necessary that a physician should be a graduate of a medical college or have a license from any medical board (New Orleans, etc., R. Co. *v.* Allbritton, 38 Miss. 242, 75 Am. Dec. 98; State *v.* Merriman, 34 S. C. 16, 12 S. E. 619), or be a specialist (Seckinger *v.* Philibert, etc., Mfg. Co., 129 Mo. 590, 31 S. W. 957; Hathaway *v.* National L. Ins. Co., 48 Vt. 335). On the other hand, without actual experience or deliberate study, a physician, merely because he practises under a license, is incompetent to testify as an expert as to the effects of poison. State *v.* Simonis, 39 Oreg. 111, 65 Pac. 595.

79. Pearson *v.* Zehr, 31 Ill. App. 199 (glanders); Riley *v.* Sparks, 52 Mo. App. 572; Piollet *v.* Simmers, 106 Pa. St. 95, 51 Am. Rep. 496 (fright or disease).

A physician who has practised somewhat as a veterinary is competent in a matter of veterinary science. Gilmore *v.* Brost, 39 Minn. 190, 39 N. W. 139.

Mere observation of symptoms by one not in charge of the treatment (Lewis *v.* Bell, 109 Mich. 189, 66 N. W. 1091) or who is not the owner of sick animals (Marshall *v.* Bingle, 36 Mo. App. 122) is not sufficient qualification.

80. Benjamin *v.* Holyoke St. R. Co., 160 Mass. 3, 35 N. E. 95, 39 Am. St. Rep. 446 (miscarriage); *In re* Vanauken, 10 N. J. Eq. 186; Young *v.* Johnson, 123 N. Y. 226, 25 N. E. 363 (holding that a physician may be asked whether pregnancy is likely to follow upon a first connection against the will); Hickenbottom *v.* Delaware, etc., R. Co., 122 N. Y. 91, 25 N. E. 279 (pain in an imaginary limb).

Range of diagnosis.— A skilled witness may state his judgment as to how far certain symptoms can be used as the basis of a reliable inference. Hartung *v.* People, 4 Park. Cr. (N. Y.) 319.

81. *Georgia.*— Von Pollnitz *v.* State, 92 Ga. 16, 18 S. E. 301, 44 Am. St. Rep. 72, wounds.

Indiana.— Louisville, etc., R. Co. *v.* Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197.

Maine.— Powers *v.* Mitchell, 77 Me. 361, holding that a physician may state whether he would expect a greater injury to result from a direct than from a glancing blow.

Michigan.— Graves *v.* Battle Creek, 95 Mich. 266, 54 N. W. 757, 35 Am. St. Rep. 561, 19 L. R. A. 641.

Missouri.— State *v.* McLaughlin, 149 Mo. 19, 50 S. W. 315, ability to walk, being shot through the heart.

Nebraska.—Poffenbarger *v.* Smith, 27 Nebr. 788, 43 N. W. 1150; Curry *v.* State, 5 Nebr. 412.

New York.— Griswold *v.* New York Cent., etc., R. Co., 115 N. Y. 61, 21 N. E. 726, 12 Am. St. Rep. 775; Kelly *v.* United Traction Co., 88 N. Y. App. Div. 283, 85 N. Y. Suppl. 9; King *v.* Second Ave. R. Co., 75 Hun 17, 26 N. Y. Suppl. 973; Ganiard *v.* Rochester City, etc., R. Co., 50 Hun 22, 2 N. Y. Suppl. 470; Griswold *v.* New York Cent., etc., R. Co., 44 Hun 236; Morison *v.* Broadway, etc., R. Co.,

a certain occurrence on the body,[82] mind,[83] or nervous system[84] of the person or animal affected, as the case may be; including the element of permanence,[85] and what would be a sufficient cause for a given result.[86] He may state whether certain detailed occurrences would be a sufficient cause of a given condition,[87]

8 N. Y. Suppl. 436; Popp *v.* New York Cent., etc., R. Co., 7 N. Y. Suppl. 249 (continuance of pain); Silberstein *v.* Houston St., etc., R. Co., 4 N. Y. Suppl. 843; Ney *v.* Troy, 3 N. Y. Suppl. 679; Cook *v.* New York Cent., etc., R. Co., 1 N. Y. Suppl. 711.

Ohio.— New York, etc., R. Co. *v.* Ellis, 13 Ohio Cir. Ct. 704, 6 Ohio Cir. Dec. 304.

South Carolina.— Stembridge *v.* Southern R. Co., 65 S. C. 440, 43 S. E. 968.

Texas.— Henry *v.* State, (Cr. App. 1899) 50 S. W. 399 [*reversing* on rehearing (Cr. App. 1899) 49 S. W. 96].

Washington.— Mitchell *v.* Tacoma R., etc., Co., 13 Wash. 560, 43 Pac. 528, child.

Wisconsin.— Lago *v.* Walsh, 98 Wis. 348, 74 N. W. 212 (liability to rheumatism); Block *v.* Milwaukee St. R. Co., 89 Wis. 371, 61 N. W. 1101, 46 Am. St. Rep. 849, 27 L. R. A. 365 (reasonable probability); Morgenstein *v.* Nejedlo, 79 Wis. 388, 48 N. W. 652.

See 20 Cent. Dig. tit. "Evidence," § 2312 *et seq.*

Where the apprehended consequences are contingent, speculative, or merely possible, the evidence should be rejected. Tozer *v.* New York, etc., R. Co., 105 N. Y. 617, 11 N. E. 369; Strohm *v.* New York, etc., R. Co., 96 N. Y. 306; Huba *v.* Schenectady R. Co., 85 N. Y. App. Div. 199, 83 N. Y. Suppl. 157; Bellemare *v.* Third Ave. R. Co., 46 N. Y. App. Div. 557, 61 N. Y. Suppl. 981; Atkins *v.* Manhattan R. Co., 57 Hun (N. Y.) 102, 10 N. Y. Suppl. 432; Elsas *v.* Second Ave. R. Co., 56 Hun (N. Y.) 161, 9 N. Y. Suppl. 210 (might suffer pain); Gregory *v.* New York, etc., R. Co., 55 Hun (N. Y.) 303, 8 N. Y. Suppl. 525; Bailey *v.* Westcott, 14 Daly (N. Y.) 506, 4 N. Y. Suppl. 482; Swinson *v.* Brooklyn Heights R. Co., 15 Misc. (N. Y.) 69, 36 N. Y. Suppl. 445; O'Brien *v.* New York, etc., R. Co., 13 N. Y. Suppl. 305 [*distinguishing* Griswold *v.* New York Cent., etc., R. Co., 115 N. Y. 61, 21 N. E. 726, 12 Am. St. Rep. 775]. A judgment as to **probability based upon the history of similar** cases is not conjectural. Alberti *v.* New York, etc., R. Co., 118 N. Y. 77, 23 N. E. 35, 6 L. R. A. 765.

82. Williams *v.* State, 64 Md. 384, 1 Atl. 887; Anthony *v.* Smith, 4 Bosw. (N. Y.) 503; O'Mara *v.* Com., 75 Pa. St. 424 (flow of blood); and other cases in the two preceding notes. An expert may be asked whether a person standing in a certain relation to one whom he was assaulting with an ax would be spotted with blood. Bram *v.* U. S., 168 U. S. 532, 18 S. Ct. 183, 42 L. ed. 568.

83. Bliss *v.* New York Cent., etc., R. Co., 160 Mass. 447, 36 N. E. 65, 39 Am. St. Rep. 504; Anthony *v.* Smith, 4 Bosw. (N. Y.) 503.

Ailment without knowledge of it.— A physician cannot testify as to whether a man could have a certain ailment and not know that he was not in perfect health. New York Mut. L. Ins. Co. *v.* Simpson, (Tex. Civ. App. 1894) 28 S. W. 837.

84. Powell *v.* Augusta, etc., R. Co., 77 Ga. 192, 3 S. E. 757.

85. *Illinois.*— Lake Erie, etc., R. Co. *v.* Wills, 39 Ill. App. 649.

Indiana.— Louisville, etc., R. Co. *v.* Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; Noblesville, etc., Gravel Road Co. *v.* Gause, 76 Ind. 142, 40 Am. Dec. 224.

Minnesota.— Peterson *v.* Chicago, etc., R. Co., 38 Minn. 511, 39 N. W. 485.

Nebraska.— Chicago, etc., R. Co. *v.* Archer, 46 Nebr. 907, 65 N. W. 1043.

New York.— Johnson *v.* Manhattan R. Co., 52 Hun (N. Y.) 111, 4 N. Y. Suppl. 848; Oties *v.* Cowles Electric Smelting, etc., Co., 4 Silv. Supreme (N. Y.) 274, 7 N. Y. Suppl. 251; Montgomery *v.* Long Island R. Co., 8 N. Y. Suppl. 811; Campbell *v.* New York Cent., etc., R. Co., 3 N. Y Suppl. 694; Reichman *v.* Second Ave. R. Co., 1 N. Y. Suppl. 836.

Pennsylvania.— Wilt *v.* Vickers, 8 Watts 227.

Texas.— Sabine, etc., R. Co. *v.* Ewing, 7 Tex. Civ. App. 8, 26 S. W. 638.

Washington.— Taylor *v.* Ballard, 24 Wash. 191, 64 Pac. 143.

United States.— Reed *v.* Pennsylvania R. Co., 56 Fed. 184; Cunningham *v.* New York Cent., etc., R. Co., 49 Fed. 439.

See 20 Cent. Dig. tit. "Evidence," § 2312 *et seq.*

86. *California.*— People *v.* Bowers, (1888) 18 Pac. 660, poison.

Kentucky.— Louisville, etc., R. Co. *v.* Braymer, 39 S. W. 24, 18 Ky. L. Rep. 1098.

Massachusetts.— Benjamin *v.* Holyoke St. R. Co., 160 Mass. 3, 35 N. E. 95, 39 Am. St. Rep. 446.

Missouri.— Seckinger *v.* Philibert, etc., Mfg. Co., 129 Mo. 590, 31 S. W. 957, blow.

New York.— People *v.* Carpenter, 102 N. Y. 238, 6 N. E. 584 (knife); Ganiard *v.* Rochester City, etc., R. Co., 50 Hun (N. Y.) 22, 2 N. Y. Suppl. 470; Montgomery *v.* Long Island R. Co., 8 N. Y. Suppl. 811 (fall).

Vermont.— State *v.* Noakes, 70 Vt. 247, 40 Atl. 249, pressure to crush infant's skull.

Wisconsin.— Tebo *v.* Augusta, 90 Wis. 405, 63 N. W. 1045; Smalley *v.* Appleton, 75 Wis. 18, 43 N. W. 826.

87. *Alabama.*— Louisville, etc., R. Co. *v.* Banks, 132 Ala. 471, 31 So. 573.

California.— People *v.* Munn, (1885) 7 Pac. 790, blow of fist.

Illinois.— Supreme Tent K. of M. of W. *v.* Stensland, 206 Ill. 124, 68 N. E. 1098, 99 Am. St. Rep. 137; Illinois Cent. R. Co. *v.* Treat, 179 Ill. 576, 54 N. E. 290; Illinois Cent. R. Co. *v.* Latimer, 128 Ill. 163, 21 N. E.

death,[88] or other result;[89] whether a given condition could have resulted from a specified injury[90] or neglect,[91] or would be likely so to result,[92] or could have been caused by a certain weapon;[93] or what he should judge was the cause of certain symptoms under given circumstances;[94] which among several possible causes was the probable[95] or proximate[96] one, but not whether a given cause will or will not produce a given bodily result[97] or in a given case did so;[98] and whether an injury was self-inflicted,[99] made with a sharp instrument or torn,[1] or could have been inflicted in a way described.[2] Such a witness may go beyond the immediate connection between causes and their physical results and state whether certain treatment was proper,[3] necessary,[4] or "sanctioned" by medical usage,[5] and how it would be likely to result;[6] the character of an injury,[7] and what treatment would have been proper;[8] and what conditions of animal life make their flesh unfit for human food.[9] Matters fully within the knowledge of the jury, as what was the

7 (fright); Decatur *v.* Fisher, 63 Ill. 241 (holding that this mode of examination in such cases is almost unavoidable); Illinois Cent. R. Co. *v.* Treat, 75 Ill. App. 327; Wabash Western R. Co. *v.* Friedman, 41 Ill. App. 270.

Iowa.— Sachra *v.* Manilla, 120 Iowa 562, 95 N. W. 198.

Massachusetts.— Flaherty *v.* Powers, 167 Mass. 61, 44 N. E. 1074.

Michigan.— Lucas *v.* Detroit City R. Co., 92 Mich. 412, 52 N. W. 745.

New York.— Bruss *v.* Metropolitan St. R. Co., 66 N. Y. App. Div. 554, 73 N. Y. Suppl. 256; Tracey *v.* Metropolitan St. R. Co., 49 N. Y. App. Div. 197, 63 N. Y. Suppl. 242; Fort *v.* Brown, 46 Barb. 366.

Texas.— Missouri, etc., R. Co. *v.* Johnson, (Civ. App. 1898) 49 S. W. 265, increase of respiration.

Wisconsin.— Conrad *v.* Ellington, 104 Wis. 367, 80 N. W. 456.

88. Livingston *v.* Com., 14 Gratt. (Va.) 592.

89. Judgment based on conversations with other experts.— A medical expert cannot base his judgment in part upon conversations with other experts. Miller *v.* St. Paul City R. Co., 62 Minn. 216, 64 N. W. 554.

90. Turner *v.* Newburgh, 109 N. Y. 301, 16 N. E. 344, 4 Am. St. Rep. 453; Fort *v.* Brown, 46 Barb. (N. Y.) 366; McKinstry *v.* Collins, (Vt. 1902) 52 Atl. 438; Werner *v.* Chicago, etc., R. Co., 105 Wis. 300, 81 N. W. 416; Proper *v.* State, 85 Wis. 615, 55 N. W. 1035.

91. Western Union Tel. Co. *v.* Cooper, 71 Tex. 507, 9 S. W. 598, 10 Am. St. Rep. 772, 1 L. R. A. 728.

92. Illinois Cent. R. Co. *v.* Treat, 75 Ill. App. 327; Baltimore City Pass. R. Co. *v.* Tanner, 90 Md. 315, 45 Atl. 188 (deafness); State *v.* Powell, 7 N. J. L. 244; Johnson *v.* Manhattan R. Co., 52 Hun (N. Y.) 111, 4 N. Y. Suppl. 848.

93. Kirk *v.* State, (Tex. Cr. App. 1896) 37 S. W. 440; Banks *v.* Banks, 13 Tex. App. 182; Waite *v.* State, 13 Tex. App. 169.

94. Donnelly *v.* St. Paul City R. Co., 70 Minn. 278, 73 N. W. 157; Haviland *v.* Manhattan R. Co., 15 N. Y. Suppl. 898.

95. Pennsylvania Co. *v.* Frund, 4 Ind. App. 469, 30 N. E. 1116.

96. Jarvis *v.* Metropolitan St. R. Co., 65 N. Y. App. Div. 490, 72 N. Y. Suppl. 829; Bowen *v.* Huntington, 35 W. Va. 682, 14 S. E. 217; Vosburg *v.* Putney, 86 Wis. 278, 56 N. W. 480.

Legal classification cannot be determined by the expert. He cannot testify as to what was a "contributory cause" of an injury. Travelers' Ins. Co. *v.* Thornton, 119 Ga. 455, 46 S. E. 678.

97. Wabash Western R. Co. *v.* Friedman, 41 Ill. App. 270 (motion of a car); Van Zandt *v.* Mutual Ben. L. Ins. Co., 55 N. Y. 169, 14 Am. Rep. 215 [*reversing* 6 Alb. L. J. 96] (melancholia); Tebo *v.* Augusta, 90 Wis. 405, 63 N. W. 1045.

98. Lake Shore, etc., R. Co. *v.* Shook, 16 Ohio Cir. Ct. 665, 9 Ohio Cir. Dec. 9.

99. State *v.* Lee, 65 Conn. 265, 30 Atl. 1110, 48 Am. St. Rep. 202, 27 L. R. A. 498; Donnelly *v.* St. Paul City R. Co., 70 Minn. 278, 73 N. W. 157.

1. State *v.* Clark, 34 N. C. 151.

2. People *v.* Clark, 33 Mich. 112 (sexual intercourse in a buggy); Hunter *v.* Third Ave. R. Co., 21 Misc. (N. Y.) 1, 46 N. Y. Suppl. 1010; State *v.* Perry, 41 W. Va. 641, 24 S. E. 634 (by a man with a wooden leg in a kneeling position). Where the inference is one which the jury are fully capable of drawing the witness will not be permitted to state it. Cook *v.* State, 24 N. J. L. 843.

3. *Indiana.*— Bishop *v.* Spining, 38 Ind. 143.

Iowa.— Broadhead *v.* Wiltse, 35 Iowa 429.

Michigan.— Spaulding *v.* Bliss, 83 Mich. 311, 47 N. W. 210; Mayo *v.* Wright, 63 Mich. 32, 29 N. W. 832.

Pennsylvania.— Olmsted *v.* Gere, 100 Pa. St. 127.

Wisconsin.— Allen *v.* Voje, 114 Wis. 1, 89 N. W. 924.

See 20 Cent. Dig. tit. "Evidence," §§ 2312, 2345 *et seq.*

4. Reed *v.* Madison, 85 Wis. 667, 56 N. W. 182.

5. Allen *v.* Voje, 114 Wis. 1, 89 N. W. 924.

6. People *v.* Johnson, 70 Ill. App. 634.

7. Galveston, etc., R. Co. *v.* Parrish, (Tex. Civ. App. 1897) 43 S. W. 536.

8. Challis *v.* Lake, 71 N. H. 90, 51 Atl. 260.

9. Branson *v.* Turner, 77 Mo. 489, sore on neck of an ox.

relative position of two persons when a bodily injury was inflicted, as determined by the direction of the wound, its locality, and other appearances, are not proper subjects for medical expert testimony.[10] It need hardly be stated that a person qualified to express an opinion on a particular medical subject is limited in stating his inference to that subject and not permitted a wide deviation.[11]

(II) *MENTAL CONDITION.*[12] The judgment of specially qualified[13] medical witnesses is used with frequency on issues involving mental condition,[14] as idiocy, insanity,[15] dementia,[16] or weak-mindedness,[17] and the probable effect of certain occurrences in creating or developing such conditions.[18] The range of a possible witness is largely determined by the nature of the mental malady involved, as related to the experience and capacity of the proposed witness.[19] Where the mental derangement is of a common type American courts as a rule have shown an inclination to accept a practising physician in good standing as competent to testify as an expert,[20] even where he is not a specialist on the

10. Brown *v.* State, 55 Ark. 593, 18 S. W. 1051; Kennedy *v.* People, 39 N. Y. 245; Cooper *v.* State, 23 Tex. 331. *A fortiori* of a witness not a physician. Champ *v.* State, 32 Tex. Cr. 87, 22 S. W. 678.

11. Hook *v.* Stovall, 26 Ga. 704. A physician who has stated the disease of a female slave cannot give his opinion as to her market value (Hook *v.* Stovall, 26 Ga. 704); but he may state that the expense of furnishing her with medical attendance "would exceed the profit she could render her owner" (Roberts *v.* Fleming, 31 Ala. 683).

12. See also *supra*, XI, B, 2, m; XI, C, 2, a, (III); XI, C, 7; XI, D, 12, a, (I), (B).

13. White *v.* McPherson, 183 Mass. 533, 67 N. E. 643; Russell *v.* State, 53 Miss. 367; State *v.* Pritchett, 106 N. C. 667, 11 S. E. 357, superintendent of an insane asylum.

Adequate data required.— Inspection of the record of an institution for the treatment of insane patients does not furnish sufficient data for the formation of a judgment. Prentis *v.* Bates, 88 Mich. 567, 50 N. W. 637, 93 Mich. 254, 53 N. W. 153, 17 L. R. A. 494. Other inadmissible facts, as hearsay statements, should be excluded. Barber's Appeal, 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90. It has been held that personal examination of the alleged insane person is essential to an admissible inference. State *v.* Palmer, 161 Mo. 152, 61 S. W. 651.

Mere care of the insane without scientific training, general or specific, is not sufficient basis for a judgment. State *v.* Crisp, 126 Mo. 605, 29 S. W. 699. A chaplain at an insane asylum is not qualified as an expert on insanity. Ledwith *v.* Claffey, 18 N. Y. App. Div. 115, 45 N. Y. Suppl. 612. Neither, on the other hand, will a medical training without actual care of the insane be deemed a sufficient qualification. Bishop *v.* Com., 109 Ky. 558, 60 S. W. 190, 22 Ky. L. Rep. 1161, 58 S. W. 817, 22 Ky. L. Rep. 760.

Reading, in order to serve as a qualification, must be along lines of medicine or science of the mind. Davis *v.* State, 35 Ind. 496, 9 Am. Rep. 760. Study, for an indefinite period, of medicine and of nervous diseases connected therewith, manufacturing medicines, publishing, or even writing medical books does not qualify one as an expert as to insanity. People *v.* Rice, 159 N. Y. 400, 54 N. E. 48. A minister who has read some authors on moral and intellectual science is not thereby qualified. Burt *v.* State, 38 Tex. Cr. 397, 40 S. W. 1000, 43 S. W. 344, 39 L. R. A. 305, 330.

14. State *v.* Feltes, 51 Iowa 495, 1 N. W. 755, delirium tremens.

15. *Arkansas.*— Green *v.* State, 64 Ark. 523, 43 S. W. 973.

Delaware.— State *v.* Windsor, 5 Harr. 512.

Missouri.— State *v.* Wright, 134 Mo. 404, 35 S. W. 1145.

New York.— Matter of Jacott, 2 Silv. Supreme 544, 6 N. Y. Suppl. 122; People *v.* Thurston, 2 Park. Cr. 49; Lake *v.* People, 1 Park. Cr. 495; Reed *v.* People, 1 Park. Cr. 481.

West Virginia.— Kerr *v.* Lunsford, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668.

Wisconsin.— Luning *v.* State, 2 Pinn. 215, 1 Chandl. 178, 52 Am. Dec. 153.

See 20 Cent. Dig. tit. "Evidence," §§ 2314, 2345.

16. Bever *v.* Spangler, 93 Iowa 576, 61 N. W. 1072, senile.

17. Ray *v.* Ray, 98 N. C. 566, 4 S. E. 526.

18. Dejarnette *v.* Com., 75 Va. 867.

19. Green *v.* State, 64 Ark. 523, 43 S. W. 973; Fairchild *v.* Bascomb, 35 Vt. 398, holding that an expert on insanity could not testify as to the mental capacity of a person not previously insane but in the last stages of disease.

20. *Delaware.*— State *v.* Windsor, 5 Harr. 512.

Georgia.— Potts *v.* House, 6 Ga. 324, 50 Am. Dec. 329.

Indiana.— Davis *v.* State, 35 Ind. 496, 9 Am. Rep. 760, holding that physicians who are engaged in practice and who have given the subject of medical jurisprudence some attention may be examined as experts on the subject of insanity.

Kentucky.— Abbott *v.* Com., 107 Ky. 624, 55 S. W. 196, 21 Ky. L. Rep. 1372.

Maine.— Fayette *v.* Chesterville, 77 Me. 28, 52 Am. Rep. 741.

New York.— People *v.* Schuyler, 106 N. Y. 298, 12 N. E. 783; Koenig *v.* Globe Mut. L. Ins. Co., 10 Hun 558.

North Carolina.— Flynt *v.* Bodenhamer, 80 N. C. 205.

subject,[21] although especial training may add weight to his judgment,[22] and no sufficient training will render him incompetent.[23] English judges have evinced the same feeling.[24] On the contrary other courts have shown a desire to escape a multitude of counselors by restricting the number of those regarded as qualified to testify as experts to persons who have made special studies in that line of medical research.[25] In these jurisdictions the evidence of a practising physician of good standing and long experience has been rejected.[26] The standard by which the mental condition is to be gauged in connection with the questions to an expert witness is not agreed upon. Whether a person is "capable of transacting ordinary business,"[27] or has had "the usual and ordinary capacity for the transaction of the business of life,"[28] has been used as a test. The witness cannot be asked to apply the standard of law involved in the case;[29] for example, whether the person in question had sufficient mental capacity to make a will,[30] or to be responsible for his criminal acts by knowing the difference between right and wrong,[31] or for his conduct in civil matters,[32] as such a question unnecessarily invades the province of the court or jury.[33] It is permissible to ask a qualified witness whether a person was insane at a certain time.[34] It has even been held that the question should be so framed as to require a witness to state the degree of the person's intelligence or incapacity in the best way he can.[35]

l. Mercantile.[36] A witness competent in mercantile affairs[37] may testify as to

Vermont.— Hathaway *v.* National L. Ins. Co., 48 Vt. 335.

See 20 Cent. Dig. tit. "Evidence," § 2345.

21. *Indiana.*— Davis *v.* State, 35 Ind. 496, 9 Am. Rep. 760.

Kansas.— State *v.* Reddick, 7 Kan. 143.

Kentucky.— Montgomery *v.* Com., 88 Ky. 509, 11 S. W. 475, 11 Ky. L. Rep. 40.

Michigan.— People *v.* Finley, 38 Mich. 482.

Vermont.— Hathaway *v.* National L. Ins. Co., 48 Vt. 335.

Moral insanity is not exclusively a subject for medical experts. People *v.* Finley, 38 Mich. 482.

22. Hathaway *v.* National L. Ins. Co., 48 Vt. 335; Rex *v.* Wright, R. & R. 339.

23. Abbott *v.* Com., 107 Ky. 624, 55 S. W. 196, 21 Ky. L. Rep. 1372.

24. *In re* McNaughten, 1 C. & K. 130 note, 47 E. C. L. 129, 10 Cl. & F. 200, 8 Eng. Reprint 718, 8 Scott N. R. 595; Rex *v.* Searle, 1 M. & Rob. 75.

25. Hutchins *v.* Ford, 82 Me. 363, 19 Atl. 832; Com. *v.* Rich, 14 Gray (Mass.) 335; Russell *v.* State, 53 Miss. 367; McLeod *v.* State, 31 Tex. Cr. 331, 333, 20 S. W. 749, where the court said: "Expert testimony in insanity cases has, in general, proved so unsatisfactory that only those who are expert in mental diseases or psychological studies are regarded as authority, for it is a knowledge rarely attained, and involving much study, observation, and experience."

26. Com. *v.* Rich, 14 Gray (Mass.) 335; Russell *v.* State, 53 Miss. 367.

27. Torrey *v.* Burney, 113 Ala. 496, 21 So. 348.

28. Poole *v.* Dean, 152 Mass. 589, 26 N. E. 406.

29. Schneider *v.* Manning, 121 Ill. 376, 12 N. E. 267.

30. *Illinois.*— Schneider *v.* Manning, 121 Ill. 376, 12 N. E. 267.

Iowa.— Marshall *v.* Hanby, 115 Iowa 318, 88 N. W. 801; Betts *v.* Betts, 113 Iowa 111, 84 N. W. 975.

Massachusetts.— May *v.* Bradlee, 127 Mass. 414.

Ohio.— Runyan *v.* Price, 15 Ohio St. 1, 86 Am. Dec. 459.

Vermont.— Fairchild *v.* Bascomb, 35 Vt. 398.

31. State *v.* Klinger, 46 Mo. 224; People *v.* Tuczkewitz, 149 N. Y. 240, 43 N. E. 548. Thus on an issue of insanity on an indictment for homicide it is not permissible for defendant to ask a medical expert "when the defendant has been undeniably subject to fits of epilepsy, should he not have the benefit of every reasonable doubt that might arise as to his sanity." State *v.* Klinger, *supra*. On the other hand such evidence has been received. U. S. *v.* Guiteau, 1 Mackey (D. C.) 498, 47 Am. Rep. 247; State *v.* Leehman, 2 S. D. 171, 49 N. W. 3.

32. Wyse *v.* Wyse, 155 N. Y. 367, 49 N. E. 942.

33. See *supra*, XI, A, 4, c; XI, F.

34. *Georgia.*— Choice *v.* State, 31 Ga. 424.

Indiana.— Goodwin *v.* State, 96 Ind. 550.

Iowa.— *In re* Norman, 72 Iowa 84, 33 N. W. 374.

New York.— People *v.* Schuyler, 106 N. Y. 298, 12 N. E. 783.

Vermont.— Hathaway *v.* National L. Ins. Co., 48 Vt. 335; Fairchild *v.* Bascomb, 35 Vt. 398.

See 20 Cent. Dig. tit. "Evidence," § 2345.

35. Fairchild *v.* Bascomb, 35 Vt. 398.

36. See also *supra*, XI, B, 2, n; XI, D, 13.

37. The acquaintance of the witness with the particular branch of mercantile affairs must be shown to have existed at a time (Erhardt *v.* Ballin, 55 Fed. 968, 5 C. C. A. 363) and place (Jones *v.* Mechanics' F. Ins. Co., 36 N. J. L. 29, 13 Am. Rep. 405) relevant to the inquiry. A subsequent change

the course of business;[38] what constitutes suitable advertising;[39] the capacity of a mercantile establishment;[40] as to the rate of interest at which a turnpike could be capitalized;[41] whether articles arriving at their destination in a given condition could have been in a different condition when shipped;[42] whether articles are of the same quality;[43] what articles would come under a trade designation;[44] whether the resemblance between certain articles is sufficiently great to deceive buyers of ordinary caution;[45] or as to the effect of rain or other injury upon certain classes of goods.[46] Such a witness may state the proper way of doing certain mercantile acts.[47]

m. Mining.[48] A witness scientifically trained or practically experienced in matters relating to the business of mining[49] may, in the discretion of the court,[50] testify as to the cause of an accident,[51] the proper method of carrying on certain mining operations,[52] or of repairing or treating the works, ways, and machinery of a particular kind of mining,[53] or whether certain workings are safe,[54] a vein continuous,[55] or certain enumerated acts possible.[56]

n. Nautical Matters.[57] Witnesses who are practically acquainted with maritime affairs and with the proper way of doing certain acts[58] may state their judgment upon facts hypothetically stated relating to the duties of the captain or other officers or of the crew of a vessel under given circumstances, and they may also state their judgment as to the propriety of certain assumed conduct[59]

of employment does not necessarily disqualify the witness. Bearss *v.* Copley, 10 N. Y. 93.

38. McFadden *v.* Murdock, 15 Wkly. Rep. 1079, retail grocer.

39. Perry *v.* Jensen, 142 Pa. St. 125, 21 Atl. 866, 12 L. R. A. 393, druggist's samples.

40. Paddock *v.* Bartlett, 68 Iowa 16, 25 N. W. 906, pork packing.

41. Cincinnati *v.* Scarborough, 6 Ohio Dec. (Reprint) 874, 8 Am. L. Rec. 562, 5 Cinc. L. Bul. 77.

42. Forcheimer *v.* Stewart, 73 Iowa 216, 32 N. W. 665, 35 N. W. 148 (spoilt hams); Kershaw *v.* Wright, 115 Mass. 361 (hams); Littlejohn *v.* Shaw, 6 N. Y. App. Div. 492, 39 N. Y. Suppl. 595 (gambier); Griffin, etc., Co. *v.* Joannes, 80 Wis. 601, 50 N. W. 785 (fruit); Leopold *v.* Van Kirk, 29 Wis. 548.

43. People *v.* Lovren, 119 Cal. 88, 51 Pac. 22, 638.

44. Howard *v.* Great Western Ins. Co., 109 Mass. 384 ("coal"); Erhardt *v.* Ballin, 55 Fed. 968, 5 C. C. A. 363 (hemmed handkerchiefs).

45. Williams *v.* Brooks, 50 Conn. 278, 47 Am. Rep. 642.

46. Sonneborn *v.* Southern R. Co., 65 S. C. 502, 44 S. E. 77, custom clothing.

47. Moschcowitz *v.* Flint, 33 Misc. (N. Y.) 480, 67 N. Y. Suppl. 852, to alter an old and decayed coat.

48. See also *supra*, XI, B, 2, o; XI, D. 15.

49. McNamara *v.* Logan, 100 Ala. 187, 14 So. 175 (miner); Hedlun *v.* Holy Terror Min. Co., 16 S. D. 261, 92 N. W. 31.

"Entirely theoretical" knowledge has been rejected as a qualification. Lineoski *v.* Susquehanna Coal Co., 157 Pa. St. 153, 27 Atl. 577.

50. Czarecki *v.* Seattle, etc., R., etc., Co., 30 Wash. 288, 70 Pac. 750.

51. Donk Bros. Coal, etc., Co. *v.* Stroff, 200 Ill. 483, 66 N. E. 29, insufficient bracing.

52. McNamara *v.* Logan, 100 Ala. 187, 14 So. 175 (cross entries); Smuggler Union Min. Co. *v.* Broderick, 25 Colo. 16, 53 Pac. 169, 71 Am. St. Rep. 106 (carrying up a slope); Island Coal Co. *v.* Neal, 15 Ind. App. 15, 42 N. E. 953, 43 N. E. 463 (propping and capping a roof).

53. Grant *v.* Varney, 21 Colo. 329, 40 Pac. 771 (timbering of a shaft); Monahan *v.* Kansas City Clay, etc., Co., 58 Mo. App. 68 (timbering of a shaft); Faulkner *v.* Mammoth Min. Co., 23 Utah 437, 66 Pac. 799.

54. McNamara *v.* Logan, 100 Ala. 187, 14 So. 175, width of cross entry in a coal mine.

55. Kahn *v.* Old. Tel. Min. Co., 2 Utah 174.

56. Hedlun *v.* Holy Terror Min. Co., 16 S. D. 261, 92 N. W. 31.

57. See also *supra*, XI. B, 2, q; XI, D. 16.

58. Price *v.* Powell, 3 N. Y. 322 (stowing cargo); Union Ins. Co. *v.* Smith, 124 U. S. 405, 8 S. Ct. 534, 31 L. ed. 497 (seamen); Thornton *v.* Royal Exch. Assur. Co., Peake 25 (shipbuilder).

59. *Alabama.*— Cook *v.* Parham, 24 Ala. 21.

Minnesota.— Hayward *v.* Knapp, 23 Minn. 430, mooring raft.

Missouri.— Hill *v.* Sturgeon, 28 Mo. 323, using a certain pilot.

New York.— Moore *v.* Westervelt, 9 Bosw. 558 (mooring a vessel); Guiterman *v.* Liverpool, etc., Mail Steamship Co., 9 Daly 119.

United States.— Union Ins. Co. *v.* Smith, 124 U. S. 405, 8 S. Ct. 534, 31 L. ed. 497; Eastern Transportation Line *v.* Hope, 95 U. S. 297, 298, 24 L. ed. 477, holding that a tug-boat captain, familiar with the waters of Chesapeake bay and with the making up of tows, may be asked this question: "With your experience, would it be safe or prudent for a tug-boat on Chesapeake Bay, or any other wide water, to tug three boats abreast, with a high wind?"

Applying legal standard of liability.— But it is said that such witnesses cannot apply the legal standard of liability and pass upon

or the necessity for it,[60] the cost of repairs,[61] the seaworthiness of a vessel,[62] the effect of wind under given conditions,[63] whether a ship has a full cargo,[64] or as to the exercise of nautical skill.[65]

o. Railroad Matters.[66] Railroad employees or other persons properly qualified by experience may testify as experts as to matters regarding railroads;[67] as the cause of an accident or other occurrence,[68] and whether it could have been prevented if certain things had been done[69] or certain appliances provided;[70] the necessary or probable effect of a given happening;[71] the condition of railroad appliances[72] and rolling-stock;[73] what would be the effect of a given defect in machinery,[74] and whether it could have been detected;[75] whether certain railroad construction could have been done unless prevented;[76] whether a road-bed is properly constructed for a given purpose,[77] or should have been guarded at a par-

"the merits of a case." Thus in a case in regard to a collision at sea nautical experts are not permitted to testify as to "the duty of the plaintiff's captain." Jameson *v.* Drinkald, 12 Moore C. P. 148, 22 E. C. L. 636.

60. Price *v.* Hartshorn, 44 N. Y. 94, 4 Am. Rep. 645 [*affirming* 44 Barb. 655] (jettison); Walsh *v.* Washington Mar. Ins. Co., 32 N. Y. 427 (jettison).

61. Walker *v.* Protection Ins. Co., 29 Me. 317; Wintringham *v.* Hayes, 144 N. Y. 1, 38 N. E. 999, 43 Am. St. Rep. 725.

62. Beckwith *v.* Sydebotham, 1 Campb. 116, 10 Rev. Rep. 652; Thornton *v.* Royal Exch. Assur. Co., Peake 25, holding that a shipbuilder may be called as a witness to give his opinion of the seaworthiness of a ship, on facts stated by others.

Sufficient data for his judgment must appear to have been furnished the witness. Voisin *v.* Commercial Mut. Ins. Co., 90 Hun (N. Y.) 392, 35 N. Y. Suppl. 873.

63. Ilfrey *v.* Sabine, etc., R. Co., 76 Tex. 63, 13 S. W. 165, size of waves.

64. Ogden *v.* Parsons, 23 How. (U. S.) 167, 16 L. ed. 410.

65. Walsh *v.* Washington Mar. Ins. Co., 32 N. Y. 427.

66. See also *supra*, XI, B, 2, r; XI, D, 18.

67. Budge *v.* Morgan's Louisiana, etc., R., etc., Co., 108 La. 349, 32 So. 535; Seaver *v.* Boston, etc., R. Co., 14 Gray (Mass.) 466 (machinist); McCray *v.* Galveston, etc., R. Co., 89 Tex. 168, 34 S. W. 95; Ft. Worth, etc., R. Co. *v.* Thompson, 75 Tex. 501, 12 S. W. 742 (brakeman).

Mere connection with a railroad in another department may not suffice to admit a witness' judgment. Bergen Neck R. Co. *v.* Point Breeze Ferry, etc., Co., 57 N. J. L. 163, 30 Atl. 584; Ballard *v.* New York, etc., R. Co., 126 Pa. St. 141, 19 Atl. 35; Ft. Worth, etc., R. Co. *v.* Thompson, 2 Tex. Civ. App. 170, 21 S. W. 137; Overby *v.* Chesapeake, etc., R. Co., 37 W. Va. 524, 16 S. E. 813; McKelvey *v.* Chesapeake, etc., R. Co., 35 W. Va. 500, 14 S. E. 261.

An attorney, employed as a claim agent of a railroad company and with an intimate acquaintance with the employees, is not entitled to pose as an expert on such technical questions relating to the operation of a railroad. Ft. Wayne, etc., R. Co. *v.* Thompson, 2 Tex. Civ. App. 170, 21 S. W. 137.

A manager of a stationary engine is not qualified to speak as to the necessity of a jerk in starting a locomotive. Williams *v.* Louisville, etc., R. Co., 103 Ky. 298, 45 S. W. 71, 19 Ky. L. Rep. 2014.

68. Brownfield *v.* Chicago, etc., R. Co., 107 Iowa 254, 77 N. W. 1038 (broken axle); Seaver *v.* Boston, etc., R. Co., 14 Gray (Mass.) 466 (derailment); Ft. Worth, etc., R. Co. *v.* Thompson, 75 Tex. 501, 12 S. W. 742; Missouri, etc., R. Co. *v.* Sherman, (Tex. Civ. App. 1899) 53 S. W. 386 (explosion of locomotive).

Conductors and engineers are not competent to testify as to the position into which collision with a moving train of cars would throw the person struck. Aidt *v.* State, 2 Ohio Cir. Ct. 18, 1 Ohio Cir. Dec. 337.

69. Donahoe *v.* New York, etc., R. Co., 159 Mass. 125, 34 N. E. 87; McCray *v.* Galveston, etc., R. Co., 89 Tex. 168, 34 S. W. 95 [*reversing* (Civ. App. 1895) 32 S. W. 548] (car properly loaded).

70. Chicago, etc., R. Co. *v.* Kreig, 22 Ind. App. 393, 53 N. E. 1033; Galveston, etc., R. Co. *v.* Croskell, 6 Tex. Civ. App. 160, 25 S. W. 486 (good brakes); Texas, etc., R. Co. *v.* Watson, 190 U. S. 287, 23 S. Ct. 681, 47 L. ed. 1057 [*affirmed* in 112 Fed. 402, 50 C. C. A. 230] (good spark-arresters).

71. Missouri, etc., R. Co. *v.* Baker, (Tex. Civ. App. 1902) 68 S. W. 556, cornering a freight car in injuring the handhold.

72. Atchison, etc., R. Co. *v.* Osborn, 58 Kan. 768, 51 Pac. 286. An experienced engineer may testify that an engine in proper condition will not throw sparks as large as a cowpea or even as large as a pinhead (Louisville, etc., R. Co. *v.* Marbury Lumber Co., 132 Ala. 520, 32 So. 745, 90 Am. St. Rep. 917), or large enough to set fires (Kansas City, etc., R. Co. *v.* Blaker, 68 Kan. 244, 75 Pac. 71, 64 L. R. A. 81).

73. Atchison, etc., R. Co. *v.* Osborn, 58 Kan. 768, 51 Pac. 286, engines.

74. Brabbits *v.* Chicago, etc., R. Co., 38 Wis. 289, leaky throttle valve.

75. International, etc., R. Co. *v.* Collins, (Tex. Civ. App. 1903) 75 S. W. 814.

76. Louisville, etc., R. Co. *v.* Donnegan, 111 Ind. 179, 12 N. E. 153.

77. Colorado Midland R. Co. *v.* O'Brien, 16 Colo. 219, 27 Pac. 701 (transporting laborers); Galveston, etc., R. Co. *v.* Pitts, (Tex. Civ. App. 1897) 42 S. W. 255 (how it can be made most safe).

ticular point;[78] what it will cost to complete a road;[79] when it was "finished";[80] the effect on its earnings of being crossed by the line of another railroad;[81] the practical value of certain appliances;[82] or the absolute or comparative ability of a certain person to do railroad work;[83] whether certain acts would have been necessary,[84] possible,[85] or proper[86] under certain conditions; what are the limits of possibility under given conditions;[87] or how definite technical acts should be performed.[88] A limitation is placed upon the use of this class of evidence by the fact that many of the operations of a railroad,[89] the manner in which they take place,[90] the effect[91] and obvious dangers attending them,[92] and whether a passenger train is an express or an accommodation[93] are well known to the community and so to the jury; thus making the use of the evidence unnecessary.[94]

p. Street Railways.[95] The employees of a street railway stand in a position similar to that held, in this connection, by employees of steam railroads and on

78. Amstein *v.* Gardner, 134 Mass. 4, cattle-guard.

79. Waco Tap R. Co. *v.* Shirley, 45 Tex. 355.

80. Hilton *v.* Mason, 92 Ind. 157.

81. Lake Shore, etc., R. Co. *v.* Baltimore, etc., R. Co., 149 Ill. 272, 37 N. E. 91.

82. Louisville, etc., R. Co. *v.* Hall, 87 Ala. 708, 6 So. 277, 13 Am. St. Rep. 84, 4 L. R. A. 710, whipping straps.

83. Louisville, etc., R. Co. *v.* Davis, 99 Ala. 593, 12 So. 786, one-armed brakeman.

84. Galveston, etc., R. Co. *v.* Bohan, (Tex. Civ. App. 1898) 47 S. W. 1050, employment of track-walker.

85. Robinson *v.* St. Louis, etc., R. Co., 21 Mo. App. 141 (maintenance of fence); Jamieson *v.* New York, etc., R. Co., 11 N. Y. App. Div. 50, 42 N. Y. Suppl. 915 (the distance to which an engine would have thrown sparks if it had been properly constructed); Gulf, etc., R. Co. *v.* Irvine, (Tex. Civ. App. 1903) 73 S. W. 540; Houston, etc., R. Co. *v.* Rodican, 15 Tex. Civ. App. 550, 40 S. W. 535 (hear a whistle as far off from a hand-car as from a train). How long it would take to stop a train (Buckman *v.* Missouri, etc., R. Co., 100 Mo. App. 30, 73 S. W. 270, engineer, section hand) and within what distance it could be done (Stewart *v.* Long Island R. Co., 54 N. Y. App. Div. 623, 66 N. Y. Suppl. 436), and how it would be done (Southern R. Co. *v.* Crowder, 135 Ala. 417, 33 So. 335), may be stated by a qualified person. The witness must show qualification. Alabama, etc., R. Co. *v.* Burgess, 119 Ala. 555, 25 So. 251, 72 Am. St. Rep. 943.

86. Chicago, etc., R. Co. *v.* Harrington, 192 Ill. 9, 61 N. E. 622 (standing on point of footboard of locomotive); Sieber *v.* Great Northern R. Co., 76 Minn. 269, 79 N. W. 95 (use of engine as snow-plow).

87. Stewart *v.* Long Island R. Co., 166 N. Y. 604, 59 N. E. 1130, stopping train.

88. Missouri, etc., R. Co. *v.* Merrill, 61 Kan. 671, 60 Pac. 819; Missouri Pac. R. Co. *v.* Johnson, 59 Kan. 776, 53 Pac. 129 (testing of bridge timbers); Illinois Cent. R. Co. *v.* Davidson, 76 Fed. 517, 22 C. C. A. 306 (constructing railroad platform with relation to the track).

89. Kitteringham *v.* Sioux City, etc., Co., 62 Iowa 285, 17 N. W. 585 (removing brasses from car-wheel boxes); Muldowney *v.* Illinois Cent. R. Co., 36 Iowa 462 (coupling cars); Hamilton *v.* Des Moines Valley R. Co., 36 Iowa 31; Hill *v.* Portland, etc., R. Co., 55 Me. 438, 92 Am. Dec. 601 (blowing whistle); Nutt *v.* Southern Pac. Co., 25 Oreg. 291, 35 Pac. 653 (unloading heavy freight). A train hand cannot testify as to the danger a brakeman would run in trying to make a coupling under certain circumstances. Muldowney *v.* Illinois Cent. R. Co., 36 Iowa 462. A witness cannot testify whether it was prudent to blow a whistle at a particular time (Hill *v.* Portland, etc., R. Co., 55 Me. 438, 92 Am. Dec. 601), that a certain method of doing certain acts is proper (Keller *v.* New York Cent. R. Co., 2 Abb. Dec. (N. Y.) 480, 24 How. Pr. (N. Y.) 172, discharging passengers; Nutt *v.* Southern Pac. Co., 25 Oreg. 291, 35 Pac. 653, unloading freight), or as to the time sufficient for a given purpose (Keller *v.* New York Cent. R. Co., 2 Abb. Dec. (N. Y.) 480, 24 How. Pr. (N. Y.) 172, alighting from train).

90. Kerrigan *v.* Market St. R. Co., 138 Cal. 506, 71 Pac. 621 (height of stakes); Bookman *v.* Masterson, 83 N. Y. App. Div. 4, 81 N. Y. Suppl. 962 (length of a push stick).

91. Toledo, etc., R. Co. *v.* Jackson, 5 Ind. App. 547, 32 N. E. 793, change in road-bed.

92. Fordyce *v.* Lowman, 62 Ark. 70, 34 S. W. 255 (riding on flat car pushed ahead of an engine); Cleveland, etc., R. Co. *v.* De Bolt, 10 Ind. App. 174, 37 N. E. 737 (cattle-guard); Pennsylvania Co. *v.* Lindley, 2 Ind. App. 111, 28 N. E. 106 (cattle-guard).

Where the danger is not obvious expert evidence may be received. Goins *v.* Chicago, etc., R. Co., 47 Mo. App. 173, holding that in an action for injuries to a brakeman, resulting from a defective link and pin used in coupling cars, the question whether the danger of the coupling was increased by the pin being so bent that it could not be removed and the coupling having to be made with the link fast in the drawhead of the standing car is a subject for expert evidence rather than to be determined by the jury from the facts in the case.

93. Gray *v.* Chicago, etc., R. Co., 189 Ill. 400, 59 N. E. 950.

94. See *supra*, XI, A, 4, b.

95. See also *supra*, XI, B, 2, s; XI, D, 19.

the same line of legal reasoning.[96] Thus a skilled witness may testify as to the distance within which a car could be stopped.[97] The usual method of constructing street railways is not a matter for expert testimony.[98] Nor is the question whether certain acts or apparatus were proper.[99] Where the inference is one which the jury may be assumed to be capable of drawing, the judgment of the expert is not received.[1]

H. Form of Question — 1. In General. It is tacitly assumed in all exercise of the reasoning faculty that the data on which it is based shall exist and be accurately observed, or otherwise cognized. In proportion, however, as the element of reasoning preponderates over the immediate reaction of sensation, it is important to ascertain as far as possible what the witness is assuming to be true. In a statement of fact, it is possible, in proportion to its familiarity, to know the connotations which the act of naming implies. No objection exists to calling directly for the fact itself. Where the inference is more complicated, especially as it becomes more in the nature of a conclusion, the witness is required to state such part of the facts as are relied on as true; the inference or conclusion being called for after and upon the basis of the detailed statement, the hypothetical form not being essential.[2] Where the statement is more nearly a pure act of judgment, the facts assumed are made part of the so-called "hypothetical" question.[3]

2. The Hypothetical Question — a. In General. Assumption of facts in putting a question might almost be regarded as a test of whether a witness is being examined as an expert. The expert, properly so called, is asked what would be his judgment, upon all[4] or any prescribed part[5] of the facts, as to which evidence has been lawfully admitted by the court,[6] assuming that they are

96. The qualification of the witness must be adequate to cover the judgment which he is asked to give. Bliss *v.* United Traction Co., 75 N. Y. App. Div. 235, 78 N. Y. Suppl. 18.

97. Pender *v.* Brooklyn City R. Co., 84 Hun (N. Y.) 460, 32 N. Y. Suppl. 366.

98. Carpenter *v.* Central Park, etc., R. Co., 4 Daly (N. Y.) 550, 11 Abb. Pr. N. S. (N. Y.) 416.

99. Laufer *v.* Bridgeport Traction Co., 68 Conn. 475, 37 Atl. 379, 37 L. R. A. 533, management of car.

1. Koenig *v.* Union Depot R. Co., 173 Mo. 698, 73 S. W. 637, failure to stop car. See also *supra*, XI, A, 4, b.

2. Brown *v.* Huffard, 69 Mo. 305; Niendorff *v.* Manhattan R. Co., 4 N. Y. App. Div. 46, 38 N. Y. Suppl. 690; State *v.* Foote, 58 S. C. 218, 36 S. E. 551.

3. It is entirely unscientific to call a question which assumes the facts to be true a "hypothetical" question. Hypothesis, properly speaking, is an assumed explanation or harmonizing of facts proved to be true. What a hypothesis assumes to be true is a fact or act of reasoning which reconciles observed phenomena. It would be entirely proper to explain the facts in evidence upon a given hypothesis; as of guilt or innocence; that a man did or did not do a certain act, was at a certain place, etc. For this the highly ambiguous term "theory" is apparently selected. To assume the constituent facts to obtain certainty in the reasoning seems precisely to reverse the proper use of the term, although the original meaning was the same, the phrase "supposititious question" would more correctly express the idea intended to be conveyed. See *infra*, XI, H, 2.

4. Chicago, etc., R. Co. *v.* Wallace, 202 Ill. 129, 66 N. E. 1096 [*affirming* 104 Ill. App. 55].

5. Chicago, etc., R. Co. *v.* Wallace, 202 Ill. 129, 66 N. E. 1096 [*affirming* 104 Ill. App. 55].

6. *In re* James, 124 Cal. 653, 57 Pac. 578, 1008; Sauntman *v.* Maxwell, 154 Ind. 114, 54 N. E. 397; Hagadorn *v.* Connecticut Mut. L. Ins. Co., 22 Hun (N. Y.) 249.

Inadmissible evidence.— Where the evidence on which the expert's judgment is based is inadmissible the judgment should be excluded. Rupe *v.* State, 42 Tex. Cr. 477, 61 S. W. 929.

Facts admitted to be true are equally admissible with those proved. Morrill *v.* Tegarden, 19 Nebr. 534, 26 N. W. 202.

Hearsay and opinion excluded.— To allow an expert to determine for himself regardless of the rules of law the facts on which he will go in making up his opinion would be "putting him in the place of the court." Heald *v.* Thing, 45 Me. 392. He cannot predicate an opinion upon hearsay (Barber's Appeal, 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90; Wright *v.* Wright, 58 Kan. 525, 50 Pac. 444, evidence in another cause; Baltimore Safe-Deposit, etc., Co. *v.* Berry, 93 Md. 560, 49 Atl. 401; Bradford *v.* Cunard Steamship Co., 147 Mass. 55, 16 N. E. 719; Lane *v.* Bryant, 9 Gray (Mass.) 245, 69 Am. Dec. 282; Lund *v.* Tyngsborough, 9 Cush. (Mass.) 36; Tibbits *v.* Phipps, 163 N. Y. 580, 57 N. E.

true;[7] provided that a sufficient number of facts are assumed to enable the witness to give an intelligent opinion.[8] Having no facts in mind as the result of observation, it is in this way alone that a proper basis for a reasonable judgment can be furnished.[9] The requirement that the question should be in the hypo-

1126; Foster *v.* New York Fidelity, etc., Co., 99 Wis. 447, 75 N. W. 69, 40 L. R. A. 833; Wright *v.* Tatham, 5 Cl. & F. 670, 2 Jur. 461, 7 Eng. Reprint 559) or the judgments of other skilled witnesses (Barber's Appeal, *supra*).

"History of case" excluded.— A witness offered as an expert cannot testify upon a hypothetical question, using as the basis of his opinion, in addition to the facts enumerated, "the history of the case." Jones *v.* Portland, 88 Mich. 598, 50 N. W. 731, 16 L. R. A. 437. But see Hathaway *v.* National L. Ins. Co., 48 Vt. 335.

That a party objects to the receipt of the evidence is not ground for excluding a question based on it. People *v.* Foley, 64 Mich. 148, 31 N. W. 94.

7. *Connecticut.*—Barber's Appeal, 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90, holding that the balance of authority is in favor of the rule requiring that the facts upon which an expert is to give his opinion should be embraced in the question.

Florida.— Baker *v.* State, 30 Fla. 41, 11 So. 492.

Georgia.— Southern Bell Telephone, etc., Co. *v.* Jordan, 87 Ga. 69, 13 S. E. 202.

Illinois.— Chicago *v.* Lamb, 105 Ill. App. 204.

Indiana.— Louisville, etc., R. Co. *v.* Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; Goodwin *v.* State, 96 Ind. 550.

Iowa.— Bever *v.* Spangler, 93 Iowa 576, 61 N. W. 1072; *In re* Norman, 72 Iowa 84, 33 N. W. 374; Kuhns *v.* Wisconsin, etc., R. Co., 70 Iowa 561, 31 N. W. 868; Crawford *v.* Wolf, 29 Iowa 567.

Kansas.— Western Union Tel. Co. *v.* Morris, 67 Kan. 410, 73 Pac. 108.

Kentucky.— Champ *v.* Com., 2 Metc. 17, 74 Am. Dec. 388.

Massachusetts.— Poole *v.* Dean, 152 Mass. 589, 26 N. E. 406; Woodbury *v.* Obear, 7 Gray 467.

Michigan.— Peoples *v.* Detroit Post, etc., Co., 54 Mich. 457, 20 N. W. 528 (holding that a tendency to prove a certain fact may be stated as the judgment of the witness upon the hypothetically stated case); Grand Rapids, etc., R. Co. *v.* Huntley, 38 Mich. 537, 31 Am. Rep. 321; Sisson *v.* Cleveland, etc., R. Co., 14 Mich. 489, 90 Am. Dec. 252.

Missouri.— State *v.* Privitt, 175 Mo. 207, 75 S. W. 457; Tingley *v.* Cowgill, 48 Mo. 291. What a witness would himself do under certain conditions is not a proper form of question. Ruschenberg *v.* Southern Electric R. Co., 161 Mo. 70, 61 S. W. 626.

New Jersey.— Bergen County Traction Co. *v.* Bliss, 62 N. J. L. 410, 41 Atl. 837.

New York.— Link *v.* Sheldon, 136 N. Y. 1, 9, 32 N. E. 696 (where the court said: "An expert witness should be confined to questions which contain in themselves the facts assumed to be proven, and upon which his opinion is desired"); Higbie *v.* Guardian Mut. L. Ins. Co., 53 N. Y. 603; Curtis *v.* Gano, 26 N. Y. 426; Miller *v.* Richardson, 88 Hun 49, 34 N. Y. Suppl. 506; Hoard *v.* Peck, 56 Barb. 202; Thompson *v.* Knickerbocker Ice Co., 6 N. Y. Suppl. 7.

Pennsylvania.—Com. *v.* Bubnis, 197 Pa. St. 542, 47 Atl. 748; Pidcock *v.* Potter, 68 Pa. St. 342, 8 Am. Rep. 181.

South Carolina.— State *v.* Coleman, 20 S. C. 441.

Texas.— Cooper *v.* State, 23 Tex. 331.

West Virginia.— State *v.* Musgrave, 43 W. Va. 672, 28 S. E. 813.

Wisconsin.— Crouse *v.* Chicago, etc., R. Co., 102 Wis. 196, 78 N. W. 446, 778.

England.— Atty.-Gen. *v.* Gooderham, 10 Ont. Pr. 259, holding that as a rule the courts discountenance bringing before them in writing professional or quasi-expert evidence.

See 20 Cent. Dig. tit. "Evidence," § 2368 *et seq.*

Actual names permitted.— It is not objectionable that the question contains the actual names of the persons involved (Lee *v.* Heuman, 10 Tex. Civ. App. 666, 32 S. W. 93), provided the jury did not understand the reference (Grand Lodge I. O. of M. A. *v.* Wieting, 168 Ill. 408, 48 N. E. 59, 61 Am. St. Rep. 123).

This is not an exclusive formula.— The judge may permit the expert to be interrogated by other forms of questions. Roraback *v.* Pennsylvania Co., 58 Conn. 292, 20 Atl. 465; McCarthy *v.* Boston Duck Co., 165 Mass. 165, 42 N. E. 568; Hunt *v.* Lowell Gas Light Co., 8 Allen (Mass.) 169, 85 Am. Dec. 697. "It is impossible to lay down an absolute rule for all cases, and some discretion must undoubtedly be left to the justice presiding at the trial." McCarthy *v.* Boston Duck Co., *supra*. The indulgence is not frequently accorded when the fact covered by the inquiry is not directly in issue. Rafferty *v.* Nawn, 182 Mass. 503, 65 N. E. 830. But see Warsaw *v.* Fisher, 24 Ind. App. 46, 55 N. E. 42, limiting admissible questions to this form. See also Wright *v.* Tatham, 5 Cl. & F. 670, 2 Jur. 461, 7 Eng. Reprint 559.

Where a detailed statement of conditions has been made, the details may be in subsequent questions referred to in a block, as "these injuries." Cass *v.* Third Ave. R. Co., 20 N. Y. App. Div. 591, 47 N. Y. Suppl. 356.

8. Berry *v.* Baltimore Safe Deposit, etc., Co., 96 Md. 45, 53 Atl. 720; N. & M. Friedman Co. *v.* Atlas Assur. Co., 133 Mich. 212, 94 N. W. 757; McQuade *v.* Metropolitan St. R. Co., 84 N. Y. App. Div. 637, 82 N. Y. Suppl. 720.

9. The witness cannot add to the hypothetical question facts within his own knowledge and not in evidence.

thetical form, stating facts of which there is some evidence in the case, continues throughout the examination of the expert, so far as the attempt to elicit affirmative facts is concerned,[10] and applies equally to cross-examination as to direct,[11] to the redirect as to the original case,[12] and to experts introduced either by plaintiff or by defendant.[13]

b. Discretion of Court — (i) *In General.* What facts the hypothetical question must cover are determined by the sound discretion of the trial judge.[14] Facts having only a remote bearing,[15] *a fortiori* those which have none,[16] may be excluded.[17] The court may properly require that sufficient facts be stated to the witness to enable him to give an opinion of some value to the jury;[18] and may

Indiana.— Burns *v.* Barenfield, 84 Ind. 43.

Kansas.— Western Union Tel. Co. *v.* Morris, 67 Kan. 410, 73 Pac. 108.

Michigan.— Fuller *v.* Jackson, 92 Mich. 197, 52 N. W. 1075.

New York.— Bramble *v.* Hunt, 68 Hun 204, 22 N. Y. Suppl. 842; Frankfort *v.* Manhattan R. Co., 12 Misc. 13, 33 N. Y. Suppl. 36.

Oregon.— State *v.* Simonis, 39 Oreg. 111, 65 Pac. 595.

Texas.— Hicks *v.* Galveston, etc., R. Co., 96 Tex. 355, 72 S. W. 835 [*reversed* in (Civ. App. 1902) 71 S. W. 322]; Lee *v.* Heuman, 10 Tex. Civ. App. 666, 32 S. W. 93.

United States.— Raub *v.* Carpenter, 187 U. S. 159, 23 S. Ct. 72, 47 L. ed. 119.

The answer stands in a different position. A physician, called as an expert to answer a hypothetical question involving matters in evidence, may in answering it introduce incidents from his own knowledge and experience. Taft *v.* Brooklyn Heights R. Co., 14 Misc. (N. Y.) 390, 35 N. Y. Suppl. 1042. A medical witness may state illustrative instances in his answer. Augusta, etc., R. Co. *v.* Dorsey, 68 Ga. 228, stopping time of train. Still an expert cannot be permitted to state in detail the facts of another case with which he is familiar because its circumstances are more or less parallel with those of the case on trial. St. Louis Gaslight Co. *v.* American F. Ins. Co., 33 Mo. App. 348. And in general the use of illustrative instances is largely a matter of administrative discretion. Leache *v.* State, 22 Tex. App. 279, 3 S. W. 539, 58 Am. Rep. 638.

The answer must be based upon the hypothesis stated. Wichita *v.* Coggshall, 3 Kan. App. 540, 43 Pac. 842.

10. Subsidiary inquiries may be made upon the implied basis of a hypothetical question without actually repeating it. Allen *v.* Voje, 114 Wis. 1, 89 N. W. 924.

11. *Indiana.*— Davidson *v.* State, 135 Ind. 254, 34 N. E. 972.

Massachusetts.— Dickenson *v.* Fitchburg, 13 Gray 546; Keith *v.* Lothrop, 10 Cush. 453.

Mississippi.— Kearney *v.* State, 38 Miss. 233, 8 So. 292.

Missouri.— Kansas *v.* Marsh Oil Co., 140 Mo. 458, 41 S. W. 943.

Montana.— Morrill *v.* Hershfield, 19 Mont. 245, 47 Pac. 997.

New York.— People *v.* Schuyler, 106 N. Y. 298, 12 N. E. 783.

12. McGinnis *v.* Kempsey, 27 Mich. 363; Kearney *v.* State, 68 Miss. 233, 8 So. 292. Where no hypothesis is distinctly stated on redirect examination, it will be assumed that the original hypothesis is continued. McGinnes *v.* Kempsey, 27 Mich. 363.

13. The hypothesis may be different if the facts embraced in it are supported by the evidence. Grand Lodge I. O. M. A. *v.* Wieting, 168 Ill. 408, 48 N. E. 59, 61 Am. St. Rep. 123; Conway *v.* State, 118 Ind. 482, 21 N. E. 285; Burt *v.* State, 38 Tex. Cr. 397, 40 S. W. 1000, 43 S. W. 344, 39 L. R. A. 305, 330; Squires *v.* State, (Tex. Cr. App. 1899) 54 S. W. 770; Foster *v.* Dickerson, 64 Vt. 233, 24 Atl. 253. But where a party's contention merely denies the truth of his opponent's position, no basis for a hypothetical question is furnished. Yaeger *v.* Southern California R. Co., (Cal. 1897) 51 Pac. 190.

14. See the cases cited in the notes following.

15. Birmingham R., etc., Co. *v.* Butler, 135 Ala. 388, 33 So. 33; Williams *v.* State, 64 Md. 384, 1 Atl. 887; Rivard *v.* Rivard, 109 Mich. 98, 66 N. W. 681, 63 Am. St. Rep. 566; People *v.* Foley, 64 Mich. 148, 31 N. W. 94; Fraser *v.* Jennison, 42 Mich. 206, 3 N. W. 882; Russ *v.* Wabash Western R. Co., 112 Mo. 45, 20 S. W. 472, 18 L. R. A. 823.

Relevancy is a prerequisite to the incorporation of any fact in a hypothetical question. Rivard *v.* Rivard, 109 Mich. 98, 66 N. W. 681, 63 Am. St. Rep. 566; Neudeck *v.* Grand Lodge A. O. U. W., 61 Mo. App. 97; Dilleber *v.* Home L. Ins. Co., 87 N. Y. 79.

16. *Idaho.*— Kelly *v.* Perrault, 5 Ida. 221, 48 Pac. 45.

Iowa.— Muldowney *v.* Illinois Cent. R. Co., 39 Iowa 615.

Michigan.— Prentis *v.* Bates, 88 Mich. 567, 50 N. W. 637.

Missouri.— Russ *v.* Wabash Western R. Co., 112 Mo. 45, 20 S. W. 472, 18 L. R. A. 823, holding that the admission of answers was prejudicial error.

New York.— People *v.* Harris, 136 N. Y. 423, 33 N. E. 65.

Ohio.— Williams *v.* Brown, 28 Ohio St. 547.

17. But to lay down the rule that the hypothetical question can include no fact which, although in evidence as part of the case, does not bear directly upon the point on which the judgment of the expert is asked has been characterized as "too stringent." Prentis *v.* Bates, 93 Mich. 234, 53 N. W. 153, 17 L. R. A. 494.

18. *Colorado.*— Rio Grande Western R. Co. *v.* Rubenstein, 5 Colo. App. 121, 38 Pac. 76. holding that the number of handkerchiefs

accordingly reject a question where it is obviously misleading [19] as by reason of ambiguity [20] or conjecture;[21] where it is complicated or involved,[22] where a disputed fact is assumed as "an absolute fact in the case," [23] where a fact essential to any theory of the case is omitted;[24] where a fact is included of which

saturated in stopping the blood flowing from a wound cannot be made the basis of an expert opinion as to the amount of blood lost.

Michigan.— Marshall *v.* Brown, 50 Mich. 148, 15 N. W. 55, record of an insane patient.

Minnesota.— Briggs *v.* Minneapolis St. R. Co., 52 Minn. 36, 53 N. W. 1019.

Missouri.— Culbertson *v.* Metropolitan St. R. Co., 140 Mo. 35, 36 S. W. 834; Turner *v.* Haar, 114 Mo. 335, 21 S. W. 737; Senn *v.* Southern R. Co., 108 Mo. 142, 18 S. W. 1007.

New York.— Van Wycklen *v.* Brooklyn, 118 N. Y. 424, 24 N. E. 179.

See 20 Cent. Dig. tit. "Evidence." § 2369 *et seq.*

19. *California.*— Carpenter *v.* Bailey, 94 Cal. 406, 29 Pac. 1101.

Connecticut.— Barber's Appeal, 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90.

Indiana.—McCormick Harvesting Mach Co. *v.* Gray, 100 Ind. 285.

Massachusetts.— Chalmers *v.* Whitmore Mfg. Co., 164 Mass. 532, 42 N. E. 98; Jewett *v.* Brooks, 134 Mass. 505; Twombly *v.* Leach, 11 Cush. 397.

Michigan.— Prentis *v.* Bates, 88 Mich. 567, 50 N. W. 637; Michigan, etc., R. Co. *v.* McDonough, 21 Mich. 165, 4 Am. Rep. 466.

Minnesota.— Wittenberg *v.* Onsgard, 78 Minn. 342, 81 N. W. 14, 47 L. R. A. 141.

Missouri.— J. D. Marshall Livery Co. *v.* McKelvy, 55 Mo. App. 240.

New York.— Dobie *v.* Armstrong, 27 N. Y. App. Div. 520, 50 N. Y. Suppl. 801; Grotsch *v.* Steinway R. Co., 19 N. Y. App. Div. 130, 45 N. Y. Suppl. 1075.

Pennsylvania.— Reagan *v.* Grim, 13 Pa. St. 508.

Wisconsin.— Vosburg *v.* Putney, 80 Wis. 523, 50 N. W. 403, 27 Am. St. Rep. 47, 14 L. R. A. 226.

See 20 Cent. Dig. tit. "Evidence," § 2369 *et seq.*

Misleading answers excluded.— In like manner the judge will order an answer to be stricken from the record where it is misleading because conjectural. Swenson *v.* Brooklyn Heights R. Co., 15 Misc. (N. Y.) 69, 36 N. Y. Suppl. 445. But an answer is not objectionable merely because it includes facts in evidence which might have been made part of the question. Hathaway *v.* National L. Ins. Co., 48 Vt. 335.

Inaccuracy.— A question which is inaccurate without being misleading is not error. Atlanta R., etc., Co. *v.* Monk, 118 Ga. 449, 45 S. E. 494; Turnbull *v.* Richardson, 69 Mich. 400, 37 N. W. 499; Thompson *v.* Knickerbocker Ice Co., 6 N. Y. Suppl. 7; Gulf, etc., R. Co. *v.* Duvall, 12 Tex. Civ. App. 348, 35 S. W. 699. The same is still more true where the only objection to the question is that certain additional facts might have been proved which would assist witnesses in giving more satisfactory answers (Hendershott *v.* Western Union Tel. Co., 114 Iowa 415, 87 N. W. 288).

Harmless error.— Where the answer to a single improperly formed question could not have misled the jury (Hewitt *v.* Eisenhart, 36 Nebr. 794, 55 N. W. 252) or prejudiced the complaining party (Foster *v.* Dickerson, 64 Vt. 233, 24 Atl. 253, answer beneficial), or where the question is admitted *de bene* before the evidence on which it is based and no request is made later that the answer be excluded or modified, or its effect controlled by instructions (Wilkinson *v.* Detroit Steel, etc., Works, 73 Mich. 405, 41 N. W. 490. See also Fuller *v.* Tolman, 92 Hun (N. Y.) 119, 36 N. Y. Suppl. 639), or where a part of an answer which fails to strengthen the contention of the party who asks the question (State *v.* Wright, 112 Iowa 436, 84 N. W. 541), a new trial will not be ordered.

20. Horton *v.* U. S., 15 App. Cas. (D. C.) 310; Baltimore Safe-Deposit, etc., Co. *v.* Berry, 93 Md. 560, 49 Atl. 401, "misconception."

21. Nave *v.* Alabama Great Southern R. Co., 96 Ala. 264, 11 So. 391 (what a boy of fifteen would earn when twenty-one); Hamilton *v.* Michigan Cent. R. Co., (Mich. 1903) 97 N. W. 392 (expectancy of life based on resemblance to father and grandfather).

22. Eastham *v.* Riedell, 125 Mass. 585.

Length not a controlling consideration.— It is no objection to a hypothetical question that it is lengthy, provided that it has been reduced to writing and embraces the whole situation in a connected manner. Barber's Appeal, 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90; Jones *v.* Portland, 88 Mich. 598, 50 N. W. 731, 16 L. R. A. 437; Cole *v.* Fall Brook Coal Co., 87 Hun (N. Y.) 584, 34 N. Y. Suppl. 572; Forsyth *v.* Doolittle, 120 U. S. 73, 7 S. Ct. 408, 30 L. ed. 586. Three printed pages have been deemed not an excessive length. Barber's Appeal, 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90. But the court has authority to require a question to be modified in these particulars. Forsyth *v.* Doolittle, 120 U. S. 73, 7 S. Ct. 408, 30 L. ed. 586.

An objection on account of the omission of a material element must, in case of a long hypothetical question, be specifically pointed out. Catlin *v.* Traders' Ins. Co., 83 Ill. App. 40; Knight *v.* Overman Wheel Co., 174 Mass. 455, 54 N. E. 890.

23. Chalmers *v.* Whitmore Mfg. Co., 164 Mass. 532, 42 N. E. 98.

24. *California.*— Rowe *v.* Such, 134 Cal. 573, 66 Pac. 862, 67 Pac. 760.

Connecticut.— Porter *v.* Ritch, 70 Conn. 235, 39 Atl. 169, 39 L. R. A. 353.

Iowa.— Thayer *v.* Smoky Hollow Coal Co., 121 Iowa 121, 96 N. W. 718 (where the question asked, what would happen "under the conditions existing," and no statement of the latter was made); Germinder *v.* Ma-

there is no evidence warranting a finding that it exists,[25] or which is too

chinery Mut. Ins. Assoc., 120 Iowa 614, 94 N. W. 1108.

Massachusetts.— Oliver *v.* North End St. R. Co., 170 Mass. 222, 49 N. E. 117; Howes *v.* Colburn, 165 Mass. 385, 388, 43 N. E. 125, where the court said: "It might be wiser to exclude such questions altogether, when they are very complicated or involve much detail."

Michigan.— Connell *v.* McNett, 109 Mich. 329, 67 N. W. 344; Prentis *v.* Bates, 88 Mich. 567, 50 N. W. 637.

Missouri.— J. D. Marshall Livery Co. *v.* McKelvy, 55 Mo. App. 240.

New York.— Dougherty *v.* Milliken, 163 N. Y. 527, 57 N. E. 757, 79 Am. St. Rep. 608 (tensile strength); Hopper *v.* Empire City Subway Co., 78 N. Y. App. Div. 637, 79 N. Y. Suppl. 907.

North Carolina.—Stevens *v.* West, 51 N. C. 49.

South Dakota.— Vermillion Artesian Well, etc., Co. *v.* Vermillion, 6 S. D. 466, 61 N. W. 802.

Texas.— Williams *v.* State, (Cr. App. 1899) 53 S. W. 859.

Utah.— Nichols *v.* Oregon Short Line R. Co., 25 Utah 240, 70 Pac. 996.

Wisconsin.— Ruscher *v.* Stanley, 120 Wis. 380, 98 N. W. 223; Schaidler *v.* Chicago, etc., R. Co., 102 Wis. 564, 78 N. W. 732.

United States.— Walton *v.* Wild Goose Min., etc., Co., 123 Fed. 209, 60 C. C. A. 155; Western Assur. Co. *v.* J. H. Mohlman Co., 83 Fed. 811, 28 C. C. A. 157, 40 L. R. A. 561.

See 20 Cent. Dig. tit. "Evidence," § 2369 *et seq.*

Were the rule otherwise there would be no limit to the cross-examination of a witness called as an expert. It could be protracted as long as the fertility of the imagination might enable counsel to suppose cases, and the mental and physical powers of endurance of the witness would permit him to frame answers. People *v.* Augsbury, 97 N. Y. 501.

If the answers obtained upon an examination in chief are shown on cross-examination to have been given upon an erroneous basis, they may be stricken out. Keating *v.* Cornell, 104 Ill. App. 448.

On cross-examination the attention of the witness may be called to any facts omitted from the question (Horton *v.* U. S., 15 App. Cas. (D. C.) 310; Chicago, etc., R. Co. *v.* Wallace, 202 Ill. 129, 66 N. E. 1096 [*affirmed* in 104 Ill. App. 55]; State *v.* Wood, 112 Iowa 411, 84 N. W. 520; Williams *v.* State, 64 Md. 384, 1 Atl. 887; Lake Shore, etc., R. Co. *v.* Whidden, 23 Ohio Cir. Ct. 85; Williams *v.* State, (Tex. Cr. App. 1899) 53 S. W. 859; Zoldoske *v.* State, 82 Wis. 580, 52 N. W. 778), and failure to do so will be deemed a waiver of the imperfection (Ragland *v.* State, 125 Ala. 12, 27 So. 983). If the question is *prima facie* competent, the fact that the question may be still further defined on cross-examination is not a ground for excluding it. Lake Shore, etc., R. Co. *v.* Whidden, 23 Ohio Cir. Ct. 85.

The omission from the question of a fact which is not in strictness material may affect the weight to be given the answer (McKinstry *v.* Collins, 74 Vt. 147, 52 Atl. 438), but the question is not necessarily error on that account (Cass *v.* Third Ave. R. Co., 20 N. Y. App. Div. 591, 47 N. Y. Suppl. 356).

25. *Alabama.*— Wollner *v.* Lehman, 85 Ala. 274, 4 So. 643.

California.— Rowe *v.* Such, 134 Cal. 573, 66 Pac. 862, 67 Pac. 760; Dopman *v.* Hoberlin, 5 Cal. 413.

Colorado.— Wells *v.* Adams, 7 Colo. 26, 1 Pac. 698.

Indiana.— Huston *v.* Roots, 30 Ind. 461; Warsaw *v.* Fisher, 24 Ind. App. 46, 55 N. E. 42.

Iowa.— Bennett *v.* Marion, 119 Iowa 473, 93 N. W. 558; Hurst *v.* Chicago, etc., R. Co., 49 Iowa 76; Muldowney *v.* Illinois Cent. R. Co., 39 Iowa 615.

Kansas.— Davis *v.* Travelers' Ins. Co., 59 Kan. 74, 52 Pac. 67; Cherokee, etc., Coal, etc., Co. *v.* Dickson, 10 Kan. App. 391, 61 Pac. 450; Greeno *v.* Roark, 8 Kan. App. 390, 56 Pac. 329.

Kentucky.— Bishop *v.* Com., 109 Ky. 558, 60 S. W. 190, 22 Ky. L. Rep. 1161; Bishop *v.* Com., 58 S. W. 817, 22 Ky. L. Rep. 760; Louisville, etc., R. Co. *v.* Asher, 10 Ky. L. Rep. 1021.

Maryland.— Baltimore Safe Deposit, etc., Co. *v.* Berry, 93 Md. 560, 49 Atl. 401.

Massachusetts.— Anderson *v.* Albertstamm, 176 Mass. 87, 57 N. E. 215; Williams *v.* Williams, 132 Mass. 304.

Minnesota.— State *v.* Scott, 41 Minn. 365, 43 N. W. 62; State *v.* Hanley, 34 Minn. 430, 26 N. W. 397; State *v.* Stokely, 16 Minn. 282.

Mississippi.— Kearney *v.* State, 68 Miss. 233, 8 So. 292; Woolner *v.* Spalding, 65 Miss. 204, 3 So. 583.

Missouri.— State *v.* Dunn, 179 Mo. 95, 77 S. W. 848; State *v.* Palmer, 161 Mo. 152, 61 S. W. 651; Russ *v.* Wabash Western R. Co., 112 Mo. 45, 20 S. W. 472, 18 L. R. A. 823; Smart *v.* Kansas City, 91 Mo. App. 586; Benjamin *v.* Metropolitan St. R. Co., 50 Mo. App. 602.

Nebraska.— Ballard *v.* State, 19 Nebr. 609, 28 N. W. 271.

New Hampshire.— Parent *v.* Nashua Mfg. Co., 70 N. H. 199, 47 Atl. 261.

New York.— Wyse *v.* Wyse, 155 N. Y. 367, 49 N. E. 942; People *v.* Tuczkewitz, 149 N. Y. 240, 43 N. E. 548; People *v.* Strait, 148 N. Y. 566, 42 N. E. 1045; People *v.* Harris, 136 N. Y. 423, 33 N. E. 65; People *v.* Smiler, 125 N. Y. 717, 26 N. E. 312; Koehler *v.* New York Steam Co., 71 N. Y. App. Div. 222, 75 N. Y. Suppl. 597; Clark *v.* Riter-Conley Co., 39 N. Y. App. Div. 598, 57 N. Y. Suppl. 755; O'Brien *v.* Brooklyn Heights R. Co., 36 N. Y. App. Div. 636, 55 N. Y. Suppl. 217; Matter of Mason, 60 Hun 46, 14 N. Y. Suppl. 434; Matter of Liddy, 2 Silv. Supreme 223, 5 N. Y. Suppl. 636; Matter of King, 29 Misc. 268, 61 N. Y. Suppl. 238; Hayes *v.* Third

remote;[26] or where it is leading.[27] Hypothetical questions must be based upon facts as to which there is such evidence that a jury might reasonably find that they are established;[28] but it is not necessary that the facts should be clearly

Ave. R. Co., 18 Misc. 582, 42 N. Y. Suppl. 703.

Ohio.— Williams *v.* Brown, 28 Ohio St. 547; Sharkey *v.* State, 4 Ohio Cir. Ct. 101, 2 Ohio Cir. Dec. 443.

Oregon.— Maynard *v.* Oregon R. Co., 43 Oreg. 63, 72 Pac. 590.

Pennsylvania.— Reber *v.* Herring, 115 Pa. St. 599, 8 Atl. 830; Hawkins' Appeal, 13 York Leg. Rec. 199.

Texas.— Prather *v.* McClelland, (Civ. App. 1894) 26 S. W. 657.

Wisconsin.— Ruscher *v.* Stanley, 120 Wis. 380, 98 N. W. 223; Lowe *v.* State, 118 Wis. 641, 96 N. W. 417; Collins *v.* Janesville, 99 Wis. 464, 75 N. W. 88; Zoldoske *v.* State, 82 Wis. 580, 52 N. W. 778; Smalley *v.* Appleton, 75 Wis. 18, 43 N. W. 826.

United States.— North American Acc. Assoc. *v.* Woodson, 64 Fed. 689, 12 C. C. A. 392.

See 20 Cent. Dig. tit. "Evidence," § 2369 *et seq.*

Evidence of certain facts not required.— Where a fact is not excluded by the evidence and its existence is entirely possible and affirmative evidence cannot well be obtained. as whether plaintiff's lungs were inflated at the time of an injury to them, the fact may be assumed. Tompkins *v.* West, 56 Conn. 478, 16 Atl. 237.

That a certain coloring by way of characterization, etc., is put into the question favorable to the examining party, as, calling low frame buildings "shanties" (Woodworth *v.* Brooklyn El. R. Co., 22 N. Y. App. Div. 501, 48 N. Y. Suppl. 80; Tyler, etc., R. Co. *v.* Wheeler, (Tex. Civ. App. 1897) 41 S. W. 517, calling a "dull headache" a "roaring" and dull aching pain), or exaggerating three or four occasions into "a hundred times" (Kansas City, etc., R. Co. *v.* Webb, 97 Ala. 157, 11 So. 888), is not necessarily fatal; but coloring (Baltimore Safe-Deposit, etc., Co. *v.* Berry, 93 Md. 560, 49 Atl. 401) or exaggeration (Williams *v.* Brown, 28 Ohio St. 547) to the point of misleading excludes the question.

26. Kentucky Mut. L. Ins. Co. *v.* Mellott, (Tex. Civ. App. 1900) 57 S. W. 887.

27. International, etc., R. Co. *v.* Bibolet, 24 Tex. Civ. App. 4, 57 S. W. 974. *Compare*, however, Alaska United Gold Min. Co. *v.* Keating, 116 Fed. 561, 53 C. C. A. 655.

28. *Colorado.*— Gottlieb *v.* Hartman, 3 Colo. 53.

Connecticut.— Dunham's Appeal, 27 Conn. 192.

Georgia.— Southern Bell Telephone, etc., Co. *v.* Jordan, 87 Ga. 69, 13 S. E. 202; Choice *v.* State, 31 Ga. 424.

Idaho.— McLean *v.* Lewiston, 8 Ida. 472, 69 Pac. 478.

Illinois.— Economy Light, etc., Co. *v.* Sheridan, 200 Ill. 439, 65 N. E. 1070.

Indiana.— Guetig *v.* State, 66 Ind. 94, 32 Am. Rep. 99; Bishop *v.* Spining, 38 Ind. 143.

Iowa.— *In re* Norman, 72 Iowa 84, 33 N. W. 374; Crawford *v.* Wolf, 29 Iowa 567.

Kansas.— Wichita *v.* Coggshall, 3 Kan. App. 540, 43 Pac. 842.

Massachusetts.—Miller *v.* Smith, 112 Mass. 470.

Michigan.— Hogmire's Appeal, 108 Mich. 410, 66 N. W. 327; People *v.* Vanderhoof, 71 Mich. 158, 39 N. W. 28.

Mississippi.— Kearney *v.* State, 68 Miss. 233, 8 So. 292.

Missouri.— State *v.* Dunn, 179 Mo. 95, 77 S. W. 848; Tingley *v.* Cowgill, 48 Mo. 291; Riley *v.* Sparks, 52 Mo. App. 572, 575, holding that the rule "that the fact embraced in the hypothesis in every case stated must be within the confines of the evidence" is said to be "an unbending one."

New Hampshire.— Spear *v.* Richardson, 37 N. H. 23.

New York.— Young *v.* Johnson, 123 N. Y. 226, 25 N. E. 363; People *v.* Schuyler, 106 N. Y. 298, 12 N. E. 783; People *v.* Augsburg, 97 N. Y. 501; Guiterman *v.* Liverpool, etc., Steamship Co., 83 N. Y. 358; Preston *v.* Ocean Steamship Co., 33 N. Y. App. Div. 193, 53 N. Y. Suppl. 444; Boldt *v.* Murray, 2 N. Y. St. 232.

North Carolina.— Burnett *v.* Wilmington, etc., R. Co., 120 N. C. 517, 26 S. E. 819.

South Carolina.— Price *v.* Richmond, etc., R. Co., 38 S. C. 199, 17 S. E. 732.

Texas.— Armendaiz *v.* Stillman, 67 Tex. 458, 3 S. W. 678; Galveston, etc., R. Co. *v.* Baumgarten, 31 Tex. Civ. App. 253, 72 S. W. 78.

Vermont.— Titus *v.* Gage, 70 Vt. 13, 39 Atl. 246; Hathaway *v.* National L. Ins. Co., 48 Vt. 335; Fairchild *v.* Bascomb, 35 Vt. 398.

United States.— Denver, etc., R. Co. *v.* Roller, 100 Fed. 738, 41 C. C. A. 22, 40 L. R. A. 77.

England.— *In re* McNaughten, 1 C. & K. 130 note, 47 E. C. L. 130, 10 Cl. & F. 200, 8 Eng. Reprint 718, 8 Scott N. R. 595.

See 20 Cent. Dig. tit. "Evidence," § 2369 *et seq.*

Illustrative questions may be permitted. Kraatz *v.* Brush Electric Light Co., 82 Mich. 457, 464, 46 N. W. 787. In an action for injuries caused by a live electric wire crossing a dead electric wire, it was held that there was no error in allowing the hypothetical question, "Supposing that a live wire should come in contact, for instance, with a telephone wire, by the telephone wire settling down upon the electric light wire, what effect would it have upon the telephone wire?" although there was no claim or evidence in regard to a telephone wire, as the effect on a telephone wire would be the same as on an electric light wire. Kraatz *v.* Brush Electric Light Co., *supra.*

Defect in form harmless.— Where the ques-

proved,[29] or that the exact language of the witness should be followed,[30] or that immaterial facts should be covered by evidence.[31] It is not intended to imply that under no circumstances are other hypothetical questions than those based upon the evidence permissible in the discretion of the court. So to hold would be to lose a possible test, upon cross-examination, of the witness' ability or inclination to aid the jury. Such questions are merely designed to test the credibility of the witness.[32] It is proper to include in a hypothetical question facts of which the

tion is based upon facts in evidence, its liability to criticism in point of form is harmless error. Mangum *v.* Bullion, etc., Min. Co., 15 Utah 534, 50 Pac. 834.

29. *Indiana.*— Louisville, etc., R. Co. *v.* Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197.

Iowa.— Manatt *v.* Scott, 106 Iowa 203, 76 N. W. 717, 68 Am. St. Rep. 293; Bever *v.* Spangler, 93 Iowa 576, 61 N. W. 1072; Hall *v.* Rankin, 87 Iowa 261, 54 N. W. 217.

Kentucky.— Davis *v.* Com., 6 Ky. L. Rep. 658.

Massachusetts.— Oliver *v.* North End St. R. Co., 170 Mass. 222, 49 N. E. 117.

Missouri.— State *v.* Dunn, 179 Mo. 95, 77 S. W. 848; Hicks *v.* Citizens' R. Co., 124 Mo. 115, 27 S. W. 542, 25 L. R. A. 508.

New York.— Gray *v.* Brooklyn Heights R. Co., 72 N. Y. App. Div. 424, 76 N. Y. Suppl. 20.

North Carolina.— Ray *v.* Ray, 98 N. C. 566, 4 S. E. 526.

Wisconsin.— Quinn *v.* Higgins, 63 Wis. 664, 24 N. W. 482, 53 Am. Rep. 305.

See 20 Cent. Dig. tit. "Evidence," § 2369 *et seq.*

It is in general sufficient to entitle a fact to be embraced in a hypothetical question, that there is some evidence of it. It is not a question as to the weight of the evidence, but whether there was any evidence tending to prove the fact.

Colorado.— Jackson *v.* Burnham, 20 Colo. 532, 39 Pac. 577; Gottlieb *v.* Hartman, 3 Colo. 53.

Connecticut.— Barber's Appeal, 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90.

Illinois.— People *v.* Johnson, 70 Ill. App. 634.

Indiana.— Guetig *v.* State, 66 Ind. 94, 32 Am. Rep. 99.

Iowa.— Bever *v.* Spangler, 93 Iowa 576, 61 N. W. 1072; *In re* Norman, 72 Iowa 84, 33 N. W. 374.

Kentucky.— Baxter *v.* Kent, 44 S. W. 972, 19 Ky. L. Rep. 1973; Davis *v.* Com., 6 Ky. L. Rep. 658.

Missouri.— State *v.* Dunn, 179 Mo. 95, 77 S. W. 848; Fullerton *v.* Fordyce, 144 Mo. 519, 44 S. W. 1053; Hicks *v.* Citizens R. Co., 124 Mo. 115, 27 S. W. 542, 25 L. R. A. 508; Smith *v.* Chicago, etc., R. Co., 119 Mo. 246, 23 S. W. 784; Turney *v.* Baker, 103 Mo. App. 390, 77 S. W. 479.

Texas.— International, etc., R. Co. *v.* Mills, (Civ. App. 1903) 78 S. W. 11.

United States.— Orient Ins. Co. *v.* Leonard, 120 Fed. 808, 57 C. C. A. 176.

See 20 Cent. Dig. tit. "Evidence," § 2369 *et seq.*

The hypothetical question should contain such assumptions of facts and such only as counsel may fairly claim that the evidence in the case tends to justify. Barber's Appeal, 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90; O'Neill *v.* Kansas City, 178 Mo. 91, 77 S. W. 64; Powers *v.* Kansas City, 56 Mo. App. 573; Poffinbarger *v.* Smith, 27 Nebr. 788, 43 N. W. 1150. The existence of the alleged fact may be controverted (State *v.* Dunn, 179 Mo. 95, 77 S. W. 848), and it may even well happen that there is a strong preponderance of evidence against the fact assumed (People *v.* Bowers, (Cal. 1888) 18 Pac. 600; Catlin *v.* Traders' Ins. Co., 83 Ill. App. 40; Deig *v.* Morehead, 110 Ind. 451, 11 N. E. 458).

That counsel are mistaken in assuming that the evidence tends to prove certain facts is not a valid objection to a question which is within the possible range of the evidence. Fullerton *v.* Fordyce, 144 Mo. 519, 44 S. W. 1053; Powers *v.* Kansas City, 56 Mo. App. 573; Stearns *v.* Field, 90 N. Y. 640; Harnett *v.* Garvey, 66 N. Y. 641; Filer *v.* New York Cent. R. Co., 49 N. Y. 42; Augsbury *v.* People, 1 N. Y. Cr. 299.

That the question is partisan is no ground of objection. Murphy *v.* Marston Coal Co., 183 Mass. 385, 67 N. E. 342.

30. Davis *v.* Com., 6 Ky. L. Rep. 658.

31. Chicago *v.* Early, 104 Ill. App. 398, action for damages for personal injuries.

32. *Alabama.*—Houston Biscuit Co. *v.* Dial, 135 Ala. 168, 33 So. 268.

California.— People *v.* Sutton, 73 Cal. 243, 15 Pac. 86.

District of Columbia.— Snell *v.* U. S., 16 App. Cas. 501 (holding that with these objects in view questions will be allowed to be propounded which are based upon hypotheses broader or more or less extensive than the facts in proof); Horton *v.* U. S., 15 App. Cas. 310.

Illinois.— West Chicago St. R. Co. *v.* Fishman, 169 Ill. 196, 48 N. E. 447; Inland Printer Co. *v.* Economical Half Tone Supply Co., 99 Ill. App. 8.

Indiana.— Deig *v.* Morehead, 110 Ind. 451, 11 N. E. 458.

Iowa.— Bennett *v.* Marion, 119 Iowa 473, 93 N. W. 558; Enix *v.* Iowa Cent. R. Co., 111 Iowa 748, 83 N. W. 805.

Michigan.— Bathrick *v.* Detroit Post, etc., Co., 50 Mich. 629, 16 N. W. 172, 45 Am. Rep. 63.

Minnesota.— Williams *v.* Great Northern R. Co., 68 Minn. 55, 70 N. W. 860, 37 L. R. A. 199.

Missouri.— Kansas City *v.* Marsh Oil Co., 140 Mo. 458, 41 S. W. 943.

existence has been admitted in the pleadings or in any other legal form,[33] and in a criminal case it is proper to include facts which have been testified to by the accused himself.[34] The judge may properly exclude a question where it is so framed as to require a single answer to several distinct propositions[35] or does not present sufficient facts to afford ground for a reasonable conclusion,[36] or where it calls for a categorical answer and the witness says that he cannot so answer it,[37] or where it excludes any definiteness,[38] or is based on an assumption which is false.[39] A long question may be excluded in the discretion of the judge if deemed misleading, as not disclosing its hypothetical nature.[40] As the order of evidence is an administrative function the judge may permit an examining counsel at any stage to include in a hypothetical question facts of which he proposes to furnish evidence.[41] Unless such evidence is furnished, the answer to the question may be stricken out;[42] and it is equally within the judge's discretion to refuse to allow the question to be put until the foundation in the evidence is actually laid.[43] It is not necessary that the questioning party submit his question to the inspection of the other side.[44]

(II) *Assuming All Material Facts.* The liberty of an examining counsel to submit, in the form of a hypothetical question to the judgment of an expert, any set of facts which he claims the jury might reasonably find upon the evidence[45] has been restricted in certain jurisdictions where it is required that a question should cover all undisputed[46] material facts relating to the sub-

Nebraska.— Schlencker *v.* State, 9 Nebr. 241, 1 N. W. 857.

New York.— People *v.* Augsbury, 97 N. Y. 501; Howell *v.* Rochester R. Co., 24 N. Y. App. Div. 502, 49 N. Y. Suppl. 17; Werner *v.* Brooklyn El. R. Co., 11 N. Y. App. Div. 86, 42 N. Y. Suppl. 846; Rosevelt *v.* Manhattan R. Co., 59 N. Y. Super. Ct. 197, 13 N. Y. Suppl. 598; Goll *v.* Manhattan R. Co., 57 N. Y. Super. Ct. 74, 5 N. Y. Suppl. 185.

Ohio.— Clark *v.* State, 12 Ohio 483, 40 Am. Dec. 481.

Texas.— Missouri, etc., R. Co. *v.* Johnson, (Civ. App. 1898) 49 S. W. 265.

See 20 Cent. Dig. tit. "Evidence," § 2368 *et seq.*

In cross-examining an expert witness the examiner should be allowed to assume almost any state of facts for the purpose of testing the witness' knowledge and credibility (Taylor *v.* Star Coal Co., 110 Iowa 40, 46, 81 N. W. 249 [*citing* Bever *v.* Spangler, 93 Iowa 576, 61 N. W. 1072]) or his confidence in his opinion (Werner *v.* Brooklyn El. R. Co., 11 N. Y. App. Div. 86, 42 N. Y. Suppl. 846) and great latitude is permitted (McLean *v.* Lewiston, 8 Ida. 472, 69 Pac. 478). But see Nichols *v.* Oregon Short Line R. Co., 25 Utah 240, 70 Pac. 996. But the judge may properly insist that any test applied on cross-examination should be shown to be an actual test by proof that the circumstances under which alone it would amount to one actually exist. State *v.* Noakes, 70 Vt. 247, 40 Atl. 249. If such evidence is not produced, the question may be rejected. State *v.* Noakes, 40 Vt. 247, 40 Atl. 249, holding that a question designed to test whether a specimen of blood was clotted or not, or was venous or arterial, could only be put in case counsel asking them was in a position to show that the specimens submitted were in point of fact clotted, venous, etc. A physician giving certain cases of insanity in his experience may be excused on cross-examination from inquiry as to other cases not mentioned by him. Titus *v.* Gage, 70 Vt. 13, 39 Atl. 246.

Redirect examination.— The same procedure may be adopted on redirect examination. State *v.* Chiles, 44 S. C. 338, 22 S. E. 339.

33. Coonan *v.* Loewenthal, 129 Cal. 197, 61 Pac. 940.

34. State *v.* Dunn, 179 Mo. 95, 77 S. W. 848.

35. Kahn *v.* Triest-Rosenberg Cap Co., 139 Cal. 340, 73 Pac. 164.

36. Baltimore Safe Deposit, etc., Co. *v.* Berry, 93 Md. 560, 49 Atl. 401; Dallas Consol. Electric St. R. Co. *v.* Rutherford, (Tex. Civ. App. 1904) 78 S. W. 558.

37. Quinn *v.* O'Keeffe, 9 N. Y. App. Div. 68, 41 N. Y. Suppl. 116.

38. Brown *v.* Third Ave. R. Co., 19 Misc. (N. Y.) 504, 43 N. Y. Suppl. 1094.

39. Baltimore Safe Deposit, etc., Co. *v.* Berry, 93 Md. 560, 49 Atl. 401, that old age, disease, and grief, causing a weak physical condition, involve mental soundness.

40. Haish *v.* Payson, 107 Ill. 365, two and one-half pages.

41. People *v.* Sessions, 58 Mich. 594, 26 N. W. 291; Jarvis *v.* Metropolitan St. R. Co., 65 N. Y. App. Div. 490, 72 N. Y. Suppl. 829; Earl *v.* Tupper, 45 Vt. 275.

42. People *v.* Sessions, 58 Mich. 594, 26 N. W. 291.

43. Porter *v.* Ritch, 70 Conn. 235, 39 Atl. 169, 39 L. R. A. 353.

44. State *v.* Doherty, 72 Vt. 381, 48 Atl. 658, 82 Am. St. Rep. 951.

45. See *supra*, XI, H, 2, b, (I).

46. Levinson *v.* Sands, 81 Ill. App. 578. Neither party has a right to discard an important undisputed fact, merely because its insertion may vary the answer or opinion

ject.[47] The courts of Kansas for example require that a hypothetical question "should contain substantially the facts as shown by the evidence."[48] Those of Missouri hold that that the question should "embody substantially all the facts relating to the subject. An opinion based upon a partial statement of the facts would be of no value and is not admissible."[49] A convenient rule is that announced in Indiana, that where there are no disputed facts the question should embrace all facts; but that when certain facts are disputed, either party may put to the expert hypothetically questions embodying the disputed facts as his construction of the evidence would show them to be.[50] The earlier rule in New York required that all material facts bearing on the issue of insanity should be stated to the expert by the prosecution in a criminal case,[51] but the rule has been established otherwise by later decisions.[52]

(III) *Assuming Facts Essential to Any Reasonable Theory.* It is not, however, in general essential that each question should embrace every fact which it might be contended should affect the expert's judgment.[53] Different hypotheses may be so put as to elicit his judgment as to the different groups of facts, covering any reasonable theory of the case,[54] although there must be evi-

of the witness to the prejudice of such party. Levinson *v.* Sands, *supra.*

47. *Illinois.*— Catlin *v.* Traders' Ins. Co., 83 Ill. App. 40, all material, undisputed facts.

Minnesota.— Smith *v.* Minneapolis St. R. Co., 91 Minn. 239, 97 N. W. 881.

Missouri.— Mammerberg *v.* Metropolitan St. R. Co., 62 Mo. App. 563.

Nebraska.— Schulz *v.* Modisett, 2 Nebr. (Unoff.) 138, 96 N. W. 338.

Pennsylvania.—*In re* Miller, 26 Pittsb. Leg. J. 428.

48. Wichita *v.* Coggshall, 3 Kan. App. 540, 43 Pac. 842.

49. Mammerberg *v.* Metropolitan St. R. Co., 62 Mo. App. 563.

50. Nave *v.* Tucker, 70 Ind. 15; Guetig *v.* State, 66 Ind. 94, 32 Am. Rep. 99; Davis *v.* State, 35 Ind. 496, 9 Am. Rep. 760.

51. People *v.* Lake, 12 N. Y. 358; People *v.* Thurston, 2 Park. Cr. (N. Y.) 49; Lake *v.* People, 1 Park. Cr. (N. Y.) 495.

52. Cowley *v.* People, 83 N. Y. 464, 470, 38 Am. Rep. 464, where it is said: "The very meaning of the word [hypothetical] is that it supposes, assumes something for the time being. Each side, in an issue of fact, has its theory of what is the true state of the facts, and assumes that it can prove it to be so to the satisfaction of the jury; and so assuming, shapes hypothetical questions to experts accordingly. And such is the correct practice."

53. *Alabama.*— Morrissett *v.* Wood, 123 Ala. 384, 26 So. 307, 82 Am. St. Rep. 127.

California.— People *v.* Hill, 116 Cal. 562, 48 Pac. 711; People *v.* Durrant, 116 Cal. 179, 48 Pac. 75.

Illinois.— Howard *v.* People, 185 Ill. 552, 57 N. E. 441; Schneider *v.* Manning, 121 Ill. 376, 12 N. E. 267; Chicago, etc., R. Co. *v.* Wallace, 104 Ill. App. 55 [*affirmed* in 202 Ill. 129, 66 N. E. 1096].

Indiana.— Goodwin *v.* State, 96 Ind. 550; Guetig *v.* State, 66 Ind. 94, 32 Am. Rep. 99.

Iowa.— Kirsher *v.* Kirsher, 120 Iowa 337, 94 N. W. 846; Swanson *v.* Keokuk, etc., R. Co., 116 Iowa 304, 89 N. W. 1088; Brooks *v.* Sioux City, 114 Iowa 641, 87 N. W. 682; Allison *v.* Parkinson, 108 Iowa 154, 78 N. W. 845.

Maryland.— United R., etc., Co. *v.* Seymour, 92 Md. 425, 48 Atl. 850.

Michigan.— Fye *v.* Chapin, 121 Mich. 675, 80 N. W. 797; People *v.* Foglesong, 116 Mich. 556, 74 N. W. 730.

Missouri.— O'Neill *v.* Kansas City, 178 Mo. 91, 77 S. W. 64; State *v.* Privitt, 175 Mo. 207, 75 S. W. 457.

Montana.— State *v.* Peel, 23 Mont. 358, 59 Pac. 169, 75 Am. St. Rep. 529.

Nebraska.— Herpolsheimer *v.* Funke, 1 Nebr. (Unoff.) 471, 95 N. W. 688.

New York.— People *v.* Krist, 168 N. Y. 19, 60 N. E. 1057, 15 N. Y. Cr. 532; Cole *v.* Fall Brook Coal Co., 159 N. Y. 59, 53 N. E. 670. Counsel may base their questions on the whole or any part of the facts. Gray *v.* Brooklyn Heights R. Co., 72 N. Y. App. Div. 424, 76 N. Y. Suppl. 20.

Texas.— Burt *v.* State, 38 Tex. Cr. 397, 40 S. W. 1000, 43 S. W. 344, 39 L. R. A. 305, 330.

Vermont.— State *v.* Doherty, 72 Vt. 381, 48 Atl. 658, 82 Am. St. Rep. 951.

United States.— Swensen *v.* Bender, 114 Fed. 1, 51 C. C. A. 627; Denver, etc., R. Co. *v.* Roller, 100 Fed. 738, 41 C. C. A. 22, 49 L. R. A. 77.

See 20 Cent. Dig. tit. "Evidence," § 2370 *et seq.*

54. *California.*— People *v.* Durrant, 116 Cal. 179, 216, 48 Pac. 75, holding that a hypothetical question "must be based upon facts in evidence, but may be addressed to any reasonable theory which may be taken of them."

Colorado.— Courvoisier *v.* Raymond, 23 Colo. 113, 47 Pac. 284; Jackson *v.* Burnham, 20 Colo. 532, 39 Pac. 577; Gottlieb *v.* Hartman, 3 Colo. 53.

Florida.— Williams *v.* State, (1903) 34 So. 279; Baker *v.* State, 30 Fla. 41, 11 So. 492.

dence of any facts assumed.[55] Purely theoretical questions[56] and those too indefinite to permit the witness to form a judgment of any value[57] are excluded. A question which fails to contain all the facts essential to some theory within the range of the evidence should be excluded,[58] provided that the objection specifi-

Illinois.— Cook *v.* People, 177 Ill. 146, 52 N. E. 273.

Indiana.— Davidson *v.* State, 135 Ind. 254, 34 N. E. 972; Louisville, etc., R. Co. *v.* Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197; Boor *v.* Lowrey, 103 Ind. 468, 3 N. E. 151, 53 Am. Rep. 519; Lotz *v.* Scott, 103 Ind. 155, 2 N. E. 560; Goodwin *v.* State, 96 Ind. 550; Guetig *v.* State, 66 Ind. 94, 32 Am. Rep. 99; Chamness *v.* Chamness, 53 Ind. 301.

Iowa.— Buce *v.* Eldon, 122 Iowa 92, 97 N. W. 989.

Kansas.— Roark *v.* Greeno, 61 Kan. 299, 59 Pac. 655; Medill *v.* Snyder, 61 Kan. 15, 58 Pac. 962, 78 Am. St. Rep. 307; Wichita Gas, etc., Co. *v.* Wright, 9 Kan. App. 730, 59 Pac. 1085.

Minnesota.— Jones *v.* Chicago, etc., R. Co., 43 Minn. 279, 45 N. W. 444.

Missouri.— State *v.* Privitt, 175 Mo. 207, 75 S. W. 457; St. Louis, etc., R. Co. *v.* St. Louis Union Stock Yard Co., 120 Mo. 541, 25 S. W. 399.

Montana.— State *v.* Peel, 23 Mont. 358, 59 Pac. 169, 75 Am. St. Rep. 529; Morrill *v.* Herchfield, 19 Mont. 245, 47 Pac. 997.

New Hampshire.— Spear *v.* Richardson, 37 N. H. 23.

New Jersey.— State *v.* Powell, 7 N. J. L. 244.

New York.— People *v.* Augsbury, 97 N. Y. 501; Cowley *v.* People, 83 N. Y. 464, 38 Am. Rep. 464; Guiterman *v.* Liverpool, etc., Steamship Co., 83 N. Y. 358; Harnett *v.* Garvey, 66 N. Y. 641; Filer *v.* New York Cent. R. Co., 49 N. Y. 42; Woodworth *v.* Brooklyn El. R. Co., 22 N. Y. App. Div. 501, 48 N. Y. Suppl. 80; Horn *v.* New Jersey Steamboat Co., 23 N. Y. App. Div. 302, 48 N. Y. Suppl. 348.

Texas.— Ft. Worth, etc., R. Co. *v.* Greathouse, 82 Tex. 104, 17 S. W. 834; Gulf, etc., R. Co. *v.* Compton, 75 Tex. 667, 13 S. W. 667; Lovelady *v.* State, 14 Tex. App. 545; Lee *v.* Heuman, 10 Tex. Civ. App. 666, 32 S. W. 93.

Vermont.— Foster *v.* Dickerson, 64 Vt. 233, 24 Atl. 253.

West Virginia.— Bowen *v.* Huntington, 35 W. Va. 682, 14 S. E. 217.

Wisconsin.— Kiekhoefer *v.* Hidershide, 113 Wis. 280, 89 N. W. 189; Nicoud *v.* Wagner, 106 Wis. 67, 81 N. W. 999; Nichols *v.* Brabazon, 94 Wis. 549, 69 N. W. 342.

United States.—Woodward *v.* Chicago, etc., R. Co., 122 Fed. 66, 58 C. C. A. 402; Western Coal, etc., Co. *v.* Berberich, 94 Fed. 329, 36 C. C. A. 364.

See 20 Cent. Dig. tit. "Evidence," § 2369 *et seq.*

In Colorado it is only necessary that the assumption should be "within the probable or possible range of the evidence." Courvoisier *v.* Raymond, 23 Colo. 113, 47 Pac. 284.

In Missouri it is sufficient if the evidence "tends" to establish the fact hypothetically assumed. Fullerton *v.* Fordyce, 144 Mo. 519, 44 S. W. 1053.

In New York "it is the privilege of the counsel in such cases to assume, within the limits of the evidence, any state of facts which he claims the evidence justifies, and have the opinion of experts upon the facts thus assumed. The facts are assumed for the purpose of the question, and for no other purpose." Filer *v.* New York Cent. R. Co., 49 N. Y. 42, 46.

If counsel disclaim an intention of relying on the theory of the case on which a question is framed it should be rejected. Cincinnati, etc., R. Co. *v.* Jones, 111 Ind. 259, 12 N. E. 113.

It is not even necessary that the prosecution should introduce into its hypothetical questions all the relevant evidence in its possession. Blume *v.* State, 154 Ind. 343, 56 N. E. 771, letters bearing on insanity.

55. That the evidence is conflicting is not an objection to receiving a question. It is the conflict which most frequently fatally compels the hypothetical form. Frankfort *v.* Manhattan R. Co., 12 Misc. (N. Y.) 13, 33 N. Y. Suppl. 36; Tebo *v.* Augusta, 90 Wis. 405, 63 N. W. 1045. See also *supra*, XI, H, 2, b, (I).

56. Illinois Silver Min., etc., Co. *v.* Raff, 7 N. M. 336, 34 Pac. 544; Galbraith *v.* Philadelphia Co., 2 Pa. Super. Ct. 359.

57. *Connecticut.*— Barber's Appeal, 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90.

Iowa.— Kuhns *v.* Wisconsin, etc., R. Co., 70 Iowa 561, 31 N. W. 868. But see *In re* Fenton, 97 Iowa 192, 66 N. W. 99.

Michigan.— Turner *v.* Ridgeway Tp., 105 Mich. 409, 63 N. W. 406. But see Rivard *v.* Rivard, 109 Mich. 98, 66 N. W. 681, 63 Am. St. Rep. 566.

Missouri.— Senn *v.* Southern R. Co., 108 Mo. 142, 18 S. W. 1007.

New York.— Seymour *v.* Fellows, 44 N. Y. Super. Ct. 124 [*affirmed* in 77 N. Y. 178]; Clussman *v.* Merkel, 3 Bosw. 402; Baer *v.* Koch, 2 Misc. 334, 21 N. Y. Suppl. 974; Fisher *v.* Monroe, 2 Misc. 326, 21 N. Y. Suppl. 995.

See 20 Cent. Dig. tit. "Evidence," § 2369 *et seq.*

58. *Connecticut.*—Porter *v.* Ritch, 70 Conn. 235, 39 Atl. 169, 39 L. R. A. 353.

Georgia.— Central R., etc., Co. *v.* Maltsby, 90 Ga. 630, 16 S. E. 953.

Idaho.— Kelly *v.* Perrault, 5 Ida. 221, 48 Pac. 45.

Iowa.— Bomgardner *v.* Andrews, 55 Iowa 638, 8 N. W. 481; Matter of Ames, 51 Iowa 596, 2 N. W. 408.

Kansas.— Davis *v.* Travelers' Ins. Co., 59 Kan. 74, 52 Pac. 67.

Michigan.— People *v.* Vanderhoof, 71 Mich.

cally points out the alleged imperfections.[59] Conflicting facts should not be embodied in a single question.[60] But it is not objectionable to permit the witness in answering a question assuming the existence of certain facts of which there is evidence to assume also the existence of other facts also in evidence, and which therefore "might properly have been embraced in the questions,"[61] or to ask an expert whether the facts testified by opposing witnesses, assuming both sets of facts to have been correctly stated, are inconsistent with the existence of a particular fact.[62] It is not necessary that the questions should cover the entire case. The witness may be examined as to the existence of any relevant fact.[63]

3. Mixed Hypothesis. It is not unusual that the witness examined as an "expert" should also be a witness establishing in whole or in part the facts hypothetically assumed as the result of scientific knowledge or personal observation.[64] There is no inherent objection to allowing a skilled observer also to testify as an expert[65] or, where the facts observed by him are few or simple, to making them part of the hypothetical question,[66] having first detailed such of the facts observed

158, 39 N. W. 28; Fraser *v.* Jennison, 42 Mich. 206, 3 N. W. 882.

Mississippi.— Kearney *v.* State, 68 Miss. 233, 8 So. 292.

Missouri.— Culbertson *v.* Metropolitan St. R. Co., 140 Mo. 35, 36 S. W. 834; J. D. Marshall Livery Co. *v.* McKelvy, 55 Mo. App. 240.

Nebraska.— Burgo *v.* State, 26 Nebr. 639, 42 N. W. 701.

North Carolina.— Burnett *v.* Wilmington, etc., R. Co., 120 N. C. 517, 26 S. E. 819.

Pennsylvania.— Lee *v.* Springfield Water Co., 176 Pa. St. 223, 35 Atl. 184 (omitting element of damage); Reber *v.* Herring, 115 Pa. St. 599, 8 Atl. 830.

Texas.— Prather *v.* McClelland, (Civ. App. 1894) 26 S. W. 657.

West Virginia.— Bowen *v.* Huntington, 35 W. Va. 682, 14 S. E. 217.

United States.— North American Acc. Assoc. *v.* Woodson, 64 Fed. 689, 12 C. C. A. 392.

See 20 Cent. Dig. tit. "Evidence," § 2370 *et seq.*

59. State *v.* Reddick, 7 Kan. 143; Prosser *v.* Montana Cent. R. Co., 17 Mont. 372, 43 Pac. 81, 30 L. R. A. 814.

60. Fairchild *v.* Bascomb, 35 Vt. 398.

61. Hathaway *v.* National L. Ins. Co., 48 Vt. 335.

62. Prentis *v.* Bates, 93 Mich. 234, 53 N. W. 153, 17 L. R. A. 494 [*overruling* 88 Mich. 567, 50 N. W. 637], insanity.

63. Gottlieb *v.* Hartman, 3 Colo. 53; McDonald *v.* Illinois Cent. R. Co., 88 Iowa 345, 55 N. W. 102.

64. Bowen *v.* Huntington, 35 W. Va. 682, 14 S. E. 217. The same technical, scientific, or professional training necessary mentally to appreciate, digest, and distil a reasonable inference from complicated facts is equally needed in many cases whether the appeal is made directly to the intellect or comes indirectly to the intellect through the senses. A competent "expert" may be of increased value if he has had an opportunity for personal observation. On the contrary it is not important that the expert knows of his own knowledge the truth of the facts hypothetically stated to him. *In re* Flint, 100 Cal. 391, 34 Pac. 863; People *v.* Johnson, 70 Ill. App. 634.

65. Selleck *v.* Janesville, 100 Wis. 157, 75 N. W. 975, 69 Am. St. Rep. 906, 41 L. R. A. 563.

66. *Arkansas.*— St. Louis Iron Mountain, etc., R. Co. *v.* Lyman, 57 Ark. 512, 22 S. W. 170.

California.— Howland *v.* Oakland Consol. St. R. Co., 110 Cal. 513, 42 Pac. 983 (holding that an expert may properly assume that the facts testified by another expert acting as an observer are true as part of a hypothetical question); *In re* Flint, 100 Cal. 391, 34 Pac. 863.

Indiana.— Louisville, etc., R. Co. *v.* Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; Geretig *v.* State, 66 Ind. 94, 32 Am. Rep. 99.

Michigan.— Joslin *v.* Grand Rapids, etc., Co., 53 Mich. 322, 19 N. W. 17; Van Deusen *v.* Newcomer, 40 Mich. 90.

Missouri.— State *v.* Wright, 134 Mo. 404, 35 S. W. 1145. But *compare* State *v.* Welsor, 117 Mo. 570, 21 S. W. 443.

New Hampshire.— Perkins *v.* Concord R. Co., 44 N. H. 223.

New York.— People *v.* Youngs, 151 N. Y. 210, 45 N. E. 460; Matteson *v.* New York Cent. R. Co., 35 N. Y. 487, 91 Am. Rep. 67; Gancard *v.* Rochester City, etc., R. Co., 50 Hun 22, 2 N. Y. Suppl. 470; Koenig *v.* Globe Mut. L. Ins. Co., 10 Hun 358.

Ohio.— The Clipper *v.* Logan, 18 Ohio 375.

Texas.— Bonner *v.* Mayfield, 82 Tex. 234, 18 S. W. 305; Missouri, etc., R. Co. *v.* Criswell, (Civ. App. 1904) 78 S. W. 388.

Vermont.— McKinstry *v.* Collins, 74 Vt. 147, 52 Atl. 438; Foster *v.* Dickerson, 64 Vt. 233, 24 Atl. 253; Johnson *v.* Central Vermont R. Co., 56 Vt. 707.

Wisconsin.— Davey *v.* Janesville, 111 Wis. 628, 87 N. W. 813; Sellack *v.* Janesville, 100 Wis. 157, 75 N. W. 975, 69 Am. St. Rep. 906, 41 L. R. A. 563.

United States.— Eastern Transp. Line *v.* Hope, 95 U. S. 297, 24 L. ed. 477; Manufac-

by him as permit of individual statement,[67] or even allowing them to constitute the basis of the question,[68] or to asking the witness a question based in part on his observation and in part on the testimony of certain witnesses.[69] The hypothesis may include facts disclosed to the witness by real evidence; as where a witness is asked whether in his opinion a boy present in court was a proper person to put to work on a machine exhibited to the witness,[70] or where use is made of articles present in court.[71] A mixture of unspecified knowledge and what the witness has heard of the testimony,[72] of facts partly within his observation or knowledge and partly derived from others,[73] or of facts in evidence and also the custom of the business[74] does not constitute a suitable hypothesis.

4. "Upon the Evidence" — a. When Allowed. A desire to economize time has occasionally induced the court to permit a witness examined as an expert to ascertain the facts directly from the evidence. In some jurisdictions, but not in all,[75] where the facts are undisputed, an expert who has heard all the testimony may be asked for his judgment "upon the evidence,"[76] provided that he has heard

turers' Acc. Indemnity Co. *v.* Dorgan, 58 Fed. 945, 7 C. C. A. 581, 22 L. R. A. 620.

But see Easler *v.* Southern R. Co., 59 S. C. 311, 37 S. E. 938.

See 20 Cent. Dig. tit. "Evidence," § 2368 *et seq.*

Physicians; privilege of communications.— The rule is the same as to a physician when testifying as an expert, even in jurisdictions where confidential statements to physicians by their patients are privileged. *In re* Flint, 100 Cal. 391, 34 Pac. 863.

67. This use of the same witness in the dual capacity of observer and "expert" probably furnishes the most common reason for grouping these two dissimilar classes of evidence under the general head of "expert testimony." The Clipper *v.* Logan, 18 Ohio 375, 396, where it is said: "I see no objection to calling these men [skilled observers] 'experts' if the name will render their testimony more unexceptionable; but it is not true as a legal proposition that no one but 'an expert' can give an opinion to a jury." See also *supra*, XI, G, 1.

68. *In re* Flint, 100 Cal. 391, 34 Pac. 863.

69. State *v.* Keene, 100 N. C. 509, 6 S. E. 91. This evidence has been rejected. McQuire *v.* Brooklyn Heights R. Co., 30 N. Y. App. Div. 227, 51 N. Y. Suppl. 1075.

70. McJuerty *v.* Hale, 161 Mass. 51, 36 N. E. 682.

71. Murphy *v.* Marston Coal Co., 183 Mass. 385, 67 N. E. 342 (iron handle); People *v.* Carpenter, 102 N. Y. 238, 6 N. E. 584 (knife); Kirk *v.* State, (Tex. Cr. App. 1896) 37 S. W. 440 (pistol).

72. Connell *v.* McNett, 109 Mich. 329, 67 N. W. 344. There is no doubt that a question as to a witness' estimate of the value of a horse from what he knows about him and from the testimony he has heard is objectionable. Connell *v.* McNett, *supra*.

73. Flanagan *v.* State, 106 Ga. 109, 32 S. E. 80; McElhannon *v.* State, 99 Ga. 672, 26 S. E. 501; Western Union Tel. Co. *v.* Morris, 67 Kan. 410, 73 Pac. 108.

74. Centerville Independent School Dist. *v.* Swearngin, 119 Iowa 702, 94 N. W. 206.

75. Contra, see *infra*, XI, H, 4, b.

76. *Alabama.*— Page *v.* State, 61 Ala. 16.

Arkansas.— Ringlehaupt *v.* Young, 55 Ark. 128, 17 S. W. 710.

Delaware.— State *v.* Windsor, 5 Harr. 512.

Illinois.— Schneider *v.* Manning, 121 Ill. 376, 12 N. E. 267.

Indiana.— Bishop *v.* Spining, 38 Ind. 143.

Louisiana.— State *v.* Baptiste, 26 La. Ann. 134.

Maine.— Lewiston Steam Mill Co. *v.* Androscoggin Water Power Co., 78 Me. 274, 4 Atl. 555.

Maryland.— Williams *v.* State, 64 Md. 384, 1 Atl. 887 (holding that while the evidence of witnesses may be the basis of the expert's judgment he cannot use the inferences of previous witnesses); Jerry *v.* Townshend, 9 Md. 145.

Massachusetts.— Dickenson *v.* Fitchburg, 13 Gray 546, 556 (where the court said: "In order to obtain the opinion of a witness on matters not depending upon general knowledge, but on facts not testified of by himself, one of two modes is pursued: either the witness is present and hears all the testimony, or the testimony is summed up in the question put to him; and in either case the question is put to him hypothetically, whether, if certain facts testified of are true, he can form an opinion, and what that opinion is"); Com. *v.* Rogers, 7 Metc. 500, 41 Am. Dec. 458.

Michigan.— People *v.* Bane, 88 Mich. 453, 50 N. W. 324.

Minnesota.— Jones *v.* Chicago, etc., R. Co., 43 Minn. 279, 281, 45 N. W. 444 (where the court said: "The question in such a case usually states the facts assumed to be proved. Strictly, perhaps, it ought to. But for convenience the court may, and often does, permit the hypothesis to be put by referring the witness to the testimony if he has heard it, instead of stating the facts. But in such case the question must require the witness to assume the testimony to be true, and not leave it for him to determine whether any of it be true or not; for that would commit to him the function of the jury"); State *v.* Lautenschlager, 22 Minn. 514; Getchell *v.* Hill, 21 Minn. 464.

Missouri.— State *v.* Klinger, 46 Mo. 224.

the whole of it,[77] or is familiar with it,[78] or even upon such part of it as is material to the inquiry.[79] To make the evidence more specific certain courts have permitted the expert to assume the facts, or to assume such of the facts as are material,[80] to be as testified to by a party[81] or some other witness[82] or set of

Ohio.— *In re* Shelleig, 11 Ohio S. & C. Pl. Dec. 81.

Pennsylvania.— Yardley *v.* Cuthbertson, 108 Pa. St. 395, 1 Atl. 765, 56 Am. Rep. 218.

Texas.— Ft. Worth, etc., R. Co. *v.* Thompson, 75 Tex. 501, 12 S. W. 742; Morrison *v.* State, 40 Tex. Cr. 473, 51 S. W. 358; Sherman, etc., R. Co. *v.* Eaves, 25 Tex. Civ. App. 409, 61 S. W. 550.

West Virginia.— Sebrell *v.* Barrows, 36 W. Va. 212, 14 S. E. 996.

Wisconsin.— Wright *v.* Hardy, 22 Wis. 348.

England.— *In re* McNaughten, 1 C. & K. 130 note 136, 47 E. C. L. 130, 10 Cl. & F. 200, 8 Eng. Reprint 718, 8 Scott N. R. 595, where the court said: "Where the facts are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right."

See 20 Cent. Dig. tit. "Evidence," § 2368 *et seq.*

Form of question.— The following has been held to be a proper form of question to be put to an expert: "You have heard all the evidence in this case — supposing the jury to be satisfied that the facts and circumstances testified to by the other witnesses, are true, what is your opinion as a medical man of the state of the prisoner's mind, at the time of the commission of the alleged crime? Was the prisoner, in your opinion, at the time of doing the act, under any and what kind of insanity or delusion; and what would you expect would be the conduct of a person under such circumstances?" State *v.* Windsor, 5 Harr. (Del.) 512, 534; Com. *v.* Rogers, 7 Metc. (Mass.) 500, 41 Am. Dec. 458. An opinion of an expert witness may be based upon a defined portion, although not upon the whole, of the testimony, provided that the latter is not contradictory in itself, that its truth is expressly assumed, and that the expert is first made acquainted with the whole of the testimony upon which he is asked to pronounce. Yardley *v.* Cuthbertson, 108 Pa. St. 395, 1 Atl. 765, 56 Am. Rep. 218.

The witness may recapitulate the evidence to the jury in answering. State *v.* Baptiste, 26 La. Ann. 134.

Where there is no dispute as to what the evidence on a given point shows it may be summarized in the question (Fonda *v.* St. Paul City R. Co., 77 Minn. 336, 79 N. W. 1043, "using all available means at hand"), and the absence of a dispute as to what the evidence tends to prove is an essential condition for admissibility (Sherman, etc., R. Co. *v.* Eaves, 25 Tex. Civ. App. 409, 61 S. W. 550). See *infra*, XI, H, 4, b.

77. Howland *v.* Oakland Consol. St. R. Co., 115 Cal. 487, 47 Pac. 255; Howland *v.* Oakland Consol. St. R. Co., 110 Cal. 513, 42 Pac. 983; State *v.* Privitt, 175 Mo. 207, 75 S. W. 457; Sebrell *v.* Barrows, 36 W. Va. 212, 14 S. E. 996; Wright *v.* Hardy, 22 Wis. 348. A deficiency may be supplied by reading (State *v.* Privitt, *supra*), and it has been held unnecessary that the fact should affirmatively appear (McGrath *v.* Great Northern R. Co., 80 Minn. 450, 83 N. W. 413).

The cross-examination of an expert witness need not have been read by the second expert. Good *v.* Good, 1 Mona. (Pa.) 718.

78. Baltimore City Pass. R. Co. *v.* Tanner, 90 Md. 315, 320, 45 Atl. 188 [*citing* Schneider *v.* Manning, 121 Ill. 376, 12 N. E. 267; Hand *v.* Brookline, 126 Mass. 324; Tingley *v.* Cowgill, 48 Mo. 291; Congress, etc., Spring Co. *v.* Edgar, 99 U. S. 645, 25 L. ed. 487].

79. Hand *v.* Brookline, 126 Mass. 324; State *v.* Hayden, 51 Vt. 296; Cornell *v.* State, 104 Wis. 527, 80 N. W. 745, all except expert.

80. Davis *v.* State, 38 Md. 15; Hand *v.* Brookline, 126 Mass. 324.

81. Hunt *v.* Lowell Gas Light Co., 8 Allen (Mass.) 169, 85 Am. Dec. 697; People *v.* Theobald, 92 Hun (N. Y.) 182, 36 N. Y. Suppl. 498.

82. *California.*— Howland *v.* Oakland Consol. St. R. Co., 110 Cal. 513, 42 Pac. 983.

Georgia.— Southern Bell Telephone, etc., Co. *v.* Jordan, 87 Ga. 69, 13 S. E. 202, plaintiff.

Indiana.— Moelering *v.* Smith, 7 Ind. App. 451, 34 N. E. 675.

Kentucky.— Baxter *v.* Knox, 44 S. W. 972, 19 Ky. L. Rep. 1973.

Maryland.— Davis *v.* State, 38 Md. 15.

Massachusetts.— Hand *v.* Brookline, 126 Mass. 324.

Michigan.—Johnson *v.* Spear, 82 Mich. 453, 46 N. W. 733.

New York.— McCollum *v.* Seward, 62 N. Y. 316; People *v.* Theobald, 92 Hun 182, 36 N. Y. Suppl. 498; Miller *v.* Richardson, 88 Hun 49, 34 N. Y. Suppl. 506; Sands *v.* Sparling, 82 Hun 401, 31 N. Y. Suppl. 251; Seymour *v.* Fellows, 44 N. Y. Super. Ct. 124 [*affirmed* in 77 N. Y. 178].

North Carolina.— Sikes *v.* Paine, 32 N. C. 280, 51 Am. Dec. 389.

Vermont.— Foster *v.* Dickerson, 64 Vt. 233, 24 Atl. 253.

Wisconsin.— Kliegel *v.* Aitken, 94 Wis. 433, 69 N. W. 67, 59 Am. St. Rep. 901, 35 L. R. A. 249; Allen *v.* Murray, 87 Wis. 41, 57 N. W. 979; Wright *v.* Hardy, 22 Wis. 348.

England.— Fenwick *v.* Bell, 1 C. & K. 312, 47 E. C. L. 312.

See 20 Cent. Dig. tit. "Evidence," § 2371 *et seq.*

On the contrary it has been held that the evidence of one expert cannot be embraced in the hypothetical question submitted to another. Barber's Estate, 63 Conn. 393, 27

witnesses,[83] provided it be made to appear that the witness has heard the former testimony,[84] or at all events such portion of it as is material[85] or sufficient to put him into possession of the essential facts.[86]

b. When Rejected. In some jurisdictions the practice of allowing an expert witness to ascertain the facts directly from the evidence, instead of their being embodied in a hypothetical question,[87] has been condemned and generally disallowed.[88] And even where the practice is allowed it is subject to limitations. There are serious objections to any other than the hypothetical question. (1) The course under consideration cannot be adopted where the facts are disputed.[89] The

Atl. 973, 22 L. R. A. 90; Louisville, etc., R. Co. *v.* Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908. See also Foster *v.* Dickerson, 64 Vt. 233, 24 Atl. 253.

83. *Illinois.*— Schneider *v.* Manning, 121 Ill. 376, 12 N. E. 267.

Massachusetts.— Hunt *v.* Lowell Gas Light Co., 8 Allen 169, 85 Am. Dec. 697.

Minnesota.— Such a question may be admitted in the discretion of the court. Storer's Will, 28 Minn. 9, 8 N. W. 827.

Missouri.— State *v.* Moxley, 102 Mo. 374, 14 S. W. 969, 15 S. W. 556.

New York.— Carpenter *v.* Central Park, etc., R. Co., 4 Daly 550, 11 Abb. Pr. N. S. 416; Uransky *v.* Dry Dock, etc., R. Co., 7 N. Y. St. 395.

Vermont.— Foster *v.* Dickerson, 64 Vt. 233, 24 Atl. 253.

Wisconsin.— McKeon *v.* Chicago, etc., R. Co., 94 Wis. 477, 69 N. W. 175, 59 Am. St. Rep. 910, 35 L. R. A. 252; Kliegel *v.* Aitken, 94 Wis. 432, 69 N. W. 67, 59 Am. St. Rep. 901, 35 L. R. A. 249; Gates *v.* Fleisher, 67 Wis. 504, 30 N. W. 674.

See 20 Cent. Dig. tit. "Evidence," § 2371 *et seq.*

84. Howland *v.* Oakland Consol. St. R. Co., 115 Cal. 487, 47 Pac. 255; Reed *v.* People, 1 Park. Cr. (N. Y.) 481; State *v.* Hayden, 51 Vt. 296. Where the different witnesses called by either side testify as to distinct facts, without conflict as to any of them, it has been held proper to allow the expert to state his opinion, "supposing all these facts you have heard testified to in this case . . . are true?" State *v.* Hayden, *supra.*

The objection that such proof was not given cannot be first raised on appeal. Howland *v.* Oakland Consol. St. R. Co., 115 Cal. 487, 47 Pac. 255.

85. Good *v.* Good, 1 Mona. (Pa.) 718; Kliegel *v.* Aitken, 94 Wis. 432, 69 N. W. 67, 59 Am. St. Rep. 901, 35 L. R. A. 249.

86. Davis *v.* State, 38 Md. 15; Swanson *v.* Mellen, 66 Minn. 486, 69 N. W. 620.

Reading sufficient.— It has been held to be sufficient if the evidence of the witness on which the expert passes is read to him (State *v.* Myers, 99 Mo. 107, 12 S. W. 516; McCann *v.* People, 3 Park. Cr. (N. Y.) 272; Gilman *v.* Strafford, 50 Vt. 723; McKeon *v.* Chicago, etc., R. Co., 94 Wis. 477, 69 N. W. 175) or read by him in the form of a deposition (Gilman *v.* Strafford, *supra*). As the object of this form of question is merely to save time, a judge is under no obligation to have the testimony of a witness which the expert has not heard read over to him that he may give his opinion on it. Choice *v.* State, 31 Ga. 424.

The minutes of evidence taken by counsel has been held to be an insufficient basis for the evidence of an expert witness. Thayer *v.* Davis, 38 Vt. 163.

87. See *supra*, XI, H, 4, a.

88. *Connecticut.*— Barber's Appeal, 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90.

Indiana.— Deig *v.* Morehead, 110 Ind. 451, 11 N. E. 458; Louisville, etc., R. Co. *v.* Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; Bedford Belt R. Co. *v.* Palmer, 16 Ind. App. 17, 44 N. E. 686.

New York.— *In re* Snelling, 136 N. Y. 515, 32 N. E. 1006; Link *v.* Sheldon, 136 N. Y. 1, 32 N. E. 696; People *v.* McElvaine, 121 N. Y. 250, 24 N. E. 465, 18 Am. St. Rep. 820; Reynolds *v.* Robinson, 64 N. Y. 589; Tibbits *v.* Phipps, 30 N. Y. App. Div. 274, 51 N. Y. Suppl. 954.

Texas.— Williams *v.* State, 37 Tex. Cr. 348, 39 S. W. 687.

United States.— Manufacturers Acc. Indemnity Co. *v.* Dorgan, 58 Fed. 945, 7 C. C. A. 581, 22 L. R. A. 620.

89. *Alabama.*— Gunter *v.* State, 83 Ala. 96, 3 So. 600; Page *v.* State, 61 Ala. 16.

Georgia.— A doctor cannot be asked what is his opinion as to insanity "upon the case on trial" where the evidence is in conflict. Choice *v.* State, 31 Ga. 424.

Indiana.— Goodwin *v.* State, 96 Ind. 550.

Iowa.— Smith *v.* Hickenbottom, 57 Iowa 733, 11 N. W. 664; Phillips *v.* Starr, 26 Iowa 349.

Kansas.— Tefft *v.* Wilcox, 6 Kan. 46.

Kentucky.— Home Constr. Co. *v.* Church, 14 Ky. L. Rep. 807.

Maryland.— Baltimore, etc., Turnpike Co. *v.* Cassell, 66 Md. 419, 7 Atl. 805, 59 Am. Rep. 175; Walker *v.* Rogers, 24 Md. 237.

Massachusetts.— McCarthy *v.* Boston Duck Co., 165 Mass. 165, 42 N. E. 568; Stoddard *v.* Winchester, 157 Mass. 567, 575, 32 N. E. 948 (where the court said: "An expert witness cannot be asked to give an opinion founded on his understanding of the evidence, against the objection of the other party, except in cases where the evidence is capable of but one interpretation"); Eastham *v.* Riedell, 125 Mass. 585; Hunt *v.* Lowell Gas Light Co., 8 Allen 169, 172, 85 Am. Dec. 697 (where the court said: "The object of all questions to experts should be to obtain their opinion as to the matter of skill or science which is in controversy, and at the same time to exclude their opinions as to the

witness cannot properly be asked for his judgment as to disputed matters of fact,[90] to comment on the evidence,[91] or to include his "understanding" of the evidence of another witness,[92] or as to the credibility of a witness.[93] (2) The practice unnecessarily invades the province of the jury.[94] (3) It may also happen that

effect of the evidence in establishing controverted facts").

Missouri.— State *v.* Klinger, 46 Mo. 224.

New Hampshire.— Spear *v.* Richardson, 37 N. H. 23.

New York.—People *v.* McElvaine, 121 N. Y. 250, 24 N. E. 793, 8 L. R. A. 458; Guiterman *v.* Liverpool, etc., Steamship Co., 83 N. Y. 358

Pennsylvania.— Coyle *v.* Com., 104 Pa. St. 117.

Texas.— Armendaiz *v.* Stillman, 67 Tex. 458, 3 S. W. 678; Flanagan *v.* Womack, 54 Tex. 45.

West Virginia.— State *v.* Musgrave, 43 W. Va. 672, 28 S. E. 813; State *v.* Maier, 36 W. Va. 757, 15 S. E. 991; Bowen *v.* Huntington, 35 W. Va. 682, 14 S. E. 217.

Wisconsin.— Green *v.* Ashland Water Co., 101 Wis. 258, 77 N. W. 722, 70 Am. St. Rep. 911, 43 L. R. A. 117.

United States.— U. S. *v.* McGlue, 26 Fed. Cas. No. 15,679, 1 Curt. 1.

England.— Sills *v.* Brown, 9 C. & P. 601, 38 E. C. L. 351.

See 20 Cent. Dig. tit. "Evidence," § 2368 *et seq.*

Even conflicting facts cannot be included in a single question, although a witness may be asked to reconcile if possible any apparent conflict. Fairchild *v.* Bascomb, 35 Vt. 398.

Loss of definiteness.— If the evidence is conflicting, to ask an expert for an inference from it deprives the answer of all definiteness. The witness must first decide in his own mind as to the truth as between the conflicting statements. Nothing discloses his decision upon this preliminary issue. It is therefore impossible to tell what facts have been used in forming his judgment (Choice *v.* State, 31 Ga. 424; Smith *v.* Hickenbottom, 57 Iowa 733, 11 N. W. 664; Butler *v.* St. Louis L. Ins. Co., 45 Iowa 93; Stoddard *v.* Winchester, 157 Mass. 567, 32 N. E. 948; State *v.* Klinger, 46 Mo. 224; People *v.* McElvaine, 121 N. Y. 250, 24 N. E. 465, 18 Am. St. Rep. 820; Armendaiz *v.* Stillman, 67 Tex. 458, 3 S. W. 678; Fairchild *v.* Bascomb, 35 Vt. 398; Bennett *v.* State, 57 Wis. 69, 14 N. W. 912, 46 Am. Rep. 26; Key *v.* Thomson, 13 N. Brunsw. 224) or in what sense he understood the language used (Diffin *v.* Dow, 22 N. Brunsw. 107).

The error in admitting such evidence is not cured by permitting the witness to show that he relied on the evidence of particular witnesses. People *v.* McElvaine, 121 N. Y. 250, 24 N. E. 465, 18 Am. St. Rep. 820.

90. *Alabama.*— Wilkinson *v.* Moseley, 30 Ala. 562.

Illinois.— Chicago *v.* Lamb, 105 Ill. App. 204; Henry *v.* Hall, 13 Ill. App. 343.

Indiana.— Bishop *v.* Spining, 38 Ind. 143.

Maryland.— Walker *v.* Rogers, 24 Md. 237.

Massachusetts.— Stoddard *v.* Winchester, 157 Mass. 567, 32 N. E. 948.

Minnesota.— Bunnell *v.* St. Paul, etc., R. Co., 29 Minn. 305, 13 N. W. 129; Winona *v.* Minnesota R. Constr. Co., 27 Minn. 415, 6 N. W. 795, 8 N. W. 148.

Missouri.— State *v.* Privitt, 175 Mo. 207, 75 S. W. 457.

Vermont.— Fairchild *v.* Bascomb, 35 Vt. 398.

West Virginia.— McMechen *v.* McMechen, 17 W. Va. 683, 41 Am. Rep. 682.

United States.— Dexter *v.* Hall, 15 Wall. 9, 21 L. ed. 73.

See 20 Cent. Dig. tit. "Evidence," § 2368 *et seq.*

91. Gulf, etc., R. Co. *v.* Bell, 24 Tex. Civ. App. 579, 58 S. W. 614.

92. Detzur *v.* B. Stroh Brewing Co., 119 Mich. 282, 77 N. W. 948, 44 L. R. A. 500.

93. *Indiana.*— Guetig *v.* State, 66 Ind. 94, 32 Am. Rep. 99; Rush *v.* Megee, 36 Ind. 69.

Massachusetts.— McCarthy *v.* Boston Duck Co., 165 Mass. 165, 42 N. E. 568; Stoddard *v.* Winchester, 157 Mass. 567, 32 N. E. 948; Hunt *v.* Lowell Gas Light Co., 8 Allen 169.

New York.— Barton *v.* Govan, 116 N. Y. 658, 22 N. E. 556; Guiterman *v.* Liverpool, etc., Steamship Co., 83 N. Y. 358.

West Virginia.— Kerr *v.* Lunsford, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668; McMechen *v.* McMechen, 17 W. Va. 683, 41 Am. Rep. 682.

Wisconsin.— Luning *v.* State, 2 Pinn. 215, 1 Chandl. 178, 52 Am. Dec. 153.

See 20 Cent. Dig. tit. "Evidence," § 2368 *et seq.*

It is not material that the incidental effect of the witness' opinion is to contradict the inference of a witness. St. Louis Gaslight Co. *v.* American F. Ins. Co., 33 Mo. App. 348.

94. *Alabama.*— Porter *v.* State, 135 Ala. 51, 33 So. 694; Page *v.* State, 61 Ala. 16.

Illinois.— Pyle *v.* Pyle, 158 Ill. 289, 41 N. E. 999; Chicago, etc., R. Co. *v.* Moffitt, 75 Ill. 524; Myers *v.* Lockwood, 85 Ill. App. 251.

Iowa.— State *v.* Watson, 81 Iowa 380, 46 N. W. 868; Smith *v.* Hickenbottom, 57 Iowa 733, 11 N. W. 664; Phillips *v.* Starr, 26 Iowa 349; State *v.* Felter, 25 Iowa 67.

Maryland.— Walker *v.* Rogers, 24 Md. 237.

Massachusetts.— Stoddard *v.* Winchester, 157 Mass. 567, 32 N. E. 948; Poole *v.* Dean, 152 Mass. 589, 26 N. E. 406.

Minnesota.— State *v.* Scott, 41 Minn. 365, 43 N. W. 62.

Missouri.— Tingley *v.* Cowgill, 48 Mo. 291.

New York.—People *v.* McElvaine, 121 N. Y. 250, 24 N. E. 465, 18 Am. St. Rep. 820; Dolz *v.* Morris, 10 Hun 201; Carpenter *v.* Blake, 2 Lans. 206.

North Carolina.— Summerlin *v.* Carolina, etc., R. Co., 133 N. C. 550, 45 S. E. 898.

the witness may not be able to recollect all the testimony, and to allow him to proceed upon what he chances to remember deprives all parties of knowledge as to the basis of his inference.[95] (4) The same ignorance of the real basis of the

Texas.— Armendaiz *v.* Stillman, 67 Tex. 458, 3 S. W. 678.

Vermont.— Fairchild *v.* Bascomb, 35 Vt. 398, 411, where the court said: "It is obvious that this is all that a jury could do, upon that basis. It is saying not only that the facts tending to show her sane may be accounted for and reconciled with the idea of her being insane, but that they are reasonably to be so accounted for. The answer of the witness shows this: 'I think her insane, for it is impossible to reconcile her conduct as testified to by defendants' witnesses with the idea of her not being insane at the time of the will;' that is, that the evidence to show her insane is so strong that he considers it conclusive on the point — preponderates decidedly over the evidence to show her sane; and that the proofs for the plaintiffs must be accounted for as consistent with her insanity, as the other evidence cannot be reconciled with her sanity. It seems to us to be really asking the witness for his opinion as to the preponderance of the evidence."

West Virginia.— McMechen *v.* McMechen, 17 W. Va. 683, 41 Am. Rep. 682.

Wisconsin.— Luning *v.* State, 2 Pinn. 215, 1 Chandl. 178, 52 Am. Dec. 153.

England.— Jameson *v.* Drinkald, 12 Moore C. P. 148, 22 E. C. L. 636.

Canada.— Diffin *v.* Dow, 22 N. Brunsw. 107; Key *v.* Thomson, 13 N. Brunsw. 224.

See 20 Cent. Dig. tit. "Evidence," § 2368 *et seq.*

It follows that an expert is not entitled to express his opinion upon the opinions of others (Barber's Appeal, 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90; Walker *v.* Fields, 28 Ga. 237; Texas Brewing Co. *v.* Walters, (Tex. Civ. App. 1897) 43 S. W. 548) or whether certain statements are "reconcilable" (Diffin *v.* Dow, 22 N. Brunsw. 107, 109, where it was said: "I think this question and answer were improperly admitted. This is apparent from the consideration of the subjects on which an expert can give an opinion and those he cannot. He cannot, I think, give an opinion whether any fact exists or not. He cannot give an opinion as to what another witness intended by what he may have said: in other words, he cannot construe the language used by another witness. He cannot give an opinion as to the truth or falsity of what another witness has sworn. He cannot give an opinion as to the truth or falsity of the statements made to him on which to found an opinion. He cannot give an opinion as to whether any one witness is more reliable than another. He cannot testify as to a conflict of opinion between himself and another expert. He may give an opinion on an assumed state of facts on a professional or scientific subject as to what would result from those facts, and he can give no other opinion"). He cannot testify as to the merits of a case (Tingley *v.* Cowgill, 48 Mo. 291), or the value of an autopsy (Manufacturers' Acc. Indemnity Co. *v.* Dorgan, 58 Fed. 945, 7 C. C. A. 581, 22 L. R. A. 620, holding that a physician, merely from hearing testimony as to an autopsy by those who performed it, cannot be asked whether the autopsy was such as to enable a physician to state the cause of death with any degree of certainty). An expert cannot state that a mechanical device is "considered" the best of its kind. Cleveland, etc., R. Co. *v.* McKelvey, 12 Ohio Cir. Ct. 426, 5 Ohio Cir. Dec. 561.

In substance the question calls upon the expert to decide whether or how far the evidence establishes the facts which might have been hypothetically assumed. But such a witness should not draw his inference from evidence. That is the function of the jury. Ringlehaupt *v.* Young, 55 Ark. 128, 17 S. W. 710.

Must assume that facts are proved.— He draws his judgment from facts. He is not to decide whether the latter are proved. He is to assume that they are.

Illinois.— Pyle *v.* Pyle, 158 Ill. 289, 41 N. E. 999.

Massachusetts.—McCarthy *v.* Boston Duck Co., 165 Mass. 165, 42 N. E. 568; Woodbury *v.* Obear, 7 Gray 467.

Mississippi.— Reed *v.* State, 62 Miss. 405.

Missouri.— Russ *v.* Wabash Western R. Co., 112 Mo. 45, 20 S. W. 472, 18 L. R. A. 823.

New York.— *In re* Snelling, 136 N. Y. 515, 32 N. E. 1006; Link *v.* Sheldon, 136 N. Y. 1, 32 N. E. 696; People *v.* McElvaine, 121 N. Y. 250, 24 N. E. 465, 18 Am. St. Rep. 820; Reynolds *v.* Robinson, 64 N. Y. 589; Connelly *v.* Manhattan R. Co., 60 Hun 495, 15 N. Y. Suppl. 176; Page *v.* New York, 57 Hun 123, 586, 10 N. Y. Suppl. 826; Gregory *v.* New York, etc., R. Co., 55 Hun 303, 8 N. Y. Suppl. 525; Loveless *v.* Manhattan R. Co., 57 N. Y. Super. Ct. 3, 5 N. Y. Suppl. 185; Carpenter *v.* Leavitt, 10 Misc. 49, 30 N. Y. Suppl. 808; Link *v.* Sheldon, 18 N. Y. Suppl. 815.

Ohio.— Cincinnati Mut. Ins. Co. *v.* May, 20 Ohio 211.

United States.— Dexter *v.* Hall, 15 Wall. 9, 21 L. ed. 73.

England.— *In re* McNaughten, 1 C. & K. 130 note, 47 E. C. L. 130, 10 Cl. & F. 200, 8 Eng. Reprint 718, 8 Scott N. R. 595; Sills *v.* Brown, 9 C. & P. 601, 38 E. C. L. 351; Jameson *v.* Drinkald, 12 Moore C. P. 148, 22 E. C. L. 636.

See 20 Cent. Dig. tit. "Evidence," § 2368 *et seq.*

95. Southern Mut. Ins. Co. *v.* Hudson, 113 Ga. 434, 38 S. E. 964; Bedford Belt R. Co. *v.* Palmer, 16 Ind. App. 17, 44 N. E. 686; People *v.* Millard, 53 Mich. 63, 18 N. W. 562; People *v.* McElvaine, 121 N. Y. 250, 24 N. E. 465, 18 Am. St. Rep. 820. It is

inference results where the witness has not heard all the material testimony and is asked to testify from what he has heard,[96] from what he has seen and heard,[97] or from what he has heard and from newspaper reports of the remainder of the evidence;[98] and evidence elicited by these forms of question has accordingly been rejected,[99] even where the evidence of a witness is incorporated with facts hypothetically stated.[1]

I. Tests of Opinion Evidence — 1. In General. The jury may properly apply in part to the statement of facts inference, conclusion, or judgment the same tests which the judge adopted in permitting the witness to testify.[2] So far as the element of fact enters into the statement the opportunities and ability of the witness to observe or otherwise cognize the fact are important. Mental capacity for forming a correct inference, conclusion, or judgment is the important factor in testing the element of reasoning.[3]

2. Inference — a. In General. An inference may be wrong: (1) Because the facts on which it is based either do not exist or are qualified in their operation by other facts which are not given proper weight; or (2) because the facts when ascertained do not support the inference.[4]

b. Accuracy of Observation. The enumeration of facts observed by the witness as part of the basis of his inference, which he may or may not be required

error to permit an expert to testify from his "recollection" of the evidence of another (Bedford Belt R. Co. *v.* Palmer, 16 Ind. App. 17, 44 N. E. 686), or indeed from what he has heard a particular witness testify (Tibbits *v.* Phipps, 30 N. Y. App. Div. 274, 51 N. Y. Suppl. 954).

96. State *v.* Medlicott, 9 Kan. 257; Kempsey *v.* McGinniss, 21 Mich. 123; Sanchez *v.* People, 22 N. Y. 147; Carpenter *v.* Blake, 2 Lans. (N. Y.) 206. But see Hand *v.* Brookline, 126 Mass. 324; Lant *v.* Rasines, 17 Misc. (N. Y.) 332, 40 N. Y. Suppl. 64.

97. Flanagan *v.* State, 106 Ga. 109, 32 S. E. 80.

98. Williams *v.* State, 37 Tex. Cr. 348, 39 S. W. 687.

99. *Alabama.*— Gould *v.* Hays, 25 Ala. 426.

Georgia.— Southern Mut. Ins. Co. *v.* Hudson, 113 Ga. 434, 38 S. E. 964; Choice *v.* State, 31 Ga. 424.

Indiana.— Craig *v.* Noblesville, etc., Gravel Road Co., 98 Ind. 109; Elliott *v.* Russell, 92 Ind. 526; Burns *v.* Barenfield, 84 Ind. 43.

Iowa.— Butler *v.* St. Louis L. Ins. Co., 45 Iowa 93; Phillips *v.* Starr, 26 Iowa 349.

Kansas.— State *v.* Medlicott, 9 Kan. 257.

Kentucky.— McCarty *v.* Com., 20 S. W. 229, 14 Ky. L. Rep. 285.

Massachusetts.— McCarthy *v.* Boston Duck Co., 165 Mass. 165, 42 N. E. 568; Stoddard *v.* Winchester, 157 Mass. 567, 32 N. E. 948; Poole *v.* Dean, 152 Mass. 589, 26 N. E. 406.

Michigan.— People *v.* Aiken, 66 Mich. 460, 33 N. W. 821, 11 Am. St. Rep. 512.

New York.— Link *v.* Sheldon, 136 N. Y. 1, 32 N. E. 696 [*affirming* 18 N. Y. Suppl. 815]; People *v.* McElvaine, 121 N. Y. 250, 24 N. E. 465, 18 Am. St. Rep. 820; Guiterman *v.* Liverpool, etc., R. Co., 83 N. Y. 358; Yates *v.* Root, 4 N. Y. App. Div. 439, 38 N. Y. Suppl. 663; Carpenter *v.* Blake, 2 Lans. 206; Freeman *v.* Lawrence, 43 N. Y. Super. Ct. 288; Scott *v.* Lilienthal, 9 Bosw. 224; Uransky *v.* Dry Dock, etc., R. Co., 13 N. Y. Suppl. 670.

North Carolina.— State *v.* Bowman, 78 N. C. 509.

South Carolina.— State *v.* Coleman, 20 S. C. 441.

South Dakota.— Aultman Co. *v.* Ferguson, 8 S. D. 458, 66 N. W. 1081.

Texas.— Armendaiz *v.* Stillman, 67 Tex. 458, 3 S. W. 678.

Wisconsin.— Luning *v.* State, 2 Pinn. 215, 1 Chandl. 178, 52 Am. Dec. 153.

United States.— The Clement, 5 Fed. Cas. No. 2,879, 2 Curt. 363 [*affirming* 5 Fed. Cas. No. 2,880, 1 Sprague 257], reading depositions. See also U. S. *v.* McGlue, 26 Fed. Cas. No. 15,679, 1 Curt. 1.

England.— *In re* Ferrers, 19 How. St. Tr. 885, 943.

Canada.— Diffin *v.* Dow, 22 N. Brunsw. 107.

See 20 Cent. Dig. tit. "Evidence," § 2368 *et seq.*

1. Barber's Appeal, 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90.

2. "The extent of the witness's acquaintance with the subject may always be inquired into, to enable the jury to estimate the weight of his evidence." Davis *v.* State, 35 Ind. 496, 497, 9 Am. Rep. 760.

3. "Testimony may broadly be divided into (1) expressions of judgment or opinion, and (2) assertions of fact; and the latter into (a) matters of common observation or patent facts, and (b) latent facts, the subject of experiment or research. It is clear that capacity plays a chief part in the trustworthiness of judgment and research, while in the case of patent facts the reliability is chiefly grounded on the assertor's means or opportunities for knowing." Testimony and Authority, 8 Mind N. S. p. 77.

4. The essential difference between the expert and the trained observer consists therefore in the nature of the inference to be drawn by each, rather than in the means by

to detail upon direct examination,[5] but which may always be inquired for on cross-examination,[6] furnish a practicable and valuable test of the accuracy of the witness' powers of observation.[7] The existence of the constituent facts relied on may therefore be disproved; and when these facts are disputed the jury will be instructed to give weight to the inference itself if, and in proportion as, they find the facts themselves to exist.[8] It may be claimed and evidence offered to show that the witness could not have observed correctly on account of his own condition, as because of intoxication[9] or because not properly qualified to observe carefully and with discrimination.[10] And as bearing on this it may be proved that the witness at first attached little or no importance to facts upon which he now strongly relies.[11]

c. Facts or Premises Supplied. The drawing of an inference by any individual involves two elements: (1) A fact or set of facts known to him; (2) the application of some general proposition involving uniformity of action in the physical or mental world, ascertained by experience. Danger of inaccuracy lurks in both these elements of the inference. To test its correctness involves therefore: (1) Ascertaining so far as possible the facts upon which the observer bases his inference; (2) the truth, scope, and applicability to the actual facts in their entirety of the general proposition of experience of which the witness consciously or unconsciously is making use. (1) Ascertaining the facts relied on by the observer must evidently be incompletely successful, since the precise reason for admitting the inference is that the facts cannot all be given.[12] In the case of a skilled observer an additional factor of confusion presents itself. Like the expert he frequently calls into operation in forming his inference what may be called subjective facts — facts furnished by his training and experience, which he is adding to those observed by him.[13] To test the value of his inference it is essential that these should be ascertained.[14] The difficulty of enumeration varies in degree according to the complexity of a particular case, but it is seldom eliminated entirely or even to such an extent as to make it certain precisely what facts the observer has in mind in giving his inference or what may be the relative value which he attaches to them respectively. (2) The proposition of experience which constitutes the major premise of the observer's inference is frequently one with which the general community is familiar.[15] Such inferences from experience so constantly constitute an implied term in the reasoning which the court and jury are called upon to make as to pass as a rule unnoticed, or adopted *sub silentio* as part of the judicial knowledge of the tribunal. A further step, a somewhat closer approximation to expert evidence, properly so called, is taken when a witness who has had sufficient opportunities for observation, with or without being asked to do so, generalizes the data furnished him by experience into a general proposition not known to the community at large, which he makes part of the

which the accuracy of the inference is determined. See *infra*, XI, I, 2 b–d.

5. People *v.* Youngs, 151 N. Y. 210, 45 N. E. 460. See also *supra*, XI, A, 4, b.

6. People *v.* Youngs, 151 N. Y. 210, 45 N. E. 460. See also *infra*, XI, I, 3, a.

7. Hammond, etc., R. Co. *v.* Spyzehalski, 17 Ind. App. 7, 46 N. E. 47. See also *supra*, XI, A, 4, b.

8. Frost *v.* Milwaukee, etc., R. Co., 96 Mich. 470, 56 N. W. 19; Clark *v.* State, 12 Ohio 483, 40 Am. Dec. 481; Easton First Nat. Bank *v.* Wireback, 106 Pa. St. 37; Foster *v.* Dickenson, 64 Vt. 233, 24 Atl. 253. An expert's opinion that a train running at a certain speed could have been stopped within the distance, when the danger became known to the engineer, is inapplicable where the train in question was running at a greater speed. Frost *v.* Milwaukee, etc., R. Co., *supra*. Where the opinion of a non-expert witness is not sustained by the facts given by the witness as a foundation of such opinion it is entitled to little weight. Clark *v.* State, *supra*.

9. Sisson *v.* Conger, 1 Thomps. & C. (N. Y.) 564.

10. *In re* Mullin, 110 Cal. 252, 42 Pac. 645.

11. Cote *v.* Grand Trunk R. Co., 70 N. H. 620, 49 Atl. 567.

12. Batten *v.* State, 80 Ind. 394; Graham *v.* Pennsylvania Co., 139 Pa. St. 149, 21 Atl. 151, 12 L. R. A. 293.

13. See *supra*, XI, A, 4, a, (III), (C); XI, D.

14. See *supra*, XI, A, 4; XI, D, 1.

15. See *supra*, XI, A, 4, a, (III), (C); XI, D.

basis of his inference.[16] Such generalizations usually cover what the witness has observed to happen under a given set of circumstances — tracing a relation of cause and effect from the persistent recurrence of the same result in cases more or less numerous where a simple factor has remained constant.[17] Under these circumstances the witness, after stating such facts as may permit of detailed statement, may give the generalization of his experience.[18] The rule that observers with special experience may state a relation of cause and effect based upon that experience is apparently exemplified in cases where a physician is asked to assign a cause for an effect which he has observed.[19] The experience may even be applied as a major premise to particular instances of application. For example one familiar with the condition of a gate may testify as to the effect of wind upon it.[20] In any case the validity of the inference is to be tested by ascertaining the propositions of experience which the witness is employing unless these are simple and obvious.[21]

d. Correctness of Reasoning. The enumeration of facts by the observer serves not only to test his accuracy of observation but also to characterize his powers of reasoning. It may occur that, even where the facts are correctly observed and accurately stated by the witness, they do not lead to the conclusion which he derives from them.[22] Accordingly a witness may be asked whether other persons have not drawn a different inference from the same facts[23] or whether another sufficient cause is not equally available.[24]

3. Judgment of Expert — a. In General. The judgment of an expert is of value precisely in accordance with what there is back of it. Every proper test should therefore be applied.[25] Being hypothetical it stands or falls with the existence of the facts upon which it is predicated.[26] Although the facts hypothetically stated are found by the jury to exist[27] they may still refuse to credit the judgment which the expert has formed from them,[28] because unwilling or

16. See *supra*, XI, A, 4, a, (III), (C); XI, D.

17. In generalizing from his own experience the witness is apparently stating facts in the only practically available way. For while it is not impossible that in certain cases the individual instances on which the generalization is based could be put in evidence with such fulness and distinctness as to place the jury in the position of the witness and enable them to draw the generalization for themselves, such a case is not customary. Usually both the completeness and the distinctness are absent. Memory is as a rule unable to call to the mind of the witness himself all the impressions, more or less intangible, which in numerous instances have united to form the generalization. Even were so remarkable a power of memory vouchsafed the witness, and sufficient time for the purpose accorded by the tribunal, the difficulty inherent in conveying these impressions to an ordinary jury in such a way as to create a uniform and correct result would usually prove insuperable. See *supra*, XI, A, 4, b.

18. Clinton *v.* Howard, 42 Conn. 294; Moreland *v.* Mitchell County, 40 Iowa 394; Matteson *v.* New York Cent. R. Co., 62 Barb. (N. Y.) 364; Griffin *v.* Joannes, 80 Wis. 601. On a case involving the effect upon plaintiff's horse of a certain pile of stones in a highway, plaintiff was permitted to state "What obstructions usually make horses shy according to your experience?" by saying "Anything new put in the road would cause almost any horse to shy," and also to state whether or not the pile of stones on the road that he saw (referring to the time of the accident) was or was not a "new object." Clinton *v.* Howard, *supra*. See also Moreland *v.* Mitchell County, *supra*. Fruit dealers may testify as to what condition of shipment is indicated by the condition in which they found the fruit on its receipt. Griffin *v.* Joannes, *supra*.

19. Mattison *v.* New York Cent. R. Co., 62 Barb. (N. Y.) 364, 377.

20. Chicago, etc., R. Co. *v.* Truitt, 68 Ill. App. 76.

21. See *supra*, XI, A, 4, a, (III), (C); XI, D.

22. Connecticut Mut. L. Ins. Co. *v.* Ellis, 89 Ill. 516.

23. Connecticut Mut. L. Ins. Co. *v.* Ellis, 89 Ill. 516.

24. People *v.* Knight, (Cal. 1895) 43 Pac. 6; Com. *v.* Mullins, 2 Allen (Mass.) 295; Bathrick *v.* Detroit Post, etc., Co., 50 Mich. 629, 16 N. W. 172, 45 Am. Rep. 63.

25. Birmingham Nat. Bank *v.* Bradley, 108 Ala. 205, 19 So. 791.

26. Guetig *v.* State, 66 Ind. 94, 32 Am. Rep. 99; Davis *v.* State, 35 Ind. 496, 9 Am. Rep. 760; Howes *v.* Colburn, 165 Mass. 385, 43 N. E. 125; Hathaway *v.* National L. Ins. Co., 48 Vt. 335.

27. State *v.* Miller, 5 Ohio S. & C. Pl. Dec. 703, 7 Ohio N. P. 458.

28. Baltimore *v.* Smith, etc., Brick Co., 80 Md. 458, 31 Atl. 423; Fairchild *v.* Bascomb,

unable to do so.[29] They may find that the facts are true and the reasoning false, or that while the facts justify his inference they are equally consistent with another.[30] To test the value of an expert's opinion it is often first necessary to ascertain so far as possible what facts he has mentally added to those hypothetically stated,[31] especially as to the general scientific propositions upon which, as ultimate major premises, the induction will be found finally to rest.[32]

b. On Cross-Examination. The tests usually applied to expert evidence[33] are the usual weapons of a cross-examining counsel.[34] The qualifications of the witness,[35] his knowledge,[36] and the basis of his opinion,[37] including statements on which he has relied,[38] may be fully investigated,[39] and the expert may be asked what his opinion would be, assuming the facts to be as the cross-examining counsel claims that the evidence shows them to be;[40] and facts stated in the hypothetical question which the witness deems unimportant may be sifted out.[41] A favorite line of attack upon the expert is in testing the process of reasoning employed in deduc-

35 Vt. 398. "The value of such opinions depends greatly upon the good sense and accuracy of the reasons given for them." Fairchild *v.* Bascomb, *supra.*

29. The ultimate judges of the qualifications of an expert are the jury. The court's inquiries on *voir dire* have been merely preliminary and furnish but a quasi-indorsement of credibility. It is still entirely open to a party interested to contend that, although admitted by the court, the qualifications of the expert are not such as entitle him to belief. Blough *v.* Parry, 144 Ind. 463, 40 N. E. 70, 43 N. E. 560; Davis *v.* State, 35 Ind. 496, 9 Am. Rep. 760.

30. Schlencker *v.* State, 9 Nebr. 241, 1 N. W. 857.

31. *California.*— *In re* Mullin, 110 Cal. 252, 42 Pac. 645.

Illinois.— Chicago, etc., R. Co. *v.* Cicero, 154 Ill. 656, 39 N. E. 574.

Indiana.— Davis *v.* State, 35 Ind. 496, 9 Am. Rep. 760.

Pennsylvania.— Dawson *v.* Pittsburgh, 159 Pa. St. 317, 28 Atl. 171.

Wyoming.— Edwards *v.* Murray, 5 Wyo. 153, 38 Pac. 681.

32. Clark *v.* Baird, 9 N. Y. 183.

33. See *supra,* XI, I, 3, a.

34. Gridley *v.* Boggs, 62 Cal. 190.

Limited cross-examination.—In courts where a cross-examining counsel cannot elicit facts for his own case the same limitation applies to the examination of an expert. Amos *v.* State, 96 Ala. 120, 11 So. 424; Gridley *v.* Boggs, 62 Cal. 190; Rice *v.* Des Moines, 40 Iowa 638.

35. Birmingham R., etc., Co. *v.* Ellard, 135 Ala. 433, 33 So. 276; Davis *v.* State, 35 Ind. 496, 9 Am. Rep. 700; Hutchinson *v.* State, 19 Nebr. 262, 27 N. W. 113.

An ordinary witness cannot be thus tested, upon technical points (Russell *v.* Cruttenden, 53 Conn. 564, 4 Atl. 267), although qualified to be called as an expert (Olmsted *v.* Gere, 100 Pa. St. 127). Conversely a witness testifying to facts obvious to any observer cannot on cross-examination testify as an expert. Enos *v.* St. Paul F. & M. Ins. Co., 4 S. D. 639, 57 N. W. 919, 46 Am. St. Rep. 796.

36. Lake *v.* People, 1 Park. Cr. (N. Y.) 495.

A medical expert may be asked what are the symptoms of the disease as to which he testifies. Lake *v.* People, 1 Park. Cr. (N. Y.) 495, insanity.

37. Harris *v.* Schuylkill River East Side R. Co., 141 Pa. St. 242, 21 Atl. 590, 23 Am. St. Rep. 278.

Facts so ascertained do not become evidence in the case (Harris *v.* Schuylkill River East Side R. Co., 141 Pa. St. 242, 21 Atl. 590, 23 Am. St. Rep. 278), but merely affect the weight of the evidence (Grooms *v.* State, 40 Tex. Cr. 319, 50 S. W. 370).

38. Skelton *v.* St. Paul City R. Co., 88 Minn. 192, 92 N. W. 960.

39. The fact as to which inquiry is made should be relevant to the object of the examination. People *v.* Sutton, 73 Cal. 243, 15 Pac. 86.

40. Louisville, etc., R. Co. *v.* Lucas, 119 Ind. 583, 21 N. E. 968, 6 L. R. A. 193; Conway *v.* State, 118 Ind. 482, 21 N. E. 285; Louisville, etc., R. Co. *v.* Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197; Louisville, etc., R. Co. *v.* Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; Davis *v.* State, 35 Ind. 496, 9 Am. Rep. 760; Kearney *v.* State, 68 Miss. 233, 8 So. 292; People *v.* Thurston, 2 Park. Cr. (N. Y.) 49. To refuse a cross-examining counsel this right constitutes error. Rush *v.* Megee, 36 Ind. 69; Davis *v.* State, 35 Ind. 496, 9 Am. Rep. 760. The examination in chief cannot be so conducted as to deprive the cross-examining counsel of this right. Louisville, etc., R. Co. *v.* Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908. Nor can they be confined to any particular part of a subject entered upon on the examination in chief. Louisville, etc., R. Co. *v.* Falvey, *supra.*

41. Prentis *v.* Gates, 93 Mich. 234, 53 N. W. 153, 17 L. R. A. 494. In this manner counsel may elicit the true ground of the expert's belief and enable the jury to judge of the reasonableness of the conclusions. Prentis *v.* Bates, *supra.*

In jurisdictions where counsel is permitted upon cross-examination to elicit evidence in support of his own case he may put similar hypotheses to an expert called by the other side with a view to using them as evidence, and not merely as a test.

ing his conclusion;[42] and a wide range of examination is usually permitted,[43] in the discretion of the court,[44] and the hypothetical questions asked may properly go beyond the scope of the evidence.[45] The court may permit cross-examination on purely imaginary or abstract questions assuming facts or theories not in evidence,[46] if the office and purpose of the examination is to elicit the reason upon which the expert based the opinion expressed by him on his examination in chief, or to ascertain the extent of his learning and knowledge of the particular subject upon which he assumes to be an expert.[47] A cross-examining counsel is entitled to bring out any fact[48] permitted by the general scope of cross-examination, which is relevant on any issue, including that of damages.[49] The general credibility of the witness may be attacked,[50] provided the inquiry is relevant.[51]

J. Weight of Opinion — 1. In General. The weight to be given to opinion evidence in any given case is, within the bounds of reason,[52] entirely a question

42. Pierce *v.* Boston, 164 Mass. 92, 41 N. E. 227. It is error to refuse such an opportunity on cross-examination. Dickenson *v.* Fitchburg, 13 Gray (Mass.) 546; Titus *v.* Gage, 70 Vt. 13, 39 Atl. 246.

43. State *v.* Reddick, 7 Kan. 143; Davis *v.* U. S., 165 U. S. 373, 17 S. Ct. 360, 41 L. ed. 750.

44. Bever *v.* Spangler, 93 Iowa 576, 61 N. W. 1072. The exercise of this discretion will not be reversed on appeal. Bever *v.* Spangler, 93 Iowa 576, 61 N. W. 1072.

In case of a direct conflict between experts the cross-examining counsel may inquire as to the eminence in the profession of his own expert. State *v.* Greenleaf, 71 N. H. 606, 54 Atl. 38.

45. Uniacke *v.* Chicago, etc., R. Co., 67 Wis. 108, 29 N. W. 899.

46. Bever *v.* Spangler, 93 Iowa 576, 61 N. W. 1072; Williams *v.* Great Northern R. Co., 68 Minn. 55, 70 N. W. 860, 37 L. R. A. 199; Dilleber *v.* Home L. Ins. Co., 87 N. Y. 79; La Beau *v.* People, 34 N. Y. 223.

A purely conjectural question may be excluded. Root *v.* Boston El. R. Co., 183 Mass. 418, 67 N. E. 365.

47. West Chicago St. R. Co. *v.* Fishman, 169 Ill. 196, 48 N. E. 447.

48. *Alabama.*— Birmingham R., etc., Co. *v.* Ellard, 135 Ala. 433, 33 So. 276.

Massachusetts.— Howes *v.* Colburn, 165 Mass. 385, 43 N. E. 125. That the expert's answer rests "simply on a one-sided statement of assumed facts; and that no facts which might have been proved to the satisfaction of the jury on the other side were or could have been taken into account by the witness" may be shown. Howes *v.* Colburn, *supra.*

New York.— Barry *v.* Second Ave. R. Co., 1 Misc. 502, 20 N. Y. Suppl. 871; Wing *v.* Rochester, 9 N. Y. St. 473.

Ohio.— New York L. Ins. Co. *v.* La Boiteaux, 5 Ohio Dec. (Reprint) 242, 4 Am. L. Rec. 1.

Pennsylvania.— Shannon *v.* Castner, 21 Pa. Super. Ct. 294, amount of compensation.

Vermont.— McGovern *v.* Smith, 75 Vt. 104, 53 Atl. 326, minimizing injury.

Wisconsin.— Quinn *v.* Higgins, 63 Wis. 664, 24 N. W. 482, 53 Am. Rep. 305.

To refuse such evidence is error. Quinn *v.* Higgins, 63 Wis. 604, 24 N. W. 482, 53 Am. Rep. 305.

49. Barry *v.* Second Ave. R. Co., 1 Misc. (N. Y.) 502, 20 N. Y. Suppl. 871.

50. Colton *v.* New York El. R. Co., 7 Misc. (N. Y.) 626, 28 N. Y. Suppl. 149, 31 Abb. N. Cas. 269.

51. Alabama Great Southern R. Co. *v.* Hill, 93 Ala. 514, 9 So. 722, 30 Am. St. Rep. 65.

The scope of cross-examination as to credibility is largely discretionary. Inquiry as to evidence in another suit has been permitted. Brooks *v.* Rochester R. Co., 10 Misc. (N. Y.) 88, 31 N. Y. Suppl. 179.

52. Where the subject is one for experts alone and one on which the jury cannot properly be assumed to have opinions of their own, the rule is otherwise, the unanimous evidence of qualified witnesses being considered conclusive. Leitch *v.* Atlantic Mut. Ins. Co., 66 N. Y. 100 (materiality of circumstances affect the risk in insurance); Hart *v.* Brooklyn, 31 N. Y. App. Div. 517, 520, 52 N. Y. Suppl. 113 (holding that, where customary symbols are used in a plan to indicate the use of certain materials, "courts cannot take notice of the meaning of these symbols in the absence of proof; but, equally, when uncontradicted proof is given by competent witnesses of the signification of such a symbol, courts are not at liberty to disregard it"); Ewing *v.* Goode, 78 Fed. 442, 444 (where the court said: "In many cases, expert evidence, though all tending one way, is not conclusive upon the court and jury, but the latter, as men of affairs, may draw their own inferences from the facts, and accept or reject the statements of experts; but such cases are where the subject of discussion is on the border line between the domain of general and expert knowledge, as, for instance, where the value of land is involved, or where the value of professional services is in dispute. There the modes of reaching conclusions from the facts when stated is not so different from the inference of common knowledge that expert testimony can be anything more than a mere guide. But when a case concerns the highly specialized art of treating an eye for cataract, or for the mysterious and dread disease of glaucoma, with respect to which a layman can have no knowledge at all, the

for the determination of the jury,[53] whether the inference or conclusion of an observer,[54] or the judgment of an expert.[55] The judgment of experts, even when unanimous[56] and uncontroverted,[57] is not necessarily[58] conclusive on the jury and they may disregard it.[59] The credibility of witnesses being a question

court and jury must be dependent on expert evidence. There can be no other guide, and, where want of skill or attention is not thus shown by expert evidence applied to the facts, there is no evidence of it proper to be submitted to the jury"). On the other hand the court will not permit the jury to be influenced by evidence on which they could not within the laws of correct reasoning make a finding. *In re* Klein, 207 Pa. St. 191, 56 Atl. 422, holding that the opinions of attending physicians as to testator's mental condition could not prevail as against evidence that he knew the condition of his property, remembered his children, the disposition he desired to make of his property, and was doing business in his own name and running a hotel. It will accordingly order that expert evidence be stricken out if manifestly absurd (Haviland *v.* Kansas City, etc., R. Co., 172 Mo. 106, 72 S. W. 515), and so where an unskilled observer testifies to his inference upon a technical subject and is contradicted by the skilled witnesses called by both parties a verdict based upon the sole evidence of the unskilled witness will not be allowed to stand (Martinek *v.* Swift, 122 Iowa 611, 98 N. W. 477).

53. *Alabama.*—McAllister *v.* State, 17 Ala. 434, 52 Am. Dec. 180; Watson *v.* Anderson, 13 Ala. 202.

California.— *In re* Blake, 136 Cal. 306, 68 Pac. 827, 89 Am. St. Rep. 135; People *v.* Barthleman, 120 Cal. 7, 52 Pac. 112; People *v.* Smith, 106 Cal. 73, 39 Pac. 40.

Georgia.— Wall *v.* State, 112 Ga. 336, 37 S. E. 371; Baker *v.* Richmond City Mill Works, 105 Ga. 225, 31 S. E. 426; Choice *v.* State, 31 Ga. 424, insanity.

Indiana.— Guetig *v.* State, 66 Ind. 94, 32 Am. Rep. 99, insanity.

Michigan.— People *v.* Vanderhoof, 71 Mich. 158, 39 N. W. 28.

Minnesota.— Moratzky *v.* Wirth, 74 Minn. 146, 76 N. W. 1032.

Missouri.— Kingsbury *v.* Joseph, 94 Mo. App. 298, 68 S. W. 93.

New York.— Card *v.* Moore, 173 N. Y. 598, 66 N. E. 1105 [*affirming* 68 N. Y. App. Div. 327, 74 N. Y. Suppl. 18]; Cadwell *v.* Arnheim, 152 N. Y. 182, 46 N. E. 310.

North Carolina.— State *v.* Wilcox, 132 N. C. 1120, 44 S. E. 625.

Ohio.— Sherlock *v.* Globe Ins. Co., 7 Ohio Dec. (Reprint) 17, 1 Cinc. L. Bul. 26.

South Carolina.— State *v.* Johnson, 66 S. C. 23, 44 S. E. 58.

Texas.— Ward *v.* Cameron, (Civ. App. 1903) 76 S. W. 240, holding that positive evidence that the alleged writer could not write will nevertheless warrant the court in finding against an alleged forgery of his signature by tracing.

West Virginia.—Ward *v.* Brown, 53 W. Va. 227, 44 S. E. 488.

Wisconsin.— Jones *v.* Roberts, 96 Wis. 427, 70 N. W. 685, 71 N. W. 883.

United States.— Southern Pac. Co. *v.* Arnett, 111 Fed. 849, 50 C. C. A. 17; Nyback *v.* Champagne Lumber Co., 109 Fed. 732, 48 C. C. A. 632.

See 20 Cent. Dig. tit. "Evidence," § 2395 *et seq.*

54. Prentis *v.* Bates, 93 Mich. 234, 53 N. W. 153, 17 L. R. A. 494, and other cases in the notes following. The court will not charge on the point. Thewes *v.* Crescent Pipe Line Co., 170 Pa. St. 369, 371, 32 Atl. 1083, where the court approved an instruction in which it was said: "Of course the greater opportunity for observation, and the greater knowledge and experience, the better is the witness qualified to testify, but the weight to be given to the testimony is largely dependent upon the credibility of the witnesses, and what credit shall be given to their evidence is for the jury. So that I cannot say to you, as a matter of law, that greater weight is to be given to the testimony of those who have knowledge and observation of several of such sales, than of a witness who has knowledge of but one such sale. The question is one for your determination, under all the evidence, and the credibility you may attach to the testimony of the respective witnesses."

55. *Compare supra*, this section, note 52.

56. Cornish *v.* Farm Buildings F. Ins. Co., 74 N. Y. 295 [*affirming* 10 Hun 466], uncontradicted testimony.

57. Baltimore, etc., R. Co. *v.* Baltimore, 98 Md. 535, 56 Atl. 790; Kehoe *v.* Halpin, 65 Mo. App. 343; Cornish *v.* Farm Buildings F. Ins. Co., 74 N. Y. 295.

A party is not obliged to employ rebutting experts, on pain of having the original evidence of experts accepted as conclusive. People *v.* Vanderhoof, 71 Mich. 158, 39 N. W. 28.

58. *Compare supra*, this section, note 52.

59. *Arkansas.*— Tatum *v.* Mohr, 21 Ark. 349.

Colorado.— Leitensdorfer *v.* King, 7 Colo. 436, 4 Pac. 37.

Georgia.— Wilcox *v.* Hall, 53 Ga. 635; White *v.* Clements, 39 Ga. 232.

Indiana.— Davis *v.* State, 35 Ind. 496, 9 Am. Rep. 760.

Louisiana.— Chandler *v.* Barrett, 21 La. Ann. 58, 99 Am. Dec. 701.

Missouri.— Hoyberg *v.* Henske, 153 Mo. 63, 74, 55 S. W. 83 [*citing* St. Louis, etc., R. Co. *v.* Fowler, 142 Mo. 670, 44 S. W. 771; Cosgrove *v.* Leonard, 134 Mo. 419, 33 S. W. 777, 35 S. W. 1137; Kansas City *v.* Butterfield, 89 Mo. 646, 1 S. W. 831; Kansas City *v.* Hill, 80 Mo. 523]; State *v.* Klinger, 46 Mo. 224, 228, where the court said: "His opinions are brought to their assistance, but they are not conclusive upon the jury, and they may

for the jury in all cases,[60] the opinion of the expert, although upon the precise point to be passed upon by the jury, does not relieve them of the power and consequent responsibility of deciding,[61] and they may believe a less technically trained set of witnesses.[62] It is equally within the special function of the jury to decide which of the facts upon which, hypothetically stated, the answer of the expert is based actually exist.[63] It is therefore beyond the function of the judge to assign any formula for weighing the evidence, as that the weight of the

give them such weight as they deem they are entitled to, and no more."

Nebraska.— Sioux City, etc., R. Co. *v.* Finlayson, 16 Nebr. 578, 20 N. W. 860, 49 Am. Rep. 724.

New York.— Cornish *v.* Farm Buildings F. Ins. Co., 74 N. Y. 295; Brehm *v.* Great Western R. Co., 34 Barb. 256.

Pennsylvania.—Delaware, etc., Steam Towboat Co. *v.* Starrs, 69 Pa. St. 36.

"Merely advisory."— The Missouri court of appeals speaks of expert testimony as "merely advisory." Undoubtedly such is the original office of this class of evidence; a fact which assists, in part, to explain the unusually large influence of judicial discretion in this connection. Price *v.* Connecticut Mut. L. Ins. Co., 48 Mo. App. 281.

A judge or magistrate sitting for the trial of an issue of fact are in the same position. *In re* Redfield, 116 Cal. 637, 48 Pac. 794; Brown *v.* Georgia Min., etc., Co., 106 Ga. 516, 32 S. E. 601.

60. Humphries *v.* Johnson, 20 Ind. 190; Olson *v.* Manistique, 110 Mich. 656, 68 N. W. 986; People *v.* Gonzalez, 35 N. Y. 49; Taft *v.* Brooklyn Heights R. Co., 14 Misc. (N. Y.) 390, 35 N. Y. Suppl. 1042; State *v.* Ward, 39 Vt. 225.

However specialized, abstruse or recondite the matter of art or science involved in the inquiry may be if the testimony of experts is conflicting the jury must necessarily decide where the balance of probability lies (Gorman *v.* St. Louis Transit Co., 96 Mo. App. 602, 70 S. W. 731; Hurley *v.* New York, etc., Brewing Co., 13 N. Y. App. Div. 167, 43 N. Y. Suppl. 259; Jones *v.* Roberts, 96 Wis. 427, 70 N. W. 685, 71 N. W. 883), and the rule applies where the judge sits to determine issues of fact (Evans *v.* Fox, 8 Pa. Dist. 383, 22 Pa. Co. Ct. 537).

Although it is for the court to judge in the first instance whether witnesses introduced as experts possess sufficient skill to entitle them to give an opinion (State *v.* Ward, 39 Vt. 225. See *supra*, XI, A, 2, 4), it is for the jury to determine from the testimony whether such experts have sufficient skill to render their opinions of any importance (State *v.* Ward, *supra*).

61. *Colorado.*—Bourke *v.* Whiting, 19 Colo. 1, 34 Pac. 172; Leitensdorfer *v.* King, 7 Colo. 436, 4 Pac. 37; Kilpatrick *v.* Haley, 6 Colo. App. 407, 41 Pac. 508.

Indiana.— Cuneo *v.* Bessoni, 63 Ind. 524.

Kansas.—Anthony *v.* Stinson, 4 Kan. 211.

Louisiana.—Dupre *v.* Desmaret, 5 La. Ann. 591 (post-mortem examination); State *v.* Bailey, 4 La. Ann. 376.

Maryland.— Davis *v.* State, 38 Md. 15.

Michigan.— Olson *v.* Manistique, 110 Mich. 656, 68 N. W. 986.

Missouri.— Hall *v.* St. Louis, 138 Mo. 618, 40 S. W. 89, 42 L. R. A. 753.

New York.— Van Wycklen *v.* Brooklyn, 118 N. Y. 424, 24 N. E. 179; Frace *v.* New York, etc., R. Co., 68 Hun 325, 22 N. Y. Suppl. 958.

South Carolina.— Jones *v.* Fitzpatrick, 47 S. C. 40, 24 S. E. 1030.

United States.— The Conqueror, 166 U. S. 110, 17 S. Ct. 510, 41 L. ed. 937; Head *v.* Hargrave, 105 U. S. 45, 26 L. ed. 1028; U. S. *v.* McGlue, 26 Fed. Cas. No. 15,679, 1 Curt. 1, 10, where the court said to the jury: "These opinions, though proper for your respectful consideration, and entitled to have, in your hands, all that weight which reasonably and justly belong to them, are nevertheless not binding on you, against your own judgment, but should be weighed, and, especially where they differ, compared by you, and such effect allowed to them as you think right; not forgetting, that on you alone rests the responsibility of a correct verdict."

See 20 Cent. Dig. tit. "Evidence," § 2395 *et seq.*

62. People *v.* Thompson, 122 Mich. 411, 81 N. W. 344.

Where the judge is sitting for the decision of matters of fact the rule is the same. Norton *v.* Jensen, 49 Fed. 859, 1 C. C. A. 452, patent.

63. *Alabama.*— Page *v.* State, 61 Ala. 16.

California.— People *v.* Barthleman, 120 Cal. 7, 52 Pac. 112; People *v.* Bowers, (1888) 18 Pac. 660.

Illinois.— People *v.* Johnson, 70 Ill. App. 634.

Indiana.— Guetig *v.* State, 66 Ind. 94, 104, 32 Am. Rep. 99 (where the court said: "For, if the facts fail, the opinion based upon them must fail also"); Bishop *v.* Spining, 38 Ind. 143; Davis *v.* State, 35 Ind. 496, 9 Am. Rep. 760.

Kansas.— Murry *v.* Woodson County, 58 Kan. 1, 48 Pac. 554.

Maine.— Hovey *v.* Chase, 52 Me. 304, 83 Am. Dec. 514.

Michigan.— People *v.* Foley, 64 Mich. 148, 31 N. W. 94.

Minnesota.— Loucks *v.* Chicago, etc., R. Co., 31 Minn. 526, 18 N. W. 651.

New York.— People *v.* Barber, 115 N. Y. 475, 22 N. E. 182; Wendell *v.* Troy, 39 Barb. 329; People *v.* Thurston, 2 Park. Cr. 49.

Vermont.— Hathaway *v.* National L. Ins. Co., 48 Vt. 335.

United States.— U. S. *v.* McGlue, 26 Fed. Cas. No. 15,679, 1 Curt. 1, 10, where the court said to the jury: "If you consider

judgment is dependent upon the correspondence of the facts stated to the expert and those established by the evidence,[64] or upon the ability of the witness, judging by the laws of mind, to deduce a correct conclusion;[65] that the skilled observer is entitled to greater consideration than the unskilled;[66] or that the expert evidence of the skilled witness is not entitled to confidence.[67] It is not error to charge concerning the testimony of experts that other things being equal the testimony of the greater number should be entitled to the greater weight.[68] Nor, on the other hand, is it proper for the court to reject the evidence merely because it seems to be of but slight weight.[69] But the judgment of an expert, when opposed to undisputed facts and the dictates of common sense, will not support a verdict;[70] nor would evidence of a supposition avail against the positive statement of one who knows the facts.[71]

2. Inference. While there can be little question that as between the evidence of a skilled and that of an unskilled witness of phenomena of a technical nature, the greater weight lies with the skilled observer;[72] a doubt may arise as to the relative weight to be attached to the inferences of a skilled observer and a witness of the same or greater scientific or practical qualification who has not seen the phenomena but who is testifying from a supposition of the existence of certain facts. The advantage in practical administration of expert testimony as contrasted with that of a skilled observer lies in the greater certainty of the basis involved in the expert's judgment.[73] In the hypothetically stated question the facts are enumerated; the limits of the field covered by the inference are definite.

that any of these states of fact put to the physicians are proved, then the opinions thereon are admissible evidence, to be weighed by you. Otherwise, their opinions are not applicable to this case.

See 20 Cent. Dig. tit. "Evidence," § 2395 *et seq.*

It is not to be understood that the entire answer fails unless all facts which constitute its hypothesis are found by the jury. The latter may properly accord weight in proportion as they find the facts to have been proved (Guetig *v.* State, 66 Ind. 94, 32 Am. Rep. 99; Turnbull *v.* Richardson, 69 Mich. 400, 37 N. W. 499; People *v.* Benham, 160 N. Y. 402, 55 N. E. 11, 14 N. Y. Cr. 188), or that the weight to be given to the evidence depends largely on the foundations of fact and of reason on which their opinions stand (Cram *v.* Chicago, 94 Ill. App. 199). It has, however, been held that it is error to allow a jury to find that an answer based upon an incorrect assumption of facts may have weight (Kirsher *v.* Kirsher, 120 Iowa 337, 94 N. W. 846; Hall *v.* Rankin, 87 Iowa 261, 54 N. W. 217; Stephens *v.* People, 4 Park. Cr. (N. Y.) 396); and it is proper to instruct the jury that if the assumed facts or any of them are not true, the judgment may be rejected by them (Dudley *v.* Gates, 124 Mich. 440, 83 N. W. 97, 86 N. W. 959), or that the value of the evidence varies with the conformity of the facts to the hypothesis (Woodward *v.* Iowa L. Ins. Co., 104 Tenn. 49, 56 S. W. 1020).

The evidentiary value of facts, as distinguished from the question of their existence, may well be a matter of science or experience with which a skilled witness is alone competent to deal. Bowen *v.* Huntington, 35 W. Va. 682, 14 S. E. 217.

The answer itself has no tendency to establish the fact on which it was based. Central R., etc., Co. *v.* Maltsby, 90 Ga. 630, 16 S. E. 953.

64. Blough *v.* Parry, 144 Ind. 463, 40 N. E. 70, 43 N. E. 560; Hall *v.* Rankin, 87 Iowa 261, 54 N. W. 217. See, however, *In re* Richmond, 206 Pa. St. 219, 55 Atl. 970, holding that the adverse opinion of an expert of high standing as to mental capacity is of no value where the witness never saw the person, and is basing his judgment upon an assumption of facts which are themselves disputed.

It is objectionable for the court to invade the jury's province by indorsing the theory of one set of experts and declining to allow counsel to address the jury on the theory of another set produced by himself. Fox *v.* Peninsular White Lead, etc., Works, 84 Mich. 676, 48 N. W. 203.

65. Blough *v.* Parry, 144 Ind. 463, 40 N. E. 70, 43 N. E. 560.

66. Carpenter *v.* Calvert, 83 Ill. 62, mental capacity.

67. Pannell *v.* Com., 86 Pa. St. 260 [*reversing* 9 Lanc. Bar 82].

68. Spensley *v.* Lancashire Ins. Co., 62 Wis. 443, 22 N. W. 740.

69. Pearl *v.* Omaha, etc., R. Co., 115 Iowa 535, 88 N. W. 1078.

70. Baxter *v.* Chicago, etc., R. Co., 104 Wis. 307, 80 N. W. 644.

71. Chicago, etc., R. Co. *v.* Pendergast, 75 Ill. App. 133.

72. St. Louis, etc., R. Co. *v.* Brown, 62 Ark. 254, 35 S. W. 225.

73. Not secondary evidence.— The inference of an observer is not secondary evidence as compared with the judgment of a skilled witness. People *v.* Gonzales, 35 N. Y. 49. See also Elliott *v.* Van Buren, 33 Mich. 49, 20 Am. Rep. 668.

Precisely the same hypothesis may be stated to another expert; or the hypothesis may itself be so varied in repeated questions as to cover all aspects in which the evidence is likely to impress the jury. The inferiority of expert testimony lies in two considerations: (1) The enumeration of facts is less complete than an equally skilled observer could perceive; and (2) the mental process is less immediate to the facts. The facts constituting part of the basis for the expert's judgment are frequently definite merely because they are incomplete. Where an observer presents to the tribunal his inference because he cannot state all the facts to the jury with the fulness necessary to enable them to draw an accurate inference, *a fortiori* such facts cannot be placed hypothetically before the expert so fully as to make his inference from them of any value to the jury.[74] In other words the expert stands in the same position regarding the original perception that the jury themselves occupy. In coördinating the separate mental impressions into a judgment the expert is compelled to use rather the functions of imagination and reasoning than the more vivid and inerrant faculties of sense, perception, and the semi-instructive coördination of common experience. On the other hand the skilled observer possesses the relative advantages: (1) That he has a broader, if less distinct, basis for his inference; (2) that he is dealing directly with the subject-matter; and (3) that he is able to seize upon some minute but possibly important phenomenon which would conceal its value from the ordinary observer and so never come within the purview of the expert's mental cognizance, because not embraced in his hypothesis. The "expert" deals, it may be said, with propositions formulated by the intellect; the trained observer considers facts known to or observed by him. Probably a higher grade of intellectuality or professional skill is needed to deal adequately with abstract propositions than to diagnose concrete appearances. But the points of resemblance are more marked than those of difference. The question of relative weight is for the jury.[75] But courts have expressed a decided leaning in favor of the evidence furnished by observation,[76] particularly in case of mental con-

74. Porter *v.* Pequonnoc Mfg. Co., 17 Conn. 249, 256 (where the court said: "It is impossible for a person, however skillful or scientific, to give an intelligent or precise opinion on facts testified to by another witness, in the manner in which they are frequently related. Such witness may detail, in the best manner he can, the facts on the subject of which the opinion of a scientific person is sought; but it may be impossible to extract from his testimony the data for such an opinion, with sufficient precision or certainty"); Cadwell *v.* Arnheim, 152 N. Y. 182, 46 N. E. 310; Pease Furniture Co. *v.* Kelser, 21 N. Y. App. Div. 631, 47 N. Y. Suppl. 473; Weber *v.* Third Ave. R. Co., 42 N. Y. Suppl. 789.

75. Goodwin *v.* State, 96 Ind. 550.

76. *Georgia.*— Western, etc., R. Co. *v.* Robinson, 119 Ga. 331, 46 S. E. 425, ability to stop train sooner.

Idaho.— Kelly *v.* Perrault, 5 Ida. 221, 48 Pac. 45, mental capacity.

Illinois.—Rutherford *v.* Morris, 77 Ill. 397, 405, where the court said: "It was said by a distinguished judge, in a case before him, if there was any kind of testimony not only of no value, but even worse than that, it was, in his judgment, that of medical experts. They may be able to state the diagnosis of the disease more learnedly, but, upon the question whether it had, at a given time, reached such a stage, that the subject of it was incapable of making a contract, or irresponsible for his acts, the opinion of his neighbors, if men of good, common sense, would be worth more than that of all the experts in the country."

Louisiana.— Virgin *v.* Dawson, 15 La. Ann. 532; Forsyth *v.* Despierris, 15 La. 215, holding that in a redhibitory action, of two physicians testifying to the nature of the disease of which the slave died, more weight is due the opinion of the attending physician who made a post-mortem examination.

Missouri.— Highfill *v.* Missouri Pac. R. Co., 93 Mo. App. 219, holding that in an action against a railway company for injuries caused by a swinging door, which being pushed open by a porter struck plaintiff in the back, knocking him over the seats and dislocating his hip, evidence by experts that the hip could not have been dislocated under such circumstances was not sufficient to overcome positive testimony of a physician that the hip was dislocated.

New York.— Cadwell *v.* Arnheim, 152 N. Y. 182, 46 N. E. 310; Health Dept. *v.* Purdon, 99 N. Y. 237, 1 N. E. 687, 52 Am. Rep. 22; Pease Furnace Co. *v.* Kesler, 21 N. Y. App. Div. 631, 47 N. Y. Suppl. 473; Weber *v.* Third Ave. R. Co., 42 N. Y. Suppl. 789. In a case of a runaway accident it was held that the evidence of experts that the horses could have been stopped by proper management would not weigh sufficiently to warrant submitting a case to the jury as against the per-

dition;[77] and it has been ruled that it is error to speak of the testimony of a skilled observer as "matter of opinion."[78] It has been said that the inference of actual observers cannot be contradicted by the judgment of skilled witnesses testifying as experts, but a contrary opinion has been expressed in favor of expert evidence.[79]

3. JUDGMENT OF EXPERT — a. In General. The general uncertainty and persistent disagreement of authority on many lines of professional and scientific inquiry, the fact that this class of evidence deals so largely with the problematical and the conjectural, and that there are other elements of unreliability arising from human frailty, bias,[80] loyalty to one's employer,[81] pride of opinion, self-interest,[82] or the heat engendered by controversy, which more or less unconsciously warp the mind of the witness, even without the more vulgar elements of venality[83] and the absence of any efficient punishment for perjury, have caused courts of the highest eminence to feel that experts are frequently rather the hired advocates of the parties than men of science placing their special experience at the service of the cause of justice.[84] Such courts have naturally characterized this

sonal testimony of a competent driver, who tried in vain to stop them on the occasion in question, that it could not be done.

Pennsylvania.— Com. *v.* Kirkbride, 11 Phila. 427.

Virginia.— Cheatham *v.* Hatcher, 30 Gratt. 56, 32 Am. Rep. 650.

See 20 Cent. Dig. tit. "Evidence," § 2392 *et seq.*

77. Matter of Phillips, 34 Misc. (N. Y.) 442, 69 N. Y. Suppl. 1011; *In re* Kane, 206 Pa. St. 204, 55 Atl. 917; Jarrett *v.* Jarrett, 11 W. Va. 584.

78. Bennett *v.* Fail, 26 Ala. 605.

79. State *v.* Reidell, 9 Houst. (Del.) 470, 14 Atl. 550; Young *v.* Barner, 27 Gratt. (Va.) 96.

80. Pannell *v.* Louisville Tobacco Warehouse Co., 113 Ky. 630, 68 S. W. 662, 82 S. W. 1141, 23 Ky. L. Rep. 2423; Ferguson *v.* Hubbell, 97 N. Y. 507, 49 Am. Rep. 544; *In re* Tracy, 10 Cl. & F. 154, 191, 8 Eng. Reprint 700, per Lord Campbell. "Men utterly incapable of telling a deliberate untruth, or deliberately expressing an insincere opinion, are nevertheless liable to be warped by personal interest in the deliberate formation of opinions. When a strong bias of this sort exists, their minds ready to receive every tittle of evidence on one side of a question, are utterly impervious to arguments on the other." Lewis Authority in Matters of Opinion, c. 3, § 9.

81. Grigsby *v.* Clear Lake Water Works Co., 40 Cal. 396; Bateman *v.* Ryder, 106 Tenn. 712, 64 S. W. 48, 82 Am. St. Rep. 910.

82. Winans *v.* New York, etc., R. Co., 21 How. (U. S.) 88, 16 L. ed. 68; Thorn *v.* Worthing Skating Rink Co., 6 Ch. 415 note; *In re* Tracy, 10 Cl. & F. 154, 8 Eng. Reprint 700.

83. Roberts *v.* New York El. R. Co., 128 N. Y. 455, 28 N. E. 486, 13 L. R. A. 499; Ferguson *v.* Hubbell, 97 N. Y. 507, 514, 49 Am. Rep. 544, where Earl, J., said: "It is generally safer to take the judgments of unskilled jurors than the opinions of hired and generally biased experts."

84. *California.*— Grigsby *v.* Clear Lake Water Works Co., 40 Cal. 396, 405, where the court said: "It must be painfully evident to every practitioner that these witnesses are generally but adroit advocates of the theory upon which the party calling them relies, rather than impartial experts, upon whose superior judgment and learning the jury can safely rely."

Indiana.— Goodwin *v.* State, 96 Ind. 550, 572, where the court said: "The current of modern authorities is setting strongly against what is called expert evidence."

Iowa.— Bever *v.* Spangler, 93 Iowa 576, 61 N. W. 1072.

Maryland.— Dashiell *v.* Griffith, 84 Md. 363, 35 Atl. 1094.

New York.— Roberts *v.* New York El. R. Co., 128 N. Y. 455, 465, 474, 28 N. E. 486, 13 L. R. A. 499, where it is said that "the particular kind of an opinion desired by any party to the investigation can be readily procured by paying the market price therefor. . . . He [the expert] comes on the stand to swear in favor of the party calling him and it may be said he always justifies by his works the faith that has been placed in him."

Pennsylvania.— Ryder *v.* Jacobs, 182 Pa. St. 624, 38 Atl. 471.

England.— Thorn *v.* Worthing Skating Rink Co., 6 Ch. D. 415 note, 416 note, where the court said: "As usual, the experts do not agree in their opinion. There is no reason why they should. As I have often explained since I have had the honour of a seat on this Bench, the opinion of an expert may be honestly obtained, and it may be quite different from the opinion of another expert also honestly obtained. But the mode in which expert evidence is obtained is such as not to give the fair result of scientific opinion to the Court. A man may go, and does sometimes, to half-a-dozen experts. I have known it in cases of valuation within my own experience at the Bar. He takes their honest opinions, he finds three in his favour and three against him; he says to the three in his favour, Will you be kind enough to give evidence? and he pays the three against him

class of evidence unfavorably[85] and have ruled that such evidence should be received with "caution,"[86] "with narrow scrutiny and with much caution,"[87] and never received at all except when absolutely necessary;[88] and that the statement of an inference or judgment is inferior in probative effect to a statement of fact.[89] It has been suggested that the court should itself select the experts,[90] but there are obvious difficulties in such a course.[91] Still it cannot be

their fees and leaves them alone; the other side does the same. It may not be three out of six, it may be three out of fifty. I was told in one case, where a person wanted a certain thing done, that they went to sixty-eight people before they found one. I was told that by the solicitor in the cause. That is an extreme case no doubt, but it may be done, and therefore I have always the greatest possible distrust of scientific evidence of this kind, not only because it is universally contradictory, and the mode of its selection makes it necessarily contradictory, but because I know of the way in which it is obtained. I am sorry to say the result is that the Court does not get that assistance from the experts which, if they were unbiased and fairly chosen, it would have a right to expect."

85. *Illinois.*— Rutherford *v.* Morris, 77 Ill. 397, of less than no value.

Indiana.— Rush *v.* Megee, 36 Ind. 69, 73, where the court said: "We are not enamored with expert testimony, however procured or presented."

Iowa.— Howe *v.* Richards, 112 Iowa 220, 83 N. W. 909 (lowest order of evidence); State *v.* Van Tassel, 103 Iowa 6, 19, 72 N. W. 497; Whitaker *v.* Parker, 42 Iowa 585 (lowest order and the most unsatisfactory character).

Kentucky.— Pannell *v.* Louisville Tobacco Warehouse Co., 113 Ky. 630, 68 S. W. 662, 82 S. W. 1141, 23 Ky. L. Rep. 2423.

Missouri.— Gates *v.* Chicago, etc., R. Co., 44 Mo. App. 488; Slais *v.* Slais, 9 Mo. App. 96.

New York.— Roberts *v.* New York El. R. Co., 128 N. Y. 455, 474, 28 N. E. 486, 13 L. R. A. 499 (wholly worthless for any judicial purpose); Dobie *v.* Armstrong, 27 N. Y. App. Div. 520, 50 N. Y. Suppl. 801 (weakest and most unreliable).

Pennsylvania.— Dawson *v.* Pittsburgh, 159 Pa. St. 317, 28 Atl. 171, the lowest grade of evidence that ever comes into a court of justice.

United States.— North America Acc. Assoc. *v.* Woodson, 64 Fed. 689, 12 C. C. A. 392, rather unreliable.

See 20 Cent. Dig. tit. "Evidence," § 2395 *et seq.*

86. Grigsby *v.* Clear Lake Water Works Co., 40 Cal. 396.

87. Grigsby *v.* Clear Lake Water Works Co., 40 Cal. 396; McFadden *v.* Murdock, 1 Ir. C. L. 211.

88. Grigsby *v.* Clear Lake Water Works Co., 40 Cal. 396; Roberts *v.* New York El. R. Co., 128 N. Y. 455, 465, 28 N. E. 486, 13 L. R. A. 499 (where it is said: "Expert evidence, so-called, or, in other words, evidence of the mere opinion of witnesses, has been used to such an extent that the evidence given by them has come to be looked upon with great suspicion by both courts and juries, and the fact has become very plain that in any case where opinion evidence is admissible, the particular kind of an opinion desired by any party to the investigation can be readily procured by paying the market price therefor. We have said lately that the rules admitting the opinions of experts should not be unnecessarily extended, because experience has shown it is much safer to confine the testimony of witnesses to facts in all cases where that is practicable, and leave the jury to exercise their judgment and experience on the facts proved"); Ferguson *v.* Hubbell, 97 N. Y. 507, 49 Am. Rep. 544.

In Louisiana the evidence of experts, not resting in any degree upon observation but conjectural and speculative, is not deemed full proof. Parlange *v.* Parlange, 16 La. Ann. 17; Stackhouse *v.* Kendall, 7 La. Ann. 670.

89. Crawford *v.* Montreal, 30 Can. Supreme Ct. 406.

90. Grigsby *v.* Clear Lake Water Works Co., 40 Cal. 396. The court in certain jurisdictions will appoint an expert. Hawkins *v.* Mahaffy, 29 Grant Ch. (U. C.) 326; McKay *v.* Keefer, 12 Ont. Pr. 256.

91. Thorn *v.* Worthing Skating Rink Co., 6 Ch. D. 415 note, 416 note, where it was said by Jessel, M. R.: "It is very difficult to do so in cases of this kind [infringement of patent]. First of all the Court has to find out an unbiased expert. That is very difficult. The Court does not know how many of these experts have been consulted by parties, either in the case of this particular patent or of a similar patent. It may turn out that a particular expert has been largely employed by the particular solicitor on the one side or the other in the case, and it is so extremely difficult to find out a really unbiased expert and a man who has no preconceived opinion or prejudice, that I have hitherto abstained from exercising the power which, no doubt, the Court has of selecting an expert to give evidence before the Court. That being so, it throws the Court on its own limited resources, and they are always limited with respect to subject-matter of the patent, a matter which depends on a very great variety of circumstances; and although the Court does derive, no doubt, a great deal of knowledge from the evidence of experts, yet of course, as we all know, in a subject-matter with which a person is not familiar from long training serious mistakes may be made which will not be made by persons who are so acquainted."

In cases involving mental condition the absolute and comparative value of expert tes-

doubted that in very many cases expert evidence must be accorded that measure of respect which is due to a class of evidence, the use of which is absolutely indispensable.[92] It may be stated as a general rule that the value of opinions given by experts depends upon the experience and knowledge which they have and evince concerning the matters about which they testify,[93] and the reasons which they assign for it.[94]

b. How Impaired. The weight to be given the judgment of a skilled witness may be impaired by the various methods employed in the case of other testimony. He may be contradicted by others in his own class or any competent witness,[95] by his own statements at another time,[96] by the fact that he formed a different opinion at another time,[97] or by the fact that he is interested.[98] He may be impeached or discredited as by showing bias.[99] It may be shown that the inferences are erroneous, as where another sufficient cause will explain the phenomena[1] or an occurrence said to be impossible has occurred.[2] Lack of qualification may be proved,[3] but the evidence must be relevant[4] and admissible. For example, hearsay,[5] including reputation[6] and opinion,[7] are excluded. It may be proved that the faculties of the witness have been impaired by disease,[8] that the facts assumed as the basis of the question do not exist[9] or are not established by the evidence,[10] or that the witness is mistaken in a portion of his testimony.[11]

c. How Increased. A party is entitled to confirm the judgment of his expert witnesses by proof of facts which tend to show its accuracy.[12] Thus a party who introduces expert testimony is entitled to show that experiments confirm[13]

timony in insanity cases is a much controverted point. See *supra*, XI, D, 2. On the one hand it has been held that in few other connections is the skill of the expert of more possible value than in that of mental derangement. Rex *v.* Wright, R. & R. 339. On the other side expert evidence on this subject has been deemed inferior to that of an observer (Kelly *v.* Perrault, 5 Ida. 221, 48 Pac. 45), or subscribing witness (Kelly *v.* Perrault, *supra*).

92. Grigsby *v.* Clear Lake Water Works Co., 40 Cal. 396; Gates *v.* Chicago, etc., R. Co., 44 Mo. App. 488; Ferguson *v.* Hubbell, 97 N. Y. 507, 49 Am. Rep. 544; Langford *v.* Jones, 18 Oreg. 307, 22 Pac. 1064. The opinions of experts on questions of medical science, although based upon hypothetical statements, are entitled to the same consideration as other direct oral testimony, when such statements are found to be real. Langford *v.* Jones, *supra*.

93. Carr *v.* Northern Liberties, 35 Pa. St. 324, 78 Am. Dec. 342; State *v.* Ward, 39 Vt. 225; Lehigh Valley Coal Co. *v.* Chicago, 26 Fed. 415.

94. Randolph *v.* Adams, 2 W. Va. 519; Knowlton *v.* Oliver, 28 Fed. 516.

Where no reasons are assigned the evidence may be rejected. Randolph *v.* Adams, 2 W. Va. 519.

95. Lake Erie, etc., R. Co. *v.* Mugg, 132 Ind. 168, 31 N. E. 564, holding that a shoemaker may contradict an expert as to the inferences to be drawn from the condition of the heel of a shoe.

96. People *v.* Donovan, 43 Cal. 162; Miller *v.* Mutual Ben. L. Ins. Co., 31 Iowa 216, 7 Am. Rep. 122; Sanderson *v.* Nashua, 44 N. H. 492.

97. People *v.* Hoch, 150 N. Y. 291, 44 N. E. 976.

98. New Jersey Zinc, etc., Co. *v.* Lehigh Zinc, etc., Co., 59 N. J. L. 189, 35 Atl. 915.

99. State *v.* Baptiste, 26 La. Ann. 134.

1. Lincoln *v.* Taunton Copper Mfg. Co., 9 Allen (Mass.) 181, holding that where an expert claimed that the copper fumes of defendant's operations injured plaintiff's vegetation because such vegetation was shown to contain copper, it might be shown that vegetation unaffected by such operations normally contained copper.

2. Com. *v.* Leach, 156 Mass. 99, 30 N. E. 163.

3. See *supra*, XI, A, 4, a.

4. Buckman *v.* Missouri, etc., R. Co., 100 Mo. App. 30, 73 S. W. 270, holding that the fact that a railroad employee was discharged and could not afterward get employment with another railroad, unless it was for incompetency, could not be shown to affect his qualifications to testify as an expert in regard to handling trains.

5. Adams *v.* Sullivan, 100 Ind. 8.

6. Adams *v.* Sullivan, 100 Ind. 8.

7. Poling *v.* San Antonio, etc., R. Co., (Tex. Civ. App. 1903) 75 S. W. 69.

8. Fairchild *v.* Bascomb, 35 Vt. 398.

9. Quinn *v.* Higgins, 63 Wis. 664, 24 N. W. 482, 53 Am. Rep. 305.

10. Bristed *v.* Weeks, 5 Redf. Surr. (N. Y.) 529.

11. Kirsher *v.* Kirsher, 120 Iowa 337, 94 N. W. 846.

12. Com. *v.* Buccieri, 153 Pa. St. 535, 26 Atl. 228, promptness of testimony.

13. *Massachusetts.*— Eidt *v.* Cutter, 127 Mass. 522.

Michigan.— People *v.* Thompson, 122 Mich. 411, 81 N. W. 344.

Rhode Island.— State *v.* Nagle, (1903) 54 Atl. 1063.

Texas.— McGrew *v.* St. Louis, etc., R. Co., (Civ. App. 1903) 74 S. W. 816.

or demonstrate[14] its correctness. He may be asked whether he is satisfied with the accuracy of his conclusion,[15] but not as to whether a jury would be justified in finding a verdict on his evidence.[16] The weight of the expert's judgment may be enhanced by the evidence of another qualified witness as to his scientific or professional attainments.[17] Where the witness has formed an opinion he may be asked on examination in chief what he did in pursuance of it.[18] On redirect examination any impairment in weight or clearness resulting from the cross-examination may be remedied.[19]

4. Standard Treatises — a. On Direct Examination. In connection with the value of expert testimony or the evidence of skilled witnesses the existence of standard treatises on scientific or technical subjects is a fact of importance; and what are standard treatises and what relevant propositions they severally lay down may be stated by the witness.[20] In accordance, however, with the rule that matters of fact cannot be proved by showing that certain authors so declare,[21] to which the necessity of employing expert testimony is largely due, a party cannot, as a general rule, read extracts from standard treatises to the jury.[22] Nor upon

United States.— Orient Ins. Co. *v.* Leonard, 120 Fed. 808, 57 C. C. A. 176.

Contra.— Evans *v.* State, 109 Ala. 11, 19 So. 535; Tesney *v.* State, 77 Ala. 33; Bollman *v.* Lucas, 22 Nebr. 796, 36 N. W. 465.

Ability to give dates of such experiences is not essential to admissibility. Orient Ins. Co. *v.* Leonard, 120 Fed. 808, 57 C. C. A. 176.

14. Donahoe *v.* New York, etc., R. Co., 159 Mass. 125, 34 N. E. 87.

15. Missouri, etc., R. Co. *v.* Sledge, (Tex. Civ. App. 1895) 30 S. W. 1102. See also Entwistle *v.* Meikle, 180 Ill. 9, 54 N. E. 217, handwriting.

16. Strudgeon *v.* Sand Beach, 107 Mich. 496, 65 N. W. 616.

17. Thompson *v.* Ish, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552; Laros *v.* Com., 84 Pa. St. 200.

It has on the contrary been held that no evidence as to scientific knowledge or professional attainments other than that of a skilled witness disclosed on his examination is competent to reinforce his statements (De Phue *v.* State, 44 Ala. 32; Tullis *v.* Kidd, 12 Ala. 648; Forcheimer *v.* Stewart, 73 Iowa 216, 32 N. W. 665, 35 N. W. 148, where the court said: "Inquiries, indeed, of that character, might be extended indefinitely") or disparage them (Carley *v.* New York, etc., R. Co., 1 N. Y. Suppl. 63).

Corroboration cannot be had by reciting the judgments of others on the subject. Indiana Natural, etc., Gas Co. *v.* Anthony, 26 Ind. App. 307, 58 N. E. 868.

The reputation of the expert is not material unless assailed. De Phue *v.* State, 44 Ala. 32.

18. Stephenson *v.* River Tyne Imp. Com'rs, 17 Wkly. Rep. 590.

19. Moyer *v.* New York Cent., etc., R. Co., 98 N. Y. 645.

20. Healy *v.* Visalia, etc., R. Co., 101 Cal. 585, 36 Pac. 125; Brodhead *v.* Wiltse, 35 Iowa 429; Huffman *v.* Click, 77 N. C. 55.

The effect of such evidence is to make the statement of the author that of the witness. Where for example a medical or other expert testifies from his reading merely the circumstance which causes such testimony to differ from a mere attempt at introduction of the book itself (which would not be permitted) lies in the fact that a competent person practically indorses the statement as consistent with his other knowledge. Healy *v.* Visalia, etc., R. Co., 101 Cal. 585, 36 Pac. 125; Finnegan *v.* Fall River Gas Works Co., 159 Mass. 311, 34 N. E. 523, where it is said: "When one who is competent on the general subject accepts from his reading as probably true a matter of detail which he has not verified, the fact gains an authority which it would not have had from the printed page alone."

21. People *v.* Millard, 53 Mich. 63, 18 N. W. 562; Darby *v.* Ouseley, 1 H. & N. 1, 2 Jur. N. S. 497, 25 L. J. Exch. 227. See Evidence, 16 Cyc. 1213.

This has been permitted by statute in some states. For example in Iowa it is provided that "historical works, works of science or art, and published maps and charts, when made by persons indifferent between the parties, are presumptive evidence of facts of general notoriety or interest." Iowa Civil Code, § 3995. Other states have permitted it in the absence of statute. Ripor *v.* Bittel, 30 Wis. 614. The effect of enabling statutes is not to make other evidence incompetent on the same points. Brodhead *v.* Wiltse, 35 Iowa 429. Thus a competent expert can state what treatment a standard authority prescribes although the treatise is itself admissible. Brodhead *v.* Wiltse, *supra.*

22. *Alabama.*— Timothy *v.* State, 130 Ala. 68, 30 So. 339.

Delaware.— State *v.* West, Houst. Cr. Cas. 371.

Georgia.— Cook *v.* Coffey, 103 Ga. 384, 30 S. E. 27 (veterinary); Bowen *v.* Gainesville, etc., R. Co., 95 Ga. 688, 22 S. E. 695.

Indiana.— Plake *v.* State, 121 Ind. 433, 23 N. E. 273, 16 Am. St. Rep. 408 (holding that definitions of insanity cannot be safely taken from medical jurisprudence); Carter *v.* State, 2 Ind. 617.

Iowa.— Stewart *v.* Equitable Mut. L. Ins. Assoc., 110 Iowa 528, 81 N. W. 782; Bixby

offering the expert witness can he reinforce the latter's evidence by such extracts,[23]

v. Omaha, etc., R., etc., Co., 105 Iowa 293, 75 N. W. 182, 67 Am. St. Rep. 299, 43 L. R. A. 533; Gould *v.* Schermer, 101 Iowa 582, 70 N. W. 697, effects of blindness in horse.

Kansas.— State *v.* Baldwin, 36 Kan. 1, 12 Pac. 318.

Massachusetts.— Ashworth *v.* Kittridge, 12 Cush. 193, 58 Am. Dec. 178.

Michigan.— People *v.* Hall, 48 Mich. 482, 12 N. W. 665, 42 Am. Rep. 477; Fraser *v.* Jennison, 42 Mich. 206, 3 N. W. 882.

Nebraska.— Van Skike *v.* Potter, 53 Nebr. 28, 73 N. W. 295.

New York.— Foggett *v.* Fischer, 23 N. Y. App. Div. 207, 48 N. Y. Suppl. 741.

South Dakota.— Brady *v.* Shirley, 14 S. D. 447, 85 N. W. 1002, veterinary text-book on telling horse's age by his teeth.

Texas.— Cranfill *v.* Hayden, 22 Tex. Civ. App. 656, 55 S. W. 805, parliamentary law.

United States.— Union Pac. R. Co. *v.* Yates, 79 Fed. 584, 25 C. C. A. 103, 40 L. R. A. 553, construing McClain Code Iowa, § 4903.

Canada.— Brown *v.* Sheppard, 13 U. C. Q. B. 178.

See 14 Cent. Dig. tit. "Criminal Law," § 1025; 20 Cent. Dig. tit. "Evidence," § 1516 *et seq.* And see *infra*, XIV, C, 12.

Contra.— Bales *v.* State, 63 Ala. 30 (medical works); Merkle *v.* State, 37 Ala. 139 (fermentation of liquors); State *v.* Hoyt, 46 Conn. 330 (books on insanity under a long established practice). See *infra*, XIV, C, 12.

23. *Illinois.*— Bloomington *v.* Shrock, 110 Ill. 219, 51 Am. Rep. 679.

Indiana.— Louisville, etc., R. Co. *v.* Howell, 147 Ind. 266, 45 N. E. 584.

Iowa.— State *v.* Petersen, 110 Iowa 647, 82 N. W. 329.

Maryland.— Davis *v.* State, 38 Md. 15.

Massachusetts.— Com. *v.* Brown, 121 Mass. 69; Com. *v.* Sturtivant, 117 Mass. 122, 19 Am. Rep. 401.

Michigan.— Fox *v.* Peninsular White Lead, etc., Works, 84 Mich. 676, 48 N. W. 203.

Mississippi.— Tucker *v.* Donald, 60 Miss. 460, 45 Am. Rep. 416.

North Carolina.— Huffman *v.* Clark, 77 N. C. 55.

Rhode Island.— State *v.* O'Brien, 7 R. I. 336.

England.— Collier *v.* Simpson, 5 C. & P. 73, 24 E. C. L. 460.

But see Western Assur. Co. *v.* Mohlman Co., 83 Fed. 811, 28 C. C. A. 157, 40 L. R. A. 561, as to tabulated results in engineering science as distinguished from medical questions.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1025, 1077; 20 Cent. Dig. tit. "Evidence," §§ 1516 *et seq.*, 2377 *et seq.*

A contrary view obtains in certain jurisdictions, where a witness may be asked to read indicated portions of a book of authority on the subject and having done so or having listened to a reading of them be asked whether he agrees or dissents from these statements. Fisher *v.* Southern Pac. R. Co., 89 Cal. 399, 26 Pac. 894; Louisville, etc., R. Co. *v.* Howell, 147 Ind. 266, 45 N. E. 584; Hutchinson *v.* State, 19 Nebr. 262, 27 N. W. 113; Byers *v.* Nashville, etc., R. Co., 94 Tenn. 345, 29 S. W. 128. The offer seems objectionable, as a mere attempt to evade the rule forbidding the reading of scientific text-books to the jury. Hall *v.* Murdock, 114 Mich. 233, 72 N. W. 150. An ingenious attempt in a similar line to get an extract from a medical treatise in evidence by asking a witness on cross-examination to read over to himself a certain paragraph and state what it says has also been defeated. Byers *v.* Nashville, etc., R. Co., 94 Tenn. 345, 29 S. W. 128; Hall *v.* Murdock, 114 Mich. 233, 72 N. W. 150; Marshall *v.* Brown, 50 Mich. 148, 15 N. W. 55.

Mortality and tidal tables, as for example the "American experience tables" (Pearl *v.* Omaha, etc., R. Co., 115 Iowa 535, 88 N. W. 1078; Kreuger *v.* Sylvester, 100 Iowa 647, 69 N. W. 1059; Boettger *v.* Scherpe, etc., Iron Co., 136 Mo. 531, 38 S. W. 298), "Carlisle tables" (Pearl *v.* Omaha, etc., R. Co., 115 Iowa 535, 88 N. W. 1078; Allen *v.* Ames, etc., R. Co., 106 Iowa 602, 76 N. W. 848; Friend *v.* Burleigh, 53 Nebr. 674, 74 N. W. 50; Camden, etc., R. Co. *v.* Williams, 61 N. J. L. 646, 40 Atl. 634; Kerrigan *v.* Pennsylvania R. Co., 194 Pa. St. 98, 44 Atl. 1069; San Antonio, etc., R. Co. *v.* Engelhorn, 24 Tex. Civ. App. 324, 62 S. W. 561, 65 S. W. 68), Wadsworth's life tables (Louisville, etc., R. Co. *v.* Kelly, 100 Ky. 421, 38 S. W. 852, 40 S. W. 452, 19 Ky. L. Rep. 69), or any other in permanent general use (Henderson *v.* Harness, 184 Ill. 520, 56 N. E. 786; Indianapolis *v.* Marold, 25 Ind. App. 428, 58 N. E. 512, standard life tables; Huntington *v.* Burke, 21 Ind. App. 655, 52 N. E. 415; Pearl *v.* Omaha, etc., R. Co., 115 Iowa 535, 88 N. W. 1078; Keyes *v.* Cedar Falls City, 107 Iowa 509, 78 N. W. 227; Atchison, etc., R. Co. *v.* Ryan, 62 Kan. 682, 64 Pac. 603, cyclopedias of known authenticity and general use; Jones *v.* McMillan, 129 Mich. 86, 88 N. W. 206; Galveston, etc., R. Co. *v.* Johnson, 24 Tex. Civ. App. 108, 58 S. W. 622; San Antonio, etc., R. Co. *v.* Morgan, (Tex. Civ. App. 1897) 46 S. W. 672; Missouri, etc., R. Co. *v.* Ransom, 15 Tex. Civ. App. 689, 41 S. W. 826, Flatchcroft insurance manual; Missouri, etc., R. Co. *v.* Hines, (Tex. Civ. App. 1897) 40 S. W. 152, life tables; Crouse *v.* Chicago, etc., R. Co., 102 Wis. 196, 78 N. W. 446, 778, annuity tables), provided that a relevant fact is stated (Decker *v.* McSorley, 111 Wis. 91, 86 N. W. 554), are received as evidence of the expectancy of life. The admission is based on the same ground as that of the almanac, that of judicial cognizance. See EVIDENCE, 16 Cyc. 924. The tables are competent if they show the expectancy of persons approximating to the age of the person in question (Pearl *v.* Omaha, etc., R. Co., 115 Iowa 535, 88 N. W. 1078), and even though the tables are based on the assumption of health and the person in question suffers from disease (Smiser *v.* State, 17 Ind. App. 519,

even while the witness is on the stand,[24] or allow the witness so to do,[25] although he be the author himself.[26] Nor can he use their authority in his argument.[27] But he may insert quotations in hypothetical questions.[28] The expert may refresh his knowledge by referring to standard works, "but the evidence must be his own, independent of the works";[29] and he may corroborate his testimony by evidence that his position is sustained by writers and authorities on the subject.[30] Apart from statute extracts from standard treatises cannot be read in evidence to contradict an expert.[31] There is, however, the recognized exception

47 N. E. 229), and do not cover the precise age of the person in question (Missouri, etc., R. Co. v. Hines, (Tex. Civ. App. 1897) 40 S. W. 152) and the employment is extra hazardous (Galveston, etc., R. Co. v. Johnson, 24 Tex. Civ. App. 180, 58 S. W. 622, railroad engineer). The same principle extends to the United States tide tables prepared by the government for the use of navigators on Puget sound. Cherry Point Fish Co. v. Nelson, 25 Wash. 558, 66 Pac. 55.

See 20 Cent. Dig. tit. "Evidence," § 1513 *et seq.* And see *infra*, XIV, C, 12.

24. *California.*— Lilley v. Parkinson, 91 Cal. 655, 27 Pac. 1091.

Illinois.— Bloomington v. Shrock, 110 Ill. 219, 51 Am. Rep. 679.

Indiana.— Louisville, etc., R. Co. v. Howell, 147 Ind. 266, 45 N. E. 584.

Mississippi.— Tucker v. Donald, 60 Miss. 460, 45 Am. Rep. 416.

New York.— Pahl v. Troy City R. Co., 81 N. Y. App. Div. 308, 81 N. Y. Suppl. 46.

South Carolina.— State v. Coleman, 20 S. C. 441.

Texas.— Carlisle v. State, (Cr. App. 1900) 56 S. W. 365.

Articles on professional subjects are in the same category. State v. Winter, 72 Iowa 627, 34 N. W. 475.

25. Com. v. Sturtivant, 117 Mass. 122, 19 Am. Rep. 401.

Indirect methods of attaining the same result, as asking the witness to detail cases from his reading, are equally inadmissible. People v. Goldenson, 76 Cal. 328, 19 Pac. 161.

Grounds of opinion relevant.— The witness may reinforce his opinion by a statement of the grounds on which it is based, although to some degree founded on medical works and "cases on record." Healy v. Visalia, etc., R. Co., 101 Cal. 585, 36 Pac. 125. A doctor may read parts of medical books to the jury and explain to them the technical medical terms used in connection with the case. Oakley v. State, 135 Ala. 29, 33 So. 693. And it has been held that a civil engineer, testifying as an expert as to the cause of the fall of a building, may read in support of his opinion from engineering books, recognized as standard authorities, giving the tabulated results of tests made to determine the strength and resisting quality of timbers of the kind used in the construction of the building. Western Assur. Co. v. J. H. Mohlman Co., 83 Fed. 811, 28 C. C. A. 157, 40 L. R. A. 561.

26. Mix v. Staples, 17 N. Y. Suppl. 775.

27. Huffman v. Click, 77 N. C. 55, 57, where the court said: "He [the witness] cannot read a medical work to the jury; how then can counsel do it? If this practice were allowed many of our cases would soon come to be tried, not upon the sworn testimony of living witnesses, but upon publications not written under oath."

28. *Connecticut.*— Tompkins v. West, 56 Conn. 478, 485, 16 Atl. 237, where the court said: "If a question is in itself proper in form and relevant to the issue, it is not of the slightest consequence how it was suggested to the mind of the interrogating counsel, and whether it was read from a book or drawn from the storehouse of memory, and whether it had reposed in the memory five minutes or five years would seem equally immaterial. To require of counsel a learning in the technicalities of all the sciences, ample enough, without special preparation, to conduct intelligently a technical examination of an expert in such science, would not only practically deny his right to conduct an examination or cross-examination at all, but would virtually deny to a party the assistance of counsel in many scientific matters."

Illinois.— Connecticut Mut. L. Ins. Co. v. Ellis, 89 Ill. 516, 519, where the court said: "What possible difference could it make whether the questions were read out of a medical book or framed by counsel for that purpose?" The statements when so used do not become evidence in the case. Connecticut Mut. L. Ins. Co. v. Ellis, *supra.*

Kentucky.— Williams v. Nalley, 45 S. W. 874, 20 Ky. L. Rep. 244.

South Carolina.—State v. Coleman, 20 S. C. 441.

Tennessee.— Byers v. Nashville, etc., R. Co., 94 Tenn. 345, 29 S. W. 128.

29. Huffman v. Click, 77 N. C. 55; Rowley v. London, etc., R. Co., L. R. 8 Exch. 221 (mortality tables); Indian Ev. Act (1872), § 159.

30. State v. Baldwin, 36 Kan. 1, 12 Pac. 318; People v. Vanderhoof, 71 Mich. 158, 39 N. W. 28. *Contra*, Link v. Sheldon, 18 N. Y. Suppl. 815. And a list of authors corroborating the views expressed has been received. Scott v. Astoria R. Co., 43 Oreg. 26, 72 Pac. 594, 99 Am. St. Rep. 710, 62 L. R. A. 543.

31. *Illinois.*— Bloomington v. Shrock, 110 Ill. 219, 51 Am. Rep. 679; Connecticut Mut. L. Ins. Co. v. Ellis, 89 Ill. 516; Forest City Ins. Co. v. Morgan, 22 Ill. App. 198.

Maryland.— Davis v. State, 38 Md. 15.

Massachusetts.— Com. v. Sturtivant, 117 Mass. 122, 19 Am. Rep. 401.

Michigan.— Marshall v. Brown, 50 Mich. 148, 15 N. W. 55.

that, where a witness bases his inference upon the statements of authority, he may be asked to name the authors on which he relies.[32] It is competent to show affirmatively, by producing the treatise itself or suitable evidence of its contents, at the proper stage, that it says nothing of the kind, or that other authorities contradict the witness' interpretation of the treatise.[33]

b. On Cross-Examination. The right to read extracts from standard treatises is greatly increased upon cross-examination. In dealing with the expert himself he may be asked upon his cross-examination as to questions framed by the use of quotations from standard treatises,[34] and he may be asked as to the relative weight of different authorities,[35] or what is the position of authorities on the particular subject in hand.[36] This, it has been said, is to test the expert's

Mississippi.— Tucker *v.* Donald, 60 Miss. 460, 45 Am. Rep. 416.

New York.— People *v.* Schuyler, 106 N. Y. 298, 12 N. E. 783.

Rhode Island.— State *v.* O'Brien, 7 R. I. 336.

Wisconsin.— Knoll *v.* State, 55 Wis. 249, 12 N. W. 369, 42 Am. Rep. 704.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1025, 1077; 20 Cent. Dig. tit. "Evidence," §§ 1516 *et seq.*, 2377 *et seq.*

32. *California.*— People *v.* Goldenson, 76 Cal. 328, 19 Pac. 161.

Kentucky.— Clark *v.* Com., 111 Ky. 443, 63 S. W. 740, 23 Ky. L. Rep. 1029.

Michigan.—Hall *v.* Murdock, 114 Mich. 233, 72 N. W. 150; People *v.* Vanderhoof, 71 Mich. 158, 39 N. W. 28; Pinney *v.* Cahill, 48 Mich. 584, 12 N. W. 862.

New York.— Pierson *v.* Hoag, 47 Barb. 243.

Wisconsin.— Ripon *v.* Bittel, 30 Wis. 614.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1025, 1077; 20 Cent. Dig. tit. "Evidence," §§ 1516 *et seq.*, 2377 *et seq.*

33. *Illinois.*— Connecticut Mut. L. Ins. Co. *v.* Ellis, 89 Ill. 516.

Kentucky.— Cark *v.* Com., 111 Ky. 443, 63 S. W. 740, 23 Ky. L. Rep. 1029.

Michigan.—Hall *v.* Murdock, 114 Mich. 233, 72 N. W. 150; Pinney *v.* Cahill, 48 Mich. 584, 12 N. W. 862. Medical books may be read to a jury, not for the purpose of proving the facts therein stated, but to discredit the testimony of experts who claim to be familiar with them and refer to them as authority. Pinney *v.* Cahill, *supra.*

Nebraska.—Union Stock-Yards Co. *v.* Goodwin, 57 Nebr. 138, 77 N. W. 357.

New Jersey.— New Jersey Zinc, etc., Co. *v.* Lehigh Zinc, etc., Co., 59 N. J. L. 189, 35 Atl. 915.

North Carolina.— Huffman *v.* Click, 77 N. C. 55.

Wisconsin.— Ripon *v.* Bittel, 30 Wis. 614.

See 14 Cent. Dig. tit. "Criminal Law," §§ 1025, 1077; 20 Cent. Dig. tit. "Evidence," §§ 1516 *et seq.*, 2377 *et seq.*

But this cannot be shown, it seems, by asking the witness to point out the place in the particular treatise. Davis *v.* State, 38 Md. 15.

The contradicting statement does not become evidence. "Where a witness says a thing or a theory is so because a book says so, and the book, on being produced, is discovered to say directly to the contrary, there is a direct contradiction which anybody can understand. But where a witness simply gives his opinion as to the proper treatment of a given disease or injury, and a book is produced recommending a different treatment, at most the repugnance is not of fact, but of theory; and any number of additional books expressing different theories, would obviously be quite as competent as the first. But since the books are not admissible as original evidence in such cases, it must follow that they are not admissible on cross-examination, where their introduction is not for the direct contradiction of something asserted by the witness, but simply to prove a contrary theory." Bloomington *v.* Shrock, 110 Ill. 219, 222, 51 Am. Rep. 679; State *v.* O'Brien, 7 R. I. 336. Still it has been said that they may be introduced into evidence. Ripon *v.* Bittel, 30 Wis. 614.

The witness cannot be compelled to declare the specific authority on which he bases his inference (People *v.* Vanderhoof, 71 Mich. 158, 39 N. W. 28. See also State *v.* O'Brien, 7 R. I. 336); and where he does not do so the opposing authority cannot be read (Butler *v.* South Carolina, etc., Extension R. Co., 130 N. C. 15, 40 S. E. 770); nor can the position of authority on the subject be introduced (Galveston, etc., R. Co. *v.* Hanway, (Tex. Civ. App. 1900) 57 S. W. 695).

34. Williams *v.* Nally, 45 S. W. 874, 20 Ky. L. Rep. 244.

35. People *v.* Carpenter, 102 N. Y. 238, 6 N. E. 584.

36. Brodhead *v.* Wiltse, 35 Iowa 429; Sale *v.* Eichberg, 105 Tenn. 333, 59 S. W. 1020. Where an expert physician had testified as an expert for plaintiff in an action against a physician for malpractice in setting certain bones in plaintiff's arm by using splints going only to the wrist and circular bandages next to the skin, it was held that the witness might be asked the following questions on cross-examination: "'Is there not a wide difference among standard surgical authorities in the manner prescribed for dressing fractures of both bones of the forearm such as plaintiff's was?' . . . 'Are you prepared to say that no standard surgical authority prescribes splints reaching only to the hands for such fractures as plaintiff's was?' . . . 'Are you prepared to say that the most modern surgical authors prescribe long splints, reaching beyond the wrist joint, in fractures such as plaintiff's?' . . . 'Do you know from

accuracy,[37] his learning,[38] and the weight to be given to his testimony,[39] or "to make the question clearly intelligible to the witness."[40] But "great care should always be taken by the court to confine such cross-examination within reasonable limits, and to see that the quotations read to the witness are so fairly selected as to present the author's views on the subject of the examination."[41] And it has been held that the position of authorities cannot be elicited where the witness has not so relied, in his direct evidence, upon the authority of writers that his answer might contradict him.[42] Permission to read an extract to a witness on cross-examination has been refused[43] as being an indirect method of getting the extract into evidence.[44]

XII. RES INTER ALIOS.*

A. In General — 1. Definitions. The maxim *res inter alios acta alteri nocere non debet* — usually abbreviated in use into *res inter alios acta* — indicates in itself merely the ground of irrelevancy in a particular instance; that is, where it is proposed to affect a person by the acts of others for whose doings he is in no way legally responsible. In the modern law of evidence, the phrase is employed in hinting rather than stating certain administrative principles usually adopted by courts in dealing with relevant facts whose probative value lies in the inference drawn by experience from the occurrence of similar events. Such events are by no means confined, as in the statement of the maxim itself, to acts done by others than the party whom it is sought to affect by them. They may be acts of the party himself at another time, and in connection with persons who are either strangers or parties to the pending inquiry. They may not even be acts at all. Mere natural occurrences are equally within the rules. In other words the administrative principles deal properly speaking with the inferences that a person has done a certain thing because he has at some other time done a similar one; or that a definite event occurred at one time because a similar event occurred at another. Being a part of the judge's administrative function the appeal is to the court's discretion. In exercising it the main considerations are three: (1) What dangers lie in the use of similar acts or occurrences; (2) what necessity exists for resorting to such evidence; (3) what would be the probative quality of the evidence itself, and consequently what advantage may reasonably be expected to accrue from its use. The phrase *res inter alios* is used moreover in a loose way to cover other classes of facts the proof of which presents no peculiarity in the law of evidence. For example it has been extended to cover proof of relevant facts, which, not being subject to direct cognition by the senses, can be

standard surgical books, or otherwise, what the practice of the ablest modern surgeons is, in regard to the use of splints extending to the fingers ends, in cases of fracture such as plaintiff's was?' . . . 'Are splints extending only to the hand in such cases of fracture of forearm, as plaintiff's, approved by any modern standard surgical authorities?' . . . 'What do standard medical authorities prescribe in regard to the use of circular bandages next to the skin?'" Brodhead *v.* Wiltse, 35 Iowa 429.

37. State *v.* Winter, 72 Iowa 627, 34 N. W. 475. A medical witness may be asked whether certain works had affected his judgment. Brown *v.* Sheppard, 13 U. C. Q. B. 178.

38. Hess *v.* Lowrey, 122 Ind. 225, 23 N. E. 156, 17 Am. St. Rep. 355, 7 L. R. A. 90 Hutchinson *v.* State, 19 Nebr. 262, 27 N. W. 113; Byers *v.* Nashville, etc., R. Co., 94 Tenn. 345, 29 S. W. 128; Clukey *v.* Seattle Electric Co., 27 Wash. 70, 67 Pac. 379. It is immaterial that the witness disclaims the position of an expert. Sale *v.* Eichberg, 105 Tenn. 333, 59 S. W. 1020.

39. Egan *v.* Dry Dock, etc., R. Co., 12 N. Y. App. Div. 556, 42 N. Y. Suppl. 188.

40. Tompkins *v.* West, 56 Conn. 478, 16 Atl. 237.

Discrediting the witness by a contradiction has apparently been permitted. Wittenberg *v.* Onsgard, 78 Minn. 342, 81 N. W. 14, 47 L. R. A. 141.

41. Connecticut Mut. L. Ins. Co. *v.* Ellis, 89 Ill. 516, 519.

42. Hanway *v.* Galveston, etc., R. Co., 94 Tex. 76, 58 S. W. 724.

43. Hall *v.* Murdock, 114 Mich. 233, 72 N. W. 150; Davis *v.* U. S., 165 U. S. 373, 17 S. Ct. 360, 41 L. ed. 750.

44. Marshall *v.* Brown, 50 Mich. 148, 15 N. W. 55.

* By Charles F. Chamberlayne. Revised and edited by Charles C. Moore and Wm. Lawrence Clark.

proved only by showing manifestations which circumstantially indicate their existence. Of this nature are the mental states, knowledge, motive, intent, etc., which may be necessary to the existence of a claim or liability.[45] The use of the phrase has also been extended to cover facts tending to show circumstantially the existence of necessarily attendant circumstances, such as the possession of the skill, physical or mental capabilities, materials, tools, motives, etc., required for doing a particular act; the presence at a certain place, at a certain time, of a certain person, and the like.[46] The maxim has even been extended so as to apply to the steps by which a relation of cause and effect is traced, by the ordinary methods of inductive reasoning based upon observation or experiment, between two or more phenomena.[47]

2. Discretion of Court. Although complicated by the exercise of volition, it is still a proposition of experience, exemplified in the creation of habit and consequently of character, that a person is more apt to do than not to do under similar circumstances what he has done before. It is equally deducible from experience that in proportion as volition is eliminated identical conduct results from similar stimuli and that, as in other parts of the natural world, similar causes produce like results. The doing of similar acts or the occurrence of similar events is to that extent probative, on an issue as to whether a particular act was done by the same person or a like occurrence happened at another time. But experience also demonstrates that the inference is in itself a weak one; that men do not invariably or even in the great majority of instances do as they have done before, where the conditions are apparently similar, and that, still more often, the absence of a former element or the presence of a new factor in a psychological or physical combination of causes suffices to produce a very different result. Courts have felt that in such cases the jury could not well be permitted to consider the inference at all without giving it undue importance; that, so far as the consideration of similar acts or occurrences had weight, it would probably be overestimated. Judges have also realized the practical inconvenience of trying a number of collateral issues at the same time,[48] and the mischief of protracting

45. See Evidence, 16 Cyc. 1131.

46. See *infra*, XII, D. Evidence of other offenses committed by a defendant is not admissible to show his commission of the offense charged, but may be admissible to show that the act was wilful, to prove motive, or to show a guilty knowledge and purpose. See Criminal Law, 12 Cyc. 405 *et seq.*

47. See *infra*, XII, E.

48. *Alabama.*— Spiva *v.* Stapleton, 38 Ala. 171.

California.— Martinez *v.* Planel, 36 Cal. 578.

Colorado.— Holy Cross Gold Min., etc., Co. *v.* O'Sullivan, 27 Colo. 237, 60 Pac. 570.

Connecticut.— Hoxie *v.* Home Ins. Co., 32 Conn. 21, 85 Am. Dec. 240.

Iowa.— Dalton *v.* Chicago, etc., R. Co., 114 Iowa 257, 86 N. W. 272.

Massachusetts.— Hathaway *v.* Tinkham, 148 Mass. 85, 19 N. E. 18; Com. *v.* Jackson, 132 Mass. 16; Emerson *v.* Lowell Gas Light Co., 3 Allen 410, 417.

New York.— Jamieson *v.* Kings County El. R. Co., 147 N. Y. 322, 41 N. E. 693.

Vermont.— Bateman *v.* Rutland, 70 Vt. 500, 41 Atl. 500; Foster *v.* Dickerson, 64 Vt. 233, 24 Atl. 253.

Wisconsin.— Allen *v.* Murray, 87 Wis. 41, 57 N. W. 979; O'Dell *v.* Rogers, 44 Wis. 136.

United States.— Union Pac. R. Co. *v.* O'Brien, 161 U. S. 451, 16 S. Ct. 618, 40 L. ed. 766; Laflin *v.* Chicago, etc., R. Co., 34 Fed. 859.

See 20 Cent. Dig. tit. "Evidence," § 393 *et seq.*

Value of property.— "The plaintiff sought to prove the evil effect of the road in diminishing values by the process of calling the owners of property in the vicinity and proving, in each case, what the particular premises owned by the witness rented for before the road was built and what thereafter. There were objections and exceptions. Such a process is not permissible. Each piece of evidence raised a collateral issue (Gouge *v.* Roberts, 53 N. Y. 619) and left the court to try a dozen issues over as many separate parcels of property." Jamieson *v.* Kings County El. R. Co., 147 N. Y. 322, 325, 41 N. E. 693, per Finch, J. See also Allen *v.* Murray, 87 Wis. 41, 57 N. W. 979.

Others similarly affected.— The practical impropriety of multiplying collateral issues, where direct evidence is available, is illustrated in Emerson *v.* Lowell Gas Light Co., 3 Allen (Mass.) 410, 417, where plaintiff, in an action of tort for injury to health by escaping gas, offered to show that a large number of houses in the neighborhood, the drains of which were similarly situated to his own, were filled with gas, and that where the gas

trials,[49] surprising,[50] and otherwise prejudicing[51] litigants by permitting the use of evidence so well calculated to bewilder and mislead a jury.[52] Hence the rule is established that it is within the discretion of the court, except under special circumstances, to reject evidence of former acts or occurrences as proof that a particular act was done or a certain occurrence happened.[53] These reasons for this administrative rule, however, limit the scope of the operation of the rule itself. No such absolute prohibition against the evidence, where relevant, exists as in case of unsworn statements offered as proof of the facts asserted.[54] The admissibility of the evidence, so far as relevancy itself is concerned, varies with the ratio of danger and advantage; increasing as relevancy grows stronger, and as the probability that other and better evidence is procurable or that the jury will be misled by the evidence offered grows weaker; and diminishing, in turn, as relevancy grows weaker, and as the probability of procuring better evidence or that the jury may be misled increases. The difficulty, for example, relating to the raising of collateral issues is a purely practical one. There is no rule of law which prevents trying such issues,[55] and it is within the court's discretion to permit it to be done in a given instance, subject to review in case of abuse.[56]

entered sickness followed. The rejection of this evidence was held to be correct, the court saying: "Each separate and individual case must stand upon, and be decided by, the evidence particularly applicable to it. The attending circumstances may be so different, that the occurrence of sickness in one house would have no tendency to show the cause of illness in the occupants of another. If such evidence was admissible, the issues in a single cause might be indefinitely multiplied; and this would tend only to confusion, and to mislead the jury. It was competent for the plaintiffs to show all the facts and circumstances attending their sickness, and to add to that, proof of the opinions of persons of skill and experience as to the cause which produced such sickness, and particularly whether it might have been, or probably was, produced by the gas to which they were exposed in their house; but they were restricted by the rules of evidence to these limits, and could not establish or strengthen the evidence in their own case, by any proof concerning the condition of, or the injuries received by, another person."

49. Foster *v.* Dickerson, 64 Vt. 233, 24 Atl. 253.

50. Com. *v.* Jackson, 132 Mass. 16; People *v.* Jacks, 76 Mich. 218, 42 N. W. 1134; Trenton Temperance Hall Assoc. *v.* Giles, 33 N. J. L. 260. The rule of exclusion is even more important in criminal than in civil cases, because the consequences of its violation are more serious, and the danger of conviction on irrelevant matter is more direct. Lightfoot *v.* People, 16 Mich. 507, 511.

Evidence of similar accidents where the case of every person who had met with a similar accident would be involved has been rejected.

Georgia.— Central of Georgia R. Co. *v.* Duffy, 116 Ga. 346, 42 S. E. 510.

Illinois.— Kolb *v.* Chicago Stamping Co., 33 Ill. App. 488; Aurora *v.* Brown, 12 Ill. App. 122.

Iowa.— Langhammer *v.* Manchester, 99 Iowa 295, 68 N. W. 688.

Maryland.—Wise *v.* Ackerman, 76 Md. 375, 25 Atl. 424.

Missouri.— Smart *v.* Kansas City, 91 Mo. App. 586.

New York.— Mailler *v.* Express Propeller Line, 61 N. Y. 312; Sherman *v.* Kortright, 52 Barb. 267.

Ohio.— Ashtabula *v.* Bartram, 3 Ohio Cir. Ct. 640, 2 Ohio Cir. Dec. 372.

See 20 Cent. Dig. tit. "Evidence," § 406 *et seq.*

51. State *v.* Kirby, 62 Kan. 436, 63 Pac. 752; Spriggins *v.* State, 42 Tex. Cr. 341, 60 S. W. 54.

52. Jamieson *v.* Kings County El. R. Co., 147 N. Y. 322, 41 N. E. 693; Thomas *v.* Parrott, 106 Wis. 605, 82 N. W. 554.

53. See the cases cited in the preceding notes.

54. See EVIDENCE, 16 Cyc. 1192.

55. Isbell *v.* New York, etc., R. Co., 25 Conn. 556. In an action for fraud in the sale of shares in a company intended to encourage the use of defendant's invention in dentistry plaintiff claimed that the shares were worthless because the invention was worthless. To meet this evidence defendant introduced the evidence of some of his patients to the effect that by use of the invention the operation of filling teeth had ceased to be painful. It was held that the evidence was properly admitted. The court said: "So far as the introduction of collateral issues goes, that objection is a purely practical one, a concession to the shortness of life. When the fact sought to be proved is very unlikely to have any other explanation than the fact in issue, and may be proved or disproved without unreasonably protracting the trial, there is no objection to going into it." Reeve *v.* Dennett, 145 Mass. 23, 28, 11 N. E. 938.

56. Isbell *v.* New York, etc., R. Co., 25 Conn. 561; Gilbrie *v.* Lockport, 122 N. Y. 403, 25 N. E. 357. The court may in its discretion limit evidence of similar occurrences to purposes of corroboration and require that plaintiff's case be first *prima facie* estab-

3. Relevancy. In order that a fact should be excluded by the rule here under consideration it must first be relevant. When merely irrelevant facts are sought to be proved they are within no aspect of the principle here involved which is of any practical value in the law of evidence. In many cases, however, civil[57]

lished. Emerson *v.* Lowell Gaslight Co., 6 Allen (Mass.) 146, 83 Am. Dec. 621.

57. *Alabama.*— Bush *v.* Coleman, 121 Ala. 548, 25 So. 569; Thweatt *v.* McCullough, 84 Ala. 517, 4 So. 399, 5 Am. St. Rep. 391; Williams *v.* Glover, 66 Ala. 189; King *v.* Mitchell, 52 Ala. 557.

California.—Williams *v.* Casebeer, 126 Cal. 77, 58 Pac. 380; Cohn *v.* Mulford, 15 Cal. 50.

Connecticut.— Hartford Bridge Co. *v.* Granger, 4 Conn. 458; Chapman *v.* Champion, 2 Day 101.

Georgia.— Western, etc., R. Co. *v.* Moore, 94 Ga. 457, 20 S. E. 640; Central R. Co. *v.* Brunson, 63 Ga. 504.

Illinois.— Dean *v.* Blackwell, 18 Ill. 336.

Indiana.— Seavey *v.* Shurick, 110 Ind. 494, 11 N. E. 597; Hudson *v.* Densmore, 68 Ind. 391; Robertson *v.* Hamilton, 16 Ind. App. 328, 45 N. E. 46, 59 Am. St. Rep. 319.

Iowa.— McPherrin *v.* Jennings, 66 Iowa 622, 24 N. W. 242.

Kentucky.— Rudd *v.* Hanna, 4 T. B. Mon. 528.

Louisiana.— May *v.* Ransom, 5 La. Ann. 424.

Maine.— Harmon *v.* Wright, 65 Me. 516; Prentiss *v.* Roberts, 49 Me. 127; Ware *v.* Ware, 8 Me. 42.

Maryland.— Phelps *v.* George's Creek, etc., R. Co., 60 Md. 536; Basford *v.* Parran, 8 Md. 360; Dement *v.* Stonestreet, 1 Md. 116.

Massachusetts.— Durkee *v.* India Mut. Ins. Co., 159 Mass. 514, 34 N. E. 1133; Gilhooley *v.* Sanborn, 128 Mass. 485; Kline *v.* Baker, 106 Mass. 61; Simmons *v.* New Bedford, etc., Steamboat Co., 97 Mass. 361, 93 Am. Dec. 99; Keliher *v.* Miller, 97 Mass. 71; Tyler *v.* Mather, 9 Gray 177; Jacobs *v.* Putnam, 4 Pick. 108.

Michigan.—Howell *v.* Smith, 108 Mich. 350, 66 N. W. 218 (other attorneys' charges for professional services); White *v.* Ross, 47 Mich. 172, 10 N. W. 188.

Minnesota.— Ham *v.* Wheaton, 61 Minn. 212, 63 N. W. 495.

Mississippi.—Merchants' Wharf-Boat Assoc. *v.* Smith, (1887) 3 So. 249; Hunter *v.* Wilkinson, 44 Miss. 721.

Missouri.—Thomas *v.* Mallinckrodt, 43 Mo. 58.

Nebraska.— Lucke *v.* Yoakum, 25 Nebr. 427, 41 N. W. 255.

New Hampshire.— Cole *v.* Boardman, 63 N. H. 580, 4 Atl. 572; Concord R. Co. *v.* Greely, 23 N. H. 237; Swamscot Mach. Co. *v.* Walker, 22 N. H. 457, 55 Am. Dec. 172; Filer *v.* Peebles, 8 N. H. 226.

New York.— Hill *v.* Syracuse, etc., R. Co., 63 N. Y. 101; Green *v.* Disbrow, 56 N. Y. 334; Ross *v.* Ackerman, 46 N. Y. 210; Isham *v.* Schafer, 60 Barb. 317; Murray *v.* Smith, 1 Duer 412; Noyes *v.* Wilson, 7 N. Y. St. 439.

North Carolina.— Durham Dyeing Co. *v.* Golden Belt Hosiery Co., 126 N. C. 292, 35 S. E. 586.

Ohio.— Jennings *v.* Haynes, 1 Ohio Cir. Ct. 22, 1 Ohio Cir. Dec. 19.

Oregon.— State *v.* O'Donnell, 36 Oreg. 222, 61 Pac. 892.

Pennsylvania.— Haworth *v.* Truby, 138 Pa. St. 222, 20 Atl. 942; Western Pennsylvania R. Co.'s Appeal, 104 Pa. St. 399; Waugh *v.* Shunk, 20 Pa. St. 130; Bennethum *v.* Long, 8 Pa. Cas. 627, 13 Atl. 778.

South Carolina.— Thompson *v.* Richmond, etc., R. Co., 24 S. E. 366.

Texas.— Waul *v.* Hardie, 17 Tex. 553; Woodward *v.* State, 42 Tex. Cr. 188, 58 S. W. 135; Biggar *v.* Lister, (Civ. App. 1894) 27 S. W. 707; Texas, etc., R. Co. *v.* Scrivener, 2 Tex. App. Civ. Cas. § 328.

Vermont.— Lucia *v.* Meech, 68 Vt. 175, 34 Atl. 695; Foster *v.* Dickerson, 64 Vt. 233, 24 Atl. 253; Noyes *v.* Fitzgerald, 55 Vt. 49.

Wisconsin.— Posey *v.* Rice, 29 Wis. 93.

United States.— Chicago *v.* Greer, 9 Wall. 726, 19 L. ed. 769; Plummer *v.* Granite Mountain Min. Co., 55 Fed. 755; Seibert Cylinder Oil-cup Co. *v.* William Powell Co., 38 Fed. 600.

England.— Holcombe *v.* Hewson, 2 Campb. 391, 11 Rev. Rep. 746; Delamotte *v.* Lane, 9 C. & P. 261, 38 E. C. L. 161; Smith *v.* Wilkins, 6 C. & P. 180, 25 E. C. L. 383; Boldron *v.* Widdows, 1 C. & P. 65, 12 E. C. L. 48; Justice *v.* Elstob, 1 F. & F. 256; Watts *v.* Lyons, 13 L. J. C. P. 91, 6 M. & G. 1047, 7 Scott N. R. 1000, 46 E. C. L. 1047; Carter *v.* Pryke, 1 Peake 95.

See 20 Cent. Dig. tit. "Evidence," § 388 *et seq.*

Examples of irrelevancy.— How others understood and acted on a rule established by a railroad company is immaterial. Western, etc., R. Co. *v.* Moore, 94 Ga. 457, 20 S. E. 640. Improper use by passengers of the boats on one side of a steamer has no tendency to show improper use by them of the boats on the other side of such steamer. Simmons *v.* New Bedford, etc., Steamboat Co., 97 Mass. 361, 93 Am. Dec. 99. The question being as to the violence of a storm at a certain point, reports of the signal bureau as to its violence at other points are inadmissible. Roos *v.* Clark, 14 Mo. App. 594. Whether a defendant has settled with other claimants for damages caused by a certain accident is irrelevant on an issue of liability for its occurrence. Thompson *v.* Richmond, etc., R. Co., 24 S. C. 366. On the question as to what wages a carpenter is to receive, what other carpenters received is inadmissible. Noyes *v.* Fitzgerald, 55 Vt. 49. On an action to recover for work done under a special contract it is immaterial what others would have done the same work for at another

and criminal,[58] the fact offered is said to be *res inter alios*, when the real meaning of the ruling is that it is irrelevant, that is, that no logical inference whatever can reasonably be drawn from it as to the existence of any fact in issue.[59] For example no inference that a certain act was reasonable can be drawn from the fact that others have[60] or have not[61] done it. Accordingly, on an issue of negligence, what others in the same business have been in the habit of doing is rejected.[62] Still less logical connection is there between the character of a house and that of one adjoining.[63] A genuine application of the principle occurs only where relevant evidence of similar acts or occurrences is rejected as evidence of the happening of an act or occurrence involved in the issue. The element of relevancy — the probative force of similar acts or events — is a resultant of three main factors: (1) The extent of the similarity; (2) the observed regularity of action; (3) the presence or absence of modifying forces. The maximum of relevancy would therefore be attained where the two facts present identical conditions, the operation of an invariable law, and the presence of no modifying circumstances. Considered in itself, apart from other elements affecting the exercise of discretion,[64] it may be said of this matter of relevancy, that as elements are added or eliminated, and in proportion as they are of importance, that is, as the similarity fails to cover all essential particulars as the relation of cause and effect is not found to be invariable, or — what is often much the same thing — as a modifying influence, such as volition, is introduced among the conditions attending an act or occurrence, relevancy is diminished. It has been

time. Chicago *v.* Greer, 9 Wall. (U. S.) 726, 19 L. ed. 769. On an action for goods sold, the question being whether the credit was given to defendant's wife or to her father, evidence that other persons had given credit to the father is not receivable. Smith *v.* Wilkins, 6 C. & P. 180, 25 E. C. L. 383.

58. *Alabama.*— Hays *v.* State, 110 Ala. 60, 20 So. 322; Brock *v.* State, 26 Ala. 104.

Arizona.—Yourkee *v.* Territory, (1892) 29 Pac. 894.

California.— People *v.* Arlington, 123 Cal. 356, 55 Pac. 1003; People *v.* Cuff, 122 Cal. 589, 55 Pac. 407; People *v.* Creegan, 121 Cal. 554, 53 Pac. 1082; People *v.* Elliott, 119 Cal. 593, 51 Pac. 955.

Georgia.— Lowman *v.* State, 109 Ga. 501, 34 S. E. 1019.

Kentucky.— Spurlock *v.* Com., 20 S. W. 1095, 14 Ky. L. Rep. 605; Gargill *v.* Com., 13 S. W. 916, 12 Ky. L. Rep. 149.

Michigan.— People *v.* Bennett, 122 Mich. 281, 81 N. W. 117.

New Mexico.— Roper *v.* Territory, 7 N. M. 255, 33 Pac. 1014.

New York.— People *v.* Drake, 65 Hun 331, 20 N. Y. Suppl. 228.

North Carolina.— State *v.* Frazier, 118 N. C. 1257, 24 S. E. 520.

Texas.— Johnson *v.* State, 42 Tex. Cr. 440, 60 S. W. 667; Jacobs *v.* State, 42 Tex. Cr. 353, 59 S. W. 1111; Tippens *v.* State, (Cr. App. 1898) 43 S. W. 1000; Clark *v.* State, (App. 1891) 17 S. W. 1089.

West Virginia.— Watts *v.* State, 5 W. Va. 532.

Wisconsin.—Paulson *v.* State, 118 Wis. 89, 94 N. W. 771.

United States.— Boyd *v.* U. S., 142 U. S. 450, 12 S. Ct. 292, 35 L. ed. 1077.

Evidence of other offenses committed by defendant see CRIMINAL LAW, 12 Cyc. 405 *et seq.*

59. Conversely, although a record is inadmissible to prove the truth of facts therein set out, except between parties and privies, yet, where the mere existence of such a record is material to be proved, it is evidence of that fact against everyone, and it is said that the rule, "*res inter alios acta*," does not apply. Falls *v.* Gamble, 66 N. C. 455.

60. Tyler *v.* Old Colony R. Co., 157 Mass. 336, 32 N. E. 227; Greenwell *v.* Crow, 73 Mo. 638.

61. Fitchburg R. Co. *v.* Freeman, 12 Gray (Mass.) 401, 74 Am. Dec. 600.

62. Holy Cross Gold Min., etc., Co. *v.* O'Sullivan, 27 Colo. 237, 60 Pac. 570; Bridwell *v.* Moore, 8 Ky. L. Rep. 535; Eastham *v.* Riedell, 125 Mass. 585; Hill Mfg. Co. *v.* Providence, etc., Steamship Co., 125 Mass. 292; Lane *v.* Boston, etc., R. Co., 112 Mass. 455; Darling *v.* Stanwood, 14 Allen (Mass.) 504; Congdon *v.* Howe Scale Co., 66 Vt. 255, 29 Atl. 253. For the line of reasoning employed in such cases see Canada Grand Trunk R. Co. *v.* Richardson, 91 U. S. 454, 474, 23 L. ed. 356.

On the other hand it has been held that where an act is not negligent *per se* a party can show that experienced men did the same. Shea *v.* Lowell, 8 Allen (Mass.) 136; Prosser *v.* Montana Cent. R. Co., 17 Mont. 372, 43 Pac. 81, 30 L. R. A. 814; Hoppe *v.* Parmalee, 20 Ohio Cir. Ct. 303, 11 Ohio Cir. Dec. 24; Hillyard *v.* Grand Trunk R. Co., 8 Ont. 583, where use of barbed wire fence by other towns was held admissible on the question as to whether a particular wire was a nuisance.

63. Doyle *v.* Levy, 89 Hun (N. Y.) 350, 35 N. Y. Suppl. 434.

64. See *supra*, XII, A, 2.

suggested that facts designated as *res inter alios* are admissible whenever relevant.[65] Without assenting to the truth of that general statement, it may be agreed that a chief difficulty in formulating this principle of administration lies in finding instances of its application as a rule, properly speaking, of exclusion; in other words, where it operates to prevent the reception of evidence which is clearly probative.

B. Similar Acts — 1. Rule Stated. Among inferences which, except under certain conditions, the law will not permit to be drawn is that a person has done a certain act because he has done a similar act at another time. The rule has repeatedly been asserted by the courts, and has been applied equally to civil[66] and

65. State *v.* Ames, 90 Minn. 183, 96 N. W. 330; Barbar *v.* Martin, (Nebr. 1903) 93 N. W. 722; People *v.* Molineux, 168 N. Y. 264, 61 N. E. 286, 10 N. Y. Annot. Cas. 256, 62 L. R. A. 193; Barnett *v.* State, 44 Tex. Cr. 592, 73 S. W. 399, 100 Am. St. Rep. 873.

66. *Alabama.*—Andrews *v.* Tucker, 127 Ala. 602, 29 So. 34; Martin *v.* Smith, 116 Ala. 639, 22 So. 917; Langworthy *v.* Goodall, 76 Ala. 325; Wyatt *v.* Steele, 26 Ala. 639.

District of Columbia.— Cohen *v.* Cohen, 2 Mackey 227; Schaffer *v.* Lehman, 2 MacArthur 305.

Georgia.— Central of Georgia R. Co. *v.* Duffy, 116 Ga. 346, 42 S. E. 510.

Illinois.— O. H. Jewell Filter Co. *v.* Kirk, 200 Ill. 382, 65 N. E. 698 [*affirming* 102 Ill. App. 246]; Henderson *v.* Miller, 36 Ill. App. 232; Burroughs *v.* Comegys, 17 Ill. App. 653.

Indiana.— Becker *v.* Gibson, 70 Ind. 239; Depuy *v.* Clark, 12 Ind. 427; Diamond Block Coal Co. *v.* Edmonson, 14 Ind. App. 594, 43 N. E. 242.

Iowa.— Hood *v.* Chicago, etc., R. Co., 95 Iowa 331, 64 N. W. 261; Lee *v.* Cresco, 47 Iowa 499.

Kentucky.— Louisville, etc., R. Co. *v.* Berry, 9 Ky. L. Rep. 683.

Maine.— Dodge *v.* Haskell, 69 Me. 429; Handly *v.* Call, 27 Me. 35.

Massachusetts.— Howe *v.* Whitehead, 130 Mass. 268; Gardner *v.* Way, 8 Gray 189.

Michigan.— Clark *v.* Cox, 32 Mich. 204.

Missouri.— Cornelius *v.* Grant, 8 Mo. 59; Smart *v.* Kansas City, 91 Mo. App. 586.

New Hampshire.— True *v.* Sanborn, 27 N. H. 383.

New York.— Lowenstein *v.* Lombard, etc., Co., 164 N. Y. 324, 58 N. E. 44; Newhall *v.* Appleton, 102 N. Y. 133, 6 N. E. 120; Ross *v.* Ackerman, 46 N. Y. 210; Wood *v.* Poughkeepsie Mut. Ins. Co., 32 N. Y. 619; Goldie *v.* Goldie, 39 Misc. 389, 79 N. Y. Suppl. 357.

Pennsylvania.— Lentz *v.* Wallace, 17 Pa. St. 412, 55 Am. Dec. 569; Stewart's Estate, 3 Pa. Dist. 747, 15 Pa. Co. Ct. 380.

South Carolina.— Benedict *v.* Rose, 24 S. C. 297; Dial *v.* Farrow, 1 Speers 114.

Tennessee.— Franklin *v.* Franklin, 90 Tenn. 44, 16 S. W. 557; Massengill *v.* Shadden, 1 Heisk. 357.

Texas.—Kingsbury *v.* Waco State Bank, 30 Tex. Civ. App. 387, 70 S. W. 551, forgery.

Vermont.— Aiken *v.* Kennison, 58 Vt. 665, 5 Atl. 757; Nones *v.* Northouse, 46 Vt. 587; Keith *v.* Taylor, 3 Vt. 153.

Washington.— Sprenger *v.* Tacoma Traction Co., 15 Wash. 660, 47 Pac. 17, 43 L. R. A. 706.

West Virginia.— Hartman *v.* Evans, 38 W. Va. 669, 18 S. E. 810.

Wisconsin.— Morawetz *v.* McGovern, 68 Wis. 312, 32 N. W. 290; Attillie *v.* Wæchter, 33 Wis. 252.

England.— Hollingham *v.* Head, 4 C. B. N. S. 388, 4 Jur. N. S. 379, 27 L. J. C. P. 241, 6 Wkly. Rep. 442, 93 E. C. L. 388; Viney *v.* Barss, 1 Esp. 293; Balcetti *v.* Serani, 1 Peake 142.

See 20 Cent. Dig. tit. "Evidence," § 388 *et seq.*

Applications of rule.— To construe an order of sale made by the orphans' court, evidence of similar orders made by the same judge in other cases is *res inter alios acta*, and is inadmissible. Wyatt *v.* Steele, 26 Ala. 639. In an action against a railroad company for personal injuries, defendant, for the purpose of proving that plaintiff was endeavoring to exaggerate his injuries, cannot show that plaintiff made fraudulent claims upon insurance associations respecting the same injuries, those claims not being so connected with the prosecution of the action as to evince a common purpose. Hood *v.* Chicago, etc., R. Co., 95 Iowa 331, 64 N. W. 261. Evidence that the agent of an insurance company frequently waived the condition of prepayment is not admissible to raise an inference of waiver, in the absence of other proof tending to establish it. Wood *v.* Poughkeepsie Mut. Ins. Co., 32 N. Y. 619. On the question of plaintiff's right to recover for the use of his horse, evidence that he allowed other persons than defendant to use it about the same time and charged them nothing was inadmissible. Harris *v.* Howard, 56 Vt. 695. In an action on a note, where the defense is usury, evidence that plaintiff had loaned money at other times prior to the transaction in question at usurious rates of interest is inadmissible. Ross *v.* Ackerman, 46 N. Y. 210; Ottillie *v.* Wæchter, 33 Wis. 252.

Negligence on a particular occasion cannot be shown by proof that the person the propriety of whose conduct is involved has met with a number of similar accidents (Higley *v.* Gilmer, 3 Mont. 90, 35 Am. Rep. 450; Mailler *v.* Express Propeller Line, 61 N. Y. 312), or been guilty of negligence on other occasions (Little Rock, etc., R. Co. *v.* Harrell, 58 Ark. 454, 25 S. W. 117; Maguire *v.*

criminal[67] cases. It is even clearer that a person cannot be shown to have done an act by evidence that another person has done a similar act,[68] although both persons are under the control of a single management.[69] The rule does not exclude evidence which is a legitimate constituent of a party's case.[70] Thus the prosecution in a criminal case may corroborate a witness,[71] establish the character of a house or room,[72] prove the poisonous nature of a beverage,[73] or

Middlesex R. Co., 115 Mass. 239; Raper *v.* Wilmington, etc., R. Co., 126 N. C. 563, 36 S. E. 115; Baltimore, etc., R. Co. *v.* Van Horn, 21 Ohio Cir. Ct. 337, 12 Ohio Cir. Dec. 106; Konold *v.* Rio Grande Western R. Co., 21 Utah 379, 60 Pac. 1021, 81 Am. St. Rep. 693; Edwards *v.* Ottawa River Nav. Co., 39 U. C. Q. B. 264), especially where such other occurrences are remote in point of time (Greeno *v.* Roark, 8 Kan. App. 390, 56 Pac. 329). If, however, an accident could have happened only through negligence, a similar occurrence at about the same time is relevant on the issue of negligence. Pullman Car Co. *v.* Gardner, 3 Pennyp. (Pa.) 78. Conversely, a person cannot show that he was careful on a particular occasion, by evidence that he was careful and prudent on other occasions. Laufer *v.* Bridgeport Traction Co., 68 Conn. 475, 37 Atl. 379, 37 L. R. A. 533. And see, generally, NEGLIGENCE.

Evidence that a dog had killed other sheep than those mentioned in the complaint is incompetent on an issue as to whether he did the damage complained of. East Kingston *v.* Towle, 48 N. H. 57, 97 Am. Dec. 575, 2 Am. Rep. 174.

Admissions by conduct are relevant upon independent grounds.' Meislahn *v.* Irving Nat. Bank, 172 N. Y. 631, 65 N. E. 1119. See EVIDENCE, 16 Cyc. 952.

67. State *v.* Harris, 73 Mo. 287; Nix *v.* State, (Tex. Cr. App. 1903) 74 S. W. 764.

Evidence of other offenses committed by defendant is inadmissible as a general rule. See CRIMINAL LAW, 12 Cyc. 405 *et seq.* *A fortiori* the fact that the accused has been "looked for" because suspected (People *v.* Vidal, 121 Cal. 221, 53 Pac. 558) or accused (People *v.* Thurston, 2 Park. Cr. (N. Y.) 49) of another offense; or had been arrested for committing it (Payson *v.* Everett, 12 Minn. 216. See Smith *v.* State, 10 Ind. 106), or pleaded guilty when arraigned (Lee *v.* State, (Tex. Cr. App. 1903) 73 S. W. 407), or that he has sought to suppress or fabricate evidence with regard to it (People *v.* Freeman, 25 N. Y. App. Div. 583, 50 N. Y. Suppl. 984), is incompetent.

68. McDowell *v.* Connecticut F. Ins. Co., 164 Mass. 394, 41 N. E. 669; Foye *v.* Leighton, 22 N. H. 71, 53 Am. Dec. 231. And see Kelly *v.* Durham Traction Co., 132 N. C. 368, 43 S. E. 923.

69. Whether a locomotive signal required by law was or was not given on a particular occasion cannot be shown by evidence that other trains did not give the signal and that trains did not usually do so. Eskridge *v.* Cincinnati, etc., R. Co., 89 Ky. 367, 12 S. W. 580, 11 Ky. L. Rep. 557; Tuttle *v.* Fitchburg R. Co., 152 Mass. 42, 25 N. E. 19. Unity of management is, however, sufficient to permit the inference that the locomotive engines of a railroad company are so nearly alike in construction as to make the setting of fires by one engine relevant, in the absence of direct evidence as to its origin, on the question whether a particular fire was set by another. Kentucky Cent. R. Co. *v.* Barrow, 6 Ky. L. Rep. 240; Sheldon *v.* Hudson River R. Co., 14 N. Y. 218, 67 Am. Dec. 155.

70. See Indianapolis St. R. Co. *v.* Dawson, 31 Ind. App. 605, 68 N. E. 909; Barbar *v.* Martin, (Nebr. 1903) 93 N. W. 722; Meislahn *v.* Irving Nat. Bank, 172 N. Y. 631, 65 N. E. 1119. Where a recovery is sought from a firm, on account of various frauds perpetrated by one of the partners in the firm-name, and one of the transactions, in which such partner fraudulently obtained a large sum of money from plaintiff, was conducted in his own name, yet was so interwoven with other frauds perpetrated in the firm-name as to render its explanation necessary to its elucidation of the former, such transaction may be shown, even though the firm be not liable therefor. Alexander *v.* State, 56 Ga. 478.

Other transactions referred to in terms in a contract upon which an action is brought are admissible. Hewes *v.* Germain Fruit Co., 106 Cal. 441, 39 Pac. 853; Bucknam *v.* Chaplin, 1 Allen (Mass.) 70; Gardner *v.* Crenshaw, 122 Mo. 79, 27 S. W. 612.

Evidence of other offenses committed by defendant in a criminal case, when admissible, see CRIMINAL LAW, 12 Cyc. 406 *et seq.*

71. State *v.* Robinson, 32 Oreg. 43, 48 Pac. 357; Lanphere *v.* State, 114 Wis. 193, 89 N. W. 128.

72. State *v.* Gorham, 67 Me. 247. Under a complaint charging defendant with being in a certain room at a certain time, engaged in selling pools and registering bets on trials of speed, etc., evidence that the room, during the ten days next preceding the date alleged, was used for that purpose was held admissible, not to show that defendant committed a similar crime on another occasion, but to show the character of the room. Com. *v.* Ferry, 146 Mass. 203, 15 N. E. 484.

73. State *v.* Thompson, 132 Mo. 301, 34 S. W. 31. Where members of a family drank tea alleged to have been poisoned the fact that they as well as the man in the family whose life was attempted showed symptoms of this poison was competent, as corroborating the other testimony as to the character of the tea. Com. *v.* Kennedy, 170 Mass. 18, 48 N. E. 770.

show that the accused is a habitual criminal[74] by evidence, either of the acts of others or of the acts at another time of the person whose conduct is involved.[75]

2. Course of Conduct or Dealing. The presumption of regularity[76] is founded upon an inference of fact. Whenever, in the opinion of the court, such a relevant[77] course of conduct or dealing on the part of a given individual is established as to render its continuance to the time involved in the issue probable, its existence may be used as evidence that he acted in accordance with it on a particular occasion.[78]

3. Habit. The probative force of a relevant habit is dealt with by the courts in accordance with the principles of administration under consideration. As a rule[79]

74. State *v.* Carr, 146 Mo. 1, 47 S. W. 790. Such collateral offenses must be within the period prescribed by the statute of limitations. World *v.* State, 50 Md. 49.

75. See the cases cited in the preceding notes.

76. See Evidence, 16 Cyc. 1050 *et seq.*

77. Georgia Cent. R. Co. *v.* Bernstein, 113 Ga. 175, 38 S. E. 394; Anglin *v.* Barlow, (Tex. Civ. App. 1898) 45 S. W. 827; Blaisdell *v.* Davis, 72 Vt. 295, 48 Atl. 14.

78. *Alabama.*— Home Ins. Co. *v.* Adler, 71 Ala. 516.

California.— Lake Shore Cattle Co. *v.* Modoc Land, etc., Co., 130 Cal. 669, 63 Pac. 72.

Connecticut.— Dwight *v.* Brown, 9 Conn. 83.

Georgia.— Conyers *v.* Ford, 111 Ga. 754, 36 S. E. 947; Fleming *v.* Hill, 65 Ga. 247.

Illinois.— Stolp *v.* Blair, 68 Ill. 541.

Indiana.— Hufford *v.* Neher, 15 Ind. App. 396, 44 N. E. 61; Moore *v.* Schrader, 14 Ind. App. 69, 42 N. E. 490.

Kentucky.— Smith *v.* Montgomery, 5 T. B. Mon. 502.

Maine.— Wood *v.* Finson, 91 Me. 280, 39 Atl. 1007; Eaton *v.* New England Tel. Co., 68 Me. 63.

Massachusetts.— L'Herbette *v.* Pittsfield Nat. Bank, 162 Mass. 137, 38 N. E. 368, 44 Am. St. Rep. 354; Tibbetts *v.* Sumner, 19 Pick. 166.

Michigan.— Ayres *v.* Hubbard, 71 Mich. 594, 40 N. W. 10.

Nebraska.— Barbar *v.* Martin, (1903) 93 N. W. 722.

New Hampshire.— State *v.* Boston, etc., R. Co., 58 N. H. 410.

New Jersey.— Smock *v.* Smock, 11 N. J. Eq. 156.

New York.— Lowenstein *v.* Lombard, etc., Co., 164 N. Y. 324, 58 N. E. 44; Pierson *v.* Atlantic Nat. Bank, 77 N. Y. 304; Costello *v.* Herbst, 16 Misc. 687, 38 N. Y. Suppl. 1123; Dudley *v.* Brinkerhoff, 13 N. Y. Civ. Proc. 92.

North Dakota.—Grand Forks Lumber, etc., Co. *v.* Tourtelot, 7 N. D. 587, 75 N. W. 901.

Pennsylvania.— Trego *v.* Lewis, 58 Pa. St. 463; Lelar *v.* Brown, 15 Pa. St. 215; Snyder *v.* Wertz, 5 Whart. 163.

Texas.— Matkins *v.* State, (Cr. App. 1900) 58 S. W. 108. See Washington Life Ins. Co. *v.* Berwald, (Civ. App. 1903) 72 S. W. 436.

Vermont.— Gibson *v.* Seymour, 13 Vt. 565.

Wisconsin.— Lill's Chicago Brewery Co. *v.* Russell, 22 Wis. 178.

United States.— Peyton *v.* Veitch, 19 Fed. Cas. No. 11,057, 2 Cranch C. C. 123.

See 20 Cent. Dig. tit. "Evidence," § 388 *et seq.*

Question of gift.— The question being whether a father gave certain property to a daughter on the occasion of her marriage, the fact that on the occasion of the marriage of other daughters he had given similar property of about the same value is competent. Smith *v.* Montgomery, 5 T. B. Mon. (Ky.) 502.

Intent to revoke will.— Where a testator duly executed a will which after his death was found in his private desk, wrapped in a newspaper, with the name and seal, except the first initial, cut off, it was held that the fact that he had been for some years before his death in the habit of canceling notes, etc., by cutting off his name, was important as sustaining the presumption that his signature to the will was cut off by himself and was done *animo revocandi.* Smock *v.* Smock, 11 N. J. Eq. 156.

The course of dealing must be uniform, and the evidence is less readily received if there is direct evidence to the point in dispute. The fact that a party drew checks in payment of his bills, to whatever number, is said to have no bearing upon the question whether in a particular instance he did or did not pay cash. Bernstein *v.* Holtz, 34 Misc. (N. Y.) 795, 69 N. Y. Suppl. 892.

79. *Alabama.*—Louisville, etc., Co. *v.* Bouldin, 110 Ala. 185, 20 So. 325.

Connecticut.— Morris *v.* East Haven, 41 Conn. 252.

Illinois.— Jones *v.* Cline, 84 Ill. App. 428; Chicago, etc., R. Co. *v.* Gibbons, 65 Ill. App. 550.

Iowa.— Dalton *v.* Chicago, etc., R. Co., 114 Iowa 257, 86 N. W. 272; Hood *v.* Chicago, etc., R. Co., 95 Iowa 331, 64 N. W. 261.

Kentucky.—Louisville, etc., R. Co. *v.* Berry, 9 Ky. L. Rep. 683.

Maine.— Chase *v.* Maine Cent. R. Co., 77 Me. 62, 65, 52 Am. Rep. 744, where the court said: "If a man who is customarily careful were always so, there would be reason for admitting the evidence."

Mississippi.— Dowling *v.* State, 5 Sm. & M. 664.

New York.— Senecal *v.* Thousand Island Steamboat Co., 79 Hun 574, 29 N. Y. Suppl. 884.

and more especially where direct evidence is or can be produced,[80] or the act is fully proved without it,[81] the evidence of habit is rejected. On the other hand it has been felt that the existence of a habit, causing a more or less settled or automatic reaction to physical or mental stimulus, presents a stronger relevancy as to what happened on a particular occasion than would the mere doing of an isolated act of a similar nature at another time.[82] Accordingly, when the existence of a habit is the only fact obtainable which is relevant on the point,[83] or, where the evidence is in conflict,[84] proof of habit has been received. Its influence, as here considered, relates to voluntary action of the person in question. Where a physical condition has been created which is beyond the control of the will, its existence, even if originally due to voluntary action, falls more nearly within the rules regulating natural occurrences[85] in which volition plays no part.[86] Much the same is true as to the habits of animals, since habit is relevant in proportion as volition ceases to disturb the ordinary relation between stimulus and conduct on which the relevancy is based.[87] In like manner, where it is claimed that an act is indicative of a particular criminal intent, evidence is competent that the actor habitually did the act without such an intent.[88] Evidence of the existence of a habit, probative for some reason other than that it renders probable the fact that the person acted in accordance with it on a particular occasion, is not within the rule.[89]

Rhode Island.—Hampson *v.* Taylor, 15 R. I. 83, 8 Atl. 33, 23 Atl. 732.

Vermont.— Scott *v.* Bailey, 73 Vt. 49, 50 Atl. 557.

See 20 Cent. Dig. tit. "Evidence," § 393 *et seq.*

80. Chicago, etc., R. Co. *v.* Pearson, 184 Ill. 386, 56 N. E. 633; Cleveland, etc., R. Co. *v.* Moss, 89 Ill. App. 1; Atchison, etc., R. Co. *v.* Gants, 38 Kan. 608, 17 Pac. 54, 5 Am. St. Rep. 780; Hampson *v.* Taylor, 15 R. I. 83, 8 Atl. 331, 23 Atl. 732; Gulf, etc., R. Co. *v.* Hamilton, 17 Tex. Civ. App. 76, 42 S. W. 358.

81. State *v.* Fitchette, 88 Minn. 145, 92 N. W. 527.

82. State *v.* Concord, etc., R. Co., 68 N. H. 247, 44 Atl. 388. Habit in case of a human being cannot be shown by evidence that the party had previously done the same thing. Dalton *v.* Chicago, etc., R. Co., 114 Iowa 257, 86 N. W. 272; Com. *v.* Ryan, 134 Mass. 223.

Care in crossing railroad.— In an action against a railroad company for negligently causing the death of deceased while driving over a highway crossing of its track, evidence that deceased during the three years preceding his death always drove slowly over the crossing in question and watched for trains was held competent, on the ground that a person is more likely to do or not to do a thing, as he is in the habit of doing it or not doing it. Davis *v.* Concord, etc., R. Co., 68 N. H. 247, 44 Atl. 388.

83. McNulta *v.* Lockridge, 137 Ill. 270, 27 N. E. 452, 31 Am. St. Rep. 362; Chicago *v.* Doolan, 99 Ill. App. 143; Orr *v.* Jason, 1 Ill. App. 439. In case of a railroad accident, there being no eye-witnesses, plaintiff's careful habits may be shown on an issue of due care. Cox *v.* Chicago, etc., R. Co., 92 Ill. App. 15. Where the facts are ancient, and other evidence is consequently unavailable, the evidence of habit has been received. Parker *v.* Parker, 52 Ill. App. 333. A caveator has a right to show that a testator always, in writing, contracted the words "it is" so as to make them "its." Outlaw *v.* Hurdle, 46 U. C. 150, 165. If defendant raises the issue of habit, plaintiff may go into the matter on rebuttal. Gulf, etc., R. Co. *v.* Johnson, (Tex. Civ. App. 1897) 42 S. W. 584.

84. Denver Tramway Co. *v.* Owens, 20 Colo. 107, 36 Pac. 848; Lannis *v.* Louisville, etc., R. Co., 16 Ky. L. Rep. 446; Parkinson *v.* Nashua, etc., R. Co., 61 N. H. 416.

85. See *infra*, XII, C.

86. Slattery *v.* People, 76 Ill. 217, where, on an indictment for procuring an abortion, the defense being that the result was due to miscarriage from natural causes, evidence that the pregnant woman was in the habit of suffering from miscarriage was admitted.

87. The course of conduct habitual to certain species of animals under given circumstances is relevant on a question as to the conduct of a particular member of that species under the same circumstances. Folsom *v.* Concord, etc., R. Co., 68 N. H. 454, 38 Atl. 209. Such habit may be proved by specific instances of its operation. Lynch *v.* Moore, 154 Mass. 335, 28 N. E. 277; Todd *v.* Rowley, 8 Allen (Mass.) 51; Whittier *v.* Franklin, 46 N. H. 23, 88 Am. Dec. 185. The question being whether accused when driving his horse turned him on a particular road, the fact that the horse made the same turn soon after is admissible. State *v.* Ward, 61 Vt. 153, 17 Atl. 483.

88. Barker *v.* State, (Tex. Cr. App. 1894) 26 S. W. 400.

89. Warner *v.* New York Cent. R. Co., 45 Barb. (N. Y.) 299; Washington L. Ins. Co. *v.* Berwald, (Tex. Civ. App. 1903) 72 S. W. 436, authority of agents.

In an action for personal injuries, plaintiff having adduced mortuary tables to prove his probable expectation of life, exclusion of evi-

C. Similar Occurrences — 1. Rule Stated. That a fact existed or event occurred at a particular time cannot be shown by evidence that another fact existed or event occurred[90] at another time, unless the two facts or occurrences are connected in some special way, indicating a relevancy beyond mere similarity in certain particulars.[91] Such relevancy is found where similarity in all essential

dence of his habits as to sobriety was held erroneous. Townsend *v.* Briggs, 99 Cal. 481, 34 Pac. 116.

The habits of an alleged mortgagor were held to be competent on the probability of his having borrowed a large sum of money. Taylor *v.* Crowninshield, 5 N. Y. Leg. Obs. 209.

In questions of fraud and imposition, evidence of the general habits of the party alleged to be defrauded, in respect to drunkenness, extravagance, thoughtlessness, etc., is admissible, as is also evidence of particular transactions with other persons. Kauffman *v.* Swar, 5 Pa. St. 230.

90. See Stephen Dig. Ev. art. 10.

91. *Georgia.*— Central of Georgia R. Co. *v.* Duffy, 116 Ga. 346, 42 S. E. 510; Robert Portner Brewing Co. *v.* Cooper, 116 Ga. 171, 42 S. E. 408.

Illinois.— North Chicago St. R. Co. *v.* Hudson, 44 Ill. App. 60; Chicago Anderson Pressed Brick Co. *v.* Reininger, 41 Ill. App. 324; Kolb *v.* Chicago Stamping Co., 33 Ill. App. 488.

Indiana.— Diamond Block Coal Co. *v.* Edmonson, 14 Ind. App. 594, 43 N. E. 242.

Iowa.— Dalton *v.* Chicago, etc., R. Co., 114 Iowa 257, 259, 86 N. W. 272 ("rarely, if ever, may previous isolated instances be shown, to prove a condition existing at the particular time in question"); Names *v.* Dwelling House Ins. Co., 95 Iowa 642, 64 N. W. 628.

Maine.— Sargent *v.* Hutchings, 86 Me. 28, 29 Atl. 926.

Massachusetts.— Com. *v.* Campbell, 7 Allen 541, 83 Am. Dec. 705.

Mississippi.— Gray *v.* Thomas, 12 Sm. & M. 111.

Missouri.— Smart *v.* Kansas City, 91 Mo. App. 586.

New Hampshire.— Mead *v.* Merrill, 33 N. H. 437.

New York.— People *v.* Molineux, 168 N. Y. 264, 61 N. E. 286, 10 N. Y. Annot. Cas. 256, 62 L. R. A. 193; Carlson *v.* Oceanic Steam Nav. Co., 109 N. Y. 359, 16 N. E. 546; Port Jervis *v.* Port Jervis First Nat. Bank, 96 N. Y. 550; Ward *v.* Troy, 55 N. Y. App. Div. 192, 66 N. Y. Suppl. 925; People *v.* Freeman, 25 N. Y. App. Div. 583, 50 N. Y. Suppl. 984; Tallman *v.* Kimball, 74 Hun 279, 26 N. Y. Suppl. 811; Townsend *v.* Merchants' Ins. Co., 36 N. Y. Super. Ct. 172, 45 How. Pr. 501.

North Carolina.— Bullock *v.* Lake Drummond Canal, etc., Co., 132 N. C. 179, 43 S. E. 593; Grant *v.* Raleigh, etc., R. Co., 108 N. C. 462, 13 S. E. 209.

Oregon.— Crossen *v.* Grandy, 42 Oreg. 282, 70 Pac. 906.

South Carolina.—Lynn *v.* Thomson, 17 S. C. 129.

See 20 Cent. Dig. tit. "Evidence," § 388 *et seq.*

Applications of rule.— On an issue whether plaintiff was hired by the week or by the year, it was error to permit other employees to testify that they were hired by the year. Lichtenhein *v.* Fisher, 6 N. Y. App. Div. 385, 39 N. Y. Suppl. 553. The amount of hay raised on a farm in a given year cannot be proved by showing the average acreage of grass land and its yield in other years. Patrick *v.* Howard, 47 Mich. 40, 10 N. W. 71. What one man paid for traveling expenses cannot be shown by evidence of what another man paid in making the same trip. Linn *v.* Gilman, 46 Mich. 628, 10 N. W. 46. Where the question was how much hay was eaten in a week by a particular horse, which was not in ordinary condition, evidence of how much hay an ordinary horse will eat in a week was held incompetent. Carlton *v.* Hescox, 107 Mass. 410. The question being whether a plaintiff in falling down an area was in the exercise of due care, the fact that many other people under other circumstances have passed the place in safety was properly excluded. Trenton Temperance Hall Assoc. *v.* Giles, 33 N. J. L. 260. Evidence of what expenses were necessary to be incurred by an engineer on one section of a railroad in its construction is incompetent to show what would be proper on another section, in the absence of proof that the conditions of both sections were the same. Pensacola, etc., R. Co. *v.* Atkinson, 20 Fla. 450. In a case of accident in a mine defendant cannot introduce evidence that there has not been an accident there before. Too many uncertain and undetermined elements which might affect the safety of its workmen make the testimony improper. Burgess *v.* Davis Sulphur Ore Co., 165 Mass. 71, 42 N. E. 501. Where, in an action for insurance on personal property, plaintiff claimed the value of a large number of books destroyed, and there was evidence that after the fire there were no remnants of the books, evidence that remnants of books remained after the burning of another building was properly excluded, where data as to the size of the building or extent of the fire were not given. Names *v.* Dwelling House Ins. Co., 95 Iowa 642, 64 N. W. 628.

A continuing fact, as a bodily condition, residence, etc., may, within limits of relevancy, be shown to have existed at a particular time by proof of its existence at an earlier date. See 16 Cyc. 1052. Its existence at the time in question cannot be shown by proof of its existence at a time which is later by a considerable interval. Bradford *v.* Haggerthy, 11 Ala. 698 (residence); Walton *v.* Cottingham, 30 Tex. 772 (disease of the womb; two months). An

particulars is shown to exist. Evidence of other facts or occurrences is then admitted, provided the court deems this course a wise exercise of its administrative discretion. The probative fact or occurrence may be (1) found in actual life by observation, or (2) reproduced voluntarily in an experiment.[92]

2. SIMILARITY IN ESSENTIAL CONDITIONS. A sufficient ground of admissibility is furnished where physical conditions are shown to have been identical on the two occasions. The observed uniformity of nature raises under such circumstances an inference that like causes will produce like results.[93] It is legally as well as logically immaterial if dissimilarity in conditions is shown to exist in the presence of some particular which cannot reasonably be expected to have affected the result. Another fact or occurrence, the conditions of which are the same in all essential respects, will be deemed relevant,[94] the burden being upon the party offering the evidence to satisfy the court that such similarity exists.[95] In admitting evidence of such facts or occurrences the court makes no finding, except that sufficient has been shown to him as to the relevancy of the evidence to warrant its submis-

interval which is short as compared with the natural permanent nature of the fact or condition in question does not destroy the relevancy of a subsequent occurrence. Finley *v.* Quirk, 9 Minn. 194, 86 Am. Dec. 93, balky horse; four days.

Evidence of other accidents similar to the one in question in certain particulars which do not establish relevancy are excluded. Florida Cent., etc., R. Co. *v.* Mooney, (Fla. 1903) 33 So. 1010; Georgia Cent. R. Co. *v.* Duffey, 116 Ga. 346, 42 S. E. 510; Smart *v.* Kansas City, 91 Mo. App. 586. But where the evidence of similar accidents is given simply to illustrate the physical fact and the conditions are the same the evidence is admissible. Aurora *v.* Brown, 12 Ill. App. 122.

92. See the following sections.

93. Polly *v.* McCall, 37 Ala. 20. In a suit by riparian proprietors to recover damages caused by a diversion of the waters of a running stream, evidence of damages accruing subsequent to the commencement of the suit was held admissible to show the effect of the diversion under similar circumstances before the suit. Stein *v.* Burden, 24 Ala. 130, 60 Am. Dec. 453. And on an issue as to the amount of moisture contained in ore, evidence of the amount found in other ore taken from the same ore body and worked under similar circumstances is relevant. Vietti *v.* Nesbitt, 22 Nev. 390, 41 Pac. 151: So, in an action for an injury to plaintiff's trees caused by escaping gas, evidence as to the condition of other trees in that vicinity after the construction of defendant's gas line is competent. Evans *v.* Keystone Gas Co., 148 N. Y. 112, 42 N. E. 513, 51 Am. St. Rep. 681, 30 L. R. A. 615.

94. *Alabama.*— Decatur Car Wheel, etc., Co. *v.* Mehaffey, 128 Ala. 242, 29 So. 646; Alabama Lumber Co. *v.* Keel, 125 Ala. 603, 28 So. 204, 82 Am. St. Rep. 265; Spiva *v.* Stapleton, 38 Ala. 171.

Indiana.— Indiana Natural, etc., Gas Co. *v.* Anthony, 26 Ind. App. 307, 58 N. E. 868; Washington Tp. Farmers' Co-operative Fuel, etc., Co. *v.* McCormick, 19 Ind. App. 663, 49 N. E. 1085.

Iowa.— Wilkins *v.* Omaha, etc., R., etc., Co., 96 Iowa 668, 65 N. W. 987.

Maryland.— Mitchell *v.* Mitchell, 10 Md. 234.

New York.— Sixth Ave. R. Co. *v.* Metropolitan El. R. Co., 56 Hun 182, 9 N. Y. Suppl. 207; Trenkmann *v.* Schneider, 17 Misc. 299, 40 N. Y. Suppl. 375; Murphy *v.* Brooklyn City R. Co., 6 N. Y. St. 47.

Pennsylvania.— Lewis *v.* Marlborough Tp., 13 Montg. Co. Rep. 170.

Texas.— Saunders *v.* Duval, 19 Tex. 467.

See 20 Cent. Dig. tit. "Evidence," § 388 *et seq.*

Railroad fires.— As to admissibility of evidence of fires set by sparks from other locomotives see, generally, RAILROADS.

95. *Alabama.*— Gibson *v.* Hatchett, 24 Ala. 201.

California.— Clark *v.* Willett, 35 Cal. 534.

Connecticut.— Laufer *v.* Bridgeport Traction Co., 68 Conn. 475, 37 Atl. 379, 37 L. R. A. 533.

Illinois.— O. H. Jewell Filter Co. *v.* Kirk, 200 Ill. 382, 65 N. E. 698; Chicago *v.* Brennan, 61 Ill. App. 247.

Indiana.—Ramsey *v.* Rushville, etc., Gravel Road Co., 81 Ind. 394.

Iowa.— Bach *v.* Iowa Cent. R. Co., 112 Iowa 241, 83 N. W. 959.

Massachusetts.— Campbell *v.* Russell, 139 Mass. 278, 1 N. E. 345; Waters' Patent Heater Co. *v.* Smith, 120 Mass. 444, 446; Standish *v.* Washburn, 21 Pick. 237.

Michigan.— Smith *v.* McGill, 27 Mich. 142.

Missouri.— Kirchgraber *v.* Lloyd, 59 Mo. App. 59.

New York.— Harroun *v.* Brush Electric Light Co., 12 N. Y. App. Div. 126, 42 N. Y. Suppl. 716; Murphy *v.* McWilliam, 15 Misc. 122, 36 N. Y. Suppl. 492; Lord *v.* Lord, 11 N. Y. Suppl. 389.

Oregon.— Crossen *v.* Grandy, 42 Oreg. 282, 70 Pac. 906.

Pennsylvania.— Newbold *v.* Mead, 57 Pa. St. 487; Minnequa Springs Imp. Co. *v.* Coon, 10 Wkly. Notes Cas. 502.

Texas.— Gulf, etc., R. Co. *v.* Brown, 15 Tex. Civ. App. 93, 40 S. W. 608.

Virginia.— Ellis *v.* Harris, 32 Gratt. 684.

Wisconsin.— Smith *v.* Russ, 22 Wis. 439.

See 20 Cent. Dig. tit. "Evidence," § 388 *et seq.*

sion to the jury.[96] Other occurrences have been deemed relevant where the essential conditions are similar, although the law of uniformity in action underlying the relevancy is not natural but legal.[97]

3. Experiments. The conditions of a relevant occurrence may be artificially created in an experiment. Where the material facts bearing on a particular issue are precisely duplicated in the experiment the result may be received in evidence,[98] the burden being on the proponent to show the correspondence in essentials.[99] Thus in a civil case whether an object in a certain position can be seen from a given height above a designated spot,[1] how far the human voice will carry words,[2] and in what degree intervening obstacles interfere with hearing under certain conditions,[3] are facts which a party may attempt to establish by showing what occurred when an experiment was tried. In a criminal case the

96. Com. *v.* Robinson, 146 Mass. 571, 581, 16 N. E. 452, where it was said: "It is only necessary that there should be so much evidence as to make it proper to submit the whole evidence to the jury. The fact of the admission of the evidence by the judge does not in a legal sense give it any greater weight with the jury; it does not affect the burden of proof, or change the duty of the jury in weighing the whole evidence. They must still be satisfied, in a criminal case, upon the whole evidence, beyond a reasonable doubt. Ordinarily, questions of fact are exclusively for the jury, and questions of law for the court. But when, in order to pass upon the admissibility of evidence, the determination of a preliminary question of fact is necessary, the court in the due and orderly course of the trial must necessarily determine it, as far as is necessary for that purpose, and usually without the assistance, at that stage, of the jury. If, under such circumstances, testimony is admitted against a party's objection, it may often happen that he may still ask the jury to disregard it."

97. Lowther *v.* Raw, 2 Bro. P. C. 451, 1 Eng. Reprint 1058. Where in each of several manors belonging to the same lord, and part of the same district, it appeared that there was a class of tenants answering the same description, and to whom their tenements were granted by similar words it was held that evidence of what rights had been enjoyed by those tenants in one manor might be received to show what were their rights in another. Rowe *v.* Brenton, 8 B. & C. 737, 3 M. & R. 361, 15 E. C. L. 363. But see Tyrwhitt *v.* Wynne, 2 B. & Ald. 554, 21 Rev. Rep. 398; Wilson *v.* Page, 4 Esp. 71.

98. *California.*—Sonoma *v.* Stofen, 125 Cal. 32, 57 Pac. 681; People *v.* Phelan, 123 Cal. 551, 56 Pac. 424.

Indiana.— Chicago, etc., R. Co. *v.* Champion, (Sup. 1892) 32 N. E. 874.

Iowa.— Burg *v.* Chicago, etc., R. Co., 90 Iowa 106, 57 N. W. 680, 48 Am. St. Rep. 419; Brooke *r.* Chicago, etc., R. Co., 81 Iowa 504, 47 N. W. 74 [*distinguishing* Klanowski *r.* Grand Trunk R. Co., 64 Mich. 279, 31 N. W. 275].

Louisiana.— Seibert *r.* McManus, 104 La. 404, 29 So. 108.

Minnesota.— Beckett *v.* Northwestern Masonic Aid Assoc., 67 Minn. 298, 69 N. W. 923.

New Hampshire.—Whitcher *v.* Boston, etc., R. Co., 70 N. H. 242, 46 Atl. 740.

North Carolina.— See Cox *r.* Norfolk, etc., R. Co., 126 N. C. 103, 35 S. E. 237.

Texas.— Rupe *v.* State, 42 Tex. Cr. 477, 61 S. W. 929.

Utah.— Hayes *v.* Southern Pac. R. Co., 17 Utah 99, 53 Pac. 1001.

United States.— Washington, etc., Steam Packet Co. *v.* Sickles, 10 How. 419, 13 L. ed. 479; Columbus Constr. Co. *v.* Crane Co., 98 Fed. 946, 40 C. C. A. 35.

Application of rule.— Evidence of experiments of a witness as to whether a person falling from the steps of a street-car by its starting would fall as plaintiff testified he did was held admissible. Gilbert *v.* Third Ave. R. Co., 54 N. Y. Super. Ct. 270. And the result of an experiment in stopping a train under the same circumstances as those which caused the death of plaintiff's intestate may be shown in evidence. Byers *v.* Nashville, etc., R. Co., 94 Tenn. 345, 29 S. W. 128.

The value of an experiment depends on reproducing actual conditions identical with the case in question, but the identity need not be carried so far as to cover conditions not causal as to the result. Sonoma County *v.* Stofen, 125 Cal. 32, 57 Pac. 681.

99. People *r.* Hill, 123 Cal. 571, 56 Pac. 443; Chicago, etc., R. Co. *v.* Logue, 47 Ill. App. 292; Lake Erie, etc., R. Co. *r.* Mugg, 132 Ind. 168, 31 N. E. 564; People *r.* Thompson, 122 Mich. 411, 81 N. W. 344. Where the conditions appear to be dissimilar in some essential particular the evidence is rejected. Alabama Great Southern R. Co. *v.* Burgess, 114 Ala. 587, 22 So. 169.

1. *California.*— People *r.* Woon Tuck Wo, 120 Cal. 294, 52 Pac. 833.

Illinois.— Elgin, etc., R. Co. *r.* Reese, 70 Ill. App. 463; Illinois Cent. R. Co. *r.* Burns, 32 Ill. App. 196.

North Carolina.— Cox *r.* Norfolk, etc., R. Co., 126 N. C. 103, 35 S. E. 237.

South Carolina.— Walker *r.* Columbia, etc., R. Co., 25 S. C. 141.

Utah.— Young *r.* Clark, 16 Utah 42, 50 Pac. 832.

2. People *r.* Phelan, 123 Cal. 551, 56 Pac. 424; Gambrill *r.* Schooley, 95 Md. 260, 52 Atl. 500, 63 L. R. A. 427.

3. Missouri Pac. R. Co. *r.* Moffatt, 56 Kan. 667, 44 Pac. 607.

distance at which a given revolver will produce certain results upon clothing,[4] or whether certain wounds could have been produced by a man standing on the ground[5] and other relevant facts,[6] may be shown by the result of experiments conducted under suitable conditions. A jury are not at liberty to try experiments for themselves out of court,[7] for this class of evidence comes within the administrative discretion of the court upon its relevancy being established.[8] Where the experiment is inconclusive,[9] or raises a number of collateral issues,[10] or the evidence seems to the court not to promise results justifying the use of the time required to hear it,[11] a party cannot insist upon producing it.

D. Attendant Circumstances — **1. Capability.** Evidence of similar acts at other times is competent, where the doing of such acts tends to establish the capability for doing the act in question,[12] or the possibility that it may be done.[13] For example whether a machine is capable of doing certain work;[14] whether a horse can attain a certain speed;[15] whether a structure[16] or steam whistle[17] is calculated to frighten horses, or a locomotive is capable of setting fires along the road-bed of a railroad;[18] or in general whether any cause is capable of producing a given result may be shown by what has happened on other occasions.[19] Knowledge may be an element of capability.[20]

2. Presence at Given Locality. Acts done at another time are competent to show that a person was present at a particular place at a given time.[21]

3. Skill. Possession of the skill necessary to do a certain act may be an attendant circumstance of probative value in identifying the doer of the act. Existence of such skill may be shown by prior acts indicative of its possession.[22] Skill shown at a later period does not establish it at a time earlier by an appreci-

4. Thrawley *v.* State, 153 Ind. 375, 55 N. E. 95 (powder-mark); Sullivan *v.* Com., 93 Pa. St. 284.

5. Dillard *v.* State, 58 Miss. 368.

6. Lincoln *v.* Taunton Copper Mfg. Co., 9 Allen (Mass.) 181, whether there is copper in vegetation.

7. People *v.* Conkling, 111 Cal. 616, 44 Pac. 616.

8. **Exercise of discretion will be reviewed** only in case of abuse (Woelfel Leather Co. *v.* Thomas, 68 Ill. App. 394; Ord *v.* Nash, 50 Nebr. 335, 69 N. W. 964), and extends to deciding on the propriety of granting a continuance for making experiments (State *v.* Hendel, 3 Ida. 88, 35 Pac. 836).

9. Klanowski *v.* Grand Trunk R. Co., 64 Mich. 279, 31 N. W. 275.

10. Libby *v.* Scherman, 146 Ill. 540, 34 N. E. 801, 37 Am. St. Rep. 191; Columbus Constr. Co. *v.* Crane Co., 98 Fed. 946, 40 C. C. A. 35.

11. Ord *v.* Nash, 50 Nebr. 335, 69 N. W. 964, 966.

12. Louisville, etc., R. Co. *v.* Bates, 8 Ky. L. Rep. 701. Where, in an action for injuries by collision with a street-car, servants of defendant testified as to the rate of speed at which the car was running, stating that it could not run any faster on the street where the accident occurred because of lack of power and rough track, it was held proper to admit evidence in rebuttal as to the speed of cars on such track at other times. Rouse *v.* Detroit Electric R. Co., 128 Mich. 149, 87 N. W. 68.

13. Blalock *v.* Randall, 76 Ill. 224.

14. Baber *v.* Rickart, 52 Ind. 594; Waters' Patent Heating Co. *v.* Smith, 120 Mass. 444.

15. Whitney *v.* Leominster, 136 Mass. 25.

16. House *v.* Metcalf, 27 Conn. 631; Elgin *v.* Thompson, 98 Ill. App. 358; Darling *v.* Westmoreland, 52 N. H. 401, 13 Am. Rep. 55.

17. Crocker *v.* McGregor, 76 Me. 282, 49 Am. Rep. 611.

18. See, generally, Railroads.

19. *Illinois.*— Cooper *v.* Randall, 59 Ill. 317.

Kentucky.— Carpenter *v.* Laswell, 63 S. W. 609, 23 Ky. L. Rep. 686.

Massachusetts.— Lane *v.* Moore, 151 Mass. 87, 23 N. E. 828, 21 Am. St. Rep. 430.

New Hampshire.— Valley *v.* Concord, etc., R. Co., 68 N. H. 546, 38 Atl. 383; Darling *v.* Westmoreland, 52 N. H. 401, 13 Am. Rep. 55.

Texas.— Phœnix Assur. Co. *v.* Stenson, (Civ. App. 1901) 63 S. W. 542.

United States.— Southern Bell Telephone, etc., Co. *v.* Watts, 66 Fed. 460, 13 C. C. A. 579.

20. Du Bois *v.* People, 200 Ill. 157, 65 N. E. 658, 93 Am. St. Rep. 183.

21. State *v.* Spray, 174 Mo. 569, 74 S. W. 846; State *v.* Wentworth, 37 N. H. 196; Coble *v.* State, 31 Ohio St. 100; State *v.* Fitzsimon, 18 R. I. 236, 27 Atl. 446, 49 Am. St. Rep. 466.

22. Paducah First Nat. Bank *v.* Wisdom, 111 Ky. 135, 63 S. W. 461, 23 Ky. L. Rep. 530.

On an issue of forgery it is not competent to show that a person has the requisite amount of skill, or has in point of fact committed other forgeries. Costelo *v.* Crowell, 139 Mass. 588, 2 N. E. 698.

able interval.[23] Where the act in question shows lack of skill, was done in a bungling manner, etc., evidence that the party claimed to have done the act is so unskilled that he would have done it in that way if at all is competent.[24]

4. System of Coördinated Action. An attendant circumstance of highly probative value may in some cases be found in the existence of such a series or system of coördinated or correlated facts as lead to the inference that the particular act which is under investigation must have been done as a necessary part of a general plan to attain a definite object and that it was done by the person to whose real or supposed interest the particular act would redound. The acts or other facts constituting such an attendant circumstance may be shown,[25] to indicate the existence of a systematized plan[26] or comprehensive design,[27] and they

23. Leighton *v.* Sargent, 31 N. H. 119, 64 Am. Dec. 323, two years.

24. Clark *v.* Com., 111 Ky. 443, 63 S. W. 740, 23 Ky. L. Rep. 1029, abortion.

25. Hawes *v.* State, 88 Ala. 37, 7 So. 302; Faucett *v.* Nichols, 64 N. Y. 377.

26. *Alabama.*— Hawes *v.* State, 88 Ala. 37, 7 So. 302.

California.— People *v.* Van Ewan, 111 Cal. 144, 43 Pac. 520.

Iowa.— State *v.* Soper, 118 Iowa 1, 91 N. W. 774.

Massachusetts.— Fowle *v.* Child, 164 Mass. 210, 41 N. E. 291, 49 Am. St. Rep. 451; Com. *v.* Robinson, 146 Mass. 571, 577, 16 N. E. 452; Tyson *v.* Booth, 100 Mass. 258.

Texas.— Efird *v.* State, 44 Tex. Cr. 447, 71 S. W. 957; Robinson *v.* State, (Cr. App. 1898) 48 S. W. 176; Gallardo *v.* State, (Cr. App. 1897) 40 S. W. 974; Moore *v.* State, 28 Tex. App. 377, 13 S. W. 152.

United States.— New York Mut. L. Ins. Co. *v.* Armstrong, 117 U. S. 591, 6 S. Ct. 877, 29 L. ed. 997.

On a prosecution for larceny of eighteen head of cattle, evidence that while defendants were driving away the cattle they also took a bull belonging to another person was admissible, as it was part of the same transaction. Lowe *v.* State, 134 Ala. 154, 32 So. 273. And see, generally, as to proof of other offenses to show scheme or system of criminal action, Criminal Law, 12 Cyc. 411.

Evidence of fraud.— On a suit for money deposited as security for a note in a safety vault, which neither party could open, except in the other's presence or with his written consent, it appeared that defendant with plaintiff's written consent went to the vault and found only worthless paper. It was held that evidence of other acts of fraud by plaintiff in the course of his transactions with defendant during the same period of time were admissible to prove that he removed the money himself by fraud while at the vault with defendant. Fowle *v.* Child, 164 Mass. 210, 214, 21 N. E. 291, 49 Am. St. Rep. 451.

27. *California.*— People *v.* Cobler, 108 Cal. 538, 41 Pac. 401; People *v.* Gray, 66 Cal. 271, 5 Pac. 240.

Georgia.— Chapman *v.* State, 112 Ga. 56, 37 S. E. 102.

Kansas.— State *v.* Folwell, 14 Kan. 105.

Massachusetts.— Com. *v.* Blood, 141 Mass. 571, 575, 6 N. E. 769; Com. *v.* Jackson, 132 Mass. 16, 18; Tyson *v.* Booth, 100 Mass. 258.

Minnesota.— State *v.* Ames, 90 Minn. 183, 96 N. W. 330; Moline-Milburn Co. *v.* Franklin, 37 Minn. 137, 33 N. W. 323.

Missouri.— State *v.* Tabor, 95 Mo. 585, 8 S. W. 744.

Nebraska.— Barbar *v.* Martin, (1903) 93 N. W. 722.

New York.— People *v.* Peckens, 153 N. Y. 576, 47 N. E. 883; Mayer *v.* People, 80 N. Y. 364; Faucett *v.* Nichols, 64 N. Y. 377; Phillips *v.* People, 57 Barb. 353.

Pennsylvania.— Goersen *v.* Com., 106 Pa. St. 477, 51 Am. Rep. 534; Swan *v.* Com., 104 Pa. St. 218; Goersen *v.* Com., 99 Pa. St. 388.

South Dakota.— State *v.* Halpin, 16 S. D. 170, 91 N. W. 605.

Texas.— White *v.* State, 11 Tex. 769; Hollar *v.* State, (Cr. App. 1903) 73 S. W. 961.

Vermont.— State *v.* Eastwood, 73 Vt. 205, 50 Atl. 1077.

United States.— Butler *v.* Watkins, 13 Wall. 456, 20 L. ed. 629; Cunard Steamship Co. *v.* Kelley, 115 Fed. 678, 53 C. C. A. 310; Mudsill Min. Co. *v.* Watrous, 61 Fed. 163, 9 C. C. A. 415.

England.— Makin *v.* Atty.-Gen., [1894] A. C. 57, 17 Cox C. C. 704, 58 J. P. 148, 63 L. J. P. C. 41, 69 L. T. Rep. N. S. 778, 6 Reports, 373; Reg. *v.* Francis, L. R. 2 C. C. 128, 12 Cox C. C. 612, 43 L. J. M. C. 97, 30 L. T. Rep. N. S. 503, 22 Wkly. Rep. 663.

As to proof of other offenses in criminal cases to show design see Criminal Law, 12 Cyc. 410–412.

The reason for the rule is that, when once system is proved, each particular part of the system may be explained by the other parts which go to make up the whole. Card *v.* State, 109 Ind. 415, 421, 9 N. E. 591.

Conspiracy.— Proof of the system of operations may involve the existence of a conspiracy. See Criminal Law, 12 Cyc. 411 note 28. But mere proof of a conspiracy to do similar disconnected acts does not make the evidence of other transactions relevant (State *v.* Faulkner, (Mo. 1903) 75 S. W. 116), which will, under ordinary principles of equity (see *supra*, IV, C, 4, g (II)) affect those who are parties to the conspiracy (Towne *v.* People, 89 Ill. App. 258; State *v.*

may be shown notwithstanding the fact that the various acts cover an extended period of time.[28]

E. Causation Established by Induction — 1. Presence or Cause in Combination Uniformly Giving Result — a. Rule Stated. Where the question is which of several antecedent circumstances is the cause of a given effect, it is logically relevant to show that on other occasions the presence of a particular antecedent has produced similar results, the other antecedents being varied. This is in accordance with the canon of inductive reasoning that "if two or more instances of the phenomenon under investigation have only one circumstance in common, the circumstance in which alone all the instances agree, is the cause (or effect) of the phenomenon."[29] In other words, persistent recurrence of a given result when one antecedent alone remains constant is highly probative that this antecedent is the cause of the result.[30] In order to meet such evidence, or generally, it is entirely relevant to prove instances where the alleged cause was present and the result failed to follow;[31] or where the same result followed when the alleged

May, 142 Mo. 135, 43 S. W. 637; Barber *v.* State, (Tex. Cr. App. 1902) 70 S. W. 210).

Single scheme.— It is not sufficient that two transactions should each be part of a scheme. They must be parts of the same scheme. Shaffner *v.* Com., 72 Pa. St. 60, 13 Am. Rep. 649.

28. Com. *v.* Robinson, 146 Mass. 571, 16 N. E. 452; McGlasson *v.* State, 37 Tex. Cr. 620, 40 S. W. 503, 66 Am. St. Rep. 842.

29. Mills Logic, c. 8, § 1.

30. *Alabama.*— Birmingham *v.* Starr, 112 Ala. 98, 20 So. 424.

Illinois.— Rowlands *v.* Elgin, 66 Ill. App. 66.

Kansas.— Junction City *v.* Blades, 1 Kan. App. 85, 41 Pac. 677.

Maine.— Crocker *v.* McGregor, 76 Me. 282, 49 Am. Dec. 611.

New York.— Kuh *v.* Metropolitan El. R. Co., 58 N. Y. Super. Ct. 138, 9 N. Y. Suppl. 710.

Texas.— Houston Cotton Oil Co. *v.* Trammell, (Civ. App. 1903) 72 S. W. 244; Meyer *v.* Wolnitzek, (Civ. App. 1901) 63 S. W. 1058.

England.—Reg. *v.* Cooper, 1 Q. B. D. 19, 13 Cox C. C. 123, 45 L. J. M. C. 15, 33 L. T. Rep. N. S. 754, 24 Wkly. Rep. 279; Reg. *v.* Stenson, 12 Cox C. C. 111, 25 L. T. Rep. N. S. 666.

Other accidents under same circumstances. — In an action for personal injuries from a defective sidewalk, evidence of other accidents to other persons at the same place and from the same cause is competent, as tending to show the common cause of the accident to be the dangerous and unsafe condition of the walk. Rowlands *v.* Elgin, 66 Ill. App. 66. And in an action for an injury caused by plaintiff's horse becoming frightened by steam escaping from defendant's mill, next to a public highway, evidence was admissible to show that other horses, ordinarily safe, when driven by it on other occasions, shortly before and after the accident, when the construction and use of the mill were the same, were also frightened by it. Crocker *v.* McGregor, 76 Me. 282, 49 Am. Dec. 611.

Discretion of court.— "How far the plaintiff shall be permitted to go into particulars in offering such evidence should depend somewhat on the circumstances of the case, and must, within reasonable limits, be left to the discretion of the presiding judge." Hunt *v.* Lowell Gas Light Co., 8 Allen (Mass.) 169, 171, 85 Am. Dec. 697, per Chapman, J.

Complication of causes tending to vary result.— A railway company, in an action by a conductor for wages, claimed a set-off for moneys collected by him and not accounted for. It was held that the set-off could not be proved by mere comparison of his returns with those of another conductor running alternate days over the same route. Denver, etc., R. Co. *v.* Glasscott, 4 Colo. 270. And in an action on a note given for a machine, it was held error to admit evidence that another machine furnished by the same manufacturer failed through similar defects, where the issue was whether the machine in question failed through defects in its construction or by mismanagement. Craver *v.* Hornburg, 26 Kan. 94.

31. Birmingham Union R. Co. *v.* Alexander, 93 Ala. 133, 9 So. 525; Shirley *v.* Keagy, 126 Pa. St. 282, 17 Atl. 607. In an action for negligence in leaving a piece of pipe suspended from a water-tank by which plaintiff's intestate, a brakeman, was injured, evidence was held relevant that the pipe had hung there for years and no one had been injured. East Tennessee, etc., R. Co. *v.* Thompson, 94 Ala. 636, 10 So. 280. And in an action for the price of a lot of frozen fish, defendant contended that they were worthless, and had been thawed and frozen several times while in plaintiff's possession, and put in evidence the state of the thermometer during this time. It was held that plaintiff might in rebuttal put in evidence that other fish of a similar description, stored in the same place for the same time, did not thaw, and were taken out afterward in good condition. Hodgkins *v.* Chappell, 128 Mass. 197. On the other hand, in an action against a ferryman for breach of his contract for transportation of animals which fell off the boat

cause was not present;[32] provided the other conditions are shown to be sufficiently similar to render the evidence relevant.[33] It is also competent to prove occurrences on other occasions which show another cause for the result than that claimed to have been the cause.[34] It is further possible logically to contend that where a new element is added, other conditions remaining constant, a variation in result is due to the operation of the new element.[35]

b. Application of Rule. Among the cases in which the method of induction noticed in the preceding section[36] constitutes a necessary line of evidence are those where it is claimed that there is a defect in a hedge,[37] highway,[38] machinery,[39] road-bed,[40] or system of directing the affairs of a municipal corporation[41] or private business; or that a certain structure[42] or other thing[43] frightened a horse or other animal.

2. Removal of Cause Accompanied by Absence of Result. In order to prove that a result was due to a cause alleged, it is relevant to show other instances where the specified cause was not present in a combination of antecedents, and the result did not follow.[44]

and were drowned through his alleged negligence in not furnishing the boat with barriers, evidence that just such a boat had been used to transport animals over the ferry for thirty years, and no accident had ever occurred before, was held inadmissible, as not being pertinent to the issue. Lewis *v.* Smith, 107 Mass. 334.

32. Fogel *v.* San Francisco, etc., R. Co., (Cal. 1895) 42 Pac. 565; Remy *v.* Olds, (Cal. 1893) 34 Pac. 216; Lotz *v.* Scott, 103 Ind. 155, 2 N. E. 560; Bradford *v.* Boylston F. & M. Ins. Co., 11 Pick. (Mass.) 162; Folkes *v.* Chadd, 3 Dougl. 157, 26 E. C. L. 111. But such evidence is not necessarily conclusive that the alleged cause was not the real cause. Dorman *v.* Ames, 12 Minn. 451; Haynes *v.* Burlington, 38 Vt. 350.

33. Hawks *v.* Charlemont, 110 Mass. 110; Standish *v.* Washburn, 21 Pick. (Mass.) 237. See also O. H. Jewell Filter Co. *v.* Kirk, 200 Ill. 382, 65 N. E. 698 [*affirming* 102 Ill. App. 246]; Crossen *v.* Grandy, 42 Oreg. 282, 70 Pac. 906.

34. Wilmington Dental Mfg. Co. *v.* Adams, Express Co., 8 Houst. (Del.) 329, 32 Atl. 250; Whitaker *v.* Bank of England, 6 C. & P. 700, 25 E. C. L. 646, dishonor of other bills, etc. But see Hathaway *v.* Tinkham, 148 Mass. 85, 19 N. E. 18.

35. Finn *v.* Clark, 12 Allen (Mass.) 522.

36. See *supra*, XII, E, 1, a.

37. Rogers *v.* New York, etc., Bridge, 159 N. Y. 556, 54 N. E. 1094.

38. *Alabama.*— Southern R. Co. *v.* Posey, 124 Ala. 486, 26 So. 914.

Colorado.— Sanderson *v.* Frazier, 8 Colo. 79, 5 Pac. 632, 54 Am. Rep. 544.

Illinois.— Taylorville *v.* Stafford, 196 Ill. 288, 63 N. E. 624.

Kansas.— Madison Tp. *v.* Scott, 9 Kan. App. 871, 61 Pac. 967.

Kentucky.— Georgetown, etc., Turnpike Road Co. *v.* Cannon, 12 Ky. L. Rep. 257.

New Hampshire.— Dow *v.* Weare, 68 N. H. 345, 44 Atl. 489.

New York.— Burns *v.* Schenectady, 24 Hun 10.

Ohio.— Lake Shore, etc., R. Co. *v.* Beall, 13 Ohio Cir. Ct. 605, 6 Ohio Cir. Dec. 250.

Pennsylvania.— Beardslee *v.* Columbia Tp., 5 Lack. Leg. N. 290.

United States.— District of Columbia *v.* Armes, 107 U. S. 519, 2 S. Ct. 840, 27 L. ed. 618. See also, generally, STREETS AND HIGHWAYS.

Remoteness of such occurrences merely goes to the weight of the evidence. Lake Shore, etc., R. Co. *v.* Beall, 13 Ohio Cir. Ct. 605, 6 Ohio Cir. Dec. 250.

39. Georgia Cotton Oil Co. *v.* Jackson, 112 Ga. 620, 37 S. E. 873; Fraser *v.* Schroeder, 163 Ill. 459, 45 N. E. 288.

40. Wilder *v.* Metropolitan St. R. Co., 10 N. Y. App. Div. 364, 41 N. Y. Suppl. 931.

41. Augusta *v.* Hafers, 61 Ga. 48, 34 Am. Rep. 95.

42. House *v.* Metcalf, 27 Conn. 631; Elgin *v.* Thompson, 98 Ill. App. 358; Darling *v.* Westmoreland, 52 N. H. 401, 13 Am. Rep. 55.

43. Crocker *v.* McGregor, 76 Me. 282, 49 Am. Rep. 611 (steam whistle); Hill *v.* Portland, etc., R. Co., 55 Me. 438, 92 Am. Dec. 601 (steam whistle); Brown *v.* Eastern, etc., R. Co., 22 Q. B. D. 391, 58 L. J. Q. B. 212 (pile of road scrapings).

44. Avery *v.* Burrall, 118 Mich. 672, 77 N. W. 272. In an action for damages for negligently and carelessly shelling popcorn so as to crack the kernels and render the corn unmarketable, evidence that corn from the same crib, in the same condition, and raised the same year, had been shelled by other parties without injuring it, was held admissible. Chase *v.* Blodgett Milling Co., 111 Wis. 655, 87 N. W. 826. Such evidence is in accordance with the canon of induction that, "If an instance in which the phenomenon under investigation occurs, and an instance in which it does not occur, have every circumstance in common save one, that one occurring only in the former; the circumstance in which alone the two instances differ, is the effect, or the cause, or an

XIII. INSPECTION.*

A. In General — 1. Nature of the Evidence. The tribunal of fact receives evidence through three channels: inspection, documents, and witnesses.[45] Evidence gained by inspection covers facts which the tribunal cognizes with its own senses; sees, hears,[46] smells, tastes,[47] or otherwise perceives[48] for itself.[49]

2. Power and Duty of Court. What the court will allow the jury to see for itself is largely within the administrative function of the judge, who will permit the use of the court-room for deviations from the usual routine of trials only when satisfied that the interests of substantial justice warrant him in so doing.[50] It is part of his function to decide necessary preliminary questions of fact, as the accuracy of a photograph,[51] or the identity of articles offered in evidence.[52] Having reached the conclusion that the information to be gained by inspection is relevant, the court decides for example that an experiment may[53] or may not[54]

indispensable part of the cause of the phenomenen." Mills Logic, c. 8, § 2.

45. As to documentary evidence, including photographs, maps, diagrams, etc., see *infra*, XIV. As to evidence by inspection in criminal cases, see Criminal Law, 12 Cyc. 537. As to evidence by view of premises, etc., see Criminal Law, 12 Cyc. 537; and, generally, Trial. As to testimony of witnesses, see, generally, Witnesses.

46. State *v.* Linkhaw, 69 N. C. 214, 12 Am. Rep. 645 (imitation of disorderly singing); Reed *v.* Carusi, 20 Fed. Cas. No. 11,642, Taney 72 (singing songs).

47. People *v.* Kinney, 124 Mich. 486, 83 N. W. 147, cider. The court may, however, decline to permit the jury to drink certain liquor to determine whether it is intoxicating. Com. *v.* Brelsford, 161 Mass. 61, 36 N. E. 677.

48. House *v.* State, 42 Tex. Cr. 125, 57 S. W. 825.

49. "By real evidence, I understand all evidence of which any object belonging to the class of things is the source; persons also included, in respect to such properties as belong to them in common with things." 3 Bentham Rationale Jud. Ev. 26. Bentham divides real evidence into immediate and reported; according as the matter is presented to the senses of the tribunal or brought to its attention by the report of a witness. As most evidence is of the latter description, the distinction seems valueless and instances of original perception by the court or jury are the only valid instances of the use of this class of evidence.

Judicial cognizance distinguished.— The circumstance that a judge or jury may ascertain by inspection a fact of which judicial notice may be taken has in some cases caused a confusion of facts of notoriety which a tribunal knows because everybody else does, and facts of casual importance or limited publicity which a tribunal learns for itself. For example, in the preface to the first edition of his Digest of the Law of Evidence, Stephen, speaking of judicial cognizance, says: "It is like proving that it is raining, by telling the judge to look out of the window," an obvious instance of real evidence.

Evidence not primary.— Except in case of a document (see *infra*, XIV) no rule of law requires production of a thing itself for the jury's inspection. Com. *v.* Morrell, 99 Mass. 542; Reg. *v.* Francis, L. R. 2 C. C. 128, 12 Cox C. C. 612, 43 L. J. M. C. 97, 30 L. T. Rep. N. S. 503, 22 Wkly. Rep. 663 (ring); Burrell *v.* North, 2 C. & K. 679, 61 E. C. L. 679 (direction on a parcel).

50. Marshall *v.* Gantt, 15 Ala. 682; Leonard *v.* Southern Pac. Co., 21 Oreg. 555, 28 Pac. 887, 15 L. R. A. 221; Burris *v.* Endy, 1 Tex. App. Civ. Cas. § 1307.

51. See *infra*, XIV, C, 11.

52. Fuller *v.* State, 117 Ala. 36, 23 So. 688; People *v.* Sullivan, 129 Cal. 557, 62 Pac. 101; Parrott *v.* Com., 47 S. W. 452, 20 Ky. L. Rep. 761; State *v.* Porter, 32 Oreg. 135, 49 Pac. 964. See also State *v.* Phillips, 118 Iowa 660, 92 N. W. 876.

53. Alabama Great Southern R. Co. *v.* Collier, 112 Ala. 681, 14 So. 327; People *v.* Woon Tuck Wo, 120 Cal. 294, 52 Pac. 833; Com. *v.* Scott, 123 Mass. 222, 25 Am. Rep. 81 (voice); Hatfield *v.* St. Paul, etc., R. Co., 33 Minn. 130, 22 N. W. 176, 53 Am. Rep. 14 (walk). See also Criminal Law, 12 Cyc. 521.

Counter experiment.— A party does not necessarily acquire a right to try a counter experiment by not objecting when his opponent has tried the original experiment. Homan *v.* Franklin County, 98 Iowa 692, 68 N. W. 559.

54. Hardwick Sav. Bank, etc., Co. *v.* Drenan, 72 Vt. 438, 48 Atl. 645, sticking postage stamps. Where fabrication or suppression may be anticipated (Campbell *v.* State, 55 Ala. 80; Com. *v.* Scott, 123 Mass. 222, 25 Am. Rep. 81), or doubt exists whether the experiment will yield valuable probative results commensurate with the consumption of time involved (Homan *v.* Franklin County, 98 Iowa 692, 68 N. W. 559; State *v.* Lindoen, 87 Iowa 702, 54 N. W. 1075), request for an experiment may be refused.

* By Charles F. Chamberlayne. Revised and edited by Charles C. Moore and Wm. Lawrence Clark.

be tried in court; that the jury shall be granted or refused a view of real or personal property;[55] or that an injured limb may be exhibited to the jury.[56] Inspection may be refused where in the opinion of the court the evidence is apt to mislead the jury,[57] unduly excite their antipathy[58] or sympathy,[59] or bewilder them with a number of preliminary[60] or collateral[61] issues; where the fact sought to be proved is remotely[62] or insufficiently[63] connected with the issue; where it is not deemed necessary to run the dangers incidental to the use of this class of evidence, because the party has a better grade of evidence which he can produce, or articles are so cumbrous that their exhibition would impede the orderly administration of justice;[64] or where the exhibition would be indecent[65] or offensive[66] to the sensibilities, without compensating advantages. The court may in its discretion refuse to compel a party to submit articles to the inspection of the jury.[67] But inspection evidence should be received where it is both relevant and highly probative and better evidence cannot reasonably be expected and the dangers of its use are small in comparison to the advantages.[68] It is said that the action of the court in the exercise of its discretion is not subject to review.[69] It may be doubted, however, whether in point of law any discretion exists in these connections which would not be equally applicable to the evidence furnished by witnesses;[70] and an unreasonable exercise of discretion has been held to constitute error.[71] The practical difficulty in securing a review is that the evidence gained by inspection cannot easily be reported for consideration of an appellate court.[72]

55. As to view in criminal cases see CRIMINAL LAW, 12 Cyc. 537. As to view in civil cases see, generally, TRIAL.

56. Jefferson Ice Co. *v.* Zwicokoski, 78 Ill. App. 646. It is said that exhibition should be refused except for the purpose of proving some disputed fact material to the issue. Nebonne *v.* Concord R. Co., 68 N. H. 296, 44 Atl. 521.

57. *Alabama.*— Tesney *v.* State, 77 Ala. 33.

Massachusetts.— Com. *v.* Scott, 123 Mass. 222, 25 Am. Rep. 81.

Pennsylvania.— Hagan *v.* Carr, 198 Pa. St. 606, 48 Atl. 688, diagram.

Texas.— Garritty *v.* Rankin, (Civ. App. 1900) 55 S. W. 367.

Wisconsin.— Stewart *v.* Everts, 76 Wis. 35, 44 N. W. 1092, 20 Am. St. Rep. 17.

See 20 Cent. Dig. tit. "Evidence," §§ 676–679.

58. Selleck *v.* Janesville, 104 Wis. 570, 80 N. W. 944, 76 Am. St. Rep. 892, 47 L. R. A. 691, photograph.

59. Rost *v.* Brooklyn Heights R. Co., 10 N. Y. App. Div. 477, 41 N. Y. Suppl. 1069, 4 N. Y. Annot. Cas. 19, amputated leg.

60. Hood *v.* Bloch, 29 W. Va. 244, 11 S. E. 910.

61. Tudor Iron-Works *v.* Weber, 129 Ill. 535, 21 N. E. 1078 (clothing torn in an accident); McCulloch *v.* Dobson, 133 N. Y. 114, 30 N. E. 641 [*affirming* 15 N. Y. Suppl. 602].

62. Osborne *v.* Detroit, 32 Fed. 36.

63. State *v.* Tippet, 94 Iowa 646, 63 N. W. 445; McGrail *v.* Kalamazoo, 94 Mich. 52, 53 N. W. 955; Murrah *v.* State, (Tex. Civ. App. 1901) 63 S. W. 318; State *v.* Burnham, 56 Vt. 445, 48 Am. Rep. 801.

64. Jacobs *v.* Davis, 34 Md. 204; Jackson *v.* Pool, 91 Tenn. 448, 19 S. W. 324 (planks and cross bars of a sidewalk); Hood *v.* Bloch, 29 W. Va. 244, 11 S. E. 910.

65. Aspy *v.* Botkins, 160 Ind. 170, 66 N. E. 462; Vierling *v.* Binder, 113 Iowa 337, 85 N. W. 621; Warlick *v.* White, 76 N. C. 175; Brown *v.* Swineford, 44 Miss. 282, 28 Am. Rep. 582.

66. Knowles *v.* Crampton, 55 Conn. 336, 11 Atl. 593.

67. Hunter *v.* Allen, 35 Barb. (N. Y.) 42, party not required to produce a watch in his pocket.

68. Com. *v.* Holliston, 107 Mass. 232, diagram.

69. Knowles *v.* Crampton, 55 Conn. 336, 11 Atl. 593. And such is undoubtedly the general practice. Harris *v.* Ansonia, 73 Conn. 359, 47 Atl. 672.

70. People *v.* Gonzalez, 35 N. Y. 49.

71. *Iowa.*— Mann *v.* Sioux City, etc., R. Co., 46 Iowa 637.

Kentucky.— Hughes *v.* General Electric Light, etc., Co., 107 Ky. 485, 54 S. W. 723, 21 Ky. L. Rep. 1202; Meier *v.* Weikel, 59 S. W. 496, 22 Ky. L. Rep. 953.

Michigan.— French *v.* Wilkinson, 93 Mich. 322, 53 N. W. 530, exhibition of limb three years and four months after injury.

New York.— Rost *v.* Brooklyn Heights R. Co., 10 N. Y. App. Div. 477, 41 N. Y. Suppl. 1069; Hunter *v.* Allen, 35 Barb. 42, ordering production of watch.

Pennsylvania.— Philadelphia *v.* Rule, 93 Pa. St. 15.

Texas.— Hays *v.* Gainesville St. R. Co., 70 Tex. 602, 8 S. W. 491, 8 Am. St. Rep. 624.

See 20 Cent. Dig. tit. "Evidence," §§ 676–679.

72. See Ihinger *v.* State, 53 Ind. 251; Hagee *v.* Grossman, 31 Ind. 223 (permission to test flour by its odor properly refused by trial court); Stephenson *v.* State, 28 Ind.

B. Animals. Animals may be produced in court[73] or inspected by the jury outside the court-room.[74]

C. Articles in General — 1. Rule Stated. Any article made important by the evidence or by the nature of the investigation may be produced for inspection.[75] Inspection evidence of this character may range over any line of human activity, as building[76] or mechanical[77] trades, the medical or surgical profession,[78] or nautical affairs.[79] It may cover the tools, as in burglary or counterfeiting,[80] or the bullet,[81] firearms,[82] or other weapon,[83] as in homicide or assault, with which a crime was committed; or the clothes which defendant,[84] or an injured person,[85] or a

272. *Compare* Tully *v.* Fitchburg R. Co., 134 Mass. 499.

73. Beaver *v.* Whiteley, 3 Pa. Co. Ct. 613 (dog); Line *v.* Taylor, 3 F. & F. 731 (dog).

74. Dillard *v.* State, 58 Miss. 368, horse.

75. *Alabama.*— Mitchell *v.* State, 94 Ala. 68, 10 So. 518, shovel used in obstructing railroad.

California.— People *v.* Westlake, 134 Cal. 505, 66 Pac. 731 (deceased's effects in possession of accused); Crusoe *v.* Clark, 127 Cal. 341, 59 Pac. 700 (books); People *v.* Durrant, 116 Cal. 179, 48 Pac. 75 (door); Thomas Fruit Co. *v.* Start, 107 Cal. 206, 40 Pac. 336 (specimen of cured fruit).

Georgia.— Adams *v.* State, 93 Ga. 166, 18 S. E. 553, trousers stolen.

Kansas.— State *v.* Keenan, (App. 1898) 55 Pac. 102, articles seized in a saloon.

Massachusetts.— Boucher *v.* Robeson Mills, 182 Mass. 500, 65 N. E. 819 (broken bolt); Lynch *v.* Swan, 167 Mass. 510, 46 N. E. 51 (broken stair).

Missouri.— State *v.* Goddard, 146 Mo. 177, 48 S. W. 82, door.

New Hampshire.— Stone *v.* Boston, etc., R. Co., 72 N. H. 206, 55 Atl. 359, watch.

New York.— People *v.* Flannigan, 174 N. Y. 356, 66 N. E. 988, 17 N. Y. Cr. 300, an iron bar and a rope.

Pennsylvania.— Udderzook *v.* Com., 76 Pa. St. 340.

South Carolina.— Robson *v.* Miller, 12 S. C. 586, 32 Am. Rep. 518.

Texas.— Jackson *v.* State, 28 Tex. App. 370, 13 S. W. 451, 19 Am. St. Rep. 839, stolen property; jury may identify the marks.

Vermont.— State *v.* Ward, 61 Vt. 153, 17 Atl. 483 (sleigh); Evarts *v.* Middlebury, 53 Vt. 626, 38 Am. Rep. 707 (caulks on the shoes of a horse injured by an alleged defect in a highway).

Washington.—Roberts *v.* Port Blakely Mill Co., 30 Wash. 25, 70 Pac. 111, piece of car flange.

Wisconsin.— Paulson *v.* State, 118 Wis. 89, 94 N. W. 771 (partly burned block of wood); Viellesse *v.* Green Bay, 110 Wis. 160, 85 N. W. 665 (rotten plank).

See 14 Cent. Dig. tit. "Criminal Law," § 891; 20 Cent. Dig. tit. "Evidence," § 679.

Inspection of other articles is not ordinarily permissible. Parker *v.* State, (Tex. Civ. App. 1903) 75 S. W. 30, liquor bought at a time not covered by the information. But in an action for the price of a ring lost by a common carrier, plaintiff was held entitled to select stones corresponding in size, shape, and color to those said by him to have been in the ring, and exhibit them to the jury. Berney *v.* Dinsmore, 141 Mass. 42, 5 N. E. 273, 55 Am. Rep. 445.

76. Philadelphia *v.* Rule, 93 Pa. St. 15 (having stones); Linch *v.* Paris Lumber, etc., Elevator Co., 80 Tex. 23, 15 S. W. 208 (piece of a column).

77. Pennsylvania Coal Co. *v.* Kelly, 156 Ill. 9, 40 N. E. 938 (admitting a coal bucket and permitting the manner of its operation to be exhibited to the jury); King *v.* New York Cent., etc., R. Co., 72 N. Y. 607 (where an iron hook alleged to be insufficient for the strain to which it was put was received). And see Boucher *v.* Robeson Mills, 182 Mass. 500, 65 N. E. 819.

78. McNaier *v.* Manhattan R. Co., 4 N. Y. Suppl. 310.

A skull may be used in explaining injuries. McNaier *v.* Manhattan R. Co., 4 N. Y. Suppl. 310, age.

Surgical instruments with which an operation was performed may be shown. Com. *v.* Brown, 121 Mass. 69 (speculum chair); McNaier *v.* Manhattan R. Co., 4 N. Y. Suppl. 310.

79. Stevenson *v.* Michigan Log Towing Co., 103 Mich. 412, 61 N. W. 536, admitting an identified portion of a tow-line claimed to have been defective.

80. Starchman *v.* State, 62 Ark. 538, 36 S. W. 940; People *v.* Winthrop, 118 Cal. 85, 50 Pac. 390; Ruloff *v.* People, 45 N. Y. 213; People *v.* Larned, 7 N. Y. 445; Taylor *v.* U. S., 89 Fed. 954, 32 C. C. A. 449, counterfeiting.

81. Burton *v.* State, 107 Ala. 108, 18 So. 284; Seltzer *v.* Saxton, 71 Ill. App. 229; State *v.* Tippet, 94 Iowa 646, 63 N. W. 445; Com. *v.* Best, 180 Mass. 492, 62 N. E. 748.

82. Ezell *v.* State, 103 Ala. 8, 15 So. 818; People *v.* Sullivan, 129 Cal. 557, 62 Pac. 101; Wynne *v.* State, 56 Ga. 113; Gardiner *v.* People, 6 Park. Cr. (N. Y.) 155.

83. Von Reeden *v.* Evans, 52 Ill. App. 209; State *v.* Sigler, 114 Iowa 408, 87 N. W. 283, stick. See also Criminal Law, 12 Cyc. 394.

84. Tudor Iron Works *v.* Weber, 129 Ill. 535, 21 N. E. 1078; People *v.* Gonzalez, 35 N. Y. 49; Gardiner *v.* People, 6 Park. Cr. (N. Y.) 155; State *v.* Ward, 61 Vt. 153, 17 Atl. 483. See also Criminal Law, 12 Cyc. 401.

85. *Alabama.*— Dorsey *v.* State, 107 Ala. 157, 18 So. 199; Watkins *v.* State, 89 Ala. 82, 8 So. 134.

California.— People *v.* Hawes, 98 Cal. 648,

witness,[86] wore under relevant circumstances, provided that the articles offered be identified to the satisfaction of the judge,[87] and that it be also shown to his satisfaction that no such substantial change in the articles exhibited as to render the evidence misleading has taken place.[88]

2. Amplification or Explanation of Evidence — a. Casts. Casts of relevant objects[89] made in plaster,[90] sand,[91] or other substances may be exhibited to the jury.

b. Duplicates. In any case where the nature and properties of an article require consideration by the jury, it is proper to submit a duplicate or facsimile conveying a correct impression.[92]

c. Illustrations. A witness may use his own body[93] or that of another person or any article[94] to illustrate the evidence. In the same way counsel to show its meaning on their theory of the case may make any use of the court furniture,[95] or of persons in attendance, as counsel may desire and the court permit.[96]

d. Models. The model of a machine[97] or mechanical device[98] may be submitted to the jury to show how an event occurred or might have been prevented,[99] or for any other relevant purpose.[1]

D. Documents. Admission of documents as evidence in general is discussed

33 Pac. 791; People *v.* Knapp, 71 Cal. 1, 11 Pac. 793.

Illinois.— Tudor Iron-Works *v.* Weber, 129 Ill. 535, 21 N. E. 1078; Quincy Gas, etc., Co. *v.* Bauman, 104 Ill. App. 600 [*affirmed* in 203 Ill. 295, 67 N. E. 807].

Indiana.— Davidson *v.* State, 135 Ind. 254, 34 N. E. 972.

Iowa.— State *v.* Peterson, 110 Iowa 647, 82 N. W. 329.

Michigan.— People *v.* Wright, 89 Mich. 70, 50 N. W. 792.

Montana.— State *v.* Cadotte, 17 Mont. 315, 42 Pac. 857.

New York.— Gardiner *v.* People, 6 Park. Cr. 155.

Pennsylvania.— Udderzook *v.* Com., 76 Pa. St. 340.

Texas.— Smith *v.* State, (Cr. App. 1900) 58 S. W. 101; Barkman *v.* State, 41 Tex. Cr. 105, 52 S. W. 73; Head *v.* State, 40 Tex. Cr. 265, 50 S. W. 352; Long *v.* State, (Cr. App. 1898) 46 S. W. 640; Levy *v.* State, 28 Tex. App. 203, 12 S. W. 596, 19 Am. St. Rep. 826; King *v.* State, 13 Tex. App. 277.

United States.— Baggs *v.* Martin, 108 Fed. 33, 47 C. C. A. 175.

A dressmaker's frame may be used to exhibit the clothes of a murdered woman. People *v.* Durrant, 116 Cal. 179, 48 Pac. 75.

86. Thomas *v.* State, (Tex. Cr. App. 1903) 74 S. W. 36, whose presence, which accused denied, was proved by blood from the wounds of deceased.

87. See *supra*, XIII, A, 2.

88. People *v.* Westlake, 134 Cal. 505, 66 Pac. 731; Com. *v.* Best, 180 Mass. 492, 62 N. E. 748; State *v.* Goddard, 146 Mo. 177, 48 S. W. 82; Barkman *v.* State, 41 Tex. Cr. 105, 52 S. W. 73.

89. People *v.* Smith, 121 Cal. 355, 53 Pac. 802 (footprints); People *v.* Searcey, 121 Cal. 1, 53 Pac. 359, 41 L. R. A. 157 (footprints). See also Whetston *v.* State, 31 Fla. 240, 12 So. 661.

90. Mann *v.* State, 22 Fla. 600 (footprints); Earl *v.* Lefler, 46 Hun (N. Y.) 9 (horse's mouth).

91. Johnson *v.* State, 59 N. J. L. 535, 37 Atl. 949, 39 Atl. 646, 38 L. R. A. 373, [*reversing* 59 L. J. L. 271, 35 Atl. 787], footprints.

92. American Express Co. *v.* Spellman, 90 Ill. 455, yeast can.

93. Horan *v.* Chicago, etc., R. Co., 89 Iowa 328, 56 N. W. 507; Freeman *v.* Hutchinson, 15 Ind. App. 639, 43 N. E. 16, thumb. A plaintiff may show the jury to what extent he can move an arm alleged to have been injured by defendant's malpractice (Richard *v.* Moore, 75 Ill. App. 553), or may move an injured knee in presence of the jury to indicate the nature and extent of the injury (Arkansas River Packet Co. *v.* Hobbs, 105 Tenn. 29, 58 S. W. 278).

94. Taylor *v.* McGrath, 9 Ind. App. 30, 36 N. E. 163 (bicycle); Farmers, etc., Bank *v.* Young, 36 Iowa 44.

95. People *v.* Chin Han, 108 Cal. 597, 41 Pac. 697 (wall and door); Louisville, etc., R. Co. *v.* Ray, 101 Tenn. 1, 46 S. W. 554 (chairs and tables).

96. Illustrations of counsel by the use of models, mechanical apparatus, and the like, do not furnish evidence, although made in the presence of the jury. Hoffman *v.* Bloomsburg, etc., R. Co., 143 Pa. St. 503, 22 Atl. 823, hydraulics.

97. Pennsylvania Coal Co. *v.* Kelly, 156 Ill. 9, 40 N. E. 938.

98. McMahon *v.* Dubuque, 107 Iowa 62, 77 N. W. 517, 70 Am. St. Rep. 143, spark arrester.

99. McMahon *v.* Dubuque, 107 Iowa 62, 77 N. W. 517, 70 Am. St. Rep. 143.

1. Augusta, etc., R. Co. *v.* Dorsey, 68 Ga. 228; Moran *v.* Snoqualmie Falls Power Co., 29 Wash. 292, 69 Pac. 759 (cause of defects); Western Gas Constr. Co. *v.* Danner, 97 Fed. 882, 38 C. C. A. 528.

elsewhere in this article.[2] By inspection of a document, however, the jury may be aided in determining whether it is genuine or written in a counterfeited hand;[3] or whether it contains an alteration,[4] erasure,[5] or mutilation.[6] The jury may be asked to determine from inspection which of two words was written over the other.[7] In all these cases the jury may receive additional assistance from the inferences of specially skilled witnesses.[8] Submission of writings to the jury for comparison is treated in another place.[9]

E. Experiments Before Jury. In the discretion of the judge,[10] experiments may be tried in the presence of the jury either in[11] or out[12] of court, the results of which they may use as evidence.[13] Indeed the judge may in a civil case compel parties to assist in making a test of this nature.[14] Such an experiment may involve a person, as where clothes are tried on to see if they fit[15] or to show how an injury happened,[16] or where one who claims not to be able to read is asked to do so.[17]

F. Persons — 1. In General. The jury may be allowed to judge of the age,[18]

No notice need be given to the adverse party. Augusta, etc., R. Co. *v.* Dorsey, 68 Ga. 228.

2. See *infra*, XIV.

3. Kimbo *v.* Washington First Nat. Bank, 1 MacArthur (D. C.) 415; Withee *v.* Rowe, 45 Me. 571. Where forgery is claimed the judge may order the document to be produced in court. Apthorpe *v.* Comstock, 1 Hopk. Ch. (N. Y.) 163.

4. Birmingham Nat. Bank *v.* Bradley, 108 Ala. 205, 19 So. 791. Fraudulent Interlineation of a record cannot be shown in this way. Forbes *v.* Wiggins, 112 N. C. 122, 16 S. E. 905.

5. Dubois *v.* Baker, 30 N. Y. 355, "all facts apparent and obvious upon an inspection of the note."

6. Taylor *v.* Crowninshield, 5 N. Y. Leg. Obs. 209.

7. Morse *v.* Blanchard, 117 Mich. 37, 75 N. W. 93.

8. *Maine.*— Withee *v.* Rowe, 45 Me. 571.

Massachusetts.— Demerritt *v.* Randall, 116 Mass. 331.

Michigan.— Vinton *v.* Peck, 14 Mich. 287.

Mississippi.— Wilson *v.* Beauchamp, 50 Miss. 24.

New York.— Dubois *v.* Baker, 30 N. Y. 355.

Ohio.— Calkins *v.* State, 14 Ohio St. 222.

For proof of handwriting, direct or circumstantial, see *supra*, XI, C, 9, b.

9. See *supra*, XI, C, 9, b, (III).

10. See *supra*, XIII, A, 2.

11. *Alabama.*— Campbell *v.* State, 55 Ala. 80, making footprints.

California.— People *v.* Hope, 62 Cal. 291, screwing couplings.

Colorado.— Hindry *v.* McPhree, 11 Colo. App. 398, 53 Pac. 389, setting of cement.

Georgia.— Innis *v.* State, 42 Ga. 473, repeating a composition said to have been memorized.

Michigan.— National Cash Register Co. *v.* Blumenthal, 85 Mich. 464, 48 N. W. 622, operating cash register.

Minnesota.— Adams *v.* Thief River Falls, 84 Minn. 30, 86 N. W. 767, moving an injured arm.

New York.— Clark *v.* Brooklyn Heights R. Co., 78 N. Y. App. Div. 478, 79 N. Y. Suppl. 811, 12 N. Y. Annot. Cas. 333 (eating and drinking to show injury); Willett *v.* People, 27 Hun 469; Hunt *v.* Lawless, 7 Abb. N. Cas. 113 (superimposing one signature on another).

Oregon.— Leonard *v.* Southern Pac. Co., 21 Oreg. 555, 28 Pac. 887, 15 L. R. A. 221.

United States.— Burr *v.* Duryee, 1 Wall. 531, 579, 17 L. ed. 650, 660, 661 (hat making); Osborne *v.* Detroit, 32 Fed. 36 (thrusting pin in side said to be paralyzed).

See 20 Cent. Dig. tit. "Evidence," § 683. See also Criminal Law, 12 Cyc. 521; and generally, Trial.

12. Schweinfurth *v.* Cleveland, etc., R. Co., 60 Ohio St. 215, 54 N. E. 89, running train over crossing. And see, generally, as to experiments out of court, Trial.

13. As to the weight of such evidence see *infra*, XVII.

14. Hatfield *v.* St. Paul, etc., R. Co., 33 Minn. 130, 22 N. W. 176, 53 Am. Rep. 14; Huff *v.* Nims, 11 Nebr. 363, 9 N. W. 548. But the power has been doubted. Gulf, etc., R. Co. *v.* Butcher, 83 Tex. 309, 18 S. W. 583. See also, generally, Trial.

15. Brown *v.* Foster, 113 Mass. 136, 18 Am. Rep. 463.

16. Tudor Iron Works *v.* Weber, 31 Ill. App. 306 [*affirmed* in 129 Ill. 535, 21 N. E. 107].

17. Ort *v.* Fowlre, 31 Kan. 478, 2 Pac. 580, 47 Am. Rep. 501.

18. *Alabama.*— Williams *v.* State, 98 Ala. 52, 13 So. 333.

Massachusetts.— Com. *v.* Emmons, 98 Mass. 6.

Michigan.— People *v.* Elco, 131 Mich. 519, 91 N. W. 755, 94 N. W. 1069.

New York.— People *v.* Meade, 10 N. Y. Suppl. 943, by statute.

North Carolina.—State *v.* Arnold, 35 N. C. 184.

Pennsylvania.— Snodgrass *v.* Bradley, 2 Grant 43.

Wisconsin.— Hermann *v.* State, 73 Wis. 248, 41 N. W. 171, 9 Am. St. Rep. 789.

color,[19] credibility,[20] intelligence,[21] identity,[22] race,[23] sex,[24] and according to many authorities the relationship of father and child,[25] of those present in court; and may determine from such observation whether a given person would have been likely to have learned the same facts in the same way.[26] Whether the court may properly compel defendant in a criminal case to exhibit a portion of his body to the jury seems to be unsettled.[27] In a civil[28] or criminal[29] case different parts of the body of a deceased or injured[30] person may be placed before the jury.

2. Exhibition of Injuries. In an action for damages resulting from personal injuries alleged to have been caused by defendant's act or negligence plaintiff may exhibit for the inspection of the jury an injured arm,[31] eye-socket,[32] foot,[33]

See 20 Cent. Dig. tit. "Evidence," § 676.

Sale of liquor to minor.— On the contrary it has been held that on an indictment for selling liquor to a minor the jury cannot judge of the alleged minor's age by inspection. Ihinger *v.* State, 53 Ind. 251. To the same effect see Robinius *v.* State, 63 Ind. 235; Stephenson *v.* State, 28 Ind. 272; McGuire *v.* State, (Tex. App. 1891) 15 S. W. 917.

19. Garvin *v.* State, 52 Miss. 207; Warlick *v.* White, 76 N. C. 175.

20. Heenan *v.* Howard, 81 Ill. App. 629; Walls *v.* Ducharme, 162 Mass. 432, 38 N. E. 1114; Com. *v.* Buccieri, 153 Pa. St. 535, 26 Atl. 228. See also, generally, Witnesses.

Bias or disinterestedness of a witness may be inferred from his demeanor on the witness stand. Mitchell *v.* State, 110 Ga. 272, 34 S. E. 576.

21. The court can judge of the intelligence of a witness of tender years examined on *voir dire*.

Louisiana.— State *v.* Richie, 28 La. Ann. 327, 26 Am. Rep. 100.

Massachusetts.— Com. *v.* Robinson, 165 Mass. 426, 43 N. E. 121.

Texas.— Davidson *v.* State, 39 Tex. 129.

West Virginia.— State *v.* Michael, 37 W. Va. 565, 16 S. E. 803, 19 L. R. A. 605.

Wisconsin.— State *v.* Juneau, 88 Wis. 180, 59 N. W. 580, 43 Am. St. Rep. 877, 24 L. R. A. 857.

United States.—Wheeler *v.* U. S., 159 U. S. 523, 16 S. Ct. 93, 40 L. ed. 244.

So in weighing testimony the trier of facts may take into consideration the intelligence or stupidity of a witness as it appeared when he was testifying. See, generally, Witnesses.

22. Williams' Case, 29 Fed. Cas. No. 17,709, Crabbe 243.

23. Jones *v.* Jones, 45 Md. 144; Garvin *v.* State, 52 Miss. 207; Almshouse Com'rs *v.* Whistelo, 3 Wheel. Cr. (N. Y.) 194; Warlick *v.* White, 76 N. C. 175.

24. Hermann *v.* State, 73 Wis. 248, 41 N. W. 171, 9 Am. St. Rep. 789.

25. As to evidence of paternity by resemblance see State *v.* Horton, 100 N. C. 443, 6 S. E. 238, 6 Am. St. Rep. 613, indictment for seduction. See also Bastards, 5 Cyc. 663.

26. Hermann *v.* State, 73 Wis. 248, 41 N. W. 171, 9 Am. St. Rep. 789, age.

27. See Criminal Law, 12 Cyc. 401. Accused may be compelled to remove his feet from under a chair so that a witness may look at them. State *v.* Prudhomme, 25 La. Ann. 522.

28. Grangers' L. Ins. Co. *v.* Brown, 57 Miss. 308, 34 Am. Rep. 446.

29. *Arkansas.*— Maclin *v.* State, 44 Ark. 115, injured bones.

Indiana.— Thrawley *v.* State, 153 Ind. 375, 55 N. E. 95, skull.

Iowa.— State *v.* Novak, 109 Iowa 717, 79 N. W. 465, skull.

Massachusetts.— Com. *v.* Brown, 121 Mass. 69 (bones); Com. *v.* Brown, 14 Gray 419 (soft parts of body in alcohol); Com. *v.* Webster, 5 Cush. 295, 52 Am. Dec. 711 (teeth, etc.).

Missouri.— State *v.* Wieners, 66 Mo. 13, backbone.

Nebraska.— Savary *v.* State, 62 Nebr. 166, 87 N. W. 34.

New York.— Gardiner *v.* People, 6 Park. Cr. 155, skull.

Tennessee.— Turner *v.* State, 89 Tenn. 547, 15 S. W. 838, ribs and vertebræ.

30. Seltser *v.* Saxton, 71 Ill. App. 229 (eye); Orschelu *v.* Scott, 90 Mo. App. 352 (eye socket).

31. *Illinois.*— Lanark *v.* Dougherty, 153 Ill. 163, 38 N. E. 892.

Kentucky.— Newport News, etc., R. Co. *v.* Carroll, 31 S. W. 132, 17 Ky. L. Rep. 374.

Minnesota.— Hatfield *v.* St. Paul, etc., R. Co., 33 Minn. 130, 22 N. W. 176, 53 Am. Rep. 14.

New York.— Mulhado *v.* Brooklyn City R. Co., 30 N. Y. 370.

West Virginia.— Carrico *v.* West Virginia Cent., etc., R. Co., 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50.

See 20 Cent. Dig. tit. "Evidence," § 677.

An expert may examine the injured member in the presence of the jury at the instance of plaintiff. Lanark *v.* Dougherty, 153 Ill. 163, 38 N. E. 892. But see Aspy *v.* Botkins, 160 Ind. 170, 66 N. E. 462.

32. Orscheln *v.* Scott, 90 Mo. App. 352.

33. Louisville, etc., R. Co. *v.* Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197; Edwards *v.* Three Rivers, 96 Mich. 625, 55 N. W. 1003; Nebonne *v.* Concord R. Co., 68 N. H. 296, 44 Atl. 521; Texas Midland R. Co. *v.* Brown, (Tex. Civ. App. 1900) 58 S. W. 44.

Irrelevant fact.— A witness other than plaintiff cannot exhibit his own injured ankle to throw light on the injury to plaintiff's leg. Grand Lodge B. of R. T. *v.* Randolph, 186 Ill. 89, 57 N. E. 882.

hand,[34] leg,[35] or other parts of the body,[36] it being first shown that the injuries have resulted from the cause alleged.[37]

XIV. DOCUMENTARY EVIDENCE.[38] *

A. Public Records and Documents — 1. In General. Public records and documents are provable by the original records or documents themselves, or by duly authenticated copies thereof, and as a general rule when a copy of a record is competent, the original, if it can be produced, is equally competent.[39] The

34. Indiana Car Co. *v.* Parker, 100 Ind. 181; People *v.* Kelly, 94 N. Y. 526.

35. *Illinois.*— West Chicago St. R. Co. *v.* Grenell, 90 Ill. App. 30; Swift *v.* O'Neill, 88 Ill. App. 162; Jefferson Ice Co. *v.* Zwicokoski, 78 Ill. App. 646; Lanark *v.* Dougherty, 45 Ill. App. 266.

Kansas.— Topeka *v.* Bradshaw, (App. 1897) 48 Pac. 751.

Michigan.— Langworthy *v.* Green Tp., 95 Mich. 93, 54 N. W. 697.

Missouri.— Haynes *v.* Trenton, 123 Mo. 326, 27 S. W. 622.

New York.— Mulhado *v.* Brooklyn City R. Co., 30 N. Y. 370; Hiller *v.* Sharon Springs, 28 Hun 344; Jordan *v.* Bowen, 46 N. Y. Super. Ct. 355; Looram *v.* Second Ave. R. Co., 11 N. Y. St. 652.

Utah.— Cunningham *v.* Union Pac. R. Co., 4 Utah 206, 7 Pac. 795.

See 20 Cent. Dig. tit. "Evidence," § 677.

An expert may examine the alleged injury, on behalf of defendant, when the limb is submitted to the jury. Haynes *v.* Trenton, 123 Mo. 326, 27 S. W. 622; Cole *v.* Fall Brook Coal Co., 87 Hun (N. Y.) 584, 34 N. Y. Suppl. 572. But see Aspy *v.* Botkins, 160 Ind. 170, 66 N. E. 462, where the court, in an action for malpractice in setting a woman's knee, declined to allow a physician, as a witness, to examine the knee in the presence of the jury.

Plaintiff cannot be compelled, by order of court, to submit to an examination by experts in the presence of the jury. Mills *v.* Wilmington City R. Co., 1 Marv. (Del.) 269, 40 Atl. 1114. See, generally, as to physical examination of parties before trial DISCOVERY, 14 Cyc. 364 *et seq.*

36. *Alabama.*— McDonald *v.* Montgomery St. R. Co., 110 Ala. 161, 20 So. 317.

Illinois.— Chicago, etc., R. Co. *v.* Clausen, 173 Ill. 100, 50 N. E. 680 (rupture); Lanark *v.* Dougherty, 153 Ill. 163, 38 N. E. 892; Jefferson Ice Co. *v.* Zwicokoski, 78 Ill. App. 646.

Indiana.— Citizens' St. R. Co. *v.* Willoeby, 134 Ind. 563, 33 N. E. 627 (hip and spine); Louisville, etc., R. Co. *v.* Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197; Indiana Car Co. *v.* Parker, 100 Ind. 181; Freeman *v.* Hutchinson, 15 Ind. App. 639, 43 N. E. 16 (thumb).

Iowa.— Barker *v.* Perry, 67 Iowa 146, 25 N. W. 100.

Michigan.— Graves *v.* Battle Creek, 95 Mich. 266, 54 N. W. 757, 35 Am. St. Rep. 561, 19 L. R. A. 641. But see Hanselman *v.* Carstens, 60 Mich. 187, 27 N. W. 18.

New York.— Perry *v.* Metropolitan St. R. Co., 68 N. Y. App. Div. 351, 74 N. Y. Suppl. 1; McNaier *v.* Manhattan R. Co., 4 N. Y. Suppl. 310, wound.

Tennessee.— Arkansas River Packet Co. *v.* Hobbs, 105 Tenn. 29, 58 S. W. 278, knee.

Canada.— Sornberger *v.* Canadian Pac. R. Co., 24 Ont. App. 263.

See 20 Cent. Dig. tit. "Evidence," § 677.

Any abuse of privilege of exhibiting injuries, as where an injured child is shown to the jury while crying in terror, may be corrected by the grant of a new trial. Butez *v.* Fonda, etc., R. Co., 20 Misc. (N. Y.) 123, 45 N. Y. Suppl. 808.

Indecent exhibition.— Exposure of organs of generation is not permissible. "If the condition of any private part of the body of any party, male or female, is material on any trial, it should be privately examined by experts out of court, and expert testimony be given of it." Brown *v.* Swineford, 44 Wis. 282, 285, 28 Am. Rep. 582, per Ryan, C. J.

37. French *v.* Wilkinson, 93 Mich. 322, 53 N. W. 530.

38. **Definition.**— Documentary evidence has been defined as: "That which teaches authoritatively, sets forth or establishes; anything furnishing proof or evidence; especially, an original or official paper relied upon as the basis, proof, or support of anything else." Webster Dict. [*quoted* in Patterson *v.* Churchman, 122 Ind. 379, 387, 22 N. E. 662, 23 N. E. 1082].

"In the law of evidence, documents are either public or private. A public document is one recording facts which may have been inquired into or taken notice of for the benefit of the public by an agent authorized and accredited for the purpose. Such are acts of parliament, judgments and proceedings of courts, records generally, registers of births, deaths and marriages, and other registers. . . . Private documents include deeds, wills, agreements, and the like." Sweet L. Dict. [*quoted* in Patterson *v.* Churchman, 122 Ind. 379, 387, 22 N. E. 662, 23 N. E. 1082].

Documentary evidence is held to include "books, papers, accounts and the like." *In re* Shepard, 3 Fed. 12, 13, 18 Blatchf. 225 [*quoted* in Arnold *v.* Pawtuxet Valley Water Co., 18 R. I. 189, 192, 26 Atl. 55, 19 L. R. A. 602].

39. *Alabama.*— Stevenson *v.* Moody, 85 Ala. 33, 4 So. 595 [*overruling* 83 Ala. 418, 3 So.

* By A. S. H. Bristow. Revised and edited by Charles C. Moore and Wm. Lawrence Clark.

fact that the removal of the original records was improper has been held not to affect the competency of the evidence.[40]

2. State Papers. Government gazettes, registers, and state papers generally are admissible as evidence of the proclamations issued by the executive and of all acts of government or matters of state therein contained,[41] but they are not admissible to prove facts of a private nature.[42] The American State Papers, published by order of congress, and the copies which they contain of legislative and executive documents, are, if they contain the authentication required by the act, admissible in evidence without further proof.[43] So a volume of public documents, printed by authority of the senate of the United States, containing letters to and from various officers of state, communicated by the president to the senate, are as competent evidence as the original documents themselves.[44]

695]; Carwile *v.* House, 6 Ala. 710; Lawson *v.* Orear, 4 Ala. 156.

Connecticut.— Gray *v.* Davis, 27 Conn. 447.

Georgia.— Dobbs *v.* Justices Baker County Inferior Ct., 17 Ga. 624.

Indiana.— Anderson *v.* Ackerman, 88 Ind. 481; Iles *v.* Watson, 76 Ind. 359; Britton *v.* State, 54 Ind. 535; James *v.* Greensboro, etc., Turnpike Co., 47 Ind. 379; Wiseman *v.* Risinger, 14 Ind. 461; McFadden *v.* Ferris, 6 Ind. App. 454, 32 N. E. 107.

Kansas.— Reed *v.* Arnold, 10 Kan. 102.

Maine.— Folsom *v.* Cressey, 73 Me. 270; Vose *v.* Manly, 19 Me. 331.

Missouri.— Moore *v.* H. Gaus, etc., Mfg. Co., 113 Mo. 98, 20 S. W. 975.

New Hampshire.— Cate *v.* Nutter, 24 N. H. 108.

New York.— People *v.* Gray, 25 Wend. 465; Denning *v.* Roome, 6 Wend. 651.

North Carolina.— Carolina Iron Co. *v.* Abernathy, 94 N. C. 545; State *v.* Voight, 90 N. C. 741; Short *v.* Currie, 53 N. C. 42.

Ohio.— Sheehan *v.* Davis, 17 Ohio St. 571; King *v.* Kenny, 4 Ohio 79.

Pennsylvania.— Miller *v.* Hale, 26 Pa. St. 432; Lewis *v.* Bradford, 10 Watts 67; Boggs *v.* Miles, 8 Serg. & R. 407; White *v.* Fitler, 2 Pa. L. J. 302.

Texas.— Rainey *v.* State, 20 Tex. App. 455; Ballinger Nat. Bank *v.* Bryan, 12 Tex. Civ. App. 673, 34 S. W. 451; Gray *v.* State, 19 Tex. Civ. App. 521, 49 S. W. 699.

Wisconsin.— Weisbrod *v.* Chicago, etc., R. Co., 21 Wis. 509.

United States.— Buckley *v.* U. S., 4 How. 251, 11 L. ed. 961; Bruce *v.* Manchester, etc., R. Co., 19 Fed. 342.

See 20 Cent. Dig. tit. "Evidence," § 1284 *et seq.*

This rule has been applied to a charter of pardon under the great seal of state (State *v.* Blaisdell, 33 N. H. 388), to notarial acts (Priou *v.* Adams, 5 Mart. N. S. (La.) 691; Baudin *v.* Pollock, 4 Mart. (La.) 613), or to records of town and municipal proceedings (Green *v.* Indianapolis, 25 Ind. 490; Jay *v.* Carthage, 48 Me. 353).

Part original and part exemplification admitted.— Elliott *v.* Trumbull, 1 Phila. (Pa.) 18.

Where document has not been recorded.— In Randall *v.* Preston, 52 Vt. 198, it was held that the original report of the commissioners to adjust claims against an estate is the best evidence, until such report is recorded, and is not objectionable on the ground that a certified copy should have been produced.

40. Priou *v.* Adams, 5 Mart. N. S. (La.) 691; Baudin *v.* Pollock, 4 Mart. (La.) 613, both holding that original notarial acts could not be rejected because the notary should have given copies instead of parting with the originals. See also *infra*, XIV, A, 4, a.

41. Lurton *v.* Gilliam, 2 Ill. 377, 33 Am. Dec. 430; Milford *v.* Greenbush, 77 Me. 330; Radcliff *v.* United Ins. Co., 7 Johns. (N. Y.) 38; Atty.-Gen. *v.* Theakstone, 8 Price 89, 22 Rev. Rep. 716; Rex *v.* Holt, 5 T. R. 436. See also Worcester *v.* Northborough, 140 Mass. 397, 5 N. E. 270. *Compare*, however, Kirwan *v.* Cockburn, 5 Esp. 233, and Rex *v.* Gardner, 2 Campb. 513, 11 Rev. Rep. 784, where a government gazette was held not to be evidence of the appointment of an officer to a commission in the army on the ground that the commission itself was the best evidence of such appointment.

Records and official papers of the Confederate government have been held admissible. Oakes *v.* U. S., 174 U. S. 778, 19 S. Ct. 864, 43 L. ed. 1169 [*affirming* 30 Ct. Cl. 378]. See also Schaben *v.* U. S., 6 Ct. Cl. 230.

Proclamation of secretary of state issued in accordance with act of congress admitted.— Whiton *v.* Albany City Ins. Co., 109 Mass. 24.

The Compendium of the Tenth Census, printed by the authority of congress, is evidence to show the population of a town in 1880. Fulham *v.* Howe, 60 Vt. 351, 14 Atl. 652. See also Lycett *v.* Wolff, 45 Mo. App. 489.

42. Del Hoyo *v.* Brundred, 20 N. J. L. 328. See also Rex *v.* Holt, 5 T. R. 436.

43. Doe *v.* Roe, 13 Fla. 602; Clemens *v.* Meyer, 44 La. Ann. 390, 10 So. 797; Dutillet *v.* Blanchard, 14 La. Ann. 97; Nixon *v.* Porter, 34 Miss. 697, 69 Am. Dec. 408; Gregg *v.* Forsyth, 24 How. (U. S.) 179, 16 L. ed. 731; Bryan *v.* Forsyth, 19 How. (U. S.) 334, 15 L. ed. 674; Watkins *v.* Holman, 16 Pet. (U. S.) 25, 10 L. ed. 873.

44. Whiton *v.* Albany City R. Co., 109 Mass. 24. See also Milford *v.* Greenbush, 77 Me. 330.

3. Laws — a. In General. A full treatment of the admissibility of documentary evidence in proof of statutes domestic and foreign, will be found elsewhere in this work.[45]

b. Ordinances. Books or pamphlets purporting to contain the ordinances of a city and to be published by municipal authority are frequently made *prima facie* evidence of such ordinances by charter or the general law; and they have been held admissible even in the absence of express provision, and even where a different method of proof is allowed by statute or ordinance.[46] It has been held, however, that there must be some declaration in or on, and as part of, a book or pamphlet, that its publication is by reason of some competent authority, to bring it within this rule.[47] So, even when they are not expressly made evidence by statute, the official books or records of a municipal corporation are admissible in evidence to prove its ordinances and their adoption, where they are required or authorized to be kept by law and where they are produced from the proper repository.[48] Provision is frequently made by statute for proving a municipal

45. See, generally, STATUTES.

46. *Alabama.*— Birmingham *v.* Tayloe, 105 Ala. 170, 16 So. 576, where the city charter provided a different method of proof.

Delaware.— McCaffrey *v.* Thomas, (1903) 56 Atl. 382.

District of Columbia.— District of Columbia *v.* Johnson, 1 Mackey 51.

Illinois.— Chicago, etc., R. Co. *v.* Beaver, 199 Ill. 34, 65 N. E. 144 [*affirming* 96 Ill. App. 558]; Byars *v.* Mt. Vernon, 77 Ill. 467; Block *v.* Jacksonville, 36 Ill. 301; Atchison, etc., R. Co. *v.* Cupello, 61 Ill. App. 432; Wapella *v.* Davis, 39 Ill. App. 592; Bethalto *v.* Conley, 9 Ill. App. 339. See also Ewbanks *v.* Ashley, 36 Ill. 177; McGregor *v.* Lovington, 48 Ill. App. 208.

Iowa.— See Larkin *v.* Burlington, etc., R. Co., 85 Iowa 492, 52 N. W. 480.

Massachusetts.— See Boston *v.* Coon, 175 Mass. 283, 56 N. E. 287.

Michigan.— Napman *v.* People, 19 Mich. 352.

Minnesota.—Holly *v.* Bennett, 46 Minn. 386, 49 N. W. 189.

Missouri.— Campbell *v.* St. Louis, etc., R. Co., 175 Mo. 161, 75 S. W. 86; Tarkio *v.* Cook, 120 Mo. 1, 25 S. W. 202, 41 Am. St. Rep. 678.

New York.— Logue *v.* Gillick, 1 E. D. Smith 398.

Texas.— Missouri, etc., R. Co. *v.* Owens, (Civ. App. 1903) 75 S. W. 579; San Antonio, etc., R. Co. *v.* Gray, (Civ. App. 1901) 66 S. W. 229; Galveston, etc., R. Co. *v.* Washington, 25 Tex. Civ. App. 600, 63 S. W. 538 [*affirmed* in (Sup. 1901) 63 S. W. 534]. See also Gulf, etc., R. Co. *v.* Holt, 3 Tex. Civ. App. 330, 70 S. W. 591; *Ex p.* Canto, 21 Tex. App. 61, 17 S. W. 155, 57 Am. Rep. 609.

See 20 Cent. Dig. tit. "Evidence," § 1234; 36 Cent. Dig. tit. "Municipal Corporations," §§ 287, 288.

Seal or attestation unnecessary.— St. Louis *v.* Foster, 52 Mo. 513.

47. Quint *v.* Merrill, 105 Wis. 406, 81 N. W. 664. See also Wapella *v.* Davis, 39 Ill. App. 592; Raker *v.* Magnon, 9 Ill. App. 155.

48. *Alabama.*— Selma St., etc., R. Co. *v.* Owen, 132 Ala. 420, 31 So. 598; Barnes *v.* Alexander City, 89 Ala. 602.

California.— See Merced County *v.* Fleming, 111 Cal. 46, 43 Pac. 392.

Colorado.— Greeley *v.* Hamman, 17 Colo. 30, 28 Pac. 460.

Georgia.— Metropolitan St. R. Co. *v.* Johnson, 90 Ga. 500, 16 S. E. 49.

Illinois.— Boyer *v.* Yates, 47 Ill. App. 115.

Kansas.— Independence *v.* Trouvalle, 15 Kan. 70.

Missouri.— Jackson *v.* Kansas City, etc., R. Co., 157 Mo. 621, 58 S. W. 32, 80 Am. St. Rep. 650; Stewart *v.* Clinton, 79 Mo. 603; Tipton *v.* Norman, 72 Mo. 380; Rockville *v.* Merchant, 60 Mo. App. 365. See also Eichenland *v.* St. Joseph, 113 Mo. 395, 21 S. W. 8, 18 L. R. A. 590; Clarence *v.* Patrick, 54 Mo. App. 462; Billings *v.* Dunnaway, 54 Mo. App. 1.

Ohio.— Toledo Consol. St. R. Co. *v.* Toledo Electric St. R. Co., 6 Ohio Cir. Ct. 362, 3 Ohio Cir. Dec. 493.

Tennessee.— Rutherford *v.* Swink, 90 Tenn. 152, 16 S. W. 76.

See 20 Cent. Dig. tit. "Evidence," § 1234; 36 Cent. Dig. tit. "Municipal Corporations," §§ 287, 288.

Original ordinances kept on file by the register and certified copies thereof were held admissible where the city provided no book for the record of ordinances, and the register simply placed them on file in his office. Troy *v.* Atchison, etc., R. Co., 11 Kan. 519.

Proof of publication of ordinance necessary. — Larkin *v.* Burlington, etc., R. Co., 85 Iowa 492, 52 N. W. 480.

Admissibility of part of ordinance.— In State *v.* Schmidt, 41 La. Ann. 27, 6 So. 530, it was held that an ordinance making a certain map or plan a part of it by referring to it as a plan on file in the office of one of the city departments, but not stating that it was physically incorporated into the ordinance, may be admitted in evidence separately from the plan.

The minutes of the common council kept by the clerk are competent evidence to prove the adoption of ordinances. Kennedy *v.* Newman, 1 Sandf. (N. Y.) 187.

ordinance by a copy of the ordinance certified by the proper city official under the corporation seal.[49]

4. Judicial Records and Proceedings — a. In General. It may be stated as a general rule that whenever it is competent for judicial proceedings to be given in evidence in a subsequent cause or proceeding, the record of those proceedings duly authenticated is legitimate and proper evidence.[50] The contents of a judicial record may be proved in the same court in which the record is entered by the original record itself.[51] So an original judicial record properly verified

49. *Florida.*— Florida Cent., etc., R. Co. *v.* Seymour, 44 Fla. 557, 33 So. 424.

Illinois.— Lindsay *v.* Chicago, 115 Ill. 120, 3 N. E. 443; Boyd *v.* Chicago, etc., R. Co., 103 Ill. App. 199; Chicago *v.* English, 80 Ill. App. 163. See also McChesney *v.* Chicago, 159 Ill. 223, 42 N. E. 894; Terre Haute, etc., R. Co. *v.* Voelker, 129 Ill. 540, 22 N. E. 20 [*affirming* 31 Ill. App. 314]; Chamberlain *v.* Litchfield, 56 Ill. App. 652.

Iowa.— See Bayard *v.* Baker, 76 Iowa 220, 40 N. W. 818.

Missouri.— St. Louis *v.* Foster, 52 Mo. 513.

New York.—Logue *v.* Gillick, 1 E. D. Smith 398.

United States.— Cleveland, etc., R. Co. *v.* Tartt, 64 Fed. 823, 12 C. C. A. 618.

See 20 Cent. Dig. tit. "Evidence," § 1234; 36 Cent. Dig. tit. "Municipal Corporations," §§ 287, 288.

Corporate seal held necessary.— Georgia Cent. R. Co. *v.* Bond, 111 Ga. 13, 36 S. E. 299.

Verification of signature of attesting officer.— In Com. *v.* Chase, 6 Cush. (Mass.) 248, it was held that on the trial of an information for the violation of a city ordinance, a copy of the ordinance duly attested by the city clerk was competent evidence without any special verification of the genuineness of his signature.

Explanation of alteration of certified copy of ordinance see Sargent *v.* Evanston, 154 Ill. 268, 40 N. E. 440.

50. *Alabama.*— Driver *v.* Spence, 1 Ala. 540. See also Edmondson *v.* Ledbetter, 114 Ala. 477, 21 So. 989.

Colorado.— Venner *v.* Denver Union Water Co., 15 Colo. App. 495, 63 Pac. 1061.

Illinois.— Bannister *v.* Read, 6 Ill. 92.

Kentucky.— Farley *v.* Lewis, 102 Ky. 234, 44 S. W. 114, 19 Ky. L. Rep. 1255.

Louisiana.— Smith *v.* Lambeth, 15 La. Ann. 566.

Massachusetts.—Bartlett *v.* Decreet, 4 Gray 111.

Mississippi.— Payne *v.* Stovall, 67 Miss. 514, 7 So. 502; State Co-operative L. Assoc. *v.* Leflore, 53 Miss. 1.

Missouri.— Beardslee *v.* Steinmesch, 38 Mo. 168; Dingee *v.* Kearney, 2 Mo. App. 515.

Montana.— Johnson *v.* Puritan Min. Co., 19 Mont. 30, 47 Pac. 337.

New York.— Ward *v.* Sire, 52 N. Y. App. Div. 443, 65 N. Y. Suppl. 101. See also Van Rensselaer *v.* Akin, 22 Wend. 549.

North Carolina.— Lindsay *v.* Beaman, 128 N. C. 189, 38 S. E. 811; Rawls *v.* Deans, 11 N. C. 298.

Pennsylvania.— Mellick *v.* Pennsylvania R. Co., 17 Pa. Super. Ct. 12.

Tennessee.—Bryan *v.* Glass, 2 Humphr. 390.

Texas.— Lee *v.* Wharton, 11 Tex. 61; Hyde *v.* Baker, 26 Tex. Civ. App. 287, 62 S. W. 962.

Wisconsin.— Durr *v.* Wildish, 108 Wis. 401, 84 N. W. 437; Eastman *v.* Harteau, 12 Wis. 267.

United States.— Campbell *v.* Rankin, 99 U. S. 261, 25 L. ed. 435.

See 20 Cent. Dig. tit. "Evidence," § 1237 *et seq.*

Effect of dismissal of cause.— It has been held that the mere fact that a cause has been dismissed does not remove the papers from the record and they are admissible as though there had been a trial upon the complaint. Woods *v.* Kessler, 93 Ind. 356. See also Burks *v.* Watson, 48 Tex. 107; Lyster *v.* Stickney, 12 Fed. 609, 4 McCrary 109.

51. *California.*— Clink *v.* Thurston, 47 Cal. 21.

Georgia.— Peck *v.* Land, 2 Ga. 1, 46 Am. Dec. 368.

Maine.— Sawyer *v.* Garcelon, 63 Me. 25.

Maryland.— State *v.* Logan, 33 Md. 1.

Pennsylvania.— Garrigues *v.* Harris, 17 Pa. St. 344.

Tennessee.— Nichol *v.* Ridley, 5 Yerg. 63, 26 Am. Dec. 254.

Texas.— Wallis *v.* Beauchamp, 15 Tex. 303.

Canada.— Paterson *v.* Todd, 24 U. C. Q. B. 296.

See 20 Cent. Dig. tit. "Evidence," §§ 1237 *et seq.*, 1285.

Record of suit transferred to another court. — In Geer *v.* Geer, 109 N. C. 679, 14 S. E. 297, it was held that where a suit instituted in the old court of equity was transferred to the superior court, the original records thereof were admissible in evidence in an action in the superior court, a transcript thereof being unnecessary.

Failure to record in book in compliance with statute.— The original records of a court have been held proper evidence in the court to which they belong, although it does not appear that the proceedings have been recorded in a well bound book kept for that purpose, as required by statute, since the court is presumed in law to know its own acts. Ward *v.* Saunders, 28 N. C. 382. So it has been held that the original report of a judicial sale is admissible in evidence without proof of its identity by an entry in the order book, as such report, found among the papers in the case, and purporting to be the

will, if it can be produced, be admissible in any court, although a certified copy might also be admissible,[52] and although it was improper to remove the records from the office of the custodian.[53] But a judicial record is not admissible where it has no tendency to prove any issue made by the pleadings.[54]

b. Records of Courts of Probate. The records of courts of probate upon all matters within their jurisdiction and required to be recorded are evidence of matters to which they relate, as in the case of other courts of record.[55]

original report, is *prima facie* genuine. Hammann *v.* Mink, 99 Ind. 279.

52. *Alabama.*— Davidson *v.* State, 68 Ala. 356. See also King *v.* Martin, 67 Ala. 177.

California.— See Rogers *v.* Riverside Land, etc., Co., 132 Cal. 9, 64 Pac. 95; Sharp *v.* Lumley, 34 Cal. 611.

Colorado.— McAllister *v.* People, 28 Colo. 156, 63 Pac. 308.

Connecticut.— Gray *v.* Davis, 27 Conn. 447.

Illinois.— Stevison *v.* Earnest, 80 Ill. 513.

Indiana.— Iles *v.* Watson, 76 Ind. 359; Britton *v.* State, 54 Ind. 535.

Massachusetts.— Greene *v.* Durfee, 6 Cush. 362; Odiorne *v.* Bacon, 6 Cush. 185.

Minnesota.— See Smith *v.* Valentine, 19 Minn. 452.

Mississippi.— See Lipscomb *v.* Postell, 38 Miss. 476, 77 Am. Dec. 651.

Montana.— See Johnson *v.* Puritan Min Co., 19 Mont. 30, 47 Pac. 337.

North Carolina.— State *v.* Hunter, 94 N. C. 829.

Ohio.— Morgan *v.* Burnett, 18 Ohio 535; Osborn *v.* State, 7 Ohio 212.

Pennsylvania.— Garrigues *v.* Harris, 17 Pa. St. 344. *Compare* White *v.* Fitler, 2 Pa. L. J. 302.

South Carolina.— See Stevelie *v.* Lowry, 2 Brev. 135.

Texas.— Houze *v.* Houze, 16 Tex. 598.

Vermont.— Paul *v.* Slason, 22 Vt. 231, 54 Am. Dec. 75; Allis *v.* Beadle, 1 Tyler 179.

Virginia.— Ballard *v.* Thomas, 19 Gratt. 14.

United States.— Bradley Timber Co. *v.* White, 121 Fed. 779, 58 C. C. A. 55.

Canada.— Sloan *v.* Whalen, 15 U. C. C. P. 319; Paterson *v.* Todd, 24 U. C. Q. B. 296.

Compare Goldsmith *v.* Kilbourn, 46 Md. 289; Jones *v.* Jones, 45 Md. 144; State *v.* Logan, 33 Md. 1.

See 20 Cent. Dig. tit. "Evidence," § 1237 *et seq.*

Rule applied to record of court-martial proceedings.— Vose *v.* Manly, 19 Me. 331; Brooks *v.* Daniels, 22 Pick. (Mass.) 498.

Original record admitted by agreement of counsel.— Hopkins *v.* State, 53 Md. 502; Oglesby *v.* Forman, 77 Tex. 647, 14 S. W. 244.

Contrary rule in Georgia.— In Georgia the rule is that the original records of one court cannot lawfully be withdrawn therefrom and introduced in evidence in another court and that the only method prescribed by law for the introduction of such evidence is by the production of duly authenticated copies. Cramer *v.* Truitt, 113 Ga. 967, 39 S. E. 459 [*distinguishing* Rogers *v.* Tillman, 72 Ga. 479]; Ellis *v.* Mills, 99 Ga. 490, 27 S. E. 740; Bowden *v.* Taylor, 81 Ga. 199, 6 S. E. 277; Bigham *v.* Coleman, 71 Ga. 176.

53. People *v.* Alden, 113 Cal. 264, 45 Pac. 327; Stevison *v.* Earnest, 80 Ill. 513; McFadden *v.* Ferris, 6 Ind. App. 454, 32 N. E. 107; Brooks *v.* Daniels, 22 Pick. (Mass.) 498. See also *supra*, XIV, A, 1.

54. Erwin *v.* Kentucky Bank, 5 La. Ann. 1; Bumgarner *v.* Manney, 32 N. C. 121.

55. *Alabama.*— See Lalonette *v.* Lipscomb, 52 Ala. 570.

California.— Randolph *v.* Bayue, 44 Cal. 366.

Georgia.— Cox *v.* Cody, 75 Ga. 175.

Idaho.— Keenan *v.* Washington Liquor Co., 8 Ida. 383, 69 Pac. 112.

Illinois.— Cully *v.* People, 73 Ill. App. 501.

Indiana.— Worthington *v.* Dunkin, 41 Ind. 515; Morris *v.* Stewart, 14 Ind. 334.

Kansas.— Jordon *v.* Bevins, 10 Kan. App. 428, 61 Pac. 985.

Maryland.— Richards *v.* Swan, 7 Gill 366.

Minnesota.— Davis *v.* Hudson, 29 Minn. 27, 11 N. W. 136.

Mississippi.— Eckford *v.* Hogan, 44 Miss. 398; Laughman *v.* Thompson, 6 Sm. & M. 259.

Missouri.— Williams *v.* Mitchell, 112 Mo. 300, 20 S. W. 647.

New Hampshire.—Remick *v.* Butterfield, 31 N. H. 70, 64 Am. Dec. 316.

Texas.— Houze *v.* Houze, 16 Tex. 598.

United States.— Thomas *v.* Hatch, 23 Fed. Cas. No. 13,899, 3 Sumn. 170.

See 20 Cent. Dig. tit. "Evidence," § 1245.

Record without caption naming parties.— It has been held that a probate record is competent evidence to show an order by the probate court for the specific performance by an executor of a contract made by a testator for the conveyance of land, and that it is immaterial that such record contains no caption naming the parties, or reciting either the filing of a petition or notice to the executors. Williams *v.* Mitchell, 112 Mo. 300, 20 S. W. 647.

Record of probate proceedings in town-clerk's office required.— In Vermont it is held that probate proceedings, where the title of land comes in question, are required by statute to be recorded in the town-clerk's office, as well as in the probate office, and unless so recorded they are not admissible as evidence of title. Royce *v.* Hurd, 24 Vt. 620.

Appointment of administrator.— The appointment of an administrator may be shown by the original record without the production of the letters of administration or accounting for their non-production.

Georgia.— Roe *v.* Sellars, 46 Ga. 550.

Kansas.— Davis *v.* Turner, 21 Kan. 131.

c. Justices' Records. The records, dockets, or minutes of the proceedings in the courts of justices of the peace, if properly authenticated and proved, have frequently been held to be admissible;[56] and this, although authenticated copies thereof would also have been admissible.[57] Such evidence has been admitted whether the keeping of a justice's docket was required by statute[58] or not.[59] On the other hand it has been held that where the law requires a docket to be kept by a justice, it will be evidence of nothing not required or authorized to be entered thereon.[60]

Missouri.— State *v.* Price, 21 Mo. 434.

South Carolina.— Browning *v.* Huff, 2 Bailey 174.

Texas.— Outler *v.* Elam, 1 Tex. App. Civ. Cas. § 1003.

England.— Elden *v.* Keddell, 8 East 187.

Compare Denver *v.* Woodward, 4 Colo. 1.

56. *Colorado.*— Baur *v.* Beall, 14 Colo. 383, 23 Pac. 345.

Connecticut.— See Church *v.* Pearne, 75 Conn. 350, 53 Atl. 955.

Idaho.— Keenan *v.* Washington Liquor Co., 8 Ida. 383, 69 Pac. 112.

Illinois.— People *v.* Ham, 73 Ill. App. 533.

Iowa.— Plummer *v.* Harbut, 5 Iowa 308.

Massachusetts.— McGrath *v.* Seagrave, 2 Allen 443, 79 Am. Dec. 797.

New York.— Carshore *v.* Huyck, 6 Barb. 583; Pollock *v.* Haag, 4 E. D. Smith 473.

North Carolina.— State *v.* Voight, 90 N. C. 741.

Pennsylvania.— Knapp *v.* Miller, 133 Pa. St. 275, 19 Atl. 555; Dean *v.* Connelly, 6 Pa. St. 239; Dennison *v.* Otis, 2 Rawle 9. In Cope *v.* Risk, 21 Pa. St. 59, it was held that where a suit before a justice of the peace is terminated by any act or agreement of the parties, which amounts to a discontinuance of the action directly or indirectly, it is a part of the official duty of the justice to enter such act or agreement upon his docket and the docket entry is evidence of the same.

Texas.— Willis *v.* Nichols, 5 Tex. Civ. App. 154, 23 S. W. 1025.

Canada.— Kerby *v.* Elliot, 13 U. C. Q. B. 367.

See 20 Cent. Dig. tit. "Evidence," § 1243.

Justice's docket admissible under express statute in California.— Beardsley *v.* Frame, 85 Cal. 134, 24 Pac. 721.

Admissibility of minutes of justice in lieu of formal record.— In Strong *v.* Bradley, 13 Vt. 9, it was held that the files and minutes of proceedings in a justice's court, from which a record was to be made, were not proper evidence of the judgment where the justice was still alive, and there was no necessity for receiving any other than either the record of the judgment, or a certified copy thereof. To same effect see Nye *v.* Kellam, 18 Vt. 594. But where the justice had died without making a formal record the minutes were held admissible. Story *v.* Kimball, 6 Vt. 541. Under statute in Connecticut making the files and minutes of a deceased justice admissible in evidence in a suit on the judgment rendered by him, where he has neglected to make up the record, it has been held not to be necessary that the minutes shall be technically full and accurate, but that if they are full enough to show that a judgment was actually rendered, they are admissible. West *v.* Hayes, 51 Conn. 533.

57. *Indiana.*— Kennard *v.* Carter, 64 Ind. 31; Miller *v.* State, 61 Ind. 503.

Maine.— Folsom *v.* Cressey, 73 Me. 270; State *v.* Bartlett, 47 Me. 396.

Massachusetts.— Day *v.* Moore, 13 Gray 522.

Missouri.— State *v.* Chambers, 70 Mo. 625.

North Carolina.— See Lash *v.* Thomas, 86 N. C. 313.

58. Reed *v.* Whitton, 78 Ind. 579. See also Richardson *v.* Vice, 4 Blackf. (Ind.) 13.

Production of original papers held unnecessary.— In Indiana it is held that the docket of a justice of the peace is competent evidence, without the original papers, when properly identified by the oral testimony of the justice as a complete record. Redelsheimer *v.* Miller, 107 Ind. 485, 8 N. E. 447.

Effect of statute requiring filing of papers.—Under a statute requiring the justice to take minutes of the examination of a garnishee, and file the same with the other papers in the cause, it has been held that an entry on a justice's docket, instead of on a separate piece of paper to be filed in the cause, of the minutes of an examination of a garnishee defendant, would not be admissible to prove the examination, in the absence of any showing that it constitutes the original and only minutes of such examination, and especially not where it appears probable that other minutes were in fact taken and placed on the files. Watson *v.* Kane, 31 Mich. 61.

Judgment indorsed on summons.— Under Ga. Code, § 457, requiring a magistrate to keep a docket, and enter his judgment on it, and section 4143, requiring the officer serving a summons to return the original with an entry of service thereon to the justice, who shall file and preserve it with the other papers pertaining to his office, a summons from a justice's court, with the judgment in the case indorsed on it, is not admissible to prove the judgment. Ramsey *v.* Cole, 84 Ga. 147, 10 S. E. 598.

59. Chapman *v.* Dodd, 10 Minn. 350.

60. Brown *v.* Pearson, 8 Mo. 159; Perry *v.* Block, 1 Mo. 484; Armstrong *v.* State, 21 Ohio St. 357. This principle has been applied to docket entries relating to the issuance of executions to constables or other officers and returns thereon. People *v.* Hayes, 63 Ill. App. 427; Stinson *v.* State, 2 Ind. 434; Mahan *v.* Power, 6 Blackf. (Ind.) 445; Gott

d. Docket Entries, Original Papers, Etc. The rule has been laid down in some of the cases that docket entries or entries in a judgment book, which are merely minutes or memoranda of a judgment and the proceedings, are not admissible.[61] But where a formal record is not required to be kept by law, docket entries which are permitted as a substitute for a formal record are admissible in evidence.[62] Moreover the rule supported by numerous authorities is that until the record is fully extended the docket is the record and the files, minutes, and entries therein are admissible;[63] and this although a certified copy of the same is

v. Williams, 29 Mo. 461; Hunt *v.* Boylan, 6 N. J. L. 211.

Justice's minutes of testimony.— In the absence of a statute a justice's minutes of the testimony of a party in a case before him is not admissible for the purpose of proving such testimony, but it must be proved by the justice himself as a witness or by some other competent witness. Eggett *v.* Allen, 119 Wis. 625, 96 N. W. 803; Zitske *v.* Goldberg, 38 Wis. 216. See also EVIDENCE, 16 Cyc. 1103.

61. *Illinois.*— Steele *v.* Steele, 89 Ill. 51.

Minnesota.— State *v.* Baldwin, 62 Minn. 518, 65 N. W. 80; Brown *v.* Hathaway, 10 Minn. 303. But *compare* Williams *v.* McGrade, 13 Minn. 46, in which it was held that a formal permanent entry of judgment upon the judgment book is the original record, and therefore evidence of the judgment without the filing of the judgment-roll.

Mississippi.— Lehr *v.* Hall, 5 How. 54.

New York.—See Handly *v.* Greene, 15 Barb. 601; People *v.* Gray, 25 Wend. 465; Baker *v.* Kingsland, 10 Paige 366. *Compare* Haddow *v.* Lundy, 59 N. Y. 320.

United States.— Leveringe *v.* Dayton, 15 Fed. Cas. No. 8,288, 4 Wash. 698.

England.— Godefroy *v.* Jay, 1 M. & P. 603.

62. Com. *v.* Bolkom, 3 Pick. (Mass.) 281; Emery *v.* Whitwell, 6 Mich. 474; Lothrop *v.* Southworth, 5 Mich. 436; Prentiss *v.* Holbrook, 2 Mich. 372; Norvell *v.* McHenry, 1 Mich. 227; Crane *v.* Hardy, 1 Mich. 56; Philadelphia, etc., R. Co. *v.* Howard, 13 How. (U. S.) 305, 14 L. ed. 157; Reg. *v.* Yeoveley, 8 A. & E. 806, 8 L. J. M. C. 9, 1 P. & D. 60, 1 W. W. & H. 614, 35 E. C. L. 853; Arundell *v.* White, 14 East 216.

Minute-book of house of lords.— In Jones *v.* Randall, Cowp. 17, copies from the minute-book of the house of lords were admitted as evidence of a decree because it was not the practice to make a formal record.

63. *Alabama.*— Gay *v.* Rogers, 109 Ala. 624, 20 So. 37; Gandy *v.* State, 86 Ala. 20, 5 So. 420; Governor *v.* Bancroft, 16 Ala. 605.

Georgia.— See Gaskill *v.* State, 64 Ga. 562.

Louisiana.—See Choppin *v.* Michel, 11 Rob. 233.

Maine.— Davis *v.* Smith, 79 Me. 351, 10 Atl. 55; Jay *v.* East Livermore, 56 Me. 107; Chamberlain *v.* Sands, 27 Me. 458.

Maryland.— See Lerian *v.* Rohr, 66 Md. 95, 5 Atl. 867, where it was held that upon the trial of an issue of *nul tiel record* in the same court where the alleged record is kept, it is not necessary to produce a formal record of the alleged proceedings, and it is sufficient to have the docket entries and original entries laid before the court for its inspection.

Massachusetts.— Townsend *v.* Way, 5 Allen 426; Central Bridge Corp. *v.* Lowell, 15 Gray 106; Read *v.* Sutton, 2 Cush. 115; Pruden *v.* Alden, 23 Pick. 184, 34 Am. Dec. 51; Com. *v.* Bolkom, 3 Pick. 281.

Ohio.— Chapman *v.* Seely, 8 Ohio Cir. Ct. 179, 4 Ohio Cir. Dec. 395.

Texas.— Glenn *v.* Ashcroft, 2 Tex. Unrep. Cas. 447.

Vermont.— Lowry *v.* Cady, 4 Vt. 504, 24 Am. Dec. 628.

Wisconsin.— Jackson *v.* Astor, 1 Pinn. 137, 39 Am. Dec. 281. See also Eastman *v.* Harteau, 12 Wis. 267.

See 20 Cent. Dig. tit. "Evidence," § 1246.

Admissibility to show institution of suit.— The docket entries of a suit, appearance, plea, and issue are admissible to show that a suit has been brought. Ruggles *v.* Gaily, 2 Rawle (Pa.) 232.

The original papers in the case have been held competent evidence when it does not appear that the final record has been made up. Wharton *v.* Thomason, 78 Ala. 45; Watts *v.* Clegg, 48 Ala. 561; Buffington *v.* Cook, 39 Ala. 64; Barron *v.* Tart, 18 Ala. 668; Ansley *v.* Carlos, 9 Ala. 973; Sharp *v.* Lumley, 34 Cal. 611; Morgan *v.* Burnett, 18 Ohio 535; Sutcliffe *v.* State, 18 Ohio 469, 51 Am. Dec. 459.

Entry on trial list.— A trial list of a stated term is a monument of the record, from the entries upon which the record may be made up at any distance of time; and an entry made thereon by the president judge of a substitution of a defendant in ejectment is sufficient evidence of such substitution, although not transferred by the clerk. Wilkins *v.* Anderson, 11 Pa. St. 399, 1 Phila. (Pa.) 134.

Docket entry admitted in connection with copy of judgment.— Docket entries required by law, showing that there is a judgment, are admissible in connection with a copy of the judgment. Shipley *v.* Fox, 69 Md. 572, 16 Atl. 275.

The judge's minutes or notes are not evidence. McCormick *v.* Wheeler, 36 Ill. 114, 85 Am. Dec. 388; Miller *v.* Wolf, 63 Iowa 233, 18 N. W. 889; Gilbert *v.* McEachen, 38 Miss. 469; Grimm *v.* Hamel, 2 Hilt. (N. Y.) 434, where it was said that if produced the judge's notes can be resorted to only as memoranda to refresh the memory of the judge who made them. *Compare* Keller *v.* Killion, 9 Iowa 329.

Ancient minutes.—Where a purchaser under

obtainable.[64] But when a formal or technical judgment-roll has been made up, it and not the original papers or docket entries is the legal evidence to establish what the record contains.[65] Upon proof of the loss or destruction of an original paper, as of an execution, regular docket entries in relation thereto are admissible as the next best evidence.[66] Other memoranda kept by the clerk may be admissible.[67] The execution itself, however, is the best evidence,[68] and its loss must be shown to render the secondary evidence admissible.[69]

e. Matters Included in Record. Since the record as a whole imports verity every part of it is admissible to prove that which it legitimately sets forth.[70] Hence the rule admitting records in proof of judicial proceedings includes all pleadings[71] and all entries and papers legitimately forming a part of the record,[72]

a sheriff, in support of his title, produced a mere memorandum from the clerk's docket of the amount of the judgment, dated in 1783, and proved that nothing more could be found, it was held that the entry, having been made in a new and frontier county, during the Revolutionary war, might be received as a record. Walker *v.* Greenlee, 10 N. C. 281.

Stenographer's minutes.— It has been held that the Michigan statute authorizing the minutes of the official stenographer to be used in settling a bill of exceptions does not give them the character of record evidence. Edwards *v.* Heuer, 46 Mich. 95, 8 N. W. 717.

64. Luce *v.* Dexter, 135 Mass. 23.

65. *Alabama.*—Goggans *v.* Myrick, 131 Ala. 286, 31 So. 22; Duncan *v.* Freeman, 109 Ala. 185, 19 So. 433; Brown *v.* Isbell, 11 Ala. 1009.

Connecticut.— Waterbury Lumber, etc., Co. *v.* Hinckley, 75 Conn. 187, 52 Atl. 739, holding that in the absence of evidence that the record was lost or destroyed an original file was inadmissible.

Iowa.— Baxter *v.* Pritchard, 113 Iowa 422, 85 N. W. 633.

Kentucky.—See Kentucky Gravel Road Co. *v.* Com., 16 Ky. L. Rep. 153.

Vermont.— Austin *v.* Howe, 17 Vt. 654.

Administrators' bonds.— See Richardson *v.* Whitworth, 103 Ga. 741, 30 S. E. 573, where it was held that since administrators' bonds are required to be recorded and kept of file in the ordinary's office, the introduction of "the record" of such a bond was properly allowed over objection thereto based on the ground that the original bond had not been produced nor a copy thereof "established."

66. Ellis *v.* Huff, 29 Ill. 449; Dunlap *v.* Berry, 5 Ill. 327, 39 Am. Dec. 413; Buchanan *v.* Moore, 10 Serg. & R. (Pa.) 275.

67. Brown *v.* Campbell, 33 Gratt. (Va.) 402, holding that where the records of a clerk's office were destroyed, including presumably three executions on a judgment, the clerk's memorandum kept in the office showing the date of the issue of each execution, when returnable, and that the first two were returned, but showing a black mark opposite the date the third was returnable, indicating that no return was made, would be received, and the court would presume therefrom that the first two were returned unsatisfied and that the third was never returned.

68. **Execution and return as evidence** see *infra*, XI, A, 4, e.

69. Ayers *v.* Roper, 111 Ala. 651, 20 So. 460; Vincent *v.* Hupf, 4 Serg. & R. (Pa.) 298. And see *infra*, XV.

70. Numbers *v.* Shelly, 78 Pa. St. 426. And see State *v.* Hawkins, 81 Ind. 486.

71. Swope *v.* Paul, 4 Ind. App. 463, 31 N. E. 42; Gregory *v.* Pike, 94 Me. 27, 46 Atl. 793; Numbers *v.* Shelly, 78 Pa. St. 426.

Pleadings written in pencil.— A demurrer or plea found among the original papers in a cause, and in the handwriting of defendant's attorney, cannot be rejected as evidence because written with a pencil. Fail *v.* Presley, 50 Ala. 342.

72. *Alabama.*— Dominick *v.* Randolph, 124 Ala. 557, 27 So. 481.

Indiana.— State *v.* Hawkins, 81 Ind. 486; Swope *v.* Paul, 4 Ind. App. 463, 31 N. E. 42.

Iowa.— Smith *v.* Smith, 22 Iowa 516.

Maryland.— State *v.* Logan, 33 Md. 1.

Missouri.— Dingee *v.* Kearney, 2 Mo. App. 515.

North Carolina.— Archibald *v.* Davis, 49 N. C. 133.

Pennsylvania.— Knapp *v.* Miller, 133 Pa. St. 275, 19 Atl. 555; Numbers *v.* Shelly, 78 Pa. St. 426.

See 20 Cent. Dig. tit. "Evidence," § 1237 *et seq.*

Letters.— Where letters appear in the transcript of record offered in evidence of a case wherein a consent decree was rendered many years before, and they appear to have some relevancy to the fact of the consent, they may be treated as a part of the record, and be received in evidence therewith. Wallace *v.* Jones, 93 Ga. 419, 21 S. E. 89.

Unrecorded matters referred to by record.— In an action on a probate bond, an account on the files of the court, referred to by the record, may be produced in evidence, and read as part of the files, although it was not recorded. Wolcott *v.* Parmelee, 2 Root (Conn.) 181.

Receipt acknowledging payment of judgment.— A receipt acknowledging payment in full of a judgment, indorsed upon a properly authenticated record of the proceedings, has been held to be a part of the record, and as such admissible as written evidence. Lothrop *v.* Blake, 3 Pa. St. 483.

at least where such evidence is material and otherwise competent.[73] An execution or other writ and the return of a sheriff or other officer thereon, made pursuant to law, are when filed a part of the record of the court, and admissible as such.[74] The rule admitting records applies, however, only to such matters as are legitimately a part of the record and not to mere collateral papers incidentally connected with the proceedings.[75] Thus bills of exceptions have been held not to form a part of the record so as to entitle them to admission,[76] the sole object of a bill of exceptions being to certify the facts embodied therein to an appellate tribunal and to enable the appellate court to revise the proceedings of the inferior court.[77]

f. Authentication of Records — (i) *In General.* The book of records of a court proves itself when offered in evidence in the same court, since a court will

Judgment-roll containing two judgments.— Where a judgment-roll offered in evidence contains two judgments, the last in point of time will be treated as the true and final judgment, and the prior judgment will not be considered as forming part of the roll so as to affect its admissibility. Colton Land, etc., Co. *v.* Swartz, 99 Cal. 278, 33 Pac. 878.

73. See Moore *v.* Leftwitch, 1 Stew. & P. (Ala.) 254; Swope *v.* Paul, 4 Ind. App. 463, 31 N. E. 42; Numbers *v.* Shelly, 78 Pa. St. 426.

74. *Alabama.*— Gunn *v.* Howell, 35 Ala. 144, 73 Am. Dec. 484; Creagh *v.* Savage, 14 Ala. 454; Hardy *v.* Gascoignes, 6 Port. 447.

Arkansas.— Snider *v.* Greathouse, 16 Ark. 72, 63 Am. Dec. 54.

Illinois.— Ellis *v.* Huff, 29 Ill. 449; Dunlap *v.* Berry, 5 Ill. 327, 39 Am. Dec. 413.

Maine.— State *v.* Lang, 63 Me. 215. See also Robinson *v.* Edwards, 70 Me. 158; French *v.* Stanley, 21 Me. 512.

Maryland.— State *v.* Logan, 33 Md. 1.

Mississippi.— Harrington *v.* O'Reilly, 9 Sm. & M. 216, 48 Am. Dec. 704.

Montana.— Heyfron *v.* Mahoney, 9 Mont. 497, 24 Pac. 93, 18 Am. St. Rep. 757.

New York.— Bechstein *v.* Sammis, 10 Hun 585.

North Carolina.— Peebles *v.* Pate, 90 N. C. 348; Loftin *v.* Hugins, 13 N. C. 10.

Necessity of recording.— In Barney *v.* Cuttler, 1 Root (Conn.) 489, it was held that an execution not recorded in the office from whence it issued, although recorded in the records of the town-clerk, could not be admitted as evidence of title. But in Perry *v.* Whipple, 38 Vt. 278, it was held that the original execution is evidence of its own contents, notwithstanding it has been incorrectly recorded. In Brewster *v.* Vail, 20 N. J. L. 56, 38 Am. Dec. 547, it was held that, although a writ and levy had not been actually returned and filed, but were still in the hands of the sheriff, a written document identified as the inventory made on the execution was admissible.

Execution returned after return-day.— The mere fact that an execution was not returned and filed until after the return-day does not destroy the effect of the writ and the return indorsed thereon as record evidence. Rowe *v.* Hardy, 97 Va. 674, 34 S. E. 625, 75 Am. St. Rep. 811. But it has been held that a receipt of payment of a judgment indorsed upon an execution and bearing date more than ten months after the return-day is no part of the record and is not admissible as such, where it does not appear that the writ was received by the sheriff and acted upon while it was in force. Chipman *v.* Fambro, 16 Ark. 291.

Indorsements by a sheriff on an execution are not competent evidence that land was sold thereunder, as the office of a return is to show the satisfaction or the failure to make satisfaction. Kimmel *v.* Meier, 106 Ill. App. 251.

Admissibility of docket entries or memoranda see *supra*, XIV, A, 4, d.

75. Gunn *v.* Howell, 35 Ala. 144, 73 Am. Dec. 484; State *v.* Hawkins, 81 Ind. 486; Dempster Mill Mfg. Co. *v.* Fitzwater, 6 Kan. App. 24, 49 Pac. 624; Gaither *v.* Brooks, 1 A. K. Marsh. (Ky.) 409; Patton *v.* Kennedy, 1 A. K. Marsh. (Ky.) 389, 10 Am. Dec. 744.

Testimony not a part of record.— Mestier *v.* New Orleans, etc., R. Co., 16 La. Ann. 354; Florance *v.* Bachemin, 3 La. Ann. 174.

Depositions in probate proceedings.— It has been held that depositions taken in a proceeding in the probate court against an executor for the payment of legacies are not necessarily a part of the record, except on appeal to the high court of errors and appeals, and hence they are not admissible in an action in the circuit court to charge a surety on the executor's bond. Lipscomb *v.* Postell, 38 Miss. 476, 77 Am. Dec. 651.

Unauthenticated opinion of court inadmissible.— Wixson *v.* Devine, 67 Cal. 341, 7 Pac. 776.

76. O'Neall *v.* Calhoun, 67 Ill. 219; State *v.* Hawkins, 81 Ind. 486; Miles *v.* Wingate, 6 Ind. 458; Shotwell *v.* Hamblin, 23 Miss. 156, 55 Am. Dec. 83; May *v.* International L. & T. Co., 92 Fed. 445, 34 C. C. A. 448. See also Green *v.* Irving, 54 Miss. 450, 28 Am. Rep. 360.

77. Shotwell *v.* Hamblin, 23 Miss. 156, 55 Am. Dec. 83; Robinson *v.* Lane, 14 Sm. & M. (Miss.) 161.

take judicial notice of its own records.[78] It is necessary, however, before any original record can be received in evidence in another court that the court be satisfied by legal and competent evidence that the alleged record is what it purports to be.[79] This may be shown either by producing in court the keeper of the records,[80] or his deputy,[81] and ascertaining from him on oath that it is a record of his office, or, it is said, by his certificate to the same effect under the seal of court.[82] And it has been held that an original record may be proved to be such by any person who can identify it.[83]

(II) *Justices' Records.* The docket of a justice is evidence *per se* where it is offered in a cause before the same justice;[84] and the original records of justices of the peace and other inferior tribunals are admissible in other courts if their authenticity is established;[85] but as a general rule there must be some proof of the identity and authenticity of the record other than the record itself.[86] The

78. Taylor *v.* Adams, 115 Ill. 570, 4 N. E. 837; Robinson *v.* Brown, 82 Ill. 279; Prescott *v.* Fisher, 22 Ill. 390; Wallis *v.* Beauchamp, 15 Tex. 303.

A writ of fieri facias under the seal of the court requires no proof to render it admissible in evidence. State *v.* Lowrance, 64 N. C. 483.

Sheriff's return.— So it is held that a sheriff's return is admissible in the court in which the sheriff is an officer without proof of his handwriting. McDonald *v.* Carson, 94 N. C. 497. See also Barron *v.* Tart, 18 Ala. 668; Lanier *v.* Montgomery Branch Bank, 18 Ala. 625.

79. Davey *v.* Lohrmann, 14 N. Y. Suppl. 922; Perry *v.* Mays, 1 Hill (S. C.) 76. See also Railway Officials', etc., Acc. Assoc. *v.* Coady, 80 Ill. App. 563 (paper purporting to be verdict of coroner's jury); Bannister *v.* Grassy Fork Ditching Assoc., 52 Ind. 178 (written appointment by judge in vacation); Doughton *v.* Tillay, 4 Blackf. (Ind.) 433 (verified answer to bill of discovery).

Executions.— It has been held that a paper purporting to be an execution is inadmissible in another action in the absence of a seal or filing mark of the proper officer, or other evidence showing that it had been in the hands of the sheriff or other officer and is a part of the record. Pryor *v.* Beck, 21 Ala. 393; Davis *v.* Ransom, 26 Ill. 100; Benjamin *v.* Shea, 83 Iowa 392, 49 N. W. 989. But an execution and return have been held admissible if identified by the officer who acted under the writ. Pellersells *v.* Allen, 56 Iowa 717, 10 N. W. 261; Den *v.* Evaul, 1 N. J. L. 283. See also Hildreth *v.* Lowell, 11 Gray (Mass.) 345.

Bonds taken by the officers of a court, such as bail-bonds or prison-bound bonds, it has been held, being matters of record, need no proof of the officer's signature. Wood *v.* Fitz, 10 Mart. (La.) 196; Labarre *v.* Durnford, 10 Mart. (La.) 180; Wynn *v.* Buckett, 1 N. C. 87, 3 N. C. 236.

80. *Alabama.*— Spence *v.* Tuggle, 10 Ala. 538.

Indian Territory.— Breedlove *v.* Dennie, 2 Indian Terr. 606, 53 S. W. 436.

Iowa.— Frazier *v.* Steenrod, 7 Iowa 339, 71 Am. Dec. 447.

Massachusetts.— Odiorne *v.* Bacon, 6 Cush. 185.

Pennsylvania.— Garrigues *v.* Harris, 17 Pa. St. 344.

81. Ballard *v.* Thomas, 19 Gratt. (Va.) 14.

82. See Perry *v.* Mays, 1 Hill (S. C.) 76.

83. *California.*— People *v.* Alden, 113 Cal. 264, 45 Pac. 327.

Massachusetts.— See Greene *v.* Durfee, 6 Cush. 362.

Michigan.— McLeod *v.* Crosby, 128 Mich. 641, 87 N. W. 883.

South Carolina.— Browning *v.* Huff, 2 Bailey 174. *Compare* Perry *v.* Mays, 1 Hill 76.

Virginia.— Ballard *v.* Thomas, 19 Gratt. 14.

Compare Phelps *v.* Hunt, 43 Conn. 194; Hardin *v.* Blackshear, 60 Tex. 132.

84. Groff *v.* Griswold, 1 Den. (N. Y.) 432; Smith *v.* Frost, 5 Hill (N. Y.) 431.

85. State *v.* Voight, 90 N. C. 741. See *supra*, XIV, A, 4, c.

86. Bridges *v.* Branam, 133 Ind. 488, 33 N. E. 271; Wentworth *v.* Keizer, 33 Me. 267; Goodhue *v.* Grant, 1 Pinn. (Wis.) 556. See also Modisett *v.* Governor, 2 Blackf. (Ind.) 135; Hickman *v.* Griffin, 6 Mo. 37, 34 Am. Dec. 124. *Compare* Selsby *v.* Redlon, 19 Wis. 17.

A paper purporting to be an affidavit made before a justice of the peace in another county is not admissible in evidence without proof of its authenticity. Hagaman *v.* Stafford, 2 Blackf. (Ind.) 351.

Proof of handwriting of justice.—The judgment of a justice of the peace, it has been held, is not such a record that it may be given in evidence without proof of his handwriting. Patterson *v.* Freeman, 132 N. C. 357, 43 S. E. 904; Reeves *v.* Davis, 80 N. C. 209. But an execution issued by a justice of the peace has been held admissible as evidence without proof of his signature or personal identity. Sandlin *v.* Anderson, 76 Ala. 403. See also Burgess *v.* Sugg, 2 Stew. & P. (Ala.) 341.

Official receipt given by justice to constable. — In an action against a justice of the peace to recover money received by him from a constable, and not paid over to the party entitled

record may be authenticated by the oath of the justice himself,[87] or, it has been held, by the oath of any competent witness who can identify the record.[88] On the other hand it has been held that where the records of a justice are offered in proof of the facts which they purport to state, they must, if originals, be brought into court by the official custodian of them, who can testify as to their character; but that when offered in evidence merely to show that they exist, they may be admitted on any satisfactory evidence of their identity.[89]

5. Official Registers and Documents — a. In General. A record or document kept or prepared by a person whose public duty it is to record truly the facts stated therein is, when relevant, admissible as *prima facie* evidence of these facts, even in a controversy between third persons, and this whether or not there exists a statute authorizing such record to be used in evidence or expressly requiring a record to be kept,[90] and notwithstanding the document consists of statements

thereto, the receipt given by the justice to the constable, and signed by the justice with his official title, has been held to be competent evidence to charge the justice, without further proof of its execution. Neal *v.* Keller, 19 Kan. 111.

87. Scott *v.* McCrary, 1 Stew. (Ala.) 315 (where it was held that if the proceedings were had before two justices and were signed by both, the testimony of one is sufficient to prove them); Hickman *v.* Griffin, 6 Mo. 37, 34 Am. Dec. 124; Pollock *v.* Hoag, 4 E. D. Smith (N. Y.) 473. See also Chapman *v.* Dodd, 10 Minn. 350.

88. State *v.* Chambers, 70 Mo. 625. See also Chapman *v.* Dodd, 10 Minn. 350; Baldwin *v.* Prouty, 13 Johns. (N. Y.) 430. In an action for malicious prosecution, where the record in the docket of a city justice was offered in evidence, and the acting city justice testified that he found the docket at the office of such city justice, that it was one of the records of the office, that a certain person, by whom the entries therein purported to have been made, was city justice, that he knew his handwriting, and that certain entries were in his handwriting, it was held that the entries were sufficiently identified and authenticated. Cole *v.* Curtis, 16 Minn. 182. So in Dennison *v.* Otis, 2 Rawle (Pa.) 9, it was held that the docket of a justice, obtained from his office during his absence from the county, and proved to be in his handwriting, is admissible, although no subpœna has been issued to procure his attendance. And in Pomeroy *v.* Golly, Ga. Dec. 26, it was held that an original affidavit and warrant is admissible in evidence, on proof of the magistrate's handwriting, although he is present in court and is not sworn.

89. Phelps *v.* Hunt, 43 Conn. 194.

90. *Connecticut.*— Enfield *v.* Ellington, 67 Conn. 459, 34 Atl. 818.

Georgia.— Trentham *v.* Waldrop, 119 Ga. 152, 45 S. E. 988, registration of physician.

Kentucky.— Loving *v.* Warren County, 14 Bush 316.

Louisiana.— Short's Succession, 45 La. Ann. 1485, 14 So. 184.

Maine.—See Brackett *v.* Persons Unknown, 53 Me. 228.

Massachusetts.— Worcester *v.* Northborough, 140 Mass. 397, 5 N. E. 270; Bruce *v.* Holden, 21 Pick. 187.

Michigan.— People *v.* Kemp, 76 Mich. 410, 43 N. W. 439.

New Hampshire.— Hayward *v.* Bath, 38 N. H. 179; Seavey *v.* Seavey, 37 N. H. 125.

North Carolina.— Davenport *v.* McKee, 98 N. C. 500, 4 S. E. 545; State *v.* Biggs, 33 N. C. 412.

North Dakota.— State *v.* Donovan, 10 N. D. 203, 86 N. W. 709.

Pennsylvania.— Allegheny *v.* Nelson, 25 Pa. St. 332; Weston *v.* Stammers, 1 Dall. 2, 1 L. ed. 11.

South Carolina.— Freeman *v.* Bailey, 50 S. C. 241, 27 S. E. 686.

Washington.— State *v.* Neal, 25 Wash. 264, 65 Pac. 188, 68 Pac. 1135.

United States.— Evanston *v.* Gunn, 99 U. S. 660, 25 L. ed. 306; Owings *v.* Speed, 5 Wheat. 420, 5 L. ed. 124; Brandon *v.* Loftus, 4 How. 127, 11 L. ed. 905.

England.— Doe *v.* Andrews, 15 Q. B. 756, 69 E. C. L. 756.

See 20 Cent. Dig. tit. "Evidence," § 1247 *et seq.*

Entries against registrar's interest.— Especially is this rule true where the entry is against the registrar's interest at the time it was made. Field *v.* Boynton, 33 Ga. 239; Livingston *v.* Arnoux, 56 N. Y. 507. See also State *v.* Cummins, 76 Iowa 133, 40 N. W. 124; State *v.* Smith, 74 Iowa 580, 38 N. W. 492.

Entries in officer's favor.— Official records are, however, admissible even in the officer's favor. Shattuck *v.* Gilson, 19 N. H. 296; Bissell *v.* Hamblin, 6 Duer (N. Y.) 512; Bissell *v.* Hamlin, 13 Abb. Pr. (N. Y.) 22; Irish Soc. *v.* Derry, 12 Cl. & F. 641, 8 Eng. Reprint 1561.

Where registrar is dead.— The rule applies with particular force where the officer making the entry is dead, or where the documents have come down through a succession of officers, all of whom are dead. Field *v.* Boynton, 33 Ga. 239; Ross *v.* Davis, 30 Ga. 823; Rindge *v.* Walker, 61 N. H. 58; Russel *v.* Werntz, 24 Pa. St. 337; Ross *v.* Rhoads, 15 Pa. St. 163; Struthers *v.* Reese, 4 Pa. St. 129; Lindsay *v.* Scroggs, 2 Rawle (Pa.) 141;

made extrajudicially by a person not under oath and not subject to cross-examination.[91] It is sufficient if the record is kept in the discharge of a public duty and is a convenient and appropriate mode of discharging that duty.[92] Thus a record has been held admissible if it was kept by the direction of superior officers and in accordance with the rules and practices of the office.[93] Nor need a public record be kept by a public officer himself, if the entries are made under his direction by a person authorized by him.[94] But a record will not be admissible on this principle unless it is made by or under the direction of an officer[95] authorized either by express statute or the nature of his duties to make it.[96] So it seems that the rec-

Cline *v.* Catron, 22 Gratt. (Va.) 378. Thus the records of deceased notaries have been held admissible. Spann *v.* Baltzell, 1 Fla. 301, 44 Am. Dec. 346; Ogden *v.* Glidewell, 5 How. (Miss.) 179; Fassin *v.* Hubbard, 61 Barb. (N. Y.) 548. Indeed it has been held that records of a public officer, like a notary public, are admissible in case of his death, although they may not be strictly official, if they are according to the customary business of his office. Livingston *v.* Arnoux, 56 N. Y. 507; Nicholls *v.* Webb, 8 Wheat. (U. S.) 326, 5 L. ed. 628.

Necessity of prompt entry.— It has been said that official registers to be admissible as public documents should be made up promptly. Birmingham *v.* Pettit, 21 D. C. 209; Doe *v.* Bray, 8 B. & C. 813, 7 L. J. K. B. O. S. 161, 3 M. & R. 428, 15 E. C. L. 399. *Compare* Barclay *v.* Bates, 2 Mo. App. 139.

Production of minutes from which record is made unnecessary.— Moses *v.* Penquit, 72 Iowa 611, 34 N. W. 443; Thorn *v.* Case, 21 Me. 393; Board of Education *v.* Moore, 17 Minn. 412.

91. Enfield *v.* Ellington, 67 Conn. 459, 34 Atl. 818; Sturla *v.* Freccia, 5 App. Cas. 623, 44 J. P. 812, 43 L. T. Rep. N. S. 209, 29 Wkly. Rep. 217. See also Little *v.* Downing, 37 N. H. 355.

92. *California.*— Kyburg *v.* Perkins, 6 Cal. 674.

District of Columbia.— U. S. *v.* Cross, 20 D. C. 365.

Florida.— Bell *v.* Kendrick, 25 Fla. 778, 6 So. 868.

Illinois.— La Salle County *v.* Simmons, 10 Ill. 513.

Kentucky.— Com. *v.* Tate, 89 Ky. 587, 13 S. W. 113, 12 Ky. L. Rep. 1.

Michigan.— Groesbeck *v.* Seeley, 13 Mich. 329.

Missouri.— Moore *v.* H. Gaus, etc., Mfg. Co., 113 Mo. 98, 20 S. W. 975.

New Jersey.— State *v.* Van Winkle, 25 N. J. L. 73.

North Carolina.— Knott *v.* Raleigh, etc., R. Co., 98 N. C. 73, 3 S. E. 735, 2 Am. St. Rep. 321.

Virginia.— Coleman *v.* Com., 25 Gratt. 865, 18 Am. Rep. 711.

United States.— White *v.* U. S., 164 U. S. 100, 17 S. Ct. 38, 41 L. ed. 365; Evanston *v.* Gunn, 99 U. S. 660, 25 L. ed. 306.

Compare Ayer *v.* Sawyer, 32 Me. 163; Jackson *v.* Collins, 16 N. Y. Suppl. 651.

See 20 Cent. Dig. tit. "Evidence," §§ 1255, 1260, 1261.

93. Kyburg *v.* Perkins, 6 Cal. 674; Cooper *v.* People, 28 Colo. 87, 63 Pac. 314; White *v.* U. S., 164 U. S. 100, 17 S. Ct. 38, 41 L. ed. 365; Daly *v.* Webster, 56 Fed. 483, 4 C. C. A. 10. See also Hesser *v.* Rowley, 139 Cal. 410, 73 Pac. 156, made in the usual course of business.

94. Evanston *v.* Gunn, 99 U. S. 660, 25 L. ed. 306; Galt *v.* Galloway, 4 Pet. (U. S.) 332, 7 L. ed. 876.

95. *Connecticut.*— Wooster *v.* Butler, 13 Conn. 309; Fowler *v.* Savage, 3 Conn. 90.

Georgia.— Maples *v.* Hoggard, 58 Ga. 315.

Kentucky.— Illinois Cent. R. Co. *v.* Barrett, 66 S. W. 9, 23 Ky. L. Rep. 1755.

Pennsylvania.—Rogers *v.* Riddlesburg Coal, etc., Co., 31 Leg. Int. 325.

United States.— Chaffee *v.* U. S., 18 Wall. 516, 21 L. ed. 908, where it was held that the fact that books were kept by the collectors of tolls in pursuance of statute as agents of the lessees of a canal under a lease from the state did not make the books public records.

Map made by ex-official.—In Gray *v.* Waterman, 40 Ill. 522, it was held that the county authorities and road commissioners were only authorized to employ the county surveyor to resurvey a public road, and hence neither the original nor a copy of a survey made by one who had ceased to be a county surveyor was admissible in evidence.

Indorsement of deputy surveyor after expiration of his office not admitted.— Vincent *v.* Huff, 4 Serg. & R. (Pa.) 298.

Recitals in record to show official character.— Recitals in a writing purporting to be a record of a public board are not evidence of the official character of the board or of its members, since writings cannot be the medium of proof of a fact upon which their own validity as evidence depends. Hall *v.* People, 21 Mich. 456; Wilson *v.* Stoner, 9 Serg. & R. (Pa.) 39, 11 Am. Dec. 664. See also Lindsay *v.* Scroggs, 2 Rawle (Pa.) 141.

96. *Alabama.*— See Nolin *v.* Parmer, 21 Ala. 66.

California.— Shepherd *v.* Turner, 129 Cal. 530, 62 Pac. 106.

District of Columbia.— Birmingham *v.* Pettit, 21 D. C. 209.

Georgia.— White *v.* Clements, 39 Ga. 232.

Indiana.— Matlock *v.* Hawkins, 92 Ind. 225; Williamson *v.* Crawford, 7 Blackf. 12.

Iowa.— Butler *v.* St. Louis L. Ins. Co., 45 Iowa 93.

Kansas.— State *v.* Krause, 58 Kan. 651, 50 Pac. 882.

ord or document must have been made originally with the intent that it should be kept as a memorial to be referred to and used as evidence.[97]

b. Specific Applications of Rule. The rule admitting official registers and documents has been applied to official letters,[98] official maps,[99] reports and records

Maine.— Milford *v.* Greenbush, 77 Me. 330.
Maryland.— Tyson *v.* Baltimore County Com'rs, 28 Md. 510.
Massachusetts.— Com. *v.* McGarry, 135 Mass. 553; Colburn *v.* Ellis, 5 Mass. 427.
Michigan.— Newell *v.* McLarney, 49 Mich. 232, 13 N. W. 529; Danielson *v.* Dyckman, 26 Mich. 169; Smith *v.* Lawrence, 12 Mich. 431.
Mississippi.— Coopwood *v.* Prewett, 30 Miss. 206.
Missouri.— Carter *v.* Hornback, 139 Mo. 238, 40 S. W. 893; Hannibal *v.* Richards, 35 Mo. App. 15.
New Hampshire.— Angier *v.* Ash, 26 N. H. 99; Davis *v.* Clements, 2 N. H. 390.
New York.— Wardwell *v.* Patrick, 1 Bosw. 406.
Pennsylvania.— Grugan *v.* Philadelphia, 158 Pa. St. 337, 27 Atl. 1000; Salmon *v.* Rance, 3 Serg. & R. 311.
Vermont.— Wheeler *v.* Barre School Dist. No. 13, 64 Vt. 184, 26 Atl. 1094.
England.— Doe *v.* Bray, 8 B. & C. 813, 7 L. J. K. B. O. S. 161, 3 M. & R. 428, 15 E. C. L. 399.
See 20 Cent. Dig. tit. "Evidence," § 1247, *et seq.*

Private letters and memoranda.—This principle has been applied to private letters (State *v.* Pagels, 92 Mo. 300, 4 S. W. 931; Mason *v.* U. S., 4 Ct. Cl. 495), and to mere private memoranda (State *v.* Vick, 25 N. C. 488; Doe *v.* Bray, 8 B. & C. 813, 7 L. J. K. B. O. S. 161, 3 M. & R. 428, 15 E. C. L. 399. See also Hand *v.* Grant, 5 Sm. & M. (Miss.) 508, 43 Am. Dec. 528; Strong *v.* U. S., 6 Wall. (U. S.) 788, 18 L. ed. 740).

A map of a city, although made by a former city surveyor, and found in the office of the register of the city, in a book labeled "Plans and Charts," but not appearing to have been made by authority of the city government or adopted by it, is not admissible in evidence to prove the location of a street. Harris *v.* Com., 20 Gratt. (Va.) 833. To same effect see Allen *v.* Vincennes, 25 Ind. 531.

Record containing matters unauthorized in part.— Although a record is required to be kept, it is evidence only of such matters as are authorized to be recorded.
Michigan.— Fox *v.* Peninsular White Lead, etc., Works, 92 Mich. 243, 52 N. W. 623.
New York.— Anderson *v.* James, 4 Rob. 35.
Pennsylvania.— Coxe *v.* Deringer, 78 Pa. St. 271.
United States.— Ellicott *v.* Pearl, 8 Fed. Cas. No. 4,386, 1 McLean 206.
England.— Burghart *v.* Angerstein, 6 C. & P. 690, 25 E. C. L. 641.

Record of matters not occurring in officer's presence or known personally.— Especially is the rule of the text true as to matters not occurring in the recorder's presence and of which he has no personal knowledge. Fox *v.* Peninsular White Lead, etc., Works, 92 Mich. 243, 52 N. W. 623; Hegler *v.* Faulkner, 153 U. S. 109, 14 S. Ct. 779, 38 L. ed. 653. But this class of evidence is not strictly confined to facts within the personal knowledge of the person making the record. Worcester *v.* Northborough, 140 Mass. 397, 5 N. E. 270; Hanson *v.* South Scituate, 115 Mass. 336; Whiton *v.* Albany City Ins. Co., 109 Mass. 24; Barclay *v.* Bates, 2 Mo. App. 139. *Compare* Howard *v.* Illinois Trust, etc., Bank, 189 Ill. 568, 59 N. E. 1106. Thus in a criminal case the record of a measurement of defendant taken in the marshal's office, as required by the department of justice, is admissible, although the person making the entry in the record did not make the measurement himself, but wrote it as dictated by another. U. S. *v.* Cross, 20 D. C. 365.

97. *Massachusetts.*— Cushing *v.* Nantasket Beach R. Co., 143 Mass. 77, 9 N. E. 22; Worcester *v.* Northborough, 140 Mass. 397, 5 N. E. 270.
Missouri.— Saetelle *v.* Metropolitan L. Ins. Co., 81 Mo. App. 509; Connor *v.* Metropolitan L. Ins. Co., 78 Mo. App. 131.
New York.— Kerr *v.* Metropolitan St. R. Co., 27 Misc. 190, 57 N. Y. Suppl. 794.
Virginia.— See Coleman *v.* Com., 25 Gratt. 865, 18 Am. Rep. 711.
United States.— Hegler *v.* Faulkner, 153 U. S. 109, 14 S. Ct. 779, 38 L. ed. 653; U. S. *v.* Six Lots of Ground, 27 Fed. Cas. No. 16,299, 1 Woods 234.
England.— Sturla *v.* Freccia, 5 App. Cas. 623, 44 J. P. 812, 43 L. T. Rep. N. S. 209, 29 Wkly. Rep. 217, where a private and confidential report intended to guide the discretion of the government was held to be inadmissible.

98. Carpenter *v.* Bailey, 56 N. H. 283; Bell *v.* Levers, 3 Yeates (Pa.) 23; Moyers *v.* Graham, 15 Lea (Tenn.) 57; Bingham *v.* Cabbot, 3 Dall. (U. S.) 19, 1 L. ed. 491; U. S. *v.* Beattie, 24 Fed. Cas. No. 14,554, Gilp. 92; Furman *v.* U. S., 5 Ct. Cl. 579; Savage *v.* U. S., 1 Ct. Cl. 170. *Compare* Morgan County Bank *v.* People, 21 Ill. 304; Pendleton *v.* U. S., 19 Fed. Cas. No. 10,924, 2 Brock. 75.

Letters addressed to public officer and on file in office.— Hammatt *v.* Emerson, 27 Me. 308, 46 Am. Dec. 598; Pettibone *v.* Derringer, 19 Fed. Cas. No. 11,043, 4 Wash. 215.

99. *California.*— Colton Land, etc., Co. *v.* Swartz, 99 Cal. 278, 33 Pac. 878; People *v.* Klumpke, 41 Cal. 263; Gates *v.* Kieff, 7 Cal. 124.
Dakota.— U. S. *v.* Beebe, 2 Dak. 292, 11 N. W. 505; McCall *v.* U. S., 1 Dak. 320, 46 N. W. 608.

generally of official surveyors,[1] sheriffs' records,[2] coroners' inquests,[3] tax receipts and records generally,[4] including books of assessors,[5] records or reports of public

Georgia.— Polhill *v.* Brown, 84 Ga. 338, 10 S. E. 921.

Illinois.— Chicago, etc., R. Co. *v.* Banker, 44 Ill. 26.

Indiana.— Meikel *v.* Greene, 94 Ind. 344. See also Huntington *v.* Hawley, 120 Ind. 502, 22 N. E. 326.

Iowa.— See Nosler *v.* Chicago, etc., R. Co., 73 Iowa 268, 34 N. W. 850. *Compare* Heinrichs *v.* Terrell, 65 Iowa 25, 21 N. W. 171; Pfotzen *v.* Mullaney, 30 Iowa 197.

Louisiana.— Wells *v.* Compton, 3 Rob. 171.

Maryland.— Burk *v.* Baltimore, 77 Md. 469, 26 Atl. 868.

Massachusetts.— Com. *v.* King, 150 Mass. 221. 22 N. E. 905, 5 L. R. A. 536.

Mississippi.— Surget *v.* Doe, 24 Miss. 118.

Missouri.— Henry *v.* Dulle, 74 Mo. 443; St. Louis Public Schools *v.* Erskine, 31 Mo. 110.

New Jersey.— Denn *v.* Pond, 1 N. J. L. 379.

New York.— People *v.* Denison, 17 Wend. 312.

Ohio.— Stephenson *v.* Leesburgh, 33 Ohio St. 475.

Pennsylvania.— Pittsburg, etc., R. Co. *v.* Rose, 74 Pa. St. 362. See also Vickroy *v.* Skelley, 14 Serg. & R. 372. *Compare* Com. *v.* Switzer, 134 Pa. St. 383, 19 Atl. 681.

Texas.— Texas, etc., R. Co. *v.* Thompson, 65 Tex. 186.

Wisconsin.— See Davis *v.* Fulton, 52 Wis. 657, 9 N. W. 809.

United States.— St. Louis Public Schools *v.* Risley, 10 Wall. 91, 19 L. ed. 850; Morris *v.* Harmer, 7 Pet. 554, 8 L. ed. 781; Hazard Powder Co. *v.* Volger, 58 Fed. 158, 7 C. C. A. 136; Chicago, etc., R. Co. *v.* McArthur, 53 Fed. 464, 3 C. C. A. 594.

See 20 Cent. Dig. tit. "Evidence," § 1254.

1. *Kentucky.*— Crockett *v.* Greenup, 4 Bibb 158.

Louisiana.— Wells *v.* Compton, 3 Rob. 171.

Maryland.— See Snavely *v.* McPherson, 5 Harr. & J. 150.

Michigan.— See Sherrard *v.* Cudney, (1903) 96 N. W. 15; Pugh *v.* Schlindler, 127 Mich. 191, 86 N. W. 515.

Minnesota.— Fish *v.* Chicago, etc., R. Co., 82 Minn. 9, 84 N. W. 458, 83 Am. St. Rep. 398.

Mississippi.— Spears *v.* Burton, 31 Miss. 547.

Nebraska.— Clark *v.* Williams, 29 Nebr. 691, 46 N. W. 82.

Pennsylvania.—Conkling *v.* Westbrook, 81* Pa. St. 81; Bratton *v.* Mitchell, 3 Pa. St. 44; Boyles *v.* Johnston, 6 Binn. 125; Sproul *v.* Plumsted, 4 Binn. 189; Stephens *v.* Bear, 3 Binn. 31; Brown *v.* Long, 1 Yeates 162.

Virginia.— Cline *v.* Catron, 22 Gratt. 378.

See 20 Cent. Dig. tit. "Evidence," § 1253.

Rule applied to records of deputy surveyor. — Russell *v.* Werntz, 24 Pa. St. 337; Ross *v.* Rhoads, 15 Pa. St. 163; McCormick *v.* McMurtrie, 4 Watts (Pa.) 192; Lindsay *v.* Scroggs, 2 Rawle (Pa.) 141; Miller *v.* Carothers, 6 Serg. & R. (Pa.) 215. *Compare* Carter *v.* Hornback, 139 Mo. 238, 40 S. W. 893.

In boundary proceedings see BOUNDARIES, 5 Cyc. 861.

2. *Georgia.*— Fleming *v.* Williams, 53 Ga. 556.

Louisiana.— Bailly *v.* Percy, 14 La. 14.

Mississippi.— Albrecht *v.* State, 62 Miss. 516.

Missouri.— Barclay *v.* Bates, 2 Mo. App. 139.

New Jersey.— Brewster *v.* Vail, 20 N. J. L. 56, 38 Am. Dec. 547.

South Carolina.— Secrist *v.* Twitty, 1 McMull. 255.

Compare Kelly *v.* Creen, 63 Pa. St. 299; McElrath *v.* Kintzing, 5 Pa. St. 337.

See 20 Cent. Dig. tit. "Evidence," §§ 1248, 1251.

3. National Woodenware, etc., Co. *v.* Smith, 108 Ill. App. 477, holding that the coroner's inquest over a dead person, which is required by statute to be sealed up and returned to the clerk of the circuit court, becomes a public record of the county, and as such it is competent evidence in another proceeding tending to prove any matter properly before the coroner appearing on the face of the inquest. See CORONERS, 9 Cyc. 994.

4. *Alabama.*— Dudley *v.* Chilton County, 66 Ala. 593; Williams *v.* Fitzpatrick, 20 Ala. 791.

California.—Lake County *v.* Sulphur Bank Quicksilver Min. Co., 66 Cal. 17, 4 Pac. 876.

Illinois.— Gage *v.* Davis, (1887) 14 N. E. 36; Bush *v.* Stanley, 122 Ill. 406, 13 N. E. 249; Gage *v.* Parker, 103 Ill. 528. See also Weber *v.* Ohio, etc., R. Co., 108 Ill. 451.

Indiana.— McKeen *v.* Haskell, 108 Ind. 97, 8 N. E. 901. See also Hanna *v.* Fisher, 95 Ind. 383.

Iowa.— Ellsworth *v.* Low, 62 Iowa 178, 17 N. W. 450.

Michigan.— Groesbeck *v.* Seeley, 13 Mich. 329; Johnstone *v.* Scott, 11 Mich. 232.

Missouri.— Seibert *v.* Allen, 61 Mo. 482. See also State *v.* St. Louis County Ct., 59 Mo. 513.

Nebraska.— National L. Ins. Co. *v.* Butler, 61 Nebr. 449, 85 N. W. 437, 87 Am. St. Rep. 462.

Nevada.— State *v.* Nevada Cent. R. Co., 26 Nev. 357, 68 Pac. 294, 69 Pac. 1042.

Pennsylvania.— Cuttle *v.* Brockway, 24 Pa. St. 145; Dikeman *v.* Parrish, 6 Pa. St. 210, 47 Am. Dec. 455; Lewisburg *v.* Augusta, 2 Watts & S. 65; Fager *v.* Campbell, 5 Watts 287.

Texas.— Webb County *v.* Gonzales, 69 Tex. 455, 6 S. W. 781.

See 20 Cent. Dig. tit. "Evidence," § 1251.

5. Books of assessments of taxes made and kept by the assessors in the performance of

school officials,[6] official entries of clerks of court,[7] prison books,[8] official inventories of estates of decedents,[9] appraisements of custom-house appraisers,[10] military,[11] post-office,[12] and official weather records,[13] and records and reports generally of

their official duty in accordance with the requirements of the statutes are competent evidence of the facts therein stated in all cases relating to the assessment or collection of the taxes.

Alabama.—Walling *v.* Morgan County, 123 Ala. 326, 28 So. 433.

Georgia.— McCrory *v.* Manes, 47 Ga. 90.

Kansas.— Smith *v.* Scully, 66 Kan. 139, 71 Pac. 249.

Missouri.— Clark *v.* Fairley, 30 Mo. App. 335.

New Hampshire.— Pittsfield *v.* Barnstead, 40 N. H. 477.

Pennsylvania.— Scranton Poor Dist. *v.* Directors of Poor, 106 Pa. St. 446; Miller *v.* Hale, 26 Pa. St. 432.

Vermont.— Day *v.* Peasley, 54 Vt. 310.

Wisconsin.— Mitchell *v.* Pillsbury, 5 Wis. 407.

United States.— Ronkendorff *v.* Taylor, 4 Pet. 349, 7 L. ed. 882.

England.— Rex *v.* King, 2 T. R. 234.

See 20 Cent. Dig. tit. "Evidence," § 1252.

Qualification of rule.— In some jurisdictions, in controversies between third persons, such assessment books have been held inadmissible to establish the domicile of persons, situation and value of property, and other facts required by law to be ascertained and recorded by the assessors according to their best information and opinion for the sole purpose of the assessment and collection of the tax. Dudley *v.* Minnesota, etc., R. Co., 77 Iowa 408, 42 N. W. 359; Sewall *v.* Sewall, 122 Mass. 156, 23 Am. Rep. 299; Com. *v.* Heffron, 102 Mass. 148; Kenerson *v.* Henry, 101 Mass. 152; Flint *v.* Flint, 6 Allen (Mass.) 34, 83 Am. Dec. 615; Mead *v.* Braxborough, 11 Cush. (Mass.) 362; Bartlett *v.* Patton, 33 W. Va. 71, 10 S. E. 21, 5 L. R. A. 523. See also Bowman *v.* Montcalm Cir. Judge, 129 Mich. 608, 89 N. W. 334; Syme *v.* Sanders, 4 Strobh. (S. C.) 341. But a different rule obtains in other jurisdictions. White *v.* Beal, etc., Grocer Co., 65 Ark. 278, 45 S. W. 1060; Milo *v.* Gardiner, 41 Me. 549; Steam Stone-Cutter Co. *v.* Scott, 157 Mo. 520, 57 S. W. 1076. See also Sutton *v.* Floyd, 7 T. B. Mon. (Ky.) 3; State *v.* Cook, 14 Mont. 201, 36 Pac. 44; Gratz *v.* Hoover, 16 Pa. St. 232; Vankirk *v.* Clark, 16 Serg. & R. 286; Welland *v.* Middleton, 11 Ir. Eq. 603; Swift *v.* McTiernan, 11 Ir. Eq. 602.

6. *Connecticut.*— Peck *v.* Smith, 41 Conn. 442; South School Dist. *v.* Blakeslee, 13 Conn. 227.

Iowa.— Sioux City Independent School Dist. *v.* Hubbard, 110 Iowa 58, 81 N. W. 241, 80 Am. St. Rep. 271; Wormley *v.* Carroll Dist. Tp., 45 Iowa 666.

Minnesota.— Board of Education *v.* Moore, 17 Minn. 412; Sanborn *v.* Rice County School-Dist., 12 Minn. 17.

New Jersey.— State *v.* Van Winkle, 25 N. J. L. 73.

United States.— Hedrick *v.* Hughes, 15 Wall. 123, 21 L. ed. 52.

See 20 Cent. Dig. tit. "Evidence," § 1255.

7. *Colorado.*—Cooper *v.* People, 28 Colo. 87, 63 Pac. 314.

Georgia.— Ross *v.* Davis, 30 Ga. 823.

Indiana.— Palmer *v.* Glover, 73 Ind. 529.

Massachusetts.— Metcalf *v.* Munson, 10 Allen 491.

Missouri.— Lawrence County *v.* Dunkle, 35 Mo. 395. See also Lycett *v.* Wolff, 45 Mo. App. 489.

New Jersey.— Browning *v.* Flanagin, 22 N. J. L. 567.

Tennessee.— Bryan *v.* Glass, 2 Humphr. 390.

Texas.— Valentine *v.* Sweatt, (Civ. App. 1903) 78 S. W. 385, record kept by county clerk of the cancellation of a lease of state lands.

Vermont.— Briggs *v.* Taylor, 35 Vt. 57.

See 20 Cent. Dig. tit. "Evidence," § 1249.

8. White *v.* U. S., 164 U. S. 100, 17 S. Ct. 38, 41 L. ed. 365; Salte *v.* Thomas, 3 B. & P. 188; Aickles' Case, 2 East P. C. 968, 1 Leach C. C. 435.

9. Seavey *v.* Seavey, 37 N. H. 125. *Compare* Harrison *v.* Harrison, 39 Ala. 489.

10. Buckley *v.* U. S., 4 How. (U. S.) 251, 11 L. ed. 961.

11. Monroe County *v.* May, 67 Ind. 562; Mathews *v.* Bowman, 25 Me. 157; Robinson *v.* Folger, 17 Me. 206; Emery *v.* Goodwin, 17 Me. 76. See also Shattuck *v.* Gilson, 19 N. H. 296.

Roll of militia company, with arbitrary pencil marks, was held inadmissible to prove member's absence. Com. *v.* Peirce, 15 Pick. (Mass.) 170.

12. *Alabama.*— Miller *v.* Boykin, 70 Ala. 469.

Connecticut.— Litchfield *v.* Farmington, 7 Conn. 100.

Maine.— Merriam *v.* Mitchell, 13 Me. 439, 29 Am. Dec. 514.

Massachusetts.— Gurney *v.* Howe, 9 Gray 404, 69 Am. Dec. 299.

New York.— Haddock *v.* Kelsey, 3 Barb. 100.

See 20 Cent. Dig. tit. "Evidence," § 1256.

13. *Connecticut.*—Mears *v.* New York, etc., R. Co., 75 Conn. 171, 52 Atl. 610, 96 Am. St. Rep. 192, 56 L. R. A. 884.

Illinois.— Chicago, etc., R. Co. *v.* Trayes, 17 Ill. App. 136.

Iowa.— Huston *v.* Council Bluffs, 101 Iowa 33, 69 N. W. 1130, 36 L. R. A. 211.

Missouri.—Moore *v.* H. Gaus, etc., Mfg. Co., 113 Mo. 98, 20 S. W. 975.

North Carolina.—Knott *v.* Raleigh, etc., R. Co., 98 N. C. 73, 3 S. E. 735, 2 Am. St. Rep. 321.

federal,[14] state,[15] county,[16] town or township,[17] and municipal[18] officials. So records of births, marriages, and deaths kept in the performance of a duty imposed by law are competent evidence,[19] and this rule has been extended in some jurisdictions, although not in others, to records made of certificates of

Pennsylvania.—Nolt *v.* Crow, 22 Pa. Super. Ct. 113.

United States.— Evanston *v.* Gunn, 99 U. S. 660, 25 L. ed. 306.

See 20 Cent. Dig. tit. "Evidence," § 1257.

Rule applied to weather record kept at state insane asylum.— Hart *v.* Walker, 100 Mich. 406, 59 N. W. 174; De Armond *v.* Neasmith, 32 Mich. 231.

14. Herriot *v.* Broussard, 4 Mart. N. S. (La.) 260; Nichols *v.* Chicago, etc., R. Co., 125 Mich. 394, 84 N. W. 470; Miles *v.* Stevens, 3 Pa. St. 21, 45 Am. Dec. 621; U. S. *v.* Kuhn, 26 Fed. Cas. No. 15,545, 4 Cranch C. C. 401.

15. Com. *v.* Tate, 89 Ky. 587, 13 S. W. 113, 12 Ky. L. Rep. 1; Franklin *v.* Tiernan, 56 Tex. 618; Harper *v.* Marion County, (Tex. Civ. App. 1903) 77 S. W. 1044, holding that the statement of a county treasurer, kept in the office of the state treasurer, and certified by him to be correct, is admissible in evidence.

16. *California.*— People *v.* Eureka Lake, etc., Canal Co., 48 Cal. 143.

Florida.— Johnson *v.* Wakulla County, 28 Fla. 720, 9 So. 690.

Georgia.— Trentham *v.* Waldrop, 119 Ga. 152, 45 S. E. 988.

Indiana.— Carroll County *v.* O'Conner, 137 Ind. 622, 35 N. E. 1006, 37 N. E. 16.

Michigan.— Van Ness *v.* Hadsell, 54 Mich. 560, 20 N. W. 585.

Minnesota.— State *v.* Ring, 29 Minn. 78, 11 N. W. 233.

South Dakota.— Coler *v.* Rhoda School Tp., 6 S. D. 640, 63 N. W. 158.

Texas.— Valentine *v.* Sweatt, (Civ. App. 1903) 78 S. W. 385, record kept by county clerk of cancellation of lease of state lands. *Compare* Highsmith *v.* State, 25 Tex. Suppl. 137.

See 20 Cent. Dig. tit. "Evidence," § 1248.

17. *Connecticut.*— Watson *v.* New Milford, 72 Conn. 561, 45 Atl. 167, 77 Am. St. Rep. 345.

Illinois.— Lowe *v.* Aroma, 21 Ill. App. 598.

Maine.— Bucksport *v.* Spofford, 12 Me. 487.

Massachusetts.—Com. *v.* Shaw, 7 Metc. 52; Briggs *v.* Murdock, 13 Pick. 305. See also Boston *v.* Weymouth, 4 Cush. 538.

New Hampshire.— Rindge *v.* Walker, 61 N. H. 58; Thornton *v.* Campton, 18 N. H. 20; Bishop *v.* Cone, 3 N. H. 513.

Vermont.— See Nye *v.* Kellam, 18 Vt. 594; Hubbard *v.* Austin, 11 Vt. 129.

See 20 Cent. Dig. tit. "Evidence," § 1258.

Rule applied to entries of overseers of poor.— Corinna *v.* Hartland, 70 Me. 355; Cabot *v.* Walden, 46 Vt. 11.

18. *Colorado.*— Greeley *v.* Hamman, 17 Colo. 30, 28 Pac. 460.

Connecticut.— Cook *v.* Ansonia, 66 Conn. 413, 34 Atl. 183.

Illinois.— St. Charles *v.* O'Mailey, 18 Ill. 407.

Maine.— Barker *v.* Fogg, 34 Me. 392.

Missouri.— St. Louis Gas Light Co. *v.* St. Louis, 86 Mo. 495; Fruin-Bambrick Constr. Co. *v.* Geist, 37 Mo. App. 509.

Nebraska.— Clark *v.* Williams, 29 Nebr. 691, 46 N. W. 82.

New Hampshire.— Bow *v.* Allenstown, 34 N. H. 351, 69 Am. Dec. 489.

New York.— Denning *v.* Roome, 6 Wend. 651.

North Carolina.— Cheatham *v.* Young, 113 N. C. 161, 18 S. E. 92, 37 Am. St. Rep. 617; Weith *v.* Wilmington, 68 N. C. 24.

Pennsylvania.— Waln *v.* Philadelphia, 99 Pa. St. 330.

Washington.— Bardsley *v.* Sternberg, 18 Wash. 612, 52 Pac. 251, 524.

West Virginia.— Parsons *v.* Miller, 46 W. Va. 334, 32 S. E. 1017; Grafton *v.* Reed, 34 W. Va. 172, 12 S. E. 767.

Wisconsin.— O'Mally *v.* McGinn, 53 Wis. 353, 10 N. W. 515.

See 20 Cent. Dig. tit. "Evidence," § 1258.

Entries of private nature.— An entry in public book of a municipal corporation has been held not to be evidence for the corporation unless it be an entry of a public nature. Fraser *v.* Charleston, 8 S. C. 318.

19. Com. *v.* Norcross, 9 Mass. 492; Milford *v.* Worcester, 7 Mass. 48; Jacocks *v.* Gilliam, 7 N. C. 47; Derby *v.* Salem, 30 Vt. 722. See also Howard *v.* Illinois Trust, etc., Bank, 189 Ill. 568, 59 N. E. 1106; Com. *v.* Hayden, 163 Mass. 453, 40 N. E. 846, 47 Am. St. Rep. 468, 28 L. R. A. 318; Kennedy *v.* Doyle, 10 Allen (Mass.) 161; Jacobi *v.* Order of Germanis, 26 N. Y. Suppl. 318 [*distinguishing* Bradford *v.* Bradford, 51 N. Y. 669].

Record of age of parties applying for marriage license held admissible.— Murray *v.* Supreme Lodge N. E. O. P., 74 Conn. 715, 52 Atl. 722; Blair *v.* Sayre, 29 W. Va. 604, 2 S. E. 97.

Parish and church registers.— In England parish registers of baptisms, marriages, and deaths, and other entries of that kind, were frequently admitted, and this before there were any statutes relating to them, because the common law made it an express duty to keep the registers. Doe *v.* Andrews, 15 Q. B. 756, 69 E. C. L. 756; Sturla *v.* Freccia, 5 App. Cas. 623, 44 J. P. 812, 43 L. T. Rep. N. S. 209, 29 Wkly. Rep. 217; Draycott *v.* Talbot, 3 Bro. P. C. 564, 1 Eng. Reprint 150; Doe *v.* Barnes, 1 M. & Rob. 386. See also Doe *v.* Savage, 1 C. & K. 487, 47 E. C. L. 487; Lloyd *v.* Wait, 6 Jur. 45, 1 Phil. 61, 19 Eng. Ch. 61. *Compare* Whittuck *v.* Waters, 4 C. & P. 375, 19 E. C. L. 561, where a register of burials of a Wesleyan chapel was held inadmissible. Registers of baptisms kept by a clergyman of the established church in

physicians as to the cause of death, required to be filed in the office of the board of health or other municipal authorities.[20] In England bishops' registers[21] and entries in vestry books[22] have been held admissible under the foregoing rule; and in this country records of religious bodies have been held admissible.[23]

England have been held admissible before his death, when accompanied by evidence of the identity of the child, to prove the date of its baptism. Draycott *v.* Talbot, 3 Bro. P. C. 564, 1 Eng. Reprint 1501; Wihen *v.* Law, 3 Stark. 63, 23 Rev. Rep. 757, 3 E. C. L. 595. See also Webb *v.* Haycock, 19 Beav. 342; Cope *v.* Cope, 5 C. & P. 604, 1 M. & Rob. 269, 24 E. C. L. 730; May *v.* May, 2 Str. 1073. *Compare* Rex *v.* North Petherton, 5 B. & C. 508, 8 D. & R. 325, 4 L. J. K. B. O. S. 213, 29 Rev. Rep. 305, 11 E. C. L. 561. But they have been held not to be admissible to prove the time of its birth, because the clergyman had no authority to make inquiry about the time of birth or any entry concerning it in the register. Burghart *v.* Angerstein, 6 C. & P. 690, 25 E. C. L. 641; Rex *v.* Clapham, 4 C. & P. 29, 19 E. C. L. 392; Wihen *v.* Law, 3 Stark. 63, 23 Rev. Rep. 757, 3 E. C. L. 595. See also Clark *v.* Trinity Church, 5 Watts & S. (Pa.) 266; *In re* Turner, 29 Ch. D. 985, 53 L. T. Rep. N. S. 528. So in this country church registers of baptisms, marriages, deaths, and burials kept in accordance with the requirement of law have been admitted. American L. Ins., etc., Co. *v.* Rosenagle, 77 Pa. St. 507; Stoever *v.* Whitman, 6 Binn. (Pa.) 416; Hyam *v.* Edwards, 1 Dall. (Pa.) 2, 1 L. ed. 11; Lewis *v.* Marshall, 5 Pet. (U. S.) 470, 8 L. ed. 195. See also Kennedy *v.* Doyle, 10 Allen (Mass.) 161; Morrissey *v.* Wiggins Ferry Co., 47 Mo. 521. But an entry in a registry of baptisms and births, the object of which was to register the baptism and not the birth, the time of birth being introduced merely by way of description, has been held not to be evidence of the time of birth. Clark *v.* Trinity Church, 5 Watts & S. (Pa.) 266. So a burial register has been held inadmissible to show parentage and time and place of birth. Sitler *v.* Gehr, 105 Pa. St. 577, 51 Am. Rep. 207. In those jurisdictions, however, where no record of baptisms is required to be kept by law, a church book containing such record has been held not to be admissible in evidence as a public record. Kennedy *v.* Doyle, 10 Allen (Mass.) 161. *Compare* Hancock *v.* Supreme Council C. B. L., 67 N. J. L. 614, 52 Atl. 301. So it has been held that, in the absence of a special statute, registers of this character from another state are not admissible unless acknowledged as documents of an authentic and public nature by the laws of the state where they are kept. Morrissey *v.* Wiggins Ferry Co., 47 Mo. 521 (baptismal register); Childress *v.* Cutter, 16 Mo. 24 (certificate of burial); Chambers *v.* Chambers, 32 N. Y. Suppl. 875.

Contra.— In some jurisdictions, however, it has been held that statutes requiring records of births, marriages, and deaths, including the causes of death, to be kept by city boards of health are mere police regulations, and the records being required for special and local purposes, viz., to assist the board of health in the conduct of the affairs of that office, are not public records in such a sense as make them evidence between private parties of the facts recorded (Sovereign Camp W. of W. *v.* Grandon, 64 Nebr. 39, 89 N. W. 448; Buffalo Loan, etc., Co. *v.* Knights Templar, etc., Mut. Aid Assoc., 126 N. Y. 450, 27 N. E. 942, 22 Am. St. Rep. 839 [*affirming* 56 Hun 303, 9 N. Y. Suppl. 346]. See also Davis *v.* Supreme Lodge K. of H., 165 N. Y. 159, 58 N. E. 891. *Compare* Keefe *v.* Supreme Council Catholic Mut. Ben. Assoc., 37 N. Y. App. Div. 276, 55 N. Y. Suppl. 827); and a general statute authorizing their use as *prima facie* evidence has been held to apply only to controversies involving public rights (Beglin *v.* Metropolitan L. Ins. Co., 173 N. Y. 374, 66 N. E. 102 [*reversing* 32 Misc. 254, 66 N. Y. Suppl. 206], where the record was introduced to show the cause of death. But *compare* Markowitz *v.* Dry Dock, etc., R. Co., 12 Misc. (N. Y.) 412, 33 N. Y. Suppl. 702).

Under Vt. Acts (1902), p. 49, providing that no public record of births or deaths, or any certified copy thereof, shall be competent evidence, except of the fact of birth and death, a certified copy of a death certificate is inadmissible to show that deceased died of pneumonia, as stated therein. McKinstry *v.* Collins, 76 Vt. 221, 56 Atl. 985. The rule was otherwise prior to this statute. McKinstry *v.* Collins, 74 Vt. 147, 52 Atl. 438.

20. Hennessy *v.* Metropolitan L. Ins. Co., 74 Conn. 699, 52 Atl. 490; Ohmeyer *v.* Supreme Forest W. C., 91 Mo. App. 189; Reynolds *v.* Prudential Ins. Co., 88 Mo. App. 679.

21. Hartley *v.* Cook, 9 Bing. 728, 23 E. C. L. 779, 5 C. & P. 441, 24 E. C. L. 646, 2 L. J. C. P. 141, 3 Moore & S. 230; Arnold *v.* Bath, 5 Bing. 316, 7 L. J. C. P. O. S. 120, 2 M. & P. 559, 15 E. C. L. 600; Irish Soc. *v.* Derry, 12 Cl. & F. 641, 8 Eng. Reprint 1561. See also Doe *v.* Wilkins, 2 C. & K. 328, 61 E. C. L. 328.

22. Price *v.* Littlewood, 3 Campb. 288; Rex *v.* Martin, 2 Campb. 100, 11 Rev. Rep. 674.

23. The records of the Maine eastern conference of christian churches, it being a legally and permanently organized ecclesiastical body having regular public sessions, have been held admissible as evidence of its acts and doings. Nason *v.* First Bangor Christian Church, 66 Me. 100. See also Rayburn *v.* Elrod, 43 Ala. 700. *Compare* Martin *v.* Gunby, 2 Harr. & J. (Md.) 248. But it has been held that a printed copy of the minutes of a Methodist conference is inadmissible in evidence to prove the authority of an alleged Methodist minister to perform a marriage, if it is not shown that such copy was issued by the conference. Pettyjohn *v.* Pettyjohn, 1 Houst. (Del.) 332.

c. Land-Office Records and Proceedings. Public land-office records are intended for the preservation of the evidence of the transactions of the land department and are admissible to prove the facts recited therein.[24] A full treatment of the admissibility and effect of these records, together with patents, surveys and maps, certificates and receipts, and other documentary evidence relating to public lands, will be found elsewhere in this work.[25]

d. Official Certificates. Certificates made by a public officer intrusted with authority for that purpose have been treated as public documents and as such they are competent evidence as against all persons of the facts which he is empowered to certify.[26] But to render the certificate admissible, the official character of the person claiming to act as such[27] and his authority to make the certificate by order of court or otherwise[28] must be established. So, although an officer is authorized to make a certificate, it is evidence only so far as the matter

24. McGarrahan *v.* New Adria Min. Co., 96 U. S. 316, 24 L. ed. 630; Galt *v.* Galloway, 4 Pet. (U. S.) 332, 7 L. ed. 876.

25. See, generally, PUBLIC LANDS.

26. *Georgia.*— Trentham *v.* Waldrop, 119 Ga. 152, 45 S. E. 988, certificate of clerk as to registration of physician.

Illinois.— See Johnston *v.* Ewing Female University, 35 Ill. 518.

Indiana.— Jay County *v.* Gillum, 92 Ind. 511.

Iowa.— Clark *v.* Polk County, 19 Iowa 248.

Mississippi.— See McNutt *v.* Lancaster, 9 Sm. & M. 570.

Missouri.— Gurno *v.* Janis, 6 Mo. 330.

New Hampshire.— Davis *v.* Clements, 2 N. H. 390.

New York.—Erickson *v.* Smith, 2 Abb. Dec. 64, 38 How. Pr. 454.

United States.— Levy *v.* Burley, 15 Fed. Cas. No. 8,300, 2 Sumn. 355.

See 20 Cent. Dig. tit. "Evidence," § 1266 *et seq.*

Certificates admitted under statutes expressly authorizing their admission.— *Illinois.* — Grand Pass Shooting Club *v.* Crosby, 181 Ill. 266, 54 N. E. 913.

Iowa.— York *v.* Sheldon, 18 Iowa 569.

Maine.— Granite Bank *v.* Treat, 18 Me. 340.

Massachusetts.— Com. *v.* Waite, 11 Allen 264, 87 Am. Dec. 711.

Nebraska.— Davis *v.* Watkins, 56 Nebr. 288, 76 N. W. 575.

Texas.—Robles *v.* Cooksey, (Civ. App. 1902) 70 S. W. 584.

Wisconsin.— Peters *v.* Reichenbach, 114 Wis. 209, 90 N. W. 184.

See 20 Cent. Dig. tit. "Evidence," § 1266 *et seq.*

Where a certificate is made evidence by statute it must be made in conformity to such statute. Parker *v.* Staniels, 38 N. H. 251. Where it is made evidence of certain facts by statute it will be admissible to prove those facts, although the certificate contains in addition thereto extraneous matter which is not evidence. Johnson *v.* Hocker, 1 Dall. (Pa.) 406, 1 L. ed. 197.

Certificate as evidence for officer.— The certificate of an officer, when by law evidence for others, is competent evidence for himself, provided he was at the time of making it competent to act officially in the matter to which it relates. McKnight *v.* Lewis, 5 Barb. (N. Y.) 681.

Certificates of deputies or assistants admitted.— Byington *v.* Allen, 11 Iowa 3; Rives *v.* Rives, 4 J. J. Marsh. (Ky.) 533; Grant *v.* Levan, 4 Pa. St. 393. In State *v.* Clark, 46 La. Ann. 1409, 16 So. 374, it was held that where the assistant secretary of state is authorized to perform all the official acts of the secretary of state, his certificate is competent evidence of the date of the promulgation of a law.

27. Harbers *v.* Tribby, 62 Ill. 56. See also Carter *v.* Territory, 1 N. M. 317. In an action to recover the price of hay sold, the certificate of a weigher's assistant, not himself an official weigher, is not admissible, even with the testimony of the weigher, to prove that on the day named therein hay was weighed by the weigher for the defendant. Prew *v.* Donahue, 118 Mass. 438.

Certificate made after expiration of term of office inadmissible.— Turner *v.* Thomas, 77 Miss. 864, 28 So. 803; Cluggage *v.* Swan, 4 Binn. (Pa.) 150, 5 Am. Dec. 400.

28. *Arkansas.*— Obermier *v.* Core, 25 Ark. 562, holding inadmissible a certificate by a sheriff setting forth the performance of acts not in the line of his official duty.

Colorado.— Howard *v.* Sherwood, 1 Colo. 117.

District of Columbia.—Birmingham *v.* Pettit, 21 D. C. 209.

Georgia.— O'Bannon *v.* Paremour, 24 Ga. 489, holding inadmissible the certificate of a Georgia commissioner as to the official character of a notary public in Texas, since such commissioner has no right to make it. See also Daniel *v.* Bailey, 118 Ga. 408, 45 S. E. 379, report of commissioners defining boundary lines of counties.

Illinois.— Sullivan *v.* State, 66 Ill. 75; Harbers *v.* Tribby, 62 Ill. 56; Deutscher Frauen Kranken Verein *v.* Berger, 35 Ill. App. 112.

Iowa.— Allen *v.* Dunham, 1 Greene 89.

Louisiana.— Rillieux *v.* Singletary, 17 La. 88.

Maine.— Randall *v.* Bradbury, 30 Me. 256.

Massachusetts.— Reed *v.* Scituate, 7 Allen 141.

Missouri.— Evans *v.* Labaddie, 10 Mo. 425.

New York.— Parr *v.* Greenbush, 72 N. Y.

certified comes within the official duty or cognizance of the officer.[29] Certificates made by officers in pursuance of a requirement of law have sometimes been held inadmissible to prove the facts recited therein on the ground that the certificates were required for a special purpose and not to serve as evidence.[30]

e. Records of Private Writings — (i) *In General.* An original record book containing a deed or other private writing is, when properly identified or verified, admissible to prove the fact of registration,[31] and in some jurisdictions the record of a deed is admissible as primary evidence to show the execution and contents of the deed,[32] where the original is not in the possession or under the control of the

463; Porter *v.* Waring, 69 N. Y. 250; Erickson *v.* Smith, 2 Abb. Dec. 64, 38 How. Pr. 454; People *v.* Cook, 14 Barb. 259; Bennett *v.* Burch, 1 Den. 141.

South Carolina.— *Ex p.* Copeland, Rice Eq. 69.

South Dakota.— Billingsley *v.* Hiles, 6 S. D. 445, 61 N. W. 687; Meyer *v.* Minnehaha County School Dist. No. 31, 4 S. D. 420, 57 N. W. 68.

Texas.— Byers *v.* Wallace, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 760; Robertson *v.* Du Bose, 76 Tex. 1, 13 S. W. 300; Reynolds *v.* Dechaumes, 22 Tex. 116.

United States.— Wagner *v.* Frederick County, 91 Fed. 969, 34 C. C. A. 147. See also Daviess County *v.* Dickinson, 117 U. S. 657, 6 S. Ct. 897, 29 L. ed. 1026.

See 20 Cent. Dig. tit. "Evidence," § 1266 *et seq.*

Necessity of statute directing certificate to be made.— In a number of cases official certificates have been admitted, although it did not appear that there was any statute expressly directing the certificate to be made.

Indiana.— Fayette County *v.* Chitwood, 8 Ind. 504.

Iowa.— Lacy *v.* Kossuth County, 106 Iowa 16, 75 N. W. 689.

Maryland.— Harwood *v.* Marshall, 9 Md. 83, holding that, where a governor is authorized by law to administer the oath of office to certain officers, he may certify the fact of administering such oath, and his certificate under the great seal of the state is evidence of such fact.

New York.— Wright *v.* Murray, 6 Johns. 286.

Pennsylvania.— Vastbinder *v.* Wager, 6 Pa. St. 339.

South Carolina.— Springs *v.* South Bound R. Co., 46 S. C. 104, 24 S. E. 166.

See 20 Cent. Dig. tit. "Evidence," § 1266 *et seq.*

Consul's certificate.— But a consul's certificate has been held not to be evidence of any fact recited therein, as between third persons, unless expressly or impliedly made so by statute (Church *v.* Hubbart, 2 Cranch (U. S.) 187, 2 L. ed. 249; The Alice, 12 Fed. 923; Levy *v.* Burley, 15 Fed. Cas. No. 8,300, 2 Sumn. 355. *Compare* U. S. *v.* Mitchell, 26 Fed. Cas. No. 15,791, 2 Wash. 478), particularly where the matters certified are not official acts of the consul nor within his personal knowledge (Brown *v.* Independence, 4 Fed. Cas. No. 2,014, Crabbe 54).

29. Newman *v.* Doe, 4 How. (Miss.) 522; Cutter *v.* Waddingham, 33 Mo. 269; Tripler *v.* New York, 125 N. Y. 617, 26 N. E. 721; Cohoes Bd. of Water Com'rs *v.* Lansing, 45 N. Y. 19; Anderson *v.* James, 4 Rob. (N. Y.) 35; Wolfe *v.* Washburn, 6 Cow. (N. Y.) 261.

30. This rule has been applied to certificates of inspection of boats. Clark *v.* Detroit Locomotive Works, 32 Mich. 348; Erickson *v.* Smith, 2 Abb. Dec. (N. Y.) 64, 38 How. Pr. (N. Y.) 454. *Compare* Perkins *v.* Augusta Ins., etc., Co., 10 Gray (Mass.) 312, 71 Am. Dec. 654.

31. Falls Land, etc., Co. *v.* Chisholm, 71 Tex. 523, 9 S. W. 479; Pope *v.* Graham, 44 Tex. 196. See also Winona *v.* Huff, 11 Minn. 119.

32. *California.*— Grant *v.* Oliver, 91 Cal. 158, 27 Pac. 596, 861. A different rule obtained under prior statutes. Fresno Canal, etc., Co. *v.* Dunbar, 80 Cal. 530, 22 Pac. 275; Brown *v.* Griffith, 70 Cal. 14, 11 Pac. 500.

Indiana.— Burns *v.* Harris, 66 Ind. 536; Patterson *v.* Dallas, 46 Ind. 48; Winship *v.* Clendenning, 24 Ind. 439; Morehouse *v.* Potter, 15 Ind. 477; Lyon *v.* Perry, 14 Ind. 515; Doe *v.* Holmes, 5 Blackf. 319; Dixon *v.* Doe, 5 Blackf. 106. See also Daniels *v.* Stone, 6 Blackf. 450; Foresman *v.* Marsh, 6 Blackf. 285.

Michigan.— See Bradley *v.* Silsbee, 33 Mich. 328.

Minnesota.— See Gaston *v.* Merriam, 33 Minn. 271, 22 N. W. 614.

Mississippi.— See Cogan *v.* Frisby, 36 Miss. 178.

New Jersey.—See Chase *v.* Caryl, 57 N. J. L. 545, 31 Atl. 1024 [*distinguishing* New Jersey R., etc., Co. *v.* Suydam, 17 N. J. L. 25; Den *v.* Gustin, 12 N. J. L. 42, which were decided on common-law principles].

New York.— Clark *v.* Clark, 47 N. Y. 664.

North Carolina.— By express statutory provision (Code, § 1251) the registry or record of a deed or other instrument required or allowed to be registered or recorded is admissible as proof of it, unless by a rule of court on affidavit the party entitled to possession of the original shall have been previously required to produce the original. Ratliff *v.* Ratliff, 131 N. C. 425, 42 S. E. 887, 63 L. R. A. 963; Mitchell *v.* Bridgers, 113 N. C. 63, 18 S. E. 91; Taylor *v.* Albemarle Steam Nav. Co., 105 N. C. 484, 10 S. E. 897. See also Devereux *v.* McMahon, 108 N. C. 134, 12 S. E. 902, 12 L. R. A. 205.

Oregon.— Serles *v.* Serles, 35 Oreg. 289, 57 Pac. 634; Stanley *v.* Smith, 15 Oreg. 505, 16 Pac. 174.

party desiring to offer it.[33] Even apart from express statutory provision records of deeds of realty[34] or of the manumission of a slave,[35] if they are within reach and can be produced, have been held admissible without accounting for the non-production of the original. The prevailing rule, however, is that a record of a deed or other private writing is, in the absence of statute, admissible as secondary evidence only,[36] and this rule with slight modifications of the common law in some instances prevails in many jurisdictions under the statutes.[37]

(II) *Defective or Unauthorized Records.* As a general rule a record not made in accordance with the law relating to the recording of instruments is incompetent evidence to prove the original.[38] Thus if the recording of the par-

Pennsylvania.— See Swank *v.* Phillips, 113 Pa. St. 482, 6 Atl. 450.

United States.— Stinson *v.* Doolittle, 50 Fed. 12, where it was held that the Minnesota statute does not limit the effect of the register's record of a deed as evidence to the first record of it, but gives at least equal weight as evidence to later records properly made.

See 20 Cent. Dig. tit. "Evidence," § 1279 *et seq.*

Where forgery is main question in issue.— In People *v.* Swetland, 77 Mich. 53, 43 N. W. 779, it was held that Howell Annot. St. Mich. § 5685, authorizing records of conveyances to be introduced in evidence without further proof, does not apply where the question of the forgery of the original instrument is in issue, but the original instrument must be produced if accessible.

Records transcribed from other records admitted under statute.— Mankato *v.* Meagher, 17 Minn. 265; Weisbrod *v.* Chicago, etc., R. Co., 21 Wis. 602.

Entries showing to whom instruments are delivered after record.— Entries made in grantors' and grantees' reception books, kept in the office of the register of deeds, showing to whom recorded instruments have been delivered, are inadmissible in evidence as proof of such delivery, where they are not made evidence of the fact by statute and such books are kept solely for the convenience and information of the register and not for the purpose of making them evidence. Lloyd *v.* Simons, 90 Minn. 237, 95 N. W. 903.

33. Staunchfield *v.* Jeutter, (Nebr. 1903) 96 N. W. 642. See also Patton *v.* Fox, 179 Mo. 525, 78 S. W. 804.

34. Morrill *v.* Gelston, 34 Md. 413; Robinson *v.* Pitzer, 3 W. Va. 335; Peltz *v.* Clarke, 19 Fed. Cas. No. 10,914, 2 Cranch C. C. 703 [*affirmed* in 5 Pet. 481, 8 L. ed. 199]; U. S. Bank *v.* Benning, 2 Fed. Cas. No. 908, 4 Cranch C. C. 81.

35. Thomas *v.* Magruder, 23 Fed. Cas. No. 13,904, 4 Cranch C. C. 446.

36. This rule has been applied to a deed of conveyance of lands (Peck *v.* Clark, 18 Tex. 239; Brooks *v.* Marbury, 11 Wheat. (U. S.) 78, 6 L. ed. 423. See also Bradley *v.* Silsbee, 33 Mich. 328; State *v.* Crocker, 49 S. C. 242, 27 S. E. 49; Purvis *v.* Robinson, 1 Bay (S. C.) 493), to a mortgage of lands (Harker *v.* Gustin, 12 N. J. L. 42) and to a certificate of manumission of a slave (Fox *v.* Lambson, 8 N. J. L. 275).

37. *Alabama.*— Jones *v.* Hagler, 95 Ala. 529, 10 So. 345; Anderson *v.* Snow, 8 Ala. 504. See also Gay *v.* Rogers, 109 Ala. 624, 20 So. 37.

Colorado.— Sullivan *v.* Hense, 2 Colo. 424; Owers *v.* Olathe Silver Min. Co., 6 Colo. App. 1, 39 Pac. 980.

Illinois.— See Hanson *v.* Armstrong, 22 Ill. 442.

Iowa.— Jaffray *v.* Thompson, 65 Iowa 323, 21 N. W. 659; Olleman *v.* Kelgore, 52 Iowa 38, 2 N. W. 612; Ingle *v.* Jones, 43 Iowa 286; Ackley *v.* Sexton, 24 Iowa 320; Williams *v.* Heath, 22 Iowa 519. See also Collins *v.* Valleau, 79 Iowa 626, 43 N. W. 284, 44 N. W. 904.

Kansas.— Williams *v.* Hill, 16 Kan. 23; Marshall *v.* Shibley, 11 Kan. 114.

Louisiana.— Beauvais *v.* Wall, 14 La. Ann. 199.

Missouri.— Patton *v.* Fox, 179 Mo. 525, 78 S. W. 804; Walker *v.* Newhouse, 14 Mo. 373.

Nebraska.— Delaney *v.* Errickson, 10 Nebr. 492, 6 N. W. 600, 35 Am. Rep. 487.

Texas.— Watters *v.* Parker, (Sup. 1892) 19 S. W. 1022; Lasher *v.* State, 30 Tex. App. 387, 17 S. W. 1064, 28 Am. St. Rep. 922.

See 20 Cent. Dig. tit. "Evidence," § 1279 *et seq.*

Similar rule under Florida constitution.— Johnson *v.* Drew, 34 Fla. 130, 15 So. 780, 43 Am. St. Rep. 172; Neal *v.* Spooner, 20 Fla. 38.

Transcribed records admitted as secondary evidence.— Where county records are transferred by the proper officers from a temporary book, where they were originally recorded, into another, which is recognized as a public record, and it is shown that such original book has been lost, the book into which such records were transferred is admissible in evidence to show the record of the location of a mining claim. Belk *v.* Meagher, 104 U. S. 279, 26 L. ed. 735. See also Collins *v.* Vallean, 79 Iowa 626, 43 N. W. 284, 44 N. W. 904.

38. Trammell *v.* Thurmond, 17 Ark. 203. See also Jones *v.* Parks, 22 Ala. 446.

Recording within year from execution held unnecessary.— Roach *v.* Martin, 1 Harr. (Del.) 548, 28 Am. Dec. 746.

Signature of register held unnecessary.— Wilt *v.* Cutler, 38 Mich. 189.

Accuracy of record as copy.— In Stow *v.* People, 25 Ill. 81, it was held that the Illinois statute does not make the record of a

ticular instrument is not required or authorized,[39] or if it is so improperly executed or acknowledged as to render the record thereof a nullity,[40] it is not admissible in evidence unless there is statutory provision to the contrary.[41]

f. Authentication of Document. In order that a document may be admissible in evidence it must appear that it is what it purports to be,[42] it being necessary to establish its authenticity and genuineness either by evidence appearing on its face, as for instance, by the proper official verification,[43] or by extrinsic evidence, as by

deed evidence of its contents, without proof that it is a true copy.

39. *Alabama.*— Martin *v.* Hall, 72 Ala. 587.

Arkansas.— Brown *v.* Hicks, 1 Ark. 232.

California.— Stevens *v.* Irwin, 12 Cal. 306.

Illinois.— Mullanphy Sav. Bank *v.* Schott, 135 Ill. 655, 26 N. E. 640, 25 Am. St. Rep. 401.

Pennsylvania.— Stonebreaker *v.* Short, 8 Pa. St. 155; Fitler *v.* Shotwell, 7 Watts & S. 14; Watson *v.* Hue, 9 Pa. Dist. 519.

See 20 Cent. Dig. tit. "Evidence," § 1280.

Rule applied to recorded copy.— A copy of a deed duly executed cannot be properly recorded, and such copy is inadmissible in evidence as a recorded instrument. Frost *v.* Wolf, 77 Tex. 455, 14 S. W. 440, 19 Am. St. Rep. 761.

Rule applied to record of deed in Spanish language.— Wilson *v.* Corbier, 13 Cal. 166.

40. Rushin *v.* Shields, 11 Ga. 636, 56 Am. Dec. 436; Papot *v.* Gibson, 7 Ga. 530; Meskimen *v.* Day, 35 Kan. 46, 10 Pac. 14; Van Auken *v.* Monroe, 38 Mich. 725; Farmers', etc., Bank *v.* Bronson, 14 Mich. 361. In Colorado it has been held that the record of a deed which was not properly acknowledged is inadmissible unless the execution of the original is otherwise proved. Trowbridge *v.* Addoms, 23 Colo. 518, 48 Pac. 535.

Record of unstamped deed held admissible.— Collins *v.* Vallean, 79 Iowa 626, 43 N. W. 284, 44 N. W. 904.

Record omitting seal in deed.— In North Carolina it has been held that where a sheriff's deed has been lost and the copy on the registration books is offered in evidence but has no seal thereto, the law will not presume from the words "Given under my hand and seal" that the original bore a seal. Strain *v.* Fitzgerald, 128 N. C. 396, 38 S. E. 929. *Compare* Smith *v.* Dall, 13 Cal. 510.

41. Under Minn. Laws (1866), c. 23, the records of deeds actually recorded prior thereto are admissible in evidence, whether properly admitted to record or not. Lamberton *v.* Windom, 18 Minn. 506; Wilder *v.* St. Paul, 12 Minn. 192. This statute does not, however, authorize the admission in evidence of the records in a case in which the originals would not be admissible. Lamberton *v.* Windom, *supra*. For similar statute in Kansas see Gildehaus *v.* Whiting, 39 Kan. 706, 18 Pac. 916.

42. *Delaware.*— Star Loan Assoc. *v.* Moore, 4 Pennew. 308, 55 Atl. 946.

Indiana.— Tyres *v.* Kennedy, 126 Ind. 523, 26 N. E. 394.

Maine.— Morrill *v.* Haywood, 16 Me. 11.

Michigan.— People *v.* Etter, 81 Mich. 570, 45 N. W. 1109; Groesbeck *v.* Seeley, 13 Mich. 329.

Minnesota.— Mower County *v.* Smith, 22 Minn. 97.

Missouri.— Alexander *v.* Campbell, 74 Mo. 142.

New Jersey.— Allen *v.* Smith, 30 N. J. L. 449.

Ohio.— State *v.* Wallahan, Tapp. 80.

South Carolina.— Dent *v.* Bryce, 16 S. C. 1.

Wisconsin.— Fowler *v.* Schafer, 69 Wis. 23, 32 N. W. 292.

See 20 Cent. Dig. tit. "Evidence," § 1522 *et seq.*

Rule applied to maps, plots, and surveys.— Franey *v.* Miller, 11 Pa. St. 434; Vicroy *v.* Skelley, 14 Serg. & R. (Pa.) 372; Farley *v.* Lenox, 8 Serg. & R. (Pa.) 392; McKenzie *v.* Crow, 4 Yeates (Pa.) 428; Chirac *v.* Reinecker, 2 Pet. (U. S.) 613, 7 L. ed. 538. See also Unger *v.* Wiggins, 1 Rawle (Pa.) 331; Leazure *v.* Hillegas, 7 Serg. & R. (Pa.) 313.

Official bonds.— The production of an alleged official bond from the proper official custody, together with the record of its approval, has been held not sufficient evidence of its execution, when the latter is denied. Craw *v.* Abrams, (Nebr. 1903) 94 N. W. 639, 97 N. W. 296. On the other hand it has been held that a guardian's bonds taken by public authority need not be verified by the ordinary tests of truth applied to merely private instruments, and, where the execution of such a bond is denied by plea, it is only necessary to prove the identity of the obligors in order to sustain the affirmative of the issue. Kello *v.* Maget, 18 N. C. 414. See also Short *v.* Currie, 53 N. C. 42. So it has been held an official bond of a justice of the peace, indorsed by the prothonotary, "Approved," the approval being signed with his name and official addition, is a record of the court of common pleas, and is entitled to be read in evidence without further proof. Hartz *v.* Com., 1 Grant (Pa.) 359.

Proof of authenticity dispensed with by admission of parties.— Miller *v.* Hale, 26 Pa. St. 432; *Ex p.* Steen, 59 S. C. 220, 37 S. E. 829.

43. *Delaware.*— Star Loan Assoc. *v.* Moore, 4 Pennew. 308, 57 Atl. 946.

Illinois.— Morgan County Bank *v.* People, 21 Ill. 304.

Iowa.— See Cooper *v.* Nelson, 38 Iowa 440.

Kansas.— Atchison, etc., R. Co. *v.* Maquilkin, 12 Kan. 301.

Louisiana.—See Board of Control *v.* Royes, 48 La. Ann. 1061, 20 So. 182.

showing the custody from which it comes.[44] If the record is produced in court and identified by the custodian thereof no further proof of its authenticity is in general required.[45] As a general rule, however, a public record is not required to be identified by the custodian thereof, but its identity may be shown by any competent witness who knows the fact.[46] In some jurisdictions the rule is laid down in general terms that, where by statute an officer is authorized to make certificates, a certificate in the form prescribed by law and signed by a person professing to act in an official capacity is *prima facie* evidence without proof of the officer's handwriting or other proof of the genuineness of the paper.[47]

6. Incomplete or Altered Records — a. In General. As a general rule mere extracts or partial or incomplete records are inadmissible; the entire record or a

Maine.— Hill *v.* Fuller, 14 Me. 121.

Massachusetts.— Wetherbee *v.* Martin, 10 Gray 245.

Nebraska.— See Davis *v.* Watkins, 56 Nebr. 288, 76 N. W. 575.

New Mexico.— Coler *v.* Santa Fe County, 6 N. M. 88, 27 Pac. 619.

New York.— Schile *v.* Brokhahus, 80 N. Y. 614 [*affirming* 44 N. Y. Super. Ct. 560]; Jackson *v.* Miller, 6 Wend. 228, 21 Am. Dec. 316.

Washington.— Seattle *v.* Parker, 13 Wash. 450, 43 Pac. 369.

The seal of the treasury department of the United States and the signature of the secretary are evidence to authenticate the official act of the secretary without any extrinsic aid. White *v.* St. Guirons, Minor (Ala.) 331, 12 Am. Dec. 56.

Uncertified duplicate tax list admitted.— Standard Oil Co. *v.* Bretz, 98 Ind. 231. *Compare* Robinoe *v.* Doe, 6 Blackf. (Ind.) 85; State *v.* Smith, 30 N. J. L. 449.

44. *California.*— People *v.* Eureka Lake, etc., Canal Co., 48 Cal. 143.

District of Columbia.— See Birmingham *v.* Pettit, 21 D. C. 209.

Maine.— Sumner *v.* Sebec, 3 Me. 223.

Massachusetts.— Richardson *v.* Smith, 1 Allen 541.

New Hampshire.—Little *v.* Downing, 37 N. H. 355.

North Carolina.— See Kello *v.* Maget, 18 N. C. 414.

United States.— Glaspie *v.* Keator, 56 Fed. 203, 5 C. C. A. 474.

England.— Doe *v.* Fowler, 14 Q. B. 700, 14 Jur. 179, 19 L. J. Q. B. 151, 68 E. C. L. 700; Atkins *v.* Hatton, 2 Anstr. 386; Baillie *v.* Jackson, 3 De G. M. & G. 38, 10 Hare, appendix xlvi, 17 Jur. 170, 22 L. J. Ch. 753, 1 Wkly. Rep. 196, 52 Eng. Ch. 31, 43 Eng. Reprint 16, 17 Eng. L. & Eq. 131; Pulley *v.* Hilton, 12 Price 625; Armstrong *v.* Hewitt, 4 Price 216, 18 Rev. Rep. 707; Swinnerton *v.* Stafford, 3 Taunt. 91.

Parol evidence of authenticity admitted when certificate of authentication was torn off.— Thompson *v.* Autry, (Tex. Civ. App. 1900) 57 S. W. 47.

Presumption as to entries in officer's books. — In *Ex p.* Steen, 59 S. C. 220, 37 S. E. 829, the rule was laid down that in the absence of any evidence to the contrary the entries in a book proved to have been kept in a public office will be presumed to have been made by the proper authority.

An unofficial paper will not be admissible merely because found on the files of a public office. Noble *v.* Douglass, 56 Kan. 92, 42 Pac. 328; Hardiman *v.* New York, 21 N. Y. App. Div. 614, 47 N. Y. Suppl. 786; Ridgeley *v.* Johnson, 11 Barb. (N. Y.) 527; West Branch Bank *v.* Donaldson, 6 Pa. St. 179.

45. *Alabama.*— Stewart *v.* Conner, 9 Ala. 803; Hartley *v.* Chandler, 6 Ala. 857.

Georgia.— See Simpson *v.* McBride, 78 Ga. 297.

Illinois.— Williams *v.* Jarrot, 6 Ill. 120.

Louisiana.— Hebert's Succession, 33 La. Ann. 1099.

Maine.— Sumner *v.* Sebec, 3 Me. 223.

Minnesota.— Sanborn *v.* Rice County School-Dist. No. 10, 12 Minn. 17.

New Hampshire.— See Pembroke *v.* Allenstown, 41 N. H. 365.

North Carolina.— See Springs *v.* Schenck, 106 N. C. 153, 11 S. E. 646.

South Carolina.— Ober *v.* Blalock, 40 S. C. 31, 18 S. E. 264.

See 20 Cent. Dig. tit. "Evidence," § 1522.

That the official oath of the custodian of a public record who produces it in court was irregular does not render the record inadmissible in evidence. Mason *v.* Belfast Hotel Co., 89 Me. 384, 36 Atl. 624; Day *v.* Peasley, 54 Vt. 310.

46. *Georgia.*— Acme Brewing Co. *v.* Central R., etc., Co., 115 Ga. 494, 42 S. E. 8; Robinson *v.* State, 82 Ga. 535, 9 S. E. 528.

Maine.— Hathaway *v.* Addison, 48 Me. 440.

Massachusetts.— Gurney *v.* Howe, 9 Gray 404, 69 Am. Dec. 299.

New Jersey.— Browning *v.* Flanagin, 22 N. J. L. 567.

Pennsylvania.—Cuttle *v.* Brockway, 24 Pa. St. 145. But see Devling *v.* Williamson, 9 Watts 311; Hockenbury *v.* Carlisle, 1 Watts & S. 282.

See 20 Cent. Dig. tit. "Evidence," § 1522.

47. Milburn *v.* State, 1 Md. 1; Prather *v.* Johnson, 3 Harr. & J. (Md.) 487; Willard *v.* Pike, 59 Vt. 202, 9 Atl. 907; State *v.* Potter, 52 Vt. 33; Benedict *v.* Heineberg, 43 Vt. 231; Lemington *v.* Blodgett, 37 Vt. 210; Hubbard *v.* Dewey, 2 Aik. (Vt.) 312; Usher *v.* Pride, 15 Gratt. (Va.) 190.

duly authenticated copy thereof must be produced.[48] But it is no objection that extracts only are read from a public record offered in evidence, where the entire record is produced and open to the use of the objecting party.[49] So where public records are contained in a record book, copies of so much of the records as relates to the subject-matter in litigation or as constitutes a distinct and independent record are admissible.[50] Where a record offered in evidence is interlined, erased, or mutilated, the interlineations or erasures should as a general rule be fully and satisfactorily explained,[51] especially where it is sought by the record in such condition to contradict a certified copy which appears to have been formally and regularly transcribed;[52] but where a public document, prepared by a sworn officer, is produced by him to whose custody the law intrusts it, the party offering it in evidence is not required to explain an alteration appearing to have been made at the same time and by the same hand as the obliterated letters and figures, there being no room for presumption that the document had been fraudulently altered.[53]

b. Judicial Records — (i) *In General.* As a general rule where judicial proceedings are offered in evidence the whole record or a duly authenticated copy thereof must be produced or accounted for, so that the court may determine the legal effect of the whole of it, which may be quite different from that of a part.[54] This general rule is not, however, universally applied, but it has been

48. Smith *v.* Rich, 37 Mich. 549; State *v.* Clark, 41 N. J. L. 486; Wood *v.* Knapp, 100 N. Y. 109, 2 N. E. 632. See also Garrish *v.* Hyman, 29 La. Ann. 28.

Extracts from official letters.— In Hammatt *v.* Emerson, 27 Me. 308, 46 Am. Dec. 598, it was held that, although letters addressed to a public officer in his official capacity become public documents, extracts or portions of them cannot be admitted in evidence.

A leaf from the register of a post-office on which a letter was entered is not admissible to show that the letter was mailed, but the whole register must be produced. U. S. *v.* Cummings, 25 Fed. Cas. No. 14,900.

But the mere fact that some of the leaves are missing from a public record, unaccompanied by any other suspicious circumstance, has been held no ground for its exclusion as evidence. People *v.* Hancock County, 21 Ill. App. 271.

Copies of records partly obliterated.— It has been held that the certified copy of a survey given by the surveyor-general under the seal of his office is admissible in evidence, although it appeared from such copy that part of the writing of the original survey on file in his office had been obliterated. Jones *v.* Hollopeter, 10 Serg. & R. (Pa.) 326. So it has been held that copies of town records are admissible in evidence, and, if words are worn out or illegible in the original, blanks should be left, and the reason added in a note. Willey *v.* Portsmouth, 35 N. H. 303.

49. Davis *v.* Mason, 4 Pick. (Mass.) 156.

50. Woods *v.* Banks, 14 N. H. 101; Wallace *v.* Douglas, 114 N. C. 450, 19 S. E. 668.

Statute making transcripts from books admissible.—In U. S. *v.* Gaussen, 19 Wall. (U. S.) 198, 22 L. ed. 41, it was held that under a statute providing that "a transcript from the books and proceedings of the treasury shall be evidence" it is not necessary that every account with an individual recorded on such books and all of every account shall be transcribed as a condition of the admissibility of any one account, and that while a garbled or mutilated statement wherein the debits shall be presented and the credits suppressed, or perhaps a statement of results only, is not evidence, an extract from the book when authenticated to be a true copy may be given in evidence.

51. See Coler *v.* Santa Fe County, 6 N. M. 88, 27 Pac. 619.

52. Dolph *v.* Barney, 5 Oreg. 191.

53. People *v.* Minck, 21 N. Y. 539; Crossen *v.* Oliver, 37 Oreg. 514, 61 Pac. 885.

54. *Florida.*— Walls *v.* Endel, 20 Fla. 86; Stark *v.* Billings, 15 Fla. 318.

Illinois.— Vail *v.* Iglehart, 69 Ill. 332.

Kentucky.— McGuire *v.* Kouns, 7 T. B. Mon. 386, 18 Am. Dec. 187.

Louisiana.— Dismukes *v.* Musgrove, 8 Mart. N. S. 375. But it is the settled rule in Louisiana that the production of the entire record in mortuary or insolvency proceedings is unnecessary, where it is sought only to prove a single fact, or a certain part of such proceedings. Sarrazin *v.* W. R. Irby Cigar, etc., Co., 93 Fed. 624, 35 C. C. A. 496, 46 L. R. A. 541. And see Henderson *v.* Maxwell, 22 La. Ann. 357; Price *v.* Emerson, 14 La. Ann. 141; Broom's Succession, 14 La. Ann. 67; Stafford's Succession, 2 La. Ann. 886; McIntosh *v.* Smith, 2 La. Ann. 756.

Maine.— Jay *v.* East Livermore, 56 Me. 107.

Maryland.— Orndorff *v.* Mumma, 3 Harr. & J. 70.

Michigan.— Platt *v.* Stewart, 10 Mich. 260.

Missouri.— Philipson *v.* Bates, 2 Mo. 116, 22 Am. Dec. 444.

Pennsylvania.— Ingham *v.* Crary, 1 Penr. & W. 389; Christine *v.* Whitehill, 16 Serg. & R. 98; Edmiston *v.* Schwartz, 13 Serg. & R. 135; Hampton *v.* Speckenagle, 9 Serg. & R. 212, 11 Am. Dec. 704. But in Pennsylvania

subjected to various modifications by the courts.[55] Thus if the whole of the record cannot by any possibility have a bearing upon the matter in issue, the material and relevant portions of the record are admissible, as for instance where pleadings or depositions in a cause are offered to show admissions by the parties.[56] Indeed in some of the decisions the rule has been broadly stated that a party is required to introduce in evidence so much of the record only as is necessary to sustain the issues in his behalf,[57] at least if the record is divisible into distinct

the admissibility of an exemplification of a record is put upon the certificate, and so where the certificate states that the accompanying copy of the record in a cause is as full and entire as it remains upon the record, such exemplification cannot be excluded, although a part of the record appears to be wanting. Schuylkill, etc., Imp., etc., Co. *v.* McCreary, 58 Pa. St. 304; Eberts *v.* Eberts, 55 Pa. St. 110; McCormick *v.* Irwin, 35 Pa. St. 111.

South Carolina.—Wilson *v.* Harper, 5 S. C. 294; Vance *v.* Reardon, 2 Nott & M. 299.

Tennessee.— Phipps *v.* Caldwell, 1 Heisk. 349; Carrick *v.* Armstrong, 2 Coldw. 265; Lewis *v.* Bullard, 3 Humphr. 207; Renshaw *v.* Tullahoma First Nat. Bank, (Ch. App. 1900) 63 S. W. 194; Brown *v.* Patton, (Ch. App. 1898) 48 S. W. 277.

Virginia.— White *v.* Clay, 7 Leigh 68.

See 20 Cent. Dig. tit. "Evidence," § 1528 *et seq.*

Introduction of complete record prevented by adverse party.— Where plaintiff had introduced an incomplete record, and was prevented by defendant's objections from introducing documents to complete it, defendant cannot raise the objection of its incompleteness. Dismukes *v.* Musgrove, 8 Mart. N. S. (La.) 375.

Part of record not offered as record evidence.— Original papers which constitute parts of the record of another suit may be admitted, where they are not offered or considered as parts of the record or as deriving any authority from them, but simply on account of their intrinsic merit as being original papers. Brown *v.* Patton, (Tenn. Ch. App. 1898) 48 S. W. 277.

Wills.— By statute in some jurisdictions the exemplification of the record of a will, to be evidence, must be accompanied by a copy of the proofs taken before the surrogate or probate judge.

Florida.— Coffee *v.* Groover, 20 Fla. 86.

Kentucky.— See Kentucky Land, etc., Co. *v.* Crabtree, 113 Ky. 922, 70 S. W. 31, 24 Ky. L. Rep. 743.

Mississippi.— See Fotheree *v.* Lawrence, 30 Miss. 416.

New Jersey.—Allaire *v.* Allaire, 37 N. J. L. 312.

New York.— Hill *v.* Crockford, 24 N. Y. 128; Caw *v.* Robertson, 5 N. Y. 125; Nichols *v.* Romaine, 3 Abb. Pr. 122; Morris *v.* Keyes, 1 Hill 540.

North Carolina.— See Sutton *v.* Westcott, 48 N. C. 283.

But in Pennsylvania it has been held that the certificate of the register of wills that a will of lands has been duly proved accompanying a copy of the will is *prima facie* evidence of such will, although the probate is not set out. Logan *v.* Watt, 5 Serg. & R. 212. See also Thursby *v.* Myers, 57 Ga. 155.

Letters of administration.— Under statute in South Carolina it is held that a certified copy of letters of administration is sufficient evidence of appointment without the introduction of the entire record. Hankinson *v.* Charlotte, etc., R. Co., 41 S. C. 1, 19 S. E. 206. In New Jersey it is held that where defendant demands oyer of the letters testamentary, and the contents of the will are not in question, it is sufficient to give a copy of the letters testamentary certified by the register, without annexing a copy of the will. Beach *v.* Pears, 1 N. J. L. 288.

Letters of guardianship.— In New Hampshire it was held that in an action against a ward, letters of guardianship are *prima facie* evidence of the guardian's appointment, without showing an application to the probate judge and notice to defendant before the letters issued. Prescott *v.* Cass, 9 N. H. 93.

55. *Kansas.*— Haynes *v.* Cowen, 15 Kan. 637.

Kentucky.— McGuire *v.* Kouns, 7 T. B. Mon. 386, 18 Am. Dec. 187.

Maine.— See Hammatt *v.* Emerson, 27 Me. 308, 46 Am. Dec. 598.

New Hampshire.— Newbury Bank *v.* Eastman, 44 N. H. 431.

New York.— Packard *v.* Hill, 7 Cow. 434.

Vermont.— Robinson *v.* Gillman, 3 Vt. 163.

56. Gay *v.* Rogers, 109 Ala. 624, 20 So. 37; Smith *v.* McGehee, 14 Ala. 404; Clayton *v.* Clayton, 4 Colo. 410; Henderson *v.* Cargill, 31 Miss. 367. See also Gregory *v.* Pike, 94 Me. 27, 46 Atl. 793.

Introduction of relevant portions of pleadings.— It has been held that where the court admits in one suit all the relevant portions of a pleading in another suit, it is not ground for complaint that it refused to admit the entire pleading. German-American Ins. Co. *v.* Paul, 2 Indian Terr. 625, 53 S. W. 442.

57. *Illinois.*— Walker *v.* Doane, 108 Ill. 236.

Indiana.— Anderson *v.* Ackerman, 88 Ind. 481; Jones *v.* Levi, 72 Ind. 586; Gale *v.* Parks, 58 Ind. 117. *Compare* Brown *v.* Eaton, 98 Ind. 591.

Texas.— Maverick *v.* Salinas, 15 Tex. 57; Lee *v.* Wilkins, 1 Tex. Unrep. Cas. 287.

West Virginia.— McClaugherty *v.* Cooper, 39 W. Va. 313, 19 S. E. 415. See also Dick-

parts,[58] and that it is open to the other party to produce the entire record if it contains matter material to his side of the case.[59]

(II) *JUDGMENT ENTRIES.* The rule has been frequently stated that where a judgment is relied on as an estoppel, as an adjudication upon the subject-matter, or as establishing any particular state of facts of which it is the judicial result, it can be proved only by offering in evidence a complete record or a duly authenticated copy of the entire proceedings in which the judgment was rendered;[60] but when the evidence is sought to be used for a collateral purpose only, and the only relevant fact in issue is whether a judgment has in fact been rendered, nothing need be produced but the judgment entry if the court is a court of record possessing general original jurisdiction,[61] especially if there is enough on the record

inson *v.* Chesapeake, etc., R. Co., 7 W. Va. 390.

United States.— O'Hara *v.* Mobile, etc., R. Co., 76 Fed. 718, 22 C. C. A. 512; Priest *v.* Glenn, 51 Fed. 400, 2 C. C. A. 305.

See 20 Cent. Dig. tit. "Evidence," § 1528.

58. Haynes *v.* Cowen, 15 Kan. 637.

59. Walker *v.* Doane, 108 Ill. 236; and other cases above cited.

60. *Alabama.*— Farley *v.* Whitehead, 63 Ala. 295.

Arkansas.— See Denton *v.* Roddy, 34 Ark. 642.

California.— Wickersham *v.* Johnston, 104 Cal. 407, 38 Pac. 89, 43 Am. St. Rep. 118; Mason *v.* Wolff, 40 Cal. 246; Young *v.* Rosenbaum, 39 Cal. 646.

Georgia.— Kerchner *v.* Frazier, 106 Ga. 437, 32 S. E. 351; Gibson *v.* Robinson, 90 Ga. 756, 16 S. E. 969, 35 Am. St. Rep. 250; Mitchell *v.* Mitchell, 40 Ga. 11.

Indiana.— See Brown *v.* Eaton, 98 Ind. 591; Cline *v.* Gibson, 23 Ind. 11; Foot *v.* Glover, 4 Blackf. 313. *Compare* Anderson *v.* Ackerman, 88 Ind. 481.

Kentucky.— Macauley *v.* Elrod, 27 S. W. 867, 16 Ky. L. Rep. 291; Hanners *v.* Baker, 4 Ky. L. Rep. 984.

Louisiana.— Mayo *v.* Brittan, 34 La. Ann. 984; Gest *v.* New Orleans, etc., R. Co., 30 La. Ann. 28; Clark *v.* Hebert, 15 La. Ann. 279; Brown *v.* King, 3 La. Ann. 594; Briggs *v.* Campbell, 19 La. 524; Tait *v.* De Ende, 18 La. 33; Dismukes *v.* Musgrove, 8 Mart. N. S. 375. See also Conway *v.* Erwin, 1 La. Ann. 391.

North Carolina.— Rainey *v.* Hines, 121 N. C. 318, 28 S. E. 410.

Tennessee.— Willis *v.* Louderback, 5 Lea 561.

Compare American Emigrant Co. *v.* Fuller, 83 Iowa 599, 50 N. W. 48; Calkins *v.* Packer, 21 Barb. (N. Y.) 275; Warren *v.* Frederichs, 76 Tex. 647, 13 S. W. 643; Guilford *v.* Love, 49 Tex. 715; Truehart *v.* McMichael, 46 Tex. 222; Townsend *v.* Munger, 9 Tex. 300; Mitchusson *v.* Wadsworth, 1 Tex. App. Civ. Cas. § 976; Frankel *v.* Heidenheimer, 1 Tex. App. Civ. Cas. § 307; Elwell *v.* Prescott, 38 Wis. 274.

See 20 Cent. Dig. tit. "Evidence," § 1528 *et seq.*

Record of suit pending for same cause.— A certified copy of the "docket entries" of a suit is inadmissible to establish the existence of a former suit pending for the same cause, where it does not purport to be an entire copy of the record. Ingham *v.* Crary, 1 Penr. & W. (Pa.) 389.

Interlocutory order appointing receiver.— In Ocean Steamship Co. *v.* Wilder, 107 Ga. 220, 33 S. E. 179, a distinction was drawn between a decree finally fixing the rights of the parties and an interlocutory order, it being held that a certified copy of an order of a court of general jurisdiction by which receivers have been appointed for a corporation is, although unaccompanied by the pleadings in the case in which they were appointed, admissible to establish the fact of the receivership.

Record of naturalization.— An exemplified copy of the record of naturalization of an alien under the United States laws in a court of competent jurisdiction is sufficient to prove the fact of naturalization, without proving the preliminary proceedings to give the naturalizing court jurisdiction. The Acorn, 1 Fed. Cas. No. 29, 2 Abb. 434. See also Ritchie *v.* Putnam, 13 Wend. (N. Y.) 524; Stark *v.* Chesapeake Ins. Co., 7 Cranch (U. S.) 420, 3 L. ed. 391.

61. *Alabama.*— Adams *v.* Olive, 62 Ala. 418.

Florida.— Watson *v.* Jones, 41 Fla. 241, 25 So. 678.

Georgia.—Stringfellow *v.* Stringfellow, 112 Ga. 494, 37 S. E. 767; Kerchner *v.* Frazier, 106 Ga. 437, 32 S. E. 351; Gibson *v.* Robinson, 90 Ga. 756, 16 S. E. 969, 35 Am. St. Rep. 250. See also Bush *v.* Lindsay, 24 Ga. 245, 71 Am. Dec. 117.

Illinois.— Phillips *v.* Webster, 85 Ill. 146. See also Turner *v.* Hause, 199 Ill. 464, 65 N. E. 445.

Louisiana.— Baudin *v.* Roliff, 1 Mart. N. S. 165, 14 Am. Dec. 181.

Missouri.— Jones *v.* Talbot, 9 Mo. 121.

New York.— Gardere *v.* Columbian Ins. Co., 7 Johns. 514.

North Carolina.— Rainey *v.* Hines, 121 N. C. 318, 28 S. E. 410.

Virginia.—Wynn *v.* Harman, 5 Gratt. 157; White *v.* Clay, 7 Leigh 68.

England.— Jones *v.* Randall, 1 Cowp. 17, Lofft. 383, 428.

See 20 Cent. Dig. tit. "Evidence," § 1528 *et seq.*

Part of record admitted to show pendency of suit.— Peck *v.* Land, 2 Ga. 1, 46 Am. Dec.

produced to show a valid judgment after service of process or the appearance of the parties.[62] Thus in an action on an injunction bond, the decree or other extracts from the record of the injunction cause are admissible to show either pendency or decision of the cause.[63] So it has been held that the entire record need not be produced where the object is to show a judgment to support an execution in favor of the purchaser at the execution sale,[64] or to show a decree which *ex proprio vigore* vests title to property,[65] or which directs a deed to be made, if sufficiently describing the land.[66] So where it is only necessary for a party to show that he has been made liable to pay a sum of money in the character of executor or administrator by a judgment or decree, the record of such judgment or decree or a duly authenticated copy thereof is sufficient.[67] The rule has been applied in an action brought on a judgment of another court.[68] To render the judgment or decree of a court of inferior or limited jurisdiction admissible, the record must be sufficiently complete to show that the court had jurisdiction of the subject-matter and of the parties.[69]

(III) *VERDICTS.* While the rule is sometimes stated that a verdict is not evidence without showing a judgment upon it, because it cannot appear but that the

368. See also White *v.* Clay, 7 Leigh (Va.) 68.

Time when suit begun shown by record of pleadings.— Oppermann *v.* McGown, (Tex. Civ. App. 1899) 50 S. W. 1078.

A decree of divorce, authenticated as required by statute, has been held to be a specific item of evidence and admissible in itself without the introduction of the entire record. Alexander *v.* Grand Lodge A. O. U. W., 119 Iowa 519, 93 N. W. 508.

Decree offered to corroborate witness.— Where a decree of divorce, offered in evidence in a collateral suit, is not offered to operate as an estoppel, but only by way of explanation, and as corroborative of other testimony, the failure to offer the pleadings and depositions in the divorce proceedings is not ground for rejecting the decree itself. Droop *v.* Ridenour, 11 App. Cas. (D. C.) 224.

In prosecution for escape see Sanford *v.* State, 11 Ark. 328; Hudgens *v.* Com., 2 Duv. (Ky.) 239. And see ESCAPE, 16 Cyc. 537.

62. Phillips *v.* Webster, 85 Ill. 146; McGuire *v.* Kouns, 7 T. B. Mon. (Ky.) 386, 18 Am. Dec. 187; Lee *v.* Lee, 21 Mo. 531, 64 Am. Dec. 247.

63. Adams *v.* Olive, 62 Ala. 418; White *v.* Clay, 7 Leigh (Va.) 68. See, generally, INJUNCTION.

64. *Indiana.*— Woolen *v.* Rockafeller, 81 Ind. 208 [*overruling* Glidewell *v.* Spaugh, 26 Ind. 319]; Gale *v.* Parks, 58 Ind. 117.

Kentucky.— McGuire *v.* Kouns, 7 T. B. Mon. 386, 18 Am. Dec. 187.

Mississippi.— Cockerel *v.* Wynn, 12 Sm. & M. 117; Carson *v.* Doe, 6 Sm. & M. 111, 45 Am. Dec. 273; Doe *v.* Gildart, 4 How. 267.

Missouri.— Lee *v.* Lee, 21 Mo. 531, 64 Am. Dec. 247.

Tennessee.— Lowry *v.* McDurmott, 5 Yerg. 225.

Texas.— Maverick *v.* Salinas, 15 Tex. 57.

See 20 Cent. Dig. tit. "Evidence," § 1528 *et seq.*

Contra.— In some jurisdictions it is held that to prove a judgment on which an execution sale is based the entire record must be produced so that it may be seen whether the court had jurisdiction to determine the cause. Harper *v.* Rowe, 53 Cal. 233; McGehee *v.* Wilkins, 31 Fla. 83, 12 So. 228; Ashmead *v.* Wilson, 22 Fla. 255; Simmons *v.* Spratt, 20 Fla. 495; Donald *v.* McKinnon, 17 Fla. 746; Davis *v.* Shuler, 14 Fla. 438. So it has been held that a judgment entry, unaccompanied by any previous files or proceedings upon which it is based, is insufficient in an action against a sheriff who relies upon the judgment to justify a levy made by him. Kenyon *v.* Baker, 16 Mich. 373, 97 Am. Dec. 158.

65. Wilson *v.* Spring, 38 Ark. 181.

66. Francis *v.* Hazlerigg, 1 A. K. Marsh. (Ky.) 93; Wynn *v.* Harman, 5 Gratt. (Va.) 157; Guinn *v.* Bowers, 44 W. Va. 507, 29 S. E. 1027; Waggoner *v.* Wolf, 28 W. Va. 820, 1 S. E. 25. See also Masters *v.* Varner, 5 Gratt. (Va.) 168, 50 Am. Dec. 114.

67. Chinn *v.* Caldwell, 4 Bibb (Ky.) 543.

So in an action on an administrator's bond the judgment entry has been held sufficient to establish the fact of the rendition of a judgment for the purpose of showing a devastavit. Chinn *v.* Caldwell, 4 Bibb (Ky.) 543.

68. Haynes *v.* Cowen, 15 Kan. 637; Rathbone *v.* Rathbone, 10 Pick. (Mass.) 1. *Compare* Brown *v.* Eaton, 98 Ind. 591, where it was held in an action upon a judgment recovered in an inferior court of limited jurisdiction of a sister state that the entire record must be produced.

69. *Florida.*— Donald *v.* McKinnon, 17 Fla. 746.

Indiana.—See Brown *v.* Eaton, 98 Ind. 591.

Kentucky.—Adams *v.* Tiernan, 5 Dana 394.

New York.— Simons *v.* De Bare, 4 Bosw. 547; Benn *v.* Borst, 5 Wend. 292; *In re* Lawrence, Tuck. Surr. 64.

Wisconsin.— Wells *v.* American Express Co., 55 Wis. 23, 11 N. W. 537, 12 N. W. 441, 42 Am. Rep. 695.

See 20 Cent. Dig. tit. "Evidence," § 1529.

verdict has been set aside or the judgment arrested,[70] yet the mere record of a verdict has been held admissible as evidence of the existence of a suit and the fact that a verdict was obtained, apart from any question of the facts adjudicated.[71]

(IV) *Executions.* As a general rule an execution is inadmissible in evidence unless it is accompanied by the judgment upon which it is founded.[72] But it has been held that where an officer sues a stranger for taking goods from his possession which he had seized by virtue of an execution, the production of the execution without the judgment is sufficient to support his right of action.[73] So it has been held that in an action against an officer by a person against whom an execution has been levied, the officer may justify his act done in obedience to the writ of execution by producing the writ without the judgment.[74] At common law, however, if a third person and not defendant in the execution brings trespass against the officer, the latter can defend only upon producing the judgment and the writ.[75]

(V) *Effect of Recitals in Judgment or Decree.* The absence of an entire record, it has been held, may be supplied by recitals in the judgment or decree of all the essential facts, jurisdictional or otherwise.[76] Thus where the judgment or decree on which the party adducing it in a collateral action relies as a muniment of title or as a link in a chain of title recites all essential facts, jurisdictional or otherwise, in regard to the proceedings in which it was rendered, the record of such judgment or decree, or a duly authenticated copy thereof, is admissible as *prima facie* evidence at least, without producing a complete record or transcript of the proceedings.[77] Recitals in the decree of a court of inferior or limited jurisdiction of the facts necessary to give jurisdiction are evidence of these facts, subject, however, to contradiction.[78]

(VI) *Inclusion of Superfluous Matter in Record.* The fact that a transcript contains matter irregularly there will not vitiate it so as to require its

70. Mitchell *v.* Mitchell, 40 Ga. 11; Donaldson *v.* Jude, 2 Bibb (Ky.) 57; Pitton *v.* Walter, 1 Str. 162. See also Kip *v.* Brigham, 7 Johns. (N. Y.) 168.

71. Waldo *v.* Long, 7 Johns. (N. Y.) 173; Kip *v.* Brigham, 7 Johns. (N. Y.) 168; Fisher *v.* Kitchenman, 7 Mod. 451, Willes 367; Pitton *v.* Walter, 1 Str. 162. See also McLeod *v.* Crosby, 128 Mich. 641, 87 N. W. 883; Garland *v.* Scoones, 2 Esp. 648.

72. *California.*— Vassault *v.* Austin, 32 Cal. 597.

Delaware.— State *v.* Records, 5 Harr. 146.

Missouri.— Ramsey *v.* Waters, 1 Mo. 406.

New York.— Townshend *v.* Wesson, 4 Duer 342; Wilson *v.* Conine, 2 Johns. 280.

Pennsylvania.— Gaskell *v.* Morris, 7 Watts & S. 32; Bauman *v.* Schissler, 9 Lanc. Bar 141.

South Carolina.— McCall *v.* Boatwright, 2 Hill 438.

United States.—Campbell *v.* Strong, 4 Fed. Cas. No. 2,367*a*, Hempst. 265; Tindall *v.* Murphy, 23 Fed. Cas. No. 14,055*a*, Hempst. 21.

England.— Britton *v.* Cole, 1 Salk. 408.

Compare Carlton *v.* King, 1 Stew. & P. (Ala.) 472, 23 Am. Dec. 295; Deloach *v.* Myrick, 6 Ga. 410.

See 20 Cent. Dig. tit. "Evidence," § 1531.

73. Spoor *v.* Holland, 8 Wend. (N. Y.) 445, 24 Am. Dec. 37; Blackley *v.* Sheldon, 7 Johns. (N. Y.) 32; Barker *v.* Miller, 6 Johns. (N. Y.) 195.

74. Deloach *v.* Myrick, 6 Ga. 410; Hunter *v.* McElhany, 2 Brev. (S. C.) 103; Britton *v.* Cole, Salk. 408.

75. Martin *v.* Podger, 2 W. Bl. 701, 5 Burr. 2631; Lake *v.* Billers, 1 Ld. Raym. 733. See also Deloach *v.* Myrick, 6 Ga. 410.

76. Simmons *v.* Threshour, 118 Cal. 100, 50 Pac. 312; Dogan *v.* Brown, 44 Miss. 235; Monk *v.* Horne, 38 Miss. 100, 75 Am. Dec. 94; Blackburn *v.* Jackson, 26 Mo. 308. *Compare* Downer *v.* Shaw, 22 N. H. 277; Buford *v.* Hickman, 4 Fed. Cas. No. 2,114*a*, Hempst. 232.

77. *Arkansas.*— Wilson *v.* Spring, 38 Ark. 181.

Georgia.— Beck *v.* Henderson, 76 Ga. 360.

Tennessee.— Verhine *v.* Ragsdale, 96 Tenn. 532, 35 S. W. 556; Whitmore *v.* Johnson, 10 Humphr. 610.

Texas.— Truehart *v.* McMichael, 46 Tex. 222.

United States.— Koons *v.* Bryson, 69 Fed. 297, 16 C. C. A. 227; Norton *v.* Meader, 18 Fed. Cas. No. 10,351, 4 Sawy. 603 [*affirmed* in 11 Wall. 442, 20 L. ed. 184].

See 20 Cent. Dig. tit. "Evidence," § 1528 *et seq.*

78. Payne *v.* Taylor, 34 Ill. App. 491; Belden *v.* Meeker, 2 Lans. (N. Y.) 470; Barber *v.* Winslow, 12 Wend. (N. Y.) 102; Comstock *v.* Crawford, 3 Wall. (U. S.) 396, 18 L. ed. 34. See also Potter *v.* Merchants' Bank, 28 N. Y. 641, 86 Am. Dec. 273. *Compare* McDonald *v.* Prescott, 2 Nev. 109, 90 Am. Dec. 517.

entire exclusion;[79] but where there are papers in a document sought to be introduced which are not legally authenticated as copies of any record of any court, and which are consequently incompetent, and these papers are offered with others in the document to which the objection might not apply in such a manner that they must all go to the jury together, without anything to indicate which are and which are not proper for consideration, the whole document is properly excluded.[80]

B. Authenticated Transcripts or Copies — 1. Public Records and Documents Generally — a. General Statement. It is a general principle that whenever documents or books of a public nature would of themselves be evidence if produced, their contents may be proved by copies duly verified on the ground that such records and documents cannot be removed from their place of custody without inconvenience to the public service.[81]

b. Sworn or Examined Copies. Thus it is a common-law rule that proof of public records or documents may be made by examined copies sworn to by the custodian of the record or any competent witness,[82] especially where the officer is not allowed to produce the original or to furnish copies.[83] Such evidence is not excluded by a statute making certified copies admissible.[84] An examined copy, however, can be proved only by proof of comparison with the original, and not by proof of comparison with some other copy.[85]

c. Certified Copies. The rule has been laid down in some of the decisions that a paper purporting to be a copy of a public document, certified by the officer in whose custody it is intrusted by law, is not receivable in evidence unless such certification is enjoined or permitted by statute;[86] but the rule sanctioned in most jurisdictions is that a certified copy given by a public officer whose duty it is to

79. Gunn *v.* Howell, 35 Ala. 144, 73 Am. Dec. 484; Halliburton *v.* Fletcher, 22 Ark. 453; Adams *v.* Lee, 82 Ind. 587.

80. Pike *v.* Crehore, 40 Me. 503. See also Tibbetts *v.* Baker, 32 Me. 25.

81. Hammatt *v.* Emerson, 27 Me. 308, 46 Am. Dec. 598; State *v.* Loughlin, 66 N. H. 266, 20 Atl. 981; Forsaith *v.* Clark, 21 N. H. 409; York *v.* Gregg, 9 Tex. 85; Connecticut Mut. L. Ins. Co. *v.* Cushman, 108 U. S. 51, 27 L. ed. 648.

82. *Alabama.*— Crawford *v.* Mobile Branch Bank, 8 Ala. 79.

Georgia.— Womack *v.* White, 30 Ga. 696.

Kansas.— Cooper *v.* Armstrong, 4 Kan. 30.

Louisiana.— Board of Control *v.* Royes, 48 La. Ann. 1061, 20 So. 182.

Maine.— State *v.* Lynde, 77 Me. 561, 1 Atl. 687. See also Atwood *v.* Winterport, 60 Me. 250.

Maryland.— Hughes *v.* Jones, 2 Md. Ch. 178. See also Hutchings *v.* Talbot, 3 Harr. & J. 378.

Missouri.— Winham *v.* Kline, 77 Mo. App. 36.

New Hampshire.— State *v.* Loughlin, 66 N. H. 266, 20 Atl. 981. See also Whitehouse *v.* Bickford, 29 N. H. 471; Society for Propagating, etc. *v.* Young, 2 N. H. 310.

New Jersey.— West Jersey Traction Co. *v.* Board of Public Works, 57 N. J. L. 313, 30 Atl. 581; State *v.* Clothier, 30 N. J. L. 351; State *v.* Hutchinson, 10 N. J. L. 242.

Ohio.— Lyon *v.* McCadden, 15 Ohio 551; Sheldon *v.* Coates, 10 Ohio 278.

Texas.— Coons *v.* Renick, 11 Tex. 134, 60 Am. Dec. 230.

Vermont.— State *v.* White, 70 Vt. 225, 39 Atl. 1085.

United States.— U. S. *v.* Johns, 26 Fed. Cas. No. 15,481, 4 Dall. 412, 1 L. ed. 888.

England.— Lynch *v.* Clerke, 3 Salk. 154.

See 20 Cent. Dig. tit. "Evidence," § 1289 *et seq.*

Sworn copy admitted under statute.— Glos *v.* Boettcher, 193 Ill. 534, 61 N. E. 1017; Wiggins Ferry Co. *v.* Illinois, etc., R. Co., 163 Ill. 238, 45 N. E. 285; Cleveland, etc., R. Co. *v.* Bender, 69 Ill. App. 262.

Rule applied to church registers.— Hancock *v.* Supreme Council C. B. L., 67 N. J. L. 614, 52 Atl. 301. See also Drosdowski *v.* Supreme Council O. of C. F., 114 Mich. 178, 72 N. W. 169; Hunt *v.* Supreme Council O. of C. F., 64 Mich. 671, 31 N. W. 576, 8 Am. St. Rep. 855.

Affidavit as to correctness of copy.— In Jones *v.* Pitcher, 3 Stew. & P. (Ala.) 135, 24 Am. Dec. 716, it was held that a sworn copy of a steamboat register, from the records of the custom-house, is not *prima facie* evidence of ownership, even as against the person making it under affidavit, without further proof of the taking of the affidavit.

83. State *v.* Collins, 68 N. H. 299, 44 Atl. 495; State *v.* Loughlin, 66 N. H. 266, 20 Atl. 981.

84. Blackman *v.* Dowling, 57 Ala. 78.

85. Grimes *v.* Bastrop, 26 Tex. 310.

86. Francis *v.* Newark, 58 N. J. L. 522, 33 Atl. 853; West Jersey Traction Co. *v.* Board of Public Works, 57 N. J. L. 313, 30 Atl. 581; State *v.* Cake, 24 N. J. L. 516; New Jersey R., etc., Co. *v.* Suydam, 17 N. J. L. 25. See also Taylor *v.* Simmons, 75 Ga. 13; Dudley *v.* Grayson, 6 T. B. Mon. (Ky.) 259; *In re* Prickett, 20 N. J. L. 134. See also Sykes *v.* Beck, 12 N. D. 242, 96 N. W. 844.

keep the original is receivable in evidence.[87] Various statutes exist in the different jurisdictions providing for the admission in evidence of copies of public records and documents generally or in specific instances, when duly certified by the custodian of the office in which they are kept.[88] By statute in several states

87. *Alabama.*— Phillips *v.* Poindexter, 18 Ala. 579; Miller *v.* Gee, 4 Ala. 359.

California.— People *v.* Williams, 64 Cal. 87, 27 Pac. 939; Soto *v.* Kroder, 19 Cal. 87.

Delaware.— See Star Loan Assoc. *v.* Moore, 4 Pennew. 308, 55 Atl. 946.

Florida.— Bell *v.* Kendrick, 25 Fla. 778, 6 So. 868; Simmons *v.* Spratt, 20 Fla. 495.

Illinois.— See Miller *v.* Goodwin, 70 Ill. 659; Merchants' Nav. Co. *v.* Amsden, 25 Ill. App. 307.

Indiana.— Mitchelltree School Tp. *v.* Hall, (Ind. App. 1903) 68 N. E. 919.

Louisiana.— Murdock *v.* Gurley, 5 Rob. 457; Judice *v.* Chrétien, 3 Rob. 15. See also Faulk *v.* Pinnell, 6 Rob. 26; Zanico *v.* Habine, 5 Mart. 372.

Maine.—See Parker *v.* Currier, 24 Me. 168.

Missouri.— Wilcoxson *v.* Darr, 139 Mo. 660, 41 S. W. 227; State *v.* Austin, 113 Mo. 538, 21 S. W. 31. See also Charlotte *v.* Chouteau, 21 Mo. 590.

New Hampshire.—See Ferguson *v.* Clifford, 37 N. H. 86; Forsaith *v.* Clark, 21 N. H. 409.

New York.— Erickson *v.* Smith, 2 Abb. Dec. 64, 38 How. Pr. 454; Herendeen *v.* De Witt, 49 Hun 53, 1 N. Y. Suppl. 467; Peck *v.* Farrington, 9 Wend. 44; Catlett *v.* Pacific Ins. Co., 1 Wend. 561.

North Carolina.—Barcello *v.* Hapgood, 118 N. C. 712, 24 S. E. 124.

Pennsylvania.— See Scott *v.* Leather, 3 Yeates 184. *Compare* Spalding *v.* Saxton, 6 Watts 338; Kenderdine *v.* Ivins, 1 Phila. 25.

United States.— Amoskeag Nat. Bank *v.* Ottawa, 105 U. S. 667, 26 L. ed. 1204; U. S. *v.* Percheman, 7 Pet. 51, 8 L. ed. 604; Catlett *v.* Pacific Ins. Co., 4 Fed. Cas. No. 2,517, 1 Paine 594; Raymond *v.* Longworth, 20 Fed. Cas. No. 11,595, 4 McLean 481 [*affirmed* in 14 How. 76, 14 L. ed. 333].

See 20 Cent. Dig. tit. "Evidence," § 1289 *et seq.*

Certified copy admitted as secondary evidence.— White *v.* Kearney, 2 La. Ann. 639; White *v.* Kearney, 9 Rob. 495; Peytavin *v.* Hopkins, 5 Mart. (La.) 438; Chenery *v.* Waltham, 8 Cush. (Mass.) 327; Forsaith *v.* Clark, 21 N. H. 409. See also Johnston *v.* Cox, 13 La. 536.

A certified copy of a certified copy of a public record or document, it has been held, cannot be received in evidence in the absence of express statutory provision. Goddard *v.* Parker, 10 Oreg. 102. On the other hand a certified copy of a copy has been held admissible as secondary evidence. Joslyn *v.* Pulver, 59 Hun (N. Y.) 129, 13 N. Y. Suppl. 311; Jackson *v.* Cole, 4 Cow. (N. Y.) 587. See also Morris *v.* Vanderen, 1 Dall. (Pa.) 64, 1 L. ed. 38. *Compare* People *v.* Riley, 15 Cal. 48.

Admissibility of copies of patent-office records.— It has been held that certified copies of patent-office records of assignments are not made primary evidence of such assignments and are only admissible to prove title to a patent where proper foundation is laid by showing the existence of the original instruments, and that they are lost or destroyed, or that it is out of complainant's power to produce them. National Cash-Register Co. *v.* Navy Cash-Register Co., 99 Fed. 89. See also Gaylord *v.* Case, 5 Ohio Dec. (Reprint) 413, 5 Am. L. Rec. 494. *Compare* Lee *v.* Blandy, 15 Fed. Cas. No. 8,182, 1 Bond 361.

A copy of the enrolment of a vessel certified by a custom-house collector has been held inadmissible. Dyer *v.* Snow, 47 Me. 254; Coolidge *v.* New York Fireman's Ins. Co., 14 Johns. (N. Y.) 308. See also Catlett *v.* Pacific Ins. Co., 4 Fed. Cas. No. 2,517, 1 Paine 594. *Compare* Sampson *v.* Noble, 14 La. Ann. 347; White *v.* Kearney, 2 La. Ann. 639.

88. *Alabama.*— Stanley *v.* State, 88 Ala. 154, 7 So. 273; Doe *v.* Eslava, 11 Ala. 1028; Caskey *v.* Nitcher, 8 Ala. 622; Brazeal *v.* Smith, 5 Ala. 206.

Connecticut.— Hennessy *v.* Metropolitan L. Ins. Co., 74 Conn. 699, 52 Atl. 490.

Florida.— Tuten *v.* Gazan, 18 Fla. 751.

Georgia.— Berry *v.* Clark, 117 Ga. 964, 44 S. E. 824; Daniel *v.* State, 114 Ga. 533, 40 S. E. 805; Carr *v.* Georgia L. & T. Co., 108 Ga. 757, 33 S. E. 190; Jones *v.* Cordele Guano Co., 94 Ga. 14, 20 S. E. 265; Polhill *v.* Brown, 84 Ga. 338, 10 S. E. 921. See also Brakebill *v.* Leonard, 40 Ga. 60.

Illinois.— Ramsay *v.* People, 197 Ill. 594, 64 N. E. 555, 90 Am. St. Rep. 199 [*affirmed* in 97 Ill. App. 283]; East St. Louis *v.* Freels, 17 Ill. App. 339.

Indiana.— Miller *v.* Indianapolis, 123 Ind. 196, 24 N. E. 228; Harrison County *v.* Benson, 83 Ind. 469; Monroe County *v.* May, 67 Ind. 562; Wells *v.* State, 22 Ind. 241; Vail *v.* McKernan, 21 Ind. 421.

Iowa.— McPeek *v.* Western Union Tel. Co., 107 Iowa 356, 78 N. W. 63, 70 Am. St. Rep. 205, 43 L. R. A. 214.

Kansas.— Bowersock *v.* Adams, 55 Kan. 681, 41 Pac. 971.

Louisiana.— State *v.* Masters, 26 La. Ann. 268; Massey *v.* Hackett, 12 La. Ann. 54; Tremoulet *v.* Tittermary, 2 Mart. 317.

Maine.— Eastport *v.* East Machias, 35 Me. 402.

Maryland.— Maurice *v.* Worden, 54 Md. 233, 39 Am. Rep. 384. See also Bradford *v.* McComas, 3 Harr. & J. 444.

Massachusetts.— Com. *v.* Hayden, 163 Mass. 453, 40 N. E. 846, 47 Am. St. Rep. 468, 28 L. R. A. 318; Tapley *v.* Martin, 116 Mass. 275.

Mississippi.— State *v.* Oliver, 78 Miss. 5, 27 So. 988.

copies of records of articles of incorporation or consolidation properly certified by the secretary of state are admissible in evidence to prove the incorporation or consolidation.[89] Generally statutes making certified copies of public records admissible in evidence do not make a certified copy of a document filed in a public office evidence in an action where the original of such copy would not be admissible.[90] Nor will a certified copy of a record be admissible where the record is not authorized by law,[91] or where it is not made in the manner prescribed by law.[92]

Missouri.— State *v.* Hendrix, 98 Mo. 374, 11 S. W. 728; State *v.* Elam, 21 Mo. App. 290.

New Hampshire.— Cate *v.* Nutter, 24 N. H. 108; State *v.* Wilson, 7 N. H. 543.

New York.— Clute *v.* Emmerich, 21 Hun 122; Devoy *v.* New York, 35 Barb. 264, 22 How. Pr. 226; Alsheimer *v.* Boon, 31 Misc. 333, 65 N. Y. Suppl. 475.

North Carolina.—State *v.* Baird, 118 N. C. 854, 24 S. E. 668; Wallace *v.* Douglas, 114 N. C. 450, 19 S. E. 668.

Ohio.— Emmitt *v.* Lee, 50 Ohio St. 662, 35 N. E. 794.

Pennsylvania.— Northumberland County *v.* Zimmerman, 75 Pa. St. 26; McCoy *v.* Lightner, 2 Watts 347.

South Carolina.— See State Treasurers *v.* Bates, 2 Bailey 362.

Tennessee.— Reeves *v.* State, 7 Coldw. 96.

Texas.— Stone Land, etc., Co. *v.* Boon, 73 Tex. 548, 11 S. W. 544; Texas Mexican R. Co. *v.* Jarvis, 69 Tex. 527, 7 S. W. 210; Brummer *v.* Galveston, (Civ. App. 1903) 77 S. W. 239 (parts of assessment roll); Brewster County *v.* Presidio County, 19 Tex. Civ. App. 639, 48 S. W. 213; Ingram *v.* Walker, 7 Tex. Civ. App. 74, 26 S. W. 477. See also Ward *v.* Hubbard, 62 Tex. 559; Harper *v.* Marion County, (Civ. App. 1903) 77 S. W. 1044.

Vermont.— McKinstry *v.* Collins, 74 Vt. 147, 52 Atl. 438; Hickok *v.* Shelburne, 41 Vt. 409; Barnet *v.* Woodbury, 40 Vt. 266; Derby *v.* Salem, 30 Vt. 722.

Virginia.— Southern R. Co. *v.* Wilcox, 99 Va. 394, 39 S. E. 144.

Washington.— State *v.* Yourex, 30 Wash. 611, 71 Pac. 203.

West Virginia.— Chenowith *v.* Ritchie County Ct., 32 W. Va. 628, 9 S. E. 910; Blair *v.* Sayre, 29 W. Va. 604, 2 S. E. 97. See also Battin *v.* Woods, 27 W. Va. 58.

Wisconsin.— Fox Lake *v.* Fox Lake, 62 Wis. 486, 22 N. W. 584; Van Valkenburgh *v.* Milwaukee, 43 Wis. 574; Knowlton *v.* Ray, 4 Wis. 288; Fouke *v.* Ray, 1 Wis. 104.

See 20 Cent. Dig. tit. "Evidence," § 1289 *et seq.*

Copies of any records or documents of federal executive departments, authenticated under the seal of the department, are admissible in evidence under U. S. Rev. St. § 882 [U. S. Comp. St. (1901) p. 669]. Crowell *v.* Hopkinton, 45 N. H. 9; Ballew *v.* U. S., 160 U. S. 187, 16 S. Ct. 263, 40 L. ed. 388; Thompson *v.* Smith, 23 Fed. Cas. No. 13,976, 2 Bond 320. See also American Surety Co. *v.* U. S., 77 Ill. App. 106; Block *v.* U. S., 7 Ct. Cl. 406.

United States treasury transcripts, etc., admitted in certain suits under federal statute. — U. S. Rev. St. (1878) § 886 [U. S. Comp. St. (1901) p. 670]. See U. S. *v.* Drachman, (Ariz. 1896) 43 Pac. 222; Lee *v.* Wisner, 38 Mich. 82; Moses *v.* U. S., 166 U. S. 571, 17 S. Ct. 682, 41 L. ed. 1119; U. S. *v.* Bell, 111 U. S. 477, 4 S. Ct. 498, 28 L. ed. 477; U. S. *v.* Stone, 106 U. S. 525, 1 S. Ct. 287, 27 L. ed. 163; Bechtel *v.* U. S., 101 U. S. 597, 25 L. ed. 1019; U. S. *v.* Hodge, 13 How. (U. S.) 478, 14 L. ed. 231; Laffan *v.* U. S., 122 Fed. 333, 58 C. C. A. 495; U. S. *v.* Humason, 8 Fed. 71, 7 Sawy. 252; U. S. *v.* Corwin, 25 Fed. Cas. No. 14,870, 1 Bond 149; U. S. *v.* Cutter, 25 Fed. Cas. No. 14,911, 2 Curt. 617; U. S. *v.* Lent, 26 Fed. Cas. No. 15,593, 1 Paine 417. See also U. S. *v.* Radowitz, 27 Fed. Cas. No. 16,112.

Certified copies of record of Confederate archives office admissible under statute.— Oakes *v.* U. S., 174 U. S. 778, 19 S. Ct. 864, 43 L. ed. 1169. *Compare* Schaben *v.* U. S., 6 Ct. Cl. 230.

89. *Alabama.*— Willingham *v.* State, 104 Ala. 59, 16 So. 116.

California.— Vance *v.* Kohlberg, 50 Cal. 346.

Colorado.— See Schiffer *v.* Adams, 13 Colo. 572, 22 Pac. 964.

Illinois.— Columbus, etc., R. Co. *v.* Skidmore, 69 Ill. 566. See also Johnston *v.* Ewing Female University, 35 Ill. 518.

Kansas.— McCune Min. Co. *v.* Adams, 35 Kan. 193, 10 Pac. 468.

Montana.— Garfield M. & M. Co. *v.* Hammer, 6 Mont. 53, 8 Pac. 153.

Pennsylvania.— Titusville, etc., R. Co. *v.* Warren, etc., R. Co., 4 Leg. Gaz. 117.

Compare Nelson *v.* Blakey, 54 Ind. 29; Evans *v.* Southern Turnpike Co., 18 Ind. 101.

See CORPORATIONS, 10 Cyc. 1; and, generally, STATUTES.

90. Natoma Water, etc., Co. *v.* Clarkin, 14 Cal. 544; Donohue *v.* Whitney, 133 N. Y. 178, 30 N. E. 848 [*reversing* 15 N. Y. Suppl. 622]; State *v.* Wells, 11 Ohio 261. See also Pittsfield, etc., Plank Road Co. *v.* Harrison, 16 Ill. 81.

91. Wilson *v.* Inloes, 6 Gill (Md.) 121; Childress *v.* Cutter, 16 Mo. 24; Fitler *v.* Shotwell, 7 Watts & S. (Pa.) 14; Cruse *v.* McCauley, 96 Fed. 369. See also Frazier *v.* Laughlin, 6 Ill. 347.

92. Dunn *v.* Com., 14 Serg. & R. (Pa.) 431; Young *v.* Com., 4 Binn. (Pa.) 113. *Compare* Burk *v.* Andis, 98 Ind. 59.

2 Judicial Records — a. In General. The admission of copies of judicial records in evidence, as in the case of copies of other public records, is founded upon a principle of public convenience in order that documents of great moment may not be ambulatory and subject to the loss that might be incurred if they were removable.[93]

b. Exemplified Copies. Judicial records are provable by exemplified copies. An exemplified copy at common law was obtained by removing the record into the court of chancery by certiorari. The great seal was attached to a copy, which was transmitted by a mittimus to the court in which it was used as evidence.[94] In this country, it has been said, the great seal being usually if not always kept by the secretary of state, a different course prevails; and an exemplified copy under the seal of the court is usually admitted, even upon a plea of *nul tiel record*, as sufficient evidence,[95] and a writ of certiorari or mittimus is unnecessary to authorize or compel the production of the copy.[96]

c. Office Copies. In addition to copies exemplified by the great seal, or seal of a court, there were at common law certified copies made by the officer having custody of the judicial records, and known as office copies.[97] The rule has been stated that at common law an office copy is in the same court and in the same cause equivalent to the record, but in another court or in another cause in the same court the copy must be proved.[98] But the rule in most jurisdictions in this country, founded either on immemorial usage or on statutes expressly making certified or office copies of judicial records admissible in evidence, or requiring the custodian of such records to furnish copies, is that certified or office copies of judicial records duly certified by the clerk or custodian of the record, if they are otherwise competent, are admissible in evidence in any cause or court in the same jurisdiction where the records themselves would be admissible,[99] the seal of

93. Hennell *v.* Lyon, 1 B. & Ald. 182, 18 Rev. Rep. 456.

94. State *v.* Board of Public Works, 57 N. J. L. 313, 30 Atl. 581. See also Woodcraft *v.* Kinaston, 2 Atk. 317, 26 Eng. Reprint 593, Dick. 233, 21 Eng. Reprint 257, 9 Mod. 305.

95. Greenleaf Ev. § 502 [*cited* in State *v.* Board of Public Works, 57 N. J. L. 313, 315, 30 Atl. 581]. See also Geohegan *v.* Eckles, 4 Bibb (Ky.) 5; Jackson *v.* Robinson, 4 Wend. (N. Y.) 436; Vail *v.* Smith, 4 Cow. (N. Y.) 71; Fant *v.* McDaniel, 1 Brev. (S. C.) 173, 2 Am. Dec. 660.

96. Vail *v.* Smith, 4 Cow. (N. Y.) 71; Brown *v.* Winn, 2 Brev. (S. C.) 297. See also Kelley *v.* Pickett, 2 Brev. (S. C.) 144.

97. State *v.* Board of Public Works, 57 N. J. L. 313, 30 Atl. 581.

98. Kellogg *v.* Kellogg, 6 Barb. (N. Y.) 116; Ripley *v.* Burgess, 2 Hill (N. Y.) 360; Jackson *v.* Harrow, 11 Johns. (N. Y.) 434; Denn *v.* Fulford, 2 Burr. 1177. See also Geohegan *v.* Eckles, 4 Bibb (Ky.) 5. *Compare* Studdy *v.* Sanders, 2 D. & R. 347, 16 E. C. L. 93.

Judgment-roll.— In an action by a judgment creditor of the testator against his sole devisee, plaintiff must prove his claim by the judgment-roll, and a mere transcript is insufficient. Lauby *v.* Gill, 42 Misc. (N. Y.) 334, 86 N. Y. Suppl. 718. See also, generally, Judgments.

Admission of office copy of chancery proceedings in issue out of chancery.— It has been intimated that upon a trial at law of an issue out of chancery, office copies of depositions or other proceedings in the same cause in chancery are admissible. See Kellogg *v.* Kellogg, 6 Barb. (N. Y.) 116; Highfield *v.* Peake, M. & M. 109, 31 Rev. Rep. 722, 22 E. C. L. 484. *Compare* Burnand *v.* Nerot, 1 C. & P. 578, 12 E. C. L. 330.

99. *Alabama.*— Childs *v.* State, 55 Ala. 28.

Florida.— Hoodless *v.* Jernigan, (1903) 35 So. 656.

Georgia.— Allen *v.* Lindsey, 113 Ga. 521, 38 S. E. 975; Bigham *v.* Coleman, 71 Ga. 176.

Indiana.— Craig *v.* Encey, 78 Ind. 141; Blizzard *v.* Bross, 56 Ind. 74; Redman *v.* State, 28 Ind. 205.

Louisiana.— State *v.* Roland, 38 La. Ann. 18.

Maryland.— Shipley *v.* Fox, 69 Md. 572, 16 Atl. 275.

Massachusetts.— Com. *v.* Kennedy, 170 Mass. 18, 48 N. E. 770; Com. *v.* Quigley, 170 Mass. 14, 48 N. E. 782; Chamberlain *v.* Ball, 15 Gray 352.

Minnesota.— Fitzpatrick *v.* Simonson Bros. Mfg. Co., 86 Minn. 140, 90 N. W. 378.

Nebraska.— Burge *v.* Gandy, 41 Nebr. 149, 59 N. W. 359. See also Morrison *v.* Boggs, 44 Nebr. 248, 62 N. W. 473.

North Carolina.— See McLeod *v.* Bullard, 84 N. C. 515; State *v.* Lowrance, 64 N. C. 483.

South Carolina.— Vance *v.* Reardon, 2 Nott & M. 299; Fant *v.* McDaniel, 1 Brev. 173, 2 Am. Dec. 660.

Texas.— Collins *v.* Ball, 82 Tex. 259, 17 S. W. 614, 27 Am. St. Rep. 877; Cannon *v.*

the court affixed to the copy being required in some jurisdictions but not in others.[1]

d. Examined or Sworn Copy. The third kind of authenticated copy is an examined or sworn copy, which is proved by producing a witness who has compared the copy with the original record, word for word, or who has examined the copy while another person read the original, and this, although the witness had not examined the original while another person read the copy.[2] Such copy is admissible without proof that the original cannot be produced.[3] But in order that copies may be admissible as examined copies some legal evidence of examination and comparison must be produced,[4] and an examined copy is inadmissible unless it appears that the original was in the proper place of deposit or in the hands of the officer in whose custody the records are kept.[5]

e. Courts of Probate. The rule making a duly authenticated copy of a judicial record admissible in evidence is very generally held to apply to records of probate, surrogates', and orphans' courts.[6] Under this rule exemplifications or certified copies of letters testamentary are admissible.[7] At common law the probate of a will before an ecclesiastical court or an exemplification thereof was not

Cannon, 66 Tex. 682, 3 S. W. 36; McDaniel *v.* Weiss, 53 Tex. 257; Winters *v.* Laird, 27 Tex. 616; Houze *v.* Houze, 16 Tex. 598; Kerr *v.* Oppenheimer, (Civ. App. 1898) 49 S. W. 149.

See 20 Cent. Dig. tit. "Evidence," § 1294 *et seq.*

Original record held necessary in same court on issue of nul tiel record.— Adams *v.* State, 11 Ark. 466; Anderson *v.* Dudley, 5 Call (Va.) 529; Burk *v.* Tregg, 2 Wash. (Va.) 215.

Copy admitted in clerk's favor.— Ratcliff *v.* Trimble, 12 B. Mon. (Ky.) 32.

Where papers are deposited simply for safe custody they are not records so as to render certified copies of them admissible. Davidson *v.* State, 68 Ala. 356.

Variance between report and certified copy of opinion.— In Gamewell Fire-Alarm Tel. Co. *v.* Municipal Signal Co., 77 Fed. 490, 23 C. C. A. 250, it was held that where a certified copy of an opinion of the supreme court, introduced on the trial of a cause, differs from the official report as published, the latter will control as to all such differences.

1. See *infra*, XIV, B, 5, b, (III), (B).

2. Porter *v.* Cox, Morr. (Iowa) 494; State *v.* Board of Public Works, 57 N. J. L. 313, 30 Atl. 581; Gyles *v.* Hill, 1 Campb. 471; Reid *v.* Margison, 1 Campb. 469; Highfield *v.* Peake, M. & M. 109, 31 Rev. Rep. 722, 22 E. C. L. 484; Rolf *v.* Dart, 2 Taunt. 52. See also Hill *v.* Packard, 5 Wend. (N. Y.) 375; Fyson *v.* Kemp, 6 C. & P. 71, 25 E. C. L. 326.

3. *Alabama.*— Jones *v.* Davis, 2 Ala. 730; Bettis *v.* Taylor, 8 Port. 564.

Kansas.— Metzger *v.* Burnett, 5 Kan. App. 374, 48 Pac. 599.

Massachusetts.—Abington *v.* North Bridgewater, 23 Pick. 170. *Compare* Com. *v.* Brooks, 9 Gray 299, where it was held that a conviction of an offense cannot be proved by an unofficial copy of the clerk's docket supported by the copyist's oath.

Pennsylvania.— Welsh *v.* Crawford, 14 Serg. & R. 440.

England.— Hennell *v.* Lyon, 1 B. & Ald. 182, 18 Rev. Rep. 456.

4. Lyon *v.* Bolling, 14 Ala. 753, 48 Am. Dec. 122; Dibble *v.* Morris, 26 Conn. 416; Catlin *v.* Underhill, 5 Fed. Cas. No. 2,523, 4 McLean 199.

Examination line for line necessary.— Kellogg *v.* Kellogg, 6 Barb. (N. Y.) 116.

5. Adamthwaite *v.* Synge, 1 Stark. 183, 2 E. C. L. 76.

6. *Alabama.*— Cofer *v.* Scroggins, 98 Ala. 342, 13 So. 115, 39 Am. St. Rep. 54; Glover *v.* Hill, 85 Ala. 41, 4 So. 613.

Colorado.— McAllister *v.* People, 28 Colo. 156, 63 Pac. 308.

Connecticut.— Hart *v.* Stone, 30 Conn. 94.

Georgia.— Smith *v.* Ross, 108 Ga. 198, 33 S. E. 953.

Indian Territory.— Breedlove *v.* Dennie, 2 Indian Terr. 606, 53 S. W. 436.

Kentucky.— Logan *v.* Troutman, 3 A. K. Marsh. 66.

Louisiana.— Reynolds *v.* Rowley, 2 La. Ann. 890.

Maryland.— Mitchell *v.* Mitchell, 1 Gill 66.

Missouri.— Gentry *v.* Field, 143 Mo. 399, 45 S. W. 286; Hubbard *v.* Gilpin, 57 Mo. 441.

New Hampshire.—Thornton *v.* Campton, 17 N. H. 338.

Texas.— Lewis *v.* Ames, 44 Tex. 319.

Vermont.— Nichols *v.* Bates, 6 Vt. 303.

See 20 Cent. Dig. tit. "Evidence," § 1297.

7. Sometimes the practice is to make out and deliver letters of administration to the personal representative as original papers, and these, although required to be recorded by the registers of probate, are admissible as originals. See Greene *v.* Durfee, 6 Cush. (Mass.) 362. But letters of administration are generally regarded as being in the nature of exemplifications of the record and are admissible as such without showing the decree of the probate court making the appointment, or certified copies of the record may be admitted instead of the original letters. Mackey *v.* Baltimore, etc., R. Co., 19 D. C. 282; Bales *v.* Binford, 6 Blackf. (Ind.) 415;

competent evidence in a court of law on an issue involving the title to land;[8] but under the statutes in most jurisdictions a will disposing of either realty or personalty may be proved by duly certified copies,[9] provided it appears that the original was regularly probated and recorded.[10] Certified copies of proceedings had before a probate judge, which were not an exercise of probate jurisdiction, and a record of which was not required to be kept in the probate court, are not admissible.[11]

f. Justices' Records. In some jurisdictions sworn copies of the entries in a justice's docket have been held admissible as primary evidence,[12] and under various statutory provisions transcripts from justices' records certified by the justice himself or the proper custodian of the record have been held admissible.[13] The rule has been stated in some of the cases, however, that a justice's record can only

Missouri Pac. R. Co. *v.* Baier, 37 Nebr. 235, 55 N. W. 913; Remick *v.* Butterfield, 31 N. H. 70, 64 Am. Dec. 316; Jackson *v.* Robinson, 4 Wend. (N. Y.) 436. See also Browning *v.* Huff, 2 Bailey (S. C.) 174; Elden *v.* Keddell, 8 East 187. Letters of administration not authenticated by the seal of the court which granted them have been held inadmissible as evidence. Tuck *v.* Boone, 8 Gill (Md.) 187. See also Denver, etc., R. Co. *v.* Woodward, 4 Colo. 1.

8. See Carmichal *v.* Elmendorf, 4 Bibb (Ky.) 484; Smith *v.* Steele, 1 Harr. & M. (Md.) 419; Barstow *v.* Sprague, 40 N. H. 27; Farnsworth *v.* Briggs, 6 N. H. 561; Allaire *v.* Allaire, 37 N. J. L. 312; Snedeker *v.* Allen, 2 N. J. L. 35; Darby *v.* Mayer, 10 Wheat. (U. S.) 465, 6 L. ed. 367.

9. *California.*— Larco *v.* Casaneuava, 30 Cal. 560.

Georgia.— Roe *v.* Doe, Dudley 168.

Maryland.— Raborg *v.* Hammond, 2 Harr. & G. 42.

Missouri.— Rodney *v.* McLaughlin, 97 Mo. 426, 9 S. W. 726; Hubbard *v.* Gilpin, 57 Mo. 441.

New Hampshire.— Farnsworth *v.* Briggs, 6 N. H. 561.

New Jersey.—Snedeker *v.* Allen, 2 N. J. L. 35.

New York.— Fetes *v.* Volmer, 58 Hun 1, 11 N. Y. Suppl. 552; Mackinnon *v.* Barnes, 66 Barb. 91; Ackley *v.* Dygert, 33 Barb. 176. See also Hill *v.* Crockford, 24 N. Y. 128; Jackson *v.* Russell, 4 Wend. 543; Jackson *v.* Walsh, 14 Johns. 407. *Compare In re* Diez, 56 Barb. 591.

Pennsylvania.— Kenyon *v.* Stewart, 44 Pa. St. 179; Loy *v.* Kennedy, 1 Watts & S. 396; Logan *v.* Watt, 5 Serg. & R. 212. See also Holliday *v.* Ward, 19 Pa. St. 485, 57 Am. Dec. 671.

Texas.— Hickman *v.* Gillum, 66 Tex. 314, 1 S. W. 339. See also Box *v.* Lawrence, 14 Tex. 545.

Washington.— Gilmore *v.* H. W. Baker Co., 12 Wash. 468, 41 Pac. 124.

See 20 Cent. Dig. tit. "Evidence," §§ 1297, 1321.

Proof of execution of will unnecessary.— Churchill *v.* Corker, 25 Ga. 479.

Certified copy of will admitted as secondary evidence.— Churchill *v.* Corker, 25 Ga. 479.

Sworn copy of probated will held inadmissible.— Ray *v.* Marriner, 3 N. C. 385.

10. *Florida.*— Coffee *v.* Groover, 20 Fla. 64.

Maryland.— Hale *v.* Monroe, 28 Md. 98, holding inadmissible a certified copy of a will not sufficiently attested to entitle it to probate as a devise of real estate.

Mississippi.— Fotheree *v.* Lawrence, 30 Miss. 416.

New Jersey.— See Allaire *v.* Allaire, 37 N. J. L. 312; Snedeker *v.* Allen, 2 N. J. L. 35.

North Carolina.— Sutton *v.* Westcott, 48 N. C. 283.

Texas.— Lagow *v.* Glover, 77 Tex. 448, 14 S. W. 141.

Formal entry of judgment held unnecessary. — Hansell *v.* Bryan, 19 Ga. 167.

11. Bowersock *v.* Adams, 55 Kan. 681, 41 Pac. 971. See also League *v.* Henecke, (Tex. Civ. App. 1894) 26 S. W. 729.

Jurisdiction presumed.— Owings *v.* Beall, 1 Litt. (Ky.) 257.

12. Jones *v.* Davis, 2 Ala. 730; White *v.* Perrine, 1 Ohio Dec. (Reprint) 58, 1 West. L. J. 397; Hibbs *v.* Blair, 14 Pa. St. 413; Welsh *v.* Crawford, 14 Serg. & R. (Pa.) 440. See also Hamner *v.* Eddins, 3 Stew. (Ala.) 192.

Admission of sworn copy as secondary evidence.— In other jurisdictions sworn copies of justices' judgments have been held admissible as secondary evidence only. Pratt *v.* Peckham, 25 Barb. (N. Y.) 195; Cherry *v.* McCants, 7 S. C. 224.

13. *Alabama.*— Burns *v.* Campbell, 71 Ala. 271, where it was held, however, that Code, § 3634, making a certified statement of a justice's docket presumptive evidence of the fact, does not apply to judgments of conviction in criminal cases, but only to civil proceedings.

Georgia.— Bell *v.* Bowdoin, 109 Ga. 209, 34 S. E. 339.

Indiana.— Yeager *v.* Davis, 112 Ind. 230, 13 N. E. 707; Steel *v.* Pope, 6 Blackf. 176.

Iowa.— Dupont *v.* Downing, 6 Iowa 172.

Kentucky.— See Com. *v.* Foster, 3 Metc. 1; Geohegan *v.* Eckles, 4 Bibb 5.

Michigan.— Goodsell *v.* Leonard, 23 Mich. 374. See also Clark *v.* Dasso, 34 Mich. 86.

Missouri.— McDermott *v.* Barnum, 19 Mo. 204; State *v.* Carroll, 9 Mo. App. 275.

be proved by the production of the original or by a sworn copy, and that a transcript certified by the justice is not evidence unless made so by statute.[14]

g. Executions and Returns. A writ of execution, when returned to the court from which it issued, becomes a record of the court, and a duly certified[15] or sworn[16] copy thereof may be used in evidence in the same way as copies of other parts of the record.

h. Stenographers' Notes and Records. In the absence of statutory provision for the certification of judicial proceedings by a court stenographer, his transcript of the testimony of a witness, although duly certified by him, is inadmissible as documentary evidence.[17] Stenographic notes are not public records within the meaning of a statute providing for the admission in evidence of copies of public records when properly certified.[18]

i. Copy of a Copy. As a general rule a certified copy of an official copy or other transcript of a record is not admissible in evidence.[19] But a copy of an officially certified copy of a judgment has been held admissible as secondary evidence, where the original records of the court had all been destroyed and where there was no evidence of the existence of the certified copy.[20]

New Jersey.— Miller *v.* Miller, 5 N. J. L. 508. See also French *v.* Shreeve, 18 N. J. L. 147.

New York.— Belgard *v.* McLaughlin, 44 Hun 557; Wilkinson *v.* Vorce, 41 Barb. 370; Pratt *v.* Peckham, 25 Barb. 195; Maynard *v.* Thompson, 8 Wend. 393; Townsend *v.* Chase, 1 Cow. 115. *Compare* McCarty *v.* Sherman, 3 Johns. 429.

See 20 Cent. Dig. tit. "Evidence," § 1298.

Copy admitted as secondary evidence.— Tillotson *v.* Warner, 3 Gray (Mass.) 574.

14. Magee *v.* Scott, 32 Pa. St. 539. See also Geohegan *v.* Eckles, 4 Bibb (Ky.) 5. *Compare* Peney *v.* Gilliland, Wright (Ohio) 38.

15. *Alabama.*— Woodward *v.* Harbin, 1 Ala. 104.

Indiana.— Hobson *v.* Doe, 4 Blackf. 487.

New Hampshire.— Newbury Bank *v.* Eastman, 44 N. H. 431.

North Carolina.— Pigot *v.* Davis, 10 N. C. 25.

South Carolina.— Tobin *v.* Seay, 2 Brev. 470.

Vermont.— Benedict *v.* Heineberg, 43 Vt. 231.

See 20 Cent. Dig. tit. "Evidence," § 1299.

Sufficiency of return immaterial.— Dean *v.* Thatcher, 32 N. J. L. 470.

Copy of execution docket.—Under Tex. Rev. St. art. 2332, making entries in an execution docket a record, certified copies thereof are admissible in evidence. Schleicher *v.* Markward, 61 Tex. 99. Indeed certified copies of such entries were held proper evidence before the passage of the statute. Portis *v.* Ennis, 27 Tex. 574. But in Snyder *v.* Norris, 6 Blackf. (Ind.) 33, it was held that the contents of an execution issued by a justice cannot be proven by a transcript from the docket, but the execution or a certified copy of it must be produced. Where it becomes necessary to prove that a lost execution was issued, a transcript from the execution docket is admissible. Becker *v.* Quigg, 54 Ill. 390.

Copy certified by register of deeds.—Dooley *v.* Wolcott, 4 Allen (Mass.) 406.

16. Bettis *v.* Taylor, 8 Port. (Ala.) 564.

Copy made out from memory inadmissible. — McGlinchey *v.* Morrison, 1 Wyo. 105.

17. Hardeman *v.* English, 79 Ga. 387, 5 S. E. 70; Smith *v.* State, 42 Nebr. 356, 60 N. W. 585 [*distinguishing* Omaha *v.* Jensen, 35 Nebr. 68, 52 N. W. 833, 37 Am. St. Rep. 432; Spielman *v.* Flynn, 19 Nebr. 342, 27 N. W. 224]; Lipscomb *v.* Lyon, 19 Nebr. 511, 27 N. W. 731.

18. Hardeman *v.* English, 79 Ga. 387, 5 S. E. 70; Smith *v.* State, 42 Nebr. 356, 60 N. W. 585.

19. Betts *v.* New Hartford, 25 Conn. 180; Drumm *v.* Cessnum, 58 Kan. 331, 49 Pac. 78; Fenwick *v.* Macey, 2 B. Mon. (Ky.) 469; Wilson *v.* Conine, 2 Johns. (N. Y.) 280. See also Handly *v.* Greene, 15 Barb. (N. Y.) 601.

Copy of proceeding in which another is an exhibit.— A record of the county court cannot be proved by the transcript of the record of a chancery suit in which the record of the county court is an exhibit, as that is but the copy of a copy. Garrett *v.* Ricketts, 9 Ala. 529.

Certified copy of transcript which has become a record.— A transcript filed in the court to which a cause has been removed by change of venue becomes a record of that court, and a duly certified transcript thereof is competent as evidence. State *v.* Rayburn, 31 Mo. App. 385. So a transcript of the record of the supreme court sent to the circuit court, containing an account of the proceedings of the supreme court in a cause sent from such circuit court to the supreme court, is, when filed in the supreme court, a record of that court; and a transcript of such transcript, made out and certified by the clerk, is evidence of the facts therein contained. Bettis *v.* Logan, 2 Mo. 2.

20. Nash *v.* Williams, 20 Wall. (U. S.) 226, 22 L. ed. 254. *Compare* Sternburg *v.* Callanan, 14 Iowa 251.

3. Public Grants and Land-Office Records. A discussion of the admissibility of transcripts and certified copies of public land grants and the proceedings generally of the land department will be found elsewhere in this work.[21]

4. Records of Private Writings — a. Certified Copies — (1) *In General.* Where the recording of a private writing is authorized by statute, a certified copy of the record is admissible to show the fact that the instrument is of record,[22] and this, although the instrument has not been so executed or acknowledged as to make a certified copy evidence of its contents.[23] So, since it is the duty of a recorder by reason of the nature of his office and without special statutory direction to note when a record is made, a certified copy of such memorandum is competent evidence to prove the date of registration of a deed.[24] In some jurisdictions certified copies of deeds and other writings affecting lands are held admissible under statute,[25] or apart from statute,[26] as primary evidence of the execution and

In Georgia it has been held that the copy of an official transcript of lost papers preserved in the office of the clerk of the supreme court, duly certified, is competent and sufficient evidence of their contents. Eagle, etc., Mfg. Co. *v.* Bradford, 57 Ga. 249.

21. See, generally, Public Lands.

22. Loeb *v.* Huddleston, 105 Ala. 257, 16 So. 714; Reading *v.* Mullen, 31 Cal. 104; Ricker *v.* Joy, 72 Me. 106. See also Erwin *v.* Kentucky Bank, 5 La. Ann. 1. *Compare* Knight *v.* Knight, 12 La. Ann. 396.

23. Stebbins *v.* Duncan, 108 U. S. 32, 2 S. Ct. 313, 27 L. ed. 641.

24. Laird *v.* Kilbourne, 70 Iowa 83, 30 N. W. 9; Stebbins *v.* Duncan, 108 U. S. 32, 2 S. Ct. 313, 27 L. ed. 641.

Office copy admissible to show that original instrument was sealed.— Gillespie *v.* Reed, 10 Fed. Cas. No. 5,436, 3 McLean 377.

25. *California.*— Weaver *v.* McKay, 108 Cal. 546, 41 Pac. 450; Grant *v.* Oliver, 91 Cal. 158, 27 Pac. 596, 861. See also Anthony *v.* Chapman, 65 Cal. 73, 2 Pac. 889; Gethin *v.* Walker, 59 Cal. 502; Canfield *v.* Thompson, 49 Cal. 210. *Compare* Eltzroth *v.* Ryan, 89 Cal. 135, 26 Pac. 647; Marriner *v.* Dennison, 78 Cal. 202, 20 Pac. 386; Brown *v.* Griffith, 70 Cal. 14, 11 Pac. 500; Mayo *v.* Mazeaux, 38 Cal. 442; Garwood *v.* Hastings, 38 Cal. 216; Hurlbutt *v.* Butenop, 27 Cal. 50; Touchard *v.* Keyes, 21 Cal. 202; Skinker *v.* Flohr, 13 Cal. 638; Macy *v.* Goodwin, 6 Cal. 579; Powell *v.* Hendricks, 3 Cal. 427.

Florida.— See L'Engle *v.* Reed, 27 Fla. 345, 9 So. 213; Skinner *v.* Pinney, 19 Fla. 42, 45 Am. Rep. 1.

Indiana.— Lentz *v.* Martin, 75 Ind. 228; Pierson *v.* Doe, 2 Ind. 123.

Kentucky.— Helton *v.* Belcher, 114 Ky. 172, 70 S. W. 295, 24 Ky. L. Rep. 927.

Louisiana.— See Eisenhauer *v.* Brosnan, 44 La. Ann. 742, 11 So. 43. *Compare* Collins *v.* Nichols, 2 Mart. 127.

Mississippi.—See Annot. Code, § 1779, providing substantially that a certified copy may be admitted without accounting for the absence of the original, unless the execution of the writing is disputed by the opposite party. But see Harmon *v.* James, 7 Sm. & M. 111, 45 Am. Dec. 296, decided under a prior statute.

New Jersey.—Doremus *v.* Smith, 4 N. J. L. 142. See also Chase *v.* Caryl, 57 N. J. L. 545, 31 Atl. 1024 [*distinguishing* New Jersey R., etc., Co. *v.* Suydam, 17 N. J. L. 25, and Den *v.* Gustin, 12 N. J. L. 42, decided on common-law principles]; Hoboken Land, etc., Co. *v.* Kerrigan, 31 N. J. L. 13.

New York.— Sudlow *v.* Warshing, 108 N. Y. 520, 15 N. E. 532; Lerche *v.* Brasher, 104 N. Y. 157, 10 N. E. 58; Clark *v.* Clark, 47 N. Y. 664; Putnam *v.* Stewart, 2 N. Y. Civ. Proc. 172; Lawrence *v.* Farley, 9 Abb. N. Cas. 371; Van Cortlandt *v.* Tozer, 17 Wend. 338; Jackson *v.* Todd, 3 Johns. 300.

North Carolina.— Mitchell *v.* Bridges, 113 N. C. 63, 18 S. E. 91; Ray *v.* Stewart, 105 N. C. 472, 11 S. E. 182; Strickland *v.* Draughan, 88 N. C. 315; Bohanan *v.* Shelton, 46 N. C. 370. *Compare* Smith *v.* Wilson, 18 N. C. 40; Park *v.* Cochran, 2 N. C. 410.

Ohio.— Livingston *v.* McDonald, 9 Ohio 168; Burnet *v.* Brush, 6 Ohio 32.

Pennsylvania.— Curry *v.* Raymond, 28 Pa. St. 144; Philips *v.* Lewistown Bank, 18 Pa. St. 394.

See 20 Cent. Dig. tit. "Evidence," § 1315 *et seq.* And see Acknowledgments, 1 Cyc. 539.

Statutes making deeds made by sheriff or other public officers primary evidence.— Hammond *v.* Johnston, 93 Mo. 198, 6 S. W. 83; Hammond *v.* Gordon, 93 Mo. 223, 6 S. W. 93; Mutual Bldg., etc., Assoc. *v.* Ambrose, 7 Pa. Dist. 526 [*distinguishing* Lodge *v.* Berrier, 16 Serg. & R. (Pa.) 297].

Copies irrelevant to issue.— Statutes making copies of records of writings *prima facie* evidence of the original writings do not make mere copies competent, relevant, or material evidence of facts of which the original writings are not evidence. Lake County *v.* Keene Five-Cents Sav. Bank, 108 Fed. 505, 47 C. C. A. 464.

26. Hood *v.* Mathers, 2 A. K. Marsh. (Ky.) 553; Tebbs *v.* White, 4 Bibb (Ky.) 42; Wells *v.* Wilson, 3 Bibb (Ky.) 264; Warner *v.* Hardy, 6 Md. 525; Hurn *v.* Soper, 6 Harr. & J. (Md.) 276; Craufurd *v.* State, 6 Harr. & J. (Md.) 231; Carroll *v.* Llewellin, 1 Harr. & M. (Md.) 162. See also Van Riper *v.* Morton, 61 Mo. App. 440. *Compare* Philipson *v.* Bates, 2 Mo. 116, 22 Am. Dec. 444. The same rule obtains at present in Maryland

contents of the original. And the same rule has been applied under statute in many jurisdictions to records of other private writings,[27] such as chattel mortgages[28] and bills of sale.[29] But the rule in most jurisdictions, founded either on the common law or statutory provision, is that a certified copy of a recorded deed or other private writing[30] is in general inadmissible, unless the proper foundation is laid for its admission as secondary evidence by accounting for the non-production of the original.[31] Where, however, the record of a private writing is author-

under statute. Preston *v.* Evans, 56 Md. 476; Morrill *v.* Gelston, 34 Md. 413; McCauley *v.* State, 21 Md. 556; Cole *v.* O'Neill, 3 Md. Ch. 174.

27. Schwartz *v.* Baird, 100 Ala. 154, 13 So. 947 (husband's written consent that wife may engage in business as a *feme sole*); Kramer *v.* Settle, 1 Ida. 485 (notice of relocation of mine). But *compare* Reading *v.* Mullen, 31 Cal. 104, where it was held that a copy of a woman's recorded declaration as a sole trader, certified by the recorder, was inadmissible as primary evidence of either the existence or contents of an original, although perhaps admissible for the purpose of showing that a declaration had been recorded.

28. *Indiana.*— Tenant *v.* Rumfield, 11 Ind. 130.

Minnesota.— Van Dervort *v.* Vye, 85 Minn. 35, 88 N. W. 2; Ellingboe *v.* Brakken, 36 Minn. 156, 30 N. W. 659.

Nebraska.— Hall *v.* Aitkin, 25 Nebr. 360, 41 N. W. 192.

New York.— Van Hassell *v.* Borden, 1 Hilt. 128; Polykranas *v.* Krausz, 73 N. Y. App. Div. 583, 77 N. Y. Suppl. 46. *Compare* Bissell *v.* Pearce, 28 N. Y. 252; Phœnix Mills *v.* Miller, 42 Hun 654; Sunderlin *v.* Wyman, 10 Hun 493; George *v.* Toll, 39 How. Pr. 497; Fellows *v.* Hyring, 23 How. Pr. 230.

North Carolina.— Griffith *v.* Richmond, 126 N. C. 377, 35 S. E. 620.

Texas.— Oxsheer *v.* Watt, 91 Tex. 402, 44 S. W. 67 [*affirming* (Civ. App. 1897) 42 S. W. 121]; Edwards *v.* Osman, 84 Tex. 656, 19 S. W. 868.

Washington.— Howard *v.* Gemming, 10 Wash. 30, 38 Pac. 766.

Compare Shelden *v.* Merrill, 69 Mich. 156, 37 N. W. 66; Haydon *v.* Moore, 1 Sm. & M. (Miss.) 605.

See 20 Cent. Dig. tit. "Evidence," § 1319.

29. Polykranas *v.* Krausz, 73 N. Y. App. Div. 583, 77 N. Y. Suppl. 46.

Copy of bill of sale of vessel certified by collector of customs admitted.— Merchants' Nav. Co. *v.* Amsden, 25 Ill. App. 307; Sampson *v.* Noble, 14 La. Ann. 347.

30. Instrument of adoption of a minor. McCollister *v.* Yard, 90 Iowa 621, 57 N. W. 447.

31. *Alabama.*— Hines *v.* Chancey, 47 Ala. 637; Thompson *v.* Ives, 11 Ala. 239; Smith *v.* Armistead, 7 Ala. 698; Fryer *v.* Dennis, 2 Ala. 144; Sommerville *v.* Stephenson, 3 Stew. 271.

Colorado.— Sullivan *v.* Hense, 2 Colo. 424.

Georgia.— Cox *v.* McDonough, 118 Ga. 414, 45 S. E. 401; Solomon *v.* Creech, 82 Ga. 445, 9 S. E. 165; Williams *v.* Moore, 68 Ga. 585; Brown *v.* Driggers, 60 Ga. 114.

Illinois.— Hanson *v.* Armstrong, 22 Ill. 442; Phenix Ins. Co. *v.* Mechanics', etc., Sav., etc., Assoc., 51 Ill. App. 479; Dugger *v.* Oglesby, 3 Ill. App. 94; Fabbri *v.* Cunio, 1 Ill. App. 240.

Iowa.— Ackley *v.* Sexton, 24 Iowa 320; Williams *v.* Heath, 22 Iowa 519.

Kansas.— West *v.* Cameron, 39 Kan. 736, 18 Pac. 894.

Maine.— Doe *v.* Scribner, 36 Me. 168.

Missouri.— Hope *v.* Blair, 105 Mo. 85, 16 S. W. 595, 24 Am. St. Rep. 366; Pierce *v.* Georger, 103 Mo. 540, 15 S. W. 848; Russell *v.* Glasser, 93 Mo. 353, 6 S. W. 362; Hoskinson *v.* Adkins, 77 Mo. 537; Patterson *v.* Fagan, 38 Mo. 70. *Compare* Tully *v.* Canfield, 60 Mo. 99.

Montana.— Manhattan Malting Co. *v.* Sweteland, 14 Mont. 269, 36 Pac. 84 [*modifying* McKinstry *v.* Clark, 4 Mont. 370, 1 Pac. 759]; Garfield M. & M. Co. *v.* Hammer, 6 Mont. 53, 8 Pac. 153.

New Hampshire.— Smyth *v.* Carlisle, 16 N. H. 464.

South Carolina.— McLeod *v.* Rogers, 2 Rich. 19; Mowry *v.* Schroder, 4 Strobh. 69; Dingle *v.* Bowman, 1 McCord 177.

Tennessee.— Anderson *v.* Walker, Mart. & Y. 201. See also Woods *v.* Bonner, 89 Tenn. 411, 18 S. W. 67.

Texas.— Johnson *v.* Franklin, (Civ. App. 1903) 76 S. W. 611. By statute a certified copy of the record is admissible when the party files an affidavit that the original has been lost or that he cannot produce it. Williamson *v.* Work, (Civ. App. 1903) 77 S. W. 266.

Utah.— Wilson *v.* Wright, 8 Utah 215, 30 Pac. 754.

United States.— Griffin *v.* Reynolds, 17 How. 609, 15 L. ed. 229; Brooks *v.* Marbury, 11 Wheat. 78, 6 L. ed. 423; Longworth *v.* Close, 15 Fed. Cas. No. 8,489, 1 McLean 282.

See 20 Cent. Dig. tit. "Evidence," §§ 1317, 1318.

In Texas a certified copy of deed, being evidence only by virtue of the statute, cannot be admitted before substantial compliance with provisions of the statute that it shall be filed among the papers of the suit in which it is to be used three days before the trial, and notice thereof given to the opposite party, and affidavit filed that the original has been lost or cannot be procured. Firebaugh *v.* Ward, 51 Tex. 409; Ury *v.* Houston, 36 Tex. 260; Gamage *v.* Trawick, 19 Tex. 58; Henry *v.* Bounds, (Civ. App. 1898) 46 S. W.

ized, the authorities are generally agreed that a certified copy is admissible as secondary evidence of the execution and contents of the writing upon proof that the original is lost or destroyed,[32] or is outside of the jurisdiction of the court,[33] or where the person in possession refuses to surrender the same.[34] So in a number of jurisdictions the broad rule is laid down either under statute or on common-law principles that a deed or other writing affecting realty may be proved by a certified copy of the record, upon showing generally that the original is not within the custody or control of the person wishing to use the same.[35] In some of the New England states the rule is laid down apart from statute that a party to an action

120. See also Storey *v.* Flanagan, 57 Tex. 649; Logan *v.* Logan, 31 Tex. Civ. App. 295, 72 S. W. 416; Batts *v.* Moore, (Civ. App. 1899) 54 S. W. 1036; Burleson *v.* Collins, (Civ. App. 1895) 29 S. W. 688; Valentine *v.* Sweatt, (Civ. App. 1903) 78 S. W. 385, holding that the rule applies to all cases in which it is sought to use a certified copy of a recorded instrument in evidence. So under statute it is the duty of a party offering a certified copy of a deed and making affidavit that the deed is lost to show by some of the known rules of the common law the execution of the deed, where the opposite party files an affidavit claiming that the deed is a forgery. Thompson *v.* Johnson, 24 Tex. Civ. App. 246, 58 S. W. 1030; Younge *v.* Guilbeau, 3 Wall. (U. S.) 636, 18 L. ed. 262. Under statute, in trespass to try title, plaintiff may show common source of title by certified copies of deeds, without accounting for the absence of the originals. Ogden *v.* Bosse, 86 Tex. 336, 24 S. W. 798; Greenwood *v.* Fontaine, (Civ. App. 1896) 34 S. W. 826; Folts *v.* Ferguson, (Civ. App. 1894) 24 S. W. 657. So by statute copies of conveyances which were filed in the office of any alcalde or judge in Texas previous to the first Monday in February, 1837, are, if certified under the hand and official seal of the officer with whom the originals are deposited, admissible in evidence and have the same force and effect as the originals thereof. Van Sickle *v.* Catlett, 75 Tex. 404, 13 S. W. 31. See also Cowan *v.* Williams, 49 Tex. 380. So it has been held that copies of notarial acts, which under the civil law were regarded in contemplation of law as originals, and were the only evidence of title which the party interested was entitled to retain in his possession, are admissible, without production of the originals, for all purposes which could be effected by the originals themselves. Smith *v.* Townsend, Dall. 569. In Morrison *v.* Bean, 22 Tex. 554, it was held that the certified copy of a note or mortgage on file in another case in the same court is not admissible, as the court will permit the original to be taken from the files, or the clerk may be compelled to attend with it.

32. *Alabama.*— Scott *v.* Brassell, 132 Ala. 660, 32 So. 694; Arthur *v.* Gayle, 38 Ala. 259.

Georgia.— Cox *v.* McDonald, 118 Ga. 414, 45 S. E. 401; Vaughn *v.* Burton, 113 Ga. 103, 38 S. E. 310; Hayden *v.* Mitchell, 103 Ga. 431, 30 S. E. 287; Conley *v.* State, 85 Ga. 348, 11 S. E. 659.

Louisiana.— Stanley *v.* Addison, 8 La. 207. See also Thomas *v.* Turnley, 3 Rob. 206.

New Hampshire.— Pendexter *v.* Carleton, 16 N. H. 482; Southerin *v.* Mendum, 5 N. H. 420.

South Carolina.— Stone *v.* Fitts, 38 S. C. 393, 17 S. E. 136; Duren *v.* Sinclair, 22 S. C. 361; Darby *v.* Keller, 2 Rich. 532.

Texas.— Williamson *v.* Work, (Civ. App. 1903) 77 S. W. 266; Johnson *v.* Franklin, (Civ. App. 1903) 76 S. W. 611.

See 20 Cent. Dig. tit. "Evidence," § 1318.

Rule applied to copy of marriage contract. — Classen *v.* Classen, 57 Md. 510.

33. Halsey *v.* Fanning, 2 Root (Conn.) 101, power of attorney to sell land.

34. Foxworth *v.* Brown, 120 Ala. 59, 24 So. 1; Cram *v.* Ingalls, 18 N. H. 613; Sally *v.* Gunter, 13 Rich. (S. C.) 72.

35. *Alabama.*— Hammond *v.* Blue, 132 Ala. 337, 31 So. 357; Jones *v.* Hagler, 95 Ala. 529, 10 So. 345; Florence Land, etc., Co. *v.* Warren, 91 Ala. 533, 9 So. 384. See also March *v.* England, 65 Ala. 275.

Florida.—Under the constitution. Johnson *v.* Drew, 34 Fla. 130, 15 So. 780, 43 Am. St. Rep. 172; Bell *v.* Kendrick, 25 Fla. 778, 6 So. 868.

Iowa.— Oakland Independent School Dist. *v.* Hewitt, 105 Iowa 663, 75 N. W. 497; Kenosha Stove Co. *v.* Shedd, 82 Iowa 540, 48 N. W. 933; Carter *v.* Davidson, 73 Iowa 45, 34 N. W. 603; McNichols *v.* Wilson, 42 Iowa 385; Knetzer *v.* Bradstreet, 3 Greene 487.

Kansas.— Bergman *v.* Bullitt, 43 Kan. 709, 23 Pac. 938; Pfefferle *v.* State, 39 Kan. 128, 17 Pac. 828; Clark *v.* Lord, 20 Kan. 390.

Missouri.— Cazier *v.* Hinchey, 143 Mo. 203, 44 S. W. 1052; Baum *v.* Sauer, 117 Mo. 460, 23 S. W. 147; Frank *v.* Reuter, 116 Mo. 517, 22 S. W. 812; Boogher *v.* Neece, 75 Mo. 383; Bosworth *v.* Bryan, 14 Mo. 575.

Nevada.—O'Meara *v.* North American Min. Co., 2 Nev. 112.

See 20 Cent. Dig. tit. "Evidence," §§ 1317, 1318.

Under a Nebraska statute, providing that the record of a deed duly recorded, or a transcript thereof duly certified, may be read in evidence with like force and effect as the original deed, whenever, by the party's oath or otherwise, the original is known to be lost or not to belong to the party seeking to use it, or to be within his control, a defendant in ejectment who seeks to prove title in a stranger as a defense, it sufficiently appear-

after proof of the original deed to himself, or of his title by devise or descent, or by extent or otherwise, may use office copies of deeds to which he is not a party, but which constitute part of his chain of title as *prima facie* evidence without accounting for the non-production of the original, and that if the copy produced purports to be of a deed regularly executed, acknowledged, and recorded, the copy will be regarded as *prima facie* evidence of these facts as well as of the contents of the deeds.[36] In some of these jurisdictions moreover the courts have still further departed from the common law in regard to the admission of secondary evidence and have held generally that where a conveyance of real estate which is required to be recorded is made to a stranger to the suit, it is competent to prove the execution and contents of such original by a certified copy without laying a foundation for such proof by accounting for the non-production of the original.[37] But where the person offering the evidence is a party to the deed and may be presumed to have it in his possession, he cannot use an office copy until the loss of the original is shown.[38] Nor does the rule admitting office copies of recorded instruments in evidence apply to deeds which are pre-

ing that the original deed does not belong to him, may introduce a copy of the record in the first instance, without proof of the loss of the original, or that it is not under his control. Buck *v.* Gage, 27 Nebr. 306, 43 N. W. 119.

Affidavit of party admitted to show absence of control of original.— Scott *v.* Bassett, 194 Ill. 602, 62 N. E. 914; Bowman *v.* Wettig, 39 Ill. 416; Nye *v.* Gribble, 70 Tex. 458, 8 S. W. 608.

Stranger to deed presumed not to have custody or control.— Florence Land, etc., Co. *v.* Warren, 91 Ala. 533, 9 So. 384.

Deed presumed to be in custody of grantee. — Eby *v.* Winters, 51 Kan. 777, 33 Pac. 471.

36. Thacher *v.* Phinney, 7 Allen (Mass.) 146; Com. *v.* Emery, 2 Gray (Mass.) 80; Smith *v.* Cushman, 59 N. H. 27; Farrar *v.* Fessenden, 39 N. H. 268; Fellows *v.* Fellows, 37 N. H. 75; Harvey *v.* Mitchell, 31 N. H. 575; Forsaith *v.* Clark, 21 N. H. 409; Andrews *v.* Davison, 17 N. H. 413, 43 Am. Dec. 606; Lyford *v.* Thurston, 16 N. H. 399; Pollard *v.* Melvin, 10 N. H. 554; Southerin *v.* Mendum, 5 N. H. 420; Pratt *v.* Battles, 34 Vt. 391. See also Williams *v.* Wetherbee, 2 Aik. (Vt.) 329.

37. Colchester Sav. Bank *v.* Brown, 75 Conn. 69, 52 Atl. 316; Bolton *v.* Cummings, 25 Conn. 410; Kelsey *v.* Hanmer, 18 Conn. 311; Clark *v.* Mix, 15 Conn. 152; Cunningham *v.* Tracy, 1 Conn. 252; Talcott *v.* Goodwin, 3 Day (Conn.) 264; Parker *v.* Smedly, 2 Root (Conn.) 286; Frazee *v.* Nelson, 179 Mass. 456, 61 N. E. 40, 88 Am. St. Rep. 391; Gragg *v.* Learned, 109 Mass. 167; Stockwell *v.* Silloway, 105 Mass. 517; Samuels *v.* Borrowscale, 104 Mass. 207; Farwell *v.* Rogers, 99 Mass. 33; Ward *v.* Fuller, 15 Pick. (Mass.) 185; Eaton *v.* Campbell, 7 Pick. (Mass.) 10.

Office copy as prima facie evidence of delivery.— Gragg *v.* Learned, 109 Mass. 167.

Rule applied to mortgages and transfers of personalty.— Clark *v.* Mix, 15 Conn. 152; Barnard *v.* Crosby, 6 Allen (Mass.) 327; Pierce *v.* Gray, 7 Gray (Mass.) 67.

In New Hampshire office copies have been held inadmissible when offered to show title in a third person under whom neither party to the action claims. Wells *v.* Jackson Iron Mfg. Co., 48 N. H. 491; Homer *v.* Cilley, 14 N. H. 85; Loomis *v.* Bedel, 11 N. H. 74; Pollard *v.* Melvin, 10 N. H. 554; Winnipisiogee Paper Co. *v.* New Hampshire Land Co., 59 Fed. 542, declaring law in New Hampshire.

In Maine it is provided that in actions in which the title to real estate is material to the issue, and when original deeds would be admissible, attested copies of such deeds from the registry may be used as evidence without proof of their execution, when the party offering such copy is not a grantee in the deed nor claims as heir, nor justifies as servant of the grantee or his heirs. New England Wiring, etc., Co. *v.* Farmington Electric Light, etc., Co., 84 Me. 284, 24 Atl. 848; Whitmore *v.* Learned, 70 Me. 276; Jewett *v.* Persons Unknown, 61 Me. 408. See also Elwell *v.* Cunningham, 74 Me. 127. Prior to the statutory provision this doctrine obtained under a rule of the supreme court. Hutchinson *v.* Chadbourne, 35 Me. 189; White *v.* Dwinel, 33 Me. 320; Baring *v.* Harmon, 13 Me. 361; Woodman *v.* Coolbroth, 7 Me. 181. Under this rule, in order to introduce an office copy instead of the original deed under which a party claims as heir, it is incumbent on him, besides showing that he has exhausted his apparent means of producing the original, to prove the execution and genuineness of the deed which he claims is lost. Egan *v.* Horrigan, 96 Me. 46, 51 Atl. 246; Elwell *v.* Cunningham, 74 Me. 127; White *v.* Dwinel, 33 Me. 320. See also Hewes *v.* Wiswell, 8 Me. 94. So office copies can be admitted only in actions touching realty and in all other actions the general principle prevailed that a party offering to prove act by a deed must produce it and prove its execution. Jackson *v.* Nason, 38 Me. 85; Doe *v.* Scribner, 36 Me. 168; Hutchinson *v.* Chadbourne, 35 Me. 189; Kent *v.* Weld, 11 Me. 459.

38. Southerin *v.* Mendum, 5 N. H. 420. See also Com. *v.* Emery, 2 Gray (Mass.) 80.

sumed to be in the possession or control of the opposite party without notice to him to produce the original.[39]

(II) *Unauthorized or Defective Records*—(A) *In General.* To render a certified copy of the record of an instrument admissible in evidence, the registry of the original must have been authorized.[40] Thus where a deed has never been registered and the registration of a copy is unauthorized a certified copy of a registered copy is not admissible.[41]

(B) *Writing Defectively Executed or Acknowledged.* A certified copy of the record of a deed or other private writing is not admissible to show the execution and contents of the original, where the writing was not executed, proved, or acknowledged in the manner required by law to entitle it to be admitted to record,[42] unless such copies are by statute made admissible notwithstanding

39. Draper *v.* Hatfield, 124 Mass. 53; Samuels *v.* Barrowscale, 104 Mass. 207; Com. *v.* Emery, 2 Gray (Mass.) 80; Homer *v.* Cilley, 14 N. H. 85.

40. *Alabama.*— Hatcher *v.* Clifton, 35 Ala. 275.

Arkansas.— Brown *v.* Hicks, 1 Ark. 232.

California.— See Smith *v.* Brannan, 13 Cal. 107.

Georgia.— Oliver *v.* Persons, 30 Ga. 391, 76 Am. Dec. 657; Rushin *v.* Shields, 11 Ga. 636, 56 Am. Dec. 436; Beverly *v.* Burke, 9 Ga. 440, 54 Am. Dec. 351.

Illinois.— Frazier *v.* Laughlin, 6 Ill. 347.

Iowa.— Morrison *v.* Coad, 49 Iowa 571.

Kentucky.— Spurr *v.* Trimble, 1 A. K. Marsh. 278.

Maryland.— Berry *v.* Matthews, 13 Md. 537; Burgess *v.* Lloyd, 7 Md. 178; Miles *v.* Knott, 12 Gill & J. 442; Coale *v.* Harrington, 7 Harr. & J. 147; Connelly *v.* Bowie, 6 Harr. & J. 141; Cheney *v.* Watkins, 1 Harr. & J. 527, 2 Am. Dec. 530; Gittings *v.* Hall, 1 Harr. & J. 14, 2 Am. Dec. 502. *Compare* Dorsey *v.* Gassaway, 2 Harr. & J. 402, 3 Am. Dec. 557.

Mississippi.— Thomas *v.* Grand Gulf Bank, 9 Sm. & M. 201.

Missouri.— Campbell *v.* Laclede Gas Light Co., 84 Mo. 352; Hoskinson *v.* Adkins, 77 Mo. 537; Haile *v.* Palmer, 5 Mo. 403; Chouteau *v.* Chevalier, 1 Mo. 343. See also Hardin *v.* Lee, 51 Mo. 241.

Nevada.— Golden Fleece Gold, etc., Min. Co. *v.* Cable Consol. Gold, etc., Min. Co., 12 Nev. 312.

New Hampshire.— Wendell *v.* Abbott, 43 N. H. 68.

New York.— Striker *v.* Striker, 31 N. Y. App. Div. 129, 52 N. Y. Suppl. 729.

North Carolina.— Burnett *v.* Thompson, 35 N. C. 379; Garland *v.* Goodloe, 3 N. C. 351.

Pennsylvania.— Hellman *v.* Hellman, 4 Rawle 440.

Texas.— Shifflet *v.* Morelle, 68 Tex. 382, 4 S. W. 843; Fitzpatrick *v.* Pope, 39 Tex. 314; Johnson *v.* Brown, 25 Tex. Suppl. 120; Uhl *v.* Musquez, 1 Tex. Unrep. Cas. 650.

Vermont.— Bush *v.* Van Ness, 12 Vt. 83.

Virginia.— See Maxwell *v.* Light, 1 Call 117. *Compare* Ben *v.* Peete, 2 Rand. 539.

West Virginia.— Clark *v.* Perdue, 40 W. Va. 300, 21 S. E. 735.

United States.— Union Pac. R. Co. *v.* Reed, 80 Fed. 234, 25 C. C. A. 389; New York Dry Dock *v.* Hicks, 18 Fed. Cas. No. 10,204, 5 McLean 111.

See 20 Cent. Dig. tit. "Evidence," § 1325.

A copy of a lost deed improperly recorded has been held admissible in connection with other evidence of the execution of the original. Webster *v.* Harris, 16 Ohio 490; Cox *v.* Rust, (Tex. Civ. App. 1895) 29 S. W. 807.

Certified copies of assignment of patents.— Certified copies of the patent-office record of instruments purporting to be assignments do not have the effect of primary evidence and are not *prima facie* proof of the execution or genuineness of the instruments, there being no statutory provision requiring assignments to be recorded in the patent office, although recordation is permitted by statute for further protection of the assignee. New York City *v.* American Cable R. Co., 60 Fed. 1016, 9 C. C. A. 336 [*disapproving* National Folding-Box, etc., Co. *v.* American Paper Pail, etc., Co., 55 Fed. 488; Dederick *v.* Whitman Agricultural Co., 26 Fed. 755]; Goodyear *v.* Blake, 10 Fed. Cas. No. 5,560; Parker *v.* Haworth, 18 Fed. Cas. No. 10,738, 4 McLean 370.

41. Olcott *v.* Bynum, 17 Wall. (U. S.) 44, 21 L. ed. 570; Barger *v.* Miller, 2 Fed. Cas. No. 979, 4 Wash. 280. See also Lund *v.* Rice, 9 Minn. 230.

42. *Alabama.*— Foxworth *v.* Brown, 114 Ala. 299, 21 So. 413; England *v.* Hatch, 80 Ala. 247.

Florida.— Parker *v.* Cleveland, 37 Fla. 39, 19 So. 344; Keech *v.* Enriquez, 28 Fla. 597, 10 So. 91; L'Engle *v.* Reed, 27 Fla. 345, 9 So. 213; Kendrick *v.* Latham, 25 Fla. 819, 6 So. 871; Sanders *v.* Pepoon, 4 Fla. 465.

Georgia.— Griffin *v.* Wise, 115 Ga. 610, 41 S. E. 1003. See also Watson *v.* Tindal, 24 Ga. 494, 71 Am. Dec. 142.

Illinois.—McCormick *v.* Evans, 33 Ill. 327; Dennis *v.* Hopper, 18 Ill. 82.

Indiana.— Starnes *v.* Allen, 151 Ind. 108, 45 N. E. 330, 51 N. E. 78.

Iowa.— Pitts *v.* Seavey, 88 Iowa 336, 55 N. W. 480.

Kentucky.— Morgan *v.* Bealle, 1 A. K. Marsh. 310; Swafford *v.* Herd, 65 S. W. 803, 23 Ky. L. Rep. 1556; Middlesborough Waterworks *v.* Neal, 49 S. W. 428, 20 Ky. L. Rep. 1403. See also Harris *v.* Price, 14 B. Mon. 414.

defects of execution or acknowledgment or recording,[43] or unless a statutory pre-

Louisiana.— Briggs *v.* Phillips, 2 La. Ann. 303; Thomas *v.* Kean, 10 Rob. 80; Marie Louise *v.* Cauchoix, 11 Mart. 243.

Maryland.— Budd *v.* Brooke, 3 Gill 198, 43 Am. Dec. 321.

Missouri.— Hunt *v.* Selleck, 118 Mo. 588, 24 S. W. 213; Musick *v.* Barney, 49 Mo. 458; Attwell *v.* Lynch, 39 Mo. 519; Patterson *v.* Fagan, 38 Mo. 70; Garnier *v.* Barry, 28 Mo. 438; Perry *v.* Roberts, 17 Mo. 36.

Nebraska.— Maxwell *v.* Higgins, 38 Nebr. 671, 57 N. W. 388.

New York.— Blackman *v.* Riley, 63 Hun 521, 18 N. Y. Suppl. 476, 28 Abb. N. Cas. 166.

Ohio.— Johnston *v.* Haines, 2 Ohio 55, 15 Am. Dec. 533.

Pennsylvania.— Velott *v.* Lewis, 102 Pa. St. 326; Kerns *v.* Swope, 2 Watts 75; Peters *v.* Condron, 2 Serg. & R. 80.

Tennessee.— Bond *v.* Montague, (Ch. App. 1899) 54 S. W. 65; McIver *v.* Robertson, 3 Yerg. 84; Craig *v.* Vance, 1 Overt. 182; Miller *v.* Holt, 1 Overt. 111.

Texas.— Heintz *v.* Thayer, 92 Tex. 658, 50 S. W. 929, 51 S. W. 640 [*reversing* (Civ. App. 1899) 50 S. W. 175]; Cavit *v.* Archer, 52 Tex. 166; Wood *v.* Welder, 42 Tex. 396; Holliday *v.* Cromwell, 26 Tex. 188; Deen *v.* Wills, 21 Tex. 642; Settegast *v.* Charpiot, (Civ. App. 1894) 28 S. W. 580; Birdseye *v.* Rogers, (Civ. App. 1894) 26 S. W. 841. *Compare* Guinn *v.* Musick, (Civ. App. 1897) 41 S. W. 723, where it was held that, although the record of a deed was insufficient as such because of a defective acknowledgment, a certified copy of the deed was admissible to show execution of the instrument, it having been sufficiently recorded as an agreement between the parties to it.

Vermont.— See Williams *v.* Bass, 22 Vt. 352.

Virginia.— Barley *v.* Byrd, 95 Va. 316, 28 S. E. 329.

United States.— McEwen *v.* Bulkley, 24 How. 242, 16 L. ed. 672; Union Pac. R. Co. *v.* Reed, 80 Fed. 234, 25 C. C. A. 389.

See 20 Cent. Dig. tit. "Evidence," § 1326 *et seq.* See also ACKNOWLEDGMENTS, 1 Cyc. 520, 531.

Copy admitted as secondary evidence.—Post *v.* Rich, 36 Mich. 16. See also Groff *v.* Ramsey, 19 Minn. 44. *Compare* Eaton *v.* Freeman, 63 Ga. 535.

Inclusion of certificate of acknowledgment in certified copy.— To make the copy of an enrolled deed evidence, it has been held that the certificate of proof or acknowledgment and registration recorded with it must be transcribed and certified. Hunt *v.* Owings, 4 T. B. Mon. (Ky.) 20.

Certified copy failing to show grantor's seal. — The rule has been laid down that, although a certified copy of a deed offered in evidence shows no seal or scrawl opposite the grantor's signature, yet if in the attestation clause the deed purports to be signed and sealed by the grantor, a presumption arises that the original deed was duly sealed as the law requires. Carrington *v.* Potter, 37 Fed. 767 (county commissioners' deed); McCoy *v.* Cassidy, 96 Mo. 429, 9 S. W. 926 (sheriff's deed) [*overruling* Hamilton *v.* Boggess, 63 Mo. 233]; Colvin *v.* Republican Valley Land Assoc., 23 Nebr. 75, 36 N. W. 361, 8 Am. St. Rep. 114 (deed of private corporation). But *compare* Switzer *v.* Knapps, 10 Iowa 72, 74 Am. Dec. 375; Williams *v.* Bass, 22 Vt. 352. And the same rule has been applied in the case of the deed of a municipal corporation, where the deed recited that the proper seal had been affixed and the only representation of a seal was a scroll with the word "seal" written on it. Acme Brewing Co. *v.* Central R., etc., Co., 115 Ga. 494, 42 S. E. 8. See also Putney *v.* Cutler, 54 Wis. 66, 11 N. W. 437.

Omission of notarial seal in certificate of acknowledgment.— Holbrook *v.* Nichol, 36 Ill. 161; Geary *v.* Kansas City, 61 Mo. 378; Ballard *v.* Perry, 28 Tex. 347; Minor *v.* Powers, (Tex. Civ. App. 1896) 38 S. W. 400; Alexander *v.* Houghton, (Tex. Civ. App. 1894) 26 S. W. 1102; Peters *v.* Reichenbach, 114 Wis. 209, 90 N. W. 184. And see ACKNOWLEDGMENTS, 1 Cyc. 580.

Execution of deed in presence of attesting witness held unnecessary.— Thacher *v.* Phinney, 7 Allen (Mass.) 146.

Deed insufficiently acknowledged as to one of two parties.— In Addis *v.* Graham, 88 Mo. 197, it was held that the insufficiency of a wife's relinquishment of dower in her acknowledgment of a deed relied on in an ejectment suit in which the question of dower is not involved will not render a certified copy of the record inadmissible. And in Hall *v.* Redson, 10 Mich. 21, it was held that when a deed from several grantors is recorded as to only a part of whom it is properly executed and witnessed, a transcript of the record can only be evidence of the deed as to those parties by whom it has been properly executed and the execution of it has been duly witnessed so as to entitle it to the record had they been the only grantors named, and hence the transcript of a record of a deed from husband and wife which is executed by them separately and at different times, the deed containing one subscribing witness to the execution of the husband but duly witnessed and acknowledged as to the execution of the wife, is no evidence of the execution of the deed by the husband.

43. Jones *v.* Marks, 47 Cal. 242; Clark *v.* Lord, 20 Kan. 390; Beaumont Pasture Co. *v.* Preston, 65 Tex. 448. See also Boykin *v.* Rosenfield, 69 Tex. 115, 9 S. W. 318.

Where record is legal without probate.— Where under a statute a deed can be legally recorded without probate, a copy from the register's office of a deed recorded is admissible in evidence, although the probate does not appear from the registry, or upon the copy. Lamar *v.* Raysor, 1 Rich. (S. C.) 509.

sumption of legal proof and acknowledgment arises from the fact that the instrument had been of record for a prescribed period.[44]

(c) *Recording at Improper Place.* Where there is no law requiring or permitting the registry of a deed or other private writing in the place where the instrument in question was recorded, a certified copy of such record will be inadmissible to show the execution and contents of the instrument.[45] Thus it is very generally held that to make a certified copy of a deed or other instrument relating to land admissible in evidence, it must appear that the deed was duly recorded in the county or registry district in which the land conveyed was situated at the time of registration.[46] But it has been held that an office copy of a deed conveying lands in two counties and recorded in one only is evidence as to the lands in the county in which the deed is not recorded on the ground that, as the instrument is legally recorded in one county, its entire contents become legal evidence.[47]

(d) *Records Not Made Within Prescribed Time.* If a deed is not recorded within the time prescribed by law, a certified copy of the record will be inadmissible.[48]

(e) *Rebutting Evidence.* An office copy of a private writing is liable to be rebutted by any evidence which would have been admissible to disprove the execution of the original instrument if it had been produced.[49]

b. Sworn Copies. Sworn or examined copies of enrolled deeds of bargain and sale of lands[50] and bills of sale of personalty[51] have been held admissible as

44. White *v.* Hutchings, 40 Ala. 253, 88 Am. Dec. 766; Robidoux *v.* Cassilegi, 10 Mo. App. 516; Dunn *v.* Miller, 8 Mo. App. 467; Webb *v.* Weatherhead, 17 How. (U. S.) 576, 15 L. ed. 35; Rigney *v.* Plaster, 88 Fed. 686, under Missouri statute. See also England *v.* Hatch, 80 Ala. 247.

45. Townsen *v.* Wilson, 9 Pa. St. 270; Sullivan *v.* Dimmitt, 34 Tex. 114; Villareal *v.* McLaughlin, (Tex. Civ. App. 1901) 62 S. W. 98.

Writing improperly recorded in notary's office.— A copy of a power of attorney certified by a notary public to have been recorded in his office is not evidence where he is not required by law to record powers of attorney attested by him. Spurr *v.* Trimble, 1 A. K. Marsh. (Ky.) 278.

46. *Georgia.*— Beverly *v.* Burke, 9 Ga. 440, 54 Am. Dec. 351.

Kentucky.— Garrison *v.* Haydon, 1 J. J. Marsh. 222, 19 Am. Dec. 70.

Maine.— Jewett *v.* Persons Unknown, 61 Me. 408.

Mississippi.— See Harper *v.* Tapley, 35 Miss. 506.

Missouri.— Gwynn *v.* Frazier, 33 Mo. 89. See also Muldrow *v.* Robison, 58 Mo. 331.

Texas.—Broxson *v.* McDougal, 63 Tex. 193; Sullivan *v.* Dimmitt, 34 Tex. 114; Grant *v.* Hill, (Civ. App. 1894) 30 S. W. 952; French *v.* Groesbeck, 8 Tex. Civ. App. 19, 27 S. W. 43; Tomlinson *v.* League, (Civ. App. 1894) 25 S. W. 313; League *v.* Thorp, 3 Tex. Civ. App. 573, 22 S. W. 179, 24 S. W. 685. See also Ballaster *v.* Mann, 86 Tex. 643, 26 S. W. 494.

Virginia.— Pollard *v.* Lively, 2 Gratt. 216. See 20 Cent. Dig. tit. "Evidence," § 1329.

47. Jackson *v.* Rice, 3 Wend. (N. Y.) 180, 20 Am. Dec. 683; Wheeler *v.* Winn, 53 Pa. St. 122, 91 Am. Dec. 186; Leazure *v.* Hillegas, 7 Serg. & R. (Pa.) 313; Western Union Tel. Co. *v.* Hearne, (Civ. App. 1897) 40 S. W. 50; McKeen *v.* Delancy, 5 Cranch (U. S.) 22, 3 L. ed. 25. See also Van Guden *v.* Virginia Coal, etc., Co., 52 Fed. 838, 3 C. C. A. 294. But see Garbutt Lumber Co. *v.* Grass Lumber Co., 111 Ga. 821, 35 S. E. 686; Bagley *v.* Kennedy, 94 Ga. 651, 20 S. E. 105.

Certified copy of re-recorded deed.— Crispen *v.* Hannavan, 72 Mo. 548; Moody *v.* Ogden, 31 Tex. Civ. App. 395, 72 S. W. 253. See also Logan *v.* Logan, 31 Tex. Civ. App. 295, 72 S. W. 416. *Compare* Wren *v.* Howland, (Tex. Civ. App. 1903) 75 S. W. 894.

48. *Alabama.*— Keller *v.* Moore, 51 Ala. 340.

Kentucky.— Ross *v.* Clore, 3 Dana 189; Bingham *v.* Orr, 2 Ky. L. Rep. 434. *Compare* Patterson *v.* Hansel, 4 Bush 654.

Maryland.— Carroll *v.* Norwood, 1 Harr. & J. 167.

New Jersey.— Jones *v.* Crowley, 57 N. J. L. 222, 30 Atl. 871.

United States.— Reorganized Church of Jesus Christ, etc. *v.* Church of Christ, 60 Fed. 937; Ormsby *v.* Tingey, 18 Fed. Cas. No. 10,580, 2 Cranch C. C. 128.

See 20 Cent. Dig. tit. "Evidence," § 1328.

49. Flynn *v.* Sullivan, 91 Me. 355, 40 Atl. 136; Samuels *v.* Borrowscale, 104 Mass. 207; Harvey *v.* Jones, 1 Disn. (Ohio) 65, 12 Ohio Dec. (Reprint) 490. See also Stout *v.* Kean, 3 Harr. (Del.) 82.

50. Smartle *v.* Williams, 1 Salk. 280. See also Lynch *v.* Clerke, 3 Salk. 154.

51. Pierce *v.* Rehfuss, 35 Mich. 53. *Compare* Brown *v.* Hicks, 1 Ark. 232, where it was held to be error to permit the reading in evidence of a copy of a record of a bill of

primary evidence. So it has been held that a copy of a written contract, although not properly certified, is admissible upon the testimony of the person who made it that it is correct, where the objection that the original should be produced is overcome or waived.[52] An examined copy can be proved only by proof of comparison with the original, and not by proof of comparison with some other copy, and hence a copy verified by examination with a certified copy of the record of a deed is not admissible.[53]

5. Requisites of Certification or Exemplification — a. Public Records Generally — (I) *General Statement.* A copy of a public record not exemplified by the certificate of the proper officer or otherwise authenticated is inadmissible in evidence.[54]

(II) *Authority of Officer to Certify.* Where certified copies of public records are offered, it should appear that the officer by whom they purport to be certified had the right to the custody of the records, and was the person who had authority to furnish authenticated copies.[55]

(III) *Certificate of Fact or Conclusion From Record.* To prove a fact of record without the production of the record itself, a duly authenticated copy of the record or so much thereof as relates to the fact in question is required. A certificate by a public officer having the lawful custody of public records as to any fact appearing on the records of his office or as to any conclusion he may draw from an inspection of the records is not competent evidence,[56] unless made

sale for a slave, executed and recorded in Kentucky, upon the testimony of the subscribing witness to such bill of sale, who stated simply that he believed the copy to be substantially the same as the original, but that he had not seen the original for many years, and when it did not appear that he had ever compared the copy with the original, nor pretended to say that it was an exact or sworn copy.

52. Kollock *v.* Parcher, 52 Wis. 393, 9 N. W. 67.

53. Lasater *v.* Van Hook, 77 Tex. 650, 14 S. W. 270.

54. Star Loan Assoc. *v.* Moore, 4 Pennew. (Del.) 308, 55 Atl. 946; Pfotzer *v.* Mullaney, 30 Iowa 197; People *v.* Turner, 117 N. Y. 227, 22 N. E. 1022, 15 Am. St. Rep. 498 [*affirming* 49 Hun 466, 2 N. Y. Suppl. 253]; Bella *v.* New York, etc., R. Co., 6 N. Y. Suppl. 552; Sykes *v.* Beck, 12 N. D. 242, 96 N. W. 844.

A marriage certificate is treated as an original document in Connecticut and need not be authenticated as a copy. Northrop *v.* Knowles, 52 Conn. 522, 52 Am. Rep. 613.

55. *Alabama.*— Sloss Iron, etc., Co. *v.* Macon County, 111 Ala. 554, 20 So. 400.

Connecticut.— State *v.* Dooris, 40 Conn. 145; Wells *v.* Tryon, 3 Day 489.

Indiana.— Parker *v.* Smith, 4 Blackf. 70.

Kansas.—Bergman *v.* Bullitt, 43 Kan. 709, 23 Pac. 938; Cooper *v.* Armstrong, 4 Kan. 30.

Kentucky.— Barret *v.* Godshaw, 12 Bush 592; Simpson *v.* Loving, 3 Bush 458, 96 Am. Dec. 252.

Louisiana.— Millaudon *v.* Smith, 6 Mart. N. S. 603.

Maine.— Foxcroft *v.* Crooker, 40 Me. 308.

Maryland.— Schnertzell *v.* Young, 3 Harr. & M. 502.

Massachusetts.— Rich *v.* Lancaster R. Co., 114 Mass. 514.

Missouri.— Strother *v.* Christy, 2 Mo. 148; Philipson *v.* Bates, 2 Mo. 116, 22 Am. Dec. 444.

New Hampshire.— Woods *v.* Banks, 14 N. H. 101.

Texas.— York *v.* Gregg, 9 Tex. 85; Uhl *v.* Musquez, 1 Tex. Unrep. Cas. 650.

United States.— Bleecker *v.* Bond, 3 Fed. Cas. No. 1,534, 3 Wash. 529; New York Dry Dock *v.* Hicks, 18 Fed. Cas. No. 10,204, 5 McLean 111; Talcott *v.* Delaware Ins. Co., 23 Fed. Cas. No. 13,734, 2 Wash. 449.

See 20 Cent. Dig. tit. "Evidence," § 1342.

Certificate by deputy register.— It has been held that for the purpose of making the copy of a recorded deed admissible in evidence, a register may certify by his deputy, and it is immaterial whether the certificate be signed, "A. B. by C. D., Deputy", or "C. D., Deputy for A. B." Cook *v.* Hunter, 6 Fed. Cas. No. 3,161, 1 Brunn. Col. Cas. 125, 2 Overt. (Tenn.) 213.

More than one officer authorized to give certificates.— Clark *v.* Empire Lumber Co., 87 Ga. 742, 13 S. E. 826; State *v.* Lowrance, 64 N. C. 483.

56. *Connecticut.*— Enfield *v.* Ellington, 67 Conn. 459, 34 Atl. 818; New-Milford *v.* Sherman, 21 Conn. 101.

Georgia.— Greer *v.* Ferguson, 104 Ga. 552, 30 S. E. 943; Hines *v.* Johnston, 95 Ga. 629, 23 S. E. 470; Lamar *v.* Pearre, 90 Ga. 377, 17 S. E. 92; Walker *v.* Logan, 75 Ga. 759; Martin *v.* Anderson, 21 Ga. 301; Dillon *v.* Mattox, 21 Ga. 113; Miller *v.* Reinhart, 18 Ga. 239.

Illinois.— Mandel *v.* Swan Land, etc., Co., 154 Ill. 177, 4 N. E. 462, 45 Am. St. Rep. 124, 27 L. R. A. 313; People *v.* Lee, 112 Ill. 113; Schott *v.* People, 89 Ill. 195; Chicago *v.* English, 80 Ill. App. 163; East St. Louis *v.* Freels, 17 Ill. App. 339. *Compare* Chambers *v.* People, 5 Ill. 351.

so by statute.[57] *A fortiori* the authority to make certified copies will not authorize a certification as to facts not appearing of record[58] or improperly inserted therein,[59] or as to the purport of papers that are missing from the record.[60] So, in the absence of a statute, a negative certificate by an officer will not be evidence of the non-appearance of a fact on the records or of the absence of any entry, paper, or document from the records of his office,[61] it being said that such negative proof requires oral testimony under oath of a search made and of its results;[62] but the mere fact that a certificate contains matter of a negative character will not exclude it as evidence of its contents of a positive character.[63] The negative certificate of a recorder that a deed cannot be found has been received in evidence as part of the proof made to let in secondary evidence of the contents.[64]

Kansas.— Bemis *v.* Becker, 1 Kan. 226.

Kentucky.— Cornelison *v.* Browning, 9 B. Mon. 50.

Louisiana.— Gill *v.* Phillips, 6 Mart. N. S. 298; Seghers *v.* Creditors, 10 Mart. 54. See also Justus' Succession, 47 La. Ann. 302, 16 So. 841. *Compare* Perkins *v.* Dickson, 1 Rob. 413; Fletcher *v.* Cavalier, 4 La. 272.

Maine.— Jay *v.* East Livermore, 56 Me. 107; McGuire *v.* Sayward, 22 Me. 230; Owen *v.* Boyle, 15 Me. 147, 32 Am. Dec. 143.

Massachusetts.— Com. *v.* Richardson, 142 Mass. 71, 7 N. E. 26; Hanson *v.* South Scituate, 115 Mass. 336; Wayland *v.* Ware, 109 Mass. 248; Robbins *v.* Townsend, 20 Pick. 345. *Compare* Lee *v.* Thorndyke, 2 Metc. 313.

Minnesota.— Preiner *v.* Meyer, 67 Minn. 197, 69 N. W. 887.

Mississippi.— French *v.* Ladd, 57 Miss. 678.

Missouri.— Major *v.* Watson, 73 Mo. 661.

New Jersey.— Francis *v.* Newark, 58 N. J. L. 522, 33 Atl. 853.

New York.— Wood *v.* Knapp, 100 N. Y. 109, 2 N. E. 632.

North Carolina.— State *v.* Champion, 116 N. C. 987, 21 S. E. 700; Drake *v.* Merrill, 47 N. C. 368.

North Dakota.— Sykes *v.* Beck, 12 N. D. 242, 96 N. W. 844.

Ohio.— Davis *v.* Gray, 17 Ohio St. 330. See also State *v.* Cincinnati Tin, etc., Co., 66 Ohio St. 182, 64 N. E. 68.

Oregon.— Northern Pac. Terminal Co. *v.* Portland, 14 Oreg. 24, 13 Pac. 705.

Rhode Island.— Hopkins *v.* Millard, 9 R. I. 37.

South Carolina.— Treasurers *v.* Witsall, 1 Speers 220.

Texas.— Byers *v.* Wallace, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 760; Tinsley *v.* Rusk County, 42 Tex. 40. See also Reynolds *v.* Dechaumes, 22 Tex. 116.

West Virginia.— Roe *v.* Phillipi, 45 W. Va. 785, 32 S. E. 224; Bartlett *v.* Patton, 33 W. Va. 71, 10 S. E. 21, 5 L. R. A. 523.

United States.— Fagan *v.* U. S., 24 Ct. Cl. 217; Dunn *v.* Games, 8 Fed. Cas. No. 4,176, 1 McLean 321 [*affirmed* in 14 Pet. 322, 10 L. ed. 476]; U. S. *v.* Edwards, 25 Fed. Cas. No. 15,026, 1 McLean 467; U. S. *v.* Patterson, 27 Fed. Cas. No. 16,008, Gilp. 44.

Compare Hoffman *v.* Pack, 114 Mich. 1, 71 N. W. 1095.

See 20 Cent. Dig. tit. "Evidence," § 1336.

The certificate of the secretary of state that he issued a certificate of incorporation is held to be inadmissible. Wall *v.* Mines, 130 Cal. 27, 62 Pac. 386; Boyle *v.* Lowsontown Station M. E. Church, 46 Md. 359; Doyle *v.* Mizner, 42 Mich. 332, 3 N. W. 968.

Certificate admitted to show fact of registration.— Hanna *v.* His Creditors, 12 Mart. (La.) 32.

Certificate as to fact of record indorsed on original paper admitted.— Garneau *v.* Port Blakely Mill Co., 8 Wash. 467, 36 Pac. 463. See also Silvester *v.* Coe Quartz Min. Co., 80 Cal. 510, 22 Pac. 217. *Compare* Jewett *v.* Darlington, 1 Wash. Terr. 601.

Certificates as to the time of filing or recording a document have been held admissible when introduced with copies of the record. Orne *v.* Barstow, 175 Mass. 193, 55 N. E. 896; Wood *v.* Simons, 110 Mass. 116; Fuller *v.* Cunningham, 105 Mass. 442; Stuart *v.* Broome, 59 Tex. 466; Pawlet *v.* Sandgate, 17 Vt. 619.

57. Doe *v.* Roe, 16 Ga. 521. See also U. S. *v.* Gaussen, 19 Wall. (U. S.) 198, 22 L. ed. 41; Hoyt *v.* U. S., 10 How. (U. S.) 109, 13 L. ed. 348, 576.

58. Daggett *v.* Bonewitz, 107 Ind. 276, 7 N. E. 900. See also Rillieux *v.* Singeltary, 17 La. 88.

59. Owings *v.* Norwood, 2 Harr. & J. (Md.) 96; Farmers', etc., Bank *v.* Bronson, 14 Mich. 361.

60. Briggs *v.* Campbell, 19 La. 524.

61. *Florida.*— Parker *v.* Cleveland, 37 Fla. 39, 19 So. 344.

Georgia.— Greer *v.* Ferguson, 104 Ga. 552, 30 S. E. 943; Hines *v.* Johnson, 95 Ga. 629, 23 S. E. 470; Martin *v.* Anderson, 21 Ga. 301; Miller *v.* Reinhart, 18 Ga. 239.

Illinois.— Cross *v.* Pinckneyville Mill Co., 17 Ill. 54; Boyd *v.* Chicago, etc., R. Co., 103 Ill. App. 199.

Indiana.— Stoner *v.* Ellis, 6 Ind. 152.

Kansas.— Chicago, etc., R. Co. *v.* Vance, 64 Kan. 686, 68 Pac. 606.

Missouri.—Cash *v.* Penix, 11 Mo. App. 597.

North Dakota.— Sykes *v.* Beck, 12 N. D. 242, 96 N. W. 844.

Tennessee.— Ayres *v.* Stewart, 1 Overt. 221. *Compare* Hanna *v.* His Creditors, 12 Mart. (La.) 32.

62. Boyd *v.* Chicago, etc., R. Co., 103 Ill. App. 199.

63. Struthers *v.* Reese, 4 Pa. St. 129.

64. Ruggles *v.* Gaily, 2 Rawle (Pa.) 232.

(IV) *Form and Mode of Authentication*—(A) *In General.* Copies of public records or documents purporting to be exemplifications or certified copies will be inadmissible in evidence unless they are authenticated in the proper form and manner.[65] Thus it is generally required either under or apart from statute that it shall appear from the certificate that the paper is a true and complete copy of the original.[66] In the absence of statutory requirement, however, it is not necessary that a copy should be expressly certified as a "true copy," but the word "copy" attested by the proper officer is sufficient, since a copy authenticated by one authorized to do so will be taken as a true copy.[67] So certification of the fact of comparison of the copy with the original is sometimes required by statute.[68] In some cases it has been held that substantial compliance with the form of certification or authentication prescribed by statute is all that is required;[69] but in other decisions it is held that where copies are made evidence by statute the mode of authentication prescribed must be strictly pursued,[70] at least if the making of such copies evidence is in derogation of the common law.[71]

(B) *Necessity of Seal.* Where by statute a seal is expressly required for certified copies of public records,[72] or a seal of office is established by law for the authentication of documents from a particular public office,[73] an unsealed certificate is inadmissible.

65. Gentry *v.* Garth, 10 Mo. 226; Mott *v.* Ramsay, 92 N. C. 152. See also Sykes *v.* Beck, 12 N. D. 242, 96 N. W. 844. Davis *v.* White, 3 Yeates (Pa.) 587.

66. Naanes *v.* State, 143 Ind. 299, 42 N. E. 609; Redford *v.* Snow, 46 Hun (N. Y.) 370; Johnson *v.* Bolton, 43 Vt. 303. See also Natoma Water, etc., Co. *v.* Clarkin, 14 Cal. 544; Sykes *v.* Beck, 12 N. D. 242, 96 N. W. 844; Harper *v.* Marion County, (Tex. Civ. App. 1903) 77 S. W. 1044.

"True copy of deed."— In Preston *v.* Robinson, 24 Vt. 583, it was held that a certificate that a copy is a "true copy of a deed" will be sufficient as intended to certify that it was a true copy from the record, where it was the officer's duty to certify a copy of the record and it clearly appeared from the copy that such record existed in his office. To the same effect see Vickery *v.* Benson, 26 Ga. 582.

Certification as to making up of record.— The fact that the record from which the copy was taken was made up from the proper sources need not appear in the certificate, since this fact will be presumed. Carbee *v.* Hopkins, 41 Vt. 250.

Certification of record composed of distinct documents or parts.— Under a statute providing that whenever a certified copy of any record, document, or other paper is allowed by law to be evidence, such copy shall be certified by an officer in whose custody the same is required by law to be, etc., it has been held that the method of authentication contemplated by the statute is for the officer to certify for each document or record which is offered in evidence, and hence that copies of several deeds attached together could not be offered in evidence under one certificate. Newell *v.* Smith, 38 Wis. 39. But a different rule has been laid down under a similar statute in Oregon. Portland *v.* Besser, 10 Oreg. 242.

Clerical errors do not exclude. Harper *v.* Marion County, (Tex. Civ. App. 1903) 77 S. W. 1044.

67. Copelin *v.* Shuler, (Tex. Sup. 1887) 6 S. W. 668; Robinson *v.* Lowe, 50 W. Va. 75, 40 S. E. 454. See also Com. *v.* Quigley, 170 Mass. 14, 48 N. E. 782.

68. Huntoon *v.* O'Brien, 79 Mich. 227, 44 N. W. 601; Bills *v.* Keesler, 36 Mich. 69; Redford *v.* Snow, 46 Hun (N. Y.) 370; Stevens *v.* Clark County Sup'rs, 43 Wis. 36.

69. Piatt *v.* People, 29 Ill. 54; Huntoon *v.* O'Brien, 79 Mich. 227, 44 N. W. 601; Bills *v.* Keesler, 36 Mich. 69; People *v.* Tobey, 153 N. Y. 381, 47 N. E. 800 [*modified* in 8 N. Y. App. Div. 468, 40 N. Y. Suppl. 577]. See also State *v.* Lowrance, 64 N. C. 483.

70. Painter *v.* Hall, 75 Ind. 208; Weston *v.* Lumley, 33 Ind. 486. See also Fry *v.* State, 27 Ind. 348; Sykes *v.* Beck, 12 N. D. 242, 96 N. W. 844.

71. Ewing *v.* U. S., 3 App. Cas. (D. C.) 353; Smith *v.* U. S., 5 Pet. (U. S.) 292, 8 L. ed. 130; U. S. *v.* Harrill, 25 Fed. Cas. No. 15,310, McAll. 243; U. S. *v.* Robinson, 27 Fed. Cas. No. 16,178, 1 Wall. Jr. 161.

72. *Alabama.*— Jinkins *v.* Noel, 3 Stew. 60.

District of Columbia.— Ewing *v.* U. S., 3 App. Cas. 353.

Indiana.— Allen *v.* Thaxter, 1 Blackf. 399.

Montana.— Chambers *v.* Jones, 17 Mont. 156, 42 Pac. 758.

New Jersey.— Hawthorne *v.* Hoboken, 35 N. J. L. 247.

New York.— New York *v.* Vanderveer, 91 N. Y. App. Div. 303, 86 N. Y. Suppl. 659.

United States.—Smith *v.* U. S., 5 Pet. 292, 8 L. ed. 130; Hotchkiss *v.* Glasgow, 12 Fed. Cas. No. 6,717, 5 McLean 424; Talcott *v.* Delaware Ins. Co., 23 Fed. Cas. No. 13,734, 2 Wash. 449.

See 20 Cent. Dig. tit. "Evidence," § 1337.

73. Wickliffe *v.* Hill, 3 Litt. (Ky.) 330. See also Talcott *v.* Delaware Ins. Co., 23 Fed. Cas. No. 13,734, 2 Wash. 449.

(c) *Necessity of Official Signature and Recital of Official Character.* It has been held that the recital in a certificate to a copy of a document as to the official character of the officer as the legal custodian of it is *prima facie* proof of that fact.[74] But an alleged certified copy of a private instrument not signed by a public officer has been held to be inadmissible, although in the body of the certificate it purports to be made by an officer.[75]

(d) *Verification by Oath.* A copy of a public record, if authenticated by the seal and signature of the proper officer, is as a general rule admissible without supplementary proof or verification by the oath of the officer or other testimony.[76]

b. Judicial Records — (i) *In General.* A copy of a judicial record that is not authenticated by the certificate of the proper officer or otherwise is inadmissible.[77]

(ii) *Authority to Make Certificate.* As a general rule the officer who is authorized to make and is bound to keep a judicial record is the only person authorized to give certified copies thereof.[78] Generally the clerk of the court is competent to certify copies;[79] and it is not necessary that the copy should be further authenticated by the signature of the judge before whom the judicial proceedings took place.[80] A copy attested and signed by a deputy clerk is admissible,[81] at least where it is indicated either in the certificate or by initials attached to the

Where no office seal is established by law.— An office copy of a survey, certified by one as deputy surveyor-general, without seal, has been held admissible where no seal was established by law for such office, and the original was not in the office. Masters *v.* Shute, 2 Dall. (Pa.) 81, 1 L. ed. 298.

74. Galvin *v.* Palmer, 113 Cal. 46, 45 Pac. 172; Bixby *v.* Carskaddon, 55 Iowa 533, 8 N. W. 354. See also Jones *v.* Gale, 4 Mart. (La.) 635.

Recital of official character held unnecessary.— Barret *v.* Godshaw, 12 Bush (Ky.) 592.

75. Citizens State Bank *v.* Bonness, 76 Minn. 45, 78 N. W. 875.

76. Surget *v.* Newman, 43 La. Ann. 873, 9 So. 561; Com. *v.* Chase, 6 Cush. (Mass.) 248; Snyder *v.* Bowman, 4 Watts (Pa.) 132.

77. Kilgore *v.* Stoner, (Ala. 1892) 12 So. 60; McGlasson *v.* Scott, 112 Iowa 289, 83 N. W. 974; Clark *v.* Dasso, 34 Mich. 86; Cockerel *v.* Doe, 12 Sm. & M. (Miss.) 117.

78. Bowersock *v.* Adams, 55 Kan. 681, 41 Pac. 971; Reynolds *v.* Mahle, 12 La. 424.

A copy of a will has been held inadmissible as evidence unless certified by the clerk having custody of the record of the probate of the will. Woolley *v.* McCormick, 45 S. W. 885, 20 Ky. L. Rep. 272.

Copy of levy on execution certified by register of deeds.— In Maine it has been held that the register of deeds who has the record of a levy and not the clerk of the court is the proper officer to give certified copies thereof. Gray *v.* Garnsey, 32 Me. 180.

Certificate showing ordinary and clerk to be same person held necessary.— Under Ga. Civ. Code, § 4247, making ordinaries clerks of their own courts, but providing that they may appoint one or more clerks at their own expense, and section 4250, making it the duty of such clerks, or the ordinaries acting as such, to give transcripts, but requiring it to appear in the certificate if the ordinary and the clerk are the same person — a certificate signed by an ordinary, for the purpose of authenticating a transcript from a record on file in his court, which failed to disclose affirmatively whether or not such ordinary was also the clerk of that court, has been held insufficient, and hence inadmissible in evidence. Lay *v.* Sheppard, 112 Ga. 111, 37 S. E. 132.

79. Jones *v.* Walker, 47 Ala. 175; Choppin *v.* Michel, 11 Rob. (La.) 233; Woolsey *v.* Saunders, 3 Barb. (N. Y.) 301.

Authority of clerk presumed.— Fitzpatrick *v.* Simonson Bros. Mfg. Co., 86 Minn. 140, 90 N. W. 378.

Unauthorized records.— A copy of a proceeding or other matter not required or authorized to be kept as a judicial record will not as a general rule be admissible upon the clerk's certificate. Bowersock *v.* Adams, 55 Kan. 681, 41 Pac. 971; Boardman *v.* Paige, 11 N. H. 431. Thus an exemplified copy of an award has been held inadmissible as primary evidence where there was no law directing the officer of the court to record the instrument. James *v.* Gordon, 13 Fed. Cas. No. 7,181, 1 Wash. 333. So in League *v.* Henecke, (Tex. Civ. App. 1894) 26 S. W. 729, it was held that a certified copy of proceedings in the probate court, offered in evidence, as a decree in partition, and excluded as such, is not admissible to show an agreed partition, since such a matter is one *coram non judice*, which the clerk could not authenticate by his seal.

80. Peck *v.* Gale, 3 La. 320; Com. *v.* Phillips, 11 Pick. (Mass.) 28; Brignold *v.* Carr, 24 Wash. 413, 64 Pac. 519.

81. Downes *v.* Tarkington, 3 La. Ann. 247.

signature that the person signing is a deputy clerk.[82] Where one court becomes the successor of another and receives from the other all its records, copies of such records certified by the clerk of the former are entitled to be received in evidence the same as if they were copies of its own records.[83] But a copy certified merely by the judge[84] or by the clerk of another court[85] is generally inadmissible.

(III) *Form of Attestation or Certification* — (A) *In General.* It is the usual practice for clerks of court in certifying judicial records to append to the copy immediately before the official signature a clause or phrase attesting the correctness of the copy, and such attestation is required by statute in some jurisdictions.[86] Apart from statutory provision to the contrary, an attestation in these words, "A true copy. Attest," or similar language, is sufficient.[87] Indeed if there is no statute prescribing a particular form of attestation, a copy authenticated by a duly authorized officer need not be attested as a true copy; but an attestation in the words, "A copy, Attest," is sufficient, since a copy must be taken to be a true copy;[88] and a certificate that the copy is full and complete is not required if the record appears on the face of the copy to be complete.[89] Where by statute the clerk or other officer is required to make certification as to the completeness of the copy, the certificate need not as a general rule be formal or technical; it is sufficient if upon a reasonable construction it affirms that the transcript contains a full, true, and correct copy of all the proceedings.[90]

(B) *Seal of Court.* Where the copy is authenticated by the proper officer under the seal of the court, no further authentication is in general needed for its introduction in another court in the same state, since the seal of a court of record proves itself within the state.[91] At common law or under statute in some of the

82. Moore *v.* Farrow, 3 A. K. Marsh. (Ky.) 41.

83. Clarke *v.* Rice, 15 R. I. 132, 23 Atl. 301. See also Woolsey *v.* Saunders, 3 Barb. (N. Y.) 301, where it was held that a copy of the docket of a judgment rendered in the supreme court, and docketed in a county clerk's office, pursuant to the statute, for the purpose of redemption, by a judgment creditor, of the land sold under the judgment, is properly certified by the clerk of the county in which the judgment was docketed.

Records of courts during confederacy.— Sugg *v.* Winston, 49 Ala. 586.

84. Dibble *v.* Morris, 26 Conn. 416; Reynolds *v.* Mahle, 12 La. 424. *Compare* Cockran *v.* State, 46 Ala. 714.

85. Bowersock *v.* Adams, 55 Kan. 681, 41 Pac. 971.

86. See Cofer *v.* Schening, 98 Ala. 338, 13 So. 123; Cargile *v.* Ragan, 65 Ala. 287; Vail *v.* Rinehart, 105 Ind. 6, 4 N. E. 218; Anderson *v.* Ackerman, 88 Ind. 481; Tull *v.* David, 27 Ind. 377.

Certificates failing to show copy to be transcript of original record.— In Drumm *v.* Cessnum, 58 Kan. 331, 49 Pac. 78, it was held that a certificate stating "the foregoing to be a full, true and correct copy of the transcript of the recognizance," etc., is defective in that it fails to show that the copy is a transcript of the original papers. On the other hand under a Texas statute requiring all judgments of the district court to be entered of record, it has been held that transcripts certified to be copies of "original orders" were defective in that they were not certified to be copies of orders as entered upon the minutes of the court. International, etc., R. Co. *v.* Moore, (Civ. App. 1895) 32 S. W. 379. See also Fossett *v.* McMahan, 74 Tex. 546, 12 S. W. 324; Thornton *v.* Murray, 50 Tex. 161. But under a statute in Illinois making the papers in a cause when filed a part of the record, although not copied into the record book, the certificate of the clerk of the court that the transcript is a true and perfect copy of the original papers in the case, as fully as the same appear from the files and records in his office, although informal, is substantially good. Harding *v.* Larkin, 41 Ill. 413.

87. Harden *v.* Webster, 29 Ga. 427; Mayfield *v.* Kilgour, 31 Md. 240; Com. *v.* Munn, 156 Mass. 51, 30 N. E. 86; Com. *v.* Wait, 131 Mass. 417; Com. *v.* Ford, 14 Gray (Mass.) 399; O'Connor *v.* Vineyard, (Tex. Civ. App. 1897) 43 S. W. 55.

88. Com. *v.* Quigley, 170 Mass. 14, 48 N. E. 782. See also Tobin *v.* Seay, 2 Brev. (S. C.) 470.

89. Radcliff *v.* Ship, Hard. (Ky.) 292. See also Merritt *v.* Lyon, 3 Barb. (N. Y.) 110, where it was held that exemplified copies of judgment records and executions, properly authenticated under the seal of the court, are admissible in evidence without a certificate of the clerk stating that the exemplification contains the whole of the record, etc., as required by statute in New York in the case of certified copies.

90. Cofer *v.* Schening, 98 Ala. 338, 13 So. 123; Cargile *v.* Ragan, 65 Ala. 287; Vail *v.* Rinehart, 105 Ind. 6, 4 N. E. 218; Anderson *v.* Ackerman, 88 Ind. 481; Wiseman *v.* Lynn, 39 Ind. 250; Tull *v.* David, 27 Ind. 377.

91. Cockran *v.* State, 46 Ala. 714; Brophy *v.* Brunswick, 2 Wyo. 86.

states copies of judicial records must be certified under the seal of the court if there be one;[92] but the rule in many jurisdictions, based either on statutory provisions or on common law principles and immemorial usage, is that a copy of a record of a court certified to be used as evidence in another court in the state need not be exemplified under the seal of the court, but it is sufficient if the copy is attested by the clerk or other proper officer.[93]

(c) *Recital of Official Character of Certifying Officer.* It has been held not to be necessary that in addition to his signature the clerk should state his official character, it being sufficient if the date or other facts stated in the body of the certificate show that the copy was made during the official term of the officer or was otherwise made in an official capacity.[94] So it has been held sufficient if the clerk indicates his official capacity by initials merely.[95]

(d) *Certification of Record Composed of Detached Papers.* The mere fact that papers composing a record are certified separately has been held insufficient to require their rejection, if the papers taken together make a complete record.[96] Where, however, only one certificate is made and the record is composed of several distinct papers, they should be attached, that the court may be enabled to see that the clerk's certificate applies to all of them, and may import verity thereto.[97]

(e) *Identification of Record Certified.* If the transcript fails to show to

The attestation by the clerk of a federal court in which the record was made, under its seal, is a sufficient affirmation of the verity of the matters contained in the record. Gregory *v.* Pike, 94 Me. 27, 46 Atl. 793.

92. *Louisiana.*— State *v.* Brown, 33 La. Ann. 1151; Campbell *v.* Karr, 7 La. 70.

Maryland.—See Mayfield *v.* Kilgour, 31 Md. 240.

Nebraska.— Burge *v.* Gandy, 41 Nebr. 149, 59 N. W. 359.

Tennessee.—Morgan *v.* Betterton, 109 Tenn. 84, 69 S. W. 969.

Texas.—Wren *v.* Howland, (Civ. App. 1903) 75 S. W. 894; McCarthy *v.* Burtis, 3 Tex. Civ. App. 439, 22 S. W. 422.

Vermont.— Parish *v.* Pearsons, 27 Vt. 621.

Under statute in Indiana the supreme court will not recognize a paper as a copy or transcript of the records of a court below, unless it comes up to them with the seal of the latter court. Brunt *v.* State, 36 Ind. 330; Sanford *v.* Sinton, 34 Ind. 539; Vanliew *v.* State, 10 Ind. 384; Hinton *v.* Brown, 1 Blackf. 429.

Where court is without a seal.— Under statutes in Illinois it has been held that the certificate of a probate judge to the copy of a will is not invalid for want of a seal, where that court, although formerly held to be a court of record, is no longer such, which fact is certified by the judge with the statement that the court has no seal. Morgan *v.* Curtenius, 17 Fed. Cas. No. 9,799, 4 McLean 366 [*affirmed* in 20 How. 1, 15 L. ed. 823].

93. *Alabama.*— Weis *v.* Levy, 69 Ala. 209; Beggs *v.* State, 55 Ala. 108; Bishop *v.* State, 30 Ala. 34.

Georgia.— Conley *v.* State, 85 Ga. 348, 11 S. E. 659; Ponder *v.* Shumans, 80 Ga. 505, 5 S. E. 502; Witzel *v.* Pierce, 22 Ga. 112; Roe *v.* Neal, Dudley 168. *Compare* Thomasson *v.* Driskell, 13 Ga. 253, decided under prior statute.

Kentucky.— Rowland *v.* McGee, 4 Bibb 439.

Massachusetts.—Com. *v.* Quigley, 170 Mass. 14, 48 N. E. 782; Chamberlin *v.* Ball, 15 Gray 352; Ladd *v.* Blunt, 4 Mass. 402. See also Abington *v.* North Bridgewater, 23 Pick. 170.

South Carolina.—Fant *v.* McDaniel, 1 Brev. 173, 2 Am. Dec. 660.

See 14 Cent. Dig. tit. "Criminal Law," § 1028; 20 Cent. Dig. tit. "Evidence," § 1351.

Private seal of officer.— A copy of a record certified by the clerk of the court under his private seal is admissible in evidence, it appearing from the certificate that there was no seal of court. Torbert *v.* Wilson, 1 Stew. & P. (Ala.) 200. So the authentication of a copy by a clerk through his deputy, under his private seal, affirming that the public seal is lost, is sufficient. Godbold *v.* Planters', etc., Bank, 4 Ala. 516. And it has been held not to be error to admit in evidence letters of administration, although sealed with a private seal, where they appear to have been granted by the proper authority, and with the usual seal of the court, which was the private seal of the judge. Ward *v.* Moorey, 1 Wash. Terr. 104. By statute in Missouri the authentication of records by the clerk by his private seal must be by seal impressed in wax or some like substance. A scrawl is not sufficient. Gates *v.* State, 13 Mo. 11.

94. Donohoo *v.* Brannon, 1 Overt. (Tenn.) 327.

95. Wynn *v.* Harman, 5 Gratt. (Va.) 157; Gibson *v.* Com., 2 Va. Cas. 111.

96. Goldstone *v.* Davidson, 18 Cal. 41. See also Gale *v.* Parks, 58 Ind. 117. *Compare* Susquehanna, etc., R., etc., Co. *v.* Quick, 68 Pa. St. 189.

The rule is otherwise if the papers do not show an entire record of the proceedings. Stark *v.* Billings, 15 Fla. 318.

97. Herndon *v.* Givens, 16 Ala. 261.

Papers attached by brass tacks or brads sufficient.— Sherburne *v.* Rodman, 51 Wis. 474, 8 N. W. 414.

what court the record belongs[98] or otherwise fails to identify the papers or record intended to be authenticated[99] it will be inadmissible.

(F) *Verification by Oath.* Duly certified exemplifications or copies of the proceedings of one court within a state will be admissible in the other courts of the same state without being sworn to.[1] So a paper certified by a United States circuit court commissioner, with his seal and signature, as a true copy of the original record in a proceeding within his jurisdiction is admissible without oath in a court of the state in which the federal court sits.[2]

(IV) *Certificate of Fact or Conclusion From Record.* In the absence of a statute authorizing the admission of such evidence,[3] the certificate of a clerk, judge, or other officer of a court as to the existence, purport, and effect of a recorded judgment or other legal proceeding is inadmissible, the record itself or a duly authenticated copy being required.[4]

(V) *Errors or Omissions in Transcript*—(A) *Clerical Errors.* A certified copy of a judicial record is not inadmissible because of clerical error, either in making out the original record or in transcribing it, if the context clearly shows the purport of the document.[5] Thus where the date of a certified copy

98. Parish *v.* Pearsons, 27 Vt. 621.

99. Clements *v.* Taylor, 65 Ala. 363; Pike *v.* Crehore, 40 Me. 503. *Compare* Weinert *v.* Simang, 29 Tex. Civ. App. 435, 68 S. W. 1011, where it was held that a county clerk's certificate to the record of an abstract of a judgment was not inadmissible in evidence, although the page of the record of the judgment was not given therein.

1. Anonymous, 1 Brev. (S. C.) 173.

2. Frost *v.* Holland, 75 Me. 108.

3. Anniston First Nat. Bank *v.* Lippman, 129 Ala. 608, 30 So. 19, holding that the certificate of the clerk of the supreme court, showing the action of that court in a particular case, is, under statute in Alabama, admissible as evidence in any court in that state of the facts set forth in such certificate as provided by law. But for the rule prior to the statute see Miller *v.* Vaughan, 78 Ala. 323; Dothard *v.* Sheild, 69 Ala. 135. *Compare* McCollum *v.* Hubbert, 13 Ala. 282, 48 Am. Dec. 56.

4. *Alabama.*—Peebles *v.* Tomlinson, 33 Ala. 336.

Florida.— Bellamy *v.* Hawkins, 17 Fla. 750.

Georgia.— Lamar *v.* Pearre, 90 Ga. 377, 17 S. E. 92.

Illinois.— Greenwood *v.* Spiller, 3 Ill. 502.

Louisiana.— Bowles' Succession, 3 Rob. 33; Taylor *v.* Jeffries, 1 Rob. 1; Briggs *v.* Campbell, 19 La. 524; Baldwin *v.* Martin, 1 Mart. N. S. 519; Kersham *v.* Collins, 2 Mart. 245.

Maryland.— Hammond *v.* Norris, 2 Harr. & J. 130.

Michigan.—Tessman *v.* Supreme C. of U. F., 103 Mich. 185, 61 N. W. 261.

Missouri.—Littleton *v.* Christy, 11 Mo. 390.

New Hampshire.—Morse *v.* Bellows, 7 N. H. 549, 28 Am. Dec. 372.

New Jersey.— Armstrong *v.* Boylan, 4 N. J. L. 76.

New Mexico.— Carter *v.* Territory, 1 N. M. 317.

New York.—Staring *v.* Bowen, 6 Barb. 109; Baldwin *v.* Ryan, 3 Thomps. & C. 251; Lansing *v.* Russell, 3 Barb. Ch. 325. See also Non-Electric Fibre Mfg. Co. *v.* Peabody, 28 N. Y. App. Div. 442, 51 N. Y. Suppl. 111.

Pennsylvania.— Heath *v.* Page, 63 Pa. St. 108, 3 Am. Rep. 533.

South Dakota.—Billingsley *v.* Hiles, 6 S. D. 445, 61 N. W. 687.

Tennessee.— Barry *v.* Rhea, 1 Overt. 345.

West Virginia.— Thomson *v.* Mann, 53 W. Va. 432, 44 S. E. 246; Dickinson *v.* Chesapeake, etc., R. Co., 7 W. Va. 390.

United States.— U. S. *v.* Makins, 26 Fed. Cas. No. 15,710.

See 20 Cent. Dig. tit. "Evidence," §§ 1355, 1358.

Rule applied to justices' certificates.— Mahan *v.* Power, 6 Blackf. (Ind.) 445; English *v.* Sprague, 33 Me. 440; Carr *v.* Youse, 39 Mo. 346, 90 Am. Dec. 470. See also Henkle *v.* German, 6 Blackf. 423. *Compare* Burke *v.* Miller, 46 Mo. 258.

Negative certificate.— In Fisher *v.* Betts, 12 N. D. 197, 96 N. W. 132, it was held that an officer certifying that a certain motion or other matter is all that the records of his office show pertaining to a levy is not evidence that the records did not show other matters pertaining to the levy.

Appended certificate as to legal effect of copy of record.— The certificate of the clerk of a court is not evidence of the character or legal effect of the paper to which it is appended, as for instance that it is a copy of a judgment-roll, but only that it is a true copy of the original on file in his office. Alexander *v.* Knox, 1 Fed. Cas. No. 170, 6 Sawy. 54.

Certificate as to indexing.— A certificate of the clerk of the county court that at a certain time he had indexed a certain judgment record has been held not to be competent evidence of such indexing without a certified copy of that part of the index which was applicable to the judgment in question. Lindsey *v.* State, 27 Tex. Civ. App. 540, 66 S. W. 332.

5. Daniel *v.* State, 114 Ga. 533, 40 S. E. 805.

has by a manifest clerical error been improperly transcribed, and the true date is obviously inferable from other parts of the record, the error may be disregarded and the copy received in evidence.[6]

(B) *Omission to Copy Seal.* The omission to copy the seal to an original execution has been held not to render the transcript thereof inadmissible in evidence,[7] especially if a seal to the original was not required by law.[8] So, where a clerk's attestation states that the seal of the court was affixed to an original judicial record and the transcript bears a scroll with the word "seal" inclosed, it is sufficient.[9]

(C) *Omission of Judge's Signature to Record.* The fact that a certified copy of a judicial proceeding omits the signature of the judge to the record will not render the copy inadmissible,[10] especially if the signature of the judge was not necessary to the validity of the original record.[11]

(VI) *Justices' Records*—(A) *Who May Certify.* It has been laid down as a rule founded on common-law principles that the person by whom a justice's record is certified must appear from the certificate or otherwise to have been the legal custodian of the record.[12] In many jurisdictions provision is made by statute for the certification of justices' records by the justice himself,[13] and provision is made in some jurisdictions for the certification of a copy of a judgment of a justice by another justice who as successor or otherwise may have the legal custody of the record,[14] provided it appears from the certificate[15] or other proof[16] that the person certifying had such legal custody. In some jurisdictions also provision is made by statute for the further authentication of the certified copy of the justice by the certification of the clerk of court of the county in which the

6. Head *v.* Woods, 92 Ga. 548, 17 S. E. 928. *Compare* Rushing *v.* Willis, (Tex. Civ. App. 1894) 28 S. W. 921.

7. Dowdle *v.* Stalcup, 25 N. C. 45.

8. Earle *v.* Thomas, 14 Tex. 583. See also Kuykendall *v.* Marx, 1 Tex. App. Civ. Cas. § 669.

9. State *v.* Bailey, 7 Iowa 390.

10. Anderson *v.* Ackerman, 88 Ind. 481; Adams *v.* Lee, 82 Ind. 587; King *v.* Duke, (Tex. Civ. App. 1895) 31 S. W. 335. *Compare* Dangerfield *v.* Thruston, 8 Mart. N. S. (La.) 232.

11. Stacks *v.* Crawford, 63 Nebr. 662, 88 N. W. 852; Scott *v.* Rohman, 43 Nebr. 618, 62 N. W. 46, 47 Am. St. Rep. 767; Fouts *v.* Mann, 15 Nebr. 172, 18 N. W. 64; Secombe *v.* Steele, 20 How. (U. S.) 94, 15 L. ed. 833. See also Osburn *v.* State, 7 Ohio 212.

Rule applied to omission of judge to add title of office.— Elliott *v.* Cronk, 13 Wend. (N. Y.) 35.

12. Stamper *v.* Gay, 3 Wyo. 322, 23 Pac. 69.

Necessity of signing in official capacity.— In Jackson *v.* Conrad, 14 W. Va. 526, it was held that where a writing was certified to be "a true abstract from docket in my possession" the whole being signed merely, "A. J. Kirkpatrick, ——— of the Peace," the certificate was not sufficient under a statute to render the transcript admissible as evidence of a justice's judgment.

13. Yeager *v.* Wright, 112 Ind. 230, 13 N. E. 707; Clark *v.* Dasso, 34 Mich. 86; Goodsell *v.* Leonard, 23 Mich. 374; McDermott *v.* Barnum, 19 Mo. 204; Miller *v.* Miller, 5 N. J. L. 508.

Certificate after expiration of office.— Under N. Y. Laws (1824), p. 292, § 29, providing that the official certificate of a justice of the peace to the judgment shall be legal evidence thereof, a certificate stating that the one signing it was the justice at the date of the judgment was held properly admitted, although the justice was no longer in office. Maynard *v.* Thompson, 8 Wend. 393. But under Me. Rev. St. c. 116, § 28, restricting the authority of a justice of the peace to certify copies of judgments rendered by him to two years from the time his commission expires, a copy of a record of a judgment certified by the justice who rendered the same more than two years after the expiration of his commission was held to be void and not admissible in evidence. Wentworth *v.* Keazer, 30 Me. 336.

14. *Indiana.*— Parker *v.* State, 8 Blackf. 292; Anderson *v.* Miller, 4 Blackf. 417. See also Yeager *v.* Wright, 112 Ind. 230, 13 N. E. 707.

Kansas.— Drumm *v.* Cessnum, 61 Kan. 467, 59 Pac. 1078.

Massachusetts.— See Tillotson *v.* Warner, 3 Gray 574.

Michigan.— Holcomb *v.* Tift, 54 Mich. 647, 20 N. W. 627; Goodsell *v.* Leonard, 23 Mich. 374.

Missouri.— Linderman *v.* Edson, 25 Mo. 105; Palmer *v.* Hunter, 8 Mo. 512.

See 20 Cent. Dig. tit. "Evidence," § 1346.

15. Anderson *v.* Miller, 4 Blackf. (Ind.) 417; Holcomb *v.* Tift, 54 Mich. 647, 20 N. W. 627.

16. Halsted *v.* Brice, 13 Mo. 171; Traylor *v.* Lide, (Tex. Sup. 1887) 7 S. W. 58.

justice resides or for the filing of the justice's transcript in the clerk's office and the issuance of certified copies by the clerk.[17] But apart from statute the certificate of a clerk as to the official character of the justice is not required.[18]

(B) *Form of Certification.* Under statute in some jurisdictions the justice is required to certify to the correctness or completeness of the copy,[19] but as a general rule no particular form of language is required,[20] and in the absence of express statutory provision, where the document purporting to be a copy comprises on its face all the essentials of a sufficient record, it is sufficient if it is certified by the justice to be "a true copy."[21]

(C) *Necessity of Seal.* In some jurisdictions under statute or on common-law principles it has been held that a transcript of the proceedings of a justice of the peace not authenticated under seal is not evidence.[22] On the other hand it has been held that, where a justice of the peace is his own clerk and has no seal, his official attestation placed upon a copy of a record made by himself is legally equivalent to the attestation placed upon a copy of a record of a judgment rendered by a superior court by the clerk thereof with its seal affixed and the certificate of the judge to the genuineness of the seal and of the clerk's signature.[23]

6. Records of Federal Courts — a. Proof Required in State Courts — (I) *In General.* The mode of authenticating documents of the departments and public offices of the United States is governed by the laws of the United States, and no authentication of documents from a public office thereof will be required in the state courts other than what would be sufficient in the federal courts.[24]

17. *Arkansas.*— State *v.* Crow, 11 Ark. 642.
Illinois.— Belton *v.* Fisher, 44 Ill. 32.
Iowa.— See Clemmer *v.* Cooper, 24 Iowa 185, 95 Am. Dec. 720.
Minnesota.— Todd *v.* Johnson, 50 Minn. 310, 52 N. W. 864; Herrick *v.* Ammerman, 32 Minn. 544, 21 N. W. 836.
Missouri.— Huston *v.* Becknell, 4 Mo. 39.
New York.— Maynard *v.* Thompson, 8 Wend. 393; Tuttle *v.* Jackson, 6 Wend. 213, 21 Am. Dec. 306; Jackson *v.* Tuttle, 9 Cow. 233.
Wisconsin.— Winn *v.* Peckham, 42 Wis. 493.
Compare Schwartz *v.* Massy, 3 Tex. App. Civ. Cas. § 470.

Necessity of filing in county where judgment rendered.— A certified copy of a transcript of a justice's judgment filed in a different county from that in which the judgment was rendered has been held inadmissible. Handly *v.* Greene, 15 Barb. (N. Y.) 601.

Transcript of docket of deceased justice.— Under statute in New Jersey providing "that the docket of the justice within one year after his death shall be deposited in the office of the clerk of the county . . . to be there kept as a public record," it has been held that the clerk may exemplify transcripts from the dockets of a deceased justice. Woodruff *v.* Woodruff, 4 N. J. L. 375.

18. Talbott *v.* Bradford, 2 Bibb (Ky.) 316.

19. Eufaula *v.* Hickman, 57 Ala. 338; Yeager *v.* Wright, 112 Ind. 230, 13 N. E. 707. See also Brown *v.* McKay, 16 Ind. 484. *Compare* Goodsell *v.* Leonard, 23 Mich. 374.

Two judgments covered by one certificate. — In Remington *v.* Henry, 6 Blackf. (Ind.) 63, it was held that the transcripts of two judgments of a justice of the peace, written on the same sheet of paper, may be authenticated by one certificate of the justice, including in its terms both transcripts.

20. See Yeager *v.* Wright, 112 Ind. 230, 13 N. E. 707; Steel *v.* Pope, 6 Blackf. (Ind.) 176.

21. Wheeler *v.* Lothrop, 16 Me. 18; Starbird *v.* Moore, 21 Vt. 529.

Certificate as to subject-matter of copy.— A paper purporting to be a true copy of proceedings before a justice has been held inadmissible unless it is certified to be a copy of matters of record or on file in the justice's office. Candy *v.* Twichel, 2 Root (Conn.) 123.

22. Geohegan *v.* Eckles, 4 Bibb (Ky.) 5; Henry *v.* Campbell, 24 N. J. L. 141; Wolverton *v.* Com., 7 Serg. & R. (Pa.) 273. *Compare* Com. *v.* Downing, 4 Gray (Mass.) 29.

Certification as to official seal.— Where a justice in certifying a transcript certifies the same to be a true transcript from his docket, and annexes his hand and seal, without certifying that it is his hand and seal, or adding, "Witness my hand and seal," it is sufficient, since the court will not presume that the seal was wrongfully added by another. Henry *v.* Campbell, 24 N. J. L. 141.

23. O'Connell *v.* Hotchkiss, 44 Conn. 51.

Proof of handwriting.— In New Jersey the transcript of a justice under his hand and seal was held admissible without proof of his handwriting. Miller *v.* Miller, 5 N. J. L. 508. But see Wagner *v.* Frederick County Com'rs, 91 Fed. 969, 34 C. C. A. 147, holding that the signature of a Maryland justice must be authenticated.

24. Wickliffe *v.* Hill, 3 Litt. (Ky.) 330; Hawthorne *v.* Hoboken, 35 N. J. L. 247.

Thus the seal of the treasury department of the United States and the signature of the secretary are sufficient to authenticate

(II) *Judicial Records.* In some jurisdictions it is held that the judgments of the courts of the United States must be deemed to be embraced in the act of congress of 1790, providing for the mode of authentication of judicial proceedings of one state for admissibility in evidence in the courts of another state,[25] or to be classed as foreign judgments;[26] and that when offered as evidence in the state courts, authentication of the certificate of the clerk of court is necessary in each case. But the weight of authority is to the effect that the district and circuit courts of the United States are not foreign to the state courts and that the act of congress prescribing the mode of proving the judicial proceedings of one state in the courts of another has no application to the proceedings of the United States courts, and hence as a general rule a copy of the record of a federal district or circuit court will be admitted in evidence in the state courts if it is certified by the clerk under the seal of the court, and this, whether or not the state in whose courts the evidence is adduced belongs to the judicial district or circuit from which the exemplified copy is brought.[27] If, however, the copy is authenti-

the official acts of the secretary. Jinkins *v.* Noel, 3 Stew. (Ala.) 60; White *v.* St. Guirons, Minor (Ala.) 331, 12 Am. Dec. 56.

25. Heard *v.* Patton, 27 La. Ann. 542; U. S. *v.* U. S. Bank, 11 Rob. (La.) 418; Dorsey *v.* Maury, 10 Sm. & M. (Miss.) 298; Tappan *v.* Norvell, 3 Sneed (Tenn.) 570. See also A. Lehmann & Co. *v.* Rivers, 110 La. 1079, 35 So. 296; State *v.* Barrow, 31 La. Ann. 692; Perry *v.* Commissioners, 11 Rob. (La.) 417.

26. Dorsey *v.* Maury, 10 Sm. & M. (Miss.) 298.

27. *Alabama.*— Allison *v.* Robinson, 136 Ala. 434, 34 So. 966.

Colorado.— Thalheimer *v.* Crow, 13 Colo. 397, 22 Pac. 779.

Connecticut.— Adams *v.* Way, 33 Conn. 419.

Georgia.— See Headman *v.* Rose, 63 Ga. 458.

Indiana.—Redman *v.* Gould, 7 Blackf. 361; Adams *v.* Lisher, 3 Blackf. 241, 25 Am. Dec. 102.

Maine.— Gregory *v.* Pike, 94 Me. 27, 46 Atl. 793.

Michigan.— Dean *v.* Chapin, 22 Mich. 275.

New York.— Pepoon *v.* Jenkins, 2 Johns. Cas. 119; Jenkins *v.* Kinsley, Col. Cas. 136, Col. & C. 80.

Pennsylvania.— Williams *v.* Wilkes, 14 Pa. St. 228. *Compare* Grant *v.* Levan, 4 Pa. St. 393.

Texas.— See Ware *v.* Bennett, 18 Tex. 794.

United States.— Turnbull *v.* Payson, 95 U. S. 418, 24 L. ed. 437.

See 20 Cent. Dig. tit. "Evidence," § 1344.

For state statutes prescribing the mode of authenticating records of the federal courts so as to render them admissible in the state courts see the following cases:

Indiana.— Bradford *v.* Russell, 79 Ind. 64.

Maine.— Pike *v.* Crehore, 40 Me. 503.

Michigan.— Dean *v.* Chapin, 22 Mich. 275.

Missouri.— Rosenfeld *v.* Siegfried, 91 Mo. App. 169; McGregor *v.* Hampton, 70 Mo. App. 98.

West Virginia.— Dickinson *v.* Chesapeake, etc., Co., 7 W. Va. 390.

An original fieri facias from a United States circuit court will in a contest arising thereunder be recognized by the state courts without proof other than intrinsic proof of its genuineness. Thomas *v.* Parker, 69 Ga. 283.

Record of bankruptcy proceedings.— Under U. S. Rev. St. (1878) § 4992, expressly providing that copies of records of bankruptcy proceedings duly certified under the seal of the court should in all cases be *prima facie* evidence of the fact therein stated, it was held that a transcript from the district court of the United States certified under the seal by the clerk was admissible in a state court. Bonesteel *v.* Sullivan, 104 Pa. St. 9; Goldsmith *v.* Dickenspiel, 2 Del. Co. (Pa.) 170; Crayton *v.* Hamilton, 37 Tex. 269. See Bradford *v.* Russell, 79 Ind. 64. *Compare* Heard *v.* Patton, 27 La. Ann. 542; Jones *v.* Stiefer, 1 Speers (S. C.) 15, where it was held that the proceedings should be authenticated by something more than the certificate of the clerk, and that a copy not authenticated by the seal of the court was inadmissible. Under the Bankruptcy Act of July 1, 1898, c. 541, § 21, 30 U. S. St. at L. 552 [U. S. Comp. St. 1901, p. 3430], a certified copy of the bankruptcy record is admissible in evidence as original evidence. Fales, etc., Mach. Co. *v.* Browning, 68 S. C. 13, 46 S. E. 545. It is not necessary to produce the entire record of a bankruptcy proceeding in order to prove a single order or act of that court. Heath *v.* Hyde, 87 Ill. 91; Price *v.* Emerson, 14 La. Ann. 141; Goldsmith *v.* Dickenspiel, 2 Del. Co. (Pa.) 170. In proceedings in bankruptcy, the custody of all papers, after reference, is in the referee, and under Bankr. Act July 1, 1898, c. 541, § 21*d*, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3430], as amended by Act Feb. 5, 1903 [U. S. Comp. St. Supp. 1903, p. 409], such papers may be certified by either the referee or clerk, so that a paper so certified by the referee, and not by the clerk is admissible in evidence. McLanahan & Alford *v.* Blackwell, 119 Ga. 64, 45 S. E. 785. The certificate must be in accordance with the state. A. Lehmann & Co. *v.* Rivers, 110 La. 1079, 35 So. 296.

cated in the manner provided by the federal statutes, it will be admissible in evidence in the state and territorial courts.[28]

b. Proof Required in Federal Courts. It is not necessary that the record of a judgment or proceeding of a federal court should be authenticated in the mode prescribed by the act of congress for the records and judicial proceedings of the state courts to render the same admissible in other federal courts. Each circuit court and district court of the United States is presumed to know the seals of every other federal, circuit, and district court, and hence the record of a district or circuit court may be proved in any other circuit or district court by the certificate of the clerk under the seal of the court, without the certificate of the judge that the attestation is in due form.[29] But while the statute does not in terms include the record and judicial proceedings of the federal courts, it has been the practice from the date of its enactment to follow its requirements in authenticating the records of those courts, and such authentication is deemed sufficient.[30]

7. Public Documents and Records of Other States — a. Legislative Acts and Journals. A discussion of the mode of authenticating the legislative acts of another state under the federal statutes and the statutes of the various states will be found elsewhere in this work.[31]

b. Judicial Records — (i) *In General.* By the act of congress of 1790, the records and judicial proceedings of the courts of any state or territory or of any country subject to the jurisdiction of the United States shall be proved and admitted in any other court within the United States by the attestation of the clerk and the seal of the court annexed if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate that the said attestation is in due form. And the said records and judicial proceedings so authenticated shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken.[32] When the proceedings of a court of another state or territory are authenticated as provided by the act of congress, they must be received as evidence.[33] Where a court of a sister state has a presiding judge, a clerk, and a seal,

28. Womack *v.* Dearman, 7 Port. (Ala.) 513; Buford *v.* Hickman, 4 Fed. Cas. No. 2,114*a*, Hempst. 232.

Certificate of district judge in absence of circuit judge.— In the absence of the federal circuit judge, and of the federal associate justice, the certificate of the federal district judge to the record of a cause in the circuit court is sufficient to render it admissible as evidence in the state courts. Stephens *v.* Bernays, 119 Mo. 143, 24 S. W. 46.

29. Turnbull *v.* Payson, 95 U. S. 418, 24 L. ed. 437; National Acc. Soc. *v.* Spiro, 94 Fed. 750, 37 C. C. A. 388; Mason *v.* Lawrason, 16 Fed. Cas. No. 9,242, 1 Cranch C. C. 190; Murray *v.* Marsh, 17 Fed. Cas. No. 9,965, Brunn. Col. Cas. 22, 3 N. C. 290; U. S. *v.* Wood, 28 Fed. Cas. No. 16,757, Brunn. Col. Cas. 456, 2 Wheel. Cr. (N. Y.) 325. See also St. Paul, etc., R. Co. *v.* Burton, 111 U. S. 788, 4 S. Ct. 699, 28 L. ed. 604.

Certificate of federal commissioner held insufficient.— In U. S. *v.* Lew Poy Dew, 119 Fed. 786, it was held that while a copy of the records of a United States commissioner, certified by him, may be sufficient to render the copy admissible in evidence in a federal court, a certificate certifying in a general way that he did certain things and made certain adjudications not amounting to a certified copy is not admissible.

30. O'Hara *v.* Mobile, etc., R. Co., 76 Fed. 718, 22 C. C. A. 512; Buford *v.* Hickman, 4 Fed. Cas. No. 2,114*a*, Hempst. 232.

31. See, generally, Statutes.

32. U. S. Rev. St. (1878) § 905 [U. S. Comp. St. (1901) p. 677].

33. *Alabama.*—Thrasher *v.* Ingram, 32 Ala. 645; Lee *v.* Hamilton, 3 Ala. 529.

California.— Parke *v.* Williams, 7 Cal. 247; Thompson *v.* Manrow, 1 Cal. 428.

Connecticut.— Barber *v.* Mexico International Co., 73 Conn. 587, 48 Atl. 758.

Illinois.— Horner *v.* Spelman, 78 Ill. 206; Ducommun *v.* Hysinger, 14 Ill. 249.

Iowa.— Taylor *v.* Runyan, 9 Iowa 522; Lewis *v.* Sutliff, 2 Greene 186.

Kansas.— Friend *v.* Miller, 52 Kan. 139, 34 Pac. 397, 39 Am. St. Rep. 340.

Kentucky.— Helm *v.* Shackleford, 5 J. J. Marsh. 390. See also Haggin *v.* Squires, 2 Bibb 334.

Louisiana.— Van Wyck *v.* Hills, 4 Rob. 140; Pleasants *v.* Botts, 5 Mart. N. S. 127.

Minnesota.— *In re* Ellis, 55 Minn. 401, 56 N. W. 1056, 43 Am. St. Rep. 514, 23 L. R. A. 287.

Missouri.— Taylor *v.* Heitz, 87 Mo. 660.

New York.— Talamo *v.* Ermano, 62 N. Y. Suppl. 246; Murphy *v.* Marscheider, 4 N. Y. Suppl. 799.

North Carolina.— Lee *v.* Gause, 24 N. C. 440.

it will be *prima facie* presumed to be a court of record,[34] and its records duly authenticated will be evidence not only of its acts but *prima facie* evidence of its jurisdiction of the subject-matter and of the parties.[35]

(II) *Requisites of Authentication*—(A) *Formalities Prescribed by Federal Statute*—(1) In General. To be admissible under the federal statute, the form of authentication prescribed must be complied with,[36] substantially at least.[37]

(2) Attestation by Clerk—(a) Form of Attestation. The act of congress does not prescribe the form of certificate by which the clerk of a court in a sister state shall certify the record to make it evidence in another state or indeed that any certificate shall be made by that officer.[38] All that is required is that the attestation of the record shall be in conformity with the form used in the state whence it comes, and the exclusive and conclusive evidence of this fact is the certificate of the presiding judge of that court.[39] Thus the federal statute does not require that the clerk shall certify the transcript to be a full and complete copy of the whole proceedings. Any certificate by the clerk certified by the proper judicial officer will be sufficient, provided the transcript as certified does not disclose defects in the original record or incompleteness in the transcript as a copy.[40] Nor does the statute require that the clerk's certificate or attestation

Ohio.— Dunlap *v.* Douthet, 15 Ohio Cir. Ct. 181, 8 Ohio Cir. Dec. 259.

South Carolina.— Wadsworth *v.* Letson, 2 Speers 277.

United States.— Taylor *v.* Carpenter, 23 Fed. Cas. No. 13,785, 2 Woodb. & M. 1.

See 20 Cent. Dig. tit. "Evidence," § 1369 *et seq.*

Certified copy of record substituted for lost record.— A new record made up by the court of another state to supply the place of one destroyed during the Civil war, duly certified under the act of congress, is sufficient. Robinson *v.* Simons, 7 Phila. (Pa.) 127.

Record of court of seceded state.—In Steere *v.* Tenney, 50 N. H. 461, it was held that a judgment rendered in a state after it had gone out of the Union and while it stood in the relation of a foreign state could, upon the return of the state to the Union, be authenticated under the act of congress.

34. Hughes *v.* Harris, 2 Ala. 269; The Thames *v.* Erskine, 7 Mo. 213; Ransom *v.* Wheeler, 12 Abb. Pr. (N. Y.) 139.

35. *Alabama.*— Slaughter *v.* Cunningham, 24 Ala. 260, 60 Am. Dec. 463; Puryear *v.* Beard, 14 Ala. 121.

Iowa.— Coughran *v.* Gilman, 81 Iowa 442, 46 N. W. 1005.

Kentucky.— Manion *v.* Titsworth, 18 B. Mon. 582.

Missouri.— Manning *v.* Hogan, 26 Mo. 570. See also Bright *v.* White, 8 Mo. 421.

New York.— Ransom *v.* Wheeler, 12 Abb. Pr. 139; Pepin *v.* Lachenmeyer, 3 Alb. L. J. 304.

Texas.— Brown *v.* Mitchell, 88 Tex. 350, 31 S. W. 621, 36 L. R. A. 64; Houze *v.* Houze, 16 Tex. 601.

Virginia.—Burtners *v.* Keran, 24 Gratt. 42.

See 20 Cent. Dig. tit. "Evidence," § 1369 *et seq.*

But if the court is without jurisdiction a certified copy of its proceedings will be inadmissible. Wren *v.* Howland, (Tex. Civ. App. 1903) 75 S. W. 894.

Records of justices of peace.— In some jurisdictions it is held that, in order to receive in evidence the transcript of a record of a justice of the peace of another state, it must appear that he had jurisdiction of the subject-matter and of the parties. Trader *v.* McKee, 2 Ill. 558; Perry *v.* Northern Ins. Co., 5 Phila. (Pa.) 188.

36. *Georgia.*— Tharpe *v.* Pearce, 89 Ga. 194, 15 S. E. 46. See also Taylor *v.* McKee, 118 Ga. 874, 45 S. E. 672.

Kentucky.— Caulfield *v.* Bullock, 18 B. Mon. 494; Barbour *v.* Watts, 2 A. K. Marsh. 290; Tarlton *v.* Briscoe, 1 A. K. Marsh. 67.

Louisiana.— A. Lehmann & Co. *v.* Rivers, 110 La. 1079, 35 So. 296.

Missouri.— Barlow *v.* Steel, 65 Mo. 611.

Nebraska.— Comstock *v.* Kerwin, 57 Nebr. 1, 77 N. W. 387.

New York.—Burnell *v.* Weld, 76 N. Y. 103; Smith *v.* Blagge, 1 Johns. Cas. 238.

See 20 Cent. Dig. tit. "Evidence," § 1370 *et seq.*

37. Thrasher *v.* Ingram, 32 Ala. 645; Horner *v.* Spelman, 78 Ill. 206.

38. White *v.* Strother, 11 Ala. 720.

39. *Alabama.*— White *v.* Strother, 11 Ala. 720; Crawford *v.* Simonton, 7 Port. 110; Brown *v.* Adair, 1 Stew. & P. 49.

Delaware.— Regan *v.* McCormick, 4 Harr. 435.

Iowa.— Simons *v.* Cook, 29 Iowa 324.

Missouri.— Grover *v.* Grover, 30 Mo. 400.

North Carolina.— Edwards *v.* Jones, 113 N. C. 453, 18 S. E. 500.

South Carolina.— Schoonmaker *v.* Lloyd, 9 Rich. 173.

Wisconsin.— Ordway *v.* Conroe, 4 Wis. 45.

United States.— Ferguson *v.* Harwood, 7 Cranch 408, 3 L. ed. 386; Craig *v.* Brown, 6 Fed. Cas. No. 3,328, Pet. C. C. 352.

See 20 Cent. Dig. tit. "Evidence," § 1370 *et seq.*

40. Mudd *v.* Beauchamp, Litt. Sel. Cas. (Ky.) 142; West Feliciana R. Co. *v.* Thorn-

shall show that he has charge of the records of the court[41] or that the court is a court of record.[42]

(b) Authority to Make Attestation. The attestation is directed to be made by the clerk in person and cannot be made by a deputy or other person acting as a substitute for the clerk.[43] Nor will an attestation by a deputy be cured by a certificate of the judge stating that the attestation is made by the proper officer.[44] A statute of the state from which the record comes enabling deputies to perform the duties of the principal will not change the rule, since this would enable the several states to alter and control an act of congress.[45] An attestation by a judge will not as a general rule be sufficient.[46] The fact, however, that the judge is also *ex-officio* clerk does not render a judicial proceeding incapable of exemplification under the statute,[47] especially if his attestation and certificate are supported by a certificate of the governor as to his official capacity.[48] When these offices are combined in one person, however, he must certify in each capacity.[49] But it has been held to be a matter of form rather than of substance whether the certification shall be by two separate certificates or comprised in one.[50]

(c) Seal of Court. The seal of the court, if there be one, must be annexed to the clerk's attestation of the copy of the record;[51] it is not sufficient that it be annexed to the certificate of the judge authenticating the attestation of the

ton, 12 La. Ann. 736, 68 Am. Dec. 778; Coffee *v.* Neely, 2 Heisk. (Tenn.) 304. See also Conley *v.* Chapman, 74 Ga. 709; Shilling *v.* Seigle, 207 Pa. St. 381, 56 Atl. 957.

Certificate held sufficient.— A certificate that "the aforegoing is truly taken from the record," etc., is sufficient and is not open to the objection that it does not appear from the certificate that the transcript was a full copy of the record of all the proceedings, since a true copy imports an entire copy. Butler *v.* Owen, 7 Ark. 369; Mudd *v.* Beauchamp, Litt. Sel. Cas. (Ky.) 142; Reber *v.* Wright, 68 Pa. St. 471; Harper *v.* Farmers', etc., Bank, 7 Watts & S. (Pa.) 204; Voris *v.* Smith, 13 Serg. & R. (Pa.) 334; Edmiston *v.* Schwartz, 13 Serg. & R. (Pa.) 135; Ferguson *v.* Harwood, 7 Cranch (U. S.) 408, 3 L. ed. 386. See also Shilling *v.* Seigle, 207 Pa. St. 381, 56 Atl. 957. *Compare* Bright *v.* White, 8 Mo. 421.

41. Kingman *v.* Cowles, 103 Mass. 283; Ritchie *v.* Carpenter, 2 Wash. St. 512, 28 Pac. 380, 26 Am. St. Rep. 877.

42. The Thames *v.* Erskine, 7 Mo. 213.

43. Kansas Pac. R. Co. *v.* Cutter, 19 Kan. 83; Willock *v.* Wilson, 178 Mass. 68, 59 N. E. 757. See also Williams *v.* Williams, 53 Mo. App. 617. But see Greasons *v.* Davis, 9 Iowa 219; Young *v.* Thayer, 1 Greene (Iowa) 196; Steinke *v.* Graves, 16 Utah 293, 52 Pac. 386, holding that an attestation by a deputy in the name of the clerk is sufficient.

Attestation by prothonotary.— It will be presumed, in the absence of evidence as to the powers of the prothonotary of a court of common pleas in Pennsylvania, that he is the chief clerk of that court, and therefore, under U. S. Rev. St. (1878) § 905 [U. S. Comp. St. (1901) p. 677], authorized to attest copies of its judgment. Trebilcox *v.* McAlpine, 46 Hun (N. Y.) 469. See also Sheriff *v.* Smith, 47 How. Pr. (N. Y.) 470.

44. Willock *v.* Wilson, 178 Mass. 68, 59 N. E. 757; Morris *v.* Patchin, 24 N. Y. 394, 82 Am. Dec. 311.

45. Lothrop *v.* Blake, 3 Pa. St. 483. See also Willock *v.* Wilson, 178 Mass. 68, 59 N. E. 757.

46. Stuart *v.* Swanzy, 12 Sm. & M. (Miss.) 684.

47. *Alabama.*— Huff *v.* Cox, 2 Ala. 310; Dozier *v.* Joyce, 8 Port. 303.

California.— Low *v.* Burrows, 12 Cal. 181.

Georgia.— Cox *v.* Jones, 52 Ga. 438.

Illinois.— Spencer *v.* Langdon, 21 Ill. 192.

Iowa.— Roop *v.* Clark, 4 Greene 294.

Louisiana.— State *v.* Barrow, 31 La. Ann. 691; Pagett *v.* Curtis, 15 La. Ann. 451.

Mississippi.— Jordan *v.* Thomas, 31 Miss. 557.

Pennsylvania.— State *v.* Hinchman, 27 Pa. St. 479.

Texas.— Welder *v.* McComb, 10 Tex. Civ. App. 85, 30 S. W. 822.

Wisconsin.— Keith *v.* Stiles, 92 Wis. 15, 64 N. W. 860, 65 N. W. 860.

See 20 Cent. Dig. tit. "Evidence," § 1373.

48. Sally *v.* Gunter, 13 Rich. (S. C.) 72.

49. Rowe *v.* Barnes, 101 Iowa 302, 70 N. W. 197; Melius *v.* Houston, 41 Miss. 59; Stewart *v.* Swanzy, 23 Miss. 502.

50. Jordan *v.* Thomas, 31 Miss. 557; Keith *v.* Stiles, 92 Wis. 15, 64 N. W. 860, 65 N. W. 860.

51. Allen *v.* Thaxter, 1 Blackf. (Ind.) 399; McFarlane *v.* Harrington, 2 Bay (S. C.) 555.

Certification under "seal of office" sufficient.— In Clark *v.* Depew, 25 Pa. St. 509, 64 Am. Dec. 717, it was held that where the clerk of a court in another state certifies that he is the clerk, and that the seal attached is the seal of his office as such clerk, it sufficiently appears that the certificate is under the seal of the court. To the same effect see McLain *v.* Winchester, 17 Mo. 49.

clerk.[52] Whenever the court whose record is certified has no seal, this fact should appear either in the certificate of the clerk or in that of the judge.[53] Where, however, the want of a seal appears from the attestation clause and the judge certifies that the attestation is in due form of law, the absence of a seal or the use of a private seal is without objection.[54]

(3) CERTIFICATE AS TO FORM OF ATTESTATION — (a) IN GENERAL. The federal statute requires also that the copy of a judicial record of another state shall be accompanied by a certificate that the attestation of the clerk is in due form and the attestation of the clerk is not alone sufficient.[55] Such certification is sufficient, however, without setting out the form of the attestation.[56] The judge is not required or even authorized to state that the person who makes attestation of the record is the clerk of the court or that the seal attached by him is the seal of the court,[57] or that he was the clerk at the time of attestation.[58]

(b) AUTHORITY TO CERTIFY. The certificate cannot be made by any judge of any court, but it must as a general rule appear from the certificate that it was made by the judge, if there be one, or if there be more, by the chief justice or presiding magistrate of the court whence the record comes.[59] It is not necessary, however, that the certificate shall use the precise language of the act of congress, provided that when different language is adopted it is not equivocal or capable of bearing a different meaning from the language used in the act,[60] and he must

Wax or paper wafer held unnecessary.— It has been held that the seal of the court which is required for the due authentication of the record of a judgment of another state may be affixed by merely making the impression of the seal on the paper, and that the use of wax or a paper wafer is not essential. Hunt *v.* Hunt, (N. J. Ch. 1887) 9 Atl. 690. *Compare* Coit *v.* Millikin, 1 Den. (N. Y.) 376.

52. Kirschner *v.* State, 9 Wis. 140; Turner *v.* Waddington, 24 Fed. Cas. No. 14,263, 3 Wash. 126.

53. Simons *v.* Cook, 29 Iowa 324; Craig *v.* Brown, 6 Fed. Cas. No. 3,328, Pet. C. C. 352.

54. Simons *v.* Cook, 29 Iowa 324; Strode *v.* Churchill, 2 Litt. (Ky.) 75.

55. *Alabama.*— Holly *v.* Flournoy, 54 Ala. 99.

Connecticut.— Smith *v.* Brockett, 69 Conn. 492, 38 Atl. 57.

Missouri.— Wilburn *v.* Hall, 16 Mo. 426; Duvall *v.* Ellis, 13 Mo. 203.

Nebraska.— Westerman *v.* Sheppard, 52 Nebr. 124, 71 N. W. 950.

New Hampshire.— Folsom *v.* Blood, 53 N. H. 434; Hutchins *v.* Gerrish, 52 N. H. 205, 13 Am. Rep. 19.

North Carolina.— Shown *v.* Barr, 33 N. C. 296.

Ohio.— Dodd *v.* Groll, 19 Ohio Cir. Ct. 718, 8 Ohio Cir. Dec. 334.

Oregon.— Pratt *v.* King, 1 Oreg. 49.

Pennsylvania.— Snyder *v.* Wise, 10 Pa. St. 157.

Wisconsin.— Ordway *v.* Conroe, 4 Wis. 45.

United States.— Craig *v.* Brown, 6 Fed. Cas. No. 3,328, Pet. C. C. 352; Trigg *v.* Conway, 24 Fed. Cas. No. 14,172, Hempst. 538.

See 20 Cent. Dig. tit. "Evidence," § 1370 *et seq.*

Rule applied to letters of administration.— Hope *v.* Burt, 59 Miss. 174.

Certificates held to be sufficient.— Blair *v.* Caldwell, 3 Mo. 353; Edwards *v.* Jones, 113 N. C. 453, 18 S. E. 500.

Certificate of judge on separate paper held insufficient.—McFarlane *v.* Harrington, 2 Bay (S. C.) 555; Norwood *v.* Cobb, 20 Tex. 588.

56. Regan *v.* McCormick, 4 Harr. (Del.) 435.

57. Linch *v.* McLemore, 15 Ala. 632; Duncommun *v.* Hysinger, 14 Ill. 249; McQueen *v.* Farrow, 4 Mo. 212.

58. Merriwether *v.* Garvin, 2 Port. (Ala.) 199, 27 Am. Dec. 650; Haynes *v.* Cowen, 15 Kan. 637. *Compare* Johnson *v.* Howe, 2 Stew. (Ala.) 27.

59. *Alabama.*— Brown *v.* Johnson, 42 Ala. 208; Elliott *v.* McClelland, 17 Ala. 206; Woodley *v.* Findlay, 9 Ala. 716; Johnson *v.* Howe, 2 Stew. 27. See also Allen *v.* Allen, Minor 249 [*explained* in White *v.* Strother, 11 Ala. 720].

Georgia.— Buck *v.* Grimes, 62 Ga. 605; Settle *v.* Alison, 8 Ga. 201, 52 Am. Dec. 393. See also Taylor *v.* McKee, 118 Ga. 874, 45 S. E. 672.

Louisiana.— Kirkland *v.* Smith, 2 Mart. N. S. 497.

Missouri.— Barlow *v.* Steel, 65 Mo. 611; Moyer *v.* Lyon, 38 Mo. App. 635.

Pennsylvania.— Lothrop *v.* Blake, 3 Pa. St. 483.

Texas.— Randall *v.* Burtis, 57 Tex. 362.

United States.— Stewart *v.* Gray, 23 Fed. Cas. No. 13,428*a*, Hempst. 94.

See 20 Cent. Dig. tit. "Evidence," § 1370 *et seq.*

60. Geron *v.* Felder, 15 Ala. 304. A judgment of the circuit court of Garland county, Ark., is sufficiently certified by a judge who recites that he is "judge of the seventh judicial circuit in the state of Arkansas, of which circuit the county of Garland constitutes a part." Williams *v.* Williams, 53 Mo. App. 617. To same effect see Geron *v.* Felder,

possess that character at the time he gives the certificate.[61] Where the fact that a judge is the presiding or sole judge of the court appears from the record, the failure of the certificate to recite the fact is immaterial.[62] Moreover when there is nothing on the face of the record to show that the court is composed of more than one judge, it is generally held immaterial that the judge's certificate does not recite that he is the sole judge.[63] If it appears from the certificate itself or the record that there are other judges of the same court, the judge's certificate must show that he is the chief justice or presiding magistrate,[64] although in several cases, where there appeared to be more than one judge and no provision was made by law for a chief justice (all of the judges being placed on an equality as to authority), the federal statute was liberally construed and it was held that a certificate by one of the judges[65] or by all of them[66] was a sufficient compliance with the statute. When the judges are commissioned for the state at large and not for any particular portion of the state and where they preside in turn, it has been held to be a strict compliance with the act of congress for the judge who in his turn is presiding to make the certificate.[67]

(4) Records Transferred From One Court to Another. The federal statutes contemplate that the certificates should be from the judge and clerk of the same court in which a judgment was rendered, if such court exists, but if the court has been abolished and its records and jurisdiction have been transferred to

15 Ala. 304; Hatcher *v.* Rocheleau, 18 N. Y. 86; Erb *v.* Scott, 14 Pa. St. 20. So in an action brought upon a judgment of the "court of pleas and quarter sessions" of S county, Tenn., a record certified by the clerk and presiding magistrate of the "county court," it appearing that the two names were used indiscriminately, was held to be properly admitted (Strong *v.* Runnels, 2 How. (Miss.) 667); and so of a certificate by one claiming to be a chairman of the court (McKenny *v.* Gordon, 13 Rich. (S. C.) 40); or by a judge styling himself "president" of the court (Gavit *v.* Snowhill, 26 N. J. L. 76; Sheriff *v.* Smith, 47 How. Pr. (N. Y.) 470); or by a judge of chancery styling himself chancellor (Scott *v.* Blanchard, 8 Mart. N. S. (La.) 303).

Recital in certificate as evidence of judicial position.— In authenticating records the certificate of a presiding judge of a court that he is the presiding judge is good evidence of the fact. Hutchison *v.* Patrick, 3 Mo. 65.

61. Stephenson *v.* Bannister, 3 Bibb (Ky.) 369; Gavit *v.* Snowhill, 26 N. J. L. 76; Lothrop *v.* Blake, 3 Pa. St. 483.

62. Mudd *v.* Beauchamp, Litt. Sel. Cas. (Ky.) 142; Ohio *v.* Hinchman, 27 Pa. St. 479.

63. *Arkansas.*— Georgia Cent. Bank *v.* Veasey, 14 Ark. 671; Butler *v.* Owen, 7 Ark. 369.

California.— Low *v.* Burrows, 12 Cal. 181.

Louisiana.— Jones *v.* Hunter, 6 Rob. 235; Dismukes *v.* Musgrove, 2 La. 335.

Massachusetts.— Willock *v.* Wilson, 178 Mass. 68, 59 N. E. 757, where it was held that a certificate by a judge stating that he was "the judge" is a sufficient showing that he was the sole judge of the court to entitle the record to be admitted in evidence. —

New York.— People *v.* Smith, 121 N. Y. 578, 24 N. E. 852. *Compare* Nolan *v.* Nolan, 35 N. Y. App. Div. 339, 54 N. Y. Suppl. 975.

Oregon.— Keyes *v.* Mooney, 13 Oreg. 179, 9 Pac. 400. *Compare* Pratt *v.* King, 1 Oreg. 49.

See 20 Cent. Dig. tit. "Evidence," § 1373.

Judicial notice of laws creating sole judges. — Where the certificate of a judge to the form of attestation of a clerk to a copy of the record of a state court did not show whether he was the sole judge, chief justice, or presiding magistrate thereof, but it appeared from the laws of the state relating to the organization of such court that it consisted of a single judge, it was held that the authentication was sufficient under the act of congress of May 26, 1789 (1 U. S. St. at L. 122 [U. S. Comp. St. (1901) p. 677]) as the federal court would take judicial notice of the laws of the state organizing a court to uphold such certificate. Bennett *v.* Bennett, 3 Fed. Cas. No. 1,318, Deady 299.

64. Morris *v.* Patchin, 24 N. Y. 394, 82 Am. Dec. 311; Van Storch *v.* Griffin, 71 Pa. St. 240; Randall *v.* Burtis, 57 Tex. 362. See also Taylor *v.* McKee, 118 Ga. 874, 45 S. E. 672.

A certificate by an associate judge is not sufficient. Johnson *v.* Howe, 2 Stew. (Ala.) 27.

Certificate by "first justice" of a county court.— A certificate by the "first justice" is not sufficient under the act of congress, unless it appear that the first or oldest justice is the chief justice or presiding magistrate. Hudson *v.* Daily, 13 Ala. 722. See also Stephenson *v.* Bannister, 3 Bibb (Ky.) 369; Lothrop *v.* Blake, 3 Pa. St. 483.

65. Huff *v.* Campbell, 1 Stew. (Ala.) 543; Orman *v.* Neville, 14 La. Ann. 392; Jordan *v.* Black, 1 Rob. (La.) 575. See Woodley *v.* Findlay, 9 Ala. 716.

66. Arnold *v.* Frazier, 5 Strobh. (S. C.) 33.

67. Taylor *v.* Kilgore, 33 Ala. 214. *Compare* Stephenson *v.* Bannister, 3 Bibb (Ky.) 369.

another, the judge and clerk of the substituted court are the proper certifying officers,[68] and it has been held that the abolition of the old court and the transfer of jurisdiction to the new may be shown by the certificate of the judge[69] or of the clerk.[70]

(5) Superfluous Attestation or Certificate. The fact that the authentication embraces more than is strictly necessary under the federal statute, by including superfluous matter either in the attestation or certification, does not impair its validity if it is otherwise in compliance with the act.[71]

(B) *Other Modes of Authentication.* The general mode of authentication of judicial records prescribed by the act of congress is not exclusive and does not abrogate any other mode of authentication known to the common law or which the courts of a particular state may deem expedient according to established principles.[72] Accordingly an original record produced and sworn to[73] or an examined or sworn copy[74] is admissible. In many of the states provision is made by statute for the admission of judicial records of sister states. Neither the federal constitution nor the statute forbids the states from authorizing the proof of records in other modes in their own state courts, provided of course that the state statute waives or dispenses with some of the requirements of the federal statute or if put into force does not have the effect of excluding a record authenticated according to the requirements of the federal statute.[75]

68. *Indiana.*— Gatling *v.* Robbins, 8 Ind. 184.

Iowa.— Darrah *v.* Watson, 36 Iowa 116; Roop *v.* Clark, 4 Greene 294.

Kentucky.— Thomas *v.* Tanner, 6 T. B. Mon. 52; Strode *v.* Churchill, 2 Litt. 75.

Massachusetts.— Capen *v.* Emery, 5 Metc. 436.

Missouri.— Manning *v.* Hogan, 26 Mo. 570.

New Hampshire.— Taylor *v.* Barron, 35 N. H. 484.

See 20 Cent. Dig. tit. "Evidence," § 1369.

69. Capen *v.* Emery, 5 Metc. (Mass.) 436.

70. Gatling *v.* Robbins, 8 Ind. 184; Darrah *v.* Watson, 36 Iowa 116; Thomas *v.* Tanner, 6 T. B. Mon. (Ky.) 52; Tittman *v.* Thornton, 107 Mo. 500, 17 S. W. 979, 16 L. R. A. 410; Manning *v.* Hogan, 26 Mo. 570.

Proof of law by which transfer was made not essential.— McRae *v.* Stokes, 3 Ala. 401, 37 Am. Dec. 698.

71. Young *v.* Chandler, 13 B. Mon. (Ky.) 252; Weeks *v.* Downing, 30 Mich. 4; Gavit *v.* Snowhill, 26 N. J. L. 76; Erb *v.* Scott, 14 Pa. St. 20.

72. Dean *v.* Chapin, 22 Mich. 275; Otto *v.* Trump, 115 Pa. St. 425, 8 Atl. 786; Ohio *v.* Hinchman, 27 Pa. St. 479; Lothrop *v.* Blake, 3 Pa. St. 483; Kean *v.* Rice, 12 Serg. & R. (Pa.) 203; Baker *v.* Field, 2 Yeates (Pa.) 532; *Ex p.* Powell, 3 Leigh (Va.) 816. See also Haggin *v.* Squires, 2 Bibb (Ky.) 334; Karr *v.* Jackson, 28 Mo. 316; Duvall *v.* Ellis, 13 Mo. 203.

Mode prescribed for foreign records sufficient.— Dean *v.* Chapin, 22 Mich. 275; *Ex p.* Powell, 3 Leigh (Va.) 816.

73. Kean *v.* Rice, 12 Serg. & R. (Pa.) 203.

74. Goodwyn *v.* Goodwyn, 25 Ga. 203; Otto *v.* Trump, 115 Pa. St. 425, 8 Atl. 786; Harvey *v.* Cummings, 68 Tex. 599, 5 S. W. 513; Bryant *v.* Kelton, 1 Tex. 434.

75. *Alabama.*— Holly *v.* Bass, 68 Ala. 206.

California.— Bean *v.* Loryea, 81 Cal. 151, 22 Pac. 513.

Florida.— See Porter *v.* Bevill, 2 Fla. 528.

Georgia.— Tharpe *v.* Pearce, 89 Ga. 194, 15 S. E. 46.

Illinois.— People *v.* Miller, 195 Ill. 621, 63 N. E. 504; Garden City Sand Co. *v.* Miller, 157 Ill. 225, 41 N. E. 753.

Indiana.— Bailey *v.* Martin, 119 Ind. 103, 21 N. E. 346; English *v.* Smith, 26 Ind. 445; Phelps *v.* Tilton, 17 Ind. 423.

Iowa.—Latterett *v.* Cook, 1 Iowa 1, 63 Am. Dec. 428.

Kentucky.— Caulfield *v.* Bullock, 18 B. Mon. 494; Haggin *v.* Squires, 2 Bibb 334.

Massachusetts.— Willock *v.* Wilson, 178 Mass. 68, 59 N. E. 757; Kingman *v.* Cowles, 103 Mass. 283.

Minnesota.— Merz *v.* Chicago, etc., R. Co., 86 Minn. 33, 90 N. W. 7; *In re* Ellis, 55 Minn. 401, 56 N. W. 1056, 43 Am. St. Rep. 514, 23 L. R. A. 287.

Mississippi.— Bates *v.* McCully, 27 Miss. 584.

Nebraska.— Comstock *v.* Kerwin, 57 Nebr. 1, 77 N. W. 387; Brown *v.* Collins, 2 Nebr. (Unoff.) 149, 96 N. W. 173.

New York.— Wells *v.* Davis, 105 N. Y. 670, 12 N. E. 42.

Tennessee.— Coffee *v.* Neely, 2 Heisk. 304.

Texas.— Harper *v.* Nichol, 13 Tex. 151; Moore *v.* Carson, 12 Tex. 66.

Washington.— Ritchie *v.* Carpenter, 2 Wash. 512, 28 Pac. 380, 26 Am. St. Rep. 877.

West Virginia.— Wilson *v.* Phœnix Powder Mfg. Co., 40 W. Va. 413, 21 S. E. 1035, 52 Am. St. Rep. 890; Thrasher *v.* Ballard, 33 W. Va. 285, 10 S. E. 411, 25 Am. St. Rep. 894; Hinchman *v.* Ballard, 7 W. Va. 152.

Wisconsin.— Hackett *v.* Bonnell, 16 Wis. 471; Ordway *v.* Conroe, 4 Wis. 45.

See 20 Cent. Dig. tit. "Evidence," § 1369.

(III) *Subject-Matter of Authentication*—(A) *In General.* The statute is not restricted to the case of judgment records, but includes everything properly embraced in the term "judicial proceedings."[76] Deeds or other instruments that have become judicial records are, when properly authenticated, admissible under the act.[77] If, however, a deed or other matter not *prima facie* of record is the subject of exemplification under the act of congress making provision for the authentication of judicial records, the law authorizing the deed or other matter to be filed as a judicial record must be shown.[78]

(B) *Records of Courts of Chancery.* A decree of a court of chancery is within the constitution and the act of congress respecting the mode of authentication and the effect of the records and judicial proceedings of the courts of the respective states when offered in evidence in the courts of any other state.[79]

(C) *Records of Probate Courts.* The proceedings of courts of probate are judicial proceedings within the meaning of the act of congress, and transcripts thereof, when properly authenticated, are admissible in evidence.[80] But compliance with the mode of authentication prescribed by the act of congress is essential,[81] unless the transcript is introduced as a copy certified in accordance with the statutes of the state in which it is to be adduced as evidence,[82] or as a sworn or examined copy,[83] or is authenticated in some other manner known to the common law.[84] The probate of a will in another state is a judicial proceeding within the meaning of the act of congress, and when properly authenticated under the act is admissible in the courts of the several states,[85] and this without the

76. *In re* Rooney, 20 Fed. Cas. No. 12,032, where an examination of a debtor taken under the laws of the state of New York under supplemental proceedings upon a judgment was held to be a "judicial proceeding."

77. Strode *v.* Churchill, 2 Litt. (Ky.) 75; Virginia *v.* Himel, 10 La. Ann. 185.

78. Carlisle *v.* Tuttle, 30 Ala. 613; White *v.* Strother, 11 Ala. 720; Mitchell *v.* Mitchell, 3 Stew. & P. (Ala.) 81; De Riesthal *v.* Walton, 66 Md. 470, 8 Atl. 462.

Sworn copy.— In Bryant *v.* Kelton, 1 Tex. 434, the same rule was applied to a sworn copy of a bill of sale recorded in a county court.

79. Barbour *v.* Watts, 2 A. K. Marsh. (Ky.) 290; Patrick *v.* Gibbs, 17 Tex. 275; Burtners *v.* Keran, 24 Gratt. (Va.) 42.

80. Kennedy *v.* Kennedy, 8 Ala. 391; Carmichael *v.* Saint, 16 Ark. 28; Abercrombie *v.* Stillman, 77 Tex. 589, 14 S. W. 196; Houze *v.* Houze, 16 Tex. 598. *Compare* Lehr *v.* Tarball, 2 How. (Miss.) 905.

81. *Delaware.*— State *v.* Adams, 5 Harr. 107.

Illinois.— Atwood *v.* Buck, 113 Ill. 268.

Kentucky.— Williams *v.* Duncan, 92 Ky. 125, 17 S. W. 330, 13 Ky. L. Rep. 389.

Mississippi.— Hope *v.* Burt, 59 Miss. 174.

Pennsylvania.— Washabaugh *v.* Entriken, 34 Pa. St. 74.

Texas.— Grimes *v.* Smith, 70 Tex. 217, 8 S. W. 33.

See 20 Cent. Dig. tit. "Evidence," §§ 1370, 1375.

82. Smith *v.* Roach, 7 B. Mon. (Ky.) 17.

83. See Bowman *v.* Bartlet, 3 A. K. Marsh. (Ky.) 86; Grimes *v.* Smith, 70 Tex. 217, 8 S. W. 33.

84. *Ex p.* Povall, 3 Leigh (Va.) 816.

85. *Alabama.*— Jemison *v.* Smith, 37 Ala. 185; Puryear *v.* Beard, 14 Ala. 121; White *v.* Strother, 11 Ala. 720.

Delaware.— See Smith *v.* Redden, 5 Harr. 321.

Iowa.— Greasons *v.* Davis, 9 Iowa 219.

Kentucky.— Robertson *v.* Barbour, 6 T. B. Mon. 523.

Louisiana.— Bowles' Succession, 3 Rob. 33; Johnson *v.* Rannels, 6 Mart. N. S. 621; Balfour *v.* Chew, 5 Mart. N. S. 517.

Maryland.— Case *v.* McGee, 8 Md. 9.

Michigan.— Wilt *v.* Cutler, 38 Mich. 189.

Minnesota.— Memphis First Nat. Bank *v.* Kidd, 20 Minn. 234.

Mississippi.—Melvin *v.* Lyons, 10 Sm. & M. 78.

Missouri.— Haile *v.* Hill, 13 Mo. 612; Bright *v.* White, 8 Mo. 421.

North Carolina.— Lancaster *v.* McBryde, 27 N. C. 421. See also Hunter *v.* Kelly, 92 N. C. 285.

South Carolina.— See Smith *v.* Smith, Harp. Eq. 160.

Vermont.— Walton *v.* Hall, 66 Vt. 455, 29 Atl. 803.

Virginia.— Gornto *v.* Bonney, 7 Leigh 234.

See 20 Cent. Dig. tit. "Evidence," §§ 1374–1377.

Where probate is inadmissible in state where made.— A copy of a probate of a will in another state will be inadmissible where the probate would not be evidence in the state where it was made. Darby *v.* Mayer, 10 Wheat. (U. S.) 465, 6 L. ed. 367.

Probate of will must appear from transcript.— It has been said that a certified copy of the probate of a will of another state cannot become evidence under the act of congress unless it appears from the transcript or exemplification that the will was admitted to probate. See Jemison *v.* Smith, 37 Ala.

formal proof of the statute giving the foreign probate court jurisdiction.[86] This rule has been applied to the probate of wills disposing of lands in the state where the evidence is sought to be introduced, although the will has not been probated or recorded in the latter state.[87] But this doctrine has been denied in other states on the ground that the lands are subject to the laws of the state in which they are situated.[88]

(D) *Records of Justices of the Peace.* Whether judgments of justices of the peace are covered by the provisions of the act of congress of 1790 prescribing the mode of authentication and proof of judicial records and proceedings is disputed. According to the rule laid down in some states the adjudications of justices of the peace who do not record their proceedings through a clerk are not within the act, but the mode of their authentication is to be governed by the laws of the state where the exemplification is to be adduced in evidence. This is upon the supposition that the court whose proceedings are to be authenticated under the act of congress must be so constituted as to admit of the officers named in the act, and justices' courts have not ordinarily the machinery to enable them to comply with the act.[89] In other jurisdictions it is held that where courts of justices of the peace are courts of record, a justice may, after attestation of his record, certify that he is the presiding magistrate and that he has no seal or clerk, but acts as

185; Coffee *v.* Groover, 20 Fla. 64; Bowles' Succession, 3 Rob. (La.) 33. *Compare* Slack *v.* Walcott, 22 Fed. Cas. No. 12,932, 3 Mason 508. But in McIntosh *v.* Marathon Land Co., 110 Wis. 296, 85 N. W. 976, an authenticated copy of a will probated in Pennsylvania was admitted under statute in Wisconsin, although the copy did not show a formal order admitting the will to probate, it appearing by the law of Pennsylvania that no formal order was necessary.

For state statutes providing either for the admission in evidence of certified copies of the foreign probate of wills or for the registry of duly authenticated copies thereof and the admission of certified copies of such registry see the following cases:

Alabama.— Huff *v.* Cox, 2 Ala. 310.

Kentucky.— Gray *v.* Patton, 2 B. Mon. 12; McConnell *v.* Brown, Litt. Sel. Cas. 459. See also Chrisman *v.* Gregory, 4 B. Mon. 474.

Maryland.— Beatty *v.* Mason, 30 Md. 409.

Minnesota.— Memphis First Nat. Bank *v.* Kidd, 20 Minn. 234.

Mississippi.— Montgomery *v.* Milliken, Sm. & M. Ch. 495. *Compare* Montgomery *v.* Millikin, 5 Sm. & M. 151, 43 Am. Dec. 507.

Missouri.— Applegate *v.* Smith, 31 Mo. 166.

Nebraska.— Fremont, etc., R. Co. *v.* Setright, 34 Nebr. 253, 51 N. W. 833.

New Hampshire.— Barstow *v.* Sprague, 40 N. H. 27.

North Carolina.— Roscoe *v.* John L. Roper Lumber Co., 124 N. C. 42, 32 S. E. 389; Knight *v.* Wall, 19 N. C. 125; Blount *v.* Patton, 9 N. C. 237.

South Carolina.— Sally *v.* Gunter, 13 Rich. 72.

Tennessee.—Harris *v.* Anderson, 9 Humphr. 779.

Texas.— Green *v.* Benton, 3 Tex. Civ. App. 92, 22 S. W. 256.

Vermont.— Ives *v.* Allyn, 12 Vt. 589.

Wisconsin.— McIntosh *v.* Marathon Land Co., 110 Wis. 296, 85 N. W. 976.

United States.— Secrist *v.* Green, 3 Wall. 744, 18 L. ed. 153 (decided under Illinois statute); O'Brien *v.* Woody, 18 Fed. Cas. No. 10,398, 4 McLean 75 (declaring law in Indiana).

See 20 Cent. Dig. tit. "Evidence," §§ 1376, 1377.

86. Puryear *v.* Beard, 14 Ala. 121; Ripple *v.* Ripple, 1 Rawle (Pa.) 386.

87. Doe *v.* Roe, 31 Ga. 593; Newman *v.* Willetts, 52 Ill. 98; Gardner *v.* Ladue, 47 Ill. 211, 95 Am. Dec. 487; Shephard *v.* Carriel, 19 Ill. 313; Keith *v.* Keith, 80 Mo. 125; Bradstreet *v.* Kinsella, 76 Mo. 63; Lewis *v.* St. Louis, 69 Mo. 595; Criswell *v.* Altemus, 7 Watts (Pa.) 565.

88. *Kentucky.*— Carmichal *v.* Elmendorf, 4 Bibb 484.

Maryland.— Beatty *v.* Mason, 30 Md. 409; Budd *v.* Brooke, 3 Gill 198, 43 Am. Dec. 321.

New Hampshire.— Barstow *v.* Sprague, 40 N. H. 27.

New Jersey.— Graham *v.* Whitely, 26 N. J. L. 254.

North Carolina.— Kelly *v.* Ross, 44 N. C. 277; Ward *v.* Hearne, 44 N. C. 184.

Texas.— Paschal *v.* Acklin, 27 Tex. 173.

Vermont.— See Ives *v.* Allyn, 12 Vt. 589.

See 20 Cent. Dig. tit. "Evidence," §§ 1376, 1377. And see, generally, WILLS.

89. *Arkansas.*—Blackwell *v.* Glass, 43 Ark. 209.

Georgia.— Sloan *v.* Wolfsfeld, 110 Ga. 70, 35 S. E. 344, where it was held that a justice's judgment could not be authenticated under the act of congress in the absence of a showing that the justice's court was a court of record, and that he had a clerk or that he was *ex officio* clerk.

Indiana.— Draggoo *v.* Graham, 9 Ind. 212.

Iowa.— Gay *v.* Lloyd, 1 Greene 78, 46 Am. Dec. 499.

Massachusetts.— See Warren *v.* Flagg, 2 Pick. 448.

clerk of his own court, and that the attestation is in due form; and that a copy so authenticated will be admitted under the act.[90] It is generally agreed that proceedings in a justice's court may be proved by a sworn copy,[91] or by a copy authenticated in the same manner as foreign judgments,[92] or in some other manner known to the common law.[93] Provision is made by statute in many of the states for the admission of certified copies of records of justices of the peace of other states.[94]

(E) *Judicial Proceedings Not of Record.* The rule has been laid down that judicial proceedings which from their nature, for example, proceedings containing matters resting in parol, cannot be proved in the manner prescribed by the act of congress, are nevertheless entitled to full faith and credit under the constitution, and are to be proved in accordance with the rules of the common law.[95]

(F) *Defective or Incomplete Records.* The phrase "judicial records and proceedings" was intended to embrace all the proceedings, whether in open court or not, which constitute in law the record of a cause.[96] Hence if the transcript or

Mississippi.— See Verhallen *v.* Laveochin, 79 Miss. 370, 30 So. 710.

Missouri.— Duvall *v.* Ellis, 13 Mo. 203; Winham *v.* Kline, 77 Mo. App. 36.

New Hampshire.— Robinson *v.* Prescott, 4 N. H. 450.

New York.— See Ransom *v.* Wheeler, 12 Abb. Pr. 139.

Ohio.— See Stockwell *v.* Coleman, 10 Ohio St. 33; Silver Lake Bank *v.* Harding, 5 Ohio 545.

Pennsylvania.— Snyder *v.* Wise, 10 Pa. St. 157; Kean *v.* Rice, 12 Serg. & R. 203.

See 20 Cent. Dig. tit. "Evidence," § 1378.

Record made up in part of transcript of justice's judgment.— The record of a court of common pleas of another state, duly certified under the act of congress, made up of the transcript of a judgment in a justice's court, and showing that execution has been issued on such transferred judgment by the court of common pleas, is entitled to be put in evidence in an action of debt on such judgment in the courts of Pennsylvania in the same manner as if the judgment had originally been obtained in the court of common pleas of the sister state. Rowley *v.* Carron, 117 Pa. St. 52, 11 Atl. 435 [*affirming* 2 Pa. Co. Ct. 539]. See also Hade *v.* Brotherton, 11 Fed. Cas. No. 5,892, 3 Cranch C. C. 594.

Justice's judgment certified by clerk of county.— In Ohio the rule has been laid down that justice's records, while not within the act of congress of 1790, are within the provisions of the constitution of the United States, and that where the proceedings of a justice's court are duly certified by the justice, with the additional certificate of the clerk of the county as to the official character of the justice, the copy is admissible (Pelton *v.* Platner, 13 Ohio 209, 42 Am. Dec. 197; Silver Lake Bank *v.* Harding, 5 Ohio 545; Kuhn *v.* Miller, Wright 127); but this mode of certification has generally been held insufficient apart from statutory authorization in the state where the evidence is sought to be introduced (Duvall *v.* Ellis, 13 Mo. 203; Lawrence *v.* Gaultney, Cheeves (S. C.) 7), at least where it does not appear that by the laws of the sister state the clerk was the proper person to give copies (Trader *v.* McKee, 2 Ill. 558; Mahurin *v.* Bickford, 6 N. H. 567; I. B. Rosenthal Millinery Co. *v.* Lennox, (Tex. Civ. App. 1899) 50 S. W. 401. See also Morrison *v.* Hinton, 5 Ill. 457).

90. Bissell *v.* Edwards, 5 Day (Conn.) 363, 5 Am. Dec. 166; Scott *v.* Cleveland, 3 T. B. Mon. (Ky.) 62; Brown *v.* Edson, 23 Vt. 435 [*disapproving* King *v.* Van Gilder, 1 D. Chipm. (Vt.) 59]; Blodgett *v.* Jordan, 6 Vt. 680; Starkweather *v.* Loomis, 2 Vt. 573.

91. McGee *v.* Sheffield, 3 Stew. & P. (Ala.) 351; Winham *v.* Kline, 77 Mo. App. 36; Etz *v.* Wheeler, 23 Mo. App. 449.

92. See Com. *v.* Green, 2 Pick. (Mass.) 380; Duvall *v.* Ellis, 13 Mo. 203; Mahurin *v.* Bickford, 6 N. H. 567.

93. Kean *v.* Rice, 12 Serg. & R. (Pa.) 203, where the original record produced and sworn to was admitted.

94. *Georgia.*— Sloan *v.* Wolfsfeld, 110 Ga. 70, 35 S. E. 344.

Indiana.— Collier *v.* Collier, 150 Ind. 276, 49 N. E. 1063; Ault *v.* Zehering, 38 Ind. 429; Dresser *v.* Wood, 19 Ind. 199; Dragoo *v.* Graham, 17 Ind. 427.

Iowa.— Railroad Bank *v.* Evans, 32 Iowa 202; Guesdorf *v.* Gleason, 10 Iowa 495; Gay *v.* Lloyd, 1 Greene 78, 46 Am. Dec. 499.

Kansas.— Case *v.* Huey, 26 Kan. 553.

Massachusetts.— See Upham *v.* Damon, 12 Allen 98.

Michigan.— Howard *v.* Coon, 93 Mich. 442, 53 N. W. 513.

Minnesota.— Smith *v.* Petrie, 70 Minn. 433, 73 N. W. 155; Bryan *v.* Farnsworth, 19 Minn. 239.

New York.— Bent *v.* Glaenzer, 17 Misc. 569, 40 N. Y. Suppl. 657.

See 20 Cent. Dig. tit. "Evidence," § 1378.

Certification by successor in office.— Under statute in Iowa it is competent for the successor of a justice of the peace to certify to a judgment rendered by his predecessor in a sister state. Railroad Bank *v.* Givens, 32 Iowa 202. But see Bryan *v.* Farnsworth, 19 Minn. 239.

95. Campbell *v.* Home Ins. Co., 1 S. C. 158, where it was held that judicial proceedings properly resting in parol are provable by parol.

96. Coffee *v.* Nealy, 2 Heisk. (Tenn.) 304.

copy does not purport to contain a complete copy of the proceedings, or if it shows a defective record on its face, it will be inadmissible, although the statutory mode of authentication is complied with.[97] Thus a duly authenticated copy of a judgment only has been held inadmissible when the evidence is introduced to establish the facts adjudicated.[98] If the copy is authenticated according to the requirements of the act of congress, the authentication, however, is *prima facie* evidence of the correctness and completeness of the record.[99] Indeed it need not appear that the record was extended with the formality and accuracy required in the records of the courts in which the evidence is sought to be introduced; but it will be enough if the record is sufficient in substance and contains all the essential requisites of a judicial record.[1] Thus it has been held that the mere fact that it does not appear from the transcript that the original record was signed by the judge or other officer will not render the copy inadmissible.[2] Nor is it material that the reasons on which the court founded the judgment are not set forth.[3] On the other hand whatever the courts of another state have certified as a part of the record must as a general rule be received as such, and no part can be excluded because it would not have been certified as a part of the record in the state where the evidence is introduced.[4] At any rate the fact that the transcript con-

97. Howell *v.* Shands, 35 Ga. 66; Kusler *v.* Crofoot, 78 Ind. 597. See also McCormick *v.* Deaver, 22 Md. 187. *Compare* Saint *v.* Taylor, 12 Heisk. (Tenn.) 488.

Transcript of minutes or docket entries.— It has been held that a copy duly authenticated that purports to be a mere transcript of the minutes extracted from the docket of the court and not a copy of a record is inadmissible. Evans *v.* Reed, 2 Mich. N. P. 212; Ferguson *v.* Harwood, 7 Cranch (U. S.) 408, 3 L. ed. 386. On the other hand it has been held that every state has the right to determine for itself how fully the judicial proceedings in its courts shall be recorded, and hence where under statute in a state it is sufficient to minute all proceedings on a voluntary petition in insolvency on the docket of the court of insolvency, down to the point of actual asssignment of the insolvent estate, such entries being the record of judicial proceedings, a certified copy of them is admissible as proof that such proceedings have been had. Smith *v.* Brockett, 69 Conn. 492, 38 Atl. 57. See also Ordway *v.* Conroe, 4 Wis. 45.

Parts of record certified and attached together.— Parts of the record of a judgment may be attested and certified at the same time, and those parts may be at the same time attached together, attested, and certified as a true copy of the whole record, without recopying the same. Dismukes *v.* Musgrave, 2 La. 335; Erb *v.* Scott, 14 Pa. St. 20. See also West *v.* McConnell, 5 La. 424, 25 Am. Dec. 191; Schoonmaker *v.* Lloyd, 9 Rich. (S. C.) 173.

98. Crone *v.* Dawson, 19 Mo. App. 214; State *v.* Misenheimer, 123 N. C. 758, 31 S. E. 852.

Copy introduced collaterally to establish fact of rendition of judgment.— But a duly authenticated copy of a judgment is admissible without the production of the remainder of the record, where the evidence is introduced collaterally to show the fact of the rendition of the judgment. Rosenfeld *v.* Siegfried, 91 Mo. App. 169; Seymore *v.* Newman, 77 Mo. App. 578. See also Haynes *v.* Cowen, 15 Kan. 479; Rathbone *v.* Rathbone, 10 Pick. (Mass.) 1; Ransom *v.* Wheeler, 12 Abb. Pr. (N. Y.) 139.

A writ of foreign attachment and return duly certified according to the act of congress in relation to records may, it has been held, be received without further proof of the issuing of it or of any proceedings on it. Hirschfeldt *v.* Fanton, Anth. N. P. (N. Y.) 361.

99. McCormick *v.* Deaver, 22 Md. 187.

1. *Maryland.*— McCormick *v.* Deaver, 22 Md. 187.

Massachusetts.— Brainard *v.* Fowler, 119 Mass. 262; Knapp *v.* Abell, 10 Allen 485. See also Boswell *v.* Cutter, 117 Mass. 69.

Minnesota.— Bowman *v.* St. Paul German Ins. Co., 58 Minn. 176, 59 N. W. 943; Bowman *v.* Hekla F. Ins. Co., 58 Minn. 173, 59 N. W. 943.

Missouri.— State *v.* Williamson, 57 Mo. 192; Williams *v.* Williams, 53 Mo. App. 617.

South Carolina.— Stephen *v.* Coleman, 1 Brev. 232. See also Gregory *v.* Williams, Harp. 417.

See 20 Cent. Dig. tit. "Evidence," § 1369 *et seq.*

2. McFarland *v.* Fricks, 99 Ga. 104, 24 S. E. 868; McCormick *v.* Deaver, 22 Md. 187; Dean *v.* Stone, 2 Okla. 13, 35 Pac. 578. But see Morris *v.* Patchin, 24 N. Y. 394, 82 Am. Dec. 311.

3. West Feliciana R. Co. *v.* Thornton, 12 La. Ann. 736, 68 Am. Dec. 778.

4. Burnham *v.* Pidcock, 58 N. Y. App. Div. 273, 68 N. Y. Suppl. 1007 [*affirming* 33 Misc. 65, 66 N. Y. Suppl. 806, 5 Am. Bankr. Rep. 42], in which it was held that where, in an action on a foreign judgment, the judgment was proved by an exemplified copy of the record of the court rendering it, which contained an opinion by the court on a review

tains matters which do not belong to the record is no ground for excluding the entire transcript.[5]

c. Documents and Records Not Legislative or Judicial — (I) *In General.* The constitution of the United States provides that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, and congress may by general laws prescribe the manner in which such acts and proceedings shall be proved and the effect thereof.[6] And by act of congress it is provided: "All records and exemplifications of books, which may be kept in any public office of any State or Territory, or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any other State or Territory, or in any such country, by the attestation of the keeper of the said records or books, and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county, parish, or district in which such office may be kept, or of the governor, or secretary of state, the chancellor or keeper of the great seal, of the State, or Territory, or country, that the said attestation is in due form, and by the proper officers. If the said certificate is given by the presiding justice of a court, it shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or, if given by such governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the State, Territory, or country aforesaid in which it is made. And the said records and exemplifications, so authenticated, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the State, Territory, or country, as aforesaid, from which they are taken."[7]

(II) *The Records to Be Certified* — (A) *In General.* It may be laid down as a general rule that every document of a public nature which there would be any inconvenience in removing from its proper place of custody and which the party has the right to inspect are "records" within the meaning of the above constitutional and statutory provisions and may be proved by a duly authenticated copy.[8]

(B) *Conveyances and Other Private Writings* — (1) In General. So copies from other states of records of conveyances and mortgages of lands[9] and other

of the proceedings after trial, it was error to refuse to admit such opinion in evidence, since it would be presumed to have been made under the law of the state where the judgment was recovered, although it would not have been as part of the record in the state where offered.

Record including assignment of judgment.— Coughran *v.* Gilman, 81 Iowa 442, 46 N. W. 1005. To same effect see Barber *v.* Mexico International Co., 73 Conn. 587, 48 Atl. 758.

County court record including decree of court of appeals.— West Feliciana R. Co. *v.* Thornton, 12 La. Ann. 736, 68 Am. Dec. 778.

5. Gunn *v.* Howell, 35 Ala. 144, 73 Am. Dec. 484.

6. U. S. Const. art. 4, § 1.

7. U. S. Rev. St. (1878) § 906 [U. S. Comp. St. (1901) p. 677].

8. See Chase *v.* Caryl, 57 N. J. L. 545, 31 Atl. 1024.

Rule applied to marriage certificates.—People *v.* Perriman, 72 Mich. 184, 40 N. W. 425. See also Com. *v.* Morris, 1 Cush. (Mass.) 391; State *v.* Horn, 43 Vt. 20.

Records in office of secretary of state.— It is held that the certificate of the secretary of state of another state that the original of the copy certified is a record in his office is, when attested by the seal of state, competent evidence (Com. *v.* Whitman, 121 Mass. 361), and this without proof of the statute constituting him the custodian of the record (Barcello *v.* Hapgood, 118 N. C. 712, 24 S. E. 124).

9. *Illinois.*— Dunlap *v.* Daugherty, 20 Ill. 397.

Kentucky.— Strode *v.* Churchill, 2 Litt. 75; McIntire *v.* Funk, Litt. Sel. Cas. 33. See also King *v.* Mims, 7 Dana 267.

Louisiana.— Smith *v.* McWaters, 7 La. Ann. 145; Norwood *v.* Green, 5 Mart. N. S. 175.

New Jersey.— Chase *v.* Caryl, 57 N. J. L. 545, 31 Atl. 1024.

North Carolina.— See Warren *v.* Wade, 52 N. C. 494.

Pennsylvania.—Garrigues *v.* Harris, 17 Pa. St. 344.

Texas.— Watrous *v.* McGrew, 16 Tex. 506; Trinitv County Lumber Co. *v.* Pinckard, 4

private writings[10] if authenticated in accordance with the act of congress are admissible. If the instruments are properly recorded, copies of such records duly authenticated will have in another state the effect as evidence to which they are entitled by the laws of the state where the record is made.[11] Thus they will be admitted as primary[12] or secondary evidence[13] in accordance with this principle. So copies of records of other states have frequently been excluded from evidence either because they were clearly inadmissible under the laws of the state where the record was made or it did not appear from the evidence what was the law on the subject in such state.[14] Thus where by the laws of the state where the record is made the registry is merely required for the purpose of giving notice and not for the purpose of the preservation of evidence, a certified copy thereof is inadmissible in another state.[15]

(2) UNAUTHORIZED RECORDS. It must appear that the laws of a state where an instrument is recorded require or authorize such registry, before an office copy thereof can be admitted in evidence in the courts of another state.[16]

(III) *AUTHENTICATION REQUIRED* — (A) *Under Federal Statute.* To authorize the admission of office copies under the act of congress, the mode of authentication prescribed by the act must be pursued.[17] Thus a copy of a deed, from a clerk of the court, without the certificate of the presiding judge that the attes-

Tex. Civ. App. 671, 23 S. W. 720, 1015. See also Smith *v.* Gillum, 80 Tex. 120, 15 S. W. 794.

United States.— See White *v.* Burnley, 20 How. 235, 15 L. ed. 886. *Compare* Russell *v.* Kearney, 27 Ga. 96, marriage settlement.

See 20 Cent. Dig. tit. "Evidence," § 1365.

Exemplification of record in one state of lands situate in another.— Since the conveyance of lands is regulated by the law of the *situs* no foreign record is evidence of it, and hence an exemplification of a record in one state of a conveyance of lands situated in another has been held inadmissible as evidence in the latter. Donaldson *v.* Phillips, 18 Pa. St. 170, 55 Am. Dec. 614. See also Penrose *v.* Wolf, 33 Leg. Int. (Pa.) 298. But a deed of land, certified as having been approved and recorded in the office of the general court of Virginia before Kentucky became a separate state according to the laws then in force, has been held sufficient to authorize its admission as evidence in Kentucky, and is as valid for all purposes as if recorded in the county in which the land was situated after the separation. Bell *v.* Fry, 5 Dana (Ky.) 341.

Admissibility of record to prove date of recording.— A certified copy of a deed to lands situate in one state, recorded in the office of register of deeds of a county in another state, is competent to prove the date on which the deed was there recorded. Schweigel *v.* L. A. Shakman Co., 78 Minn. 142, 80 N. W. 871, 81 N. W. 529.

10. This rule has been applied to transfers of personalty (Bruce *v.* Smith, 3 Harr. & J. (Md.) 499; James *v.* Kirk, 29 Miss. 206. See also King *v.* Mims, 7 Dana (Ky.) 267; Horn *v.* Bayard, 11 Rob. (La.) 259), to a marriage license (King *v.* Dale, 2 Ill. 513), and to a power of attorney (Rochester *v.* Toler, 4 Bibb (Ky.) 106).

11. Smoot *v.* Fitzhugh, 9 Port. (Ala.) 72; Swift *v.* Fitzhugh, 9 Port. (Ala.) 39.

12. Graham *v.* Williams, 21 La. Ann. 594; Smith *v.* McWaters, 7 La. Ann. 145; Chase *v.* Caryl, 57 N. J. L. 545, 31 Atl. 1024.

13. Whaun *v.* Atkinson, 84 Ala. 592, 4 So. 681.

14. *Georgia.*— See Russell *v.* Kearney, 27 Ga. 96.

Kansas.— Munkres *v.* McCoskill, 64 Kan. 516, 68 Pac. 42.

Louisiana.— Leggo *v.* New Orleans Canal, etc., Co., 3 La. Ann. 138.

Missouri.— Clardy *v.* Richardson, 24 Mo. 295.

New Jersey.— State *v.* Engle, 21 N. J. L. 347.

New York.— Quay *v.* Eagle F. Ins. Co., Anth. N. P. 237.

Virginia.— Petermans *v.* Laws, 6 Leigh 523.

See 20 Cent. Dig. tit. "Evidence," § 1361 *et seq.*

15. Griffin *v.* Reynolds, 17 How. (U. S.) 609, 15 L. ed. 229; Saunders *v.* Harris, 5 Humphr. (Tenn.) 345.

16. Martin *v.* Martin, 22 Ala. 86; Powell *v.* Knox, 16 Ala. 364; Gamble *v.* Gamble, 11 Ala. 966; Lee *v.* Mathews, 10 Ala. 682, 44 Am. Dec. 498; Mitchell *v.* Mitchell, 3 Stew. & P. (Ala.) 81; Dixon *v.* Thatcher, 14 Ark. 141.

17. *Alabama.*— Key *v.* Vaughn, 15 Ala. 497.

Delaware.— Hollister *v.* Armstrong, 5 Houst. 46; Pennel *v.* Weyant, 2 Harr. 501.

Georgia.— Taylor *v.* McKee, 118 Ga. 874, 45 S. E. 672, holding that the additional certificate by the clerk that the judge is duly commissioned and qualified is essential.

Kentucky.— Moore *v.* Ann, 9 B. Mon. 36.

Louisiana.— Reynolds *v.* Rowley, 3 Rob. 201, 38 Am. Dec. 233; Parham *v.* Murphee, 4 Mart. N. S. 355; Simmins *v.* Parker, 4 Mart. N. S. 200.

Mississippi.— Kidd *v.* Manley, 28 Miss. 156.

tation of the clerk is in due form, cannot be received as evidence.[18] So the attestation of the custodian of the record must be under his seal of office,[19] unless it appears that no seal of office is established by law.[20] Likewise the certificate of the governor or other officer that the person who assumes the character of custodian of the records is the proper officer must be under the seal of state or the proper seal of office.[21]

(B) *Other Modes of Authentication.* The act of congress does not exclude other modes of authentication or abrogate any principle of evidence previously established.[22] Provision is made by statute in some of the states for the receipt in evidence of copies of public records in sister states when certified and authenticated in a designated manner.[23] A record of another state not judicial may also be proved by a sworn copy, this common-law right not being abridged by the federal statutes authorizing the use of certified copies in evidence.[24] But copies of records of other states, although sworn to, are not evidence, until it be shown that the records themselves were kept under authority of law.[25]

8. State Records Offered in Federal Courts. The rule has been laid down in the federal courts that when the copy of an instrument on record in a public office of a state is certified to by the officer whose duty it is by law to keep the original on file in his office, it must be received as evidence of the original.[26] The record of a judgment of a state court is not admissible in evidence in a federal court sitting in another state unless it is authenticated in manner provided by section 905 of the Revised Statutes of the United States;[27] but when the record of a

New York.— See Morrell *v.* Kimball, 4 Abb. Pr. 352; Thurston *v.* King, 1 Abb. Pr. 126.

Tennessee.— Richard *v.* Hicks, 1 Overt. 207.

Virginia.— Petermans *v.* Laws, 6 Leigh 523.

See 20 Cent. Dig. tit. "Evidence," § 1362 *et seq.*

18. Waller *v.* Cralle, 8 B. Mon. (Ky.) 11; Johnson *v.* Rannels, 6 Mart. N. S. (La.) 621; Paca *v.* Dutton, 4 Mo. 371; Drummond *v.* Magruder, 9 Cranch (U. S.) 122, 3 L. ed. 677.

19. Phillips *v.* Flint, 3 La. 146; Brock *v.* Burchett, 2 Swan (Tenn.) 27; Paul *v.* Chenault, (Tex. Civ. App. 1898) 44 S. W. 682.

20. Hackney *v.* Williams, 6 Yerg. (Tenn.) 340.

21. Phillips *v.* Flint, 3 La. 146; Brock *v.* Burchett, 2 Swan (Tenn.) 27.

22. Goodwyn *v.* Goodwyn, 25 Ga. 203; Ellmore *v.* Mills, 2 N. C. 359; Logansport Gaslight, etc., Co. *v.* Knowles, 15 Fed. Cas. No. 8,466.

23. Johnson *v.* Martin, 68 Miss. 330, 8 So. 847; Davis *v.* Rhodes, 39 Miss. 152; Pabst Brewing Co. *v.* Smith, 59 Mo. App. 476.

Record of insane hospital.— In State *v.* Pagels, 92 Mo. 300, 4 S. W. 931, it was held that, to render certified copies of the records of hospitals for the insane situated in another state admissible in evidence in Missouri, it is necessary, under Mo. Rev. St. § 2285, to show that such institutions are "public offices of a sister state."

24. *Illinois.*— Louisville, etc., R. Co. *v.* Shires, 108 Ill. 617.

Indiana.— Hall *v.* Bishop, 78 Ind. 370.

Massachusetts.— Smith *v.* Strong, 14 Pick. 128.

Missouri.— Karr *v.* Jackson, 28 Mo. 316.

New Jersey.— Condit *v.* Blackwell, 19 N. J. Eq. 193.

Texas.— Smith *v.* Gillum, 80 Tex. 120, 15 S. W. 794; Frost *v.* Wolf, 77 Tex. 455, 14 S. W. 440, 19 Am. St. Rep. 761.

See 20 Cent. Dig. tit. "Evidence," § 1361 *et seq.*

25. Richmond *v.* Patterson, 3 Ohio 368.

26. Logansport Gaslight, etc., Co. *v.* Knowles, 15 Fed. Cas. No. 8,466.

A pardon, granted by a governor of a state, under its great seal, is evidence *per se*, without further proof. U. S. *v.* Wilson, 28 Fed. Cas. No. 16,730, Baldw. 78.

27. U. S. *v.* Biebusch, 1 Fed. 213, 1 McCrary 42. See also Tooker *v.* Thompson, 24 Fed. Cas. No. 14,097, 3 McLean 92. But see Bennett *v.* Bennett, 3 Fed. Cas. No. 1,318, Deady 299.

State records offered in circuit court of District of Columbia.— In Smallwood *v.* Violet, 22 Fed. Cas. No. 12,962, 1 Cranch C. C. 516, a record certified under the seal of the state court was admitted in pursuance of an agreement of the members of the bar on July 17, 1807, "that copies of records of any state court should be received in evidence if certified and authenticated in such manner as would make them evidence in courts of the state from whence they are brought." *Compare* Gardner *v.* Lindo, 9 Fed. Cas. No. 5,231, 1 Cranch C. C. 78 [*reversed* on a different point in 1 Cranch 343, 2 L. ed. 130].

Completeness of record exemplified.— In an action on a judgment of a state court, an exemplification which is a transcript of the "complete record" of the proceedings, made up according to the practice in the courts of the state, is held to be sufficient when it shows that the court had jurisdiction of the subject-matter and the parties, and that the

judgment rendered in a state court is offered in evidence in a federal court sitting within the same state where the judgment was rendered, an authentication in accordance with the federal statute is not required; the certificate of the clerk and the seal of the court is sufficient.[28]

9. Foreign Documents or Records[29] — a. In General. The public records or documents of a foreign country may be proved by the original records themselves if they can be produced and are properly authenticated.[30] But as a general rule the original records cannot be produced and hence proof may be made by duly authenticated copies.[31] But it has been held that a transcript of the registry of marriage in a foreign country, however well authenticated, is not *prima facie* evidence of the marriage, without proof of the laws of the foreign country requiring the registry to be made and kept.[32] The statutes of some jurisdictions make provision for the mode of authenticating official copies of records and documents generally or of specified classes of records found in foreign registries or public offices.[33] In the absence of such statutory provision the rule has been laid down that the proper mode of authentication of foreign records or documents other than foreign laws or judicial records must be determined under the guidance furnished by the rules of the common law or the usages of nations, and that any evidence is in general sufficient that legitimately tends to prove that the document offered is in fact certified by the official custodian of the original of which it purports to be a copy, and that he has due authority to make such certification.[34]

judgment was in fact rendered. Woodbridge, etc., Engineering Co. *v.* Ritter, 70 Fed. 677.

28. Mewster *v.* Spalding, 17 Fed. Cas. No. 9,513, 6 McLean 24. See also Turnbull *v.* Payson, 95 U. S. 418, 24 L. ed. 437. *Compare* Catlin *v.* Underhill, 5 Fed. Cas. No. 2,523, 4 McLean 199; *Ex p.* Garnet, 10 Fed. Cas. No. 5,243.

29. Documents and records of other states see *supra*, XIV, B, 7.

30. Williams *v.* Conger, 125 U. S. 397, 8 S. Ct. 933, 31 L. ed. 778.

Ship's papers executed by officials of foreign government.— Grace *v.* Browne, 86 Fed. 155, 29 C. C. A. 621.

An original marriage license, issued in another state, identified by a witness who knows of the fact, is not inadmissible because produced by one who is not its legal custodian and does not account for his possession. State *v.* Pendleton, 67 Kan. 180, 72 Pac. 527.

31. Cavazos *v.* Trevino, 6 Wall. (U. S.) 773, 18 L. ed. 813; U. S. *v.* Delespine, 15 Pet. (U. S.) 226, 10 L. ed. 719; U. S. *v.* Rodman, 15 Pet. (U. S.) 130, 10 L. ed. 685; U. S. *v.* Wiggins, 14 Pet. (U. S.) 334, 10 L. ed. 481.

Copies of foreign registers of baptism, marriage, and death duly authenticated have frequently been held to be admissible either under or apart from statute.

Kentucky.— See Faustre *v.* Com., 92 Ky. 34, 17 S. W. 189, 13 Ky. L. Rep. 347.

Michigan.—Drosdowski *v.* Supreme Council O. of C. F., 114 Mich. 178, 72 N. W. 169; Hunt *v.* Supreme Council O. of C. F., 64 Mich. 671, 31 N. W. 576, 8 Am. St. Rep. 855; Hutchins *v.* Kimmel, 31 Mich. 126. See also Tessmann *v.* Supreme Commandery U. F., 103 Mich. 185, 61 N. W. 261.

New Jersey.— Hancock *v.* Supreme Council C. B. L., 67 N. J. L. 614, 52 Atl. 301. See also Supreme Assembly R. S. G. F. *v.* McDonald, 59 N. J. L. 248, 35 Atl. 1061.

New York.— Jacobi *v.* Order of Germania, 73 Hun 602, 26 N. Y. Suppl. 318. See also Nolan *v.* Nolan, 35 N. Y. App. Div. 339, 54 N. Y. Suppl. 975.

Pennsylvania.— American L. Ins., etc., Co. *v.* Rosenagle, 77 Pa. St. 507; Hyam *v.* Edwards, 1 Dall. 2, 1 L. ed. 11.

Wisconsin.— Sandberg *v.* State, 113 Wis. 578, 89 N. W. 504; Lavin *v.* Mutual Aid Soc., 74 Wis. 349, 43 N. W. 143.

See 20 Cent. Dig. tit. "Evidence," § 1384.

32. *Connecticut.*— See State *v.* Dooris, 40 Conn. 145.

Kentucky.— See Faustre *v.* Com., 92 Ky. 34, 17 S. W. 189, 13 Ky. L. Rep. 347.

Missouri.— See Childress *v.* Cutter, 16 Mo. 24.

New Jersey.— See Supreme Assembly R. S. G. F. *v.* McDonald, 59 N. J. L. 248, 35 Atl. 1061. *Compare* Hancock *v.* Supreme Council C. B. L., 67 N. J. L. 614, 52 Atl. 301.

North Carolina.— See State *v.* Behrman, 114 N. C. 797, 19 S. E. 220, 25 L. R. A. 449.

Ohio.— Stanglein *v.* State, 17 Ohio St. 453. *Compare* Hunt *v.* Supreme Council O. of C. F., 64 Mich. 671, 31 N. W. 576, 8 Am. St. Rep. 855.

See, generally, Marriage.

33. Lavin *v.* Mutual Aid Soc., 74 Wis. 349, 43 N. W. 143; Sandberg *v.* State, 113 Wis. 578, 89 N. W. 504.

Certified copy of foreign patent provided for by federal statute.— Schoerken *v.* Swift, etc., Co., 7 Fed. 469, 19 Blatchf. 209.

Under statute in Louisiana documents properly authenticated by United States representatives abroad are admissible in evidence in the courts of that state. Justus's Succession, 48 La. Ann. 1096, 20 So. 680; Jerman *v.* Tenneas, 44 La. Ann. 620, 11 So. 80.

34. Barber *v.* Mexico International Co., 73 Conn. 587, 48 Atl. 758. See also State *v.*

Thus a copy certified under the great seal of state is admissible.[35] So it has been held to be one of the proper and essential functions of consuls under the rules of international law to aid in the authentication of foreign documents for use in their country, and that for this purpose the courts will take notice of their seals of office.[36] Examined or sworn copies of foreign records have also been held admissible.[37]

b. Judicial Records — (I) *In General.* The best proof of the proceedings of a foreign court are the original records.[38] But these cannot ordinarily be produced.[39] Hence one of the usual modes of authenticating foreign judgments is by an exemplification under the great seal of state.[40] A copy authenticated by the great seal is sufficient, although unaccompanied by any certificate of its being a copy under the official signature of any officer of the court, or by other evidence of its genuineness.[41] But it has been held that a copy certified under the private seal of the secretary of state for foreign affairs of a foreign government,[42] or under the seal of a foreign minister,[43] is not admissible. Foreign judgments may be authenticated by a copy proved to be true by a witness who has personally compared it with the original record in the proper custody.[44] Thus a copy is

Dooris, 40 Conn. 145; Mauri *v.* Heffernan, 13 Johns. (N. Y.) 58.

The seal of a notary public is one of which the courts take judicial notice whenever it is used to attest a foreign document which by the usages of nations may be so attested. See Barber *v.* Mexico International Co., 73 Conn. 587, 48 Atl. 758; Ashcraft *v.* Chapman, 38 Conn. 230; Orr *v.* Lacy, 18 Fed. Cas. No. 10,589, 4 McLean (U. S.) 243. As for instance in cases of protest of foreign bills of exchange. Waldron *v.* Turpin, 15 La. 552, 35 Am. Dec. 210; Phillips *v.* Flint, 3 La. 146; Rosine *v.* Bonnabel, 5 Rob. (La.) 163; Lloyd *v.* McGarr, 6 Pa. L. J. 74. So a notary public is an officer to whom in many countries resort is had for certificates authenticating copies of documents in public archives, and when the notary's certificate is properly authenticated the certified copy will be admissible. Barber *v.* Mexico International Co., 73 Conn. 587, 48 Atl. 758; Bowman *v.* Sanborn, 25 N. H. 87; Williams *v.* Conger, 125 U. S. 397, 8 S. Ct. 933, 31 L. ed. 778. In Talcott *v.* Delaware Ins. Co., 23 Fed. Cas. No. 13,734, 2 Wash. 449, a copy to which a notarial certificate was affixed was not admitted where it did not appear that the notary had charge of the papers and that he had authority to authenticate them.

Form of attestation.— The attestation of the proper officer at the end of the entire document and over his signature that the same was "a true copy" has been held a sufficient verification to entitle it to be received in evidence as a certified copy. Barber *v.* Mexico International Co., 73 Conn. 587, 48 Atl. 758.

35. See Las Caygas *v.* Larionda, 4 Mart. (La.) 283; Church *v.* Hubbart, 2 Cranch (U. S.) 187, 2 L. ed. 249; Schoerken *v.* Swift, etc., Co., 7 Fed. 469, 19 Blatchf. 209.

The acts of foreign governments certified under their great seal are admissible in evidence without further authentication. Groover *v.* Coffee, 19 Fla. 61; Stanglein *v.* State, 17 Ohio St. 453; Church *v.* Hubbart, 2 Cranch (U. S.) 187, 2 L. ed. 249. See also U. S. *v.* Wilson, 28 Fed. Cas. No. 16,730, Baldw. 78.

36. Barber *v.* Mexico International Co., 73 Conn. 587, 48 Atl. 758; Ferrers *v.* Bosel, 10 Mart. (La.) 35. *Compare* Las Caygas *v.* Larionda, 4 Mart. (La.) 283.

37. Barber *v.* Mexico International Co., 73 Conn. 587, 48 Atl. 758; Hunt *v.* Supreme Council O. of C. F., 64 Mich. 671, 31 N. W. 576, 8 Am. St. Rep. 855; American L. Ins., etc., Co. *v.* Rosenagle, 77 Pa. St. 507.

38. Spaulding *v.* Vincent, 24 Vt. 501.

39. Spaulding *v.* Vincent, 24 Vt. 501.

40. *Connecticut.*— Griswold *v.* Pitcairn, 2 Conn. 85.

New Hampshire.— See Mahurin *v.* Bickford, 6 N. H. 567.

New York.— See Lincoln *v.* Battelle, 6 Wend. 475.

Pennsylvania.— See Snyder *v.* Wise, 10 Pa. St. 157.

Vermont.— See Spaulding *v.* Vincent, 24 Vt. 501.

United States.— Church *v.* Hubbart, 2 Cranch 187, 2 L. ed. 249.

England.— Anonymous, 9 Mod. 66. *Compare* Collins *v.* Mathew, 5 East 473, 2 Smith K. B. 25, where it was said by Lord Ellenborough, C. J., that an Irish judgment was only provable by an examined copy on oath. See 20 Cent. Dig. tit. "Evidence," § 1385.

41. Griswold *v.* Pitcairn, 2 Conn. 85.

42. Vandervoort *v.* Smith, 2 Cai. (N. Y.) 155; Church *v.* Hubbart, 2 Cranch (U. S.) 187, 2 L. ed. 249. *Compare* Hadfield *v.* Jameson, 2 Munf. (Va.) 53.

43. Stein *v.* Bowman, 13 Pet. (U. S.) 209, 10 L. ed. 129.

Translation certified by consul.—The translation of a foreign judgment certified by a consul is not admissible, since the translation of a consul not under oath can have no greater validity than that of any other respectable person. Vandervoort *v.* Smith, 2 Cai. (N. Y.) 155; Church *v.* Hubbart, 2 Cranch (U. S.) 187, 2 L. ed. 249.

44. Gaines *v.* Relf, 12 How. (U. S.) 472,

sufficiently authenticated by proof that the witness assisted the clerk in comparing the copy with the record and in affixing the seal of the court to the copy and saw the clerk attest the copy by putting his name to it.[45]

(II) *Office Copy.* A foreign judgment may also be proved by a copy thereof duly authenticated by the properly authenticated certificate of an officer authorized by law to give a copy.[46] Under this rule it has been held that the clerk or prothonotary of a court is presumed to possess authority to make and certify copies of the records of the court in his keeping, and such copies are duly authenticated by his certificate, over his official signature and the seal of the court, and that his official signature and the seal are duly authenticated by the great seal of the state or government in which the court is found affixed to the certificate of the keeper thereof.[47] Since a court of admiralty acts under the law of nations, its proceedings are sufficiently proved by the certificate of a deputy register under the seal of the court, the certificate of the judge, and the certificate of a notary.[48] Indeed it has been held that a copy of a decree of a court of admiralty certified by the deputy registrar under the seal of the court is sufficiently authenticated, the seal of a court of admiralty being deemed evidence of itself.[49] But in the case of foreign courts generally, the certificate of the clerk or other officer under seal of the court is not alone sufficient but must itself be properly authenticated.[50]

13 L. ed. 1071; Church *v.* Hubbart, 2 Cranch (U. S.) 187, 2 L. ed. 249.

A copy of a copy cannot be admitted as a sworn copy. Lincoln *v.* Battelle, 6 Wend. (N. Y.) 475.

45. Buttrick *v.* Allen, 8 Mass. 273, 5 Am. Dec. 105; Pickard *v.* Bailey, 26 N. H. 152.

46. *Maryland.*— Owings *v.* Nicholson, 4 Harr. & J. 66.

New York.— See Vandervoort *v.* Smith, 2 Cai. 155.

Pennsylvania.— See Snyder *v.* Wise, 10 Pa. St. 157.

Vermont.— See Woodbridge *v.* Austin, 2 Tyler 364, 4 Am. Dec. 740.

United States.— Church *v.* Hubbart, 2 Cranch 187, 2 L. ed. 249.

See 20 Cent. Dig. tit. "Evidence," § 1385.

Completeness of transcript.— It has been held that the mere transcript of an order of a foreign court containing no previous proceedings upon which the order rested and no copy of the judgment-roll other than said order is inadmissible on the ground of the incompleteness of the record in the absence of proof of a procedure in the foreign country making such evidence sufficient. Wickersham *v.* Johnson, 104 Cal. 407, 38 Pac. 89, 43 Am. St. Rep. 118; Young *v.* Rosenbaum, 39 Cal. 646; Coleman's Estate, 7 Pa. Dist. 731. See also Gunn *v.* Peakes, 36 Minn. 177, 30 N. W. 466, 1 Am. St. Rep. 661. *Compare* Calhoun *v.* Ross, 60 Ill. App. 309; Packard *v.* Hill, 7 Cow. (N. Y.) 434; Gardere *v.* Columbian Ins. Co., 7 Johns. (N. Y.) 514; Hourquebie *v.* Girard, 12 Fed. Cas. No. 6,732, 2 Wash. 212.

Alterations and interlineations in a record of a court of Upper Canada, noted and verified by the clerk of the court, have been held no ground of objection to its admission in evidence in a New York court, without some evidence of their being made improperly and in bad faith. Lazier *v.* Westcott, 26 N. Y. 146, 82 Am. Dec. 404.

47. Gunn *v.* Peakes, 36 Minn. 177, 30 N. W. 466, 1 Am. St. Rep. 661.

Additional certificate of judge.— Especially is the rule of the text true where the transcript is further certified by the judge. Calhoun *v.* Ross, 60 Ill. App. 309; *In re* Gautier Steel Co., 2 Pa. Co. Ct. 399, 18 Wkly. Notes Cas. (Pa.) 346. See also Spaulding *v.* Vincent, 24 Vt. 501.

Proof of seal and official character of person certifying by witnesses.— In Gardere *v.* Columbian Ins. Co., 7 Johns. (N. Y.) 514, it was held that a copy of the sentence of a foreign court of vice-admiralty under the seal of the court, signed by the actuary in the absence of the register, accompanied with a deposition of a witness proving the seal and signature, was sufficiently authenticated, although not signed by the judge. So in Packard *v.* Hill, 7 Cow. (N. Y.) 434, it was held that a copy of a foreign sentence certified by the clerk who had the custody of the records of the court was admissible where a witness at the trial proved the signature of the clerk, and that the court had no seal, and that the copy was authenticated in the usual form of those sent to be used as evidence in a foreign country.

48. Yeaton *v.* Fry, 5 Cranch (U. S.) 335, 3 L. ed. 117.

49. Thompson *v.* Stewart, 3 Conn. 171, 8 Am. Dec. 168.

50. *Connecticut.*— Spegail *v.* Perkins, 2 Root 274. See also Griswold *v.* Pitcairn, 2 Conn. 85.

Illinois.— Thompson *v.* Mason, 4 Ill. App. 452.

New York.— Lincoln *v.* Battelle, 6 Wend. 475; Delafield *v.* Hand, 3 Johns. 310.

Vermont.— Pierson *v.* Boston, 1 Aik. 54.

United States.— Catlett *v.* Pacific Ins. Co., 5 Fed. Cas. No. 2,517, 1 Paine 594, where it was held that the additional certificate of an American consul as to the official character of the register was insufficient. See also Leay

(III) *Provision Under State Statutes.* Under statute in the various states provision is made for the authentication of foreign judgments so as to render them admissible in evidence.[51]

c. Foreign Laws. A discussion of the mode of proof of foreign laws will be found elsewhere in this work.[52]

C. Private or Unofficial Documents — 1. Wills, Conveyances, Contracts, and Other Instruments — a. In General. The general principles of evidence in respect to relevancy and competency in general are applicable to wills, conveyances, contracts, and other private writings of a kindred nature as in the case of other forms of evidence.[53]

b. Recitals. The admissibility of recitals in deeds of conveyance, mortgages, etc., depends on the binding effect of the recitals on the person against whom they are sought to be introduced, and hence the question is one properly treated elsewhere in this work.[54]

c. Void or Defective Instruments. As a general rule a deed, will, or other writing relied on as a muniment of title as embodying a contract, or as otherwise establishing by its terms a claim or right, will be excluded from the jury if it is so defective, either in substance or in form, that the court is able to say as a matter of law that it is an invalid instrument;[55] otherwise the evidence will be

v. Wilson, 15 Fed. Cas. No. 8,174, 1 Cranch C. C. 191.

England.— Henry *v.* Adey, 3 East 221, 4 Esp. 228. See also Appleton *v.* Braybrook, 6 M. & S. 34, 2 Stark. 6, 18 Rev. Rep. 294, 3 E. C. L. 293; Black *v.* Braybrook, 2 Stark. 7, 3 E. C. L. 294. *Compare* Capling *v.* Herman, 17 Mich. 524.

See 20 Cent. Dig. tit. "Evidence," § 1385.

Copies uncertified by any official inadmissible.— Pearson's Estate, 5 Pa. Co. Ct. 330, 21 Wkly. Notes Cas. (Pa.) 559.

51. *California.*— Wickersham *v.* Johnston, 104 Cal. 407, 38 Pac. 89, 43 Am. St. Rep. 118.

Illinois.— Thompson *v.* Mason, 4 Ill. App. 452.

Louisiana.— Lorenz's Succession, 41 La. Ann. 1091, 6 So. 886, 7 L. R. A. 265.

Michigan.— Capling *v.* Herman, 17 Mich. 524.

Nebraska.— Linton *v.* Baker, 1 Nebr. (Unoff.) 896, 96 N. W. 251.

New York.— Lazier *v.* Westcott, 26 N. Y. 146, 82 Am. Dec. 404; Jarvis *v.* Sewall, 40 Barb. 449.

See 20 Cent. Dig. tit. "Evidence," § 1385.

Provision made by statute for proof of foreign probate of wills.— Wickersham *v.* Johnston, 104 Cal. 407, 38 Pac. 89, 43 Am. St. Rep. 118; McCarthy *v.* McCarthy, 57 N. J. Eq. 587, 42 Atl. 332; Chew *v.* Keck, 4 Rawle (Pa.) 163; Morris *v.* Vanderen, 1 Dall. (Pa.) 64, 1 L. ed. 38; Weston *v.* Stammers, 1 Dall. (Pa.) 2, 1 L. ed. 11. See also De Sobry *v.* De Laistre, 2 Harr. & J. (Md.) 191, 3 Am. Dec. 555.

52. See, generally, Statutes.

53. See Evidence, 16 Cyc. 1110 *et seq.*

54. See Estoppel, 16 Cyc. 671.

Admissions, see Evidence, 16 Cyc. 938 *et seq.*

55. *Alabama.*— See Buchanan *v.* Larkin, 116 Ala. 431, 22 So. 543.

Georgia.— Foster *v.* Rutherford, 20 Ga. 676.

Illinois.— Curtis *v.* Harrison, 36 Ill. App. 287.

Indiana.— Westerman *v.* Foster, 57 Ind. 408.

Louisiana.—Dick *v.* Maxwell, 6 Mart. N. S. 396.

Maine.— Proctor *v.* Rand, 94 Me. 313, 47 Atl. 537.

Michigan.— Wilbur *v.* Stoepel, 82 Mich. 344, 46 N. W. 724, 21 Am. St. Rep. 568.

Mississippi.— Alexander *v.* Polk, 39 Miss. 737; Hanna *v.* Renfro, 32 Miss. 125.

Nebraska.— Merriam *v.* Dovey, 25 Nebr. 618, 41 N. W. 550.

New York.—Flood *v.* Mitchell, 4 Hun 813 [*reversed* in 68 N. Y. 507]; Mumford *v.* Whitney, 15 Wend. 380, 30 Am. Dec. 60.

South Carolina.—Darby *v.* Hunt, 2 Treadw. 740.

Texas.— Pierce *v.* Weaver, 65 Tex. 44.

Utah.— Tarpey *v.* Deseret Salt Co., 5 Utah 205, 14 Pac. 338.

Vermont.— Stiles *v.* Brown, 16 Vt. 563.

See 20 Cent. Dig. tit. "Evidence," § 1418.

Instrument in foreign language.— An instrument written in a foreign language is properly excluded when offered as evidence of its contents without translation. Meyer *v.* Witter, 25 Mo. 83; Sartor *v.* Bolinger, 59 Tex. 411.

For admissibility of contracts without the revenue stamp required by statute see Contracts, 3 Cyc. 305. And see Trowbridge *v.* Addoms, 23 Colo. 518, 48 Pac. 535; Knox *v.* Rossi, 25 Nev. 96, 57 Pac. 179, 83 Am. St. Rep. 566, 48 L. R. A. 305; Barry *v.* Law, 89 Fed. 582.

Instrument invalid in part only.— A bill of sale of a slave which contains a warranty of soundness, and which is inoperative to convey the title, for the want of a subscribing witness, may nevertheless be read as evidence of the warranty, provided the actual sale and delivery be proven *dehors.* Hussey

admitted;[56] extrinsic proof, however, in aid of the defects being held a prerequisite to admission in some instances.[57] An instrument, although invalid as an

v. Weathersby, 51 N. C. 387. To same effect see Maxwell *v.* Miller, 33 N. C. 272.

56. *Alabama.*— Bedell *v.* Smith, 37 Ala. 619.

California.— Bunting *v.* Salz, (1889) 22 Pac. 1132; Peck *v.* Vandenberg, 30 Cal. 11.

Connecticut.— Watson *v.* New Milford, 72 Conn. 561, 45 Atl. 167, 77 Am. St. Rep. 345; Hill *v.* Banks, 61 Conn. 25, 23 Atl. 712; Platt *v.* Brown, 30 Conn. 336.

Delaware.— Doe *v.* Halloway, 2 Houst. 527; Doe *v.* Prettyman, 1 Houst. 334.

Georgia.— Coody *v.* Gress Lumber Co., 82 Ga. 793, 10 S. E. 218; Sumner *v.* Bryan, 54 Ga. 613.

Indiana.— McCoskey *v.* Deming, 3 Blackf. 145.

Iowa.— Jefferson County *v.* Savory, 2 Greene 238.

Kansas.— Arn *v.* Matthews, 39 Kan. 272, 18 Pac. 65; Walters *v.* Van Derveer, 17 Kan. 425.

Kentucky.— Peniston *v.* Wall, 3 J. J. Marsh. 37.

Louisiana.— Cronan *v.* Cochran, 27 La. Ann. 120; Morfit *v.* Fuentes, 27 La. Ann. 107; Carpenter *v.* Featherston, 15 La. Ann. 235; Clauss *v.* Burgess, 12 La. Ann. 142; Hubnall *v.* Watt, 11 La. Ann. 57; Weis *v.* Mainhaut, 4 La. 121; Hawkins *v.* Vanwickle, 6 Mart. N. S. 418; Barfield *v.* Hewlett, 6 Mart. N. S. 78; Simmins *v.* Parker, 4 Mart. N. S. 200; Hipkins *v.* Salkeld, 7 Mart. 565.

Maine.— Clark *v.* Mann, 33 Me. 268.

Maryland.— Equitable Endowment Assoc. *v.* Fisher, 71 Md. 430, 18 Atl. 808; Western Maryland R. Co. *v.* Orendorff, 37 Md. 328.

Massachusetts.— Foye *v.* Patch, 132 Mass. 105; Cobb *v.* Arnold, 8 Metc. 398.

Michigan.— Crooks *v.* Whitford, 47 Mich. 283, 11 N. W. 159; Munroe *v.* Eastman, 31 Mich. 283.

Missouri.— Houx *v.* Batteen, 68 Mo. 84; Norfleet *v.* Russell, 64 Mo. 176; Howe *v.* Williams, 51 Mo. 252; Endsley *v.* Strock, 50 Mo. 508; Pease *v.* Lawson, 33 Mo. 35; Vette *v.* Leonori, 42 Mo. App. 217.

Nevada.—Carpenter *v.* Johnson, 1 Nev. 331.

New Jersey.— Longstreet *v.* Ketcham, 1 N. J. L. 170.

New York.— Michigan Carbon Works *v.* Schad, 1 N. Y. Suppl. 490.

North Carolina.— Bell *v.* Couch, 132 N. C. 346, 43 S. E. 911; Geer *v.* Geer, 109 N. C. 679, 14 S. E. 297.

North Dakota.— Fargo First Nat. Bank *v.* Red River Valley Nat. Bank, 9 N. D. 319, 83 N. W. 221.

Oregon.— Stanley *v.* Smith, 15 Oreg. 505, 16 Pac. 174.

Pennsylvania.— Silliman *v.* Whitmer, 196 Pa. St. 363, 46 Atl. 489; Miller *v.* Binder, 28 Pa. St. 489; Strawbridge *v.* Cartledge, 7 Watts & S. 394; Urket *v.* Coryell, 5 Watts & S. 60; Brotherton *v.* Livingston, 3 Watts & S. 334; Sitzell *v.* Michael, 3 Watts & S. 329; Myers *v.* Irwin, 2 Serg. & R. 368; Brown *v.* Long, 1 Yeates 162; McDill *v.* McDill, 1 Dall. 63, 1 L. ed. 38; Branch *v.* Johnson, 1 Phila. 206.

Texas.— March *v.* Huyter, 50 Tex. 243; Cowan *v.* Williams, 49 Tex. 380; Ragsdale *v.* Robinson, 48 Tex. 379; Kingston *v.* Pickins, 46 Tex. 99; Womack *v.* Womack, 8 Tex. 397, 58 Am. Dec. 119; Hitchler *v.* Scanlan, 15 Tex. Civ. App. 40, 39 S. W. 633; Hill *v.* Smith, 6 Tex. Civ. App. 312, 25 S. W. 1079; Trinity County Lumber Co. *v.* Pinckard, 4 Tex. Civ. App. 671, 23 S. W. 720, 1015.

Vermont.— Tillotson *v.* Prichard, 60 Vt. 94, 14 Atl. 302, 6 Am. St. Rep. 95; Armstrong *v.* Colby, 47 Vt. 359; Gilson *v.* Gilson, 16 Vt. 464.

West Virginia.— Miller *v.* Holt, 47 W. Va. 7, 34 S. E. 956.

Wisconsin.— Slaughter *v.* Bernards, 88 Wis. 111, 59 N. W. 576; Fisk *v.* Tank, 12 Wis. 276, 78 Am. Dec. 737.

United States.—Kelly *v.* Crawford, 5 Wall. 785, 18 L. ed. 562.

See 20 Cent. Dig. tit. "Evidence," § 1417 *et seq.*

Fragments or mutilated writings.— A paper offered in evidence is not to be rejected merely because composed of several fragments pasted together. Sharp *v.* Stephens, 1 La. 116.

Effect of alterations in instruments upon their admissibility see ALTERATIONS OF INSTRUMENTS, 2 Cyc. 237 *et seq.* And see the following cases:

Georgia.— Doe *v.* Roe, 14 Ga. 252.

Iowa.— Dwinnell *v.* McKibben, 93 Iowa 331, 61 N. W. 985.

Kentucky.— Gilpin *v.* Davis, 2 Bibb 416, 5 Am. Dec. 622.

Maryland.— Handy *v.* State, 7 Harr. & J. 42.

Massachusetts.— Newcomb *v.* Presbrey, 8 Metc. 406.

Michigan.—Sirrine *v.* Briggs, 31 Mich. 443.

Missouri.— Patterson *v.* Fagan, 38 Mo. 70; Parker *v.* Moore, 29 Mo. 218.

New York.— Every *v.* Merwin, 6 Cow. 360.

Pennsylvania.— Jordan *v.* Stewart, 23 Pa. St. 244.

Tennessee.— Walker *v.* Walker, 6 Coldw. 571.

Texas.— Fitch *v.* Boyer, 51 Tex. 336; McCampbell *v.* Henderson, 50 Tex. 601; Thompson *v.* Thompson, 12 Tex. 327.

Vermont.— Kimball *v.* Lamson, 2 Vt. 138.

Virginia.— Virginia, etc., Coal, etc., Co. *v.* Fields, 94 Va. 102, 26 S. E. 426.

Washington.— Crowley *v.* U. S. Fidelity, etc., Co., 29 Wash. 268, 69 Pac. 784.

Wisconsin.—Schwalm *v.* McIntyre, 17 Wis. 232; Low *v.* Merrill, 1 Pinn. 340.

United States.— Little *v.* Herndon, 10 Wall. 26, 19 L. ed. 878; U. S. *v.* Galbraith, 2 Black 394, 17 L. ed. 449.

See 20 Cent. Dig. tit. "Evidence," § 1418 *et seq.*

57. Tustin *v.* Faught, 23 Cal. 237; Booth-

operative instrument, may be admitted in connection with and by way of inducement for other evidence upon which a right is predicated,[58] or as containing an admission,[59] as showing the hostility and extent of adverse possession,[60] as evidence of the mere fact of its execution,[61] or for some other collateral purpose.[62]

d. Collateral Writings. Collateral writings expressly referred to and made a part of an instrument introduced in evidence are admissible in explanation of the latter,[63] and this, although the collateral writing is between third persons.[64] Indeed it is held that an instrument made subject to another writing or expressly referring thereto for the ascertainment of the terms of the entire contract will not be received without the introduction of the writing referred to;[65] but this rule is inapplicable to an instrument which, although referring to another, is complete in itself.[66]

2. Book Entries — a. In General. The mere fact that unofficial statements of third persons or of a party in his favor are in the form of written entries will not

royd *v.* Engles, 23 Mich. 19; Drake *v.* Curtis, 88 Mo. 644; Jones *v.* Montes, 15 Tex. 351.

Deeds by grantor without title.— It has been held that a deed cannot be read in evidence without some proof of title in the grantor. Farmers', etc., Bank *v.* Bronson, 14 Mich. 361; Hoak *v.* Long, 10 Serg. & R. (Pa.) 9; Peter *v.* Condron, 2 Serg. & R. (Pa.) 80; Faulkner *v.* Eddy, 1 Binn. (Pa.) 188. *Compare* Peck *v.* Vanderberg, 30 Cal. 11. But executory contracts for the future conveyance of land are not within the rule. Chew *v.* Parker, 3 Rawle (Pa.) 283.

58. Buchanan *v.* Larkin, 116 Ala. 431, 22 So. 543; Bartlett *v.* Mayo, 33 Me. 518; Jelks *v.* Barrett, 52 Miss. 315; Philadelphia *v.* Riddle, 25 Pa. St. 259.

Admissibility of defective writing as evidence of oral agreement see Contracts, 9 Cyc. 763 *et seq.* And see Purington *v.* Akhurst, 74 Ill. 490; Simpson *v.* Kimberlin, 12 Kan. 579; Goodell *v.* Labadie, 19 Mich. 88; La Point *v.* Scott, 36 Vt. 603.

Where a written contract is subsequently modified by parol so that the entire contract becomes parol, the writing is admissible in connection with evidence of the parol agreement. Tomlinson *v.* Briles, 101 Ind. 538, 1 N. E. 63; Carrier *v.* Dilworth, 59 Pa. St. 406; Charles *v.* Scott, 1 Serg. & R. (Pa.) 294. See also Contracts, 9 Cyc. 763. So a writing drawn up after a contract is concluded by parol and intended merely as a memorandum may be given in evidence concurrently with oral proof of the additional facts necessary to constitute a contract. Mobile Mar. Dock, etc., Ins. Co. *v.* McMillan, 31 Ala. 711.

The fact that a grantor's husband did not join in her deed, so that it was inoperative to pass title, will not destroy its admissibility as corroborative evidence, by its recitals, of the extent of a prior deed. Williamson *v.* Work, (Tex. Civ. App. 1903) 77 S. W. 266.

59. *Alabama.*— Crawford *v.* Jones, 54 Ala. 459.

Connecticut.— Cornwall *v.* Hoyt, 7 Conn. 420.

District of Columbia.— Thompson *v.* Shepherd, 1 Mackey 385.

Indiana.— Kerwin *v.* Wright, 59 Ind. 369.

Louisiana.— Richard *v.* Bird, 4 La. 305.

Michigan.— See Fenton *v.* Miller, 94 Mich. 204, 53 N. W. 957.

Mississippi.— Parr *v.* Gibbons, 23 Miss. 92.

Missouri.— Clamorgan *v.* Greene, 32 Mo. 285.

New Jersey.—Ortley *v.* Chatwick, 30 N. J. L. 35.

Oregon.— Ramsey *v.* Loomis, 6 Oreg. 367.

Pennsylvania.— Lea *v.* Hopkins, 7 Pa. St. 492.

Texas.— Williams *v.* Wilson, 76 Tex. 69, 13 S. W. 69; Huffman *v.* Cartwright, 44 Tex. 296.

See Evidence, 16 Cyc. 938 *et seq.*

60. *Maine.*— Ross *v.* Gould, 5 Me. 204; Robison *v.* Sweet, 3 Me. 316.

Ohio.— Beal *v.* King, Wright 223 [*affirming* 6 Ohio 11].

Texas.— Grimes *v.* Bastrop, 26 Tex. 310; McCelvey *v.* Cryer, 8 Tex. Civ. App. 437, 28 S. W. 691. See also Hughey *v.* Mosby, 31 Tex. Civ. App. 76, 71 S. W. 395.

Vermont.— Beach *v.* Sutton, 5 Vt. 209.

Virginia.— Olinger *v.* Shepherd, 12 Gratt. 462.

See also Adverse Possession, 1 Cyc. 1150, 1151.

61. Singer *v.* Sheldon, 56 Iowa 354, 9 N. W. 298.

62. Gibbons *v.* Duley, 7 Mackey (D. C.) 320.

63. Satterlee *v.* Bliss, 36 Cal. 489; Hicks *v.* Coleman, 25 Cal. 122, 85 Am. Dec. 103; Clark *v.* Houghton, 12 Gray (Mass.) 38.

64. Blair *v.* Hum, 2 Rawle (Pa.) 104. See also Contracts, 9 Cyc. 770.

65. Hammond *v.* Norris, 2 Harr. & J. (Md.) 130; Chapman *v.* Crooks, 41 Mich. 595, 2 N. W. 924.

66. Tustin Fruit Assoc. *v.* Earl Fruit Co., (Cal. 1898) 53 Pac. 693.

Admissibility of mortgage without notes secured.— A mortgage is held to be admissible in evidence of the mortgagee's title to the land mortgaged and of the mortgage debt without first producing the notes which it was given to secure, since the notes form no part of the mortgage. Powers *v.* Patten, 71 Me. 583; Smith *v.* Johns, 3 Gray (Mass.) 517. See also Fuller *v.* Rounceville, 31 N. H. 512

render them admissible unless a foundation is laid for their admission under some recognized rule of law.[67]

b. Entries in Regular Course of Business — (I) *Party's Shop-Books* — (A) *General Rule.* In most jurisdictions of this country the rule established either under or apart from statute is, with modifications or restrictions in some instances, that the books of account of the party supported by his suppletory oath are admissible as evidence of goods sold and delivered or of services performed.[68] This rule, which is sometimes spoken of as "the shop-book rule" or

Admissibility of interest coupons without bonds.— In Welsh *v.* First Div. St. Paul, etc., R. Co., 25 Minn. 314, it was held that, in an action on overdue interest coupons of a railroad company, it is not necessary to introduce at the trial the bonds from which the coupons were detached, where they are sufficiently identified by other evidence. See also Conshohocken Tube Co. *v.* Iron Car Equipment Co., 161 Pa. St. 391, 28 Atl. 1119.

67. See Evidence, 16 Cyc. 1192 *et seq.*

68. *Alabama.*— Alabama Constr. Co. *v.* Wagnon, 137 Ala. 388, 34 So. 352; Bolling *v.* Fannin, 97 Ala. 619, 12 So. 59; McDonald *v.* Carnes, 90 Ala. 147, 7 So. 919; Dismukes *v.* Tolson, 67 Ala. 386. *Compare* Halliday *v.* Butt, 40 Ala. 178; Nolley *v.* Holmes, 3 Ala. 642; Moore *v.* Andrews, 5 Port. 107.

California.—White *v.* Whitney, 82 Cal. 163, 22 Pac. 1138; Roche *v.* Ware, 71 Cal. 375, 12 Pac. 284, 60 Am. Rep. 539; Carroll *v.* Storck, 57 Cal. 366; Caulfield *v.* Sanders, 17 Cal. 569; Caldwell *v.* McDermit, 17 Cal. 464; Severance *v.* Lombardo, 17 Cal. 57; Landis *v.* Turner, 14 Cal. 573; La Franc *v.* Stewart, 7 Cal. 186; Lubert *v.* Chaubiteau, 3 Cal. 458, 58 Am. Dec. 415. *Compare* Ross *v.* Brusie, (1886) 10 Pac. 121.

Connecticut.— Smith *v.* Law, 47 Conn. 431; Bradley *v.* Goodyear, 1 Day 104.

Delaware.— Cannon *v.* Kinney, 3 Harr. 317.

Florida.— Dunbar *v.* Wright, 20 Fla. 446; Robinson *v.* Dibble, 17 Fla. 457; Hooker *v.* Johnson, 6 Fla. 730; Grady *v.* Thigpen, 6 Fla. 668. *Compare* Higgs *v.* Shehee, 4 Fla. 382, decided prior to statute making books of account admissible.

Georgia.— Martin *v.* Fyffe, Dudley 16.

Illinois.— New Boston Presby. Church *v.* Emerson, 66 Ill. 269; Boyer *v.* Sweet, 4 Ill. 120; F. H. Hill Co. *v.* Sommer, 55 Ill. App. 345.

Indiana.— Place *v.* Baugher, 159 Ind. 232, 64 N. E. 852.

Maine.— Clark *v.* Perry, 17 Me. 175.

Massachusetts.— Pratt *v.* White, 132 Mass. 477; Mathes *v.* Robinson, 8 Metc. 269, 41 Am. Dec. 505; Faxon *v.* Hollis, 13 Mass. 427; Prince *v.* Smith, 4 Mass. 455; Cogswell *v.* Dolliver, 2 Mass. 217, 3 Am. Dec. 45.

Michigan.— Baxter *v.* Reynolds, 112 Mich. 471, 70 N. W. 1039; Seventh-Day Adventist Pub. Assoc. *v.* Fisher, 95 Mich. 274, 54 N. W. 759; Montague *v.* Dongan, 68 Mich. 98, 35 N. W. 840.

Minnesota.— Coleman *v.* Retail Lumberman's Ins. Assoc., 76 Minn. 31, 79 N. W. 588; Johnson *v.* Morstad, 63 Minn. 397, 65 N. W. 727.

Missouri.— See Robinson *v.* Smith, 111 Mo. 205, 20 S. W. 29, 33 Am. St. Rep. 510; Anchor Milling Co. *v.* Walsh, 108 Mo. 277, 18 S. W. 904, 32 Am. St. Rep. 600 [*distinguishing* Hissrick *v.* McPherson, 20 Mo. 310, where a different rule was laid down on common-law principles]. *Compare* Nelson *v.* Nelson, 90 Mo. 460, 2 S. W. 413; Nipper *v.* Jones, 27 Mo. App. 538; Hensgen *v.* Donnely, 24 Mo. App. 398; Hensgen *v.* Mullally, 23 Mo. App. 398.

New Hampshire.— Sheehan *v.* Hennessy, 65 N. H. 101, 18 Atl. 652; Bailey *v.* Harvey, 60 N. H. 152; Snell *v.* Parsons, 59 N. H. 521; Dodge *v.* Moss, 3 N. H. 232; Eastman *v.* Moulton, 3 N. H. 156.

New Jersey.— Rush *v.* Hance, 3 N. J. L. 860.

New York.— Smith *v.* Rentz, 131 N. Y. 169, 30 N. E. 54, 15 L. R. A. 138; Hodnett *v.* Gault, 64 N. Y. App. Div. 163, 71 N. Y. Suppl. 831; Burke *v.* Wolfe, 38 N. Y. Super. Ct. 263; Young *v.* Luce, 21 N. Y. Suppl. 225; Vosburgh *v.* Thayer, 12 Johns. 461.

North Carolina.— See Bland *v.* Warren, 65 N. C. 372.

Ohio.— Kugler *v.* Wiseman, 20 Ohio 361.

Pennsylvania.— Curren *v.* Crawford, 4 Serg. & R. 3; Poultney *v.* Ross, 1 Dall. 238, 1 L. ed. 117.

Rhode Island.— Cargill *v.* Atwood, 18 R. I. 303, 27 Atl. 214.

South Carolina.— Thomas *v.* Dyott, 1 Nott & M. 186; Lamb *v.* Hart, 1 Brev. 105; Spence *v.* Sanders, 1 Bay 119; Foster *v.* Sinkler, 1 Bay 40; Thomson *v.* Porter, 4 Strobh. Eq. 58, 53 Am. Dec. 653.

Texas.— Burleson *v.* Goodman, 32 Tex. 229.

Vermont.— See Gleason *v.* Kinney, 65 Vt. 560, 27 Atl. 208; Godding *v.* Orcutt, 44 Vt. 54; Hunter *v.* Kittredge, 41 Vt. 359; Bell *v.* McLeran, 3 Vt. 185. *Compare* Houghton *v.* Paine, 29 Vt. 57; Chase *v.* Smith, 5 Vt. 556; Burnham *v.* Adams, 5 Vt. 313.

Wisconsin.— Betts *v.* Stevens, 6 Wis. 400.

Wyoming.— See Hay *v.* Peterson, 6 Wyo. 419, 45 Pac. 1073, 34 L. R. A. 581.

United States.— See Bates *v.* Preble, 151 U. S. 149, 14 S. Ct. 277, 38 L. ed. 106. *Compare* Bennett *v.* Wilson, 3 Fed. Cas. No. 1,326, 1 Cranch C. C. 446; Jeffrey *v.* Schlasinger, 13 Fed. Cas. No. 7,253*a*, Hempst. 12.

See 20 Cent. Dig. tit. "Evidence," § 1432 *et seq.*

Secondary evidence.— The rule has been laid down in some of the cases that the best evidence of accounts which it is in the power of the party to produce must be exhausted

as the "American rule," has been repudiated in England [69] and to some extent in this country.[70] The rule was sanctioned by the courts of this country as an exception to the general rule of law as it once existed that a party should not be a witness in his own case on grounds of supposed necessity in order to prevent a failure of justice, since the business of tradesmen was often carried on without clerks on whose testimony they might rely, and since many of their transactions on account of their variety and minuteness were necessarily not in the presence of witnesses.[71] Although the rule allowing a party's shop-books in evidence was established at a time when parties to an action were not allowed to be witnesses, subsequent legislation which removed that disqualification and authorized parties to testify in their own behalf does not deprive them of the right to introduce their books of account in evidence.[72] So, in suits by or against estates of deceased persons, the adverse party is not as a general rule prohibited by statutes excluding parties from testifying against the estates of deceased persons or restricting their right in this respect from introducing his account-books in evidence or from

before the books of such accounts are admissible.

California.— See Severance *v.* Lombardo, 17 Cal. 57; Landis *v.* Turner, 14 Cal. 573.

Georgia.— Bracken *v.* Dillon, 64 Ga. 243, 37 Am. Rep. 70; Slade *v.* Nelson, 20 Ga. 365.

Maine.— See Dwinel *v.* Pottle, 31 Me. 167.

Mississippi.— Bookout *v.* Shannon, 59 Miss. 378; Moody *v.* Roberts, 41 Miss. 347.

New York.— See Tomlinson *v.* Borst, 30 Barb. 42.

Pennsylvania.— Corr *v.* Sellers, 100 Pa. St. 169, 45 Am. Rep. 370.

South Carolina.— See Thomas *v.* Dyott, 1 Nott & M. 186.

Tennessee.— Neville *v.* Northcutt, 7 Coldw. 294.

Texas.— Werbiskie *v.* McManus, 31 Tex. 116.

Canada.— See Garth *v.* Montreal Park, etc., R. Co., 18 Quebec Super. Ct. 463.

See 20 Cent. Dig. tit. "Evidence," § 1432 *et seq.*

Account-book of individual inadmissible in favor of persons suing jointly.— In a joint suit by two co-plaintiffs, a book of accounts charging defendant with work done and money paid is inadmissible where it does not purport and is not shown to be the book of both plaintiffs but shows dealings between defendant and one plaintiff only. Hansen *v.* Kirtley, 11 Iowa 565.

Entries as part of res gestæ.— The entries in books of account are regarded as the statements of the person making them, and if an act done by the party is competent then entries in his books made by him at the time of the act tending to elucidate and give a character to it may be admitted as part of the *res gestæ*. Batchelder *v.* Sanborn, 22 N. H. 325. Thus a party's shop-books may be admitted as a part of the *res gestæ* for the purpose of explaining the character of the party's possession of goods. Welch *v.* Cooper, 8 Pa. St. 217. But the mere entry of a fact by a party will not, apart from any act which it is calculated to elucidate, be admissible on this principle. Leighton *v.* Sargent, 31 N. H. 119, 64 Am. Dec. 323; Batchelder *v.* Sanborn, 22 N. H. 325.

69. Smith *v.* Williams, Comb. 247; Sikes *v.* Marshal, 2 Esp. 705; Crouch *v.* Drury, 1 Keb. 27; Lefebure *v.* Worden, 2 Ves. 54, 28 Eng. Reprint 36; Glynn *v.* Bank of England, 2 Ves. 38, 28 Eng. Reprint 26.

70. Burr *v.* Byers, 10 Ark. 398, 52 Am. Dec. 239; Lyons *v.* Teal, 28 La. Ann. 592; Porche *v.* Le Blanc, 12 La. Ann. 778; Flower *v.* Downs, 6 La. Ann. 538; Kendall *v.* Bean, 12 Rob. (La.) 407; Martinstein *v.* His Creditors, 8 Rob. (La.) 6; Herring *v.* Levy, 4 Mart. N. S. (La.) 383; Johnston *v.* Breedlove, 2 Mart. N. S. (La.) 508; Cavelier *v.* Collins, 3 Mart. (La.) 188; Gill *v.* Staylor, 93 Md. 453, 49 Atl. 650; Stallings *v.* Gottschalk, 77 Md. 429, 26 Atl. 524; Römer *v.* Jaecksch, 39 Md. 585; Atwell *v.* Mayhew, 6 Md. 10, 61 Am. Dec. 294; Whiteford *v.* Burkmyer, 1 Gill (Md.) 127, 39 Am. Dec. 640; Owings *v.* Law, 5 Gill & J. (Md.) 134. See also De Camp *v.* Vandergrift, 4 Blackf. (Ind.) 272. For later decisions which while not overruling this decision throw some doubt upon its authority see Fleming *v.* Yost, 137 Ind. 95, 36 N. E. 705; Dodge *v.* Morrow, 14 Ind. App. 534, 41 N. E. 967, 43 N. E. 153; Wilber *v.* Scherer, 13 Ind. App. 428, 41 N. E. 837.

Party's books admitted to refresh witness' memory.— Wilber *v.* Scherer, 13 Ind. App. 428, 41 N. E. 837; Stallings *v.* Gottschalk, 77 Md. 429, 26 Atl. 524; Bulloch *v.* Hurter, 44 Md. 416.

71. Pratt *v.* White, 132 Mass. 477; Molony *v.* Benners, 3 Grant (Pa.) 233, 234 (where it was said that books of original entries are admissible "from the necessities of trade, and on the principle that the entries are part of the *'res gestæ'*"); Lonergan *v.* Whitehead, 10 Watts (Pa.) 249; Missouri Pac. R. Co. *v.* Johnson, (Tex. Sup. 1888) 7 S. W. 838.

72. *Georgia.*— See Reviere *v.* Powell, 61 Ga. 30, 34 Am. Rep. 94; Petit *v.* Teal, 57 Ga. 145.

Missouri.—See Robinson *v.* Smith, 111 Mo. 205, 20 S. W. 29, 33 Am. St. Rep. 510; Anchor Milling Co. *v.* Walsh, 108 Mo. 277, 18 S. W. 904, 32 Am. St. Rep. 600.

New Hampshire.— Swain *v.* Cheney, 41 N. H. 232.

accompanying his offer with his suppletory testimony in cases where he could have done so prior to the statutes.[73]

(B) *Requisites to Admissibility* — (1) In General. Since on strict common-law principles the books of a party are inadmissible in his favor, they will be rejected unless the requisite foundation in proof of their character, authenticity, correctness, and regularity is laid for their introduction in evidence.[74]

(2) Suppletory Oath. Thus it is in general essential that the books should be supported by the suppletory oath of the party;[75] and mere proof of

New York.— Smith *v.* Smith, 163 N. Y. 168, 57 N. E. 300, 52 L. R. A. 545; Smith *v.* Rentz, 131 N. Y. 169, 30 N. E. 54, 15 L. R. A. 138; Stroud *v.* Tilton, 4 Abb. Dec. 324, 3 Keyes 139; Tomlinson *v.* Borst, 30 Barb. 42 [*disapproving* Sickles *v.* Mather, 20 Wend. 72, 32 Am. Dec. 521].

Texas.— See Missouri Pac. R. Co. *v.* Johnson, (Sup. 1888) 7 S. W. 838. *Compare* Kerns *v.* McKean, 76 Cal. 87, 18 Pac. 122; Henderson *v.* Morris, 5 Oreg. 24; Corr *v.* Sellers, 100 Pa. St. 169, 45 Am. Rep. 370; Nichols *v.* Haynes, 78 Pa. St. 174.

73. *Colorado.*— Haines *v.* Christie, 28 Colo. 502, 66 Pac. 883.

Florida.— Lewis *v.* Meginniss, 30 Fla. 419, 12 So. 19; Belote *v.* O'Brian, 20 Fla. 126.

Illinois.— Alling *v.* Brazee, 27 Ill. App. 595.

Massachusetts.— Dexter *v.* Booth, 2 Allen 559.

Mississippi.—Bookout *v.* Shannon, 59 Miss. 378.

Missouri.— See Jesse *v.* Davis, 34 Mo. App. 351.

New Hampshire.— Snell *v.* Parsons, 59 N. H. 521.

New York.—Young *v.* Luce, 21 N. Y. Suppl. 225. See also West *v.* Van Tuyl, 119 N. Y. 620, 23 N. E. 450; McGoldrick *v.* Traphagen, 88 N. Y. 334.

Ohio.— Bentley *v.* Hollenback, Wright 168.

Pennsylvania.— White's Estate, 11 Phila. 100.

Rhode Island.— Cargill *v.* Atwood, 18 R. I. 303, 27 Atl. 214. But see Dismukes *v.* Tolson, 67 Ala. 386.

See 20 Cent. Dig. tit. "Evidence," § 1432 *et seq.*

In Kentucky a party is permitted by express statutory provision to prove the correctness of his original entries against the estate of a deceased person. Estes *v.* Jackson, 53 S. W. 271, 21 Ky. L. Rep. 859; Freeman *v.* Deer, 14 Ky. L. Rep. 813.

Verification by party's wife.— Under statute in Nebraska it is held that where the wife of a person incompetent to testify by reason of the death of the adverse party to the transactions in question testifies to the correctness and genuineness of her husband's books of account, containing entries against such decedent, such books should be admitted in evidence. Martin *v.* Scott, 12 Nebr. 42, 10 N. W. 532.

Admissibility under Vermont statute of books of surviving party in action of book-account see Post *v.* Kenerson, 72 Vt. 341, 47 Atl. 1072; Gleason *v.* Kinney, 65 Vt. 560, 27 Atl. 208; Hunter *v.* Kittredge, 41 Vt. 359.

74. *Arkansas.*— Atkinson *v.* Burt, 65 Ark. 316, 53 S. W. 404.

California.— Watrous *v.* Cunningham, 71 Cal. 30, 11 Pac. 811; Heyneman *v.* Dannenberg, 6 Cal. 376, 65 Am. Dec. 519.

Florida.— Lewis *v.* Meginniss, 30 Fla. 419, 12 So. 19.

Illinois.— Kirby *v.* Watt, 19 Ill. 393; Baird *v.* Hooker, 8 Ill. App. 306. See also Trainor *v.* German-American Savings, etc., Assoc., 204 Ill. 616, 68 N. E. 650 [*reversing* 102 Ill. App. 604]; Schnellbacher *v.* Frank McLaughlin Plumbing Co., 108 Ill. App. 486.

Iowa.— Arney *v.* Meyer, 96 Iowa 395, 65 N. W. 337; U. S. Bank *v.* Burson, 90 Iowa 191, 57 N. W. 705; Security Co. *v.* Graybeal, 85 Iowa 543, 52 N. W. 497, 39 Am. St. Rep. 311.

Minnesota.— Wimmer *v.* Key, 87 Minn. 402, 92 N. W. 228.

Missouri.— Hensgen *v.* Donnelly, 24 Mo. App. 398.

New Jersey.— Perry *v.* Lambert, 3 N. J. L. 543.

New Mexico.— Byerts *v.* Robinson, 9 N. M. 427, 54 Pac. 932.

New York.— Irish *v.* Horn, 84 Hun 121, 32 N. Y. Suppl. 455; Tomlinson *v.* Borst, 30 Barb. 42; Conklin *v.* Stamler, 2 Hilt. 422.

Pennsylvania.— McKnight *v.* Newell, 207 Pa. St. 562, 57 Atl. 39.

Wisconsin.— Brown *v.* Warner, 116 Wis. 358, 93 N. W. 17.

See 20 Cent. Dig. tit. "Evidence," § 1628 *et seq.*

Effect of proof at former trial.— The mere fact that a book of accounts sought to be introduced has been proved and admitted at a former trial will not dispense with the necessity of laying a proper foundation at a subsequent trial. Linberger *v.* Latourette, 5 N. J. L. 809; Brown *v.* Williams, (Tex. Civ. App. 1895) 31 S. W. 225.

75. *Illinois.*— Kirby *v.* Watt, 19 Ill. 393; Sexton *v.* Brown, 36 Ill. App. 281. See also Trainor *v.* German-American Savings, etc., Assoc., 204 Ill. 616, 68 N. E. 650 [*reversing* 102 Ill. App. 604].

Maine.— Dwinel *v.* Pottle, 31 Me. 167.

South Carolina.— See Langton *v.* Everingham, 2 McCord 157.

Tennessee.— Forsee *v.* Matlock, 7 Heisk. 421; Neville *v.* Northcutt, 7 Coldw. 294.

Texas.— Townsend *v.* Coleman, 18 Tex. 418, 20 Tex. 817.

See 20 Cent. Dig. tit. "Evidence," § 1628 *et seq.*

his handwriting will not be sufficient.[76] But the suppletory oath of the party making the entries may be dispensed with under certain circumstances, upon proof of his handwriting.[77] Thus the books of account of a deceased person are competent evidence in favor of his executor or administrator if supported by the oath of the personal representative,[78] or, as is held in some jurisdictions, if proved to be in his handwriting by a competent witness.[79] A similar rule is applied where the party since making the charges has become insane, the books being offered by his guardian.[80] But it has been held that the fact that a party whose entries are sought to be introduced is absent from the state will not render them admissible upon proof of his handwriting.[81] Where one of several copartners who made the entries is dead[82] or is out of the jurisdiction of the court[83] the other copartner may swear to his handwriting in the books. But if the partner making the entry is alive and can be produced his testimony only is receivable,[84] except where a contrary provision is made by statute.[85]

(3) IDENTIFICATION OF BOOKS. It is held that it must appear that the books produced are the account-books of the party.[86]

(4) CRAFT OR OCCUPATION. The general rule has been laid down that the books of all persons practising in a regular craft or occupation which makes it necessary for books to be kept as the record of transactions are admissible in evidence to prove the usual subjects of book charges in such business.[87] Under

For sufficiency of oath in general see Hooker *v.* Johnson, 6 Fla. 730; Dwinel *v.* Pottle, 31 Me. 167; Forsee *v.* Matlock, 7 Heisk. (Tenn.) 421; Neville *v.* Northcutt, 7 Coldw. (Tenn.) 294.

Oath of party not required in New York.— Tomlinson *v.* Borst, 30 Barb. 42; Larue *v.* Rowland, 7 Barb. 107; Sickles *v.* Mather, 20 Wend. 72, 32 Am. Dec. 521.

76. Townsend *v.* Coleman, 18 Tex. 418, 20 Tex. 817.

77. Leighton *v.* Manson, 14 Me. 208; Odell *v.* Culbert, 9 Watts & S. (Pa.) 66, 42 Am. Dec. 317.

78. Pratt *v.* White, 132 Mass. 477; Sheehan *v.* Hennessey, 65 N. H. 101, 18 Atl. 652; Dodge *v.* Morse, 3 N. H. 232.

79. St. Louis, etc., R. Co. *v.* Murphy, 60 Ark. 333, 30 S. W. 419, 46 Am. St. Rep. 202; Mathews *v.* Saunders, 15 Ark. 255; Setchel *v.* Keigwin, 57 Conn. 473, 18 Atl. 594; Chase *v.* Burritt, (Conn. 1888) 14 Atl. 212; Buckley *v.* Buckley, 12 Nev. 423; Dicken *v.* Winters, 169 Pa. St. 126, 32 Atl. 289; Hoover *v.* Gehr, 62 Pa. St. 136; Odell *v.* Culbert, 9 Watts & S. (Pa.) 66, 42 Am. Dec. 317; Van Swearingen *v.* Harris, 1 Watts & S. (Pa.) 356. *Compare* Gill *v.* Staylor, 93 Md. 453, 49 Atl. 650.

80. Holbrook *v.* Gay, 6 Cush. (Mass.) 215.

81. Douglass *v.* Hart, 4 McCord (S. C.) 257 [*distinguishing* Spence *v.* Sanders, 1 Bay (S. C.) 119; Foster *v.* Sinkler, 1 Bay (S. C.) 40].

82. Leighton *v.* Manson, 14 Me. 208; White *v.* Murphy, 3 Rich. (S. C.) 369; Thomson *v.* Porter, 4 Strobh. Eq. (S. C.) 58, 53 Am. Dec. 653. *Compare* Römer *v.* Jaecksch, 39 Md. 585.

83. New Haven, etc., Co. *v.* Goodwin, 42 Conn. 230; Alter *v.* Berghaus, 8 Watts (Pa.) 77; Tunno *v.* Rogers, 1 Bay (S. C.) 480; Spence *v.* Sanders, 1 Bay (S. C.) 119; Foster *v.* Sinkler, 1 Bay (S. C.) 40.

84. Karr *v.* Stivers, 34 Iowa 123; Walker *v.* Parkham, 3 McCord (S. C.) 295. See also Horton *v.* Miller, 84 Ala. 537, 4 So. 370; American F. Ins. Co. *v.* First Nat. Bank, (Tex. Civ. App. 1895) 30 S. W. 384.

Books admitted on oaths of two partners coöperating in making entries.— Mitchell *v.* Belknap, 23 Me. 475; Smith *v.* Sanford, 12 Pick. (Mass.) 139, 22 Am. Dec. 415.

85. Webb *v.* Michener, 32 Minn. 48, 19 N. W. 82.

86. Smith *v.* Smith, 163 N. Y. 168, 57 N. E. 300, 52 L. R. A. 545; McGoldrick *v.* Traphagen, 88 N. Y. 334; Dooley *v.* Moan, 57 Hun (N. Y.) 535, 11 N. Y. Suppl. 239; Tomlinson *v.* Borst, 30 Barb. (N. Y.) 42; Foster *v.* Coleman, 1 E. D. Smith (N. Y.) 85; Vosburgh *v.* Thayer, 12 Johns. (N. Y.) 461.

87. Ganahl *v.* Shore, 24 Ga. 17, under statute. See also Tomlinson *v.* Borst, 30 Barb. (N. Y.) 42; Linnell *v.* Sutherland, 11 Wend. (N. Y.) 568.

This rule has been applied to the books of merchants (Bass *v.* Gobert, 113 Ga. 262, 38 S. E. 834; Stucky *v.* Sheckler, 12 Ky. L. Rep. 985; Foster *v.* Sinkler, 1 Bay (S. C.) 40), physicians (Weaver *v.* Morgan, 49 Ala. 142; Halliday *v.* Butt, 40 Ala. 178; Richardson *v.* Dorman, 28 Ala. 679; Simmons *v.* Means, 8 Sm. & M. (Miss.) 397; Clarke *v.* Smith, 46 Barb. (N. Y.) 30; Foster *v.* Coleman, 1 E. D. Smith (N. Y.) 85; *In re* Moffett, 32 Leg. Int. (Pa.) 213; Harlocker *v.* Gertner, 7 Pa. L. J. 277; McBride *v.* Watts, 1 McCord (S. C.) 384), printers (Thomas *v.* Dyott, 1 Nott & M. (S. C.) 186. See also Ward *v.* Powell, 3 Harr. (Del.) 379), keepers of grist-mills (Exum *v.* Davis, 10 Rich. (S. C.) 357) or sawmills (Gordan *v.* Arnold, 1 McCord (S. C.) 517), attorneys (Waterhouse *v.* Fogg, 38 Me. 425; Codman *v.* Caldwell, 31 Me. 560; Rexford *v.* Comstock, 3

modern statutes in some states the privilege of introducing account-books in evidence is extended to either party in all suits and actions, whether the parties are merchants or not.[88]

(5) KEEPING CLERK. To render a book of account admissible under the shop-book rule it is frequently laid down as a general rule that it must appear that the party offering the book had no clerk.[89] But, where the entries are as a matter of fact made by the party, the mere fact that he had a clerk is immaterial.[90] So it is held that the clerk intended is an employee who has something to do with and has knowledge generally of the business of his employer as to goods sold or work done, so that he can testify on the subject.[91] Thus it is held that one whose

N. Y. Suppl. 876; Charlton *v.* Lawry, 3 N. C. 14. See also Briggs *v.* Georgia, 15 Vt. 61. *Compare* Hale *v.* Ard, 48 Pa. St. 22; Meany *v.* Kleine, 3 Wkly. Notes Cas. (Pa.) 474), and tradesmen or mechanics (Tomlinson *v.* Borst, 30 Barb. (N. Y.) 42; Petrie *v.* Lynch, 1 Nott & M. (S. C.) 130; Lamb *v.* Hart, 2 Bay (S. C.) 362; Slade *v.* Teasdale, 2 Bay (S. C.) 172; Burleson *v.* Goodman, 32 Tex. 229). But in White *v.* St. Philip's Church, 2 McMull. (S. C.) 306, 39 Am. Dec. 125, it was held that the books of a tradesman or mechanic are admissible in evidence only to prove the performance and delivery of work done within the mechanic's shop, and that where the work is done outside of his shop, or on the premises of the party charged, such as building or repairing a house or any other fixture, there can be no necessity for books, for the work is apparent. So as to books of a schoolmaster. Oliver *v.* Phelps, 21 N. J. L. 597. But in Pelzer *v.* Cranston, 2 McCord (S. C.) 328, it was held that the books of a schoolmaster, although regularly kept, are not admissible to prove an account for instruction; there being no necessity, as such person should be able to furnish witnesses. The rule has been held not to extend to the books of a farmer or planter (Jeter *v.* Martin, 2 Brev. (S. C.) 156; Slade *v.* Teasdale, 2 Bay (S. C.) 172. *Compare* Tomlinson *v.* Borst, 30 Barb. (N. Y.) 42; Lamb *v.* Hart, 1 Brev. (S. C.) 105), a scrivener (Watson *v.* Bigelow, 2 Brev. (S. C.) 127; Slade *v.* Teasdale, 2 Bay (S. C.) 172), a journeyman shoemaker (Schall *v.* Eisner, 58 Ga. 190), a peddler (Thayer *v.* Deen, 2 Hill (S. C.) 677), or the keeper of a billiard table (Boyd *v.* Ladson, 4 McCord (S. C.) 76, 17 Am. Dec. 707). Nor does the rule apply to the accounts of a guardian kept with his ward. Fowler *v.* Hebbard, 40 N. Y. App. Div. 108, 57 N. Y. Suppl. 531.

88. Dunbar *v.* Wright, 20 Fla. 446; Hooker *v.* Johnson, 6 Fla. 730. See also Coleman *v.* Retail Lumberman's Ins. Assoc., 76 Minn. 31, 79 N. W. 588; Levine *v.* Lancashire Ins. Co., 66 Minn. 138, 68 N. W. 855.

89. Jackson *v.* Evans, 8 Mich. 476; Irish *v.* Horn, 84 Hun (N. Y.) 121, 32 N. Y. Suppl. 455; Tomlinson *v.* Borst, 30 Barb. (N. Y.) 42; Conklin *v.* Stamler, 2 Hilt. (N. Y.) 422; Foster *v.* Coleman, 1 E. D. Smith (N. Y.) 85; Vosburgh *v.* Thayer, 12 Johns. (N. Y.) 461. See Martin *v.* Fyffe, Dudley (Ga.) 16; Harris *v.* Caldwell, 2 McMull. (S. C.) 133, holding that where a shopkeeper himself sold and delivered goods to a party, and during the same day the entries were made by another person, who occasionally acted as clerk for him, the book was no evidence of the debt, and that the evidence was inadmissible.

90. Townsend *v.* Coleman, 18 Tex. 418, 20 Tex. 817.

Entries made partly by party.—It has been held that the mere fact that the entries are made partly by the party himself and partly by his clerk will not render the book inadmissible as to the entries made by the party. Dunlap *v.* Cooper, 66 Ga. 211; McDaniel *v.* Trulock, 27 Ga. 366; Wheeler *v.* Smith, 18 Wis. 651.

91. Smith *v.* Smith, 163 N. Y. 168, 57 N. E. 300, 52 L. R. A. 543; McGoldrick *v.* Traphagen, 88 N. Y. 334; Atwood *v.* Barney, 80 Hun (N. Y.) 1, 29 N. Y. Suppl. 810; Rexford *v.* Comstock, 3 N. Y. Suppl. 876; Sickles *v.* Mather, 20 Wend. (N. Y.) 72, 32 Am. Dec. 521. See also Young *v.* Luce, 21 N. Y. Suppl. 225. *Compare* Harris *v.* Caldwell, 2 McMull. (S. C.) 133.

A foreman who tended to sales no further than merely delivering goods manufactured, neither keeping memoranda of the delivery for temporary purposes nor making entries on the employer's books, has been held not to be a clerk within the meaning of the rule. Sickles *v.* Mather, 20 Wend. (N. Y.) 72, 32 Am. Dec. 521.

Books kept by party's wife.—It is held that a party's wife who makes entries from memoranda furnished by him is not a clerk within the meaning of the rule requiring proof that the party had no clerk in order to render his shop-books admissible. Smith *v.* Smith, 163 N. Y. 168, 57 N. E. 300, 52 L. R. A. 543. So it has been held that a wife who keeps her husband's accounts is competent, where he introduces his book of original entries, to testify that she made the same by his direction and in his presence, and after she has so testified he may testify as to the times when they were made and that the charges contained therein are just and true. Littlefield *v.* Rice, 10 Metc. (Mass.) 287. *Compare* Carr *v.* Cornell, 4 Vt. 116. But to render such evidence admissible it has been held that the entries must be made under the eye of the husband, and that an entry made merely by the direction of a husband who could not write is inadmissible. Luce *v.* Doane, 38 Me. 478.

business is simply to keep the books is not a clerk within the meaning of the rule.[92] In some jurisdictions, under statute,[93] and even apart from statute,[94] a party is allowed to prove his own books whether kept by himself or by a clerk or agent.

(6) Proof of Delivery of Goods and Performance of Services. The rule is sometimes laid down that to render a party's books of account admissible he must make oath or in some way prove that the articles were delivered or the services actually performed.[95] In other jurisdictions the rule is stated that some of the articles charged must have been delivered or some of the services rendered.[96]

(7) Form and Regularity — (a) In General. The entries must appear to have been made in the regular course of business and under such circumstances as to import trustworthiness,[97] and the book must be in such shape that it may be presumed to be the register of the daily business transactions of the party offering it.[98] The law, however, prescribes no particular form in which a book must

92. McGoldrick *v.* Traphagen, 88 N. Y. 334.

93. House *v.* Beak, 141 Ill. 290, 30 N. E. 1065, 33 Am. St. Rep. 307; Perry State Bank *v.* Elledge, 99 Ill. App. 307; Webb *v.* Michener, 32 Minn. 48, 19 N. W. 82. *Compare* Ingersoll *v.* Banister, 41 Ill. 388, decided prior to statute.

94. Webb *v.* Pindergrass, 4 Harr. (Del.) 439.

95. *Maine.*— Godfrey *v.* Codman, 32 Me. 162; Dwinel *v.* Pottle, 31 Me. 167.

North Carolina.— Adkinson *v.* Simmons, 33 N. C. 416.

South Carolina.— Thomson *v.* Porter, 4 Strobh. Eq. 58, 53 Am. Dec. 653.

Tennessee.— Neville *v.* Northcutt, 7 Coldw. 294.

Texas.—Baldridge *v.* Penland, 68 Tex. 441, 4 S. W. 565.

Compare Hooker *v.* Johnson, 6 Fla. 730; Bookout *v.* Shannon, 59 Miss. 378, where it was held that a physician suing his patient's administrator, being incompetent to testify, may introduce his books, apparently fair and unobjectionable, supported with suppletory proof, and a key to explain them, without preliminary proof that the visits were ever made.

See 20 Cent. Dig. tit. "Evidence," § 1628 *et seq.*

96. Ingersoll *v.* Banister, 41 Ill. 388; Boyer *v.* Sweet, 4 Ill. 120; Conklin *v.* Stamler, 2 Hilt. (N. Y.) 422, 8 Abb. Pr. (N. Y.) 395, 17 How. Pr. (N. Y.) 399; Morrill *v.* Whitehead, 4 E. D. Smith (N. Y.) 239; Vosburgh *v.* Thayer, 12 Johns. (N. Y.) 461. See also House *v.* Beak, 141 Ill. 290, 30 N. E. 1065, 33 Am. St. Rep. 307; Kent *v.* Garvin, 1 Gray (Mass.) 148; Linnell *v.* Sutherland, 11 Wend. (N. Y.) 568.

97. *Alabama.*— Avery *v.* Avery, 49 Ala. 193.

Georgia.— Bower *v.* Smith, 8 Ga. 74.

Illinois.— Pittsburgh, etc., R. Co. *v.* Fawsett, 56 Ill. 513; Dickson *v.* Kewanee Electric Light, etc., Co., 53 Ill. App. 379.

Iowa.— Karr *v.* Stivers, 34 Iowa 123.

Massachusetts.—Riley *v.* Boehm, 167 Mass. 183, 45 N. E. 84; Donovan *v.* Boston, etc., R. Co., 158 Mass. 450, 33 N. E. 583; Pratt *v.* White, 132 Mass. 477.

New York.— Skipworth *v.* Deyell, 83 Hun 307, 31 N. Y. Suppl. 918.

The mere existence of errors, however, does not, in the absence of evidence that the books were fraudulently falsified, necessarily render them incompetent. Gosewich *v.* Zebley, 5 Harr. (Del.) 124; Levine *v.* Lancashire Ins. Co., 66 Minn. 138, 68 N. W. 855; Rodenbough *v.* Rosebury, 24 N. J. L. 491. See also Mathes *v.* Robinson, 8 Metc. (Mass.) 269, 41 Am. Dec. 505; Cogswell *v.* Dolliver, 2 Mass. 217, 3 Am. Dec. 45.

98. *Georgia.*— Petit *v.* Teal, 57 Ga. 145; Bower *v.* Smith, 8 Ga. 74.

Illinois.— Kibbe *v.* Bancroft, 77 Ill. 18; Treadway *v.* Treadway, 5 Ill. App. 478.

Massachusetts.— Prince *v.* Smith, 4 Mass. 455.

New Hampshire.— Richardson *v.* Emery, 23 N. H. 220; Eastman *v.* Moulton, 3 N. H. 156.

Pennsylvania.— McKnight *v.* Newell, 207 Pa. St. 562, 57 Atl. 39; Smith *v.* Lane, 12 Serg. & R. 80.

Texas.— Baldridge *v.* Penland, 68 Tex. 441, 4 S. W. 565.

See 20 Cent. Dig. tit. "Evidence," § 1438 *et seq.*

A single charge of a sale or other transaction in a book will not render it a book of accounts within the rule.

California.— See Le Franc *v.* Hewitt, 7 Cal. 186.

Illinois.— Ingersoll *v.* Banister, 41 Ill. 388.

Kansas.— See Metzger *v.* Burnett, 5 Kan. App. 374, 48 Pac. 599.

Montana.— Ryan *v.* Dunphy, 4 Mont. 356, 5 Pac. 324, 47 Am. Rep. 355.

New Jersey.— Carman *v.* Dunham, 11 N. J. L. 189; Wilson *v.* Wilson, 6 N. J. L. 95.

New York.—Corning *v.* Ashley, 4 Den. 354; Vosburgh *v.* Thayer, 12 Johns. 461.

See 20 Cent. Dig. tit. "Evidence," § 1455.

Book containing charges against adverse party only.— In Fulton's Estate, 178 Pa. St. 78, 35 Atl. 880, 35 L. R. A. 133, it was held that a book which shows on its face that it was not one of entries in the regular course of business, but was a separate book contain-

be kept and no particular material to be used,[99] and books may be admitted that are deficient in many respects, since it does not follow that before a plaintiff can fairly ask a verdict he may not be compelled to supply deficiencies in the evidence which his book affords.[1] Upon this principle marks on a shingle[2] or on a notched stick have been admitted.[3]

(b) Ledgers — aa. *In General.* Books of account are admissible, although kept in ledger form; that is, where all the charges against the adverse party are entered on the same leaf of the book with no intervening charges against others,[4]

ing no charges except against defendant, is not admissible as a book of original entries, although it contained several items against defendant. So in Swing *v.* Sparks, 7 N. J. L. 59, it was held that a book of accounts containing charges in several successive years, all written from oral directions, and all against one person, without any intervening charge, is not sufficient evidence to go to the jury. On the other hand it has been held that the fly leaf of a bible containing only one account is a sufficient book of account, within the meaning of the Missouri statute. Stephan *v.* Metzger, 95 Mo. App. 609, 69 S. W. 625.

Entries on first leaf of book.— An entry on the front leaf of a tradesman's books, before the first regular page of the book, and not in the regular course of charges, is not evidence to go to a jury to establish an account. Lynch *v.* McHugo, 1 Bay (S. C.) 33.

Entries on last leaf of book.— Charges of cash paid, advanced or lent, written on one of the last leaves of a book, detached from the daily entries and accounts by intervening blank leaves, and dated during the time of such entries and accounts, are not evidence. Wilson *v.* Wilson, 6 N. J. L. 95.

Under statute in some states the book must show a continuous dealing with persons generally or several items of charges at different times against the other party in the same book. Arney *v.* Meyer, 96 Iowa 395, 65 N. W. 337; Security Co. *v.* Graybeal, 85 Iowa 543, 52 N. W. 497, 39 Am. St. Rep. 311; Atkins *v.* Seeley, 54 Nebr. 688, 74 N. W. 1100; Pollard *v.* Turner, 22 Nebr. 366, 35 N. W. 192.

99. Hooper *v.* Taylor, 39 Me. 224; Witherell *v.* Swan, 32 Me. 247; Cummings *v.* Nichols, 13 N. H. 420, 38 Am. Dec. 501.

Illustration.— In an action to recover pay for labor, plaintiff's time-book, kept in a tabular form, in which the name of the laborer is inserted on the side, and all the days of the month are denoted by figures at the top, and under those figures are inserted other figures denoting the time of labor on those days, is admissible in evidence, with plaintiff's suppletory oath, not only as to his own labor, but also as to the labor of his apprentice. Mathes *v.* Robinson, 8 Metc. (Mass.) 269, 41 Am. Dec. 505.

Entries in pencil.— It is no objection to a party's book of accounts that the entries are made in pencil. Gibson *v.* Bailey, 13 Metc. (Mass.) 537; True *v.* Bryant, 32 N. H. 241; Hill *v.* Scott, 12 Pa. St. 168; Walton's Estate, 4 Kulp (Pa.) 487.

Books formerly used by another.— Account-books of original entry are not inadmissible because they were formerly used by a firm of which plaintiff was a member, and he continued to use them after the retirement of his copartner. Dunlap *v.* Hooper, 66 Ga. 211.

Private account of partner kept in firm-book.— Plaintiff was a member of a firm and kept his private account with defendant in the firm-book with the authority of his partner and at the request of defendant. It was held in a suit by plaintiff against defendant that this private account could be proved by the firm-book. White *v.* Tucker, 9 Iowa 100.

Records of a cash register are not admissible as books of account. Cullinan *v.* Moncrief, 90 N. Y. App. Div. 538, 85 N. Y. Suppl. 745.

A question for the court.— It is for the court to decide whether the book offered possesses the requisites of a book of accounts, and the question of competency must be determined by the appearance and character of the book and all the circumstances of the case, including the degree of education of the party, and the nature of his employment, indicating that it has been kept honestly and with reasonable care and accuracy or the reverse.

Alabama.— See Halliday *v.* Butt, 40 Ala. 178.

Florida.— Dunbar *v.* Wright, 20 Fla. 446.

Georgia.— Holden *v.* Spier, 65 Kan. 412, 70 Pac. 348.

Massachusetts.— Riley *v.* Boehm, 167 Mass. 183, 45 N. E. 84; Com. *v.* Morgan, 159 Mass. 375, 34 N. E. 458; Pratt *v.* White, 132 Mass. 477; Com. *v.* Coe, 115 Mass. 481; Hawks *v.* Charlemont, 110 Mass. 110; Mathes *v.* Robinson, 8 Metc. 269, 41 Am. Dec. 505; Prince *v.* Smith, 4 Mass. 455; Cogswell *v.* Dolliver, 2 Mass. 217, 3 Am. Dec. 45.

Mississippi.— Moody *v.* Roberts, 41 Miss. 74.

Ohio.— Allen *v.* Davis, Tapp. 60.

See 20 Cent. Dig. tit. "Evidence," § 1628 *et seq.*

1. Platt *v.* White, 132 Mass. 477.

2. Kendall *v.* Field, 14 Me. 30, 30 Am. Dec. 728. See also Pallman *v.* Smith, 135 Pa. St. 188, 19 Atl. 891.

3. Rowland *v.* Burton, 2 Harr. (Del.) 288.

4. *Massachusetts.*— Gibson *v.* Bailey, 13 Metc. 537; Cogswell *v.* Dolliver, 2 Mass. 217, 3 Am. Dec. 45.

New Hampshire.— Wells *v.* Hatch, 43 N. H. 246.

except when excluded on the ground that the original books of entry are the best evidence.[5] A ledger copied from a day-book or blotter is held to be inadmissible.[6] But a ledger has been held admissible, although a pass-book has been used for making memoranda to secure accuracy in the entries.[7]

bb. *Necessity of Production of Ledger.* When it appears from marks upon a day-book that entries therein have been transferred to a ledger the ledger should be produced in connection with the day-book.[8] But where it does not affirmatively appear from the day-book that any of the accounts have been posted or credits entered in the ledger, it is not necessary to produce the ledger without previous notice.[9]

(c) Entries on Separate Sheets of Paper. It has been held not to be material that the entries are made on a separate sheet or sheets of paper,[10] or even on scraps of paper.[11] On the other hand it has been held that entries made on loose or unconnected sheets of paper do not amount to books of account, since they cannot be presumed to be the daily minutes of business transactions.[12]

(d) Diaries and Memoranda of Accounts. Loose memoranda or entries in diaries or memorandum books used for recording any matter of which the owner may wish to make note, while admissible for the purpose of refreshing the memory of a witness,[13] have generally been excluded as independent evidence.[14]

New Jersey.— Jones *v.* De Kay, 3 N. J. L. 955.

New York.— Farley *v.* Gibbs, 4 N. Y. Suppl. 353.

Pennsylvania.— Hoover *v.* Gehr, 62 Pa. St. 136; Odell *v.* Culbert, 9 Watts & S. 66, 42 Am. Dec. 317; Rehrer *v.* Zeigler, 3 Watts & S. 258; Thomson *v.* Hopper, 1 Watts & S. 467; Rodman *v.* Hoops, 1 Dall. 85, 1 L. ed. 47.

South Carolina.— Toomer *v.* Gadsden, 4 Strobh. 193; Hurtz *v.* Neufville, 2 McMull. 138.

Compare Leveringe *v.* Dayton, 15 Fed. Cas. No. 8,288, 4 Wash. 698.

See 20 Cent. Dig. tit. "Evidence," § 1438 *et seq.*

Entries irrelevant to issue.— Ledger entries are properly rejected where they contain no charges involved in the issue between the parties (Wells *v.* Hatch, 43 N. H. 246) or where it does not appear whether they refer to the transactions under consideration (Seligman *v.* Ten Eyck, 53 Mich. 285, 18 N. W. 818).

5. *Alabama.*— Talladega First Nat. Bank *v.* Chaffin, 118 Ala. 246, 24 So. 80.

Colorado.— Jones *v.* Henshall, 3 Colo. App. 448, 34 Pac. 254.

Illinois.— McCormick *v.* Elston, 16 Ill. 204.

Iowa.— Way *v.* Cross, 95 Iowa 258, 63 N. W. 691.

New York.— Griesheimer *v.* Tanenbaum, 124 N. Y. 650, 26 N. E. 957 [*reversing* 8 N. Y. Suppl. 582]; Vilmar *v.* Schall, 35 N. Y. Super. Ct. 67.

Oregon.— Durkheimer *v.* Heilner, 24 Oreg. 270, 33 Pac. 401, 34 Pac. 475.

Pennsylvania.— *In re* Huston, 167 Pa. St. 217, 31 Atl. 553.

Texas.— Pohl *v.* Bradford, (Civ. App. 1894) 25 S. W. 984.

Compare Columbia *v.* Harrison, 2 Mill (S. C.) 213.

See 20 Cent. Dig. tit. "Evidence," § 1443.

Ledger introduced in corroboration of day-book.— Stickle *v.* Otto, 86 Ill. 161.

6. Estes *v.* Jackson, 53 S. W. 271, 21 Ky. L. Rep. 859; Breinig *v.* Meitzler, 23 Pa. St. 156.

7. Hoover *v.* Gehr, 62 Pa. St. 136; Gifford *v.* Thomas, 62 Vt. 34, 19 Atl. 1088. See also Farley *v.* Gibbs, 4 N. Y. Suppl. 353.

8. Prince *v.* Swett, 2 Mass. 569; Eastman *v.* Moulton, 3 N. H. 156; Bonnell *v.* Mawha, 37 N. J. L. 198. See also Stetson *v.* Godfrey, 20 N. H. 227. *Compare* Stokes *v.* Fenner, 10 Phila. (Pa.) 14.

9. Hervey *v.* Harvey, 15 Me. 357; Tindall *v.* McIntyre, 24 N. J. L. 147.

10. Taylor *v.* Tucker, 1 Ga. 231; Hooper *v.* Taylor, 39 Me. 224. For a similar holding in action on book-account under a Vermont statute see Bell *v.* McLeran, 3 Vt. 185.

Sheet of paper sewed together in octavo admitted.— Hall *v.* Field, 4 Harr. (Del.) 533 note *a*.

Single sheet severed from book by mistake. — If an account is offered on a single piece of paper, proof is admissible to show that it is a part of an account-book severed by mistake or accident, in order that it may be read as a part of the book. Allen *v.* Davis, Tapp. (Ohio) 60.

11. Smith *v.* Smith, 4 Harr. (Del.) 532.

12. Jones *v.* Jones, 21 N. H. 219; Thomson *v.* McKelvey, 13 Serg. & R. (Pa.) 126. See also Kennedy *v.* Ankrim, Tapp. (Ohio) 40; Fulton's Estate, 178 Pa. St. 78, 35 Atl. 880, 35 L. R. A. 133.

13. Barksdale *v.* McKewn, 2 Nott & M. (S. C.) 17; Bates *v.* Sabin, 64 Vt. 511, 24 Atl. 1013.

14. *Illinois.*— Cairns *v.* Hunt, 78 Ill. App. 420; Boyd *v.* Jennings, 46 Ill. App. 290.

Iowa.— Under Code, § 3657, providing for the admission of evidence of books of account containing charges by one party against the other, made in the ordinary course of business, a book used as a mere memorandum book, from which to enter up charges against parties in a sale book, is not admissible in evi-

(e) Check-Book Stubs. A blank check-book from which checks when filled are cut out and in which a memorandum is entered in the margin, opposite to each check cut out, of the name of the drawee, the amount, date, etc., is not a book of accounts to which the party can swear.[15] They are inadmissible generally to show cash transactions, even granting that they are to be treated as books of account.[16]

(f) Suspicious Appearance or Circumstances. Suspicious circumstances appearing on the face of a book of accounts or otherwise proved against it must be explained before it can be admitted in evidence.[17] Thus a book of original entries bearing manifest and suspicious marks of erasure or alteration in a material point will be rejected unless the alteration is satisfactorily explained by the party.[18] It has even been held that the explanation must be made by a disinterested person, the explanation of the party being deemed insufficient.[19] So as a general rule mutilated books are not entitled to credit in favor of the owner.[20]

dence, since such memorandum book is not an original book of account as between the parties. Hancock *v.* Hintrager, 60 Iowa 374, 14 N. W. 725. See also Hart *v.* Livingston, 29 Iowa 217.

Maine.— Waldron *v.* Priest, 96 Me. 36, 51 Atl. 235.

Massachusetts.— Riley *v.* Boehm, 167 Mass. 183, 45 N. E. 84; Costelo *v.* Crowell, 139 Mass. 588, 2 N. E. 698; Watts *v.* Howard, 7 Metc. 478.

Nebraska.— Pollard *v.* Turner, 22 Nebr. 366, 35 N. W. 192.

New Hampshire.— Richardson *v.* Emery, 23 N. H. 220.

Pennsylvania.— Gibbons' Estate, 1 Leg. Gaz. 10.

Tennessee.— Callaway *v.* McMillian, 11 Heisk. 557.

Texas.— Kotwitz *v.* Wright, 37 Tex. 82.

Vermont.— Barnes *v.* Dow, 59 Vt. 530, 10 Atl. 258; Barber *v.* Bennett, 58 Vt. 476, 4 Atl. 231, 56 Am. Rep. 565; Laphan *v.* Kelly, 35 Vt. 195. See also *In re* Diggins, 68 Vt. 198, 34 Atl. 696. *Compare* Gleason *v.* Kinney, 65 Vt. 560, 27 Atl. 208, where it was held that if an entry is in proper form and refers to proper matter of book-account, it does not lose its character as independent evidence from the fact that it is made upon a diary and not upon the regular account-books of the party making it.

Wyoming.— Hay *v.* Peterson, 4 Wyo. 419, 45 Pac. 1073, 34 L. R. A. 581.

See 20 Cent. Dig. tit. "Evidence," § 1438 *et seq.*

Rule applied to loan and collection registers.— U. S. Bank *v.* Burson, 90 Iowa 191, 57 N. W. 705; Security Co. *v.* Graybeal, 85 Iowa 543, 52 N. W. 497, 39 Am. St. Rep. 311; Labaree *v.* Klosterman, 33 Nebr. 150, 50 N. W. 1102; Martin *v.* Scott, 12 Nebr. 42, 10 N. W. 532.

15. Carter *v.* Fischer, 127 Ala. 52, 28 So. 376; Watts *v.* Shewell, 31 Ohio St. 331; Wilson *v.* Goodin, Wright (Ohio) 219; Mathias Planing-Mill Co. *v.* Hazen, 20 Ohio Cir. Ct. 287, 11 Ohio Cir. Dec. 54. *Compare* Fulkerson *v.* Long, 63 Mo. App. 268.

16. Simons *v.* Steele, 82 N. Y. App. Div. 202, 81 N. Y. Suppl. 737 [*affirmed* in 177 N. Y. 542, 69 N. E. 1131].

17. Caldwell *v.* McDermit, 17 Cal. 464; Cogswell *v.* Dolliver, 2 Mass. 217, 3 Am. Dec. 45; McNulty's Appeal, 135 Pa. St. 210, 19 Atl. 936. Where the entries in a book of account extended from 1874 to 1881, and had every appearance of having been made at the same time — the first entries, although written in pencil, being as fresh and legible as the last — it was held not error for the court to exclude them from evidence. Dunbar *v.* Wright, 20 Fla. 446. See also Davis *v.* Sanford, 91 Mass. 216.

18. *Connecticut.*— See Downer *v.* Lothrop, 1 Root 273.

Massachusetts.— Pratt *v.* White, 132 Mass. 477.

Nebraska.— See Campbell *v.* Holland, 22 Nebr. 587, 35 N. W. 871.

Pennsylvania.— Bougher *v.* Conn, 1 Pa. Co. Ct. 184, 17 Phila. 81.

Texas.— Baldridge *v.* Penland, 68 Tex. 441, 4 S. W. 565.

See 20 Cent. Dig. tit. "Evidence," §§ 1460, 1461.

This rule has been applied to an alteration in the name of the person charged (Churchman *v.* Smith, 6 Whart. (Pa.) 146, 36 Am. Dec. 211. See Bartlett *v.* Morgan, 4 Wash. 723, 31 Pac. 22), and in the amount charged (Doster *v.* Brown, 25 Ga. 24, 71 Am. Dec. 153).

Alteration immaterial to issue.— In an action against a corporation for services, its receipted pay-rolls are admissible in evidence for the purpose of showing the practice concerning payments; and this notwithstanding interlineations, the alterations being immaterial to the issue. Martin *v.* Victor Mill, etc., Co., 18 Nev. 303, 3 Pac. 488.

19. Caldwell *v.* McDermit, 17 Cal. 464.

20. Lovelock *v.* Gregg, 14 Colo. 53, 23 Pac. 86; Harrold *v.* Smith, 107 Ga. 849, 33 S. E. 640; Deimel *v.* Brown, 35 Ill. App. 303. See also Cheever *v.* Brown, 30 Ga. 904. *Compare* Jones *v.* De Kay, 3 N. J. L. 955.

Illustration.— Where payments alleged to have been made by a deceased mortgage debtor are denied by the creditor, they are not sufficiently proved by entries in the debtor's handwriting on the last page in his day-book, from which the immediately preceding leaves have been torn, while the regu-

(g) Certainty and Particularity of Charges — aa. *In General.* There is no particular form in which a book charge must be made in order that it may be admissible in evidence.[21] But it must be made in such a manner as to show of itself a charge against the adverse party and the nature of the charge, so that in connection with a party's oath as to requisite preliminary matters it will show the nature of the claim without further evidence from the party to interpret the meaning of arbitrary characters, or terms intelligible only to himself.[22] Charges need not, however, be such as to be understood by the general public if they are intelligible to persons in the profession or business; although where they are not intelligible to the common understanding it would seem to be necessary to support them by other evidence as to their meaning and character.[23] The entries must be sufficient to show to a reasonable certainty what article or thing is made the basis of the charge.[24] It has also been held that the entries to be admissible must contain the price or value of the goods sold or services rendered;[25] but in other jurisdictions entries to which the price or value of the goods or services is not affixed are admitted when accompanied by other proof of the price or value.[26] The mere fact that the measure, weight, and quantity are not given in connection with the items will not render the accounts inadmissible.[27]

bb. *Lumping Charges.* Charges must as a general rule be specific and particular, and lumping accounts renders them inadmissible.[28] But in this respect, it

lar entries in a prior portion of the book are followed by a number of blank pages. Robinson *v.* Hoyt, 39 Mich. 405.

Sheets of paper torn from a book of original entries, containing charges of work done by plaintiff for defendant, are inadmissible to show the work done. Hough *v.* Doyle, 4 Rawle (Pa.) 291; Carroll *v.* School, 2 Phila. (Pa.) 260.

Mutilated books inadmissible as secondary evidence.— The production of a book of accounts, with three leaves cut out, kept by a person deceased, together with evidence of his declarations that he had made charges in his book as advancements to his children, are not competent evidence that such advancements had been made on the missing leaves. Hartwell *v.* Rice, 1 Gray (Mass.) 587.

Mutilation after commencement of suit.— A memorandum book, out of which some of the entries bearing on the cause of action have been torn after the action was commenced, is not admissible in evidence. Johnson *v.* Fry, 88 Va. 695, 12 S. E. 973, 14 S. E. 183.

The fact that books of account have become shopworn from use, and the covers and some outside leaves lost, there being nothing to indicate any fraud or purpose to destroy entries, is not a justification for the exclusion of the entries proved; the condition of the books is a matter going to their weight and credibility with the jury. Weigle *v.* Brautigam, 74 Ill. App. 285.

21. Miller *v.* Shay, 145 Mass. 162, 13 N. E. 468, 1 Am. St. Rep. 449; Remick *v.* Rumery, 69 N. H. 601, 45 Atl. 574; Cummings *v.* Nichols, 13 N. H. 420, 38 Am. Dec. 501; Staggers' Estate, 8 Pa. Super. Ct. 260.

22. Remick *v.* Rumery, 69 N. H. 601, 45 Atl. 574; Swain *v.* Cheney, 41 N. H. 232; Cummings *v.* Nichols, 13 N. H. 420, 38 Am. Dec. 501; Hough *v.* Doyle, 4 Rawle (Pa.) 291.

23. Cummings *v.* Nichols, 13 N. H. 420, 38 Am. Dec. 501; Fulton's Estate, 178 Pa. St. 78, 35 Atl. 880, 35 L. R. A. 133; Hough *v.* Doyle, 4 Rawle (Pa.) 291.

Books of physician.— Thus, in an action by a physician to recover for services rendered, his books of account are admissible in evidence, although some of the charges are made in the usual abbreviations employed by the profession. Bay *v.* Cook, 22 N. J. L. 343. *Compare* Hedges *v.* Boyle, 7 N. J. L. 68; Kelley's Estate, 5 Pa. Dist. 263; German's Estate, 16 Phila. (Pa.) 318.

24. Walton's Estate, 4 Kulp (Pa.) 487; Baldridge *v.* Penland, 68 Tex. 441, 4 S. W. 565.

25. Witherell *v.* Swan, 32 Me. 247; Hagaman *v.* Case, 4 N. J. L. 370. See also Manufacturing Co. *v.* Harding, 3 Pa. Co. Ct. 150.

Price fixed by law.— A statement of the quantity or amount of goods delivered or services rendered is sufficient if the price or value is fixed by law. Witherell *v.* Swan, 32 Me. 247.

26. Morris *v.* Briggs, 3 Cush. (Mass.) 342; Remick *v.* Rumery, 69 N. H. 601, 45 Atl. 574; Steele *v.* John R. Howells Mfg. Co., 4 Kulp (Pa.) 414; Jones *v.* Orton, 65 Wis. 9, 26 N. W. 172.

27. Hooper *v.* Taylor, 39 Me. 224; Pratt *v.* White, 132 Mass. 477.

28. *Georgia.*— Williams *v.* Abercrombie, Dudley 252.

Massachusetts.— Earle *v.* Sawyer, 6 Cush. 142; Henshaw *v.* Davis, 5 Cush. 145.

Pennsylvania.— McKnight *v.* Newell, 207 Pa. St. 562, 57 Atl. 39; Foreman's Estate, 7 Pa. Dist. 214, 20 Pa. Co. Ct. 627; Harbison *v.* Hawkins, 6 Leg. Gaz. 157. See also Nichols *v.* Haynes, 78 Pa. St. 174.

Rhode Island.— Cargill *v.* Atwood, 18 R. I. 303, 27 Atl. 214.

has been held, some latitude is allowed, depending upon the nature of the case, and the matter must rest to a great extent in the discretion of the court.[29] Accordingly single charges for services extending over several days,[30] or for goods delivered during a similar period, especially if delivered under a single order,[31] have been admitted.

cc. *Dates.* It has been held that a book of accounts is not to be rejected because the accounts are without date, as the date may be established by other evidence.[32] On the other hand it is held that there must be dates to the entries, although it is not necessary that the precise day of the month should be affixed to the charge in all cases, if the month is given and the books appear to be regular in other respects.[33]

(h) Completeness of Accounts. To entitle books of account to be received as evidence, it is held that it must appear that the entries therein are designed at least to embrace all the items of the account between the parties which are proper subjects of entry.[34]

(i) Original Entries Required — aa *In General.* To be admitted in evidence the book must appear to contain the party's original entries or the first permanent records of the transactions, and when the contrary is discoverable upon the face of the books, or comes out upon the examination of the party, or otherwise, they ought to be rejected as incompetent evidence.[35] But it is not a valid objection to the admission in evidence of original entries that they are in a book which contains other charges admitted not to be original.[36]

South Carolina.— Lance *v.* McKenzie, 2 Bailey 449; Petrie *v.* Lynch, 1 Nott & M. 130.

See 20 Cent. Dig. tit. "Evidence," § 1453 *et seq.*

Illustrations.— A book entry in the following form, "B. Corr, Dr. July 13th 1880. To repairing brick machine, $1,932.76," was held inadmissible. Corr *v.* Sellers, 100 Pa. St. 169, 14 Am. Rep. 370. The same was held of the following charge: "To building 92¾ rods cedar fence at 75 cts. $69.56." Towle *v.* Blake, 38 Me. 95. An entry in a physician's book of charges as follows, "13 dollars for medicine and attendance on one of the General's daughters, in curing the whooping cough," has been held not sufficiently specific to be admitted in evidence. Hughes *v.* Hampton, 3 Brev. (S. C.) 544.

Balance from former account.— A book entry reading, "Balance from former account," has been held inadmissible. Buckner *v.* Meredith, 1 Brewst. (Pa.) 306. *Compare* Cargill *v.* Atwood, 18 R. I. 303, 27 Atl. 214.

29. Cummings *v.* Nichols, 13 N. H. 420, 38 Am. Dec. 501.

30. Cummings *v.* Nichols, 13 N. H. 420, 38 Am. Dec. 501; Bay *v.* Cook, 22 N. J. L. 343.

31. Le Franc *v.* Hewitt, 7 Cal. 186.

32. Doster *v.* Brown, 25 Ga. 24, 71 Am. Dec. 153.

33. Cummings *v.* Nichols, 13 N. H. 420, 38 Am. Dec. 501. See also McNulty's Appeal, 135 Pa. St. 210, 19 Atl. 936; Harbison *v.* Hawkins, 6 Leg. Gaz. (Pa.) 157.

Accounts dated on Sunday held inadmissible.— Walton's Estate, 4 Kulp (Pa.) 487.

34. Countryman *v.* Bunker, 101 Mich. 218, 59 N. W. 422.

35. *Arkansas.*—See Mathews *v.* Sanders, 15 Ark. 255.

California.— Watrous *v.* Cunningham, 71 Cal. 30, 11 Pac. 811.

Florida.— Hooker *v.* Johnson, 6 Fla. 730.

Georgia.— Martin *v.* Fyffe, Dudley 16.

Illinois.—Schnellbacher *v.* Frank McLaughlin Plumbing Co., 108 Ill. App. 486; Cairns *v.* Hunt, 78 Ill. App. 420.

Iowa.— Frick *v.* Kabaker, 116 Iowa 494, 90 N. W. 498; Arney *v.* Meyer, 96 Iowa 395, 65 N. W. 337; Security Co. *v.* Graybeal, 85 Iowa 543, 52 N. W. 497, 39 Am. St. Rep. 311.

Kentucky.— Lawhorn *v.* Carter, 11 Bush 7; Groschell *v.* Knoll, 10 Ky. L. Rep. 314.

Maine.— Witherell *v.* Swan, 32 Me. 247.

Massachusetts.— Stetson *v.* Wolcott, 15 Gray 545; Cogswell *v.* Dolliver, 2 Mass. 217, 3 Am. Dec. 45.

Nebraska.— Pollard *v.* Turner, 22 Nebr. 366, 35 N. W. 192.

New York.— Winne *v.* Hills, 91 Hun 89, 36 N. Y. Suppl. 683.

Pennsylvania.— Breinig *v.* Meitzler, 23 Pa. St. 156; Budden *v.* Petriken, 5 Watts 286; Curren *v.* Crawford, 4 Serg. & R. 3.

Texas.— Flato *v.* Brod, 37 Tex. 734; Cole *v.* Dial, 8 Tex. 347; Guthrie *v.* Mann, (Civ. App. 1896) 35 S. W. 710. See also Missouri Pac. R. Co. *v.* Johnson, (Sup. 1888) 7 S. W. 838.

See 20 Cent. Dig. tit. "Evidence," § 1455 *et seq.*

Book shown to be party's only book.— Evidence that the account-book of a deceased person is the only book kept by him is equivalent to proof that they are books of original entry. Patrick *v.* Jack, 82 Ill. 81; Van Swearingen *v.* Harris, 1 Watts & S. (Pa.) 356.

36. Chisholm *v.* Beaman Mach. Co., 160 Ill. 101, 43 N. E. 796; Ives *v.* Niles, 5 Watts (Pa.) 323. *Compare* Fitzgerald *v.* McCarty, 55 Iowa 702, 8 N. W. 646, where it was held that a ledger to which accounts from other books are transferred is not a book of origi-

bb *Copies of Destroyed Originals Made by Party.* An account purporting to be drawn out by the party himself from his original and daily minutes is not as a general rule admissible in evidence, although the book from which such statement might have been copied has been burnt or destroyed by accident.[37] But it has been held that the transcript is admissible if there is proof that the items of the account drawn out actually existed in the party's book where his daily transactions were minuted, and that the transcript has been duly taken therefrom.[38]

cc *Charges Transferred From Memoranda.* It is not an objection to the competency of the party's book supported by a suppletory oath that the entries therein were transcribed from a slate, card, or memorandum book in which they were first entered for a temporary purpose, although the entries on the slate or memorandum were made by a person other than the party who copied them on the book. In such cases the entry of the charges in the first instance are regarded as memoranda preparatory to permanent evidence of the transactions, and the entry in the regular book of accounts of the party is deemed to be the first and original entry, and as such competent proof with the oath of the party of the charges therein made.[39] Especially is this true where the original entries or memoranda are incomplete and the final entries contain the first entries of the charges in their entirety.[40]

(8) Subject-Matter of Entry — (a) In General. The entries must relate to the business carried on by the person for whom the books are kept and not to matters in no way connected with the business.[41] Thus entries even in a regular book are not evidence of the casual sale of an article not in the line of the party's business.[42]

(b) Goods Delivered and Services Performed. In jurisdictions where a party's

nal entry, even as to an entry made in it and nowhere else, and that it is inadmissible in evidence to prove the fact shown by such entry.

37. Creamer *v.* Shannon, 17 Ga. 65, 63 Am. Dec. 226; Prince *v.* Smith, 4 Mass. 455.

38. Prince *v.* Smith, 4 Mass. 455.

39. *California.*— Landis *v.* Turnip, 14 Cal. 573.

Connecticut.— Smith *v.* Law, 47 Conn. 431.

Delaware.— Jefferis *v.* Urmy, 3 Houst. 653; Ewart *v.* Morrell, 5 Harr. 126.

Florida.— Grady *v.* Thigpin, 6 Fla. 668.

Georgia.— Taylor *v.* Tucker, 1 Ga. 231.

Illinois.— Redlich *v.* Bauerlee, 98 Ill. 134, 38 Am. Rep. 87.

Indiana.— Place *v.* Baugher, 159 Ind. 232, 64 N. E. 852, memoranda on board of measurements of logs, transferred on same day to day-book.

Kentucky.— Groschell *v.* Knoll, 10 Ky. L. Rep. 314.

Maine.— Hall *v.* Glidden, 39 Me. 445.

Massachusetts.— Whitney *v.* Sawyer, 11 Gray 242; Kent *v.* Garvin, 1 Gray 148; Barker *v.* Haskell, 9 Cush. 218; Morris *v.* Briggs, 3 Cush. 342; Arnold *v.* Sabin, 1 Cush. 525; Ball *v.* Gates, 12 Metc. 491; Smith *v.* Sandford, 12 Pick. 139, 22 Am. Dec. 415; Faxon *v.* Hollis, 13 Mass. 427.

Michigan.— Jackson *v.* Evans, 8 Mich. 476.

New Hampshire.— State *v.* Shinborn, 46 N. H. 497, 88 Am. Dec. 224.

New York.— McGoldrick *v.* Traphagen, 88 N. Y. 334; Davison *v.* Powell, 16 How. Pr. 467; Sickles *v.* Mather, 20 Wend. 72, 32 Am. Dec. 521.

Pennsylvania.— Hartley *v.* Brookes, 6 Whart. 189; Patton *v.* Ryan, 4 Rawle 408; Ingraham *v.* Bockius, 9 Serg. & R. 285, 11 Am. Dec. 730. See also Forsythe *v.* Norcross, 5 Watts 432, 30 Am. Dec. 334; Vicary *v.* Moore, 2 Watts 451, 27 Am. Dec. 323. *Compare* Ogden *v.* Miller, 1 Browne 147.

Texas.— Cahn *v.* Salinas, 2 Tex. App. Civ. Cas. § 614. *Compare* Guthrie *v.* Mann, (Civ. App. 1896) 35 S. W. 710.

Compare Gage *v.* McIlwain, 1 Strobh. (S. C.) 135; Venning *v.* Hacker, 2 Hill (S. C.) 584; Drummond *v.* Hyams, Harp. (S. C.) 268, 18 Am. Dec. 649.

See 20 Cent. Dig. tit. "Evidence," § 1457.

Entries transferred from chalk scores on butcher's cart admitted.— Miller *v.* Shay, 145 Mass. 162, 13 N. E. 468, 1 Am. St. Rep. 449; Smith *v.* Sanford, 12 Pick. (Mass.) 139, 22 Am. Dec. 415.

40. McGoldrick *v.* Traphagen, 88 N. Y. 334, holding that original entries transferred from a slate to a day-book and from a day-book to a ledger may be proved by the slate, day-book, and ledger, where the entries in neither are complete in themselves.

41. Avery *v.* Avery, 49 Ala. 193; Petit *v.* Teal, 57 Ga. 145; Fulton's Estate, 178 Pa. St. 78, 35 Atl. 880, 35 L. R. A. 133; Stuckslager *v.* Neel, 123 Pa. St. 53, 16 Atl. 94; Baldridge *v.* Penlan, 68 Tex. 441, 4 S. W. 565; Cole *v.* Dial, 8 Tex. 347.

42. Stuckslager *v.* Neel, 123 Pa. St. 53, 16 Atl. 94; Shoemaker *v.* Kellog, 11 Pa. St. 310, where the entry of the sale of a horse in the account-books of a dry-goods merchant was held inadmissible.

books of account are admissible in his favor, they are very generally received for the purpose of proving charges for goods or articles delivered and services performed.[43] Indeed it is often asserted that the shop-book rule is confined to entries of this character.[44] The books of the purchaser of goods[45] or of the employer

43. *California.*—Severance *v.* Lombardo, 17 Cal. 57.

Delaware.— McDaniel *v.* Webster, 2 Houst. 305; Conoway *v.* Spicer, 5 Harr. 425.

Georgia.— Martin *v.* Fyffe, Dudley 16.

Illinois.— F. H. Hill Co. *v.* Sommer, 55 Ill. App. 345.

Maine.— Mitchell *v.* Belknap, 23 Me. 475; Clark *v.* Perry, 17 Me. 175.

Massachusetts.— Doody *v.* Pierce, 9 Allen 141; Prince *v.* Smith, 4 Mass. 455; Cogswell *v.* Dolliver, 2 Mass. 217, 3 Am. Dec. 45.

New York.— West *v.* Van Tuyl, 119 N. Y. 620, 23 N. E. 450.

Pennsylvania.—Molony *v.* Benners, 3 Grant 233.

Wisconsin.— Jones *v.* Orton, 65 Wis. 9, 26 N. W. 172.

See 20 Cent. Dig. tit. "Evidence," §§ 1449, 1450.

Ferriage.— In an action to recover a sum due for ferriage, the books of the ferry-owner are admissible to prove the account. Frazier *v.* Drayton, 2 Nott & M. (S. C.) 471.

Horse hire.— An account for the hire of a horse, it has been held, may be proved, as work and labor, under the book-debt law. Easly *v.* Eakin, Cooke (Tenn.) 388.

Charges for board.—In Tremain *v.* Edwards, 7 Cush. (Mass.) 414, it was held that meals furnished to one and his servants from day to day are a proper subject of book charge. But *compare* Gibbons' Estate, 1 Leg. Gaz. (Pa.) 10, where it was held that items charging board are not for goods sold in the ordinary course of business, and the book containing them is not such a book of original entry as to be admissible in evidence.

Price of goods.— A day-book is *prima facie* evidence of the prices of goods as well as of their sale and delivery. Ducoign *v.* Schreppel, 1 Yeates (Pa.) 347. See also F. H. Hill Co. *v.* Sommer, 55 Ill. App. 345.

Date of delivery of goods.— Where the date of delivery of goods was a material fact, the account-book containing the original entries thereof was held properly admitted in evidence. Costello *v.* Crowell, 133 Mass. 352.

Work done by party's servants.— In an action for work and materials plaintiff's books are admissible to prove work done by persons in his employment. Barker *v.* Haskell, 9 Cush. (Mass.) 218; Mitchell *v.* Clarke, 3 N. C. 13. *Compare* Wright *v.* Sharp, 1 Browne (Pa.) 344.

Book containing record of notes.— A book in which an intervener kept a record of certain notes has been held not admissible, as a book of accounts, to prove plaintiff's indebtedness on said notes. Kassing *v.* Walter, (Iowa 1896) 65 N. W. 832. So a note register or book of bills receivable kept by a bank or banker is not a "book of account." Martin *v.* Scott, 12 Nebr. 42, 10 N. W. 532.

Items relating to rent or breach of lease.— Books of account are not admissible to prove a debt of defendant to plaintiff for rent of land, or other items referable to the failure of a party to comply with the terms of a lease. Prince *v.* Smith, 4 Mass. 455.

Expenditures in search of slave.— In an action against stage-coach proprietors for aiding in the escape of plaintiff's slave, plaintiff's book entries are not, it is held, proper evidence of expenditures in search of his slave, as such expenditures are not matter of account. Redden *v.* Spruance, 4 Harr. (Del.) 217.

Charge for commission on ship-broker's book.— A ship-broker's book and his suppletory oath cannot, it is held, be received in evidence to support a charge for a commission on the sale of a vessel, since it relates to a transaction of which from the nature of the case other and better evidence could be given. Winsor *v.* Dillaway, 4 Metc. (Mass.) 221.

Charges for wharfage cannot, it is held, be proved by books of account. Lennig *v.* Quaker City Steamboat Co., 3 Wkly. Notes Cas. (Pa.) 434; Wilmer *v.* Israel, 1 Browne (Pa.) 257.

Literary labor improper subject of book entries see Hirst *v.* Clarke, 3 Pa. L. J. 32, 1 Pa. L. J. Rep. 398.

Charges of damages.— Charges which are not in their nature liquidated sums, but damages which can be rendered certain only by convention or judicial decision, are not matters of book-account. Wait *v.* Krewson, 59 N. J. L. 71, 35 Atl. 742; Swing *v.* Sparks, 7 N. J. L. 59.

Books of agent or broker.— The rule relating to the admission of shop-books of services rendered, or the sale and delivery of merchandise on credit, has been held not to extend to the account-books of a broker or agent showing purchases from or sales to third persons by the agent, in an action between him and his principal. Rathborne *v.* Hatch, 80 N. Y. App. Div. 115, 80 N. Y. Suppl. 347. *Compare* Mertens *v.* Nottebohms, 4 Gratt. (Va.) 163. So where an agent conducted the business of a principal incapable of transacting his own business, the agent's books were held inadmissible to prove the supply of necessaries by the agent to his principal during the agency. Poag *v.* Poag, 1 Hill Eq. (S. C.) 285.

Entry of settlement inadmissible.— A mere entry made in a man's book of accounts of a settlement with another is not as against such other person legal evidence of a settlement. Prest *v.* Mercereau, 9 N. J. L. 268.

44. J. Snow Hardware Co. *v.* Loveman, 131 Ala. 221, 31 So. 19; Waldren *v.* Priest, 96 Me. 36, 51 Atl. 235.

45. Dailey *v.* Sonnerborn, 35 Tex. 60.

for whom labor or services have been performed are not admissible in his favor.[46]

(c) Collateral Matters — aa. *In General.* The account-books of a party, whether verified by oath or not, are as a general rule inadmissible to prove any matter collateral to the issue of debt and credit between the parties.[47] If other facts aside from the sale and delivery of goods or the performance of work and labor are necessary to make out the party's case, these facts cannot be established by his books and suppletory oath, but must be made out by independent testimony.[48]

bb. *To Whom Credit Is Given.* Books of account are inadmissible to show to whom credit was given when that fact is in issue.[49] Thus they are not evidence to charge a defendant with goods delivered to a third person or for services performed for a third person, on the adverse party's order.[50] But after an order to deliver goods or to render services is proved by competent evidence *aliunde*, the delivery or performance itself may be proved by the books and suppletory oath of the party.[51]

46. Summers *v.* McKim, 12 Serg. & R. (Pa.) 405. See also Sherman *v.* Whiteside, 93 Ill. App. 572 [*affirmed* in 190 Ill. 576, 60 N. E. 838].

47. *Alabama.*— See Davis *v.* Tarver, 65 Ala. 98. See also Stone *v.* Watson, 37 Ala. 279.

Georgia.— See Bracken *v.* Dillon, 64 Ga. 243, 37 Am. Rep. 70.

Illinois.— Palmer *v.* Goldsmith, 15 Ill. App. 544.

New Hampshire.— Bailey *v.* Harvey, 60 N. H. 152; Putnam *v.* Goodall, 31 N. H. 419; Batchelder *v.* Sanborn, 22 N. H. 325; Woods *v.* Allen, 18 N. H. 28; Little *v.* Wyatt, 14 N. H. 23; Woodes *v.* Dennett, 12 N. H. 510. See also Leighton *v.* Sargent, 31 N. H. 119, 64 Am. Dec. 323.

Pennsylvania.— Murphy *v.* Cress, 2 Whart. 33.

South Carolina.— Gage *v.* McIlwain, 1 Strobh. 135.

See 20 Cent. Dig. tit. "Evidence," § 1448 *et seq.*

48. Forsee *v.* Matlock, 7 Heisk. (Tenn.) 421.

49. Kaiser *v.* Alexander, 144 Mass. 71, 12 N. E. 209; Textile Pub. Co. *v.* Smith, 31 Misc. (N. Y.) 271, 64 N. Y. Suppl. 123. See also Peck *v.* Von Keller, 76 N. Y. 604; Paine *v.* Ronan, 6 N. Y. St. 420.

50. *Delaware.*— Walker *v.* Yeatman, 5 Harr. 267.

Maine.— Soper *v.* Yeazie, 32 Me. 122; Mitchell *v.* Belknap, 23 Me. 475.

Massachusetts.— Field *v.* Thompson, 119 Mass. 151; Bentley *v.* Ward, 116 Mass. 333; Somers *v.* Wright, 114 Mass. 171; Gorman *v.* Montgomery, 1 Allen 416; Keith *v.* Kibbe, 10 Cush. 35; Coppin *v.* Cross, 3 Dane Abr. 322.

Michigan.— See Montague *v.* Dougan, 68 Mich. 98, 35 N. W. 840; Larson *v.* Jensen, 53 Mich. 427, 19 N. W. 30.

New Hampshire.— Webster *v.* Clark, 30 N. H. 245.

New Jersey.— Townley *v.* Wooly, 1 N. J. L. 377; Tenbroke *v.* Johnson, 1 N. J. L. 288.

Pennsylvania.— Poultney *v.* Ross, 1 Dall. 238, 1 L. ed. 117; Wheeler's Estate, 13 Phila. 373.

South Carolina.— Kinloch *v.* Brown, 1 Rich. 223; Darby *v.* Deas, 1 Nott & M. 436.

Virginia.— Kerr *v.* Love, 1 Wash. 172. *Compare* Richmond Union Pass. R. Co. *v.* New York, etc., R. Co., 95 Va. 386, 28 S. E. 573; Downer *v.* Morrison, 2 Gratt. 250.

Washington.— See Bartlett *v.* Morgan, 4 Wash. 723, 31 Pac. 22.

Wisconsin.—See Murphey *v.* Gates, 81 Wis. 370, 51 N. W. 573.

Compare Dunlap *v.* Hooper, 66 Ga. 211; Leisman *v.* Otto, 1 Bush (Ky.) 225; Winslow *v.* Dakota Lumber Co., 32 Minn. 237, 20 N. W. 145.

See 20 Cent. Dig. tit. "Evidence," § 1448 *et seq.*

Rule applied to entries by party's clerk.— Kaiser *v.* Alexander, 144 Mass. 71, 12 N. E. 209.

Money paid to third person on adverse party's order.— So books of account are not admissible to prove charges for cash paid third persons on the order of the adverse party. Lyman *v.* Bechtel, 55 Iowa 437, 7 N. W. 673; Snell *v.* Eckerson, 8 Iowa 284; Prince *v.* Smith, 4 Mass. 455; Brown *v.* Warner, 116 Wis. 358, 93 N. W. 17. *Compare* Gleason *v.* Kinney, 65 Vt. 560, 27 Atl. 208.

51. *Maine.*— Mitchell *v.* Belknap, 23 Me. 475.

New Hampshire.— Bailey *v.* Harvey, 60 N. H. 152.

New York.— Wilcox Silver Plate Co. *v.* Green, 72 N. Y. 17.

Pennsylvania.— Hartley *v.* Brookes, 6 Whart. 189; Linn *v.* Naglee, 4 Whart. 92.

South Carolina.— See Kinloch *v.* Brown, 2 Speers 284.

Wisconsin.— Schettler *v.* Jones, 20 Wis. 412.

See 20 Cent. Dig. tit. "Evidence," § 1449 *et seq.*

Establishment of mechanic's lien.— In scire facias upon a mechanic's lien, where the materials were furnished on the credit of the building, charges in the book made against the owner or contractor individually have

cc. *Special Agreements.* Books of account to be received in evidence must be a registry of business actually done; they are inadmissible to prove the terms or contents of a special agreement.[52] In some of the decisions moreover it is held that the delivery of goods, the performance of services, or the payment of money under a special agreement is not provable by books of account, since by an agreement of this kind the transaction is taken out of the usual course of business dealings and the performance or non-performance of the contract is susceptible of other proof.[53] On the other hand it is held that, although a book of accounts

been held competent to show the amount of materials furnished, the facts which rendered the building liable having been proven *aliunde*. Barbier *v.* Smith, 38 Pa. St. 296; McMullin *v.* Gilbert, 2 Whart. (Pa.) 277; Church *v.* Davis, 9 Watts (Pa.) 304. See also Bailey *v.* Harvey, 60 N. H. 152; Schettler *v.* Jones, 20 Wis. 412. *Compare* Lynch *v.* Cronan, 6 Gray (Mass.) 531, where it was held, on the trial of a petition to enforce a mechanic's lien upon a building, that his books of charges and suppletory oath were not admissible in evidence in his favor before the passage of the statutes making parties competent witnesses, since the mechanic has it in his power to secure other evidence of the work he has performed, either by the testimony of the contractor or of his own fellow workmen.

52. *Alabama.*— See J. Snow Hardware Co. *v.* Loveman, 131 Ala. 221, 31 So. 19.

Delaware.— Ward *v.* Powell, 3 Harr. 379.

Iowa.— Hart *v.* Livingston, 29 Iowa 217.

Michigan.— *In re* Ward, 73 Mich. 220, 41 N. W. 431.

Missouri.— Daum *v.* Neumeister, 2 Mo. App. 597.

New Jersey.— Danser *v.* Boyle, 16 N. J. L. 395; Wilson *v.* Wilson, 6 N. J. L. 95.

New York.— Griesheimer *v.* Tanenbaum, 124 N. Y. 650, 26 N. E. 957; McGoldrick *v.* Traphagen, 88 N. Y. 334. See also Mason *v.* Wedderspoon, 43 Hun 20.

South Carolina.— Pritchard *v.* McOwen, 1 Nott & M. 131 note *a*. See also McPherson *v.* Neuffer, 11 Rich. 267.

Vermont.— Stillwell *v.* Farewell, 64 Vt. 286, 24 Atl. 243.

Wisconsin.— Hazer *v.* Streich, 92 Wis. 505, 66 N. W. 720.

See 20 Cent. Dig. tit. "Evidence," § 1448 *et seq.*

Illustrations.— Thus a special contract under which a party alleges he has paid a claim against him by crediting the same upon an account against another party is not provable by a book of accounts. Griesheimer *v.* Tanenbaum, 124 N. Y. 650, 26 N. E. 957. So the execution of a note in settlement of an account has been held not to be a transaction of a character which can be evidenced by a party's shop-books. Estes *v.* Jackson, 53 S. W. 271, 21 Ky. L. Rep. 859. And a plaintiff's books of account and suppletory oath are not competent evidence of the consideration of a promissory note. Rindge *v.* Breck, 10 Cush. (Mass.) 43. So in an action to recover contribution from one who is alleged to be a joint indorser with plaintiff of a promissory note, plaintiff cannot introduce in evidence an extract from his own books of account to corroborate his own testimony tending to show that the parties were joint indorsers. Alger *v.* Thompson, 1 Allen (Mass.) 453.

Charges becoming matters of account upon rescission of contract.— Charges for services done or property delivered under a supposed special contract, but which afterward become matter of account by operation of law in consequence of a rescission of the contract, cannot be proved by the party's book, since there must be a right to charge when the service is done or the goods delivered. Merrill *v.* Ithaca, etc., R. Co., 16 Wend. (N. Y.) 586, 30 Am. Dec. 130.

Delivery to sell on commission.— The fact that plaintiff had delivered wood to defendant to sell on commission must be proven by some other evidence than plaintiff's account-books, as the rule allowing such books in evidence cannot be extended to agreements other than the sale. Murphy *v.* Cress, 2 Whart. (Pa.) 33. See also Baisch *v.* Hoff, 1 Yeates (Pa.) 198. *Compare* Smith *v.* Law, 47 Conn. 431.

Books not evidence of sum of money due on contract.— Danser *v.* Boyle, 16 N. J. L. 395. See also Inslee *v.* Prall, 23 N. J. L. 457; Butz *v.* Manwiller, 2 Woodw. (Pa.) 260.

53. *California.*— Kerns *v.* McKean, 76 Cal. 87, 18 Pac. 122.

Delaware.— See McDaniel *v.* Webster, 2 Houst. 305. *Compare* Ward *v.* Powell, 3 Harr. 379.

Iowa.— Lyman *v.* Bechtel, 55 Iowa 437, 7 N. W. 673.

Massachusetts.— See Earle *v.* Sawyer, 6 Cush. 142.

Pennsylvania.— Hall *v.* Chambersburg Woolen Co., 187 Pa. St. 18, 40 Atl. 986, 67 Am. St. Rep. 563, 52 L. R. A. 689; Stuckslager *v.* Neel, 123 Pa. St. 53, 16 Atl. 94; Eshleman *v.* Harnish, 76 Pa. St. 97; Phillips *v.* Tapper, 2 Pa. St. 323; Nickle *v.* Baldwin, 4 Watts & S. 290; Lonergan *v.* Whitehead, 10 Watts 249.

See 20 Cent. Dig. tit. "Evidence," § 1446 *et seq.*

Rule applied to contract to deliver goods at several distinct times.—Alexander *v.* Hoffman, 5 Watts & S. (Pa.) 382; Lonergan *v.* Whitehead, 10 Watts (Pa.) 249.

Applied to payment of an outstanding note. — Brannin *v.* Foree, 12 B. Mon. (Ky.) 506.

Contract failing to stipulate amount and price of work.— Where the amount of work to be done, the materials to be furnished, and the prices to be paid are not stipulated, the

may be incompetent to prove the performance of a special contract, yet where services are rendered or goods are delivered from time to time in the performance of the contract, it is proper to charge them upon the book, and such charges are competent evidence, not of the performance of the contract, but of the fact of the delivery of the goods and the rendition of the services and their amount.[54] So in a jurisdiction where a party's book of accounts with his suppletory oath is admissible to prove the payment generally of a sum of money not exceeding a prescribed amount, the book of accounts is held admissible to prove the fact of payment but not to prove that it was paid upon a particular debt.[55]

(d) Cash Items or Dealings. In some jurisdictions, under statute, items indicating loans or advances of money are to be admitted in evidence equally with other items, assuming the account to be otherwise admissible.[56] But as a general rule books of account of a party are not admissible in his own favor to prove charges for "money paid" or "money lent," or cash items or dealings between the parties generally, since these charges are not usually such as are made in the ordinary course of business, and since other and better evidence of the transaction usually exists or might reasonably be called for by the party making the advance.[57]

agreement has been held not to be sufficiently special in its terms to exclude books of account as evidence. Kline *v.* Foster, 1 Walk. (Pa.) 250.

Making of entry in performance of contract. — In Ross *v.* Brusie, 70 Cal. 465, 11 Pac. 760, it was held that a party's book of account is admissible in evidence when offered, not to establish a claim against the adverse party, but to prove that the party has performed his contract and given a credit which he has promised. To the same effect see Moore *v.* Knott, 14 Oreg. 35, 12 Pac. 59.

54. Bailey *v.* Harvey, 60 N. H. 152; Swain *v.* Cheney, 41 N. H. 232; Cummings *v.* Nichols, 13 N. H. 420, 38 Am. Dec. 501; Oliver *v.* Phelps, 21 N. J. L. 597.

55. Bailey *v.* Harvey, 60 N. H. 152.

56. Richards *v.* Burroughs, 62 Mich. 117, 28 N. W. 755; Woolsey *v.* Bohn, 41 Minn. 235, 42 N. W. 1022; Stephan *v.* Metzger, 95 Mo. App. 609, 69 S. W. 625. See also Union Central L. Ins. Co. *v.* Prigge, 90 Minn. 370, 96 N. W. 917.

57. *Delaware.*— Townsend *v.* Townsend, 5 Harr. 125.

Georgia.— See Beall *v.* Rust, 68 Ga. 774; Bracken *v.* Dillon, 64 Ga. 243, 37 Am. Rep. 70; Petit *v.* Teal, 57 Ga. 145.

Illinois.— Ruggles *v.* Gatton, 50 Ill. 412; Rothschild *v.* Sessell, 103 Ill. App. 274. See also Kibbe *v.* Bancroft, 77 Ill. 18.

Iowa.— Shaffer *v.* McCrackin, 90 Iowa 578, 58 N. W. 910, 48 Am. St. Rep. 465; U. S. Bank *v.* Burson, 90 Iowa 191, 57 N. W. 705; Cummins *v.* Hull, 35 Iowa 253; Snell *v.* Eckerson, 8 Iowa 284; Young *v.* Jones, 8 Iowa 219; Veiths *v.* Hagge, 8 Iowa 163.

Kentucky.— Brannin *v.* Foree, 12 B. Mon. 506.

Massachusetts.— Maine *v.* Harper, 4 Allen 115; Townsend Bank *v.* Whitney, 3 Allen 454.

Missouri.— Gregory *v.* Jones, 101 Mo. App. 270, 73 S. W. 899.

New Hampshire.—Richardson *v.* Emery, 23 N. H. 220.

New Jersey.— Hauser *v.* Leviness, 62 N. J. L. 518, 41 Atl. 724; Inslee *v.* Prall, 23 N. J. L. 457 [*affirmed* in 25 N. J. L. 665]; Carman *v.* Dunham, 11 N. J. L. 189; Wilson *v.* Wilson, 6 N. J. L. 95. *Compare* Craven *v.* Shaird, 7 N. J. L. 345.

New York.— Smith *v.* Rentz, 131 N. Y. 169, 30 N. E. 54, 15 L. R. A. 138; Low *v.* Payne, 4 N. Y. 247; Shipman *v.* Glynn, 31 N. Y. App. Div. 425, 52 N. Y. Suppl. 691; Irvine *v.* Wortendyke, 2 E. D. Smith 374; Dusenbury *v.* Hoadley, 20 N. Y. Suppl. 911; Schwartz *v.* Allen, 7 N. Y. Suppl. 5; Vosburgh *v.* Thayer, 12 Johns. 461. See also Case *v.* Potter, 8 Johns. 211.

Ohio.— Page *v.* Zehring, 8 Ohio Dec. (Reprint) 211, 6 Cinc. L. Bul. 299. See also Kennedy *v.* Dodge, 19 Ohio Cir. Ct. 425, 10 Ohio Cir. Dec. 360; Hough *v.* Henk, 8 Ohio Cir. Ct. 354, 4 Ohio Cir. Dec. 69.

Pennsylvania.— Juniata Bank *v.* Brown, 5 Serg. & R. 226; Ducoign *v.* Schreppel, 1 Yeates 347; Walton's Estate, 4 Kulp 487. See also Hess' Appeal, 112 Pa. St. 168, 4 Atl. 340.

South Carolina.— Williams *v.* Gregg, 2 Strobh. Eq. 297; Lever *v.* Lever, 2 Hill Eq. 158. See also Rowland *v.* Martindale, Bailey Eq. 226.

Tennessee.— Callaway *v.* McMillian, 11 Heisk. 557; Black *v.* Fizer, 10 Heisk. 48.

Texas.— Cole *v.* Dial, 8 Tex. 347. See also Kotwitz *v.* Wright, 37 Tex. 82.

See 20 Cent. Dig. tit. "Evidence," § 1451.

An item for commission for collecting a sum of money has been held inadmissible. Hale *v.* Ard, 48 Pa. St. 22. See also Greal *v.* Noll, 1 Wkly. Notes Cas. (Pa.) 26; Kotwitz *v.* Wright, 37 Tex. 82.

Goods charged as money loaned.— In Le Franc *v.* Hewitt, 7 Cal. 186, it was held that, although the account-book of a tradesman is generally inadmissible to show money loaned, yet where it is in fact shown that there was no money loaned, but that plaintiff had procured and paid for articles for defendant and charged them as so much money loaned, the books were admissible.

This rule has been modified by some of the decisions, however, and it is held that where money charges are made in the banking business, or otherwise as a matter of fact in the ordinary course of business, the accounts will be admissible under the shop-book rule.[58] Moreover the effect of the decisions in some jurisdictions is to extend the rule permitting proof of the delivery of goods sold and the performance of labor by shop-books so as to include charges of sums of money not exceeding a certain sum,[59] or small sums not definitely fixed by law.[60]

(9) The Person Charged — (a) In General. To be admissible under the shop-book rule the book must as a general rule contain charges by one party to the action against the other and the entry must be made with the intent to make a charge.[61] Thus books of entries of work done have been held inadmissible where

58. *Georgia.*— Beall *v.* Rust, 68 Ga. 774; Bagley *v.* Roberson, 57 Ga. 148; Ganahl *v.* Shore, 24 Ga. 24.

Iowa.— Orcutt *v.* Hanson, 70 Iowa 604, 31 N. W. 950; Lyman *v.* Bechtel, 55 Iowa 437, 7 N. W. 673; Veiths *v.* Hagge, 8 Iowa 163.

New Jersey.— See Wilson *v.* Wilson, 6 N. J. L. 95.

Ohio.— Cram *v.* Spear, 8 Ohio 494.

Oregon.— See Harmon *v.* Decker, 41 Oreg. 587, 68 Pac. 11, 1111, 93 Am. St. Rep. 748.

Rhode Island.— Cargill *v.* Atwood, 18 R. I. 303, 27 Atl. 214.

South Dakota.— Union School Furniture Co. *v.* Mason, 3 S. D. 147, 52 N. W. 671.

Vermont.— Gleason *v.* Kinney, 65 Vt. 560, 27 Atl. 208 [*distinguishing* Parris *v.* Bellows, 52 Vt. 351; Lapham *v.* Kelly, 35 Vt. 195].

Compare Smith *v.* Rentz, 131 N. Y. 169, 30 N. E. 54, 15 L. R. A. 138.

See 20 Cent. Dig. tit. "Evidence," § 1432 *et seq.*

59. Waldron *v.* Priest, 96 Me. 36, 51 Atl. 235; Kelton *v.* Hill, 58 Me. 114; Hooper *v.* Taylor, 39 Me. 224; Dunn *v.* Whitney, 10 Me. 9; Davis *v.* Sanford, 9 Allen (Mass.) 216; Turner *v.* Twing, 9 Cush. (Mass.) 512; Burns *v.* Fay, 14 Pick. (Mass.) 8; Union Bank *v.* Knapp, 3 Pick. (Mass.) 96, 15 Am. Dec. 181; Remick *v.* Rumery, 69 N. H. 601, 45 Atl. 574; Bailey *v.* Harvey, 60 N. H. 152; Rich *v.* Eldredge, 42 N. H. 153; Bassett *v.* Spofford, 11 N. H. 167. *Compare* Lyman *v.* Bechtel, 55 Iowa 437, 7 N. W. 673; Veiths *v.* Hagge, 8 Iowa 163; McLellan *v.* Crofton, 6 Me. 307.

Rule applied to books of decedent in action to which personal representative is party.— Burns *v.* Fay, 14 Pick. (Mass.) 8; Rich *v.* Eldredge, 42 N. H. 153.

Under Wisconsin statute money charges are limited to five dollars. Brown *v.* Warner, 116 Wis. 358, 93 N. W. 17.

60. In Georgia books are admitted to prove only small sums of cash advanced in cases other than in particular lines, like the banking business. See Beall *v.* Rust, 68 Ga. 774; Bagley *v.* Roberson, 57 Ga. 148. To the same effect see Watts *v.* Shewell, 31 Ohio St. 331; Cram *v.* Spear, 8 Ohio 494; Harmon *v.* Decker, 41 Oreg. 587, 68 Pac. 11, 1111, 93 Am. St. Rep. 748.

61. *Illinois.*— Ingersoll *v.* Banister, 41 Ill. 388; Sanford *v.* Miller, 19 Ill. App. 536.

Maryland.— See Gill *v.* Staylor, 93 Md. 453, 49 Atl. 650.

Mississippi.— Bookout *v.* Shannon, 59 Miss. 378.

Nebraska.— Pollard *v.* Turner, 22 Nebr. 366, 35 N. W. 192; Van Every *v.* Fitzgerald, 21 Nebr. 36, 31 N. W. 264, 59 Am. St. Rep. 835; Masters *v.* Marsh, 19 Nebr. 458, 27 N. W. 438; Martin *v.* Scott, 12 Nebr. 42, 10 N. W. 532.

New Hampshire.— Brown *v.* George, 17 N. H. 128.

New Jersey.— See New Jersey Zinc., etc., Co. *v.* Lehigh Zinc, etc., Co., 59 N. J. L. 189, 35 Atl. 915.

Oregon.— See Harmon *v.* Decker, 41 Oreg. 587, 68 Pac. 11, 1111, 93 Am. St. Rep. 748.

Pennsylvania.— Fairchild *v.* Dennison, 4 Watts 258; Hough *v.* Doyle, 4 Rawle 291; Foreman's Estate, 20 Pa. Co. Ct. 627. See also Gamber *v.* Wolaver, 1 Watts & S. 66.

Compare Witherell *v.* Swan, 32 Me. 247; Coleman *v.* Retail Lumberman's Ins. Assoc., 77 Minn. 31, 79 N. W. 588; Levine *v.* Lancashire Ins. Co., 66 Minn. 138, 68 N. W. 855; Woolsey *v.* Bohn, 41 Minn. 235, 42 N. W. 1022.

Entries charged in wrong name by mistake. — It has been held that where entries in a book of accounts are made by mistake to a wrong name, they may be read in evidence against the party intended to be charged, after the mistake has been satisfactorily explained by other competent evidence. Schettler *v.* Jones, 20 Wis. 412. See also Linn *v.* Naglee, 4 Whart. (Pa.) 92. So where plaintiff, in consequence of the declarations of one of defendants that the name of the firm was changed, the partners remaining as before, charged the goods sold and delivered afterward in the name of the new firm, it was held that his book of original entries was properly admitted in evidence in a suit brought against the partners, who were sued as trading under the original firm-name. Williamson *v.* Fox, 38 Pa. St. 214.

Charges against individual partners inadmissible against firm.— In an action against a firm, plaintiff's books, containing charges against the several members, are not evidence of the delivery to the firm of the goods so charged, and the declaration of one of the partners to plaintiff's servant that it was no matter to which of them the articles were charged, since they would all be paid for, does not make such books evidence. Kidder *v.* Norris, 18 N. H. 532.

the primary object of the entries was to enable the party to settle with his employees in the work and not to charge the work against the adverse party.[62] So a book of credits and not of charges kept by a purchaser or employer is inadmissible.[63] So a party's books are inadmissible to establish a negative in his favor by showing the absence of affirmative entries.[64]

(b) CHARGE AGAINST AGENT. A charge in a book of original entries against an agent may be given in evidence in a suit against the principal on proof *aliunde* of the agency and that the transaction was made in the course of the principal's business.[65]

(c) CHARGES AGAINST TWO OR MORE PERSONS JOINTLY. So shop-books are admissible to prove accounts against two or more persons jointly,[66] if the joint liability is established by evidence *aliunde*.[67] The evidence of the joint liability need not precede the admission of the books, but may be subsequently introduced.[68]

(10) AMOUNT OF CHARGE. In some states, by statute, books are competent evidence to prove an account not exceeding a sum specified,[69] and indeed it has been intimated apart from statute that charges may be of such magnitude as to be improper subjects of book-accounts.[70]

(11) CONTEMPORANEOUSNESS. To be admitted in evidence the entries must

Charge against third person as showing admission.— In an action on an account, where the issue is as to whether the debt is owing by defendant or by a third person, plaintiff's account-books, showing that he charged the debt to a third person and not to defendant, are admissible against plaintiff. Loomis *v.* Stuart, (Tex. Civ. App. 1893) 24 S. W. 1078. See also Winslow *v.* Dakota Lumber Co., 32 Minn. 237, 20 N. W. 145.

A charge by an attorney against a person for procuring a writ in the name of a third person may be proved by the former's book of original entries with his suppletory oath. Waterhouse *v.* Fogg, 38 Me. 425.

Heading account in alternative.— Where in an account-book the charge was entered to "A., B., or C. and D.," it was held in an action to which "C. and D." and the person making the entries were parties that after preliminary proof was made the account was admissible in evidence if the reason for making the charge in the alternative is satisfactorily explained. Burnell *v.* Dunlap, 11 Iowa 446.

Collection and loan registers made to keep track of collections and loans are not "books of account," within the meaning of Nebr. Civ. Code, § 346, which renders "books of account, containing charges by one party against the other, made in the ordinary course of business," admissible in evidence. Labaree *v.* Klosterman, 33 Nebr. 150, 49 N. W. 1102; Martin *v.* Scott, 12 Nebr. 42, 10 N. W. 532. See also Kassing *v.* Walter, (Iowa 1896) 65 N. W. 832; U. S. Bank *v.* Burson, 90 Iowa 191, 57 N. W. 705; Security Co. *v.* Graybeal, 85 Iowa 543, 52 N. W. 497, 39 Am. St. Rep. 311.

62. Van Every *v.* Fitzgerald, 21 Nebr. 36, 31 N. W. 264, 59 Am. Rep. 835; Alexander *v.* Hoffman, 5 Watts & S. (Pa.) 382; Rhoads *v.* Gaul, 4 Rawle (Pa.) 404, 27 Am. Dec. 277; Rogers *v.* Old, 5 Serg. & R. (Pa.) 404. See also Smith *v.* Lane, 12 Serg. & R. (Pa.) 80.

Book of third person.— Masters *v.* Marsh, 19 Nebr. 458, 27 N. W. 438.

63. Morse *v.* Potter, 4 Gray (Mass.) 292; Summers *v.* McKim, 12 Serg. & R. (Pa.) 405; Dailey *v.* Sonnerborn, 35 Tex. 60.

64. Kerns *v.* McKeen, 76 Cal. 87, 18 Pac. 122; Riley *v.* Boehm, 167 Mass. 183, 45 N. E. 84; Morse *v.* Potter, 4 Gray (Mass.) 292 (where a book kept in tabular form by defendant of the days on which plaintiff worked was held inadmissible to show by the absence of entries on certain days that plaintiff did not work on those days); Scott *v.* Bailey, 73 Vt. 49, 50 Atl. 557; Mattocks *v.* Lyman, 18 Vt. 98, 46 Am. Dec. 138.

65. Smith *v.* Jessup, 5 Harr. (Del.) 121; Davis *v.* Dyer, 60 N. H. 400; McGee *v.* Cleveland Organ Co., 4 Ohio Dec. (Reprint) 481, 2 Clev. L. Rep. 219; Hartley *v.* Brookes, 6 Whart. (Pa.) 189.

66. Bowers *v.* Still, 49 Pa. St. 65.

67. Bowers *v.* Still, 49 Pa. St. 65. See also Birkey *v.* McMakin, 64 Pa. St. 343. *Compare* Box *v.* Welch, Quincy (Mass.) 227.

After evidence of partnership has been introduced, books may be given in evidence, containing original entries, against the firm. Johnston *v.* Warden, 3 Watts (Pa.) 101. But the books are inadmissible to establish the partnership. Severance *v.* Lombardo, 17 Cal. 57.

In an action against one of two joint obligors on a bond, where defendant has not objected to the non-joinder, plaintiff's books of account, showing joint charges against the obligors, are held to be admissible. Exum *v.* Davis, 10 Rich. (S. C.) 357.

Charges against one of two partners.— Charges in a book of original entries against one of two partners for work done on firm property are held admissible in an action against the firm for such work. Thomson *v.* Flanegan, 6 Phila. (Pa.) 13.

68. Bowers *v.* Still, 49 Pa. St. 65.

69. See Bland *v.* Warren, 65 N. C. 372; Charlton *v.* Lawry, 3 N. C. 14; Forsee *v.* Matlock, 7 Heisk. (Tenn.) 421; Neville *v.* Northcutt, 7 Coldw. (Tenn.) 294.

70. Bustin *v.* Rogers, 11 Cush. (Mass.) 346; Corr *v.* Seller, 100 Pa. St. 169, 49 Am. Rep. 370.

appear to have been made at or near the time of the transaction to be proved, and when the contrary is apparent upon the face of the books or is shown by extrinsic proof the entries are inadmissible, but no precise time is fixed by law when the entries should be made. The entry need not be made exactly at the time of the occurrence; but it is sufficient if it is made within a reasonable time. In this particular every case must be made to depend upon its own peculiar circumstances, having regard to the situation of the parties, the kind of business, the mode of conducting it, and the time and manner of making the entries.[71]

Charges of bulky articles.— So an entry in a book-account has been held inadmissible where the articles are of such bulk and weight that they could not have been delivered without assistance, so that better evidence was attainable. Leighton *v.* Manson, 14 Me. 208.

71. *Alabama.*— Lane *v.* May, etc., Hardware Co., 121 Ala. 296, 25 So. 809; Lunsford *v.* Butler, 102 Ala. 403, 15 So. 239.

California.— Watrous *v.* Cunningham, 71 Cal. 30, 11 Pac. 811.

Colorado.— See Lovelock *v.* Gregg, 14 Colo. 53, 23 Pac. 86.

Florida.— Hooker *v.* Johnson, 6 Fla. 730.

Georgia.— Petit *v.* Teal, 57 Ga. 145; Williams *v.* Abercrombie, Dudley 252.

Iowa.— Farner *v.* Turner, 1 Iowa 53.

Maine.— Dwinel *v.* Pottle, 31 Me. 167.

Massachusetts.— Davis *v.* Sanford, 9 Allen 216; Barker *v.* Haskell, 9 Cush. 218; Earle *v.* Sawyer, 6 Cush. 142; Watts *v.* Howard, 7 Metc. 478; Cogswell *v.* Dolliver, 2 Mass. 217, 3 Am. Dec. 45.

Missouri.— Stephan *v.* Metzger, 95 Mo. App. 609, 69 S. W. 625; Wells *v.* Hobson, 91 Mo. App. 379; Collins Bros. Drug Co. *v.* Graddy, 57 Mo. App. 41; Martin *v.* Nichols, 54 Mo. App. 594.

New Hampshire.— Cummings *v.* Nichols, 13 N. H. 420, 38 Am. Dec. 501.

New Jersey.—Bay *v.* Cook, 22 N. J. L. 343.

New York.— Griesheimer *v.* Tanenbaum, 124 N. Y. 650, 26 N. E. 957; Skipworth *v.* Deyell, 83 Hun 307, 31 N. Y. Suppl. 918; Eberhardt *v.* Schuster, 10 Abb. N. Cas. 374.

Ohio.— See Bogart *v.* Cox, 4 Ohio Cir. Ct. 289, 2 Ohio Cir. Dec. 551.

Pennsylvania.— Molony *v.* Benners, 3 Grant 233; Hartley *v.* Brookes, 6 Whart. 189; Walter *v.* Bollman, 8 Watts 544; Jones *v.* Long, 3 Watts 325; Curren *v.* Crawford, 4 Serg. & R. 3; Vance *v.* Fairis, 1 Yeates 321, 2 Dall. 217, 1 L. ed. 355; McGarry's Estate, 9 Pa. Dist. 172; *In re* Groff, 14 Phila. 306; Ridgway *v.* Bell, 1 Phila. 117. See also McKnight *v.* Newell, 207 Pa. St. 562, 57 Atl. 39.

South Carolina.— Toomer *v.* Gadsden, 4 Strobh. 193.

Texas.— Baldridge *v.* Penland, 68 Tex. 441, 4 S. W. 565; Stone *v.* Taylor, 27 Tex. 555.

West Virginia.— Rowan *v.* Chenoweth, 49 W. Va. 287, 38 S. E. 544, 87 Am. St. Rep. 796.

United States.— See Burley *v.* German-American Bank, 111 U. S. 216, 4 S. Ct. 341, 28 L. ed. 406.

See 20 Cent. Dig. tit. "Evidence," § 1453 *et seq.*

Rule applied to transfers from slate entries or other memoranda to books of account.— Landis *v.* Turner, 14 Cal. 573; Redlich *v.* Bauerlee, 98 Ill. 134, 38 Am. Rep. 87; Woolsey *v.* Bohn, 41 Minn. 235, 42 N. W. 1022; Hartley *v.* Brookes, 6 Whart. (Pa.) 189; Forsythe *v.* Norcross, 5 Watts (Pa.) 432, 30 Am. Dec. 334; Vicary *v.* Moore, 2 Watts (Pa.) 458, 27 Am. Dec. 323; Patton *v.* Ryan, 4 Rawle (Pa.) 408; Kessler *v.* McConachy, 1 Rawle (Pa.) 435; Ingraham *v.* Bockrus, 9 Serg. & R. (Pa.) 285, 11 Am. Dec. 730. See also *supra*, XIV, C, 2, b, (I), (B), (7), (i), cc.

Illustrations.— Entries made on the day following the transaction (Jones *v.* Long, 3 Watts (Pa.) 325; Patton *v.* Ryan, 4 Rawle (Pa.) 408; Ingraham *v.* Bockrus, 9 Serg. & R. (Pa.) 285, 11 Am. Dec. 730), or on the second day thereafter (Hartley *v.* Brookes, 6 Whart. (Pa.) 189. *Compare* Grady *v.* Thigpen, 6 Fla. 668), or after the lapse of three days (Landis *v.* Turner, 14 Cal. 573; Bay *v.* Cook, 22 N. J. L. 343. *Compare* Cook *v.* Ashmead, 2 Miles (Pa.) 268; Groff's Estate, 14 Phila. (Pa.) 306), have been held admissible. So the lapse of even a month between the time of making a memorandum and the time of transcribing it has been held not to render the entries inadmissible. Redlich *v.* Bauerlee, 98 Ill. 134, 38 Am. Rep. 87. See also Hall *v.* Glidden, 39 Me. 445. On the other hand a delay of two weeks in making entries has been held unreasonable. Kessler *v.* McConachy, 1 Rawle (Pa.) 435. So a delay of five or six days has been so regarded. Forsythe *v.* Norcross, 5 Watts (Pa.) 432, 30 Am. Dec. 334. See also Vicary *v.* Moore, 2 Watts (Pa.) 451, 27 Am. Dec. 323.

Entries at end of week by employee working extra hours.— An employee who has worked for one person all day, and frequently late in the night and Sundays, for a period of two years, need not make an entry of the work done and credits every day, to make his books admissible in evidence. An entry once a week is sufficient. Yearsley's Appeal, 48 Pa. St. 531.

Entries upon completion of continuous transaction.— A book of original entries kept by a paper-hanger has been held to be evidence of the amount of paper furnished, and of the labor in putting it on, when the entry is made as soon as the quantity of paper is determined from its use, and the amount of work done in using it, although it requires several days to finish the work. Bolton's Appeal, 3 Grant (Pa.) 204. See also Le Franc *v.* Hewitt, 7 Cal. 186; Anderson *v.* Ames, 6 Iowa 486; Koch *v.* Howell, 6 Watts

(12) Testimony of Third Persons as to Correctness of Accounts. To render a party's shop-books admissible it is generally held necessary to prove by third persons who have dealt with him that he keeps correct books.[72] The witness moreover must be able to identify the books and to testify to settlements made from the books and based upon an examination of the items contained therein.[73] Thus it is not sufficient for him to testify to having made settlements with the

& S. (Pa.) 350; Benners *v.* Maloney, 3 Phila. (Pa.) 57. *Compare* Shannon *v.* Starkey, 5 Phila. (Pa.) 153.

Entry before completion of transaction.— The entry of a charge of the price of goods has been held not to be evidence as a general rule if made before the sale was complete. Laird *v.* Campbell, 100 Pa. St. 159; Rheem *v.* Snodgrass, 2 Grant (Pa.) 379; Parker *v.* Donaldson, 2 Watts & S. (Pa.) 9; Ridgway *v.* Bell, 1 Phila. (Pa.) 117. But in Wollenweber *v.* Ketterlinus, 17 Pa. St. 389, it was held that when the entry in a day-book is made at the time when the articles ordered are finished and ready for delivery, although they are not delivered till afterward, such book and entries may be used as evidence. *Compare* Rhoads *v.* Gaul, 4 Rawle (Pa.) 404, 27 Am. Dec. 277. So in Kaughley *v.* Brewer, 16 Serg. & R. (Pa.) 133, 16 Am. Dec. 554, it was held that the book of a tailor, to whom cloth is delivered to make a garment, is admissible in evidence, where he testifies that it is his book of original entries, and that the several entries were made at the time of the date affixed thereto, although such entries were made immediately after he had cut out the work and delivered it to his journeyman for completion. See also Curren *v.* Crawford, 4 Serg. & R. (Pa.) 3. *Compare* Thompson *v.* Bullock, 2 Miles (Pa.) 269.

Entries of goods to be delivered at distance. — Entries made by the vendor of goods to be delivered at a distance, at the time when they are delivered to the carrier to be delivered by it, are competent evidence of the sale and delivery. Keim *v.* Rush, 5 Watts & S. (Pa.) 377.

Effect of practice of making tardy entries. — The mere fact that it appears to be the general practice of a deceased person to make his entries on a slate and afterward draw them off in his book, sometimes two or three days afterward, will not render the books inadmissible, if it is not shown that the same practice was pursued as regards the particular account in controversy. Van Swearingen *v.* Harris, 1 Watts & S. (Pa.) 356.

72. *California.*— See Landis *v.* Turner, 14 Cal. 573.

Georgia.— Cheever *v.* Brown, 30 Ga. 904. See also Taylor *v.* Tucker, 1 Ga. 231; Martin *v.* Fyffe, Dudley 16.

Illinois.— Patrick *v.* Jack, 82 Ill. 81; Ruggles *v.* Gatton, 50 Ill. 412; Ingersoll *v.* Banister, 41 Ill. 388; Waggeman *v.* Peters, 22 Ill. 42; Boyer *v.* Sweet, 4 Ill. 120. See also House *v.* Beak, 141 Ill. 290, 30 N. E. 1065, 33 Am. St. Rep. 307.

New York.— Smith *v.* Smith, 163 N. Y. 168, 57 N. E. 300, 7 N. Y. Annot. Cas. 470, 52 L. R. A. 545 [*affirming* 13 N. Y. App. Div. 207, 43 N. Y. Suppl. 257]; McGoldrick *v.* Traphagen, 88 N. Y. 334; Irish *v.* Horn, 84 Hun 121, 32 N. Y. Suppl. 455; Atwood *v.* Barney, 80 Hun 1, 29 N. Y. Suppl. 810; Beatty *v.* Clark, 44 Hun 126; Ives *v.* Waters, 30 Hun 297; Textile Pub. Co. *v.* Smith, 31 Misc. 271, 64 N. Y. Suppl. 123; Linnell *v.* Sutherland, 11 Wend. 568; Vosburgh *v.* Thayer, 12 Johns. 461.

Texas.— See Baldridge *v.* Penland, 68 Tex. 441, 4 S. W. 565; Werbiskie *v.* McManus, 31 Tex. 116.

See 20 Cent. Dig. tit. "Evidence," § 1453 *et seq.*

Proof by one witness held sufficient.— Beattie *v.* Qua, 15 Barb. (N. Y.) 132.

Rule applied to physician's book of visits.— Knight *v.* Cunnington, 6 Hun (N. Y.) 100 [*disapproving* Clark *v.* Smith, 46 Barb. (N. Y.) 30]; Larue *v.* Rowland, 7 Barb. (N. Y.) 107; Foster *v.* Coleman, 1 E. D. Smith (N. Y.) 85.

Testimony of bookkeeper.— The fact that the witness is a bookkeeper does not disqualify him from testifying that his employer kept honest and correct books, where he has settled his own private account with his employer by his books, and found them correct. McGoldrick *v.* Traphagen, 88 N. Y. 334 [*overruling* Hauptman *v.* Catlin, 1 E. D. Smith (N. Y.) 729].

Estoppel to deny correctness of account.— In House *v.* Beak, 141 Ill. 290, 30 N. E. 1065, 33 Am. St. Rep. 307, it was held that proof by customers who have settled with a party by his books and found them correct was not required where it appeared that the adverse party had made a payment upon the account without questioning it and afterward accepted a statement of the account with the remark that it was "all right" and never made any objection to the correctness thereof between that time and the bringing of the suit three years later. See also West *v.* Van Tuyl, 119 N. Y. 620, 23 N. E. 450.

Effect of statutes enabling party to testify. — In Michigan it has been held that, since the enactment of the statute permitting parties to testify in their own behalf, it is no longer necessary to call as witnesses others who have settled by the books. Seventh-Day Adventist Pub. Assoc. *v.* Fisher, 95 Mich. 274, 54 N. W. 759; Montague *v.* Dougan, 68 Mich. 98, 35 N. W. 840. See also White *v.* Whitney, 82 Cal. 163, 22 Pac. 1138.

73. Bower *v.* Smith, 8 Ga. 74; Jackson *v.* Evans, 8 Mich. 476; McGoldrick *v.* Traphagen, 88 N. Y. 334. See also Cole *v.* Anderson, 8 N. J. L. 68. *Compare* Shute *v.* Ogden, 3 N. J. L. 921.

party from bills presented.[74] Where a party has established by the testimony of a creditor the probity of his shop-books he need not go further and show by evidence *aliunde* that the particular charges against the adverse party are usual and reasonable.[75]

(13) Entries Made From Memoranda Furnished by Another. Entries made by a party from data furnished or memoranda kept by an employee to assist his memory in making a report or return will be admissible if supplemented by the oath of the party and the testimony of the person furnishing the information.[76] In some of the cases moreover the testimony of the servant making the memoranda or furnishing the information is held to be necessary to render the books admissible unless at least he is dead or his absence is otherwise satisfactorily accounted for.[77] But in other jurisdictions a different rule prevails.[78]

(c) *Impeachment of Credit of Books.* The rule has been laid down that a plaintiff who swears to his original books of entries puts his general character for truth and veracity[79] and the general character of his book for honesty and accuracy in evidence, and invites attack upon either or both.[80] Accordingly it has been held competent for the adverse party to show the general character of the

74. Jackson *v.* Evans, 8 Mich. 476; Stone *v.* Cronin, 72 N. Y. App. Div. 565, 76 N. Y. Suppl. 605; Wright *v.* Hicks, 61 N. Y. App. Div. 489, 70 N. Y. Suppl. 675; Powell *v.* Murphy, 18 N. Y. App. Div. 25, 45 N. Y. Suppl. 374; Walbridge *v.* Simon, 13 Misc. (N. Y.) 634, 34 N. Y. Suppl. 939.

75. Bailey *v.* Barnelly, 23 Ga. 582.

76. Smith *v.* Law, 47 Conn. 431; Miller *v.* Shay, 145 Mass. 162, 13 N. E. 468, 1 Am. St. Rep. 449; Harwood *v.* Mulry, 8 Gray (Mass.) 250; Barker *v.* Haskell, 9 Cush. (Mass.) 218; Morris *v.* Briggs, 3 Cush. (Mass.) 342; Smith *v.* Sanford, 12 Pick. (Mass.) 139, 22 Am. Dec. 415; Krom *v.* Levy, 1 Hun (N. Y.) 171; Hoover *v.* Gehr, 62 Pa. St. 136.

Sufficiency of servant's testimony.— Where plaintiff's clerk testified that he weighed the grain taken in at an elevator, and set the weights down in a scale-book, from which he made a daily report to his employer, who entered the same in his day-book, the day-book was held inadmissible to prove the amount of such weights, as the clerk did not testify that he entered the weights correctly or made a correct report thereof. Missouri Pac. R. Co. *v.* Johnson, (Tex. Sup. 1888) 7 S. W. 838.

77. *Illinois.*— Schnellbacher *v.* Frank McLaughlin Plumbing Co., 108 Ill. App. 486.

Massachusetts.— Kent *v.* Garvin, 1 Gray 148.

Michigan.— Jackson *v.* Evans, 8 Mich. 476.

Minnesota.— Paine *v.* Sherwood, 21 Minn. 225.

New York.— Ives *v.* Waters, 30 Hun 297.

South Carolina.— See Clough *v.* Little, 3 Rich. 353; Venning *v.* Hacker, 2 Hill 584.

See 20 Cent. Dig. tit. "Evidence," § 1453 *et seq.*

78. Taylor *v.* Tucker, 1 Ga. 231; Groschell *v.* Knoll, 10 Ky. L. Rep. 314. Thus it has been held not to be necessary that the person who makes the entries in shop-books should with his own hands deliver the goods charged in order to make the entry evidence of sale and delivery, and that a party's books supported by his oath is admissible to prove the sale and delivery of goods without the testimony of the carter or other person delivering the goods (Curren *v.* Crawford, 4 Serg. & R. (Pa.) 3. See also Kline *v.* Gundrum, 11 Pa. St. 242); and this, although the entries are made from memoranda furnished by the carter (Jones *v.* Long, 3 Watts (Pa.) 325). *Compare* Kessler *v.* McConachy, 1 Rawle (Pa.) 435. So in Bailey *v.* Barnelly, 23 Ga. 582, it was held that the books of a blacksmith, when proven in the usual mode by the blacksmith, are admissible in evidence, although it appears that some portion of the account was charged on information received from a slave who did the work.

79. Kitchen *v.* Tyson, 7 N. C. 314; Funk *v.* Ely, 45 Pa. St. 444; Barber *v.* Bull, 7 Watts & S. (Pa.) 391. *Compare* Nickerson *v.* Morin, 3 Wis. 243.

Character for honesty.— Where a party offers in evidence his books of original entries, kept by another, who is absent from the state, and whose handwriting is proven, the adverse party may, it is held, give evidence as to the general character of such absent person for honesty. Crouse *v.* Miller, 10 Serg. & R. (Pa.) 155; White's Estate, 11 Phila. (Pa.) 100.

Reputation for keeping false or inaccurate accounts.— It has been held that evidence is not admissible to show that a party is generally reputed to keep inaccurate, false, and fraudulent accounts. Roberts *v.* Ellsworth, 11 Conn. 290; Hitt *v.* Slocum, 37 Vt. 524. *Compare* Sheridan *v.* Tenner, 5 Ohio Cir. Ct. 19, 3 Ohio Cir. Dec. 10.

Evidence of general moral character of party inadmissible.— In an action to recover for labor and material furnished, where plaintiff offered his books of account as evidence in support of his claim, defendant will not be permitted to prove the general moral character of plaintiff to be bad, for the purpose of discrediting such books. Tomlinson *v.* Borst, 30 Barb. (N. Y.) 42.

80. Funk *v.* Ely, 45 Pa. St. 444; Barber *v.* Bull, 7 Watts & S. (Pa.) 391; White's Estate, 11 Phila. (Pa.) 100.

book when admitted by pointing to charges and entries affecting other persons and by calling witnesses to prove these entries false and fraudulent.[81]

(II) *Entries by Clerks and Third Persons Generally* — (A) *General Statement.* The general rule is well settled that an entry made contemporaneously with the transaction by a clerk of a party to the cause, or by any third person in the ordinary course of his business or vocation, with no interest to misrepresent, before any controversy or question has arisen, and in a book produced from the proper custody, is competent evidence after his death of the facts thus recorded.[82] A similar rule has been applied where the party making the entry

81. Merchants' Bank *v.* Rawls, 7 Ga. 191, 50 Am. Dec. 394; Funk *v.* Ely, 45 Pa. St. 444 (where it was said, however, that the court should limit the investigation to the time or near the time covered by the account in suit); White's Estate, 11 Phila. (Pa.) 100. See also Read *v.* Smith, 1 Hun (N. Y.) 263, 3 Thomps. & C. (N. Y.) 760; Harrison *v.* State Cent. Bank, 1 Tex. App. Civ. Cas. § 375. *Compare* Gardner *v.* Way, 8 Gray (Mass.) 189, where it was held that the introduction of plaintiff's book of original entries and ledger, with his oath, in support of an action for goods sold and delivered, does not authorize defendant to show that plaintiff some years before made dishonest charges in other books of original entry, against other parties, whose accounts appeared in the same ledger.

82. *Alabama.*—Sands *v.* Hammell, 108 Ala. 624, 18 So. 489; Terry *v.* Birmingham Nat. Bank, 93 Ala. 599, 9 So. 299, 30 Am. St. Rep. 87; McDonald *v.* Carnes, 90 Ala. 147, 7 So. 919; Elliott *v.* Dycke, 78 Ala. 150; Dismukes *v.* Tolson, 67 Ala. 386; Davis *v.* Tarver, 65 Ala. 98; Avery *v.* Avery, 49 Ala. 193; Montgomery Bank *v.* Plannett, 37 Ala. 222; Grant *v.* Cole, 8 Ala. 519; Everly *v.* Bradford, 4 Ala. 371; Batre *v.* Simpson, 4 Ala. 305; Clemens *v.* Patton, 9 Port. 289.

California.— Sill *v.* Reese, 47 Cal. 294.

Colorado.— See Farrington *v.* Tucker, 6 Colo. 557.

Connecticut.— Bridgewater *v.* Roxbury, 54 Conn. 213, 6 Atl. 415; Ashmead *v.* Colby, 26 Conn. 287; Livingston *v.* Tyler, 14 Conn. 493.

Indiana.— Culver *v.* Marks, 122 Ind. 554, 23 N. E. 1086, 17 Am. St. Rep. 377, 7 L. R. A. 489; Glover *v.* Hunter, 28 Ind. 185.

Louisiana.— Lathrop *v.* Lawson, 5 La. Ann. 238, 52 Am. Dec. 585; Oxnard *v.* Locke, 13 La. 447; Hunter *v.* Smith, 6 Mart. N. S. 351; Herring *v.* Levy, 4 Mart. N. S. 383.

Maine.— Dow *v.* Sawyer, 29 Me. 117.

Maryland.— Reynolds *v.* Manning, 15 Md. 510; King *v.* Maddux, 7 Harr. & J. 467; Clarke *v.* Magruder, 2 Harr. & J. 77.

Massachusetts.— Kennedy *v.* Doyle, 10 Allen 161; Jones *v.* Howard, 3 Allen 223; Washington Bank *v.* Prescott, 20 Pick. 339; Shove *v.* Wiley, 18 Pick. 558; North Bank *v.* Abbot, 13 Pick. 465, 25 Am. Dec. 334; Union Bank *v.* Knapp, 3 Pick. 96, 15 Am. Dec. 181; Welsh *v.* Barrett, 15 Mass. 380.

New Hampshire.— Roberts *v.* Rice, 69 N. H. 472, 45 Atl. 237; Wheeler *v.* Walker, 45 N. H. 355; Rand *v.* Dodge, 17 N. H. 343.

New York.— Fisher *v.* New York, 67 N. Y. 73 [*reversing* 6 Hun 64]; Livingston *v.* Arnoux, 56 N. Y. 507; Gawtry *v.* Doane, 51 N. Y. 84; Leland *v.* Cameron, 31 N. Y. 115; Stroud *v.* Tilton, 4 Abb. Dec. 324, 3 Keyes 139; Bentley *v.* Falker, 24 N. Y. App. Div. 560, 49 N. Y. Suppl. 691; Ocean Nat. Bank *v.* Carll, 9 Hun 239; Chenango Bridge Co. *v.* Lewis, 63 Barb. 111; Arms *v.* Middleton, 23 Barb. 571; Burke *v.* Wolfe, 38 N. Y. Super. Ct. 263; Elsworth *v.* Muldoon, 15 Abb. Pr. N. S. 440; Merrill *v.* Ithaca, etc., R. Co., 16 Wend. 586, 30 Am. Dec. 130; Hawley *v.* Bennett, 5 Paige 104. *Compare* Crouch *v.* Parker, 56 N. Y. 597.

North Carolina.— Bland *v.* Warren, 65 N. C. 372.

South Carolina.— Hand *v.* Savannah, etc., R. Co., 17 S. C. 219.

South Dakota.— Smith *v.* Hawley, 8 S. D. 363, 66 N. W. 942.

Vermont.— State *v.* Phair, 48 Vt. 366; Bacon *v.* Vaughn, 34 Vt. 73; Derby *v.* Salem, 30 Vt. 722.

Virginia.— Brown *v.* Brown, 2 Wash. 151; Lewis *v.* Norton, 1 Wash. 76.

United States.— Chaffee *v.* U. S., 18 Wall. 516, 21 L. ed. 908; Nicholls *v.* Webb, 8 Wheat. 326, 5 L. ed. 628; U. S. Bank *v.* Davis, 2 Fed. Cas. No. 915, 4 Cranch C. C. 533; Gale *v.* Norris, 9 Fed. Cas. No. 5,190, 2 McLean 469. See also Owens *v.* Adams, 18 Fed. Cas. No. 10,633, 1 Brock. 72.

England.— Doe *v.* Turford, 3 B. & Ad. 890, 1 L. J. K. B. 262, 23 E. C. L. 388; Poole *v.* Dicas, 1 Bing. N. Cas. 649, 27 E. C. L. 803; Evans *v.* Lake, Buller N. P. 282; Doe *v.* Robson, 15 East 32, 13 Rev. Rep. 361; Price *v.* Torrington, 2 Ld. Raym. 873, 1 Salk. 285; Pitman *v.* Maddox, 1 Ld. Raym. 732; Barry *v.* Bebbington, 4 T. R. 514, 2 Rev. Rep. 450. *Compare* Sikes *v.* Marshal, 2 Esp. 705.

See 20 Cent. Dig. tit. "Evidence," § 1435 *et seq.*

Proof of handwriting essential.— Farrington *v.* Tucker, 6 Colo. 557; Owens *v.* Adams, 18 Fed. Cas. No. 10,633, 1 Brock. 72.

Effect of existence of better evidence.— In Montgomery Bank *v.* Plannett, 37 Ala. 222, it was held that a book of original entries made by the deceased teller of a bank is inadmissible in evidence to prove payment made to a depositor, where the custom of the bank is to pay money to depositors only on checks, on the ground that the reason of the rule admitting books of account kept by a deceased person in the regular course of business ceases, and the rule consequently fails,

has since become insane[83] or is beyond the jurisdiction of the court, at least if his absence is permanent and not temporary,[84] or generally, it has been said, where it has become impossible to procure his testimony, the cause of such impossibility being immaterial.[85] But it has been held to be incumbent on the party offering entries of this kind, unauthenticated by the oath of the person who made them, to show as a prerequisite to their admission that such person cannot be produced as a witness, and when he is living some discretion must be allowed to the trial court in deciding whether proof offered as preliminary to the introduction of the entries is sufficient to admit them as in case of the witness' death.[86] The general rule established at common law and adopted by statute in many jurisdictions, with slight modifications in some instances, is that book entries should be proved or corroborated by the clerk, servant, or other person making them, if he is alive and can be produced.[87] Testimony of a party or the person for whom the books

when it appears that there is other and better evidence of the same facts.

83. Bridgewater *v.* Roxbury, 54 Conn. 213, 6 Atl. 415; Union Bank *v.* Knapp, 3 Pick. (Mass.) 96, 15 Am. Dec. 181.

84. *Alabama.*—McDonald *v.* Carnes, 90 Ala. 147, 7 So. 919 [*overruling* Moore *v.* Andrews, 5 Port. 107].

Colorado.— See Farrington *v.* Tucker, 6 Colo. 557.

Connecticut.—See Bartholomew *v.* Farwell, 41 Conn. 107.

Indiana.— Culver *v.* Marks, 122 Ind. 554, 23 N. W. 1086, 17 Am. St. Rep. 377, 7 L. R. A. 489.

Maryland.— Heiskell *v.* Rollins, 82 Md. 14, 33 Atl. 263, 51 Am. St. Rep. 455; Reynolds *v.* Manning, 15 Md. 510.

Massachusetts.— North Bank *v.* Abbot, 13 Pick. 465, 25 Am. Dec. 334.

Michigan.—Cameron Lumber Co. *v.* Somerville, 129 Mich. 552, 89 N. W. 346.

Pennsylvania.— Crouse *v.* Miller, 10 Serg. & R. 155; Sterrett *v.* Bull, 1 Binn. 234. See also Gochenauer *v.* Good, 3 Penr. & W. 274.

Rhode Island.— State *v.* Mace, 6 R. I. 85.

South Carolina.— Elms *v.* Chevis, 2 McCord 349.

West Virginia.— Vinal *v.* Gilman, 21 W. Va. 301, 45 Am. Rep. 562.

United States.— James *v.* Wharton, 13 Fed. Cas. No. 7,187, 3 McLean 492. *Compare* Little Rock Granite Co. *v.* Dallas County, 66 Fed. 522, 13 C. C. A. 620.

Compare Browning *v.* Flanagin, 22 N. J. L. 567; Brewster *v.* Doane, 2 Hill (N. Y.) 537; Merrill *v.* Ithaca, etc., R. Co., 16 Wend. (N. Y.) 586, 30 Am. Dec. 130; Wilbur *v.* Selden, 6 Cow. (N. Y.) 162; Whitfield *v.* Walk, 3 N. C. 24; Kennedy *v.* Fairman, 2 N. C. 458; Cooper *v.* Marsden, 1 Esp. 1.

See 20 Cent. Dig. tit. "Evidence," § 1432 *et seq.*

Temporary absence held sufficient.— Hay *v.* Kramer, 2 Watts & S. (Pa.) 137. *Compare* McKeen *v.* Providence County Sav. Bank, 24 R. I. 542, 54 Atl. 49.

85. North Bank *v.* Abbot, 13 Pick. (Mass.) 465, 25 Am. Dec. 334. See also Townsend *v.* Pepperell, 99 Mass. 40; Stevelie *v.* Greenlee, 12 N. C. 317.

Witness unable to attend on account of sickness.— In Rodman *v.* Hoop, 1 Dall. (Pa.) 85, 1 L. ed. 47, the court ordered a book in the form of a ledger, containing in some instances references to a waste book, to be read, leaving it to the jury to determine on the face of it whether it was original or a transcript, it appearing that the person who could prove it was incapable of attending on account of sickness. *Compare* Taylor *v.* Chicago, etc., R. Co., 80 Iowa 431, 46 N. W. 64, where a memorandum made by an employee was inadmissible in the employer's favor, although the employee was sick and unable to testify in person.

Witness unable to testify on account of interest.— Where a clerk who kept the books of a deceased person which were offered in evidence was incompetent to testify by reason of the fact that he had since married the widow and was interested as one of the distributees of the estate, the book was nevertheless held admissible. Van Horne *v.* Brady, Wright (Ohio) 451. *Compare* Hale *v.* Smith, 6 Me. 416.

86. St. Louis, etc., R. Co. *v.* Henderson, 57 Ark. 402, 21 S. W. 878. See also Sneed *v.* State, 47 Ark. 180, 1 S. W. 68.

87. *Alabama.*—Powell *v.* State, 84 Ala. 444, 4 So. 719.

California.— *In re* Flint, 100 Cal. 391, 34 Pac. 863; Kerns *v.* Dean, 77 Cal. 555, 19 Pac. 817; Kerns *v.* McKean, 76 Cal. 87, 18 Pac. 122.

Colorado.— Farrington *v.* Tucker, 6 Colo. 557; Charles *v.* Ballin, 4 Colo. App. 186, 35 Pac. 279.

Florida.— Union Bank *v.* Call, 5 Fla. 409.

Georgia.— Bracken *v.* Dillon, 64 Ga. 243, 37 Am. Rep. 70.

Illinois.— Barnes *v.* Simmons, 27 Ill. 512, 81 Am. Dec. 248. See also Trainor *v.* German-American Savings, etc., Assoc., 204 Ill. 616, 68 N. E. 650; House *v.* Beak, 141 Ill. 290, 30 N. E. 1065, 33 Am. St. Rep. 307; Ruggles *v.* Gatton, 50 Ill. 412.

Iowa.— Ford *v.* St. Louis, etc., R. Co., 54 Iowa 723, 7 N. W. 126.

Maryland.— Owings *v.* Low, 5 Gill & J. 134.

Michigan.— See Tioga Mfg. Co. *v.* Stimson, 48 Mich. 213, 12 N. W. 173.

New Jersey.— Browning *v.* Flanagin, 22 N. J. L. 567.

New York.— Ocean Nat. Bank *v.* Carll, 55

are kept or of another clerk or servant or of third persons generally will not in the absence of statute be sufficient for this purpose.[88] The entries are, however, very generally held admissible in connection with the testimony of the person making them,[89] the evidence usually being admitted on the theory of refreshing

N. Y. 440; White *v.* Ambler, 8 N. Y. 170; Smith *v.* Smith, 1 Thomps. & C. 63; Sheriden *v.* Smith, 2 Hill 538; Merrill *v.* Ithaca, etc., R. Co., 16 Wend. 586; Nichols *v.* Goldsmith, 7 Wend. 160; Hart *v.* Wilson, 2 Wend. 513; Butler *v.* Wright, 2 Wend. 369; Halliday *v.* Martinet, 20 Johns. 168, 11 Am. Dec. 262. *Compare* Steubling *v.* New York El. R. Co., 19 N. Y. Suppl. 313.

North Carolina.— Sloan *v.* McDowell, 75 N. C. 29. See also State Bank *v.* Clark, 8 N. C. 36.

Ohio.— Bennett *v.* Shaw, 12 Ohio Cir. Ct. 574, 5 Ohio Cir. Dec. 480.

Pennsylvania.— Budden *v.* Petriken, 5 Watts 286; Gochenauer *v.* Good, 3 Penr. & W. 274; Rhoads *v.* Gaul, 4 Rawle 404, 27 Am. Dec. 277; Patton *v.* Ash, 7 Serg. & R. 116; Sterrett *v.* Bull, 1 Binn. 234. See also Vance *v.* Fairis, 2 Dall. 217, 1 L. ed. 355. *Compare* Schollenberger *v.* Seldonridge, 49 Pa. St. 83.

South Carolina.— Tunno *v.* Rogers, 1 Bay 480.

Texas.— Arnold *v.* Penn, 11 Tex. Civ. App. 325, 32 S. W. 353.

Vermont.— Burnham *v.* Adams, 5 Vt. 313.

Virginia.— Courtney *v.* Com., 5 Rand. 666.

West Virginia.—Vinal *v.* Gilman, 21 W. Va. 301, 45 Am. Rep. 562.

Wisconsin.— Marsh *v.* Case, 30 Wis. 531.

United States.— Chaffee *v.* U. S., 18 Wall. 516, 21 L. ed. 908; Chandler *v.* Pomeroy, 87 Fed. 262; Little Rock Granite Co. *v.* Dallas County, 66 Fed. 522, 13 C. C. A. 620. See also Owens *v.* Adams, 18 Fed. Cas. No. 10,633, 1 Brock. 72.

See 20 Cent. Dig. tit. "Evidence," § 1432 *et seq.*

For application of rule in criminal cases see State *v.* Thomas, 64 N. C. 74; Wade *v.* State, 37 Tex. Cr. 401, 35 S. W. 663; Howard *v.* State, 35 Tex. Cr. 136, 32 S. W. 544; People *v.* Biddlecome, 3 Utah 208, 2 Pac. 194. A train register is not competent on a criminal prosecution to prove the time of the arrival and departure of a train at a certain station on the night of the crime, where the conductor who made the register is not called as a witness, and the agents of the railroad who are called have no actual knowledge of the time, but are only able to testify that the rules of the company required the conductor to register. People *v.* Mitchell, 94 Cal. 550, 29 Pac. 1106.

Book entries introduced to prove collateral matter.— Book entries introduced to show the earnings of a vessel prior to collision are not inadmissible because not authenticated by the person making the entries as original entries, as would be required if they were introduced to prove an account. The William H. Bailey, 103 Fed. 799 [*affirmed* in 111 Fed. 1006, 50 C. C. A. 76].

In Connecticut except in the action of book debt and kindred proceedings in law and equity for the adjustment of matters of account (Butler *v.* Cornwall Iron Co., 22 Conn. 335) the rule of the text is applied (Bartholomew *v.* Farwell, 41 Conn. 107; Stiles *v.* Homer, 21 Conn. 507).

In Vermont accounts kept by a living clerk have been held admissible in an action on book-account without the production of the clerk as a witness. Cummings *v.* Fullain, 13 Vt. 434.

Under statute in some states books of account containing charges by one party against another must be verified by the clerk or other person making them (Gilbert *v.* Merriam, etc., Saddlery Co., 26 Nebr. 194, 42 N. W. 11; Holland *v.* Commercial Bank, 22 Nebr. 571, 36 N. W. 113), except where a sufficient reason is given for not calling such witness (Arney *v.* Meyer, 96 Iowa 395, 65 N. W. 337; Karr *v.* Stivers, 34 Iowa 123; Volker *v.* Tecumseh First Nat. Bank, 26 Nebr. 602, 42 N. W. 732).

88. Charles *v.* Ballin, 4 Colo. App. 186, 35 Pac. 279; Day *v.* Crawford, 13 Ga. 508; Karr *v.* Stivers, 34 Iowa 123; Smith *v.* Smith, 1 Thomps. & C. (N. Y.) 63; Horowitz *v.* Jacobs, 34 Misc. (N. Y.) 402, 69 N. Y. Suppl. 746. *Compare* Continental Nat. Bank *v.* Nashville First Nat. Bank, 108 Tenn. 374, 68 S. W. 497, where it was held that bank-books which are produced and identified by the cashier are admissible, without showing by the person making the entries therein that they are correct.

Under statute in Illinois the interested party is allowed to testify to his own book-accounts, although kept by a clerk. House *v.* Beak, 141 Ill. 290, 30 N. E. 1065, 33 Am. St. Rep. 307; Kibbe *v.* Bancroft, 77 Ill. 18; Taliaferro *v.* Ives, 51 Ill. 247. But it has been held that it was not the intention of the statute to prohibit the introduction in evidence of books of account kept by a clerk upon his testimony, when such clerk is living in the state and is able to testify to the correctness of the books. House *v.* Beak, 141 Ill. 290, 30 N. E. 1065, 33 Am. St. Rep. 307 [*overruling* New Boston Presb. Church *v.* Emerson, 66 Ill. 269]; Stettauer *v.* White, 98 Ill. 72; Taliaferro *v.* Ives, 51 Ill. 247; Weigle *v.* Brautigam, 74 Ill. App. 285.

Similar statute in Minnesota see Webb *v.* Michener, 32 Minn. 48, 19 N. W. 82.

89. *Alabama.*—Snow Hardware Co. *v.* Loveman, 131 Ala. 221, 31 So. 19; Walling *v.* Morgan County, 126 Ala. 326, 28 So. 433; Wager Lumber Co. *v.* Sullivan Logging Co., 120 Ala. 558, 24 So. 949; Bolling *v.* Fannin, 97 Ala. 619, 12 So. 59; Hart *v.* Kendall, 82 Ala. 144, 3 So. 41; Hancock *v.* Kelly, 81 Ala. 368, 2 So. 281; Calloway *v.* Varner, 77 Ala. 541, 54 Am. Rep. 78; Acklen *v.* Hickman, 63

the witness' memory and this although as a matter of fact the witness may have no present recollection of the facts entered,[90] and although, as it has been said, in cases of accounts composed of many items refreshing the memory means nothing more than reading the book in evidence.[91] In some instances contemporaneous entries by a person in the usual course of his duties have been received as constituting part of the *res gestæ* of the principal transaction, although the person who made the entry was alive at the time of the trial.[92] On the other hand this prin-

Ala. 494, 35 Am. Rep. 54; Knowles *v.* Lee, 34 Ala. 181.

California.— See Pauly *v.* Pauly, 107 Cal. 8, 40 Pac. 29, 48 Am. St. Rep. 98; McLennan *v.* State Bank, 87 Cal. 569, 25 Pac. 760.

Connecticut.— Weeden *v.* Hawes, 10 Conn. 50.

Georgia.— Taylor *v.* Tucker, 1 Ga. 231. See also Williams *v.* Kelsey, 6 Ga. 365.

Illinois.— Chicago, etc., R. Co. *v.* American Strawboard Co., 190 Ill. 268, 60 N. E. 518 [*affirming* 91 Ill. App. 635]; Ryan *v.* Miller, 153 Ill. 138, 38 N. E. 642; Jones *v.* Smith, 37 Ill. App. 169. See also Lehmann *v.* Rothbarth, 111 Ill. 185.

Indiana.— Culver *v.* Marks, 122 Ind. 554, 23 N. E. 1086, 17 Am. St. Rep. 377, 7 L. R. A. 489; Davis *v.* Franklin, 25 Ind. 407; Cleland *v.* Applegate, 8 Ind. App. 499, 35 N. E. 1108.

Louisiana.— See Penny's Succession, 14 La. Ann. 194.

Maryland.— Spring Garden Mut. Ins. Co. *v.* Evans, 15 Md. 54, 74 Am. Dec. 555. See also Blumhardt *v.* Rohr, 70 Md. 328, 17 Atl. 266.

Massachusetts.— Anderson *v.* Edwards, 123 Mass. 273; Jordan *v.* Osgood, 109 Mass. 457, 12 Am. Rep. 731; Adams *v.* Coulliard, 102 Mass. 167; Briggs *v.* Rafferty, 14 Gray 525; Bradford *v.* Stevens, 10 Gray 379; McKavlin *v.* Bresslin, 8 Gray 177; Bunker *v.* Shed, 8 Metc. 150. See also Parsons *v.* Manufacturers' Ins. Co., 16 Gray 463; Watson *v.* Phœnix Bank, 8 Metc. 217, 41 Am. Dec. 500; Union Bank *v.* Knapp, 3 Pick. 96, 15 Am. Dec. 181.

Michigan.— Union Cent. L. Ins. Co. *v.* Smith, 119 Mich. 171, 77 N. W. 706; Welch *v.* Palmer, 85 Mich. 310, 48 N. W. 552; Peters *v.* Gallagher, 37 Mich. 407.

Minnesota.— Newell *v.* Houlton, 22 Minn. 19.

Missouri.— Borgess Invest. Co. *v.* Vette, 142 Mo. 560, 44 S. W. 754, 64 Am. St. Rep. 567; Smith *v.* Beattie, 57 Mo. 281.

New Hampshire.— State *v.* Shinborn, 46 N. H. 497, 88 Am. Dec. 224; Webster *v.* Clark, 30 N. H. 245; Heath *v.* West, 26 N. H. 191.

New York.— Gilbert *v.* Sage, 57 N. Y. 639; Green *v.* Disbrow, 7 Lans. 381; Burke *v.* Wolfe, 38 N. Y. Super. Ct. 263; Muckle *v.* Rennie, 16 N. Y. Suppl. 208; Rosenstock *v.* Hoggarty, 13 N. Y. Suppl. 228; Dunn *v.* James, 62 How. Pr. 307; Monroe Bank *v.* Culver, 2 Hill 531; Merrill *v.* Ithaca, etc., R. Co., 16 Wend. 586, 30 Am. Dec. 130. See also Irish *v.* Horn, 84 Hun 121, 32 N. Y. Suppl. 455; Peck *v.* Von Keller, 15 Hun 470.

Ohio.— Moots *v.* State, 21 Ohio St. 653.

Pennsylvania.— Meighen *v.* Bank, 25 Pa. St. 288; Messinger *v.* Hagenbuch, 2 Whart. 410; Farmers', etc., Bank *v.* Boraef, 1 Rawle 152. See also Holt *v.* Pie, 120 Pa. St. 425, 14 Atl. 389; Petriken *v.* Baldy, 7 Watts & S. 429.

Rhode Island.— Almy *v.* Allen, 22 R. I. 595, 48 Atl. 934.

South Carolina.— Black *v.* Shooler, 2 McCord 293.

Texas.— Underwood *v.* Parrott, 2 Tex. 168; Cahn *v.* Salinas, 2 Tex. App. Civ. Cas. § 614; Nugent *v.* Martin, 1 Tex. App. Civ. Cas. § 1173. See also Baldridge *v.* Penland, 68 Tex. 441, 4 S. W. 565; Taylor *v.* Coleman, 20 Tex. 772.

Utah.— Burraston *v.* Nephi First Nat. Bank, 22 Utah 328, 62 Pac. 425.

Vermont.— Burnham *v.* Adams, 5 Vt. 313.

Virginia.— Courtney *v.* Com., 5 Rand. 666.

Wisconsin.— Milwaukee Trust Co. *v.* Warren, 112 Wis. 505, 87 N. W. 801; Hopkins *v.* Stefan, 77 Wis. 45, 45 N. W. 676; Curran *v.* Witter, 68 Wis. 16, 31 N. W. 705, 60 Am. Rep. 827; Riggs *v.* Weise, 24 Wis. 545; Schettler *v.* Jones, 20 Wis. 412.

See 20 Cent. Dig. tit. "Evidence," § 1432 *et seq.*

Rule applied to entry made by clerk afterward suing as executor.— Hodge *v.* Higgs, 12 Fed. Cas. No. 6,558, 2 Cranch C. C. 552.

Application of rule in criminal cases see Davis *v.* State, 91 Ga. 167, 17 S. E. 292; Com. *v.* Jeffs, 132 Mass. 5; People *v.* Brow, 90 Hun (N. Y.) 509, 35 N. Y. Suppl. 1009; Shriedly *v.* State, 23 Ohio St. 130; Moots *v.* State, 21 Ohio St. 653.

Whether a particular book is the stock ledger of a bank is a question of fact, which may be proved by the testimony of the cashier, and no attestation of the book by him or any other officer is necessary to make it admissible in evidence. Skowhegan Bank *v.* Cutler, 52 Me. 509.

Banker's book identified by one clerk.— A banker's book has been held receivable in evidence to show that a customer had no funds in the banker's hands, although it was kept by many clerks and only one was sworn to identify it and to show the manner of its being kept. Furness *v.* Cope, 5 Bing. 114, 6 L. J. C. P. O. S. 242, 2 M. & P. 197, 15 E. C. L. 498.

90. On this question see, generally, WITNESSES.

91. See Anchor Milling Co. *v.* Walsh, 108 Mo. 277, 18 S. W. 904, 32 Am. St. Rep. 600.

92. Chisholm *v.* Beaman Mach. Co., 160 Ill. 101, 43 N. E. 796; House *v.* Beak, 141 Ill. 290, 30 N. E. 1065, 33 Am. St. Rep. 307; Chicago, etc., R. Co. *v.* Ingersoll, 65 Ill. 399;

ciple has been held inapplicable where an entry covers the entire transaction, that is, the principle fact in issue, and does not relate merely to contemporaneous facts leading up to the main issue.[93]

(B) *Prerequisites to Admissibility* — (1) In General. In order to lay a foundation for the admission of evidence under the regular course of business rule, the requisite facts prescribed by law must be established.[94]

(2) Contemporaneousness. The entries must be made contemporaneously with the facts which they record so as, in the language of some of the decisions, to form a part of the *res gestæ*. The law has, however, fixed no definite time within which the entries must be made.[95]

Ruggles *v.* Gatton, 50 Ill. 412; Humphreys *v.* Spear, 15 Ill. 275; Jacksonville, etc., R. Co. *v.* Hall, 2 Ill. App. 618; Oelrichs *v.* Ford, 21 Md. 489; Robinson *v.* Smith, 111 Mo. 205, 20 S. W. 29, 33 Am. St. Rep. 510; Anchor Milling Co. *v.* Walsh, 108 Mo. 277, 18 S. W. 904, 32 Am. St. Rep. 600; Mathias *v.* O'Neill, 94 Mo. 520, 6 S. W. 253; Smith *v.* Beattie, 57 Mo. 281; Gubernator *v.* Rettalack, 86 Mo. App. 184. See also Fleming *v.* Yost, 137 Ind. 95, 36 N. E. 705; Gilmore *v.* Merritt, 62 Ind. 525. *Compare* Pittsburgh, etc., R. Co. *v.* Noel, 77 Ind. 110; Weadley *v.* Toney, 24 Mo. App. 304; Lord *v.* Siegel, 5 Mo. App. 582; Martin *v.* Union Pac. R. Co., 1 Wyo. 143.

Admissibility of entry to show fact of entry. — An entry made on plaintiff's books by his clerk, who was present at the making of the bargain and was also a witness in the case, has been held admissible as evidence of the fact that such an entry was made, as part of the *res gestæ*, the reason for the making of the entry being explained by the clerk. Moore *v.* Meacham, 10 N. Y. 207.

93. Sypher *v.* Savery, 39 Iowa 258; McKeen *v.* Providence County Sav. Bank, 24 R. I. 542, 54 Atl. 49.

94. *Colorado.*— Farrington *v.* Tucker, 6 Colo. 557.

Connecticut.— Smith *v.* Vincent, 15 Conn. 1, 38 Am. Dec. 59.

Georgia.— Talbotton R. Co. *v.* Gibson, 106 Ga. 229, 32 S. E. 151.

Illinois.—Trainor *v.* German-American Savings, etc., Assoc., 204 Ill. 616, 68 N. E. 650 [*reversing* 102 Ill. App. 604]; Schuellbacher *v.* Frank McLaughlin Plumbing Co., 108 Ill. App. 486.

Minnesota.— Union Central L. Ins. Co. *v.* Prigge, 90 Minn. 370, 96 N. W. 917.

Nebraska.— Norberg *v.* Plummer, 58 Nebr. 410, 78 N. W. 708.

New York.— Pike State Bank *v.* Brown, 165 N. Y. 216, 59 N. E. 1, 53 L. R. A. 513; *In re* Paige, 62 Barb. 476; Schule *v.* Cunningham, 54 N. Y. Super. Ct. 302; Horton *v.* Wood, 21 N. Y. Suppl. 178.

South Carolina.— Watkins *v.* Lang, 17 S. C. 13; Walker *v.* McMahan, 3 Brev. 251.

Texas.— Duty *v.* Storrs, (Civ. App. 1902) 70 S. W. 357.

See 20 Cent. Dig. tit. "Evidence," § 1463 *et seq.*

Identification of book of entries.— In Dow *v.* Sawyer, 29 Me. 117, it was held that where the book of a deceased agent is sought to be introduced there is no rule requiring proof to be made by extraneous testimony that the book is the account-book of the agent, when the book itself upon inspection sufficiently discloses the purpose for which it is kept and for which the entries are made.

No limitation as to amount of money charge in entry.— The rule in some jurisdictions limiting the amount of a money charge to be proved by the party's shop-books has been held inapplicable to book entries made by a deceased person in the regular course of business. Union Bank *v.* Knapp, 3 Pick. (Mass.) 96, 15 Am. Dec. 181.

Evidence of third persons as to correctness of accounts kept by clerk.— It has been intimated that it is necessary to the introduction of entries of account-books made in the regular course of business by a clerk of the party that the correctness of the entries should be shown by witnesses who have made settlements by the books. See House *v.* Beak, 141 Ill. 290, 30 N. E. 1065, 33 Am. St. Rep. 307; Stroud *v.* Tilton, 4 Abb. Dec. (N. Y.) 324, 3 Keyes (N. Y.) 139; Taggart *v.* Fox, 11 Daly (N. Y.) 159. *Compare* Seventh-Day Adventist Pub. Assoc. *v.* Fisher, 95 Mich. 274, 54 N. W. 759.

Private books of municipal corporation.— A private entry in the books of a municipal corporation falls within the rule applicable to private books, and the proper foundation must be laid as in other cases for the admission of the entry in evidence in favor of the corporation. Darlington *v.* Atlantic Trust Co., 68 Fed. 849, 16 C. C. A. 28.

95. *Illinois.*— House *v.* Beak, 141 Ill. 290, 30 N. E. 1065, 33 Am. St. Rep. 307.

Missouri.— Penn *v.* Watson, 20 Mo. 13.

New Jersey.— Rumsey *v.* New York, etc., Telephone Co., 49 N. J. L. 322, 8 Atl. 290.

North Carolina.— State *v.* Castle, 79 N. C. 580.

Oregon.— Harmon *v.* Decker, 41 Oreg. 587, 68 Pac. 11, 1111, 93 Am. St. Rep. 748.

Pennsylvania.— McKnight *v.* Newell, 207 Pa. St. 562, 57 Atl. 39; Smith *v.* Lane, 12 Serg. & R. 80. See also Vance *v.* Fairis, 2 Dall. 217, 1 L. ed. 355.

Texas.— Duty *v.* Storrs, (Civ. App. 1902) 70 S. W. 357. See also Baldridge *v.* Penland, 68 Tex. 441, 4 S. W. 565.

Washington.— Union Electric Co. *v.* Seattle Theater Co., 18 Wash. 213, 51 Pac. 367.

Wisconsin.— Milwaukee Trust Co. *v.* Warren, 112 Wis. 505, 87 N. W. 801.

(3) Form and Regularity — (a) In General. The entries must also appear to have been regularly and fairly made.[96]

(b) Original Entries Required — aa. *In General.* So the entries must be shown to be original entries.[97] Thus a day-book or a blotter has been held to be a permanent record of business transactions and cannot be superseded as evidence by a ledger or other book which is transcribed from it.[98] The fact, however, that a book of accounts introduced in evidence contains some entries which are not original entries forms no objection to receiving the book as evidence of other entries which are regularly made, it appearing that the entries generally have been properly made.[99]

bb. *Entries Transcribed From Memoranda.* The mere fact that a temporary entry is first made on a slate, tally-board, slips of paper, by chalk score, or in a memorandum book, for the purpose of convenience and aiding the memory until a permanent book entry can be made, will not operate to deprive the subsequent entry of its character as an original entry.[1]

England.— Champneys *v.* Peck, 1 Stark. 404, 2 E. C. L. 157; Doe *v.* Beviss, 7 C. B. 456, 18 L. J. C. P. 128, 62 E. C. L. 456; Ray *v.* Jones, 2 Gale 220.

Canada.— Barton *v.* Dundas, 24 U. C. Q. B. 273.

See 20 Cent. Dig. tit. "Evidence," § 1456. See also *supra*, XIV, C, 2, b, (I), (B), (11).

For entries made within reasonable time see the following cases:

Illinois.— Chisholm *v.* Beaman Mach. Co., 160 Ill. 101, 43 N. E. 796.

Kansas.— Rice *v.* Hodge, 26 Kan. 164.

New York.— Forgay *v.* Atlantic Mut. Ins. Co., 2 Rob. 79.

Oregon.— Ladd *v.* Sears, 9 Oreg. 244.

Pennsylvania.— Hartley *v.* Brookes, 6 Whart. 189; Koch *v.* Howell, 6 Watts & S. 350.

For cases of unreasonable delay see Lovelock *v.* Gregg, 14 Colo. 53, 23 Pac. 86; Healey *v.* Bauer, 19 N. Y. Suppl. 989; Patterson *v.* Wyomissing Woolen Mfg. Co., 2 Woodw. (Pa.) 215.

96. Budden *v.* Petriken, 5 Watts (Pa.) 286; Gamber *v.* Wolaver, 1 Watts & S. (Pa.) 60; Gale *v.* Norris, 9 Fed. Cas. No. 5,190, 2 McLean 469. See also Armstrong *v.* Landers, 1 Pennew. (Del.) 449, 42 Atl. 617; Smith *v.* Lane, 12 Serg. & R. (Pa.) 80; Baldridge *v.* Penland, 68 Tex. 441, 4 S. W. 565.

97. *Alabama.*— Baird Lumber Co. *v.* Devlin, 124 Ala. 245, 27 So. 425.

California.— Kerns *v.* McKean, 76 Cal. 87, 18 Pac. 122.

Colorado.— Jones *v.* Henshall, 3 Colo. App. 448, 34 Pac. 254.

Georgia.— Bracken *v.* Dillon, 64 Ga. 243, 37 Am. Rep. 70. See also Dunlap *v.* Hooper, 66 Ga. 211.

Illinois.—Schnellbacher *v.* Frank McLaughlin Plumbing Co., 108 Ill. App. 486; Bradley *v.* Gardner, 87 Ill. App. 404.

Louisiana.— Herring *v.* Levy, 4 Mart. N. S. 383.

Maryland.— Thomas *v.* Price, 30 Md. 483.

Missouri.— Owen *v.* Bray, 80 Mo. App. 526.

New Jersey.— New Jersey Zinc, etc., Co. *v.* Lehigh Zinc, etc., Co., 59 N. J. L. 189, 35 Atl. 915.

Oregon.— Harmon *v.* Decker, 41 Oreg. 587, 68 Pac. 11, 1111, 93 Am. St. Rep. 748.

Pennsylvania.— Bishop *v.* Goodhart, 135 Pa. St. 374, 19 Atl. 1026; Cooper *v.* Morrel, 4 Yeates 341.

Texas.— Wills Point Bank *v.* Bates, 72 Tex. 137, 10 S. W. 348. See also Maverick *v.* Maury, 79 Tex. 435, 15 S. W. 686.

United States.— Lake County *v.* Keene Five-Cents Sav. Bank, 108 Fed. 505, 47 C. C. A. 464; Chandler *v.* Pomeroy, 87 Fed. 262; Fendall *v.* Billy, 8 Fed. Cas. No. 4,725, 1 Cranch C. C. 87; Fendall *v.* Turner, 8 Fed. Cas. No. 4,727, 1 Cranch C. C. 35; Gale *v.* Norris, 9 Fed. Cas. No. 5,190, 2 McLean 469; James *v.* Wharton, 13 Fed. Cas. No. 7,187, 3 McLean 492; Owens *v.* Adams, 18 Fed. Cas. No. 10,633, 1 Brock. 72.

See 20 Cent. Dig. tit. "Evidence," § 1453 *et seq.* See also *supra*, XIV, C, 2, b, (I), (B), (7), (I).

98. Clark *v.* Bullock, 2 N. Y. Suppl. 408; Breinig *v.* Meitzler, 23 Pa. St. 156. See also Haas' Estate, 3 Pa. Co. Ct. 345.

99. Chisholm *v.* Beaman Mach. Co., 160 Ill. 101, 43 N. E. 796; Wollenweber *v.* Ketterlinus, 17 Pa. St. 389.

1. *Colorado.*— Plummer *v.* Struby-Estabrooke Mercantile Co., 23 Colo. 190, 47 Pac. 294.

Kansas.— Rice *v.* Hodge, 26 Kan. 164.

Michigan.— Welch *v.* Palmer, 85 Mich. 310, 48 N. W. 552; Crane Lumber Co. *v.* Otter Creek Lumber Co., 79 Mich. 307, 44 N. W. 788.

Minnesota.— Levine *v.* Lancashire Ins. Co., 66 Minn. 138, 68 N. W. 855; Webb *v.* Michener, 32 Minn. 48, 19 N. W. 82; Paine *v.* Sherwood, 21 Minn. 225.

New Hampshire.— State *v.* Shinborn, 46 N. H. 497, 88 Am. Dec. 224; Pillsbury *v.* Locke, 33 N. H. 96, 66 Am. Dec. 711.

New Jersey.—Diament *v.* Colloty, 66 N. J. L. 295, 49 Atl. 445, 808. See also Rumsey *v.* New York, etc., Telephone Co., 49 N. J. L. 322, 8 Atl. 290.

New York.— Stroud *v.* Tilton, 4 Abb. Dec. 324, 3 Keyes 139; Van Wie *v.* Loomis, 77 Hun 399, 28 N. Y. Suppl. 803; Forgay *v.* Atlantic Mut. Ins. Co., 2 Rob. 79; Taggart *v.* Fox, 11

(4) Duty or Right to Make Entry. It is very generally stated as a part of the rule under discussion that the entry must have been made by the person making it in the discharge of his duty or in the usual and regular course of his business or employment.[3] It has even been held that the rule relates only to entries made by an agent in the discharge of his duty toward his principal and does not apply to entries made by a principal.[3] Moreover it has been held that it must appear that the entry was not only made in the due discharge of the business about which the person is employed, but the duty must be to do the very thing to which the entry relates and then to make a report or record of it.[4]

(5) Knowledge of Person Making Entry. It must appear that the entries are made by a person having knowledge of the facts entered,[5] or that information was communicated to the person by whom the entries were made by some person engaged in the business whose duty it was to transact the particular business and make report thereof for entry on the books.[6]

(6) Absence of Motive to Misrepresent. It is sometimes said that it must also appear that the party making the entry had no motive or interest to mis-

Daly 159; Anonymous, 21 Misc. 656, 48 N. Y. Suppl. 277.

Pennsylvania.—Hartley *v.* Brooks, 6 Whart. 189; Heery's Estate, 10 Kulp 226.

Wisconsin.— Riggs *v.* Weise, 24 Wis. 545.

United States.— See Chicago Lumbering Co. *v.* Hewitt, 64 Fed. 314, 12 C. C. A. 129.

England.— Price *v.* Torrington, 2 Ld. Raym. 873, 1 Salk. 285.

Compare Thomas *v.* Price, 30 Md. 483.

See 20 Cent. Dig. tit. "Evidence," § 1453 *et seq.* And see *supra*, XIV, C, 2, b, (I), (B), (7), (i).

A meter book containing meter readings copied on the day they were made from a memorandum made by the one reading the meter, and a register showing debits and credits of the customers, have been held admissible in an action on account by a lighting company; the former being a book of original entries, and the latter a necessary companion book. Missouri Electric Light, etc., Co. *v.* Carmody, 72 Mo. App. 534.

Admissibility of memoranda in connection with books of original entries.— Where slips containing reports of work done, and the cost of the same, and of the amount and kind of materials used, are part of a method of carrying on business, they are held to be competent evidence, when offered in connection with the books of account of the business. Diament *v.* Colloty, 66 N. J. L. 295, 49 Atl. 445, 808.

2. *Colorado.*— Haines *v.* Christie, 28 Colo. 502, 66 Pac. 883; Farrington *v.* Tucker, 6 Colo. 557.

Maine.— See McKenney *v.* Waite, 20 Me. 349.

New York.— New York *v.* Second Ave. R. Co., 102 N. Y. 572, 7 N. E. 905, 55 Am. Rep. 839; Ridgeley *v.* Johnson, 11 Barb. 527.

Wisconsin.— Kelley *v.* Crawford, 112 Wis. 368, 88 N. W. 296.

United States.— See Nicholls *v.* Webb, 8 Wheat. 326, 5 L. ed. 628.

Canada.— Barton *v.* Dundas, 24 U. C. Q. B. 273.

3. Watts *v.* Shewell, 31 Ohio St. 331; Rex *v.* Worth, 4 Q. B. 132, 3 G. & D. 376, 7 Jur. 172, 12 L. J. Q. B. 144, 45 E. C. L. 132.

4. Ridgeley *v.* Johnson, 11 Barb. (N. Y.) 527; Smith *v.* Blakey, L. R. 2 Q. B. 326, 8 B. & S. 157, 36 L. J. Q. B. 156, 15 Wkly. Rep. 492; Massey *v.* Allen, 13 Ch. D. 558, 49 L. J. Ch. 76, 41 L. T. Rep. N. S. 788, 28 Wkly. Rep. 212; Trotter *v.* Maclean, 13 Ch. D. 574, 42 L. T. Rep. N. S. 118, 28 Wkly. Rep. 244; Polini *v.* Gray, 12 Ch. D. 411; Webster *v.* Webster, 1 F. & F. 401; Chambers *v.* Bernasconi, 1 C. M. & R. 347, 3 L. J. Exch. 373, 4 Tyrw. 531. See also Osborn *v.* Merwin, 50 How. Pr. (N. Y.) 183; Watts *v.* Shewell, 31 Ohio St. 331.

5. *Illinois.*— Schnellbacher *v.* Frank McLaughlin Plumbing Co., 108 Ill. App. 486.

Indiana.— Dodge *v.* Morrow, 14 Ind. App. 534, 41 N. E. 967, 43 N. E. 153.

Minnesota.— Carlton *v.* Carey, 83 Minn. 232, 86 N. W. 85. See also Union Central L. Ins. Co. *v.* Prigge, 90 Minn. 370, 96 N. W. 917.

New Jersey.— New Jersey Zinc, etc., Co. *v.* Lehigh Zinc, etc., Co., 59 N. J. L. 189, 35 Atl. 915.

New York.— Dykman *v.* Northbridge, 80 Hun 258, 30 N. Y. Suppl. 164; Burke *v.* Wolfe, 38 N. Y. Super. Ct. 263.

United States.— Connecticut Mut. L. Ins. Co. *v.* Schwenk, 94 U. S. 593, 24 L. ed. 294; Chaffee *v.* U. S., 18 Wall. 516, 21 L. ed. 908; Chicago Lumbering Co. *v.* Hewitt, 64 Fed. 314, 12 C. C. A. 129.

Illustration.— Books kept by an electric company, purporting to show the number of nightly performances of a theater to which the electric company furnished light, the entries being made at the end of each month from information collected from the daily newspapers and from the electric company's collectors, are incompetent to prove the correctness of the charges for light. Union Electric Co. *v.* Seattle Theatre Co., 18 Wash. 213, 51 Pac. 367.

6. U. S. *v.* Cross, 20 D. C. 365; Chicago, etc., R. Co. *v.* Provine, 61 Miss. 288; Payne *v.* Hodge, 7 Hun (N. Y.) 612; Jones *v.* Long,

represent the facts.[7] But it is unnecessary that the entries should have been against the interest of the person making them.[8]

(7) Effect of Coöperation in Making Entry. Where one person makes an entry from memoranda or information furnished by another, or two or more persons have otherwise coöperated in making an entry, the entry will be admissible in connection with the testimony of all the parties participating.[9] Indeed it is held that where the clerk who makes the entries has no knowledge of their correctness, but makes them as the items furnished by another, as for instance where entries are made by a bookkeeper from reports made by a foreman, it is essential that in addition to the oath of the party making the entry the party furnishing the items should testify to their correctness,[10] or that satisfactory

3 Watts (Pa.) 325; Imhoff *v.* Fleurer, 2 Phila. (Pa.) 35. *Compare* Gould *v.* Conway, 59 Barb. (N. Y.) 355.

7. Lord *v.* Moore, 37 Me. 208; Kennedy *v.* Doyle, 10 Allen (Mass.) 161; Smith *v.* Blakey, L. R. 2 Q. B. 326, 8 B. & S. 157, 36 L. J. Q. B. 156, 15 Wkly. Rep. 492; Polini *v.* Gray, 12 Ch. D. 411. See also Burr *v.* Byers, 10 Ark. 398, 52 Am. Dec. 239.

8. Augusta *v.* Windsor, 19 Me. 317; Doe *v.* Turford, 3 B. & Ad. 890, 1 L. J. K. B. 262, 23 E. C. L. 388.

9. *Massachusetts.*— Littlefield *v.* Rice, 10 Metc. 287; Smith *v.* Sanford, 12 Pick. 139, 22 Am. Dec. 415. See also Barker *v.* Haskell, 9 Cush. 218.

Michigan.— Cameron Lumber Co. *v.* Somerville, 129 Mich. 552, 89 N. W. 346.

New Hampshire.— State *v.* Shinborn, 46 N. H. 497, 88 Am. Dec. 224.

New York.— Cobb *v.* Wells, 124 N. Y. 77, 26 N. E. 284; New York *v.* Second Ave. R. Co., 102 N. Y. 572, 7 N. E. 905, 55 Am. Rep. 839; Bloomington Min. Co. *v.* Brooklyn Hygienic Ice Co., 58 N. Y. App. Div. 66, 68 N. Y. Suppl. 699 [*affirmed* in 171 N. Y. 673, 64 N. E. 1118]; Van Wie *v.* Loomis, 77 Hun 399, 28 N. Y. Suppl. 803; Rudd *v.* Robinson, 54 Hun 339, 7 N. Y. Suppl. 535; Payne *v.* Hodge, 7 Hun 612; West *v.* Van Tuyl, 1 N. Y. Suppl. 718. *Compare* Dooley *v.* Moan, 57 Hun 535, 11 N. Y. Suppl. 239; Gould *v.* Conway, 59 Barb. 355, where entries made on information furnished by another were rejected as embodying mere hearsay.

Pennsylvania.— Ingraham *v.* Bockius, 9 Serg. & R. 285, 11 Am. Dec. 730.

Texas.— Missouri Pac. R. Co. *v.* Johnson, (Sup. 1888) 7 S. W. 838.

Wisconsin.— Taylor *v.* Davis, 82 Wis. 455, 52 N. W. 756.

See 20 Cent. Dig. tit. "Evidence," § 1453 *et seq.*

Information must be furnished in pursuance of duty.— It has been held to be a proper qualification of the rule admitting such evidence, that the entry must have been made in the ordinary course of business, and that it should not be extended so as to admit a mere private memorandum, not made in pursuance of any duty owing by the person making it, or when made upon information derived from another who made the communication casually and voluntarily, and not under the sanction of duty or other obligation. New York *v.* Second Ave. R. Co., 102 N. Y. 572, 7 N. E. 905, 55 Am. Rep. 839.

Entries made by several persons.— One of several persons making book entries may testify as to the entries made by himself (Herriott *v.* Kersey, 69 Iowa 111, 28 N. W. 468; Green *v.* Disbrow, 7 Lans. (N. Y.) 381; Burnham *v.* Chandler, 15 Tex. 441), but not as to the entries made by others (Whitley Grocery Co. *v.* Roach, 115 Ga. 918, 42 S. E. 282; Herriott *v.* Kersey, 69 Iowa 111, 28 N. W. 468; Congdon, etc., Co. *v.* Sheehan, 11 N. Y. App. Div. 456, 42 N. Y. Suppl. 255; Skipworth *v.* Deyell, 83 Hun 307, 31 N. Y. Suppl. 918; Hancock *v.* Flynn, 5 Silv. Supreme (N. Y.) 122, 8 N. Y. Suppl. 133; *In re* Simpson, 5 N. Y. Suppl. 863; Burnham *v.* Chandler, 15 Tex. 441; Darlington *v.* Atlantic Trust Co., 68 Fed. 849, 16 C. C. A. 28). *Compare* Bradford *v.* Stevens, 10 Gray (Mass.) 379, where a book of entries kept by a clerk was admitted in connection with his testimony alone, although one of the entries was begun in the handwriting of another clerk but was finished, and the quantities, prices, weights and measures were entered by the witness, the entries being deemed to have been made substantially by him.

10. *California.*— Butler *v.* Estrella Raisin Vineyard Co., 124 Cal. 239, 56 Pac. 1040.

Colorado.— Stidger *v.* McPhee, 15 Colo. App. 252, 62 Pac. 332. See also Farrington *v.* Tucker, 6 Colo. 557.

Louisiana.— White *v.* Wilkinson, 12 La. Ann. 359.

Massachusetts.— Kent *v.* Garvin, 1 Gray 148. *Compare* Donovan *v.* Boston, etc., R. Co., 158 Mass. 450, 33 N. E. 583, where a distinction was made between book entries made from written memoranda and those made from oral information, it being held that in the latter case the person furnishing the information need not be called.

Michigan.— Swan *v.* Thurman, 112 Mich. 416, 70 N. W. 1023. See also Taylor-Woolfenden Co. *v.* Atkinson, 127 Mich. 633, 87 N. W. 89.

Minnesota.— Paine *v.* Sherwood, 21 Minn. 225.

New York.— Rathborne *v.* Hatch, 80 N. Y. App. Div. 115, 80 N. Y. Suppl. 347; Shipman *v.* Glynn, 31 N. Y. App. Div. 425, 52 N. Y. Suppl. 691; Abele *v.* Falk, 28 N. Y. App. Div. 191, 50 N. Y. Suppl. 876; Powers *v.* Savin, 64 Hun 560, 19 N. Y. Suppl. 340, 22

proof thereof — such as the transactions are reasonably susceptible of — from other sources should be produced.[11] If the person furnishing the information or memoranda for the entries is dead or cannot be produced, the entries are admissible when supported by the testimony of the person making them, especially if supplemented by proof of the correctness of the memoranda.[12]

(III) *BOOK ENTRIES AS ADMISSIONS*[13] — (A) *Against Owner of Book* — (1) IN GENERAL. A statement contained in a book entry may, like verbal or other written admissions, be competent evidence against the party by whom[14] or

N. Y. Civ. Proc. 253, 28 Abb. N. Cas. 463 [*distinguishing* New York *v.* Second Ave. R. Co., 102 N. Y. 572, 7 N. E. 905, 55 Am. Rep. 839]; Whitman *v.* Horton, 46 N. Y. Super. Ct. 531 [*affirmed* in 94 N. Y. 644]; Irving *v.* Claggett, 9 N. Y. Suppl. 136. See also Fisher *v.* Verplanck, 23 Hun 286; Gould *v.* Conway, 59 Barb. 355.

Pennsylvania.— Smith *v.* Lane, 12 Serg. & R. 80; Imhoff *v.* Fleurer, 2 Phila. 35.

United States.— The Norma, 68 Fed. 509, 15 C. C. A. 553.

Canada.— Leslie *v.* Hanson, 12 N. Brunsw. 263.

Compare U. S. *v.* Cross, 20 D. C. 365; Schaefer *v.* Georgia R. Co., 66 Ga. 39; Bailey *v.* Barnelly, 23 Ga. 582; Fielder *v.* Collier, 13 Ga. 496.

See 20 Cent. Dig. tit. "Evidence," § 1453 *et seq.*

A register of patients kept at a hospital, by the superintendent from information furnished by the physician, and naming the disease with which a patient was suffering, is not, when accompanied by the testimony of the superintendent alone, admissible in evidence to establish the nature of the disease. Price *v.* Standard L., etc., Ins. Co., 90 Minn. 264, 95 N. W. 1118.

11. Chisholm *v.* Beaman Mach. Co., 160 Ill. 101, 43 N. E. 796; House *v.* Beak, 141 Ill. 290, 30 N. E. 1065, 33 Am. St. Rep. 307; Stettauer *v.* White, 98 Ill. 72. See also Meyer *v.* Brown, 130 Mich. 449, 90 N. W. 285. See also Trainor *v.* German-American Savings, etc., Assoc., 204 Ill. 616, 68 N. E. 650 [*reversing* 102 Ill. App. 604]; Schnellbacher *v.* Frank McLaughlin Plumbing Co., 108 Ill. App. 486; Union Central L. Ins. Co. *v.* Prigge, 90 Minn. 370, 96 N. W. 917.

12. American Surety Co. *v.* Pauly, 72 Fed. 470, 18 C. C. A. 644. *Compare* Rich *v.* Eldredge, 42 N. H. 153; Chicago Lumbering Co. *v.* Hewitt, 64 Fed. 314, 12 C. C. A. 129, where it was held that entries made by a person from data furnished by another are inadmissible without the testimony of the person furnishing the data, although it appeared that he could not be found.

13. See also EVIDENCE, 16 Cyc. 938 *et seq.*

14. *Alabama.*— Lang *v.* State, 97 Ala. 41, 12 So. 183.

Colorado.— Plummer *v.* Struby-Estabrooke Mercantile Co., 23 Colo. 190, 47 Pac. 294.

Dakota.— See Waldron *v.* Evans, 1 Dak. 11, 46 N. W. 607.

Georgia.— Gaines *v.* Gaines, 39 Ga. 68.

Illinois.— Story *v.* De Armond, 179 Ill. 510, 53 N. E. 990 [*affirming* 77 Ill. App. 74].

Louisiana.— Moise's Succession, 107 La. 717, 31 So. 990; Donaldson *v.* Walker, 7 Rob. 329.

Maryland.— Carroll *v.* Ridgaway, 8 Md. 328.

Massachusetts.— Com. *v.* Clark, 145 Mass. 251, 13 N. E. 888.

Missouri.— Coombs *v.* Coombs, 86 Mo. 176.

New Jersey.— Bird *v.* Megowan, (Ch. 1898) 43 Atl. 278.

New York.— Doolittle *v.* Stone, 136 N. Y. 613, 32 N. E. 639; Kirkpatrick *v.* Goldsmith, 81 N. Y. App. Div. 265, 80 N. Y. Suppl. 835; Goetting *v.* Weber, 71 N. Y. App. Div. 503, 75 N. Y. Suppl. 890; Saugerties Bank *v.* Mack, 34 N. Y. App. Div. 494, 54 N. Y. Suppl. 360; Terry *v.* McNiel, 58 Barb. 241.

Ohio.— See Halleck *v.* State, 11 Ohio 400.

Pennsylvania.— Johnson *v.* McCain, 145 Pa. St. 531, 22 Atl. 979; Robert's Appeal, 126 Pa. St. 102, 17 Atl. 538; Hollinshead *v.* Allen, 17 Pa. St. 275; Brown *v.* Chambersburg Bank, 3 Pa. St. 187; Farmers' Bank *v.* McKee, 2 Pa. St. 318; Little *v.* Fairchild, 10 Pa. Super. Ct. 211; Rindt's Estate, 2 Lehigh Val. L. Rep. 246. See also Levering *v.* Rittenhouse, 4 Whart. 130.

Virginia.— Hampton *v.* Michael, 6 Gratt. 151.

West Virginia.— Rowan *v.* Chenoweth, 49 W. Va. 287, 38 S. E. 544, 87 Am. St. Rep. 796.

United States.— Missouri, etc., R. Co. *v.* Elliott, 102 Fed. 96, 42 C. C. A. 188; McCay *v.* Lamar, 12 Fed. 367, 20 Blatchf. 474.

England.— Hudson *v.* The Barge Swiftsure, 9 Aspin. 65, 82 L. T. Rep. N. S. 389.

Canada.— Darling *v.* Brown, 1 Can. Supreme Ct. 360, 21 L. C. Jur. 169; Moxley *v.* Canada Atlantic R. Co., 15 Montreal Super. Ct. 145, 14 Ont. App. 309; McNutt *v.* McDonald, 3 Nova Scotia Dec. 175.

See 20 Cent. Dig. tit. "Evidence," § 1463 *et seq.* See also EVIDENCE, 16 Cyc. 943 *et seq.*, 977 *et seq.*

Form of books immaterial.— Where the book containing the entries against interest is shown to belong to the party, he will not be heard to object to the form of the book or the manner in which it is kept. Loewenthal *v.* McCormick, 101 Ill. 143; Barry *v.* Foyles, 1 Pet. (U. S.) 311, 7 L. ed. 157. See also Currier *v.* Boston, etc., R. Co., 31 N. H. 209. Thus a book kept by defendant in his business may be introduced against him, whatever the book may be called, and although it may in fact be a "mere blotter." Beyle *v.* Reid, 31 Kan. 113, 1 Pac. 264. So in McLellan *v.* Crofton, 6 Me. 307, it was held

under whose direction[15] the entries were made. But unauthorized entries by a stranger or an agent will be inadmissible against the principal.[16]

that a paper book in the handwriting of defendant's testator, containing accounts between himself and plaintiff's intestate, found among the intestate's papers, although mutilated and torn, is competent evidence, as admissions of defendant's testator against himself; and plaintiff is not bound to account for the mutilation, nor are the jury bound to infer that the part missing contained a settlement of the accounts. See also Bechtel's Case, 3 Fed. Cas. No. 1,204.

Book containing admissions and self-serving declarations.— If the adverse party calls for and introduces the party's book in evidence, all entries touching the subject are thus made evidence — the self-serving as well as the self-disserving entries. Dewey *v.* Hotchkiss, 30 N. Y. 497; Rowan *v.* Chenoweth, 49 W. Va. 287, 38 S. E. 544, 87 Am. St. Rep. 796. But the fact that a book containing admissions has been received against the party will not render admissible in his favor another book having no relation to the first. Doolittle *v.* Stone, 136 N. Y. 613, 32 N. E. 639. Thus where entries in a memorandum book have been admitted as being in the nature of admissions against the party, his entries in a journal or ledger which were not made contemporaneously with nor posted from the memorandum book are inadmissible in rebuttal of the entries on the memorandum book. Bentley *v.* Ward, 116 Mass. 333.

For admissions by accounts rendered see the following cases:

Georgia.— Carey *v.* Clayton, 11 Ga. 434.

Michigan.— Donkersley *v.* Levy, 38 Mich. 54.

Mississippi.— Forniquet *v.* West Feliciana R. Co., 6 How. 116.

New York.— See Wotherspoon *v.* Wotherspoon, 49 N. Y. Super. Ct. 152.

Vermont.— See Burrows *v.* Stevens, 39 Vt. 378.

Wisconsin.— Thorn *v.* Smith, 71 Wis. 18, 36 N. W. 707.

15. *California.*— San Pedro Lumber Co. *v.* Reynolds, 121 Cal. 74, 53 Pac. 410.

Illinois.— Second Borrowers, etc., Bldg. Assoc. *v.* Cochrane, 103 Ill. App. 29; Alling *v.* Wenzell, 27 Ill. App. 511.

Louisiana.— Magi's Succession, 107 La. 208, 31 So. 660.

Maine.— Blackington *v.* Rockland, 66 Me. 332.

Maryland.— Hutzler *v.* Lord, 64 Md. 534, 3 Atl. 891.

Massachusetts.—Williamsburg City F. Ins. Co. *v.* Frothingham, 122 Mass. 391; Bell *v.* Smith, 99 Mass. 617; Chapman *v.* Briggs Iron Co., 6 Gray 330.

Mississippi.— See Fellows *v.* Harris, 12 Sm. & M. 462.

Nebraska.—German Nat. Bank *v.* Leonard, 40 Nebr. 676, 59 N. W. 107.

New York.— Nelson *v.* New York, 131 N. Y. 4, 29 N. E. 814 [*affirming* 1 Silv. Supreme 471, 5 N. Y. Suppl. 688]; Leonard *v.* New York Cent., etc., R. Co., 44 N. Y. Super. Ct. 575 [*affirmed* in 80 N. Y. 659].

South Carolina.— Pelzer *v.* Durham, 37 S. C. 354, 16 S. E. 46.

Canada.— Moxley *v.* Canada Atlantic R. Co., 15 Montreal Super. Ct. 145, 14 Ont. App. 309; Lawton *v.* Tarratt, 9 N. Brunsw. 1.

See 20 Cent. Dig. tit. "Evidence," § 1463 *et seq.* See also EVIDENCE, 16 Cyc. 943 *et seq.*, 1003 *et seq.*

This rule has been applied to entries of loan agents (Dexter *v.* Berge, 76 Minn. 216, 78 N. W. 1111; General Convention, etc. *v.* Torkelson, 73 Minn. 401, 76 N. W. 215), entries by the agent of a railroad (Louisville, etc., R. Co. *v.* McGuire, 79 Ala. 395; Root *v.* Great Western R. Co., 55 N. Y. 636 [*affirming* 65 Barb. 619, 1 Thomps. & C. 10]), and to the books of a bank (Johnson *v.* Culver, 116 Ind. 278, 19 N. E. 129; Globe Sav. Bank *v.* Nat. Bank of Commerce, 64 Nebr. 413, 89 N. W. 1030).

A bank pass-book given to a depositor, the entries in which were made by an officer of the bank, is admissible against the bank.

California.— Nicholson *v.* Randall Banking Co., 130 Cal. 533, 62 Pac. 930.

Georgia.— Atlanta Trust, etc., Co. *v.* Close, 115 Ga. 939, 42 S. E. 265.

Illinois.— Arnold *v.* Hart, 75 Ill. App. 165.

Indiana.— See Porter County First Nat. Bank *v.* Williams, 4 Ind. App. 501, 31 N. E. 370.

Maryland.—See Chesapeake Bank *v.* Swain, 29 Md. 483.

Michigan.— Kux *v.* Central Michigan Sav. Bank, 93 Mich. 511, 53 N. W. 828.

New York.— See Jermain *v.* Denniston, 6 N. Y. 276.

Wisconsin.— See Goff *v.* Stoughton State Bank, 84 Wis. 369, 54 N. W. 732.

An envelope on which the sums paid into and drawn out of a bank by a depositor are entered by the cashier is admissible against the bank to show the state of his account. L'Herbette *v.* Pittsfield Nat. Bank, 162 Mass. 137, 38 N. E. 368, 44 Am. St. Rep. 354.

Production of person making entry not essential.— In an action against a bank to recover a deposit, the ledger of the bank produced in court at plaintiff's request by the president, and offered by plaintiff, has been held admissible evidence of his claim, without producing the clerk who made the entries therein. Watson *v.* Phœnix Bank, 8 Metc. (Mass.) 217, 41 Am. Dec. 500.

16. Davison *v.* West Oxford Land Co., 126 N. C. 704, 36 S. E. 162; Winter *v.* Newell, 49 Pa. St. 507; Brickley *v.* Walker, 68 Wis. 563, 32 N. W. 773. And see EVIDENCE, 16 Cyc. 1003 *et seq.*

Books of a real estate agent, containing debits and credits relating to business transacted for a particular principal, and also other customers, are not admissible as books of the principal; it having had no power or

(2) PARTNERSHIP BOOKS. Entries in partnership books, made in the regular course of business during the continuance of a firm, by either of the partners or their authorized clerks, are admissible evidence against and bind all the partners having access thereto in controversies to which a stranger is a party as well as in controversies between the partners themselves.[17]

(B) *Against Adverse Party.* The entries in a party's books of account are admissible as containing admissions by the adverse party, where the entries are made by the adverse party,[18] where they are made or read in his presence without objection on his part,[19] or where they have been used by the parties as the basis of their settlement of accounts[20] or their correctness has otherwise been assented

right to make or direct entries therein. McKeen *v.* Providence County Sav. Bank, 23 R. I. 542, 54 Atl. 49.

The books of a bank, through the agency of which the parties have mutually conducted their business, are held admissible to show the state of their accounts between themselves, the bank acting in such case as the common agent of them both, and accordingly the books of the bank in which a plaintiff and defendant have kept their accounts are held competent to prove that a check given by plaintiff to defendant had been carried to the credit of the latter in the books of the bank, and that the money had thus come into the possession of the latter. Oliver *v.* Phelps, 21 N. J. L. 597 [*affirming* 20 N. J. L. 180]. But in Perrine *v.* Hotchkiss, 58 Barb. (N. Y.) 77, it was held that the books of a bank, kept by neither of the parties to an action, and relating solely to transactions between defendant and the bank, are not competent evidence between the parties to show the amount of paper which has been discounted by the bank for defendant and indorsed by plaintiff, and the number of notes so discounted and indorsed.

17. *Georgia.*— Perry *v.* Butt, 14 Ga. 699; Bond *v.* Baldwin, 9 Ga. 9.

Indiana.— Eden *v.* Lingenfelter, 39 Ind 19.

Maine.— Foster *v.* Fifield, 29 Me. 136.

New Hampshire.— Tucker *v.* Peaslee, 36 N. H. 167.

New York.— Fairchild *v.* Fairchild, 64 N. Y. 471 [*affirming* 5 Hun 407]; Jersey City First Nat. Bank *v.* Huber, 75 Hun 80, 26 N. Y. Suppl. 961 [*distinguishing* Kohler *v.* Lindenmeyr, 129 N. Y. 498, 29 N. E. 957]; Walden *v.* Sherburne, 15 Johns. 409.

Texas.— See Martin Brown Co. *v.* Perrill, 77 Tex. 199, 13 S. W. 975.

Virginia.— Shackelford *v.* Shackelford, 32 Gratt. 481.

See 20 Cent. Dig. tit. "Evidence," § 1463 *et seq.* See also EVIDENCE, 16 Cyc. 1031 *et seq.*

Correctness of books held immaterial.— A partnership book containing charges made against a partner on account of moneys paid by him for his private debts was held admissible in evidence for defendant to show the knowledge and assent of the other partner to such appropriation of the partnership funds, although other payments may have been made which have not been entered therein, it being held to be immaterial whether the books were correctly kept or not. Foster *v.* Fifield, 29 Me. 136.

Admissibility of partnership books in controversies between the partners see, generally, PARTNERSHIP.

18. Rembert *v.* Brown, 14 Ala. 360.

Books of account kept by a clerk or agent are admissible to show admissions made by him in his principal's favor in an action against the clerk or his sureties.

Connecticut.— Agricultural Ins. Co. *v.* Keeler, 44 Conn. 161.

Illinois.— Second Borrowers, etc., Bldg. Assoc. *v.* Cochrane, 103 Ill. App. 29; Delbridge *v.* Lake, etc., Bldg., etc., Assoc., 98 Ill. App. 96.

Louisiana.— Spears *v.* Spears, 27 La. Ann. 537.

Maryland.— Ward *v.* Leitch, 30 Md. 326.

Massachusetts.— See Williamsburg City F. Ins. Co. *v.* Frothingham, 122 Mass. 391.

New York.— Lucas *v.* Thompson, 75 Hun 584, 27 N. Y. Suppl. 659.

Ohio.— Stetson *v.* New Orleans City Bank, 12 Ohio St. 577.

Pennsylvania.— Kane *v.* Schuylkill F. Ins. Co., 199 Pa. St. 198, 48 Atl. 989; Roberts' Appeal, 126 Pa. St. 102, 17 Atl. 538; Morrell *v.* Adams Express Co., 1 Walk. 388.

South Carolina.— State Bank *v.* Johnson, 1 Mill 404, 12 Am. Dec. 645.

See 20 Cent. Dig. tit. "Evidence," § 1463 *et seq.*

19. Reviere *v.* Powell, 61 Ga. 30, 34 Am. Rep. 94; Tucker *v.* Stephens, 4 Thomps. & C. (N. Y.) 593; McCluskey *v.* Falke, 4 Rob. (N. Y.) 87; Darlington *v.* Taylor, 3 Grant (Pa.) 195.

20. McDavid *v.* Ellis, 78 Ill. App. 381; Powers *v.* Hamilton, 6 Blackf. (Ind.) 293; Hanson *v.* Jones, 20 Mo. App. 595. In an action by the promisee against the maker of a note, who sets up infancy as a defense, plaintiff, after proving that the note was given to balance an account standing on his books against defendant, may show, from his day-book and ledger, although they do not contain his original entries, the several articles of which the account was composed. Such evidence is competent for the purpose of showing an admission of defendant that he received the articles, but not for the purpose of showing that the articles were necessaries, or that they were charged at fair prices. Earle *v.* Reed, 10 Metc. (Mass.) 387.

to by the adverse party.[21] If the correctness of the entries is admitted they are admissible, although they are not original,[22] or although the items are not the subject of book charge under the shop-book rule,[23] or although the person making the entry is not produced as a witness.[24]

(iv) *Entries by Third Persons Against Interest.* If a person having peculiar means of knowing a fact makes a written entry of that fact, which is against his interest at the time, it is evidence of the fact as between third persons after his death if he could have been examined as to the fact in his lifetime.[25] It is not necessary that the entry should have been made at the time of the transaction.[26]

(v) *Corroboration or Impeachment of Witness.* Books of account or book entries generally are frequently admitted for the purpose of corroborating[27] or impeaching[28] a witness' testimony, although not supported by proof of a

21. *Michigan.*— Fish *v.* Adams, 37 Mich. 598.

Missouri.— See Manion Blacksmith, etc., Co. *v.* Carreras, 19 Mo. App. 162.

Nebraska.— McDonald *v.* Buckstaff, 56 Nebr. 88, 76 N. W. 476.

New Hampshire.— Stetson *v.* Godfrey, 20 N. H. 227.

New York.— Bartlett *v.* Tarbox, 1 Abb. Dec. 120, 1 Keyes 495.

Ohio.— Halleck *v.* State, 11 Ohio 400.

Texas.— See Taylor *v.* Coleman, 20 Tex. 772.

Rule applied to entries by clerk in his favor against employer.— *Iowa.*— Cormac *v.* Western White Bronze Co., 77 Iowa 32, 41 N. W. 480.

Louisiana.— Rayne *v.* Taylor, 12 La. Ann. 765.

Missouri.— Wiggins *v.* Graham, 51 Mo. 17.

New York.— Rockwell *v.* Merwin, 1 Sweeny 484, 8 Abb. Pr. N. S. 330 [*affirmed* in 45 N. Y. 166].

Rhode Island.— Flynn *v.* Columbus Club, 21 R. I. 534, 45 Atl. 551.

See 20 Cent. Dig. tit. "Evidence," § 1463 *et seq.*

Entries in pass-book.— Entries in a pass-book by a merchant or other person, of goods sold or other transactions, are admissible against the holder in favor of the person making the entry. Ruch *v.* Fricke, 28 Pa. St. 241. See Folsom *v.* Grant, 136 Mass. 493. In Hovey *v.* Thompson, 37 Ill. 538, a pass-book was held proper evidence only to fix the amount of the goods purchased, the jury being left to ascertain whether the price was correctly entered from other evidence.

22. Snodgrass *v.* Caldwell, 90 Ala. 319, 7 So. 834; Darlington *v.* Taylor, 3 Grant (Pa.) 195; Texas, etc., Co. *v.* Lawson, 10 Tex. Civ. App. 491, 31 S. W. 843.

Production of ledger unnecessary where correctness of original entries admitted.— Where plaintiff relies upon the evidence that defendant has admitted and promised to pay a particular account, and the books of the former are produced to show what that account contains, it is not necessary, although the items appear to have been posted, to produce the ledger. Stetson *v.* Godfrey, 20 N. H. 227.

23. Darlington *v.* Taylor, 3 Grant (Pa.) 195.

24. Stetson *v.* Godfrey, 20 N. H. 227.

25. *Idaho.*— See Kent *v.* Richardson, 8 Ida. 750, 71 Pac. 117.

Minnesota.— Zimmerman *v.* Bloom, 43 Minn. 163, 45 N. W. 10.

New Hampshire.— Austin *v.* Thomson, 45 N. H. 113; Rand *v.* Dodge, 17 N. H. 343.

Texas.— Heidenheimer *v.* Johnson, 76 Tex. 200, 13 S. W. 46.

Vermont.— Chase *v.* Smith, 5 Vt. 556.

England.— Higham *v.* Ridgway, 10 East 109, 10 Rev. Rep. 235.

See 20 Cent. Dig. tit. "Evidence," §§ 1481, 1482.

Entrant must be dead.— Carr *v.* Stanley, 52 N. C. 131.

For a full discussion of this question see EVIDENCE, 16 Cyc. 1217.

26. Doe *v.* Turford, 3 B. & Ad. 890, 1 L. J. K. B. 262, 23 E. C. L. 388.

27. *Georgia.*— Petit *v.* Teal, 57 Ga. 145.

Illinois.— Perry State Bank *v.* Elledge, 99 Ill. App. 307.

Indiana.— McCullough *v.* McCullough, 12 Ind. 487.

Maryland.— Gill *v.* Staylor, 93 Md. 453, 49 Atl. 650.

Michigan.— Wright *v.* Towle, 67 Mich. 255, 34 N. W. 578.

Nevada.— Cahill *v.* Hirschman, 6 Nev. 57.

New Hampshire.— Ladd *v.* Dudley, 45 N. H. 61.

New York.— Scheftel *v.* Hatch, 70 Hun 597, 25 N. Y. Suppl. 240; National Ulster County Bank *v.* Madden, 41 Hun 113.

North Carolina.— Fain *v.* Edwards, 33 N. C. 305. See also Falls *v.* Gamble, 66 N. C. 455.

Pennsylvania.— Donahue *v.* Connor, 93 Pa. St. 356; Moyes *v.* Brumaux, 3 Yeates 30.

United States.— Bean *v.* Lambert, 77 Fed. 862.

England.— Digby *v.* Stedman, 1 Esp. 328.

Compare Cornville *v.* Brighton, 35 Me. 141; Baird *v.* Fletcher, 50 Vt. 603.

See 20 Cent. Dig. tit. "Evidence," § 1466.

28. Moshier *v.* Frost, 110 Ill. 206; Perry State Bank *v.* Elledge, 99 Ill. App. 307; Davenport *v.* Cummings, 15 Iowa 219; Healey *v.* Wellesley, etc., R. Co., 176 Mass. 440, 57 N. E. 703; Moyes *v.* Brumaux, 3 Yeates (Pa.) 30.

character to render them admissible as substantive evidence for the purpose of proving items of account or other contents.[29]

3. Memoranda — a. In General. Private memoranda may under certain conditions be used by a witness to refresh his recollection, and this according to the generally accepted rule, even in a case where the witness has no present recollection of the facts, if he recollects that when the memorandum was made he knew it to be true and hence can swear that it was correctly made; and under this rule the memorandum is according to many of the decisions allowed to go before the jury.[30] Memoranda introduced in cases where the witness had no present recollection of the fact, but is able to swear only to the correctness of the entries when made, have sometimes been referred to as independent evidence.[31] But in view of the language of other authorities this evidence seems properly to fall within the refreshing memory rule.[32] With this explanation it may be laid down as a general rule that mere private memoranda are inadmissible as independent evidence, that is, apart from oral testimony,[33] unless they form part of a transaction

29. See, generally, Witnesses.

30. For a full discussion of this matter see, generally, Witnesses.

31. Imhoff *v.* Richards, 48 Nebr. 590, 67 N. W. 483; Bates *v.* Preble, 151 U. S. 149, 14 S. Ct. 277, 38 L. ed. 106; Chicago Lumbering Co. *v.* Hewitt, 64 Fed. 314, 12 C. C. A. 129. See also Curtis *v.* Bradley, 65 Conn. 99, 31 Atl. 591, 48 Am. St. Rep. 177, 28 L. R. A. 143; State *v.* Brady, 100 Iowa 191, 69 N. W. 290, 62 Am. St. Rep. 560, 36 L. R. A. 693.

32. Costello *v.* Crowell, 133 Mass. 352; Bryan *v.* Moring, 94 N. C. 687; Republic F. Ins. Co. *v.* Weide, 14 Wall. (U. S.) 375, 20 L. ed. 894.

33. *Alabama.*— Alabama Constr. Co. *v.* Wagnon, 137 Ala. 388, 34 So. 352; Rarden *v.* Cunningham, 136 Ala. 263, 34 So. 26; Nashville, etc., R. Co. *v.* Parker, 123 Ala. 683, 27 So. 323; Kling *v.* Tunstall, 109 Ala. 608, 19 So. 907; Bolling *v.* Fannin, 97 Ala. 619, 12 So. 59; Jeffries *v.* Castleman, 68 Ala. 432; Minniece *v.* Jeter, 65 Ala. 222. See also Lane *v.* May, etc., Hardware Co., 121 Ala. 296, 25 So. 809; Louisville, etc., R. Co. *v.* Cassibry, 109 Ala. 697, 19 So. 900.

Arkansas.—Phœnix Ins. Co. *v.* Public Parks Amusement Co., 63 Ark. 187, 37 S. W. 959.

California.— Baum *v.* Reay, 96 Cal. 462, 29 Pac. 117, 31 Pac. 561. See also Peterson Bros. *v.* Mineral King Fruit Co., 140 Cal. 624, 74 Pac. 162, report made by employee as to number of boxes of fruit packed.

Colorado.— Strauss *v.* Phenix Ins. Co., 9 Colo. App. 386, 48 Pac. 822.

Florida.— Germania F. Ins. Co. *v.* Stone, 21 Fla. 555.

Georgia.— Ingram *v.* Hilton, etc., Lumber Co., 108 Ga. 194, 33 S. E. 961.

Illinois.— Henderson *v.* Miller, 36 Ill. App. 232.

Kentucky.— Crawford *v.* Gamm, 5 Ky. L. Rep. 688.

Louisiana.— Watson *v.* Yates, 10 Mart. 687; Urquharts *v.* Robinson, 1 Mart. 236, 5 Am. Dec. 710. See also Dalcour *v.* McCan, 37 La. Ann. 7.

Maryland.— See Atwell *v.* Miller, 6 Md. 10, 61 Am. Dec. 294.

Massachusetts.— Fiske *v.* Cole, 152 Mass. 335, 25 N. E. 608; Snow *v.* Warner, 10 Metc. 132, 43 Am. Dec. 417.

Minnesota.— Granning *v.* Swenson, 49 Minn. 381, 52 N. W. 30. See also Beebe *v.* Wilkinson, 30 Minn. 548, 16 N. W. 450.

Mississippi.— Commercial Bank *v.* Chisholm, 6 Sm. & M. 457.

Missouri.— Elliott *v.* Sheppard, 179 Mo. 382, 78 S. W. 627, memoranda in a diary.

Montana.— Kipp *v.* Silverman, 25 Mont. 296, 64 Pac. 884.

Nebraska.— Lipscomb *v.* Lyon, 19 Nebr. 511, 27 N. W. 731. See also Wittenberg *v.* Mollyneaux, 55 Nebr. 429, 75 N. W. 835.

New Hampshire.— Harris *v.* Burley, 10 N. H. 171. See also Page *v.* Parker, 40 N. H. 47.

New Jersey.— Lindenthal *v.* Hatch, 61 N. J. L. 29, 39 Atl. 662.

New York.— Howard *v.* McDonough, 77 N. Y. 592; McCormick *v.* Pennsylvania R. Co., 49 N. Y. 303; State Nat. Bank *v.* Weed, 39 N. Y. App. Div. 602, 57 N. Y. Suppl. 706; Whitaker *v.* White, 69 Hun 258, 23 N. Y. Suppl. 487; Judd *v.* Cushing, 50 Hun 181, 2 N. Y. Suppl. 836, 22 Abb. N. Cas. 358; Purchase *v.* Mattison, 2 Rob. 71; Hurd *v.* Birch, 11 N. Y. St. 870. See also Delafield *v.* Parish, 25 N. Y. 9; Cullinan *v.* Moncrief, 90 N. Y. App. Div. 538, 85 N. Y. Suppl. 745 (records of cash register); U. S. Paper Co. *v.* Gruhn, 86 N. Y. Suppl. 730 (bill of particulars as to price of goods sold).

Pennsylvania.— Hottle *v.* Weaver, 206 Pa. St. 87, 55 Atl. 838 (unsigned memorandum in book of original entries); Franklin F. Ins. Co. *v.* Updegraff, 43 Pa. St. 350. *Compare* Riche *v.* Broadfield, 1 Dall. 16, 1 L. ed. 18.

Texas.— Tobler *v.* Austin, (Civ. App. 1902) 71 S. W. 407.

Vermont.— Pingree *v.* Johnson, 69 Vt. 225, 39 Atl. 202; Godding *v.* Orcutt, 44 Vt. 54; Lapham *v.* Kelly, 35 Vt. 195. See also Cross *v.* Bartholomew, 42 Vt. 206. *Compare* Post *v.* Kenerson, 72 Vt. 341, 47 Atl. 1072, 82 Am. St. Rep. 948, 52 L. R. A. 552; Gleason *v.* Kinney, 65 Vt. 560, 27 Atl. 208.

Virginia.— Wells *v.* Ayres, 84 Va. 341, 5 S. E. 21.

which they tend to characterize and explain and thus become a part of the *res gestæ*.[34] Nor is the rule altered by the fact that the person making the memoranda has since died, where the memoranda are offered in favor of his personal representative.[35] They may, however, be admissible as containing admissions by the parties or as amounting to a contemporaneous record of a transaction agreed upon by the parties.[36]

b. In Explanation of Parol Contract. A memorandum relating to the terms of a parol contract made at the time by one of the parties negotiating the contract and read over to the other without dissent, or made by a third person under

West Virginia.— Vinal *v.* Gilman, 21 W. Va. 301, 45 Am. Rep. 562.

Wisconsin.— Anderson *v.* Fetzer, 75 Wis. 562, 44 N. W. 838.

Wyoming.— Hay *v.* Peterson, 6 Wyo. 419, 45 Pac. 1073, 34 L. R. A. 581.

See 20 Cent. Dig. tit. "Evidence," § 1484 *et seq.*

Rule applied to record of inspection of locomotive engines or cars.— Baltimore, etc., R. Co. *v.* Tripp, 175 Ill. 251, 51 N. E. 833; Taylor *v.* Chicago, etc., R. Co., 80 Iowa 431, 46 N. W. 64; Hoffman *v.* Chicago, etc., R. Co., 40 Minn. 60, 41 N. W. 301; Hicks *v.* Southern R. Co., 63 S. C. 559, 41 S. E. 753. *Compare* Perkins *v.* Augusta Ins., etc., Co., 10 Gray (Mass.) 312, 71 Am. Dec. 654.

A hospital record containing remarks regarding a patient entered thereon by a nurse is not competent evidence to prove the facts therein stated. Baird *v.* Reilly, 92 Fed. 884, 35 C. C. A. 78.

A memorandum made from statements of facts by a third person as to the correctness of which the witness has no personal knowledge is not sufficiently verified. Stickney *v.* Bronson, 5 Minn. 215. So in Phenix Ins. Co. *v.* Hart, 112 Ga. 765, 38 S. E. 67, it was held that before a memorandum made for the purpose of preserving a record of a given fact or transaction can in any event be admitted in evidence as original testimony, it must affirmatively appear that it was made by the witness in connection with whose testimony it is offered, and that testimony must show absolutely the genuineness and correctness of the memorandum.

Memorandum made by two persons.— A survey of a vessel signed by two persons, only one of whom has been examined as a witness and testified to its correctness, is inadmissible. Cunningham *v.* Hall, 4 Allen (Mass.) 268. Where one of two persons who had examined and appraised the assets of an insolvent debtor was called as a witness to the value thereof, and produced a paper, signed by himself and his associate, containing the results of their appraisal, it was held that such paper could not be read to the jury as the joint certificate of the witness and his associate without first calling the latter to testify to its accuracy. Com. *v.* Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596. But in an action of trespass for cutting trees, a memorandum of the number cut, made by one at the dictation of another, authenticated by the testimony of both, is admissible. Wallace *v.* Goodall, 18 N. H. 439.

34. National Ulster County Bank *v.* Madden, 114 N. Y. 280, 21 N. E. 408, 11 Am. St. Rep. 633; Moore *v.* Meacham, 10 N. Y. 207. See also Place *v.* Baugher, 159 Ind. 232, 64 N. E. 852.

35. *Alabama.*— Harrison *v.* Cordle, 22 Ala. 457.

California.— Thompson *v.* Oreña, 134 Cal. 26, 66 Pac. 24.

District of Columbia.— Page *v.* Burnstine, 3 MacArthur 194.

Illinois.— Sherman *v.* Whiteside, 93 Ill. App. 572 [*affirmed* in 190 Ill. 576, 60 N. E. 838].

Massachusetts.—Mair *v.* Bassett, 117 Mass. 356.

New York.— Vaughn *v.* Strong, 4 N. Y. Suppl. 686, 689.

Texas.— Turner *v.* Cochran, 30 Tex. Civ. App. 549, 70 S. W. 1024.

West Virginia.— Rowan *v.* Chenowith, 49 W. Va. 287, 38 S. E. 544, 87 Am. St. Rep. 796.

Compare Buckley *v.* Buckley, 16 Nev. 180.

See 20 Cent. Dig. tit. "Evidence," § 1491.

Under statute in Connecticut providing that "in actions by or against the representatives of deceased persons, the entries, memoranda and declarations of the deceased, relevant to the matter in issue, may be received as evidence" a different rule obtains. Rowland *v.* Philadelphia, etc., R. Co., 63 Conn. 415, 28 Atl. 102; Olmstead's Appeal, 43 Conn. 110; Craft's Appeal, 42 Conn. 146; Bissell *v.* Beckwith, 32 Conn. 509; Douglas *v.* Chapin, 26 Conn. 76.

36. *Connecticut.*— Nichols *v.* Alsop, 10 Conn. 263.

Georgia.— Reviere *v.* Powell, 61 Ga. 30, 34 Am. Rep. 94.

Iowa.— Nagle *v.* Fulmer, 98 Iowa 585, 67 N. W. 369; Mather *v.* Robinson, 47 Iowa 403. See also Shadbolt *v.* Shaw, 40 Iowa 583.

Maine.— Bailey *v.* Blanchard, 62 Me. 168.

Texas.— Newton *v.* Newton, (Civ. App. 1894) 25 S. W. 159.

Illustration.— Thus it has been held that a memorandum made by the parties to the transaction jointly, a portion having been written by one and a portion by the other, is admissible as part of the *res gestæ*. Bigelow *v.* Hall, 91 N. Y. 145. So where the maker and the holder of a promissory note had mutually compared memoranda, respectively made by them, of the part payments thereon, it was held that in an action thereon for the benefit of the estate of the deceased holder such memoranda of the maker

circumstances showing an assent thereto by the parties, although not in itself a valid written contract, may be competent as substantive evidence tending to establish in connection with other evidence the terms of the contract.[37] If not made under the direction of both the parties or subsequently approved by them the memorandum will be inadmissible.[38]

4. Corporate Books and Records — a. In General. It has been laid down as a general rule essential to the public convenience that corporation books are competent evidence to prove its existence and the preliminary proceedings showing its organization under its charter or a general law,[39] and the corporate acts and proceedings generally.[40] This rule has been applied not only as between the cor-

were admissible in his favor to prove payment. Meyer *v.* Reichardt, 112 Mass. 108.

37. *Illinois.*— Monroe *v.* Snow, 131 Ill. 126, 23 N. E. 401.

Indiana.— Cook *v.* Anderson, 20 Ind. 15; McCarty *v.* Osborne, 1 Blackf. 325. See also Tomlinson *v.* Briles, 101 Ind. 538, 1 N. E. 63.

Iowa.— McDermott *v.* Abney, 106 Iowa 749, 77 N. W. 505.

Kentucky.— McClelland *v.* Crawford, 2 Bibb 336.

Massachusetts.— Dickinson *v.* Robbins, 12 Pick. 74.

Mississippi.— See Millsaps *v.* Merchants', etc., Bank, 71 Miss. 361, 13 So. 903.

Nebraska.— Carstens *v.* McDonald, 38 Nebr. 858, 57 N. W. 757.

New York.— Lathrop *v.* Bramhall, 64 N. Y. 365; Lazarus *v.* Ludwig, 18 Misc. 481, 41 N. Y. Suppl. 997.

Pennsylvania.— Eby *v.* Eby, 5 Pa. St. 435.

South Carolina.— Miller *v.* Creyon, 2 Brev. 108.

Vermont.— Hosford *v.* Foote, 3 Vt. 391.

Wisconsin.— Hazer *v.* Streich, 92 Wis. 505, 66 N. W. 720.

United States.— Pacey *v.* McKinney, 125 Fed. 675, 60 C. C. A. 365.

See 20 Cent. Dig. tit. "Evidence," § 1484 *et seq.*

38. *Alabama.*— Pharr *v.* Bachelor, 3 Ala. 237.

Michigan.— Collins *v.* Shaw, 124 Mich. 474, 83 N. W. 146.

New York.— Flood *v.* Mitchell, 68 N. Y. 507 [*reversing* 4 Hun 813].

Pennsylvania.—Manayunk Fifth Mut. Bldg. Soc. *v.* Holt, 184 Pa. St. 572, 39 Atl. 293.

Virginia.— Carpenter *v.* Virginia-Carolina Chemical Co., 98 Va. 177, 35 S. E. 358.

Wisconsin.— See Hazer *v.* Streich, 92 Wis. 505, 66 N. W. 720.

See 20 Cent. Dig. tit. "Evidence," §§ 1485, 1486.

39. Duke *v.* Cahawba Nav. Co., 10 Ala. 82, 44 Am. Dec. 472; Hall *v.* Carey, 5 Ga. 239; Wood *v.* Jefferson County Bank, 9 Cow. (N. Y.) 194; Grays *v.* Lynchburg, etc., Turnpike Co., 4 Rand. (Va.) 578.

This rule has been applied in favor of the corporation against a stranger (Buncombe Turnpike Co. *v.* McCarson, 18 N. C. 306), in favor of a third person against a stockholder (Semple *v.* Glenn, 91 Ala. 245, 6 So. 46, 9 So. 265, 24 Am. St. Rep. 894), and in controversies between the stock-holders and the corporation (Peake *v.* Wabash R. Co., 18 Ill. 88; Ryder *v.* Alton, etc., R. Co., 13 Ill. 516; Vawter *v.* Franklin College, 53 Ind. 88). See also Fitch *v.* Pinckard, 5 Ill. 69; Highland Turnpike Co. *v.* McKean, 10 Johns. (N. Y.) 154, 6 Am. Dec. 324.

40. Morris *v.* Morton, 20 S. W. 287, 14 Ky. L. Rep. 360; North River Meadow Co. *v.* Christ Church, 22 N. J. L. 424, 53 Am. Dec. 258; Wetherbee *v.* Baker, 35 N. J. Eq. 501; Highland Turnpike Co. *v.* McKean, 10 Johns. (N. Y.) 154, 6 Am. Dec. 324. See also Wheeler *v.* Walker, 45 N. H. 355; Rudd *v.* Robinson, 126 N. Y. 113, 26 N. E. 1046, 82 Am. St. Rep. 816, 12 L. R. A. 473. See also Star Loan Assoc. *v.* Moore, 4 Penew. (Del.) 308, 55 Atl. 946.

For a discussion of the admissibility of corporation books as admissions by the corporation itself or its members see Corporations, 10 Cyc. 514. See also the following cases:

Alabama.— State Bank *v.* Comegys, 12 Ala. 772, 46 Am. Dec. 278.

California.— Smith *v.* Woodville Consol. Silver Min. Co., 66 Cal. 398, 5 Pac. 688.

Georgia.— Robinson *v.* Bealle, 20 Ga. 275.

Illinois.— Illinois Cent. R. Co. *v.* Swisher, 61 Ill. App. 611; Lake Shore, etc., R. Co. *v.* Ward, 35 Ill. App. 423 [*affirmed* in 135 Ill. 511, 26 N. E. 520].

Iowa.— Walsh *v.* Ætna L. Ins. Co., 30 Iowa 133, 6 Am. Rep. 664.

Maryland.— Frank *v.* Morrison, 58 Md. 423; Weber *v.* Fickey, 47 Md. 196.

Massachusetts.— Clarke *v.* Warwick Cycle Mfg. Co., 174 Mass. 434, 54 N. E. 887; Brewer *v.* Stone, 11 Gray 228; Hayward *v.* Pilgrim Soc., 21 Pick. 270.

Michigan.—Kalamazoo Novelty Mfg. Works *v.* Macalister, 40 Mich. 84.

Nevada.— Abernathie *v.* Consolidated Virginia Min. Co., 16 Nev. 260.

New York.— Minor *v.* Crosby, 76 N. Y. App. Div. 561, 78 N. Y. Suppl. 594; Bedford *v.* Sherman, 68 Hun 317, 22 N. Y. Suppl. 892; Leonard *v.* New York Cent., etc., R. Co., 44 N. Y. Super. Ct. 575 [*affirmed* in 80 N. Y. 659].

North Carolina.— Gwyn Harper Mfg. Co. *v.* Carolina Cent. R. Co., 128 N. C. 280, 38 S. E. 894, 83 Am. St. Rep. 675.

Ohio.— Stillwater Turnpike Co. *v.* Coover, 25 Ohio St. 558.

Pennsylvania.— North American Bldg. Assoc. *v.* Sutton, 35 Pa. St. 463, 78 Am. Dec.

poration and its members and between members, but also as between the corporation or its members and strangers.[41] But in the absence of statute the rule generally prevailing is that corporation books are not admissible in matters of a private nature to establish or support a right or claim of the corporation or its members against a stranger.[42]

349; Buffington *v.* Butler, etc., Turnpike Co., 3 Penr. & W. 71.

United States.— Bailey *v.* New York Cent. R. Co., 22 Wall. 604, 22 L. ed. 840.

See 20 Cent. Dig. tit. "Evidence," § 1398 *et seq.*

Corporate records not evidence of private agreement by stock-holders.— The minutes of a corporation are not evidence of an agreement alleged to have been made by the stockholders as individuals, and not intended to bind the corporation. Black *v.* Shreve, 13 N. J. Eq. 455. See also Trainor *v.* German-American Savings, etc., Assoc., 204 Ill. 616, 68 N. E. 650 [*reversing* 102 Ill. App. 604].

As between corporation and its members.— For a discussion of the admissibility of the corporate records as between the corporation and a member or as between the members see CORPORATIONS, 10 Cyc. 515 *et seq.* And see the following cases:

Alabama.— Curtis *v.* Parker, 136 Ala. 217, 33 So. 935; Booth *v.* Dexter Steam Fire Engine Co., 118 Ala. 369, 24 So. 405; Semple *v.* Glenn, 91 Ala. 245, 6 So. 46, 9 So. 265, 24 Am. St. Rep. 894.

Connecticut.— Fish *v.* Smith, 73 Conn. 377, 47 Atl. 711, 84 Am. St. Rep. 161.

Delaware.— Jefferson *v.* Stewart, 4 Harr. 82.

District of Columbia.— National Express, etc., Co. *v.* Morris, 15 App. Cas. 262.

Georgia.— Howard *v.* Glenn, 85 Ga. 238, 11 S. E. 610, 21 Am. St. Rep. 156; Brower *v.* East Rome Town Co., 84 Ga. 219, 10 S. E. 629; Macon, etc., R. Co. *v.* Vason, 57 Ga. 314; Merchants' Bank *v.* Rawls, 21 Ga. 334.

Illinois.— Protection L. Ins. Co. *v.* Dill, 91 Ill. 174; K. & L. of A. *v.* Weber, 101 Ill. App. 488.

Iowa.— St. Louis, etc., Co. *v.* Eakins, 30 Iowa 279.

Louisiana.— See Hatch *v.* New Orleans City Bank, 1 Rob. 470.

Maine.— Long Wharf *v.* Palmer, 37 Me. 379.

Maryland.— Tome *v.* Parkersburgh Branch R. Co., 39 Md. 36, 17 Am. Rep. 540.

Michigan.— Monroe *v.* Ft. Wayne, etc., R. Co., 28 Mich. 271.

New Jersey.— Black *v.* Lamb, 12 N. J. Eq. 108.

New York.— Pearsall *v.* Western Union Tel. Co., 124 N. Y. 256, 66 N. E. 534, 21 Am. St. Rep. 662; Whitehall First Nat. Bank *v.* Tisdale, 84 N. Y. 655; Hubbell *v.* Meigs, 50 N. Y. 480; Powell *v.* Conover, 75 Hun 11, 26 N. Y. Suppl. 1028; Chenango Bridge Co. *v.* Lewis, 63 Barb. 111; Abernathy *v.* Puritan Church Soc., 3 Daly 1; Highland Turnpike Co. *v.* McKean, 10 Johns. 153, 6 Am. Dec. 324.

Pennsylvania.— Diehl *v.* Adams County Mut. Ins. Co., 58 Pa. St. 443, 98 Am. Dec. 302; Bedford R. Co. *v.* Bowser, 48 Pa. St. 29; Bavington *v.* Pittsburgh, etc., R. Co., 34 Pa. St. 358; Graff *v.* Pittsburgh, etc., R. Co., 31 Pa. St. 489; Davis *v.* Meade, 13 Serg. & R. 281; Fleming *v.* Wallace, 2 Yeates 120.

Rhode Island.— Woonsocket Union R. Co. *v.* Sherman, 8 R. I. 564; Olney *v.* Chadsey, 7 R. I. 224.

United States.— Brown *v.* Ellis, 103 Fed. 834; Hayden *v.* Williams, 96 Fed. 279, 37 C. C. A. 479; Carey *v.* Williams, 79 Fed. 906, 25 C. C. A. 227.

England.— Hill *v.* Manchester, etc., Water Works Co., 5 B. & Ad. 866, 3 L. J. K. B. 19, 2 N. & M. 573, 27 E. C. L. 364.

See 20 Cent. Dig. tit. "Evidence," § 1398 *et seq.*

Acts of foreign corporation.— Under N. Y. Code Civ. Proc. § 929, providing that, where a party wishes to prove an act or transaction of a foreign corporation, its books may be used as presumptive evidence, original books of a foreign corporation which have been in the custody of its proper officer are admissible to prove its corporate acts or transactions in an action against a transferee of stock for unpaid calls without first proving the correctness of each entry by the person making it. Sigua Iron Co. *v.* Brown, 171 N. Y. 488, 64 N. E. 194 [*affirming* 58 N. Y. App. Div. 436, 69 N. Y. Suppl. 295].

41. North River Meadow Co. *v.* Christ Church, 22 N. J. L. 424, 53 Am. Rep. 258; Wetherbee *v.* Baker, 35 N. J. Eq. 501; Buncombe Turnpike Co. *v.* McCarson, 18 N. C. 306. See also Rudd *v.* Robinson, 126 N. Y. 113, 26 N. E. 1046, 22 Am. St. Rep. 816, 12 L. R. A. 473. See also Star Loan Assoc. *v.* Moore, 4 Pennew. (Del.) 308, 55 Atl. 946.

42. *Alabama.*— Jones *v.* Florence Wesleyan University, 46 Ala. 626; Tuskaloosa *v.* Wright, 2 Port. 230.

Connecticut.— Howard Ins. Co. *v.* Hope Mut. Ins. Co., 22 Conn. 394.

Georgia.— Central R., etc., Co. *v.* Skellie, 90 Ga. 694, 16 S. E. 657; Hall *v.* Carey, 5 Ga. 239.

Illinois.— Chase *v.* Sycamore, etc., R. Co., 38 Ill. 215. See also Trainor *v.* German-American Savings, etc., Assoc., 204 Ill. 616, 68 N. E. 650 [*reversing* 102 Ill. App. 604].

Iowa.— Heffner *v.* Brownell, 82 Iowa 104, 47 N. W. 979.

Kansas.— Dolan *v.* Wilkerson, 57 Kan. 758, 48 Pac. 23.

Louisiana.— See Hincks *v.* Converse, 37 La. Ann. 484. *Compare* New Orleans Canal, etc., Co. *v.* Leeds, 49 La. Ann. 123, 21 So. 168.

Maryland.— Brown *v.* State, 64 Md. 199, 1 Atl. 54, 6 Atl. 172.

Massachusetts.— Old South Soc. *v.* Wainwright, 156 Mass. 115, 30 N. E. 476.

b. Mode of Proof. The original books or records of a corporation if duly authenticated may be admitted;[43] but it must be made to appear that they are the books of the corporation, kept as such by the proper officer, or some other person authorized in his absence.[44] It is not enough to prove the book to be in

Minnesota.— Redding *v.* Godwin, 44 Minn. 355, 46 N. W. 563.

Missouri.— Cape Girardeau, etc., R. Co. *v.* Kimmel, 58 Mo. 83.

New Hampshire.— South Hampton *v.* Fowler, 52 N. H. 225; Wheeler *v.* Walker, 45 N. H. 355; Haynes *v.* Brown, 36 N. H. 545.

New Jersey.— Whitaker *v.* Miller, 63 N. J. L. 587, 44 Atl. 643; North River Meadow Co. *v.* Christ Church, 22 N. J. L. 424, 53 Am. Dec. 258; Wetherbee *v.* Baker, 35 N. J. Eq. 501. See also New England Mfg. Co. *v.* Vandyke, 9 N. J. Eq. 498.

New York.— Legrand *v.* Manhattan Mercantile Assoc., 44 N. Y. Super. Ct. 562 [*affirmed* in 80 N. Y. 638]. See also Jackson *v.* Walsh, 3 Johns. 226. *Compare* Rochester Folding Box Co. *v.* Brown, 55 N. Y. App. Div. 444, 66 N. Y. Suppl. 867.

Ohio.— Pittsburgh, etc., R. Co. *v.* Cunnington, 39 Ohio St. 327.

Pennsylvania.— Com. *v.* Woelper, 3 Serg. & R. 29, 8 Am. Dec. 628; Fleming *v.* Wallace, 2 Yeates 120.

South Carolina.— Gaffney *v.* Peeler, 21 S. C. 55.

United States.— Coosaw Min. Co. *v.* Carolina Min. Co., 75 Fed. 860; Darlington *v.* Atlantic Trust Co., 68 Fed. 849, 16 C. C. A. 28. *Compare* Bradley *v.* McKee, 2 Fed. Cas. No. 1,784, 5 Cranch C. C. 298.

Compare Ganther *v.* Jenks, 76 Mich. 510, 43 N. W. 600.

See 20 Cent. Dig. tit. "Evidence," § 1398 *et seq.*

43. Cantwell *v.* Welch, 187 Ill. 275, 58 N. E. 414; Mandel *v.* Swan Land, etc., Co., 154 Ill. 177, 40 N. E. 462, 45 Am. St. Rep. 124, 27 L. R. A. 313; Smith *v.* Natchez Steamboat Co., 1 How. (Miss.) 479; St. Stanislaus Church *v.* Verein, 164 N. Y. 606, 58 N. E. 1086 [*affirming* 31 N. Y. App. Div. 133, 52 N. Y. Suppl. 922]; Highland Turnpike *v.* McKean, 10 Johns. (N. Y.) 154, 6 Am. Dec. 324; Vanderwerken *v.* Glenn, 85 Va. 9, 6 S. E. 806; Lewis *v.* Glenn, 84 Va. 947, 6 S. E. 866.

The records of a stock-holders' meeting, made on loose sheets of paper, and kept in a drawer several months before they were copied into a book called the "Record," are admissible; it not appearing that the minutes did not truly represent their action, or that the record was not adopted by them, or that there was anything improper in the transaction. Vawter *v.* Franklin College, 53 Ind. 88.

Notes taken to be afterward extended on record.— Where a clerk *pro tempore* of a religious society takes brief notes of the proceedings of the meeting for the purpose of more extended record being made therefrom and entered upon the record of the society, his notes are evidence in the nature of a record until the extended record is made. Waters *v.* Gilbert, 2 Cush. (Mass.) 27. See also Pruden *v.* Alden, 23 Pick. (Mass.) 184, 34 Am. Dec. 51.

Entry in handwriting of secretary held not essential.— Minutes of directors' meetings may be read in evidence, if duly authenticated, although not entered in the handwriting of the secretary. United Growers Co. *v.* Eisner, 22 N. Y. App. Div. 1, 47 N. Y. Suppl. 906.

Corporate seal to corporation book held unnecessary.— In Fleming *v.* Wallace, 2 Yeates (Pa.) 120, it was held that the original books of a corporation are evidence, although the common seal is not attached thereto.

Who may identify books.— The books of a corporation may be identified by its clerk or secretary (Syuchar *v.* Workingmen's Co-operative Assoc., 14 Misc. (N. Y.) 10, 35 N. Y. Suppl. 124), although he is a member and interested in the suit in which they are used in evidence (Stebbins *v.* Merritt, 10 Cush. (Mass.) 27; Wiggin *v.* First Freewill Baptist Church, 8 Metc. (Mass.) 301). The receipt book of a corporation containing entries of payments by a member and proved by the secretary is held to be evidence against the company without producing the officer by whom they were countersigned. North America Bldg. Assoc. *v.* Sutton, 35 Pa. St. 463, 78 Am. Dec. 349. So it has been held that corporate records fully identified by a witness who was a member of the board of trustees and treasurer of the corporation at the time of the transactions sought to be shown thereby are admissible in evidence. Illinois Conference, etc. *v.* Plagge, 177 Ill. 431, 53 N. E. 76, 69 Am. St. Rep. 252 [*affirmed* in 76 Ill. App. 468]. In St. Lawrence Mut. Ins. Co. *v.* Paige, 1 Hilt. (N. Y.) 430, it was held that any person who saw the entries made in the corporation books, although he be not the secretary, can verify the books.

44. *Colorado.*— Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 565.

Connecticut.—See Bartholomew *v.* Farwell, 41 Conn. 107.

Iowa.— St. Louis, etc., R. Co. *v.* Eakins, 30 Iowa 279.

Maine.— Whitman *v.* Granite Church, 24 Me. 236.

Mississippi.— Smith *v.* Natchez Steamboat Co., 1 How. 479.

New York.— Highland Turnpike *v.* McKean, 10 Johns. 154, 6 Am. Dec. 324.

Pennsylvania.— Pittsburg Coal Co. *v.* Fosten, 59 Pa. St. 365.

Rhode Island.— Hayes *v.* Kenyon, 7 R. I. 136.

England.— Rex *v.* Mothersell, 1 Str. 93.

See 20 Cent. Dig. tit. "Evidence," § 1398 *et seq.*

Documents purporting to be the articles and by-laws of a corporation are inadmissible unless identified. Wright *v.* Farmers' Mut.

the handwriting of a person stated in the book itself to be the secretary, but not otherwise shown to be the proper officer.[45] Provision is made by statute in some jurisdictions for the admission of certified[46] or sworn[47] copies of corporate records. So ordinarily apart from any statutory provision copies of the articles or by-laws or acts and proceedings generally of a corporation if duly authenticated may be received in evidence without requiring the production of the originals before the court.[48]

Live-Stock Ins. Assoc., 96 Iowa 360, 65 N. W. 308.

A medical diploma from a college in another state has been held inadmissible without proof of its genuineness and of the legal existence of the college. Parkerson *v.* Burke, 59 Ga. 100; Hunter *v.* Blount, 27 Ga. 76. So in Barton *v.* Wilson, 9 Rich. (S. C.) 273, it was held necessary to prove the genuineness of the seal affixed to the diploma. But under statute in Alabama a medical license has been held to be competent evidence, without proof of the signatures.. White *v.* Mastin, 38 Ala. 147.

45. Highland Turnpike *v.* McKean, 10 Johns. (N. Y.) 154, 16 Am. Dec. 324.

46. Maynard *v.* Interstate Bldg., etc., Assoc., 112 Ga. 443, 37 S. E. 741; Mandel *v.* Swan Land, etc., Co., 154 Ill. 177, 40 N. E. 462, 45 Am. St. Rep. 124, 27 L. R. A. 313; Cantwell *v.* Stockmen's Bldg., etc., Union, 88 Ill. App. 247 [*affirmed* in 187 Ill. 275, 58 N. E. 414]; Cape *v.* K. & L. of A., (Tenn. Ch. App. 1900) 61 S. W. 1068.

47. Cantwell *v.* Welch, 187 Ill. 275, 58 N. E. 414; Mandel *v.* Swan Land, etc., Co., 154 Ill. 177, 40 N. E. 462, 45 Am. St. Rep. 124, 27 L. R. A. 313; King *v.* Enterprise Ins. Co., 45 Ind. 43. See also Van Riper *v.* American Cent. Ins. Co., 60 Ind. 123.

Books of account.— Burn Rev. St. Ind. (1901) § 474, providing that sworn copies of the acts and proceedings of corporations shall be received in evidence in all cases where the original would be evidence, does not authorize the contents of the books of account of a building and loan association to be proved by the affidavit of the secretary, in an action by the association to foreclose a mortgage, for the purpose of showing the state of the members' account. Coppes *v.* Union Nat. Sav. Loan Assoc., (Ind. App. 1903) 67 N. E. 1022, (Ind. App. 1904) 69 N. E. 702, where the court said: "It does not seem to have been intended by the Legislature, by this provision, to provide that the contents of the books of account of a private corporation may be used in evidence in a manner different from that in which the contents of such books of natural persons may be used."

48. Zimmerman *v.* Masonic Aid Assoc., 75 Fed. 236.

Certified copies.—A resolution of the stockholders or directors of a corporation certified by the secretary to be a genuine extract from the corporate minutes or records and authenticated by the corporate seal is *prima facie* the act of the corporation and is admissible in evidence as such. Purser *v.* Eagle Land, etc., Co., 111 Cal. 139, 43 Pac. 523; Barcello *v.* Hapgood, 118 N. C. 712, 24 S. E. 124. See also Whitehouse *v.* Bickford, 29 N. H. 471. *Compare* Hallowell, etc., Bank *v.* Howard, 14 Mass. 181, where it was held that a secretary of a banking corporation is not a certifying officer, it appearing moreover that no such officer was created by the act of incorporation.

Copy certified by stranger excluded.— Miller *v.* Johnston, 71 Ark. 174, 72 S. W. 371.

Certificate of facts.— In Oakes *v.* Gill, 14 Pick. (Mass.) 442, it was held that a clerk of a religious corporation may make verified copies of the corporate records, but it is no part of his duty to certify facts, and his certificate cannot be received as evidence of facts. See also Tessmann *v.* Supreme Commandery of U. F., 103 Mich. 185, 61 N. W. 261.

Printed copies.— In a suit on a benefit certificate issued by an incorporated fraternal order, plaintiff's declaration averred generally, under section 126 of the Practice Act (2 Gen. St. 2554), the performance of all conditions precedent to recovery, and defendant's pleading specified, compliance with a law of the order, alleged to have been enacted after the issuing of the certificate as a condition precedent, the performance of which it intended to contest. It was held that such enactment could not be proved by the testimony of a member of the order that a printed book produced by him, in which such law was included, contained the laws of the order in force at a date stated. Herman *v.* Supreme Lodge K. of P., 66 N. J. L. 77, 48 Atl. 1000 [*distinguishing* Schubert Lodge No. 118 K. of P. *v.* Schubert Kranken Untersturzen Verein, 56 N. J. Eq. 78, 38 Atl. 347]. The Tennessee code, which provides that in actions between corporations and their stock-holders a copy of the proceedings of the board of directors and the subscription and other books of the company, certified by the secretary under the corporate seal, shall be evidence, applies to actions by the beneficiaries of a benefit insurance certificate against a benefit society; and hence a printed copy of the constitution and by-laws of such organization is improperly received in evidence in such an action, on the ground that it is not the best evidence. Page *v.* K. & L. of A., (Ch. App. 1900) 61 S. W. 1068. But it is held that the by-laws of an insurance company are sufficiently proved by printed copies attached to a policy of insurance and referred to by the policy and made a part of it to make them admissible where there is evidence to prove the policy. Atlantic Mut. F. Ins. Co. *v.* Sanders, 36 N. H. 252.

Sworn copies.— Copies of the acts and pro-

5. Church Registers and Certificates. Under the rule admitting book entries made in the regular course of business, registers and certificates kept or issued by a clergyman or other proper officer, such as registers of marriages or deaths, have been held to be competent evidence.[49] So baptismal registers or certificates are admissible to show the fact and date of baptism,[50] but not to prove other facts, for example, the date of birth of the child except that he was born before the baptism,[51] or that he was baptized as the lawful child of the parents,[52] when these facts are in issue. But the date of baptism which is provable by the entry may with the aid of other evidence tending to fix the child's age at the time become material.[53]

6. Records of Secret Societies. As a general rule the records of a masonic lodge or other secret society which are not required by law to be kept are inadmissible, unless brought within some exception to the hearsay rule, to prove facts, such as the age of a member, which are susceptible of proof in the ordinary way.[54] But they have been held competent when offered to show not extraneous facts but the action of the body itself, and this although the society did not appear to have been incorporated.[55]

7. Reports of Commercial Agencies. The commercial "ratings" or other facts reported by a commercial agency are inadmissible against third persons who in no way participate in making or publishing the reports.[56]

8. Log-Books and Protests. A ship's log-book is by act of congress made

ceedings of corporations verified by the oath of the proper officer are admissible. Henderson *v.* Montgomery Bank, 11 Ala. 855; Hallowell, etc., Bank *v.* Hamlin, 14 Mass. 178; Brown *v.* Ellis, 103 Fed. 834. See also Ide *v.* Pierce, 134 Mass. 260. In Pennsylvania it has been held that examined copies of the books of an incorporated bank are inadmissible in evidence against any other than the bank without proof being first made as to who made the entries in the book, and that the proper witnesses to make such proof are the clerks by whom the entries were made, if to be found within the jurisdiction of the court, but if dead or out of the jurisdiction of the court, proof may be made of their handwriting. Gochenauer *v.* Good, 3 Penr. & W. 274; Ridgway *v.* Farmers' Bank, 12 Serg. & R. 256, 14 Am. Dec. 681.

Sworn copy as secondary evidence.—Where it appeared that the secretary of a political convention had lost the original minutes and was unable to find them, and the copy of the minutes offered in evidence was according to the testimony of the secretary complete as to a question of adjournment, concerning which it was offered, it was held that the refusal to receive it in evidence was error. Palmer *v.* Ruland, 28 Colo. 65, 62 Pac. 841.

49. Maxwell *v.* Chapman, 8 Barb. (N. Y.) 579; Blackburn *v.* Crawfords, 3 Wall. (U. S.) 175, 18 L. ed. 186. See also Meconce *v.* Mower, 37 Kan. 298, 15 Pac. 155.

For admissibility of church registers as public records see *supra*, XIV, A, 5, b, note 19.

50. *Connecticut.*— Huntly *v.* Compstock, 2 Root 99.

Maryland.—Weaver *v.* Leiman, 52 Md. 708.

Massachusetts.— Kennedy *v.* Doyle, 10 Allen 161.

Michigan.— Durfee *v.* Abbott, 61 Mich. 471, 28 N. W. 521. See also Hunt *v.* Supreme Council of C. F., 64 Mich. 671, 31 N. W. 576, 8 Am. St. Rep. 855.

New York.— Clark *v.* St. James' Church Soc., 21 Hun 95.

Texas.— See Overall *v.* Armstrong, (Civ. App. 1894) 25 S. W. 440.

United States.— Blackburn *v.* Crawford, 3 Wall. 175, 18 L. ed. 186.

England.— See O'Connor *v.* Malone, 6 Cl. & F. 572, Macl. & R. 468, 7 Eng. Reprint 814; Malone *v.* L'Estrange, 2 Ir. Eq. 16.

See 20 Cent. Dig. tit. "Evidence," § 1392.

51. *Michigan.*— Durfee *v.* Abbott, 61 Mich. 471, 28 N. W. 521.

Minnesota.— Houlton *v.* Manteuffel, 51 Minn. 185, 53 N. W. 541.

New Mexico.— Berry *v.* Hull, 6 N. M. 643, 30 Pac. 936.

New York.— Kabok *v.* Phœnix Mut. L. Ins. Co., 4 N. Y. Suppl. 718. See also Jacobi *v.* Germania Order, 73 Hun 602, 26 N. Y. Suppl. 318; Maxwell *v.* Chapman, 8 Barb. 579.

Wisconsin.— Herman *v.* Mason, 37 Wis. 273.

Compare Fletcher *v.* Cavalier, 4 La. 267.

See 20 Cent. Dig. tit. "Evidence," § 1392.

52. Blackburn *v.* Crawfords, 3 Wall. (U. S.) 175, 18 L. ed. 186.

53. Whitcher *v.* McLaughlin, 115 Mass. 167.

54. Connecticut Mut. L. Ins. Co. *v.* Schwenk, 94 U. S. 593, 24 L. ed. 294.

55. Howard *v.* Russell, 75 Tex. 171, 12 S. W. 525; Leach *v.* Dodson, 64 Tex. 185.

56. Richardson *v.* Stringfellow, 100 Ala. 416, 14 So. 283; Henderson *v.* Miller, 36 Ill. App. 232; Marx *v.* Hardy, 78 S. W. 864, 1105, 25 Ky. L. Rep. 1770, 1909; Cook *v.* Penrhyn Slate Co., 36 Ohio St. 135, 38 Am. Rep. 568; Baker *v.* Ashe, 80 Tex. 356, 16 S. W. 36; Frank *v.* J. S. Brown Hardware Co., 10 Tex.

legal *prima facie* evidence in proof of desertion.[57] But apart from statute the rule has been laid down that the log-book is not proof *per se* of the facts therein stated,[58] at least where it is sought to be used in behalf of those by whom the entries are made.[59] It may be used, however, as evidence against those having a concern in writing or directing what should be contained therein.[60] In the same way the protests of the master of a vessel are not admissible as evidence of their contents for himself or his owners,[61] but may be evidence against them.[62]

9. Letters and Telegrams — a. In General. The general principles of evidence in respect to relevancy and competency are applicable of course to letters and telegrams.[63] A contract may be embraced in letters or telegrams constituting a correspondence between the parties, and such correspondence is admissible for the purpose of proving the contract and its terms and conditions,[64] or letters

Civ. App. 439, 31 S. W. 64. See, generally, Mercantile Agencies.

57. Jones *v.* The Phœnix, 13 Fed. Cas. No. 7,489, 1 Pet. Adm. 201.

Compliance with statute necessary.— The entry, however, must be a full compliance with the statute. Worth *v.* Mumford, 1 Hilt (N. Y.) 1; Clutman *v.* Tunison, 5 Fed. Cas. No. 2,907, 1 Sumn. 373. Thus an entry that the seamen named "abandoned the ship" is not sufficient; that the seamen left the vessel without leave must be distinctly entered as a fact. Worth *v.* Mumford, 1 Hilt. (N. Y.) 1. So it must appear that the entry was made on the day of the desertion. Clutman *v.* Tunison, 5 Fed. Cas. No. 2,907, 1 Sumn. 373; The Phœbe *v.* Dignum, 19 Fed. Cas. No. 11,110, 1 Wash. 48. See also Brink *v.* Lyons, 18 Fed. 605.

58. Worth *v.* Mumford, 1 Hilt. (N. Y.) 1; Cameron *v.* Rich, 5 Rich. (S. C.) 352, 52 Am. Dec. 747; U. S. *v.* Gibert, 25 Fed. Cas. No. 15,204, 2 Sumn. 19; U. S. *v.* Sharp, 27 Fed. Cas. No. 16,264, Pet. C. C. 118. See also Worrall *v.* Davis Coal, etc., Co., 113 Fed. 549. *Compare* Smallwood *v.* Mitchell, 3 N. C. 145; U. S. *v.* Mitchell, 26 Fed. Cas. No. 15,792, 3 Wash. 95.

Log-books held inadmissible to show time of vessel's sailing.— U. S. *v.* Gibert, 25 Fed. Cas. No. 15,204, 2 Sumn. 19. *Compare* D'Israeli *v.* Jowett, 1 Esp. 427.

Entry in log-book referred to in deposition. — In Falconer *v.* Hanson, 1 Campb. 171, 10 Rev. Rep. 663, an entry in a log-book was received in evidence where it appeared that it had been referred to in a deposition affirming the truth of the entries.

Rule of admissibility governed by lex fori. — The admissibility or competency of evidence in a legal proceeding pertains to the remedy, and is governed by the *lex fori*, and therefore a clause in the British shipping act of 1854, making certain entries in the official log-book competent evidence in all courts, does not make them so in the courts of any other country. The City of Carlisle, 39 Fed. 807, 5 L. R. A. 52.

59. U. S. *v.* Gibert, 25 Fed. Cas. No. 15,204, 2 Sumn. 19.

60. U. S. *v.* Gibert, 25 Fed. Cas. No. 15,204, 2 Sumn. 19.

61. *Connecticut.*— Hempstead *v.* Bird, 1 Day 91.

Georgia.— Straffin *v.* Newell, T. U. P. Charlt. 224.

Louisiana.— Peck *v.* Gale, 3 La. 320, where the protest was held inadmissible except in the event of the death of the person making it.

Maryland.— See Patterson *v.* Maryland Ins. Co., 3 Harr. & J. 71, 5 Am. Dec. 419.

North Carolina.— Cunningham *v.* Butler, 3 N. C. 392.

Pennsylvania.— See Richette *v.* Stewart, 1 Dall. 317, 1 L. ed. 154. *Compare* Nixon *v.* Long, 1 Dall. 6, 1 L. ed. 13.

South Carolina.— Cudworth *v.* South Carolina Ins. Co., 4 Rich. 416, 55 Am. Dec. 692.

Tennessee.— Doherty *v.* Farris, 2 Yerg. 73.

United States.— Hand *v.* The Elvira, 11 Fed. Cas. No. 6,015, Gilp. 60; Merriman *v.* The May Queen, 17 Fed. Cas. No. 9,481, Newb. Adm. 464. See also Ruan *v.* Gardner, 20 Fed. Cas. No. 12,100, 1 Wash. 145.

England.— Christian *v.* Coombe, 2 Esp. 489; Betsey *v.* Caines, 2 Hagg. Adm. 28.

See 20 Cent. Dig. tit. "Evidence," § 1396.

Protest admissible to prove itself.— Hempstead *v.* Bird, 1 Day (Conn.) 91.

Protest admitted in corroboration of master's testimony.— Sampson *v.* Johnson, 21 Fed. Cas. No. 12,281, 2 Cranch C. C. 107.

62. Atkins *v.* Elwell, 45 N. Y. 753; Merriman *v.* The May Queen, 17 Fed. Cas. No. 9,481, Newb. Adm. 464.

63. Mobile, etc., R. Co. *v.* Jay, 65 Ala. 113; Percy *v.* Bibber, 134 Mass. 404; Coleman *v.* Colgate, 69 Tex. 88, 6 S. W. 553. And see Evidence, 16 Cyc. 1110 *et seq.*

Letters as hearsay see Evidence, 16 Cyc. 1192 *et seq.*

Admissions in letters see Evidence, 16 Cyc. 945.

64. *Alabama.*— Strong *v.* Catlin, 37 Ala. 706.

Indiana.— Thames L. & T. Co. *v.* Beville, 100 Ind. 309.

Maryland.— Stoddert *v.* Tuck, 5 Md. 18.

Massachusetts.— Merrifield *v.* Robbins, 8 Gray 150.

Michigan.— Shaw *v.* Davis, 7 Mich. 318.

Minnesota.— Sanborn *v.* Nockin, 20 Minn. 178.

Missouri.— Taylor *v.* The Robert Campbell, 20 Mo. 254.

New York.— Momeyer *v.* New Jersey Sheep, etc., Co., 20 N. Y. Suppl. 814.

or telegrams may be so connected with and related to an oral or written contract as to become a part of the *res gestæ*.[65] So while a letter or telegram is as a general rule inadmissible in the writer's or sender's favor, especially if addressed to a third person with whom the adverse party is in no wise connected,[66] it may be admissible as containing an admission by the person by whom or under whose direction it is written.[67] So a letter calling for an answer may be admissible

Texas.— Tinsley *v.* Dowell, (Civ. App. 1892) 24 S. W. 928. See also Orange Rice Mill Co. *v.* McIlhinney, (Civ. App. 1903) 77 S. W. 428.

United States.— J. S. Toppan Co. *v.* McLaughlin, 120 Fed. 705.

See 20 Cent. Dig. tit. "Evidence," § 1492 *et seq.* And see Contracts, 9 Cyc. 293 *et seq.*, 763 et seq.

Letter by third person referred to in letter relied on as containing contract held admissible.— Parrish *v.* Bradley, 73 Mich. 610, 41 N. W. 818.

Letter written by third person at request of party to contract.— A letter to plaintiff from his agent, containing a proposition from defendant, in connection with evidence that it stated the proposition as made by defendant, and was sent at his request, and was acted on by acceptance, is competent to prove the proposition accepted. Sherman *v.* Robertson, 88 Hun (N. Y.) 40, 34 N. Y. Suppl. 275.

65. *Iowa.*— Crane *v.* Malony, 39 Iowa 39.

Massachusetts.— New England Mar. Ins. Co. *v.* De Wolf, 8 Pick. 56; Lewis *v.* Gray, 1 Mass. 297, 2 Am. Dec. 21.

Michigan.—Sweetzer *v.* Mead, 5 Mich. 107.

Missouri.— Hammond *v.* Beeson, 112 Mo. 190, 20 S. W. 474, (1891) 15 S. W. 1000.

New Hampshire.— Merrill *v.* Downs, 41 N. H. 72.

See 20 Cent. Dig. tit. "Evidence," § 1492 *et seq.* See also Evidence, 16 Cyc. 1148, 1158, 1241.

A letter accompanying a note and stating the purpose for which the latter is sent is admissible as part of the *res gestæ*. Crary *v.* Pollard, 14 Allen (Mass.) 284; Monroe Bank *v.* Culver, 2 Hill (N. Y.) 531.

Letters held inadmissible as part of the res gestæ.— A letter by a party rehearsing his understanding of the agreement long after it was made is inadmissible as a part of the *res gestæ*. Clarkson *v.* Kerber, 84 Ill. App. 658; Hodgkins *v.* Chappell, 128 Mass. 197; Hammond *v.* Beeson, 112 Mo. 190, 20 S. W. 474; Farrington *v.* Hayes, 65 Vt. 153, 25 Atl. 1091. See also Evidence, 16 Cyc. 1162, 1258.

66. *Maryland.*— Whiteford *v.* Burckmyer, 1 Gill 127, 39 Am. Dec. 640.

Massachusetts.— Snow *v.* Warner, 10 Metc. 132, 43 Am. Dec. 417.

Minnesota.— Houde *v.* Tolman, 42 Minn. 522, 44 N. W. 879.

Missouri.— J. K. Armsby Co. *v.* Eckerly, 42 Mo. App. 299.

North Carolina.— Higgins *v.* North Carolina R. Co., 52 N. C. 470.

Oregon.— Hannan *v.* Greenfield, 36 Oreg. 97, 58 Pac. 888.

Texas.— Dewees *v.* Bluntzer, 70 Tex. 406, 7 S. W. 820.

See 20 Cent. Dig. tit. "Evidence," § 1492 *et seq.*

Self-serving declarations see Evidence, 16 Cyc. 1202.

Letter by third person at party's request.— A presumption against a writer arising from letters proved to be written by him cannot be rebutted by showing letters written to the same addressee by other persons acting under his advice or at his request, since this in effect would permit a defendant to make evidence in his own behalf. Lewis *v.* Post, 1 Ala. 65.

Letters containing mere reports from agents to their principals are incompetent to prove the facts recited in the letters against third persons in the principal's favor. Insurance Co. of North America *v.* Guardiola, 129 U. S. 642, 9 S. Ct. 425, 32 L. ed. 802.

67. *California.*— Ryland *v.* Heney, (1898) 52 Pac. 1132, 130 Cal. 426, 62 Pac. 616. See also Goldman *v.* Bashore, 80 Cal. 146, 22 Pac. 82.

Connecticut.— Deep River Nat. Bank's Appeal, 73 Conn. 341, 47 Atl. 675.

Georgia.— Knowles *v.* Williams, 62 Ga. 316.

Illinois.— Dick *v.* Zimmerman, 207 Ill. 636, 69 N. E. 754 [*affirming* 105 Ill. App. 615]; Holley *v.* Knapp, 45 Ill. App. 372.

Massachusetts.— Merrifield *v.* Robbins, 8 Gray 150. See also Short Mountain Coal Co. *v.* Hardy, 114 Mass. 197.

Missouri.— See Brown *v.* State Bank, 2 Mo. 191.

New York.— White *v.* McNulty, 164 N. Y. 582, 58 N. E. 1094 [*affirming* 26 N. Y. App. Div. 173, 49 N. Y. Suppl. 903]; Maddock *v.* Root, 72 Hun 98, 25 N. Y. Suppl. 396.

Pennsylvania.—Commercial Bank *v.* Wood, 7 Watts & S. 89. *Compare* Kemmerer *v.* Wilson, 31 Pa. St. 110.

Wisconsin.— Griffin, etc., Co. *v.* Joannes, 80 Wis. 601, 50 N. W. 785.

United States.— Farnsworth *v.* Nevada Co., 102 Fed. 578, 42 C. C. A. 509.

See 20 Cent. Dig. tit. "Evidence," § 1492 *et seq.* And see Evidence, 16 Cyc. 945.

Rule applied to letter addressed to third person.— Beecher *v.* Pettee, 40 Mich. 181; Lyle *v.* Higginbotham, 10 Leigh (Va.) 63.

Application of rule in criminal cases see the following cases:

Alabama.— Burton *v.* State, 107 Ala. 108, 18 So. 284.

Georgia.— Rumph *v.* State, 91 Ga. 20, 16 S. E. 104.

Illinois.— Simon *v.* People, 150 Ill. 66, 36 N. E. 1019.

Kentucky.— Stricklin *v.* Com., 83 Ky. 566.

against the addressee where he fails to reply,[68] or replies only in part.[69] And so a letter or telegram may be evidence of a notice or demand,[70] or a refusal to rescind a contract, and the like.[71] And a letter, like other oral or written declarations, may be admissible to show the existence of a particular intention on the part of the writer at the time of writing whenever it is material to be proved.[72]

b. Admission of Correspondence in Entirety. Where letters or telegrams are offered in evidence by a party for the purpose of establishing a contract,[73] or to show admissions by the adverse party,[74] the latter, for the purpose of explaining the letters in evidence, may introduce or call for the production of the entire correspondence relevant or material to the transaction or question in issue. In the same way where part of a letter has been put in other explanatory parts are admissible.[75] Moreover the rule has been laid down that a party who attempts to establish a contract by correspondence will not be allowed to put in evidence a

Massachusetts.— Com. *v.* Hayden, 163 Mass. 453, 40 N. E. 846, 47 Am. St. Rep. 468, 28 L. R. A. 318; Com. *v.* Jeffries, 7 Allen 548, 83 Am. Dec. 712.

Wisconsin.— Monteith *v.* State, 114 Wis. 165, 89 N. W. 828.

United States.— U. S. *v.* Dunbar, 60 Fed. 75.

England.— Rex *v.* Derrington, 2 C. & P. 418, 12 E. C. L. 650.

See also CRIMINAL LAW, 12 Cyc. 418 *et seq.*

Threatening letter.— A letter threatening to kill deceased and his brother, purporting to have been written to the latter by defendant, which appears to have been intended for them both, and which defendant has admitted to the brother that he wrote, is properly admitted, especially as against a general objection. Westbrook *v.* People, 126 Ill. 81, 18 N. E. 304.

68. Whitaker *v.* White, 69 Hun (N. Y.) 258, 23 N. Y. Suppl. 487. And see Waring *v.* Moseley, 22 Ala. 667. See also EVIDENCE, 16 Cyc. 956 *et seq.* One to whom a letter is written may remain silent when there is no duty to speak, and in such a case silence does not operate as an admission of the matters to which the letter relates. Thomas *v.* Gage, 141 N. Y. 506, 36 N. E. 385. See also Janin *v.* Cheney, 44 N. Y. App. Div. 110, 60 N. Y. Suppl. 645; Panama R. Co. *v.* Charlier, 4 Silv. Supreme (N. Y.) 439, 7 N. Y. Suppl. 528. See also EVIDENCE, 16 Cyc. 956 *et seq.*

69. Beach *v.* Travelers' Ins. Co., 73 Conn. 118, 46 Atl. 867.

70. Swann *v.* West, 41 Miss. 104; Merrill *v.* Downs, 41 N. H. 72; Struthers *v.* Drexel, 122 U. S. 487, 7 S. Ct. 1293, 30 L. ed. 1216. See also Higgins *v.* North Carolina R. Co., 52 N. C. 470.

71. Swann *v.* West, 41 Miss. 104, refusal to rescind contract. Letters containing a denial of liability by the company on the contract of life insurance sued on are admissible in evidence. Prudential Ins. Co. *v.* Devoe, 98 Md. 584, 56 Atl. 809. In trespass to try title, where defendant claims under an outstanding title founded on certain transfers of a land certificate which were found among the papers of a deceased surveyor of the county in which the land is situated, a letter written by the transferee of the certificate to the surveyor, stating that he inclosed the certificate for record, etc., is admissible on the question of proper custody of the transfers, and also as to the filling in of the transfers with the name of the transferee; they having been left blank when executed. Ward *v.* Cameron, (Tex. Civ. App. 1903) 76 S. W. 240.

72. New York Mut. L. Ins. Co. *v.* Hillmon, 145 U. S. 285, 12 S. Ct. 909, 36 L. ed. 706.

73. *Kansas.*— Thayer *v.* Hoffman, 53 Kan. 723, 37 Pac. 125.

Michigan.— Gage *v.* Myers, 59 Mich. 300, 26 N. W. 522.

New York.— Harris *v.* Pryor, 18 N. Y. Suppl. 128, 19 N. Y. Suppl. 911. See also Lewis *v.* Newcombe, 1 N. Y. App. Div. 59, 37 N. Y. Suppl. 8; Lindheim *v.* Duys, 11 Misc. 16, 31 N. Y. Suppl. 870.

North Dakota.— Anderson *v.* Grand Forks First Nat. Bank, 4 N. D. 182, 59 N. W. 1029.

Virginia.— See Downer *v.* Morrison, 2 Gratt. 250.

See 20 Cent. Dig. tit. "Evidence," § 1492 *et seq.*

74. *Alabama.*— Zimmerman *v.* Huber, 29 Ala. 379.

Georgia.— Moore *v.* Hawks, 56 Ga. 557.

Indiana.— Stringer *v.* Breen, 7 Ind. App. 557, 34 N. E. 1015.

Michigan.— Pinkham *v.* Cockell, 77 Mich. 265, 43 N. W. 921; Lester *v.* Sutton, 7 Mich. 329.

New York.— Raymond *v.* Howland, 17 Wend. 389. See also Livermore *v.* St. John, 4 Rob. 12.

North Carolina.— Overman *v.* Clemmons, 19 N. C. 185.

Texas.—See Werner *v.* Kasten, (Civ. App. 1894) 26 S. W. 322.

See 20 Cent. Dig. tit. "Evidence," § 1494 *et seq.*

Right of one party to introduce entire correspondence.— A party who has given in evidence letters addressed to him may, for the purpose of explaining or construing them, introduce previous letters, written by himself, to which such letters were replies. Buffum *v.* York Mfg. Co., 175 Mass. 471, 56 N. E. 599.

75. Walker *v.* Griggs, 28 Ga. 552; Glover *v.* Stevenson, 126 Ind. 532, 26 N. E. 486; Stanbrough *v.* Garrett, 1 Rob. (La.) 13;

letter from himself to the adverse party which purports on its face to answer a letter from the adverse party, without producing the previous communication, or if the previous letter is lost or beyond his control, without showing this fact and then proving its contents.[76] But a party may give in evidence against the adverse party any letters of the latter containing admissions material to the questions in issue without putting in the whole correspondence between them,[77] at least where the letter offered in evidence as an admission is fairly self-explanatory.[78] So a reply is admissible as evidence of notice to the adverse party to whom it was addressed without producing the letter to which it referred.[79]

c. Authentication—(I) *In General.* To render a letter not in response to a letter previously sent to the alleged writer admissible in evidence, its authenticity must be established either by proof of the handwriting or by other proof establishing its genuineness; the mere fact that it purports to have been written by him is not sufficient.[80] To render letters admissible, it is not necessary that it be proved beyond a reasonable doubt that they were the letters of the alleged

Lapice *v.* Clifton, 17 La. 152; Stringfellow *v.* Thomson, 1 Tex. App. Civ. Cas. § 1008.

76. Belmont Coal Co. *v.* Richter, 31 W. Va. 858, 8 S. E. 609. See also Stone *v.* Sanborn, 104 Mass. 319, 6 Am. Rep. 238. *Compare* Newton *v.* Price, 41 Ga. 186, where it was held that one of a series of letters written in a correspondence negotiating the written contract which was the subject of the action, in reply to one from plaintiff, was admissible in evidence by defendant, although plaintiff's letter was lost; plaintiff being himself a witness at the trial and competent to prove the contents of his letters.

77. *Illinois.*— Barnes *v.* Northern Trust Co., 169 Ill. 112, 48 N. E. 31.

Maine.— See North Berwick Co. *v.* New England, etc., Ins. Co., 52 Me. 336.

Massachusetts.— Stone *v.* Sanborn, 104 Mass. 319, 6 Am. Rep. 238.

New York.— Dainese *v.* Allen, 45 How. Pr. 430. See also Merchants' Exch. Nat. Bank *v.* Cardozo, 35 N. Y. Super. Ct. 162.

England.— De Medina *v.* Owen, 3 C. & K. 72; Barrymore *v.* Taylor, 1 Esp. 326. *Compare* Watson *v.* Moore, 1 C. & K. 626, 47 E. C. L. 626.

Part of letter introduced as admission.— In Lester *v.* Piedmont, etc., L. Ins. Co., 55 Ga. 475, it was held that a letter introduced as evidence need not be read in its entirety by the party who introduces it. To the same effect see Raphael *v.* Hartman, 87 Ill. App. 634. So it is held error to exclude a letter material to the issues written by defendant, and offered in evidence by plaintiff, on the ground that a part of the letter has been cut off and is gone, where defendant is asked as a witness to state whether the contents of the portion offered are in any way connected with the contents of the portion missing, and he refuses to do so. Van Vechten *v.* Van Vechten, 65 Hun (N. Y.) 215, 20 N. Y. Suppl. 140.

Letter from third person who is dead or out of state.— Where A, a party in a suit, seeks to put in as evidence a letter written to him by another person than the opposite party, in reply to a letter written by A, it is not necessary that he should, before he can be allowed to introduce such evidence, also put in evidence the letter written by himself, or prove its contents, when the person to whom it was written is either dead or out of the state. Hayward Rubber Co. *v.* Duncklee, 30 Vt. 29. See also Dix *v.* Jackman, (Tex. Civ. App. 1896) 37 S. W. 344.

Right of party to introduce entire correspondence.— In Trischet *v.* Hamilton Mut. Ins. Co., 14 Gray (Mass.) 456, it was held that a party who, for the purpose of showing bias and prejudice against him of a witness called by the adverse party, has given in evidence a letter addressed to him by the witness, may also for the purpose of explaining its meaning introduce a previous letter from himself to which the letter of the witness was a reply. But where the issue was as to whether a certain transaction amounted to a satisfaction of a judgment against plaintiff, a letter written by defendant, subsequent to such transaction, purporting to be a reply to a letter from plaintiff requesting a certificate of satisfaction, was held to be inadmissible in defendant's behalf, although offered in connection with a letter from the adverse party to which it was a reply, plaintiff not having introduced any part of the correspondence. Houde *v.* Tolman, 42 Minn. 522, 44 N. W. 879.

78. Brayley *v.* Ross, 33 Iowa 505; New Hampshire Trust Co. *v.* Korsmeyer Plumbing, etc., Co., 57 Nebr. 784, 78 N. W. 303.

79. Crary *v.* Pollard, 14 Allen (Mass.) 284. *Compare* Norris *v.* Hartford F. Ins. Co., 57 S. C. 358, 35 S. E. 572, where it was held that the insurer cannot offer in evidence a letter written by its agent to plaintiff's attorneys for the purpose of showing that there had been no waiver of a forfeiture of the policy, without offering all the correspondence touching the policy.

80. *Alabama.*— O'Connor Min., etc., Co. *v.* Dickson, 112 Ala. 304, 20 So. 413; Stetson *v.* Lyons, 34 Ala. 140. See also Southern R. Co. *v.* Howell, 135 Ala. 639, 34 So. 6.

California.— Sinclair *v.* Wood, 3 Cal. 98.

Georgia.— Freeman *v.* Brewster, 93 Ga. 648, 21 S. E. 165.

Indiana.— Baltimore, etc., R. Co. *v.* McWhinney, 36 Ind. 436; Lingg *v.* State, 28 Ind. App. 248, 61 N. E. 696.

author, but it is sufficient to introduce evidence which when uncontradicted would satisfy all reasonable minds of that fact.[81] The usual method of proving the genuineness of a letter is by proof of the handwriting;[82] but other evidence may be resorted to for this purpose.[83] Thus a letter not in the handwriting of

Iowa.— State *v.* Waite, 101 Iowa 377, 70 N. W. 596.

Kansas.— Clark *v.* Ford, 7 Kan. App. 332, 51 Pac. 938.

Kentucky.— Donnelly *v.* Donnelly, 78 S. W. 182, 25 Ky. L. Rep. 1543.

Maryland.— Smith *v.* Easton, 54 Md. 138, 39 Am. Rep. 355.

Missouri.— Brown *v.* Massey, 138 Mo. 519, 38 S. W. 939; Love *v.* Love, 98 Mo. App. 562, 73 S. W. 255; Fowle *v.* Adams Express Co., 9 Mo. App. 572.

Nebraska.— Peycke *v.* Shinn, (1902) 94 N. W. 135; Gartrell *v.* Stafford, 12 Nebr. 545, 11 N. W. 732, 41 Am. Rep. 767.

New Hampshire.— See Glauber Mfg. Co. *v.* Voter, 70 N. H. 332, 47 Atl. 612.

New York.— Nichols *v.* Kingdom Iron Ore Co., 56 N. Y. 618; Rothchild *v.* Schwarz, 28 Misc. 521, 59 N. Y. Suppl. 527.

North Carolina.— Foushee *v.* Owen, 122 N. C. 360, 29 S. E. 770.

Pennsylvania.— Sweeney *v.* Ten-Mile Oil, etc., Co., 130 Pa. St. 193, 18 Atl. 612.

Vermont.— See Johnson *v.* Bolton, 43 Vt. 303. *Compare* Spellman *v.* Richmond, etc., R. Co., 35 S. C. 475, 14 S. E. 947, 28 Am. St. Rep. 858.

See 20 Cent. Dig. tit. "Evidence," § 1648 *et seq.*

Proof of authority of person writing for alleged sender necessary.— *Alabama.*— Cobb *v.* Malone, 91 Ala. 388, 8 So. 693. See also Hightower *v.* Ogletree, 114 Ala. 94, 21 So. 934; Prestridge *v.* Irwin, 46 Ala. 653.

Indiana.—Hargrove *v.* John, 120 Ind. 285, 22 N. E. 132.

Kansas.— McGee *v.* Kroh, 44 Kan. 301, 24 Pac. 424.

Maine.— See Abbott *v.* McAloon, 70 Me. 98.

Massachusetts.— Butler *v.* Price, 115 Mass. 578.

Minnesota.— See Lemon *v.* De Wolf, 89 Minn. 465, 95 N. W. 316.

New York.—Wheeler, etc., Mfg. Co. *v.* McLaughlin, 8 N. Y. Suppl. 95.

Pennsylvania.— Yost *v.* Mensch, 141 Pa. St. 73, 21 Atl. 507; Scott *v.* Moore, 30 Leg. Int. 64.

See 20 Cent. Dig. tit. "Evidence," § 1648 *et seq.*

A printed circular letter is inadmissible in evidence where it has not been authenticated in any way. St. Louis Loan, etc., Co. *v.* Yantis, 173 Ill. 321, 50 N. E. 807.

Stamped letter.— In an action on a note purporting to have been executed by the agent of a mortgagor, in which one of the matters in dispute is the authority of the agent, it is error to admit in evidence a letter, apparently written by the mortgagor and recognizing the validity of the note, and which is signed only by means of a rubber stamp, without evidence showing who affixed the stamp. Reynolds *v.* Phillips, 1 Nebr. (Unoff.) 114, 95 N. W. 491.

Proof of handwriting once sufficient.— Letters introduced in evidence by a party, the handwriting of which has once been proved by competent evidence, may be used, without further proof of handwriting, by any party to the record. Haskit *v.* Elliott, 58 Ind. 493.

Accounting for custody held unnecessary.— In an action by an administrator on a note, letters written by defendant to plaintiff's decedent in his lifetime are held competent evidence against defendant without accounting for their custody, proof of their genuineness being sufficient. Cooper *v.* Perry, 16 Colo. 436, 27 Pac. 946.

Proof at hearing.— A letter offered in evidence without having been proved may be proved at the hearing. Dana *v.* Nelson, 1 Aik. (Vt.) 252.

Letters made basis of action.— In Texas it has been held that letters acknowledging an indebtedness and made the basis of an action may be read in evidence without proof of their execution, unless that fact is put in evidence by the pleadings. Close *v.* Judson, 34 Tex. 288.

81. Deep River Nat. Bank's Appeal, 73 Conn. 341, 47 Atl. 675; Ingram *v.* Reiman, 81 Ill. App. 123. That a letter from a bank was handed to a mortgagor by its authorized agent is *prima facie* evidence of its execution by the bank. Leavenworth First Nat. Bank *v.* Wright, 104 Mo. App. 242, 78 S. W. 686.

82. Swicard *v.* Hooks, 85 Ga. 580, 11 S. E. 863; Pearson *v.* McDaniel, 62 Ga. 100; Sutton *v.* Hayden, 62 Mo. 101; Parker *v.* Amazon Ins. Co., 34 Wis. 363.

Proof of handwriting see *supra*, XI, C, 9, b.

Unsigned letters.— Letters proved to have been written by a person may be admitted against him, although not signed by him. State *v.* Sibley, (Mo. 1895) 31 S. W. 1033; State *v.* Winningham, 124 Mo. 423, 27 S. W. 1107.

Effect of denial of handwriting by party charged.— Where the handwriting of a letter has been identified as that of one of the parties to the action, it is, if otherwise competent and relevant, admissible in evidence, although the signature thereto is denied by the party charged with writing it. Burgess *v.* Burgess, 44 Nebr. 16, 62 N. W. 242.

83. In *In re* Kennedy, (Cal. 1894) 36 Pac. 1030, petitioner introduced evidence tending to show that she received at Buffalo a letter signed C K (testatrix's name), containing a railroad ticket and five dollars. It was shown that the address of C K was at 616½ N street, and that at about that time she

the alleged sender may be looked into for internal evidence of the source from which it came, as for instance the fact that it relates to matters which are known only to the alleged sender.[84] A telegram is not admissible in the absence of proof of its authenticity either by proof of the handwriting, where the original message is offered, or by other evidence of its genuineness.[85]

(II) *Admissions of Genuineness.* An admission as to a writing is like an admission of any other fact, and a foundation for the introduction of a letter may be laid by proving that the party against whom it is offered has admitted its genuineness.[86] An admission by a party that he sent a letter dispenses with proof of its authenticity, although it is not in his handwriting.[87]

(III) *Letters or Telegrams Received in Reply.* A letter received in the due course of mail purporting to be written by a person in answer to another letter proved to have been sent to him is *prima facie* genuine, and is admissible in evidence without proof of the handwriting or other proof of its authenticity.[88] And the same rule has been applied to a telegram purporting to be

borrowed five dollars to send, as she said, to her sister at Buffalo. It was held that petitioner might introduce from the book of registered letters of the San Francisco post-office an entry reciting the receipt of an letter from C K, 616½ N street, addressed to M R (petitioner), Buffalo, such testimony being proper, as affording some evidence that the letter came from deceased. So the fact that letters addressed to testator are found among his papers, with memoranda on them of their dates in testator's handwriting, is *prima facie* evidence that they are what they purport to be, so that they may be admitted without proof of their authenticity, where the object for which they were introduced was to show testator's mental capacity by his replies thereto. Barber's Appeal, 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90.

Unsigned letter.— In Goldman *v.* Bashore, 80 Cal. 146, 22 Pac. 82, a letter unsigned and not indicating either the place or person from whom it emanated was admitted upon proof that it was written by an attorney for the person sought to be bound thereby.

84. Deep River Nat. Bank's Appeal, 73 Conn. 341, 47 Atl. 675; Singleton *v.* Bremar, Harp. (S. C.) 201.

85. *Connecticut.*— Lewis *v.* Havens, 40 Conn. 363.

Louisiana.— Richie *v.* Bass, 15 La. Ann. 668.

Minnesota.— Adams *v.* Mille Lacs Lumber Co., 32 Minn. 216, 19 N. W. 735; Burt *v.* Winona, etc., R. Co., 31 Minn. 472, 18 N. W. 285, 289.

South Dakota.— Reynolds *v.* Hinrichs, 16 S. D. 602, 94 N. W. 694.

United States.— Drexel *v.* True, 74 Fed. 12, 20 C. C. A. 265.

See 20 Cent. Dig. tit. "Evidence," § 1653.

The receipt of a telegram in agreed cipher identifies it as much as a proved handwriting. Oregon Steamship Co. *v.* Otis, 100 N. Y. 446, 3 N. E. 485, 53 Am. Rep. 221.

86. Mead *v.* Randall, 111 Mich. 268, 69 N. W. 506; Kloes *v.* Wurmser, 34 Mo. App. 453; Aspell *v.* Smith, 134 Pa. St. 59, 19 Atl. 484; Overholtzer *v.* McMichael, 10 Pa. St. 139; Distad *v.* Shanklin, 15 S. D. 507, 90 N. W. 151. See also Dick *v.* Zimmerman, 207 Ill. 636, 69 N. E. 754 [*affirming* 105 Ill. App. 615].

87. Dunbar *v.* U. S., 156 U. S. 185, 15 S. Ct. 325, 39 L. ed. 390 [*affirming* 60 Fed. 75].

88. *Alabama.*— White *v.* Tolliver, 110 Ala. 300, 20 So. 97.

Colorado.— Atlantic Ins. Co. *v.* Manning, 3 Colo. 224; Chicago, etc., R. Co. *v.* Roberts, 10 Colo. App. 87, 49 Pac. 428.

Illinois.— Dick *v.* Zimmerman, 207 Ill. 636, 69 N. E. 754 [*affirming* 105 Ill. App. 615]; Consolidated Perfume Co. *v.* National Bank of Republic, 86 Ill. App. 642; Illinois Cent. R. Co. *v.* Messnard, 15 Ill. App. 213.

Iowa.— Davis *v.* Robinson, 67 Iowa 355, 25 N. W. 280; Lyon *v.* Railway Pass. Assur. Co., 46 Iowa 631.

Massachusetts.—State *v.* Bradish, 14 Mass. 296.

Minnesota.— Melby *v.* Osborne, 33 Minn. 492, 24 N. W. 253.

Missouri.—J. H. Sanders Pub. Co. *v.* Emerson, 64 Mo. App. 662.

Nebraska.— People's Nat. Bank *v.* Geisthardt, 55 Nebr. 232, 75 N. W. 582.

North Carolina.— McKonkey *v.* Gaylord, 46 N. C. 94.

South Dakota.— Armstrong *v.* Advance Thresher Co., 5 S. D. 12, 57 N. W. 1131.

Texas.— Ullman *v.* Babcock, 63 Tex. 68; Lewis *v.* Alexander, (Civ. App. 1895) 31 S. W. 414.

United States.— National Acc. Soc. *v.* Spiro, 78 Fed. 774, 24 C. C. A. 334.

See 20 Cent. Dig. tit. "Evidence," § 1648 *et seq.*

Letters purporting to be written by authority of sender.— So where a letter in reply to another purports to have been written under the authority of the alleged sender proof of such authority is unnecessary. Bloom *v.* State Ins. Co., 94 Iowa 359, 62 N. W. 810; Norwegian Plow Co. *v.* Munger, 52 Kan. 371, 35 Pac. 11; Hoxsie *v.* Empire Lumber Co., 41 Minn. 548, 43 N. W. 476; Armstrong *v.* Advance Thresher Co., 5 S. D. 12, 57 N. W. 1131.

sent by a person in reply to a letter or telegram sent to him, at least where a foundation is laid for the introduction of secondary evidence.[89]

d. Proof of Delivery. To render a letter or telegram or a copy thereof admissible against the addressee, it must be shown that it was received or duly sent or delivered for transmission.[90]

e. Address or Direction. But it seems to be immaterial that a letter or telegram relating to a transaction between the parties is addressed and sent to a person not a party to the suit, provided it comes into the possession of the party against whom it is offered and is recognized by him by sending a reply or otherwise.[91] So a letter may be admitted against the writer, although addressed to no one, if it is shown to relate to a transaction between the parties and is produced by the adverse party and no suspicion is cast upon his possession.[92]

10. Maps, Diagrams, Etc. It is the common practice in the courts to receive private or unofficial maps, diagrams, models, or sketches for the purpose of giving a representation of objects and places which generally cannot otherwise be as conveniently shown or described by witnesses, and when proved to be correct or offered in connection with the testimony of a witness they are admissible as legitimate aids to the court or jury.[93] It is not essential for this purpose that the person making the map or diagram should testify to its correct-

Existence of prior letter must be established.— Linn *v.* New York L. Ins. Co., 78 Mo. App. 192.

89. People *v.* Hammond, 132 Mich. 422, 93 N. W. 1084; Taylor *v.* The Robert Campbell, 20 Mo. 254; Western Twine Co. *v.* Wright, 11 S. D. 521, 78 N. W. 942, 44 L. R. A. 438. See also Thorp *v.* Philbin, 15 Daly (N. Y.) 155, 29 N. Y. St. 140 [*affirming* 2 N. Y. Suppl. 732]. *Compare* Smith *v.* Easton, 54 Md. 138, 39 Am. Rep. 355 (where the rule applied to letters was held inapplicable where both the message sent and the answer are by telegraph); Howley *v.* Whipple, 48 N. H. 487 (where, however, the telegram was rejected on the ground that it was not the best evidence).

90. *California.*— Eppinger *v.* Scott, 112 Cal. 369, 42 Pac. 301, 44 Pac. 723, 53 Am. St. Rep. 220.

Georgia.— Foster *v.* Leeper, 29 Ga. 294.

Massachusetts.— Davis *v.* Mason, 4 Pick. 156. See also McKay *v.* Myers, 168 Mass. 312, 47 N. E. 98; Hedden *v.* Roberts, 134 Mass. 38, 45 Am. Rep. 276.

Missouri.—Armsby *v.* Eckerly, 42 Mo. App. 299. See also Phillips *v.* Scott, 43 Mo. 86, 97 Am. Dec. 369.

New Jersey.— See Starr *v.* Torrey, 22 N. J. L. 190.

New York.— See Thallhimer *v.* Brinckerhoff, 6 Cow. 90.

Pennsylvania.— Huckestein *v.* Kelly, 139 Pa. St. 201, 21 Atl. 78.

Texas.— Griffith *v.* Lake, (Sup. 1889) 12 S. W. 285.

Utah.— Cooney *v.* McKinney, 25 Utah 329, 71 Pac. 485.

Wisconsin.— Joannes *v.* Millerd, 90 Wis. 68, 62 N. W. 916; Whiting *v.* Mississippi Valley Mut. Ins. Co., 76 Wis. 592, 45 N. W. 672.

United States.— Smiths *v.* Shoemaker, 17 Wall. 630, 21 L. ed. 717.

See 20 Cent. Dig. tit. "Evidence," § 1494.

Receipt presumed from answer.— Where it appears that a letter from plaintiff to defendant was answered by the latter, it is not error to admit a copy of it in evidence without proper proof of the mailing or delivery of the original. Willis *v.* Hammond, 41 S. C. 153, 19 S. E. 310.

Presumption of receipt of letters and telegrams upon proof of delivery for transmission see Evidence, 16 Cyc. 1065 *et seq.*, 1071.

91. See Eldridge *v.* Hargreaves, 30 Nebr. 638, 46 N. W. 923.

92. See Armistead *v.* Brooke, 18 Ark. 521.

Letter incorrectly addressed.— A letter of a party directed to A C is admissible against him, as written for B C upon parol evidence from which it may be inferred that it was so intended. Wilkins *v.* Burton, 5 Vt. 76.

Letters to agent.— Letters relating to the negotiation of a compromise in the handwriting of a party and addressed to the agent of the adverse party and produced by the latter as containing a representation or admission by the writer will be presumed to have been sent to the agent according to their address and to have reached the adverse party through the agent without further proof. Blodgett *v.* Webster, 24 N. H. 91.

93. *Alabama.*—Humes *v.* Bernstein, 72 Ala. 546.

Arizona.— Jordan *v.* Duke, (1898) 53 Pac. 197.

Arkansas.— Smith *v.* Leach, 44 Ark. 287.

California.— Pickering Light, etc., Co. *v.* Savage, (1902) 69 Pac. 846.

Georgia.— Brantly *v.* Huff, 62 Ga. 532.

Illinois.— Wahl *v.* Laubersheimer, 174 Ill. 338, 51 N. E. 860.

Iowa.— Goldsborough *v.* Pidduck, 87 Iowa 599, 54 N. W. 431.

Kansas.—See Chicago, etc., R. Co. *v.* Davidson, 49 Kan. 589, 31 Pac. 131.

Kentucky.— Hackney *v.* L. & N. R. Co., 1 Ky. L. Rep. 357.

ness; any person acquainted with the facts may do so.[94] But they cannot be received as evidence *per se* independently of the testimony of a witness verifying or accompanying them,[95] unless the map is referred to in a deed for the descrip-

Louisiana.— Gillis *v.* Nelson, 16 La. Ann. 275; Milligan *v.* Hargrove, 6 Mart. N. S. 337.

Massachusetts.— Barrett *v.* Murphy, 140 Mass. 133, 2 N. E. 833; Com. *v.* Holliston, 107 Mass. 232. See also Paine *v.* Woods, 108 Mass. 160. *Compare* Bearce *v.* Jackson, 4 Mass. 408.

Minnesota.— Hall *v.* Connecticut Mut. L. Ins. Co., 78 Minn. 401, 79 N. W. 497.

Missouri.— Williamson *v.* Fischer, 50 Mo. 198.

New York.— Bodine *v.* Andrews, 47 N. Y. App. Div. 495, 62 N. Y. Suppl. 385; Curtiss *v.* Ayrault, 3 Hun 487, 5 Thomps. & C. 611; Stuart *v.* Binsse, 10 Bosw. 436.

Oregon.— Rowland *v.* McCown, 20 Oreg. 538, 26 Pac. 853.

Pennyslvania.— McVey *v.* Durkin, 136 Pa. St. 418, 20 Atl. 541; Gratz *v.* Beates, 45 Pa. St. 495.

Texas.— Armendaiz *v.* Stillman, 67 Tex. 458, 3 S. W. 678; Haney *v.* Clark, 65 Tex. 93; Hanrick *v.* Dodd, 62 Tex. 75; Rodriquez *v.* State, 32 Tex. Cr. 259, 22 S. W. 978; Besson *v.* Richards, 24 Tex. Civ. App. 64, 58 S. W. 611.

Utah.— Dederichs *v.* Salt Lake City R. Co., 14 Utah 137, 46 Pac. 656, 35 L. R. A. 802.

Vermont.— Tillotson *v.* Prichard, 60 Vt. 94, 14 Atl. 302, 6 Am. St. Rep. 95; Wood *v.* Willard, 36 Vt. 82, 84 Am. Dec. 659.

West Virginia.— Poling *v.* Ohio River R. Co., 38 W. Va. 645, 18 S. E. 782, 24 L. R. A. 215; State *v.* Harr, 38 W. Va. 58, 17 S. E. 794.

United States.— Turner *v.* U. S., 66 Fed. 280, 13 C. C. A. 436, 66 Fed. 289, 13 C. C. A. 445.

See 20 Cent. Dig. tit. "Evidence," § 1500 *et seq.*

A question for the court.— The admission of a map for the purpose of enabling witnesses to explain their testimony is for the court and will only be reversed for clear error. Florida Southern R. Co. *v.* Parsons, 33 Fla. 631, 15 So. 338. See also Chicago *v.* Le Moyne, 119 Fed. 662, 56 C. C. A. 278.

Diagram of place of accident.— In personal injury cases maps or diagrams of the scene of the accident proved to be correct are admissible in evidence.

Connecticut.— Waterbury *v.* Waterbury Traction Co., 74 Conn. 152, 50 Atl. 3.

Illinois.— Lake Street El. R. Co. *v.* Burgess, 200 Ill. 628, 66 N. E. 215 [*affirming* 99 Ill. App. 499]; Chicago City R. Co. *v.* McLaughlin, 146 Ill. 353, 34 N. E. 796.

Michigan.— Le Beau *v.* Telephone, etc., Constr. Co., 109 Mich. 302, 67 N. W. 339.

Nebraska.— Culbertson *v.* Holliday, 50 Nebr. 229, 69 N. W. 853.

New York.— Clegg *v.* Metropolitan St. R. Co., 159 N. Y. 550, 54 N. E. 1089 [*affirming* 1 N. Y. App. Div. 207, 37 N. Y. Suppl. 130]; McCooey *v.* Forty-Second St., etc., R. Co., 79 Hun 255, 29 N. Y. Suppl. 368; Stouter *v.* Manhattan R. Co., 6 N. Y. Suppl. 163.

North Carolina.— Arrowwood *v.* South Carolina, etc., R. Co., 126 N. C. 629, 36 S. E. 151.

Texas.— Missouri, etc., R. Co. *v.* Moore, (App. 1891) 15 S. W. 714.

Vermont.— Hyde *v.* Swanton, 72 Vt. 242, 47 Atl. 790.

United States.— Southern Pac. Co. *v.* Hall, 100 Fed. 760, 41 C. C. A. 50; Western Gas Constr. Co. *v.* Danner, 97 Fed. 882, 38 C. C. A. 528; Bunker Hill, etc., Min., etc., Co. *v.* Schnelling, 79 Fed. 263, 24 C. C. A. 564.

See 20 Cent. Dig. tit. "Evidence," § 1508.

An official plat, although not made and recorded according to the statute, is still admissible as a map, to aid a witness in identifying and describing the *locus in quo.* Vilas *v.* Reynolds, 6 Wis. 214. To the same effect see Doherty *v.* Thayer, 31 Cal. 140.

Engravings.— In Ordway *v.* Haynes, 50 N. H. 159, it was held that engravings may be used merely as a chalk to illustrate a point in a case; but that the jury should be told nothing of the history of the print, as, in an action for malpractice, that it was taken from a medical book, since that gives it an undue importance with the jury.

Diagram held unnecessary for illustration. — In an action for damages for libel against a dentist, whom defendant had publicly denounced as a disgrace to the profession, a diagram exhibiting the condition of defendant's teeth on which plaintiff had operated before and after they were injured by plaintiff is inadmissible, as such drawing is unnecessary to illustrate the facts asserted. Thrall *v.* Smiley, 9 Cal. 529.

Mathematical accuracy not essential.— *Illinois.*— Lake St. El. R. Co. *v.* Burgess, 200 Ill. 628, 66 N. E. 215; Brown *v.* Galesburg Pressed Brick, etc., Co., 132 Ill. 648, 24 N. E. 522.

Michigan.— Le Beau *v.* Telephone, etc., Constr. Co., 109 Mich. 302, 67 N. W. 339.

Texas.— Besson *v.* Richard, 24 Tex. Civ. App. 64, 58 S. W. 611.

Vermont.— Wood *v.* Willard, 36 Vt. 82, 84 Am. Dec. 659.

United States.— Western Gas Constr. Co. *v.* Danner, 97 Fed. 882, 38 C. C. A. 528.

See 20 Cent. Dig. tit. "Evidence," §§ 1505, 1506.

Plat made by non-expert.— A plat of land is not necessarily inadmissible because not made by a civil engineer. Gustin *v.* Jose, 11 Wash. 348, 39 Pac. 687.

94. Shook *v.* Pate, 50 Ala. 91; Hall *v.* Connecticut Mut. L. Ins. Co., 76 Minn. 401, 79 N. W. 497. *Compare* Smith *v.* Bunch, 31 Tex. Civ. App. 541, 73 S. W. 559, where it was held that a plat of land is not admissible as independent evidence, on the mere testimony of a witness that he was familiar with the location of the land, and that he was with the surveyor who made the survey and plat, and knew the plat was correct.

95. *Alabama.*—Stein *v.* Ashby, 24 Ala. 521.

tion of the subject-matter conveyed or otherwise becomes a part of the deed,[96] or unless the parties have assented to it as containing the truth.[97]

11. Photographs and Other Pictures — a. In General. Photographs and pictures, it is said, stand on the same footing as diagrams, maps, plans, etc.,[98] and as a general rule whenever it is relevant or important to describe a person, place, or thing, in either a civil or criminal case, photographs or pictures are admissible for the purpose of explaining and applying the evidence in a cause and assisting the court or jury in understanding the case.[99] This kind of evidence has sometimes

Arizona.— See Dalton *v.* Rentaria, 2 Ariz. 275, 15 Pac. 37.

California.— Rose *v.* Davis, 11 Cal. 133. See also Smith *v.* Glenn, (1900) 62 Pac. 180.

Georgia.—Parker *v.* Salmons, 113 Ga. 1167, 39 S. E. 475.

Indiana.— Ellison *v.* Branstrator, 153 Ind. 146, 54 N. E. 433.

Maine.— Dunn *v.* Hayes, 21 Me. 76.

Maryland.— Jacob Tome Institute *v.* Davis, 87 Md. 591, 41 Atl. 166.

Montana.— Story *v.* Maclay, 3 Mont. 480.

New York.— Marble *v.* McMinn, 57 Barb. 610; Jackson *v.* Frost, 5 Cow. 346. See also Bucker *v.* Fero, 16 Hun 589.

North Carolina.— Burwell *v.* Sneed, 104 N. C. 118, 10 S. E. 152.

Pennsylvania.—Meehan *v.* Williams, 48 Pa. St. 238.

Texas.— Smith *v.* Gulf, etc., R. Co., (Civ. App. 1901) 64 S. W. 943.

West Virginia.— Hoge *v.* Ohio River R. Co., 35 W. Va. 562, 14 S. E. 152.

United States.—Johnston *v.* Jones, 1 Black 209, 17 L. ed. 117.

See 20 Cent. Dig. tit. "Evidence," §§ 1500 *et seq.*, 1656.

Illustrations.— The field-notes of a survey are not admissible in evidence where there is no competent evidence of their correctness, and the surveyor who made them is not present to testify to such fact. Scanlan *v.* San Francisco, etc., R. Co., 128 Cal. 586, 61 Pac. 271. So where a witness testified that he made a map of the premises in question from his brother's notes, but there was no evidence of the correctness of the notes, the map was held inadmissible. Hays *v.* Ison, 72 S. W. 733, 24 Ky. L. Rep. 1947.

96. *California.*— Caldwell *v.* Center, 30 Cal. 539, 89 Am. Dec. 131; Vance *v.* Fore, 24 Cal. 435.

Illinois.— See Prouty *v.* Tilden, 164 Ill. 163, 45 N. E. 445.

Louisiana.— Milligan *v.* Hargrove, 6 Mart. N. S. 337.

Massachusetts.—Weld *v.* Brooks, 152 Mass. 297, 25 N. E. 719. See also Hazen *v.* Boston, etc., R. Co., 2 Gray 574.

Missouri.— Brewington *v.* Jenkins, 85 Mo. 57.

New York.— O'Donohue *v.* Cronin, 62 N. Y. App. Div. 379, 70 N. Y. Suppl. 737; Kingsland *v.* Chittenden, 6 Lans. 15 [*affirmed* in 61 N. Y. 618].

North Carolina.— Where no evidence is offered as to when a map found among the grantor's books was made, or that it was in existence and referred to by the parties at the execution of the deed, it is inadmissible to show the land included in the deed. Perkins *v.* Brinkley, 133 N. C. 348, 45 S. E. 652.

Pennsylvania.— See Transue *v.* Sell, 105 Pa. St. 604.

Tennessee.— Mayse *v.* Lafferty, 1 Head 60. See also Dunn *v.* Eaton, 92 Tenn. 743, 23 S. W. 163.

Texas.— Smith *v.* Navasota, 72 Tex. 422, 10 S. W. 414.

Compare Burnett *v.* Thompson, 35 N. C. 379.

See 20 Cent. Dig. tit. "Evidence," § 1507.

97. Milligan *v.* Hargrove, 6 Mart. N. S. (La.) 337; Stuart *v.* Binsse, 10 Bosw. (N. Y.) 436; Union Canal Co. *v.* Loyd, 4 Watts & S. (Pa.) 393. See also Comins *v.* Hetfield, 80 N. Y. 261.

98. Lake Erie, etc., R. Co. *v.* Wilson, 189 Ill. 89, 59 N. E. 573; State *v.* Hersom, 90 Me. 273, 38 Atl. 160; Dederichs *v.* Salt Lake City R. Co., 14 Utah 137, 46 Pac. 656, 35 L. R. A. 802.

A photograph rests to some extent upon the credit of witnesses, in the same way as a map, plat, or plan; but that fact furnishes no reason for excluding it as evidence. Lake Erie, etc., R. Co. *v.* Wilson, 189 Ill. 89, 59 N. E. 573.

99. *Alabama.*— Malachi *v.* State, 89 Ala. 134, 8 So. 104.

California.— People *v.* Durrant, 116 Cal. 179, 48 Pac. 75.

Colorado.— Mow *v.* People, 31 Colo. 351, 72 Pac. 1069.

Connecticut.— State *v.* Cook, 75 Conn. 267, 53 Atl. 589.

Florida.— Ortiz *v.* State, 30 Fla. 256, 11 So. 611.

Georgia.— Shaw *v.* State, 83 Ga. 92, 9 S. E. 768; Franklin *v.* State, 69 Ga. 36, 47 Am. Rep. 748.

Indiana.— Keyes *v.* State, 122 Ind. 527, 23 N. E. 1097.

Iowa.— State *v.* Windahl, 95 Iowa 470, 64 N. W. 420.

Maine.— State *v.* Hersom, 90 Me. 273, 38 Atl. 160.

Massachusetts.— Com. *v.* Best, 180 Mass. 492, 62 N. E. 748 (of bullets in a homicide case); Com. *v.* Robertson, 162 Mass. 90, 38 N. E. 25; Hollenbeck *v.* Rowley, 8 Allen 473; Marcy *v.* Barnes, 16 Gray 161, 77 Am. Dec. 405.

Minnesota.— Stewart *v.* St. Paul City R. Co., 78 Minn. 110, 80 N. W. 855; State *v.* Holden, 42 Minn. 350, 44 N. W. 123.

Missouri.— State *v.* O'Reilly, 126 Mo. 597, 29 S. W. 577.

been referred to as secondary evidence,[1] and sometimes as demonstrative evidence.[2] The photographs must be shown by extrinsic evidence to be true and faithful representations of the place or subject as it existed at the time involved in the controversy.[3] The photograph, however, need not be verified by the oath of the photographer taking it; the foundation for its introduction may be laid by any one who testifies to its correctness as a representation or likeness.[4] So it is essential that the photographs should be practically instructive as evidence,[5] and, it has been stated, substantially necessary.[6] Whether a photograph is sufficiently verified[7]

Nebraska.— Marion *v.* State, 20 Nebr. 233, 29 N. W. 911, 57 Am. Rep. 825.

New York.— People *v.* Pustolka, 149 N. Y. 570, 43 N. E. 548; People *v.* Fish, 125 N. Y. 136, 26 N. E. 319; People *v.* Smith, 121 N. Y. 578, 24 N. E. 852; Cowley *v.* People, 83 N. Y. 464, 38 Am. Rep. 464; Ruloff *v.* People, 45 N. Y. 213; Cozzens *v.* Higgins, 1 Abb. Dec. 451, 3 Keyes 206.

Oklahoma.— Smith *v.* Territory, 11 Okla. 669, 69 Pac. 805.

Pennsylvania.— Com. *v.* Connors, 156 Pa. St. 147, 27 Atl. 366; Udderzook *v.* Com., 76 Pa. St. 340.

Rhode Island.— State *v.* Elwood, 17 R. I. 763, 24 Atl. 782.

South Carolina.— State *v.* Kelley, 46 S. C. 55, 24 S. E. 60.

Utah.— State *v.* McCoy, 15 Utah 136, 49 Pac. 420; Dederichs *v.* Salt Lake City R. Co., 14 Utah 137, 46 Pac. 656, 35 L. R. A. 802.

Wisconsin.— Church *v.* Milwaukee, 31 Wis. 512.

United States.— Wilson *v.* U. S., 162 U. S. 613, 16 S. Ct. 895, 40 L. ed. 1090; Considine *v.* U. S., 112 Fed. 342, 50 C. C. A. 272.

See 14 Cent. Dig. tit. "Criminal Law," § 893; 20 Cent. Dig. tit. "Evidence," § 1509 *et seq.*

Photographs and pictures of a machine may be introduced to illustrate the statements of witnesses. Record *v.* Chickasaw Cooperage Co., 108 Tenn. 657, 69 S. W. 334.

A picture of an insect enlarged from a photograph and published in a bulletin of a government department has been held to be admissible where it is verified as a correct representation. Virginia-Carolina Chemical Co. *v.* Kirven, 57 S. C. 445, 35 S. E. 745.

1. Cunningham *v.* Fair Haven, etc., R. Co., 72 Conn. 244, 43 Atl. 1047; Baustian *v.* Young, 152 Mo. 317, 53 S. W. 921, 75 Am. St. Rep. 462; Goldsboro *v.* New Jersey Cent. R. Co., 60 N. J. L. 49, 37 Atl. 433.

2. Stewart *v.* St. Paul City R. Co., 78 Minn. 110, 80 N. W. 855.

3. *Connecticut.*— Cunningham *v.* Fair Haven, etc., R. Co., 72 Conn. 244, 43 Atl. 1047.

Florida.— Ortiz *v.* State, 30 Fla. 256, 11 So. 611.

Illinois.— Chicago *v.* Vesey, 105 Ill. App. 191.

Michigan.— Leidlein *v.* Meyer, 95 Mich. 586, 55 N. W. 367.

Minnesota.— Stewart *v.* St. Paul City R. Co., 78 Minn. 110, 80 N. W. 855.

Missouri.— Baustian *v.* Young, 152 Mo. 317, 53 S. W. 921, 75 Am. St. Rep. 462.

New Jersey.— Goldsboro *v.* New Jersey Cent. R. Co., 60 N. J. L. 49, 37 Atl. 433.

Oklahoma.— See Smith *v.* Territory, 11 Okla. 669, 69 Pac. 805.

Oregon.— State *v.* Miller, 43 Oreg. 325, 74 Pac. 658.

Pennsylvania.— Beardslee *v.* Columbia Tp., 188 Pa. St. 496, 41 Atl. 617, 68 Am. St. Rep. 883.

Wisconsin.— Hupfer *v.* National Distilling Co., 114 Wis. 279, 90 N. W. 191.

See 14 Cent. Dig. tit. "Criminal Law," § 893; 20 Cent. Dig. tit. "Evidence," § 1509 *et seq.*

4. Mow *v.* People, 31 Colo. 351, 72 Pac. 1069; Hall *v.* Connecticut Mut. L. Ins. Co., 76 Minn. 401, 79 N. W. 497; Stiasny *v.* Metropolitan St. R. Co., 172 N. Y. 656, 65 N. E. 1122 [*affirming* 58 N. Y. App. Div. 172, 68 N. Y. Suppl. 694]; Nies *v.* Broadhead, 75 Hun (N. Y.) 255, 27 N. Y. Suppl. 52; Roosevelt Hospital *v.* New York El. R. Co., 21 N. Y. Suppl. 205, 206; New York, etc., R. Co. *v.* Moore, 105 Fed. 725, 45 C. C. A. 21. *Compare* Hollenbeck *v.* Rowley, 8 Allen (Mass.) 473.

Thus a verification by the owner of the property photographed has been held sufficient. McGar *v.* Bristol, 71 Conn. 652, 42 Atl. 1000.

5. Lake Erie, etc., R. Co. *v.* Wilson, 87 Ill. App. 360; Harris *v.* Quincy, 171 Mass. 472, 50 N. E. 1042; Gilbert *v.* West End St. R. Co., 160 Mass. 403, 36 N. E. 60; Fore *v.* State, 75 Miss. 727, 23 So. 710; State *v.* Miller, 43 Oreg. 325, 74 Pac. 658.

6. Baxter *v.* Chicago, etc., R. Co., 104 Wis. 307, 80 N. W. 644, where it was intimated that a photograph of plaintiff's injured leg should be excluded where plaintiff was in court and his leg might have been exhibited to the jury. To the same effect see Omaha Southern R. Co. *v.* Beeson, 36 Nebr. 361, 54 N. W. 557; Mauch *v.* Hartford, 112 Wis. 40, 87 N. W. 816; Selleck *v.* Janesville, 104 Wis. 570, 80 N. W. 944, 76 Am. St. Rep. 892, 47 L. R. A. 691. *Compare* Alberti *v.* New York, etc., R. Co., 118 N. Y. 77, 23 N. E. 35, 6 L. R. A. 765.

Photograph of premises viewed by jury excluded.— In a land-damage case, where the jury has viewed the premises, it is proper to exclude photographs of parts of the street which was opened; the photographs at best being secondary evidence. Dobson *v.* Philadelphia, 7 Pa. Dist. 321.

7. State *v.* Cook, 75 Conn. 267, 53 Atl. 589; Chicago *v.* Vesey, 105 Ill. App. 191; Lake Erie, etc., R. Co. *v.* Wilson, 87 Ill. App.

or is practically instructive[8] is a preliminary question to be determined by the judge presiding at the trial. The discretion of the court in respect to the question of verification of the photograph as a representation[9] and in other respects[10] has been held not to be open to exception or review by the appellate courts. In other jurisdictions it is held that the court's discretion is not unlimited even in respect to the question of the verification of the photograph but in clear cases is open to exception.[11]

b. Physical Appearance or Condition. Under this rule photographs have been admitted on the question of personal identity or appearance,[12] as of the

360; Jameson *v.* Weld, 93 Me. 345, 45 Atl. 299; Carey *v.* Hubbardston, 172 Mass. 106, 51 N. E. 521.

8. McGar *v.* Bristol, 71 Conn. 652, 42 Atl. 1000; Jameson *v.* Weld, 93 Me. 345, 45 Atl. 299; Dolan *v.* Mutual Reserve Fund L. Assoc., 173 Mass. 197, 53 N. E. 398; Carey *v.* Hubbardston, 172 Mass. 106, 51 N. E. 521; Walker *v.* Curtis, 116 Mass. 98; Com. *v.* Coe, 115 Mass. 481; Pritchard *v.* Austin, 69 N. H. 367, 46 Atl. 188.

Question of accuracy may be considered by jury.— Marcy *v.* Barnes, 16 Gray (Mass.) 161, 77 Am. Dec. 405. See also Cunningham *v.* Fair Haven, etc., R. Co., 72 Conn. 244, 43 Atl. 1047.

9. Jameson *v.* Weld, 93 Me. 345, 45 Atl. 299; Pritchard *v.* Austin, 69 N. H. 367, 46 Atl. 188. See also Goldsboro *v.* New Jersey Cent. R. Co., 60 N. J. L. 49, 37 Atl. 433.

10. Jameson *v.* Weld, 93 Me. 345, 45 Atl. 299.

In Massachusetts the rule has been laid down that whether a photograph is sufficiently verified is a preliminary question of fact to be decided by the judge presiding at the trial and is not open to exception. Van Houten *v.* Moss, 162 Mass. 414, 38 N. E. 705, 44 Am. St. Rep. 373, 26 L. R. A. 430; Com. *v.* Morgan, 159 Mass. 375, 34 N. E. 458; Blair *v.* Pelham, 118 Mass. 420. In other cases a somewhat broader rule is laid down (Carey *v.* Hubbardston, 172 Mass. 106, 51 N. E. 521; Harris *v.* Quincy, 171 Mass. 472, 50 N. E. 1042; Gilbert *v.* West End St. R. Co., 160 Mass. 403, 36 N. E. 60; Verran *v.* Baird, 150 Mass. 441, 22 N. E. 630), the principle being extended to the question whether the photograph was practically instructive to the jury (Harris *v.* Quincy, 171 Mass. 472, 50 N. E. 1042). But in Reimer *v.* New York, etc., R. Co., 178 Mass. 54, 59 N. E. 671, the court, after reviewing the prior decisions on this question, held that except on the matter of verification of the photograph the discretion of the trial court was not unlimited and could not be exercised arbitrarily.

11. Harris *v.* Ansonia, 73 Conn. 359, 47 Atl. 672; Cunningham *v.* Fair Haven, etc., R. Co., 72 Conn. 244, 43 Atl. 1047; McGar *v.* Bristol, 71 Conn. 652, 42 Atl. 1000; Carlson *v.* Benton, 66 Nebr. 486, 92 N. W. 600, where it was held that the discretion of the trial court in admitting or excluding X-ray photographs is not to be exercised arbitrarily.

12. *Alabama.*— Malachi *v.* State, 89 Ala. 134, 8 So. 104 (of deceased on a trial for homicide); Luke *v.* Calhoun County, 52 Ala. 115.

California.— People *v.* Durrant, 116 Cal. 179, 48 Pac. 75, of deceased.

Iowa.— State *v.* Hasty, 121 Iowa 507, 96 N. W. 1115 (photograph of defendant's paramour in prosecution for adultery); State *v.* Windahl, 95 Iowa 470, 64 N. W. 420 (of deceased).

Massachusetts.—Com. *v.* Morgan, 159 Mass. 375, 34 N. E. 458, where a photograph of defendant was admitted for the purpose of showing that when it was taken he wore side-whiskers.

Minnesota.— State *v.* Holden, 42 Minn. 350, 44 N. W. 123, of deceased.

Missouri.— State *v.* Fulkerson, 97 Mo. App. 599, 71 S. W. 704, of defendant.

Nebraska.— Marion *v.* State, 20 Nebr. 233, 29 N. W. 911, 57 Am. Rep. 825, of deceased.

New York.— People *v.* Smith, 121 N. Y. 578, 24 N. E. 852 (of defendant); Ruloff *v.* People, 45 N. Y. 213 (of deceased). See also Pessolano *v.* Pessolano, 34 Misc. 16, 69 N. Y. Suppl. 449. *Compare* Cary-Squire *v.* Press Pub. Co., 58 N. Y. App. Div. 362, 68 N. Y. Suppl. 1028.

Pennsylvania.— Com. *v.* Connors, 156 Pa. St. 147, 27 Atl. 366 (of defendant); Udderzook *v.* Com., 76 Pa. St. 340.

Rhode Island.— State *v.* Elwood, 17 R. I. 763, 24 Atl. 782, of defendant.

Utah.— State *v.* McCoy, 15 Utah 136, 49 Pac. 420, of deceased.

United States.— Wilson *v.* U. S., 162 U. S. 613, 16 S. Ct. 895, 40 L. ed. 1090 (of deceased on a trial for homicide); Considine *v.* U. S., 112 Fed. 342, 50 C. C. A. 272 (of defendant); U. S. *v.* A Lot of Jewelry, etc., 59 Fed. 684.

England.— See Frith *v.* Frith, [1896] P. 74, 65 L. J. P. & Adm. 53.

Compare Townsend's Succession, 40 La. Ann. 66, 3 So. 488.

See 14 Cent. Dig. tit. "Criminal Law," § 893; 20 Cent. Dig. tit. "Evidence," §§ 1509 *et seq.*, 1657.

On an issue of paternity, a photograph of the deceased putative father, proven to be a good likeness of him, was held admissible for the purpose of comparison with the child in court. Shorten *v.* Judd, 56 Kan. 43, 42 Pac. 337, 54 Am. St. Rep. 587.

Proof of time of taking photograph held not essential.— In Pritchard *v.* Austin, 69 N. H. 367, 46 Atl. 188, it was held not to be error, in an action to set aside a will for undue influence, to admit photographs of the

deceased on a trial for murder or of the defendant in a criminal prosecution, and of physical condition of persons or animals.[13]

c. Location, Surroundings, and Condition of Premises. So also, when in an action for personal injuries or other action of tort,[14] or in criminal prosecu-

testator and his wife, as tending to show "the character, vigor, temperament, and disposition" of the subjects, without showing when they were taken, where there was evidence that the photographs correctly represented the subjects at the time of the alleged influence.

Photographs excluded as being indecent.— The introduction of photographs showing rear views of the person of a twenty-year-old girl, nude from below the shoulders to mid-thigh, is improper and indecent; the proper method being to obtain the evidence by a private examination by experts out of court, and expert testimony by them. Guhl *v.* Whitcomb, 109 Wis. 69, 85 N. W. 142, 83 Am. St. Rep. 889.

13. *Connecticut.*— State *v.* Cook, 75 Conn. 267, 53 Atl. 589, photographs of horses in a prosecution for cruelty in depriving them of necessary sustenance.

Georgia.— Franklin *v.* State, 69 Ga. 36, 47 Am. Rep. 748, photograph of wound in a homicide case.

Illinois.— People's Gas Light, etc., Co. *v.* Amphlett, 93 Ill. App. 194.

Minnesota.— Cooper *v.* St. Paul City R. Co., 54 Minn. 379, 56 N. W. 42.

New York.— People *v.* Webster, 139 N. Y. 73, 34 N. E. 730 (photograph of deceased in a homicide case to rebut defendant's plea of fear of bodily harm); People *v.* Fish, 125 N. Y. 136, 26 N. E. 319 (of wound); Cowley *v.* People, 83 N. Y. 464, 38 Am. Rep. 464 [*affirming* 21 Hun 415, 8 Abb. N. Cas. 1] (of child).

Oklahoma.— Smith *v.* Territory, 11 Okla. 669, 69 Pac. 805, of wounds.

Pennsylvania.— Com. *v.* Keller, 191 Pa. St. 122, 43 Atl. 198 (photograph of deceased standing beside a witness, to show his size); Washington L. Ins. Co. *v.* Schaible, 1 Wkly. Notes Cas. 369; Schaible *v.* Washington L. Ins. Co., 9 Phila. 136.

Texas.— Monson *v.* State, (Cr. App. 1901) 63 S. W. 647, photograph showing condition of the brain of deceased.

But see State *v.* Miller, 43 Oreg. 325, 74 Pac. 658, photograph of wounds. And *compare* Gilbert *v.* West End St. R. Co., 160 Mass. 403, 36 N. E. 60, where, without determining that a photograph can never be received as evidence of health and strength of a person, it was ruled that it was in the discretion of the court to reject it.

See 14 Cent. Dig. tit. "Criminal Law," § 893; 20 Cent. Dig. tit. "Evidence," §§ 1509 *et seq.*, 1657.

In an action for personal injuries, a photograph of plaintiff, showing the manner in which his limbs had been contracted, has been held to be admissible in evidence, after a physician has testified that it was taken in his presence, and correctly represented the condition of the limbs. Alberti *v.* New York, etc., R. Co., 118 N. Y. 77, 23 N. E. 35, 6 L. R. A. 765. *Compare* Baxter *v.* Chicago, etc., R. Co., 104 Wis. 307, 80 N. W. 644, where it was intimated that the fact that plaintiff was present in court and might have exhibited his injured leg to the jury was a ground for exclusion of the photograph.

Photograph taken several years before trial. — In an action for personal injuries the photograph of plaintiff taken nine years before the trial has been held to be inadmissible for the purpose of showing plaintiff's emaciated condition. Rock Island *v.* Drost, 71 Ill. App. 613.

14. *Alabama.*— Kansas City, etc., R. Co. *v.* Smith, 90 Ala. 25, 8 So. 43, 24 Am. St. Rep. 753.

Connecticut.— McGar *v.* Bristol, 71 Conn. 652, 42 Atl. 1000; Dyson *v.* New York, etc., R. Co., 57 Conn. 9, 17 Atl. 137, 14 Am. St. Rep. 82.

Illinois.— Lake Erie, etc., R. Co. *v.* Wilson, 189 Ill. 89, 59 N. E. 573 [*reversing* 87 Ill. App. 360]; Wabash R. Co. *v.* Prast, 101 Ill. App. 167; Williams *v.* Carterville, 97 Ill. App. 160; Chicago, etc., R. Co. *v.* Lawrence, 96 Ill. App. 635; Chicago, etc., R. Co. *v.* Myers, 86 Ill. App. 401; Wabash R. Co. *v.* Jenkins, 84 Ill. App. 511.

Iowa.— Bach *v.* Iowa Cent. R. Co., 112 Iowa 241, 83 N. W. 959; Barker *v.* Perry, 67 Iowa 146, 25 N. W. 100; Locke *v.* Sioux City, etc., R. Co., 46 Iowa 109.

Kentucky.— Vanarsdell *v.* Louisville, etc., R. Co., 65 S. W. 858, 23 Ky. L. Rep. 1666.

Maryland.— Dorsey *v.* Habersack, 84 Md. 117, 35 Atl. 96.

Massachusetts.— Turner *v.* Boston, etc., R. Co., 158 Mass. 261, 33 N. E. 520; Randall *v.* Chase, 133 Mass. 210; Blair *v.* Pelham, 118 Mass. 420.

Michigan.— Sterling *v.* Detroit, (1903) 95 N. W. 986.

Missouri.— Robinson *v.* St. Joseph, 97 Mo. App. 503, 71 S. W. 465.

Nebraska.—Omaha Southern R. Co. *v.* Beeson, 36 Nebr. 361, 54 N. W. 557.

New York.— Archer *v.* New York, etc., R. Co., 106 N. Y. 589, 13 N. E. 318; Cozzens *v.* Higgins, 1 Abb. Dec. 451, 3 Keyes 206, 33 How. Pr. 436; Leeds *v.* New York Telephone Co., 79 N. Y. App. Div. 121, 80 N. Y. Suppl. 114; Warner *v.* Randolph, 18 N. Y. App. Div. 458, 45 N. Y. Suppl. 1112; Glasier *v.* Hebron, 62 Hun 137, 16 N. Y. Suppl. 503; Galway *v.* Metropolitan El. R. Co., 13 N. Y. Suppl. 47.

Tennessee.— Livermore Foundry, etc., Co. *v.* Union Compress, etc., Co., 105 Tenn. 187, 58 S. W. 270.

Texas.— Missouri, etc., R. Co. *v.* Moore, (Civ. App. 1891) 15 S. W. 714. See also San Antonio *v.* Talerico, (Civ. App. 1903) 78 S. W. 28 [*modified* in (Sup. 1904) 81 S. W.

tions,[15] it becomes material to know the location, surroundings, and condition of the premises upon which the accident, injury, or crime in controversy occurred, photographs of the *locus in quo*, if verified by proof that they are true representations, are competent evidence. But the value and admissibility of the photograph, as in other cases, depends upon the fact that it is a correct repre-

518], holding that photographs of a defective sidewalk, taken two months after plaintiff was injured thereby, are admissible in evidence in connection with evidence that they represent the locality as it was when the accident occurred, and that they were taken before the place was repaired; and also that where the extent of a hole in a sidewalk in which plaintiff had been injured was in issue, photographs which showed a cement patch where the walk had been repaired were admissible in evidence.

Utah.—Dederichs *v.* Salt Lake City R. Co., 14 Utah 137, 46 Pac. 656, 35 L. R. A. 802.

Wisconsin.— Church *v.* Milwaukee, 31 Wis. 512.

United States.—Denver, etc., R. Co. *v.* Roller, 100 Fed. 738, 41 C. C. A. 22, 49 L. R. A. 77.

See 20 Cent. Dig. tit. "Evidence," §§ 1509 *et seq.*, 1657.

The difference between the images produced upon a photographic plate and upon the human eye does not render photographs of the place where an accident has been caused by an obstruction in a street inadmissible in evidence, but bears only upon the effect of such evidence. Scott *v.* New Orleans, 75 Fed. 373, 21 C. C. A. 402.

Sketch or drawing.— In Hartford County Com'rs *v.* Wise, 71 Md. 43, 18 Atl. 31, it was held that as under Md. Acts (1886), c. 415, it was competent for the jury to be taken to the spot where the damage was alleged to have occurred, to inspect the location of the bridge and the adjacent country, it was not error to admit in evidence a sketch or drawing of these objects, although the drawing was made by an artist who had never seen the bridge.

Admissibility of stereoscopic view.— Upon the trial of an action against a town to recover damages sustained from a defective highway, it was held that a stereoscopic view of the spot was properly submitted to the jury with the aid of a stereoscope. Rockford *v.* Russell, 9 Ill. App. 229. So in an action against a city to recover damages for the negligent location and construction of a sewer and certain streets, whereby during a flood plaintiff's property was injured, stereoscopic views of the premises taken the day after the flood may be admitted in evidence to show the condition of the property. German Theological School *v.* Dubuque, 64 Iowa 736, 17 N. W. 153.

Exhibition of entire premises unnecessary.— In an action by a turnpike company against a landowner for obstructing the drainage of the road by a bridge across the gutter at the side of the road, photographic views of the location are admissible, and the fact that they did not exhibit every part of the ground is not cause for their exclusion. Chestnut Hill, etc., Turnpike Co. *v.* Piper, 15 Wkly. Notes Cas. (Pa.) 55.

15. *Alabama.*— Burton *v.* State, 107 Ala. 108, 18 So. 284; Wilkinson *v.* State, 106 Ala. 23, 17 So. 458.

California.— People *v.* Crandall, 125 Cal. 129, 57 Pac. 785.

Colorado.— Mow *v.* People, 31 Colo. 351, 72 Pac. 1069.

Florida.— Adams *v.* State, 28 Fla. 511, 10 So. 106.

Georgia.— Shaw *v.* State, 83 Ga. 92, 9 S. E. 768; Moon *v.* State, 68 Ga. 687.

Indiana.— Keyes *v.* State, 122 Ind. 527, 23 N. E. 1097.

Maine.— State *v.* Hersom, 90 Me. 273, 38 Atl. 160.

Massachusetts.— Com. *v.* Fielding, 184 Mass. 484, 69 N. E. 216 (in a prosecution for burning a building to defraud insurer); Com. *v.* Chance, 174 Mass. 245, 54 N. E. 551, 75 Am. St. Rep. 306; Com. *v.* Robertson, 162 Mass. 90, 38 N. E. 25.

Minnesota.— State *v.* Lawlor, 28 Minn. 216, 9 N. W. 698.

Missouri.— State *v.* O'Reilly, 126 Mo. 597, 29 S. W. 577.

New York.— People *v.* Pustolka, 149 N. Y. 570, 43 N. E. 548; People *v.* Fish, 125 N. Y. 136, 26 N. E. 319; People *v.* Jackson, 111 N. Y. 362, 19 N. E. 54, 6 N. Y. Cr. 393; People *v.* Buddensieck, 103 N. Y. 487, 9 N. E. 44, 5 N. Y. Cr. 69, 25 N. Y. Wkly. Dig. 125, 57 Am. Rep. 766 [*affirming* 4 N. Y. Cr. 230, 24 N. Y. Wkly. Dig. 82].

North Carolina.— State *v.* Whiteacre, 98 N. C. 753, 3 S. E. 488.

South Carolina.— State *v.* Kelley, 46 S. C. 55, 24 S. E. 69.

Texas.— Smith *v.* State, 21 Tex. App. 277, 17 S. W. 471.

Wisconsin.— Paulson *v.* State, 118 Wis. 89, 94 N. W. 771.

But see Fore *v.* State, 75 Miss. 727, 23 So. 710, holding that the introduction in evidence in a prosecution for murder of photographic representations of *tableaux vivants*, carefully arranged by the chief witness for the state, and intended to exhibit the situations of the parties and the scene of the tragedy according to this witness' account, was error.

See 20 Cent. Dig. tit. "Evidence," § 893.

Sketch showing locality of bloodstains.— Where an artist swore, from his own personal knowledge and observation, to the accuracy of his sketches, which showed the locality of bloodstains in the building in which the murder was committed, the accuracy of the sketches was satisfactorily shown, and they were admissible to explain locali-

sentation of the place in question, and that the condition existing when it was taken was an exactly accurate reproduction of the condition existing when the accident, injury, or crime occurred.[16] Hence if the photographs are taken so long after the occurrence that the surroundings or conditions have changed,[17] or, whenever taken, if they do not for any reason appear to represent the subject or the conditions existing at the time of the occurrence in controversy in such a way as to be instructive they will be rejected.[18] Moreover, where the photograph

ties. People *v.* Johnson, 140 N. Y. 350, 35 N. E. 604.

Plan of house verified by occupant.— In a prosecution for rape, a plan of the interior of the house where the crime was said to have been committed, made without any personal examination or survey by the draftsman, but sworn to be correct by one of the occupants of the premises, was introduced by the state in explanation of their oral testimony, but it did not go to the jury in the jury-room. It was held that there was nothing objectionable in this use of the plan. State *v.* Jerome, 33 Conn. 265.

16. *Colorado.*— Mow *v.* People, (Sup. 1903) 72 Pac. 1069.

Florida.— Ortiz *v.* State, 30 Fla. 256, 11 So. 611.

Illinois.— Iroquois Furnace Co. *v.* McCrea, 91 Ill. App. 337; Wabash R. Co. *v.* Farrell, 79 Ill. App. 508.

Minnesota.— Stewart *v.* St. Paul City R. Co., 78 Minn. 110, 80 N. W. 855.

Missouri.— Smart *v.* Kansas City, 91 Mo. App. 586.

Pennsylvania.— Beardslee *v.* Columbia Tp., 188 Pa. St. 496, 41 Atl. 617, 68 Am. St. Rep. 883.

17. Chicago, etc., R. Co. *v.* Corson, 198 Ill. 98, 64 N. E. 739 [*affirming* 101 Ill. App. 115]; Iroquois Furnace Co. *v.* McCrea, 191 Ill. 340, 61 N. E. 79 [*affirming* 91 Ill. App. 337]; Leidlein *v.* Meyer, 95 Mich. 586, 55 N. W. 367; Stewart *v.* St. Paul City R. Co., 78 Minn. 85, 80 N. W. 854; Hampton *v.* Norfolk, etc., R. Co., 120 N. C. 534, 27 S. E. 96, 35 L. R. A. 808.

Photograph by amateur two months after accident excluded.— In Cleveland, etc., R. Co. *v.* Monaghan, 140 Ill. 474, 30 N. E. 869 [*affirming* 41 Ill. App. 498], photographs taken by an inexperienced operator two months after an accident, when the situation had been changed, were excluded. But see San Antonio *v.* Talirico, (Tex. Civ. App. 1903) 78 S. W. 28 [*modified* in (Tex. Sup. 1904) 81 S. W. 518, and *cited supra*, note 14].

Photograph three months after accident admitted.— A photograph of a jetty causing injury to a tug, taken three months after the accident, has been held to be competent to show its condition, where there was no evidence of a change of condition. Tracy *v.* Baltimore, etc., R. Co., 98 Fed. 633.

Changes not destroying substantial identity of locality.— In Beardslee *v.* Columbia Tp., 188 Pa. St. 496, 41 Atl. 617, 68 Am. St. Rep. 883, it was held that since photographs of the scene of an accident taken at or near the time are not always obtainable, photographs taken after changes in the surroundings have taken place may be admissible where it appears that the changes are not such as to destroy the substantial identity of the locality, and the changes, whatever they are, are brought to the attention of the jury. Accordingly in the above case photographs were admitted, although subsequently to the injury, and prior to the taking of the photograph changes had been made in the road or the place of accident. So it has been held that a change in the appearance of the locality made by the falling of the leaves from the trees is open to explanation. Dyson *v.* New York, etc., R. Co., 57 Conn. 9, 17 Atl. 137, 14 Am. St. Rep. 82; Dedericks *v.* Salt Lake City R. Co., 14 Utah 137, 46 Pac. 656, 35 L. R. A. 802. So the fact that snow was on the ground at the time the photographs were taken has been held not to be ground for their exclusion. Fitzgerald *v.* Hedstrom, 98 Ill. App. 109.

18. In an action for injuries caused by slipping on ice on a public highway at night, photographs of the sidewalk taken the following morning may be excluded, if they do not represent the condition of the walk, with reference to the roughness, slipperiness, or quantity of the ice, in such a way as to be instructive. Harris *v.* Quincy, 171 Mass. 472, 50 N. E. 1042. In an action for damages to plaintiff's property from the breaking of defendant's dam, about three miles above, the exclusion of a photograph of a gorge about halfway between, offered to show the force and effect of the water escaping from the dam, is within the discretion of the trial court, where there is no evidence as to the condition of the gorge before the breaking of the dam, or of other facts rendering the condition of the gorge instructive. Verran *v.* Baird, 150 Mass. 141, 22 N. E. 630. In a suit to recover for injuries sustained upon defendants' car, plaintiff offered in evidence a photograph of another car, which he proposed to show was precisely similar to the car in question. It was held that the evidenc was inadmissible. People's Pass. R. Co. *v.* Green, 56 Md. 84. In an action for death caused by the bursting of a distillery slop vat, plaintiff produced purported photographs of the vat hoops taken five days after the accident. Defendant's secretary testified that the photographs correctly represented the location of the tank, office building, roadway, and plant. The photographer testified that he took the photographs in defendant's back yard. Defendant's engineer testified that the burst vat hoops were thrown in this yard about three days after the accident, but that there were other hoops there, and he did not know whether the photographs represented

is not offered as a mere general representation of the *locus in quo*, but to show distances, relative sizes, or locations of objects, it may be very deceptive and misleading,[19] and it seems that much more convincing proof of its accuracy is required than in ordinary cases.[20]

d. X-Ray Photographs. While a picture produced by an X-ray cannot be verified as a true representation of the subject in the same way that a picture made by a camera can be, the rule in regard to the use of ordinary photographs on the trial of a cause applies to photographs of the internal structure and conditions of the human body taken by the aid of X-rays when verified by proof that they are a true representation.[21] It has been held that, to constitute a foundation for the introduction of an X-ray photograph in evidence, it is not essential that it appear that it was taken by a competent person, nor that the condition of the apparatus with which it was taken and the circumstances under which it was taken were such as to insure an accurate picture; but where it has been shown by the evidence of competent witnesses that it truly represents the object it is claimed to represent, there is sufficient foundation for its admission.[22]

e. Photographic Copies of Documents.[23] A photographic copy of a document is held to be admissible where the original cannot be produced[24] or has become illegible[25] on proof that it is an exact copy of the original. But photographic copies of instruments can be used only as secondary evidence.[26] Thus a photograph of a document will be rejected where the document itself is in court.[27] However photographs of instruments already in evidence which are so enlarged as to make the proportions plainer and to illustrate the testimony of witnesses may go to the jury in the same way as would a magnifying glass or microscope.[28]

the hoops in question; that he did not point them out to the photographer; that he showed plaintiff's attorney where the hoops were; that he did show someone, but only one person, the vat hoops a few days after the accident; but that he showed them to no one with a camera. It was held that the photographs were not sufficiently identified as being of the hoops from the burst vat to be admissible. Hupfer *v.* National Distilling Co., 114 Wis. 279, 90 N. W. 191.

19. Harris *v.* Ansonia, 73 Conn. 359, 47 Atl. 672; Cunningham *v.* Fair Haven, etc., R. Co., 72 Conn. 244, 43 Atl. 1047; Stewart *v.* St. Paul City R. Co., 78 Minn. 85, 80 N. W. 855.

20. Cunningham *v.* Fair Haven, etc., R. Co., 72 Conn. 244, 43 Atl. 1047.

21. *Maine.*— Jameson *v.* Weld, 93 Me. 345, 45 Atl. 299.

Massachusetts.— De Forge *v.* New York, etc., R. Co., 178 Mass. 59, 59 N. E. 669, 86 Am. St. Rep. 464.

Nebraska.— Geneva *v.* Burnett, 65 Nebr. 464, 91 N. W. 275, 101 Am. St. Rep. 628, 58 L. R. A. 287.

Ohio.— Tish *v.* Welker, 5 Ohio S. & C. Pl. Dec. 725, 7 Ohio N. P. 472.

Tennessee.— Bruce *v.* Beall, 99 Tenn. 303, 41 S. W. 445.

Washington.— Miller *v.* Dumon, 24 Wash. 648, 64 Pac. 804.

Wisconsin.— Mauch *v.* Hartford, 112 Wis. 40, 87 N. W. 816.

22. Carlson *v.* Benton, 66 Nebr. 486, 92 N. W. 600. *Compare* Bruce *v.* Beall, 99 Tenn. 303, 41 S. W. 445.

23. Photographs for comparison of handwritings see *supra*, XI, C, 9, b, (III), (D).

24. *California.*—People *v.* Mooney, 132 Cal. 13, 63 Pac. 1070.

Massachusetts.— Marcy *v.* Barnes, 16 Gray 161, 77 Am. Dec. 405.

Texas.— Ayers *v.* Harris, 77 Tex. 108, 13 S. W. 768; Grooms *v.* State, 40 Tex. Cr. 319, 50 S. W. 370, of forged deed.

Wisconsin.— See Baxter *v.* Chicago, etc., R. Co., 104 Wis. 307, 80 N. W. 644.

United States.— Leathers *v.* Salver Wrecking, etc., Co., 15 Fed. Cas. No. 8,164, 2 Woods 680. See also Luco *v.* U. S., 23 How. 515, 16 L. ed. 545.

England.— *Re* Stephens, L. R. 9 C. P. 187, 22 Wkly. Rep. 615.

Compare Tome *v.* Parkersburg Branch R. Co., 39 Md. 36, 93, 17 Am. Rep. 540; Geer *v.* Missouri Lumber, etc., Co., 134 Mo. 85, 34 S. W. 1099, 56 Am. St. Rep. 489; Hynes *v.* McDermott, 82 N. Y. 41, 37 Am. Rep. 538; Taylor Will Case, 10 Abb. Pr. N. S. (N. Y.) 300.

25. Duffin *v.* People, 107 Ill. 113, 47 Am. Rep. 431, where the copy was offered in evidence simply to prove the words of the original, and not the peculiarity of the handwriting.

26. MacLean *v.* Scripps, 52 Mich. 214, 17 N. W. 815, 18 N. W. 209; Eborn *v.* Zimpelman, 47 Tex. 503, 26 Am. Rep. 315.

27. *In re* Foster, 34 Mich. 21; Crane *v.* Dexter, 5 Wash. 479, 32 Pac. 223. See also Howard *v.* Illinois Trust, etc., Bank, 189 Ill. 568, 59 N. E. 1106.

28. Howard *v.* Illinois Trust, etc., Bank, 189 Ill. 568, 59 N. E. 1106; Marcy *v.* Barnes, 16 Gray (Mass.) 161, 77 Am. Dec. 405. *Compare* Taylor Will Case, 10 Abb. Pr. N. S. (N. Y.) 300.

12. Books and Other Printed Publications — a. In General. It may be stated as a general rule that a book or other publication printed by a private person and not shown to be approved by any public authority is not competent evidence of the facts therein stated,[29] at least if it does not appear to be in general use among the class of persons interested in the matters of which it treats, and if on account of the recent occurrence of the facts or for other reasons they may be proved by living witnesses or other better evidence.[30]

b. Books of Science and Learning[31] — (I) *In General.* Medical and other works of science or learning, at least books of inductive as distinguished from exact science are, although accepted as standard authorities, inadmissible as independent evidence of the theories and opinions therein expressed,[32] or as evidence for any purpose except to some extent in connection with the examination of an expert,[33] unless they are made competent evidence by statute.[34]

Enlarged photographic copies of an alleged forged signature and a signature offered as a standard of comparison are admissible in evidence on proof by the photographer of the accuracy of the method pursued and the results obtained by him in making the copies. Paducah First Nat. Bank *v.* Wisdom, 111 Ky. 135, 63 S. W. 461, 23 Ky. L. Rep. 530; U. S. *v.* Ortiz, 176 U. S. 422, 20 S. Ct. 466, 44 L. ed. 529. See *supra*, XI, C, 9, b, (III), (D).

29. Whiton *v.* Albany City Ins. Co., 109 Mass. 24.

A catalogue of the students of an academy is not evidence, unless assented to by the party against whom it is offered. State *v.* Daniels, 44 N. H. 383.

A city directory has been held inadmissible as proof of a party's place of business or residence, unless the statement therein is verified by oral evidence showing its reliability. Langley *v.* Smith, 3 N. Y. St. 276. See also Tichenor *v.* Newman, 186 Ill. 264, 57 N. E. 826.

30. Whiton *v.* Albany City Ins. Co., 109 Mass. 24; Spalding *v.* Hedges, 2 Pa. St. 240.

31. **Reference to authorities on examination of expert** see *supra*, XI, J, 4.

32. *Georgia.*— Cook *v.* Coffey, 103 Ga. 684, 30 S. E. 27; Johnston *v.* Richmond, etc., R. Co., 95 Ga. 685, 22 S. E. 694.

Illinois.— North Chicago Rolling Mill Co. *v.* Monka, 107 Ill. 340; Gale *v.* Rector, 5 Ill. App. 481; Chicago City R. Co. *v.* Douglas, 104 Ill. App. 41.

Massachusetts.— Ashworth *v.* Kittridge, 12 Cush. 193, 59 Am. Dec. 178.

Michigan.— Fox *v.* Peninsular White Lead, etc., Works, 84 Mich. 676, 48 N. W. 203.

Mississippi.— Tucker *v.* Donald, 60 Miss. 460, 45 Am. Rep. 416.

New Jersey.— New Jersey Zinc, etc., Co. *v.* Lehigh Zinc, etc., Co., 59 N. J. L. 189, 35 Atl. 915.

New York.— McEvoy *v.* Lommel, 78 N. Y. App. Div. 324, 80 N. Y. Suppl. 71; Foggett *v.* Fischer, 23 N. Y. App. Div. 207, 48 N. Y. Suppl. 741; Harris *v.* Panama R. Co., 3 Bosw. 7. *Compare* Green *v.* Cornwell, 1 City Hall Rec. 11.

North Carolina.— Melvin *v.* Easley, 46 N. C. 386, 62 Am. Dec. 171. See also Huffman *v.* Click, 77 N. C. 55.

South Dakota.— Brady *v.* Shirley, 14 S. D. 447, 85 N. W. 1002.

Texas.— Fowler *v.* Lewis, 25 Tex. Suppl. 380; Boehringer *v.* A. B. Richards Medicine Co., 9 Tex. Civ. App. 284, 29 S. W. 508.

Wisconsin.— Boyle *v.* State, 57 Wis. 472, 15 N. W. 827, 46 Am. Rep. 41; Stilling *v.* Thorp, 54 Wis. 528, 11 N. W. 906, 41 Am. Rep. 60. *Compare* Luning *v.* State, 2 Pinn. 284, 1 Chandl. 264.

United States.— Union Pac. R. Co. *v.* Yates 79 Fed. 584, 25 C. C. A. 103, 40 L. R. A. 553.

Compare Stoudenmeier *v.* Williamson, 29 Ala. 558.

See 20 Cent. Dig. tit. "Evidence," § 1516 *et seq.*

Application of rule in criminal cases see the following cases:

Delaware.— State *v.* West, 1 Houst. Cr. Cas. 371.

Indiana.— Plake *v.* State, 121 Ind. 433, 23 N. E. 273, 16 Am. St. Rep. 408; Carter *v.* State, 2 Ind. 617.

Kansas.— State *v.* Baldwin, 36 Kan. 1, 12 Pac. 318.

Maryland.— Davis *v.* State, 38 Md. 15.

Michigan.— People *v.* Hall, 48 Mich. 482, 12 N. W. 665, 42 Am. Rep. 477.

Rhode Island.— State *v.* O'Brien, 7 R. I. 336. *Compare* Bales *v.* State, 63 Ala. 30; Merkle *v.* State, 37 Ala. 139; State *v.* Hoyt, 46 Conn. 330.

See 14 Cent. Dig. tit. "Criminal Law," § 1025.

Book of topography excluded.— Spalding *v.* Hedges, 2 Pa. St. 240.

Extracts from parliamentary authors are inadmissible to show that certain proceedings of a convention were regular and according to parliamentary usage. Cranfill *v.* Hayden, 22 Tex. Civ. App. 656, 55 S. W. 805.

33. Bloomington *v.* Shrock, 110 Ill. 219, 51 Am. Rep. 678; Union Stock-Yards Co. *v.* Goodwin, 57 Nebr. 139, 77 N. W. 357. See also Bixby *v.* Omaha, etc., R. Bridge Co., 105 Iowa 293, 75 N. W. 182, 67 Am. St. Rep. 299, 43 L. R. A. 533. See *supra*, XI, J, 4.

34. **By statute** in some jurisdictions it is provided that historical works, books of science or art, etc., when made by persons indifferent between the parties, are presumptive evidence of facts of general notoriety or interest. Burg *v.* Chicago, etc.,

(II) *Mathematical Calculations, Exact Sciences, Etc.* The reasons for the rejection of medical treatises and other works of the inductive class are held not to apply to works of recognized authority containing mathematical calculations or dealing with what are known as the exact sciences.[35] Under this distinction, almanacs[36] and millwrights' tables[37] have been admitted.

(III) *Mortality and Annuity Tables.* On this principle also mortality and annuity tables which are standards on the subject of which they treat are admissible as evidence to show the expectancy of human life.[38] They may be received without any proof of their authenticity and correctness,[39] the courts taking, it is

R. Co., 90 Iowa 106, 57 N. W. 680, 48 Am. St. Rep. 419; Sioux City, etc., R. Co. *v.* Finlayson, 16 Nebr. 578, 20 N. W. 860, 49 Am. St. Rep. 724, where the book entitled "A Catechism of a Locomotive," by Forney, which was shown by expert witnesses to be a standard work upon its subject, was held admissible in an action in which the safety, state of repair, etc., of a locomotive was involved. These statutes have, however, been held not to authorize the admission of medical treatises. Gallagher *v.* Market St. R. Co., 67 Cal. 13, 6 Pac. 869, 51 Am. Rep. 680 note; Stewart *v.* Equitable Mut. L. Assoc., 110 Iowa 528, 81 N. W. 782; Bixby *v.* Omaha, etc., R. Co., 105 Iowa 293, 75 N. W. 182, 67 Am. St. Rep. 299, 43 L. R. A. 533 [*distinguishing* Quackenenbush *v.* Chicago, etc., R. Co., 73 Iowa 458, 35 N. W. 523; Brodhead *v.* Wiltse, 35 Iowa 429; Bowman *v.* Woods, 1 Greene (Iowa) 441]; Van Skike *v.* Potter, 53 Nebr. 28, 73 N. W. 295; Union Pac. R. Co. *v.* Yates, 79 Fed. 584, 25 C. C. A. 103, 40 L. R. A. 553, decided under Iowa statute.

35. Huffman *v.* Click, 77 N. C. 55. See also Gallagher *v.* Market St. R. Co., 67 Cal. 13, 6 Pac. 869, 51 Am. Rep. 680 note; Foggett *v.* Fischer, 23 N. Y. App. Div. 207, 48 N. Y. Suppl. 741; Western Assur. Co. *v.* J. H. Mohlman Co., 83 Fed. 811, 28 C. C. A. 157, 40 L. R. A. 561. *Compare* North Chicago Rolling Mill Co. *v.* Monka, 107 Ill. 340; Payson *v.* Everett, 12 Minn. 216.

36. Mobile, etc., R. Co. *v.* Ladd, 92 Ala. 287, 9 So. 169; State *v.* Morris, 47 Conn. 179; Munshower *v.* State, 55 Md. 11, 39 Am. Rep. 414.

37. Garwood *v.* New York Cent., etc., R. Co., 45 Hun (N. Y.) 128.

38. *Colorado.*— Denver, etc., R. Co. *v.* Woodward, 4 Colo. 1; Kansas Pac. R. Co. *v.* Lundin, 3 Colo. 94.

Georgia.— Atlanta R., etc., Co. *v.* Monk, 118 Ga. 449, 45 S. E. 494.

Illinois.— Henderson *v.* Harness, 184 Ill. 520, 56 N. E. 786.

Indiana.— Indianapolis *v.* Marold, 25 Ind. App. 428, 58 N. E. 512; Huntington *v.* Burke, 21 Ind. App. 655, 52 N. E. 415; Smiser *v.* State, 17 Ind. App. 519, 47 N. E. 229.

Iowa.— Keyes *v.* Cedar Falls, 107 Iowa 509, 78 N. W. 227; Coates *v.* Burlington, etc., R. Co., 62 Iowa 486, 17 N. W. 760; Donaldson *v.* Mississippi, etc., R. Co., 18 Iowa 280, 87 Am. Dec. 391. See also Pearl *v.* Omaha, etc., R. Co., 115 Iowa 538, 88 N. W. 1078.

Kansas.— Atchison, etc., R. Co. *v.* Ryan, 62 Kan. 682, 64 Pac. 603.

Kentucky.— Louisville, etc., R. Co. *v.* Mahony, 7 Bush 235.

Michigan.— Jones *v.* McMillan, 129 Mich. 86, 88 N. W. 206.

New York.— Sternfels *v.* Metropolitan St. R. Co., 174 N. Y. 512, 66 N. E. 1117 [*affirming* 73 N. Y. App. Div. 494, 77 N. Y. Suppl. 309]; Hall *v.* Germain, 14 N. Y. Suppl. 5.

Texas.— Galveston, etc., R. Co. *v.* Johnson, 24 Tex. Civ. App. 180, 58 S. W. 622; Missouri, etc., R. Co. *v.* Hines, (Civ. App. 1897) 40 S. W. 152; Gulf, etc., R. Co. *v.* Johnson, 10 Tex. Civ. App. 254, 31 S. W. 255.

Wisconsin.—Crouse *v.* Chicago, etc., R. Co., 102 Wis. 196, 78 N. W. 446, 778.

United States.— Whelan *v.* New York, etc., R. Co., 38 Fed. 15.

See 20 Cent. Dig. tit. "Evidence," § 1520. See also *supra*, XI, J, 4.

Mortality tables used by reputable insurance companies are admissible in evidence.— *Alabama.*— Mary Lee Coal, etc., Co. *v.* Chambliss, 97 Ala. 171, 11 So. 897.

Georgia.— Central R. Co. *v.* Richards, 62 Ga. 306.

Iowa.— Pearl *v.* Omaha, etc., Co., 115 Iowa 535, 88 N. W. 1078.

Tennessee.— Mississippi, etc., R. Co. *v.* Ayres, 16 Lea 725.

Texas.— Gulf, etc., R. Co. *v.* Smith, (Civ. App. 1894) 26 S. W. 644; San Antonio, etc., R. Co. *v.* Morgan, (Civ. App. 1897) 46 S. W. 672.

See 20 Cent. Dig. tit. "Evidence," § 1520.

Relevancy of tables.— It is necessary for the one relying on a mortality table to prove the life expectancy of a person to show that he belongs to the class of persons from which such tables are made; they not being based on the general run of mankind, but being made up of selected risks, persons of sound body and mind, and having no physical defects or constitutional troubles, and of correct habits. Vicksburg R., etc., Co. *v.* White, 82 Miss. 468, 34 So. 331. So the admission of a mortality table in evidence, showing the expectancy of life of a child ten years of age, was held error in an action for the death of a child four and one-half years of age. Decker *v.* McSorley, 111 Wis. 91, 86 N. W. 554.

39. Keast *v.* Santa Ysabel Gold Min. Co., 136 Cal. 256, 68 Pac. 771; Atlanta R., etc., Co. *v.* Monk, 118 Ga. 449, 45 S. E. 494; Western, etc., R. Co. *v.* Cox, 115 Ga. 715, 42 S. E. 74.

said, judicial notice of their genuineness and authoritativeness.[40] To be admissible under this rule the book containing the tables must be of standard authority.[41] The rule has been applied to the Carlisle tables,[42] the American tables,[43] and the Northampton tables.[44]

(IV) *HISTORICAL WORKS.*[45] Historical facts of general and public notoriety may be proved by reputation, and that reputation may be established by historical works of known character and accuracy.[46] But evidence of this sort is confined

40. Atchison, etc., R. Co. *v.* Ryan, 62 Kan. 682, 64 Pac. 603; Scheffler *v.* Minneapolis, etc., R. Co., 32 Minn. 518, 21 N. W. 711. See EVIDENCE, 16 Cyc. 871.

41. Galveston, etc., R. Co. *v.* Arispe, 81 Tex. 517, 17 S. W. 47, where it was held that a table of the expectation of life, contained in a book entitled: "A Million of Facts: Conkling's Handy Manual of Useful Information," is incompetent, in the absence of proof of its correctness.

Illustrations.—Tables printed in a law book of general acceptance and authority in the courts of the state, as the Carlisle tables, are admissible in evidence. Sellars *v.* Foster, 27 Nebr. 118, 42 N. W. 907. And see *infra*, note 42. So the Encyclopædia Britannica is admissible to show the Carlisle life tables. Pearl *v.* Omaha, etc., R. Co., 115 Iowa 539, 88 N. W. 1078; Haden *v.* Sioux City, etc., R. Co., 99 Iowa 735, 48 N. W. 733; Worden *v.* Humeston, etc., R. Co., 76 Iowa 310, 41 N. W. 26; Atchison, etc., R. Co. *v.* Ryan, 62 Kan. 682. In the same way the Northampton and American life tables, contained in volume 3, Johnson's New Universal Encyclopædia, have been held admissible. Scagel *v.* Chicago, etc., R. Co., 83 Iowa 380, 48 N. W. 990. So Wigglesworth's life tables (Louisville, etc., R. Co. *v.* Kelly, 100 Ky. 421, 38 S. W. 852, 40 S. W. 452, 19 Ky. L. Rep. 69) and the Flatchcraft insurance manual (Missouri, etc., R. Co. *v.* Ransom, 15 Tex. Civ. App. 689, 41 S. W. 826) have been held competent. So it has been held that a book is admissible to show the expectancy of life, on being identified as a standard and scientific work by a witness who "had something to do with the book." Gorman *v.* Minneapolis etc., R. Co., 78 Iowa 509, 43 N. W. 303.

42. *Colorado.*— Kansas Pac. R. Co. *v.* Lundin, 3 Colo. 94.

Georgia.— Atlanta R., etc., Co. *v.* Monk, 118 Ga. 449, 45 S. E. 494; Western, etc., R. Co. *v.* Cox, 115 Ga. 715, 42 S. E. 74.

Indiana.— Louisville, etc., R. Co. *v.* Miller, 141 Ind. 533, 37 N. E. 343.

Iowa.— Allen *v.* Ames, etc., R. Co., 106 Iowa 602, 76 N. W. 848; Simonson *v.* Chicago, etc., R. Co., 49 Iowa 87; Waters *v.* Chicago, etc., R. Co., 41 Iowa 71; McDonald *v.* Chicago, etc., R. Co., 26 Iowa 124, 95 Am. Dec. 114; Donaldson *v.* Mississippi, etc., R. Co., 18 Iowa 280, 87 Am. Dec. 391. See also Nelson *v.* Chicago, etc., R. Co., 38 Iowa 564.

Minnesota.— Scheffler *v.* Minneapolis, etc., R. Co., 32 Minn. 518, 21 N. W. 711.

Nebraska.— Chicago, etc., R. Co. *v.* Hambel, [1902] 89 N. W. 642; Friend *v.* Burleigh, 53 Nebr. 674, 74 N. W. 50; Friend *v.* Ingersoll, 39 Nebr. 717, 58 N. W. 281; Lincoln *v.* Smith, 28 Nebr. 762, 45 N. W. 41; Sellars *v.* Foster, 27 Nebr. 118, 42 N. W. 907; King *v.* Bell, 13 Nebr. 409, 14 N. W. 141; Roose *v.* Perkins, 9 Nebr. 304, 2 N. W. 715, 31 Am. Rep. 409.

New Jersey.— Camden, etc., R. Co. *v.* Williams, 61 N. J. L. 646, 40 Atl. 634.

Pennsylvania.— Campbell *v.* York, 172 Pa. St. 205, 33 Atl. 879; Shippen's Appeal, 80 Pa. St. 391.

England.— See Rowley *v.* London, etc., R. Co., L. R. 8 Exch. 221, 42 L. J. Exch. 153, 29 L. T. Rep. N. S. 180, 21 Wkly. Rep. 869.

See 20 Cent. Dig. tit. "Evidence," § 1520. And see *supra*, XI, J, 4.

43. *Alabama.*— Louisville, etc., R. Co. *v.* Hurt, 101 Ala. 34, 13 So. 130; Richmond, etc., R. Co. *v.* Hissong, 97 Ala. 187, 13 So. 209; Mary Lee Coal, etc., Co. *v.* Chambliss, 97 Ala. 171, 11 So. 897; Birmingham Mineral R. Co. *v.* Wilmer, 97 Ala. 165, 11 So. 886; McDonnell *v.* Alabama Gold L. Ins. Co., 85 Ala. 401, 5 So. 120.

Iowa.— Pearl *v.* Omaha, etc., R. Co., 115 Iowa 535, 88 N. W. 1078; Kreuger *v.* Sylvester, 100 Iowa 647, 69 N. W. 1059.

Kentucky.— Greer *v.* Louisville, etc., R. Co., 94 Ky. 169, 21 S. W. 649, 14 Ky. L. Rep. 876, 42 Am. St. Rep. 345.

Missouri.— Boettger *v.* Scherpe, etc., Iron Co., 136 Mo. 531, 38 S. W. 298.

New York.— Atty.-Gen. *v.* North America L. Ins. Co., 82 N. Y. 172 [*distinguishing* People *v.* Security L. Ins., etc., Co., 78 N. Y. 114, 34 Am. Rep. 522].

Texas.— San Antonio, etc., R. Co. *v.* Engelhorn, 24 Tex. Civ. App. 324, 62 S. W. 561, 65 S. W. 68.

See 20 Cent. Dig. tit. "Evidence," § 1520. And see *supra*, XI, J, 4.

44. Georgia R., etc., Co. *v.* Oaks, 52 Ga. 410; Schell *v.* Plumb, 55 N. Y. 592; Banta *v.* Banta, 84 N. Y. App. Div. 138, 82 N. Y. Suppl. 113; Davis *v.* Standish, 26 Hun (N. Y.) 608; Sauter *v.* New York Cent., etc., R. Co., 6 Hun (N. Y.) 446; Peterson *v.* Oleson, 47 Wis. 122, 2 N. W. 94. See *supra*, XI, J, 11.

45. **Judicial notice** see EVIDENCE, 16 Cyc. 864, 923.

46. See Morris *v.* Harmer, 7 Pet. (U. S.) 554, 8 L. ed. 781.

Instances of admission of historical work. — In Bow *v.* Allenstown, 34 N. H. 351, 69 Am. Dec. 489, it was held that an account of a fire sent to the New Hampshire historical society's collections, by a former secretary of state, was admissible as a history of the event for the purpose of showing that many public records and papers had

in a great measure to ancient facts which do not presuppose better evidence in existence, and where, from the nature of the transaction, the remoteness of the period, or the public and general reception of the facts, a just foundation is laid for general confidence.[47] Thus the writings of a living author on recent historical subjects are not admissible.[48] So a local history has been excluded as evidence of the facts therein recited.[49]

(v) *Dictionaries.* Dictionaries are not of themselves evidence, but they may be referred to as aids to the memory and understanding of the court.[50]

(vi) *Law Commentaries.* The works of commentators of recognized authority on domestic or foreign law are admissible.[51] So the courts must consult and obtain such aid as they can from the works of jurists and commentators on the subject of international law.[52] But these works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.[53]

c. Law Reports. The books of reports of cases adjudged in the courts of another state[54] or of a foreign country[55] are very generally held admissible as evidence of the unwritten or common law of the sister state or foreign country.[56]

been destroyed by fire. So in Com. *v.* Alburger, 1 Whart. (Pa.) 469, it was held that historical works are admissible for the purpose of showing copies of ancient historical documents proceeding from a public source and treated as authentic from the beginning.

47. Morris *v.* Harmer, 7 Pet. (U. S.) 554, 8 L. ed. 781.

48. Morris *v.* Harmer, 7 Pet. (U. S.) 554, 8 L. ed. 781.

49. Roe *v.* Strong, 107 N. Y. 350, 14 N. E. 294; McKinnon *v.* Bliss, 21 N. Y. 206; Evans *v.* Getting, 6 C. & P. 586, 25 E. C. L. 587; Stainer *v.* Droitwich, 1 Salk. 281. *Compare* Onondaga Nation *v.* Thacher, 29 Misc. (N. Y.) 428, 61 N. Y. Suppl. 1027 [*affirmed* in 53 N. Y. App. Div. 561, 65 N. Y. Suppl. 1014].

Historical work relating to Mormon church. — Under Utah Rev. St. § 3400, providing that historical works, books of science, etc., when made by persons indifferent between the parties, are *prima facie* evidence of facts of general notoriety and interest, historical works relating to the Mormon church, and the records and journals of such church, are admissible to show the meaning of the term "sealing ordinance" as applied by the adherents of the Mormon faith to the ceremony of marriage. Hilton *v.* Roylance, 25 Utah 129, 69 Pac. 660, 95 Am. St. Rep. 821, 58 L. R. A. 723.

50. Nix *v.* Hedden, 149 U. S. 304, 13 S. Ct. 881, 37 L. ed. 745; Zante Currants, 73 Fed. 183. See also Cook *v.* State, 110 Ala. 40, 20 So. 360. And see Evidence, 16 Cyc. 875, 922, 923.

Law dictionary.— In Banco de Sonora *v.* Bankers' Mut. Casualty Co., (Iowa 1903) 95 N. W. 232, it was held that on an issue as to when an infant becomes an adult under the law of Mexico, that part of Bouvier's Law Dictionary stating that the foundation of the laws of Mexico was the civil law, and that an adult under the civil law was a male infant who had attained the age of fourteen years, was admissible.

51. Charlotte *v.* Chouteau, 33 Mo. 194; The Pawashick, 19 Fed. Cas. No. 10,851, 2 Lowell 142. See also Lacon *v.* Higgins, D. & R. N. P. 38, 3 Stark. 178, 25 Rev. Rep. 779, 16 E. C. L. 425.

Judicial notice see Evidence, 16 Cyc. 883, 924.

52. Hilton *v.* Guyot, 159 U. S. 113, 16 S. Ct. 139, 40 L. ed. 95.

Judicial notice see Evidence, 16 Cyc. 888, 924.

53. The Paquete Habana, 175 U. S. 677, 20 S. Ct. 290, 44 L. ed. 320.

54. Inge *v.* Murphy, 10 Ala. 885; Billingsley *v.* Dean, 11 Ind. 331; Musser *v.* Stauffer, 192 Pa. St. 398, 43 Atl. 1018. *Compare* Gardner *v.* Lewis, 7 Gill (Md.) 377, where it was held that the common or unwritten law of a sister state is to be proved by witnesses acquainted with the law.

Rule applied under express statute.— Chicago, etc., R. Co. *v.* Tuite, 44 Ill. App. 535; Ames *v.* McCamber, 124 Mass. 85; Cragin *v.* Lamkin, 7 Allen (Mass.) 395; Penobscot, etc., R. Co. *v.* Bartlett, 12 Gray (Mass.) 244, 71 Am. Dec. 753. *Compare* French *v.* Lowell, 18 Pick. (Mass.) 34.

Dissenting opinion inadmissible.— The Illinois statute making the reports of the decisions of the courts of other states competent evidence of such decisions does not make the dissenting opinions admissible, since a dissenting opinion is not a decision, and has no value in determining what the decision was. Chicago, etc., R. Co. *v.* Tuite, 44 Ill. App. 535.

Authentication of law reports.— Certain volumes of the reports of the supreme court of Massachusetts were proved by a member of the bar of that commonwealth to be "volumes of the regular reports" of that court, and it was also proved that they were obtained from an established law library association in New York city. It was held that they were properly proved. Congregational Unitarian Soc. *v.* Hale, 29 N. Y. App. Div. 396, 51 N. Y. Suppl. 704.

55. Charlotte *v.* Chouteau, 33 Mo. 194; Marguerite *v.* Chouteau, 3 Mo. 540.

56. Judicial notice see Evidence, 16 Cyc. 883, 924.

In the same way the printed reports may be referred to as expositions of domestic law.[57]

d. Market Quotations. Prices current and reports of the state of the market published in the newspapers and relied upon by the commercial world are held admissible.[58] But according to some of the authorities the sources of information or the mode in which the prices are ascertained must first be shown by extrinsic proof to render the evidence competent.[59]

e. Live-Stock Registers. Records published by authority of a recognized trotting association, if accepted and acted upon by persons conversant with racing matters as authentic and official, have been held admissible for the purpose of showing the speed of a horse and of others to whom he is related.[60] So under statute in Iowa a printed copy of a herd book in which cattle are registered has been held admissible if it be shown to be a standard authority recognized by cattle-breeders, it being regarded as an historical work of a particular subject.[61] The admissibility of books kept to register cattle and other animals as coming within the exception to the hearsay rule relating to proof of pedigree is discussed elsewhere.[62]

13. Authentication and Proof of Execution — a. Necessity — (i) *In General.* The general rule on the subject of proving private writings is that before they are receivable in evidence their due and valid execution or their genuineness and authenticity must be established.[63] This rule has repeatedly been applied not

57. Mackay *v.* Easton, 19 Wall. (U. S.) 619, 22 L. ed. 211 [*affirming* 16 Fed. Cas. No. 8,843, 2 Dill. 41]. See also Stayner *v.* Baker, 12 Mod. 86.

Printed reports held secondary evidence only.— In Donellan *v.* Hardy, 57 Ind. 393, it was held that a printed report of a decision of the supreme court, although issued by authority of law, is only secondary evidence of a judgment rendered by such court, and is admissible only when the destruction of the original record has been shown and a properly authenticated transcript cannot be obtained. So it has been held that the published volumes of supreme court reports do not furnish the highest evidence of the judgment of affirmance or reversal in a particular case, but the remittitur is the best evidence. Freeman *v.* Bigham, 65 Ga. 580.

Judicial notice see Evidence, 16 Cyc. 883, 924.

58. Nash *v.* Classen, 163 Ill. 409, 45 N. E. 276; Aulls *v.* Young, 98 Mich. 231, 57 N. W. 119; Sisson *v.* Cleveland, etc., R. Co., 14 Mich. 489, 90 Am. Dec. 252; Terry *v.* McNiel, 58 Barb. (N. Y.) 241; Cliquot *v.* U. S., 3 Wall. (U. S.) 114, 18 L. ed. 116.

59. *California.*— Vogt *v.* Cope, 66 Cal. 31, 4 Pac. 915.

Colorado.— Willard *v.* Mellor, 19 Colo. 534, 36 Pac. 148.

Missouri.— Golson *v.* Ebert, 52 Mo. 260.

New York.— Whelan *v.* Lynch, 60 N. Y. 469, 19 Am. Rep. 202.

North Carolina.— Fairley *v.* Smith, 87 N. C. 367, 42 Am. Rep. 522.

60. Pittsburgh, etc., R. Co. *v.* Sheppard, 56 Ohio St. 68, 46 N. E. 61, 60 Am. St. Rep. 732.

Private publication.— In an action against a carrier for injury to and loss of blooded horses, plaintiff's private catalogue was held not admissible as a book of pedigree to show the history of one of the horses. Louisville, etc., R. Co. *v.* Frazee, 71 S. W. 437, 24 Ky. L. Rep. 1273.

61. Kuhns *v.* Chicago, etc., R. Co., 65 Iowa 528, 22 N. W. 661.

Recognized authority a prerequisite.— Crawford *v.* Williams, 48 Iowa 247.

62. See Evidence, 16 Cyc. 1133, 1223.

63. *Alabama.*— Richmond, etc., R. Co. *v.* Jones, 92 Ala. 218, 9 So. 276.

Arkansas.— Lane *v.* Farmer, 13 Ark. 63.

Florida.— Williams *v.* Keyser, 11 Fla. 234, 89 Am. Dec. 243.

Georgia.— Kidd *v.* Huff, 105 Ga. 209, 31 S. E. 430.

Indiana.— Jessup *v.* Gray, 7 Blackf. 332; Smith *v.* Scantling, 4 Blackf. 443.

Kentucky.— Gentry *v.* Doolin, 1 Bush 1; McClain *v.* Esham, 17 B. Mon. 146; Burgen *v.* Com., 8 Ky. L. Rep. 613. See also Burkhart *v.* Loughridge, 76 S. W. 397, 25 Ky. L. Rep. 875.

Louisiana.— Calhoun *v.* Pierson, 44 La. Ann. 584, 10 So. 880; Hawes *v.* Bryan, 10 La. 136; Griffith *v.* Towles, 6 Mart. N. S. 261.

Massachusetts.— Bugbee *v.* Davis, 167 Mass. 33, 44 N. E. 1055; Com. *v.* Eastman, 1 Cush. 189, 48 Am. Dec. 596.

Minnesota.— Massillon Engine, etc., Co. *v.* Holdridge, 68 Minn. 393, 71 N. W. 399; State *v.* Shevlin-Carpenter Co., 66 Minn. 217, 68 N. W. 973.

Missouri.— Julian *v.* Rogers, 87 Mo. 229; Hicks *v.* Chouteau, 12 Mo. 341.

New Hampshire.— Bean *v.* Smith, 20 N. H. 461.

New Jersey.— Linn *v.* Ross, 16 N. J. L. 55; Williamson *v.* Wright, 3 N. J. L. 984.

New York.— Moses *v.* Banker, 7 Rob. 441; Bidwell *v.* Overton, 13 N. Y. Suppl. 274, 26 Abb. N. Cas. 402. See also Hawxhurst *v.* Hennion, 9 N. Y. Suppl. 542.

North Carolina.— See Costen *v.* McDowell, 107 N. C. 546, 12 S. E. 432.

only to deeds,[64] but also to various other private writings. It has been applied to

Oregon.— Baum *v.* Rainbow Smelting Co., 42 Oreg. 453, 71 Pac. 538.

Pennsylvania.— Reese *v.* Reese, 90 Pa. St. 89, 35 Am. Rep. 634; Hays *v.* Hays, 6 Pa. St. 368. See also Caldwell *v.* Remington, 2 Whart. 132.

Texas.— Trinity County Lumber Co. *v.* Pinckard, 4 Tex. Civ. App. 671, 23 S. W. 720, 1015. See also Arnold *v.* Attaway, (Civ. App. 1896) 35 S. W. 482.

See 20 Cent. Dig. tit. "Evidence," § 1559 *et seq.*

Joint instruments.—Where a joint and several bond was offered in evidence against a single one of the parties charged thereby, preliminary proof of its execution by the party sought to be charged was held sufficient to render it admissible in evidence, although there was no proof of its execution by the other party thereon. Conard *v.* Atlantic Ins. Co., 1 Pet. (U. S.) 386, 7 L. ed. 189 [*approved* in Conard *v.* Nicoll, 4 Pet. (U. S.) 291, 7 L. ed. 862]. So it has been held that proof of the execution of a quitclaim deed by one of several grantors is sufficient to authorize the introduction of the deed in evidence in so far as it is sought to affect the interest owned by that particular grantor. Kolb *v.* Jones, 62 S. C. 193, 40 S. E. 168.

Application of rule in criminal cases see the following cases:

California.— People *v.* Hust, 49 Cal. 653.

Georgia.— See Smith *v.* State, 77 Ga. 705.

Iowa.— See State *v.* Oeder, 80 Iowa 72, 45 N. W. 543.

Maryland.— See Gross *v.* State, 62 Md. 179.

Missouri.— State *v.* Grant, 74 Mo. 33. See also State *v.* Harvey, 131 Mo. 339, 32 S. W. 1110.

New York.— People *v.* Corey, 148 N. Y. 476, 42 N. E. 1066.

Oregon.— State *v.* Chee Gong, 16 Oreg. 534, 19 Pac. 607.

Texas.— Langford *v.* State, 9 Tex. App. 283; Johnson *v.* State, 9 Tex. App. 249.

Wisconsin.— See Monteith *v.* State, 114 Wis. 165, 89 N. W. 828.

See 14 Cent. Dig. tit. "Criminal Law," § 1027.

Memorandum found in possession of accused.— A memorandum made in pencil, in the pocketbook taken from the accused, upon his arrest, may be read in evidence, without proof of its execution. Whaley *v.* State, 11 Ga. 123.

County warrants are held inadmissible in evidence at common law without proof of their execution, where the genuineness of the signatures thereto is put in issue by the pleadings. Apache County *v.* Barth, 177 U. S. 538, 20 S. Ct. 718, 44 L. ed. 878 [*reversed* in (Ariz. 1898) 53 Pac. 187].

Time of proof of execution.— It is not absolutely essential that the execution of the instrument should be proved prior to its admission. Allen *v.* State, 61 Ind. 268, 28 Am. Rep. 673; Washington County *v.* Dunn, 27 Gratt. (Va.) 608. Thus on the assurance of a party that due execution of a paper offered in evidence will be shown later in the trial, the court may allow it to be received without proof of execution. Dupree *v.* Virginia Home Ins. Co., 92 N. C. 417. So where an instrument is received in evidence without sufficient proof of its execution, the error is cured, if such proof be made subsequently during the trial. Houck *v.* Linn, 48 Nebr. 227, 66 N. W. 1103.

Instruments referred to by other instruments in evidence.— The rule of the text has been applied to instruments, although they are referred to by other instruments already in evidence. Lee *v.* Payne, 4 Mich. 106; Jackson *v.* Sackett, 7 Wend. (N. Y.) 94. *Compare* Rhame *v.* Bower, 27 Ga. 408; Jackson *v.* Halstead, 5 Cow. (N. Y.) 216. But in Neuval *v.* Cowell, 36 Cal. 648, it was held that in an action upon a contract referring to a previous contract as containing the plan by and prices for which the work sued for is to be done, the previous contract is admissible in evidence for purposes of description, whether its execution is proved or not. So in an action on a bond in which the principal and sureties guaranteed payment at maturity of instruments purchased of the principal by plaintiff, the instruments referred to in the bond were held admissible for the purpose of fixing the amount of plaintiff's recovery, without proof of their execution, although their execution is denied by the answer. Lombard *v.* Mayberry, 24 Nebr. 674, 40 N. W. 271, 8 Am. St. Rep. 234. To the same effect see Mallory *v.* Lyman, 3 Pinn. (Wis.) 443, 4 Chandl. (Wis.) 143.

Identification of writing referred to in verbal contract.—Where a contract lying wholly in parol refers for some of its terms to a written instrument, not as containing any operative words of obligation but as rendering the verbal agreement definite in details, it is not necessary to the admission of the writing in evidence, in establishing the verbal contract to prove its execution, it being sufficient to identify it. Smith *v.* New York Cent. R. Co., 4 Abb. Dec. (N. Y.) 262, 4 Keyes (N. Y.) 180.

Instrument offered in explanation of declarations.— Where a written instrument is so connected with the declarations of a party that they cannot be fully understood without it, proof of its execution is not a prerequisite to its admissibility in evidence, in connection with and as explanatory of the declarations. Mims *v.* Sturtevant, 18 Ala. 359.

64. *Connecticut.*— Canfield *v.* Squire, 2 Root 300, 1 Am. Dec. 71.

Georgia.— Holland *v.* Carter, 79 Ga. 139, 3 S. E. 690. See also Bentley *v.* McCall, 119 Ga. 530, 46 S. E. 645.

Louisiana.— Savenet *v.* Le Briton, 8 Mart. N. S. 501.

Maine.— Webber *v.* Stratton, 89 Me. 379, 36 Atl. 614; Dunlap *v.* Glidden, 31 Me. 510.

Michigan.— Bulen *v.* Granger, 63 Mich. 311, 29 N. W. 718.

wills,[65] leases,[66] mortgages of real estate,[67] bonds,[68] assignments,[69] checks,[70] bills of sale,[71] promissory notes,[72] chattel mortgages,[73] receipts,[74] insurance policies,[75] powers of attorney,[76] bills of lading,[77] contracts generally,[78] printed papers or circulars,[79] advertisements in newspapers,[80] a copy of the passenger list of a steamer as it appeared in the newspaper,[81] log-books and ship's papers,[82] and to indorsements upon the back of written instruments.[83] It has been stated, however, that any evidence, however slight, tending to prove the execution of the instrument

Pennsylvania.— Harden *v.* Hays, 14 Pa. St. 91.

Texas.— Clay *v.* Holbert, 14 Tex. 189; Smith *v.* Kenney, (Civ. App. 1899) 54 S. W. 801.

United States.— Wright *v.* Taylor, 30 Fed. Cas. No. 18,096, 2 Dill. 23.

See 20 Cent. Dig. tit. "Evidence," § 1560 *et seq.* See also DEEDS, 13 Cyc. 505.

A deed under the seal of a banking corporation within the state of Pennsylvania, incorporated by act of assembly, has been held inadmissible unless the seal is proved. Leazure *v.* Hillegas, 7 Serg. & R. (Pa.) 313.

A deed from a public hospital, under its corporate seal, must be proved in the same manner as other deeds, as it is not an institution of such notoriety that its seal will prove itself. Jackson *v.* Pratt, 10 Johns. (N. Y.) 381.

65. Hicks *v.* Deemer, 187 Ill. 164, 58 N. E. 252 [*reversing* 87 Ill. App. 384]. See, generally, WILLS.

66. Kalmes *v.* Gerrish, 7 Nev. 31; Wheeler, etc., Mfg. Co. *v.* McLaughlin, 54 Hun (N. Y.) 639, 8 N. Y. Suppl. 95. See, generally, LANDLORD AND TENANT.

67. Cooke *v.* Pennington, 7 S. C. 385. See, generally, MORTGAGES.

68. Burgen *v.* Com., 8 Ky. L. Rep. 613; Hicks *v.* Chouteau, 12 Mo. 341; Craw *v.* Abrams, (Nebr. 1903) 94 N. W. 639, 97 N. W. 296. See also *supra*, p. 316, note 42; and BONDS, 5 Cyc. 721.

69. *California.*— Pennsylvania Min. Co. *v.* Owens, 15 Cal. 135.

Kentucky.— Hagins *v.* Arnett, 64 S. W. 430, 23 Ky. L. Rep. 809.

Michigan.— Lee *v.* Payne, 4 Mich. 106.

Ohio.—Swearingen *v.* Hawkenberry, Wright 111.

Pennsylvania.— Smith *v.* Myler, 22 Pa. St. 36.

See also ASSIGNMENTS, 4 Cyc. 1.

70. Sloan *v.* Fist, 53 Nebr. 691, 74 N. W. 45. See also BANKS AND BANKING, 5 Cyc. 527 *et seq.*; COMMERCIAL PAPER, 8 Cyc. 256 *et seq.*

71. Ramsey *v.* Waters, 1 Mo. 406; Morrow *v.* State, 22 Tex. App. 239, 2 S. W. 624. See, generally, SALES.

72. McRae *v.* McDonald, 57 Ala. 423; McHugh *v.* Brown, 33 Mich. 2; Western Mattress Co. *v.* Potter, 1 Nebr. (Unoff.) 627, 631, 95 N. W. 841; Hamilton *v.* Phelps, Wright (Ohio) 689. See also COMMERCIAL PAPER, 8 Cyc. 256 *et seq.*

73. McHugh *v.* Brown, 33 Mich. 2; Betterton *v.* Echols, 85 Tex. 212, 20 S. W. 63; Becker *v.* Brown, (Tex. Civ. App. 1904) 79 S. W. 45; Peterson *v.* Martinez, (Tex. Civ. App. 1904) 78 S. W. 401. See also CHATTEL MORTGAGES, 6 Cyc. 980.

74. *Connecticut.*— Neil *v.* Miller, 2 Root 117.

Delaware.— Pleasanton *v.* Simmons, 2 Pennew. 477, 47 Atl. 697.

Missouri.— Acock *v.* McBroom, 38 Mo. 342.

Pennsylvania.— Sterrett *v.* Bull, 1 Binn. 234.

Texas.— Lynch *v.* Munson, (Civ. App. 1901) 61 S. W. 140; Staples *v.* Word, (Civ. App. 1898) 48 S. W. 751.

Vermont.— Nye *v.* Daniels, 75 Vt. 81, 53 Atl. 150.

See 20 Cent. Dig. tit. "Evidence," § 1560. And see, generally, PAYMENT; RELEASE.

75. Crutchfield *v.* Dailey, 98 Ga. 462, 25 S. E. 526; American Underwriters' Assoc. *v.* George, 97 Pa. St. 238. See, generally, INSURANCE.

76. Jackson *v.* Hopkins, 18 Johns. (N. Y.) 487; Watson *v.* Hopkins, 27 Tex. 637. See, generally, PRINCIPAL AND AGENT.

77. Pendery *v.* Crescent Mut. Ins. Co., 21 La. Ann. 410; Cunard Steamship Co. *v.* Kelley, 115 Fed. 678, 53 C. C. A. 310. See also CARRIERS, 6 Cyc. 352.

78. Coons *v.* Graham, 12 Rob. (La.) 206; Equitable Endowment Assoc. *v.* Fisher, 71 Md. 430, 18 Atl. 808; Weiland *v.* Weyland, 64 Mo. 168; Lewin *v.* Dille, 17 Mo. 64; American Underwriters' Assoc. *v.* George, 97 Pa. St. 238. See also CONTRACTS, 9 Cyc. 757 *et seq.*

Title bond.— Burkhart *v.* Loughridge, 76 S. W. 397, 25 Ky. L. Rep. 815.

79. Willard *v.* Mellor, 19 Colo. 534, 36 Pac. 148; Berry *v.* Mathewes, 7 Ga. 457; Atchison, etc., R. Co. *v.* Cruzen, 31 Kan. 718, 3 Pac. 520; Brayley *v.* Kelly, 25 Minn. 160.

80. Mann *v.* Russell, 11 Ill. 586.

81. Johnson *v.* Johnson, 25 Oreg. 496, 30 Pac. 161.

82. Vandyke *v.* Memphis, etc., Packet Co., 71 S. W. 441, 24 Ky. L. Rep. 1283; U. S. *v.* Mitchell, 27 Fed. Cas. No. 15,791, 2 Wash. 478. See also The Missouri, 17 Fed. Cas. No. 9,653, 4 Ben. 410 [*affirmed* in 26 Fed. Cas. No. 15,785, 9 Blatchf. 433].

83. Indorsements upon the backs of written instruments are independent writings, in the nature of receipts or written declarations, and can be read in evidence only after proof made that they are signed by the party sought to be charged, or have received his assent in some binding form. Turrell *v.* Morgan, 7 Minn. 368, 82 Am. Dec. 101; Hugumin *v.* Hinds, 97 Mo. App. 346, 71 S. W. 479; Strong Mfg. Co. *v.* Meridan Britannia Co., 23 Fed. Cas. No. 13,546. The mere fact that the signature to an agreement indorsed on a

is sufficient to entitle the instrument to go to the jury.[84] In many jurisdictions there are statutes either dispensing with proof of execution except on formal denial, or otherwise modifying the common-law rule.[85]

(II) *AUTHORITY TO EXECUTE* — (A) *In General.* A deed executed by the party in whom title is vested, and expressing a valuable consideration, never needs as against him or those claiming under him, or as against a stranger, to be supported by proof of any authority in addition to the will of the party which led to its execution.[86]

(B) *Instruments Purporting to Be Made Under Power of Attorney.* A deed or contract purporting to be made by a trustee or an attorney in fact is not admissible as evidence of its contents unless the authority of the attorney in fact is established.[87] But the fact of execution may be shown independently of the

bill of lading is admitted by the signer will not render the bill of lading admissible without proof of execution. Millam *v.* Southern R. Co., 58 S. C. 247, 36 S. E. 571. But it has been held that where a settlement in writing was agreed on, and a person was employed to put it, in the presence of the parties, on the back of an instrument to which it referred, the written settlement is admissible without proof of the execution of the instrument on which it is indorsed. Walker *v.* Driver, 7 Ala. 679.

84. Hamsher *v.* Kline, 57 Pa. St. 397. See also Cairrell *v.* Higgs, 1 Tex. Unrep. Cas. 56. *Compare* Hicks *v.* Chouteau, 12 Mo. 341.

85. *Alabama.*— Jones *v.* Rives, 3 Ala. 11.

Georgia.— Wylly *v.* Screven, 98 Ga. 213, 25 S. E. 435; Fitzgerald *v.* Williams, 24 Ga. 343; Williams *v.* Rawlins, 10 Ga. 491.

Illinois.— Zuel *v.* Bowen, 78 Ill. 234; Otto *v.* Jackson, 35 Ill. 349; Miller *v.* Metzger, 16 Ill. 390; Bonner *v.* Ames, 82 Ill. App. 93; Western Mut. L. Assoc. *v.* People, 73 Ill. App. 496; Brooks *v.* Brady, 53 Ill. App. 155.

Indiana.—Boseker *v.* Chamberlain, 160 Ind. 114, 66 N. E. 448; Leary *v.* Meier, 78 Ind. 393; Jessup *v.* Gray, 7 Blackf. 332.

Minnesota.— London, etc., Mortg. Co. *v.* St. Paul Park Imp. Co., 84 Minn. 144, 86 N. W. 872; McGinty *v.* St. Paul, etc., R. Co., 74 Minn. 259, 77 N. W. 141; Fitzgerald *v.* English, 73 Minn. 266, 76 N. W. 27.

Texas.— Lignoski *v.* Crooker, 86 Tex. 324, 24 S. W. 278, 788; Robertson *v.* Du Bose, 76 Tex. 1, 13 S. W. 300; Cox *v.* Cock, 59 Tex. 521; Durst *v.* Swift, 11 Tex. 273; Williamson *v.* Gore, (Civ. App. 1903) 73 S. W. 563; Western Union Tel. Co. *v.* Bertram, 1 Tex. App. Civ. Cas. § 1152.

Virginia.— Shepherd *v.* Fry, 3 Gratt. 442; Kelly *v.* Paul, 3 Gratt. 191.

Wisconsin.— Shattuck *v.* Bates, 92 Wis. 633. 66 N. W. 706.

United States.— Strong Mfg. Co. *v.* Meridan Britannia Co., 23 Fed. Cas. No. 13,546.

See 20 Cent. Dig. tit. "Evidence," § 1560 *et seq.*; and, generally, PLEADING.

86. A deed offered in evidence, and executed in Scotland, by which land in Ohio, which had been patented to B by the United States, was conveyed to S, recited that it was made in pursuance of a decree of the circuit court of United States for the district of Virginia, but no exemplification of the decree was offered in evidence in support of the deed. It was held in ejectment that as B was the patentee of the land, although he made the deed in pursuance of the decree, such decree could add nothing to the validity of the conveyance, and hence it was unnecessary to prove the decree, the deed being good without it. Games *v.* Dunn, 14 Pet. (U. S.) 322, 10 L. ed. 476. So in ejectment, plaintiff having proved title in his grantor, offered in evidence a deed from such grantor to himself, duly executed, expressing a consideration of one dollar, and also reciting that it was executed under and by virtue of the statute concerning voluntary assignments, and was made pursuant to the application of an insolvent and his creditors, and in pursuance of an order made by a county judge, etc. The reading of the deed was objected to unless plaintiff first proved the proceedings in the matter of the insolvency of his grantor. It was held that such proof was not necessary. Rockwell *v.* Brown, 54 N. Y. 210 [*reversing* 33 N. Y. Super. Ct 380]. See EJECTMENT, 15 Cyc. 123 *et seq.*

87. *Arkansas.*— Carnall *v.* Duval, 22 Ark. 136; Elliott *v.* Pearce, 20 Ark. 508.

California.— Gashwiler *v.* Willis, 33 Cal. 11, 91 Am. Dec. 607.

Illinois.— Gray *v.* Gillilan, 15 Ill. 453, 60 Am. Dec. 761; Darst *v.* Doom, 38 Ill. App. 397.

Iowa.— Hughes *v.* Holliday, 3 Greene 30. See also Murray *v.* Walker, 83 Iowa 202, 48 N. W. 1075.

Kansas.— See St. Louis, etc., R. Co. *v.* Tiernan, 37 Kan. 606, 15 Pac. 544.

Kentucky.— Birney *v.* Haim, 2 Litt. 262.

Massachusetts.— Chaffee *v.* Blaisdell, 142 Mass. 538, 8 N. E. 435; Tolman *v.* Emerson, 4 Pick. 160; Emerson *v.* Province Hat. Mfg. Co., 12 Mass. 237, 7 Am. Dec. 66.

Minnesota.— Lamberton *v.* Windom, 18 Minn. 506; Lowry *v.* Harris, 12 Minn. 255.

Missouri.— Hancock *v.* Whybark, 66 Mo. 672.

Nebraska.— Green *v.* Barker, 47 Nebr. 934, 66 N. W. 1032.

New York.— See McKensie *v.* Farrell, 4 Bosw. 192.

Texas.— See Brashear *v.* Martin, 25 Tex. 202; Watrous *v.* McGrew, 16 Tex. 506; Grant *v.* Hill, (Civ. App. 1894) 30 S. W. 952; Cohen *v.* Oliver, 9 Tex. Civ. App. 35, 29 S. W.

power to do so if that fact is relevant to the issue and the instrument is otherwise competent evidence.[88]

(c) *Deeds of Executors or Administrators.* So a party producing an executor's or administrator's deed must show that its execution was authorized,[89] and hence the appointment of the executor or administrator,[90] and the judicial proceedings under the authority of which the sale purported to have been made[91] must be shown.

(d) *Deeds of Sheriffs or Other Officers.* It is a general rule that a deed by a sheriff, as in the case of a deed to a purchaser at an execution sale,[92] or by a

81. *Compare* Austin *v.* Townes, 10 Tex. 24, where it was held under statute that proof of authority to execute was unnecessary except upon a denial under oath.

Compare Gantt *v.* Eaton, 25 La. Ann. 507 (where the power was not denied); Davidson *v.* Beatty, 3 Harr. & M. (Md.) 594.

See 20 Cent. Dig. tit. "Evidence," § 1565. And see, generally, PRINCIPAL AND AGENT.

To prove a reservation or dedication in a deed by an attorney in fact as against the grantee therein, who has accepted it, it is unnecessary to introduce the power under which the deed was made. Waco Bridge Co. *v.* Waco, 85 Tex. 320, 20 S. W. 137.

Instrument offered to prove collateral matter.— In an action by S against L to recover money collected by L from a railway company under S's contract therewith to deliver ties, it was held that the contract was admissible to show the amount, although signed on the part of the company by a superintendent of division without showing his authority to sign it. Londoner *v.* Stewart, 3 Colo. 47.

Necessity of production of decree compelling attorney to sell land.— A party gave a power of attorney to sell certain lands, and the person having the power was compelled by the decree of a court to convey such lands. It was held that in a subsequent suit the deed might be offered in evidence without accompanying proof of the decree. Hanrick *v.* Neely, 10 Wall. (U. S.) 364, 19 L. ed. 947.

A certified copy of the record of an assignment of a judgment by one as attorney in fact is not proof of the assignment, in absence of evidence of the attorney's authority. Bell *v.* Farwell, 189 Ill. 414, 59 N. E. 955 [*affirming* 89 Ill. App. 638].

88. Hogans *v.* Carruth, 18 Fla. 587. See also Ortley *v.* Chadwick, 30 N. J. L. 35.

Deed introduced to show color of title.— McDonald *v.* Bear River, etc., Water, etc., Co., 13 Cal. 220; Brackett *v.* Persons Unknown, 53 Me. 228; Alexander *v.* Campbell, 74 Mo. 142.

89. Chapman *v.* Crooks, 41 Mich. 595, 2 N. W. 924.

90. Kimball *v.* Semple, 25 Cal. 440; Chapman *v.* Crooks, 41 Mich. 595, 2 N. W. 924; Ury *v.* Houston, 36 Tex. 260.

91. La Plante *v.* Lee, 83 Ind. 155; Riley *v.* Pool, 5 Tex. Civ. App. 346, 24 S. W. 85; Hartshorn *v.* Wright, 11 Fed. Cas. No. 6,169, Pet. C. C. 64. See also Ury *v.* Houston, 36 Tex. 260. *Compare* Ransom *v.* Long, 13 La. Ann. 523. See, generally, EXECUTORS AND ADMINISTRATORS.

92. *Alabama.*— Lewis *v.* Goguette, 3 Stew. & P. 184.

California.— Vassault *v.* Austin, 32 Cal. 597.

Connecticut.— Lillie *v.* Wilson, 2 Root 517.

Florida.— McGehee *v.* Wilkins, 31 Fla. 83, 12 So. 228.

Georgia.— Carr *v.* Georgia L. & T. Co., 108 Ga. 757, 33 S. E. 190; Sabattie *v.* Baggs, 55 Ga. 572.

Illinois.— Bybee *v.* Ashby, 7 Ill. 151, 43 Am. Dec. 47; Curtis *v.* Swearingen, 1 Ill. 207.

Indiana.— Teal *v.* Langsdale, 78 Ind. 339; Nichol *v.* McCalister, 52 Ind. 586.

Kentucky.— Swafford *v.* Herd, 65 S. W. 803, 23 Ky. L. Rep. 1556.

New Jersey.— Den *v.* Morse, 12 N. J. L. 331; Casher *v.* Peterson, 4 N. J. L. 317.

New York.— Bowen *v.* Bell, 20 Johns. 338, 11 Am. Dec. 286.

Pennsylvania.— Weyand *v.* Tipton, 5 Serg. & R. 332.

Texas.— Hill *v.* Templeton, (Civ. App. 1895) 29 S. W. 535.

Virginia.— Masters *v.* Varner, 5 Gratt. 168, 50 Am. Dec. 114.

United States.— Hartshorn *v.* Wright, 11 Fed. Cas. No. 6,169, Pet. C. C. 64; Lanning *v.* London, 14 Fed. Cas. No. 8,076, 4 Wash. 513.

Compare Jordan *v.* Surghnor, 107 Mo. 520, 17 S. W. 1009; Merchants' Bank *v.* Harrison, 39 Mo. 433, 93 Am. Dec. 285; McCormick *v.* Fitzmorris, 39 Mo. 24; Morse *v.* Stockman, 73 Wis. 89, 40 N. W. 679; Claflin *v.* Robinhorst, 40 Wis. 482.

See 20 Cent. Dig. tit. "Evidence," § 1536.

Rule applied to sheriff's deed executed in another state.— Porter *v.* Wells, 6 Kan. 448.

Immaterial variance between deed and judgment.— If a sheriff in his deed to the purchaser set forth the execution but not the judgment the deed is admissible in support of the grantee's title; the grantee proving a judgment agreeing with the recitals of the deed, so far as relates to the names of the parties, although differing in some slight particulars in respect of the amounts constituting the sum for which judgment was rendered. Pettison *v.* Budd, 17 Ark. 546, 65 Am. Dec. 442.

Unsigned levy.— A tax fieri facias was offered in support of a sheriff's deed, and it appeared that the fieri facias was under fifty dollars, and that, although there was

constable,[93] a commissioner or master in chancery,[94] or other officer cannot be given in evidence to support title without producing the record of the decree, judgment, and execution under the authority of which the sale was made,[95] or without proper secondary evidence thereof in case the records cannot be produced.[96]

(E) *Instruments Under Corporation Seals.* An instrument purporting to be executed by an officer or agent of a corporation for the corporation and having the corporate seal affixed is admissible in evidence without proof of the authority of the officer or agent to execute it.[97]

a levy entered thereon, it was not signed by any one. It was held that it was not error in the judge to refuse to let the fieri facias be read in evidence, without some proof that the entry was made by an officer authorized to levy such fieri facias, although there was a recital in the sheriff's deed that he had made such levy. Jones *v.* Easley, 53 Ga. 454.

Estoppel to deny sheriff's authority to sell. — When a sheriff's deed is offered by plaintiff to show the title under which defendant holds, plaintiff is not obliged to show the judgment and execution under which the deed was given, as he would have been if he had offered it in the line of his own title because defendant is estopped to deny the authority of the sheriff to sell, as he has entered under the sheriff's deed. Morehouse *v.* Cotheal, 22 N. J. L. 521.

Proof of collateral matter.—A sheriff's deed is admissible in evidence, without proof of his authority to sell, by showing judgment and execution, where it is offered to prove a collateral matter (Bolles *v.* Beach, 22 N. J. L. 680, 53 Am. Dec. 263), as for instance where the object is merely to show color of title (Doe *v.* Roe, 32 Ga. 448; Sutton *v.* McLoud, 26 Ga. 638; Burkhalter *v.* Edwards, 16 Ga. 593, 60 Am. Dec. 744).

Effect of long possession under deed.— A sheriff's deed under which possession has been held for more than twenty years is admissible, it is held, without producing the record of the pleadings, verdict, and judgment. Burke *v.* Ryan, 1 Dall. (Pa.) 94, 1 L. ed. 51.

Sheriff's deed amounting to judicial act.— In Gooch *r.* Scheidler, 20 Tex. 443, it was held that a deed made by a sheriff before the Revolution and executed before the judge upon whose judgment an execution issued with his sanction and authority is a judicial act, and hence presumed to be correct, and is admissible, although the record of the judgment is not produced.

93. Peterson *v.* Weissbein, 75 Cal. 174, 16 Pac. 769.

Official capacity presumed.— Where a constable signs a constable's deed as such, his signature is *prima facie* evidence of his official capacity, and the deed is rightly admitted in evidence in the absence of proof to the contrary. Cannon *v.* Cannon, 66 Tex. 682, 3 S. W. 36.

94. Drayton *r.* Marshall, 1 Mill (S. C.) 184; Cales *v.* Miller, 8 Gratt. (Va.) 6; McDodrill *v.* Pardee, etc., Lumber Co., 40 W. Va. 564, 21 S. E. 878; Waggoner *r.* Wolf, 28 W. Va. 820, 1 S. E. 25. See also Benningfield *v.* Reed, 8 B. Mon. (Ky.) 102.

Deed introduced to show claim by adverse party.— A deed made under a decree in chancery may be introduced without an exemplification of the decree, where the only purpose is to show that the other party claims under it, and therefore cannot deny the grantor's title. Nixon *v.* Porter, 34 Miss. 697, 69 Am. Dec. 408.

95. **A tax deed** unaccompanied by any proof of the proceedings on which it is founded, or of the prerequisites of the law authorizing the sale, has been held inadmissible.

District of Columbia.— See Beale *v.* Brown, 6 Mackey 574.

Georgia.— See Verdery *v.* Dotterer, 69 Ga. 194.

Illinois.— Anderson *v.* McCormick, 129 Ill. 308, 21 N. E. 803; Baily *v.* Doolittle, 24 Ill. 577; Dukes *v.* Rowley, 24 Ill. 210; Irving *v.* Brownell, 11 Ill. 402; Doe *v.* Bean, 6 Ill. 302.

Indiana.— Johnson *r.* Briscoe, 92 Ind. 367.

Michigan.— Farmers', etc., Bank *r.* Bronson, 14 Mich. 361; Ives *v.* Kimball, 1 Mich. 308.

Ohio.— Carlisle *v.* Longworth, 5 Ohio 368.

Virginia.— Reusens *r.* Lawson, 91 Va. 226, 21 S. E. 347. *Compare* Bowman *v.* Cockrill, 6 Kan. 311.

See 20 Cent. Dig. tit. "Evidence," § 1538.

Deed introduced for collateral purpose.— In McDermott *v.* Hoffman, 70 Pa. St. 31, it was held that in ejectment treasurer's deeds for lands in the same block with that in dispute were admissible to show location, without being accompanied by evidence of an assessment and valid sale for taxes, as they were not offered to show title.

96. Irby *v.* Gardner, 56 Ga. 643; Clarke *v.* Trawick, 56 Ga. 359; Boatright *r.* Porter, 32 Ga. 130.

97. *California.*— See Gashwiler *r.* Willis, 33 Cal. 11, 91 Am. Dec. 607.

Georgia.—Almand *r.* Equitable Mortg. Co., 113 Ga. 983, 39 S. E. 421.

Illinois.— Springer *v.* Bigford, 160 Ill. 495, 43 N. E. 751 [*affirming* 55 Ill. App. 198].

Iowa.— Blackshire *v.* Iowa Homestead Co., 39 Iowa 624. See also Middleton Sav. Bank *r.* Dubuque, 19 Iowa 467.

Kansas.— National Bank of Commerce *v.* Atkinson, 8 Kan. App. 30, 54 Pac. 8.

Montana.— Tague *r.* John Caplice Co., 28 Mont. 51, 72 Pac. 297.

North Carolina.— See Shaffer *v.* Hahn, 111 N. C. 1, 15 S. E. 1033.

Compare Quackenboss *r.* Globe, etc., F. Ins. Co., 77 N. Y. App. Div. 168, 78 N. Y. Suppl. 1019.

(III) *Necessity and Effect of Acknowledgment and Registration.* Questions as to the necessity of acknowledgment[98] and recording or registration[99] to render a deed or other writing admissible in evidence without proof of execution, the effect of defective acknowledgments,[1] and of valid acknowledgments in dispensing with other proof of execution,[2] is treated elsewhere in this work.

(IV) *Necessity of Probate of Wills.* Under statute in various jurisdictions it is the general rule that before a will can be admitted in evidence in support of the title to property therein bequeathed or devised it must be shown to have been regularly probated.[3]

(V) *Documents Produced on Notice.* A paper produced on notice by the adverse party must be proved by him who offers it in like manner as if he had himself produced it, unless the party producing it be a party to the instrument, or claim a beneficial interest under it.[4] But production of a paper pursuant to notice by the opposite party dispenses with the necessity of proof by the party calling for its production, if the party producing it, or both parties, claim any benefit thereunder.[5]

b. Mode of Proof — (I) *Attested Instruments* — (A) *In General.* In the absence of statutory provision to the contrary,[6] the execution of an attested instrument must be proved by the subscribing witnesses, if they or any one of them can be had and are competent to be examined.[7] This rule applies both to

See 20 Cent. Dig. tit "Evidence," § 1566.

Where a lease running to a city is executed by the proper officers under the city's seal, and is accompanied by the formal affidavit required by the recording act, it is presumptive evidence of its own validity. Holder *v.* Yonkers, 25 Misc. (N. Y.) 250, 55 N. Y. Suppl. 254.

Proof of seal.— In Charleston *v.* Moorhead, 2 Rich. (S. C.) 430, it was held that the usual practice is to prove the identity of a corporate seal by a witness acquainted with its impression.

98. See Acknowledgments, 1 Cyc. 519 *et seq.*

99. See Acknowledgments, 1 Cyc. 538.

1. See Acknowledgments, 1 Cyc. 530 *et seq.*

2. See Acknowledgments, 1 Cyc. 536.

3. See, generally, Wills.

4. *Delaware.*— Taylor *v.* Jackson, 5 Houst. 224.

New York.—Jackson *v.* Kingsley, 17 Johns. 158. See also Kenny *v.* Clarkson, 1 Johns. 385, 3 Am. Dec. 336.

Pennsylvania.— See Strawn *v.* Park, 1 Phila. 104.

United States.— Hylton *v.* Brown, 12 Fed. Cas. No. 6,982, 1 Wash. 343; Rhoades *v.* Selin, 20 Fed. Cas. No. 11,740, 4 Wash. 715.

England.— Pearce *v.* Hooper, 3 Taunt. 60; Gordon *v.* Secretan, 8 East 548. *Compare* Rex *v.* Middlezoy, 2 T. R. 41.

Compare Hobby *v.* Alford, 73 Ga. 791; Whaley *v.* State, 11 Ga. 123.

See 20 Cent. Dig. tit. "Evidence," § 1574.

5. *Alabama.*— Woodstock Iron Co. *v.* Reed, 84 Ala. 493, 4 So. 369; Ward *v.* Reynolds, 32 Ala. 384.

Florida.— Williams *v.* Keyser, 11 Fla. 234, 89 Am. Dec. 243.

Georgia.—Campbell *v.* Roberts, 66 Ga. 733; Herring *v.* Rogers, 30 Ga. 615; Rogers *v.* Hoskins, 15 Ga. 270; Beverly *v.* Burke, 9 Ga. 440, 54 Am. Dec. 351. *Compare* McGee *v.* Guthry, 32 Ga. 307, where it was held that this rule does not authorize a party to call for the production of, and to put in evidence, a paper that has of itself no connection with or relevancy to the issue, for the sole purpose of laying a foundation to get in evidence, without proof of execution, another paper that is pertinent to the issue, and the substance of which is recited in the irrelevant paper before mentioned.

Massachusetts.— McGregor *v.* Wait, 10 Gray 72, 69 Am. Dec. 305.

New York.— White *v.* Miller, 7 Hun 427; Betts *v.* Badger, 12 Johns. 223, 7 Am. Dec. 309.

South Carolina.— Izlar *v.* Haitley, 24 S. C. 382.

England.— Roe *v.* Wilkins, 4 A. & E. 86, 31 E. C. L. 57; Bell *v.* Chaytor, 1 C. & K. 162, 47 E. C. L. 162; Carr *v.* Burdiss, 1 C. M. & R. 782, 5 Tyrw. 309. See also Gordon *v.* Secretan, 8 East 548; Scott *v.* Waithman, 3 Stark. 168; Pearce *v.* Hooper, 3 Taunt. 60.

See 20 Cent. Dig. tit. "Evidence," § 1574.

Character of interest.— The rule only applies where the party producing the deed claims an interest under it in the cause. Reardon *v.* Minter, 12 L. J. C. P. 139, 5 M. & G. 204, 44 E. C. L. 115. So it has been intimated that the interest must be of an abiding or permanent nature. Collins *v.* Bayntun, 1 Q. B. 117, 5 Jur. 530, 10 L. J. Q. B. 98, 4 P. & D. 544, 41 E. C. L. 463.

6. For statutory modifications of the common-law rule see Pannell *v.* Williams, 8 Gill & J. (Md.) 511; McKay *v.* Lasher, 121 N. Y. 477, 24 N. E. 711 [*affirming* 50 Hun 383, 3 N. Y. Suppl. 352]; Garvey *v.* Owens, 9 N. Y. St. 227; Marigault *v.* Deas, 1 McCord (S. C.) 391.

7. *Alabama.*— Collins *v.* Sherbet, 114 Ala. 480, 21 So. 997; Houston *v.* State, 114 Ala. 15, 21 So. 813; Martin *v.* Mayer, 112 Ala. 620, 20

instruments under seal[8] and to instruments not under seal.[9] Thus it applies to deeds of land,[10] bills of sale,[11] submission and award,[12] applications for insurance,[13]

So. 963; Richmond, etc., R. Co. *v.* Jones, 92 Ala. 218, 9 So. 276; Jenks *v.* Terrell, 73 Ala. 238.

Arkansas.— Brock *v.* Saxton, 5 Ark. 708.

California.— Stevens *v.* Irwin, 12 Cal. 306.

Connecticut.— Kelsey *v.* Hanmer, 18 Conn. 311.

Georgia.— Howard *v.* Russell, 104 Ga. 230, 30 S. E. 802; Hudson *v.* Puett, 86 Ga. 341, 12 S. E. 640; Barron *v.* Walker, 80 Ga. 121, 7 S. E. 272; Barber *v.* Terrell, 54 Ga. 146.

Indiana.— See Pence *v.* Makepeace, 65 Ind. 345.

Kentucky.— Goodall *v.* Goodall, 5 J. J. Marsh. 596.

Maryland.— Handy *v.* State, 7 Harr. & J. 42.

Missouri.— Glasgow *v.* Ridgeley, 11 Mo. 34.

Nevada.— Kalmes *v.* Gerrish, 7 Nev. 31.

New Hampshire.— Foye *v.* Leighton, 24 N. H. 29.

New Jersey.— Corlies *v.* Vannote, 16 N. J. L. 324; Williams *v.* Davis, 2 N. J. L. 277.

New York.—Kayser *v.* Sichel, 34 Barb. 84; Jones *v.* Underwood, 28 Barb. 481; Story *v.* Lovett, 1 E. D. Smith 153. See also Hall *v.* Beston, 165 N. Y. 632, 59 N. E. 1123 [*affirming* 26 N. Y. App. Div. 105, 49 N. Y. Suppl. 811].

North Carolina.— Johnston *v.* Knight, 5 N. C. 293.

Ohio.— Warner *v.* Baltimore, etc., R. Co., 31 Ohio St. 265.

Oregon.— Hannan *v.* Greenfield, 36 Oreg. 97, 58 Pac. 888.

Pennsylvania.— Truby *v.* Byers, 6 Pa. St. 347; Peter *v.* Condron, 2 Serg. & R. 80; January *v.* Goodman, 1 Dall. 208, 1 L. ed. 103. See also Charles *v.* Scott, 1 Serg. & R. 294.

Rhode Island.— Kinney *v.* Flynn, 2 R. I. 319.

South Carolina.— Trammell *v.* Roberts, 1 McMull. 305; Townsend *v.* Covington, 3 McCord 219.

Texas.— Lewis *v.* Bell, (Civ. App. 1897) 40 S. W. 747.

Vermont.— Harding *v.* Cragie, 8 Vt. 501.

Wisconsin.— Carrington *v.* Eastman, 1 Pinn. 650.

See 20 Cent. Dig. tit. "Evidence," § 1559 *et seq.*

Proof of deed by one witness sufficient.— Burnett *v.* Thompson, 35 N. C. 379.

For discussions as to reason of rule see Hollenback *v.* Fleming, 6 Hill (N. Y.) 303; Clark *v.* Sanderson, 3 Binn. (Pa.) 192, 5 Am. Dec. 398; Jones *v.* Lovell, 13 Fed. Cas. No. 7,478, 1 Cranch C. C. 183; Call *v.* Dunning, 4 East 53; Manners *v.* Postan, 4 Esp. 239; Cussons *v.* Skinner, 12 L. J. Exch. 347, 11 M. & W. 168.

Effect of necessity of attestation.— This rule is applied at common law whether the instrument is required by law to be attested (Brynjolfson *v.* Northwestern Elevator Co., 6 N. D. 450, 71 N. W. 555, 66 Am. St. Rep. 612), or not (Giannone *v.* Fleetwood, 93 Ga. 491, 21 S. E. 76).

Testimony of stranger inadmissible.— Patterson *v.* Kicker, 72 Ala. 406; Sample *v.* Irwin, 45 Tex. 567.

Where one of two witnesses is disqualified by interest.—Where one of the two witnesses to an instrument is a defendant, he is not competent for the co-defendant, where the absence of the other witness is not accounted for. Umphreys *v.* Hendricks, 28 Ga. 157.

Rule applied to instrument executed by person unable to write.— Hess *v.* Griggs, 43 Mich. 397, 5 N. W. 427. See also Eichelberger *v.* Sifford, 27 Md. 320.

Instrument offered to prove forgery.— It has been held that no writing can be received in evidence, either as genuine or forged, until proved genuine or forged; and, if there be a subscribing witness, he must be called, whether the object be to prove the writing genuine or spurious. Stamper *v.* Griffin, 20 Ga. 312, 65 Am. Dec. 628. *Compare* State *v.* Wier, 12 N. C. 363, where it was held that on trial for larceny, where a bill of sale is introduced as a forgery, for the purpose of supporting the credit of a witness, the subscribing witness need not be called.

8. Lewis *v.* Ringo, 3 A. K. Marsh. (Ky.) 247; Henry *v.* Bishop, 2 Wend. (N. Y.) 575; International, etc., R. Co. *v.* McRae, 82 Tex. 614, 18 S. W. 672, 27 Am. St. Rep. 926; Clarke *v.* Courtney, 5 Pet. (U. S.) 319, 8 L. ed. 140.

9. Bennet *v.* Robinson, 3 Stew. & P. (Ala.) 227; Townsend *v.* Covington, 3 McCord (S. C.) 219.

10. *Alabama.*— Allred *v.* Elliott, 71 Ala. 224.

Georgia.— Ellis *v.* Doe, 10 Ga. 253.

Indiana.— Sampson *v.* Grimes, 7 Blackf. 176.

Maine.— Woodman *v.* Segar, 25 Me. 90.

Mississippi.— Chaplain *v.* Briscoe, 11 Sm. & M. 372.

South Carolina.— Spencer *v.* Bedford, 4 Strobh. 96.

Time of executing deed.— The time of executing a deed can only be proved by the testimony of the subscribing witnesses, unless their absence is satisfactorily accounted for. McConnell *v.* Brown, Litt. Sel. Cas. (Ky.) 459.

The fact of an erasure in a deed, although there be a subscribing witness to it, may, it is held, be proved by any other person. Penny *v.* Corwithe, 18 Johns. (N. Y.) 499.

The execution of a sheriff's deed may, it has been held, be proved by a subscribing witness when it is offered in evidence. Hutchinson *v.* Kelly, 10 Ark. 178.

11. Brown *v.* Hicks, 1 Ark. 232; Horton *v.* Hagler, 8 N. C. 48.

12. Tyler *v.* Stephens, 7 Ga. 278.

13. Read *v.* Metropolitan L. Ins. Co., 17 Misc. (N. Y.) 307, 40 N. Y. Suppl. 374.

articles of copartnership or dissolution,[14] contracts for the sale of land,[15] and promissory notes.[16] Proof of the handwriting of a witness who can be produced,[17] or of a witness who cannot be produced, if failure to produce another witness is not accounted for,[18] is insufficient. Nor can the necessity of calling the subscribing witness be dispensed with by the admission of the party executing the instrument,[19] by the testimony of the parties to the instrument,[20] or, it

14. Tams *v.* Hitner, 9 Pa. St. 441.

15. Townsend *v.* Covington, 3 McCord (S. C.) 219.

16. Labarthe *v.* Gerbeau, 1 Mart. N. S. (La.) 486.

Addition of signatures subsequent to attestation.— To prove that signatures were added to a note subsequent to that of the subscribing witness, it is not necessary first to call that witness. Harding *v.* Cragie, 8 Vt. 501.

17. *Alabama.*— Allred *v.* Elliott, 71 Ala. 224.

California.— Powell *v.* Hendricks, 3 Cal. 427.

Georgia.— Ellis *v.* Doe, 10 Ga. 253.

Indiana.— Sampson *v.* Grimes, 7 Blackf. 176.

Maine.— Woodman *v.* Segar, 25 Me. 90.

Mississippi.— Chaplain *v.* Briscoe, 11 Sm. & M. 372.

New York.— Jackson *v.* Cody, 9 Cow. 140; Jackson *v.* Gager, 5 Cow. 383.

North Carolina.—Horton *v.* Hagler, 8 N. C. 48.

South Carolina.— Spencer *v.* Bedford, 4 Strobh. 96.

United States.— Spring *v.* South Carolina Ins. Co., 8 Wheat. 268, 5 L. ed. 614.

18. Chambers *v.* Handley, 3 J. J. Marsh. (Ky.) 98; Whittemore *v.* Brooks, 1 Me. 57; Gelott *v.* Goodspeed, 8 Cush. (Mass.) 411; Tams *v.* Hitner, 9 Pa. St. 441; Davison *v.* Bloomer, 1 Dall. (Pa.) 123, 1 L. ed. 64. *Compare* Barnwall *v.* Murrell, 108 Ala. 366, 18 So. 831; Snider *v.* Burks, 84 Ala. 53, 4 So. 225.

19. *Georgia.*— Ellis *v.* Doe, 10 Ga. 253.

Kentucky.— Cartmell *v.* Walton, 4 Bibb 488.

New Jersey.— Hogland *v.* Sebring, 4 N. J. L. 105.

Ohio.— Zerby *v.* Wilson, 3 Ohio 42, 17 Am. Dec. 577.

Rhode Island.— See Kinney *v.* Flynn, 2 R. I. 319.

United States.— Smith *v.* Carolin, 22 Fed. Cas. No. 13,020, 1 Cranch C. C. 99.

England.— See Abbot *v.* Plumb, 1 Dougl. 5; Rex *v.* Harringworth, 4 M. & S. 350.

Compare Hodges *v.* Eastman, 12 Vt. 358.

See 20 Cent. Dig. tit. "Evidence," § 1592.

In New York the rule of the text has been applied to sealed instruments. Fox *v.* Reil, 3 Johns. 477. See also Henry *v.* Bishop, 2 Wend. 575; Shaver *v.* Ehle, 16 Johns. 201; Rex *v.* Harringworth, 4 M. & S. 350. In Hall *v.* Phelps, 2 Johns. 451, the rule was relaxed in respect to negotiable paper. See also Pentz *v.* Winterbottom, 5 Den. 51. And in Gilberton *v.* Ginochio, 1 Hilt. 218, it was held that the execution of an instrument not under seal may be proved by the admission of a party signing it, although attested by a subscribing witness.

Admissions in pleadings.— This rule has been applied, although the admission was made in an answer in chancery (Roberts *v.* Tennell, 3 T. B. Mon. (Ky.) 247), as for instance in an answer to a bill of discovery (Call *v.* Dunning, 4 East 53). But in Smith *v.* Gale, 144 U. S. 509, 12 S. Ct. 674, 36 L. ed. 521 [*affirming* 4 Dak. 182, 29 N. W. 661], a different rule seems to have been applied in the case of an admission in a pleading in the same cause in which the instrument was sought to be introduced.

Agreement to admit instrument.— Where a party does not simply acknowledge the execution of an instrument, but agrees that the adverse party may introduce the instrument and may act upon it, as if the subscribing witness had been produced, evidence of the witness may be dispensed with. Blake *v.* Sawin, 10 Allen (Mass.) 340; Jones *v.* Henry, 84 N. C. 320, 37 Am. Rep. 624; Laing *v.* Raine, 2 B. & P. 85. But where defendants permit a deed to be read in evidence on two trials without proof of execution, this does not give plaintiffs permission to read it afterward, on another trial, without such proof. Baldridge *v.* Walton, 1 Mo. 520.

Execution proved by admission of counsel in open court.— Grady *v.* Sharron, 6 Yerg. (Tenn.) 320.

Admissions as secondary evidence.— Where the subscribing witnesses have been called, and failed to show that a deed was executed by a wife, whereby she relinquished her right of dower, the admissions of the wife, made during her widowhood, of her having executed the deed have been held admissible as the next best evidence. Frost *v.* Deering, 21 Me. 156. See also Harrington *v.* Gable, 81 Pa. St. 406.

20. *Alabama.*— Petree *v.* Wilson, 104 Ala. 157, 16 So. 143; Russell *v.* Walker, 73 Ala. 315. But for a different rule under statute in Alabama see Hayes *v.* Banks, 132 Ala. 354, 31 So. 464; Stamphill *v.* Bullen, 121 Ala. 250, 25 So. 928.

Georgia.— Fletcher *v.* Perry, 97 Ga. 368, 23 S. E. 824.

Nevada.— Kalmes *v.* Gerrish, 7 Nev. 31.

New York.— Kayser *v.* Sichel, 34 Barb. 84; King *v.* Smith, 21 Barb. 158; Van Dyne *v.* Thayre, 19 Wend. 162; Willoughby *v.* Carleton, 9 Johns. 136.

Ohio.—Gaines *v.* Scott, 7 Ohio Cir. Ct. 447, 4 Ohio Cir. Dec. 673, 30 Cinc. L. Bul. 242.

South Carolina.— Barry *v.* Wilbourne, 2 Bailey 91. See also Barton *v.* Keith, 2 Hill 537.

Compare Forsythe *v.* Hardin, 62 Ill. 206;

has been held, by the testimony of their agents.[21] Nor according to the prevailing view is the rule altered by statutes allowing parties to a suit to be witnesses.[22]

(B) *Who Is a Subscribing Witness.* A person cannot be considered a subscribing witness if he does not affix his signature to the instrument by the request or with the consent of the party or parties executing it,[23] or if his name is subscribed without his own knowledge and consent.[24] It is not necessary, however, that the subscribing witness should see the instrument executed if the party or parties acknowledge the instrument and request the witness to sign.[25]

(C) *Certainty and Sufficiency of Testimony.* Testimony of an attesting witness to the effect that he was present and saw the instrument signed and delivered and attested the execution is in general sufficient to entitle the instrument to admission as evidence.[26] So it has been held sufficient where the witness testified that the instrument was signed in his presence "to the best of his recollection."[27] Nor is it essential to admit an instrument in evidence that the subscribing witness should remember its execution by the parties; it is sufficient if he states that his signature is genuine and that it would not have been placed upon the instrument unless he had been called to witness it and unless the execution either took place in his presence or was acknowledged to him.[28]

Smith *v.* Morrow, 7 J. J. Marsh. (Ky.) 442, where it was held that where a grantor is ready and willing to be a witness to prove a deed, its execution need not be proved by the subscribing witness.

See 20 Cent. Dig. tit. "Evidence," § 1581 *et seq.*

Waiver of proof by subscribing witness.— In Rayburn *v.* Mason Lumber Co., 57 Mich. 273, 23 N. W. 811, it was held that, where a party calls his adversary or permits him to be called to prove an instrument referred to, it need not also be proved by the subscribing witness.

In Texas it is held that the execution of a deed may be proved by the grantor who is not interested without accounting for the non-production of the attesting witnesses (White *v.* Holliday, 20 Tex. 679), but not by the grantee (Wiggins *v.* Fleishel, 50 Tex. 57). See also Texas Land Co. *v.* Williams, 51 Tex. 51.

21. McMurtry *v.* Frank, 4 T. B. Mon. (Ky.) 39; Barry *v.* Ryan, 4 Gray (Mass.) 523. *Compare* Falls *v.* Gaither, 9 Port. (Ala.) 605; Jackson *v.* Britton, 4 Wend. (N. Y.) 507.

22. Brigham *v.* Palmer, 3 Allen (Mass.) 450; Weigand *v.* Sichel, 4 Abb. Dec. (N. Y.) 592, 3 Keyes (N. Y.) 120, 33 How. Pr. (N. Y.) 174; Hodnett *v.* Smith, 2 Sweeny (N. Y.) 401, 41 How. Pr. (N. Y.) 190, 10 Abb. Pr. N. S. (N. Y.) 86; Whyman *v.* Garth, 8 Exch. 803. *Compare* Bowling *v.* Hax, 55 Mo. 446; Garrett *v.* Hanshue, 53 Ohio St. 482, 42 N. E. 256, 35 L. R. A. 321.

23. Sherwood *v.* Pratt, 63 Barb. (N. Y.) 137; Henry *v.* Bishop, 2 Wend. (N. Y.) 575; Schomaker *v.* Dean, 201 Pa. St. 439, 50 Atl. 923; Huston *v.* Ticknor, 99 Pa. St. 231; Hays *v.* Hays, 6 Pa. St. 368.

Subscribing necessary.— *In re* Clute, 37 Misc. (N. Y.) 586, 75 N. Y. Suppl. 1059.

Express request to sign unnecessary.— In proving the execution of an instrument, an express request by the maker to a subscribing witness to sign need not be shown, it being sufficient if he sign with the maker's assent. Smith *v.* Soper, 12 Colo. App. 264, 55 Pac. 195.

Witness of immature age.— An instrument may be read, although the party who executed it be long since dead, and the witness swearing positively to his signature was young at the time and read writing with difficulty. Wyche *v.* Wyche, 10 Mart. (La.) 408.

24. Handy *v.* State, 7 Harr. & J. (Md.) 42.

25. Hale *v.* Stone, 14 Ala. 803; Pequawkett Bridge *v.* Mathes, 7 N. H. 230, 26 Am. Dec. 737; Munns *v.* De Nemours, 17 Fed. Cas. No. 9,926, 3 Wash. 31.

A writing, although signed by mark, may be attested by one who did not see the parties sign it; they appearing before him, acknowledging the signature as theirs, and requesting him to attest. Elston *v.* Roop, 133 Ala. 331, 32 So. 129.

26. Hale *v.* Stone, 14 Ala. 803; Dawson *v.* Callaway, 18 Ga. 573.

Testimony held insufficient.— The testimony of an attesting witness to an instrument that the maker thereof took her seat at the table; that he did not see her write her name; that he did not know whether at the time of signing his name as witness she had signed her name; that he could not say that it was her handwriting; and that the instrument was not, to his knowledge, ever read to or by her, is not sufficient proof of execution. Edelen *v.* Gough, 5 Gill (Md.) 103.

Proof by attesting witness called for another purpose.— No exception lies to the admission of a written agreement in evidence for plaintiff after its execution had been proved by cross-examination of an attesting witness, who had been called by defendant for other purposes. Carruth *v.* Bayley, 14 Allen (Mass.) 532.

27. McGarrity *v.* Byington, 12 Cal. 426.

28. *Alabama.*— Hale *v.* Stone, 14 Ala. 803; Graham *v.* Lockhart, 8 Ala. 9.

(D) *Number of Witnesses to Be Produced.* Ordinarily it is sufficient to call one of several subscribing witnesses to an instrument to prove its execution and to authorize the reading of it to the jury,[29] unless, it has been held, the judge in his discretion requires the production of the others.[30] But it has been held that the single witness must be able to prove all the facts essential to the legal execution of the instrument; proof of his own signature and the signatures of the other witnesses not being sufficient.[31]

(E) *Instruments Incidentally in Issue.* Where a writing is not directly but only incidentally in issue, its execution may be proved by any competent testimony without calling the subscribing witness.[32]

(F) *Secondary Evidence of Execution* — (1) GROUNDS OF ADMISSIBILITY. If the subscribing witness or witnesses to a written instrument cannot be produced for the purpose of proving its execution,[33] as for instance if they are dead[34] or

Kentucky.— Allen *v.* Trimble, 4 Bibb 21, 7 Am. Dec. 726.

Maine.— Wheeler *v.* Hatch, 12 Me. 389.

Maryland.— Miller *v.* Honey, 4 Harr. & J. 241.

Massachusetts.— Robinson *v.* Brennan, 115 Mass. 582; Crittenden *v.* Rogers, 8 Gray 452.

Nebraska.— Cheston *v.* Wilson, 2 Nebr. (Unoff.) 674, 89 N. W. 764.

New Jersey.— Gaston *v.* Mason, 1 N. J. L. 10.

New York.— Hall *v.* Luther, 13 Wend. 491.

South Carolina.— Collins *v.* Lemasters, 2 Bailey 141.

See 20 Cent. Dig. tit. "Evidence," § 1588.

29. *Louisiana.*— See Collins *v.* McElroy, 15 La. Ann. 639.

Massachusetts.— White *v.* Wood, 8 Cush. 413; Gelott *v.* Goodspeed, 8 Cush. 411.

Pennsylvania.— McAdams *v.* Stilwell, 13 Pa. St. 90.

Texas.— Allen *v.* Hoxey, 37 Tex. 320. See also Tevis *v.* Collier, 84 Tex. 638, 19 S. W. 801.

United States.— Hemphill *v.* Dixon, 11 Fed. Cas. No. 6,346*a*, Hempst. 235.

See 20 Cent. Dig. tit. "Evidence," § 1589.

This rule has been applied to deeds (O'Sullivan *v.* Overton, 56 Conn. 102, 14 Atl. 300; Jackson *v.* Sheldon, 22 Me. 569; White *v.* Wood, 8 Cush. (Mass.) 413; Russell *v.* Coffin, 8 Pick. (Mass.) 143; Melcher *v.* Flanders, 40 N. H. 139. See also Little *v.* White, 29 S. C. 170, 7 S. E. 72. *Compare* Vickroy *v.* McKnight, 4 Binn. (Pa.) 204), to wills (Jackson *v.* Le Grange, 19 Johns. (N. Y.) 386, 10 Am. Dec. 237; Howell *v.* House, 2 Mill (S. C.) 80. See also Jackson *v.* Vandyke, 1 N. J. L. 28, where it was held that proof by two of three subscribing witnesses was sufficient. See, generally, WILLS), and to bills of sale (Cooper *v.* O'Brien, 98 Ga. 773, 26 S. E. 470).

30. Burke *v.* Miller, 7 Cush. (Mass.) 547.

31. Jackson *v.* Le Grange, 19 Johns. (N. Y.) 386, 10 Am. Dec. 237; Martin *v.* Bowie, 37 S. C. 102, 15 S. E. 736; Russell *v.* Tunno, 11 Rich. (S. C.) 303.

32. *Alabama.*— Steiner *v.* Tranum, 98 Ala. 315, 13 So. 365.

Colorado.— Smith *v.* Soper, 12 Colo. App. 264, 55 Pac. 195.

Georgia.— National Computing Scale Co. *v.* Eaves, 116 Ga. 511, 42 S. E. 783; Summerour *v.* Felker, 102 Ga. 254, 29 S. E. 448. See also Coody *v.* Gress Lumber Co., 82 Ga. 793, 10 S. E. 218; Barron *v.* Walker, 80 Ga. 121, 7 S. E. 272.

Kentucky.— Brashear *v.* Burton, 4 Bibb 442. *Compare* Roberts *v.* Tennell, 3 T. B. Mon. 247; Cartmell *v.* Walton, 4 Bibb 488.

Maine.—Ayers *v.* Hewett, 19 Me. 281. *Compare* Pullen *v.* Hutchinson, 25 Me. 249.

Massachusetts.— See Skinner *v.* Brigham, 126 Mass. 132; Spooner *v.* Holmes, 102 Mass. 503, 3 Am. Rep. 491.

Missouri.— Heege *v.* Fruin, 18 Mo. App. 139.

New Hampshire.— See Rand *v.* Dodge, 17 N. H. 343.

North Carolina.— Leavering *v.* Smith, 115 N. C. 385, 20 S. E. 446.

Pennsylvania.— Kitchen *v.* Smith, 101 Pa. St. 452; Wright *v.* Wood, 23 Pa. St. 120; Heckert *v.* Haine, 6 Binn. 16.

Texas.— See Bilger *v.* Buchanan, (Sup. 1887) 6 S. W. 408.

Vermont.— Curtis *v.* Belknap, 21 Vt. 433; Chandler *v.* Caswell, 17 Vt. 580.

United States.— Citizens' Bank *v.* Nantucket Steamboat Co., 5 Fed. Cas. No. 2,730, 2 Story 16.

Compare Jackson *v.* Sackett, 7 Wend. (N. Y.) 94.

See 20 Cent. Dig. tit. "Evidence," § 1580.

33. Skinner *v.* Fulton, 39 Ill. 484; Job *v.* Tebbetts, 10 Ill. 376; Jewell *v.* Chamberlain, 41 Nebr. 254, 59 N. W. 784; Taylor *v.* Meekly, 4 Yeates (Pa.) 79.

34. *Alabama.*— Snider *v.* Burks, 84 Ala. 53, 4 So. 225; Mardis *v.* Shackleford, 4 Ala. 493.

Georgia.— McVicker *v.* Conkle, 96 Ga. 584, 24 S. E. 23; Howard *v.* Snelling, 32 Ga. 195.

Illinois.— Job *v.* Tebbetts, 10 Ill. 376.

Indiana.—Jones *v.* Cooprider, 1 Blackf. 47.

Kentucky.— Yocum *v.* Barnes, 8 B. Mon. 496; Gibbs *v.* Cook, 4 Bibb 535.

Louisiana.— McGowan *v.* Laughlan, 12 La. Ann. 242; Grand Gulf R., etc., Co. *v.* Barnes, 12 Rob. 127.

Missouri.—Gallagher *v.* Delargy, 57 Mo. 29; Waldo *v.* Russell, 5 Mo. 387.

New Jersey.— Glover *v.* Armstrong, 15 N. J. L. 186; Van Doren *v.* Van Doren, 3 N. J. L. 697, 4 Am. Dec. 408; Servis *v.* Nelson, 14 N. J. Eq. 94.

where they are unknown[35] or reside outside of the state or country or out of reach of the process of the court[36] or cannot be found after reasonable

New York.— Borst *v.* Empie, 5 N. Y. 33; Mott *v.* Doughty, 1 Johns. Cas. 230.

North Carolina.—Angier *v.* Howard, 94 N. C. 27; Jones *v.* Blount, 2 N. C. 238.

South Carolina.—Martin *v.* Bowie, 37 S. C. 102, 15 S. E. 736.

Texas.— Texas Land Co. *v.* Williams, 51 Tex. 51; Mapes *v.* Leal, 27 Tex. 345; Timmony *v.* Burns, (Civ. App. 1897) 42 S. W. 133; Cairreil *v.* Higgs, 1 Tex. Unrep. Cas. 56.

United States.— Murdock *v.* Hunter, 17 Fed. Cas. No. 9,941, 1 Brock. 135.

See 20 Cent. Dig. tit. "Evidence," § 1594 *et seq.*

The affidavit of a party to the cause may be received to prove the death of one subscribing witness to a bill of sale, and that the other cannot be found, so as to let in other evidence of the execution of the writing. McDowell *v.* Hall, 2 Bibb (Ky.) 610. See also Waters *v.* Spafford, 58 Tex. 115.

Rumors inadmissible.— Proof of the handwriting of a subscribing witness to an instrument is not admissible on the ground that he is in the army or dead, without better proof of the fact than flying reports. Hart *v.* Coram, 3 Bibb (Ky.) 26. See also Delony *v.* Delony, 24 Ark. 7.

Absence tending to show death.— Where it was testified that a subscribing witness to an instrument enlisted on board a privateer and had not been heard of for four years, this was held sufficient to let in secondary evidence of his handwriting, no reasonable ground being left to doubt of the witness' death. Spring *v.* South Carolina Ins. Co., 8 Wheat. (U. S.) 268, 5 L. ed. 614. To the same effect see Nicks *v.* Rector, 4 Ark. 251. See also Gaither *v.* Martin, 3 Md. 146; Jackson *v.* Chamberlain, 8 Wend. (N. Y.) 620.

35. When the subscribing witnesses to a lost deed are unknown other evidence may be resorted to for the purpose of establishing the existence of the lost deed. Turner *v.* Cates, 90 Ga. 731, 16 S. E. 971; Congdon *v.* Morgan, 14 S. C. 587; Keeling *v.* Ball, Peake Add. Cas. 88. See also Williams *v.* Cowart, 27 Ga. 187.

36. *Alabama.*— Guice *v.* Thornton, 76 Ala. 466; Foote *v.* Cobb, 18 Ala. 585; Barringer *v.* Sneed, 3 Stew. 201, 20 Am. Dec. 74.

Georgia.— Harris *v.* Cannon, 6 Ga. 382.

Illinois.— Skinner *v.* Fulton, 39 Ill. 484; Mariner *v.* Saunders, 10 Ill. 113.

Indiana.— State *v.* Bodly, 7 Blackf. 355.

Kentucky.— Kemper *v.* Pryor, 1 J. J. Marsh. 598; McCain *v.* Gregg, 2 A. K. Marsh. 454; Gibbs *v.* Cook, 4 Bibb 535.

Louisiana.— Carpenter *v.* Featherstone, 15 La. Ann. 235; Grand Gulf, etc., R. Co. *v.* Barnes, 12 Rob. 127.

Maine.— Emery *v.* Twombly, 17 Me. 65.

Maryland.— Dorsey *v.* Smith, 7 Harr. & J. 345.

Massachusetts.— Smith Charities *v.* Connolly, 157 Mass. 272, 31 N. E. 1058.

Missouri.— Clardy *v.* Richardson, 24 Mo. 295; Little *v.* Chauvin, 1 Mo. 626.

Nebraska.— Buchanan *v.* Wise, 34 Nebr. 695, 52 N. W. 163.

New Hampshire.— Dunbar *v.* Marden, 13 N. H. 311.

New Jersey.— New Jersey Zinc, etc., Co. *v.* Lehigh Zinc., etc., Co., 59 N. J. L. 189, 35 Atl. 915; Glover *v.* Armstrong, 15 N. J. L. 186; Lorillard *v.* Van Houten, 10 N. J. L. 270; Van Doren *v.* Van Doren, 3 N. J. L. 697, 4 Am. Dec. 408.

New York.— Teall *v.* Van Wyck, 10 Barb. 376; People *v.* Rowland, 5 Barb. 449; Jackson *v.* Chamberlain, 8 Wend. 620.

North Carolina.— Edwards *v.* Sullivan, 30 N. C. 302; Irving *v.* Irving, 3 N. C. 27; Jones *v.* Brinkley, 2 N. C. 20.

Ohio.— Richards *v.* Skiff, 8 Ohio St. 586; Hutchins *v.* Wick, 4 Ohio Dec. (Reprint) 170, 1 Clev. L. Rep. 89.

Pennsylvania.—Clark *v.* Sanderson, 3 Binn. 192, 5 Am. Dec. 368.

South Carolina.— Swancey *v.* Parrish, 62 S. C. 240, 40 S. E. 554; Price *v.* McGee, 1 Brev. 373.

Tennessee.— Stump *v.* Hughes, 5 Hayw. 93 [*overruling* Shepherd *v.* Goss, 1 Overt. 487]. *Compare* Love *v.* Payton, 1 Overt. 255.

Texas.— Frazier *v.* Moore, 11 Tex. 755; Lapowski *v.* Taylor, 13 Tex. Civ. App. 624, 35 S. W. 934. See also Teal *v.* Sevier, 26 Tex. 516.

United States.— Hanrick *v.* Patrick, 119 U. S. 156, 7 S. C. 147, 30 L. ed. 396; Davies *v.* Davies, 7 Fed. Cas. No. 3,612, 2 Cranch C. C. 105; Jones *v.* Lovell, 13 Fed. Cas. No. 7,478, 1 Cranch C. C. 183. *Compare* Whann *v.* Hall, 29 Fed. Cas. No. 17,478, 2 Cranch C. C. 4.

England.— Adam *v.* Kers, 1 B. & P. 360; Prince *v.* Blackburn, 2 East 250.

See 20 Cent. Dig. tit. "Evidence," § 1594 *et seq.*

Witness out of jurisdiction on public duty. —Where the subscribing witness to a bill of sale was out of the jurisdiction, on public duty, as a member of congress, proof of his handwriting was admitted. Selby *v.* Clark, 11 N. C. 265.

Residence known and near.— It has been held that if the subscribing witness lives outside of the state, it is no ground for the admission of secondary evidence of execution that his place of residence is known. Dunbar *v.* Marden, 13 N. H. 311. So it is held that the fact that his residence is near to the place of trial is immaterial. Harris *v.* Cannon, 6 Ga. 382; Emery *v.* Twombly, 17 Me. 65. But in Rich *v.* Trimble, 2 Tyler (Vt.) 249, it was held that if the place of the witness' residence is known and he lives within a reasonable distance from the place of trial, although outside of the state, his deposition should be taken.

Absence from county held immaterial.— Baker *v.* Massengale, 83 Ga. 137, 10 S. E.

efforts,[37] secondary evidence of execution is admissible. And the same is true if after the time of subscribing the witness becomes incompetent because of his

347. *Compare* Baker *v.* Blount, 3 N. C. 404, where it was held that the handwriting of a subscribing witness may be proved, where the party desiring to prove it has done all he could to procure the witness' attendance, but the latter had removed out of the county to avoid an attachment issued to procure his presence. So in Cook *v.* Husted, 12 Johns. (N. Y.) 188, it was held that the declaration of plaintiff that the subscribing witnesses did reside in another county is sufficient evidence of the fact of their non-residence within the county in which the cause is tried to authorize the justice to admit other evidence of the execution of the deed. So a different rule is laid down under statute in Nebraska. Buchanan *v.* Wise, 34 Nebr. 695, 52 N. W. 163.

Temporary absence.—According to some of the cases, absence of the witness from the state or country or beyond the jurisdiction of the court, without any showing of a permanent residence elsewhere, is sufficient to lay the foundation for the introduction of secondary evidence. Jackson *v.* Feather River, etc., Water Co., 14 Cal. 18; McGarrity *v.* Byington, 12 Cal. 426; Harper *v.* Solomon, 1 Brev. (S. C.) 3; Oliphant *v.* Taggart, 1 Bay (S. C.) 255; Prince *v.* Blackburn, 2 East 250. See also Clark *v.* Sanderson, 3 Binn. (Pa.) 192, 5 Am. Dec. 368. But the general rule is that the mere temporary absence of the witness from the state or country will not justify the admission of secondary evidence (Gaither *v.* Martin, 3 Md. 146; *In re* Sacket, 1 Mass. 58; Harrel *v.* Ward, 2 Sneed (Tenn.) 610); and this whether the witness has been summoned (McCord *v.* Johnson, 4 Bibb (Ky.) 531; Creighton *v.* Johnson, Litt. Sel. Cas. (Ky.) 240) or not (Brown *v.* Hicks, 1 Ark. 232), and although his absence is caused by sickness (Gordon *v.* Payne, 3 N. C. 72).

Evidence of non-residence.— The fact of non-residence may like any other fact be established by any competent testimony. Dismukes *v.* Musgrove, 8 Mart. N. S. (La.) 375; Buchanan *v.* Wise, 34 Nebr. 695, 52 N. W. 163; People *v.* Rowland, 5 Barb. (N. Y.) 449; Clark *v.* Boyd, 2 Ohio 56; Harper *v.* Solomon, 1 Brev. (S. C.) 3. Proof by old residents of the town where a deed was executed, and who had resided there before and since the execution of the deed, that they never knew or heard of such persons in the state as the witnesses to the deed is *prima facie* sufficient to prove non-residence, and to let in secondary evidence of the genuineness of the signatures to the deed. Holman *v.* Norfolk Bank, 12 Ala. 369. Proof that a subscribing witness to a bond was residing out of the state when last heard from by one who was well acquainted with him is *prima facie* proof of his absence from the state, so as to render proof of his handwriting admissible. Gordon *v.* Miller, 1 Ind. 531. So proof that an attesting witness to a note, when last seen, was engaged in business out of the state, coupled with a return *non est inventus* on a subpœna by a constable of the city in which the attesting witness lived before going out of the state, is sufficient to let in secondary evidence of the genuineness of the signature. Troeder *v.* Hyams, 153 Mass. 536, 27 N. E. 775. But a sheriff's return is not the only evidence of a witness' non-residence and it is not necessary that a subpœna in such case should have issued for the absent witness. Dismukes *v.* Musgrove, 8 Mart. N. S. (La.) 375; Clark *v.* Boyd, 2 Ohio 56.

Foreign residence presumed from execution of instrument outside of jurisdiction.—Elliott *v.* Dyche, 80 Ala. 376; McMinn *v.* Whelan, 27 Cal. 300; McMinn *v.* O'Connor, 27 Cal. 238; Landers *v.* Bolton, 26 Cal. 393; Newsom *v.* Luster, 13 Ill. 175; Barfield *v.* Hewlett, 4 La. 118; Crouse *v.* Duffield, 12 Mart. (La.) 539; Valentine *v.* Piper, 22 Pick. (Mass.) 85, 33 Am. Dec. 715; Catlin *v.* Ware, 9 Mass. 218, 6 Am. Dec. 56; Sherman *v.* Champlain Transp. Co., 31 Vt. 162; Wilcox *v.* Hunt, 13 Pet. (U. S.) 378, 10 L. ed. 209; Manchester *v.* Milne, 16 Fed. Cas. No. 9,006, Abb. Adm. 115. *Compare* Craddock *v.* Merrill, 2 Tex. 494. But the description of the grantor in a deed as residing out of the commonwealth and proof of such non-residence are not sufficient evidence that the deed was in fact executed abroad, so as to admit secondary evidence of its execution, without accounting for the absence of the subscribing witnesses. Tyng *v.* Boston, etc., R. Co., 12 Cush. (Mass.) 277.

37. *Kentucky.*— McDowell *v.* Hall, 2 Bibb 610.

Louisiana.— Thompson *v.* Wilson, 13 La. 138; Dismukes *v.* Musgrove, 8 Mart. N. S. 375.

New York.— Willson *v.* Betts, 4 Den. 201.

South Carolina.— Manigault *v.* Hampton, 1 Brev. 394.

Texas.— See Teal *v.* Sevier, 26 Tex. 516.

United States.— Cooke *v.* Woodrow, 5 Cranch 13, 3 L. ed. 22.

England.— Cunliffe *v.* Sefton, 2 East 183.

See 20 Cent. Dig. tit. "Evidence," § 1594 *et seq.*

As to what constitutes due diligence see the following cases:

Arkansas.— Delony *v.* Delony, 24 Ark. 7.

Maine.— Whittemore *v.* Brooks, 1 Me. 57.

New York.—Van Dyne *v.* Thayre, 19 Wend. 162; Mills *v.* Twist, 8 Johns. 121.

Pennsylvania.—Gallagher *v.* London Assur. Corp., 149 Pa. St. 25, 24 Atl. 115; Tams *v.* Hitner, 9 Pa. St. 441.

Wisconsin.— Silverman *v.* Blake, 17 Wis. 213.

United States.— Cooke *v.* Woodrow, 5 Cranch 13, 3 L. ed. 22 [*affirming* 6 Fed. Cas. No. 3,181, 1 Cranch C. C. 437]; Broadwell *v.* McClish, 4 Fed. Cas. No. 1,911, 1 Cranch C. C. 4.

England.— Wardell *v.* Fermor, 2 Campb.

becoming a party in litigation or otherwise interested, whether his interest is thrown on him by operation of law or is acquired by his voluntary act,[38] or if he subsequently becomes insane,[39] infamous,[40] or otherwise incompetent.[41] So, if the subscribing witness to an instrument denies or cannot recollect the transaction in question, other evidence of its execution may be resorted to.[42] But the mere fact that a witness is sick and incapable of attending the trial has been held to be no ground for dispensing with his testimony.[43]

(2) PROOF OF HANDWRITING[44] — (a) OF ATTESTING WITNESS. It is a general rule that, where the attesting witness is unavailable, proof of his handwriting is admissible as secondary evidence,[45] and proof of the handwriting of one of

282; Cunliffe *v.* Sefton, 2 East 183; Crosby *v.* Percy, 1 Taunt. 364.

See 20 Cent. Dig. tit. "Evidence," § 1594 *et seq.*

38. *Louisiana.*— Buard *v.* Buard, 5 Mart. N. S. 132.

Maryland.— Keefer *v.* Zimmerman, 22 Md. 274.

Massachusetts.— Haynes *v.* Rutter, 24 Pick. 242.

Mississippi.—Tinnin *v.* Price, 31 Miss. 422.

North Carolina.— Saunders *v.* Ferrill, 23 N. C. 97 [*distinguishing* Hall *v.* Bynum, 3 N. C. 328, negotiable instrument case]; Blackwelder *v.* Fisher, 20 N. C. 304.

Pennsylvania.— Hamilton *v.* Marsden, 6 Binn. 45; Bell *v.* Cowgell, 1 Ashm. 7.

England.— Cunliffe *v.* Sefton, 2 East 183; Godfrey *v.* Norris, 1 Str. 34.

Compare McKinley *v.* Irvine, 13 Ala. 681.

See 20 Cent. Dig. tit. "Evidence," § 1597.

Interest acquired without fault of party claiming under instrument.— In Robertson *v.* Allen, 16 Ala. 106, it was held that if a subscribing witness to an instrument becomes incompetent from interest, without the fault or agency of the party who claims under it, secondary evidence is admissible to prove its execution.

Attempt to introduce incompetent witness unnecessary.— Robertson *v.* Allen, 16 Ala. 106.

Proof of interest a prerequisite to admission of secondary evidence.—To authorize the admission of secondary evidence of the execution of a written instrument, it is not enough to prove that the subscribing witness bears the same name as the wife of the party who executed it, but it must be proved that she is his wife. Kinney *v.* Flynn, 2 R. I. 319.

39. Currie *v.* Child, 3 Campb. 283.

40. Jones *v.* Mason, 2 Str. 833.

41. Witness disqualified through party's fault.—In Edwards *v.* Perry, 21 Barb. (N. Y.) 600, it was held that, if a party offering the instrument has himself rendered the witness incompetent, proof of the witness' handwriting will not be received. So in Paterson *v.* Schenck, 15 N. J. L. 434, it was held not to be a sufficient excuse for not producing a subscribing witness to an instrument to establish its execution that the magistrate before whom the suit is brought is the subscribing witness, since it is the party's fault thus to disqualify his witness. See also Jones *v.* Phelps, 5 Mich. 218.

42. *Georgia.*— Buchanan *v.* Simpson Grocery Co., 105 Ga. 393, 31 S. E. 105; Reinhart *v.* Miller, 22 Ga. 402, 68 Am. Dec. 506.

Indiana.— Booker *v.* Bowles, 2 Blackf. 90.

Maine.— Crabtree *v.* Clark, 20 Me. 337; Quimby *v.* Buzzell, 16 Me. 470.

Massachusetts.—Whitaker *v.* Salisbury, 15 Pick. 534.

New Jersey.— Patterson *v.* Tucker, 9 N. J. L. 322, 17 Am. Dec. 472; Ketchum *v.* Johnson, 4 N. J. Eq. 370.

New York.— Hall *v.* Phelps, 2 Johns. 451; Goodhue *v.* Berrien, 2 Sandf. Ch. 630.

North Carolina.— Colvord *v.* Monroe, 63 N. C. 288.

Ohio.— Duckwall *v.* Weaver, 2 Ohio 13.

Pennsylvania.— Fritz *v.* Montgomery County Com'rs, 17 Pa. St. 130; *In re* Miller, 3 Rawle 312, 24 Am. Dec. 345.

South Carolina.— Pearson *v.* Wightman, 1 Mill 336, 12 Am. Dec. 636.

See 20 Cent. Dig. tit. "Evidence," § 1598.

Illustrations.—A witness having proved his own signature to a bond, but being unable to identify the party executing it, not knowing him, proof of the obligor's handwriting was admitted as sufficient. Layton *v.* Hastings, 2 Harr. (Del.) 147. Indeed it has been held that an instrument may be admitted upon proof by the witness of the genuineness of his signature merely, where his memory fails him as to the particulars of the transaction. Hamsher *v.* Kline, 57 Pa. St. 397.

43. Jackson *v.* Root, 18 Johns. (N. Y.) 60.

44. As to proof of handwriting see *supra*, XI, C, 9, b.

45. *Alabama.*— Snider *v.* Burks, 84 Ala. 53, 4 So. 225; Guice *v.* Thornton, 76 Ala. 466; Foote *v.* Cobb, 18 Ala. 585; Thomas *v.* Wallace, 5 Ala. 268.

Florida.— Groover *v.* Coffee, 19 Fla. 61.

Indiana.— State *v.* Bodly, 7 Blackf. 355; Jones *v.* Cooprider, 1 Blackf. 47.

Kentucky.— McMurtry *v.* Frank, 2 T. B. Mon. 113; Miller *v.* Dillon, 2 T. B. Mon. 73; Ford *v.* Hale, 1 T. B. Mon. 23.

Maryland.— Dorsey *v.* Smith, 7 Harr. & J. 345.

Missouri.— Little *v.* Chauvin, 1 Mo. 626.

New Jersey.— Glover *v.* Armstrong, 15 N. J. L. 186.

New York.— Borst *v.* Empie, 5 N. Y. 33; People *v.* McHenry, 19 Wend. 482; Kimball *v.* Davis, 19 Wend. 437; Cook *v.* Husted, 12 Johns. 188; Mott *v.* Doughty, 1 Johns. Cas. 230.

North Carolina.—Angier *v.* Howard, 94

several witnesses may be sufficient.[46] Such evidence has been held sufficient in some of the cases without any proof of the handwriting of the person or persons executing the instrument,[47] but other cases require proof of the handwriting of the person executing the instrument in addition to proof of the handwriting of the witness.[48] At any rate it seems that there should be proof of some fact

N. C. 27; Edwards *v.* Sullivan, 30 N. C. 302; Jones *v.* Brinkley, 2 N. C. 20.

Pennsylvania.— Kelly *v.* Dunlap, 3 Penr. & W. 136; Unger *v.* Wiggins, 1 Rawle 331; Powers *v.* McFerran, 2 Serg. & R. 44.

South Carolina.— Price *v.* McGee, 1 Brev. 373.

Wisconsin.— Garrison *v.* Owens, 1 Pinn. 544.

United States.— Murdock *v.* Hunter, 17 Fed. Cas. No. 9,941, 1 Brock. 135. See also Pulliam *v.* Pulliam, 10 Fed. 53.

See 20 Cent. Dig. tit. "Evidence," § 1594 *et seq.*

Proof of sealing and delivery.— Proof of the death and handwriting of a subscribing witness of an instrument not in the usual form of a sealed instrument, nor purporting in the body of it to be sealed, is held not to be evidence of the delivery and sealing of the instrument, although a sufficient seal, under the statute, is affixed to the subscriber's name. Newbold *v.* Lamb, 5 N. J. L. 449. So in Dawson *v.* Dawson, Rice Eq. (S. C.) 243, it was held that where the attestation of the subscribing witnesses to a deed certifies to its delivery as well as the execution, accounting for the non-production of witnesses, coupled with proof of their signatures, will sufficiently prove the delivery, but it is otherwise where the instrument does not recite that it was delivered.

46. *Alabama.*— Smith *v.* Keyser, 115 Ala. 455, 22 So. 149; Thomas *v.* Wallace, 5 Ala. 268.

Kentucky.— Fitzhugh *v.* Croghan, 2 J. J. Marsh. 429, 19 Am. Dec. 139.

Massachusetts.— Gelott *v.* Goodspeed, 8 Cush. 411.

North Carolina.— Davis *v.* Higgins, 91 N. C. 382; Burnett *v.* Thompson, 35 N. C. 379.

Tennessee.—See Stump *v.* Hughes, 5 Hayw. 93.

Texas.— Mapes *v.* Leal, 27 Tex. 345.

United States.— Hanrick *v.* Patrick, 119 U. S. 156, 7 S. Ct. 147, 30 L. ed. 396; Stebbins *v.* Duncan, 108 U. S. 32, 2 S. Ct. 313, 27 L. ed. 641.

England.— Cunliffe *v.* Sefton, 2 East 183; Adam *v.* Kers, 1 B. & P. 360.

47. *Georgia.*— McVicker *v.* Conkle, 96 Ga. 584, 24 S. E. 23; Howard *v.* Snelling, 32 Ga. 195.

Maryland.—Parker *v.* Fassitt, 1 Harr. & J. 337.

New Jersey.—Servis *v.* Nelson, 14 N. J. Eq. 94.

New York.— Borst *v.* Empie, 5 N. Y. 33; People *v.* Rowland, 5 Barb. 449; Van Winkle *v.* Constantine, 2 Edm. Sel. Cas. 460 [*affirmed* in 10 N. Y. 422]; Brown *v.* Kimball, 25 Wend. 259; McPherson *v.* Rathbone, 11 Wend. 96; Lush *v.* Druse, 4 Wend. 313; Jackson *v.* Lewis, 13 Johns. 504; Sluby *v.* Champlin, 4 Johns. 461.

North Carolina.—Black *v.* Wright, 31 N. C. 447; Jones *v.* Blount, 2 N. C. 238.

Ohio.— Clark *v.* Boyd, 2 Ohio 56.

Pennsylvania.— Powers *v.* McFerran, 2 Serg. & R. 44; Hamilton *v.* Marsden, 6 Binn. 45. *Compare* Clark *v.* Sanderson, 3 Binn. 192, 5 Am. Dec. 368.

Vermont.— Sanborn *v.* Cole, 63 Vt. 590, 22 Atl. 716, 14 L. R. A. 208.

England.— Cunliffe *v.* Sefton, 2 East 183.

See 20 Cent. Dig. tit. "Evidence," § 1602 *et seq.*

48. Harris *v.* Patten, 2 La. Ann. 217; Tagiasco *v.* Molinari, 9 La. 512; Dismukes *v.* Musgrove, 7 Mart. N. S. (La.) 58; Sims *v.* De Graffenreid, 4 McCord (S. C.) 253; Plunket *v.* Bowman, 2 McCord (S. C.) 138; Cornneil *v.* Bickley, 1 McCord (S. C.) 466. See also Manigault *v.* Hampton, 1 Brev. (S. C.) 394; Myers *v.* Taylor, 1 Brev. (S. C.) 245; Turner *v.* Moore, 1 Brev. (S. C.) 236; Meyers *v.* Taylor, 2 Bay (S. C.) 506. *Compare* Davis *v.* Concordia Police Jury, 19 La. 533; Martin *v.* Bowie, 37 S. C. 102, 15 S. E. 736; Brown *v.* Edgar, 4 McCord (S. C.) 91; Heard *v.* Martin, 3 Brev. (S. C.) 412, 1 Treadw. (S. C.) 487.

Unavailability of proof of maker's signature.— In McGowan *v.* Laughlan, 12 La. Ann. 242, it was held that where the only subscribing witness to an act of sale is dead, and after diligent search and inquiry no one can be found who is acquainted with the signature or place of residence of the vendor, proof of the genuineness of the signature of the subscribing witness will be sufficient proof of the execution of the instrument.

Instruments signed by mark or cross.— If the person executing the instrument signed by a mark or cross the execution may be proved by proof of the handwriting of the attesting witness without any evidence of the maker's signature. Tagiasco *v.* Molinari, 9 La. 512; Lyons *v.* Holmes, 11 S. C. 429, 32 Am. Rep. 483; Shiver *v.* Johnson, 2 Brev. (S. C.) 397.

Proof of signature of person executing instrument held sufficient.— Where one of the witnesses is dead, and the residences of the others are out of the state or unknown, proof of the principal's signature will suffice. Grand Gulf R., etc., Co. *v.* Barnes, 12 Rob. (La.) 127.

Rule of text applied to instrument required by law to be witnessed.— Cram *v.* Ingalls, 18 N. H. 613. See also Newsom *v.* Luster, 13 Ill. 176. *Compare* Hobart *v.* Hobart, 154 Ill. 610, 39 N. E. 581, 45 Am. St. Rep. 151.

or facts showing the identity of the maker and connecting him with the instrument.[49]

(b) Of Person Executing Instrument. According to the decisions in some jurisdictions if it appears that the attesting witness is incapable of being produced, proof of the signature of the person executing the instrument may be made without first showing the unavailability of proof of the witness' handwriting.[50] In other jurisdictions, however, where the subscribing witness cannot be produced, it has been held essential as the next step to prove the handwriting of the witness, this being regarded as furnishing the evidence next in degree; and proof of the handwriting of the person who executed the instrument will not according to these authorities be admitted unless proof of the handwriting of the witness cannot be procured.[51] But it is agreed that proof of the handwriting of the person executing the instrument may be resorted to if the party is unable to prove the handwriting of the attesting witness.[52] Such proof may always be

49. Taylor *v.* Crowninshield, 5 N. Y. Leg. Obs. 209; Russell *v.* Tunno, 11 Rich. (S. C.) 303; Nelson *v.* Whittall, 1 B. & Ald. 19; Whitelocke *v.* Musgrove, 1 Cromp. & M. 511, 2 L. J. Exch. 210, 3 Tyrw. 541. See also Gallagher *v.* Delargy, 57 Mo. 29; Harrel *v.* Ward, 2 Sneed (Tenn.) 610.

50. *Alabama.*— Snider *v.* Burks, 84 Ala. 53, 4 So. 225; Lee *v.* Shivers, 70 Ala. 288; Cox *v.* Davis, 17 Ala. 714, 52 Am. Dec. 199; Lazarus *v.* Lewis, 5 Ala. 457; Mardis *v.* Shackleford, 4 Ala. 493.

California.— McMinn *v.* Whelan, 27 Cal. 300.

Kentucky.— Yocum *v.* Barnes, 8 B. Mon. 496; McClain *v.* Gregg, 2 A. K. Marsh. 454; Sentney *v.* Overton, 4 Bibb 445.

Maine.— Jones *v.* Roberts, 65 Me. 273; Woodman *v.* Segar, 25 Me. 90.

Massachusetts.— Smith Charities *v.* Connony, 157 Mass. 272, 31 N. E. 1058; Valentine *v.* Piper, 22 Pick. 85, 33 Am. Dec. 715. See also Clark *v.* Houghton, 12 Gray 38.

Ohio.— Clark *v.* Boyd, 2 Ohio 56.

South Carolina.— See Brown *v.* Edgar, 4 McCord 91.

Texas.— Chator *v.* Brunswick-Balke-Collender Co., 71 Tex. 588, 10 S. W. 250; Sloan *v.* Thompson, 4 Tex. Civ. App. 419, 23 S. W. 613.

See 20 Cent. Dig. tit. "Evidence," § 1604.

Instruments not requiring attestation.—In some cases it is held that the execution of an instrument which the law does not require to be attested by witnesses may be authenticated by proof of the handwriting of the grantor or obligor, if the subscribing witnesses are not available. Landers *v.* Bolton, 26 Cal. 393; Sherman *v.* Champlain Transp. Co., 31 Vt. 162.

Subscribing witness signing by means of mark.— In some of the decisions the rule is laid down that if a subscribing witness to an instrument merely makes his mark, instead of writing his name, the instrument is to be proved by adducing proof of the handwriting of the party executing it. Watts *v.* Kilburn, 7 Ga. 356; Carrier *v.* Hampton, 33 N. C. 307; Gilliam *v.* Perkinson, 4 Rand. (Va.) 325.

Handwriting of maker proved in connection with his acknowledgment of execution.— Down *v.* Down, 2 How. (Miss.) 915.

51. *Arkansas.*— Wilson *v.* Royston, 2 Ark. 315.

Delaware.— Boyer *v.* Norris, 1 Harr. 22.

Indiana.— Bowser *v.* Warren, 4 Blackf. 522.

New Hampshire.— Gould *v.* Kelley, 16 N. H. 551; Farnsworth *v.* Briggs, 6 N. H. 561.

New York.—Jackson *v.* Waldron, 13 Wend. 178. See also Van Dyne *v.* Thayre, 19 Wend. 162; Devlin *v.* Second Ave. R. Co., 2 Alb. L. J. 69.

North Carolina.— Jones *v.* Blount, 2 N. C. 238.

United States.— Stebbins *v.* Duncan, 108 U. S. 32, 2 S. Ct. 313, 27 L. ed. 641; Clarke *v.* Courtney, 5 Pet. 319, 8 L. ed. 140. *Compare* Leonard *v.* Neale, 15 Fed. Cas. No. 8,259, 1 Cranch C. C. 493; Manchester *v.* Milne, 16 Fed. Cas. No. 9,006, Abb. Adm. 115; Wellford *v.* Eakin, 29 Fed. Cas. No. 17,379, 1 Cranch C. C. 264.

England.— Barnes *v.* Trompowsky, 7 T. R. 265.

See 20 Cent. Dig. tit. "Evidence," § 1604.

Effort to prove handwriting of witness held insufficient.— Where it appeared that the subscribing witness to a bond had been clerk of the county court of a large, populous, and wealthy county, and had been dead only twenty-five years, it was held not to be sufficient for admitting testimony of the obligor's handwriting to show by one witness only that he did not know the subscribing witness' handwriting, and did not know of any person who did have such knowledge. McKinder *v.* Littlejohn, 23 N. C. 66.

52. *Illinois.*— Newsom *v.* Luster, 13 Ill. 175.

Missouri.— Clardy *v.* Richardson, 24 Mo. 295.

New York.— McPherson *v.* Rathbone, 11 Wend. 96.

Pennsylvania.— Miller *v.* Carothers, 6 Serg. & R. 215; Clark *v.* Sanderson, 3 Binn. 192, 5 Am. Dec. 368.

Virginia.— Raines *v.* Philips, 1 Leigh 483.

United States.— Morgan *v.* Curtenius, 17 Fed. Cas. No. 9,799, 4 McLean 366. *Compare* Boyer *v.* Norris, 1 Harr. (Del.) 22.

See 20 Cent. Dig. tit. "Evidence," § 1604.

produced as corroborative evidence of the due and valid execution of the instrument.[53]

(c) INCOMPETENT WITNESSES. Where the subscribing witnesses to an instrument upon which an action is brought have become disqualified by interest acquired since its execution, proof of the handwriting of the witnesses is competent to prove the due execution of the instrument.[54] Where, however, the subscribing witness was, by reason of the relation of husband and wife or interest in some other way, incompetent to testify to the execution of an instrument at the time of the subscribing as well as at the time of trial, proof of the witness' handwriting is inadmissible, but proof of the party's handwriting is admissible as if there had been no attesting witness.[55]

(d) *Rebutting or Impeaching Evidence.* It may be shown by a subscribing witness or alleged subscribing witness that the deed was not in fact delivered[56] or that his signature is not genuine.[57] So the presumption of the execution of an instrument by the maker arising from proof of the handwriting of a deceased subscribing witness may be rebutted by evidence that the signature is not in the maker's handwriting,[58] or by the denial of the person by whom the instrument purports to be executed in connection with other circumstances.[59] The character

An ineffectual effort to prove the handwriting of a subscribing witness by his brother has been held sufficient to allow proof of the instrument by proving the handwriting of the party. McPherson *v.* Rathbone, 11 Wend. (N. Y.) 96.

Admission of party held not secondary evidence to proof of his handwriting.— Conrad *v.* Farrow, 5 Watts (Pa.) 536.

53. *Arkansas.*— Tatum *v.* Mohr, 21 Ark. 349.

California.— Jackson *v.* Feather River, etc., Water Co., 14 Cal. 18.

Illinois.— Doe *v.* Bean, 6 Ill. 302.

Indiana.— Ungles *v.* Graves, 2 Blackf. 191.

Kentucky.— Gibbs *v.* Cook, 4 Bibb 535.

Louisiana.— Thomas *v.* Turnley, 3 Rob. 206; Lynch *v.* Postlethwaite, 7 Mart. 69, 12 Am. Dec. 495.

Massachusetts.— Gelott *v.* Goodspeed, 8 Cush. 411.

New Hampshire.— Dunbar *v.* Marden, 13 N. H. 311.

New Jersey.— Van Doren *v.* Van Doren, 3 N. J. L. 1022; Servis *v.* Nelson, 14 N. J. Eq. 94.

North Carolina.— Miller *v.* Hahn, 84 N. C. 226.

Pennsylvania.— Irwin *v.* Patchen, 164 Pa. St. 51, 30 Atl. 436.

Tennessee.— Stump *v.* Hughes, 5 Hayw. 93.

United States.— Adams *v.* Norris, 23 How. 353, 16 L. ed. 539; Clarke *v.* Courtney, 5 Pet. 319, 8 L. ed. 140; Davies *v.* Davies, 7 Fed. Cas. No. 3,612, 2 Cranch C. C. 105. See also U. S. *v.* Yorba, 1 Wall. 412, 17 L. ed. 635.

See 20 Cent. Dig. tit. "Evidence," § 1601 *et seq.*

54. *Louisiana.*— Buard *v.* Buard, 5 Mart. N. S. 132.

Maryland.— Keefer *v.* Zimmerman, 22 Md. 274.

Mississippi.— Tinnin *v.* Price, 31 Miss. 422.

North Carolina.— Saunders *v.* Ferrill, 23 N. C. 97; Blackwelder *v.* Fisher, 20 N. C. 345.

Pennsylvania.— Lautermilch *v.* Kneagy, 3 Serg. & R. 202; Hamilton *v.* Marsden, 6 Binn. 45; Bell *v.* Cowgell, 1 Ashm. 7.

England.— Godfrey *v.* Norris, 1 Str. 34.

See 20 Cent. Dig. tit. "Evidence," § 1605.

55. *Massachusetts.*—Packard *v.* Dunsmore, 11 Cush. 282; Amherst Bank *v.* Root, 2 Metc. 522.

North Carolina.— Nelius *v.* Brickell, 2 N. C. 19.

Pennsylvania.— Mackrell *v.* Wolf, 104 Pa. St. 421; Miller *v.* Carothers, 6 Serg. & R. 215.

South Carolina.— Lever *v.* Lever, 1 Hill Eq. 62.

England.— Swire *v.* Bell, 5 T. R. 371.

See 20 Cent. Dig. tit. "Evidence," § 1605.

56. Jackson *v.* Inabinit, Riley Eq. (S. C.) 9.

57. Jones *v.* Garza, 11 Tex. 186.

Testimony of witness held not to amount to denial of signature.— Testimony of an alleged subscribing witness that on the day when the deed purports to have been executed she was not in the county, and did not on that day witness a deed from such grantors to such grantee, is not a denial of the genuineness of her signature on such deed. Sutherland *v.* Ross, 160 Pa. St. 29, 28 Atl. 437.

Conflicting testimony of witnesses.— The testimony of one whose name appears as a subscribing witness to a deed executed about twelve years previously, that he had no recollection of ever having seen and attested the deed, and believes he never did, is not sufficient to show the deed to be spurious, in opposition to one witness who testifies to its execution by the parties, and of others who state corroborating facts. Juzam *v.* Toulmin, 9 Ala. 662, 44 Am. Dec. 448.

58. People *v.* McHenry, 19 Wend. (N. Y.) 482.

59. Thompson *v.* Halstead, 44 W. Va. 390, 29 S. E. 991.

of the subscribing witness to an instrument who has proved the instrument in open court for the purpose of registration may be impeached in a subsequent suit based on the instrument, although he is not a witness in the suit.[60] So where an instrument is read in evidence on proof of the handwriting of a deceased attesting witness the adverse party, it has been held, may show the bad character of such witness at the time when he made the attestation,[61] or his contradictory declarations, as that the instrument was a forgery or was antedated.[62]

(II) *Unattested Instruments.* The execution of a written instrument not attested by a subscribing witness may be proved by a person who was present and saw its execution,[63] by the testimony or admissions of the person executing it,[64] by the proof of the handwriting. Hunter *v.* Glenn, 1 Bailey (S. C.) 542. So a statement of a witness that "it is A's bond" does not prove that A signed and delivered it. Burgen *v.* Com., 8 Ky. L. Rep. 613.

60. Vandyke *v.* Thompson, 1 Harr. (Del.) 109.

61. Losee *v.* Losee, 2 Hill (N. Y.) 609. See also Lawless *v.* Guelbreth, 8 Mo. 139.

Instrument not rendered inadmissible by proof of bad character.— Lawless *v.* Guelbreth, 8 Mo. 139.

62. Smith *v.* Asbell, 2 Strobh. (S. C.) 141; McElwee *v.* Sutton, 2 Bailey (S. C.) 128; Doe *v.* Ridgway, 4 B. & Ald. 53, 6 E. C. L. 387. *Compare* U. S. *v.* Boyd, 8 App. Cas. (D. C.) 440; Stobart *v.* Dryden, 2 Gale 146, 5 L. J. Exch. 218, 1 M. & W. 615.

Declarations of deceased witness inadmissible to impeach living witness.— Where the execution of a will offered in evidence to show title to real estate is proved by one of the subscribing witnesses, the other being dead, the declarations of the deceased witness, made before and after the execution of the will, are no part of the *res gestæ*, and are inadmissible to contradict the attestation. Meeker *v.* Boylan, 28 N. J. L. 274.

Bad character of dead witness inadmissible in case of proof by living witness.— Where the execution of a will offered in evidence in ejectment to show title to real estate is proved by one of the subscribing witnesses, the other being dead, the bad character of the deceased witness for veracity is not admissible to invalidate the will. Meeker *v.* Boylan, 28 N. J. L. 274.

63. Stoddard *v.* Hill, 38 S. C. 385, 17 S. E. 138; Meuley *v.* Zeigler, 23 Tex. 88; Richards *v.* Belcher, 6 Tex. Civ. App. 284, 25 S. W. 740. See also Dundy *v.* Chambers, 23 Ill. 369; Archer *v.* U. S., 9 Okla. 569, 60 Pac. 268.

Evidence held sufficient.— Where a witness stated that he had seen the bill of sale presented to him, and that he was present when the same was executed, such statement was equivalent to saying that he saw it executed, and was admissible in proof of execution. Mosely *v.* Gordon, 16 Ga. 384.

Evidence held insufficient.— Where a witness who could not read testified that he saw the party to the alleged contract sign a paper about the time of the date of the contract, and understood it to be of the purport of the paper offered in evidence, but was not a subscribing witness, and could not identify the paper either by the handwriting or by any mark, there is not sufficient evidence of the execution of the paper to authorize its admission, since, for aught that appears, it was in the power of the party offering it to have called a witness to the

64. *Dakota.*— See Lander *v.* Propper, 6 Dak. 64, 50 N. W. 400.

Illinois.— Lowman *v.* Aubery, 72 Ill. 619; Dundy *v.* Chambers, 23 Ill. 369.

Kentucky.— Harrison *v.* Edwards, 3 Litt. 340; Burgen *v.* Com., 8 Ky. L. Rep. 613.

Louisiana.— Robertson *v.* Lucas, 1 Mart. N. S. 187.

Massachusetts.— White *v.* Solomon, 164 Mass. 516, 42 N. E. 104, 30 L. R. A. 537.

Michigan.— Gibbs *v.* Linabury, 22 Mich. 479, 7 Am. Rep. 675.

Missouri.— Powell *v.* Adams, 9 Mo. 766.

Nebraska.— Matoushek *v.* Dutcher, (1903) 93 N. W. 1049.

New Jersey.— Yeomans *v.* Petty, 40 N. J. Eq. 495, 4 Atl. 631.

New York.— Eichhold *v.* Tiffany, 20 Misc. 681, 46 N. Y. Suppl. 534; Van Alen *v.* Bliven, 4 Den. 455; McCoon *v.* Biggs, 2 Hill 121.

Texas.— Bohn *v.* Davis, 75 Tex. 24, 12 S. W. 837.

Utah.— Burraston *v.* Nephi First Nat. Bank, 22 Utah 328, 62 Pac. 425.

See 20 Cent. Dig. tit. "Evidence," § 1581 *et seq.*

Execution admitted in pleadings.— Wills *v.* Wood, 28 Kan. 400; Smith *v.* Gale, 144 U. S. 509, 12 S. Ct. 674, 36 L. ed. 521.

Admission by use of instrument in same trial.— When a party admits a private writing to be genuine by using it as such upon a trial, he cannot afterward deny its authenticity when his opponent desires to use it. Borah *v.* Archers, 7 Dana (Ky.) 176; Whitman *v.* Horton, 46 N. Y. Super. Ct. 531 [*affirmed* in 94 N. Y. 644]; Robeson *v.* Schuylkill Nav. Co., 3 Grant (Pa.) 186. See also Boggs *v.* Miles, 8 Serg. & R. (Pa.) 407. But where plaintiff makes affidavit of the loss of a writing, and offers secondary evidence of its contents, defendant may produce the original in court, by way of rebuttal of plaintiff's evidence, without thereby admitting the execution of the instrument. Hill *v.* Townsend, 24 Tex. 575.

Admission by production of instrument in prior proceeding.— In an action in a state court to recover damages for breach of a charter-party plaintiff offered in evidence a charter-party which had been produced and used by defendant, in a cause pending in the

testimony of any one familiar with his handwriting,[65] or by any competent proof of the genuineness of his handwriting.[66] It is not necessary, to entitle an unattested instrument to be read in evidence, that its execution should be proved by direct evidence, but it will be sufficient if that fact is fairly inferable from the facts and circumstances proved.[67] If the genuineness of the signature to an instrument is proved by the admission of the party or otherwise, it will not be necessary to go further and prove the genuineness of the writing in the body of the instrument,[68] or to prove that it was actually made on the day of its date.[69]

D. Ancient Documents[70] — **1. General Rule of Admissibility.** An ancient document is admissible in evidence without direct proof of its execution, if it appears to be of the age of at least thirty years, is found in the proper custody, and is unblemished by alterations and otherwise free from suspicion; the instrument being said in such a case to prove itself.[71] Under this rule documents have

United States court, as the true and genuine charter-party between the parties. It was held that the paper was admissible, the use made thereof by defendant being an admission of its authenticity. Crichton *v.* Smith, 34 Md. 42.

Name of party affixed by third person.— Where the signature of a subscriber to an instrument was written by a third person, parol admissions of the party whose name is so signed are admissible in evidence as tending to show that it was done by authority. Pottgieser *v.* Dorn, 16 Minn. 204; Houston, etc., R. Co. *v.* Chandler, 51 Tex. 416.

65. *Colorado.*— Hinchman *v.* Keener, 5 Colo. App. 300, 38 Pac. 611.

Georgia.— Royce *v.* Gazan, 76 Ga. 79.

Illinois.— Hall *v.* Jones, 32 Ill. 38; Sisk *v.* Woodruff, 15 Ill. 15.

Indiana.— Haynes *v.* Thomas, 7 Ind. 38.

Louisiana.—Bradford *v.* Cooper, 1 La. Ann. 325.

United States.— U. S. *v.* Moreno, 1 Wall. 400, 17 L. ed. 633.

See 20 Cent. Dig. tit. "Evidence," § 1583. See also *supra*, XI, C, 9, b.

66. *Alabama.*— Dillingham *v.* Brown, 38 Ala. 311.

Louisiana.— Dwight *v.* Scates, 14 La. 495. See also Thatcher *v.* Goff, 11 La. 94.

Maine.— Pullen *v.* Hutchinson, 25 Me. 249.

Mississippi.— Dancey *v.* Sugg, 46 Miss. 606.

New York.— Rogers *v.* New York, etc., Bridge, 159 N. Y. 556, 54 N. E. 1094 [*affirming* 11 N. Y. App. Div. 141, 42 N. Y. Suppl. 1046]; Small *v.* Sloan, 1 Bosw. 352.

North Carolina.— Black *v.* Justice, 86 N. C. 504; Allen *v.* Martin, 4 N. C. 42; Ingram *v.* Hall, 2 N. C. 193.

Pennsylvania.— Clark *v.* Freeman, 25 Pa. St. 133; Cabarga *v.* Seeger, 17 Pa. St. 514.

United States.— Milligan *v.* Mayne, 17 Fed. Cas. No. 9,606, 2 Cranch C. C. 210.

See 20 Cent. Dig. tit. "Evidence," § 1583. See also *supra*, XI, C, 9, b.

Rule applied to improperly attested instruments.— Handy *v.* State, 7 Harr. & J. (Md.) 42; Sherwood *v.* Pratt, 63 Barb. (N. Y.) 137.

67. Forgerson *v.* Smith, 104 Ind. 246, 3 N. E. 866. See also Garland *v.* Gaines, 73 Conn. 662, 49 Atl. 19, 84 Am. St. Rep. 182; Bentley *v.* McCall, 119 Ga. 530, 46 S. E. 645; L. Lamb Lumber Co. *v.* Benson, 90 Minn. 403, 97 N. W. 143; Burriss *v.* Missouri Pac. R. Co., 105 Mo. App. 659, 78 S. W. 1042; Persons *v.* Persons, (N. D. 1903) 97 N. W. 551; Stewart *v.* Gleason, 23 Pa. Super. Ct. 325.

68. Mandere *v.* Bonsignore, 28 La. Ann. 521.

69. Pullen *v.* Hutchinson, 25 Me. 249; Glenn *v.* Grover, 3 Md. 212.

70. See also *supra*, XI, C, 9, b, (III), (E).

71. *Alabama.*— Alexander *v.* Wheeler, 78 Ala. 167; Carter *v.* Doe, 21 Ala. 72; Doe *v.* Eslava, 11 Ala. 1028.

California.— Gwin *v.* Calegaris, 139 Cal. 384, 73 Pac. 851.

Delaware.— Doe *v.* Deputy, 3 Houst. 574.

Georgia.— Follendore *v.* Follendore, 110 Ga. 359, 35 N. E. 676; Weitman *v.* Thiot, 64 Ga. 11; Settle *v.* Alison, 8 Ga. 201, 52 Am. Dec. 393; McCleskey *v.* Leadbetter, 1 Ga. 551.

Illinois.— Stalford *v.* Goldring, 197 Ill. 156, 64 N. E. 395; Whitman *v.* Heneberry, 73 Ill. 109.

Indiana.— Henthorn *v.* Doe, 1 Blackf. 157.

Kentucky.—Harlan *v.* Howard, 79 Ky. 373; Burgin *v.* Chenault, 9 B. Mon. 285; Thruston *v.* Masterson, 9 Dana 228; Botts *v.* Chiles, 2 T. B. Mon. 36.

Maine.— Lawry *v.* Williams, 13 Me. 281.

Maryland.— Owings *v.* Norwood, 2 Harr. & J. 96.

Massachusetts.— Pettingell *v.* Boynton, 139 Mass. 244, 29 N. E. 655. And see *In re* Buttrick, 185 Mass. 107, 69 N. E. 1044.

Missouri.—Kansas City *v.* Scarritt, 169 Mo. 471, 69 S. W. 283.

New Jersey.— Havens *v.* Sea-Shore Land Co., 47 N. J. Eq. 365, 20 Atl. 497.

New York.— Clark *v.* Owens, 18 N. Y. 434. See also Jackson *v.* Schoonmaker, 2 Johns. 230.

Pennsylvania.— McReynolds *v.* Longenberger, 57 Pa. St. 13; Zeigler *v.* Houtz, 1 Watts & S. 533.

South Carolina.— Thompson *v.* Brannon, 14 S. C. 542; Duncan *v.* Beard, 2 Nott & M. 400; Brown *v.* Wood, 6 Rich. Eq. 155.

Tennessee.— Cox *v.* Bowman, 2 Yerg. 108; Perry *v.* Clift, (Ch. App. 1899) 54 S. W. 121.

Texas.— Von Rosenberg *v.* Haynes, 85 Tex. 357, 20 S. W. 143; Cox *v.* Cock, 59 Tex. 521; Glasscock *v.* Hughes, 55 Tex. 461; Pendleton *v.* Shaw, 18 Tex. Civ. App. 439, 44 S. W. 1002; Timmony *v.* Burns, (Civ. App. 1897) 42

been frequently admitted in evidence upon proof of the handwriting of parties thereto or of subscribing witnesses without calling the subscribing witnesses.[72] A subscribing witness to an ancient document will not, according to the weight of authority, be required to be called, although it appears that he is living and actually in court at the time,[73] and this whether the testimony of the witness would tend to overthrow or establish the document.[74] This rule is adopted for common convenience and is founded upon the great difficulty of proving the due execution of a deed after an interval of many years. After the lapse of thirty years from the time of execution of a document the witnesses are presumed to be dead or beyond the jurisdiction of the court.[75] The fact that an instrument is an ancient document does not, however, affect its admissibility in evidence further than to dispense with proof of its genuineness, where it is otherwise admissible.[76] Ancient documents have been admitted, not only as muniments of title, or as instruments under which the parties to the action in which they are sought to be introduced assert a claim, but also to show other facts which they recite even in actions between strangers to the instrument.[77] The recitals in

S. W. 133; Pendleton *v.* Robertson, (Civ. App. 1895) 32 S. W. 442; Kennard *v.* Withrow, (Civ. App. 1894) 28 S. W. 226; Lunn *v.* Scarborough, 6 Tex. Civ. App. 15, 24 S. W. 846; La Vega *v.* League, 2 Tex. Civ. App. 252, 21 S. W. 565. See also Ward *v.* Cameron, (Civ. App. 1903) 76 S. W. 240.

United States.— Fulkerson *v.* Holmes, 117 U. S. 389, 6 S. Ct. 780, 29 L. ed. 915; Applegate *v.* Lexington, etc., Min. Co., 117 U. S. 255, 6 S. Ct. 742, 29 L. ed. 892; Winn *v.* Patterson, 9 Pet. 663, 9 L. ed. 266; Barr *v.* Gratz, 4 Wheat. 213, 4 L. ed. 553.

England.— Lefebure *v.* Worden, 2 Ves. 54, 28 Eng. Reprint 36.

Canada.— Chamberlain *v.* Torrance, 14 Grant Ch. (U. C.) 181; Thompson *v.* Bennett, 22 U. C. C. P. 393; Doe *v.* Turnbull, 5 U. C. Q. B. 129.

See 20 Cent. Dig. tit. "Evidence," § 1613 *et seq.*

72. *Florida.*— Hogans *v.* Carruth, 19 Fla. 84.

Maryland.— Carroll *v.* Norwood, 1 Harr. & J. 167.

Mississippi.— Nixon *v.* Porter, 34 Miss. 697, 69 Am. Dec. 408.

New York.— Jackson *v.* Burton, 11 Johns. 64. *Compare* Northrop *v.* Wright, 7 Hill 476.

Pennsylvania.— Urket *v.* Coryell, 5 Watts & S. 60; Thomas *v.* Horlocker, 1 Dall. 14, 1 L. ed. 17.

South Carolina.— Edmondston *v.* Hughes, Cheves 81.

Texas.— Hollis *v.* Dashiell, 52 Tex. 187; Baldwin *v.* Goldfrank, 9 Tex. Civ. App. 269, 26 S. W. 155. See also Harris *v.* Hoskins, 2 Tex. Civ. App. 486, 22 S. W. 251.

United States.— Stebbins *v.* Duncan, 108 U. S. 32, 2 S. Ct. 313, 27 L. ed. 641.

See 20 Cent. Dig. tit. "Evidence," § 1614 *et seq.*

Comparison of handwriting.— Where the antiquity of the writing makes it impossible for any living witness to swear that he ever saw the party write, comparison with documents known to be in his handwriting is admissible. Clark *v.* Wyatt, 15 Ind. 271, 77 Am. Dec. 90; Jackson *v.* Brooks, 8 Wend. (N. Y.) 426. See *supra*, XI, C, 9, b, (III), (E).

Presumption that signature of party unable to write was duly authorized.— In the case of an ancient deed, coming from proper custody, no fraud appearing, it may be presumed that a signature made by another than the grantor who could not write was duly authorized. Hogans *v.* Carruth, 19 Fla. 84.

73. Settle *v.* Alison, 8 Ga. 201, 52 Am. Dec. 393; Jackson *v.* Christman, 4 Wend (N. Y.) 277; McReynolds *v.* Longenberger, 57 Pa. St. 13; Doe *v.* Wooley, 8 B. & C. 22, 15 E. C. L. 21, 3 C. & P. 402, 14 E. C. L. 631, 6 L. J. K. B. O. S. 286, 2 M. & R. 195; Marsh *v.* Collnett, 2 Esp. 665, 5 Rev. Rep. 763. See also Shaw *v.* Pershing, 57 Mo. 416. *Compare* Smith *v.* Rankin, 20 Ill. 14; Tolman *v.* Emerson, 4 Pick. (Mass.) 160; Jackson *v.* Blanshan, 3 Johns. (N. Y.) 292, 3 Am. Dec. 485.

74. Gardner *v.* Granniss, 57 Ga. 539.

75. Lunn *v.* Scarborough, 6 Tex. Civ. App. 15, 24 S. W. 846; Winn *v.* Patterson, 9 Pet. (U. S.) 663, 9 L. ed. 266; Wynne *v.* Tyrwhitt, 4 B. & Ald. 376, 6 E. C. L. 524.

76. King *v.* Watkins, 98 Fed. 913.

Recitals.— Cal. Code Civ. Proc. § 1963, subd. 34, authorizing the admission of ancient documents in evidence without proof of authenticity, merely creates a presumption that the documents are genuine, and does not import verity to any of their recitals. Gwin *v.* Calegaris, 139 Cal. 384, 73 Pac. 851.

77. Boston Water Power Co. *v.* Hanlon, 132 Mass. 483; James *v.* Letzler, 8 Watts & S. (Pa.) 192; Deery *v.* Cray, 5 Wall. (U. S.) 795, 18 L. ed. 653.

Recitals in ancient deeds to prove former deed.— A recital in an ancient deed or will of any antecedent deed or document, consistent with its own provisions, will after the lapse of a long period be presumptive proof of the former existence of such deed or document, especially in a case where nothing appears to rebut such presumption. Saxton *v.* Fuller, 20 N. J. L. 61; Havens *v.* Sea-Shore Land Co., 47 N. J. Eq. 365, 20 Atl. 497; Davis *v.* Gaines, 104 U. S. 386, 26

ancient deeds under which neither party to the action claims are competent evidence to prove the location of a disputed line[78] or a right of way.[79] Ancient plans and maps have been admitted on the same principle.[80] But it has been held that plans or maps may be so imperfect as to justify the court in declining to admit them, as for instance when they amount to memoranda merely and are preparations for a transaction which may have never taken place.[81] So ancient documents coming out of the proper custody, and purporting on their face to show exercise of ownership, such as leases or licenses, have been admitted as being in themselves acts of ownership and proof of possession.[82]

2. Character of Instrument — a. In General. It may be laid down as a general rule that any document or paper if it is otherwise competent may upon proof of the requisite facts be admitted in evidence as an ancient document,[83] and this rule applies whether the writing is with or without attesting witnesses.[84] Thus the rule applies not only to deeds,[85] wills,[86] bonds,[87] powers of

L. ed. 757; Crane *v.* Morris, 6 Pet. (U. S.) 598, 8 L. ed. 514; Carver *v.* Astor, 4 Pet. (U. S.) 1, 7 L. ed. 761. See also Chandler *v.* Wilson, 77 Me. 76.

Recitals in ancient deed or will admissible as presumptive evidence of pedigree.— Little *v.* Palister, 4 Me. 209; Russell *v.* Jackson, 22 Wend. (N. Y.) 277; Scharff *v.* Keener, 64 Pa. St. 376; Fulkerson *v.* Holmes, 117 U. S. 389, 6 S. Ct. 780, 29 L. ed. 915.

78. Hathaway *v.* Evans, 113 Mass. 264; Morris *v.* Callanan, 105 Mass. 129; Sparhawk *v.* Bullard, 1 Metc. (Mass.) 95; Pierce *v.* Schram, (Tex. Civ. App. 1899) 53 S. W. 716; Plaxton *v.* Dare, 10 B. & C. 17, 8 L. J. K. B. O. S. 98, 5 M. & R. 1, 21 E. C. L. 18. Nor is it material whether the line is one immediately in dispute between the parties, or one from the position of which the location of the immediately disputed line can be determined. Hathaway *v.* Evans, 113 Mass. 264; Pierce *v.* Schram, (Tex. Civ. App. 1899) 53 S. W. 716. See also Boundaries, 5 Cyc. 959.

79. Randall *v.* Chase, 133 Mass. 210.

80. Whitman *v.* Shaw, 166 Mass. 451, 44 N. E. 333; Drury *v.* Midland R. Co., 127 Mass. 571.

81. Boston Water Power Co. *v.* Hanlon, 132 Mass. 483.

82. Boston *v.* Richardson, 105 Mass. 351; Dodge *v.* Gallatin, 130 N. Y. 117, 29 N. E. 107; Lyon *v.* Adde, 63 Barb. (N. Y.) 89; Hewlett *v.* Cock, 7 Wend. (N. Y.) 371; Bristow *v.* Cormican, 3 App. Cas. 641; Rogers *v.* Allen, 1 Campb. 309, 10 Rev. Rep. 689; Malcomson *v.* O'Dea, 10 H. L. Cas. 593, 9 Jur. N. S. 1135, 9 L. T. Rep. N. S. 93, 12 Wkly. Rep. 178, 11 Eng. Reprint 1155.

Ancient book entries showing claim of adverse possession.— In an action for specific performance of a contract to convey land, books containing entries made over fifty years ago, showing that the possession of a prior owner of the land was hostile and adverse to the rights of a prior cotenant, and bearing every evidence of genuineness, were not objectionable as a history of past transactions, or as entries in the interest of the owner, but were admissible as ancient documents to establish adverse possession of such owner as against the cotenant. Hamerschlag *v.* Duryea, 58 N. Y. App. Div. 288, 68 N. Y. Suppl. 1061 [*affirmed* in 172 N. Y. 622, 65 N. E. 1117].

83. Holt *v.* Maverick, 5 Tex. Civ. App. 650, 23 S. W. 751; Wynne *v.* Tyrwhitt, 4 B. & Ald. 376, 6 E. C. L. 524.

Rule applied to parish certificate of settlement.— Rex *v.* Ryton, 5 T. R. 259.

Rule applied to antenuptial settlement.— Adams *v.* Dickson, 23 Ga. 406.

84. Nowlin *v.* Burwell, 75 Va. 551.

85. Thompson *v.* Louisville, etc., R. Co., 110 Ky. 973, 63 S. W. 42, 23 Ky. L. Rep. 476, and other cases in the notes preceding and following.

The rule is applied also to licenses to occupy lands (Boston *v.* Richardson, 105 Mass. 351), to land certificates (Shinn *v.* Hicks, 68 Tex. 277, 4 S. W. 486; Timmony *v.* Burns, (Tex. Civ. App. 1897) 42 S. W. 133), and to transfers thereof (Ward *v.* Cameron, (Tex. Civ. App. 1903) 76 S. W. 240; Walker *v.* Peterson, (Tex. Civ. App. 1897) 42 S. W. 1045).

Abstract of title.— In Illinois it is held that an abstract of title was properly admitted in evidence under the Burnt Records Act where the genuineness thereof was proven, and it appeared that it had been in the possession of the owners of a part of the property therein described for more than thirty years. Conney *v.* A. Booth Packing Co., 169 Ill. 370, 48 N. E. 406.

86. *Georgia.*— Jordan *v.* Cameron, 12 Ga. 267.

Maryland.— Hall *v.* Gittings, 2 Harr. & J. 112.

New York.— Rider *v.* Legg, 51 Barb. 260; Staring *v.* Bowen, 6 Barb. 109; Jackson *v.* Laroway, 3 Johns. Cas. 283.

Pennsylvania.— Shaller *v.* Brand, 6 Binn. 435, 6 Am. Dec. 482.

South Carolina.— Eubanks *v.* Harris, 1 Speers 183; Duncan *v.* Beard, 2 Nott & M. 400.

England.— Doe *v.* Wooley, 8 B. & C. 22, 15 E. C. L. 21, 3 C. & P. 402, 14 E. C. L. 631, 6 L. J. K. B. O. S. 286, 2 M. & R. 195.

See 20 Cent. Dig. tit. "Evidence," § 1623. See, generally, Wills.

87. Walton *v.* Coulson, 29 Fed. Cas. No. 17,132, 1 McLean 120 [*affirmed* in 9 Pet. 62,

attorney,[88] and assignments,[89] but also to receipts,[90] letters,[91] and maps, plans, or field-notes.[92]

b. Public Records. Ancient original public records like ancient deeds, when shown to have come from the proper custody, are, in the absence of anything to impeach their verity, admissible in evidence without further proof of their authenticity, it being presumed after the lapse of thirty years that the official who made the record is dead.[93] The rule has been applied to books and records of land proprietors preserved as township or public records,[94] and to public records of deeds, although irregularly made,[95] provided facts requisite for the admission of the deeds themselves as ancient documents exist.[96]

c. Private Records. In the same way records and books of a private character, such as those kept by associations or societies of various kinds, have been frequently admitted as ancient documents where they contain intrinsic evidence of their verity and genuineness and are produced from the proper custody.[97]

9 L. ed. 51]; Chelsea Water-Works *v.* Cowper, 1 Esp. 275.

88. Nowlin *v.* Burwell, 75 Va. 551; Winn *v.* Patterson, 9 Pet. (U. S.) 663, 9 L. ed. 266.

89. Wolcott *v.* Merchant's Gargling Oil Co., 45 N. Y. App. Div. 379, 60 N. Y. Suppl. 862, assignment of right to receive royalties.

90. *Georgia.*— Settle *v.* Alison, 8 Ga. 201, 52 Am. Dec. 393.

Maryland.— Allender *v.* Trinity Church, 3 Gill 166.

Pennsylvania.— Lewis *v.* Lewis, 4 Watts & S. 378.

Texas.—Ballard *v.* Carmichael, 83 Tex. 355, 18 S. W. 734; Culmore *v.* Medlenka, (Civ. App. 1898) 44 S. W. 676.

United States.— Vattier *v.* Hinde, 7 Pet. 252, 8 L. ed. 675.

England.—Bertie *v.* Beaumont, 2 Price 303.

See 20 Cent. Dig. tit. "Evidence," § 1613 *et seq.*

Receipts from a public officer, such as a treasurer's receipt for taxes, if produced from the proper custody, are receivable without calling the officer. McReynolds *v.* Longenberger, 57 Pa. St. 13.

91. Bell *v.* Brewster, 44 Ohio St. 690, 10 N. E. 679; Peterson *v.* Logan, 3 Yeates (Pa.) 195; Doe *v.* Beynon, 12 A. & E. 431, 9 L. J. Q. B. 359, 4 P. & D. 193, 40 E. C. L. 218; Fenwick *v.* Reed, 6 Madd. 7.

92. *Louisiana.*— Carrollton R. Co. *v.* Municipality No. 2, 19 La. 62.

Massachusetts.— Whitman *v.* Shaw, 166 Mass. 451, 44 N. E. 333; Boston Water Power Co. *v.* Hanlon, 132 Mass. 483.

New Hampshire.—Lawrence *v.* Tennant, 64 N. H. 532, 15 Atl. 543; Wells *v.* Jackson Iron Mfg. Co., 48 N. H. 491; Whitehouse *v.* Bickford, 29 N. H. 471.

New York.— See Jackson *v.* Witter, 2 Johns. 180.

North Carolina.— Dugger *v.* McKesson, 100 N. C. 1, 6 S. E. 746.

Pennsylvania.— Mineral R., etc., Co. *v.* Auten, 188 Pa. St. 568, 41 Atl. 327; Smucker *v.* Pennsylvania R. Co., 188 Pa. St. 40, 41 Atl. 457; Huffman *v.* McCrea, 56 Pa. St. 95; Burchfield *v.* McCauley, 3 Watts 9. *Compare* Biddle *v.* Shippen, 1 Dall. 19, 1 L. ed. 19.

Vermont.— Aldrich *v.* Griffith, 66 Vt. 390, 29 Atl. 376; Hart *v.* Gage, 6 Vt. 170.

See 20 Cent. Dig. tit. "Evidence," § 1625½.

93. *Connecticut.*— Enfield *v.* Ellington, 67 Conn. 459, 34 Atl. 818.

Massachusetts.— Boston *v.* Weymouth, 4 Cush. 538.

New Hampshire.— Adams *v.* Stanyan, 24 N. H. 405. See also Cass *v.* Bellows, 31 N. H. 501, 64 Am. Dec. 347.

Rhode Island.— Almy *v.* Church, 18 R. I. 182, 26 Atl. 58.

United States.—McClaskey *v.* Barr, 47 Fed. 154; Fuller *v.* Fletcher, 44 Fed. 34; Dodge *v.* Briggs, 27 Fed. 160.

See 20 Cent. Dig. tit. "Evidence," § 1625.

Rule applied to ancient plans or field-books found among township records.— Gibson *v.* Poor, 21 N. H. 440, 53 Am. Dec. 216.

Ancient military pay-roll produced from government archives admitted.—Bell *v.* Brewster, 44 Ohio St. 690, 10 N. E. 679.

Probate records.— In Willetts *v.* Mandlebaum, 28 Mich. 521, it was held that where defendant in ejectment has been in undisputed possession for fifty years under a title dependent on probate proceedings, he is not required to make as strict proof of such proceedings as if they were new, especially where such proceedings were had during the period of which judicial records are, to a considerable extent, lost or destroyed.

94. Pells *v.* Webquish, 129 Mass. 469; Rust *v.* Boston Mill Corp., 6 Pick. (Mass.) 158; Little *v.* Downing, 37 N. H. 355; Sanger *v.* Merritt, 120 N. Y. 109, 24 N. E. 386; Smyth *v.* New Orleans Canal, etc., Co., 93 Fed. 899, 35 C. C. A. 646.

95. Baeder *v.* Jennings, 40 Fed. 199. See also Carroll *v.* Norwood, 1 Harr. & J. (Md.) 167; Heinmiller *v.* Hatheway, 60 Mich. 391, 27 N. W. 558; McCarty *v.* Johnson, 20 Tex. Civ. App. 184, 49 S. W. 1098.

Ancient record of deed admitted as secondary evidence.— McCarty *v.* Johnson, 20 Tex. Civ. App. 184, 49 S. W. 1098; Booge *v.* Parsons, 2 Vt. 456, 21 Am. Dec. 557.

96. Baeder *v.* Jennings, 40 Fed. 199.

97. Hamerschlag *v.* Duryea, 172 N. Y. 622, 65 N. E. 1117; Bullen *v.* Michel, 2 Price 399, 16 Rev. Rep. 77. The rule has been applied

Thus the rule has been applied to entries on the minutes of a masonic lodge[98] and to the books and records of companies of proprietors under whose authority lands have been divided or disposed of;[99] and in the latter instance, according to some of the decisions, without any proof of the original and continued legal organization of the proprietary and whether a clerk or any other person authorized to keep the records is in existence or not.[1] So entries appearing to be copies of authentic and contemporaneous instruments by persons employed for the purpose in books in which ancient deeds and instruments are usually transcribed for the sake of reference and preservation according to the custom of families having a muniment-room have been held admissible, where a search was made for the originals and they could not be found.[2]

d. Certified or Examined Copies. Office copies of ancient recorded deeds or other documents may as a general rule be admitted in evidence as if they were the original instruments themselves,[3] at least where it appears that the original

to hospital records (Hamerschlag *v.* Duryea, 172 N. Y. 622, 65 N. E. 1117 [*affirming* 58 N. Y. App. Div. 288, 68 N. Y. Suppl. 1061]), to entries by monks of an abbey (Bullen *v.* Michel, 2 Price 399, 16 Rev. Rep. 77), and to entries in a steward's book (Wynne *v.* Tyrwhitt, 4 B. & Ald. 376, 6 E. C. L. 524).

Tribal records of an Indian tribe, purporting to have been made by their tribal officer, and having been for many years in the custody of the town-clerk, are ancient instruments, and, as such, admissible to show an allotment of land within the reservation made to members of the tribe in severalty. Fowler *v.* Scott, 64 Wis. 509, 25 N. W. 716.

98. Howard *v.* Russell, 75 Tex. 171, 12 S. W. 525.

99. Goodwin *v.* Jack, 62 Me. 414; Almy *v.* Church, 18 R. I. 182, 26 Atl. 58; Townsend *v.* Downer, 32 Vt. 183.

Copies of letters and memoranda of the agent and officers of the proprietors of land relating to their affairs, found among the ancient records of their proceedings, are admissible without evidence of the existence, loss, or destruction of the original. Goodwin *v.* Jack, 62 Me. 414.

Recent entries.— Where the transactions recorded upon the ancient books of a proprietary are of a recent date, it is necessary to introduce some evidence tending to show that they were made by a clerk either duly elected or *de facto* exercising the office. Goulding *v.* Clark, 34 N. H. 148.

Failure to deposit with town-clerk held not to render record inadmissible.— Where the records of a proprietary have been deposited with the town-clerk, as required by Me. St. (1821) c. 4, § 3, after the proprietary ceased to exist, the original is admissible without any certificate of the town-clerk to authenticate it. Brackett *v.* Persons Unknown, 53 Me. 228.

Records of land proprietors preserved among township records see *supra*, XIV, D, 2, b.

1. Goodwin *v.* Jack, 62 Me. 414; King *v.* Little, 1 Cush. (Mass.) 436; Tolman *v.* Emerson, 4 Pick. (Mass.) 160; Almy *v.* Church, 18 R. I. 182, 26 Atl. 58.

2. Bullen *v.* Michel, 4 Dow. 297, 3 Eng. Reprint 1171.

3. *Alabama.*— Allison *v.* Little, 85 Ala. 512, 5 So. 221.

Georgia.— See Jones *v.* Morgan, 13 Ga. 515. *Compare* Patterson *v.* Collier, 75 Ga. 419, 58 Am. Rep. 472. And see Bentley *v.* McCall, 119 Ga. 530, 46 S. E. 645.

Massachusetts.— New York, etc., R. Co. *v.* Benedict, 169 Mass. 262, 47 N. E. 1027; King *v.* Little, 1 Cush. 436.

New Hampshire.— Little *v.* Downing, 37 N. H. 355.

Pennsylvania.— Duffield *v.* Brindley, 1 Rawle 91; Kingston *v.* Lesley, 10 Serg. & R. 383.

Texas.—Andrews *v.* Marshall, 26 Tex. 212; Hill *v.* Templeton, (Civ. App. 1895) 29 S. W. 535.

Vermont.— See Townsend *v.* Downer, 32 Vt. 183; Williams *v.* Bass, 22 Vt. 352.

United States.— McClaskey *v.* Barr, 47 Fed. 154. See also Sicard *v.* Davis, 6 Pet. 124, 8 L. ed. 342.

Canada.—Montgomery *v.* Graham, 31 U. C. Q. B. 57.

See 20 Cent. Dig. tit. "Evidence," § 1614 *et seq.*

Rule applied to recorded maps, surveys, etc.— Com. *v.* Alburger, 1 Whart. (Pa.) 469; Rogers *v.* Riddlesburg Coal, etc., Co., 31 Leg. Int. (Pa.) 325. See also Gibson *v.* Poor, 21 N. H. 440, 53 Am. Dec. 216.

Instrument improperly recorded.—In Settegast *v.* Charpiot, (Tex. Civ. App. 1894) 28 S. W. 580, it was held that a certified copy of the record of a deed is not admissible as of an ancient instrument unless the deed was properly of record. So in Hoddy *v.* Harryman, 3 Harr. & M. (Md.) 581, it was held that a copy of an ancient deed which does not appear to have been acknowledged is inadmissible in evidence, although the record book appears to have been lost. But in Hall *v.* Gittings, 2 Harr. & J. (Md.) 380, it was held that where possession had accompanied land, agreeably to an ancient deed, the *inspeximus* of the deed was admissible in evidence, although the deed needed no enrolment.

In South Carolina it is held that a copy of a deed is not admissible without proof of

is lost or destroyed or for some other reason cannot be produced.[4] Especially is this true if the copies are of an age sufficient to constitute them ancient documents.[5] But it has been held that an examined copy of an instrument cannot be admitted in evidence without proof of the execution of the original, however old the original may purport to be.[6]

e. Instruments Purporting to Be Executed Under a Power. Where a deed purports to have been executed by virtue of a power of attorney and is admissible as an ancient document, the existence of the power of attorney authorizing its execution will be presumed;[7] but it has been held that if the power of attorney is recorded so that the evidence is perpetuated, the deed is not admissible without the power, however ancient it may be.[8] After the lapse of thirty years a partnership deed is admissible in evidence and the authority of a member of

execution, however old it may be. Woolfolk *v.* Graniteville Mfg. Co., 22 S. C. 332.

Antiquity of record required.— Under statute in Texas, it has been held that in order for a certified copy of the record of an ancient deed or document to take the place of the original when the latter is lost, the registration must be shown to be ancient just as the deed must appear to be ancient where the deed is offered. Brown *v.* Simpson, 67 Tex. 225, 2 S. W. 644; Ehrenberg *v.* Baker, (Tex. Civ. App. 1899) 54 S. W. 435; Davis *v.* Pearson, 6 Tex. Civ. App. 593, 26 S. W. 241. See also Smith *v.* Madison, 67 Mo. 694; Dunn *v.* Miller, 8 Mo. App. 467.

4. *Massachusetts.*— Berry *v.* Raddin, 11 Allen 577.

New York.— See Dodge *v.* Gallatin, 130 N. Y. 117, 29 N. E. 107 [*affirming* 52 Hun 158, 5 N. Y. Suppl. 126].

North Carolina.— Cochran *v.* Linville Imp. Co., 127 N. C. 386, 37 S. E. 496.

Tennessee.—Woods *v.* Bonner, 89 Tenn. 411, 18 S. W. 67.

Texas.— Brown *v.* Simpson, 67 Tex. 225, 2 S. W. 644; Holmes *v.* Coryell, 58 Tex. 680.

United States.— Smyth *v.* New Orleans Canal, etc., Co., 93 Fed. 899, 35 C. C. A. 646.

Accounting for non-production of original held not essential.— Rowletts *v.* Daniel, 4 Munf. (Va.) 473; Stokes *v.* Dawes, 23 Fed. Cas. No. 13,477, 4 Mason 268. *Compare* Crispen *v.* Hannavan, 72 Mo. 548.

5. Hodge *v.* Palms, 117 Fed. 396, 54 C. C. A. 570; Smyth *v.* New Orleans, etc., Co., 93 Fed. 899, 35 C. C. A. 646. See also Hamilton *v.* Smith, 74 Conn. 374, 50 Atl. 884.

6. Schunior *v.* Russell, 83 Tex. 83, 18 S. W. 484 [*distinguishing* Holmes *v.* Coryell, 58 Tex. 680]. *Compare* Woods *v.* Bonner, 89 Tenn. 411, 18 S. W. 67.

7. *Illinois.*— Reuter *v.* Stuckart, 181 Ill. 529, 54 N. E. 1014 [*distinguishing* Fell *v.* Young, 63 Ill. 106].

Maine.— See Innman *v.* Jackson, 4 Me. 237.

Massachusetts.—Stockbridge *v.* West Stockbridge, 14 Mass. 257.

New York.— Hoopes *v.* Auburn Water Works Co., 37 Hun 568 [*affirmed* in 109 N. Y. 635, 16 N. E. 681]; Ensign *v.* McKinney, 30 Hun 249; Doe *v.* Campbell, 10 Johns. 475; Doe *v.* Phelps, 9 Johns. 169.

Pennsylvania.— Providence School Fund's Appeal, 2 Walk. 37.

South Carolina.— Robinson *v.* Craig, 1 Hill 389.

Texas.— O'Donnell *v.* Johns, 76 Tex. 362, 13 S. W. 376; Harrison *v.* McMurray, 71 Tex. 122, 8 S. W. 612; Johnson *v.* Timmons, 50 Tex. 521; Johnson *v.* Shaw, 41 Tex. 428; Ferguson *v.* Ricketts, (Civ. App. 1900) 55 S. W. 975 [*reversed* in 93 Tex. 565, 57 S. W. 19]; Rigsby *v.* Galceron, 15 Tex. Civ. App. 377, 39 S. W. 650; Pearson *v.* Davis, (Civ. App. 1896) 37 S. W. 602; Davis *v.* Pearson, 6 Tex. Civ. App. 593, 26 S. W. 241. See also Storey *v.* Flanagan, 57 Tex. 649; Blackburn *v.* Norman, (Civ. App. 1895) 30 S. W. 718; Smith *v.* Swan, 2 Tex. Civ. App. 563, 22 S. W. 247. *Compare* Baldwin *v.* Goldfrank, 88 Tex. 249, 31 S. W. 1064, where no claim had been asserted.

See 20 Cent. Dig. tit. "Evidence," § 1613 *et seq.*

Indorsement of court reciting existence of power.— The existence of a power under which an ancient deed purports to have been executed may be inferred from a recital on the face of the deed, made by the judge of first instance, before whom the same was executed, that such a power was in existence in his court, having been executed by the attorneys of the owner of the property. Storey *v.* Flanagan, 57 Tex. 649. See also Hooper *v.* Hall, 35 Tex. 82.

In Canada it has been held that the production of a deed thirty years old purporting on its face to be executed under a power of attorney does not prove the power, but proves only what appears on the face of the instrument that the person in question preferred to act under a power. Jones *v.* McMullen, 25 U. C. Q. B. 542.

In England, where a deed more than thirty years old purports to be made in the execution of a special power of appointment and to be executed by the attorney of the donee of the power, it has been held that, although by reason of the antiquity of the deed the execution of it by the attorney as such ought to be presumed, yet there is no rule of law which requires or justifies the presumption that the attorney was duly authorized to execute the power. *In re* Airey, [1897] 1 Ch. 164, 66 L. J. Ch. 152, 76 L. T. Rep. N. S. 151, 45 Wkly. Rep. 286.

8. Tolman *v.* Emerson, 4 Pick. (Mass.) 160. See also Green *v.* Blake, 10 Me. 16. And see, generally, PRINCIPAL AND AGENT.

the partnership will be presumed.[9] A distinction has, however, been drawn in this respect between a private and a statutory or public power, and it has been accordingly held that an ancient deed purporting to have been made by an administrator under an order of court is not admissible in evidence in the absence of proof of an order of a court having jurisdiction to make the order.[10] So a sheriff's deed is not admissible as an ancient instrument where the judgment and execution on which it is issued are not produced or accounted for.[11] But where the authority of an administrator or a public officer to make the sale is shown, it will be presumed in favor of an ancient deed by him that the necessary and proper steps were taken to make the sale regular and legal,[12] at least where possession followed.[13]

3. Age of Document — a. In General. To render an instrument admissible as an ancient document there must generally be direct proof or evidence reasonably warranting the inference that the instrument has been in existence for thirty years or more.[14]

b. Circumstances Showing Age — (i) *Date.* The date of the paper, if resembling the residue of its contents, and not appearing to be altered or interpolated or otherwise spurious, is of itself a circumstance of some strength to show the period of its execution, inasmuch as a suspicion of its genuineness is not to be unreasonably indulged;[15] but the fact that an instrument bears a date indicating

9. Frost *v.* Wolf, 77 Tex. 455, 14 S. W. 440, 19 Am. St. Rep. 761.

10. Fell *v.* Young, 63 Ill. 106.

11. French *v.* McGinnis, 69 Tex. 19, 9 S. W. 323; French *v.* McGinnis, 10 Tex. Civ. App. 7, 29 S. W. 656. See also Fowler *v.* Savage, 3 Conn. 90.

Proof of destruction of records.— After the lapse of thirty years the existence of a judgment and execution recited in a sheriff's deed will be presumed, on proof of the destruction of the records of the court from which the execution purported to issue. Giddings *v.* Day, 84 Tex. 605, 19 S. W. 682.

Loss of records of court.— Testimony of an attorney that he and the clerk have searched the records with diligence and could not find the papers under which a sheriff's deed was executed forty years before, together with evidence that they were withdrawn by a firm of lawyers, one of whom moved away years ago, and the other of whom disclaims all knowledge of them, warrants the court to whose records the papers belong in admitting the sheriff's deed as an ancient instrument, without further proof of the sheriff's authority to make it. Ruby *v.* Von Valkenberg, 72 Tex. 459, 10 S. W. 514.

12. Pendleton *v.* Shaw, 18 Tex. Civ. App. 439, 44 S. W. 1002; Graham *v.* Hawkins, 1 Tex. Unrep. Cas. 514.

13. Drouet *v.* Rice, 2 Rob. (La.) 374; Blossom *v.* Connon, 14 Mass. 177; Pejepscut *v.* Ranson, 14 Mass. 145; Colman *v.* Anderson, 10 Mass. 105; Winkley *v.* Kaime, 32 N. H. 268; Osborne *v.* Tunis, 25 N. J. L. 633.

Appointment and qualification of officer.— And it has been held that it will be presumed in favor of a deed by a public officer that he was duly chosen and qualified. Pejepscut *v.* Ranson, 14 Mass. 145; Blossom *v.* Cannom, 14 Mass. 177.

14. *Georgia.*— Jones *v.* Morgan, 13 Ga. 515.

Illinois.— Whitman *v.* Heneberry, 73 Ill. 109; Smith *v.* Rankin, 20 Ill. 14.

Mississippi.— Fairly *v.* Fairly, 38 Miss. 280.

New York.— Clark *v.* Owens, 18 N. Y. 434.

Texas.— Mapes *v.* Leal, 27 Tex. 345. *Compare* Wille *v.* Ellis, 22 Tex. Civ. App. 462, 54 S. W. 922; McCulloch County Land, etc., Co. *v.* Whitefort, 21 Tex. Civ. App. 314, 50 S. W. 1042.

England.— Doe *v.* Beynon, 12 A. & E. 431, 9 L. J. Q. B. 359, 4 P. & D. 193, 40 E. C. L. 218; Doe *v.* Wooley, 8 B. & C. 22, 15 E. C. L. 21, 3 C. & P. 402, 14 E. C. L. 631, 6 L. J. K. B. O. S. 286, 2 M. & R. 195; Mann *v.* Ricketts, 7 Beav. 93; Doe *v.* Passingham, 2 C. & P. 440, 30 Rev. Rep. 327, 12 E. C. L. 663; Marsh *v.* Collnett, 2 Esp. 665, 5 Rev. Rep. 763; Orange *v.* Pickford, 4 Jur. N. S. 649, 27 L. J. Ch. 808; Holton *v.* Lloyd, 1 Molloy 30; Rex *v.* Farringdon, 2 T. R. 471; Boyd *v.* Petrie, 19 Wkly. Rep. 221.

Canada.— Thompson *v.* Bennett, 22 U. C. C. P. 393.

See 20 Cent. Dig. tit. "Evidence," § 1614 *et seq.*

Instrument less than thirty years old admitted.— Everley *v.* Stoner, 2 Yeates (Pa.) 122, assignment of an application for land, sent to the deputy surveyor, although only twenty-eight years and five months old.

Existence for twenty years held sufficient. — Woods *v.* Montevallo Coal, etc., Co., 84 Ala. 560, 3 So. 475, 5 Am. St. Rep. 393. See also Allison *v.* Little, 85 Ala. 512, 5 So. 221. *Compare* Doe *v.* Eslava, 11 Ala. 1028.

Former rule at common law.— At one time the document was required to be forty years old. Gittings *v.* Hall, 1 Harr. & J. (Md.) 14, 2 Am. Dec. 502; Benson *v.* Olive, Bunb. 284.

15. Enders *v.* Sternbergh, 2 Abb. Dec. (N. Y.) 31, 1 Keyes (N. Y.) 264, 33 How. Pr. (N. Y.) 464.

that it is thirty years of age is not conclusive evidence of the fact and the presumption may be overcome by proof to the contrary.[16]

(II) *Marks of Age.* So the marks of age that the paper bears upon its face, such as its tattered condition, its color, and the faded appearance of the ink is intrinsic evidence of the time of its execution more or less strong according to circumstances.[17]

(III) *Indorsements and Certificates.* So, when the age of a document is under investigation, all indorsements made thereon and certificates attached thereto which in any manner indicate its age are matters to be considered by the jury.[18] Thus in view of the habit of recorders of deeds, which is universal and matter of common knowledge, to indorse upon the deeds themselves the fact and date of their registration, such certificates appearing on deeds, are competent and sufficient evidence of the fact that the deeds had been put upon record during the year mentioned in the certificates.[19]

(IV) *Copy of Instrument.* So a copy of a power of attorney has been held to be admissible where it is offered to show the fact that there was such a paper in existence as the original power of attorney at the date the copy purports to have been made, and as bearing on the question of the antiquity of the original.[20]

(V) *Computation of Age.* A deed may be admitted in evidence as an ancient document when it is thirty years old at the time of the trial, although less than thirty years old when the action was brought, since the competency of the evidence depends as a general rule upon the state of things at the time it is offered and received.[21] It has been held that the principle upon which the antiquity of a deed is reckoned from the date of the deed applies to a will, although the testator has died within the thirty years.[22]

4. Custody. The mere fact that the deed is ancient will not of itself warrant the presumption that it is genuine and entitle it to be admitted in evidence.[23] In addition to proof of antiquity it is necessary that there shall be evidence that the deed comes from the proper custody or depository to justify its admission in evidence.[24] Thus the rule has no application to a deed in the possession of the

16. Whitman *v.* Heneberry, 73 Ill. 109; Smith *v.* Rankin, 20 Ill. 14; Fairly *v.* Fairly, 38 Miss. 280.

17. Enders *v.* Sternbergh, 2 Abb. Dec. (N. Y.) 31, 1 Keyes (N. Y.) 264, 33 How. Pr. (N. Y.) 464; Perry *v.* Clift, (Tenn. Ch. App. 1899) 54 S. W. 121.

18. Bell *v.* Hutchings, (Tex. Civ. App. 1897) 41 S. W. 200.

Rule applied to certificate of acknowledgment.—Kennard *v.* Withrow, (Tex. Civ. App. 1894) 28 S. W. 226. See also Prigden *v.* Green, 80 Ga. 737, 7 S. E. 97; Fairly *v.* Fairly, 38 Miss. 280; Carhampton *v.* Carhampton, 1 Ir. T. R. 567.

19. Prigden *v.* Green, 80 Ga. 737, 7 S. E. 97; Perry *v.* Clift, (Tenn. Ch. App. 1899) 54 S. W. 121; Applegate *v.* Lexington, etc., Min. Co., 117 U. S. 255, 7 S. Ct. 742, 29 L. ed. 892.

20. Williams *v.* Conger, 125 U. S. 397, 8 S. Ct. 933, 31 L. ed. 778.

21. Gardner *v.* Granniss, 57 Ga. 539; Reuter *v.* Stuckart, 181 Ill. 529, 54 N. E. 1014; Bass *v.* Sevier, 58 Tex. 567.

22. Doe *v.* Wooley, 8 B. & C. 22, 15 E. C. L. 21, 3 C. & P. 402, 14 E. C. L. 631, 6 L. J. K. B. O. S. 286, 2 M. & R. 195; Man *v.* Ricketts, 7 Beav. 93; Doe *v.* Deakin, 3 C. & P. 402, 14 E. C. L. 631; Galthorpe *v.* Gough, 4 T. R. 707 note; McKenire *v.* Fraser, 9 Ves. Jr. 5, 32 Eng. Reprint 501. *Compare* Staring *v.* Bowen, 6 Barb. (N. Y.) 109; Jackson *v.* Blanshan, 3 Johns. (N. Y.) 292, 3 Am. Dec. 485.

23. Havens *v.* Sea Shore Land Co., 47 N. J. Eq. 365, 20 Atl. 497; Fogal *v.* Pirro, 10 Bosw. (N. Y.) 100; Williams *v.* Bass, 22 Vt. 352.

24. *Georgia.*— Long *v.* Georgia Land, etc., Co., 82 Ga. 628, 9 S. E. 425.

Kentucky.— Swafford *v.* Herd, 65 S. W. 803, 23 Ky. L. Rep. 1556.

Mississippi.— Fairly *v.* Fairly, 38 Miss. 280.

New Jersey.— See Havens *v.* Sea Shore Land Co., 47 N. J. Eq. 365, 20 Atl. 497.

New York.— Martin *v.* Rector, 24 Hun 27; Fogal *v.* Pirro, 17 Abb. Pr. 113.

Pennsylvania.—Rogers *v.* Riddlesburg Coal, etc., Co., 31 Leg. Int. 325. See also Lau *v.* Mumma, 43 Pa. St. 267.

Canada.— Rogers *v.* Shortis, 10 Grant Ch. (U. C.) 243.

See 20 Cent. Dig. tit. "Evidence," § 1613 *et seq.*

Custody held improper.—Where the record of the transfer of a land certificate in 1854 failed to show how or when such transfer came into the custody of the land-office prior

grantor since the alleged execution.[25] But if an ancient document is produced from the proper custody,[26] as for instance documents found among the family papers of the person entitled thereto,[27] or in the hands of a trustee of an estate,[28] or of an agent or attorney of the parties beneficially interested,[29] it is admissible under the rule. Documents are said to be in proper custody if they are in the place in which and under the care of the person with whom they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.[30] Accordingly the custody to be shown for the purpose of making a

to the location of the certificate in 1874, it was held to be necessary for the party offering such transfer in evidence as an ancient instrument to show how or when it came into the land-office, or to explain its custody prior to the time it was known to be in such office, since the land-office was not the proper depository of the transfer before the location of the certificate. Chamberlain *v.* Showalter, 5 Tex. Civ. App. 226, 23 S. W. 1017. See also Harris *v.* Hoskins, 2 Tex. Civ. App. 486, 22 S. W. 251.

25. Williamson *v.* Mosley, 110 Ga. 53, 35 S. E. 301; Heintz *v.* O'Donnell, 17 Tex. Civ. App. 21, 42 S. W. 797.

Custody of lease.— In Doe *v.* Keeling, 11 Q. B. 884, 12 Jur. 433, 17 L. J. Q. B. 199, 63 E. C. L. 884, it was held that the proper custody of an expired lease was that of the lessor. See also Plaxton *v.* Dare, 10 B. & C. 17, 8 L. J. K. B. O. S. 98, 5 M. & R. 1, 21 E. C. L. 18.

26. *Florida.*— Sullivan *v.* Richardson, 33 Fla. 1, 14 So. 692.

Georgia.— Dooly *v.* Roe, 31 Ga. 593.

Illinois.— Whitman *v.* Heneberry, 73 Ill. 109.

Massachusetts.— Whitman *v.* Shaw, 166 Mass. 451, 44 N. E. 333. See also *In re* Buttrick, 185 Mass. 107, 69 N. E. 1044, in custody of heir.

New Jersey.— Havens *v.* Sea-Shore Land Co., 47 N. J. Eq. 365, 20 Atl. 497.

Ohio.— Bell *v.* Brewster, 44 Ohio St. 690, 10 N. E. 679.

South Carolina.—Polson *v.* Ingram, 22 S. C. 541; Duncan *v.* Beard, 2 Nott & M. 400.

Texas.— Crain *v.* Huntington, 81 Tex. 614, 17 S. W. 243; Wilson *v.* Simpson, 80 Tex. 279, 16 S. W. 40; Ammons *v.* Dwyer, 78 Tex. 639, 15 S. W. 1049; Warren *v.* Frederichs, 76 Tex. 647, 13 S. W. 643; Williams *v.* Conger, 49 Tex. 582; Jouett *v.* Gunn, 13 Tex. Civ. App. 84, 35 S. W. 194; Huff *v.* Crawford, (Civ. App. 1895) 32 S. W. 592; Pendleton *v.* Robertson, (Civ. App. 1895) 32 S. W. 442; McCelvey *v.* Cryer, 8 Tex. Civ. App. 437, 28 S. W. 691; Masterson *v.* Todd, 6 Tex. Civ. App. 131, 24 S. W. 682; Fletcher *v.* Ellison, 1 Tex. Unrep. Cas. 661.

United States.— Barr *v.* Gratz, 4 Wheat. 213, 4 L. ed. 553; Templeton *v.* Luckett, 75 Fed. 254, 21 C. C. A. 325.

England.—Andrew *v.* Motley, 12 C. B. N. S. 514, 32 L. J. C. P. 128, 104 E. C. L. 514; Doe *v.* Owen, 8 C. & P. 751, 34 E. C. L. 1000; Reece *v.* Walters, 2 Jur. 378, 7 L. J. Exch. 138, 3 M. & W. 527; Orange *v.* Pickford, 4 Jur. N. S. 649, 27 L. J. Ch. 808; Holton *v.* Lloyd, 1 Molloy 30. See also Malcomson *v.* O'Dea, 10 H. L. Cas. 593, 9 Jur. N. S. 1135, 9 L. T. Rep. N. S. 93, 12 Wkly. Rep. 178, 11 Eng. Reprint 1155. Lord Ellenborough, in Roe *v.* Rawlings, 7 East 279, 291, 3 Smith K. B. 254, 8 Rev. Rep. 632, said: "Ancient deeds proved to have been found amongst deeds and evidences of land may be given in evidence, although the execution of them cannot be proved; and the reason given is, 'that it is hard to prove ancient things, and the finding them in such a place is a presumption they were fairly and honestly obtained, and reserved for use, and are free from suspicion of dishonesty.'"

Canada.— Cook *v.* Christie, 12 U. C. C. P. 517.

See 20 Cent. Dig. tit. "Evidence," § 1613 *et seq.*

27. Bell *v.* Brewster, 44 Ohio St. 690, 10 N. E. 679; Lewis *v.* Lewis, 4 Watts & S. (Pa.) 378; Orser *v.* Vernon, 14 U. C. C. P. 573.

28. Thompson *v.* Bennett, 22 U. C. C. P. 393.

29. Thursby *v.* Myers, 57 Ga. 155; Warren *v.* Frederichs, 76 Tex. 647, 13 S. W. 643; Doe *v.* Keeling, 11 Q. B. 884, 12 Jur. 433, 17 L. J. Q. B. 199, 63 E. C. L. 884; Doe *v.* Phillips, 8 Q. B. 158, 10 Jur. 34, 15 L. J. Q. B. 47, 55 E. C. L. 158. But see Evans *v.* Rees, 10 A. & E. 151, 9 L. J. M. C. 83, 2 P. & D. 626, 37 E. C. L. 101, in which it was held that if it was necessary to prove the custody of ancient documents someone must be sworn for that purpose, and it is not sufficient that it is produced in court by the counsel or steward of the manor. See also Ward *v.* Cameron, (Tex. Civ. App. 1903) 76 S. W. 240.

30. Stephen Dig. Ev. art. 88 [*quoted* in Whitman *v.* Shaw, 166 Mass. 451, 460, 44 N. E. 333]. See also the following cases:

New Hampshire.—Gibson *v.* Poor, 21 N. H. 440, 53 Am. Dec. 216.

New Jersey.— Havens *v.* Sea-Shore Land Co., 47 N. J. Eq. 365, 20 Atl. 497.

Ohio.— Bell *v.* Brewster, 44 Ohio St. 690, 10 N. E. 679.

Texas.— Warren *v.* Frederichs, 76 Tex. 647, 13 S. W. 643; Williams *v.* Conger, 49 Tex. 582.

Virginia.— Nowlin *v.* Burwell, 75 Va. 551.

England.— Bertie *v.* Beaumont, 2 Price 303.

If found where it would not properly and naturally be, its absence from the proper place must be satisfactorily accounted for.

document evidence without proof of execution is not necessarily that of the person strictly entitled to the possession. It is enough if the person in whose custody the deed is found is so connected with the deed that he may reasonably be supposed to be in possession of it without fraud.[31] Whether a document comes from the proper custody is a question for the court and not for the jury.[32]

5. Possession Under Instrument and Other Circumstances — a. In General. The rule as to what evidence in addition to proof of antiquity and that the deed or will comes from a proper source is required to justify the admission of an ancient instrument in evidence without proof of execution is not entirely settled. The decisions are harmonious to this extent: That, where possession of the land has accompanied the deed or will, that fact furnishes sufficient evidence of its authenticity to justify its admission.[33] If property passes through several hands

Gibson *v.* Poor, 21 N. H. 440, 53 Am. Dec. 216.

31. Doe *v.* Samples, 8 A. & E. 151, 2 Jur. 841, 7 L. J. Q. B. 140, 3 N. & P. 254, 1 W. W. & H. 228, 35 E. C. L. 526. See also Doe *v.* Phillips, 8 Q. B. 158, 10 Jur. 34, 15 L. J. Q. B. 47, 55 E. C. L. 158. And see Ward *v.* Cameron, (Tex. Civ. App. 1903) 76 S. W. 240, custody of county surveyor.

32. Doe *v.* Keeling, 11 Q. B. 884, 12 Jur. 433, 17 L. J. Q. B. 199, 63 E. C. L. 884; Reece *v.* Walters, 2 Jur. 378, 7 L. J. Exch. 138, 3 M. & W. 527.

33. *Alabama.*— Carter *v.* Doe, 21 Ala. 72; Doe *v.* Eslava, 11 Ala. 1028; Beall *v.* Dearing, 7 Ala. 124.

Georgia.— Goza *v.* Browning, 96 Ga. 421, 23 S. E. 842; Bell *v.* McCawley, 29 Ga. 355; Roe *v.* Doe, Dudley 168. See also McArthur *v.* Morrison, 107 Ga. 796, 34 S. E. 205.

Illinois.— Reuter *v.* Stuckart, 181 Ill. 529, 54 N. E. 1014.

Kentucky.— Winston *v.* Gwathmey, 8 B. Mon. 19; Thruston *v.* Masterson, 9 Dana 228; Cook *v.* Totton, 6 Dana 108; Bennett *v.* Runyon, 4 Dana 422.

Maine.— Crane *v.* Marshall, 16 Me. 27, 33 Am. Dec. 631.

Maryland.— Carroll *v.* Norwood, 1 Harr. & J. 167; Hoddy *v.* Harryman, 3 Harr. & M. 581. See also Gittings *v.* Hall, 1 Harr. & J. 14, 2 Am. Dec. 502.

Massachusetts.— Green *v.* Chelsea, 24 Pick. 71; Stockbridge *v.* West Stockbridge, 14 Mass. 257. See also *In re* Buttrick, 185 Mass. 107, 69 N. E. 1044, possession and claim of title by heir under instrument shown by records of the probate court.

Michigan.— King *v.* Merritt, 67 Mich. 194, 34 N. W. 689.

Missouri.— Ryder *v.* Fash, 50 Mo. 476.

New Hampshire.— Clark *v.* Wood, 34 N. H. 447.

New Jersey.— Havens *v.* Sea-Shore Land Co., 47 N. J. Eq. 365, 20 Atl. 497.

New York.— Enders *v.* Sternberg, 2 Abb. Dec. 31, 1 Keyes 264, 33 How. Pr. 464; Troup *v.* Hurlbut, 10 Barb. 354; Fetherly *v.* Waggoner, 11 Wend. 599; Hewlett *v.* Cock, 7 Wend. 371; Jackson *v.* Christman, 4 Wend. 277; Jackson *v.* Thompson, 6 Cow. 178; Doe *v.* Phelps, 9 Johns. 169.

North Carolina.—Davis *v.* Higgins, 91 N. C. 382; Plummer *v.* Baskerville, 36 N. C. 252.

Pennsylvania.— Healy *v.* Moul, 5 Serg. & R. 181; Shaller *v.* Brand, 6 Binn. 435, 6 Am. Dec. 482.

South Carolina.— Frost *v.* Frost, 21 S. C. 501; Swygart *v.* Taylor, 1 Rich. 54; Duncan *v.* Beard, 2 Nott & M. 400.

Texas.— Holmes *v.* Coryell, 58 Tex. 680; Thompson *v.* Rutherford, 2 Tex. Unrep. Cas. 652.

Vermont.— Giddings *v.* Smith, 15 Vt. 344. See also Williams *v.* Bass, 22 Vt. 352.

Virginia.—Roberts *v.* Stanton, 2 Munf. 129, 5 Am. Dec. 463.

United States.— Stokes *v.* Dawes, 23 Fed. Cas. No. 13,477, 4 Mason 268.

England.— Isack *v.* Clarke, 1 Rolle 126; Rex *v.* Ryton, 5 T. R. 259; Carhampton *v.* Carhampton, 1 Ir. T. R. 567.

Canada.— Orser *v.* Vernon, 14 U. C. C. P. 573.

See 20 Cent. Dig. tit. "Evidence," § 1616 *et seq.*

Possession of part of premises.— To entitle a deed to be given in evidence as an ancient deed, without proof of its execution, it seems that possession under it for thirty years of a part of the premises contained in it is sufficient, even as against one in possession of another part. Jackson *v.* Davis, 5 Cow. (N. Y.) 123, 15 Am. Dec. 451.

Occupation of premises through subordinate.— Evidence that the occupant of certain real estate had said that the land belonged to the descendant of a grantee, who had acquired title many years before through a sheriff's deed, raises a sufficient presumption of possession in the grantee to admit the deed in evidence as an ancient instrument. Hasbrouck *v.* Burhans, 47 Hun (N. Y.) 487.

Order of proof.— Apart from any consideration of the necessity of proof of possession under an ancient deed or will, the question whether the instrument shall be read in evidence before proof of an accompanying possession is had is one as to the order of proof; it is within the discretion of the court whether the possession shall be first proved or the instrument first given in evidence in order that the court may be able to say whether the possession has been in accordance with the tenor of the instrument. Staring *v.* Bowen, 6 Barb. (N. Y.) 109; Doe *v.* Passingham, 2 C. & P. 440, 30 Rev. Rep. 327, 12 E. C. L. 663.

in the course of a given time, each keeping in his possession the deed given to him, the possession of all is equally under the first deed, which may be given in evidence as an ancient deed, although never seen by any but the first grantee to whom it was given.[34] But where possession has not accompanied the deed the cases are not agreed as to what proof other than proof of possession will be sufficient to justify its admission.[35] In some jurisdictions it is held that proof of accompanying possession of the lands claimed to be embraced by the deed is indispensable to its admissibility as an ancient document,[36] and in some instances possession for the full period of thirty years seems to have been required.[37] But in a number of cases it has been held that possession for a less period than thirty years will be sufficient if there are other circumstances tending to show the genuineness of the instrument;[38] and indeed it may be stated as the general rule that a deed may be introduced in evidence without proof of its execution or without proof of possession thereunder, if such an account be given of the instrument as may under all the circumstances be reasonably expected and as will afford the presumption that it is genuine.[39] Thus the fact that important trans-

34. Waldron *v.* Tuttle, 4 N. H. 371; Williams *v.* Conger, 125 U. S. 397, 8 S. Ct. 933, 31 L. ed. 778.

35. See Havens *v.* Sea-Shore Land Co., 47 N. J. Eq. 365, 20 Atl. 497.

36. Clark *v.* Wood, 34 N. H. 447; Homer *v.* Cilley, 14 N. H. 85; Waldron *v.* Tuttle, 4 N. H. 371; Middlebury Bank *v.* Rutland, 33 Vt. 414. See also Fairly *v.* Fairly, 38 Miss. 280.

37. Thirteen years' possession held insufficient.— Homer *v.* Cilley, 14 N. H. 35.

38. *Georgia.*— King *v.* Sears, 91 Ga. 577, 18 S. E. 830.

Illinois.— See Reuter *v.* Stuckart, 181 Ill. 529, 54 N. E. 1014.

New York.— Cahill *v.* Palmer, 45 N. Y. 478.

South Carolina.— Wagner *v.* Aiton, 1 Rice, 100; Robinson *v.* Craig, 1 Hill 389.

Texas.— Wilson *v.* Simpson, 80 Tex. 279, 16 S. W. 40; Gainer *v.* Cotton, 49 Tex. 101.

See 20 Cent. Dig. tit. "Evidence," § 1614 *et seq.*

Possession for part of full period coupled with acknowledgment by grantor of execution.— Where the grantee in a deed, shortly after its date, which is thirty years before the trial, took possession of the land, which he believed to be that conveyed by the deed, and the grantor twenty years afterward acknowledged that he executed it on the day of its date, it is sufficient to show that the deed is an ancient instrument, so as to dispense with the production of the subscribing witness to prove its execution. Nixon *v.* Porter, 34 Miss. 697, 69 Am. Dec. 408.

Where possession is only circumstance.— In Walker *v.* Walker, 67 Pa. St. 185, it was said that where possession is the only circumstance relied on to establish the authenticity of the deed, nothing less than proof of possession for thirty years will be sufficient. To the same effect see Nowlin *v.* Burwell, 75 Va. 551.

39. *Alabama.*— White *v.* Farris, 124 Ala. 461, 27 So. 259; Alexander *v.* Wheeler, 78 Ala. 167; Carter *v.* Doe, 21 Ala. 72; Doe *v.* Eslava, 11 Ala. 1028; Beall *v.* Dearing, 7 Ala. 124.

Illinois.— Whitman *v.* Heneberry, 73 Ill. 109. See also Reuter *v.* Stuckart, 181 Ill. 529, 54 N. E. 1014; Smith *v.* Rankin, 20 Ill. 14.

Kentucky.— Harlan *v.* Howard, 79 Ky. 373, 2 Ky. L. Rep. 368.

Missouri.— Long *v.* McDow, 87 Mo. 197.

New Jersey.— Osborne *v.* Tunis, 25 N. J. L. 633; Havens *v.* Sea-Shore Land Co., 47 N. J. Eq. 365, 20 Atl. 497.

New York.— Enders *v.* Sternbergh, 2 Abb. Dec. 31, 1 Keyes 264, 33 How. Pr. 464; Lyon *v.* Adde, 63 Barb. 89; Staring *v.* Bowen, 6 Barb. 109; Willson *v.* Betts, 4 Den. 201; Jackson *v.* Luquere, 5 Cow. 221; Jackson *v.* Laroway, 3 Johns. Cas. 283; Bogardus *v.* Trinity Church, 4 Sandf. Ch. 623. *Compare* Martin *v.* Rector, 24 Hun 27; Ridgeley *v.* Johnson, 11 Barb. 527; Staring *v.* Bowen, 6 Barb. 109; Jackson *v.* Blanshan, 3 Johns. 292, 3 Am. Dec. 485.

Pennsylvania.— Walker *v.* Walker, 67 Pa. St. 185; Thomas *v.* Horlocker, 1 Dall. 14, 1 L. ed. 17. *Compare* McGennis *v.* Allison, 10 Serg. & R. 197; Healy *v.* Moul, 5 Serg. & R. 181.

South Carolina.—Thompson *v.* Brannon, 14 S. C. 540; Brown *v.* Wood, 6 Rich. Eq. 155. See also Frost *v.* Frost, 21 S. C. 501; Swygart *v.* Taylor, 1 Rich. 54; Edmonston *v.* Hughes, Cheves 81. *Compare* Sims *v.* De Graffenreid, 4 McCord 253; Middleton *v.* Mass, 2 Nott & M. 55; Thompson *v.* Bullock, 1 Bay 364.

Texas.— Crin *v.* Huntington, 81 Tex. 614, 17 S. W. 243; Ammons *v.* Dwyer, 78 Tex. 639, 15 S. W. 1049 [*distinguishing* and *explaining* Stroud *v.* Springfield, 28 Tex. 649; Holmes *v.* Coryell, 58 Tex. 680]; Warren *v.* Frederichs, 76 Tex. 647, 13 S. W. 643; Parker *v.* Chancellor, 73 Tex. 475, 11 S. W. 503; Timmony *v.* Burns, (Civ. App. 1897) 42 S. W. 133; Rigsby *v.* Galceron, 15 Tex. Civ. App. 377, 39 S. W. 650; Kellogg *v.* McCabe, 14 Tex. Civ. App. 598, 38 S. W. 542; Williams *v.* Hardie, (Civ. App. 1892) 21 S. W. 267; Holt *v.* Maverick, 5 Tex. Civ. App. 650, 23 S. W. 751. See also Williams *v.* Conger,

actions have taken place under the deed[40] or that taxes have been paid on the lands by those claiming under the deed,[41] especially in the case of wild and uncultivated lands,[42] has been considered as a circumstance tending to confirm the presumption of authenticity. So contemporaneous official acts may be considered in determining the genuineness of the deed, in the absence of proof of possession.[43] Indorsements or memoranda appearing upon an ancient deed, whether they are official or private, have been considered as circumstances indicating that the deed is genuine, where they are of such a character as to show to a cautious and discriminating man that they would not be there if the paper had been a forgery.[44] So also, if it be established that the document has been on record for over thirty years, this fact is strong evidence in favor of its

49 Tex. 582; Stooksberry *v.* Swann, 12 Tex. Civ. App. 66, 34 S. W. 369; Chamberlain *v.* Showalter, 5 Tex. Civ. App. 226, 23 S. W. 1017.

Virginia.— Nowlin *v.* Burwell, 75 Va. 551; Caruthers *v.* Eldridge, 12 Gratt. 670 [*overruling* Dishazer *v.* Maitland, 12 Leigh 524]. *Compare* Shanks *v.* Lancaster, 5 Gratt. 110, 50 Am. Dec. 108.

United States.— Fulkerson *v.* Holmes, 117 U. S. 389, 6 S. Ct. 780, 29 L. ed. 915; Applegate *v.* Lexington County, etc., Min. Co., 117 U. S. 255, 6 S. Ct. 742, 29 L. ed. 892; Hodge *v.* Palms, 117 Fed. 396, 54 C. C. A. 570.

England.— See Doe *v.* Passingham, 2 C. & P. 440, 30 Rev. Rep. 327, 12 E. C. L. 663; Rancliffe *v.* Parkyns, 6 Dow. 149, 3 Eng. Reprint 1428; McKenire *v.* Fraser, 9 Ves. Jr. 5, 32 Eng. Reprint 501. *Compare* Isack *v.* Clarke, 1 Rolle 126; James *v.* Trollop, Skin. 239; Forbes *v.* Wale, 1 W. Bl. 532, in which it was held that an ancient bond could not be read until proved, where there had been no payment of interest or other marks of authenticity.

See 20 Cent. Dig. tit. "Evidence," § 1614 *et seq.*

Wild and uncultivated land.— Under Ga. Code, § 2700, providing that "a deed more than thirty years old, having the appearance of genuineness, and coming from the proper custody, if possession has been consistent therewith, is admissible in evidence without proof of execution," a deed which meets the other requirements is admissible, although possession is not proved, where it is admitted by both parties that the land was wild and unoccupied until shortly before the suit. Pridger *v.* Green, 80 Ga. 737, 7 S. E. 97. See also Gardner *v.* Granniss, 57 Ga. 539; Thursby *v.* Myers, 57 Ga. 155.

Rule applied to leases.— Clark *v.* Owens, 18 N. Y. 434; Hewlett *v.* Cock, 7 Wend. (N. Y.) 371.

Rule applied to mortgage.— Cunningham *v.* Davis, 175 Mass. 213, 56 N. E. 2.

Rule applied to will.— Enders *v.* Sternbergh, 2 Abb. Dec. (N. Y.) 31, 1 Keyes (N. Y.) 264, 33 How. Pr. (N. Y.) 464; Jackson *v.* Laroway, 3 Johns. Cas. (N. Y.) 283; Ferguson *v.* King, 2 Nott & M. (S. C.) 588; Doe *v.* Passingham, 2 C. & P. 440, 30 Rev. Rep. 327, 12 E. C. L. 663.

Proof of corroborating circumstances held essential.— Lau *v.* Mumma, 43 Pa. St. 267; Williams *v.* Bass, 22 Vt. 352.

Admissibility of ancient deed as against adverse claimant in possession with title of record.— In Davidson *v.* Morrison, 86 Ky. 397, 5 S. W. 871, 9 Ky. L. Rep. 629, 9 Am. St. Rep. 295, it was held that an ancient deed cannot be read in evidence against an adverse claimant in possession for more than thirty years with his title of record to establish on the part of plaintiff a right of entry where no possession prior to the execution of the deed under the same chain of title or since its execution has been shown.

40. Bucklen *v.* Hasterlik, 51 Ill. App. 132 [*affirmed* in 155 Ill. 423, 40 N. E. 561].

41. Shaw *v.* Pershing, 57 Mo. 416; Ryder *v.* Fash, 50 Mo. 476. See also Thompson *v.* Brannon, 14 S. C. 542.

42. White *v.* Farris, 124 Ala. 461, 27 So. 259; Williams *v.* Hillegas, 5 Pa. St. 492.

43. Hodge *v.* Palms, 117 Fed. 396, 54 C. C. A. 570. See also Cook *v.* Totton, 6 Dana (Ky.) 108.

44. Reuter *v.* Stuckart, 181 Ill. 529, 54 N. E. 1014; Whitman *v.* Heneberry, 73 Ill. 109; Smith *v.* Rankin, 20 Ill. 14. See also Cook *v.* Totton, 6 Dana (Ky.) 108.

Rule applied to certificate of registration.— Pridgen *v.* Green, 80 Ga. 737, 7 S. E. 97.

Contemporaneous plat indorsed on deed.— In trespass to try title, where it was admitted that a parol partition was made thirty years before, by parties since deceased, but the manner and extent of the partition was in dispute, a deed made in 1861 by plaintiff's ancestor was introduced, which had on its back a plat showing the land divided in a certain way. It appeared from a comparison of the handwritings that the deed and plat were made by the same person and were of the same age. It was held that in view of the age and evident genuineness of the deed, the death of the parties, and that a contemporaneous partition was made, the plat was properly admitted, especially as it was explanatory of the deed. Linam *v.* Anderson, 2 Tex. Civ. App. 631, 21 S. W. 768.

Where indorsements are suggestive of better evidence.— Where the papers themselves show that if genuine evidence of a satisfactory character might have been produced of the genuineness of the indorsements upon them and of the actual antiquity of the documents, the documents will not be admissible in the absence of the production of such other evidence. Smith *v.* Rankin, 20 Ill. 14.

genuineness, although it may not have been recorded in the place or manner required by law.[45]

b. Documents as Evidence of Acts of Ownership. Ancient documents coming out of proper custody and purporting upon the face of them to show exercise of ownership, such as a lease or a license, may be given in evidence without proof of possession or payment of rent under them, as being in themselves acts of ownership on the part of the lessor or licensor and hence proof of possession in him, at least where such acts of ownership are accompanied by other evidence showing enjoyment consistent with such ownership.[46]

6. Defects or Irregularities. The principle has been broadly laid down that the rule allowing ancient documents to be introduced in evidence without proof of their execution embraces no instrument which is not valid on its face and which does not contain every essential requirement of the law under which it was made.[47] Instruments have, however, been held admissible as ancient documents, although in some respects defectively or irregularly executed, and this, although the defect or irregularity appears on the face of the instrument,[48] although improperly or insufficiently acknowledged,[49] or although unrecorded or improperly recorded.[50] So it has been held proper to admit in evidence a certified copy of a deed which has been of record more than thirty years, although not acknowledged as required by the law in force when it was executed.[51] But in Texas it has been held that in the absence of a proper acknowledgment and proper certificate of such acknowledgment of the execution of a deed, no lapse of time will make admissible as an ancient instrument a certified copy from the record of such deed.[52]

7. Effect of Suspicious Circumstances — a. In General. To be admissible as an ancient document, a paper must be free from suspicion and have the appearance of genuineness.[53]

45. Stalford *v.* Goldring, 197 Ill. 156, 64 N. E. 395; Reuter *v.* Stuckart, 181 Ill. 529, 54 N. E. 1014; Quinn *v.* Eagleston, 108 Ill. 248; Whitman *v.* Heneberry, 73 Ill. 109; Smith *v.* Rankin, 20 Ill. 14; Cook *v.* Totten, 6 Dana (Ky.) 108.

46. Boston *v.* Richardson, 105 Mass. 351; Dodge *v.* Gallatin, 130 N. Y. 117, 29 N. E. 107; Lyon *v.* Adde, 63 Barb. (N. Y.) 89; Hewlett *v.* Cock, 7 Wend. (N. Y.) 371; Bristow *v.* Cormican, 3 App. Cas. 641; Clarkson *v.* Woodhouse, 3 Dougl. 189, 5 T. R. 412 note, 26 E. C. L. 131; Malcomson *v.* O'Dea, 10 H. L. Cas. 593, 9 Jur. N. S. 1135, 9 L. T. Rep. N. S. 93, 12 Wkly. Rep. 178, 11 Eng. Reprint 1155. See also Bogardus *v.* Trinity Church, 4 Sandf. Ch. (N. Y.) 633.

47. Boyle *v.* Chambers, 32 Mo. 46; Reaume *v.* Chambers, 22 Mo. 36; Meegan *v.* Boyle, 19 How. (U. S.) 130, 15 L. ed. 577. See also Gittings *v.* Hall, 1 Harr. & J. (Md.) 14, 2 Am. Dec. 502.

48. *Georgia.*— Thursby *v.* Myers, 57 Ga. 155.

Kentucky.— Boyd *v.* Bethel, 9 S. W. 417, 10 Ky. L. Rep. 470.

Maine.— Hill *v.* Lord, 48 Me. 83.

Texas.— Mackey *v.* Armstrong, 84 Tex. 159, 19 S. W. 463; Texas-Mexican R. Co. *v.* Locke, 74 Tex. 370, 12 S. W. 80.

Vermont.— See Williams *v.* Bass, 22 Vt. 352.

See 20 Cent. Dig. tit. "Evidence." § 1626.

49. *Alabama.*— White *v.* Hutchings, 40 Ala. 253, 88 Am. Dec. 766.

Illinois.—Stalford *v.* Goldring, 197 Ill. 156, 64 N. E. 395; Quinn *v.* Eagleston, 108 Ill. 248.

Mississippi.— Hughes *v.* Wilkinson, 37 Miss. 482.

Texas.— Frost *v.* Wolf, 77 Tex. 455, 14 S. W. 440, 19 Am. St. Rep. 761; Smith *v.* Cavitt, 20 Tex. Civ. App. 558, 50 S. W. 167; Stooksberry *v.* Swann, 12 Tex. Civ. App. 66, 34 S. W. 369.

United States.— Williams *v.* Conger, 125 U. S. 397, 8 S. Ct. 933, 31 L. ed. 778; Stoddard *v.* Chambers, 2 How. 284, 11 L. ed. 269.

Compare Reaume *v.* Chambers, 22 Mo. 36.

See 20 Cent. Dig. tit. "Evidence," § 1626.

50. Hedger *v.* Ward, 15 B. Mon. (Ky.) 106; Taylor *v.* Cox, 2 B. Mon. (Ky.) 429; Boyd *v.* Bethel, 9 S. W. 417, 10 Ky. L. Rep. 470; Stooksberry *v.* Swann, 12 Tex. Civ. App. 66, 34 S. W. 369.

Rule applied to will improperly probated or recorded.— Jordan *v.* Cameron, 12 Ga. 267; Jackson *v.* Laroway, 3 Johns. Cas. (N. Y.) 283; Giddings *v.* Smith, 15 Vt. 344.

51. Bradley *v.* Lightcap, 201 Ill. 511, 66 N. E. 546; Plaster *v.* Rigney, 97 Fed. 12, 38 C. C. A. 25, decided under Missouri statute.

52. Hill *v.* Taylor, 77 Tex. 295, 14 S. W. 366. See also Andrews *v.* Marshall, 26 Tex. 212.

53. Lau *v.* Mumma, 43 Pa. St. 267, in which case lack of genuineness appeared from an indorsement of the recorder in a note to the record that the paper was not the original but only a copy, and the further fact that

b. Alterations and Interlineations. Thus some explanation of alterations, interlineations, or erasures, if there are any of a material character, should as a general rule be required by the court, especially when insisted on by the adverse party, before a document should be allowed to be exhibited and read as part of the evidence.[54] Thus, where there is evidence tending to show that the date of a document has been changed so as to leave uncertainty arising from the face of the instrument itself as to what its true date is, it is for the trial judge to inspect the paper and hear such evidence as may be offered to explain the uncertainty and to determine whether it bears such marks of suspicion unexplained as to justify its rejection as an ancient document.[55] If the document is admitted, the jury must, it has been held, receive it as at least *prima facie* evidence.[56]

c. Circumstances Appearing From Extraneous Evidence. But the grounds of suspicion from which such instruments must be free before they are admissible in evidence, it has been held, refer to something apparent upon their face or shown by some fact or circumstance directly connected with them, and not to extraneous testimony.[57] Thus the fact that an affidavit has been made attacking the document as a forgery or otherwise impeaching its genuineness has been held not to affect its admissibility.[58] But although an instrument possessing the requisites prescribed by law proves itself, it may be shown to be a forgery or attacked as invalid on other grounds after its admission, by the introduction of evidence at the trial.[59]

the signature of a witness who was not German was written in the German style of penmanship.

54. Herrick *v.* Malin, 22 Wend. (N. Y.) 388. See also Ridgeley *v.* Johnson, 11 Barb. (N. Y.) 527; Jackson *v.* Osborn, 2 Wend. (N. Y.) 555, 20 Am. Dec. 649; Rodriguez *v.* Haynes, 76 Tex. 225, 13 S. W. 296; Houston *v.* Blythe, 60 Tex. 506; McCelvey *v.* Cryer, 8 Tex. Civ. App. 437, 28 S. W. 691. *Compare* Stribling *v.* Atkinson, 79 Tex. 162, 14 S. W. 1054; Beaumont Pasture Co. *v.* Preston, 65 Tex. 448; Holt *v.* Maverick, 5 Tex. Civ. App. 650, 23 S. W. 751; McWhirter *v.* Allen, 1 Tex. Civ. App. 649, 20 S. W. 1007. The transfer of a land certificate with the name of the grantee left blank when executed, and the grantee's name afterward inserted, all appearing from the face of the instrument, does not cast suspicion on it, so as to prevent its being received in evidence as an ancient instrument. Ward *v.* Cameron, (Tex. Civ. App. 1903) 76 S. W. 240.

Ga. Code, § 2712, providing that a registered deed shall be admitted in evidence without further proof, unless an affidavit is filed that it is a forgery, when an issue is to be made and tried as to its genuineness, is held to apply to any registered deed bearing marks of alteration on its face, although more than thirty years old. Hill *v.* Nisbet, 58 Ga. 586.

55. Wisdom *v.* Reeves, 110 Ala. 418, 18 So. 13.

56. Wisdom *v.* Reeves, 110 Ala. 418, 18 So. 13. *Compare* Beaumont Pasture Co. *v.* Preston, 65 Tex. 448; Cox *v.* Cock, 59 Tex. 521.

57. Williams *v.* Conger, 49 Tex. 582.

Alleged forgery not apparent on face of instrument.—Where the fact that the signatures to certain transfers of a land certificate were traced was not obvious from the instruments themselves, but it required expert evidence to suggest such fact, it was held that a contention that the transfers were not admissible as ancient instruments, because "blemished on the face" was untenable. Ward *v.* Cameron, (Tex. Civ. App. 1903) 76 S. W. 240.

58. McArthur *v.* Morrison, 107 Ga. 796, 34 S. E. 205 [*explaining* Patterson *v.* Collier, 75 Ga. 419, 58 Am. Rep. 472]; Matthews *v.* Castleberry, 43 Ga. 346; Stooksbury *v.* Swan, 85 Tex. 563, 22 S. W. 963; Parker *v.* Chancellor, 73 Tex. 475, 11 S. W. 503; Shinn *v.* Hicks, 68 Tex. 277, 4 S. W. 486; Timmony *v.* Burns, (Tex. Civ. App. 1897) 42 S. W. 133; Chamberlain *v.* Showalter, 5 Tex. Civ. App. 226, 23 S. W. 1017. See also McWhirter *v.* Allen, 1 Tex. Civ. App. 649, 20 S. W. 1007. *Compare* Houston *v.* Blythe, 60 Tex. 506; Cox *v.* Cock, 59 Tex. 521.

Certified copy.—In Georgia it has been held that where an alleged certified copy of a deed is offered in evidence, and is met by an affidavit of forgery, as authorized by Ga. Civ. Code, § 3628, the burden is on the party offering the copy to show execution of the original, although it was more than thirty years old. McCall *v.* Bentley, 114 Ga. 752, 40 S. E. 768. See also Patterson *v.* Collier, 75 Ga. 419, 58 Am. Rep. 472. But in Holmes *v.* Coryell, 58 Tex. 680, it was held that, when the affidavit of the loss of a deed thirty years old is filed, a certified copy from a record of like age with strong corroborating circumstances is admissible in evidence, notwithstanding an affidavit has been filed impeaching the genuineness of the original.

59. Albright *v.* Jones, 106 Ga. 302, 31 S. E. 761; Chamberlain *v.* Torrance, 14 Grant Ch. (U. C.) 181. Where a certified copy of a recorded deed is offered in evidence, and is met by the affidavit of forgery provided for in Ga. Civ. Code (1895), § 3826, the burden is on the party offering the deed to show the

E. Compelling Production of Documents — 1. Public Documents. The general rule has been laid down that the courts undoubtedly have the power to compel the custodian of records and documents to produce them in court for inspection, and to be used as evidence when material and necessary; and whenever it is made clearly to appear in a proper manner that their production is necessary and material for the support of either a cause of action or defense, or the promotion of public justice, the power should be exercised.[60] But where its exercise is not so shown to be necessary, for the reason that certified copies could be obtained,[61] where the party making application for the production of the record is not shown to have any rights or interest therein,[62] or where it is for the public interest to prevent the publicity of the record,[63] the power should not be exercised.

2. Private Writings — a. In General. The power of compelling the inspection or production of documents by a bill of discovery[64] or by a subpœna duces tecum[65] is treated elsewhere in this work. The discussion here is confined in the main to the right of one party to compel the production of private writings by his adversary by order of a court of law.

b. Production by Adverse Party[66] — (i) *In General.* Notice to produce was as a general rule the only remedy of a party in a suit at common law unless he resorted to equity, in case the other party to the record had in his possession books or writings containing evidence material to the cause. Such notice, however, never enabled the party to compel the production of the documents, but served only to lay the foundation for the introduction of secondary evidence in case it appeared that the documents were in the possession of the party notified and that he refused to produce them at the trial, as requested.[67] But in England and to some extent in this country a modification of this rule has been made apart from any statutory provision, in cases where the party calling for the inspection has a direct interest in the document,[68] at least if the instrument is the foundation of the action and the party cannot declare against the adverse party without it, or it is required to perfect his defense.[69] Moreover various

existence of the original, though it appears from the certified copy that the original was more than thirty years old. Bentley *v.* McCall, 119 Ga. 530, 46 S. E. 645.

60. Dunham *v.* Chicago, 55 Ill. 357. See also Fox *v.* Jones, 7 B. & C. 732, 6 L. J. K. B. O. S. 131, 1 M. & R. 570, 14 E. C. L. 329.

Under Kan. Code Civ. Proc. § 12, which provides that no county clerk or treasurer shall be compelled to attend any court sitting more than one mile from his office with any record or records belonging to his office or in his custody, the district court has no power to require that the books and records of the county treasurer and county clerk shall be removed fifty miles from the place where they are usally kept in another county, to be used as evidence in a criminal action pending in such other county. State *v.* Smithers, 14 Kan. 629.

Right of access to and inspection of public records in general see, generally, Records.

61. See Dunham *v.* Chicago, 55 Ill. 357.

62. Dunham *v.* Chicago, 55 Ill. 357; Atherfold *v.* Beard, 2 T. R. 610, 1 Rev. Rep. 556; Crew *v.* Blackburn [*cited* in Rex *v.* Purnell, 1 Wils. K. B. 239, 240].

63. Atherfold *v.* Beard, 2 T. R. 610, 1 Rev. Rep. 556. See also Patton *v.* Freeman, 1 N. J. L. 113, where it was said that no party to a civil suit has a right to compel the production of a written examination taken on a criminal prosecution of the other party.

64. See, generally, Discovery.

65. See, generally, Witnesses.

66. See also Discovery, 14 Cyc. 301.

67. *Alabama.*— Golden *v.* Conner, 89 Ala. 598, 8 So. 148.

Arkansas.— See Cross *v.* Johnson, 30 Ark. 396.

Illinois.— Hoagland *v.* Great Western Tel. Co., 30 Ill. App. 304.

United States.— Iasigi *v.* Brown, 12 Fed. Cas. No. 6,993, 1 Curt. 401; Merchants' Nat. Bank *v.* Boston State Nat. Bank, 17 Fed. Cas. No. 9,448, 3 Cliff. 201.

England.— Cooper *v.* Gibbons, 3 Campb. 363.

Best and secondary evidence see *infra*, XV.

68. Rowe *v.* Howden, 4 Bing. 539 note, 13 E. C. L. 624; Ratcliffe *v.* Bleasby, 3 Bing. 148, 3 L. J. C. P. O. S. 208, 10 Moore C. P. 523, 11 E. C. L. 80; Powell *v.* Bradbury, 4 C. B. 541, 56 E. C. L. 541.

69. Seeley *v.* Hobson, 11 Ky. L. Rep. 403; Utica Bank *v.* Hillard, 6 Cow. (N. Y.) 62; Davenbagh *v.* McKinnie, 5 Cow. (N. Y.) 27; Wallis *v.* Murray, 4 Cow. (N. Y.) 399; Brush *v.* Gibbon, 3 Cow. (N. Y.) 18 note; Jackson *v.* Jones, 3 Cow. (N. Y.) 17; Denslow *v.* Fowler, 2 Cow. (N. Y.) 592; Willis *v.* Bailey, 19 Johns. (N. Y.) 268; Lawrence *v.* Ocean Ins.

statutes exist in the different jurisdictions vesting courts of law or the courts in general with the power of compelling by order the production of private writings by one party in favor of another and attaching to the non-production of the paper or disobedience of the order the penalty of a nonsuit or default or a penalty in some other form.[70] These provisions were intended to prevent the necessity of instituting suits in equity to obtain from an adverse party in a suit at law the production of papers relative to the litigated issue.[71] The statutes, however, are generally applicable to all actions, whether the relief prayed for be legal or equitable.[72]

(II) *THE APPLICATION.* It is generally held that some basis should be laid for the issuing of the order by affidavit, petition, or otherwise, pointing out the

Co., 11 Johns. (N. Y.) 245 note. See also People *v.* Newaygo Cir. Judge, 41 Mich. 258, 49 N. W. 921; Rowe *v.* Howden, 4 Bing. 539 note, 13 E. C. L. 624.

70. *Alabama.*—Rarden *v.* Cunningham, 136 Ala. 263, 34 So. 26.

California.— Barnstead *v.* Empire Min. Co., 5 Cal. 299. See also Morehouse *v.* Morehouse, 136 Cal. 332, 68 Pac. 976.

Delaware.— See Thomas *v.* Pennsylvania R. Co., 2 Pennew. 411, 47 Atl. 380.

Florida.— Sinclair *v.* Gray, 9 Fla. 71.

Georgia.— Marshall *v.* McNeal, 114 Ga. 622, 40 S. E. 796; Georgia Iron, etc., Co. *v.* Etowah Iron Co., 104 Ga. 395, 30 S. E. 878; American Nat. Bank *v.* Brunswick Light, etc., Co., 100 Ga. 92, 26 S. E. 473; Stiger *v.* Monroe, 97 Ga. 479, 25 S. E. 478.

Indiana.— See Silvers *v.* Junction R. Co., 17 Ind. 142.

Louisiana.—Murison *v.* Butler, 18 La. Ann. 197; Waters *v.* Briscoe, 11 La. Ann. 639; Flower *v.* O'Conner, 7 La. 198; Woodruff *v.* Bradford, 1 La. 114; Godel *v.* McLanahan, 2 Mart. N. S. 435. See also Chaffe *v.* Mackenzie, 43 La. Ann. 1062, 10 So. 369.

Michigan.— See Grant *v.* Masterton, 55 Mich. 161, 20 N. W. 885.

New Jersey.— Flemming *v.* Lawless, 56 N. J. Eq. 138, 38 Atl. 864.

North Carolina.— McDonald *v.* Carson, 95 N. C. 377; McLeod *v.* Bullard, 84 N. C. 515; Linker *v.* Benson, 67 N. C. 150.

Ohio.— Johns *v.* Johns, 6 Ohio 271; Kelly *v.* Ingersoll, 6 Ohio Dec. (Reprint) 630, 7 Am. L. Rec. 189.

Pennsylvania.— Wills *v.* Kane, 2 Grant 47; Arrott *v.* Pratt, 2 Whart. 566; Kuhn *v.* Elmaker, 1 Pa. L. J. Rep. 318, 2 Pa. L. J. 299; Rauschmeyer *v.* City Bank, 2 L. T. N. S. 67.

United States.— Thompson *v.* Shelden, 20 How. 194, 15 L. ed. 1001; Iasigi *v.* Brown, 12 Fed. Cas. No. 6,993, 1 Curt. 401; Merchants' Nat. Bank *v.* Boston State Nat. Bank, 17 Fed. Cas. No. 9,448, 3 Cliff. 201. See also U. S. *v.* Twenty-Five Cases of Cloths, 28 Fed. Cas. No. 16,563, Crabbe 356.

See 20 Cent. Dig. tit. "Evidence," § 1540 *et seq.*

Rule inapplicable to defendant in criminal cases.— State *v.* Wallahan, Tapp. (Ohio) 80; Union Glass Co. *v.* New Castle First Nat. Bank, 10 Pa. Co. Ct. 574.

Compelling production by prosecution in criminal cases.— In U. S. *v.* Burr, 25 Fed. Cas. No. 14,694, it was held sufficient, in an affidavit for the production of a paper in the possession of the prosecution, to aver that it "may be material" in the defense. *Compare* State *v.* Fitzgerald, 130 Mo. 407, 32 S. W. 1113.

Statutory discovery provided for in New York.— See Hoyt *v.* American Exch. Bank, 1 Duer (N. Y.) 652, 8 How. Pr. (N. Y.) 89.

Party residing out of parish.— In Louisiana it is held that where a party resides out of the parish in which the court is held, he cannot be compelled to produce books but sworn copies will be sufficient. Cain *v.* Pullen, 34 La. Ann. 511; Murison *v.* Butler, 18 La. Ann. 296. But where the books of a corporation which is a party to pending litigation are at their place of business in the parish where the suit is pending, and in the custody of one of their officials in such parish, the process of the court to reach these books and have them produced in court will lie, notwithstanding the nominal or legal domicile of the corporation may be in another parish. State *v.* Allen, 104 La. 301, 29 So. 114.

Admissibility of evidence after production. — When the production of papers containing evidence relating to the issue is ordered by the court the party producing them cannot restrict the uses to which the evidence may be put, the papers are competent for all legitimate purposes. Austin *v.* Secrest, 91 N. C. 214.

71. Geyger *v.* Geyger, 10 Fed. Cas. No. 5,375, 2 Dall. 332.

72. Georgia Iron, etc., Co. *v.* Etowah Iron Co., 104 Ga. 395, 30 S. E. 878; Meeth *v.* Rankin Brick Co., 48 Ill. App. 602; Flemming *v.* Lawless, 56 N. J. Eq. 138, 38 Atl. 864.

The federal statute applies only in actions at law. Merchants' Nat. Bank *v.* Boston State Nat. Bank, 17 Fed. Cas. No. 9,448, 3 Cliff. 201.

A proceeding in rem is not within the provisions of the act of congress of Sept. 24, 1879, § 15 (1 U. S. St. at L. 73), which authorizes an order to produce books and writings on the trial of actions at law. U. S. *v.* Twenty-Eight Packages of Pins, 28 Fed. Cas. No. 16,561, Gilp. 306.

Action of tort.— Under the Pennsylvania act of Feb. 27, 1798, authorizing the supreme court and the several courts of common pleas to compel the production of books and writings, plaintiff in an action for libel cannot, it has been held, secure the production of li-

necessity and propriety of the desired order before the court can be called upon to act.[73] Thus as a general rule the applicant must show that the paper exists,[74] describing it with reasonable certainty,[75] that it is in the control of the other party,[76] that it is pertinent and material to the issue,[77] and that the case is such that a court of equity would compel its discovery.[78]

(III) *NOTICE*—(A) *Necessity.* A motion to require the production of a paper will generally be denied where reasonable notice to produce was not given.[79] But as a general rule no formal notice to produce is necessary if the papers are

belous letters which have come again to the possession of defendant, as the act does not apply to torts. Morgan *v.* Watson, 2 Whart. (Pa.) 10.

73. McDuffee *v.* Collins, 117 Ala. 487, 23 So. 45; Meeth *v.* Rankin Brick Co., 48 Ill. App. 602; Flower *v.* O'Conner, 7 La. 198; Stanton *v.* Delaware Mut. Ins. Co., 2 Sandf. (N. Y.) 662.

Who may make affidavit.— Under a statute providing for an affidavit to be made by a party to the action it has been held that in a suit by a municipality subpœna duces tecum may be awarded for the production of a document in defendant's possession, on the affidavit of plaintiff's counsel, having peculiar knowledge of the importance of such document as evidence for the municipality. Wheeling *v.* Black, 25 W. Va. 266.

The affidavit of a party interested, taken without cross-examination, is competent evidence on a motion for an order on the opposite party to produce books and writings under the act of congress of Sept. 24, 1789, § 15 (1 U. S. St. at L. 73). U. S. *v.* Twenty-Eight Packages of Pins, 28 Fed. Cas. No. 16,561, Gilp. 306.

Under N. C. Code, § 1373, no affidavit is necessary to an order on the adverse party to produce papers containing evidence pertinent to the issue, but on motion and due notice their production may be ordered. McDonald *v.* Carson, 95 N. C. 377 [*distinguishing* Graham *v.* Hamilton, 25 N. C. 381]. *Compare* Maxwell *v.* McDowell, 50 N. C. 391.

74. Georgia Iron, etc., Co. *v.* Etowah Iron Co., 104 Ga. 395, 30 S. E. 878; Buell *v.* Connecticut Mut. L. Ins. Co., 4 Fed. Cas. No. 2,103; Iasigi *v.* Brown, 12 Fed. Cas. No. 6,993, 1 Curt. 401.

75. Stanton *v.* Delaware Mut. Ins. Co., 2 Sandf. (N. Y.) 662; Wills *v.* Kane, 2 Grant (Pa.) 47; Rose *v.* King, 5 Serg. & R. (Pa.) 241; Davenport *v.* Pennsylvania R. Co., 2 Pa. Dist. 784; Lowenstein *v.* Carey, 12 Fed. 811.

76. *Georgia.*— Georgia Iron, etc., Co. *v.* Etowah Iron Co., 104 Ga. 395, 30 S. E. 878.

Idaho.— See Murphy *v.* Russe, 8 Ida. 133, 67 Pac. 421.

Iowa.— Beebe *v.* Equitable Mut. L., etc., Assoc., 76 Iowa 129, 40 N. W. 122.

Pennsylvania.— Wills *v.* Kane, 2 Grant 47; Rose *v.* King, 5 Serg. & R. 241.

United States.— Buell *v.* Connecticut Mut. L. Ins. Co., 4 Fed. Cas. No. 2,103; Iasigi *v.* Brown, 12 Fed. Cas. No. 6,993, 1 Curt. 401.

Possession of attorney sufficient.— Morehead Banking Co. *v.* Walker, 121 N. C. 115, 28 S. E. 253.

77. *Colorado.*— Buckingham *v.* Harris, 10 Colo. 455, 15 Pac. 817.

Georgia.—Georgia Iron, etc., Co. *v.* Etowah Iron Co., 104 Ga. 395, 30 S. E. 878; Hamby Mountain Gold Mines *v.* Findley, 85 Ga. 431, 11 S. E. 775.

Illinois.— Woodstock First Nat. Bank *v.* Mansfield, 48 Ill. 494.

Louisiana.— Consolidated Assoc. *v.* Hughes, 10 La. Ann. 610. See also Forbes *v.* Fahrmer, 15 La. Ann. 319.

Maryland.— Cooney *v.* Hax, 92 Md. 134, 48 Atl. 58.

New York.—Neukirch *v.* Keppler, 174 N. Y. 509, 66 N. E. 1112 [*affirming* 56 N. Y. App. Div. 225, 67 N. Y. Suppl. 710].

North Carolina.— Morehead Banking Co. *v.* Walker, 121 N. C. 115, 28 S. E. 253.

Pennsylvania.— Wills *v.* Kane, 2 Grant 47; Rose *v.* King, 5 Serg. & R. 245; Langcliff Coal Co. *v.* New York, etc., Coal Co., 10 Pa. Dist. 645.

South Carolina.— Boyce *v.* Foster, 1 Bailey 540.

Texas.— Muse *v.* Burns, 3 Tex. App. Civ. Cas. § 73.

West Virginia.— Abrahams *v.* Swann, 18 W. Va. 274, 41 Am. Rep. 692.

United States.— L. Bucki, etc., Lumber Co. *v.* Atlantic Lumber Co., 121 Fed. 233, 57 C. C. A. 469; Lowenstein *v.* Carey, 12 Fed. 811; Buell *v.* Connecticut Mut. L. Ins. Co., 4 Fed. Cas. No. 2,103; Iasigi *v.* Brown, 12 Fed. Cas. No. 6,993, 1 Curt. 401; Triplett *v.* Washington Bank, 24 Fed. Cas. No. 14,178, 3 Cranch C. C. 646. See also Coit *v.* North Carolina Gold Amalgamating Co., 9 Fed. 577.

See 20 Cent. Dig. tit. "Evidence," § 1543 *et seq.*

Statement of facts intended to be shown. — According to the rule in some jurisdictions the applicant must state the facts intended to be shown by the papers. Beebe *v.* Equitable Mut. L., etc., Assoc., 76 Iowa 129, 40 N. W. 122; Chaffe *v.* Mackenzie, 43 La. Ann. 1062, 10 So. 369.

78. Iasigi *v.* Brown, 12 Fed. Cas. No. 6,993, 1 Curt. 401.

Illustration.— A bank will not, it is held, be required by the federal circuit court, on motion, to produce books and papers, when it does not appear that a subpœna duces tecum directed to the proper officers of the bank, would not suffice. Merchants' Nat. Bank *v.* Boston State Nat. Bank, 17 Fed. Cas. No. 9,448, 3 Cliff. 201.

79. Cairo, etc., R. Co. *v.* Easterly, 89 Ill. 156; Woodstock First Nat. Bank *v.* Mansfield, 48 Ill. 494; Weston *v.* Barnicoat, 175

in court.[80] So where the form of action or the pleadings gives a party notice to be prepared to produce a written instrument, no other notice to produce is necessary.[81]

(B) *Time of Giving Notice.* Notice to produce books or writings must allow a reasonable time for the party to appear and show cause why the rule should not be made.[82] It should be such, it has been held, as would be sufficient for preparation to try an issue of fact.[83]

(C) *Description of Documents.* The description of the document in the notice to produce must be sufficient to identify it and to apprise a man of ordinary intelligence of what is demanded.[84]

(IV) *ORDER OF COURT.* An order of court is as a general rule necessary to enable a party to call upon the adverse party for the production of papers; and a notice without such order will not be sufficient.[85]

Mass. 454, 56 N. E. 619, 49 L. R. A. 612; Blood *v.* Harrington, 8 Pick. (Mass.) 552; Waring *v.* Warren, 1 Johns. (N. Y.) 340.

Under statute in Indiana it is held that refusal to compel a party to produce certain books on the trial is not error if he was neither notified of the motion, as required by Rev. St. (1894) § 487 (Rev. St. (1881) § 479), nor present in person or by counsel when the motion was made. Globe Acc. Ins. Co. *v.* Helwig, 13 Ind. App. 539, 41 N. E. 976, 55 Am. St. Rep. 247.

Papers in town where trial occurs.—Where no notice to produce books is served on a party, he cannot, it has been held, be forced by the court to produce them, although they are in the town where the case is on trial. Brand *v.* Kennedy, 71 Ga. 707.

Special notice held essential.— It has been held that a party is not bound to produce books and papers before an auditor upon a simple notice from him of the time and place of hearing, without special notice to produce. Stetson *v.* Godfrey, 20 N. H. 227.

Notice of intention to move for judgment by default.— Under the federal statute providing that failure to produce papers after notice gives the party calling for them, if plaintiff, a right to a judgment by default, notice to produce the papers must give the information that it is intended to move for a judgment by default. Bas *v.* Steele, 2 Fed. Cas. No. 1,088, 3 Wash. 381.

Notice served on attorney.— In Geyger *v.* Geyger, 10 Fed. Cas. No. 5,375, 2 Dall. 332, 1 L. ed. 403, it was held that requiring the production of books and papers "on motion and due notice" pursuant to the Judiciary Act of 1789, § 15 (1 U. S. St. at L. 73), is a procedure to be kept under the control of the court for the purposes of substantial justice, and that where notice to produce deeds is served on the attorney of a party who lives at a distance, and the attorney offers to give references to the pages, etc., where the deeds are recorded, this is sufficient, without service on the party himself.

80. *California.*— Freel *v.* Market St. Cable R. Co., 97 Cal. 40, 31 Pac. 730.

Georgia.— Boatright *v.* Porter, 32 Ga. 130. See also Chester Church *v.* Blount, 70 Ga. 779.

Illinois.— Field *v.* Zemansky, 9 Ill. App. 479. See also Truesdale Mfg. Co. *v.* Hoyle, 39 Ill. App. 532.

New York.— Whelan *v.* Gorton, 15 Misc. 625, 37 N. Y. Suppl. 344; Boynton *v.* Boynton, 16 Abb. Pr. 87, 25 How. Pr. 490. See also Stone *v.* Mansfield, 27 Misc. 560, 58 N. Y. Suppl. 339.

United States.— Banks *v.* Miller, 2 Fed. Cas. No. 963, 1 Cranch C. C. 543; Waller *v.* Stewart, 29 Fed. Cas. No. 17,109, 4 Cranch C. C. 532.

Contra.— Watkins *v.* Pintard, 1 N. J. L. 378.

See 20 Cent. Dig. tit. "Evidence," § 1544.

81. Silvers *v.* Junction R. Co., 17 Ind. 142. See also Kellar *v.* Savage, 20 Me. 199; Burke *v.* Stewart, 9 Heisk. (Tenn.) 175.

82. Rose *v.* King, 5 Serg. & R. (Pa.) 241; Langcliff Coal Co. *v.* New York, etc., Coal Co., 10 Pa. Dist. 645; Lowenstein *v.* Carey, 12 Fed. 811; Macomber *v.* Clarke, 16 Fed. Cas. No. 8,918, 3 Cranch C. C. 347. See also Allison *v.* Vaughan, 40 Iowa 421.

Under the Louisiana statute the production of books may be ordered on motion after the trial has begun, if no delay is thereby occasioned. Wolff *v.* Wolff, 47 La. Ann. 548, 17 So. 126. See also Plympton *v.* Preston, 4 La. Ann. 360.

83. Rose *v.* King, 5 Serg. & R. (Pa.) 241.

84. *Georgia.*— Georgia Iron, etc., Co. *v.* Etowah Iron Co., 104 Ga. 395, 30 S. E. 878; Hamby Mountain Gold Mines *v.* Findley, 85 Ga. 431, 11 S. E. 775. See also Parish *v.* Weed Sewing-Mach. Co., 79 Ga. 682, 7 S. E. 138.

Illinois.— Nussbaum *v.* U. S. Brewing Co., 63 Ill. App. 35.

Minnesota.— Carson *v.* Hawley, 82 Minn. 204, 84 N. W. 746.

New York.— See Cram *v.* Moore, 1 Sandf. 662.

Pennsylvania.— Wills *v.* Kane, 2 Grant 47; Rose *v.* King, 5 Serg. & R. 241.

85. Hoagland *v.* Great Western Tel. Co., 30 Ill. App. 304; Thompson *v.* Shelden, 20 How. (U. S.) 194, 15 L. ed. 1001; Macomber *v.* Clarke, 16 Fed. Cas. No. 8,918, 3 Cranch C. C. 347; Maye *v.* Carbery, 16 Fed. Cas. No. 9,339, 2 Cranch C. C. 336. Under statute in Georgia it is held necessary that there should be a peremptory written order made by the court and entered upon its minutes

(v) *Time of Production.* It has been held that a party need not respond to a notice requiring him to produce papers on a trial before the jury are called or the party demanding their production has entered upon his case.[86]

(vi) *Excuse For Non-Production.* The non-production of the instrument may, however, be excused and the order for its production be rescinded,[87] as for instance because of inability of the person against whom the order is issued to find the document after diligent search,[88] or, it has been held, because of the fact that the documents called for are in the nature of hearsay or otherwise incompetent as evidence.[89] But where the plaintiff has documents in his possession which are legally admissible *per se* in behalf of the defendant, it has been held that it is no ground for not producing them that by reason of the plaintiff's

requiring the production of the papers and providing for a reasonable time in which the party shall comply with the order. Marshall *v.* McNeal, 114 Ga. 622, 40 S. E. 796; Georgia Iron, etc., Co. *v.* Etowah Iron Co., 104 Ga. 395, 30 S. E. 878; Stiger *v.* Monroe, 97 Ga. 479, 25 S. E. 478.

Description of papers to be produced.— An order for the production of papers must, it is held, specify definitely what papers are required. Olney *v.* Hatcliff, 37 Hun (N. Y.) 286. But in Cleveland, etc., R. Co. *v.* Closser, 126 Ind. 348, 26 N. E. 159, 22 Am. St. Rep. 593, 9 L. R. A. 754, it was held that the fact that an order for the production of books and papers was too broad is not reversible error where it does not appear that irrelevant or improper parts of the books or papers were used as evidence.

Effect of failure to object to order.—Where an order for the production of books directs the production of all the books, without describing them, and the party complaining raises no objection in the trial court because the books were not described, but produces the books, and makes such objection only after the same are in the custody of the court, and under examination by the party calling for them, he cannot obtain the aid of the supreme court, through its remedial writs, to set aside the order of production. State *v.* Allen, 104 La. 301, 29 So. 114.

Delivery to commissioner.— In Cain *v.* Pullen, 34 La. Ann. 511, it was held that a party to a suit cannot be compelled to deliver his books and papers to a commissioner to be examined by witnesses summoned by him.

Order directed to party's agent.— An order of the court to produce books or writings ought, it has been held, to be made on plaintiff on record, and is bad if directed to a third person though he be plaintiff's agent. Rose *v.* King, 5 Serg. & R. (Pa.) 241.

Discretion of court in granting rule.— While the power of the court to grant an order is discretionary (Schmidt *v.* Kiser, 75 Iowa 457, 39 N. W. 707; Allison *v.* Vaughan, 40 Iowa 421; Sheldon *v.* Mickel, 40 Iowa 19; Boston Merchants' Nat. Bank *v.* Boston State Nat. Bank, 17 Fed. Cas. No. 9,448, 3 Cliff. 201. See also Ward *v.* Baker, 16 Vt. 287), yet it is one to be firmly exercised in a case falling within the conditions specified in the statute (Boston Merchants' Nat. Bank *v.* Boston State Nat. Bank, *supra*).

86. Sinclair *v.* Gray, 9 Fla. 71; Kelly *v.* Ingersoll, 6 Ohio Dec. (Reprint) 630, 7 Am. L. Rec. 189; Iasigi *v.* Brown, 12 Fed. Cas. No. 6,993, 1 Curt. 401; Hylton *v.* Brown, 12 Fed. Cas. No. 6,981, 1 Wash. 298. *Compare* Fidelity Trust, etc., Co. *v.* Nevin, 5 Houst. (Del.) 148; Howard College *v.* Pace, 15 Ga. 486.

In Louisiana it is held that the trial judge has discretion to assign for the production of books and papers on a subpœna duces tecum taken out by one of the parties against his adversary another day than the one fixed for the trial of the cause. Marks' Succession, 108 La. 494, 32 So. 401; Murison *v.* Butler, 18 La. Ann. 296.

Under statute in Pennsylvania it has been held that a party will be allowed to inspect a paper and make a copy of it before the time whenever he has a common interest in it, without regard to the right of custody. Arrott *v.* Pratt, 2 Whart. 566. But a different rule is applied where the applicant has no interest in the papers. Pennsylvania Ins. Co. *v.* Philadelphia, etc., R. Co., 9 Pa. Co. Ct. 517.

87. **Sufficiency of excuse held within discretion of court.**— In Alabama it has been held that upon notice to plaintiff, under a rule of court for the regulation of practice in the circuit and county courts, to produce the writing sued on, the sufficiency of the excuse for its non-production was addressed to the discretion of the primary court and its decision was conclusive. Herndon *v.* Givens, 16 Ala. 261.

88. *Illinois.*— Cameron *v.* Savage, 37 Ill. 172.

Indiana.— Eakright *v.* Logansport, etc., R. Co., 13 Ind. 404.

Maryland.— See Seldner *v.* Smith, 40 Md. 602.

North Carolina.— Fuller *v.* McMillan, 44 N. C. 206.

Pennsylvania.— Gilpin *v.* Howell, 5 Pa. St. 41, 45 Am. Dec. 720. See also Silliman *v.* Molloy, 4 Phila. 44; Coleman *v.* Spencer, 1 Phila. 271.

See 20 Cent. Dig. tit. "Evidence," §§ 1550, 1552, 1554.

89. Powell *v.* Northern Pac. R. Co., 46 Minn. 249, 48 N. W. 907, report of employees as to accident. *Compare* Flower *v.* O'Connor, 7 La. 198; McIntyre *v.* Ajax Min. Co., 17 Utah 213, 53 Pac. 1124.

incompetency as a witness he may not be able to give his own testimony in explanation of them.[90]

(VII) *Effect of Inconvenience or Expense of Production.* Where the inconvenience and expense attending the production of books and papers at the trial are very great, and where a sworn copy of the papers or of the entries from the books is given or proposed to be given, it has been held that a strong case of the necessity of the production of the books or papers themselves should be made to compel their production or to subject the delinquent to the penalty prescribed by the statute.[91]

(VIII) *Effect of Production and Inspection.* A party cannot call on his adversary for the production of documentary evidence and when so produced claim the benefit of such portion thereof as may be to his advantage and at the same time deprive the adverse party of the right to use such part as may tend to the latter's interest.[92] In some of the decisions the rule is laid down that papers which are produced on notice and submitted to the inspection of the other side become by reason of such production and inspection evidence for both parties at the trial on the ground that to allow a party, after requiring his adversary to produce a document and after inspecting it, to insist on excluding it from the case altogether would give him an unfair advantage over the other.[93] But in other cases it is held that production and inspection alone do not make the

90. Imhof *v.* Imhof, 45 La. Ann. 706, 13 So. 90.

91. Lowenstein *v.* Carey, 12 Fed. 811. See also Cram *v.* Moore, 1 Sandf. (N. Y.) 662.

92. *Alabama.*— Young *v.* State Bank, 5 Ala. 179, 39 Am. Dec. 322.

Georgia.— Vischer *v.* Talbottom Branch R. Co., 34 Ga. 536.

Illinois.— Boudinot *v.* Winter, 91 Ill. App. 106 [*affirmed* in 190 Ill. 394, 60 N. E. 553].

Massachusetts.— Com. *v.* Davidson, 1 Cush. 33.

New York.— Lawrence *v.* Ocean Ins. Co., 11 Johns. 241.

See also *infra*, XIV, G, 2.

Party calling for papers not required to read them in entirety.— Where plaintiff in an action on a policy of insurance called on defendant to produce "all proofs of the death" of the insured, and defendant produced a package of papers containing the proofs which plaintiff had furnished it, and also other papers, plaintiff was not bound to offer all the papers in evidence, but was entitled to select only those which he had furnished to defendant. Heaffer *v.* New Era L. Ins. Co., 101 Pa. St. 178.

93. *Delaware.*—Randel *v.* Chesapeake, etc., Canal Co., 1 Harr. 284.

Georgia.— Wood *v.* McGuire, 21 Ga. 576.

Maine.— Merrill *v.* Merrill, 67 Me. 70; Blake *v.* Russ, 33 Me. 360. See also Penobscot Boom Corp. *v.* Lamson, 16 Me. 224, 23 Am. Dec. 656.

Massachusetts.— Long *v.* Drew, 114 Mass. 77; Clark *v.* Fletcher, 1 Allen 53; Com. *v.* Davidson, 1 Cush. 33.

Mississippi.— See Anderson *v.* Root, 8 Sm. & M. 362.

United States.— Edison Electric Light Co. *v.* U. S. Electric Lighting Co., 45 Fed. 55; Coote *v.* U. S. Bank, 6 Fed. Cas. No. 3,203, 3 Cranch C. C. 50; Waller *v.* Stewart, 28 Fed. Cas. No. 17,109, 4 Cranch C. C. 532; Wilkes *v.* Elliot, 29 Fed. Cas. No. 17,660, 5 Cranch C. C. 611. *Compare* Worrall *v.* Davis Coal, etc., Co., 113 Fed. 549; Smith *v.* Coleman, 22 Fed. Cas. No. 13,029, 2 Cranch C. C. 237.

England.— Calvert *v.* Flower, 7 C. & P. 386, 32 E. C. L. 669. *Compare* Sayer *v.* Kitchen, 1 Esp. 209.

See 20 Cent. Dig. tit. "Evidence," § 1556 *et seq.*

Effect as evidence in subsequent trials.— It has been held that, where a party to a suit gives the adverse party notice to produce a paper at the trial, such notice is sufficient for the production of the same paper at any subsequent trial of the same cause. Rawson *v.* Knight, 73 Me. 340. But in Ellison *v.* Cruser, 40 N. J. L. 444, it was held that the rule compelling a party to put in evidence a paper, notice to produce which has been given to the opposite party, does not extend to a new trial of the cause, unless he again gives notice and makes inspection. In Georgia it is held that while writings produced on notice and inspected will thereby become evidence of the producing party without further proof on all trials of the same case (Wooten *v.* Nall, 18 Ga. 609), the production of such writings will not suffice to make them evidence for the producing party on the trial of another and entirely different case, although brought by the same plaintiff against the same defendant and for the same cause of action (Cushman *v.* Coleman, 92 Ga. 772, 19 S. E. 46).

Identical instrument called for necessary.— A party who produces a paper at the trial on the call of the adverse party is not entitled to read such paper in evidence for himself, after the party calling for it has inspected it and declined to use it, unless it appear to be the identical instrument called for. Reed *v.* Anderson, 12 Cush. (Mass.) 481. Thus a party who in response to a notice that he produce his account-books to be used as evidence produces instead of his books of original entry his

papers evidence,[94] unless the party producing them sees fit to annex this as a condition of their production.[95] Papers produced on notice do not become evidence for the producer, unless the party calling for them inspects them.[96]

F. Determination of Question of Admissibility — 1. In General. The admissibility of documentary evidence as in the case of evidence in general is a question for the trial court to be determined from the circumstances of the particular case.[97] So it is the province of the court to decide any preliminary questions of fact, however intricate the solution, which may be necessary to enable it to determine the admissibility of the documents.[98] And its decision is conclusive unless it saves the question for revision, or counsel bring up the question on a bill of exceptions which contains a statement of the evidence.[99]

2. Sufficiency of Proof of Execution. Where the question is as to the sufficiency of the proof of the execution of a document, the rule has been laid down that the party offering it is only required to make out a *prima facie* case to render it admissible; that if the evidence wholly fails to show the execution of the instrument the court should reject it, but if there is a reasonable probability established that the paper is what it purports to be the question is one for the jury and the paper ought to go before them with instructions as to their duty.[1]

ledger, not embraced in the notice, which is merely inspected by the adverse party, is not entitled to have such ledger considered as evidence in his favor. Harper *v.* Ely, 70 Ill. 581.

Effect of information as to paper derived from questions.—A book of accounts referred to in the answer but not offered in evidence is not made evidence because the complainant called for it, and asked, when it was produced, some questions about it which brought out its contents. Treadwell *v.* Lennig, 50 Fed. 872.

94. Austin *v.* Thomson, 45 N. H. 113 [*distinguishing* Huckins *v.* People's Mut. F. Ins. Co., 31 N. H. 238]; Smith *v.* Rentz, 131 N. Y. 169, 30 N. E. 54, 15 L. R. A. 138 [*reversing* 60 Hun 85, 14 N. Y. Suppl. 255]; Reed *v.* Zimmerman, 1 Misc. (N. Y.) 189, 20 N. Y. Suppl. 665; Stalker *v.* Gaunt, 12 N. Y. Leg. Obs. 124; Withers *v.* Gillespy, 7 Serg. & R. (Pa.) 10. See also Carradine *v.* Hotchkiss, 120 N. Y. 608, 24 N. E. 1020; Lawrence *v.* Van Horne, 1 Cai. (N. Y.) 276; Rumsey *v.* Lovell, Anth. N. P. (N. Y.) 26.

95. Wentworth *v.* McDuffie, 48 N. H. 402; Huckins *v.* People's Mut. F. Ins. Co., 31 N. H. 238.

96. *Alabama.*— State *v.* Wisdom, 8 Port. 511.

Maine.— Penobscot Boom Corp. *v.* Lamson, 16 Me. 224, 33 Am. Dec. 656.

Maryland.— Morrison *v.* Whiteside, 17 Md. 452, 79 Am. Dec. 661.

Mississippi.— Anderson *v.* Root, 8 Sm. & M. 362.

Texas.— See Ricker Nat. Bank *v.* Brown, (Civ. App. 1897) 43 S. W. 909.

United States.— Blight *v.* Ashley, 3 Fed. Cas. No. 1,541, Pet. C. C. 15; U. S. *v.* Mitchell, 27 Fed. Cas. No. 15,791, 2 Wash. 478; Willings *v.* Consequa, 30 Fed. Cas. No. 17,767, Pet. C. C. 301.

See 20 Cent. Dig. tit. "Evidence," § 1556 *et seq.*

Admission of execution in pleading and calling for production.— In Broughton *v.* Telfer, 3 Rich. Eq. (S. C.) 431, it was held that, where plaintiff in his bill alleges the execution and delivery of a deed under which defendant claims, and calls for its production, defendant, upon producing it at the trial, cannot be required to prove its execution and delivery.

97. Dunbar *v.* Wright, 20 Fla. 446; Robinson *v.* Dibble, 17 Fla. 457; Barret *v.* Godshaw, 12 Bush (Ky.) 592; Carrico *v.* McGee, 1 Dana (Ky.) 5; Blair *v.* Pelham, 118 Mass. 420; Gorton *v.* Hadsell, 9 Cush. (Mass.) 508; Cogswell *v.* Dolliver, 2 Mass. 217, 3 Am. Dec. 45; Moody *v.* Roberts, 41 Miss. 74. *Compare* Foster *v.* Smith, 104 Ala. 248, 16 So. 61, where it was held that the court has no discretion to refuse to admit a memorandum which a witness swears to have been correct when made, and still to be so, to aid the jury in recollecting his testimony, he having testified from independent recollection to the correctness of each item therein.

98. Carrico *v.* McGee, 1 Dana (Ky.) 5; Gorton *v.* Hadsell, 9 Cush. (Mass.) 508.

Variance between paper and its description in offer.— In Hammond *v.* O'Hara, 2 Harr. & G. (Md.) 111, it was held that whenever the offer in its description of a paper proposed to be given in evidence differs from the paper the paper itself must determine whether it is admissible. To the same effect see Keedy *v.* Newcomer, 1 Md. 241.

99. Gorton *v.* Hadsell, 9 Cush. (Mass.) 508.

1. Granniss *v.* Irvin, 39 Ga. 22. See also Howell *v.* Smith, 108 Mich. 350, 66 N. W. 218; Flournoy *v.* Warden, 17 Mo. 435; Skow *v.* Locks, (Nebr. 1903) 91 N. W. 204; Erickson First Nat. Bank *v.* Erickson, 20 Nebr. 580, 31 N. W. 387; Pitt Tp. *v.* Leech, 12 Pa. St. 33; Duffy *v.* Duffy, 20 Pa. Super. Ct. 25. See also Bentley *v.* McCall, 119 Ga. 530, 46 S. E. 530; L. Lamb Lumber Co. *v.* Benson, 90 Minn. 403, 97 N. W. 143; Burriss *v.* Missouri Pac. R. Co., 105 Mo. App. 659, 78 S. W. 1042; Persons *v.* Persons, (N. D. 1903) 97 N. W. 551; Stewart *v.* Gleason, 23

The admission of the instrument on this preliminary proof of its execution does not relieve the party of the burden of proving to the jury its due and valid execution.[2]

G. Conclusiveness and Effect — **1. In General.** A discussion of the conclusiveness of records and documents generally, both public and private,[3] as well as their weight and sufficiency,[4] will be found elsewhere in this title.

2. Effect of Introducing Part of Document. A book or document offered in evidence must as a general rule be considered in its entirety, the parts operating against the interest of the party offering it as well as the parts in his favor.[5] Accordingly as a general rule when a part of a document is introduced by one party the other party is entitled to put in the remainder.[6] But under this

Pa. Super. Ct. 325. Where certain transfers of land certificates are attacked as forgeries, the fact that the transferrer could not write his name and that the transfers are signed with his name is not conclusive evidence of forgery, since a man may direct another to sign his name, or hold the pen while another writes it for him. Ward *v.* Cameron, (Tex. Civ. App. 1903) 76 S. W. 240.

On the plea of non est factum it has been held that if there is any evidence, however slight, tending to prove the formal execution of the instrument, it is sufficient to entitle the instrument to go to the jury. Grady *v.* American Cent. Ins. Co., 60 Mo. 116; Berks, etc., Turnpike Road Co. *v.* Myers, 6 Serg. & R. (Pa.) 12, 9 Am. Dec. 402.

Documents proved by witness not subjected to cross-examination.— Where a witness is examined as to the identity of documents, the opposite party is entitled to inspect such documents, and to cross-examine the witness in relation thereto; otherwise it cannot be considered as proven. De Witt *v.* Prescott, 51 Mich. 298, 16 N. W. 656.

Document excluded notwithstanding genuineness of signature.— In Aday *v.* Echols, 18 Ala. 353, 52 Am. Dec. 225, it was held that the supreme court would not undertake to say that a paper not before them purporting to be a receipt may not bear marks or evidence on its face conclusive to show that it is not a genuine receipt, although the signature attached to it may be in the handwriting of him whose receipt it purports to be.

Determination of question as to which of two copies is true copy.— Where two papers were produced, not alike, but both purporting to be copies of the same patent, it was held to be a question of fact for the jury which of them was the true copy. McGowan *v.* Crooks, 5 Dana (Ky.) 65.

2. Jordan *v.* State, 52 Ala. 188; Scott *v.* Delany, 87 Ill. 146; Ross *v.* Gould, 5 Me. 204; Bogle *v.* Sullivan, 1 Call (Va.) 561.

Attack on instrument as forgery.— Under statute in Georgia it is held that, although a paper, upon testimony tending to prove its execution, has been admitted in evidence without objection — the same, however, not being the foundation of the action — the opposite party may nevertheless attack its genuineness and introduce evidence tending to show that the signature is a forgery. Anderson *v.* Cuthbert, 103 Ga. 767, 30 S. E. 244.

3. See *infra*, XV.

4. See *infra*, XVII, C, 1, d.

5. Banks *v.* Darden, 18 Ga. 318; Countryman *v.* Bunker, 101 Mich. 218, 59 N. W. 422; Shaller *v.* Brand, 6 Binn. (Pa.) 435, 6 Am. Dec. 482; Butler *v.* The Arrow, 4 Fed. Cas. No. 2,237, 6 McLean 470, Newb. Adm. 59.

Accounts or books of account.— If a party makes the accounts or books of account of his adversary evidence in his favor to prove his credits he thereby admits in evidence against himself the entries on the debit side of the accounts.

Iowa.— Veiths *v.* Hagge, 8 Iowa 163.

Louisiana.— White *v.* Jones, 14 La. Ann. 681; Martinstein *v.* His Creditors, 8 Rob. 6.

Maryland.— Lee *v.* Tinges, 7 Md. 215; Allendre *v.* Trinity Church Vestry, 3 Gill 166; King *v.* Maddux, 7 Harr. & J. 467.

Missouri.— Lewin *v.* Dille, 17 Mo. 64; Todd *v.* Terry, 26 Mo. App. 598.

New York.— Biglow *v.* Sanders, 22 Barb. 147; Johnson *v.* Wissman, 5 N. Y. Leg. Obs. 18.

Pennsylvania.— Piper *v.* White, 56 Pa. St. 90.

Virginia.— Jones *v.* Jones, 4 Hen. & M. 447.

United States.— Bell *v.* Davis, 3 Fed. Cas. No. 1,249, 3 Cranch C. C. 4; Griffin *v.* Jeffers, 11 Fed. Cas. No. 5,817, 5 Cranch C. C. 444.

Compare Chase *v.* State Bank, 16 Ark. 189.

See 20 Cent. Dig. tit. "Evidence," § 1675.

6. Spanagel *v.* Dellinger, 38 Cal. 278; Noble *v.* Fagnant, 162 Mass. 275, 38 N. E. 507. See also *supra*, XIV, E, 2, b, (VIII).

This rule has been applied to public documents and records generally (Easly *v.* Dye, 14 Ala. 158; Bumpass *v.* Webb, 1 Stew. 19, 18 Am. Dec. 34; Thatcher *v.* Crisman, 6 Colo. App. 49, 39 Pac. 887; Davies *v.* Flewellen, 29 Ga. 49; Great Western Tel. Co. *v.* Mears, 154 Ill. 437, 40 N. E. 298; State *v.* Hawkins, 81 Ind. 486; Miles *v.* Wingate, 6 Ind. 458; Baker *v.* Mygatt, 14 Iowa 131; Storch *v.* Harvey, 45 Kan. 39, 25 Pac. 220; Central Branch Union Pac. R. Co. *v.* Hardenbrook, 21 Kan. 440; Greenlee *v.* Lowing, 35 Mich. 63; Dogan *v.* Brown, 44 Miss. 235; Haile *v.* Hill, 13 Mo. 612; Morrill *v.* Foster, 33 N. H. 379; Sheahan *v.* National Steamship Co., 66 Hun (N. Y.) 48, 20 N. Y. Suppl. 740; Doe *v.* Longworth, 10 Ohio St. 20; Rush *v.*

rule the using of part of a writing does not entitle the adverse party to read portions of a book, writing, or record which are irrelevant to the issue,[7] and in some of the authorities the rule is laid down that while in practice the instances may be very rare, where the entire writing would not be explanatory of the part read, yet if there are portions not explanatory the adverse party cannot put in the entire writing, although relevant, but only so much as tends to qualify, limit, or explain the part read by his adversary.[8] In addition to the foregoing rule allowing an adverse party to read the remainder of an instrument introduced in part by his opponent, the party producing the document in the first instance is sometimes required to read the entire instrument, on the ground that unless the whole is read there can be no certainty as to the real sense.[9]

3. Introduction For Particular Purpose. As a general rule, although a document is introduced to prove a particular fact, or for a particular purpose, it becomes substantive evidence in the cause and may be used by the adverse party for other purposes.[10] Nor, it is held, is a party entitled by an express qualification at the time of introducing a document to restrict its effect as evidence to a definite purpose, but he is compelled to offer it for what it is worth as evidence generally.[11]

XV. Best and Secondary Evidence.*

A. Definitions. Best evidence or primary evidence is that particular means of proof which is indicated by the nature of the fact under investigation as the most natural and satisfactory; the best evidence the nature of the case admits; such evidence as may be called for in the first instance, upon the principle that its non-production gives rise to a reasonable suspicion that if produced it would tend against the fact alleged.[1] "All evidence which shows upon its face that better remains behind, is secondary."[2]

Good, 14 Serg. & R. (Pa.) 226; Duncan *v.* Gibbs, 1 Yerg. (Tenn.) 256; Hughes *v.* Driver, 50 Tex. 175; Fowler *v.* Stonum, 6 Tex. 60; Medlin *v.* Wilkens, 1 Tex. Civ. App. 465, 20 S. W. 1026; Davis *v.* Forrest, 7 Fed. Cas. No. 3,634, 2 Cranch C. C. 23), to records of private corporations (Vischer *v.* Tolbottom Branch R. Co., 34 Ga. 536. See also Pike *v.* Dyke, 2 Me. 213), books of account (Stokes *v.* Stokes, 91 Hun (N. Y.) 605, 36 N. Y. Suppl. 350; Piper *v.* White, 56 Pa. St. 90), and to private documents and writings generally (Phillips *v.* Green, 5 T. B. Mon. (Ky.) 344; Clarke *v.* Ray, 1 Harr. & J. (Md.) 318; Robeson *v.* Schuylkill Nav. Co., 3 Grant (Pa.) 186).

7. Ponder *v.* Cheeves, 104 Ala. 307, 16 So. 145; Herndon *v.* Givens, 16 Ala. 261. See also Imperial Hotel Co. *v.* H. B. Claflin Co., 55 Ill. App. 337.

8. Conger *v.* Bean, 58 Iowa 321, 12 N. W. 284; Wentworth *v.* McDuffie, 48 N. H. 402. See also Abbott *v.* Pearson, 130 Mass. 191; Pennock *v.* Dialogue, 11 Fed. Cas. No. 10,941, 4 Wash. 538 [*affirmed* in 2 Pet. 1, 7 L. ed. 327].

Other explanatory writing.— Where a note is admitted in evidence after proof of its possession by plaintiff's intestate at his death, and of indorsements in intestate's handwriting indicating payment, plaintiff, to explain the indorsement, may introduce in evidence memoranda in private books of the intestate, made about the same time, in reference to the same matter, under Hill Annot. Laws Oreg. § 690, providing that where a detached writing is given in evidence any other writing necessary to make it understood is admissible. Sturgis *v.* Baker, 39 Oreg. 541, 65 Pac. 810.

9. *California.*—English *v.* Johnson, 17 Cal. 107, 76 Am. Dec. 574.

Kentucky.— Barbour *v.* Watts, 2 A. K. Marsh. 290.

Louisiana.— See Kallman *v.* His Creditors, 39 La. Ann. 1089, 3 So. 382.

New York.— Larue *v.* Rowland, 7 Barb. 107. *Compare* Van Bokkelein *v.* Berdell, 3 N. Y. Suppl. 333.

North Carolina.— University *v.* Harrison, 93 N. C. 84; Bond *v.* Bond, 73 N. C. 67.

South Carolina.— Cordray *v.* Mordecai, 2 Rich. 518. *Compare* Banks *v.* Darden, 18 Ga. 318; Chesapeake Bank *v.* Swain, 29 Md. 483.

See 20 Cent. Dig. tit. "Evidence," §§ 1674, 1675.

In an action to reform an insurance policy, the policy, if offered in evidence by plaintiff, must be offered as a whole. Guernsey *v.* American Ins. Co., 17 Minn. 104.

As to the admissibility of parts of public records and documents see *supra*, XIV, A, 6.

10. Bristol *v.* Warner, 19 Conn. 7; Orr *v.* Foote, 10 B. Mon. (Ky.) 387; Davidson *v.* St. Paul, etc., R. Co., 34 Minn. 51, 24 N. W. 324. *Compare* Erie, etc., Dispatch *v.* Stanley, 22 Ill. App. 459 [*affirmed* in 123 Ill. 158, 14 N. E. 212].

11. Winants *v.* Sherman, 3 Hill (N. Y.) 74. But see Murray's Succession, 41 La. Ann. 1109, 7 So. 126.

1. 1 Abbott L. Dict. 448.

2. Putnam *v.* Goodall, 31 N. H. 419, per Eastman, J. But "evidence which carries

* By Hiram Thomas. Revised and edited by Charles C. Moore and Wm. Lawrence Clark.

B. "The Best Evidence Rule" — 1. Statement of Rule. The rule of evidence commonly known as "the best evidence rule" — one which from early times has been repeatedly enunciated by the courts — is that the highest degree of proof of which the case from its nature is susceptible must if accessible be produced; or in other words that no evidence shall be received which presupposes that the party who offers it can obtain better evidence.[3]

2. Limitations of Rule — a. In General. "The best evidence rule" does not demand that the strongest possible evidence of the matter in dispute shall be given, or that all evidence existing in the case shall be produced, but requires simply that no evidence shall be given from which, considering its own character and the nature of the transaction, an inference may arise that there is obtainable by the party other evidence more direct and conclusive and more nearly original in its source. While secondary evidence cannot be admitted in substitution for primary evidence, yet where the evidence offered is primary or

on its face no indication that better remains behind is not secondary, but primary." 1 Greenleaf Ev. § 84 [*approved* in Jelks *v.* Barrett, 52 Miss. 315]. To the same effect see Shoenberger *v.* Hackman, 37 Pa. St. 87; Capera *v.* Mignon, (Tex. Civ. App. 1896) 33 S. W. 882. And evidence which is originally secondary may become primary by the loss of that which was originally primary. Jelks *v.* Barrett, 52 Miss. 315.

Abbott's definition of secondary evidence.— "The term secondary evidence is applied to evidence not primary, but which, having some tendency to prove the fact, is received because the best evidence cannot be obtained." 1 Abbott L. Dict. 448.

3. *Alabama.*— Patton *v.* Rambo, 20 Ala. 485.

Arkansas.— Taylor *v.* Auditor, 4 Ark. 574.

California.— Norris *v.* Russell, 5 Cal. 249.

Colorado.— Crane *v.* Andrews, 6 Colo. 353; Hartford F. Ins. Co. *v.* Smith, 3 Colo. 422.

Florida.—Bellamy *v.* Hawkins, 17 Fla. 750; Orman *v.* Barnard, 5 Fla. 528.

Illinois.— Vigus *v.* O'Bannon, 118 Ill. 334, 8 N. E. 778 [*reversing* 19 Ill. App. 241]; Anderson *v.* Irwin, 101 Ill. 411; Humphreys *v.* Collier, 1 Ill. 297; Sullivan *v.* People, 108 Ill. App. 328.

Louisiana.—Woods' Succession, 30 La. Ann. 1002; Choppin *v.* Michel, 11 Rob. 233; Lockhart *v.* Jones, 9 Rob. 381; Clark *v.* Slidell, 5 Rob. 330; Etie *v.* Sparks, 4 La. 463; Walden *v.* Grant, 8 Mart. N. S. 565; Pratt *v.* Flower, 3 Mart. N. S. 452; Lucile *v.* Toustin, 5 Mart. 611.

Maryland.— Green *v.* Caulk, 16 Md. 556.

Massachusetts.— Com. *v.* Kinison, 4 Mass. 646; Torrey *v.* Fuller, 1 Mass. 524.

Michigan.— People *v.* Lambert, 5 Mich. 349, 72 Am. Dec. 49.

Mississippi.— Storm *v.* Green, 51 Miss. 103.

Missouri.— Bent *v.* Lewis, 88 Mo. 462 [*reversing* 15 Mo. App. 40, 578]; Bank of North America *v.* Crandall, 87 Mo. 208 [*reversing* 13 Mo. App. 597]; Davis *v.* Hilton, 17 Mo. App. 319.

Nebraska.— Bee Pub. Co. *v.* World Pub. Co., 59 Nebr. 713, 82 N. W. 28.

New Hampshire.— Greely *v.* Quimby, 22 N. H. 335; Hoitt *v.* Moulton, 21 N. H. 586.

New Jersey.— Hoffman *v.* Rodman, 39 N. J. L. 252.

New York.— Kain *v.* Larkin, 131 N. Y. 300, 30 N. E. 105 [*reversing* 17 N. Y. Suppl. 223]; Loomis *v.* Mowry, 4 Hun 271; Reddington *v.* Gilman, 1 Bosw. 235.

North Carolina.— Scott *v.* Bryan, 73 N. C. 582.

Pennsylvania.— White's Estate, 11 Phila. 100.

South Carolina.— State *v.* Teague, 9 S. C. 149; Walker *v.* McMahan, 1 Treadw. 129.

Tennessee.— Sims *v.* Sims, 5 Humphr. 370.

Texas.— Cotton *v.* Campbell, 3 Tex. 493.

United States.— Clifton *v.* U. S., 4 How. 242, 11 L. ed. 957; Church *v.* Hubbart, 2 Cranch 187, 2 L. ed. 249; Ward *v.* Kohn, 58 Fed. 462, 7 C. C. A. 314; Anglo-American Packing, etc., Co. *v.* Cannon, 31 Fed. 313; U. S. *v.* Scott, 25 Fed. 470; The Schooner Ulalia, 37 Ct. Cl. 466.

England.— Williams *v.* East India Co., 3 East 192, 6 Rev. Rep. 589; Cole *v.* Gibson, 1 Ves. 503, 27 Eng. Reprint 1169.

See 20 Cent. Dig. tit. "Evidence," § 460.

The "one general rule of evidence."— "The judges and sages of the law have laid it down that there is but one general rule of evidence, the best that the nature of the case will admit." Omychund *v.* Barker, 1 Atk. 21, 49, Willes 538, 26 Eng. Reprint 15, per Hardwicke, L. Ch.

"The object of the rule of law which requires the production of the best evidence of which the facts sought to be established is susceptible, is the prevention of fraud; for, if a party is in possession of this evidence, and withholds it, and seeks to substitute inferior evidence in its place, the presumption naturally arises, that the better evidence is withheld for fraudulent purposes which its production would expose and defeat." Bagley *v.* McMickle, 9 Cal. 430, 446, per Field, J. Similar observations are to be found in many of the cases dealing with this principle of evidence. See particularly Mordecai *v.* Beal, 8 Port. (Ala.) 529; Fitzgerald *v.* Adams, 9 Ga. 471; U. S. *v.* Reyburn, 6 Pet. (U. S.) 352, 8 L. ed. 424 (opinion of Marshall, C. J.); Taylor *v.* Riggs, 1 Pet. (U. S.) 591, 7 L. ed. 275.

original in its character, it cannot be excluded because there might have been introduced other primary evidence that is corroborative or stronger and more conclusive.[4] Under such circumstances it is the weight of the evidence, not its admissibility, that is involved.[5] In brief it is essential to the exclusion of evidence under the best evidence rule that the evidence not produced should be not only more direct, satisfactory, and conclusive than that offered, but should be also higher in grade or degree; and where there is no substitution of secondary for primary or original evidence the rule is not violated.[6]

In Georgia this rule has been declared by statute. Hudson *v.* Spence, 49 Ga. 479; Anglo-American Packing, etc., Co. *v.* Cannon, 31 Fed. 313; Ga. Rev. Code, § 3707.

Discussion of the history and development of the best evidence rule see Thayer Cas. Ev. 726 *et seq.* note.

4. *Alabama.*— McCreary *v.* Turk, 29 Ala. 244; Patton *v.* Rambo, 20 Ala. 485.

Connecticut.— Barnum *v.* Barnum, 9 Conn. 242.

Illinois.— Vigus *v.* O'Bannon, 118 Ill. 334, 8 N. E. 778.

Indiana.— Hewitt *v.* State, 121 Ind. 245, 23 N. E. 83.

Kentucky.— Grubbs *v.* Pickett, 1 A. K. Marsh. 253; Buckwalter *v.* Arnett, 34 S. W. 238, 17 Ky. L. Rep. 1233.

Maryland.— Richardson *v.* Milburn, 17 Md. 67.

Massachusetts.— Chamberlain *v.* Carter, 19 Pick. 188 [*distinguishing* Williams *v.* East India Co., 3 East 192, 6 Rev. Rep. 589]; Com. *v.* James, 1 Pick. 375.

Michigan.— Robinson *v.* Mulder, 81 Mich. 75, 45 N. W. 505; Shotwell *v.* Harrison, 22 Mich. 410.

Missouri.— Austin *v.* Boyd, 23 Mo. App. 317.

New Hampshire.— Roberts *v.* Dover, 72 N. H. 147, 55 Atl. 895; Webster *v.* Clark, 30 N. H. 245 [*distinguishing* Eastman *v.* Moulton, 3 N. H. 156].

New York.— People *v.* Gonzales, 35 N. Y. 49; Rockwell *v.* Tunnicliff, 62 Barb. 408. See also Fry *v.* Bennett, 3 Bosw. 200. *Compare* Domschke *v.* Metropolitan El. R. Co., 148 N. Y. 337, 42 N. E. 804 [*reversing* 74 Hun 442, 26 N. Y. Suppl. 840].

North Carolina.— Clements *v.* Hunt, 46 N. C. 400.

Pennsylvania.— Crozer *v.* New Chester Water Co., 148 Pa. St. 130, 23 Atl. 1123; Canfield *v.* Johnson, 144 Pa. St. 61, 22 Atl. 974; Western Union Tel. Co. *v.* Stevenson, 128 Pa. St. 442, 18 Atl. 441, 15 Am. St. Rep. 687, 5 L. R. A. 515; Shoenberger *v.* Hackman, 37 Pa. St. 87; Cutbush *v.* Gilbert, 4 Serg. & R. 551.

Texas.— Holmes *v.* Coryell, 58 Tex. 680.

Vermont.— Whitney Wagon Works *v.* Moore, 61 Vt. 230, 17 Atl. 1007; Houghton *v.* Paine, 29 Vt. 57.

West Virginia.— State *v.* Cain, 9 W. Va. 559.

Wisconsin.— Althouse *v.* Jamestown, 91 Wis. 46, 64 N. W. 423.

United States.— U. S. *v.* Reyburn, 6 Pet. 352, 8 L. ed. 424; U. S. *v.* Scott, 25 Fed. 470; U. S. *v.* Gilbert, 25 Fed. Cas. No. 15,204, 2 Sumn. 19.

See 20 Cent. Dig. tit. "Evidence," § 460.

5. *Indiana.*— Hewitt *v.* State, 121 Ind. 245, 23 N. E. 83.

Massachusetts.— Com. *v.* Merrell, 99 Mass. 542; Chamberlain *v.* Carter, 19 Pick. (Mass.) 188 [*distinguishing* Williams *v.* East India Co., 3 East 192, 6 Rev. Rep. 589].

New Hampshire.— Roberts *v.* Dover, 72 N. H. 147, 55 Atl. 895.

New York.— People *v.* Gonzalez, 35 N. Y. 49; Rockwell *v.* Tunnicliff, 62 Barb. 408.

Pennsylvania.— Canfield *v.* Johnson, 144 Pa. St. 61, 22 Atl. 974.

Vermont.— Whitney Wagon Works *v.* Moore, 61 Vt. 230, 17 Atl. 1007; Houghton *v.* Paine, 29 Vt. 57.

See 20 Cent. Dig. tit. "Evidence," §§ 460, 463–465.

6. *Alabama.*— McCaskle *v.* Amarine, 12 Ala. 17.

Connecticut.— Barnum *v.* Barnum, 9 Conn. 242.

Illinois.— Vigus *v.* O'Bannon, 118 Ill. 334, 8 N. E. 778.

Kentucky.—Buckwalter *v.* Arnett, 34 S. W. 238, 17 Ky. L. Rep. 1233.

Maryland.— Richardson *v.* Milburn, 17 Md. 67. See also Oelrichs *v.* Ford, 21 Md. 489.

Michigan.— Elliott *v.* Van Buren, 33 Mich. 49, 20 Am. Rep. 668; Shotwell *v.* Harrison, 22 Mich. 410.

New Jersey.—Patton *v.* Freeman, 1 N. J. L. 113.

New York.— People *v.* Gonzalez, 35 N. Y. 48; Rockwell *v.* Tunnicliff, 62 Barb. 408.

North Carolina.— Clements *v.* Hunt, 46 N. C. 400; Governor *v.* Roberts, 9 N. C. 26.

Pennsylvania.— Canfield *v.* Johnson, 144 Pa. St. 61, 22 Atl. 974; Western Union Tel. Co. *v.* Stevenson, 128 Pa. St. 442, 18 Atl. 441, 15 Am. St. Rep. 687, 5 L. R. A. 515.

South Carolina.— Thomasson *v.* Kennedy, 3 Rich. Eq. 440.

Tennessee.—McCully *v.* Malcom, 9 Humphr. 187.

Texas.— See Bledsoe *v.* Gonzales County, 31 Tex. 636.

Vermont.— Whitney Wagon Works *v.* Moore, 61 Vt. 230, 17 Atl. 1007; Houghton *v.* Paine, 29 Vt. 57.

West Virginia.— State *v.* Cain, 9 W. Va. 559.

United States.— U. S. *v.* Gilbert, 25 Fed. Cas. No. 15,204, 2 Sumn. 19.

See 20 Cent. Dig. tit. "Evidence," §§ 463–465.

b. Admissibility of Best Evidence Obtainable. Where the evidence offered, while not of the highest degree or of the most satisfactory kind, is otherwise competent and is the best which under the circumstances of the case can be produced, and the absence of evidence of a higher degree or of a more conclusive character is not attributable to the fault of the party seeking to prove the fact in controversy, then the requirements of the best evidence rule are complied with and the evidence is admissible.[7] This is the underlying principle upon which secondary evidence is admitted, where the primary evidence has been lost or destroyed, or is otherwise inaccessible to the party desiring to use it.[8] But the secondary evidence offered must of course be otherwise competent and admissible, notwithstanding that it is the best or only evidence of which the nature of the case is susceptible; and if for any reason it is incompetent it cannot be admitted.[9]

c. Prerequisites to Exclusion of Evidence. Before evidence can be excluded on the ground that it is secondary it must appear either from the nature of the fact to be proved or by evidence introduced by the objecting party that there is higher evidence in existence and of what that evidence consists;[10] that it is mate-

A pass-book given to a depositor in a bank is no better evidence of the amounts deposited than are the entries made in the bank's book, from the slips presented by the depositor. Zang *v.* Wyant, 25 Colo. 551, 56 Pac. 565, 71 Am. St. Rep. 145.

7. *Alabama.*— Adams *v.* Governor, 1 Ala. 627.

California.— Walsh *v.* Harris, 10 Cal. 391.

Georgia.— Woodruff *v.* Woodruff, 22 Ga. 237.

Kentucky.— Louisville Bridge Co. *v.* Louisville, etc. R. Co., 75 S. W. 285, 25 Ky. L. Rep. 405.

Louisiana.— Montgomery *v.* Routh, 10 La. Ann. 316.

Maryland.— Cloherty *v.* Creek, 3 Harr. & J. 428.

Massachusetts.— Binney *v.* Russell, 109 Mass. 55; Pease *v.* Smith, 24 Pick. 122.

Minnesota.— Wilson *v.* Minneapolis, etc., R. Co., 31 Minn. 481, 18 N. W. 291.

New York.— Langdon *v.* New York, 133 N. Y. 628, 31 N. E. 98 [*affirming* 59 Hun 434, 13 N. Y. Suppl. 864]; Ellsworth *v.* Ætna Ins. Co., 105 N. Y. 624, 11 N. E. 355; McKinnon *v.* Bliss, 21 N. Y. 206; Bogardus *v.* Trinity Church, 4 Sandf. Ch. 633.

Pennsylvania.— McGarr *v.* Lloyd, 3 Pa. St. 474.

Rhode Island.— Inman *v.* Potter, 18 R. I. 111, 25 Atl. 912.

South Carolina.— Rigby *v.* Logan, 45 S. C. 651, 24 S. E. 56; Hobbs *v.* Beard, 43 S. C. 370, 21 S. E. 305.

Tennessee.— Teil *v.* Roberts, 3 Hayw. 139.

United States.— U. S. *v.* Reyburn, 6 Pet. 352, 8 L. ed. 424; U. S. *v.* Scott, 25 Fed. 470.

England.— Omychund *v.* Barker, 1 Atk. 21, Willes 538, 26 Eng. Reprint 15.

See 20 Cent. Dig. tit. "Evidence," §§ 461, 462.

Ancient possession.— In a case in which it was sought to establish the possession of a party at a period one hundred and forty years before the trial, the statements of standard historians, recitals in public records and in statutes and legislative journals, the proceedings in courts of justice, their averments and results, and the depositions of witnesses taken in old suits, were admitted as evidence, because other testimony did not exist; but such evidence was admitted with great caution, and with due allowance for its importance and its capability of misleading, and restricted as to the historical part to facts of public interest of a general nature. Bogardus *v.* Trinity Church, 4 Sandf. Ch. (N. Y.) 633.

If evidence of a particular kind be required by a statute which has no negative words, and, without any negligence of the party desiring to prove a fact, the evidence required by law cannot be obtained the next best evidence may be admitted. Kendall *v.* Kingston, 5 Mass. 524.

Rental value as proof of rent received.— In an action to recover damages for obstruction of light, air, and access to plaintiff's premises, the persons from whom plaintiff derived title and also their agents for the collection of rents being dead, and it being difficult or impossible to find the former tenants, evidence of the rental value may be admitted as evidence of what was actually received as rent, that being the best evidence of which the case is susceptible. Griswold *v.* Metropolitan El. R. Co., 14 Daly (N. Y.) 484.

8. See *infra*, XV, E.

9. See Prince *v.* Smith, 4 Mass. 455; Niles *v.* Forman, 3 Barb. (N. Y.) 594.

Hearsay is excluded under this principle. Nichols *v.* Kingdom Iron Ore Co., 56 N. Y. 618; Reeves *v.* State, 7 Tex. App. 276. See also Domschke *v.* Metropolitan El. R. Co., 148 N. Y. 377, 42 N. E. 804 [*reversing* 74 Hun 442, 26 N. Y. Suppl. 840].

10. *Alabama.*— Scarborough *v.* Reynolds, 12 Ala. 252; Curry *v.* Robinson, 11 Ala. 266.

Georgia.— May *v.* Dorsett, 30 Ga. 116.

Indiana.— Terre Haute, etc., R. Co. *v.* Stockwell, 118 Ind. 98, 20 N. E. 650.

Iowa.— Arnold *v.* Arnold, 20 Iowa 273; Conger *v.* Converse, 9 Iowa 554.

Louisiana.— Eastin *v.* Eastin, 10 La. 194; Duplessis *v.* Kennedy, 6 La. 231; Gosselin *v.* Abat, 3 La. 549.

Maine.— Bryer *v.* Weston, 16 Me. 261.

Maryland.— Hadden *v.* Linville, 86 Md. 210, 38 Atl. 37, 900.

rial, relevant, and competent to prove the fact;[11] and that if produced it would more satisfactorily explain and establish the fact than the evidence offered.[12]

d. Evidence Relating to Collateral Matter. Evidence relating to a matter which does not form the foundation of the cause but is collateral to the issue does not properly fall within the best evidence rule, and although secondary in its character, cannot be excluded on the ground that primary evidence is obtainable.[13]

e. Rule Confined to Documentary Evidence. The courts have repeatedly held that the best evidence rule does not apply to parol evidence so as to exclude the otherwise competent testimony of a witness on the ground that another witness who might give more conclusive evidence ought to be called.[14] A few decisions apparently maintaining a contrary doctrine are in reality founded upon

Michigan.—Kalamazoo Novelty Mfg. Works *v.* Macalister, 40 Mich. 84.

Missouri.— Gilbert *v.* Boyd, 25 Mo. 27.

New Hampshire.— Roberts *v.* Dover, 72 N. H. 147, 55 Atl. 895.

New York.— Imperial Bldg. Co. *v.* John H. Woodbury Dermatological Institute, 29 Misc. 617, 61 N. Y. Suppl. 129 [*affirming* 59 N. Y. Suppl. 186]; Bank of North America *v.* Embury, 21 How. Pr. 14.

Pennsylvania.— Lee *v.* Lee, 9 Pa. St. 169.

South Carolina.— Ingram *v.* Sumter Music House, 51 S. C. 281, 28 S. E. 936; Kilpatrick *v.* Vandiver, 2 Mill 341; Treasury Com'rs *v.* Allen, 2 Mill 88.

Texas.— Missouri, etc., R. Co. *v.* Milam, 20 Tex. Civ. App. 688, 50 S. W. 417.

Vermont.— Curtis *v.* Ingham, 2 Vt. 287.

United States.— U. S. *v.* Reyburn, 6 Pet. 352, 8 L. ed. 424.

Canada.— Taggart *v.* Ross, 13 U. C. Q. B. 611.

See 20 Cent. Dig. tit. "Evidence," §§ 461, 462.

Ownership.— When it does not appear that written proof of the ownership of a steamboat is in existence, parol evidence of ownership will be admitted. Fay *v.* Davidson, 13 Minn. 523; McMahon *v.* Davidson, 12 Minn. 357.

Dissolution of partnership.— Where a partnership need not be, and is not shown to have been, formed in writing, its dissolution may be proved by parol. Poignand *v.* Livermore, 5 Mart. N. S. (La.) 324.

The lading of goods may be proved by parol, if it be neither alleged nor proved that there was a bill of lading. Giraudel *v.* Mendiburne, 3 Mart. N. S. (La.) 509.

Land not included in conveyance.— Parol evidence is admissible to show that land in dispute is not included in the conveyance under which plaintiff claims, in the absence of a survey of the premises or of a plan annexed to the act of sale. Hiestand *v.* Forsyth, 12 Rob. (La.) 371.

Authority of public officer.— It has been held in Texas that a controller's instructions to a sheriff, authorizing the latter to employ counsel to prosecute suits on delinquent tax lists, need not be in writing, but that the authority may be established by parol. Houston, etc., R. Co. *v.* State, 39 Tex. 148, 152, where the court said: "This question is settled by the statute — there need be no proof of the authority of a public officer to discharge a duty which the law imposes upon him."

11. Ware *v.* Morgan, 67 Ala. 461; Lamb *v.* Moberly, 3 T. B. Mon. (Ky.) 179; Clifton *v.* Litchfield, 106 Mass. 34; Doe *v.* Morris, 12 East 237.

12. *Alabama.*— O'Neal *v.* Brown, 20 Ala. 510; Patton *v.* Rambo, 20 Ala. 485.

Arkansas.— Greenfield *v.* Wright, 16 Ark. 186; State *v.* Thompson, 10 Ark. 61.

Connecticut.— Edgerton *v.* Edgerton, 8 Conn. 6.

Indiana.— Lee *v.* Hills, 66 Ind. 474.

Iowa.— Donahue *v.* McCosh, 70 Iowa 733, 30 N. W. 14.

New Hampshire.— Caldwell *v.* Wentworth, 16 N. H. 318.

New Jersey.— Den *v.* Hamilton, 12 N. J. L. 109.

North Carolina.— Dail *v.* Sugg, 85 N. C. 104.

South Carolina.— Simmons Hardware Co. *v.* Greenwood Bank, 41 S. C. 177, 19 S. E. 502, 44 Am. St. Rep. 700.

England.— Doe *v.* Morris, 12 East 237.

See 20 Cent. Dig. tit. "Evidence," § 462.

13. New Jersey Zinc, etc., Co. *v.* Lehigh Zinc, etc., Co., 59 N. J. L. 189, 35 Atl. 915; Gilbert *v.* Duncan, 29 N. J. L. 133; McFadden *v.* Kingsbury, 11 Wend. (N. Y.) 667; Carrington *v.* Allen, 87 N. C. 354; Dail *v.* Sugg, 85 N. C. 104; State *v.* Carter, 72 N. C. 99; Pollock *v.* Wilcox, 68 N. C. 46; Schoenberger *v.* Hackman, 37 Pa. St. 87. See also Holt *v.* Weld, 140 Mass. 578, 5 N. E. 506.

14. *Alabama.*— McCaskle *v.* Amarine, 12 Ala. 17; Drish *v.* Davenport, 2 Stew. 266.

Delaware.— State *v.* Hancock, 2 Pennew. 252, 45 Atl. 851.

Georgia.— Sellars *v.* Cheney, 70 Ga. 790.

Iowa.— State *v.* Scroggs, 123 Iowa 649, 96 N. W. 723.

Massachusetts.— Nelson *v.* Boynton, 3 Metc. 396, 37 Am. Dec. 148; Chamberlain *v.* Carter, 19 Pick. 188; Com. *v.* James, 1 Pick. 375. See also Rice *v.* Bancroft, 11 Pick. 469.

Michigan.— Elliott *v.* Van Buren, 33 Mich. 49, 20 Am. Rep. 668.

Minnesota.— Smith *v.* Valentine, 19 Minn. 452.

Missouri.— Austin *v.* Boyd, 23 Mo. 317.

New Hampshire.— Badger *v.* Story, 16 N. H. 168.

New York.— People *v.* Gonzalez, 35 N. Y. 49. See also Greany *v.* Long Island R. Co., 101 N. Y. 419, 5 N. E. 425.

different rules of evidence or are otherwise easily explainable.[15] Moreover not only is the best evidence rule confined to cases where the law has divided evidence into primary and secondary,[16] but there are no degrees of evidence, except where some document or other written instrument exists, the contents of which should be proved by an original rather than by other evidence which is open to the danger of inaccuracy.[17] Likewise the best evidence rule does not apply to proof of the nature, appearance, and condition of mere physical objects, but these

North Carolina.— Governor *v.* Roberts, 9 N. C. 26. See also Green *v.* Cawthorn, 15 N. C. 409.

Pennsylvania.— Featherman *v.* Miller, 45 Pa. St. 96.

Tennessee.— McCully *v.* Malcom, 9 Humphr. 187.

West Virginia.— State *v.* Cain, 9 W. Va. 559.

Wisconsin.— Althouse *v.* Jamestown, 91 Wis. 46, 64 N. W. 423.

United States.— U. S. *v.* Gilbert, 25 Fed. Cas. No. 15,204, 2 Sumn. 19.

See 20 Cent. Dig. tit. "Evidence," § 463.

Handwriting of a justice of the peace on an execution issued by him may be proved by the testimony of a third person familiar with the justice's handwriting, without calling the justice himself (McCaskle *v.* Amarine, 12 Ala. 17. See also Osborne *v.* State, 9 Yerg. (Tenn.) 488), and the same is true as to a warrant of arrest and a judgment of committal by a justice of the peace, and this although the justice be present (McCully *v.* Malcom, 9 Humphr. (Tenn.) 187).

A summons may be proved and identified by a constable who served it and by a justice of the peace succeeding the one who issued it, and this without the necessity of calling the justice who issued the summons, since the constable knows as much about it as the justice. Sellars *v.* Cheney, 70 Ga. 790.

A person may testify to his age if he is otherwise a competent witness, although his parents are living and might be called as witnesses. Bain *v.* State, 61 Ala. 75; State *v.* Scroggs, 123 Iowa 649, 96 N. W. 723; Pearce *v.* Kyzer, 16 Lea (Tenn.) 521, 57 Am. Rep. 240; State *v.* Cain, 9 W. Va. 559; Loose *v.* State, 120 Wis. 115, 97 N. W. 526. See also Morrison *v.* Emsley, 53 Mich. 564, 19 N. W. 187. And this is true although his testimony to some extent is founded on hearsay. See EVIDENCE, 16 Cyc. 1123 *et seq.* This rule is applied in prosecutions for selling intoxicating liquor (see INTOXICATING LIQUORS) and in prosecutions for rape (see RAPE).

Testimony of a chemist who has analyzed blood and that of an observer who has merely recognized it belong to the same grade of evidence; and although one may be entitled to and may have greater weight with the jury the exclusion of either would be illegal. People *v.* Gonzalez, 35 N. Y. 39.

Weight of the evidence, however, is materially affected by the failure of a party to produce accessible witnesses whose knowledge of the facts is superior to that of those called to testify. Stevenson *v.* State, 83 Ga. 575, 10 S. E. 234; and cases cited in EVIDENCE, 16 Cyc. 1062 notes 4, 6.

15. Parliman *v.* Young, 2 Dak. 175, 4 N. W. 139, 711; Domschke *v.* Metropolitan El. R. Co., 148 N. Y. 337, 42 N. E. 804; Smith *v.* State, 13 Tex. App. 507, all are apparently contrary to the weight of authority as stated, but upon examination it appears that the testimony excluded in these cases might as well have been rejected as being hearsay. In Cheritree *v.* Roggen, 67 Barb. (N. Y.) 124, the true ground of rejection of the testimony was its irrelevancy. There are also cases which appear to lay down the proposition that the testimony of a third person as to the admissions and declarations of another who is himself a competent and accessible witness cannot be given in evidence, and in some of these cases there are to be found expressions of opinion which would imply that the holdings were based upon the best evidence rule. Parliman *v.* Young, 2 Dak. 175, 4 N. W. 139, 711; Woodward *v.* Paine, 15 Johns. (N. Y.) 493; Wilson *v.* Boerem, 15 Johns. (N. Y.) 286; Alexander *v.* Mahon, 11 Johns. (N. Y.) 185; Coleman *v.* Southwick, 9 Johns. (N. Y.) 45, 6 Am. Dec. 253. But the true basis of these decisions appears to be that the testimony rejected was hearsay, in that its object was to prove not the mere fact that such declarations or admissions were made, but to establish the truth of their subject-matter. That the broad proposition which some of these cases lay down is not law see Rice *v.* Bancroft, 11 Pick. (Mass.) 469; Badger *v.* Story, 16 N. H. 168; Featherman *v.* Miller, 45 Pa. St. 96.

Evidence destitute of probative force should be rejected for that reason, regardless of the best evidence rule. Rockwell *v.* Tunnicliff, 62 Barb. (N. Y.) 408. The cases of Hoadley *v.* Seward, 71 Conn. 640, 42 Atl. 997; Ward *v.* Kohn, 58 Fed 462, 7 C. C. A. 314; and Williams *v.* East India Co., 3 East 192, 6 Rev. Rep. 559, are all clearly referable to this principle, although the language used in the opinions shows that the best evidence rule was considered applicable to exclude the incompetent testimony.

16. Elliott *v.* Van Buren, 33 Mich. 49, 20 Am. Rep. 668. For the classification indicated see *infra,* XV, C, D.

17. Elliott *v.* Van Buren, 33 Mich. 49, 20 Am. Rep. 668. To the same effect see Heneky *v.* Smith, 10 Oreg. 349, 45 Am. Rep. 143. And see *infra,* XV, G.

Death of a person may be disproved by testimony of those who have seen him; his production in court is not necessary. Schneider *v.* Ætna L. Ins. Co., 32 La. Ann. 1049, 36 Am. Rep. 276.

facts may be proved by parol without offering the objects themselves in evidence or accounting for their absence,[18] and even where the objects themselves are present in court.[19] Hence, whatever the law may have been in early times, at the present day it can be said to be well settled that the best evidence rule applies exclusively to documentary evidence; and this is the view adopted by the more modern writers on the law of evidence.[20]

C. Parol Evidence Secondary to Written Evidence — 1. General Rule. Where written evidence of a fact exists, the writing as a general rule constitutes the best evidence of that fact; and where the writing is not produced parol evidence is inadmissible to prove its contents unless its absence is satisfactorily explained. In brief, parol evidence is not admissible in substitution for available written evidence, and the contents of an accessible writing cannot be proved by parol.[21] Where the fact to be proved is required by law to be evi-

18. Com. *v.* Welsch, 142 Mass. 473, 8 N. E. 342 (testimony that tumbler contained intoxicating liquor); Com. *v.* Pope, 103 Mass. 440; Heneky *v.* Smith, 10 Oreg. 349, 45 Am. Rep. 143; Congdon *v.* Howe Scale Co., 66 Vt. 255, 29 Atl. 253; Lucas *v.* Williams, [1892] 2 Q. B. 113, 61 L. J. Q. B. 595, 66 L. T. Rep. N. S. 706; Reg. *v.* Francis, L. R. 2 C. C. 128, 12 Cox C. C. 612, 43 L. J. M. C. 97, 30 L. T. Rep. N. S. 503, 22 Wkly. Rep. 663. But *compare* Boosey *v.* Davidson, 13 Q. B. 257, 13 Jur. 678, 18 L. J. Q. B. 174, 66 E. C. L. 257. See also *infra*, XV, C, 3, a, (XIII).

19. Congdon *v.* Howe Scale Co., 66 Vt. 255, 29 Atl. 253.

20. See Thayer Ev. C, XI, *in extenso*, but especially pp. 486, 487, 488; Best Ev. (Chamberlayne ed.) bk. 1, pt. 1, pp. 87, 88; Taylor Ev. (Chamberlayne ed.) pt. iii, c. 4, p. 358 *et seq.*

21. *Alabama.*— Torrey *v.* Burney, 113 Ala. 496, 21 So. 348; Boykin *v.* Collins, 20 Ala. 230; Wiswall *v.* Knevals, 18 Ala. 65; Scarborough *v.* Reynolds, 12 Ala. 252 [*distinguishing* Planters, etc., Bank *v.* Willis, 5 Ala. 770]; Cloud *v.* Patterson, 1 Stew. 394; Rinaldi *v.* Rives, 1 Stew. 174.

Arkansas.— Whiting *v.* Beebe, 12 Ark. 421.

Connecticut.— Richards *v.* Stewart, 2 Day 328.

Georgia.— Trentham *v.* Blumenthal, 118 Ga. 530, 45 S. E. 421; Jarratt *v.* Corbett, 99 Ga. 72, 24 S. E. 408; Durham *v.* Holeman, 30 Ga. 619; Bigelow *v.* Young, 30 Ga. 121; Newsom *v.* Jackson, 26 Ga. 241, 71 Am. Dec. 206; Fitzgerald *v.* Adams, 9 Ga. 471; Flournoy *v.* Newton, 8 Ga. 306.

Illinois.— Farrell *v.* West Chicago Park Com'rs, 182 Ill. 250, 55 N. E. 325 [*affirmed* in 181 U. S. 404, 21 S. Ct. 609, 645, 45 L. ed. 916, 924]; Snapp *v.* Peirce, 24 Ill. 156; Rawson *v.* Curtiss, 19 Ill. 456; Bryan *v.* Smith, 3 Ill. 47; Sullivan *v.* People, 108 Ill. App. 328; Jack *v.* Rowland, 98 Ill. App. 352.

Indiana.— Ohio Ins. Co. *v.* Nunemacher, 10 Ind. 234; Meek *v.* Spencer, 8 Ind. 118; Murray *v.* Buchanan, 7 Blackf. 549; Dumont *v.* McCracken, 6 Blackf. 355.

Indian Territory.— Perry *v.* Archard, 1 Indian Terr. 487, 42 S. W. 421.

Iowa.— Hawkins *v.* Rice, 40 Iowa 435; Greenough *v.* Shelden, 9 Iowa 503.

Kansas.— Coder *v.* Stotts, 51 Kan. 382, 32 Pac. 1102; Roberts *v.* Dixon, 50 Kan. 436, 31 Pac. 1083; Pilcher *v.* Atchison, etc., R. Co., 34 Kan. 46, 7 Pac. 613; Shaw *v.* Mason, 10 Kan. 184; Guthrie *v.* Merrill, 4 Kan. 187; Perkins *v.* Ermel, 2 Kan. 325; Walker *v.* Armstrong, 2 Kan. 198.

Kentucky.— Pepper *v.* Pepper, 115 Ky. 520, 74 S. W. 739, 25 Ky. L. Rep. 155.

Louisiana.— Marks *v.* Winter, 19 La. Ann. 445; Roebuck *v.* Curry, 2 La. Ann. 998; Rosine *v.* Bonnabel, 5 Rob. 163; Adams *v.* Gaynard, 5 Mart. N. S. 248.

Maine.— Dyer *v.* Fredericks, 63 Me. 592; Kimball *v.* Morrill, 4 Me. 368.

Maryland.—Young *v.* Mertens, 27 Md. 114; Glenn *v.* Rogers, 3 Md. 312; Gaither *v.* Martin, 3 Md. 146; Marshall *v.* Haney, 9 Gill 251; Trundle *v.* Williams, 4 Gill 313; Mulliken *v.* Boyce, 1 Gill 60; Dunnock *v.* Dunnock, 3 Md. Ch. 140.

Massachusetts.— Post *v.* Leland, 184 Mass. 601, 69 N. E. 361; Stratford *v.* Ames, 8 Allen 577; Hope Mut. L. Ins. Co. *v.* Chapman, 6 Gray 75; Boynton *v.* Rees, 8 Pick. 329, 19 Am. Dec. 326; Hall *v.* Gardner, 1 Mass. 172.

Michigan.—Tanner *v.* Page, 106 Mich. 155, 63 N. W. 993; Mason *v.* Scio Fractional School Dist. No. 1, 34 Mich. 228.

Minnesota.— Board of Education *v.* Moore, 17 Minn. 391; Winona *v.* Huff, 11 Minn. 119.

Missouri.— Filley *v.* Talbott, 18 Mo. 416; Benton *v.* Craig, 2 Mo. 198; Kuhn *v.* Schwartz, 33 Mo. App. 610.

New Hampshire.— Brighton Market Bank *v.* Philbrick, 40 N. H. 506; Putnam *v.* Goodall, 31 N. H. 419; Hall *v.* Ray, 18 N. H. 126.

New Jersey.— Johnson *v.* Arnwine, 42 N. J. L. 451, 36 Am. Rep. 527; Sterling *v.* Potts, 5 N. J. L. 773.

New York.— Kain *v.* Larkin, 131 N. Y. 300, 30 N. E. 105 [*reversing* 17 N. Y. Suppl. 223]; Crosby *v.* Hotaling, 99 N. Y. 661, 2 N. E. 39; Berrian *v.* Sanford, 1 Hun 625; Speyer *v.* Stern, 2 Sweeny 516; Eberle *v.* Bryant, 63 N. Y. Suppl. 963 [*affirmed* in 35 Misc. 195, 65 N. Y. Suppl. 728]; Roosevelt *v.* Eckard, 17 Abb. N. Cas. 58; Northrup *v.* Jackson, 13 Wend. 85.

North Carolina.— Brafford *v.* Reed, 125 N. C. 311, 34 S. E. 443; Covington *v.* Steele,

denced by a writing, parol evidence is of course not admissible unless the absence of the writing is satisfactorily explained.[22]

2. Limitations of Rule. It cannot be laid down as a universal rule that where written evidence of a fact exists, all parol evidence of the same fact must be excluded;[23] and it has been said that there is perhaps no rule of evidence which allows of more exceptions than that which requires the best evidence to be adduced which the case admits of.[24] It is difficult, however, to formulate any rule which will accurately define in what cases it is not necessary to produce a writing as the best evidence, there being much conflict in the decisions; although this arises more perhaps from the application of the best evidence rule to differ-

88 N. C. 145; Felton *v.* McDonald, 15 N. C. 406.

Ohio.— State *v.* Lent, Tapp. 105; McDevitt *v.* Powel, Tapp. 54.

Oklahoma.— Richardson *v.* Fellner, 9 Okla. 513, 60 Pac. 270.

Oregon.— Huffman *v.* Knight, 36 Oreg. 581, 60 Pac. 207.

Pennsylvania.— Grauley *v.* Jermyn, 163 Pa. St. 501, 30 Atl. 203; Brown *v.* Burr, 160 Pa. St. 458, 28 Atl. 828; Brown *v.* Day, 78 Pa. St. 129; Campbell *v.* Wallace, 3 Yeates 271.

South Carolina.— Ford *v.* Whitaker, 3 Brev. 244; Hurt *v.* Davis, 1 Brev. 304.

Tennessee.— Smith *v.* Large, 2 Heisk. 5.

Texas.— Prather *v.* Wilkens, 68 Tex. 187, 42 S. W. 252; Huff *v.* State, 23 Tex. App. 291, 4 S. W. 890; Missouri, etc., R. Co. *v.* Mazzie, 29 Tex. Civ. App. 295, 68 S. W. 56; St. Louis, etc., R. Co. *v.* Miller, 27 Tex. Civ. App. 344, 66 S. W. 139; Olive *v.* Morgan, 8 Tex. Civ. App. 654, 28 S. W. 572.

Virginia.— Dawson *v.* Greaves, 4 Call 127.

United States.— Sebree *v.* Dorr, 9 Wheat. 558, 6 L. ed. 160; Bouldin *v.* Massie, 7 Wheat. 122, 5 L. ed. 414; Dunlop *v.* Munroe, 7 Cranch 242, 3 L. ed. 329; U. S. *v.* Scott, 25 Fed. 470; U. S. *v.* Long, 26 Fed. Cas. No. 15,625, 1 Cranch C. C. 373 (warrant of arrest); U. S. *v.* Lynn, 26 Fed. Cas. No. 15,649, 2 Cranch C. C. 309; U. S. *v.* Porter, 27 Fed. Cas. No. 16,074, Brunn. Col. Cas. 54, 3 Day (Conn.) 283.

England.— Vincent *v.* Cole, 3 C. & P. 481, M. & M. 257, 14 E. C. L. 673; Stamps *v.* Birmingham, etc., R. Co., 7 Hare 251, 27 Eng. Ch. 251, 17 L. J. Ch. 431, 2 Phil. 673, 22 Eng. Ch. 673; Rex *v.* St. Paul's Bedford, 6 T. R. 452.

Canada.— Quebec *v.* Quebec Cent. R. Co., 10 Can. Supreme Ct. 563.

See 20 Cent. Dig. tit. "Evidence," § 527.

The best evidence rule is of ancient origin, existing before it was the practice for witnesses to testify before the jury, and is connected with the doctrine of profert in pleading. Thayer Prelim. Tr. Ev. c. 11, pp. 503, 504.

As to the rules respecting profert in pleading see, generally, Pleading.

22. *California.*— Eby *v.* Foster, 61 Cal. 282; Racouillat *v.* Requena, 36 Cal. 651.

Georgia.— Fitzgerald *v.* Adams, 9 Ga. 471.

Louisiana.— Ayles *v.* Hawley, 9 La. Ann. 363.

Maryland.— Baltimore *v.* Hughes, 1 Gill & J. 480, 19 Am. Dec. 243.

New Hampshire.— Greeley *v.* Quimby, 22 N. H. 335.

New Jersey.— Somers *v.* Westcoat, 66 N. J. L. 551, 49 Atl. 462.

Wisconsin.— Roshoet *v.* Corlett, 106 Wis. 474, 82 N. W. 305.

See 20 Cent. Dig. tit. "Evidence," § 527.

For illustrations of this proposition so far as it involves applications of principles of evidence see *infra*, XV, C, 3. But for a discussion of the rule excluding parol evidence of contracts required by the statute of frauds to be evidenced by a writing, which is obviously not a mere rule of evidence, see, generally, Frauds, Statute of.

The "existence and design" of an instrument (as a bond) cannot be distinguished from its contents, and parol evidence is not admissible to prove either until the proper foundation has been laid. Smith *v.* Large, 1 Heisk. (Tenn.) 5.

Existence of instrument shown on cross-examination.— That the existence of a writing containing the facts to which the witness testifies comes out on cross-examination is no reason for dispensing with its production or refusing to strike out parol evidence of its contents. Crary *v.* Campbell, 24 Cal. 634; Kingman *v.* Hett, 5 Kan. App. 533, 58 Pac. 1022; Boone *v.* Dykes, 3 T. B. Mon. (Ky.) 529; Mahaney *v.* Carr, 175 N. Y. 454, 67 N. E. 903. See also Bullett *v.* Worthington, 3 Md. Ch. 99. *Contra*, Elliott *v.* Stocks, 67 Ala. 336.

23. Keene *v.* Meade, 3 Pet. (U. S.) 1, 7 L. ed. 581 [*affirming* 16 Fed. Cas. No. 9,373, 3 Cranch C. C. 51], per Thompson, J. To the same effect see the opinion of Chapman, J., in Com. *v.* Morrell, 99 Mass. 542.

24. Sally *v.* Capps, 1 Ala. 121, 122, per Collier, C. J., who said further: "This rule is founded upon a reasonable suspicion that the substitution of inferior for better evidence, arises from some sinister motive, and an apprehension that the best evidence, if produced, would alter the case to the prejudice of the party. It assumes that the transaction admits of better evidence; and though this may be true, yet if such better evidence is lost, or cannot be produced, proof of a secondary character may be adduced. So the rule being intended to guard against fraud, it ceases to operate where the presumption of fraud does not arise."

ing cases than from the rule itself.[25] Writings which constitute primary evidence have been divided by Mr. Greenleaf into three classes: (1) Instruments which the law requires to be in writing; (2) those contracts which the parties themselves have put in writing; and (3) all other writings the existence of which is disputed and which are material to the issue.[26] This classification has been expressly approved in numerous cases, and it has been held that writings which do not fall within one of the enumerated classes are not primary evidence.[27] In order that a writing may constitute primary evidence within the rule under discussion, it is required: (1) That the writing must have a legitimate tendency to prove the fact to be established;[28] (2) the writing must in reality be the more accurate, satisfactory, and conclusive medium of proof. Thus where the matter

25. Gilbert *v.* Duncan, 29 N. J. L. 133. Conflicts in the decisions on this branch of the law will be found indicated in their appropriate places in this section.

26. 1 Greenleaf Ev. § 85.

27. St. Louis, etc., R. Co. *v.* Kilpatrick, 67 Ark. 47, 54 S. W. 971; Triplett *v.* Rugby Distilling Co., 66 Ark. 219, 49 S. W. 975; Denver, etc., R. Co. *v.* Wilson, 4 Colo. App. 355, 36 Pac. 67; St. Louis, etc., R. Co. *v.* Eakins, 30 Iowa 279; Teegarden *v.* Caledonia, 50 Wis. 292, 6 N. W. 875.

Existence of unsigned memoranda containing statements as to the fact in controversy does not exclude parol evidence; and in fact the best or most direct evidence is the testimony of persons shown to be familiar with the fact. Adams *v.* Sullivan, 100 Ind. 8; Doe *v.* Cartwright, 3 B. & Ald. 326, 22 Rev. Rep. 413, 5 E. C. L. 193. *Compare* Williamson *v.* Hill, 3 Mackey (D. C.) 100. A mere memorandum containing a quantity of figures and calculations is not a contract, agreement, or writing which can be proved only by its production. It is only a mere calculation of accounts, and as to them any witness may testify if he has seen and remembered them. Hirschfelder *v.* Levy, 69 Ala. 351; Weaver *v.* Crocker, 49 Ill. 461. See also Decatur First Nat. Bank *v.* Priest, 50 Ill. 321.

28. Where the writing if produced would not be evidence of the fact to be proved, parol evidence is admissible.

Alabama.— Ware *v.* Morgan, 67 Ala. 461; O'Neal *v.* Brown, 20 Ala. 510.

Arkansas.— Greenfield *v.* Wright, 16 Ark. 186; Conway *v.* State Bank, 13 Ark. 48.

Connecticut.— Buell *v.* Cook, 5 Conn. 206; Vernon *v.* East Hartford, 3 Conn. 475.

Georgia.— Daniel *v.* Johnson, 29 Ga. 207.

Indiana.— Lee *v.* Hills, 66 Ind. 474.

Iowa.— Donahue *v.* McCosh, 70 Iowa 733, 30 N. W. 14.

Kentucky.— Lamb *v.* Moberly, 3 T. B. Mon. 179; Foster *v.* Davis, 1 Litt. 71 (unsworn certificate excluded because hearsay); McIlvoy *v.* Kennedy, 2 Bibb 380.

Louisiana.— See Pharr *v.* Gall, 108 La. 307, 32 So. 418. See also Groves *v.* Steel, 2 La. Ann. 480, 46 Am. Dec. 551; Bue *v.* Splane, 9 Rob. 6.

Maryland.— See Bland *v.* Dowling, 9 Gill & J. 19.

Massachusetts.— Clifton *v.* Litchfield, 106 Mass. 34. See also O'Brien *v.* Woburn, 184 Mass. 598, 69 N. E. 350.

New Hampshire.— Low *v.* Connecticut, etc., R. Co., 45 N. H. 370.

New York.— Kobbe *v.* Price, 14 Hun 55, passport containing a statement of the age of the person to whom it was issued inadmissible on the question of the person's infancy.

Texas.— Condict *v.* Brown, 21 Tex. 421.

Vermont.— Bates *v.* Sabin, 64 Vt. 511, 24 Atl. 1013; Johnson *v.* Volido Marble Co., 64 Vt. 337, 25 Atl. 441; Houghton *v.* Paine, 29 Vt. 57; Hayden *v.* Rice, 18 Vt. 353; Goodrich *v.* Mott, 9 Vt. 395.

United States.— See Vasse *v.* Mifflin, 28 Fed. Cas. No. 16,895, 4 Wash. 519.

England.— Doe *v.* Morris, 12 East 237.

See 20 Cent. Dig. tit. "Evidence," §§ 471–474½.

Illustrations.—In assumpsit for money promised by defendant to be paid plaintiff for a note of a third person sold and delivered by plaintiff to defendant, plaintiff need not produce, nor require defendant to produce, the note, but may prove its existence and the sale by parol evidence. Lamb *v.* Moberly, 3 T. B. Mon. (Ky.) 179. Although parol evidence of the contents of a deed in the opposite party's possession is inadmissible without notice to produce the deed; yet where the fact in issue is not the contents of the deed but that the opposite party sets up a claim under such deed in fraud of his adversary and the existence and possession of such deed are not disputed, parol evidence is admissible to prove the fact. McIlvoy *v.* Kennedy, 2 Bibb (Ky.) 380. Where there is nothing in a deed of a peculiar character requiring its production as the best evidence of the matters to be proved, parol evidence of fraud in the sale may be given without producing it on notice to do so. Condict *v.* Brown, 21 Tex. 421. A receipt which contains no contract, although executed at the same time and in reference to the same subject-matter as the contract, need not be produced as evidence of the contract. Goodrich *v.* Mott, 9 Vt. 395. The fact that a person has received a writing may be proved by parol without producing the writing or accounting for its absence, for the proof of this fact does not involve the contents of the writing. Alexander *v.* U. S., 57 Fed. 828, 6 C. C. A. 602. To prove a sale of corporate stock the certificates are not the best evidence, since what is written upon them does not necessarily indicate a sale and delivery. Cincinnati, etc., R.

to be proved is a substantive fact which exists independently of any writing, although evidenced thereby, and which can be as fully and satisfactorily established by parol as by the written evidence, then both classes of evidence are primary and independent and parol evidence may be admitted regardless of the writing.[29] Likewise where it appears that a witness has a distinct and independent recollection of the matters of which he testifies, his testimony is not rendered incompetent under the best evidence rule by reason of the fact that he made a contemporaneous written memorandum of those matters and does not produce it;[30] and under such circumstances the written memorandum is frequently held to be secondary evidence and inadmissible.[31] Moreover, where the writing or other documentary evidence of a fact is not as satisfactory or conclusive as the

Co. *v.* Rawson, 9 Ohio Dec. (Reprint) 709, 16 Cinc. L. Bul. 423.

29. *Alabama.*— Culver *v.* Caldwell, 137 Ala. 125, 34 So. 13; Anniston First Nat. Bank *v.* Lippman, 129 Ala. 608, 30 So. 19. *Compare* Smith *v.* Arnustead, 7 Ala. 698.

Colorado.— See Reithmann *v.* Godsman, 23 Colo. 202, 46 Pac. 684.

Connecticut.— Dyer *v.* Smith, 12 Conn. 384.

Georgia.— Rutledge *v.* Hudson, 80 Ga. 266, 5 S. E. 93. See also Wynn *v.* Savannah City, etc., R. Co., 91 Ga. 344, 17 S. E. 649.

Illinois.— Decatur First Nat. Bank *v.* Priest, 50 Ill. 321; Weaver *v.* Crocker, 49 Ill. 461. See also Mandel *v.* Swan Land, etc., Co., 154 Ill. 177, 40 N. E. 462, 45 Am. St. Rep. 124, 27 L. R. A. 313.

Indiana.— Coonrod *v.* Madden, 126 Ind. 197, 25 N. E. 1102; Hewitt *v.* State, 121 Ind. 245, 23 N. E. 83; Adams *v.* Sullivan, 100 Ind. 8; Western Union Tel. Co. *v.* Cline, 8 Ind. App. 364, 35 N. E. 564.

Iowa.— Hagan *v.* Merchants', etc., Ins. Co., 81 Iowa 321, 46 N. W. 1114, 25 Am. St. Rep. 493; Bish *v.* Hawkeye Ins. Co., 69 Iowa 184, 28 N. W. 553; St. Louis, etc., R. Co. *v.* Eakins, 30 Iowa 279.

Kansas.— State *v.* Woods, 49 Kan. 237, 30 Pac. 520.

Maryland.— Cecil Bank *v.* Snively, 23 Md. 253; Cramer *v.* Shriner, 18 Md. 140; Glenn *v.* Rogers, 3 Md. 312.

Michigan.— Bullard *v.* Hascall, 25 Mich. 132.

Minnesota.— See Phelps *v.* Winona, etc., R. Co., 37 Minn. 485, 35 N. W. 273, 5 Am. St. Rep. 867.

Missouri.— Roe *v.* Versailles Bank, 167 Mo. 406, 67 S. W. 303; State *v.* Young, 105 Mo. 634, 16 S. W. 408; Weaver *v.* Robinett, 17 Mo. 459; Fitzgerald *v.* Beers, 31 Mo. App. 356.

New Jersey.— See Patton *v.* Freeman, 1 N. J. L. 113.

New York.— Devoe *v.* New York Cent., etc., R. Co., 174 N. Y. 1, 66 N. E. 568 [*reversing* 70 N. Y. App. Div. 495, 75 N. Y. Suppl. 136].

North Carolina.— Dail *v.* Sugg, 85 N. C. 104.

South Carolina.— Wilson *v.* Atlanta, etc., Air Line R. Co., 16 S. C. 587.

Texas.— Clark *v.* Clark, 21 Tex. Civ. App. 371, 51 S. W. 337.

Washington.— See Daly *v.* Everett Pulp, etc., Co., 31 Wash. 252, 71 Pac. 1014.

England.— See Trewhitt *v.* Lambert, 10 A. & E. 470, 3 P. & D. 676, 3 Jur. 629, 37 E. C. L. 257.

See 20 Cent. Dig. tit. "Evidence," §§ 471–474½.

A person may prove his indebtedness to another without producing or accounting for the non-production of the written evidence of the indebtedness, such as promissory notes and the like. Duffie *v.* Phillips, 31 Ala. 571; Graham *v.* Lockhart, 8 Ala. 9.

Purchase of railroad ticket from one point to another is provable by the purchaser's testimony without producing the ticket or explaining its absence. Oliver *v.* Columbia, etc., R. Co., 65 S. C. 1, 43 S. E. 307.

The time of running of trains and when they are regularly due at a certain point may be proved by parol notwithstanding the existence of a railroad time-table. Chicago, etc., R. Co. *v.* George, 19 Ill. 510, 71 Am. Dec. 239.

Population of a town may be proved by the testimony of any person having knowledge of the fact. Louisville, etc., R. Co. *v.* Johnson, 135 Ala. 232, 33 So. 661.

Width of a street is provable without producing the town map or accounting for its absence. Davis *v.* Atlanta, etc., Air Line R. Co., 63 S. C. 370, 577, 41 S. E. 468, 892.

30. *Florida.*— Jacksonville, etc., R. Co. *v.* Wellman, 26 Fla. 344, 7 So. 845.

Illinois.— Mandel *v.* Swan Land, etc., Co., 154 Ill. 177, 40 N. E. 462, 45 Am. St. Rep. 124, 27 L. R. A. 313.

Iowa.— Shawyer *v.* Chamberlain, 113 Iowa 742, 84 N. W. 661, 86 Am. St. Rep. 411. See also Iowa State Bank *v.* Novak, 97 Iowa 270, 66 N. W. 186.

Michigan.— Robinson *v.* Mulder, 81 Mich. 75, 45 N. W. 505.

Mississippi.— Nabers *v.* Goldforb, 77 Miss. 661, 27 So. 641.

Wisconsin.— Loose *v.* State, 120 Wis. 115, 97 N. W. 526; Tuckwood *v.* Hanthorn, 67 Wis. 326, 30 N. W. 705.

See 20 Cent. Dig. tit. "Evidence," §§ 469, 470.

31. *District of Columbia.*— Gurley *v.* MacLennan, 17 App. Cas. 170.

Louisiana.— State *v.* Menard, 110 La. 1098, 35 So. 360.

New York.— National Ulster County Bank *v.* Madden, 114 N. Y. 280, 21 N. E. 408, 11 Am. St. Rep. 633; Russell *v.* Hudson River R. Co., 17 N. Y. 134; Zwangizer *v.* Newman,

testimony of available witnesses, it is frequently excluded on the ground that the witnesses ought to be called, especially where the witness is the person who made the writing or executed the document.[32]

3. Applications of Rule — a. To Private Writings — (I) *Contracts* — (A) *In General.* The best evidence of the terms of a contract in writing is the writing itself, and parol evidence is not admissible unless the instrument is produced or its absence satisfactorily explained.[33]

87 N. Y. App. Div. 64, 83 N. Y. Suppl. 1071; Donlon *v.* English, 89 Hun 67, 35 N. Y. Suppl. 82; Meacham *v.* Pell, 51 Barb. 65; Brown *v.* Jones, 46 Barb. 400.

Pennsylvania.— Myers *v.* Brice, 12 Wkly. Notes Cas. 87.

Wisconsin.— Tuckwood *v.* Hanthorn, 67 Wis. 326, 30 N. W. 705.

United States.— Vicksburg, etc., R. Co. *v.* O'Brien, 119 U. S. 99, 7 S. Ct. 172, 30 L. ed. 299.

See 20 Cent. Dig. tit. "Evidence," §§ 469, 470.

But an original entry or memorandum made by a witness at or presently after the time of the transaction is admissible in evidence as auxiliary to his testimony, or as a detailed statement thereof, when without its aid he is unable to recollect distinctly the fact to which it relates, but testifies to the truth and correctness of the writing. People *v.* McLaughlin, 150 N. Y. 365, 44 N. E. 1017; Wilson *v.* Kings County El. R. Co., 114 N. Y. 487, 21 N. E. 1015; Peck *v.* Valentine, 94 N. Y. 569 [*reversing* 29 Hun 668]; Howard *v.* McDonough, 77 N. Y. 592; Guy *v.* Mead, 22 N. Y. 462; Halsey *v.* Sinsebaugh, 15 N. Y. 485. See also National Ulster County Bank *v.* Madden, 114 N. Y. 280, 21 N. E. 408, 11 Am. St. Rep. 633. And upon the same principle a copy of such a memorandum is admissible where the original has been lost. Brunnemer *v.* Cook, etc., Co., 89 N. Y. App. Div. 406, 85 N. Y. Suppl. 954. That such memorandum is not admissible as corroborative of the witness' testimony see Donlon *v.* English, 89 Hun (N. Y.) 67, 35 N. Y. Suppl. 82; Meacham *v.* Pell, 51 Barb. (N. Y.) 65. See also, generally, Witnesses.

32. *Alabama.*— Terry *v.* Birmingham Nat. Bank, 93 Ala. 599, 9 So. 299, 30 Am. St. Rep. 87.

Arkansas.— Burr *v.* Byers, 10 Ark. 398, 52 Am. Dec. 239.

California.— Powell *v.* Hendricks, 3 Cal. 427.

Connecticut.— Brown *v.* Wheeler, 18 Conn. 199.

Delaware.— Pleasanton *v.* Simmons, 2 Pennew. 477, 47 Atl. 697.

Georgia.— Bracken *v.* Dillon, 64 Ga. 243, 37 Am. Rep. 70.

Illinois.— Howard *v.* Illinois Trust, etc., Bank, 189 Ill. 568, 59 N. E. 1106; Cavenant Mut. L. Assoc. *v.* Kentner, 188 Ill. 431, 58 N. E. 966; Stettauer *v.* White, 98 Ill. 72.

Kansas.— Werner *v.* Graley, 54 Kan. 383, 38 Pac. 482.

Louisiana.— Bue *v.* Splane, 9 Rob. 6.

Maryland.— Young *v.* Mertens, 27 Md. 114.

New York.— Graville *v.* New York Cent., etc., R. Co., 34 Hun 224; Kobbe *v.* Price, 14 Hun 55 (writing excluded where witness was beyond the jurisdiction, but his testimony might have been taken by commission); Weymouth *v.* Broadway, etc., R. Co., 2 Misc. 506, 22 N. Y. Suppl. 1047.

Ohio.— See Jones Fertilizing Co. *v.* Cleveland, etc., R. Co., 2 Ohio S. & C. Pl. Dec. 511, 7 Ohio N. P. 245.

Pennsylvania.—English *v.* Hannah, 4 Watts 424; Townsend *v.* Kerns, 2 Watts 180; Glaser *v.* Reno, 6 Serg. & R. 206; Cutbush *v.* Gilbert, 4 Serg. & R. 551; Myers *v.* Brice, 12 Wkly. Notes Cas. 87.

Texas.— Texas, etc., R. Co. *v.* Scrivener, 2 Tex. App. Civ. Cas. § 328.

United States.— Vicksburg, etc., R. Co. *v.* O'Brien, 119 U. S. 99, 7 S. Ct. 118, 30 L. ed. 299; Milligan *v.* Mayne, 17 Fed. Cas. No. 9,606, 2 Cranch C. C. 210. *Compare* Mississippi River Logging Co. *v.* Robson, 69 Fed. 773, 16 C. C. A. 400.

See 20 Cent. Dig. tit. "Evidence," § 467.

Report of an examination of an insured person by the board of police surgeons, made several years before a policy on his life was issued, and not shown to have been known to the insured, was held to have been properly excluded as secondary evidence of his physical condition at such time, since the fact could better be proved by the doctors on the witness' stand. Terwilliger *v.* Supreme Council R. A., 49 Hun (N. Y.) 305, 2 N. Y. Suppl. 144.

Historical writings of a living author who is within reach of the process of the court and may be called and examined as a witness concerning the accuracy of his information are considered not to be the best evidence, especially if the facts to be proved are of recent date and may be fairly presumed to be within the knowledge of many living persons from whom the author may have derived his materials. Morris *v.* Harmer, 7 Pet. (U. S.) 554, 8 L. ed. 781. See also McKinnon *v.* Bliss, 21 N. Y. 206. But special circumstances may exist which will justify an exception to this rule. Morris *v.* Harmer, 7 Pet. (U. S.) 554, 8 L. ed. 781.

Pictures from catalogues.— Where the purchaser of a patent right in an action for the purchase-price alleged fraud in that others were selling the same article, pictures from catalogues were held inadmissible to prove such fact, as the best evidence would have been the testimony of the manufacturers themselves or someone having actual knowledge of the facts. Perkins *v.* Buaas, (Tex. Civ. App. 1895) 32 S. W. 240.

33. *Alabama.*— Alabama Midland R. Co. *v.* Coskry, 92 Ala. 254, 9 So. 202; Foster *v.*

(B) *Performance of Contract.* Parol evidence is not admissible to show the performance of a written contract according to its terms, unless the contract is produced or its absence satisfactorily explained.[34] But this rule does not apply to require the production of a written report of work done under a contract for public improvements, even though the report is required by law to be made, where the purpose of making the report is other than to preserve evidence of the work done.[35]

State, 88 Ala. 182, 7 So. 185; Ricketts *v.* Birmingham St. R. Co., 85 Ala. 600, 5 So. 353; Elliott *v.* Dyche, 80 Ala. 376; Street *v.* Nelson, 67 Ala. 504; Street *v.* Kelly, 67 Ala. 478; Hooks *v.* Smith, 18 Ala. 338; Brewton *v.* Driver, 13 Ala. 826; Peck *v.* Dinsmore, 4 Port. 212.

Arkansas.—Stone *v.* Waggoner, 8 Ark. 204; Byrd *v.* Bertrand, 7 Ark. 321.

California.— Grimes *v.* Fall, 15 Cal. 63; Poole *v.* Gerrard, 9 Cal. 593, decided under Code, § 447.

Connecticut.— Pitkin *v.* Brainerd, 5 Conn. 451, 13 Am. Dec. 79.

Georgia.— Gunn *v.* Slaughter, 83 Ga. 124, 9 S. E. 772; Davis *v.* Alston, 61 Ga. 225.

Illinois.— Dowden *v.* Wilson, 71 Ill. 485; Cross *v.* Bryant, 3 Ill. 36; Smith *v.* Leady, 47 Ill. App. 441.

Indiana.— Clow *v.* Brown, (Sup. 1892) 31 N. E. 361; Patterson *v.* Fisher, 8 Blackf. 237.

Kansas.— Kingman *v.* Hett, 9 Kan. App. 533, 58 Pac. 1022.

Kentucky.— Condict *v.* Stevens, 1 T. B. Mon. 73.

Louisiana.— Goodman *v.* Rayburn, 27 La. Ann. 639; Roberts *v.* Riley, 15 La. Ann. 103, 77 Am. Dec. 183.

Massachusetts.— Holmes *v.* Hunt, 122 Mass. 505, 23 Am. Rep. 381; Hall *v.* Gardner, 1 Mass. 172.

Michigan.— Collar *v.* Collar, 86 Mich. 507, 49 N. W. 551, 13 L. R. A. 621; Hatch *v.* Fowler, 28 Mich. 205.

Minnesota.— Steele *v.* Etheridge, 15 Minn. 501; Cowley *v.* Davidson, 13 Minn. 92.

Mississippi.— Ketchum *v.* Brennan, 53 Miss. 596; Baldwin *v.* McKay, 41 Miss. 358; Parr *v.* Gibbons, 27 Miss. 375; Edge *v.* Keith, 13 Sm. & M. 295.

Missouri.— Cockrill *v.* Kirkpatrick, 9 Mo. 697; Chouteau *v.* Dean, 7 Mo. App. 210.

New York.— Mahaney *v.* Carr, 175 N. Y. 454, 67 N. E. 903; Hatch *v.* Pryor, 2 Abb. Dec. 343, 3 Keyes 441, 3 Transcr. App. 317; Blade *v.* Noland, 12 Wend. 173, 27 Am. Dec. 126; Cary *v.* Campbell, 10 Johns. 363.

North Carolina.— Gwynn *v.* Setzer, 48 N. C. 382; McFarland *v.* Patterson, 4 N. C. 421.

Ohio.— McDevitt *v.* Powel, Tapp. 54.

Pennsylvania.— Irwin *v.* Irwin, 34 Pa. St. 525; Barnett *v.* Barnett, 16 Serg. & R. 51.

South Carolina.— Eubanks *v.* Harris, 1 Speers 183.

Tennessee.— Littlejohn *v.* Fowler, 5 Coldw. 284; Creed *v.* White, 11 Humphr. 549.

Texas.— Rice *v.* Peacock, 37 Tex. 392; San Antonio, etc., R. Co. *v.* Woodley, 20 Tex. Civ. App. 216, 49 S. W. 691; Kennon *v.* Bailey, 15 Tex. Civ. App. 28, 38 S. W. 377.

Wisconsin.— Orr *v.* Le Claire, 55 Wis. 93, 12 N. W. 356; Campbell *v.* Moore, 3 Wis. 767.

United States.— Hutchinson *v.* Peyton, 12 Fed. Cas. No. 6,958, 2 Cranch C. C. 365; U. S. *v.* Doughty, 25 Fed. Cas. No. 14,987; U. S. *v.* Porter, 27 Fed. Cas. No. 15,074, Brunn. Col. Cas. 54, 3 Day (Conn.) 283; Wilson *v.* Young, 30 Fed. Cas. No. 17,849, 2 Cranch C. C. 33.

See 20 Cent. Dig. tit. "Evidence," § 517.

Maps, surveys, and drawings, when constituting a part of a contract as explanatory of its terms, are not to be distinguished from other papers to which the rule applies, but are the best evidence of whatever they contain. Bryant *v.* Stilwell, 24 Pa. St. 314. *Compare* St. Louis, etc., R. Co. *v.* Eakins, 30 Iowa 279.

Various writings.—The rule stated in the text is applicable where the contract or a material part thereof is contained in written receipts (Davis *v.* Alston, 61 Ga. 225; Cowley *v.* Davidson, 13 Minn. 92), correspondence by letters (Lockhart *v.* Jones, 9 Rob. (La.) 381; Steele *v.* Etheridge, 15 Minn. 501; Irwin *v.* Irwin, 34 Pa. St. 525), bills of lading (St. Louis South Western R. Co. *v.* Cates, 15 Tex. Civ. App. 135, 38 S. W. 648), policies of insurance (Waller *v.* Cockfield, 111 La. 595, 35 So. 778; Dade *v.* Ætna Ins. Co., 54 Minn. 336, 56 N. W. 48), written subscriptions to the endowment fund of a university (Beeler *v.* Highland University Co., 8 Kan. App. 89, 54 Pac. 295), promissory notes (Hooks *v.* Smith, 18 Ala. 338; Dowden *v.* Wilson, 71 Ill. 485; Parr *v.* Gibbons, 27 Miss. 375; Cockrill *v.* Kirkpatrick, 9 Mo. 697; Blade *v.* Noland, 12 Wend. (N. Y.) 173, 27 Am. Dec. 126; Cary *v.* Campbell, 10 Johns. (N. Y.) 363; Rice *v.* Peacock, 37 Tex. 392. *Compare* Dail *v.* Sugg, 85 N. C. 104), and *a fortiori* where the contract is required by law to be in writing, as a contract to convey interests in real estate (Ricketts *v.* Birmingham St. R. Co., 85 Ala. 600, 5 So. 353), or a mortgage (Dowden *v.* Wilson, 71 Ill. 485. See also *infra*, XV, C, 3, b, (II)).

34. Dupey *v.* Ashby, 2 A. K. Marsh. (Ky.) 11; Bryant *v.* Stilwell, 24 Pa. St. 314. See also Thompson *v.* Richards, 14 Mich. 172. *Compare* Lee *v.* Hills, 66 Ind. 474.

Compliance with conditions of an insurance policy cannot be shown by parol evidence without producing the policy or accounting for its absence. Dade *v.* Ætna Ins. Co., 54 Minn. 336, 56 N. W. 48.

35. Grady *v.* Desobry, 21 La. Ann. 132, report of engineer of the completion of public works. *Compare* Brown *v.* Burr, 160 Pa. St. 458, 28 Atl. 828.

(c) *Fact of Contract as Distinct From Its Terms.* Where the matter to be proved is simply the fact that a contract has been made, as distinct from its terms or provisions, the best evidence rule does not apply and parol evidence is admissible.[36]

(d) *Terms of Contract Collateral to Issue.* Where the terms of a written contract are collateral to the issue they may be proved by parol evidence without producing the writing or accounting for its absence.[37]

(e) *Terms of Contract Must Be in Writing*—(1) In General. In order to exclude parol evidence of the terms of a contract on the ground that there is written evidence thereof, it must appear that the parties or their authorized agents actually reduced the material terms of the contract to writing and that the writing was intended to embody their agreement, for otherwise the contract still rests in parol and may be proved by parol notwithstanding the existence of a writing relating thereto,[38] such as a memorandum made by an agent who acted for one of the parties only,[39] or whose agency was limited to bringing the parties together.[40] And where the immediate issue is whether there is or was a writing embodying the contract, it is erroneous to exclude parol evidence bearing on that issue upon the assumption that such a writing exists.[41]

(2) Consideration in Parol. An oral promise made by one party in consideration of the execution of a written instrument by the other may be shown by parol evidence.[42]

(3) Writing Made Subsequent to Execution or Performance. Parol evidence of a valid verbal contract is not excluded under the best evidence rule

36. St. Louis, etc., R. Co. *v.* Eakins, 30 Iowa 279; Holyoke *v.* Hadley Water-Power Co., 174 Mass. 424, 54 N. E. 889. See also Trimble *v.* Shaffer, 3 Greene (Iowa) 233.

37. *Alabama.*—Street *v.* Nelson, 67 Ala. 504. Where matters contained in a certain written contract are sought to be proved in order to show an inducement for another written contract and to explain the latter, and the second contract defines and determines the relative rights of the parties *inter se* and is the main issue in the cause, the best evidence rule does not require the production of the first contract, but does require the production of the second contract. Street *v.* Nelson, *supra.*

New Jersey.— New Jersey Zinc, etc., Co. *v.* Lehigh Zinc, etc., Co., 59 N. J. L. 189, 35 Atl. 915.

North Carolina.— Archer *v.* Hooper, 119 N. C. 581, 26 S. E. 143.

South Carolina.— Elrod *v.* Cochran, 59 S. C. 467, 38 S. E. 122.

United States.— Foster *v.* Cleveland, etc., R. Co., 56 Fed. 434.

And see *infra*, XV, C, 3, e.

38. *Arkansas.*— Greenfield *v.* Wright, 16 Ark. 186.

District of Columbia.— Bailey *v.* District of Columbia, 9 App. Cas. 360.

Kansas.— Beyle *v.* Reid, 31 Kan. 113, 1 Pac. 264.

Massachusetts.— Mullen *v.* Kavanagh, 101 Mass. 351; Olmstead *v.* Mansir, 10 Allen 424; Tisdale *v.* Harris, 20 Pick. 9; Blood *v.* Harrington, 8 Pick. 552.

Michigan.—Kalamazoo Novelty Mfg. Works *v.* Macalister, 40 Mich. 84.

Missouri.— See McQuade *v.* St. Louis, 78 Mo. 46.

New Hampshire.— Pearson *v.* Wheeler, 55 N. H. 41; Brown *v.* Fitz, 13 N. H. 283.

New York.— Aguiree *v.* Allen, 10 Barb. 74 [*affirmed* in 7 N. Y. 543, Seld. Notes 35]; Chase *v.* Evarts, 19 N. Y. Suppl. 987; Waring *v.* Mason, 18 Wend. 425.

Pennsylvania.— Moore *v.* Small, 9 Pa. St. 194; Lee *v.* Lee, 9 Pa. St. 169.

England.— Rex *v.* Wrangle, 1 Hurl. & W. 41, 4 L. J. M. C. 43, 4 N. & M. 375.

See 20 Cent. Dig. tit. "Evidence," § 462.

A verbal contract which has superseded a prior written contract is within the rule stated in the text. Pope *v.* Cheney, 68 Iowa 563, 27 N. W. 754; Pearson *v.* Wheeler, 55 N. H. 41.

Unsigned writing.— Where parties upon making a verbal contract reduce its terms to writing and agree that the writing is a correct statement of the terms of their contract, the memorandum thus made, although it is not signed, is the best evidence of the terms of the contract and parol evidence is not admissible. Williamson *v.* Hill, 3 Mackey (D. C.) 100. But see Doe *v.* Cartwright, 3 B. & Ald. 326, 22 Rev. Rep. 413, 5 E. C. L. 193; Rex *v.* Wrangle, 1 Hurl. & W. 41, 4 L. J. M. C. 43, 4 N. & M. 375; Valentine *v.* Smith, 9 U. C. C. P. 59.

39. Tisdale *v.* Harris, 20 Pick. (Mass.) 9; Brown *v.* Washington Com'rs, 63 N. C. 514; Hodges *v.* Tarrant, 31 S. C. 608, 9 S. E. 1038.

40. Aguiree *v.* Allen, 10 Barb. (N. Y.) 74 [*affirmed* in 7 N. Y. 543, Seld. Notes 35].

41. Kalamazoo Novelty Mfg. Works *v.* Macalister, 40 Mich. 84.

42. Shughart *v.* Moore, 78 Pa. St. 469; Powelton Coal Co. *v.* McShain, 75 Pa. St. 238; Weaver *v.* Wood, 9 Pa. St. 220; Knight *v.* Knotts, 8 Rich. (S. C.) 35.

by the fact that the contract is reduced to writing after it has been executed or performed.[43]

(II) *Bonds.* The best evidence rule applies to exclude parol evidence of the contents of bonds unless their loss or destruction is shown or their absence otherwise satisfactorily explained.[44]

(III) *Assignments.* The best evidence rule applies to written assignments of contracts or other choses in action, and excludes parol evidence thereof unless the writing be produced or its absence explained, and the rule is applicable both to the assignment itself and to the original instrument which is assigned or which evidences the right transferred.[45] The same is true where it is sought to prove the assignment of a judgment.[46]

(IV) *Letters.* As a general rule a letter is the best evidence of its own contents, and unless the letter itself be produced or its absence explained parol evidence of its contents is not admissible.[47] This rule does not apply, however,

43. Sanders *v.* Stokes, 30 Ala. 432; Conrad *v.* Marcotte, 23 Minn. 55.

44. *Georgia.*—Georgia Pac. R. Co. *v.* Strickland, 80 Ga. 776, 6 S. E. 27, 12 Am. St. Rep. 282, bond for titles.

Iowa.— Patterson *v.* Linder, 14 Iowa 414.

Kansas.— Walker *v.* Armstrong, 2 Kan. 198, statutory bond.

Maine.— Gorham *v.* Herrick, 2 Me. 87, bond of defeasance executed by vendee to vendor.

Maryland.— Clarke *v.* State, 8 Gill & J. 111, bond of guardian.

Montana.— Montana Min. Co. *v.* St. Louis Min., etc., Co., 20 Mont. 394, 51 Pac. 824.

Pennsylvania.— Rank *v.* Shewey, 4 Watts 218; Dreisbach *v.* Berger, 6 Watts & S. 564.

Tennessee.— Smith *v.* Large, 1 Heisk. 5.

See 20 Cent. Dig. tit. "Evidence," § 551.

45. *California.*— Grimes *v.* Fall, 15 Cal. 63.

Georgia.— Flournoy *v.* Newton, 8 Ga. 306, assignment of execution.

Illinois.— Landt *v.* McCullough, 206 Ill. 214, 69 N. E. 107 [*reversing* 103 Ill. App. 668] (assignment of lease); Cross *v.* Bryant, 3 Ill. 36.

New York.— Ven Doren *v.* Jelliffe, 1 Misc. 354, 20 N. Y. Suppl. 636. *Compare* Platt *v.* Thorn, 8 Bosw. 574.

North Carolina.— Stancill *v.* Spain, 133 N. C. 76, 45 S. E. 466, assignment of note.

Texas.— Bruce *v.* Strawn Coal-Min. Co., (Civ. App. 1900) 59 S. W. 52, assignment of an account.

See 20 Cent. Dig. tit. "Evidence," §§ 522, 548.

46. Hawkins *v.* Rice, 40 Iowa 435; Lockhart *v.* Jones, 9 Rob. (La.) 381.

47. *Alabama.*— Kidd *v.* Cromwell, 17 Ala. 648; Simpson *v.* Wiley, 4 Port. 215.

California.— Byrne *v.* Byrne, 113 Cal. 294, 45 Pac. 536.

Colorado.— Rose *v.* Otis, 5 Colo. App. 472, 39 Pac. 77.

Georgia.— Dobbins *v.* Blanchard, 94 Ga. 500, 21 S. E. 215; Jackson *v.* Jackson, 47 Ga. 99; Holcombe *v.* State, 28 Ga. 66.

Illinois.— Prussing *v.* Jackson, 208 Ill. 85, 69 N. E. 771 [*reversing* 85 Ill. App. 324]; Ward *v.* Ward, 103 Ill. 477; Rawson *v.* Curtiss, 19 Ill. 456; Sullivan *v.* People, 108 Ill. App. 328; McNemar *v.* McKennan, 79 Ill. App. 354; Robinson *v.* Sullivan, 50 Ill. App. 426.

Indiana.— Coats *v.* Gregory, 10 Ind. 345; Hackleman *v.* Moat, 4 Blackf. 164; Jenkins *v.* Lutz, 26 Ind. App. 150, 59 N. E. 288; McFadden *v.* Ross, 14 Ind. App. 312, 41 N. E. 607.

Iowa.— Frick *v.* Kabaker, 116 Iowa 494, 90 N. W. 498; Watson *v.* Richardson, 110 Iowa 673, 80 N. W. 407; Gimbel *v.* Salomon, 54 Iowa 389, 6 N. W. 582. *Compare* Hagan *v.* Merchants', etc., Ins. Co., 81 Iowa 321, 46 N. W. 1114, 25 Am. St. Rep. 493.

Louisiana.— Martinez *v.* Vives, 32 La. Ann. 305.

Maryland.— Beall *v.* Poole, 27 Md. 645.

Massachusetts.— Post *v.* Leland, 184 Mass. 601, 69 N. E. 361.

Minnesota.— Lowry *v.* Harris, 12 Minn. 255; Guerin *v.* Hunt, 6 Minn. 375.

Mississippi.— Kaufman *v.* Simon, 80 Miss. 189, 31 So. 713.

Missouri.— Farrell *v.* Brennan, 32 Mo. 328, 82 Am. Dec. 137.

Nebraska.— McClure *v.* Campbell, 25 Nebr. 57, 40 N. W. 595.

New Hampshire.— Brown *v.* Jewett, 18 N. H. 230.

North Carolina.— Rumbough *v.* Southern Imp. Co., 112 N. C. 751, 17 S. E. 536, 34 Am. St. Rep. 528.

Pennsylvania.— Stern *v.* Stanton, 184 Pa. St. 468, 39 Atl. 404.

South Carolina.— De Loach *v.* Sarratt, 55 S. C. 254, 33 S. E. 21, 35 S. E. 441; Moore *v.* Dickinson, 39 S. C. 441, 17 S. E. 998.

South Dakota.— Distad *v.* Shanklin, 15 S. D. 507, 90 N. W. 151.

Texas.— Mugge *v.* Adams, 76 Tex. 448, 13 S. W. 330; Odom *v.* Woodward, 74 Tex. 41, 11 S. W. 925; Cabaness *v.* Holland, 19 Tex. Civ. App. 383, 47 S. W. 379; Missouri Pac. R. Co. *v.* Rountree, 2 Tex. App. Civ. Cas. § 387.

Vermont.— Murray *v.* Mattison, 67 Vt. 553, 32 Atl. 479.

Wisconsin.— Neweller *v.* Clapp, 97 Wis. 104, 72 N. W. 366; Diener *v.* Schley, 5 Wis. 483.

United States.— Dwyer *v.* Dunbar, 5 Wall. 318, 18 L. ed. 489; Simpson *v.* Dall, 3 Wall. 460, 18 L. ed. 265; Allen *v.* Blunt, 1 Fed. Cas.

where it is sought to prove the mere fact that a letter was written, and the fact is not in issue but only collaterally involved;[48] nor does it apply to proof of the contents of the letter where the contents are not in issue.[49]

(v) *TELEGRAMS.* The best evidence of the contents of a telegram is the original message itself, and parol evidence of the contents of the message is admissible only where the original writing is produced or its absence explained.[50]

(vi) *NOTICES.* The contents of a notice cannot be proved by parol evidence, unless the document itself is produced or its absence satisfactorily explained,[51] except where the notice is collateral to the issue or is unimportant and not likely to have been preserved.[52] But the fact that notice was given or received may be proved by parol without accounting for the absence of the writing,[53] especially

No. 217, 2 Woodb. & M. 121; De Tastett *v.* Crousillat, 7 Fed. Cas. No. 3,828, 2 Wash. 132.

See 20 Cent. Dig. tit. "Evidence," § 558.

Testimony of writer.— Neither the person who wrote the letter nor the person who dictated it can testify as to its contents without satisfactory proof of its loss, destruction, or inaccessibility. Stern *v.* Stanton, 184 Pa. St. 468, 39 Atl. 404.

A libel contained in a letter is within the rule stated in the text. Winter *v.* Donovan, 8 Gill (Md.) 370. And see, generally, LIBEL AND SLANDER.

A party's written declarations in a letter may be shown by the production of the letter and proof of his handwriting without calling him as a witness. Davis *v.* Windsor Sav. Bank, 48 Vt. 532.

48. Clarke *v.* Harvard, 115 Ga. 882, 42 S. E. 264; Conaway *v.* Shelton, 3 Ind. 334; Griswold *v.* Learned, 9 N. Y. St. 242.

49. Griswold *v.* Learned, 9 N. Y. St. 242. And see *infra*, XV, C, 3, e.

50. *Alabama.*— McCormick *v.* Joseph, 83 Ala. 401, 3 So. 796.

Arizona.— Yavapai County *v.* O'Neill, 3 Ariz. 363, 29 Pac. 430.

Georgia.— Western Union Tel. Co. *v.* Hines, 94 Ga. 430, 20 S. E. 349.

Minnesota.— Magie *v.* Herman, 50 Minn. 424, 52 N. W. 909, 36 Am. St. Rep. 660; Nichols *v.* Howe, 43 Minn. 181, 45 N. W. 14.

Mississippi.—Williams *v.* Brickell, 37 Miss. 682, 75 Am. Dec. 88.

Missouri.— Lindauer *v.* Meyberg, 27 Mo. App. 181.

Texas.— Prather *v.* Wilkens, 68 Tex. 187, 4 S. W. 252; Conner *v.* State, 23 Tex. App. 378, 5 S. W. 189.

Vermont.—Durkee *v.* Vermont Cent. R. Co., 29 Vt. 127. See also State *v.* Hopkins, 50 Vt. 316.

As to what constitutes the original, that is, whether the original is the message delivered to the operator for transmission or the message delivered to the recipient after the transmission, see *infra*, XV, D, 2.

Operator instructed orally.— Where it is sought to show by parol evidence the contents of a message delivered to the telegraph operator, it cannot be objected that the evidence offered was not the best evidence, unless it be shown that the message delivered to the operator was in writing; and since as a matter of fact many telegrams are communicated orally by the sender to the operator the court cannot conclude without proof that telegrams given to an operator in any given case were in writing (Terre Haute, etc., R. Co. *v.* Stockwell, 118 Ind. 98, 20 N. E. 650. See also Banks *v.* Richardson, 47 N. C. 109), and the same rule would clearly be applicable where it is sought to prove by parol the contents of a message transmitted and delivered, if it appeared that the message transmitted was delivered orally to the recipient without being reduced to writing (Durkee *v.* Vermont Cent. R. Co., 29 Vt. 127, per Redfield, C. J.).

When parol evidence not secondary.—Where the telegraph message itself is not the foundation of the action, but the failure to transmit and deliver it within a reasonable time is the gist of the controversy, the fact that the message was delivered for transmission is a substantive fact necessary to be proved, and the best evidence rule does not apply, and parol evidence is not secondary but primary. Western Union Tel. Co. *v.* Cline, 8 Ind. App. 364, 35 N. E. 564. *Compare* Western Union Tel. Co. *v.* Hopkins, 49 Ind. 223. And see *infra*, XV, C, 3, e. Where copies of telegrams relating to a matter about which there is no controversy have been filed on notice, it is proper to permit the operator who received the telegrams to state them, when such statement does not materially differ from the copies filed. International, etc., R. Co. *v.* Prince, 77 Tex. 560, 14 S. W. 171, 19 Am. St. Rep. 795; International, etc., R. Co. *v.* Cock, (Tex. Sup. 1890) 14 S. W. 242.

51. Lombardo *v.* Ferguson, 15 Cal. 372; Burlington Gas Light Co. *v.* Greene, 28 Iowa 289; Young *v.* Mertens, 27 Md. 114; Jones *v.* Tarleton, 1 Dowl. P. C. N. S. 625, 6 Jur. 348, 11 L. J. Exch. 267, 9 M. & W. 675, portable notice hanging in an office.

52. McFadden *v.* Kingsbury, 11 Wend. (N. Y.) 667; Jones *v.* Call, 93 N. C. 170; State *v.* Credle, 91 N. C. 640; Williams *v.* Willard, 23 Vt. 369.

53. Peterman *v.* Jones, 94 Iowa 591, 63 N. W. 338; Burlington Gas Light Co. *v.* Greene, 28 Iowa 289.

The posting of notice of the appointment of an executor or administrator, as required by a statute, has been held to be provable by parol without producing the original notice or a copy thereof or accounting for its ab-

where the notice is not in issue but is merely collaterally involved.[54] Where a notice or notice and demand are required by law to be in writing and constitute an essential element of the right of action, so that without proof thereof the action cannot be maintained, the best evidence rule applies to make the writing primary evidence, and parol or other secondary evidence is not admissible until a proper foundation has been laid for its introduction.[55]

(VII) *Accounts and Books of Account.* As a general rule original written accounts and books of account are the best evidence of the matters they contain, and unless they are produced or their absence is explained their contents cannot be proved by parol.[56] But this rule does not apply to exclude parol evidence

sence. Estes *v.* Wilkes, 16 Gray (Mass.) 363; Green *v.* Gill, 8 Mass. 111.

54. Polly *v.* McCall, 37 Ala. 20; Young *v.* Keller, 16 Mo. App. 550.

55. Western Union Tel. Co. *v.* Bates, 93 Ga. 352, 20 S. E. 639; McFadden *v.* Kingsbury, 11 Wend. (N. Y.) 677 (per Savage, C. J.); Fairbault *v.* Ely, 13 N. C. 67 (per Toomer, J.); Rosholt *v.* Corlett, 106 Wis. 474, 82 N. W. 305.

56. *Alabama.*— Roden *v.* Brown, 103 Ala. 324, 15 So. 598.

Connecticut.— Treat *v.* Barber, 7 Conn. 274.

Delaware.— Bunting *v.* Bunting, 3 Houst. 551.

Georgia.— Phillips *v.* Trowbridge Furniture Co., 86 Ga. 699, 13 S. E. 19; Solomon *v.* Creech, 82 Ga. 445, 9 S. E. 165; Crawford *v.* Stetson, 51 Ga. 120; Day *v.* Crawford, 13 Ga. 508.

Illinois.— Bartlett *v.* Wheeler, 195 Ill. 445, 63 N. E. 169 [*affirming* 96 Ill. App. 342]; Mandel *v.* Swan Land, etc., Co., 154 Ill. 177, 40 N. E. 462, 45 Am. St. Rep. 124, 27 L. R. A. 313 [*reversing* 51 Ill. App. 204]; Walker *v.* Douglas, 70 Ill. 445; Schotte *v.* Puscheck, 79 Ill. App. 31; Rau Mfg. Co. *v.* Townsend, 50 Ill. App. 558.

Indiana.— Williams *v.* Dewitt, 12 Ind. 309; Thompson *v.* Fry, 7 Blackf. 608; Wilt *v.* Bird, 7 Blackf. 258.

Iowa.— Wilson *v.* Morse, 117 Iowa 581, 91 N. W. 823; Iowa State Bank *v.* Novak, 97 Iowa 270, 66 N. W. 186; Churchill *v.* Fulliam, 8 Iowa 45. But see Drummond *v.* Stewart, 8 Iowa 341.

Kansas.— Manley *v.* Atchison, 9 Kan. 358, book kept by city treasurer.

Kentucky.— Cunningham *v.* Smith, 11 B. Mon. 325; Travers *v.* Wood, 50 S. W. 60, 20 Ky. L. Rep. 1819. See also Poor *v.* Robinson, 13 Bush 290.

Massachusetts.— Hunt *v.* Roylance, 11 Cush. 117, 59 Am. Dec. 140.

Minnesota.— Paine *v.* Sherwood, 19 Minn. 315.

Mississippi.— Dyson *v.* Baker, 54 Miss. 24. *Compare* Calhoun *v.* Calhoun, 37 Miss. 668.

Missouri.— Anderson *v.* Volmer, 83 Mo. 403; State *v.* Rosenfeld, 35 Mo. 472; Cozens *v.* Barrett, 23 Mo. 544; O'Connell *v.* Nicolson, 67 Mo. App. 657; Wolff *v.* Matthews, 39 Mo. App. 376.

New Hampshire.— Hall *v.* Ray, 18 N. H. 126.

New Jersey.— Park *v.* Miller, 27 N. J. L. 338.

New York.—Brayton *v.* Sherman, 119 N. Y. 623, 23 N. E. 471; Collins *v.* Shaffer, 78 Hun 512, 29 N. Y. Suppl. 574; National Bank *v.* Navassa Phosphate Co., 56 Hun 136, 8 N. Y. Suppl. 929. *Compare* Train *v.* Brown, 12 Abb. Pr. 217, 21 How. Pr. 93.

Pennsylvania.— Porter *v.* Lee, 16 Pa. St. 412; Keely *v.* Ord, 1 Dall. 310, 1 L. ed. 151; Kelly *v.* Holdship, 1 Browne 36; Renshaw *v.* Proctor, 16 Wkly. Notes Cas. 495.

South Carolina.—Furman *v.* Peay, 2 Bailey, 394; Justrobe *v.* Price, Harp. 111.

Texas.— Webb County *v.* Gonzales, 69 Tex. 455, 6 S. W. 781; Rogers *v.* O'Barr, (Civ. App. 1903) 76 S. W. 593; Watson *v.* Boswell, 25 Tex. Civ. App. 379, 61 S. W. 407; Garrett *v.* Garrett, (Civ. App. 1898) 47 S. W. 76.

West Virginia.— Fox *v.* Baltimore, etc., R. Co., 34 W. Va. 466, 12 S. E. 757; Hall *v.* Lyons, 29 W. Va. 410, 1 S. E. 582. See also Bennett *v.* Bennett, 37 W. Va. 396, 16 S. E. 638, 38 Am. St. Rep. 47.

United States.— Bergdoll *v.* Pollock, 95 U. S. 337, 24 L. ed. 512; Thorp *v.* Orr, 23 Fed. Cas. No. 14,006, 2 Cranch C. C. 335. *Compare* Molson *v.* Hawley, 17 Fed. Cas. No. 9,702, 1 Blatchf. 409.

England.— See Dupuy *v.* Truman, 2 Y. & Coll. 341, 21 Eng. Ch. 341.

See 20 Cent. Dig. tit. "Evidence," § 556.

This rule, however, is subject to qualification where it is necessary to prove the results of voluminous writings, books, etc. See *infra*, XV, C, 3, g.

Credits on plaintiff's books.— In an action on an open account, credits thereon are matters of defense and, as to the proof of these credits, plaintiff's books are not the highest evidence, but parol evidence is admissible. Hodges *v.* Tarrant, 31 S. C. 608, 9 S. E. 1038.

Books of a bank are within the rule stated in the text. Clark *v.* Dearborn, 6 Duer (N. Y.) 309. See also Poor *v.* Robinson, 13 Bush (Ky.) 290. But see Concord *v.* Concord Bank, 16 N. H. 26.

Existence or non-existence of entry.— It has been held that parol evidence is admissible to show that a certain fact does not appear in a book (Bessemer Land, etc., Co. *v.* Jenkins, 111 Ala. 135, 18 So. 565, 56 Am. St. Rep. 26. See also Burton *v.* Driggs, 20 Wall. (U. S.) 125, 22 L. ed. 299. *Contra*, McCall *v.* Moschowitz, 14 Daly (N. Y.) 16, 1 N. Y. St. 199); and parol evidence has been held admissible to show whether or not certain

given by witnesses whose testimony is founded on their personal knowledge independent of the books;[57] and where persons who can give such independent testimony are available and can readily be called as witnesses, or do in fact testify, the books of account are frequently excluded as being inferior evidence, especially where such persons made the book entries containing the facts to be proved.[58]

books contain a certain entry (Ramsey *v.* Cortlandt Cattle Co., 6 Mont. 498, 13 Pac. 248). Thus a witness may be asked whether he found charges against a party in an account-book, not to show what the charges are, but to call the attention of the witness to them in order that they may be pointed out to the jury; and the witness may also be asked whether he found on the books any credits against the charges, where this question is asked for the purpose of obtaining a reply in the negative as a matter of convenience and to prevent the necessity of an examination of all the accounts. Waldron *v.* Priest, 96 Me. 36, 51 Atl. 235.

57. *Alabama.*— Godbold *v.* Blair, 27 Ala. 592.

California.— Cowdery *v.* McChesney, 124 Cal. 363, 57 Pac. 221; Schurtz *v.* Kerkow, 85 Cal. 277, 24 Pac. 609.

Connecticut.— Barnum *v.* Barnum, 9 Conn. 242.

Delaware.— State *v.* Hancock, 2 Pennew. 252, 45 Atl. 851.

Georgia.— See Wynn *v.* City, etc., R. Co., 91 Ga. 344, 17 S. E. 649.

Iowa.— Christman *v.* Pearson, 100 Iowa 634, 69 N. W. 1055; Iowa State Bank *v.* Novak, 97 Iowa 270, 66 N. W. 186.

Michigan.— See Hyde *v.* Shank, 93 Mich. 535, 53 N. W. 787.

Mississippi.— Dyson *v.* Baker, 54 Miss. 24.

Pennsylvania.— Fitler *v.* Beckley, 2 Watts & S. 458.

South Carolina.— Wilson *v.* Atlanta, etc., R. Co., 16 S. C. 587.

Texas.— Webb County *v.* Gonzales, 69 Tex. 455, 6 S. W. 781; Gulf, etc., R. Co. *v.* Brown, 16 Tex. Civ. App. 93, 40 S. W. 608.

United States.— Keene *v.* Meade, 3 Pet. 1, 7 L. ed. 581 [*affirming* 17 Fed. Cas. No. 9,373, 3 Cranch C. C. 51].

See 20 Cent. Dig. tit. "Evidence," § 556.

Consideration of a note for goods sold may be proved by the testimony of a third person who has personal and independent knowledge thereof, and the production of the books in which the goods were charged is unnecessary. Fitler *v.* Beckley, 2 Watts & S. (Pa.) 458.

Proof of mechanic's lien.— Where a statute subjecting buildings to liens for debts contracted for materials furnished therefor does not prescribe the kind of evidence necessary to prove that the debt was contracted, the delivery of the material or the performance of labor may be proved by parol, although custom and convenience has introduced the practice of using the original books of entry, supported by the oath of the party to substantiate such charges. Church *v.* Davis, 9 Watts (Pa.) 304.

Testimony against interest.— The testimony of plaintiff corroborated by entries in his books cannot be regarded as better evidence than the testimony of defendant to an account against himself. Aiken *v.* Kilburne, 27 Me. 252.

58. *Arkansas.*— Burr *v.* Byers, 10 Ark. 398, 52 Am. Dec. 239.

California.— Cowdery *v.* McChesney, 124 Cal. 363, 57 Pac. 221.

Georgia.— Durand *v.* Grimes, 18 Ga. 693.

Illinois.— Dodson *v.* Sears, 25 Ill. 513; Waggeman *v.* Peters, 22 Ill. 42.

Indiana.— Williamson *v.* Doe, 7 Blackf. 12; Dodge *v.* Mauro, 14 Ind. App. 534, 41 N. E. 967, 43 N. E. 153.

Louisiana.— Groves *v.* Steel, 2 La. Ann. 480, 46 Am. Dec. 551.

New Hampshire.— Eastman *v.* Moulton, 3 N. H. 156.

New Mexico.— Price *v.* Garland, 3 N. M. 285, 6 Pac. 472.

New York.— People *v.* McLoughlin, 150 N. Y. 365, 44 N. E. 1017; National Ulster County Bank *v.* Madden, 114 N. Y. 280, 21 N. E. 408, 11 Am. St. Rep. 633; Textile Pub. Co. *v.* Smith, 31 Misc. 271, 64 N. Y. Suppl. 123.

Pennsylvania.— Townsend *v.* Kerns, 2 Watts 180; Myers *v.* Brice, 2 Pennyp. 382; Wheeler's Estate, 13 Phila. 370.

West Virginia.— Vinal *v.* Gilman, 21 W. Va. 301, 45 Am. Rep. 562.

See 20 Cent. Dig. tit. "Evidence," §§ 468, 470. But *compare* Black *v.* Richards, 2 Stew. & P. (Ala.) 338. See also *supra*, XV, C, 2.

Statutes.— This rule of exclusion has been held to apply not only at common law but under statutes providing for the admission of book-accounts. Bracken *v.* Dillon, 64 Ga. 243, 37 Am. Rep. 70; Stettauer *v.* White, 98 Ill. 72.

Stock exchange and bank-books.— Entries on books of a stock exchange, a private corporation, are not admissible as independent evidence in an action to which the corporation is not a party, without accounting for the absence of the secretary who made the entries. Terry *v.* Birmingham Nat. Bank, 93 Ala. 599, 9 So. 299, 30 Am. St. Rep. 87.

Books of a bank have been excluded under like circumstances where it did not appear that the clerk who made the entries was dead or beyond the reach of process. Philadelphia Bank *v.* Officer, 12 Serg. & R. (Pa.) 49.

In an action against an administrator, it was held that a private account-book of the intestate was not admissible on the part of defendant to prove payments of money to third persons, they being competent witnesses. Faunce *v.* Gray, 21 Pick. (Mass.) 243.

(VIII) *WILLS.* The best evidence of the provisions and contents of a will is the instrument itself, and unless it be produced or its absence satisfactorily explained, parol evidence of the matters it contains is not admissible.[59]

(IX) *BILLS OF LADING.* The contents of bills of lading cannot be proved by parol under the best evidence rule.[60] But the receipt of goods by a common carrier can be proved by parol without producing the bill of lading or accounting for its absence.[61]

(X) *RULES OF RAILROAD COMPANIES.* The written or printed orders, rules, or regulations of a railroad company concerning the management and running of its trains and the duties of its employees cannot be proved by parol evidence under the best evidence rule.[62] On the other hand the best evidence rule does not require that such regulations be produced or their absence explained, where the witness can testify to them of his own independent knowledge and recollection;[63] and of course parol evidence is not excluded where it does not appear that any written or printed rules exist, or where it is shown that the rules in question were not written or printed.[64] The fact that certain rules were not in force on a given date and had not then been put into the hands of the employees is susceptible of proof by the testimony of any one cognizant of the fact.[65]

(XI) *WRITINGS EXECUTED IN DUPLICATE.* Where a written instrument is executed in duplicate, parol evidence of its contents is not admissible unless the loss or destruction of both parts is shown or their absence satisfactorily explained.[66]

(XII) *OTHER APPLICATIONS OF RULE.* To indicate the extent to which the

"The use of one's own books, verified by his oath, is not secondary evidence, nor is it necessary to its admission first to show the loss of other evidence." Mathes *v.* Robinson, 8 Metc. (Mass.) 269, 271, 41 Am. Dec. 505, per Shaw, C. J. See also Cummings *v.* Fullam, 13 Vt. 434; Mississippi River Logging Co. *v.* Robson, 69 Fed. 773, 16 C. C. A. 400. *Compare* Ball *v.* Gates, 12 Metc. (Mass.) 491.

59. *Arkansas.*— Hershy *v.* Berman, 45 Ark. 309.

Georgia.— Thomasson *v.* Driskell, 13 Ga. 253; Raines *v.* Perryman, 29 Ga. 529.

Indiana.— McNear *v.* Roberson, 12 Ind. App. 87, 39 N. E. 896.

New York.— Matter of Smith, 61 Hun 101, 15 N. Y. Suppl. 425.

North Carolina.— Thompson *v.* Applewhite, 16 N. C. 460.

See 20 Cent. Dig. tit. "Evidence," § 553.

This rule applies where it is sought to prove a legacy (Millers *v.* Catlett, 10 Gratt. (Va.) 477), a devise (Fronty *v.* Wood, 1 Hill (S. C.) 165), the appointment of an executor (Millers *v.* Catlett, 10 Gratt. (Va.) 477), or the fact that as to certain property the testator died intestate (Morrill *v.* Otis, 12 N. H. 466).

60. Mather *v.* Goddard, 7 Conn. 304; Columbus, etc., R. Co. *v.* Tillman, 79 Ga. 607, 5 S. E. 135; St. Louis Southwestern R. Co. *v.* Cates, 15 Tex. Civ. App. 135, 38 S. W. 648.

61. Louisville, etc., R. Co. *v.* McGuire, 79 Ala. 395. See also McBee *v.* Caesar, 15 Oreg. 62, 13 Pac. 652; Bell *v.* Keely, 2 Yeates (Pa.) 255. And see *infra*, XV, C, 3, b, (XII), (A).

62. Louisville, etc., R. Co. *v.* Orr, 94 Ala. 602, 10 So. 167; Georgia Pac. R. Co. *v.* Propst, 90 Ala. 1, 7 So. 635; St. Louis, etc., R. Co. *v.* Bauer, 156 Ill. 106, 40 N. E. 448; Price *v.* Richmond, etc., R. Co., 38 S. C. 199, 17 S. E. 732; Missouri Pac. R. Co. *v.* Lamothe, 76 Tex. 219, 13 S. W. 194; Missouri, etc., R. Co. *v.* Pawkett, 28 Tex. Civ. App. 583, 68 S. W. 323. *Compare* Oldenburg *v.* New York Cent., etc., R. Co., 9 N. Y. Suppl. 419.

63. Devoe *v.* New York Cent., etc., R. Co., 174 N. Y. 1, 66 N. E. 568 [*reversing* 70 N. Y. App. Div. 495, 75 N. Y. Suppl. 136], in which case the rules in question were those of another company.

64. *Georgia.*— Yonge *v.* Kinney, 28 Ga. 111.

Illinois.— St. Louis, etc., R. Co. *v.* Bauer, 156 Ill. 106, 40 N. E. 448.

Indiana.—Pittsburgh, etc., R. Co. *v.* Martin, 157 Ind. 216, 61 N. E. 229. See Cincinnati, etc., R. Co. *v.* McMullen, 117 Ind. 439, 20 N. E. 287, 10 Am. St. Rep. 67, where, under peculiar circumstances, existence of a written order was presumed and parol evidence excluded.

Minnesota.— Sobieski *v.* St. Paul, etc., R. Co., 41 Minn. 169, 42 N. W. 863.

Texas.— Galveston, etc., R. Co. *v.* Brown, (Civ. App. 1900) 59 S. W. 930 [*reversed* on other grounds in 95 Tex. 2, 63 S. W. 305]; Galveston, etc., R. Co. *v.* Henning, (Civ. App. 1897) 39 S. W. 302.

See 20 Cent. Dig. tit. "Evidence," § 513.

65. Dougherty *v.* Philadelphia, etc., R. Co., 171 Pa. St. 457, 33 Atl. 340, holding also that while receipts signed by the employees on receiving copies of the rules might be the best evidence of the date when each employee received his copy, yet they were not evidence as to when the rules took effect.

66. Alabama Great Southern R. Co. *v.* Mt. Vernon Co., 84 Ala. 173, 4 So. 356; New York L. Ins. Co. *v.* Goodrich, 74 Mo. App. 355; Matthews *v.* Union Pac. R. Co., 66 Mo. App. 663; Rex *v.* Castleton, 6 T. R. 236.

courts have gone in applying the best evidence rule, it may be mentioned that under this rule parol evidence has been held inadmissible to prove the rating of a person on the books of a commercial agency,[67] a subscription for corporate stock,[68] written instructions given to an officer with respect to serving a writ,[69] the contents of an application for a life-insurance policy,[70] the contents of "time-checks" made out to employees of a railroad company,[71] or to show instructions contained in an illustrated catalogue as to the management of an engine.[72] Standard life-tables may be introduced in evidence to show the duration of a person's life, and the statement of a witness who has no knowledge of the subject, except such as he may have gained by consulting such tables, has been held inadmissible under the best evidence rule.[73] On the question whether the personal property of a decedent's estate is sufficient to pay the debts, it has been considered that the inventory is the best evidence; and testimony based on opinion is not admissible.[74] On the other hand, it has been held that the inventory and appraisement of the estate are not as high a grade of evidence as the testimony of the administrator or the appraisers,[75] while the fact that a witness' knowledge of the decedent's financial condition was derived in part from proceedings had in the probate court in settlement of the decedent's estate has been held not to render the witness' testimony inadmissible as being secondary evidence.[76]

(XIII) *Particular Writings Not Within Rule.* There are certain writings or inscriptions which cannot be properly classified as documents, and which the courts decline to hold as the best evidence of what they contain, but regard as simply matters of description or identity and primarily susceptible of proof by parol evidence. Among writings of this class are a direction on a parcel,[77] words written on the tag of a valise,[78] or on labels attached to jugs or decanters and indicating their contents;[79] and in a prosecution for unlawful assembly, where the purpose of the evidence is to show the character and intention of the assembly, parol evidence has been held admissible as primary evidence to prove an inscription on a banner or flag carried by the leaders of the crowd.[80] The log-book of a vessel is not proof *per se* of the facts therein stated except in certain cases specified by statute. Therefore it is proper to admit parol evidence to establish the time of sailing of a vessel and to show the course and termination of her voyage, without first proving that the log-book is missing or lost.[81]

b. To Particular Facts and Transactions — (I) *Title to and Possession of Real Property* — (A) *Title* — (1) In General. It is elementary law that where the title to real property is in issue, the deeds, patents, wills, mortgages, or other muniments of title constitute the best evidence, and parol evidence is not admissible to prove title unless their absence is satisfactorily explained.[82] This

67. Deere *v.* Bagley, 80 Iowa 197, 45 N. W. 557.

68. Cincinnati, etc., R. Co. *v.* Cochran, 17 Ind. 516.

69. Thornton *v.* Moody, 11 Me. 253.

70. Lewis *v.* Hudman, 56 Ala. 186.

71. Chicago, etc., R. Co. *v.* Brown, 44 Kan. 384, 24 Pac. 497.

72. Richardson *v.* Douglas, 100 Iowa 239, 69 N. W. 530.

73. Erb *v.* Popritz, 59 Kan. 264, 52 Pac. 871, 68 Am. St. Rep. 362.

74. McCown *v.* Terrell, (Tex. Civ. App. 1897) 40 S. W. 54. See also Semple *v.* Fletcher, 3 Mart. N. S. (La.) 382.

75. McPeters *v.* Phillips, 46 Ala. 496.

76. Phelps *v.* Winona, etc., R. Co., 37 Minn. 485, 35 N. W. 273, 5 Am. St. Rep. 867.

77. Burrell *v.* North, 2 C. & K. 679, 61 E. C. L. 679.

78. Com. *v.* Morrell, 99 Mass. 542.

79. Com. *v.* Blood, 11 Gray (Mass.) 74, which was a prosecution for keeping intoxicating liquors with intent to sell. *Compare* Atchison, etc., R. Co. *v.* Palmore, 68 Kan. 545, 75 Pac. 509, 64 L. R. A. 90, holding that a card attached to a pile of railroad ties and bearing the words "Arkansas and Texas Tie Company. Creosote Treated Ties" was technically the best evidence of its contents, although slight evidence if its loss was sufficient to lay the foundation for parol evidence.

80. Rex *v.* Hunt, 3 B. & Ald. 566, 22 Rev. Rep. 485, 5 E. C. L. 327.

Appearance and condition of mere physical objects see *supra*, XV, B, 2, e.

81. U. S. *v.* Gibert, 25 Fed. Cas. No. 15,204, 2 Sumn. 19.

82. *Alabama.*— Ricketts *v.* Birmingham St. R. Co., 85 Ala. 600, 5 So. 353; Hussey *v.* Roquemore, 27 Ala. 281.

rule excludes parol evidence of the contents of maps and surveys describing the boundaries of land when these matters become material to the issue,[83] although it has been held that the testimony of a witness who has knowledge of the lines, marks, and corners, and is thus competent to testify as to the boundaries of the property, is primary evidence and not secondary either to field-notes or certified copies of field-notes, or to the testimony of a person who was present and saw the survey originally made.[84]

(2) WHERE TITLE NOT IN ISSUE. Where the title to real property is not in issue but is only collaterally involved, or where it is necessary for a party to make only a *prima facie* showing of ownership, the best evidence rule is not applicable, and the fact of title or *prima facie* right of ownership may be established by parol evidence.[85] But although the title is only collaterally involved, yet, if it appears that the knowledge of the witness is derived from a written instrument affecting the title, the best evidence rule applies and the testimony is inadmissible unless the instrument is produced or its absence explained.[86]

Arkansas.— Hershy *v.* Berman, 45 Ark. 309; Bivens *v.* McElroy, 11 Ark. 23, 3 Am. Dec. 258.

California.— Crary *v.* Campbell, 24 Cal. 634.

Colorado.— Terpening *v.* Holton, 9 Colo. 306, 12 Pac. 189.

Georgia.— Wright *v.* Roberts, 116 Ga. 194, 42 S. E. 369; Phillips *v.* O'Neal, 87 Ga. 727, 13 S. E. 819.

Illinois.— Reich *v.* Berdel, 120 Ill. 499, 11 N. E. 912.

Iowa.— Boddy *v.* Henry, 113 Iowa 462, 85 N. W. 771, 53 L. R. A. 769.

Kentucky.— Asher Lumber Co. *v.* French, 37 S. W. 149, 18 Ky. L. Rep. 682, title to standing timber.

Louisiana.— Gaudet *v.* Dumoulin, 49 La. Ann. 984, 22 So. 622; Lard *v.* Strother, 4 Rob. 95; Lewis *v.* Beatty, 8 Mart. N. S. 287; Davis *v.* Prevost, 6 Mart. N. S. 265; Coleman *v.* Breaud, 6 Mart. N. S. 207; Allard *v.* Lobau, 3 Mart. N. S. 293; Robertson *v.* Lucas, 1 Mart. N. S. 187. See also Barataria, etc., Canal Co. *v.* Field, 17 La. 421.

Maryland.— Hammond *v.* Norris, 2 Harr. & J. 130.

Michigan.—Thompson *v.* Richards, 14 Mich. 172.

New Hampshire.— Morrill *v.* Foster, 32 N. H. 358.

Pennsylvania.— Goodright *v.* Miller, 1 Yeates 305. See also Deppen *v.* Bogar, 7 Pa. Super. Ct. 434.

South Carolina.— Eubanks *v.* Harris, 1 Speers 183; Spence *v.* Spence, 2 Brev. 466.

See 20 Cent. Dig. tit. "Evidence," § 518.

Proof of husband's title and seizin in actions for dower see DOWER, 14 Cyc. 871 *et seq.*

Where title is asserted under sheriff's sale, the sheriff's deed must be produced or its absence explained before secondary evidence is admissible. Goodson *v.* Brothers, 111 Ala. 589, 20 So. 443; Harlan *v.* Harris, 17 Ind. 328; Dufour *v.* Camfranc, 11 Mart. (La.) 675; Smith *v.* Phillips, 25 Mo. 555. See also Morgan *v.* Thames Bank, 14 Conn. 99.

"But the local record of a mining community, while it may be and probably is the best evidence of the rules and customs governing the community, and to some extent the distribution of mining rights, is not the best or the only evidence of priority or extent of actual possession." Campbell *v.* Rankin, 99 U. S. 261, 264, 25 L. ed. 435.

83. Pool *v.* Myers, 13 Sm. & M. (Miss.) 466; State *v.* Atherton, 16 N. H. 203; Ross *v.* Pleasants, 3 Pa. St. 408. See also Surget *v.* Little, 5 Sm. & M. (Miss.) 319.

To prove the time of a survey, a copy of the survey is the best evidence. Dawson *v.* Laughlin, 2 Yeates (Pa.) 446.

Mistake in field-notes.— Where certain field-notes were offered in evidence, and there was a mistake apparent on the face of them, it was held that a witness could not state to the jury that it appeared by the field-notes that there was a mistake in them, since the field-notes themselves were the best evidence of that fact. Coleman *v.* Smith, 55 Tex. 254.

84. Weaver *v.* Robinett, 17 Mo. 459. See also Surget *v.* Little, 5 Sm. & M. (Miss.) 319; Perry *v.* Block, 1 Mo. 484.

85. *Alabama.*— Alabama Great Southern R. Co. *v.* Johnston, 128 Ala. 283, 29 So. 771. *Compare* Arnold *v.* Cofer, 135 Ala. 364, 33 So. 539.

Georgia.— Central R. Co. *v.* Whitehead, 74 Ga. 441. *Compare* Wright *v.* Roberts, 116 Ga. 194, 42 S. E. 369.

Kentucky.— See Helen *v.* Spencer, 1 Ky. L. Rep. 56.

Massachusetts.— See Tucker *v.* Welsh, 17 Mass. 160, 9 Am. Dec. 137.

Michigan.— Babcock *v.* Beaver Creek Tp., 65 Mich. 479, 32 N. W. 653.

Minnesota.— Cooper *v.* Breckenridge, 11 Minn. 341.

Missouri.— See Weaver *v.* Robinett, 17 Mo. 459; Perry *v.* Block, 1 Mo. 484.

South Carolina.— Pelzer Mfg. Co. *v.* American F. Ins. Co., 36 S. C. 213, 15 S. E. 562.

Texas.— Bexar County *v.* Terrell, (Sup. 1890) 14 S. W. 62; Oaks *v.* West, (Civ. App. 1901) 64 S. W. 1033.

West Virginia.— Phillips *v.* Huntington, 35 W. Va. 406, 14 S. E. 17.

See 20 Cent. Dig. tit. "Evidence," § 474½.

86. Ricketts *v.* Birmingham St. R. Co., 85

(B) *Possession.* For the purpose of proving mere possession of real property, parol evidence is always admissible, notwithstanding the existence of written evidence such as deeds or other muniments of title.[87] The same is true as to a mere transfer of possession of land.[88] But it has been held that where it is sought to prove ownership or possession by the fact of the execution of a mortgage on the land, the best evidence rule applies and requires the production of the mortgage or an explanation of its absence.[89]

(II) *Sales, Conveyances, and Mortgages of Real Property*—(A) *In General.* Where it is sought to prove a sale or conveyance of real property, the general rule is that the written contract of sale or the deed of conveyance constitutes the best evidence of the transaction and the terms thereof; and if the instrument be not produced or its absence explained parol evidence of the transaction is not admissible.[90] The same rule applies to a mortgage of real

Ala. 600, 5 So. 353; Bell *v.* Denson, 56 Ala. 444. See also Cain *v.* Busby, 30 Ga. 714.

87. Robinson *v.* Tunnell, 2 Houst. (Del.) 387; Jacob Tome Institute *v.* Davis, 87 Md. 591, 41 Atl. 166; Den *v.* Hamilton, 12 N. J. L. 109; Martin *v.* Bowie, 37 S. C. 102, 15 S. E. 736. See also Devacht *v.* Newsam, 3 Ohio 57. *Compare* Buell *v.* Cook, 5 Conn. 206.

To show the nature of the possession that accompanied a deed of gift of a slave, parol evidence of the existence of the deed was held admissible. Spiers *v.* Willison, 4 Cranch (U. S.) 398, 2 L. ed. 659.

88. Jacob Tome Institute *v.* Davis, 87 Md. 591, 41 Atl. 166; Martin *v.* Bowie, 37 S. C. 102, 15 S. E. 736.

89. Bell *v.* Denson, 56 Ala. 444.

90. *Alabama.*—Ricketts *v.* Birmingham St. R. Co., 85 Ala. 600, 5 So. 353; Lecroy *v.* Wiggins, 31 Ala. 13; Allen *v.* Smith, 22 Ala. 416. But see Robinson *v.* Tipton, 31 Ala. 595.

California.— Lewis *v.* Burns, 122 Cal. 358, 55 Pac. 132 (deed); Poorman *v.* Miller, 44 Cal. 269 (deed); Patterson *v.* Keystone Min. Co., 30 Cal. 360; Crary *v.* Campbell, 24 Cal. 634, all of which were sales of mining claims.

Colorado.— Terpening *v.* Holton, 9 Colo. 306, 12 Pac. 189, sale of mining claim.

Georgia.— Cain *v.* Busby, 30 Ga. 714.

Illinois.— Reich *v.* Berdel, 120 Ill. 499, 11 N. E. 912; Hardin *v.* Forsythe, 99 Ill. 312.

Indiana.— State *v.* Davis, 117 Ind. 307, 20 N. E. 159. *Compare* Uhl *v.* Moorhous, 137 Ind. 445, 37 N. E. 366.

Kentucky.— Griffith *v.* Huston, 7 J. J. Marsh. 385; Hughes *v.* Easten, 4 J. J. Marsh. 572, 20 Am. Dec. 230.

Maine.— Jewett *v.* Persons Unknown, 61 Me. 408; Emery *v.* Vinall, 26 Me. 295.

Maryland.— Hammond *v.* Norris, 2 Harr. & J. 130.

Massachusetts.—Brackett *v.* Evans, 1 Cush. 79.

Michigan.—Thompson *v.* Richards, 14 Mich. 172.

Mississippi.— Graham *v.* Warren, 81 Miss. 330, 33 So. 71.

Missouri.— Ebersole *v.* Rankin, 102 Mo. 488, 15 S. W. 422; Houck *v.* Patty, 100 Mo. App. 302, 73 S. W. 389, sale of standing timber.

New Hampshire.— Morrill *v.* Foster, 32 N. H. 358.

New Mexico.— Daly *v.* Bernstein, 6 N. M. 380, 28 Pac. 764.

New York.— Jackson *v.* Parkhurst, 4 Wend. 369.

North Carolina.— Woodbury *v.* Evans, 122 N. C. 779, 30 S. E. 2.

Oregon.— Smith *v.* Cox, 9 Oreg. 327.

South Carolina.— Spence *v.* Spence, 2 Brev. 466; Howell *v.* House, 2 Mill 80.

Texas.— Farmer *v.* Simpson, 6 Tex. 303; Willard *v.* Cleveland, 14 Tex. Civ. App. 557, 38 S. W. 222; Rogers *v.* Wallace, (Civ. App. 1894) 28 S. W. 246. See also Macdonnell *v.* De los Fuentes, 7 Tex. Civ. App. 136, 26 S. W. 792; Greer *v.* Richardson Drug Co., 1 Tex. Civ. App. 634, 20 S. W. 1127.

See 20 Cent. Dig. tit. "Evidence," § 518.

Proof of the husband's title and seizin in actions for dower see DOWER, 14 Cyc. 871 *et seq.*

To show who was the grantor in a deed, the deed is the best evidence, and parol evidence of the fact is not admissible under the best evidence rule. Jacob Tome Institute *v.* Davis, 87 Md. 591, 41 Atl. 166.

Homestead.— Under Ga. Code (1882), §§ 3816, 3817, it is held that, in the trial of a case involving the setting apart and valuation of a homestead, the original homestead papers are primary evidence, and an exemplified or certified copy from the records of the clerk of the superior court is secondary. Pritchett *v.* Davis, 101 Ga. 236, 28 S. E. 666, 65 Am. St. Rep. 298; Brown *v.* Driggers, 60 Ga. 114.

Issue and assignment of certificate of entry.— That a certificate of entry of lands at the land-office had been issued and had been assigned by the purchaser cannot be shown by parol testimony, unless it is first shown that the certificate has been lost or destroyed or is in possession of the adverse party. Groover *v.* Coffee, 19 Fla. 61. But since an unlocated land certificate can be transferred by parol, it has been held that its transfer may be proved by circumstantial evidence without preliminary proof as to the loss, etc., of the writing by which it was transferred. Jones *v.* Reus, 5 Tex. Civ. App. 628, 24 S. W. 674.

Void deed.— The fact that a deed is be-

estate,[91] and to a written instrument given by a grantee to a grantor showing that the grantee is to hold the land in trust.[92] Where the record of a conveyance or a properly authenticated copy of the record is made primary evidence by statute,[93] parol evidence of the contents of a recorded conveyance is not admissible if the statutory primary evidence can be produced.[94]

(B) *Deed Collateral to Issue.* The rule just stated[95] does not properly apply where the contents of the deed are not in issue or the object of the evidence is not to establish a conveyance under the deed, and the instrument is only collaterally involved. In such cases parol evidence is admissible.[96] This limitation to the rule is not, however, always observed.[97]

(C) *Time of Execution and Delivery.* The time when a deed was executed and delivered may be shown by parol evidence, since this is not proving the contents of the instrument.[98]

(D) *Fact of Sale or Conveyance Apart From Its Terms.* The question whether the best evidence rule applies to exclude parol evidence of the fact of a sale or conveyance of land, as distinct from the contents of the contract or deed, is a matter involved in some doubt. In some cases it has been held that the rule does not apply, and parol statements that a person has purchased land, has sold and conveyed it, or has executed a deed thereof have been held admissible without producing the written instrument or accounting for its absence.[99] In other cases, however, such evidence has been excluded under the best evidence rule.[1]

(III) *Leases and Tenancy of Real Property.* Where the relation of landlord and tenant exists by virtue of a written lease or other instrument, and the existence and terms of the tenancy lie at the foundation of the cause or are directly in issue, the written instrument constitutes the best evidence, and parol or other secondary evidence is excluded under the best evidence rule.[2] But in

tween third parties, and void because of incapacity of the grantor, has been held not to alter the rule that it must first be produced, or its non-production accounted for, before parol evidence is admissible. Smith *v.* Cox, 9 Oreg. 327.

Harmless error.— But where the deed is read in evidence after the admission of testimony that the witness wrote the deed, error in admitting the parol evidence is immaterial. Shaw *v.* Adams, 2 Tex. App. Civ. Cas. § 177.

91. Bell *v.* Denson, 56 Ala. 444; Arnd *v.* Amling, 53 Md. 192; Hoitt *v.* Moulton, 21 N. H. 586; Chattanooga First Nat. Bank *v.* Reid, (Tenn. Ch. App. 1900) 58 S. W. 1124.

92. Boyd *v.* Boyd, (Tex. Civ. App. 1903) 78 S. W. 39.

93. See *supra*, XIV, B, 4.

94. Johnson *v.* Ashland Lumber Co., 52 Wis. 458, 9 N. W. 464; Sexsmith *v.* Jones, 13 Wis. 565.

95. See *supra*, XV, C, 3, b, (II), (A).

96. Palmer *v.* Tripp, 8 Cal. 95; Trimble *v.* Shaffer, 3 Greene (Iowa) 233 (parol evidence that conveyance was made by deed); Tucker *v.* Welsh, 17 Mass. 160, 9 Am. Dec. 137; Smith *v.* Eckford, (Tex. Sup. 1891) 18 S. W. 210. See also Uhl *v.* Moorhous, 137 Ind. 445, 37 N. E. 366.

Parol evidence of fraudulent conveyances.— A party impeaching a sale for fraud may prove by parol that the vendor about the time of sale executed a conveyance to the same vendee and another person, of other portions of his property, for which no consideration was paid; and to entitle him to do so, it is not necessary to prove notice to the vendee to produce the original. Lowry *v.* Pinson, 2 Bailey (S. C.) 324, 23 Am. Dec. 140. See also *infra*, XV, C, 3, e.

97. See Smith *v.* Armistead, 7 Ala. 698; Arnd *v.* Amling, 53 Md. 192; Rogers *v.* Wallace, (Tex. Civ. App. 1894) 28 S. W. 246.

98. Davar *v.* Cardwell, 27 Ind. 478. *Compare* Frick Co. *v.* Marshall, 86 Mo. App. 463.

99. Jay *v.* Stein, 49 Ala. 514; Robinson *v.* Tipton, 31 Ala. 595; Davitte *v.* Southern R. Co., 108 Ga. 665, 34 S. E. 327; Uhl *v.* Morehous, 137 Ind. 445, 37 N. E. 366; Baltes Land, etc., Co. *v.* Sutton, 32 Ind. App. 14, 69 N. E. 179; Trimble *v.* Shaffer, 3 Greene (Iowa) 233. But see Cain *v.* Busby, 30 Ga. 714.

1. Rogers *v.* Wallace, (Tex. Civ. App. 1894) 28 S. W. 246. A declaration by a person to the effect that he had sold and conveyed certain land and had no claim to it means that he had conveyed it by writing, and cannot therefore be given in evidence without proving that the writing is lost, destroyed, or otherwise inaccessible. McDonald *v.* Campbell, 2 Serg. & R. (Pa.) 473.

2. *Alabama.*— Burks *v.* Bragg, 89 Ala. 204, 7 So. 156.

Indiana.— Rucker *v.* McNeely, 5 Blackf. 123.

Iowa.— See Wallace *v.* Wallace, 62 Iowa 651, 17 N. W. 905.

Michigan.— Gilbert *v.* Kennedy, 22 Mich. 5.

Mississippi.— Weiler *v.* Monroe County, 74 Miss. 682, 21 So. 969, 22 So. 188.

other cases it is generally held that where the fact to be established is simply the existence of the tenancy as distinct from its terms, the best evidence rule does not apply, and, although there may be a lease or other written instrument defining the terms of the tenancy, the fact of the tenancy may be proved by parol without the necessity of producing the writing.[3] And it has been held that, although the terms of the tenancy may be directly in issue, parol admissions of the landlord or tenant or acts amounting to admissions are competent evidence against the party who made them, although they may involve the contents of the lease, and that to such admissions the best evidence rule is not applicable.[4]

(iv) *Title to Personal Property.* Where the title to personal property is in issue, and it appears that the title is evidenced by a bill of sale or other similar written instrument, it is generally held that the writing is the best evidence and parol evidence is not admissible unless the instrument is produced or its absence explained,[5] although there is authority to the contrary.[6] But where

New Hampshire.— Putnam *v.* Goodall, 31 N. H. 419.

New Jersey.— Den *v.* Hamilton, 12 N. J. L. 109.

Tennessee.— Littlejohn *v.* Fowler, 5 Coldw. 284.

Texas.—Dikes *v.* Miller, 24 Tex. 417; Grayson *v.* Peyton, (Civ. App. 1902) 67 S. W. 1074.

Washington.—Cowie *v.* Ahrenstedt, 1 Wash. 416, 25 Pac. 458, holding that the plaintiff in an action to subject to a mechanic's lien property which the defendant holds under a written lease cannot show the defendant's interest under the lease by parol evidence, the lease being the best evidence.

England.— Rex *v.* Merthyr Fidol, 1 B. & Ad. 29, 8 L. J. M. C. O. S. 114, 20 E. C. L. 384; Rex *v.* Rawden, 8 B. & C. 708, 7 L. J. M. C. O. S. 35, 15 E. C. L. 348; Doe *v.* Harvey, 8 Bing. 239, 1 L. J. C. P. 9, 1 Moore & S. 374, 21 E. C. L. 523.

See 20 Cent. Dig. tit. "Evidence," §§ 549, 550.

3. *Delaware.*— Doe *v.* Gray, 2 Houst. 135.

Georgia.— Central R. Co. *v.* Whitehead, 74 Ga. 441.

Michigan.— Rayner *v.* Lee, 20 Mich. 384.

Nebraska.— Consaul *v.* Sheldon, 35 Nebr. 247, 52 N. W. 1104.

New Hampshire.— Straw *v.* Jones, 9 N. H. 400. *Compare* Putnam *v.* Goodall, 31 N. H. 419.

New Jersey.— Den *v.* Hamilton, 12 N. J. L. 109.

New York.— Bogardus *v.* Trinity Church, 4 Sandf. Ch. 633.

North Carolina.— Thompson *v.* Matthews, 61 N. C. 15.

Texas.— Howard *v.* Britton, 71 Tex. 286, 9 S. W. 73.

Virginia.— Taylor *v.* Peck, 21 Gratt. 11.

United States.— See May *v.* Sheehy, 16 Fed. Cas. No. 9,335, 4 Cranch C. C. 135.

England.— Rex *v.* Rawden, 8 B. & C. 708, 7 L. J. M. C. O. S. 35, 15 E. C. L. 348; Rex *v.* Holy Trinity, 7 B. & C. 611, 6 L. J. M. C. 24, 1 M. & R. 444, 31 Rev. Rep. 267, 14 E. C. L. 275. *Compare* Strother *v.* Barr, 5 Bing. 136, 6 L. J. C. P. O. S. 245, 2 M. & P. 207, 30 Rev. Rep. 545, 15 E. C. L. 509.

See 20 Cent. Dig. tit. "Evidence," § 516.

Compare Wallace *v.* Wallace, 62 Iowa 651, 17 N. W. 905.

Parol declarations that the demandant in a writ of entry was in possession under a lease are admissible to show a claim of title in him, and the lease need not be produced or its absence accounted for. Straw *v.* Jones, 9 N. H. 400.

An assignment by the lessee is within the rule stated in the text. May *v.* Sheehy, 16 Fed. Cas. No. 9,335, 4 Cranch C. C. 135.

Payment of rent is evidence of a tenancy and may be proved by parol or by rent receipts without producing the lease. Den *v.* Gray, 2 Houst. (Del.) 135; Taylor *v.* Peck, 21 Gratt. (Va.) 11; May *v.* Sheehy, 16 Fed. Cas. No. 9,335, 4 Cranch C. C. 135; Rex *v.* Holy Trinity, 7 B. & C. 611, 6 L. J. M. C. 24, 1 M. & R. 444, 31 Rev. Rep. 267, 14 E. C. L. 275.

4. Taylor *v.* Peck, 21 Gratt. (Va.) 11; Howard *v.* Smith, 10 L. J. C. P. 245, 3 M. & G. 254, 3 Scott N. R. 574, 42 E. C. L. 139. See also Noye *v.* Reed, 6 L. J. K. B. O. S. 5, 1 M. & R. 63, 17 E. C. L. 645.

5. *Alabama.*— Street *v.* Nelson, 67 Ala. 504.

Arkansas.— Stone *v.* Waggoner, 8 Ark. 204.

Georgia.— Epping *v.* Mockler, 55 Ga. 376. See also Morgan *v.* Jones, 24 Ga. 155; Ga. Code, §§ 3760–3762.

Louisiana.— Lucile *v.* Toustin, 5 Mart. 611.

Mississippi.— Baldwin *v.* McKay, 41 Miss. 358.

North Carolina.— Graham *v.* Hamilton, 25 N. C. 381.

Ohio.— Straus *v.* Payne, 1 Ohio Dec. (Reprint) 61, 1 West L. J. 410.

South Carolina.—Foster *v.* Cherry, 2 Nott & M. 367.

Canada.— Caldwell *v.* Green, 8 U. C. Q. B. 327. See also Bratt *v.* Lee, 7 U. C. C. P. 280.

See 20 Cent. Dig. tit. "Evidence," §§ 515, 552.

A party refusing to produce a written contract under which he claims personal property cannot introduce parol evidence of ownership. Mullins *v.* Bullock, 12 Ky. L. Rep. 95. *Compare* Wilson *v.* Atlanta, etc., Airline R. Co., 16 S. C. 587.

6. Williams *v.* Jarrot, 6 Ill. 120, 129, where the court said: "The general rule of the

the title to personal property is not directly in issue and is only collaterally involved, or it is necessary for a party to make only a *prima facie* showing of ownership, the best evidence rule is not applicable and the title or *prima facie* right of ownership may be proved by parol evidence.[7] On the other hand if the party instead of relying solely on parol evidence seeks to prove the ownership by a written instrument, then the best evidence rule applies and parol evidence is not admissible unless the instrument is produced or its absence explained.[8]

(v) *Sales and Mortgages of Personal Property*—(a) *In General.* Where a sale of personal property is in issue and the transfer is evidenced by a bill of sale or similar written instrument, this instrument as a general rule constitutes the best evidence of the terms of the transaction and parol evidence is not admissible to prove matters contained in the writing unless the instrument itself is produced or its absence satisfactorily explained.[9] The same rule applies to a mortgage of personal property.[10]

(b) *Fact and Time of Sale as Distinguished From Terms.* In many well considered cases, however, a distinction has been made between proving the mere fact of the sale or its date and showing the terms of the transaction, it being held that where a writing is not essential to the passing of title, parol evidence is admissible to establish the fact of the sale and likewise the time when it

common law is, that parol evidence is admissible to prove the sale, delivery and ownership of personalty. Exceptions to it, introduced by statute, such as the registering of ships, recording bills of sale under the statute of frauds, and the like, grow out of the policy of the law, in relation to particular kinds of personalty, etc."; Gallagher *v.* London Assur. Corp., 149 Pa. St. 25, 24 Atl. 115. See also Conrad *v.* Farrow, 5 Watts (Pa.) 536.

In New Mexico the ownership of animals may be established by any competent evidence showing the fact. Gale *v.* Salas, (1901) 66 Pac. 520. See also Chavez *v.* Territory, 6 N. M. 455, 30 Pac. 903.

In Nebraska it has been held that parol evidence is competent to prove the ownership of a store building, if it does not appear that the building is real estate. Knights *v.* State, 58 Nebr. 225, 78 N. W. 508, 76 Am. St. Rep. 78.

7. Patterson *v.* Kicker, 72 Ala. 406; Street *v.* Nelson, 67 Ala. 504; Oaks *v.* West, (Tex. Civ. App. 1901) 64 S. W. 1033; Sleep *v.* Heymann, 57 Wis. 495, 16 N. W. 17. See also Ricketts *v.* Birmingham St. R. Co., 85 Ala. 600, 5 So. 353.

8. Patterson *v.* Kicker, 72 Ala. 406.

9. *Alabama.*—Street *v.* Nelson, 67 Ala. 504; Yarbrough *v.* Hudson, 19 Ala. 653.

Arkansas.—Stone *v.* Waggoner, 8 Ark. 204.

Connecticut.— Morgan *v.* Thames Bank, 14 Conn. 99, sale of bank-stock under execution.

Georgia.— Epping *v.* Mockler, 55 Ga. 376; Raines *v.* Perryman, 29 Ga. 529.

Iowa.— Fischer *v.* Johnson, 106 Iowa 181, 76 N. W. 658; Brady *v.* Flickinger, 69 Iowa 167, 28 N. W. 492.

Kansas.— Barnett *v.* Williams, 7 Kan. 339.

Kentucky.— Nancy *v.* Snell, 6 Dana 148.

Louisiana.— Clark *v.* Slidell, 5 Rob. 330.

Maine.— Morton *v.* White, 16 Me. 53.

Maryland.— Troxall *v.* Applegarth, 24 Md. 163.

Michigan.— Hood *v.* Olin, 80 Mich. 296, 45 N. W. 341; Hatch *v.* Fowler, 28 Mich. 205.

New York.— Dunn *v.* Hewitt, 2 Den. 637.

Ohio.— Straus *v.* Payne, 1 Ohio Dec. (Reprint) 61, 1 West. L. J. 410.

Oregon.— Price *v.* Wolfer, 33 Oreg. 15, 52 Pac. 759.

Vermont.— Peaslee *v.* Staniford, 1 D. Chipm. 170.

See 20 Cent. Dig. tit. "Evidence," §§ 515, 552.

That the law does not require a writing is immaterial. Lucile *v.* Toustin, 5 Mart. (La.) 611.

Sale of a ship or steamboat, where the federal statute requires registry and a bill of sale in order to entitle the owner to immunities and privileges denied other vessels, is especially subject to the rule stated in the text. Epping *v.* Mockler, 55 Ga. 376.

Quality and kind of goods and the fact of their delivery pursuant to a written order for shipment may be proved by parol independently of the written order. Lee *v.* Hills, 66 Ind. 474.

Writing executed subsequent to date.— Where a parol sale of chattels is perfected by delivery, and thereafter a bill of sale is executed and delivered, the sale may be proved by parol evidence without the production of the writing; for while the failure to introduce the bill of sale may perhaps go to the credibility or weight of the parol evidence, it does not affect the admissibility of that evidence. Sanders *v.* Stokes, 30 Ala. 432. See also Conrad *v.* Marcotte, 23 Minn. 55. But *compare* Stone *v.* Waggoner, 8 Ark. 204; Foster *v.* Cherry, 2 Nott & M. (S. C.) 367.

10. Thomson *v.* Rehkopf, 70 Ill. App. 169; Citizens' Bank *v.* Rhutasel, 67 Iowa 316, 25 N. W. 261. But where the matter to be proved is the mere identity of the property mortgaged parol evidence is admissible. Citizens' Bank *v.* Rhutasel, 67 Iowa 316, 25 N. W. 261. And see *infra*, XV, C, 3, b, (xi).

was made, notwithstanding that the terms of the sale have been reduced to writing, although where it is sought to ascertain the terms of the sale the document containing them constitutes the best evidence.[11] But this distinction has not always been observed and the best evidence rule has been applied, not only in proving the terms of the sale, but also in proving the fact that the sale was made.[12]

(c) *Writing Must Contain Terms of Sale.* In any case, in order to exclude parol evidence of the sale on the ground that there is written evidence thereof, it must appear that the writing contains at least the material terms of the transaction.[13]

(VI) *ARBITRATION AND AWARD.* The best evidence of the contents of a written award is the instrument itself, and parol evidence of the contents thereof is not admissible unless the award be produced or its absence satisfactorily explained.[14] The same rule applies to a written submission to arbitration.[15] But while the award is the best evidence of its contents, it is not the best evidence of matters which were acted upon by the arbitrators and were considered by them in making up the award; in proving these matters parol evidence is not only admissible but necessary.[16] On the other hand, although the law does not require that matters submitted to arbitration be reduced to writing, yet when these are put in writing by the parties, the writing is the best evidence thereof and parol evidence is secondary.[17]

(VII) *AGENCY.* Where it appears that the appointment of an agent or an attorney in fact was made in writing, the best evidence rule applies to exclude parol evidence of the agent's or attorney's appointment or powers or of other matters contained in the writing unless the absence of the writing is explained.[18]

Mere existence of a chattel mortgage, where the fact is collateral to the issue, may be proved by parol. Foxworth *v.* Brown, 120 Ala. 59, 24 So. 1; Sleep *v.* Heyman, 57 Wis. 495, 16 N. W. 17. And see, generally, *infra*, XV, C, 3, e.

11. *Georgia.*— Thompson *v.* Mapp, 6 Ga. 260.

Michigan.— Sirrine *v.* Briggs, 31 Mich. 443; Hatch *v.* Fowler, 28 Mich. 205.

North Carolina.— See Hollingsworth *v.* Smith, 49 N. C. 270.

Tennessee.—Grady *v.* Sharron, 6 Yerg. 320.

Wisconsin.— Osen *v.* Sherman, 27 Wis. 501.

See 20 Cent. Dig. tit. "Evidence," § 515.

12. Stone *v.* Waggoner, 8 Ark. 204; Nancy *v.* Snell, 6 Dana (Ky.) 148; Clark *v.* Slidell, 5 Rob. (La.) 330; Lucile *v.* Toustin, 5 Mart. (La.) 611.

13. Mullen *v.* Kavanagh, 101 Mass. 351; Olmstead *v.* Mansir, 10 Allen (Mass.) 424; Blood *v.* Harrington, 8 Pick. (Mass.) 552; Brown *v.* Fitz, 13 N. H. 283; Chase *v.* Evarts, 19 N. Y. Suppl. 987; Waring *v.* Mason, 18 Wend. (N. Y.) 425; Hodges *v.* Tarrant, 31 S. C. 608, 9 S. E. 1038.

14. Burke *v.* Voyles, 5 Blackf. (Ind.) 190; Caledonia Ins. Co. *v.* Traub, 83 Md. 524, 35 Atl. 13. Where a witness states that, according to his best recollection, written evidence of an award exists, it is sufficient, in the absence of opposing proof, to exclude parol testimony of the award. Scarborough *v.* Reynolds, 12 Ala. 252.

Where settlement is based upon written arbitration evidence cannot be given of the terms of the settlement, without producing the award. Smith *v.* McGehee, 14 Ala. 404.

15. Bullock *v.* Koon, 9 Cow. (N. Y.) 30, submission by bonds entered into by the parties.

16. Brown *v.* Brown, 49 N. C. 123; Scott *v.* Baker, 37 Pa. St. 330.

17. Williams *v.* Dewitt, 12 Ind. 309, holding that parol evidence of the items of a written account claimed to be settled by arbitration was not admissible unless the absence of the writing was satisfactorily explained.

18. *Alabama.*— Newby *v.* New England Mortg. Security Co., 110 Ala. 663, 17 So. 940 (state agent of foreign corporation); Planters', etc., Bank *v.* Willis, 5 Ala. 770; May *v.* May, 1 Port. 229. But see Elliott *v.* Stocks, 67 Ala. 336.

Georgia.— Neal *v.* Patten, 40 Ga. 363.

Illinois.— Rawson *v.* Curtiss, 19 Ill. 456.

Indiana.— Hotchkiss *v.* Dailey, 2 Ind. 117.

Iowa.— Lee *v.* Agricultural Ins. Co., 79 Iowa 379, 44 N. W. 683, insurance agent.

Maryland.— Rusk *v.* Sowerwine, 3 Harr. & J. 97.

Massachusetts.— Kennebeck Purchase *v.* Call, 1 Mass. 483.

New Hampshire.— Putnam *v.* Goodall, 31 N. H. 419. *Compare* Kent *v.* Tyson, 20 N. H. 121; Concord *v.* Concord Bank, 16 N. H. 26.

New Jersey.— Emery *v.* King, 64 N. J. L. 529, 45 Atl. 915.

New York.— Langbein *v.* Tongue, 25 Misc. 757, 54 N. Y. Suppl. 145. *Compare* Weed Sewing Mach. Co. *v.* Kaulback, 3 Thomps. & C. 304.

Oregon.— Wicktorwitz *v.* Farmers' Ins. Co., 31 Oreg. 569, 51 Pac. 75, agent of insurance company.

This is obviously true where the law expressly requires that the agent's authority must be evidenced by a writing, as in cases of authority to sell real estate.[19] But where the authority of the attorney or agent is not required by law to be in writing, and where it does not appear that written evidence thereof exists, the best evidence rule of course does not apply and parol evidence is admissible.[20] And although the agent was appointed by a written power of attorney or other writing, the fact of agency may be proved by parol where it is collateral to the issue,[21] or where, as to the particular matter in controversy, the agency was constituted independently of the power of attorney,[22] as where the agent had both written and oral authority, and it does not appear that he acted under the written authority.[23] Likewise, in a jurisdiction where the admissions of a party as to matters contained in a writing dispense with the production of the writing,[24] it has been held that the principal's admissions of the agency may be proved by parol without the necessity of producing the written authority of the agent.[25] And in an action between the principal and a third person who is a stranger to the instrument, the third person may establish by parol the fact of the agency.[26]

(VIII) *PARTNERSHIP.* If a partnership agreement exists in the form of written articles of copartnership, and it is sought to prove the terms of the agreement or other matters contained in the instrument, then ordinarily the instrument is best or primary evidence and the best evidence rule applies.[27] But in

Pennsylvania.— Beale *v.* Com., 11 Serg. & R. 299; Vanhorn *v.* Frick, 3 Serg. & R. 278; McKinney *v.* Leacock, 1 Serg. & R. 27.

South Carolina.— Charles *v.* Jacobs, 6 S. C. 69; Richardson *v.* Provost, 4 Strobh. 57.

Texas.— Tinsley *v.* Penniman, 83 Tex. 54, 18 S. W. 718; Continental Fire Assoc. *v.* Bearden, 29 Tex. Civ. App. 569, 69 S. W. 982; Cason *v.* Laney, (Civ. App. 1894) 27 S. W. 420.

Virginia.— Rucker *v.* Lowther, 6 Leigh 259.

United States.— U. S. *v.* Boyd, 5 How. 29, 12 L. ed. 36, government agent.

See 20 Cent. Dig. tit. "Evidence," §§ 516, 550.

A written memorandum of instructions to an agent is within the rule stated in the text. Minnesota Linseed Oil Co. *v.* Montague, 59 Iowa 448, 13 N. W. 438.

An order entered on the books of a corporation is within the rule of the text where it is sought to prove by such order that a person is an agent of the corporation. Montgomery R. Co. *v.* Hurst, 9 Ala. 513. But see Concord *v.* Concord Bank, 16 N. H. 26.

Insurance agent.— In an action on an insurance policy, a question to the secretary of defendant company as to the authority of the agent who procured the policy was held properly excluded, since such authority could only be proved by producing the power of attorney issued to him by the company, or by a resolution of defendant's directors prescribing the powers and duties of agents. Benninghoff *v.* Agricultural Ins. Co., 93 N. Y. 495.

Powers of partners.— It has been held that parol evidence is inadmissible to prove that one partner had authority under seal to bind his copartner, unless the written authority is shown to have been lost or destroyed or otherwise beyond the power and control of the party desiring to prove it. Turbeville *v.* Ryan, 1 Humphr. (Tenn.) 113, 34 Am. Dec. 622. *Compare* Weed Sewing Mach. Co. *v.* Kaulback, 3 Thomps. & C. (N. Y.) 304. See, generally, PARTNERSHIP.

19. Somers *v.* Wescoat, 66 N. J. L. 551, 49 Atl. 462. See also Rucker *v.* Lowther, 6 Leigh (Va.) 259. But see Elliott *v.* Stocks, 67 Ala. 336.

20. Kansas L. & T. Co. *v.* Love, 45 Kan. 127, 25 Pac. 191; Bank of North America *v.* Embury, 33 Barb. (N. Y.) 323, 21 How. Pr. (N. Y.) 14; Curtis *v.* Ingham, 2 Vt. 287. See also Powesheik County *v.* Ross, 9 Iowa 511; Bryer *v.* Weston, 16 Me. 261; Kent *v.* Tyson, 20 N. H. 121.

Acceptance or ratification of agent's acts.— Upon an objection to the statement of a witness that he was authorized by an express company to do certain acts, it was held that if the company had accepted his acts it made no difference whether he had or had not original authority, or whether it was verbal or written, and, as the court could not know judicially that his acts were not adopted by the company, the evidence was not inadmissible. Edwards *v.* Chandler, 14 Mich. 471, 90 Am. Dec. 249.

21. Columbia Delaware Bridge Co. *v.* Geisse, 38 N. J. L. 39; Faulcon *v.* Johnston, 102 N. C. 264, 9 S. E. 394, 11 Am. St. Rep. 737. See also Newby *v.* New England Mortg. Security Co., 110 Ala. 663, 17 So. 940.

22. Gross *v.* Feehan, 110 Iowa 163, 81 N. W. 235; Caldwell *v.* Wentworth, 16 N. H. 318. See also Kent *v.* Tyson, 20 N. H. 121; Curtis *v.* Ingham, 2 Vt. 287.

23. Bank of North America *v.* Embury, 33 Barb. (N. Y.) 323, 21 How. Pr. (N. Y.) 14.

24. See *infra*, XV, C, 3, f.

25. Curtis *v.* Ingham, 2 Vt. 287.

26. Kaskaskia Bridge Co. *v.* Shannon, 6 Ill. 15 [*citing* 2 Phil. Ev. 540, 556, 557].

27. Smith *v.* Walker, 57 Mich. 456, 22 N. W. 267, 24 N. W. 830, 26 N. W. 783; Field *v.* Tenney, 47 N. H. 513; Hastings *v.* Hopkinson, 28 Vt. 108. And see, generally,

actions between partners and third persons, where it is sought to prove not the terms of the agreement but merely the existence of partnership,[28] or where the terms of the partnership are not in issue but are only collaterally involved,[29] the best evidence rule does not apply, and in the former case the existence of the partnership, and in the latter its terms and provisions, may be proved by parol evidence without the necessity of producing the written articles or explaining their absence. On the other hand it seems that as between the partners themselves the articles of copartnership constitute the best evidence even of the fact of partnership.[30]

(IX) *BIRTH, MARRIAGE, AND DEATH.*[31] Where the fact or date of a birth or death is in issue, the best evidence rule applies to require that the usual documentary or record evidence of these facts be produced or its absence explained before parol evidence is admissible.[32] The same rule has been said to apply to proof of marriage, the registry being considered the best evidence.[33] But the weight of authority appears to be that the mere fact that the law requires a record of marriages to be kept does not make the record higher evidence than the direct testimony of witnesses, and that such evidence is admissible without producing the record or accounting for its absence; the object of the record being to facilitate and preserve the evidence and not to limit or narrow the mode of proof.[34] Thus it has been held that in civil actions the production of record evidence of the marriage is unnecessary, parol evidence being admissible.[35] But where it does not appear that there is a legally authorized public register or record of births, marriages, or deaths in existence, and the existence of such a record will not be presumed but must be positively proved,[36] these facts and their dates may

PARTNERSHIP. This rule applies where the question involves the construction of the contract of partnership. Trump *v.* Baltzell, 3 Md. 295; Price *v.* Hunt, 59 Mo. 258.

28. *Alabama.*— Griffin *v.* Stoddard, 12 Ala. 783.

Illinois.— Kaskaskia Bridge Co. *v.* Shannon, 6 Ill. 15.

Louisiana.—Ingraham *v.* White, 2 La. 294; Doane *v.* Farrow, 10 Mart. 74.

Maine.— Bryer *v.* Weston, 16 Me. 261.

Massachusetts.— See Trowbridge *v.* Cushman, 24 Pick. 310.

Missouri.— See Price *v.* Hunt, 59 Mo. 258.

New Hampshire.—Field *v.* Tenney, 47 N. H. 513.

Pennsylvania.— Edwards *v.* Tracy, 62 Pa. St. 374; Widdifield *v.* Widdifield, 2 Binn. 245; Tussey *v.* Behmer, 9 Lanc. Bar 45.

Vermont.— Cutler *v.* Thomas, 25 Vt. 73.

England.— Alderson *v.* Clay, 1 Stark. 405, 2 E. C. L. 157.

See 20 Cent. Dig. tit. "Evidence," §§ 516, 550.

Contra.— Bonnaffe *v.* Fenner, 6 Sm. & M. (Miss.) 212, 45 Am. Dec. 278 (holding that where partners when sued seek to establish the existence of the partnership, the best evidence rule applies); and Wilson *v.* Colman, 29 Fed. Cas. No. 17,798, 1 Cranch C. C. 408 (holding that parol evidence of printed cards bearing the names of defendants is not admissible to prove the fact of partnership).

29. Brem *v.* Allison, 68 N. C. 412.

30. See Doane *v.* Farrow, 10 Mart. (La.) 74; Bonnaffe *v.* Fenner, 6 Sm. & M. (Miss.) 212, 45 Am. Dec. 278; Cutler *v.* Thomas, 25 Vt. 73.

31. See EVIDENCE, 16 Cyc. 1122 *et seq.*

32. Martinez *v.* Ives, 32 La. Ann. 305 (evidence of death contained in letters); *In re* Carver, 103 Fed. 624 (holding that the proper return of a birth, by the attending physician, is the best evidence of the date of the birth); Hartigan *v.* International L. Assur. Soc., 8 L. C. Jur. 203 (holding that the baptismal register was the best evidence with respect to birth). See DEATH, 13 Cyc. 290 *et seq.*; and, generally, INFANTS.

33. Hubee's Succession, 20 La. Ann. 97.

34. State *v.* Marvin, 35 N. H. 22, 27 [*citing* Cowen & H. Notes to Phillips Ev. 207, 208; 2 Greenleaf Ev. § 461; 1 Phillips Ev. § 410]. See also Com. *v.* Walker, 163 Mass. 226, 39 N. E. 1014; Chew *v.* State, 23 Tex. App. 230, 5 S. W. 373.

35. Lowry *v.* Coster, 91 Ill. 182, 184 [*citing* 2 Greenleaf Ev. §§ 461, 462]. To the same effect see Albertson *v.* Smyth, 3 N. J. L. 473; Logan *v.* Gray, Tapp. (Ohio) 69. See, generally, MARRIAGE.

But upon libel for divorce a vinculo, for adultery, where a second marriage of the respondent was to be proved, the court would not receive the usual certificate of the officiating minister as evidence, but required his testimony upon oath. Ellis *v.* Ellis, 11 Mass. 92.

36. Guerin *v.* Bagneries, 18 La. 590; Duplessis *v.* Kennedy, 6 La. 231; Broussard *v.* Mallet, 8 Mart. N. S. (La.) 269; Dufour *v.* Delacroix, 11 Mart. (La.) 718.

Register of baptism.— Although the register of baptism is higher evidence of the age of a person than the testimony of witnesses, yet the existence of the former will not be presumed; it must be positively proved that

be proved by parol evidence, provided it does not appear that there is higher evidence obtainable.[37] Hence under such circumstances heirship may be proved by parol evidence, such as reputation and other corroborating facts.[38] Likewise on an issue of infancy, parol evidence is admissible to prove the date of birth and the consequent fact of infancy, unless it be shown that there is accessible record or other competent documentary evidence thereof.[39] Although an entry in a family bible or other family memorandum or record as to the date of a person's birth or death may often be competent evidence,[40] yet such an entry does not belong to the grade of record evidence, and not only is it no better than the testimony of living witnesses cognizant of such date,[41] but where the parent or other relative who made the entry is alive and can testify, it is inferior or secondary to such person's testimony and therefore is not admissible as independent evidence.[42]

(x) *Foreign Law*—(a) *Written or Statute Law.* The general rule in the United States is that the best evidence rule applies to the written or statute laws[43] of a foreign state or country, and hence that such laws cannot be proved by parol evidence, unless express provision therefor is made by statute.[44] But it seems that

such register does exist. Broussard *v.* Mallet, 8 Mart. N. S. (La.) 269.

37. Hubee's Succession, 20 La. Ann. 97; Holmes *v.* Holmes, 6 La. 463, 26 Am. Dec. 482; Duplessis *v.* Kennedy, 6 La. 231; Broussard *v.* Mallet, 8 Mart. N. S. (La.) 269; Dufour *v.* Delacroix, 11 Mart. (La.) 718; Clements *v.* Hunt, 46 N. C. 400; Dobson *v.* Cothran, 34 S. C. 518, 13 S. E. 679. And see the cases in the following notes.

38. Guerin *v.* Bagneries, 18 La. 590; Lewis *v.* His Executors, 5 La. 387. This rule applies where the person whose heirship is sought to be established was born in a foreign state. Lewis *v.* His Executors, *supra.*

39. Beeler *v.* Young, 3 Bibb (Ky.) 520; Tandy *v.* Masterson, 1 Bibb (Ky.) 330; Duplessis *v.* Kennedy, 6 La. 231; Broussard *v.* Mallet, 8 Mart. N. S. (La.) 269; Dobson *v.* Cothran, 34 S. C. 518, 13 S. E. 679; Hawkins *v.* Taylor, 1 McCord (S. C.) 164.

40. See Evidence, 16 Cyc. 1234, 1235.

41. *Iowa.*— Greenleaf *v.* Dubuque, etc., R. Co., 30 Iowa 301.

Kansas.— State *v.* Woods, 49 Kan. 237, 30 Pac. 520.

Kentucky.— Beeler *v.* Young, 3 Bibb 520.

New York.— Kobbe *v.* Price, 14 Hun 55.

South Carolina.— Dobson *v.* Cothran, 34 S. C. 518, 13 S. E. 679; Hawkins *v.* Taylor, 1 McCord 164.

Wisconsin.— Loose *v.* State, 120 Wis. 115, 97 N. W. 526.

Declarations of deceased members of family may be proved to show the time of the birth of a child belonging to that family, although there may be a family register of births in existence; for the one kind of evidence is of no higher dignity than the other. Clements *v.* Hunt, 46 N. C. 400.

A copy of an entry in a family bible purporting to show the date of a person's death is not admissible without accounting for the absence of the original. Greenleaf *v.* Dubuque, etc., R. Co., 30 Iowa 301.

42. *California.*— People *v.* Mayne, 118 Cal. 516, 50 Pac. 654, 62 Am. St. Rep. 256.

Iowa.—See State *v.* Scroggs, 123 Iowa 649, 96 N. W. 723; Greenleaf *v.* Dubuque, etc., R. Co., 30 Iowa 301.

Kansas.— State *v.* Woods, 49 Kan. 237, 30 Pac. 520.

Kentucky.— See Tandy *v.* Masterson, 1 Bibb 330.

Louisiana.— State *v.* Menard, 110 La. 1098, 35 So. 360.

New York.— Kobbe *v.* Price, 14 Hun 55; Leggett *v.* Boyd, 3 Wend. 376.

South Carolina.— Dobson *v.* Cothran, 34 S. C. 518, 13 S. E. 679; Robinson *v.* Blakeley, 4 Rich. 586, 55 Am. Dec. 703.

Wisconsin.— Loose *v.* State, 120 Wis. 115, 97 N. W. 526.

A private memorandum of the date of birth of a child is not legitimate evidence, and a witness who has made such a memorandum need not produce it when testifying to such date. Tandy *v.* Masterson, 1 Bibb (Ky.) 330. In a prosecution for statutory rape, where the father of the girl testifies from his own independent recollection as to her age, a record or memorandum made by him as to the births of his children is not admissible. State *v.* Menard, 110 La. 1098, 35 So. 360. See also State *v.* Scriggs, 123 Iowa 649, 96 N. W. 723. And see, generally, Rape.

43. Unwritten or common law of another state or country may be proved by witnesses having knowledge thereof (See Common Law, 8 Cyc. 387; Evidence, 16 Cyc. 886) and in like manner foreign usages or unwritten regulations may be proved (Evidence, 16 Cyc. 886; Wakeman *v.* Marquand, 5 Mart. N. S. (La.) 265; Stewart *v.* Swanzy, 23 Miss. 502; Dougherty *v.* Snyder, 15 Serg. & R. (Pa.) 84, 22 Am. Dec. 520. See also Drake *v.* Hudson, 7 Harr. & J. (Md.) 399).

44. *Arkansas.*—McNeill *v.* Arnold, 17 Ark. 154.

Georgia.— Leonard *v.* Peeples, 30 Ga. 61.

Illinois.— McDeed *v.* McDeed, 67 Ill. 545; Hoes *v.* Van Alstyne, 20 Ill. 201.

Indiana.— Line *v.* Mack, 14 Ind. 330; Comparet *v.* Jernegan, 5 Blackf. 375.

Louisiana.— Phillips *v.* Murphy, 2 La. Ann. 654.

the English courts permit such laws to be proved by competent parol evidence in the same manner as unwritten foreign laws are proved.[45] Where the written or statute laws of a foreign state or country have been properly proved, parol evidence otherwise competent is admissible to expound them,[46] but such evidence must be given by an expert or at least by a person shown to be familiar with the law to be proved.[47] Where, however, the statutes of a foreign state have been judicially construed, the decisions of the highest tribunal of that state are admissible as the best evidence,[48] although it seems that parol evidence is also admissible, for the reason that the judicial decisions construing the statutes constitute a part of the unwritten law.[49]

(B) *Proof of Nature of Foreign Law*—(1) GENERAL RULE. The court will not assume that a law of another state or country is statutory, and it is not necessary to prove that the law is not statutory before introducing parol evidence of it, especially if the foreign state is one where the common law prevails; but the necessity of establishing that the law is statutory rests with the party objecting to the evidence.[50]

(2) WHETHER RATE OF INTEREST IS STATUTORY. Since, however, the right to recover interest on claims for money was not recognized at common law, but is solely the creature of statute, the better rule in the United States is that the rate of interest of another state cannot be proved by parol evidence unless the allowance of such interest be expressly proved as a usage having the force of law.[51] But there is authority to the contrary.[52]

Michigan.—Kermott *v.* Ayer, 11 Mich. 181; People *v.* Lambert, 5 Mich. 349, 72 Am. Dec. 49.

Missouri.— Charlotte *v.* Chouteau, 25 Mo. 465.

Texas.— Martin *v.* Payne, 11 Tex. 292.

Vermont.— Smith *v.* Potter, 27 Vt. 304, 65 Am. Dec. 198. *Compare* Danforth *v.* Reynolds, 1 Vt. 259.

United States.— Church *v.* Hubbart, 2 Cranch 187, 2 L. ed. 249; U. S. *v.* Ortega, 27 Fed. Cas. No. 15,971, 4 Wash. 531. See also Leton *v.* Delaware Ins. Co., 21 Fed. Cas. No. 12,675, 2 Wash. 175.

See 20 Cent. Dig. tit. "Evidence," § 530. And see, generally, STATUTES.

A decree of the Spanish government passed while Texas was subject to that government was held not to be provable by parol evidence. Holliday *v.* Harvey, 39 Tex. 670.

Qualification of rule.—The strict rule stated in the text is applicable only to laws or public edicts of which a regular record is presumed to have been kept; and if the law or regulation is not of this character, it may be proved by parol, even though it is in writing. Drake *v.* Hudson, 7 Harr. & J. (Md.) 399; Livingston *v.* Maryland Ins. Co., 6 Cranch (U. S.) 274, 3 L. ed. 222.

45. De Bode's Case, 8 Q. B. 208, 55 E. C. L. 208; Vander Donckt *v.* Thellusson, 8 C. B. 812, 19 L. J. C. P. 12, 65 E. C. L. 812; *In re* Sussex Peerage, 11 Cl. & F. 85, 8 Jur. 793, 8 Eng. Reprint 1034. See also People *v.* Lambert, 5 Mich. 349, 72 Am. Dec. 49.

46. Dyer *v.* Smith, 12 Conn. 384; People *v.* Lambert, 5 Mich. 349, 72 Am. Dec. 49. See also *In re* Sussex Peerage Case, 11 Cl. & F. 85, 8 Jur. 793, 8 Eng. Reprint 1034.

47. People *v.* Lambert, 5 Mich. 349, 72 Am. Dec. 49; Reg. *v.* Povey, 6 Cox C. C. 83. Dears. C. C. 32, 17 Jur. 120, 22 L. J. M. C. 19, 1 Wkly. Rep. 40, 14 Eng. L. & Eq. 549.

As to qualification of the witness to render him competent see *supra*, XI, B, 2, h.

48. Horton *v.* Reed, 13 R. I. 366. See also St. Louis, etc., R. Co. *v.* Stewart, 68 Ark. 606, 61 S. W. 169, 82 Am. St. Rep. 311.

49. Dyer *v.* Smith, 12 Conn. 384. See also EVIDENCE, 16 Cyc. 886. *Contra*, St. Louis, etc., R. Co. *v.* Stewart, 68 Ark. 606, 61 S. W. 169, 82 Am. St. Rep. 311, holding that the reported decisions are the best evidence and that parol evidence is not admissible.

50. Dougherty *v.* Snyder, 15 Serg. & R. (Pa.) 84, 16 Am. Dec. 520; Livingston *v.* Maryland Ins. Co., 6 Cranch (U. S.) 274, 3 L. ed. 222; and cases cited in EVIDENCE, 16 Cyc. 886 note 72.

51. Talbot *v.* Peeples, 6 J. J. Marsh. (Ky.) 200; Tryon *v.* Rankin, 9 Tex. 595.

52. In Louisiana while the best evidence rule obtains if it affirmatively appears that the law of the foreign state as to interest is a statute (Glasgow *v.* Stevenson, 6 Mart. N. S. 567; Minor *v.* Harding, 4 La. 378; Mason *v.* Mason, 12 La. 589), it is held that a judge cannot presume that a law granting interest must be a statute, and therefore that, where it is not proved that a statute exists on the subject, parol evidence is admissible to show that the laws of another state give interest on notes on which no interest is expressed (Boggs *v.* Reed, 5 Mart. 673, 12 Am. Dec. 482), and parol evidence has also been held admissible to prove that by "the common law and usage and customs of merchants" in a foreign state, interest is demandable on an open account from the time it becomes due (Wakeman *v.* Marquand, 5 Mart. N. S. 265).

(xi) *Identity.* Where the question to be solved by the evidence is merely the identity of a person, document, or thing, the best evidence rule does not apply, and parol evidence is admissible.[53]

(xii) *Payment and Delivery*—(a) *Receipt Not Best Evidence*—(1) General Rule. The best evidence rule does not apply to proof of payments of money[54] or delivery of merchandise[55] for which receipts are given, but the fact of payment or delivery may be proved by parol without producing the receipt or accounting for its absence; provided that the witness can testify to the fact positively and from his own independent knowledge not founded on his having seen the receipt itself.[56] And receipts have sometimes been held inadmissible as being inferior to the testimony of living witnesses.[57]

53. *Connecticut.*— Lewis *v.* Healy, 73 Conn. 744, 48 Atl. 212, words used to identify a check.

Indiana.— Baltes Land, etc., Co. *v.* Sutton, 32 Ind. App. 14, 69 N. E. 179, identity of mutilated written instrument.

Iowa.— Citizens' Bank *v.* Rhutasel, 67 Iowa 316, 25 N. W. 261, identity of property covered by chattel mortgage.

Louisiana.—Lafon *v.* Gravier, 1 Mart. N. S. 243, person.

Massachusetts.—Hadley *v.* Citizens' Sav. Inst., 123 Mass. 301 (piece of land); Com. *v.* Morrell, 99 Mass. 542 (tag on a valise); Goddard *v.* Sawyer, 91 Mass. 78 (promissory note).

Minnesota.— Ames *v.* First Div. St. Paul, etc., R. Co., 12 Minn. 412, lumber referred to in receipt or bill of sale.

New Jersey.— West *v.* State, 22 N. J. L. 212, deed.

Ohio.— Logan *v.* Gray, Tapp. 69, persons alleged to have been married.

Contra.— Pool *v.* Myers, 13 Sm. & M. (Miss.) 466, identity of parcels of land sold.

54. *Alabama.*— Steed *v.* Knowles, 97 Ala. 573, 12 So. 75; Wiggins *v.* Pryor, 3 Port. 430. See also Planters', etc., Bank *v.* Willis, 5 Ala. 770; Planters', etc., Bank *v.* Borland, 5 Ala. 531.

Arkansas.— Conway *v.* State Bank, 13 Ark. 48; Humphries *v.* McCraw, 5 Ark. 61.

California.— See Moore's Estate, 72 Cal. 335, 13 Pac. 880.

Connecticut.— Willimantic School Soc. *v.* Windham First School Soc., 14 Conn. 457.

Delaware.— Donely *v.* McGrann, 1 Harr. 453.

Illinois.— See West Chicago St. R. Co. *v.* Piper, 165 Ill. 325, 46 N. E. 186 [*affirming* 64 Ill. App. 605].

Kansas.— Stainbrook *v.* Drawer, 25 Kan. 383; Wolf *v.* Foster, 13 Kan. 116.

Maine.— Sibley *v.* Lumbert, 30 Me. 253.

Massachusetts.— Williams *v.* Gridley, 9 Metc. 482.

New Hampshire.— Kinsbury *v.* Moses, 45 N. H. 222.

New Jersey.—Chambers *v.* Hunt, 22 N. J. L. 552; Berry *v.* Berry, 17 N. J. L. 440.

New York.— Southwick *v.* Hayden, 7 Cow. 334.

Pennsylvania.— Heckert *v.* Haine, 6 Binn. 16; Darrach *v.* Hanover Junction, etc., R. Co., 9 Lanc. Bar 141.

Texas.— McAlpin *v.* Ziller, 17 Tex. 508.

Vermont.— See Warden *v.* Johnson, 11 Vt. 455.

Virginia.— See Hamlin *v.* Atkinson, 6 Rand. 574.

Wisconsin.— See Hawes *v.* Woolcock, 30 Wis. 213.

United States.— Meade *v.* Keane, 16 Fed. Cas. No. 9,373, 3 Cranch C. C. 51 [*affirmed* in 3 Pet. 1, 7 L. ed. 581].

England.— Jacob *v.* Lindsay, 1 East 460; Rambert *v.* Cohen, 4 Esp. 213, 6 Rev. Rep. 851, per Lord Ellenborough.

See 20 Cent. Dig. tit. "Evidence," § 473.

Compare Clements *v.* Biossat, 26 La. Ann. 243, holding that a public officer was not entitled to credit for payment by him which was evidenced by a voucher without production of the latter.

"How can that be called the best evidence, which is itself liable to be destroyed and done away by parol evidence?" said the court in Southwick *v.* Hayden, 7 Cow. (N. Y.) 334, 336, in deciding that a receipt need not be produced. See also Berry *v.* Berry, 17 N. J. L. 440.

Redemption from sheriff's sale.— A party alleging that premises have been redeemed from a sheriff's sale by another person is not bound to produce the sheriff's certificate or the receipt indorsed thereon, in order to prove the payment of the money upon the redemption. Stafford *v.* Williams, 12 Barb. (N. Y.) 240.

Payment on an execution has been held to be within the rule stated in the text. The evidence of payment does not depend for its admissibility on the fact that payment is indorsed on the execution. Loughry *v.* Mail, 34 Ill. App. 523.

Book entries of payment do not preclude parol evidence of the payment. Conway *v.* State Bank, 13 Ark. 48; Boyle *v.* Reid, 31 Kan. 113, 1 Pac. 264; Clough *v.* State, 7 Nebr. 320.

55. Humphries *v.* McCraw, 5 Ark. 61; Dana *v.* Boyd, 2 J. J. Marsh. (Ky.) 587; Southwick *v.* Hayden, 7 Cow. (N. Y.) 334.

56. Wiggin *v.* Pryor, 3 Port. (Ala.) 430; Townsend *v.* Atwater, 5 Day (Conn.) 298; Jackson *v.* Lewis, 29 S. C. 193, 7 S. E. 252, 32 S. C. 593, 10 S. E. 1074; Hamlin *v.* Atkinson, 6 Rand. (Va.) 574.

57. Receipts given for the payment of money between one of the parties to the ac-

(2) QUALIFICATION OF RULE. A distinction is to be observed, however, between proof of the payment or the delivery of the property, and proof of the contents of the receipt. Thus while parol evidence of the payment or delivery is admissible without the production of the receipt, yet where it is sought to prove that a person executed and delivered a receipt for a certain amount, or to show by whom or the manner in which the receipt was signed, or to prove facts which it recites, parol evidence is not admissible without accounting for the absence of the receipt, for this would be proving the contents of the receipt by parol, and of its contents the instrument itself is the best evidence.[58]

(B) *Payment of Commercial Paper.* The payment of obligations that are evidenced by commercial paper may be proved by parol evidence, without producing the written instruments or accounting for their absence.[59]

(C) *Payment by or in Commercial Paper.* Where payment has been made by giving commercial paper, the paper need not be produced or its absence accounted for, but the fact of payment may be proved by parol.[60]

c. To Public Writings — (I) *IN GENERAL.* The best evidence rule applies as well to writings of a public character as to private documents; and, where such writings are accessible, parol evidence of their contents is excluded. Among writings of this character may be mentioned the official registry of the arrival and departure of mails,[61] the books of the collector of internal revenue,[62] or of a county tax assessor,[63] the judgment of an inspector of buildings condemning a wall,[64] a plat, report, and legislative confirmation of the reservation of a city block by state commissioners,[65] the rulings and orders of the interstate commerce commission,[66] a public weigher's certificate,[67] government and railway reports as

tion and a stranger, although the payments were for the use of the other party, have been held inadmissible where the third person was alive and could testify.

California.— Ford *v.* Smith, 5 Cal. 314.

Connecticut.— Newell *v.* Roberts, 13 Conn. 63.

Maryland.— Leatherbury *v.* Bennett, 4 Harr. & M. 392.

Pennsylvania.—English *v.* Hannah, 4 Watts 424; Townsend *v.* Kerns, 2 Watts 180; Cutbert *v.* Gilbert, 4 Serg. & R. 551.

United States.— Jordan *v.* Wilkins, 13 Fed. Cas. No. 7,527, 3 Wash. 110.

See 20 Cent. Dig. tit. "Evidence," §§ 469, 470.

58. *Alabama.*— Steed *v.* Knowles, 97 Ala. 573, 12 So. 73.

Arkansas.— Humphries *v.* McCraw, 5 Ark. 61.

Connecticut.— Townsend *v.* Atwater, 5 Day 298.

Iowa.— Sloan *v.* Ault, 8 Iowa 229.

Maryland.— Marshall *v.* Haney, 9 Gill 251.

Michigan.— Zube *v.* Weber, 67 Mich. 52, 34 N. W. 264; Van Ness *v.* Hadsell, 54 Mich. 560, 20 N. W. 585.

Minnesota.— Board of Education *v.* Moore, 17 Minn. 412 (receipt for bonds delivered); Cowley *v.* Davidson, 13 Minn. 92.

New Jersey.—Chambers *v.* Hunt, 22 N. J. L. 552; Large *v.* Van Doren, 14 N. J. Eq. 208.

North Carolina.— Ashe *v.* De Rossett, 53 N. C. 240; Ledbetter *v.* Morris, 46 N. C. 545.

South Carolina.— Jackson *v.* Lewis, 32 S. C. 593, 10 S. E. 1074, 29 S. C. 193, 7 S. E. 352.

United States.—Romayne *v.* Duane, 20 Fed. Cas. No. 12,028, 3 Wash. 246.

See 20 Cent. Dig. tit. "Evidence," §§ 473, 474, 554, 555.

59. *Alabama.*— Planters', etc., Bank *v.* Willis, 5 Ala. 770; Planters', etc., Bank *v.* Borland, 5 Ala. 531.

Arkansas.— Greenfield *v.* Wright, 16 Ark. 186.

Indiana.—Coonrod *v.* Madden, 126 Ind. 197, 25 N. E. 1102.

Maryland.— Cecil Bank *v.* Snively, 23 Md. 253.

Missouri.— Benton *v.* Craig, 2 Mo. 198.

North Carolina.—Page *v.* Einstein, 52 N. C. 147.

See 20 Cent. Dig. tit. "Evidence," § 473.

Expenditure of money paid on check.— Parol evidence is admissible to show for whom or for what the money paid on a check was expended, and this without producing the check or accounting for its absence. Johnson *v.* Valido Marble Co., 64 Vt. 337, 25 Atl. 441.

60. Daniel *v.* Johnson, 29 Ga. 207; Coonrod *v.* Madden, 126 Ind. 197, 25 N. E. 1102. *Compare* Chambers *v.* Hunt, 22 N. J. L. 552.

61. Miller *v.* Boykin, 70 Ala. 469.

62. Thurman *v.* State, (Tex. Cr. App. 1904) 78 S. W. 937.

63. Hicks *v.* Pogue, (Tex. Civ. App. 1903) 76 S. W. 786.

64. Nesbit *v.* Bendheim, 15 N. Y. Suppl. 300.

65. State Historical Assoc. *v.* Lincoln, 14 Nebr. 336, 15 N. W. 717.

66. Mouton *v.* Louisville, etc., R. Co., 128 Ala. 537, 29 So. 602.

67. Commerce Milling, etc., Co. *v.* Morris, 27 Tex. Civ. App. 553, 65 S. W. 1118.

to quantity of rock shipped,[68] and reports kept and issued by a university as to the average monthly rainfall.[69]

(II) *Newspapers.* The best evidence of a notice, advertisement, or other matter contained in a newspaper is the newspaper itself, and unless the paper is produced or its absence explained parol evidence of its contents is not admissible.[70]

(III) *Election, Appointment, or Official Character of Public Officers.* Where it is sought to prove that a person is a public officer it is generally not necessary to produce the written or record evidence of his appointment or election, unless it is essential to show that he is an officer *de jure*; but it is sufficient to prove by parol that he has acted in his official capacity; the reason for this rule being the strong presumption which arises from the undisturbed exercise of a public office that the appointment thereto is valid,[71] and the absence of any inference of fraud arising from the failure to produce primary evidence.[72] But the record is the best evidence, and parol evidence is excluded where it is necessary to prove that a person is an officer *de jure*, where his appointment

68. Sabine Land, etc., Co. *v.* Perry, (Tex. Civ. App. 1899) 54 S. W. 327.

69. St. Louis *v.* Arnot, 94 Mo. 275, 7 S. W. 15.

70. Barrett *v.* Butler, 54 Ga. 581; Schley *v.* Lyon, 6 Ga. 530; Bond *v.* Central Bank, 2 Ga. 92; Ormsby *v.* Louisville, 79 Ky. 197; Beattyville Coal Co. *v.* Hoskins, 44 S. W. 363, 19 Ky. L. Rep. 1759; Rutland, etc., R. Co. *v.* Thrall, 35 Vt. 536. But see Miller *v.* Webb, 8 La. 516.

As to publication of libel see, generally, Libel and Slander.

In an action by a printer for services in publishing advertisements and the like in a newspaper, it has been held unnecessary to produce the newspaper in order to show the performance of the printer's services. Enloe *v.* Hall, 1 Humphr. (Tenn.) 303, 310. In this case the court, per Green, J., said: "This case does not fall within the rule of evidence which the counsel seeks to apply. The work and labor for which this suit is brought was done upon the paper, and the work so done is no more required to be produced in open court than would any other work. As well might the tailor be required to produce the coat, or the watch-maker the watch, as evidence that the work had been performed." But in Richards *v.* Howard, 2 Nott & M. (S. C.) 474, also an action by a printer for services, it was held that the newspaper was the best evidence to show the performance of plaintiff's work.

71. As to the presumption see Evidence, 16 Cyc. 1076.

72. *Alabama.*— Moody *v.* Keener, 7 Port. 218.

Arkansas.— James *v.* State, 41 Ark. 451; Hardage *v.* Coffman, 24 Ark. 256, military officer.

Indiana.— Hall *v.* Bishop, 78 Ind. 370.

Iowa.— Londegan *v.* Hammer, 30 Iowa 508; Gourley *v.* Hankens, 2 Iowa 75.

Maine.— New Portland *v.* Kingfield, 55 Me. 172; Dillingham *v.* Smith, 30 Me. 370.

Massachusetts.— Webber *v.* Davis, 5 Allen 393; Com. *v.* McCue, 16 Gray 226.

Michigan.— Scott *v.* Detroit Young Men's Soc., 1 Dougl. 119.

Missouri.— State *v.* Findley, 101 Mo. 217, 14 S. W. 185.

New Jersey.— Peck *v.* Essex County, 20 N. J. L. 457 [*reversed* on other grounds in 21 N. J. L. 656]; Stout *v.* Hopping, 6 N. J. L. 125.

New York.— Woolsey *v.* Rondout, 4 Abb. Dec. 639, 2 Keyes 603; Dominick *v.* Hill, 6 N. Y. St. 329; Potter *v.* Luther, 3 Johns. 431.

North Carolina.— Tatom *v.* White, 95 N. C. 453; State *v.* Lyon, 89 N. C. 568.

Ohio.— Eldred *v.* Sexton, 5 Ohio 215; Johnson *v.* Stedman, 3 Ohio 94.

Pennsylvania.—Chapman Tp. *v.* Herrold, 58 Pa. St. 106. *Compare* Beale *v.* Com., 11 Serg. & R. 299.

South Carolina.— Mauldin *v.* Greenville, 64 S. C. 444, 42 S. E. 202.

Texas.— Biencourt *v.* Parker, 27 Tex. 558; De Lucenay *v.* State, (Cr. App. 1902) 68 S. W. 796. *Compare* Webb County *v.* Gonzales, 69 Tex. 455, 6 S. W. 781.

Vermont.— State *v.* Taylor, 70 Vt. 1, 39 Atl. 447, 67 Am. St. Rep. 648, 42 L. R. A. 673.

United States.— U. S. Bank *v.* Benning, 2 Fed. Cas. No. 908, 4 Cranch C. C. 81; Jacob *v.* U. S., 13 Fed. Cas. No. 7,157, 1 Brock. 520.

See 20 Cent. Dig. tit. "Evidence," § 499. And see, generally, Officers.

The official character of justices of the peace may be proved according to the rule stated in the text.

Illinois.— Rehkopf *v.* Miller, 59 Ill. App. 662.

Indiana.—Brown *v.* Connelly, 5 Blackf. 390.

Kentucky.— Noland *v.* Moore, 2 Litt. 365.

New Jersey.— Conover *v.* Solomon, 20 N. J. L. 295.

United States.— Dunlop *v.* Munroe, 8 Fed. Cas. No. 4,167, 1 Cranch C. C. 536 [*affirmed* in 7 Cranch 242, 3 L. ed. 329].

See 20 Cent. Dig. tit. "Evidence," § 499.

But where it is sought to prove a negative, i. e., that during a certain time a certain person was not a justice of the peace, a certified copy of the record of commissions from the executive office is the best evidence, both in its character as record evidence and in the degree of its demonstrative power. Fain *v.* Garthright, 5 Ga. 6.

or election is specifically alleged,[73] where it is sought to show the result of an election,[74] or where a statute expressly provides the manner in which evidence of the election or appointment shall be preserved of record.[75] And the best evidence rule applies to exclude parol evidence, where it is sought to prove the official character of a judicial officer of a foreign state or country.[76]

d. To Records and Judicial Documents — (I) *General Rule.* Where the fact to be proved is one which the law requires to appear of record, the general rule is that the record itself or a properly authenticated copy is the best evidence, and parol evidence cannot be received to prove the fact except where the record is lost or destroyed or is for other reasons inaccessible, and a properly authenticated copy cannot be obtained.[77]

(II) *Limitations of Rule.* In order to constitute a record the best evidence of any given fact, the record must be one which is authorized or required by law to be kept, and the fact must be one for the recording of which the law makes provision; otherwise, although the fact may exist in and be proved by a record, it is not necessarily thus to be proved, and other evidence of the fact is

73. Henderson County *v.* Dixon, 63 S. W. 756, 23 Ky. L. Rep. 1204; Griffin *v.* Rising, 2 Cush. (Mass.) 75.

74. Griffin *v.* Rising, 2 Cush. (Mass.) 75; O'Donnel *v.* Dusman, 39 N. J. L. 677; *In re* Prickett, 20 N. J. L. 134.

75. Benninghoof *v.* Finney, 22 Ind. 101; Curtis *v.* Fay, 37 Barb. (N. Y.) 64; Crowley *v.* Conner, 1 N. Y. City Ct. 162; Bovee *v.* McLean, 24 Wis. 225. See also De Soto *v.* Brown, 44 Mo. App. 148; Beale *v.* Com., 11 Serg. & R. (Pa.) 299.

76. Buford *v.* Johnson, 10 Rob. (La.) 456; Clark *v.* Parsons, Rice (S. C.) 16. See also Rosine *v.* Bonnabel, 5 Rob. (La.) 163.

77. *Alabama.*— Mouton *v.* Louisville, etc., R. Co., 128 Ala. 537, 29 So. 602.

Arkansas.— Mason *v.* Bull, 26 Ark. 164.

Florida.— Adams *v.* Board of Trustees, 37 Fla. 266, 20 So. 266.

Illinois.— Mandel *v.* Swan Land, etc., Co., 154 Ill. 177, 40 N. E. 462, 45 Am. St. Rep. 124, 27 L. R. A. 313; People *v.* Madison County, 125 Ill. 334, 17 N. E. 802; Hall *v.* Jackson County, 95 Ill. 352 [*affirming* 5 Ill. App. 609]; People *v.* Finley, 97 Ill. App. 214.

Indiana.— Hamilton *v.* Shoaff, 99 Ind. 63; Jenkins *v.* Parkhill, 25 Ind. 473.

Iowa.— Monk *v.* Carbin, 58 Iowa 503, 12 N. W. 571.

Kansas.— Downing *v.* Haxton, 21 Kan. 178; Manley *v.* Atchison, 9 Kan. 358; Walker *v.* Armstrong, 2 Kan. 198, filing of bond as required by statute.

Kentucky.— Mt. Sterling Nat. Bank *v.* Bowen, 43 S. W. 483, 19 Ky. L. Rep. 1416.

Massachusetts.— Stearns *v.* Woodbury, 10 Metc. 27; Pease *v.* Smith, 24 Pick. 122, per Morton, J.

Minnesota.— Hurley *v.* West St. Paul, 83 Minn. 401, 86 N. W. 427.

Missouri.— Reppy *v.* Jefferson County, 47 Mo. 66; Bogart *v.* Green, 8 Mo. 115.

Nebraska.— State *v.* Superior City School Dist., 55 Nebr. 317, 75 N. W. 855; Nebraska City *v.* Lampkin, 6 Nebr. 27.

New York.— Duffy *v.* Beirne, 30 N. Y. App. Div. 384, 51 N. Y. Suppl. 626; Jackson *v.* Daley, 5 Wend. 526.

North Dakota.— Sykes *v.* Beck, 12 N. D. 242, 96 N. W. 844; Fisher *v.* Betts, 12 N. D. 197, 96 N. W. 132.

Texas.— Clayton *v.* Rehm, 67 Tex. 52, 2 S. W. 45; State *v.* Cardinas, 47 Tex. 250; Stafford *v.* King, 30 Tex. 257, 94 Am. Dec. 304; Ayres *v.* Duprey, 27 Tex. 593, 86 Am. Dec. 657; Thompson Sav. Bank *v.* Gregory, (Civ. App. 1900) 59 S. W. 622.

Vermont.— Dow *v.* Hinesburgh, 2 Aik. 18.

West Virginia.— Phares *v.* State, 3 W. Va. 567, 100 Am. Dec. 777.

United States.— U. S. *v.* Scott, 25 Fed. 470.

See 20 Cent. Dig. tit. "Evidence," § 465.

Statements contained in an encyclopedia as to the date of settlement of a town are not admissible to disprove the statement of a witness that on a certain date he received a letter postmarked and mailed at such town, as there is better evidence to be had in the records of the post-office department. Howard *v.* Russell, 75 Tex. 171, 12 S. W. 525.

Where regulations of a mining district are recorded in the proper office, pursuant to the laws relating thereto, such record constitutes the best evidence, and parol evidence cannot be introduced to prove a local mining custom. Ralston *v.* Ploughman, 1 Ida. 595.

Although the witness has the record before him while he testifies, his testimony has been declared inadmissible (Mt. Sterling Nat. Bank *v.* Bowen, 43 S. W. 483, 19 Ky. L. Rep. 1416. See also Ferguson *v.* Brown, 75 Miss. 214, 21 So. 603), but not where the witness' testimony is simply that he signed the record (People *v.* Donovan, 43 Cal. 162, a verdict of a coroner's jury).

Testimony of the custodian of a record is not competent to establish the contents of the record.

Arkansas.— Jones *v.* Melindy, 62 Ark. 203, 36 S. W. 22.

Florida.— *Ex p.* Pitts, 35 Fla. 149, 17 So. 76; Bellamy *v.* Hawkins, 17 Fla. 750.

Georgia.— Georgia R., etc., Co. *v.* Hamilton, 59 Ga. 171.

Kansas.— Downing *v.* Haxton, 21 Kan. 178.

not secondary, but original.[78] The book or document must be one which the law declares to be a record or to be evidence of the fact it recites.[79] The record must also be one which would naturally show the fact sought to be proved.[80] Thus on questions of the identity of persons, records and registers are not the best evidence, for although the entries in them are received it is still necessary to identify the persons mentioned and this must be done by extrinsic evidence;[81] and the same is true where it is sought to show the identity of animals, certified copies of recorded brands and ear-marks being held not the only competent evidence, but parol evidence being equally admissible.[82] Where the fact to be established is one of general knowledge, or as it has been termed, "a public fact," it may be proved by the testimony of any person cognizant thereof notwithstanding that it appears of record.[83]

(III) *Want of Record*—(A) *In General.* Where the fact to be proved is not one as to the existence of which the law declares the record to be the sole and conclusive evidence, it is generally held that if the record does not contain evidence of the fact parol evidence otherwise competent is admissible,[84] especially when to exclude such evidence would prejudice the rights of innocent persons or enable a public officer to take advantage of his own default.[85] And *a fortiori*

Kentucky.— Com. *v.* Miles, 14 Ky. L. Rep. 107.

Texas.— Stafford *v.* King, 30 Tex. 257, 94 Am. Dec. 304; Matthews *v.* Thatcher, (Civ. App. 1903) 76 S. W. 61.

See 20 Cent. Dig. tit. "Evidence," § 465.

78. *California.*— Jolley *v.* Foltz, 34 Cal. 321.

Massachusetts.— Wayland *v.* Ware, 104 Mass. 46.

New Hampshire.— Roberts *v.* Dover, 72 N. H. 147, 55 Atl. 895; Pierce *v.* Richardson, 37 N. H. 306; Moore *v.* Chesley, 17 N. H. 151.

Utah.— Peay *v.* Salt Lake City, 11 Utah 331, 40 Pac. 206.

Vermont.— Manchester Bank *v.* Allen, 11 Vt. 302.

See 20 Cent. Dig. tit. "Evidence," § 464.

79. Fowler *v.* Donovan, 79 Ill. 310; Wilson *v.* McClure, 50 Ill. 366; Com. *v.* Walker, 163 Mass. 226, 39 N. E. 1014; Howser *v.* Com., 51 Pa. St. 332.

80. Thompson *v.* Healy, 4 Metc. (Ky.) 257; Brookline *v.* Westminster, 4 Vt. 224. See also O'Brien *v.* Woburn, 184 Mass. 598, 69 N. E. 350; Board of Education *v.* Moore, 17 Minn. 412.

81. Howser *v.* Com., 51 Pa. St. 332.

82. Gale *v.* Salas, (N. M. 1901) 66 Pac. 520; Chavez *v.* Territory, 6 N. M. 455, 30 Pac. 903. See also Animals, 2 Cyc. 324 *et seq.*

83. Brown *v.* Jefferson County, 16 Iowa 339; Young *v.* Kansas City, etc., R. Co., 39 Mo. App. 52. *Compare* Clark *v.* Robinson, 88 Ill. 498.

84. *Connecticut.*—Bethlehem *v.* Waterman, 51 Conn. 490.

Georgia.— Hilton *v.* Singletary, 107 Ga. 821, 33 S. E. 715.

Illinois.— School Directors *v.* Kimmel, 31 Ill. App. 537.

Iowa.— Powesheik County *v.* Ross, 9 Iowa 511; Dollarhide *v.* Muscatine County, 1 Greene 158.

Maryland.— Blaen Avon Coal Co. *v.* McCulloh, 59 Md. 403, 43 Am. Rep. 560.

Massachusetts.— Henry *v.* Estey, 13 Gray 336; Pease *v.* Smith, 24 Pick. 122.

Minnesota.—Antill *v.* Potter, 69 Minn. 192, 71 N. W. 935; State *v.* Ramsey County Dist. Ct., 29 Minn. 62.

Missouri.— State *v.* Shires, 39 Mo. App. 560.

Ohio.— Albright *v.* Payne, 43 Ohio St. 8, 1 N. E. 16; Ratcliff *v.* Teters, 27 Ohio St. 66.

Oregon.— Stout *v.* Yamhill County, 31 Oreg. 314, 51 Pac. 442.

Pennsylvania.— Roland *v.* Reading School Dist., 161 Pa. St. 102, 28 Atl. 995; Sidney School Furniture Co. *v.* Warsaw Tp. School Dist., 158 Pa. St. 35, 27 Atl. 856.

Texas.— Corder *v.* Steiner, (Civ. App. 1899) 54 S. W. 277.

Washington.— Robertson *v.* King County, 20 Wash. 259, 55 Pac. 52.

Wisconsin.— Nehrling *v.* Herold Co., 112 Wis. 558, 88 N. W. 614; Terbell *v.* Jones, 15 Wis. 253.

Wyoming.— Laramie County *v.* Stone, 7 Wyo. 280, 51 Pac. 605.

United States.— German Ins. Co. *v.* Independent School Dist., 80 Fed. 366, 25 C. C. A. 492.

See 20 Cent. Dig. tit. "Evidence," § 465.

Supplying omissions in the records of municipal corporations see, generally, Municipal Corporations.

85. *Georgia.*— Price *v.* Douglass County, 77 Ga. 163, 3 S. E. 240.

Illinois.— Bryant *v.* Dana, 8 Ill. 343; Vermilion County *v.* Knight, 2 Ill. 97.

Indiana.— Jay County *v.* Brewington, 74 Ind. 7; McCabe *v.* Fountain County, 46 Ind. 383.

Iowa.— Jordan *v.* Osceola County, 59 Iowa 388, 13 N. W. 344.

Kansas.— Gillett *v.* Lyon County Com'rs, 18 Kan. 410.

Kentucky.— Com. *v.* Hurt, 4 Bush 64.

Louisiana.— Donnelly *v.* St. John's Protestant Episcopal Church, 26 La. Ann. 738.

New Jersey.— Board of Justices *v.* Fennimore, 1 N. J. L. 242.

where the fact is not one which is required to appear of record and does not so appear, it may be established by parol.[86]

(B) *Proof of Absence From Record* — (1) IN GENERAL. Where it is sought to prove a negative, that is, that facts or documents do not appear of record, or that as to certain acts or proceedings the record is silent, parol evidence is admissible as primary proof; the record is not higher evidence.[87] But the certificate of the custodian of the record that facts or instruments do not appear of record is generally held incompetent and inadmissible,[88] although there is authority to the contrary.[89]

(2) BY WHOM PROOF MAY BE MADE. That documents or facts do not appear of record may be proved by the sworn testimony of the person who is legal custodian of the record,[90] or by that of any other competent person;[91] some

Ohio.— Dixon *v.* Liberty Sub-Dist. Tp. No. 5, 3 Ohio Cir. Ct. 517, 2 Ohio Cir. Dec. 298.

Oregon.— Stout *v.* Yamhill County, 31 Oreg. 314, 51 Pac. 442.

Vermont.— Lowry *v.* Walker, 5 Vt. 181.

See 20 Cent. Dig. tit. "Evidence," § 465. And see, generally, RECORDS.

86. *California.*— Carey *v.* Philadelphia, etc., Petroleum Co., 33 Cal. 694.

Indiana.— Jay County *v.* Gillum, 92 Ind. 511; Hamilton *v.* Newcastle, etc., R. Co., 9 Ind. 359; Richardson *v.* St. Joseph's Iron Co., 5 Blackf. 146, 33 Am. Dec. 460.

Kentucky.— Thompson *v.* Healy, 4 Metc. 257; Richardson *v.* Mehler, 63 S. W. 957, 23 Ky. L. Rep. 917.

Missouri.— Gilbert *v.* Boyd, 25 Mo. 27; Morey *v.* Clopton, 103 Mo. App. 368, 77 S. W. 467.

New Hampshire.— Winnepesaukee Camp-Meeting Assoc. *v.* Gordon, 67 N. H. 98, 29 Atl. 412.

New York.— Smith *v.* Helmer, 7 Barb. 416.

Washington.— Fouts *v.* New Whatcom, 14 Wash. 49, 44 Pac. 111.

See 20 Cent. Dig. tit. "Evidence," § 464.

87. *Connecticut.*— Smith *v.* Richards, 29 Conn. 232.

Georgia.— Vizard *v.* Moody, 117 Ga. 67, 43 S. E. 426; Hines *v.* Johnston, 95 Ga. 629, 23 S. E. 470; Cowan *v.* Corbett, 68 Ga. 66; Woodruff *v.* Woodruff, 22 Ga. 237. But see Williams *v.* Goodall, 60 Ga. 482; Adams *v.* Fitzgerald, 14 Ga. 36, where it was sought to show that a summons had not been served, and it was held that the papers in the case were the best evidence.

Illinois.— Beardstown *v.* Virginia, 81 Ill. 541; Bartlett *v.* Board of Education, 59 Ill. 364; Cross *v.* Pinckneyville Mill Co., 17 Ill. 54; Board of Education *v.* Taft, 7 Ill. App. 571.

Indiana.— Lacey *v.* Marnan, 37 Ind. 168; Stoner *v.* Ellis, 6 Ind. 152; Nossaman *v.* Nossaman, 4 Ind. 648.

Michigan.— Maxwell *v.* Paine, 53 Mich. 30, 18 N. W. 546.

Nebraska.— Gutta-Percha, etc., Mfg. Co. *v.* Ogalalla, 40 Nebr. 975, 59 N. W. 513, 42 Am. St. Rep. 696.

United States.— See Morrow *v.* Whitney, 95 U. S. 551, 24 L. ed. 456. *Compare* Bemis *v.* Becker, 1 Kan. 226; Williams *v.* Davis, 56 Tex. 250.

Contra.— Cannon *v.* Labarre, 13 La. 399.

88. *Georgia.*— Daniel *v.* Braswell, 113 Ga. 372, 38 S. E. 829; Hines *v.* Johnson, 95 Ga. 629, 23 S. E. 470.

Illinois.— Beardstown *v.* Virginia, 81 Ill. 541; Cross *v.* Pinckneyville Mill Co., 17 Ill. 54.

Indiana.— Stoner *v.* Ellis, 6 Ind. 152.

Maryland.— Young *v.* Mackall, 3 Md. Ch. 398.

North Carolina.— Wilcox *v.* Ray, 2 N. C. 410, judicial record.

North Dakota.— Sykes *v.* Beck, 12 N. D. 242, 96 N. W. 844; Fisher *v.* Betts, 12 N. D. 197, 96 N. W. 132.

89. In Pennsylvania such a negative certificate is admissible. Struthers *v.* Reese, 4 Pa. St. 129; Ruggles *v.* Gaily, 2 Rawle 232; Weidman *v.* Kohr, 4 Serg. & R. 174.

90. *California.*— People *v.* Clingan, 5 Cal. 389.

Connecticut.— Smith *v.* Richards, 29 Conn. 232.

Georgia.— Greenfield *v.* McIntyre, 112 Ga. 691, 38 S. E. 44; Cowan *v.* Corbett, 68 Ga. 66.

Indiana.— Lacey *v.* Marnan, 37 Ind. 168; Stoner *v.* Ellis, 6 Ind. 152.

North Dakota.— Sykes *v.* Beck, 12 N. D. 242, 96 N. W. 844; Fisher *v.* Betts, 12 N. D. 197, 96 N. W. 132.

Texas.— Pendleton *v.* Shaw, 18 Tex. Civ. App. 439, 44 S. W. 1002.

91. *Georgia.*— Hines *v.* Johnston, 95 Ga. 629, 23 S. E. 470, conveyances. See also Greenfield *v.* McIntyre, 112 Ga. 691, 38 S. E. 44.

Illinois.— Beardstown *v.* Virginia, 81 Ill. 541 (naturalization); Cross *v.* Pinckneyville Mill Co., 17 Ill. 54 (certificate of organization of a corporation).

Nebraska.— Gutta-Percha, etc., Mfg. Co. *v.* Ogalalla, 40 Nebr. 775, 59 N. W. 513, 42 Am. St. Rep. 696.

Texas.— Johnson *v.* Skipworth, 59 Tex. 473; Chalk *v.* Foster, 2 Tex. Unrep. Cas. 704.

Virginia.— Atkinson *v.* Smith, (1896) 24 S. E. 901, will. *Compare* Louisville, etc., R. Co. *v.* Dulaney, 43 Ill. App. 297, holding that the testimony of a witness that there was no stock law in a certain town, and that animals were there allowed to run at large was not the best evidence.

courts have held, however, that the custodian when accessible is the only competent witness.[92]

(IV) *Particular Classes of Records* — (A) *Judicial Records and Documents* — (1) General Rule. In accordance with the general rule excluding parol evidence of the contents of an accessible public record,[93] it is well settled that the proceedings, orders, judgments, and decrees of courts of record cannot be proved by parol unless the record is lost or destroyed or is otherwise inaccessible, and a properly authenticated copy or transcript thereof cannot be obtained.[94]

92. Norris *v.* Russell, 5 Cal. 249; Sykes *v.* Beck, 12 N. D. 242, 96 N. W. 844; Fisher *v.* Betts, 12 N. D. 197, 96 N. W. 132.

93. See *supra*, XV, C, 3, d, (I).

94. *Alabama.*— Donegan *v.* Wade, 70 Ala. 501; Gassenheimer *v.* Huguley, 64 Ala. 83.

Arkansas.— Alexander *v.* Foreman, 7 Ark. 252; Clark *v.* Oakley, 4 Ark. 236; Williams *v.* Brummel, 4 Ark. 129.

California.—Leviston *v.* Henninger, 77 Cal. 461, 19 Pac. 834; Nims *v.* Johnson, 7 Cal. 110.

Colorado.— Union Pac. R. Co. *v.* Jones, 21 Colo. 340, 40 Pac. 891; Watson *v.* Hahn, 1 Colo. 385; Fox *v.* Lipe, 14 Colo. App. 258, 59 Pac. 850.

Connecticut.— Northrup *v.* Chase, 76 Conn. 146, 56 Atl. 518; Waterbury Lumber, etc., Co. *v.* Hinckley, 75 Conn. 187, 52 Atl. 739; Sherman *v.* Talman, 2 Root 140.

Delaware.— Downs *v.* Rickards, 4 Del. Ch. 416.

Georgia.— Wilson *v.* Allen, 108 Ga. 275, 33 S. E. 975; Cody *v.* Gainesville First Nat. Bank, 103 Ga. 789, 30 S. E. 281; Clark *v.* Cassidy, 64 Ga. 662; Armstrong *v.* Lewis, 61 Ga. 680; James *v.* Kerby, 29 Ga. 684; Griffin *v.* Moore, 2 Ga. 331.

Illinois.— McIntyre *v.* People, 103 Ill. 142; Weis *v.* Tiernan, 91 Ill. 27; Rockford, etc., R. Co. *v.* Lynch, 67 Ill. 149; Sherman *v.* Smith, 20 Ill. 350; Humphreys *v.* Collier, 1 Ill. 297; McNeill *v.* Donohue, 44 Ill. App. 42; McGuire *v.* Goodman, 31 Ill. App. 420; Moore *v.* Bruner, 31 Ill. App. 400; Stillman *v.* Palis, 23 Ill. App. 408.

Indiana.— Bible *v.* Voris, 141 Ind. 569, 40 N. E. 670; Reilly *v.* Cavanaugh, 29 Ind. 435; Jenkins *v.* Parkhill, 25 Ind. 473; Cline *v.* Gibson, 23 Ind. 11; Beatty *v.* Gates, 4 Ind. 154.

Indian Territory.— Schwab Clothing Co. *v.* Cromer, 1 Indian Terr. 661, 43 S. W. 951.

Iowa.— Parsons *v.* Hedges, 15 Iowa 119.

Kansas.— Borin *v.* Johnson, (Sup. 1901) 65 Pac. 640; Pulsifer *v.* Arbuthnot, 59 Kan. 380, 53 Pac. 70; La Clef *v.* Campbell, 3 Kan. App. 756, 45 Pac. 461.

Kentucky.— Cynthiana, etc., Turnpike Co. *v.* Hutchinson, 60 S. W. 378, 22 Ky. L. Rep. 1233; Beattyville Coal Co. *v.* Hoskins, 44 S. W. 363, 19 Ky. L. Rep. 1759.

Louisiana.— Payne *v.* James, 45 La. Ann. 381, 12 So. 492; State *v.* Brooks, 39 La. Ann. 817, 2 So. 498; Graves *v.* Hunter, 23 La. Ann. 132; Lockhart *v.* Jones, 9 Rob. 381; Williams *v.* Duer, 14 La. 523; Broussard *v.* Bernard, 7 La. 216.

Maine.— Chase *v.* Savage, 55 Me. 543; Emery *v.* Fowler, 39 Me. 326, 63 Am. Dec. 627; Moody *v.* Moody, 11 Me. 247.

Maryland.— Gambrill *v.* Schooley, 95 Md. 260, 52 Atl. 500, 63 L. R. A. 427; Carlysle *v.* Carlysle, 10 Md. 440; Harker *v.* Dement, 9 Gill 7, 52 Am. Dec. 670. *Compare* Blaen Avon Coal Co. *v.* McCulloch, 59 Md. 403, 43 Am. Rep. 560.

Massachusetts.— Fitch *v.* Randall, 163 Mass. 381, 40 N. E. 182; Fleming *v.* Clark, 12 Allen 191; Kendall *v.* Powers, 4 Metc. 553; Sheldon *v.* Frink, 12 Pick. 568. See also Chase *v.* Hathaway, 14 Mass. 222, per Parker, C. J.

Missouri.— Dennison *v.* St. Louis County, 33 Mo. 168; Wynne *v.* Aubuchon, 23 Mo. 30; Milan *v.* Pemberton, 12 Mo. 598. See also Bobb *v.* Letcher, 30 Mo. App. 43.

Nebraska.— Reynolds *v.* State, 58 Nebr. 49, 78 N. W. 483.

Nevada.— Davis *v.* Notware, 13 Nev. 421.

New Hampshire.—Probate Judge *v.* Briggs, 3 N. H. 309.

New Jersey.— Tice *v.* Reeves, 30 N. J. L. 314; Tyrrel *v.* Woodbridge Tp., 27 N. J. L. 416; Raymond *v.* Post, 25 N. J. Eq. 447; Michener *v.* Lloyd, 16 N. J. Eq. 38.

New York.— Dorr *v.* Troy, 19 Hun 223; Wright *v.* Maseras, 56 Barb. 521; Sutton *v.* Dillaye, 3 Barb. 529; Underhill *v.* Reinor, 2 Hilt. 319; Pollock *v.* Hoag, 4 E. D. Smith 473; Rosenberg *v.* Goldstein, 38 Misc. 753, 78 N. Y. Suppl. 831; Pohalski *v.* Ertheiler, 18 Misc. 33, 41 N. Y. Suppl. 10; McVity *v.* Stanton, 10 Misc. 105, 30 N. Y. Suppl. 934; Stebbins *v.* Cooper, 4 Den. 191 (warrant signed by president of court-martial); Cooper *v.* Watson, 10 Wend. 202; Lansing *v.* Russell, 3 Barb. Ch. 325.

North Carolina.— Baker *v.* Garris, 108 N. C. 218, 13 S. E. 2; Scott *v.* Bryan, 73 N. C. 582; Smith *v.* Harkins, 38 N. C. 613, 44 Am. Dec. 83.

Ohio.— Smiley *v.* Dewey, 17 Ohio 156; Newcomb *v.* Smith, 5 Ohio 447; Ludlow *v.* Johnston, 3 Ohio 553, 17 Am. Dec. 609; Inman *v.* Jenkins, 3 Ohio 271.

Oregon.— Bowick *v.* Miller, 21 Oreg. 25, 26 Pac. 861.

Pennsylvania.— Otto *v.* Trump, 115 Pa. St. 425, 8 Atl. 786; Karch *v.* Com., 3 Pa. St. 269. See also Wentz *v.* Lowe, 2 Pa. Cas. 379, 3 Atl. 878.

South Carolina.— Baker *v.* Deliesseline, 4 McCord 372.

South Dakota.— Noyes *v.* Belding, 5 S. D. 603, 59 N. W. 1069; Woodward *v.* Stark, 4 S. D. 588, 57 N. W. 496.

(2) APPLICATIONS OF RULE — (a) IN GENERAL. The rule just stated[95] applies where it is sought to establish by parol facts which properly appear upon the records of a court, or to prove by oral evidence the contents of documents properly constituting a part of such records, although such facts and documents are not the acts of the court itself.[96] In like manner the record itself, or a properly authenticated copy or transcript, is the best evidence, and parol evidence is excluded by this rule, where it is sought to prove facts properly appearing of record in courts of criminal jurisdiction,[97] or in the courts of sister states and for-

Tennessee.— Brady *v.* White, 4 Baxt. 382; Williamson *v.* Anthony, 4 Heisk. 78; Ezell *v.* Giles County Justices, 3 Head 583; Brown *v.* Wright, 4 Yerg. 57; City Sav. Bank *v.* Kensington Land Co., (Ch. App. 1896) 37 S. W. 1037.

Texas.— Dosche *v.* Nette, 81 Tex. 265, 16 S. W. 1013; Hughes *v.* Christy, 26 Tex. 230; Green *v.* White, 18 Tex. Civ. App. 509, 45 S. W. 389.

Vermont.— Graham *v.* Gordon, 1 D. Chipm. 115.

Virginia.— Millers *v.* Catlett, 10 Gratt. 477; Buford *v.* Buford, 4 Munf. 241, 6 Am. Dec. 511.

West Virginia.—Bloss *v.* Plymale, 3 W. Va. 393, 100 Am. Dec. 752. *Compare* Chenowith *v.* Ritchie County Ct., 32 W. Va. 628, 9 S. E. 910.

United States.— Weatherhead *v.* Baskerville, 11 How. 329, 13 L. ed. 717; Fowler *v.* Byrd, 9 Fed. Cas. No. 4,999*a*, Hempst. 213; Gass *v.* Stinson, 10 Fed. Cas. No. 5,261, 2 Sumn. 605.

See 20 Cent. Dig. tit. "Evidence," § 476.

Testimony of the judge before whom the proceedings were had is excluded by this rule. Bellamy *v.* Hawkins, 17 Fla. 750.

Purpose of evidence.— It is immaterial that the parol evidence is offered to prove the result of a judgment and not the proceedings by which it was obtained; such evidence is not admissible under the rule stated in the text. Lomerson *v.* Hoffman, 24 N. J. L. 674. *Compare* Oliver *v.* Hutchinson, 41 Oreg. 443, 69 Pac. 139, 1024.

An award by an executive officer constituting a statutory judgment cannot be proved by parol. Bogert *v.* U. S., 3 Ct. Cl. 18.

95. See *supra*, XV, C, 3, d, (IV), (A), (1).

96. *Alabama.*— Kornegay *v.* Mayer, 135 Ala. 141, 33 So. 36 (claim against decedent's estate); Crenshaw County *v.* Sikes, 113 Ala. 626, 21 So. 135 (presentation of claim to county commissioner); Glover *v.* Gentry, 104 Ala. 222, 16 So. 38; Donegan *v.* Wade, 70 Ala. 501 (grounds of contest of probate).

Georgia.— McKee *v.* McKee, 48 Ga. 332, terms of distribution of a decedent's estate.

Idaho.— Idaho Mercantile Co. *v.* Kalanquin, 8 Ida. 101, 66 Pac. 933, bill of particulars.

Maine.— Pierce *v.* Strickland, 26 Me. 277, final account of administrator.

Maryland.— Clarke *v.* State, 8 Gill & J. 111, qualification of guardian.

Missouri.— Gates *v.* Hunter, 13 Mo. 511, bill of costs.

Nebraska.— Quinby *v.* Ayers, 1 Nebr. (Unoff.) 70, 95 N. W. 464, administrator's report.

Pennsylvania.— Snyder *v.* Snyder, 6 Binn. 483, 6 Am. Dec. 493.

Tennessee.—See Bryan *v.* Glass, 2 Humphr. 390.

Texas.— Roberts *v.* Connellee, 71 Tex. 11, 8 S. W. 626 (qualification and inventory of executor); Williams *v.* Davis, 56 Tex. 250 (that administration on an estate is still pending).

Vermont.— Franklin *v.* Brownson, 2 Tyler 103, presentation of claim to commissioners of insolvent decedent's estate.

United States.— Sutton *v.* Mandeville, 23 Fed. Cas. No. 13,648, 1 Cranch C. C. 2.

See 20 Cent. Dig. tit. "Evidence," §§ 476–491.

Receipt of payment of a judgment, if the receipt is entered upon the record, is within the rule stated in the text. Williams *v.* Jones, 12 Ind. 561; Hall *v.* Hall, (Tenn. Ch. App. 1900) 59 S. W. 203. See also Nichols *v.* Disner, 29 N. J. L. 293. *Compare* Davidson *v.* Peck, 4 Mo. 438. But the date of payment of a judgment may be shown by parol; also the date of entry of satisfaction. Downs *v.* Rickards, 4 Del. Ch. 416. And payment made on the execution may be proved by parol as an independent fact, without producing the writ of execution containing indorsement of payment; such indorsement being only *prima facie* evidence at best. Hayden *v.* Rice, 18 Vt. 353.

As to the time when a suit was commenced the record is the best evidence. Graybill *v.* De Young, 140 Cal. 323, 73 Pac. 1067.

To prove due diligence in certain chancery proceedings, it was held that a solicitor's testimony based upon his examination of the records was not admissible, but that the records should be produced. Duvall *v.* Peach, 1 Gill (Md.) 172.

97. *Arkansas.*— Southern Ins. Co. *v.* White, 58 Ark. 277, 24 S. W. 425.

Georgia.— Harris *v.* Atlanta, 62 Ga. 290.

Indiana.— Abrams *v.* Smith, 8 Blackf. 95.

Kentucky.— Cole *v.* Hanks, 3 T. B. Mon. 208.

Louisiana.— Flynn *v.* Merchants' Mut. Ins. Co., 17 La. Ann. 135; Castellano *v.* Peillon, 2 Mart. N. S. 466.

Massachusetts.— Hackett *v.* King, 6 Allen 58.

New Hampshire.— Smith *v.* Smith, 43 N. H. 536.

New York.— Newcomb *v.* Griswold, 24 N. Y. 298; Tacy *v.* Starks, 67 N. Y. App.

eign countries.[98] The rule under discussion applies also to exclude parol evidence of the contents of pleadings,[99] of the findings and verdict of a jury,[1] of judicial writs, including the returns and other indorsements made thereon,[2] and certificates of discharge in bankruptcy.[3] The appointment of administrators,[4] and the revocation of the powers of executors,[5] can be proved only in conformity with this principle.

(b) Proceedings Before Justices and Magistrates. Although the courts of justices of the peace, magistrates, and trial justices are not technically courts of record, yet where the proceedings and judgments of such courts are required by law to be put in writing, or where a record of such proceedings and judgments is in fact kept, such writing or record, or a properly authenticated transcript thereof, constitutes the best evidence, and parol evidence thereof is excluded unless the writing has been lost or destroyed or is otherwise inaccessible.[6] This

Div. 422, 73 N. Y. Suppl. 225; Peck *v.* Yorks, 47 Barb. 131; Rathbun *v.* Ross, 46 Barb. 127.

South Carolina.— Cherry *v.* McCants, 7 S. C. 224; Lining *v.* Bentham, 2 Bay 1.

Wisconsin.—Kirschner *v.* State, 9 Wis. 140.

United States.— Baltimore, etc., R. Co. *v.* Rambo, 59 Fed. 75, 8 C. C. A. 6; U. S. *v.* Wary, 28 Fed. Cas. No. 16,645, 1 Cranch C. C. 312.

See 20 Cent. Dig. tit. "Evidence," § 478.

98. *Illinois.*— Atwood *v.* Buck, 113 Ill. 268.

Indiana.— Teter *v.* Teter, 88 Ind. 494; Anderson *v.* Ackerman, 88 Ind. 481.

Louisiana.— Jones *v.* Jamison, 15 La. Ann. 35.

South Carolina.— State *v.* McElmurray, 3 Strobh. 33.

Washington.— Kentzler *v.* Kentzler, 3 Wash. 166, 28 Pac. 370, 28 Am. St. Rep. 21.

United States.— Zimpelman *v.* Hipwell, 54 Fed. 848, 4 C. C. A. 609.

See 20 Cent. Dig. tit. "Evidence," §§ 476, 477.

But see Goodwyn *v.* Goodwyn, 25 Ga. 203; Young *v.* Gregory, 3 Call (Va.) 446, 2 Am. Dec. 556.

As to mode of proving such records see *supra*, XIV, B, 7, b; XIV, B, 9, b.

99. *California.*— Nims *v.* Johnson, 7 Cal. 110.

Colorado.— Rose *v.* Otis, 5 Colo. App. 472, 39 Pac. 77.

Georgia.— Nelson *v.* Solomon, 112 Ga. 188, 37 S. E. 404.

Indiana.— Howe *v.* Fleming, 123 Ind. 262, 24 N. E. 238; Colborn *v.* Fry, 23 Ind. App. 485, 55 N. E. 621, admissions in pleadings.

Maine.— Levant *v.* Rogers, 32 Me. 159.

New York.— Dygert *v.* Coppernoll, 13 Johns. 210.

See 20 Cent. Dig. tit. "Evidence," §§ 490, 539.

Proof of independent fact.— But where a party sought to show that a certain note signed by him was invalid, as being subject to a counter-claim, it was held that while parol evidence of the contents of written pleadings filed in a suit which had been brought on a note and was pending in a foreign country were not admissible to prove the counter-claim, yet the facts tending to establish the counter-claim could be proved by parol. Moor *v.* Moor, (Tex. Civ. App. 1910) 63 S. W. 347.

1. Hames *v.* Brownlee, 71 Ala. 132; Abrams *v.* Smith, 8 Blackf. (Ind.) 95; Lawrence *v.* Sherman, 15 Fed. Cas. No. 8,144, 2 McLean 488.

2. *Alabama.*— Smelser *v.* Drane, 19 Ala. 245; McDade *v.* Mead, 18 Ala. 214.

Colorado.— Gottlieb *v.* Barton, 13 Colo. App. 147, 57 Pac. 754.

Iowa.— Faville *v.* State Trust Co., (1903) 96 N. W. 1109.

Kentucky.— French *v.* Frazier, 7 J. J. Marsh. 425.

Missouri.— Dawson *v.* Quillen, 61 Mo. App. 672.

New York.— Foster *v.* Truill, 12 Johns. 456; Brush *v.* Taggart, 7 Johns. 19.

North Carolina.— Wells *v.* Bourne, 113 N. C. 82, 18 S. E. 106.

Pennsylvania.— Farmers', etc., Bank *v.* Fordyce, 1 Pa. St. 454.

Texas.— Luck *v.* Zapp, 1 Tex. Civ. App. 528, 21 S. W. 418.

United States.— Ray *v.* Law, 20 Fed. Cas. No. 11,592, Pet. C. C. 207.

See 20 Cent. Dig. tit. "Evidence," §§ 484, 541.

Compare McKnight *v.* Sessions, 8 Rich. (S. C.) 210.

3. Regan *v.* Regan, 72 N. C. 195. For evidence of discharge in bankruptcy see Bankruptcy, 5 Cyc. 407. See also, generally, Insolvency.

4. Williams *v.* Jarret, 6 Ill. 120; Rouly *v.* Berard, 11 Rob. (La.) 478; Smith *v.* Wilson, 17 Md. 460, 79 Am. Dec. 665; Hay *v.* Bruere, 6 N. J. L. 212. See also Elliott *v.* Eslava, 3 Ala. 568; Hostler *v.* Scull, 3 N. C. 179, 1 Am. Dec. 583. *Compare* Rigg *v.* Cook, 9 Ill. 336, 46 Am. Dec. 462; Davis *v.* Turner, 21 Kan. 131; People *v.* Fleming, 4 Den. (N. Y.) 137.

But where the court acts ministerially, and not judicially in granting letters of administration, etc., parol evidence is admissible. Wardwell *v.* McDowell, 31 Ill. 364; Ayres *v.* Clinefelter, 20 Ill. 465.

5. Wright *v.* Gilbert, 51 Md. 146. See also Steele *v.* Steele, 89 Ill. 51.

6. *Alabama.*— Watson *v.* State, 63 Ala. 19; Blackman *v.* Dowling, 57 Ala. 78.

Georgia.— Fitzgerald *v.* Adams, 9 Ga. 471.

is true, although the parol evidence offered to prove such proceedings or judgments is the testimony of the justice himself.[7]

(c) Seizure and Sale of Property Under Process. As a general rule the seizure and sale of property under an order or decree or other judicial process cannot be proved by parol evidence, unless the loss or destruction of the record evidence of the authority under which the proceedings were had is shown, and a properly authenticated copy or transcript of the record cannot be obtained.[8]

(3) Limitations of Rule. But a judicial record does not constitute the best evidence of facts which are not from their nature susceptible of proof by the record,[9] or of facts which, while they may perhaps be to some extent provable by the record, are in their nature independent facts or matters *in pais*.[10] Among

Illinois.— Walter *v.* Kirk, 14 Ill. 55; Comisky *v.* Breen, 7 Ill. App. 369; Cantrall *v.* Fawcett, 2 Ill. App. 569.

Kentucky.—Stromburg *v.* Earick, 6 B. Mon. 578.

Massachusetts.— Whitton *v.* Harding, 15 Mass. 535, surrender by bail before justice.

Mississippi.—Standifer *v.* Bush, 8 Sm. & M. 383.

New York.— Whitman *v.* Seaman, 61 N. Y. 633; Grimm *v.* Hamel, 2 Hilt. 434; Webb *v.* Alexander, 7 Wend. 281; Posson *v.* Brown, 11 Johns. 166.

South Carolina.— State *v.* Rice, 49 S. C. 418, 27 S. E. 452, 61 Am. St. Rep. 816; Cherry *v.* McCants, 7 S. C. 224; Etters *v.* Etters, 11 Rich. 413.

Tennessee.— Jones *v.* Walker, 5 Yerg. 427.

Texas.— Holt *v.* Maverick, 5 Tex. Civ. App. 650, 23 S. W. 751, 24 S. W. 532.

Vermont.— Nye *v.* Kellam, 18 Vt. 594; Wright *v.* Fletcher, 12 Vt. 431.

United States.— U. S. *v.* Chenault, 25 Fed. Cas. No. 14,791, 2 Cranch C. C. 70, warrant issued by justice.

See 20 Cent. Dig. tit. "Evidence," §§ 476, 477, 536.

7. *Alabama.*— Bullock *v.* Ogburn, 13 Ala. 346.

Florida.— Bellamy *v.* Hawkins, 17 Fla. 750.

Indiana.— See Williams *v.* Case, 14 Ind. 253.

New York.— Boomer *v.* Laine, 10 Wend. 525; White *v.* Hawn, 5 Johns. 351.

Ohio.— Heeney *v.* Kilbane, 59 Ohio St. 499, 53 N. E. 262.

South Dakota.— Miller *v.* Durst, 14 S. D. 587, 86 N. W. 631.

Texas.— Holt *v.* Maverick, 5 Tex. Civ. App. 650, 23 S. W. 751, 24 S. W. 532.

See 20 Cent. Dig. tit. "Evidence," §§ 476, 477, 536.

8. *Alabama.*— Stephens *v.* Head, 138 Ala. 455, 35 So. 565 (holding that a question whether a sheriff took possession of goods under a writ of execution called for secondary evidence of the writ); Phillips *v.* Costley, 40 Ala. 486 (sale under order of court of chancery); Doe *v.* Reynolds, 27 Ala. 364 (foreclosure sale of mortgaged premises).

Arkansas.— Kennedy *v.* Clayton, 29 Ark. 207, holding that in an action to recover property purchased at an execution sale, the judgment and execution must be produced or their absence explained.

Georgia.— Shiver *v.* Bentley, 78 Ga. 537, 3 S. E. 770.

Indiana.— Harlan *v.* Harris, 17 Ind. 328, execution sale. *Compare* Stanley *v.* Sutherland, 54 Ind. 339.

Kansas.— MacRae *v.* Kansas City Piano Co., 64 Kan. 580, 68 Pac. 54, sale under execution or tax warrant.

Louisiana.— Payne *v.* James, 45 La. Ann. 381, 12 So. 492 (sale under judgment for rent); French *v.* Prieur, 6 Rob. 299 (sale under probate decree). See also Stakes *v.* Shackleford, 12 La. 170.

Maryland.— Myers *v.* Smith, 27 Md. 91 (seizure and sale under a distress warrant); McKee *v.* McKee, 16 Md. 516; Gaither *v.* Martin, 3 Md. 146; Giese *v.* Thomas, 7 Harr. & J. 458 (levy and sale under execution).

See 20 Cent. Dig. tit. "Evidence," § 486.

9. *Connecticut.*— Williams *v.* Cheseborough, 4 Conn. 356.

Delaware.— See Downs *v.* Rickards, 4 Del. Ch. 416.

Georgia.— Graham *v.* Hall, 68 Ga. 354; Morgan *v.* Marshall, 62 Ga. 401.

Indiana.— Denny *v.* Moore, 13 Ind. 418. See also Wabash, etc., Canal *v.* Reinhart, 22 Ind. 463.

New York.— People *v.* Fleming, 4 Den. 137.

Tennessee.— Lipscomb *v.* Kitrell, 11 Humphr. 256.

Texas.— Mills *v.* Howeth, 19 Tex. 257, 70 Am. Dec. 331.

Vermont.— Harrington *v.* Rich, 6 Vt. 666; Lowry *v.* Walker, 5 Vt. 181.

See 20 Cent. Dig. tit. "Evidence," §§ 476–491, 536.

10. *Alabama.*— East *v.* Pace, 57 Ala. 521.

Connecticut.— See Supples *v.* Lewis, 37 Conn. 568.

Illinois.— Massey *v.* Westcott, 40 Ill. 160; Loughry *v.* Mail, 34 Ill. App. 523, payment on an execution.

Indiana.— Gurley *v.* Park, 135 Ind. 440, 35 N. E. 279; File *v.* Springel, 132 Ind. 312, 31 N. E. 1054; Stanley *v.* Sutherland, 54 Ind. 339; Wabash, etc., Canal *v.* Reinhart, 22 Ind. 463.

Louisiana.— Keller *v.* Vernon, 24 La. Ann. 280.

Maryland.— See Owings *v.* Nicholson, 4 Harr. & J. 66.

Michigan.— Turnbull *v.* Richardson, 69 Mich. 400, 37 N. W. 499.

the latter class are merely ministerial acts of a court, such as granting letters testamentary or approving official bonds.[11]

(4) Want of Record. It is generally held that the proceedings, judgments, and decrees of courts of record can be proved only by the record itself or a properly authenticated copy thereof, and that, if no record of such matters has ever been made, the absence of the record cannot be supplied by parol or other extrinsic evidence; the rule whereby secondary evidence is admitted as to lost or destroyed records not being applicable.[12] In such cases the proper remedy is by legal proceedings to have the missing record properly made up, and for this purpose parol evidence is admissible to show the existence and occurrence of the proceedings, the record of which is to be supplied.[13] But the foregoing rules do not apply to the proof of facts and proceedings which are not required by law to be recorded;[14] nor do these rules apply in proving the proceedings of a tribunal which is not a court of record.[15]

Nebraska.— Arabian Horse Co. *v.* Bivens, (1903) 96 N. W. 621, payment of costs.

New Hampshire.— Whitman *v.* Morey, 63 N. H. 448, 2 Atl. 899.

New York.— Cogswell *v.* Meech, 12 Wend. 147.

Oregon.— Oliver *v.* Hutchinson, 41 Oreg. 443, 69 Pac. 139, 1024.

South Carolina.— McKnight *v.* Sessions, 8 Rich. 210.

Tennessee.— Chattanooga Grocery Co. *v.* Livingston, (Ch. App. 1900) 59 S. W. 470.

Washington.— Daly *v.* Everett Pulp, etc., Co., 31 Wash. 252, 71 Pac. 1014.

See 20 Cent. Dig. tit. "Evidence," §§ 476–491.

Attendance or non-attendance of a witness may be proved by parol. Cogswell *v.* Meech, 12 Wend. (N. Y.) 147; Baker *v.* Brill, 15 Johns. (N. Y.) 260.

11. Wardwell *v.* McDowell, 31 Ill. 364; Ayres *v.* Clinefelter, 20 Ill. 465; State *v.* McGonigle, 101 Mo. 353, 13 S. W. 758, 20 Am. St. Rep. 609, 8 L. R. A. 735.

12. *Alabama.*— Millard *v.* Hall, 24 Ala. 209.

Connecticut.— Davidson *v.* Murphy, 13 Conn. 213; Beach *v.* Baldwin, 9 Conn. 476.

Iowa.— Cadwell *v.* Dullaghan, 74 Iowa 239, 37 N. W. 178.

Louisiana.— State *v.* Smith, 12 La. Ann. 349; State *v.* Lougineau, 6 La. Ann. 700.

Maine.— Moody *v.* Moody, 11 Me. 247.

Maryland.— Smith *v.* Wilson, 17 Md. 460, 79 Am. Dec. 665.

Massachusetts.— Lund *v.* George, 1 Allen 403; Sayles *v.* Briggs, 4 Metc. 421.

Mississippi.— Eakin *v.* Doe, 10 Sm. & M. 549, 48 Am. Dec. 770.

Ohio.— Newcomb *v.* Smith, 5 Ohio 447. See also Goforth *v.* Longworth, 4 Ohio 129, 19 Am. Dec. 588; Ludlow *v.* Johnston, 3 Ohio 553, 17 Am. Dec. 609.

Pennsylvania.— Baskin *v.* Seechrist, 6 Pa. St. 154. *Compare* Fink's Appeal, 101 Pa. St. 74.

United States.— Weatherhead *v.* Baskerville, 11 How. 329, 13 L. ed. 717.

Compare Davis *v.* Turner, 21 Kan. 131.

Proceedings of justices of the peace are within the rule stated in the text, when such proceedings are required to be recorded. Poor *v.* Dougharty, Quincy (Mass.) 1; Niles *v.* Totman, 3 Barb. (N. Y.) 594; Godfred *v.* Godfred, 30 Ohio St. 53.

Proof of naturalization is within the rule stated in the text. Prentice *v.* Miller, 82 Cal. 570, 23 Pac. 189; Bode *v.* Trimmer, 82 Cal. 513, 23 Pac. 187; Dryden *v.* Swinburne, 20 W. Va. 89. *Compare* Strickley *v.* Hill, 22 Utah 257, 62 Pac. 893, 83 Am. St. Rep. 786. And see, generally, Aliens, 2 Cyc. pp. 115, 116.

13. Moody *v.* Moody, 11 Me. 247. See also Steele *v.* Steele, 89 Ill. 51; State *v.* Smith, 12 La. Ann. 349; Godfred *v.* Godfred, 30 Ohio St. 53. See also, generally, Judgments; Records. For the admissibility of docket entries, etc., where the proceedings have not been extended on the record, see *supra*, XIV, A, 4, d.

Orders made in vacation.— Where a statute requires that orders of a judge in vacation should be entered of record in the same manner as orders made in the term, the record of such an order is the best evidence thereof; and if the order is not entered of record parol evidence, if admissible at all, should be very strict and exact. Bristol Sav. Bank *v.* Judd, 116 Iowa 26, 89 N. W. 93.

14. *California.*— Jolley *v.* Foltz, 34 Cal. 321.

Indiana.— Dehority *v.* Wright, 101 Ind. 382.

Iowa.— Barlow *v.* Buckingham, 68 Iowa 169, 26 N. W. 58.

Michigan.— Van Kleek *v.* Eggleston, 7 Mich. 511.

New York.— Cogswell *v.* Meech, 12 Wend. 147.

South Carolina.— See Maybin *v.* Virgin, 1 Hill 420.

See 20 Cent. Dig. tit. "Evidence," § 464.

Arrest and confinement in jail for vagrancy or intoxication does not necessarily imply that there is any record thereof, or that any sentence has been rendered by any court, and parol evidence therefor admissible to prove the facts. People *v.* Manning, 48 Cal. 335; State *v.* Pike, 65 Me. 111.

15. Richardson *v.* Hitchcock, 28 Vt. 757, proceedings of jail commissioners.

(B) *Corporate Records* — (1) OF PRIVATE CORPORATIONS — (a) IN GENERAL. Where a record of the acts and proceedings of a private corporation is required by law to be kept, such record constitutes the best evidence of its contents, and parol evidence is not admissible if the record is accessible.[16] The foregoing rule, however, is not of unlimited scope; independent facts of which a witness has personal knowledge may be proved by his testimony, notwithstanding that they may also appear upon the records of the corporation.[17] Thus the fact that a corporate meeting was held may be proved by parol without producing the record of what occurred at the meeting.[18] And where it is sought to show that a person is an officer of a corporation, unless it is necessary to prove that he is an officer *de jure*, the production of record evidence of his appointment or election is not necessary under the best evidence rule, but parol evidence is

16. *Arkansas.*— Supreme Lodge K. of P. *v.* Robbins, 70 Ark. 364, 67 S. W. 758.

Colorado.— Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 565.

Connecticut.— Hurd *v.* Hotchkiss, 72 Conn. 472, 45 Atl. 11.

Idaho.— Corcoran *v.* Sonora Min., etc., Co., 8 Ida. 651, 71 Pac. 127.

Illinois.— Mandel *v.* Swan Land, etc., Co., 154 Ill. 177, 40 N. E. 462, 45 Am. St. Rep. 124, 27 L. R. A. 313; Soldiers' Orphans' Home *v.* Shaffer, 63 Ill. 243.

Iowa.— See Iowa State Bank *v.* Novak, 97 Iowa 270, 66 N. W. 186; Whitaker *v.* Johnson County, 10 Iowa 161.

Kansas.— Beeler *v.* Highland University Co., 8 Kan. App. 89, 54 Pac. 295.

Kentucky.— See Louisville, etc., R. Co. *v.* Hart County, 75 S. W. 288, 25 Ky. L. Rep. 395.

Maine.— Skowhegan Bank *v.* Cutler, 49 Me. 315 (transfer of shares on books of corporation); Methodist Chapel Corp. *v.* Herrick, 25 Me. 354; Coffin *v.* Collins, 17 Me. 440.

Maryland.— Harrison *v.* Morton, 83 Md. 456, 35 Atl. 99.

Michigan.— Walrath *v.* Campbell, 28 Mich. 111; People *v.* Oakland County Bank, 1 Dougl. 282.

Missouri.— Chouteau *v.* Dean, 7 Mo. App. 210.

New Hampshire.— Edgerly *v.* Emerson, 23 N. H. 555, 55 Am. Dec. 207; Haven *v.* New Hampshire Insane Asylum, 13 N. H. 532, 38 Am. Dec. 512; Lumbard *v.* Aldrich, 8 N. H. 31, 28 Am. Dec. 381.

New York.— Mengis *v.* Fifth Ave. R. Co., 81 Hun 480, 30 N. Y. Suppl. 999, 24 N. Y. Civ. Proc. 131.

Oregon.— Bowick *v.* Miller, 21 Oreg. 25, 26 Pac. 861 [*citing* Hill Annot. Code, § 691].

Pennsylvania.— Pittsburgh, etc., R. Co. *v.* Clarke, 29 Pa. St. 146, consent of directors to transfer of stock.

South Carolina.— Dial *v.* Valley Mut. L. Assoc., 29 S. C. 560, 8 S. E. 27.

Texas.— Guadalupe, etc., Stock Assoc. *v.* West, 76 Tex. 461, 13 S. W. 307.

Vermont.— Stevens *v.* Eden Meeting-House Soc., 12 Vt. 688.

United States.— Central Electric Co. *v.* Sprague Electric Co., 120 Fed. 925, 57 C. C. A. 197; Ramsdell *v.* National Rivet, etc., Co., 104 Fed. 16 [*citing* W. Va. Code, c. 53, § 52]; Tobin *v.* Roaring Creek, etc., R. Co., 86 Fed. 1020.

See 20 Cent. Dig. tit. "Evidence," §§ 508, 511, 512, 546.

A by-law of a benevolent society is within the rule stated in the text. Supreme Lodge K. of P. *v.* Robbins, 70 Ark. 364, 67 S. W. 758.

The constitution of a life-insurance company is the best evidence of its provisions. Masons' Union L. Ins. Assoc. *v.* Brockman, 20 Ind. App. 206, 50 N. E. 493.

But entries of mailing letters, and notices of calls upon corporate stock, are nothing more than memoranda and are not records within the rule stated in the text. Mandel *v.* Swan Land, etc., Co., 154 Ill. 177, 40 N. E. 462, 45 Am. St. Rep. 124, 27 L. R. A. 313.

The articles of incorporation are the best evidence of their contents. Miller *v.* Wild Cat Gravel Road Co., 52 Ind. 51; Saltsman *v.* Shults, 14 Hun (N. Y.) 256. But where the date of filing is no part of the articles it may be proved by parol. Johnson *v.* Crawfordsville, etc., R. Co., 11 Ind. 280.

To prove organization and existence of a corporation, the articles of incorporation or other record of organization are generally the best evidence. Jones *v.* Hopkins, 32 Iowa 503; Warner *v.* Daniels, 29 Fed. Cas. No. 17,181, 1 Woodb. & M. 90. Thus to prove the acceptance of the charter by the corporators, the records of the corporation have been held to be the best evidence. Hudson *v.* Carman, 41 Me. 84; Coffin *v.* Collins, 17 Me. 440. *Compare* Philadelphia Bank *v.* Lambreth, 4 Rob. (La.) 463; Russell *v.* McLellan, 14 Pick. (Mass.) 63. But to prove establishment and existence of a corporation *de facto*, parol evidence is admissible without producing the corporate records or accounting for their absence. Johnson *v.* Okerstrom, 70 Minn. 303, 73 N. W. 147. See also Manchester Bank *v.* Allen, 11 Vt. 302. As to proof of organization, acceptance of charter, and corporate existence see, generally, CORPORATIONS, 10 Cyc. pp. 204, 235 *et seq.*

17. Fouche *v.* Merchants' Nat. Bank, 110 Ga. 827, 39 S. E. 256; Banks *v.* Darden, 18 Ga. 318; Ramsdell *v.* National Rivet, etc., Co., 104 Fed. 16.

18. Ramsdell *v.* National Rivet, etc., Co., 104 Fed. 16.

admissible to prove that he acted in his official capacity, and this proof is sufficient.[19]

(b) Want of Record. Unless it is expressly provided by statute, charter, or articles of corporation that the acts and proceedings of a private corporation can be proved only by its records, parol evidence is admissible to prove a fact or transaction which, although required to be recorded, has been omitted from the corporate records.[20] The omission of a corporation to make a record of its proceedings will not be allowed to prejudice the rights of an innocent third person who has in good faith relied upon an official assurance of its corporate acts.[21] *A fortiori* parol evidence is admissible where the fact in question is one not required by law to be recorded,[22] or the matter to be proved is of such a character that it would not be shown by the record,[23] or where the association of individuals whose proceedings are sought to be proved is not a corporation or official body required by law to keep a record, and in such a case it is immaterial whether any written evidence has been preserved or not.[24]

(2) Public Corporations — (a) In General. Where the acts and proceedings of public corporations and of public boards are required to appear of record,

19. *Alabama.*— East Tennessee, etc., R. Co. *v.* Davis, 91 Ala. 615, 8 So. 349.

California.— Boston Tunnel Co. *v.* McKenzie, 67 Cal. 485, 8 Pac. 22.

Connecticut.— Barnum *v.* Barnum, 9 Conn. 242.

Maine.— Baker *v.* Cotter, 45 Me. 236; Cabot *v.* Given, 45 Me. 144.

Michigan.— Walrath *v.* Campbell, 28 Mich. 111, trustees of religious society.

New Hampshire.— Concord *v.* Concord Bank, 16 N. H. 26, bank cashier.

New York.— Partridge *v.* Badger, 25 Barb. 146; Pusey *v.* New Jersey West Line R. Co., 14 Abb. Pr. N. S. 434.

Wisconsin.— Brown *v.* La Crosse City Gas Light, etc., Co., 21 Wis. 51.

See 20 Cent. Dig. tit. "Evidence," § 509.

See also Corporations, 10 Cyc. pp. 755, 756.

20. *Alabama.*— Martin Mach. Works *v.* Miller, 132 Ala. 629, 32 So. 305 (vote of corporation); Birmingham Railway, etc., Co. *v.* Birmingham Traction Co., 128 Ala. 110, 29 So. 187, evidence of proceedings at meeting of stock-holders.

California.— Boggs *v.* Lakeport Agricultural Park Assoc., 111 Cal. 354, 43 Pac. 1106; Bay View Homestead Assoc. *v.* Williams, 50 Cal. 353.

Colorado.— Hendrie, etc., Mfg. Co. *v.* Collins, 29 Colo. 102, 67 Pac. 164, resolution of board of directors.

District of Columbia.— See Jackson *v.* Clifford, 5 App. Cas. 312.

Illinois.— Ryan *v.* Dunlap, 17 Ill. 40, 63 Am. Dec. 334. See also Du Quoin Star Coal Min. Co. *v.* Thorwell, 3 Ill. App. 394.

Indiana.— Langsdale *v.* Bonton, 12 Ind. 467; Richardson *v.* St. Joseph Iron Co., 5 Blackf. 146, 33 Am. Dec. 460.

Iowa.— Selley *v.* American Lubricator Co., 119 Iowa 591, 93 N. W. 590; Zalesky *v.* Iowa State Ins. Co., 102 Iowa 512, 70 N. W. 187, 71 N. W. 433 (acts of board of directors); Foley *v.* Tipton Hotel Assoc., 102 Iowa 272, 71 N. W. 236.

Louisiana.— Donelly *v.* St. John's Protestant Episcopal Church, 26 La. Ann. 738; Wolf *v.* Bureau, 1 Mart. N. S. 162.

Maryland.— Zihlman *v.* Cumberland Glass Co., 74 Md. 303, 22 Atl. 271, execution of contract by directors and stock-holders. See also Weber *v.* Fickey, 52 Md. 500.

Massachusetts.— See Waters *v.* Gilbert, 2 Cush. 27, records of religious society.

New Hampshire.— Edgerly *v.* Emerson, 23 N. H. 555, 55 Am. Dec. 207.

New York.— Moss *v.* Averell, 10 N. Y. 449; Union Nat. Bank *v.* Scott, 53 N. Y. App. Div. 65, 66 N. Y. Suppl. 145; Morrill *v.* C. T. Segar Mfg. Co., 32 Hun 543; St. Mary's Church *v.* Cagger, 6 Barb. 576.

Pennsylvania.— See Barrington *v.* Washington Bank, 14 Serg. & R. 405.

Texas.— Pickett *v.* Abney, 84 Tex. 645, 19 S. W. 859.

Utah.— Murray *v.* Beal, 23 Utah 548, 65 Pac. 726.

Wisconsin.— *In re* West Superior Bank, 109 Wis. 672, 85 N. W. 501.

See 20 Cent. Dig. tit. "Evidence," §§ 507, 512.

Circumstantial evidence is admissible where no direct evidence can be obtained. Moss *v.* Averell, 10 N. Y. 449; St. Mary's Church *v.* Cagger, 6 Barb. (N. Y.) 576.

21. St. Mary's Church *v.* Cagger, 6 Barb. (N. Y.) 576.

22. Carey *v.* Philadelphia, etc., Petroleum Co., 33 Cal. 694 (appointment and authority of agent); People *v.* Eel River, etc., R. Co., 98 Cal. 665, 33 Pac. 728; Hamilton *v.* Newcastle, etc., R. Co., 9 Ind. 359; Richardson *v.* St. Joseph Iron Co., 5 Blackf. (Ind.) 146, 33 Am. Dec. 460; Isman *v.* Loder, (Mich. 1904) 97 N. W. 769; Gage *v.* Sanborn, 106 Mich. 269, 64 N. W. 32; Winnepesaukee Camp-Meeting Assoc. *v.* Gordon, 67 N. H. 98, 29 Atl. 412. The same is true as to the appointment of trustees of a religious society. Gilbert *v.* Boyd, 25 Mo. 27.

23. Ellison *v.* Dunlap, 78 S. W. 155, 25 Ky. L. Rep. 1495.

24. Morey *v.* Clopton, 103 Mo. App. 368, 77 S. W. 467.

parol evidence is not admissible to prove such acts or proceedings unless the absence of the record is satisfactorily explained.[25] But this rule does not apply to exclude parol evidence of an independent fact which is not necessarily a matter of record and which is not shown by the witness' testimony to be a matter of record; in such a case parol evidence founded on the witness' own knowledge is not secondary but original evidence.[26] Moreover the right of a third person dealing in good faith with a municipal corporation or board cannot be prejudiced by a failure of the corporation or board to keep a proper record of its proceedings.[27]

(b) ORDINANCES. The best evidence of the existence and provisions of a municipal ordinance is the record containing it, and parol evidence is not admissible unless the loss or destruction of the record is established.[28] But, in the

25. Records of municipal corporations.—*Alabama.*— Perryman *v.* Greenville, 51 Ala. 507.

Arizona.— Yavapai County *v.* O'Neill, 3 Ariz. 363, 29 Pac. 430.

Arkansas.— Hencke *v.* Standiford, 66 Ark. 535, 52 S. W. 1.

Connecticut.— Gilbert *v.* New Haven, 40 Conn. 102.

Georgia.— Jackson *v.* Ellis, 116 Ga. 719, 43 S. E. 53; Baker *v.* Scofield, 58 Ga. 182.

Illinois.— Cincinnati, etc., R. Co. *v.* People, 205 Ill. 538, 69 N. E. 40 (vote of town-meeting authorizing levy of tax); Hall *v.* Jackson County, 95 Ill. 352 [*affirming* 5 Ill. App. 609] (order of a county board). The proceedings of highway commissioners are within the rule. Chaplin *v.* Wheatland, 129 Ill. 651, 22 N. E. 484; People *v.* Madison County, 125 Ill. 334, 17 N. E. 802; People *v.* Finley, 97 Ill. App. 214.

Indiana.— Whetten *v.* Clayton, 111 Ind. 360, 12 N. E. 513 (order vacating a highway); Aurora *v.* Fox, 78 Ind. 1 (proceedings of city council). See also Fayette County *v.* Chetwood, 8 Ind. 504, proceeding of township trustees.

Iowa.— Lathrop *v.* Central Iowa R. Co., 69 Iowa 105, 28 N. W. 465.

Maine.— Bean *v.* Maine Water Co., 92 Me. 469, 43 Atl. 22; Small *v.* Pennell, 31 Me. 267, proceedings of board of commissioners.

Massachusetts.—Hobart *v.* Plymouth County, 100 Mass. 159 (proceedings of county commissioners for the alteration of a highway); Com. *v.* Wallace, Thatch. Cr. Cas. 592.

New Hampshire.— Greeley *v.* Quimby, 22 N. H. 335, proceedings of selectmen of a town in laying out a road.

New Jersey.— O'Donnel *v.* Dusman, 39 N. J. L. 677, vote at town election.

New York.— Duffy *v.* Beirne, 30 N. Y. App. Div. 384, 51 N. Y. Suppl. 626 (proceedings of village trustees); Christman *v.* Phillips, 58 Hun 282, 12 N. Y. Suppl. 338; Thompson *v.* Smith, 2 Den. 177; Meeker *v.* Van Rensselaer, 15 Wend. 397 (proceedings of board of health in abating nuisance).

Oklahoma.— Cooke *v.* Custer County, 13 Okla. 11, 73 Pac. 270, proceedings of board of health.

Texas.—Wagner *v.* Porter, (Civ. App. 1900) 56 S. W. 560.

Vermont.— Cabot *v.* Britt, 36 Vt. 349; Slack *v.* Norwich, 32 Vt. 818 (vote of a town); Stedman *v.* Putney, N. Chipm. 11.

West Virginia.— Jordan *v.* Benwood, 42 W. Va. 312, 26 S. E. 266, 57 Am. St. Rep. 859, 36 L. R. A. 519; Childrey *v.* Huntington, 34 W. Va. 457, 12 S. E. 536, 11 L. R. A. 313.

Wisconsin.—Montpelier Sav. Bank, etc., Co. *v.* Ludington School Dist. No. 5, 115 Wis. 622, 92 N. W. 439; Eastland *v.* Fogo, 58 Wis. 274, 16 N. W. 632, action of a village board in opening streets.

See 20 Cent. Dig. tit. "Evidence," § 495.

By-laws of a public hospital for the insane are within the rule stated in the text. Butler *v.* St. Louis L. Ins. Co., 45 Iowa 93.

To prove a street grade in a city, the records and files pertaining thereto should be produced as the primary evidence; and, unless proper proof of their having been lost, etc., is made, secondary evidence will not be received. Nebraska City *v.* Lampkin, 6 Nebr. 27.

Records of public school-boards constitute the best evidence of the proceedings of such bodies, and parol evidence thereof is not admissible.

Indiana.— Elmore *v.* Overton, 104 Ind. 548, 4 N. E. 197, 54 Am. Rep. 343.

Kansas.— Hinton *v.* Nemaha County, etc., School-Dist. No. 2, 12 Kan. 573.

Maine.— Jordan *v.* Lisbon, etc., School Dist. No. 3, 38 Me. 164; Moor *v.* Newfield, 4 Me. 44.

Michigan.— Thompson *v.* Crockery School Dist. No. 6, 25 Mich. 483.

Pennsylvania.— Roland *v.* Riding School Dist., 161 Pa. St. 102, 28 Atl. 995; Whitehead *v.* North Huntingdon School-Dist., 145 Pa. St. 418, 22 Atl. 991; Mangan *v.* McCue, 9 Kulp 555; Wachob *v.* Bingham School Dist., 8 Phila. 568.

United States.— German Ins. Co. *v.* Independent School Dist., 80 Fed. 366, 25 C. C. A. 492.

See 20 Cent. Dig. tit. "Evidence," § 495.

26. Roberts *v.* Dover, 72 N. H. 147, 55 Atl. 895, testimony of a mayor that property-owners made certain connections with the sewer and paid the fees fixed by ordinance.

27. Bigelow *v.* Perth Amboy, 25 N. J. L. 297; Calahan *v.* New York, 34 N. Y. App. Div. 344, 54 N. Y. Suppl. 279.

As to supplying omissions in the records of municipal corporations see COUNTIES, 11 Cyc. 401; and, generally, MUNICIPAL CORPORATIONS.

28. *Arkansas.*— Pugh *v.* Little Rock, 35 Ark. 75.

absence of a statute to the contrary, proof of the publication of a municipal ordinance may be made by parol.[29]

(c) Records of Deeds and Mortgages. Parol evidence is not admissible to prove the contents of the records of deeds and mortgages where the records or properly authenticated copies are accessible,[30] although the testimony offered is that of the custodian of the records.[31]

e. Writings and Records Collateral to Issue. It is generally held that the best evidence rule does not apply to writings collateral to the issue. So, where the execution or existence of a writing, as distinct from its contents, does not form the foundation of the action, although it is material to the controversy, and where the purpose of the evidence is not to maintain or destroy any right involved in the action, the production of the writing is not required, but its execution and existence may be proved by parol.[32] Upon the same principle where

Indiana.— Miller *v.* Valparaiso, 10 Ind. App. 22, 37 N. E. 418.

Kansas.— Missouri Pac. R. Co. *v.* Cooper, 57 Kan. 185, 45 Pac. 587.

New York.— Rehberg *v.* New York, 99 N. Y. 652, 2 N. E. 11.

Ohio.— Cleveland, etc., R. Co. *v.* Workman, 66 Ohio St. 509, 64 N. E. 582, 90 Am. St. Rep. 602; Cleveland *v.* Beaumont, 4 Ohio Dec. (Reprint) 444, 2 Clev. L. Rep. 172, 4 Cinc. L. Bul. 345.

See 20 Cent. Dig. tit. "Evidence," § 495.

As to supplying omissions in the records of ordinances see, generally, Municipal Corporations.

Certified copy.— It seems, however, that a duly certified copy of the ordinance would be sufficient. Pugh *v.* Little Rock, 35 Ark. 75.

But because the court cannot take judicial notice of a city ordinance it has been held that an objection to parol evidence of a fact on the ground that the fact is shown by such an ordinance cannot be sustained where the ordinance properly attested is not introduced in evidence or presented to the reviewing court. O'Brien *v.* Woburn, 184 Mass. 598, 69 N. E. 350. As to judicial notice of municipal ordinances see Evidence, 16 Cyc. 898.

Proof of town ordinance.— Where a statute provides that the board of trustees of a town shall keep a journal of their proceedings, and that their proceedings shall be published, the journal of the proceedings of the board is the best evidence of a town ordinance, and parol evidence is not admissible to show the existence of the ordinance. Stewart *v.* Clinton, 79 Mo. 603.

29. Teft *v.* Size, 10 Ill. 432; Eldora *v.* Burlingame, 62 Iowa 32, 17 N. W. 148; Des Moines *v.* Casady, 21 Iowa 570. And see, generally, Municipal Corporations.

30. *Arkansas.*— Jones *v.* Melindy, 62 Ark. 203, 36 S. W. 22.

Georgia.— Georgia R., etc., Co. *v.* Hamilton, 59 Ga. 171.

Illinois.— Hardin *v.* Forsythe, 99 Ill. 312.

Indiana.— Hamilton *v.* Shoaff, 99 Ind. 63.

Michigan.— Angell *v.* Rosenbury, 12 Mich. 241.

31. Jones *v.* Melindy, 62 Ark. 203, 36 S. W. 22; Georgia R., etc., Co. *v.* Hamilton, 59 Ga. 171; Angell *v.* Rosenbury, 12 Mich. 241.

32. *Alabama.*— Howell *v.* Carden, 99 Ala. 100, 10 So. 640; Snodgrass *v.* Decatur Branch Bank, 25 Ala. 161, 60 Am. Dec. 505; Dixon *v.* Barclay, 22 Ala. 370; Hogan *v.* Reynolds, 8 Ala. 59; McGeehee *v.* Hill, 1 Ala. 140.

California.— Marriner *v.* Dennison, 78 Cal. 202, 20 Pac. 386; Poole *v.* Gerrard, 9 Cal. 593.

Connecticut.—Raymond *v.* Sellick, 10 Conn. 480.

Illinois.— Massey *v.* Farmers' Nat. Bank, 113 Ill. 334; Goodrich *v.* Hanson, 33 Ill. 498; Ault *v.* Rawson, 14 Ill. 484.

Indiana.— Conaway *v.* Shelton, 3 Ind. 334; Western Union Tel. Co. *v.* Cline, 8 Ind. App. 364, 35 N. E. 564.

Iowa.— Hagan *v.* Merchants', etc., Ins. Co., 81 Iowa 321, 46 N. W. 1114, 25 Am. St. Rep. 493.

Kentucky.— Lamb *v.* Moberly, 3 T. B. Mon. 179.

Louisiana.— State *v.* Sterling, 41 La. Ann. 679, 6 So. 583.

Michigan.— Hanselman *v.* Doyle, 90 Mich. 142, 51 N. W. 195; Clemens *v.* Conrad, 19 Mich. 170.

New Jersey.—Gilbert *v.* Duncan, 29 N. J. L. 133.

New York.— Reynolds *v.* Kelly, 1 Daly 283; Bishop *v.* Kelly, 7 Alb. L. J. 94.

North Carolina.— See Dail *v.* Sugg, 85 N. C. 104.

Pennsylvania.— Shoenberger *v.* Hackman, 37 Pa. St. 87.

South Carolina.— Sims *v.* Jones, 43 S. C. 91, 20 S. E. 905; Lowry *v.* Pinson, 2 Bailey 324, 23 Am. Dec. 140.

Texas.— Howard *v.* Britton, 71 Tex. 286, 9 S. W. 73.

Vermont.— Taylor *v.* Moore, 63 Vt. 60, 21 Atl. 919.

Wisconsin.— Sleep *v.* Heymann, 57 Wis. 495, 16 N. W. 17.

Reference by witness when testifying.— "Yet, while this rule [the best evidence rule] is fully conceded, it is also true that a witness, when testifying, may, for the purpose of making his statements intelligible, and giving coherence to such of them as are unquestionably admissible in evidence, properly speak of the execution of deeds, the giving of receipts, the writing of a letter, and the like, without producing the instrument or writing referred to. To hold otherwise would cer-

the contents of a writing are not directly in issue, facts contained in the writing may be proved by parol evidence without the necessity of producing the writing or explaining its absence.[33] Likewise, where the existence or contents of a judicial record is only incidentally or collaterally involved, the best evidence rule does not require that the record be produced or its absence explained before parol evidence can be admitted.[34] Nor can parol evidence be excluded on the ground that

tainly be productive of great inconvenience, and in some cases would defeat the ends of justice. References to written instruments by a witness, for the purpose stated, are to be regarded as but mere inducement to the more material parts of his testimony." Massey *v.* Farmers' Nat. Bank, 113 Ill. 334, 338.

Distinction between subject and contents. — With respect to documents not the foundation of the action, a distinction has been drawn between proving their contents and showing merely their subject, it being held that the subject of such documents may be shown by parol evidence without producing the originals or accounting for their absence. Lewis *v.* Healy, 73 Conn. 744, 48 Atl. 212; *In re* Myers, 111 Iowa 584, 82 N. W. 961; Rosenberger *v.* Marsh, 108 Iowa 47, 78 N. W. 837; State *v.* Seymore, 94 Iowa 699, 63 N. W. 661; Hagan *v.* Merchants', etc., Ins. Co., 81 Iowa 321, 46 N. W. 1114, 25 Am. St. Rep. 493; Knapp *v.* Wing, 72 Vt. 334, 47 Atl. 1075. But see Rawson *v.* Curtiss, 19 Ill. 456.

Proof of loss by assured. — And the fact that proof of loss of insured property was properly prepared and sent to the insurance company may be shown by parol. Hagan *v.* Merchants', etc., Ins. Co., 81 Iowa 321, 46 N. W. 1114, 25 Am. St. Rep. 493; Bish *v.* Hawkeye Ins. Co., 69 Iowa 184, 28 N. W. 553.

33. *Alabama.* — Anniston First Nat. Bank *v.* Lippman, 129 Ala. 608, 30 So. 19; Davis *v.* Walker, 125 Ala. 325, 27 So. 313; Bunzel *v.* Maas, 116 Ala. 68, 22 So. 568; Cobb *v.* State, 100 Ala. 19, 14 So. 362; Rodgers *v.* Crook, 97 Ala. 722, 12 So. 108; Wollner *v.* Lehman, 85 Ala. 274, 4 So. 643; Rodgers *v.* Gaines, 73 Ala. 218; Planters', etc., Bank *v.* Borland, 5 Ala. 531. But see Torrey *v.* Burney, 113 Ala. 496, 21 So. 348; Smith *v.* Armistead, 7 Ala. 698.

Arkansas. — Triplett *v.* Rugby Distilling Co., 66 Ark. 219, 49 S. W. 975.

Georgia. — Daniel *v.* Johnson, 29 Ga. 207.

Illinois. — Silsbury *v.* Blumb, 26 Ill. 287.

Indiana. — Coonrod *v.* Madden, 126 Ind. 197, 25 N. E. 1102; Hewitt *v.* State, 121 Ind. 245, 23 N. E. 83; Carter *v.* Pomeroy, 30 Ind. 438; Wabash, etc., Canal *v.* Reinhart, 22 Ind. 463; Western Union Tel. Co. *v.* Cline, 8 Ind. App. 364, 35 N. E. 564. See also Lumbert *v.* Woodward, 144 Ind. 335, 43 N. E. 302, 55 Am. St. Rep. 175.

Louisiana. — See Grady *v.* Desobry, 21 La. Ann. 132.

Maine. — Phinney *v.* Holt, 50 Me. 570.

Massachusetts. — Holyoke *v.* Hadley Water Power Co., 174 Mass. 424, 54 N. E. 889; Smith *v.* Abington Sav. Bank, 174 Mass. 178, 50 N. E. 545; Tucker *v.* Welsh, 17 Mass. 160, 9 Am. Dec. 137.

Michigan. — Sirrine *v.* Briggs, 31 Mich. 443; Bullard *v.* Hascall, 25 Mich. 132. But see Angell *v.* Rosenbury, 12 Mich. 241.

New Hampshire. — Amoskeag Mfg. Co. *v.* Head, 59 N. H. 332. See also Caldwell *v.* Wentworth, 16 N. H. 318.

New Jersey. — New Jersey Zinc, etc., Co. *v.* Lehigh Zinc, etc., Co., 59 N. J. L. 189, 35 Atl. 915; Gilbert *v.* Duncan, 29 N. J. L. 133; West *v.* State, 22 N. J. L. 212.

New York. — Fairchild *v.* Fairchild, 64 N. Y. 471 [*affirming* 5 Hun 407]; Maxwell *v.* Hofheimer, 81 Hun 551, 30 N. Y. Suppl. 1090; Bowen *v.* Newport Nat. Bank, 11 Hun 226; Daniels *v.* Smith, 5 Silv. Supreme 117, 8 N. Y. Suppl. 128 [*affirmed* in 130 N. Y. 696, 29 N. E. 1098]; Patton *v.* Dodge, 2 Thomps. & C. 229; Engel *v.* Eastern Brewing Co., 19 Misc. 632, 44 N. Y. Suppl. 391; Sommer *v.* Oppenheim, 19 Misc. 605, 44 N. Y. Suppl. 396; McFadden *v.* Kingsbury, 11 Wend. 667; Mumford *v.* Bowne, Anth. N. P. 40. See also Souls *v.* Lowenthal, 40 Misc. 186, 81 N. Y. Suppl. 622.

North Carolina. — Belding *v.* Archer, 131 N. C. 287, 42 S. E. 800; Archer *v.* Hooper, 119 N. C. 581, 26 S. E. 143; Carden *v.* McConnell, 116 N. C. 875, 21 S. E. 923; Faulcon *v.* Johnston, 102 N. C. 264, 9 S. E. 394, 11 Am. St. Rep. 737; Brem *v.* Allison, 68 N. C. 412; Pollock *v.* Wilcox, 68 N. C. 46; Oates *v.* Kendall, 67 N. C. 241; Page *v.* Einstein, 52 N. C. 147.

Oregon. — See McBee *v.* Ceasar, 15 Oreg. 62, 13 Pac. 652.

Pennsylvania. — Howser *v.* Com., 51 Pa. St. 332; Grier *v.* Sampson, 27 Pa. St. 183.

South Carolina. — Elrod *v.* Cochran, 59 S. C. 467, 38 S. E. 122.

Texas. — Gooch *v.* Addison, 13 Tex. Civ. App. 76, 36 S. W. 83.

Washington. — Seattle Land Co. *v.* Day, 2 Wash. St. 451, 27 Pac. 74.

Wisconsin. — Gordon *v.* Mulhare, 13 Wis. 22.

United States. — Scullin *v.* Harper, 78 Fed. 460, 24 C. C. A. 169; Foster *v.* Cleveland, etc., R. Co., 56 Fed. 434; Andrews *v.* Creegan, 7 Fed. 477, 19 Blatchf. 113.

See 20 Cent. Dig. tit. "Evidence," § 528.

In an action to recover the value of services, the value which defendant placed on the services may be shown by parol evidence that a promissory note was given by defendant, payable after his death, and the note need not be produced or accounted for. Jack *v.* McKee, 9 Pa. St. 235.

34. *Alabama.* — Curtis *v.* Parker, 136 Ala. 217, 33 So. 935; Davis *v.* Walker, 125 Ala. 325, 27 So. 313; East *v.* Pace, 57 Ala. 521.

Georgia. — Fountain *v.* Anderson, 33 Ga. 372.

record evidence ought to be produced, where the record is not a part of the fact to be proved but is merely a collateral or subsequent memorial thereof.[35]

f. Admissions as to Contents of Writings and Records. It has been held in many jurisdictions that the best evidence rule does not apply to parol admissions *in pais* and against interest, or acts equivalent thereto, and that such admissions are competent as primary evidence against the party making them, although they involve what must necessarily be contained in a written instrument,[36] in a corporate vote,[37] or in a public record.[38] In other jurisdictions, however, the best evidence rule is applied to parol proof of admissions by a party to the same extent as it is applied to other parol evidence; and the admissions are competent evidence only where other parol evidence of the fact to be proved would be competent.[39] But the rule last stated has been held not to apply to exclude the

Missouri.— State *v.* Scott, 31 Mo. 121.

Pennsylvania.— Helfrick *v.* Stein, 17 Pa. St. 143. *Compare* Snyder *v.* Snyder, 6 Binn. 483, 6 Am. Dec. 493.

Tennessee.— Stewart *v.* Massengale, 1 Overt. 479.

Texas.— Parker *v.* Chancellor, 78 Tex. 524, 15 S. W. 157.

But see Angell *v.* Rosenbury, 12 Mich. 241.

35. Wabash, etc., Canal *v.* Reinhart, 22 Ind. 463; Grady *v.* Desobry, 21 La. Ann. 132; Howser *v.* Com., 51 Pa. St. 332.

36. *Colorado.*— See Denver, etc., R. Co. *v.* Wilson, 4 Colo. App. 335, 36 Pac. 67.

Connecticut.— Morey *v.* Hoyt, 62 Conn. 542, 26 Atl. 127, 19 L. R. A. 611. See also Davis *v.* Kingsley, 13 Conn. 285; Edgerton *v.* Edgerton, 8 Conn. 6.

Indiana.— Combs *v.* Union Trust Co., 146 Ind. 688, 46 N. E. 16.

Iowa.— See Work *v.* McCoy, 87 Iowa 217, 54 N. W. 140.

Maine.— Blackington *v.* Rockland, 66 Me. 332.

Maryland.— Maurice *v.* Worden, 54 Md. 233, 39 Am. Rep. 384.

Massachusetts.— Loomis *v.* Wadhams, 8 Gray 557; Smith *v.* Palmer, 6 Cush. 513. But see Hope Mut. L. Ins. Co. *v.* Chapman, 6 Gray 75.

Michigan.— See New York Cent. Ins. Co. *v.* Watson, 23 Mich. 486.

Mississippi.— See Williams *v.* Brickell, 37 Miss. 682, 75 Am. Dec. 88.

Ohio.— Edgar *v.* Richardson, 33 Ohio St. 581, 31 Am. Rep. 571; Wolverton *v.* State, 16 Ohio 173, 47 Am. Dec. 373.

South Carolina.— Hodges *v.* Tarrant, 31 S. C. 608, 9 S. E. 1038.

Texas.— Hoefling *v.* Hambleton, 84 Tex. 517, 19 S. W. 689. *Compare* Majors *v.* Goodrich, (Civ. App. 1900) 54 S. W. 919.

Vermont.— Curtis *v.* Ingham, 2 Vt. 287.

Virginia.— Taylor *v.* Peck, 21 Gratt. 11.

United States.— Paige *v.* Loring, 18 Fed. Cas. No. 10,672, 1 Holmes 275.

England.— Reg. *v.* Basingstoke, 14 Q. B. 611, 68 E. C. L. 611; Newhall *v.* Holt, 4 Jur. 610, 9 L. J. Exch. 293, 6 M. & W. 662; Howard *v.* Smith, 10 L. J. C. P. 245, 3 M. & G. 254, 3 Scott N. R. 574, 42 E. C. L. 139; Slatterie *v.* Pooley, 10 L. J. Exch. 8, 6 M. & W. 664.

Canada.— Rogers *v.* Card, 7 U. C. C. P. 89.

See 20 Cent. Dig. tit. "Evidence," § 560. And see EVIDENCE, V, B, 4, a [16 Cyc. 942].

In the leading case, Slatterie *v.* Pooley, 10 L. J. Exch. 8, 6 M. & W. 664, 669 [*approved* in Taylor *v.* Peck, 21 Gratt. (Va.) 11], it was said by Parke, B.: "The reason why such parol statements are admissible, without notice to produce, or accounting for the absence of the written instrument, is, that they are not open to the same objection which belongs to parol evidence from other sources, where the written evidence might have been produced; for such evidence is excluded from the presumption of its untruth, arising from the very nature of the case, where better evidence is withheld; whereas what a party himself admits to be true, may reasonably be presumed to be so. The weight and value of such testimony is quite another question."

Where a debtor makes a written calculation, thereby ascertaining the balance due by him, and verbally admits his indebtedness for such amount, his admission may be proved without the production of the written calculation. Hodges *v.* Tarrant, 31 S. C. 608, 9 S. E. 1038.

To contradict document.—But it seems that a parol admission is not admissible for the purpose of contradicting documentary evidence. Harrison *v.* Moore [*cited* in 1 Phillips & A. Ev. p. 365].

37. Clarke *v.* Warwick Cycle Mfg. Co., 174 Mass. 434, 54 N. E. 887.

38. Combs *v.* Union Trust Co., 146 Ind. 688, 46 N. E. 16; Smith *v.* Palmer, 6 Cush. (Mass.) 513; Edgar *v.* Richardson, 33 Ohio St. 581, 31 Am. Rep. 571. *Contra,* in England. Scott *v.* Clare, 3 Campb. 236.

39. *Alabama.*— Fralick *v.* Presley, 29 Ala. 457, 65 Am. Dec. 413; Ware *v.* Roberson, 18 Ala. 105, contents of judgment rendered by justice of the peace. *Contra,* Sally *v.* Capps, 1 Ala. 121; Paysant *v.* Ware, 1 Ala. 160, adhering to the rule stated in the preceding paragraph of text. The case last cited was approved (*obiter*) in Bickley *v.* Bickley, 136 Ala. 548, 34 So. 946.

Arkansas.— Halliburton *v.* Fletcher, 22 Ark. 453; Bivens *v.* McElroy, 11 Ark. 23, 3 Am. Dec. 258.

Florida.— Bellamy *v.* Hawkins, 17 Fla. 750.

Georgia.— Flournoy *v.* Newton, 8 Ga. 306.

admissions of a party as to the existence and contents of an original document on file as a public record in a foreign country, where an alleged copy of the document is shown to him and he acknowledges its correctness.[40]

g. Proving Results of Voluminous Writings and Records. Where the results of voluminous facts contained in writings, or of the examination of many books and papers or records, are to be proved, and the necessary examination of this documentary evidence cannot be conveniently or satisfactorily made in court, it may be made by an expert accountant or other competent person and the results thereof may be proved by him, if the books, papers, or records themselves are properly in evidence, or their absence satisfactorily explained.[41] It seems, how-

Illinois.— Prussing *v.* Jackson, 208 Ill. 85, 69 N. E. 771 [*reversing* 85 Ill. App. 324].

Kentucky.— See Rees *v.* Lawless, 4 Litt. 218.

Louisiana.— Clark *v.* Slidell, 5 Rob. 330.

Minnesota.— See Horton *v.* Chadbourn, 31 Minn. 322, 17 N. W. 865, where it was sought to impeach the credibility of a witness by admissions contained in a letter.

Missouri.— Bank of North America *v.* Crandall, 87 Mo. 208 [*reversing* 13 Mo. App. 597].

New Jersey.— Cumberland Mut. F. Ins. Co. *v.* Giltinan, 48 N. J. L. 495, 7 Atl. 424, 57 Am. Rep. 586, holding, however, that where the admission of a party insured was contained in a written proof of loss made under oath, and set forth the policies existing on the premises, this document was admissible to show the existence of the policies without producing them. This evidence was considered not as an ordinary admission, but as an admission so formal and so accredited as to amount to an admission of law intended to dispense with primary evidence.

New York.— Sherman *v.* People, 13 Hun 575; Welland Canal Co. *v.* Hathaway, 8 Wend. 480, 24 Am. Dec. 51; Hasbrouck *v.* Baker, 10 Johns. 248. See also Bryant *v.* Woodruff, 5 N. Y. Leg. Obs. 139. *Compare* Langdon *v.* New York, 59 Hun 434, 13 N. Y. Suppl. 864 [*affirmed* in 133 N. Y. 628, 31 N. E. 98].

North Carolina.— Threadgill *v.* White, 33 N. C. 591.

Pennsylvania.— Com. *v.* County Prison, 11 Wkly. Notes Cas. 341. But see Conrad *v.* Farrow, 5 Watts 536.

See 20 Cent. Dig. tit. "Evidence," § 560.

Admission in testimony.— But an admission, made by a party when in court and under examination, that a paper produced was a letter-press copy of an agreement he had signed and was a true copy of the original, was held to bind the party as an admission against interest and to make the evidence primary in its nature. Haas *v.* Storner, 21 Misc. (N. Y.) 661, 47 N. Y. Suppl. 1100. To the same effect see Barnett *v.* Wilson, 132 Ala. 375, 31 So. 521.

To contradict document.— Where this rule obtains, parol evidence of such admissions cannot of course be received to contradict positive documentary evidence. Clark *v.* Slidell, 5 Rob. (La.) 330.

Admissions as to contents of record.— In these jurisdictions of course the best evidence rule is applied to exclude parol evidence of a party's admission as to matters of record. Halliburton *v.* Fletcher, 22 Ark. 453; Bivens *v.* McElroy, 11 Ark. 23, 3 Am. Dec. 258; Bellamy *v.* Hawkins, 17 Fla. 750; Bank of North America *v.* Crandall, 87 Mo. 208 [*reversing* 13 Mo. App. 597]; Welland Canal Co. *v.* Hathaway, 8 Wend. (N. Y.) 480, 24 Am. Dec. 51; Com. *v.* County Prison, 11 Wkly. Notes Cas. (Pa.) 341. See also Jenner *v.* Joliffe, 6 Johns. (N. Y.) 9. But an admission by a witness that he had been convicted of petit larceny has been held sufficient to render him incompetent without the necessity of producing the record of his conviction, or a properly authenticated copy thereof. Cash *v.* Cash, 67 Ark. 278, 54 S. W. 744.

40. Cociancich *v.* Vazzoler, 48 N. Y. App. Div. 462, 62 N. Y. Suppl. 893 [*reviewing* and *distinguishing* the New York cases cited in the foregoing note].

41. *Arizona.*—Schumacher *v.* Pima County, (1901) 64 Pac. 490.

Arkansas.— Woodruff *v.* State, 61 Ark. 157, 32 S. W. 102.

California.— Cahill *v.* Baird, (1902) 70 Pac. 1061; Pacific Pav. Co. *v.* Gallett, 137 Cal. 174, 69 Pac. 985; People *v.* Dole, 122 Cal. 486, 55 Pac. 581, 68 Am. St. Rep. 50 [*reversing* (1898) 51 Pac. 945]. The foregoing cases were decided under statutory provisions embodying the rule stated in the text, Code Civ. Proc. § 1855, subd. 5. See also San Pedro Lumber Co. *v.* Reynolds, 121 Cal. 71, 53 Pac. 410.

Colorado.— New la Junta, etc., Co. *v.* Kreybill, 17 Colo. App. 26, 67 Pac. 1026.

Connecticut.— Elmira Roofing Co. *v.* Gould, 71 Conn. 629, 42 Atl. 1002.

Illinois.— North America Guarantee Co. *v.* Mutual Bldg., etc., Assoc., 57 Ill. App. 254; West Chicago Alcohol Works *v.* Sheer, 8 Ill. App. 367.

Indiana.— Chicago, etc., R. Co. *v.* Wolcott, 141 Ind. 267, 39 N. E. 451, 50 Am. St. Rep. 320; Culver *v.* Marks, 122 Ind. 554, 23 N. E. 1086, 17 Am. St. Rep. 377, 7 L. R. A. 489; Hollinsworth *v.* State, 111 Ind. 289, 12 N. E. 490; Rogers *v.* State, 99 Ind. 218.

Iowa.— State *v.* Brady, 100 Iowa 191, 69 N. W. 290, 62 Am. St. Rep. 560, 36 L. R. A. 693.

Louisiana.— State *v.* Mathis, 106 La. 263, 30 So. 834.

ever, that the jury are not bound by the result thus ascertained, but may make their own calculations from the books and papers in evidence.[42]

h. Proving a Negative. Parol evidence to prove that an original private writing does not show a certain fact is as much forbidden by the best evidence rule as parol evidence to show that the writing does show the fact.[43]

D. Copy Secondary to Original Writing — 1. General Rule. Where the fact to be proved is evidenced by a written instrument or other writing, the original writing is the best evidence, and a copy is not admissible unless the original is produced or its absence satisfactorily explained, or unless a copy is made primary evidence by statute.[44]

Maryland.— Lynn *v.* Cumberland, 77 Md. 449, 26 Atl. 1001.

Michigan.— Hoffman *v.* Pack, 114 Mich. 1, 71 N. W. 1095.

Minnesota.—Wolford *v.* Farnham, 47 Minn. 95, 49 N. W. 528.

Missouri.— State *v.* Findley, 101 Mo. 217, 14 S. W. 185; Kennedy *v.* Holladay, 25 Mo. App. 503.

Nevada.— State *v.* Rhoades, 6 Nev. 352.

New York.—Greenfield *v.* Massachusetts Mut. L. Ins. Co., 47 N. Y. 430. See also Von Sachs *v.* Kretz, 72 N. Y. 548.

Oregon.— Scott *v.* Astoria R. Co., 43 Oreg. 26, 72 Pac. 594, 99 Am. St. Rep. 710, 62 L. R. A. 543; Salem Traction Co. *v.* Anson, 41 Oreg. 562, 67 Pac. 1015, 69 Pac. 675; Hill Annot. Laws Oreg. § 691, subd. 5.

Texas.—Davis *v.* Harper, 17 Tex. Civ. App. 88, 42 S. W. 788.

United States.—Burton *v.* Driggs, 20 Wall. 125, 22 L. ed. 299. See also Northern Pac. R. Co. *v.* Keyes, 91 Fed. 47.

Compare Quinby *v.* Ayres, (Nebr. 1901) 95 N. W. 464.

In Massachusetts evidence of the character indicated is admissible in the discretion of the court. Bicknell *v.* Mellett, 160 Mass. 328, 35 N. E. 1130; Jordan *v.* Osgood, 109 Mass. 457, 12 Am. Rep. 731; Boston, etc., R. Corp. *v.* Dana, 1 Gray 83.

A state treasurer's official books which are public records is within the rule stated in the text. State *v.* Rhoades, 6 Nev. 352.

Negative evidence.— The rule stated in the text applies also where the object is to prove not that the books do but that they do not show certain facts. Burton *v.* Driggs, 2 Wall. (U. S.) 125, 22 L. ed. 299.

Tabulated statements of the results of voluminous documents have been held admissible according to the principle announced in the text, when the original documents are subject to the examination of the adverse party. Louisville Bridge Co. *v.* Louisville, etc., Co., 75 S. W. 285, 25 Ky. L. Rep. 405. See also Northern Pac. R. Co. *v.* Keyes, 91 Fed. 47.

If the books or papers are not produced and if it is impossible or very inconvenient to produce them, their contents must be proved by a properly authenticated copy before parol testimony can be admitted to prove the result of a person's examination of them. Howard *v.* Russell, 75 Tex. 171, 12 S. W. 525; Fox *v.* Baltimore, etc., R. Co., 34 W. Va. 466, 12 S. E. 757. See also Poor *v.* Robinson, 13 Bush (Ky.) 290; Quinby *v.* Ayres, (Nebr. 1901) 95 N. W. 464; Bee Pub. Co. *v.* World Pub. Co., 59 Nebr. 713, 82 N. W. 28. *Compare* Wolford *v.* Farnham, 47 Minn. 95, 49 N. W. 528.

42. West Chicago Alcohol Works *v.* Sheer, 8 Ill. App. 367; Lynn *v.* Cumberland, 77 Md. 449, 26 Atl. 1101.

43. Aspinwall *v.* Chisholm, 109 Ga. 437, 34 S. E. 568; Holliday *v.* Griffith, 108 Ga. 803, 34 S. E. 126. See also Adams *v.* Fitzgerald, 14 Ga. 36. *Compare* Bessemer Land, etc., Co. *v.* Jenkins, 111 Ala. 135, 18 So. 565, 56 Am. St. Rep. 26.

44. *Alabama.*— Hallett *v.* Eslava, 3 Stew. & P. 105.

Arkansas.— Hartford F. Ins. Co. *v.* Enoch, (1903) 77 S. W. 899.

California.— Ord *v.* McKee, 5 Cal. 515.

Connecticut.—Smith *v.* Holebrook, 2 Root 45.

Delaware.— Carnon *v.* Kinney, 3 Harr. 317.

Georgia.— Morgan *v.* Jones, 24 Ga. 155; Robinson *v.* Bealle, 20 Ga. 275.

Illinois.— Matteson *v.* Noyes, 25 Ill. 591.

Indiana.— Gimbel *v.* Hufford, 46 Ind. 125.

Iowa.— Ruthorn *v.* Clarke, 109 Iowa 25, 79 N. W. 454; Byington *v.* Oaks, 32 Iowa 488.

Kansas.—Central Branch Union Pac. R. Co. *v.* Walters, 24 Kan. 504.

Kentucky.— Beall *v.* Barclay, 10 B. Mon. 261.

Louisiana.— Landry *v.* Klopman, 13 La. Ann. 345; Millaudon *v.* McDonough, 18 La. 102; Lum *v.* Kelso, 3 La. 64; Wells *v.* McMaster, 5 Rob. 154; Coleman *v.* Breaud, 6 Mart. N. S. 207; Norwood *v.* Green, 5 Mart. N. S. 175.

Maine.— Elwell *v.* Cunningham, 74 Me. 127.

Maryland.— Maurice *v.* Worden, 54 Md. 233, 39 Am. Dec. 384; Hayward *v.* Carroll, 4 Harr. & J. 518.

Massachusetts.— Washington County Mut. Ins. Co. *v.* Dawes, 6 Gray 376; Bogart *v.* Brown, 5 Pick. 18; Torrey *v.* Fuller, 1 Mass. 524.

Michigan.— Woods *v.* Burke, 67 Mich. 674, 39 N. W. 798.

Mississippi.— Freeland *v.* McCaleb, 2 How. 756.

Missouri.— Carr *v.* Carr, 36 Mo. 408; Lewin *v.* Dillie, 17 Mo. 64.

Montana.— Stapleton *v.* Pease, 2 Mont. 550.

2. Applications of Rule. The foregoing rule[45] applies to exclude as secondary evidence copies of contracts of partnership, hiring, and other contracts,[46]

Nebraska.— Watson *v.* Roode, 30 Nebr. 264, 46 N. W. 491.

New Hampshire.— Wallace *v.* Goodall, 18 N. H. 439.

New Jersey.— Bozorth *v.* Davidson, 3 N. J. L. 617.

New York.— Marcly *v.* Shults, 29 N. Y. 346; Crane *v.* Bennett, 77 N. Y. App. Div. 102. 79 N. Y. Suppl. 66; Reilly *v.* Lee, 16 N. Y. Suppl. 313; Myers *v.* Long Island R. Co., 10 N. Y. St. 430.

North Carolina.— Egerton *v.* Wilmington, etc., R. Co., 115 N. C. 645, 20 S. E. 184.

Pennsylvania.—Porter *v.* Wilson, 13 Pa. St. 641; Hart *v.* Yunt, 1 Watts 253; Sweigart *v.* Lowmarter, 14 Serg. & R. 200.

Texas.— Boydston *v.* Morris, 71 Tex. 697, 10 S. W. 331; Hicks *v.* Pogue, (Civ. App. 1903) 76 S. W. 786 (diagram taken from abstract book of county assessor of taxes); Miller *v.* Goodman, 15 Tex. Civ. App. 244, 40 S. W. 743; Prior *v.* North Texas Nat. Bank, (Civ. App. 1894) 29 S. W. 84.

Virginia.— Lunsford *v.* Smith, 12 Gratt. 554. *Compare* Rea *v.* Trotter, 26 Gratt. 585.

Wisconsin.— Miller *v.* Crawford County, 106 Wis. 210, 82 N. W. 175.

United States.— Anglo-American Packing, etc., Co. *v.* Cannon, 31 Fed. 313; The Alice, 12 Fed. 923; Comstock *v.* Carnley, 6 Fed. Cas. No. 3,081, 4 Blatchf. 58. *Compare* Chicago *v.* Le Moyne, 119 Fed. 662, 56 C. C. A. 278.

England.— Nodin *v.* Murray, 3 Campb. 228, 13 Rev. Rep. 756; Pardoe *v.* Price, 14 L. J. Exch. 212, 13 M. & W. 267.

See 20 Cent. Dig. tit. "Evidence," § 561.

Word "copy" in a deposition.— While the word "copy," as generally used, presumes an original from which it is taken, this is not always true; and when this word is used in a deposition with reference to a writing it is a question of fact whether the writing is an original or a copy. Catron *v.* German Ins. Co., 67 Mo. App. 544, where one of two duplicate originals was marked "copy"; Banks *v.* Richardson, 47 N. C. 109, where the word was used with reference to a telegram.

If a copy is admitted and it afterward appears that the original is in the hands of plaintiff, the copy should be withdrawn. Gimbel *v.* Hufford, 46 Ind. 125. It is proper, however, for a witness whose deposition is taken to identify a written instrument and attach a copy thereof to the deposition; this part of the deposition should not be suppressed, for the absence of the original instrument may be accounted for at the trial and the copy thus be rendered admissible. Gimbel *v.* Hufford, 46 Ind. 125. See also Baltimore, etc., R. Co. *v.* McWhinney, 36 Ind. 436. See, generally, Depositions.

A memorandum is inadmissible, even if it be a copy made by the witness himself from his own original memoranda. Green *v.* Caulk, 16 Md. 556.

Signature to advertisement published in newspaper.— Where plaintiff offered in evidence an advertisement published in a newspaper and purporting to have been signed by defendant and others, and defendant denied that he signed any advertisement it was held that the original paper signed by defendant must be produced or its absence satisfactorily explained before the advertisement published in the newspaper was admissible. McConachy *v.* Centre, etc., Turnpike Co., 1 Penr. & W. (Pa.) 426.

Admissions.— It has been held that the admission by the adverse party that a letter corresponded with a written contract which had been entered into by the parties will not authorize the letter to be read in evidence, to prove the contract, without accounting satisfactorily for the omission to produce the written instrument, of which the letter is at best only a copy. Fletcher *v.* Weisman, 1 Ala. 602. On the other hand it has been held that, in an action on an account where a copy of the book of original entries is admitted to be correct, the copy is admissible in evidence without producing the book; the copy by virtue of the admission becoming competent evidence. Work *v.* McCoy, 87 Iowa 217, 54 N. W. 140. See also *supra*, XV, C, 3, f.

Tax roll secondary to original assessment.— To show that a person was the owner of certain property, it was held error to admit the tax rolls to show that he had had the property assessed in his own name unless it was first shown that the original as signed and sworn to by him could not be produced. Weatherford First Nat. Bank *v.* Bruce, (Tex. Civ. App. 1900) 55 S. W. 126. And see, generally, Taxation.

Record of instrument.— Where a statute expressly makes the record of an instrument *prima facie* evidence of the facts therein stated, such record, when offered in evidence, is not subject to the objection that it is secondary. Grand Forks First M. E. Church *v.* Fadden, 8 N. D. 162, 77 N. W. 615.

45. See *supra*, XV, D, 1.

46. *Indiana.*—Manson *v.* Blair, 15 Ind. 242.

Kansas.— Waterville *v.* Hughan, 18 Kan. 473.

Kentucky.— Davidson *v.* Davidson, 10 B. Mon. 115.

Massachusetts.— Bogart *v.* Brown, 5 Pick. 18, contract of partnership.

Michigan.— Woods *v.* Burke, 67 Mich. 674, 35 N. W. 798.

Pennsylvania.— Porter *v.* Wilson, 13 Pa. St. 641 (articles of partnership); Donath *v.* Insurance Co. of North America, 4 Yeates 275.

Wisconsin.— Fisk *v.* Tank, 12 Wis. 276, 78 Am. Dec. 737.

See 20 Cent. Dig. tit. "Evidence." § 567.

Where a "profile" of work was referred to by parties when making a contract for grading a railroad, a profile proved by a witness to be made from the same data and measure-

bonds,[47] bank-bills,[48] negotiable instruments,[49] chattel mortgages,[50] assignments,[51] accounts and books of account,[52] letters, including letter-press copies,[53] tele-

ments cannot be admitted, unless the absence of the original is first accounted for. Currier *v.* Boston, etc., R. Co., 31 N. H. 209.

Where a copy of a prior writing is attached to and incorporated in a written contract, it is admissible as primary evidence without accounting for the absence of the original. Comer *v.* Comer, 120 Ill. 420, 11 N. E. 848. See also Hauberger *v.* Root, 6 Watts & S. (Pa.) 431.

A blank for a contract of sale on instalments, although of the kind used in the seller's business, is inadmissible at least without showing that the original contract actually made, or a certified copy of the record of the same, is not obtainable. Phillips *v.* Trowbridge Furniture Co., 86 Ga. 699, 13 S. E. 19. *Compare* Fogle *v.* Lycoming Mut. Ins. Co., 3 Grant (Pa.) 77.

Record as primary evidence.—Where a statute (Ind. Rev. St. (1843) p. 518) required that a sworn account be made of administrators' sales and that the account be filed with the clerk of the probate court, to be preserved as evidence, it was held that the account thus made and filed was admissible as primary evidence to prove a sale made by an administrator, without producing the original memorandum from which the account was made or accounting for its absence. Meek *v.* Spencer, 8 Ind. 118. As to documents and records made admissible as primary evidence by statute see *supra*, XIV.

47. Monts *v.* Stephens, 43 Ala. 217; Selden *v.* Delaware, etc., Canal Co., 29 N. Y. 634.

48. Robinson *v.* Bealle, 20 Ch. 275.

49. Smith *v.* Holebrook, 2 Root (Conn.) 45; Dumont *v.* McCracken, 6 Blackf. (Ind.) 355; Beall *v.* Barclay, 10 B. Mon. (Ky.) 261; Patriotic Bank *v.* Coote, 18 Fed. Cas. No. 10,807, 3 Cranch C. C. 169.

50. A copy of a chattel mortgage is secondary evidence, under the Texas statute (2 Sayles Rev. St. art. 3190*b*, § 3), providing that a copy of a chattel mortgage duly filed for registration and certified to by the clerk in whose office it has been filed "shall be received in evidence of the fact that such instrument . . . was received and filed according to the indorsements of the clerk thereon, but of no other fact." Boydston *v.* Morris, 71 Tex. 697, 699, 10 S. W. 331.

51. Gaines *v.* Page, 15 La. Ann. 108 (assignment of firm property); Hayward *v.* Carroll, 4 Harr. & J. (Md.) 518 (assignment of mortgage); Rauh *v.* Scholl, 12 Wash. 135, 40 Pac. 726 (assignment of lease).

52. *Delaware.*—Bunting *v.* White, 3 Houst. 551.

Georgia.— Cloud *v.* Hartridge, 28 Ga. 272.

Illinois.— McDavid *v.* Ellis, 78 Ill. App. 381.

Iowa.— Creswell *v.* Slack, 68 Iowa 110, 26 N. W. 42; Halstead *v.* Cuppy, 67 Iowa 600, 25 N. W. 820; Peck *v.* Parchen, 52 Iowa 46, 2 N. W. 597; Churchill *v.* Fulliam, 8 Iowa 45.

Louisiana.— Byrne *v.* Grayson, 15 La. Ann. 457.

Mississippi.— Dyson *v.* Baker, 54 Miss. 24; Moody *v.* Roberts, 41 Miss. 74.

Missouri.— Ritchie *v.* Kinney, 46 Mo. 298.

New York.— Smith *v.* Castle, 81 N. Y. App. Div. 638, 81 N. Y. Suppl. 18; Rouss *v.* McDowell, 88 Hun 532, 34 N. Y. Suppl. 776; McCormick *v.* Mulvihill, 1 Hilt. 131; Reddington *v.* Gilman, 1 Bosw. 235.

Texas.— Theus *v.* Jipson, 3 Tex. App. Civ. Cas. § 189. *Compare* Converse *v.* McKee, 14 Tex. 20.

United States.— Ellicott *v.* Chapman, 8 Fed. Cas. No. 4,385, 1 Cranch C. C. 419; Gale *v.* Norris, 9 Fed. Cas. No. 5,190, 2 McLean 469; Lombard *v.* McLean, 15 Fed. Cas. No. 8,471, 4 Cranch C. C. 623; Thorp *v.* Orr, 23 Fed. Cas. No. 14,006, 2 Cranch C. C. 335, balance of account.

See 20 Cent. Dig. tit. "Evidence," § 562.

Compare Rea *v.* Trotter, 26 Gratt. (Va.) 585.

Copies attached to depositions.— Copies of account-books of original entry and of a receipt attached to depositions are not objectionable on the ground that the originals instead of copies should be attached, where the originals are private property of witnesses having no interest in the litigation, and are produced before the commissioner taking the depositions. Hauenstein *v.* Gillespie, 73 Miss. 742, 19 So. 673, 55 Am. St. Rep. 569.

53. *Alabama.*— North Alabama Home Protection *v.* Whidden, 103 Ala. 203, 15 So. 567.

California.— Spottiswood *v.* Weir, 66 Cal. 525, 6 Pac. 381, press-copies.

Georgia.— Watkins *v.* Paine, 57 Ga. 50, press-copies.

Illinois.— King *v.* Worthington, 73 Ill. 161.

Kentucky.— Heilman Milling Co. *v.* Hotaling, 53 S. W. 655, 21 Ky. L. Rep. 950, press-copies.

Maryland.— Marsh *v.* Hand, 35 Md. 123.

Missouri.— Traber *v.* Hicks, 131 Mo. 180, 32 S. W. 1145.

Nebraska.— Westinghouse Co. *v.* Tilden, 56 Nebr. 129, 76 N. W. 416 (press-copies); Watson *v.* Roode, 30 Nebr. 264, 46 N. W. 491; Delaney *v.* Errickson, 11 Nebr. 533, 10 N. W. 451, 10 Nebr. 492, 6 N. W. 600, 35 Am. Rep. 487 (press-copies).

New York.— Foot *v.* Bentley, 44 N. Y. 166, 4 Am. Rep. 652 (press-copies); Heller *v.* Heine, 38 Misc. 816, 78 N. Y. Suppl. 887 (press-copies).

North Carolina.— Churchill *v.* Lee, 77 N. C. 341, 346 (per Bynum, J.); Murphy *v.* McNiel, 19 N. C. 244.

Pennsylvania.— Patton *v.* Ash, 7 Serg. & R. 116.

Texas.— Thompson-Houston Electric Co. *v.* Berg, 10 Tex. Civ. App. 200, 30 S. W. 454; Texas Min., etc., Co. *v.* Arkell, (Civ. App. 1895) 29 S. W. 816.

grams,[54] entries in a family bible showing a person's age,[55] agreements to sub-

United States.— Anglo-American Packing, etc., Co. *v.* Cannon, 31 Fed. 313 (press-copy); Vasse *v.* Mifflin, 28 Fed. Cas. No. 16,895, 4 Wash. 519.

England.— Nodin *v.* Murray, 3 Campb. 228, 13 Rev. Rep. 796, press-copy.

See 20 Cent. Dig. tit. "Evidence," § 566.

But as against a party who wrote the letters, press-copies taken from his own letter-book have been held admissible. Truitt's Estate, 10 Phila. (Pa.) 16 [*distinguishing* Foot *v.* Bentley, 44 N. Y. 166, 4 Am. Rep. 652].

Letter written from draft.— Where a person directs a letter to be written from a draft prepared by himself and the letter is written and sent accordingly, this letter and not the original draft is the primary evidence, for it constitutes the communication between the parties. McDonald *v.* Carson, 94 N. C. 497.

54. *Illinois.*— Matteson *v.* Noyes, 25 Ill. 591; Chisholm *v.* Beaver Lake Lumber Co., 18 Ill. App. 131.

Indiana.— Western Union Tel. Co. *v.* Hopkins, 49 Ind. 223.

Maryland.— Smith *v.* Easton, 54 Md. 138, 39 Am. Rep. 355.

Texas.— Abernathy *v.* Hewlett, 2 Tex. App. Civ. Cas. § 805.

United States.— Anglo-American Packing, etc., Co. *v.* Cannon, 31 Fed. 313.

See 20 Cent. Dig. tit. "Evidence," § 566.

But the dots and dashes made on paper at the telegraph office cannot constitute the original of a message where the words of the message are put in writing by the operator. Banks *v.* Richardson, 47 N. C. 109.

Message given orally for transmission.— In order to exclude as a copy the message transmitted and delivered, it must appear that the message given for transmission was in writing, for there can be no copy of an oral communication. Banks *v.* Richardson, 47 N. C. 109.

What is original telegram.— The question whether a message delivered by a person to a telegraph company for transmission, or the telegram delivered by the company to the person to whom it is sent, is the original and primary evidence of the contents of the message depends upon the further question whether the telegraph company is the agent of the sender, or of the recipient of the message. The rule is that in the absence of evidence of mistake in transmission, if the person sending the message takes the initiative so that the telegraph company is to be regarded as his agent, the message actually delivered at the end of the line is the original and primary evidence, but if the person to whom the message is sent takes the risk of its transmission, or is the employer of the telegraph company, the message delivered to the operator is the original.

Illinois.— Anheuser-Busch Brewing Assoc. *v.* Hutmacher, 127 Ill. 652, 21 N. E. 626, 4 L. R. A. 575 [*affirming* 29 Ill. App. 316]; Morgan *v.* People, 59 Ill. 58. See also Chisholm *v.* Beaver Lake Lumber Co., 18 Ill. App. 131.

Maryland.— Smith *v.* Easton, 54 Md. 138. 39 Am. Rep. 355.

Massachusetts.— Nickerson *v.* Spindell, 164 Mass. 25, 41 N. E. 105.

Minnesota.— Magie *v.* Herman, 50 Minn. 424, 52 N. W. 909, 36 Am. St. Rep. 660; Wilson *v.* Minneapolis, etc., R. Co., 31 Minn. 481, 18 N. W. 291.

Texas.— See Abernathy *v.* Hewlett, 2 Tex. App. Civ. Cas. § 805.

Vermont.—Durkee *v.* Vermont Cent. R. Co., 29 Vt. 127, the leading case on this point.

Wisconsin.— Saveland *v.* Green, 40 Wis. 431 [*distinguishing* Matteson *v.* Noyes, 25 Ill. 591; Williams *v.* Brickell, 37 Miss. 682, 75 Am. Dec. 88; Howley *v.* Whipple, 48 N. H. 487; Kinghorne *v.* Montreal Tel. Co., 18 U. C. Q. B. 60].

See 20 Cent. Dig. tit. "Evidence," § 566.

In an action against a telegraph company to recover damages or a statutory penalty for failure to transmit and deliver a message with due diligence, the issue being not as to the contents of the telegram but as to the failure or delay in transmission and delivery, the message actually delivered by the company is admissible in evidence without producing or explaining the absence of the message delivered by the sender to the company. Western Union Tel. Co. *v.* Blance, 94 Ga. 431, 19 S. E. 255; Western Union Tel. Co. *v.* Bates, 93 Ga. 352, 20 S. E. 639; Conyers *v.* Postal Tel. Cable Co., 92 Ga. 619, 19 S. E. 253, 44 Am. St. Rep. 100; Western Union Tel. Co. *v.* Fatman, 73 Ga. 285, 54 Am. Rep. 877; Western Union Tel. Co. *v.* Cline, 8 Ind. App. 364, 35 N. E. 564. See also Western Union Tel. Co. *v.* Smith, (Tex. Civ. App. 1894) 26 S. W. 216. *Compare* Western Union Tel. Co. *v.* Hopkins, 49 Ind. 223, holding that the despatch delivered to the operator was the original and should have been produced. This case was disapproved in Reliance Lumber Co. *v.* Western Union Tel. Co., 58 Tex. 394, 44 Am. Rep. 620. But it has been held that if in such an action the contents of the telegram sent are material, the loss by plaintiff of the telegram received will not lay the foundation for introducing parol evidence of its contents without accounting by notice to produce, or otherwise, for the non-production of the telegram written and delivered by the sender for transmission. Western Union Tel. Co. *v.* Hines, 94 Ga. 430, 20 S. E. 349 [*disapproving* and *limiting* Cincinnati, etc., R. Co. *v.* Disbrow, 76 Ga. 253]. But see Western Union Tel. Co. *v.* Thompson, 18 Tex. Civ. App. 279, 44 S. W. 402. See *infra*, XV, F, 3, b, (I); XV, G.

55. Ryerson *v.* Grover, 1 N. J. L. 458.

Entries copied into bible.— Where entries in a family bible of the ages of members of the family are copies from another book containing the original entries, the bible is excluded as secondary evidence within the

mit to arbitration, and awards rendered pursuant thereto,[56] bills of lading,[57] way-bills issued by a railroad company,[58] manifests of vessels,[59] statements of loss required to be given to insurers,[60] and resolutions of directors of a corporation.[61] Where the title to real property is in issue, the rule applies to exclude copies of grants,[62] deeds,[63] mortgages,[64] and contracts to convey.[65] But the rule has been held inapplicable where the copy was made by the party against whom it is attempted to be used, and was furnished by him to the party on whose behalf it is offered;[66] and where the copy is set forth in an answer in equity in compliance with an interrogatory and a demand made in the bill.[67] Likewise where a person

rule of the text. Curtis *v.* Patton, 6 Serg. & R. (Pa.) 135.

56. Davidson *v.* Davidson, 10 B. Mon. (Ky.) 115.

57. McMakin *v.* Weston, 64 Ind. 270; State *v.* Howe, 64 Ind. 18; Gimbel *v.* Hufford, 46 Ind. 125; Edgerton *v.* Wilmington, etc., R. Co., 115 N. C. 645, 20 S. E. 184; Wood *v.* Roach, 2 Dall. (Pa.) 180, 1 L. ed. 340, 1 Am. Dec. 276; The Alice, 12 Fed. 923.

58. Haas *v.* Chubb, 67 Kan. 787, 74 Pac. 230.

59. Pendery *v.* Crescent Mut. Ins. Co., 21 La. Ann. 410.

60. Hartford F. Ins. Co. *v.* Enoch, (Ark. 1903) 77 S. W. 899.

61. Ruthven *v.* Clarke, 109 Iowa 25, 79 N. W. 454.

62. Brooking *v.* Dearmond, 27 Ga. 58; Sutton *v.* McLoud, 26 Ga. 638.

63. *Alabama.*— Branch *v.* Smith, 114 Ala. 463, 21 So. 423; Potier *v.* Barclay, 15 Ala. 439; Smith *v.* Armistead, 7 Ala. 698.

California.— Poorman *v.* Miller, 44 Cal. 269.

Connecticut.— Cunningham *v.* Tracy, 1 Conn. 252.

Illinois.— Hanson *v.* Armstrong, 22 Ill. 442.

Iowa.— Courtright *v.* Deeds, 37 Iowa 503; Byington *v.* Oaks, 32 Iowa 488.

Kentucky.—Dickerson *v.* Talbot, 14 B. Mon. 60; Rees *v.* Lawless, 4 Litt. 218.

Louisiana.— Tesson *v.* Gusman, 26 La. Ann. 248.

Maine.— Elwell *v.* Cunningham, 74 Me. 127; Bird *v.* Bird, 40 Me. 392; White *v.* Dwinel, 33 Me. 320.

Missouri.— West *v.* West, 75 Mo. 204; Attwell *v.* Lynch, 39 Mo. 519.

South Carolina.— Malcolmson *v.* McKee, 1 Brev. 168.

Tennessee.— Saunders *v.* Harris, 5 Humphr. 345.

Texas.— Crafts *v.* Daugherty, 69 Tex. 477, 6 S. W. 850. See also Greer *v.* Richardson Drug Co., 1 Tex. Civ. App. 634, 20 S. W. 1127.

See 20 Cent. Dig. tit. "Evidence," § 564.

To prove fact of sale.— The rule has been applied even though the copy of the deed was offered merely to prove the fact of the sale and not as evidence of title in the grantee, where it appeared that the original was in the control of the person offering the copy. Sims *v.* Gray, 66 Mo. 613.

A judicial record showing an entry by the prothonotary that the sheriff had acknowledged a certain deed amounts to nothing more than an abstract of the deed. It is not even a copy, and is secondary evidence which, where the title is in issue, cannot be introduced in evidence unless the original deed is produced or its absence satisfactorily explained. Lodge *v.* Berrier, 16 Serg. & R. (Pa.) 297.

Boundaries of land conveyed.— Where a tract of land is conveyed with a reservation of a certain parcel thereof which has been previously conveyed by deed by the grantor to a third person, this prior deed is the best evidence of its contents; and hence the boundaries of the reserved tract so conveyed cannot be proved by a description in a deed of later date from the same grantor to the same grantee, even if given in lieu of the prior deed. Poorman *v.* Miller, 44 Cal. 269.

Record of establishment of lost deed.— Under Ga. Civ. Code (§ 3611) declaring that if an original deed be lost a copy may be established by the superior court of the county where the land lies, and when so established shall have all the effect of the original, it is held that, where a deed has been established by regular proceedings in court, a certified copy of the proceedings taken from the minutes and records of the court is admissible as original evidence in any controversy where the original deed would be admissible. Leggett *v.* Patterson, 114 Ga. 714, 40 S. E. 736.

64. Ord *v.* McKee, 5 Cal. 515; Roberts *v.* Haskell, 20 Ill. 59; Andrews *v.* Hooper, 13 Mass. 472; Hartmann *v.* Hoffman, 65 N. Y. App. Div. 443, 72 N. Y. Suppl. 982.

65. Woods *v.* Burke, 67 Mich. 674, 35 N. W. 798.

66. Moore *v.* Belloni, 42 N. Y. Super. Ct. 184; Truitt's Estate, 10 Phila. (Pa.) 16 [*distinguishing* Foot *v.* Bentley, 44 N. Y. 166, 4 Am. Rep. 652]; Carroll *v.* Peake, 1 Pet. (U. S.) 18, 7 L. ed. 34. See also White *v.* Herrman, 62 Ill. 73.

Blue prints of drawings by architect.— In an action by an architect for professional services in erecting a building, if the plans which he actually submitted were blue prints and the contract simply called for "plans," it is immaterial whether the plans submitted were the original drawings or merely facsimile copies thereof; and an objection that the blue prints are secondary evidence is untenable. Lincoln School Dist. *v.* Fiske, 61 Nebr. 3, 84 N. W. 401.

67. Farmers', etc., Bank *v.* Griffith, 2 Wis. 443, holding that under such circumstances the copy is primary and not secondary evi-

delivers to another a copy of a paper, but keeps the original, the original cannot be read in evidence to affect with knowledge of its contents the person to whom the copy is delivered unless notice to produce the copy is given.[68]

3. Photographs. Photographs of written instruments can be used only as secondary evidence. They are but copies which may or may not be facsimiles of their originals; and whether a photographic copy of a writing when offered in evidence is a mathematically exact reproduction of its original is a question of fact.[69]

4. Copy of a Copy. It is generally held that a copy of a copy of an original written instrument or other writing is not admissible in evidence unless the absence of both the original and the copy is satisfactorily explained.[70] But the contrary has been held upon the ground that there are no degrees in secondary evidence;[71] and where the original is lost or destroyed and it satisfactorily appears that the writing introduced as secondary evidence is in fact a correct copy of the original, it has been held admissible notwithstanding that it was made from a copy which is not produced and the absence of which is not explained.[72]

5. Duplicate, Originals, and Counterparts. Where an original instrument or writing is made or executed in duplicate or in a greater number of counterparts, each duplicate or counterpart is primary evidence and is admissible without the necessity of producing the other or accounting for its absence.[73] But the docu-

dence. See also Greenspau *v.* American Star Order, 1 Misc. (N. Y.) 406, 20 N. Y. Suppl. 945.

68. Com. *v.* Parker, 2 Cush. (Mass.) 212. See also *infra*, XV, F, 3.

69. *In re* Foster, 34 Mich. 21; Eborn *v.* Zimpelman, 47 Tex. 503, 26 Am. Rep. 315. See also U. S. *v.* Messman, 1 Cent. L. J. 121 Hence where the original writing is in court, it is not error to reject a photograph thereof. *In re* Foster, 34 Mich. 21; Crane *v.* Horton, 5 Wash. 479, 32 Pac. 223.

Photographs as evidence see *supra*, XIV, C, 11.

70. *Illinois.*— Crane Co. *v.* Tierney, 175 Ill. 79, 51 N. E. 715; White *v.* Herrman, 62 Ill. 73.

Indiana.— Crim *v.* Fleming, 123 Ind. 438, 24 N. E. 358.

Kansas.— Jobes *v.* Lows, (Sup. 1901) 66 Pac. 627.

Louisiana.— Chambers *v.* Haney, 45 La. Ann. 447, 12 So. 621; Mercier *v.* Harnan, 39 La. Ann. 94, 1 So. 410; Perkins *v.* Bard, 16 La. Ann. 443; Lum *v.* Kelso, 3 La. 64.

Maryland.— Maurice *v.* Worden, 54 Md. 233, 39 Am. Rep. 384; Green *v.* Caulk, 16 Md. 556.

Mississippi.— Carey *v.* Fulmer, 74 Miss. 729, 21 So. 752.

Pennsylvania.—Morris *v.* Vanderen, 1 Dall. 64, 1 L. ed. 38. *Compare* Phillips *v.* Tapper, 2 Pa. St. 323.

Texas.— Eppler *v.* Brown, (Civ. App. 1895) 30 S. W. 710.

United States.— U. S. *v.* The Paul Shearman, 27 Fed. Cas. No. 16,012, Pet. C. C. 98.

See 20 Cent. Dig. tit. "Evidence," §§ 561, 562. And see *supra*, XIV, B, 2, i.

Compare Jackson *v.* Cole, 4 Cow. (N. Y.) 587; Winn *v.* Patterson, 9 Pet. (U. S.) 663, 9 L. ed. 266.

Contract set forth in report of case.—What purports to be a contract of sale, contained in a report of the opinion of the supreme court on a former hearing of the case, is secondary evidence, and inadmissible, without proof of the loss or destruction of the original contract, or that the contract set out in such opinion as published is the same as that copied in the bill of exceptions. Hoyt *v.* Shipherd, 70 Ill. 309. *Compare* Taylor *v.* Com., 29 Gratt. (Va.) 780.

71. Goodrich *v.* Weston, 102 Mass. 362, 3 Am. Rep. 469, holding that a copy sworn to have been correctly made from a press-copy of a letter was admissible as secondary evidence without the necessity of producing the press-copy; the party introducing this copy having offered to produce the press-copy in court if desired, to which offer no reply was made. *Compare* Vinal *v.* Burrill, 16 Pick. (Mass.) 401. See *infra*, XV, G.

72. Cameron *v.* Peck, 37 Conn. 555; Fowler *v.* Hoffman, 31 Mich. 215; Winn *v.* Patterson, 9 Pet. (U. S.) 663, 9 L. ed. 266. See also Robertson *v.* Lynch, 18 Johns. (N. Y.) 459, 9 Am. Dec. 227. *Compare* White *v.* Herrman, 62 Ill. 73.

73. *Alabama.*— Westbrook *v.* Fulton, 79 Ala. 510, notices.

Illinois.— Gardner *v.* Eberhart, 82 Ill. 316, demands in action of forcible entry and detainer.

Indiana.— Weaver *v.* Shipley, 127 Ind. 526, 27 N. E. 146, lease.

Maryland.— Totten *v.* Bucy, 57 Md. 446.

Michigan.— Cleveland, etc., Co. *v.* Perkins, 17 Mich. 296, contract.

Missouri.— Catron *v.* German Ins. Co., 67 Mo. App. 544.

New York.— Hubbard *v.* Russell, 24 Barb. 404, letter.

South Dakota.— Zipp *v.* Colchester Rubber Co., 12 S. D. 218, 80 N. W. 367.

Vermont.— See Waterman *v.* Davis, 66 Vt. 83, 28 Atl. 664.

ment offered in evidence must be shown to be in fact a duplicate of the one not produced,[74] and secondary evidence of the contents of an instrument thus executed is not admissible until the absence of all the parts is satisfactorily explained.[75]

E. Grounds For Admission of Secondary Evidence — 1. Loss or Destruction of Primary Evidence — a. General Rule. Where the writing containing or constituting the primary evidence of the fact to be proved is satisfactorily shown to have been lost or destroyed without the fault of the party desiring to prove the fact, secondary evidence becomes admissible.[76]

b. Applications of Rule — (I) *To Private Writings.* It is obvious that

Wisconsin.— See Niagara F. Ins. Co. *v.* Whittaker, 21 Wis. 329.

United States.—See Anglo-American Packing, etc., Co. *v.* Cannon, 31 Fed. 313.

England.— Doe *v.* Pulman, 3 Q. B. 622, 6 Jur. 1122, 43 E. C. L. 895; Colling *v.* Trewick, 6 B. & C. 394, 9 D. & R. 456, 5 L. J. K. B. O. S. 132, 30 Rev. Rep. 366, 13 E. C. L. 183 (per Bagley, J.); Jory *v.* Orchard, 2 B. & P. 39, 5 Rev. Rep. 537 (notices); Surtees *v.* Hubbard, 4 Esp. 203, 6 Rev. Rep. 853 (notices); Gotlieb *v.* Danvers, 1 Esp. 455.

See 20 Cent. Dig. tit. "Evidence," §§ 564, 566.

Papers printed from the same press at the same time, such as notices, placards, and the like, are within the rule stated in the text. Manchester, etc., R. Co. *v.* Fisk, 33 N. H. 297; Rex *v.* Watson, 2 Stark. 116, 3 E. C. L. 341.

A telegram is a document executed in counterpart and each counterpart is primary evidence against the party executing it. Anglo-American Packing, etc., Co. *v.* Cannon, 31 Fed. 313.

Where each counterpart is directed to a different person whose name appears at the head of the paper, as in case of notices or demands, the name constitutes no part of the instrument, it being merely intended to designate the person to whom it should be delivered, and each counterpart is an original notwithstanding the variance in names. Gardner *v.* Eberhart, 82 Ill. 316.

Copy subsequently made and signed.— Where parties in executing a lease made but one original instrument, but afterward made a copy of the original and signed it, it was held that this copy was to all intents and purposes a duplicate original and was admissible in evidence without the necessity of explaining the absence of the lease first executed. Weaver *v.* Shipley, 127 Ind. 526, 27 N. E. 146.

74. Kyser *v.* Kansas City, etc., R. Co., 56 Iowa 207, 440, 9 N. W. 133.

75. Holden's Steam Mill Co. *v.* Westervelt, 67 Me. 446; Dyer *v.* Fredericks, 63 Me. 173; Poignard *v.* Smith, 8 Pick. (Mass.) 272; Wright *v.* Bogan, 2 N. C. 177 note; Rex *v.* Castleton, 6 T. R. 236.

76. *Alabama.*— Andrews *v.* Jones, 10 Ala. 460; Weir *v.* Hoss, 6 Ala. 881, copy of alleged libelous publication admitted.

Arkansas.— Steward *v.* Scott, 57 Ark. 153, 20 S. W. 1088.

California.— Caulfield *v.* Sanders, 17 Cal. 569; Bagley *v.* Eaton, 10 Cal. 126; Bagley *v.* McMickle, 9 Cal. 430.

Colorado.— Oppenheimer *v.* Denver, etc., R. Co., 9 Colo. 320, 12 Pac. 217.

Connecticut.—Brownell *v.* Palmer, 22 Conn. 107; Stoddard *v.* Mix, 14 Conn. 12; U. S. Bank *v.* Sill, 5 Conn. 106, 13 Am. Dec. 44. See also Jewet *v.* Worthington, 1 Root 226.

Florida.— Edwards *v.* Rives, 35 Fla. 89, 17 So. 416.

Georgia.— Baker *v.* Adams, 99 Ga. 135, 25 S. E. 28; Hines *v.* Johnston, 95 Ga. 629, 23 S. E. 470; Shaeffer *v.* Georgia R. Co., 66 Ga. 39; Schley *v.* Lyon, 6 Ga. 530.

Idaho.— Mills *v.* Glennon, 2 Ida. (Hasb.) 105, 6 Pac. 116.

Illinois.— Rudgear *v.* U. S. Leather Co., 206 Ill. 74, 69 N. E. 30 [*affirming* 108 Ill. App. 227]; Orne *v.* Cook, 31 Ill. 238; Granger *v.* Warrington, 8 Ill. 299; Palmer *v.* Logan, 4 Ill. 56; Petrue *v.* Wakem, 99 Ill. App. 463.

Indiana.— Curme *v.* Rauh, 100 Ind. 247; Langsdale *v.* Woollen, 99 Ind. 575. See also Lumbert *v.* Woodard, 144 Ind. 335, 43 N. E. 302, 55 Am. St. Rep. 175.

Indian Territory.— Missouri, etc., R. Co. *v.* Elliott, 2 Indian Terr. 407, 51 S. W. 1067.

Iowa.— Brier *v.* Davis, 122 Iowa 59, 96 N. W. 983; Davis *v.* Strohm, 17 Iowa 421.

Kansas.— Western Union Tel. Co. *v.* Collins, 45 Kan. 88, 25 Pac. 187, 10 L. R. A. 515; Stainbrook *v.* Drawer, 25 Kan. 383.

Kentucky.— Stokes *v.* Prescott, 4 B. Mon. 37; Grimes *v.* Talbot, 1 A. K. Marsh. 205; Drake *v.* Holbrook, 78 S. W. 158, 25 Ky. L. Rep. 1489; Moore *v.* Beale, 50 S. W. 850, 20 Ky. L. Rep. 2029; Kinney *v.* Bryen, 13 Ky. L. Rep. 784.

Louisiana.—Kidd's Succession, 52 La. Ann. 2113, 28 So. 353; Cochran *v.* Cochran, 46 La. Ann. 536, 15 So. 57; Billen *v.* White, 17 La. Ann. 10.

Maine.— Gerry *v.* Herrick, 87 Me. 219, 32 Atl. 882 (warrant for town taxes); Angier *v.* Smalley, 56 Me. 515 (certificate of debtor's exemption from execution).

Maryland.— Safe Deposit, etc., Co. *v.* Turner, 98 Md. 22, 55 Atl. 1023; Smith *v.* Steele, 1 Harr. & M. 419.

Massachusetts.—Hersey *v.* Jones, 128 Mass. 473; Taunton, etc., Turnpike Corp. *v.* Whiting, 10 Mass. 327, 6 Am. Dec. 124.

Michigan.— People *v.* Dennis, 4 Mich. 609, 69 Am. Dec. 338.

Minnesota.— Magie *v.* Herman, 50 Minn. 424, 52 N. W. 909, 36 Am. St. Rep. 660;

the rule just stated[77] is of necessity one of wide application. It admits secondary evidence of lost or destroyed private writings apparently of all kinds, among which may be mentioned deeds and other sealed instruments,[78]

Wilson *v.* Minneapolis, etc., R. Co., 31 Minn. 481, 18 N. W. 291; Molm *v.* Barton, 27 Minn. 530, 8 N. W. 765; Groff *v.* Ramsey, 19 Minn. 34; Board of Education *v.* Moore, 17 Minn. 412; Thayer *v.* Barney, 12 Minn. 502.

Mississippi.— Turner *v.* Thomas, 77 Miss. 864, 28 So. 803; Jelks *v.* Barrett, 52 Miss. 315; Adams *v.* Guice, 30 Miss. 397.

Missouri.—Morley *v.* Weakley, 86 Mo. 451; State *v.* Schooley, 84 Mo. 447; Wilkerson *v.* Allen, 67 Mo. 502; Morey *v.* Clopton, 103 Mo. App. 368, 77 S. W. 467; Brookshire *v.* Chillicothe Town Mut. F. Ins. Co., 91 Mo. App. 599; Wilson *v.* Reeves, 70 Mo. App. 30; Davis *v.* Kroyden, 60 Mo. App. 441; Lindauer *v.* Meyberg, 27 Mo. App. 181; Conn *v.* McCollough, 14 Mo. App. 584.

Montana.— Finch *v.* Kent, 24 Mont. 268, 61 Pac. 653.

Nebraska.— Larson *v.* Cox, (1903) 93 N. W. 1011; South Omaha *v.* Wrzesinski, 66 Nebr. 790, 92 N. W. 1045.

New Hampshire.— Scammon *v.* Scammon, 33 N. H. 52 (warrants for county taxes); Pickard *v.* Bailey, 26 N. H. 152.

New Jersey.— Johnson *v.* Arnwine, 42 N. J. L. 451, 36 Am. Rep. 527; Smith *v.* Axtell, 1 N. J. Eq. 494.

New Mexico.— Wagner *v.* Romero, 3 N. M. 167, 3 Pac. 50.

New York.— Enders *v.* Sternbergh, 2 Abb. Dec. 31, 1 Keyes 264, 33 How. Pr. 464; Dunning *v.* Roberts, 35 Barb. 463; Baker *v.* Squier, 3 Thomps. & C. 465; New York Car Oil Co. *v.* Richmond, 6 Bosw. 213, 10 Abb. Pr. 185, 19 How. Pr. 505; Holmes *v.* Rogers, 4 N. Y. St. 426; Bank of North America *v.* Embury, 21 How. Pr. 14; Ford *v.* Walsworth, 19 Wend. 334; Francis *v.* Ocean Ins. Co., 6 Cow. 404.

North Carolina.— Jennings *v.* Reeves, 101 N. C. 447, 7 S. E. 897. See also Gathings *v.* Williams, 27 N. C. 487, 44 Am. Dec. 49.

Ohio.— John *v.* John, Wright 584 [*affirmed* in 6 Ohio 272].

Oklahoma.— Randolph *v.* Hudson, 12 Okla. 516, 74 Pac. 946.

Pennsylvania.— Gould *v.* Lee, 55 Pa. St. 99; Raab *v.* Urick, 2 Wkly. Notes Cas. 53.

South Carolina.— Hunter *v.* Hunter, 63 S. C. 78, 41 S. E. 33, 90 Am. St. Rep. 663; Perry *v.* Jeffries, 61 S. C. 292, 39 S. E. 515; Cook *v.* Wood, 1 McCord 139.

South Dakota.— State *v.* Pierre, 15 S. D. 559, 90 N. W. 1047.

Tennessee.—Amis *v.* Marks, 3 Lea 568, certified copy of constable's bond admitted.

Texas.— Hunter *v.* Lanius, 82 Tex. 677, 18 S. W. 201; Oritz *v.* De Benavides, 61 Tex. 60; Lochridge *v.* Corbett, 31 Tex. Civ. App. 676, 73 S. W. 96; Coleman *v.* Waxahachie First Nat. Bank, (Civ. App. 1901) 64 S. W. 93; Judd *v.* State, 25 Tex. Civ. App. 418, 62 S. W. 543; Boyd *v.* Leith, (Civ. App. 1899) 50 S. W. 618.

Vermont.— Rogers *v.* Swanton, 54 Vt. 585; Spear *v.* Tilson, 24 Vt. 420; Gates *v.* Bowker, 18 Vt. 23; Braintree *v.* Battles, 6 Vt. 395. See also Warden *v.* Johnson, 11 Vt. 455.

Virginia.— Beirne *v.* Rosser, 26 Gratt. 537.

Washington.— State *v.* Champoux, 33 Wash. 339, 74 Pac. 557; Service *v.* Deming Imp. Co., 20 Wash. 668, 56 Pac. 837; Williams *v.* Miller, 1 Wash. Terr. 88.

West Virginia.— Edgell *v.* Conaway, 24 W. Va. 747.

Wisconsin.— Kelley, etc., Co. *v.* La Crosse Carriage Co., 120 Wis. 84, 97 N. W. 674; Goldberg *v.* Ahnapee, etc., R. Co., 105 Wis. 1, 80 N. W. 920, 76 Am. St. Rep. 899, 47 L. R. A. 221; Mullenbach *v.* Butz, 49 Wis. 499, 5 N. W. 942.

United States.—Burton *v.* Driggs, 20 Wall. 125, 22 L. ed. 299; Minor *v.* Tillotson, 7 Pet. 99, 8 L. ed. 621; Renner *v.* Columbia Bank, 9 Wheat. 581, 6 L. ed. 166; Riggs *v.* Tayloe, 9 Wheat. 483, 6 L. ed. 140; Hodge *v.* Palms, 117 Fed. 396, 54 C. C. A. 570; U. S. *v.* Parsons, 27 Fed. Cas. No. 16,002, 1 Lowell 107, consul's certificate.

England.— Gathercole *v.* Miall, 10 Jur. 337, 15 L. J. Exch. 179, 15 M. & W. 319; Harper *v.* Cook, 1 C. & P. 139, 12 E. C. L. 91; Blair *v.* Ormond, 1 De G. & Sm. 428, 11 Jur. 665.

See 20 Cent. Dig. tit. "Evidence," §§ 581, 594.

Instrument lost in transmission by mail.— If an instrument is lost in consequence of an irregular or defective transmission by mail, secondary evidence of its contents is admissible. U. S. Bank *v.* Sill, 5 Conn. 106, 13 Am. Dec. 44; Shaw *v.* Pershing, 57 Mo. 416.

Where part of a writing has been torn off and lost, a copy of the entire writing is admissible (Dean *v.* Speakman, 7 Blackf. (Ind.) 317, where the writing in question was a promissory note); or where there is no copy, the part of the writing remaining may be introduced in evidence, and parol evidence may be given as to the contents of the part which has been lost (Farmers', etc., Bank *v.* Champlain Transp. Co., 23 Vt. 186, 56 Am. Dec. 68, a printed advertisement; Doe *v.* Jack, 6 N. Brunsw. 476).

77. See *supra*, XV, E, 1, a.

78. *Alabama.*— Anniston City Land Co. *v.* Edmondson, 127 Ala. 445, 30 So. 61; Nashville, etc., R. Co. *v.* Hammond, 104 Ala. 191, 15 So. 935; Beard *v.* Ryan, 78 Ala. 37; Juzan *v.* Toulmin, 9 Ala. 662, 44 Am. Dec. 448; Evans *v.* Bolling, 8 Port. 546.

Arkansas.— Steward *v.* Scott, 57 Ark. 153, 20 S. W. 1088; Calloway *v.* Cossart, 45 Ark. 81; Trammell *v.* Thurmond, 17 Ark. 203.

Connecticut.— Kelley *v.* Riggs, 2 Root 126.

Georgia.— Silva *v.* Rankin, 80 Ga. 79, 4 S. E. 756; Graham *v.* Campbell, 56 Ga. 258; Roe *v.* Doe, 32 Ga. 39.

Illinois.— Gillespie *v.* Gillespie, 159 Ill. 84,

wills,[79] partnership and all other contracts,[80] bills of exchange and promissory

42 N. E. 305; Miller *v.* Shaw, 103 Ill. 277; Swearengen *v.* Gulick, 67 Ill. 208; Sawyer *v.* Cox, 63 Ill. 130.

Indiana.— Rucker *v.* McNeely, 5 Blackf. 123.

Kentucky.— Dickerson *v.* Talbot, 14 B. Mon. 60; Brooks *v.* Clay, 3 A. K. Marsh. 545; Winney *v.* Cartright, 3 A. K. Marsh. 493; Gill *v.* De Witt, 7 Ky. L. Rep. 594.

Louisiana.— Willett *v.* Andrews, 106 La. 319, 30 So. 883; Gordon *v.* Fahrenberg, 26 La. Ann. 366.

Maine.— Moses *v.* Morse, 74 Me. 472.

Missouri.— Ebersole *v.* Rankin, 102 Mo. 488, 15 S. W. 422; Compton *v.* Arnold, 54 Mo. 147; Skinner *v.* Henderson, 10 Mo. 205.

New Hampshire.— Downing *v.* Pickering, 15 N. H. 344; Colby *v.* Kenniston, 4 N. H. 262.

New Mexico.— Wagner *v.* Romero, 3 N. M. 131, 3 Pac. 50.

New York.— Metcalf *v.* Van Benthuysen, 3 N. Y. 424; Haywood *v.* Townsend, 4 N. Y. App. Div. 246, 38 N. Y. Suppl. 517 (executor's bond); Jewell *v.* Harrington, 19 Wend. 471.

North Carolina.— Jennings *v.* Reeves, 101 N. C. 447, 7 S. E. 897; Cowles *v.* Hardin, 91 N. C. 231; Baker *v.* Webb, 2 N. C. 43.

Ohio.—Blackburn *v.* Blackburn, 8 Ohio 81; Allen *v.* Parish, 3 Ohio 107.

Pennsylvania.— Gorgas *v.* Hertz, 150 Pa. St. 538, 24 Atl. 756; Kaul *v.* Lawrence, 73 Pa. St. 410; Diehl *v.* Emig, 65 Pa. St. 320; Wallace *v.* Harmstad, 44 Pa. St. 492; Huzzard *v.* Trego, 35 Pa. St. 9; Shortz *v.* Unangst, 3 Watts & S. 45; Schall *v.* Miller, 3 Whart. 250; Paul *v.* Durborow, 13 Serg. & R. 392; Scott *v.* Leather, 3 Yeates 184; Folger *v.* Evig, 2 Yeates 119; Edgar *v.* Robinson, 4 Dall. 132, 1 L. ed. 772.

South Carolina.— Hobbs *v.* Beard, 43 S. C. 370, 21 S. E. 305; Congdon *v.* Morgan, 14 S. C. 587.

Texas.— Holmes *v.* Coryell, 58 Tex. 680; Texas, etc., R. Co. *v.* Bancroft, (Civ. App. 1900) 56 S. W. 606.

Vermont.— Oatman *v.* Barney, 46 Vt. 594; Brown *v.* Austin, 41 Vt. 262; Colchester *v.* Culver, 29 Vt. 111.

Virginia.— Taylor *v.* Peyton, 1 Wash. 252.

United States.— Emanuel *v.* Gates, 53 Fed. 772, 3 C. C. A. 663; Lewis *v.* Baird, 15 Fed. Cas. No. 8,316, 3 McLean 56.

See 20 Cent. Dig. tit. "Evidence," § 584.

Recorded and unrecorded deeds.— Where it appears that a recorded deed has been lost and that the record thereof has been destroyed by fire, the testimony of a witness who has read the deed as it appeared on the records is admissible to prove the existence of the contents of the instrument, and notice of the introduction of such testimony is not prerequisite as it would be under a statute providing for such notice where a certified copy of the record is desired to be introduced. Hobbs *v.* Beard, 43 S. C. 370, 21 S. E. 305. Although a statute requires that a deed must be recorded before it is admissible in evidence, these provisions do not apply to exclude secondary evidence of unrecorded deeds that have been lost or destroyed. Moses *v.* Morse, 74 Me. 472; Jennings *v.* Reeves, 101 N. C. 447, 7 S. E. 897. See also Brown *v.* Austin, 41 Vt. 262. And if the deed was recorded and both the deed and record are lost or destroyed, secondary evidence is admissible to prove that the deed was properly recorded. Cowles *v.* Hardin, 91 N. C. 231; Freeman *v.* Hatley, 48 N. C. 115.

79. *Kentucky.*— *In re* Lane, 2 Dana 106, sworn copy admitted.

Louisiana.— Lucas *v.* Brooks, 23 La. Ann. 117; Thomas *v.* Thomas, 2 La. 166.

Maryland.— Smith *v.* Steele, 1 Harr. & M. 419, copy of will together with letters testamentary was held admissible.

New York.— Fetherly *v.* Waggoner, 11 Wend. 599 (parol evidence); Jackson *v.* Lucett, 2 Cai. 363 (book of probate judge containing the record of the probate of a will).

South Carolina.— Reeves *v.* Reeves, 2 Mill 334, 12 Am. Dec. 679 (parol evidence held admissible); Legare *v.* Ashe, 1 Bay 464.

Texas.— Ortiz *v.* De Benavides, 61 Tex. 60, parol evidence held admissible.

Virginia.— Smith *v.* Carter, 3 Rand. 167, parol evidence held admissible.

United States.— Spencer *v.* Spencer, 22 Fed. Cas. No. 13,233, 1 Gall. 622, office copy held admissible.

England.— Sugden *v.* St. Leonards, 1 P. D. 154, 45 L. J. P. & M. 49, 34 L. T. Rep. N. S. 372, 24 Wkly. Rep. 860; *In re* Fitzwalter Peerage, 10 Cl. & F. 946, 8 Eng. Reprint 997; Brown *v.* Brown, 8 E. & B. 876, 4 Jur. N. S. 163, 27 L. J. Q. B. 173, 92 E. C. L. 876.

See 20 Cent. Dig. tit. "Evidence," § 593.

80. *Colorado.*— Gilpin County Min. Co. *v.* Drake, 8 Colo. 586, 9 Pac. 787, decided under Civ. Code, § 382.

Florida.— Edwards *v.* Rives, 35 Fla. 89, 17 So. 416.

Indiana.— See Draper *v.* Vanhorn, 12 Ind. 352.

Iowa.— Louis Cook Mfg. Co. *v.* Randall, 62 Iowa 244, 17 N. W. 507.

Kentucky.— Ellison *v.* Dunlap, 78 S. W. 155, 25 Ky. L. Rep. 1495; Bowler *v.* Blair, 6 Ky. L. Rep. 658, contract of partnership.

Michigan.—Stanley *v.* Anderson, 107 Mich. 384, 65 N. W. 247.

Mississippi.— Perry *v.* Randolph, 6 Sm. & M. 335, contract of partnership.

Pennsylvania.—Krise *v.* Neason, 66 Pa. St. 253; Fisher *v.* South Williamsport, 1 Pa. Super. Ct. 386.

Texas.— Rains *v.* McMills, 14 Tex. 614, contract to convey land.

Utah.— Nelson *v.* Southern Pac. R. Co., 18 Utah 244, 55 Pac. 364.

See 20 Cent. Dig. tit. "Evidence," § 590.

A written contract within the statute of frauds may, if lost or destroyed, be established by parol evidence. Thus where an antenuptial contract was partially destroyed

notes,[81] receipts, vouchers, and original entries in accounts and books of account,[82] books and records of a corporation[83] or of an unincorporated joint stock company,[84] powers of attorney or other written authority to act as agent,[85] and assignments of judgments.[86] It also admits parol evidence of letters,[87] telegrams,[88]

so that the signatures were missing, it was held that the existing portion could be admitted in evidence and the missing portion established by parol. *In re* Devoe, 113 Iowa 4, 84 N. W. 923. See, generally, FRAUDS, STATUTE OF.

81. *Illinois.*— Palmer *v.* Logan, 4 Ill. 56.
Kentucky.— Stokes *v.* Prescott, 4 B. Mon. 37.
Massachusetts.— Jones *v.* Fales, 5 Mass. 101.
North Carolina.— Buie *v.* Scott, 112 N. C. 375, 17 S. E. 160, date of execution of note.
Oklahoma.— Randolph *v.* Hudson, 12 Okla. 516, 74 Pac. 946.
South Carolina.— Anderson *v.* Robson, 2 Bay 495.
United States.— Renner *v.* Columbia Bank, 9 Wheat. 581, 6 L. ed. 166.
England.— Charnley *v.* Grundy, 2 C. L. R. 822, 14 C. B. 608, 18 Jur. 653, 23 L. J. C. P. 121, 78 E. C. L. 608; Blackie *v.* Pidding, 6 C. B. 196, 60 E. C. L. 196.
See 20 Cent. Dig. tit. "Evidence," § 589.

82. *Arkansas.*— Stanley *v.* Wilkerson, 63 Ark. 556, 39 S. W. 1043.
Georgia.— Lane *v.* Morris, 8 Ga. 468.
Idaho.— Mills *v.* Glennon, 2 Ida. (Hasb.) 105, 6 Pac. 116.
Iowa.— Davis *v.* Cochran, 71 Iowa 369, 32 N. W. 445.
Louisiana.— State *v.* Mathis, 106 La. 263, 30 So. 834; Jordan *v.* White, 4 Mart. N. S. 335.
Maine.— Hudson *v.* Carman, 41 Me. 84, books of corporation.
Maryland.— Safe Deposit, etc., Co. *v.* Turner, 98 Md. 22, 55 Atl. 1023, trial balances and balance sheets admitted in connection with the testimony of the bookkeeper.
Massachusetts.— Holmes *v.* Marden, 12 Pick. 169.
Michigan.— McDonnell *v.* Ford, 87 Mich. 198, 49 N. W. 545.
New York.— Hodnett *v.* Gault, 64 N. Y. App. Div. 163, 71 N. Y. Suppl. 831; Beekman *v.* Beekman, Anth. N. P. 169.
Pennsylvania.— See Rine *v.* Hall, 187 Pa. St. 264, 40 Atl. 1088.
South Carolina.— Rigby *v.* Logan, 45 S. C. 651, 24 S. E. 56; McCrady *v.* Jones, 36 S. C. 136, 15 S. E. 430.
South Dakota.— La Rue *v.* St. Anthony, etc., Elevator Co., (1903) 95 N. W. 292.
Vermont.— Tucker *v.* Bradley, 33 Vt. 324.
United States.— Burton *v.* Driggs, 20 Wall. 125, 22 L. ed. 299; Republic F. Ins. Co. *v.* Weides, 14 Wall. 375, 20 L. ed. 894; U. S. *v.* Laub, 12 Pet. 1, 9 L. ed. 977; Moore *v.* Voss, 17 Fed. Cas. No. 9,778, 1 Cranch C. C. 179.
See 20 Cent. Dig. tit. "Evidence," § 592.

83. Thistlewaite *v.* Pierce, 30 Ind. App. 642, 66 N. E. 755; St. Albans Baptist Meeting-House *v.* Webb, 66 Me. 398; Weber *v.* Fickey, 52 Md. 500; Blanton *v.* Kentucky Distilleries, etc., Co., 120 Fed. 318.

84. Cameron *v.* Decatur First Nat. Bank, (Tex. Civ. App. 1896) 34 S. W. 178.

85. Prothro *v.* Minden Seminary, 2 La. Ann. 939; Bank of North America *v.* Embury, 33 Barb. (N. Y.) 323, 21 How. Pr. (N. Y.) 14; Livingston *v.* Rogers, 2 Johns. Cas. (N. Y.) 488, 1 Cai. Cas. (N. Y.) 27.

86. Smith *v.* Brown, 151 Mass. 338, 24 N. E. 31.

87. *Alabama.*— Schieffelin *v.* Schieffelin, 127 Ala. 14, 28 So. 687.
Georgia.— Marietta Sav. Bank *v.* Janes, 66 Ga. 286.
Indiana.— Roehl *v.* Haumesser, 114 Ind. 311, 15 N. E. 345.
Iowa.— Brier *v.* Davis, 122 Iowa 59, 96 N. W. 983; Frick *v.* Kabaker, 116 Iowa 494, 90 N. W. 498.
Kentucky.— Seibert *v.* Ragsdale, 103 Ky. 206, 44 S. W. 653, 19 Ky. L. Rep. 1869.
Louisiana.— Benton *v.* Benton, 106 La. 99, 30 So. 137; Sevier *v.* Gordon, 22 La. Ann. 85; Hyde *v.* Hepp, 11 Rob. 159; Findley *v.* Breedlove, 4 Mart. N. S. 105.
Michigan.—Conkling *v.* Nicholas, 133 Mich. 651, 95 N. W. 745; June *v.* Labadie, 132 Mich. 135, 92 N. W. 937.
Minnesota.— Hargreaves *v.* Reese, 66 Minn. 434, 69 N. W. 223.
Mississippi.— Howie *v.* Pratt, 83 Miss. 15, 35 So. 216.
Missouri.— Leavenworth First Nat. Bank *v.* Wright, 104 Mo. App. 242, 78 S. W. 686.
Nebraska.— See Hapgood Plow Co. *v.* Martin, 16 Nebr. 27, 19 N. W. 512.
Pennsylvania.— Armstrong *v.* Morgan, 3 Yeates 529; Lewis *v.* Manly, 2 Yeates 200.
Texas.—Price *v.* Oatman, (Civ. App. 1903) 77 S. W. 258.
Vermont.— Clark *v.* Marsh, 20 Vt. 338.
Wisconsin.— Kelley *v.* La Crosse Carriage Co., 120 Wis. 84, 97 N. W. 674; Mullenback *v.* Batz, 49 Wis. 499, 5 N. W. 942, postal card.
See 20 Cent. Dig. tit. "Evidence," § 586.

Letters written in foreign language.— Where diligent search has failed to discover a lost letter, its contents may be shown by parol, even though it was written in a language which the witness could not read, where the letter had been accompanied by a translation, the correctness of which had been virtually admitted in another suit between the same parties for the same cause of action. Meier *v.* Meier, 105 Mo. 411, 16 S. W. 223.

88. *Kansas.*— Western Union Tel. Co. *v.* Collins, 45 Kan. 88, 25 Pac. 187, 10 L. R. A. 515.
Nebraska.— Carlson *v.* Holm, 2 Nebr. (Unoff.) 38, 95 N. W. 1125.
New York.— Oregon Steamship Co. *v.* Otis, 100 N. Y. 446, 3 N. E. 485, 53 Am. Rep. 221

notices and advertisements,[89] naturalization papers,[90] marriage licenses,[91] marriage certificates,[92] ballots cast at a township election,[93] and documents more than thirty years old which if not lost or destroyed would prove themselves.[94]

(II) *To Public Documents and Records*—(A) *In General.* Secondary evidence is admissible to prove the contents of lost or destroyed documents of a public character, such as certificates of entry of land at the land-office,[95] township plats,[96] field books of original survey,[97] a "grand list" of taxable inhabitants,[98] orders of town boards of supervisors vacating highways,[99] and written appointment of, or authority given to, public officers.[1] In respect to secondary evidence of their contents when the originals are lost or destroyed, public records do not differ from private documents; so where it is satisfactorily shown that public records have been lost or destroyed, their contents may be proved by parol or other competent secondary evidence, provided that the existence of other and better evidence is not disclosed by the circumstances of the case or the character of the evidence introduced.[2]

[*affirming* 14 Abb. N. Cas. 388]; Holmes *v.* Rogers, 4 N. Y. St. 426.

South Dakota.— Western Twine Co. *v.* Wright, 11 S. D. 521, 78 N. W. 942, 44 L. R. A. 438.

Texas.— Western Union Tel. Co. *v.* Williford, (Civ. App. 1894) 27 S. W. 700.

See 20 Cent. Dig. tit. "Evidence," § 586.

89. Dunning *v.* Rankin, 19 Cal. 640 (notice posted on mining claim); Rice *v.* Poynter, 15 Kan. 263 (newspaper notice of sheriff's sale); Johnson *v.* Johnson, 70 Mich. 65, 37 N. W. 712 (notice to quit). Where a person who has suffered loss by the neglect of a telegraph company to deliver a message serves upon the agent of the company a written demand for damages, and gives the agent a copy thereof, but keeps the original, on which the agent accepts service in writing, he may prove the contents thereof by parol where the loss of the original is shown. Western Union Tel. Co. *v.* Collins, 45 Kan. 88, 25 Pac. 187, 10 L. R. A. 515.

Where a paper is made out in duplicate and one counterpart is served on one of the parties as a notice, and the other retained, and afterward the one served as a notice cannot be found, the contents of the one served may be proved by the counterpart retained. Grant *v.* Pendery, 15 Kan. 236.

90. People *v.* Smith, 10 Misc. (N. Y.) 100, 31 N. Y. Suppl. 199. And see, generally, Aliens, 2 Cyc. 115, 116.

91. Crook *v.* Webb, 125 Ala. 457, 28 So. 384.

92. Stanton *v.* Simpson, 48 Vt. 628, parol proof of marriage in foreign country.

93. State *v.* Conser, 24 Ohio Cir. Ct. 270.

94. McReynolds *v.* Longenberger, 57 Pa. St. 13; Blackstone *v.* White, 41 Pa. St. 330. See also Holmes *v.* Coryell, 58 Tex. 680; Emanuel *v.* Gates, 53 Fed. 772, 3 C. C. A. 663. As to instruments of this character see *supra*, XIV, D.

95. Steward *v.* Scott, 57 Ark. 153, 20 S. W. 1088, copy of entry at land-office held admissible. And see, generally, Public Lands.

96. Hedrick *v.* Hughes, 15 Wall. (U. S.) 123, 21 L. ed. 52, holding that if a township plat is lost or destroyed it may be proved by a copy; and that memoranda on such copy, not contained in the original, if accounted for and explained, will not exclude the copy as evidence of the contents of the original, even though such memoranda be a translation of corresponding memoranda in the original.

97. Jackson *v.* Jacoby, 9 Cow. (N. Y.) 125, holding that, where the field book of an original survey has been burned, maps copied from the original survey are admissible to establish the location of lots located by such survey. See also Burchfield *v.* McCauley, 3 Watts (Pa.) 9; Pennsylvania Canal Co. *v.* Kunkel, 33 Leg. Int. (Pa.) 339.

98. Spear *v.* Tilson, 24 Vt. 420.

99. Schroeder *v.* Klipp, 120 Wis. 245, 97 N. W. 909.

1. *Mississippi.*—Pickens *v.* McNutt, 12 Sm. & M. 651, appointment of deputy sheriffs.

Pennsylvania.— Barnet *v.* School Directors, 6 Watts & S. 46, appointment of collector of school-tax.

Texas.— Gabell *v.* Holloway, 10 Tex. Civ. App. 307, 31 S. W. 201, appointment of deputy clerk of court.

Vermont.— Kittell *v.* Missisquoi R. Co., 56 Vt. 96, appointment of commissioners to assess damages in condemnation proceedings.

United States.— Wright *v.* U. S., 158 U. S. 232, 15 S. Ct. 819, 39 L. ed. 963, authority to deputy marshal.

See 20 Cent. Dig. tit. "Evidence," § 587.

2. *Alabama.*— Kilgore *v.* Stanley, 90 Ala. 523, 8 So. 130; Smith *v.* Wert, 64 Ala. 34; Kenan *v.* Carr, 10 Ala. 867.

Arkansas.— Davies *v.* Pettit, 11 Ark. 349 [*overruling* Smith *v.* Dudley, 2 Ark. 60].

California.— McGarrity *v.* Byington, 12 Cal. 426.

Colorado.— Duggan *v.* McCullough, 27 Colo. 43, 59 Pac. 743.

Connecticut.— St. Peter's Church *v.* Beach, 26 Conn. 355, lost record of an ancient grant from proprietors of a town.

Georgia.— Headman *v.* Rose, 63 Ga. 458.

Illinois.— People *v.* Pike, 197 Ill. 449, 64 N. E. 393; Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349; Maxey *v.* Williamson County Ct., 72 Ill. 207.

Indiana.— Bundy *v.* Cunningham, 107 Ind. 368, 8 N. E. 174; Jones *v.* Levi, 72 Ind. 586;

(B) *Judicial Records and Documents.* The rule just stated[3] applies equally to admit parol or other competent secondary evidence to prove the contents of lost or destroyed judicial records, writs, processes, and other judicial papers.[4]

Jackson *v.* Cullum, 2 Blackf. 228, 18 Am. Dec. 158.

Iowa.— Lyons *v.* Van Gorder, 77 Iowa 600, 42 N. W. 500; Higgins *v.* Reed, 8 Iowa 298, 74 Am. Dec. 305, parol evidence of lost records of school-district.

Kentucky.— Com. *v.* Logan, 5 Litt. 286; Beaver *v.* Lancaster, 21 S. W. 243, 14 Ky. L. Rep. 658.

Louisiana.— State *v.* Stewart, 45 La. Ann. 1164, 14 So. 143; Landry *v.* Landry, 45 La. Ann. 1113, 13 So. 672.

Maine.— Prentiss *v.* Davis, 83 Me. 364, 22 Atl. 246 (contents of lost record of organization of plantation for election purposes proved by parol); Freeman *v.* Thayer, 33 Me. 73.

Massachusetts.—Wallace *v.* Townsend First Parish, 109 Mass. 263; Stockbridge *v.* West Stockbridge, 12 Mass. 400, parol evidence of incorporation of a town.

Michigan.— People *v.* Clarke, 105 Mich. 169, 62 N. W. 1117; Cilley *v.* Van Patten, 68 Mich. 80, 35 N. W. 831; Drake *v.* Kinsell, 38 Mich. 232.

Minnesota.— Estes *v.* Farnham, 11 Minn. 423.

Mississippi.— Pickens *v.* McNutt, 12 Sm. & M. 651; Eakin *v.* Doe, 10 Sm. & M. 549, 48 Am. Dec. 770.

Missouri.— Wells *v.* Pressy, 105 Mo. 164, 16 S. W. 670; Davis *v.* Preveler, 65 Mo. 189.

New Hampshire.— Wells *v.* Jackson Iron Mfg. Co., 47 N. H. 235, 90 Am. Dec. 575. See also Pittsfield *v.* Barnstead, 38 N. H. 115.

New York.— Leland *v.* Cameron, 31 N. Y. 115; Wildrick *v.* Hager, 10 N. Y. St. 764.

North Carolina.— State *v.* Durham, 121 N. C. 546, 28 S. E. 22.

Ohio.— Young *v.* Buckingham, 5 Ohio 485.

Pennsylvania.— Richards' Appeal, 122 Pa. St. 547, 15 Atl. 903; Clark *v.* Trindle, 52 Pa. St. 492; Miltimore *v.* Miltimore, 40 Pa. St. 151; Farmers' Bank *v.* Gilson, 6 Pa. St. 51; Fisher *v.* South Williamsport, 1 Pa. Super. Ct. 386, parol evidence of contents of lost minutes of municipal corporation.

South Carolina.— McQueen *v.* Fletcher, 4 Rich. Eq. 152.

Texas.— Grace *v.* Bonham, 26 Tex. Civ. App. 161, 63 S. W. 158; Gulf, etc., R. Co. *v.* Calvert, 11 Tex. Civ. App. 297, 32 S. W. 246 (municipal ordinance); *Ex p.* Canto, 21 Tex. App. 61, 17 S. W. 155, 57 Am. Rep. 609 (municipal ordinance).

Vermont.— Sherwin *v.* Bugbee, 16 Vt. 439, parol evidence of lost records of school-district.

United States.— Peralta *v.* U. S., 3 Wall. 434, 18 L. ed. 221, per Davis, J.

England.— Kingston *v.* Horner, 1 Cowp. 102, per Lord Mansfield.

See 20 Cent. Dig. tit. "Evidence," §§ 583, 585.

Rule sustained by public policy.— Drake *v.* Kinsell, 38 Mich. 232, 234, where Cooley, J., said: "A rule of law that should make every man's rights depend upon the preservation of records in their integrity, would be intolerable, because it would not only render losses by casualty irretrievable in many cases, but it would leave him at the mercy of any one interested in destroying the records, and sufficiently bold and reckless to make way with them. Such a state of the law would be a direct invitation to unscrupulous men to tamper with the public records."

Where the report of a state board cannot be found in the office of the secretary of state, its proper custodian, extracts from the report may be read from the original senate journal in the custody of the secretary. Woodruff *v.* State, 61 Ark. 157, 32 S. W. 102.

3. See *supra*, XV, E, 1, b, (II), (A).

4. *Alabama.*— Davidson *v.* Kahn, 119 Ala. 364, 24 So. 583; Prestwood *v.* Watson, 111 Ala. 604, 20 So. 600; Dawson *v.* Burrus, 73 Ala. 111; Baucum *v.* George, 65 Ala. 259 (sheriff's memorandum of execution, levy, and sale held admissible); Smith *v.* Wert, 64 Ala. 34; Derrett *v.* Alexander, 25 Ala. 265 (parol evidence of lost attachment); Kenan *v.* Carr, 10 Ala. 867.

Arkansas.— Wilson *v.* Spring, 38 Ark. 181; Gracie *v.* Morris, 22 Ark. 415 (lost process of justice of the peace); Davies *v.* Pettit, 11 Ark. 349 [*overruling* Smith *v.* Dudley, 2 Ark. 60, and holding parol evidence admissible]; James *v.* Biscoe, 10 Ark. 184.

California.— *In re* Warfield, 22 Cal. 51, 83 Am. Dec. 49.

Colorado.— Conway *v.* John, 14 Colo. 30, 23 Pac. 170, parol evidence of contents of lost files of justice of the peace.

Georgia.— Battle *v.* Braswell, 107 Ga. 128, 32 S. E. 838; Rudolph *v.* Underwood, 88 Ga. 664, 16 S. E. 55; Silva *v.* Rankin, 80 Ga. 79, 4 S. E. 756; McLaren *v.* Birdsong, 24 Ga. 265 (parol evidence of lost order of court); Allen *v.* State, 21 Ga. 217, 68 Am. Dec. 457. See also Young *v.* Baker, T. U. P. Charlt. 276.

Illinois.— Forsyth *v.* Vehmeyer, 176 Ill. 359, 52 N. E. 55 [*affirming* 75 Ill. App. 308]; Ashley *v.* Johnson, 74 Ill. 392 (parol evidence of lost affidavit on which justice's warrant was issued); Forsyth *v.* Vehmeyer, 55 Ill. App. 223 (destroyed judgment).

Indiana.— Bundy *v.* Cunningham, 107 Ind. 360, 8 N. E. 174; Johnson *v.* State, 80 Ind. 220 (parol evidence of lost summons); Jones *v.* Levi, 72 Ind. 586; Newhouse *v.* Martin, 68 Ind. 224 (parol evidence of lost execution and return); Sanders *v.* Sanders, 24 Ind. 133; Linsee *v.* State, 5 Blackf. 601; Richardson *v.* Vice, 4 Blackf. 13; Jackson *v.* Cullum, 2 Blackf. 228, 18 Am. Dec. 158.

Iowa.— *In re* Edwards, 58 Iowa 431, 10 N. W. 793 (parol evidence of contents of pe-

(c) *Statutory Provisions.* In many jurisdictions statutes have been passed providing for the restoration and establishment of lost or destroyed records. It

tition for divorce); Foster *v.* Bowman, 55 Iowa 237, 7 N. W. 513; Bridges *v.* Arnold, 37 Iowa 221; Conger *v.* Converse, 9 Iowa 554.

Kansas.— Davis *v.* Turner, 21 Kan. 131.

Kentucky.— Hawkins *v.* Craig, 1 B. Mon. 27; Com. *v.* Logan, 5 Litt. 286; Belcher *v.* Belcher, 55 S. W. 693, 21 Ky. L. Rep. 1460.

Louisiana.— State *v.* Stewart, 45 La. Ann. 1164, 14 So. 143 (parol evidence of jury commissioner's oath); Saloy *v.* Leonard, 15 La. Ann. 391; Choppin *v.* Michel, 11 Rob. 233.

Maine.— Angier *v.* Smalley, 56 Me. 515; Foster *v.* Dow, 29 Me. 442; Tyler *v.* Dyer, 13 Me. 41.

Massachusetts.— Dailey *v.* Coleman, 122 Mass. 64 (lost execution); Com. *v.* Roark, 8 Cush. 210; Nelson *v.* Boynton, 3 Metc. 396, 37 Am. Dec. 148; Pruden *v.* Alden, 23 Pick. 184, 34 Am. Dec. 51; Sturtevant *v.* Robinson, 18 Pick. 175.

Michigan.— Crane *v.* Waldron, 133 Mich. 73, 94 N. W. 593; Cook *v.* Bertram, 86 Mich. 356, 49 N. W. 42; Cilley *v.* Van Patten, 68 Mich. 80, 35 N. W. 831 (execution, levy, sale, and return); People *v.* Gordon, 39 Mich. 259 (lost files of police court); Drake *v.* Kinsell, 38 Mich. 232; Van Kleek *v.* Eggleston, 7 Mich. 511; Norvell *v.* McHenry, 1 Mich. 227 (calendar entries held admissible).

Minnesota.— Smith *v.* Valentine, 19 Minn. 452 (parol evidence of rendition and signing of lost decree); Estes *v.* Farnham, 11 Minn. 423 (parol evidence of contents of pleadings).

Mississippi.— Redus *v.* State, 54 Miss. 712; Jones *v.* Lewis, 37 Miss. 434; Scott *v.* Loomis, 13 Sm. & M. 635 (lost docket of justice); Eakin *v.* Doe, 10 Sm. & M. 549, 48 Am. Dec. 770.

Missouri.— Davis *v.* Peveler, 65 Mo. 189; Grayson *v.* Weddle, 63 Mo. 523; Kidd *v.* Guibar, 63 Mo. 342; Gibson *v.* Vaughan, 61 Mo. 418; Parry *v.* Walser, 57 Mo. 169; Foulk *v.* Colburn, 48 Mo. 225; Ravenscroft *v.* Giboney, 2 Mo. 1 (execution and return); Holladay-Klotz Land, etc., Co. *v.* T. J. Moss Tie Co., 87 Mo. App. 167; Wise *v.* Loring, 59 Mo. App. 269.

Nebraska.— Regier *v.* Shreck, 47 Nebr. 667, 66 N. W. 618; Keller *v.* Amos, 31 Nebr. 438, 48 N. W. 59.

Nevada.— *In re* Millenovich, 5 Nev. 161.

New York.— Mandeville *v.* Reynolds, 68 N. Y. 528 (judgment-roll); Church *v.* Hempsted, 27 N. Y. App. Div. 412, 50 N. Y. Suppl. 325, 27 N. Y. Civ. Proc. 230; Jackson *v.* Crawfords, 12 Wend. 533.

North Carolina.— Weeks *v.* McPhail, 128 N. C. 130, 38 S. E. 472, 129 N. C. 73, 39 S. E. 732; Aiken *v.* Lyon, 127 N. C. 171, 37 S. E. 199; Cox *v.* Beaufort County Lumber Co., 124 N. C. 78, 32 S. E. 381; Williams *v.* Kerr, 113 N. C. 306, 18 S. E. 501; Smith *v.* Allen, 112 N. C. 223, 16 So. 932 (minutes of court admissible to show contents of lost papers); Isley *v.* Boone, 109 N. C. 555, 13 S. E. 795; Hare *v.* Hollomon, 94 N. C. 14 (minutes of court admissible to show regularity of proceedings); Ryan *v.* Martin, 91 N. C. 464; Curlee *v.* Smith, 91 N. C. 172; Rollins *v.* Henry, 78 N. C. 342 (parol evidence of contents of lost execution). But see Hargett *v.* ——, 3 N. C. 76.

Ohio.— Herney *v.* Kilbane, 59 Ohio St. 499, 53 N. E. 262; Young *v.* Buckingham, 5 Ohio 485.

Pennsylvania.— Richards' Appeal, 122 Pa. St. 547, 15 Atl. 903; McFate's Appeal, 105 Pa. St. 323; Butler *v.* Slam, 50 Pa. St. 456; Miltimore *v.* Miltimore, 40 Pa. St. 151; Harvey *v.* Thomas, 10 Watts 63, 36 Am. Dec. 141 (docket entry admissible); Fox *v.* Wood, 1 Rawle 143.

South Carolina.— Garrett *v.* Weinberg, 54 S. C. 127, 31 S. E. 341, 34 S. E. 70; Norton *v.* Wallace, 1 Rich. 507; McQueen *v.* Fletcher, 4 Rich. Eq. 152, parol evidence of judgments and other proceedings in partition. See also Smith *v.* Smith, Rice 232; Fretwell *v.* Neal, 11 Rich. Eq. 559.

Tennessee.— Ingram *v.* Cocke, 1 Overt. 22.

Texas.— Houston, etc., R. Co. *v.* De Berry, (Civ. App. 1904) 78 S. W. 736; Johnson *v.* Franklin, (Civ. App. 1903) 76 S. W. 611 (report of commissioners in partition); Smith *v.* Ridley, 30 Tex. Civ. App. 158, 70 S. W. 235; Kingsley *v.* Schmicker, (Civ. App. 1900) 60 S. W. 331; Davis *v.* Beall, 21 Tex. Civ. App. 183, 50 S. W. 1086; Bouldin *v.* Miller, (Civ. App. 1894) 26 S. W. 133.

Vermont.— Dickerman *v.* Chapman, 54 Vt. 506 (parol evidence of lost judgment of justice of the peace); Brown *v.* Richmond, 27 Vt. 583; Bliss *v.* Stevens, 4 Vt. 88.

Virginia.— Taylor *v.* Com., 29 Gratt. 780 (printed volume of court of appeals reports admitted); Newcomb *v.* Drummond, 4 Leigh 57.

Wisconsin.— Bartlett *v.* Hunt, 17 Wis. 214.

United States.— U. S. *v.* Price, 113 Fed. 851; U. S. *v.* Lambell, 26 Fed. Cas. No. 15,553, 1 Cranch C. C. 312 (warrant of arrest); The Schooner Ulalia, 37 Ct. Cl. 466 (in which case a translation of a decree of condemnation rendered by a French prize court was held admissible, a literal copy not being obtainable).

England.— Freeman *v.* Arkell, 2 B. & C. 494, 9 E. C. L. 218, 1 C. & P. 135, 326, 12 E. C. L. 89, 195, 3 D. & R. 669, 2 L. J. K. B. O. S. 64; Weatherell *v.* Watson, 1 L. J. K. B. O. S. 2; Anonymous, 1 Vent. 257.

Canada.— Beatty *v.* Haldan, 10 Ont. 278; Wardrope *v.* Canadian Pac. R. Co., 7 Ont. 321 (order and writ of execution); Soules *v.* Donovan, 15 U. C. C. P. 121; Heany *v.* Parker, 27 U. C. Q. B. 509 (judgment and executions).

See 20 Cent. Dig. tit. "Evidence," §§ 583, 585. And see COURTS, 11 Cyc. 633 *et seq*; and, generally, JUDGMENTS; RECORDS.

is generally held, however, that the remedies provided by these statutes do not preclude the common-law mode of proof, but merely furnish an additional remedy.[5]

c. Destruction by Party Offering Secondary Evidence — (i) *In General.* It is not, however, a matter of course to admit secondary evidence of the contents of a writing upon proof of its destruction, but the cause or motive of the destruction is the controlling fact which determines the admissibility of such evidence.[6] Where it appears that a party seeking to establish a fact has voluntarily destroyed a writing constituting or containing the best evidence of that fact, he cannot introduce secondary evidence thereof, especially where the suit is in his own behalf and is founded upon the writing, without first introducing evidence to explain his destruction of the writing and to repel all inference of fraudulent design arising therefrom.[7] If, however, it appears that the destruction was done through acci-

For secondary evidence of lost or destroyed depositions see DEPOSITIONS, 13 Cyc. 978, 979.

Whether the lost record is of ancient or recent date is immaterial in the application of this rule. Davies *v.* Pettit, 11 Ark. 349; Isley *v.* Boone, 109 N. C. 555, 13 S. E. 795; Mobley *v.* Watts, 98 N. C. 284, 3 S. E. 284.

Copies of pleadings not marked "filed."— If pleadings in another case would be admissible in evidence, but are lost, copies thereof upon which the case was tried and which are found in the files of the case, although not marked "filed," are competent evidence. Ponder *v.* Cheeves, 104 Ala. 307, 16 So. 145.

Minutes entered upon the docket by a clerk of a court constitute the record of such court until the full record is made up from the minutes; and if in the meantime the docket be lost, it is to be deemed a loss of the record, and secondary evidence of its contents is admissible. Pruden *v.* Alden, 23 Pick. (Mass.) 184, 34 Am. Dec. 51. See also Dayrell *v.* Bridge, 2 Str. 1264; Evans *v.* Thomas, 2 Str. 833.

Records of naturalization are in nowise different from other records. When lost or destroyed, secondary evidence of their contents may be given, the same as of the contents of any other record. Headman *v.* Rose, 63 Ga. 458; Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349. See also People *v.* Smith, 10 Misc. (N. Y.) 100, 31 N. Y. Suppl. 199. See also ALIENS, 2 Cyc. 115, 116.

Judgment, execution, and sheriff's sale.— In an action for the recovery of real estate where defendant claims under an execution sale, the issuance of the execution may, where the execution is lost or destroyed, be proved by an entry in a register made by the attorney who entered up the judgment and who has since died. Leland *v.* Cameron, 31 N. Y. 115. Likewise, although the return to an execution is ordinarily the best evidence of a levy and sale under it, yet when the execution has not been returned to the clerk's office, and it, with any return on it, has been destroyed or lost, and it is proved otherwise than from recital in the sheriff's deed that there was a judgment and execution, the recital in such deed is *prima facie* evidence of the levy and sale, they being official acts of the sheriff, even although the sale was not a recent one. Rollins *v.* Henry, 78 N. C. 342 [*distinguishing* Hardin *v.* Cheek, 48 N. C. 135, 64 Am. Dec. 600]. *Compare* Baskin *v.* Seechrist, 6 Pa. St. 154, 162.

When higher evidence exists.— In an early New York case it was held that to support an objection to the competency of a witness because he had been convicted of felony, parol evidence of the conviction was inadmissible, although it be proved that the clerk's office of the county had been burnt down, and the record probably destroyed, for there was higher evidence of the fact capable of being produced, that is, the transcript delivered into the court of exchequer by the district attorney, which must be presumed to have been delivered, such being his duty under a statute. Hilts *v.* Colvin, 14 Johns. (N. Y.) 182. See also *infra*, XV, G.

5. *Michigan.*— Drake *v.* Kinsell, 38 Mich. 232.

Missouri.— Parry *v.* Walser, 57 Mo. 169.

Pennsylvania.— Richards' Appeal, 122 Pa. St. 547, 15 Atl. 903; Miltimore *v.* Miltimore, 40 Pa. St. 151.

Texas.— Johnson *v.* Skipworth, 59 Tex. 473.

Virginia.— Corbett *v.* Nutt, 18 Gratt. 624; Newcomb *v.* Drummond, 4 Leigh 57.

See 20 Cent. Dig. tit. "Evidence," § 583. And see, generally, LOST INSTRUMENTS; RECORDS.

Cases arising under North Carolina code (§§ 69–71) see Irvin *v.* Clark, 98 N. C. 437, 8 S. E. 30; Hare *v.* Hollomon, 94 N. C. 14.

Tennessee statute (Shannon Tenn. Code, § 5701) was applied in Galbraith *v.* McFarland, 3 Coldw. 267, 91 Am. Dec. 281, and Pierce *v.* State Bank, 1 Swan 265.

6. Bagley *v.* Eaton, 10 Cal. 126; Bagley *v.* McMickle, 9 Cal. 430. See also cases cited in the following note.

7. *Colorado.*— Breen *v.* Richardson, 6 Colo. 605.

Illinois.— Blake *v.* Fash, 44 Ill. 302; Palmer *v.* Goldsmith, 15 Ill. App. 544.

Indiana.— Baldwin *v.* Threlkeld, 8 Ind. App. 312, 34 N. E. 851, 35 N. E. 841.

Massachusetts.— Joannes *v.* Bennett, 5 Allen 169, 81 Am. Dec. 738.

New Jersey.— Broadwell *v.* Stiles, 8 N. J. L.

dent or mistake, or upon an erroneous impression of its effect, or under other circumstances free from a suspicion of intended fraud, there is no impediment to his introducing secondary evidence.[8] So if the writing was destroyed in the usual course of business, or when it was not likely to be used as evidence in the party's favor, and had no value, the destruction cannot be held fraudulent and secondary evidence is admissible.[9]

(II) *Voluntary Destruction Not Presumed.* It will not be presumed that a party has voluntarily destroyed an instrument which he was interested in preserving, where there is no evidence on that point except that the instrument cannot be found. In such a case the only inference is that the instrument is lost.[10]

d. Destruction by Adverse Party. Where the writing constituting or containing the best evidence of a fact has been voluntarily destroyed by the party against whom the fact is sought to be proved, secondary evidence is admissible.[11] And acts of such party whereby the writing is effectually placed beyond the power

58; Price *v.* Tallman, 1 N. J. L. 447; Wyckoff *v.* Wyckoff, 16 N. J. Eq. 401.

New York.— West *v.* New York Cent., etc., R. Co., 55 N. Y. App. Div. 464, 67 N. Y. Suppl. 104.

North Carolina.— See Coxe *v.* Skeen, 25 N. C. 443.

Pennsylvania.— Wallace *v.* Harmstad, 44 Pa. St. 492.

United States.— Riggs *v.* Tayloe, 9 Wheat. 483, 6 L. ed. 140.

Canada.— Cote *v.* Cantin, 21 Quebec Super. Ct. 432.

See 20 Cent. Dig. tit. "Evidence," § 580.

Voluntary destruction, without explanation, is held such presumptive evidence of fraudulent design as to preclude all secondary evidence. Bagley *v.* McMickle, 9 Cal. 430.

Destruction of a writing through mere negligence, however, appears not to be within the rule stated in the text and to afford no grounds for the exclusion of the party's parol evidence. Rodgers *v.* Crook, 97 Ala. 722, 12 So. 108.

In actions for libel the rule stated in the text is especially applicable, for the language used and the sense and meaning which properly attach to it constitute the gist of the action. Joannes *v.* Bennett, 5 Allen (Mass.) 169, 81 Am. Dec. 738. And see, generally, LIBEL AND SLANDER.

Where a grantee voluntarily destroys the deed which is the proper and primary evidence of his title, the rule of the text applies to prevent his giving secondary evidence of the contents of the deed to establish his title. Wilke *v.* Wilke, 28 Wis. 296; Parker *v.* Kane, 4 Wis. 1, 65 Am. Dec. 283. See also Bryan *v.* Parsons, 5 N. C. 152. So where land was sold and paid for and the deed was executed and delivered, but subsequently the grantee refunded the consideration and the deed was destroyed by agreement of the parties, it was held that the grantee and those claiming under him could not introduce parol evidence of the contents of the destroyed deed in order to sustain title to the land. Gugins *v.* Van Gorder, 10 Mich. 523, 82 Am. Dec. 55. But the rule does not apply where innocent third parties attempt to establish title under a deed thus destroyed. Wilke *v.* Wilke, 28 Wis. 296.

8. *California.*— Bagley *v.* Eaton, 10 Cal. 126; Bagley *v.* McMickle, 9 Cal. 430. *Compare* Smith *v.* Truebody, 2 Cal. 341.

Connecticut.— U. S. Bank *v.* Sill, 5 Conn. 106, 13 Am. Dec. 44.

Indiana.— Rudolph *v.* Lane, 57 Ind. 115.

Iowa.— Murphy *v.* Olberding, 107 Iowa 547, 78 N. W. 205.

Kentucky.— Shields *v.* Lewis, 49 S. W. 803, 20 Ky. L. Rep. 1601.

Maine.— Tobin *v.* Shaw, 45 Me. 331, 71 Am. Dec. 547.

Michigan.— Davis *v.* Teachout, 126 Mich. 135, 85 N. W. 475, 86 Am. St. Rep. 531. See People *v.* Sharp, 53 Mich. 523, 19 N. W. 168.

Missouri.— Schroeder *v.* Michel, 98 Mo. 43, 11 S. W. 314; Skinner *v.* Henderson, 10 Mo. 205; Stephan *v.* Metzger, 95 Mo. App. 609, 69 S. W. 625.

New Jersey.— Wyckoff *v.* Wyckoff, 16 N. J. Eq. 401.

New York.— Dearing *v.* Pearson, 8 Misc. 269, 28 N. Y. Suppl. 715.

United States.— Riggs *v.* Tayloe, 9 Wheat. 483, 6 L. ed. 140.

See 20 Cent. Dig. tit. "Evidence," § 580.

When an adequate motive is assigned for the destruction of an instrument by the party, and clearly established by the evidence, the court will not upon mere conjecture impute an inadequate and dishonest motive. Wyckoff *v.* Wyckoff, 16 N. J. Eq. 401, 404.

9. Oriental Bank *v.* Haskins, 3 Metc. (Mass.) 332, 37 Am. Dec. 140; Davis *v.* Teachout, 126 Mich. 135, 85 N. W. 475, 86 Am. St. Rep. 531; Steele *v.* Lord, 70 N. Y. 280, 28 Am. Rep. 602 [*distinguishing* Blade *v.* Noland, 12 Wend. (N. Y.) 173, 27 Am. Dec. 126]; Pollock *v.* Wilcox, 68 N. C. 46.

10. Foster *v.* Mackay, 7 Metc. (Mass.) 531; Clark *v.* Hornbeck, 17 N. J. Eq. 430. See also Wyckoff *v.* Wyckoff, 16 N. J. L. 401.

11. *Indiana.*— McNutt *v.* McNutt, 116 Ind. 545, 19 N. E. 115, 2 L. R. A. 372; Avan *v.* Frey, 69 Ind. 91.

Louisiana.— Lucas *v.* Brooks, 23 La. Ann. 117.

New York.— Scott *v.* Pentz, 5 Sandf. 573.

North Dakota.— Kelly *v.* Cargill Elevator Co., 7 N. D. 343, 75 N. W. 264.

Texas.— Cheatham *v.* Riddle, 8 Tex. 162.

and control both of the other party and the court are equivalent to destruction and authorize the admission of secondary evidence.[12]

2. Inaccessibility of Primary Evidence — a. In General. In order to introduce secondary evidence of a writing it is not necessary to show that the original has been lost or destroyed, but it is sufficient to show that it is deposited in a place from which it cannot be removed for the purpose of being produced in court.[13] But the mere prospect that an original writing will be required in another suit or the fact that it is somewhat inconvenient for the party to produce it is not a sufficient ground for the introduction of secondary evidence.[14]

b. Primary Evidence in Custody of Another Court. Where an original instrument is in the possession of another court of the same state, secondary evidence of its contents is admissible if it appears that the instrument cannot be procured.[15] On the other hand the mere fact that an instrument is on file in another court in the same state or jurisdiction does not dispense with the necessity of reasonable efforts to obtain it; and if it does not appear that the instrument cannot with reasonable diligence be produced, secondary evidence is not admissible.[16] *A fortiori* secondary evidence cannot be introduced where the original instrument is on file in the same court, and permission of the court can readily be obtained to remove the instrument and introduce it in evidence.[17]

c. Primary Evidence Held by Third Person — (i) *In General.* It is undoubtedly true as a general rule that where a party desires to use in evidence an instrument in writing which is in the possession of a third person, he must either have it produced under a subpœna duces tecum or show that it is beyond his power to produce it in this or some other way, before he will be allowed to introduce secondary evidence of its contents.[18]

See 20 Cent. Dig. tit. "Evidence," § 581. And as to the maxim *omnia præsumuntur contra spoliatorem* see Evidence, 16 Cyc. 1058 *et seq.*

12. Cheatham *v.* Riddle, 8 Tex. 162, where the party had obtained possession of the instrument and had fled the country with it, and it was held that secondary evidence of its contents was admissible without further proof of search or notice to produce it. See also Suburban R. Co. *v.* Balkwill, 94 Ill. App. 454; Selman *v.* Cobb, 4 Iowa 534.

13. Manchester, etc., R. Co. *v.* Fisk, 33 N. H. 297 (freight rates posted at railroad stations); Bartholomew *v.* Stephens, 8 C. & P. 728, 34 E. C. L. 986 (posted notice that trespassing animals would be shot); Doe *v.* Cole, 6 C. & P. 359, 25 E. C. L. 474 (inscription on a tablet affixed to a church); Rex *v.* Fursey, 6 C. & P. 81, 25 E. C. L. 332 (paper affixed to a wall). See also Bruce *v.* Nicolopulo, 3 C. L. R. 775, 11 Exch. 129, 24 L. J. Exch. 321, 3 Wkly. Rep. 483.

Documents on file among the government archives or records of the federal government at Washington may be proved by secondary evidence. Beauvais *v.* Wall, 14 La. Ann. 199 (document on file in office of land department); Carpenter *v.* Bailey, 56 N. H. 283 (document on file in navy department); Leathers *v.* Salvor Wrecking, etc., Co., 15 Fed. Cas. No. 8,164, 2 Woods 680 (public document on file in war department — photographic copy admitted).

Documents filed with the interstate commerce commission are within this rule. Gulf, etc., R. Co. *v.* Dimmitt, 17 Tex. Civ. App. 255, 42 S. W. 583.

14. The Alice, 12 Fed. 923.

15. Ingle *v.* Jones, 43 Iowa 286. See also Mount *v.* Scholes, 120 Ill. 394, 11 N. E. 401 [*affirming* 21 Ill. App. 192].

16. *Georgia.*— Earnest *v.* Napier, 15 Ga. 306.

Kentucky.— Davidson *v.* Davidson, 10 B. Mon. 115.

New York.— Jackson *v.* Shearman, 6 Johns. 19.

Texas.— Crafts *v.* Daugherty, 69 Tex. 477, 6 S. W. 850; Bauman *v.* Chambers, (Civ. App. 1895) 28 S. W. 917.

England.— Rush *v.* Peacock, 2 M. & Rob. 162; Williams *v.* Munnings, R. & M. 18, 21 E. C. L. 695.

See 20 Cent. Dig. tit. "Evidence," § 572.

17. Dare *v.* McNutt, 1 Ind. 148.

18. *Alabama.*— Powell *v.* Knox, 16 Ala. 364.

Illinois.— Scott *v.* Bassett, 186 Ill. 98, 57 N. E. 835.

Indiana.— Rucker *v.* McNeely, 5 Blackf. 123.

Iowa.— Hawkins *v.* Rice, 40 Iowa 435.

Louisiana.— Erwin *v.* Porter, 6 Mart. N. S. 166.

Maine.— Dyer *v.* Fredericks, 63 Me. 173; Bird *v.* Bird, 40 Me. 392.

Mississippi.— Wooldridge *v.* Wilkins, 3 How. 360.

New Hampshire.— Woods *v.* Gassett, 11 N. H. 442.

New York.— Butler *v.* Mail, etc., Pub. Co., 171 N. Y. 208, 63 N. E. 951 [*reversing* 54 N. Y. App. Div. 382, 66 N. Y. Suppl. 788]; Chaffee *v.* Cox, 1 Hilt. 78; Auten *v.* Jacobus, 21 Misc. 632, 47 N. Y. Suppl. 1119 [*affirm-*

(II) *Party Without Possession or Right to Possession of Primary Evidence* — (A) *In General.* There is, however, a line of authorities holding that where a party desiring to prove facts evidenced by written instruments shows that the documents are not in his possession or control, and it appears from the circumstances of the case and the nature of the documents themselves that he is not entitled to their custody, he may introduce secondary evidence of their contents without further proof of his inability to procure the originals.[19]

(B) *Establishing Conveyances in Chain of Title.* The rule just stated,[20] although frequently embodied in statutes providing for the admission of copies, records, or transcripts of records, is applied in many jurisdictions in proving conveyances and mortgages of land, especially in establishing chains of title. In cases of this character it is held that where a person desiring to prove a deed or mortgage is not the grantee or mortgagee or the person who is entitled to the custody of the instrument, and it is shown that the instrument is not in his possession or control, he may introduce secondary evidence without further proof of his inability to produce the original instrument.[21]

ing 20 Misc. 669, 46 N. Y. Suppl. 68]; Berg *v.* Carroll, 16 N. Y. Suppl. 175; Vogell *v.* Rhind, 11 N. Y. St. 564.

Pennsylvania.— De Baril *v.* Pardo, 6 Pa. Cas. 148, 8 Atl. 876.

Texas.— Hall *v.* York, 16 Tex. 18; Greer *v.* Richardson Drug Co., 1 Tex. Civ. App. 634, 20 S. W. 1127.

England.— Whitford *v.* Tutin, 10 Bing. 395, 25 E. C. L. 189, 6 C. & P. 228, 25 E. C. L. 407, 3 L. J. C. P. 106, 4 Moore & S. 166; Parry *v.* May, 1 M. & Rob. 279.

See 20 Cent. Dig. tit. "Evidence," § 597. See also *infra*, XV, E, 2, d.

Facts appearing on the trial.— If secondary evidence is introduced by plaintiff upon a *prima facie* showing of loss of the original document, and it then appears by defendant's testimony that the original is in the possession of a third person, plaintiff should move the court for leave to summon the third person to produce the writing, and if this course is not pursued plaintiff cannot object to defendant's use of secondary evidence to rebut the same kind of evidence adduced by himself. Dyer *v.* Fredericks, 63 Me. 173.

In Louisiana, it has been held that, where the instrument is in the possession of a third person whose interest it is to conceal it, this amounts to a proof of loss by an "overpowering force" under Civ. Code, p. 312, art. 247, and authorizes the introduction of secondary evidence without the necessity of serving upon such third person a subpœna duces tecum. Stockdale *v.* Escaut, 4 Mart. 564.

19. *Alabama.*— Graham *v.* Lockhart, 8 Ala. 9. *Contra,* Smith *v.* Armistead, 7 Ala. 698.

Connecticut.— Lynde *v.* Judd, 3 Day 499.

Georgia.— See Napier *v.* Neal, 3 Ga. 298.

Louisiana.— Hotard *v.* Texas, etc., R. Co., 36 La. Ann. 450; Kræutler *v.* U. S. Bank, 12 Rob. 456, parol evidence of contents of power of attorney.

Tennessee.— Denton *v.* Hill, 4 Hayw. 73.

See 20 Cent. Dig. tit. "Evidence," §§ 595, 597.

Articles of partnership.— Where each partner testified that the articles of partnership were not in his possession or control, but were or ought to be in the possession of the other partner, who was called upon to produce them, it was held that these facts, in the absence of any testimony sufficient to show a fraudulent suppression of the instrument by either partner, authorized the admission of parol evidence to show the contents of the instrument. Jones *v.* Morehead, 3 B. Mon. (Ky.) 377.

Writing the private property of adversary. — Where one of the parties to an action seeks to introduce testimony of a fact evidenced by a writing which is the private property of his adversary, he cannot be required to produce this writing, since he is not entitled to its custody and cannot be presumed to have it in his possession or power. Griffin *v.* Doe, 12 Ala. 783, which was an action by a creditor against a partnership, the document in controversy being the articles of copartnership.

20. See *supra,* XV, E, 2, c, (II), (A).

21. *Alabama.*— Jones *v.* Hagler, 95 Ala. 529, 10 So. 345, record of deed held admissible. *Contra,* Smith *v.* Armistead, 7 Ala. 698.

Connecticut.— Kelsey *v.* Hanmer, 18 Conn. 311 (copy from record); Halsey *v.* Fanning, 2 Root 101; Sherwood *v.* Hubbel, 1 Root 498.

Illinois.— Nixon *v.* Cableigh, 52 Ill. 387. See also Prettyman *v.* Walston, 34 Ill. 175, decided under the act of 1861, Gross Comp. § 38, of chapter entitled Conveyances, which provides for the admission of the record or a certified transcript thereof and which modifies the common-law rule in this state as enunciated in Dickinson *v.* Breeden, 25 Ill. 186. In Fisk *v.* Kissane, 42 Ill. 87, it was held that the statute must not be strictly construed.

Iowa.— Rea *v.* Jaffray, 82 Iowa 231, 48 N. W. 78; Kreuger *v.* Walker, 80 Iowa 733, 45 N. W. 871; Bixby *v.* Carskaddon, 55 Iowa 533, 8 N. W. 354. The foregoing cases were decided under Code, § 3660.

Kansas.— McLean *v.* Webster, 45 Kan. 644, 26 Pac. 10; Stratton *v.* Hawks, 43 Kan. 538,

(III) *Possession of Primary Evidence Obtained by Fraud.* A party who is deprived of the possession of written instruments belonging to him by the fraudulent representations or devices of another person who unjustly detains or secretly disposes of such instruments so that they cannot be found or recovered, may give secondary evidence of their contents as in the case of lost documents.[22] This rule is especially applicable where the party offering an instrument in evidence at the trial is deprived of its possession and control by the fraudulent devices of his adversary's attorney.[23]

d. Primary Evidence Out of Jurisdiction — (I) *In General.* Where primary evidence of the fact to be proved is out of the jurisdiction of the court in which the evidence is desired to be used, as where books, instruments, documents, or other writings constituting or containing the primary evidence are in possession of a stranger who is beyond the jurisdiction of the court and the reach of its process, the question of the admissibility of secondary evidence has given rise to some conflict in the authorities. It is held in a number of jurisdictions that

23 Pac. 591; Marshall *v.* Shibley, 11 Kan. 114. The foregoing cases were decided under Code, § 372, providing for the admission of records of deeds. See also Clippenger *v.* Hastings, 21 Kan. 679.

Massachusetts.— Chamberlin *v.* Huguenot Mfg. Co., 118 Mass. 532; Samuels *v.* Borrowscale, 104 Mass. 207; Blanchard *v.* Young, 11 Cush. 341; Ward *v.* Fuller, 15 Pick. 185; Scanlan *v.* Wright, 13 Pick. 523, 25 Am. Dec. 344; Burghardt *v.* Turner, 12 Pick. 534; Eaton *v.* Campbell, 7 Pick. 10. In the foregoing cases office copies of deeds were held admissible.

Missouri.—See Walker *v.* Newhouse, 14 Mo. 373.

Montana.— Montana Min. Co. *v.* St. Louis Min., etc., Co., 20 Mont. 394, 51 Pac. 824.

Nebraska.— Buck *v.* Gage, 27 Nebr. 306, 43 N. W. 110; Delaney *v.* Errickson, 10 Nebr. 492, 6 N. W. 600, 35 Am. Rep. 487. The foregoing cases were decided under Comp. St. (1887) c. 73, § 13, providing for the admission of a record or a certified transcript thereof.

Nevada.— O'Meara *v.* North American Min. Co., 2 Nev. 112, certified copy of recorded deed held admissible.

New Hampshire.— Wells *v.* Jackson Iron Mfg. Co., 48 N. H. 491 (office copy of deed); Harvey *v.* Mitchell, 31 N. H. 575 (office copy of deed); Johnson *v.* Brown, 31 N. H. 405 (office copy of mortgage); Atkinson *v.* Bemis, 11 N. H. 44 (conveyance by vote of proprietors of township proved by copy of their records).

New Jersey.— See Popino *v.* McAllister, 7 N. J. L. 46.

Pennsylvania.— Morris *v.* Vanderen, 1 Dall. 64, 1 L. ed. 38.

Tennessee.— Lannum *v.* Brooks, 4 Hayw. 121.

See 20 Cent. Dig. tit. "Evidence," §§ 595, 597.

A purchaser of land at a sheriff's sale is not bound to produce the original deeds under which the person whose land was sold claimed title, but he is at liberty to read copies in evidence since he is not entitled to the custody of the originals. Dem *v.* Cox, 27 N. C. 521; Nicholson *v.* Hilliard, 6 N. C. 270; Tillery *v.* Simmons, 1 Overt. (Tenn.) 209.

In an action for dower the widow, not having a right to the custody of her husband's deeds, may, after proof of her marriage and of her husband's possession and death, use an office copy of his deed, without proof of the loss of the original. Stevens *v.* Reed, 37 N. H. 49. See also Jackson *v.* Waltermire, 5 Cow. (N. Y.) 299; Bancroft *v.* White, 1 Cai. (N. Y.) 185. And see, generally, Dower.

Presumption or inference as to possession. —Where a party holds or claims land under a deed with general warranty, there is a presumption or inference that the original grant and other title papers are not in his possession, but are in the possession of his warrantor; therefore it is held that the warrantee may introduce secondary evidence of the prior title papers without accounting for their absence. King *v.* Hall, 1 Overt. (Tenn.) 209; Cook *v.* Hunter, 6 Fed. Cas. No. 3,161, 1 Col. Cas. 125, 2 Overt. (Tenn.) 113. See also Tillery *v.* Simmons, 1 Overt. (Tenn.) 209.

Even though the grantee is within the jurisdiction of the court and could be summoned to produce the deed, the rule stated in the text has been held applicable. Scanlan *v.* Wright, 13 Pick. (Mass.) 523, 25 Am. Dec. 344. *Contra*, Smith *v.* Armistead, 7 Ala. 698.

22. Grimes *v.* Kimball, 3 Allen (Mass.) 518; Hedge *v.* McQuaid, 11 Cush. (Mass.) 352; Almy *v.* Reed, 10 Cush. (Mass.) 421; The Julia, 14 Fed. Cas. No. 7,575, 1 Gall. 594 [*affirmed* in 8 Cranch 181, 3 L. ed. 528].

23. Selman *v.* Cobb, 4 Iowa 534. But a defendant does not entitle himself to the use of secondary evidence by merely charging that a combination and conspiracy exists between plaintiff and a third person, and that the latter has control of the primary evidence upon which defendant relies to sustain his defense; and by simply making such a charge in general terms with the prayer that the third person be made a party plaintiff, he cannot deprive plaintiff of the right to insist that secondary evidence shall not be received to defeat his action until it is made

under such circumstances secondary evidence is admissible, apparently without further proof of inability to procure the original writings.[24] In other jurisdictions, however, it is held that the fact that the writing is in the possession of a person beyond the jurisdiction of the court is not in itself sufficient ground for the introduction of secondary evidence; but that it must be shown that fruitless efforts have been made to obtain the writing, or the court must be satisfied that with the exercise of due diligence the writing cannot be produced.[25] But

to appear that the primary evidence cannot be produced. Bailey *v.* Trammell, 27 Tex. 317.

24. *Alabama.*— Danforth *v.* Tennessee, etc., R. Co., 99 Ala. 331, 13 So. 51; Memphis, etc., R. Co. *v.* Hembree, 84 Ala. 182, 4 So. 392; Elliott *v.* Dyche, 80 Ala. 376; Young *v.* East Alabama R. Co., 80 Ala. 100; Pensacola R. Co. *v.* Schaffer, 76 Ala. 233; Martin *v.* Brown, 75 Ala. 442; Ware *v.* Morgan, 67 Ala. 461; Elliott *v.* Stocks, 67 Ala. 290; Whilden *v.* Merchants', etc., Nat. Bank, 64 Ala. 1, 38 Am. Rep. 1; Snow *v.* Carr, 61 Ala. 363, 32 Am. Rep. 3; Shorter *v.* Sheppard, 33 Ala. 648; Mordecai *v.* Beal, 8 Port. 529; Scott *v.* Rivers, 1 Stew. & P. 19. See also Beall *v.* Dearing, 7 Ala. 124.

California.— Zellerbach *v.* Allenberg, 99 Cal. 57, 33 Pac. 786; Gordon *v.* Searing, 8 Cal. 49.

Colorado.—Owers *v.* Olathe Silver Min. Co., 6 Colo. App. 1, 39 Pac. 980.

Georgia.— Shirley *v.* Hicks, 105 Ga. 504, 31 S. E. 105; Miller *v.* McKinnon, 103 Ga. 553, 29 S. E. 467; Bowden *v.* Anchor, 95 Ga. 243, 22 S. E. 254; Tharpe *v.* Pearce, 89 Ga. 194, 15 S. E. 46; Petersburg Sav., etc., Co. *v.* Manhattan F. Ins. Co., 66 Ga. 446; Schaefer *v.* Georgia R. Co., 66 Ga. 39; Brown *v.* Oattis, 55 Ga. 416; Lunday *v.* Thomas, 26 Ga. 537.

Indiana.— Thom *v.* Wilson, 27 Ind. 370; German-American Bldg. Assoc. *v.* Droge, (App. 1895) 41 N. E. 397.

Kentucky.— Waller *v.* Cralle, 8 B. Mon. 11; Sutton *v.* Floyd, 7 B. Mon. 3; Boone *v.* Dykes, 3 T. B. Mon. 529.

Missouri.— Brown *v.* Wood, 19 Mo. 475; St. Louis Perpetual Ins. Co. *v.* Cohen, 9 Mo. 421; Price *v.* Clevenger, 99 Mo. App. 536, 74 S. W. 894; T. W. Harvey Lumber Co. *v.* Herriman, etc., Lumber Co., 39 Mo. App. 214.

New Jersey.— See Hirsch *v.* C. W. Leatherbee Lumber Co., 69 N. J. L. 509, 55 Atl. 645.

New York.— Bronson *v.* Tuthill, 1 Abb. Dec. 206, 3 Keyes 32; Cullinan *v.* Furthmann, 70 N. Y. App. Div. 110, 75 N. Y. Suppl. 90; Maxwell *v.* Hofheimer, 81 Hun 551, 30 N. Y. Suppl. 1090; Tucker *v.* Woolsey, 6 Lans. 482, 64 Barb. 142; Black *v.* Camden, etc., R., etc., Co., 45 Barb. 40; Holthausen *v.* Pondir, 55 N. Y. Super. Ct. 73; Bailey *v.* Johnson, 9 Cow. 115; Mauri *v.* Heffernan, 13 Johns. 58; Matter of New York Express Co., 2 Month. L. Bul. 62; Leinkaup *v.* Calman, 23 N. Y. Wkly. Dig. 520.

South Dakota.— See Hagaman *v.* Gillis, 9 S. D. 61, 68 N. W. 192.

Utah.— Dwyer *v.* Salt Lake City Copper Mfg. Co., 14 Utah 339, 47 Pac. 311.

West Virginia.— Vinal *v.* Gilman, 21 W. Va. 301, 45 Am. Rep. 562.

United States.— Burton *v.* Driggs, 20 Wall. 125, 22 L. ed. 299. See also U. S. *v.* Reyburn, 6 Pet. 352, 8 L. ed. 424. *Compare* Turner *v.* Yates, 16 How. 14, 14 L. ed. 824; Central Electric Co. *v.* Sprague Electric Co., 120 Fed. 925, 57 C. C. A. 197.

See 20 Cent. Dig. tit. "Evidence," § 577.

Rule restated.— In Burton *v.* Driggs, 20 Wall. (U. S.) 125, 134, 22 L. ed. 299, it was said: "It is well settled that, if books or papers necessary as evidence in a court in one State be in the possession of a person living in another State, secondary evidence, without further showing, may be given to prove the contents of such papers, and notice to produce them is unnecessary." This statement has been approved in many of the cases above cited in this note.

Party or his attorney in possession.— The rule stated in the text has been held not to apply where the party desiring to introduce the secondary evidence (Alabama Great Southern R. Co. *v.* Mt. Vernon Co., 84 Ala. 173, 4 So. 356) or his attorney (King *v.* Scheuer, 105 Ala. 558, 16 So. 923) had the custody of the document and resided out of the jurisdiction, and no attempt was made to obtain the document.

Non-residence of the grantor, in a suit to which the grantee is a party, does not of itself authorize the introduction of secondary evidence to prove title in the grantee under the deed; the presumption being that the deed is in the possession of the grantee, he must be notified to produce it, or its loss or non-existence must be established, before resort can be had to inferior evidence. Hussey *v.* Roquemore, 27 Ala. 281.

Presumption as to letters.— The fact that a letter was written to a person residing in another state or country raises a presumption that it is beyond the jurisdiction of the court, and its contents may be proven by secondary evidence without proving its actual loss or destruction. Manning *v.* Maroney, 87 Ala. 563, 6 So. 343, 13 Am. St. Rep. 671; Zellerbach *v.* Allenberg, 99 Cal. 57, 33 Pac. 786.

25. *Connecticut.*— Townsend *v.* Atwater, 5 Day 298. *Compare* Shepard *v.* Giddings, 22 Conn. 282.

Iowa.— Waite *v.* High, 96 Iowa 742, 65 N. W. 397.

Kansas.— Shaw *v.* Mason, 10 Kan. 184.

Louisiana.— Lewis *v.* Beatty, 8 Mart. N. S. 287.

Maine.— Knowlton *v.* Knowlton, 84 Me. 283, 24 Atl. 847.

Michigan.— Phillips *v.* U. S. Benefit Soc., 120 Mich. 142, 79 N. W. 1, holding that the

even in jurisdictions where the latter rule obtains, secondary evidence becomes admissible when the court is satisfied that the party desiring to prove the fact has made sufficiently diligent efforts to procure the primary evidence, but without success, or when it appears that the evidence is not subject to his control and that efforts to obtain it would be fruitless.[26] It has been so held where the person in possession of the document resided in another county than that in which the trial was had.[27]

(II) *Primary Evidence in Custody of Foreign Court.* Where an original written instrument is in the custody of the court of another state or country, or is attached to, or forms a part of the record of that court and cannot be removed therefrom, secondary evidence of its contents is admissible.[28] But it

deposition of the custodian of the document should be obtained.

Minnesota.—Wood *v.* Cullen, 13 Minn. 394.

New Mexico.— Kirchner *v.* Laughlin, 6 N. M. 300, 28 Pac. 505.

North Carolina.— Justice *v.* Luther, 94 N. C. 793; McCracken *v.* McCrary, 50 N. C. 399; Threadgill *v.* White, 33 N. C. 591; Davidson *v.* Norment, 27 N. C. 555.

Oregon.— Wiseman *v.* Northern Pac. R. Co., 20 Oreg. 425, 26 Pac. 272, 23 Am. St. Rep. 135.

Pennsylvania.— De Baril *v.* Pardo, 6 Pa. Cas. 148, 8 Atl. 876.

South Carolina.— Bunch *v.* Hurst, 3 Desauss. 273, 5 Am. Dec. 551.

Texas.— Read *v.* Chambers, (Civ. App. 1898) 45 S. W. 742. See also Crafts *v.* Daugherty, 69 Tex. 477, 6 S. W. 850; Prior *v.* North Texas Nat. Bank, (Civ. App. 1894) 29 S. W. 84.

England.— Boyle *v.* Wiseman, 3 C. L. R. 482, 10 Exch. 647, 1 Jur. N. S. 115, 24 L. J. Exch. 160, 3 Wkly. Rep. 206.

See 20 Cent. Dig. tit. "Evidence," § 577.

26. *Arkansas.*— Bozeman *v.* Browning, 31 Ark. 364.

Connecticut.— Elwell *v.* Mersick, 50 Conn. 272; Shepard *v.* Giddings, 22 Conn. 282.

District of Columbia.— Jackson *v.* Clifford, 5 App. Cas. 312.

Illinois.— Bishop *v.* American Preservers' Co., 157 Ill. 284, 41 N. E. 765, 48 Am. St. Rep. 317; Mitchell *v.* Jacobs, 17 Ill. 235.

Iowa.— Bullis *v.* Easton, 96 Iowa 513, 65 N. W. 395; Ingle *v.* Jones, 43 Iowa 286.

Kansas.— Deitz *v.* Regnier, 27 Kan. 94.

Louisiana.— State *v.* Sterling, 41 La. Ann. 679, 6 So. 583; Beauvais *v.* Wall, 14 La. Ann. 199; Montgomery *v.* Routh, 10 La. Ann. 316; Look *v.* Mays, 6 La. Ann. 726.

Massachusetts.— L'Herbette *v.* Pittsfield Nat. Bank, 162 Mass. 137, 38 N. E. 368, 44 Am. St. Rep. 354; Williamson *v.* Cambridge R. Co., 144 Mass. 148, 10 N. E. 790; Stevens *v.* Miles, 142 Mass. 571, 8 N. E. 426; Ide *v.* Pierce, 134 Mass. 260 (copies of books of corporation held admissible); Binney *v.* Russell, 109 Mass. 55; Eaton *v.* Campbell, 7 Pick. 10. See also Topping *v.* Bickford, 4 Allen 120.

Michigan.— People *v.* Seaman, 107 Mich. 348, 65 N. W. 203, 61 Am. St. Rep. 326; Knickerbocker *v.* Wilcox, 83 Mich. 200, 47 N. W. 123, 21 Am. St. Rep. 595.

Minnesota.— Kleeberg *v.* Schrader, 69 Minn. 136, 72 N. W. 59; Thomson-Houston Electric Co. *v.* Palmer, 52 Minn. 174, 53 N. W. 1137, 38 Am. St. Rep. 536.

New Hampshire.— Carpenter *v.* Bailey, 56 N. H. 283; Lord *v.* Staples, 23 N. H. 448; Woods *v.* Banks, 14 N. H. 101; Little *v.* Paddleford, 13 N. H. 167; Burnham *v.* Wood, 8 N. H. 334.

New York.— Forrest *v.* Forrest, 6 Duer 102.

North Carolina.— Casey *v.* Williams, 51 N. C. 578; Robards *v.* McLean, 30 N. C. 522.

Pennsylvania.— Otto *v.* Trump, 115 Pa. St. 425, 8 Atl. 786; Rhodes *v.* Seibert, 2 Pa. St. 18; Ralph *v.* Brown, 3 Watts & S. 395; Bell *v.* Keely, 2 Yeates 255; Davis *v.* Fireman's Fund Ins. Co., 5 Pa. Super. Ct. 506.

Texas.— Missouri, etc., R. Co. *v.* Dilworth, 95 Tex. 327, 67 S. W. 88 [*affirming* (Civ. App. 1901) 65 S. W. 502]; Missouri Pac. R. Co. *v.* Gernan, 84 Tex. 141, 19 S. W. 461; Smith *v.* Traders' Nat. Bank, 82 Tex. 368, 17 S. W. 779; McBride *v.* Willis, 82 Tex. 141, 18 S. W. 205; Veck *v.* Holt, 71 Tex. 715, 9 S. W. 743; Harvey *v.* Edens, 69 Tex. 420, 6 S. W. 306; Clifton *v.* Lilley, 12 Tex. 130; Cheatham *v.* Riddle, 8 Tex. 162; Latimer *v.* Kershner, (Civ. App. 1902) 68 S. W. 1016; De la Garza *v.* Macmanus, (Civ. App. 1898) 44 S. W. 704; Western Union Tel. Co. *v.* Smith, (Civ. App. 1894) 26 S. W. 216; Holt *v.* Maverick, 5 Tex. Civ. App. 650, 23 S. W. 751, (1894) 24 S. W. 532.

Virginia.— Beirne *v.* Rosser, 26 Gratt. 537.

Wisconsin.— Wisconsin River Lumber Co. *v.* Walker, 48 Wis. 614, 4 N. W. 803; Bonner *v.* Home Ins. Co., 13 Wis. 677.

United States.— Gass *v.* Stinson, 10 Fed. Cas. No. 5,262, 3 Sumn. 98.

England.— Quilter *v.* Jorss, 14 C. B. N. S. 747, 11 Wkly. Rep. 888, 108 E. C. L. 747.

See 20 Cent. Dig. tit. "Evidence," § 577.

27. Combs *v.* Breathitt County, 46 S. W. 505, 20 Ky. L. Rep. 529. See also Missouri, etc., R. Co. *v.* Dilworth, 95 Tex. 327, 67 S. W. 88; Sayles *v.* Bradley, etc., Co., 92 Tex. 406, 49 S. W. 209.

28. *Arkansas.*— Bozeman *v.* Browning, 31 Ark. 364.

Colorado.— Owers *v.* Olathe Silver Min. Co., 6 Colo. App. 1, 39 Pac. 980, holding the record of a deed admissible.

New Hampshire.—Lord *v.* Staples, 23 N. H. 448.

has been held that application should first be made to the court having the custody of the document,[29] and that application to an inferior officer of the court, although he may have the actual custody of the document, is not sufficient.[30]

(III) *Primary Evidence Among Archives of Foreign Government.* Where an original document is filed among the archives of a foreign government from which it cannot be withdrawn, secondary evidence of its contents is admissible,[31] especially where it is shown that reasonable efforts have been made to procure it.[32]

3. Failure of Adverse Party to Produce Primary Evidence on Notice — a. In General. Where the primary evidence of a fact which a party desires to prove is in the possession or control of his adversary who, after being notified to produce it at the trial,[33] fails or refuses to do so, secondary evidence becomes admissible.[34]

New York.— Patten *v.* Park, Anth. N. P. 46.

North Carolina.— Casey *v.* Williams, 51 N. C. 578.

Pennsylvania.— Otto *v.* Trump, 115 Pa. St. 425, 8 Atl. 786.

See 20 Cent. Dig. tit. "Evidence," § 577.

Compare Shillito *v.* Robbins, 8 Ohio Dec. (Reprint) 313, 7 Cinc. L. Bul. 74; Doe *v.* Whitney, 2 N. Brunsw. 514.

29. Crispin *v.* Doglioni, 32 L. J. P. & M. 109, 8 L. T. Rep. N. S. 91, 3 Swab. & Tr. 44, 11 Wkly. Rep. 500. See also Doe *v.* Whitney, 2 N. Brunsw. 514.

30. Crispin *v.* Doglioni, 32 L. J. P. & M. 109, 8 L. T. Rep. N. S. 91, 3 Swab. & Tr. 44, 11 Wkly. Rep. 500.

31. Bowman *v.* Sanborn, 25 N. H. 87; De la Garza *v.* Macmanus, (Tex. Civ. App. 1898) 44 S. W. 704.

32. Quilter *v.* Jorss, 14 C. B. N. S. 747, 11 Wkly. Rep. 888, 108 E. C. L. 747.

33. As to notice to produce primary evidence see *infra*, XV, F, 3.

34. *Alabama.*— Loeb *v.* Huddleston, 105 Ala. 257, 16 So. 714; Smith *v.* Collins, 94 Ala. 394, 10 So. 334; Fralick *v.* Presley, 29 Ala. 457, 65 Am. Dec. 413; Mims *v.* Sturtevant, 18 Ala. 359; Bright *v.* Young, 15 Ala. 112; Blevins *v.* Pope, 7 Ala. 371.

Arkansas.— Cross *v.* Johnson, 30 Ark. 396.

California.— Harloe *v.* Lambie, 132 Cal. 133, 64 Pac. 88 (decided under Code Civ. Proc. § 1938); Jones *v.* Jones, 38 Cal. 584.

Georgia.— Hines *v.* Johnston, 95 Ga. 629, 23 S. E. 470; Crawford *v.* Hodge, 81 Ga. 728, 8 S. E. 208.

Illinois.— Rudgear *v.* U. S. Leather Co., 206 Ill. 74, 69 N. E. 30 [*affirming* 108 Ill. App. 227]; Union Surety, etc., Co. *v.* Tenney, 200 Ill. 349, 65 N. E. 688 [*affirming* 102 Ill. App. 95]; Suburban R. Co. *v.* Balkwill, 195 Ill. 535, 63 N. E. 389 [*affirming* 94 Ill. App. 454]; Spencer *v.* Boardman, 118 Ill. 553, 9 N. E. 330; Marlow *v.* Marlow, 77 Ill. 633; Prettyman *v.* Walston, 34 Ill. 175.

Indiana.— Barklay *v.* Mahon, 95 Ind. 101.

Indian Territory.— Missouri, etc., R. Co. *v.* Elliott, 2 Indian Terr. 407, 51 S. W. 1067 [*affirmed* in 102 Fed. 96, 42 C. C. A. 188].

Iowa.— State *v.* Chase, 89 Iowa 38, 56 N. W. 275.

Kentucky.— Benjamin *v.* Ellinger, 80 Ky. 472; Buckner *v.* Morris, 2 J. J. Marsh. 121.

Louisiana.— Merritt *v.* Wright, 19 La. Ann. 91.

Maine.— Lowell *v.* Flint, 20 Me. 401; Norton *v.* Heywood, 20 Me. 359.

Massachusetts.— Morse *v.* Woodworth, 155 Mass. 233, 29 N. E. 525, 27 N. E. 1010; Fletcher *v.* Powers, 131 Mass. 333; Chamberlin *v.* Huguenot Mfg. Co., 118 Mass. 532; Dana *v.* Kemble, 19 Pick. 112.

Michigan.— Boglarsky *v.* Singer Mfg. Co., 65 Mich. 510, 32 N. W. 880.

Minnesota.— Hobe *v.* Swift, 58 Minn. 84, 59 N. W. 831; Lovejoy *v.* Howe, 55 Minn. 353, 57 N. W. 57.

Mississippi.— Cooper *v.* Granberry, 33 Miss. 117.

Missouri.— Sisk *v.* American Cent. F. Ins. Co., 96 Mo. App. 695, 69 S. W. 687.

New Hampshire.— Downer *v.* Button, 26 N. H. 338; Nealley *v.* Greenough, 25 N. H. 325; Hacker *v.* Young, 6 N. H. 95.

New Jersey.— Truax *v.* Truax, 2 N. J. L. 166.

New York.— Sessions *v.* Palmeter, 75 Hun 268, 26 N. Y. Suppl. 1076; King *v.* Lowry, 20 Barb. 532; Sheldon *v.* Wood, 2 Bosw. 267; Hess-Mott Co. *v.* Brown, 84 N. Y. Suppl. 168 (insurance policies); Homeyer *v.* New Jersey Sheep, etc., Co., 20 N. Y. Suppl. 814; Haden *v.* Clarke, 10 N. Y. Suppl. 291; Life, etc., Ins. Co. *v.* Mechanics' F. Ins. Co., 7 Wend. 31; Jackson *v.* McVey, 18 Johns. 330; Jackson *v.* Woolsey, 11 Johns. 446; Jackson *v.* Shearman, 6 Johns. 19. See also Weston *v.* Weston, 86 N. Y. App. Div. 159, 83 N. Y. Suppl. 528.

North Carolina.— Robards *v.* McLean, 30 N. C. 522; Overman *v.* Clemmons, 19 N. C. 185.

Ohio.— John *v.* John, Wright 584 [*affirmed* in 6 Ohio 271]; Gilchrist *v.* Perrysburg, etc., Transp. Co., 21 Ohio Cir. Ct. 19, 11 Ohio Cir. Dec. 350.

Oregon.— Sugar Pine Lumber Co. *v.* Garrett, 28 Oreg. 168, 42 Pac. 129.

Pennsylvania.— Strawbridge *v.* Clamond Tel. Co., 195 Pa. St. 118, 45 Atl. 677; West Branch Ins. Co. *v.* Helfenstein, 40 Pa. St. 289, 80 Am. Dec. 573.

South Carolina.— Rose *v.* Winnsboro Nat. Bank, 41 S. C. 191, 19 S. E. 487; Boyce *v.* Foster, 1 Bailey 540.

Texas.— Behee *v.* Missouri Pac. R. Co., 71 Tex. 424, 9 S. W. 449; Newsom *v.* Davis,

This is true, although the person to whom the notice is given is not a party to the

20 Tex. 419; Cranfill *v.* Hayden, 22 Tex. Civ. App. 656, 55 S. W. 805; Boyd *v.* Leith, (Civ. App. 1899) 50 S. W. 618 [*citing* Rev. Civ. St. (1895) art. 2312]; Galveston, etc., R. Co. *v.* Robinett, (Civ. App. 1899) 54 S. W. 263; Hazelwood *v.* Pennybacker, (Civ. App. 1899) 50 S. W. 199; Heintz *v.* O'Donnell, 17 Tex. Civ. App. 21, 42 S. W. 797.

Vermont.— Orr *v.* Clark, 62 Vt. 136, 19 Atl. 929; Mattocks *v.* Stearns, 9 Vt. 326.

Virginia.— Maxwell *v.* Light, 1 Call 117.

Washington.— Nunn *v.* Jordan, 31 Wash. 506, 72 Pac. 124.

Wisconsin.— Speiser *v.* Phœnix Mut. L. Ins. Co., 119 Wis. 530, 97 N. W. 207; Tewksbury *v.* Schulenburg, 48 Wis. 577, 4 N. W. 757.

United States.— Dunbar *v.* U. S., 156 U. S. 185, 15 S. Ct. 325, 39 L. ed. 390; Union Ins. Co. *v.* Smith, 124 U. S. 405, 8 S. Ct. 534, 31 L. ed. 497; Butler *v.* Maples, 9 Wall. 766, 19 L. ed. 822; Missouri, etc., R. Co. *v.* Elliott, 102 Fed. 96, 42 C. C. A. 188 [*affirming* 2 Indian Terr. 407, 51 S. W. 1067]. See also Supreme Council A. L. of H. *v.* Champe, 127 Fed. 541, 63 C. C. A. 282.

England.— Sturge *v.* Buchanan, 10 A. & E. 598, 8 L. J. Q. B. 272, 2 M. & Rob. 90, 2 P. & D. 573, 37 E. C. L. 321; Doe *v.* Wainwright, 5 A. & E. 520, 2 Hurl. & W. 391, 6 L. J. K. B. 35, 1 N. & P. 8, 31 E. C. L. 714; Robb *v.* Starkey, 2 C. & K. 143, 61 E. C. L. 143; Gibbons *v.* Powell, 9 C. & P. 634, 38 E. C. L. 370; Firkin *v.* Edwards, 9 C. & P. 478, 38 E. C. L. 283; Beckwith *v.* Benner, 6 C. & P. 681, 25 E. C. L. 636; Lloyd *v.* Mostyon, 2 Dowl. P. C. N. S. 476, 6 Jur. 974, 12 L. J. Exch. 1, 10 M. & W. 478; Reg. *v.* Barker, 1 F. & F. 326.

See 20 Cent. Dig. tit. "Evidence," § 596.

Where adverse party disclaims knowledge of instrument.— Secondary evidence of the contents of a written instrument may be given, when the party offering it is not entitled to the custody of the original, and the opposite party, to whose custody it rightfully belongs, upon being notified to produce it, disclaims all knowledge of it. Jones *v.* Jones, 38 Cal. 584. See also Benjamin *v.* Ellinger, 80 Ky. 472; Augur Steel Axle, etc., Co. *v.* Whittier, 117 Mass. 451; Dunbar *v.* U. S., 156 U. S. 185, 15 S. Ct. 325, 39 L. ed. 390. *Compare* Sun Ins. Co. *v.* Earle, 29 Mich. 406.

Letter written to adverse party.— Where a letter, directed to the adverse party at his usual address, has been mailed, postage prepaid, and notice has been given to that party to produce the original letter, which he has failed to do, a letter-press copy, or other copy of the letter, when shown to be correct, is admissible to prove the contents of the original. McDowell *v.* Ætna Ins. Co., 164 Mass. 444, 41 N. E. 665; Augur Steel Axle, etc., Co. *v.* Whittier, 117 Mass. 451; Sugar Pine Lumber Co. *v.* Garrett, 28 Oreg. 168, 42 Pac. 129. But see Freeman *v.* Morey, 45 Me. 50, 71 Am. Dec. 527. As to presumption of receipt of letters see EVIDENCE, 16 Cyc. 1065 *et seq.*

Failure of executors to produce original will.— Where executors under a will which revoked all former wills have failed on notice given to produce the original of a former will, it may be proved by production of the original draft by the attorney who drew the will. Keagle *v.* Pessell, 91 Mich. 618, 52 N. W. 58.

Mortgage to secure note.— Where a note secured by a mortgage is indorsed to a third person, who brings a suit thereon, the presumption is that the mortgage follows the note; and after notice to the holder of the note to produce the mortgage upon the trial, and its non-production, defendant may introduce secondary evidence of its contents. Downer *v.* Button, 26 N. H. 338.

In an action against a sheriff, where it is shown that an execution has been returned to plaintiff or his agent who fails to produce it on notice, defendant may give parol evidence of the regularity of his proceedings. Sias *v.* Badger, 6 N. H. 393.

An agreement between opposing counsel in open court that defendant would without notice produce before the trial all documents in his possession or under his control, relating to the case, is equivalent to notice to produce them; and upon defendant's failure to comply with this agreement, secondary evidence of such documents is admissible. Duringer *v.* Moschino, 93 Ind. 495.

Failure to produce records of corporation.— Under a statute providing that the acts and proceedings of corporations might be proved by sworn copies of the records thereof, it was held that the failure of a corporation to produce the original records on notice was not sufficient to authorize the opposite party to introduce parol evidence of their contents. Madison, etc., R. Co. *v.* Whitesel, 11 Ind. 55.

What facts may be proved.— A notice to produce papers for any purpose is sufficient to admit secondary evidence of any fact which would be shown by the papers upon their production, as for instance payment indorsed on a mortgage. Howell *v.* Huyck, 2 Abb. Dec. (N. Y.) 423, 4 Transcr. App. (N. Y.) 202.

Where the adverse party has produced the original instrument in compliance with a notice to do so, secondary evidence of its contents cannot of course be introduced. Dean *v.* Carnahan, 7 Mart. N. S. (La.) 258; Carr *v.* Gale, 5 Fed. Cas. No. 2,435, 3 Woodb. & M. 38. But where secondary evidence has been introduced on failure to comply with the notice, the fact that the original evidence is afterward produced does not render erroneous the previous admission of the secondary evidence. Phenix Ins. Co. *v.* Jacobs, 23 Ind. App. 509, 55 N. E. 778; Gulf, etc., R. Co. *v.* Leatherwood, 29 Tex. Civ. App. 507, 69 S. W. 119.

record, if it appears that he is the real party in interest.[35] And a party who has failed to produce the primary evidence, and through whose fault the necessity has arisen for resorting to secondary evidence cannot complain that the latter is not of a wholly satisfactory character.[36] It makes no difference that the instrument is in the actual possession of some third person if it is still within the control of the adverse party, but under such circumstances the latter is held to his obligation to produce the writing on notice, and upon his failure to do so secondary evidence is admissible.[37] And the same rule applies where the document is in the custody of another court from which it may be withdrawn,[38] or is out of the jurisdiction.[39] On the other hand, if the document is held by a third person and is not in the adverse party's control, the notice is inoperative, and the party's failure to produce the document will not warrant the admission of secondary evidence, but the party seeking to introduce the evidence must summon the third person or show that with due diligence the document cannot be obtained.[40]

Statutes prescribing the manner in which courts may compel the production of books and papers, by a party to an action, and imposing a penalty for failure to comply with the court's orders, do not preclude the ordinary remedy under a notice to produce. Missouri, etc., R. Co. *v.* Elliott, 2 Indian Terr. 407, 51 S. W. 1067 [*affirmed* in 102 Fed. 96, 42 C. C. A. 188].

35. Norton *v.* Heywood, 20 Me. 359.

36. *Alabama.*—Mims *v.* Sturtevant, 18 Ala. 359.

Kentucky.— Benjamin *v.* Ellinger, 80 Ky. 472.

Massachusetts.— Dana *v.* Kemble, 19 Pick. 112.

New Hampshire.— Nealley *v.* Greenough, 25 N. H. 325.

New York.— Life, etc., Ins. Co. *v.* Mechanics' F. Ins. Co., 7 Wend. 31; Jackson *v.* McVey, 18 Johns. 330.

See 20 Cent. Dig. tit. "Evidence," § 596.

37. *Alabama.*—Blevins *v.* Pope, 7 Ala. 371.

Louisiana.— Hills *v.* Jacobs, 7 Rob. 406.

Maine.— See Thomas *v.* Harding, 8 Me. 417.

Missouri.— Pope *v.* Mooney, 40 Mo. 104.

New York.—Jackson *v.* Shearman, 6 Johns. 19. See also King *v.* Lowry, 20 Barb. 532; Wood *v.* Lawrence, 13 N. Y. Suppl. 441.

Pennsylvania.— McKellip *v.* McIlhenny, 4 Watts 317, 28 Am. Dec. 711. See also De Baril *v.* Pardo, 6 Pa. Cas. 148, 8 Atl. 876.

Texas.— See Newsom *v.* Davis, 20 Tex. 419.

United States.— Missouri, etc., R. Co. *v.* Elliott, 102 Fed. 96, 42 C. C. A. 188 [*affirming* 2 Indian Terr. 407, 51 S. W. 1067].

England.— Sinclair *v.* Stevenson, 2 Bing. 514, 9 E. C. L. 684, 1 C. & P. 582, 12 E. C. L. 331, 10 Moore C. P. 46; Bell *v.* Francis, 9 C. & P. 66, 38 E. C. L. 50; Burton *v.* Payne, 2 C. & P. 520, 31 Rev. Rep. 692, 12 E. C. L. 709; Partridge *v.* Coates, 1 C. & P. 534, R. & M. 156, 12 E. C. L. 307; Wright *v.* Bunyard, 2 F. & F. 193; Irwin *v.* Lever, 2 F. & F. 296; Baldney *v.* Ritchie, 1 Stark. 338, 2 E. C. L. 133.

See 20 Cent. Dig. tit. "Evidence," § 596.

An instrument in the possession of one of two executors is, in contemplation of law, in the possession of both and it will be assumed that either of them has the instrument under his control. Fralick *v.* Presley, 29 Ala. 457, 65 Am. Dec. 413.

Notice to executor of deceased custodian.— Where a bill presented to a drawee for acceptance was at his request left with him, a notice to his executors after his death to produce it on the trial of an action against them for the refusal of their testator to accept will authorize the admission of parol evidence of its contents, although they deny it ever came to their possession. Kennedy *v.* Geddes, 3 Ala. 581, 37 Am. Dec. 714.

38. Jackson *v.* Shearman, 6 Johns. (N. Y.) 19; Rush *v.* Peacock, 2 M. & Rob. 162.

39. Missouri, etc., R. Co. *v.* Elliott, 102 Fed. 96, 42 C. C. A. 188 [*affirming* 2 Indian Terr. 407, 51 S. W. 1067].

40. *Alabama.*— Powell *v.* Know, 16 Ala. 364.

Georgia.— Bell *v.* Chandler, 23 Ga. 356.

Illinois.— Landt *v.* McCullough, 103 Ill. App. 668; La Salle Pressed Brick Co. *v.* Coe, 53 Ill. App. 506.

Kansas.— Jobes *v.* Lows, 63 Kan. 886, 66 Pac. 627.

Maine.— Baker *v.* Pike, 33 Me. 213.

New York.— Birkbeck *v.* Tucker, 2 Hall 139; Chaffee *v.* Cox, 1 Hilt. 78; Berg *v.* Carroll, 16 N. Y. Suppl. 175; Vogell *v.* Rhind, 11 N. Y. St. 564.

Pennsylvania.— De Baril *v.* Pardo, 3 Pa. Cas. 148, 8 Atl. 876.

England.—Whitford *v.* Tutin, 10 Bing. 395, 25 E. C. L. 189, 6 C. & P. 228, 25 E. C. L. 407, 3 L. J. C. P. 106, 4 Moore & S. 166; Evans *v.* Sweet, 1 C. & P. 277, 12 E. C. L. 166, R. & M. 83, 21 E. C. L. 706; Hibberd *v.* Knight, 2 Exch. 11, 12 Jur. 162, 17 L. J. Exch. 119; Parry *v.* May, 1 M. & Rob. 279, 280, where Littledale, J., said: "In order to let in secondary evidence the instrument need not be in the actual possession of the party; it is enough if it is in his power, which it would be, if in the hands of a party in whom it would be wrongful not to give up possession to him. But he must have such a right to it, as would entitle him not merely to inspect but to retain; that is not so here, because even if the document were given to the defendant for the purpose of this cause,

b. Qualified, Conditional, or Restricted Production. Where books or papers are produced in court pursuant to a notice, the party producing them has no right to impose any conditions as to their use in evidence, but the requirement is absolute that they shall be brought into court for the benefit of the adverse party and shall be offered without reserve; it is for the adverse party, after thus obtaining possession of them, to decide whether it is expedient to use them. Hence if the party producing the books or papers endeavors to restrict their use in evidence, his adversary is entitled to give secondary evidence of their contents.[41]

c. Primary Evidence Privileged From Production. Where the documents, notice to produce which has been given, are privileged from production, and the party seeking to introduce the evidence has inspected and taken copies of the documents, he can, notwithstanding the privilege, introduce such secondary evidence on failure of his opponent to produce the writings.[42] Likewise, while an attorney cannot be compelled to produce or disclose the contents of an instrument intrusted to him by his client, he may be compelled to testify that such an instrument exists and that it is in his custody, and then, if proper notice to produce has been given, the opposite party may introduce secondary evidence.[43]

4. Inadmissibility of Primary Evidence. Secondary evidence of the contents of a writing cannot be introduced where it appears that, for any reason, the writing if produced would not be admissible,[44] even if its absence is satisfactorily

it must be returned." See also Harvey *v.* Mitchell, 2 M. & Rob. 366.

The rule stated in the text applies where the nature of the instrument, production of which is desired, is such as to raise the inference that it is not in the possession or control of the party notified to produce it, but that it is properly in the custody of some third person. Bell *v.* Chandler, 23 Ga. 356, holding that a fieri facias is presumed to be in the possession of the clerk, and therefore a notice to a party to produce it is not a sufficient foundation for the introduction of secondary evidence. See also Powell *v.* Knox, 16 Ala. 364; Earnest *v.* Napier, 15 Ga. 306.

Admission of co-defendant.— Where it is not shown that papers are in the possession or control of a defendant who has been notified to produce them, an admission made by his co-defendant will not establish that fact. Birkbeck *v.* Tucker, 2 Hall (N. Y.) 139.

41. Carr *v.* Gale, 5 Fed. Cas. No. 2,435, 3 Woodb. & M. (U. S.) 38. See also Skillman *v.* Downs, 10 La. 103. *Compare* as to the English practice Wharam *v.* Routledge, 5 Esp. 235, 8 Rev. Rep. 851; Wilson *v.* Bowie, 1 C. & P. 9, 12 E. C. L. 18.

42. Calcraft *v.* Guest, [1898] 1 Q. B. 759, 67 L. J. Q. B. 505, 78 L. T. Rep. N. S. 283, 46 Wkly. Rep. 420; Lloyd *v.* Mostyn, 2 Dowl. P. C. N. S. 476, 6 Jur. 974, 12 L. J. Exch. 1, 10 M. & W. 478. See also Speiser *v.* Phœnix Mut. L. Ins. Co., 119 Wis. 530, 97 N. W. 207.

43. Mitchell's Case, 12 Abb. Pr. (N. Y.) 249; Coveney *v.* Tannahill, 1 Hill (N. Y.) 33, 37 Am. Dec. 287; Jackson *v.* McVey, 18 Johns. (N. Y.) 330; Brandt *v.* Klein, 17 Johns. (N. Y.) 335; Hubble *v.* Judd Linseed, etc., Oil Co., 19 Alb. L. J. 97; Durkee *v.* Leland, 4 Vt. 612; Rhoades *v.* Selin, 20 Fed. Cas. No. 11,740, 4 Wash. 715; Dwyer *v.* Collins, 7 Exch. 639, 16 Jur. 569, 21 L. J. Exch. 225, 12 Eng. L. & Eq. 532. See also Lynde *v.* Judd, 3 Day (Conn.) 499. As to privileged communications see, generally, Witnesses.

Subpœna duces tecum not a notice.— Where an instrument relating to the cause is delivered by the adverse party to his attorney, it is a confidential communication which the attorney cannot be permitted to disclose, and if the other party desires to prove its contents he must give notice to produce it. Production cannot be compelled by force of a subpœna duces tecum served upon the attorney, and the subpœna in such a case cannot operate as a notice to produce. McPherson *v.* Rathbone, 7 Wend. (N. Y.) 216.

44. *Alabama.*— Street *v.* Kelly, 67 Ala. 478.

Georgia.— Epping *v.* Mockler, 55 Ga. 376.

Illinois.— Comisky *v.* Breen, 7 Ill. App. 369.

Maine.— Gage *v.* Wilson, 17 Me. 378; Hovey *v.* Dean, 13 Me. 31.

New Hampshire.—Chesley *v.* Frost, 1 N. H. 145.

New York.—Peck *v.* Valentine, 94 N. Y. 569 [*reversing* 29 Hun 668]; Clute *v.* Small, 17 Wend. 238.

Texas.— Baldridge *v.* Penland, 68 Tex. 441, 4 S. W. 565.

See 20 Cent. Dig. tit. "Evidence," § 573.

If execution of the instrument is not properly proved (Hovey *v.* Deane, 13 Me. 31; Epping *v.* Mockler, 55 Ga. 376), as where the subscribing witnesses are not produced and no excuse is given for their absence (Street *v.* Kelly, 67 Ala. 478; Gage *v.* Wilson, 17 Me. 378), secondary evidence of the contents of the instrument is not admissible.

Primary evidence excluded.— Where the record of proceedings by a justice of the peace has been excluded, parol evidence of matters contained therein is not admissible. Comisky *v.* Breen, 7 Ill. App. 369. But where a written contract clearly admissible is improperly excluded, no error is committed in afterward

explained.[45] But if the fact to which the writing relates can be proved independently of the writing, it may be proved by parol evidence even though the writing if produced could not be received as evidence of the fact.[46]

F. Preliminaries to Admission of Secondary Evidence — 1. Proof of Execution, Existence, and Genuineness of Original Instrument. Before a party can be permitted to introduce secondary evidence of the contents of a written contract, deed, or other instrument stated to have been lost or destroyed, satisfactory proof must first be made of the former existence, proper execution,[47] and

admitting parol evidence showing the execution and terms of the contract and the acts of the parties under it. Nebeker *v.* Harvey, 21 Utah 363, 60 Pac. 1029. Likewise, a party after obtaining the exclusion of a document cannot object to parol evidence of the contents of the document, on the ground that the writing is the best evidence. Burnett *v.* Crawford, 50 S. C. 161, 27 S. E. 645.

45. Peck *v.* Valentine, 94 N. Y. 569 [*reversing* 29 Hun 668]; Clute *v.* Small, 17 Wend. (N. Y.) 238; Baldridge *v.* Penland, 68 Tex. 441, 4 S. W. 565.

46. Sparks *v.* Rawls, 17 Ala. 211; Paysant *v.* Ware, 1 Ala. 160; People *v.* Leonard, 106 Cal. 302, 39 Pac. 617; Charleston *v.* Allen, 6 Vt. 633. See also Pharr *v.* Bachelor, 3 Ala. 237; Dow *v.* Hinesburgh, 2 Aik. (Vt.) 18.

47. *Alabama.*— Hughes *v.* Southern Warehouse Co., 94 Ala. 613, 10 So. 133; Potts *v.* Coleman, 86 Ala. 94, 5 So. 780; Singer Mfg. Co. *v.* Riley, 80 Ala. 314; Shorter *v.* Sheppard, 33 Ala. 648.

California.— Reynolds *v.* Lincoln, 71 Cal. 183, 9 Pac. 176, 12 Pac. 449.

Colorado.— Reynolds *v.* Campling, 23 Colo. 105, 46 Pac. 639.

Connecticut.— Kelsey *v.* Hanmer, 18 Conn. 311.

Florida.— Stewart *v.* Stewart, 19 Fla. 846.

Georgia.— Crummey *v.* Bentley, 114 Ga. 746, 40 S. E. 765; Garbutt Lumber Co. *v.* Gress Lumber Co., 111 Ga. 821, 35 S. E. 686; Smith *v.* Smith, 106 Ga. 303, 31 S. E. 762; Dasher *v.* Ellis, 102 Ga. 830, 30 S. E. 544; Calhoun *v.* Calhoun, 81 Ga. 91, 6 S. E. 913; White *v.* Clements, 39 Ga. 232; Durham *v.* Holeman, 30 Ga. 619; Heard *v.* McKee, 26 Ga. 332.

Illinois.— Palmer *v.* Logan, 4 Ill. 56.

Indiana.— Forsythe *v.* Park, 16 Ind. 247.

Kentucky.— Helton *v.* Asher, 103 Ky. 730, 46 S. W. 22, 20 Ky. L. Rep. 935, 82 Am. St. Rep. 601; Elmondorff *v.* Carmichael, 3 Litt. 472, 14 Am. Dec. 86; Embry *v.* Millar, 1 A. K. Marsh. 300, 10 Am. Dec. 732.

Maine.— Elwell *v.* Cunningham, 74 Me. 127; Moor *v.* Carey, 42 Me. 29; Dunlap *v.* Glidden, 31 Me. 510; Kimball *v.* Morrell, 4 Me. 368.

Maryland.— Young *v.* Mackall, 4 Md. 362 [*affirming* 3 Md. Ch. 398].

Minnesota.— Slocum *v.* Bracy, 65 Minn. 500, 67 N. W. 843; Stocking *v.* St. Paul Trust Co., 39 Minn. 410, 40 N. W. 365; Board of Education *v.* Moore, 17 Minn. 412.

Mississippi.— Weiler *v.* Monroe County, 74 Miss. 682, 21 So. 969, 22 So. 188.

Missouri.— Ebersole *v.* Rankin, 102 Mo. 488, 15 S. W. 422; Gould *v.* Trowbridge, 32 Mo. 291; Boatman *v.* Curry, 25 Mo. 433; Zollman *v.* Tarr, 93 Mo. App. 234; Shea *v.* Seelig, 89 Mo. App. 146; Brinkman *v.* Luhrs, 60 Mo. App. 512; Holman *v.* Bacchus, 24 Mo. App. 629.

Nebraska.— Whitwell *v.* Johnson, 2 Nebr. (Unoff.) 66, 96 N. W. 272; Samuelson *v.* Gale Mfg. Co., 1 Nebr. (Unoff.) 815, 95 N. W. 809; Peycke *v.* Shinn, (1903) 94 N. W. 135.

New York.— Edwards *v.* Noyes, 65 N. Y. 125; Metcalf *v.* Van Benthuysen, 3 N. Y. 424; McKineron *v.* Bliss, 31 Barb. 180 [*affirmed* in 21 N. Y. 206].

North Carolina.— Gillis *v.* Wilmington, etc., R. Co., 108 N. C. 441, 13 S. E. 11, 1019; Tooley *v.* Lucas, 48 N. C. 146; Lambert *v.* Lambert, 33 N. C. 162.

Pennsylvania.— Burr *v.* Kase, 168 Pa. St. 81, 31 Atl. 954; Emig *v.* Diehl, 76 Pa. St. 359; McReynolds *v.* McCord, 6 Watts 288; Meyer *v.* Barker, 6 Binn. 228; Anders *v.* New Jersey Cent. R. Co., 19 Pa. Super. Ct. 564.

South Carolina.— Woolfolk *v.* Gainteville Mfg. Co., 22 S. C. 332; Howell *v.* House, 2 Mill 80.

Texas.— Hampshire *v.* Floyd, 39 Tex. 103.

United States.— Doe *v.* Aiken, 31 Fed. 393 (decided under Ga. Code, § 3769, providing that "the existence of a genuine original is essential to the admissibility of a copy"); U. S. *v.* The Paul Shearman, 27 Fed. Cas. No. 16,012, Pet. C. C. 98.

Canada.— Ansley *v.* Breo, 14 U. C. C. P. 371; Gough *v.* McBride, 10 U. C. C. P. 166; Dickson *v.* McFarlane, 22 U. C. Q. B. 539.

See 20 Cent. Dig. tit. "Evidence," §§ 600, 601–604.

Execution of a lost deed must be as strictly proved as if the deed itself were produced in court, or secondary evidence of its contents is not admissible. Mariner *v.* Saunders, 10 Ill. 113; Wells *v.* Jackson Iron Mfg. Co., 48 N. H. 491; State *v.* Shinborn, 46 N. H. 497, 88 Am. Dec. 224; Melvin *v.* Marshall, 22 N. H. 379. See also Porter *v.* Wilson, 13 Pa. St. 641. And see Deeds, 13 Cyc. 725 *et seq.*; and, generally, Lost Instruments. But it has been held otherwise with respect to deeds more than thirty years old which if produced would prove themselves (Beall *v.* Dearing, 7 Ala. 124; Smith *v.* Cavitt, 20 Tex. Civ. App. 558, 50 S. W. 167. See also Palmer *v.* Logan, 4 Ill. 56, and *supra*, XIV, D), except where the evidence is met by a statutory affidavit of forgery (McCall *v.* Bentley, 114 Ga. 752, 40 S. E. 768).

Proof of delivery.— The necessity for proof of execution includes proof of delivery. Lewis

genuineness[48] of the instrument. The same requirements must be complied

v. Burns, 122 Cal. 358, 55 Pac. 132; Smith *v.* Smith, 112 Ga. 351, 37 S. E. 407; Jack *v.* Woods, 29 Pa. St. 375; McCredy *v.* Schuylkill Nav. Co., 3 Whart. (Pa.) 424. See also Thompson *v.* Thompson, 9 Ind. 323, 68 Am. Dec. 638; Wells *v.* Jackson Iron Mfg. Co., 48 N. H. 491.

Escrow.— So where it appears that the instrument was held as an escrow, secondary evidence of its contents cannot be received. McCredy *v.* Schuylkill Nav. Co., 3 Whart. (Pa.) 424.

Proof of suppression or destruction by the party to be affected by the instrument is equivalent to proof of execution where no better evidence can be had. McCredy *v.* Schuylkill Nav. Co., 3 Whart. (Pa.) 424. Thus where parol evidence was offered to prove that plaintiff executed a discharge of defendant from a certain claim, and tendered it to him in the court-room, by putting it in his lap, and that he brushed it or it fell upon the floor and was not afterward seen, it was held that the evidence was admissible; the instrument under such circumstances being considered a lost paper. Stoddard *v.* Mix, 14 Conn. 12.

Under Ga. Civ. Code, § 3611, providing for the establishing of lost deeds, if a properly established copy of a lost deed has been placed upon record, it is admissible without proof of the execution of the original deed. Leggett *v.* Patterson, 114 Ga. 714, 40 S. E. 736.

When a deed is not produced after due notice to the party having the control of it, the court will be liberal in the application of the rule which allows secondary evidence; and, although there be no direct evidence of the identity and execution of the deed, proof of circumstances tending to establish these facts is admissible and proper to be submitted to the jury. Bright *v.* Young, 15 Ala. 112.

Slight evidence of the existence of the original writing has been deemed sufficient to lay the foundation for secondary evidence, where no issue is made as to the existence of the writing. Poulet *v.* Johnson, 25 Ga. 403; Doe *v.* Biggers, 6 Ga. 188; Groff *v.* Ramsey, 19 Minn. 44; Doe *v.* Aiken, 31 Fed. 393 [*citing* Ga. Code, § 3769]. But where an issue is made on this question the court will require cogent and satisfactory evidence. Oliver *v.* Persons, 30 Ga. 391, 76 Am. Dec. 657.

For evidence held sufficient to establish the former execution and existence of a power of attorney (see Williams *v.* Conger, 125 U. S. 397, 8 S. Ct. 933, 31 L. ed. 778); of a receipt (see Board of Education *v.* Moore, 17 Minn. 412); of a trustee's bond (see Boyd *v.* Com., 36 Pa. St. 355); of a note (see Mandell *v.* Fulcher, 86 Ga. 166, 12 S. E. 469); and of deeds (see Beall *v.* Dearing, 7 Ala. 124; Swift *v.* Fitzhugh, 9 Port. (Ala.) 39; Harrell *v.* Enterprise Sav. Bank, 183 Ill. 538, 56 N. E. 63; Golder *v.* Bressler, 105 Ill. 419; Dickerson *v.* Talbot, 14 B. Mon. (Ky.) 60; Gaston *v.* Merriam, 33 Minn. 271, 22 N. W. 614; Reinboth *v.* Zerbe Run Imp. Co., 29 Pa. St. 139; Gray *v.* Coulter, 4 Pa. St. 188; Garwood *v.* Dennis, 4 Binn. (Pa.) 314; Hobbs *v.* Beard, 43 S. C. 370, 21 S. E. 305; Belton *v.* Briggs, 4 Desauss. (S. C.) 465).

For evidence held insufficient to establish the former existence of a deed (see Stewart *v.* Stewart, 19 Fla. 846; Metcalf *v.* Van Benthuysen, 3 N. Y. 424) and a note (see Borland *v.* Phillips, 3 Ala. 718).

48. *Alabama.*— Potts *v.* Coleman, 86 Ala. 94, 5 So. 780.

California.—Reynolds *v.* Jourdan, 6 Cal. 108.

Connecticut.— Kelsey *v.* Hanmer, 18 Conn. 311.

Georgia.— Oliver *v.* Persons, 30 Ga. 391, 76 Am. Dec. 657.

Illinois.— Palmer *v.* Logan, 4 Ill. 56.

Indiana.— Forsythe *v.* Park, 16 Ind. 247.

Kentucky.— Helton *v.* Asher, 103 Ky. 730, 46 S. W. 22, 20 Ky. L. Rep. 935, 82 Am. St. Rep. 601.

Louisiana.— Bradley *v.* Calvit, 5 Mart. 662.

Massachusetts.— Prince *v.* Smith, 4 Mass. 455.

New York.— McPherson *v.* Rathbone, 7 Wend. 216.

Pennsylvania.— Krise *v.* Neason, 66 Pa. St. 253.

England.— Goodier *v.* Lake, 1 Atk. 446, 26 Eng. Reprint 284.

See 20 Cent. Dig. tit. "Evidence," §§ 600, 601.

Before the contents of a lost letter can be proved there must be testimony tending to prove the handwriting, or that it came from the alleged writer or his authorized agent, or was received in due course of mail in answer to letters previously mailed to the address of the alleged writer. Whitwell *v.* Johnson, 2 Nebr. (Unoff.) 66, 96 N. W. 272.

As to proof of handwriting, a distinction exists between the proof as to lost instruments, and of a paper produced and under the inspection of the witness. With respect to lost instruments, and especially where the knowledge of the witness has been acquired since he saw the paper, the proof of the handwriting as to the execution of which he testifies must be of the most unequivocal and positive kind. Nothing short of actually seeing the party write, or an acknowledgment, distinctly and clearly made by the party himself, will suffice. And, before a witness is permitted to state his belief of the genuineness of the handwriting of another, he must state facts and circumstances to show that he has knowledge enough to speak of it with reasonable certainty. It must not be guesswork, or mere probability. Porter *v.* Wilson, 13 Pa. St. 641. To the same effect see Hart *v.* Eckles, 4 Phila. (Pa.) 48. And see, generally, LOST INSTRUMENTS: So where the witness' only knowledge of the genuineness of a letter was derived from the signature, and he had no knowledge of the writer's handwriting, it was

with before introducing secondary evidence of the contents of an instrument that is beyond the jurisdiction of the court.[49] Although the contents of written instruments cannot be proved by parol evidence without laying a proper foundation therefor, yet evidence of this character is competent to show the existence and execution of the instrument with a view to admitting secondary evidence in case of loss of the original.[50] The same is true where it is sought to show for this purpose the former existence of a record.[51]

2. Proof of Grounds For Admission of Secondary Evidence — a. In General. Where a party seeks to introduce secondary evidence of the contents of documents, and as a foundation for the introduction of such evidence relies upon the fact that the original writings have been lost or destroyed or are inaccessible to him, he must first establish this fact by sufficient and satisfactory evidence.[52]

held that his testimony was incompetent. Dorsey *v.* Dorsey, 3 Harr. & J. (Md.) 410, 6 Am. Dec. 506. But where a witness who could not remember the contents of a letter written to him had previously shown the letter to another person, it was held that the latter, although he had no knowledge of the handwriting of the letter, was competert to prove its contents and that the identity of the letter together with the evidence to show its contents were questions for the jury; the theory of the decision being that there did not appear to be any more satisfactory evidence obtainable. Curry *v.* Robinson, 11 Ala. 266.

Admission of a party that he executed an instrument is not secondary to proof of his handwriting, and may of itself be sufficient. Krise *v.* Neason, 66 Pa. St. 253; Conrad *v.* Farrow, 5 Watts (Pa.) 536.

If one witness swears positively to the handwriting, the proof is sufficient and it matters not how many other witnesses may swear to the contrary or what circumstances may be proved to cast doubt upon it; the secondary evidence becomes admissible, although the question of its sufficiency is still for the jury. Krise *v.* Neason, 66 Pa. St. 253.

Admitting secondary evidence of the contents of a letter does not obviate the necessity of proving the genuineness of the letter. Nichols *v.* Kingdom Iron Ore Co., 56 N. Y. 618.

Genuineness of telegram.— "While the transcript delivered to the person addressed is for some purposes, as between him and the sender, deemed the original, it never can be so without competent proof that the alleged sender did actually send, or authorize to be sent, the dispatches in question. The primary and original evidence of that fact would be the telegram itself in the handwriting of the sender, or of an agent shown to have been duly authorized. But when it appears that the telegram has been destroyed by the company, secondary evidence of the essential fact may be given." Oregon Steamship Co. *v.* Otis, 100 N. Y. 446, 453, 3 N. E. 485, 53 Am. Rep. 221. To the same effect see Chisholm *v.* Beaver Lake Lumber Co., 18 Ill. App. 131; Smith *v.* Easton, 54 Md. 138, 39 Am. Rep. 455 note; Geiser *v.* Cathers, (Nebr. 1903) 97 N. W. 840; Howley *v.* Whipple, 48 N. H. 487; Flint *v.* Kennedy, 33 Fed. 820; U. S. *v.* Babcock, 24 Fed. Cas. No. 14,486, 3 Dill. 577. And the secondary evidence to prove this fact may be circumstantial. Oregon Steamship Co. *v.* Otis, 100 N. Y. 446, 3 N. E. 485, 53 Am. Rep. 221; Flint *v.* Kennedy, 33 Fed. 820.

49. Calhoun *v.* Calhoun, 81 Ga. 91, 6 S. E. 913; White *v.* Clements, 39 Ga. 232; Rhodes *v.* Seibert, 2 Pa. St. 18.

50. *Illinois.*— Ashley *v.* Johnson, 74 Ill. 392.

Indiana.— Stoner *v.* Ellis, 6 Ind. 152.

Kentucky.— See Gill *v.* De Witt, 7 Ky. L. Rep. 594.

Louisiana.— Thomas *v.* Thomas, 2 La. 166.

Nebraska.— Ponca *v.* Crawford, 18 Nebr. 551, 26 N. W. 365 [*affirmed* in 23 Nebr. 662, 37 N. W. 609, 8 Am. St. Rep. 144].

New York.— Heimerdinger *v.* Lehigh Valley R. Co., 26 Misc. 374, 56 N. Y. Suppl. 188.

South Carolina.— De Loach *v.* Sarratt, 55 S. C. 254, 33 S. E. 2, 35 S. E. 441; Belton *v.* Briggs, 4 Desauss. 465.

Utah.— Scott *v.* Cranch, 24 Utah 377, 67 Pac. 1068, conveyance of mining claim.

See 20 Cent. Dig. tit. "Evidence," § 601.

Depositions have been held admissible for this purpose. Canfield *v.* Squire, 2 Root (Conn.) 300, 1 Am. Dec. 71.

51. Ponca *v.* Crawford, 18 Nebr. 551, 26 N. W. 365 [*affirmed* in 23 Nebr. 662, 37 N. W. 609, 8 Am. St. Rep. 144]. See also Burnett *v.* McCluey, 78 Mo. 676; Johnston *v.* Hamburger, 13 Wis. 175. Thus parol evidence is admissible to prove the former existence of a judgment. Read *v.* Staton, 3 Hayw. (Tenn.) 159, 9 Am. Dec. 740.

For evidence held sufficient to show the former existence of a complaint and a warrant in an action before a justice of the peace (see Tillotson *v.* Warner, 69 Mass. 574); of the issuance of an execution (see Russell *v.* Harris, 38 Cal. 426, 99 Am. Dec. 421); of an affidavit (see Blair *v.* Black, 21 N. Y. Suppl. 754); and of a sheriff's return of a list of lands to be sold for taxes (see Hair *v.* Melton, 47 N. C. 59).

For evidence held insufficient to show the former existence of a judgment see Davidson *v.* Murphy, 13 Conn. 213.

52. *Alabama.*— Burgess *v.* Blake, 128 Ala. 105, 28 So. 963, 86 Am. St. Rep. 78.

Delaware.— Shrowders *v.* Harper, 1 Harr. 444.

Georgia.— Morgan *v.* Jones, 24 Ga. 155.

The same rule applies where it is sought to introduce secondary evidence of the contents of public[53] or corporate[54] records.

b. Burden of Proof. The burden of proving the facts essential to a proper foundation for the admission of secondary evidence, such as the loss, destruction, or inaccessibility of an original written instrument, rests of course on the party seeking to introduce the evidence.[55]

c. Mode of Proof. The preliminary proof of loss or destruction when made by a party to the cause[56] may generally be made either by his affidavit or his testimony in open court,[57] although his affidavit appears to be generally considered the proper mode of proof at least in the first instance,[58] provided that the

Illinois.— Abersol *v.* Elmwood Coal Co., 106 Ill. App. 235.

Indiana.— Anderson Bridge Co. *v.* Applegate, 13 Ind. 339.

Iowa.— Hawkins *v.* Rice, 40 Iowa 435.

Kentucky.— Panny *v.* Pindell, 7 Bush 571.

Maine.— Dyer *v.* Fredericks, 63 Me. 173; Kimball *v.* Morrell, 4 Me. 368.

Massachusetts.— Post *v.* Leland, 184 Mass. 601, 69 N. E. 361.

Minnesota.— Slocum *v.* Bracy, 65 Minn. 100, 67 N. W. 843.

Missouri.— Ebersole *v.* Rankin, 102 Mo. 488, 15 S. W. 422.

New Hampshire.— Wells *v.* Jackson Iron Mfg. Co., 48 N. H. 491.

New Jersey.— Large *v.* Van Doran, 14 N. J. Eq. 208.

New York.— Abel *v.* Brewster, 12 N. Y. Suppl. 331.

Pennsylvania.— Emig *v.* Diehl, 76 Pa. St. 359; Porter *v.* Wilson, 13 Pa. St. 641; Parks *v.* Dunkle, 3 Watts & S. 291.

Texas.— Wade *v.* Work, 13 Tex. 482.

United States.— Simpson *v.* Dall, 3 Wall. 460, 18 L. ed. 265; Maye *v.* Carberry, 16 Fed. Cas. No. 9,339, 2 Cranch C. C. 336; Brown *v.* U. S., 1 Ct. Cl. 377.

Canada.— Ansley *v.* Breo, 14 U. C. C. P. 371.

See 20 Cent. Dig. tit. "Evidence," §§ 605–641. See also *infra*, XV, F, 2, e.

Where the only proof is an inquiry of the adverse party and his counsel, both of whom deny ever having had possession or control of the document, secondary evidence is not admissible. Landt *v.* McCullough, 206 Ill. 214, 69 N. E. 107 [*reversing* 103 Ill. App. 668].

53. *Alabama.*— Hanna *v.* Price, 23 Ala. 826.

Connecticut.— Davidson *v.* Murphy, 13 Conn. 213.

District of Columbia.— Pierce *v.* Jacobs, 7 Mackey 498.

Illinois.— Weis *v.* Tiernan, 91 Ill. 27.

Kentucky.— Penny *v.* Pindell, 7 Bush 571.

Louisiana.— Fletcher *v.* Jeter, 32 La. Ann. 401; Knight *v.* Ragan, 31 La. Ann. 289.

Maine.— Phillips *v.* Purrington, 15 Me. 425.

Nebraska.— Nebraska City *v.* Lampkin, 6 Nebr. 27.

North Carolina.— Isley *v.* Boon, 109 N. C. 555, 13 So. 795; Deaver *v.* Rice, 24 N. C. 280.

Pennsylvania.— Baskin *v.* Seechrist, 6 Pa. St. 154.

See 20 Cent. Dig. tit. "Evidence," §§ 611, 614.

54. Abersol *v.* Elmwood Coal Co., 106 Ill. App. 235.

55. Hansen *v.* American Ins. Co., 57 Iowa 741, 11 N. W. 670; Dyer *v.* Fredericks, 63 Me. 173; Emig *v.* Diehl, 76 Pa. St. 359; Moore *v.* Everitt, 20 Pa. Super. Ct. 13; U. S. *v.* Moorhead, 1 Black (U. S.) 227, 17 L. ed. 76.

56. See *infra*, XV, F, 2, c, (II), (B), (2).

57. Bagley *v.* Eaton, 10 Cal. 126; Mitchell *v.* Shanley, 12 Gray (Mass.) 206; Gray *v.* Thomas, 83 Tex. 246, 18 S. W. 721; Parks *v.* Caudle, 58 Tex. 216; Dohoney *v.* Womack, 1 Tex. Civ. App. 354, 19 S. W. 883, 20 S. W. 950. See also Smith *v.* Cavitt, 20 Tex. Civ. App. 558, 50 S. W. 167; and, generally, WITNESSES.

In Missouri it is held that, while the testimony of the party may be taken by deposition with the same effect as if the party were examined in open court, yet his affidavit is not admissible. Gould *v.* Trowbridge, 32 Mo. 291.

Texas statute.— Tex. Rev. St. art. 2257, providing that whenever any party to a suit shall file an affidavit stating that any instrument recorded in the county court has been lost or destroyed, a certified copy of the record shall be admitted in like manner as the original, requires the filing of such an affidavit only when it is proposed to introduce in evidence a certified copy; and therefore, when the loss or destruction of an unrecorded deed is proved as at common law, a sufficient predicate for the proof of such lost deed is laid by the evidence produced at the trial. Blanton *v.* Ray, 66 Tex. 61, 17 S. W. 264.

58. *California.*— Fallon *v.* Dougherty, 12 Cal. 104.

Georgia.— Morgan *v.* Jones, 24 Ga. 155.

Illinois.— Palmer *v.* Logan, 4 Ill. 56.

Kentucky.— Spears *v.* Chrisman, 4 J. J. Marsh. 47.

Louisiana.— Porter *v.* His Creditors, 18 La. 495; Gravier *v.* Rapp, 12 La. 162.

Massachusetts.— Almy *v.* Reed, 10 Cush. 421. See also Davis *v.* Spooner, 3 Pick. 284.

New Hampshire.—Stevens *v.* Reed, 37 N. H. 49; Woods *v.* Gassett, 11 N. H. 442.

North Carolina.—Smith *v.* Wilson, 18 N. C. 40.

Ohio.— Wells *v.* Martin, 1 Ohio St. 386.

Tennessee.— Smith *v.* Martin, 2 Overt. 208.

Vermont.— Clark *v.* Marsh, 20 Vt. 338.

United States.— Tayloe *v.* Riggs, 1 Pet.

testimony of the last custodian of the instrument cannot be obtained.[59] But the affidavit of a third person is generally held inadmissible.[60]

d. Order of Proof. It is immaterial in what order a party gives evidence constituting the proof preliminary to the introduction of secondary evidence, but this is a matter which rests in the sound discretion of the trial court and which, while reviewable on appeal, will not be interfered with except in case of abuse of discretion.[61] In determining the sufficiency of the preliminary proof of loss or destruction of primary evidence, the appellate court will not confine itself to the evidence received prior to the admission of the secondary evidence; but if it appears from all the evidence in the case that the facts before the court were sufficient to authorize the introduction of secondary evidence a new trial will not be granted for the admission of such evidence out of its regular order.[62] Thus where secondary evidence as to the contents of an original document is first received, and afterward satisfactory proof is made of the loss of the document, the mere fact of inverting the order of proof cannot be considered as reversible error.[63]

e. Proof of Loss or Destruction of Primary Evidence — (i) *Admissibility of Evidence* — (a) *In General.* While the sufficiency of evidence offered to show the loss or destruction of primary evidence is a matter resting in the sound discretion of the trial court,[64] the admissibility of such evidence is governed by the settled rules that apply to evidence offered for other purposes.[65] But, where

591, 7 L. ed. 275; Boyle *v.* Arledge, 3 Fed. Cas. No. 1,758, Hempst. 620.

See 20 Cent. Dig. tit. "Evidence," §§ 607-611; and, generally, Witnesses.

Affidavit where made.— A party's affidavit of loss must be made within the state unless otherwise provided by statute. Ramy *v.* Kirk, 9 Dana (Ky.) 267. See also Tyree *v.* Magness, 1 Sneed (Tenn.) 276, must be made before the court where the action is pending.

Second affidavit.— Where a party has made an affidavit of loss which is adjudged insufficient for vagueness, he is not precluded from making an additional affidavit. Bateman *v.* Bateman, 21 Tex. 432.

Where relief in equity is sought upon a lost instrument, an affidavit of the loss is required as a guard upon the preliminary exercise of jurisdiction; but in order to maintain the suit it is necessary, if the loss is not admitted by defendant's answer, that it should be established at the hearing of the cause by competent and satisfactory evidence, and in making this proof the affidavit of loss is not admissible. Owen *v.* Paul, 16 Ala. 130; Hooe *v.* Harrison, 11 Ala. 499. But where the loss of a bond, which was evidence of plaintiff's right, was averred under oath in a petition for an injunction, it was held that there was sufficient foundation for secondary evidence of its contents. Fisk *v.* Wilson, 15 Tex. 430. As to actions founded on lost instruments see, generally, Lost Instruments.

In a bill for the rescission of a contract to convey land, an affidavit of the loss of a title bond may be made either in the body of the bill or separately. Evans *v.* Bolling, 5 Ala. 550.

59. Proof of loss by the last custodian of the instrument, where he is a disinterested witness, dispenses with the necessity of an affidavit of loss made by the party offering to prove the contents of the instrument. Hale *v.* Darter, 10 Humphr. (Tenn.) 92. See also Smith *v.* Cavitt, 20 Tex. Civ. App. 558, 50 S. W. 167. And the affidavit of the party has been held inadmissible where the testimony of the last custodian of the instrument can be obtained. Pryor *v.* McNairy, 1 Stew. (Ala.) 150.

60. See *infra*, XV, F, 2, e, (I), (A).

61. Fitch *v.* Boag, 19 Conn. 285; Groff *v.* Ramsey, 19 Minn. 44; Denn *v.* Pond, 1 N. J. L. 379. See also Minor *v.* Tillotson, 7 Pet. (U. S.) 99, 8 L. ed. 621; Morehead *v.* U. S., 17 Fed. Cas. No. 9,792, Hoff. Op. 404. But *compare* Shrowders *v.* Harper, 1 Harr. (Del.) 444. See, generally, Trial. It is sufficient to account for the absence of an original document at the time when a copy thereof is offered in evidence. Hewlett *v.* Henderson, 9 Rob. (La.) 379.

Secondary evidence admitted without preliminary proof of loss or destruction of the primary evidence, although it is not competent when offered, is rendered competent by the subsequent unqualified admission of counsel. Culver *v.* Culver, 31 N. J. Eq. 448.

62. Groff *v.* Ramsey, 19 Minn. 44. See also Morehead *v.* U. S., 17 Fed. Cas. No. 9,792, Hoff. Op. 404.

63. Cross *v.* Williams, 72 Mo. 577.

64. See *infra*, XV, F, 2, e, (II).

65. *Alabama.*— Cooper *v.* Maddan, 6 Ala. 431; Mitchell *v.* Mitchell, 3 Stew. & P. 81.

Georgia.— Harper *v.* Scott, 12 Ga. 125.

Illinois.— Rhode *v.* McLean, 101 Ill. 467.

Indiana.— Indianapolis, etc., R. Co. *v.* Jewett 16 Ind. 273.

Maryland.— Gaither *v.* Martin, 3 Md. 146.

Massachusetts.— Foster *v.* Mackay, 7 Metc. 531; Chapin *v.* Taft, 18 Pick. 379.

Missouri.— Apperson *v.* Ingram, 12 Mo. 59.

there is sufficient competent evidence submitted to the court as a foundation for the admission of secondary evidence, the fact that hearsay evidence also was received is not ground for reversal.[66]

(B) *Of Loss or Destruction of Records* — (1) In General. The admissibility of evidence to prove the loss or destruction of public records appears to be governed by the principles generally applicable to evidence offered for other purposes. Thus the loss of public records, such for instance as the records of judicial proceedings, may be proved by parol.[67] And to show the probability of loss it is competent to prove that, when the record should have been made and thereafter, the officers keeping the records were careless and negligent in performing their duties.[68]

(2) Testimony of Custodian of Record. While the testimony of the custodian of a public record is of course admissible to prove that the record is lost or destroyed,[69] it has been held that there is no rule of evidence which requires that the loss or destruction of a public record shall be proved solely by the testimony

New Jersey.— Clark *v.* Hornbeck, 17 N. J. Eq. 430.

New York.— Dan *v.* Brown, 4 Cow. 483, 15 Am. Dec. 395.

Pennsylvania.—Shortz *v.* Unangst, 3 Watts & S. 45.

South Carolina.— McLaurin *v.* Talbot, 2 Hill 525.

Texas.— Vandergriff *v.* Piercy, 59 Tex. 371; Masterson *v.* Jordan, (Civ. App. 1893) 24 S. W. 549.

Vermont.— Clark *v.* Marsh, 20 Vt. 338.

Canada.— Bratt *v.* Lee, 7 U. C. C. P. 280.

See 20 Cent. Dig. tit. "Evidence," §§ 607–610.

Contra.— Bridges *v.* Hyatt, 2 Abb. Pr. (N. Y.) 449, holding that the court is not bound by rules of evidence applicable to testimony addressed to a jury.

The affidavit of a third person not a party to the cause is not admissible as preliminary proof; he must testify in the usual form in order that the right of cross-examination may be preserved. McFarland *v.* Dey, 69 Ill. 419; Becker *v.* Quigg, 54 Ill. 390; Poignand *v.* Smith, 6 Pick. (Mass.) 172; Viles *v.* Moulton, 13 Vt. 510. See also Masterson *v.* Jordan, (Tex. Civ. App. 1893) 24 S. W. 549. *Contra,* Taylor *v.* McIrvin, 94 Ill. 488.

Unsworn declarations of the last custodian of the document are not admissible where he can be produced as a witness. Apperson *v.* Ingram, 12 Mo. 59; Justice *v.* Luther, 94 N. C. 793; Governor *v.* Barkley, 11 N. C. 20; Vandergriff *v.* Piercy, 59 Tex. 371. See also Lawrence *v.* Fulton, 19 Cal. 683; Harper *v.* Hancock, 28 N. C. 124; Masterson *v.* Jordan, (Tex. Civ. App. 1893) 24 S. W. 549. But *compare* Indianapolis, etc., R. Co. *v.* Jewett, 16 Ind. 273.

The admission of one of several co-plaintiffs that a will was lost, the co-plaintiffs not being partners, was held incompetent to affect the others. Dan *v.* Brown, 4 Cow. (N. Y.) 483, 15 Am. Dec. 395.

Testimony of illiterate person.— In order to show that a deed has been destroyed, the testimony of a witness who cannot read that she has destroyed a paper which she understood to be the deed in question is incompetent. Mitchell *v.* Mitchell, 3 Stew. & P. (Ala.) 81.

A letter written to the secretary of the navy, asking for the delivery of an original letter on the files of the navy department, and his reply, giving his reasons for declining to deliver up said original, were held to be admissible, after proof of their genuineness, for the purpose of laying a foundation for the admission of secondary evidence. Maurice *v.* Worden, 54 Md. 233, 39 Am. Rep. 384.

Recitals in a deed are admissible to prove the loss of an ancient deed, where such recitals are made by one likely to know, and some evidence of the loss of the ancient deed has been given, and the witnesses to it are all dead, and the possession has not been contrary to the deed. Garwood *v.* Dennis, 4 Binn. (Pa.) 314. *Compare* Murphy *v.* Loyd, 3 Whart. (Pa.) 538, 549, in which it was said, per Huston, J., that the facts in the foregoing case "were so complicated, that it may fairly be said to be no authority, except in a case precisely like it."

66. Brooke *v.* Jordan, 14 Mont. 375, 36 Pac. 450.

67. Cilley *v.* Van Patten, 68 Mich. 80, 35 N. W. 831; Hamberger *v.* Brooker, 6 Leg. Gaz. (Pa.) 130, 31 Leg. Int. (Pa.) 101; Stuart *v.* Fitzgerald, 6 N. C. 255; Read *v.* Staton, 3 Hayw. (Tenn.) 159, 9 Am. Dec. 740.

Tradition of loss.— Where court records over fifty years old were missing, and papers were found relating to acts of the court performed during such time, the fact that the records had once existed and had been lost was held sufficiently indicated to render admissible evidence of a tradition among the lawyers and others that such records were missing, and testimony of the custodian of the record that when elected he was informed of such fact. Pendleton *v.* Shaw, 18 Tex. Civ. App. 439, 44 S. W. 1002.

68. Stevenson *v.* McReary, 12 Sm. & M. (Miss.) 9, 51 Am. Dec. 102. See also Burke *v.* Tregre, 28 La. Ann. 437; Yount *v.* Miller, 91 N. C. 331.

69. Pendleton *v.* Shaw, 18 Tex. Civ. App. 439, 44 S. W. 1002.

of such custodian; but any person having knowledge of the fact may, if otherwise competent, testify thereto, and it is no valid ground of objection that the custodian is not called.[70]

(3) CERTIFICATE OF CUSTODIAN OF RECORD. It is generally held that the certificate of the custodian of a record is incompetent to prove loss of the record or parts thereof, but that this fact must be proved by the oath of some person having knowledge thereof.[71] In Pennsylvania, however, the contrary rule obtains.[72]

(II) *SUFFICIENCY OF EVIDENCE* — (A) *Question For Trial Court.* Preliminary proof of the loss or destruction of primary evidence does not involve the question in issue and is not regarded as evidence in the cause; it is addressed solely to the trial court and its sufficiency is a question of fact for that court and not for the jury.[73] Moreover, the sufficiency of the evidence adduced on the preliminary proof rests in the sound discretion of the trial court; and the determination of that court on this question will generally not be disturbed on appeal, except in case of abuse of discretion amounting to error of law.[74] Proof of loss

70. Johnson *v.* Skipworth, 59 Tex. 473; Chalk *v.* Foster, 2 Tex. Unrep. Cas. 704. See also Hill *v.* Fitzpatrick, 6 Ala. 314; Weis *v.* Tiernan, 91 Ill. 27. But *compare* Norris *v.* Russell, 5 Cal. 249.

71. Young *v.* Mackall, 3 Md. Ch. 398; Wilcox *v.* Ray, 2 N. C. 410, judicial records. See also *supra*, XIV, A; XV, C, 3, d.

72. Ruggles *v.* Gaily, 2 Rawle (Pa.) 232; Weidman *v.* Kohr, 4 Serg. & R. (Pa.) 174.

73. *Alabama.*— Glassell *v.* Mason, 32 Ala. 719.

California.— Bagley *v.* McMickle, 9 Cal. 430.

Connecticut.— Fitch *v.* Bogue, 19 Conn. 285; Witter *v.* Latham, 12 Conn. 392. *Contra*, Coleman *v.* Wolcott, 4 Day 388, which, however, may be considered as overruled by the foregoing cases.

Georgia.— Maynor *v.* Lewis, Ga. Dec. 205, Pt. II; Doe *v.* Biggers, 6 Ga. 188. See also Graham *v.* Campbell, 56 Ga. 258.

Illinois.— Loewe *v.* Reismann, 8 Ill. App. 525.

Maryland.— Union Baking Co. *v.* Gittings, 45 Md. 181.

Massachusetts.— Page *v.* Page, 15 Pick. 368.

Michigan.— Sun Ins. Co. *v.* Earle, 29 Mich. 406.

New York.— Jackson *v.* Frier, 16 Johns. 193.

North Carolina.— It has been held that this question, while it is one ordinarily addressed to the trial court in the first instance, is one not of fact but of law. Avery *v.* Stewart, 134 N. C. 287, 46 S. E. 519 [*disapproving* Gillis *v.* Wilmington, etc., R. Co., 108 N. C. 441, 13 S. E. 11, 1019].

Pennsylvania.— Graff *v.* Pittsburgh, etc., R. Co., 31 Pa. St. 489. *Compare* Hazard *v.* Van Amringe, 4 Binn. 289, 295 note.

Tennessee.— Tyree *v.* Magness, 1 Sneed 276.

Canada.— See Gilbert *v.* Campbell, 12 N. Brunsw. 474; Williams *v.* Grey, 23 U. C. C. P. 561; Russell *v.* Fraser, 15 U. C. C. P. 375.

See 20 Cent. Dig tit. "Evidence," §§ 605, 612–637.

74. *Alabama.*— Thorn *v.* Kemp, 98 Ala. 417, 13 So. 749.

California.— Bagley *v.* McMickle, 9 Cal. 430.

Connecticut.— Elwell *v.* Mersick, 50 Conn. 272; Fitch *v.* Bogue, 19 Conn. 285; Witter *v.* Latham, 12 Conn. 392.

Florida.— Bell *v.* Kendrick, 25 Fla. 778, 6 So. 868.

Georgia.— Hayden *v.* Mitchell, 103 Ga. 431, 30 S. E. 287.

Illinois.— Loewe *v.* Reismann, 8 Ill. App. 525.

Indiana.— Thompson *v.* Thompson, 9 Ind. 323, 68 Am. Dec. 638.

Maine.— Bain *v.* Walsh, 85 Me. 108, 26 Atl. 1001; Milford *v.* Veazie, (1888) 14 Atl. 730; Camden *v.* Belgrade, 78 Me. 204, 3 Atl. 652.

Maryland.—Union Banking Co. *v.* Gittings, 45 Md. 181.

Massachusetts.—Smith *v.* Brown, 151 Mass. 338, 24 N. E. 31; Stevens *v.* Miles, 142 Mass. 571, 8 N. E. 426; Com. *v.* Morrell, 99 Mass. 542; Page *v.* Page, 15 Pick. 368; Donelson *v.* Taylor, 8 Pick. 390.

Michigan.— Sun Ins. Co. *v.* Earle, 29 Mich. 406.

Missouri.— Wells *v.* Pressy, 105 Me. 164, 16 S. W. 670; Stephan *v.* Metzger, 95 Mo. App. 609, 69 S. W. 625.

Montana.—Brooke *v.* Jordan, 14 Mont. 375, 36 Pac. 450.

Nebraska.— Rupert *v.* Penner, 35 Nebr. 587, 53 N. W. 598, 17 L. R. A. 824; Fremont, etc., R. Co. *v.* Marley, 25 Nebr. 138, 40 N. W. 948, 13 Am. St. Rep. 482.

Nevada.—O'Meara *v.* North American Min. Co., 2 Nev. 112.

New Hampshire.— Pearson *v.* Wheeler, 55 N. H. 41; Hill *v.* Barney, 18 N. H. 607; Woods *v.* Gassett, 11 N. H. 442.

New Jersey.— Longstreet *v.* Korb, 64 N. J. L. 112, 44 Atl. 934; Johnson *v.* Arnwine, 42 N. J. L. 451, 36 Am. Rep. 527.

New Mexico.— Daly *v.* Bernstein, 6 N. M. 380, 28 Pac. 764.

New York.— Kearney *v.* New York, 92 N. Y. 617; Mason *v.* Libbey, 90 N. Y. 683, 64 How. Pr. 259; West *v.* New York Cent.,

or destruction of judicial records, records of deeds, and other records, is governed by the same rule.[75]

(B) *As to Search For Missing Document* — (1) IN GENERAL. Although it is difficult to formulate any comprehensive rule as to the *quantum* of proof which the law will deem sufficient to establish the loss or destruction of an original document, so as to authorize the admission of secondary evidence of its contents, it may be stated as a broad and general rule that the law will require evidence that a diligent and *bona fide* but unsuccessful search has been made for the document, in the place where it belongs or is most likely to be found, and that the party has exhausted in a reasonable degree all accessible sources of information and means of discovery which the nature of the case would naturally suggest; and such evidence will be sufficient.[76] The law does not, however, require direct and positive

etc., R. Co., 55 N. Y. App. Div. 464, 67 N. Y. Suppl. 104; Isaacs *v.* Cohn, 10 N. Y. App. Div. 216, 41 N. Y. Suppl. 779; Graham *v.* Chrystal, 1 Abb. Pr. N. S. 121, 32 How. Pr. 287; Woodworth *v.* Barker, 1 Hill 172; Jackson *v.* Frier, 16 Johns. 193. See also Steele *v.* Lord, 70 N. Y. 280, 26 Am. Rep. 602.

Ohio.— Blackburn *v.* Blackburn, 8 Ohio 81.

Pennsylvania.— Gorgas *v.* Hertz, 150 Pa. St. 538, 24 Atl. 756; Hemphill *v.* McClimans, 24 Pa. St. 367; Flinn *v.* McGonigle, 9 Watts & S. 75; Raab *v.* Urick, 2 Wkly. Notes Cas. 53. The earlier decisions in this state, however, were somewhat more strict in their requirements and left less liberty to the trial court. See Porter *v.* Wilson, 13 Pa. St. 641; Pipher *v.* Lodge, 16 Serg. & R. 214.

South Carolina.— Elrod *v.* Cochran, 59 S. C. 467, 38 S. E. 122; Norris *v.* Clinkscales, 47 S. C. 488, 25 S. E. 797; Hobbs *v.* Beard, 43 S. C. 370, 21 S. E. 305; Martin *v.* Bowie, 37 S. C. 102, 15 S. E. 736; Caulfield *v.* Charleston County, 19 S. C. 600; Oliver *v.* Sale, 17 S. C. 587.

Texas.— Waggoner *v.* Alvord, 81 Tex. 365, 16 S. W. 1083; Cheatham *v.* Riddle, 8 Tex. 162; Harrison *v.* Hawley, 7 Tex. Civ. App. 308, 26 S. W. 765; Johnson *v.* Hollamon, 2 Tex. Unrep. Cas. 294.

Vermont.— Moore *v.* Beattie, 33 Vt. 219.

United States.— Tayloe *v.* Riggs, 1 Pet. 591, 7 L. ed. 275.

Canada.— See Gilbert *v.* Campbell, 12 N. Brunsw. 474; Williams *v.* Grey, 23 U. C. C. P. 561; Russell *v.* Fraser, 15 U. C. C. P. 375.

See 20 Cent. Dig. tit. "Evidence," §§ 612–637.

Contra.— Avery *v.* Stewart 134 N. C. 287, 46 S. E. 519, holding that the sufficiency of the proof is purely a question of law, not a matter within the court's discretion, and that the court's ruling thereon is reviewable on appeal [*overruling* or *distinguishing* Gillis *v.* Wilmington, etc., R. Co., 108 N. C. 441, 13 S. E. 11, 1019; Bonds *v.* Smith, 106 N. C. 553, 11 S. E. 322; Leak *v.* Covington, 99 N. C. 559, 6 S. E. 241; Jones *v.* Call, 93 N. C. 170].

For instances of error in that the trial court failed to exercise a sound legal discretion in determining the sufficiency of preliminary proof see the following cases:

Alabama.— Mordecai *v.* Beal, 8 Port. 529.

Indiana.— See Littler *v.* Franklin, 9 Ind. 216.

Minnesota.— Slocum *v.* Bracy, 65 Minn. 100, 67 N. W. 843.

Nebraska.— Myers *v.* Bealer, 30 Nebr. 280, 46 N. W. 479.

Nevada.—O'Meara *v.* North American Min. Co., 2 Nev. 112.

North Carolina.— McKesson *v.* Smart, 108 N. C. 17, 13 S. E. 96.

Pennsylvania.— Blackstone *v.* White, 41 Pa. St. 330.

South Carolina.— Norris *v.* Clinkscales, 47 S. C. 488, 25 S. E. 797.

Texas.— Collins *v.* Boyd, (Civ. App. 1900) 59 S. W. 831.

See 20 Cent. Dig. tit. "Evidence," §§ 612–637.

75. Leake *v.* Covington, 99 N. C. 559, 6 S. E. 241; Waggoner *v.* Alvord, 81 Tex. 365, 16 S. W. 1083; Mays *v.* Moore, 13 Tex. 85.

76. *Alabama.*— Stuart *v.* Mitchum, 135 Ala. 546, 33 So. 670; Phœnix Assur. Co. *v.* McAuthor, 116 Ala. 659, 22 So. 903, 67 Am. St. Rep. 154; O'Neal *v.* McKinna, 116 Ala. 606, 22 So. 905; King *v.* Scheuer, 105 Ala. 558, 16 So. 923; Boulden *v.* State, 102 Ala. 78, 15 So. 341; Burks *v.* Bragg, 89 Ala. 204, 7 So. 156; Foster *v.* State, 88 Ala. 182, 7 So. 185; Singer Mfg. Co. *v.* Riley, 80 Ala. 314; Calhoun *v.* Thompson, 56 Ala. 166, 28 Am. Rep. 754; Bogan *v.* McCutchen, 48 Ala. 493; Green *v.* State, 41 Ala. 419; Owen *v.* Paul, 16 Ala. 130; Sledge *v.* Clopton, 6 Ala. 589.

Arkansas.— Wilburn *v.* State, 60 Ark. 141, 29 S. W. 149.

California.— Kenniff *v.* Caulfield, 140 Cal. 34, 73 Pac. 803; Woods *v.* Jensen, 130 Cal. 200, 62 Pac. 473; Samonset *v.* Mesnager, 108 Cal. 354, 41 Pac. 337; Taylor *v.* Clark, 49 Cal. 671; Patterson *v.* Keystone Min. Co., 30 Cal. 360; Caulfield *v.* Sanders, 17 Cal. 569; Folsom *v.* Scott, 6 Cal. 460; People *v.* Clingan, 5 Cal. 389.

Colorado.— Billin *v.* Henkel, 9 Colo. 394, 13 Pac. 420; Bruns *v.* Clase, 9 Colo. 225, 11 Pac. 79; Wells *v.* Adams, 7 Colo. 26, 1 Pac. 698; Lyon *v.* Washburn, 3 Colo. 201; Hobson *v.* Porter, 2 Colo. 28; Brevoort *v.* Hughes, 10 Colo. App. 379, 50 Pac. 1050.

Connecticut.— Witter *v.* Latham, 12 Conn. 392.

Georgia.— Hayden *v.* Mitchell, 103 Ga. 431,

evidence of the loss or destruction of the document, but requires only such evi-

30 S. E. 287; Nolan *v.* Pelham, 77 Ga. 262, 2 S. E. 639; Parish *v.* McLeod, 73 Ga. 123; Molyneaux *v.* Collier, 13 Ga. 406; Ellis *v.* Doe, 10 Ga. 253; Doe *v.* Biggers, 6 Ga. 188.

Illinois.— Prussing *v.* Jackson, 208 Ill. 85, 69 N. E. 771 [*reversing* 85 Ill. App. 324]; Golder *v.* Bressler, 105 Ill. 419; Weis *v.* Tiernan, 91 Ill. 27; Crocker *v.* Lowenthal, 83 Ill. 579; Hazen *v.* Pierson, 83 Ill. 241; Case *v.* Lyman, 66 Ill. 229; Pardee *v.* Lindley, 31 Ill. 174, 83 Am. Dec. 219; Holbrook *v.* School Trustees, 28 Ill. 187; Dickinson *v.* Breeden, 25 Ill. 186; Mariner *v.* Saunders, 10 Ill. 113; Palmer *v.* Logan, 4 Ill. 56; Blakely Printing Co. *v.* Pease, 95 Ill. App. 341.

Indiana.— Meek *v.* Spencer, 8 Ind. 118; McNeely *v.* Rucker, 6 Blackf. 391.

Iowa.— Williams *v.* Williams, 108 Iowa 91, 78 N. W. 792; Waite *v.* High, 96 Iowa 742, 65 N. W. 397; Laird *v.* Kilbourne, 70 Iowa 83, 30 N. W. 9; Hill *v.* Aultman, 68 Iowa 630, 27 N. W. 788; Hansen *v.* American Ins. Co., 57 Iowa 741, 11 N. W. 670; Crowe *v.* Capwell, 47 Iowa 426; The Wisconsin *v.* Young, 3 Greene 268.

Kansas.— Rullman *v.* Barr, 54 Kan. 643, 39 Pac. 179; Barons *v.* Brown, 25 Kan. 410.

Kentucky.— Penny *v.* Pindell, 7 Bush 571.

Louisiana.— McQueen *v.* Sandel, 15 La. Ann. 140; Winston *v.* Prevost, 6 La. Ann. 164.

Maine.— Egan *v.* Horrigan, 96 Me. 46, 51 Atl. 246; Hammond *v.* Ludden, 47 Me. 447; Bartlett *v.* Sawyer, 46 Me. 317; Kidder *v.* Blaisdell, 45 Me. 461.

Maryland.— Bartlett *v.* Wilbur, 53 Md. 485; Glenn *v.* Rogers, 3 Md. 312; Gaither *v.* Martin, 3 Md. 146.

Massachusetts.— McConnell *v.* Wildes, 153 Mass. 487, 26 N. E. 1114; Brigham *v.* Coburn, 10 Gray 329; Foster *v.* Mackay, 7 Metc. 531; Poignard *v.* Smith, 8 Pick. 272; Taunton Bank *v.* Richardson, 5 Pick. 436.

Michigan.— Burt *v.* Long, 106 Mich. 210, 64 N. W. 60; Angell *v.* Loomis, 97 Mich. 5, 55 N. W. 1008.

Minnesota.— Windom *v.* Brown, 65 Minn. 394, 67 N. W. 1028; Slocum *v.* Bracy, 65 Minn. 100, 67 N. W. 843; Stocking *v.* St. Paul Trust Co., 39 Minn. 410, 40 N. W. 365; Nelson *v.* Central Land Co., 35 Minn. 408, 29 N. W. 121; Groff *v.* Ramsey, 19 Minn. 44; Thayer *v.* Barney, 12 Minn. 502.

Mississippi.— Walton *v.* Forsdick, (1899) 25 So. 668; Page *v.* State, 59 Miss. 474; Freeland *v.* McCaleb, 2 How. 756.

Missouri.— Blondeau *v.* Sheridan, 81 Mo. 545; Barton *v.* Murrain, 27 Mo. 235, 72 Am. Dec. 259; Visitation Convent *v.* Kleinhopper, 76 Mo. App. 661; Brinkman *v.* Luhrs, 60 Mo. App. 512.

Montana.—Brooke *v.* Jordan, 14 Mont. 375, 36 Pac. 450.

Nebraska.— Post *v.* Gage County School Dist. No. 10, 19 Nebr. 135, 26 N. W. 911; Samuelson *v.* Gale Mfg. Co., 1 Nebr. (Unoff.) 815, 95 N. W. 809.

New Jersey.— Koehler *v.* Schilling, (Sup. 1904) 57 Atl. 154; Johnson *v.* Armwine, 42 N. J. L. 451, 36 Am. Rep. 527; Sussex County Mut. Ins. Co. *v.* Woodruff, 26 N. J. L. 541; Smith *v.* Axtell, 1 N. J. Eq. 494.

New York.— Kearney *v.* New York, 92 N. Y. 617; Brigger *v.* Mutual Reserve Fund L. Assoc., 75 N. Y. App. Div. 149, 77 N. Y. Suppl. 362; Dishaw *v.* Wadleigh, 15 N. Y. App. Div. 205, 44 N. Y. Suppl. 207, 4 N. Y. Annot. Cas. 170; Stanfield *v.* Knickerbocker Trust Co., 1 N. Y. App. Div. 592, 37 N. Y. Suppl. 600; People *v.* Lord, 67 Barb. 109; Meakim *v.* Anderson, 11 Barb. 215; Batchelor *v.* Hatie, 23 Misc. 119, 50 N. Y. Suppl. 663; Dan *v.* Brown, 4 Cow. 483, 15 Am. Dec. 395; Jackson *v.* Woolsey, 11 Johns. 446.

North Carolina.—Churchill *v.* Lee, 77 N. C. 341; Redman *v.* Green, 38 N. C. 54; Dumas *v.* Powell, 14 N. C. 103; Eure *v.* Pittman, 10 N. C. 364.

North Dakota.— McManus *v.* Commow, 10 N. D. 340, 87 N. W. 8.

Oklahoma.— Johnson, etc., Dry Goods Co. *v.* Cornell, 4 Okla. 412, 46 Pac. 860.

Oregon.— Sperry *v.* Wesco, 26 Oreg. 483, 38 Pac. 623; Wiseman *v.* Northern Pac. R. Co., 20 Oreg. 425, 26 Pac. 272, 23 Am. St. Rep. 135.

Pennsylvania.— Heller *v.* Peters, 140 Pa. St. 648, 21 Atl. 416; Burr *v.* Kase, 168 Pa. St. 81, 31 Atl. 954; Brown *v.* Day, 78 Pa. St. 129; Kaul *v.* Lawrence, 73 Pa. St. 410; Susquehanna, etc., R., etc., Co. *v.* Quick, 61 Pa. St. 328; Porter *v.* Wilson, 13 Pa. St. 641; Spalding *v.* Susquehanna County Bank, 9 Pa. St. 28; Parke *v.* Bird, 3 Pa. St. 360; Bell *v.* Young, 1 Grant 175; Whitesell *v.* Crane, 8 Watts & S. 369; Moore *v.* Everitt, 20 Pa. Super. Ct. 13.

South Carolina.— Brooks *v.* McMeekin, 37 S. C. 285, 15 S. E. 1019; Dent *v.* Bryce, 16 S. C. 1; Drake *v.* Ramey, 3 Rich. 37; Hinds *v.* Evans, 2 Speers 17; Sims *v.* Sims, 2 Mill 225.

Tennessee.— Anderson *v.* Maberry, 2 Heisk. 653; Vaulx *v.* Merriwether, 2 Sneed 683; Whiteside *v.* Watkins, (Ch. App. 1900) 58 S. W. 1107.

Texas.— Hunter *v.* Lanius, 82 Tex. 677, 18 S. W. 201; Foot *v.* Silliman, 77 Tex. 268, 13 S. W. 1032; Bounds *v.* Little, 75 Tex. 316, 12 S. W. 1109; Snyder *v.* Ivers, 61 Tex. 400; Vandergriff *v.* Piercy, 59 Tex. 371; Evans *v.* Womack, 48 Tex. 230; Hutchins *v.* Bacon, 46 Tex. 408; Wallace *v.* Wilcox, 27 Tex. 60; Wade *v.* Work, 13 Tex. 482; Stevens *v.* Equitable Mfg. Co., 29 Tex. Civ. App. 168, 67 S. W. 1041; Abeel *v.* Levy, (Civ. App. 1901) 61 S. W. 937; Thompson *v.* Johnson, 24 Tex. Civ. App. 246, 58 S. W. 1030; Smith *v.* Cavitt, 20 Tex. Civ. App. 558, 50 S. W. 167; Baldwin *v.* Goldfrank, 9 Tex. Civ. App. 269, 26 S. W. 155; Harrison *v.* Hawley, 7 Tex. Civ. App. 308, 26 S. W. 765; Johnson *v.* Hollamon, 2 Tex. Unrep. Cas. 294.

Vermont.— Thrall *v.* Todd, 34 Vt. 97; Fletcher *v.* Jackson, 23 Vt. 581, 56 Am. Dec. 98; Viles *v.* Moulton, 11 Vt. 470.

dence as will raise a reasonable inference of loss or destruction.[77] The fact of loss

Virginia.— Corbett *v.* Nutt, 18 Gratt. 624.
Wisconsin.— Perrin *v.* State, 81 Wis. 135, 50 N. W. 516.
United States.— Simpson *v.* Dall, 3 Wall. 460, 18 L. ed. 265; De Lane *v.* Moore, 14 How. 253, 14 L. ed. 409; Patterson *v.* Winn, 5 Pet. 233, 8 L. ed. 108; Dupee *v.* Chicago Horseshoe Co., 117 Fed. 40, 54 C. C. A. 426; Boyle *v.* Arledge, 3 Fed. Cas. No. 1,758, Hempst. 620.
England.— Reg. *v.* Hinckley, 3 B. & S. 885, 9 Jur. N. S. 1054, 32 L. J. M. C. 158, 8 L. T. Rep. N. S. 270, 11 Wkly. Rep. 663, 113 E. C. L. 885; Boyle *v.* Wiseman, 3 C. L. R. 482, 10 Exch. 647, 1 Jur. N. S. 115, 24 L. J. Exch. 160, 3 Wkly. Rep. 206; Bligh *v.* Wellesley, 2 C. & P. 400, 12 E. C. L. 639; McGahey *v.* Alston, 2 Gale 238, 6 L. J. Exch. 29, 2 M. & W. 206.
Canada.— Keith *v.* Coates, 17 Can. L. T. 33; Basterach *v.* Atkinson, 7 N. Brunsw. 439; Little *v.* Johnson, 3 N. Brunsw. 496; Soules *v.* Donovan, 14 U. C. C. P. 510; Ansley *v.* Breo, 14 U. C. C. P. 371.
See 20 Cent. Dig. tit. "Evidence," §§ 612–637.
Compare cases cited *supra*, notes 73, 74.

Want of time and the inconvenience of search on the part of a public officer will not excuse the non-production of official documents in a proceeding in the court of claims or render parol evidence of their contents admissible. Brown *v.* U. S., 1 Ct. Cl. 377.

The character and extent of the search must be shown. Laster *v.* Blackwell, 128 Ala. 143, 30 So. 663; Rankin *v.* Crow, 19 Ill. 626; Avery *v.* Stewart, 134 N. C. 287, 46 S. E. 519; Parks *v.* Dunkle, 3 Watts & S. (Pa.) 291; W. V. Davidson Lumber Co. *v.* Jones, (Tenn. Ch. App. 1901) 62 S. W. 386.

Statement of party's conclusion.— When the party offering secondary evidence testifies that the original is "lost or destroyed," without showing a search or other facts to support his statement, the court will not adopt his conclusion and secondary evidence will be rejected. Booth *v.* Cook, 20 Ill. 129; Johnson *v.* Mathews, 5 Kan. 118; Avery *v.* Stewart, 134 N. C. 287, 46 S. E. 519; Anglo-American Packing, etc., Co. *v.* Cannon, 31 Fed. 313. So the mere statement of a witness that diligent search has been made to find the document in question is not sufficient proof of loss. Rankin *v.* Crow, 19 Ill. 626; W. V. Davidson Lumber Co. *v.* Jones, (Tenn. Ch. App. 1901) 62 S. W. 386.

A statement of counsel as to what his client has done in searching for the documents, where counsel's information is derived from the client, is not proper proof; the court must be distinctly informed by the testimony of a person having knowledge of the facts, and the extent of the search must be clearly proved. Smith *v.* Coker, 110 Ga. 650, 36 S. E. 105.

Where the proper custodian of the document testifies positively that it has been lost, or is not in his office in which it belongs, it has been held that a sufficient foundation is laid for the introduction of secondary evidence; that such testimony, in the absence of examination as to the search or manner of loss, raises the presumption that a proper search has been made. People *v.* Clingan, 5 Cal. 389; Postel *v.* Palmer, 71 Iowa 157, 32 N. W. 257 [*distinguishing* Howe Mach. Co. *v.* Stiles, 53 Iowa 424, 5 N. W. 577; Horseman *v.* Todhunter, 12 Iowa 230]; McKesson *v.* Smart, 108 N. C. 17, 13 S. E. 96. *Compare* Swink *v.* Bohn, 6 Colo. App. 517, 41 Pac. 838. *Contra,* Preslar *v.* Stallworth, 31 Ala. 402.

A party's affidavit of loss should state the facts bringing it within the rule of the text. Thus it must state with certainty whether the document is lost or destroyed, or in the possession of the opposite party, and should show what diligence has been used to recover it. Palmer *v.* Logan, 4 Ill. 56. It should show that search has been made in those places where the document would be most likely to be found, and should exclude all presumption that the party may have the document in his own possession or may know where it is.
Indiana.— Plant *v.* Crane, 7 Ind. 486.
Maine.— Mason *v.* Tallman, 34 Me. 472.
Mississippi.— Martin *v.* King, 3 How. 125.
New Hampshire.— Stevens *v.* Reed, 37 N. H. 49; Woods *v.* Gassett, 11 N. H. 442.
North Carolina.— Harven *v.* Hunter, 30 N. C. 464.
Texas.— Hill *v.* Taylor, 77 Tex. 295, 14 S. W. 366; Kauffman *v.* Shellworth, 64 Tex. 179; Bateman *v.* Bateman, 16 Tex. 541; Crayton *v.* Munger, 11 Tex. 234. *Compare* Johnson *v.* Lyford, 9 Tex. Civ. App. 85, 29 S. W. 57.
See 20 Cent. Dig. tit. "Evidence," § 612–637.

77. *Alabama.*— Owen *v.* Paul, 16 Ala. 130.
Connecticut.— Elwell *v.* Mersick, 50 Conn. 272; Kelsey *v.* Hanmer, 18 Conn. 311.
Georgia.— Harper *v.* Scott, 12 Ga. 125; Doe *v.* Biggers, 6 Ga. 188.
Louisiana.— See Burke *v.* Tregre, 28 La. Ann. 437.
Massachusetts.— Taunton Bank *v.* Richardson, 5 Pick. 436.
Michigan.— Burt *v.* Long, 106 Mich. 210, 64 N. W. 60. See also Bottomley *v.* Goldsmith, 36 Mich. 27.
Minnesota.— Phœnix Ins. Co. *v.* Taylor, 5 Minn. 492.
New Jersey.— Clark *v.* Hornbeck, 17 N. J. Eq. 430.
New York.— See Kane *v.* Metropolitan El. R. Co., 15 Daly 294, 6 N. Y. Suppl. 526; Jackson *v.* Woolsey, 11 Johns. 446.
North Carolina.— Gillis *v.* Wilmington, etc., R. Co., 108 N. C. 441, 13 S. E. 11, 1019.
Ohio.— Wells *v.* Martin, 1 Ohio St. 386.
Pennsylvania.— Bright *v.* Allan, 203 Pa. St. 386, 53 Atl. 248; Parks *v.* Dunkle, 3 Watts & S. 291.
South Carolina.— Norris *v.* Clinkscales,

or destruction must, like any other fact, be proved by a fair preponderance of evidence, and this is sufficient.[78] And where the evidence introduced shows that the document has been destroyed, of course no further proof of search is required before admitting secondary evidence of its contents.[79]

(2) By Whom Proof Should Be Made. The loss or destruction of the document in question should be proved by the person in whose hands the document was at the time of the loss, or in whose custody it may be presumed to be or to whose possession it is traced, if he is living and within reach of the process of the court.[80] In case he is out of the jurisdiction, his deposition must be procured if practicable or some good excuse given for not doing so.[81] If he is dead the

47 S. C. 488, 25 S. E. 797; Oliver *v.* Sale, 17 S. C. 587.

Tennessee.— Tyree *v.* Magness, 1 Sneed 276.

Texas.— Cheatham *v.* Riddle, 8 Tex. 162.

Virginia.— Corbett *v.* Nutt, 18 Gratt. 624.

United States.— U. S. *v.* Sutter, 21 How. 170, 16 L. ed. 119.

78. McCormick Harvesting Mach. Co. *v.* Gray, 114 Ind. 340, 16 N. E. 787; Wells *v.* Martin, 1 Ohio St. 386; Corbett *v.* Nutt, 18 Gratt. (Va.) 624; U. S. *v.* Sutter, 21 How. (U. S.) 170, 16 L. ed. 119. See also Parks *v.* Dunkle, 3 Watts & S. (Pa.) 291.

79. Rhode *v.* McLean, 101 Ill. 467; Hawley *v.* Robeson, 14 Nebr. 435, 16 N. W. 438; Peay *v.* Picket, 3 McCord (S. C.) 318.

80. *Alabama.*— Bogan *v.* McCutcheon, 48 Ala. 493; Mims *v.* Sturtevant, 18 Ala. 359; Pryor *v.* McNairy, 1 Stew. 150; Judson *v.* Eslava, Minor 71, 12 Am. Dec. 32. See also Bass *v.* Brooks, 1 Stew. 44.

California.— King *v.* Randlett, 33 Cal. 318; Patterson *v.* Keystone Min. Co., 30 Cal. 360; Fallon *v.* Dougherty, 12 Cal. 104; Norris *v.* Russell, 5 Cal. 249; McCann *v.* Beach, 2 Cal. 25.

Colorado.— Swink *v.* Bohn, 6 Colo. App. 517, 41 Pac. 838.

Georgia.— Seisel *v.* Register, 65 Ga. 662; Doe *v.* Biggers, 6 Ga. 188.

Illinois.— Prussing *v.* Jackson, 208 Ill. 85, 69 N. E. 771 [*reversing* 85 Ill. App. 324]; Mullanphy Sav. Bank *v.* Schott, 135 Ill. 655, 26 N. E. 640, 25 Am. St. Rep. 401; Moore *v.* Wright, 90 Ill. 470; Chicago, etc., R. Co. *v.* Ingersoll, 65 Ill. 399; Cook *v.* Hunt, 24 Ill. 535; Whitehall *v.* Smith, 24 Ill. 166; Mariner *v.* Saunders, 10 Ill. 113; Sullivan *v.* People, 108 Ill. App. 328; Kankakee Coal Co. *v.* Crane Bros. Mfg. Co., 38 Ill. App. 555; Lundberg *v.* Mackenheuser, 4 Ill. App. 603.

Indiana.— Murray *v.* Buchanan, 7 Blackf. 549.

Kansas.— Lee *v.* Bermingham, 30 Kan. 312, 1 Pac. 73; Barons *v.* Brown, 25 Kan. 410; Brock *v.* Cottingham, 23 Kan. 383.

Kentucky.— Nuttall *v.* Brannin, 5 Bush 11.

Minnesota.— Nelson *v.* Central Land Co., 35 Minn. 408, 29 N. W. 121.

Missouri.— Apperson *v.* Ingram, 12 Mo. 59.

Nebraska.— Myers *v.* Bealer, 30 Nebr. 280, 46 N. W. 479.

New Jersey.— Koehler *v.* Schilling, 70 N. J. L. 585, 57 Atl. 154; Smith *v.* Axtell, 1 N. J. Eq. 494.

New York.— Kearney *v.* New York, 92 N. Y. 617; Batchelor *v.* Hatie, 23 Misc. 119, 50 N. Y. Suppl. 663.

North Carolina.— Harven *v.* Hunter, 30 N. C. 464; Harper *v.* Hancock, 28 N. C. 124; Deaver *v.* Rice, 24 N. C. 280; Allen *v.* Barkley, 11 N. C. 20; Governor *v.* Roberts, 9 N. C. 26.

Oklahoma.— Richardson *v.* Fellner, 9 Okla. 513, 60 Pac. 270.

Pennsylvania.— Hemphill *v.* McClimans, 24 Pa. St. 367; Hartz *v.* Woods, 8 Pa. St. 471; Goddard *v.* Philadelphia, etc., R. Co., 2 Lanc. L. Rev. 265.

South Carolina.— O'Neal *v.* Isbell, 9 Rich. 367; Floyd *v.* Mintsey, 5 Rich. 361.

Tennessee.— Tyree *v.* Magness, 1 Sneed 276; Pharis *v.* Lambert, 1 Sneed 228; Hall *v.* Darter, 10 Humphr. 92.

Texas.— Bounds *v.* Little, 75 Tex. 316, 12 S. W. 1109; Crafts *v.* Daugherty, 69 Tex. 477, 6 S. W. 850; Vandergriff *v.* Piercy, 59 Tex. 371; Dunn *v.* Choate, 4 Tex. 14; Baldwin *v.* Goldfrank, 9 Tex. Civ. App. 269, 26 S. W. 155.

United States.— U. S. *v.* Reyburn, 6 Pet. 352, 8 L. ed. 424.

England.— Rex *v.* Piddlehinton, 3 B. & Ad. 460, 1 L. J. M. C. 43, 23 E. C. L. 207; Rex *v.* Denio, 7 B. & C. 620, 1 M. & R. 294, 14 E. C. L. 279; Rex *v.* Rhodegeidio, 6 L. J. M. C. O. S. 10; Freeman *v.* Arkell, 2 B. & C. 494, 9 E. C. L. 218, 1 C. & P. 135, 326, 12 E. C. L. 89, 195, 3 D. & R. 669, 2 L. J. K. B. O. S. 64; Reg. *v.* Saffron Hill, 1 E. & B. 93, 22 L. J. M. C. 22, 72 E. C. L. 93.

See 20 Cent. Dig. tit. "Evidence," §§ 605, 612–637.

Deed to antecedent grantee.— Where the deed of which a copy is sought to be given in evidence was made to an antecedent grantee, the preliminary proof of the loss of the original deed may be made by such grantee, although he be not a party to the suit, or it may be made by his agent or attorney. Pardee *v.* Lindley, 31 Ill. 174, 83 Am. Dec. 219. *Compare* Acme Brewing Co. *v.* Central R., etc., Co., 115 Ga. 494, 42 S. E. 8.

81. Phillips *v.* U. S. Benevolent Soc., 120 Mich. 142, 79 N. W. 1; Kearney *v.* New York, 92 N. Y. 617; Deaver *v.* Rice, 24 N. C. 280. See also *supra*, XV, E, 2, d.

Where he has fled the country and his whereabouts are unknown, the requirements of the text cannot of course be complied with and do not preclude the admission of secondary evidence. West Philadelphia Nat. Bank *v.* Field, 143 Pa. St. 473, 22 Atl. 829,

loss or destruction of the document should be proved by his legal representatives who are charged with the custody of his papers, or by his successor in office. In brief the last custodian of the document should be produced or his absence should be satisfactorily explained.[82] The party seeking to introduce the secondary evidence may make the preliminary proof of loss or destruction of the original document;[83] and if he is the proper custodian of the document, the preliminary proof must generally be made by him.[84] These requirements, however, are not uni-

24 Am. St. Rep. 562. See also Lemon *v.* Johnson, 6 Dana (Ky.) 399; Cheatham *v.* Riddle, 8 Tex. 162.

An unsuccessful attempt to take the deposition of a non-resident, in whose possession a deed was last known to be, is equivalent to a demand of the deed and is sufficient. Beall *v.* Dearing, 7 Ala. 124.

82. Rankin *v.* Crow, 19 Ill. 626; Lundberg *v.* Mackenheuser, 4 Ill. App. 603; Floyd *v.* Mintsey, 5 Rich. (S. C.) 361; Vandergriff *v.* Piercy, 59 Tex. 371; Dunn *v.* Choate, 4 Tex. 14; Baldwin *v.* Goldfrank, 9 Tex. Civ. App. 269, 26 S. W. 155; Rex *v.* Piddlehinton, 3 B. & Ad. 460, 1 L. J. M. C. 43, 23 E. C. L. 207; Doe *v.* Lewis, 11 C. B. 1035, 15 Jur. 512, 20 L. J. C. P. 177, 73 E. C. L. 1035; Rex *v.* Hinckley, 9 L. J. M. C. O. S. 75.

83. *Alabama.*— Glassell *v.* Mason, 32 Ala. 719.

California.— Bagley *v.* Eaton, 10 Cal. 126; Bagley *v.* McMickle, 9 Cal. 430.

Connecticut.— Fitch *v.* Bogue, 19 Conn. 285.

Delaware.— Shrowders *v.* Harper, 1 Harr. 444.

Georgia.— Morgan *v.* Jones, 24 Ga. 155; Maynor *v.* Lewis, Ga. Dec. 205, Pt. II.

Illinois.— Wade *v.* Wade, 12 Ill. 89.

Kentucky.—Hart *v.* Strode, 2 A. K. Marsh. 115.

Louisiana.— Tuttle *v.* Burroughes, 9 La. Ann. 494; Gravier *v.* Rapp, 12 La. 162.

Massachusetts.— Almy *v.* Reed, 10 Cush. 421.

Missouri.— Gould *v.* Trowbridge, 32 Mo. 291.

New Hampshire.— Stevens *v.* Reed, 37 N. H. 49; Woods *v.* Gassett, 11 N. H. 442.

New Jersey.— Smith *v.* Axtell, 1 N. J. Eq. 494.

New York.— Dan *v.* Brown, 4 Cow. 483, 15 Am. Dec. 395.

North Carolina.— Harper *v.* Hancock, 28 N. C. 124.

Texas.— Gray *v.* Thomas, 83 Tex. 246, 18 S. W. 721; Parks *v.* Caudle, 58 Tex. 216; Dohoney *v.* Womack, 1 Tex. Civ. App. 354, 19 S. W. 883, 20 S. W. 950.

Vermont.— Clark *v.* Marsh, 20 Vt. 338.

Virginia.— Beirne *v.* Rosser, 26 Gratt. 537.

United States.— Tayloe *v.* Riggs, 1 Pet. 591, 7 L. ed. 275; Boyle *v.* Arledge, 3 Fed. Cas. No. 1,758, Hempst. 620.

See 20 Cent. Dig. tit. "Evidence," § 605. See also *supra*, XIV, F, 2, c.

Ga. Code, § 5673, following a former rule of court, provides that "whenever a party wishes to introduce the copy of a deed or other instrument, between the parties litigant, in evidence, the oath of the party stating his belief of the loss or destruction of the original, and that it is not in his possession, power or custody, shall be a sufficent foundation for the introduction of such secondary evidence." See Cameron *v.* Kersey, 41 Ga. 40; Roe *v.* Doe, 32 Ga. 39; Poulet *v.* Johnson, 25 Ga. 403; Marshall *v.* Morris, 16 Ga. 368; Smith *v.* Atwood, 14 Ga. 402; Ratteree *v.* Nelson, 10 Ga. 439. Instruments between others than the parties litigant must be governed by common-law principles except in so far as such principles have been changed or modified by other court rules or by legislative enactment. Cox *v.* McDonald, 118 Ga. 414, 45 S. E. 401. But the party's testimony that he had never seen the original document was held not a sufficient compliance with the rule. Sutton *v.* McLoud, 26 Ga. 638.

84. Fallon *v.* Dougherty, 12 Cal. 104; Batchelor *v.* Hatie, 23 Misc. (N. Y.) 119, 50 N. Y. Suppl. 663; Harper *v.* Hancock, 28 N. C. 124; Deaver *v.* Rice, 24 N. C. 280; Park *v.* Cochran, 2 N. C. 410; Blanton *v.* Miller, 2 N. C. 4; Pennybacker *v.* Hazelwood, 26 Tex. Civ. App. 183, 61 S. W. 153. It has been held also that the search must be made by persons interested in the instrument, such as those claiming under it, or by others at their request. Dan *v.* Brown, 4 Cow. (N. Y.) 483, 15 Am. Dec. 395.

Testimony of a clerk that he had the oversight of defendant's papers and that he had made a thorough search among them but had been unable to find the paper in question is not sufficient to authorize the introduction of secondary evidence, since the testimony is not inconsistent with the hypothesis that the paper is in existence and that defendant himself has a knowledge of the place where it can be found. Hanson *v.* Kelly, 38 Me. 456.

Where the document has never been in the party's custody or control and is of such a character that it would not naturally be in his control, it is not necessary that he himself should make the proof of loss. Wells *v.* Miller, 37 Ill. 276. See also Harper *v.* Hancock, 28 N. C. 124.

The party's agent or attorney cognizant of the facts may make the preliminary affidavit of loss or destruction. Smith *v.* Martin, 2 Overt. (Tenn.) 208; Henry *v.* Whitaker, 82 Tex. 5, 17 S. W. 509. See also Corbin *v.* Beebee, 36 Iowa 336. *Compare* Deaver *v.* Rice, 24 N. C. 280. But where it does not appear that the party has not the custody of the document, proof of search by his agent or attorney is insufficient; the party's affidavit should be produced. Fallon *v.*

versal or inflexible, and may be dispensed with when they are not necessary to the satisfactory establishment of the facts to be proved. Under such circumstances the testimony of other persons who have knowledge of the facts is admissible if otherwise competent, and may of itself be sufficient.[85]

(3) Degree of Diligence Necessary — (a) In General. The degree of diligence necessary to be made in the search is a matter which cannot be confined within the limits of any inflexible rule, but must be determined largely by the peculiar circumstances of each case, and the character and importance of the document.[86] It has been said that the search must be made with the utmost good

Dougherty, 12 Cal. 104. See also Deaver *v.* Rice, *supra.*

85. *Alabama.*— Laster *v.* Blackwell, 128 Ala. 143, 30 So. 663; Hill *v.* Fitzpatrick, 6 Ala. 314; Pryor *v.* McNairy, 1 Stew. 150.

Georgia.— Marshall *v.* Morris, 16 Ga. 368.

Massachusetts.— Foster *v.* Mackay, 7 Metc. 531; Davis *v.* Spooner, 3 Pick. 284.

Nebraska.— Buchanan *v.* Wise, 34 Nebr. 695, 52 N. W. 163 [*distinguishing* Myers *v.* Bealer, 30 Nebr. 280, 46 N. W. 479].

New York.— Smith *v.* Young, 2 Barb. 545; Jackson *v.* Russell, 4 Wend. 543.

Pennsylvania.— Caufman *v.* Cedar Springs Presb. Congregation, 6 Binn. 59.

South Carolina.— Norris *v.* Clinkscales, 47 S. C. 488, 25 S. E. 797.

Tennessee.— Johnson *v.* Hall, 9 Baxt. 351; Hale *v.* Darter, 10 Humphr. 92.

Texas.— Waggoner *v.* Alvord, 81 Tex. 365, 16 S. W. 1083; Johnson *v.* Skipworth, 59 Tex. 473; Chalk *v.* Foster, 2 Tex. Unrep. Cas. 704.

Canada.— Nesbitt *v.* Rice, 14 U. C. C. P. 409.

See 20 Cent. Dig. tit. "Evidence," §§ 605, 607.

86. *Colorado.*— Hobson *v.* Porter, 2 Colo. 28.

Connecticut.— Waller *v.* New Milford Eleventh School Dist., 22 Conn. 326; Kelsey *v.* Hanmer, 18 Conn. 311.

Georgia.— Hayden *v.* Mitchell, 103 Ga. 431, 30 S. E. 287.

Illinois.— Rankin *v.* Crow, 19 Ill. 626; Mariner *v.* Saunders, 10 Ill. 113.

Louisiana.— Lavergne *v.* Elkins, 17 La. 220; Tate *v.* Penne, 7 Mart. N. S. 548.

Minnesota.— Thayer *v.* Barney, 12 Minn. 502.

New Jersey.— Johnson *v.* Arnwine, 42 N. J. L. 451, 36 Am. Rep. 527. See also Sterling *v.* Potts, 5 N. J. L. 773.

North Carolina.— Gillis *v.* Wilmington, etc., R. Co., 108 N. C. 441, 13 S. E. 11, 1019.

Ohio.— Wells *v.* Martin, 1 Ohio St. 386.

Pennsylvania.— Flinn *v.* McGonigle, 9 Watts & S. 75.

South Carolina.— Floyd *v.* Mintsey, 5 Rich. 361.

Tennessee.—Tyree *v.* Magness, 1 Sneed 276.

Texas.— Cheatham *v.* Riddle, 8 Tex. 162.

United States.— Simpson *v.* Dall, 3 Wall. 460, 18 L. ed. 265.

England.— Gully *v.* Exeter, 4 Bing. 290, 12 Moore C. P. 591, 29 Rev. Rep. 565, 13 E. C. L. 508.

Canada.— Tiffany *v.* McCumber, 13 U. C. Q. B. 159.

See 20 Cent. Dig. tit. "Evidence," §§ 612–637.

Denial that a deed or contract exists demands extraordinary diligence to procure the original before secondary evidence can be admitted. Daly *v.* Bernstein, 6 N. M. 380, 28 Pac. 764; Wiseman *v.* Northern Pac. R. Co., 20 Oreg. 425, 26 Pac. 272, 23 Am. St. Rep. 135. See also Nelson *v.* Central Land Co., 35 Minn. 408, 29 N. W. 121.

Where there has been a great lapse of time since the execution of a deed alleged to be lost, strict proof of the loss need not be required.

Alabama.— Beall *v.* Dearing, 7 Ala. 124.

Georgia.— See Doe *v.* Biggers, 6 Ga. 188.

Pennsylvania.— Early *v.* Euwer, 102 Pa. St. 338.

South Carolina.— See McMullen *v.* Brown, Harp. 76.

United States.— Lewis *v.* Baird, 15 Fed. Cas. No. 8,316, 3 McLean 56.

England.— Rex *v.* East Farleigh, 6 D. & R. 147, 3 L. J. K. B. O. S. 172, 16 E. C. L. 258.

Canada.— Tiffany *v.* McCumber, 13 U. C. Q. B. 159.

See 20 Cent. Dig. tit. "Evidence," §§ 635–637.

Length of time and the ravages of war, in which many citizens lost deeds and papers, have been held sufficient to raise an inference of the loss of a deed. Peay *v.* Picket, 3 McCord (S. C.) 318; Holmes *v.* Rochell, 2 Bay (S. C.) 487.

Advertisement.— By La. Civ. Code, art. 2280 (2259), it is provided that "in every case, where a lost instrument is made the foundation of a suit or defence, it must appear that the loss has been advertised, within a reasonable time, in a public newspaper, and proper means taken to recover the possession of the instrument." See Tichnor *v.* Calhoun, 29 La. Ann. 277; Peace *v.* Head, 12 La. Ann. 582; Williams *v.* Morancy, 3 La. Ann. 227. *Compare* Cox *v.* Bradley, 15 La. Ann. 529. But where the instrument is not the foundation of the suit, advertisement of its loss is unnecessary. Willett *v.* Andrews, 106 La. 319, 30 So. 883; State *v.* Doyle, 42 La. Ann. 640, 7 So. 699. An advertisement is not required where the loss or destruction of the document is established. Willett *v.* Andrews, 106 La. 319, 30 So. 883; Wood's Succession, 30 La. Ann. 1002; Gordon *v.* Fahrenberg, 26 La. Ann. 366.

faith and should be as thorough and vigilant as though, were the paper not

Deeds and mortgages.— For evidence held sufficient to show the loss or destruction of a deed or mortgage as a basis for secondary evidence see the following cases:

Alabama.— Nashville, etc., R. Co. *v.* Hammond, 104 Ala. 191, 15 So. 935; Beard *v.* Ryan, 78 Ala. 37; Dunning *v.* Dunning, 57 Ala. 590; Bright *v.* Young, 15 Ala. 112; Juzan *v.* Toulmin, 9 Ala. 662, 44 Am. Dec. 448; Beall *v.* Dearing, 7 Ala. 124; McRae *v.* Pegues, 4 Ala. 158; Swift *v.* Fitzhugh, 9 Port. 39.

California.— Kennif *v.* Caulfield, 140 Cal. 34, 73 Pac. 803.

Georgia.— Denny *v.* Broadway Nat. Bank, 118 Ga. 221, 44 S. E. 982; Silva *v.* Rankin, 80 Ga. 79, 4 S. E. 756; Payne *v.* Ormond, 44 Ga. 514; Roe *v.* Doe, 32 Ga. 39.

Illinois.— Perry *v.* Burton, 111 Ill. 138; Golder *v.* Bressler, 105 Ill. 419; Taylor *v.* McIrvin, 94 Ill. 488; Swearengen *v.* Gulick, 67 Ill. 208; Nixon *v.* Cobleigh, 52 Ill. 387; Fisk *v.* Kissane, 42 Ill. 87; Bester *v.* Powell, 7 Ill. 119.

Indiana.— Rucker *v.* McNeely, 5 Blackf. 123, 6 Blackf. 391.

Iowa.— Hall *v.* Cardell, 111 Iowa 206, 82 N. W. 503; Matter of Rea, 82 Iowa 231, 48 N. W. 78; Kreuger *v.* Walker, 80 Iowa 733, 45 N. W. 871; Postel *v.* Palmer, 71 Iowa 157, 32 N. W. 257.

Kansas.— McLean *v.* Webster, 45 Kan. 644, 26 Pac. 10.

Kentucky.— Dickerson *v.* Talbot, 14 B. Mon. 60.

Massachusetts.— Brigham *v.* Coburn, 10 Gray 329; Davis *v.* Spooner, 3 Pick. 284.

Michigan.— King *v.* Carpenter, 37 Mich. 363.

Missouri.— Hume *v.* Hopkins, 140 Mo. 65, 41 S. W. 784; Hall *v.* Gallemore, 138 Mo. 638, 40 S. W. 891.

Nebraska.— Baldwin *v.* Burt, 43 Nebr. 245, 61 N. W. 601.

New Jersey.— Roll *v.* Rea, 50 N. J. L. 264, 12 Atl. 905.

New York.— Jackson *v.* Woolsey, 11 Johns. 446.

Pennsylvania.— Gray *v.* Colter, 4 Pa. St. 188.

South Carolina.— Edwards *v.* Edwards, 11 Rich. 537; Berry *v.* Jourdan, 11 Rich. 67; Birchfield *v.* Bonham, 2 Speers 62.

Texas.— Bounds *v.* Little, 79 Tex. 128, 15 S. W. 225; Dawson *v.* Ward, 71 Tex. 72, 9 S. W. 106; Snyder *v.* Ivers, 61 Tex. 400; Parks *v.* Candle, 58 Tex. 216; Robertson *v.* Moorer, 25 Tex. 428; Walker *v.* Pittman, 18 Tex. Civ. App. 519, 46 S. W. 117; Daniels *v.* Creekmore, 7 Tex. Civ. App. 573, 27 S. W. 148; Dohoney *v.* Womack, 1 Tex. Civ. App. 354, 19 S. W. 883, 20 S. W. 950.

Virginia.— Ben *v.* Prete, 2 Rand. 539.

England.— Green *v.* Bailey, 11 Jur. 258, 15 Sim. 542, 38 Eng. Ch. 542.

See 20 Cent. Dig. tit. "Evidence," §§ 635–637.

For evidence held insufficient to show the loss or destruction of a deed or mortgage see the following cases:

Alabama.—Echols *v.* Hubbard, 90 Ala. 309, 7 So. 817; Tannis *v.* Doe, 21 Ala. 449.

California.— Lawrence *v.* Fulton, 19 Cal. 683.

Florida.— Bell *v.* Kendrick, 25 Fla. 778, 6 So. 868.

Illinois.— Scott *v.* Bassett, 174 Ill. 390, 51 N. E. 577; Wing *v.* Sherrer, 77 Ill. 200; Dickinson *v.* Breeden, 25 Ill. 167; Rankin *v.* Crow, 19 Ill. 626; Mariner *v.* Saunders, 10 Ill. 113.

Indiana.— Plant *v.* Crane, 7 Ind. 486.

Louisiana.— Prevost *v.* Johnson, 9 Mart. 123.

Missouri.— Orchard *v.* Collier, 171 Mo. 390, 71 S. W. 677.

New York.— Jackson *v.* Frier, 16 Johns. 193.

North Carolina.— Harven *v.* Hunter, 30 N. C. 464; Harper *v.* Hancock, 28 N. C. 124.

Ohio.— Middleton *v.* Westeney, 7 Ohio Cir. Ct. 393, 4 Ohio Cir. Dec. 650.

Pennsylvania.— Heller *v.* Peters, 140 Pa. St. 648, 21 Atl. 416.

South Carolina.— O'Neal *v.* Isbell, 9 Rich. 367; Floyd *v.* Mintsey, 5 Rich. 361.

Texas.— Hill *v.* Taylor, 77 Tex. 295, 14 S. W. 366.

England.— Horlock *v.* Priestley, 1 L. J. Ch. O. S. 73.

See 20 Cent. Dig. tit. "Evidence," §§ 635–637.

Wills.— For evidence held sufficient to establish the loss or destruction of a will see McConnell *v.* Wildes, 153 Mass. 487, 26 N. E. 1114; Jackson *v.* Betts, 6 Cow. (N. Y.) 377; Corbett *v.* Nutt, 18 Gratt. (Va.) 624. In proving the loss of a will as a foundation for the introduction of secondary evidence of its contents, it has been said that the proof, being addressed to the court, need not be as strict as if submitted to the jury. Fetherly *v.* Waggoner, 11 Wend. (N. Y.) 599. For evidence held insufficient to establish the loss or destruction of a will see Dash *v.* Dosson, 6 Rob. (La.) 11; Dan *v.* Brown, 4 Cow. (N. Y.) 483, 15 Am. Dec. 395.

Notes.— For evidence held sufficient to establish loss or destruction of a promissory note, see the following cases:

Alabama.— Cooper *v.* Madden, 6 Ala. 431.

Illinois.— McMillan *v.* Bithold, 35 Ill. 250; Kupfer *v.* Galena Bank, 34 Ill. 328, 85 Am. Dec. 309.

Ohio.— Wells *v.* Martin, 1 Ohio St. 386.

Pennsylvania.— West Philadelphia Nat. Bank *v.* Field, 143 Pa. St. 473, 22 Atl. 829, 24 Am. St. Rep. 562.

Texas.— Gray *v.* Thomas, 83 Tex. 246, 18 S. W. 721.

See 20 Cent. Dig. tit. "Evidence," § 617.

For evidence held insufficient to establish loss or destruction of a promissory note see the following cases:

Alabama.—Borland *v.* Phillips, 3 Ala. 718;

found, its benefit would be lost.[87] If any suspicion hangs over the instrument, or there are circumstances tending to excite a suspicion that it is designedly withheld, the most rigid inquiry should be made into the reason for its non-production; but where there is no such suspicion, all that ought to be required is reasonable diligence in the effort to obtain the original.[88] The court must of course be satisfied on the whole that the paper is lost or destroyed,[89] and that it

Judson *v.* Eslava, Minor 71, 12 Am. Dec. 32.

Connecticut.— White *v.* Brown, 19 Conn. 577.

Indiana.— Depew *v.* Wheelan, 6 Blackf. 485.

Iowa.— Crowe *v.* Capwell, 47 Iowa 426.

New York.— Seckel *v.* Frauenthal, 9 Bosw. 350.

See 20 Cent. Dig. tit. "Evidence," § 617.

Bonds.— For evidence held sufficient to establish the loss or destruction of a bond see Livingstone County *v.* White, 30 Barb. (N. Y.) 72; State *v.* Hare, 70 N. C. 658; Veramendi *v.* Hutchins, 48 Tex. 531. For evidence held insufficient see Hartz *v.* Woods, 8 Pa. St. 471; Dumas *v.* Powell, 14 N. C. 103; Bateman *v.* Bateman, 16 Tex. 541.

Letters.— For evidence held sufficient to establish the loss or destruction of letters see the following cases:

Arizona.— Rush *v.* French, 1 Ariz. 99, 25 Pac. 816.

Indiana.— Littler *v.* Franklin, 9 Ind. 216.

Kansas.— Powell *v.* Wallace, 44 Kan. 656, 25 Pac. 42; Vancil *v.* Hagler, 27 Kan. 407.

Maine.— Augusta *v.* Vienna, 21 Me. 298.

Maryland.— Jones *v.* Jones, 45 Md. 144.

Massachusetts.— Augur Steel Axle, etc., Co. *v.* Whittier, 117 Mass. 451.

Michigan.— Burt *v.* Long, 106 Mich. 210, 64 N. W. 60; Shrimpton *v.* Netzorg, 104 Mich. 225, 62 N. W. 343; Nowlen *v.* Lyon, 73 Mich. 434, 41 N. W. 496; Bottomley *v.* Goldsmith, 36 Mich. 27.

Missouri.— Meyers *v.* Russell, 52 Mo. 26.

New York.— Voorhees *v.* Dorr, 51 Barb. 580; Delamater *v.* Prudential Ins. Co., 1 Silv. Supreme 538, 5 N. Y. Suppl. 586.

North Carolina.— Gillis *v.* Wilmington, etc., R. Co., 108 N. C. 441, 13 S. E. 11, 1019.

Texas.— Price *v.* Oatman, (Civ. App. 1903) 77 S. W. 258; Wallace *v.* Byers, 14 Tex. Civ. App. 574, 38 S. W. 228.

Washington.— State *v.* Erving, 19 Wash. 435, 53 Pac. 717.

Canada.— Williams *v.* Grey, 23 U. C. C. P. 561.

See 20 Cent. Dig. tit. "Evidence," § 634.

For evidence held insufficient to establish the loss or destruction of letters see the following cases:

Colorado.— Billin *v.* Henkel, 9 Colo. 394, 13 Pac. 420; Swink *v.* Bohn, 6 Colo. App. 517, 41 Pac. 838.

Iowa.— Burlington Lumber Co. *v.* Whitebreast Coal, etc., Co., 66 Iowa 292, 23 N. W. 674.

Louisiana.— Lockhart *v.* Jones, 9 Rob. 381.

Maine.— Hanson *v.* Kelly, 38 Me. 456.

Maryland.— Clement *v.* Ruckle, 9 Gill 326.

Michigan.— Sun Ins. Co. *v.* Earle, 29 Mich. 406.

New York.— Berg *v.* Carroll, 16 N. Y. Suppl. 175.

North Carolina.— Avery *v.* Stewart, 134 N. C. 287, 46 S. E. 519.

See 20 Cent. Dig. tit. "Evidence," § 634.

Telegrams.— For evidence held sufficient to show the loss or destruction of a telegram see the following cases:

Illinois.— Western Union Tel. Co. *v.* Kemp, 55 Ill. App. 583.

Iowa.— Riordan *v.* Guggerty, 74 Iowa 688, 39 N. W. 107.

Kansas.— Western Union Tel. Co. *v.* Collins, 45 Kan. 88, 45 Pac. 187, 10 L. R. A. 115.

Maryland.—Smith *v.* Easton, 54 Md. 138, 39 Am. Rep. 355.

Missouri.— Lindauer *v.* Meyberg, 27 Mo. App. 181.

Tennessee.— Ward *v.* Tennessee Coal, etc., Co., (Ch. App. 1900) 57 S. W. 193.

See 20 Cent. Dig. tit. "Evidence," § 615.

For evidence held insufficient to establish the loss or destruction of a telegram see American Union Tel. Co. *v.* Daugherty, 89 Ala. 191, 7 So. 660; Newton *v.* Donnelly, 9 Ind. App. 359, 36 N. E. 769; Barons *v.* Brown, 25 Kan. 410; Blair *v.* Brown, 116 N. C. 631, 21 S. E. 434.

87. Prussing *v.* Jackson, 208 Ill. 85, 69 N. E. 771 [*reversing* 85 Ill. App. 324]; Rankin *v.* Crow, 19 Ill. 626; Mariner *v.* Saunders, 10 Ill. 113.

88. *Minnesota.*— Phœnix Ins. Co. *v.* Taylor, 5 Minn. 492.

New Jersey.— Johnson *v.* Arnwine, 42 N. J. L. 451, 36 Am. Rep. 527.

New York.— People *v.* Lord, 67 Barb. 109. See also Lallman *v.* Hovey, 92 Hun 419, 36 N. Y. Suppl. 662.

South Carolina.— Floyd *v.* Mintsey, 5 Rich. 361.

Tennessee.— Tyree *v.* Magness, 1 Sneed 275.

Texas.— Ricks *v.* Wofford, 31 Tex. 411.

Virginia.— Beirne *v.* Rosser, 26 Gratt. 537.

United States.— Minor *v.* Tillotson, 7 Pet. 99, 8 L. ed. 621. See also Morehead *v.* U. S., 17 Fed. Cas. No. 9,762, Hoff. Op. 404.

See 20 Cent. Dig. tit. "Evidence," §§ 612–637.

Where the document belongs to the party's adversary, very much less diligence in search is required than where the document belongs to the party seeking to introduce the secondary evidence. Desnoyer *v.* McDonald, 4 Minn. 515. See also Little *v.* Marsh, 37 N. C. 18.

89. Hobson *v.* Porter, 2 Colo. 28; Mullanphy Sav. Bank *v.* Schott, 135 Ill. 655, 26 N. E. 640, 25 Am. St. Rep. 401; Chicago, etc.,

cannot be found at the time of the trial;[90] but it is generally sufficient to prove that diligent and unsuccessful search has been made in every reasonable quarter; it is not ordinarily necessary to exhaust every source of information or discovery.[91] Where the party never had the custody of the document and never was entitled to its possession, he will not be held to such strict requirements in proving its loss, destruction, or inaccessibility as if the document were one of which he had once had the possession or to the custody of which he was entitled.[92] In fine, it is held that under ordinary circumstances sufficient grounds are established for the introduction of secondary evidence, where it appears from the preliminary evidence that there is no reasonable probability or suspicion that the writing is designedly withheld or suppressed;[93] and it is not necessary to negative every possibility of its suppression.[94]

(b) Value or Importance of Document. In determining the degree of diligence which will be required in a search for a document, the value and importance of the paper and the purposes for which it is expected to be used are material matters to be considered.[95] If the document be a private paper in which the party offering secondary evidence of its contents has a personal interest, and it be an important paper, such as in the usual course of business would be likely to be in his possession or in the possession of another for his benefit, search for it in every direction in which it can be traced may reasonably be required, before

R. Co. *v.* Ingersoll, 65 Ill. 399; Mariner *v.* Saunders, 10 Ill. 118. See also Bascom *v.* Toner, 15 Ind. App. 229, 31 N. E. 856.

90. Lott *v.* Buck, 113 Ga. 640, 39 S. E. 70; Porter *v.* Wilson, 13 Pa. St. 641. See also Donegan *v.* Wade, 70 Ala. 501; Watson *v.* State, 63 Ala. 19; Hobson *v.* Porter, 2 Colo. 28. *Compare* Poe *v.* Dorrah, 20 Ala. 288, 56 Am. Dec. 196; Fitz *v.* Rabbits, 2 M. & Rob. 60.

91. *California.*— Woods *v.* Jansen, 130 Cal. 200, 62 Pac. 473.

Illinois.— Dugger *v.* Oglesby, 99 Ill. 405; Mariner *v.* Saunders, 10 Ill. 113.

Massachusetts.—Smith *v.* Brown, 151 Mass. 338, 24 N. E. 31; Brigham *v.* Coburn, 10 Gray 329. *Compare* Taunton Bank *v.* Richardson, 5 Pick. 436.

New Jersey.— Johnson *v.* Arnwine, 42 N. J. L. 451, 36 Am. Rep. 527.

North Carolina.—Gillis *v.* Wilmington, etc., R. Co., 108 N. C. 441, 13 S. E. 11, 1019.

Pennsylvania.—See Strause *v.* Braunreuter, 14 Pa. Super. Ct. 125.

South Carolina.— Oliver *v.* Sale, 17 S. C. 587.

England.— Reg. *v.* Hinckley, 3 B. & S. 885, 9 Jur. N. S. 1054, 32 L. J. M. C. 158, 8 L. T. Rep. N. S. 270, 11 Wkly. Rep. 663, 113 E. C. L. 885; McGahey *v.* Alston, 2 Gale 238, 6 L. J. Exch. 29, 2 M. & W. 206; Hart *v.* Hart, 1 Hare 1, 5 Jur. 1007, 11 L. J. Ch. 9, 23 Eng. Ch. 1; Minshall *v.* Lloyd, 1 Jur. 336, 6 L. J. Exch. 115, M. & H. 125, 2 M. & W. 450.

Canada.— Williams *v.* Grey, 23 U. C. C. P. 561; Russell *v.* Fraser, 15 U. C. C. P. 375; Gordon *v.* McPhail, 32 U. C. Q. B. 480.

See 20 Cent. Dig. tit. "Evidence," §§ 612–637.

92. Lemon *v.* Johnson, 6 Dana (Ky.) 399. See also Blalock *v.* Miland, 87 Ga. 573, 13 S. E. 551.

93. *Iowa.*— See The Wisconsin *v.* Young, 3 Greene 268.

Massachusetts.— Brigham *v.* Coburn, 10 Gray 329.

New Jersey.— Clark *v.* Hornbeck, 17 N. J. Eq. 430.

North Carolina.— Robards *v.* McLean, 30 N. C. 522.

Virginia.— Beirne *v.* Rosser, 26 Gratt. 537; Corbett *v.* Nutt, 18 Gratt. 624.

United States.— Renner *v.* Columbia Bank, 9 Wheat. 581, 6 L. ed. 166.

England.— McGahey *v.* Alston, 2 Gale 238, 6 L. J. Exch. 29, 2 M. & W. 206.

See 20 Cent. Dig. tit. "Evidence," §§ 612–637.

When rule of diligence relaxed.— Where the instrument is one required by law to be recorded, and was in fact recorded, no presumption can arise that the original is withheld for an improper purpose; and in such a case the law is much less stringent in its requirements of proof of loss than where the instrument is of a different character. Adams *v.* Shelby, 10 Ala. 478; Jones *v.* Scott, 2 Ala. 58. Where the custodian of the document is a third person who cannot be compelled to produce it, the rule as to diligence in search is relaxed, although enough must be shown to reasonably satisfy the court that the document is not voluntarily withheld by the party offering the secondary evidence. Laster *v.* Blackwell, 128 Ala. 143, 30 So. 663.

94. Robards *v.* McLean, 30 N. C. 522; McGahey *v.* Alston, 2 Gale 238, 6 L. J. Exch. 29, 2 M. & W. 206.

95. *Connecticut.*— Waller *v.* New Milford Eleventh School Dist., 22 Conn. 326.

New Jersey.— Johnson *v.* Arnwine, 42 N. J. L. 451, 36 Am. Rep. 527.

North Carolina.— Gillis *v.* Wilmington, etc., R. Co., 108 N. C. 441, 13 S. E. 11, 1019.

Oregon.— Wiseman *v.* Northern Pac. R. Co., 20 Oreg. 425, 26 Pac. 272, 23 Am. St. Rep. 135.

secondary evidence of its contents will be received.[96] *A fortiori* great diligence should be exercised where the instrument is one upon which the cause of action or the defense is based, and its execution and alleged contents are denied.[97] If the document be one in which other persons are also interested, and which has been placed in the hands of a custodian for safe-keeping, the latter must be required to make search, and the fruitlessness of such search must be shown, before secondary evidence can be admitted.[98] If the paper be one of importance chiefly to third persons, search among the papers of such persons as would have an interest in the preservation of the paper, or would under the circumstances be likely to have it in possession, will be sufficient.[99] Where the document is useless, or of little or no value, or is of such a character that it would not naturally be preserved with any care its loss or destruction may be inferred upon very slight evidence.[1] Thus where the purpose has been accomplished for which the instrument was executed, so that the instrument is *functus officio* and no rights can be founded thereon, there is a presumption or inference that it has been lost or destroyed, since necessity or reason for preserving it no longer exists and in such cases little or no evidence of search is required.[2]

Pennsylvania.— American L. Ins., etc., Co. *v.* Rosenagle, 77 Pa. St. 507; Porter *v.* Wilson, 13 Pa. St. 641; Spalding *v.* Susquehanna County Bank, 9 Pa. St. 26.

England.— Gathercole *v.* Miall, 10 Jur. 337, 15 L. J. Exch. 179, 15 M. & W. 319.

See 20 Cent. Dig. tit. "Evidence," § 612.

96. Johnson *v.* Arnwine, 42 N. J. L. 451, 36 Am. Rep. 527; Wiseman *v.* Northern Pac. R. Co., 20 Oreg. 425, 26 Pac. 272, 23 Am. St. Rep. 135. See also Wills *v.* McDole, 5 N. J. L. 501; Smith *v.* Axtell, 1 N. J. Eq. 494.

97. Wiseman *v.* Northern Pac. R. Co., 20 Oreg. 425, 26 Pac. 272, 23 Am. St. Rep. 135. See also Wills *v.* McDole, 5 N. J. L. 501.

98. Johnson *v.* Arnwine, 42 N. J. L. 451, 36 Am. Rep. 527; Smith *v.* Axtell, 1 N. J. Eq. 494.

99. Johnson *v.* Arnwine, 42 N. J. L. 451, 36 Am. Rep. 527; Jackson *v.* Woolsey, 11 Johns. (N. Y.) 446. See also Reg. *v.* Hinckley, 3 B. & S. 885, 9 Jur. N. S. 1054, 32 L. J. M. C. 158, 8 L. T. Rep. N. S. 270, 11 Wkly. Rep. 663, 113 E. C. L. 885.

1. *Alabama.*— Beall *v.* Dearing, 7 Ala. 124.

Connecticut.—Waller *v.* New Milford Eleventh School Dist., 22 Conn. 326.

Georgia.— Crawford *v.* Hodge, 81 Ga. 728, 8 S. E. 208.

Kansas.— Atchison, etc., R. Co. *v.* Palmore, 68 Kan. 545, 75 Pac. 509, 64 L. R. A. 90.

Maryland.— Wright *v.* State, 88 Md. 436, 41 Atl. 795; Union Banking Co. *v.* Gittings, 45 Md. 181; Jones *v.* Jones, 45 Md. 144.

Minnesota.— Slocum *v.* Bracy, 65 Minn. 100, 67 N. W. 843.

New Jersey.— Johnson *v.* Arnwine, 42 N. J. L. 451, 36 Am. Rep. 527. See also Overseers of Poor Kingwood Tp. *v.* Overseers of Poor Bethlehem Tp., 13 N. J. L. 221.

New York.— Baker *v.* Squier, 3 Thomps. & C. 465.

Pennsylvania.— American L. Ins., etc., Co. *v.* Rosenagle, 77 Pa. St. 507; Weeks *v.* Haas, 3 Watts & S. 520, 39 Am. Dec. 39.

South Carolina.— See Turner *v.* Moore, 1 Brev. 236.

Vermont.— Williams *v.* Willard, 23 Vt. 369.

United States.— See Bouldin *v.* Massie, 7 Wheat. 122, 5 L. ed. 414.

England.— Brewster *v.* Sewell, 3 B. & Ald. 296, 22 Rev. Rep. 395, 5 E. C. L. 177; Freeman *v.* Arkell, 2 B. & C. 494, 9 E. C. L. 218, 1 C. & P. 135, 326, 12 E. C. L. 89, 195, 3 D. & R. 669, 2 L. J. K. B. O. S. 64.

See 20 Cent. Dig. tit. "Evidence," §§ 612–637.

2. Waller *v.* New Milford Eleventh School Dist., 22 Conn. 326; Chrysler *v.* Renois, 43 N. Y. 209; Jackson *v.* Root, 18 Johns. (N. Y.) 60; Haywood, etc., Plank Road Co. *v.* Bryan, 51 N. C. 82; Brewster *v.* Sewell, 3 B. & Ald. 296, 22 Rev. Rep. 395, 5 E. C. L. 177; Freeman *v.* Arkell, 2 B. & C. 494, 9 E. C. L. 218, 1 C. & P. 135, 326, 12 E. C. L. 89, 195, 3 D. & R. 669, 2 L. J. K. B. O. S. 64. See also Western Union Tel. Co. *v.* Collins, 45 Kan. 88, 25 Pac. 187, 10 L. R. A. 515 (a telegram presumably destroyed pursuant to a rule of the company); Overseers of Poor Kingwood Tp. *v.* Overseers of Poor Bethlehem Tp., 13 N. J. L. 221.

This rule has been applied to bonds discharged and surrendered (Whittemore *v.* Moore, 9 Dana (Ky.) 315; May *v.* Hill, 5 Litt. (Ky.) 307. See also Hines *v.* Johnston, 95 Ga. 629, 23 S. E. 470; Snapp *v.* Peirce, 24 Ill. 156), to lottery tickets after the drawing has been made (Grover *v.* Morris, 73 N. Y. 473; Yoter *v.* Sanno, 6 Watts (Pa.) 164 [*distinguishing* Gray *v.* Pentland, 2 Serg. & R. (Pa.) 23]), to writings appointing proxies, to act in a stock-holders' meeting (Haywood, etc., Plank Road Co. *v.* Bryan, 51 N. C. 82), to notices of a tax-sale (Rodgers *v.* Gaines, 73 Ala. 218), to a notice of an administrator's sale of land, after the sale has been made (Brown *v.* Redwyne, 16 Ga. 67), to contracts or leases under which possession of land has been held but which no longer constitute muniments of title (Williams *v.* Mitchell, 30 Ala. 299; Hinton *v.* Fox, 3 Litt. (Ky.) 380; Jackson *v.* Root, 18 Johns. (N. Y.) 60. See also Bogardus *v.* Trinity

(4) PLACE OF SEARCH. If the document is traced to the possession of a particular person or officer, or if by law some particular person or officer is charged with its custody, or if the document has a particular place of deposit, then these avenues of search must be diligently explored; the papers of the custodian must be searched by him, or the place of deposit carefully examined; and if after this search the document is not found and no other reasonable and accessible sources of information are discovered, the search will ordinarily be deemed sufficient.[3] Upon the death of the person entitled to the custody of the

Church, 4 Sandf. Ch. (N. Y.) 633; Bouldin *v.* Massie, 7 Wheat. (U. S.) 122, 5 L. ed. 414), and to promissory notes paid or renewed and surrendered to the maker (Pond *v.* Lockwood, 8 Ala. 669; Spencer *v.* Conrad, 9 Rob. (La.) 78; Chrysler *v.* Renois, 43 N. Y. 209; Washington Bank *v.* Pierson, 2 Fed. Cas. No. 953, 2 Cranch C. C. (U. S.) 685; Lyman *v.* Cain, 8 N. Brunsw. 259).

3. *Alabama.*— King *v.* Scheuer, 105 Ala. 558, 16 So. 923; Katzruberg *v.* Lehman, 80 Ala. 512, 2 So. 272; Bobe *v.* Stickney, 36 Ala. 482; Johnson *v.* Powell, 30 Ala. 113; Tannis *v.* Doe, 21 Ala. 449; Herndon *v.* Givens, 16 Ala. 261; Owen *v.* Paul, 16 Ala. 130; Shields *v.* Byrd, 15 Ala. 818; Juzan *v.* Toulmin, 9 Ala. 662, 44 Am. Dec. 448; Jones *v.* Scott, 2 Ala. 58; Ward *v.* Ross, 1 Stew. 136. *Compare* Adams *v.* Shelby, 10 Ala. 478.

California.— King *v.* Randlett, 33 Cal. 318; Patterson *v.* Keystone Min. Co., 30 Cal. 360; Pierce *v.* Wallace, 18 Cal. 165; Folsom *v.* Scott, 6 Cal. 460; Posten *v.* Rassette, 5 Cal. 467; Norris *v.* Russell, 5 Cal. 249.

Colorado.— Bruns *v.* Clase, 9 Colo. 225, 11 Pac. 79; Hobson *v.* Porter, 2 Colo. 28; Swink *v.* Bohn, 6 Colo. App. 517, 41 Pac. 838.

Connecticut.— Kelsey *v.* Hanmer, 18 Conn. 311.

Georgia.— Seisel *v.* Register, 65 Ga. 662; Carr *v.* Smith, 58 Ga. 361; Keaton *v.* Davis, 18 Ga. 457.

Illinois.— McDonald *v.* Stark, 176 Ill. 456, 52 N. E. 37; Mullanphy Sav. Bank *v.* Schott, 135 Ill. 655, 26 N. E. 640, 25 Am. St. Rep. 401; Moore *v.* Wright, 90 Ill. 470; Kupfer *v.* Galena Bank, 34 Ill. 328, 85 Am. Dec. 309; Stow *v.* People, 25 Ill. 81; Rankin *v.* Crow, 19 Ill. 626; Doyle *v.* Wiley, 15 Ill. 576; Boyd *v.* Jennings, 46 Ill. App. 290; Kankakee Coal Co. *v.* Crane Bros. Mfg. Co., 38 Ill. App. 555.

Indiana.— McComas *v.* Haas, 107 Ind. 512, 8 N. E. 579; Johnston Harvester Co. *v.* Bartley, 94 Ind. 131; Indianapolis, etc., R. Co. *v.* Jewett, 16 Ind. 273; Carter *v.* Edwards, 16 Ind. 238; Cleveland *v.* Worrell, 13 Ind. 545; Little *v.* Indianapolis, 13 Ind. 364; Plant *v.* Crane, 7 Ind. 486; Newton *v.* Donnelly, 9 Ind. App. 359, 36 N. E. 769; Bascom *v.* Toner, 5 Ind. App. 229, 31 N. E. 856.

Iowa.— Watson *v.* Richardson, 110 Iowa 673, 80 N. W. 407.

Kansas.— Lee *v.* Bermingham, 30 Kan. 312, 1 Pac. 73.

Louisiana.— Compton *v.* Mathews, 3 La. 128, 22 Am. Dec. 167.

Maine.— Sellers *v.* Carpenter, 33 Me. 485.

Maryland.— Harrison *v.* Morton, 83 Md. 456, 35 Atl. 99; Brashears *v.* State, 58 Md. 563; Dowler *v.* Cushwa, 27 Md. 354; Hall *v.* Hall, 6 Gill & J. 386; Shorter *v.* Rozier, 3 Harr. & M. 238.

Massachusetts.— Atherton *v.* Phœnix Ins. Co., 109 Mass. 32; Page *v.* Page, 15 Pick. 368; Taunton Bank *v.* Richardson, 5 Pick. 436; Jones *v.* Fales, 5 Mass. 101.

Michigan.— Thomson *v.* Flint, etc., R. Co., 131 Mich. 95, 90 N. W. 1037; Deerfield Tp. *v.* Harper, 115 Mich. 678, 74 N. W. 207; Darrow *v.* Pierce, 91 Mich. 63, 51 N. W. 813; McKeown *v.* Harvey, 40 Mich. 226; Stewart *v.* People, 23 Mich. 63, 9 Am. Rep. 78; Higgins *v.* Watson, 1 Mich. 428.

Minnesota.—Slocum *v.* Bracy, 65 Minn. 100, 67 N. W. 843; Stocking *v.* St. Paul Trust Co., 39 Minn. 410, 40 N. W. 365; Molm *v.* Barton, 27 Minn. 530, 8 N. W. 765; Board of Education *v.* Moore, 17 Minn. 412.

Mississippi.— Tigner *v.* McGehee, 60 Miss. 185; Smith *v.* Mississippi, etc., R. Co., 6 Sm. & M. 179; Freeland *v.* McCaleb, 2 How. 756.

Missouri.— Kleimann *v.* Gieselmann, 114 Mo. 437, 21 S. W. 796, 35 Am. St. Rep. 761 [*reversing* 45 Mo. App. 497]; Henry *v.* Diviney, 101 Mo. 378, 13 S. W. 1057; Strain *v.* Murphy, 49 Mo. 337; Abel *v.* Strimple, 31 Mo. App. 86.

New Hampshire.— Dalton *v.* Bethlehem, 20 N. H. 505.

New Jersey.— Clark *v.* Hornbeck, 17 N. J. Eq. 430; Smith *v.* Axtell, 1 N. J. Eq. 494.

New York.— Blair *v.* Flack, 141 N. Y. 53, 35 N. E. 941 [*affirming* 21 N. Y. Suppl. 754]; Van Bokkelen *v.* Berdell, 130 N. Y. 141, 29 N. E. 254 [*reversing* 3 N. Y. Suppl. 333]; McCulloch *v.* Hoffman, 73 N. Y. 615; Rice *v.* Davis, 7 Lans. 393; Teall *v.* Van Wyck, 10 Barb. 376; Jackson *v.* Russell, 4 Wend. 543; Francis *v.* Ocean Ins. Co., 6 Cow. 404; Jackson *v.* Neely, 10 Johns. 374; Livingston *v.* Rogers, 1 Cai. Cas. xxvii.

North Carolina.— State *v.* Hare, 70 N. C. 658; Den *v.* Hunter, 30 N. C. 464; Wylie *v.* Smitherman, 30 N. C. 236; Deaver *v.* Rice, 24 N. C. 280; Nicholson *v.* Hilliard, 6 N. C. 270.

Pennsylvania.— Empire Transp. Co. *v.* Steele, 70 Pa. St. 188; Graff *v.* Pittsburgh, etc., R. Co., 31 Pa. St. 489; Hemphill *v.* McClimans, 24 Pa. St. 367; Hartz *v.* Woods, 8 Pa. St. 471; Caufman *v.* Cedar Springs Presbyterian Congregation, 6 Binn. 59; Todd *v.* Ockerman, 1 Yeates 295.

South Carolina.— Woody *v.* Dean, 24 S. C. 499; Oliver *v.* Sale, 17 S. C. 587; Culpepper *v.* Wheeler, 2 McMull. 66; Turnipseed *v.* Hawkins, 1 McCord 272.

Texas.— Vandergriff *v.* Piercy, 59 Tex. 371; White *v.* Burney, 27 Tex. 50; Trimble *v.* Ed-

document, application should be made to those persons who are charged with the custody of his papers, or who in fact have them in their possession, such for instance, as his legal representatives or his successor in office, and diligent search among these papers should be made. And if this search is unsuccessful the proof is ordinarily sufficient.[4] The destruction by fire of the place of deposit is ordinarily sufficient proof of the loss or destruction of the document to warrant

wards, 84 Tex. 497, 19 S. W. 772; Colorado Nat. Bank *v.* Scott, (Sup. 1891) 16 S. W. 997; Walker *v.* Peterson, (Civ. App. 1895) 33 S. W. 269; Howard *v.* Galbraith, (Civ. App. 1894) 30 S. W. 689; Adkins *v.* Galbraith, 10 Tex. Civ. App. 175, 30 S. W. 291; Baldwin *v.* Goldfrank, 9 Tex. Civ. App. 269, 26 S. W. 155; Masterson *v.* Jordan, (Civ. App. 1893) 24 S. W. 549.

Vermont.— Moore *v.* Beattie, 33 Vt. 219; Fletcher *v.* Jackson, 23 Vt. 581, 56 Am. Dec. 98; Royalton *v.* Royalton, etc., Turnpike Co., 14 Vt. 311.

Washington.— Tibbals *v.* Iffland, 10 Wash. 451, 39 Pac. 102.

Wisconsin.— Niland *v.* Murphy, 73 Wis. 326, 41 N. W. 335; Conkey *v.* Post, 7 Wis. 131.

United States.— U. S. *v.* Reyburn, 6 Pet. 352, 8 L. ed. 424; Patriotic Bank *v.* Little, 18 Fed. Cas. No. 10,809, 2 Cranch C. C. 627; Ransdale *v.* Grove, 20 Fed. Cas. No. 11,570, 4 McLean 282.

England.— Rex *v.* Stourbridge, 8 B. & C. 96, 6 L. J. M. C. O. S. 65, 2 M. & R. 43, 15 E. C. L. 54; Freeman *v.* Arkell, 2 B. & C. 494, 9 E. C. L. 218, 1 C. & P. 135, 326, 12 E. C. L. 89, 195, 3 D. & R. 669, 2 L. J. K. B. O. S. 64; Harper *v.* Cook, 1 C. & P. 139, 12 E. C. L. 91; McGahey *v.* Alston, 2 Gale 238, 6 L. J. Exch. 29, 2 M. & W. 206; Minshall *v.* Lloyd, 1 Jur. 336, 6 L. J. Exch. 115, M. & H. 125, 2 M. & W. 450; Fernley *v.* Worthington, 10 L. J. M. C. 81, 1 M. & G. 491, 39 E. C. L. 871; Rex *v.* Morton, 4 M. & S. 48; Reg. *v.* St. Mary, 1 Wkly. Rep. 34; Cruise *v.* Clancy, 6 Ir. Eq. 552.

Canada.— Ross *v.* Adams, 34 N. Brunsw. 158; Hazell *v.* Dyas, 11 Nova Scotia 36; Ainleyville Congregation *v.* Grewer, 23 U. C. C. P. 533; Soules *v.* Donovan, 14 U. C. C. P. 510; Gordon *v.* McPhail, 32 U. C. Q. B. 480; Suter *v.* McLean, 18 U. C. Q. B. 490.

See 20 Cent. Dig. tit. "Evidence," §§ 612–637.

"The first inquiry is, where would the document naturally be, if still in existence, for there the search should be made." Reg. *v.* Hinckley, 3 B. & S. 885, 892, 9 Jur. N. S. 1054, 32 L. J. M. C. 158, 8 L. T. Rep. N. S. 270, 11 Wkly. Rep. 663, 113 E. C. L. 885, per Blackburn, J.

If the document be one of public concern, and there be, by law, a place where such instruments, in due course of law, should be deposited and be found, search in that place is all that will be required, and in the absence of grounds of suspicion that the original is fraudulently withheld, will justify the admission of secondary evidence, without calling persons who have had access to the paper, and might possibly have the original in their possession. Johnson *v.* Arnwine, 42 N. J. L. 451, 36 Am. Rep. 527. To the same effect see Woodruff *v.* State, 61 Ark. 157, 32 S. W. 102; Braintree *v.* Battles, 6 Vt. 395; Reg. *v.* Saffron Hill, 1 E. & B. 93, 22 L. J. M. C. 22, 72 E. C. L. 93.

Search among papers in place of deposit.— Ordinarily it is not sufficient that the paper is not found in its usual place of deposit, but all the papers in the office or place should be examined. But this need not always be done, when, from the extent of the archives or office, it would be impracticable, or if by reason of the order in which the place is kept a more limited examination is equally satisfactory. Mariner *v.* Saunders, 10 Ill. 113; Hatch *v.* Carpenter, 9 Gray (Mass.) 271; Studebaker Mfg. Co. *v.* Dickson, 70 Mo. 272.

If more than one person is entitled to the custody of the document, search must be made among the papers of both if the document is important. Brown *v.* Tucker, 47 Ga. 485; Kimball *v.* Bellows, 13 N. H. 58.

4. *Alabama.*— McGuire *v.* Mobile Bank, 42 Ala. 589.

Connecticut.— Kelsey *v.* Hanmer, 18 Conn. 311.

Delaware.— Armstrong *v.* Timmons, 3 Harr. 342.

Georgia.— Hayden *v.* Mitchell, 103 Ga. 431, 30 S. E. 287; Blalock *v.* Miland, 87 Ga. 573, 13 S. E. 551. *Compare* Brown *v.* Tucker, 47 Ga. 485.

Illinois.— Hawley *v.* Hawley, 187 Ill. 351, 58 N. E. 332; Harrell *v.* Enterprise Sav. Bank, 183 Ill. 538, 56 N. E. 63; Mayfield *v.* Turner, 180 Ill. 332, 54 N. E. 418.

Massachusetts.— Atherton *v.* Phœnix Ins. Co., 109 Mass. 32.

Nebraska.— Baldwin *v.* Burt, 43 Nebr. 245, 61 N. W. 601.

New Hampshire.— Pendexter *v.* Carleton, 16 N. H. 482.

New York.— Dan *v.* Brown, 4 Cow. 483, 15 Am. Dec. 395.

Pennsylvania.—Todd *v.* Ockerman, 1 Yeates 295.

South Carolina.— Norris *v.* Clinkscales, 47 S. C. 488, 25 S. E. 797; Drake *v.* Ramey, 3 Rich. 37.

Tennessee.— Girdner *v.* Walker, 1 Heisk. 186.

Texas.— Gray *v.* Thomas, 83 Tex. 246, 18 S. W. 721; Bounds *v.* Little, 79 Tex. 128, 15 S. W. 225; Hill *v.* Taylor, 77 Tex. 295, 14 S. W. 366; Dunn *v.* Choate, 4 Tex. 14.

England.— Pardoe *v.* Price, 14 L. J. Exch. 212, 13 M. & W. 267; Rex *v.* Hinckley, 9 L. J. M. C. O. S. 75.

Canada.— Johnson *v.* Lithgow, 11 Nova Scotia 567. *Compare* Russell *v.* Fraser, 15 U. C. C. P. 375.

the admission of secondary evidence of its contents;[5] but if there is any doubt as to the destruction of the document in the fire, its proper custodian should be called to prove that the document was in the place of deposit when the fire occurred.[6]

(c) *As to Search For Missing Record.* The foregoing principles with respect to search for a missing document, and especially as to the person who should make the search and the place where the search should be made, apply with at least equal force where it is sought to establish the loss or destruction of public records or documents constituting matters of record; these writings commonly being in the custody of public officers and having well known places of deposit.[7]

A diligent search by one of two executors has been held sufficient. Turnipseed *v.* Hawkins, 1 McCord (S. C.) 272 [*explained* in O'Neal *v.* Isbell, 9 Rich. (S. C.) 367].

Where the grantee in a deed is dead, the inference is that the instrument is in the possession of his heirs or other legal representatives, and the inquiry should be made of them before secondary evidence is admissible. Floyd *v.* Mintsey, 5 Rich. (S. C.) 361; Bounds *v.* Little, 75 Tex. 316, 12 S. W. 1109; Adkins *v.* Galbraith, 10 Tex. Civ. App. 175, 30 S. W. 291; Baldwin *v.* Goldfrank, 9 Tex. Civ. App. 269, 26 S. W. 155. See also Mims *v.* Sturtevant, 18 Ala. 359; Rankin *v.* Crow, 19 Ill. 626; Vandergriff *v.* Piercy, 59 Tex. 371. The fact that the grantee in a deed resided and died in another state does not dispense with the necessity of examining his legal representatives concerning the loss of the deed. Floyd *v.* Mintsey, 5 Rich. (S. C.) 361.

5. *Alabama.*— Watson *v.* State, 63 Ala. 19.
Louisiana.— Clapier *v.* Banks, 10 La. 60.
New York.— Jackson *v.* Neely, 10 Johns. 374.
North Carolina.— Robertson *v.* Council, (1887) 3 S. E. 681.
South Carolina.— Peay *v.* Picket, 3 McCord 318; Belton *v.* Briggs, 4 Desauss. 465; Harrison *v.* Long, 4 Desauss. 110.
Canada.— Ferguson *v.* Freeman, 27 Grant Ch. (U. C.) 211; Haskill *v.* Fraser, 12 U. C. C. P. 383.
See 20 Cent. Dig. tit. "Evidence," §§ 612–637.

6. Chicago, etc., R. Co. *v.* Ingersoll, 65 Ill. 399. See also Watson *v.* State, 63 Ala. 19; Bray *v.* Aikin, 60 Tex. 688.

7. *Alabama.*— Hamilton *v.* Maxwell, 133 Ala. 233, 32 So. 13; Williams *v.* Colbert County, 81 Ala. 216, 1 So. 74; Donegan *v.* Wade, 70 Ala. 501; Watson *v.* State, 63 Ala. 19; Johnson *v.* Powell, 30 Ala. 113 (execution issued by justice of the peace); Millard *v.* Hall, 24 Ala. 209; Poe *v.* Dorrah, 20 Ala. 288, 56 Am. Dec. 196; Stewart *v.* Conner, 9 Ala. 803 (writ of execution); Sturdevant *v.* Gains, 5 Ala. 435.
Colorado.— Bruns *v.* Clase, 9 Colo. 225, 11 Pac. 79, writ of execution.
District of Columbia.— Pierce *v.* Jacobs, 18 D. C. 498, record of naturalization proceedings.
Georgia.— Headman *v.* Rose, 63 Ga. 458 (judgment of naturalization); Davenport *v.* Harris, 27 Ga. 68; Adams *v.* Fitzgerald, 14 Ga. 36; Fretwell *v.* Doe, 7 Ga. 264 (order of court); Doe *v.* Biggers, 6 Ga. 188.
Illinois.— Williams *v.* Case, 79 Ill. 356; Sturges *v.* Hart, 45 Ill. 103 (writ of injunction); Carr *v.* Miner, 42 Ill. 179; Whitehall *v.* Smith, 24 Ill. 166.
Indiana.— Steel *v.* Williams, 18 Ind. 161; Schwartz *v.* Osthimer, 4 Ind. 109.
Iowa.— Decorah First Nat. Bank *v.* Doon Dist. Tp., 86 Iowa 330, 53 N. W. 301, 41 Am. St. Rep. 489; Lyons *v.* Van Gorder, 77 Iowa 600, 42 N. W. 500; *In re* Edwards, 58 Iowa 431, 10 N. W. 793; Corwin Dist. Tp. *v.* Morehead, 51 Iowa 99, 49 N. W. 1052; Conger *v.* Converse, 9 Iowa 554.
Kansas.— Douglas *v.* Wolf, 6 Kan. 88.
Kentucky.— Doty *v.* Deposit Bldg., etc., Assoc., 103 Ky. 710, 46 S. W. 219, 47 S. W. 433, 20 Ky. L. Rep. 625, 43 L. R. A. 551, 554; Hawkins *v.* Craig, 1 B. Mon. 27.
Louisiana.— Fletcher *v.* Jeter, 32 La. Ann. 401 (election returns); Knight *v.* Ragan, 31 La. Ann. 289 (election returns); Lawrence *v.* Burris, 13 La. Ann. 611.
Maine.— Simpson *v.* Norton, 45 Me. 281; Wing *v.* Abbott, 28 Me. 367, judgment of justice of the peace.
Maryland.— Basford *v.* Mills, 6 Md. 385; State *v.* Wayman, 2 Gill & J. 254.
Michigan.— Howd *v.* Breckenridge, 97 Mich. 65, 56 N. W. 221; Hogsett *v.* Ellis, 17 Mich. 351; Rash *v.* Whitney, 4 Mich. 495.
Nebraska.— Murphy *v.* Lyons, 19 Nebr. 689, 28 N. W. 328.
New Jersey.— Johnson *v.* Arnwine, 42 N. J. L. 451, 36 Am. Rep. 527; Fox *v.* Lambson, 8 N. J. L. 275.
New York.— Mandeville *v.* Reynolds, 68 N. Y. 528 (judgment-roll); Leland *v.* Cameron, 31 N. Y. 115; Teall *v.* Van Wyck, 10 Barb. 376; Josuez *v.* Conner, 7 Daly 448.
North Carolina.— Smith *v.* Garris, 131 N. C. 34, 42 S. E. 445; Williams *v.* Kerr, 113 N. C. 306, 18 S. E. 501; Isley *v.* Boon, 109 N. C. 555, 13 S. E. 795; McKesson *v.* Smart, 108 N. C. 17, 13 S. E. 96; Clifton *v.* Fort, 98 N. C. 173, 3 S. E. 726; Deaver *v.* Rice, 24 N. C. 280.
Oregon.— Harmon *v.* Decker, 41 Oreg. 587, 68 Pac. 11, 1111, 93 Am. St. Rep. 748.
Pennsylvania.— Susquehanna Mut. F. Ins. Co. *v.* Mardorf, 152 Pa. St. 22, 25 Atl. 234.
Tennessee.— Rhea *v.* McCorkle, 11 Heisk. 415; Tyree *v.* Magness, 1 Sneed 276.
Texas.— Ramsey *v.* Hurley, 72 Tex. 194, 12 S. W. 56; Bray *v.* Aikin, 60 Tex. 688;

The same requirements exist in respect to proving the loss or destruction of the records of private[8] or municipal[9] corporations.

3. Notice to Produce Primary Evidence — a. General Rule. As a general rule, a party cannot give secondary evidence of the contents of original documents which are in the possession or control of his adversary, without first giving the latter or his attorney due notice to produce them at the trial.[10]

Mays *v.* Moore, 13 Tex. 85; Rhodus *v.* Sansom, (Sup. 1887) 6 S. W. 849.

Vermont.— Maxham *v.* Place, 46 Vt. 434, judgment.

See 20 Cent. Dig. tit. "Evidence," § 614.

Justice's judgment.— Secondary evidence of a judgment rendered by a justice of the peace during a former term of office cannot be received on proof of unsuccessful search in his office for his docket and papers, unless it is also shown that he has been in office continuously or has succeeded to the same office after an interval; for under such circumstances it does not appear but that the docket on which the judgment entry was made had been delivered to the justice's successor as required by law, and had not been returned. Roach *v.* Privett, 90 Ala. 391, 7 So. 808, 24 Am. St. Rep. 819. See also Hogsett *v.* Ellis, 17 Mich. 351.

The destruction by fire of the places of deposit of public records and documents dispenses with production of the originals, which it may be fairly supposed were destroyed. Clapier *v.* Banks, 10 La. 60.

If the custodian of the record cannot testify as a witness to the loss of documents forming a part of the record, as where he is a judge and is thus incompetent to testify in a case being tried before him, the search may be made by some other person who is familiar with the office in which the records are kept and proof of unsuccessful search by him is proper and sufficient. Randall *v.* Wadsworth, 130 Ala. 633, 31 So. 555.

8. Mullanphy Sav. Bank *v.* Schott, 135 Ill. 655, 26 N. E. 640, 25 Am. St. Rep. 401; Graff *v.* Pittsburgh, etc., R. Co., 31 Pa. St. 489.

9. Norris *v.* Russell, 5 Cal. 249; Blackstone *v.* White, 41 Pa. St. 330.

10. *Alabama.*—Payne *v.* Crawford, 102 Ala. 387, 14 So. 854; Olive *v.* Adams, 50 Ala. 373.

Arkansas.— Jones *v.* Robinson, 11 Ark. 504, 54 Am. Dec. 212.

California.— Poole *v.* Gerard, 9 Cal. 593.

Colorado.— Rockwell Stock, etc., Co. *v.* Castroni, 6 Colo. App. 521, 42 Pac. 180.

Delaware.— Jefferson *v.* Conoway, 5 Harr. 16.

District of Columbia.— Main *v.* Aukam, 4 App. Cas. 51.

Florida.— Hanover F. Ins. Co. *v.* Lewis, 23 Fla. 193, 1 So. 863.

Georgia.— Jarratt *v.* Corbett, 99 Ga. 72, 24 S. E. 408; Brown *v.* Tucker, 47 Ga. 485; South Carolina Bank *v.* Brown, Dudley 62.

Illinois.— Landt *v.* McCullough, 206 Ill. 214, 69 N. E. 107 [*reversing* 103 Ill. App. 668]; Wright *v.* Rattree, 181 Ill. 464, 54 N. E. 998; Holbrook *v.* School Trustees, 22 Ill. 539; Ferguson *v.* Miles, 8 Ill. 358, 44 Am. Dec. 702; Landt *v.* McCullough, 103 Ill. App. 668; Jack *v.* Rowland, 98 Ill. App. 352; Cleveland, etc., R. Co. *v.* Newlin, 74 Ill. App. 638; J. Obermann Brewing Co. *v.* Adams, 35 Ill. App. 540; Strong *v.* Lord, 8 Ill. App. 539.

Indiana.— State *v.* Lockwood, 5 Blackf. 144; Rucher *v.* McNeely, 5 Blackf. 123.

Iowa.— Burlington Lumber Co. *v.* Whitebreast Coal, etc., Co., 66 Iowa 292, 23 N. W. 674.

Kansas.— Roberts *v.* Dixon, 50 Kan. 436, 31 Pac. 1083.

Kentucky.— Dupey *v.* Ashby, 2 A. K. Marsh. 11; McIlvay *v.* Kennedy, 2 Bibb 380.

Louisiana.— Williams *v.* Benton, 12 La. Ann. 91; Gardere *v.* Fisk, 6 Mart. N. S. 387; Erwin *v.* Porter, 6 Mart. N. S. 166; Abat *v.* Rion, 9 Mart. 465, 13 Am. Dec. 313.

Maine.— Belfast *v.* Washington, 46 Me. 460; Abbott *v.* Wood, 22 Me. 541.

Maryland.— Winter *v.* Donovan, 8 Gill 370; Kennedy *v.* Fowke, 5 Harr. & J. 63; Robertson *v.* Parks, 3 Md. Ch. 65.

Massachusetts.— Bourne *v.* Boston, 2 Gray 494; Com. *v.* Emery, 2 Gray 80; Gould *v.* Norfolk Lead Co., 9 Cush. 338, 57 Am. Dec. 50; Vinal *v.* Burrill, 16 Pick. 401.

Michigan.— Ferguson *v.* Hemingway, 38 Mich. 159.

Missouri.— Farmers', etc., Bank *v.* Lonergan, 21 Mo. 46; Merrill Chemical Co. *v.* Nickells, 66 Mo. App. 678; Coffman *v.* Niagara F. Ins. Co., 57 Mo. App. 647; Sheehan *v.* Southern Ins. Co., 53 Mo. App. 351.

Nebraska.— Birdsall *v.* Carter, 5 Nebr. 517.

New Hampshire.— Webster *v.* Clark, 30 N. H. 245.

New Jersey.—Ford *v.* Munson, 4 N. J. L. 93.

New York.— Foster *v.* Newbrough, 58 N. Y. 481; Weeks *v.* Lyon, 18 Barb. 530; Grimm *v.* Hamel, 2 Hilt. 434; Ehrlich *v.* Chevra Agudas Achinanshi Wisna, 86 N. Y. Suppl. 820 (corporate minutes); Dole *v.* Belden, 9 N. Y. St. 116; Utica Bank *v.* Hillard, 5 Cow. 153; Overseers of Poor *v.* Albany, 2 Cow. 537; Rogers *v.* Van Hoesen, 12 Johns. 221; Dobbin *v.* Watkins, Col. Cas. 23, Col. & C. 39.

North Carolina.— Murchison *v.* McLeod, 47 N. C. 239; Whitley *v.* Daniels, 28 N. C. 480; Smallwood *v.* Mitchell, 3 N. C. 145.

Ohio.— John *v.* John, Wright 584 [*affirmed* in 6 Ohio 271].

Pennsylvania.— Eibert *v.* Finkbeiner, 68 Pa. St. 243, 8 Am. Rep. 176; De Baril *v.* Pardo, 6 Pa. Cas. 148, 8 Atl. 876; Buchanan *v.* Moore, 10 Serg. & R. 275; Patton *v.* Nash, 7 Serg. & R. 116.

South Carolina.— Aaron *v.* Southern R. Co., 68 S. C. 98, 46 S. E. 556; Worth *v.*

b. Limitations of Rule — (I) *In General.* In cases, however, where it is sought to prove not the contents of an original document but some fact collateral thereto, or where the document relates not to the main issue in the cause but to some collateral circumstance, notice to produce the writing is not prerequisite to the introduction of parol evidence.[11]

(II) *When Pleadings Give Sufficient Notice.* And where the nature of the action or defense, or the form or contents of the pleadings, give notice to

Norton, 60 S. C. 293, 38 S. E. 605; Burwell, etc., Co. *v.* Chapman, 59 S. C. 581, 38 S. E. 222; Simms *v.* Southern R. Co., 59 S. C. 246, 37 S. E. 836. *Compare* Lott *v.* Macon, 2 Strobh. 178.

Texas.— Hunter *v.* Lanius, 82 Tex. 677, 18 S. W. 201; Dean *v.* Border, 15 Tex. 298; Golin *v.* State, (37 Tex. Cr. 1897) 38 S. W. 794; Stevens *v.* Equitable Mfg. Co., 29 Tex. Civ. App. 168, 67 S. W. 1041; Wamego First Nat. Bank *v.* Oliver, 16 Tex. Civ. App. 428, 41 S. W. 414; McCormick Harvesting Mach. Co. *v.* Millett, (Civ. App. 1894) 29 S. W. 80.

Utah.— Stoll *v.* Daly Min. Co., 19 Utah 271, 57 Pac. 295.

United States.— Washington Bank *v.* Kurtz, 2 Fed. Cas. No. 950, 2 Cranch C. C. 110; Nicholls *v.* Warfield, 18 Fed. Cas. No. 10,233, 2 Cranch C. C. 290; Underwood *v.* Huddlestone, 24 Fed. Cas. No. 14,339, 2 Cranch C. C. 76.

England.— Goodered *v.* Armour, 3 Q. B. 956, 3 G. & D. 206, 12 L. J. Q. B. 56, 43 E. C. L. 1054; Read *v.* Gamble, 10 A. & E. 597 note, 37 E. C. L. 320; Molton *v.* Harris, 2 Esp. 549; Hattam *v.* Withers, 1 Esp. 259; Rex *v.* Doran, 1 Esp. 127; Knight *v.* Waterford, 5 Jur. 818, 10 L. J. Exch. Eq. 57, 4 Y. & C. Exch. 284; Stulz *v.* Stulz, 5 Sim. 460, 9 Eng. Ch. 460; Doe *v.* Grey, 1 Stark. 283, 2 E. C. L. 113.

Canada.— Hood *v.* Cronkite, 29 U. C. Q. B. 98; Montreal Bank *v.* Snyder, 18 U. C. Q. B. 492; McCrae *v.* Osborne, 6 U. C. Q. B. O. S. 500; Heward *v.* McDougall, 3 U. C. Q. B. O. S. 647. See also Duffy *v.* Stymest, 10 N. Brunsw. 197.

See 20 Cent. Dig. tit. "Evidence," § 642.

The object of requiring notice to produce an original document, before secondary evidence of its contents can be given, is to afford a sufficient opportunity to the opposite party to produce the writing and thereby secure, if he desires it, the best evidence of its contents, and is not to enable him to prepare evidence to explain or confirm the document. McDowell *v.* Ætna Ins. Co., 164 Mass. 444, 41 N. E. 665; Dwyer *v.* Collins, 7 Exch. 639, 16 Jur. 569, 21 L. J. Exch. 225, 12 Eng. L. & Eq. 532. *Contra*, Grimm *v.* Hamel, 2 Hilt. (N. Y.) 434.

Reception of evidence without notice.— If parol evidence of a fact is received without notice to produce a document said to be primary evidence of the fact, the error is cured by subsequent proof that no such document ever existed. Reading R. Co. *v.* Johnson, 7 Watts & S. (Pa.) 317; Pecos Valley Bank *v.* Evans-Snider-Buel Co., 107 Fed. 654, 46 C. C. A. 534.

Party out of jurisdiction.— The fact that the adverse party possessing the instrument is out of the jurisdiction constitutes no excuse for failing to serve upon him notice to produce the document, except where after diligent inquiry he cannot be found. Frank *v.* Longstreet, 44 Ga. 178. See also McAdam *v.* Weikel, etc., Spice Co., 64 Ga. 441. A notice to his attorney, however, is all that can be required. Mattocks *v.* Stearns, 9 Vt. 326. See also Frank *v.* Longstreet, 44 Ga. 178. But if notice is not given to the party it must be given to his attorney. Smith *v.* Holbrook, 99 Ga. 256, 25 S. E. 627.

Where a contract has been executed in duplicate, each part is an original, and notice to produce one part is not a prerequisite to the introduction of the other as evidence upon a trial. Totten *v.* Bucy, 57 Md. 446.

When notice not admissible in evidence.— Where defendant refused to produce a document on notice and the court held that the notice was not given a sufficient length of time before the trial, and thereupon the notice itself containing the alleged contents of the document was received in evidence, it was held that the admission of the notice was error; that although it might have been produced to the judge it should not be offered or received in evidence. McNamara *v.* Pengilly, 64 Minn. 543, 67 N. W. 661.

Where an alleged mutilated paper is produced by the adverse party, voluntarily, on request of counsel, no notice to produce having been given, this fact will not operate to exclude secondary evidence of the contents of the part alleged to have been destroyed, and the objection that notice to produce the paper was not given is untenable. Bell *v.* Chicago, etc., R. Co., 64 Iowa 321, 20 N. W. 456. See also Robinson *v.* Cutter, 163 Mass. 377, 40 N. E. 112.

11. *Connecticut.*—See Ross *v.* Bruce, 1 Day 100.

Indiana.— Coonrod *v.* Madden, 126 Ind. 197, 25 N. E. 1102.

Kentucky.— Luckett *v.* Clark, Litt. Sel. Cas. 178, which was an action to recover the amount of a forged bank-note which had been returned to defendant.

New Hampshire.— Webster *v.* Clark, 30 N. H. 245, testimony that witness sent bills of goods through the mail.

South Carolina.—Hampton *v.* Ray, 52 S. C. 74, 29 S. E. 537; Gist *v.* McJunkin, 2 Rich 154; Lowry *v.* Pinsen, 2 Bailey, 324, 23 Am. Dec. 140.

Texas.— Cleburne First Nat. Bank *v.* Turner, (App. 1891) 15 S. W. 710, testimony that a letter was written and sent.

See 20 Cent. Dig. tit. "Evidence," § 642.

the adverse party to be prepared to produce a particular instrument or writing, if necessary to contradict his evidence, no other notice to produce the instrument is necessary before introducing secondary evidence of its contents.[12]

(III) *Where Party Has Obtained Possession of Document by Fraud, Etc.* Where a party has obtained possession of an original document by wrongful means, such as fraud, violence, and the like, he is not entitled to a notice to produce the writing as a preliminary to the introduction of secondary evidence.[13]

(IV) *When Document Not in Party's Possession or Control.* Notice to produce a document as a prerequisite to the admission of secondary evidence of its contents is required only when the instrument is, or may be presumed to be, in the possession or control of the adverse party, for otherwise the notice would be nugatory.[14] Thus notice to produce the document is unnecessary where

12. *Alabama.*—Blevins *v.* Pope, 7 Ala. 371.
California.— See Nicholson *v.* Tarpey, 70 Cal. 608, 12 Pac. 778.
Connecticut.— See Ross *v.* Bruce, 1 Daly 100.
Illinois.—Continental L. Ins. Co. *v.* Rogers, 119 Ill. 474, 10 N. E. 242, 59 Am. Rep. 810; Geo. J. Stadler Brewing Co. *v.* Weadley, 99 Ill. App. 161. *Compare* Cleveland, etc., R. Co. *v.* Newlin, 74 Ill. App. 638, holding that under the circumstances the pleadings did not give sufficient notice.
Maine.— State *v.* Mayberry, 48 Me. 218.
Maryland.— Smith *v.* Robertson, 4 Harr. & J. 30.
Michigan.— Rose *v.* Lewis, 10 Mich. 483.
Missouri.— Cross *v.* Williams, 72 Mo. 577; Hart *v.* Robinett, 5 Mo. 11.
New Hampshire.— Morrill *v.* Boston, etc., R. Co., 58 N. H. 68; Nealley *v.* Greenough, 25 N. H. 325.
New York.— Lawson *v.* Bachman, 81 N. Y. 616; Hooker *v.* Eagle Bank, 30 N. Y. 83, 86 Am. Dec. 351; Howell *v.* Huyck, 2 Abb. Dec. 423, 4 Transcr. App. 202; Forward *v.* Harris, 30 Barb. 338; Edwards *v.* Bonneau, 1 Sandf. 610; Hays *v.* Riddle, 1 Sandf. 248; Hammond *v.* Hoppin, 13 Wend. 505; Bissel *v.* Drake, 19 Johns. 66; Hardin *v.* Kretsinger, 17 Johns. 293; People *v.* Holbrook, 13 Johns. 90.
North Dakota.— Nichols, etc., Co. *v.* Charlebois, 10 N. D. 446, 88 N. W. 80.
Ohio.— Scioto Valley R. Co. *v.* Cromin, 38 Ohio St. 122 [*affirming* 7 Ohio Dec. (Reprint) 224, 1 Cinc. L. Bul. 315].
Pennsylvania.— De Baril *v.* Pardo, 6 Pa. Cas. 148, 8 Atl. 876; McClean *v.* Hertzog, 6 Serg. & R. 154.
South Carolina.— Pickering *v.* Meyers, 2 Bailey 113; Oswald *v.* King, 2 Brev. 471. *Compare* Worth *v.* Norton, 60 S. C. 293, 38 S. E. 605, holding that the pleadings in the particular case did not dispense with notice.
South Dakota.— Zipp *v.* Colchester Rubber Co., 12 S. D. 218, 80 N. W. 367.
Tennessee.— Burke *v.* Stewart, 9 Heisk. 175.
Texas.— Pennington *v.* Schwartz, 70 Tex. 211, 8 S. W. 32; Reliance Lumber Co. *v.* Western Union Tel. Co., 58 Tex. 394, 44 Am. Rep. 620; Hamilton *v.* Rice, 15 Tex. 382; Ellis *v.* Sharpe, 20 Tex. Civ. App. 482, 49 S. W. 409, (1898) 47 S. W. 670; Battaglia *v.* Stahl, (Civ. App. 1898) 47 S. W. 683; Western Union Tel. Co. *v.* Thompson, (Civ. App. 1898) 44 S. W. 402; Steele *v.* Steele, 2 Tex. App. Civ. Cas. § 345. But see Muller *v.* Hoyt, 14 Tex. 49.
Vermont.— Dana *v.* Conant, 30 Vt. 246.
Wisconsin.— Niagara F. Ins. Co. *v.* Whittaker, 21 Wis. 329.
United States.— Bissell *v.* Michigan Farmers', etc., Bank, 3 Fed. Cas. No. 1,446, 5 McLean 495.
England.— Bucher *v.* Jarratt, 3 B. & P. 143; Jolley *v.* Taylor, 1 Campb. 143; How *v.* Hall, 14 East 274, 12 Rev. Rep. 515; Reg. *v.* Clube, 3 Jur. N. S. 698; Wood *v.* Strickland, 2 Meriv. 461; Hammond *v.* Place, Peake Add. Cas. 90; Scott *v.* Jones, 4 Taunt. 865, 14 Rev. Rep. 686. *Compare* Goodered *v.* Armour, 3 Q. B. 956, 3 G. & D. 206, 12 L. J. Q. B. 56, 43 E. C. L. 1054; Read *v.* Gamble, 10 A. & E. 597 note, 37 E. C. L. 320; Hattam *v.* Withers, 1 Esp. 259; Lawrence *v.* Clark, 3 D. & L. 87, 15 L. J. Exch. 40, 14 M. & W. 250, all holding that under the circumstances the pleadings did not dispense with notice.
Canada.—Tilly *v.* Fisher, 10 U. C. Q. B. 32.
See 20 Cent. Dig. tit. "Evidence," §§ 647, 651.

In an action for delay in delivering a telegram, secondary evidence of the telegram is admissible without notice having been given defendant to produce the original. Western Union Tel. Co. *v.* Thompson, (Tex. Civ. App. 1898) 44 S. W. 402.

Contract in duplicate.— Where defendant set up in his answer a contract between himself and plaintiff, alleged to have been executed in duplicate, each exemplar by one of the parties only, and offered in evidence the one executed by plaintiff, oral proof of the contents of the other was held admissible, without proof of any other notice to plaintiff to produce his exemplar. Niagara F. Ins. Co. *v.* Whittaker, 21 Wis. 329. See also Nicholson *v.* Tarpey, 70 Cal. 608, 12 Pac. 778.

13. Nealley *v.* Greenough, 25 N. H. 325; Gray *v.* Kernahan, 2 Mill (S. C.) 65. See also Scott *v.* Pentz, 5 Sandf. (N. Y.) 573.

14. *Alabama.*— Shields *v.* Byrd, 15 Ala. 818.
Georgia.— Earnest *v.* Napier, 15 Ga. 306, decided under the provisions of the 57th Common Law Rule.
Illinois.— Taylor *v.* McIrvin, 94 Ill. 488; Geo. J. Stadler Brewing Co. *v.* Weadley,

it is shown that the writing is lost or destroyed,[15] or is in the possession of a third person who is out of the jurisdiction of the court and beyond the reach of its process.[16] But although the document is not in the physical possession of the party, and even though it is held by a third person beyond the jurisdiction, notice to produce it is necessary if there is such a privity between the party and the custodian of the document that the writing is really under the party's control.[17]

(v) *When Document Is Not Primary Evidence.* The rule requiring notice to produce a document before introducing secondary evidence of its contents does not apply when the document in question is not one which constitutes primary evidence of the fact sought to be proved.[18]

(vi) *Where the Document Is a Notice.* Where the instrument, the contents of which are to be proved, is itself a notice, it is well settled that ordinarily notice to produce it is not a prerequisite to the admission of secondary evidence; but the contents of the document may be proved by a copy or by parol or of course by a duplicate original.[19] Where a statute requires a written notice or

99 Ill. App. 161; La Salle Pressed Brick Co. *v.* Coe, 53 Ill. App. 506.

Maryland.— Safe Deposit, etc., Co. *v.* Turner, 98 Md. 22, 55 Atl. 1023; Union Banking Co. *v.* Gittings, 45 Md. 181.

Massachusetts.— Roberts *v.* Spencer, 123 Mass. 397.

Missouri.— St. Louis Dredging Co. *v.* Crown Coal, etc., Co., 77 Mo. App. 362.

New York.— Birkbeck *v.* Tucker, 2 Hall 139; Vogel *v.* Rhind, 9 N. Y. St. 377.

South Dakota.— Hagaman *v.* Gillis, 9 S. D. 61, 68 N. W. 192.

Wisconsin.— Kelley *v.* La Crosse Carriage Co., 120 Wis. 84, 97 N. W. 674.

United States.— Burton *v.* Driggs, 20 Wall. 125, 22 L. ed. 299.

England.— Rex *v.* Haworth, 4 C. & P. 254, 19 E. C. L. 502.

See 20 Cent. Dig. tit. "Evidence," § 655.

Compare Clary *v.* O'Shea, 72 Minn. 105, 75 N. W. 115, 71 Am. St. Rep. 465.

Contents of a letter which was properly addressed and duly deposited in the post-office, with postage prepaid, but the receipt of which is denied by the addressee, may be proved without prior notice to the addressee to produce the letter. Briggs *v.* Hervey, 130 Mass. 186. See also Bickley *v.* Bickley, 136 Ala. 548, 34 So. 946; Roberts *v.* Spencer, 123 Mass. 397.

Very slight evidence that the party notified has control of the document will be sufficient where the document belongs exclusively to him and has recently been or regularly ought to be in his possession according to the course of business. Rose *v.* Winnsboro Nat. Bank, 41 S. C. 191, 19 S. E. 487.

15. *Alabama.*— Shields *v.* Byrd, 15 Ala. 818.

Illinois.— Taylor *v.* McIrvin, 94 Ill. 488; Cleveland, etc., R. Co. *v.* Patton, 104 Ill. App. 550 [*affirmed* in 203 Ill. 376, 67 N. E. 804]; Geo. J. Stadler Brewing Co. *v.* Weadley, 99 Ill. App. 161.

Indiana.— Pape *v.* Ferguson, 28 Ind. App. 298, 62 N. E. 712; McCreary *v.* Hood, 5 Blackf. 316; Continental Ins. Co. *v.* Chew, 11 Ind. App. 330, 38 N. E. 417, 54 Am. St. Rep. 506.

Maryland.— Union Banking Co. *v.* Gittings, 45 Md. 181.

Michigan.— Wheeler *v.* Detroit, 127 Mich. 329, 86 N. W. 822.

South Carolina.— Elrod *v.* Cochran, 59 S. C. 467, 38 S. E. 122; Hobbs *v.* Beards, 43 S. C. 370, 21 S. E. 305.

England.— Rex *v.* Haworth, 4 C. & P. 254, 19 E. C. L. 502.

See 20 Cent. Dig. tit. "Evidence," § 644.

Admission of loss.— Admission or testimony by the adverse party or his attorney that the document has been lost or destroyed will dispense with the necessity of notice to produce.

Alabama.— Bickley *v.* Bickley, 136 Ala. 548, 34 So. 946; Cooper *v.* Maddan, 6 Ala. 431.

Illinois.— Cleveland, etc., R. Co. *v.* Patton, 104 Ill. App. 550 [*affirmed* in 203 Ill. 376, 67 N. E. 804]; Geo. J. Stadler Brewing Co. *v.* Weadley, 99 Ill. App. 161.

Maryland.— Union Banking Co. *v.* Gittings, 45 Md. 181.

Nebraska.— Barmby *v.* Plummer, 29 Nebr. 64, 45 N. W. 277.

England.— Rex *v.* Haworth, 4 C. & P. 254, 19 E. C. L. 502.

See 20 Cent. Dig. tit. "Evidence," § 644.

16. Stirling *v.* Buckingham, 46 Conn. 461; Shepard *v.* Giddings, 22 Conn. 282; Hagaman *v.* Gillis, 9 S. D. 61, 68 N. W. 192; Burton *v.* Driggs, 20 Wall. (U. S.) 125, 22 L. ed. 299. See also *supra*, XV, E, 2, d.

17. De Baril *v.* Pardo, 6 Pa. Cas. 148, 8 Atl. 876; Murray *v.* Mattison, 67 Vt. 553, 32 Atl. 479.

18. Hirschfelder *v.* Levy, 69 Ala. 351. And see *supra*, XV, C, 2.

19. *Alabama.*— Collins *v.* Alabama Great Southern R. Co., 104 Ala. 390, 16 So. 140; Watson *v.* State, 63 Ala. 19.

Arkansas.— Hyde *v.* Benson, 6 Ark. 396.

California.— Gethin *v.* Walker, 59 Cal. 502, decided under Code Civ. Proc. §§ 1855, 1938. See also Kelly *v.* Taylor, 23 Cal. 11.

Florida.— Florida Cent., etc., R. Co. *v.* Seymour, 44 Fla. 557, 33 So. 424; Pensacola, etc., R. Co. *v.* Braxton, 34 Fla. 471, 16 So. 317.

notice and demand to be served on a party as a prerequisite to an action against him, some authorities hold that notice to produce these writings is necessary before secondary evidence of their contents can be admitted,[20] while in others notice has been held unnecessary, the courts applying the rule that a notice to produce a notice is not a prerequisite to the admission of secondary evidence.[21]

(VII) *WHERE PARTY EVADES NOTICE.* Evidence that the party in possession of an original document has evaded the service of notice to produce it and has avoided the production of the document has been held sufficient to dispense with actual service of the notice.[22]

c. Sufficiency of Notice — (I) *IN GENERAL.* A notice to produce documents should describe the desired papers with sufficient accuracy to enable the party

Illinois.— Brown *v.* Booth, 66 Ill. 419; Prairie State Land, etc., Assoc. *v.* Gorrie, 64 Ill. App. 325.

Iowa.— Brentner *v.* Chicago, etc., R. Co., 58 Iowa 625, 12 N. W. 615; Smith *v.* Kansas City, etc., R. Co., 58 Iowa 622, 12 N. W. 619.

Missouri.— Christy *v.* Horne, 24 Mo. 242.

New York.— Edwards *v.* Bonneau, 1 Sandf. 610.

Pennsylvania.— Morrow *v.* Com., 48 Pa. St. 305; Smyth *v.* Hawthorn, 3 Rawle 355. See also Fogle *v.* Lycoming Mut. Ins. Co., 3 Grant 77.

England.— Colling *v.* Trewick, 6 B. & C. 394, 9 D. & R. 456, 5 L. J. K. B. O. S. 132, 30 Rev. Rep. 366, 13 E. C. L. 183; Jory *v.* Orchard, 2 B. & P. 39, 5 Rev. Rep. 537; Surtees *v.* Hubbard, 4 Esp. 203, 6 Rev. Rep. 853; Gotlieb *v.* Danvers, 1 Esp. 455; Grove *v.* Ware, 2 Stark. 174, 3 E. C. L. 364. *Compare* Robinson *v.* Brown, 3 C. B. 754, 16 L. J. C. P. 46, 54 E. C. L. 754; Jones *v.* Tarlton, 1 Dowl. P. C. N. S. 625, 6 Jur. 348, 11 L. J. Exch. 267, 9 M. & W. 675.

See 20 Cent. Dig. tit. "Evidence," § 642.

Contra.— Lathrop *v.* Mitchell, 47 Ga. 610; Frank *v.* Longstreet, 44 Ga. 178.

Reason of rule.— "Every written notice is, for the best of all reasons, to be proved by a duplicate original; for if it were otherwise, the notice to produce the original could be proved only in the same way as the original notice itself; and thus a fresh necessity would be constantly arising, *ad infinitum*, to prove notice of the preceding notice; so that the party would, at every step, be receding instead of advancing." Eisenhart *v.* Slaymaker, 14 Serg. & R. (Pa.) 153, 156, per Gibson, C. J. The statement has been quoted and approved in many of the foregoing cases in this note.

Applications of rule.— The rule stated in the text has been applied to a notice to quit (Falkner *v.* Beers, 2 Dougl. (Mich.) 117; Eisenhart *v.* Slaymaker, 14 Serg. & R. (Pa.) 153; Doe *v.* Somerton, 7 Q. B. 58, 9 Jur. 775, 14 L. J. Q. B. 210, 53 E. C. L. 58), a notice of sale under a power in a mortgage (McMillan *v.* Baxley, 112 N. C. 578, 16 S. E. 845), a notice to purchasers at a sheriff's sale (Gaskell *v.* Morris, 7 Watts & S. (Pa.) 32), a notice of the time and place where taxes will be received (Waterman *v.* Davis, 66 Vt. 83, 28 Atl. 664), a notice that taxes are paid under protest (Michigan Land, etc., Co. *v.* Republic Tp., 65 Mich. 628, 32 N. W. 882), and a notice of dishonor or protest (Central Bank *v.* Allen, 16 Me. 41; Atwell *v.* Grant, 11 Md. 101; Eagle Bank *v.* Chapin, 3 Pick. 180; Johnston *v.* Mason, 27 Mo. 511; Leavitt *v.* Simes, 3 N. H. 14; Scott *v.* Betts, Lalor 363; Johnson *v.* Haight, 13 Johns. (N. Y.) 470; Faribault *v.* Ely, 13 N. C. 67; Lindenberger *v.* Beall, 6 Wheat. (U. S.) 104, 5 L. ed. 216; Kine *v.* Beaumont, 3 B. & B. 288, 7 Moore C. P. 112, 24 Rev. Rep. 678, 7 E. C. L. 734; Swain *v.* Lewis, 2 C. M. & R. 261, 4 Dowl. P. C. 261, 1 Gale 182, 4 L. J. Exch. 249, 5 Tyrw. 998. *Compare* Lanauze *v.* Palmer, M. & M. 31, 31 Rev. Rep. 709, 22 E. C. L. 464. And see, generally, COMMERCIAL PAPER, 8 Cyc. 278).

An address on an envelope inclosing a notice may be regarded as a portion of the notice and no notice to produce the original is necessary in order to admit parol evidence of its contents. Williams *v.* German Mut. F. Ins. Co., 68 Ill. 387.

20. Central Branch Union Pac. R. Co. *v.* Walters, 24 Kan. 504, demand for value of stock killed by railroad train, where the demand was made in writing, although not required by statute to be thus made.

21. Florida Cent., etc., R. Co. *v.* Seymour, 44 Fla. 557, 33 So. 424; Pensacola, etc., R. Co. *v.* Braxton, 34 Fla. 471, 16 So. 317 (written notice of claim for stock killed by railroad train); Brentner *v.* Chicago, etc., R. Co., 58 Iowa 625, 12 N. W. 615; Smith *v.* Kansas City, etc., R. Co., 58 Iowa 622, 12 N. W. 619 (notice and affidavit of loss in action against railroad company for injuries to stock); Edwards *v.* Bonneau, 1 Sandf. (N. Y.) 610 (notice to pay wharfage of a vessel); Willoughby *v.* Carlton, 9 Johns. (N. Y.) 136 (notice to build portion of division fence); Anderson *v.* May, 2 B. & P. 237, 3 Esp. 167; and Colling *v.* Trewick, 6 B. & E. 394, 9 D. & R. 456, 5 L. J. K. B. O. S. 132, 30 Rev. Rep. 366, 13 E. C. L. 183 (bill for services rendered by attorney).

Mailing of notice.— Where the requirement of a statute and the fact necessary to be proved is the mailing of a notice, parol evidence that a notice on a postal card was mailed is admissible without serving a notice to produce the card. Collins *v.* Alabama Great Southern, etc., R. Co., 104 Ala. 390, 16 So. 140.

22. Bright *v.* Pennywit, 21 Ark. 130.

notified to understand what writings are required,[23] and a notice to produce certain documents described therein is not sufficient to warrant the introduction of secondary evidence of other documents than those mentioned in the notice.[24] But where the notice does not describe the documents with perfect accuracy, it is sufficient if so framed with regard to the subject-matter to which the documents relate, or otherwise, that the party notified cannot doubt what papers are meant.[25]

(II) *Question For Trial Court.* The sufficiency of a notice to produce a written instrument is a preliminary question of fact for the trial court, whose determination will generally not be disturbed on appeal, except in a plain instance of injury.[26]

(III) *To Whom Notice May Be Given.* Notice to produce a paper may be given either to the attorney of record of the real party in interest or to the party himself.[27] But the document must be held by the attorney as counsel for the party to the cause, and not as counsel for some stranger thereto.[28]

23. Arnstine *v.* Treat, 71 Mich. 561, 39 N. W. 749; Gourdin *v.* Staggers, 12 Rich. (S. C.) 307; Wardlaw *v.* Hammond, 9 Rich. (S. C.) 454; International, etc., R. Co. *v.* Donalson, 2 Tex. App. Civ. Cas. § 238; Jones *v.* Edwards, McClel. & Y. 139; France *v.* Lucy, R. & M. 341, 21 E. C. L. 763. See also Julius King Optical Co. *v.* Treat, 72 Mich. 599, 40 N. W. 912.

Written notice.— A general rule of practice requiring that a notice to produce papers shall be written has reference to preliminary preparation for the trial. The reason of the rule does not apply to a notice given in the presence and hearing of the court while the trial is in progress from day to day, and the materiality and pertinency of the document are apparent, and each party is at least presumed to have present all papers bearing on the case. Hence where a verbal notice to produce papers is given at a meeting before a referee, it is sufficient to warrant the introduction of secondary evidence at a subsequent meeting when the papers are not produced. Kerr *v.* McGuire, 28 N. Y. 446, 28 How. Pr. (N. Y.) 27. See also Wright *v.* Hicks, 61 N. Y. App. Div. 489, 70 N. Y. Suppl. 675. *Compare* Cummings *v.* McKinney, 5 Ill. 59, holding that a written notice is essential.

24. Mobile L. Ins. Co. *v.* Egger, 67 Ala. 134; Moore *v.* Leonard, 52 N. Y. Super. Ct. 8; Sturge *v.* Buchanan, 10 A. & E. 598, 8 L. J. Q. B. 272, 2 M. & Rob. 90, 2 P. & D. 573, 37 E. C. L. 321. But where plaintiff had given defendant notice to produce a certain document which had been delivered by plaintiff to defendant, and defendant produced a document which he claimed was the one he had received, it was held that plaintiff might testify that the document produced was not the one which he gave to defendant, and might introduce a copy of the one which he testified he did give to him. Barnett *v.* Wilson, 132 Ala. 375, 31 So. 521.

25. *Massachusetts.*— McDowell *v.* Ætna Ins. Co., 164 Mass. 444, 41 N. E. 665; Bemis *v.* Charles, 1 Metc. 440; Bogart *v.* Brown, 5 Pick. 18.

New Hampshire.— Jones *v.* Parker, 20 N. H. 31.

New York.— Dole *v.* Belden, 1 N. Y. Suppl. 667; Walden *v.* Davison, 11 Wend. 65, 25 Am. Dec. 602.

United States.— Vasse *v.* Miflin, 28 Fed. Cas. No. 16,895, 4 Wash. 519.

England.— Morris *v.* Hannen, C. & M. 29, 2 M. & Rob. 392, 41 E. C. L. 22; Rogers *v.* Custance, 2 M. & Rob. 179; Jacob *v.* Lee, 2 M. & Rob. 33; Engall *v.* Druce, 9 Wkly. Rep. 536.

See 20 Cent. Dig. tit. "Evidence," § 645.

"Literal accuracy cannot be expected in the description of a paper in the possession of the adverse party; such description as will apprise a man of ordinary intelligence of the document desired is enough." Burke *v.* Table Mountain Water Co., 12 Cal. 403, 408.

Construction of notice.— Where the notice to produce a certain letter described it as inclosed in an envelope, it was held that an intention to call for both the envelope and its inclosure was sufficiently indicated, although such notice did not specify the envelope. U. S. *v.* Duff, 6 Fed. 45, 46, 19 Blatchf. 9.

26. Burke *v.* Table Mountain Water Co., 12 Cal. 403; Cummings *v.* McKinney, 5 Ill. 57; Florsheim *v.* Palmer, 99 Ill. App. 559; Price *v.* Kohn, 99 Ill. App. 115; State *v.* Salverson, 87 Minn. 40, 91 N. W. 1; Winona *v.* Huff, 11 Minn. 119. See Bourne *v.* Buffington, 125 Mass. 481.

27. Bishop *v.* American Preservers' Co., 157 Ill. 284, 41 N. E. 765, 41 Am. St. Rep. 317; Lagow *v.* Patterson, 1 Blackf. (Ind.) 327; Den *v.* McAllister, 7 N. J. L. 46; Sessions *v.* Palmeter, 75 Hun (N. Y.) 268, 26 N. Y. Suppl. 1076; Brown *v.* Littlefield, 7 Wend. (N. Y.) 454. This rule has been embodied in statutes. See for example Simington *v.* Kent, 8 Ala. 691; Jefford *v.* Ringgold, 6 Ala. 544; Bethea *v.* McCall, 3 Ala. 449.

28. Baker *v.* Pike, 33 Me. 213. *Compare* Den *v.* McAllister, 7 N. J. L. 46. But where a suit is brought in the name of one person for the use of another, a notice to the attorney of record of plaintiff to produce a writing which merely describes the suit as between the nominal plaintiff and defendant is sufficiently certain, and the attorney can-

(IV) *TIME OF SERVICE*—(A) *In General.* As to the time of service of a notice to produce papers, no comprehensive rule can be laid down, but each case must be determined largely upon its peculiar facts, especially with regard to the accessibility of the document. The most that can be said is that the notice must be given in sufficient time to enable the party by the exercise of reasonable diligence, under the circumstances, to procure and produce the writings desired.[29]

not excuse the non-production by proof that he was retained by plaintiff really interested. Simington *v.* Kent, 8 Ala. 691.

29. *Alabama.*— Jefford *v.* Ringgold, 6 Ala. 544.

Illinois.— Jack *v.* Rowland, 98 Ill. App. 352; Cleveland, etc., R. Co. *v.* Newlin, 74 Ill. App. 638.

Iowa.— Brock *v.* Des Moines Ins. Co., 106 Iowa 30, 75 N. W. 683.

Michigan.— Pitt *v.* Emmons, 92 Mich. 542, 52 N. W. 1004; Mortlock *v.* Williams, 76 Mich. 568, 43 N. W. 592.

Missouri.— Linn *v.* New York L. Ins. Co, 78 Mo. App. 192.

New Hampshire.— Downer *v.* Button, 26 N. H. 338.

New York.— Utica Ins. Co. *v.* Cadwell, 3 Wend. 296.

Oregon.— Sugar Pine Lumber Co. *v.* Garrett, 28 Oreg. 168, 42 Pac. 129.

South Carolina.— Worth *v.* Norton, 60 S. C. 293, 38 S. E. 605.

Texas.— Ellis *v.* Sharp, (Civ. App. 1898) 47 S. W. 670.

Wisconsin.— Barton *v.* Kane, 17 Wis. 37, 84 Am. Dec. 728.

England.— Holt *v.* Miers, 9 C. & P. 191, 38 E. C. L. 121.

See 20 Cent. Dig. tit. "Evidence," § 646.

Where the deposition of a witness is taken to prove the contents of documents, it is not necessary to give notice to produce the documents when the deposition is taken; but such notice must be given before the deposition can be used on the trial; and if notice is given a reasonable time before the trial, it is sufficient to admit the deposition or copies of the documents attached thereto. Hemphill *v.* Townsend, 7 Ala. 853; Harris *v.* Sturtevant, 34 Me. 63; Illinois Car, etc., Co. *v.* Linstroth Wagon Co., 112 Fed. 737, 50 C. C. A. 504.

Notice to produce "on the trial of the cause" is sufficient without giving a new notice for every succeeding circuit. The notice is good whenever the cause comes on for trial. Wilson *v.* Gale, 4 Wend. (N. Y.) 623; Jackson *v.* Shearman, 6 Johns. (N. Y.) 19; Gilmore *v.* Wale, Anth. N. P. (N. Y.) 87. See also Hope *v.* Beadon, 17 Q. B. 509, 16 Jur. 80, 21 L. J. Q. B. 25, 2 L. M. & P. 593, 79 E. C. L. 509; Reg. *v.* Robinson, 5 Cox C. C. 183. Thus such a notice given in a suit before a justice has been held good and operative in the court of common pleas if the suit is subsequently removed to that court by appeal. Wilson *v.* Gale, 4 Wend. (N. Y.) 623.

Notice on non-judicial day.— It has been held that a notice to produce a document is good, although given on a non-judicial day. Sugar Pine Lumber Co. *v.* Garrett, 28 Oreg. 168, 42 Pac. 129. *Contra*, as to notice served on Sunday. Hughes *v.* Budd, 8 Dowl. P. C. 315, 4 Jur. 150. And see, generally, HOLIDAYS; SUNDAYS.

Sufficient notices.— For cases holding that under the circumstances notice was given in due time see the following:

Alabama.— Hemphill *v.* Townsend, 7 Ala. 853; Jefford *v.* Ringgold, 6 Ala. 544.

California.— Burke *v.* Table Mountain Water Co., 12 Cal. 403.

Illinois.— Warner *v.* Campbell, 26 Ill. 282.

Maryland.— Divers *v.* Fulton, 8 Gill & J. 202.

Missouri.— Park *v.* Viernow, 16 Mo. App. 383.

New York.— Hammond *v.* Hopping, 13 Wend. 505; Jackson *v.* Shearman, 6 Johns. 19.

United States.— U. S. *v.* Duff, 6 Fed. 45, 19 Blatchf. 9; Shreve *v.* Dulany, 22 Fed. Cas. No. 12,817, 1 Cranch C. C. 499.

England.— Sturge *v.* Buchanan, 10 A. & E. 598, 8 L. J. Q. B. 272, 2 M. & Rob. 90, 2 P. & D. 573, 37 E. C. L. 321; Doe *v.* Wainwright, 5 A. & E. 520, 2 Hurl. & W. 391, 6 L. J. K. B. 35, 1 N. & P. 8, 31 E. C. L. 714; Sturn *v.* Jeffree, 2 Car. & K. 442, 61 E. C. L. 442; Gibbons *v.* Powell, 9 C. & P. 634, 38 E. C. L. 370; Firkin *v.* Edwards, 9 C. & P. 478, 38 E. C. L. 283; Drabble *v.* Donner, 1 C. & P. 188, R. & M. 47, 12 E. C. L. 117; Lloyd *v.* Mostyn, 2 Dowl. P. C. N. S. 476, 6 Jur. 974, 12 L. J. Exch. 1, 10 M. & W. 478; Reg. *v.* Barker, 1 F. & F. 326.

See 20 Cent. Dig. tit. "Evidence," § 646.

Insufficient notices.—For cases holding that under the circumstances the notice was not given in due time see the following:

Illinois.— Bushnell *v.* Bishop Hill Colony, 28 Ill. 204.

Maryland.— Glenn *v.* Rogers, 3 Md. 312.

New York.— Gorham *v.* Gale, 7 Cow. 739, 17 Am. Dec. 549.

England.— Rex *v.* Ellicombe, 5 C. & P. 522, 1 M. & Rob. 260, 24 E. C. L. 687; Houseman *v.* Roberts, 5 C. & P. 394, 24 E. C. L. 621; Hargest *v.* Fothergill, 5 C. & P. 303, 24 E. C. L. 577; Vice *v.* Anson, 3 C. & P. 19, M. & M. 96, 14 E. C. L. 428; Atkins *v.* Meredith, 4 Dowl. P. C. 658; George *v.* Thompson, 4 Dowl. P. C. 656; Howard *v.* Williams, 1 Dowl. P. C. N. S. 877, 6 Jur. 585, 11 L. J. Exch. 279, 9 M. & W. 725; Ehrensperger *v.* Anderson, 3 Exch. 148, 18 L. J. Exch. 132; Coombs *v.* Bristol, etc., R. Co., 1 F. & F. 206; Loibl *v.* Strampfer, 16 L. T. Rep. N. S. 720; Byrne *v.* Harvey, 2 M. & Rob. 89.

Canada.— Nash *v.* Bush, 5 U. C. C. P. 300; McCrae *v.* Osborne, 6 U. C. Q. B. O. S. 500.

If it were impossible to procure the document between the time of giving notice and the time of the trial, this fact should be made to appear.[30]

(B) *Notice at Trial.* Where the document is in the possession of the adverse party or his attorney at the trial and is in court, notice given or demand made during the trial is generally sufficient,[31] and notice thus given is sufficient, although the paper is not actually in court, if it is so near that it can be speedily obtained.[32] Likewise, where the circumstances of the case are such that the document may be fairly presumed to be in the possession of the adverse party at the trial, and the want of a notice to produce it could work no surprise upon him and could not prejudice his rights, notice before the trial is not a prerequisite to the introduction of secondary evidence.[33] Thus where the papers are the subject of the action or defense, they will be presumed to be not only in the possession of the party relying upon them, but also to be present in court; and this latter fact may be presumed from the nature of the document itself and its particular connection with the cause. Under such circumstances notice at the trial is sufficient.[34] But ordinarily if the paper is not shown to be in the party's possession and in court, or if it does not appear to be readily procurable by him, notice at the trial is not sufficient.[35]

d. Proof of Service of Notice. The method of proving the service on a party of a notice to produce a document in his possession or control and the sufficiency of such proof are matters governed by the same principles and statutory provisions that relate to the service of notice in general.[36] The

See 20 Cent. Dig. tit. "Evidence," § 646.

30. Burke *v.* Table Mountain Water Co., 12 Cal. 403. Where notice to produce a paper was given the day before the trial, and the paper was in the possession of a person eighty miles distant, it was held that the court could not assume that the paper could not have been obtained and therefore that the introduction of secondary evidence was proper. Cody *v.* Hough, 20 Ill. 43. *Compare* Julius King Optical Co. *v.* Treat, 72 Mich. 599, 40 N. W. 912.

31. *Alabama.*— Brown *v.* Isbell, 11 Ala. 1009.

California.— See Burke *v.* Table Mountain Water Co., 12 Cal. 403.

Kentucky.— Dana *v.* Boyd, 2 J. J. Marsh. 587; Lamb *v.* Moberly, 3 T. B. Mon. 179.

Maine.— Overlock *v.* Hall, 81 Me. 348, 17 Atl. 169.

New Hampshire.— Downer *v.* Button, 26 N. H. 338.

New Jersey.— Board of Justices *v.* Fennimore, 1 N. J. L. 242.

New York.— Whelan *v.* Gorton, 15 Misc. 625, 37 N. Y. Suppl. 344; Anonymous, Anth. N. P. 273. *Contra,* Grimm *v.* Hamel, 2 Hilt. 434.

South Carolina.— Reynolds *v.* Quattlebum, 2 Rich. 140.

United States.— Chadwick *v.* U. S., 3 Fed. 750.

England.— Dwyer *v.* Collins, 7 Exch. 639, 16 Jur. 569, 21 L. J. Exch. 225, 12 Eng. L. & Eq. 352 [*disapproving* Cook *v.* Hearn, 1 M. & Rob. 201, and statements in 1 Stark. Ev. (2d ed.) p. 350; 1 Taylor Ev. p. 322].

See 20 Cent. Dig. tit. "Evidence," §§ 646, 654.

Contra.— Greenough *v.* Shelden, 9 Iowa 503; Milliken *v.* Barr, 7 Pa. St. 23.

32. Buckner *v.* Morris, 2 J. J. Marsh. (Ky.) 121; Board of Justices *v.* Fennimore, 1 N. J. L. 242.

33. Nicholson *v.* Tarpey, 70 Cal. 608, 12 Pac. 778; Griffin *v.* Sheffield, 38 Miss. 359, 77 Am. Dec. 646; Barker *v.* Barker, 14 Wis. 131. See also Ross *v.* Bruce, 1 Day (Conn.) 100.

34. Howell *v.* Huyck, 2 Abb. Dec. (N. Y.) 423; Hammond *v.* Hopping, 13 Wend. (N. Y.) 505. To the same effect see Nicholson *v.* Tarpey, 70 Cal. 608, 12 Pac. 778; Cummings *v.* McKinney, 5 Ill. 57 (in which it was held, however, that the document involved was not within the rule); Gould *v.* Norfolk Lead Co., 9 Cush. (Mass.) 338, 57 Am. Dec. 50; Griffin *v.* Sheffield, 38 Miss. 359, 77 Am. Dec. 646.

35. *Alabama.*— Bates *v.* Ridgeway, 48 Ala. 611, 614.

Illinois.— Cummings *v.* McKinney, 5 Ill. 57; Jack *v.* Rowland, 98 Ill. App. 352; Cleveland, etc., R. Co. *v.* Newlin, 74 Ill. App. 638.

Maryland.—Atwell *v.* Miller, 6 Md. 10, 61 Am. Dec. 294.

Massachusetts.— Welch *v.* New York, etc., R. Co., 176 Mass. 393, 57 N. E. 668; Bourne *v.* Buffington, 125 Mass. 481.

Minnesota.— Dade *v.* Ætna Ins. Co., 54 Minn. 336, 56 N. W. 48.

New York.— McPherson *v.* Rathbone, 7 Wend. 216; Gorham *v.* Gale, 7 Cow. 739, 17 Am. Dec. 549.

Texas.— Continental Fire Assoc. *v.* Bearden, 29 Tex. Civ. App. 569, 69 S. W. 982.

Wisconsin.— Barton *v.* Kane, 17 Wis. 37, 84 Am. Dec. 728.

United States.— The Osceola, 18 Fed. Cas. No. 10,602, Olcott 450.

See 20 Cent. Dig. tit. "Evidence," § 646.

36. See, generally, NOTICE, and cross-references there given. In Willard *v.* Germer,

mere statement of counsel to the court that he served such a notice has been held insufficient.[37]

e. Waiver of Notice or of Objections to Its Sufficiency. The right of a party to require a notice to produce documents in his possession before the introduction of secondary evidence of their contents may be waived by him.[38] Likewise he may waive objection for insufficient description of the documents,[39] or because of service at too short a time before trial.[40] And the actual production of the documents or a voluntary offer to produce them will amount to a waiver.[41]

4. Proof of Correctness of Copy. Where the secondary evidence offered is a writing purporting to be a copy of an original document, it must be shown usually by proof of comparison with the original, that the writing is in fact a true copy.[42] Thus a copy of a copy of a lost or destroyed writing is not admissible as

1 Sandf. (N. Y.) 50, the court considered that it was irregular to prove by affidavit the service of a notice to produce documents, the proper mode of proof being deemed to be the examination of witnesses at the trial.

Sheriff's return on notice.— In McDonald *v.* Carson, 94 N. C. 497, it was held that a sheriff's return "executed by delivering a copy" indorsed on a notice to produce papers is sufficient, since it implies a delivery to each party to whom the notice is addressed.

37. Landt *v.* McCullough, 206 Ill. 214, 69 N. E. 107 [*reversing* 103 Ill. App. 668].

38. Dwinell *v.* Larrabee, 38 Me. 464. Thus in an action by a chattel mortgagee against an officer who had attached the goods as property of the mortgagor, plaintiff having testified in his own behalf that he received a letter from the mortgagor a day or two before the execution of the mortgage; and, having stated on cross-examination that he had left the letter at home, it was held error to refuse defendant leave to cross-examine him as to its contents, for the purpose of disproving the *bona fides* of the mortgage, although he had not been notified to produce it, for the objection could affect only the rights of defendant, and he could waive it. Kalk *v.* Fielding, 50 Wis. 339, 7 N. W. 296.

39. Thus where the notice described a title bond as a deed, but the party took no exception, and produced the bond, and at a second trial exceptions were taken to the misnomer in the notice, and for that reason the bond was not produced, but the court thereupon admitted secondary evidence of its contents, it was held that the production of the paper on the former occasion under the notice was a waiver of the misnomer, and an acquiescence in the meaning intended by the notice, and that the secondary evidence was properly admitted. Lockhart *v.* Camfield, 48 Miss. 470.

40. Willard *v.* Germer, 1 Sandf. (N. Y.) 50.

41. Dwinell *v.* Larrabee, 38 Me. 464; Willard *v.* Germer, 1 Sandf. (N. Y.) 50.

42. *Arkansas.*— Supreme Lodge K. of P. *v.* Robinson, 70 Ark. 364, 67 S. W. 758.

California.— Dyer *v.* Hudson, 65 Cal. 372, 4 Pac. 235.

Illinois.— Dupuie *v.* McCausland, 1 Ill. App. 395. See also Chisholm *v.* Beaver Lake Lumber Co., 18 Ill. App. 131.

Iowa.— Kyser *v.* Kansas City, etc., R. Co., 56 Iowa 207, 9 N. W. 133.

Maryland.— Smith *v.* Easton, 54 Md. 138, 39 Am. Rep. 355, copy of telegram.

Michigan.— Fowler *v.* Hoffman, 31 Mich. 215.

Minnesota.— *In re* Gazett, 35 Minn. 532, 29 N. W. 347.

Nebraska.— Nostrum *v.* Halliday, 39 Nebr. 828, 58 N. W. 429.

New Jersey.— Wills *v.* McDole, 5 N. J. L. 501.

New York.— Brewster *v.* Countryman, 12 Wend. 446.

Pennsylvania.— McGinniss *v.* Sawyer, 63 Pa. St. 259; Kerns *v.* Swope, 2 Watts 75.

Compare State Bank *v.* Ensminger, 7 Blackf. (Ind.) 105; Tenney *v.* Mulvaney, 9 Oreg. 405.

Entries in day-book transcribed in ledger. — Evidence that a day-book or book of original entries has been destroyed by fire does not make a ledger competent as to the same matter, without evidence to show that the entries in the ledger were transcribed correctly from the day-book by the person who made the entries in the day-book, or by one having knowledge of the transactions and of the correctness of the original entries. Kennedy *v.* Dodge, 19 Ohio Cir. Ct. 425, 10 Ohio Cir. Dec. 360.

Testimony of the person who made the copy is not essential; correctness of the copy may be proved by the testimony of any competent witness. Lombard *v.* Johnson, 76 Ill. 599; Terry *v.* Wood, 7 Baxt. (Tenn.) 292. And comparison with the original as read by another person has been held sufficient (Lynde *v.* Judd, 3 Day (Conn.) 499. See also Rice *v.* Rice, (N. J. Ch. 1892) 25 Atl. 321), especially where the person reading the original was the agent of both parties, as under such circumstances the inference is that he read correctly (Krise *v.* Neason, 66 Pa. St. 253).

Merely proving the handwriting of the copyist is not sufficient. Wills *v.* McDole, 5 N. J. L. 501; Brewster *v.* Countryman, 12 Wend. (N. Y.) 446. Yet where the copy is a press-copy, proof of the handwriting is sufficient, for such a copy is a facsimile of the original. Smith *v.* Moorhead Mfg. Co., 23 Minn. 141.

Proving incorrectness of copy.— Where a party introduces in evidence a certified copy

secondary evidence, unless it has been compared with the original and found to be correct.[43] But the objection that a copy offered is only a copy of a copy is considered purely technical,[44] and where a witness testifies of his own knowledge that the paper is in fact a true copy of the original, it should be admitted; and the question whether the evidence shows it to be a copy of the original or simply a copy of a copy is for the jury to determine.[45] *A fortiori*, where there is some evidence introduced to show that the writing offered as a copy of the original is a true copy thereof, the writing is admissible and the question whether it is in fact a true copy is for the jury,[46] although where the document is the foundation of the action, more strictness in the proof is required[47] than where the document is only collaterally involved.[48]

G. Degrees of Secondary Evidence. On the question whether there are degrees of secondary evidence — that is, whether one kind of secondary evidence is admissible when another kind having more probative value is accessible — there are many *dicta* and some decisions, but these are in conflict, some courts holding that the most satisfactory kind of secondary evidence must always be produced or its absence explained,[49] and others holding that there are no degrees of secondary evidence, but that parol or any other secondary evidence is compe-

of a public record, it has been held that he cannot show by parol that the copy is incorrect in any particular, since by so doing he would prove the contents of the record by parol, which is forbidden by the best evidence rule. Monk *v.* Corbin, 58 Iowa 503, 12 N. W. 571. But it is generally held that where an original deed has been lost and a certified copy of the record thereof is introduced in evidence, it may be shown that the copy is not in fact a true copy (Harvey *v.* Thorpe, 28 Ala. 250, 65 Am. Dec. 344; Nixon *v.* Cobleigh, 52 Ill. 387; Sexsmith *v.* Jones, 13 Wis. 565; Booth *v.* Tiernan, 109 U. S. 205, 3 S. Ct. 122, 27 L. ed. 907), although it has been considered that the record itself must be produced (Georgia R., etc., R. Co. *v.* Hamilton, 59 Ga. 171).

43. Dyer *v.* Hudson, 65 Cal. 372, 4 Pac. 235; Fowler *v.* Hoffman, 31 Mich. 215.

44. Cameron *v.* Peck, 37 Conn. 555.

45. Cameron *v.* Peck, 37 Conn. 555; Fowler *v.* Hoffman, 31 Mich. 215; Winn *v.* Patterson, 9 Pet. (U. S.) 663, 9 L. ed. 266. *Compare* White *v.* Herrman, 62 Ill. 73; Healy *v.* Gilman, 1 Bosw. (N. Y.) 235. See also Robertson *v.* Lynch, 18 Johns. (N. Y.) 451. Although the rule excluding a copy of a copy properly applies to cases where the copy is taken from a copy, the original being still in existence and capable of being compared with the copy; or where the copy is taken from a record which is in existence and by law deemed as high evidence as the original, it is quite a different question whether it applies to cases where the original is lost or the record of it is not by law deemed as high evidence as the original, or where the copy of a copy is the highest proof in existence. So where the document introduced is not a mere copy of a copy verified as such, but is a second copy verified as a true copy of the original, it is admissible. Winn *v.* Patterson, 9 Pet. (U. S.) 663, 9 L. ed. 266.

46. Burrill *v.* Wilcox Lumber Co., 65 Mich. 571, 32 N. W. 824. See also Ide *v.* Pierce, 134 Mass. 260; Brigham *v.* Coburn, 10 Gray (Mass.) 329; Tenny *v.* Mulvaney, 9 Oreg. 405. *Compare* Nostrum *v.* Halliday, 39 Nebr. 828, 58 N. W. 429.

A statement by the president of a corporation that he sent such a telegram as was shown by a copy of the original offered in evidence, and relied on by plaintiffs to establish defendant's liability, was held competent as tending to show correctness of the copy. Ward *v.* Tennessee Coal, etc., Co., (Tenn. Ch. App. 1900) 57 S. W. 193.

Printed form in common use.— Where it was sought to introduce a copy of a notice given to the makers and indorsers of notes, and a clerk of a bank produced a printed form in common use and testified to his belief that the notice in question was the same in form, it was held that the proof was sufficient. Shove *v.* Wiley, 18 Pick. (Mass.) 558.

Copy of judicial record.— For evidence held sufficient for the introduction of a copy of a judicial record which had been destroyed by fire see Houston, etc., R. Co. *v.* De Berry, (Tex. Civ. App. 1904) 78 S. W. 736.

47. Wills *v.* McDole, 5 N. J. L. 501.

48. Rice *v.* Rice, (N. J. Ch. 1892) 25 Atl. 321.

49. Overseers of Poor Niskayuna *v.* Overseers of Poor Albany, 2 Cow. 537; Hilts *v.* Colvin, 14 Johns. 182; Stevenson *v.* Hoy, 43 Pa. St. 191. See Siegel *v.* Liberty, 118 Wis. 599, 95 N. W. 402. See also Harvey *v.* Thorpe, 28 Ala. 250, 65 Am. Dec. 344; Healy *v.* Gilman, 1 Bosw. (N. Y.) 235.

Letter-press copies of letters are the best secondary evidence of their contents, and unless they are produced or their absence explained parol evidence of the contents of the letters is not admissible. Ford *v.* Cunningham, 87 Cal. 209, 25 Pac. 403; Stevenson *v.* Hoy, 43 Pa. St. 191; De Baril *v.* Pardo, 6 Pa. Cas. 148, 8 Atl. 876. See also Dennis *v.* Barber, 6 Serg. & R. (Pa.) 420. And an interrogatory as to a witness' recollection of the contents of a letter which he

tent which is admissible by other rules of law, its weight being a matter for the jury.[50] Under the decisions in Michigan the question appears to be still unsettled.[51] It is universally conceded, however, that, where a proper case is made for the introduction of secondary evidence, any kind of secondary evidence is competent which is admissible by other rules of law, unless it is shown by the

has written is properly disallowed, where he is not first required to state whether he has a copy, and if so to produce it. Lazzaro *v.* Maugham, 10 Misc. (N. Y.) 230, 30 N. Y. Suppl. 1066.

Under Ga. Civ. Code, § 5173, "there are degrees in secondary evidence, and the best should always be produced. Thus a duplicate is better than a copy, and an examined copy than oral evidence." Shedden *v.* Heard, 110 Ga. 461, 467, 35 S. E. 707; Williams *v.* Waters, 36 Ga. 454. And under this provision where a duly approved copy of an inaccessible writing is in evidence, parol evidence as to its contents is not admissible. Shedden *v.* Heard, 110 Ga. 461, 35 S. E. 707. But to prove the contents of a lost document or judicial record it is not necessary to establish a copy in a separate proceeding but parol evidence is admissible, for parol evidence would have to be resorted to for the purpose of establishing the copy. Cross *v.* Johnson, 65 Ga. 717; Bridges *v.* Thomas, 50 Ga. 378. See, generally, LOST INSTRUMENTS; RECORDS.

To prove the contents of a will, the original and record of which are destroyed, parol evidence is not admissible where a copy is accessible. Illinois Land, etc., Co. *v.* Bonner, 75 Ill. 315.

To prove the adoption of a by-law by an assurance association, parol evidence is not admissible where the laws of the state provide that a certified copy of the record may be used. Lloyd *v.* Supreme Lodge K. of P., 98 Fed. 66, 38 C. C. A. 654.

Record or copy of deed.— Where a deed or grant which is shown to be lost has been recorded, it is error to admit parol evidence as to its contents without showing why the record or a certified copy of the record could not be produced. Brotherton *v.* Mart, 6 Cal. 488; Mariner *v.* Saunders, 10 Ill. 113; Aurora Bank *v.* Linzee, 166 Mo. 496, 65 S. W. 735.

Telegrams.— Where the original of a telegraph message is the one transmitted and delivered, it is held under the rule stated in the text that proof of loss of this original is not a sufficient foundation for the introduction of parol evidence of its contents, but that the non-production of the telegram written and delivered by the sender for transmission must first be satisfactorily explained. Western Union Tel. Co. *v.* Hines, 94 Ga. 430, 20 S. E. 349.

50. *Indiana.*— Dix *v.* Akers, 30 Ind. 431; Carpenter *v.* Dame, 10 Ind. 125 [*overruling* Coman *v.* State, 4 Blackf. 241]. See also Barnett *v.* Lucas, 27 Ind. App. 441, 61 N. E. 683.

Massachusetts.— Com. *v.* Smith, 151 Mass. 491, 24 N. E. 677; Smith *v.* Brown, 151 Mass. 338, 24 N. E. 31; Goodrich *v.* Weston, 102 Mass. 362, 3 Am. Rep. 469.

Minnesota.— Magie *v.* Hermann, 50 Minn. 424, 52 N. W. 909, 36 Am. St. Rep. 660.

Montana.— See Belk *v.* Meagher, 3 Mont. 65.

Nebraska.— Rawlings *v.* Young Men's Christian Assoc., 48 Nebr. 216, 66 N. W. 1124.

North Carolina.— Mauney *v.* Crowell, 84 N. C. 314; Osborne *v.* Ballew, 29 N. C. 415.

Vermont.— See Mattocks *v.* Stearns, 9 Vt. 326.

England.— Doe *v.* Ross, 8 Dowl. P. C. 389, 4 Jur. 321, 10 L. J. Exch. 201, 7 M. & W. 102, the leading case on this point.

The contents of a letter may be proved by parol without accounting for the absence of a copy. Brown *v.* Woodman, 6 C. & P. 206, 25 E. C. L. 396.

The record of a deed is only secondary evidence and is not superior to parol; therefore the party desiring to prove the contents of a deed may introduce parol evidence without showing that no record of the deed is in existence. Simpson *v.* Edens, 14 Tex. Civ. App. 235, 38 S. W. 474. See also Mattocks *v.* Stearns, 9 Vt. 326.

The copy of a grant from the register's office, and one from the office of the secretary of the state, are both secondary evidence; and, where secondary evidence is admissible it is not a valid objection to the copy from the register's office that one from the office of the secretary would be better evidence. Osborne *v.* Ballew, 29 N. C. 415.

Telegrams.— Under the rule that there are no degrees of secondary evidence it is held that where the telegraph message actually delivered is the best and primary evidence of the contents of the message, if its non-production is satisfactorily accounted for, parol evidence is admissible, even though there be other secondary evidence which may be more satisfactory, as for instance, a written copy or the message delivered to the telegraph company. Nickerson *v.* Spindell, 164 Mass. 25, 41 N. E. 105; Magie *v.* Hermann, 50 Minn. 424, 52 N. W. 909, 36 Am. St. Rep. 660. See also Smith *v.* Easton, 54 Md. 138, 39 Am. Rep. 355.

51. In the case of Eslow *v.* Mitchell, 26 Mich. 500, 502, it was declared that "there is no rule of law that requires secondary evidence to be of one kind rather than another, where the writing is a private writing, and no counterpart is legally presumed or required to exist." But in Phillips *v.* U. S. Benevolent Soc., 125 Mich. 186, 84 N. W. 57, the point was treated as still unsettled, but not being necessary to the decision of the case was of course undecided. The members of the court were equally divided in

nature of this evidence itself, or is made to appear by the objecting party, that other and more satisfactory secondary evidence is known to the other party and can be produced by him.[52] Moreover, where the secondary evidence offered is parol, the otherwise competent testimony of one witness cannot be rejected on the ground that it is not as conclusive and satisfactory as would be the testimony of some other witness who is not called.[53]

H. Suppression of Primary Evidence. As a general rule a party will not be allowed to give secondary evidence of the contents of original papers which are in his possession and which he has refused to produce upon notice.[54] And, although by such refusal he has compelled his adversary to resort to secondary evidence, he is still precluded from introducing secondary evidence in his own behalf.[55] Nor can he by subsequently producing the original document exclude the secondary evidence given by his adversary.[56] But whether the party has estopped himself from using secondary evidence is a question the determination of which depends upon the facts of the particular case and rests largely in the sound discretion of the trial court.[57]

XVI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.*

A. General Rule — 1. Rule Stated. The general rule is that when any judgment of any court, or any other judicial or official proceeding, or any grant or other disposition of property, or any contract, agreement, or undertaking has been reduced to writing, and is evidenced by a document or series of documents, the contents of such documents cannot be contradicted, altered, added to, or varied by parol or extrinsic evidence. This rule exists independent of statute, but has been embodied in the statute law of some states.[58] The rule is a neces-

their opinions on the question. Yet in Dillon *v.* Howe, 98 Mich. 168, 57 N. W. 102, it was held that, where a copy of a time book is accessible, the admission of parol evidence of its contents is error.

52. *Georgia.*— Doe *v.* Biggers, 6 Ga. 188.

Illinois.— Wilson *v.* South Park Com'rs., 70 Ill. 46; Cleveland, etc., R. Co. *v.* Newlin, 74 Ill. App. 638.

Iowa.— Conger *v.* Converse, 9 Iowa 554; Higgins *v.* Reed, 8 Iowa 298, 74 Am. Dec. 305.

Minnesota.— Minneapolis Times Co. *v.* Nimocks, 53 Minn. 381, 55 N. W. 546.

Missouri.— Leavenworth First Nat. Bank *v.* Wright, 104 Mo. App. 242, 78 S. W. 686.

Oregon.— See Howe *v.* Taylor, 9 Oreg. 288.

Texas.— Lewis *v.* San Antonio, 7 Tex. 288.

Vermont.— See Mattocks *v.* Stearns, 9 Vt. 326.

United States.— Nash. *v.* Williams, 20 Wall. 226, 22 L. ed. 254; Butler *v.* Maples, 9 Wall. 766, 19 L. ed. 822; Renner *v.* Columbia Bank, 9 Wheat. 581, 6 L. ed. 166.

Where there is no direct evidence obtainable to establish the contents of a lost writing, circumstantial evidence is admissible. Johnson *v.* Franklin, (Tex. Civ. App. 1903) 76 S. W. 611, in which circumstantial evidence was admitted to establish the contents of a report of commissioners appointed to make partition of an estate.

Contents of lost telegram.— An objection that parol evidence of the contents of a lost telegram is but evidence of the contents of a copy, not of the original, is untenable, where it does not appear either from the evidence or from any judicial knowledge that any copy was made. Southern R. Co. *v.* Howell, 135 Ala. 639, 34 So. 6.

53. Nelson *v.* Boynton, 3 Metc. (Mass.) 396, 37 Am. Dec. 148; Smith *v.* Valentine, 19 Minn. 452; Althouse *v.* Jamestown, 91 Wis. 46, 64 N. W. 423. Thus the contents of lost letters may be proved by any one cognizant of their contents without accounting for the absence of the person to whom they were written. Drish *v.* Davenport, 2 Stew. (Ala.) 266.

54. Platt *v.* Platt, 58 N. Y. 646; Dole *v.* Belden, 1 N. Y. Suppl. 667; Barnes *v.* Lynch, 9 Okla. 156, 56 Pac. 995.

55. Gage *v.* Campbell, 131 Mass. 566; Dole *v.* Belden, 1 N. Y. Suppl. 667.

56. Peytavin *v.* Hopkins, 5 Mart. (La.) 438; Doe *v.* Hodgson, 12 A. & E. 135, 4 Jur. 1302, 9 L. J. Q. B. 327, 2 M. & Rob. 183, 4 P. & D. 142, 40 E. C. L. 75; Edmonds *v.* Challis, 7 C. B. 413, 6 D. & L. 581, 62 E. C. L. 413.

57. State *v.* Marsh, 70 Vt. 288, 40 Atl. 836.

58. *Alabama.*—Lakeside Land Co. *v.* Dromgoole, 89 Ala. 505, 7 So. 444; Moody *v.* McCown, 39 Ala. 586; Alabama, etc., R. Co. *v.* Sanford, 36 Ala. 703; Beard *v.* White, 1 Ala. 436.

Arizona.— R. H. Burmister, etc., Co. *v.* Empire Gold Min., etc., Co., (1903) 71 Pac. 961; Stewart *v.* Albuquerque Nat. Bank,

* By Joseph Walker Magrath. Revised and edited by Charles C. Moore and Wm. Lawrence Clark.

sary one because of the obvious fact that written instruments would soon come to be of little value if their explicit provisions could be varied, controlled, or superseded by such evidence, and it is also plain that a different rule would

(1891) 30 Pac. 303; Snead *v.* Tietjen, (1890) 24 Pac. 324.

Arkansas.— Colonial, etc., Mortg. Co. *v.* Jeter, 71 Ark. 185, 71 S. W. 945; Richardson *v.* Comstock, 21 Ark. 69.

California.— Frink *v.* Roe, 70 Cal. 296, 11 Pac. 820.

Colorado.— Drummond *v.* Carson, 4 Colo. 13; Hardwick *v.* McClurg, 16 Colo. App. 354, 65 Pac. 405.

Connecticut.— White Sewing Mach. Co. *v.* Feeley, 72 Conn. 181, 44 Atl. 36; Galpin *v.* Atwater, 29 Conn. 93.

Delaware.— Penn Steel Casting, etc., Co. *v.* Wilmington Malleable Iron Co., 1 Pennew. 337, 41 Atl. 236.

District of Columbia.— Rogers *v.* Garland, 19 D. C. 24; Owens *v.* Wilkinson, 20 App. Cas. 51.

Florida.— Harrell *v.* Durrance, 9 Fla. 490.

Georgia.— Forsyth Mfg. Co. *v.* Castlen, 112 Ga. 199, 37 S. E. 485, 81 Am. St. Rep. 28; Polhill *v.* Brown, 84 Ga. 338, 10 S. E. 921.

Hawaii.— See Testa *v.* Kahahawai, 12 Hawaii 254.

Idaho.— Jacobs *v.* Shenon, 3 Ida. 274, 29 Pac. 44.

Illinois.— Bulkley *v.* Devine, 127 Ill. 406, 20 N. E. 16, 3 L. R. A. 330; Johnson *v.* Glover, 121 Ill. 283, 12 N. E. 257; Longfellow *v.* Moore, 102 Ill. 289; Moulding *v.* Prussing, 70 Ill. 151; Emery *v.* Mohler, 69 Ill. 221; Chicago Pressed Steel Co. *v.* Clark, 87 Ill. App. 658; Millikin *v.* Starr, 79 Ill. App. 443; Westbrook *v.* Howell, 34 Ill. App. 571.

Indiana.— Baltimore, etc., R. Co. *v.* Seymour, 154 Ind. 17, 55 N. E. 953; Reynolds *v.* Louisville, etc., R. Co., 143 Ind. 579, 40 N. E. 410; Miller *v.* Indianapolis, 123 Ind. 196, 24 N. E. 228; Fordice *v.* Scribner, 108 Ind. 85, 9 N. E. 122; Sage *v.* Jones, 47 Ind. 122; Ferris *v.* Ludlow, 7 Ind. 517.

Indian Territory.— Fox *v.* Tyler, 3 Indian Terr. 1, 53 S. W. 462; Yocum *v.* Cary, 1 Indian Terr. 626, 43 S. W. 756.

Iowa.— McEnery *v.* McEnery, 110 Iowa 718, 80 N. W. 1071; Davis *v.* Danforth, 65 Iowa 601, 22 N. W. 889; Myers *v.* Munson, 65 Iowa 423, 21 N. W. 759; Atkinson *v.* Blair, 38 Iowa 156.

Kansas.— Rose *v.* Lanyon Zinc Co., 68 Kan. 126, 74 Pac. 625; Willard *v.* Ostrander, 46 Kan. 591, 26 Pac. 1017.

Kentucky.— American Assoc. *v.* Innis, 109 Ky. 595, 60 S. W. 388, 22 Ky. L. Rep. 1196; Cain *v.* Flynn, 4 Dana 499.

Louisiana.—St. Landry State Bank *v.* Meyers, 52 La. Ann. 1769, 28 So. 136; Selby *v.* Friedlander, 22 La. Ann. 381; Wilson *v.* Phillips, 4 La. Ann. 158; Macarty *v.* Gasquet, 11 Rob. 270; Lynch *v.* Burr, 7 Rob. 96; Gould *v.* Bridgers, 3 Mart. N. S. 692; Henderson *v.* Stone, 1 Mart. N. S. 639; Chabot *v.* Blanc, 5 Mart. 328.

Maine.— Millett *v.* Marston, 62 Me. 477; Gillerson *v.* Small, 45 Me. 17. See also Chamberlain *v.* Black, 64 Me. 40.

Maryland.—Scott *v.* Baltimore, etc., R. Co., 93 Md. 475, 49 Atl. 327; Ecker *v.* McAllister, 45 Md. 290.

Massachusetts.— Pike *v.* McIntosh, 167 Mass. 309, 45 N. E. 749; Bergin *v.* Williams, 138 Mass. 544; Adams *v.* Wilson, 12 Metc. 138, 45 Am. Dec. 240; Wakefield *v.* Stedman, 12 Pick. 562.

Michigan.— Crane *v.* Bayley, 126 Mich. 323, 85 N. W. 874; Johnson *v.* Bratton, 112 Mich. 319, 70 N. W. 1021; Cohen *v.* Jackoboice, 101 Mich. 409, 59 N. W. 665.

Minnesota.— Potter *v.* Easton, 82 Minn. 247, 84 N. W. 1011; Gasper *v.* Heimbach, 53 Minn. 414, 55 N. W. 559; Winona *v.* Thompson, 24 Minn. 199.

Mississippi.— Kerr *v.* Kuykendall, 44 Miss. 137; Wren *v.* Hoffman, 41 Miss. 619.

Missouri.— Boyd *v.* Paul, 125 Mo. 9, 28 S. W. 171; State *v.* Hoshaw, 98 Mo. 358, 11 S. W. 759; Bunce *v.* Beck, 43 Mo. 266.

Nebraska.— Sylvester *v.* Carpenter Paper Co., 55 Nebr. 621, 75 N. W. 1092; Norfolk Beet Sugar Co. *v.* Berger, 1 Nebr. (Unoff.) 151, 95 N. W. 336.

Nevada.— Menzies *v.* Kennedy, 9 Nev. 152.

New Hampshire.— Libby *v.* Mt. Monadnock Mineral Spring, etc., Co., 67 N. H. 587, 32 Atl. 772.

New Jersey.— Hanrahan *v.* National Bldg., etc., Assoc., 66 N. J. L. 80, 48 Atl. 517; Naumberg *v.* Young, 44 N. J. L. 331, 43 Am. Rep. 380; Useful Manufactures Soc. *v.* Haight, 1 N. J. Eq. 393.

New Mexico.— Miller *v.* Preston, 4 N. M. 314, 17 Pac. 565.

New York.—Uihlein *v.* Matthews, 172 N. Y. 154, 64 N. E. 792 [*reversing* 57 N. Y. App. Div. 476, 68 N. Y. Suppl. 309]; Armstrong *v.* Lake Champlain Granite Co., 147 N. Y. 495, 42 N. E. 186, 49 Am. St. Rep. 683; House *v.* Walch, 144 N. Y. 418, 39 N. E. 327; Case *v.* Phœnix Bridge Co., 134 N. Y. 78, 31 N. E. 254; Thomas *v.* Scutt, 127 N. Y. 133, 27 N. E. 961; Engelhorn *v.* Reitlinger, 122 N. Y. 76, 25 N. E. 297, 9 L. R. A. 548; Green *v.* Collins, 86 N. Y. 246, 40 Am. Rep. 531; McCluskey *v.* Cromwell, 11 N. Y. 593; Richardson *v.* Home Ins. Co., 47 N. Y. Super. Ct. 138; Lowber *v.* Le Roy, 2 Sandf. 202; Finck *v.* Bauer, 40 Misc. 218, 81 N. Y. Suppl. 625; Fellerman *v.* Goldberg, 28 Misc. 235, 58 N. Y. Suppl. 1113; James *v.* Coe, 61 N. Y. Suppl. 1099; Movan *v.* Hays, 1 Johns. Ch. 339.

North Carolina.— Hopper *v.* Justice, 111 N. C. 418, 16 S. E. 626; Kerr *v.* Brandon, 84 N. C. 128.

North Dakota.— Plano Mfg. Co. *v.* Root, 3 N. D. 165, 54 N. W. 924.

Ohio.— Tuttle *v.* Burgett, 53 Ohio St. 498, 42 N. E. 427, 53 Am. St. Rep. 649, 30 L. R. A. 214; J. Weller Co. *v.* Gordon, 24 Ohio Cir. Ct. 407; Eleventh St. Church of Christ *v.*

greatly increase the temptations to commit perjury.[59] It has been asserted that this rule is one of evidence merely[60] and does not depend upon the doctrine of

Pennington, 18 Ohio Cir. Ct. 408, 10 Ohio Cir. Dec. 74.

Oklahoma.— Moorehead *v.* Davis, 13 Okla. 166, 73 Pac. 1103; Liverpool, etc., Ins. Co. *v.* L. M. Richardson Lumber Co., 11 Okla. 579, 585, 69 Pac. 936, 938.

Oregon.— Hilgar *v.* Miller, 42 Oreg. 552, 72 Pac. 319; Stoddard *v.* Nelson, 17 Oreg. 417, 21 Pac. 456; Hoxie *v.* Hodges, 1 Oreg. 251.

Rhode Island.— Russell *v.* Morgan, 24 R. I. 134, 52 Atl. 809; Watkins *v.* Greene, 22 R. I. 34, 46 Atl. 38; Dyer *v.* Cranston Print Works, 21 R. I. 63, 41 Atl. 1015.

South Carolina.—Arnold *v.* Bailey, 24 S. C. 493; Wood *v.* Ashe, 1 Strobh. 407; Gibson *v.* Watts, 1 McCord Eq. 490.

South Dakota.— Stebbins *v.* Lardner, 2 S. D. 127, 48 N. W. 847; Osborne *v.* Stringham, 1 S. D. 406, 47 N. W. 408.

Tennessee.— Fields *v.* Stunston, 1 Coldw. 40; Clark *v.* Cuson, 3 Head 55; Kearly *v.* Duncan, 1 Head 397, 73 Am. Dec. 179; Ellis *v.* Hamilton, 4 Sneed 512; Price *v.* Allen, 9 Humphr. 703.

Texas.— Lanius *v.* Shuber, 77 Tex. 24, 13 S. W. 614; McKay *v.* Overton, 65 Tex. 82; Henry *v.* Chapman, (App. 1891) 16 S. W. 543; San Antonio, etc., R. Co. *v.* Brooking, (Civ. App. 1899) 51 S. W. 537; Sanborn *v.* Plowman, 13 Tex. Civ. App. 95, 35 S. W. 193; San Antonio Lumber Co. *v.* Dickey, (Civ. App. 1894) 27 S. W. 955.

Utah.— Haskins *v.* Dern, 19 Utah 89, 56 Pac. 953; Moyle *v.* Salt Lake City Cong. Soc., 16 Utah 69, 50 Pac. 806; Nephi Bank *v.* Foote, 12 Utah 157, 42 Pac. 205.

Vermont.— Noyes *v.* Evans, 6 Vt. 628, 27 Am. Dec. 579.

Virginia.— Hardin *v.* Kelley, 89 Va. 332, 15 S. E. 894; Jarrett *v.* Johnson, 11 Gratt. 327; Ratcliffe *v.* Allen, 3 Rand. 537.

Washington.— See Elliott *v.* Puget Sound, etc., Steamship Co., 22 Wash. 220, 60 Pac. 410.

West Virginia.— Providence-Washington Ins. Co. *v.* Board of Education, 49 W. Va. 360, 38 S. E. 679; Martin *v.* Monongahela R. Co., 48 W. Va. 542, 37 S. E. 563; Crislip *v.* Cain, 19 W. Va. 438.

Wisconsin.— Erbacher *v.* Seefeld, 92 Wis. 350, 66 N. W. 252; Taylor *v.* Davis, 82 Wis. 455, 52 N. W. 756.

Wyoming.— See Lonabaugh *v.* Morrow, 11 Wyo. 17, 70 Pac. 724.

United States.— Johnson *v.* St. Louis, etc., R. Co., 141 U. S. 602, 12 S. Ct. 124, 35 L. ed. 875; Fire Ins. Assoc. *v.* Wickham, 141 U. S. 564, 12 S. Ct. 84, 35 L. ed. 860; Seitz *v.* Brewers' Refrigerating Mach. Co., 141 U. S. 510, 12 S. Ct. 46, 35 L. ed. 837; Henderson *v.* Carbondale Coal, etc., Co., 140 U. S. 25, 11 S. Ct. 691, 35 L. ed. 332; Topliff *v.* Topliff, 122 U. S. 121, 7 S. Ct. 1057, 30 L. ed. 1110; Bast *v.* Ashland First Nat. Bank, 101 U. S. 93, 25 L. ed. 794; U. S. *v.* Neleigh, 1 Black 298, 17 L. ed. 144; Hunt *v.* Rousmanier, 8 Wheat. 174, 5 L. ed. 589; Arnold *v.* Scharbauer, 118 Fed. 1008; American Electric Constr. Co. *v.* Consumers' Gas Co., 47 Fed. 43 [*affirmed* in 50 Fed. 778, 1 C. C. A. 663]; *In re* Golder, 10 Fed. Cas. No. 5,510, 2 Hask. 28.

England.— Goss *v.* Nugent, 5 B. & Ad. 58, 2 L. J. K. B. 127, 2 N. & M. 28, 27 E. C. L. 34; Rutland's Case, 5 Coke 25; Smith *v.* Jeffryes, 15 L. J. Exch. 325, 15 M. & W. 561; Ogilvie *v.* Foljambe, 3 Meriv. 53, 17 Rev. Rep. 13; Meres *v.* Ansell, 3 Wils. K. B. 275.

Canada.— Bury *v.* Murray, 24 Can. Supreme Ct. 77; McAlpine *v.* How, 9 Grant Ch. (U. C.) 372; Dominion Oil Cloth Co. *v.* Martin, 6 Montreal Leg. N. 344; Fortier *v.* Bedard, 4 Quebec Super. Ct. 78; Gilpin *v.* Greene, 7 U. C. Q. B. 586; Upper Canada Bank *v.* Boulton, 7 U. C. Q. B. 235.

See 20 Cent. Dig. tit. "Evidence," §§ 1678–1968.

In Pennsylvania parol evidence is allowed to contradict or vary written instruments, "1st. Where there was fraud, accident or mistake in the creation of the instrument itself, and 2d. Where there has been an attempt to make a fraudulent use of the instrument, in violation of a promise or agreement made at the time the instrument was signed, and without which it would not have been executed." Phillips *v.* Meily, 106 Pa. St. 536, 543, per Paxson, C. J. In other cases the rule stated in the text obtains. Wodock *v.* Robinson, 148 Pa. St. 503, 24 Atl. 73.

Rule obtains both at law and in equity.— *Illinois.*— Gibbons *v.* Bressler, 61 Ill. 110.

Kentucky.— Harrison *v.* Talbot, 2 Dana 258.

Maine.— Eveleth *v.* Wilson, 15 Me. 109.

Maryland.— Watkins *v.* Stockett, 6 Harr. & J. 435.

Massachusetts.— Dwight *v.* Pomeroy, 17 Mass. 303, 9 Am. Dec. 148.

See 20 Cent. Dig. tit. "Evidence," §§ 1678–1968.

A conditional agreement cannot be changed to an absolute one by parol. St. Vrain Stone Co. *v.* Denver, etc., R. Co., 18 Colo. 211, 32 Pac. 827.

When such evidence is improperly admitted the court should instruct the jury to disregard it. Moorehead *v.* Davis, 13 Okla. 166, 73 Pac. 1103.

59. Millett *v.* Marston, 62 Me. 477.

Instrument not effective.— It has even been held that, although through some defect of form or by reason of some positive provision of law a written instrument cannot have the effect intended, it still remains the best evidence of the understanding of the parties and cannot be varied or contradicted by parol. Gardiner Mfg. Co. *v.* Heald, 5 Me. 381, 17 Am. Dec. 248, in which case parol evidence was held inadmissible to contradict a written instrument purporting to be a deed of partition and signed by the parties but not sealed.

60. Wilkinson *v.* Wilkinson, 17 N. C. 376.

estoppel at law,[61] nor upon the statute of frauds,[62] although it rests upon substantially the same principle.[63] But according to the modern and better view the rule which prohibits the modification of a written contract by parol is a rule, not of evidence merely, but of substantive law.[64]

2. Legal Effect of Instrument. The legal effect of a written instrument, even though not apparent from the terms of the instrument itself, but left to be implied by law, can no more be contradicted, explained, or controlled by parol or extrinsic evidence than if such effect had been expressed.[65] Thus where no time of performance is specified in a contract the legal effect is that it is to be performed within a reasonable time and parol evidence is not admissible to show an agreement that it shall be performed at a particular time;[66] and where no time

This rule is founded on the general rules of evidence in which writing stands higher in the scale than mere parol testimony. Ratcliffe *v.* Allison, 3 Rand. (Va.) 537. See also *infra*, XVII, C, 1, d.

61. Wilkinson *v.* Wilkinson, 17 N. C. 376.

62. Wesley *v.* Thomas, 6 Harr. & J. (Md.) 24; Reid *v.* Diamond Plate-Glass Co., 85 Fed. 193, 29 C. C. A. 110.

63. Union Mut. Ins. Co. *v.* Wilkinson, 13 Wall. (U. S.) 222, 20 L. ed. 617; Reid *v.* Diamond Plate-Glass Co., 85 Fed. 193, 29 C. C. A. 110. See, generally, Frauds, Statute of.

64. Pitcairn *v.* Philip Hiss Co., 125 Fed. 110, 113, 61 C. C. A. 657 [*citing* 1 Greenleaf Ev. (16th ed.) § 350*a*; Thayer Ev. 390 *et seq.*], where the court said: "Parol proof is excluded, not because it is lacking in evidentiary value, but because the law for some substantive reason declares that what is sought to be proved by it (being outside the writing by which the parties have undertaken to be bound) shall not be shown."

65. *Arkansas.*— Rector *v.* Bernaschina, 64 Ark. 650, 44 S. W. 222.

Iowa.— Fawkner *v.* Lew Smith Wall Paper Co., 88 Iowa 169, 49 N. W. 1003, 55 N. W. 200, (1891) 45 Am. St. Rep. 230; Mather *v.* Butler County, 28 Iowa 253; Wetherell *v.* Brobst, 23 Iowa 586.

Kentucky.— Coger *v.* McGee, 2 Bibb 321, 322, 5 Am. Dec. 610.

Maine.— Richards *v.* McKenney, 43 Me. 177; Maine Bank *v.* Smith, 18 Me. 99; Lowell *v.* Robinson, 16 Me. 357, 33 Am. Dec. 671.

Massachusetts.— Warren *v.* Wheeler, 8 Metc. 97; Salisbury *v.* Andrews, 19 Pick. 250. See also Higgins *v.* Livermore, 14 Mass. 106.

Missouri.— See Wise *v.* St. Louis Mar. Ins. Co., 23 Mo. 80.

Montana.— Riddell *v.* Peck-Williamson Heating, etc., Co., 27 Mont. 44, 69 Pac. 241.

New York.— Crocker *v.* Crocker, 5 Hun 587; Thomas *v.* Truscott, 53 Barb. 200; Boehm *v.* Lies, 60 N. Y. Super. Ct. 436, 18 N. Y. Suppl. 577; La Farge *v.* Rickert, 5 Wend. 187, 21 Am. Dec. 209; Pattison *v.* Hull, 9 Cow. 747; Thompson *v.* Ketchum, 8 Johns. 189, 5 Am. Dec. 332.

North Dakota.— Clendening *v.* Red River Valley Nat. Bank, 12 N. D. 51, 94 N. W. 901.

Ohio.— Douglass *v.* Campbell, 24 Ohio Cir. Ct. 241.

Vermont.— Brown *v.* Hitchcock, 28 Vt. 452; Butler *v.* Gale, 27 Vt. 739.

Wisconsin.— Cliver *v.* Heil, 95 Wis. 364, 70 N. W. 346.

United States.— Godkin *v.* Monahan, 83 Fed. 116, 27 C. C. A. 410.

England.— See Mercantile Bank *v.* Taylor, [1893] A. C. 317, 57 J. P. 741, 1 Reports 371.

In Pennsylvania the common-law rule stated in the text has not been adopted. Chalfant *v.* Williams, 35 Pa. St. 212.

Where technical language is used in a conveyance, it will be presumed that it was intended in a technical sense, and parol evidence is not admissible to vary its legal effect. Ryan *v.* Goodwyn, McMull. Eq. (S. C.) 451.

An assignment of a debt secured by mortgage passes the mortgage interest as an incident to the debt, even though it is not mentioned, and it is not permissible to show by parol that the assignor intended to reserve the mortgage. Pattison *v.* Hull, 9 Cow. (N. Y.) 747.

An assignment of a judgment carries the security, and, as this is part of the contract, it can no more be affected by parol evidence of matters of negotiation than can the language of the assignment be changed by such evidence. State *v.* Hoshaw, 98 Mo. 358, 11 S. W. 759.

A written promise to furnish board for "three persons" amounts to an agreement to furnish board for any three unobjectionable persons who may be designated by the promisee, and its legal import cannot be varied by parol evidence that the contract was to board three particular individuals. Rector *v.* Bernaschina, 64 Ark. 650, 44 S. W. 222.

66. *Illinois.*— Driver *v.* Ford, 90 Ill. 595.

Massachusetts.— Atwood *v.* Cobb, 16 Pick. 227, 26 Am. Dec. 657, where such evidence was held inadmissible, unless perhaps in connection with other facts as bearing on the question of what is a reasonable time for performance.

Michigan.— Stange *v.* Wilson, 17 Mich. 342.

Minnesota.— Liljengren Furniture, etc., Co. *v.* Mead, 42 Minn. 420, 44 N. W. 306.

Missouri.— Blake Mfg. Co. *v.* Jaeger, 81 Mo. App. 239.

New York.— Boehm *v.* Lies, 60 N. Y. Super. Ct. 436, 18 N. Y. Suppl. 577; Morowsky *v.* Rohrig, 4 Misc. 167, 23 N. Y. Suppl. 880.

Texas.— Self *v.* King, 28 Tex. 552.

for payment of an amount is fixed, it is, according to the established rule of law, payable on demand, and hence no parol evidence is admissible to show an agreement as to the time of payment.[67] Similarly where a contract of employment does not specify the time it shall remain in force, it is terminable by either party at pleasure, and parol evidence cannot be admitted of an agreement that the services shall be continued for a specified time.[68] So also it has been held that where a contract of employment was silent as to compensation, the law implied a reasonable sum and parol evidence was not admissible to show a specific sum.[69] It has also been held that, as the legal effect of two mortgages to secure instalments of the same debt is to give priority as to the proceeds of the mortgaged property to the instalments first due, such legal effect cannot be altered or varied by parol evidence tending to prove an agreement that the two mortgages should be of equal liens.[70]

B. Writings Within the Rule — 1. Public or Official Records, Documents, or Proceedings — a. Judicial Records or Proceedings — (i) *In General.* The rule under discussion is stringently enforced to forbid the admission of any parol or extrinsic evidence to contradict or impeach, vary or explain, judicial records,[71] especially where the right of third persons acquired under a judgment would be

But see *infra*, XVI, C, 39, b.

67. Warren *v.* Wheeler, 8 Metc. (Mass.) 97; Thompson *v.* Phelan, 22 N. H. 339; Thompson *v.* Ketcham, 8 Johns. (N. Y.) 190, 5 Am. Dec. 332. But see *infra*, XVI, C, 39, b.

68. Irish *v.* Dean, 39 Wis. 562.

69. Williams *v.* Kansas City Suburban Belt R. Co., 85 Mo. App. 103.

70. Isett *v.* Lucas, 17 Iowa 503, 85 Am. Dec. 572.

71. *Alabama.*— King *v.* Martin, 67 Ala. 177; Weakley *v.* Gurley, 60 Ala. 399; Thomason *v.* Odum, 31 Ala. 108, 68 Am. Dec. 159; State *v.* Allen, 1 Ala. 442. See also State *v.* Bell, 5 Port. 365.

Arkansas.— Gates *v.* Bennett, 33 Ark. 475; Newton *v.* State Bank, 14 Ark. 9, 58 Am. Dec. 363; May *v.* Jameson, 11 Ark. 368.

California.— Wilson *v.* Wilson, 45 Cal. 399.

Connecticut.— Douglass *v.* Wickwire, 19 Conn. 489; Rogers *v.* Moor, 2 Root 159.

Georgia.— Guerry *v.* Perryman, 6 Ga. 119.

Illinois.— Rubel *v.* Title Guarantee, etc., Co., 199 Ill. 110, 64 N. E. 1033 [*affirming* 101 Ill. App. 439]; Herrington *v.* McCollum, 73 Ill. 476; Rivard *v.* Gardner, 39 Ill. 125; Eaton *v.* Harth, 45 Ill. App. 355; Weigley *v.* Matson, 24 Ill. App. 178 [*affirmed* in 125 Ill. 64, 16 N. E. 881, 8 Am. St. Rep. 355].

Indiana.— Straub *v.* Terre Haute, etc., R. Co., 135 Ind. 458, 35 N. E. 504.

Indian Territory.— Barringer *v.* Booker, 1 Indian Terr. 432, 35 S. W. 246.

Iowa.— State *v.* Miller, 95 Iowa 368, 64 N. W. 288; Maynes *v.* Brockway, 55 Iowa 457, 8 N. W. 317; Ney *v.* Dubuque, etc., Co., 20 Iowa 347; Farley *v.* Budd, 14 Iowa 289.

Kansas.— *In re* Macke, 31 Kan. 54, 1 Pac. 785.

Kentucky.— Bennett *v.* Tiernay, 78 Ky. 580; Green *v.* Goodrum, 4 Metc. 274.

Louisiana.— Townsend *v.* Fontenot, 42 La. Ann. 890, 8 So. 616; Mann *v.* Mann, 33 La. Ann. 351; Green *v.* Reagan, 32 La. Ann. 974; Henderson *v.* Walmsly, 23 La. Ann. 562; Nolan *v.* Babin, 12 Rob. 531; Skipwith *v.* His Creditors, 19 La. 198; Williams *v.* Hooper, 4 Mart. N. S. 176.

Maine.— Pennell *v.* Curd, 96 Me. 392, 52 Atl. 801; Willard *v.* Whitney, 49 Me. 235; Cragin *v.* Carleton, 21 Me. 492; Hunt *v.* Elliott, 20 Me. 312; Ellis *v.* Madison, 13 Me. 312.

Maryland.— Burgess *v.* Lloyd, 7 Md. 178; Butler *v.* State, 5 Gill & J. 511; Maryland Ins. Co. *v.* Bathurst, 5 Gill & J. 159.

Massachusetts.— Bent *v.* Stone, 184 Mass. 92, 68 N. E. 46; Speirs, etc., Co. *v.* Robbins, 182 Mass. 128, 65 N. E. 25; Com. *v.* Lane, 151 Mass. 356; Com. *v.* Certain Intoxicating Liquors, 135 Mass. 519; Winchester *v.* Thayer, 129 Mass. 129.

Mississippi.— Sadler *v.* Prairie Lodge, 59 Miss. 572; Murrah *v.* State, 51 Miss. 652.

Missouri.— Cumberland Presb. Church *v.* Drummond, 167 Mo. 54, 66 S. W. 930; Long *v.* Long, 141 Mo. 352, 44 S. W. 341; Brown *v.* Walker, 85 Mo. 262 [*affirming* 11 Mo. App. 226]; Knight *v.* Cherry, 64 Mo. 513; Montgomery *v.* Farley, 5 Mo. 233; State *v.* Stinebaker, 90 Mo. App. 280; Crockett *v.* Althouse, 35 Mo. App. 404.

New Jersey.— Wallace *v.* Coil, 24 N. J. L. 606.

New York.— Sims *v.* Sims, 12 Hun 231; People *v.* Powers, 7 Barb. 462 [*affirmed* in 6 N. Y. 50].

North Carolina.— Galloway *v.* McKeithen, 27 N. C. 12, 42 Am. Dec. 153; Wade *v.* Odeneal, 14 N. C. 423.

Ohio.— Merchant *v.* North, 10 Ohio St. 251; Cincinnati *v.* Hosea, 19 Ohio Cir. Ct. 744, 10 Ohio Cir. Dec. 618.

Pennsylvania.— Springer *v.* Wood, 3 Pa. Cas. 391, 6 Atl. 330; Withers *v.* Livezey, 1 Watts & S. 433; McDermott *v.* U. S. Life Ins. Co., 3 Serg. & R. 604; Leech *v.* Armatage, 2 Dall. 125, 1 L. ed. 316; Williams *v.* McNeal, 3 Luz. Leg. Reg. 37.

affected.[72] This rule protects pleadings forming a part of the judgment-roll,[73] recitals in the record,[74] the description in a writ,[75] and even the clerk's file-mark on the return of a writ,[76] or his entry of the filing of a bill of exceptions in his office.[77] It also precludes the admission of evidence showing the grounds of the judgment, order, or decree,[78] or to show that the grounds on which the judgment was apparently based did not exist,[79] or that the verdict was improper.[80]

(II) *Records of Probate Court.* The rule against the contradiction, impeachment, or variation of judicial records by parol or other extrinsic evidence applies to the records of probate courts.[81] Accordingly the courts have refused

South Carolina.— Parr *v.* Lindler, 40 S. C. 193, 18 S. E. 636.

South Dakota.— Taylor *v.* Neys, 11 S. D. 605, 79 N. W. 998.

Tennessee.— Union, etc., Bank *v.* Memphis, 107 Tenn. 66, 64 S. W. 13; Carrick *v.* Armstrong, 2 Coldw. 265; State *v.* Disney, 5 Sneed 598.

Texas.— Allen *v.* Read, 66 Tex. 13, 17 S. W. 115.

Vermont.— *In re* Bodwell, 66 Vt. 231, 28 Atl. 989; Beech *v.* Rich, 13 Vt. 595.

Virginia.— Chesapeake, etc., R. Co. *v.* Rison, 99 Va. 18, 37 S. E. 320; Quinn *v.* Com., 20 Gratt. 138; Vaughan *v.* Com., 17 Gratt. 386; Nichols *v.* Campbell, 10 Gratt. 560; Beeson *v.* Stephenson, 7 Leigh 107.

West Virginia.— Wandling *v.* Straw, 25 W. Va. 692.

United States.— Lyon *v.* Perin, etc., Mfg. Co., 125 U. S. 698, 8 S. Ct. 1024, 31 L. ed. 839; Humphreys *v.* Cincinnati Third Nat. Bank, 75 Fed. 852, 21 C. C. A. 538; Dilworth *v.* Johnson, 6 Fed. 459; Riggs *v.* Collins, 20 Fed. Cas. No. 11,824, 2 Biss. 268 [*affirmed* in 14 Wall. 491, 20 L. ed. 723]; Vogler *v.* Spaugh, 28 Fed. Cas. No. 16,988, 4 Biss. 288.

See 20 Cent. Dig. tit. "Evidence," § 1678.

A judgment for a specific amount cannot be contradicted by extrinsic evidence to show that the judgment was really rendered for the specie value of that amount of depreciated bank-notes. Mandeville *v.* Bracy, 31 Miss. 460.

An order of adjournment precludes the reception of parol evidence that the court was in fact in session at a certain time subsequent to such order. Ainge *v.* Corby, 70 Mo. 257.

Answers of a party to interrogatories on facts and articles relative to a verbal sale alleged to have been made by him of immovable property, which negative such a sale, cannot be contradicted by parol evidence. Wright-Blodgett Co. *v.* Elms, 106 La. 150, 30 So. 311.

Where a judgment has been satisfied and much time has elapsed the court will not allow it to be amended on parol proof. Pitman *v.* Lowe, 24 Ga. 429.

A confessed judgment in which a stay is claimed, but in which no reference is made to security, cannot be varied by showing a parol agreement for such stay "without security." Mayse *v.* Biggs, 3 Head (Tenn.) 36.

Where an action has been settled by a consent decree, and another action is brought to recover goods alleged to be due plaintiff on such settlement, evidence showing that such property was to be delivered in addition to the property specified in the decree is inadmissible, unless it appear that the omission to enumerate it was due to fraud, accident, or mistake. Williams *v.* Huson, 54 Ga. 28.

A confession of judgment by an attorney may be shown by the testimony of the attorney to have been made without authority. Berg *v.* McLafferty, 9 Pa. Cas. 135, 12 Atl. 460.

72. Rivard *v.* Gardner, 39 Ill. 125; Scull *v.* Wallace, 15 Serg. & R. (Pa.) 231; Riggs *v.* Collins, 20 Fed. Cas. No. 11,824, 2 Biss. 268 [*affirmed* in 14 Wall. 491, 20 L. ed. 723].

A title resting on an adjudication of a court of record cannot be set aside on the evidence of witnesses as to the impression made on their minds by transactions occurring more than seventeen years before, especially where such impressions were produced mainly by the conduct and *ex parte* declarations of the adverse claimant. Haynes *v.* Swann, 6 Heisk. (Tenn.) 560.

73. Long *v.* Webb, 24 Minn. 380.

74. Atwood *v.* Atwood, 55 Mo. App. 370.

A recital in an execution respecting the time of the rendition of the judgment cannot be contradicted by oral evidence of the clerk. Morris *v.* Hubbard, 10 S. D. 259, 72 N. W. 894.

75. Stuart *v.* Morrison, 67 Me. 549.

76. Sweet *v.* Gibson, 123 Mich. 699, 83 N. W. 407. *Contra,* Franke *v.* Alexander, 88 Mo. App. 35, where a clerk's file-mark was held only *prima facie* evidence of when a petition was lodged in his office.

77. Walker *v.* Smith, 50 Ga. 487.

78. Forsyth *v.* Vehmeyer, 75 Ill. App. 308; Legg *v.* Legg, 8 Mass. 99; Gallagher *v.* Kenedy, 2 Rawle (Pa.) 163; Sheets *v.* Hawk, 14 Serg. & R. (Pa.) 173, 16 Am. Dec. 486.

The report of a master to whom a suit in equity has been referred is inadmissible to explain or in any way affect the final judgment therein. Sparhawk *v.* Twichell, 1 Allen (Mass.) 450.

79. Sheppard *v.* Whitfield, 50 Ga. 311.

Judgment against joint defendants.— In a suit on a judgment obtained in another state against two, as joint defendants, parol evidence is inadmissible to disprove their joint liability to plaintiff. Powell *v.* Davis, 60 Ga. 70.

80. Taylor *v.* Talman, 2 Root (Conn.) 291.

81. *Alabama.*— Deslonde *v.* Darrington, 29 Ala. 92.

to receive such evidence to impeach a grant of letters of administration,[82] or the record of the execution of an administrator's bond.[83] But the record of a will is not conclusive.[84]

(III) *RECORDS OF JUSTICE'S COURT* — (A) *In General.* The record or docket of a justice of the peace is the best evidence to show the proceedings before him, and parol or extrinsic evidence is inadmissible to contradict or vary it.[85] This rule will protect a justice's return on appeal,[86] or his certificate as to the proceed-

Louisiana.— Wood *v.* Harrell, 14 La. Ann. 61.

Minnesota.— Dayton *v.* Mintzer, 22 Minn. 393.

Mississippi.— McFarlane *v.* Randle, 41 Miss. 411; Cason *v.* Cason, 31 Miss. 578.

Missouri.—Lamothe *v.* Lippott, 40 Mo. 142.

Ohio.— Shroyer *v.* Richmond, 16 Ohio St. 455.

Pennsylvania.—Leedom *v.* Lombaert, 80 Pa. St. 381; Stecher *v.* Com., 6 Whart. 60.

Texas.— See Dickson *v.* Moore, 9 Tex. Civ. App. 514, 30 S. W. 76.

Recitals in orders.— Bishop *v.* Hampton, 15 Ala. 761.

Recital in record of appointment of guardian.— Lynch *v.* Kirby, 36 Mich. 238.

Date of decree.— Richardson *v.* Hazelton, 101 Mass. 108.

Holding over of executor.— Brown *v.* Williams, 16 La. 344.

82. Hankinson *v.* Charlotte, etc., R. Co., 41 S. C. 1, 19 S. E. 206.

Irregularities respecting bond and oath.— Eslava *v.* Elliott, 5 Ala. 264, 39 Am. Dec. 326.

Letters issued without authority.—Where letters of curatorship are offered in evidence the adverse party may prove that no order had been made appointing a curator, for such evidence does not contradict the letters but shows that they were issued without authority and in error. Lawson *v.* Mosely, 6 La. Ann. 700.

83. Taylor *v.* Jones, 3 La. Ann. 619.

Conditional signature of surety.— Taylor *v.* Jones, 3 La. Ann. 619.

84. Naylor *v.* Brown, 32 Misc. (N. Y.) 298, 66 N. Y. Suppl. 729; Morris *v.* Keyes, 1 Hill (N. Y.) 540. See, generally, WILLS.

Record may be attacked as not being a correct copy of will.— Naylor *v.* Brown, 32 Misc. (N. Y.) 298, 66 N. Y. Suppl. 729.

The New Jersey statute, making copies of the records of wills evidence, was not designed to give to persons claiming under such instruments any undue advantage when a question was mooted as to their honest or legal execution. The intention was to make them *prima facie* evidence for the sake of convenience. But when such record is produced, the ordinary principles of evidence become applicable, one of which is that the statements of a subscribing witness made out of court which do not coincide with his affidavit at the time of probate, or with the import of the attestation clause, may be introduced by way of contradiction. Otterson *v.* Hafford, 36 N. J. L. 129, 13 Am. Rep. 429.

85. *Alabama.*— *Ex p.* Davis, 95 Ala. 9, 11 So. 308.

Connecticut.— Douglass *v.* Wickwire, 19 Conn. 489.

Illinois.— Garfield *v.* Douglass, 22 Ill. 100, 74 Am. Dec. 137; Saterlee *v.* Hickman, 38 Ill. App. 139.

Maine.— Dolloff *v.* Hartwell, 38 Me. 54; Ayer *v.* Fowler, 30 Me. 347; Carey *v.* Osgood, 18 Me. 152.

Massachusetts.— May *v.* Hansmond, 146 Mass. 439, 15 N. E. 925.

Michigan.— Weaver *v.* Lammon, 62 Mich. 366, 28 N. W. 905; Clark *v.* Holmes, 1 Dougl. 390.

Missouri.— Sutton *v.* Cole, 155 Mo. 206, 55 S. W. 1052; Cooksey *v.* Kansas City, etc., R. Co., 74 Mo. 477; Murray *v.* Lafton, 15 Mo. 621.

New York.— Smith *v.* Compton, 20 Barb. 262; Hard *v.* Shipman, 6 Barb. 621.

North Carolina.—Jones *v.* Judkins, 20 N. C. 454, 34 Am. Dec. 302.

Ohio.— Herig *v.* Nougaret, 7 Ohio St. 480.

Pennsylvania.— Gardner *v.* Davis, 15 Pa. St. 41; Coffman *v.* Hampton, 2 Watts & S. 377, 37 Am. Dec. 511; Ritter *v.* Keller, 2 Pa. Dist. 519, 12 Pa. Co. Ct. 239.

Tennessee.— Witt *v.* Russey, 10 Humphr. 208, 51 Am. Dec. 701.

Texas.— Irwin *v.* Bexar County, (Civ. App. 1901) 63 S. W. 550.

Vermont.— Owen *v.* State, 55 Vt. 47; Eastman *v.* Waterman, 26 Vt. 494; Pike *v.* Hill, 15 Vt. 183; Barnard *v.* Flanders, 12 Vt. 657; Spaulding *v.* Chamberlain, 12 Vt. 538, 36 Am. Dec. 358.

See 20 Cent. Dig. tit. "Evidence," § 1680.

The deposition of a justice who rendered a judgment cannot be received to discredit it. Paul *v.* Hussey, 35 Me. 97.

Appearance of parties.— Facey *v.* Fuller, 13 Mich. 527.

Number of prosecutions.— Sayles *v.* Briggs, 4 Metc. (Mass.) 421.

An entry of a magistrate allowing time for a party to give security for an appeal from his judgment cannot be impeached by parol evidence to show that such entry was made without an affidavit of the party that he was then unprepared with security. Long *v.* Weaver, 52 N. C. 626.

Supplying omissions.— Where a justice's docket omits to enter a proceeding which should be entered, other proper evidence may be admitted to prove the proceeding. Anderson *v.* Henry, 45 W. Va. 319, 31 S. E. 998.

86. Holden *v.* Barrows, 39 Me. 135; Young *v.* Conklin, 3 Misc. (N. Y.) 123, 23 N. Y. Suppl. 993.

ings in a cause before him,[87] and will preclude a showing that the justice intended to enter a judgment different from the one recorded in his docket,[88] or that the form of the judgment was the result of a supposition that no other could properly be entered in the case.[89]

(B) *Proceeding to Obtain Surety of the Peace.* The record of a justice in a proceeding before him to obtain surety of the peace is not conclusive, but may be contradicted by parol evidence.[90]

(IV) *Records of Police Court.* The rule against the controlling of judicial records by parol evidence has been applied even to the records of a police court.[91]

(V) *Foreign Judgments.* The rule that a judicial record cannot be contradicted applies where an action is brought in one state upon a judgment obtained in another state.[92] But it has been held that the sentence of a foreign court of admiralty condemning property is only *prima facie* evidence of the facts upon which the condemnation purports to be founded, and in a collateral action such evidence may be rebutted by proof that no such facts existed.[93]

(VI) *Record as to Particular Matters*—(A) *Acknowledgment of Service.* Parol evidence is inadmissible to vary the date of the acknowledgment of service on a bill of exceptions.[94]

(B) *Appraisement.* Parol evidence is not competent to contradict or impeach the report or action of appraisers on execution proceedings,[95] or in ejectment.[96]

(C) *Assignment of Dower.* The record of an assignment of dower is conclusive as to the identity of the land set off[97] and its boundaries,[98] and also as to dower having been assigned in all the land.[99]

(D) *Drawing of Jury.* Oral evidence is inadmissible to impugn the certificate of officers to whom the selection or drawing of jurors is confided.[1]

(E) *Duration of Judgment For Alimony.* Where a judgment for alimony does not recite the length of time for which it is to be paid, it cannot be shown that there was a parol agreement between the parties before the entry of the divorce judgment that the alimony adjudged should continue during the life of the woman, for the effect of such testimony would be to contradict the terms and legal effect of the judgment.[2]

(F) *Elements or Items Included in Verdict or Award.* It may be shown that in the trial of an action the jury allowed in their award of damages certain items embraced within the declaration;[3] but the rule against contradicting the record precludes any showing that in a suit brought for one cause of action damages were given for another and different cause of action,[4] or for anything not included in the declaration.[5] Similarly, where an action has been tried by

The adjournment of a court is a part of the trial and the justice's return as to the same is conclusive. Young *v.* Conklin, 3 Misc. (N. Y.) 123, 23 N. Y. Suppl. 993.

87. McLean *v.* Hugarin, 13 Johns. (N. Y.) 184. *Contra*, Morton *v.* Edwin, 19 Vt. 77.

88. Zimmerman *v.* Zimmerman, 15 Ill. 84.

89. Brintall *v.* Foster, 7 Wend. (N. Y.) 103.

90. Smelzer *v.* Lockhart, 97 Ind. 315.

91. Tufts *v.* Hancox, 171 Mass. 148, 50 N. E. 459; Com. *v.* O'Brien, 152 Mass. 495, 25 N. E. 834; Sewall *v.* Sullivan, 108 Mass. 355.

92. Powell *v.* Davis, 60 Ga. 70; Field *v.* Gibbs, 9 Fed. Cas. No. 4,768, Pet. C. C. 155. And see, generally, Judgments.

93. Ocean Ins. Co. *v.* Francis, 2 Wend. (N. Y.) 64, 19 Am. Dec. 549.

94. Shealy *v.* McClung, 50 Ga. 485.

95. Tibbits *v.* Merrill, 12 Me. 122; Boody *v.* York, 8 Me. 272; Fletcher *v.* State Capital Bank, 37 N. H. 369.

96. Patrick *v.* Woods, 3 Bibb (Ky.) 29.

97. Young *v.* Gregory, 46 Me. 475.

98. Farr *v.* Farr, 21 Ark. 573.

99. Fuller *v.* Ruse, 153 Mass. 46, 26 N. E. 410.

1. State *v.* Allen, 1 Ala. 442.

Absence of the clerk cannot be shown where by the certificate or *procès verbal* his presence appears. State *v.* Clarkson, 3 Ala. 378; State *v.* Revells, 31 La. Ann. 387.

Where the clerk's name appears to the certificate it cannot be shown that it was not signed by him. State *v.* Clarkson, 3 Ala. 378.

2. Maxwell *v.* Sawyer, 90 Wis. 352, 63 N. W. 283. See Divorce, 14 Cyc. 788.

3. Wallace *v.* Coil, 24 N. J. L. 600.

4. Wallace *v.* Coil, 24 N. J. L. 600.

5. Craig *v.* Todd, 3 Brev. (S. C.) 551.

the parties and the court on the theory that plaintiff is entitled to have a certain matter considered as an element of his damages, the record of the case cannot be contradicted by testimony of the jurors that they did not include any allowance on account of such matter in their verdict.[6] Nor can it be shown after the confirmation of the report of commissioners allowing damages for the widening of a street that in the amount awarded by them to a certain person was included a sum intended for the benefit of another person, and for a purpose not appearing in the report.[7]

(G) *Inquisition of Lunacy.* It has been held that the record of selectmen who are made by statute a judicial tribunal for holding inquisitions of lunacy cannot be impeached by parol evidence;[8] but any person not a party to an inquisition may, if the proceeding is admitted in evidence against him, introduce other evidence to show that the alleged lunatic was of sound mind at any period of the time covered thereby.[9]

(H) *Judicial or Execution Sale.* The general rule with respect to the conclusiveness of records applies to the record of a judicial or execution sale.[10] Consequently it cannot be shown by parol or extrinsic evidence in contradiction of the record that necessary prerequisites to the sale were omitted;[11] that the sale did not pass the quantity of land,[12] or the title[13] which the record shows to have passed; that the real purchaser was a person other than the one stated on the record;[14] that the terms and conditions of sale were other than those appearing by the record;[15] nor that property was sold without authority.[16] But parol evidence has been held admissible for the purpose of showing the amount of money received by an administrator for a sale of land to be different from the amount named in the report of sale made by him.[17]

(I) *Orders of Court.* The rule forbidding the admission of parol or extrinsic evidence to contradict or vary judicial records or the recitals therein applies to orders of the court;[18] but such evidence is admissible for the purpose of rebutting a charge of fraud in the procurement of an order.[19]

(J) *Poor Debtor Proceedings.* It has been asserted as the rule that a certificate of justices of the peace as to the administration of a poor debtor's oath or bond is conclusive,[20] unless its effect be destroyed by an agreed statement of facts or the voluntary admission of illegal testimony;[21] and the same is true as to the certificate that due notice was given to the creditor.[22] But in other jurisdictions the contrary rule prevails.[23]

6. Oster *v.* Broe, 161 Ind. 113, 64 N. E. 918.

7. Turner *v.* Williams, 10 Wend. (N. Y.) 139.

8. Eastport *v.* Belfast, 40 Me. 262.

9. Aber *v.* Clark, 10 N. J. L. 217, 18 Am. Dec. 417. See also *infra*, XVI, D, 3, a.

10. Linton *v.* Wikoff, 12 La. Ann. 878.

The name of the land as appearing by the record is conclusive evidence. Collins *v.* Ball, 82 Tex. 259, 17 S. W. 614, 27 Am. St. Rep. 877.

11. Pritchard *v.* Madren, 31 Kan. 38, 2 Pac. 691.

12. Thompson *v.* Wofford, 13 S. C. 216.

13. McKenzie *v.* Cacon, 40 La. Ann. 157, 4 So. 65.

14. Small *v.* Hodgen, 1 Litt. (Ky.) 16.

15. Lewis *v.* Labauve, 13 La. Ann. 382; Vandever *v.* Baker, 13 Pa. St. 121.

A record showing a sale by the acre cannot be contradicted. Myers *v.* Lindsay, 5 Lea (Tenn.) 331.

16. Henbaugh *v.* Powell, 3 Pa. Dist. 177, 13 Pa. Co. Ct. 360. See also *infra*, XVI, F.

Execution paid.— Pitts *v.* Clark, 2 Root (Conn.) 221.

17. State *v.* Lindley, 98 Ind. 48.

18. Deslonde *v.* Darrington, 29 Ala. 92; Boynton *v.* People, 155 Ill. 66, 39 N. E. 622; Lewis *v.* St. Paul, etc., R. Co., 5 S. D. 148, 58 N. W. 580.

Time of opening court.— Davis *v.* Messenger, 17 Ohio St. 231.

19. Stell *v.* Glass, 1 Ga. 475. See *infra*, XVI, C, 32, a.

20. Clement *v.* Wyman, 31 Me. 50; Burnham *v.* Howe, 23 Me. 489; Fullerton *v.* Harris, 8 Me. 393. See, generally, POOR PERSONS.

21. Clement *v.* Wyman, 31 Me. 50.

22. Clement *v.* Wyman, 31 Me. 50; Cunningham *v.* Turner, 20 Me. 435; Brown *v.* Watson, 19 Me. 452; Colby *v.* Moody, 19 Me. 111; Carey *v.* Osgood, 18 Me. 152; Churchill *v.* Hatch, 17 Me. 411 [*explaining* Knight *v.* Norton, 15 Me. 337]; Agry *v.* Betts, 12 Me. 415.

23. Slasson *v.* Brown, 20 Pick. (Mass.) 436; Parker *v.* Staniels, 38 N. H. 251.

(K) *Recognizance.* The record of a recognizance may not be controlled or impeached by parol evidence,[24] at least between the parties.[25]

(L) *Satisfaction of Judgment or Execution.* An entry of satisfaction of a judgment or execution is, in the absence of statute, nothing but a receipt, and like any other receipt may be explained or varied by satisfactory evidence that payment was not in fact made.[26]

(M) *Stay of Execution.* Parol evidence is not admissible to prove that so much of the entry of a judgment by confession as relates to a stay of execution was without the consent of the person by whom the judgment was confessed.[27]

(N) *Stipulations.* A clear stipulation in writing with respect to certain suits is protected by the rule under discussion, and cannot be varied or contradicted by parol evidence.[28]

(O) *Time of Issuing Process.* The true time of filling up a process and placing it in the officer's hands for service or execution may be shown by extrinsic proof irrespective of the date of the process.[29]

(P) *Time of Signing or Entering Judgment.* Statement of the record as to the time of signing or entering up a judgment is a material part thereof and hence cannot be contradicted by parol or extrinsic evidence;[30] and the same rule applies to orders, except in a direct proceeding to set them aside.[31] But the exact hour of the entry of a judgment may be proved, as matter *dehors* the record, by competent evidence,[32] unless such proof would tend to impeach the record.[33]

Sufficiency of service.— Parol evidence is admissible to show that the place where service was made of notice of an application of a debtor to take the poor debtor's oath was not "the last and usual place of abode of the creditor," within a statute authorizing service by leaving a copy of the notice at such place. Smith *v.* Randall, 1 Allen (Mass.) 456.

24. Longley *v.* Vose, 27 Me. 179; Watts *v.* Stevenson, 169 Mass. 61, 47 N. E. 447; May *v.* Hammond, 146 Mass. 439, 15 N. E. 925; Sewall *v.* Sullivan, 108 Mass. 355; Hinman *v.* Swift, 18 Vt. 315; Walker *v.* Briggs, 11 Vt. 84. A sheriff's recognizance, duly entered in the office of the recorder of deeds, is a record which cannot be contradicted or impeached by parol evidence other than that which is available against the most solemn judgments and decrees of courts of record, such as fraud or false personation. McMicken *v.* Com., 58 Pa. St. 213.

Contra.— Gregory *v.* Sherman, 44 Conn. 466, a magistrate's certificate of recognizance on issuing a writ of replevin. See also Kirkland *v.* Candler, 114 Ga. 739, 40 S. E. 734.

25. Walker *v.* Briggs, 11 Vt. 84.

26. *Indiana.*— Lapping *v.* Duffy, 65 Ind. 229; Stewart *v.* Armel, 62 Ind. 593; Lewis *v.* Matlock, 3 Ind. 120.

Massachusetts.— Brown *v.* South Boston Sav. Bank, 148 Mass. 300, 19 N. E. 382.

Michigan.— Dane *v.* Holmes, 41 Mich. 661, 3 N. W. 169.

Missouri.— State *v.* Branch, 112 Mo. 661, 20 S. W. 693.

New Hampshire.— Edgerly *v.* Emerson, 23 N. H. 555, 55 Am. Dec. 207.

South Carolina.— See Moore *v.* Edwards, 1 Bailey 23; Sims *v.* Campbell, 1 McCord Eq. 53, 21 Am. Dec. 595.

Texas.— Pierrepont *v.* Sassee, 1 Tex. App. Civ. Cas. § 1294.

See 20 Cent. Dig. tit. "Evidence," § 1834. And see *infra*, XVI, B, 2, p.

27. Calwell *v.* Shields, 2 Rob. (Va.) 305.

28. State *v.* Lefaivre, 53 Mo. 470.

29. Porter *v.* Kimball, 3 Lans. (N. Y.) 330; Johnson *v.* Turnell, 113 Wis. 468, 89 N. W. 515. See also Woodville *v.* Harrison, 73 Wis. 360, 41 N. W. 526; Allen *v.* Portland Stage Co., 8 Me. 207. And see *infra*, XVI, C, 12, a.

The teste of a writ of execution is not conclusive as to the real time of the issuing out of the writ, but such time may be shown by parol. Harrell *v.* Martin, 6 Ala. 587; Crosby *v.* Stone, 3 N. J. L. 988; Wambaugh *v.* Schenck, 2 N. J. L. 229.

Issuance of execution before entry of judgment may be proved by parol, although the date of both execution and judgment is the same, as this does not contradict the record. Baker *v.* Barber, 16 Ill. App. 621. See also Humphreys *v.* Swain, 21 Ill. App. 232.

30. *Connecticut.*—Bush *v.* Byvanks, 2 Root 248.

Illinois.— Wiley *v.* Sutherland, 41 Ill. 25; Dillman *v.* Nadelhoffer, 23 Ill. App. 168.

Louisiana.— Nolan *v.* Babin, 12 Rob. 531.

New Jersey.— Den *v.* Dowman, 13 N. J. L. 135.

Ohio.— Steinbarger *v.* Steinbarger, 19 Ohio 106.

See 20 Cent. Dig. tit. "Evidence," § 1687.

Date of judgment of a justice of the peace may be shown by extrinsic evidence to have been erroneously entered upon his docket. Raum *v.* Eyermann, 2 Mo. App. 476. *Contra*, Wiley *v.* Sutherland, 41 Ill. 25.

31. Bennett *v.* Tiernay, 1 Ky. L. Rep. 312.

32. Hunt *v.* Swayze, 55 N. J. L. 33, 25 Atl. 850.

33. Where the record shows a confession of judgment in open court it cannot be shown by parol that the judgment was entered by

(VII) *MINUTES OF COURT*—(A) *In General.* The minutes of a judge or clerk are ordinarily proved by the production of the proper docket and showing by inspection that there is a minute, in which case it cannot be contradicted, explained, or enlarged by parol evidence[34] in the absence of any averment of fraud or error[35] But there is nothing about a minute which in legal contemplation precludes the possibility of forgery or mistake, and hence it may be shown by evidence *aliunde* whether the entry produced is in fact what it purports to be;[36] and the person by whom the minute purports to have been made is a competent witness whenever the question of the genuineness thereof is involved.[37]

(B) *Contradiction of Record by Minutes.* The minutes of the court are not admissible for the purpose of contradicting or impeaching the record proper after it has been made up.[38]

(VIII) *EVIDENCE AS TO JURISDICTION*—(A) *General Rule as to Courts of Record.* The jurisdiction of courts of record is presumed,[39] and as a general rule parol or extrinsic evidence will not be received to show that the court had not jurisdiction[40] or to contradict recitals showing jurisdiction,[41] unless there is something in the record itself showing that such recitals are not or cannot be true.[42] But parol evidence to support the jurisdiction may in a proper case be received.[43]

a judge at chambers at an hour earlier than the time appointed for the convening of the court. Roche *v.* Beldam, 119 Ill. 320, 10 N. E. 191 [*followed* in Hansen *v.* Schlesinger, 125 Ill. 230, 17 N. E. 718].

34. *Georgia.*— Kneeland *v.* State, 63 Ga. 641.

Illinois.— Gillett *v.* Booth, 95 Ill. 183.

Iowa.— State *v.* Little, 42 Iowa 51.

Kentucky.— Handley *v.* Russell, Hard. 145.

Louisiana.— Mechanics', etc., Ins. Co. *v.* Levi, 40 La. Ann. 135, 3 So. 559; Mann *v.* Mann, 33 La. Ann. 351; Green *v.* Reagan, 32 La. Ann. 974.

See 20 Cent. Dig. tit. "Evidence," § 1684.

The day of adjournment of the court cannot be shown by parol evidence contradicting the minutes. Jones *v.* Williams, 62 Miss. 183.

A judge's trial list cannot be contradicted by parol evidence. Finley *v.* Hanbest, 1 Phila. (Pa.) 400.

35. Mechanics, etc., Ins. Co. *v.* Levi, 40 La. Ann. 135, 3 So. 559.

36. Gillett *v.* Booth, 95 Ill. 183.

37. Gillett *v.* Booth, 95 Ill. 183.

38. Willard *v.* Whitney, 49 Me. 235; Southgate *v.* Burnham, 1 Me. 369; Mandeville *v.* Stockett, 28 Miss. 398; Newcomb *v.* Downam, 13 N. J. L. 135.

39. See COURTS, 11 Cyc. 691 *et seq.*

40. *Arkansas.*— Marks *v.* Matthews, 50 Ark. 338, 7 S. W. 303.

Kansas.— *In re* Watson, 30 Kan. 753, 1 Pac. 775.

Kentucky.— Bustard *v.* Gates, 4 Dana 429.

Maryland.— Thomas *v.* Farmers' Bank, 46 Md. 43.

Pennsylvania.— Cochran *v.* Sanderson, 151 Pa. St. 591, 25 Atl. 121.

Texas.— Wilkerson *v.* Schoonmaker, 77 Tex. 615, 14 S. W. 223, 19 Am. St. Rep. 803.

United States.— Erwin *v.* Lowry, 7 How. 172, 12 L. ed. 655.

See 20 Cent. Dig. tit. "Evidence," § 1682.

Probate courts are courts of record and their jurisdiction cannot be collaterally attacked. Cincinnati, etc., Co. *v.* Belle Centre, 48 Ohio St. 273, 24 N. E. 464; Shroyer *v.* Richmond, 16 Ohio St. 455; Antram *v.* Ten Eck, 11 Ohio Dec. (Reprint) 665, 28 Cinc. L. Bul. 265. And see COURTS, 11 Cyc. 791.

Want of jurisdiction to render a tax judgment may be shown by evidence *dehors* the record. Brown *v.* Corbin, 40 Minn. 508, 42 N. W. 481.

41. *Illinois.*— Robinson *v.* Ferguson, 78 Ill. 538; Zepp *v.* Hager, 70 Ill. 223; Payne *v.* Taylor, 34 Ill. App. 491.

Missouri.— Freeman *v.* Thompson, 53 Mo. 183.

Ohio.— Richards *v.* Skiff, 8 Ohio St. 586.

Texas.— Lawler *v.* White, 27 Tex. 250.

United States.— Riggs *v.* Collins, 20 Fed. Cas. No. 11,824, 2 Biss. 268 [*affirmed* in Collins *v.* Riggs, 14 Wall. 491, 20 L. ed. 723].

See 20 Cent. Dig. tit. "Evidence," § 1682.

Contra.— Ferguson *v.* Crawford, 70 N. Y. 253, 26 Am. Dec. 589 [*reversing* 7 Hun 25].

42. Riggs *v.* Collins, 20 Fed. Cas. No. 11,824, 2 Biss. 268 [*affirmed* in 14 Wall. 491, 20 L. ed. 723]. See also Cissell *v.* Pulaski County, 10 Fed. 891, 3 McCrary 446.

43. See, generally, JUDGMENTS. See also Anderson *v.* Binford, 2 Baxt. (Tenn.) 310.

Where a record is vague as to the appearance of a defendant, parol evidence of his appearance is competent. Tallman *v.* Ely, 6 Wis. 244.

Showing jurat to affidavit.— In an action to avoid a decree entered on service by publication based on an affidavit of non-residence, to which no jurat was attached, parol evidence is admissible to show that the affidavit was in fact sworn to by affiant. Bantley *v.* Finney, 43 Nebr. 794, 62 N. W. 213.

Letters of administration.— Parol evidence is admissible to show that the deceased left estate in a county where letters of administration were granted, although no property was included in an inventory exhibited to the judge of probate, as the judge is required

(B) *Rule as to Inferior Courts.* There is no conclusive presumption of jurisdiction in the case of courts of inferior jurisdiction,[44] and any statement in relation to jurisdiction found in the minutes, docket, record, or judgment of a justice of the peace or other inferior court is only *prima facie* evidence, in opposition to which it may be shown by any satisfactory means of proof that the authority of the court did not extend over the matter in controversy or the parties to the action.[45] Conversely, where the jurisdiction does not appear on the face of the record it may be shown by evidence *aliunde*.[46]

(C) *Foreign Judgments.* Any jurisdictional fact appearing in a record of a foreign judgment, or a judgment of a sister state, may be met by plea and proof to the contrary.[47]

(IX) *EVIDENCE IN AID OF RECORD.* The rule against parol evidence does not preclude the reception of extrinsic evidence in aid of the record,[48] or to explain

to grant letters on representation that there is property, and is not required to wait until he has satisfactory evidence of that fact. Harrington *v.* Brown, 5 Pick. (Mass.) 519. See, generally, EXECUTORS AND ADMINISTRATORS. *Compare* Montgomery *v.* Merrill, 36 Mich. 97, 104, where Cooley, C. J., said: "Jurisdictional facts cannot rest in parol, to be proved in one case and disproved, perhaps, in another. The record must be complete in itself."

44. Wilkerson *v.* Schoonmaker, 77 Tex. 615, 14 S. W. 223, 19 Am. St. Rep. 803. And see COURTS, 11 Cyc. 693.

45. *Arkansas.*— Visart *v.* Bush, 46 Ark. 153; Jones *v.* Terry, 43 Ark. 230.

Connecticut.— Sears *v.* Terry, 26 Conn. 273.

Iowa.— Salladay *v.* Bainhill, 29 Iowa 555.

Michigan.— Clark *v.* Holmes, 1 Dougl. 390. But *compare* Toliver *v.* Brownell, 94 Mich. 577, 54 N. W. 302.

New York.— People *v.* Powers, 7 Barb. 462 [*affirmed* in 6 N. Y. 50]; People *v.* Cassels, 5 Hill 164; Barber *v.* Winslow, 12 Wend. 102.

Vermont.— Mosseaux *v.* Brigham, 19 Vt. 457.

Compare Ex p. Davis, 95 Ala. 9, 11 So. 308.

See 20 Cent. Dig. tit. "Evidence," § 1680.

46. *Arkansas.*— Visart *v.* Bush, 46 Ark. 153.

California.— *In re* Williams, 102 Cal. 70, 36 Pac. 407, 41 Am. St. Rep. 163 (where the rule was applied by analogy to an order of adoption); Jolly *v.* Foltz, 34 Cal. 321.

Colorado.— Liss *v.* Wilcoxen, 2 Colo. 85.

Georgia.— Baker *v.* Thompson, 89 Ga. 486, 15 S. E. 644.

New York.—Van Deusen *v.* Sweet, 51 N. Y. 378; Roberts *v.* Burrell, 3 Thomps. & C. 30.

West Virginia.— Stevens *v.* Brown, 20 W. Va. 450.

United States.— Hodgson *v.* Mountz, 12 Fed. Cas. No. 6,569, 1 Cranch C. C. 366.

See 20 Cent. Dig. tit. "Evidence," § 1864.

Contra.— Holmes *v.* Cole, 95 Mich. 272, 54 N. W. 761; Toliver *v.* Brownell, 94 Mich. 577, 54 N. W. 302.

47. Starbuck *v.* Murray, 5 Wend. (N. Y.) 148, 21 Am. Dec. 172; Pennywit *v.* Foote, 27 Ohio St. 600, 22 Am. Rep. 340; Norwood *v.* Cobb, 15 Tex. 500; Hall *v.* Lanning, 91 U. S. 160, 23 L. ed. 271; Knowles *v.* Logansport Gas Light, etc., Co., 19 Wall. (U. S.) 58, 22 L. ed. 70 [*reversing* 15 Fed. Cas. No. 8,467, 2 Dill. 421]; Graham *v.* Spencer, 14 Fed. 603; and cases cited in ESTOPPEL, 16 Cyc. 695 note 23. And see, generally, JUDGMENTS. *Contra*, May *v.* Jameson, 11 Ark. 368.

48. *Alabama.*—Strauss *v.* Meertief, 64 Ala. 299, 38 Am. Rep. 8; *Ex p.* Nall, 36 Ala. 299.

Connecticut.—Webster *v.* Merriam, 9 Conn. 225; Olmsted *v.* Hoyt, 4 Day 436; Young *v.* Kenyon, 2 Day 252.

Georgia.— Wilson *v.* Stricker, 66 Ga. 575 (holding that where the sheriff's entry of levy of an attachment referred to a list of goods attached thereto, but no list was attached, parol evidence was admissible to show that the same list was attached to this as to another levy on the same stock, in order to show that the list had become detached; it not being sought to show the contents of the list by such evidence); McWilliams *v.* Walthall, 65 Ga. 109.

Indiana.— See Straub *v.* Terre Haute, etc., R. Co., 135 Ind. 458, 35 N. E. 504.

Iowa.— Weaver *v.* Stacey, 105 Iowa 657, 75 N. W. 640.

Kentucky.— Singleton *v.* Cogar, 7 Dana 479.

Louisiana.— Ware *v.* Wilson, 22 La. Ann. 102.

Maine.— Carter *v.* Shibles, 74 Me. 273.

Maryland.— Citizens' F., etc., Ins. Co. *v.* Wallis, 23 Md. 173.

Minnesota.— State *v.* Gut, 13 Minn. 341.

New Hampshire.— King *v.* Chase, 15 N. H. 9, 41 Am. Dec. 675.

Pennsylvania.— Tarr *v.* Eddy, 142 Pa. St. 410, 21 Atl. 993.

Vermont.— Booth *v.* Tousey, 1 Tyler 407.

See 20 Cent. Dig. tit. "Evidence," § 1863.

Issuance and loss of papers.— Gates *v.* Bennett, 33 Ark. 475.

Parol evidence to verify an entry left unauthenticated by reason of the death of the presiding judge is admissible. Moore *v.* State, 3 Heisk. (Tenn.) 493.

Identity of party.— In an action on a judgment, parol evidence is admissible to establish the identity of the judgment defendant, with defendant in the action, although the two names are not precisely the same. Mobile, etc., R. Co. *v.* Yeates, 67 Ala. 164. See also *infra*, XVI, C, 23, e.

an apparent discrepancy[49] or an immaterial variance,[50] or to dispel obscurity or ambiguity,[51] in case the terms of the judgment or record are of doubtful construction.[52] But a judgment or proceeding which the record shows to be void cannot be validated by parol evidence;[53] and matters which should but do not appear of record cannot be supplied by parol,[54] especially if the omission is such as affects the conclusiveness or validity of the proceedings;[55] for the record must be complete and perfect in itself without reference to extrinsic circumstances, and, if deficient or imperfect, it cannot be assisted or aided by evidence *dehors* the same.[56] Nor is it admissible to show by oral evidence that the record is defective and then have its defects corrected or supplied by the same evidence.[57] But where, although the record is complete and nothing which should have been incorporated therein is omitted, it becomes necessary for any purpose to ascertain a fact which does not appear on the record, parol evidence of such fact is admissible.[58]

49. *Illinois.*— People *v.* Young, 72 Ill. 411.
Louisiana.— Singleton *v.* Smith, 4 La. 430.
Maryland.— Clammer *v.* State, 9 Gill 279.
Nebraska.— Wilkinson *v.* Carter, 22 Nebr. 186, 34 N. W. 351.
Ohio.—Humbert *v.* Cincinnati M. E. Church, Wright 213.
Texas.— Sawyer *v.* Boyle, 21 Tex. 28.
United States.— Ryan *v.* Staples, 76 Fed. 721, 23 C. C. A. 551.
See 20 Cent. Dig. tit. "Evidence," § 1863.
Date of publication of notice.— Where a newspaper containing a notice of sale under judgment was dated the day before such judgment was rendered, parol evidence is admissible to show that the paper was not in fact published until the day succeeding its date. Ryan *v.* Staples, 76 Fed. 721, 23 C. C. A. 551.

50. De Loach *v.* Robbins, 102 Ala. 288, 14 So. 777, 48 Am. St. Rep. 46; San Antonio, etc., R. Co. *v.* Brooking, (Tex. Civ. App. 1899) 51 S. W. 537.

51. Straub *v.* Terre Haute, etc., R. Co., 135 Ind. 458, 35 N. E. 504; Bostwick *v.* Bryant, 113 Ind. 448, 16 N. E. 378; Phillips *v.* Jamison, 14 B. Mon. (Ky.) 579; State *v.* Hall, 79 Me. 501, 11 Atl. 181; Watt *v.* Greenlee, 7 N. C. 346.
Relation of plaintiffs.— In an action on a foreign judgment, it may be shown by parol that plaintiffs constituted a partnership at the time the cause of action accrued, and as such recovered said judgment, and that, by the laws of the country where the judgment was recovered, partnerships could sue in the firm-name; the record in the foreign action being silent on those matters, but referring to the plaintiffs merely by their firm-name. Fisher *v.* Fielding, 67 Conn. 91, 34 Atl. 714, 52 Am. St. Rep. 270, 32 L. R. A. 236.

52. Avery *v.* Iberville Police Jury, 15 La. Ann. 223.

53. Morrison *v.* Knight, 82 Ga. 96, 8 S. E. 211; Hayward *v.* Collins, 60 Ill. 328; Gardner *v.* McKinney, 4 Ky. L. Rep. 260; Scott *v.* State, 70 Miss. 247, 11 So. 657, 35 Am. St. Rep. 649.

54. *Connecticut.*— Grant *v.* Shaw, 1 Root 526.
Georgia.— See Carr *v.* Emory College, 32 Ga. 557.
Iowa.— State *v.* Glover, 3 Greene 249.
Louisiana.— Fluker *v.* Herbert, 27 La. Ann. 284; State *v.* Lougineau, 6 La. Ann. 700.
Mississippi.— Root *v.* McFerrin, 37 Miss. 17, 75 Am. Dec. 49.
North Carolina.— State *v.* McAlpin, 26 N. C. 140.
Pennsylvania.— Loughry *v.* McCullough, 1 Pa. St. 503. *Compare* Lynn *v.* Risberg, 2 Dall. 180, 1 L. ed. 339.
Tennessee.— Ezell *v.* Giles County Justices, 3 Head 583.
Entry of judgment.— Where a record of a former action shows that no judgment had been entered, parol evidence tending to show that a judgment was entered is inadmissible. Cadwell *v.* Dullaghan, 74 Iowa 239, 37 N. W. 178.
Appeal.— Parol evidence is not admissible to show that an appeal has been taken from a judgment rendered by a justice of the peace, when it does not so appear on the record. Gammon *v.* Chandler, 30 Me. 152. See also Wells *v.* Stevens, 2 Gray (Mass.) 115.
Where the sole object of the suit is to remedy an omission to enter an order of appeal, and plaintiff has laid a foundation for the evidence by producing the bond and transcript, the custodian of the record may prove his omission. Temple *v.* Marshall, 11 La. Ann. 641.
Where a justice's docket is only prima facie evidence under the statute, omissions may be supplied from other sources when it becomes necessary. Blair *v.* Hamilton, 32 Cal. 49.

55. Hutton *v.* Williams, 60 Ala. 133; Munroe *v.* Reding, 15 Me. 153; Cunningham *v.* Pacific R. Co., 61 Mo. 33; Clark *v.* Melton, 19 S. C. 498.

56. Young *v.* Thompson, 14 Ill. 380; Croswell *v.* Brynes, 9 Johns. (N. Y.) 287; Elliott *v.* Piersol, 1 Pet. (U. S.) 328, 7 L. ed. 164; James *v.* Stookey, 13 Fed. Cas. No. 7,184, 1 Wash. 330.

57. Jones *v.* Ritter, 56 Ala. 270.

58. Thomason *v.* Odum, 31 Ala. 108, 68 Am. Dec. 139 (holding that, where the record does not show on what ground the judgment was rendered, the deficiency may be supplied by parol); Blair *v.* Hamilton, 32

(x) *Evidence Not Tending to Impeach Record.* The rule against parol evidence does not exclude evidence which, while relating to the same matters dealt with in the record, in no way tends to impeach or contradict the record.[59] Thus extrinsic facts, not required to be made a part of the record, may be shown.[60]

(xi) *Aiding or Impeaching One Part of Record by Another.* A recital in one part of a judicial record may be either aided or impeached by other parts of the record.[61]

(xii) *Matters Not Protected* — (a) *Unauthorized or Extrajudicial Certificate.* The rule protecting records from impeachment by extrinsic evidence does not apply so as to protect unauthorized or extrajudicial certificates of judges, justices, or officers of the court.[62]

(b) *Execution Book.* The execution book kept by a clerk of court is only *prima facie* evidence of the truth of the entries therein, and may be contradicted by parol.[63]

Cal. 49; Smith *v.* De Kock, 81 Iowa 535, 46 N. W. 1056; Gelstrop *v.* Moore, 26 Miss. 206, 59 Am. Dec. 254.

Matters in pais.— An inquisition, being a matter *in pais*, the omission of any material part by mistake may be corrected by parol evidence. Hale *v.* Henrie, 2 Watts (Pa.) 143, 27 Am. Dec. 289; Thomas *v.* Wright, 9 Serg. & R. (Pa.) 87. So also the time of the return of an execution is a fact *in pais*, and may be proven by parol. Thornton *v.* Lane, 11 Ga. 459.

The grounds of a judgment may be shown by parol, where from the form of the issue such grounds do not appear by the record itself, provided the matter alleged to have been passed upon be such as might legitimately have been given in evidence under the issues joined. Briggs *v.* Wells, 12 Barb. (N. Y.) 567.

Where the execution of a sentence does not appear, through the default of the court, it may be shown by extrinsic evidence. Keith *v.* Goodwin, 51 N. C. 398, where the question was whether a person who had claimed the benefit of clergy had been burned in the hand and delivered.

59. *Iowa.*— Johnson *v.* Pennell, 67 Iowa 669, 25 N. W. 874.

Massachusetts.— Knott *v.* Sargent, 125 Mass. 95.

New York.—See Webb *v.* Bindon, 21 Wend. 98.

Pennsylvania.— Jordon *v.* Minster, 5 Pa. L. J. 542, 3 Pa. L. J. Rep. 457.

South Carolina.— Murrell *v.* Graham, 1 Brev. 490, holding that evidence to prove an eviction of the thing sold by the production of a record does not preclude other evidence to show that the seller had no property in the thing sold.

Texas.—Kennedy *v.* State, 11 Tex. App. 73.

Vermont.—Pawlet *v.* Sandgate, 19 Vt. 621.

Evidence which is merely explanatory of the record is admissible. Stark *v.* Fuller, 42 Pa. St. 320.

Consent to action.— Parol evidence that an action by the trustee to foreclose a trust deed was prosecuted, and the property sold and bid in by the trustee, for the use and benefit of the *cestuis que trustent*, at their procurement and with their consent, is admissible. Mareck *v.* Minneapolis Trust Co., 74 Minn. 538, 77 N. W. 428.

Transfer of bid.— For the purpose of determining the right to a rent note, parol testimony is admissible to show that a certain person purchased land reported by the commissioner as sold to another, and transferred his bid to such reported purchaser. Bagby *v.* Warren Deposit Bank, 49 S. W. 177, 20 Ky. L. Rep. 1357.

Where the return of a sale does not show that it was made in the manner prescribed by statute, it may be shown by parol that it was not so made. Worten *v.* Howard, 2 Sm. & M. (Miss.) 527, 41 Am. Dec. 607.

60. Darling *v.* Peck, 15 Ohio 65. See also *supra*, XVI, B, 1, a, (IX).

61. Gay *v.* State, 7 Kan. 394; Cloud *v.* Pierce City, 86 Mo. 367; Ainge *v.* Corby, 70 Mo. 257 (holding that a recital in an order approving an administrator's report of sale that the sale was held on a day when the probate court was in session may be contradicted by producing another order showing that the court stood adjourned on the day of sale); Jester *v.* Spurgeon, 27 Mo. App. 477.

62. Wolfe *v.* Washburn, 6 Cow. (N. Y.) 261.

A certificate of a justice of the peace reciting matters as to which he is not called upon to certify and which are regularly no part of his record may be contradicted by parol evidence (Wolfe *v.* Washburn, 6 Cow. (N. Y.) 261); and where the statute does not require the justice's certificate of the oath made by plaintiff as required by law to authorize the arrest of defendant to be indorsed upon the writ, defects in an insufficient certificate indorsed upon the writ may be supplied by extrinsic evidence (Marsh *v.* Bancroft, 1 Metc. (Mass.) 497).

An unauthorized certificate of the clerk to the effect that a certain release bond accepted by the sheriff has not been delivered to him to be filed is not such a document as cannot be impeached by parol evidence. State *v.* Gordy, 28 La. Ann. 589.

A statement in a return which must, from the nature of the case, be a matter of opinion only, may be explained by parol. Williams *v.* Cheesebrough, 4 Conn. 356.

63. Taylor *v.* Dundass, 1 Wash. (Va.) 92.

(c) *Amendment of Record.* A defendant in execution is not precluded by an amendment of the execution, made by authority of the court, from showing the original form of the execution.[64]

(XIII) *Clerical Errors or Mistakes.* It has been laid down as a general rule that parol evidence is not admissible to show clerical errors or mistakes in judicial records, in collateral proceedings, or in actions founded upon the judgment;[65] but in a number of cases such evidence has been admitted.[66]

b. Official Records and Documents — (I) *General Rule.* The rule under discussion also protects from contradiction or impeachment by parol or extrinsic evidence the official records or documents prepared and kept by public officers in the performance of their duties as such,[67] or filed with them for record or preser-

64. Kleissendorff *v.* Fore, 3 B. Mon. (Ky.) 471.

65. King *v.* Martin, 67 Ala. 177; Morris *v.* Galbraith, 8 Watts (Pa.) 166; State Bank *v.* Patterson, 8 Humphr. (Tenn.) 363, 47 Am. Dec. 618.

On the trial of an issue to correct the record of a judicial tribunal on account of inadvertence and mistake therein, parol evidence is admissible. Gill *v.* Pelkey, 54 Ohio St. 348, 43 N. E. 991. See also *infra*, XVI, D, 1.

On the hearing of a motion to vacate or modify a judgment or order on the ground that it was entered by mistake parol evidence is admissible. Murphy *v.* Swadner, 34 Ohio St. 672. See also *infra*, XVI, D, 1.

66. *Indiana.*—Bostwick *v.* Bryant, 113 Ind. 448, 16 N. E. 378, holding that in an action on a non-negotiable note parol evidence was admissible to show that a judgment had been rendered against the maker of such note as garnishee on a judgment against the payee, and that the date of such note and the rate of interest were misstated by mistake by him in the garnishment proceedings, but that the debt sued on and the debt with which he was charged as garnishee were the same.

Louisiana.— Blanchard *v.* Gloyd, 7 Rob. 542, holding that parol evidence is admissible to show that a recital in an appeal-bond as to the date of the judgment is a mistake.

Maryland.— Clammer *v.* State, 9 Gill 279, holding that a clerical error in allowing a default judgment to remain on the docket after it should have been struck off because superseded by a judgment by confession is admissible, not to contradict the record but to restore the consistency of the pleading.

Michigan.— McDonald *v.* McDonald, 55 Mich. 155, 20 N. W. 882, holding that where a defendant in replevin claimed ownership of the property by purchase from plaintiff, and introduced as evidence a bill of particulars, filed by plaintiff in a prior action in which the value of the property was included as an item of set-off, plaintiff might show that such item was included by mistake of his attorney.

South Carolina.— Sims *v.* Campbell, 1 McCord Eq. 53, 21 Am. Dec. 595 [*followed* in Moore *v.* Edwards, 1 Bailey 23], holding that where the word "satisfied" had been indorsed on an execution, proof might be admitted that this was done by mistake.

Texas.— Holmes *v.* Buckner, 67 Tex. 107, 2 S. W. 452 (holding that in an action of trespass to try title to land acquired by a purchaser at an execution sale, the purchaser's title is not dependent on the sheriff's making a proper return of the execution; and if the return is incorrect through mistake parol evidence is admissible to explain and correct it); Davidson *v.* Chandler, 27 Tex. Civ. App. 418, 65 S. W. 1080 (holding that parol evidence is admissible to show a clerical error in the return to an execution reciting the levy thereunder as made prior to the date of its issuance).

67. *Connecticut.*— State *v.* Main, 69 Conn. 123, 37 Atl. 80, 61 Am. St. Rep. 30, 36 L. R. A. 623.

Iowa.— Porter *v.* Butterfield, 116 Iowa 725, 89 N. W. 199.

Louisiana.— Gaither *v.* Green, 40 La. Ann. 362, 4 So. 210; Innis *v.* Kemper, 3 Mart. N. S. 119.

Maine.— Whitman *v.* Freese, 23 Me. 212; Dole *v.* Allen, 4 Me. 527.

Massachusetts.— *In re* Lovett, 16 Pick. 84.

Missouri.— Butler *v.* Barr, 18 Mo. 357.

New York.— People *v.* Highway Com'rs, 27 Barb. 94.

Ohio.— Taylor *v.* Wallace, 31 Ohio St. 151.

Oregon.— Bays *v.* Trulson, 25 Oreg. 109, 35 Pac. 26.

Wisconsin.— Whitney *v.* Nelson, 33 Wis. 365.

United States.— See U. S. *v.* Souders, 27 Fed. Cas. No. 16,358, 2 Abb. 456.

See 20 Cent. Dig. tit. "Evidence," § 1698.

Unofficial letters of subordinate officers of the treasury are inadmissible to contradict, or even to explain, the official adjustment of accounts as shown by the duly certified transcript. Strong *v.* U. S., 6 Wall. (U. S.) 788, 18 L. ed. 740.

A copy of the Revised Statutes deposited in the office of the secretary of state, certified under his hand and the seal of the state, has the same force and effect as if it were a portion of the original records of the legislature, and as such imports absolute verity. Therefore it is not competent in an ordinary civil suit to permit any inquiry into the correctness of the proceedings of the revising committee or of the secretary of state, in relation to such Revised Statutes. Eld *v.* Gorham, 20 Conn. 8.

Statements in letters patent issued by the governor to a corporation must be taken as

vation pursuant to statute.[68] But in order thus to protect from contradiction a paper or document deposited in a public office it must have been made and certified in the manner and have come from the source required by statute to constitute it an official paper.[69]

(II) *Application of the Rule* — (A) *Legislative Records.* Records of the legislature are conclusive evidence of the matters which they purport to show,[70] and parol or extrinsic evidence will not be received to contradict or impeach either the enrolled bill of a statute[71] or the journals of the houses of the legislature;[72] although such evidence may be received to supply missing portions of the journals, which have become detached through accident or design,[73] or to show that through fraud, mistake, or error of judgment on the part of the recording officer the journals do not faithfully recite the proceedings as they actually transpired.[74]

(B) *County Records and Proceedings.* The rule against parol evidence also applies to county records and proceedings, and precludes the contradiction or variation of the same by parol or extrinsic evidence.[75]

(C) *Municipal Records and Proceedings.* Parol or extrinsic evidence

verity, and neither the minute-book of the corporation nor parol evidence of officers of the corporation can be admitted to contradict them. Goodbread *v.* Philadelphia, etc., Turnpike Co., 13 Pa. Super. Ct. 82.

The record of a fire district cannot be added to or varied by parol. Hunneman *v.* Jamaica Fire Dist., No. 1, 37 Vt. 40.

68. Ham *v.* Salem, 100 Mass. 350.

The written location of a railroad filed by the company with the county commissioner, pursuant to statute, is, as against the corporation, conclusive as to the land taken for the road, and cannot be controlled by extrinsic evidence. But a map or plan filed with the location and made a part of the description may be used to explain it. Hazen *v.* Boston, etc., R. Co., 2 Gray (Mass.) 574.

69. U. S. *v.* Souders, 27 Fed. Cas. No. 16,358, 2 Abb. 456. See also Funkhouser *v.* Peck, 67 Mo. 19.

70. State *v.* Hoff, (Tex. Civ. App. 1895) 29 S. W. 672, holding that the testimony of a legislator who introduced a bill is not admissible to show the purpose of the act.

Printed laws.— Annapolis *v.* Harwood, 32 Md. 471, 3 Am. Rep. 161.

71. *In re* Howard County, 15 Kan. 194; Green *v.* Weller, 32 Miss. 650. An enrolled bill showing a veto by the governor and a failure to pass the same over his veto cannot be contradicted by parol evidence that the bill was approved by the governor and deposited with the secretary of state, and subsequently withdrawn from his custody by the governor and the approval canceled. Weeks *v.* Smith, 81 Me. 538, 18 Atl. 325. An enrolled bill cannot be contradicted by legislative journals. See Koehler *v.* Hill, 60 Iowa 543, 14 N. W. 738, 15 N. W. 609. *Contra*, State *v.* Frank, 60 Nebr. 327, 83 N. W. 74, 61 Nebr. 679, 85 N. W. 956. See, generally, STATUTES.

72. *Indiana.*— McCulloch *v.* State, 11 Ind. 424.

Iowa.— Koehler *v.* Hill, 60 Iowa 543, 14 N. W. 738, 14 N. W. 609.

Kansas.— *In re* Howard County, 15 Kan. 194.

Nebraska.— State *v.* Frank, 60 Nebr. 327, 83 N. W. 74, 61 Nebr. 679, 85 N. W. 956.

North Carolina.— Wilson *v.* Markley, 133 N. C. 616, 45 S. E. 1023.

Ohio.— State *v.* Moffitt, 5 Ohio 358.

Virginia.— Wise *v.* Bigger, 79 Va. 269.

See 20 Cent. Dig. tit. "Evidence," § 1699.

Under a statute declaring that the printed journals shall be *prima facie* evidence to the same extent that duly authenticated copies of the originals would be, such journals are only *prima facie* evidence of what they contain and are liable to be rebutted. Bradley *v.* West, 60 Mo. 33.

In the absence of any law making the journals evidence for any purpose, they are not conclusive evidence of the passage of an act, but it may be necessary to refer to parol evidence to ascertain whether the act was passed in conformity to the constitution. This is true even where the constitution requires each house to keep a journal of its proceedings and publish the same, and a statute requires that the journal shall be deposited and kept in the office of the secretary of state and shall be printed and published. Green *v.* Weller, 32 Miss. 650.

In England the journals of the houses of parliament do not import absolute verity and are not conclusive of the facts stated in them, except in the case of a judgment rendered by the house of lords as a judicial tribunal upon appeal. Green *v.* Weller, 32 Miss. 650 [*citing* 1 Phillips Ev. 406].

Enrolment of a proposed constitutional amendment, not being required by the constitution, it cannot be used to impeach or contradict the legislative journal. Koehler *v.* Hill, 60 Iowa 543, 14 N. W. 738, 15 N. W. 609.

73. State *v.* Frank, 60 Nebr. 327, 83 N. W. 74, 61 Nebr. 679, 85 N. W. 956.

74. State *v.* State Secretary, 43 La. Ann. 590, 9 So. 776.

75. *California.*— See People *v.* Bircham, 12 Cal. 50.

cannot be admitted to contradict or vary municipal records,[76] unless something appearing in the record itself gives ground for an attack.[77]

(D) *Town Records.* The records of a town cannot be contradicted by parol evidence in respect to matters regularly within the jurisdiction of the town or its officers, where the entry of record is made by a public officer in pursuance of the duty imposed on him by law;[78] but evidence of a town-clerk as to his

Indiana.—Carroll County *v.* O'Connor, 137 Ind. 622, 35 N. E. 1006, 37 N. E. 16.

Louisiana.— State *v.* Simmons, 40 La. Ann. 758, 5 So. 29.

North Carolina.— Cline *v.* Lemon, 4 N. C. 323.

Ohio.— Beebe *v.* Scheidt, 13 Ohio St. 406.

South Dakota.— Brown *v.* Bon Homme County, 1 S. D. 216, 46 N. W. 173.

Tennessee.— Brooks *v.* Claiborne County, 8 Baxt. 43.

United States.— Miner *v.* McLean, 17 Fed. Cas. No. 9,630, 4 McLean 138.

See 20 Cent. Dig. tit. "Evidence," § 1702.

Commissioners' record of acceptance of macadamized road as completed according to contract cannot be modified by parol evidence. Noble County Com'rs *v.* Hunt, 33 Ohio St. 169.

A contract made by the board of supervisors by an affirmative act within the scope of its authority, evidenced by an entry on its minutes, cannot be varied by proof, at the time it was made, that the person contracting with the board misunderstood its purport, and was partly led into such misunderstanding by some of the members of the board, who in open session attempted to explain its terms to him, and misinformed him as to its requirements. Bridges *v.* Clay County, 58 Miss. 817. *Compare* Riley *v.* Pettis County, 96 Mo. 318, 9 S. W. 906.

A deficiency in the parish records is not to be supplied by the testimony of the inhabitants. Manning *v.* Gloucester Fifth Parish, 6 Pick. (Mass.) 6.

Unauthorized purpose of grant.— Where the record of a parish as to a grant of money states merely that it is for parish charges and does not state for what specific purpose the money was granted, it may be shown by parol evidence that the moneys were not in fact granted for purposes for which parishes are empowered to grant moneys. Bangs *v.* Snow, 1 Mass. 181.

76. *Kentucky.*— Barfield *v.* Gleason, 111 Ky. 491, 63 S. W. 964, 23 Ky. L. Rep. 128.

Massachusetts.— Mayhew *v.* Gay Head Dist., 13 Allen 129.

Michigan.— Stevenson *v.* Bay City, 26 Mich. 44.

New York.— Pooley *v.* Buffalo, 15 Misc. 240, 36 N. Y. Suppl. 796.

Texas.— Kerr *v.* Corsicana, (Civ. App. 1895) 35 S. W. 694.

Virginia.— Page *v.* Belvin, 88 Va. 985, 14 S. E. 843.

See 20 Cent. Dig. tit. "Evidence," § 1703.

The journal or minutes of a city council cannot be contradicted. Covington *v.* Ludlow, 1 Metc. (Ky.) 295; Dallas *v.* Beeman, 18 Tex. Civ. App. 335, 45 S. W. 626.

Date of mayor's approval of an ordinance as attested by the city clerk cannot be contradicted by parol testimony. Ball *v.* Fagg, 67 Mo. 481.

A contract created by a written resolution of a city council accepting a written proposition cannot be varied by parol. Curtiss *v.* Waterloo, 38 Iowa 266. See also Bristol *v.* Hussey, 9 Ohio Dec. (Reprint) 680, 16 Cinc. L. Bul. 290.

A rough and imperfect draft of a list of lands which a city claimed had been sold for taxes, and which had been laid away because it was imperfect, and supplied by a more full and correct list, was held inadmissible for the purpose of derogating from the accurate list finally furnished by the agent of the city and on which the parties acted. Lyman *v.* Philadelphia, 56 Pa. St. 488.

77. See State *v.* Alexander, 107 Iowa 177, 77 N. W. 841, holding that a record of a vote of the city council which showed on its face that three members voted yea and three no might be contradicted by parol evidence to show that two of the latter members did not vote at all, where the record also showed that members of the council who were present and did not vote were recorded as voting no.

78. *Maine.*— Blaisdell *v.* Briggs, 23 Me. 123; Crommett *v.* Pearson, 18 Me. 344.

Massachusetts.— Saxton *v.* Nimms, 14 Mass. 315; Thayer *v.* Stearns, 1 Pick. 109.

New Hampshire.— Sawyer *v.* Manchester, etc., R. Co., 62 N. H. 135, 13 Am. St. Rep. 541.

New York.— People *v.* Zeyst, 23 N. Y. 140.

Vermont.— Eddy *v.* Wilson, 43 Vt. 362 (holding that the records of the proceedings of municipal corporations, such as towns and school-districts, cannot be collaterally impeached by evidence tending to show that a portion of the majority who voted at any meeting were not qualified to vote at that meeting); Slack *v.* Norwich, 32 Vt. 818; Hoag *v.* Durfey, 1 Aik. 286; Taylor *v.* Holcomb, 2 Tyler 344.

See 20 Cent. Dig. tit. "Evidence," § 1704.

But compare Westerhaven *v.* Clive, 5 Ohio 136, 138, in which case the court said: "We do not believe that these [township] records are of that absolute verity, that any person shall be estopped to show the truth, in consequence of any matter which they contain."

An amended record of the proceedings of a town-meeting cannot be controlled or contradicted by parol or extrinsic evidence. Boston Turnpike Co. *v.* Pomfret, 20 Conn. 590; Halleck *v.* Boylston, 117 Mass. 469.

A vote of a town as recorded cannot be varied or explained by parol or extrinsic evi-

general mode of making the records may be received, as going to explain a particular record.[79]

(E) *School-District Records.* The records of a school-district are within the protection of the rule and cannot be contradicted or varied by parol evidence.[80]

(F) *Tax Records.* Records and official documents relating to the assessment and collection of taxes and the acts of the tax officers in the premises are usually considered conclusive and not subject to impeachment by parol evidence.[81]

(G) *Land-Office Records.* The protection of the rule against the contradiction or impeachment of public records by parol or extrinsic evidence is usually extended to the records and documents of land-offices.[82]

(H) *Official Surveys, Maps, and Plats.* An official survey, map, or plat, or one which is duly filed or recorded in the proper office, is not subject to be contradicted, impeached, or invalidated, by parol or other extrinsic evidence.[83] But

dence. Howlett *v.* Holland, 6 Gray (Mass.) 418; Franklin Falls Pulp Co. *v.* Franklin, 66 N. H. 274, 20 Atl. 333.

Certificate of township trustees to the correctness of a bill for aid or support of poor, required by statute, cannot be contradicted by parol evidence showing that such aid or support was not furnished at the request or order of such trustees. Mussel *v.* Tama County, 73 Iowa 101, 34 N. W. 762.

Records of the proprietors of common lands are within the protection of the rule. See Williams *v.* Ingell, 21 Pick. (Mass.) 288; Doe *v.* Lawrence, 1 D. Chipm. (Vt.) 103.

79. Taylor *v.* Holcomb, 2 Tyler (Vt.) 344. See also *supra*, XVI, B, 1, b, (IV).

80. Bartlett *v.* Kinsley, 15 Conn. 327; Common School Dist. No. 50 *v.* Fishback, 49 S. W. 29, 20 Ky. L. Rep. 1198; Stoughton Third School Dist. *v.* Atherton, 12 Metc. (Mass.) 105; Cowley *v.* Harrisville Tp. School Dist. No. 3, 130 Mich. 634, 90 N. W. 680.

The legal effect of the vote of a meeting as a ratification of previous acts of agents must be determined by the record, and cannot be varied by parol proof of the intentions of the voters. Cameron *v.* North Hero School Dist. No. 2, 42 Vt. 507. See also *supra*, XVI, A, 2.

Evidence in aid of record admissible.— Buckeye Tp. School Dist. No. 2 *v.* Clark, 90 Mich. 435, 51 N. W. 529.

81. Gaither *v.* Green, 40 La. Ann. 362, 4 So. 210; Blanchard *v.* Powers, 42 Mich. 619, 4 N. W. 542 [*distinguishing* Wattles *v.* Lapeer, 40 Mich. 624]; Case *v.* Dean, 16 Mich. 12; Mullins *v.* Shaw, 77 Miss. 900, 27 So. 602, 28 So. 958. *Contra*, holding that tax records are open to contradiction. State *v.* Aldridge, 66 Ohio St. 598, 64 N. E. 562; Hagerty *v.* Huddleston, 60 Ohio St. 149, 53 N. E. 960; Lewis *v.* State, 59 Ohio St. 37, 51 N. E. 440. The assessor's return of the assessment of polls is conclusive as to the number of qualified voters, under a constitutional provision requiring the consent of a majority of the qualified voters of the county for a change of the county-seat. Vance *v.* Austell, 45 Ark. 400. Correction of false record may be compelled by mandamus. Gaither *v.* Green, 40 La. Ann. 362, 4 So. 210. Parol evidence is admissible to show that a tax-sale was made within the hours fixed by statute. French *v.* Spalding, 61 N. H. 395.

82. McConnell *v.* Kenton, Hughes (Ky.) 257; Consilla *v.* Briscoe, Hughes (Ky.) 84; Craig *v.* Pelham, Ky. Dec. 242; Goodloe *v.* Wilson, 2 Overt. (Tenn.) 59; Branson *v.* Wirth, 17 Wall. (U. S.) 32, 21 L. ed. 566; Bly *v.* U. S., 3 Fed. Cas. No. 1,581, 4 Dill. 464. See also Jones *v.* Park, 2 Yeates (Pa.) 448; Hyde *v.* Torrence, 2 Yeates (Pa.) 440. *Compare* Dailey *v.* Avery, 4 Serg. & R. (Pa.) 281.

A receipt for the purchase-price of land by the receiver of the land-office is only *prima facie* evidence of title and may be rebutted by parol evidence. Allison *v.* Hunter, 9 Mo. 749. See also *infra*, XVI, B, 2, p, (I).

83. *California.*— Chapman *v.* Polack, 70 Cal. 487, 11 Pac. 764.

Kentucky.— Cowan *v.* Harrod, Litt. Sel. Cas. 4.

Maryland.— Hammond *v.* Norris, 2 Harr. & J. 130.

Michigan.— Moore *v.* People, 2 Dougl. 420.

Ohio.— McCoy *v.* Galloway, 3 Ohio 282, 17 Am. Dec. 591.

Pennsylvania.— Bellas *v.* Levan, 4 Watts 294. But *compare* McCall *v.* Sybert, 4 Watts 431, where the return of a survey was considered merely *prima facie* evidence.

Tennessee.— White *v.* Crocket, 3 Hayw. 183.

Texas.— Anderson *v.* Stamps, 19 Tex. 460; Jamison *v.* New York, etc., Land Co., (Civ. App. 1903) 77 S. W. 969; Giddings *v.* Winfree, (Civ. App. 1903) 73 S. W. 1066; Hartz *v.* Owen, (Civ. App. 1894) 27 S. W. 42.

Wisconsin.— Orton *v.* Harvey, 23 Wis. 99.

United States.— Jones *v.* Johnston, 18 How. 150, 15 L. ed. 320.

See 20 Cent. Dig. tit. "Evidence," § 1701.

Where there is no conflict in the field-notes of a survey, the calls must speak for themselves and parol evidence is not admissible to vary them. Thompson *v.* Langdon, 87 Tex. 254, 28 S. W. 931.

A certificate of survey cannot be contradicted by parol evidence to show that a tract of land included therein was never actually surveyed by the surveyor (Cain *v.* Flynn, 4 Dana (Ky.) 499; Hammond *v.* Norris, 2 Harr. & J. (Md.) 130; Hammond *v.* Shere-

evidence *aliunde* is admissible in all cases where there is a doubt as to the true location of the survey, or a question as to the application of a grant to its proper subject-matter,[84] or where the survey was not made according to law.[85]

(I) *Military Records.* Military records have also been held conclusive evidence and not subject to be varied or contradicted by parol.[86]

(J) *Registration or Certificate Thereof.* There is authority asserting the conclusiveness of the record or registration of a deed or other instrument,[87] and the recording officer's certificate thereof.[88] On the other hand in many cases such records and certificates have been declared to be merely *prima facie* evidence and open to contradiction.[89]

dine, 4 Harr. & M. (Md.) 420), or that the survey was not made at the time stated therein (Cain *v.* Flynn, 4 Dana (Ky.) 499; Webb *v.* Beard, 1 Harr. & J. (Md.) 349; Pollard *v.* Dwight, 4 Cranch (U. S.) 421, 2 L. ed. 666).

A surveyor's declarations, whether oral or written, are not admissible to contradict his official report upon which the state has issued a grant (Reusens *v.* Lawson, 91 Va. 226, 21 S. E. 347), or to impeach the map of the survey which has been adopted by the proprietors of the town (Barclay *v.* Howell, 2 Fed. Cas. No. 975 [*affirmed* in 6 Pet. 498, 8 L. ed. 477]).

The recorded plot of a town, showing the width of a certain street, cannot be impeached by parol evidence to show that the proprietor of the town intended the street to be of a different width. Wood *v.* Mansell, 3 Blackf. (Ind.) 125.

Where an express dedication is evidenced by a recorded plat, the intent to dedicate cannot be contradicted by parol (Denver *v.* Clements, 3 Colo. 484; Miller *v.* Indianapolis, 123 Ind. 196, 24 N. E. 228; Indianapolis *v.* Kingsbury, 101 Ind. 200, 51 Am. Rep. 749; Strunk *v.* Pritchett, 27 Ind. App. 582, 61 N. E. 973); and the same is true where the owner of property adopts a city map on which streets are laid off, by making sales with reference thereto (Clark *v.* Elizabeth, 40 N. J. L. 172).

Papers found in the office of the deputy surveyor of a district, and in his handwriting, may be given in evidence to impeach his return of survey. Democrat *v.* Goodlander, 2 Yeates (Pa.) 313.

84. Reusens *v.* Lawson, 91 Va. 226, 21 S. E. 347.

85. Bridges *v.* McClendon, 56 Ala. 327.

Survey made without notice.— A survey and diagram of land made by a county surveyor without notice to the opposite party that such survey would be made as required by statute is not conclusive that the lines bounding the land are correctly shown. Bridges *v.* McClendon, 56 Ala. 327.

86. A written discharge, issued to a soldier by the proper military authorities, on a surgeon's certificate of disability, is conclusive evidence of the cause of his leaving the service. Fitchburg *v.* Lunenburg, 102 Mass. 358.

At common law, when the lord distrained for escuage his tenant holding by knight's fee, and the tenant pleaded that he was with the king in Scotland forty days, that issue was "tried by the certificate of the marshal of the king's host in writing under his seal"; and his certificate, when produced in a court of common law, was conclusive. Coke Litt. 74*a*.

87. Ridley *v.* McGehee, 13 N. C. 40.

Where two mortgages are recorded upon the same day, their priority of registry must be determined by the record alone, and parol evidence is not admissible to show which was first received. Hatch *v.* Haskins, 17 Me. 391.

The satisfaction of a mortgage on the record cannot be contradicted by evidence of subsequent declarations of the mortgagee. Safe Deposit, etc., Co. *v.* Kelly, 159 Pa. St. 82, 28 Atl. 221.

88. Dawson *v.* Cross, 88 Mo. App. 292; Vanderveere *v.* Gaston, 25 N. J. L. 615; Musser *v.* Hyde, 2 Watts & S. (Pa.) 314. See also Silvester *v.* Coe Quartz Mine Co., 80 Cal. 510, 22 Pac. 217, holding that a statement in the certificate of a recorder that a lien was duly sworn to is at least *prima facie* evidence of that fact.

Where a mortgage is withdrawn after being left with the recorder for record, but before being spread on the record, and the date of its return is not indorsed thereon, parol evidence of such withdrawal and the date of the return is admissible, notwithstanding the fact that the recorder's certificate is conclusive as to the time when the instrument was left with him, for such returned mortgage will only give notice from the date of its being spread on the record. Dawson *v.* Cross, 88 Mo. App. 292.

89. Taylor *v.* Pearce, 15 La. Ann. 564; Morton *v.* Webster, 2 Allen (Mass.) 352.

Record not conclusive.— Harvey *v.* Thorpe, 28 Ala. 250, 65 Am. Dec. 344; Morris *v.* Keyes, 1 Hill (N. Y.) 540; Boyce *v.* Stanton, 15 Lea (Tenn.) 346; Baldwin *v.* Marshall, 2 Humphr. (Tenn.) 116.

Certificate not conclusive.—Love *v.* Harbin, 87 N. C. 249; Johnson *v.* Burden, 40 Vt. 567, 94 Am. Dec. 436; Bartlett *v.* Boyd, 34 Vt. 256.

Where the certificate fails to disclose the date of recording this may be proved by parol. Truss *v.* Harvey, 120 Ala. 636, 24 So. 927. See also Miller *v.* Estill, Meigs (Tenn.) 479.

Record contradicting certificate.— The certificate of a recording officer that a deed has been recorded may be rebutted by the

(K) *Certificate of Acknowledgment.* The admissibility of parol or extrinsic evidence in aid of, or to impeach, a certificate of acknowledgment, has received full treatment elsewhere in this work.[90]

(L) *Official Sales.* The records of official sales, kept pursuant to statutory requirements, cannot be contradicted or varied by parol.[91]

(M) *Transcripts and Authenticated Copies.* A transcript or a duly authenticated copy of a record or recorded instrument cannot be shown by parol to be incorrect,[92] but its incorrectness may be shown by a production of the record or the original document and a comparison therewith.[93]

(III) *Records or Documents Not Conclusive* — (A) *In General.* There is a class of entries, sometimes called records, which are of a public nature and required by law to be kept by various officers, but which are of a less solemn character and are not accorded the conclusiveness attaching to judgments of courts of record. These, while competent evidence of the facts recorded and required by law to be recorded, are not conclusive but may be contradicted by parol or other extrinsic evidence.[94] To this class belong the records of births and marriages kept by clerks of towns;[95] the registry or enrolment of a vessel at the custom-house;[96] the record kept by a person employed in the signal service of the United States;[97] the calendar of prisoners kept by a sheriff or jailer;[98] and many others of a like character.[99]

(B) *Ex Parte Certificate or Report.* The law does not give a conclusive effect to the *ex parte* certificates and reports of public officers in relation to matters which depend upon the exercise of integrity, judgment, and discretion, and by which private rights and contracts may be seriously affected, but they may be controverted by extrinsic evidence,[1] unless a legislative intent that they

production of the record showing that it has not been recorded. Hastings *v.* Blue Hill Turnpike Corp., 9 Pick. (Mass.) 80.

Indorsement of the clerk on the deed, of the day when it was left with him to be recorded, and his return to the court of the deeds left with him to be recorded, is not conclusive as to the day when the deed was left, but the true day may be shown by parol evidence. Hosley *v.* Garth, 2 Gratt. (Va.) 471, 44 Am. Dec. 393.

Where there is no seal on the record and the original deed is lost, parol evidence is admissible to show that there was a seal on the original deed. Strain *v.* Fitzgerald, 130 N. C. 600, 41 S. E. 872.

90. See ACKNOWLEDGMENTS, 1 Cyc. 616 *et seq.*

91. Cooper *v.* Freeman Lumber Co., 61 Ark. 36, 31 S. W. 981, 32 S. W. 494; Bays *v.* Trulson, 25 Oreg. 109, 35 Pac. 26.

Foreclosure by advertisement.— The affidavit required by statute in New York as to sales on foreclosure by advertisement is only *prima facie* evidence of the facts stated therein, and may be controverted. Mowry *v.* Sanborn, 72 N. Y. 534 [*reversing* 11 Hun 545]; Story *v.* Hamilton, 20 Hun (N. Y.) 133 [*affirmed* in 86 N. Y. 428].

92. Carroll *v.* Pathkiller, 3 Port. (Ala.) 279; Shirley *v.* Fearne, 33 Miss. 653, 60 Am. Dec. 375; Mandeville *v.* Stockett, 28 Miss. 398. See also People *v.* Hagar, 52 Cal. 171.

A justice's certificate to his transcript and the jurat to the affidavit of the appellant are not records of such dignity that they cannot be contradicted; but evidence is admissible to show mistake or fraud in their date. Lacy *v.* Cox, 15 N. J. L. 469.

Written documents certified by foreign notaries under their seal may be contradicted by parol evidence. U. S. *v.* The Jason, 26 Fed. Cas. No. 15,470, Pet. C. C. 450.

93. Mobile Cong. Church *v.* Morris, 8 Ala. 182.

94. Goodrich *v.* Senate, 92 Me. 248, 42 Atl. 409; Com. *v.* Chase, 6 Cush. (Mass.) 248; Lewis *v.* Marshall, 5 Pet. (U. S.) 470, 8 L. ed. 195.

95. Sumner *v.* Sebec, 3 Me. 223.

96. Colson *v.* Bonzey, 6 Me. 474; Vinal *v.* Burrill, 16 Pick. (Mass.) 401; Whiton *v.* Spring, 74 N. Y. 169; Ring *v.* Franklin, 2 Hall (N. Y.) 9. *Contra*, Clark *v.* Slidell, 5 Rob. (La.) 330.

97. Evanston *v.* Gunn, 99 U. S. 660, 25 L. ed. 306.

98. Goodrich *v.* Senate, 92 Me. 248, 42 Atl. 408; White *v.* U. S., 164 U. S. 100, 17 S. Ct. 38, 41 L. ed. 365.

99. See Goodrich *v.* Senate, 92 Me. 248, 42 Atl. 409.

1. Lafarge *v.* Morgan, 11 Mart. (La.) 462; Clintsman *v.* Northrop, 8 Cow. (N. Y.) 45; Read *v.* Jamaica, 40 Vt. 629.

Applications of the rule.— Accordingly it has been held admissible to contradict or explain the books and annual report of the treasurer of a school-district (Saville *v.* Marshall County School-Dist. No. 27, 22 Kan. 529); a printed report of the state controller (Dulaney *v.* Dunlap, 3 Coldw. (Tenn.) 306); a tax-collector's return of his proceedings under a tax warrant (Boardman *v.*

should be conclusive as to the matters required to be reported is expressed or must necessarily be implied from the language used.[2]

(c) *Foreign Documents.* It has been held that it would be pushing the comity usually extended to tribunals and officers of a foreign government beyond the bounds of justice and the usages of nations to claim for them a total exemption from inquiry when their acts affect the rights of another nation or its citizens.[3]

(iv) *Explanation.* Parol evidence which does not contradict but merely explains the record or report of a public officer or board is admissible.[4]

(v) *Identification.* Records may also be identified by the testimony of witnesses,[5] and it has been held that where there were two apparently perfect records of the proceedings of a town-meeting, parol evidence must of necessity be admissible to determine which was the legitimate record.[6]

(vi) *Supplying Omissions.* Where certain matters are by law required to be made to appear of record or in an official document, an omission as to such matters cannot be supplied by parol or extrinsic evidence;[7] nor can the records of official proceedings be supplemented by parol so as to show a compliance with statutory requirements;[8] nor can public officers put into their report, by parol evidence, matters as to which they were not authorized by law to act;[9] and in no

Goldsmith, 48 Vt. 403); a certificate of protest (Wood *v.* American L. Ins., etc., Co., 7 How. (Miss.) 609; Parry *v.* Almond, 12 Serg. & R. (Pa.) 284. See also Commercial Paper, 2 Cyc. 274 *et seq.*); a certificate of a wheat inspector that a cargo of wheat was of a specified grade (Camors *v.* Gomila, 9 Mo. App. 205); a certificate of enlistment from the adjutant-general's office (Welch *v.* Sugar Creek, 28 Wis. 618); a certificate that a road was made as required by the condition of a grant of a ferry right (Davis *v.* Concordia Police Jury, 19 La. 533); a written report of a city committee of an interview with a creditor of the city, stating the terms upon which his claim could be adjusted (Porter *v.* Dubuque, 20 Iowa 440); and the recitals of a certificate of election as to the duration of the term (Hale *v.* Evans, 12 Kan. 562). But *compare* Hammondsport, etc., Plank Road Co. *v.* Brundage, 13 How. Pr. (N. Y.) 448, 452, in which case parol evidence was held inadmissible to explain the certificates of inspectors as to the completion of a plank road, the court saying: "If parol evidence were admissible to explain the certificates . . . it is not perceived why the certificates might not be dispensed with altogether."

2. See Hunter *v.* Burnsville Turnpike Co., 56 Ind. 213.

3. U. S. *v.* King, 3 How. (U. S.) 773, 11 L. ed. 824, holding that a United States court has a right to hear and determine whether the certificate of a surveyor-general, although recognized and sanctioned by the colonial authorities of Spain, is antedated or made out either with or without their privity and consent, in order to defraud the United States, and to deprive them of lands which rightfully belonged to them under the treaty with Spain.

4. Darter *v.* Houser, 63 Ark. 475, 39 S. W. 358; Hinson *v.* Forsdick, (Miss. 1899) 25 So. 353 (holding that testimony of a tax-collector and his deputy that certain land, sold for taxes, and listed among lands sold to the state, was put on such list by mistake, is not an impeachment, but an explanation of their official acts, and hence admissible); Thompson *v.* Chase, 2 Grant (Pa.) 367; Pope *v.* Anthony, 29 Tex. Civ. App. 298, 68 S. W. 521; District School Trustees *v.* Wimberly, 2 Tex. Civ. App. 404, 21 S. W. 49.

Clerical error in election return is explainable. Nelson *v.* State, (Tex. Civ. App. 1902) 75 S. W. 502.

5. Hopper *v.* Justice, 111 N. C. 418, 16 S. E. 626.

6. Walter *v.* Belding, 24 Vt. 658.

7. *Alabama.*— Parker *v.* Doe, 20 Ala. 251.

California.— Gordon *v.* San Diego, 108 Cal. 264, 41 Pac. 301.

Illinois.— Wabash R. Co. *v.* Hughes, 38 Ill. 174.

Maine.— Hill *v.* Turner, 18 Me. 413; Crommett *v.* Pearson, 18 Me. 344; Sawtel *v.* Davis, 5 Me. 438.

Massachusetts.— Andrews *v.* Boylston, 110 Mass. 214; Manning *v.* Gloucester Fifth Parish, 6 Pick. 6; Taylor *v.* Henry, 2 Pick. 397.

Missouri.— Lebanon Light, etc., Co. *v.* Lebanon, 163 Mo. 254, 63 S. W. 811; Stewart *v.* Clinton, 79 Mo. 603.

North Dakota.— Pickton *v.* Fargo, 10 N. D. 469, 88 N. W. 90.

Pennsylvania.— Barnet *v.* Barnet, 15 Serg. & R. 72, 16 Am. Dec. 516.

Vermont.— Sherwin *v.* Bugbee, 17 Vt. 337.

But compare Ratcliff *v.* Teters, 27 Ohio St. 66; Drott *v.* Riverside, 4 Ohio Cir. Ct. 312, 2 Ohio Cir. Dec. 565.

Adjournment of town-meeting cannot be proved by parol. Taylor *v.* Henry, 2 Pick. (Mass.) 397.

8. Terre Haute, etc., R. Co. *v.* Flora, 29 Ind. App. 442, 64 N. E. 648.

9. Vorrath *v.* Hoboken, 49 N. J. L. 285, 8 Atl. 125.

case can an omission which renders the record or document null and void be supplied by parol.[10] But an omission may be explained by parol;[11] and parol evidence may be admissible to show matters which, while they might properly appear on the record or document, are not required to be therein set forth;[12] or matters as to which a record is usually kept, although not required by statute.[13] It has also been asserted that, in the absence of any statute making the record of a public officer or board the sole evidence of his or their proceedings, parol evidence is admissible to show that certain acts were done or proceedings had, although as to them the record is silent, where the rights of innocent persons might otherwise be prejudiced.[14]

c. Quasi-Public Records. Parol evidence is admissible to explain or contradict records which, while kept pursuant to a public duty or even required by statute, have not the dignity which pertains to the more solemn official records, such as a ship's log-book,[15] entries made by physicians in the ward books of an asylum,[16] or the records of a religious society.[17]

d. Corporate Records. The preponderance of authority favors the view that the records of a private corporation are conclusive and may not be contradicted or varied by parol,[18] although there are some cases in which this conclusive effect

10. People *v.* Highway Com'rs, 27 Barb. (N. Y.) 94; Klais *v.* Pulford, 36 Wis. 587.

A description in an assessment book which is fatally defective in failing to show the township or range in which the land is situated cannot be cured by oral evidence. Sheets *v.* Paine, 10 N. D. 103, 86 N. W. 117.

11. Wilson *v.* Belinda, 3 Serg. & R. (Pa.) 396, holding that, under a statute requiring registration of slaves and that the registry should state the occupation of the owner of the slave, where the registry failed to state any occupation, parol evidence was admissible to show that he had none.

12. *California.*— Gordon *v.* San Diego, 108 Cal. 264, 41 Pac. 301.

Illinois.— Bartlett *v.* Board of Education, 59 Ill. 364.

Iowa.— Morgan *v.* Wilfley, 71 Iowa 212, 32 N. W. 265.

Kentucky.— Bowling Green *v.* Potter, 8 Ky. L. Rep. 522.

Maine.— Whiting *v.* Ellsworth, 85 Me. 301, 27 Atl. 177.

Maryland.— Harry *v.* Lyles, 4 Harr. & M. 215.

Massachusetts.— Robbins *v.* Townsend, 20 Pick. 345.

Ohio.— Westerhaven *v.* Clive, 5 Ohio 136.

Washington.— Seattle *v.* Doran, 5 Wash. 482, 32 Pac. 105, 1002.

United States.— Van Ness *v.* U. S. Bank, 13 Pet. 17, 10 L. ed. 38; Lamb *v.* Gillett, 14 Fed. Cas. No. 8,016, 6 McLean 365.

Under a statute providing that no omission in the assessment of property shall affect the legality of the taxes levied thereon, a fact omitted from the record may be proved by parol. Cedar Rapids, etc., R. Co. *v.* Carroll County, 41 Iowa 153.

The date of registration of a deed may be proved by parol where the register has neglected to state such date on his books. Miller *v.* Estill, Meigs (Tenn.) 479. See *supra*, XI, C, 34.

13. Bartlett *v.* Board of Education, 59 Ill. 364; Reynolds *v.* Schweinefus, 27 Ohio St. 311; Bays *v.* Trulson, 25 Oreg. 109, 35 Pac. 26.

14. Taymouth Tp. *v.* Koehler, 35 Mich. 22; Pickett *v.* Abney, 84 Tex. 645, 19 S. W. 859; Cameron *v.* Decatur First Nat. Bank, (Tex. Civ. App. 1896) 34 S. W. 178; Burrows *v.* Kinsley, 27 Wash. 694, 68 Pac. 332; Nickeus *v.* Lewis County, 23 Wash. 125, 62 Pac. 763. See also Hannibal, etc., R. Co. *v.* Smith, 9 Wall. (U. S.) 95, 19 L. ed. 599. And see *supra*, XV, C, 3, d, (III) (A).

15. Worth *v.* Mumford, 1 Hilt. (N. Y.) 1; The Hercules, 12 Fed. Cas. No. 6,401, 1 Sprague 534; Jones *v.* The Phœnix, 13 Fed. Cas. No. 7,489, 1 Pet. Adm. 201; Malone *v.* Bell, 16 Fed. Cas. No. 8,994, 1 Pet. Adm. 139; Orne *v.* Townsend, 18 Fed. Cas. No. 10,583, 4 Mason 541; Whitton *v.* The Commerce, 29 Fed. Cas. No. 17,604, 1 Pet. Adm. 160.

16. State *v.* Hinkley, 9 N. J. L. J. 118.

17. Fletcher First Universalist Soc. *v.* Leach, 35 Vt. 108.

18. *California.*— See San Joaquin Land, etc., Co. *v.* Beecher, 101 Cal. 70, 35 Pac. 349. But *compare* Gilson Quartz Min. Co. *v.* Gilson, 51 Cal. 341.

Indiana.— Hamilton *v.* Grand Rapids, etc., R. Co., 13 Ind. 347; Price *v.* Grand Rapids, etc., R. Co., 13 Ind. 58.

Minnesota.— Oswald *v.* Minneapolis Times Co., 65 Minn. 249, 68 N. W. 15.

Missouri.— R. T. Davis Mill Co. *v.* Bennett, 39 Mo. App. 460.

Ohio.— Royce *v.* Tyler, 2 Ohio Cir. Ct. 175, 1 Ohio Cir. Dec. 428.

See 20 Cent. Dig. tit. "Evidence," § 1717.

A recorded vote of the directors of a corporation, being a written instrument, must be construed by its terms alone, with reference to the subject-matter to which it applies, and parol evidence is not admissible of the sense in which it was understood by a director. Gould *v.* Norfolk Lead Co., 9 Cush. (Mass.) 338, 57 Am. Dec. 50; Peterborough R. Co. *v.* Wood, 61 N. H. 418.

has been denied.[19] Omissions from the corporate records may be supplied by parol evidence, particularly where there are no statutory provisions as to what the records shall show,[20] and such evidence may be admitted to explain entries in the minutes.[21]

2. Private Writings — a. Arbitration and Award. The rule against the admission of parol evidence applies to the case of an arbitration and award, and such evidence cannot be received to vary or contradict the terms of either a written submission[22] or the award itself.[23] It cannot be shown that the arbitrators did not intend what their award on its face declares,[24] nor that a change has been made in the powers committed to the arbitrators by the submission;[25] nor can the scope of a written submission to arbitration be enlarged by evidence of a contemporaneous parol agreement.[26] But it has been held that parol evidence is admissible to invalidate the award by showing that the arbitrators exceeded their powers, although the submission and award are in writing and under seal.[27]

b. Bills and Notes. Although the authorities as to the admissibility of parol evidence to affect commercial paper are by no means uniform,[28] the general rule

The purpose for which a corporation is formed, as set forth in its articles of incorporation, cannot be limited by parol evidence. Kalamazoo *v.* Kalamazoo Heat, etc., Co., 124 Mich. 74, 82 N. W. 811.

The subscription book of a corporation, kept pursuant to statute, cannot be varied by parol. State *v.* Hancock, 2 Pennew. (Del.) 252, 45 Atl. 851.

A recital in the articles of association of a corporation as to the amount paid on the stock, viewed as a mere receipt or written acknowledgment of so much money in hand, is only *prima facie* evidence and disputable with oral evidence. Hequembourg *v.* Edwards, 155 Mo. 514, 56 S. W. 490. See also *infra*, XVI, B, 2, p, (I).

19. Goodwin *v.* U. S. Annuity, etc., Ins. Co., 24 Conn. 591; Georgia R., etc., Co. *v.* Smith, 83 Ga. 626, 10 S. E. 235, holding that the books of a corporation, although made by statute *prima facie* evidence, may be rebutted or discredited as to particular entries by internal or external evidence of falsity or error.

The minutes of a resolution of the board of trustees can be controlled by parol evidence showing that they do not correctly express a proposition voted on by the board. Gilson Quartz Min. Co. *v.* Gilson, 51 Cal. 341. But *compare* San Joaquin Land, etc., Co. *v.* Beecher, 101 Cal. 70, 35 Pac. 349, holding that in a suit on an assessment the subscriber could not show in contradiction of the secretary's minutes that the directors were not elected by ballot.

Mistake in record.— Parol evidence is admissible to show that a resolution by the board of directors of a corporation, entered on the record of their proceedings, did not correctly recite the amount of money found due and ordered to be paid to one of its officers. St. Louis, etc., R. Co. *v.* Tiernan, 37 Kan. 606, 15 Pac. 544. See also *infra*, XVI, C, 18, i, (I).

20. *Illinois.*— Lurton *v.* Jacksonville Loan, etc., Assoc., 87 Ill. App. 395 [*affirmed* in 187 Ill. 141, 58 N. E. 218].

Louisiana.— Vicksburg, etc., R. Co. *v.* Ouachita Parish, 11 La. Ann. 649.

Missouri.— St. Louis Rawhide Co. *v.* Hill, 72 Mo. App. 142.

Pennsylvania.— Hamill *v.* Supreme Council R. A., 152 Pa. St. 537, 25 Atl. 645; Harmony Bldg. Assoc. *v.* Goldbeck, 13 Wkly. Notes Cas. 24.

Texas.— Cameron *v.* Decatur First Nat. Bank, (Civ. App. 1896) 34 S. W. 178.

United States.— U. S. Bank *v.* Dandridge, 12 Wheat. 64, 6 L. ed. 552; Allis *v.* Jones, 45 Fed. 148.

21. Crown Coal, etc., Co. *v.* Thomas, 177 Ill. 534, 52 N. E. 1042 [*affirming* 73 Ill. App. 679].

22. Buck *v.* Spofford, 35 Me. 526; McNear *v.* Bailey, 18 Me. 251; Bixby *v.* Whitney, 5 Me. 192; Woodbury *v.* Northy, 3 Me. 85, 14 Am. Dec. 214; De Long *v.* Stanton, 9 Johns. (N. Y.) 38.

Parol evidence that the arbitrator exceeded his authority is inadmissible in a suit at law on an award which appears on its face to be within the submission. Ruckman *v.* Ransom, 35 N. J. L. 565.

23. Buck *v.* Spofford, 35 Me. 526; McNear *v.* Baily, 18 Me. 251; Bixby *v.* Whitney, 5 Me. 192; Woodbury *v.* Northy, 3 Me. 85, 14 Am. Dec. 214; Monk *v.* Beal, 2 Allen (Mass.) 585; Currier *v.* Basset, Smith (N. H.) 191; Joseph *v.* Ostell, 1 L. C. Jur. 265.

The terms of the award cannot be controlled by the oral declarations of the chairman of the arbitrators. Clark *v.* Burt, 4 Cush. (Mass.) 396.

The facts recited in the award as having been ascertained by the arbitrators cannot be contradicted by parol evidence, the award not being assailed for fraud, partiality, or corruption. King *v.* Jemison, 33 Ala. 499.

24. Doke *v.* James, 4 N. Y. 568.

The "understanding" of the arbitrators as to the effect of an award in writing cannot be shown. Scott *v.* Green, 89 N. C. 278.

25. Manhattan L. Ins. Co. *v.* McLaughlin, 80 Pa. St. 53.

26. Palmer *v.* Green, 6 Conn. 14.

27. Butler *v.* New York, 7 Hill (N. Y.) 329 [*reversing* 1 Hill 489].

28. See, generally, Commercial Paper, 7 Cyc. 664 *et seq.*, 8 Cyc. 251 *et seq.*

is that bills, notes, and other instruments of a similar nature are not subject to be varied or contradicted by parol or extrinsic evidence.[29] Accordingly it has

29. *Alabama.*— Maness *v.* Henry, 96 Ala. 454, 11 So. 410; Fennell *v.* Henry, 70 Ala. 484, 45 Am. Rep. 88; Montgomery R. Co. *v.* Hurst, 9 Ala. 513; Owen *v.* Henderson, 7 Ala. 641.

Arkansas.— Featherston *v.* Wilson, 4 Ark. 154.

California.— Easton Packing Co. *v.* Kennedy, (1900) 63 Pac. 130; San Jose Sav. Bank *v.* Stone, 59 Cal. 183; Aud *v.* Magruder, 10 Cal. 282.

Colorado.— Peddie *v.* Donnelly, 1 Colo. 421; Cooper *v.* German Nat. Bank, 9 Colo. App. 169, 47 Pac. 1041.

Connecticut.— Alsop *v.* Goodwin, 1 Root 196.

District of Columbia.— Randle *v.* Davis Coal, etc., Co., 15 App. Cas. 357; Metzerott *v.* Ward, 10 App. Cas. 514.

Florida.— Robinson *v.* Barnett, 18 Fla. 602, 43 Am. Rep. 327.

Georgia.— American Harrow Co. *v.* Dolvin, 119 Ga. 186, 45 S. E. 983; Powell *v.* Fraley, 98 Ga. 370, 25 S. E. 450; Patterson *v.* Ramspeck, 81 Ga. 808, 10 S. E. 390; Patten *v.* Newell, 30 Ga. 271.

Illinois.— Mosher *v.* Rogers, 117 Ill. 446, 5 N. E. 583; Moore *v.* Prussing, 62 Ill. App. 496 [*affirmed* in 165 Ill. 319, 46 N. E. 184]; Adams *v.* Chicago Trust, etc., Bank, 54 Ill. App. 672; Kriz *v.* Rad Pokrok No. 65 C. S. P. S., 46 Ill. App. 418.

Indiana.— American Ins. Co. *v.* Gallahan, 75 Ind. 168; Hayes *v.* Matthews, 63 Ind. 412, 30 Am. Rep. 226; McDonald *v.* Elfes, 61 Ind. 279; Davis *v.* Green, 57 Ind. 493; Roche *v.* Roanoke Classical Seminary, 56 Ind. 198; Woodall *v.* Greater, 51 Ind. 539; Miller *v.* Goldthwait, 37 Ind. 217; Billan *v.* Hercklebrath, 23 Ind. 71; Fankboner *v.* Fankboner, 20 Ind. 62; Columbia *v.* Amos, 5 Ind. 184; Smith *v.* Stevens, 3 Ind. 332; Calhoun *v.* Davis, 2 Ind. 532; Mahan *v.* Sherman, 7 Blackf. 378; Burge *v.* Dishman, 5 Blackf. 272.

Iowa.— Russell *v.* Smith, 115 Iowa 261, 88 N. W. 361; Clute *v.* Frazier, 58 Iowa 268, 12 N. W. 327; Draper *v.* Rice, 56 Iowa 114, 7 N. W. 524, 8 N. W. 797, 41 Am. St. Rep. 88; Barhydt *v.* Bonny, 55 Iowa 717, 8 N. W. 672; American Emigrant Co. *v.* Clark, 47 Iowa 671; Atherton *v.* Dearmond, 33 Iowa 353.

Kentucky.— Crane *v.* Williamson, 111 Ky. 271, 63 S. W. 610, 975, 23 Ky. L. Rep. 689; Williams *v.* Beazley, 3 J. J. Marsh. 577; Garten *v.* Chandler, 2 Bibb 246; Hart *v.* Dixon, 5 Ky. L. Rep. 602.

Maine.— Nutter *v.* Stover, 48 Me. 163; Goddard *v.* Hill, 33 Me. 582.

Maryland.— Wooldridge *v.* Royer, 69 Md. 113, 14 Atl. 681; Hunting *v.* Emmart, 55 Md. 265.

Massachusetts.—Torpey *v.* Tebo, 184 Mass. 307, 68 N. E. 223; Clemens Electrical Mfg. Co. *v.* Walton, 173 Mass. 286, 52 N. E. 132, 53 N. E. 820; Whitwell *v.* Winslow, 134 Mass. 343; Perry *v.* Bigelow, 128 Mass. 129; St. Louis Perpetual Ins. Co. *v.* Homer, 9 Metc. 39.

Michigan — Breckenridge First State Sav. Bank *v.* Webster, 121 Mich. 149, 79 N. W. 1068; Phelps *v.* Abbot, 114 Mich. 88, 72 N. W. 3; Hutchinson *v.* Hutchinson, 102 Mich. 635, 61 N. W. 60.

Minnesota.— Harrison *v.* Morrison, 39 Minn. 319, 40 N. W. 66; Esch *v.* Hardy, 22 Minn. 65; Butler *v.* Paine, 8 Minn. 324.

Mississippi.— O'Neal *v.* McLeod, (1900) 28 So. 23; Cole *v.* Hundley, 8 Sm. & M. 473.

Missouri.— Henshaw *v.* Dutton, 59 Mo. 139; Helmrichs *v.* Gehrke, 56 Mo. 79; Barton *v.* Wilkins, 1 Mo. 74; Mechanics' Bank *v.* Terry, 67 Mo. App. 12; Reed *v.* Nicholson, 37 Mo. App. 646; Higgins *v.* Cartwright, 25 Mo. App. 609; Mechanics' Bank *v.* Valley Packing Co., 4 Mo. App. 200 [*affirmed* in 70 Mo. 643].

Nebraska.— Western Mfg. Co. *v.* Rogers, 54 Nebr. 456, 74 N. W. 849; Miller *v.* Gunderson, 48 Nebr. 715, 67 N. W. 769.

New Hampshire.— Simpson *v.* Currier, 60 N. H. 19; Weare *v.* Sawyer, 44 N. H. 198; Cross *v.* Rowe, 22 N. H. 77.

New Jersey.— Kean *v.* Davis, 20 N. J. L. 425.

New York.— Parker *v.* Syracuse, 31 N. Y. 376; Norton *v.* Coons, 6 N. Y. 33; Gridley *v.* Dole, 4 N. Y. 486; Potter *v.* Tallman, 35 Barb. 182; Carter *v.* Hamilton, 11 Barb. 147; Oppenheimer *v.* Kruckman, 84 N. Y. Suppl. 129; Schmittler *v.* Simon, 7 N. Y. St. 273; Eaves *v.* Henderson, 17 Wend. 190.

North Carolina.— Ijames *v.* McClamroch, 92 N. C. 362.

Ohio.— Cummings *v.* Kent, 44 Ohio St. 92, 4 N. E. 710, 58 Am. St. Rep. 796 [*affirming* 6 Ohio Dec. (Reprint) 1178, 12 Am. L. Rec. 163, 10 Cinc. L. Bul. 38]; Avery *v.* Vansickle, 35 Ohio St. 270; Corwin *v.* Cook, 8 Ohio Dec. (Reprint) 432, 8 Cinc. L. Bul. 4.

Pennsylvania.— Ziegler *v.* McFarland, 147 Pa. St. 607, 23 Atl. 1045; Miller *v.* Miller, 4 Pa. St. 317; Heydt *v.* Frey, 10 Pa. Cas. 84, 13 Atl. 475; Meily *v.* Phillips, 16 Wkly. Notes Cas. 429; Bearne *v.* Brandlis, 1 Wkly. Notes Cas. 102; American Baptist Publication Soc. *v.* Erb, 19 Phila. 325; Heil *v.* Ginginger, 1 Woodw. 259.

South Carolina.— Bomar *v.* Asheville, etc., R. Co., 30 S. C. 450, 9 S. E. 512; Daniel *v.* Ray, 1 Hill 32.

Tennessee.— Wallace *v.* Goodlet, 93 Tenn. 598, 30 S. W. 27; Ragsdale *v.* Gossett, 2 Lea 729.

Texas.— Watson *v.* Miller, 82 Tex. 279, 17 S. W. 1053; San Antonio Lumber Co. *v.* Dickey, (Civ. App. 1894) 27 S. W. 955; Standard Wagon Co. *v.* Roberts, (Civ. App. 1894) 26 S. W. 246; Bedwell *v.* Thompson, 25 Tex. Suppl. 245; Leavell *v.* Seale, (Civ. App. 1898) 45 S. W. 171.

Utah.—Andrus *v.* Blazzard, 23 Utah 233, 63 Pac. 888, 54 L. R. A. 354; Gregg *v.* Groesbeck, 11 Utah 310, 40 Pac. 202, 32 L. R. A. 266.

been held inadmissible to show a parol agreement of the payee or holder of commercial paper not to enforce payment against the person or persons liable thereon,[30] or a parol agreement that the payee or holder shall look to some other

Vermont.— Norton *v.* Downer, 31 Vt. 407; Gillett *v.* Ballou, 29 Vt. 296; Bradley *v.* Anderson, 5 Vt. 152; Downs *v.* Webster, Brayt. 79.

Virginia.— Martin *v.* Lewis, 30 Gratt. 672, 32 Am. Rep. 682.

Washington.— Catlin *v.* Harris, 7 Wash. 542, 35 Pac. 385.

Wisconsin.— Cook *v.* Durham, 61 Wis. 15, 20 N. W. 670; Gregory *v.* Hart, 7 Wis. 532.

United States.— Burnes *v.* Scott, 117 U. S. 582, 6 S. Ct. 865, 29 L. ed. 991; Martin *v.* Cole, 104 U. S. 30, 26 L. ed. 647; White *v.* Georgetown Miners Nat. Bank, 102 U. S. 658, 26 L. ed. 250; Brown *v.* Spofford, 95 U. S. 474, 24 L. ed. 508; Forsythe *v.* Kimball, 91 U. S. 291, 23 L. ed. 352; Specht *v.* Howard, 16 Wall. 564, 21 L. ed. 348; Van Vleet *v.* Sledge, 45 Fed. 743; Smith *v.* Burnham, 22 Fed. Cas. No. 13,019, 3 Sumn. 435.

England.— Hill *v.* Wilson, L. R. 8 Ch. 888, 42 L. J. Ch. 817, 29 L. T. Rep. N. S. 238, 21 Wkly. Rep. 757; Abrey *v.* Crux, L. R. 5 C. P. 37, 39 L. J. C. P. 9, 21 L. T. Rep. N. S. 327, 18 Wkly. Rep. 63; Besant *v.* Cross, 10 C. B. 895, 15 Jur. 828, 20 L. J. C. P. 173, 2 L. M. & P. 351, 70 E. C. L. 895.

Canada.— Smith *v.* Squires, 13 Manitoba 360; Davis *v.* McSherry, 7 U. C. Q. B. 490.

See 20 Cent. Dig. tit. "Evidence," § 1799 *et seq.*

A memorandum at the foot of a note as a part thereof cannot be contradicted or varied. Corley *v.* McKeag, 9 Mo. App. 38.

Note cannot be shown to be intended as receipt.— Shaw *v.* Shaw, 50 Me. 94, 79 Am. Dec. 605; City Bank *v.* Adams, 45 Me. 455; Billings *v.* Billings, 10 Cush. (Mass.) 178; Meily *v.* Phillips, 16 Wkly. Notes Cas. (Pa.) 429. *Contra*, Beals *v.* Beals, 20 Ind. 163. See also De Lavallette *v.* Wendt, 75 N. Y. 579, 31 Am. Rep. 494, in which it was held that parol evidence was admissible to show that a writing in the following form, "Received of P. five hundred dollars due on demand," was intended as a mere receipt.

Use of instrument.— A note cannot be shown to have been intended to be used only as collateral. Clement *v.* Drybread, 108 Iowa 701, 78 N. W. 235. Evidence of an agreement not to negotiate an instrument negotiable on its face would be a contradiction of the writing and hence is not admissible. McSherry *v.* Brooks, 46 Md. 103; Waddle *v.* Owen, 43 Nebr. 489, 61 N. W. 731; Heist *v.* Hart, 73 Pa. St. 286; Knox *v.* Clifford, 38 Wis. 651, 20 Am. Rep. 28. *Contra*, under the Louisiana code. Robertson *v.* Nott, 2 Mart. N. S. 122, 3 Mart. N. S. 268. The use of an accommodation note may be shown by parol to have been restricted by an agreement between the parties. Western Nat. Bank *v.* Wood, 19 N. Y. Suppl. 81.

A check cannot be contradicted by parol (Shirts *v.* Rooker, 21 Ind. App. 420, 52 N. E. 629), or shown to have been intended as a memorandum for money lent (Kelley *v.* Brown, 5 Gray (Mass.) 108).

The giving of a duplicate of a lost draft by the drawer does not necessarily evince a purpose to waive a defense of the drawer against liability on the draft, nor does such duplicate as a matter of law import a promise to pay the draft. Therefore it is competent to show by parol evidence that the drawer informed the payee that he did not intend by the giving of such duplicate to waive his right, but merely intended to accommodate the payee by putting in his hands a paper which would enable him to collect the money from the drawee. Gilby Bank *v.* Farnsworth, 7 N. D. 6, 72 N. W. 901, 38 L. R. A. 843.

A note executed more than six months after a sale of goods, for the price of which the note is given, and based upon no new consideration, is not conclusive as to the real agreement between the parties as to a warranty, but the real agreement between the parties may be shown. Hille *v.* Adair, 58 S. W. 697, 22 Ky. L. Rep. 742.

Interest.— It cannot be shown that there was an agreement that the note should not bear interest (Stutsman *v.* Stutsman, 3 Blackf. (Ind.) 231), or that interest was to be paid at a rate other than that expressed in the instrument (Redden *v.* Inman, 6 Ill. App. 55; Davis *v.* Stout, 126 Ind. 12, 25 N. E. 862, 22 Am. St. Rep. 565; Catlin *v.* Harris, 7 Wash. 542, 35 Pac. 385), or that interest apparently payable at maturity was to be paid annually (Dance *v.* Dance, 56 Md. 433; Kœhring *v.* Muemminghoff, 61 Mo. 403, 21 Am. Rep. 402). Nor can a promise to pay interest on a non-interest bearing instrument be shown. Durnford's Succession, 8 Rob. (La.) 488; Bell *v.* Norwood, 7 La. 95; Toussaint *v.* Delogny, 2 Mart. (La.) 78; Milliken *v.* Southgate, 26 Me. 424; Read *v.* Attica Bank, 124 N. Y. 671, 27 N. E. 250 [*modifying* 55 Hun 154, 8 N. Y. Suppl. 364].

30. *Alabama.*— Bomar *v.* Rosser, 131 Ala. 215, 31 So. 430.

Arkansas.— Bishop *v.* Dillard, 49 Ark. 285, 5 S. W. 341.

California.— Leonard *v.* Miner, 120 Cal. 403, 52 Pac. 655.

Georgia.— Dendy *v.* Gamble, 59 Ga. 434.

Illinois.— Wood *v.* Surrells, 89 Ill. 107; Bright *v.* Kenefick, 94 Ill. App. 137.

Indiana.— Withrow *v.* Wiley, 3 Ind. 379.

Iowa.— Altman *v.* Anton, 91 Iowa 612, 60 N. W. 191; Atkinson *v.* Blair, 38 Iowa 156.

Kansas.— Dominion Nat. Bank *v.* Manning, 60 Kan. 729, 57 Pac. 949.

Maine.— Fairfield *v.* Hancock, 34 Me. 93.

Massachusetts.— Henry Wood's Sons Co. *v.* Schaefer, 173 Mass. 443, 53 N. E. 881; Barnstable Sav. Bank *v.* Ballou, 119 Mass. 487; Davis *v.* Randall, 115 Mass. 547, 15 Am. Rep. 146.

person or persons for payment,[31] that he shall require payment only in a certain event[32] or out of some particular fund,[33] that he shall not require payment until a certain security has been exhausted,[34] or shall not call on one of the persons liable for payment until all remedies against the others have been exhausted.[35] It has also been held not admissible to show that the time for the payment of the obligation as agreed upon by the parties is different from the date of maturity as appearing in the instrument,[36] to contradict a note as to the place of pay-

New Hampshire.— True *v.* Shepard, 51 N. H. 501.

New Jersey.— Remington *v.* Wright, 43 N. J. L. 451; Wright *v.* Remington, 41 N. J. L. 48, 32 Am. Rep. 180.

Ohio.— Cummings *v.* Kent, 44 Ohio St. 92, 4 N. E. 710, 58 Am. Rep. 796; Cummings *v.* Kent, 6 Ohio Dec. (Reprint) 1178, 12 Am. L. Rec. 163.

Pennsylvania.— Superior Nat. Bank *v.* Stadelman, 153 Pa. St. 634, 26 Atl. 201; Heydt *v.* Frey, 10 Pa. Cas. 84, 13 Atl. 475; Hill *v.* Ely, 5 Serg. & R. 363, 9 Am. Dec. 376; Dickson *v.* Tunstall, 3 C. Pl. 128; Rodgers *v.* Donovan, 13 Phila. 51; Brown *v.* Scanlan, 1 Leg. Chron. 381.

South Carolina.— McClanaghan *v.* Hines, 2 Strobh. 122, holding that, in a suit on a note in legal form, defendant cannot show by oral testimony that it was only a memorandum, which the maker was not to pay at all, except in the character of collecting agent.

Texas.— Barnard *v.* Robertson, (Civ. App. 1895) 29 S. W. 697.

Vermont.— Morse *v.* Low, 44 Vt. 561.

Washington.— Gurney *v.* Morrison, 12 Wash. 456, 41 Pac. 192; Bryan *v.* Duff, 12 Wash. 233, 40 Pac. 936, 50 Am. St. Rep. 889; Tacoma Mill Co. *v.* Sherwood, 11 Wash. 492, 39 Pac. 977.

Canada.— Chamberlin *v.* Ball, 5 L. C. Jur. 88, 11 L. C. Rep. 50; Decelles *v.* Samoisette, 4 Montreal Super. Ct. 361.

See 20 Cent. Dig. tit. "Evidence," § 1802.

An indorser cannot control his indorsement of a draft by parol evidence showing that he was not to be held liable as indorser. Prescott Bank *v.* Caverly, 7 Gray (Mass.) 217, 66 Am. Dec. 473.

Where a husband and wife have executed a joint note, and a mortgage on her lands to secure it, the husband cannot escape personal liability on the note by setting up a contemporaneous agreement to the effect that he was to incur no personal liability, but was to sign the note simply as evidence of his consent to the note and mortgage by her. Jackson *v.* Jackson, 12 Ky. L. Rep. 388.

31. *Indiana.*— Brush *v.* Raney, 34 Ind. 416.

Kentucky.— Citizens' Bank *v.* Millet, 103 Ky. 1, 44 S. W. 366, 20 Ky. L. Rep. 5, 82 Am. St. Rep. 546, 44 L. R. A. 664.

Ohio.— Lillie *v.* Bates, 3 Ohio Cir. Ct. 94, 2 Ohio Cir. Dec. 54.

Oregon.— Portland Nat. Bank *v.* Scott, 20 Oreg. 421, 26 Pac. 276.

Pennsylvania.— Mahanoy City First Nat. Bank *v.* Dick, 22 Pa. Super. Ct. 445.

See 20 Cent. Dig. tit. "Evidence," §§ 1800, 1802.

32. *Alabama.*— West *v.* Kelly, 19 Ala. 353, 54 Am. Dec. 192.

Connecticut.— Osborne *v.* Taylor, 58 Conn. 439, 20 Atl. 605.

Georgia.— Lunsford *v.* Malsby, 101 Ga. 39, 28 S. E. 496; Johnson *v.* Cobb, 100 Ga. 139, 28 S. E. 72; Dinkler *v.* Baer, 92 Ga. 432, 17 S. E. 953.

Iowa.— Atkinson *v.* Blair, 38 Iowa 156.

Kentucky.— Allen *v.* Thompson, 108 Ky. 476, 56 S. W. 823, 22 Ky. L. Rep. 164; Dale *v.* Pope, 4 Litt. 166.

Minnesota.— Northern Trust Co. *v.* Hiltgen, 62 Minn. 361, 64 N. W. 909.

Mississippi.— Wren *v.* Hoffman, 41 Miss. 616.

Tennessee.— Ellis *v.* Hamilton, 4 Sneed 512.

Texas.— Floyd *v.* Brawner, 1 Tex. App. Civ. Cas. § 135.

See 20 Cent. Dig. tit. "Evidence," §§ 1800, 1802. See also *infra*, XVI, C, 6.

33. *Alabama.*— Rice *v.* Gilbreath, 119 Ala. 424, 24 So. 421.

Illinois.— Mumford *v.* Tolman, 54 Ill. App. 471.

Iowa.— De Long *v.* Lee, 73 Iowa 53, 34 N. W. 613.

Kentucky.— Bowers *v.* Linn, 14 Ky. L. Rep. 889.

Minnesota.— Singer Mfg. Co. *v.* Potts, 59 Minn. 240, 61 N. W. 23.

New York.— Lewis *v.* Jones, 7 Bosw. 366. But *compare* Andrews *v.* Hess, 20 N. Y. App. Div. 194, 46 N. Y. Suppl. 796.

Tennessee.— Ellis *v.* Hamilton, 4 Sneed 512.

Texas.— Franklin *v.* Smith, 1 Tex. Unrep. Cas. 229.

See 20 Cent. Dig. tit. "Evidence," §§ 1800, 1802, 1806.

34. Moore *v.* Prussing, 165 Ill. 319, 46 N. E. 184 [*affirming* 62 Ill. App. 496]; Fisher *v.* Briscoe, 10 Mont. 124, 25 Pac. 30; Anderson *v.* Matheny, (S. D. 1903) 95 N. W. 911; Abrey *v.* Crux, L. R. 5 C. P. 37, 39 L. J. C. P. 9, 21 L. T. Rep. N. S. 327, 18 Wkly. Rep. 63.

35. Cowles *v.* Townsend, 31 Ala. 133.

36. *Alabama.*— Walker *v.* Clay, 21 Ala. 797.

Michigan.— Kelsey *v.* Chamberlain, 47 Mich. 241, 10 N. W. 355.

New York.— Block *v.* Stevens, 72 N. Y. App. Div. 246, 76 N. Y. Suppl. 213; Farmers', etc., Bank *v.* Whinfield, 24 Wend. 419; Fitzhugh *v.* Runyon, 8 Johns. 375.

Pennsylvania.— Mason *v.* Graff, 35 Pa. St. 448; Davis *v.* Cammel, Add. 233; Bank *v.* Bradford, 2 Lack. Leg. Rec. 383.

United States.— Brown *v.* Wiley, 20 How. 442, 15 L. ed. 965.

ment,[37] or where by the express terms or legal effect of an instrument it is payable in money to show that it was agreed that it should be paid in any other way.[38] It has also been asserted that any evidence varying or nullifying the effect of a written acceptance of a bill is inadmissible.[39]

c. Bills of Sale — (I) *In General.* The great weight of authority places bills of sale or sale notes on the footing of other written instruments, with respect to the admission of parol evidence to vary the same, and therefore hold that such an instrument cannot be varied, added to, contradicted, or explained by parol or other extrinsic evidence.[40] On the other hand it has also been held that a simple bill of sale does not embody the preliminary or essential terms of a contract in such a way as to exclude parol evidence.[41] These authorities, however, are not necessarily conflicting but may be explained by the following distinction: In so far as a bill of sale partakes of the nature of a receipt or is simply declaratory of a fact, it may be explained or perhaps contradicted; but to the extent that it expresses the contract of the parties and defines their rights and liabilities, it is

Canada.— McQueen *v.* McQueen, 9 U. C. Q. B. 536. See also Porteous *v.* Muir, 8 Ont. 127.

See 20 Cent. Dig. tit. "Evidence," § 1804.

Agreement to renew at maturity cannot be shown. Wolf *v.* Wolf, 2 Pa. Super. Ct. 590; Wolf *v.* Rosenbach, 2 Pa. Super. Ct. 587.

37. Montgomery R. Co. *v.* Hurst, 9 Ala. 513; Anthony *v.* Pittman, 66 Ga. 701. See also Baily *v.* Birkhofer, 123 Iowa 59, 98 N. W. 594. But see *infra*, XVI, C, 25, g, (II).

38. *District of Columbia.*—Linville *v.* Holden, 2 MacArthur 329.

Indiana.— Thornburgh *v.* Newcastle, etc., R. Co., 14 Ind. 499.

Iowa.— Clement *v.* Houck, 113 Iowa 504, 85 N. W. 765.

Nebraska.— Vradenburgh *v.* Johnson, 3 Nebr. (Unoff.) 326, 91 N. W. 496.

New Hampshire.— Lang *v.* Johnson, 24 N. H. 302.

Texas.— Roundtree *v.* Gilroy, 57 Tex. 176; Holt *v.* Chandler, (Civ. App. 1895) 29 S. W. 532.

United States.— Olshausen *v.* Lewis, 18 Fed. Cas. No. 10,507, 1 Biss. 419.

See 20 Cent. Dig. tit. "Evidence," § 1806. But *compare infra*, XVI, C, 25, g, (II).

39. Burns, etc., Lumber Co. *v.* Doyle, 71 Conn. 742, 43 Atl. 483, 71 Am. St. Rep. 235; Schwartz *v.* Barringer, 20 La. Ann. 419; Sylvester *v.* Staples, 44 Me. 496; Kervan *v.* Townsend, 25 N. Y. App. Div. 256, 49 N. Y. Suppl. 137.

40. *Alabama.*— Jones *v.* Trawick, 31 Ala. 253; McCoy *v.* Moss, 5 Port. 88.

California.— Hodson *v.* Varney, 122 Cal. 619, 55 Pac. 413.

Connecticut.— See Munson *v.* Munson, 24 Conn. 115.

Indiana.— Allen *v.* Nofsinger, 13 Ind. 494.

Iowa.— Tuttle *v.* Cone, 108 Iowa 468, 79 N. W. 267.

Kansas.— Cunningham *v.* Martin, 46 Kan. 352, 26 Pac. 696.

Louisiana.— Lyons *v.* Jackson, 4 Rob. 465.

Maine.— Neal *v.* Flint, 88 Me. 72, 33 Atl. 669.

Maryland.— Ecker *v.* McAllister, 45 Md. 290.

Massachusetts.— Finnigan *v.* Shaw, 184 Mass. 112, 68 N. E. 35; Stevens *v.* Wiley, 165 Mass. 402, 43 N. E. 177; Harper *v.* Ross, 10 Allen 332.

New Hampshire.—Smith *v.* Gibbs, 44 N. H. 335.

New York.— Kelly *v.* Roberts, 40 N. Y. 432; Fales *v.* McKeon, 2 Hilt. 53; Spickerman *v.* McChesney, 6 N. Y. St. 374.

Texas.— Coverdill *v.* Seymour, 94 Tex. 1, 57 S. W. 37 [*reversing* (Civ. App. 1900) 56 S. W. 221].

Vermont.— Putnam *v.* McDonald, 72 Vt. 4, 47 Atl. 159; Davis *v.* Bradley, 24 Vt. 55; Reed *v.* Wood, 9 Vt. 285.

England.— Meyer *v.* Everth, 4 Campb. 22, 15 Rev. Rep. 722; Greaves *v.* Ashlin, 3 Campb. 426, 14 Rev. Rep. 771; Lano *v.* Neale, 2 Stark. 105, 3 E. C. L. 336.

See 20 Cent. Dig. tit. "Evidence," § 1729.

Reservation cannot be shown by parol. Cook *v.* Menominee First Nat. Bank, 90 Mich. 214, 51 N. W. 206.

A statement as to the consideration contained in a bill of sale is contractual in its nature and cannot be varied by proof of a parol contemporaneous agreement engrafting an additional consideration thereon. Pickett *v.* Green, 120 Ind. 584, 22 N. E. 737; McFarland *v.* McGill, 16 Tex. Civ. App. 298, 41 S. W. 402. See also *infra*, XVI, C, 9, i.

A memorandum of sale made by an auctioneer cannot be varied by parol evidence. Stoddert *v.* Port Tobacco Parish, 2 Gill & J. (Md.) 227.

A recital as to the interest of a part owner of a vessel which is the subject of a bill of sale may be contradicted by parol in a suit by such part owner for his share of the proceeds of the sale. Whiton *v.* Spring, 74 N. Y. 169.

A receipted statement of account is not a bill of sale, but may be varied by parol. Putnam *v.* McDonald, 72 Vt. 4, 47 Atl. 159.

Reciprocal bills of sale executed by two persons to each other may be shown by parol to have been merely a means adopted of effecting an exchange of the chattels conveyed thereby. McGehee *v.* Rump, 37 Ala. 651.

41. Picard *v.* McCormick, 11 Mich. 68.

subject to the same rule as other written contracts and precludes the admission of parol or extrinsic evidence.[42]

(II) *Property Included.* The conclusive effect of a bill of sale extends to the statements therein as to the property included and the description thereof, and as to these matters the instrument cannot be contradicted or varied.[43]

(III) *Title or Interest Conveyed.* It is not permissible to show by parol or extrinsic evidence that the title or interest conveyed was other than that which appears from the face of the instrument,[44] nor to vary the time of the vesting of title as shown thereby.[45]

(IV) *Warranty.* It is also the rule that a warranty cannot be engrafted upon a bill of sale by parol or extrinsic evidence,[46] and that a warranty contained in the bill cannot be varied or limited by such evidence.[47] But an implied warranty

42. Cohen *v.* Jackoboice, 101 Mich. 409, 59 N. W. 655; Linsley *v.* Lovely, 26 Vt. 123. See also Perrine *v.* Cooley, 39 N. J. L. 449; Putnam *v.* McDonald, 72 Vt. 4, 47 Atl. 159.

A mere bill of parcels is not such a contract as will exclude parol evidence. Grant *v.* Frost, 80 Me. 202, 13 Atl. 881; Atwater *v.* Clancy, 107 Mass. 369; Dunham *v.* Barnes, 9 Allen (Mass.) 352; Hazard *v.* Loring, 10 Cush. (Mass.) 267. See also Johnson *v.* Powers, 65 Cal. 179, 3 Pac. 625.

43. *California.*— Schroeder *v.* Schmidt, 74 Cal. 459, 16 Pac. 243.

Florida.— Harrell *v.* Durrance, 9 Fla. 490.

Illinois.— McCloskey *v.* McCormick, 37 Ill. 86.

Massachusetts.—Parry *v.* Libbey, 166 Mass. 112, 44 N. E. 124; Ridgway *v.* Bowman, 7 Cush. 268.

Montana.— Hogan *v.* Kelly, 29 Mont. 485, 75 Pac. 81.

New York.— Brady *v.* Cassidy, 104 N. Y. 147, 10 N. E. 131; Caulkins *v.* Hellman, 14 Hun 330; Cram *v.* Union Bank, 1 Abb. Dec. 461, 4 Keyes 558.

See 20 Cent. Dig. tit. "Evidence," § 1730.

Non-delivery of goods.— The recital of a bill of sale as to the number of articles included therein, and to be delivered pursuant thereto, does not estop the vendee from denying that he received that number. Murdock *v.* Clarke, 90 Cal. 427, 24 Pac. 272, 27 Pac. 275.

44. Trumbo *v.* Curtright, 1 A. K. Marsh. (Ky.) 582; Scott *v.* Auld, 21 Fed. Cas. No. 12,523, 3 Cranch C. C. 647.

Contract cannot be shown to be of bailment only.— Allen *v.* Bryson, 67 Iowa 591, 25 N. W. 820, 56 Am. Rep. 358; Bonesteel *v.* Flack, 41 Barb. (N. Y.) 435.

Trust cannot be shown.— Davis *v.* Moody, 15 Ga. 175; Feusier *v.* Sneath, 3 Nev. 120. *Contra,* Neresheimer *v.* Smyth, 167 N. Y. 202, 60 N. E. 449, holding that parol evidence is admissible to prove that a bill of sale was made with the consent of creditors and for their benefit, as this does not tend to contradict the writing but merely to show the trust arrangement between the vendor and his creditors.

Bill of sale can be shown to be intended as a mortgage (McAnnulty *v.* Seick, 59 Iowa 586, 13 N. W. 743; Fuller *v.* Parrish, 3 Mich. 211) where no innocent third persons will be affected (King *v.* Greaves, 51 Mo. App. 534). *Contra,* Thompson *v.* Patton, 5 Litt. (Ky.) 74, 15 Am. Dec. 44; Grant *v.* Frost, 80 Me. 202, 13 Atl. 881; Whitaker *v.* Sumner, 20 Pick. (Mass.) 399; Thomas *v.* Scutt, 52 Hun (N. Y.) 343, 5 N. Y. Suppl. 365; State *v.* Koch, 40 Mo. App. 635, at least as to innocent third persons.

45. Rennell *v.* Kimball, 5 Allen (Mass.) 356.

46. *Alabama.*— Bush *v.* Bradford, 15 Ala. 317.

Arkansas.— Hanger *v.* Evins, 38 Ark. 334; Hooper *v.* Chism, 13 Ark. 496.

California.— Johnson *v.* Powers, 65 Cal. 179, 3 Pac. 625.

Illinois.— Vierling *v.* Iroquois Furnace Co., 170 Ill. 189, 48 N. E. 1069 [*affirming* 68 Ill. App. 643].

Iowa.— Mast *v.* Pearce, 58 Iowa 579, 8 N. W. 632, 12 N. W. 597, 43 Am. St. Rep. 125.

Kansas.— Willard *v.* Ostrander, 46 Kan. 591, 26 Pac. 1017.

Louisiana.— Buhler *v.* McHatton, 9 La. Ann. 192; Milliken *v.* Andrews, 11 Rob. 241.

Minnesota.— Thompson *v.* Libby, 34 Minn. 374, 26 N. W. 1.

Missouri.— Jolliffe *v.* Collins, 21 Mo. 338.

New York.— Engelhorn *v.* Reitlinger, 55 N. Y. Super. Ct. 485, 14 N. Y. St. 749; Mumford *v.* McPherson, 1 Johns. 414, 3 Am. Dec. 339.

North Carolina.— Etheridge *v.* Palin, 72 N. C. 213.

Tennessee.— Smith *v.* Cozart, 2 Head 526.

Vermont.— Reed *v.* Wood, 9 Vt. 285.

United States.— Randall *v.* Rhodes, 20 Fed. Cas. No. 11,556, 1 Curt. 90.

England.— Powell *v.* Edmunds, 12 East 6, 11 Rev. Rep. 316.

See 20 Cent. Dig. tit. "Evidence," § 1732.

A conditional sale note executed by the buyer of a horse for a part of the price does not constitute the entire contract of sale precluding the admission of parol evidence of a warranty of soundness. Nauman *v.* Ullman, 102 Wis. 92, 78 N. W. 159.

An independent warranty may be shown by parol where the party seeking to show the same does not rely upon the writing to make out his case. Hersom *v.* Henderson, 21 N. H. 224, 53 Am. Dec. 185.

47. *Arkansas.*— Hanger *v.* Evins, 38 Ark. 334.

may be sustained by parol,[48] or the implied warranty of title which results from the sale itself may be rebutted by such evidence; that is to say the vendor may overcome the legal presumption by proof that he did not warrant the title, for in such case he does not add to the terms expressed in writing but only rebuts a legal presumption not itself expressed in writing but arising from that which is expressed.[49]

d. Bonds. The execution of a bond merges all prior agreements or understandings with reference to the subject-matter and is not subject to be varied or contradicted, either as to its terms or conditions, by parol or extrinsic evidence.[50] But where a bond provides for the performance of certain acts, and for the pay-

Louisiana.— Jackson *v.* Hays, 14 La. Ann. 577.

Nebraska.— Watson *v.* Roode, 30 Nebr. 264, 46 N. W. 491, 43 Nebr. 348, 61 N. W. 625.

New York.— See Smith *v.* Smith, 4 N. Y. Leg. Obs. 106.

South Carolina.— Stucky *v.* Clyburn, Cheves 186, 34 Am. Dec. 590.

Tennessee.— Hogan *v.* Carland, 5 Yerg. 283.

Wisconsin.— McQuaid *v.* Ross, 77 Wis. 470, 40 N. W. 892.

See 20 Cent. Dig. tit. "Evidence," § 1732.

An express warranty as to one thing precludes proof of oral warranties as to other things. Humphrey *v.* Merriam, 46 Minn. 413, 49 N. W. 199; Bradford *v.* Neil, 46 Minn. 347, 49 N. W. 193. Thus an express warranty of title precludes proof of an additional parol warrant of soundness (Pender *v.* Fobes, 18 N. C. 250; Smith *v.* Williams, 5 N. C. 426, 4 Am. Dec. 564; Wood *v.* Ashe, 1 Strobh. (S. C.) 407) or that the property was merchantable (Merriam *v.* Field, 24 Wis. 640).

48. Miller *v.* Gaither, 3 Bush (Ky.) 152.

49. Johnson *v.* Powers, 65 Cal. 179, 3 Pac. 625; Miller *v.* Van Tassel, 24 Cal. 458. See *infra*, XVI, C, 28.

50. *Connecticut.*— Baldwin *v.* Carter, 17 Conn. 201, 42 Am. Dec. 735.

Georgia.— Gray *v.* Phillips, 88 Ga. 199, 14 S. E. 205; Brumby *v.* Barnard, 60 Ga. 292.

Illinois.— Cunningham *v.* Wrenn, 23 Ill. 64; Broadwell *v.* Broadwell, 6 Ill. 599.

Indiana.— Rhoads *v.* Jones, 92 Ind. 328; Clifford *v.* Smith, 4 Ind. 377; Miller *v.* Elliott, Smith 267.

Iowa.— Carroll County *v.* Ruggles, 69 Iowa 269, 28 N. W. 590, 58 Am. Rep. 223.

Kentucky.— Kelly *v.* Bradford, 3 Bibb 317, 6 Am. Dec. 656.

Maine.— Whitney *v.* Slayton, 40 Me. 224; Ayer *v.* Fowler, 30 Me. 347; Robinson *v.* Heard, 15 Me. 296; Sawyer *v.* Hammatt, 12 Me. 391.

Maryland.— Worthington *v.* Bullitt, 6 Md. 172; Bullett *v.* Worthington, 3 Md. Ch. 99.

Massachusetts.— Banorgee *v.* Hovey, 5 Mass. 11, 4 Am. Dec. 17.

Minnesota.— Keough *v.* McNitt, 6 Minn. 513.

Missouri.— Lane *v.* Price, 5 Mo. 101; Hydraulic Press Brick Co. *v.* Neumeister, 15 Mo. App. 592.

Nevada.— Morris *v.* McCoy, 7 Nev. 399.

New Jersey.— Chetwood *v.* Brittan, 2 N. J. Eq. 438, 4 N. J. Eq. 334 [*affirmed* in 5 N. J. Eq. 628].

New York.— Belloni *v.* Freeborn, 63 N. Y. 383; Mutual L. Ins. Co. *v.* Aldrich, 44 N. Y. App. Div. 620, 60 N. Y. Suppl. 195; Nelson *v.* Sharp, 4 Hill 584; Wells *v.* Baldwin, 18 Johns. 45.

North Carolina.—Howell *v.* Hooks, 17 N. C. 258.

Ohio.— McGovney *v.* State, 20 Ohio 93.

Pennsylvania.— Clever *v.* Hilberry, 116 Pa. St. 431, 9 Atl. 647; Fulton *v.* Hood, 34 Pa. St. 365, 75 Am. Dec. 664; Miller *v.* Fichthorn, 31 Pa. St. 252; Com. *v.* Deck, 28 Pa. St. 497; Stub *v.* Stub, 3 Pa. St. 251; Yeager *v.* Yeager, 5 Pa. Cas. 174, 8 Atl. 579; Hain *v.* Kalbach, 14 Serg. & R. 159, 16 Am. Dec. 484; Cook *v.* Ambrose, Add. 323; Field *v.* Biddle, 2 Dall. 171, 1 L. ed. 335; Heil *v.* Ginginger, 1 Woodw. 259.

South Carolina.— South Carolina Soc. *v.* Johnson, 1 McCord 41, 10 Am. Dec. 644; Atkinson *v.* Scott, 1 Bay 307.

Tennessee.— McLean *v.* State, 8 Heisk. 22; Nichol *v.* Thompson, 1 Yerg. 151.

Texas.— Callison *v.* Gray, 25 Tex. 84; Flewellen *v.* Ft. Bend County, 17 Tex. Civ. App. 155, 42 S. W. 775; Page *v.* White Sewing Mach. Co., 12 Tex. Civ. App. 327, 34 S. W. 988.

Virginia.— Barnett *v.* Barnett, 83 Va. 504, 2 S. E. 733.

Wisconsin.— Wussow *v.* Hase, 108 Wis. 382, 84 N. W. 433; Brinker *v.* Meyer, 81 Wis. 33, 50 N. W. 782.

United States.— Gavinzel *v.* Crump, 22 Wall. 308, 22 L. ed. 783.

See 20 Cent. Dig. tit. "Evidence," § 1794.

This rule has been applied to an indemnity bond (American Surety Co. *v.* Thurber, 121 N. Y. 655, 23 N. E. 1129; Bernard-Beere *v.* Klaw, 35 Misc. (N. Y.) 27, 70 N. Y. Suppl. 204 [*affirming* 66 N. Y. Suppl. 495]; Wylie *v.* Commercial, etc., Bank, 63 S. C. 406, 41 S. E. 504), a forthcoming bond (Bolling *v.* Vandiver, 91 Ala. 375, 8 So. 290), an official bond (Jones *v.* Smith, 64 Ga. 711; State *v.* Hall, (Miss. 1891) 8 So. 464; Stoner *v.* Keith County, 48 Nebr. 279, 67 N. W. 311; McKee *v.* Com., 2 Grant (Pa.) 23), a poor debtor's bond (Chase *v.* Collins, 68 Me. 375; Titcomb *v.* Keene, 20 Me. 381), a recognizance or undertaking in replevin (Baker *v.* Merriam, 97 Ind. 539; Smith *v.* Tyler, 51 Ind. 512), a bond for title given in connection with a contract of sale (Crouch *v.* Johnson, 7 Tex. Civ. App. 435, 27 S. W. 9), a bond to convey a right of way for a railroad (Applegate *v.* Burlington, etc., R.

ment of a stipulated sum as damages in case of a breach parol evidence concerning the subject-matter of the contract, so far as the situation of the parties is concerned, is admissible when it tends to show that a breach has resulted in such damages as cannot be readily ascertained by a pecuniary standard.[51]

e. Certificates of Stock. It has been held that a resolution of the directors of a joint-stock company authorizing a certain person to contribute capital and become a shareholder and the certificate of stock issued in accordance therewith cannot in the absence of fraud or mistake be varied by parol evidence that the transaction was a loan and not a contribution to the capital.[52]

f. Charter-Parties. Parol evidence is not admissible to enlarge or vary the terms of a charter-party or in any way to contradict it.[53]

g. Collateral Security or Pledges. The writing evidencing a deposit as a pledge or collateral security cannot be added to, contradicted, or varied by showing the nature of the transaction to be other than what appears by the face of the instrument,[54] and conversely where the law requires a pledge to be in writing parol evidence is not admissible to show that writings which on their face are not pledges amount to such in fact.[55]

h. Contracts — (i) *General Rule.* The most usual application of the parol evidence rule is with respect to contracts, as to which it is established that in the absence of fraud or mistake parol or extrinsic evidence is not admissible to vary, add to, modify, or contradict the terms or provisions of the written instrument by showing the intentions of the parties or their real agreement with reference to the subject-matter to have been different from what is expressed in the writing;[56] for where the parties have deliberately put their engagements into writing

Co., 41 Iowa 214), and a bond by an absolute grantee to reconvey (Bennock *v.* Whipple, 12 Me. 346, 28 Am. Dec. 186).

The rule excludes evidence to show that at the time of the execution of the bond the obligee said he would not hold the obligor responsible (Cowel *v.* Anderson, 33 Minn. 374, 23 N. W. 542; Woodward *v.* McGaugh, 8 Mo. 161; Chetwood *v.* Brittan, 2 N. J. Eq. 438, 4 N. J. Eq. 334 [*affirmed* in 5 N. J. Eq. 628]; Towner *v.* Lucas, 13 Gratt. (Va.) 705); that the bond was accepted only as a temporary bond to be void on the execution of a new bond (Jones *v.* Smith, 64 Ga. 711); that a bond absolute on its face was intended as indemnity merely (Howell *v.* Hooks, 17 N. C. 258); that the principal or interest of the bond was intended to have been made payable at a later period than appeared on the face of the bond (Davis *v.* Cammel, Add. (Pa.) 233; Cook *v.* Ambrose, Add. (Pa.) 323), as that a bond payable immediately was not to be demanded until after the obligor's death (Geddy *v.* Stainback, 21 N. C. 475); to make an executor's bond, describing the testator as James L. F., applicable to the estate of Joseph L. F. (McGovney *v.* State, 20 Ohio 93); or to contradict the implication of possession from a recital in a delivery bond that the obligor was desirous of retaining possession (Lucas *v.* Beebe, 88 Ill. 427. But see *infra*, XVI, C, 28).

The fact that a bond refers to an extrinsic matter, to explain which a resort to parol evidence may be necessary, does not authorize the admission of such evidence to explain or contradict the bond itself. South Carolina Soc. *v.* Johnson, 1 McCord (S. C.) 41, 10 Am. Dec. 644.

51. Morris *v.* McCoy, 7 Nev. 399.

52. Snyder *v.* Lindsey, 157 N. Y. 616, 32 N. E. 592 [*affirming* 92 Hun 432, 36 N. Y. Suppl. 1037]. *Contra*, Wild *v.* Western Union Bldg., etc., Assoc., 60 Mo. App. 200; Brick *v.* Brick, 98 U. S. 514, 25 L. ed. 256.

53. Johnson *v.* D. H. Bibb Lumber Co., 140 Cal. 95, 73 Pac. 730; Pitkin *v.* Brainerd, 5 Conn. 451, 13 Am. Dec. 79; The Augustine Kobbe, 37 Fed. 696; Baker *v.* Ward, 2 Fed. Cas. No. 785, 3 Ben. 499; The Eli Whitney, 8 Fed. Cas. No. 4,345, 1 Blatchf. 360.

54. Fay *v.* Gray, 124 Mass. 500; Bomar *v.* Asheville, etc., R. Co., 30 S. C. 450, 9 S. E. 512; Hyde *v.* German Nat. Bank, 115 Wis. 170, 91 N. W. 230.

That the transaction amounts to a sale cannot be shown by parol. Johnson *v.* Zweigart, 114 Ky. 545, 71 S. W. 445, 24 Ky. L. Rep. 1323; Nelson *v.* Robson, 17 Minn. 284.

The rule applies only to a valid instrument, and where a memorandum given by a pawnbroker to a pledgor did not comply with the law and showed usury upon its face, it was permissible to show an oral agreement between the parties that legal interest only should be charged. Roosevelt *v.* Dreyer, 12 Daly (N. Y.) 370. See also *infra*, XVI, C, 32.

55. De Blois *v.* Reiss, 32 La. Ann. 586.

56. *Alabama.*— Lambie *v.* Sloss Iron, etc., Co., 118 Ala. 427, 24 So. 108; Dexter *v.* Ohlander, 93 Ala. 441, 9 So. 361; Lakeside Land Co. *v.* Dromgoole, 89 Ala. 505, 7 So. 434.

Arkansas.— Anderson *v.* Wainwright, 67 Ark. 62, 53 S. W. 566; Turner *v.* Baker, 30 Ark. 186; Quartermous *v.* Kennedy, 29 Ark. 544.

California.— Booth *v.* Hoskins, 75 Cal. 271,

in such terms as import a legal obligation, without any uncertainty as to the object or extent of their engagement, all previous negotiations and agreements with reference to the subject-matter are presumed to have been merged in the

17 Pac. 225; Bryan *v.* Idaho Quartz Min. Co., 73 Cal. 249, 14 Pac. 859; Frink *v.* Roe, 70 Cal. 296, 11 Pac. 820.

Colorado.— Nesmith *v.* Martin, (Sup. 1904) 75 Pac. 590; St. Vrain Stone Co. *v.* Denver, etc., R. Co., 18 Colo. 211, 32 Pac. 827; Neuman *v.* Dreifurst, 9 Colo. 228, 11 Pac. 98; Drummond *v.* Carson, 4 Colo. 13.

Connecticut.— Fitch *v.* Woodruff, etc., Iron Works, 29 Conn. 82; Beckley *v.* Munson, 22 Conn. 299; Glendale Woolen Co. *v.* Protection Ins. Co., 21 Conn. 19, 54 Am. Dec. 309.

District of Columbia.— Hartman *v.* Ruby, 16 App. Cas. 45; Rogers *v.* Garland, 19 D. C. 24.

Florida.— Bacon *v.* Green, 36 Fla. 325, 18 So. 870; Robinson *v.* Hyer, 35 Fla. 544, 17 So. 745.

Georgia.— Bullard *v.* Brewer, 118 Ga. 918, 45 S. E. 711; Heard *v.* Tappan, 116 Ga. 930, 43 S. E. 375; Foote, etc., Co. *v.* Malony, 115 Ga. 985, 42 S. E. 413; Richmond, etc., R. Co. *v.* Shomo, 90 Ga. 496, 16 S. E. 220.

Idaho.— Hailey First Nat. Bank *v.* Bews, 5 Ida. 678, 51 Pac. 777; Jacobs *v.* Shenon, 3 Ida. 274, 29 Pac. 44.

Illinois.— Ellis *v.* Conrad Leipp Brewing Co., 207 Ill. 291, 69 N. E. 808 [*affirming* 107 Ill. App. 139]; Kane *v.* Farrelly, 192 Ill. 521, 61 N. E. 648; Graham *v.* Sadlier, 165 Ill. 95, 46 N. E. 221; Mosher *v.* Rogers, 117 Ill. 446, 5 N. E. 585.

Indiana.— Ralya *v.* Atkins, 157 Ind. 331, 61 N. E. 726; Conant *v.* National State Bank, 121 Ind. 323, 22 N. E. 250; Singer Mfg. Co. *v.* Sults, 17 Ind. App. 639, 47 N. E. 341.

Indian Territory.—Yocum *v.* Cary, 1 Indian Terr. 626, 43 S. W. 756.

Iowa.— Burgher *v.* Chicago, etc., R. Co., 105 Iowa 335, 75 N. W. 192; Fawkner *v.* Lew Smith Wall Paper Co., 88 Iowa 169, 55 N. W. 200, 45 Am. St. Rep. 230, (1891) 49 N. W. 1003; Davis *v.* Robinson, 71 Iowa 618, 33 N. W. 132.

Kansas.— Rose *v.* Lanyon Zinc Co., 68 Kan. 126, 74 Pac. 625; Ehrsam *v.* Brown, 64 Kan. 466, 67 Pac. 867; Miller *v.* Edgerton, 38 Kan. 36, 15 Pac. 894.

Kentucky.— National Mut. Ben. Assoc. *v.* Heckman, 86 Ky. 254, 5 S. W. 565, 9 Ky. L. Rep. 525; Vansant *v.* Runyon, 44 S. W. 949, 19 Ky. L. Rep. 1981; Gaither *v.* Dougherty, 38 S. W. 2, 18 Ky. L. Rep. 709.

Louisiana.— Hebert *v.* Dupaty, 42 La. Ann. 343, 7 So. 580; Porter *v.* Sandidge, 32 La. Ann. 449.

Maine.— Williams *v.* Robinson, 73 Me. 186, 40 Am. Rep. 352; Coombs *v.* Charter Oak L. Ins. Co., 65 Me. 382.

Maryland.— Badart *v.* Foulon, 80 Md. 579, 31 Atl. 513; Wooldridge *v.* Royer, 69 Md. 113, 14 Atl. 681.

Massachusetts.— Merrigan *v.* Hall, 175 Mass. 508, 56 N. E. 605; Poole *v.* Massachusetts Mohair Plush Co., 171 Mass. 49, 50 N. E. 451; Wooley *v.* Cobb, 165 Mass. 503, 43 N. E. 497; Sirk *v.* Ela, 163 Mass. 394, 40 N. E. 183; Will M. Kinnard Co. *v.* Cutter Tower Co., 159 Mass. 391, 34 N. E. 460.

Michigan.— Sax *v.* Detroit, etc., R. Co., 129 Mich. 502, 89 N. W. 368; Rough *v.* Breitung, 117 Mich. 48, 75 N. W. 147; Sheley *v.* Brooks, 114 Mich. 11, 72 N. W. 37.

Minnesota.— Bell *v.* Mendenhall, 78 Minn. 57, 80 N. W. 843; Phelps *v.* Sargent, 73 Minn. 260, 76 N. W. 25; Winslow Bros. Co. *v.* Herzog Mfg. Co., 46 Minn. 452, 49 N. W. 234.

Mississippi.—Pine Grove Lumber Co. *v.* Interstate Lumber Co., 71 Miss. 944, 15 So. 105; Kerr *v.* Kuykendall, 44 Miss. 137.

Missouri— Boyd *v.* Paul, 125 Mo. 9, 28 S. W. 171; Sprague *v.* Rooney, 82 Mo. 493, 52 Am. Rep. 383.

Montana.— Ming *v.* Pratt, 22 Mont. 262, 56 Pac. 279.

Nebraska.— Bradley *v.* Basta, (Sup. 1904) 98 N. W. 697; Te Poel *v.* Shutt, 57 Nebr. 592, 78 N. W. 288; Sylvester *v.* Carpenter Paper Co., 55 Nebr. 621, 75 N. W. 1092; Western Mfg. Co. *v.* Rogers, 54 Nebr. 456, 74 N. W. 849; Norfolk Beet Sugar Co. *v.* Berger, 1 Nebr. (Unoff.) 151, 95 N. W. 336.

Nevada.— Menzies *v.* Kennedy, 9 Nev. 152.

New Hampshire.—Saddlery Hardware Mfg. Co. *v.* Hillsborough Mills, 68 N. H. 216, 44 Atl. 300, 73 Am. St. Rep. 569; Simpson *v.* Currier, 60 N. H. 19; Page *v.* Brewster, 54 N. H. 184.

New Jersey.— Naumberg *v.* Young, 44 N. J. L. 331, 43 Am. Rep. 380; Dewees *v.* Manhattan Ins. Co., 35 N. J. L. 366; Russell *v.* Russell, 63 N. J. Eq. 282, 49 Atl. 1081 [*affirming* 60 N. J. Eq. 282, 47 Atl. 37].

New Mexico.— Miller *v.* Preston, 4 N. M. 314, 17 Pac. 565.

New York.— Tripp *v.* Smith, 168 N. Y. 655, 61 N. E. 1135 [*affirming* 50 N. Y. App. Div. 499, 64 N. Y. Suppl. 94]; *In re* Bateman, 145 N. Y. 623, 40 N. E. 10; Societa Italiana di Beneficenza *v.* Sulzer, 138 N. Y. 468, 34 N. E. 193; Smith *v.* Lennon, 131 N. Y. 560, 29 N. E. 820; Gordon *v.* Niemann, 118 N. Y. 152, 23 N. E. 454; Reed *v.* Van Ostrand, 1 Wend. 424, 19 Am. Dec. 529; Frost *v.* Everett, 5 Cow. 497; Spencer *v.* Tilden, 5 Cow. 144; Fitzhugh *v.* Runyon, 8 Johns. 375.

North Carolina.— Merchants', etc., Nat. Bank *v.* McElwee, 104 N. C. 305, 10 S. E. 295; Nickelson *v.* Reves, 94 N. C. 559; Davis *v.* Glenn, 76 N. C. 427.

North Dakota.— Hutchinson *v.* Cleary, 3 N. D. 270, 55 N. W. 729; Plano Mfg. Co. *v.* Root, 3 N. D. 165, 54 N. W. 924.

Ohio.— Tuttle *v.* Burgett, 53 Ohio St. 498, 42 N. E. 427, 53 Am. St. Rep. 649, 30 L. R. A. 214; Denton *v.* Whitney, 31 Ohio St. 89.

Oklahoma.— Liverpool, etc., Ins. Co. *v.* T. M. Richardson Lumber Co., 11 Okla. 579, 585, 69 Pac. 936, 938.

Oregon.— Hoxie *v.* Hodges, 1 Oreg. 251.

Pennsylvania.— Irvin *v.* Irvin, 169 Pa. St.

written contract, and the whole engagement of the parties and the extent of their undertaking is presumed to have been reduced to writing.[57] The rule, however, goes even further than this, and it has been established that where the instrument is free from ambiguity and is in itself susceptible of a clear and sensible construction, parol or extrinsic evidence is not admissible even to explain its meaning or determine the construction of the writing.[58]

529, 32 Atl. 445, 29 L. R. A. 292; Baugh *v.* White, 161 Pa. St. 632, 29 Atl. 267; Van Voorhis *v.* Rea, 153 Pa. St. 19, 25 Atk. 800; Halberstadt *v.* Bannan, 149 Pa. St. 51, 24 Atl. 83; Rearick *v.* Rearick, 15 Pa. St. 66.

South Carolina.— Fishburne *v.* Smith, 34 S. C. 330, 13 S. E. 525; Lee *v.* Fowler, 19 S. C. 607.

Texas.— Watson *v.* Miller, 82 Tex. 279, 17 S. W. 1053; Bruner *v.* Strong, 61 Tex. 555.

Utah.— Hall *v.* McNally, 23 Utah 606, 65 Pac. 724.

Vermont.— Grand Isle *v.* Kinney, 70 Vt. 381, 41 Atl. 130; Daggett *v.* Johnson, 49 Vt. 345.

Virginia.— Consumers' Ice Co. *v.* Jennings, 100 Va. 719, 42 S. E. 879; Allen *v.* Crank, (1895) 23 S. E. 772; Scott *v.* Norfolk, etc., R. Co., 90 Va. 241, 17 S. E. 882.

Washington.— Gordon *v.* Parke, etc., Mach. Co., 10 Wash. 18, 38 Pac. 755.

West Virginia.— Howell *v.* Behler, 41 W. Va. 610, 24 S. E. 646; Long *v.* Perine, 41 W. Va. 314, 23 S. E. 611.

Wisconsin.— Milwaukee Carnival Assoc. *v.* King, 112 Wis. 647, 88 N. W. 598; Skobis *v.* Ferge, 102 Wis. 122, 78 N. W. 426; Custeau *v.* St. Louis Land Imp. Co., 88 Wis. 311, 60 N. W. 425.

United States.—De Witt *v.* Berry, 134 U. S. 306, 10 S. Ct. 536, 33 L. ed. 896; Bailey *v.* Hannibal, etc., R. Co., 17 Wall. 96, 21 L. ed. 611 [*affirming* 2 Fed. Cas. No. 736, 1 Dill. 174]; Merchants Mut. Ins. Co. *v.* Lyman, 15 Wall. 664, 21 L. ed. 246; Willard *v.* Tayloe, 8 Wall. 557, 19 L. ed. 501; Selden *v.* Myers, 20 How. 506, 15 L. ed. 976; Shankland *v.* Washington, 5 Pet. 390, 8 L. ed. 166 [*affirming* 21 Fed. Cas. No. 12,703, 3 Cranch C. C. 328]; Van Ness *v.* Washington, 4 Pet. 232, 7 L. ed. 842; Hunt *v.* Rousmanier, 8 Wheat. 174, 5 L. ed. 589; Whaly *v.* Graham, 122 Fed. 192; Arthur *v.* Baron de Hirsch Fund, 121 Fed. 791, 58 C. C. A. 67; Cold Blast Transp. Co. *v.* Kansas City Bolt, etc., Co., 114 Fed. 77, 52 C. C. A. 25, 57 L. R. A. 696; New York L. Ins. Co. *v.* McMaster, 87 Fed. 63, 30 C. C. A. 532; Reid *v.* Diamond Plate-Glass Co., 85 Fed. 193, 29 C. C. A. 110; Godkin *v.* Monahan, 83 Fed. 116, 27 C. C. A. 410.

England.— Farquharson *v.* Barston, 4 Bligh N. S. 560, 5 Eng. Reprint 199.

Canada.— O'Neil *v.* Lingham, 9 U. C. C. P. 14.

See 20 Cent. Dig. tit. "Evidence," § 1756.

The rule applies to subsequent declarations of the parties as well as to prior or contemporaneous oral declarations. Brooks *v.* Isbell, 22 Ark. 488; Fitts *v.* Brown, 20 N. H. 393; Mott *v.* Richtmyer, 57 N. Y. 49.

The time of performance fixed by the contract cannot be changed, nor can the contract be contradicted in this respect by parol. Powe *v.* Powe, 42 Ala. 113; Morrison *v.* Lovejoy, 6 Minn. 319; Page *v.* Brewsters, 54 N. H. 184. But see *infra*, XVI, C, 39, b.

Agreement first established by parol.— Grand Isle *v.* Kinney, 70 Vt. 381, 41 Atl. 130.

Relation back of delivery.—Where contracts are not delivered and hence do not become effective until some time after their date, and such contracts are prospective in their language, parol evidence is inadmissible to show that the parties understood that the contracts were to have the same effect as if they had been delivered at the time of their date. Davis Sewing Mach. Co. *v.* Stone, 131 Mass. 384.

57. Nesmith *v.* Martin, (Colo. Sup. 1904) 75 Pac. 590; Randolph *v.* Helps, 9 Colo. 29, 10 Pac. 245; Cohen *v.* Jackoboice, 101 Mich. 409, 59 N. W. 665. See also cases cited *supra*, note 56.

Superseding of prior written contract.— McClurg *v.* Whitney, 82 Mo. App. 625.

Distinct agreements.—A written agreement does not merge a prior oral agreement so as to exclude evidence thereof, where the two are entirely different and distinct. Clator *v.* Otto, 38 W. Va. 89, 18 S. E. 378.

58. *Alabama.*— Powell *v.* State, 84 Ala. 444, 4 So. 719; Litchfield *v.* Falconer, 2 Ala. 280; Paysant *v.* Ware, 1 Ala. 160; Johnson *v.* Ballew, 2 Port. 29; Barringer *v.* Sneed, 3 Stew. 201, 20 Am. Dec. 74; Bennett *v.* Hubbard, Minor 270.

California.— Donohoe *v.* Mariposa Land, etc., Co., 66 Cal. 317, 5 Pac. 495.

District of Columbia.— Langdon *v.* Evans, 3 Mackey 1.

Illinois.— Rigdon *v.* Conley, 141 Ill. 565, 30 N. E. 1060; McCormick *v.* Huse, 66 Ill. 315; Lyon *v.* Lyon, 3 Ill. App. 434.

Indiana.— Davis *v.* Liberty, etc., Gravel Road Co., 84 Ind. 36; Heath *v.* West, 68 Ind. 548; Spears *v.* Ward, 48 Ind. 541; Free *v.* Meikel, 39 Ind. 318; Lett *v.* Horner, 5 Blackf. 296.

Iowa.— McClelland *v.* James, 33 Iowa 571.

Kentucky.— Kendall *v.* Russell, 5 Dana 501, 30 Am. Dec. 696.

Louisiana.— Weinberger *v.* Merchants' Ins. Co., 41 La. Ann. 31, 5 So. 728.

Maine.— McLeod *v.* Johnson, 96 Me. 271, 52 Atl. 760.

Maryland.— Young *v.* Frost, 5 Gill 287.

Massachusetts.— Black *v.* Bachelder, 120 Mass. 171; Goodell *v.* Smith, 9 Cush. 592; Stackpole *v.* Arnold, 11 Mass. 27, 6 Am. Dec. 150.

(II) *Requisites of Writing.* It is of course necessary to the application of the rule just stated[59] that there shall be a complete written contract between the parties,[60] the writing being of such a nature as to show that it was intended

Minnesota.— Winona *v.* Thompson, 24 Minn. 199.

Mississippi.— Ellis *v.* Kelly, 33 Miss. 695.

Missouri.— Halliday *v.* Lesh, 85 Mo. App. 285; Miller *v.* Dunlap, 22 Mo. App. 97; Rubey *v.* Missouri Coal, etc., Co., 21 Mo. App. 159; Michael *v.* St. Louis Mut. F. Ins. Co., 17 Mo. App. 23.

New Hampshire.— Newbury Bank *v.* Sinclair, 60 N. H. 100, 49 Am. Rep. 307; Bromley *v.* Elliot, 38 N. H. 287, 75 Am. Dec. 182.

New Jersey.— Rogers *v.* Colt, 21 N. J. L. 704; Parker *v.* Jameson, 32 N. J. Eq. 222; Speer *v.* Whitfield, 10 N. J. Eq. 107.

New York.— Marsh *v.* McNair, 99 N. Y. 174, 1 N. E. 660; Collender *v.* Dinsmore, 55 N. Y. 200, 14 Am. Rep. 224 [*reversing* 64 Barb. 457]; Giles *v.* Comstock, 4 N. Y. 270; 53 Am. Dec. 374; Mittnacht *v.* Slevin, 67 Hun 315, 22 N. Y. Suppl. 131; Sayre *v.* Peck, 1 Barb. 464; Pollen *v.* Le Roy, 10 Bosw. 58.

North Carolina.— Collins *v.* Benbury, 27 N. C. 118, 42 Am. Dec. 155; Carter *v.* McNeeley, 23 N. C. 448.

Ohio.— Morris *v.* Edwards, 1 Ohio 189; Edwards *v.* Richards, Wright 596; Sinton *v.* Ezekiel, 6 Ohio Dec. (Reprint) 845, 8 Am. L. Rec. 423, 4 Cinc. L. Bul. 1060.

Pennsylvania.— Fisher *v.* Deibert, 54 Pa. St. 460; Litle *v.* Henderson, 2 Yeates 295.

South Carolina.— De Camps *v.* Carpin, 19 S. C. 121; Conway *v.* Cunningham, 6 S. C. 351; King *v.* Colding, 1 McMull. 133.

Tennessee.— Mills *v.* Faris, 12 Heisk. 451; Betts *v.* Demumbrune, Cooke 39.

Texas.— Rhine *v.* Blake, 59 Tex. 240; Dakota Bldg., etc., Assoc. *v.* Hamm, (Civ. App. 1896) 36 S. W. 313; Denison First Nat. Bank *v.* Randall, 1 Tex. App. Civ. Cas. § 971.

Vermont.— *In re* Haynes, 69 Vt. 553, 38 Atl. 240; Brandon Mfg. Co. *v.* Morse, 48 Vt. 322; Groot *v.* Story, 44 Vt. 200.

Virginia.— Bowyer *v.* Martin, 6 Rand. 525.

West Virginia.— McGuire *v.* Wright, 18 W. Va. 507.

Wisconsin.— Johnson *v.* Pugh, 110 Wis. 167, 85 N. W. 641.

United States.— Culver *v.* Wilkinson, 145 U. S. 205, 12 S. Ct. 832, 36 L. ed. 676 [*affirming* 33 Fed. 708]; Moran *v.* Prather, 23 Wall. 492, 23 L. ed. 121; Meredith *v.* Picket, 9 Wheat. 573, 6 L. ed. 163; Tinsley *v.* Jemison, 74 Fed. 177, 20 C. C. A. 371; Auld *v.* Hepburn, 2 Fed. Cas. No. 650, 1 Cranch C. C. 122; Hurliki *v.* Bacon, 12 Fed. Cas. No. 6,921, 1 Cranch C. C. 340; Ladd *v.* Wilson, 14 Fed. Cas. No. 7,976, 1 Cranch C. C. 293; Scott *v.* The Dick Keyes, 21 Fed. Cas. No. 12,528, 1 Bond 164; Troy Iron, etc., Factory *v.* Corning, 24 Fed. Cas. No. 14,195, 1 Blatchf. 467.

See 20 Cent. Dig. tit. "Evidence," § 1756.

See also *infra*, XVI, C, 10, a.

Showing what was actually done.— While prior or contemporaneous declarations of parties contracting cannot be received to interpret an unambiguous written contract, yet evidence that certain alterations from the first draft of the contract were made by the parties before its execution is admissible to show their real intentions. Pancake *v.* George Campbell Co., 44 W. Va. 82, 86, 28 S. E. 719, where the court said: "This is not the case of mere antecedent or contemporaneous oral declaration, introduced to explain a contract; but it is putting ourselves in the situation of the parties, and showing what they actually did in the very execution of the contract."

59. See *supra*, XVI, B, 2, h, (I).

60. *District of Columbia.*—Burke *v.* Claughton, 6 App. Cas. 350.

Illinois.—Handwerk *v.* Oswood, 23 Ill. App. 282.

New York.— Fitch *v.* Kennard, 2 Misc. 95, 20 N. Y. Suppl. 845.

North Dakota.—Edwards, etc., Lumber Co. *v.* Baker, 2 N. D. 289, 50 N. W. 718.

Pennsylvania.— Holt *v.* Pie, 120 Pa. St. 425, 14 Atl. 389.

Wisconsin.— Smith *v.* Coleman, 77 Wis. 343, 46 N. W. 664.

See 20 Cent. Dig. tit. "Evidence," § 1757.

The following writings were held not to constitute written contracts excluding parol evidence: An indorsement on an envelope containing securities given as collateral, stating the borrower's name and place of business, the name of the lender, the amount of the loan, the time and rate of interest, and a list of the securities (Union Trust Co. *v.* Whiton, 97 N. Y. 172); a receipt given for a part payment on the contract price of certain work (Flood *v.* Joyner, 96 Ind. 459); the indorsement and delivery of bills of lading (Security Bank *v.* Luttgen, 29 Minn. 363, 13 N. W. 151); a check for the amount of a bank deposit assigned by parol (Rislevy *v.* Phenix Bank, 83 N. Y. 318, 38 Am. Rep. 421); and a mere written acknowledgment of a sum due (Alexander *v.* Thompson, 42 Minn. 498, 44 N. W. 534).

A vote of a corporation fixing an officer's salary is not a contract until it has been communicated to the officer and accepted by him; and parol evidence as to the circumstances attending the transaction is admissible as affording an inference that the vote was communicated to him and accepted by him, or the reverse, for such evidence does not vary the written vote but only shows whether or not it took effect as a contract. Sears *v.* Kings County El. R. Co., 152 Mass. 151, 25 N. E. 98, 9 L. R. A. 117.

Writing must be adopted.— Satterfield *v.* Smith, 33 N. C. 60.

A verbal contract made on a verbal understanding that it shall conform to the terms of a written paper does not differ from any other verbal contract and may be shown to have agreed with the writing or differed from

to evidence their agreement with reference to the subject-matter,[61] and having the element of mutuality necessary to constitute a complete contract;[62] but it is not necessary that the contract shall be in any particular form[63] or that it shall be all contained in one paper,[64] or signed by both parties;[65] and a writing evidencing the whole of an agreement between the parties which has been delivered, accepted, and under which business has been transacted, cannot be varied

it, according to the facts. Arbuckle *v.* Smith, 74 Mich. 568, 42 N. W. 124.

61. Anderson *v.* Portland Flouring Mills Co., 37 Oreg. 483, 60 Pac. 859, 82 Am. St. Rep. 771, 50 L. R. A. 235; Woolworth *v.* McPherson, 55 Fed. 558.

Notes executed by a purchaser of personal property to secure deferred payments are not the contract of sale, so as to exclude oral testimony of the terms of sale. Gammon *v.* Ganfield, 42 Minn. 368, 44 N. W. 125.

62. Routledge *v.* Worthington Co., 119 N. Y. 592, 23 N. E. 1111; Wise *v.* Rosenblatt, 16 Daly (N. Y.) 496, 12 N. Y. Suppl. 288; Curtis *v.* Soulan, 16 Daly (N. Y.) 490, 12 N. Y. Suppl. 285; Lockett *v.* Nicklin, 2 Exch. 93, 19 L. J. Exch. 403. See, generally, CONTRACTS, 9 Cyc. 213.

The advertisement of a chancery sale is not the contract of the parties, and hence parol evidence is admissible to show that the purchaser knew of an encumbrance on the premises not mentioned in the advertisement. Farmers', etc., Bank *v.* Martin, 3 Md. Ch. 224.

A mere written order for goods is not in itself a contract binding both parties, and parol evidence is admissible to show the real contract between the buyer and seller.

Indiana.— Morehead *v.* Murray, 31 Ind. 418.

Iowa.— McCormick Harvesting Mach. Co. *v.* Richardson, 89 Iowa 525, 56 N. W. 682.

Michigan.— Weiden *v.* Woodruff, 38 Mich. 130.

Minnesota.—Boynton Furnace Co. *v.* Clark, 42 Minn. 335, 44 N. W. 121. See also Tufts *v.* Hunter, 63 Minn. 464, 65 N. W. 922.

New York.—Routledge *v.* Worthington Co., 119 N. Y. 592, 23 N. E. 111 [*reversing* 55 N. Y. Super. Ct. 565, 3 N. Y. Suppl. 819]; Grand Rapids Veneer Works *v.* Forsythe, 83 Hun 230, 31 N. Y. Suppl. 601; Chase *v.* Evarts, 19 N. Y. Suppl. 987.

South Dakota.— National Cash Register Co. *v.* Pfister, 5 S. D. 143, 58 N. W. 270.

England.— Lockett *v.* Nicklin, 2 Exch. 93, 19 L. J. Exch. 403.

See 20 Cent. Dig. tit. "Evidence," §§ 1757, 1758.

63. See Millett *v.* Marston, 62 Me. 477; Woods *v.* Oakman, 116 Mass. 599; Hadley *v.* Clinton County Importing, etc., Co., 13 Ohio St. 502, 82 Am. Dec. 210; Schultz *v.* Coon, 51 Wis. 416, 8 N. W. 285, 37 Am. Rep. 839.

Letter and indorsement thereon.— Where a letter written by one person taken in connection with an indorsement thereon by another evidences an entire contract, parol evidence is inadmissible to vary its terms. Parker *v.* Norman, 65 Ark. 333, 46 S. W. 134; Mallory *v.* Tioga R. Co., 3 Abb. Dec. (N. Y.) 139, 3 Keyes (N. Y.) 354, 5 Abb. Pr. N. S. (N. Y.) 420, 36 How. Pr. (N. Y.) 202.

A memorandum may be within the rule. Colt *v.* Cone, 107 Mass. 285; Thompson *v.* Irwin, 42 Mo. App. 403; Niles *v.* Culver, 8 Barb. (N. Y.) 205; Wiener *v.* Whipple, 53 Wis. 298, 10 N. W. 433, 40 Am. Rep. 775. But see *infra*, XVI, B, 2, t.

A bill of parcels being considered evidence of a contract, and a sufficient memorandum in writing to take the case out of the statute of frauds, parol evidence cannot be received substantially to change it. Batturs *v.* Sellers, 6 Harr. & J. (Md.) 249. But see *infra*, XVI, B, 2, t.

The term of a certificate of deposit cannot be varied by parol evidence. Rich *v.* Dessar, 50 Ind. 309.

64. Meinhardt *v.* Mode, 22 Fla. 279; Houck *v.* Frisbee, 66 Mo. App. 16; Hull *v.* Adams, 1 Hill (N. Y.) 601.

A contract in the form of correspondence between the contracting parties, consisting of letters containing offers and letters accepting the same, cannot be varied by oral evidence of the previous understanding of the parties.

Kentucky.— Louisville, etc., R. Co. *v.* Goodin, 12 Ky. L. Rep. 508.

Maryland.— Delanter *v.* Chappell, 48 Md. 244.

Massachusetts.—See Zerrahn *v.* Ditson, 117 Mass. 553; McFarland *v.* Boston, etc., R. Corp., 115 Mass. 63.

Mississippi.— Odeneal *v.* Henry, 70 Miss. 172, 12 So. 154.

Missouri.— Hunt *v.* Hunter, 52 Mo. App. 263.

United States.— Lawrence *v.* Morrisania Steam-Boat Co., 12 Fed. 850.

See 20 Cent. Dig. tit. "Evidence," §§ 1757, 1758.

The terms of a letter and telegram which together constitute a contract being unmistakable no prior negotiations whether written or verbal can be invoked to change them. Rough *v.* Breitung, 117 Mich. 48, 75 N. W. 147.

65. Doty *v.* Thompson, 39 Hun (N. Y.) 243; Lamson Consol. Store Service Co. *v.* Hartung, 19 N. Y. Suppl. 233; Bagley, etc., Co. *v.* Saranac River Pulp, etc., Co., 16 N. Y. Suppl. 657; Cincinnati, etc., R. Co. *v.* Pontius, 19 Ohio St. 221, 2 Am. Rep. 391; Collins *v.* Dignowity, (Tex. Sup. 1888) 8 S. W. 326.

A unilateral promise or agreement in writing to pay for specified personal property may not be contradicted by oral evidence. Horn *v.* Hansen, 56 Minn. 43, 57 N. W. 315, 22 L. R. A. 617.

by parol, even though it is not signed.[66] Nor does the fact that a contract originally rested in parol and was reduced to writing only after being partly performed preclude the application to the writing of the rule excluding parol evidence to vary or contradict the writing, for the parol agreement is merged in the written one.[67]

(III) *Particular Classes of Contracts*—(A) *Advertising.* A written contract for the publication of advertisements cannot be varied by showing parol agreements not embodied therein.[68]

(B) *Building and Working.* A contract for buildings or other works stands upon the same plane as any other contract and must be held to express the entire agreement of the parties; and hence cannot be varied, added to, modified, or contradicted by parol or extrinsic evidence, or by any showing of the intentions of the parties, or of their real agreement with reference to the subject-matter.[69]

A written proposition accepted and acted upon consummates a contract in writing which cannot be varied by parol. Wiley *v.* California Hosiery Co., (Cal. 1893) 32 Pac. 522; Pickrel *v.* Rose, 87 Ill. 263; Lake *v.* Freer, 11 Ill. App. 576; Commercial State Bank *v.* Antelope County, 48 Nebr. 496, 67 N. W. 465; Hooker *v.* Hyde, 61 Wis. 204, 21 N. W. 52. But *compare* Pacific Iron Works *v.* Newhall, 34 Conn. 67.

Conditional acceptance.— Bolton *v.* Huling, 51 Ill. App. 591. See also *infra*, XVI, C, 6, a.

Identity of contract disputed.— Where an action was brought to recover for work done under an alleged written contract, and the contract introduced in evidence was not signed by defendant, who claimed that the writing was not the contract and that the work was done under a different verbal contract, it was held entirely proper to admit all evidence tending to show what the true contract between the parties was. Hess *v.* Board of Education, 33 Ill. App. 440.

66. Farmer *v.* Gregory, 78 Ky. 475, 1 Ky. L. Rep. 18. See also Cohen *v.* Jackoboice, 101 Mich. 409, 59 N. W. 665; Gage *v.* Jaqueth, 1 Lans. (N. Y.) 207.

67. Worthington *v.* Bullitt, 6 Md. 172; Cable *v.* Foley, 45 Minn. 421, 47 N. W. 1135.

Extent of merger.— A parol agreement, under which there has been partial performance, is not, when reduced to writing, so merged that it cannot be resorted to to show acts done or rights acquired under it. The merger takes effect only so far as to exclude evidence of variance between the two contracts. Mills *v.* Matthews, 7 Md. 315.

68. James T. Hair Co. *v.* Walmsley, 32 Mo. App. 115; Hallowell *v.* Lierz, 171 Pa. St. 577, 33 Atl. 344. See also Coleman *v.* Rung, 10 Misc. (N. Y.) 456, 31 N. Y. Suppl. 456.

Agreement that the advertisement may be discontinued before the expiration of the time covered by the contract cannot be shown. Cohen *v.* Jackoboice, 101 Mich. 409, 59 N. W. 665; Quaker City Car Advertising Co. *v.* Myers, 3 Pa. Co. Ct. 558; Coe *v.* Schenkmeyer, 5 Wkly. Notes Cas. (Pa.) 252.

Where payment is to be made "in trade" under the terms of the contract for an advertisement, this means that the amount is payable in such articles as the advertiser deals in, and parol evidence is inadmissible to show that the phrase meant that the amount should be payable in a specific article dealt in by the advertiser and included in a former unexecuted agreement between the parties. Dudley *v.* Vose, 114 Mass. 34.

69. *Colorado.*— Flick *v.* Hahn's Peak, etc., Canal, etc., Min. Co., 16 Colo. App. 485, 66 Pac. 453.

Connecticut.— Hartford Bridge Co. *v.* Granger, 4 Conn. 142.

Illinois.— Coey *v.* Lehman, 79 Ill. 173; Colwell *v.* Brown, 103 Ill. App. 22.

Iowa.— Walker *v.* Manning, 6 Iowa 519.

Kentucky.— Voss *v.* Schebeck, 76 S. W. 21, 25 Ky. L. Rep. 481.

Maryland.— Merritt *v.* Peninsular Constr. Co., 91 Md. 453, 46 Atl. 1013.

Massachusetts.— Norwood *v.* Lathrop, 178 Mass. 208, 59 N. E. 650; Smith *v.* Flanders, 129 Mass. 322; Blackmer *v.* Davis, 128 Mass. 538; Smith *v.* Emerson, 126 Mass. 169; Stuart *v.* Cambridge, 125 Mass. 102; Huntley *v.* Woodward, 9 Gray 86; Boyle *v.* Agawam Canal Co., 22 Pick. 381, 33 Am. Dec. 749.

Michigan.— Mouat *v.* Montague, 122 Mich. 334, 81 N. W. 112; Eaton *v.* Gladwell, 108 Mich. 678, 66 N. W. 598.

Minnesota.— Pearce *v.* McGowan, 35 Minn. 507, 29 N. W. 176; Stees *v.* Leonard, 20 Minn. 474.

Missouri.— Miller *v.* Municipal Electric Light, etc., Co., 133 Mo. 205, 34 S. W. 585.

New York.— Thorp *v.* Ross, 4 Abb. Dec. 416, 4 Keyes 546; Interstate Steamboat Co. *v.* Syracuse First Nat. Bank, 87 Hun 93, 33 N. Y. Suppl. 966.

Ohio.— Malone *v.* Cincinnati, 7 Ohio Dec. (Reprint) 513, 3 Cinc. L. Bul. 578.

Pennsylvania.— Dixon-Woods Co. *v.* Phillips Glass Co., 169 Pa. St. 167, 32 Atl. 432; McKinney *v.* Chester, 2 Del. Co. 525.

Texas.— Stell *v.* Hale, 20 Tex. Civ. App. 39, 48 S. W. 603.

Wisconsin.— Beers *v.* North Milwaukee Town Site Co., 93 Wis. 569, 67 N. W. 936.

See 20 Cent. Dig. tit. "Evidence," §§ 1772–1777. And see, generally, Builders and Architects, 6 Cyc. 99.

Accordingly it cannot be shown that the builder verbally warranted that the architect's plans would be satisfactory (Hills *v.* Farmington, 70 Conn. 450, 39 Atl. 795); that

Nor where the clear legal effect of the contract is to include the doing of certain work can it be shown by parol evidence that such work was not included.[70] But the intention of the parties to the contract may be shown where its language is not sufficiently specific,[71] or certain incidents are omitted.[72]

(c) *Carriage.* The rule against the admission of parol evidence to vary or contradict a written contract applies in full force to contracts of carriage or shipment.[73] The most usual application of this rule is to bills of lading, as to which

certain things not mentioned in the contract were to be furnished for the compensation stated (Meader *v.* Allen, 110 Iowa 588, 81 N. W. 799); that a provision in a contract for digging a well whereby the contractor agreed "to furnish thirty barrels of water per day or no pay" meant fresh water and not salt (Dearmin *v.* Schnell, 71 Mo. App. 503); that a forfeiture for failure to complete by a certain day, provided by the terms of the contract, was intended by the parties as liquidated damages and not as a penalty (Van Buren *v.* Digges, 11 How. (U. S.) 461, 13 L. ed. 771); that representations, inconsistent with the contract, as to the outside cost of the work, were made on the part of the contractor (May Mantel Co. *v.* U. S. Blow-Pipe Co., 93 Ga. 778, 21 S. E. 142); that it was agreed that a deduction was to be made from the contract price to provide for work which the contractor was not required to do under his contract (McGuinness *v.* Shannon, 154 Mass. 86, 27 N. E. 881); that there was an understanding that certain work included in the contract should not be done, or that work included in the contract, in excess of a certain amount, should be paid for as an extra (Dougherty *v.* Norwood Borough, 196 Pa. St. 92, 46 Atl. 384); that interest should be paid by the owner on a deposit in bank which the contract required the contractor to make as security for his performance thereof, the contract being silent as to interest (Wear *v.* Schmelzer, 92 Mo. App. 314); or, where by the terms of the agreement the contractor was to take in payment of the price certain notes of a third person secured by mortgage, that the owner undertook that the notes were well secured, and the land mortgaged free from other encumbrance (Conant *v.* Dewey, 21 N. H. 353).

Provision against subletting.— Lewis *v.* Yagel, 77 Hun (N. Y.) 337, 28 N. Y. Suppl. 833.

Where no amount of work is specified in a contract to do grading or ballasting at a certain rate per yard, parol evidence tending to show that any given amount was contemplated is inadmissible. Wells *v.* Milwaukee, etc., R. Co., 30 Wis. 605.

The value of work cannot be shown by parol where the price is fixed by contract. Sherman *v.* New York, 1 N. Y. 316.

Items of extra work cannot be shown by parol where the contract provides that no extra work is to be allowed unless executed under written authority. Page *v.* Nicholson, 27 La. Ann. 116.

A contract making price payable upon approval of the work by a third person is not ambiguous because it fails to state by what evidence the approval is to be shown, and parol evidence is not admissible to show that it was intended that the approval should be in writing, as this would vary the written agreement. Union Stove Works *v.* Arnoux, 7 Misc. (N. Y.) 700, 28 N. Y. Suppl. 23.

Architect's construction of specifications.— Robertson *v.* King, 55 Iowa 725, 8 N. W. 665.

70. Daly *v.* Kingston, 177 Mass. 312, 58 N. E. 1019.

71. Vogel *v.* Weissmann, 23 Misc. (N. Y.) 256, 51 N. Y. Suppl. 173, holding that where a contractor agreed in writing to furnish a "door with fancy embossed glass," the owner might prove by parol that the door should contain oval glass. See *infra*, XVI, C, 10, b, (XI).

72. Rugely *v.* Goodloe, 7 La. Ann. 294, holding that where a contract to put up a sugar mill and engine for a planter specifies no time for the completion of the work, parol evidence is admissible to show such facts and usages as, coupled with the stipulations, will indicate the period which the parties must be presumed to have contemplated, but not mentioned, from a knowledge that such incident would be supplied by equity, usage, and law.

73. *Connecticut.*—Barber *v.* Brace, 3 Conn. 9, 8 Am. Dec. 149.

Kentucky.— Richmond, etc., R. Co. *v.* Richardson, 43 S. W. 465, 19 Ky. L. Rep. 1495. See also Adams Express Co. *v.* Nock, 2 Duv. 562, 87 Am. Dec. 510.

Michigan.— Sloman *v.* National Express Co., (1903) 95 N. W. 999.

New York.— Hinckley *v.* New York Cent., etc., R. Co., 56 N. Y. 429; Reed *v.* U. S. Express Co., 48 N. Y. 462, 7 Am. Rep. 561.

Tennessee.— Western, etc., R. Co. *v.* McElwee, 6 Heisk. 208.

United States.—Morris *v.* Chesapeake, etc., Steamship Co., 125 Fed. 62.

Canada.—McNeeley *v.* McWilliams, 13 Ont. App. 324.

See 20 Cent. Dig. tit. "Evidence," § 1826.

The rule applies to a shipping bill signed by the shipper and accepted by the carrier (Doty *v.* Thomson, 39 Hun (N. Y.) 243), and to a contract limiting the liability of the carrier, signed by the parties several hours after the shipment (Stewart *v.* Cleveland, etc., R. Co., 21 Ind. App. 218, 52 N. E. 89).

Railroad tickets are within the rule in so far as they express the contract. Walker *v.* Price, 62 Kan. 327, 62 Pac. 1001, 84 Am. St. Rep. 388, 52 L. R. A. 323. But *compare* Van Buskirk *v.* Roberts, 31 N. Y. 661; Quimby *v.* Vanderbilt, 17 N. Y. 306, 72 Am.

it is well established that in so far as they express the contract between the parties and define their rights, liabilities, and undertakings, they cannot be varied or contradicted by parol evidence.[74] But bills of lading are instruments of a two-fold

Dec. 469, in which cases it was held that steamship passage tickets are generally to be regarded as tokens rather than contracts, and are not within the rule excluding parol evidence to vary an agreement. Where a printed railway ticket is lost before use, evidence that at the time of purchase the agent of the railway company orally agreed to issue a duplicate in case of loss is inadmissible. Simis *v.* New York, etc., R. Co., 1 Misc. (N. Y.) 179, 20 N. Y. Suppl. 639. Nor, where the ticket contains a full and unambiguous printed contract signed in ink by the purchaser, that it shall expire on a date shown by punch marks on its margin, can parol evidence of statements made by the ticket agent at the time, contradictory of the contract contained in the ticket, be admitted. Rolfs *v.* Atchison, etc., R. Co., 66 Kan. 272, 71 Pac. 526. But the provisions of a railroad ticket may be supplemented by parol to show a special arrangement whereby the company agreed to stop a train at a point at which it was not scheduled to stop. Evansville, etc., R. Co. *v.* Wilson, 20 Ind. App. 5, 50 N. E. 90.

74. *Alabama.*— Tallassee Falls Mfg. Co. *v.* Western R. Co., 117 Ala. 520, 23 So. 139, 67 Am. St. Rep. 179; Louisville, etc., R. Co. *v.* Fulgham, 91 Ala. 555, 8 So. 803; Wayland *v.* Mosely, 5 Ala. 430, 39 Am. Dec. 335.

Connecticut.— Jones *v.* Warner, 11 Conn. 40.

Georgia.— McElveen *v.* Southern R. Co., 109 Ga. 249, 34 S. E. 281, 77 Am. St. Rep. 371; Richmond, etc., R. Co. *v.* Shomo, 90 Ga. 496, 16 S. E. 220.

Indiana.— Stewart *v.* Cleveland, etc., R. Co., 21 Ind. App. 218, 52 N. E. 89.

Louisiana.— Sonia Cotton Oil Co. *v.* The Red River, 106 La. 42, 30 So. 303, 87 Am. St. Rep. 293; Center *v.* Torry, 8 Mart. 206.

Massachusetts.— Shaw *v.* Gardner, 12 Gray 488.

Michigan.— Cohen *v.* Jackoboice, 101 Mich. 409, 59 N. W. 665.

Minnesota.— Minneapolis, etc., R. Co. *v.* Home Ins. Co., 55 Minn. 236, 56 N. W. 815, 22 L. R. A. 390; Ortt *v.* Minneapolis, etc., R. Co., 36 Minn. 396, 31 N. W. 519.

Missouri.— See Erb *v.* Keokuk Packet Co., 43 Mo. 53.

New York.— Hill *v.* Syracuse, etc., R. Co., 73 N. Y. 351, 29 Am. Rep. 163 [*reversing* 8 Hun 296, and *distinguishing* Bostwick *v.* Baltimore, etc., R. Co., 45 N. Y. 712]; White *v.* Ashton, 51 N. Y. 280; Long *v.* New York Cent. R. Co., 50 N. Y. 76; Fitzhugh *v.* Wiman, 9 N. Y. 559; Bostwick *v.* Baltimore, etc., R. Co., 55 Barb. 137; White *v.* Van Kirk, 25 Barb. 16.

Ohio.— Cincinnati, etc., R. Co. *v.* Pontius, 19 Ohio St. 211, 2 Am. Rep. 391; Stevens *v.* Lake Shore, etc., R. Co., 20 Ohio Cir. Ct. 41, 11 Ohio Cir. Dec. 168; Cleveland, etc., R. Co. *v.* La Tourette, 2 Ohio Cir. Ct. 279, 1 Ohio Cir. Dec. 486.

Pennsylvania.— Warden *v.* Greer, 6 Watts 424.

Rhode Island.— Gardner *v.* Chace, 2 R. I. 112.

South Carolina.— Benjamin *v.* Sinclair, 1 Bailey 174.

Texas.— Arnold *v.* Jones, 26 Tex. 335, 82 Am. Dec. 617; St. Louis Southwestern R. Co. *v.* Cates, 15 Tex. Civ. App. 135, 38 S. W. 648.

United States.— The Delaware *v.* Oregon Iron Co., 14 Wall. 579, 20 L. ed. 779; King *v.* The Lady Franklin, 8 Wall. 325, 19 L. ed. 455; De Sola *v.* Pomares, 119 Fed. 373; Petrie *v.* Heller, 35 Fed. 310; O'Rourke *v.* Two Hundred and Twenty-One Tons of Coal, 1 Fed. 619; Chapin *v.* Siger, 5 Fed. Cas. No. 2,600, 4 McLean 378.

But *compare* Chicago, etc., R. Co. *v.* Hull, 76 Ill. App. 408.

See 20 Cent. Dig. tit. "Evidence," § 1827. And see CARRIERS, 6 Cyc. 420.

Place or mode of stowing.— Inasmuch as a bill of lading which is silent as to the place of storage in a ship imports a contract, according to the customs of shipping, that the goods are to be stored under deck, parol evidence of an agreement that the goods might be stored on deck is inadmissible. Creery *v.* Holly, 14 Wend. (N. Y.) 26. But *compare* Doane *v.* Keating, 12 Leigh (Va.) 391, 37 Am. Dec. 671. See CARRIERS, 6 Cyc. 420 note 1.

A guaranty of the payment of freight written on the back of the bill of lading cannot be shown by parol evidence to have been intended as security for the payment of the freight in place of the lien held by the carrier. Jones *v.* Hoyt, 25 Conn. 374.

Statement as to condition of goods.— A statement in a bill of lading or receipt for goods shipped that they were received in good order or in apparent good order is merely *prima facie* evidence, and parol evidence is admissible to show the actual condition of the goods. Bissel *v.* Price, 16 Ill. 408; Kimball *v.* Brander, 6 La. 711; Warden *v.* Greer, 6 Watts (Pa.) 424; Blade *v.* Chicago, etc., R. Co., 10 Wis. 4. See CARRIERS, 6 Cyc. 423 note 21.

Evidence not tending to vary bill of lading. — Where the defense to an action for the freight of a cargo is that it was carried under special charter by the day, and a bill of lading of the cargo has been introduced, evidence that it is not customary to give a bill of lading where the boat is chartered by the day is admissible, for such evidence does not tend to vary the purport of the bill of lading, but goes to show that if the fact had been as contended for by defendant they would have been unable to produce the paper in question. Zimmerman *v.* Rainey, 26 Misc.

character, being at once contracts and receipts,[75] and in so far as they partake merely of the nature of receipts they may be explained or contradicted by extrinsic evidence.[76]

(D) *Employment.* The terms of a written contract of employment cannot be varied or contradicted by parol.[77] This rule precludes any showing that the duration of the employment was by a parol agreement to be different from the

(N. Y.) 795, 56 N. Y. Suppl. 199. So too evidence to fix a liability on others than the signer does not vary the contract within the meaning of the rule. McTyer *v.* Steele, 26 Ala. 487. See *infra*, XVI, C, 2.

An exception to the rule stated in the text, which effects a modification of the principle, is, where the bill of lading is executed and delivered, or the freight charges are paid as stipulated therein, and there has been published and posted for public inspection in the office of the carrier, where it could be seen by the shipper or consignee, an order of the carrier, allowing authorized special rates for certain classes of freight to be used for particular purposes, and directing the freight to be paid for at the regular tariff rates, the overcharge to be refunded upon application. Louisville, etc., R. Co. *v.* Fulgham, 91 Ala. 555, 8 So. 803.

75. Wayland *v.* Mosely, 5 Ala. 430, 39 Am. Dec. 335. See cases cited *infra*, note 76; and CARRIERS, 6 Cyc. 421 note 10.

What part treated as receipt.— That part of the bill of lading which relates to the receipt of the goods, their quality, condition, and quantity, is treated as a receipt, and as distinct from the contract. Meyer *v.* Peck, 28 N. Y. 590 [*affirming* 33 Barb. 532]; Ellis *v.* Willard, 9 N. Y. 529.

76. *Alabama.*— Wayland *v.* Mosely, 5 Ala. 430, 39 Am. Dec. 335.

Indiana.— Cleveland, etc., R. Co. *v.* Moline Plow Co., 13 Ind. App. 225, 41 N. E. 480.

Louisiana.— Hunt *v.* Mississippi Cent. R. Co., 29 La. Ann. 446; Hedricks *v.* The Morning Star, 18 La. Ann. 353.

Maine.— Dyer *v.* Fredericks, 63 Me. 592.

Maryland.— Lazard *v.* Merchants, etc., Transp. Co., 78 Md. 1, 26 Atl. 897.

Michigan.— Cohen *v.* Jackoboice, 101 Mich. 409, 59 N. W. 665.

New York.— Meyer *v.* Peck, 28 N. Y. 590 [*affirming* 33 Barb. 532]; Ellis *v.* Willard, 9 N. Y. 529; Robinson *v.* Frost, 14 Barb. 536; Wolfe *v.* Myers, 3 Sandf. 7. See also Ide *v.* Sadler, 18 Barb. 32.

Ohio.— Wood *v.* Perry, Wright 240.

Pennsylvania.— Page *v.* Sandusky, etc., R. Co., 2 Ohio Dec. (Reprint) 716, 4 West. L. Month. 644.

Vermont.—Hadd *v.* U. S., etc., Express Co., 52 Vt. 335, 36 Am. Rep. 757.

United States.— The Delaware *v.* Oregon Iron Co., 14 Wall. 579, 20 L. ed. 779; King *v.* The Lady Franklin, 8 Wall. 325, 19 L. ed. 455; Planters' Fertilizer Mfg. Co. *v.* Elder, 101 Fed. 1001, 42 C. C. A. 130; Chapin *v.* Siger, 5 Fed. Cas. No. 2,600, 4 McLean 378. See also Maryland Ins. Co. *v.* Ruden, 6 Cranch (U. S.) 338, 3 L. ed. 242.

England.— Berkley *v.* Watling, 7 A. & E. 29, 6 L. J. K. B. 195, 2 N. & P. 178, 34 E. C. L. 41; Howard *v.* Tucker, 1 B. & Ad. 712, 20 E. C. L. 661.

See 20 Cent. Dig. tit. "Evidence," § 1827. See also *infra*, XVI, B, 2, p; and CARRIERS, 6 Cyc. 421.

As against assignee.— Dickerson *v.* Seelye, 12 Barb. (N. Y.) 99. See *infra*, XVI, F.

77. *Alabama.*— Drennen *v.* Satterfield, 119 Ala. 84, 24 So. 723.

Illinois.— Holmes *v.* Stummel, 15 Ill. 412; Hair *v.* Johnson, 35 Ill. App. 562.

Iowa.— Plano Mfg. Co. *v.* Eich, (1904) 97 N. W. 1106; Mann *v.* Le Grand Independent School-Dist., 52 Iowa 130, 2 N. W. 1005.

Massachusetts.— Zerrahn *v.* Ditson, 117 Mass. 553.

Pennsylvania.— Ivery *v.* Phillips, 196 Pa. St. 1, 46 Atl. 133.

Rhode Island.— See Kenny *v.* Foster, 25 R. I. 474, 56 Atl. 680.

Tennessee.— McClanahan *v.* Keeble, 1 Humphr. 120.

England.— Emery *v.* Parry, 17 L. T. Rep. N. S. 152.

See 20 Cent. Dig. tit. "Evidence," § 1766.

This rule has been applied to contracts of ordinary agency (Pollock *v.* Cohen, 32 Ohio St. 514. See also Richardson *v.* Churchill, 5 Cush. (Mass.) 425), between an insurance company and its agent (Stowell *v.* Greenwich Ins. Co., 163 N. Y. 298, 57 N. E. 480 [*reversing* 20 N. Y. App. Div. 188, 46 N. Y. Suppl. 802]; Borley *v.* McDonald, 69 Vt. 309, 38 Atl. 60; Partridge *v.* Phœnix Mut. L. Ins. Co., 15 Wall. (U. S.) 573, 21 L. ed. 229; Montgomery *v.* Ætna L. Ins. Co., 97 Fed. 913, 38 C. C. A. 553), between a broker and his employer (Alvord *v.* Cook, 174 Mass. 120, 54 N. E. 499; Finck *v.* Schaubacher, 34 Misc. (N. Y.) 547, 69 N. Y. Suppl. 977; Nunn *v.* Townes, (Tex. Civ. App. 1893) 23 S. W. 1117), between an actress and a theatrical manager (Violette *v.* Rice, 173 Mass. 82, 53 N. E. 144), between a mail contractor and a subcontractor (Pierce *v.* Walker, 23 Iowa 424), for work on a railroad (Bupp *v.* O'Conner, 1 Tex. Civ. App. 328, 21 S. W. 619), and for the felling, cutting, hauling, or delivery of logs or timber (Hodgdon *v.* Waldron, 9 N. H. 66; Veeder *v.* Cooley, 2 Hun (N. Y.) 74; Ford *v.* Summers, (Tex. Civ. App. 1894) 26 S. W. 459; Godkin *v.* Monahan, 83 Fed. 116, 27 C. C. A. 410).

Shipping articles see, generally, SEAMEN.

Meaning of term "services."—Evidence that at the time an actress made a written agreement with the proprietor of certain theatrical companies "to render services at any theaters" it was agreed that the word "services" meant services in a particular part in a certain play, contradicts the instrument, and

term stated in the written contract,[78] that the compensation to be paid was other than that stipulated for therein,[79] or that services for which payment was promised by the contract were rendered gratuitously.[80]

(E) *Guaranty of Suretyship.* A written undertaking of guaranty or suretyship cannot be varied or contradicted by parol or extrinsic evidence.[81]

is inadmissible. Violette *v.* Rice, 173 Mass. 82, 53 N. E. 144.

78. Drennen *v.* Satterfield, 119 Ala. 84, 24 So. 723; Mann *v.* Le Grand Independent School-Dist., 52 Iowa 130, 2 N. W. 1005 [*distinguishing* Cook *v.* North McGregor Independent Dist., 40 Iowa 444; Athearn *v.* Millersburg Independent Dist., 33 Iowa 105]; Shelmire *v.* Williams, 68 Hun (N. Y.) 196, 22 N. Y. Suppl. 847; Evans *v.* Roe, L. R. 7 C. P. 138, 26 L. T. Rep. N. S. 70.

Where the contract does not specify any particular time for which the employment shall be continued, the employee cannot prove an oral condition that the employment should be for a year, unless such condition was omitted by fraud or mistake. Dickson *v.* Hartman Mfg. Co., 179 Pa. St. 343, 36 Atl. 246.

79. *California.*— McDonald *v.* Poole, 113 Cal. 437, 45 Pac. 702.

Georgia.— Connor *v.* Lasseter, 98 Ga. 708, 25 S. E. 830.

Kentucky.— Castleman *v.* Southern Mut. L. Ins. Co., 14 Bush 197.

Missouri.— Kenefick *v.* Missouri Brass Type Foundry Co., 72 Mo. App. 381.

New York.— Deering *v.* Schreyer, 58 N. Y. App. Div. 322, 68 N. Y. Suppl. 1015; Mallon *v.* Story, 2 E. D. Smith 331.

South Dakota.— Roberts *v.* Minneapolis Threshing Mach. Co., 8 S. D. 579, 67 N. W. 607, 59 Am. St. Rep. 777.

Texas.— Sanborn *v.* Plowman, 13 Tex. Civ. App. 95, 35 S. W. 193.

Washington.—Ross *v.* Portland Coffee, etc., Co., 30 Wash. 647, 71 Pac. 184.

See 20 Cent. Dig. tit. "Evidence," § 1771.

Evidence of agreement to pay bonus was held inadmissible. McGarrigle *v.* McCosker, 83 N. Y. App. Div. 184, 82 N. Y. Suppl. 494.

A contract allowing a commission on the annual renewal premiums collected on existing policies within the territory allotted to the general agent of an insurance company cannot be varied by parol evidence to incorporate therein a collateral guaranty as to the amount of such renewal premiums. Montgomery *v.* Ætna L. Ins. Co., 97 Fed. 913, 38 C. C. A. 553.

An agreement for a share of the "profits" refers to the profits in a mercantile sense and a different meaning cannot be established by parol. Chilberg *v.* Jones, 3 Wash. 530, 28 Pac. 1104.

80. Worthington *v.* Plymouth County R. Co., 168 Mass. 474, 47 N. E. 403.

81. *Alabama.*— Sanford *v.* Howard, 29 Ala. 684, 68 Am. Dec. 101.

Arizona.— Stewart *v.* Albuquerque Nat. Bank, (1891) 30 Pac. 303.

Arkansas.— West-Winfree Tobacco Co. *v.* Waller, 66 Ark. 445, 51 S. W. 320.

California.— Adams *v.* Wallace, 119 Cal. 67, 51 Pac. 14.

Connecticut.— Allen *v.* Rundle, 50 Conn. 9, 47 Am. Rep. 599. See also Tyler *v.* Waddingham, 58 Conn. 375, 20 Atl. 335, 8 L. R. A. 657.

Illinois.— Schroer *v.* Wessell, 89 Ill. 113; Jones *v.* Albee, 70 Ill. 34.

Indiana.— Trentman *v.* Fletcher, 100 Ind. 105.

Iowa.—Domestic Sewing Mach. Co. *v.* Webster, 47 Iowa 357.

Kansas.— Brenner *v.* Luth, 28 Kan. 581; Pease Piano Co. *v.* Matthews, 5 Kan. App. 370, 48 Pac. 449.

Louisiana.— Furguson *v.* Glaze, 12 La. Ann. 667.

Maine.— Monroe *v.* Matthews, 48 Me. 555.

Massachusetts.— Boston, etc., Glass Co. *v.* Moore, 119 Mass. 435.

Mississippi.— Pollock *v.* Helm, 54 Miss. 1, 28 Am. Rep. 342.

Missouri.— Squier *v.* Evans, 127 Mo. 514, 30 S. W. 143; State *v.* Potter, 63 Mo. 212, 21 Am. Rep. 440.

Montana.— Gillett *v.* Clark, 6 Mont. 190, 9 Pac. 823.

Nebraska.— Maxwell *v.* Burr, 44 Nebr. 31, 62 N. W. 236.

New York.—Henry McShane Co. *v.* Padian, 142 N. Y. 207, 36 N. E. 880 [*reversing* 1 Misc. 332, 20 N. Y. Suppl. 679]; Sherman *v.* Pedrick, 35 N. Y. App. Div. 15, 54 N. Y. Suppl. 467.

North Carolina.— Nixon *v.* Long, 33 N. C. 428.

Ohio.— Deming *v.* Ohio Agricultural, etc., College, 31 Ohio St. 41; Neil *v.* Ohio Agricultural, etc., College, 31 Ohio St. 15; Williamson *v.* Hall, 1 Ohio St. 190.

Pennsylvania.— Ellmaker *v.* Franklin F. Ins. Co., 5 Pa. St. 183.

Rhode Island.— Di Iorio *v.* Di Biasio, 21 R. I. 208, 42 Atl. 1114.

South Carolina.— Kinloch *v.* Brown, 2 Speers 284.

Texas.— Wilson *v.* Childress, 2 Tex. App. Civ. Cas. § 425.

Vermont.—Hakes *v.* Hotchkiss, 23 Vt. 231.

United States.—Gilbert *v.* Moline Plow Co., 119 U. S. 491, 7 S. Ct. 305, 30 L. ed. 476.

England.—Holmes *v.* Mitchell, 7 C. B. N. S. 361, 6 Jur. N. S. 73, 28 L. J. C. P. 301, 97 E. C. L. 361.

See 20 Cent. Dig. tit. "Evidence," §§ 1813–1817.

Accordingly evidence is not admissible to prove that a continuing guaranty was not intended to be continuous (Schneider-Davis Co. *v.* Hart, 23 Tex. Civ. App. 529, 57 S. W. 903), that a guaranty for all goods sold to a certain person "until further notice" was limited to one year (Indiana Bicycle Co. *v.*

(F) *Indemnity.* The rule excluding parol or extrinsic evidence to contradict or vary a written contract[82] applies to contracts of indemnity.[83]

(G) *Insurance.* The rule that a contract in writing merges all previous negotiations leading up thereto and, if its terms are free from doubt or ambiguity, cannot be altered or contradicted by parol evidence unless in case of fraud or mistake, is applicable to contracts or policies of insurance.[84]

Tuttle, 74 Conn. 489, 51 Atl. 538), that a guaranty of payment for all materials delivered to a certain person up to a fixed amount was intended to apply only to materials furnished to be used in the execution of a particular contract (Henry McShane Co. *v.* Padian, 142 N. Y. 207, 36 N. E. 880 [*reversing* 1 Misc. 332, 20 N. Y. Suppl. 679]), that a guaranty of payment of all sums to become due "on account of coal" from a certain colliery was limited to a particular kind of coal (Hutchinson *v.* Root, 2 N. Y. App. Div. 584, 38 N. Y. Suppl. 16), or that a continuing guaranty of payment for goods delivered from time to time was intended as security for past indebtedness (Pritchett *v.* Wilson, 39 Pa. St. 421, in which case, however, the evidence was rejected on the ground that the guarantor could not be affected by such an agreement between the person guaranteed and the creditor, to which he was not a party).

An imperfect description of a note in a guaranty thereof cannot be aided by parol. Ordeman *v.* Lawson, 49 Md. 135.

Showing notes to be within guaranty.— In Eckel *v.* Jones, 8 Pa. St. 501, it was held that parol evidence was admissible to show that a guaranty of S's notes "payable to" E for a certain amount was intended to cover two notes drawn by S to the order of a third person, on the same date with the guaranty, and in the aggregate amounting to the sum named, and by such third person transferred to E; the court saying: "There is no exact technical meaning to be applied to the word 'payable' when used in contracts. It is to be taken according to the common acceptation of the word in the popular language of the country and in that sense means due to, to be paid to, which would exactly fit the condition and description of E in regard to these notes and the guaranty."

82. See *supra*, XVI, B, 2, h, (I).

83. Woodcock *v.* Bostic, 128 N. C. 243, 38 S. E. 881; Traders' Nat. Bank *v.* Washington Water Power Co., 22 Wash. 467, 61 Pac. 152.

An agreement to indemnify an indorser against loss on his indorsement of notes to a certain amount is limited to the indorsement of notes, once only, to the amount indicated, and cannot be shown to have related to a continuing indemnity for indorsements of a series of notes. Hall *v.* Rand, 8 Conn. 560.

An indemnity against all damages or expenses for the selling of certain goods on execution cannot be shown to have been intended to apply only to the claims of a particular person. Jones *v.* Wolcott, 2 Allen (Mass.) 247.

84. *Alabama.*— Mobile L. Ins. Co. *v.* Pruett, 74 Ala. 487.

Arkansas.— Germania Ins. Co. *v.* Bromwell, 62 Ark. 43, 34 S. W. 83.

Connecticut.— Sheldon *v.* Hartford F. Ins. Co., 22 Conn. 235, 58 Am. Dec. 430.

Georgia.— Mutual Ben. L. Ins. Co. *v.* Ruse, 8 Ga. 534.

Illinois.— Hartford F. Ins. Co. *v.* Webster, 69 Ill. 392; Cannon *v.* Michigan Mut. L. Ins. Co., 103 Ill. App. 414.

Indiana.— King *v.* Enterprise Ins. Co., 45 Ind. 43.

Iowa.— Congower *v.* Equitable Mut. L., etc., Assoc., 94 Iowa 499, 63 N. W. 192.

Kansas.— Commercial Union Assur. Co. *v.* Norwood, 57 Kan. 610, 47 Pac. 529.

Kentucky.— National Mut. Ben. Assoc. *v.* Heckman, 86 Ky. 254, 5 S. W. 565, 9 Ky. L. Rep. 525.

Louisiana.— Arguimbau *v.* Germania Ins. Co., 106 La. 139, 30 So. 148; Bell *v.* Western Mar., etc., Ins. Co., 5 Rob. 423, 39 Am. Dec. 542.

Maine.— Bolton *v.* Bolton, 73 Me. 299.

Maryland.— Prudential Ins. Co. *v.* Devoe, 98 Md. 584, 56 Atl. 809.

Massachusetts.— Pierce *v.* Charter Oak L. Ins. Co., 138 Mass. 151; Finney *v.* Bedford Commercial Ins. Co., 8 Metc. 348, 41 Am. Dec. 515; Ewer *v.* Washington Ins. Co., 16 Pick. 502, 28 Am. Dec. 258; Lewis *v.* Thatcher, 15 Mass. 431.

New Jersey.— Franklin F. Ins. Co. *v.* Martin, 40 N. J. L. 568, 29 Am. Rep. 271.

New York.— New York *v.* Brooklyn F. Ins. Co., 3 Abb. Dec. 251, 4 Keyes 465; Home Ins. Co. *v.* Continental Ins. Co., 89 N. Y. App. Div. 1, 85 N. Y. Suppl. 262; Saunders *v.* Agricultural Ins. Co., 39 N. Y. App. Div. 631, 57 N. Y. Suppl. 683; Rölker *v.* Great Western Ins. Co., 2 Sweeny 275; New York Gas Light Co. *v.* Mechanics' F. Ins. Co., 2 Hall 125; Alston *v.* Mechanics' Mut. Ins. Co., 4 Hill 329 [*reversing* 1 Hill 510]; Mumford *v.* Hallett, 1 Johns. 433.

North Carolina.— Hoffman *v.* Standard L., etc., Ins. Co., 127 N. C. 337, 37 S. E. 466.

Ohio.— Union Cent. L. Ins. Co. *v.* Hook, 62 Ohio St. 256, 56 N. E. 906; Richards *v.* Hale, 24 Ohio Cir. Ct. 468.

Oklahoma.— Liverpool, etc., Ins. Co. *v.* T. M. Richardson Lumber Co., 11 Okla. 579, 585, 69 Pac. 936, 938.

South Carolina.— Lagrone *v.* Timmerman, 46 S. C. 372, 24 S. E. 290.

South Dakota.— Knudson *v.* Grand Council N. L. of H., 7 S. D. 214, 63 N. W. 911.

Texas.—Chamberlain *v.* Wright, (Civ. App. 1896) 35 S. W. 707; Union Cent. L. Ins. Co. *v.* Chowning, 8 Tex. Civ. App. 455, 28 S. W. 117. See also Orient Ins. Co. *v.* Prather, 25 Tex. Civ. App. 446, 62 S. W. 89.

United States.— Union Mut. L. Ins. Co. *v.*

(H) *Partnership.* A contract of partnership cannot be extended, limited, or otherwise varied by parol evidence to show that the true relation of the parties or their rights and liabilities are different from what appears in the written instrument,[85] for all of their prior negotiations and agreements with respect to the proposed partnership are merged in the articles of partnership.[86] And the same rule applies to a written agreement entered into for the dissolution of the partnership.[87]

(I) *Sale* — (1) In General. The parol evidence rule applies in full force to contracts of sale, whether relating to real or personal property, and whether formally drawn up and executed or existing only in the shape of offers or orders and acceptances thereof, and such contracts cannot be added to, varied, contradicted, or controlled by parol or extrinsic evidence.[88]

Mowry, 96 U. S. 544, 24 L. ed. 674; Merchants Mut. Ins. Co. *v.* Lyman, 15 Wall. 664, 21 L. ed. 246; Marine Ins. Co. *v.* Hodgson, 6 Cranch 206, 3 L. ed. 200; Ocean Steamship Co. *v.* Ætna Ins. Co., 121 Fed. 882; Phillips *v.* Union Cent. L. Ins. Co., 101 Fed. 33 [*reversed* on other grounds in 102 Fed. 19, 41 C. C. A. 263]; McMaster *v.* New York L. Ins. Co., 99 Fed. 856, 40 C. C. A. 119 [*affirming* 90 Fed. 40]; Indemnity Mut. Mar. Assur. Co. *v.* United Oil Co., 88 Fed. 315; Union Nat. Bank *v.* German Ins. Co., 71 Fed. 473, 18 C. C. A. 203; Hearn *v.* Equitable Safety Ins. Co., 11 Fed. Cas. No. 6,299, 3 Cliff. 328.

Canada.— Dingee *v.* Agricultural Ins. Co., 16 N. Brunsw. 80; Mason *v.* Hartford F. Ins. Co., 29 U. C. Q. B. 585.

See 20 Cent. Dig. tit. "Evidence," §§ 1818–1824.

An application for insurance is inadmissible in an action on a policy to show the intention of the parties, as the policy itself is conclusive as to such intention. Dow *v.* Whetten, 8 Wend. (N. Y.) 160.

Evidence of a custom of a mutual insurance company to relieve a member from further liability after he has defaulted in the payment of one assessment is inadmissible in an action to collect an assessment, where such custom is at variance with the certificate of membership, and the constitution and by-laws. Lehman *v.* Clark, 71 Ill. App. 366.

The designation of a beneficiary in an application for insurance may be varied by parol evidence where it is not made a part of the policy, which is the contract between the parties. Rudershauer *v.* Metropolitan L. Ins. Co., 18 Ohio Cir. Ct. 609, 10 Ohio Cir. Dec. 258.

85. *Alabama.*— Couch *v.* Woodruff, 63 Ala. 466.

California.— Miller *v.* Butterfield, 79 Cal. 62, 21 Pac. 543.

Georgia.— Pursley *v.* Ramsey, 31 Ga. 403.

Illinois.— Taft *v.* Schwamb, 80 Ill. 289.

Indiana.— Wood *v.* Deutchman, 75 Ind. 148.

Massachusetts.— Dix *v.* Otis, 5 Pick. 38.

Michigan.— Michigan Sav. Bank *v.* Butler, 98 Mich. 381, 57 N. W. 253.

New York.— Hull *v.* Barth, 48 N. Y. App. Div. 590, 62 N. Y. Suppl. 946; Spingarn *v.* Rosenfeld, 4 Misc. 523, 24 N. Y. Suppl. 733.

Pennsylvania.— Brett *v.* Challis, 5 Pa. L. J. Rep. 360.

See 20 Cent. Dig. tit. "Evidence," § 1761.

The articles of association with accompanying schedules required by the Pennsylvania limited partnership act cannot be supplemented or amended by parol evidence. Gearing *v.* Carroll, 151 Pa. St. 79, 24 Atl. 1045.

Recital as to payment.— A recital in a contract of copartnership that each partner has contributed to the stock a specified sum is not conclusive, but like an ordinary receipt, may be explained, controlled, qualified, or contradicted. Lowe *v.* Thompson, 86 Ind. 503. See also *infra*, XVI, B, 2, p.

86. Evans *v.* Hanson, 42 Ill. 234.

87. Bragg *v.* Geddes, 93 Ill. 39; Van Horn *v.* Van Horn, 49 N. J. Eq. 327, 23 Atl. 1079 [*reversing* (Ch. 1890) 20 Atl. 826]; Walsh *v.* Brown, 4 N. Y. Suppl. 79; Jarvis *v.* Palmer, 11 Paige (N. Y.) 650; Cochran *v.* Perry, 8 Watts & S. (Pa.) 262.

Agreement for division of partnership assets cannot be varied. Lowber *v.* Le Roy, 2 Sandf. (N. Y.) 202.

Agreement for purchase of retiring partner's interest cannot be varied. Delaney *v.* Anderson, 54 Ga. 586; Yocum *v.* Carey, 1 Indian Terr. 626, 43 S. W. 756; Burress *v.* Blair, 61 Mo. 133; Hains *v.* Rapp, 2 Wkly. Notes Cas. (Pa.) 595.

Guaranty as to debts.— Where by a written dissolution of a partnership one partner takes the assets and assumes the debts, a guaranty by the other that they did not exceed a certain sum cannot be shown by parol. Lynch *v.* Burr, 7 Rob. (La.) 96.

88. *Alabama.*— Dozier *v.* Duffee, 1 Ala. 320.

California.— Hewitt *v.* San Jacinto, etc., Dist., 124 Cal. 186, 56 Pac. 893; Bullock *v.* Consumers' Lumber Co., (1892) 31 Pac. 367. See also Langley *v.* Rodriguez, 122 Cal. 580, 55 Pac. 406, 68 Am. St. Rep. 70.

Connecticut.— New Idea Pattern Co. *v.* Whelan, 75 Conn. 455, 53 Atl. 953; Parker *v.* Selden, 69 Conn. 544, 38 Atl. 212; Hotchkiss *v.* Higgins, 52 Conn. 205, 52 Am. Rep. 582.

Florida.— Jenkins *v.* Lykes, 19 Fla. 148, 45 Am. Rep. 19.

Georgia.— Bass Dry Goods Co. *v.* Granite City Mfg. Co., 119 Ga. 124, 45 S. E. 980; Wilson *v.* Hinnant, 117 Ga. 46, 43 S. E. 408; National Computing Scales Co. *v.* Eaves, 116

(2) Description of Property Included. Parol or extrinsic evidence to contradict or vary the terms of the contract of sale as to the property included

Ga. 511, 42 S. E. 783; Bass Dry Goods Co. *v.* Granite City Mfg. Co., 113 Ga. 1142, 39 S. E. 471; Walker *v.* Bryant, 112 Ga. 412, 37 S. E. 749; Barrie *v.* Smith, 105 Ga. 34, 31 S. E. 121.

Illinois.—Tichenor *v.* Newman, 186 Ill. 264, 57 N. E. 826; Pickrel *v.* Rose, 87 Ill. 263; Illinois Cent. R. Co. *v.* Cassell, 17 Ill. 389; Lynn *v.* Lynn, 10 Ill. 602; Lane *v.* Sharpe, 4 Ill. 566; Over *v.* Walzer, 103 Ill. App. 104.

Indiana.— Smith *v.* Barber, 153 Ind. 322, 53 N. E. 1014; Robinson Mach. Works *v.* Chandler, 56 Ind. 575; Snyder *v.* Koons, 20 Ind. 389; Moore *v.* Pendleton, 16 Ind. 481; McClure *v.* Jeffrey, 8 Ind. 79; Buckeye Mfg. Co. *v.* Woolley Foundry, etc., Works, 26 Ind. App. 7, 58 N. E. 1069; Colles *v.* Lake Cities Electric R. Co., 22 Ind. App. 86, 53 N. E. 256; Singer Mfg. Co. *v.* Sults, 17 Ind. App. 639, 47 N. E. 341.

Iowa.— McCormick Harvesting Mach. Co. *v.* Markert, 107 Iowa 340, 78 N. W. 33; Fawkner *v.* Lew Smith Wall Paper Co., 88 Iowa 169, 55 N. W. 200 [*reversing* on rehearing (1891) 49 N. W. 1003]; Hetzler *v.* Morrell, 82 Iowa 562, 48 N. W. 938; Kramer *v.* Richie, (1886) 31 N. W. 90.

Kansas.— Smith *v.* Deere, 48 Kan. 416, 29 Pac. 603.

Kentucky.—Langdon *v.* Woolfolk, 2 B. Mon. 105.

Louisiana.— Welsh's Succession, 111 La. 801, 35 So. 913, 64 L. R. A. 823; Baltimore *v.* New Orleans, 45 La. Ann. 526, 12 So. 878; Wade *v.* Percy, 24 La. Ann. 173; Arnous *v.* Davern, 18 La. 42; Pew *v.* Livaudais, 3 La. 459.

Maine.— Williams *v.* Robinson, 73 Me. 186, 40 Am. Rep. 352.

Maryland.— Lawder, etc., Co. *v.* Albert Mackie Grocery Co., 97 Md. 1, 54 Atl. 634; Cassard *v.* McGlannan, 88 Md. 168, 40 Atl. 711.

Massachusetts.— Tripp *v.* Smith, 180 Mass. 122, 61 N. E. 804; Fitz *v.* Camey, 118 Mass. 100; Russell *v.* Barry, 115 Mass. 300; Faucett *v.* Currier, 109 Mass. 79; Coddington *v.* Goddard, 16 Gray 436.

Michigan.— Leffel *v.* Piatt, 126 Mich. 443, 86 N. W. 65; Price *v.* Marthen, 122 Mich. 655, 81 N. W. 551; Harrow Spring Co. *v.* Whipple Harrow Co., 90 Mich. 147, 51 N. W. 197, 30 Am. St. Rep. 421; National Cash Register Co. *v.* Blumenthal, 85 Mich. 464, 48 N. W. 622; Simonds Mfg. Co. *v.* Riddle, 73 Mich. 497, 41 N. W. 675; Cook *v.* Bell, 18 Mich. 387.

Minnesota.— Gasper *v.* Heimbach, 53 Minn. 414, 55 N. W. 559; American Mfg. Co. *v.* Klarquist, 47 Minn. 344, 50 N. W. 243; Day *v.* Raquet, 14 Minn. 273.

Mississippi.— Coats *v.* Bacon, 77 Miss. 320, 27 So. 621.

Missouri.— Chrisman *v.* Hodges, 75 Mo. 413; Wortmann *v.* Campbell, 48 Mo. 509; Howard *v.* Scott, 98 Mo. App. 509, 72 S. W. 709; Walther *v.* Stampfli, 91 Mo. App. 398; Gill *v.* Johnson-Brinkman Commission Co., 84 Mo. App. 456; Russe *v.* Hendricks, 75 Mo. App. 386; Consolidated Coal Co. *v.* Mexico Fire Brick Co., 66 Mo. App. 296; Remington Sewing Mach. Co. *v.* Cushen, 8 Mo. App. 528.

Nebraska.— Nebraska Land, etc., Co. *v.* Trauerman, (1904) 98 N. W. 37; Quinn *v.* Moss, 45 Nebr. 614, 63 N. W. 931.

New Jersey.— Rogers *v.* Colt, 21 N. J. L. 704; Rittenhouse *v.* Tomlinson, 27 N. J. Eq. 379; King *v.* Ruckman, 21 N. J. Eq. 599.

New York.— Holcombe *v.* Munson, 103 N. Y. 682, 9 N. E. 443; Corse *v.* Peck, 102 N. Y. 513, 7 N. E. 810; Pollen *v.* Le Roy, 30 N. Y. 549; Baker *v.* Higgins, 21 N. Y. 397; Grabfelder *v.* Vosburgh, 90 N. Y. App. Div. 307, 85 N. Y. Suppl. 633; Van Pub. Co. *v.* Westinghouse, 72 N. Y. App. Div. 121, 76 N. Y. Suppl. 340; Smith *v.* Coe, 55 N. Y. App. Div. 585, 67 N. Y. Suppl. 350 [rehearing *denied* in 57 N. Y. App. Div. 631, 68 N. Y. Suppl. 274]; Stokes *v.* Polley, 30 N. Y. App. Div. 550, 52 N. Y. Suppl. 406; Carter *v.* Hamilton, 11 Barb. 147; Pierrepont *v.* Barnard, 5 Barb. 364; Newerf *v.* Jeff, 1 Silv. Supreme 109, 6 N. Y. Suppl. 581; Delafield *v.* De Grauw, 9 Bosw. 1; Globe Soap Co. *v.* Liss, 36 Misc. 199, 73 N. Y. Suppl. 153; Moores *v.* Glover, 13 N. Y. Suppl. 565; Breck *v.* Ringler, 13 N. Y. Suppl. 501; Blood *v.* Goodrich, 9 Wend. 68, 24 Am. Dec. 121; Champion *v.* White, 5 Cow. 509.

North Carolina.— Merchants, etc., Nat. Bank *v.* McElwee, 104 N. C. 305, 10 S. E. 295; Nickelson *v.* Reves, 94 N. C. 559.

North Dakota.— Northwestern Fuel Co. *v.* Burns, 1 N. D. 137, 45 N. W. 699.

Ohio.—Ormsbee *v.* Machir, 20 Ohio St. 295.

Pennsylvania.— Fry *v.* National Glass Co., 207 Pa. St. 505, 56 Atl. 1063; Baker *v.* Flick, 200 Pa. St. 13, 49 Atl. 349; Melcher *v.* Hill, 194 Pa. St. 440, 45 Atl. 488; Hunter *v.* McHose, 100 Pa. St. 38; Lloyd *v.* Farrell, 48 Pa. St. 73, 86 Am. Dec. 563; Coen *v.* Adamson, 8 Pa. Cas. 170, 11 Atl. 74; Cooper *v.* Whitmer, 3 Pa. Cas. 377, 6 Atl. 571; Seitzinger *v.* Ridgway, 4 Watts & S. 472; Harris *v.* Sharpless, 15 Pa. Super. Ct. 643; Hennershotz *v.* Gallagher, 23 Wkly. Notes Cas. 280.

South Carolina.—Church of Advent *v.* Farrow, 7 Rich. Eq. 378; Doar *v.* Gibbes, Bailey Eq. 371; Askew *v.* Payas, 2 Desauss. 145.

South Dakota.— Strunk *v.* Smith, 8 S. D. 407, 66 N. W. 926.

Tennessee.— See Ross *v.* Carter, 1 Humphr. 415.

Texas.— Du Bois *v.* Rooney, 82 Tex. 173, 17 S. W. 528; Dunovant *v.* Anderson, 24 Tex. Civ. App. 517, 59 S. W. 824; Sanborn *v.* Murphy, 5 Tex. Civ. App. 509, 25 S. W. 459 [*affirmed* in 86 Tex. 437, 25 S. W. 610]; Heflin *v.* Campbell, 5 Tex. Civ. App. 106, 23 S. W. 595.

Vermont.— Pictorial League *v.* Nelson, 69 Vt. 162, 37 Atl. 247; Daggett *v.* Johnson, 49 Vt. 345.

Virginia.— Scott *v.* Norfolk, etc., R. Co., 90 Va. 241, 17 S. E. 882.

therein, or as to the description of such property, is inadmissible.[89] Thus it has

Washington.— Glick *v.* Weatherwax, 14 Wash. 560, 45 Pac. 156; Staver *v.* Rogers, 3 Wash. 603, 28 Pac. 906.

West Virginia.— Anderson *v.* Snyder, 21 W. Va. 632; Depue *v.* Sergent, 21 W. Va. 326 [*disapproving* Caldwell *v.* Craig, 21 Gratt. 132].

Wisconsin.— Newell *v.* New Holstein Canning Co., 119 Wis. 635, 97 N. W. 487; Custeau *v.* St. Louis Land Imp. Co., 88 Wis. 311, 60 N. W. 581; Yenner *v.* Hammond, 36 Wis. 277; Burhans *v.* Johnson, 15 Wis. 286.

United States.— Ruffner *v.* Hogg, 1 Black 115, 17 L. ed. 38; Housekeeper Pub. Co. *v.* Swift, 97 Fed. 290, 38 C. C. A. 187; Hancock *v.* Cossett, 45 Fed. 754; White *v.* Boyce, 21 Fed. 228; Wright *v.* Deklyne, 30 Fed. Cas. No. 18,076, Pet. C. C. 199.

England.—Smith *v.* Jeffryes, 15 L. J. Exch. 325, 15 M. & W. 561.

Canada.— Ulster Spinning Co. *v.* Foster, 3 Montreal Q. B. 396; Blaikie *v.* McLennan, 33 Nova Scotia 558; Page *v.* Proctor, 5 Ont. 238; Noble *v.* Spencer, 27 U. C. Q. B. 210.

See 20 Cent. Dig. tit. "Evidence," §§ 1778, 1787.

Bills of sale see *supra*, XVI, B, 2, c.

A right to rescind cannot be shown by parol. Kessler *v.* Smith, 42 Minn. 494, 44 N. W. 794; Houck *v.* Wright, (Miss. 1898) 23 So. 422.

Evidence that an order for goods was countermanded is incompetent as contradicting the terms of a written instrument, where the order stipulated that it was not subject to countermand. Burwell *v.* Chapman, 59 S. C. 581, 38 S. E. 222.

An assumption of encumbrances by the vendee cannot be shown to vary or add to the contract. Smith *v.* Taylor, 82 Cal. 533, 23 Pac. 217; Leak *v.* Thorn, 13 Ind. App. 335, 41 N. E. 602; Lewis *v.* Day, 53 Iowa 575, 5 N. W. 753. See also Tharin *v.* Fickling, 2 Rich. (S. C.) 361.

A bond for the conveyance of land is within the rule. Russell *v.* Schumier, 9 Minn. 28.

Executory contract cannot be shown to be intended as bill of sale. Godfrey *v.* Germain, 24 Wis. 410.

An instrument on its face a conditional sale of personal property cannot in a court of law be shown by parol evidence to have been in fact intended as a mortgage. Bates *v.* Crowell, 122 Ala. 611, 25 So. 217. But see *infra*, XVI, C, 26.

An agreement to allow a running credit on sales to "at least" a certain amount does not bind the seller not to furnish credit for a greater amount, and it cannot be shown by parol that he made such an agreement. Fuqua *v.* Pabst Brewing Co., (Tex. Civ. App. 1896) 36 S. W. 479.

Where there is a contract to convey land to several joint purchasers, parol evidence may be admitted to show the proportion of the purchase-money paid by each. Brothers *v.* Porter, 6 B. Mon. (Ky.) 106. See also *infra*, XVI, C, 2.

[39]

89. *California.*— Osborn *v.* Hendrickson, 7 Cal. 282.

Illinois.— O'Reer *v.* Strong, 13 Ill. 688; Hill *v.* Hatfield, 72 Ill. App. 534.

Indiana.—Conant *v.* Terre Haute Nat. State Bank, 121 Ind. 323; Baldwin *v.* Kerlin, 46 Ind. 426; Patterson *v.* Doe, 8 Blackf. 237; Jacobs *v.* Finkel, 7 Blackf. 432.

Iowa.— Smay *v.* Etnire, 99 Iowa 149, 68 N. W. 597.

Louisiana.— Angomar *v.* Wilson, 12 La. Ann. 857.

Maine.— Elder *v.* Elder, 10 Me. 80, 25 Am. Dec. 205; Small *v.* Quincy, 4 Me. 497.

Maryland.— Kent *v.* Carcaud, 17 Md. 291.

Massachusetts.— Dean *v.* Washburn, etc., Mfg. Co., 177 Mass. 137, 58 N. E. 162; Keller *v.* Webb, 126 Mass. 393; Fitzgerald *v.* Clark, 6 Gray 393.

Minnesota.— Cook *v.* Finch, 19 Minn. 407.

Mississippi.— Pine Grove Lumber Co. *v.* Interstate Lumber Co., 71 Miss. 944, 15 So. 105.

Nebraska.— Quinn *v.* Moss, 45 Nebr. 614, 63 N. W. 931.

New Jersey.— Fitch *v.* Archibald, 29 N. J. L. 160.

New York.— Dady *v.* Rourke, 172 N. Y. 447, 65 N. E. 273 [*reversing* 61 N. Y. App. Div. 29, 70 N. Y. Suppl. 694]; Veeder *v.* Cooley, 4 Thomps. & C. 245; Bopp *v.* Atkins, 10 N. Y. Suppl. 539.

North Carolina.— Merchants, etc., Nat. Bank *v.* McElwee, 104 N. C. 305, 10 S. E. 295.

North Dakota.— Northwestern Fuel Co. *v.* Bruns, 1 N. D. 137, 45 N. W. 699.

Ohio.— Ormsbee *v.* Machir, 20 Ohio St. 295; Malone *v.* Cincinnati, 7 Ohio Dec. (Reprint) 513, 3 Cinc. L. Bul. 578.

Pennsylvania.— Baugh *v.* White, 161 Pa. St. 632, 29 Atl. 267; Watsontown Car Mfg. Co. *v.* Elmsport Lumber Co., 99 Pa. St. 605.

Texas.— Hopkins *v.* Woldert Grocery Co., (Civ. App. 1902) 66 S. W. 63; Evans-Snider-Buel Co. *v.* Stribling, (Civ. App. 1898) 45 S. W. 40.

Vermont.— Ripley *v.* Paige, 12 Vt. 353.

Virginia.— Allen *v.* Crank, (1895) 23 S. E. 772.

Wisconsin.— Caldwell *v.* Perkins, 93 Wis. 89, 67 N. W. 29; Cooper *v.* Cleghorn, 50 Wis. 113, 6 N. W. 491.

England.— Smith *v.* Jeffryes, 15 L. J. Exch. 325, 15 M. & W. 561.

See 20 Cent. Dig. tit. "Evidence," §§ 1780, 1789.

This rule has been applied to exclude evidence that a contract to sell a certain quantity of pecans referred to pecans to be grown in certain territory (Hopkins *v.* Woldert Grocery Co., (Tex. Civ. App. 1902) 66 S. W. 63), that a contract for the sale of a certain quantity of sound rice referred to a particular cargo (Ruiz *v.* Norton, 4 Cal. 355, 60 Am. Dec. 618), that a contract for the sale of a grist-mill included bolting cloth (O'Reer *v.* Strong, 13 Ill. 688), that a contract to ship

been frequently held that a contract for the sale of a business cannot be added to by parol evidence of an agreement that the good-will was included or that the vendor should not again engage in such business at a particular place or for a particular time.[90]

(3) PRICE. The statement in a contract of sale as to the price paid or to be paid by the purchaser is an essential part of the contract, and hence it cannot be varied or contradicted by parol.[91]

(4) TIME AND MODE OF PAYMENT. A contract of sale is also conclusive as to the time, mode, and terms of payment, and cannot be varied or contradicted as to these matters by parol.[92]

(5) TIME AND PLACE OF DELIVERY. Parol evidence is not admissible to vary or contradict the language of the contract as to the time[93] or place of delivery of

a certain quantity of ice referred to such only as was then owned by the vendor (Schreiber *v.* Butler, 84 Ind. 576), or that a sale of land by the acre was contemplated where the contract shows a sale in gross (Dozier *v.* Duffee, 1 Ala. 320; Wadhams *v.* Swan, 109 Ill. 46; Anderson *v.* Snyder, 21 W. Va. 632; Depue *v.* Sergent, 21 W. Va. 326).

Where the land is described in general terms parol evidence of the vendor's representations as to the quantity of land is inadmissible to lay the ground for compensation for a deficiency. National Iron Armor Co. *v.* Bruner, 19 N. J. Eq. 331. Thus where the contract states that the land contains "about 65 acres," parol evidence is inadmissible to prove a sale of sixty-five acres, or the vendor's representations that there were at least sixty-five acres. Baltimore Permanent Bldg., etc., Soc. *v.* Smith, 54 Md. 187, 39 Am. Rep. 374.

Where no mention is made of the quantity of land agreed to be sold, it cannot be shown by parol evidence that, prior to the written contract, it was orally agreed that the tract contained a certain number of acres. Ohlert *v.* Alderson, 86 Wis. 433, 57 N. W. 88.

Where an insufficient description is given in a bond to make title, parol evidence cannot be resorted to for the purpose of showing what the parties meant or to identify a particular parcel of land which was the subject-matter of a written contract. Richardson *v.* Godwin, 59 N. C. 220. But see *infra*, XVI, C, 30.

Where the contract refers to an official survey or draft, such survey must be taken to contain the true quantity, and in the absence of fraud evidence to vary this amount cannot be received. Wier *v.* Dougherty, 27 Pa. St. 182.

90. *Kansas.*— Drake *v.* Dodsworth, 4 Kan. 159.

Louisiana.—Damare *v.* Dupaty, 42 La. Ann. 343, 7 So. 580.

Massachusetts.— Bassett *v.* Percival, 5 Allen 345; Wilson *v.* Sherburne, 6 Cush. 68. See also Doyle *v.* Dixon, 12 Allen 576, a case involving a contract in the nature of a lease.

Missouri.— Walther *v.* Stampfli, 91 Mo. App. 398.

New York.— Costello *v.* Eddy, 12 N. Y. Suppl. 236 [*affirmed* in 128 N. Y. 650, 29 N. E. 146].

Pennsylvania.—Beardslee *v.* Hibbs, 2 Wkly. Notes Cas. 697. *Contra*, Emrick *v.* Groome, 4 Pa. Dist. 511; Dixon *v.* Witte, 4 Wkly. Notes Cas. 213.

Rhode Island.— Zanturjian *v.* Boornazian, (1903) 55 Atl. 199.

Washington.—Gordon *v.* Parke, etc., Mach. Co., 10 Wash. 18, 38 Pac. 755.

But see *infra*, XVI, C, 25, i, (XI).

91. *Iowa.*—Hutton *v.* Maines, 68 Iowa 650, 28 N. W. 9. See also Plano Mfg. Co. *v.* Eich, (1904) 97 N. W. 1106.

Louisiana.— Formento *v.* Robert, 27 La. Ann. 489.

Maine.— Hilton *v.* Homans, 23 Me. 136.

Michigan.—McLeod *v.* Hunt, 128 Mich. 124, 87 N. W. 101.

Texas.— Wright *v.* Hays, 34 Tex. 253.

92. *Alabama.*— Ware *v.* Cowles, 24 Ala. 446, 60 Am. Dec. 482.

Iowa.— Hunt *v.* Gray, 76 Iowa 268, 41 N. W. 14.

Maine.— Chase *v.* Jewett, 37 Me. 351.

Massachusetts.— Dixon *v.* Williamson, 173 Mass. 50, 52 N. E. 1067; Davis *v.* Pope, 12 Gray 193; Ryan *v.* Hall, 13 Metc. 520.

Michigan.—Walker *v.* Mack, 129 Mich. 527, 89 N. W. 338; Smith *v.* Kemp, 92 Mich. 357, 52 N. W. 639.

New York.— Armstrong *v.* Munday, 5 Den. 166.

Pennsylvania.— Forrest *v.* Nelson, 108 Pa. St. 481; Hemmings *v.* Gemberling, 24 Leg. Int. 404.

Texas.— Johnson *v.* Portwood, 89 Tex. 235, 34 S. W. 596, 787; Moore *v.* Giesecke, 76 Tex. 543, 13 S. W. 290.

United States.— Richardson *v.* Hardwick, 106 U. S. 252, 1 S. Ct. 213, 27 L. ed. 145.

See 20 Cent. Dig. tit. "Evidence," §§ 1784–1786, 1792, 1793.

Encumbrances.— Where, by a written contract for an exchange of property, one party has assumed the payment of encumbrances on the property received by him, evidence of parol contemporaneous representations that the debts which he had assumed would be extended is inadmissible. McGregor *v.* Johnston, (Tex. Civ. App. 1896) 34 S. W. 407.

Subsequent parol agreement to extend time may be shown. Jones *v.* Alley, 4 Greene (Iowa) 181. See also *infra*, XVI, C, 31.

93. Frost *v.* Everett, 5 Cow. (N. Y.) 497. See also Lawrence *v.* McGuire, 21 Kan. 552.

the articles sold especially where the original agreement is in the form of a covenant.[94]

(6) Time and Essence of Contract. Parol evidence cannot be admitted to show that time was of the essence of the contract where the terms of the contract do not so provide.[95]

(7) Reservations. Reservations cannot be shown by parol where this would add to or contradict the contract.[96]

(8) Warranty. Parol or extrinsic evidence is not admissible either to add to the terms of a written contract of sale by engrafting thereon a warranty as to the thing sold,[97] or to add to, limit, or extend to matters other than those specified an express warranty contained in the instrument.[98] But evidence of a verbal

Certain amount "per year."— A written contract to deliver one thousand tons of bark "per year" for five years allows the contractor the entire year in which to furnish one thousand tons, and parol evidence is not admissible to show that the bark was to be delivered at particular times during the year. Curtiss *v.* Howell, 39 N. Y. 211.

Where no time for delivery is specified the law implies a contract that the goods shall be delivered within a reasonable time; and no evidence will be admissible to prove a specific time at which they were to be delivered, for that would be to contradict and vary the legal interpretation of the instrument. Cocker *v.* Franklin Hemp, etc., Mfg. Co., 5 Fed. Cas. No. 2,932, 3 Sumn. 530. See also Jenkins *v.* Lykes, 19 Fla. 148, 45 Am. Rep. 19; and *supra*, XVI, A, 2.

94. Handley *v.* Moorman, 4 Bibb (Ky.) 1.

95. Jones *v.* Alley, 4 Greene (Iowa) 181; Ferguson *v.* Arthur, 128 Mich. 297, 87 N. W. 259; Tufts *v.* Morris, 87 Mo. App. 98; Strunk *v.* Smith, 8 S. D. 407, 66 N. W. 926. *Contra*, Van Winkle *v.* Wilkins, 81 Ga. 93, 7 S. E. 644, 12 Am. St. Rep. 299. See also Scarlett *v.* Stein, 40 Md. 512.

96. *Michigan.*— Vanderkarr *v.* Thompson, 19 Mich. 82.

Mississippi.— Millburn Gin, etc., Co. *v.* Ringold, (1896) 19 So. 675.

New York.— Long *v.* Millerton Iron Co., 101 N. Y. 638, 4 N. E. 735.

Pennsylvania.— Harbold *v.* Kuster, 44 Pa. St. 392; Renshaw *v.* Gans, 7 Pa. St. 117.

West Virginia.— Findley *v.* Armstrong, 23 W. Va. 113.

See 20 Cent. Dig. tit. "Evidence," § 1782.

97. *Alabama.*— Whitehead *v.* Lane, etc., Co., 72 Ala. 39.

Connecticut.— Fitch *v.* Woodruff, etc., Iron Works, 29 Conn. 82.

Georgia.— Martin *v.* Moore, 63 Ga. 531.

Illinois.— Robinson *v.* McNeill, 51 Ill. 225; McMillan *v.* De Tamble, 93 Ill. App. 65; Wightman *v.* Tucker, 50 Ill. App. 75; Graham *v.* Eiszner, 28 Ill. App. 269.

Indiana.— Conant *v.* National State Bank, 121 Ind. 323, 22 N. E. 250; Johnson *v.* McCabe, 37 Ind. 535; Smith *v.* Dallas, 35 Ind. 255; McClure *v.* Jeffrey, 8 Ind. 79.

Iowa.— Sandwich Mfg. Co. *v.* Trindle, 71 Iowa 600, 33 N. W. 79; Nichols *v.* Wyman, 71 Iowa 160, 32 N. W. 258.

Kansas.— Ehrsam *v.* Brown, 64 Kan. 466, 67 Pac. 867.

Kentucky.— Ramsey *v.* Beedle, 8 Ky. L. Rep. 702.

Maryland.— Rice *v.* Forsyth, 41 Md. 389.

Massachusetts.— Frost *v.* Blanchard, 97 Mass. 155.

Minnesota.— McCormick Harvesting-Mach. Co. *v.* Thompson, 46 Minn. 15, 48 N. W. 415.

Nebraska.— Kummer *v.* Dubuque Turbine, etc., Mills Co., (1903) 93 N. W. 938.

New York.— Eighmie *v.* Taylor, 98 N. Y. 288; Mayer *v.* Dean, 54 N. Y. Super. Ct. 315; Hungerford Co. *v.* Rosenstein, 19 N. Y. Suppl. 471; Chamberlain *v.* Van Campen, 7 N. Y. St. 99; Reed *v.* Van Ostrand, 1 Wend. 424, 19 Am. Dec. 529; Vrooman *v.* Phelps, 2 Johns. 177.

Ohio.— Curran *v.* Hauser, 9 Ohio S. & C. Pl. Dec. 468, 6 Ohio N. P. 281; Hauser *v.* Curran, 8 Ohio S. & C. Pl. Dec. 495, 5 Ohio N. P. 224.

Vermont.— Bond *v.* Clark, 35 Vt. 577.

United States.— Wilson *v.* New U. S. Cattle-Ranch Co., 73 Fed. 994, 20 C. C. A. 241.

Canada.— Fry *v.* Richelieu Co., 9 L. C. Rep. 406.

See 20 Cent. Dig. tit. "Evidence," § 1790.

Contra.— Osborne *v.* Walley, 8 Pa. Super. Ct. 193.

A warranty is not a collateral undertaking so as to be exempt from the application of the rule prohibiting the variance or modification of a written agreement by parol. Mayer *v.* Dean, 54 N. Y. Super. Ct. 315. But see *infra*, XVI, C, 25, i, (XI).

Showing recital to be intended as warranty. — Sharp *v.* Sturgeon, 75 Mo. App. 651.

In an action for deceit in a sale of goods, parol proof of a warranty not contained in the written contract is competent only as evidence of representation. Salem India-Rubber Co. *v.* Adams, 23 Pick. (Mass.) 256.

98. *Georgia.*— Allen *v.* Young, 62 Ga. 617.

Iowa.— Warbasse *v.* Card, 74 Iowa 306, 37 N. W. 383; Barrett *v.* Wheeler, 71 Iowa 662, 33 N. W. 230.

Kansas.— Richardson *v.* Great Western Mfg. Co., 3 Kan. App. 445, 43 Pac. 809.

Louisiana.— Goodloe *v.* Hart, 2 La. 446.

Michigan.— Osborne Co. *v.* Wigent, 127 Mich. 624, 86 N. W. 1022; Dowagiac Mfg. Co. *v.* Corbit, 127 Mich. 473, 86 N. W. 954, 87 N. W. 886; Hutchinson Mfg. Co. *v.* Pinch, 107 Mich. 12, 64 N. W. 729, 66 N. W. 340; Rumely *v.* Emmons, 85 Mich. 511, 48 N. W. 636; Nichols *v.* Crandall, 77 Mich. 401, 43 N. W. 875, 6 L. R. A. 412.

warranty such as would be implied from the contract itself does not change the terms of the written instrument, and hence may be admitted.[99]

(J) *Subscription*—(1) In General. A contract of subscription to any undertaking or enterprise or for any other object cannot be varied or contradicted by parol or extrinsic evidence.[1]

(2) Subscription For Corporate Stock. A written contract of subscription for the stock of a corporation merges all prior agreements or negotiations with reference to the subject-matter, and cannot be varied, controlled, or contradicted by parol evidence of the understanding or intentions of the parties, or of previous or contemporaneous agreements or undertakings not expressed in the writing.[2]

New Hampshire.— Wallace *v.* Rogers, 2 N. H. 506.

North Dakota.— Plano Mfg. Co. *v.* Root, 3 N. D. 165, 54 N. W. 924.

Texas.— J. I. Case Threshing Mach. Co. *v.* Hall, (Civ. App. 1903) 73 S. W. 835.

Wisconsin.— Exhaust Ventilator Co. *v.* Chicago, etc., R. Co., 69 Wis. 454, 34 N. W. 509.

United States.— Buckstaff *v.* Russell, 79 Fed. 611, 25 C. C. A. 129; Empire State Phosphate Co. *v.* Heller, 61 Fed. 280, 9 C. C. A. 504; Chandler *v.* Thompson, 30 Fed. 38.

Canada.— Northey Mfg. Co. *v.* Sanders, 31 Ont. 475.

See 20 Cent. Dig. tit. "Evidence," § 1790.

99. Tufts *v.* Verkuyl, 124 Mich. 242, 82 N. W. 891. See *infra*, XVI, C, 3.

1. *Connecticut.*— Bull *v.* Talcot, 2 Root 119, 1 Am. Dec. 62.

Indiana.— Evansville, etc., Straight Line R. Co. *v.* Shearer, 10 Ind. 244.

Iowa.— Thompson *v.* Stewart, 60 Iowa 223, 14 N. W. 247.

Maine.— Gilman *v.* Veazie, 24 Me. 202.

Maryland.—Sothoron *v.* Weems, 3 Gill & J. 435.

Massachusetts.— Stillings *v.* Timmins, 152 Mass. 147, 25 N. E. 50.

Nebraska.— Mefford *v.* Sell, 3 Nebr. (Unoff.) 566, 92 N. W. 148.

New Hampshire.— George *v.* Harris, 4 N. H. 533, 17 Am. Dec. 446.

North Carolina.— Marshall Foundry Co. *v.* Killian, 99 N. C. 501, 6 S. E. 680, 6 Am. St. Rep. 539.

Ohio.— Freeman *v.* Muth, 7 Ohio Dec. (Reprint) 555, 3 Cinc. L. Bul. 914.

Texas.— San Antonio, etc., R. Co. *v.* Wilson, 4 Tex. Civ. App. 178, 23 S. W. 282.

Vermont.— Grand Isle *v.* Kinney, 70 Vt. 381, 41 Atl. 130.

See 20 Cent. Dig. tit. "Evidence," § 1759.

Conditions attached to the subscription but not appearing in the paper signed cannot be shown.

Indiana.— Low *v.* Studabaker, 110 Ind. 57, 10 N. E. 301.

Kentucky.— Logan Turnpike Road Co. *v.* Pettit, 2 B. Mon. 428.

Missouri.— James *v.* Clough, 25 Mo. App. 147.

New Mexico.— Miller *v.* Preston, 4 N. M. 314, 17 Pac. 565.

Texas.— Cooper *v.* McCrimmin, 33 Tex. 383, 7 Am. Rep. 279.

See 20 Cent. Dig. tit. "Evidence," § 1759.

Mode of payment.— In an action on a subscription of a sum of money toward the erection of a church, parol evidence that defendant was to do work in the erection of the building to the value of the sum subscribed was held inadmissible. Montpelier M. E. Church *v.* Town, 49 Vt. 29. But see *infra*, XVI, C, 39, b.

A written promise to donate a right of way if a railroad shall run through the promisor's land cannot be varied by evidence of a previous oral agreement that the railroad should run through the land in a particular way. Burch *v.* Augusta, etc., R. Co., 80 Ga. 296, 4 S. E. 850.

Representations varying from terms of contract.— Wooters *v.* International, etc., R. Co., 54 Tex. 294.

Contract to issue bonds to subscriber.— San Antonio, etc., R. Co. *v.* Busch, (Tex. Civ. App. 1893) 21 S. W. 164.

2. *Florida.*— Johnson *v.* Pensacola, etc., R. Co., 9 Fla. 299.

Georgia.— Chattanooga, etc., R. Co. *v.* Warthen, 98 Ga. 599, 25 S. E. 988.

Illinois.— Dill *v.* Wabash Valley R. Co., 21 Ill. 91.

Indiana.— Jones *v.* Milton, etc., Turnpike Co., 7 Ind. 547.

Iowa.— Langford *v.* Ottumwa Water Power Co., 59 Iowa 283, 13 N. W. 303; Jack *v.* Naber, 15 Iowa 450; Gelpcke *v.* Blake, 15 Iowa 387, 83 Am. Dec. 418.

Kansas.— Topeka Mfg. Co. *v.* Hale, 39 Kan. 23, 17 Pac. 601.

Kentucky.— Gathright *v.* Oil City Land, etc., Co., 56 S. W. 163, 21 Ky. L. Rep. 1657.

Maryland.— Scarlett *v.* Academy of Music, 46 Md. 132.

Minnesota.— Minneapolis Masonic Temple Assoc. *v.* Channell, 43 Minn. 353, 45 N. W. 716.

New Jersey.— Grosse Isle Hotel Co. *v.* I'Anson, 43 N. J. L. 442.

New York.— New York Exch. Co. *v.* De Wolf, 5 Bosw. 593.

South Carolina.— Carolina, etc., R. Co. *v.* Seigler, 24 S. C. 124.

Texas.— Clegg *v.* Galveston Hotel Co., 1 Tex. App. Civ. Cas. § 621.

Vermont.— Connecticut, etc., R. Co. *v.* Bailey, 24 Vt. 465, 58 Am. Dec. 181.

United States.— American Alkali Co. *v.* Bean, 125 Fed. 823 (attempt to show that subscription was for others than subscribers); Davis *v.* Shafer, 50 Fed. 764.

i. Deeds — (i) *General Rule.* The execution and acceptance of a deed, being the final act of the parties expressing the terms of their agreement with reference to the subject-matter, all prior negotiations or agreements are as a rule merged therein,[3] and the deed must be presumed to express truly the intention of the parties.[4] Hence, in the absence of fraud or mistake, parol or extrinsic evidence cannot be received to add to, limit, vary, or contradict the terms of the instrument.[5] Thus it cannot be shown that an agreement was made at the time of the

Canada.—Christopher *v.* Noxon, 4 Ont. 672. See 20 Cent. Dig. tit. "Evidence," § 1760; and cases cited in CORPORATIONS, 10 Cyc. 391.

Statements or representations of the person soliciting stock subscriptions, whether made at or prior to the time of the subscription, are not admissible to vary or contradict the written contract. Johnson *v.* Crawfordsville, etc., R. Co., 11 Ind. 280; Shattuck *v.* Robbins, 68 N. H. 565, 44 Atl. 694; Davis *v.* Shafer, 50 Fed. 764.

Conditions contained in the contract cannot be limited or varied by parol evidence. Monadnock R. Co. *v.* Felt, 52 N. H. 379; Carolina, etc., R. Co. *v.* Seigler, 24 S. C. 124.

An agreement to accept payment in property instead of money cannot be shown by parol to vary the terms of the subscription. Newland Hotel Co. *v.* Wright, 73 Mo. App. 240. But see *infra*, XVI, C, 39, b.

Agreement that a stock-holder shall not be bound on his subscription is not admissible in evidence to defeat an action on the written subscription. Wurtzburger *v.* Anniston Rolling Mills, 94 Ala. 640, 10 So. 129.

The purpose and intent to become incorporated may be shown by parol where nothing in the writing conflicts therewith. Espy *v.* Mt. Lebanon Cemetery, 1 Walk. (Pa.) 40.

3. Beall *v.* Fisher, 95 Cal. 568, 30 Pac. 773; Cole *v.* Gray, 139 Ind. 396, 38 N. E. 856; Gregory *v.* Griffin, 1 Pa. St. 208; Creigh *v.* Beelin, 1 Watts & S. (Pa.) 83; Falconer *v.* Garrison, 1 McCord (S. C.) 209. See also *infra*, note 5. *Compare* Cook *v.* Adams, 32 N. Y. App. Div. 385, 53 N. Y. Suppl. 120, holding that the question of merger depends upon intent of the parties and parol evidence is admissible to show that the grantee did not intend to have a prior agreement superseded or merged in the deed.

4. Morris *v.* Morris, 2 Bibb (Ky.) 311.

A lost deed is presumed to have conformed to the articles of agreement, and such articles cannot be contradicted by parol. Patterson *v.* Forry, 2 Pa. St. 456.

5. *Alabama.*—Pettus *v.* McKinney, 74 Ala. 108; Rogers *v.* Peebles, 72 Ala. 529; Hogan *v.* Smith, 16 Ala. 600.

Arkansas.— Ferguson *v.* Peden, 33 Ark. 150; Rogers *v.* Sebastian County, 21 Ark. 440.

California.— Beall *v.* Fisher, 95 Cal. 568, 30 Pac. 773; Frink *v.* Roe, 70 Cal. 296, 11 Pac. 820; Judson *v.* Malloy, 40 Cal. 299.

Colorado.— Highland Park Co. *v.* Walker, 13 Colo. App. 352, 57 Pac. 759.

Connecticut.— Elliott *v.* Weed, 44 Conn. 19; Butler *v.* Catling, 1 Root 310.

District of Columbia.— McCartney *v.* Fletcher, 11 App. Cas. 1.

Georgia.— Mays *v.* Shields, 117 Ga. 814, 45 S. E. 68; Anderson *v.* Continental Ins. Co., 112 Ga. 532, 37 S. E. 766; Logan *v.* Bond, 13 Ga. 192; *Ex. p.* Morel, T. U. P. Charlt. 240, a partition deed.

Illinois.— Kershaw *v.* Kershaw, 102 Ill. 307.

Indiana.— Barnes *v.* Bartlett, 47 Ind. 98; Fouty *v.* Fouty, 34 Ind. 433; Cincinnati, etc., R. Co. *v.* Pearce, 28 Ind. 502; Coleman *v.* Hart, 25 Ind. 256; Turner *v.* Cool, 23 Ind. 56, 85 Am. Dec. 449; New Albany, etc., R. Co. *v.* Fields, 10 Ind. 187; New Albany, etc., R. Co. *v.* Slaughter, 10 Ind. 218; Burns *v.* Jenkins, 8 Ind. 417; Trullinger *v.* Webb, 3 Ind. 198.

Iowa.— Van Huson *v.* Omaha Bridge, etc., R. Co., 118 Iowa 366, 92 N. W. 47; McEnery *v.* McEnery, 110 Iowa 718, 80 N. W. 1071; Beeson *v.* Green, 103 Iowa 406, 72 N. W. 555.

Kansas.— Sill *v.* Sill, 31 Kan. 248, 1 Pac. 556.

Kentucky.— Pritchard *v.* James, 93 Ky. 306, 20 S. W. 216; Spurrier *v.* Parker, 16 B. Mon. 274; Marshall *v.* Dean, 4 J. J. Marsh. 583; Anderson *v.* Hutcheson, 4 Litt. 296; Morris *v.* Morris, 2 Bibb 311; Sanders *v.* McCracken, Hard. 258; Wilson *v.* Stephens, 4 Ky. L. Rep. 901.

Louisiana.— Clark *v.* Hedden, 109 La. 147, 33 So. 116; Kunmengeiser *v.* Juncker, 28 La. Ann. 678; Janney *v.* Ober, 28 La. Ann. 281; Sewall *v.* Roach, 5 La. Ann. 683; Boner *v.* Mahle, 3 La. Ann. 600; Allison *v.* Fox, 5 La. 457; Lloyd *v.* Graham, 8 Mart. N. S. 700; Walsh *v.* Texada, 7 Mart. N. S. 231; Skillman *v.* Lacey, 12 Mart. 404.

Maine.— Morrill *v.* Robinson, 71 Me. 24; Wellington *v.* Murdough, 41 Me. 281; Rogers *v.* McPheters, 40 Me. 114; Chandler *v.* McCard, 38 Me. 564; Jordan *v.* Otis, 38 Me. 428; Hale *v.* Jewell, 7 Me. 435, 22 Am. Dec. 212; Kimball *v.* Morrell, 4 Me. 368.

Maryland.— Snowden *v.* Pitcher, 45 Md. 260; Bladen *v.* Wells, 30 Md. 577; Campbell *v.* Lowe, 9 Md. 500, 66 Am. Dec. 339; Woollen *v.* Hillen, 9 Gill 185, 52 Am. Dec. 690; Cole *v.* Albers, 1 Gill 412; Clagett *v.* Hall, 9 Gill & J. 80; Howard *v.* Rogers, 4 Harr. & J. 278; *In re* Young, 3 Md. Ch. 461; Hertle *v.* McDonald, 2 Md. Ch. 128; Westminster Bank *v.* Whyte, 1 Md. Ch. 536.

Massachusetts.— Kelley *v.* Saltmarsh, 146 Mass. 585, 16 N. E. 460; Muhling *v.* Fiske, 131 Mass. 110; Goodrich *v.* Longley, 4 Gray 379; Crafts *v.* Hibbard, 4 Metc. 438; Paine *v.* McIntier, 1 Mass. 69.

Michigan.— Adams *v.* Watkins, 103 Mich.

execution of a deed that the instrument should have an operation different from that imported by its terms,[6] or even what was the understanding of the parties as to the effect of a deed, the terms of which are not ambiguous.[7] Nor is it permissible to give evidence of a prior parol agreement pursuant to which the

431, 61 N. W. 774; Webb *v.* Rowe, 35 Mich. 58.

Minnesota.— McMurphy *v.* Walker, 20 Minn. 382.

Mississippi.— Carmichael *v.* Foley, 1 How. 591.

Missouri.— Gorton *v.* Rice, 153 Mo. 676, 55 S. W. 241; Owen *v.* Ellis, 64 Mo. 77; King *v.* Fink, 51 Mo. 209; Hartt *v.* Rector, 13 Mo. 497, 53 Am. Dec. 157; Simonds *v.* Beauchamp, 1 Mo. 589; Whelan *v.* Tobener, 71 Mo. App. 361.

Nebraska.— Stanisics *v.* McMurtry, 64 Nebr. 761, 90 N. W. 884.

New Hampshire.— Proctor *v.* Gilson, 49 N. H. 62; Carleton *v.* Redington, 21 N. H. 291; Badger *v.* Story, 16 N. H. 168.

New Jersey.— Clark *v.* Elizabeth, 37 N. J. L. 120; Morris Canal, etc., Co. *v.* Ryerson, 27 N. J. L. 457; New Jersey Zinc Co. *v.* New Jersey Franklinite Co., 13 N. J. Eq. 322; Adams *v.* Hudson County Bank, 10 N. J. Eq. 535, 64 Am. Dec. 469.

New York.—Uihleim *v.* Matthews, 172 N. Y. 154, 64 N. E. 762 [*reversing* 57 N. Y. App. Div. 476, 68 N. Y. Suppl. 309]; Riehlman *v.* Field, 81 N. Y. App. Div. 526, 81 N. Y. Suppl. 239; Arnot *v.* McClure, 4 Den. 41.

North Carolina.— Chamness *v.* Crutchfield, 37 N. C. 148.

Ohio.—See Hott *v.* McDonough, 3 Ohio Cir. Ct. 177, 2 Ohio Cir. Dec. 100.

Pennsylvania.— Merriman *v.* Bush, 116 Pa. St. 276, 9 Atl. 345; Tobin *v.* Gregg, 34 Pa. St. 446; Miller *v.* Smith, 33 Pa. St. 386; Stecker *v.* Shimer, 5 Whart. 452; Buck *v.* Fisher, 4 Whart. 516; Snyder *v.* Snyder, 6 Binn. 483, 6 Am. Dec. 493; Pennsylvania, etc., Canal, etc., Co. *v.* Betts, 1 Wkly. Notes Cas. 368.

South Carolina.— Hartsfield *v.* Chamblin, 42 S. C. 1, 19 S. E. 959, 20 S. E. 65; Younge *v.* Moore, 1 Strobh. 48; Milling *v.* Crankfield, 1 McCord 258; Barret *v.* Barret, 4 Desauss. 447; Dupree *v.* McDonald, 4 Desauss. 209.

Tennessee.— Vance *v.* Smith, 2 Heisk. 343.

Texas.— Hutchinson *v.* Patrick, 22 Tex. 318; Ladd *v.* Farrar, (App. 1891) 17 S. W. 55; Lacky *v.* Bennett, (Civ. App. 1901) 65 S. W. 651; Caffey *v.* Caffey, 12 Tex. Civ. App. 616, 35 S. W. 738; Lambert *v.* McClure, 12 Tex. Civ. App. 577, 34 S. W. 973.

Vermont.— Smith *v.* Fitzgerald, 59 Vt. 451, 9 Atl. 604; Pitts *v.* Brown, 49 Vt. 86, 24 Am. Rep. 114; Abbott *v.* Choate, 47 Vt. 53; Vermont Cent. R. Co. *v.* Hills, 23 Vt. 681.

Virginia.—Holston Salt, etc., Co. *v.* Campbell, 89 Va. 396, 16 S. E. 274; Norfolk Trust Co. *v.* Foster, 78 Va. 413.

West Virginia.— Pusey *v.* Gardner, 21 W. Va. 469; Troll *v.* Carter, 15 W. Va. 567; Hurst *v.* Hurst, 7 W. Va. 289.

Wisconsin.— Kirch *v.* Davies, 55 Wis. 287, 11 N. W. 689.

United States.— Zimpelman *v.* Hipwell, 54 Fed. 843, 4 C. C. A. 609.

England.— Marnell *v.* Blake, 2 Ball & B. 35, 4 Dow. 248, 12 Rev. Rep. 68, 3 Eng. Reprint 1153; Kain *v.* Old, 2 B. & C. 627, 4 D. & R. 52, 2 L. J. K. B. O. S. 102, 26 Rev. Rep. 497, 9 E. C. L. 274; Cowlishaw *v.* Hardy, 25 Beav. 169; Palmer *v.* Newell, 20 Beav. 32; Leggott *v.* Barrett, 15 Ch. D. 306, 43 L. T. Rep. N. S. 641, 28 Wkly. Rep. 962; Pickering *v.* Dowson, 4 Taunt. 779; Brydges *v.* Chandos, 2 Ves. Jr. 417, 30 Eng. Reprint 702.

Canada.— Quebec *v.* North Shore R. Co., 27 Can. Supreme Ct. 102; Malott *v.* Carscadden, 31 U. C. Q. B. 363.

See 20 Cent. Dig. tit. "Evidence," § 1719.

The rule applies in cases involving the title to land as well as in other cases. Milling *v.* Crankford, 1 McCord (S. C.) 258.

Evidence to contradict a certificate of acknowledgment for the purpose of making a deed ineffectual is inadmissible. Greene *v.* Godfrey, 44 Me. 25. See also ACKNOWLEDGMENTS, 1 Cyc. 619.

The form of issue under a petition for partition cannot result in changing the operation of a deed under which the parties are tenants in common, nor can the relation evinced thereby be altered as the result of such proceeding without impeaching the deed for fraud. Piper *v.* Farr, 47 Vt. 721.

Terms of dedication.— Dallas *v.* Gibbs, 27 Tex. Civ. App. 275, 65 S. W. 81.

Easements.— Kruegel *v.* Nitschman, 15 Tex. Civ. App. 641, 40 S. W. 68.

An agreement to refund the purchase-money in case of a failure of title cannot be shown by parol to vary the effect of a quit-claim deed. Putnam *v.* Russell, 86 Mich. 389, 49 N. W. 147.

A declaration of residence in an act of conveyance is not conclusive on the party making the same, and evidence is admissible to contradict the recital when the domicil is not one of the causes of the contract. Tillman *v.* Mosely, 14 La. Ann. 710 [*following* Davis *v.* Binion, 5 La. Ann. 248].

6. Brooks *v.* Maltbie, 4 Stew. & P. (Ala.) 96.

Release of building restrictions.— Uihlein *v.* Matthews, 172 N. Y. 154, 64 N. E. 792 [*reversing* 57 N. Y. App. Div. 476, 68 N. Y. Suppl. 309].

7. Dye *v.* Thompson, 126 Mich. 597, 85 N. W. 1113; Owen *v.* Ellis, 64 Mo. 77. Evidence that neither of the parties to a deed understood its legal effect and operation at the time of its delivery is inadmissible to defeat the deed. Winslow *v.* Driskell, 9 Gray (Mass.) 363.

Even in a suit in which the grantor is not interested, he cannot explain his own grant,

deed was executed,[8] to show agreements of the vendor to extinguish interfering claims[9] or existing encumbrances,[10] to affect a grantee's stipulation, contained in the deed, to pay a mortgage on the land,[11] or to show that there was such a stipulation on the part of the grantee where it does not appear in the deed.[12] Nor can parol declarations by the grantor change the character of the instrument.[13]

(II) *Grants of Public Lands*—(A) *In General.* Grants of public lands, where the subject-matter is within the power of the officer making the grant, are of that dignity which precludes the admission of any parol or extrinsic evidence to impeach, vary, or contradict them,[14] or even, it has been held, to aid in their construction.[15]

(B) *Character of Land.* A title under a grant of public lands of the government cannot be defeated by parol evidence that the land is not of such a character as to be subject to the grant, where there is no evidence that the secretary of the interior neglected or refused to decide the question,[16] but it is otherwise where such neglect or refusal is made to appear.[17]

(C) *As Between Third Persons.* Even in a collateral proceeding not between the parties to the grant, it has been held that the grant being a matter of record cannot in general be impeached and declared void except by some matter of record, evidence of the same grade as the grant itself, or by facts apparent on the face of the grant.[18]

(III) *Official Deeds*—(A) *In General.* A deed executed by a public officer in his official capacity to the purchaser at a judicial, execution, or other official sale is entitled to the same conclusive effect as any other deed and is not subject to be impeached, contradicted, added to or varied by parol or extrinsic evidence.[19] Thus it cannot be shown that the terms of sale were other than those appearing

there being no ambiguity of any kind. Revere *v.* Leonard, 1 Mass. 91.

8. Shattuck *v.* Rogers, 54 Kan. 266, 38 Pac. 280.

9. Machir *v.* McDowell, 4 Bibb (Ky.) 473.

10. Chaplin *v.* Baker, 124 Ind. 385, 24 N. E. 233; Forsyth *v.* Rowell, 59 Me. 131; Mott *v.* Rutter, (N. J. Ch. 1903) 54 Atl. 159; Desmond *v.* McNamara, 107 Wis. 126, 82 N. W. 701.

11. Blood *v.* Crew Levick Co., 177 Pa. St. 606, 35 Atl. 871, 55 Am. St. Rep. 742.

12. Rooney *v.* Koenig, 80 Minn. 483, 83 N. W. 399; Maxwell *v.* Chamberlain, (Miss. 1898) 23 So. 266. Evidence of the grantee's knowledge of the value of the land, which was much greater than the agreed price, cannot be admitted to show that he assumed an outstanding encumbrance as part of the price. Morehouse *v.* Heath, 99 Ind. 509.

13. Bowdoin College *v.* Merritt, 75 Fed. 480.

14. Cain *v.* Flynn, 4 Dana (Ky.) 499; Pearson *v.* Baker, 4 Dana (Ky.) 321; Jackson *v.* Miller, 6 Wend. (N. Y.) 228, 21 Am. Dec. 316; Jackson *v.* Foster, 12 Johns. (N. Y.) 488; Jackson *v.* Hart, 12 Johns. (N. Y.) 77, 7 Am. Dec. 280; Tate *v.* Greenlee, 9 N. C. 486. See also Jones *v.* Park, 2 Yeates (Pa.) 448.

A state grant cannot be impeached by any kind of evidence except an entry. Polk *v.* Hill, 2 Overt. (Tenn.) 118, 19 Fed. Cas. No. 11,249.

A map or plat annexed to a grant is not an essential part of it, and can be recurred to only for the purpose of explanation and not to destroy its validity. Polk *v.* Hill, 19 Fed. Cas. No. 11,249, 2 Overt. (Tenn.) 118.

15. Stuart *v.* Easton, 170 U. S. 383, 18 S. Ct. 650, 42 L. ed. 1078 [*affirming* 74 Fed. 854, 21 C. C. A. 146]. See also Nesbit *v.* Titus, 1 Yeates (Pa.) 284.

16. Palmer *v.* Boorn, 80 Mo. 99 [*disapproving* Funkhouser *v.* Peck, 67 Mo. 19 (on the ground that they gave too extended an effect to the decision in Hannibal, etc., R. Co. *v.* Smith, 9 Wall. (U. S.) 95, 19 L. ed. 599 [*affirming* 41 Mo. 310]); Hannibal, etc., R. Co. *v.* Snead, 65 Mo. 239; Campbell *v.* Wortman, 58 Mo. 258; Clarkson *v.* Buchanan, 53 Mo. 563]; Birch *v.* Gillis, 67 Mo. 102; French *v.* Fyan, 93 U. S. 169, 23 L. ed. 812. See also Spalding *v.* Reeder, 1 Harr. & M. (Md.) 187.

17. Hannibal, etc., R. Co. *v.* Smith, 9 Wall. (U. S.) 95, 19 L. ed. 599 [*affirming* 41 Mo. 310]. See, generally, Public Lands.

18. Fowler *v.* Nixon, 7 Heisk. (Tenn.) 719; Curle *v.* Barrel, 2 Sneed (Tenn.) 63.

19. *Arkansas.*— Newton *v.* State Bank, 14 Ark. 9, 58 Am. Dec. 363.

California.— Donahue *v.* McNulty, 24 Cal. 411, 85 Am. Dec. 78.

Mississippi.— Bown *v.* Chess, etc., Co., 83 Miss. 218, 35 So. 444.

Missouri.— Talley *v.* Schlatitz, 180 Mo. 231, 79 S. W. 162; Caldwell *v.* Layton, 44 Mo. 220; Reed *v.* Austin, 9 Mo. 722, 45 Am. Dec. 336.

New York.—Mason *v.* White, 11 Barb. 173; Jackson *v.* Robert, 11 Wend. 422; Jackson *v.* Croy, 12 Johns. 427.

by the deed,[20] or, in the absence of any ambiguity in the description of the premises, that land covered thereby was not intended to be conveyed.[21] It is also inadmissible to show that the land was sold under a different judgment and execution than those recited in the deed,[22] nor can a recital as to the property sold be enlarged by parol evidence.[23]

(B) *Evidence to Uphold Deed.* Parol evidence has been held inadmissible even to support a tax deed,[24] or to contradict recitals in a sheriff's deed which if true would render the deed void.[25]

(IV) *Matters as to Which Deed Is Conclusive*—(A) *Description of Parties.* A deed is conclusive as to the parties thereto, and parol evidence is not admissible to show that the person described in the deed as the grantee was not the person intended.[26]

(B) *Description of Premises*—(1) In General. Where the description in a deed of the premises intended to be conveyed is clear and free from ambiguity, it cannot be varied, controlled, or contradicted by parol or extrinsic evidence.[27]

North Carolina.— Miller *v.* Miller, 89 N. C. 402.

Pennsylvania.— Duff *v.* Wynkoop, 74 Pa. St. 300.

Rhode Island.— See Borden *v.* Borden, 2 R. I. 94.

South Carolina.— Hairston *v.* Hairston, 1 Brev. 305.

Tennessee.— McLemore *v.* Memphis, etc., R. Co., (Sup. 1902) 69 S. W. 338.

West Virginia.— McClain *v.* Batton, 50 W. Va. 121, 40 S. E. 509. See also McCallister *v.* Cottrille, 24 W. Va. 173.

See 20 Cent. Dig. tit. "Evidence," § 1721.

A tax deed is conclusive evidence of the manner of listing and assessment of the property as required by law, and it cannot be shown by other evidence that the assessment was in a manner different from that prescribed. Easton *v.* Perry, 37 Iowa 681. Nor is it competent to show by parol that the land was sold for the taxes of a different year from that stated in the tax deed. Bower *v.* Chess, etc., Co., 83 Miss. 218, 35 So. 444. A failure to advertise the sale as required by law cannot be shown by parol for the purpose of questioning a sheriff's deed for land sold for taxes. Flanagan *v.* Grimmett, 10 Gratt. (Va.) 421.

Withdrawal of execution and abandonment of levy cannot be shown by parol, in contradiction of a sheriff's deed made pursuant to a sale under the execution. Jackson *v.* Vanderheyden, 17 Johns. (N. Y.) 167, 8 Am. Dec. 378.

Fraud in sale may be shown. Jackson *v.* Sternberg, 20 Johns. (N. Y.) 49. See *infra*, XVI, C, 18, e.

Mistake in the date of the deed may be shown. Hinson *v.* Fosdick, (Miss. 1899) 25 So. 353. See *infra*, XVI, C, 12.

Recitals as to the acts of third persons in transferring the certificate of sale are only *prima facie* evidence of the assignment, and may be contradicted by parol evidence. Stafford *v.* Williams, 12 Barb. (N. Y.) 240.

A subsequent deed made to correct a mistake in a previous deed made by the predecessor of the officer by whom the later deed is made is only *prima facie* evidence of the truth of the correction and may be rebutted. Maxcy *v.* Clabaugh, 6 Ill. 26.

20. Wells *v.* Savannah, 107 Ga. 1, 32 S. E. 669.

21. Oliver *v.* Brown, 102 Ga. 157, 29 S. E. 159; Todd *v.* Philhower, 24 N. J. L. 796.

22. Zabriskie *v.* Meade, 2 Nev. 285, 90 Am. Dec. 542; Jackson *v.* Sternberg, 20 Johns. (N. Y.) 49; Edwards *v.* Miller, 4 Heisk. (Tenn.) 314.

23. Wade *v.* Pellitier, 71 N. C. 74.

24. McClain *v.* Batton, 50 W. Va. 121, 40 S. E. 509. But see *infra*, XVI, C, 32, a.

An omission which renders the deed fatally defective cannot be supplied by parol. Sullivan *v.* Donnell, 90 Mo. 278, 2 S. W. 264; Daniels *v.* Case, 45 Fed. 843. See also Maxcy *v.* Clabaugh, 6 Ill. 26.

25. See Hanby *v.* Tucker, 23 Ga. 132, 68 Am. Dec. 514, where it was said to be "questionable" whether such recitals were subject to contradiction. See *infra*, XVI, C, 32, b.

26. Jackson *v.* Foster, 12 Johns. (N. Y.) 488; Jackson *v.* Hart, 12 Johns. (N. Y.) 77, 7 Am. Dec. 280; Milling *v.* Crankfield, 1 McCord (S. C.) 258; Pitts *v.* Brown, 49 Vt. 86, 24 Am. Rep. 114. See also Wooters *v.* Feeny, 12 La. Ann. 449; Jackson *v.* Miller, 6 Wend. (N. Y.) 228, 21 Am. Dec. 316; State *v.* Nashville, 2 Tenn. Ch. 755, beneficiaries in trust deed.

The word "heirs," as used in a deed, must be given its natural effect and cannot be controlled by parol evidence to show that it was intended to mean "children." Pritchard *v.* James, 93 Ky. 306, 20 S. W. 216, 14 Ky. L. Rep. 243 [*distinguishing* Tucker *v.* Tucker, 78 Ky. 503].

A mistake in inserting the name of a husband as well as of his wife as a grantee where the deed was intended to operate as a gift to the wife alone may be shown by parol. Dunham *v.* Chatham, 21 Tex. 231, 73 Am. Dec. 228.

27. *Alabama.*— Guilmartin *v.* Wood, 76 Ala. 204; Lamar *v.* Minter, 13 Ala. 31. See also Wharton *v.* Hannon, 101 Ala. 554, 14 So. 630.

California.— Altschul *v.* San Francisco

In such case the deed must be held to be conclusive evidence as to what land is intended by the grantor to be conveyed,[28] the quantity of land,[29] and likewise the

Central Park Homestead, etc., Assoc., 43 Cal. 171.

Connecticut.— Elliott *v.* Weed, 44 Conn. 19.

Florida.— Andreu *v.* Watkins, 26 Fla. 390, 7 So. 876.

Georgia.— Turner *v.* Rives, 75 Ga. 606.

Illinois.— Duggan *v.* Uppendahl, 197 Ill. 179, 64 N. E. 289; Wear *v.* Parish, 26 Ill. 240.

Indiana.— Porter *v.* Reid, 81 Ind. 569.

Kentucky.— McGill *v.* Cromwell, 5 Ky. L. Rep. 246.

Maine.— Bartlett *v.* Corliss, 63 Me. 287; Wellington *v.* Murdough, 41 Me. 281; Lincoln *v.* Avery, 10 Me. 418.

Maryland.— Clarke *v.* Lancaster, 36 Md. 196, 11 Am. Rep. 486; Helms *v.* Howard, 2 Harr. & M. 57.

Massachusetts.— Stowell *v.* Buswell, 135 Mass. 340; Bond *v.* Fay, 12 Allen 86; Dodge *v.* Nichols, 5 Allen 548; Child *v.* Wells, 13 Pick. 121. See also Hall *v.* Eaton, 139 Mass. 217, 29 N. E. 660.

Minnesota.— Beardsley *v.* Crane, 52 Minn. 537, 54 N. W. 740.

Mississippi.—Campe *v.* Renandine, 64 Miss. 441, 1 So. 498; Nixon *v.* Porter, 38 Miss. 401.

Missouri.— Harding *v.* Wright, 119 Mo. 1, 24 S. W. 211; Johnson County *v.* Wood, 84 Mo. 489; Jennings *v.* Brizeadine, 44 Mo. 332; Heitkamp *v.* La Motte Granite Co., 59 Mo. App. 244.

Montana.— See Taylor *v.* Holter, 1 Mont. 688.

Nevada.— Weill *v.* Lucerne Min. Co., 11 Nev. 200.

New Hampshire.— Dean *v.* Erskine, 18 N. H. 81.

New York.— Muldoon *v.* Deline, 135 N. Y. 150, 31 N. E. 1091; Armstrong *v.* Du Bois, 90 N. Y. 95; Drew *v.* Swift, 46 N. Y. 204; Hubbell *v.* McCulloch, 47 Barb. 287; Emerick *v.* Kohler, 29 Barb. 165; Clark *v.* Wethey, 19 Wend. 320.

North Carolina.— McKenzie *v.* Houston, 130 N. C. 566, 41 S. E. 780; Kitchen *v.* Wilson, 80 N. C. 191.

Ohio.— McAfferty *v.* Conover, 7 Ohio St. 99, 70 Am. Dec. 57.

Oregon.— Holcomb *v.* Mooney, 13 Oreg. 503, 11 Pac. 274.

South Carolina.— Norwood *v.* Byrd, 1 Rich. 135, 42 Am. Dec. 406; Bratton *v.* Clawson, 3 Strobh. 127.

Vermont.— Fletcher *v.* Clark, 48 Vt. 211.

Virginia.— Carrington *v.* Goddin, 13 Gratt. 587.

Wisconsin.— Elofrson *v.* Lindsay, 90 Wis. 203, 63 N. W. 89; Prentiss *v.* Brewer, 17 Wis. 635, 86 Am. Dec. 730.

United States.— Parker *v.* Kane, 22 How. 1, 16 L. ed. 286.

See 20 Cent. Dig. tit. "Evidence," § 1723.

Where a plan is expressly referred to by a deed, such plan becomes subject to the same restrictions as to introduction of parol evidence to explain its terms as would be the case were it incorporated in the deed. Kennebec Purchase *v.* Tiffany, 1 Me. 219, 10 Am. Dec. 60; Renwick *v.* Renwick, 9 Rich. (S. C.) 50.

Acquiescence in a different location than that described in a deed cannot be shown by extrinsic evidence where the description is definite and unambiguous. Elofrson *v.* Lindsay, 90 Wis. 203, 63 N. W. 89.

Understanding of parties.— Parol evidence is inadmissible to show that one of the parties to a deed, which did not refer to any particular survey, and was unambiguous in its terms, understood its descriptive words to refer to a particular private survey. Rowland *v.* McCown, 20 Oreg. 538, 26 Pac. 853.

A grant of a right of way across land does not authorize the grantee to enter at one place, go partly across, and come out at another place on the same side of the lot, and parol evidence to show that such was the intention of the grant is inadmissible. Comstock *v.* Van Deusen, 5 Pick. (Mass.) 163.

28. *Indiana.*— Porter *v.* Reid, 81 Ind. 569; Langohr *v.* Smith, 81 Ind. 495.

Louisiana.— Madison *v.* Zabriski, 11 La. 247.

Maine.— Madden *v.* Tucker, 46 Me. 367.

Missouri.— Talley *v.* Schlatitz, 180 Mo. 231, 79 S. W. 162.

New Hampshire.— Dean *v.* Erskine, 18 N. H. 81; Bell *v.* Morse, 6 N. H. 205.

Texas.— Dawson *v.* McLeary, (Civ. App. 1894) 25 S. W. 705.

Vermont.— Pitts *v.* Brown, 49 Vt. 86, 24 Am. Rep. 114.

See 20 Cent. Dig. tit. "Evidence," § 1723.

29. *Alabama.*— Carter *v.* Beck, 40 Ala. 599; Frederick *v.* Youngblood, 19 Ala. 680, 54 Am. Dec. 209.

California.— Hogins *v.* Boggs, (1893) 34 Pac. 653.

Indiana.— Doe *v.* Swails, 3 Ind. 329.

Maryland.— Bladen *v.* Wells, 30 Md. 577.

Massachusetts.— Child *v.* Wells, 13 Pick. 121.

Mississippi.— Kerr *v.* Calvit, Walk. 115, 12 Am. Dec. 537; Carmichael *v.* Foley, 1 How. 591.

New York.—Howes *v.* Barker, 3 Johns. 506, 3 Am. Dec. 526.

North Carolina.—Herring *v.* Wiggs, 4 N. C. 474.

South Carolina.— See Falconer *v.* Garrison, 1 McCord 209.

Virginia.— Carrington *v.* Goddin, 13 Gratt. 587.

See 20 Cent. Dig. tit. "Evidence," § 1723.

Where a tract of land is described in a deed, but the number of acres therein stated is inaccurate, it cannot be shown by parol that only that number of acres out of the tract was sold. Turner *v.* Rives, 75 Ga. 606.

Half of a parcel of land, as described in a deed, means the exact half in quantity, and the court will not go outside the deed to ascertain whether the parties intended other-

conclusive evidence of his intention to include in or exclude from the instrument particular land.[30]

(2) Boundaries. The statements of a deed as to the boundaries of land have the same conclusiveness as any other portion of the description and cannot be varied by parol or extrinsic evidence or by showing any understanding of the parties different from that expressed in the deed;[31] and it is not admissible to

wise. Schleif *v.* Hart, 7 Ohio Dec. (Reprint) 170, 1 Cinc. L. Bul. 226; Butler *v.* Gale, 27 Vt. 739.

"More or less."— Baynard *v.* Eddings, 2 Strobh. (S. C.) 374.

Variance in description.— When a piece of land is conveyed by metes and bounds, or any other certain description, this will control the quantity, although not correctly stated in the deed, and the description being thus definite parol evidence will not be received to vary it. Porter *v.* Reid, 81 Ind. 569.

30. *Alabama.*— Griffin *v.* Hall, 115 Ala. 482, 22 So. 162.

California.— Dent *v.* Bird, 67 Cal. 652, 8 Pac. 504; Altschul *v.* San Francisco Central Park Homestead Assoc., 43 Cal. 171.

Massachusetts.— Adams *v.* Marshall, 138 Mass. 228, 52 Am. Rep. 271; Warren *v.* Cogswell, 10 Gray 76. See also Wood *v.* West Boston Bridge, etc., Com'rs, 122 Mass. 394.

New Hampshire.— Nutting *v.* Herbert, 35 N. H. 120.

New York.— Thayer *v.* Finton, 108 N. Y. 397; Coleman *v.* Manhattan Beach Imp. Co., 94 N. Y. 229; Potter *v.* Boyce, 36 Misc. 467, 73 N. Y. Suppl. 764; Jackson *v.* Croy, 12 Johns. 427.

South Carolina.— Senterfit *v.* Reynolds, 3 Rich. 128.

Texas.— Watts *v.* Howard, 77 Tex. 71, 13 S. W. 966.

Virginia.— Sulphur Mines Co. *v.* Thompson, 93 Va. 293, 25 S. E. 232; Pasley *v.* English, 5 Gratt. 141.

Wisconsin.— Elofrson *v.* Lindsay, 90 Wis. 203, 63 N. W. 89.

See 20 Cent. Dig. tit. "Evidence," § 1723.

Where a deed contains two descriptions of one parcel of land intended to be conveyed — a particular description, and a description of less certainty bounding the land by adjoining property — parol evidence is inadmissible to show that the grantor intended to convey premises excluded by the more particular description, but which might be included in the other description. Benedict *v.* Gaylord, 11 Conn. 332, 29 Am. Dec. 299.

If a right of way appurtenant is plainly conveyed by deed it cannot be shown by parol that it was not the intention of the parties to convey it. Shepherd *v.* Watson, 1 Watts (Pa.) 35.

31. *Alabama.*— Donehoo *v.* Johnson, 120 Ala. 438, 24 So. 888; Guilmartin *v.* Wood, 76 Ala. 204.

Georgia.— Weaver *v.* Stoner, 114 Ga. 165, 39 S. E. 874.

Iowa.— Murphy *v.* Copeland, 58 Iowa 409, 10 N. W. 786, 43 Am. Rep. 118.

Kentucky.— Smith *v.* Dudley, 1 Litt. 66, 13 Am. Dec. 222.

Maine.— Ames *v.* Hilton, 70 Me. 36; Farley *v.* Bryant, 32 Me. 474; Price *v.* Lunt, 19 Me. 115.

Maryland.— Neal *v.* Hopkins, 87 Md. 19, 39 Atl. 322; Dorsey *v.* Hammond, 1 Harr. & J. 190.

Massachusetts.— Cook *v.* Babcock, 7 Cush. 526.

New Hampshire.— Sleeper *v.* Laconia, 60 N. H. 201, 49 Am. Rep. 311; Wells *v.* Jackson Iron Mfg. Co., 47 N. H. 235, 90 Am. Dec. 575.

New York.— Drew *v.* Swift, 46 N. Y. 204; Waugh *v.* Waugh, 28 N. Y. 94; Clark *v.* Baird, 9 N. Y. 183; Harris *v.* Oakley, 7 N. Y. Suppl. 232.

North Carolina.— Davidson *v.* Arledge, 88 N. C. 326; Patton *v.* Alexander, 52 N. C. 603; Johnson *v.* Farlow, 33 N. C. 199; Herring *v.* Wiggs, 4 N. C. 474.

Pennsylvania.— Fuller *v.* Weaver, 175 Pa. St. 182, 34 Atl. 634; Davis *v.* Russell, 142 Pa. St. 426, 21 Atl. 870; Weiler *v.* Hottenstein, 102 Pa. St. 499.

Rhode Island.— Segar *v.* Babcock, 18 R. I. 203, 26 Atl. 257.

Tennessee.—See Draper *v.* Stanley, 1 Heisk. 432.

Texas.— Sloan *v.* King, 29 Tex. Civ. App. 599, 69 S. W. 541.

See 20 Cent. Dig. tit. "Evidence," § 1724. But *compare infra*, XVI, C, 30, f.

The rule applies to a patent.— Frazier *v.* Frazier, 81 Ky. 137; Bruckner *v.* Lawrence, 1 Dougl. (Mich.) 19. *Contra*, Wallace *v.* Maxwell, 1 J. J. Marsh. (Ky.) 447 (conceding the rule as to an ordinary deed to be as stated in the text); Perry *v.* Middleton, 1 Brev. (S. C.) 546.

The division line between adjoining city lots held by purchase from a common grantor must be determined by the descriptive words of the deeds, and parol evidence tending to show that the original division lines had been altered by occupation and acts of ownership by the proprietors is not admissible to modify the descriptions in the deeds, or to estop either party from claiming up to the true line. Davidson *v.* Arledge, 97 N. C. 172, 2 S. E. 378.

Where the deed does not describe the boundaries of the property conveyed, but simply grants sufficient land for a mill-site and water-power, the grantee cannot show by parol evidence that the grantor pointed out lines and boundaries not consistent with the grant — as for a dwelling, of which no mention is made in the deed. Messer *v.* Rhodes, 3 Brewst. (Pa.) 180.

A meander line run by a government survey is not a boundary and evidence *aliunde* is inadmissible to show that it was intended as

contradict or vary the statements in the deed as to the courses,[32] distances,[33] or calls,[34] unless the land is described by distance and course only, and monuments of boundary were made at the time of the execution of the deed or grant, in which case these control in case of a variance between them and the description.[35]

(c) *Estate or Interest Conveyed.* It is not admissible to contradict or vary the terms of a deed by parol or extrinsic evidence to show that the estate or interest intended to be conveyed was different from that which the clear language of the instrument purports to convey.[36] This rule has, however, been held to be

such. Schlosser *v.* Cruickshank, 96 Iowa 414, 65 N. W. 344 [*distinguishing* Bigelow *v.* Hoover, 85 Iowa 162, 52 N. W. 124, 39 Am. St. Rep. 296; Glenn *v.* Jeffrey, 75 Iowa 20, 39 N. W. 160; Lammers *v.* Nissen, 4 Nebr. 245].

Boundary lines established by consent may, it has been held in Pennsylvania, be shown notwithstanding their contradiction of general words in a deed. The court based this holding, however, upon the view that such lines, without regard to the words of the deed, have been recognized and maintained by the law because the case is not within the statute of frauds. Gertzer *v.* Kammerer, 13 Phila. (Pa.) 190. See also Kellum *v.* Smith, 65 Pa. St. 86; Hagey *v.* Detweiler, 35 Pa. St. 409. See, generally, FRAUDS, STATUTE OF.

32. Fratt *v.* Woodward, 32 Cal. 219, 91 Am. Dec. 573; Hamilton *v.* Cawood, 3 Harr. & M. (Md.) 437, 1 Am. Dec. 378; Wynne *v.* Alexander, 29 N. C. 237, 47 Am. Dec. 326; Reed *v.* Shenck, 13 N. C. 415; Slade *v.* Green, 9 N. C. 218; Rich *v.* Elliot, 10 Vt. 211.

A straight line called for in a deed cannot be shown by parol to have been intended to be a curved line. Allen *v.* Kingsbury, 16 Pick. (Mass.) 235 [*cited* in Pitts *v.* Brown, 49 Vt. 86, 24 Am. Rep. 114].

33. Hamilton *v.* Cawood, 3 Harr. & M. (Md.) 437, 1 Am. Dec. 378; Jackson *v.* Bowen, 1 Cai. (N. Y.) 358, 2 Am. Dec. 193; Reed *v.* Shenck, 13 N. C. 415; Slade *v.* Green, 9 N. C. 218.

34. Pollard *v.* Shively, 5 Colo. 309; Wiswell *v.* Marston, 54 Me. 270; Goodeno *v.* Hutchinson, 54 N. H. 159; Anderson *v.* Stamps, 19 Tex. 460.

The boundaries must be got at by the calls, when they are definite and distinct, and no extrinsic facts or parol evidence of intent can in such case be resorted to to vary the description. Lawrence *v.* Palmer, 71 N. Y. 607; Waugh *v.* Waugh, 28 N. Y. 94.

Point "opposite" another.— Bradley *v.* Wilson, 58 Me. 357.

35. Batts *v.* Staton, 123 N. C. 45, 31 S. E. 372; Reed *v.* Shenck, 13 N. C. 415, 14 N. C. 65; —— *v.* Beatty, 2 N. C. 376; Bradford *v.* Hill, 2 N. C. 22, 1 Am. Dec. 546; Massengill *v.* Boyles, 4 Humphr. (Tenn.) 205. See also Fleischfresser *v.* Schmidt, 41 Wis. 223.

This rule was disapproved in Slade *v.* Green, 9 N. C. 218, 225, although the court adhered to it, saying: "It is now too late to vary the rule."

A stake is not such a permanent monument as will control the description in a deed. Reed *v.* Shenck, 14 N. C. 65. But *compare* Fleischfresser *v.* Schmidt, 41 Wis. 223.

36. *Alabama.*— Phillips *v.* Costley, 40 Ala. 486.

Indiana.— Cole *v.* Gray, 139 Ind. 396, 38 N. E. 856.

Kentucky.— Garner *v.* Garner, 4 Ky. L. Rep. 823.

Maryland.— Campbell *v.* Lowe, 9 Md. 500, 66 Am. Dec. 339.

Massachusetts.— Lincoln *v.* Parsons, 1 Allen 388.

Minnesota.— McKusick *v.* Washington County Com'rs, 16 Minn. 151.

New Jersey.— Beebe *v.* Staples, 3 N. J. L. J. 249.

North Carolina.— Dail *v.* Jones, 85 N. C. 221.

Ohio.— Schmidt *v.* Ehler, 11 Ohio Dec. (Reprint) 425, 27 Cinc. L. Bul. 2.

Pennsylvania.— Caldwell *v.* Fulton, 31 Pa. St. 475, 72 Am. Dec. 760; Bowlby *v.* Thunder, 2 Pa. Cas. 191, 3 Atl. 588.

South Carolina.— Jones *v.* Swearingen, 42 S. C. 58, 19 S. E. 947; Ryan *v.* Goodwyn, McMull. Eq. 451; Westbrook *v.* Harbeson, 2 McCord Eq. 112; Pooser *v.* Tyler, 1 McCord Eq. 18.

Tennessee.— Richardson *v.* Thompson, 1 Humphr. 151.

Texas.— Cauble *v.* Worsham, 96 Tex. 86, 70 S. W. 737, 97 Am. St. Rep. 871 [*reversing* (Civ. App. 1902) 69 S. W. 194].

West Virginia.— Hurst *v.* Hurst, 7 W. Va. 289.

See 20 Cent. Dig. tit. "Evidence," § 1725.

A parol agreement to reconvey cannot, in the absence of accident, fraud, mistake, or undue advantage, be set up to contradict the terms of an absolute conveyance. Bonham *v.* Craig, 80 N. C. 224; Campbell *v.* Campbell, 55 N. C. 364.

Where a wife has signed a deed with her husband, but there are no words releasing or indicating an intention to release dower, an agreement to release dower cannot be shown by parol. Lothrop *v.* Foster, 51 Me. 367.

A recital showing a trust attached to the grant cannot be contradicted by parol evidence showing an intent that the deed should operate as an absolute conveyance. McDermith *v.* Voorhees, 16 Colo. 402, 27 Pac. 250, 25 Am. St. Rep. 286.

Where the grantees are described as husband and wife so that they take an estate by entireties, the deed cannot, in an action by the wife's heirs against the husband's grantee, be contradicted by parol evidence

subject to the exception that a deed absolute on its face may in equity be shown, by parol evidence, to have been intended to have the effect of a mortgage merely;[37] and it has also been held that, where the making of the deed involves a criminal offense, the intention of the grantor may be shown.[38]

(D) *Covenants.* The legal effect of a covenant in a deed cannot be enlarged or restricted, varied or destroyed by parol evidence of simultaneous or prior agreements, or of the intentions of the parties.[39] Nor is it permissible to engraft a covenant upon a deed by parol.[40]

(E) *Reservations or Limitations.* A deed which is upon its face an absolute grant is not subject to have reservations or limitations engrafted thereon by parol or extrinsic evidence of intentions, understandings, or agreements contradictory to or at variance with its clear language;[41] and conversely where the deed does

that the parties were not husband and wife and took as tenants in common. Jacobs *v.* Miller, 50 Mich. 119, 15 N. W. 42.

Record of deed.— Where the copy of the record of a conveyance purported to convey a life-estate, parol evidence is inadmissible to show that the original deed, which had been lost, contained words of inheritance making the estate a fee simple. Sisson *v.* Donnelly, 36 N. J. L. 432.

37. Hieronymus *v.* Glass, 120 Ala. 46, 23 So. 674; Cole *v.* Gray, 139 Ind. 396, 38 N. E. 856; Minchin *v.* Minchin, 157 Mass. 265, 32 N. E. 164. But *compare* Christian *v.* Highlands, 32 Ind. App. 104, 69 N. E. 266. See, generally, MORTGAGES.

38. U. S. *v.* Thomas, 28 Fed. Cas. No. 16,474, 2 Cranch C. C. 36.

39. *Alabama.*— Holley *v.* Younge, 27 Ala. 203.

Kansas.— Reagle *v.* Dennis, 8 Kan. App. 151, 55 Pac. 469.

New Hampshire.—Seavey *v.* Jones, 43 N. H. 441.

Wisconsin.— Powers *v.* Spaulding, 96 Wis. 487, 71 N. W. 891.

United States.— Pollard *v.* Dwight, 4 Cranch 421, 2 L. ed. 666.

See 20 Cent. Dig. tit. "Evidence," § 1727.

Covenants of warranty are subject to the rule:

Georgia.— Miller *v.* Desverges, 75 Ga. 407.

Massachusetts.— Earle *v.* De Witt, 6 Allen 520; Raymond *v.* Raymond, 10 Cush. 134.

New Hampshire.— Sargent *v.* Gutterson, 13 N. H. 467.

New York.— Suydam *v.* Jones, 10 Wend. 180, 25 Am. Dec. 552.

Pennsylvania.— Collingwood *v.* Irwin, 3 Watts 306.

South Carolina.— Garrett *v.* Weinberg, 54 S. C. 127, 31 S. E. 341, 34 S. E. 70.

Texas.— Bigham *v.* Bigham, 57 Tex. 238; Wells *v.* Groesbeck, 22 Tex. 429; Warren *v.* Clark, (Civ. App. 1894) 24 S. W. 1105; Voss *v.* Hoffman, (Civ. App. 1897) 40 S. W. 544.

Contra, Bumgardner *v.* Allen, 6 Munf. (Va.) 439.

See 20 Cent. Dig. tit. "Evidence," § 1727.

Covenants against encumbrances are subject to the rule. Small *v.* Jenkins, 16 Gray (Mass.) 155; Harlow *v.* Thomas, 15 Pick. (Mass.) 66; Bruns *v.* Schreiber, 43 Minn. 468, 45 N. W. 861; Farley *v.* Farrell, 51 How. Pr. (N. Y.) 497; Long *v.* Moler, 5 Ohio St. 271. Where certain taxes are excepted from an express warranty against all claims, the grantee cannot show that the warrantor contemporaneously and orally agreed to pay such taxes. MacLeod *v.* Skiles, 81 Mo. 595, 51 Am. Rep. 254. But a general covenant of warranty does not, at least conclusively, extend to such encumbrances as were known to the purchaser at the time of the contract of sale, and which he agreed to pay or discharge himself in addition to or as part of the consideration moving from him to the vendor. Allen *v.* Lee, 1 Ind. 58, 48 Am. Dec. 352.

40. Sawyer *v.* Vories, 44 Ga. 662.

Covenants of warranty are within the rule. Stookey *v.* Hughes, 18 Ill. 55. See also McMurphy *v.* Walker, 20 Minn. 382. *Contra,* Graves *v.* Pflueger, 26 Tex. Civ. App. 488, 63 S. W. 651 [*citing* Richardson *v.* Levi, 67 Tex. 359, 3 S. W. 444], holding that a warranty is no part of the conveyance of land, but is a collateral undertaking and may be shown by parol. See *infra,* XVI, C, 25, g, (XI). A quitclaim deed cannot, by a parol agreement, be converted into a warranty deed. Cartier *v.* Douville, 98 Mich. 22, 56 N. W. 1045; Putnam *v.* Russell, 86 Mich. 389, 49 N. W. 147.

Warranty as to quantity is within the rule. Martin *v.* Hamlin, 18 Mich. 354, 100 Am. Dec. 181; Hobein *v.* Frick, 69 Mo. App. 263; Cook *v.* Combs, 39 N. H. 592, 75 Am. Dec. 241; Cabot *v.* Christie, 42 Vt. 121, 1 Am. Rep. 313.

Warranty as to condition is covered by the rule. Eighmie *v.* Taylor, 98 N. Y. 288.

41. *Illinois.*— Smith *v.* Price, 39 Ill. 28, 89 Am. Dec. 284.

Indiana.— Sage *v.* Jones, 47 Ind. 122.

Iowa.— Wickersham *v.* Orr, 9 Iowa 253, 74 Am. Dec. 348.

New Hampshire.— Conner *v.* Coffin, 22 N. H. 538.

New York.— Rathbun *v.* Rathbun, 6 Barb. 98.

South Carolina.— Holmes *v.* Simons, 3 Desauss. 149, 4 Am. Dec. 606.

Texas.— Heffron *v.* Cunningham, 76 Tex. 312, 13 S. W. 259.

See 20 Cent. Dig. tit. "Evidence," § 1726.

This rule has been applied to an attempt

contain reservations or limitations they cannot be defeated or varied by evidence of a similar character,[42] even though such reservations are inconsistent with the other provisions of the deed.[43]

j. Instruments of Compromise and Settlement. Where parties enter into a written compromise or settlement of claims or liabilities it is not subject to be varied or contradicted in its terms or effect by parol evidence,[44] but parol evi-

to show a reservation of a right of possession in the grantor (Hickman *v.* Hickman, 55 Mo. App. 303; Hamwer *v.* Wright, 45 N. Y. Suppl. 659; Cathcart *v.* Chandler, 5 Strobh. (S. C.) 19), either for life (Woodward *v.* Foster, 64 Hun (N. Y.) 147, 18 N. Y. Suppl. 827), for a definite time (Drake *v.* Root, 2 Colo. 685; Carr *v.* Hays, 110 Ind. 408, 11 N. E. 25), or until the purchase-money is paid, in whole (Omaha, etc., Smelting, etc., Co. *v.* Tabor, 13 Colo. 41, 21 Pac. 925, 16 Am. St. Rep. 185, 5 L. R. A. 236), or in part (Gilbert *v.* Bulkley, 5 Conn. 262, 13 Am. Dec. 57), until the youngest grantee becomes of age (Ford *v.* Boone, (Tex. Civ. App. 1903) 75 S. W. 353), or until another crop is made (Melton *v.* Watkins, 24 Ala. 433, 60 Am. Dec. 481); a right of way (Collam *v.* Hocker, 1 Rawle (Pa.) 108; Shaver *v.* Edgell, 48 W. Va. 502, 37 S. E. 664. See also Wilder *v.* Wheeldon, 56 Vt. 344), unaccrued rents (Winn *v.* Murehead, 52 Iowa 64, 2 N. W. 249; Macarty *v.* Commercial Ins. Co., 17 La. 365), or damages which might be allowed in pending condemnation proceedings (Bailey *v.* Briant, 117 Ind. 362, 20 N. E. 278); and also to a retention of the ownership of the buildings on the land conveyed (Smith *v.* Odom, 63 Ga. 499; *In re* Perkins, 65 Vt. 313, 26 Atl. 637), or of other fixtures on the premises (Towson *v.* Smith, 13 App. Cas. (D. C.) 48; Noble *v.* Bosworth, 19 Pick. (Mass.) 314; Bond *v.* Coke, 71 N. C. 97), or trees, plants, and shrubbery (Smith *v.* Price, 39 Ill. 28, 89 Am. Dec. 284; Wintermute *v.* Light, 46 Barb. (N. Y.) 278; Backenstoss *v.* Stahler, 33 Pa. St. 251, 75 Am. Dec. 592).

As to a reservation of growing crops the weight of authority supports the rule stated in the text.

Arkansas.— Gibbons *v.* Dillingham, 10 Ark. 9, 50 Am. Dec. 233.

Illinois.— Damery *v.* Ferguson, 48 Ill. App. 224; Carter *v.* Wingard, 47 Ill. App. 296.

Maine.— Brown *v.* Thurston, 56 Me. 126, 96 Am. Dec. 438.

Michigan.— Vanderkarr *v.* Thompson, 19 Mich. 82.

Missouri.— McIlvaine *v.* Harris, 20 Mo. 457, 64 Am. Dec. 196.

New York.— Austin *v.* Sawyer, 9 Cow. 39. See 20 Cent. Dig. tit. "Evidence," § 1726.

Contra.— Harvey *v.* Million, 67 Ind. 90 [*overruling* Chapman *v.* Long, 10 Ind. 465]; Heavilon *v.* Heavilon, 29 Ind. 509 [*overruling* Turner *v.* Cool, 23 Ind. 56, 85 Am. Dec. 449]; Flynt *v.* Conrad, 61 N. C. 190, 93 Am. Dec. 588.

Things pertaining to realty.— In Indiana, while there is a class of cases in which it is held that a parol reservation may be made, they relate to growing crops and trade fixtures, or such other articles as are not permanently attached to the land (Harvey *v.* Million, 67 Ind. 90; Heavilon *v.* Heavilon, 29 Ind. 509), and the rule is never extended to such things as pertain to and form, or constitute a permanent part of, the realty (Bailey *v.* Briant, 117 Ind. 362, 20 N. E. 278; Armstrong *v.* Lawson, 73 Ind. 498).

The time of taking effect of a deed whose terms show the passing of a present estate cannot be postponed by showing an oral agreement or intention that the deed should not take effect until some time in the future. Wright *v.* Graves, 80 Ala. 416; Wallace *v.* Berdell, 97 N. Y. 13; Lott *v.* Kaiser, 61 Tex. 665; Walker *v.* Renfro, 26 Tex. 142.

42. *Massachusetts.*— Stockbridge Iron Co. *v.* Hudson Iron Co., 107 Mass. 290.

New Hampshire.— Lear *v.* Durgin, 64 N. H. 618, 15 Atl. 128.

New York.— Eysaman *v.* Eysaman, 24 Hun 430; Swick *v.* Sears, 1 Hill 17.

Texas.— Bombarger *v.* Morrow, 61 Tex. 417.

United States.— Hornbuckle *v.* Stafford, 111 U. S. 389, 4 S. Ct. 515, 28 L. ed. 468.

See 20 Cent. Dig. tit. "Evidence," § 1726.

A reservation of a temporary easement cannot be enlarged by parol evidence into an agreement to dedicate the property to public use. Kansas City *v.* Banks, 9 Kan. App. 885, 61 Pac. 333.

A reservation of "standing wood" cannot be limited by parol evidence to wood suitable for fuel. Strout *v.* Harper, 72 Me. 270.

The reservation of a life-estate to the grantors may be shown by parol to have been made to secure payment of the purchase-price, which was to be paid by support and allowing the grantors to reside on the premises. Bever *v.* Bever, 144 Ind. 157, 41 N. E. 944.

43. Jacobs *v.* Mutual Ins. Co., 56 S. C. 558, 35 S. E. 221.

44. *Alabama.*— Mobile Bank *v.* Mobile, etc., R. Co., 69 Ala. 305; Hart *v.* Freeman, 42 Ala. 567.

Georgia.— Wright *v.* Wilson, 60 Ga. 614.

Illinois.— Meyer *v.* McKee, 19 Ill. App. 109.

Louisiana.— Pickens *v.* Friend, 26 La. Ann. 585; Gould *v.* Bridgers, 3 Mart. N. S. 692.

Massachusetts.— Farrington *v.* Hodgdon, 119 Mass. 453.

New York.— O'Beirne *v.* Lloyd, 6 Abb. Pr. N. S. 387.

North Carolina.— Parker *v.* Morrill, 98 N. C. 232, 3 S. E. 511.

Pennsylvania.— Horn *v.* Miller, 142 Pa. St. 557, 21 Atl. 994.

dence of a non-compliance with the conditions of the compromise or settlement agreement may be shown.[45]

k. Leases — (I) *In General.* The terms and effect of a written lease cannot be added to, contradicted, or varied by parol or extrinsic evidence of the intentions of the parties, their negotiations leading up to the lease, or what was said and done prior to and at the time of executing the instrument.[46] Nor is such evi-

South Carolina.— Boyce *v.* Foster, 1 Bailey 540.

Texas.— Rubrecht *v.* Powers, 1 Tex. Civ. App. 282, 21 S. W. 318.

Virginia.—Bonsack Mach. Co. *v.* Woodrum, 88 Va. 512, 13 S. E. 994.

United States.— Bofinger *v.* Tuyes, 120 U. S. 198, 7 S. Ct. 529, 30 L. ed. 649.

See 20 Cent. Dig. tit. "Evidence," § 1762.

Contra.— Byrne *v.* Schwing, 6 B. Mon. (Ky.) 199, 206, in which case the court said: "Accounts, settlements, and even receipts are always susceptible of explanation and correction."

45. Meyer *v.* McKee, 19 Ill. App. 109.

46. *Alabama.*— Pierce *v.* Tidwell, 81 Ala. 299, 2 So. 15.

Arizona.— Snead *v.* Tietjen, (1890) 24 Pac. 324.

Arkansas.— Pickett *v.* Ferguson, 45 Ark. 177, 55 Am. Rep. 545.

California.— Jungerman *v.* Bovee, 19 Cal. 354.

Colorado.— Randolph *v.* Helps, 9 Colo. 29, 10 Pac. 245.

Connecticut.— Gulliver *v.* Fowler, 64 Conn. 556, 30 Atl. 856.

Illinois.— Rector *v.* Hartford Deposit Co., 190 Ill. 380, 60 N. E. 528 [*affirming* 92 Ill. App. 175]; Leavitt *v.* Stern, 159 Ill. 526, 42 N. E. 869 [*affirming* 55 Ill. App. 416]; Borggard *v.* Gale, 107 Ill. App. 128 [*affirmed* in 205 Ill. 511, 68 N. E. 1063]; Smith *v.* McEvoy, 98 Ill. App. 330; Hartford Deposit Co. *v.* Rector, 92 Ill. App. 175 [*affirmed* in 190 Ill. 380, 60 N. E. 528]; Robbins *v.* Conway, 92 Ill. App. 173; Fish *v.* Ryan, 88 Ill. App. 524; Resser *v.* Corwin, 72 Ill. App. 625; McMullen *v.* Moffitt, 68 Ill. App. 160; Friedman *v.* Schwabacher, 64 Ill. App. 422; Sauber *v.* Collins, 40 Ill. App. 426; Hoag *v.* Carpenter, 18 Ill. App. 555.

Indiana.— Burbank *v.* Dyer, 54 Ind. 392.

Iowa.— Kelly *v.* Chicago, etc., R. Co., 93 Iowa 436, 61 Pac. 957.

Louisiana.— Hollingsworth *v.* Atkins, 46 La. Ann. 515, 15 So. 77.

Maine.— Stevens *v.* Haskell, 70 Me. 202.

Maryland.— Williams *v.* Kent, 67 Md. 350, 10 Atl. 228.

Massachusetts.— Hovey *v.* Newton, 7 Pick. 29.

Michigan.— Grashaw *v.* Wilson, 123 Mich. 364, 82 N. W. 73.

Minnesota.— McLean *v.* Nicol, 43 Minn. 169, 45 N. W. 15.

Missouri.— Tyler *v.* Gresler, 85 Mo. App. 278.

New Hampshire.— Meredith Mechanic's Assoc. *v.* American Twist Drill Co., 66 N. H. 267, 20 Atl. 330.

New Jersey.— Showhill *v.* Reed, 49 N. J. L. 292, 10 Atl. 737, 60 Am. Rep. 615; Naumberg *v.* Young, 44 N. J. L. 331, 43 Am. Rep. 380 [*criticizing* Erskine *v.* Adeane, L. R. 8 Ch. 756, 42 L. J. Ch. 835, 29 L. T. Rep. N. S. 234, 21 Wkly. Rep. 802; Morgan *v.* Griffith, L. R. 6 Exch. 70, 40 L. J. Exch. 46, 23 L. T. Rep. N. S. 783, 19 Wkly. Rep. 957; Mann *v.* Nunn, 43 L. J. C. P. 241, 30 L. T. Rep. N. S. 526]; Useful Manufactures Soc. *v.* Haight, 1 N. J. Eq. 393.

New York.— Riley *v.* Riley, 83 Hun 398, 31 N. Y. Suppl. 753; Sprague *v.* Bartholdi Hotel Co., 56 N. Y. Super. Ct. 608, 3 N. Y. Suppl. 828; Marrotto *v.* McCotter, 85 N. Y. Suppl. 431; Soule *v.* Palmer, 49 N. Y. Suppl. 475; New York *v.* Mason, 9 N. Y. St. 282; Butler *v.* Smith's Homeopathic Pharmacy, 5 N. Y. St. 885.

North Carolina.— Taylor *v.* Hunt, 118 N. C. 168, 24 S. E. 359.

North Dakota.— Merchants' State Bank *v.* Ruettell, (1903) 97 N. W. 853.

Ohio.—Howard *v.* Thomas, 12 Ohio St. 201.

Pennsylvania.— Lyon *v.* Miller, 24 Pa. St. 392; Cozens *v.* Stevenson, 5 Serg. & R. 421; Biddle *v.* Wilhem, 16 Phila. 78; Woodland Cemetery Co. *v.* Carville, 9 Leg. Int. 98; Grubb *v.* Matlack, 2 Chest. Co. Rep. 408.

Rhode Island.— Watkins *v.* Greene, 22 R. I. 34, 46 Atl. 38.

South Carolina.— Charles *v.* Byrd, 29 S. C. 544, 8 S. E. 1; Easterby *v.* Heilbron, 1 McMull. 462.

Texas.— Greenhill *v.* Hunton, (Civ. App. 1902) 69 S. W. 440; De Vitt *v.* Kaufman County, 27 Tex. Civ. App. 332, 66 S. W. 224.

Vermont.— Rickard *v.* Dana, 74 Vt. 74, 52 Atl 113; Knapp *v.* Marlboro, 29 Vt. 282.

Virginia.— Emerick *v.* Tavener, 9 Gratt. 220, 58 Am. Dec. 217.

West Virginia.—Hukill *v.* Guffy, 37 W. Va. 425, 16 S. E. 544.

Wisconsin.— Ninman *v.* Suhr, 91 Wis. 392, 64 N. W. 1035.

United States.— Harmon *v.* Harmon, 51 Fed. 113.

England.— Larochelle *v.* Baxter, 21 Rev. Lég. 87. See also Angell *v.* Duke, L. R. 10 Q. B. 174, 32 L. T. Rep. N. S. 320, 23 Wkly. Rep. 548.

Canada.— McElveney *v.* McKilligan, 12 N. Brunsw. 322.

See 20 Cent. Dig. tit. "Evidence," § 1736.

The unsworn declaration of a partner in a firm which transferred a lease, reduced to writing after the transfer, is not admissible to add to or explain the terms and conditions of the lease transferred. Hollingsworth *v.* Atkins, 46 La. Ann. 515, 15 So. 77.

Indorsements on a lease by the lessor extending the term and providing that all improvements then or thereafter made shall be

dence admissible to show that an instrument which is on its face a lease is in reality a contract of sale.[47] But it may be shown that a written instrument purporting upon its face to be merely a lease was intended to operate as a mortgage to secure the payment of a debt.[48]

(II) *Conclusiveness as to Particular Matters* — (A) *Accessaries to Be Furnished.* The terms of a written lease cannot be added to by showing an agreement on the part of the lessor to furnish certain accessaries which are necessary or convenient to the use of the demised premises or property, such as water, steam, and the like;[49] nor can a custom to furnish such accessaries be shown where this would add to the terms of the written instrument by parol.[50]

(B) *Assignment.* Where a lease is silent as to the lessee's right to assign his term, parol evidence is inadmissible to show that the premises were to be used and occupied by the lessee himself.[51]

(C) *Description and Identity of Premises.* The written lease is also conclusive as to the description and identity of the demised premises, and cannot be contradicted, added to, or varied in this respect by parol evidence;[52] nor is it permissible to show reservations and exceptions not contained in the lease.[53]

(D) *Fixtures.* An agreement that the tenant shall have the right to remove buildings or other fixtures erected by him, at the end of his term, cannot be added to the lease by parol evidence.[54]

(E) *Rent.* A written lease cannot be varied by establishing a parol agreement between the parties modifying its terms as to the rent payable,[55] either with respect to the amount of rent to be paid according to its terms,[56] or the

the lessor's property cannot be varied by parol evidence. Walsh *v.* Martin, 69 Mich. 29, 37 N. W. 40.

A lease giving the privilege of purchasing does not admit of parol evidence to show a contemporaneous agreement that in case of purchase the rent should be applied on the purchase-price. Braun *v.* Wisconsin Rendering Co., 92 Wis. 245, 66 N. W. 196.

Annulment of previous written agreement. — If the effect of a lease is wholly to abrogate and annul a written agreement between the parties thereto of previous date, parol evidence is inadmissible to show that it was the intention of the parties that such agreement should remain, notwithstanding the lease, as a subsisting contract. Tibbits *v.* Percy, 24 Barb. (N. Y.) 39.

Where the object of a lease was a special one, parol evidence is inadmissible to prove that the lessor had granted the privilege of using the premises for other purposes. Sientes *v.* Odier, 17 La. Ann. 153.

Where a lease was originally verbal and after the articles were counted and delivered thereunder a written lease was executed, its recital as to the number delivered might be varied by proof. Lemmon *v.* Sibert, 15 Colo. App. 131, 61 Pac. 202.

47. Andrus *v.* Mann, 92 Ill. 40.

48. Meyer *v.* Davenport Elevator Co., 12 S. D. 172, 80 N. W. 189; Lamson *v.* Moffat, 61 Wis. 153, 21 N. W. 62. And see, generally, Mortgages.

49. See Cooney *v.* Murray, 45 Ill. App. 463. An agreement of the lessor to provide certain furniture cannot be shown by parol where the lease is silent with reference thereto. Wilson *v.* Deen, 74 N. Y. 531.

50. Watkins *v.* Green, 22 R. I. 34, 46 Atl. 38.

51. Nave *v.* Berry, 22 Ala. 382.

52. *Illinois.*— Conwell *v.* Springfield, etc., R. Co., 81 Ill. 232.

New Jersey.— Morris *v.* Kettle, 57 N. J. L. 218, 30 Atl. 879.

Vermont.— Knapp *v.* Marlboro, 29 Vt. 282.

Virginia.— Emerich *v.* Tavener, 9 Gratt. 220, 58 Am. Dec. 217.

England.— Minton *v.* Geiger, 28 L. T. Rep. N. S. 449.

See 20 Cent. Dig. tit. "Evidence," § 1737.

53. Hovey *v.* Newton, 7 Pick. (Mass.) 29; Meredith Mechanic Assoc. *v.* American Twist Drill Co., 66 N. H. 267, 20 Atl. 330.

54. Jungerman *v.* Bovee, 19 Cal. 354; Stephens *v.* Ely, 162 N. Y. 79, 56 N. E. 499 [*reversing* 14 N. Y. App. Div. 202, 43 N. Y. Suppl. 762]; Tait *v.* Central Lunatic Asylum, 84 Va. 271, 4 S. E. 697.

55. Knefel *v.* Daly, 91 Ill. App. 321; Seitz Brewing Co. *v.* Ayres, 60 N. J. Eq. 190, 46 Atl. 535; Henson *v.* Coope, 3 Scott N. R. 48.

56. *Maryland.*— Williams *v.* Kent, 67 Md. 350, 10 Atl. 228.

New York.— Beadle *v.* Monroe, 68 Hun 323, 22 N. Y. Suppl. 981; Delameter *v.* Bush, 63 Barb. 168; Patterson *v.* O'Hara, 2 E. D. Smith 58; Liebeskind *v.* Moore Co., 84 N. Y. Suppl. 850. See also Castillo *v.* Walker, Anth. N. P. 339.

North Dakota.— Merchants' State Bank *v.* Ruettell, 12 N. D. 519, 97 N. W. 853.

Ohio.— Strong *v.* Schmidt, 13 Ohio Cir. Ct. 302, 7 Ohio Cir. Dec. 233.

Pennsylvania.— Hultz *v.* Wright, 16 Serg. & R. 345, 16 Am. Dec. 575; Hawk *v.* Greensweig, 7 Pa. L. J. 374.

England.— Preston *v.* Merceau, 2 W. Bl. 1249.

See 20 Cent. Dig. tit. "Evidence," § 1742.

time[57] or mode of payment;[58] nor can an agreement that payment of rent shall cease on a certain contingency or condition not named in the writing be shown.[59]

(F) *Repairs and Improvements.* The lease cannot be added to by showing an agreement to make certain repairs and improvements other than those, if any, stipulated for in the instrument,[60] nor can the stipulations of the lease in regard to these matters be varied or controlled by parol.[61]

(G) *Right to Sublet.* A right given by the lease to sublet either generally or for certain purposes cannot be restricted by evidence of a contemporaneous oral prohibition against subletting for a purpose within the general terms of the authority.[62]

An agreement by the tenant to pay water-rates for water used for running a hydraulic elevator placed in the leased building at the tenant's request cannot be shown by parol, the lease having been changed at the time of such improvement so as to provide for an increased rent in consideration thereof. Williams *v.* Kent, 67 Md. 350, 10 Atl. 228.

Acceptance of reduced rent.— Loach *v.* Farnum, 90 Ill. 368.

57. Harloe *v.* Lambie, 132 Cal. 133, 64 Pac. 88; Carpenter *v.* Shanklin, 7 Blackf. (Ind.) 308.

Evidence that rent was to be paid monthly does not vary the terms of a written lease providing merely for a rental of a certain amount "per year," but simply explains its meaning. Steinfield *v.* Wilcox, 26 Misc. (N. Y.) 401, 56 N. Y. Suppl. 217.

Time not provided for.— Under a written lease for one year from March 1, 1889, with the privilege of two years, the rent for the first year being due June 1, 1889, it was competent for the landlord to show by parol that the rent for the second year was to be paid in advance, as it does not follow, from the fact that the rent for the first year was due June 1, that the rent for the second year was also to be paid on that date. Tennelly *v.* Ross, 14 Ky. L. Rep. 48.

58. Pickett *v.* Ferguson, 45 Ark. 177, 55 Am. Rep. 545. This rule precludes evidence of a parol contemporaneous agreement that part of the rent was to be taken out in board (Stull *v.* Thompson, 154 Pa. St. 43, 25 Atl. 890), or that the lessor should accept on account of the rent the fixtures placed on the premises by the lessee (Collamer *v.* Farrington, 15 N. Y. Suppl. 452).

59. Pierce *v.* Tidwell, 81 Ala. 299, 2 So. 15; Martin *v.* Berens, 67 Pa. St. 459.

60. *Connecticut.*— Gulliver *v.* Fowler, 64 Conn. 556, 30 Atl. 852; Averill *v.* Sawyer, 62 Conn. 560, 27 Atl. 73.

Indiana.— Welshbillig *v.* Dienhart, 65 Ind. 94; Roehrs *v.* Timmons, 28 Ind. App. 578, 63 N. E. 481.

Iowa.— Lerch *v.* Sioux City Times Co., 91 Iowa 750, 60 N. W. 611.

Massachusetts.— Brigham *v.* Rogers, 17 Mass. 571.

Minnesota.— McLean *v.* Nichol, 43 Minn. 169, 45 N. W. 15.

Montana.— York *v.* Steward, 21 Mont. 515, 55 Pac. 29, 43 L. R. A. 125.

New Jersey.— Naumberg *v.* Young, 44 N. J. L. 331, 43 Am. Rep. 380.

New York.— Hartford, etc., Steamboat Co. *v.* New York, 78 N. Y. 1; Smith *v.* Smull, 69 N. Y. App. Div. 452, 74 N. Y. Suppl. 1061; Hall *v.* Beston, 26 N. Y. App. Div. 105, 49 N. Y. Suppl. 811; Fargis *v.* Walton, 51 N. Y. Super. Ct. 32; New York *v.* Price, 5 Sandf. 542; Post *v.* Vetter, 2 E. D. Smith 248; Lynch *v.* Lauer, 14 Misc. 252, 35 N. Y. Suppl. 715; Cleves *v.* Willoughby, 7 Hill 83. See also Mayer *v.* Mollie, 1 Hilt. 491.

Ohio.— Howard *v.* Thomas, 12 Ohio St. 201.

Oregon.— Stoddard *v.* Nelson, 17 Oreg. 417, 21 Pac. 456.

Pennsylvania.— Eberle *v.* Girard L. Ins., etc., Co., 1 Pa. Cas. 409, 4 Atl. 808.

Texas.—Johnson *v.* Witte, (Civ. App. 1895) 32 S. W. 426.

West Virginia.—Kline *v.* McLain, 33 W. Va. 32, 10 S. E. 11, 5 L. R. A. 400.

Canada.— Losee *v.* Kezar, 5 U. C. C. P. 234.

See 20 Cent. Dig. tit. "Evidence," § 1739. But *compare infra*, XVI, C, 25, g, (VII).

This rule has been applied to an attempt to show an agreement to introduce gas and water into the premises (McLean *v.* Nicol, 43 Minn. 169, 45 N. W. 15), to ditch the land leased (Diven *v.* Johnson, 117 Ind. 512, 20 N. E. 428, 3 L. R. A. 308), or to lay certain railroad tracks to the premises (Tracy *v.* Union Iron-Works, 29 Mo. App. 342 [*affirmed* in 104 Mo. 193, 16 S. W. 203].

A letter written in the course of negotiations for the lease of a house, stating that it would be put in first-class order, is a mere proposal leading up to the renting of the property and hence, the proposal being merged in the lease, the letter is not admissible in evidence. Hunter *v.* Hathaway, 108 Wis. 620, 84 N. W. 996.

61. Murdock *v.* Ganahl, 47 Mo. 135. An express covenant of the tenant to put the premises in repair precludes the admission of parol evidence to establish an oral collateral agreement by which the landlord was to perform such covenant instead of the tenant. Wodock *v.* Robinson, 148 Pa. St. 503, 24 Atl. 73; Heintze *v.* Erlacher, 1 N. Y. City Ct. 465.

The time for the completion of alterations or repairs stipulated for in the lease cannot be shown by parol, where no time is fixed by the lease. Cronin *v.* Epstein, 15 Daly (N. Y.) 50, 2 N. Y. Suppl. 709; Calhoun *v.* Wilson, 27 Gratt. (Va.) 639.

62. Harrison *v.* Howe, 109 Mich. 476, 67 N. W. 527, holding that an authority to

(H) *Term.* The statements in the lease as to the term thereof are also conclusive, and the term can be neither enlarged nor restricted by showing a contemporaneous parol agreement;[63] nor can an agreement giving the tenant the right to surrender the premises and terminate the lease upon the happening of certain contingencies, or at his pleasure, be shown.[64]

(I) *Use of Premises.* A covenant in the lease that the premises will not be used for certain purposes or in a certain manner cannot be controlled by parol evidence showing declarations that the covenant would not be enforced;[65] and conversely, where the purpose for which the premises are to be occupied is not stated in the lease, parol evidence is not admissible to show an alleged verbal agreement of the landlord without consideration to sign a consent to the use of the premises for the sale of liquors.[66]

(J) *Warranty.* It cannot be shown by parol that there was an oral warranty in reference to the condition of the demised premises or property, or their fitness for the purpose for which they are liable, which is not contained in the lease itself.[67]

l. Letters. The parol evidence rule may protect letters from variation or contradiction where they are of a contractual nature, containing promises, propositions, undertakings, representations, and the like, especially where it is intended that the receiver shall act upon the faith of the contents of the letter;[68] but letters

sublet for "business purposes" precludes parol evidence to show a contemporaneous oral prohibition against subletting for saloon purposes.

63. *Indiana.*— Burbank *v.* Dyer, 54 Ind. 392.

Maine.— Wheeler *v.* Cowan, 25 Me. 283.

New Jersey.— Elizabeth Town Sav. Inst. *v.* Conroy, 4 N. J. L. J. 189.

New York.— U. S. Equitable L. Assur. Soc. *v.* Schum, 40 Misc. 657, 83 N. Y. Suppl. 161.

Texas.— Slaughter *v.* De Vitt, 30 Tex. Civ. App. 589, 71 S. W. 616.

See 20 Cent. Dig. tit. "Evidence," § 1741.

An agreement for holding over by the tenant after the expiration of the term stated in the lease cannot be shown where a covenant in the lease provides for the delivery up of the leased premises at the expiration of the term. Keegan *v.* Kinnaire, 12 Ill. App. 484.

An agreement to surrender the lease upon the happening of a certain contingency cannot be shown by parol. Hukill *v.* Guffey, 37 W. Va. 425, 16 S. E. 544.

Sale of land.— Parol evidence that in case the lessor should sell the land the lease should terminate is inadmissible, no such provision being fairly implied from anything in the lease. Randolph *v.* Helps, 9 Colo. 29, 10 Pac. 245.

64. Brady *v.* Peiper, 1 Hilt. (N. Y.) 61; Hall *v.* Phillips, 164 Pa. St. 494, 30 Atl. 353.

65. Dodge *v.* Lambert, 2 Bosw. (N. Y.) 570.

66. Nostrand *v.* Hughes, 54 N. Y. App. Div. 602, 67 N. Y. Suppl. 72.

67. Stevens *v.* Pierce, 151 Mass. 207, 23 N. E. 1006; Dutton *v.* Gerrish, 9 Cush. (Mass.) 89, 55 Am. Dec. 45; York *v.* Steward, 21 Mont. 515, 55 Pac. 29, 43 L. R. A. 125; Naumberg *v.* Young, 44 N. J. L. 331, 43 Am. Rep. 380. But see *infra*, XVI, C, 25, g, (VII).

A guaranty that a machine would give satisfaction cannot be shown to add to the terms of a lease thereof. Restein *v.* Graf, 17 Phila. (Pa.) 266.

A warranty as to the power of an engine and boiler cannot be shown by parol to vary the terms of a lease of a steam mill. Wilcox *v.* Cate, 65 Vt. 478, 26 Atl. 1105.

68. *Colorado.*— Cross *v.* Kistler, 14 Colo. 571, 23 Pac. 903.

Illinois.— Brant *v.* Gallup, 111 Ill. 487, 53 Am. Rep. 638; Lyon *v.* Lyon, 3 Ill. App. 434.

Louisiana.— Selby *v.* Friedlander, 22 La. Ann. 381; Williams *v.* Hood, 11 La. Ann. 113.

Massachusetts.— Cook *v.* Shearman, 103 Mass. 21.

Missouri.— Bunce *v.* Beck, 43 Mo. 266.

England.— See Brice *v.* Bletchley, 6 Madd. 17.

See 20 Cent. Dig. tit. "Evidence," § 1758. See *infra*, XVI, B, 2, t.

Representations as to financial condition.— Where a person in order to obtain credit from a merchant has written a letter stating that his indebtedness does not exceed a certain sum, parol evidence is not admissible, in an action for false representations in such letter, to show that the writer had reference therein only to his "merchandise indebtedness" and not to his general money indebtedness. Flower *v.* Brumbach, 30 Ill. App. 294 [*affirmed* in 131 Ill. 646, 23 N. E. 335].

A letter containing an offer to sell real estate, but naming no time for acceptance, must be construed to allow a reasonable time, and parol evidence is not admissible to show that at the time the offer was made the parties understood or agreed that it was to remain open for any specified time, nor to prove their understanding as to what would be a reasonable time. Stone *v.* Harmon, 31 Minn. 512, 19 N. W. 88.

forming no part of a contract and not contractual in their nature are not protected.[69]

m. Mortgages and Deeds of Trust — (i) *In General.* Mortgages and deeds of trust are within the protection of the rule under discussion, and the terms and legal effect of such instruments cannot be added to, varied, controlled, or contradicted by parol or other extrinsic evidence.[70] Thus it cannot be shown that a transaction evidenced by a written instrument which clearly appears on its face to be a mortgage was intended by the parties to be a conditional sale,[71] an absolute conveyance,[72] or an assignment.[73] It is also inadmissible to introduce parol evidence denying the personal liability of the mortgagor,[74] depriving the mort-

69. Lichtenstein *v.* Rabolinsky, 75 N. Y. App. Div. 66, 77 N. Y. Suppl. 792; Smith *v.* Crego, 54 Hun (N. Y.) 22, 7 N. Y. Suppl. 86; Ottman Co. *v.* Martin, 16 Misc. (N. Y.) 490, 38 N. Y. Suppl. 966; Clifford *v.* Baessman, 41 Wis. 597.

The terms of a letter containing an offer to make a gift may be varied by parol. Sourse *v.* Marshall, 23 Ind. 194.

Letter of instructions.— A letter written by a lessee to his agent, giving directions as to the use of the premises, although signed by the lessor, does not constitute a contract, and parol evidence is admissible to show that the letting was on a condition not performed. Bernhard *v.* Trimble, 45 Ill. App. 56.

Conditional acceptance of offer.— Wilson *v.* Imperial Electric Light Co., 20 Misc. (N. Y.) 547, 46 N. Y. Suppl. 430.

70. *Alabama.*— Cowley *v.* Shelby, 71 Ala. 122; Edwards *v.* Dwight, 68 Ala. 389; Davis *v.* Lassiter, 20 Ala. 561.

California.— Wise *v.* Collins, 121 Cal. 147, 53 Pac. 640.

Colorado.— Falke *v.* Fassett, 4 Colo. App. 171, 34 Pac. 1005.

Dakota.— Dean *v.* Canton First Nat. Bank, 6 Dak. 222, 50 N. W. 831.

Florida.— Patterson *v.* Taylor, 15 Fla. 336.

Georgia.— Dyar *v.* Walton, 79 Ga. 466, 7 S. E. 220.

Illinois.— Lane *v.* Allen, 162 Ill. 426, 44 N. E. 831; Morris *v.* Calumet, etc., Canal, etc., Co., 91 Ill. App. 437.

Indiana.— Brunson *v.* Henry, 140 Ind. 455, 39 N. E. 256; Stewart *v.* Babbs, 120 Ind. 568, 22 N. E. 770; Mallett *v.* Page, 8 Ind. 364.

Iowa.— Kracke *v.* Homeyer, 91 Iowa 51, 58 N. W. 1056.

Louisiana.— Courtney *v.* Andrews, 10 Rob. 180; Hill *v.* Hall, 4 Rob. 416.

Maine.— Varney *v.* Hawes, 68 Me. 442.

Maryland.— Timms *v.* Shannon, 19 Md. 296, 81 Am. Dec. 632.

Massachusetts.— Southwick *v.* Hapgood, 10 Cush. 119.

Michigan.— Holmes *v.* Holmes, 129 Mich. 412, 89 N. W. 47, 95 Am. St. Rep. 444; Dunham *v.* W. Steele Packing, etc., Co., 100 Mich. 75, 58 N. W. 627.

Minnesota.— Security Bank *v.* Holmes, 68 Minn. 538, 71 N. W. 699; Berthold *v.* Fox, 13 Minn. 501, 97 Am. Dec. 243.

Missouri.— New England L. & T. Co. *v.* Workman, 71 Mo. App. 275.

Nevada.— Gage *v.* Phillips, 21 Nev. 150, 26 Pac. 60, 37 Am. St. Rep. 494.

New Jersey.— Van Syckel *v.* Dalrymple, 32 N. J. Eq. 233.

New York.— Snyder *v.* Ash, 30 N. Y. App. Div. 183, 51 N. Y. Suppl. 772; Ball *v.* Slafter, 26 Hun 353 [*affirmed* in 98 N. Y. 622]; Sinclair *v.* Jackson, 8 Cow. 543; Stevens *v.* Cooper, 1 Johns. Ch. 425, 7 Am. Dec. 499.

North Carolina.— Pollock *v.* Warwick, 104 N. C. 638, 10 S. E. 699; Boone *v.* Hardie, 87 N. C. 72.

Oregon.— Edgar *v.* Golden, 36 Oreg. 448, 48 Pac. 1118, 60 Pac. 2.

Pennsylvania.— Schiehl's Estate, 179 Pa. St. 308, 36 Atl. 181; Parsons *v.* Adeler, 8 Wkly. Notes Cas. 72.

South Carolina.— Porter *v.* Jefferies, 40 S. C. 92, 18 S. E. 229.

Texas.— Hart *v.* Eppstein, 71 Tex. 752, 10 S. W. 85; People's Bldg., etc., Assoc. *v.* Ghio, (Civ. App. 1901) 62 S. W. 560; Magill *v.* Brown, 20 Tex. Civ. App. 662, 50 S. W. 143, 642.

Vermont.— Wing *v.* Cooper, 37 Vt. 169.

Washington.— Goon Gan *v.* Richardson, 16 Wash. 373, 47 Pac. 762.

United States.— Gair *v.* Tuttle, 49 Fed. 198.

See 20 Cent. Dig. tit. "Evidence," § 1746.

An agreement for a commission to be paid to the trustee in a trust deed cannot be shown by parol. Disbrow *v.* Disbrow, 46 N. Y. App. Div. 111, 61 N. Y. Suppl. 614.

A written defeasance executed on the same day with an absolute deed cannot be varied by parol evidence. Snyder *v.* Griswold, 37 Ill. 216.

The record of a mortgage recorded on the day of its execution is admissible to show that alterations have not been made in the mortgage since execution. Hart *v.* Sharpton, 124 Ala. 638, 27 So. 450.

An unexecuted chattel mortgage is not a written instrument within the rule preventing the introduction of parol evidence to vary or contradict its terms. Its statements are admissions of the party from whom it proceeds, which may be explained by parol, the same as verbal admissions. Wise *v.* Collins, 121 Cal. 147, 53 Pac. 640.

71. Brown *v.* Nickle, 6 Pa. St. 390; Wing *v.* Cooper, 37 Vt. 169.

72. Goon Gan *v.* Richardson, 16 Wash. 373, 47 Pac. 762.

73. Dunham *v.* McNatt, 15 Tex. Civ. App. 552, 39 S. W. 1016.

74. Benoit *v.* Schneider, 47 Ind. 13; Wallace *v.* Langston, 52 S. C. 133, 29 S. E. 552;

gage of its priority over other liens,[75] changing the order of priority of several obligations secured by the same mortgage,[76] or, where there are two mortgages, securing the same liability, contradicting the same with respect to which property is primarily liable.[77] But evidence consistent with the instrument and offered merely to show the truth of the facts therein stated is competent.[78]

(II) *Debts or Obligations Secured.* While it has been laid down as the rule that a mortgage is conclusive as to the debts or obligations intended to be secured thereby, and it is not permissible to add to, vary, control, or contradict the written instrument in this respect by parol evidence,[79] it has also been held, usually upon the ground that the true consideration may always be shown, that even though a mortgage appears upon its face to be for the payment of a specified sum of money, it may be shown by parol evidence that it was really intended to secure advances to be made from time to time,[80] or a balance due from time to

Gillespie *v.* Brown, (Tex. Civ. App. 1895) 30 S. W. 448. But *compare* Hoopes *v.* Beale, 90 Pa. St. 82; Irwin *v.* Shoemaker, 8 Watts & S. (Pa.) 75.

75. Reading *v.* Hopson, 90 Pa. St. 494.

A mortgage given by a vendee to a person other than the vendor cannot, as against another *bona fide* mortgagee without notice whose mortgage was first recorded, be shown by parol evidence to have been intended to secure the purchase-money and be thus given priority. Albright *v.* Lafayette Bldg., etc., Assoc., 102 Pa. St. 411.

76. Schultz *v.* Plankinton Bank, 141 Ill. 116, 30 N. E. 346, 33 Am. St. Rep. 290 [*affirming* 40 Ill. App. 462]; Hancock's Appeal, 34 Pa. St. 155.

77. McRae *v.* His Creditors, 16 La. Ann. 305.

78. Bacon *v.* Brown, 19 Conn. 29.

79. *Alabama.*— Wilkerson *v.* Tillman, 66 Ala. 532.

Colorado.— Falke *v.* Fassett, 4 Colo. App. 171, 34 Pac. 1005.

Georgia.— Dyar *v.* Walton, 79 Ga. 466, 7 S. E. 220.

Illinois.—Union Nat. Bank *v.* International Bank, 22 Ill. App. 652 [*affirmed* in 123 Ill. 510, 14 N. E. 859].

Massachusetts.— Southwick *v.* Hapgood, 10 Cush. 119; Barker *v.* Buel, 5 Cush. 519.

Michigan.— Adair *v.* Adair, 5 Mich. 204, 71 Am. Dec. 779.

New York.—Bowery Bank *v.* Hart, 77 N. Y. App. Div. 121, 79 N. Y. Suppl. 46; Kenney *v.* Aitken, 9 Daly 500; Knight *v.* Warren, 9 N. Y. Suppl. 380; Meads *v.* Lansingh, Hopk. Ch. 124. But *compare* Hubbell *v.* Blakeslee, 71 N. Y. 63; Durfee *v.* Knowles, 2 N. Y. Suppl. 466.

North Carolina.— Moffitt *v.* Maness, 102 N. C. 457, 9 S. E. 399; Knight *v.* Bunn, 42 N. C. 77; Miller *v.* Lucas, 5 N. C. 228, holding that parol evidence is not admissible to prove that a deed of trust, "to pay, satisfy, and detain to themselves the sum of five hundred dollars, together with all cost which will arise against them for their being security for A." was intended to extend to subsequent suretyships.

South Carolina.— Lindsay *v.* Garvin, 31 S. C. 259, 9 S. E. 862, 5 L. R. A. 219.

United States.— Goodwin *v.* Fox, 129 U. S. 601, 9 S. Ct. 367, 32 L. ed. 805.

See 20 Cent. Dig. tit. "Evidence," § 1748.

Compare Worthington *v.* Bicknell, 2 Harr. & J. (Md.) 58, where parol evidence was admitted to prove that a debt secured by a mortgage was continental money, although expressed to be a specie debt.

Where a mortgage was given to secure notes, and the parties made notes which on their face were not within its terms, they cannot show by parol, in order to bring such notes within the security, that they were antedated. Ohio L. Ins., etc., Co. *v.* Winn, 4 Md. Ch. 253.

80. *Alabama.*— Kirby *v.* Raynes, 138 Ala. 194, 35 So. 118, 100 Am. St. Rep. 39; Hendon *v.* Morris, 110 Ala. 106, 20 So. 27; Huckaba *v.* Abbott, 87 Ala. 409, 6 So. 48; Tison *v.* People's Sav., etc., Assoc., 57 Ala. 323.

Kentucky.—Louisville Banking Co. *v.* Leonard, 90 Ky. 106, 13 S. W. 521, 11 Ky. L. Rep. 917.

Maryland.— Cole *v.* Albers, 1 Gill 412.

Michigan.— Johnson *v.* Bratton, 112 Mich. 319, 70 N. W. 1021.

Missouri.— Foster *v.* Reynolds, 38 Mo. 553; Williams *v.* Alnutt, 72 Mo. App. 62.

New York.— McKinster *v.* Babcock, 26 N. Y. 378 [*reversing* 37 Barb. 265]; Cady *v.* Merchants' Bank, 14 N. Y. St. 99; Utica Bank *v.* Finch, 3 Barb. Ch. 293. See also Ferris *v.* Hard, 135 N. Y. 354, 32 N. E. 129; Townsend *v.* Empire Stone-Dressing Co., 6 Duer 208.

South Carolina.— Moses *v.* Hatfield, 27 S. C. 324, 3 S. E. 538; Lindsay *v.* Garvin, 31 S. C. 259, 9 S. E. 862, 5 L. R. A. 219.

Texas.— Groos *v.* Iowa Park First Nat. Bank, (Civ. App. 1903) 72 S. W. 402; Glenn *v.* Seeley, 25 Tex. Civ. App. 523, 61 S. W. 959.

United States.— Lawrence *v.* Tucker, 23 How. 14, 16 L. ed. 474. See also Shirras *v.* Caig, 7 Cranch 34, 3 L. ed. 260.

See 20 Cent. Dig. tit. "Evidence," § 1748. And see *infra*, XVI, C, 9.

Contra.— Barnhart *v.* Edwards, (Cal. 1896) 47 Pac. 251; Swedish-American Nat. Bank *v.* Germania Bank, 76 Minn. 409, 79 N. W. 399, holding that parol evidence was not admissible to show that a mortgage given to se-

time;[81] or that it was given to secure or indemnify against a contingent liability of the mortgagee as the mortgagor's surety and the like.[82] And it has also been held that in the absence of any specific statement in the mortgage as to the character of the advances, parol evidence may be introduced to prove what advances were intended, and if the mortgage is made to one member of a firm evidence of advances made by the firm would be competent.[83]

(III) *Property Included.* The description in the mortgage as to the property included therein and intended to be covered thereby is conclusive and parol or extrinsic evidence is not admissible to contradict, add to, or vary the same by showing the intention of the parties in this respect to have been other than that expressed by the instrument.[84]

(IV) *Time and Mode of Payment.* Parol evidence is not admissible to vary or contradict the express language of a mortgage with reference to the time when the debt secured thereby shall become payable;[85] nor can it be shown that it was intended that payment should be made only out of a certain fund.[86]

n. Powers of Attorney. A power of attorney cannot be added to, varied, or contradicted by parol evidence,[87] although it has been held in several cases that

cure "money owing" was intended to secure future advances.

A mortgage to secure advances for a certain year cannot be varied by parol evidence to show that it was subsequently agreed that the mortgage should be retained as security for other and further advances for the succeeding year, not previously contemplated or provided for therein. O'Neil *v.* Bennett, 33 S. C. 243, 11 S. E. 727.

81. *Missouri.*— Williams *v.* Alnutt, 72 Mo. App. 62.

New York.— McKinster *v.* Babcock, 26 N. Y. 378 [*reversing* 37 Barb. 265].

Ohio.— Utter *v.* Hudnell, 6 Ohio Dec. (Reprint) 621, 7 Am. L. Rec. 118.

South Carolina.— Lindsay *v.* Garvin, 31 S. C. 259, 9 S. E. 862, 5 L. R. A. 219.

Wisconsin.—Lippincott *v.* Laurie, 119 Wis. 573, 97 N. W. 179.

See 20 Cent. Dig. tit. "Evidence," § 1748.

82. Tison *v.* People's Sav., etc., Assoc., 57 Ala. 323; Kimball *v.* Myers, 21 Mich. 276, 4 Am. Rep. 487; Colman *v.* Post, 10 Mich. 422, 82 Am. Dec. 49 (indemnity against liability as bail); Harrington *v.* Samples, 36 Minn. 200, 30 N. W. 671 (indemnity for making of accommodation note); Williams *v.* Alnutt, 72 Mo. App. 62; Sparks *v.* Brown, 33 Mo. App. 505, 46 Mo. App. 529. *Contra*, Southwick *v.* Hapgood, 10 Cush. (Mass.) 119; Clark *v.* Hobbs, 11 N. H. 122; Jackson *v.* Jackson, 5 Cow. (N. Y.) 173.

83. Hall *v.* Tay, 131 Mass. 192; Johnson *v.* Bratton, 112 Mich. 319, 70 N. W. 1021.

84. *Alabama.*— Chambers *v.* Ringstaff, 69 Ala. 140.

Dakota.— Dean *v.* Canton First Nat. Bank, 6 Dak. 222, 50 N. W. 831.

Florida.— Patterson *v.* Taylor, 15 Fla. 336.

Illinois.— Hutton *v.* Arnett, 51 Ill. 198.

Iowa.— Becker *v.* Dalby, (1901) 86 N. W. 314.

Massachusetts.— Wentworth *v.* Daly, 136 Mass. 423.

Michigan.— Thompson *v.* Smith, 96 Mich. 258, 55 N. W. 886; Whitney *v.* Hall, 82 Mich. 580, 47 N. W. 27.

Texas.— Crawford *v.* Bonner, 53 Tex. 194. See 20 Cent. Dig. tit. "Evidence," § 1747.

Defective description.— When a mortgage sought to be introduced in evidence is insufficient because the state and county are omitted in the description of the land intended to be mortgaged it may be identified by parol evidence, and the deficiency in the mortgage thereby supplied. Barron *v.* Barron, 122 Ala. 194, 25 So. 55. See *infra*, XVI, C, 30, e.

85. Bullion, etc., Bank *v.* Spooner, (Cal. 1894) 36 Pac. 121; Van Syckel *v.* Dalrymple, 32 N. J. Eq. 233; Manning *v.* Young, 28 N. J. Eq. 568; Baltes *v.* Ripp, 1 Abb. Dec. (N. Y.) 78, 3 Keyes (N. Y.) 210; Martin *v.* Rapelye, 3 Edw. (N. Y.) 229; Edgar *v.* Golden, 36 Oreg. 448, 48 Pac. 1118, 60 Pac. 2.

Inconsistent dates.—A mortgage dated 1837, payable in 1830, is payable immediately, and parol evidence cannot be given to vary this legal result. Fuller *v.* Acker, 1 Hill (N. Y.) 473.

Time of foreclosure.— Where one gives a chattel mortgage which provides that if the mortgagee shall deem himself unsafe he may foreclose, parol evidence is not admissible to show an agreement that the mortgage should not be foreclosed within a year, unless the mortgagor was induced, in signing it, to believe that it contained stipulations not included therein. Moore *v.* Howe, 115 Iowa 62, 87 N. W. 750.

Omission of time.— Where a mortgage does not recite when the sum secured is payable, but provides for the payment of interest thereon "until paid at the time hereinbefore set forth," the presumption that the sum is immediately payable is overcome, and the agreement of the parties as to when it shall become due may be shown by parol. Crowley *v.* Langdon, 127 Mich. 51, 86 N. W. 391.

86. Carlton *v.* Vineland Wine Co., 33 N. J. Eq. 466; Sangston *v.* Gordon, 22 Gratt. (Va.) 755. See also Neale *v.* Albertson, 39 N. J. Eq. 382.

87. *California.*— Frink *v.* Roe, 70 Cal. 296, 11 Pac. 820.

in a proper case such evidence may be received to interpret the powers conferred by the instrument.[88]

o. Printed Conditions of Sale at Auction. It has been held that the printed conditions under which a sale by auction proceeds cannot be varied or contradicted by parol evidence of the verbal statements of the auctioneer made at the time of sale, unless it be for the purpose of proving fraud.[89]

p. Receipts — (i) *General Rule.* It is well settled as a general proposition that the rule excluding parol or extrinsic evidence to vary or contradict written instruments does not apply to mere receipts; but these may be contradicted by showing that the money receipted for was not in fact paid, that certain items were or were not intended to be included or otherwise.[90] It has been held that the reason why receipts are open to parol investigation, and to be varied in their

Colorado.— Pollard *v.* McCloskey, 5 Colo. App. 554, 39 Pac. 432.

Delaware.— Logan *v.* Farmers' Bank, 1 Houst. 35.

Illinois.— Packer *v.* Roberts, 140 Ill. 9, 29 N. E. 668.

Maryland.— Scott *v.* Amoss, 73 Md. 80, 20 Atl. 724.

Pennsylvania.—Bowman *v.* Tagg, 5 Pa. Cas. 74, 8 Atl. 384.

Texas.— Griffin *v.* Walker, 36 Tex. 88; Mitchell *v.* Balderas, 2 Tex. Unrep. Cas. 17.

Virginia.— Redd *v.* Com., 85 Va. 648, 8 S. E. 490.

Wisconsin.— Gee *v.* Bolton, 17 Wis. 604 [*distinguishing* Marr *v.* Given, 23 Me. 55, 39 Am. Dec. 600].

United States.— Peckham *v.* Lyon, 19 Fed. Cas. No. 10,899, 4 McLean 45.

A power of attorney to collect cannot be shown by parol to be an absolute assignment of the claim to be collected. Best *v.* Sinz, 73 Wis. 243, 41 N. W. 169.

88. Frink *v.* Roe, 70 Cal. 296, 11 Pac. 820; Coldwater Nat. Bank *v.* Buggie, 117 Mich. 416, 75 N. W. 1057, holding that evidence that an attorney in fact was authorized to do certain acts, the doing of which the power of attorney was broad enough to cover, was admissible, as this did not tend to vary the terms of the power of attorney.

89. Chouteau *v.* Goddin, 39 Mo. 229, 90 Am. Dec. 462.

90. *Alabama.*— Selma *v.* Mullen, 46 Ala. 411; Hart *v.* Freeman, 42 Ala. 567; Dillard *v.* Scruggs, 36 Ala. 670; Stallworth *v.* Preslar, 34 Ala. 505; Pettus *v.* Roberts, 6 Ala. 811.

Arkansas.— Springfield, etc., R. Co. *v.* Allen, 46 Ark. 217; Humphries *v.* McCraw, 5 Ark. 61; Trowbridge *v.* Sanger, 4 Ark. 179.

California.— Lacrabere *v.* Wise, (1903) 71 Pac. 175; Hawley *v.* Bader, 15 Cal. 44.

Colorado.— Colorado School Land Leasing, etc., Co. *v.* Ponick, 16 Colo. App. 478, 66 Pac. 458; Mulligan *v.* Smith, 13 Colo. App. 231, 57 Pac. 731.

Connecticut.— Bishop *v.* Perkins, 19 Conn. 300.

Delaware.— Tatman *v.* Barrett, 3 Houst. 226; Cannon *v.* Kinney, 3 Harr. 317.

District of Columbia.— Connell *v.* Vanderwerken, 1 Mackey 242.

Georgia.— Bigham *v.* Coleman, 71 Ga. 176; Scurry *v.* Cotton States L. Ins. Co., 51 Ga. 624; Dunagan *v.* Dunagan, 38 Ga. 554.

Idaho.— Barghoorn *v.* Moore, 6 Ida. 531, 57 Pac. 265.

Illinois.— Starkweather *v.* Maginnis, 196 Ill. 274, 63 N. E. 692 [*affirming* 98 Ill. App. 143]; Reading *v.* Traver, 83 Ill. 372; White *v.* Merrell, 32 Ill. 511; Scott *v.* Bennett, 8 Ill. 243; O'Bannon *v.* Vigus, 32 Ill. App. 473.

Indiana.— Fordice *v.* Scribner, 108 Ind. 85, 9 N. E. 122; Flood *v.* Joyner, 96 Ind. 459; Travellers' Ins. Co. *v.* Chappelow, 83 Ind. 429; Pauley *v.* Weisart, 59 Ind. 241; Charlton *v.* Tardy, 28 Ind. 452; Henry *v.* Henry, 11 Ind. 236, 71 Am. Dec. 354; Pribble *v.* Kent, 10 Ind. 325, 71 Am. Dec. 327; Robison *v.* Wolf, 27 Ind. App. 683, 62 N. E. 74; Fox *v.* Cox, 20 Ind. App. 61, 50 N. E. 92.

Iowa.— Mast *v.* Pearce, 58 Iowa 579, 8 N. W. 632, 12 N. W. 597; Perkins *v.* Hodge, 38 Iowa 284; Kohn *v.* Zimmerman, 34 Iowa 544.

Kansas.— Ellicott *v.* Barnes, 31 Kan. 170, 1 Pac. 767; Thompson *v.* Williams, 30 Kan. 114, 1 Pac. 47.

Kentucky.— Clay *v.* Clay, 3 Metc. 548; Byrne *v.* Schwing, 6 B. Mon. 199; Dana *v.* Boyd, 2 J. J. Marsh. 587; Hitt *v.* Holliday, 2 Litt. 332.

Louisiana.— Lee *v.* Carter, 52 La. Ann. 1453, 27 So. 739; Berard *v.* Boagni, 30 La. Ann. 1125; Borden *v.* Hope, 21 La. Ann. 581; Porter *v.* Brown, 21 La. Ann. 532; Draughan *v.* White, 21 La. Ann. 175; Bringier *v.* Gordon, 14 La. Ann. 274; Gray *v.* Lonsdale, 10 La. Ann. 749; Roy *v.* Gorton, 6 La. Ann. 203; Bass *v.* Balph, 5 La. Ann. 235; Copley *v.* Benton, 2 La. Ann. 590; Clamagaran *v.* Sacerdotte, 8 Mart. N. S. 533. But *compare* Mather *v.* Knox, 34 La. Ann. 410 (holding that a tutor's receipt, by authentic act, for money due his wards, cannot be contradicted by parol evidence); Knox *v.* Liddell, 5 Rob. 111; Adams *v.* Gaynard, 5 Mart. N. S. 248.

Maine.— Truworthy *v.* French, 97 Me. 143, 53 Atl. 1005; Robbins Cordage Co. *v.* Brewer, 48 Me. 481; Richardson *v.* Beede, 43 Me. 161.

Maryland.— Bladen *v.* Wells, 30 Md. 577; Cramer *v.* Shriner, 18 Md. 140; Shepherd *v.* Bevin, 9 Gill 32.

Massachusetts.— Brooks *v.* White, 2 Metc. 283, 37 Am. Dec. 95; Stackpole *v.* Arnold, 11 Mass. 27, 6 Am. Dec. 150. See also Nelson *v.* Weeks, 111 Mass. 223.

operation and even contradicted, is that they are usually general in their expressions, and many matters, not thought of at the time, might otherwise be controlled by their general expressions, contrary to right and contrary to the intention of the

Michigan.— French *v.* Newberry, 124 Mich. 147, 82 N. W. 840; Cohen *v.* Jackoboice, 101 Mich. 409, 59 N. W. 665.

Minnesota.— Elsbarg *v.* Myrman, 41 Minn. 541, 43 N. W. 572; Burke *v.* Ray, 40 Minn. 34, 41 N. W. 240; McKinney *v.* Harvie, 38 Minn. 18, 35 N. W. 668, 8 Am. St. Rep. 640; Morris *v.* St. Paul, etc., R. Co., 21 Minn. 91.

Mississippi.—Anderson *v.* Root, 8 Sm. & M. 362.

Missouri.— Squier *v.* Evans, 127 Mo. 514, 30 S. W. 143; Carpenter *v.* Jamison, 75 Mo. 285; Alexander *v.* Moore, 19 Mo. 143; The Charlotte *v.* Hammond, 9 Mo. 59, 43 Am. Dec. 536; State *v.* Cummiskey, 34 Mo. App. 189.

Nebraska.— Sylvester *v.* Carpenter Paper Co., 55 Nebr. 621, 75 N. W. 1092; Barnett *v.* Pratt, 37 Nebr. 349, 55 N. W. 1050.

New Hampshire.— Cass *v.* Brown, 68 N. H. 85, 44 Atl. 86; Goodwin *v.* Goodwin, 59 N. H. 548; Furbush *v.* Goodwin, 25 N. H. 425; Hersom *v.* Henderson, 23 N. H. 498; Pendexter *v.* Carleton, 16 N. H. 482.

New Jersey.— Joslin *v.* Giese, 59 N. J. L. 130, 36 Atl. 680; Britton *v.* McDonald, 43 N. J. L. 591; Dorman *v.* Wilson, 39 N. J. L. 474.

New York.— Ryan *v.* Ward, 48 N. Y. 204, 8 Am. Rep. 539; Buswell *v.* Poineer, 37 N. Y. 312; McKinster *v.* Babcock, 26 N. Y. 378; Terry *v.* Wheeler, 25 N. Y. 520; Filkins *v.* Whyland, 24 N. Y. 338 [*affirming* 24 Barb. 379]; Meislahn *v.* Irving Nat. Bank, 62 N. Y. App. Div. 231, 70 N. Y. Suppl. 988 [*affirmed* in 172 N. Y. 631, 65 N. E. 1119]; Komp *v.* Raymond, 42 N. Y. App. Div. 32, 58 N. Y. Suppl. 909; Emmett *v.* Pennoyer, 76 Hun 551, 28 N. Y. Suppl. 234; Jones *v.* Ennis, 18 Hun 452; Trull *v.* Barkley, 11 Hun 644; Syracuse, etc., R. Co. *v.* Collins, 3 Lans. 29; Ide *v.* Sadler, 18 Barb. 32; Sheldon *v.* Peck, 13 Barb. 317; Green *v.* Rochester Iron Mfg. Co., 1 Thomps. & C. 5; Johnson *v.* Weed, 9 Johns. 310, 6 Am. Dec. 279; McKinstry *v.* Pearsall, 3 Johns. 319; House *v.* Low, 2 Johns. 378; Murray *v.* Gouverneur, 2 Johns. Cas. 438, 1 Am. Dec. 177.

North Carolina.— Keaton *v.* Jones, 119 N. C. 43, 25 S. E. 710; Bryan *v.* Hodges, 107 N. C. 492, 12 S. E. 430; Harper *v.* Dail, 92 N. C. 394; Wilson *v.* Derr, 69 N. C. 137; Wilson *v.* Holley, 66 N. C. 408; Newbern *v.* Dawson, 32 N. C. 436.

Ohio.— Stone *v.* Vance, 6 Ohio 246; Seeman *v.* Ohio Coal Min. Co., 22 Ohio Cir. Ct. 311, 12 Ohio Cir. Dec. 206; Miller *v.* Sullivan, 1 Cinc. Super. Ct. 271 [*affirmed* in 26 Ohio St. 639].

Oregon.— Milos *v.* Covacevich, 40 Oreg. 239, 66 Pac. 914.

Pennsylvania.— Schaeffer *v.* Sensinig, 182 Pa. St. 634, 38 Atl. 473; Shepherd *v.* Busch, 154 Pa. St. 149, 26 Atl. 363, 35 Am. St. Rep. 815; Borlin *v.* Highberger, 104 Pa. St. 143; Russell *v.* Pottsville First Presb. Church, 65 Pa. St. 9; Dutton *v.* Tilden, 13 Pa. St. 46; Pleasants *v.* Pemberton, 1 Yeates 202, 2 Dall. 196, 1 L. ed. 346.

Rhode Island.—Vaughan *v.* Mason, 23 R. I. 348, 50 Atl. 390.

South Carolina.—Rapley *v.* Klugh, 40 S. C. 134, 18 S. E. 680; Bomar *v.* Asheville, etc., R. Co., 30 S. C. 450, 9 S. E. 512; Bulwinkle *v.* Cramer, 27 S. C. 376, 3 S. E. 776, 13 Am. St. Rep. 645; Moffatt *v.* Hardin, 22 S. C. 9; Brice *v.* Hamilton, 12 S. C. 32; Heath *v.* Steele, 9 S. C. 86; McElwee *v.* Jeffreys, 7 S. C. 228; Wright *v.* Wright, 2 McCord Eq. 185. But *compare* Union Bank *v.* Sollee, 2 Strobh. (S. C.) 390.

South Dakota.— Osborne *v.* Stringham, 4 S. D. 593, 57 N. W. 776.

Tennessee.— Stewart *v.* Phœnix Ins. Co., 9 Lea 104; Kirkpatrick *v.* Smith, 10 Humphr. 188.

Texas.—Pool *v.* Chase, 46 Tex. 207; Swann *v.* Muschke, 42 Tex. 342; Rogers *v.* Tomlinson, (Civ. App. 1896) 38 S. W. 244.

Vermont.— Randall *v.* Kelsey, 46 Vt. 158; Hitt *v.* Slocum, 37 Vt. 524.

Virginia.— Tuley *v.* Barton, 79 Va. 387.

Washington.— Allen *v.* Tacoma Mill Co., 18 Wash. 216, 51 Pac. 372.

West Virginia.— Cushwa *v.* Martinsburg Imp., etc., Assoc., 45 W. Va. 490, 32 S. E. 259; Dunlap *v.* Shanklin, 10 W. Va. 662; Dolan *v.* Freiberg, 4 W. Va. 101.

Wisconsin.— Seeger *v.* Manitowoc Steam Boiler Works, 120 Wis. 11, 97 N. W. 485; Twohy Mercantile Co. *v.* McDonald, 108 Wis. 21, 83 N. W. 1107; Charboneau *v.* Orton, 43 Wis. 96; Woodman *v.* Clapp, 21 Wis. 350.

United States.— New England Mortg. Sec. Co. *v.* Gay, 33 Fed. 636; Shaw *v.* Thompson, 21 Fed. Cas. No. 12,726, Olcott 144.

England.— Straton *v.* Rastall, 2 T. R. 366.

Canada.— Whitney *v.* Clark, 3 L. C. Jur. 318; Steinhoff *v.* McRae, 13 Ont. 546; Baskerville *v.* Doan, 12 U. C. C. P. 127; Montforton *v.* Bondit, 1 U. C. Q. B. 362.

See 20 Cent. Dig. tit. "Evidence," § 1829.

The rule has been applied to a receipt for rent (Bettman *v.* Shadle, 22 Ind. App. 542, 53 N. E. 662), a receipt for a note (King *v.* Mitchell, 30 Ga. 164), a receipt for a legacy (Sparhawk *v.* Buell, 9 Vt. 41), a receipt given to an officer to make up his record in a foreclosure suit (Hardin *v.* Dickey, 123 Cal. 513, 56 Pac. 258), a receipt given in satisfaction of a judgment (Dunn *v.* Pipes, 20 La. Ann. 276), a receipt given by the agent of a fire-insurance company for the premium on a policy (Ferebee *v.* North Carolina Mut. Home Ins. Co., 68 N. C. 11), a receipt given, on a settlement, to a guardian by his ward (Beedle *v.* State, 62 Ind. 26; Powell *v.* Powell, 52 Mich. 432, 18 N. W. 203), or by the executor of a deceased ward (Heath *v.* Steele, 9 S. C. 86), a receipt by a carrier for goods to be transported (Deford

parties; and that many mistakes are made in settlements, to correct which the doors of justice should not be shut by the general terms of a receipt, which describes no particulars of what is settled,[91] and hence that when a receipt contains no general or vague expressions, but is definitely descriptive of what is intended to be affected thereby, such a receipt, like other writings in general, must not be assailed with parol evidence, unless on the ground of fraud.[92] A more satisfactory explanation is that such instruments are in no way contractual in their nature, but are mere acknowledgments, and that the reason which has given rise to the parol evidence rule has no application to them.[93]

(II) *Instruments Within the Rule.* The rule that parol evidence is admissible to explain or contradict receipts applies to all writings which are in the nature of receipts, even though they might not technically be termed such,[94] and regardless of whether they are independent instruments, or mere parts of[95] or indorsements on other instruments.[96] A receipt given by a public officer in the

v. Seinour, Smith (Ind.) 325; Tierney *v.* New York Cent., etc., R. Co., 67 Barb. (N. Y.) 538. And see *supra*, XVI, B, 2, h, (III), (C)), and a receipt given by a route messenger of an express company (Swann *v.* Southern Express Co., 53 Miss. 286).

A receipt for a note "in payment" may be contradicted, to show that it was not taken in payment. Gravlee *v.* Lamkin, 120 Ala. 210, 24 So. 756.

A receipt under seal is conclusive and cannot be controverted by parol evidence. State *v.* Messick, 1 Houst. (Del.) 347. See also Outten *v.* Knowles, 4 Harr. (Del.) 533, holding that a receipt and acquittance of a ward, sealed, acknowledged, and recorded under an act of assembly was conclusive against him, and could not be corrected in an action against the guardian. *Compare* Felton *v.* Long, 43 N. C. 224, holding that a sealed receipt is no bar to a bill by wards against their guardian for an account, on the ground of a mistake which the guardian admits.

Sworn denial of execution of a receipt is not necessary before a party can contradict it. Ditch *v.* Vollhardt, 82 Ill. 134.

91. Raymond *v.* Roberts, 2 Aik. (Vt.) 204, 16 Am. Dec. 698.

92. Hull *v.* Butler, 7 Ind. 267; Raymond *v.* Roberts, 2 Aik. (Vt.) 204, 16 Am. Dec. 698.

93. See cases cited *supra*, note 90.

94. Quattrochi *v.* Farmers, etc., Bank, 89 Mo. App. 500 (an entry of a bank deposit in a pass-book); Hotchkiss *v.* Mosher, 48 N. Y. 478 (a certificate of deposit). See also Williamson *v.* Reddish, 45 Iowa 550; Eaton *v.* Alger, 2 Abb. Dec. (N. Y.) 5, 2 Keyes (N. Y.) 41; Fareira *v.* Smith, 3 Misc. (N. Y.) 255, 22 N. Y. Suppl. 939.

A letter stating that the writer had collected a certain sum of money for the person addressed is a receipt, and may be explained by parol evidence, when no one has been prejudiced by acting on it. Carr *v.* Miner, 42 Ill. 179.

A written memorandum of a settlement, like an ordinary receipt, is open to explanation as to what transactions were in fact covered by its general terms. Thomas Pressed Brick Co. *v.* Fowler, 97 Ill. App. 80.

An entry of satisfaction on the record of a mortgage is not conclusive but may be explained or contradicted. Patch *v.* King, 29 Me. 448; Petway *v.* Matthews, (Tenn. Ch. App. 1901) 61 S. W. 1048; Thompson *v.* Avery, 11 Utah 214, 39 Pac. 829.

95. Mulligan *v.* Smith, 13 Colo. App. 231, 57 Pac. 731; Hildreth *v.* O'Brien, 10 Allen (Mass.) 104; Smith *v.* Holland, 61 N. Y. 635 (holding that a receipt which is embodied in a note is open to explanation by parol); Grier *v.* Mutual L. Ins. Co., 132 N. C. 542, 44 S. E. 28.

An acknowledgment in an insurance policy of the receipt of the premium is not conclusive evidence that the premium was paid but may be explained or contradicted (Sheldon *v.* Atlantic F. & M. Ins. Co., 26 N. Y. 460, 84 Am. Dec. 231; Pennsylvania Ins. Co. *v.* Smith, 3 Whart. (Pa.) 520; Texas Mut. L. Ins. Co. *v.* Davidge, 51 Tex. 244; Laughlin *v.* Fidelity Mut. L. Ins. Assoc., 8 Tex. Civ. App. 448, 28 S. W. 411), even though a showing of non-payment may invalidate the policy (Sheldon *v.* Atlantic F. & M. Ins. Co., 26 N. Y. 460, 84 Am. Dec. 231 [*distinguishing* Goit *v.* National Protection Ins. Co., 25 Barb. (N. Y.) 189; Dalzell *v.* Mair, 1 Campb. 532; De Gaminde *v.* Pigou, 4 Taunt. 246; Mavor *v.* Simeon, 3 Taunt. 497 note; Foy *v.* Bell, 3 Taunt. 493]. *Contra*, Provident L. Ins. Co. *v.* Fennell, 49 Ill. 180; Illinois Cent. Ins. Co. *v.* Wolf, 37 Ill. 354, 87 Am. Dec. 251; Trager *v.* Louisiana Equitable L. Ins. Co., 31 La. Ann. 235, in which the recital of payment was regarded as contractual. See, generally, Insurance.

A receipt in a deed may be contradicted. Woollen *v.* Hillen, 9 Gill (Md.) 185, 52 Am. Dec. 690; Soule *v.* Soule, 157 Mass. 451, 32 N. E. 663.

A receipt in a broker's contract for the sale of stock acknowledging the receipt of the first payment or the margin on the contract is only *prima facie* evidence of the payment of the money, and may be explained by parol evidence. Winans *v.* Hassey, 48 Cal. 634.

96. *Alabama.*— Gayle *v.* Randle, 1 Stew. 529.

Georgia.— Pettyjohn *v.* Liebscher, 92 Ga. 149, 17 S. E. 1007.

discharge of his duties as such is no more protected from contradiction or explanation by parol evidence than any other receipt.[97]

(III) *Receipts Contractual in Nature.* Where a writing, although in the form of a receipt, also embodies the elements of a contract, it is, in so far as it expresses the contract or is contractual in its nature, subject to the same rules as any other contract and is not open to contradiction by parol;[98] and of course the mere fact that a contract, as part of its terms, acknowledges the receipt of certain

Illinois.— Richardson *v.* Hadsall, 106 Ill. 476.

Kentucky.— Baugh *v.* Brassfield, 5 J. J. Marsh. 78.

Maryland.— Oneale *v.* Lodge, 3 Harr. & M. 433, 1 Am. Dec. 377.

Minnesota.— Sears *v.* Wempner, 27 Minn. 351, 7 N. W. 362.

Missouri.— Lionberger *v.* Pohlman, 13 Mo. App. 123.

Wisconsin.— Woodman *v.* Clapp, 21 Wis. 350.

See 20 Cent. Dig. tit. "Evidence," § 1834.

A credit indorsed on a note may be explained. Sanders *v.* Huey, 4 La. Ann. 518.

Indorsements of payments made upon promissory notes, whether of interest or principal, constitute, when made upon the note itself, no part of the note, but are to be considered the same as receipts, executed by the holder to the maker of the note, for the sums received, and parol evidence is admissible to explain them, or even to show that they were erroneously placed upon the note. McDaniels *v.* Lapham, 21 Vt. 222.

97. *Alabama.*— Haynes *v.* Wheat, 9 Ala. 329.

Kansas.— Stout *v.* Hyatt, 13 Kan. 232.

Maine.— Nason *v.* Read, 7 Me. 22.

Michigan.—Woodbury *v.* Lewis, Walk. 256.

Mississippi.—Butler *v.* State, 81 Miss. 734, 33 So. 847.

Missouri.— Cole County *v.* Dallmeyer, 101 Mo. 57, 13 S. W. 687.

Vermont.— Nye *v.* Kellam, 18 Vt. 594. See also Downer *v.* Bowen, 12 Vt. 452.

See 20 Cent. Dig. tit. "Evidence," § 1836.

Compare Halsey *v.* Blood, 29 Pa. St. 319.

Tax receipts are not conclusive. Gage *v.* Hampton, 127 Ill. 87, 20 N. E. 12, 2 L. R. A. 512; Stumpf *v.* Osterhage, 111 Ill. 82; Elston *v.* Kennicott, 52 Ill. 272; Elston *v.* Kennicott, 46 Ill. 187; Rand *v.* Scofield, 43 Ill. 167; Municipality No. 1 *v.* Wheeler, 10 La. Ann. 745; Hammond *v.* Hannin, 21 Mich. 374, 4 Am. Rep. 490.

98. *Alabama.*— Gravlee *v.* Lamkin, 120 Ala. 210, 24 So. 756.

Connecticut.— Barber *v.* Brace, 3 Conn. 9, 8 Am. Dec. 149.

Delaware.— Tatman *v.* Barrett, 3 Houst. 226.

Georgia.— Simmons *v.* Martin, 52 Ga. 570.

Illinois.— Hossack *v.* Moody, 39 Ill. App. 17; Fowler *v.* Richardson, 32 Ill. App. 252.

Indiana.— Fordice *v.* Scribner, 108 Ind. 85, 9 N. W. 122; Long *v.* Straus, 107 Ind. 94, 6 N. E. 123, 7 N. E. 763, 57 Am. Rep. 87; Alcorn *v.* Morgan, 77 Ind. 184; McKernan *v.* Mayhew, 21 Ind. 291; Dale *v.* Evans, 14 Ind. 288; Henry *v.* Henry, 11 Ind. 236, 71 Am. Dec. 354; Tisloe *v.* Graeter, 1 Blackf. 353.

Iowa.— Marks *v.* Cass County Mill, etc., Co., 43 Iowa 146; Stapleton *v.* King, 33 Iowa 28, 11 Am. Rep. 109.

Kansas.— Thompson *v.* Williams, 30 Kan. 114, 1 Pac. 47.

Kentucky.— Lemaster *v.* Buckhart, 2 Bibb 25. See also Querry *v.* White, 1 Bibb 271.

Louisiana.— See Young *v.* Cook, 15 La. Ann. 126.

Massachusetts.— Bursley *v.* Hamilton, 15 Pick. 40, 25 Am. Dec. 423; Wakefield *v.* Stedman, 12 Pick. 562.

Michigan.—Cohen *v.* Jackoboice, 101 Mich. 409, 59 N. W. 665.

Minnesota.— Cummings *v.* Baars, 36 Minn. 350, 31 N. W. 449; Morris *v.* St. Paul, etc., R. Co., 21 Minn. 91; Knoblauch *v.* Kronschnabel, 18 Minn. 300; Wykoff *v.* Irvine, 6 Minn. 496, 80 Am. Dec. 461.

Mississippi.— Johnson *v.* Johnson, 74 Miss. 549, 21 So. 147.

Missouri.— Blakely *v.* Bennecke, 59 Mo. 193; Montany *v.* Rock, 10 Mo. 506; Slattery *v.* Bates, 8 Mo. App. 595.

New Hampshire.— Cass *v.* Brown, 68 N. H. 85, 44 Atl. 86; Goodwin *v.* Goodwin, 59 N. H. 548; Probate Judge *v.* Adams, 49 N. H. 150; Scott *v.* Whittemore, 27 N. H. 309; Remick *v.* Atkinson, 11 N. H. 256, 35 Am. Dec. 493.

New York.— Meyer *v.* Lathrop, 73 N. Y. 315; Hinckley *v.* New York Cent. R. Co., 56 N. Y. 429; Graves *v.* Dudley, 20 N. Y. 76; Parker *v.* North German Lloyd Steamship Co., 74 N. Y. App. Div. 16, 76 N. Y. Suppl. 806; Milton *v.* Hudson River Steamboat Co., 4 Lans. 76; Ide *v.* Sadler, 18 Barb. 32; Sheldon *v.* Peck, 13 Barb. 317; Niles *v.* Culver, 8 Barb. 205; Egleston *v.* Knickerbacker, 6 Barb. 458; Berrian *v.* New York, 4 Rob. 538; Vacheron *v.* Hildebrant, 39 Misc. 61, 78 N. Y. Suppl. 771; Tower *v.* Blessing, 29 Misc. 276, 61 N. Y. Suppl. 255; La Farge *v.* Rickert, 5 Wend. 187, 21 Am. Dec. 209.

North Carolina.— Grier *v.* Mutual L. Ins. Co., 132 N. C. 542, 44 S. E. 28; Keaton *v.* Jones, 119 N. C. 43, 25 S. E. 710; Smith *v.* Brown, 10 N. C. 580; Clark *v.* McMillan, 4 N. C. 244.

North Dakota.— Prairie School Tp. *v.* Haseleu, 3 N. D. 328, 55 N. W. 938.

Ohio.— Stone *v.* Vance, 6 Ohio 246.

Oregon.—Milos *v.* Covacevich, 40 Oreg. 239, 66 Pac. 914.

Pennsylvania.— Wood *v.* Donahue, 94 Pa. St. 128; Newman *v.* Hunt, 1 Phila. 503.

Rhode Island.—Vaughan *v.* Mason, 23 R. I. 348, 50 Atl. 390.

South Carolina.— Harris *v.* Dinkins, 4 Desauss. 60.

money or property does not render the writing a mere receipt subject to be contradicted by parol evidence.[99] But where a written instrument is both a receipt and an agreement or contract, the contractual nature of the writing does not prevent the admission of parol evidence to contradict or explain that portion which is operative only as a receipt.[1]

(iv) *Warehouse and Storage Receipts.* A warehouse or storage receipt evidences a contract of storage between the maker of the receipt and the person to whom it is issued, and hence is, according to the better view, within the rule prohibiting the admission of parol evidence to vary contracts;[2] but when it is nothing more than an acknowledgment of the receipt of property it stands on the same ground as other receipts and is open to parol explanation or contradiction.[3]

(v) *Receipts Amounting to Accord and Satisfaction.* When the receipt contains anything in the nature of an agreement upon the compromise or settlement of disputed claims or unliquidated damages that one party shall accept and receive from the other a certain sum of money or certain property in satis-

South Dakota.— Washabaugh *v.* Hall, 4 S. D. 168, 56 N. W. 82.

Tennessee.— Stewart *v.* Phœnix Ins. Co., 9 Lea 104; Western, etc., R. Co. *v.* McElwee, 6 Heisk. 208.

Texas.— Lanes *v.* Squires, 45 Tex. 382.

Vermont.— McGregor *v.* Bugbee, 15 Vt. 734; Parsons *v.* Strong, 13 Vt. 235.

Virginia.— Tuley *v.* Barton, 79 Va. 387.

Wisconsin.— Harrison *v.* Juneau Bank, 17 Wis. 340.

United States.— Fire Ins. Assoc. *v.* Wickham, 141 U. S. 564, 12 S. Ct. 84, 35 L. ed. 860.

Canada.— West *v.* Fleck, 15 L. C. Rep. 422; Gilchrist *v.* Lachaud, 14 Quebec 278.

See 20 Cent. Dig. tit. "Evidence," § 1831.

A warranty in a receipt cannot be contradicted. Davis *v.* Ball, 6 Cush. (Mass.) 505, 53 Am. Dec. 53.

Receipt "for collection."— A receipt stating that the signer has received a certain note or other evidence of indebtedness "for collection" is with respect to such recital a contract which cannot be varied or contradicted by parol. Foulks *v.* Falls, 91 Ind. 315; Langdon *v.* Langdon, 4 Gray (Mass.) 186; Wood *v.* Whiting, 21 Barb. (N. Y.) 190; Tuley *v.* Barton, 79 Va. 387. *Contra*, Cox *v.* Sullivan, 7 Ga. 144, 50 Am. Dec. 386; Mann *v.* Major, 6 Rob. (La.) 475.

An accountable receipt given to an officer for goods attached on mesne process cannot be varied by parol evidence. Curtis *v.* Wakefield, 15 Pick. (Mass.) 437; Bursley *v.* Hamilton, 15 Pick. (Mass.) 40, 25 Am. Dec. 423; Wakefield *v.* Stedman, 12 Pick. (Mass.) 562; Brown *v.* Gleed, 33 Vt. 147.

Receipt not constituting contract.— A receipt in the following form: "Received . . . sixty dollars, to apply on purchase of lot . . . at the price of $1,100; the balance to be paid in 15 days from this date, provided the title of said lot is proved good, . . . and on the delivery of good and sufficient warranty deed. Possession of said premises is this day surrendered to" the purchaser, has been held not such an instrument as should be considered a written agreement of sale, shutting out all oral proof of the bargain between the parties. Baily *v.* Cornell, 66 Mich. 107, 33 N. W. 50. See also McKinney *v.* Harvie, 38 Minn. 18, 35 N. W. 668, 8 Am. St. Rep. 640.

99. Taylor *v.* Taylor, (Tex. Civ. App. 1900) 54 S. W. 1039.

1. Hossack *v.* Moody, 39 Ill. App. 17; Goodwin *v.* Goodwin, 59 N. H. 548; Prairie School Tp. *v.* Haseleu, 3 N. D. 328, 55 N. W. 938. See *supra*, XVI, B, 2, p, (II).

2. *Illinois.*— Leonard *v.* Dunton, 51 Ill. 482, 99 Am. Dec. 568.

Iowa.— Marks *v.* Cass County Mill, etc., Co., 43 Iowa 146.

Minnesota.— Thompson *v.* Thompson, 78 Minn. 389, 81 N. W. 204, 543; Tarbell *v.* Farmers' Mut. Elevator Co., 44 Minn. 471, 47 N. W. 152.

New Hampshire.— Scott *v.* Whittemore, 27 N. H. 309.

New York.— Wadsworth *v.* Alcott, 6 N. Y. 64; Peck *v.* Armstrong, 38 Barb. 215.

Oregon.— Hirsch *v.* Salem Mills Co., 40 Oreg. 601, 67 Pac. 949, 68 Pac. 733.

Pennsylvania.—Union Storage Co. *v.* Speck, 194 Pa. St. 126, 45 Atl. 48.

See 20 Cent. Dig. tit. "Evidence," § 1825. And see, generally, Warehousemen.

As between the maker and an assignee who has in good faith taken a warehouse receipt as security for money advanced, the instrument is not simply a receipt subject to be explained by parol proof, but a contract subject to the rules applicable to other contracts and excluding parol proof. This is not upon the ground that such receipts are negotiable strictly, but that they are *sui generis* and stand upon grounds applicable to that class of paper. Stewart *v.* Phœnix Ins. Co., 9 Lea (Tenn.) 104.

Where an oral contract for storage has preceded the giving of a warehouse receipt, such receipt, being written and signed by only one of the parties, must embody the real contract, and if it does not do so this fact may be shown by parol. Windell *v.* Readman Warehouse Co., 30 Wash. 469, 71 Pac. 56.

3. Wadsworth *v.* Allcott, 6 N. Y. 64; Hirsch *v.* Salem Mills Co., 40 Oreg. 601, 67 Pac. 949, 68 Pac. 733. A receipt for property to be held

faction and discharge, the paper signed is a contract between the parties and must be treated as such, and in the absence of fraud or mistake cannot be varied or contradicted by parol.[4]

(VI) *RECEIPTS IN FULL.* The mere fact that a receipt expresses on its face that it is "in full" of all demands or of certain demands does not make the instrument of such a contractual nature as to preclude the admission of parol evidence to vary its effect.[5]

subject to the order of a third person may be impeached unless the third person has incurred some responsibility or done some act on the credit of it. Bebee *v.* Moore, 3 Fed. Cas. No. 1,202, 3 McLean 387. A receipt to a warehouseman on return of the goods reciting their return "in good condition" is not conclusive on the receiptor in an action for injuries to the goods. Comerford *v.* Smith, 82 N. Y. App. Div. 638, 81 N. Y. Suppl. 610.

4. *Alabama.*— Motley *v.* Motley, 45 Ala. 555.

Connecticut.— Bull *v.* Bull, 43 Conn. 455; Carter *v.* Bellamy, Kirby 291.

Massachusetts.— Squires *v.* Amherst, 145 Mass. 192, 13 N. E. 609; James *v.* Bligh, 11 Allen 4; Brown *v.* Cambridge, 3 Allen 474.

Minnesota.— Cummings *v.* Baars, 36 Minn. 350, 31 N. W. 449.

Missouri.— Carpenter *v.* Jamison, 6 Mo. App. 216 [*affirmed* in 75 Mo. 285]. See also Buffington *v.* South Missouri Land Co., 25 Mo. App. 492.

New York.— Coon *v.* Knap, 8 N. Y. 402, 59 Am. Dec. 502; Komp *v.* Raymond, 42 N. Y. App. Div. 32, 55 N. Y. Suppl. 909; Howard *v.* Norton, 65 Barb. 161; Downing *v.* Smith, 4 Redf. Surr. 310. See also Drew *v.* New York, 8 Hun 443.

Ohio.— Jackson *v.* Ely, 57 Ohio St. 450, 49 N. E. 792; Seeman *v.* Ohio Coal Min. Co., 22 Ohio Cir. Ct. 311, 12 Ohio Cir. Dec. 206.

Rhode Island.—Vaughan *v.* Mason, 23 R. I. 348, 50 Atl. 390.

Wisconsin.— Kammermeyer *v.* Hilz, 107 Wis. 101, 82 N. W. 689.

United States.— The Cayuga, 59 Fed. 483, 8 C. C. A. 188.

See 20 Cent. Dig. tit. "Evidence," §§ 1830, 1831.

Compare Counselman *v.* Collins, 35 Ill. App. 68.

5. *Alabama.*— Rarden *v.* Cunningham, 136 Ala. 263, 34 So. 26.

Arkansas.— See Thompson *v.* Lemoyne, 5 Ark. 312.

District of Columbia.— Connell *v.* Vanderwerken, 1 Mackey 242.

Georgia.— Walters *v.* Odom, 53 Ga. 286; Alexander *v.* Alexander, 46 Ga. 283.

Illinois.— Walrath *v.* Norton, 10 Ill. 437; Culver *v.* Belt, 72 Ill. App. 619.

Indiana.— Beedle *v.* State, 62 Ind. 26; Markel *v.* Spitler, 28 Ind. 488; Ohio, etc., R. Co. *v.* Crumbo, 4 Ind. App. 456, 30 N. E. 434.

Iowa.— Mounce *v.* Kurtz, 101 Iowa 192, 70 N. W. 119.

Kansas.— Clark *v.* Marbourg, 33 Kan. 471, 6 Pac. 548; American Bridge Co. *v.* Murphy, 13 Kan. 35.

Louisiana.— See Gray *v.* Lonsdale, 10 La. Ann. 749.

Minnesota.— Cummings *v.* Baars, 36 Minn. 350, 31 N. W. 449.

Missouri.— Bigbee *v.* Coombs, 64 Mo. 529; Edwards *v.* Smith, 63 Mo. 119; Ireland *v.* Spickard, 95 Mo. App. 53, 68 S. W. 748; Lionberger *v.* Pohlman, 13 Mo. App. 123; Slattery *v.* Bates, 8 Mo. App. 595.

Nebraska.— Barnett *v.* Pratt, 37 Nebr. 349, 55 N. W. 1050.

New Hampshire.— Gleason *v.* Sawyer, 22 N. H. 85.

New York.— Komp *v.* Raymond, 175 N. Y. 102, 67 N. E. 113 [*reversing* 71 N. Y. App. Div. 612, 76 N. Y. Suppl. 1018]; Ryan *v.* Ward, 48 N. Y. 204, 8 Am. Rep. 539; Joslyn *v.* Capron, 64 Barb. 598; Colburn *v.* Lansing, 46 Barb. 37; Churchill *v.* Bradley, 43 N. Y. Super. Ct. 170; Tower *v.* Blessing, 29 Misc. 276, 61 N. Y. Suppl. 255; Tobey *v.* Barber, 5 Johns. 68, 4 Am. Dec. 326; Ensign *v.* Webster, 1 Johns. Cas. 145; Van Rensselaer *v.* Morris, 1 Paige 13. See also Herold *v.* Fleming, 17 Misc. 581, 40 N. Y. Suppl. 690. *Contra*, Berrian *v.* New York, 4 Rob. 538; Vacheron *v.* Hildebrant, 39 Misc. 61, 78 N. Y. Suppl. 771.

North Carolina.— Reid *v.* Reid, 13 N. C. 247, 18 Am. Dec. 570.

Oregon.— Williams *v.* Poppleton, 3 Oreg. 139.

Pennsylvania.— Haverly *v.* State Line, etc., R. Co., 125 Pa. St. 116, 17 Atl. 224; Megargel *v.* Megargel, 105 Pa. St. 475; Horton's Appeal, 38 Pa. St. 294; Gue *v.* Kline, 13 Pa. St. 60. See also Trymby *v.* Andress, 175 Pa. St. 6, 34 Atl. 347.

South Carolina.— Heller *v.* Charleston Phosphate Co., 28 S. C. 224, 5 S. E. 611. See also McDowall *v.* Lemaitre, 2 McCord (S. C.) 320.

Texas.— Rogers *v.* Tomlinson, (Civ. App. 1896) 38 S. W. 244. But *compare* Adriance *v.* Crews, 38 Tex. 148.

Vermont.— McLane *v.* Johnson, 59 Vt. 237, 9 Atl. 837; Sparhawk *v.* Buell, 9 Vt. 41. *Contra*, Sessions *v.* Gilbert, Brayt. 75.

Washington.— Allen *v.* Tacoma Mill Co., 18 Wash. 216, 51 Pac. 372.

West Virginia.— Dolan *v.* Freiberg, 4 W. Va. 101.

Wisconsin.— Twohy Mercantile Co. *v.* McDonald, 108 Wis. 21, 83 N. W. 1107; Smith *v.* Schulenberg, 34 Wis. 41. *Contra*, Conant *v.* Kimball, 95 Wis. 550, 70 N. W. 74.

United States.— Fire Ins. Assoc. *v.* Wickham, 141 U. S. 564, 12 S. Ct. 84, 35 L. ed.

q. Releases. A release is usually an instrument of such a contractual nature that it is within the rule prohibiting the admission of parol or extrinsic evidence to vary or contradict written contracts;[6] but such a writing may be so similar in its character to a receipt that the rules of evidence applicable to a receipt may be applied and it may be explained, controlled, qualified, or even contradicted by parol evidence.[7]

r. Transfers and Assignments. Where a transfer or assignment is clear and free from ambiguity parol evidence is not admissible to change the scope of the instrument.[8] This rule undoubtedly excludes any showing by the parties of parol

860; Leak *v.* Isaacson, 15 Fed. Cas. No. 8,160, Abb. Adm. 41; Thompson *v.* Faussat, 23 Fed. Cas. No. 13,954, Pet. C. C. 182; Thorne *v.* White, 23 Fed. Cas. No. 13,989, 1 Pet. Adm. 168.

See 20 Cent. Dig. tit. "Evidence," § 1830.

A different conclusion, when the terms of the instrument are considered is strongly indicated in some of the cases cited *supra*, note 4.

Evidence of a mistake must be full and certain to countervail receipts in full, in consequence of the interchange of which vouchers were destroyed. Barton *v.* Dunlap, 2 Mill (S. C.) 140.

A distinction has been made between the receipt of money in full payment and the receipt of property or other security, but there is no good ground for such a distinction. See Howard *v.* Norton, 65 Barb. (N. Y.) 161.

6. *Colorado.*— Denver, etc., R. Co. *v.* Sullivan, 21 Colo. 302, 41 Pac. 501.

Connecticut.— Drake *v.* Starks, 45 Conn. 96.

Illinois.— Clark *v.* Mallory, 185 Ill. 227, 56 N. E. 1099 [*affirming* 83 Ill. App. 488].

Kansas.— Atchison, etc., R. Co. *v.* Vanordstrand, 67 Kan. 386, 73 Pac. 113; Drumm Flato Commission Co. *v.* Barnard, 66 Kan. 568, 72 Pac. 257.

Kentucky.— Hitt *v.* Holliday, 2 Litt. 332.

Louisiana.— Morgan *v.* Morgan, 5 La. Ann. 230.

Maryland.— Neidig *v.* Whiteford, 29 Md. 178; Woollen *v.* Hillen, 9 Gill 185, 52 Am. Dec. 690.

Massachusetts.— Leddy *v.* Barney, 139 Mass. 394, 2 N. E. 107; Rice *v.* Woods, 21 Pick. 30; West Boylston Mfg. Co. *v.* Searle, 15 Pick. 225; Deland *v.* Amesbury Woolen, etc., Mfg. Co., 7 Pick. 244; Wade *v.* Howard, 6 Pick. 492.

Minnesota.— Thompson *v.* Layman, 41 Minn. 295, 42 N. W. 1061.

New York.— Van Bokkelen *v.* Taylor, 62 N. Y. 105; Howlett *v.* Howlett, 56 Barb. 467; Strong *v.* Dean, 55 Barb. 337; Curro *v.* Altieri, 32 Misc. 690, 66 N. Y. Suppl. 499; Andrews *v.* Brewster, 9 N. Y. Suppl. 114; Peet *v.* Cowenhoven, 14 Abb. Pr. 56; Hoes *v.* Van Hoesen, 1 Barb. Ch. 379; Van Brunt *v.* Van Brunt, 3 Edw. 14.

North Carolina.— Lowe *v.* Weatherley, 29 N. C. 353.

Ohio.— Cassilly *v.* Cassilly, 57 Ohio St. 582, 49 N. E. 795.

Rhode Island.— Vaughan *v.* Mason, 23 R. I. 348, 50 Atl. 390; Myron *v.* Union R. Co., 19 R. I. 125, 32 Atl. 165.

Tennessee.— Mayberry *v.* Jackson, 4 Hayw. 203.

Texas.— Moore *v.* Missouri, etc., R. Co., 30 Tex. Civ. App. 266, 69 S. W. 997.

United States.— St. Louis, etc., R. Co. *v.* Dearborn, 60 Fed. 880, 9 C. C. A. 286.

See 20 Cent. Dig. tit. "Evidence," §§ 1843–1845. And see, generally, RELEASE.

Accordingly it cannot be shown that a release was intended to embrace matters not specified therein (Frost *v.* Brigham, 139 Mass. 43, 29 N. E. 217; Brady *v.* Read, 94 N. Y. 631), or that a release of all demands was not intended to include a particular debt (Pierson *v.* Hooker, 3 Johns. (N. Y.) 68, 3 Am. Dec. 467).

A statute which permits inquiry into the consideration of a sealed instrument does not alter the rule of the common law by which an instrument under seal operates *per se* as an extinguishment of the debt to which it refers, and, although liable to be avoided by proof that it was obtained by fraud or duress, is not open to contradiction by parol evidence. Stearns *v.* Tappin, 5 Duer (N. Y.) 294.

Release of one of several joint obligors.— In equity the intent of the parties may be shown for the purpose of restraining the general effect of a release of one of several joint obligors and preventing the release from operating to discharge the others. This does not explain, vary, or contradict the language of the instrument but shows something extrinsic to and outside of it. Massey *v.* Brown, 4 S. C. 85.

7. Scott *v.* Scott, 105 Ind. 584, 5 N. E. 397; Penny *v.* Weston, 4 Rob. (La.) 165.

A recital as to payment of the consideration may be contradicted. Soule *v.* Soule, 157 Mass. 451, 32 N. E. 663.

A certificate under seal, of payment of a mortgage and note accompanying it, authorizing the register of deeds to discharge the mortgage on the record, has no element of a contract in it, and may, in an action on the note, be contradicted by parol. Thompson *v.* Layman, 41 Minn. 295, 42 N. W. 1061.

8. *Alabama.*— Griel *v.* Lomax, 86 Ala. 132, 5 So. 325.

Connecticut.— Galpin *v.* Atwater, 29 Conn. 93.

Indiana.— Woodall *v.* Greater, 51 Ind. 539; Rose *v.* Hurley, 39 Ind. 77.

Iowa.— Evans *v.* Burns, 67 Iowa 179, 25 N. W. 119.

reservations,[9] or evidence adding to the terms of the instrument by showing a parol warranty[10] or guaranty.[11] But the true character of the instrument or transaction may be shown, at least in equity.[12]

s. Wills. Parol evidence cannot be received to add to or vary a will,[13] but it is admissible to explain an equivocal clause.[14]

t. Writings Not Contractual Nor Amounting to Disposition of Property. A writing which does not vest, pass, or extinguish any right either by contract, operation of law, or otherwise, but is only used as evidence of a fact, the existence of which it acknowledges, and not as evidence of a contract or right, may be susceptible of explanation by extrinsic circumstances or facts.[15] This rule

Maine.— Knowlton Platform, etc., Co. *v.* Cook, 70 Me. 143.

Maryland.— Farrow *v.* Hayes, 51 Md. 498.

Massachusetts.— Munde *v.* Lambie, 122 Mass. 336; Howard *v.* Howard, 3 Metc. 548.

Michigan.— Jennings *v.* Moore, 83 Mich. 231, 47 N. W. 127, 21 Am. St. Rep. 601.

Minnesota.— Jones *v.* Alley, 17 Minn. 292.

Missouri.— State *v.* Hoshaw, 98 Mo. 358, 11 S. W. 759.

New Hampshire.— Currier *v.* Taylor, 19 N. H. 189.

New Jersey.— Taylor *v.* Sayre, 24 N. J. L. 647.

New York.— Emmett *v.* Penoyer, 151 N. Y. 564, 45 N. E. 1041; Baird *v.* Baird, 145 N. Y. 659, 40 N. E. 222, 28 L. R. A. 375; Marsh *v.* McNair, 99 N. Y. 174, 1 N. E. 660; Durgin *v.* Ireland, 14 N. Y. 322; Graves *v.* Porter, 11 Barb. 592; Hanes *v.* Sackett, 56 N. Y. App. Div. 610, 67 N. Y. Suppl. 843; Cosgriff *v.* Dewey, 21 N. Y. App. Div. 129, 47 N. Y. Suppl. 255.

Pennsylvania.— Hamilton *v.* Neel, 7 Watts 517.

South Carolina.—Arnold *v.* Bailey, 24 S. C. 493.

Texas.—Kalteyer *v.* Wipff, (Civ. App. 1901) 65 S. W. 207.

Vermont.— Fuller *v.* Hapgood, 39 Vt. 617.

Washington.— Osburn *v.* Dolan, 7 Wash. 62, 34 Pac. 433.

West Virginia.— Houston *v.* McNeer, 40 W. Va. 365, 22 S. E. 80.

Wisconsin.— Hahn *v.* Doolittle, 18 Wis. 196, 86 Am. Dec. 757.

United States.—Bast *v.* Ashland First Nat. Bank, 101 U. S. 93, 25 L. ed. 794; Smallwood *v.* Worthington, 22 Fed. Cas. No. 12,963, 2 Cranch C. C. 431.

See 20 Cent. Dig. tit. "Evidence," §§ 1733–1735½.

An assignment of a mortgage cannot be shown by parol to have been intended to be a discharge, except for the purpose of proving fraud. Howard *v.* Howard, 3 Metc. (Mass.) 548; Tyler *v.* Taylor, 8 Barb. (N. Y.) 585.

Assignment for benefit of creditors.— Parol evidence is not admissible to show by the conversation of the parties when an assignment for the benefit of creditors was executed what debts were intended to be secured (Wilson *v.* Hanson, 12 Me. 58); and where a creditor has accepted such an assignment in writing, parol evidence cannot be admitted to show that there was any condition attached to the acceptance other than the conditions in the assignment (Arnold *v.* Bailey, 24 S. C. 493); nor can it be shown that the assignment was intended to embrace property not included therein (Driscoll *v.* Fiske, 21 Pick. (Mass.) 503).

9. Spies *v.* National City Bank, 68 N. Y. App. Div. 70, 74 N. Y. Suppl. 64.

10. *Alabama.*— Griel *v.* Lomax, 86 Ala. 132, 5 So. 325.

Indiana.— Rose *v.* Hurley, 39 Ind. 77.

Maine.— Osgood *v.* Davis, 18 Me. 146, 36 Am. Dec. 708.

Minnesota.— Jones *v.* Alley, 17 Minn. 292.

Wisconsin.— Hahn *v.* Doolittle, 18 Wis. 196, 86 Am. Dec. 757.

11. Jones *v.* Alley, 17 Minn. 292; O'Harra *v.* Hall, 18 Fed. Cas. No. 10,468, 4 Dall. 340.

See 20 Cent. Dig. tit. "Evidence," §§ 1733–1735½.

12. Hieronymus *v.* Glass, 120 Ala. 46, 23 So. 674; Kendall *v.* Equitable L. Assur. Soc., 171 Mass. 568, 51 N. E. 464; Minchin *v.* Minchin, 157 Mass. 265, 32 N. E. 164. See also Wittenauer *v.* Watson, 11 Mo. App. 588; and *infra*, XVI, C, 26.

Consequently it has been held admissible to show that a written assignment absolute in form was made with the understanding that the assignee should collect the accounts and hold the proceeds as a trust fund for the assignor's creditors (Matthews *v.* Forslund, 112 Mich. 591, 70 N. W. 1105; Taylor *v.* Paul, 6 Pa. Super. Ct. 496); or that an assignment absolute in form was merely a pledge (Riley *v.* Hampshire County Nat. Bank, 164 Mass. 482, 41 N. E. 679; Quick *v.* Turner, 26 Mo. App. 29; Gettelman *v.* Commercial Union Assur Co., 97 Wis. 237, 72 N. W. 627); or was intended merely as collateral security (Callender *v.* Drabelle, 73 Iowa 317, 35 N. W. 240; Robinson *v.* Blood, 64 Kan. 290, 67 Pac. 842; Hamilton *v.* Whitson, 5 Kan. App. 347, 48 Pac. 462; Dixon *v.* National L. Ins. Co., 168 Mass. 48, 46 N. E. 430; Newton *v.* Fay, 10 Allen (Mass.) 505; Fryer *v.* Rishel, 1 Walk. (Pa.) 470).

13. Doyal *v.* Smith, 28 Ga. 262; Chesnut *v.* Strong, 1 Hill Eq. (S. C.) 122.

14. Doyal *v.* Smith, 28 Ga. 262. See, generally, WILLS.

15. *Illinois.*— Smith *v.* Mayfield, 163 Ill. 447, 45 N. E. 157 [*affirming* 60 Ill. App. 266].

Maryland.— Courtney *v.* William Knabe, etc., Mfg. Co., 97 Md. 499, 55 Atl. 614, 99 Am. St. Rep. 456.

Michigan.— Rowe *v.* Wright, 12 Mich. 289.

applies to memoranda,[16] account-books,[17] statements of account,[18] bills of parcels,[19]

Missouri.— Wild *v.* Western Union Bldg., etc., Assoc., 60 Mo. App. 200.

New York.— McCrea *v.* Purmort, 16 Wend. 460, 30 Am. Dec. 103.

North Carolina.— Keaton *v.* Jones, 119 N. C. 43, 25 S. E. 710.

Texas.— Nowlin *v.* Frichott, 11 Tex. Civ. App. 442, 32 S. W. 831; St. Louis, etc., R. Co. *v.* Turner, 1 Tex. Civ. App. 625, 20 S. W. 1008.

Vermont.— Labbee *v.* Johnson, 66 Vt. 234, 28 Atl. 986; Houghton *v.* Carpenter, 40 Vt. 588 (holding that the principle that parol evidence is inadmissible to vary a written contract does not apply to a document which, although entitled a bill of sale, does not actually contain all the necessary elements of a contract of sale); Commercial Bank *v.* Clark, 28 Vt. 325.

Wisconsin.— Clifford *v.* Baessman, 41 Wis. 597.

England.— See Birce *v.* Bletchley, 6 Madd. 17.

See 20 Cent. Dig. tit. "Evidence," §§ 1846–1854.

16. *California.*— Kreuzberger *v.* Wingfield, 96 Cal. 251, 31 Pac. 109; Rice *v.* Heath, 39 Cal. 609.

Kentucky.— Atwater *v.* Cardwell, 54 S. W. 960, 21 Ky. L. Rep. 1297.

Massachusetts.— Whitney *v.* Eaton, 15 Gray 225.

Minnesota.— Vaughan *v.* McCarthy, 63 Minn. 221, 65 N. W. 249.

New York.— Thomas *v.* Nelson, 69 N. Y. 118; Smith *v.* Williams, 90 N. Y. App. Div. 507, 85 N. Y. Suppl. 506; Aguirre *v.* Allen, 10 Barb. 74.

South Carolina.— Stone *v.* Wilson, 3 Brev. 228.

Utah.— Steed *v.* Harvey, 18 Utah 367, 54 Pac. 1011, 72 Am. St. Rep. 789.

Vermont.— Stannard *v.* Smith, 40 Vt. 513.

See 20 Cent. Dig. tit. "Evidence," § 1847.

An entry in a diary may be explained or contradicted by parol. Dale's Appeal, 57 Conn. 127, 17 Atl. 757.

Memorandum given by creditor to debtor, stating the amount due on an account, cannot be contradicted by parol evidence. Gammage *v.* Walker, (Tex. Civ. App. 1898) 46 S. W. 916.

17. *Connecticut.*— Northford Rivet Co. *v.* Blackman Mfg. Co., 44 Conn. 183.

Illinois.— McCall *v.* Moss, 112 Ill. 493.

Maine.— See Northrop *v.* Hale, 72 Me. 275.

Massachusetts.— Langdon *v.* Hughes, 107 Mass. 272; Swift *v.* Pierce, 13 Allen 136; Lee *v.* Wheeler, 11 Gray 236; James *v.* Spaulding, 4 Gray 451. See also McKim *v.* Blake, 139 Mass. 593, 2 N. E. 157.

New Hampshire.— Boston, etc., R. Co. *v.* Oliver, 32 N. H. 172; Pecker *v.* Hoit, 15 N. H. 143.

New York.— Ball *v.* Tibbits, 14 N. Y. St. 306; Freer *v.* Budington, 6 N. Y. St. 319; Van Fleet *v.* Ketcham, 6 N. Y. St. 72.

Pennsylvania.— Shaeffer *v.* Sensenig, 182 Pa. St. 634, 38 Atl. 473; Chapin *v.* Cambria Iron Co., 145 Pa. St. 478, 22 Atl. 1041; Coverdill *v.* Heath, 12 Pa. Super. Ct. 15; Imhoff *v.* Smith, 3 Phila. 381; Jones *v.* Shacklett, 2 Am. L. J. 261.

Wisconsin.— Hannan *v.* Engelmann, 49 Wis. 278, 5 N. W. 791.

United States.— Mack *v.* Adler, 22 Fed. 570.

See 20 Cent. Dig. tit. "Evidence," § 1850.

Compare Strong *v.* Kamm, 13 Oreg. 172, 9 Pac. 331, holding that while an entry in an account-book may be explained, evidence is not admissible to show that its meaning is contrary to what its language imports.

An entry on the books of a bank of a certain amount as a credit on a depositor's account is not conclusive of the bank's liability to the depositor for that amount, but may be explained by parol. Anderson *v.* Walker, (Tex. Civ. App. 1899) 49 S. W. 937. Parol evidence is also admissible to show that a depositor in a bank is the absolute owner of money entered to his credit as "trustee." Powers *v.* Provident Sav. Inst., 124 Mass. 377.

After great lapse of time (in the case at bar twenty-four years) parol evidence of the sum brought into the copartnership funds by one of the partners will not be allowed to prevail against an entry in the books of a much smaller sum credited him on that account. Richardson *v.* Wyatt, 2 Desauss. (S. C.) 471.

18. *Indiana.*— Hostetler *v.* State, 62 Ind. 183.

Maryland.— Barger *v.* Collins, 7 Harr. & J. 213.

Massachusetts.— Robinson *v.* Mansfield, 13 Pick. 139.

Missouri.— Mooney *v.* Williams, 15 Mo. 442.

New Jersey.— Parker *v.* Miller, 27 N. J. L. 338.

United States.— Bank of British North America *v.* Cooper, 137 U. S. 473, 11 S. Ct. 160, 34 L. ed. 759 [*affirming* 30 Fed. 171].

See 20 Cent. Dig. tit. "Evidence," § 1850.

19. *Georgia.*— Bland *v.* Strange, 52 Ga. 93.

Kansas.— Irwin *v.* Thompson, 27 Kan. 643.

Massachusetts.— Stacy *v.* Kemp, 97 Mass. 166; Bradford *v.* Manly, 13 Mass. 139, 7 Am. Dec. 122.

Michigan.— Rowe *v.* Wright, 12 Mich. 289.

South Carolina.— Bulwinkle *v.* Cramer, 27 S. C. 376, 3 S. E. 776, 13 Am. St. Rep. 645.

United States.— Harris *v.* Johnston, 3 Cranch 311, 2 L. ed. 450.

Canada.— Magee *v.* Street, 6 N. Brunsw. 242.

A bill of particulars accompanying goods sold, such as is generally furnished by vendors, is not conclusive as to the terms on which the goods were sold. It is presumptive evidence of a sale, but does not preclude the vendor from showing the actual facts. Sutton *v.* Crosby, 54 Barb. (N. Y.) 80. See also Bland *v.* Strange, 52 Ga. 93.

and allows parol or extrinsic evidence for the same purpose in respect of other writings of a similar character.[20]

C. Limitations of and Exceptions to the Rule — 1. Flexibility of Rule. There is perhaps no rule of law which is more flexible or subject to a greater number of exceptions than the rule which in actions at law excludes parol evidence offered to vary or explain written documents.[21] It has been said that in the multitude of exceptions much confusion has arisen, so that the exact limit to be placed upon the exceptions depends not only upon the peculiar facts of each case, but also to some extent upon the peculiar cast of thought of the individuals composing the court.[22] It may be stated generally, however, that the courts have endeavored to adapt their rulings, either way, to the obvious demands of abstract justice in each particular case.[23] The result is that, while the decisions are fairly uniform with respect to their abstract statements of the limitations of and exceptions to this rule, when the question arises as to whether a case presenting a particular state of facts comes within the general rule, or is taken out of it by one of the recognized limitations or exceptions, or again brought within it by one of the numerous limitations of and exceptions to those limitations and exceptions, the authorities are in many instances in hopeless conflict.[24]

2. Evidence Not Inconsistent With Writing. The parol evidence rule does not preclude the reception of parol evidence with reference to a matter evidenced by the writing, where such evidence relates to a matter *in pais*, or is of such a character that it does not tend to vary or contradict the written instrument.[25] Thus there is no objection to the admission of evidence which is offered not to contra-

20. Berth check.— Mann Boudoir Car Co. *v.* Dupre, 54 Fed. 646, 4 C. C. A. 540, 21 L. R. A. 289.

Deposit ticket given to a bank.— Weisinger *v.* Gallatin Bank, 10 Lea (Tenn.) 330.

Mere license.— Fargis *v.* Walton, 107 N. Y. 398, 14 N. E. 303. *Contra*, Ives *v.* Williams, 50 Mich. 100, 15 N. W. 33.

Notices of sale sent by brokers to their principal are not writings of such a character as to preclude the admission of parol evidence to show the real transaction. Porter *v.* Wormser, 94 N. Y. 431.

A representation made in writing may be contradicted by parol, except where it operates by way of estoppel. Darke *v.* Bush, 57 Ga. 180.

Written acknowledgment of a settlement made furnishes *prima facie* evidence that the settlement embraced all matters of account which at the time existed between the parties, but this, like any other acknowledgment, may be explained or contradicted. Wheeler *v.* Alexander, 1 Strobh. (S. C.) 61.

21. Bassell *v.* Glover, 31 Mo. App. 150.

22. Hines *v.* Willcox, 96 Tenn. 148, 33 S. W. 914, 54 Am. St. Rep. 823, 34 L. R. A. 824, 832. See also Richardson *v.* Thompson, 1 Humphr. (Tenn.) 151.

23. Liebke *v.* Methudy, 14 Mo. App. 65 [*quoted* in Bassett *v.* Glover, 31 Mo. App. 150]. See also Thompson *v.* McClenachan, 17 Serg. & R. (Pa.) 110.

24. See Kennedy *v.* Erie, etc., Plank Road Co., 25 Pa. St. 224, 225, where the court said: "To reconcile the adjudicated cases with each other or with the rule itself, would require great ingenuity, and perhaps be an impossible undertaking."

25. *Alabama.*— Louisville, etc., R. Co. *v.* Duncan, 137 Ala. 446, 34 So. 988; Beck *v.* Simmons, 7 Ala. 71.

Arkansas.— Sessions *v.* Peay, 21 Ark. 100, holding that parol evidence that a note payable in "dollars" was not to be paid in bonds or coupons, but in specie, would not be contradictory of, but consistent with, what is expressed on its face.

Colorado.— Cross *v.* Kistler, 14 Colo. 571, 23 Pac. 903.

Connecticut.— Hartford, etc., Transp. Co. *v.* Hartford First Nat. Bank, 46 Conn. 569; Daggett *v.* Whiting, 35 Conn. 366.

Delaware.— Stephens *v.* Green Hill Cemetery Co., 1 Houst. 26.

Florida.— Southern L. Ins., etc., Co. *v.* Gray, 3 Fla. 262.

Georgia.— Dempsey *v.* Hertzfield, 30 Ga. 866 (holding that, in an action by a lessee against a lessor for breach of contract in failing to stop a leak in the roof of the building leased, the lessee may prove by parol the purpose for which the lessor knew the building was rented, as this does not add anything to the written contract, but only goes to show the amount of damage properly chargeable against defendant, and what the parties must be presumed in reasonable contemplation to have foreseen would be a probable consequence of the breach); Hopkins *v.* Watts, 27 Ga. 490.

Hawaii.— Testa *v.* Kahahawai, 12 Hawaii 254.

Illinois.— McDonald *v.* Danaly, 196 Ill. 133, 63 N. E. 648 [*affirming* 96 Ill. App. 380]; Chandler *v.* Morey, 195 Ill. 596, 63 N. E. 512 [*affirming* 96 Ill. App. 278]; Pool *v.* Marshall, 48 Ill. 440; Webster *v.* Enfield, 10 Ill. 298; Wheaton *v.* Bartlett, 105 Ill. App. 326.

dict or vary the terms of a written agreement, but simply to explain how it is to be carried out,[26] or to prove that one party has according to the terms of the writing made an election respecting the manner of its performance.[27] So a particular mode of payment or discharge agreed on by the parties may be proved by parol.[28] And evidence of representations made at the time of the execution of the instrument is admissible where it is offered only for the purpose of showing what the terms of the instrument would have passed if the representations had been true, and not for the purpose of showing that it was intended to pass something which by the terms of the instrument was not passed.[29] Certainly the cir-

Indiana.— Schmied *v.* Frank, 86 Ind. 250; Webster *v.* Metropolitan Washing Mach. Co., 29 Ind. 453.

Iowa.— Mann *v.* Taylor, 78 Iowa 355, 43 N. W. 220; Aultman *v.* Wheeler, 49 Iowa 647; Collins *v.* Gilson, 29 Iowa 61.

Kentucky.— Williams *v.* Hall, 2 Dana 97.

Louisiana.— Pinard *v.* Holton, 30 La. Ann. 167; Bozant's Succession, 6 La. Ann. 588; Warfield *v.* Ludewig, 9 Rob. 240; Blanchard *v.* Lockett, 4 Rob. 370; Terrell *v.* Cutrer, 1 Rob. 367; Brown *v.* Cobb, 10 La. 172; Chew *v.* Chinn, 7 Mart. N. S. 532; Lafariere *v.* Sanglair, 12 Mart. 399, holding that where a bill of sale recites that the two vendees "gave his note" for a certain sum, each may show by parol that his note was for half the amount.

Maine.— Chamberlain *v.* Dover, 13 Me. 466, 29 Am. Dec. 517.

Maryland.— Planters' Mut. Ins. Co. *v.* Deford, 38 Md. 382; Groshon *v.* Thomas, 20 Md. 234.

Massachusetts.— Drake *v.* Allen, 179 Mass. 197, 60 N. E. 477; Allin *v.* Whittemore, 171 Mass. 259, 50 N. E. 618.

Michigan.— Saxton *v.* Pells, 98 Mich. 340, 57 N. W. 169; De Camp *v.* Scofield, 75 Mich. 449, 42 N. W. 962.

Minnesota.— Rugland *v.* Thompson, 48 Minn. 539, 51 N. W. 604.

Missouri.— Linville *v.* Savage, 58 Mo. 248 (holding that an agreement between the holder and the payee of notes secured by a deed of trust to substitute other notes secured by a different deed of trust may be shown by parol); Chouteau *v.* Goddin, 39 Mo. 229, 90 Am. Dec. 462; Consolidated Coal Co. *v.* Mexican Fire-Brick Co., 66 Mo. App. 296.

Montana.— Carman *v.* Staudaker, 20 Mont. 364, 51 Pac. 738.

Nebraska.— Emery *v.* Hanna, (1903) 94 N. W. 973.

New York.— Stokes *v.* Polley, 164 N. Y. 266, 58 N. E. 133 [*reversing* 30 N. Y. App. Div. 550, 52 N. Y. Suppl. 406]; Kumberger *v.* Congress Spring Co., 158 N. Y. 339, 53 N. E. 3 [*reversing* 8 N. Y. App. Div. 96, 40 N. Y. Suppl. 396]; Clarke *v.* Meigs, 10 Bosw. 337; Bernheimer *v.* Prince, 29 Misc. 308, 60 N. Y. Suppl. 449 [*affirming* 58 N. Y. Suppl. 392]; Herold *v.* Fleming, 17 Misc. 581, 40 N. Y. Suppl. 690; Walker *v.* Hubert, 6 Misc. 122, 26 N. Y. Suppl. 46.

North Carolina.— Griffith *v.* Roseborough, 52 N. C. 520.

Pennsylvania.— Brown *v.* Beecher, 120 Pa. St. 590, 15 Atl. 608; Dubois *v.* Bigler, 95 Pa. St. 203.

Rhode Island.— Fuller *v.* Atwood, 13 R. I. 316.

South Carolina.— Virginia-Carolina Chemical Co. *v.* Kirven, 57 S. C. 445, 35 S. E. 745.

South Dakota.— McCormick Harvesting Mach. Co. *v.* Yankton Sav. Bank, 15 S. D. 196, 87 N. W. 974.

Texas.— Harper *v.* Marion County, (Civ. App. 1903) 77 S. W. 1044; Lord *v.* New York L. Ins. Co., 27 Tex. Civ. App. 139, 65 S. W. 699 (holding that declarations by assured that a life-insurance policy payable to his estate belonged to his sister were not incompetent as tending to vary the terms of a written instrument, as the policy was subject to gift); Jenkins *v.* Darling, (Civ. App. 1900) 56 S. W. 931; Lea *v.* Union Cent. L. Ins. Co., 17 Tex. Civ. App. 451, 43 S. W. 927; Crutcher *v.* Schick, 10 Tex. Civ. App. 676, 32 S. W. 75; Lochte *v.* Blum, 10 Tex. Civ. App. 385, 30 S. W. 925 (holding that in a suit to declare a certain instrument a statutory assignment, parol evidence that the maker was insolvent, and conveyed all his property under the instrument, is admissible); Eikel *v.* Randolph, 6 Tex. Civ. App. 421, 25 S. W. 62.

Vermont.— Dano *v.* Sessions, 65 Vt. 79, 26 Atl. 585; Lemington *v.* Blodgett, 37 Vt. 210.

Virginia.— Tuley *v.* Barton, 79 Va. 387; Harvey *v.* Skipwith, 16 Gratt. 410.

Washington.— Blewitt *v.* Bash, 22 Wash. 536, 61 Pac. 770.

Wisconsin.— Lathrop *v.* Humble, 120 Wis. 331, 97 N. W. 905; Simanek *v.* Nemetz, 120 Wis. 42, 97 N. W. 508; Marsh *v.* Pugh, 39 Wis. 507; State *v.* Hilmantel, 23 Wis. 422.

Wyoming.—Lonabaugh *v.* Morrow, 11 Wyo. 17, 70 Pac. 724.

United States.— Missouri Pac. R. Co. *v.* Hall, 66 Fed. 868, 14 C. C. A. 153.

Mortgages deposited for record on same day.— Where two mortgages on the same land are executed and deposited for record on the same day, parol evidence is admissible, on the issue of priority, to determine which was first deposited with the recorder. Spaulding *v.* Scanland, 6 B. Mon. (Ky.) 353.

Where parol evidence may or may not contradict a written contract, it should not be admitted. Tufts *v.* Morris, 87 Mo. App. 98.

26. Willis *v.* Fernald, 33 N. J. L. 206. See also Leslie *v.* Evans, 4 Ohio Dec. (Reprint) 307, 1 Clev. L. Rep. 273.

27. Norton *v.* Ware, 35 Me. 218.

28. Honeycut *v.* Strother, 2 Ala. 135.

29. Sharp *v.* New York, 40 Barb. (N. Y.) 256, 25 How. Pr. (N. Y.) 389.

cumstance that a matter is evidenced by a writing cannot preclude the admission of parol evidence of independent facts, although they relate to the same transaction.[30]

3. Aiding Inference From Instrument. Parol evidence is admissible to aid an inference which may be deduced from a written instrument.[31]

4. Alterations, Erasures, and Mutilation — a. Alterations. The rule against parol evidence to vary or contradict a written instrument does not preclude evidence to explain an alteration in a written instrument and to show that it was made under such circumstances as not to vitiate the instrument;[32] nor does it exclude evidence to show that an alteration of or addition to a writing was made without authority from the writer.[33] Evidence is also admissible to show the fact that an alteration has been made,[34] and the person by whom and the circumstances under which it was made.[35] Where it is claimed that an instrument in evidence, by reason of alterations therein, fails to express the true contract or agreement of the parties, extrinsic evidence thereof is admissible.[36] It has been held that the alteration of a record may be shown by parol.[37]

b. Erasures. Parol evidence may be received to show the time when and the circumstances under which an erasure was made in a written instrument and to sustain the validity of the instrument notwithstanding,[38] and, where the instrument is to be enforced as though there had been no erasure, parol evidence may be received to show what the erased words were if they cannot be ascertained from the instrument itself.[39] It has also been held that where the portion of a

30. *Louisiana.*— Spencer *v.* Sloo, 8 La. 290; Andrus *v.* Chretien, 7 La. 318.

Maryland.— Castleman *v.* Du Val, 89 Md. 657, 43 Atl. 821; Dorsey *v.* Eagle, 7 Gill & J. 321.

Minnesota.— Keough *v.* McNitt, 6 Minn. 513.

New Hampshire.—Allison *v.* Smith, 19 N. H. 557.

New York.— Douglass *v.* Peele, Clarke 563, where the court said: "It is competent to introduce parol evidence . . . to show facts *dehors* the instrument, which may materially vary its legal effect."

Pennsylvania.— Miller *v.* Fichthorn, 31 Pa. St. 252 (holding that a written instrument does not exclude oral evidence of collateral facts which according to the purpose of the instrument could not properly be declared in it, even though these facts may show a countervailing right that neutralizes the obligation defined by the writing); Bower *v.* Hall, 9 Lanc. Bar 14.

31. Mayo *v.* Murchie, 3 Munf. (Va.) 358, holding that where the owner of land on a navigable river was authorized by law to establish a town on it, and to dispose of the lots by lottery, and in the scheme of such lottery, as advertised, adventurers therein were assured that the lots should be laid off in a town, "convenient to the river, with public landings," parol evidence was admissible in aid of the inference deducible from such printed proposals, to establish an equitable title in the inhabitants of the town as tenants in common of a piece of ground between the river and the lots actually laid off into a town. See also Stephens *v.* Green Hill Cemetery Co., 1 Houst. (Del.) 26.

32. Jenkinson *v.* Monroe, 61 Mich. 454, 28 N. W. 663; McLane *v.* Maurer, 28 Tex. Civ. App. 75, 66 S. W. 693, 1108. But *compare* Labiche *v.* Jahan, 9 Rob. (La.) 30, holding that, in the absence of any allegation of fraud or error, parol evidence is inadmissible to prove the assent of a party to an alteration, as to the quantity of land, in an act of sale of real estate, made by the notary before recording it. See Alterations of Instruments, 2 Cyc. 246 *et seq.*

33. Robinson *v.* Nevada Bank, 81 Cal. 106, 22 Pac. 478.

A fraudulent alteration of a deed by the grantee, which avoids it, may, in an action of ejectment, be shown at law without going into a court of equity. Rives *v.* Thompson, 41 Ga. 68.

34. Harris *v.* McReynolds, 10 Colo. App. 532, 51 Pac. 1016, where the court held that parol evidence was admissible, in an action for false imprisonment, to show that a complaint and warrant which had been issued against R, under which McR was arrested, were altered by correcting the name after the arrest.

35. Heywood *v.* Perrin, 10 Pick. (Mass.) 228, 20 Am. Dec. 518. But *compare* Bowe *v.* Dotterer, 80 Ga. 50, 4 S. E. 253.

36. Curtice *v.* West, 50 Hun (N. Y.) 47, 2 N. Y. Suppl. 507; Walker *v.* Walker, 6 Coldw. (Tenn.) 571.

37. Brier *v.* Woodbury, 1 Pick. (Mass.) 362; Despard *v.* Pleasants County, 23 W. Va. 318; Herring *v.* Lee, 22 W. Va. 661. But *compare* Kerr *v.* Porter, 1 Overt. (Tenn.) 15, holding that an erasure or alteration of an entry in the entry book of the surveyor-general could not be shown by parol. See, generally, Records.

38. Bailey *v.* Boylan, 17 Ind. 478; Johnson *v.* Wabash, etc., Plank-Road Co., 16 Ind. 389; Justus *v.* Cooper, 7 Blackf. (Ind.) 7.

39. Thomas *v.* Thomas, 76 Minn. 237, 79 N. W. 104, 77 Am. St. Rep. 639.

written instrument bearing upon a certain matter has been purposely erased by the parties, evidence of a parol agreement with regard to the erased matter is admissible, since it is then not embraced within the contract.[40]

c. Mutilation. Although an instrument may be so mutilated that an essential portion thereof is illegible, it may nevertheless be shown by parol to sustain an action thereon that it was mutilated under circumstances not affecting its validity.[41]

5. Clerical Errors. Clerical errors in a written instrument may be corrected by extrinsic evidence.[42]

6. Condition or Contingency — a. In General. It has been frequently asserted that parol evidence is admissible to show the existence of some contingency or condition affecting the operation and effect of a written instrument;[43] and on the other hand there are a great many cases holding that parol evidence is not admissible for such purpose.[44] These two lines of authorities, while on their face

40. Letcher *v.* Letcher, 50 Mo. 137.

41. See Hatch *v.* Dickinson, 7 Blackf. (Ind.) 48.

42. *Connecticut.*—Chapman *v.* Allen, Kirby 399, 1 Am. Dec. 24.

Louisiana.— Sutton *v.* Calhoun, 14 La. Ann. 209; Palangue *v.* Guesnon, 15 La. 311

Missouri.— Moore *v.* Wingate, 53 Mo. 398.

New York.— McNulty *v.* Prentice, 25 Barb 204.

North Carolina.— Davidson *v.* Shuler, 119 N. C. 582, 26 S. E. 340.

Pennsylvania.—Com. *v.* Blaine, 4 Binn. 186, holding that parol evidence was admissible to explain a patent error in the registry of a negro child.

See *infra*, XVI, C, 18, i.

43. *Indiana.*— Singer Mfg. Co. *v.* Forsyth, 108 Ind. 334, 9 N. E. 372.

Kentucky.— Duncan *v.* Sheehan, 13 Ky. L. Rep. 780.

Massachusetts.— Barker *v.* Prentiss, 6 Mass. 430.

Mississippi.—Butler *v.* Smith, 35 Miss. 457.

New York.— Andrews *v.* Hess, 20 N. Y. App. Div. 194, 46 N. Y. Suppl. 796; Hamilton Bank *v.* Klock, 73 Hun 304, 26 N. Y. Suppl. 259.

North Carolina.— Bresee *v.* Crumpton, 121 N. C. 122, 28 S. E. 351.

Pennsylvania.— Frederick *v.* Campbell, 13 Serg. & R. 136; Field *v.* Biddle, 2 Dall. 171, 1 L. ed. 335.

South Carolina.— Robertson *v.* Evans, 3 S. C. 330.

Tennessee.—Breeden *v.* Grigg, 8 Baxt. 163; Bissenger *v.* Guiteman, 6 Heisk. 277.

Vermont.— Labbee *v.* Johnson, 66 Vt. 234, 28 Atl. 986.

United States.— Michels *v.* Olmstead, 14 Fed. 219, 4 McCrary 549; Corcoran *v.* Dougherty, 6 Fed. Cas. No. 3,227, 4 Cranch C. C. 205; Susquehanna Bridge, etc., Co. *v.* Evans, 23 Fed. Cas. No. 13,635, 4 Wash. 480.

See 20 Cent. Dig. tit. "Evidence," §§ 1929–1944.

Evidence has been admitted to show that a promissory note was to be surrendered upon a certain condition (Hagood *v.* Swords, 2 Bailey (S. C.) 305); that a note under seal was not to be paid till the collection of another note given to the maker of the first note by a third person for the purchase-money of land sold to the first maker (Quin *v.* Sexton, 125 N. C. 447, 34 S. E. 542); that a release of claims on account of the publication of a libel was executed on condition that no further libel would thereafter be published (De Haven *v.* Coup, 5 Ohio Dec. (Reprint) 562, 6 Am. L. Rec. 593); that at the time a note was executed and put into the hands of the payee an agreement was made that it should be returned to the maker at a certain date if he should then demand it (McFarland *v.* Sikes, 54 Conn. 250, 7 Atl. 408, 1 Am. St. Rep. 111); and that at the time the payees of an accommodation note indorsed the same it was agreed that before the maker should sell it he should obtain the name of another party as payee and that the latter should also indorse it and that the maker should execute a mortgage to indemnify the payees against loss (Caudle *v.* Ford, 72 S. W. 270, 24 Ky. L. Rep. 1764).

Option to rescind sale.— Where an unconditional note is given for the purchase-price of certain property, parol evidence is admissible to show an option on the part of the purchaser to rescind the sale within a certain time, as this does not contradict the note but sets up an independent agreement made at the same time that upon a condition or contingency the note was to become void. Lyons *v.* Stills, 97 Tenn. 514, 37 S. W. 280.

44. *Alabama.*— Dexter *v.* Ohlander, 89 Ala. 262, 7 So. 115; Tennessee, etc., R. Co. *v.* East Alabama R. Co., 73 Ala. 426; Alabama, etc., R. Co. *v.* Sanford, 36 Ala. 703.

Arkansas.— Martin *v.* Taylor, 52 Ark. 389, 12 S. W. 1011; Haney *v.* Caldwell, 35 Ark. 156.

California.— Prouty *v.* Adams, 141 Cal. 304, 74 Pac. 845; Leonard *v.* Miner, 120 Cal. 403, 52 Pac. 655.

Connecticut.— Beard *v.* Boylan, 59 Conn. 181, 22 Atl. 152.

Illinois.— Cairo, etc., R. Co. *v.* Parker, 84 Ill. 613; Foy *v.* Blackstone, 31 Ill. 538, 83 Am. Dec. 246; Haines *v.* Nance, 52 Ill. App. 406; Frankfort Whisky Process Co. *v.* Manhattan Distilling Co., 45 Ill. App. 432.

conflicting, may be to a great extent reconciled by the reasonable assumption that the courts in making the decision one way or the other had in mind, although they may not have clearly expressed, the true distinction, which is this: The rules excluding parol evidence have no place in any inquiry in which the court has not got before it some ascertained paper beyond question binding and of full effect,[45] and hence parol evidence is admissible to show conditions relating to the delivery or taking effect of the instrument, as that it shall only become effective upon certain conditions or contingencies; for this is not an oral contradiction or variation of the written instrument but goes to the very existence of the contract and tends to show that no valid and effective contract ever existed;[46] but evi-

Indiana.— Madison, etc., Plank-Road Co. *v.* Stevens, 6 Ind. 379.

Iowa.— Younie *v.* Walrod, 104 Iowa 475, 73 N. W. 1021; Potts *v.* Polk County, 80 Iowa 401, 45 N. W. 775; Marquis *v.* Lauretson, 76 Iowa 23, 40 N. W. 73; Warren *v.* Crew, 22 Iowa 315.

Kentucky.—Marshall *v.* Cox, 7 J. J. Marsh. 133; Louisville Bldg. Assoc. *v.* Hegan, 49 S. W. 796, 20 Ky. L. Rep. 1629; Ellis *v.* Grigsby, 5 Ky. L. Rep. 854.

Maine.— Augusta Bank *v.* Augusta, 36 Me. 255.

Missouri.— Hurt *v.* Ford, 142 Mo. 283, 44 S. W. 228, 41 L. R. A. 823, (1896) 36 S. W. 671 [*distinguishing* State *v.* Potter, 63 Mo. 212, 21 Am. Rep. 440; Carter *v.* McClintock, 29 Mo. 464]; Martin *v.* Witty, 104 Mo. App. 262, 78 S. W. 829; Christian University *v.* Hoffman, 95 Mo. App. 488, 69 S. W. 474.

Nebraska.— Aultman *v.* Hawk, (1903) 95 N. W. 695.

New York.— Van Brunt *v.* Day, 17 Hun 166; Hess *v.* Liebmann, 84 N. Y. Suppl. 178.

North Carolina.—Meekins *v.* Newberry, 101 N. C. 17, 7 S. E. 655.

Pennsylvania.— Hickman *v.* Bingaman, (1889) 17 Atl. 20; Fulton *v.* Hood, 34 Pa. St. 365, 75 Am. Dec. 664.

South Carolina.— Gazoway *v.* Moore, Harp. 401.

Tennessee.— Desport *v.* Metcalf, 3 Head 424.

Texas.— Faires *v.* Cockerell, 88 Tex. 428, 31 S. W. 190, 639, 28 L. R. A. 528 [*affirming* (Civ. App. 1895) 29 S. W. 669]; Newman *v.* Blum, (Sup. 1888) 9 S. W. 178; Bruce *v.* Brown, (Civ. App. 1894) 25 S. W. 444.

West Virginia.— Little Kanawha Nav. Co. *v.* Rice, 9 W. Va. 636.

Wisconsin.— Lowber *v.* Connit, 36 Wis. 176.

United States.— Levy, etc., Mule Co. *v.* Kauffman, 114 Fed. 170, 52 C. C. A. 126.

Canada.— Tyson *v.* Abercrombie, 16 Ont. 98.

See 20 Cent. Dig. tit. "Evidence," §§ 1929–1944.

45. Guardhouse *v.* Blackburn, L. R. 1 P. 109, 12 Jur. N. S. 278, 35 L. J. P. & M. 116, 14 L. T. Rep. N. S. 69, 14 Wkly. Rep. 463. See also Peugh *v.* Davis, 96 U. S. 332, 336, 24 L. ed. 775, in which case the court said: "The rule which excludes parol evidence to contradict or vary a written instrument has reference to the language used by the parties. That cannot be qualified or varied from its natural import, but must speak for itself. The rule does not forbid an inquiry into the object of the parties in executing and receiving the instrument."

There is a radical distinction between a conditional delivery, which is not to become complete and effective until the happening of some condition precedent, and a complete delivery which is sought to be defeated by subsequent contingencies that may or may not arise. In the one case there is no contract until the condition has been complied with; in the other there is a binding contract, notwithstanding the happening of the contingency relied upon to defeat it. Jamestown Business College Assoc. *v.* Allen, 172 N. Y. 291, 64 N. E. 952, 92 Am. St. Rep. 740 [*reversing* 59 N. Y. App. Div. 627, 69 N. Y. Suppl. 1137].

46. *Colorado.*— Hurlburt *v.* Dusenbery, 26 Colo. 240, 57 Pac. 860; Bourke *v.* Van Keuren, 20 Colo. 95, 36 Pac. 882; Roberts *v.* Greig, 15 Colo. App. 378, 62 Pac. 574; Denver Brewing Co. *v.* Barets, 9 Colo. App. 341, 48 Pac. 834.

Connecticut.— Trumbull *v.* O'Hara, 71 Conn. 172, 41 Atl. 546; Caulfield *v.* Hermann, 64 Conn. 325, 30 Atl. 52; McFarland *v.* Sikes, 54 Conn. 250, 7 Atl. 408, 1 Am. St. Rep. 111.

District of Columbia.— Donaldson *v.* Uhlfelder, 21 App. Cas. 489; Randle *v.* Davis Coal, etc., Co., 15 App. Cas. 357.

Illinois.— Ottawa, etc., R. Co. *v.* Hall, 1 Ill. App. 612.

Indian Territory.— Fox *v.* Tyler, 3 Indian Terr. 1, 53 S. W. 462.

Iowa.— McCormick Harvesting Mach. Co. *v.* Morlan, 121 Iowa 451, 96 N. W. 976; Sutton *v.* Griebel, 118 Iowa 78, 91 N. W. 825.

Kentucky.— See Moore *v.* Moore, (1904) 78 S. W. 141.

Maryland.— Harrison *v.* Morton, 83 Md. 456, 35 Atl. 99; Beall *v.* Poole, 27 Md. 645.

Massachusetts.— Wilson *v.* Powers, 131 Mass. 539.

Michigan.— Ada Dairy Assoc. *v.* Mears, 123 Mich. 470, 82 N. W. 258; Cleveland Refining Co. *v.* Dunning, 115 Mich. 238, 73 N. W. 239.

Minnesota.— Merchants' Exch. Bank *v.* Luckow, 37 Minn. 542, 35 N. W. 434; Skaaraas *v.* Finnegan, 31 Minn. 48, 16 N. W. 456; Westman *v.* Krumweide, 30 Minn. 313, 15 N. W. 255.

dence is not admissible which, conceding the existence and delivery of the contract or obligation, and that it was at one time effective, seeks to nullify, modify, or change the character of the obligation itself, by showing that it is to cease to be effective or is to have an effect different from that stated therein, upon certain conditions or contingencies, for this does vary or contradict the terms of the writing.[47]

Mississippi.— Cocke *v.* Blackbourn, 57 Miss. 689.

Missouri.— Tutt *v.* Price, 7 Mo. App. 194.

New Hampshire.— Atlantic Ins. Co. *v.* Goodall, 35 N. H. 328.

New Jersey.— Naumberg *v.* Young, 44 N. J. L. 331, 43 Am. Rep. 380.

New York.— Jamestown Business College *v.* Allen, 172 N. Y. 291, 64 N. E. 952, 92 Am. St. Rep. 740; Higgins *v.* Ridgway, 153 N. Y. 130, 47 N. E. 32; Blewitt *v.* Boorum, 142 N. Y. 357, 37 N. E. 119, 40 Am. St. Rep. 600 [*affirming* 59 N. Y. Super. Ct. 321, 14 N. Y. Suppl. 298]; Reynolds *v.* Robinson, 110 N. Y. 654, 18 N. E. 127 [*reversing* 37 Hun 561]; Juillard *v.* Chaffee, 92 N. Y. 529; Benton *v.* Martin, 52 N. Y. 570; Seymour *v.* Cowing, 4 Abb. Dec. 200, 1 Keyes 532; Pratt *v.* Pneumatic Tool Co., 50 N. Y. App. Div. 369, 63 N. Y. Suppl. 1062 [*affirmed* in 166 N. Y. 588, 59 N. E. 1129]; Washington Sav. Bank *v.* Ferguson, 43 N. Y. App. Div. 74, 59 N. Y. Suppl. 295; Gallo *v.* New York, 15 N. Y. App. Div. 61, 44 N. Y. Suppl. 143; Ostrander *v.* Snyder, 73 Hun 378, 26 N. Y. Suppl. 263; Van Bokkelen *v.* Taylor, 4 Thomps. & C. 422; Burnham *v.* Wilbur, 7 Bosw. 169; Cartledge *v.* Crespo, 5 Misc. 349, 25 N. Y. Suppl. 515; Persons *v.* Hawkins, 58 N. Y. Suppl. 831; Round Lake Assoc. *v.* Kellogg, 11 N. Y. Suppl. 859.

South Carolina.—Lipscomb *v.* Lipscomb, 32 S. C. 243, 10 S. E. 929.

South Dakota.— Manufacturers' Furnishing Co. *v.* Kremer, 7 S. D. 463, 64 N. W. 528; Osborne *v.* Stringham, 1 S. D. 406, 47 N. W. 408.

Tennessee.— Brady *v.* Isler, 9 Lea 357.

Texas.— Merchants' Nat. Bank *v.* McAnulty, (Civ. App. 1895) 31 S. W. 1091; Franklin *v.* Smith, 1 Tex. Unrep. Cas. 229.

Vermont.— Holmes *v.* Crossett, 33 Vt. 116.

Virginia.— Catt *v.* Olivier, 98 Va. 580, 36 S. E. 980; Humphreys *v.* Richmond, etc., R. Co., 88 Va. 431, 13 S. E. 985; Solenberger *v.* Gilbert, 86 Va. 778, 11 S. E. 789.

Washington.— O'Connor *v.* Lighthizer, 34 Wash. 152, 75 Pac. 643; Reiner *v.* Crawford, 23 Wash. 669, 63 Pac. 516, 83 Am. St. Rep. 84. See also Shuey *v.* Adair, 18 Wash. 188, 51 Pac. 388, 63 Am. St. Rep. 879, 39 L. R. A. 473.

United States.— Burke *v.* Dulaney, 153 U. S. 228, 14 S. Ct. 816, 38 L. ed. 698 [*reversing* 2 Ida. (Hasb.) 719, 23 Pac. 915]; Ware *v.* Allen, 128 U. S. 590, 9 S. Ct. 174, 32 L. ed. 563; Tug River, etc., Co. *v.* Brigel, 86 Fed. 818, 30 C. C. A. 415; Michels *v.* Olmstead, 14 Fed. 219, 4 McCrary 549.

England.— Guardhouse *v.* Blackburn, L. R. 1 P. 109, 12 Jur. N. S. 278, 35 L. J. P. & M. 116, 14 L. T. Rep. N. S. 69, 14 Wkly. Rep. 463; Wallis *v.* Littell, 11 C. B. N. S. 369, 8 Jur. N. S. 745, 31 L. J. C. P. 100, 5 L. T. Rep. N. S. 489, 10 Wkly. Rep. 192, 103 E. C. L. 369; Pym *v.* Campbell, 6 E. & B. 370, 2 Jur. N. S. 641, 25 L. J. Q. B. 277, 4 Wkly. Rep. 528, 88 E. C. L. 370.

See 20 Cent. Dig. tit. "Evidence," §§ 1929–1944.

Instruments not under seal may be delivered to the one to whom upon their face they are made payable, or who by their terms is entitled to some interest or benefit under them, upon conditions the observance of which is essential to their validity. And the annexing of such conditions to the delivery is not an oral contradiction of the written obligation, although negotiable, as between the parties to it or others having notice. It needs a delivery to make the obligation operative at all and the effect of the delivery and the extent of the operation of the instrument may be limited by the conditions upon which delivery is made. Benton *v.* Martin, 52 N. Y. 570.

The character of the delivery of a written instrument, whether absolute or conditional, may be established by parol. Verzan *v.* McGregor, 23 Cal. 339; Ryan *v.* Cooke, 172 Ill. 302, 50 N. E. 213 [*affirming* 68 Ill. App. 592]; Curtis *v.* Harrison, 36 Ill. App. 287; Wilson *v.* Powers, 131 Mass. 539; Quarles *v.* Governor, 10 Humphr. (Tenn.) 122.

A separate oral agreement constituting a condition precedent to the attaching of any obligation under a contract, grant, or disposition of property may be shown by parol. Flomerfelt *v.* Englander, 29 Misc. (N. Y.) 655, 61 N. Y. Suppl. 187.

Failure of conditions may be shown by parol. Gregory *v.* Littlejohn, 25 Nebr. 368, 41 N. W. 253.

Nature of condition.— In Mehlin *v.* Mutual Reserve Fund L. Assoc., 2 Indian Terr. 396, 400, 51 S. W. 1063, the court, after referring to the rule stated in the text, said: "Unless the non-fulfillment of the condition goes to the failure of consideration, this would seem to trench upon fixed principles of law."

47. *Arkansas.*— Findley *v.* Means, 71 Ark. 289, 73 S. W. 101.

Connecticut.— Trumbull *v.* O'Hara, 71 Conn. 172, 41 Atl. 546; Caulfield *v.* Hermann, 64 Conn. 325, 30 Atl. 52.

Illinois.— Ryan *v.* Cooke, 172 Ill. 302, 50 N. E. 213 [*affirming* 68 Ill. App. 592]; Haven *v.* Chicago Sash, etc., Co., 96 Ill. App. 92 [*reversed* on other grounds in 195 Ill. 474, 63 N. E. 158].

Indiana.— Foley *v.* Cowgill, 5 Blackf. 18, 32 Am. Dec. 49.

Massachusetts.— Lilienthal *v.* Suffolk

b. Particular Instruments — (I) *Sealed Instruments Generally.* It is well established as a general rule that an instrument under seal cannot be delivered to the grantee or obligee upon a parol condition which may prevent the taking effect of the instrument according to its tenor,[48] although in New York it has been held that this applies only to instruments which are required to be under seal, and not to instruments effective without a seal.[49]

(II) *Bills and Notes.* Where a bill or note or other negotiable instrument is absolute in its terms, neither the maker nor the indorser can be allowed to show that the obligation was a conditional one merely or was to be paid only in a certain contingency,[50] and this is true notwithstanding the fact that the note was given pursuant to a verbal agreement for the payment of a sum of money on

Brewing Co., 154 Mass. 185, 28 N. E. 151, 26 Am. St. Rep. 234, 12 L. R. A. 821.

Michigan.— Central Sav. Bank *v.* O'Connor, 132 Mich. 578, 94 N. W. 11.

Missouri.— St. Louis Third Nat. Bank *v.* Reichert, 101 Mo. App. 242, 73 S. W. 893.

New York.— Jamestown Business College Assoc. *v.* Allen, 172 N. Y. 291, 64 N. E. 952, 92 Am. St. Rep. 740; Pratt *v.* Pneumatic Tool Co., 50 N. Y. App. Div. 369, 63 N. Y. Suppl. 1062 [*affirmed* in 166 N. Y. 588, 59 N. E. 1129]; Washington Sav. Bank *v.* Ferguson, 43 N. Y. App. Div. 74, 59 N. Y. Suppl. 295; Munsell *v.* Flood, 45 N. Y. Super. Ct. 460; Prosser *v.* Miller, 37 Misc. 841, 76 N. Y. Suppl. 974.

Ohio.—Monnett *v.* Monnett, 46 Ohio St. 30, 17 N. E. 659.

Pennsylvania.— Kennedy *v.* Erie, etc., Plank-Road Co., 25 Pa. St. 224; Butler *v.* Keller, 19 Pa. Super. Ct. 472.

England.— Pym *v.* Campbell, 6 E. & B. 370, 2 Jur. N. S. 641, 25 L. J. Q. B. 277, 4 Wkly. Rep. 528, 88 E. C. L. 370.

Instruments not under seal.—The rule that where there has been an actual delivery of an instrument with the intention at the time of passing the present title, it cannot be shown by parol that the writing was not to become operative until the performance of some condition, applies to unsealed as well as to sealed instruments. Ryan *v.* Cooke, 172 Ill. 302, 50 N. E. 213 [*affirming* 68 Ill. App. 592].

48. Newman *v.* Baker, 10 App. Cas. (D. C.) 187; Braman *v.* Bingham, 26 N. Y. 483; Worrall *v.* Munn, 5 N. Y. 229, 55 Am. Dec. 330.

This is not merely a technical rule but is founded in good sense, based upon a proper regard for the soundness of titles and the interest of those who deal in them. Moore *v.* Winans, 23 N. Y. App. Div. 308, 48 N. Y. Suppl. 287 [*affirmed* in 160 N. Y. 703, 57 N. E. 1118].

49. Blewitt *v.* Boorum, 142 N. Y. 357, 37 N. E. 119, 40 Am. St. Rep. 600 [*affirming* 59 N. Y. Super. Ct. 321, 14 N. Y. Suppl. 298], in which case the court to this extent limited the rule from what it had been generally supposed to be.

50. *Alabama.*— Garner *v.* Fite, 93 Ala. 405, 9 So. 367; Gliddens *v.* Harrison, 59 Ala. 481; Standifer *v.* White, 9 Ala. 527; Barlow *v.* Flemming, 6 Ala. 146.

Connecticut.— Osborne *v.* Taylor, 58 Conn. 439, 20 Atl. 605; Converse *v.* Moulton, 2 Root 195.

District of Columbia.— Linville *v.* Holden, 2 MacArthur 329.

Georgia.— Stapleton *v.* Monroe, 111 Ga. 848, 36 S. E. 428; Johnson *v.* Cobb, 100 Ga. 139, 28 S. E. 72; Rodgers *v.* Rosser, 57 Ga. 319; Howard *v.* Stephens, 52 Ga. 448; Scaife *v.* Beall, 43 Ga. 333.

Idaho.— Dulaney *v.* Burke, 2 Ida. (Hasb.) 719, 23 Pac. 915.

Illinois.— Cairo, etc., R. Co. *v.* Parker, 84 Ill. 613; Walker *v.* Crawford, 56 Ill. 444, 8 Am. Rep. 701; Miller *v.* Wells, 46 Ill. 46; Harris *v.* Galbraith, 43 Ill. 309; Foy *v.* Blackstone, 31 Ill. 538, 83 Am. Dec. 246; Penny *v.* Graves, 12 Ill. 287; May *v.* May, 36 Ill. App. 77; Cairo, etc., R. Co. *v.* Delap, 7 Ill. App. 60.

Indiana.— Clanin *v.* Esterly Harvesting Mach. Co., 118 Ind. 372, 21 N. E. 35, 3 L. R. A. 863; Parks *v.* Zeek, 53 Ind. 221; Graves *v.* Clark, 6 Blackf. 183.

Iowa.— Farmer *v.* Perry, 70 Iowa 358, 30 N. W. 752; Myers *v.* Sunderland, 4 Greene 567.

Kentucky.— Dale *v.* Pope, 4 Litt. 166; Slusher *v.* Conant, 37 S. W. 579, 18 Ky. L. Rep. 660; Moore *v.* Parker, 15 Ky. L. Rep. 125.

Maine.— Sears *v.* Wright, 24 Me. 278; Boody *v.* McKenney, 23 Me. 517.

Maryland.— McSherry *v.* Brooks, 46 Md. 103.

Massachusetts.— Underwood *v.* Simonds, 12 Metc. 275; Adams *v.* Wilson, 12 Metc. 138, 45 Am. Dec. 240; Crossman *v.* Fuller, 17 Pick. 171; Rose *v.* Learned, 14 Mass. 154.

Michigan.— McEwan *v.* Ortman, 34 Mich. 325; Hyde *v.* Terwinkel, 26 Mich. 93.

Minnesota.—Curtice *v.* Hokanson, 38 Minn. 510, 38 N. W. 694; Huey *v.* Pinney, 5 Minn. 310.

Mississippi.— Wren *v.* Hoffman, 41 Miss. 616.

Missouri.— Smith *v.* Thomas, 29 Mo. 307; Houck *v.* Frisbee, 66 Mo. App. 16.

Montana.— Fisher *v.* Briscoe, 10 Mont. 124, 25 Pac. 30.

New Hampshire.—Porter *v.* Pierce, 22 N. H. 275, 55 Am. Dec. 151.

New York.— Thompson *v.* Hall, 45 Barb. 214; Ely *v.* Kilborn, 5 Den. 514; Erwin *v.* Saunders, 1 Cow. 249, 13 Am. Dec. 520. *Compare* Chapin *v.* Allen, 19 N. Y. Suppl. 818.

a certain contingency, for the condition must be held to have been waived by the giving of an unconditional note.[51] But it may be shown as between the parties or others having notice that the delivery was conditional only and that the instrument never in fact came into force as a binding obligation.[52]

(III) *BILLS OF SALE AND CONTRACTS OF SALE.* Parol evidence is inadmissible to annex to a bill of sale[53] or a contract of sale[54] any condition other than and different from conditions, if any, recited therein.

(IV) *BONDS.* The rule that parol or extrinsic evidence is not admissible to change or defeat the operation of a written instrument by showing a condition attached thereto and not appearing in the writing applies with full force to bonds.[55] But consistently with this rule it may be shown by parol or extrinsic

North Carolina.— Gatlin *v.* Kilpatrick, 4 N. C. 147, 534, 6 Am. Dec. 557.

Ohio.— Beecher *v.* Dunlap, 52 Ohio St. 64, 38 N. E. 795; Holzworth *v.* Koch, 26 Ohio St. 33.

Pennsylvania.— Phillips *v.* Meily, 106 Pa. St. 536; Heydt *v.* Frey, 10 Pa. Cas. 84, 13 Atl. 475; Spanlove *v.* Westrup, 1 Wkly. Notes Cas. 156.

South Carolina.— Harris *v.* Caston, 2 Bailey 342.

Tennessee.—Williams *v.* Terrell, 7 Humphr. 551. But *compare* Bissenger *v.* Guiteman, 6 Heisk. 277.

Texas.— Ablowich *v.* Greenville Nat. Bank, 22 Tex. Civ. App. 272, 54 S. W. 794; Aultman *v.* McKinney, (Civ. App. 1894) 26 S. W. 267; Riley *v.* Treanor, (Civ. App. 1894) 25 S. W. 1054.

Vermont.— Hatch *v.* Hyde, 14 Vt. 25, 39 Am. Dec. 203; Isaacs *v.* Elkins, 11 Vt. 679.

Virginia.— Watson *v.* Hurt, 6 Gratt. 633.

Wisconsin.— Wayland University *v.* Boorman, 56 Wis. 657, 14 N. W. 819; Gillmann *v.* Henry, 53 Wis. 465, 10 N. W. 692.

See 20 Cent. Dig. tit. "Evidence," §§ 1800, 1943. See also COMMERCIAL PAPER, 8 Cyc. pp. 251, 260.

In South Carolina, as between parties to a note or as against transferees with notice where the note does not state the consideration upon which it was given or where only a general consideration such as value received is stated, it is competent to prove that the note was given as part of an agreement by which the payment was to be conditional instead of absolute. McGrath *v.* Barnes, 13 S. C. 328, 36 Am. Rep. 687.

Indorsement in blank.— Parol evidence is admissible to prove that at the time when the owner of a note, who was not a party to it, indorsed his name in blank thereon, it was agreed that he was not to be liable unless the purchaser should return it on failure to collect it at maturity. Brewer *v.* Woodward, 54 Vt. 581, 41 Am. Rep. 857.

A written agreement contemporaneous with a note, the effect of which is to prescribe a contingency until the happening of which no action can be maintained, is admissible. Munro *v.* King, 3 Colo. 238; Elmore *v.* Hoffman, 6 Wis. 68.

Evidence showing set-off.— In an action on a note given for the purchase-money of certain property, parol evidence is admissible to show an agreement that part of the property would be taken back if not satisfactory, as such evidence does not go to alter the terms of the note, but tends to establish a set-off. Barnes *v.* Shelton, Harp. (S. C.) 33, 18 Am. Dec. 642.

A promise renewing a note cannot be shown by parol to have been made on a condition which had not been complied with. Warren Academy *v.* Starrett, 15 Me. 443.

51. Swank *v.* Nichols, 24 Ind. 199.

52. Westman *v.* Krumweide, 30 Minn. 313, 15 N. W. 255; Bovey Queen City Pressed Brick Co. *v.* Chillicothe Foundry, etc., Works, 6 Ohio Dec. (Reprint) 713, 7 Am. L. Rec. 548; Merchants' Nat. Bank *v.* McAnulty, (Tex. Civ. App. 1895) 31 S. W. 1091; Proctor *v.* Evans, 1 Tex. App. Civ. Cas. § 647.

53. Adams *v.* Garrett, 12 Ala. 229; Slatten *v.* Konrath, 1 Kan. App. 636, 42 Pac. 399; Goodloe *v.* Hart, 2 La. 446; Dixon *v.* Blondin, 58 Vt. 689, 5 Atl. 514; Sanborn *v.* Chittenden, 27 Vt. 171.

54. Davis *v.* Robinson, 71 Iowa 618, 33 N. W. 132; Daly *v.* W. W. Kimball Co., 67 Iowa 132, 24 N. W. 756; Kinnard Co. *v.* Cutter Tower Co., 159 Mass. 391, 34 N. E. 460; Lilienthal *v.* Suffolk Brewing Co., 154 Mass. 185, 28 N. E. 151, 26 Am. St. Rep. 234, 12 L. R. A. 821; Winslow Bros. Co. *v.* Herzog Mfg. Co., 46 Minn. 452, 49 N. W. 234; Englehorn *v.* Reitlinger, 122 N. Y. 76, 25 N. E. 297, 9 L. R. A. 548 [*affirming* 55 N. Y. Super. Ct. 485, 14 N. Y. St. 749].

55. *Louisiana.*— Police Jury *v.* Haw, 2 La. 41, 20 Am. Dec. 294.

Michigan.— Mason, etc., Co. *v.* Gage, 119 Mich. 361, 78 N. W. 130.

Mississippi.— Powell *v.* Jones, 12 Sm. & M. 506.

New Jersey.— Black *v.* Shreve, 13 N. J. Eq. 455.

New York.— Gerard *v.* Cowperthwait, 2 Misc. 371, 21 N. Y. Suppl. 1092; Richards *v.* Day, 18 N. Y. Suppl. 733; Grand *v.* Tefft, 7 N. Y. Suppl. 129; McCurtie *v.* Stevens, 13 Wend. 527.

North Carolina.— State *v.* Lewis, 73 N. C. 138, 21 Am. Rep. 461; Walters *v.* Walters, 33 N. C. 145; Geddy *v.* Stainback, 21 N. C. 475.

Pennsylvania.— Field *v.* Biddle, 2 Dall. 171, 1 L. ed. 335; Baillie *v.* Kessler, 6 Wkly. Notes Cas. 527.

South Carolina.— Atkinson *v.* Scott, 1 Bay 307.

See 20 Cent. Dig. tit. "Evidence," § 1942.

evidence that the bond never became effective because of the failure of conditions precedent therein.[56]

(v) *Deeds of Conveyance, Leases, and Mortgages.* A deed of conveyance may of course be delivered to a third person to take effect upon a condition to be subsequently performed,[57] but it is a well established rule that a deed cannot be delivered to the grantee or his agent in escrow, and that a deed so delivered at once becomes effective according to its terms.[58] It follows that parol evidence is not admissible to show that a deed which has been executed and delivered is subject to any conditions whatever which do not appear in the writing itself.[59] The effect of this rule is simply that when a person has made a deed of real estate and delivered it to the grantee who thereby becomes possessed of the power to use it, the grantor cannot overthrow the title thus created by any assertion that he did not intend to do precisely what he did do when the deed was delivered.[60] But a vendee may prove by parol that he did not accept a deed as performance of the vendor's contract to convey or only accepted it as such conditionally, for such evidence does not contradict the terms of the deed or tend to prove that it was not to be operative as a conveyance according to its terms.[61] Parol evidence is inadmissible to prove that a lease[62] or a mortgage[63] was delivered subject to conditions not appearing in the instrument.

Where a bond was signed in blank and was afterward filled up with a condition to pay certain sums of money absolutely, the signer may show that he did not authorize or assent to the condition as written in the bond, but that by the agreement of the parties the payments were to be conditional. Richards *v.* Day, 137 N. Y. 183, 33 N. E. 146, 33 Am. St. Rep. 704, 23 L. R. A. 601 [*reversing* 18 N. Y. Suppl. 733].

56. Nash *v.* Fugate, 32 Gratt. (Va.) 595, 34 Am. Rep. 780, holding that a bond apparently complete on its face may be avoided by parol evidence that the obligee at the time he received it from the principal obligor had notice that other persons were to sign it before it became effectual as to the sureties thereon.

57. Foley *v.* Cogwill, 5 Blackf. (Ind.) 18, 32 Am. Dec. 49. See, generally, Escrows.

58. Inglish *v.* Breneman, 5 Ark. 377, 41 Am. Dec. 96; Foley *v.* Cogwill, 5 Blackf. (Ind.) 18, 32 Am. Dec. 49. See also Campbell *v.* Jones, 52 Ark. 493, 12 S. W. 1016, 6 L. R. A. 783. And see, generally, Escrows.

59. *Alabama.*— Hargrave *v.* Melbourne, 86 Ala. 270, 5 So. 285; Williams *v.* Higgins, 69 Ala. 517.

California.— Mowry *v.* Heney, 86 Cal. 471, 25 Pac. 17.

Connecticut.— Bailey *v.* Close, 37 Conn. 408; Northrop *v.* Speary, 1 Day 23, 2 Am. Dec. 48; Skinner *v.* Hendrick, 1 Root 253, 1 Am. Dec. 43.

Florida.— Haworth *v.* Norris, 28 Fla. 763, 10 So. 18.

Georgia.— Hawkins *v.* Bevel, 61 Ga. 262.

Illinois.— Ryan *v.* Cooke, 172 Ill. 302, 50 N. E. 213 [*affirming* 68 Ill. App. 592]; Haven *v.* Chicago Sash, etc., Co., 96 Ill. App. 92 [*reversed* on other grounds in 195 Ill. 474, 63 N. E. 158].

Indiana.— Fouty *v.* Fouty, 34 Ind. 433; Thompson *v.* Thompson, 9 Ind. 323, 68 Am. Dec. 638.

Iowa.— McGee *v.* Allison, 94 Iowa 527, 63 N. W. 322; Marshall County High School Co. *v.* Iowa Evangelical Synod, 28 Iowa 360.

Maine.— Warren *v.* Miller, 38 Me. 108; Ellis *v.* Higgins, 32 Me. 34.

Michigan.— Beers *v.* Beers, 22 Mich. 42.

Nebraska.— Mattison *v.* Chicago, etc., R. Co., 42 Nebr. 545, 60 N. W. 925.

New Jersey.— Black *v.* Shreve, 13 N. J. Eq. 455.

New York.—Hutchins *v.* Hutchins, 98 N. Y. 56; Cocks *v.* Barker, 49 N. Y. 107; Braman *v.* Bingham, 26 N. Y. 483; Worrall *v.* Munn, 5 N. Y. 229, 55 Am. Dec. 330; Lawton *v.* Sager, 11 Barb. 349; Rathbun *v.* Rathbun, 6 Barb. 98.

Pennsylvania.— Storch *v.* Carr, 28 Pa. St. 135.

Texas.— Galveston, etc., R. Co. *v.* Pfeuffer, 56 Tex. 66; McClendon *v.* Brockett, 32 Tex. Civ. App. 150, 73 S. W. 854; Byars *v.* Byars, 11 Tex. Civ. App. 565, 32 S. W. 925; Gulf, etc., R. Co. *v.* Richards, 11 Tex. Civ. App. 95, 32 S. W. 96.

Virginia.— Miller *v.* Fletcher, 27 Gratt. 403, 21 Am. Rep. 356.

Wisconsin.— Schwalbach *v.* Chicago, etc., R. Co., 73 Wis. 137, 40 N. W. 579.

United States. — Philadelphia, etc., R. Co. *v.* Howard, 13 How. 307, 14 L. ed. 157; Blewett *v.* Front St. Cable R. Co., 51 Fed. 625, 2 C. C. A. 415 [*affirming* 49 Fed. 126].

See 20 Cent. Dig. tit. "Evidence," § 1929.

60. Moore *v.* Winans, 23 N. Y. App. Div. 308, 48 N. Y. Suppl. 287 [*affirmed* in 160 N. Y. 703, 57 N. E. 1118].

61. Slocum *v.* Bracy, 55 Minn. 249, 56 N. W. 826, 43 Am. St. Rep. 499.

62. Browning *v.* Haskell, 22 Pick. (Mass.) 310.

63. Russell *v.* Kinney, 1 Sandf. Ch. (N. Y.) 34; Sargent *v.* Cooley, 12 N. D. 1, 94 N. W. 576 [*citing* N. D. Rev. Code (1899), § 3517]; Shea *v.* Leisy, 85 Fed. 243.

(vi) *Subscriptions to Stock.* A subscription to the stock of a corporation cannot be varied by parol or extrinsic evidence for the purpose of showing that it was made upon conditions not appearing in the written instrument.[64] But it may be shown that the subscription was made under such circumstances that it was not to become a binding obligation until the condition was fulfilled,[65] and where the subscription books have been signed not by the alleged subscriber but by a person whom he authorized to subscribe for him, the subscriber may show by parol evidence that he authorized the subscription only on certain conditions.[66] So where the subscription has been delivered in escrow it may be shown that it was delivered to take effect only upon certain conditions.[67]

c. Conditions on Which Delivery to Be Made. Where an instrument, even though it be under seal, has been executed but not delivered absolutely, parol evidence is admissible to show the terms and conditions upon which it was, by the agreement and understanding of the parties, to be delivered,[68] or that it was not to be delivered at all, until certain conditions should be performed.[69]

d. Performance of Conditions. Parol evidence is admissible to show that a condition precedent to the liability of a party to a written instrument has been fulfilled,[70] or, where the instrument is by its terms to be void unless certain conditions are complied with, to show non-compliance.[71]

e. Time For Performance. Parol evidence is not admissible to enlarge the time allowed for the performance of a condition precedent specified in a written instrument.[72]

f. Completeness of Writing. The rules excluding parol evidence to show conditions annexed to the delivery of a deed or other written instrument apply only to instruments which upon their face are complete and require nothing but delivery to make them effective, and not to instruments which are insufficiently executed or show upon their face that they are not intended to take effect.[73]

7. Connection of Different Writings — a. In General. It has been asserted that parol evidence is not admissible to connect writings which are in themselves distinct and complete and do not on their face show any connection;[74] but this rule is not of uniform operation, as there are cases in which such evidence has

64. *Connecticut.*— Fairfield County Turnpike Co. *v.* Thorp, 13 Conn. 173.

Illinois.— Corwith *v.* Culver, 69 Ill. 502.

Indiana.—Cincinnati, etc., R. Co. *v.* Pearce, 28 Ind. 502; Evansville, etc., Straight Line R. Co. *v.* Evansville, 15 Ind. 395; McAllister *v.* Indianapolis, etc., R. Co., 15 Ind. 11; Jones *v.* Milton, etc., Turnpike Co., 7 Ind. 547; Madison, etc., Plank-Road Co. *v.* Stevens, 6 Ind. 379.

Kentucky.— Wight *v.* Shelby R. Co., 16 B. Mon. 4, 63 Am. Dec. 522.

Maryland.— Baile *v.* Calvert College Educational Soc., 47 Md. 117.

Minnesota.— Masonic Temple Assoc. *v.* Channell, 43 Minn. 353, 45 N. W. 716.

Nebraska.— Nebraska Exposition Assoc. *v.* Townley, 46 Nebr. 893, 65 N. W. 1062.

Pennsylvania.—Espy *v.* Mt. Lebanon Cemetery, 1 Walk. 40.

United States.— Brewer's F. Ins. Co. *v.* Clauson, 4 Fed. Cas. No. 1,851.

Canada.— Wilson *v.* Société de Construction, etc., 3 Montreal Leg. N. 79.

See 20 Cent. Dig. tit. "Evidence," § 1938; and cases cited in Corporations, 10 Cyc. 413.

65. Brewer's F. Ins. Co. *v.* Clauson, 4 Fed. Cas. No. 1,851.

66. Tonica, etc., R. Co. *v.* Stein, 21 Ill. 96.

67. Ottawa, etc., R. Co. *v.* Hall, 1 Ill. App. 612.

68. Cuthrell *v.* Cuthrell, 101 Ind. 375.

69. Black *v.* Lamb, 12 N. J. Eq. 108; Flommerfelt *v.* Englander, 29 Misc. (N. Y.) 655, 61 N. Y. Suppl. 187.

70. Hawes *v.* Illinois Wesleyan University, 21 Ill. App. 337.

71. Meyer *v.* McKee, 19 Ill. App. 109; New York Exch. Co. *v.* De Wolf, 31 N. Y. 273 [*reversing* 5 Bosw. 593].

72. Porter *v.* Stewart, 2 Aik. (Vt.) 417.

73. Ryan *v.* Cooke, 68 Ill. App. 592 [*affirmed* in 172 Ill. 302, 50 N. E. 213]; Moore *v.* Winans, 23 N. Y. App. Div. 308, 48 N. Y. Suppl. 287 [*affirmed* in 160 N. Y. 703, 57 N. E. 1118]; Wendlinger *v.* Smith, 75 Va. 309, 40 Am. Rep. 727.

74. *Indiana.*— Reynolds *v.* Louisville, etc., R. Co., 143 Ind. 579, 40 N. E. 410.

Kentucky.— Dillingham *v.* Estill, 3 Dana 21.

North Carolina.— Fortesque *v.* Crawford, 105 N. C. 29, 10 S. E. 910; Mayer *v.* Adrian, 77 N. C. 83.

Pennsylvania.— Hennershotz *v.* Gallagher, 124 Pa. St. 1, 16 Atl. 518.

United States.— Singer Mfg. Co. *v.* Hester, 6 Fed. 804, 2 McCrary 417.

See 20 Cent. Dig. tit. "Evidence," § 1903.

been considered admissible;[75] and certainly such evidence must be admissible where there is something on the face of one of the instruments to indicate that it does not in itself evidence a complete transaction, or where it refers to some other writing or undertaking.[76]

b. Of Obligation With Collateral Security or Guaranty. Parol evidence would seem to be always permissible to connect an instrument containing an obligation to pay money with another instrument evidencing the giving of security for, or a guaranty of, payment, as this is in effect nothing more than identifying the subject-matter of the latter instrument, or explaining an ambiguity, and the latter instrument is usually of such a character as to show that it does not, standing alone, evidence the complete agreement of the parties.[77] And this is true even though the note or other obligation produced does not in all particulars correspond with a description thereof in the mortgage or other writing.[78]

8. Of Parol Agreement With Writing Between Different Persons. It has been held that where one of two contracting parties to an agreement in writing made a similar verbal agreement with a third person, expressly referred to in the writing, there could be no objection to connecting the parol agreement with the written one by parol evidence, and thus showing the terms of the parol agreement.[79]

9. Consideration — a. General Rule. As a general rule the recitals of a written instrument as to the consideration are not conclusive, and it is always competent to inquire into the consideration and show by parol or other extrinsic evidence what the real consideration was.[80] Thus it may be shown that the real

This rule can have no application when the party sought to be charged voluntarily gives the parol evidence serving to connect the writings, which when connected evidence the contract. Beckwith *v.* Talbot, 2 Colo. 639. See also *infra*, XVI, E.

75. *Connecticut.*— Kellogg *v.* Rockwell, 19 Conn. 446.

Illinois.— See Gould *v.* Magnolia Metal Co., 207 Ill. 172, 69 N. E. 896 [*affirming* 108 Ill. App. 203].

Iowa.— Lee *v.* Mahoney, 9 Iowa 344. See also Myers *v.* Munson, 65 Iowa 423, 21 N. W. 759.

Missouri.— Welsh *v.* Edmisson, 46 Mo. App. 282.

Texas.— Howard *v.* Davis, 6 Tex. 174; Masterson *v.* Burnett, 27 Tex. Civ. App. 370, 66 S. W. 90.

England.— McGuffie *v.* Burleigh, 78 L. T. Rep. N. S. 264.

See 20 Cent. Dig. tit. "Evidence," § 1903.

76. *Iowa.*— McConaughy *v.* Wilsey, 115 Iowa 589, 88 N. W. 1101.

Kansas.— Wichita University *v.* Schweiter, 50 Kan. 672, 32 Pac. 352.

Kentucky.— Dillingham *v.* Estill, 3 Dana 21.

Massachusetts.— Hall *v.* Tufts, 18 Pick. 455.

United States.— Rutland, etc., R. Co. *v.* Crocker, 21 Fed. Cas. No. 12,176, 4 Blatchf. 179, 29 Vt. 540.

See 20 Cent. Dig. tit. "Evidence," § 1903.

77. *Connecticut.*— Douglas *v.* Chatham, 41 Conn. 211.

Maine.— Stowe *v.* Merrill, 77 Me. 550, 1 Atl. 684; Brown *v.* Holyoke, 53 Me. 9; Bourne *v.* Littlefield, 29 Me. 302.

Maryland.— Nelson *v.* Willey, 94 Md. 373, 55 Atl. 527.

Massachusetts.— Goddard *v.* Sawyer, 9 Allen 78; Baxter *v.* McIntire, 13 Gray 168; Clark *v.* Houghton, 12 Gray 38.

Nebraska.— Harlan County *v.* Whitney, 65 Nebr. 105, 90 N. W. 993, 101 Am. St. Rep. 610.

New Hampshire.— Colby *v.* Dearborn, 59 N. H. 326; Benton *v.* Summer, 57 N. H. 117; Somersworth Sav. Bank *v.* Roberts, 38 N. H. 22.

Tennessee.—Stanford *v.* Andrews, 12 Heisk. 664; Fitzpatrick *v.* School Com'rs, 7 Humphr. 224, 46 Am. Dec. 76.

Texas.— Looney *v.* Le Geirse, 2 Tex. App. Civ. Cas. § 531.

78. *Alabama.*— Morrison *v.* Taylor, 21 Ala. 779; Posey *v.* Decatur Bank, 12 Ala. 802.

Georgia.— See Gunn *v.* Jones, 67 Ga. 398.

Maine.— Hoey *v.* Candage, 61 Me. 257; Williams *v.* Hilton, 35 Me. 547, 58 Am. Dec. 729.

Massachusetts.— Johns *v.* Church, 12 Pick. 557, 23 Am. Dec. 651.

Missouri.— Williams *v.* Moniteau Nat. Bank, 72 Mo. 292; Aull *v.* Lee, 61 Mo. 160.

New Hampshire.— Cushman *v.* Luther, 53 N. H. 562; Melvin *v.* Fellows, 33 N. H. 401.

Wisconsin.— Paine *v.* Benton, 32 Wis. 491.

See 20 Cent. Dig. tit. "Evidence," § 1905.

79. Hargrave *v.* Davidson, 13 N. C. 535.

80. *Alabama.*— Folmar *v.* Siler, 132 Ala. 297, 31 So. 719; Booth *v.* Dexter Steam Fire Engine Co., 118 Ala. 369, 24 So. 405; Davis *v.* Snider, 70 Ala. 315; Ramsay *v.* Young, 69 Ala. 157; Wilkerson *v.* Tillman, 66 Ala. 532; Reader *v.* Helms, 57 Ala. 440.

California.— Arnold *v.* Arnold, 137 Cal.

consideration was in fact greater than that which is expressed in the instru-

291, 70 Pac. 23; Hendrick *v.* Crowley, 31 Cal. 472.

Colorado.— Rouse *v.* Wallace, 10 Colo. App. 93, 50 Pac. 366.

Connecticut.— Collins *v.* Tillou, 26 Conn. 368, 68 Am. Dec. 398.

Georgia.— Harkless *v.* Smith, 115 Ga. 350, 41 S. E. 634; Stone *v.* Minter, 111 Ga. 45, 36 S. E. 321, 50 L. R. A. 356; Burke *v.* Napier, 106 Ga. 327, 32 S. E. 134; Hawkins *v.* Collier, 101 Ga. 145, 28 S. E. 632; Henderson *v.* Thompson, 52 Ga. 149.

Idaho.— Kelly *v.* Leachman, 3 Ida. 672, 34 Pac. 813, 3 Ida. 629, 33 Pac. 44.

Illinois.— Booth *v.* Hynes, 54 Ill. 363; Sidders *v.* Riley, 22 Ill. 109; Scott *v.* Bennett, 8 Ill. 243.

Indiana.— Smith *v.* McClain, 146 Ind. 77, 45 N. E. 41; Pickett *v.* Green, 120 Ind. 584, 22 N. E. 737; Singer Mfg. Co. *v.* Forsyth, 108 Ind. 334, 9 N. E. 372; Levering *v.* Shockey, 100 Ind. 558; Smith *v.* Boruff, 75 Ind. 412; Moore *v.* Harrison, 26 Ind. App. 408, 59 N. E. 1077; French *v.* Arnett, 15 Ind. App. 674, 44 N. E. 551.

Indian Territory.— Mehlin *v.* Mutual Reserve Fund L. Assoc., 2 Indian Terr. 396, 51 S. W. 1063.

Iowa.— Sioux City First Nat. Bank *v.* Flynn, 117 Iowa 493, 91 N. W. 784; Coleman *v.* Gammon, (1900) 83 N. W. 898; McEnery *v.* McEnery, 110 Iowa 718, 80 N. W. 1071; Lewis *v.* Day, 53 Iowa 575, 5 N. W. 753.

Kentucky.—Gully *v.* Grubbs, 1 J. J. Marsh. 387; Hutchison *v.* Sinclair, 7 T. B. Mon. 291; Wade *v.* Pent, 71 S. W. 444, 24 Ky. L. Rep. 1294; Price *v.* Price, 66 S. W. 529, 23 Ky. L. Rep. 1911, 64 S. W. 746, 23 Ky. L. Rep. 1086.

Louisiana.— Clark *v.* Hedden, 109 La. 147, 33 So. 116. *Contra,* Cook *v.* Parkarson, 16 La. 129.

Maine.— Schillinger *v.* McCann, 6 Me. 364.

Maryland.— Higdon *v.* Thomas, 1 Harr. & G. 139; Oneale *v.* Lodge, 3 Harr. & M. 433, 1 Am. Dec. 377; Lingan *v.* Henderson, 1 Bland 236. *Contra,* Dixon *v.* Swiggett, 1 Harr. & J. 252.

Massachusetts.— Drury *v.* Tremont Imp. Co., 13 Allen 168; Ely *v.* Wolcott, 4 Allen 506; Wilkinson *v.* Scott, 17 Mass. 249.

Michigan.— White *v.* Rice, 112 Mich. 403, 70 N. W. 1024; Breitenwischer *v.* Clough, 111 Mich. 6, 69 N. W. 88, 66 Am. St. Rep. 372.

Minnesota.—Northwestern Creamery Co. *v.* Lanning, 83 Minn. 19, 85 N. W. 823; Langan *v.* Iverson, 78 Minn. 299, 80 N. W. 1051; Keith *v.* Briggs, 32 Minn. 185, 20 N. W. 91; Kumler *v.* Ferguson, 7 Minn. 442.

Mississippi.—Thompson *v.* Bryant, 75 Miss. 12, 21 So. 655; Baum *v.* Lynn, 72 Miss. 932, 18 So. 428, 30 L. R. A. 441.

Missouri.— Baile *v.* St. Joseph F. & M. Ins. Co., 73 Mo. 371; Edwards *v.* Smith, 63 Mo. 119; Hollocher *v.* Hollocher, 62 Mo. 267; Williams *v.* Kansas City Suburban Belt R. Co., 85 Mo. App. 103; Williams *v.* Alnutt, 72 Mo. App. 62.

Nebraska.— Wolf *v.* Haslach, 65 Nebr. (Unoff.) 303, 91 N. W. 283.

Nevada.— Lake *v.* Bender, 18 Nev. 361, 4 Pac. 711, 7 Pac. 74.

New Hampshire.— Pritchard *v.* Brown, 4 N. H. 397, 17 Am. Dec. 431; Morse *v.* Shattuck, 4 N. H. 229, 17 Am. Dec. 419.

New York.— Keuka College *v.* Ray, 167 N. Y. 96, 60 N. E. 325 [*affirming* 41 N. Y. App. Div. 200, 58 N. Y. Suppl. 745]; Wheeler *v.* Billings, 38 N. Y. 263; McKinster *v.* Babcock, 26 N. Y. 378; Rochester Folding Box Co. *v.* Brown, 55 N. Y. App. Div. 444, 66 N. Y. Suppl. 867; Wells *v.* Wells, 8 N. Y. App. Div. 422, 40 N. Y. Suppl. 836; Hess *v.* Allen, 24 Misc. 393, 53 N. Y. Suppl. 413; Homestead Bank *v.* Wood, 1 Misc. 145, 20 N. Y. Suppl. 640; Andrews *v.* Brewster, 9 N. Y. Suppl. 114; McCrea *v.* Purmort, 16 Wend. 460, 30 Am. Dec. 104; Bowen *v.* Bell, 20 Johns. 338, 11 Am. Dec. 286; Shephard *v.* Little, 14 Johns. 210; Leonard *v.* Vredenburgh, 8 Johns. 29, 5 Am. Dec. 317. *Contra,* Schemerhorn *v.* Vanderheyden, 1 Johns. 139, 3 Am. Dec. 304.

Ohio.— Groves *v.* Groves, 65 Ohio St. 442, 62 N. E. 1044; Burkhardt *v.* Burkhardt, 36 Ohio St. 261; Reid *v.* Sycks, 27 Ohio St. 285; Vail *v.* McMillan, 17 Ohio St. 617; Steele *v.* Worthington, 2 Ohio 182; Swisher *v.* Swisher, Wright 755.

Oregon.— Stark *v.* Olney, 3 Oreg. 88.

Pennsylvania.— Jack *v.* Dougherty, 3 Watts 151; Watson *v.* Blaine, 12 Serg. & R. 131, 14 Am. Dec. 669; Jordan *v.* Cooper, 3 Serg. & R. 564; Hamilton *v.* McGuire, 3 Serg. & R. 355; Fenn-Barnes *v.* Black, 7 Pa. Dist. 57.

Rhode Island.— National Exch. Bank *v.* Watson, 13 R. I. 91, 43 Am. Rep. 13.

South Carolina.— Trimmier *v.* Liles, 58 S. C. 284, 36 S. E. 652; Willis *v.* Hammond, 41 S. C. 153, 19 S. E. 310; Rapley *v.* Klugh, 40 S. C. 134, 18 S. E. 680; Curry *v.* Lyles, 2 Hill 404; Garrett *v.* Stewart, 1 McCord 514; Craig *v.* Pervis, 14 Rich. Eq. 150. *Contra,* Miller *v.* Bagwell, 3 McCord 562.

Texas.— Taylor *v.* Merrill, 64 Tex. 494; Perry *v.* Smith, 34 Tex. 277; Boren *v.* Boren, 29 Tex. Civ. App. 221, 68 S. W. 184; Cummings *v.* Moore, 27 Tex. Civ. App. 555, 65 S. W. 1113; Wilson *v.* Vick, (Civ. App. 1899) 51 S. W. 45; Banks *v.* House, (Civ. App. 1899) 50 S. W. 1022; Morris *v.* Graham, (Civ. App. 1897) 42 S. W. 575.

Utah.— Miller *v.* Livingston, 22 Utah 174, 61 Pac. 569.

Vermont.— Citizens' Sav. Bank, etc., Co. *v.* Babbitt, 71 Vt. 182, 44 Atl. 71.

Virginia.— Bruce *v.* Slemp, 82 Va. 352, 4 S. E. 692; Summers *v.* Darne, 31 Gratt. 791; Harvey *v.* Alexander, 1 Rand. 219, 10 Am. Dec. 519.

Washington.— Williams *v.* Blumenthal, 27 Wash. 24, 67 Pac. 393; Van Lehn *v.* Morse, 16 Wash. 219, 45 Pac. 435.

West Virginia.—Thomas *v.* Linn, 40 W. Va. 122, 20 S. E. 878.

ment,[81] or that there was some other consideration in addition to that set forth;[82]

Wisconsin.—Perkins *v.* McAuliffe, 105 Wis. 582, 81 N. W. 645; Frey *v.* Vanderhoof, 15 Wis. 397. But *compare* Hei *v.* Heller, 53 Wis. 415, 10 N. W. 620.

United States.— Mattoon *v.* McGrew, 112 U. S. 713, 5 S. Ct. 369, 28 L. ed. 824; Hitz *v.* National Metropolitan Bank, 111 U. S. 722, 4 S. Ct. 613, 28 L. ed. 577; Riddle *v.* Hudgins, 58 Fed. 490, 7 C. C. A. 335.

England.— Butcher *v.* Steuart, 1 D. & L. 308, 7 Jur. 774, 12 L. J. Exch. 391, 11 M. & W. 857; Goldshede *v.* Swan, 1 Exch. 154, 16 L. J. Exch. 284; Tull *v.* Parlett, M. & M. 472, 31 Rev. Rep. 751, 22 E. C. L. 566; Rex *v.* Scammonden, 3 T. R. 474, 1 Rev. Rep. 442.

Canada.— Shank *v.* Coulthard, 19 Grant Ch. (U. C.) 324; Davis *v.* McSherry, 7 U. C. Q. B. 490.

See 20 Cent. Dig. tit. "Evidence," §§ 1912–1928.

On application for equitable relief against a judgment entered by confession, on a bond or warrant of attorney, the court will receive parol evidence in relation to the extent and object of the bond or warrant, and the consideration thereof. Averill *v.* Loucks, 6 Barb. (N. Y.) 19.

In Iowa it has been held that where a consideration is expressed and fully stated in unmistakable language in a written instrument, parol evidence is not competent to add to, change, or vary it (De Goey *v.* Van Wyk, 97 Iowa 491, 496, 66 N. W. 787 [*citing* Kracke *v.* Homeyer, 91 Iowa 51, 58 N. W. 1056; Tabor, etc., R. Co. *v.* McCormick, 90 Iowa 446, 57 N. W. 949; Benson *v.* Haywood, 86 Iowa 107, 53 N. W. 85, 23 L. R. A. 335; Grundy Center First Nat. Bank *v.* Snyder, 79 Iowa 191, 44 N. W. 356; Blair *v.* Buttolph, 72 Iowa 31, 33 N. W. 349; Lewis *v.* Day, 53 Iowa 575, 5 N. W. 753; Courtwright *v.* Strickler, 37 Iowa 382; Gelpcke *v.* Blake, 19 Iowa 263]); but in a late case the court has intimated that this is perhaps going too far (see Schrimper *v.* Chicago, etc., R. Co., 115 Iowa 35, 82 N. W. 916, 87 N. W. 731).

New terms cannot be engrafted into an agreement by parol under the guise of varying the consideration. Kingsland *v.* Haines, 62 N. Y. App. Div. 146, 70 N. Y. Suppl. 873.

81. *Alabama.*— Pique *v.* Arendale, 71 Ala. 91.

Colorado.— Cheesman *v.* Nicholl, 18 Colo. App. 174, 70 Pac. 787.

District of Columbia.— Droop *v.* Ridenour, 11 App. Cas. 224.

Illinois.— Lloyd *v.* Sandusky, 95 Ill. App. 593.

Iowa.— Gelpcke *v.* Blake, 19 Iowa 263.

Maryland.— Smith *v.* Davis, 49 Md. 470; Cunningham *v.* Dwyer, 23 Md. 219.

Massachusetts.— Galvin *v.* Boston El. R. Co., 180 Mass. 587, 62 N. E. 961; Bullard *v.* Briggs, 7 Pick. 533, 19 Am. Dec. 292.

Missouri.— Culbertson *v.* Young, 86 Mo. App. 277.

Ohio.— Hicks *v.* Cubbon, 4 Ohio Dec. (Reprint) 408, 2 Clev. L. Rep. 121.

Pennsylvania.—McGary *v.* McDermott, 207 Pa. St. 620, 54 Atl. 46; Jack *v.* Dougherty, 3 Watts 151; Wilson *v.* Pearl, 12 Pa. Super. Ct. 66.

Texas.— Schneider *v.* Sanders, 26 Tex. Civ. App. 169, 61 S. W. 727; Powell *v.* Walker, 24 Tex. Civ. App. 312, 58 S. W. 838; Northington *v.* Tuohy, 2 Tex. App. Civ. Cas. § 326.

Vermont.— Harwood *v.* Harwood, 22 Vt. 507.

Virginia.— Harvey *v.* Alexander, 1 Rand. 219, 10 Am. Dec. 519.

Washington.— Don Yook *v.* Washington Mill Co., 16 Wash. 459, 47 Pac. 964.

England.— Clifford *v.* Turrell, 14 L. J. Ch. 390, 1 Y. & Coll. 138, 20 Eng. Ch. 138; Rex *v.* Scammonden, 3 T. R. 474, 1 Rev. Rep. 442.

See 20 Cent. Dig. tit. "Evidence," §§ 1912–1928.

82. *Alabama.*— Steed *v.* Hinson, 76 Ala. 298; Henry *v.* Murphy, 54 Ala. 246; Cowan *v.* Cooper, 41 Ala. 187; Dixon *v.* Barclay, 22 Ala. 370; Mead *v.* Steger, 5 Port. 498; Toulmin *v.* Austin, 5 Stew. & P. 410.

California.— Coles *v.* Soulsby, 21 Cal. 47.

Connecticut.— Belden *v.* Seymour, 8 Conn. 304, 21 Am. Dec. 661.

District of Columbia.— Diggins *v.* Doherty, 4 Mackey 172.

Georgia.— Thompson *v.* Cody, 100 Ga. 771, 28 S. E. 669.

Illinois.—Henderson *v.* Tobey, 105 Ill. App. 154.

Kansas.— Miller *v.* Edgerton, 38 Kan. 36, 15 Pac. 894.

Kentucky.— Bourne *v.* Bourne, 92 Ky. 211, 17 S. W. 443, 13 Ky. L. Rep. 545; Bryant *v.* Hunter, 6 Bush 75; Engleman *v.* Craig, 2 Bush 424; Trumbo *v.* Curtright, 1 A. K. Marsh. 582; Thomas *v.* Smith, 5 Ky. L. Rep. 768, 6 Ky. L. Rep. 737.

Louisiana.— Hart *v.* Clark, 5 Mart. 614; Clark *v.* Farrar, 3 Mart. 247.

Maine.— Abbott *v.* Marshall, 48 Me. 44; Brown *v.* Lunt, 37 Me. 423.

Maryland.— Cunningham *v.* Dwyer, 23 Md. 219; Anderson *v.* Tydings, 3 Md. Ch. 167.

Massachusetts.—Miller *v.* Goodwin, 8 Gray 542.

Minnesota.— Bolles *v.* Sachs, 37 Minn. 315, 33 N. W. 862; Keith *v.* Briggs, 32 Minn. 185, 20 N. W. 91.

Missouri.— McConnell *v.* Brayner, 63 Mo. 461; Laudman *v.* Ingram, 49 Mo. 212; Holt *v.* Holt, 57 Mo. App. 272; Hickman *v.* Hickman, 55 Mo. App. 303.

New York.— Beagle *v.* Harby, 73 Hun 310, 26 N. Y. Suppl. 375; Lynch *v.* Hunneke, 61 N. Y. Super. Ct. 235, 19 N. Y. Suppl. 718; Hope *v.* Smith, 35 N. Y. Super. Ct. 458.

North Carolina.—Robbins *v.* Love, 10 N. C. 82.

Ohio.— Vail *v.* McMillan, 17 Ohio St. 617; Steele *v.* Worthington, 2 Ohio 182.

Oregon.— Scoggin *v.* Schloath, 15 Oreg. 380, 15 Pac. 635.

Pennsylvania.— Taylor *v.* Preston, 79 Pa. St. 436; Lewis *v.* Brewster, 57 Pa. St. 410;

especially where the consideration set forth is only nominal,[83] even though the additional consideration rested upon the happening of a contingency.[84] And where the writing expresses that there were "other considerations" in addition to that set forth, it may be shown by parol what these were.[85] It may also be shown that the actual consideration was less than that recited in the instrument,[86]

Buckley's Appeal, 48 Pa. St. 491, 88 Am. Dec. 468; Hayden *v.* Mentzer, 10 Serg. & R. 329; Day *v.* Osborn, 19 Wkly. Notes Cas. 443; Audenreid *v.* Walker, 11 Phila. 183.

Rhode Island.— Wood *v.* Moriarty, 15 R. I. 518, 9 Atl. 427.

South Carolina.— Gist *v.* Davis, 2 Hill Eq. 335, 29 Am. Dec. 89; Henderson *v.* Dodd, Bailey Eq. 138.

Texas.—Sanger *v.* Miller, 26 Tex. Civ. App. 111, 62 S. W. 425; Garrett *v.* Robinson, (Civ. App. 1897) 43 S. W. 288; Womack *v.* Wamble, 7 Tex. Civ. App. 273, 27 S. W. 154.

Vermont.— Wait *v.* Wait, 28 Vt. 350.

Virginia.— Harvey *v.* Alexander, 1 Rand. 219, 10 Am. Dec. 519.

Wisconsin.—Kickland *v.* Menasha Wooden-Ware Co., 68 Wis. 34, 31 N. W. 471, 60 Am. Rep. 831; Hannan *v.* Oxley, 23 Wis. 519.

England.— Newcomb *v.* Bonham, 2 Ch. Cas. 58, 22 Eng. Reprint 845; *Re* Barnstaple Second Annuitant Soc., 50 L. T. Rep. N. S. 424.

See 20 Cent. Dig. tit. "Evidence," § 1913.

It may be shown that as an additional consideration the vendee of property agreed to pay the vendor one half of the profit he might make by a resale (Thomas *v.* Barker, 37 Ala. 392), or an additional sum in case of a resale at a profit (Clark *v.* Deshon, 12 Cush. (Mass.) 589), or that a grantee agreed to erect a sawmill on the land (Fraly *v.* Bentley, 1 Dak. 25, 46 N. W. 506), to grade a certain lot, and to remove a portion of a warehouse thereon (Mobile, etc., R. Co. *v.* Wilkinson, 72 Ala. 286); or to allow the grantor to sow and raise for his own use, a crop of wheat upon the land conveyed (Breitenwischer *v.* Clough, 111 Mich. 6, 69 N. W. 88, 66 Am. St. Rep. 372 [*distinguishing* Adams *v.* Watkins, 103 Mich. 431, 61 N. W. 774]). So where an instrument amounting to an accord and satisfaction has been executed reciting the release of a judgment for a consideration of a smaller sum than the amount thereof, it may be shown by parol that as part of the consideration the judgment debtor waived his right to appeal (Williams *v.* Blumenthal, 27 Wash. 24, 67 Pac. 393).

Where a cash consideration is recited in a contract, parol evidence of another and additional consideration is permissible. Walter *v.* Dearing, (Tex. Civ. App. 1901) 65 S. W. 380.

The additional consideration proved must be different either in character or quality from that stated, and not a simple increase of the same character added to the consideration named. Hyne *v.* Campbell, 6 T. B. Mon. (Ky.) 286.

83. Harraway *v.* Harraway, 136 Ala. 499, 34 So. 836; Davenport *v.* McCampbell, 17 B. Mon. (Ky.) 38; West Chester, etc., R. Co. *v.* Broomall, 18 Wkly. Notes Cas. (Pa.) 44; Perry *v.* Central Southern R. Co., 5 Coldw. (Tenn.) 138.

84. *Alabama.*— Thomas *v.* Barker, 37 Ala. Ala. 392.

Colorado.— Cheesman *v.* Nicholl, 18 Colo. App. 174, 70 Pac. 797.

Maine.— Nickerson *v.* Saunders, 36 Me. 413.

Massachusetts.— Clark *v.* Deshon, 12 Cush. 589.

New Hampshire.— Hall *v.* Hall, 8 N. H. 129.

See 20 Cent. Dig. tit. "Evidence," § 1913.

85. *Alabama.*— Johnson *v.* Boyles, 26 Ala. 576.

Kentucky.— Hyne *v.* Campbell, 6 T. B. Mon. 286.

New Hampshire.— Pomeroy *v.* Bailey, 43 N. H. 118.

North Carolina.— Chesson *v.* Pettijohn, 28 N. C. 121.

South Carolina.— Alexander *v.* McDaniel, 56 S. C. 252, 34 S. E. 405; Hatcher *v.* Hatcher, McMull. Eq. 311.

Washington.— Wright *v.* Stewart, 19 Wash. 179, 52 Pac. 1020.

See 20 Cent. Dig. tit. "Evidence," § 1913.

Effect of statement as to other consideration.— There is authority among the earlier cases to the effect that an additional consideration may be proved where the instrument expresses that there are "other considerations" than that stated, but that in the absence of some such expression evidence of further consideration would not be admissible. Braigley *v.* Hawes, 7 Johns. (N. Y.) 342; Miller *v.* Bagwell, 3 McCord (S. C.) 562.

86. *Alabama.*— Pique *v.* Arendale, 71 Ala. 81.

Colorado.— Cheesman *v.* Nicholl, 18 Colo. App. 174, 70 Pac. 797.

Illinois.— Lloyd *v.* Sandusky, 95 Ill. App. 593.

Iowa.— Gelpcke *v.* Blake, 19 Iowa 263.

Maine.— Hodges *v.* Heal, 80 Me. 281, 14 Atl. 11, 6 Am. St. Rep. 199.

Massachusetts.— Bullard *v.* Briggs, 7 Pick. 533, 19 Am. Dec. 292.

Vermont.— Harwood *v.* Harwood, 22 Vt. 507.

See 20 Cent Dig. tit. "Evidence," § 1912.

Assumption of debts.— Where a grantee has assumed as a part of the consideration the payment of a certain proportion of the debts of a business, he may show by parol evidence, in an action brought by him for the purpose of collecting the excess from the grantor, that the debts were agreed at the time of the conveyance to be a certain amount and that in fact they exceeded such

or that there was a want or failure of consideration, either in whole or in part.[87] It has been held that where an aggregate sum is mentioned in a contract as the

amount. Clark *v.* Lowe, 113 Mich. 352, 71 N. W. 638.

87. *Alabama.*— Parker *v.* Bond, 121 Ala. 529, 25 So. 898; Booth *v.* Dexter Steam Fire Engine Co., 118 Ala. 369, 24 So. 405; Reader *v.* Helms, 57 Ala. 440; Corbin *v.* Sistrunk, 19 Ala. 203; Brown *v.* Isbell, 11 Ala. 1009.

Arkansas.— Waymack *v.* Heilman, 26 Ark. 449. But see Davis *v.* Jernigan, 71 Ark. 494, 76 S. W. 554, holding that where a deed recites a pecuniary consideration, parol evidence is not admissible to show that there was no such consideration.

California.— Braly *v.* Henry, 71 Cal. 481, 11 Pac. 385, 12 Pac. 623, 60 Am. Rep. 543.

Colorado.— Stewart *v.* Kindel, 15 Colo. 539, 25 Pac. 990.

Connecticut.—Atwood *v.* Vincent, 17 Conn. 575; Lawrence *v.* Stonington Bank, 6 Conn. 521; Pettibone *v.* Roberts, 2 Root 258.

Georgia.— Hawkins *v.* Collier, 101 Ga. 145, 28 S. E. 632; Reese *v.* Strickland, 96 Ga. 784, 22 S. E. 323; Boynton *v.* Twitty, 53 Ga. 214.

Illinois.—Belohradsky *v.* Kuhn, 69 Ill. 547; Gage *v.* Lewis, 68 Ill. 604; Great Western Ins. Co. *v.* Rees, 29 Ill. 272.

Indiana.— Tombler *v.* Reitz, 134 Ind. 9, 33 N. E. 789; Ewing *v.* Justice, 132 Ind. 600, 31 N. E. 68; Ewing *v.* Wilson, 132 Ind. 223, 31 N. E. 64, 19 L. R. A. 767; Smith *v.* Boruff, 75 Ind. 412.

Indian Territory.— Fox *v.* Tyler, 3 Indian Terr. 1, 53 S. W. 462; Mehlin *v.* Mutual Reserve Fund L. Assoc., 2 Indian Terr. 396, 51 S. W. 1063.

Iowa.— Beaty *v.* Carr, 109 Iowa 183, 80 N. W. 326; Port *v.* Robbins, 35 Iowa 208; Gelpcke *v.* Blake, 19 Iowa 263; Code, § 3070.

Kentucky.— Tribble *v.* Oldham, 5 J. J. Marsh. 137.

Louisiana.— Falcon *v.* Boucherville, 1 Rob. 337; Le Blanc *v.* Sanglair, 12 Mart. 402, 13 Am. Dec. 377.

Maine.— Bigelow *v.* Bigelow, 93 Me. 439, 45 Atl. 513; Nutter *v.* Stover, 48 Me. 163; Thompson *v.* Linscott, 2 Me. 186, 11 Am. Dec. 57.

Maryland.— Groff *v.* Rohrer, 35 Md. 327. But *compare* Criss *v.* English, 26 Md. 553.

Massachusetts.— Stackpole *v.* Arnold, 11 Mass. 27, 6 Am. Dec. 150.

Michigan.— Jennison *v.* Stone, 33 Mich. 99; Bell *v.* Utley, 17 Mich. 508; Groesbeck *v.* Seeley, 13 Mich. 329, holding that parol evidence was admissible to show that there was no consideration for a deed, as opening the question of value under the Stamp Act.

Minnesota.— Northwestern Creamery Co. *v.* Lanning, 83 Minn. 19, 85 N. W. 823; Warner *v.* Schulz, 74 Minn. 252, 77 N. W. 25; Slater *v.* Foster, 62 Minn. 150, 64 N. W. 160.

Mississippi.— Cocke *v.* Blackbourn, 57 Miss. 689; Meyer *v.* Casey, 57 Miss. 615. See also Kerr *v.* Calvit, Walk. 115, 12 Am. Dec. 537.

Missouri.— Squier *v.* Evans, 127 Mo. 514, 30 S. W. 143; Holmes *v.* Farris, 97 Mo. App. 305, 71 S. W. 116; Christian University *v.* Hoffman, 95 Mo. App. 488, 69 S. W. 474.

Nebraska.— Luce *v.* Foster, 42 Nebr. 818, 60 N. W. 1027.

New Hampshire.— Lyford *v.* Thurston, 16 N. H. 399.

New York.— Baird *v.* Baird, 145 N. Y. 659, 40 N. E. 222, 28 L. R. A. 375 [*affirming* 81 Hun 300, 30 N. Y. Suppl. 785]; Juilliard *v.* Chaffee, 92 N. Y. 529; Wenz *v.* Meyersohn, 59 N. Y. App. Div. 130, 68 N. Y. Suppl. 1091; Carter *v.* Hamilton, 11 Barb. 147; Baker *v.* Connell, 1 Daly 469; Homestead Bank *v.* Wood, 1 Misc. 145, 20 N. Y. Suppl. 640.

North Dakota.—Sargent *v.* Cooley, 12 N. D. 1, 94 N. W. 576.

Ohio.— Bayles *v.* Crossman, 5 Ohio Dec. (Reprint) 354, 5 Am. L. Rec. 13.

Oregon.— La Grande Nat. Bank *v.* Blum, 26 Oreg. 49, 37 Pac. 48.

Pennsylvania.— McCulloch *v.* McKee, 16 Pa. St. 289.

Tennessee.—McCallum *v.* Jobe, 9 Baxt. 168, 40 Am. Rep. 84.

Texas.— Watson *v.* Boswell, 25 Tex. Civ. App. 379, 61 S. W. 407. See also Cleburne First Nat. Bank *v.* Turner, (App. 1891) 15 S. W. 710.

Wisconsin.— Remington *v.* Detroit Dental Mfg. Co., 101 Wis. 307, 77 N. W. 178; Smith *v.* Carter, 25 Wis. 283.

United States.— Fire Ins. Assoc. *v.* Wickham, 141 U. S. 564, 12 S. Ct. 84, 35 L. ed. 860.

England.— Abbott *v.* Kendricks, 1 Drinkw. 31, 4 Jur. 1113, 10 L. J. C. P. 51, 1 M. & G. 791, 2 Scott N. R. 183, 39 E. C. L. 1029.

See 20 Cent. Dig. tit. "Evidence," §§ 1912, 1981–1989.

At law as well as in equity the illegality or vice of the consideration for a bill of sale may be shown and made available. Tribble *v.* Oldham, 5 J. J. Marsh. (Ky.) 137.

The distinction between sealed and unsealed instruments as to the right to impeach the consideration does not exist in Mississippi. Meyer *v.* Casey, 57 Miss. 615.

In an action to set aside a certificate of redemption executed by a sheriff, its recitals may be impeached by parol evidence showing that no redemption was in fact made, and no money paid to the sheriff. Cooper *v.* Finke, 38 Minn. 2, 35 N. W. 469.

The Illinois statute allowing the defense of failure of consideration of a note not only gives to the maker of negotiable paper the right to introduce verbal evidence to vary or contradict such paper, but also operates to abrogate the general elementary rule that parol evidence is not admissible as against another writing than the note, if such other written instrument relates to the consideration of the note, or was executed in the course of the same transaction as was the note, and under such circumstances that the note and such other instrument ought to be regarded as but parts of one and the same

consideration for the transfer of several items of property, the actual consideration for each item may be shown by parol.[88] The principle admitting parol evidence to vary the consideration expressed in a written instrument does not rest upon the ground of fraud, accident, or mistake, and hence it is not necessary in order to form a basis for the admission of such evidence that the pleading should contain any allegation thereof.[89]

b. Application to Particular Instruments — (I) *Sealed Instruments Generally.* It was formerly held, although there was much conflict of opinion, that the clause stating the consideration in a deed or other instrument under seal must be held conclusive on the parties like other parts of the instrument and was not open to contradiction or explanation,[90] but the more modern decisions settle the rule that, although the consideration expressed in a sealed instrument is *prima facie* the sum paid or to be paid, it may still be shown by the parties that the real consideration is different from that expressed in the written instrument.[91]

(II) *Deeds of Conveyance* — (A) *In General.* Accordingly[92] it is held by an uncounted multitude of authorities that the true consideration of a deed of conveyance may always be inquired into, and shown by parol evidence,[93] for the

transaction. New York L. Ins. Co. *v.* Easton, 69 Ill. App. 479; Baker *v.* Fawcett, 69 Ill. App. 300. See also Broadwell *v.* Sanderson, 29 Ill. App. 384.

Showing relation of principal and surety.— The admissibility of parol evidence to show the relation of principal and surety is within the rule that admits such evidence to show that the written instrument is void either for the want or failure of consideration, and this is no infringement of the rule excluding parol contemporaneous evidence to contradict or vary the terms of a written instrument. Port *v.* Robbins, 35 Iowa 208.

The terms of a written instrument cannot be varied nor can conditions not found therein be created by parol evidence, even though the defense to an action on the instrument is failure of consideration. Sargent *v.* Cooley, 12 N. D. 1, 94 N. W. 576.

88. Field *v.* Austin, 131 Cal. 379, 63 Pac. 692.

89. Gulf, etc., R. Co. *v.* Jones, 82 Tex. 156, 17 S. W. 534; Taylor *v.* Merrill, 64 Tex. 494; Boren *v.* Boren, 29 Tex. Civ. App. 221, 68 S. W. 184; Johnson *v.* Elmen, 24 Tex. Civ. App. 43, 59 S. W. 605.

90. *Connecticut.*— Northrop *v.* Speary, 1 Day 23, 2 Am. Dec. 48; Bradley *v.* Blodget, Kirby 22, 1 Am. Dec. 11.

Kentucky.— Gill *v.* Hanks, 3 Litt. 95.

Maine.—Emery *v.* Chase, 5 Me. 232; Steele *v.* Adams, 1 Me. 1.

Mississippi.— Davidson *v.* Jones, 26 Miss. 56; Kerr *v.* Calvit, Walk. 115, 12 Am. Dec. 537.

New York.— Maigley *v.* Hauer, 7 Johns. 341, holding that where the consideration is expressly stated in a deed, and it is not said also, "and for other considerations" proof of any other consideration is inadmissible.

North Carolina.— See Spiers *v.* Clay, 11 N. C. 22; Graves *v.* Carter, 9 N. C. 576, 11 Am. Dec. 786; Brocket *v.* Foscue, 8 N. C. 64; Dickenson *v.* Dickenson, 6 N. C. 279.

Pennsylvania.— Wilt *v.* Franklin, 1 Binn. 502, 2 Am. Dec. 474.

England.— Clarkson *v.* Hanway, 2 P. Wms. 203, 24 Eng. Reprint 700; Rountree *v.* Jacob, 2 Taunt. 141; Peacock *v.* Monk, 1 Ves. 127, 27 Eng. Reprint 934.

See 20 Cent. Dig. tit. "Evidence," § 1912 *et seq.*

91. Counts *v.* Harlan, 78 Ala. 551 [*citing* Ala. Code, § 2981]; Eckles *v.* Carter, 26 Ala. 563; Fechheimer *v.* Trounstine, 15 Colo. 386, 24 Pac. 882; Hubbard *v.* Mulligan, 13 Colo. App. 116, 57 Pac. 738; Farnum *v.* Burnett, 21 N. J. Eq. 87; Hall *v.* McNally, 23 Utah 606, 65 Pac. 724.

92. See *supra*, XVI, C, 9, b, (I).

93. *Alabama.*— Bailey *v.* Litten, 52 Ala. 282; McGehee *v.* Rump, 37 Ala. 651.

Arkansas.— Vaugine *v.* Taylor, 18 Ark. 65.

California.— Peck *v.* Vandenberg, 30 Cal. 11; Bennett *v.* Solomon, 6 Cal. 134.

Colorado.— Cheesman *v.* Nicholl, 18 Colo. App. 174, 70 Pac. 797.

Connecticut.— Hannah *v.* Wadsworth, 1 Root 458.

District of Columbia.— National Metropolitan Bank *v.* Hitz, 1 Mackey 111.

Georgia.— Martin *v.* White, 115 Ga. 866, 42 S. E. 279; Leggett *v.* Patterson, 114 Ga. 714, 40 S. E. 736; Martin *v.* Gordon, 24 Ga. 533.

Illinois.— Worrell *v.* Forsyth, 141 Ill. 22, 30 N. E. 673; Howell *v.* Moores, 127 Ill. 67, 19 N. E. 863; Kidder *v.* Vandersloot, 114 Ill. 133, 28 N. E. 460; Primm *v.* Legg, 67 Ill. 500.

Indiana.— Cuthrell *v.* Cuthrell, 101 Ind. 375; Morehouse *v.* Heath, 99 Ind. 509; Headrick *v.* Wisehart, 57 Ind. 129; Lamb *v.* Donovan, 19 Ind. 40; Andrews *v.* Andrews, 12 Ind. 348; Thompson *v.* Thompson, 9 Ind. 323, 68 Am. Dec. 638; Rockhill *v.* Spraggs, 9 Ind. 30, 68 Am. Dec. 607.

Iowa.— Clapp *v.* Forster, 67 Iowa 49, 24 N. W. 587; Puttman *v.* Haltey, 24 Iowa 425; Swafford *v.* Whipple, 3 Greene 261, 54 Am. Dec. 498.

Kentucky.— Hickman *v.* McCurdy, 7 J. J. Marsh. 555; Neurenberger *v.* Lehenbauer, 66 S. W. 15, 23 Ky. L. Rep. 1753.

Louisiana.— Jackson *v.* Miller, 32 La. Ann.

obvious reason that a change in or contradiction of the expressed consideration

432; Gayoso *v.* Delaroderie, 9 La. Ann. 278; Linkswiler *v.* Hoffman, 109 La. 948, 34 So. 34; Harrison *v.* Laveery, 8 Mart. 213, 13 Am. Dec. 283.

Maine.— Tyler *v.* Carlton, 7 Me. 175, 20 Am. Dec. 357.

Maryland.— Smith *v.* Davis, 49 Md. 470; Baxter *v.* Sewell, 3 Md. 334 [*affirming* 2 Md. Ch. 447].

Massachusetts.— Twomey *v.* Crowley, 137 Mass. 184; Pickman *v.* Trinity Church, 123 Mass. 1, 25 Am. Rep. 1; Gale *v.* Coburn, 18 Pick. 397.

Michigan.— Ford *v.* Savage, 111 Mich. 144, 69 N. W. 240; Fitzpatrick *v.* Hoffman, 104 Mich. 228, 62 N. W. 349; Flynn *v.* Flynn, 68 Mich. 20, 35 N. W. 817; Hyler *v.* Nolan, 45 Mich. 357, 7 N. W. 910; Dean *v.* Adams, 44 Mich. 117, 6 N. W. 229; Strohauer *v.* Voltz, 42 Mich. 444, 4 N. W. 161; Doty *v.* Martin, 32 Mich. 462.

Minnesota.— Le May *v.* Brett, 81 Minn. 506, 84 N. W. 339; Jensen *v.* Crosby, 80 Minn. 158, 83 N. W. 43; Ripon College *v.* Brown, 66 Minn. 179, 68 N. W. 837.

Mississippi.— Kerr *v.* Calvit, Walk. 115, 12 Am. Dec. 537.

Missouri.—Taylor *v.* Crockett, 123 Mo. 300, 27 S. W. 620; Moore *v.* Ringo, 82 Mo. 468; Wood *v.* Broadley, 76 Mo. 23, 43 Am. Rep. 754.

Nebraska.— Ord First Nat. Bank *v.* Bower, (1904) 98 N. W. 834; Columbia Nat. Bank *v.* Baldwin, 64 Nebr. 732, 90 N. W. 899; Fall *v.* Glover, 34 Nebr. 522, 52 N. W. 168.

Nevada.— Lake *v.* Bender, 18 Nev. 361, 4 Pac. 711, 7 Pac. 74.

New Hampshire.— Pritchard *v.* Brown, 4 N. H. 397, 17 Am. Dec. 431.

New Jersey.— Morris Canal, etc., Co. *v.* Ryerson, 27 N. J. L. 457; Silvers *v.* Potter, 48 N. J. Eq. 539, 22 Atl. 584.

New York.— Witbeck *v.* Waine, 16 N. Y. 532; Mains *v.* Haight, 14 Barb. 76; Leonard *v.* Redenburgh, 8 Johns. 29, 5 Am. Dec. 317; Benedict *v.* Lynch, 1 Johns. Ch. 370, 7 Am. Dec. 484.

North Dakota.— Forester *v.* Van Auken, 12 N. D. 175, 96 N. W. 301.

Ohio.— Conklin *v.* Hancock, 67 Ohio St. 455, 66 N. E. 518 [*distinguishing* Brumbaugh *v.* Chapman, 45 Ohio St. 368, 13 N. E. 584]; Swisher *v.* Swisher, Wright 755.

Oregon.— Williams *v.* Poppleton, 3 Oreg. 139; Brown *v.* Cahalin, 3 Oreg. 45.

Pennsylvania.— McGary *v.* McDermott, 207 Pa. St. 620, 57 Atl. 46; Henry *v.* Zurflieh, 203 Pa. St. 440, 53 Atl. 243; Strawbridge *v.* Cartledge, 7 Watts & S. 394.

Rhode Island.— National Exch. Bank *v.* Watson, 13 R. I. 94, 43 Am. Rep. 132; Hedley *v.* Briggs, 2 R. I. 489.

South Carolina.— Willcox *v.* Priester, 68 S. C. 106, 46 S. E. 553; Lenhardt *v.* Ponder, 64 S. C. 354, 42 S. E. 169; Davis *v.* Keller, 5 Rich. Eq. 434.

Texas.— Stiles *v.* Giddens, 21 Tex. 783; Johnson *v.* Elmen, 24 Tex. Civ. App. 43, 59 S. W. 605.

Vermont.— Wheeler *v.* Campbell, 68 Vt. 98, 34 Atl. 35; Pierce *v.* Brew, 43 Vt. 292; Holbrook *v.* Holbrook, 30 Vt. 432.

Virginia.— Bruce *v.* Slemp, 82 Va. 352, 4 S. E. 692.

Wisconsin.— Halvorsen *v.* Halvorsen, 120 Wis. 52, 97 N. W. 494; Cuddy *v.* Foreman, 107 Wis. 519, 83 N. W. 1103; Beckman *v.* Beckman, 86 Wis. 655, 57 N. W. 1117; Horner *v.* Chicago, etc., R. Co., 38 Wis. 165; Reynolds *v.* Vilas, 8 Wis. 471, 76 Am. Dec. 238.

United States.— Mills *v.* Allen, 133 U. S. 423, 10 S. Ct. 413, 33 L. ed. 717; Patrick *v.* Leach, 2 Fed. 120, 1 McCrary 250.

See 20 Cent. Dig. tit. "Evidence," § 1912.

Evidence is admissible to show that the real consideration of a deed to a railroad company was the company's promise to build a depot on the land, although the expressed consideration was "benefit to be derived from the building of the road and one dollar paid" (Louisville, etc., R. Co. *v.* Neafus, 93 Ky. 53, 18 S. W. 1030, 13 Ky. L. Rep 951. See also Missouri, etc., R. Co. *v.* Doss, (Tex. Civ. App. 1896) 36 S. W. 497); that part of the consideration for a grant was that the property should not be used for the sale of intoxicating liquors (Hall *v.* Solomon, 61 Conn. 476, 23 Atl. 876, 29 Am. St. Rep. 218; Taylor *v.* Becker, 8 Ohio Dec. (Reprint) 151, 6 Cinc. L. Bul. 25); that the consideration of a conveyance by a husband to his wife, reciting a valuable consideration, was her promise to execute her will, and devise to him one third of her estate, including said lands (Manning *v.* Pippen, 86 Ala. 357, 5 So. 572, 11 Am. St. Rep. 46); that, although a money consideration is recited, the true consideration of a deed was the agreement of the grantee to support the grantor (Rankin *v.* Wallace, 14 S. W. 79, 12 Ky. L. Rep. 97; Scott *v.* Scott, 3 B. Mon. (Ky.) 2. *Contra*, Thompson *v.* Corrie, 57 Md. 197), or some other persons (Wilfong *v.* Johnson, 41 W. Va. 283, 23 S. E. 730); that a conveyance of property in trust for a wife was made in consideration of her release of dower (Bullard *v.* Briggs, 7 Pick. (Mass.) 533, 19 Am. Dec. 292); that marriage was the consideration of a deed expressed to be for a money consideration only (Tolman *v.* Ward, 86 Me. 303, 29 Atl. 1081, 41 Am. St. Rep. 556; Eppes *v.* Randolph, 2 Call (Va.) 125; Villers *v.* Beaumont, Benl. 39, Dyer 146*a*. *Contra*, Betts *v.* Union Bank, 1 Harr. & G. (Md.) 175, 18 Am. Dec. 283); that the consideration for a deed of post-nuptial settlement moved from the wife's father, although it is recited to have been paid by the husband (Marks *v.* Spencer, 81 Va. 751); or that the price of the land was to depend on the number of square feet contained therein (Cardinal *v.* Hadley, 158 Mass. 352, 33 N. E. 575, 35 Am. St. Rep. 492).

Agreement preceding execution.— It is impossible to give effect to the doctrine that the consideration of a deed may be shown by parol without permitting the parties to prove

does not affect in any manner the covenants of the grantor or grantee, and neither enlarges nor limits the grant." [94]

(B) *Assumption of Encumbrances.* It may be shown, although not expressed in a deed, that the grantee agreed as part of the consideration to pay or assume an existing encumbrance,[95] even though the deed contains a covenant of warranty against encumbrances, for such evidence does not destroy the warranty but leaves it in full force and effect except as to the specific encumbrance, the payment or assumption of which was a part of the consideration.[96]

(III) *Other Instruments.* The rule just stated in respect to evidence of consideration of deeds[97] has also been applied to assignments,[98] bills and notes,[99] bills

what agreement as to the consideration preceded the execution of the deed. Such agreement necessarily precedes the execution, and the fact that the consideration was agreed upon sometime prior to the execution and delivery of the deed does not preclude the grantor from showing what constituted the true consideration. Lowry *v.* Downey, 150 Ind. 364, 50 N. E. 79; Hays *v.* Peck, 107 Ind. 389, 8 N. E. 274.

A memorandum of real estate conveyed, and of the prices thereof per acre, made by the grantors, and furnished by one of the grantees to the conveyancer before the execution of the deed, can be introduced in evidence by the grantors, to show the true consideration. Guinotte *v.* Chouteau, 34 Mo. 154.

In an action on a covenant of seizin, as the damages are regulated by the amount of the purchase-money, parol evidence is admissible to prove a different amount from that mentioned in the deed. Henderson *v.* Henderson, 13 Mo. 151; Morse *v.* Shattuck, 4 N. H. 229, 17 Am. Dec. 419.

Testimony as to the value of land conveyed is inadmissible to rebut the *prima facie* evidence of the actual consideration as shown by the consideration expressed in the deed. Yenner *v.* Hammond, 36 Wis. 277.

94. Henry *v.* Zurflieh, 203 Pa. St. 440, 53 Atl. 243.

95. *Indiana.*— Hays *v.* Peck, 107 Ind. 389, 8 N. E. 274; McDill *v.* Gunn, 43 Ind. 315; Carver *v.* Louthain, 38 Ind. 530; Fitzer *v.* Fitzer, 29 Ind. 468; Pitman *v.* Conner, 27 Ind. 337.

Maine.— Burnham *v.* Dorr, 72 Me. 198.

Maryland.— Mahoney *v.* Mackubin, 54 Md. 268.

Michigan.— Strohauer *v.* Voltz, 42 Mich. 444, 4 N. W. 161.

Missouri.— Laudman *v.* Ingram, 49 Mo. 212.

Pennsylvania.— Buckley's Appeal, 48 Pa. St. 491, 88 Am. Dec. 468.

South Dakota.— Miller *v.* Kennedy, 12 S. D. 478, 81 N. W. 906.

Texas.— Johnson *v.* Elmen, 94 Tex. 168, 59 S. W. 253, 86 Am. St. Rep. 845, 52 L. R. A. 162 [*affirming* 24 Tex. Civ. App. 43, 59 S. W. 604].

Wisconsin.— Morgan *v.* South Milwaukee Lake View Co., 97 Wis. 275, 72 N. W. 872.

See 20 Cent. Dig. tit. "Evidence," § 1914. But see *supra,* XVI, B, 2, i, (I).

Where the consideration is stated in general terms it may be shown by parol that the grantee verbally agreed, as part of the consideration, to pay an encumbrance existing on the real estate conveyed. Lowry *v.* Downey, 150 Ind. 364, 50 N. E. 79.

96. Johnson *v.* Elmen, 94 Tex. 168, 59 S. W. 253, 86 Am. St. Rep. 845, 52 L. R. A. 162 [*affirming* 24 Tex. Civ. App. 43, 59 S. W. 604]. *Contra,* Brown *v.* Morgan, 56 Mo. App. 382 [*criticizing* Laudman *v.* Ingram, 49 Mo. 212].

97. See *supra,* XVI, C, 9, b, (II), (A), (B).

98. *California.*— Lockwood *v.* Canfield, 20 Cal. 126; Bennett *v.* Solomon, 6 Cal. 134.

Michigan.— McLouth *v.* Dibble, 31 Mich. 68.

New York.— Nortrip *v.* Hermans, 16 Misc. 313, 39 N. Y. Suppl. 415; Henderson *v.* Fullerton, 54 How. Pr. 422.

North Carolina.— Wade *v.* Carter, 76 N. C. 171.

Pennsylvania.— Galway's Appeal, 34 Pa. St. 242.

See 20 Cent. Dig. tit. "Evidence," § 1919.

99. *Alabama.*—Booth *v.* Dexter Steam Fire Engine Co., 118 Ala. 369, 24 So. 405.

Georgia.— Burke *v.* Napier, 106 Ga. 327, 32 S. E. 134.

Illinois.— Kidder *v.* Vandersloot, 114 Ill. 133, 28 N. E. 460.

Indiana.— Smith *v.* Boruff, 75 Ind. 412.

Mississippi.— Cocke *v.* Blackbourn, 57 Miss. 689.

Missouri.— Grand River College *v.* Robertson, 67 Mo. App. 329.

Nebraska.— Gifford *v.* Fox, 2 Nebr. (Unoff.) 30, 95 N. W. 1066.

New York.— Caryl *v.* Williams, 7 Lans. 416.

South Carolina.— Monaghan Bay Co. *v.* Dickson, 39 S. C. 146, 17 S. E. 696, 39 Am. St. Rep. 704.

See 20 Cent. Dig. tit. "Evidence," § 1925. See also COMMERCIAL PAPER, 8 Cyc. 32 *et seq.,* 252 *et seq.*

Breach of a verbal contract which constituted the consideration of a promissory note may be shown in defense to an action on the note. Dicken *v.* Morgan, 54 Iowa 684, 7 N. W. 145.

An indorsement in blank may be shown to have been without consideration. Farmers' Sav. Bank *v.* Hansmann, 114 Iowa 49, 86 N. W. 31.

In an action to foreclose a mortgage of

of sale,[1] bonds,[2] contracts generally,[3] contracts of guaranty and suretyship,[4] contracts of sale,[5] mortgages and deeds of trust,[6] and releases.[7]

c. Recital of Payment. A recital in a written instrument as to the payment of the consideration is merely in the nature of a receipt and may be contradicted,[8]

land, between the original parties, or those having no superior rights, parol evidence is admissible to show a want of consideration for the note which the mortgage secured. Bigelow *v.* Bigelow, 93 Me. 439, 45 Atl. 513; Aldrich *v.* Whitaker, 70 N. H. 627, 47 Atl. 591.

1. *Alabama.*— Troy Fertilizer Co. *v.* Norman, 107 Ala. 667, 18 So. 201; Whitman *v.* Revels, 39 Ala. 121.

Arkansas.— Clinton *v.* Estes, 20 Ark. 216.

Indiana.— McMahan *v.* Stewart, 23 Ind. 590.

Kentucky.— Engleman *v.* Craig, 2 Bush 424.

Maryland.—Cunningham *v.* Dwyer, 23 Md. 219.

Massachusetts.— Paget *v.* Cook, 1 Allen 522.

Michigan.— Trevidick *v.* Mumford, 31 Mich. 467.

Missouri.— Nedvidek *v.* Meyer, 46 Mo. 600.

Nebraska.— Wolf *v.* Haslach, 65 Nebr. 303, 91 N. W. 283.

New York.— Cosgriff *v.* Dewey, 21 N. Y. App. Div. 129, 47 N. Y. Suppl. 255; Rosboro *v.* Peck, 48 Barb. 92; Howland *v.* Hammill, 5 Alb. L. J. 334.

Ohio.— Hicks *v.* Cubbon, 4 Ohio Dec. (Reprint) 408, 2 Clev. L. Rep. 121.

South Carolina.— Foster *v.* Calhoun, Dudley 75.

Washington.— Don Yook *v.* Washington Mill Co., 16 Wash. 459, 47 Pac. 964.

Wisconsin.— Halpin *v.* Stone, 78 Wis. 183, 47 N. W. 177.

United States.—Riddle *v.* Hudgins, 58 Fed. 490, 7 C. C. A. 335.

See 20 Cent. Dig. tit. "Evidence," § 1918.

2. Baldwin *v.* Carter, 17 Conn. 201, 42 Am. Dec. 735; Singer Mfg. Co. *v.* Forsyth, 108 Ind. 334, 9 N. E. 372; Miller *v.* Fichthorn, 31 Pa. St. 252; Miller *v.* McCardle, 2 Lanc. Bar (Pa.) 22; Wrightsman *v.* Bowyer, 24 Gratt. (Va.) 433. See also BONDS, 5 Cyc. 846.

3. *Alabama.*— Foster *v.* Napier, 74 Ala. 393.

Arkansas.— Fitzpatrick *v.* Moore, 53 Ark. 4, 16 S. W. 7.

Illinois.— Ryan *v.* Hamilton, 205 Ill. 191, 68 N. E. 781 [*reversing* 103 Ill. App. 212].

Indiana.— Baltes Land, etc., Co. *v.* Sutton, 32 Ind. App. 14, 69 N. E. 179.

Minnesota.— Anderman *v.* Meier, 91 Minn. 413, 98 N. W. 327.

Mississippi.— Millsaps *v.* Merchants', etc., Bank, 71 Miss. 361, 13 So. 903.

Missouri.— Liebke *v.* Knapp, 79 Mo. 22, 49 Am. Rep. 212; Edwards *v.* Smith, 63 Mo. 119; Harrington *v.* Kansas City Cable R. Co., 60 Mo. App. 223.

New York.— Van Gorden *v.* Sackett, 2 Silv. Supreme 582, 6 N. Y. Suppl. 860; Hope *v.* Smith, 35 N. Y. Super. Ct. 458.

Oregon.— Williams *v.* Poppleton, 3 Oreg. 139.

Pennsylvania.— Holmes' Appeal, 79 Pa. St. 279.

Texas.— Perry *v.* Smith, 34 Tex. 277; Cooper *v.* Bumpass Caleb, 1 Tex. App. Civ. Cas. § 498.

United States.— Lafitte *v.* Shawcross, 12 Fed. 519.

See 20 Cent. Dig. tit. "Evidence," § 1922; and also CONTRACTS, 9 Cyc. 368 note 49.

Where a contract is plainly divisible, it may be shown by parol that the consideration extended only to one part of the contract, and that the other part was not sustained by a consideration. Platt *v.* Scribner, 18 Ohio Cir. Ct. 452, 9 Ohio Cir. Dec. 771.

4. Taylor *v.* Wightman, 51 Iowa 411, 1 N. W. 607; Nichols *v.* Bell, 46 N. C. 32.

The consideration of the original liability may be proved by parol in an action on a written promise to pay the debt of another. Giltinan *v.* Strong, 64 Pa. St. 242; Burt *v.* Flynn, 24 Pa. Co. Ct. 451.

5. Witzel *v.* Zuel, 90 Minn. 340, 96 N. W. 1124; Barker *v.* Bradley, 42 N. Y. 316, 1 Am. Rep. 521; Graver *v.* Scott, 80 Pa. St. 88.

6. *Alabama.*— Ohmer *v.* Boyer, 89 Ala. 273, 7 So. 663; Blum *v.* Mitchell, 59 Ala. 535.

Illinois.— Babcock *v.* Lisk, 57 Ill. 327.

Indiana.— Murdock *v.* Cox, 118 Ind. 266, 20 N. E. 786; Colt *v.* McConnell, 116 Ind. 249, 19 N. E. 106.

Maine.— Abbott *v.* Marshall, 48 Me. 44.

Massachusetts.— Cook *v.* Johnson, 165 Mass. 245, 43 N. E. 96.

Michigan.— Church *v.* Case, 110 Mich. 621, 68 N. W. 424.

New York.— Ferris *v.* Hard, 135 N. Y. 354, 32 N. E. 129; Kane *v.* Cortesy, 100 N. Y. 132, 2 N. E. 874; Baird *v.* Baird, 81 Hun 300, 30 N. Y. Suppl. 785. *Contra,* Patchin *v.* Pierce, 12 Wend. 61.

Ohio.— Hicks *v.* Cubbon, 4 Ohio Dec. (Reprint) 408, 2 Clev. L. Rep. 121.

Texas.— Glenn *v.* Seeley, 25 Tex. Civ. App. 523, 61 S. W. 959.

Vermont.— Perry *v.* Dow, 56 Vt. 569.

See 20 Cent. Dig. tit. "Evidence," § 1921. See also *supra,* XVI, B, 2, m, (II).

7. *California.*— Stufflebeem *v.* Arnold, 57 Cal. 11.

Indiana.— Citizens' St. R. Co. *v.* Heath, 29 Ind. App. 395, 62 N. E. 107.

Massachusetts.— Galvin *v.* Boston El. R. Co., 180 Mass. 587, 62 N. E. 961; Hill *v.* Whidden, 158 Mass. 267, 33 N. E. 526.

Mississippi.— Fry *v.* Prewett, 56 Miss. 783.

Pennsylvania.— Watterson *v.* Allegheny Valley R. Co., 74 Pa. St. 208.

See 20 Cent. Dig. tit. "Evidence," § 1928.

8. *Alabama.*— McGehee *v.* Rump, 37 Ala. 651; Saunders *v.* Hendrix, 5 Ala. 224.

Arkansas.— Vaugine *v.* Taylor, 18 Ark. 65; Pate *v.* Johnson, 15 Ark. 275.

unless such contradiction would have the effect of rendering nugatory some substantial and contractual provision of a valid written contract or undertaking,[9] or in the case of a conveyance where the grantor or those claiming under him attempt, by contradicting the consideration clause, to defeat the operation of the deed or establish a resulting trust in the grantee.[10] It has been held that parol

California.— Anthony *v.* Chapman, 65 Cal. 73, 2 Pac. 889; Rhine *v.* Ellen, 36 Cal. 362; Millard *v.* Hathaway, 27 Cal. 119.

Connecticut.— Collins *v.* Tillou, 26 Conn. 368, 68 Am. Dec. 398; Meeker *v.* Meeker, 16 Conn. 383; Hannah *v.* Wadsworth, 1 Root 458.

Delaware.—Wood *v.* Bangs, 2 Pennew. 435, 48 Atl. 189; Callaway *v.* Hearn, 1 Houst. 607.

Illinois.— Elder *v.* Hood, 38 Ill. 533; Kimball *v.* Walker, 30 Ill. 482; Ayres *v.* McConnel, 15 Ill. 230.

Indiana.— Lamb *v.* Donovan, 19 Ind. 40; Swope *v.* Forney, 17 Ind. 385; Citizens' St. R. Co. *v.* Heath, 29 Ind. App. 395, 62 N. E. 107; Kentucky, etc., Cement Co. *v.* Cleveland, 4 Ind. App. 171, 30 N. E. 802.

Iowa.— Hall *v.* Perry, 3 Greene 579.

Kansas.— Milich *v.* Armour Packing Co., 60 Kan. 229, 56 Pac. 1.

Kentucky.— Bourne *v.* Bourne, 92 Ky. 211, 17 S. W. 443, 13 Ky. L. Rep. 545; Gordon *v.* Gordon, 1 Metc. 285; Triplett *v.* Gill, 7 J. J. Marsh. 438; Tribble *v.* Oldham, 5 J. J. Marsh. 137; Gully *v.* Grubbs, 1 J. J. Marsh. 387; Hutchison *v.* Sinclair, 7 T. B. Mon. 291; Neurenberger *v.* Lehenbauer, 66 S. W. 15, 23 Ky. L. Rep. 1753.

Louisiana.— Harper *v.* Pierce, 13 La. Ann. 340. *Contra*, Foster *v.* Her Husband, 6 La. 22; Baker *v.* Voorhies, 6 Mart. N. S. 315. And see Thomas' Succession, 12 Rob. 215; Forest *v.* Shores, 11 La. 416.

Maine.— Bassett *v.* Bassett, 55 Me. 127; Goodspeed *v.* Fuller, 46 Me. 141, 71 Am. Dec. 572; Burbank *v.* Gould, 15 Me. 118.

Maryland.— Thompson *v.* Corrie, 57 Me. 197; Bladen *v.* Wells, 30 Md. 577; Bratt *v.* Bratt, 21 Md. 578; Carr *v.* Hobbs, 11 Md. 285; Woollen *v.* Hillen, 9 Gill 185, 52 Am. Dec. 690; Morgan *v.* Bitzenberger, 3 Gill 350; Wolfe *v.* Hauver, 1 Gill 84; Higdon *v.* Thomas, 1 Harr. & G. 139; Oneale *v.* Lodge, 3 Harr. & M. 433, 1 Am. Dec. 377; Lingan *v.* Henderson, 1 Bland 236; Spalding *v.* Brent, 3 Md. Ch. 411; Elysville Mfg. Co. *v.* Okisko Co., 1 Md. Ch. 392. *Contra*, Dixon *v.* Swiggett, 1 Harr. & J. 252.

Massachusetts.— Clapp *v.* Tirrell, 20 Pick. 247; Wilkinson *v.* Scott, 17 Mass. 249; Davenport *v.* Mason, 15 Mass. 85.

Missouri.— Davenport *v.* Murray, 68 Mo. 198.

New Jersey.— Depeyster *v.* Gould, 3 N. J. Eq. 474, 29 Am. Dec. 723.

New York.— Emmett *v.* Penoyer, 151 N. Y. 564, 45 N. E. 1041 [*reversing* 76 Hun 551, 28 N. Y. Suppl. 234]; Hebbard *v.* Haughian, 70 N. Y. 54; Bingham *v.* Weiderwax, 1 N. Y. 509; Secor *v.* Law, 9 Bosw. 163; Whitbeck *v.* Whitbeck, 9 Cow. 266, 18 Am. Dec. 503; Bowen *v.* Bell, 20 Johns. 338, 11 Am. Dec. 286; Shephard *v.* Little, 14 Johns. 210.

North Carolina.— Marcom *v.* Adams, 122 N. C. 222, 29 S. E. 333; Barbee *v.* Barbee, 108 N. C. 581, 13 S. E. 215; Shaw *v.* Williams, 100 N. C. 272, 6 S. E. 196. *Contra*, Powell *v.* Heptinstall, 79 N. C. 207; Mendenhall *v.* Parish, 53 N. C. 105, 78 Am. Dec. 269; Spiers *v.* Clay, 11 N. C. 22; Graves *v.* Carter, 9 N. C. 576, 11 Am. Dec. 786; Brocket *v.* Foscue, 8 N. C. 64.

Ohio.— Davis *v.* Coffield, 1 Ohio Dec. (Reprint) 267, 6 West. L. J. 318.

Pennsylvania.— Allison *v.* Kurtz, 2 Watts 185; Weigley *v.* Weir, 7 Serg. & R. 309; Jordan *v.* Cooper, 3 Serg. & R. 564; Hamilton *v.* McGuire, 3 Serg. & R. 355; Depew *v.* Clark, 1 Phila. 432.

South Carolina.— Coln *v.* Coln, 24 S. C. 596; Deloach *v.* Turner, 6 Rich. 117.

Texas.— Lanier *v.* Faust, 81 Tex. 186, 16 S. W. 994; Richardson *v.* Dallas, (Sup. 1891) 16 S. W. 622; Gibson *v.* Fifer, 21 Tex. 260; Howard *v.* David, 6 Tex. 174.

Vermont.— Harwood *v.* Harwood, 22 Vt. 507; White *v.* Miller, 22 Vt. 380; Beach *v.* Packard, 10 Vt. 96, 33 Am. Dec. 185.

Wisconsin.— Hanson *v.* Michelson, 19 Wis. 498.

See 20 Cent. Dig. tit. "Evidence," § 1915.

Where a conveyance has been made by order of court on the application of the purchaser at a sale made under order of court, parol evidence is not admissible to prove the non-payment of the purchase-money; for it is the duty of the court to be satisfied that the money has been paid before it authorizes a conveyance, and the admission of parol evidence in an action at law to negative the adjudication would lead to inextricable confusion. Dugger *v.* Tayloe, 46 Ala. 320.

Equity will relieve a grantor from the effect of a formal release for the purchase-money contained in a deed when it is shown that he has not actually received it or taken security for its payment. Wesson *v.* Stephens, 37 N. C. 557.

9. Kentucky, etc., Cement Co. *v.* Cleveland, 4 Ind. App. 171, 30 N. E. 802. Where a deed for land contains an acknowledgment of the grantor of the receipt of the consideration, and a clause exonerating the grantee therefrom, it amounts to a release, and parol evidence cannot be received to show that the purchase-money is unpaid. Brocket *v.* Fosque, 8 N. C. 64.

10. *Alabama.*—Hamaker *v.* Coons, 117 Ala. 603, 23 So. 655; Goodlet *v.* Hansell, 66 Ala. 151; McGehee *v.* Rump, 37 Ala. 651.

Arkansas.— Vaugine *v.* Taylor, 18 Ark. 65.

Illinois.— Richardson *v.* Clow, 8 Ill. App. 91.

Maine.— Bassett *v.* Bassett, 55 Me. 127; Godspeed *v.* Fuller, 46 Me. 147, 71 Am. Dec. 572.

evidence is competent to show that the consideration named in a deed was paid not by the grantee but by a third person, and thus raise a resulting trust for such third person.[11]

d. Manner of Payment. Where an instrument recites that the consideration was a certain amount, parol evidence may be admitted to show how such amount was actually paid, or was to be paid.[12]

e. Where Consideration Is Not Stated. Even though the instrument does not state any consideration or set forth what the consideration is, parol evidence may be admitted to show that there was a consideration, and of what it consisted,[13]

Minnesota.— McKusick *v.* Washington County Com'rs, 16 Minn. 151.

New Hampshire.— Farrington *v.* Barr, 36 N. H. 86.

New York.—Stackpole *v.* Robbins, 47 Barb. 212; Hess *v.* Allen, 24 Misc. 393, 53 N. Y. Suppl. 413; Henderson *v.* Fullerton, 54 How. Pr. 422.

Oregon.— Finlayson *v.* Finlayson, 17 Oreg. 347, 21 Pac. 57, 11 Am. St. Rep. 836, 3 L. R. A. 801.

South Carolina.— Gist *v.* Davis, 2 Hill Eq. 335, 29 Am. Dec. 89.

Utah.— Hall *v.* McNally, 23 Utah 606, 65 Pac. 724.

Vermont.— Harwood *v.* Harwood, 22 Vt. 507.

Contra, Ryan *v.* O'Connor, 41 Ohio St. 368.

See 20 Cent. Dig. tit. "Evidence," § 1915.

In an action to set aside a deed under seal, properly acknowledged and delivered, and reciting an adequate consideration and the receipt thereof, the grantor may introduce parol evidence to deny such consideration *in toto*, for the purpose of rendering such deed void. Eckler *v.* Alden, 125 Mich. 215, 84 N. W. 141.

11. Robertson *v.* Maclin, 3 Hayw. (Tenn.) 70, 4 Hayw. (Tenn.) 53. See also Collins *v.* Corson, (N. J. Ch. 1894) 30 Atl. 862.

12. *Alabama.*— Steed *v.* Hinson, 76 Ala. 298.

Massachusetts.— Holden *v.* Parker, 110 Mass. 324.

New York.— Seaman *v.* Hasbrouck, 35 Barb. 151; Earle *v.* Crane, 6 Duer 564.

South Carolina.— Calvert *v.* Nickles, 26 S. C. 304, 2 S. E. 116.

Texas.— Dubeneck *v.* Kutzer, 17 Tex. Civ. App. 577, 43 S. W. 541.

Wisconsin.— Beckman *v.* Beckman, 86 Wis. 655, 57 N. W. 1117.

See 20 Cent. Dig. tit. "Evidence," §§ 1912, 1915.

Thus it may be shown, although a money consideration is stated, that the true consideration was the extinguishment, satisfaction, or discharge of prior indebtedness (Buford *v.* Shannon, 95 Ala. 205, 10 So. 263; Mason *v.* Buchanan, 62 Ala. 110; Hair *v.* Little, 28 Ala. 236; Poor *v.* Scott, 68 S. W. 397, 24 Ky. L. Rep. 239); the discharge of notes (Hopkins *v.* Watts, 27 Ga. 490); the cancellation and surrender of a note and the assumption of payment on another note (Mobile Sav. Bank *v.* McDonnell, 89 Ala. 434, 8 So. 137, 9 L. R. A. 645); or a promise to pay an encumbrance, although the consideration is stated as paid "in hand" (Harts *v.* Emery, 184 Ill. 560, 56 N. E. 865 [*affirming* 84 Ill. App. 317]).

Evidence that the consideration was paid in property is admissible, although a money consideration is expressed.

Alabama.— Eckles *v.* Carter, 26 Ala. 563.

Iowa.— Bristol Sav. Bank *v.* Stiger, 86 Iowa 344, 53 N. W. 265.

Kentucky.—Carneal *v.* May, 2 A. K. Marsh. 587, 12 Am. Dec. 453.

Missouri.— Miller *v.* McCoy, 50 Mo. 214.

Nevada.— Lake *v.* Bender, 18 Nev. 361, 4 Pac. 711, 7 Pac. 74.

See 20 Cent. Dig. tit. "Evidence," § 1912.

13. *Alabama.*— Reader *v.* Helms, 57 Ala. 440 [*overruling* Gaines *v.* Shelton, 47 Ala. 413]; Beard *v.* White, 1 Ala. 436.

California.— De Merle *v.* Mathews, 26 Cal. 455.

Florida.— Sullivan *v.* Lear, 23 Fla. 463, 2 So. 846, 11 Am. St. Rep. 388.

Georgia.— Boynton *v.* Twitty, 53 Ga. 214.

Indiana.— Singer Mfg. Co. *v.* Forsyth, 108 Ind. 334, 9 N. E. 372; Moore *v.* Harrison, 26 Ind. App. 408, 59 N. E. 1077.

Kentucky.— Witting *v.* Ringwood, 13 Ky. L. Rep. 687.

Louisiana.— Dickson *v.* Ford, 38 La. Ann. 736; Falcon *v.* Boucherville, 1 Rob. 337.

Maine.— Haskell *v.* Tukesbury, 92 Me. 551, 43 Atl. 500, 69 Am. St. Rep. 529; Warren *v.* Walker, 23 Me. 453; Thompson *v.* Linscott, 2 Me. 186, 11 Am. Dec. 57.

Massachusetts.— Davenport *v.* Mason, 15 Mass. 85.

Minnesota.— Horn *v.* Hansen, 56 Minn. 43, 57 N. W. 315, 22 L. R. A. 617. See also Zelch *v.* Hirt, 59 Minn. 360, 61 N. W. 20.

Missouri.— Jackson *v.* Chicago, etc., R. Co., 54 Mo. App. 636; Bartlett *v.* Matson, 1 Mo. App. 151.

New York.— Cosgriff *v.* Dewey, 21 N. Y. App. Div. 129, 47 N. Y. Suppl. 255; Baring *v.* Waterbury, 10 N. Y. App. Div. 1, 41 N. Y. Suppl. 612; Frink *v.* Green, 5 Barb. 455; Curtis *v.* Brown, 2 Barb. 51; Hope *v.* Smith, 35 N. Y. Super. Ct. 458; Griffin *v.* Cranston, 1 Bosw. 281, 10 Bosw. 1; Parks *v.* Clark, 2 N. Y. St. 329; Henderson *v.* Fullerton, 54 How. Pr. 422.

Ohio.— Conklin *v.* Hancock, 67 Ohio St. 455, 66 N. E. 518; Platt *v.* Scribner, 18 Ohio Cir. Ct. 452, 9 Ohio Cir. Dec. 771.

Pennsylvania.— Bowser *v.* Cravener, 56 Pa. St. 132; Shively *v.* Black, 45 Pa. St. 345; White *v.* Weeks, 1 Penr. & W. 486; Burt *v.* Flynn, 24 Pa. Co. Ct. 451.

unless the instrument is of such a nature that the failure to express a consideration renders it void under the statute of frauds.[14]

f. Consistency With Expressed Consideration. It has been laid down that the consideration to be shown by the parol evidence must be consistent with that stated in the writing, otherwise the evidence cannot be admitted.[15]

g. Altering or Defeating Legal Effect or Operation of Instrument — (i) *In General.* Where the effect of parol evidence contradicting the consideration expressed in the instrument or showing the true consideration to be different therefrom would be to change or defeat the legal operation and effect of the instrument, or to add new matter to an agreement complete upon its face, the evidence is not admissible; for in such case it comes within the rule which forbids the introduction of parol evidence to vary, contradict, or defeat a written instrument and not within the exception to that rule that parol evidence is admissible for the purpose of contradicting or showing that the true consideration is other and different from that expressed in the writing.[16]

South Carolina.— Willis *v.* Hammond, 41 S. C. 153, 19 S. E. 310.

Texas.— Wheeler *v.* Friend, 22 Tex. 683.

Vermont.— Gregory *v.* Gleed, 33 Vt. 405; Harwood *v.* Harwood, 22 Vt. 507; Wood *v.* Beach, 7 Vt. 522; Hall *v.* Mott, Brayt. 81.

Wisconsin.— Dyer *v.* Gibson, 16 Wis. 557.

England.—Holmes *v.* Mitchell, 7 C. B. N. S. 361, 6 Jur. N. S. 73, 28 L. J. C. P. 301, 97 E. C. L. 361.

See 20 Cent. Dig. tit. "Evidence," §§ 1916, 1918–1928. See also CONTRACTS, 9 Cyc. 368 note 45.

The words "for no consideration," in a written obligation prepared by the obligor, afford sufficient evidence of fraud to let in parol proof that there was a good consideration notwithstanding, and to entitle the obligee to prove the real transaction and facts of the case. Young *v.* Young, 19 Tex. 504.

14. Deutsch *v.* Bond, 46 Md. 164 [*distinguishing* Nabb *v.* Koontz, 17 Md. 283, and Mitchell *v.* McCleary, 42 Md. 374, from Hutton *v.* Padgett, 26 Md. 228, and Frank *v.* Miller, 38 Md. 450]; Wood *v.* Wheelock, 25 Barb. (N. Y.) 625. See also Horn *v.* Hansen, 56 Minn. 43, 57 N. W. 315, 22 L. R. A. 617. And see, generally, FRAUDS, STATUTE OF.

15. *Alabama.*— Murphy *v.* Mobile Branch Bank, 16 Ala. 90.

District of Columbia.— Droop *v.* Ridenour, 11 App. Cas. 224.

Georgia.— Norris *v.* Ham, R. M. Charlt. 267.

Indiana.— Lamb *v.* Donovan, 19 Ind. 40.

Iowa.— Gelpcke *v.* Blake, 19 Iowa 263.

Maine.— Abbott *v.* Marshall, 48 Me. 44.

Massachusetts.— Griswold *v.* Messenger, 6 Pick. 517; Quarles *v.* Quarles, 4 Mass. 680.

Mississippi.— Hughes *v.* Daniel, Walk. 488.

Ohio.— Groves *v.* Groves, 65 Ohio St. 442, 62 N. E. 1044.

Pennsylvania.— Lewis *v.* Brewster, 57 Pa. St. 410; Wilson *v.* Pearl, 12 Pa. Super. Ct. 66. See also McGary *v.* McDermott, 207 Pa. St. 620, 57 Atl. 46.

South Carolina.— Latimer *v.* Latimer, 53 S. C. 483, 31 S. E. 304.

Washington.— Don Yook *v.* Washington Mill Co., 16 Wash. 459, 47 Pac. 964; Van Lehn *v.* Morse, 16 Wash. 219, 47 Pac. 435.

Wisconsin.— Cuddy *v.* Foreman, 107 Wis. 519, 83 N. W. 1103; Perkins *v.* McAuliffe, 105 Wis. 582, 81 N. W. 645.

United States.— Buchtel *v.* Mason Lumber Co., 4 Fed. Cas. No. 2,077, 1 Flipp. 640 [*affirmed* in 101 U. S. 638, 25 L. ed. 1073].

Considerations held consistent with those expressed.— Where a deed from a husband to his wife recites a consideration of five dollars "and the further consideration of love and affection," evidence that the real consideration was an antenuptial agreement was held admissible, as this was not directly inconsistent with the consideration expressed. Barnes *v.* Black, 193 Pa. St. 447, 44 Atl. 550, 74 Am. St. Rep. 694. So where a deed conveys or assigns property "for value received" such recital is not inconsistent with, nor does it exclude, parol proof that the consideration for which the deed was made was executory in its character. Sullivan *v.* Lear, 23 Fla. 463, 2 So. 846, 11 Am. St. Rep. 388. Where the consideration of a mortgage on a separate statutory estate of a married woman was the joint promissory note of the married woman and her husband, it was not a contradiction or variation of the mortgage to prove that the consideration of the note was the individual indebtedness of the husband. Stribling *v.* Kentucky Bank, 48 Ala. 451. See also Ferris *v.* Hard, 135 N. Y. 354, 32 N. E. 129.

Aiding implication.— Where the recited consideration of a contract between a principal and agent is the procuring of a purchaser for property, but there is a clear implication of a consideration consisting of the services in that behalf to be rendered by the agent, proof of facts which make out such implied consideration does not contradict, add to, or vary the written contract, but tends to support it according to the legitimate and proper interpretation. Goward *v.* Waters, 98 Mass. 596. See *supra*, XVI, C, 3.

The words "divers good causes and considerations" admit evidence of any sufficient consideration. Norris *v.* Ham, R. M. Charlt. (Ga.) 267.

16. *Alabama.*—Hamaker *v.* Coons, 117 Ala. 603, 23 So. 655; Williams *v.* Higgins, 69 Ala. 517; McGehee *v.* Rump, 37 Ala. 651.

(II) *Illegality of Consideration.* But the principle just stated[17] does not apply so as to preclude the admission of evidence to show that the consideration was vicious or illegal, for if such evidence were excluded the policy of the law in making a deed, contract, or other undertaking founded on an illegal consideration void would be defeated by the parties expressing on the face of the instrument a legal consideration.[18]

California.— Arnold *v.* Arnold, 137 Cal. 291, 70 Pac. 23; Feeney *v.* Howard, 79 Cal. 525, 21 Pac. 984, 12 Am. St. Rep. 162, 4 L. R. A. 826; Hendrick *v.* Crowley, 31 Cal. 471.

Colorado.— Cheesman *v.* Nicholl, 18 Colo. App. 174, 70 Pac. 797.

Georgia.— Anderson *v.* Continental Ins. Co., 112 Ga. 532, 37 S. E. 766.

Illinois.— Windett *v.* Hurlbut, 115 Ill. 403, 5 N. E. 589.

Indiana.— Lowry *v.* Downey, 150 Ind. 364, 50 N. E. 79.

Iowa.— Schrimper *v.* Chicago, etc., R. Co., 115 Iowa 35, 82 N. W. 916, 87 N. W. 731; Finch *v.* Garrett, 102 Iowa 381, 71 N. W. 429; McGee *v.* Allison, 94 Iowa 527, 63 N. W. 322.

Kansas.— Johnston *v.* Winfield Town Co., 14 Kan. 390.

Kentucky.— Logan Turnpike Road Co. *v.* Pettit, 2 B. Mon. 428; Chiles *v.* Coleman, 2 A. K. Marsh. 296, 12 Am. Dec. 396; Paris *v.* Lilleston, 60 S. W. 919, 22 Ky. L. Rep. 1506.

Louisiana.— Jones *v.* Jones, 51 La. Ann. 636, 25 So. 368.

Maryland.— Cole *v.* Albers, 1 Gill 412; Hurn *v.* Soper, 6 Harr. & J. 276.

Massachusetts.— Trafton *v.* Hawes, 102 Mass. 533, 3 Am. Rep. 494.

Michigan.— Adams *v.* Watkins, 103 Mich. 431, 61 N. W. 774.

Minnesota.— Jensen *v.* Crosby, 80 Minn. 158, 83 N. W. 43.

Missouri.— Bobb *v.* Bobb, 89 Mo. 411, 4 S. W. 511; Wishart *v.* Gerhart, 105 Mo. App. 112, 78 S. W. 1094.

New Hampshire.— Connor *v.* Follansbee, 59 N. H. 124; Farrington *v.* Barr, 36 N. H. 86; Horn *v.* Thompson, 51 N. H. 562.

New Jersey.— Wooden *v.* Shotwell, 23 N. J. L. 465.

New York.— Wells *v.* Wells, 8 N. Y. App. Div. 422, 40 N. Y Suppl. 836; Baker *v.* Connell, 1 Daly 469; Olin *v.* Arendt, 27 Misc. 270, 58 N. Y. Suppl. 429; Grout *v.* Townsend, 2 Den. 336 [*affirming* 2 Hill 554]; Wood *v.* Young, 5 Wend. 620.

Ohio.— Nave *v.* Marshall, 9 Ohio S. & C. Pl. Dec. 415, 6 Ohio N. P. 488.

South Carolina.— Lavender *v.* Daniel, 58 S. C. 125, 36 S. E. 546; McGrath *v.* Barnes, 13 S. C. 328, 36 Am. Rep. 687.

South Dakota.— Miller *v.* Kennedy, 12 S. D. 478, 81 N. W. 906.

Texas.— Houston, etc., R. Co. *v.* McKinney, 55 Tex. 176; Rotan Grocery Co. *v.* Martin, (Civ. App. 1900) 57 S. W. 706; Beaumont Car Works *v.* Beaumont Imp. Co., 4 Tex. Civ. App. 257, 23 S. W. 274.

Washington.—Wright *v.* Stewart, 19 Wash. 179, 52 N. W. 1020.

Wisconsin.— Whiting *v.* Gould, 2 Wis. 552.

United States.— Hartshorn *v.* Day, 19 How. 211, 15 L. ed. 605.

See 20 Cent. Dig. tit. "Evidence," §§ 1981–1989.

Where fraud is charged, the want of consideration for a deed may be shown by the grantor in connection with and as part of the fraud. Brison *v.* Brison, 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189; Shotwell *v.* Shotwell, 24 N. J. Eq. 378; McLeod *v.* Bullard, 84 N. C. 515.

In favor of creditors it may be shown that a deed founded upon an expressed valuable consideration was without any consideration and therefore liable to be set aside. Groves *v.* Groves, 65 Ohio St. 442, 62 N. E. 1044.

17. See *supra*, XVI, C, 9, g, (I).

18. *Alabama.*— Patton *v.* Gilmer, 42 Ala. 548, 94 Am. Dec. 665.

Arkansas.— Waymack *v.* Heilman, 26 Ark. 449. See also Patterson *v.* Fowler, 22 Ark. 396.

Georgia.— See Southern Express Co. *v.* Duffey, 48 Ga. 358.

Illinois.— See Miles *v.* Andrews, 40 Ill. App. 155 [*affirmed* in 153 Ill. 262, 38 N. E. 644].

Iowa.— Gelpcke *v.* Blake, 19 Iowa 263.

Kentucky.— Chiles *v.* Coleman, 2 A. K. Marsh. 296, 12 Am. Dec. 396.

Louisiana.— Platt *v.* Maples, 19 La. Ann. 459.

Mississippi.—Cocke *v.* Blackbourn, 57 Miss. 689.

New Jersey.— See Wooden *v.* Shotwell, 23 N. J. L. 465.

Texas.— Sanger *v.* Miller, 26 Tex. Civ. App. 111, 62 S. W. 425.

See 20 Cent. Dig. tit. "Evidence," § 2028.

Thus it may be shown that a note or other obligation, apparently valid, was given for a gambling debt (Soubie *v.* Beale, 1 Mart. N. S. (La.) 95), or to prevent or stop a criminal prosecution (Wolf *v.* Fletemeyer, 83 Ill. 418; New Brunswick State Bank *v.* Moore, 5 N. J. L. 470; Groesbeck *v.* Marshall, 44 S. C. 538, 22 S. E. 743), or in consideration of Confederate treasury notes (Parker *v.* Broas, 20 La. Ann. 167; Goodman *v.* McGehee, 31 Tex. 252. But see Chappell *v.* Doe, 49 Ala. 153, holding that where a deed recited a cash consideration, it could not be shown, in an action at law, that the consideration was Confederate money), or in part for illegal attorney's fees (Macomb *v.* Wilkinson, 83 Mich. 486, 47 N. W. 336).

Evidence of a particular illegal motive which induced the party to execute an instrument is not admissible where the instrument is founded on a sufficient legal consideration. Patterson *v.* Fowler, 22 Ark. 396.

h. Good and Valuable Considerations. Legitimate considerations are either good or valuable, and it has been asserted as a distinction that where one of these is expressed, parol evidence cannot be admitted at law to show that the consideration was of the other kind; the reason being that if the consideration of the deed is only good it impresses upon the title the character of a deed of gift, while if the consideration expressed is a valuable one, the title is thereby impressed with the character of title by purchase; and hence that to permit the introduction of parol evidence to show that the consideration is of a different nature from that expressed would change the legal effect of the deed.[19] It is to be noted, however, that there are cases in which this distinction has not been observed,[20] or has been expressly denied.[21] It would certainly seem proper, where a deed expresses merely a nominal valuable consideration, to show a good consideration, such as natural love and affection, and such evidence has been admitted.[22] Similarly it has been held that notwithstanding a deed recites a money consideration it may be shown that it was in fact an advancement.[23]

i. Where Consideration Is Executory or Contractual. Where the statement in a written instrument as to the consideration is more than a mere statement of fact or acknowledgment of payment of a money consideration, and is of a contractual nature, as where the consideration consists of a specific and direct promise by one of the parties to do certain things, this part of the contract can no more be changed or modified by parol or extrinsic evidence than any other part, for a party has the right to make the consideration of his agreement of the essence of the contract, and when this is done the provision as to the consideration for the contract must stand upon the same plane as the other provisions of

19. *Alabama.*— Pique *v.* Arendale, 71 Ala. 91; Potter *v.* Gracie, 58 Ala. 303, 29 Am. Rep. 748; Murphy *v.* Mobile Branch Bank, 16 Ala. 90.

District of Columbia.— Droop *v.* Ridenour, 11 App. Cas. 224; National Metropolitan Bank *v.* Hitz, 1 Mackey 111.

Maryland.— Mayfield *v.* Kilgour, 31 Md. 240; Ellinger *v.* Crowl, 17 Md. 361; Baxter *v.* Sewell, 3 Md. 334 [*affirming* 2 Md. Ch. 447]; Cole *v.* Albers, 1 Gill 412.

Ohio.— Groves *v.* Groves, 65 Ohio St. 442, 62 N. E. 1044 [*distinguishing* Carter *v.* Day, 59 Ohio St. 96, 51 N. E. 967, 69 Am. St. Rep. 757; Harrison *v.* Castner, 11 Ohio St. 339; Mitchell *v.* Ryan, 3 Ohio St. 377]; Patterson *v.* Lamson, 45 Ohio St. 77, 12 N. E. 531; Vail *v.* McMillan, 17 Ohio St. 617; Burrage *v.* Beardsley, 16 Ohio 438, 47 Am. Dec. 382; Steele *v.* Worthington, 2 Ohio 182; Ossman *v.* Schmitz, 24 Ohio Cir. Ct. 709; Williams *v.* Williams, 2 Ohio Dec. (Reprint) 478, 3 West. L. Month. 258; Holmes *v.* Sullivan, 9 Ohio Dec. (Reprint) 499, 14 Cinc. L. Bul. 167.

South Carolina.— Latimer *v.* Latimer, 53 S. C. 483, 31 S. E. 304; Garrett *v.* Stuart, 1 McCord 514.

England.— Peacock *v.* Monk, 1 Ves. 127, 27 Eng. Reprint 934.

See 20 Cent. Dig. tit. "Evidence," §§ 1912–1917.

Different consideration of same kind.— The rule stated in the text does not require that the precise consideration must be proved as it may be recited, but any consideration greater or less, of the same kind, may be shown and will support the conveyance if otherwise fair. Pique *v.* Arendale, 71 Ala. 91.

20. *Georgia.*— Thompson *v.* Cody, 100 Ga. 771, 28 S. E. 669.

Indiana.— Jones *v.* Jones, 12 Ind. 389.

Ohio.— Mitchell *v.* Ryan, 3 Ohio St. 377.

Oregon.— Velten *v.* Carmack, 23 Oreg. 282, 31 Pac. 658, 20 L. R. A. 101.

South Carolina.— U. S. Bank *v.* Brown, 2 Hill Eq. 558, 30 Am. Dec. 380.

See 20 Cent. Dig. tit. "Evidence," §§ 1912–1917.

21. Carty *v.* Connolly, 91 Cal. 15, 27 Pac. 599; Coles *v.* Soulsby, 21 Cal. 47; Nichols *v.* Burch, 128 Ind. 324, 27 N. E. 737; Lewis *v.* Brewster, 57 Pa. St. 410 (where there was a nominal valuable consideration stated); Miles *v.* Waggoner, 23 Pa. Super. Ct. 432; Pott *v.* Todhunter, 2 Coll. 76, 9 Jur. 589, 33 Eng. Ch. 76 (where the consideration expressed was love and affection and divers other good considerations).

22. Dawson *v.* Briscoe, 97 Ga. 408, 24 S. E. 157; Kenney *v.* Phillipy, 91 Ind. 511.

23. *Connecticut.*— Meeker *v.* Meeker, 16 Conn. 383.

Iowa.— Finch *v.* Garrett, 102 Iowa 381, 71 N. W. 429.

Louisiana.— Gonor *v.* Gonor, 11 Rob. 526.

New Jersey.— Speer *v.* Speer, 14 N. J. Eq. 240.

New York.— Palmer *v.* Culbertson, 143 N. Y. 213, 38 N. E. 199.

North Carolina.— Barbee *v.* Barbee, 108 N. C. 581, 13 S. E. 215, 109 N. C. 299, 13 S. E. 792; Johnson *v.* Taylor, 15 N. C. 355.

Ohio.— Williams *v.* Williams, 2 Ohio Dec. (Reprint) 478, 3 West. L. Month. 258.

Oregon.— Velten *v.* Carmack, 23 Oreg. 282, 31 Pac. 658, 20 L. R. A. 101.

the contract with reference to conclusiveness and immunity from attack by parol or extrinsic evidence.[24]

10. Construction of Language — a. In General. The parol evidence rule does not preclude the admission of parol or extrinsic evidence for the purpose of aiding in the interpretation or construction of a written instrument,[25] where the language of the instrument itself taken alone is such that it does not clearly

Virginia.— Bruce *v.* Slemp, 82 Va. 352, 4 S. E. 692.

See 20 Cent. Dig. tit. "Evidence," § 1912.

24. *Colorado.*— Cheesman *v.* Nicholl, 18 Colo. App. 174, 70 Pac. 797.

Indiana.— Indianapolis Union R. Co. *v.* Houlihan, 157 Ind. 494, 60 N. E. 943, 54 L. R. A. 787; Western Pav., etc., Co. *v.* Citizens' St. R. Co., 128 Ind. 525, 26 N. E. 188, 28 N. E. 88, 25 Am. St. Rep. 462, 10 L. R. A. 770 [*overruling* Welz *v.* Rhodius, 87 Ind. 1, 44 Am. Rep. 747]; Conant *v.* National State Bank, 121 Ind. 323, 22 N. E. 250; Pickett *v.* Green, 120 Ind. 584, 22 N. E. 737; Hilgeman *v.* Sholl, 21 Ind. App. 86, 51 N. E. 728.

Kansas.— Trice *v.* Yoeman, 60 Kan. 742, 57 Pac. 955; Milich *v.* Armour Packing Co., 60 Kan. 229, 56 Pac. 1.

Kentucky.— Gully *v.* Grubbs, 1 J. J. Marsh. 387; Dohoney *v.* Columbia Bank, 10 Ky. L. Rep. 815.

Louisiana.—See Hyman *v.* Schlenker, 44 La. Ann. 108, 10 So. 623; Balfour *v.* Chew, 4 Mart. N. S. 154.

Maine.— Hilton *v.* Homans, 23 Me. 136.

Maryland.— Bladen *v.* Wells, 30 Md. 577.

Minnesota.— Sayre *v.* Burdick, 47 Minn. 367, 50 N. W. 245.

Mississippi.— Thompson *v.* Bryant, 75 Miss. 12, 21 So. 655; Baum *v.* Lynn, 72 Miss. 932, 18 So. 428, 30 L. R. A. 441.

Missouri.—Halferty *v.* Scearce, 135 Mo. 428, 37 S. W. 113, 255; Culbertson *v.* Young, 86 Mo. App. 277; Williams *v.* Kansas City Suburban Belt R. Co., 85 Mo. App. 103; Davis *v.* Gann, 63 Mo. App. 425; Jackson *v.* Chicago, etc., R. Co., 54 Mo. App. 636; Klein *v.* Isaacs, 8 Mo. App. 568.

New Hampshire.— Beach *v.* Steele, 12 N. H. 82.

New York.— Emmett *v.* Penoyer, 151 N. Y. 564, 45 N. E. 1041 [*reversing* 76 Hun 551, 28 N. Y. Suppl. 234]; Hinckley *v.* New York Cent., etc., R. Co., 56 N. Y. 429; Cocks *v.* Barker, 49 N. Y. 107; Delemater *v.* Bush, 45 How. Pr. 382.

North Dakota.— Merchants' State Bank *v.* Ruettell, (1903) 97 N. W. 853.

Texas.— Kahn *v.* Kahn, 94 Tex. 114, 58 S. W. 825 [*reversing* (Civ. App. 1900) 56 S. W. 946]; Teague *v.* Teague, 31 Tex. Civ. App. 156, 71 S. W. 555; Texas, etc., Co. *v.* Lawson, 10 Tex. Civ. App. 491, 31 S. W. 843; Weaver *v.* Gainesville, 1 Tex. Civ. App. 286, 21 S. W. 317.

Vermont.— See Pierce *v.* Brew, 43 Vt. 292.

Wisconsin.— Hubbard *v.* Marshall, 50 Wis. 322, 6 N. W. 497.

See 20 Cent. Dig. tit. "Evidence," §§ 1912–1928.

A covenant to pay a certain sum, contained in a deed, cannot be varied or contradicted by parol evidence. Delemater *v.* Bush, 45 How. Pr. (N. Y.) 382.

Assumption of debts.— Where the consideration recited is the assumption by the grantee of certain named debts of the grantor, parol evidence is not admissible to show the assumption of other debts. Walter *v.* Dearing, (Tex. Civ. App. 1901) 65 S. W. 380.

When rule not applicable.— The rule excluding parol evidence of a consideration different from a contractual one recited in the written instrument has no application when it is evident that the instruments were executed in pursuance of a more comprehensive agreement which the parties did not undertake to express in writing. Street *v.* Roberts, 28 Tex. Civ. App. 222, 66 S. W. 1120.

25. *Alabama.*— McGhee *v.* Alexander, 104 Ala. 116, 16 So. 148; Dexter *v.* Ohlander, 89 Ala. 262, 7 So. 115; Jenkins *v.* Cooper, 50 Ala. 419; Mobile Mar. Dock, etc., Ins. Co. *v.* McMillan, 31 Ala. 711; Cowles *v.* Garrett, 30 Ala. 341.

Arizona.— R. H. Burmeister, etc., Co. *v.* Empire, etc., Co., (1903) 71 Pac. 961.

Arkansas.— Parker *v.* Norman, 65 Ark. 333, 46 S. W. 134; Glanton *v.* Anthony, 15 Ark. 543.

California.— Balfour *v.* Fresno Canal, etc., Co., 109 Cal. 221, 41 Pac. 876.

Colorado.— Rhodes *v.* Wilson, 12 Colo. 65, 20 Pac. 746; Mulligan *v.* Smith, 13 Colo. App. 231, 57 Pac. 731.

Connecticut.— Malleable Irons Works *v.* Phœnix Ins. Co., 25 Conn. 465; Baldwin *v.* Carter, 17 Conn. 201, 42 Am. Dec. 735; Brown *v.* Slater, 16 Conn. 192, 41 Am. Dec. 136.

District of Columbia.— Rogers *v.* Garland, 19 D. C. 24; Whelan *v.* McCullough, 4 App. Cas. 58.

Florida.— Robinson *v.* Barnett, 18 Fla. 602, 43 Am. Rep. 327.

Georgia.— Sterling Cycle Works *v.* Willingham, 109 Ga. 559, 35 S. E. 55; Wheelwright *v.* Aiken, 92 Ga. 394, 17 S. E. 610; Johnston *v.* Patterson, 86 Ga. 725, 13 S. E. 17; Brown *v.* Doane, 86 Ga. 32, 12 S. E. 179, 11 L. R. A. 381; Hill *v.* John P. King Mfg. Co., 79 Ga. 105, 3 S. E. 445; Savannah, etc., R. Co. *v.* Collins, 77 Ga. 376, 3 S. E. 416, 4 Am. St. Rep. 87; Turner *v.* Berry, 74 Ga. 481; Barrett *v.* Powell, 63 Ga. 552; Armistead *v.* McGuire, 46 Ga. 232; Williams *v.* Waters, 36 Ga. 454. See also McMahan *v.* Tyson, 23 Ga. 43.

Idaho.— Vincent *v.* Larson, 1 Ida. 241.

Illinois.— Razor *v.* Razor, 142 Ill. 375, 31 N. E. 678 [*affirming* 39 Ill. App. 527]; Kershaw *v.* Kershaw, 102 Ill. 307; Durham *v.* Gill, 48 Ill. 151; Thomas *v.* Wiggers, 41 Ill. 470; Chambers *v.* Prewitt, 71 Ill. App. 119 [*affirmed* in 172 Ill. 615, 50 N. E. 145]; Brown, etc., Co. *v.* Sampson, 44 Ill. App. 308.

express the intention of the parties or the subject of the agreement. Such evidence is admitted not to add to nor detract from the writing, but merely to ascer-

Indiana.— Martindale *v.* Parsons, 98 Ind. 174; Heaston *v.* Squires, 9 Ind. 27.

Iowa.— Van Husen *v.* Omaha Bridge, etc., R. Co., 118 Iowa 366, 92 N. W. 47; Green Bay Lumber Co. *v.* Thomas, 106 Iowa 420, 76 N. W. 749; Des Moines County *v.* Hinckley, 62 Iowa 637, 17 N. W. 915; Taylor *v.* Galland, 3 Greene 17.

Kansas.— Mason *v.* Ryus, 26 Kan. 464; Shepard *v.* Haas, 14 Kan. 443; Babcock *v.* Deford, 14 Kan. 408; Simpson *v.* Kimberlin, 12 Kan. 579.

Kentucky.— Edrington *v.* Harper, 3 J. J. Marsh. 353, 20 Am. Dec. 145; Baker *v.* Talbott, 6 T. B. Mon. 179; Collins *v.* Alvery, 10 Ky. L. Rep. 985.

Louisiana.—Campbell *v.* Short, 35 La. Ann. 447; Lallande *v.* Lee, 9 Rob. 514.

Maine.— Lancey *v.* Phœnix F. Ins. Co., 56 Me. 562.

Maryland.— Fryer *v.* Patrick, 42 Md. 51; Criss *v.* English, 26 Md. 553; Murray *v.* Spencer, 24 Md. 520.

Massachusetts.—Matthews *v.* Westborough, 134 Mass. 555; Swett *v.* Shumway, 102 Mass. 365, 3 Am. Rep. 471; Knight *v.* New England Worsted Co., 2 Cush. 271; Foster *v.* U. S. Insurance Co., 11 Pick. 85. See also Hemenway *v.* Bassett, 13 Gray 378.

Michigan.— Stoddard Mfg. Co. *v.* Miller, 107 Mich. 51, 64 N. W. 948; Jenkinson *v.* Monroe, 61 Mich. 454, 28 N. W. 663; Facey *v.* Otis, 11 Mich. 213; Norris *v.* Showerman, 2 Dougl. 16.

Minnesota.— King *v.* Merriman, 38 Minn. 47, 35 N. W. 570; Baldwin *v.* Winslow, 2 Minn. 213.

Mississippi.— Heirn *v.* McCaughan, 32 Miss. 17, 66 Am. Dec. 588.

Missouri.— Edwards *v.* Smith, 63 Mo. 119; Washington Mut. F. Ins. Co. *v.* St. Mary's Seminary, 52 Mo. 480.

Montana.— Taylor *v.* Holter, 1 Mont. 688.

Nebraska.— Modern Woodmen Acc. Assoc. *v.* Kline, 50 Nebr. 345, 69 N. W. 943.

New Hampshire.— Grant *v.* Lathrop, 23 N. H. 67.

New Jersey.—Torrey *v.* Thayer, 37 N. J. L. 339; Sandford *v.* Newark, etc., R. Co., 37 N. J. L. 1; Morris, etc., R. Co. *v.* Bonnell, 34 N. J. L. 474; Ackens *v.* Winston, 22 N. J. Eq. 444.

New Mexico.— Miller *v.* Preston, 4 N. M. 314, 17 Pac. 565.

New York.— Barney *v.* Forbes, 118 N. Y. 580, 23 N. E. 890; Hill *v.* Miller, 76 N. Y. 32; Knapp *v.* Warner, 57 N. Y. 668; Field *v.* Munson, 47 N. Y. 221; Blossom *v.* Griffin, 13 N. Y. 569, 67 Am. Dec. 75; La Chicotte *v.* Richmond R., etc., Co., 15 N. Y. App. Div. 380, 44 N. Y. Suppl. 75; Howlett *v.* Howlett, 56 Barb. 467; Spencer *v.* Babcock, 22 Barb. 326; Harnickell *v.* Brown, 45 N. Y. Super. Ct. 350; Tochman *v.* Brown, 33 N. Y. Super. Ct. 409; De Wolf *v.* Crandall, 1 Sweeny 556; Henry *v.* Agostini, 12 Misc. 15, 33 N. Y. Suppl. 37; Sire *v.* Rumbold, 11 N. Y. Suppl. 734; Wilson *v.* Troup, 2 Cow. 195, 14 Am. Dec. 458; Keisselbrack *v.* Livingston, 4 Johns. Ch. 144.

North Carolina.— Echerd *v.* Johnson, 126 N. C. 409, 35 S. E. 1036; Richards *v.* Schlegelmich, 65 N. C. 150; Davis *v.* Morgan, 64 N. C. 570, holding that parol evidence is admissible to explain a payee's blank indorsements. See also Hunter *v.* Bynum, 3 N. C. 354.

Ohio.— Masters *v.* Freeman, 17 Ohio St. 323; Kelsey *v.* Hibbs, 13 Ohio St. 340; Wright *v.* Merchant, 2 Ohio Dec. (Reprint) 742, 5 West. L. Month. 194. See also Walrath *v.* Royal Ins. Co., 16 Ohio Cir. Ct. 413, 9 Ohio Cir. Dec. 233.

Oregon.— Oliver *v.* Oregon Sugar Co., 42 Oreg. 276, 70 Pac. 902.

Pennsylvania.— Caley *v.* Philadelphia, etc., R. Co., 80 Pa. St. 363; Chicago Cottage Organ Co. *v.* McManigal, 8 Pa. Super. Ct. 632; Block *v.* Dowling, 7 Pa. Dist. 261, 20 Pa. Co. Ct. 489; Birchfield *v.* Castleman, Add. 181.

South Carolina.— Willis *v.* Hammond, 41 S. C. 153, 19 S. E. 310; Lowndes *v.* King, 1 S. C. 102; Church of Advent *v.* Farrow, 7 Rich. Eq. 378; Cannon *v.* Mitchell, 2 Desauss. 320.

Tennessee.— Taylor *v.* Neblett, 4 Heisk. 491.

Texas.— Converse *v.* Langshaw, 81 Tex. 275; Horne *v.* Chatham, 64 Tex. 36; Masterson *v.* Goodlett, 46 Tex. 402; Hamman *v.* Keigwin, 39 Tex. 34; Bender *v.* Pryor, 31 Tex. 341; Epperson *v.* Young, 8 Tex. 135; Franklin *v.* Mooney, 2 Tex. 452; Hammond *v.* Martin, 15 Tex. Civ. App. 570, 40 S. W. 347. See also Missouri, etc., R. Co. *v.* Bodie, (Civ. App. 1903) 74 S. W. 100; Shaw *v.* Parvin, 1 Tex. App. Civ. Cas. § 365; Peake *v.* Blythe, 1 Tex. App. Civ. Cas. § 7.

Utah.— Brown *v.* Markland, 16 Utah 360, 52 Pac. 597, 67 Am. St. Rep. 629.

Vermont.— Young *v.* Young, 59 Vt. 342, 10 Atl. 528; Lawrence *v.* Dole, 11 Vt. 549; Campbell *v.* Hyde, 1 D. Chipm. 65.

Virginia.— Knick *v.* Knick, 75 Va. 12. See also Coutt *v.* Craig, 2 Hen. & M. 618.

Washington.— Carr *v.* Jones, 29 Wash. 78, 69 Pac. 646. See also Langert *v.* Ross, 1 Wash. 250, 24 Pac. 443.

West Virginia.— Uhl *v.* Ohio River R. Co., 51 W. Va. 106, 41 S. E. 340; Thomas *v.* Linn, 40 W. Va. 122, 20 S. E. 878; Crislip *v.* Cain, 19 W. Va. 483.

Wisconsin.—Boden *v.* Maher, 105 Wis. 539, 81 N. W. 661; Roe *v.* Bacheldor, 41 Wis. 360; Merriam *v.* Field, 29 Wis. 592.

United States.— Bell *v.* Bruen, 1 How. 169, 11 L. ed. 89; Wilson *v.* Higbee, 62 Fed. 723; Butler *v.* The Arrow, 4 Fed. Cas. No. 2,237, 6 McLean 470, Newb. Adm. 59; Phelps *v.* Clasen, 19 Fed. Cas. No. 11,074, Woolw. 204.

England.— New Zealand Bank *v.* Simpson,

tain what the meaning of the parties is.[26] Thus a written instrument is open to explanation by parol or extrinsic evidence when it is expressed in short and incomplete terms,[27] or is fairly susceptible of two constructions;[28] where the language employed is vague or ambiguous;[29] or where the words of the contract

[1900] A. C. 182, 69 L. J. P. C. 22, 82 L. T. Rep. N. S. 102, 48 Wkly. Rep. 591; McCollin *v.* Gilpin, 6 Q. B. D. 516, 45 J. P. 828, 44 L. T. Rep. N. S. 914, 29 Wkly. Rep. 408; Atty.-Gen. *v.* Clapham, 4 De G. M. & G. 591, 3 Eq. Rep. 702, 1 Jur. N. S. 505, 24 L. J. Ch. 177, 3 Wkly. Rep. 158, 53 Eng. Ch. 463, 43 Eng. Reprint 638 [*reversing* 2 Eq. Rep. 91, 10 Hare 540, 23 L. J. Ch. 70, 2 Wkly. Rep. 28, 44 Eng. Ch. 523]; Pharoah *v.* Lush, 2 F. & F. 721; Rex *v.* Laindon, 8 T. R. 379; Chadwick *v.* Burney, 12 Wkly. Rep. 1077.

Canada.— Garth *v.* Woodbury, 1 L. C. Jur. 43 [*affirmed* in 9 L. C. Rep. 438]; Currier *v.* Crosby, 17 N. Brunsw. 464; Prior *v.* Atkinson, 19 Quebec Super. Ct. 210; Walker *v.* Brown, 19 Quebec Super. Ct. 23; Poulin *v.* Thibault, 2 Rev. de Lég. 332; McAdie *v.* Sills, 24 U. C. C. P. 606.

See 20 Cent. Dig. tit. "Evidence," §§ 2066–2084.

Evidence to explain judicial records admissible.— *Illinois.*— Harvey *v.* Drew, 82 Ill. 606.

Iowa.— Porter *v.* Sigler, 1 Greene 261.

Louisiana.— Derouin *v.* Segura, 5 La. Ann. 550.

Michigan.— Damm *v.* Gow, 88 Mich. 99, 50 N. W. 140.

Pennsylvania.— Schnitzel's Appeal, 49 Pa. St. 23; Shoemaker *v.* Ballard, 15 Pa. St. 92; Carmony *v.* Hoober, 5 Pa. St. 305.

See 20 Cent. Dig. tit. "Evidence," § 2066.

Evidence to explain official writings or proceedings admissible.—*California.*—Robinson *v.* Forrest, 29 Cal. 317.

Massachusetts.— Brady *v.* Fall River, 121 Mass. 262.

Missouri.— Pattison *v.* Coons, 56 Mo. 169.

New York.— Smith *v.* Helmer, 7 Barb. 416.

Ohio.— Caldwell *v.* Carthage, 40 Ohio St. 453 [*reversing* 5 Cinc. L. Bul. 531].

See 20 Cent. Dig. tit. "Evidence," § 2067.

26. Hinnemann *v.* Rosenback, 39 N. Y. 98, holding that where a party to a contract undertook to take a certain sum in money and "Five hundred dollars in an order on W.," this language did not necessarily mean that the order was to be payable in money, and it might be shown by parol that the order was to be for materials of the value stated. This was considered a case of aiding in the interpretation of the language of the contract by extrinsic evidence.

Testimony of an abstracter explanatory of his system and of what is indicated by the want of any entry under the "remarks" column, is not incompetent as being at variance with the abstract. Robbins *v.* Ginnochio, (Tex. Civ. App. 1898) 45 S. W. 34.

27. *Alabama.*— Boykin *v.* Mobile Bank, 72 Ala. 262, 47 Am. Rep. 408.

Illinois.— Scott *v.* Schnadt, 70 Ill. App. 25.

Iowa.— McEnery *v.* McEnery, 110 Iowa 718, 80 N. W. 1071.

Minnesota.— Head *v.* Miller, 45 Minn. 446, 48 N. W. 192.

Mississippi.— Shackelford *v.* Hooker, 54 Miss. 716.

Missouri.— Amonett *v.* Montague, 63 Mo. 201.

New Mexico.— Miller *v.* Preston, 4 N. M. 314, 17 Pac. 565.

Pennsylvania.— Wingate *v.* Mechanics' Bank, 10 Pa. St. 114, holding that parol evidence is admissible to explain the meaning of short entries in a bank-book.

28. Babcock *v.* Deford, 14 Kan. 408; Brown *v.* Markland, 16 Utah 360, 52 Pac. 597, 67 Am. St. Rep. 629; Findley *v.* Armstrong, 23 W. Va. 113.

Where a writing is deficient in punctuation, and the sense may be varied as the punctuation is one way or another, extrinsic evidence may be introduced to explain its meaning. Graham *v.* Hamilton, 27 N. C. 428.

29. *Alabama.*— Gunn *v.* Clendenin, 68 Ala. 294; Drake *v.* Goree, 22 Ala. 409; Hogan *v.* Reynolds, 8 Ala. 59.

California.— Daly *v.* Ruddell, 137 Cal. 671, 70 Pac. 784; Baker *v.* Clark, 128 Cal. 181, 60 Pac. 677.

Colorado.— Hardwick *v.* McClurg, 16 Colo. App. 354, 65 Pac. 405.

Connecticut.— Adams *v.* Turner, 73 Conn. 38, 46 Atl. 247.

District of Columbia.— Whelan *v.* McCullough, 4 App. Cas. 58.

Georgia.—Forsyth Mfg. Co. *v.* Castlen, 112 Ga. 199, 37 S. E. 485, 81 Am. St. Rep. 28; Follendore *v.* Follendore, 110 Ga. 359, 35 S. E. 676; Tumlin *v.* Perry, 108 Ga. 520, 34 S. E. 171; University Bank *v.* Tuck, 96 Ga. 456, 23 S. E. 467; Maynard *v.* Render, 95 Ga. 652, 23 S. E. 194; American Exch. Nat. Bank *v.* Georgia Constr., etc., Co., 87 Ga. 651, 13 S. E. 505; Johnston *v.* Patterson, 86 Ga. 725, 13 S. E. 17; Boyer *v.* Ausburn, 64 Ga. 271.

Illinois.— Stevens *v.* Wait, 112 Ill. 544; Chambers *v.* Prewitt, 71 Ill. App. 119 [*affirmed* in 172 Ill. 615, 50 N. E. 145].

Indiana.— Burke *v.* Mead, 159 Ind. 252, 64 N. E. 880; Cross *v.* Pearson, 17 Ind. 612.

Iowa.— Wilts *v.* Mulhall, 102 Iowa 458, 71 N. W. 418; Taylor *v.* Galland, 3 Greene 17.

Kansas.— Peters *v.* McVey, 59 Kan. 775, 52 Pac. 896; Erie Cattle Co. *v.* Guthrie, 56 Kan. 754, 44 Pac. 984; Coates *v.* Sulau, 46 Kan. 341, 26 Pac. 720; Simpson *v.* Kimberlin, 12 Kan. 579.

Kentucky.— Patteson *v.* Garret, 7 J. J. Marsh. 112; Coger *v.* McGee, 2 Bibb 321, 5 Am. Dec. 610; Chapman *v.* Clements, 56 S. W. 646, 22 Ky. L. Rep. 17; Craft *v.* Bates, 49 S. W. 436, 20 Ky. L. Rep. 1418.

Louisiana.— McLeroy *v.* Duckworth, 13 La. Ann. 410.

Maine.— Ladd *v.* Dillingham, 34 Me. 316.

must be applied to facts ascertainable only by extrinsic evidence.[30] So also if there is doubt and uncertainty, not about what the substance of the contract is,

Maryland.— Parks *v.* Parks, 19 Md. 323; Davis *v.* Batty, 1 Harr. & J. 264; Dorsey *v.* Hammond, 1 Harr. & J. 190.

Massachusetts.— Yorston *v.* Brown, 178 Mass. 654, 59 N. E. 654; Macdonald *v.* Dana, 154 Mass. 152, 27 N. E. 993; Keller *v.* Webb, 125 Mass. 88, 28 Am. Rep. 209; Foster *v.* Woods, 16 Mass. 116.

Michigan.— Germain *v.* Central Lumber Co., 116 Mich. 245, 74 N. W. 644, 120 Mich. 61, 78 N. W. 1007; Aspinwall Mfg. Co. *v.* Johnson, 97 Mich. 531, 56 N. W. 932; Kendrick *v.* Beard, 81 Mich. 182, 45 N. W. 837.

Minnesota.— King *v.* Merriman, 38 Minn. 47, 35 N. W. 570.

Missouri.— Edwards *v.* Smith, 63 Mo. 119; Wolfert *v.* Pittsburg, etc., R. Co., 44 Mo. App. 330; Keane *v.* Beard, 11 Mo. App. 10.

Nebraska.— Fidelity Mut. F. Ins. Co. *v.* Murphy, (1903) 95 N. W. 702; State *v.* Cass County, 60 Nebr. 566, 83 N. W. 733.

New Jersey.— Sullivan *v.* Visconti, 69 N. J. L. 452, 55 Atl. 1133 [*affirming* 68 N. J. L. 543, 53 Atl. 598]; Suffern *v.* Butler, 21 N. J. Eq. 410.

New York.— Southampton *v.* Jessup, 173 N. Y. 84, 65 N. E. 949 [*modifying* 64 N. Y. App. Div. 525, 72 N. Y. Suppl. 312, 780]; Emmett *v.* Penoyer, 151 N. Y. 564, 45 N. E. 1041 [*reversing* 76 Hun 551, 28 N. Y. Suppl. 234]; Wilson *v.* Randall, 67 N. Y. 338; Tanenbaum *v.* Levy, 83 N. Y. App. Div. 319, 82 N. Y. Suppl. 171; O'Connor *v.* Green, 60 N. Y. App. Div. 553, 69 N. Y. Suppl. 1097; Woodruff *v.* Klee, 47 N. Y. App. Div. 638, 62 N. Y. Suppl. 350; Howlett *v.* Howlett, 56 Barb. 467; Phelps *v.* Bostwick, 22 Barb. 314; Hurd *v.* Bovee, 4 Silv. Supreme 186, 7 N. Y. Suppl. 241; McNulty *v.* Urban, 1 Misc. 422, 21 N. Y. Suppl. 247; Cassidy *v.* Fonthan, 14 N. Y. Suppl. 151; Chase *v.* Senn, 13 N. Y. Suppl. 266, 7 N. Y. Suppl. 65; Walrath *v.* Thompson, 4 Hill 200; Steere *v.* Steere, 5 Johns. Ch. 1, 9 Am. Dec. 256.

North Carolina.— Colgate *v.* Latta, 115 N. C. 127, 20 S. E. 388, 26 L. R. A. 321; Richards *v.* Schlegelmich, 65 N. C. 150.

Oregon.— Oliver *v.* Oregon Sugar Co., 42 Oreg. 276, 70 Pac. 902; Kanne *v.* Otty, 25 Oreg. 531, 36 Pac. 537; Hicklin *v.* McClear, 18 Oreg. 126, 22 Pac. 1057.

Pennsylvania.— Foster *v.* McGraw, 64 Pa. St. 464; McCann *v.* McCrea, 18 Pa. Super. Ct. 456.

Rhode Island.— Thomas Mack Co. *v.* Voelker, 23 R. I. 441, 50 Atl. 838.

Tennessee.— Taylor *v.* Neblett, 4 Heisk. 491.

Texas.— Hueske *v.* Broussard, 55 Tex. 201; McAdoo *v.* Lummis, 43 Tex. 227; Missouri, etc., R. Co. *v.* Graves, (App. 1890) 16 S. W. 102; Eckford *v.* Berry, (Civ. App. 1894) 27 S. W. 840; Strauss *v.* Gross, 2 Tex. Civ. App. 432, 21 S. W. 305.

Vermont.— Young *v.* Young, 59 Vt. 342, 10 Atl. 528; McLane *v.* Johnson, 59 Vt. 237, 9 Atl. 837.

Virginia.— Richardson *v.* Planters' Bank, 94 Va. 130, 26 S. E. 413.

Washington.— Pennsylvania Mortg. Invest. Co. *v.* Simms, 16 Wash. 243, 47 Pac. 441; Adamant Plaster Mfg. Co. *v.* National Bank of Commerce, 5 Wash. 232, 31 Pac. 634.

West Virginia.— Uhl *v.* Ohio River R. Co., 51 W. Va. 106, 41 S. E. 340; Knowlton *v.* Campbell, 48 W. Va. 294, 37 S. E. 581; Findley *v.* Armstrong, 23 W. Va. 113; Hansford *v.* Chesapeake Coal Co., 22 W. Va. 70; Crislip *v.* Cain, 19 W. Va. 438. See also Martin *v.* Monongahela R. Co., 48 W. Va. 542, 37 S. E. 563.

Wisconsin.— Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 113 Wis. 161, 87 N. W. 1085, 89 N. W. 180; Beason *v.* Kurz, 66 Wis. 448, 29 N. W. 230; Bedard *v.* Bonville, 57 Wis. 270, 15 N. W. 185; Sigerson *v.* Cushing, 14 Wis. 527.

United States.— Union Bank *v.* Hyde, 6 Wheat. 572, 5 L. ed. 333; Wolff *v.* Wells, 115 Fed. 32, 52 C. C. A. 626; Wilson *v.* Higbee, 62 Fed. 723; Moore *v.* U. S., 17 Ct. Cl. 17.

England.— Stokes *v.* Moore, 1 Cox Ch. 219, 1 Rev. Rep. 24, 29 Eng. Reprint 1137; Paddock *v.* Fradley, 1 Cromp. & J. 90.

Canada.— Harris *v.* Moore, 10 Ont. App. 10; Clark *v.* Bonnycastle, 3 U. C. Q. B. O. S. 528.

See 20 Cent. Dig. tit. "Evidence," § 2066, *et seq.*

Nature of ambiguity.— An ambiguity, in order to authorize parol evidence, must relate to a subject treated of in the paper and must arise out of words used in treating that subject. Such an ambiguity never arises out of what was not written at all, but only out of what was written so blindly and imperfectly that its meaning is doubtful. Southampton *v.* Jessup, 173 N. Y. 84, 65 N. E. 949 [*modifying* 64 N. Y. App. Div. 525, 72 N. Y. Suppl. 312, 780].

Ambiguity brought out on cross-examination.— Where an expression in a written contract is shown by extrinsic matters to be ambiguous, the fact that the ambiguity was disclosed by defendant's cross-examination does not affect defendant's right to explain the ambiguity. Rogers *v.* Toilettes Co., 37 Misc. (N. Y.) 779, 76 N. Y. Suppl. 940.

Latent and patent ambiguity see *infra*, XVI, C, 10, c.

30. *Delaware.*— Penn Steel Casting, etc., Co. *v.* Wilmington Malleable Iron Co., 1 Pennew. 337, 41 Atl. 236.

Illinois.— St. Clair County Benev. Soc. *v.* Fietsam, 97 Ill. 474 [*affirming* 6 Ill. App. 151].

Mississippi.—Tufts *v.* Greenewald, 66 Miss. 360, 6 So. 156.

New York.— Manchester Paper Co. *v.* Moore, 104 N. Y. 680, 10 N. E. 861; Lawrence *v.* Gallagher, 73 N. Y. 613; Allen *v.* Armstrong, 58 N. Y. App. Div. 427, 68 N. Y. Suppl. 1079.

but as to its particular application, it may be explained and properly directed.[31] Likewise where the writing is illegible parol evidence is necessarily admissible.[32] But where the language used is clear and unambiguous, extrinsic evidence is not admissible on the ground of aiding the construction, for in such case the only thing which could be accomplished would be to show the meaning of the writing to be other than what its terms express,[33] and the instrument cannot be varied or

Oregon.— Oliver *v.* Oregon Sugar Co., 42 Oreg. 276, 70 Pac. 902.

Pennsylvania.— Bartley *v.* Phillips, 165 Pa. St. 325, 30 Atl. 842; Leggoe *v.* Mayer, 2 Pa. Super. Ct. 529; Harvey *v.* Vandegrift, 1 Wkly. Notes Cas. 629.

Texas.— Cooper *v.* Webb, (Civ. App. 1894) 25 S. W. 151.

Virginia.— Richmond Union Pass. R. Co. *v.* New York, etc., R. Co., 95 Va. 386, 28 S. E. 573.

Wisconsin.— Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 113 Wis. 161, 87 N. W. 1085, 89 N. W. 180.

United States.— Goddars *v.* Crefield Mills, 75 Fed. 818, 21 C. C. A. 530.

England.— Sweet *v.* Lee, 5 Jur. 1134, 3 M. & G. 452, 4 Scott N. R. 77, 42 E. C. L. 240.

See 20 Cent. Dig. tit. "Evidence," § 2066 *et seq.*

31. Scott *v.* Bennett, 8 Ill. 243.

32. *Alabama.*— Goldsmith *v.* Picard, 27 Ala. 142.

Iowa.— Jefferson County *v.* Savory, 2 Greene 238.

Kansas.— Walrath *v.* Whittekind, 26 Kan. 482.

Maine.— Fenderson *v.* Owen, 54 Me. 372, 92 Am. Dec. 551.

New York.— Arthur *v.* Roberts, 60 Barb. 580.

See 20 Cent. Dig. tit. "Evidence," §§ 2102–2103.

33. *Alabama.*— Donehoo *v.* Johnson, 113 Ala. 126, 21 So. 70; Vann *v.* Lunsford, 91 Ala. 576, 8 So. 719; Jenkins *v.* Cooper, 50 Ala. 419.

California.— Braun *v.* Woollacott, 129 Cal. 107, 61 Pac. 801.

Colorado.— Hager *v.* Rice, 4 Colo. 90, 34 Am. Rep. 68; Hardwick *v.* McClurg, 16 Colo. App. 354, 65 Pac. 405.

Connecticut.— Burr *v.* Spencer, 26 Conn. 159, 68 Am. Dec. 379.

Delaware.— Tatman *v.* Barrett, 3 Houst. 226.

District of Columbia.— Seitz *v.* Seitz, 11 App. Cas. 358.

Georgia.— Southern Bell Telephone, etc., Co. *v.* Harris, 117 Ga. 1001, 44 S. E. 885; Terrell *v.* Huff, 108 Ga. 655, 34 S. E. 345; Ainslie *v.* Eason, 107 Ga. 747, 33 S. E. 711; Carter *v.* Williamson, 106 Ga. 280, 31 S. E. 651.

Illinois.— Ingraham *v.* Mariner, 194 Ill. 269, 62 N. E. 609; Kane *v.* Farrelly, 192 Ill. 521, 61 N. E. 648; Walton *v.* Follansbee, 165 Ill. 480, 46 N. E. 459; Stevens *v.* Wait, 112 Ill. 544; Western R. Equipment Co. *v.* Missouri Malleable Iron Co., 91 Ill. App. 28.

Indiana.— Blythe *v.* Gibbons, 141 Ind. 332, 35 N. E. 557; Johnston *v.* Griest, 85 Ind. 503; Symmes *v.* Brown, 13 Ind. 318.

Iowa.— Van Husen *v.* Omaha Bridge, etc., R. Co., 118 Iowa 366, 92 N. W. 47; Lantz *v.* Ryman, 102 Iowa 348, 71 N. W. 212; Fawkner *v.* Lew Smith Wall Paper Co., 88 Iowa 169, 55 N. W. 200, 45 Am. St. Rep. 230, (1891) 49 N. W. 1003.

Kansas.— Atchison, etc., R. Co. *v.* Vanordstrand, 67 Kan. 386, 73 Pac. 113.

Kentucky.— Franklin F. Ins. Co. *v.* Hellerick, 49 S. W. 1066, 20 Ky. L. Rep. 1703.

Louisiana.— Millard *v.* Smith, 25 La. Ann. 491.

Maine.— Porter *v.* Porter, 51 Me. 376; Walker *v.* Sanborn, 46 Me. 470.

Maryland.— Lazear *v.* National Union Bank, 52 Md. 78, 36 Am. Rep. 355.

Massachusetts.— Stowell *v.* Buswell, 135 Mass. 340; Dascomb *v.* Sartell, 1 Allen 281; Gay *v.* Welles, 7 Pick. 217.

Michigan.— Brown *v.* Schiappacasse, 115 Mich. 47, 72 N. W. 1096; Pettyplace *v.* Groton Bridge, etc., Co., 103 Mich. 155, 61 N. W. 266; North American F. Ins. Co. *v.* Throop, 22 Mich. 146, 7 Am. Rep. 638.

Minnesota.— National Gaslight, etc., Co. *v.* Bixby, 48 Minn. 323, 51 N. W. 217.

Mississippi.— Jordan *v.* Neal, (1902) 33 So. 17.

Missouri.— Blakely *v.* Bennecke, 59 Mo. 193; Grisham Mercantile, etc., Co. *v.* Rabich, 84 Mo. App. 544; Grand Lodge *v.* Sater, 44 Mo. App. 445; Conrad *v.* Fisher, 37 Mo. App. 352, 8 L. R. A. 147; Webster *v.* Switzer, 15 Mo. App. 346.

Nebraska.— Drexel *v.* Murphy, 59 Nebr. 210, 80 N. W. 813; Fisk *v.* McNeal, 23 Nebr. 726, 37 N. W. 616, 8 Am. St. Rep. 162; Gillespie *v.* Sawyer, 15 Nebr. 536, 19 N. W. 449.

New Jersey.— Commonwealth Roofing Co. *v.* Palmer Leather Co., 67 N. J. L. 566, 52 Atl. 389; Camden, etc., R. Co. *v.* Adams, 62 N. J. Eq. 656, 51 Atl. 24.

New York.— House *v.* Walch, 144 N. Y. 418, 39 N. E. 327; White's Bank *v.* Myles, 73 N. Y. 335, 29 Am. Rep. 157; Norton *v.* Woodruff, 2 N. Y. 153 [*affirming* 2 Barb. 520]; Singer *v.* New York, 47 N. Y. App. Div. 42, 62 N. Y. Suppl. 347 [*affirmed* in 165 N. Y. 658, 59 N. E. 1130]; Phelps *v.* Gamewell Fire Alarm Tel. Co., 72 Hun 26, 25 N. Y. Suppl. 654; Mercantile Mut. Ins. Co. *v.* State Mut. F. & M. Ins. Co., 25 Barb. 319; Lent *v.* Hodgman, 15 Barb. 274; Weed *v.* Clark, 4 Sandf. 31; Campbell *v.* Jimenes, 7 Misc. 77, 27 N. Y. Suppl. 351; Rooney *v.* Thompson, 84 N. Y. Suppl. 263; Barry *v.* New York, 56 N. Y. Suppl. 1049; Van Hagen *v.* Van Rensselaer, 18 Johns. 420.

contradicted under the guise of explanation or construction.[34] Nor can any evidence of the language employed by the parties in making the contract be

North Carolina.— Chard *v.* Warren, 122 N. C. 75, 29 S. E. 373.

Ohio.— Johnson *v.* Pierce, 16 Ohio St. 472; Morris *v.* Edwards, 1 Ohio 189. But *compare* Lamping *v.* Cole, 2 Ohio Dec. (Reprint) 737, 5 West. L. Month. 187.

Oklahoma.— Liverpool, etc., Ins. Co. *v.* Richardson Lumber Co., 11 Okla. 579, 585, 69 Pac. 936, 938.

Oregon.— Tallmadge *v.* Hooper, 37 Oreg. 503, 61 Pac. 349, 1127.

Pennsylvania.— King *v.* New York, etc., Gas Coal Co., 204 Pa. St. 628, 54 Atl. 477; Serfass *v.* Serfass, 190 Pa. St. 484, 42 Atl. 888; Harvey *v.* Vandegrift, 89 Pa. St. 346.

South Carolina.— Coates *v.* Early, 46 S. C. 220, 24 S. E. 305; Carolina, etc., R. Co. *v.* Seigler, 24 S. C. 124; Moore *v.* Cooper, 1 Speers 87.

Texas.— Farley *v.* Deslonde, 69 Tex. 458, 6 S. W. 786; Chew *v.* Zweib, 29 Tex. Civ. App. 311, 69 S. W. 207; Jones *v.* Hanna, 24 Tex. Civ. App. 550, 60 S. W. 279; Curtis *v.* Kelley, 24 Tex. Civ. App. 540, 60 S. W. 265; Harris *v.* Springfield First Nat. Bank, (Civ. App. 1898) 45 S. W. 311.

Utah.— Brown *v.* Markland, 16 Utah 360, 52 Pac. 597, 67 Am. St. Rep. 629.

Vermont.— Herrick *v.* Noble, 27 Vt. 1.

Virginia.— Grubb *v.* Burford, 98 Va. 553, 37 S. E. 4.

Washington.— Carr *v.* Jones, 29 Wash. 78, 69 Pac. 646; Owen *v.* Henderson, 16 Wash. 39, 47 Pac. 215, 58 Am. St. Rep. 17.

West Virginia.— Uhl *v.* Ohio River R. Co., 51 W. Va. 106, 41 S. E. 340; Martin *v.* Monongahela R. Co., 48 W. Va. 542, 37 S. E. 563; Camden *v.* McCoy, 48 W. Va. 377, 37 S. E. 637; Knowlton *v.* Campbell, 48 W. Va. 294, 37 S. E. 581.

Wisconsin.— Hart *v.* Hart, 117 Wis. 639, 94 N. W. 890; Whitworth *v.* Brown, 85 Wis. 375, 55 N. W. 422; Smith *v.* Scott, 31 Wis. 420; Barton *v.* Babcock, 28 Wis. 192; Peet *v.* Chicago, etc., R. Co., 20 Wis. 594, 91 Am. Dec. 446.

United States.— Wolff *v.* Wells, 115 Fed. 32, 52 C. C. A. 626; Holmes *v.* Montauk Steamboat Co., 93 Fed. 731, 35 C. C. A. 556.

England.— Coker *v.* Guy, 2 B. & P. 565; Hitchin *v.* Groom, 5 C. B. 515, 17 L. J. C. P. 145, 57 E. C. L. 515; De la Warr *v.* Miles, 17 Ch. D. 535, 50 L. J. Ch. 754, 44 L. T. Rep. N. S. 487, 29 Wkly. Rep. 809; Shore *v.* Atty.-Gen., 9 Cl. & F. 355, 5 Scott N. R. 958, 8 Eng. Reprint 450; Sotilichos *v.* Kemp, 3 Exch. 105, 18 L. J. Exch. 36.

See 20 Cent. Dig. tit. "Evidence," § 2066 *et seq.* See also *supra*, XVI, A, 1; XVI, B, 2, h, (I); and CONTRACTS, 9 Cyc. 588 note 43, 774 note 9.

Where two writings construed together are unambiguous parol evidence is not admissible to explain their meaning. Harrison *v.* Tate, 100 Ga. 383, 28 S. E. 227.

The settled legal construction of the language used in a written instrument cannot be contradicted by parol. Self *v.* King, 28 Tex. 552; Godkin *v.* Monahan, 83 Fed. 116, 27 C. C. A. 410.

Parol evidence of prior agreements as to the meaning of ambiguous terms is inadmissible in the absence of fraud concealing the terms of the contract from the party executing it. Green *v.* Chicago, etc., R. Co., 92 Fed. 873, 35 C. C. A. 68.

Where the language used is in its primary meaning unambiguous, and that meaning is not excluded by the context, and is sensible with reference to the extrinsic circumstances in which the parties to the instrument were placed at the time the writing was made, such primary meaning must be conclusively taken to be that which the parties intended and to state the intention of the parties, and no evidence is receivable to show that in fact the parties used the language in any other sense, or had any other intention. Hildreth *v.* Hartford, etc., Tramway Co., 73 Conn. 631, 48 Atl. 963.

A contract which has been interpreted by the supreme court is not ambiguous or uncertain, and on a new trial parol evidence cannot be introduced to show the intention of the parties, under Cal. Civ. Code, § 1649, and Cal. Code Civ. Proc. § 1864, authorizing parol evidence in cases of doubtful and ambiguous contracts; for these sections do not apply when the courts are able to declare the true intent of the parties. San Diego Flume Co. *v.* Chase, (Cal. 1893) 32 Pac. 245.

The use of the words "more or less" in a writing concerning a sale of property does not create such an ambiguity as will let in parol evidence. Cabot *v.* Winsor, 1 Allen (Mass.) 546; Shickle *v.* Chouteau, etc., Iron Co., 10 Mo. App. 241 [*affirmed* in 84 Mo. 161].

The mere assertion by a party to a written contract that uncertainties exist in it will not open the door for admission of parol evidence, where the court can find no equivocal language in the contract. Atchison, etc., R. Co. *v.* Truskett, 67 Kan. 26, 72 Pac. 562.

34. *Alabama.*— Thorpe *v.* Sughi, 33 Ala. 330; Mobile Mar. Dock, etc., Ins. Co. *v.* McMillan, 31 Ala. 711.

California.—Donahue *v.* Cromactie, 21 Cal. 80.

Colorado.— Hardwick *v.* McClurg, 16 Colo. App. 354, 65 Pac. 405.

Connecticut.— Excelsior Needle Co. *v.* Smith, 61 Conn. 56, 23 Atl. 693.

Georgia.— Scurry *v.* Cotton States L. Ins. Co., 51 Ga. 624.

Illinois.— Razor *v.* Razor, 142 Ill. 375, 31 N. E. 678 [*affirming* 39 Ill. App. 527]; F. F. Ide Mfg. Co. *v.* Sager Mfg. Co., 82 Ill. App. 685; Chambers *v.* Prewitt, 71 Ill. App. 119 [*affirmed* in 172 Ill. 615, 50 N. E. 145].

Iowa.— Hyler *v.* Wellington, 57 Iowa 413, 10 N. W. 822.

resorted to except that which is furnished by the writing itself.[35] It is also well established that parol evidence is not admissible to give to a writing a construction conformable to the secret intentions which one or both of the parties may have entertained but which the writing fails to express.[36]

b. What Evidence Is Admissible—(I) *Evidence Must Tend to Aid Construction.* The parol evidence which can be admitted to explain the contract must be such as tends to show the correct interpretation of the language used, and its only purpose is to enable the court or jury to understand what the language really means; parol evidence which has no tendency to aid in the construction of the writing or to explain any ambiguity therein cannot be admitted.[37]

(II) *Acts of Parties.* Where the meaning of the parties is uncertain from the words used and it is not within the power of the court to ascertain their meaning by reference to the body of the instrument, evidence of the acts of the parties contemporaneous with and immediately prior to the execution of the instrument may properly be considered.[38] The subsequent conduct of the parties acting under a contract the meaning of which is doubtful is also admissible to aid in the construction of the instrument and in determining the question of intent.[39]

(III) *Condition of Subject-Matter.* A deed or other writing should be construed with reference to the actual state of the subject-matter at the time of its execution, and for that purpose extrinsic evidence may be admitted to place

Louisiana.— Mullard *v.* Smith, 25 La. Ann. 491.

Maine.— Gatchell *v.* Morse, 81 Me. 205, 16 Atl. 662.

Massachusetts.— Alvord *v.* Cook, 174 Mass. 120, 54 N. E. 499.

Michigan.— Gregory *v.* Lake Linden, 130 Mich. 368, 90 N. W. 29.

Missouri.— Chrisman *v.* Hodges, 75 Mo. 413.

Nebraska.— State *v.* Cass County, 60 Nebr. 566, 83 N. W. 733; Latenser *v.* Misner, 56 Nebr. 340, 76 N. W. 897.

New York.— De Remer *v.* Brown, 165 N. Y. 410, 59 N. E. 129 [*affirming* 36 N. Y. App. Div. 634, 55 N. Y. Suppl. 367]; Wilson *v.* Randall, 67 N. Y. 338.

United States.— Dennis *v.* Slyfield, 117 Fed. 474, 54 C. C. A. 520.

England.—Atty.-Gen. *v.* Clapham, 4 De G., M. & G. 591, 3 Eq. Rep. 702, 1 Jur. N. S. 505, 24 L. J. Ch. 177, 3 Wkly. Rep. 158, 53 Eng. Ch. 463, 43 Eng. Reprint 638 [*reversing* 2 Eq. Rep. 91, 10 Hare 540, 23 L. J. Ch. 70, 2 Wkly. Rep. 28, 44 Eng. Ch. 523].

See 20 Cent. Dig. tit. "Evidence," § 2066 *et seq.* And see *supra*, XVI, A, 1.

35. Dent *v.* North American Steamship Co., 49 N. Y. 390.

36. Slater *v.* Demarest Spoke, etc., Co., 94 Ga. 687, 21 S. E. 715; Citizens' Bank *v.* Brighan, 61 Kan. 727, 60 Pac. 754 [*reversing* 9 Kan. App. 889, 58 Pac. 1117]; King *v.* Merriman, 38 Minn. 47, 35 N. W. 570; Standard Sewing Mach. Co. *v.* Leslie, 78 Fed. 325, 24 C. C. A. 107.

37. Saunders *v.* Agricultural Ins. Co., 39 N. Y. App. Div. 631, 57 N. Y. Suppl. 683; Carr *v.* Jones, 29 Wash. 78, 69 Pac. 646.

38. Haven *v.* Brown, 7 Me. 421, 22 Am. Dec. 208; Dodd *v.* Witt, 139 Mass. 63, 29 N. W. 475, 52 Am. Rep. 700; Fowle *v.* Bigelow, 10 Mass. 379; Block *v.* Columbian Ins. Co., 42 N. Y. 393.

39. *Alabama.*— Boykin *v.* Mobile Bank, 72 Ala. 262, 47 Am. Rep. 408.

California.— Vejar *v.* Mound City Land, etc., Assoc., 97 Cal. 659, 32 Pac. 713; Truett *v.* Adams, 66 Cal. 218, 5 Pac. 96.

Illinois.— Wrigley *v.* Cornelius, 162 Ill. 92, 44 N. E. 406 [*affirming* 61 Ill. App. 279]; Davenport First Nat. Bank *v.* Rothschild, 107 Ill. App. 133.

Indiana.— Bell *v.* Golding, 27 Ind. 173.

Louisiana.— Marcotte *v.* Coco, 12 Rob. 167.

Maine.— Bradford *v.* Cressey, 45 Me. 9; Emery *v.* Webster, 42 Me. 204, 66 Am. Dec. 274.

Massachusetts.— Lovejoy *v.* Lovett, 124 Mass. 270.

Michigan.— Borden *v.* Fletcher, 131 Mich. 220, 91 N. W. 145; Gregory *v.* Lake Linden, 130 Mich. 368, 90 N. W. 29.

Missouri.— St. Louis Gaslight Co. *v.* St. Louis, 46 Mo. 121.

New Hampshire.— Bell *v.* Woodward, 46 N. H. 315.

New York.— French *v.* Carhart, 1 N. Y. 96; Beacham *v.* Eckford, 2 Sandf. Ch. 116, a case of a partnership contract.

Pennsylvania.— Barnhart *v.* Riddle, 29 Pa. St. 92; Stevenson's Estate, 16 Phila. 365.

Texas.— Linney *v.* Wood, 66 Tex. 22, 17 S. W. 244; Minor *v.* Powers, (Civ. App. 1893) 24 S. W. 710.

West Virginia.— Uhl *v.* Ohio River R. Co., 51 W. Va. 106, 41 S. E. 340; Findley *v.* Armstrong, 23 W. Va. 113; Hansford *v.* Chesapeake Coal Co., 22 W. Va. 70; Crislip *v.* Cain, 19 W. Va. 438. See also Martin *v.* Monongahela R. Co., 48 W. Va. 542, 37 S. E. 563; Camden *v.* McCoy, 48 W. Va. 377, 37 S. E. 637.

Wisconsin.— Hart *v.* Hart, 117 Wis. 639, 94 N. W. 890.

the court or jury in the position of the parties at the time of executing the instrument, and thus enable them to intelligently interpret the language used.[40]

(iv) *Construction by Parties.* Evidence of the practical construction given to an instrument of writing by the parties thereto may be admissible to explain its meaning when explanation is necessary.[41] But an unambiguous contract cannot be varied by evidence of a construction by the parties different from that which the language clearly imports.[42]

(v) *Conversations and Statements of Parties.* The conversations and statements of the parties at the time of or just previous to the execution of the contract between them may be admissible for the purpose of aiding in the construction of the writing;[43] but oral declarations of the parties made at or before the time of the execution of the instrument are not admissible for the purpose of showing an intention or purpose not therein expressed.[44] Conversations between and statements of the parties to a written contract after its execution have also been held admissible to explain an ambiguity in the writing.[45]

(vi) *Expert Evidence.* The admission of expert testimony to show what work was necessary to be done in order to comply with a building contract is not an infringement of the rule which forbids the admission of parol evidence to vary or contradict a written contract.[46]

United States.— Rhodes *v.* Cleveland Rolling-Mill Co., 17 Fed. 426.

Such evidence is competent only to show the understanding of the parties and not to affect the terms of the contract. Potter *v.* Phenix Ins. Co., 63 Fed. 382.

40. Cook *v.* Whiting, 16 Ill. 480; Meade *v.* Gilfoyle, 64 Wis. 18, 24 N. W. 413; Whitney *v.* Robinson, 53 Wis. 309, 10 N. W. 512; Messer *v.* Oestreich, 52 Wis. 684, 10 N. W. 6.

41. *Georgia.*— Georgia R. Co. *v.* Hart, 60 Ga. 550.

Illinois.— Western R. Equipment Co. *v.* Missouri Malleable Iron Co., 91 Ill. App. 28.

Indiana.— Bell *v.* Golding, 27 Ind. 173.

Maine.— Tyler *v.* Fickett, 73 Me. 410.

Massachusetts.— Lovejoy *v.* Lovett, 124 Mass. 270; Goodrich *v.* Longley, 1 Gray 615; Stone *v.* Clark, 1 Metc. 378, 35 Am. Dec. 370.

Michigan.— Borden *v.* Fletcher, 131 Mich. 220, 91 N. W. 145; Gregory *v.* Lake Linden, 130 Mich. 368, 90 N. W. 29.

Minnesota.— Engel *v.* Scott, etc., Lumber Co., 60 Minn. 39, 61 N. W. 825.

New York.— Hart *v.* Thompson, 10 N. Y. App. Div. 183, 41 N. Y. Suppl. 909. See also United Press *v.* New York Press Co., 164 N. Y. 406, 58 N. E. 527, 53 L. R. A. 288 [*affirming* 35 N. Y. App. Div. 444, 54 N. Y. Suppl. 807]; Tanenbaum *v.* Levy, 83 N. Y. App. Div. 319, 82 N. Y. Suppl. 171.

Pennsylvania.— Wright *v.* Monongahela Natural Gas Co., 2 Pa. Super. Ct. 219.

Rhode Island.— Phetteplace *v.* British, etc., Ins. Co., 23 R. I. 26, 49 Atl. 33.

Texas.— Heidenheimer *v.* Cleveland, (Sup. 1891) 17 S. W. 524; Linney *v.* Wood, 66 Tex. 22, 17 S. W. 244; Hope *v.* Riggs, (Civ. App. 1897) 43 S. W. 306.

Vermont.— Fletcher *v.* Phelps, 28 Vt. 257.

West Virginia.— See Camden *v.* McCoy, 48 W. Va. 377, 37 S. E. 637.

United States.—Cavazos *v.* Trevino, 6 Wall. 773, 18 L. ed. 813.

See 20 Cent. Dig. tit. "Evidence," § 2068 *et seq.* See also Contracts, 9 Cyc. 588, 773.

Rule not applicable to overthrow plain terms of contract.— Western R. Equipment Co. *v.* Missouri Malleable Iron Co., 91 Ill. App. 28.

42. Kinney *v.* McBride, 88 N. Y. App. Div. 92, 84 N. Y. Suppl. 958.

43. *Florida.*— Robinson *v.* Barnett, 18 Fla. 602, 43 Am. Rep. 327.

Georgia.— Skinner *v.* Moyle, 69 Ga. 476.

Iowa.— Kelly *v.* Fejervary, 111 Iowa 693, 83 N. W. 791.

Massachusetts.— Proctor *v.* Hartigan, 139 Mass. 554, 2 N. E. 99, 143 Mass. 462, 9 N. E. 841.

Michigan.— Purkiss *v.* Benson, 28 Mich. 538.

Missouri.— Sharp *v.* Sturgeon, 66 Mo. App. 191.

New York.— Hart *v.* Thompson, 10 N. Y. App. Div. 183, 41 N. Y. Suppl. 909; Rogers *v.* Straub, 75 Hun 264, 26 N. Y. Suppl. 1066; Austin *v.* Southworth, 13 Mich. 45, 34 N. Y. Suppl. 88; Ely *v.* Adams, 19 Johns. 313.

Pennsylvania.— De Bois *v.* Bigler, 48 Leg. Int. 293.

United States.— See Gray *v.* Harper, 10 Fed. Cas. No. 5,716, 1 Story 374.

England.— Chambers *v.* Kelly, Ir. R. 7 C. L. 231.

Canada.— Doe *v.* Pitt, 6 N. Brunsw. 385.

Contra.— Carolina, etc., R. Co. *v.* Seigler, 24 S. C. 124; Uhl *v.* Ohio River R. Co., 51 W. Va. 106, 41 S. E. 340; Hansford *v.* Chesapeake Coal Co., 22 W. Va. 70.

44. Tuttle *v.* Burgett, 53 Ohio St. 498, 42 N. E. 427, 53 Am. St. Rep. 649, 30 L. R. A. 214; Toledo First Nat. Bank *v.* Central Chandelier Co., 17 Ohio Cir. Ct. 443, 9 Ohio Cir. Dec. 807.

45. Sabin *v.* Kendrick, 58 N. Y. App. Div. 108, 68 N. Y. Suppl. 546; Linney *v.* Wood, 66 Tex. 22, 17 S. W. 244. *Contra*, Carolina, etc., R. Co. *v.* Seigler, 24 S. C. 124; Hansford *v.* Chesapeake Coal Co., 22 W. Va. 70.

46. Haver *v.* Tenney, 36 Iowa 80. See also *supra*, XI.

(VII) *EXTRINSIC MATTERS REFERRED TO.* Where a writing itself contains a reference to extrinsic matters these matters may be shown for the purpose of explaining the writing.[47]

(VIII) *FACTS EXISTING AT TIME.* Facts existing at the time of the making of the contract may properly be considered for the purpose of interpreting the language used, where such language is obscure and ambiguous.[48]

(IX) *IDENTIFICATION OF WRITING REFERRED TO.* Where a written contract or agreement contains a reference to some other writing, parol evidence is admissible for the purpose of identifying the writing so referred to.[49]

(X) *INDUCING CAUSE.* The inducing causes leading up to the execution of a written instrument may also be shown to aid in its construction where its phraseology is doubtful or ambiguous.[50]

(XI) *INTENTION OF PARTIES.* Parol or extrinsic evidence of the intention of the parties may be received to clear up an ambiguity by reason of which such intention is not definitely expressed;[51] but evidence is not admissible to show

47. Dorsey *v.* Eagle, 7 Gill & J. (Md.) 321 (holding that a party who claims under a lease, stipulating that he "shall have and hold the premises [a part of a manor] according to manor regulations," may prove by parol that by such regulations the tenants have a right to remove their away-going crops at any time within a reasonable period after the determination of their leases); Ferguson *v.* Davis, 65 Mich. 667, 32 N. W. 892 (holding that where a contractor gave to a lumber dealer from whom he was purchasing lumber for the construction of a house, a draft, payable at a certain date, which was accepted by the drawee, for whom the house was being built, with the condition "that the dwelling shall be completed before this draft is paid," it was permissible in a suit by the payee, the lumber dealer, against the drawee, to read in evidence the building contract between the drawer and the drawee, in order to explain the "completion" referred to in the acceptance).

48. *Maryland.*— McCreary *v.* McCreary, 5 Gill & J. 147.

Massachusetts.— Hill *v.* Rewee, 11 Metc. 268.

Michigan.— Ives *v.* Kimball, 1 Mich. 308.

New York.— Dent *v.* North American Steamship Co., 49 N. Y. 390.

Virginia.— French *v.* Williams, 82 Va. 462, 4 S. E. 591.

United States.— Mauger *v.* Holyoke Mut. F. Ins. Co., 16 Fed. Cas. No. 9,305, Holmes 287.

England.— Rex *v.* Laindon, 8 T. R. 379.

Canada.— See Whitney *v.* Wall, 17 U. C. C. P. 474.

49. *California.*— Redd *v.* Murry, 95 Cal. 48, 24 Pac. 841, 30 Pac. 132; Penry *v.* Richards, 52 Cal. 496.

Georgia.— Way *v.* Arnold, 18 Ga. 181.

Massachusetts.—Adams *v.* Morgan, 150 Mass. 143, 22 N. E. 708; Bergin *v.* Williams, 138 Mass. 544 (holding that parol evidence is admissible to identify certain specifications referred to in a written contract to erect a building); Stone *v.* Cambridge, 6 Cush. (Mass.) 270.

Ohio.— Fitzgerald *v.* Louisville, etc., R. Co., 7 Ohio Dec. (Reprint) 173, 1 Cinc. L. Bul. 226.

Rhode Island.— Wilson *v.* Tucker, 10 R. I. 578.

Texas.— Zimpleman *v.* Stamps, 21 Tex. Civ. App. 129, 51 S. W. 341.

Vermont.— Dodge *v.* Billings, 2 D. Chipm. 26.

West Virginia.— Snooks *v.* Wingfield, 52 W. Va. 441, 44 S. E. 277.

England.—Hodges *v.* Horsfall, 1 Russ. & M. 116, 39 Eng. Reprint 45.

Canada.— Des Brisay *v.* Glencross, 12 N. Brunsw. 105; Ward *v.* Hayes, 19 Grant Ch. (U. C.) 239.

50. Citizens' Bank *v.* Brigham, 61 Kan. 727, 60 Pac. 754 [*reversing* 9 Kan. App. 889, 58 Pac. 1117]. See also *infra*, XVI, C, 17.

51. *Arkansas.*— Glanton *v.* Anthony, 15 Ark. 543.

California.— Ruiz *v.* Dow, 113 Cal. 490, 45 Pac. 867; Cornwall *v.* Culver, 16 Cal. 423; Brewster *v.* Lathrop, 15 Cal. 21; Brannan *v.* Mesick, 10 Cal. 95.

Indiana.— Wilson *v.* Carrico, 140 Ind. 533, 40 N. E. 50, 49 Am. St. Rep. 213.

Iowa.— Ruthven *v.* Clarke, 109 Iowa 25, 79 N. W. 454.

Kentucky.—Price *v.* Rodman, 2 Ky. L. Rep. 213.

Maryland.— Conn *v.* Conn, 1 Md. Ch. 212. But *compare* Young *v.* Frost, 5 Gill 287.

Massachusetts.—Foster *v.* Woods, 16 Mass. 116.

Minnesota.— Ripon College *v.* Brown, 66 Minn. 179, 68 N. W. 837; Case *v.* Young, 3 Minn. 209; Baldwin *v.* Winslow, 2 Minn. 213.

New Hampshire.— Downes *v.* Union Cong. Soc., 63 N. H. 151.

New York.— New York L. Ins. Co. *v.* Aitkin, 125 N. Y. 660, 26 N. E. 732; Perrior *v.* Peck, 39 N. Y. App. Div. 390, 57 N. Y. Suppl. 377 [*affirmed* in 167 N. Y. 582, 60 N. E. 1118]; Vogel *v.* Weissmann, 23 Misc. 256, 51 N. Y. Suppl. 173; Livingston *v.* Ten Broeck, 16 Johns. 14, 8 Am. Dec. 287.

North Carolina.— Egerton *v.* Carr, 94 N. C. 648, 55 Am. Rep. 630.

Oregon.— Kanne *v.* Otty, 25 Oreg. 531, 36 Pac. 537.

that the real intention of a party was other than what is clearly expressed by the writing.[52]

(XII) *KNOWLEDGE OF SUBJECT-MATTER.* It has been held that, in cases of obscure instruments, the court may inquire into the actual state of knowledge which the parties to the instrument had on the subject of it, and where it involves questions of science, may refer to the state of public knowledge or learning on the subject at the time the instrument was made.[53]

(XIII) *ORIGIN OF LIABILITY.* Parol evidence is admissible as to the origin of the debt for which a note was given, for this does not change or even purport to change any of the terms of the note.[54]

(XIV) *OTHER WRITINGS.* Other writings relating to the same subject-matter are, especially if expressly referred to,[55] admissible in evidence to explain the agreement before the court,[56] or to aid the description of the subject-matter.[57] A reference to a particular writing, however, does not exclude other evidence than the writing so referred to.[58]

(XV) *OTHER TRANSACTIONS BETWEEN SAME PARTIES.* Previous and contemporaneous transactions may properly be taken into consideration to ascertain the sense in which the parties used particular terms,[59] or to ascertain the subject-matter of the contract.[60]

(XVI) *PRIOR NEGOTIATIONS.* The negotiations between the parties prior to

Pennsylvania.— See Beaver *v.* Slear, 182 Pa. St. 213, 37 Atl. 991.

Rhode Island.— Thomas Mach. Co. *v.* Voelker, 23 R. I. 441, 50 Atl. 838; Phetteplace *v.* British, etc., Mar. Ins. Co., 23 R. I. 26, 49 Atl. 33.

South Carolina.— Murray *v.* Northwestern R. Co., 64 S. C. 520, 42 S. E. 617.

Texas.— Walker *v.* McDonald, 49 Tex. 458; Henderson *v.* Stith, (Civ. App. 1898) 43 S. W. 566; Eckford *v.* Berry, (Civ. App. 1894) 27 S. W. 840.

Vermont.— Wing *v.* Gray, 36 Vt. 261.

Virginia.— See Flemings *v.* Willis, 2 Call 5.

West Virginia.— Foley *v.* Ruley, 43 W. Va. 513, 27 S. E. 268.

United States.— Hall *v.* The Barnstable, 84 Fed. 895.

England.— Roden *v.* London Small Arms Co., 46 L. J. Q. B. 213, 35 L. T. Rep. N. S. 505, 25 Wkly. Rep. 269.

See 20 Cent. Dig. tit. "Evidence," § 2129 *et seq.* And see CONTRACTS, 9 Cyc. 577 *et seq.*

52. *Alabama.*— Morris *v.* Robinson, 80 Ala. 291.

Delaware.— Dale *v.* Smith, 1 Del. Ch. 1, 12 Am. Dec. 64.

Indiana.— Barney *v.* Indiana R. Co., 157 Ind. 228, 61 N. E. 194.

Massachusetts.— McCabe *v.* Swap, 14 Allen 188; West Boylston Mfg. Co. *v.* Searle, 15 Pick. 225.

Minnesota.—Gilbert *v.* Thompson, 14 Minn. 544.

Missouri.— O'Brien *v.* Ash, 169 Mo. 283, 69 S. W. 8.

New Hampshire.— Peaslee *v.* Gee, 19 N. H. 273.

New York.— Palmer *v.* Gurnsey, 7 Wend. 248.

South Carolina.— Coates *v.* Early, 46 S. C. 220, 24 S. E. 305.

Texas.— Johnson *v.* Morton, 28 Tex. Civ. App. 296, 67 S. W. 790.

Wisconsin.—Arnold *v.* Elmore, 16 Wis. 509.

See 20 Cent. Dig. tit. "Evidence," § 2129 *et seq.*

53. French *v.* Brewer, 9 Fed. Cas. No. 5,096, 3 Wall. Jr. 346. See also Webster Loom Co. *v.* Higgins, 105 U. S. 580, 26 L. ed. 1177.

54. Armstrong *v.* Carwile, 56 S. C. 463, 35 S. E. 196.

55. Rorabacher *v.* Lee, 16 Mich. 169, holding that a bond referred to in the contract sued on, as explaining the meaning and effect of a proviso therein, is admissible in evidence.

Identification of writing referred to see *supra*, XVI, C, 10, b, (IX).

56. *Louisiana.*— Meyer *v.* King, 29 La. Ann. 567.

Mississippi.— Williams *v.* Jones, 10 Sm. & M. 108.

Missouri.—Walsh *v.* Edmisson, 46 Mo. App. 282.

New York.— Wilson *v.* Randall, 67 N. Y. 338.

United States.— Brown *v.* Grove, 80 Fed. 564, 25 C. C. A. 644. See also Burckle *v.* The Tapperheten, 4 Fed. Cas. No. 2,141.

England.— Scarlet *v.* Lucton Free School, 4 Cl. & F. 1, 7 Eng. Reprint 1, 10 Bligh N. S. 592, 6 Eng. Reprint 218; *In re* Phœnix Bessemer Steel Co., 44 L. J. Ch. 683, 32 L. T. Rep. N. S. 854.

57. Clough *v.* Bowman, 15 N. H. 504; Meade *v.* Gilfoyle, 64 Wis. 18, 24 N. W. 413.

58. Hughlett *v.* Conner, 12 Heisk. (Tenn.) 83; Deery *v.* Cray, 10 Wall. (U. S.) 263, 19 L. ed. 887.

59. Brawley *v.* U. S., 96 U. S. 168, 24 L. ed. 622; Peck *v.* U. S., 14 Ct. Cl. 84; Bourne *v.* Gatliff, 11 Cl. & F. 45, 8 Eng. Reprint 1019.

60. Brawley *v.* U. S., 96 U. S. 168, 24 L. ed. 622; Peck *v.* U. S., 14 Ct. Cl. 84.

the contract may be admissible for the purpose of aiding the court in the interpretation of the instrument.[61]

(xvii) *Purpose of Writing.* In order to correctly ascertain the intentions of the parties to a deed, contract, or other instrument of writing, and properly to interpret the same, it is competent to inquire into the purpose for which the writing was executed, and to this end parol evidence is admissible.[62]

(xviii) *Relations of Parties.* Evidence is admissible to show the relations of the parties to the subject-matter and to each other, where, on the face of the contract, its terms are obscure.[63]

(xix) *Rules of Association.* Where the constitution and by-laws of an association prescribe the mode of performing contracts of a certain kind between members of the association, they become a part of a contract between such members, and are admissible in evidence in an action on such a contract to aid in its construction.[64]

(xx) *Supplying Omissions.* It has even been held that, when necessary to a correct interpretation of the instrument, an omission may be supplied;[65] but

61. *California.*— Snyder *v.* Holt Mfg. Co., 134 Cal. 324, 66 Pac. 311.

Illinois.— Balohradsky *v.* Carlisle, 14 Ill. App. 289.

Massachusetts.—Keller *v.* Webb, 125 Mass. 88, 28 Am. Rep. 209.

Michigan.— Wilbur *v.* Stoepel, 82 Mich. 344, 46 N. W. 724, 21 Am. St. Rep. 568.

New York.— Flagler *v.* Hearst, 62 N. Y. App. Div. 18, 70 N. Y. Suppl. 956.

South Carolina.—Colvin *v.* McCormick Cotton Oil Co., 66 S. C. 61, 44 S. E. 380; Bruce *v.* Moon, 57 S. C. 60, 35 S. E. 415.

Tennessee.— Gholson *v.* Finney, (Ch. App. 1898) 46 S. W. 345.

United States.—Arthur *v.* Baron de Hirsch Fund, 121 Fed. 791, 58 C. C. A. 67; American Bonding, etc., Co. *v.* Takahashi, 111 Fed. 125, 49 C. C. A. 267; Western Union Tel. Co. *v.* American Bell Telephone Co., 105 Fed. 684.

Where a deed was executed in fulfilment of a written contract and on the terms of the deed there was a doubt as to its meaning, it was not error to admit the contract in evidence to explain the deed. Helmholz *v.* Everingham, 24 Wis. 266.

62. *Arkansas.*— Smith *v.* Childress, 27 Ark. 328.

California.— Corcoran *v.* Hinkel, (1893) 34 Pac. 1031; Pierce *v.* Robinson, 13 Cal. 116.

Connecticut.— Purcell *v.* Burns, 39 Conn. 429; Baldwin *v.* Carter, 17 Conn. 201, 42 Am. Dec. 735; Lawrence *v.* Stonington Bank, 6 Conn. 521.

Florida.— Robinson *v.* Barnett, 18 Fla. 602, 43 Am. Rep. 327.

Georgia.— McCathern *v.* Belt, 93 Ga. 290, 20 S. E. 315.

Idaho.— Kelly *v.* Leachman, 3 Ida. 629, 33 Pac. 44, 3 Ida. 672, 34 Pac. 813.

Iowa.— Wilts *v.* Mulhall, 102 Iowa 458, 71 N. W. 418; Cousins *v.* Westcott, 15 Iowa 253.

Kansas.— McWhirt *v.* McKee, 6 Kan. 412.

Nebraska.— Cortelyou *v.* Hiatt, 36 Nebr. 584, 54 N. W. 964; Donisthorpe *v.* Fremont, etc., R. Co., 30 Nebr. 142, 46 N. W. 240, 27 Am. St. Rep. 387.

New York.—Crosby *v.* Delaware, etc., Canal Co., 128 N. Y. 641, 28 N. E. 363 [*reversing* 13 N. Y. Suppl. 306]; Hutchins *v.* Hebbard, 34 N. Y. 24; Grierson *v.* Mason, 1 Hun 113 [*affirmed* in 60 N. Y. 394]; Bell *v.* Shibley, 33 Barb. 610; Allen *v.* Hudson River Mut. Ins. Co., 19 Barb. 442; Von Bruck *v.* Peyser, 4 Rob. 514; Douglass *v.* Peele, Clarke 563.

Oklahoma.— See Humphrey *v.* Timken Carriage Co., 12 Okla. 413, 75 Pac. 528.

Pennsylvania.— Shaeffer *v.* Sensenig, 182 Pa. St. 634, 38 Atl. 473; Sweetzer's Appeal, 71 Pa. St. 264; Keller *v.* Leib, 1 Penr. & W. 220; Peterson *v.* Willing, 3 Dall. 506, 1 L. ed. 698.

Texas.— Johnson *v.* Hamilton, 36 Tex. 270.

Vermont.— Stewart *v.* Martin, 49 Vt. 266; Allen *v.* Spafford, 42 Vt. 116.

Wisconsin.— See Gross *v.* Heckert, 120 Wis. 314, 97 N. W. 952.

United States.— Brick *v.* Brick, 98 U. S. 514, 25 L. ed. 256; Cripps *v.* Mudd, 6 Fed. Cas. No. 3,391, 1 Hayw. & H. 50.

See 20 Cent. Dig. tit. "Evidence," § 2134 *et seq.*

63. *Massachusetts.*— Baker *v.* Hall, 158 Mass. 361, 369, 33 N. E. 612, where the court said: "For the purpose of interpreting the document, we may put ourselves 'in the position of the parties, and ascertain by oral evidence their relations to any property which would satisfy the terms of the memorandum.'"

New York.— Goodrich *v.* Stevens, 5 Lans. 230.

Ohio.— Monnett *v.* Monnett, 46 Ohio St. 30, 17 N. E. 659; Wright *v.* Merchant, 2 Ohio Dec. (Reprint) 742, 5 West. L. Month. 194.

Utah.— Brown *v.* Markland, 16 Utah 360, 52 Pac. 597, 67 Am. St. Rep. 629.

Wisconsin.— Wrigglesworth *v.* Wrigglesworth, 45 Wis. 255; Lyman *v.* Babcock, 40 Wis. 503.

64. Peabody *v.* Speyers, 56 N. Y. 230, holding the constitution and by-laws of the New York gold exchange admissible to aid in the construction of a contract between members of the exchange.

65. *California.*— Owen *v.* Meade, 104 Cal. 179, 37 Pac. 923.

this principle cannot of course be applicable where the omission is such that it renders the instrument void or of no effect.[66]

(xxi) *Surrounding Circumstances.* Parol evidence is admissible to show the situation of the parties and the circumstances under which a written instrument was executed, for the purpose of ascertaining the intentions of the parties and properly construing the writing.[67] In other words the court may, by admit-

Georgia.— Ingram *v.* Little, 21 Ga. 420.

Indiana.— Legget *v.* Harding, 10 Ind. 414 (holding that where a lease was for a year but did not state when the year was to commence, parol evidence was admissible to show that it was to take effect from its date and not from the time of its execution which was through accident or carelessness delayed); Marion School Tp. *v.* Carpenter, 12 Ind. App. 191, 39 N. E. 878.

Kentucky.— Huston *v.* Noble, 4 J. J. Marsh. 130.

Louisiana.— Beauvais *v.* Wall, 14 La. Ann. 199; Union Bank *v.* Meeker, 4 La. Ann. 189, 50 Am. Dec. 559.

Nebraska.— Goodrich *v.* McClary, 3 Nebr. 123.

New York.— Barnes *v.* O'Reilly, 73 Hun 169, 25 N. Y. Suppl. 906.

Pennsylvania.— Hyndman *v.* Hogsett, 111 Pa. St. 643, 4 Atl. 717.

Texas.— Oppenheimer *v.* Fritter, 1 Tex. App. Civ. Cas. § 372.

Vermont.— Cole *v.* Howe, 50 Vt. 35.

Washington.— Langert *v.* Ross, 1 Wash. 250, 24 Pac. 443.

United States.— The Antelope, 1 Fed. Cas. No. 484, 1 Lowell 130.

But *compare* Ham *v.* Johnson, 51 Minn. 105, 52 N. W. 1080.

66. Copeland *v.* Cunningham, 63 Ala. 394, holding that in an action on an attachment bond in which the penalty was left blank, parol evidence was not admissible to show what sum should have been specified.

Where a note is not signed, the name of the maker cannot be supplied by parol evidence. Heman *v.* Francisco, 12 Mo. App. 559.

67. *Alabama.*— Holland *v.* Kimbrough, 52 Ala. 249.

Arizona.— R. H. Burmister, etc., Co. *v.* Empire Gold Min., etc., Co., (1903) 71 Pac. 961.

California.— Daly *v.* Ruddell, 137 Cal. 671, 70 Pac. 784; Curtin *v.* Ingle, 137 Cal. 95, 69 Pac. 836, 1013; Lassing *v.* James, 107 Cal. 348, 40 Pac. 534; Darby *v.* Arrowhead Hot Springs Hotel Co., 97 Cal. 384, 32 Pac. 454; Piper *v.* True, 36 Cal. 606; Donahue *v.* Cromartie, 21 Cal. 80; Cornwall *v.* Culver, 16 Cal. 423.

Colorado.— Hardwick *v.* McClurg, 16 Colo. App. 354, 65 Pac. 405.

Connecticut.— Excelsior Needle Co. *v.* Smith, 61 Conn. 56, 23 Atl. 693; Hotchkiss *v.* Barnes, 34 Conn. 27, 91 Am. Dec. 713; Baldwin *v.* Carter, 17 Conn. 201, 42 Am. Dec. 735.

Delaware.— Plunkett *v.* Dillon, 4 Del. Ch. 198.

District of Columbia.— Rogers *v.* Garland, 19 D. C. 24; Mason *v.* Spalding, 18 D. C. 115.

Florida.— Solary *v.* Webster, 35 Fla. 363, 17 So. 646; Robinson *v.* Barnett, 18 Fla. 602, 43 Am. Rep. 327; Southern L. Ins., etc., Co. *v.* Gray, 3 Fla. 262.

Georgia.— Wells *v.* Gress, 118 Ga. 566, 45 S. E. 418; Dwelle *v.* Blackwood, 106 Ga. 486, 32 S. E. 593; Slater *v.* Demorest Spoke, etc., Co., 94 Ga. 687, 21 S. E. 715; Scurry *v.* Cotton States L. Ins. Co., 51 Ga. 624.

Idaho.— Westheimer *v.* Thompson, 3 Ida. 560, 32 Pac. 205.

Illinois.— Mann *v.* Bergmann, 203 Ill. 406, 67 N. E. 814 (holding that where a deed refers to a plat, designating a street contiguous to the property, on a bill to prevent a replatting it is proper to identify the plat by parol, and show that the purchase was made with reference thereto, not to change the deed, but to show the circumstances under which the purchase was made); Hogan *v.* Wallace, 166 Ill. 328, 46 N. E. 1136 [*reversing* 63 Ill. App. 385]; Hartshorn *v.* Byrne, 147 Ill. 418, 35 N. E. 622; Kamphouse *v.* Gaffner, 73 Ill. 453; Davenport First Nat. Bank *v.* Rothschild, 107 Ill. App. 133; Chambers *v.* Prewitt, 71 Ill. App. 119 [*affirmed* in 172 Ill. 615, 50 N. E. 145].

Indiana.— Ransdel *v.* Moore, 153 Ind. 393, 53 N. E. 767, 53 L. R. A. 753; Louisville, etc., R. Co. *v.* Power, 119 Ind. 269, 21 N. E. 751; Hubbard *v.* Harrison, 38 Ind. 323; Mace *v.* Jackson, 38 Ind. 162; Chicago, etc., R. Co. *v.* West, 37 Ind. 211; Foster *v.* Honan, 22 Ind. App. 252, 53 N. E. 667.

Iowa.— Ruthven *v.* Clarke, 109 Iowa 25, 79 N. W. 454; Clement *v.* Drybread, 108 Iowa 701, 78 N. W. 235; Hamill Co. *v.* Woods, 94 Iowa 246, 62 N. W. 735; Thompson *v.* Locke, 65 Iowa 429, 21 N. W. 762; Rush *v.* Carpenter, 54 Iowa 132, 6 N. W. 172; Grimes *v.* Simpson Centenary College, 42 Iowa 589.

Kansas.— Erie Cattle Co. *v.* Guthrie, 56 Kan. 754, 44 Pac. 984; Babcock *v.* Deford, 14 Kan. 408; Simpson *v.* Kimberlin, 12 Kan. 579.

Kentucky.— Crane *v.* Williamson, 111 Ky. 271, 63 S. W. 610, 975, 23 Ky. L. Rep. 689; Thompson *v.* Thompson, 2 B. Mon. 161; Gross *v.* Houchin, 6 Ky. L. Rep. 442.

Louisiana.— Lee *v.* Carter, 52 La. Ann. 1453, 27 So. 739; Campbell *v.* Short, 35 La. Ann. 447; Guillory's Succession, 29 La. Ann. 495; Barnebe *v.* Suaer, 18 La. Ann. 148; Perkins *v.* Dickson, 1 Rob. 413.

Maine.— Hartwell *v.* California Ins. Co., 84 Me. 524, 24 Atl. 954; Tyler *v.* Fickett, 73 Me. 410; Lancey *v.* Phœnix F. Ins. Co., 56 Me. 562; Bradford *v.* Cressey, 45 Me. 9; Herrick *v.* Bean, 20 Me. 51.

Maryland.— Morrison *v.* Baechtold, 93 Md. 319, 48 Atl. 926; Castleman *v.* Du Val, 89

ting in evidence the extrinsic circumstances under which the writing was made, place itself in the situation of the party who made it, and so judge of the mean-

Md. 657, 43 Atl. 821; Waters *v.* Riggin, 19 Md. 536.

Massachusetts.— Alvord *v.* Cook, 174 Mass. 120, 54 N. E. 499; Cook *v.* Johnson, 165 Mass. 245, 43 N. E. 96; Proctor *v.* Hartigan, 139 Mass. 554, 2 N. E. 99, 143 Mass. 462, 9 N. E. 841; Russell *v.* Lathrop, 117 Mass. 424; Hodges *v.* King, 7 Metc. 583; Salisbury *v.* Andrews, 19 Pick. 250.

Michigan.— Gregory *v.* Lake Linden, 130 Mich. 368, 90 N. W. 29; Powers *v.* Hibbard, 114 Mich. 533, 72 N. W. 399; Detroit, etc., R. Co. *v.* Starnes, 38 Mich. 698; Facey *v.* Otis, 11 Mich. 213; Ives *v.* Kimball, 1 Mich. 308.

Minnesota.— Ham *v.* Johnson, 51 Minn. 105, 52 N. W. 1080; King *v.* Merriman, 38 Minn. 47, 35 N. W. 570; Stone *v.* Harmon, 31 Minn. 512, 19 N. W. 88.

Mississippi.— Heirn *v.* McCaughan, 32 Miss. 17, 66 Am. Dec. 588.

Missouri.— Lewis *v.* Coates, 93 Mo. 170, 5 S. W. 897; Newberry *v.* Durand, 87 Mo. App. 290; Arnoldia *v.* Childs, 70 Mo. App. 530; Weil *v.* Schwartz, 21 Mo. App. 372. But *compare* C. E. Donnell Newspaper Co. *v.* Jung, 81 Mo. App. 577.

Montana.— Taylor *v.* Holter, 1 Mont. 688.

New Hampshire.— Webster *v.* Atkinson, 4 N. H. 21. See also Bancroft *v.* Union Embossing Co., 72 N. H. 402, 57 Atl. 97, 64 L. R. A. 298.

New Jersey.— Sullivan *v.* Visconti, 68 N. J. L. 543, 53 Atl. 598; Suffern *v.* Butler, 21 N. J. Eq. 410.

New York.— Schmittler *v.* Simon, 114 N. Y. 176, 21 N. E. 162, 11 Am. St. Rep. 621; Wilson *v.* Randall, 67 N. Y. 338; Belloni *v.* Freeborn, 63 N. Y. 383; Chouteau *v.* Suydam, 21 N. Y. 179; Agawam Bank *v.* Strever, 18 N. Y. 502; French *v.* Carhart, 1 N. Y. 96; South Hampton *v.* Jessup, 64 N. Y. App. Div. 525, 72 N. Y. Suppl. 312, 780; State Bank *v.* Lighthall, 46 N. Y. App. Div. 396, 61 N. Y. Suppl. 794; Garvin Mach. Co. *v.* Hammond Typewriter Co., 12 N. Y. App. Div. 294, 42 N. Y. Suppl. 564 [*affirmed* in 159 N. Y. 539, 53 N. E. 1125]; Gowdy *v.* Cordts, 40 Hun 469; Goodrich *v.* Stevens, 5 Lans. 230; Perkins *v.* Goodman, 21 Barb. 218; Bellinger *v.* Kitts, 6 Barb. 273; Union India Rubber Co. *v.* Tomlinson, 1 E. D. Smith 364; Manchester *v.* Van Brunt, 19 N. Y. Suppl. 685; Johnson *v.* Williams, 63 How. Pr. 233.

North Carolina.— Wade *v.* Carter, 76 N. C. 171.

Ohio.— Monnett *v.* Monnett, 46 Ohio St. 30, 17 N. E. 659; Masters *v.* Freeman, 17 Ohio St. 323; Hildebrand *v.* Fogle, 20 Ohio 147; Wright *v.* Merchant, 2 Ohio Dec. (Reprint) 742, 5 West. L. Month. 194.

Oregon.— Wills *v.* Leverick, 20 Oreg. 168, 25 Pac. 398; Hicklin *v.* McClear, 18 Oreg. 126, 22 Pac. 1057.

Pennsylvania.— Douthett *v.* Fort Pitt Gas Co., 202 Pa. St. 416, 51 Atl. 981; Clarke *v.* Adams, 83 Pa. St. 309; Easton Power Co. *v.* Sterlingworth R. Supply Co., 22 Pa. Super. Ct. 538; Musselman *v.* East Brandywine, etc., R. Co., 2 Wkly. Notes Cas. 105. See also Philadelphia L. Ins. Co. *v.* American L., etc., Ins. Co., 23 Pa. St. 65.

South Carolina.— Sullivan *v.* Williams, 43 S. C. 489, 21 S. E. 642; Monaghan Bay Co. *v.* Dickson, 39 S. C. 146, 17 S. E. 696, 39 Am. St. Rep. 704; Carolina, etc., R. Co. *v.* Seigler, 24 S. C. 124; Baker *v.* Scott, 5 Rich. 305.

South Dakota.— Osborne *v.* Stringham, 1 S. D. 406, 47 N. W. 408.

Tennessee.— Taylor *v.* Neblett, 4 Heisk. 491.

Texas.— Threadgill *v.* Butler, 60 Tex. 599; Schlieger *v.* Runge, (Civ. App. 1896) 37 S. W. 982; Kelley *v.* Collier, 11 Tex. Civ. App. 353, 32 S. W. 428; Fairbanks *v.* Simpson, (Civ. App. 1894) 28 S. W. 128; Minor *v.* Powers, (Civ. App. 1893) 24 S. W. 710; McHugh *v.* Gallagher, 1 Tex. Civ. App. 196, 20 S. W. 1115.

Vermont.— Stewart *v.* Martin, 49 Vt. 266; Lowry *v.* Adams, 22 Vt. 160; Lawrence *v.* Dole, 11 Vt. 549.

Virginia.— Richardson *v.* Planters' Bank, 94 Va. 130, 26 S. E. 431; French *v.* Williams, 82 Va. 462, 4 S. E. 591; Smith *v.* Spiller, 10 Gratt. 318; Crawford *v.* Jarrett, 2 Leigh 630.

Washington.— Adamant Plaster Mfg. Co. *v.* National Bank of Commerce, 5 Wash. 232, 31 Pac. 634; Langert *v.* Ross, 1 Wash. 250, 24 Pac. 443; Brewster *v.* Baxter, 2 Wash. Terr. 135, 3 Pac. 844.

West Virginia.— Uhl *v.* Ohio River R. Co., 51 W. Va. 106, 41 S. E. 340; Findley *v.* Armstrong, 23 W. Va. 113; Hansford *v.* Chesapeake Coal Co., 22 W. Va. 70; Crislip *v.* Cain, 19 W. Va. 438. See also Martin *v.* Monongahela R. Co., 48 W. Va. 542, 37 S. E. 563.

Wisconsin.— Excelsior Wrapper Co. *v.* Messinger, 116 Wis. 549, 93 N. W. 459; Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 113 Wis. 161, 87 N. W. 1085, 89 N. W. 180; Murray Hill Land Co. *v.* Milwaukee Light, etc., Co., 110 Wis. 555, 86 N. W. 199; Lego *v.* Medley, 79 Wis. 211, 48 N. W. 375, 24 Am. St. Rep. 706; Bedard *v.* Bowville, 57 Wis. 270, 15 N. W. 185; Wrigglesworth *v.* Wrigglesworth, 45 Wis. 255; Lyman *v.* Babcock, 40 Wis. 503; Lamon *v.* French, 25 Wis. 37; Rockwell *v.* Mutual L. Ins. Co., 21 Wis. 548, 27 Wis. 372; Farmers' L. & T. Co. *v.* Commercial Bank, 15 Wis. 424, 82 Am. Dec. 689; Cady *v.* Shepard, 12 Wis. 639.

United States.— Cavazos *v.* Trevmo, 6 Wall. 773, 18 L. ed. 813; Bradley *v.* Washington, etc., Steam Packet Co., 13 Pet. 89, 10 L. ed. 72; Dennis *v.* Slyfield, 117 Fed. 474, 54 C. C. A. 520; Wolff *v.* Wells, 115 Fed. 32, 52 C. C. A. 626; American Bonding, etc., Co. *v.* Takahashi, 111 Fed. 125, 49 C. C. A. 267; Western Union Tel. Co. *v.* American Bell Tel. Co., 105 Fed. 684; Wilson *v.* Higbee,

ing of the words, and of the correct application of the language to the things described. Such evidence is received, not for the purpose of importing into the writing an intention not expressed therein, but simply with the view of elucidating the meaning of the words employed; and in its admission the line which separates evidence which aids the interpretation of what is in the instrument from direct evidence of intention independent of the instrument must be kept steadily in view, the duty of the court being to declare the meaning of what is written in the instrument and not of what was intended to be written.[68]

(XXII) *Understanding of Parties.* Parol or extrinsic evidence of the understanding of the parties in respect to the construction of a written instrument may be given to explain that which would otherwise be ambiguous,[69] and for this purpose evidence of declarations of a party made previous to or at the time of signing the contract is admissible.[70] But the understanding which one party to a contract has of its meaning is not evidence in his own favor and against the other party, to whom such understanding was not communicated, where the effect of the contract is in controversy.[71]

c. Latent and Patent Ambiguity — (I) *Lord Bacon's Rule.* It was laid down as the rule by Lord Bacon that a latent ambiguity may be explained by extrinsic evidence, but that a patent ambiguity may not;[72] and this has been very generally accepted by the courts as correct.[73] But this general distinction has

62 Fed. 723; Delaware Indians *v.* Cherokee Nation, 38 Ct. Cl. 234 [*affirmed* in 193 U. S. 127, 24 S. Ct. 342, 48 L. ed. 646]; Fenlon *v.* U. S., 17 Ct. Cl. 138; Peck *v.* U. S., 14 Ct. Cl. 84; Peisch *v.* Dickson, 19 Fed. Cas. No. 10,911, 1 Mason 9.

England.— Bainbridge *v.* Wade, 16 Q. B. 89, 15 Jur. 572, 20 L. J. Q. B. 7, 71 E. C. L. 89; New Zealand Bank *v.* Simpson, (1900) A. C. 186; Stratford *v.* Powell, 1 Ball & B. 14; Brown *v.* Fletcher, 35 L. T. Rep. N. S. 165.

Canada.— Christie *v.* Burnett, 10 Ont. 609; Baskerville *v.* Doan, 12 U. C. C. P. 127.

See 20 Cent. Dig. tit. "Evidence," § 2071 *et seq.*; and Contracts, 9 Cyc. 588, text, and note 42.

68. Hughes *v.* Wilkinson, 35 Ala. 453.

69. *California.*— See Brannon *v.* Mesick, 10 Cal. 95. But *compare* Swift *v.* Occidental Min., etc., Co., 141 Cal. 161, 74 Pac. 700.

Connecticut.— *In re* Curtis-Castle Arbitration, 64 Conn. 501, 30 Atl. 769, 42 Am. St. Rep. 200.

Indiana.— Bates *v.* Dehaven, 10 Ind. 319.

Massachusetts.— Foster *v.* Woods, 16 Mass. 116.

Oregon.— Vance *v.* Wood, 22 Oreg. 77, 29 Pac. 73.

Pennsylvania.— Cummins *v.* German-American Ins. Co., 197 Pa. St. 61, 46 Atl. 902; Quigley *v.* De Hass, 98 Pa. St. 292; Selden *v.* Williams, 9 Watts 9; Easton Power Co. *v.* Sterlingworth R. Supply Co., 22 Pa. Super. Ct. 538; Block *v.* Dowling, 7 Pa. Dist. 261, 20 Pa. Co. Ct. 489.

Tennessee.— Mills *v.* Faris, 12 Heisk. 451.

Vermont.— New England Granite Works *v.* Bailey, 69 Vt. 257, 37 Atl. 1043; Hubbard *v.* Moore, 67 Vt. 532, 32 Atl. 465.

Washington.— Adamant Plaster Mfg. Co. *v.* National Bank of Commerce, 5 Wash. 232, 31 Pac. 634.

Wisconsin.— Ganson *v.* Madigan, 15 Wis. 144, 82 Am. Dec. 659.

United States.— Douglass *v.* Reynolds, 7 Pet. 113, 8 L. ed. 626; Union Bank *v.* Hyde, 6 Wheat. 572, 5 L. ed. 333.

Contra, Carolina, etc., R. Co. *v.* Seigler, 24 S. C. 124.

See 20 Cent. Dig. tit. "Evidence," § 2071 *et seq.*

A written but unsigned agreement between the parties to an executed chattel mortgage, drawn up by the same attorney at the same time, is admissible, in connection with his testimony, to show how the parties at the time understood the arrangement as to a loan and share of profits. Eager *v.* Crawford, 76 N. Y. 97.

Understandings not expressed or indicated by anything in the writing cannot be shown by parol evidence, for in such case the maxim, "*Id certum est, quod certum reddi potest,*" does not apply. Freed *v.* Brown, 41 Ark. 495.

70. Easton Power Co. *v.* Sterlingworth R. Supply Co., 22 Pa. Super. Ct. 538 [*quoting* 6 Pepper & L. Dig. of Dec. 10,214]. See also *supra,* XVI, C, 10, b, (v).

71. Taft *v.* Dickinson, 6 Allen (Mass.) 553. See also Coppes *v.* Union Nat. Sav. Loan Assoc., (Ind. App. 1904) 69 N. E. 702; McKee *v.* Needles, 123 Iowa 195, 98 N. W. 618. See also *supra,* XVI, C, 10, b, (XI).

72. See Bacon L. Tracts 99, 100; 1 Greenleaf Ev. § 297.

73. *California.*— Mesick *v.* Sunderland, 6 Cal. 297.

Illinois.— Fisher *v.* Quackenbush, 83 Ill. 310; Panton *v.* Tefft, 22 Ill. 367; Boyle *v.* Teas, 5 Ill. 202.

Iowa.— Palmer *v.* Albee, 50 Iowa 429.

Maryland.— Clarke *v.* Lancaster, 36 Md. 196, 11 Am. Rep. 486; Howard *v.* Rogers, 4 Harr. & J. 278.

Massachusetts.— Storer *v.* Freeman, 6 Mass. 435, 4 Am. Dec. 155.

also been criticized,[74] and it is necessary to examine into the statement closely in order to see what it really means and how far it is a correct exposition of the law.

(II) *Latent Ambiguity*—(A) *Rule Stated.* A latent ambiguity arises when the writing upon its face appears clear and unambiguous, but there is some collateral matter which makes the meaning uncertain.[75] And it is so well established as to be beyond all possible dispute that parol or other extrinsic evidence is always admissible to explain a latent ambiguity in any written instrument.[76] The reason

Michigan.— Ives *v.* Kimball, 1 Mich. 308.
Mississippi.— Selden *v.* Coffee, 55 Miss. 41; Brown *v.* Guice, 46 Miss. 299; Carmichael *v.* Foley, 1 How. 591; Gildart *v.* Howell, 1 How. 198.
Missouri.— Mudd *v.* Dillon, 166 Mo. 110, 65 S. W. 973; Carter *v.* Holman, 60 Mo. 498; Hardy *v.* Matthews, 38 Mo. 121.
New Hampshire.— Webster *v.* Atkinson, 4 N. H. 21.
New York.— Vandevoort *v.* Dewey, 42 Hun 68; Weed *v.* Clark, 4 Sandf. 31.
North Carolina.— Wharton *v.* Elborn, 88 N. C. 344; North Carolina Institute for Education, etc. *v.* Norwood, 45 N. C. 65.
Oregon.— Noyes *v.* Stauff, 5 Oreg. 455; Brauns *v.* Stearns, 1 Oreg. 367.
Pennsylvania.— Lycoming Mut. Ins. Co. *v.* Sailer, 67 Pa. St. 108.
Tennessee.— Nashville L. Ins. Co. *v.* Mathews, 8 Lea 499.
Texas.— Webb *v.* Frazar, (Civ. App. 1895) 29 S. W. 665.
Vermont.— Hull *v.* Fuller, 7 Vt. 100; Brown *v.* Bebee, 1 D. Chipm. 227, 6 Am. Dec. 728.
Virginia.— Gatewood *v.* Burrus, 3 Call 194, 198, where Fleming, J., said: "The general rule is, that parol evidence cannot be received to explain the ambiguities of a deed or written agreement. There are some few exceptions, as in the case of a latent ambiguity: But, then, the person offering the evidence ought to shew, that his case is within the exceptions."
England.— Druce *v.* Denison, 6 Ves. Jr. 385, 31 Eng. Reprint 1106.
See 20 Cent. Dig. tit. "Evidence," § 2085 *et seq.*

74. *Minnesota.*— Baldwin *v.* Winslow, 2 Minn. 213.
Pennsylvania.— Miller *v.* Fichthorn, 31 Pa. St. 252.
South Carolina.— Dupree *v.* McDonald, 4 Desauss. 209.
Texas.— Meyers *v.* Maverick, (Civ. App. 1894) 28 S. W. 716.
Wisconsin.— Ganson *v.* Madigan, 15 Wis. 144, 82 Am. Dec. 659.
See 20 Cent. Dig. tit. "Evidence," § 2085 *et seq.*

75. *Alabama.*— Hughes *v.* Wilkinson, 35 Ala. 453.
Indiana.— Craven *v.* Butterfield, 80 Ind. 503.
Massachusetts.— Durr *v.* Chase, 161 Mass. 40, 36 N. E. 741 (holding that where at the time of a lease of "all the brick building recently erected by me" on the corner of certain streets, the lessor had a structure through which ran a solid brick partition wall, extending a foot above the roof, dividing it into two parts, with no opening from one part into the other, the ambiguity, if any, in the lease, was latent, and might be explained by parol evidence); Putnam *v.* Bond, 100 Mass. 58, 1 Am. Rep. 82.
Michigan.— Ives *v.* Kimball, 1 Mich. 308.
Texas.— Kingston *v.* Pickins, 46 Tex. 99.
See 20 Cent. Dig. tit. "Evidence," § 2093 *et seq.*
Where the uncertainty arises from the state of the subject-matter and not from the terms used, a case of latent ambiguity is presented. Rugg *v.* Ward, 64 Vt. 402, 23 Atl. 726; Patch *v.* Keeler, 28 Vt. 332.
Mode of performing contract.— Where there is a written contract to do a particular thing, which may be done in two usual and ordinary modes, the party upon whom performance devolves may adopt either, and it is not a case of latent ambiguity as to which shall be adopted. Hence parol evidence is not admissible to show that such party agreed to adopt one of such modes. Webster *v.* Paul, 10 Ohio St. 531.

76. *Alabama.*— Hughes *v.* Wilkinson, 35 Ala. 453; Lockhard *v.* Avery, 8 Ala. 502; Beard *v.* White, 1 Ala. 436; Paysant *v.* Ware, 1 Ala. 160.
Arkansas.— Cato *v.* Stewart, 28 Ark. 146.
California.— Piper *v.* True, 36 Cal. 606.
Connecticut.— Hotchkiss *v.* Barnes, 34 Conn. 27, 91 Am. Dec. 713; Nichols *v.* Turney, 15 Conn. 101; Wooster *v.* Butler, 13 Conn. 309.
Delaware.— Tatman *v.* Barrett, 3 Houst. 226.
Georgia.— Meadows *v.* Barry, Ga. Dec. 80.
Illinois.— Hogan *v.* Wallace, 166 Ill. 328, 46 N. E. 1136 [*reversing* 63 Ill. App. 385]; Hutton *v.* Arnett, 51 Ill. 198 [*distinguishing* Myers *v.* Ladd, 26 Ill. 415; Lyon *v.* Lyon, 3 Ill. App. 434].
Indiana.— Symmes *v.* Brown, 13 Ind. 318.
Iowa.— Burnell *v.* Dunlap, 11 Iowa 446.
Kentucky.— Kentucky Citizens' Bldg., etc., Assoc. *v.* Lawrence, 106 Ky. 88, 49 S. W. 1059, 20 Ky. L. Rep. 1700; Breeding *v.* Taylor, 13 B. Mon. 477; Wilson *v.* Robertson, 7 J. J. Marsh. 78; Coger *v.* McGee, 2 Bibb 321, 5 Am. Dec. 610.
Louisiana.— Doyle *v.* Estornet, 13 La. Ann. 318; Gale *v.* Kemper, 10 La. 205; Purdon *v.* Linton, 9 La. 563; Brand *v.* Daunoy, 8 Mart. N. S. 159, 19 Am. Dec. 176; Taylor *v.* Hollander, 5 Mart. N. S. 295; Pigeau *v.* Commeau, 4 Mart. N. S. 190; Turnbull *v.* Cureton, 9 Mart. 37.

given for the rule is that as the ambiguity is raised by extrinsic evidence the same kind of evidence must be admitted to remove it.[77]

(B) *Limitations of Rule.* It is to be observed, however, that while parol evidence may be admitted in explanation where there is a latent ambiguity, it can do no more than explain the doubtful expressions of the instrument consistently with the relations of the parties and the other incidents of the contract.[78] The rule that where an ambiguity is created by parol it may be removed by parol was never intended to violate the rule that a writing shall not be contradicted or explained by inferior testimony. If therefore when an ambiguity is created by parol the

Maine.— Tyler *v.* Fickett, 73 Me. 410; Pride *v.* Lunt, 19 Me. 115; Patrick *v.* Grant, 14 Me. 233.

Maryland.—Mitchell *v.* Mitchell, 6 Md 224.

Massachusetts.— Flagg *v.* Mason, 141 Mass. 64, 6 N. E. 702; Hoar *v.* Goulding, 116 Mass. 132; Crafts *v.* Hibbard, 4 Metc. 438; Rhoades *v.* Castner, 12 Allen 130; Sargent *v.* Adams, 3 Gray 72, 63 Am. Dec. 718; Herring *v.* Boston Iron Co., 1 Gray 134.

Michigan.— Purkiss *v.* Benson, 28 Mich. 538.

Mississippi.— Miles *v.* Miles, 78 Miss. 904, 30 So. 2; Bowers *v.* Andrews, 52 Miss. 596; Wilson *v.* Horne, 37 Miss. 477. *Compare* Schlottman *v.* Hoffman, 73 Miss. 188, 18 So. 893, 55 Am. St. Rep. 527, where the court said that it is not true that all latent ambiguities may be explained by parol.

Missouri.— Schreiber *v.* Osten, 50 Mo. 513; Brown *v.* Walker, 11 Mo. App. 226 [*affirmed* in 85 Mo. 262]; Hymers *v.* Druhe, 5 Mo. App. 580.

New Hampshire.— Bell *v.* Woodward, 46 N. H. 315.

New Jersey.— Sullivan *v.* Visconti, 68 N. J. L. 543, 53 Atl. 598; Martin *v.* Bell, 18 N. J. L. 167.

New Mexico.— Gentile *v.* Crossan, 7 N. M. 589, 38 Pac. 247.

New York.— Galen *v.* Brown, 22 N. Y. 37; Burr *v.* Broadway Ins. Co., 16 N. Y. 267; McKee *v.* De Witt, 12 N. Y. App. Div. 617, 43 N. Y. Suppl. 132; Cole *v.* Wendel, 8 Johns. 116.

North Carolina.— Steadman *v.* Taylor, 77 N. C. 134; Wade *v.* Carter, 76 N. C. 171.

Ohio.— Clements *v.* Baldwin Quarry Co., 4 Ohio Dec. (Reprint) 218, 1 Clev. L. Rep. 130.

Oregon.— Ruckman *v.* Imbler Lumber Co., 42 Oreg. 231, 70 Pac. 811.

Pennsylvania.—Cooper *v.* Rose Valley Mills, 185 Pa. St. 115, 39 Atl. 824; Hetherington *v.* Clark, 30 Pa. St. 393; McCullough *v.* Wainwright, 14 Pa. St. 171; Place *v.* Proctor, 2 Pennyp. 264; Hunsecker's Estate, 6 Pa. Dist. 202, 19 Pa. Co. Ct. 14.

Rhode Island.— Coombs *v.* Patterson, 19 R. I. 25, 31 Atl. 428.

South Carolina.—Barkley *v.* Barkley, 3 McCord 269; Milling *v.* Crankford, 1 McCord 258; Wallace *v.* McCullough, 1 Rich. Eq. 426.

South Dakota.— Osborne *v.* Stringham, 1 S. D. 406, 47 N. W. 408.

Texas.— Busby *v.* Bush, 79 Tex. 656, 15 S. W. 638; Early *v.* Sterrett, 18 Tex. 113; Barclay *v.* Stuart, 4 Tex. Civ. App. 685, 23 S. W. 799.

Utah.— Brown *v.* Mackland, 16 Utah 360, 52 Pac. 597, 67 Am. St. Rep. 629.

Vermont.— Pitts *v.* Brown, 49 Vt. 86, 24 Am. Rep. 114; Hull *v.* Fuller, 7 Vt. 100.

Virginia.— Midlothian Coal Min. Co. *v.* Finney, 18 Gratt. 304.

Wisconsin.— Fornette *v.* Carmichael, 41 Wis. 200.

United States.— Atkinson *v.* Crimmins, 9 How. 479, 13 L. ed. 223; Boardman *v.* Reed, 6 Pet. 328, 8 L. ed. 415; Camden Iron Works *v.* Fox, 34 Fed. 300; Pomeroy *v.* Manin, 19 Fed. Cas. No. 11,260, 2 Paine 476; Peisch *v.* Dickson, 19 Fed. Cas. No. 10,911, 1 Mason 9; Delaware Indians *v.* Cherokee Nation, 38 Ct. Cl. 234 [*affirmed* in 193 U. S. 127, 24 S. Ct. 342, 48 L. ed. 646].

England.— Ulrich *v.* Litchfield, 2 Atk. 372, 26 Eng. Reprint 625; Beaumont *v.* Field, 1 B. & Ald. 247, 2 Chit. 275, 19 Rev. Rep. 308, 18 E. C. L. 632; Doe *v.* Morgan, C. & M. 235, 2 L. J. Exch. 88, 3 Tyrw. 179; Cheyney's Case, 5 Coke 68*a*; Doe *v.* Hiscocks, 5 M. & W. 363; Thomas *v.* Thomas, 6 T. R. 671; Parsons *v.* Parsons, 1 Ves. Jr. 266, 30 Eng. Reprint 335; Hordern *v.* Commercial Union Ins. Co., 56 L. J. P. C. 78, 56 L. T. Rep. N. S. 240.

See 20 Cent. Dig. tit. "Evidence," § 2093 *et seq.*

Judgments of courts, as well as deeds and acts of parties, may be carried into effect by inquiries outside the decree, deed, or act, when there is a mere latent ambiguity. Lea *v.* Terry, 15 La. Ann. 159.

Official deed.— A latent ambiguity in a sheriff's deed may be explained as well as such an ambiguity in a written transaction between individuals. Brown *v.* Walker, 11 Mo. App. 226 [*affirmed* in 85 Mo. 262]; Frazier *v.* Waco Bldg. Assoc., 25 Tex. Civ. App. 476, 61 S. W. 132. But see Wofford *v.* McKenna, 23 Tex. 36, 76 Am. Dec. 53, holding that a latent ambiguity in the description in an assessor's deed cannot be explained.

77. *Alabama.*— Hughes *v.* Wilkinson, 35 Ala. 453.

Maryland.— Marshall *v.* Haney, 4 Md. 498, 59 Am. Dec. 92.

Pennsylvania.— Lycoming Mut. Ins. Co. *v.* Sailer, 67 Pa. St. 108.

South Carolina.— Elfe *v.* Gadsden, 2 Rich. 373.

United States.— Reed *v.* Merrimac River Locks, etc., 8 How. 274, 12 L. ed. 1077; and other cases cited in the preceding note.

78. Streeter *v.* Seigman, (N. J. Ch. 1901) 48 Atl. 907.

instrument itself removes the ambiguity it cannot be controlled.[79] When there are two tracts of land, to either of which the same description applies, and a deed purports to convey one of them by such description, and it is proposed to show by parol testimony, not that the intention was to convey one in particular, but that it was to convey both, the offer is not to remove an ambiguity and to identify a thing that has actually been conveyed, but rather to enlarge the operation of the instrument, and to make it convey two tracts of land, contrary to the expressed intention to convey one only. This is not evidence to explain a deed, but is simply evidence to add to its terms and make it convey more than it purports to convey and hence is not admissible.[80] The fact that there is in a writing a latent ambiguity which may be met or removed by parol evidence does not open the door for the admission of parol evidence generally or for any other purpose.[81]

(c) *In What Latent Ambiguity Consists.* The most ordinary instance of a latent ambiguity is where an instrument of writing contains a reference to a particular person or thing and is thus apparently clear upon its face, but it is shown by extrinsic evidence that there are two or more persons or things to whom or to which the description in the instrument might properly apply.[82]

79. Barkley *v.* Barkley, 3 McCord (S. C.) 269, 273, in which case the court stated an illustration as follows: "Thus if a man convey to his son John a house in the town of Columbia, 'being the house in which he now lives,' proof that he had two sons of that name would render it uncertain which of the two was meant. But if by the same testimony it should appear that one of those sons was in Europe at the time the deed was made, and the other son living in the house, the deed itself would remove the doubt of its being made to him who was then living in the house."

80. Clark *v.* Gregory, 87 Tex. 189, 27 S. W. 56.

81. Stewart *v.* Phœnix Ins. Co., 9 Lea (Tenn.) 104.

82. *Alabama.*— Stamphill *v.* Bullen, 121 Ala. 250, 25 So. 928; Moseley *v.* Mastin, 37 Ala. 216.

Arkansas.— Wolff *v.* Elliott, 68 Ark. 326, 57 S. W. 1111.

Connecticut.—Coit *v.* Starkweather, 8 Conn. 289; Doolittle *v.* Blakesley, 4 Day 265, 4 Am. Dec. 218.

Illinois.— Clark *v.* Powers, 45 Ill. 283; Dougherty *v.* Purdy, 18 Ill. 206; Peabody *v.* Dewey, 51 Ill. App. 260 [*affirmed* in 153 Ill. 657, 39 N. E. 977, 27 L. R. A. 322].

Indiana.— Thomas *v.* Troxel, 26 Ind. App. 322, 59 N. E. 683.

Maine.— Melcher *v.* Ocean Ins. Co., 59 Me. 217.

Maryland.— Marshall *v.* Haney, 4 Md. 498, 59 Am. Dec. 92.

Massachusetts.—Peabody *v.* Brown, 10 Gray 45.

Mississippi.— Wilson *v.* Horne, 37 Miss. 477.

Missouri.— Coe *v.* Ritter, 86 Mo. 277; Goff *v.* Roberts, 72 Mo. 570; Schreiber *v.* Osten, 50 Mo. 513.

New Hampshire.— French *v.* Hayes, 43 N. H. 30, 80 Am. Dec. 127; State *v.* Weare, 38 N. H. 314; Lathrop *v.* Blake, 23 N. H. 46; Clough *v.* Bowman, 15 N. H. 504; Bartlett *v.* Nottingham, 8 N. H. 300; Claremont *v.* Carlton, 2 N. H. 369, 9 Am. Dec. 88. See also Peaslee *v.* Gee, 19 N. H. 273.

New Jersey.— Cubberly *v.* Cubberly, 12 N. J. L. 308.

North Carolina.—Newberry *v.* Norfolk, etc., R. Co., 133 N. C. 45, 45 S. E. 356; Lawrence *v.* Hyman, 79 N. C. 209; Parks *v.* Mason, 29 N. C. 362.

Ohio.— Avery *v.* Stites, Wright 56.

Pennsylvania.— Lycoming Mut. Ins. Co. *v.* Sailer, 67 Pa. St. 108.

South Carolina.— Elfe *v.* Gadsden, 2 Rich. 373.

Tennessee.— Mumford *v.* Memphis, etc., R. Co., 2 Lea 393, 31 Am. Rep. 616.

Texas.— Clark *v.* Gregory, 87 Tex. 189, 27 S. W. 56.

Vermont.— See St. Martin *v.* Thrasher, 40 Vt. 460.

Wisconsin.— Begg *v.* Begg, 56 Wis. 534, 14 N. W. 602.

England.— Richardson *v.* Watson, 4 B. & Ad. 787, 2 L. J. K. B. 134, 1 N. & M. 567, 24 E. C. L. 343; Miller *v.* Travers, 8 Bing. 244, 21 E. C. L. 524; Doe *v.* Needs, 2 M. & W. 129.

See 20 Cent. Dig. tit. "Evidence," § 2093 *et seq.*

When it appears from the instrument itself that the description would equally apply to two persons or things, then the ambiguity is patent and not susceptible of explanation by parol. Dougherty *v.* Purdy, 18 Ill. 206.

Where land is described by reference to a plat of the town on file, but the fact that there are two plats raises a doubt as to the property conveyed, extrinsic evidence is admissible to show the lot intended. Slosson *v.* Hall, 17 Minn. 95.

The appellation "junior" forms no part of a man's name (see, generally, NAMES) and hence, where there are two persons of the same name as the one mentioned in a writing, it may be shown by parol which was intended notwithstanding the fact that one was known as "junior." State *v.* Weare, 38 N. H. 314.

When, of two things presented, neither tallies with the description given, it is against

Where a grant is issued to a certain person, but no person of that name ever existed, it is a case of latent ambiguity and evidence is admissible to show who was the person intended,[83] and the same is true where a grantee is described by a wrong christian name.[84] Latent ambiguities also arise through the difficulty in applying to the land itself a description thereof contained in a written instrument,[85] and it has been held that where the ambiguity consists of a reference to records, documents, and descriptions outside of the writing, and which are necessary to be regarded as part of the description of the subject-matter, there is a latent ambiguity.[86] So when a person, by a written instrument, sells or contracts to sell a certain number of articles of a specified kind and owns more of such articles than the number mentioned in the writing, a case of latent ambiguity arises.[87] The courts also consider that a latent ambiguity may exist from the terms of the instrument itself,[88] as for example where a writing is capable of two constructions, both of which are in harmony with the language used.[89]

principle, whatever anomalous cases may be found in the books, to receive evidence as to which of them was intended or whether both were intended. Wallace *v.* McCullough, 1 Rich. Eq. (S. C.) 426.

Description preventing ambiguity.— The mere fact that there are two persons of the same name as the grantee in a patent does not create a latent ambiguity which will permit the introduction of parol evidence to show who is the real grantee, where the two persons reside in different places and the grantee is described not only by name but by residence. Babcock *v.* Pettibone, 2 Fed. Cas. No. 700, 12 Blatchf. 354.

83. Bowen *v.* Slaughter, 24 Ga. 338, 71 Am. Dec. 135.

84. Staak *v.* Sigelkow, 12 Wis. 234.

85. *Alabama.*— Hereford *v.* Hereford, 131 Ala. 573, 32 So. 620.

Illinois.— Sharp *v.* Thompson, 100 Ill. 447, 39 Am. Rep. 61. But *compare* Ritchie *v.* Pease, 114 Ill. 353, 3 N. E. 897.

Kentucky.— Hall *v.* Conlee, 62 S. W. 899, 23 Ky. L. Rep. 177.

Massachusetts.— Putnam *v.* Bond, 100 Mass. 58, 1 Am. Rep. 82; Waterman *v.* Johnson, 13 Pick. 261.

New Mexico.— Gentile *v.* Crossan, 7 N. M. 589, 38 Pac. 247.

Ohio.— McAfferty *v.* Conover, 7 Ohio St. 99, 70 Am. Dec. 57.

Oregon.— Kanne *v.* Otty, 25 Oreg. 531, 36 Pac. 537.

Vermont.— Rugg *v.* Ward, 64 Vt. 402, 23 Atl. 726.

Wisconsin.— Lego *v.* Medley, 79 Wis. 211, 48 N. W. 375, 24 Am. St. Rep. 706.

See 20 Cent. Dig. tit. "Evidence," § 2095.

86. Meade *v.* Gilfoyle, 64 Wis. 18, 24 N. W. 413.

87. Marshall *v.* Gridley, 46 Ill. 247.

88. *Illinois.*— Bulkley *v.* Devine, 127 Ill. 406, 20 N. E. 16, 3 L. R. A. 330; Fisher *v.* Quackenbush, 83 Ill. 310; Young *v.* Lorain, 11 Ill. 624, 52 Am. Dec. 463; Paugh *v.* Paugh, 40 Ill. App. 143; School Trustees *v.* Rodgers, 7 Ill. App. 33.

Maine.— Storer *v.* Elliott F. Ins. Co., 45 Me. 175.

Massachusetts.— Thornell *v.* Brockton, 141 Mass. 151, 6 N. E. 74; Riley *v.* Gerrish, 9 Cush. 104.

Michigan.— Wickes *v.* Swift Electric Light Co., 70 Mich. 322, 38 N. W. 299.

Missouri.— Hymers *v.* Druhe, 5 Mo. App. 580.

New York.— Bowman *v.* Agricultural Ins. Co., 59 N. Y. 521; Hay *v.* Leigh, 48 Barb. 393.

Texas.— Green *v.* Barnes, 9 Tex. Civ. App. 660, 29 S. W. 545. See also Kingston *v.* Pickins, 46 Tex. 99, 101 [*quoted* in Giddings *v.* Day, 84 Tex. 605, 19 S. W. 682], where the court said: "When the uncertainty does not appear upon the face of the deed, but arises from extraneous facts, as in other cases of latent ambiguity, parol evidence is admissible to explain or remove it."

See 20 Cent. Dig. tit. "Evidence," § 2095 *et seq.*

89. Smith *v.* Aikin, 75 Ala. 209 (holding that where at the time a contract was entered into there were two well recognized rules or modes for measuring lumber, a contract to saw lumber at a certain price "per thousand feet" without indicating how the lumber should be measured contained a latent ambiguity which might be explained by parol evidence showing the rule or mode of measurement in reference to which the parties contracted); Hotchkiss *v.* Barnes, 34 Conn. 27, 91 Am. Dec. 713; Bulow *v.* Goddard, 1 Nott & M. (S. C.) 45, 9 Am. Dec. 663 (holding that where the words "British weight" in a charter-party may have two meanings, it is such a latent ambiguity as to warrant the introduction of parol testimony to show whether, in commercial usage, it is understood to mean gross or net weight).

Suggestion as to intermediate cases.— It has been suggested that those cases in which the words are all sensible and have a settled meaning, but at the same time consistently admit of two interpretations according to the subject-matter in the contemplation of the parties, constitute an intermediate class partaking of the nature both of patent and latent ambiguities, and in such case evidence ought to be admitted showing the circumstances under which the contract was made and the subject-matter to which the parties refer.

(III) *PATENT AMBIGUITY*—(A) *In General.* What is usually termed a patent ambiguity[90] is such as exists or appears on the face of the writing itself.[91] That portion of Lord Bacon's rule in which he states that an ambiguity of this character cannot be explained by parol has frequently been repeated by the courts as a correct exposition of the law;[92] but it has also been subjected to much criticism.[93] Thus it has been said that it is too general,[94] and not of universal application,[95] at least where the word "ambiguity" is taken in its broad sense of doubtfulness, uncertainty, or double meaning.[96] It is certainly not true that an ambiguity appearing on the face of the paper, if that alone be looked to, cannot be explained by parol,[97] and the rule laid down by Lord Bacon that extrinsic evidence is not admissible to explain a patent ambiguity has never been acted upon in its widest extent,[98] for there are to be found in the reports many cases

Moody *v.* Alabama, etc., R. Co., 124 Ala. 195, 26 So. 952; Chambers *v.* Ringstaff, 69 Ala. 140; Jenny Lind Co. *v.* Bower, 11 Cal. 194; Martin *v.* Bell, 18 N. J. L. 167; Early *v.* Wilkinson, 9 Gratt. (Va.) 68; Ganson *v.* Madigan, 15 Wis. 144, 82 Am. Dec. 659; Peisch *v.* Dickson, 19 Fed. Cas. No. 10,911, 1 Mason 9. The difficulty is, however, more easily solved by assigning this character of cases to the class of latent ambiguities, which will reconcile many apparently conflicting statements of the rule. Schlottman *v.* Hoffman, 73 Miss. 188, 18 So. 893, 55 Am. St. Rep. 527.

90. **Latent ambiguity existing from terms of instrument** see *supra*, XVI, C, 10, c, (II), (C), text, and note 88.

91. Craven *v.* Butterfield, 80 Ind. 503; Marshall *v.* Haney, 4 Md. 498, 59 Am. Dec. 92; Peisch *v.* Dickson, 19 Fed. Cas. No. 10,911, 1 Mason 9.

92. *Alabama.*— Johnson *v.* Johnson, 32 Ala. 637.

Illinois.— Griffith *v.* Furry, 30 Ill. 251, 83 Am. Dec. 186.

Indiana.— Richmond Trading, etc., Co. *v.* Farquar, 8 Blackf. 89.

Louisiana.— Mithoff *v.* Byrne, 20 La. Ann. 363.

Maryland.— Castleman *v.* Du Val, 89 Md. 657, 43 Atl. 821; Marshall *v.* Haney, 4 Md. 498, 59 Am. Dec. 92; McCreary *v.* McCreary, 5 Gill & J. 147.

Minnesota.— McNair *v.* Toler, 5 Minn. 435.

Missouri.— C. E. Donnell Newspaper Co. *v.* Jung, 81 Mo. App. 577, in which case, however, it was further held that the instrument was void for uncertainty.

New Jersey.— Carr *v.* Passaic Land Imp., etc., Co., 22 N. J. Eq. 85.

New York.— Blossburg, etc., R. Co. *v.* Tioga R. Co., 1 Abb. Dec. 149, 1 Keyes 486; Strong *v.* Waters, 27 N. Y. App. Div. 299, 50 N. Y. Suppl. 257; Crocker *v.* Crocker, 5 Hun 587.

North Carolina.— Holman *v.* Whitaker, 119 N. C. 113, 25 S. E. 793; Capps *v.* Holt, 58 N. C. 153.

Oregon.— Tallmadge *v.* Hooper, 37 Oreg. 503, 61 Pac. 349, 1127.

Pennsylvania.—Wright *v.* Weakly, 2 Watts 89.

Texas.— Cammack *v.* Prather, (Civ. App. 1903) 74 S. W. 354; Pierson *v.* Sanger, (Civ. App. 1899) 51 S. W. 869; Taffinder *v.* Merrell, 18 Tex. Civ. App. 661, 45 S. W. 477; Curdy *v.* Stafford, (Civ. App. 1894) 27 S. W. 823.

Vermont.— Pingry *v.* Watkins, 17 Vt. 379.

Wisconsin.— Cole *v.* Clark, 3 Pinn. 303, 4 Chandl. 29.

United States.— Bradley *v.* Washington, etc., Steam Packet Co., 13 Pet. 89, 10 L. ed. 72; Kemmil *v.* Wilson, 14 Fed. Cas. No. 7,685, 4 Wash. 308; Delaware Indians *v.* Cherokee Nation, 38 Ct. Cl. 234 [*affirmed* in 193 U. S. 127, 24 S. Ct. 342, 48 L. ed. 646].

England.— Saunderson *v.* Piper, 2 Arn. 58, 5 Bing. N. Cas. 425, 3 Jur. 773, 8 L. J. C. P. 227, 7 Scott 408, 35 E. C. L. 231; Doe *v.* Gwillim, 5 B. & Ad. 122, 27 E. C. L. 60; Beaumont *v.* Field, 1 B. & Ald. 247, 2 Chit. 275, 19 Rev. Rep. 308, 18 E. C. L. 632.

See 20 Cent. Dig. tit. "Evidence," §§ 2085–2092.

93. Jenny Lind Co. *v.* Bower, 11 Cal. 194, 199, where the court said: "It will not do to say, therefore, that a patent ambiguity (meaning thereby merely an ambiguity patent or appearing on the face of the instrument) cannot be explained by evidence *aliunde*; although such remarks are frequently found in the books."

94. Palmer *v.* Albee, 50 Iowa 429; Schlottman *v.* Hoffman, 73 Miss. 188, 202, 18 So. 893, 55 Am. St. Rep. 527 (where the court said: "The rule against the introduction of parol testimony in cases of patent ambiguity is very generally stated too broadly — frequently for the reason that, with reference to the case before the court, the rule, however broadly stated, is correct in its application"); Peacher *v.* Strauss, 47 Miss. 353.

95. Peacher *v.* Strauss, 47 Miss. 353.

96. Doyle *v.* Teas, 5 Ill. 202; Fish *v.* Hubbard, 21 Wend. (N. Y.) 651.

97. Schlottman *v.* Hoffman, 73 Miss. 188, 18 So. 893, 55 Am. St. Rep. 527.

98. *California.*— Jenny Lind Co. *v.* Bower, 11 Cal. 194.

New Jersey.— Martin *v.* Bell, 18 N. J. L. 167.

New York.— Fish *v.* Hubbard, 21 Wend. 651; Cole *v.* Wendel, 8 Johns. 116.

Texas.— Roberts *v.* Short, 1 Tex. 373.

Washington.— Adamant Plaster Mfg. Co. *v.* National Bank of Commerce, 5 Wash. 232, 238, 31 Pac. 634.

where, although the ambiguity was such as should undoubtedly be designated as patent, if that term be taken in its broad sense, the courts have admitted evidence to explain it[99] or to show the circumstances surrounding the transaction and the situation of the parties.[1] In addition to this there are many cases flatly repudiating this part of the rule and expressly holding that a patent as well as a latent ambiguity may be explained by extrinsic evidence.[2]

(B) *Description of Land.* The lack of uniformity in the cases is well illustrated by those relating to the description of land. Thus the principle that parol evidence is inadmissible to explain or correct a patent ambiguity has been frequently applied to such ambiguities in the description of land in a deed or other writing,[3] as for instance where there is a failure to recite the state, county,

United States.— Union Bank *v.* Hyde, 6 Wheat. 572, 5 L. ed. 333; Alexandria Mechanics' Bank *v.* Columbia Bank, 5 Wheat. 326, 5 L. ed. 100.

England.— Colpoys *v.* Colpoys, Jac. 451, 464, 4 Eng. Ch. 451 [*quoted* in Fish *v.* Hubbard, 21 Wend. (N. Y.) 651] (where the court said: "When the person or the thing is designated on the face of the instrument, by terms imperfect and equivocal, admitting either of no meaning at all by themselves, or of a variety of different meanings, referring tacitly or expressly for the ascertainment and completion of the meaning to extrinsic circumstances, it has never been considered an objection to the reception of the evidence of those circumstances, that the ambiguity was patent, manifested on the face of the instrument"); Rex *v.* Laindon, 8 T. R. 379; Doe *v.* Burt, 1 T. R. 701, 1 Rev. Rep. 367.

See 20 Cent. Dig. tit. "Evidence," § 2085 *et seq.*

99. *Colorado.*— Sullivan *v.* Collins, 20 Colo. 528, 39 Pac. 334.

Iowa.— American Sav. Bank *v.* Shaver Carriage Co., 111 Iowa 137, 138, 82 N. W. 484; Martin Steam Feed Cooker Co. *v.* Olive, 82 Iowa 122, 47 N. W. 980.

Maine.— Gallagher *v.* Black, 44 Me. 99.

Missouri.— Franklin Ave. German Sav. Inst. *v.* Board of Education, 75 Mo. 408; Thorn, etc., Lime, etc., Co. *v.* St. Louis Expanded Metal Fire Proofing Co., 77 Mo. App. 21.

New Jersey.—Simanton *v.* Vliet, 61 N. J. L. 595, 40 Atl. 595.

New York.— Bird *v.* Beckwith, 45 N. Y. App. Div. 124, 60 N. Y. Suppl. 1041; Myers *v.* Sea Beach R. Co., 43 N. Y. App. Div. 573, 60 N. Y. Suppl. 284; Garvin Mach. Co. *v.* Hammond Typewriter Co., 12 N. Y. App. Div. 294, 42 N. Y. Suppl. 564 [*affirmed* in 159 N. Y. 539, 53 N. E. 1125]; McNulty *v.* Urban, 1 Misc. 422, 21 N. Y. Suppl. 247.

Pennsylvania.—Kelly *v.* Thompson, 7 Watts 401; Cox *v.* Burdett, 23 Pa. Super. Ct. 346.

Texas.— Montgomery *v.* Carlton, 56 Tex. 431.

Wisconsin.— Excelsior Wrapper Co. *v.* Messinger, 116 Wis. 549, 93 N. W. 459.

See 20 Cent. Dig. tit. "Evidence," § 2085 *et seq.*

1. Ham *v.* Cerniglia, 73 Miss. 290, 18 So. 577 (holding that resort may properly be had to parol evidence to show the surrounding circumstances in order to remove a patent ambiguity in a writing); Webster *v.* Atkinson, 4 N. H. 21, 24 (where the court said: "It seems to be well settled that parol evidence is admissible to show the situation and circumstances of any person or thing to which the instrument relates. But no evidence of an expressed intention, nor of the acts of the parties, can be received to explain an ambiguity apparent on the face of the instrument"); Titchenell *v.* Jackson, 26 W. Va. 460; Ganson *v.* Madigan, 15 Wis. 144, 82 Am. Dec. 659. See *supra*, XVI, C, 10, b, (XXI).

2. *Georgia.*— Tumlin *v.* Perry, 108 Ga. 520, 522, 34 S. E. 171 (where the court said: "In extreme cases of ambiguity, where the instrument as it stands is without meaning, courts will supply words" [*citing* Civ. Code, § 3675 (5)]); Mohr *v.* Dillon, 80 Ga. 572, 5 S. E. 770; Bell *v.* Boyd, 53 Ga. 643; Scurry *v.* Cotton States L. Ins. Co., 51 Ga. 624.

Minnesota.— Ripon College *v.* Brown, 66 Minn. 179, 68 N. W. 837.

New Mexico.— Gentile *v.* Crossan, 7 N. M. 589, 38 Pac. 247.

Oklahoma.— Keokuk Falls Imp. Co. *v.* Kingsland, etc., Mfg. Co., 4 Okla. 32, 47 Pac. 484.

South Dakota.— Osborne *v.* Stringham, 1 S. D. 406, 47 N. W. 408.

Texas.— Meyers *v.* Maverick, (Civ. App. 1894) 28 S. W. 716.

See 20 Cent. Dig. tit. "Evidence," § 2085 *et seq.*

3. *Alabama.*— Dane *v.* Glennon, 72 Ala. 160.

Indiana.— Baldwin *v.* Kerlin, 46 Ind. 426.

Maryland.— Clarke *v.* Lancaster, 36 Md. 196, 11 Am. Rep. 486.

Mississippi.— Levenworth *v.* Greenville Wharf, etc., Co., 82 Miss. 578, 35 So. 138.

Missouri.— Carter *v.* Holman, 60 Mo. 498.

North Carolina.— Radford *v.* Edwards, 88 N. C. 347.

Tennessee.— Barnes *v.* Sellars, 2 Sneed 33.

Texas.— Coker *v.* Roberts, 71 Tex. 597, 9 S. W. 665.

See 20 Cent. Dig. tit. "Evidence," § 2088.

Where the property is not described in a paper purporting to be a lease, the ambiguity is patent, and parol evidence is not admis-

town, or range in which the land is located.[4] On the other hand there are a number of cases holding that an omission of the name of the state, county, section, township, or range from the description of land in a writing may be supplied by parol,[5] some of which base their holding upon the ground that such an omission constitutes a latent ambiguity.[6]

(c) *The True Rule.* The true rule with regard to patent ambiguities must be taken to be this: The patent ambiguity which cannot be explained by parol evidence is that which remains uncertain after the court has received evidence of the surrounding circumstances and collateral facts which are of such a nature as to throw light upon the intention of the parties. In other words and more generally speaking if the court, after placing itself in the situation in which the parties stood at the time of executing the instrument, and with full understanding of the force and import of the words, cannot definitely ascertain the meaning and intention of the parties from the language of the instrument thus illustrated, it is a case of incurable and hopeless uncertainty and the instrument is so far inoperative and void; and it cannot be sustained or rendered operative by the introduction of evidence which would necessarily have the effect of adding new terms to the writing.[7]

d. Meaning of Words, Phrases, and Abbreviations — (i) *In General.* Where any doubt arises as to the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument, for both reason and common sense agree that by no other means can the language of the instrument be made to speak the real mind of the party. In this case parol evidence is admissible *ex necessitate*.[8] Evidence has been admitted under this principle to show the meaning of

sible to explain it. Noyes *v.* Stauff, 5 Oreg. 455.

4. Fuller *v.* Fellows, 30 Ark. 657; Mudd *v.* Dillon, 166 Mo. 110, 65 S. W. 973; Taffinder *v.* Merrell, 18 Tex. Civ. App. 661, 45 S. W. 477. See also Black *v.* Pratt Coal, etc., Co., 85 Ala. 504, 5 So. 89.

The Mississippi cases as to the admissibility of evidence in case of the omission of the township, county, etc., from the description in a deed are far from uniform. See Ladnier *v.* Ladnier, 75 Miss. 777, 23 So. 430; Haughton *v.* Sartor, 71 Miss. 357, 15 So. 71; Lochte *v.* Austin, 69 Miss. 271, 13 So. 838; Lewis *v.* Seibles, 65 Miss. 251, 3 So. 652, 7 Am. St. Rep. 649; Bowers *v.* Andrews, 52 Miss. 596; Foute *v.* Fairman, 48 Miss. 536; Peacher *v.* Strauss, 47 Miss. 353; Hanna *v.* Renfro, 32 Miss. 125.

5. Webb *v.* Elyton Land Co., 105 Ala. 471, 18 So. 178; Chambers *v.* Ringstaff, 69 Ala. 140; Coffee *v.* Groover, 20 Fla. 64; Atwater *v.* Schenck, 9 Wis. 160.

6. Hawkins *v.* Hudson, 45 Ala. 482 (where the name of the county was omitted); Halliday *v.* Hess, 147 Ill. 588, 35 N. E. 380; Bybee *v.* Hageman, 66 Ill. 519; Dougherty *v.* Purdy, 18 Ill. 206.

7. *Alabama.*— Hughes *v.* Wilkinson, 35 Ala. 453.

Colorado.— Kretschmer *v.* Hard, 18 Colo. 223, 32 Pac. 418.

Illinois.— Doyle *v.* Teas, 5 Ill. 202.

Maine.— Nichols *v.* Frothingham, 45 Me. 220, 225, 71 Am. Dec. 539.

Mississippi.— Schlottman *v.* Hoffman, 73 Miss. 188, 18 So. 893, 55 Am. St. Rep. 527; Bowers *v.* Andrews, 52 Miss. 596; Peacher *v.* Strauss, 47 Miss. 353.

New York.— Fish *v.* Hubbard, 21 Wend. 651.

Vermont.— Goodsell *v.* Rutland-Canadian R. Co., 75 Vt. 375, 56 Atl. 7.

Virginia.— Early *v.* Wilkinson, 9 Gratt. 68.

See 20 Cent. Dig. tit. "Evidence," § 2085 *et seq.*

Another statement of the rule is as follows: "First. Where the instrument itself seems to be clear and certain on its face, and the ambiguity arises from some extrinsic or collateral matter, the ambiguity may be helped by parol evidence. Second. Where the ambiguity consists in the use of equivocal words designating the person or subject-matter, parol evidence of collateral or extrinsic matters may be introduced for the purpose of aiding the court in arriving at the meaning of the language used. Third. Where the ambiguity is such that a perusal of the instrument shows plainly that something more must be added before the reader can determine what of several things is meant, the rule is inflexible that parol evidence cannot be admitted to supply the deficiency," and the last class constitutes the patent ambiguity of Lord Bacon. Palmer *v.* Albee, 50 Iowa 429, 433.

8. *Alabama.*— McClure *v.* Cox, 32 Ala. 617, 70 Am. Dec. 552.

Arkansas.— Western Assur. Co. *v.* Altheimer, 58 Ark. 565, 25 S. W. 1067.

California.— Hawley *v.* Bader, 15 Cal. 44.

"accounts," [9] "all accounts," [10] "artesian," [11] "associates," [12] "barrel," [13] "Canada money," [14] "current funds," [15] "deed of conveyance," [16] "during," [17] "entitled to all the privileges of a course of study," [18] "expenses," [19] "farm" or "homestead farm," [20] "freight and passenger depot," [21] "good custom cowhide," [22] "grading, excavating, and filling," [23] "good, merchantable, shipping hay," [24] "increasing

Connecticut.— *In re* Curtis-Castle Arbitration, 64 Conn. 501, 30 Atl. 769, 42 Am. St. Rep. 200.

Florida.— Hinote *v.* Brigman, 44 Fla. 589, 33 So. 303.

Georgia.— Atlanta *v.* Schmeltzer, 83 Ga. 609, 10 S. E. 543.

Illinois.— Irwin *v.* Powell, 188 Ill. 107, 58 N. E. 941; Stewart *v.* Smith, 28 Ill. 397.

Indiana.— Jaqua *v.* Witham, etc., Co., 106 Ind. 545, 7 N. E. 314, holding that evidence tending to explain the sense in which the parties were in the habit of using the particular words and phrases is admissible.

Iowa.— Haddock *v.* Woods, 46 Iowa 433.

Kansas.— Seymour *v.* Armstrong, 62 Kan. 720, 64 Pac. 612 [*affirming* 10 Kan. App. 10, 61 Pac. 675].

Louisiana.— Livaudais *v.* Municipality No. 2, 16 La. 509, holding that parol evidence is admissible against a party to show the general meaning of a word, but not the sense in which he has declared he used it.

Maine.— Emery *v.* Webster, 42 Me. 204, 66 Am. Dec. 274.

Massachusetts.— Keller *v.* Webb, 125 Mass. 88, 28 Am. Rep. 209.

Michigan.— Preston Nat. Bank *v.* George T. Smith Middlings Purifier Co., 102 Mich. 462, 60 N. W. 981.

Minnesota.— State *v.* Sibley, 25 Minn. 387.

Mississippi.— Hattiesburg Plumbing Co. *v.* Carmichael, 80 Miss. 66, 31 So. 536.

Missouri.— Lewis *v.* Coates, 93 Mo. 170, 5 S. W. 897.

Montana.— Cambers *v.* Lowry, 21 Mont. 478, 54 Pac. 816.

New Hampshire.— Locke *v.* Rowell, 47 N. H. 46.

New Jersey.— Hartwell *v.* Camman, 10 N. J. Eq. 128, 64 Am. Dec. 448, where the court considered this a case of latent ambiguity.

New York.— Hutchinson *v.* Root, 2 N. Y. App. Div. 584, 38 N. Y. Suppl. 16 [*affirmed* in 158 N. Y. 681, 52 N. E. 1124]; Lynch *v.* Hunneke, 61 N. Y. Super. Ct. 235, 19 N. Y. Suppl. 718.

Ohio.— Baldwin Quarry Co. *v.* Clements, 38 Ohio St. 587.

Oregon.— Abraham *v.* Oregon, etc., R. Co., 37 Oreg. 495, 60 Pac. 899, 82 Am. St. Rep. 779, 64 L. R. A. 391.

Pennsylvania.— Brown *v.* Brooks, 25 Pa. St. 210; Adams *v.* Lake, 2 Wkly. Notes Cas. 228.

Tennessee.— Dorris *v.* King, (Ch. App. 1899) 54 S. W. 683.

Texas.— Ginnuth *v.* Blankenship, etc., Co., (Civ. App. 1894) 28 S. W. 828.

Vermont.— Rugg *v.* Hale, 40 Vt. 138.

Wisconsin.— Andrews *v.* Robertson, 111 Wis. 334, 87 N. W. 190, 87 Am. St. Rep. 870, 54 L. R. A. 673. See also Williams *v.* Stevens Point Lumber Co., 72 Wis. 487, 40 N. W. 154.

United States.— Fenlon *v.* U. S., 17 Ct. Cl. 138.

England.— Spicer *v.* Cooper, 1 Q. B. 424, 1 G. & D. 52, 5 Jur. 1036, 10 L. J. Q. B. 241, 41 E. C. L. 608; New Zealand Bank *v.* Simpson, [1900] A. C. 182, 65 L. J. P. C. 22, 82 L. T. Rep. N. S. 102, 48 Wkly. Rep. 591; Grant *v.* Grant, L. R. 5 C. P. 727, 39 L. J. C. P. 272, 22 L. T. Rep. N. S. 829, 18 Wkly. Rep. 951; Colburn *v.* Dawson, 10 C. B. 765, 15 Jur. 680, 20 L. J. C. P. 154, 70 E. C. L. 765; Charlton *v.* Gibson, 1 C. & K. 541, 47 E. C. L. 541; Waterpark *v.* Fennell, 7 H. L. Cas. 650, 5 Jur. N. S. 1135, 7 Wkly. Rep. 634, 11 Eng. Reprint 259.

Canada.— Christie *v.* Burnett, 10 Ont. 609; Caird *v.* Webster, 9 Quebec 158.

See 20 Cent. Dig. tit. "Evidence," §§ 2104 *et seq.*

9. Preston Nat. Bank *v.* George T. Smith Middlings Purifier Co., 102 Mich. 462, 60 N. W. 981; Waldheim *v.* Miller, 97 Wis. 300, 72 N. W. 869. See also Denniston *v.* Schaal, 5 Pa. Super. Ct. 632.

10. Hawley *v.* Bader, 15 Cal. 44.

11. Hattiesburg Plumbing Co. *v.* Carmichael, 80 Miss. 66, 31 So. 536.

12. As used in the charter of a corporation see State *v.* Sibley, 25 Minn. 387.

13. In a contract for the sale of one thousand barrels of oil, it being uncertain whether the term referred to the vessels or to the measure. Miller *v.* Stevens, 100 Mass. 518, 1 Am. Rep. 139, 97 Am. Dec. 123.

14. Thompson *v.* Sloan, 23 Wend. (N. Y.) 71, 35 Am. Dec. 546.

15. Haddock *v.* Woods, 46 Iowa 433. But *compare* Galena Ins. Co. *v.* Kupfer, 28 Ill. 332, 81 Am. Dec. 284.

16. Zantzinger *v.* Ketch, 4 Dall. (Pa.) 132, 1 L. ed. 772.

17. Bird *v.* Beckwith, 45 N. Y. App. Div. 124, 60 N. Y. Suppl. 1041.

18. In a certificate of admission to a collegiate institution. Iron City Commercial College *v.* Kerr, 3 Brewst. (Pa.) 196.

19. In a mortgage providing for the payment of all costs and expenses incurred in a certain action. Bowery Bank *v.* Hart, 37 Misc. (N. Y.) 412, 75 N. Y. Suppl. 781.

20. Locke *v.* Rowell, 47 N. H. 46.

21. In a covenant to establish and maintain one. Murray *v.* Northwestern R. Co., 64 S. C. 520, 42 S. E. 617.

22. Wait *v.* Fairbanks, Brayt. (Vt.) 77.

23. Atlanta *v.* Schmeltzer, 83 Ga. 609, 10 S. E. 543.

24. Fitch *v.* Carpenter, 43 Barb. (N. Y.) 40.

transportation facilities,"[25] "merchantable timber,"[26] "old channel,"[27] "product,"[28] "published,"[29] "rainy day,"[30] "river,"[31] "sanction,"[32] "Savannah market,"[33] "security for the payment made by note,"[34] "set of books,"[35] "stockholders,"[36] "subject to the mortgage,"[37] "taking stock,"[38] "team,"[39] "Texas money at its current price at New Orleans,"[40] "unsettled,"[41] "waste ground,"[42] "without damage,"[43] and "work."[44]

(II) *Words of Fixed Meaning.* Where, however, the words used are familiar and ordinary and not of technical use and have a well defined meaning, parol evidence is not admissible to explain them or give them a different meaning.[45] Evidence has been excluded under this rule to attach any other than the usual meaning to "appurtenances,"[46] "currency of this state,"[47] "current funds,"[48]

25. Lewis *v.* Coates, 93 Mo. 170, 5 S. W. 897.

26. Dorris *v.* King, (Tenn. Ch. App. 1899) 54 S. W. 683.

27. Of a river having two channels. Emery *v.* Webster, 42 Me. 204, 66 Am. Dec. 274.

28. In an instrument promising to pay the product of hogs received. Stewart *v.* Smith, 28 Ill. 397.

29. Stoops *v.* Smith, 100 Mass. 63, 97 Am. Dec. 76, 1 Am. Rep. 85.

30. Balfour *v.* Wilkins, 2 Fed. Cas. No. 807, 5 Sawy. 429.

31. Greenleaf *v.* Kilton, 11 N. H. 530.

32. As used in a contract which bound one of the parties to procure the "sanction" of a foreign government to a proposed enterprise. O'Sullivan *v.* Roberts, 42 N. Y. Super. Ct. 282.

33. In a contract binding one of the parties to "retire from the business of purchasing in the Savannah market" certain specified goods. Goodman *v.* Henderson, 58 Ga. 567.

34. Campbell Printing Press, etc., Co. *v.* Walker, 1 N. Y. St. 200.

35. Western Assur. Co. *v.* Altheimer, 58 Ark. 565, 25 S. W. 1067.

36. In a deed conveying land in trust for the "stock-holders" of a charitable institution having no stock-holders. Carleton *v.* Roberts, 1 Tex. Unrep. Cas. 587.

37. Merrill *v.* Cooper, 36 Vt. 314.

38. Ginnuth *v.* Blankenship, etc., Co., (Tex. Civ. App. 1894) 28 S. W. 828.

39. Ganson *v.* Madigan, 15 Wis. 144, 82 Am. Dec. 659.

40. Roberts *v.* Short, 1 Tex. 373.

41. Auzerais *v.* Naglee, 74 Cal. 60, 15 Pac. 371.

42. Prather *v.* Ross, 17 Ind. 495.

43. In a contract to deliver potatoes by boat at a given point for a specified price, plaintiff to pay towage, and defendant guaranteeing "to return to boat without damage." McKee *v.* De Witt, 12 N. Y. App. Div. 617, 43 N. Y. Suppl. 132.

44. In a contract providing that one of the parties should work a street. *In re* Curtis-Castle Arbitration, 64 Conn. 501, 30 Atl. 769, 42 Am. St. Rep. 200.

45. *Alabama.*— Wikle *v.* Johnson Laboratories, 132 Ala. 268, 31 So. 715.

Illinois.— Galena Ins. Co. *v.* Kupfer, 28 Ill. 332, 81 Am. Dec. 292; Lyon *v.* Lyon, 3 Ill. App. 434.

Indiana.— Langohr *v.* Smith, 81 Ind. 495.

Iowa.— Cash *v.* Hinkle, 36 Iowa 623; Willmering *v.* McGaughey, 30 Iowa 205, 6 Am. Rep. 673.

Kansas.— Gowans *v.* Pierce, 57 Kan. 180, 45 Pac. 586.

Kentucky.— Coger *v.* McGee, 2 Bibb 321, 5 Am. Dec. 610.

Maine.— Littlefield *v.* Littlefield, 28 Me. 180.

Michigan.— Trowbridge *v.* Dean, 40 Mich. 687.

New Jersey.— Hartwell *v.* Camman, 10 N. J. Eq. 128, 64 Am. Dec. 448.

New York.—Armstrong *v.* Lake Champlain Granite Co., 147 N. Y. 495, 42 N. E. 186, 49 Am. St. Rep. 683 [*affirming* 24 N. Y. Suppl. 1144]; Collender *v.* Dinsmore, 55 N. Y. 200, 14 Am. Rep. 224 [*reversing* 64 Barb. 457]; Hutchinson *v.* Root, 2 N. Y. App. Div. 584, 38 N. Y. Suppl. 16 [*affirmed* in 158 N. Y. 681, 52 N. E. 1124].

Pennsylvania.— Weisenberger *v.* Harmony F. & M. Ins. Co., 56 Pa. St. 442; *In re* Gulf Creek Bridge, 3 Del. Co. 172.

Vermont.— Butler *v.* Gale, 27 Vt. 739.

United States.— Kemble *v.* Lull, 14 Fed. Cas. No. 7,683, 3 McLean 272.

England.— New Zealand Bank *v.* Simpson, [1900] A. C. 182, 65 L. J. P. C. 22, 82 L. T. Rep. N. S. 102, 48 Wkly. Rep. 591; Beacon F., etc., Ins. Co. *v.* Gibb, 9 Jur. N. S. 185, 7 L. T. Rep. N. S. 574, 1 Moore P. C. N. S. 73, 1 N. R. 110, 11 Wkly. Rep. 194, 15 Eng. Reprint 630.

See 20 Cent. Dig. tit. "Evidence," § 2104 *et seq.* See also *supra*, XVI, C, 10, a.

The use of the same word to express different meanings does not create such an ambiguity in the contract as to let in parol proof, if it appears by the context of the contract itself in which particular sense the parties used the disputed word. Mellen *v.* Ford, 28 Fed. 639.

46. Johnson *v.* Nasworthy, (Tex. App. 1890) 16 S. W. 758.

47. Cockrill *v.* Kirkpatrick, 9 Mo. 697. But *compare* Pilmer *v.* Des Moines Branch State Bank, 16 Iowa 321.

48. Galena Ins. Co. *v.* Kupfer, 28 Ill. 332, 81 Am. Dec. 284. But *compare* Haddock *v.* Woods, 46 Iowa 433.

"deal," [49] "deliver," [50] "grandson," [51] "half," [52] "help," [53] "legal representatives," [54] "legitimate railroad purposes," [55] "liabilities," [56] "made useful," [57] "New York state currency," [58] "placing," [59] "plant," [60] "ship timber," [61] "sound," [62] "strand," [63] "to be forwarded," [64] "unavoidable accident," [65] "vigorously push," [66] "well," [67] and "dollars." [68] Even where the words used are of a technical nature or are confined to commercial parlance, if they have a fixed meaning among those to whom they are familiar, extrinsic evidence cannot be admitted to give them a different meaning. [69]

(III) *TECHNICAL LANGUAGE.* Where a written instrument contains words or expressions which are of a technical nature, being connected with some art, science, or occupation, and unintelligible to the common reader, yet susceptible of a definite interpretation by experts, parol evidence is admitted for the purpose of explaining the language used and thus effectuating the intention of the parties through the medium of their own language. [70] Evidence has been admitted in

49. Greenfield First Nat. Bank *v.* Coffin, 162 Mass. 180, 38 N. E. 444.

50. In a contract of sale. Lippert *v.* Saginaw Milling Co., 108 Wis. 512, 84 N. W. 831.

51. Doe *v.* Taylor, 6 N. Brunsw. 525.

52. Butler *v.* Gale, 27 Vt. 739.

53. In an agreement to pay a person a certain sum if he will "help" to sell certain lands. Hooker *v.* Hyde, 61 Wis. 204, 21 N. W. 52.

54. Sullivan *v.* Louisville, etc., R. Co., 138 Ala. 650, 35 So. 694.

55. Abraham *v.* Oregon, etc., R. Co., 37 Oreg. 495, 60 Pac. 899, 82 Am. St. Rep. 779, 64 L. R. A. 391.

56. Lloyd *v.* Sturgeon Falls Pulp Co., 85 L. T. Rep. N. S. 162.

57. Davis *v.* Ball, 6 Cush. (Mass.) 505, 53 Am. Dec. 53.

58. Ehle *v.* Chittenango Bank, 24 N. Y. 548.

59. As used in reference to a loan. Heiberger *v.* Johnson, 34 N. Y. App. Div. 66, 53 N. Y. Suppl. 1057.

60. Middleton *v.* Flanagan, 25 Ont. 417.

61. Pillsbury *v.* Locke, 33 N. H. 96, 66 Am. Dec. 711.

62. In a warranty of a horse. Thompson *v.* Pruden, 18 Ohio Cir. Ct. 886, 4 Ohio Cir. Dec. 20.

63. Stillman *v.* Burfeind, 21 N. Y. App. Div. 13, 47 N. Y. Suppl. 280.

64. In a contract of carriage. Fischer *v.* Merchants' Dispatch Transp. Co., 13 Mo. App. 133.

65. Neff *v.* Friedman, 2 Sweeny (N. Y.) 607.

66. As used in a contract with reference to the right to manufacture and sell a patent medicine. Lord *v.* Owen, 35 Ill. App. 382.

67. Strong *v.* Waters, 27 N. Y. App. Div. 299, 50 N. Y. Suppl. 257.

68. The word "dollars" is such that as a general rule parol evidence is not admissible to show that the parties intended anything other than what the word ordinarily imports. Howes *v.* Austin, 35 Ill. 396; Veeche *v.* Grayson, 1 Mart. N. S. (La.) 133; Noe *v.* Hodges, 3 Humphr. (Tenn.) 162. But it has frequently been held that the use of this term in a contract or other writing, executed in the Confederate states during the Civil war, might be explained by parol evidence to show whether United States or Confederate money was intended. Bryan *v.* Harrison, 76 N. C. 360; Neely *v.* McFadden, 2 S. C. 169; Austin *v.* Kinsman, 13 Rich. Eq. (S. C.) 259; Stewart *v.* Smith, 3 Baxt. (Tenn.) 231; Carmichael *v.* White, 11 Heisk. (Tenn.) 262; Taylor *v.* Bland, 60 Tex. 29; Johnson *v.* Blount, 48 Tex. 38; Sexton *v.* Windell, 23 Gratt. (Va.) 534; Calbreath *v.* Virginia Porcelain, etc., Co., 22 Gratt. (Va.) 697; Atlantic, etc., R. Co. *v.* Carolina Nat. Bank, 19 Wall. (U. S.) 548, 22 L. ed. 196; Thorington *v.* Smith, 8 Wall. (U. S.) 1, 19 L. ed. 361. *Contra*, Hill *v.* Erwin, 44 Ala. 661; Roane *v.* Green, 24 Ark. 210.

69. Bachman *v.* Roller, 9 Baxt. (Tenn.) 409, 40 Am. Rep. 97 (holding that the words "par bank notes" have a distinctive and fixed technical meaning which cannot be varied by parol evidence); St. Martin *v.* Thrasher, 40 Vt. 460.

70. *Alabama.*— Mouton *v.* Louisville, etc., R. Co., 128 Ala. 537, 29 So. 602.

Florida.— Hinote *v.* Brigman, 44 Fla. 589, 33 So. 303.

Georgia.— Cannon *v.* Hunt, 116 Ga. 452, 42 S. E. 734.

Illinois.— Myers *v.* Walker, 24 Ill. 133.

Iowa.—Grasmier *v.* Wolf, (1902) 90 N. W. 813; Cash *v.* Hinkle, 36 Iowa 623; Willmering *v.* McGaughey, 30 Iowa 205, 6 Am. Rep. 673.

Minnesota.— Winona *v.* Thompson, 24 Minn. 199.

Missouri.— Heyworth *v.* Miller Grain, etc., Co., 174 Mo. 171, 73 S. W. 498; Elliott *v.* Secor, 60 Mo. 163; Blair *v.* Corby, 37 Mo. 313.

Montana.— Cambers *v.* Lowry, 21 Mont. 478, 54 Pac. 816.

New Jersey.— Hartwell *v.* Camman, 10 N. J. Eq. 128, 64 Am. Dec. 448.

New York.— Collender *v.* Dinsmore, 55 N. Y. 200, 14 Am. Rep. 224 [*reversing* 64 Barb. 457]; Colwell *v.* Lawrence, 38 N. Y. 71, 36 How. Pr. 306 [*affirming* 38 Barb. 643, 24 How. Pr. 324]; O'Connor *v.* Green, 60 N. Y. App. Div. 553, 69 N. Y. Suppl. 1097; Hutchinson *v.* Root, 2 N. Y. App. Div. 584,

the application of this principle to show the meaning of "actual stone measured in the wall,"[71] "cabinet and mahogany door making,"[72] "cold storage,"[73] "colliery,"[74] "crop of flax,"[75] "dangers of the river,"[76] "excavated and repaired,"[77] "feed privileges,"[78] "four dollars an order,"[79] "good, hard brick,"[80] "hewn timber to average one hundred and twenty feet, and class B. No. 1 good,"[81] "mason work,"[82] "mercantile measurement,"[83] "noiseless steam motors,"[84] "on margin,"[85] "privilege,"[86] "quantity guaranteed,"[87] "sea letter,"[88] "season,"[89] "spitting of blood,"[90] "subject to strikes,"[91] "tontine policy," and "tontine instalment policy,"[92] "transportation," "switching," and "transfer,"[93] "traveling expenses,"[94] "zinc,"[95] and the like.[96] It is not necessary in order that

38 N. Y. Suppl. 16 [*affirmed* in 158 N. Y. 681, 52 N. E. 1124].

Oregon.— Brauns *v.* Stearns, 1 Oreg. 367.

Pennsylvania.— Brown *v.* Brooks, 25 Pa. St. 210; Wingate *v.* Mechanics' Bank, 10 Pa. St. 104; Glenn *v.* Strickland, 21 Pa. Super. Ct. 88.

Tennessee.— Fry *v.* New York Provident Sav. L. Assur. Soc., (Ch. App. 1896) 38 S. W. 116.

Vermont.— St. Martin *v.* Thrasher, 40 Vt. 460; Butler *v.* Gale, 27 Vt. 739; Hart *v.* Hammett, 18 Vt. 127.

Wisconsin.— Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 113 Wis. 161, 87 N. W. 1085, 89 N. W. 180; Bedard *v.* Bonville, 57 Wis. 270, 15 N. W. 185.

United States.— Webster Loom Co. *v.* Higgins, 105 U. S. 580, 26 L. ed. 1177.

England.— Spicer *v.* Cooper, 1 Q. B. 424, 1 G. & D. 52, 5 Jur. 1036, 10 L. J. Q. B. 241, 41 E. C. L. 608; Birch *v.* Depeyster, 4 Campb. 385, 1 Stark. 210, 2 E. C. L. 86; Hills *v.* Evans, 8 Jur. N. S. 525, 31 L. J. Ch. 457, 6 L. T. Rep. N. S. 90; Evans *v.* Pratt, 11 L. J. C. P. 87, 3 M. & G. 759, 4 Scott N. R. 370, 42 E. C. L. 396; Tudgay *v.* Sampson, 30 L. T. Rep. N. S. 262.

See 20 Cent. Dig. tit. "Evidence," § 2104 *et seq.* See also *supra*, XI, B, 2, u.

71. As used in a contract for furnishing stone for a building, to designate the manner of measuring stone furnished. Brenneman *v.* Bush, (Tex. Civ. App. 1895) 30 S. W. 699.

72. Stroud *v.* Frith, 11 Barb. (N. Y.) 300.

73. Behrman *v.* Linde, 47 Hun (N. Y.) 530.

74. Carey *v.* Bright, 58 Pa. St. 70.

75. Goodrich *v.* Stevens, 5 Lans. (N. Y.) 230.

76. As used in a bill of lading for steamboat transportation. McClure *v.* Cox, 32 Ala. 617, 70 Am. Dec. 552.

77. As used in a railway construction contract. Miller *v.* McKeesport, etc., R. Co., 179 Pa. St. 350, 36 Atl. 287.

78. As used in a way bill accompanying a shipment of cattle which has noted upon it "with feed privileges" at an intermediate point. Missouri, etc., R. Co. *v.* De Bord, 21 Tex. Civ. App. 691, 53 S. W. 587.

79. In a contract of employment to canvass for a serial publication. Newhall *v.* Appleton, 49 N. Y. Super. Ct. 238.

80. Felter *v.* Claffy, 12 N. Y. St. 625.

81. Jones *v.* Anderson, 76 Ala. 427, 82 Ala. 302, 2 So. 911.

82. Elgin *v.* Joslyn, 36 Ill. App. 301 [*affirmed* in 136 Ill. 525, 26 N. E. 1090].

83. Gaunt *v.* Pries, 21 Mo. App. 540.

84. Farnum *v.* Concord Horse R. Co., 66 N. H. 569, 29 Atl. 541.

85. Hatch *v.* Douglas, 48 Conn. 116, 40 Am. Rep. 154.

86. As used in a contract of employment of a master of a ship. Birch *v.* Depeyster, 4 Campb. 385, 1 Stark. 210, 2 E. C. L. 86.

87. In a bill of lading. Bissel *v.* Campbell, 54 N. Y. 353.

88. Sleght *v.* Hartshorne, 2 Johns. (N. Y.) 531 [*reversing* 1 Johns. 192].

89. In a contract of employment. McIntosh *v.* Miner, 53 N. Y. App. Div. 240, 65 N. Y. Suppl. 735; Wachtershauser *v.* Smith, 10 N. Y. Suppl. 535.

90. As used in an application for life insurance. Singleton *v.* St. Louis Mut. Ins. Co., 66 Mo. 63, 27 Am. Rep. 321.

91. As used in a contract to deliver coal. Hesser-Milton-Renahan Coal Co. *v.* La Crosse Fuel Co., 114 Wis. 654, 90 N. W. 1094.

92. As used in an application for insurance. Thompson *v.* Thorne, 83 Mo. App. 241.

93. As applied to railroad operations. Dixon *v.* Georgia Cent. R. Co., 110 Ga. 173, 35 S. E. 369.

94. Wilcox *v.* Baer, 85 Mo. App. 587.

95. In a case where a deed conveyed all the zinc and other ores excepting the ore called "franklinite," and one party claimed a vein of ores as passing by the name of zinc while the other claimed it as excepted under the name of franklinite. New Jersey Zinc Co. *v.* Boston Franklinite Co., 15 N. J. Eq. 418.

96. "Breeder."— As to the admissibility of evidence to explain the term "breeder" the decisions are not uniform. In St. Paul, etc., Trust Co. *v.* Harrison, 64 Minn. 300, 66 N. W. 980, the term was considered a technical one which might be explained by farmers, horsemen, and stockmen engaged in such business. In Connable *v.* Clark, 26 Mo. App. 162, it was held that the words "good breeder" as applied to a jack were properly treated as a technical term which might be explained, but the court said that the words, if used separately, could be easily interpreted. And the opinion intimated in this case finds support in Cross *v.* Thompson, 50 Kan. 627, 32 Pac. 357, where the court held squarely that the words "breeder and foal getter" were so familiar and easily understood as to preclude the admission of evidence as to their meaning.

this rule may apply that the word or phrase should have no fixed meaning in ordinary usage, for even though it has such a meaning, yet if it also has a technical meaning in the language of commerce or art, parol evidence is admissible to show that it was used in the latter sense,[97] and, if the court is satisfied that it was so used,[98] extrinsic evidence is admissible to explain what the technical meaning is.[99] On the other hand where by giving a word its strict technical legal meaning a contract will be rendered entirely meaningless, it is competent to show by parol the sense in which the word was used, if it is used by laymen in a different sense, or has a popular or common meaning, and by doing so the contract may be given force and effect.[1]

(iv) *Abbreviations, Signs, and Cipher Writings.* It has also been held that parol evidence is admissible to explain the meaning of abbreviations appearing in a written instrument;[2] but this principle is of course not applicable in the case of those abbreviations of the meanings of which the courts will take judicial notice.[3] Similarly where a writing contains certain signs or characters the meaning of which is not commonly known, although it is familiar to those among whom such signs or characters are used, parol evidence of their meaning is admissible.[4] There is a sort of mercantile shorthand made up of few and short expressions which generally convey the full meaning and intention of the par-

97. *Delaware.*— Penn Steel Casting, etc., Co. *v.* Wilmington Malleable Iron Co., 1 Pennew. 337, 41 Atl. 236.

New Jersey.— Halsey *v.* Adams, 63 N. J. L. 330, 43 Atl. 708.

New York.— Eneas *v.* Hoops, 42 N. Y. Super. Ct. 517.

Ohio.— Thompson *v.* Pinden, 18 Ohio Cir. Ct. 886, 9 Ohio Cir. Dec. 857.

Canada.— Schollfield *v.* Leblond, 2 Rev. de Lég 77.

See 20 Cent. Dig. tit. "Evidence," § 2104 *et seq.*

Existence of technical meaning must be shown. Chase *v.* Ainsworth, (Mich. 1903) 97 N. W. 404, holding that where there was no evidence or offer to show that the phrase in a memorandum of sale, "he to have advance for two weeks," had any definite trade meaning, testimony as to the meaning of that expression was properly excluded.

98. Holt *v.* Collyer, 16 Ch. D. 718, 50 L. J. Ch. 311, 44 L. T. Rep. N. S. 214, 29 Wkly. Rep. 502, holding that the court must be satisfied, either from the instrument itself or from the circumstances of the case, that the word ought to be construed, not in its popular or primary signification, but according to its secondary or technical meaning, before evidence as to the latter meaning can be admitted.

99. *Illinois.*— Myers *v.* Walker, 24 Ill. 133.

Indiana.— Rastetter *v.* Reynolds, 160 Ind. 133, 66 N. E. 612.

Kansas.— Seymour *v.* Armstrong, 62 Kan. 720, 64 Pac. 612 [*affirming* 10 Kan. App. 10, 61 Pac. 675].

New Jersey.— Halsey *v.* Adams, 63 N. J. L. 330, 43 Atl. 708.

New York.— Eneas *v.* Hoops, 42 N. Y. Super. Ct. 517.

Oregon.— Abraham *v.* Oregon, etc., R. Co., 37 Oreg. 495, 60 Pac. 899, 82 Am. St. Rep. 779, 64 L. R. A. 391.

England.— Clayton *v.* Grayson, 5 A. & E. 302, 1 Hurl & W. 159, 4 N. & M. 602, 31 E. C. L. 623.

1. Kohl *v.* Frederick, 115 Iowa 517, 88 N. W. 1055.

2. *Connecticut.*— Comstock *v.* Savage, 27 Conn. 184.

Illinois.— Converse *v.* Wead, 142 Ill. 132, 31 N. E. 314; Rowley *v.* Berrian, 12 Ill. 200; Shattuck *v.* People, 5 Ill. 477.

Indiana.— Barton *v.* Anderson, 104 Ind. 578, 4 N. E. 420.

Iowa.— Cameron *v.* Fellows, 109 Iowa 534, 80 N. W. 567; Lacy *v.* Dubuque Lumber Co., 43 Iowa 510.

Michigan.— Dages *v.* Brake, 125 Mich. 64, 83 N. W. 1039, 84 Am. St. Rep. 556; Rood *v.* Bloomfield School Dist. No. 7, 1 Dougl. 502.

Minnesota.—Maurin *v.* Lyon, 69 Minn. 257, 72 N. W. 72, 65 Am. St. Rep. 568.

Missouri.— Springfield First Nat. Bank *v.* Fricke, 75 Mo. 178, 42 Am. Rep. 397.

Nebraska.— Aultman *v.* Richardson, 7 Nebr. 1.

New Hampshire.—State *v.* Collins, 68 N. H. 299, 44 Atl. 495.

New York.— De Lavallette *v.* Wendt, 75 N. Y. 579, 31 Am. Rep. 494; Collender *v.* Dinsmore, 55 N. Y. 200, 14 Am. Rep. 224; Hulbert *v.* Carver, 37 Barb. 62; Ottman Co. *v.* Martin, 16 Misc. 490, 38 N. Y. Suppl. 966; Sheldon *v.* Benham, 4 Hill 129, 40 Am. Dec. 271.

Tennessee.— Hite *v.* State, 9 Yerg. 357.

Vermont.— Farmers, etc., Bank *v.* Day, 13 Vt. 36.

United States.— U. S. *v.* Hardyman, 13 Pet. 176, 10 L. ed. 113; Barry *v.* Coombe, 1 Pet. 643, 7 L. ed. 295.

See 20 Cent. Dig. tit. "Evidence," § 2107.

3. Dages *v.* Brake, 125 Mich. 64, 83 N. W. 1039, 84 Am. St. Rep. 556. See Evidence, 16 Cyc. 875.

4. *Alabama.*— Moulton *v.* Louisville, etc., R. Co., 128 Ala. 537, 29 So. 602, where evidence to show the meaning of the char-

ties,[5] to those who are in the business, but are unintelligible to others, and parol explanations of such memoranda have always been admitted as violating no rule against contradicting or varying the terms of a written contract.[6] Where a writing is in cipher, the meaning may be explained by a person able to read the cipher.[7]

(v) *Foreign Language.* If the writing is in a language not understood by the court, it may be interpreted.[8]

(vi) *Local Usage of Terms.* Where words or phrases have acquired a definite meaning by local usage, and the language used is such that the court does not understand it, parol evidence is admissible as to the meaning of such words or phrases.[9] But it has also been held that where a term is of general use throughout the state or country and is not peculiar to any particular part or section thereof, it cannot be shown by parol evidence that in a certain locality the

acters "K. D." in a bill of lading was admitted.

Georgia.— Penn Tobacco Co. *v.* Leman, 109 Ga. 428, 34 S. E. 679, holding that the letters "O. K." written on an order for goods, being ambiguous, their meaning may be explained by parol evidence.

Illinois.— Singer Mfg. Co. *v.* Leeds, 48 Ill. App. 297, holding that a party should be allowed to explain the meaning of arbitrary signs and peculiar forms of entry on his account-books which are in evidence.

Louisiana.— De Blois *v.* Reiss, 32 La. Ann. 586.

Minnesota.— Maurin *v.* Lyon, 69 Minn. 257, 72 N. W. 72, 65 Am. St. Rep. 568.

New York.— Arthur *v.* Roberts, 60 Barb. 580.

See 20 Cent. Dig. tit. "Evidence," § 2107.

The figures and lines in a diagram of a public improvement may be explained by parol evidence in a proceeding to confirm an assessment therefor. Hyde Park *v.* Andrews, 87 Ill. 229.

5. Marshall *v.* Lynn, 9 L. J. Exch. 126, 6 M. & W. 109.

6. *California.*—Berry *v.* Kowalsky, (1891) 27 Pac. 286.

Georgia.— Wilson *v.* Coleman, 81 Ga. 297, 6 S. E. 693, where evidence was held admissible to show that "C. L. R. P. oats" means car load of Texas rust-proof oats.

Kansas.— Western Union Tel. Co. *v.* Collins, 45 Kan. 88, 25 Pac. 187, 10 L. R. A. 515.

Minnesota.— Reeves *v.* Cross, 80 Minn. 466, 83 N. W. 443; Maurin *v.* Lyon, 69 Minn. 257, 72 N. W. 72, 65 Am. St. Rep. 568.

Missouri.— Earl Fruit Co. *v.* McKinney, 65 Mo. App. 220 (holding that the term "f. o. b." as used in a contract for the sale of goods may be explained by evidence outside the contract); Heideman *v.* Wolfstein, 12 Mo. App. 366.

New Hampshire.— George *v.* Joy, 19 N. H. 544.

New York.— Dana *v.* Fiedler, 12 N. Y. 40, 62 Am. Dec. 130; Storey *v.* Solomon, 6 Daly 531, holding that evidence of stockbrokers is admissible to explain abbreviated expressions used in a written contract, giving an option to buy or sell certain stock.

North Carolina.— White *v.* McMillan, 114 N. C. 349, 19 S. E. 234.

Texas.— See Ullman *v.* Babcock, 63 Tex. 68.

See 20 Cent. Dig. tit. "Evidence," § 2105 *et seq.*

7. Wilson *v.* Frisbee, 57 Ga. 269; Wingate *v.* Mechanics' Bank, 10 Pa. St. 104.

8. Erusha *v.* Tomash, 98 Iowa 510, 67 N. W. 390.

9. *Florida.*— Hinote *v.* Brigman, 44 Fla. 589, 33 So. 303.

Illinois.— Galena Ins. Co. *v.* Kupfer, 28 Ill. 332, 81 Am. Dec. 284; Myers *v.* Walker, 24 Ill. 133 (holding that the local meaning of the word "season" in a contract for the purchase and delivery of corn at a particular locality during "the coming season" may be shown by extrinsic evidence); Broadwell *v.* Broadwell, 6 Ill. 599.

Indiana.— Rastetter *v.* Reynolds, 160 Ind. 133, 66 N. E. 612.

Iowa.— Wood *v.* Allen, 111 Iowa 97, 82 N. W. 451; Steyer *v.* Dwyer, 31 Iowa 20 (holding that parol evidence is admissible to show that the word "town" as used in a stipulation not to resume business in the same town had, by established usage, acquired the signification of "town and vicinity"); Pilmer *v.* Des Moines Branch State Bank, 16 Iowa 321.

New Jersey.— Smith *v.* Clayton, 29 N. J. L. 357.

North Carolina.—Tatum *v.* Sawyer, 9 N. C. 226.

Oregon.— Abraham *v.* Oregon, etc., R. Co., 37 Oreg. 495, 60 Pac. 899, 82 Am. St. Rep. 779, 64 L. R. A. 391.

Texas.— Dewees *v.* Lockhart, 1 Tex. 535.

England.— Smith *v.* Wilson, 3 B. & Ad. 728, 1 L. J. K. B. 194, 23 E. C. L. 319, holding that in an action on a lease of an estate including a rabbit warren, evidence of usage was admissible to show that the words "thousand of rabbits" were understood to mean one hundred dozen, the decision being placed on the ground that the words "hundred," "thousand," and the like were not understood when applied to particular subjects to mean that number of units but that the definition was not fixed by law and was therefore open to such proof of usage.

term has a meaning other than that which it has in other parts of the state or country.[10]

(VII) *Intention to Use Words of Particular Meaning.* Evidence is not admissible of such facts as tend only to show that the writer intended to use words bearing a particular sense.[11]

11. Customs and Usages. The extent to which evidence of custom and usage is admissible in construction of a written instrument is treated elsewhere in this work.[12]

12. Date of Instrument. As a general rule it is admissible to show by parol the true date of an instrument, even though such evidence may tend to vary the writing, or to supply the date when it is omitted, for the date is not generally such an important element of the agreement that the reason of the rule against parol evidence applies thereto; and in addition to this the evidence usually amounts to mere correction of a mistake.[13] But the rule against parol evidence to vary or contradict written agreements applies in full force to preclude any evi-

See 20 Cent. Dig. tit. "Evidence," § 2105. And see Customs and Usages, 12 Cyc. 1228.

10. Brown *v.* Brown, 8 Metc. (Mass.) 573 [*distinguishing* Smith *v.* Wilson, 3 B. & Ad. 728, 1 L. J. K. B. 194, 23 E. C. L. 319]; Stillman *v.* Burfeind, 21 N. Y. App. Div. 13, 47 N. Y. Suppl. 280; Tatum *v.* Sawyer, 9 N. C. 226. But *compare* Pilmer *v.* Des Moines Branch State Bank, 16 Iowa 321, holding that where the word "currency" had acquired a local meaning different from its usual significance, which was known to the parties to a draft payable "in currency," who contracted with reference to such meaning in making and accepting it, parol evidence was admissible, in an action thereon, to show such meaning.

11. Grant *v.* Grant, L. R. 5 C. P. 727, 39 L. J. C. P. 272, 22 L. T. Rep. N. S. 829, 18 Wkly. Rep. 951.

12. See Customs and Usages, 12 Cyc. 1081 *et seq.*, 1091 *et seq.*

13. *Alabama.*— Burns *v.* Moore, 76 Ala. 339, 52 Am. Rep. 332; Robbins *v.* Webb, 68 Ala. 393; Miller *v.* Hampton, 37 Ala. 342; Aldridge *v.* Decatur Branch Bank, 17 Ala. 45.

Arkansas.— Howell *v.* Rye, 35 Ark. 470; Trowbridge *v.* Sanger, 4 Ark. 179.

California.— Gately *v.* Irvine, 51 Cal. 172.

District of Columbia.— District of Columbia *v.* Camden Iron Works, 15 App. Cas. 198 [*affirmed* in 181 U. S. 453, 21 S. Ct. 680, 45 L. ed. 948].

Georgia.— Russell *v.* Carr, 38 Ga. 459.

Illinois.— Lambe *v.* Manning, 171 Ill. 612, 49 N. E. 509; Blake *v.* Fash, 44 Ill. 302; Abrams *v.* Pomeroy, 13 Ill. 133; Thompson *v.* Schuyler, 7 Ill. 271; School Dist. No. 4 *v.* Stilley, 36 Ill. App. 133.

Indiana.— Briggs *v.* Fleming, 112 Ind. 313, 14 N. E. 86.

Iowa.— Barlow *v.* Buckingham, 68 Iowa 169, 26 N. W. 58; McIntosh *v.* Lee, 57 Iowa 356, 10 N. W. 895.

Kansas.— McFall *v.* Murray, 4 Kan. App. 554, 45 Pac. 1100.

Kentucky.— Perrin *v.* Broadwell, 3 Dana 596; Tribble *v.* Oldham, 5 J. J. Marsh. 137.

Louisiana.— Clauss *v.* Burgess, 12 La. Ann. 142; Drake *v.* Drake, 7 La. Ann. 545; Roy *v.* Gorton, 6 La. Ann. 203; McGill *v.* McGill, 4 La. Ann. 262; Belot *v.* Donnavan, 1 Rob. 257; Kenner *v.* His Creditors, 8 Mart. N. S. 36, 1 La. 121. But *compare* Hepp *v.* Parker, 8 Mart. N. S. 473, in which it was held that the date of an authentic act cannot be contradicted by parol.

Maine.— Partridge *v.* Swazey, 46 Me. 414; Burditt *v.* Hunt, 25 Me. 419, 43 Am. Dec. 289; Churchill *v.* Bailey, 13 Me. 64.

Maryland.— Stockham *v.* Stockham, 32 Md. 196.

Massachusetts.— Sever *v.* Bickford, 15 Gray 73; Gurney *v.* Howe, 9 Gray 404, 69 Am. Dec. 299; Fisk *v.* Fisk, 12 Cush. 150; Battles *v.* Fobes, 21 Pick. 239; Parkman *v.* Crosby, 16 Pick. 297.

Mississippi.— Hinson *v.* Forsdick, (1899) 25 So. 353; McComb *v.* Gilkey, 29 Miss. 146; Dean *v.* De Lezardi, 24 Miss. 424.

Missouri.— Hall *v.* Huffman, 32 Mo. 519.

New York.— Germania Bank *v.* Distler, 64 N. Y. 642 [*affirming* 4 Hun 633, 67 Barb. 333]; Draper *v.* Snow, 20 N. Y. 331, 75 Am. Dec. 408; Kincaid *v.* Archibald, 10 Hun 9; Breck *v.* Cole, 4 Sandf. 79.

North Carolina.— Cutlar *v.* Cutlar, 3 N. C. 154.

Ohio.— Jessup *v.* Dennison, 2 Disn. 150; State *v.* Wallahan, Tapp. 80.

Pennsylvania.—Cover *v.* Manaway, 115 Pa. St. 338, 8 Atl. 393, 2 Am. St. Rep. 552; Hewes *v.* Taylor, 70 Pa. St. 387; Finney's Appeal, 59 Pa. St. 398; Biery *v.* App, 8 Pa. Cas. 54, 4 Atl. 198; Kelly *v.* Thompson, 7 Watts 401; Hall *v.* Benner, 1 Penr. & W. 402, 21 Am. Dec. 394; Parker *v.* Luffborough, 10 Serg. & R. 249; Geiss *v.* Odenheimer, 4 Yeates 278, 2 Am. Dec. 407; Fox *v.* Palmer, 2 Dall. 214, 1 L. ed. 354.

South Carolina.— Pressly *v.* Hunter, 1 Speers 133; Loren *v.* South Carolina Ins. Co., 1 Nott & M. 505; McDowel *v.* Chambers, 1 Strobh. Eq. 347, 47 Am. Dec. 539.

South Dakota.— Erickson *v.* Brookings County, 3 S. D. 434, 53 N. W. 857, 18 L. R. A. 347.

Tennessee.— Garner *v.* Johnston, Peck 24; Alexander *v.* Bland, Cooke 431. See also

dence varying the date of a written instrument, where the date is a material part of the contract or undertaking, so that to vary the date would vary the rights of the parties.[14] Such a case arises where a promissory note is made payable a certain time after date,[15] where the date is referred to in the body of the contract as fixing the time of payment,[16] or where the date of a lease shows the remaining time it has to run and is thus obviously an essential item in the description of the interest created by the instrument, without the fixing of which the whole interest under the lease would be indeterminate.[17] But where a contract provided that certain work should be completed within a certain number of days "after the date of the execution of the contract," parol evidence was admitted to show that the contract was executed and delivered at a date subsequent to the date of the instrument.[18]

Mankin *v.* Fletcher, 7 Coldw. 162; Rogers *v.* Cawood, 1 Swan 142, 55 Am. Dec. 729; Reid *v.* Dodson, 1 Overt. 396. *Contra,* Pratt *v.* Phillips, 1 Sneed 543, 60 Am. Dec. 162 [*cited* in Ferguson *v.* Coleman, 5 Heisk. 378, 380].

Texas.— Perry *v.* Smith, 34 Tex. 277.

Vermont.— Wilmot *v.* Lathrop, 67 Vt. 671, 32 Atl. 861 (holding that the true date when tax listers were sworn and when they deposited the quadrennial appraisal in the town-clerk's office could be shown by parol, although there was attached to the appraisal, as deposited, a certificate that the oath was administered on a day later than that within which the list should have been completed and filed); Bellows *v.* Weeks, 41 Vt. 590; Goodwin *v.* Perkins, 39 Vt. 598; Hopkins *v.* Danby School Dist. No. 3, 27 Vt. 281; Jarvis *v.* Barker, 3 Vt. 445.

Wisconsin.— Moore *v.* Smead, 89 Wis. 558, 62 N. W. 426.

United States.— U. S. *v.* Le Baron, 19 How. 73, 15 L. ed. 525; Pascault *v.* Cochran, 34 Fed. 358.

England.— Steele *v.* Mart, 4 B. & C. 272, 6 D. & R. 392, 28 Rev. Rep. 256, 10 E. C. L. 576; Davis *v.* Jones, 17 C. B. 625, 25 L. J. C. P. 91, 4 Wkly. Rep. 248, 84 E. C. L. 625; Clayton's Case, 5 Coke 1; Hubert *v.* Moreau, 2 C. & P. 528, 12 E. C. L. 715; Oshey *v.* Hicks, Cro. Jac. 263; Hall *v.* Cazenove, 4 East 477.

Canada.— Doe *v.* Dickinson, 12 N. Brunsw. 459.

See 20 Cent. Dig. tit. "Evidence," § 1858.

An intentional antedating may be shown by parol. Bird *v.* Munroe, 66 Me. 337, 22 Am. Rep. 571.

A mistake in the date of an advertisement of a sale on execution may be shown by parol. Arberry *v.* Noland, 2 J. J. Marsh. (Ky.) 421.

Affecting time for recording.— Parol evidence is admissible to show that the date stated in the *in testimonium* clause of a mortgage of personal property is not its true date, from which the time limited by statute for the recording thereof begins to run. Shaughnessey *v.* Lewis, 130 Mass. 355.

Notice of school-district meeting.— A statute providing merely that the notice for a school-district meeting shall be posted a certain time before the meeting, but prescribing no way of showing that the notice has been up the specified time, does not require that the notice shall be dated, and hence parol evidence is admissible to show when the notice was in fact posted. Braley *v.* Dickinson, 48 Vt. 599.

Evidence that an instrument was not dated when delivered and that a date was subsequently inserted without authority by the person to whom it was delivered is admissible. California Pac. Mut. Ins. Co. *v.* Shaffer, 30 Tex. Civ. App. 313, 70 S. W. 566.

A writ dated on Sunday may be shown by parol to have been in fact made on another day. Trafton *v.* Rogers, 13 Me. 315.

Time of issuing writ may be shown by parol. Jenkens *v.* Cockerham, 23 N. C. 309. *Contra,* Crosby *v.* Stone, 3 N. J. L. 988.

Time of operation.— Parol evidence is admissible to show that a written contract which has no date was not intended to operate from its delivery but from a future uncertain period. Davis *v.* Jones, 17 C. B. 625, 25 L. J. C. P. 91, 4 Wkly. Rep. 248, 84 E. C. L. 625.

Time of taking effect.— Where a railroad time-table, on the reverse side of which rules for employees were printed, contained nothing to show when the rules took effect, the fact that the time-table recited that it took effect on a certain day did not preclude proof *aliunde* that the rules were in force prior to that time. Lake Erie, etc., R. Co. *v.* Charman, 161 Ind. 95, 67 N. E. 923.

The date of the approval of an ordinance may be shown by parol, where the record is silent or ambiguous as to such date. Avoca *v.* Pittston, etc., R. Co., 7 Kulp (Pa.) 470.

Mistake in the date of a notice of tax-sale cannot be shown by parol. Fitch *v.* Pinckard, 5 Ill. 69.

14. Scribner *v.* Mansfield, 68 Me. 74; Cushman *v.* Waite, 21 Me. 540; Milliken *v.* Coombs, 1 Me. 343, 10 Am. Dec. 70. See also Styles *v.* Wardle, 4 B. & C. 908, 7 D. & R. 507, 4 L. J. K. B. O. S. 81, 28 Rev. Rep. 501, 10 E. C. L. 854.

Blank date in power of attorney may be supplied by parol evidence. Rapley *v.* Price, 9 Ark. 428.

15. Huston *v.* Young, 33 Me. 85.

16. Joseph *v.* Bigelow, 4 Cush. (Mass.) 82.

17. Kingsley *v.* Siebrecht, 92 Me. 23, 42 Atl. 249, 69 Am. St. Rep. 486.

18. District of Columbia *v.* Camden Iron

13. Discharge, Performance, and the Like — a. In General. It is always competent for a party to a written contract or obligation to show that his liability thereunder has been terminated by some method known to the law.[19] Thus it is permissible to show that a contract or other obligation has been fully discharged, as this does not vary the terms of the writing in any particular,[20] or that a party has been released from all or a part of his obligations under the writing.[21] It is also permissible to show that the obligations which a party to a writing has thereby assumed have been performed by him,[22] or that the written agreement between the parties has been entirely rescinded, abrogated, or abandoned by them.[23]

b. Payment or Accord and Satisfaction. Where a writing evidences an obligation or a promise to pay money, or is based upon a money consideration, it is admissible to show by extrinsic evidence that the money has been paid,[24] or the

Works, 181 U. S. 453, 21 S. Ct. 680, 45 L. ed. 948 [*affirming* 15 App. Cas. (D. C.) 198].

19. Jones *v.* Trawick, 31 Ala. 253; King *v.* Greer, 49 Ga. 545; Dauchy Iron Works *v.* Toles, 76 Ill. App. 669; Harrington *v.* Samples, 36 Minn. 200, 30 N. W. 671.

20. *Arkansas.*— Borden *v.* Peay, 20 Ark. 293.

California.— Howard *v.* Stratton, (1884) 2 Pac. 263.

Illinois.— Dauchy Iron Works *v.* Toles, 76 Ill. App. 669.

Iowa.— Sutton *v.* Gribel, 118 Iowa 78, 91 N. W. 825.

Kentucky.— Louisville Tobacco Warehouse Co. *v.* Stewart, 70 S. W. 285, 24 Ky. L. Rep. 934.

Massachusetts.— Crosman *v.* Fuller, 17 Pick. 171.

Minnesota.— Levering *v.* Langley, 8 Minn. 107.

Missouri.— Baile *v.* St. Joseph F. & M. Ins. Co., 73 Mo. 371.

New York.— Juilliard *v.* Chaffee, 92 N. Y. 529.

North Carolina.— Walters *v.* Walters, 34 N. C. 28, 55 Am. Dec. 401.

Ohio.— Roberts *v.* Elmore, 3 Ohio Dec. (Reprint) 208, 4 Wkly. L. Gaz. 393.

Texas.— Harper *v.* Kelley, 1 Tex. App. Civ. Cas. § 21.

Vermont.— Reynolds *v.* Scott, Brayt. 75.

See 20 Cent. Dig. tit. "Evidence," § 2145.

21. Howard *v.* Gresham, 27 Ga. 347 (holding that parol evidence is admissible to show a release *pro tanto* of a mortgage by part payment); Dauchy Iron Works *v.* Toles, 76 Ill. App. 669; Bryant *v.* Thesing, 46 Nebr. 244, 64 N. W. 967.

22. Henry *v.* Herschey, (Ida. 1904) 75 Pac. 266 (compliance with one of conditions of instrument before execution); Louisiana Union Bank *v.* Coster, 3 N. Y. 203, 53 Am. Dec. 280; Pairo *v.* Bethell, 75 Va. 825; Chapman *v.* Ingram, 30 Wis. 290.

In an action on a promissory note, evidence is admissible to show that it was given to secure the performance of a certain agreement by the maker, and that such agreement has been performed. Howard *v.* Stratton, 64 Cal. 487, 2 Pac. 263; Gifford *v.* Fox, 2 Nebr. (Unoff.) 30, 95 N. W. 1066; Clark *v.* Ducheneau, 26 Utah 97, 72 Pac. 331.

23. *Illinois.*— Alschuler *v.* Schiff, 164 Ill. 298, 45 N. E. 424 [*reversing* 59 Ill. App. 51].

Indiana.— Rhodes *v.* Thomas, 2 Ind. 638.

Kentucky.— Hawkins *v.* Lowry, 6 J. J. Marsh. 245.

Louisiana.— Gardiner *v.* Bataille, 5 La. Ann. 597, holding that the dissolution of a partnership formed in writing, when it might have been formed verbally, may be shown by parol. *Contra*, Sharkey *v.* Wood, 5 Rob. 326; Spencer *v.* Sloo, 8 La. 290; Andrus *v.* Chretien, 7 La. 318.

New Hampshire.— Buel *v.* Miller, 4 N. H. 196.

New Jersey.— Mairs *v.* Sparks, 5 N. J. L. 513, holding that parol evidence is admissible to show that a lease has been surrendered.

North Dakota.— Wadge *v.* Kittleson, 12 N. D. 452, 97 N. W. 856.

Tennessee.—Walker *v.* Wheatly, 2 Humphr. 119.

See 20 Cent. Dig. tit. "Evidence," § 2145.

Reinstatement.— Where parol evidence has been introduced to show the rescission of a contract under seal by mutual consent, it is also admissible to show its subsequent reinstatement. Flynn *v.* McKeon, 6 Duer (N. Y.) 203.

24. *Georgia.*— Ober, etc., Co. *v.* Drane, 106 Ga. 406, 32 S. E. 371.

Idaho.— Vincent *v.* Larson, 1 Ida. 241.

Indiana.— Ketcham *v.* Hill, 42 Ind. 64.

Louisiana.— Dull *v.* Gordon, 24 La. Ann. 478; Stewart *v.* McDonald, 18 La. Ann. 194; Derouin *v.* Segura, 5 La. Ann. 550; Macarty *v.* Gasguet, 11 Rob. 270.

Maine.— Thornton *v.* Wood, 42 Me. 282; Thayer *v.* Mowry, 36 Me. 287.

Massachusetts.— Savage *v.* Blanchard, 148 Mass. 348, 19 N. E. 396.

Mississippi.— Stadeker *v.* Jones, 52 Miss. 729.

Missouri.— The Charlotte *v.* Hammond, 9 Mo. 59, 43 Am. Dec. 536; Estes *v.* Fry, 22 Mo. App. 53.

New Jersey.— Berry *v.* Berry, 17 N. J. L. 440.

New York.— Waters *v.* Travis, 9 Johns. 450.

See 20 Cent. Dig. tit. "Evidence," § 2148.

Payment of a judgment may be proved by parol.

Indiana.— Morrison *v.* King, 4 Blackf. 125.

obligation satisfied.[25] And this is true even though the evidence tends to show a payment or satisfaction other than in money or in the method provided by the writing, provided the payment or satisfaction actually made has been accepted by the parties as a compliance with the obligation which the writing shows; or is in accordance with an agreement that the obligation may be satisfied in that manner.[26] A person liable upon a written instrument may show that his liability has been discharged by accord and satisfaction.[27]

c. Waiver and Estoppel. Parol or other extrinsic evidence has been admitted to show that a party to a contract has waived the benefit of or become estopped to assert his rights under some or all of the provisions in his favor in the agreement.[28]

14. Dispute as to Contractual Character of Writing. The rule which excludes parol evidence to contradict or vary the terms of a written agreement can be applied only when a written agreement is proved to exist between the parties, and consequently parol evidence is admissible to show that a writing, although purporting on its face to be a contract, was not in fact intended by the parties to be such.[29]

Iowa.— Hollenbeck *v.* Stanberry, 38 Iowa 325.

Kentucky.— French *v.* Frazier, 7 J. J. Marsh. 425.

Louisiana.— Vidichi *v.* Cousin, 6 La. Ann. 489.

Pennsylvania.— Fowler *v.* Smith, 153 Pa. St. 639, 25 Atl. 744.

Tennessee.— Gates *v.* Brinkley, 4 Lea 710.

Texas.— Imperial Roller Milling Co. *v.* Cleburne First Nat. Bank, 5 Tex. Civ. App. 686, 27 S. W. 49.

See 20 Cent. Dig. tit. "Evidence," § 2148.

25. Reynolds *v.* Scott, Brayt. (Vt.) 75.

26. *Arkansas.*— Borden *v.* Peay, 20 Ark. 293.

Georgia.— Denham *v.* Walker, 93 Ga. 497, 21 S. E. 102.

Indiana.— Tucker *v.* Tucker, 113 Ind. 272, 13 N. E. 710; Isbell *v.* Brinkman, 70 Ind. 118.

Kentucky.— Duncan *v.* Sheehan, 13 Ky. L. Rep. 780.

Maryland.— Elysville Mfg. Co. *v.* Okisko Co., 1 Md. Ch. 392.

New Jersey.— Oliver *v.* Phelps, 20 N. J. L. 180 [*affirmed* in 21 N. J. L. 597].

Pennsylvania.— Fowler *v.* Smith, 153 Pa. St. 639, 25 Atl. 744.

Vermont.— Sanders *v.* Howe, 1 D. Chipm. 363.

See 20 Cent. Dig. tit. "Evidence," §§ 2147, 2148.

27. Savage *v.* Blanchard, 148 Mass. 348, 19 N. E. 396. See also Oliver *v.* Phelps, 20 N. J. L. 180. And see, generally, Accord and Satisfaction, 1 Cyc. 305.

28. *Connecticut.*— O'Keefe *v.* St. Francis' Church, 59 Conn. 551, 22 Atl. 325; Sheldon *v.* Connecticut Mut. L. Ins. Co., 25 Conn. 207, 65 Am. Dec. 565.

Louisiana.— Edson *v.* McGraw, 37 La. Ann. 294; Pino *v.* Merchants' Mut. Ins. Co., 19 La. Ann. 214, 92 Am. Dec. 529.

Maine.— Medomak Bank *v.* Curtis, 24 Me. 36.

Maryland.— Franklin F. Ins. Co. *v.* Hamill, 5 Md. 170.

Massachusetts.— Leathe *v.* Bullard, 8 Gray 545; Thompson *v.* Catholic Cong. Soc., 5 Pick. 469.

Michigan.— Duplanty *v.* Stokes, 103 Mich. 630, 61 N. W. 1015, holding that parol evidence that delay in performance of a written contract was assented to by the other party is admissible.

New York.— Brady *v.* Cassidy, 145 N. Y. 171, 39 N. E. 814; Pechner *v.* Phœnix Ins. Co., 65 N. Y. 195; Carroll *v.* Charter Oak Ins. Co., 1 Abb. Dec. 316, 10 Abb. Pr. N. S. 166 [*affirming* 40 Barb. 292]; Baldwin *v.* Citizens' Ins. Co., 60 Hun 389, 15 N. Y. Suppl. 587; Matter of Zillig, 13 N. Y. St. 891; Fleming *v.* Gilbert, 3 Johns. 528. See also Parker *v.* Syracuse, 31 N. Y. 376; Delacroix *v.* Bulkley, 13 Wend. 71.

Pennsylvania.— Raffensberger *v.* Cullison, 28 Pa. St. 426; Grove *v.* Donaldson, 15 Pa. St. 128.

United States.— Glover *v.* Baltimore Nat. F. Ins. Co., 85 Fed. 125, 30 C. C. A. 95.

See 20 Cent. Dig. tit. "Evidence," § 2146.

A contract under seal may be waived by a parol agreement especially if the latter is executed. Munroe *v.* Perkins, 9 Pick. (Mass.) 298, 20 Am. Dec. 475. See also cases cited in Contracts, 9 Cyc. 597 note 91.

29. Pechner *v.* Phœnix Ins. Co., 65 N. Y. 195; Grierson *v.* Mason, 60 N. Y. 394; Richardson *v.* Home Ins. Co., 47 N. Y. Super. Ct. 138; Pattle *v.* Hornibrook, [1897] 1 Ch. 25, 66 L. J. Ch. 144, 75 L. T. Rep. N. S. 475, 45 Wkly. Rep. 123. See also Hathaway *v.* Rogers, 112 Iowa 638, 84 N. W. 674. Where a paper set up as an agreement is not admitted to be such by the party sought to be affected by it and there is a conflict of evidence on the question whether it is such agreement or not, the court will not exclude testimony adduced to prove a verbal agreement differing in its terms from the written one, but will merely direct the jury to disregard such testimony in case they find the writing to be the agreement of the parties. Bruce *v.* Snow, 18 N. H. 514; Hoag *v.* Owen, 57 N. Y. 644.

15. Formal Parts of Instrument. The reasons upon which the rule excluding parol evidence to add to, vary, or contradict a written instrument is founded confine it to the essential and substantial parts of the writing and the rule does not apply to those parts which are merely formal.[30]

16. Identification of Writing. Evidence, the sole purpose of which is to identify a writing offered in evidence, is not objectionable as tending to vary or contradict it.[31]

17. Inducing Cause. It has been held that where the execution of a written instrument has been induced by an oral stipulation or agreement made at the time, on the faith of which the party executed the writing and without which he would not have executed it, but such agreement or stipulation is omitted from the writing, even if its omission is not due to fraud or mistake, evidence of the oral agreement or stipulation may be given, although it may have the effect of varying the contract or obligation evidenced by the writing,[32] where there has been an attempt to make a fraudulent use of the instrument in violation of such promise or agreement, or where the circumstances would make the use of the writing for any purpose inconsistent with such agreement dishonest or fraudulent.[33] This rule is put upon the ground that the attempt by one party afterward to take advantage of the omission of such terms from the contract is a fraud upon the other party who was induced to execute it upon the faith of

Whether a written contract has been consummated is a question which may always rest in parol. Hayward Rubber Co. *v.* Dunklee, 30 Vt. 29.

30. Barmore *v.* Jay, 2 McCord (S. C.) 371, 13 Am. Dec. 736.

31. Baltes Land, etc., Co. *v.* Sutton, 32 Ind. App. 14, 69 N. E. 179; Bradley *v.* Delaware County, 54 Iowa 137, 6 N. W. 175.

32. *Nebraska.*— Barnett *v.* Pratt, 37 Nebr. 349, 55 N. W. 1050. See also Norman *v.* Waite, 30 Nebr. 302, 46 N. W. 639.

New Jersey.— Black *v.* Lamb, 12 N. J. Eq. 108.

Ohio.— Wales *v.* Bates, 1 Ohio Dec. (Reprint) 180, 3 West. L. J. 263.

Pennsylvania.— *In re* Sutch, 201 Pa. St. 305, 50 Atl. 943; Clinch Valley Coal, etc., Co. *v.* Willing, 180 Pa. St. 165, 36 Atl. 737, 57 Am. St. Rep. 626; Close *v.* Zell, 141 Pa. St. 390, 21 Atl. 770, 23 Am. St. Rep. 296; Sidney School-Furniture Co. *v.* Warsaw School Dist., 130 Pa. St. 76, 18 Atl. 604; Cullmans *v.* Lindsay, 114 Pa. St. 166, 6 Atl. 332; Thomas *v.* Loose, 114 Pa. St. 35, 6 Atl. 326; Brown *v.* Morange, 108 Pa. St. 69; Juniata Bldg., etc., Assoc. *v.* Hetzel, 103 Pa. St. 507; Greenawalt *v.* Kohne, 85 Pa. St. 369; Thudium *v.* Yost, 7 Pa. Cas. 306, 11 Atl. 436; Campbell *v.* McClenachan, 6 Serg. & R. 171; Commonwealth Title Ins., etc., Co. *v.* Folz, 19 Pa. Super. Ct. 28; McCormick Harvesting Mach. Co. *v.* Nicholson, 17 Pa. Super. Ct. 188; Chicago Cottage Organ Co. *v.* McManigal, 8 Pa. Super. Ct. 632; Osborne *v.* Walley, 8 Pa. Super. Ct. 193; Smith *v.* Harvey, 4 Pa. Super Ct. 377; Emrick *v.* Groome, 4 Pa. Dist. 511; Boyd *v.* Breece, 3 Phila. 206; Hill *v.* Schucker, 1 Woodw. 251. See also Rearich *v.* Swinehart, 11 Pa. St. 233, 51 Am. Dec. 540; Renshaw *v.* Gans, 7 Pa. St. 117; Elliott *v.* Adams, 3 Wkly. Notes Cas. 44.

Tennessee.— Waterbury *v.* Russell, 8 Baxt. 159; Leinau *v.* Smart, 11 Humphr. 308.

See 20 Cent. Dig. tit. "Evidence," § 2049. But *compare* Concord Bank *v.* Rogers, 16 N. H. 9; Scholz *v.* Dankert, 69 Wis. 416, 34 N. W. 394.

33. *Alabama.*—Kennedy *v.* Kennedy, 2 Ala. 571.

District of Columbia.— Tobriner *v.* White, 19 App. Cas. 163.

New York.— Juilliard *v.* Chaffee, 92 N. Y. 529; Lawrence *v.* Sullivan, 79 N. Y. App. Div. 453, 80 N. Y. Suppl. 499.

Pennsylvania.— Myerstown Bank *v.* Roessler, 186 Pa. St. 431, 40 Atl. 963; Cooper *v.* Potts, 185 Pa. St. 115, 39 Atl. 824; Phillips *v.* Meily, 106 Pa. St. 536; Breneman *v.* Furniss, 90 Pa. St. 186, 35 Am. Rep. 651; Hoopes *v.* Beale, 90 Pa. St. 82; Lippincott *v.* Whitman, 83 Pa. St. 244; Hoeveler *v.* Mugele, 66 Pa. St. 348; Reitenbaugh *v.* Ludwick, 31 Pa. St. 131; Rearich *v.* Swinehart, 11 Pa. St. 233, 51 Am. Dec. 540; Parke *v.* Chadwick, 8 Watts & S. 98; Morrison *v.* Morrison, 6 Watts & S. 516; Lyon *v.* Huntingdon Bank, 12 Serg. & R. 61; Hartzell *v.* Reiss, 1 Binn. 289; Commonwealth Title Ins., etc., Co. *v.* Folz, 19 Pa. Super. Ct. 28; Hardwick *v.* Pollock, 3 Pa. Dist. 245; Levy *v.* Moore, 1 Phila. 325; Bartol *v.* Shaffer, 7 Northam. Co. Rep. 217.

South Dakota.— Osborne *v.* Stringham, 1 S. D. 406, 47 N. W. 408.

Tennessee.— McCallum *v.* Jobe, 9 Baxt. 168, 40 Am. Rep. 84.

England.— Jervis *v.* Berridge, L. R. 8 Ch. 351, 42 L. J. Ch. 518, 28 L. T. Rep. N. S. 481, 21 Wkly. Rep. 395; Martin *v.* Pycroft, 2 De G. M. & N. 785, 16 Jur. 1125, 22 L. J. Ch. 94, 51 Eng. Ch. 615, 42 Eng. Reprint 1079.

Original fraudulent intent not necessary.— Rearich *v.* Swinehart, 11 Pa. St. 233, 51 Am.

such promise, and hence he will be permitted to show by parol evidence the truth of the matter.[34]

18. Invalidating or Defeating Operation of Instrument — a. In General. The objection to parol evidence does not apply where it is offered not for the purpose of contradicting or varying the effect of a written contract of admitted authority, but to disprove the legal existence or rebut the operation of the instrument,[35] and in order to determine the validity of the writing the true character of the transaction may always be shown.[36] So also evidence which is offered not for the purpose of varying or contradicting the terms of a written instrument but to show that it was never intended to be operative between the parties and never in fact had any legal existence as a contract or grant is admissible.[37]

Dec. 540; Osborne *v.* Stringham, 1 S. D. 406, 47 N. W. 408.

34. Powelton Coal Co. *v.* McShain, 75 Pa. St. 238; Osborne *v.* Walley, 8 Pa. Super. Ct. 193. The writing must have been executed on the faith of the promise and the promise have been made and intended to operate as part of the grant or contract set forth in the deed as fully, if not in the same manner as if it had been reduced to writing. Boyd *v.* Breece, 3 Phila. (Pa.) 206.

Personal liability on mortgage.— It may be shown that it was a part of the contract under which a bond and mortgage were given that the mortgagee should look alone to the property for the payment of the amount secured, and that there was an express understanding that the mortgagor should not be personally liable, it being manifest that except for this understanding the mortgage would not have been executed. Hoopes *v.* Beale, 90 Pa. St. 82; Irwin *v.* Shoemaker, 8 Watts & S. (Pa.) 75. But *compare* Benoit *v.* Schneider, 47 Ind. 13.

35. *Alabama.*—Corbin *v.* Sistrunk, 19 Ala. 203.

Colorado.— Waid *v.* Hobson, 17 Colo. App. 54, 67 Pac. 176.

Illinois.— Black *v.* Wabash, etc., R. Co., 111 Ill. 351, 53 Am. Rep. 628.

Indian Territory.— Fox *v.* Tyler, 3 Indian Terr. 1, 53 S. W. 462.

Iowa.— Bowman *v.* Torr, 3 Iowa 571.

Kentucky.— Ray *v.* Barker, 1 B. Mon. 364.

Louisiana.— Lerude's Succession, 11 La. Ann. 386.

Massachusetts.— Baker *v.* Briggs, 8 Pick. 122, 19 Am. Dec. 311. See also Reidell *v.* Morse, 19 Pick. 358.

Michigan.— See Doyle *v.* Dobson, 74 Mich. 562, 42 N. W. 137.

Missouri.— Joerdens *v.* Schrimpf, 77 Mo. 383; Durette *v.* Briggs, 47 Mo. 356.

New York.— Pechner *v.* Phœnix Ins. Co., 65 N. Y. 195.

Vermont.— Cameron *v.* Estabrooks, 73 Vt. 73, 50 Atl. 638; Webster *v.* Smith, 72 Vt. 12, 13, 47 Atl. 101, where the court said: "The rule which prohibits the introduction of parol evidence to vary a written instrument has no application when the legal existence or binding force of the instrument is in question."

See 20 Cent. Dig. tit. "Evidence," §§ 1969–1974.

Evidence of an alteration of a lease in a material matter is admissible as tending to prove that the instrument is void for that reason. Everman *v.* Robb, 52 Miss. 653, 24 Am. Rep. 682.

Grant of public lands may be shown to be void. Pearson *v.* Baker, 4 Dana (Ky.) 321; Jennings *v.* Whitaker, 4 T. B. Mon. (Ky.) 50; Atchley *v.* Latham, 2 Litt. (Ky.) 362; Dallam *v.* Handley, 2 A. K. Marsh. (Ky.) 418; Cummings *v.* Powell, 116 Mo. 473, 21 S. W. 1079, 38 Am. St. Rep. 610 [*distinguishing* Ehrhardt *v.* Hogaboom, 115 U. S. 67, 5 S. Ct. 1157, 29 L. ed. 346; French *v.* Fyan, 93 U. S. 169, 23 L. ed. 812]; Collins *v.* Brannin, 1 Mo. 540 (holding that under the general issue in ejectment, evidence may be given to prove that plaintiff of record, who claimed under a patent from the United States, was dead at the time the patent issued); Mason *v.* Russel, 1 Tex. 721.

36. Robertson *v.* Robinson, 65 Ala. 610, 39 Am. Rep. 17. Thus where the law incapacitates persons from making contracts of a particular kind the form of the contract cannot prevent their being allowed to prove the real nature of the transaction by parol evidence or other proof going to contradict the contents of the instrument and tending to show that the parties intended to evade the provisions of the law. Leblanc *v.* Bouchereau, 16 La. Ann. 11; Waggaman *v.* Zacharie, 8 Rob. (La.) 181; Macarty *v.* Roach, 7 Rob. (La.) 357; Firemens' Ins. Co. *v.* Cross, 4 Rob. (La.) 508; Pilie *v.* Patin, 8 Mart. N. S. (La.) 692; Louisiana State Bank *v.* Rowell, 7 Mart. N. S. (La.) 341; Bradley Fertilizer Co. *v.* Caswell, 65 Vt. 231, 26 Atl. 956.

37. *Alabama.*— Corbin *v.* Sistrunk, 19 Ala. 203.

Illinois.— Robinson *v.* Nessel, 86 Ill. App. 212.

Iowa.— Brewster *v.* Reel, 74 Iowa 506, 38 N. W. 381.

Maryland.— Southern St. R. Advertising Co. *v.* Metropole Shoe Mfg. Co., 91 Md. 61, 46 Atl. 513.

Massachusetts.— Earle *v.* Rice, 111 Mass. 17.

Michigan.— Atwood *v.* Gillett, 2 Dougl. 206.

New Jersey.— Boulevard Globe, etc., Co. *v.* Kern Incandescent Gaslight Co., 67 N. J. L. 279, 51 Atl. 704.

b. Disproving Authenticity of Record. The rule which declares that parol evidence is inadmissible to vary or contradict a record does not prohibit the introduction of such evidence, when the purpose is to show that a paper, writing, or instrument which purports to be a record is in fact not a record.[38]

c. Duress. Parol evidence is admissible to defeat a written instrument by showing that it was executed under duress.[39]

d. Forgery. Parol evidence is always admissible to show that an instrument introduced in evidence is a forgery.[40]

e. Fraud — (i) *In General.*. It is well established that, as fraud vitiates everything which it touches, parol evidence is always admissible to show for the purpose of invalidating a written instrument that its execution was procured by fraud, or that by reason of fraud it does not express the true intentions of the parties.[41] With the limitation that while a party may in an action at law avoid

New York.— Thomas *v.* Scutt, 127 N. Y. 133, 27 N. E. 961; Schmittler *v.* Simon, 114 N. Y. 176, 21 N. E. 162, 11 Am. St. Rep. 621; Union Trust Co. *v.* Whiton, 97 N. Y. 172; Grierson *v.* Mason, 60 N. Y. 394; O'Leary *v.* McDonough, 2 Misc. 219, 23 N. Y. Suppl. 665.

Tennessee.— Perry *v.* Central Southern R. Co., 5 Coldw. 138.

Utah.— Gregg *v.* Groesbeck, 11 Utah 310, 40 Pac. 202, 32 L. R. A. 266.

See 20 Cent. Dig. tit. "Evidence," §§ 1969–1974.

Non-acceptance may be shown in the case of a grant (Corbett *v.* Norcross, 35 N. H. 99), lease (Johnson *v.* Smith, 165 Pa. St. 195, 30 Atl. 675), or trust deed (Armstrong *v.* Morrill, 14 Wall. (U. S.) 120, 20 L. ed. 765.

Where a writing is signed by one party only, parol evidence is admissible to show that the minds of the parties did not meet in the contract alleged to be evidenced thereby, and that it was not in fact consummated by the assent of the other party. Stone *v.* Daggett, 73 Ill. 367.

A writing purporting to be an official certificate may be shown by parol never to have had any legal existence or binding force as such. Hopkins *v.* Danby School Dist. No. 3, 27 Vt. 281.

38. Louisville, etc., R. Co. *v.* Malone, 116 Ala. 600, 22 So. 897; Dyer *v.* Brogan, 70 Cal. 136, 11 Pac. 589; Benwood *v.* Wheeling R. Co., 53 W. Va. 465, 44 S. E. 271.

An entry on the minutes of a corporation may be shown by parol to be the act of the secretary never approved by the board of directors. Saudek *v.* Tennessee Colonial, etc., Co., 1 Baxt. (Tenn.) 289.

39. *Georgia.*— See Southern Express Co. *v.* Duffey, 48 Ga. 358.

Illinois.— Crane *v.* Crane, 81 Ill. 165.

Indian Territory.— Fox *v.* Tyler, 3 Indian Terr. 1, 53 S. W. 462.

Louisiana.— Vicknair *v.* Trosclair, 45 La. Ann. 373, 12 So. 486; Moore *v.* Rush, 30 La. Ann. 1157.

Michigan.— McAllister *v.* Engle, 52 Mich. 56, 17 N. W. 694.

Pennsylvania.— Heeter *v.* Glasgow, 79 Pa. St. 79, 21 Am. Rep. 46; Louden *v.* Blythe, 27 Pa. St. 22, 67 Am. Dec. 442.

Texas.— Westbrooks *v.* Jeffers, 33 Tex. 86; Horton *v.* Reynold, 8 Tex. 284.

See 20 Cent. Dig. tit. "Evidence," §§ 2021–2024.

40. State *v.* Gonce, 79 Mo. 600; Zuver *v.* Clark, 104 Pa. St. 222. The rule applies to both ancient and modern deeds. Parker *v.* Waycross, etc., R. Co., 81 Ga. 387, 8 So. 871; Sibley *v.* Haslan, 75 Ga. 490; Patterson *v.* Collier, 75 Ga. 419, 58 Am. Rep. 472.

41. *Alabama.*— Blackman *v.* Johnson, 35 Ala. 252; Turnipseed *v.* McMath, 13 Ala. 44; Kennedy *v.* Kennedy, 2 Ala. 571; Paysant *v.* Ware, 1 Ala. 160; Cozzins *v.* Whitaker, 3 Stew. & P. 322.

California.— Langley *v.* Rodriguez, 122 Cal. 580, 55 Pac. 406, 68 Am. St. Rep. 70.

Colorado.— Johnson *v.* Cummings, 12 Colo. App. 17, 55 Pac. 269.

Connecticut.— Gustafson *v.* Rustemeyer, 70 Conn. 125, 39 Atl. 104, 66 Am. St. Rep. 92, 39 L. R. A. 644; Calhoun *v.* Richardson, 30 Conn. 210.

Delaware.— Thomas *v.* Grise, 1 Pennew. 381, 41 Atl. 883; Plunkett *v.* Dillon, 4 Del. Ch. 198.

District of Columbia.— Cotharin *v.* Davis, 4 Mackey 146.

Georgia.— Gore *v.* Malsby, 110 Ga. 893, 36 S. E. 315; McBride *v.* Macon Tel. Pub. Co., 102 Ga. 422, 30 S. E. 999.

Illinois.— Race *v.* Weston, 86 Ill. 91; Doyle *v.* Overby, 75 Ill. App. 634; Kuck *v.* Fulfs, 68 Ill. App. 134.

Indiana.— Equitable Trust Co. *v.* Milligan, 3 Ind. App. 20, 65 N. E. 1044. See also State *v.* Holloway, 8 Blackf. 45.

Indian Territory.— Fox *v.* Tyler, 3 Indian Terr. 1, 53 S. W. 462.

Iowa.— Humbert *v.* Larson, 99 Iowa 275, 68 N. W. 703; Bowman *v.* Torr, 3 Iowa 571.

Kentucky.—Huston *v.* Noble, 4 J. J. Marsh. 130; Baugh *v.* Ramsey, 4 T. B. Mon. 155; Morris *v.* Morris, 2 Bibb 311; Garten *v.* Chandler, 2 Bibb 246.

Louisiana.— Dickson *v.* Ford, 38 La. Ann. 736; Montgomery *v.* Chaney, 13 La. Ann. 207; Rachal *v.* Rachal, 4 La. Ann. 500; Akin *v.* Drummond, 2 La. Ann. 92; Baudue *v.* Conrey, 10 Rob. 466; Croizet *v.* Gaudet, 6 Mart. 526. See also Garrett *v.* Crooks, 15 La. Ann. 483.

Maine.— Morton *v.* Chandler, 7 Me. 44.

the contract by proof of fraud, he cannot in such an action establish by parol

Maryland.— Groff *v.* Rohrer, 35 Md. 327; Young *v.* Frost, 5 Gill 287; Watkins *v.* Stockett, 6 Harr. & J. 435.

Massachusetts.— Trambly *v.* Ricard, 130 Mass. 259; Dwight *v.* Pomeroy, 17 Mass. 303, 9 Am. Dec. 148; Stackpole *v.* Arnold, 11 Mass. 27, 6 Am. Dec. 150.

Michigan.— Rambo *v.* Pattison, 133 Mich. 655, 95 N. W. 722 [*distinguishing* Church *v.* Case, 110 Mich. 624, 68 N. W. 424; Bush *v.* Merriman, 87 Mich. 260, 49 N. W. 567]; Cohen *v.* Jackoboice, 101 Mich. 409, 59 N. W. 665; Kranich *v.* Sherwood, 92 Mich. 397, 52 N. W. 741; Phelps *v.* Whitaker, 37 Mich. 72.

Minnesota.— Vilett *v.* Moler, 82 Minn. 12, 84 N. W. 452; Cooper *v.* Finke, 38 Minn. 2, 35 N. W. 469.

Mississippi.— Howie *v.* Pratt, 83 Miss. 15, 35 So. 216; Butler *v.* State, 81 Miss. 734, 33 So. 847; Cocke *v.* Blackbourn, 57 Miss. 689.

Missouri.— Leicher *v.* Keeney, 98 Mo. App. 394, 72 S. W. 145; Muth *v.* St. Louis Trust Co., 94 Mo. App. 94, 67 S. W. 978.

Nebraska.— Bauer *v.* Taylor, (1903) 96 N. W. 268; Martens *v.* Pittock, 3 Nebr. (Unoff.) 770, 92 N. W. 1038.

New Hampshire.— Anderson *v.* Scott, 70 N. H. 350, 47 Atl. 607; Cass *v.* Brown, 68 N. H. 85, 44 Atl. 86.

New Jersey.— Wooden *v.* Shotwell, 23 N. J. L. 465; Useful Manufactures Soc. *v.* Haight, 1 N. J. Eq. 393.

New York.— Juilliard *v.* Chaffee, 92 N. Y. 529; Miller *v.* Barber, 66 N. Y. 558; Scherff *v.* Jacobi, 71 Hun 391, 25 N. Y. Suppl. 37; Mattes *v.* Frankel, 65 Hun 203, 20 N. Y. Suppl. 145; Koop *v.* Handy, 41 Barb. 454; Farmers', etc., Bank *v.* Whinfield, 24 Wend. 419.

North Carolina.— Gwaltney *v.* Provident Sav. L. Assur. Soc., 132 N. C. 925, 44 S. E. 659; Powell *v.* Heptinstall, 79 N. C. 207; Smith *v.* Williams, 5 N. C. 426, 4 Am. Dec. 564.

North Dakota.— Sargent *v.* Cooley, 12 N. D. 1, 94 N. W. 576.

Pennsylvania.— Cooper *v.* Rose Valley Mills, 185 Pa. St. 115, 39 Atl. 824; Phillips *v.* Meily, 106 Pa. St. 536; Kostenbader *v.* Peters, 80 Pa. St. 438; Lippincott *v.* Whitman, 83 Pa. St. 244; Maute *v.* Gross, 56 Pa. St. 250, 94 Am. Dec. 62; Miller *v.* Henderson, 10 Serg. & R. 290; Christ *v.* Diffenbach, 1 Serg. & R. 464, 7 Am. Dec. 624; Com. *v.* Folz, 19 Pa. Super. Ct. 28; Hardwick *v.* Pollock, 3 Pa. Dist. 245. See also Frederick *v.* Campbell, 14 Serg. & R. 293; Drum *v.* Simpson, 6 Binn. 478, 6 Am. Dec. 490.

South Carolina.— Wilcox *v.* Priester, 68 S. C. 106, 46 S. E. 553.

South Dakota.— Osborne *v.* Stringham, 1 S. D. 406, 47 N. W. 408.

Tennessee.— Barnard *v.* Roane Iron Co., 85 Tenn. 139, 2 S. W. 21; McCallum *v.* Jobe, 9 Baxt. 168, 40 Am. Rep. 84; Fine *v.* Stuart, (Ch. App. 1898) 48 S. W. 371.

Texas.— Dunham *v.* Chatham, 21 Tex. 231, 73 Am. Dec. 228; Wuest *v.* Moehrig, 24 Tex. Civ. App. 124, 57 S. W. 864; Herring *v.* Mason, 17 Tex. Civ. App. 559, 43 S. W. 797; Wright *v.* U. S. Mortgage Co., (Civ. App. 1897) 42 S. W. 789. See also Cleburne First Nat. Bank *v.* Turner, (App. 1891) 15 S. W. 710; Oriental Invest. Co. *v.* Barclay, 25 Tex. Civ. App. 543, 64 S. W. 80. But *compare* Lanius *v.* Shuber, 77 Tex. 24, 13 S. W. 614; Gulf, etc., R. Co. *v.* Fenn, (Civ. App. 1903) 76 S. W. 597.

Vermont.— Winn *v.* Chamberlin, 32 Vt. 318.

Virginia.— Starke *v.* Littlepage, 4 Rand. 368.

Washington.— O'Connor *v.* Lighthizer, 34 Wash. 152, 75 Pac. 643; Young *v.* Stampflier, 27 Wash. 350, 67 Pac. 721.

West Virginia.— See Cushwa *v.* Improvement, etc., Assoc., 45 W. Va. 490, 32 S. E. 259.

Wisconsin.— Hurlbert *v.* T. D. Kellogg Lumber, etc., Co., 115 Wis. 225, 91 N. W. 673.

United States.— St. Louis, etc., R. Co. *v.* Dearborn, 60 Fed. 880, 9 C. C. A. 286; Camden Iron Works *v.* Fox, 34 Fed. 200; The Tarquin, 23 Fed. Cas. No. 13,755, 2 Lowell 358.

England.— Marnell *v.* Blake, 2 Ball & B. 35, 4 Dow. 248, 12 Rev. Rep. 88, 3 Eng. Reprint 1153.

Canada.— Watson Mfg. Co. *v.* Stock, 6 Manitoba 146.

See 20 Cent. Dig. tit. "Evidence," § 2005–2020. And see, generally, FRAUD.

Rule applies to sealed instruments.— Stannard *v.* McCarty, Morr. (Iowa) 124.

A verbal agreement may be shown where through fraud of a party the writing does not express the same. McAboy *v.* Johns, 70 Pa. St. 9.

Although the written instrument is silent on the subject to which the fraudulent representation refers, it is nevertheless competent to prove fraud by parol. Davis *v.* Driscoll, 22 Tex. Civ. App. 14, 54 S. W. 43.

Declarations of third person.— In an action on a subscription evidence is not admissible of declarations made at the time by a person not a party to the contract or to the suit, especially where on the faith of defendant's subscription other persons have afterward subscribed. Davis *v.* Meade, 13 Serg. & R. (Pa.) 281.

Evidence furnishing only proof of fraud.— It has been said that parol evidence is not admissible on a ground of fraud where that evidence is itself the only proof of the alleged fraud. Broughton *v.* Coffer, 18 Gratt. (Va.) 184.

Surrounding circumstances.—Where the instrument is attacked for fraud, all the circumstances and transactions leading up to and surrounding the execution of the instrument, as well as the motives and intentions that prompted the makers to execute it, may

evidence and recover upon an agreement different from that expressed in the writing,[42] the rule just stated applies in actions at law as well as in suits in equity.[43]

(II) *APPLICATIONS* — (A) *To Records.* Judicial[44] or official records[45] may, it has been held, be attacked by parol for fraud.

(B) *To Private Writings.* Parol evidence has also been admitted to show fraud in the case of assignments and transfers,[46] bills and notes,[47] and indorsements or transfers thereof,[48] bills of sale,[49] bonds,[50] contracts generally,[51] contracts of

be shown. Fairbanks *v.* Simpson, (Tex. Civ. App. 1894) 28 S. W. 128.

42. Koffman *v.* Southwest Missouri Electric R. Co., 95 Mo. App. 459, 68 S. W. 212; Reed *v.* Moore, 25 N. C. 310. See also Mitchell *v.* Universal L. Ins. Co., 54 Ga. 289; Henderson *v.* Thompson, 52 Ga. 149; Towner *v.* Lucas, 13 Gratt. (Va.) 705.

43. *Alabama.*— Paysant *v.* Ware, 1 Ala. 160.

Georgia.— Tarver *v.* Rankin, 3 Ga. 210.

Illinois.— Windett *v.* Hurlbut, 115 Ill. 403, 5 N. E. 589.

Kentucky.— Tribble *v.* Oldham, 5 J. J. Marsh. 137.

Massachusetts.— Dwight *v.* Pomeroy, 17 Mass. 303, 9 Am. Dec. 148. But *compare* Whiting *v.* Withington, 3 Cush. 413.

Missouri.— See Koffman *v.* Southwest Missouri Electric R. Co., 95 Mo. App. 459.

New York.— Chamboret *v.* Cagney, 35 N. Y. Super. Ct. 474.

Pennsylvania.— Barnhart *v.* Riddle, 29 Pa. St. 92.

Vermont.— Cameron *v.* Estabrooks, 73 Vt. 73, 50 Atl. 638.

Washington.— Young *v.* Stampfler, 27 Wash. 350, 67 Pac. 721.

See 20 Cent. Dig. tit. "Evidence," §§ 2005–2020.

Compare McDonald *v.* Orvis, 16 Fed. Cas. No. 8,764, 5 Biss. 183.

Stipulation that estimate shall be conclusive.— A stipulation in a contract that the engineer's estimate "shall be conclusive upon both parties, unless founded on fraud or mistake," does not render such estimate, as an award of arbitrators, unimpeachable and unassailable except in direct proceedings in equity, and, in an action at law to recover a balance due on the contract, evidence of mistakes implying fraud may be received, so as to entitle plaintiff to recover the agreed price for the work done, although in excess of the engineer's estimate. Terrell Coal Co. *v.* Lacey, (Ala. 1901) 31 So. 109.

44. Warren *v.* Kimball, 59 Me. 264 (holding that the fraudulent antedating of a writ may be shown by parol); Mitchell *v.* Kintzer, 5 Pa. St. 216, 47 Am. Dec. 408; Lowry *v.* McMullan, 8 Pa. St. 157, 49 Am. Dec. 501. But *compare* Morris *v.* Galbraith, 8 Watts (Pa.) 166.

It is only in a clear case, and where it is necessary to prevent manifest injustice, that the effect of a record should be changed by parol. Clawson *v.* Eichbaum, 2 Grant (Pa.) 130.

45. Thorne *v.* Travellers' Ins. Co., 80 Pa. St. 15, 21 Am. Rep. 89.

46. Tussell *v.* Tuttle, 2 Root (Conn.) 22 (holding that parol evidence may be admitted to prove a fraud in the assignment of a public security, although the assignment is in writing); Nicholson *v.* Hendricks, 22 La. Ann. 511; Oliver *v.* Oliver, 4 Rawle (Pa.) 141, 26 Am. Dec. 123.

47. Phœnix Ins. Co. *v.* Owens, 81 Mo. App. 201; American Nat. Bank *v.* Cruger, (Tex. Civ. App. 1898) 44 S. W. 1057. See also COMMERCIAL PAPER, 8 Cyc. 261.

48. Turner *v.* Grobe, (Tex. Civ. App. 1898) 44 S. W. 898.

49. *Arkansas.*— George *v.* Norris, 23 Ark. 121; Plant *v.* Condit, 22 Ark. 454.

Maine.— Cushing *v.* Rice, 46 Me. 303, 71 Am. Dec. 579.

South Carolina.— Johnson *v.* Brockelbank, 2 Hill 353.

Texas.— Halsell *v.* Musgraves, 5 Tex. Civ. App. 476, 24 S. W. 358.

Virginia.— Starke *v.* Littlepage, 4 Rand. 368, holding parol evidence admissible to show fraud in a bill of sale, although under seal.

See 20 Cent. Dig. tit. "Evidence," § 2008.

50. McCulloch *v.* McKee, 16 Pa. St. 289.

51. *Alabama.*—Guntersville Bank *v.* Webb, 108 Ala. 132, 19 So. 14; Tabor *v.* Peters, 74 Ala. 90, 49 Am. Rep. 804; Pierce *v.* Wilson, 34 Ala. 596; Waddell *v.* Glassell, 18 Ala. 561, 54 Am. Dec. 170; Cozzins *v.* Whitaker, 3 Stew. & P. (Ala.) 322.

California.— Isenhoot *v.* Chamberlain, 59 Cal. 630; Murray *v.* Dake, 46 Cal. 644.

Connecticut.— Fox *v.* Tabel, 66 Conn. 397, 34 Atl. 101.

District of Columbia.— Cotharin *v.* Davis, 4 Mackey 146.

Georgia.— Ham *v.* Parkerson, 68 Ga. 830; Lunday *v.* Thomas, 26 Ga. 537.

Illinois.— Grand Tower, etc., R. Co. *v.* Walton, 150 Ill. 428, 37 N. E. 920; Van Buskirk *v.* Day, 32 Ill. 260; Shrimpton *v.* Dunaway, 52 Ill. App. 448.

Indiana.— Baldwin *v.* Burrows, 95 Ind. 81; Hines *v.* Driver, 72 Ind. 125; Gatling *v.* Newell, 9 Ind. 572.

Iowa.— Childs *v.* Dobbins, 61 Iowa 109, 15 N. W. 849; Hopkins *v.* Hawkeye Ins. Co., 57 Iowa 203, 10 N. W. 605, 42 Am. Rep. 41; Day *v.* Lown, 51 Iowa 364, 1 N. W. 786; Wilson Sewing Mach. Co. *v.* Sloan, 50 Iowa 367; Van Dusen *v.* Parley, 40 Iowa 70; Nixon *v.* Carson, 38 Iowa 338; Rohrabacher *v.* Ware, 37 Iowa 85; Cedar Rapids First Nat. Bank *v.* Hurford, 29 Iowa 579; Bowman *v.* Torr, 3 Iowa 571; Hunt *v.* Carr, 3 Greene 581; Stannard *v.* McCarty, Morr. 124.

Kentucky.— Bright *v.* Wagle, 3 Dana 252;

guaranty,[52] contracts of insurance,[53] contracts of sale,[54] deeds of conveyance,[55]

Tribble *v.* Oldham, 5 J. J. Marsh. 137; Edrington *v.* Harper, 3 J. J. Marsh. 353, 20 Am. Dec. 145; Stone *v.* Ramsey, 4 T. B. Mon. 236; Martin *v.* Lewis, 1 A. K. Marsh. 102.

Louisiana.— Lazare *v.* Jacques, 15 La. Ann. 599; Davis *v.* Stern, 15 La. Ann. 177; Morris *v.* Terrenoire, 2 La. Ann. 458; Tilghman's Succession, 11 Rob. 124; Badon *v.* Badon, 6 La. 255; Broussard *v.* Sudrique, 4 La. 347.

Maine.— Prentiss *v.* Russ, 16 Me. 30.

Maryland.— Farrell *v.* Bean, 10 Md. 217; Young *v.* Frost, 5 Gill 287.

Massachusetts.—Holbrook *v.* Burt, 22 Pick. 546; Stackpole *v.* Arnold, 11 Mass. 27, 6 Am. Dec. 150.

Michigan.— Match *v.* Hunt, 38 Mich. 1.

Minnesota.—Lewis *v.* Willoughby, 43 Minn. 307, 45 N. W. 439; Kerrick *v.* Van Dusen, 32 Minn. 317, 20 N. W. 228.

Mississippi.— Hirschburg Optical Co. *v.* Jackson, 63 Miss. 21.

Missouri.— Gooch *v.* Conner, 8 Mo. 391.

New Hampshire.— Lull *v.* Cass, 43 N. H. 62.

New Jersey.— Brewster *v.* Brewster, 38 N. J. L. 119.

New York.— Hall *v.* Erwin, 66 N. Y. 649; Van Alstyne *v.* Smith, 82 Hun 382, 31 N. Y. Suppl. 277; Koop *v.* Handy, 41 Barb. 454; Chapman *v.* O'Brien, 34 N. Y. Super. Ct. 524; Farmers', etc., Bank *v.* Whinfield, 24 Wend. 419; Sandford *v.* Handy, 23 Wend. 260; Phyfe *v.* Wardell, 2 Edw. 47.

North Carolina.— Ray *v.* Blackwell, 94 N. C. 10; Ward *v.* Ledbetter, 21 N. C. 496.

Ohio.— Columbus, etc., R. Co. *v.* Steinfeld, 42 Ohio St. 499; U. S. Home, etc., Assoc. *v.* Reams, 8 Ohio Dec. (Reprint) 272, 7 Cinc. L. Bul. 8 [*affirmed* in 12 Cinc. L. Bul. 264]; Williams *v.* Williams, 2 Ohio Dec. (Reprint) 478, 3 West. L. Month. 258.

Pennsylvania.— Lippincott *v.* Whitman. 83 Pa. St. 244 [*affirming* 3 Wkly. Notes Cas. 94]; Wharton *v.* Douglass, 76 Pa. St. 273; Powelton Coal Co. *v.* McShain, 75 Pa. St. 238; Coughenour *v.* Suhre, 71 Pa. St. 462; Martin *v.* Berens, 67 Pa. St. 459; Fisher *v.* Deibert, 54 Pa. St. 460; Scott *v.* Burton, 2 Ashm. 312; McManaman *v.* Hanover Coal Co., 6 Kulp 181; Wite *v.* Dixon, 35 Leg. Int. 114; Hawk *v.* Greensweig, 7 Pa. L. J. 374.

Texas.— Davis *v.* Driscoll, 22 Tex. Civ. App. 14, 54 S. W. 43; Fairbanks *v.* Simpson, (Civ. App. 1894) 28 S. W. 128; Atchison, etc., R. Co. *v.* Grant, 6 Tex. Civ. App. 674, 26 S. W. 286; Jones *v.* Jones, 2 Tex. App. Civ. Cas. § 1; Glisson *v.* Craig, 1 Tex. App. Civ. Cas. § 42; Peake *v.* Blythe, 1 Tex. App. Civ. Cas. § 7.

Vermont.— Mallory *v.* Leach, 35 Vt. 156, 82 Am. Dec. 625.

Wisconsin.—McKesson *v.* Sherman, 51 Wis. 303, 8 N. W. 200.

United States.— Hunt *v.* Rousmanier, 8 Wheat. 174, 5 L. ed. 589; Howison *v.* Alabama Coal, etc., Co., 70 Fed. 683, 17 C. C. A. 339.

See 20 Cent. Dig. tit. "Evidence," § 2012.

52. Townsend *v.* Cowles, 31 Ala. 428.

53. Maxson *v.* Llewelyn, 122 Cal. 195, 54 Pac. 732; Bennett *v.* Massachusetts Mut. L. Ins. Co., 107 Tenn. 371, 64 S. W. 758; McKenzie *v.* Planters' Ins. Co., 9 Heisk. (Tenn.) 261. And see, generally, INSURANCE.

54. *Alabama.*— Nelson *v.* Wood, 62 Ala. 175; Thompson *v.* Bell, 37 Ala. 438.

Illinois.— Hicks *v.* Stevens, 121 Ill. 186, 11 N. E. 241; Race *v.* Weston, 86 Ill. 91; Wilson *v.* Haecker, 85 Ill. 349; Barrie *v.* Frost, 105 Ill. App. 187; Telluride Power Transmission Co. *v.* Crane Co., 103 Ill. App. 647.

Iowa.— McCormick Harvesting Mach. Co. *v.* Williams, 99 Iowa 601, 68 N. W. 907; Scrogin *v.* Wood, 87 Iowa 497, 54 N. W. 437.

Kansas.— Bird, etc., Map Co. *v.* Jones, 27 Kan. 177.

Louisiana.— Williams *v.* Vance, 2 La. Ann. 908.

Michigan.— Hobbs *v.* Solis, 37 Mich. 357.

Missouri.— Stone *v.* Barrett, 34 Mo. App. 15.

Nebraska.— Bryant *v.* Thesing, 46 Nebr. 244, 64 N. W. 967.

North Carolina.— Knight *v.* Houghtalling, 85 N. C. 17.

Pennsylvania.— Thorne *v.* Warfflein, 100 Pa. St. 519; Bailey *v.* Wyoming Valley Ice Co., 7 Luz. Leg. Reg. 203.

Tennessee.— Deakins *v.* Alley, 9 Lea 494; Smith *v.* Cozart, 2 Head 526.

West Virginia.— Depue *v.* Sergent, 21 W. Va. 326.

United States.— Crocker *v.* Lewis, 6 Fed. Cas. No. 3,399, 3 Sumn. 1.

See 20 Cent. Dig. tit. "Evidence," §§ 2013, 2014.

Waiver of agreements not embodied in writing.— Although a person ordering goods agrees in writing that all claims for verbal agreements not embodied in the agreement "are waived," parol evidence is competent to show that the purchaser signed the order relying on the seller's representations, and that they were false. Peck *v.* Jenison, 99 Mich. 326, 58 N. W. 312.

55. *Alabama.*—Thweatt *v.* McLeod, 56 Ala. 375.

California.— Hick *v.* Thomas, 90 Cal. 289, 27 Pac. 208, 376.

Georgia.— Adams *v.* Jones, 39 Ga. 479.

Indiana.— Ewing *v.* Smith, 132 Ind. 205, 31 N. E. 464.

Iowa.— Fuller *v.* Lamar, 53 Iowa 477, 5 N. W. 606.

Louisiana.— Le Bleu *v.* Savoie, 109 La. 680, 33 So. 729; Thomas *v.* Kennedy, 24 La. Ann. 209; Willis *v.* Kern, 21 La. Ann. 749. But *compare* Hoffmann *v.* Ackermann, 110 La. 1070, 35 S. W. 293.

Maine.— Goodspeed *v.* Fuller, 46 Me. 141, 71 Am. Dec. 572.

Maryland.— Davis *v.* Hamblin, 51 Md. 525.

leases,[56] mortgages,[57] receipts,[58] releases, settlements, or discharges,[59] and subscriptions to corporate stock.[60] It is necessary, in order to permit the introduction of parol evidence of fraud, that fraud should be alleged in the pleadings.[61] Where fraud or mistake is alleged and proved, it is then proper to admit testimony to show the real agreement between the parties, but it is not proper, simply upon the allegation of fraud or mistake, and without proof to establish the averment, to permit parties to offer parol evidence to contradict the writing which purports to contain the contract between them.[62] Parol evidence admitted and admissible

Minnesota.— Cooper *v.* Finke, 38 Minn. 2, 35 N. W. 469; McMurphy *v.* Walker, 20 Minn. 382.

Missouri.— Stone *v.* Barrett, 34 Mo. App. 15.

North Carolina.— Cutler *v.* Roanoke R., etc., Co., 128 N. C. 477, 39 S. E. 30.

Pennsylvania.— Cover *v.* Manaway, 115 Pa. St. 338, 8 Atl. 393, 2 Am. St. Rep. 552; Flagler *v.* Pleiss, 3 Rawle 345; Christ *v.* Diffenbach, 1 Serg. & R. 464, 7 Am. Dec. 624.

West Virginia.— Troll *v.* Carter, 15 W. Va. 567.

United States.— Chandler *v.* Von Roeder, 24 How. 224, 16 L. ed. 633; Morris *v.* Nixon, 1 How. 118, 11 L. ed. 69.

See 20 Cent. Dig. tit. "Evidence," § 2007.

Fraud in obtaining a patent for public lands may be shown by parol. Singery *v.* Atty.-Gen., 2 Harr. & J. (Md.) 487. See also Bell *v.* Hearne, 10 La. Ann. 515.

56. Young *v.* Heffernan, 67 Ill. App. 354; Holley *v.* Young, 66 Me. 520; Meyers *v.* Rosenback, 5 Misc. (N. Y.) 337, 25 N. Y. Suppl. 521; Pryor *v.* Foster, 1 N. Y. Suppl. 774; Robinson *v.* Leahy, 5 Wkly. Notes Cas. (Pa.) 318.

57. Belohradsky *v.* Kuhn, 69 Ill. 547; Barth *v.* Kasa, 30 La. Ann. 940; Cox *v.* King, 20 La. Ann. 209; New Brunswick State Bank *v.* Moore, 5 N. J. L. 470; Heeter *v.* Glasgow, 79 Pa. St. 79, 21 Am. Rep. 46.

The true character of the instrument, for what consideration it was given, and what purpose the parties intended it should subserve may be shown by parol evidence where a mortgage is assailed for fraud. Price *v.* Gover, 40 Md. 102.

The understanding of a witness as to what property was covered by a mortgage is not admissible to control the terms of the mortgage, nor to show fraud in its execution, especially where the witness does not state when he had this understanding. Hurd *v.* Gallaher, 14 Iowa 394.

58. *Georgia.*— Tarver *v.* Rankin, 3 Ga. 210.

Michigan.— Michigan Cent. R. Co. *v.* Dunham, 30 Mich. 128.

New Hampshire.— King *v.* Hutchins, 28 N. H. 561.

New York.— Joslyn *v.* Capron, 64 Barb. 598.

South Carolina.— Hogg *v.* Brown, 2 Brev. 223.

See 20 Cent. Dig. tit. "Evidence," § 2018.

59. Jamison *v.* Ludlow, 3 La. Ann. 492; Akin *v.* Drummond, 2 La. Ann. 92; Brownson *v.* Fenwick, 19 La. 431; Martin *v.* Righter, 10 N. J. Eq. 510; Lord *v.* American Mut. Acc. Assoc., 89 Wis. 19, 61 N. W. 293, 46 Am. St. Rep. 815, 26 L. R. A. 741.

60. Anderson *v.* Scott, 70 N. H. 350, 47 Atl. 607; Turner *v.* Grobe, (Tex. Civ. App. 1898) 44 S. W. 898.

61. *Connecticut.*— New Idea Pattern Co. *v.* Whelan, 75 Conn. 455, 53 Atl. 953.

Georgia.— Miller *v.* Cotten, 5 Ga. 341.

Kentucky.— Morris *v.* Morris, 2 Bibb 311.

Louisiana.— See Johnson *v.* Flanner, 42 La. Ann. 522, 7 So. 455.

Maryland.— Watkins *v.* Stockett, 6 Harr. & J. 435.

Michigan.— Cohen *v.* Jackoboice, 101 Mich. 409, 59 N. W. 665.

Nebraska.— Bauer *v.* Taylor, (1903) 96 N. W. 268.

New York.— New York *v.* Brooklyn F. Ins. Co., 3 Abb. Dec. 251, 4 Keyes 465.

Pennsylvania.— Krueger *v.* Nicola, 205 Pa. St. 38, 54 Atl. 494.

United States.—See Supreme Council C. K. *v.* Fidelity, etc., Co., 63 Fed. 48, 11 C. C. A. 96.

See also CONTRACTS, 9 Cyc. 742; and, generally, FRAUD.

But *compare* Thomas *v.* Grise, 1 Pennew. (Del.) 381, 41 Atl. 883, holding that fraud can be proved under the general issue.

The Illinois Practice Act requires a verified affidavit denying the execution of the contract sued on in order to prevent the contract from proving itself, and, in the absence of a compliance with this requirement, evidence cannot be admitted to prove that a provision giving the buyer an option to rescind before a certain day was fraudulently omitted from an order for a certain article. Altman *v.* Henderson, 32 Ill. App. 331.

When pleading not necessary.— Where an instrument is pleaded in defense or read in evidence on the trial under a general denial, as the foundation of or in support of a defense in an action at law, plaintiff has the same right to show that it was obtained from him by fraud or that the particular clause relied on was inserted fraudulently as he would have if it were the subject of a formal issue. Chambovet *v.* Cagney, 35 N. Y. Super. Ct. 474.

62. *Colorado.*—St. Vrain Stone Co. *v.* Denver, etc., R. Co., 18 Colo. 211, 32 Pac. 827.

Kentucky.— Vansant *v.* Runyon, 44 S. W. 949, 19 Ky. L. Rep. 1981.

Minnesota.— Follansbee *v.* Johnson, 28 Minn. 311, 9 N. W. 882.

Pennsylvania.— Thorne *v.* Warfflein, 100 Pa. St. 519.

Wisconsin.—Callanan *v.* Judd, 23 Wis. 343.

only for the purpose of proving fraud in a written agreement cannot be legally used to control or vary the terms of such agreement.[63]

(III) *Intention to Defraud Third Persons.* It is not permissible for one party to a writing, in an action against the other party, to show by parol evidence that at the time it was executed it was agreed to be a mere sham and made only for the purpose of deceiving the creditors of one of the parties.[64]

f. Illegality. The rule which forbids the introduction of parol evidence to contradict, add to, or vary a written instrument does not extend to evidence offered to show that the contract was made in furtherance of objects forbidden by statute, by the common law, or by the general policy of the law.[65] Thus parol evidence is admissible to show that, although the writing evidencing a transaction is legal upon its face, the real transaction is tainted with usury;[66] or

See 20 Cent. Dig. tit. "Evidence," §§ 2005–2020.

Fraud in not executing another distinct agreement.— Refusal to enter into a written agreement that a check should be held by the drawee without recourse on the drawer pursuant to a parol agreement to that effect is not such fraud as will admit parol evidence to change the contract embodied in the check. American Emigrant Co. *v.* Clark, 47 Iowa 671.

63. Leonard *v.* Smith, 11 Metc. (Mass.) 330.

64. Conner *v.* Carpenter, 28 Vt. 237. See also Fenwick *v.* Brinkworth, 2 F. & F. 86. And see, generally, FRAUD; FRAUDULENT CONVEYANCES.

65. *Alabama.*— Allen *v.* Turnham, 83 Ala. 323, 3 So. 854.

California.— Benicia Agricultural Works *v.* Estes, (1893) 32 Pac. 938; Buffendeau *v.* Brooks, 28 Cal. 641.

Kansas.— Friend *v.* Miller, 52 Kan. 139, 34 Pac. 397, 39 Am. St. Rep. 340.

Kentucky.— Wilhite *v.* Roberts, 4 Dana 172.

Louisiana.— Fletcher's Succession, 11 La. Ann. 59.

Maine.— Gould *v.* Leavitt, 92 Me. 416, 43 Atl. 17; Lime Rock Bank *v.* Hewett, 50 Me. 267.

Massachusetts.— Clemens Electrical Mfg. Co. *v.* Walton, 173 Mass. 286, 52 N. E. 132, 53 N. E. 820; Allen *v.* Hawks, 13 Pick. 79; Russell *v.* De Grand, 15 Mass. 35.

Michigan.— Detroit Salt Co. *v.* National Salt Co., 134 Mich. 103, 96 N. W. 1.

Nebraska.— Luce *v.* Foster, 42 Nebr. 818, 60 N. W. 1027.

New Hampshire.— Wheeler *v.* Metropolitan Stock Exchange, 72 N. H. 315, 56 Atl. 754.

New Jersey.— Wooden *v.* Shotwell, 23 N. J. L. 465.

New York.— Plath *v.* Kline, 18 N. Y. App. Div. 240, 45 N. Y. Suppl. 951.

Ohio.— Ohio Ins. Co. *v.* Shotts, 6 Ohio Dec. (Reprint) 813, 8 Am. L. Rec. 321.

Rhode Island.— Martin *v.* Clarke, 8 R. I. 389, 5 Am. Rep. 586.

England.— Rex *v.* North Wingfield, 9 L. J. M. C. O. S. 57.

See 20 Cent. Dig. tit. "Evidence," §§ 2025–2027. See also CONTRACTS, 9 Cyc. 766.

Judicial sale.— Parol evidence is competent to prove that a purchaser at an executor's sale, and the judge who made the order and confirmed the sale, are the same persons. Frieburg *v.* Isbell, (Tex. Civ. App. 1894) 25 S. W. 988.

Violation of law in carrying out contract. — In an action for the hire of convicts under a written contract legal on its face, parol evidence is not admissible to show that by a private understanding the hirers were to work the convicts in an illegal manner, for the fact that the hirers, with or without the consent of the public officer with whom the contract was made, violated the law in the working or treatment of the convicts, would furnish no reason for not paying the hire at the rate stipulated in the contract. Walton County *v.* Powell, 94 Ga. 646, 19 S. E. 989.

Existence of another contract in itself illegal between the same parties cannot be shown by parol in order to get rid of a written contract which is on its face unexceptionable. Porter *v.* Viets, 19 Fed. Cas. No. 11,291, 1 Biss. 177.

66. *Arkansas.*— Roe *v.* Kiser, 62 Ark. 92, 34 S. W. 534, 54 Am. St. Rep. 288.

California.— Daw *v.* Niles, (1893) 33 Pac. 1114.

Connecticut.— Reading *v.* Weston, 7 Conn. 409.

Illinois.—McGuire *v.* Campbell, 58 Ill. App. 188.

Kentucky.— Bright *v.* Wagle, 3 Dana 252; Edrington *v.* Harper, 3 J. J. Marsh. 353, 20 Am. Dec. 145; Fenwick *v.* Ratliff, 6 T. B. Mon. 154; Murphy *v.* Trigg, 1 T. B. Mon. 72.

Mississippi.— Newson *v.* Thighen, 30 Miss. 414.

New Jersey.— Crawford *v.* Denyse, 18 N. J. L. 325.

New York.—Mudgett *v.* Goler, 18 Hun 302; Austin *v.* Fuller, 12 Barb. 360; Douglass *v.* Peele, Clarke 563.

Ohio.— Ohio Ins. Co. *v.* Shotts, 6 Ohio Dec. (Reprint) 813, 8 Am. L. Rec. 321. But *compare* Blackburn *v.* Gano, 7 Ohio Dec. (Reprint) 557, 3 Cinc. L. Bul. 939.

Pennsylvania.— Chamberlain *v.* McClurg, 8 Watts & S. 31.

Texas.— Cotton States Bldg. Co. *v.* Rawlins, (Civ. App. 1901) 62 S. W. 805; Peightal *v.* Cotton States Bldg. Co., (Civ. App.

that a contract valid on its face was intended, not as a commercial transaction, but as a mere wager on the future state of the market.[67]

g. Lack of Authority to Execute Instrument. Where an instrument purporting to bind one person is executed by another, parol evidence is competent to show whether the latter had authority to sign an instrument in the terms of those which he did sign, or whether the instrument has been accepted by the person to be bound as his contract.[68] So also extrinsic evidence is admissible to show the lack of authority of public officers, as of the officer who issued a patent[69] or bounty order.[70]

h. Matters Relating to Execution or Delivery. The rule that antecedent and contemporaneous oral statements cannot be received to alter or vary the terms of a written instrument presupposes the due execution and delivery of the writing in a way to bind both parties as to its terms; and it has no application when the execution of the writing is the subject of inquiry, but upon the issue of execution *vel non* what was said and done at the time and by whom are the vital facts, and evidence as to these matters is admissible.[71] Delivery of a deed or other written instrument is the final act of the parties by which the party executing the instrument puts it into the possession of the other party, both intending thereby to make it operative and binding;[72] but it is not a part of the contract and is not

1901) 61 S. W. 428; Southern Home Bldg., etc., Assoc. *v.* Winans, (Civ. App. 1900) 60 S. W. 825; Dangerfield Nat. Bank *v.* Ragland, (Civ. App. 1899) 51 S. W. 661; People's Bldg. Loan, etc., Assoc. *v.* Keller, 20 Tex. Civ. App. 616, 50 S. W. 183.

Vermont.— Jackson *v.* Kirby, 37 Vt. 448.

United States.— Scott *v.* Lloyd, 9 Pet. 418, 9 L. ed. 178; New England Mortg. Security Co. *v.* Gay, 33 Fed. 636.

See 20 Cent. Dig. tit. "Evidence," § 2029. And, generally, USURY.

Collateral agreement.— Parol evidence is admissible to show that at the time a note was given for money lent, a collateral agreement was made to pay a certain sum as extra interest, and that all the payments made were for the extra interest and not on the note, as this does not control or modify the written contract executed by the parties, but establishes an independent fact or a collateral agreement incidentally connected with the written contract. Rohan *v.* Hanson, 11 Cush. (Mass.) 44.

An agreement to extend a note at usurious rates upon payment of a part at maturity cannot be shown by parol, where the note does not stipulate the usurious interest. In such case the agreement to extend is alone affected by the usury. Allen *v.* Turnham, 83 Ala. 323, 3 So. 854.

Place of payment.— Where money was lent by a citizen of New York to a firm doing business in Iowa, and the money was remitted to them there, and a certificate of deposit taken, dated in Iowa, by which the firm acknowledged the receipt of the money and promised to pay it to the order of the lender one year from date, on the return of the certificate, with interest at the rate of ten per cent per annum, a lawful rate of interest in Iowa, parol evidence was held inadmissible, in an action on the certificate, to prove that it was a part of the contract that the principal and interest mentioned in the certificate should be payable in New York, where the rate of interest named would be usurious. Potter *v.* Tallman, 35 Barb. (N. Y.) 182.

A deed purporting to be an absolute conveyance of land cannot be avoided or controlled in its construction by parol evidence to show that it is in reality a mortgage or assurance made for the payment of money, and that the contract on which it was made was usurious, since the effect of such proof would be to vary the legal effect and import of the deed by parol evidence. Flint *v.* Sheldon, 13 Mass. 443, 7 Am. Dec. 162.

67. Beadles *v.* McElrath, 85 Ky. 230, 3 S. W. 152, 8 Ky. L. Rep. 848: Kent *v.* Miltenberger, 13 Mo. App. 503; Wheeler *v.* Metropolitan Stock Exchange, 72 N. H. 315, 56 Atl. 754; Peck *v.* Doran, 57 Hun (N. Y.) 343, 10 N. Y. Suppl. 401.

68. Remick *v.* Sandford, 118 Mass. 102; Coddington *v.* Goddard, 16 Gray (Mass.) 436; Thompson *v.* Toledo First Nat. Bank, 111 U. S. 529, 4 S. Ct. 689, 28 L. ed. 507.

Where a contract is made by an agent, it may be shown by parol that the other parties were told at the time the contract was made that the agent had no right to make such a contract. Meserole *v.* Archer, 3 Bosw. (N. Y.) 376.

69. Sherman *v.* Buick, 93 U. S. 209, 23 L. ed. 849.

70. Hubbard *v.* Lyndon, 28 Wis. 674.

71. White *v.* Kahn, 103 Ala. 308, 15 So. 595; Fox *v.* Tyler, 3 Indian Terr. 1, 53 S. W. 462; Gribble *v.* Everett, 98 Mo. App. 32, 71 S. W. 1124; McCartney *v.* McCartney, 93 Tex. 359, 55 S. W. 310 [*reversing* (Civ. App. 1899) 53 S. W. 388].

Impeaching truth of writing.—Where plaintiff denies the execution of a written accord and satisfaction pleaded, evidence tending to impeach the truth of the matters set forth in such writing is admissible. Flowers *v.* Fletcher, 40 W. Va. 103, 20 S. E. 870.

72. King *v.* Woodbridge, 34 Vt. 565.

proved by it.[73] The intent and purpose thereby to make the instrument effective is generally inferred from the act thus changing the custody, or from the fact that the party to whom it purports to be executed has it in his possession, but this may be explained and rebutted by parol evidence,[74] and declarations of intentions connected with the execution and delivery and the circumstances attending the same may properly come in as part of the *res gestæ*.[75] Thus it may be shown that there never was any valid and effective delivery of the instrument,[76] or that an apparent delivery was without authority,[77] or was only in escrow.[78] It may also be shown that the party executing the instrument handed it to the other party, not as a final delivery, but to be examined and returned,[79] or for the purpose of being retained until some precedent act was done by the party to whom it purported to be executed;[80] or that the party obtained possession of it by accident, and against the will of the other party;[81] or that by mistake a wrong paper was delivered.[82] Similarly, it may be shown by parol that an instrument in the form of a contract was accepted by the person to whom it was delivered under the belief that it was a mere receipt, to which he was entitled.[83]

i. Mistake — (i) *In General.* Parol evidence is as a general rule admissible for the purpose of showing that by reason of a mistake a written instrument does not truly express the intention of the parties,[84] mistake being always

73. Verzan *v.* McGregor, 23 Cal. 339; King *v.* Woodbridge, 34 Vt. 565. Delivery may be proved by parol. Barney *v.* Forbes, 118 N. Y. 580, 28 N. E. 890.

74. *California.*—Black *v.* Sharkey, 104 Cal. 279, 37 Pac. 939.

Illinois.— Schaeppi *v.* Glade, 195 Ill. 62, 62 N. E. 874 [*affirming* 95 Ill. App. 500].

New York.— Stephens *v.* Buffalo, etc., R. Co., 20 Barb. 332; Farnum *v.* Carr, 69 N. Y. App. Div. 493, 74 N. Y. Suppl. 1111; Seymour *v.* Cowing, 4 Abb. Dec. 200, 1 Keyes 532.

South Carolina.— Coln *v.* Coln, 24 S. C. 596.

Vermont.— King *v.* Woodbridge, 34 Vt. 565.

Virginia.— Solenberger *v.* Gilbert, 86 Va. 778, 11 S. E. 789.

See 20 Cent. Dig. tit. "Evidence," § 1078. See also DEEDS, 13 Cyc. 560 *et seq.*

The fact that a deed is recorded is only *prima facie* evidence of a delivery, and consequently may be rebutted. Gilbert *v.* North American F. Ins. Co., 23 Wend. (N. Y.) 43, 35 Am. Dec. 543.

75. Verzan *v.* McGregor, 23 Cal. 339; Condit *v.* Dady, 56 Ill. App. 545; Steffian *v.* Milmo Nat. Bank, 69 Tex. 513, 6 S. W. 823.

76. *Alabama.*— White *v.* Kahn, 103 Ala. 308, 15 So. 595.

Arkansas.— Scaife *v.* Byrd, 39 Ark. 568.

Colorado.—Mosier *v.* Kushow, 16 Colo. App. 453, 66 Pac. 449; Denver Brewing Co. *v.* Barets, 9 Colo. App. 341, 48 Pac. 834.

Illinois.— Price *v.* Hudson, 125 Ill. 284, 17 N. E. 817; Jordan *v.* Davis, 108 Ill. 336.

Iowa.— Reichart *v.* Wilhelm, 83 Iowa 510, 50 N. W. 19.

Maryland.— Harrison *v.* Morton, 83 Md. 456, 35 Atl. 99; Leppoc *v.* National Union Bank, 32 Md. 136.

Massachusetts.— Faunce *v.* State Mut. L. Assur. Co., 101 Mass. 279.

New York.— Brackett *v.* Barney, 28 N. Y. 333; Hendy *v.* Smith, 49 Hun 510, 2 N. Y. Suppl. 535; Jackson *v.* Roberts, 1 Wend. 478.

North Dakota.—Sargent *v.* Cooley, 12 N. D. 1, 94 N. W. 576.

Oregon.— Brandon *v.* Oregonian R. Co., 11 Oreg. 161, 2 Pac. 86.

Texas.— Wheeler, etc., Mfg. Co. *v.* Briggs, (Sup. 1891) 18 S. W. 555; Large *v.* Parker, (Civ. App. 1900) 56 S. W. 587.

Vermont.— Winn *v.* Chamberlin, 32 Vt. 318.

Wisconsin.— Gilman *v.* Gross, 97 Wis. 224, 72 N. W. 885; Gibbons *v.* Ellis, 83 Wis. 434, 53 N. W. 701.

See 20 Cent. Dig. tit. "Evidence," § 1978.

77. Large *v.* Parker, (Tex. Civ. App. 1900) 56 S. W. 587.

A delivery by an agent may be shown to have been in violation of his instructions. Belleville Sav. Bank *v.* Bornman, (Ill. 1886) 7 N. E. 686; Haley *v.* Johnson, (Tex. Civ. App. 1894) 28 S. W. 382.

78. Crawford *v.* Foster, 6 Ga. 202, 50 Am. Dec. 327; Beall *v.* Poole, 27 Md. 645; Pawling *v.* U. S., 4 Cranch (U. S.) 222, 2 L. ed. 601. See also ESCROWS.

79. Ryan *v.* Cooke, 68 Ill. App. 592 [*affirmed* in 172 Ill. 302, 50 N. E. 213]; King *v.* Wodbridge, 34 Vt. 565; Curry *v.* Colburn, 99 Wis. 319, 74 N. W. 778, 67 Am. St. Rep. 860.

80. King *v.* Woodbridge, 34 Vt. 565. See also *supra*, XVI, C, 6.

81. King *v.* Woodbridge, 34 Vt. 565.

82. King *v.* Woodbridge, 34 Vt. 565.

Mistake of either party is sufficient, especially when that mistake is caused by the conduct and declarations of the other party. King *v.* Woodbridge, 34 Vt. 565.

83. King *v.* Woodbridge, 34 Vt. 565; Strohn *v.* Detroit, etc., R. Co., 21 Wis. 554, 99 Am. Dec. 564; Boorman *v.* American Express Co., 21 Wis. 152.

84. *Alabama.*— Avery *v.* Miller, 86 Ala. 495, 6 So. 38; Adler *v.* Potter, 57 Ala. 571.

California.— Lassing *v.* James, 107 Cal. 348, 40 Pac. 534.

recognized as one of the grounds of equity jurisdiction;[85] and while many authorities declare that evidence of mistake is admissible only in equity and not in a court of law,[86] this rule is by no means universal, and there are many cases in the books, especially since the tendency has grown up to obliterate the sharp distinctions between law and equity, in which parol evidence has been held admissible to show a mistake in reducing the agreement to writing irrespective of the form of the action and whether it is in fact an action at law or a suit in equity.[87] In order that parol evidence may be admissible to show a mistake in

Connecticut.— Parsons *v.* Hosmer, 2 Root 1, 1 Am. Dec. 58.

Georgia.— Ham *v.* Parkerson, 68 Ga. 830.

Illinois.— McLean County Bank *v.* Mitchell, 88 Ill. 52; McLennan *v.* Johnston, 60 Ill. 306; Wollschlager *v.* McEldowney, 96 Ill. App. 34; Lloyd *v.* Sandusky, 95 Ill. App. 593 [*affirmed* in 203 Ill. 621, 68 N. E. 154]; Kuch *v.* Fulfs, 68 Ill. App. 134.

Indiana.— Equitable Trust Co. *v.* Milligan, 31 Ind. App. 20, 65 N. W. 1044.

Iowa.— Van Dusen *v.* Parley, 40 Iowa 70.

Kentucky.—Huston *v.* Noble, 4 J. J. Marsh. 130; Baugh *v.* Ramsey, 4 T. B. Mon. 155; Morris *v.* Morris, 2 Bibb 311; Garten *v.* Chandler, 2 Bibb 246.

Louisiana.— White *v.* Jones, 14 La. Ann. 681.

Maryland.— Poplein *v.* Foley, 61 Md. 381; Young *v.* Frost, 5 Gill 287.

Michigan.— Chambers *v.* Livermore, 15 Mich. 381.

Mississippi.— Butler *v.* State, 81 Miss. 734, 33 So. 847; Marsh *v.* Mandeville, 28 Miss. 122.

Missouri.— See Freeman *v.* Moffet, 119 Mo. 280, 25 S. W. 87.

Nebraska.— Martens *v.* Pittock, 3 Nebr. (Unoff.) 770, 92 N. W. 1038.

Nevada.— Travis *v.* Epstein, 1 Nev. 116

New Jerscy.— Useful Manufactures Soc. *v.* Haight, 1 N. J. Eq. 393.

New York.— Meyer *v.* Lathrop, 73 N. Y. 315; Lee *v.* Salter, Lalor 163.

North Carolina.— Gwaltney *v.* Provident Sav. L. Assur. Soc., 132 N. C. 925, 44 S. E. 659; Smith *v.* Amis, 10 N. C. 469; Smith *v.* Williams, 5 N. C. 426, 4 Am. Dec. 564.

North Dakota.— Sargent *v.* Cooley, 12 N. D. 1, 94 N. W. 576.

Ohio.— Clayton *v.* Freet, 10 Ohio St. 554.

Pennsylvania.—Cooper *v.* Rose Valley Mills, 185 Pa. St. 115, 39 Atl. 824; Phillips *v.* Meily, 106 Pa. St. 536; Monocacy Bridge Co. *v.* American Iron Bridge Mfg. Co., 83 Pa. St. 517; Kostenbader *v.* Peters, 80 Pa. St. 438; Gower *v.* Sterner, 2 Whart. 75; Moliere *v.* Pennsylvania F. Ins. Co., 5 Rawle 342, 28 Am. Dec. 675; Com. Title, etc., Co. *v.* Folz, 19 Pa. Super. Ct. 28; Hardwick *v.* Pollock, 3 Pa. Dist. 245.

South Carolina.— Cozens *v.* Pooser, 1 Speers 325; Gibson *v.* Watts, 1 McCord Eq. 490.

Tennessee.— Jones *v.* Sharp, 9 Heisk. 660.

Texas.— Dunham *v.* Chatham, 21 Tex. 231, 73 Am. Dec. 228; Hilliard *v.* White, (Civ. App. 1895) 31 S. W. 553. See also Galloway *v.* San Antonio, etc., R. Co., (Civ. App. 1903) 78 S. W. 32; Davis *v.* Kirksey, 14 Tex. Civ. App. 380, 37 S. W. 994.

Vermont.— White *v.* Miller, 22 Vt. 380.

Virginia.— Elliott *v.* Horton, 28 Gratt. 766.

West Virginia.— Allen *v.* Yeater, 17 W. Va. 128.

United States.— Camden Iron Works *v.* Fox, 34 Fed. 200.

England.— Baker *v.* Paine, 1 Ves. 456, 27 Eng. Reprint 1140.

See 20 Cent. Dig. tit. "Evidence," §§ 1990–2004.

Compare Morton *v.* Chandler, 7 Me. 44.

85. *California.*— Hathaway *v.* Brady, 23 Cal. 121.

Illinois.— Race *v.* Weston. 86 Ill. 91; McKinstry *v.* Elliott, 89 Ill. App. 599.

Kentucky.— Inskoe *v.* Procter, 6 T. B. Mon. 311 [*explaining* Baugh *v.* Ramsey, 4 T. B. Mon. 155]; Coger *v.* McGee, 2 Bibb 321, 5 Am. Dec. 610.

Mississippi.— Ross *v.* Wilson, 7 Sm. & M. 753; Landerdale *v.* Hallock, 7 Sm. & M. 622.

Texas.— Dunham *v.* Chatham, 21 Tex. 231, 73 Am. Dec. 228.

West Virginia.— Allen *v.* Yeater, 17 W. Va. 128.

United States.— Hunt *v.* Rousmaniere, 1 Pet. 1, 7 L. ed. 27.

See, generally, EQUITY, 16 Cyc. 68 *et seq.*

86. *Connecticut.*— Noble *v.* Comstock, 3 Conn. 295.

Kentucky.— Tribble *v.* Oldham, 5 J. J. Marsh. 137.

Maine.— Linscott *v.* Fernald, 5 Me. 496.

Maryland.— Boyce *v.* Wilson, 32 Md. 122.

Mississippi.— Young *v.* Jacoway, 9 Sm. & M. 212; Peques *v.* Mosby, 7 Sm. & M. 340.

Missouri.— Bassett *v.* Glover, 31 Mo. App. 150.

North Carolina.— Dismukes *v.* Wright, 20 N. C. 346.

West Virginia.— Knowlton *v.* Campbell, 48 W. Va. 294, 37 S. E. 581.

See 20 Cent. Dig. tit. "Evidence," §§ 1990–2004.

The remedy is in equity to reform the writing and until it is so reformed it is unassailable by parol evidence. Pierson *v.* McCahill, 21 Cal. 123; Van Horn *v.* Van Horn, 49 N. J. Eq. 327, 23 Atl. 1079 [*reversing* (Ch. 1890) 20 Atl. 826]. See, generally, REFORMATION OF INSTRUMENTS.

87. *Georgia.*—Sutton *v.* Sutton, 25 Ga. 383.

Missouri.— Wood *v.* Matthews, 73 Mo. 477; Bassett *v.* Glover, 31 Mo. App. 150; Quick *v.* Turner, 26 Mo. App. 29; Wittenhauer *v.* Watson, 11 Mo. App. 588.

a written instrument the existence of such mistake must have been alleged in the pleadings.[88]

(II) *Application to Particular Instruments*—(A) *Deeds.* The rule that parol evidence is admissible to show a mistake in a written instrument has been frequently applied to deeds;[89] most commonly in proceedings brought for the purpose of reformation,[90] or other proceedings in equity,[91] but also in actions at law.[92] Thus evidence has been admitted to show a mistake in the name of the grantee;[93] the description of the property conveyed;[94] the insertion of courses and distances;[95] or as to the quantity of land;[96] or in stating the district wherein the property lies.[97] It has also been held admissible to show that the property

North Carolina.— See Runyon *v.* Leary, 20 N. C. 373.

Pennsylvania.— Schotte *v.* Meredith, 192 Pa. St. 159, 43 Atl. 952. See Dayton *v.* Newman, 19 Pa. St. 194.

Virginia.— Elliott *v.* Horton, 28 Gratt. 766.

England.— Guardhouse *v.* Blackburn, L. R. 1 P. 109, 12 Jur. N. S. 278, 35 L. J. P. & M. 116, 14 L. T. Rep. N. S. 69, 14 Wkly. Rep. 463; Wake *v.* Harrop, 6 H. & N. 768.

See 20 Cent. Dig. tit. "Evidence," §§ 1990–2004.

A court having no equitable powers, for the correction of mistakes in written instruments, cannot admit parol evidence to show that a mistake occurred in making the contract in writing which appears on its face to completely express the agreement of the parties. Ferree *v.* Ellsworth, 1 Misc. (N. Y.) 93, 19 N. Y. Suppl. 659.

88. Huff *v.* Thomas, 1 T. B. Mon. (Ky.) 158; Morris *v.* Morris, 2 Bibb (Ky.) 311; Krueger *v.* Nicola, 205 Pa. St. 38, 54 Atl. 494; McDonald *v.* Rose, 17 Grant Ch. (U. C.) 657.

Denial of mistake in the answer does not preclude the admission of parol evidence to prove it. Allen *v.* Yeater, 17 W. Va. 128.

89. *Georgia.*— Bedgood *v.* McLain, 89 Ga. 793, 15 S. E. 670.

New York.— Keisselbrack *v.* Livingston, 4 Johns. Ch. 144.

Ohio.— Pitts *v.* Langdon, 2 Ohio S. & C. Pl. Dec. 481, 7 Ohio N. P. 304.

Texas.— Chesnutt *v.* Chism, 20 Tex. Civ. App. 20, 48 S. W. 549.

Vermont.— White *v.* Miller, 22 Vt. 380.

See 20 Cent. Dig. tit. "Evidence," §§ 1993, 1994.

Mistake in sheriff's deed may be shown. Longworth *v.* U. S. Bank, 6 Ohio 536.

Where a deed bears on its face evidence of mistake in drawing it, as erasures and interlineations, parol evidence is admissible to show the intent of the parties. Koonce *v.* Bryan, 21 N. C. 227.

What evidence inadmissible.— Evidence is not admissible to contradict a deed by showing a mistake of the person who wrote it, when it relates to matters which did not take place at or about the time of the transaction, and of which it does not appear that the person to be affected was cognizant. Wager *v.* Chew, 15 Pa. St. 323.

90. Capelli *v.* Dondero, 123 Cal. 324, 55 Pac. 1057; Wieneke *v.* Deputy, 31 Ind. App. 621, 68 N. E. 921; McKelway *v.* Armour, 10 N. J. Eq. 115, 64 Am. Dec. 445. See *infra*, XVI, D, 1; and, generally, Reformation of Instruments.

91. Abbe *v.* Goodwin, 7 Conn. 377; Sheppard *v.* Reese, 114 Ga. 411, 40 S. E. 282; Webster *v.* Webster, 33 N. H. 18, 66 Am. Dec. 705; Allen *v.* Yeater, 17 W. Va. 128.

92. Elliott *v.* Horton, 28 Gratt. (Va.) 766, an action of ejectment.

93. Louisville, etc., R. Co. *v.* Power, 119 Ind. 269, 21 N. E. 751.

94. *Alabama.*— Doe *v.* Pickett, 51 Ala. 584.

Connecticut.— Avery *v.* Chappel, 6 Conn. 270, 16 Am. Dec. 53; Washburn *v.* Merrills, 1 Day 139, 2 Am. Dec. 59.

Louisiana.— Levy *v.* Ward, 33 La. Ann. 1033; Fleming *v.* Scott, 26 La. Ann. 545; Sutton *v.* Calhoun, 14 La. Ann. 209.

Nevada.— Terry *v.* Berry, 13 Nev. 514.

New York.— Bush *v.* Hicks, 2 Thomps. & C. 356; Gillespie *v.* Moon, 2 Johns. Ch. 585, 7 Am. Dec. 559.

North Carolina.— Loften *v.* Heath, 3 N. C. 347.

South Carolina.— Perry *v.* Middleton, 2 Brev. 142; Perry *v.* Middleton, 2 Bay 539; White *v.* Eagan, 1 Bay 247.

Wisconsin.— Thompson *v.* Jones, 4 Wis. 106.

See 20 Cent. Dig. tit. "Evidence," § 1994.

95. *Indiana.*— Hedge *v.* Sims, 29 Ind. 574.

Kentucky.— Reid *v.* Langford, 3 J. J. Marsh. 420.

Pennsylvania.— Mageehan *v.* Adams, 2 Binn. 109.

Tennessee.— Jones *v.* Sharp, 9 Heisk. 660.

Virginia.— Elliott *v.* Horton, 28 Gratt. 766.

See 20 Cent. Dig. tit. "Evidence," § 1994.

96. Wurzburger *v.* Meric, 20 La. Ann. 415. *Contra*, Kerr *v.* Calvit, Walk. (Miss.) 115, 12 Am. Dec. 537, holding that, in the absence of fraud, parol evidence is not admissible to show a mistake in the number of acres mentioned in the deed.

97. Way *v.* Lowery, 72 Ga. 63, holding that a county map was admissible in evidence to show that the word "seventh," as contained in the deed descriptive of the district in which the property lay, was inserted by mistake and "seventeenth" was intended; the map showing no such district as the seventh.

conveyed was not that which was sold,[98] or that property intended to be conveyed was omitted by mistake.[99]

(B) *Other Instruments.* Evidence to show mistake has also been admitted in the case of assignments,[1] bills and notes,[2] contracts generally,[3] contracts of carriage,[4] contracts of insurance,[5] contracts of partnership,[6] contracts of sale,[7] leases,[8] mortgages,[9] and deeds of trust.[10]

(III) *Character of Mistake.* The rule admitting parol evidence in case a written instrument through mistake does not correctly express the intention of the parties applies only in cases of mistake of fact and not where a party has contracted under a mistake of law.[11] In order to render parol evidence admissible to contradict the terms of a writing on the ground of mistake, it must clearly appear that such mistake was mutual.[12] Where the person sought to be bound by a writing has carelessly signed the same without reading it, the fact that it is averred not to contain the contract as made furnishes no ground for admitting parol evidence to vary its terms, for it is not the duty of courts to relieve parties from the results of their own gross negligence.[13]

98. Swan *v.* Ewing, Morr. (Iowa) 344; Vignie *v.* Brady, 35 La. Ann. 560; Robert *v.* Boulat, 9 La. Ann. 29; Palangue *v.* Guesnon, 15 La. 311; Washburne *v.* White, 62 Miss. 545; Bumpas *v.* Zachary, (Tex. Civ. App. 1896) 34 S. W. 672.

99. Gladish *v.* Godchaux, 46 La. Ann. 1571, 16 So. 451; Chew *v.* Gillespie, 56 Pa. St. 308.

1. Bolster *v.* Bismark Bldg., etc., Assoc., 29 Pittsb. Leg. J. (Pa.) 97.

2. See COMMERCIAL PAPER, 8 Cyc. 252 note 34.

3. *California.*— Lassing *v.* James, 107 Cal. 348, 355, 40 Pac. 534; Isenhoot *v.* Chamberlain, 59 Cal. 630; Murray *v.* Dake, 46 Cal. 644; Pierson *v.* McCahill, 23 Cal. 249.

Georgia.— Ham *v.* Parkerson, 68 Ga. 830.

Iowa.— Van Dusen *v.* Parley, 40 Iowa 70; Scott *v.* Granger, 3 Iowa 447.

Kentucky.— Stone *v.* Ramsey, 4 T. B. Mon. 236.

Maryland.— Popplein *v.* Foley, 61 Md. 381; Young *v.* Frost, 5 Gill 287.

Mississippi.— Young *v.* Jacoway, 9 Sm. & M. 212.

New York.— Keisselbrack *v.* Livingston, 4 Johns. Ch. 144.

North Carolina.— Ray *v.* Blackwell, 94 N. C. 10; Ward *v.* Ledbetter, 21 N. C. 496.

Pennsylvania.— Wharton *v.* Douglass, 76 Pa. St. 273; Coughenour *v.* Suhre, 71 Pa. St. 462; Martin *v.* Berens, 67 Pa. St. 459; Fisher *v.* Deibert, 54 Pa. St. 460; Gower *v.* Sterner, 2 Whart. 75; Hamilton *v.* Asslin, 14 Serg. & R. 448; Scott *v.* Burton, 2 Ashm. 312; Insurance Co. of North America *v.* Union Canal Co., Brightly 48, 2 Pa. L. J. 65; Hawk *v.* Greensweig, 7 Pa. L. J. 374; Grubb *v.* Matlack, 2 Chest. Co. Rep. 408.

Texas.— Jones *v.* Jones, 2 Tex. App. Civ. Cas. § 1; Glisson *v.* Craig, 1 Tex. App. Civ. Cas. § 42; Peake *v.* Blythe, 1 Tex. App. Civ. Cas. § 7.

Virginia.— McMahon *v.* Spangler, 4 Rand. 51.

See 20 Cent. Dig. tit. "Evidence," § 1999.

4. Wood *v.* The Fleetwood, 22 Mo. 560; Graves *v.* Harwood, 9 Barb. (N. Y.) 477.

5. Parsons *v.* Hosmer, 2 Root (Conn.) 1, 1 Am. Dec. 58 (holding that a mistake in drawing up a life-insurance policy may be shown by parol in a court of chancery, in order to obtain relief); Continental Ins. Co. *v.* Randolph, 2 Ky. L. Rep. 313, 3 Ky. L. Rep. 188; Eilenberger *v.* Protective Mut. F. Ins. Co., 89 Pa. St. 464 (holding that parol evidence is admissible to reform an insurance policy, where there is a mutual mistake between the contracting parties). And see, generally, INSURANCE.

6. Isles *v.* Tucker, 5 Duer (N. Y.) 393.

7. McCurdy *v.* Breathitt, 5 T. B. Mon. (Ky.) 232, 17 Am. Dec. 65; Lauchner *v.* Rex, 20 Pa. St. 464.

As a defense to the specific performance of a written contract, a mistake in it may be shown by parol. Chambers *v.* Livermore, 15 Mich. 381.

8. Snyder *v.* May, 19 Pa. St. 235; Christ *v.* Diffenbach, 1 Serg. & R. (Pa.) 464, 7 Am. Dec. 624.

9. Ellis *v.* Kenyon, 25 Ind. 134; Armstrong *v.* Armstrong, 36 La. Ann. 549; Jackson *v.* Bowen, 7 Cow. (N. Y.) 13; Davenport *v.* Sovil, 6 Ohio St. 459. *Contra,* Locke *v.* Whiting, 10 Pick. (Mass.) 279. See, generally, MORTGAGES.

Where equity will reform or set aside a mortgage on the ground of accident or mistake, parol evidence is admissible to contradict or deny its terms. Lippincott *v.* Whitman, 83 Pa. St. 244.

Mistake in discharge of mortgage may be shown. Bond *v.* Dorsey, 65 Md. 310, 4 Atl. 279; Seiberling *v.* Tipton, 113 Mo. 373, 21 S. W. 4.

10. Lauderdale *v.* Hallock, 7 Sm. & M. (Miss.) 622.

11. Wheaton *v.* Wheaton, 9 Conn. 96; Potter *v.* Sewall, 54 Me. 142; *In re* Meckley, 20 Pa. St. 478.

12. Deering *v.* Russell, 5 N. D. 319, 65 N. W. 691; Riha *v.* Pelnar, 86 Wis. 408, 57 N. W. 51.

13. Bostwick *v.* Duncan, 60 Ga. 383. See also Faucett *v.* Currier, 109 Mass. 79; Day *v.* Raguet, 14 Minn. 273.

19. Medium of Payment. Parol evidence may be admitted to show the medium of payment of an obligation in writing,[14] where the evidence is not contradictory of the terms of the instrument.[15]

20. Nature and Extent of Liability. Evidence is admissible which does not tend to vary or contradict the terms of a written obligation but merely shows the nature or extent of the liability of the obligors.[16] Thus parol evidence may be admitted to show the nature of the liability of an irregular or anomalous indorser;[17] the relation *inter sese* of the parties to commercial paper, or other

14. *Alabama.*— Tarleton *v.* Southern Bank, 41 Ala. 722; Scheible *v.* Bacho, 41 Ala. 423. But *compare* Wharton *v.* Cunningham, 46 Ala. 590.

New Jersey.— Moore *v.* Moore, 1 N. J. L. 363.

Pennsylvania.— McMeen *v.* Owen, 1 Yeates 135; Field *v.* Biddle, 1 Yeates 132; McMinn *v.* Owens, 2 Dall. 173, 1 L. ed. 336, where the obligation was for payment of a certain amount without specifying whether in specie or paper money.

South Carolina.— Smith *v.* Prothro, 2 S. C. 371.

Texas.— Donley *v.* Tindall, 32 Tex. 43, 5 Am. Rep. 234.

Virginia.— Stearns *v.* Mason, 24 Gratt. 484.

Washington.— Stringham *v.* Davis, 23 Wash. 568, 63 Pac. 230.

West Virginia.— Jarrett *v.* Nickell, 9 W. Va. 345.

United States.— Thorington *v.* Smith, 8 Wall. 1, 19 L. ed. 361.

See 20 Cent. Dig. tit. "Evidence," § 1965.

Where a bond is payable in "current funds" it may be shown by parol that it was, by an agreement made at the time the bond was executed, payable, at any time before maturity, in Confederate currency. Meredith *v.* Salmon, 21 Gratt. (Va.) 762. But see cases cited *infra*, note 15.

Where a note is payable in cloth "at a fair wholesale factory price" parol evidence is admissible to show that a certain scale of prices was intended, different from the actual wholesale prices in the market. Barrett *v.* Allen, 10 Ohio 426.

Evidence confirming the statutory presumption arising on the face of a note as to the kind of money in which it is payable is admissible. Duke *v.* Williams, 84 N. C. 74.

15. Osgood *v.* McConnell, 32 Ill. 74; Baugh *v.* Ramsey, 4 T. B. Mon. (Ky.) 155; Davis *v.* Glenn, 76 N. C. 427.

16. *Connecticut.*— Smith *v.* Barber, 1 Root 207. See also Graves *v.* Johnson, 48 Conn. 160, 40 Am. Rep. 162.

Indiana.— Lake Erie, etc., R. Co. *v.* Holland, 162 Ind. 460, 69 N. E. 138, 63 L. R. A. 948; Foulks *v.* Falls, 91 Ind. 315.

Iowa.— Truman *v.* Bishop, 83 Iowa 697, 50 N. W. 278; Harrison *v.* McKim, 18 Iowa 485.

Kansas.— Commercial Nat. Bank *v.* Atkinson, 62 Kan. 775, 64 Pac. 617.

Louisiana.— Cole *v.* Smith, 29 La. Ann. 551, 29 Am. Rep. 343.

Maryland.— Owings *v.* Baker, 54 Md. 82, 39 Am. Rep. 353.

Massachusetts.— Brown *v.* Butler, 99 Mass. 179; Pearson *v.* Stoddard, 9 Gray 199; Austin *v.* Boyd, 24 Pick. 64.

Nebraska.—Corbett *v.* Fetzer, 47 Nebr. 269, 66 N. W. 417.

Nevada.— California Bank *v.* White, 14 Nev. 373.

New Jersey.— Watkins *v.* Kirkpatrick, 26 N. J. L. 84.

New York.— Little *v.* Tyng, 1 N. Y. City Ct. 309; Burkhalter *v.* Pratt, 1 N. Y. City Ct. 22. But *compare* Prosser *v.* Luqueer, 4 Hill 420, 40 Am. Dec. 288.

North Carolina.— Williams *v.* Glenn, 92 N. C. 253, 53 Am. Rep. 416.

Ohio.— Oldham *v.* Broom, 28 Ohio St. 41.

West Virginia.—Young *v.* Sehon, 53 W. Va. 127, 44 S. E. 136, 97 Am. St. Rep. 970, 62 L. R. A. 499.

Wisconsin.— Cady *v.* Shepard, 12 Wis. 639. But *compare* Metzerott *v.* Ward, 10 App. Cas. (D. C.) 514.

See 20 Cent. Dig. tit. "Evidence," §§ 1957–1964. See also Commercial Paper, 8 Cyc. 262.

Contradiction of express language.— Where goods were furnished to a married woman, and charged to her husband, and upon suit being brought against the husband, a note was given by both in settlement, with the word "security" under the wife's name, evidence was not admissible in an action on the note to contradict the meaning of that word. Van Name *v.* Vanderveer, 2 N. J. L. J. 125.

Where a promise to pay is joint and several, it cannot be shown by parol to be otherwise. Mariner's Bank *v.* Abbott, 28 Me. 280.

17. *Alabama.*— Carter *v.* Long, 125 Ala. 280, 23 So. 74.

Connecticut.— Case *v.* Spaulding, 24 Conn. 578.

Illinois.— Pfirshing *v.* Heitner, 91 Ill. App. 407.

Indiana.— Kealing *v.* Vansickle, 74 Ind. 529, 39 Am. Rep. 101; Browning *v.* Merritt, 61 Ind. 425; Harris *v.* Pierce, 6 Ind. 162.

Louisiana.— Ragsdale *v.* Ragsdale, 105 La. 405, 29 So. 906.

Michigan.— Barger *v.* Farnham, 130 Mich. 487, 90 N. W. 281.

Missouri.— Herndon *v.* Lewis, 175 Mo. 116, 74 S. W. 976.

New Jersey.— Elliott *v.* Moreland, 69 N. J. L. 216, 54 Atl. 224.

Ohio.— Champion *v.* Griffith, 13 Ohio 228.

Pennsylvania.— Ross *v.* Espy, 66 Pa. St. 481, 5 Am. Rep. 394.

Texas.— Marshall Nat. Bank *v.* Smith, (Civ. App. 1903) 77 S. W. 237.

obligations for the payment of money,[18] as who is principal and who surety in a note or bond;[19] that as between themselves the relation of successive indorsers is that of cosureties,[20] or that successive accommodation indorsers had agreed to be jointly bound.[21] And it is also established by the weight of authority that parol evidence is admissible to show that one who appears by the face of the instrument to be a joint obligor, promisor, or maker, is in fact only a surety.[22]

Vermont.— Barrows *v.* Lane, 5 Vt. 161, 26 Am. Dec. 293.

West Virginia.— Burton *v.* Hansford, 10 W. Va. 470, 27 Am. Rep. 571.

See 20 Cent. Dig. tit. "Evidence," § 1964. See also COMMERCIAL PAPER, 7 Cyc. 669, 670.

18. *Massachusetts.*— Mansfield *v.* Edward, 136 Mass. 15, 49 Am. Rep. 1; Harris *v.* Brooks, 21 Pick. 195, 32 Am. Rep. 254.

Michigan.— Lee *v.* Wisner, 38 Mich. 82. *Compare* Coots *v.* Farnsworth, 61 Mich. 497, 28 N. W. 534.

Missouri.— Leeper *v.* Paschal, 70 Mo. App. 117.

Nebraska.— Jaster *v.* Currie, (1903) 94 N. W. 995.

New York.— Wells *v.* Miller, 66 N. Y. 255; Easterly *v.* Barber, 4 Hun 426; Thomas *v.* Truscott, 53 Barb. 200.

Ohio.— Stark *v.* Benton, 4 Ohio Dec. (Reprint) 401, 2 Clev. L. Rep. 106.

Pennsylvania.— Mickley *v.* Stocksleger, 10 Pa. Co. Ct. 345.

South Carolina.— Field *v.* Pelot, McMull. Eq. 369.

United States.— Vary *v.* Norton, 6 Fed. 808.

Canada.— Scott *v.* Turnbull, 6 Montreal Leg. N. 397.

See 20 Cent. Dig. tit. "Evidence," §§ 1911–1964; and cases cited in COMMERCIAL PAPER, 8 Cyc. 262 *et seq.*

19. *Alabama.*— Pollard *v.* Stanton, 5 Ala. 451.

Georgia.— Higdon *v.* Bailey, 26 Ga. 426.

Indiana.— Dickerson *v.* Ripley County, 6 Ind. 128, 63 Am. Dec. 373.

Kentucky.— Emmons *v.* Overton, 18 B. Mon. 643.

Maryland.— Brown *v.* Stewart, 4 Md. Ch. 368.

Massachusetts.—Carpenter *v.* King, 9 Metc. 511, 43 Am. Dec. 405.

Mississippi.— Davis *v.* Mikell, Freem. 548.

Missouri.— Mechanics' Bank *v.* Wright, 53 Mo. 153; Garrett *v.* Ferguson, 9 Mo. 125; Foster *v.* Wallace, 2 Mo. 231.

New Hampshire.— Nims *v.* Bigelow, 44 N. H. 376.

New Jersey.—Paulin *v.* Kaighn, 27 N. J. L. 503.

New York.— Neimcewicz *v.* Gahn, 3 Paige 614.

South Carolina.— Smith *v.* Tunno, 1 McCord Eq. 443, 16 Am. Dec. 617.

Texas.— Burke *v.* Cruger, 8 Tex. 66, 58 Am. Dec. 102; Babcock *v.* Milmo Nat. Bank, 1 Tex. App. Civ. Cas. § 817.

West Virginia.— Creigh *v.* Hedrick, 5 W. Va. 140.

20. Weeks *v.* Parsons, 176 Mass. 570, 58 N. E. 157; Sloan *v.* Gibbes, 56 S. C. 480, 35 S. E. 408, 76 Am. St. Rep. 551.

21. Egbert *v.* Hanson, 34 Misc. (N. Y.) 596, 70 N. Y. Suppl. 383. See also Ross *v.* Espy, 66 Pa. St. 481, 5 Am. Rep. 394, holding that parol evidence is admissible to show that at the time of an indorsement the first and second indorsers agreed that in case of loss they should share it jointly.

22. *Alabama.*—State Branch Bank *v.* James, 9 Ala. 949.

Georgia.— Buck *v.* Georgia State Bank, 104 Ga. 660, 30 S. E. 872; Code Civ. Proc. § 2984.

Kentucky.— Craddock *v.* Lee, 61 S. W. 22, 22 Ky. L. Rep. 1651; Youtsey *v.* Kutz, 60 S. W. 857, 22 Ky. L. Rep. 1520.

Louisiana.—Waggaman *v.* Zacharie, 8 Rob. 181; McCarty *v.* Roach, 7 Rob. 357; Pilie *v.* Patin, 8 Mart. N. S. 692.

Maine.— Mariner's Bank *v.* Abbott, 28 Me. 280.

Maryland.— Spencer *v.* Almoney, 56 Md. 551.

Minnesota.— Metzner *v.* Baldwin, 11 Minn. 150.

Missouri.— Scott *v.* Bailey, 23 Mo. 140; Markham *v.* Cover, 99 Mo. App. 83, 72 S. W. 474; Hardester *v.* Tate, 85 Mo. App. 624; Citizens' Ins. Co. *v.* Broyles, 78 Mo. App. 364. But *compare* McCollum *v.* Boughton, 132 Mo. 601, 30 S. W. 1028, 33 S. W. 476, 34 S. W. 480, 35 L. R. A. 480; McMillan *v.* Parkell, 64 Mo. 286.

New York.— Hubbard *v.* Gurney, 64 N. Y. 457, 13 Alb. L. J. 267 [*overruling* Campbell *v.* Tate, 7 Lans. 370; Benjamin *v.* Arnold, 5 Thomps. & C. 54]; Knowles *v.* Cuddeback, 19 Hun 590; Le Farge *v.* Herter, 11 Barb. 159.

North Carolina.— Cole *v.* Fox, 83 N. C. 463; Welfare *v.* Thompson, 83 N. C. 276.

Ohio.— Smith *v.* Bing, 3 Ohio 33.

Oklahoma.— Stovall *v.* Adair, 9 Okla. 620, 60 Pac. 282.

Oregon.—Thompson *v.* Coffman, 15 Oreg. 631, 16 Pac. 713.

Rhode Island.—Otis *v.* Van Storch, 15 R. I. 41, 23 Atl. 39.

Tennessee.— White *v.* Brown, 4 Humphr. 292.

Utah.— Gillett *v.* Taylor, 14 Utah 190, 46 Pac. 1099, 60 Am. St. Rep. 890.

Virginia.— Williams *v.* Macatee, 86 Va. 681, 10 S. E. 1061.

Washington.— British Columbia Bank *v.* Jeffs, 15 Wash. 230, 46 Pac. 247; Harmon *v.* Hale, 1 Wash. Terr. 422, 34 Am. Rep. 816. But *compare* Allen *v.* Chambers, 13 Wash. 327, 43 Pac. 57.

United States.— American, etc., Corp. *v.* Marquam, 62 Fed. 960. But *compare* Sprigg

21. Non-Contractual Recitals. A statement of fact contained in a contract but forming no part of the contract may be contradicted by parol evidence.[23]

22. Papers Relating to Same Transaction. Under the rule that papers executed at the same time and relating to the same subject-matter should be construed together,[24] it may be permissible to contradict or vary the effect of one of such papers by what is contained in the other,[25] and where two such papers differ in a certain particular, extrinsic evidence is admissible to show which paper expresses the true agreement of the parties.[26]

23. Parties to Instrument or Obligation — a. In General. Where a deed, contract, or other instrument in writing is ambiguous as to the parties thereto, parol evidence is admissible to show who are the real parties,[27] and the principle

v. Mt. Pleasant Bank, 14 Pet. 201, 10 L. ed. 419 [*affirming* 22 Fed. Cas. No. 13,257, 1 McLean 384].

But *compare* Aud *v.* Magruder, 10 Cal. 282; Kritzer *v.* Mills, 9 Cal. 21; Hutchinson *v.* Hendrickson, 29 N. J. L. 180; Pintard *v.* Davis, 21 N. J. L. 632, 47 Am. Dec. 172; Arnold *v.* Cessna, 25 Pa. St. 34.

See 20 Cent. Dig. tit. "Evidence," § 1964; and cases cited in Commercial Paper, 8 Cyc. 263 note 92.

Where two persons have signed a lease as lessees, parol evidence is admissible to show that one of them is a mere surety, for the purpose of determining his rights as against the other lessee, but not for the purpose of altering the legal effect of the written instrument. Hobbs *v.* Batory, 86 Md. 68, 37 Atl. 713.

Contradiction of express language.— Where the makers of a note "jointly and severally, all as principals, promise," etc., none of them can introduce parol evidence that they were sureties only. Exeter Bank *v.* Stowell, 16 N. H. 61, 41 Am. Dec. 716. So also where a note is drawn "We, or either of us, promise," etc., and is signed by three persons, parol evidence is inadmissible, in an action at law thereon, to show that two of the signers were only accommodation sureties. Honeyman *v.* Van Nest, 4 N. J. L. 151. And in an action on a note which recites that at a certain date "we, as principals, promise to pay," etc., and which is signed by individuals only, the makers cannot show by parol evidence that the money in question was advanced by the payee for the use of the state, that the note was made as evidence of the state's indebtedness, and that the signers are all sureties. Wingate *v.* Blalock, 15 Wash. 44, 45 Pac. 663.

23. Rose *v.* Madden, 1 Kan. 445; Bourne *v.* Bourne, 92 Ky. 211, 17 S. W. 443, 13 Ky. L. Rep. 545; Glover *v.* Ruffin, 6 Ohio 255; The Nith, 36 Fed. 86, 13 Sawy. 368.

A recital as to the value of property contained in a receipt given by one who undertook to keep it for the owner is not conclusive, but parol evidence of the value may be admitted. Bancroft *v.* Parker, 13 Pick. (Mass.) 192.

Recitals in a tax deed of the fact of sale are not conclusive but the owner may show against such recitals that in fact no sale was made. McNamara *v.* Estes, 22 Iowa 246.

24. See Contracts, 9 Cyc. 580.

25. Thomas *v.* Austin, 4 Barb. (N. Y.) 265.

26. Payson *v.* Lamson, 134 Mass. 593, 45 Am. Rep. 348, where a note and collateral mortgage executed at the same time did not correspond as to interest.

27. *Alabama.*— May *v.* Hewitt, 33 Atl. 161; Lindsay *v.* Hoke, 21 Ala. 542.

Illinois.— Hogan *v.* Wallace, 166 Ill. 328, 46 N. E. 1136 [*reversing* 63 Ill. App. 385]; Adams Express Co. *v.* Boskowitz, 107 Ill. 660; Young *v.* Lorain, 11 Ill. 624, 52 Am. Dec. 463.

Iowa.— Baldwin *v.* Hill, 97 Iowa 586, 66 N. W. 889.

Maine.— Haskell *v.* Tukesbury, 92 Me. 551, 43 Atl. 500, 69 Am. St. Rep. 529.

Maryland.— Rice *v.* Forsyth, 41 Md. 389.

Massachusetts.— Shawmut Sugar Refining Co. *v.* Hampden Mut. Ins. Co., 12 Gray 540; Herring *v.* Boston Iron Co., 1 Gray 134; Root *v.* Fellowes, 6 Cush. 29.

New Hampshire.— Bartlett *v.* Remington, 59 N. H. 364.

New York.— See Secor *v.* Law, 9 Bosw. 163.

Rhode Island.— Kinney *v.* Flynn, 2 R. I. 319.

South Dakota.— First Nat. Bank *v.* North, 2 S. D. 480, 51 N. W. 96.

Tennessee.— Holmes *v.* Jarrett, 7 Heisk. 506.

Texas.— Moore *v.* Williams, 26 Tex. Civ. App. 142, 62 S. W. 977.

Virginia.— Wadsworth *v.* Allen, 8 Gratt. 174, 56 Am. Dec. 137.

United States.— Daniels *v.* Citizens' Ins. Co., 5 Fed. 425, 10 Biss. 116.

England.— Taylor *v.* Hodgson, 3 D. & L. 115, 10 Jur. 355. See also Holding *v.* Elliott, 5 H. & N. 117, 29 L. J. Exch. 134, 1 L. T. Rep. N. S. 381, 8 Wkly. Rep. 192.

See 20 Cent. Dig. tit. "Evidence," § 1906.

Where the christian name of a grantee is omitted in a deed, evidence *aliunde* is admissible to identify him. Holmes *v.* Jarrett, 7 Heisk. (Tenn.) 506; Leach *v.* Dodson, 64 Tex. 185.

Where a subscription contract does not name a payee, parol evidence is admissible to show that the vestry of the church for the erection of which the subscription is made, were the payees. Hopkins *v.* Upshur, 20 Tex. 89, 70 Am. Dec. 375 [*distinguishing* Philips

that the rule excluding parol evidence to vary or control a written contract does not apply as against third persons has been successfully invoked to procure or sustain the admission of evidence showing that a person not a party to a writing was entitled to participate in the benefits thereof.[28] It has also been held that in order to charge the real principal it is always competent, in whatever form a contract is executed by an agent, to ascertain by evidence *dehors* the instrument who is the principal, and whether it purports to be the contract of an agent or is made in the name of the agent as principal;[29] on the other hand the general rule against the admission of parol evidence to vary or contradict a written instrument has been held to preclude the admission of evidence to show that the real parties to the instrument are other than those whose names appear in or are signed thereto.[30]

b. Showing Real Party in Interest. Parol evidence is admissible to show for whose benefit a contract was made,[31] or where an instrument shows that a

Limerick Academy *v.* Davis, 11 Mass. 113, 6 Am. Dec. 162].

Where there is no such person as the one named as the grantee in a deed, this is a case of latent ambiguity which will admit of the introduction of parol evidence to show who the real grantee is. Sykes *v.* McRory, 32 Ga. 348; Walker *v.* Wells, 25 Ga. 141, 71 Am. Dec. 164 [*overruling* Tison *v.* Yawn, 15 Ga. 491, 60 Am. Dec. 708; Sykes *v.* Doe, 10 Ga. 465, 54 Am. Dec. 402], holding that where a grant was to "B. S., orphan," and there was no person of that name, it might be shown that the grant was intended to be to "B. S.'s orphan."

Where there are two persons of the same name a case of latent ambiguity arises. See *supra*, XVI, C, 10, c, (II).

28. Stone *v.* Aldrich, 43 N. H. 52. See also Hall *v.* Crouse, 13 Hun (N. Y.) 557, holding that parol evidence is admissible to show that a mortgage was given to secure future advances to be made by a person not named in the security. See also *infra*, XVI, D, 3, a.

29. *California.*— Curran *v.* Holland, 141 Cal. 437, 75 Pac. 46.

Massachusetts.— See Byington *v.* Simpson, 134 Mass. 169, 45 Am. Rep. 314.

New York.— See Briggs *v.* Partridge, 64 N. Y. 357, 21 Am. Rep. 617; Coleman *v.* Elmira Third Nat. Bank, 53 N. Y. 393.

United States.— Ford *v.* Williams, 21 How. 287, 16 L. ed. 36; Exchange Bank *v.* Hubbard, 62 Fed. 112, 10 C. C. A. 295.

England.—See Higgins *v.* Senior, 8 M. & W. 834.

See 20 Cent. Dig. tit. "Evidence," § 1910.

30. *Alabama.*— Wren *v.* Wardlaw, Minor 363, 12 Am. Dec. 60.

California.— Ferguson *v.* McBean, 91 Cal. 63, 2 Pac. 518, 14 L. R. A. 65; Young America Engine Co. No. 6 *v.* Sacramento, 47 Cal. 594.

Iowa.— Evans *v.* Duncan, 82 Iowa 401, 48 N. W. 922; Chambers *v.* Brown, 69 Iowa 213, 28 N. W. 561.

Maine.— Conner *v.* Lewis, 16 Me. 268.

Maryland.— American Nat. Bank *v.* Harlan, 89 Md. 675, 43 Atl. 756; Zihlman *v.* Cumberland Glass Co., 74 Md. 303, 22 Atl. 271.

Nebraska.— Nebraska Nat. Bank *v.* Ferguson, 49 Nebr. 109, 68 N. W. 370, 59 Am. St. Rep. 522.

Texas.— Brackenridge *v.* Claridge, 91 Tex. 527, 44 S. W. 819, 43 L. R. A. 593 [*reversing* (Civ. App. 1897) 42 S. W. 1005]; Heffron *v.* Pollard, 73 Tex. 96, 11 S. W. 165, 15 Am. St. Rep. 764.

See 20 Cent. Dig. tit. "Evidence," § 1907.

A sealed instrument cannot be varied by parol evidence as to the real parties in interest. Mason *v.* Breslin, 2 Sweeny (N. Y.) 386, 9 Abb. Pr. N. S. (N. Y.) 427, 40 How. Pr. (N. Y.) 436; O'Brien *v.* Smith, 13 N. Y. Suppl. 408.

Where the legal effect of a contract is to bind certain persons as principals, such persons cannot, by parol, defeat the effect of such contract, by showing that some other person was to be bound thereby and not themselves. Weir Furnace Co. *v.* Bodwell, 73 Mo. App. 389, holding it to be settled law in Missouri that where an association assumes to enter into a contract in a corporate capacity, and the party dealing with the association contracts with it as if it were a corporation, the individual members of the association can be held liable as partners, in the absence of any stipulation that a corporation to be organized thereafter shall be alone looked to for payment; where corporate promoters enter into a written contract for and in the name of a future corporation they cannot by parol defeat the effect of such contract by showing that the future corporation was to be bound thereby and not themselves. See also *supra*, XVI, A, 2.

A contract which by its terms is a joint one of two persons cannot be turned into a separate contract of one of such persons by parol evidence. Snyder *v.* Neefus, 53 Barb. (N. Y.) 63.

When a contract is not under seal parol evidence is admissible to show that persons other than the parties are interested therein or chargeable thereunder. Woodhouse *v.* Duncan, 106 N. Y. 527, 13 N. E. 334 [*affirming* 36 Hun 644]; Ropes *v.* Arnold, 81 Hun (N. Y.) 476, 30 N. Y. Suppl. 997.

31. Lancey *v.* Phœnix F. Ins. Co., 56 Me. 562; Burrows *v.* Turner, 24 Wend. (N. Y.) 276, 35 Am. Dec. 622. See also Bainbridge *v.* Richmond, 17 Hun (N. Y.) 391; Catlett *v.* Pacific Ins. Co., 1 Wend. (N. Y.) 561.

party thereto acts not for himself but for another, to show the real party in interest.[32]

c. Character in Which Party Acts or Contracts. Where there is on the face of a contract ambiguity as to the character in which a party contracts, the door is open to parol evidence, which cannot in such case be said to vary the contract.[33] Thus, where an executor, administrator, guardian, or other fiduciary is a party to an instrument, parol evidence is admissible to show that he acted in his fiduciary capacity;[34] and where there is such ambiguity on the face of an instrument or agreement made or signed by a public or corporate officer as to be consistent with the construction, either that he means to bind himself personally, or that he acts in his official capacity, parol evidence is clearly admissible to prove the circumstances under which the contract was made and the true nature of the transaction, in order to show in what character he acted.[35] But where the legal effect of an instrument is to bind the officers by whom it is signed alone, and the name of the corporation does not appear on the instrument in such a way as to render it doubtful from the paper itself whether the corporation or the officers were

32. Johnson *v.* Calnan, 19 Colo. 168, 34 Pac. 905, 41 Am. St. Rep. 224; Southern L. Ins., etc., Co. *v.* Gray, 3 Fla. 262; Bayles *v.* Crossman, 5 Ohio Dec. (Reprint) 354, 5 Am. L. Rec. 13; Union Pac. R. Co. *v.* Durant, 95 U. S. 576, 24 L. ed. 391; Baldwin *v.* Newbury bank, 1 Wall. (U. S.) 234, 17 L. ed. 534.

33. *Indiana.*— Holt *v.* Sweetzer, 23 Ind. App. 237, 55 N. E. 254.

Maryland.— Morrison *v.* Baechtold, 93 Md. 319, 48 Atl. 926.

Mississippi.— Richardson *v.* Foster, 73 Miss. 12, 18 So. 573, 55 Am. St. Rep. 481.

Ohio.—Consolidated Coal, etc., Co. *v.* Cincinnati, etc., R. Co., 9 Ohio Dec. (Reprint) 15, 10 Cinc. L. Bul. 42.

South Dakota.— Small *v.* Elliott, 12 S. D. 570, 82 N. W. 92, 76 Am. St. Rep. 630.

See, generally, PRINCIPAL AND AGENT.

34. *Alabama.*— Russell *v.* Erwin, 41 Ala. 292; Beasley *v.* Watson, 41 Ala. 234; Baker *v.* Gregory, 28 Ala. 544, 65 Am. Dec. 366.

District of Columbia.— Woodbury *v.* District of Columbia, 5 Mackey 127.

Michigan.— Catlin *v.* Birchard, 13 Mich. 110.

South Carolina.— Childs *v.* Alexander, 22 S. C. 169.

Washington.— Cole *v.* Satsop R. Co., 9 Wash. 487, 37 Pac. 700, 43 Am. St. Rep. 858; Brewster *v.* Baxter, 2 Wash. Terr. 135, 3 Pac. 844.

See 20 Cent. Dig. tit. "Evidence," § 1908.

Where a receiver executes a bond binding him personally to indemnify his surety on an undertaking for costs in an action brought by him as receiver, he cannot show by parol that the bond was not a personal obligation. American Surety Co. *v.* McDermott, 5 Misc. (N. Y.) 298, 25 N. Y. Suppl. 467 [*affirmed* in 9 Misc. 123, 29 N. Y. Suppl. 76].

Where the maker of a note adds the word "trustee" to his signature, parol evidence is inadmissible to show an agreement at the time of the execution of the note that the maker was not to be personally liable, but that it was to be paid out of a fund of which he was trustee. Conner *v.* Clark, 12 Cal. 168, 73 Am. Dec. 529.

35. *Alabama.*— Chambers *v.* Falkner, 65 Ala. 448.

Colorado.— Hager *v.* Rice, 4 Colo. 90, 34 Am. Rep. 68 [*disapproving* Tannatt *v.* Rocky Mountain Nat. Bank, 1 Colo. 278, 9 Am. Rep. 156]; Lewis *v.* New York Mut. L. Ins. Co., 8 Colo. App. 368, 46 Pac. 621.

Georgia.— Ghent *v.* Adams, 2 Ga. 214.

Illinois.— Keeley Brewing Co. *v.* Neubauer Decorating Co., 194 Ill. 580, 62 N. E. 923; Scanlan *v.* Keith, 102 Ill. 634, 40 Am. Rep. 624; Hypes *v.* Griffin, 89 Ill. 134, 31 Am. Rep. 71.

Kansas.— Kline *v.* Tescott Bank, 50 Kan. 91, 31 Pac. 688, 34 Am. St. Rep. 107, 18 L. R. A. 533; Gardner *v.* Cooper, 9 Kan. App. 587, 58 Pac. 230, 60 Pac. 540.

Maryland.— Morrison *v.* Baechtold, 93 Md. 319, 48 Atl. 926; Laflin, etc., Co. *v.* Sinsheimer, 48 Md. 411, 30 Am. Rep. 472; Haile *v.* Peirce, 32 Md. 327, 3 Am. Rep. 139.

Massachusetts.— Simonds *v.* Heard, 23 Pick. 120, 34 Am. Dec. 41.

Missouri.— McClellan *v.* Reynolds, 49 Mo. 312; Marks *v.* Turner, 54 Mo. App. 650.

New Jersey.— Simanton *v.* Vliet, 61 N. J. L. 595, 40 Atl. 595; Kean *v.* Davis, 21 N. J. L. 683, 47 Am. Dec. 182.

New York.— Hood *v.* Hallenbeck, 7 Hun 362; Lee *v.* Ft. Edward M. E. Church, 52 Barb. 116; Becker *v.* Lamont, 13 How. Pr. 23. See also Brockway *v.* Allen, 17 Wend. 40.

Oklahoma.— Janes *v.* Citizens' Bank, 9 Okla. 546, 60 Pac. 290 [*overruling* Keokuk Falls Imp. Co. *v.* Kingsland, etc., Mfg. Co., 5 Okla. 32, 47 Pac. 484].

Pennsylvania.— Smith *v.* Philadelphia Nat. Bank, 1 Walk. 318.

Texas.— Kelley *v.* Collier, 11 Tex. Civ. App. 353, 32 S. W. 428. See also Davis *v.* Harnbell, (Civ. App. 1894) 24 S. W. 972.

Vermont.— Michigan State Bank *v.* Peck, 28 Vt. 200, 65 Am. Dec. 234.

Virginia.— Richmond, etc., R. Co. *v.* Snead, 19 Gratt. 354, 100 Am. Dec. 670.

United States.—Alexandria Mechanics' Bank *v.* Columbia Bank, 5 Wheat. 326, 5 L. ed. 100; *In re* Southern Minnesota R. Co., 22 Fed. Cas. No. 13,188.

intended to be bound, parol evidence is not admissible to show that the officers acted only in their official capacity.[36]

d. Individual or Partnership Contract. Parol evidence has been held to be admissible to show that an instrument executed by one partner individually is intended as a firm obligation and is binding upon the firm,[37] or was made for the use and benefit of the firm,[38] especially where the instrument contains something indicating that it is more than a mere personal obligation.[39] It may also be shown by parol that the name of an individual appearing as a party to an instrument is a partnership name,[40] and that the contract or obligation is that of the firm;[41] and similarly where several persons have formed a partnership but have not adopted any firm-name, and one of them has made a contract in his own name with a person who knows he is acting for the firm, parol evidence is admissible to bind the firm on such contract.[42] Where an instrument is executed by several persons, it is competent to show by parol, when properly pleaded, that such persons composed a partnership and that they executed the instrument as a firm obligation,[43] or that the transaction was a partnership one and for the benefit of the firm.[44] Where the title to land purchased by the members of a firm is taken in the individual names of the persons composing the firm, parol evidence is admissible to show that the lands were purchased for partnership purposes and paid for with partnership funds,[45] and where land is purchased or held in the name of one partner, parol evidence is admissible to prove that the purchase was for the use and benefit of the firm, thus showing a resulting trust in favor of the firm.[46]

e. Identification of Parties. Where a person claims the benefit of an instrument in writing, or it is sought to charge him thereunder, parol evidence is admissible for the purpose of identifying such person as the one named in the instrument.[47]

See 20 Cent. Dig. tit. "Evidence," §§ 1908, 1910.

36. *Alabama.*— Moragne *v.* Richmond Locomotive, etc., Works, 124 Ala. 537, 27 So. 240.

California.— Richardson *v.* Scott River Water, etc., Co., 22 Cal. 150.

Illinois.— Hypes *v.* Griffin, 89 Ill. 134, 31 Am. Rep. 71; Powers *v.* Briggs, 79 Ill. 493, 22 Am. Rep. 175; Haines *v.* Nance, 52 Ill. App. 406.

Indiana.— Prescott *v.* Hixon, 22 Ind. App. 139, 53 N. E. 391, 72 Am. St. Rep. 291.

Kansas.— Merrill *v.* Young, 5 Kan. App. 761, 47 Pac. 187.

Maine.— Sturdivant *v.* Hull, 59 Me. 172, 8 Am. Rep. 409.

See 20 Cent. Dig. tit. "Evidence," § 1908.

Conflicting authorities.— It is to be noted that, while the principles set forth in the text are well settled and supported, there is the usual lack of uniformity in the application thereof to particular states of facts; and several of the cases cited *supra*, note 35, are, when the instrument in question is looked at, difficult to distinguish from the cases cited in this note.

37. Snead *v.* Barringer, 1 Stew. (Ala.) 134.

38. Hutchinson *v.* Payton, 12 Fed. Cas. No. 6,958, 2 Cranch C. C. 365.

39. Owings *v.* Trotter, 1 Bibb (Ky.) 157. Where two or more individuals are partners under a firm-name consisting of their individual names, or indicating that there is more than one member, an instrument executed by one partner in his individual name alone cannot be shown, for the purpose of charging the partnership, to be in truth the agreement or undertaking of the partnership as such, there being nothing upon the face of the instrument to indicate that such is the case. Osgood *v.* Bauder, 82 Iowa 171, 47 N. W. 1001; Jones *v.* Phelps, 5 Mich. 218.

40. De Cordova *v.* Korte, 7 N. M. 678, 41 Pac. 526.

41. Daugherty *v.* Heckard, 89 Ill. App. 544 [*affirmed* in 189 Ill. 239, 59 N. E. 569].

42. Getchell *v.* Foster, 106 Mass. 42.

43. Markham *v.* Cover, 99 Mo. App. 83, 72 S. W. 474; Davis *v.* Turner, 120 Fed. 605, 56 C. C. A. 669. See also Ellinger's Appeal, 114 Pa. St. 505, 7 Atl. 180.

44. Teare *v.* Cain, 7 Ohio Cir. Ct. 375, 4 Ohio Cir. Dec. 643.

45. Leary *v.* Boggs, 1 N. Y. St. 571.

46. *Iowa.*— York *v.* Clemens, 41 Iowa 95.

Kansas.— Scruggs *v.* Russell, McCahon 39.

Minnesota.— Sherwood *v.* St. Paul, etc., R. Co., 21 Minn. 127.

New York.— Fairchild *v.* Fairchild, 64 N. Y. 471 [*affirming* 5 Hun 407].

Pennsylvania.— See Black's Appeal, 89 Pa. St. 201.

Texas.— Kempner *v.* Rosenthal, 81 Tex. 12, 16 S. W. 639.

See 20 Cent. Dig. tit. "Evidence," § 1909. And see, generally, PARTNERSHIP; TRUSTS.

47. *Alabama.*— Chandler *v.* Shehan, 7 Ala. 251; Mundine *v.* Crenshaw, 3 Stew. 87.

California.— Hancock *v.* Watson, 18 Cal. 137.

f. Relations of Parties. The relation actually existing between parties to an instrument may be shown by parol, where the effect of such evidence is not to vary the effect of the writing,[48] but where a written paper appears to be a joint undertaking of all the signers, parol evidence is not admissible to show that some of the signers were parties of the first part contracting with the others as parties of the second part.[49]

g. Mistake or Variance in Name. While there are cases supporting the rule that a written instrument can be reformed only in equity and hence that in an action or proceeding at law parol evidence is not admissible to show a mistake in the name of a party,[50] the better and more modern rule is that at law as well as in equity a mistake or variance in the name of a party may be shown and parol evidence admitted to show the real party intended.[51]

24. Place of Execution. The place at which an instrument was executed, not being an essential part of the writing, parol evidence is admissible to show that the instrument was executed at a place different from the one at which it purports to have been executed.[52]

Georgia.— Greene *v.* Barnwell, 11 Ga. 282.
Mississippi.— Whitworth *v.* Harris, 40 Miss. 483.
Missouri.— Yantis *v.* Yourie, 10 Mo. 669.
New York.— Woolsey *v.* Morris, 96 N. Y. 311.
England.— Shore *v.* Atty.-Gen., 9 Cl. & F. 355, 5 Scott N. R. 958, 8 Eng. Reprint 450.

See 20 Cent. Dig. tit. "Evidence," § 2109.

A party to a decree may be identified by parol. Carmichael *v.* Vandebur, 50 Iowa 651.

Circumstantial evidence is admissible to identify parties to a deed. French *v.* Koenig, 8 Tex. Civ. App. 341, 27 S. W. 1079.

Appointment of public officer.— Parol evidence is admissible to show that the person acting as a justice of the peace under an appointment is the man intended by it, although the initial letter of the middle name of the appointee is omitted in the writing. Alexander *v.* Wilmorth, 2 Aik. (Vt.) 413.

48. Thus joint grantees may be shown to be husband and wife. McLaughlin *v.* Rice, 185 Mass. 212, 70 N. E. 52; Dowling *v.* Salliotte, 83 Mich. 131, 47 N. W. 225.

49. Myrick *v.* Dame, 9 Cush. (Mass.) 248 [*distinguishing* Carpenter *v.* King, 9 Metc. (Mass.) 511, 43 Am. Dec. 405].

50. *Alabama.*— Flournoy *v.* Mims, 17 Ala. 36; Gayle *v.* Hudson, 10 Ala. 116.
Kentucky.— Woodyard *v.* Threlkeld, 1 A. K. Marsh. 10.
Maine.— Whitmore *v.* Learned, 70 Me. 276.
Massachusetts.— Crawford *v.* Spencer, 8 Cush. 418.
North Carolina.— Coleman *v.* Crumpler, 13 N. C. 508.

51. *Alabama.*— Lamar *v.* Minter, 13 Ala. 31.
Arkansas.— Lafferty *v.* Lafferty, 10 Ark. 268.
Connecticut.— Riley *v.* Gourley, 9 Conn. 154.
Georgia.— Hicks *v.* Ivey, 99 Ga. 648, 26 S. E. 68; Ferrell *v.* Hurst, 68 Ga. 132; Thompson *v.* Hall, 67 Ga. 627; Tuggle *v.* McMath, 38 Ga. 648; Brooking *v.* Dearmond, 27 Ga. 58; Doe *v.* Roe, 16 Ga. 521, 23 Ga. 383, 68 Am. Dec. 529; Meadows *v.* Barry, Ga. Dec. 80.
Illinois.— Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704; Beardstown *v.* Virginia, 81 Ill. 541; Nixon *v.* Cobleigh, 52 Ill. 387; Scott *v.* Bennett, 8 Ill. 243; O'Connell *v.* Lamb, 63 Ill. App. 652.
Iowa.— Simons *v.* Marshall, 3 Greene 502.
Louisiana.— Robert *v.* Boulat, 9 La. Ann. 29; Palangue *v.* Guesnon, 15 La. 311.
Maine.— Andrews *v.* Dyer, 81 Me. 104. 16 Atl. 405; Jacobs *v.* Benson, 39 Me. 132. 63 Am. Dec. 609.
Maryland.— Mobberly *v.* Mobberly, 60 Md. 376; State *v.* Wootton, 4 Harr. & J. 21.
Massachusetts.— Milford *v.* Uxbridge, 130 Mass. 107; Slasson *v.* Brown, 20 Pick. 436; Scanlan *v.* Wright, 13 Pick. 523, 25 Am. Dec. 344.
Michigan.— Reed *v.* Gage, 33 Mich. 179.
Missouri.— Skinker *v.* Haagsma, 99 Mo. 208, 12 S. W. 659; Langlois *v.* Crawford, 59 Mo. 456; Williams *v.* Carpenter, 42 Mo. 327.
New York.— McArthur *v.* Soule, 5 Hun 63; Lee *v.* Salter, Lalor 163; Brockway *v.* Allen, 17 Wend. 40; Jackson *v.* Stanley, 10 Johns. 133, 6 Am. Dec. 319.
Oregon.— La Vie *v.* Tooze, 43 Oreg. 590, 74 Pac. 210, omission of christian name.
Pennsylvania.— Imhoff *v.* Fleurer, 2 Phila. 35.
South Dakota.— Salmer *v.* Lathrop, 10 S. D. 216, 72 N. W. 570.
Texas.— Stokes *v.* Riley, 29 Tex. Civ. App. 373, 68 S. W. 703.
Wisconsin.—Cleveland *v.* Burnham, 64 Wis. 347, 25 N. W. 407.

See 20 Cent. Dig. tit. "Evidence," § 2114.

There must be something found in the writing from which, connected with the parol evidence, the person beneficially entitled is clearly ascertained, for otherwise he might be arbitrarily designated by parol evidence without any written evidence indicating that any particular person was intended. Jacobs *v.* Benson, 39 Me. 132, 63 Am. Dec. 609.

52. Keys *v.* Powell, 9 La. 572; Scates *v.* Henderson, 44 S. C. 548, 22 S. E. 724.

25. Prior and Contemporaneous Collateral Agreements — a. In General. The rule excluding parol evidence to vary or contradict a writing does not extend so far as to preclude the admission of extrinsic evidence to show prior or contemporaneous collateral parol agreements between the parties.[53] Nor is it necessary in

53. *Alabama.*— Maness *v.* Henry, 96 Ala. 454, 11 So. 410; Huckabee *v.* Shepherd, 75 Ala. 342; Huntington *v.* Adams, 12 Ala. 834; Brown *v.* Isbell, 11 Ala. 1009.

Arkansas.— Weaver *v.* Fletcher, 27 Ark. 510.

California.—Southern California Sav. Bank *v.* Asbury, 117 Cal. 96, 48 Pac. 1081; Raynor *v.* Drew, 72 Cal. 307, 13 Pac. 866.

Colorado.— Mosier *v.* Kershow, 16 Colo. App. 453, 66 Pac. 449.

Florida.— Chamberlain *v.* Lesley, 39 Fla. 452, 22 So. 736; Branch *v.* Wilson, 12 Fla. 543.

Georgia.— Carter *v.* Griffin, 114 Ga. 321, 40 S. E. 290; Forsyth Mfg. Co. *v.* Castlen, 112 Ga. 199, 37 S. E. 485, 81 Am. St. Rep. 28.

Illinois.— Millers' Nat. Ins. Co. *v.* Kinneard, 35 Ill. App. 105. See also Gould *v.* Magnolia Metal Co., 207 Ill. 172, 69 N. E. 896 [*affirming* 108 Ill. App. 203].

Indiana.— Welz *v.* Rhodius, 87 Ind. 1, 44 Am. Rep. 747, Equitable Trust Co. *v.* Milligan, 31 Ind. App. 20, 65 N. E. 1044; Stewart *v.* Cleveland, etc., R. Co., 21 Ind. App. 218, 52 N. E. 89. See also Sharp *v.* Radebaugh, 70 Ind. 547.

Indian Territory.— Fox *v.* Tyler, 3 Indian Terr. 1, 53 S. W. 462.

Iowa.— Sutton *v.* Griebel, 118 Iowa 78, 91 N. W. 825; Harvey *v.* Henry, 108 Iowa 168, 78 N. W. 850; Gray *v.* Anderson, 99 Iowa 342, 68 N. W. 790, 61 Am. St. Rep. 243; Lister *v.* Clark, 48 Iowa 168; Frederick *v.* Remking, 4 Greene 56. See also Zabel *v.* Nyenhuis, 83 Iowa 756, 49 N. W. 999.

Kansas.— Schoen *v.* Sunderland, 39 Kan. 758, 18 Pac. 913; Polk *v.* Anderson, 16 Kan. 243; Babcock *v.* Deford, 14 Kan. 408; Slatten *v.* Konrath, 1 Kan. App. 636, 42 Pac. 399.

Kentucky.— Duncan *v.* Sheehan, 13 Ky. L. Rep. 780.

Louisiana.— Dwight *v.* Linton, 3 Rob. 57. See also Webre *v.* Beltran, 47 La. Ann. 195, 16 So. 860.

Maine.— Cook *v.* Littlefield, 98 Me. 299, 56 Atl. 899; Neal *v.* Flint, 88 Me. 72, 33 Atl. 669; Bradstreet *v.* Rich, 72 Me. 233; Goodspeed *v.* Fuller, 46 Me. 141, 71 Am. Dec. 572; Nickerson *v.* Saunders, 36 Me. 413; Marshall *v.* Baker, 19 Me. 402.

Maryland.— Hawley Down-Draft Furnace Co. *v.* Hooper, 90 Md. 390, 45 Atl. 456; Roberts *v.* Bonaparte, 73 Md. 191, 20 Atl. 918, 10 L. R. A. 689; Allen *v.* Sowerby, 37 Md. 410; Bladen *v.* Wells, 30 Md. 577; McCreary *v.* McCreary, 5 Gill & J. 147.

Massachusetts.— Taylor *v.* Wilcox, 167 Mass. 572, 46 N. E. 115; Rackemann *v.* Riverbank Imp. Co., 167 Mass. 1, 44 N. E. 990, 57 Am. St. Rep. 427; Dana *v.* Taylor, 150 Mass. 25, 22 N. E. 65; Willis *v.* Hulbert, 117 Mass. 151; Weston *v.* Chamberlin, 7 Cush. 404; Lapham *v.* Whipple, 8 Metc. 59, 41 Am. Dec. 487.

Michigan.— Buhl *v.* Mechanics' Bank, 123 Mich. 591, 82 N. W. 282; Stahelin *v.* Sowle, 87 Mich. 124, 49 N. W. 529; Blackwood *v.* Brown, 34 Mich. 4.

Minnesota.— King *v.* Dahl, 82 Minn. 240, 84 N. W. 737; Germania Bank *v.* Osborne, 81 Minn. 272, 83 N. W. 1084; Lynch *v.* Curfman, 65 Minn. 170, 68 N. W. 5; Hand *v.* Ryan Drug Co., 63 Minn. 539, 65 N. W. 1081; Beyerstedt *v.* Winona Mill Co., 49 Minn. 1, 51 N. W. 619.

Missouri.—Boggs *v.* Pacific Steam Laundry Co., 86 Mo. App. 616; Finks *v.* Hathaway, 64 Mo. App. 186.

Montana.— Armington *v.* Stelle, 27 Mont. 13, 69 Pac. 115, 94 Am. St. Rep. 811.

Nebraska.—Huffman *v.* Ellis, 64 Nebr. 623, 90 N. W. 552.

Nevada.— Travis *v.* Epstein, 1 Nev. 116.

New Jersey.— Naumberg *v.* Young, 44 N. J. L. 331, 43 Am. Rep. 380.

New York.— Van Brunt *v.* Day, 81 N. Y. 251 [*reversing* 17 Hun 166]; Chapin *v.* Dobson, 78 N. Y. 74, 34 Am. Rep. 512; Barry *v.* Ransom, 12 N. Y. 462; Lawrence *v.* Sullivan, 79 N. Y. App. Div. 453, 80 N. Y. Suppl. 499; Gibbons *v.* Bush Co., 52 N. Y. App. Div. 211, 65 N. Y. Suppl. 215 [*affirmed* in 169 N. Y. 574, 61 N. E. 1129]; Weigley *v.* Kneeland, 18 N. Y. App. Div. 47, 45 N. Y. Suppl. 388; Grand Rapids Veneer Works *v.* Forsythe, 83 Hun 230, 31 N. Y. Suppl. 601; Emmett *v.* Penoyer, 76 Hun 551, 28 N. Y. Suppl. 234; Duparquet *v.* Knubel, 24 Hun 653; Schenectady County *v.* McQueen, 15 Hun 551; Mayer *v.* Dean, 54 N. Y. Super. Ct. 315; Hoyt *v.* Hall, 3 Bosw. 42; Beckwith *v.* Burlingame, 16 Misc. 217, 39 N. Y. Suppl. 191; Gray *v.* Bliss, 19 N. Y. Suppl. 7; Andrews *v.* Brewster, 9 N. Y. Suppl. 114; Lanphire *v.* Slaughter, 61 How. Pr. 36; Potter *v.* Hopkins, 25 Wend. 417.

North Carolina.— Hardwood Log Co. *v.* Coffin, 130 N. C. 432, 126 N. C. 931; Colgate *v.* Latta, 115 N. C. 127, 20 S. E. 388, 26 L. R. A. 321; Terry *v.* Danville, etc., R. Co., 91 N. C. 236; Clark *v.* Clark, 65 N. C. 655.

Ohio.— Miller *v.* Florer, 15 Ohio St. 148.

Oregon.— Looney *v.* Rankin, 15 Oreg. 617, 16 Pac. 660; Oregonian R. Co. *v.* Wright, 10 Oreg. 162.

Pennsylvania.— *In re* Sutch, 201 Pa. St. 305, 50 Atl. 943; Huckestein *v.* Kelly, 152 Pa. St. 631, 25 Atl. 747; Everson *v.* Fry, 72 Pa. St. 326; Foster *v.* McGraw, 64 Pa. St. 464; White *v.* Black, 14 Pa. Super. Ct. 459; Emrick *v.* Groome, 4 Pa. Dist. 511.

Rhode Island.— See Warwick, etc., Water Co. *v.* Allen, (1896) 35 Atl. 579.

South Carolina.— Virginia-Carolina Chemical Co. *v.* Moore, 61 S. C. 166, 39 S. E. 346.

South Dakota.— Schuler *v.* Citizens' Bank, 13 S. D. 188, 82 N. W. 389; Chase *v.* Redfield Creamery Co., 12 S. D. 529, 81 N. W.

order to render evidence of an independent collateral parol agreement admissible that the written agreement should contain any reference thereto.[54] Existence of the alleged collateral agreement is a question for the jury.[55]

b. Agreement Must Be Consistent With Writing. In order to let in evidence of a collateral agreement between the parties, such agreement must be consistent with the terms of the writing; and the evidence must not tend to vary or contradict the terms of the written instrument or to defeat its operation.[56] With

951; Stebbins *v.* Lardner, 2 S. D. 127, 48 N. W. 847; Osborne *v.* Stringham, 1 S. D. 406, 47 N. W. 408.

Tennessee.— Quigley *v.* Shedd, 104 Tenn. 560, 58 S. W. 266; Hines *v.* Willcox, 96 Tenn. 148, 33 S. W. 914, 54 Am. St. Rep. 823, 34 L. R. A. 824, 832; Hill *v.* McLean, 10 Lea 107; Stewart *v.* Phœnix Ins. Co., 9 Lea 104; White *v.* Blakemore, 8 Lea 49; Hawkins *v.* Lea, 8 Lea 42; Lytle *v.* Bass, 7 Coldw. 303; Cobb *v.* Wallace, 5 Coldw. 539, 98 Am. Dec. 435; Leinau *v.* Smart, 11 Humphr. 308; Dick *v.* Martin, 7 Humphr. 263; Vanleer *v.* Fain, 6 Humphr. 104; Betts *v.* Demumbrune, Cooke 39.

Texas.— Thomas *v.* Hammond, 47 Tex. 42; Co.. *v.* Bray, 28 Tex. 247; Pishkos *v.* Wortek, (App. 1892) 18 S. W. 788; Blair *v.* Slosson, 27 Tex. Civ. App. 403, 66 S. W. 112; Peel *v.* Giesen, 21 Tex. Civ. App. 334, 51 S. W. 44; Hansen *v.* Yturria, (Civ. App. 1898) 48 S. W. 795; Staley *v.* Hankla, (Civ. App. 1897) 43 S. W. 20; Glisson *v.* Craig, 1 Tex. App. Civ. Cas. § 42.

Vermont.— Reynolds *v.* Hooker, 76 Vt. 184, 56 Atl. 988; Grand Isle *v.* Kinney, 70 Vt. 381, 41 Atl. 130; Redfield *v.* Gleason, 61 Vt. 320, 17 Atl. 1075, 15 Am. St. Rep. 889; Smith *v.* Hyde, 19 Vt. 54; Morton *v.* Wells, 1 Tyler 381.

Washington.— Gordon *v.* Parke, etc., Mach. Co., 10 Wash. 18, 38 Pac. 755.

West Virginia.— Rymer *v.* South Penn Oil Co., 54 W. Va. 530, 46 S. E. 559; Faulkner *v.* Thomas, 48 W. Va. 148, 35 S. E. 915.

Wisconsin.— Starke *v.* Wolf, 90 Wis. 434, 63 N. W. 755; Riemer *v.* Rice, 88 Wis. 16, 59 N. W. 450.

United States.— Godkin *v.* Monahan, 83 Fed. 116, 27 C. C. A. 410; Union Stock-Yards, etc., Co. *v.* Western Land, etc., Co., 59 Fed. 49, 7 C. C. A. 660; Michels *v.* Olmstead, 14 Fed. 219, 4 McCrary 549.

England.— Erskine *v.* Adeane, L. R. 8 Ch. 756, 42 L. J. Ch. 835, 29 L. T. Rep. N. S. 234, 21 Wkly. Rep. 802; Morgan *v.* Griffith, L. R. 6 Exch. 70, 40 L. J. Exch. 46, 23 L. T. Rep. N. S. 783, 19 Wkly. Rep. 957; Lindley *v.* Lacey, 17 C. B. N. S. 578, 10 Jur. N. S. 1108, 34 L. J. C. P. 7, 11 L. T. Rep. N. S. 273, 13 Wkly. Rep. 80, 112 E. C. L. 578; Wallis *v.* Littell, 11 C. B. N. S. 369, 8 Jur. N. S. 745, 31 L. J. C. P. 100, 5 L. T. Rep. N. S. 489, 10 Wkly. Rep. 192, 103 E. C. L. 369; Jeffery *v.* Walton, 1 Stark. 267, 2 E. C. L. 108.

Canada.— Northey Mfg. Co. *v.* Sanders, 31 Ont. 475; McMillan *v.* Byers, 3 Manitoba 361; McGinness *v.* Kennedy, 29 U. C. Q. B. 93.

See 20 Cent. Dig. tit. "Evidence," §§ 2030–2047.

Separate parol agreement constituting condition precedent may be shown. Eleventh St. Church of Christ *v.* Pennington, 18 Ohio Cir. Ct. 408, 10 Ohio Cir. Dec. 74.

Where there is an issue as to whether a writing constitutes the contract between the parties, evidence of an alleged verbal contract is admissible. Brennecke *v.* Heald, 107 Iowa 376, 77 N. W. 1063.

At law and in equity.— The rule applies whether the evidence is offered in an action at law or a suit in equity. Bryant *v.* Mansfield, 22 Me. 360.

54. Downey *v.* Hatter, (Tex. Civ. App. 1898) 48 S. W. 32.

55. Carter *v.* Griffin, 114 Ga. 321, 40 S. E. 290; Hines *v.* Willcox, 96 Tenn. 148, 33 S. W. 914, 54 Am. St. Rep. 823, 34 L. R. A. 824, 832.

56. *Alabama.*— Forbes *v.* Taylor, 139 Ala. 286, 35 So. 855; Brewton *v.* Glass, 116 Ala. 629, 22 So. 916; Tennessee, etc., R. Co. *v.* East Alabama R. Co., 73 Ala. 426; Holt *v.* Moore, 5 Ala. 521; Garrow *v.* Carpenter, 1 Port. 359.

Arkansas.— Borden *v.* Peay, 20 Ark. 293.

California.— Johnson *v.* D. H. Bibb Lumber Co., 140 Cal. 95, 73 Pac. 730; Bradford Invest. Co. *v.* Joost, 117 Cal. 204, 48 Pac. 1083.

Colorado.— Mackey *v.* Magnon, 28 Colo. 100, 62 Pac. 945 [*affirming* 12 Colo. App. 137, 54 Pac. 907]; Wilson *v.* Union Distilling Co., 16 Colo. App. 429, 66 Pac. 170; Denver Brewing Co. *v.* Barets, 9 Colo. App. 341, 48 Pac. 834.

Connecticut.— Adams *v.* Turner, 73 Conn. 38, 46 Atl. 247.

Delaware.— Gam *v.* Cordrey, (1902) 53 Atl. 334.

District of Columbia.— Randle *v.* Davis Coal, etc., Co., 15 App. Cas. 357; Linville *v.* Holden, 2 MacArthur 329.

Florida.— Chamberlain *v.* Lesley, 39 Fla. 452, 22 So. 736.

Georgia.— Carter *v.* Griffin, 114 Ga. 321, 40 S. E. 290; Stapleton *v.* Monroe, 111 Ga. 848, 36 S. E. 428.

Idaho.— Tyson *v.* Neill, 8 Ida. 603, 70 Pac. 790.

Illinois.— Ryan *v.* Cooke, 172 Ill. 302, 50 N. E. 213 [*affirming* 68 Ill. App. 592]; Heisen *v.* Heisen, 145 Ill. 658, 34 N. E. 597, 21 L. R. A. 434; Purinton *v.* Northern Illinois R. Co., 46 Ill. 297; Wheaton *v.* Bartlett, 105 Ill. App. 326; Kempshall *v.* Vedder, 79 Ill. App. 368; Miller's Nat. Ins. Co. *v.* Kinned, 35 Ill. App. 105.

respect to this principle it has been said that the implied conditions of a contract are as much a part of its terms as the written parts, and the rule which forbids

Indiana.— Sandage *v.* Studebaker Bros. Mfg. Co., 142 Ind. 148, 41 N. E. 380, 51 Am. St. Rep. 165, 34 L. R. A. 363; Stevens *v.* Flannagan, 131 Ind. 122, 30 N. E. 898; Singer Mfg. Co. *v.* Forsyth, 108 Ind. 334, 9 N. E. 372; Jones *v.* Schulmeyer, 39 Ind. 119; Smith *v.* Dallas, 35 Ind. 255.

Indian Territory.— Fox *v.* Tyler, 3 Indian Terr. 1, 53 S. W. 462.

Iowa.— Harvey *v.* Henry, 108 Iowa 168, 78 N. W. 850; Younie *v.* Walrod, 104 Iowa 475, 73 N. W. 1021; Taylor *v.* Trulock, 55 Iowa 448, 8 N. W. 306; Cedar Rapids, etc., R. Co. *v.* Boone County, 34 Iowa 45.

Kansas.— Robieson *v.* Royce, (Sup. 1901) 66 Pac. 646; Schoen *v.* Sunderland, 39 Kan. 758, 18 Pac. 913; Weeks *v.* Medler, 20 Kan. 57; Slatten *v.* Konrath, 1 Kan. App. 636, 42 Pac. 399.

Kentucky.— Hudspeth *v.* Tyler, 108 Ky. 520, 56 S. W. 973, 22 Ky. L. Rep. 221; Beattyville Bank *v.* Roberts, 78 S. W. 901, 25 Ky. L. Rep. 1796; Danville, etc., Turnpike Road Co. *v.* Lincoln County Fiscal Ct., 77 S. W. 379, 25 Ky. L. Rep. 1162; Sutton *v.* Kentucky Lumber Co., 44 S. W. 86, 19 Ky. L. Rep. 1604; Rudy *v.* Shelbyville, etc., Turnpike Road Co., 35 S. W. 916, 18 Ky. L. Rep. 180.

Maine.— Neal *v.* Flint, 88 Me. 72, 33 Atl. 669; Bonney *v.* Morrill, 57 Me. 368. See also Cook *v.* Littlefield, 98 Me. 299, 56 Atl. 899.

Maryland.— Merritt *v.* Peninsular Constr. Co., 91 Md. 453, 46 Atl. 1013.

Massachusetts.— Gardner *v.* Templeton St. R. Co., 184 Mass. 294, 68 N. E. 340; Taylor *v.* Goding, 182 Mass. 231, 65 N. E. 64; Radigan *v.* Johnson, 174 Mass. 68, 54 N. E. 358; Lilienthal *v.* Suffolk Brewing Co., 154 Mass. 185, 28 N. E. 151, 26 Am. St. Rep. 234, 12 L. R. A. 821.

Michigan.— Dowagiac Mfg. Co. *v.* Corbit, 127 Mich. 473, 86 N. W. 954, 87 N. W. 886; Brewster *v.* Potruff, 55 Mich. 129, 20 N. W. 823; Blackwood *v.* Brown, 34 Mich. 4.

Minnesota.— King *v.* Dahl, 82 Minn. 240, 84 N. W. 737; Baylor *v.* Butterfass, 82 Minn. 21, 84 N. W. 640; Winslow Bros. Co. *v.* Herzog Mfg. Co., 46 Minn. 452, 49 N. W. 234; St. Paul, etc., R. Co. *v.* St. Paul Union Depot Co., 44 Minn. 325, 46 N. W. 566; Stewart *v.* Murray, 13 Minn. 426.

Mississippi.— Chicago Bldg., etc., Co. *v.* Higginbotham, (1901) 29 So. 79; Feld *v.* Stewart, 78 Miss. 187, 28 So. 819 [*distinguishing* Volking *v.* Huckabay, 67 Miss. 206, 7 So. 325].

Missouri.— Standard Fireproofing Co. *v.* St. Louis Expanded Metal Fireproofing Co., 177 Mo. 559, 76 S. W. 1008; Chambers *v.* Board of Education, 60 Mo. 370; McCormick Harvesting Mach. Co. *v.* Mackey, 100 Mo. App. 400, 74 S. W. 388; First State Bank *v.* Noel, 94 Mo. App. 498, 68 S. W. 235; Norwich Union F. Ins. Co. *v.* Buchalter, 83 Mo. App. 504.

Nebraska.— Aultman *v.* Hawk, (1903) 95 N. W. 695; Peterson *v.* Ferbrache, (1903) 93 N. W. 1011; Huffman *v.* Ellis, 64 Nebr. 623, 90 N. W. 552; Faulkner *v.* Gilbert, 61 Nebr. 602, 85 N. W. 843; Thomas *v.* Nebraska Moline Plow Co., 56 Nebr. 383, 76 N. W. 876; Kaserman *v.* Fries, 33 Nebr. 427, 50 N. W. 269.

New Jersey.— Huffman *v.* Hummer, 17 N. J. Eq. 269.

New York.— Mead *v.* Dunlevie, 174 N. Y. 108, 66 N. E. 658; Brantingham *v.* Huff, 174 N. Y. 53, 66 N. E. 620, 95 Am. St. Rep. 545 [*reversing* 67 N. Y. App. Div. 621, 73 N. Y. Suppl. 643]; Thomas *v.* Scutt, 127 N. Y. 133, 27 N. E. 961; Grabfelder *v.* Vosburgh, 90 N. Y. App. Div. 307, 85 N. Y. Suppl. 633; Lillis *v.* Mertz, 89 N. Y. App. Div. 289, 85 N. Y. Suppl. 800; Gray *v.* Meyer, 88 N. Y. App. Div. 359, 84 N. Y. Suppl. 613; Townsend *v.* Greenwich Ins. Co., 86 N. Y. App. Div. 323, 83 N. Y. Suppl. 909 [*affirming* 39 Misc. 87, 78 N. Y. Suppl. 897]; Fuller *v.* Schrenk, 58 N. Y. App. Div. 222, 68 N. Y. Suppl. 781 [*affirmed* in 171 N. Y. 671, 64 N. E. 1126]; Hanes *v.* Sackett, 56 N. Y. App. Div. 610, 67 N. Y. Suppl. 843; Disbrow *v.* Disbrow, 46 N. Y. App. Div. 111, 61 N. Y. Suppl. 614 [*affirmed* in 167 N. Y. 606, 60 N. E. 1110]; Davis *v.* New York Steam Co., 33 N. Y. App. Div. 401, 54 N. Y. Suppl. 78; Williamson *v.* Seeley, 22 N. Y. App. Div. 389, 48 N. Y. Suppl. 196; Hutzler *v.* Richter, 13 N. Y. App. Div. 592, 43 N. Y. Suppl. 679; Emmett *v.* Penoyer, 76 Hun 551, 28 N. Y. Suppl. 234; American Surety Co. *v.* Crow, 22 Misc. 573, 49 N. Y. Suppl. 946; Abramson-Engesser Co. *v.* McCafferty, 86 N. Y. Suppl. 185; Rooney *v.* Thompson, 84 N. Y. Suppl. 263; Andrews *v.* Brewster, 9 N. Y. Suppl. 114.

Ohio.—De Haven *v.* Coup, 5 Ohio Dec. (Reprint) 562, 6 Am. L. Rec. 593.

Oklahoma.— Liverpool, etc., Ins. Co. *v.* T. M. Richardson Lumber Co., 11 Okla. 579, 585, 69 Pac. 936, 938.

Oregon.— Ruckman *v.* Imbler Lumber Co., 42 Oreg. 231, 70 Pac. 811; Hindman *v.* Edgar, 24 Oreg. 581, 17 Pac. 862.

Pennsylvania.— Kaufmann *v.* Friday, 201 Pa. St. 178, 50 Atl. 942; Streator *v.* Paxton, 201 Pa. St. 135, 50 Atl. 926; Eberle *v.* Girard L. Ins., etc., Co., 1 Pa. Cas. 409, 4 Atl. 808; Fahey *v.* Howley, 22 Pa. Super. Ct. 472.

South Carolina.—Virginia-Carolina Chemical Co. *v.* Moore, 61 S. C. 166, 39 S. E. 346.

Texas.— Belcher *v.* Mulhall, 57 Tex. 17; Smith *v.* Garrett, 29 Tex. 48; Cox *v.* Bray, 28 Tex. 247; Trammell *v.* Pilgrim, 20 Tex. 158; Pishkos *v.* Wortek, (App. 1892) 18 S. W. 788; Bruel *v.* Liggett, etc., Tobacco Co., 29 Tex. Civ. App. 405, 68 S. W. 718; Staley *v.* Hankla, (Civ. App. 1897) 43 S. W. 20.

Utah.— McCall Co. *v.* Jennings, 26 Utah 459, 73 Pac. 639.

Vermont.— Nelson *v.* Godfrey, 74 Vt. 470,

the proof of a collateral parol agreement which is inconsistent with the written terms equally forbids the proof of one which is inconsistent with its implied conditions.[57]

c. Completeness of Writing. In order to let in parol evidence of collateral agreements relating to the same subject-matter as a written agreement between the same parties, it must appear that the writing was not intended to embrace the entire agreement of the parties.[58] The only criterion of the completeness of a written contract as a full expression of the agreement of the parties is the writing itself. If it imports on its face to be a complete expression of the whole agreement — that is, contains such language as imports a complete legal obligation — it is conclusively presumed that the parties have introduced into it every material term, and parol evidence cannot be admitted to add another term, although the writing is silent as to the particular one to which the parol evidence is directed.[59] The writing cannot be proved to be incomplete by going outside and proving that there was an oral stipulation entered into and not contained in

52 Atl. 1037; Gilman *v.* Williams, 74 Vt. 327, 52 Atl. 428.

Virginia.— Triplett *v.* Woodward, 98 Va. 187, 35 S. E. 455; Slaughter *v.* Smither, 97 Va. 202, 33 S. E. 544.

Washington.— Pacific Nat. Bank *v.* San Francisco Bridge Co., 23 Wash. 425, 63 Pac. 207; Sibson *v.* Hamilton, etc., Co., 22 Wash. 449, 61 Pac. 162; Hemrich *v.* Wist, 19 Wash. 516, 53 Pac. 710; Gurney *v.* Morrison, 12 Wash. 456, 41 Pac. 192.

West Virginia.— Providence Washington Ins. Co. *v.* Board of Education, 49 W. Va. 360, 38 S. E. 679; Buena Vista Co. *v.* Billmyer, 48 W. Va. 382, 37 S. E. 583; Hukill *v.* Guffey, 37 W. Va. 425, 16 S. E. 544.

Wisconsin.— Jackowski *v.* Illinois Steel Co., 103 Wis. 448, 79 N. W. 757; Cliver *v.* Heil, 95 Wis. 364, 70 N. W. 346; Hubbard *v.* Marshall, 50 Wis. 322, 6 N. W. 497; Crawford *v.* Earl, 38 Wis. 312.

United States.—McAleer *v.* U. S., 150 U. S. 424, 14 S. Ct. 160, 37 L. ed. 1130; Burnes *v.* Scott, 117 U. S. 582, 6 S. Ct. 865, 29 L. ed. 991; Bast *v.* Ashland First Nat. Bank, 101 U. S. 93, 25 L. ed. 794; Specht *v.* Howard, 16 Wall. 564, 21 L. ed. 348; Pitcairn *v.* Philip Hiss Co., 125 Fed. 110, 61 C. C. A. 657; Ferguson Contracting Co. *v.* Manhattan Trust Co., 118 Fed. 791, 55 C. C. A. 529; Dennis *v.* Slyfield, 117 Fed. 474, 54 C. C. A. 520; Levy, etc., Mule Co. *v.* Kauffman, 114 Fed. 170, 52 C. C. A. 126; Green *v.* Chicago, etc., R. Co., 92 Fed. 873, 35 C. C. A. 68; Godkin *v.* Monahan, 83 Fed. 116, 27 C. C. A. 410; Union Stock-Yards, etc., Co. *v.* Western Land, etc., Co., 59 Fed. 49, 7 C. C. A. 660.

England.— Erskine *v.* Adeane, L. R. 8 Ch. 756, 42 L. J. Ch. 835, 29 L. T. Rep. N. S. 234, 21 Wkly. Rep. 802; Morgan *v.* Griffith, L. R. 6 Exch. 70, 40 L. J. Exch. 46, 23 L. T. Rep. N. S. 783, 19 Wkly. Rep. 957.

Canada.— Pherrill *v.* Pherrill, 13 Grant Ch. (U. C.) 476; McPherson *v.* Moody, 35 N. Brunsw. 51; Lancey *v.* Brake, 10 Ont. 428; Cramer *v.* Hodgson, 3 U. C. Q. B. 174.

See 20 Cent. Dig. tit. "Evidence," §§ 2030–2047.

The express engagement to pay contained in a promissory note of the usual form constitutes such instrument a complete contract importing on its face an absolute obligation as to which a reservation of right not to pay is contradictory. Therefore oral evidence of a contemporaneous agreement to surrender the note without payment, in rescission of the contract pursuant to which it was given, is inadmissible. Thisler *v.* Mackey, 65 Kan. 464, 70 Pac. 334.

A contemporaneous writing, authorizing the return of goods ordered in case they are not satisfactory, and showing on its face that it is executed by the seller's agent on the seller's behalf, is admissible, even though it conflicts in some respects with printed terms embodied in the order. Eastern Mfg. Co. *v.* Brenk, (Tex. Civ. App. 1903) 73 S. W. 538.

57. Sun Printing, etc., Assoc. *v.* Edwards, 113 Fed. 445, 51 C. C. A. 279. But see *infra*, XVI, C, 28.

58. *Alabama.*— Maness *v.* Henry, 96 Ala. 454, 11 So. 410.

Florida.— Chamberlain *v.* Lesley, 39 Fla. 452, 22 So. 736.

Indiana.— Diven *v.* Johnson, 117 Ind. 512, 20 N. E. 428, 3 L. R. A. 308.

Minnesota.— Hand *v.* Ryan Drug Co., 63 Minn. 539, 65 N. W. 1081.

Montana.— Armington *v.* Stelle, 27 Mont. 13, 69 Pac. 115, 94 Am. St. Rep. 811.

New Jersey.— Naumberg *v.* Young, 44 N. J. L. 331, 43 Am. Rep. 380.

New York.— See Atwater *v.* Orford Copper Co., 85 N. Y. Suppl. 426.

North Dakota.— Johnson *v.* Kindred State Bank, 12 N. D. 336, 96 N. W. 588.

Oregon.— Looney *v.* Rankin, 15 Oreg. 617, 16 Pac. 660.

Pennsylvania.— See Tranter Davison Mfg. Co. *v.* Pittsburg Trolley Pole Co., 23 Pa. Super. Ct. 46, where the contract provided that "there are no understandings or agreements outside of this written contract."

Wisconsin.— O'Brien Lumber Co. *v.* Wilkinson, 117 Wis. 468, 94 N. W. 337.

See 20 Cent. Dig. tit. "Evidence," §§ 2030–2047, 2048. See also *infra*, XVI, C, 39, c.

59. *Indiana.*— Reynolds *v.* Louisville, etc., R. Co., 143 Ind. 579, 40 N. E. 410; Diven *v.* Johnson, 117 Ind. 512, 518, 20 N. E. 428, 3 L. R. A. 308.

the written agreement,[60] nor can parol evidence be admitted to prove a contemporaneous agreement that a written instrument which appears upon its face to be duly executed, intelligible, unambiguous, reasonable, and complete, should be considered only as the basis or outline of a contract to be subsequently filled out with stipulations other than those contained in the writing.[61]

d. Matters of Inducement. The general rule admitting parol evidence of a collateral agreement[62] is especially applicable where such agreement constituted a part of the consideration of the written agreement,[63] or operated as an inducement for entering into it,[64] and indeed there are many cases asserting or intimating that it is necessary in order to render proof of the oral agreement admissible that it should have been of this character.[65]

e. Subject of Collateral Agreement. It has been asserted that where the parties have reduced a contract to writing, in order to warrant the introduction of parol evidence of a matter as collateral, it must relate to a subject distinct from that to which the writing relates.[66] On the other hand there are cases holding that the rule against parol evidence does not apply where a distinct, collateral, contemporaneous agreement, independent of and not varying the written agreement, is offered in evidence, although it relates to the same subject-

Kansas.— Thisler *v.* Mackey, 65 Kan. 464, 70 Pac. 334; Ehrsam *v.* Brown, 64 Kan. 466, 67 Pac. 867.

Minnesota.— Thompson *v.* Libby, 34 Minn. 374, 26 N. W. 1.

New Jersey.— Church of Holy Communion *v.* Paterson Extension R. Co., 63 N. J. L. 470, 43 Atl. 696.

New York.— Mead *v.* Dunlevie, 174 N. Y. 108, 66 N. E. 658; Thomas *v.* Scutt, 127 N. Y. 133, 27 N. E. 961; Williamson *v.* Seeley, 22 N. Y. App. Div. 389, 48 N. Y. Suppl. 196.

Washington.— Gordon *v.* Parke, etc., Mach. Co., 10 Wash. 18, 38 Pac. 755.

See 20 Cent. Dig. tit. "Evidence," §§ 2030–2047.

A written order for goods to be sent and put up, specifying the price and terms of payment, a condition as to the title remaining in the vendor until payment shall be made, and other provisions, the property having been sent pursuant thereto and appropriated and used by the purchaser, is on its face a complete contract binding upon the purchaser and excluding proof that the prior oral agreement was different therefrom. American Mfg. Co. *v.* Klarquist, 47 Minn. 344, 50 N. W. 243.

60. Wheaton Roller-Mill Co. *v.* John T. Noye Mfg. Co., 66 Minn. 156, 68 N. W. 854.

61. Ehrsam *v.* Brown, 64 Kan. 466, 67 Pac. 867; Millett *v.* Marston, 62 Me. 477.

62. See *supra*, XVI, C, 25, a.

63. Welz *v.* Rhodius, 87 Ind. 1, 44 Am. Rep. 747; Arms *v.* Arms, 113 N. Y. 646, 21 N. E. 147; Andrews *v.* Brewster, 9 N. Y. Suppl. 114; Lafite *v.* Shawcross, 12 Fed. 519.

64. *Arkansas.*— Kelly *v.* Carter, 55 Ark. 112, 17 S. W. 706.

Connecticut.— Quinn *v.* Roath, 37 Conn. 16.

Maine.— Bonney *v.* Morrill, 57 Me. 368.

Massachusetts.— Durkin *v.* Cobleigh, 156 Mass. 108, 30 N. E. 474, 32 Am. St. Rep. 436, 17 L. R. A. 270.

Minnesota.— American Bldg., etc., Assoc. *v.* Dahl, 54 Minn. 355, 56 N. W. 47.

Ohio.— Royal Ins. Co. *v.* Walrath, 17 Ohio Cir. Ct. 509, 9 Ohio Cir. Dec. 699; Wales *v.* Bates, 1 Ohio Dec. (Reprint) 180, 3 West. L. J. 263.

Pennsylvania.— Levy *v.* Moore, 1 Phila. 325.

Texas.— Pishkos *v.* Wortek, (App. 1892) 18 S. W. 788; Ackerman *v.* Bundren, 1 Tex. App. Civ. Cas. § 1306.

Vermont.— Proctor *v.* Wiley, 55 Vt. 344.

West Virginia.— Faulkner *v.* Thomas, 48 W. Va. 148, 35 S. E. 915.

England.— Lloyd *v.* Sturgeon Falls Pulp Co., 85 L. T. Rep. N. S. 162.

Canada.— *In re* Mason, 21 Grant Ch. 166, 629.

See 20 Cent. Dig. tit. "Evidence," § 2049. See also *supra*, XVI, C, 17.

65. Neal *v.* Flint, 88 Me. 72, 33 Atl. 669; Bonney *v.* Morrill, 57 Me. 368; Armington *v.* Stelle, 27 Mont. 13, 69 Pac. 115, 94 Am. St. Rep. 811; Patton *v.* Fox, 22 Pa. Super. Ct. 416; Downey *v.* Hatter, (Tex. Civ. App. 1898) 48 S. W. 32.

66. *Kansas.*— Ehrsam *v.* Brown, 64 Kan. 466, 67 Pac. 867.

Minnesota.— Thompson *v.* Libby, 34 Minn. 374, 26 N. W. 1.

Montana.— Armington *v.* Stelle, 27 Mont. 13, 69 Pac. 115, 94 Am. St. Rep. 811.

New Jersey.— Church of Holy Communion *v.* Paterson Extension R. Co., 63 N. J. L. 470, 43 Atl. 696; Bandholz *v.* Judge, 62 N. J. L. 526, 41 Atl. 723; McTague *v.* Finnegan, 54 N. J. Eq. 454, 35 Atl. 542.

North Dakota.— Johnson *v.* Kindred State Bank, 12 N. D. 336, 96 N. W. 588.

United States.— Seitz *v.* Brewers' Refrigerating Mach. Co., 141 U. S. 510, 12 S. Ct. 46, 35 L. ed. 837; Sun Printing, etc., Assoc. *v.* Edwards, 113 Fed. 445, 51 C. C. A. 279; Godkin *v.* Monahan, 83 Fed. 116, 27 C. C. A. 410.

Right to maintain mill on property conveyed is a distinct matter. Shiels *v.* Stark, 14 Ga. 429.

matter.[67] This conflict may be explained upon the theory that in the first class of cases the court had in view the subject of the writing in the more confined sense of the term, while in the latter class the court had reference to the general subject-matter of the agreement. To illustrate, the rule first set forth has been held not to exclude evidence of a collateral agreement of warranty or guaranty as to articles, the sale of which is evidenced by the written instrument, for it has been said that the writing is limited to the article sold as such, while the guaranty or warranty is limited to the capacity or quality of the article;[68] yet it would hardly be an improper course of reasoning, and would lead to the same result, to say that the subject of the agreement is the sale of articles of a particular capacity or quality, and that, while the sale is evidenced by a writing, the agreement as to capacity or quality is suffered to rest in parol.

f. Agreement Must Be Separate and Independent. It has been held that in order to admit parol evidence of a collateral agreement as to a transaction evidenced by a writing, the agreement must be separate and distinct from and independent of that which the writing purports to express.[69] In the application of this rule the existence of a written lease precludes evidence of an alleged agreement of the lessor to make certain repairs not referred to in the lease.[70] A bill of sale or written contract for the sale of personal property precludes evidence of a warranty not referred to in the writing,[71] and a written contract of warranty precludes evidence of any other warranty.[72]

g. Particular Writings — (I) *Assignments.* A written instrument evidencing an assignment does not preclude parol evidence of a collateral agreement between the parties which does not contradict or vary the terms of the instrument.[73]

(II) *Bills and Notes.* Bills and notes and instruments of a like character do not as a rule even purport to express the entire contract or agreement between the parties thereto, and hence parol evidence is admissible to show collateral agreements between such parties,[74] provided such agreements are not inconsistent

67. Cook *v.* Littlefield, 98 Me. 299, 56 Atl. 899; Bonney *v.* Morrill, 57 Me. 368; Basshor *v.* Forbes, 36 Md. 154; Brown *v.* Bowen, 90 Mo. 184, 2 S. W. 398; Hutzler *v.* Richter, 13 N. Y. App. Div. 592, 43 N. Y. Suppl. 679.

68. Chapin *v.* Dobson, 78 N. Y. 74, 34 Am. Rep. 512. See also Vaughn Mach. Co. *v.* Lighthouse, 64 N. Y. App. Div. 138, 144, 71 N. Y. Suppl. 799 [*citing* Bagley, etc., Co. *v.* Saranac River Pulp, etc., Co., 135 N. Y. 626, 32 N. E. 132; Routledge *v.* Worthington Co., 119 N. Y. 592, 23 N. E. 1111; Schmittler *v.* Simon, 114 N. Y. 176, 21 N. E. 162, 11 Am. St. Rep. 621; Hanes *v.* Sackett, 56 N. Y. App. Div. 610, 67 N. Y. Suppl. 843; Rochester Folding Box Co. *v.* Browne, 55 N. Y. App. Div. 444, 66 N. Y. Suppl. 867].

69. Thompson Foundry, etc., Works *v.* Glass, 136 Ala. 648, 33 So. 811; Garrow *v.* Carpenter, 1 Port. (Ala.) 359; Schoen *v.* Sunderland, 39 Kan. 758, 18 Pac. 913; Weeks *v.* Medler, 20 Kan. 57; Slatten *v.* Konrath, 1 Kan. App. 636, 42 Pac. 399; Love *v.* Hamel, 59 N. Y. App. Div. 360, 69 N. Y. Suppl. 251; Hutzler *v.* Richter, 13 N. Y. App. Div. 592, 43 N. Y. Suppl. 679; Costello *v.* Eddy, 12 N. Y. Suppl. 236 [*affirmed* in 128 N. Y. 650, 29 N. E. 146].

An agreement to grade a street on which a lot conveyed is situated is an agreement which can be shown by parol evidence. Cole *v.* Hadley, 162 Mass. 579, 39 N. E. 279.

70. Thompson Foundry, etc., Works *v.* Glass, 136 Ala. 648, 33 So. 811; Hall *v.* Beston, 26 N. Y. App. Div. 105, 110 note, 49 N. Y. Suppl. 811 [*affirmed* in 165 N. Y. 632, 59 N. E. 1123]. See also Van Derhoef *v.* Hartmann, 63 N. Y. App. Div. 419, 71 N. Y. Suppl. 552, where it was alleged that the agreement to repair was part and parcel of the agreement of letting and hiring. But see *infra*, XVI, C, 25, g, (VII).

71. Ehrsam *v.* Brown, 64 Kan. 466, 67 Pac. 867; Rogers *v.* Perrault, 41 Kan. 385, 21 Pac. 287; Hallwood Cash-Register Co. *v.* Millard, 127 Mich. 316, 86 N. W. 833; Wheaton Roller-Mill Co. *v.* John T. Noye Mfg. Co., 66 Minn. 156, 68 N. W. 854; Thompson *v.* Libby, 34 Minn. 374, 26 N. W. 1; Jones *v.* Alley, 17 Minn. 292; Curran *v.* Hauser, 4 Ohio S. & C. Pl. Dec. 449. But see *infra*, XVI, C, 25, g, (X).

72. McCormick Harvesting Mach. Co. *v.* Yoeman, 26 Ind. App. 415, 59 N. E. 1069.

73. *Alabama.*— Brown *v.* Isbell, 11 Ala. 1009.

Massachusetts.— Snow *v.* Alley, 151 Mass. 14, 23 N. E. 576.

New York.— Playa de Oro Min. Co. *v.* Gage, 60 N. Y. App. Div. 1, 69 N. Y. Suppl. 702 [*affirmed* in 172 N. Y. 630, 65 N. E. 1121]; Robinson *v.* McManus, 4 Lans. 380.

Pennsylvania.— Barclay *v.* Wainwright, 86 Pa. St. 191.

Vermont.— Jewett *v.* Deiter, 59 Vt. 638, 10 Atl. 672.

See 20 Cent. Dig. tit. "Evidence," § 2038.

74. *Alabama.*— Murchie *v.* Cook, 1 Ala. 41.

with and do not tend to vary or contradict the terms of the written instrument.[75] Parol evidence of a verbal agreement of the parties at the time of the making of a note is admissible where the object is to show a partial or total failure of the consideration for the note.[76] Collateral agreements as to the manner of payment or satisfaction of the note[77] or the place of payment[78] have also been held admissible.

(III) *CONTRACTS OF CARRIAGE OR STORAGE.* The existence of a written contract for the carriage of goods or live stock[79] or for the storage of goods[80] does not preclude the admission of parol evidence of a prior or contemporaneous agreement collateral thereto but not inconsistent therewith.

(IV) *CONTRACTS OF EMPLOYMENT.* The existence of a written contract of employment does not preclude the admission of parol evidence of prior or contemporaneous agreements between the employer and employee,[81] which are not contradictory of the writing.[82]

(V) *CONTRACTS OF INSURANCE.* A prior or contemporaneous collateral agreement between the insured and the insurer may be shown notwithstanding the fact that there is a written contract or policy of insurance.[83] But it is to be

Arkansas.— Ramsey *v.* Capshaw, 71 Ark. 408, 75 S. W. 479.

Connecticut.— Blinn *v.* Chester, 5 Day 359.

Indiana.— Rawlings *v.* Fisher, 24 Ind. 52.

Iowa.— Murdy *v.* Skyles, 101 Iowa 549, 70 N. W. 714, 63 Am. St. Rep. 411; Farrar *v.* Mathews, 37 Iowa 418.

Kentucky.— Bush *v.* Robinson, 95 Ky. 492, 26 S. W. 178, 16 Ky. L. Rep. 226; Elliott *v.* Elliott, 79 Ky. 277.

Michigan.— Bowker *v.* Johnson, 17 Mich. 42.

Missouri.— Roe *v.* Versailles Bank, 167 Mo. 406, 67 S. W. 303; Barnard State Bank *v.* Fesler, 89 Mo. App. 217.

Nebraska.— Garneau *v.* Cohn, 61 Nebr. 500, 85 N. W. 531.

New Hampshire.— Shepherd *v.* Temple, 3 N. H. 455.

New York.— Isaacs *v.* Jacobs, 15 Daly 490, 8 N. Y. Suppl. 344.

North Carolina.— Wright *v.* Latham, 7 N. C. 298.

Pennsylvania.—See *In re* Sutch, 201 Pa. St. 317, 50 Atl. 946.

South Carolina.— Brock *v.* Thompson, 1 Bailey 322.

Texas.— Thomas *v.* Hammond, 47 Tex. 42; Henry *v.* McCardell, 15 Tex. Civ. App. 497, 40 S. W. 172.

Vermont.— Gilman *v.* Williams, 74 Vt. 327, 52 Atl. 428.

United States.— Franklin *v.* Browning, 117 Fed. 226, 54 C. C. A. 258.

See 20 Cent. Dig. tit. "Evidence," §§ 2043, 2044.

75. *Connecticut.*— Pierpont *v.* Longden, 46 Conn. 499.

Massachusetts.— Kelley *v.* Thompson, 175 Mass. 427, 56 N. E. 713.

Minnesota.—Walters *v.* Armstrong, 5 Minn. 448.

Nebraska.— Mallory *v.* Fitzgerald, (1903) 95 N. W. 601.

New York.— Zinsser *v.* Columbia Cab Co., 66 N. Y. App. Div. 514, 73 N. Y. Suppl. 287.

Pennsylvania.— Fuller *v.* Law, 207 Pa. St. 101, 56 Atl. 333. See also Homewood People's Bank *v.* Heckert, 207 Pa. St. 231, 57 Atl. 431.

Texas.— Bailey *v.* Rockwall County Nat. Bank, (Civ. App. 1901) 61 S. W. 530.

United States.— Keith *v.* Parker, 115 Fed. 397.

England.— New London Credit Syndicate *v.* Neale, [1898] 2 Q. B. 487, 67 L. J. Q. B. 825, 79 L. T. Rep. N. S. 323.

See 20 Cent. Dig. tit. "Evidence," § 2043.

A contemporaneous written agreement may vary or control the terms of an indorsement in blank. Zekind *v.* Newkirk, 12 Ind. 544.

76. Smith *v.* Carter, 25 Wis. 283. See also *supra*, XVI, C, 9, a.

77. Bennett *v.* Tillmon, 18 Mont. 28, 44 Pac. 80; Hagood *v.* Swords, 2 Bailey (S. C.) 305; Jilson *v.* Gilbert, 26 Wis. 637, 7 Am. Rep. 100; Jones *v.* Keyes, 16 Wis. 562. But see *supra*, XVI, B, 2, b.

78. Logan *v.* Hartwell, 5 Kan. 649; Wyman *v.* Winslow, 11 Me. 398, 26 Am. Dec. 542. But see *supra*, XVI, B, 2, b.

79. Merchants' Dispatch Transp. Co. *v.* Furthmann, 47 Ill. App. 561 [*affirmed* in 149 Ill. 66, 36 N. E. 624, 41 Am. St. Rep. 265]; Harrison *v.* Missouri Pac. R. Co., 74 Mo. 364, 41 Am. Rep. 318.

80. Western Union Cold Storage Co. *v.* Warner, 78 Ill. App. 577.

81. Wolters *v.* King, 119 Cal. 172, 51 Pac. 35; Joannes *v.* Mudge, 6 Allen (Mass.) 245.

82. Eden *v.* Silberburg, 89 N. Y. App. Div. 259, 85 N. Y. Suppl. 781; Sun Printing, etc., Assoc. *v.* Edwards, 113 Fed. 445, 51 C. C. A. 279.

83. *Indiana.*— Prudential Ins. Co. *v.* Sullivan, 27 Ind. App. 30, 59 N. E. 873.

Maine.— Catland *v.* Hoyt, 78 Me. 355, 5 Atl. 775.

Oklahoma.— Liverpool, etc., Ins. Co. *v.* T. M. Richardson Lumber Co., 11 Okla. 579, 585, 69 Pac. 936, 938.

Pennsylvania.— Michigan Mut. L. Ins. Co. *v.* Williams, 155 Pa. St. 405, 26 Atl. 655.

understood of course that the parol evidence must not be inconsistent with the written instrument.[84]

(VI) *CONTRACTS OF PARTNERSHIP.* Parol evidence is admissible to show an agreement collateral to but not inconsistent with a contract of partnership.[85]

(VII) *LEASES.* The existence of a written lease does not preclude parol evidence of a collateral agreement between the lessor and the lessee,[86] unless it is inconsistent with or contradictory to the terms of the written instrument.[87] Thus it may be shown that there was an independent agreement of the lessor to make certain repairs[88] or to provide certain fixtures,[89] a warranty as to the condition of the premises,[90] or a contemporaneous promise of the landlord that the adjoining premises shall not be used in a manner inconsistent with the convenient use of the demised premises.[91] So also it has been held admissible to show that at the time of the execution of the lease the lessor expressly reserved by parol the crop then growing upon the demised premises.[92]

(VIII) *MORTGAGES.* Subject to the usual limitation that the evidence must not have the effect of varying the writing[93] parol evidence may be received of a prior or contemporaneous collateral agreement with respect to the transaction evidenced by a mortgage.[94]

(IX) *RECORDS.* A collateral agreement between the parties may be shown by parol, even though such agreement be connected with matters which are evi-

Vermont.— Wood *v.* Rutland, etc., Mut. F. Ins. Co., 31 Vt. 552.

See 20 Cent. Dig. tit. "Evidence," § 2046.

84. Rutter *v.* Hanover F. Ins. Co., 138 Ala. 202, 35 So. 33; Maupin *v.* Scottish Union, etc., Ins. Co., 53 W. Va. 557, 45 S. E. 1003.

85. Walker *v.* Schindel, 58 Md. 360.

86. Raub *v.* Barbour, 6 Mackey (D. C.) 245 (holding that an oral promise, made at the execution of a lease with a covenant to sell, that if the tenant should assign his right to purchase he would pay the landlord one half of any sum received therefor, is a collateral agreement, and may be proved by parol); Ryder *v.* Faxon, 171 Mass. 206, 50 N. E. 631, 68 Am. St. Rep. 417; Drew *v.* Buck, 12 Hun (N. Y.) 267; Sire *v.* Rumbold, 14 N. Y. Suppl. 925 [*affirming* 11 N. Y. Suppl. 734].

87. *Minnesota.*— Haycock *v.* Johnston, 81 Minn. 49, 83 N. W. 494, 1118.

Missouri.— Sandige *v.* Hill, 76 Mo. App. 540.

New Jersey.—Kistler *v.* McBride, 65 N. J. L. 553, 48 Atl. 558.

New York.—Hamilton *v.* Emerson, 31 Misc. 257, 64 N. Y. Suppl. 48; Kaven *v.* Chrystie, 84 N. Y. Suppl. 470.

Tennessee.—Hines *v.* Willcox, 96 Tenn. 148, 33 S. W. 914, 54 Am. St. Rep. 823, 34 L. R. A. 824, 832.

Texas.— Boone *v.* Microm, (Civ. App. 1903) 76 S. W. 772.

Canada.— McKenzie *v.* McGlaughlin, 8 Ont. 111; Gilroy *v.* McMillan, 6 Ont. 120.

See 20 Cent. Dig. tit. "Evidence," § 2037.

88. Vandegrift *v.* Abbott, 75 Ala. 487; Clenighan *v.* McFarland, 16 Daly (N. Y.) 402, 11 N. Y. Suppl. 719; Johnson *v.* Blair, 126 Pa. St. 426, 17 Atl. 663. But see *supra*, XVI, B, 2, k, (II), (F); XVI, C, 25, f.

89. Lewis *v.* Seabury, 74 N. Y. 409, 30 Am. Rep. 311.

90. De Lassalle *v.* Guildford, [1901] 2 K. B. 215, 70 L. J. K. B. 533, 84 L. T. Rep. N. S. 549, 49 Wkly. Rep. 467. But see *supra*, XVI, B, 2, k, (II), (J).

91. Gray *v.* Gaff, 8 Mo. App. 329.

92. Youmans *v.* Caldwell, 4 Ohio St. 71.

93. *Indiana.*— Case *v.* Winship, 4 Blackf. 425, 30 Am. Dec. 664.

Missouri.—Connersville Buggy Co. *v.* Lowry, 104 Mo. App. 186.

New York.— Hunt *v.* Bloomer, 5 Duer 202.

North Dakota.— Langdon First Nat. Bank *v.* Prior, 10 N. D. 146, 86 N. W. 362.

Ohio.— Goodman *v.* Manning, 9 Ohio S. & C. Pl. Dec. 373, 5 Ohio N. P. 94.

See 20 Cent. Dig. tit. "Evidence," § 2039.

94. *Maine.*— Pierce *v.* Stevens, 30 Me. 184.

New Jersey.— Hopler *v.* Cutler, (Ch. 1896) 34 Atl. 746.

New York.— Bouton *v.* Welch, 59 N. Y. App. Div. 288, 69 N. Y. Suppl. 407.

Pennsylvania.— Cloud *v.* Markle, 186 Pa. St. 614, 40 Atl. 811.

Vermont.— Perry *v.* Dow, 56 Vt. 569.

See 20 Cent. Dig. tit. "Evidence," § 2039. And see, generally, MORTGAGES.

Agreement as to priority.— Where two mortgages are executed to different mortgagees, who agree among themselves as to which one should have priority, the agreement for priority is collateral to and not merged in the mortgage; and, nothing having been expressed in the mortgages as to their priority, parol evidence is properly received to establish the agreement. Collier *v.* Miller, 62 Hun (N. Y.) 99, 16 N. Y. Suppl. 633. So where a mortgage and judgment are entered on the same day, and hence presumed to be of equal rank, and therefore payable *pro rata*, an agreement between the parties, changing this general rule and giving a precedence to one or the other, may be proved by parol. Maze *v.* Burke, 12 Phila. (Pa.) 335.

denced by a judicial record, provided of course the evidence does not tend to contradict the record.[95]

(x) *Sales of Personalty.* Evidence of a parol contemporaneous agreement connected with a sale of personalty is admissible, although the sale is evidenced by a written instrument,[96] provided such agreement does not tend to vary or contradict the terms of the writing itself.[97] Thus evidence has been admitted to show that there was an oral warranty with respect to the articles sold,[98] or that there were certain reservations or limitations agreed upon by the parties, and consistent with the writing but not expressed therein,[99] or that the seller agreed to advertise the goods sold.[1] So also it has been held that an agreement by the vendor of a stock of goods or business establishment not to engage in the same business at a particular place or for a specified time may be shown.[2]

(xi) *Sales of Realty.* Notwithstanding the fact that a sale of realty is evidenced by a deed or other written instrument, the parties may show by parol prior or contemporaneous agreements collateral to the transaction, subject of course to the limitation that such evidence must not tend to vary or contradict the writing, but must be consistent therewith.[3] Thus it may be shown that there were certain collateral agreements between the parties concerning the assumption or payment of encumbrances upon the property,[4] or that there were certain reser-

95. Brown *v.* Decker, 21 Hun (N. Y.) 199; Flick *v.* Troxsell, 7 Watts & S. (Pa.) 65.

96. *Iowa.*— Ewalt *v.* Farlow, 62 Iowa 212, 17 N. W. 487.

Maryland.— Fusting *v.* Sullivan, 41 Md. 162.

New York.—Stranahan *v.* Putnam, 65 N. Y. 591; Wooster *v.* Sherwood, 25 N. Y. 278; Silliman *v.* Tuttle, 45 Barb. 171.

Vermont.— Wills *v.* Barrister, 36 Vt. 220.

Virginia.— Brent *v.* Richards, 2 Gratt. 539.

Washington.— Johnston *v.* McCart, 24 Wash. 19, 63 Pac. 1121.

West Virginia.— Johnson *v.* Burns, 39 W. Va. 658, 20 S. E. 686.

See 20 Cent. Dig. tit. "Evidence," § 2035.

97. Mead *v.* Strouse, 41 Conn. 565; Durham *v.* Lathrop, 95 Ill. App. 429; Doolittle *v.* Fitchett, 35 Misc. (N. Y.) 529, 71 N. Y. Suppl. 1124; Elsas *v.* Gallagher, 34 Misc. (N. Y.) 772, 68 N. Y. Suppl. 839; Gormully, etc., Mfg. Co. *v.* Cross, 25 Misc. (N. Y.) 336, 55 N. Y. Suppl. 527; Gale Mfg. Co. *v.* Finkelstein, (Tex. Civ. App. 1900) 59 S. W. 571; Foote *v.* Frost, (Tex. Civ. App. 1897) 39 S. W. 328.

98. Chapin *v.* Dobson, 78 N. Y. 74, 34 Am. Rep. 512; Vaughn Mach. Co. *v.* Lighthouse, 64 N. Y. App. Div. 138, 71 N. Y. Suppl. 799; Koop *v.* Handy, 41 Barb. (N. Y.) 454; Puget Sound Iron, etc., Works *v.* Clemmons, 32 Wash. 36, 72 Pac. 465. *Contra*, Wheaton Roller-Mill Co. *v.* John T. Noye Mfg. Co., 66 Minn. 156, 68 N. W. 854; Thompson *v.* Libby, 34 Minn. 374, 26 N. W. 1; Kummer *v.* Dubuque Turbine, etc., Co., (Nebr. 1903) 93 N. W. 938. And see *supra*, XVI, C, 25, f.

99. Hecht *v.* Johnson, 3 Wyo. 277, 21 Pac. 1080.

A reservation of a right of possession in the vendor may be shown. Strong *v.* Strong, 6 Ala. 345.

1. Ayer *v.* R. W. Bell Mfg. Co., 147 Mass. 46, 16 N. E. 754.

2. Durham *v.* Lathrop, 95 Ill. App. 429; Fusting *v.* Sullivan, 41 Md. 162; Pierce *v.* Woodward, 6 Pick. (Mass.) 206. But see *supra*, XVI, B, 2, h, (III), (1), (2).

3. *Connecticut.*—Parsons *v.* Camp, 11 Conn. 525.

District of Columbia.— Main *v.* Aukam, 12 App. Cas. 375, a case of an oral agreement collateral to a contract for an exchange of lands.

Georgia.— Smith *v.* Odom, 63 Ga. 499.

Illinois.— Ludeke *v.* Sutherland, 87 Ill. 481, 29 Am. Rep. 66.

Indiana.— Page *v.* Lashley, 15 Ind. 152.

Kentucky.— Haney *v.* Barney, 22 S. W. 550, 15 Ky. L. Rep. 142.

Maine.— Hersey *v.* Verrill, 39 Me. 271.

Massachusetts.— Drew *v.* Wiswall, 183 Mass. 554, 67 N. E. 666; Spurr *v.* Andrew, 6 Allen 420.

Michigan.— Dean *v.* Adams, 44 Mich. 117, 6 N. W. 229.

North Carolina.— Johnson *v.* East Carolina Land, etc., Co., 116 N. C. 926, 21 S. E. 28; Manning *v.* Jones, 44 N. C. 368.

Pennsylvania.— Parcell *v.* Grosser, 109 Pa. St. 617, 1 Atl. 909; Thompson *v.* White, 1 Dall. 424, 1 L. ed. 206, 1 Am. Dec. 252.

Tennessee.— Leinau *v.* Smart, 11 Humphr. 308.

Texas.— Green *v.* Gresham, 21 Tex. Civ. App. 601, 53 S. W. 382.

Vermont.— Buzzell *v.* Willard, 44 Vt. 44; Thayer *v.* Viles, 23 Vt. 494.

See 20 Cent. Dig. tit. "Evidence," § 2032.

4. *Connecticut.*—Post *v.* Gilbert, 44 Conn. 9.

Indiana.— Robinius *v.* Lister, 30 Ind. 142, 95 Am. Dec. 674.

Kansas.— Hopper *v.* Calhoun, 52 Kan. 703, 35 Pac. 816, 39 Am. St. Rep. 363.

Massachusetts.— Carr *v.* Dooley, 119 Mass. 294.

Michigan.— Seaman *v.* O'Hara, 29 Mich. 66.

New York.— Peet *v.* Kent, 5 N. Y. St. 134.

Vermont.— Green *v.* Randall, 51 Vt. 67.

vations which the writing does not set forth,[5] or that there was an agreement collateral to an expressed reservation.[6]

26. Real Nature of Transaction. It is generally considered that parol evidence is admissible where it is offered, not for the purpose of varying the terms of a written contract, but for the purpose of explaining and showing the true nature and character of the transaction evidenced thereby,[7] especially where it is plain that the language used, taken in its literal sense, does not exhibit the real

Wisconsin.— Becker *v.* Knudson, 86 Wis. 14, 56 N. W. 192.

See 20 Cent. Dig. tit. "Evidence," § 2033.

But *compare* Hott *v.* McDonough, 3 Ohio Cir. Ct. 177, 2 Ohio Cir. Dec. 100.

5. Noble *v.* Sylvester, 42 Vt. 146. But see *supra*, XVI, B, 2, i, (IV), (E).

Reservation of growing crops may be shown. *Indiana.*— Benner *v.* Bragg, 68 Ind. 338; Harvey *v.* Million, 67 Ind. 90 [*overruling* Chapman *v.* Long, 10 Ind. 465].

Kansas.— Surface *v.* Leffingwell, 6 Kan. App. 319, 51 Pac. 73.

Kentucky.— Bourne *v.* Bourne, 12 Ky. L. Rep. 467.

North Carolina.— Walton *v.* Jordan, 65 N. C. 170.

Ohio.— Baker *v.* Jordon, 3 Ohio St. 438.

Pennsylvania.— Backenstoss *v.* Stahler, 33 Pa. St. 251, 75 Am. Dec. 592.

Vermont.— Merrill *v.* Blodgett, 34 Vt. 480.

West Virginia.— Kerr *v.* Hill, 27 W. Va. 576; Robinson *v.* Pitzer, 3 W. Va. 335.

See 20 Cent. Dig. tit. "Evidence," § 2034.

A reservation of the right of possession for a certain time may be shown. Willis *v.* Hulbert, 117 Mass. 151; Quimby *v.* Stebbins, 55 N. H. 420; Hamilton *v.* Clark, (Tex. Civ. App. 1894) 26 S. W. 515; Merrill *v.* Blodgett, 34 Vt. 480.

Reservation of fixtures may be shown. Pea *v.* Pea, 35 Ind. 387; Heysham *v.* Dettre, 89 Pa. St. 506. *Contra*, Smith *v.* Odom, 63 Ga. 499.

6. Farrar *v.* Smith, 64 Me. 74.

7. *Connecticut.*— Schindler *v.* Muhlheiser, 45 Conn. 153.

Iowa.— Hughes *v.* Stanley, 45 Iowa 622.

Kansas.— Brook *v.* Latimer, 44 Kan. 431, 24 Pac. 946, 21 Am. St. Rep. 292, 11 L. R. A. 805.

Louisiana.— Cole *v.* Smith, 29 La. Ann. 551, 29 Am. Rep. 343.

Michigan.— Cutler *v.* Steele, 93 Mich. 204, 53 N. W. 521; Hill *v.* Goodrich, 39 Mich. 439.

Mississippi.— Klein *v.* McNamara, 54 Miss. 90.

Missouri.— Emory *v.* Joice, 70 Me. 537; Philibert *v.* Burch, 4 Mo. App. 470. See also Broadwater *v.* Darne, 10 Mo. 277.

Nebraska.— Cortelyou *v.* Hiatt, 36 Nebr. 584, 54 N. W. 964.

New Hampshire.— Blanchard *v.* Putnam, 16 N. H. 48.

New York.— Coe *v.* Cassidy, 72 N. Y. 133; Farmer *v.* A. D. Farmer, etc., Type Founding Co., 83 N. Y. App. Div. 218, 82 N. Y. Suppl. 228; Ostrander *v.* Snyder, 73 Hun 378, 26 N. Y. Suppl. 263; Wormuth *v.* Tracy, 15 Hun 180; Errico *v.* Brand, 9 Hun 654; Weber *v.* Weber, 9 Daly 211.

North Carolina.— Vestal *v.* Wicker, 108 N. C. 21, 12 S. E. 1037.

Ohio.— Davis *v.* Coffield, 1 Ohio Dec. (Reprint) 267, 6 West. L. J. 318.

Oregon.— Walker *v.* Athena First Nat. Bank, 43 Oreg. 102, 72 Pac. 635.

Pennsylvania.— Light *v.* Heilman, 1 Pearson 537.

Rhode Island.— Smith *v.* Ballou, 1 R. I. 496.

South Dakota.— Osborne *v.* Stringham, 4 S. D. 593, 57 N. W. 776.

Tennessee.— Garner *v.* Taylor, (Ch. App. 1900) 58 S. W. 758.

Texas.— Walker *v.* McDonald, 49 Tex. 458; Moore *v.* Williams, 26 Tex. Civ. App. 142, 62 S. W. 977; Deutschman *v.* Battaile, (Civ. App. 1896) 36 S. W. 489.

Virginia.— Dooley *v.* Baynes, 86 Va. 644, 649, 10 S. E. 974, where the court said: "There is surely no principle which excludes parol evidence to show that a deed, which is apparently an absolute deed, is, in reality, a partition deed between coparceners, and therefore no conveyance at all."

West Virginia.— Sayre *v.* King, 17 W. Va. 562.

Wisconsin.— Riemer *v.* Rice, 88 Wis. 16, 59 N. W. 450; Gardinier *v.* Kellogg, 14 Wis. 605.

United States.— Brick *v.* Brick, 98 U. S. 514, 25 L. ed. 256; Peugh *v.* Davis, 96 U. S. 332, 24 L. ed. 775; Truman *v.* Hardin, 24 Fed. Cas. No. 14,205, 5 Sawy. 115.

England.— Gray *v.* Dowman, 27 L. J. Ch. 702, 6 Wkly. Rep. 571.

Canada.— Barnhart *v.* Patterson, 1 Grant Ch. (U. C.) 459.

Showing signer to be witness merely.— Parol evidence is admissible to show that a person whose name appears on a written instrument in the usual and proper place for the name of a subscribing witness, but without any attestation clause to show in what capacity he signed, was in fact a witness. Garrison *v.* Owen, 1 Pinn. (Wis.) 471. See also Tombler *v.* Reitz, 134 Ind. 9, 33 N. E. 789, holding that parol evidence may be admitted to show that a person who signed his name on the back of a note, secured by mortgage, did so not as an indorser but as a witness to the transaction.

When rule not applicable.— The rule admitting extraneous evidence to show the real character of a conveyance of realty is not applicable to a contract to convey land, where the party to be charged derived his title from a stranger; for the rule can only be applied where the complaining party parts with the title, and it passes to respondent. Tobey *v.* Leonard, 23 Fed. Cas. No. 14,067, 2 Cliff. 40.

transaction,[8] or where the writing is assailed on the ground of fraud.[9] Applications of this principle are to be found in those cases where evidence has been admitted to show that, although a writing evidences upon its face an absolute transfer of property or an absolute promise to pay money, the real transaction consisted merely in the giving of security[10] or indemnity,[11] or that the grantee in a written instrument, such as a deed, assignment, bill of sale, or the like, which on its face passes the title to property, took the title subject to a trust.[12] So also

8. Matthews *v.* Capital F. Ins. Co., 115 Wis. 272, 91 N. W. 675.

9. Price *v.* Gover, 40 Md. 102.

10. *Georgia.*— Florida Cent., etc., R. Co. *v.* Usina, 111 Ga. 697, 36 S. E. 928.

Illinois.— German Ins. Co. *v.* Gibe, 162 Ill. 251, 44 N. E. 490 [*affirming* 59 Ill. App. 614].

Indiana.— Ginz *v.* Stumph, 73 Ind. 209.

Iowa.— Ayers *v.* Home Ins. Co., 21 Iowa 185.

Kansas.— Robinson *v.* Blood, (App. 1900) 62 Pac. 677.

Kentucky.— Mercer *v.* Blain, Litt. Sel. Cas. 412.

Louisiana.— Summers *v.* U. S. Insurance, etc., Co., 13 La. Ann. 504.

Massachusetts.— Reeve *v.* Dennett, 137 Mass. 315; Pond *v.* Eddy, 113 Mass. 149; Howard *v.* Odell, 1 Allen 85; Hazard *v.* Loring, 10 Cush. 267.

Michigan.— Hyler *v.* Nolan, 45 Mich. 357, 7 N. W. 910.

Minnesota.— Davis *v.* Crookston Waterworks, etc., Co., 57 Minn. 402, 59 N. W. 482, 47 Am. St. Rep. 622.

Missouri.— See Ittner *v.* Hughes, 154 Mo. 55, 55 S. W. 267.

Nebraska.— Scharman *v.* Scharman, 38 Nebr. 39, 56 N. W. 704. See also Gifford *v.* Fox, 2 Nebr. (Unoff.) 30, 95 N. W. 1066.

New York.— Matthews *v.* Sheehan, 69 N. Y. 585; Vickers *v.* Battershall, 84 Hun 496, 32 N. Y. Suppl. 314; Storer *v.* Coe, 2 Bosw. 661; Anthony *v.* Atkinson, 2 Sweeny 228; Kelly *v.* Ferguson, 46 How. Pr. 411; Adams *v.* Hull, 2 Den. 306; Gilchrist *v.* Cunningham, 8 Wend. 641.

Pennsylvania.— Sweetzer's Appeal, 71 Pa. St. 264.

West Virginia.— Sayre *v.* King, 17 W. Va. 562.

Wisconsin.— Matthews *v.* Capital F. Ins. Co., 115 Wis. 272, 91 N. W. 675; Gettelman *v.* Commercial Union Assur. Co., 97 Wis. 237, 72 N. W. 627; Andrews *v.* Jenkins, 39 Wis. 476.

Thus a certificate of stock may be shown to have been issued as security for a loan and not upon a purchase. Wild *v.* Western Union Bldg., etc., Assoc., 60 Mo. App. 200: Brick *v.* Brick, 98 U. S. 514, 25 L. ed. 256. *Contra*, Snyder *v.* Lindsey, 157 N. Y. 616, 32 N. E. 592 [*affirming* 92 Hun 432, 36 N. Y. Suppl. 1037].

Where it is admitted that an assignment absolute on its face was made as security or indemnity merely, the party interested has a right to go into parol proof to explain the extent and object of the security. Van Meter *v.* McFaddin, 8 B. Mon. (Ky.) 435; Moses *v.* Murgatroyd, 1 Johns. Ch. (N. Y.) 119, 7 Am. Dec. 478.

11. Fullwood *v.* Blanding, 26 S. C. 312, 2 S. E. 565.

A judgment confessed by the maker of commercial paper to the indorser may be shown by parol to have been intended as a security to the latter against his liability on the indorsement. State Bank *v.* Myers, 1 Bailey (S. C.) 412.

12. *Alabama.*— Brown *v.* Isbell, 11 Ala. 1009; Locket *v.* Child, 11 Ala. 640.

California.— Brison *v.* Brison, 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189; Isenhoot *v.* Chamberlain, 59 Cal. 630; Bayles *v.* Baxter, 22 Cal. 575; Hidden *v.* Jordan, 21 Cal. 92; Lockwood *v.* Canfield, 20 Cal. 126; Russ *v.* Mebius, 16 Cal. 350; Osborne *v.* Endicott, 6 Cal. 149, 65 Am. Dec. 498.

Mississippi.— Soggins *v.* Heard, 31 Miss. 426.

New York.— Robinson *v.* McManus, 4 Lans. 380.

North Carolina.— Hughes *v.* Pritchard, 122 N. C. 59, 29 S. E. 93; Holmes *v.* Holmes, 86 N. C. 205; Shields *v.* Whitaker, 82 N. C. 516; Whitfield *v.* Cates, 59 N. C. 136; Riggs *v.* Swann, 59 N. C. 118; Shelton *v.* Shelton, 58 N. C. 292.

Oregon.— Martin *v.* Martin, 43 Oreg. 119, 72 Pac. 639, holding that parol evidence is competent to show that a transfer of personalty by bill of sale absolute in form was in trust for the assignor.

Pennsylvania.— Church *v.* Ruland, 64 Pa. St. 432; Porter *v.* Mayfield, 21 Pa. St. 263.

South Carolina.— McTeer *v.* Sheppard, 1 Bay 461.

Tennessee.— Pritchard *v.* Wallace, 4 Sneed 405, 70 Am. Dec. 254.

Texas.— Reeves *v.* Bass, 39 Tex. 618; Dunham *v.* Chatham, 21 Tex. 231, 73 Am. Dec. 228; McClenny *v.* Floyd, 10 Tex. 159; Mead *v.* Randolph, 8 Tex. 191.

Virginia.— Coffman *v.* Coffman, 79 Va. 504; U. S. Bank *v.* Carrington, 7 Leigh 566.

England.— Rochefoucauld *v.* Boustead, [1897] 1 Ch. 196, 66 L. J. Ch. 74, 75 L. T. Rep. N. S. 502, 45 Wkly. Rep. 272.

Where a conveyance is made to the wife, there is no rule which prevents evidence being given that she held the estate in trust for her husband. Smith *v.* Strahan, 16 Tex. 314, 67 Am. Dec. 622.

An agreement to hold the title in trust for the vendor cannot be shown by parol, for this would be a flat contradiction of the written instruments established by the parties as the evidence of their relation, and would make them void from their very inception. Holtherich *v.* Smith, 74 S. W. 689, 24 Ky.

it may be shown that a conveyance by a parent to a child was intended as an advancement.[13]

27. Rebutting Equity. Parol evidence is always admissible for the purpose of rebutting an equity.[14]

28. Rebutting Presumption or Inference. Parol evidence which does not contradict the express terms of a record or instrument in writing is admissible to rebut a presumption or implication which would or might otherwise arise therefrom,[15] or to oppose a conclusion of fact which it tends, as circumstantial evidence, to establish.[16]

29. Set-Off. The rule against parol evidence to contradict or vary a writing does not preclude evidence on the part of an obligor or promisee establishing a set-off against his liability under the writing.[17]

30. Subject-Matter — a. Identification in General. Parol evidence is always admissible where it is necessary in order to identify, explain, or define the subject-matter of a grant, mortgage, contract, or other writing, for without such evidence it would be impossible to give effect to the intentions of the parties.[18] Evidence

L. Rep. 2535; Porter *v.* Mayfield, 21 Pa. St. 263.

13. McClanahan *v.* McClanahan, 36 W. Va. 34, 14 S. E. 419.

14. Hughes *v.* Wilkinson, 35 Ala. 453; McMeen *v.* Owen, 1 Yeates (Pa.) 135; Field *v.* Biddle, 1 Yeates (Pa.) 132; Chestnut *v.* Strong, 1 Hill Eq. (S. C.) 122; Townshend *v.* Stangroom, 6 Ves. Jr. 328, 5 Rev. Rep. 312, 31 Eng. Reprint 1076.

15. *Alabama.*— McGehee *v.* Rump, 37 Ala. 651; Gookin *v.* Richardson, 11 Ala. 889, 46 Am. Dec. 232.

California.— Faylor *v.* Faylor, 136 Cal. 92, 68 Pac. 482; Braly *v.* Henry, 71 Cal. 481, 11 Pac. 385, 12 Pac. 623; Johnson *v.* Powers, 65 Cal. 179, 3 Pac. 625, 60 Am. Rep. 543; Ingersoll *v.* Truebody, 40 Cal. 603; Miller *v.* Van Tassel, 24 Cal. 459.

District of Columbia.— Whelan *v.* McCullough, 4 App. Cas. 58.

Florida.— Solary *v.* Stultz, 22 Fla. 263.

Georgia.— Bryan *v.* Walton, 20 Ga. 480.

Iowa.— Evans *v.* Burns, 67 Iowa 179, 25 N. W. 119; Preston *v.* Gould, 64 Iowa 44, 19 N. W. 834; Thurston *v.* Arnold, 43 Iowa 43.

Kentucky.— Butler *v.* Suddeth, 6 T. B. Mon. 541.

Maryland.— Groff *v.* Rohrer, 35 Md. 327.

Massachusetts.— Way *v.* Butterworth, 108 Mass. 509; Riley *v.* Gerrish, 9 Cush. 104.

Missouri.— Mammon *v.* Hartman, 51 Mo. 168; Seymour *v.* Farrell, 51 Mo. 95.

Montana.— See Bohm Mfg. Co. *v.* Harrison, 13 Mont. 293, 34 Pac. 313.

New Jersey.— Simanton *v.* Vliet, 61 N. J. L. 595, 40 Atl. 595.

North Carolina.—Davis *v.* Morgan, 64 N. C. 570; Sowers *v.* Earnhart, 64 N. C. 96.

Pennsylvania.— Chalfant *v.* Williams, 35 Pa. St. 212; Morrison *v.* Davis, 20 Pa. St. 171, 57 Am. Dec. 695; Leary *v.* Meredith, 5 Wkly. Notes Cas. 37.

South Carolina.— Gardner *v.* Hust, 2 Rich. 601.

Wisconsin.— Plano Mfg. Co. *v.* Frawley, 68 Wis. 577, 32 N. W. 768.

England.— Bartlett *v.* Purnell, 4 A. & E. 792, 5 L. J. K. B. 169, 6 N. & M. 299, 31 E. C. L. 348; Hurst *v.* Beach, 5 Madd. 360, 21 Rev. Rep. 304; Oldman *v.* Slater, 3 Sim. 84, 6 Eng. Ch. 84.

But *compare* Galbraith *v.* Littiech, 73 Ill. 209; Smith *v.* Conway, 17 N. H. 586.

A presumption that a judgment against an indorser passes by a written assignment of a judgment against the principal may be rebutted by parol evidence. Bank *v.* Fordyce, 9 Pa. St. 275, 49 Am. Dec. 561.

A bill of lading is not conclusive evidence as to the ownership of goods, and while it may raise a presumption of title in the consignee, such presumption is open to be explained or repelled by parol evidence to the contrary. Hooper *v.* Chicago, etc., R. Co., 27 Wis. 81, 9 Am. Rep. 439.

16. Strong *v.* Harris, 3 Humphr. (Tenn.) 451.

17. Noyes *v.* Hall, 28 Vt. 645.

18. *Alabama.*— Donehoo *v.* Johnson, 120 Ala. 438, 24 So. 888; Humes *v.* Bernstein, 72 Ala. 546; Ellis *v.* Burden, 1 Ala. 458.

Arizona.—R. H. Burmister, etc., Co. *v.* Empire, etc., Co., (1903) 71 Pac. 961.

California.— Darby *v.* Arrowhead Hot Springs Hotel Co., 97 Cal. 384, 32 Pac. 454; Habenicht *v.* Lissak, 77 Cal. 139, 19 Pac. 260; Hancock *v.* Watson, 18 Cal. 137.

Colorado.— Murray *v.* Hobson, 10 Colo. 66, 13 Pac. 921.

Connecticut.— Hildreth *v.* Hartford, etc., Tramway Co., 73 Conn. 631, 48 Atl. 963; Bennett *v.* Pierce, 28 Conn. 315.

District of Columbia.— Mason *v.* Spalding, 18 D. C. 115.

Georgia.— Ainslie *v.* Eason, 107 Ga. 747, 33 S. E. 711; Kiser *v.* Carrollton Dry-Goods Co., 96 Ga. 760, 22 S. E. 303; Bowen *v.* Frick, 75 Ga. 786; Ingram *v.* Fisher, 70 Ga. 745.

Idaho.— Kelly *v.* Leachman, 3 Ida. 672, 34 Pac. 813, 33 Pac. 44.

Illinois.— Webster *v.* Fleming, 178 Ill. 140, 52 N. E. 975 [*affirming* 73 Ill. App. 234] (holding that where encumbrances, which a grantee has assumed, rest on a number of lots, parol evidence that the trust deed securing a note sued on is the particular encum-

has been admitted under this rule to identify the property covered by a deed of

brance resting on a particular lot is admissible); Bulkley *v.* Devine, 127 Ill. 406, 20 N. E. 16, 3 L. R. A. 330; Bell *v.* Prewitt, 62 Ill. 361; Myers *v.* Ladd, 26 Ill. 415; Barrett *v.* Stow, 15 Ill. 423; Chicago Pressed Steel Co. *v.* Clark, 87 Ill. App. 658; Cheney *v.* Barge, 26 Ill. App. 182; Riebling *v.* Tracy, 17 Ill. App. 158.

Indiana.— Burk *v.* Mead, 159 Ind. 252, 64 N. E. 880; Baldwin *v.* Boyce, 152 Ind. 46, 51 N. E. 334; Hunt *v.* Francis, 5 Ind. 302.

Indian Territory.— Turner *v.* Gonzales, 3 Indian Terr. 649, 64 S. W. 565.

Iowa.— Van Husen *v.* Omaha Bridge, etc., Co., 118 Iowa 366, 91 N. W. 77; Clapp *v.* Trowbridge, 74 Iowa 550, 38 N. W. 411; Thompson *v.* Locke, 65 Iowa 429, 21 N. W. 762; Wise *v.* Adair, 50 Iowa 104.

Kentucky.— Wood *v.* Lee, 5 T. B. Mon. 50; Warfield *v.* Curd, 5 Dana 318; Venable *v.* McDonald, 4 Dana 336; Thacker *v.* Howell, 26 S. W. 719, 16 Ky. L. Rep. 134.

Louisiana.— Bayley *v.* Denny, 26 La. Ann. 255; *In re* Kugler, 23 La. Ann. 455; Squier *v.* Stockton, 5 La. Ann. 741; Larue *v.* Hampton, 4 La. Ann. 53.

Maine.— Haskell *v.* Tukesbury, 92 Me. 551, 43 Atl. 500, 69 Am. St. Rep. 529; Hartwell *v.* California Ins. Co., 84 Me. 524, 24 Atl. 954; Williams *v.* Robinson, 73 Me. 186, 40 Am. Rep. 352.

Maryland.— Castleman *v.* Du Val, 89 Md. 657, 43 Atl. 821; Rice *v.* Forsyth, 41 Md. 389; Criss *v.* English, 26 Md. 553.

Massachusetts.— Eastman *v.* Perkins, 111 Mass. 30; Swett *v.* Shumway, 102 Mass. 365, 3 Am. Rep. 471; Blake *v.* Exchange Mut. Ins. Co., 12 Gray 265; Clark *v.* Houghton, 12 Gray 38; Fisk *v.* Fisk, 12 Cush. 150; Allen *v.* Bates, 6 Pick. 460.

Michigan.— Lawrence *v.* Comstock, 124 Mich. 120, 82 N. W. 808.

Minnesota.— Ham *v.* Johnson, 51 Minn. 105, 52 N. W. 1080; Ames *v.* First Div. St. Paul, etc., R. Co., 12 Minn. 412; Case *v.* Young, 3 Minn. 209; Baldwin *v.* Winslow, 2 Minn. 213.

Mississippi.— Peacher *v.* Strauss, 47 Miss. 353; Whitworth *v.* Harris, 40 Miss. 483.

Missouri.— Amonett *v.* Montague, 63 Mo. 201; Edwards *v.* Smith, 63 Mo. 119; Wallace *v.* Wilson, 30 Mo. 335 (holding that where a written assignment recites merely that it was "as collateral security" parol evidence is admissible to show what it was given to secure); Thornton *v.* Crowther, 24 Mo. 164; Wilkerson *v.* Moulder, 15 Mo. 609; Welsh *v.* Edmisson, 46 Mo. App. 282.

New Hampshire.— Gill *v.* Ferrin, 71 N. H. 421, 52 Atl. 558; Locke *v.* Rowell, 47 N. H. 46.

New Jersey.—Crossen *v.* Carr, (Sup. 1904) 57 Atl. 158; Sullivan *v.* Visconti, 68 N. J. L. 543, 53 Atl. 598; Axford *v.* Meeks, 59 N. J. L. 502, 36 Atl. 1036; Chamberlain *v.* Letson, 5 N. J. L. 452.

New York.—McIlvaine *v.* Steinson, 90 N. Y. App. Div. 77, 85 N. Y. Suppl. 889; Thomas *v.* Truscott, 53 Barb. 200; Mason *v.* White, 11 Barb. 173; New York *v.* Butler, 1 Barb. 325; Richardson *v.* Home Ins. Co., 47 N. Y. Super. Ct. 138; Bell *v.* Holford, 1 Duer 58; Hastings *v.* Parke, 22 Alb. L. J. 115. See also People's Guaranty, etc., Co. *v.* Doernberg, 37 Misc. 809, 76 N. Y. Suppl. 916.

North Carolina.— Arrington *v.* Culpepper, 5 N. C. 297.

Ohio.— Robbins *v.* Klein, 60 Ohio St. 199, 54 N. E. 94; Hurd *v.* Robinson, 11 Ohio St. 232; Barton *v.* Morris, 15 Ohio 408; Graf *v.* Wirthweine, 1 Handy 20, 12 Ohio Dec. (Reprint) 4.

Oklahoma.— Ferguson *v.* Blackwell, 8 Okla. 489, 58 Pac. 647.

Oregon.— Reinstein *v.* Roberts, 34 Oreg. 87, 55 Pac. 90, 75 Am. St. Rep. 564; Hicklin *v.* McClear, 18 Oreg. 126, 22 Pac. 1057; Hannah *v.* Shirley, 7 Oreg. 115.

Pennsylvania.— Duquesne Nat. Bank *v.* Williams, 155 Pa. St. 48, 25 Atl. 742; Morris' Appeal, 88 Pa. St. 368; Gould *v.* Lee, 55 Pa. St. 99; Barnhart *v.* Riddle, 29 Pa. St. 92; Bertsch *v.* Lehigh Coal, etc., Co., 4 Rawle 130; George *v.* Conneaut Tp., 18 Pa. Super. Ct. 47; Carroll *v.* Miner, 1 Pa. Super. Ct. 439; Burt *v.* Flynn, 24 Pa. Co. Ct. 451.

Rhode Island.— Lee *v.* Stone, 21 R. I. 123, 42 Atl. 717; Coombs *v.* Patterson, 19 R. I. 25, 31 Atl. 428.

South Carolina.— Barkley *v.* Barkley, 3 McCord 269.

Tennessee.— Turner *v.* Jackson, (Ch. App. 1901) 63 S. W. 511.

Texas.— Thompson *v.* Cobb, 95 Tex. 140, 65 S. W. 1090, 93 Am. St. Rep. 820; Burleson *v.* Burleson, 28 Tex. 383; Ascarete *v.* Pfaff, (Civ. App. 1904) 78 S. W. 974; Pierce *v.* Johnson, (Civ. App. 1899) 50 S. W. 610; McDonald *v.* Dorbrandt, 17 Tex. Civ. App. 277, 41 S. W. 1047; Hitchler *v.* Scanlan, 15 Tex. Civ. App. 40, 39 S. W. 633.

Utah.— Brown *v.* Markland, 16 Utah 360, 52 Pac. 597, 67 Am. St. Rep. 629.

Vermont.—Rugg *v.* Hale, 40 Vt. 138; Bradley *v.* Pike, 34 Vt. 215; Patch *v.* Keller, 28 Vt. 332; Preston *v.* Robinson, 24 Vt. 583; Hodges *v.* Strong, 10 Vt. 247.

Virginia.— New River Mineral Co. *v.* Painter, 100 Va. 507, 42 S. E. 300; Carrington *v.* Goddin, 13 Gratt. 587.

Washington.— Newman *v.* Buzard, 24 Wash. 225, 64 Pac. 139.

Wisconsin.— Excelsior Wrapper Co. *v.* Messinger, 116 Wis. 549, 93 N. W. 459; Lutz *v.* Compton, 77 Wis. 584, 46 N. W. 889; Lynch *v.* Henry, 75 Wis. 631, 44 N. W. 837; Sargeant *v.* Solberg, 22 Wis. 132.

United States.— U. S. *v.* Peck, 102 U. S. 64, 26 L. ed. 46; Brawley *v.* U. S., 96 U. S. 168, 24 L. ed. 622; Reed *v.* Baltimore Merchants' Mut. Ins. Co., 95 U. S. 23, 24 L. ed. 348; Atkinson *v.* Cummins, 9 How. 479, 13 L. ed. 223; Wright *v.* Deklyne, 30 Fed. Cas. No. 18,076, Pet. C. C. 199.

England.— New Zealand Bank *v.* Simpson, [1900] A. C. 182, 69 L. J. P. C. 22, 82 L. T. Rep. N. S. 102, 48 Wkly. Rep. 591; McMurray *v.* Spicer, L. R. 5 Eq. 527, 37 L. J. Ch.

conveyance,[19] bill of sale,[20] real estate or chattel mortgage,[21] insurance policy,[22] assignment for the benefit of creditors,[23] contract for the sale of real[24] or personal[25] property, the subject-matter of a recorded vote of a corporation,[26] or a warranty in a deed,[27] judgments which have been assigned in writing,[28] the debt secured by a mortgage,[29] and the obligations of one party to a contract which the other had undertaken to pay.[30] Evidence has also been admitted to show what land was embraced in the terms of a lease,[31] the extent of the interest intended to be covered by an insurance policy,[32] what particular work was intended by a contract obligating one party to complete "all the excavating the parties of the first part desire to have done by September 1st,"[33] whether a contract to pay for the procurement of a person "to buy my place" referred to the real estate or to the business conducted thereon,[34] whether a guaranty of "the account" of a certain person with a firm to an amount named was a continuing guaranty,[35] what judgment was referred to in a letter addressed to a justice directing him to enter the writer's name as a stay to the judgment,[36] where one of two parties transferred in writing to the other his interest in the assets, including the accounts, to show that an indebtedness of the retiring partner to the firm was not intended to be included among the accounts,[37] and in many other cases.[38] This is true even

505, 18 L. T. Rep. N. S. 116, 16 Wkly. Rep. 332; Shore *v.* Atty.-Gen., 9 Cl. & F. 355, 5 Scott N. R. 958, 8 Eng. Reprint 450; Macdonald *v.* Longbottom, 1 E. & E. 977, 9 Jur. N. S. 724, 29 L. J. Q. B. 256, 2 L. T. Rep. N. S. 606, 8 Wkly. Rep. 614, 102 E. C. L. 977; Pharoah *v.* Lush, 2 F. & F. 721; Ogilvie *v.* Foljambe, 3 Meriv. 53, 17 Rev. Rep. 13, 36 Eng. Reprint 21; Chadwick *v.* Burnley, 12 Wkly. Rep. 1077; Chambers *v.* Kelly, Ir. R. 7 C. L. 231; Waldron *v.* Jacob, Ir. R. 5 Eq. 131.

Canada.— Pugsley *v.* Gillespie, 14 N. Brunsw. 195.

See 20 Cent. Dig. tit. "Evidence," §§ 2115–2128.

19. Schreiber *v.* Osten, 50 Mo. 513; New River Mineral Co. *v.* Painter, 100 Va. 507, 42 S. E. 300; and other cases cited in the preceding note and the notes following.

20. Coale *v.* Harrington, 7 Harr. & J. (Md.) 147.

21. *Alabama.*—Corbitt *v.* Reynolds, 68 Ala. 378.

Illinois.— Myers *v.* Ladd, 26 Ill. 415; Mattingly *v.* Darwin, 23 Ill. 618; Farmers', etc., Bank *v.* Arnold, 58 Ill. App. 349; Chicago, etc., R. Co. *v.* Beach, 29 Ill. App. 157.

Indiana.— Burns *v.* Harris, 66 Ind. 536; Holmes *v.* Hinkle, 63 Ind. 518; Duke *v.* Strickland, 43 Ind. 494.

Maine.— Elder *v.* Miller, 60 Me. 118.

Missouri.— Atchison County Bank *v.* Shackelford, 67 Mo. App. 475; Campbell *v.* Allen, 38 Mo. App. 27; State *v.* Cabanne, 14 Mo. App. 294.

New Hampshire.— Brooks *v.* Aldrich, 17 N. H. 443.

North Carolina.— Harris *v.* Woodard, 96 N. C. 232, 1 S. E. 544; Rountree *v.* Britt, 94 N. C. 104.

Texas.— Fort Worth Nat. Bank *v.* Red River Nat. Bank, 84 Tex. 369, 19 S. W. 517.

See 20 Cent. Dig. tit. "Evidence," § 2127.

22. Ætna Ins. Co. *v.* Strout, 16 Ind. App. 160, 44 N. E. 934; Bowman *v.* Agricultural Ins. Co., 2 Thomps. & C. (N. Y.) 261; Roots *v.* Cincinnati Ins. Co., 1 Disn. (Ohio) 138, 12 Ohio Dec. (Reprint) 535.

23. Block *v.* Peter, 63 Ga. 260, an assignment for benefit of creditors of all goods and effects in a certain storehouse.

24. Lee *v.* Stone, 21 R. I. 123, 42 Atl. 717.

25. Shaw Blank Book Co. *v.* Maybell, 86 Minn. 241, 90 N. W. 392 (book-accounts sold); Rib River Lumber Co. *v.* Ogilvie, 113 Wis. 482, 89 N. W. 483.

26. Pope *v.* Machias Water Power, etc., Co., 52 Me. 535.

27. Gill *v.* Ferrin, 71 N. H. 421, 52 Atl. 558.

28. Harper *v.* Columbus Factory, 35 Ala. 127.

29. Goddard *v.* Selden, 7 Conn. 515 (where it was shown that a certain debt was not included); Delaplaine *v.* Hitchcock, 6 Hill (N. Y.) 14; Jones *v.* New York Guaranty, etc., Co., 101 U. S. 622, 25 L. ed. 1030.

30. Beemer *v.* Packard, 92 Hun (N. Y.) 546, 38 N. Y. Suppl. 1045.

31. Tate *v.* Reynolds, 8 Watts & S. (Pa.) 91.

32. Franklin M. & F. Ins. Co. *v.* Drake, 2 B. Mon. (Ky.) 47.

33. Boden *v.* Maher, 105 Wis. 539, 81 N. W. 661.

34. Axford *v.* Meeks, 59 N. J. L. 502, 36 Atl. 1036.

35. Denniston *v.* Schaal, 5 Pa. Super. Ct. 632.

36. Barr *v.* McGregor, 11 Humphr. (Tenn.) 518.

37. Long *v.* Long, 44 Mo. App. 141.

38. Other illustrations.—Such evidence has also been admitted where defendant authorized plaintiffs to sell certain lots, agreeing on their selling enough to realize fifty-five hundred dollars to her, to convey the remainder to them, to show what lots were sold and therefore what lots should be conveyed (Stamets *v.* Deniston, 193 Pa. St. 548, 44 Atl. 575); where an agreement recited that "great difficulties had arisen" but did not set forth what they were, to show that a

though the contract or transaction as to which the evidence is sought to be introduced is of such a nature that by the statute of frauds it is required to be in writing, for the evidence does not supply an omission and thus make a contract which the law requires to be in writing, rest in parol, but merely tends to explain an ambiguity, which is permissible.[39] Of course, if the instrument is not ambiguous as to the subject-matter, but clearly designates it, parol evidence is not admissible, for in such case its only effect would be to vary the writing.[40]

b. Imperfect or Inaccurate Description. Thus where the subject-matter of the writing is imperfectly described therein or the description is in some respects inaccurate, ambiguous, or very general in character, it is always competent to aid the description and identify the subject-matter to which it is intended to apply and to apply the description to such subject-matter by extrinsic evidence not inconsistent with what is written.[41]

certain claim was among the difficulties and was settled by the agreement (Wood *v.* Lee, 5 T. B. Mon. (Ky.) 50); where the articles of a corporation declared that one of the purposes of its organization was "to own, manufacture, sell, and lease directory machines" without describing or specifying them, to show that the machines meant were those for which a patent had been applied for by one of the incorporators and were the same as those which were alleged to infringe another patent (National Mechanical Directory Co. *v.* Polk, 121 Fed. 742, 58 C. C. A. 24); where a physician sold the good-will of his practice to another by written contract, to show in what locality the seller practised his profession (Warfield *v.* Booth, 33 Md. 63); where two persons entered into a partnership by which one agreed to pay the debts of the other, to show what the other's debts were (Goldbeck *v.* Eisele, 8 Wkly. Notes Cas. (Pa.) 512); where a person contracted to "make a deed for 500 acres of land as soon as I get my warrant laid," to show that he then had a one-thousand-acre preëmption warrant and that the parties intended that the five hundred acres should be conveyed out of it (Peyton *v.* Matson, Litt. Sel. Cas. (Ky.) 37); to prove that land granted to the husband of a demandant is the same land out of which dower is demanded (Keefer *v.* Young, 2 Harr. & J. (Md.) 53); and to prove that a certain transaction between two parties was not within a contract of agency between them, even though the contract stated that it contained all the contracts between the parties, and that no verbal agreement should be binding (Springfield Fertilizer Co. *v.* Tompkins, 16 Ind. App. 403, 45 N. E. 615). So also it has been held that, where the defense in ejectment is an outstanding title in another, extrinsic evidence is admissible to show that the descriptions in the deed relied on and in plaintiff's deed cover the same premises, unless such descriptions be repugnant to each other. Schultz *v.* Lindell, 30 Mo. 310.

In reference to judicial proceedings evidence has been admitted to identify the subject-matter of a suit (Hobart *v.* Beers, 26 Kan. 329); property attached (Darling *v.* Dodge, 36 Me. 370); replevied (Pool *v.* Tucker, 36 Ill. App. 377), or levied on under an execution (Elliott *v.* Hart, 45 Mich. 234, 7 N. W. 812; Morgan *v.* Spangler, 14 Ohio St. 102; Wildasin *v.* Bare, 171 Pa. St. 387, 33 Atl. 365; Titusville Novelty Iron Works' Appeal, 77 Pa. St. 103; Scott *v.* Sheakly, 3 Watts (Pa.) 50); to show what was included in the inventory of an administrator (Wheeler *v.* Smith, 13 Iowa 564); to show that a particular action was included in a written agreement to settle all actions between the parties, although it was brought in the name of one of the parties as next friend to his son, who was a minor (Lawson *v.* McAnulty, 1 Pittsb. (Pa.) 200); to identify a judgment as having been rendered on a replevin bond signed by plaintiff at defendant's request (Knickerbocker *v.* Wilcox, 83 Mich. 200, 47 N. W. 123, 21 Am. St. Rep. 595); to identify the matters submitted to arbitrators or referees and to prove that they acted upon them (Buck *v.* Spofford, 35 Me. 526; Hoagland *v.* Veghte, 23 N. J. L. 92; Osborne *v.* Calvert, 83 N. C. 365); and to identify a note designated in an award as "the note of M." (Bancroft *v.* Grover, 23 Wis. 463, 99 Am. Dec. 195).

The subject-matter of an exception expressed in general terms in a deed, mortgage, or contract of sale may be identified or made certain by extrinsic evidence. Pipe *v.* Smith, 4 Colo. 444; Lanman *v.* Crooker, 97 Ind. 163, 49 Am. Rep. 437; Buford *v.* Lonergan, 6 Utah 301, 22 Pac. 164.

Admissibility of evidence not dependent upon distinction between latent and patent ambiguity.— Bulkley *v.* Devine, 127 Ill. 406, 20 N. E. 16, 3 L. R. A. 330.

39. Guy *v.* Barnes, 29 Ind. 103.

40. *Delaware.*—Tatman *v.* Barrett, 3 Houst. 226.

Illinois.— Mead *v.* Peabody, 183 Ill. 126, 55 N. E. 719 [*affirming* 83 Ill. App. 297].

Massachusetts.— Miller *v.* Washburn, 117 Mass. 371.

Nebraska.— Frey *v.* Drahos, 6 Nebr. 1, 29 Am. Rep. 353.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Philadelphia, etc., Pass. R. Co., 6 Pa. Dist. 269.

41. *Alabama.*— Alabama Mut. F. Ins. Co. *v.* Minchener, 133 Ala. 632, 32 So. 225; Pearson *v.* Adams, 129 Ala. 157, 29 So. 977; Meyer *v.* Mitchell, 77 Ala. 312; Fore *v.* Hib-

c. Application of Instrument to Subject-Matter. Parol evidence is admissible to apply the instrument or a description therein to its subject-matter and to

bard, 63 Ala. 410; Duval *v.* McLoskey, 1 Ala. 708; Bullock *v.* Malone, Minor 400.

Arkansas.— Swayne *v.* Vance, 28 Ark. 282.

California.— Ontario Deciduous Fruit Growers' Assoc. *v.* Cutting Fruit Packing Co., 134 Cal. 21, 66 Pac. 28, 86 Am. St. Rep. 231, 53 L. R. A. 681 (holding that where a written contract is to furnish peaches to be grown in "sundry orchards in" specified counties, parol evidence is admissible to identify the orchards referred to); Vejar *v.* Mound City Land, etc., Assoc., 97 Cal. 659, 32 Pac. 713; Walbridge *v.* Ellsworth, 44 Cal. 353.

Colorado.— Kretschmer *v.* Hard, 18 Colo. 223, 32 Pac. 418; Blair *v.* Bruns, 8 Colo. 397, 8 Pac. 569.

Connecticut.— Watson *v.* New Milford, 72 Conn. 561, 45 Atl. 167, 77 Am. St. Rep. 345.

Georgia.— Chauncey *v.* Brown, 99 Ga. 766, 26 S. E. 763; Shore *v.* Miller, 80 Ga. 93, 4 S. E. 561, 12 Am. St. Rep. 239; Jennings *v.* Athens Nat. Bank, 74 Ga. 782; Hulsey *v.* Clark, 49 Ga. 99; Summerlin *v.* Hesterly, 20 Ga. 689, 65 Am. Dec. 639.

Illinois.— Evans *v.* Gerry, 174 Ill. 595, 51 N. E. 615; McChesney *v.* Chicago, 173 Ill. 75, 50 N. E. 191 (holding that parol evidence is admissible to show that "Sec. 23, 38, 14," means section 23, township 38, range 14); Marske *v.* Willard, 169 Ill. 276, 48 N. E. 290 [*affirming* 68 Ill. App. 83] (holding that a lease that leaves a blank for the number of the lot in the description of the demised premises has such an ambiguity as may be removed by parol evidence); Mason *v.* Merrill, 129 Ill. 503, 21 N. E. 799; Cornwell *v.* Cornwell, 91 Ill. 414; Paris *v.* Lewis, 85 Ill. 597; Lake Shore, etc., R. Co. *v.* Pittsburg, etc., R. Co., 71 Ill. 38; Swift *v.* Lee, 65 Ill. 336; Spaulding *v.* Mozier, 57 Ill. 148; Turney *v.* Goodman, 2 Ill. 184.

Indiana.— Scheible *v.* Slagle, 89 Ind. 323; Harris *v.* Doe, 4 Blackf. 369.

Indian Territory.— Turner *v.* Gonzales, 3 Indian Terr. 649, 64 S. W. 565.

Iowa.— Brown *v.* Ward, 110 Iowa 123, 81 N. W. 247 (holding that where property was contracted to be sold as one-half interest in Linn Grove Mills, and the land thereunto belonging, parol evidence was admissible, in an actior for specific performance, to identify the tract by showing what land was used with the mills. Myers *v.* Snyder, 96 Iowa 107, 64 N. W. 771; Martin *v.* Brown, 91 Iowa 574, 60 N. W. 182; Judd *v.* Anderson, 51 Iowa 345, 1 N. W. 677; Goe *v.* Hetherington, 51 Iowa 345, 1 N. W. 677.

Kansas.— Powers *v.* Scharling, 64 Kan. 339, 67 Pac. 820.

Kentucky.— Graham *v.* Botner, 37 S. W. 583, 18 Ky. L. Rep. 637, holding that parol evidence is admissible to show what estate the grantor had when he conveyed "all his estate, real and personal."

Louisiana.— Dickson *v.* Dickson, 36 La. Ann. 870; D'Aquin *v.* Barbour, 4 La. Ann. 441; Moore *v.* Hampton, 3 La. Ann. 192.

Maine.— Eveleth *v.* Wilson, 15 Me. 109.

Massachusetts.— Barrett *v.* Murphy, 140 Mass. 133, 2 N. E. 833; Hampden Cotton Mills *v.* Payson, 130 Mass. 88; Chester Emery Co. *v.* Lucas, 112 Mass. 424; Bond *v.* Fay, 12 Allen 86; Clark *v.* Houghton, 12 Gray 38; Pierce *v.* Parker, 4 Metc. 80; Hall *v.* Tufts, 18 Pick. 455.

Minnesota.— Eddy *v.* Caldwell, 7 Minn. 225.

Mississippi.— Dixon *v.* Cook, 47 Miss. 220; Peacher *v.* Strauss, 47 Miss. 200; Whitworth *v.* Harris, 40 Miss. 483; McCaleb *v.* Pradat, 25 Miss. 257; Morton *v.* Jackson, 1 Sm. & M. 494, 40 Am. Dec. 107; Jenkins *v.* Bodley, Sm. & M. Ch. 338.

Missouri.— Turner *v.* Dixon, 150 Mo. 416, 51 S. W. 725; Charles *v.* Patch, 87 Mo. 450; McPile *v.* Allman, 53 Mo. 551; Means *v.* De la Vergne, 50 Mo. 343; Rollins *v.* Claybrook, 22 Mo. 405; Thornton *v.* Missouri Pac. R. Co., 40 Mo. App. 265; Brown *v.* Walker, 11 Mo. App. 226.

Montana.— Taylor *v.* Holter, 1 Mont. 688.

Nebraska.— Keplinger *v.* Woolsey, (1903) 93 N. W. 1008; Abbott *v.* Coates, 62 Nebr. 247, 86 N. W. 1058.

New Hampshire.— Bell *v.* Woodward, 46 N. H. 315.

New Jersey.— Morris, etc., R. Co. *v.* Bonnell, 34 N. J. L. 474; Dunn *v.* English, 23 N. J. L. 126; Conover *v.* Wardell, 22 N. J. Eq. 492.

New Mexico.—Armijo *v.* New Mexico Town Co., 3 N. M. 244, 5 Pac. 709.

New York.— Heyward *v.* Willmarth, 87 N. Y. App. Div. 125, 84 N. Y. Suppl. 75 [*affirming* 78 N. Y. Suppl. 347]; Petit *v.* Shepard, 32 N. Y. 97; Dady *v.* O'Rourke, 61 N. Y. App. Div. 529, 70 N. Y. Suppl. 694; Orvis *v.* Elmira, etc., R. Co., 17 N. Y. App. Div. 187, 45 N. Y. Suppl. 367 [*affirming* 172 N. Y. 656, 65 N. E. 1120]; Seaman *v.* Hogeboom, 21 Barb. 398; Mason *v.* White, 11 Barb. 173; Mittler *v.* Herter, 39 Misc. 843, 81 N. Y. Suppl. 494; Altman *v.* Tilson, 10 N. Y. St. 235; Clark *v.* Wethey, 19 Wend. (N. Y.) 320.

North Carolina.— Stancill *v.* Spain, 133 N. C. 76, 45 S. E. 466; Harrison *v.* Hahn, 95 N. C. 28; Williams *v.* Kivett, 82 N. C. 110; Edwards *v.* Tipton, 77 N. C. 222; Parks *v.* Mason, 29 N. C. 362.

Pennsylvania.— Peart *v.* Brice, 152 Pa. St. 277, 25 Atl. 537; Koch *v.* Dunkel, 90 Pa. St. 264; Clarke *v.* Adams, 83 Pa. St. 309; Brownfield *v.* Brownfield, 20 Pa. St. 55; Commercial Bank *v.* Woodside, 14 Pa. St. 404; Messer *v.* Rhodes, 3 Brewst. 180; Carroll *v.* Miner, 1 Pa. Super. Ct. 439, 38 Wkly. Notes Cas. 194.

South Carolina.—Rapley *v.* Klugh, 40 S. C. 134, 18 S. E. 680; Birchfield *v.* Bonham, 2 Speers 62.

South Dakota.— Farrell *v.* Edwards, 8 S. D. 425, 66 N. W. 812.

enable the court to execute it;[42] and this principle admits extrinsic evidence beyond the mere designation of the thing on which the contract operates and extends so far as to embrace the circumstances which accompany the transaction, when without the aid of those circumstances the written contract could not be applied to its proper subject-matter.[43]

d. Qualities and Nature of Subject. It is also true that as written instruments are to be interpreted according to their subject-matter, parol evidence may be introduced to ascertain the qualities and nature of the subject to which the

Tennessee.— Cannon *v.* Trail, 1 Head 282; Barnes *v.* Sellars, 2 Sneed 33.

Texas.— Herndon *v.* Vick, 89 Tex. 469, 35 S. W. 141 [*reversing* (Civ. App. 1895) 33 S. W. 1011]; Lohff *v.* Germer, 37 Tex. 578; Connecticut F. Ins. Co. *v.* Hilbrant, (Civ. App. 1903) 73 S. W. 558; Clark *v.* Regan, (Civ. App. 1898) 45 S. W. 169; House *v.* Johnson, (Civ. App. 1896) 36 S. W. 916; Shaw *v.* Adams, 2 Tex. App. Civ. Cas. § 177.

Vermont.— O'Hear *v.* De Goesbriand, 33 Vt. 593, 80 Am. Dec. 653; Fletcher *v.* Phelps, 28 Vt. 257; Gray *v.* Clark, 11 Vt. 583; Hodges *v.* Strong, 10 Vt. 247.

Virginia.— Sulphur Mines Co. *v.* Thompson, 93 Va. 293, 25 S. E. 232.

Washington.—McLennan *v.* Grant, 8 Wash. 603, 36 Pac. 682.

Wisconsin.— Wussow *v.* Hase, 108 Wis. 382, 84 N. W. 433; Jenkins *v.* Sharpf, 27 Wis. 472.

United States.— Noonan *v.* Braley, 2 Black 499, 17 L. ed. 278.

See 20 Cent. Dig. tit. "Evidence," § 2118.

Where a contract for work does not specify the work to be performed but refers to drawings and specifications "hereunto annexed" but no such papers are annexed, a separate paper purporting to contain the specifications referred to in the contract is admissible. Mullen *v.* Cohen, 34 Misc. (N. Y.) 398, 69 N. Y. Suppl. 646.

A slight variance between the real situation of lands sold for taxes and the recital in the marshal's deed may be reconciled by parol evidence. Hood *v.* Mathers, 2 A. K. Marsh. (Ky.) 553.

Rule applies to deeds based on good consideration as well as those on valuable consideration. Blackburn *v.* McDonald, 1 Tex. Unrep. Cas. 355.

42. *Alabama.*— Guilmartin *v.* Wood, 76 Ala. 204.

Connecticut.—Robbins *v.* Wolcott, 28 Conn. 396; Bennett *v.* Pierce, 28 Conn. 315.

District of Columbia.— Whelan *v.* McCullough, 4 App. Cas. 58.

Georgia.—Follendore *v.* Follendore, 110 Ga. 359, 35 S. E. 676; Gress Lumber Co. *v.* Coody, 94 Ga. 519, 21 S. E. 217.

Illinois.— Kamphouse *v.* Gaffner, 73 Ill. 453; Reed *v.* Ellis, 68 Ill. 206.

Indiana.— Clark *v.* Crawfordsville Coffin Co., 125 Ind. 277, 25 N. E. 288; Wills *v.* Ross, 77 Ind. 1, 40 Am. Rep. 279; Mace *v.* Jackson, 38 Ind. 162.

Iowa.— Carlyon *v.* Eade, 48 Iowa 707.

Kentucky.— Farmer *v.* Gregory, 1 Ky. L. Rep. 18.

Maine.— Baker *v.* Windham, 13 Me. 74.

Massachusetts.— Bigelow *v.* Capen, 145 Mass. 270, 13 N. E. 896; Swett *v.* Shumway, 102 Mass. 365, 3 Am. Rep. 471; Clark *v.* Houghton, 12 Gray 38; Sutton *v.* Bowker, 5 Gray 416.

Minnesota.— Cannon *v.* Moody, 78 Minn. 68, 80 N. W. 842; Borer *v.* Lange, 44 Minn. 281, 46 N. W. 358.

Mississippi.— Price *v.* Ferguson, 66 Miss. 404, 6 So. 210.

New Hampshire.— Dinsmore *v.* Winegar, 57 N. H. 382; Peaslee *v.* Gee, 19 N. H. 273.

New Jersey.— Fuller *v.* Carr, 33 N. J. L. 157.

New York.— Almgren *v.* Dutilh, 5 N. Y. 28; Sale *v.* Darragh, 2 Hilt. 184.

Ohio.— Morgan *v.* Spangler, 14 Ohio St. 102; Ashworth *v.* Carleton, 12 Ohio St. 381; Hildebrand *v.* Fogle, 20 Ohio 147.

Pennsylvania.— Boice *v.* Zimmerman, 3 Pa. Super. Ct. 181.

Tennessee.— Snodgrass *v.* Ward, 3 Hayw. 40.

Texas.— Ellis *v.* Cochran, 8 Tex. Civ. App. 510, 28 S. W. 243.

Virginia.— Peery *v.* Elliott, 101 Va. 709, 44 S. E. 919; Reusens *v.* Lawson, 91 Va. 226, 21 S. E. 347.

West Virginia.— Snooks *v.* Wingfield, 52 W. Va. 441, 44 S. E. 277; Johnson *v.* Burns, 39 W. Va. 658, 20 S. E. 686.

United States.— Reed *v.* Merrimac River Locks, etc., 8 How. 274, 12 L. ed. 1077; Bradley *v.* Washington, etc., Steam Packet Co., 13 Pet. 89, 10 L. ed. 72 [*reversing* 22 Fed. Cas. No. 13,333, 5 Cranch C. C. 393].

See 20 Cent. Dig. tit. "Evidence," § 2116.

Bond taken for benefit of several persons.— Where a bond is taken by an officer for the joint benefit of several claimants for distinct portions of property levied on, evidence outside of the bond is competent to show what property is claimed by each of the claimants. State *v.* Leutzinger, 41 Mo. 498

In an action on two replevin bonds given by the same parties for the recovery of the same attached property, it is competent for plaintiff to show by extraneous evidence to which writ each of the bonds applies, if such fact does not appear from the return on the writ. McManus *v.* Donohoe, 175 Mass. 308, 56 N. E. 291.

43. Bradley *v.* Washington, etc., Steam Packet Co., 13 Pet. (U. S.) 89, 10 L. ed. 72.

A judgment may be applied to its subject-matter by extrinsic evidence. Stringfellow *v.* Stringfellow, 112 Ga. 494, 37 S. E. 767.

instrument refers,[44] for it must readily be seen that evidence to explain the subject-matter of an agreement is essentially different from that which varies the terms in which the contract is expressed.[45]

e. Property Included in Description. Where it is doubtful from the language used what property, or what interest in property, or what easements and appurtenances connected with the property, are included in the description in a deed or other writing, parol evidence is admissible.[46]

f. Boundaries. For the purpose of showing the exact subject-matter of a deed, grant, or other instrument relating to land, parol evidence is admissible to show the actual boundaries, where the writing does not definitely and certainly locate them;[47] and evidence as to the actual boundaries or the lines actually run

44. *Alabama.*— Moore *v.* Barber Asphalt Pav. Co., 118 Ala. 563, 23 So. 798.

Louisiana.— Bagly *v.* Rose Hill Sugar Co., 111 La. 249, 35 So. 539; Rivers *v.* Oak Lawn Sugar Co., 52 La. Ann. 762, 27 So. 118; Campbell *v.* Short, 35 La. Ann. 447; Bayley *v.* Denny, 26 La. Ann. 255.

Maryland.— Parks *v.* Parks, 19 Md. 323; Berry *v.* Matthews, 13 Md. 537.

New York.— Cary *v.* Thompson, 1 Daly 35.

Pennsylvania.— Aldridge *v.* Eshleman, 46 Pa. St. 420; Barnhart *v.* Riddle, 29 Pa. St. 92; Leggoe *v.* Mayer, 2 Pa. Super. Ct. 529.

England.— New Zealand Bank *v.* Simpson, [1900] A. C. 182, 69 L. J. C. P. 22, 82 L. T. Rep. N. S. 102, 48 Wkly. Rep. 591.

See 20 Cent. Dig. tit. "Evidence," § 2118.

45. Barnhart *v.* Riddle, 29 Pa. St. 92.

46. *Alabama.*— Holly *v.* Pruitt, 77 Ala. 334; Sikes *v.* Shows, 74 Ala. 382.

California.— Claffey *v.* Hartford F. Ins. Co., 68 Cal. 169, 8 Pac. 711.

Georgia.—Towner *v.* Thompson, 82 Ga. 740, 9 S. E. 672 (holding that a writing reciting the purchase of a "mill-seat" is ambiguous, and parol evidence is admissible to show whether land covered by the water of the mill-pond was included or excluded); Goldsmith *v.* White, 68 Ga. 334; Saulsbury *v.* Blandys, 60 Ga. 646; Kirkpatrick *v.* Brown, 59 Ga. 450 (holding that where all rights and appurtenances to the premises are conveyed by the deed, parol evidence is competent to show that the use of an alley was one of such rights); Maguire *v.* Baker, 57 Ga. 109.

Illinois.— Bradish *v.* Yocum, 130 Ill. 386, 23 N. E. 114; Prettyman *v.* Walston, 34 Ill. 175.

Indiana.— Indiana Cent. Canal Co. *v.* State, 53 Ind. 575.

Louisiana.— Bagley *v.* Rose Hill Sugar Co., 111 La. 249, 35 So. 539.

Maine.— Morrell *v.* Cook, 35 Me. 207.

Massachusetts.— Atkins *v.* Bordman, 2 Metc. 457, 37 Am. Dec. 100; Stone *v.* Clark, 1 Metc. 378, 35 Am. Dec. 370; Sparhawk *v.* Bullard, 1 Metc. 95.

Minnesota.— Eastman *v.* St. Anthony Falls Water-Power Co., 43 Minn. 60, 44 N. W. 882.

Missouri.— Hancock *v.* Whybark, 66 Mo. 672; State *v.* Cabanne, 14 Mo. App. 455.

Montana.— Donnell *v.* Humphreys, 1 Mont. 518.

New York.— Gowdy *v.* Cordts, 40 Hun 469; Jackson *v.* Britton, 4 Wend. 507.

Pennsylvania.— Palmer *v.* Farrell, 129 Pa. St. 162, 18 Atl. 761, 15 Am. St. Rep. 708; Hetherington *v.* Clark, 30 Pa. St. 393.

Vermont.— Coffrin *v.* Cole, 67 Vt. 226, 31 Atl. 313.

Wisconsin.— Weber *v.* Illing, 66 Wis. 79, 27 N. W. 834.

See 20 Cent. Dig. tit. "Evidence," § 2119.

47. *Alabama.*—Guilmartin *v.* Wood, 76 Ala. 204 (holding that where premises are described as situated "on" a certain street, parol evidence is admissible to show on which side of the street they are; but, where they are described as bounded on the east by the street, parol evidence is not admissible to show that in fact the street was the western boundary); Doe *v.* Riley, 28 Ala. 164, 65 Am. Dec. 334.

Arkansas.— Dorr *v.* School Dist. No. 26, 40 Ark. 237.

California.— Ferris *v.* Coover, 10 Cal. 589.

Georgia.—Towner *v.* Thompson, 82 Ga. 740, 9 S. E. 672; Mohr *v.* Dillon, 80 Ga. 572, 5 S. E. 770.

Illinois.— Kamphouse *v.* Gaffner, 73 Ill. 453; Williams *v.* Warren, 21 Ill. 541.

Kentucky.— Shelby *v.* Lewis, 14 S. W. 501, 12 Ky. L. Rep. 428.

Louisiana.— See Purl *v.* Miles, 9 La. Ann. 270.

Massachusetts.— Graves *v.* Broughton, 185 Mass. 174, 69 N. E. 1083; Reynolds *v.* Boston Rubber Co., 160 Mass. 240, 35 N. E. 677; Dunham *v.* Gannett, 124 Mass. 151.

Michigan.— Moran *v.* Lezotte, 54 Mich. 83, 19 N. W. 757.

Mississippi.— Spears *v.* Burton, 31 Miss. 547; McCaleb *v.* Pradat, 25 Miss. 257; Surget *v.* Little, 5 Sm. & M. 319.

Missouri.—Kronenberger *v.* Hoffner, 44 Mo. 185.

Nebraska.— Hanlon *v.* Union Pac. R. Co., 40 Nebr. 52, 58 N. W. 590.

New Hampshire.— Bartlett *v.* La Rochelle, 68 N. H. 211, 44 Atl. 302; Hall *v.* Davis, 36 N. H. 569; Claremont *v.* Carlton, 2 N. H. 369, 9 Am. Dec. 88.

New Jersey.— Opdyke *v.* Stephens, 28 N. J. L. 83.

New York.— Harris *v.* Oakley, 130 N. Y. 1, 28 N. E. 530 [*reversing* 7 N. Y. Suppl. 232]; Pettit *v.* Shepard, 32 N. Y. 97.

North Carolina.— Huffman *v.* Walker, 83 N. C. 411 (holding that the location of boundaries mentioned in a deed may be estab-

has been admitted, although it showed the actual lines to differ somewhat from those given in the instrument,[48] or contradicted ancient parish records.[49] So also evidence is admissible to show the practical location of a boundary,[50] or a fixing of a boundary by agreement of the parties.[51]

g. Monuments and Calls. Parol evidence is admissible for the purpose of locating and identifying the monuments referred to, and the calls of the description in a deed or other writing relating to real property.[52]

lished by parol proof and by reputation); Bustin *v.* Christie, 3 N. C. 99.

Oregon.— Wills *v.* Leverich, 20 Oreg. 168, 25 Pac. 398.

Texas.— Lohff *v.* Germer, 37 Tex. 578; Logan *v.* Pierce, 2 Tex. Unrep. Cas. 286.

United States.— Atkinson *v.* Cummins, 9 How. 479, 13 L. ed. 223.

See 20 Cent. Dig. tit. "Evidence," § 2120. See also BOUNDARIES, 5 Cyc. 861.

A variable boundary may be fixed by parol evidence. Raymond *v.* Coffey, 5 Oreg. 132.

Boundary on highway.— Where the owners of land convey the same, bounding it by the line of a highway, parol evidence is admissible to show whether, by such description, the parties meant the surveyed line of the highway or the line as actually used and occupied. Wead *v.* St. Johnsbury, etc., R. Co., 64 Vt. 52, 24 Atl. 361.

Testimony of a surveyor is admissible to identify the boundaries of the town with the limits defined in the charter. State *v.* Hoff, (Tex. Civ. App. 1895) 29 S. W. 672.

Where a description of land by bounds is repugnant with itself, parol evidence may be received to show the bounds referred to, and thus show the application to the subject-matter of the grant. Peaslee *v.* Gee, 19 N. H. 273.

Where the description merely refers to lots by number, parol evidence of use and occupation is competent to establish an uncertain and controverted boundary. Davidson *v.* Arledge, 97 N. C. 172, 2 S. E. 378.

Where no ambiguity exists in a description as to the location of the boundaries called for, the court may exclude evidence outside of the grant to prove such location. Dorsey *v.* Hammond, 1 Harr. & J. (Md.) 190.

48. *California.*— O'Farrel *v.* Harney, 51 Cal. 125.

Kentucky.— McNiel *v.* Dixon, 1 A. K. Marsh. 365, 10 Am. Dec. 740; Francis *v.* Hazlerigg, 1 A. K. Marsh. 93; Hagins *v.* Whitaker, 43 S. W. 224, 19 Ky. L. Rep. 1203; Broaddus *v.* Eubanks, 38 S. W. 134, 18 Ky. L. Rep. 742; Snow *v.* Morse, 37 S. W. 953, 18 Ky. L. Rep. 707.

North Carolina.— Graybeal *v.* Powers, 76 N. C. 66; Bustin *v.* Christie, 3 N. C. 99.

Pennsylvania.—Mageehan *v.* Adams, 2 Binn. 109.

Virginia.— Baker *v.* Seekright, 1 Hen. & M. 177. See also Herbert *v.* Wise, 3 Call 239.

See 20 Cent. Dig. tit. "Evidence," § 2120.

A dotted line on a map not being *per se* conclusive evidence that the line was run, parol evidence may be introduced to explain the character of such line, and prove that it was never actually run and marked. Newman *v.* Foster, 3 How. (Miss.) 383, 34 Am. Dec. 98.

49. Fleming *v.* Scott, 26 La. Ann. 545.

50. Stewart *v.* Patrick, 68 N. Y. 450; Smith *v.* Stacey, 68 N. Y. App. Div. 521, 73 N. Y. Suppl. 1022.

51. Horner *v.* Stillwell, 35 N. J. L. 307. See also Diggo *v.* Kurtz, 132 Mo. 250, 33 S. W. 815, 53 Am. St. Rep. 488.

52. *California.*— Stinchfield *v.* Gillis, 107 Cal. 84, 40 Pac. 98; Anderson *v.* Richardson, 92 Cal. 623, 28 Pac. 679; Thompson *v.* Southern California Motor Road Co., 82 Cal. 497, 23 Pac. 130; Altschul *v.* San Francisco Central Park Homestead Assoc., 43 Cal. 171; Reamer *v.* Nesmith, 34 Cal. 624; Colton *v.* Seavey, 22 Cal. 496.

Illinois.— Stevens *v.* Wait, 112 Ill. 544; Colcord *v.* Alexander, 67 Ill. 581.

Maine.— Greeley *v.* Weaver, (1888) 13 Atl. 575; Abbott *v.* Abbott, 51 Me. 575 (holding that if a monument found on the ground corresponds with that in a deed in some particulars, and differs from it in others, parol evidence is admissible to show whether such monument is the one intended); Robinson *v.* White, 42 Me. 209; Wing *v.* Burgis, 13 Me. 111; Brown *v.* Haven, 12 Me. 164.

New Hampshire.— Clough *v.* Bowman, 15 N. H. 504; Claremont *v.* Carlton, 2 N. H. 369, 9 Am. Dec. 88.

New Jersey.— Jackson *v.* Perrine, 35 N. J. L. 137, holding that where a deed describes a lot as beginning at a locust stump at the corner between the land of B and C, parol evidence is admissible to show whether it was the intention of the party to measure from the center or side of the stump. See also Blackman *v.* Doughty, 40 N. J. L. 319.

North Carolina.— Davidson *v.* Shuler, 119 N. C. 582, 26 S. E. 340; Bonaparte *v.* Carter, 106 N. C. 534, 11 S. E. 262; Strickland *v.* Draugham, 88 N. C. 315; Waters *v.* Simmons, 52 N. C. 541.

Ohio.— Caldwell *v.* Carthage, 40 Ohio St. 453; McAfferty *v.* Conover, 7 Ohio St. 99, 70 Am. Dec. 57; Alshire *v.* Hulse, Wright 170.

Oregon.—Boehreinger *v.* Creighton, 10 Oreg. 42; Raymond *v.* Coffey, 5 Oreg. 132.

South Carolina.— Foreman *v.* Sandefur, 1 Brev. 474.

Texas.— Robinson *v.* Douthit, 64 Tex. 101; Hughes *v.* Sandal, 25 Tex. 162; Williamson *v.* Simpson, 16 Tex. 433; Sloan *v.* King, (Civ. App. 1903) 77 S. W. 48, where the uncertainty in the calls in a deed does not arise on the face of the instrument, but only when the effort is made to apply them to the land.

h. Sufficiency of Description to Admit Parol Evidence. In order to admit parol evidence to aid in the description of the subject-matter of a deed or other writing, there must be some such description as will serve as a foundation for such evidence; that is to say, the writing must at least give some data from which the description may be found and made certain. Evidence is not admissible to identify the property, where the description thereof is so vague as to amount practically to no description at all,[53] or as it has been expressed, parol evidence cannot be admitted, first to describe the subject-matter of the deed or other writing and then to apply the description.[54] But any description, however general and indefinite, which is capable of being made certain by other evidence is sufficient to sustain the writing and admit of parol evidence to identify the property meant.[55]

West Virginia.— Warren *v.* Syme, 7 W. Va. 474.

United States.— Blake *v.* Doherty, 5 Wheat. 359, 5 L. ed. 109.

See 20 Cent. Dig. tit. "Evidence," § 2122.

Corner fixed by writing may be shown to be marked by monument. O'Connell *v.* Cox, 179 Mass. 250, 60 N. E. 580.

Where there is a conflict in the calls of a railroad survey incorporated in a patent, parol evidence is admissible to show where the metes and bounds of the surveys were actually run and marked on the ground. Minor *v.* Kirkland, (Tex. Civ. App. 1892) 20 S. W. 932.

53. *Minnesota.*— Ham *v.* Johnson, 51 Minn. 105, 107, 52 N. W. 1080.

Mississippi.— Crawford *v.* McLaurin, 83 Miss. 265, 35 So. 209, 949.

North Carolina.—Lowe *v.* Harris, 112 N. C. 472, 17 S. E. 539, 22 L. R. A. 379; Fortesque *v.* Crawford, 105 N. C. 29, 10 S. E. 910.

Oklahoma.— Ferguson *v.* Blackwell, 8 Okla. 489, 58 Pac. 647.

Pennsylvania.— Peart *v.* Brice, 152 Pa. St. 277, 25 Atl. 537.

Texas.— Coker *v.* Roberts, 71 Tex. 597, 9 S. W. 665; Pierson *v.* Sanger, (Civ. App. 1899) 51 S. W. 869.

See 20 Cent. Dig. tit. "Evidence," § 2121. See *infra*, XVI, C, 32, b, (II).

The test of the admissibility of evidence *dehors* the deed is involved in the question whether it tends to explain some descriptive word or expression contained in it, as to show that such phraseology, otherwise of doubtful import, contains in itself, with such explanation, an identification of the land conveyed. The rule is founded on the maxim, "*Id certum est quod certum reddi potest.*" Blow *v.* Vaughan, 105 N. C. 198, 10 S. E. 891.

Descriptions held not sufficient.— The following descriptions have been held too vague and indefinite to receive aid by parol evidence: "Thirty three or four thousand acres of land situate in the county Surry, between Rockford and the Blue Ride" (Worth *v.* Simmons, 121 N. C. 357, 28 S. E. 528); "your lot" (Farthing *v.* Rochelle, 131 N. C. 563, 43 S. E. 1); "adjoining the lands of J. R. Conner and others, and containing fifty acres, more or less" (Wilson *v.* Johnson, 105 N. C. 211, 10 S. E. 895); the "forty acres tract" (Johnson *v.* Fecht, 94 Mo. App. 605, 68 S. W. 615); all the crop "raised on" certain land, in a chattel mortgage, the year not being stated (Eggert *v.* White, 59 Iowa 464, 13 N. W. 426); and "a one horse wagon," being the only description in a chattel mortgage, and the mortgagor having four such wagons (Holman *v.* Whitaker, 119 N. C. 113, 25 S. E. 793).

54. Ferguson *v.* Staver, 33 Pa. St. 411.

55. *Georgia.*— Stephens *v.* Tucker, 55 Ga. 543, 58 Ga. 391.

Iowa.— Haller *v.* Parrott, 82 Iowa 42, 47 N. W. 996.

Louisiana.— Kernan *v.* Baham, 45 La. Ann. 799, 13 So. 155.

Mississippi.— Tucker *v.* Field, 51 Miss. 191; Jenkins *v.* Bodley, Sm. & M. Ch. 338.

New York.— Conkling *v.* Shelley, 28 N. Y. 360, 84 Am. Dec. 348; Dunning *v.* Stearns, 9 Barb. 630.

Texas.— Lohff *v.* Germer, 37 Tex. 578.

Wisconsin.— Meade *v.* Gilfoyle, 64 Wis. 18, 24 N. W. 413.

See 20 Cent. Dig. tit. "Evidence," § 2121.

Where natural boundaries and the lines of adjoining proprietors are called for in the description of land in a complaint for the recovery of the same and defendant admits that he holds possession of the land claimed by the complainant, the description is not too indefinite to admit of parol evidence to identify the land. Wellons *v.* Jordan, 83 N. C. 371.

That land is well known in the locality by the description given in a deed may be shown by parol evidence, no matter how vague the description may appear. Shewalter *v.* Pirner, 55 Mo. 218; Webster *v.* Blount, 39 Mo. 500; Vasquez *v.* Richardson, 19 Mo. 96; Bates *v.* State Bank, 15 Mo. 309, 55 Am. Dec. 145; Hart *v.* Rector, 7 Mo. 531.

Descriptions held sufficient.— The following descriptions have been held not too vague or indefinite to be aided by parol: The "entire crop" of a mortgagor, "of every description, raised by him annually," until the debt is paid (Varnum *v.* State, 78 Ala. 28); "any of my black walnut trees, not exceeding fifteen in number, that will girth eight feet six inches in circumference, and under ten feet," in a written agreement to sell the same (Dunkart *v.* Rineheart, 89 N. C. 354); "homestead farm" (Hunsecker's Estate, 6 Pa. Dist. 202, 19 Pa. Co. Ct. 14); a certain person's

i. Different Descriptions in Different Instruments. Where different instruments relating to property describe the same in a different manner, it may be

"Enfield property" (Packard *v.* Putnam, 57 N. H. 43); "water lot 36 in Kinzie's addition to Chicago" (Chicago Dock, etc., Co. *v.* Kinzie, 93 Ill. 415); "thirty acres of land situated in Stony Creek township, adjoining the lands of W. J. and B." (Wilkins *v.* Jones, 119 N. C. 95, 25 S. E. 789); "twenty-five head of horses," in a mortgage (Barker *v.* Wheelip, 5 Humphr. (Tenn.) 329, 42 Am. Dec. 432); "Rose Hill," in a lease (Dougherty *v.* Chesnutt, 86 Tenn. 1, 5 S. W. 444); "known as the property of the late George Robertson, deceased," being the description of land in a partition decree (Calloway *v.* Henderson, 130 Mo. 77, 32 S. W. 34); "one-half of boat," in an assignment of a year's support to a widow, parol evidence being admissible to show that a particular boat was the only one in which the husband had any interest at the time of his death (Lupton *v.* Lupton, 117 N. C. 30, 23 S. E. 184); and "my entire crop of cotton and corn of the present year," in a mortgage (Ellis *v.* Martin, 60 Ala. 394. See also Smith *v.* Fields, 79 Ala. 335; Wasson *v.* Connor, 54 Miss. 351). Parol evidence has also been admitted to show that the parties to a written lease of "four acres out of lot 4" had, when it was made, agreed on certain boundaries thereof (Schneider *v.* Patterson, 38 Nebr. 680, 57 N. W. 398).

In the case of deeds a description which gives the beginning corner and the several courses, so that it may be easily identified, is sufficient, and parol evidence is admissible to identify the land, where its identity is called in question. Orr *v.* How, 55 Mo. 328. The following descriptions have been held sufficient to admit evidence: "Situated in said Phipsburg near the east end of the old Winnegance mill-dam, and being the same land said to have been conveyed to said Reuben S. by his late father, Wm. Morse, and reserved from a farm conveyed to Albion W. Morse, dated July 10, 1850, and recorded" (Moses *v.* Morse, 74 Me. 472); "the Douglas gold mine" (Baucum *v.* George, 65 Ala. 259); "on the south side of Trent river, adjoining the lands of Colgrove, McDaniel, and others, containing three hundred and sixty acres, more or less" (Perry *v.* Scott, 109 N. C. 374, 14 S. E. 294); "all their lands lying between Haw River and Stony Creek, up to the line of J. H." (Euliss *v.* McAdams, 108 N. C. 507, 13 S. E. 162); "a piece of the Abraham Moore tract of land that belongs to the heirs of Z. P., lying and being in the county of M., on the Elijah creek and its waters in district eleven, as we inherited it at the death of Z. P. as heirs of him" (Moses *v.* Peak, 48 N. C. 520); "all the interest, right, title and claim they may have in the estate of her father, William A. Brawley, deceased, more particularly an undivided seventh share, which descended to the said Mary Catharine from her father, of all the lands of his estate" (Robbins *v.* Harris, 96 N. C. 557, 558, 2 S. E. 70); "all the real estate, waterrights, and property of every description, real and personal, in the state of Nevada, belonging to the first parties of the first part, or either of them" (Brown *v.* Warren, 16 Nev. 228); "all that tract of land situate in said county and bounded as follows: adjoining the lands of B., H., M., T., and others, containing 360 acres, more or less" (McGlawhorn *v.* Worthington, 98 N. C. 199, 3 S. E. 633); "the Sellars tract" (Euliss *v.* McAdams, 108 N. C. 507, 13 S. E. 162); "a certain tract of land in this state, lying about 12 miles above F., containing about 500 acres" (Cox *v.* Rust, (Tex. Civ. App. 1895) 29 S. W. 807); "known by the name of the mill spot" (Woods *v.* Sawin, 4 Gray (Mass.) 322. See also Tucker *v.* Field, 51 Miss. 191); and "a certain tract in N. Township, adjoining the lands of H. S. and others, said to contain 37½ acres" (Hinton *v.* Roach, 95 N. C. 106). See also Dorgan *v.* Weeks, 86 Ala. 329, 5 So. 581; Black *v.* Pratt Coal, etc., Co., 85 Ala. 504, 5 So. 89; Hartsell *v.* Coleman, 116 N. C. 670, 21 S. E. 392; Moses *v.* Peak, 48 N. C. 520; James *v.* Koy, (Tex. Civ. App. 1900) 59 S. W. 295.

In the case of contracts of sale a description less definite than would be necessary in the case of a deed may be sufficient to form a basis for the admission of parol evidence to identify the subject-matter. Thus where a person owned but one tract of land in a subdivision of a city, and this tract was referred to in the correspondence which constituted the contract for a sale thereof, but without a definite description, parol evidence was held admissible to identify the property. Adams *v.* Thompson, 28 Nebr. 53, 44 N. W. 74. The following descriptions have also been held sufficient to admit of parol evidence to identify the property: "30 acres of land, lying and being in the State and county aforesaid, adjoining the land of E. P. Simons and the land of the said White" (Edwards *v.* Deans, 125 N. C. 59, 34 S. E. 105); "a house on Church street" (Mead *v.* Parker, 115 Mass. 413, 15 Am. Rep. 110. See also Hurley *v.* Brown, 98 Mass. 545, 96 Am. Dec. 671); "one tract containing 193 acres, more or less, it being the interest in two shares, adjoining the lands of J. B., E. O., and others" (Farmer *v.* Batts, 83 N. C. 387); "his farm" (Brinkerhoff *v.* Olp, 35 Barb. (N. Y.) 27); "two lots owned by me in 116th street, New York, between 8th and 9th avenues" (Waring *v.* Ayres, 40 N. Y. 357); "sixty acres Comida and Cone bottom, also ten acres hillside woodland adjoining the Mitchell tract" (Meyer *v.* Mitchell, 75 Ala. 475); "a steam-mill and distillery, with all the machinery, . . . situate in the County of Smith, and State (of Tennessee) aforesaid, near the village of Rome, in Civil District No. 13, on the banks of the Cumberland River, supposed to contain one and a half acres of land" (White *v.* Motley, 4 Baxt. (Tenn.) 544); and "the wharf and flats occupied by

shown by parol that such different descriptions relate to the same piece of property, if they are not absolutely repugnant.[56]

j. Evidence Must Be Consistent With Writing. The general rule that parol evidence is not admissible to vary or contradict a written instrument precludes the admission of evidence to identify the subject-matter of a contract or the property described therein when such evidence is inconsistent with what appears in the writing.[57] But where a portion of the description of property is erroneous, the fact may be shown by parol evidence and the property intended to be described may be identified, as this amounts merely to the rejection of the false reference in the description, pursuant to the well settled rule of interpretation *falsa demonstratio non nocet.*[58]

31. Subsequent Agreements — a. In General. The rule forbidding the admission of parol or extrinsic evidence to alter, vary, or contradict a written instrument does not apply so as to prohibit the establishment by parol of an agreement between the parties to a writing, entered into subsequent to the time when the written instrument was executed, notwithstanding such agreement may have the effect of adding to, changing, modifying, or even altogether abrogating the contract of the parties as evidenced by the writing;[59] for the parol evidence does

T. and owned by H." (Gerrish *v.* Towne, 3 Gray (Mass.) 82). And see, generally, Specific Performance.

56. Stewart *v.* Chadwick, 8 Iowa 463; Wood *v.* Le Baron, 8 Cush. (Mass.) 471; McGregor *v.* Brown, 5 Pick. (Mass.) 170; Jackson *v.* Jackson, 35 N. C. 159.

57. *Alabama.*— Guilmartin *v.* Wood, 76 Ala. 204.

Illinois.— Hutton *v.* Arnett, 51 Ill. 198.

Massachusetts.— Newcomb *v.* Noble, 10 Gray 47.

Michigan.— Lawrence *v.* Comstock, 124 Mich. 120, 82 N. W. 808.

Mississippi.— Carmichael *v.* Foley, 1 How. 591.

Missouri.— Mayer *v.* Keith, 55 Mo. App. 157; New Hampshire Cattle Co. *v.* Bilby, 37 Mo. App. 43.

New Hampshire.— Peaslee *v.* Gee, 19 N. H. 273.

Ohio.— Johnson *v.* Pierce, 16 Ohio St. 472; McAfferty *v.* Conover, 7 Ohio St. 99, 70 Am. Dec. 57; Barton *v.* Morris, 15 Ohio 408.

Pennsylvania.—Messer *v.* Rhodes, 3 Brewst. 180.

Rhode Island.— Coombs *v.* Patterson, 19 R. I. 25, 31 Atl. 428.

Wisconsin.— Curtis *v.* Brown County, 22 Wis. 167.

See 20 Cent. Dig. tit. "Evidence," §§ 2115–2128.

Evidence not inconsistent.— Parol evidence of extrinsic facts and circumstances is admissible to show that a tract of land described in a deed as the tract or lot "known as the east half" of a certain named division, was in fact less than the mathematical half of the division, as this evidence whereby the land described is identified does not contradict, vary, or explain the terms in the deed but leaves every word in the description to be understood in its plain and ordinary sense, as the description does not call for a certain quantity of land. Schlief *v.* Hart, 29 Ohio St. 150.

58. *California.*—Swain *v.* Grangers' Union, 69 Cal. 186, 10 Pac. 404.

Massachusetts.— Bigelow *v.* Capen, 145 Mass. 270, 13 N. E. 896; Pierce *v.* Parker, 4 Metc. 80.

Minnesota.—Adamson *v.* Petersen, 35 Minn. 529, 29 N. W. 321.

Mississippi.—Hunt *v.* Shackleford, 56 Miss. 397.

New York.— Dodge *v.* Potter, 18 Barb. 193.

North Carolina.— Goff *v.* Pope, 83 N. C. 123.

See 20 Cent. Dig. tit. "Evidence," §§ 2118, 2121.

59. *Alabama.*—Andrews *v.* Tucker, 127 Ala. 602, 29 So. 34; Grey *v.* Grey, 22 Ala. 233.

California.— Mackenzie *v.* Hodgkin, 126 Cal. 591, 59 Pac. 36, 77 Am. St. Rep. 209. See also Corson *v.* Berson, 86 Cal. 433, 25 Pac. 7; Adler *v.* Friedman, 16 Cal. 138.

Colorado.— Cerrusite Min. Co. *v.* Steele, 18 Colo. App. 216, 70 Pac. 1091.

Connecticut.— Barber *v.* Brace, 3 Conn. 9, 8 Am. Dec. 149; Hall *v.* Stewart, 5 Day 428.

Florida.— Wilson *v.* McClenny, 32 Fla. 363, 13 So. 873; Spann *v.* Baltzell, 1 Fla. 301, 44 Am. Dec. 346.

Georgia.— Mitchell *v.* Universal L. Ins. Co., 54 Ga. 289; Rogers *v.* Atkinson, 1 Ga. 12.

Illinois.— Sharkey *v.* Miller, 69 Ill. 560; Palmer *v.* Bennett, 96 Ill. App. 281; McMillan *v.* De Tamble, 93 Ill. App. 65; Chicago, etc., R. Co. *v.* Moran, 85 Ill. App. 543 [*affirmed* in 187 Ill. 316, 58 N. E. 335]; Watkins *v.* Newman, 71 Ill. App. 196; Danforth *v.* McIntyre, 11 Ill. App. 417.

Indiana.— Toledo, etc., R. Co. *v.* Levy, 127 Ind. 168, 26 N. E. 773; Rigsbee *v.* Bowler, 17 Ind. 167.

Indian Territory.— Fox *v.* Tyler, 3 Indian Terr. 1, 53 S. W. 462.

Iowa.— Walker *v.* Camp, 63 Iowa 627, 19 N. W. 802.

Kansas.— Todd *v.* Allen, 18 Kan. 543; Logan *v.* Hartwell, 5 Kan. 649.

not in any way deny that the original agreement of the parties was that which the writing purports to express, but merely goes to show that the parties have exer-

Kentucky.—Illinois Cent. R. Co. *v.* Manion, 67 S. W. 40, 23 Ky. L. Rep. 2267.

Louisiana.— Janney *v.* Brown, 36 La. Ann. 118; Cary *v.* Richardson, 35 La. Ann. 505; Cain *v.* Pullen, 34 La. Ann. 511; Buckmaster *v.* Jacobs, 27 La. Ann. 626; Davidson *v.* Bodley, 27 La. Ann. 149; Helm *v.* Ducayet, 20 La. Ann. 417; McDonald *v.* Stewart, 18 La. Ann. 90; Leeds *v.* Fassman, 17 La. Ann. 32; Cunningham *v.* Caldwell, 7 Rob. 520; Ross *v.* O'Nail, 1 Rob. 358; Kenyon *v.* Berghel, 13 La. 133; Bouligny *v.* Urquhart, 4 La. 29. But *compare* Barthet *v.* Estebene, 5 La. Ann. 315; Pew *v.* Livaudais, 3 La. 459.

Maine.— Courtenay *v.* Fuller, 65 Me. 156; Marshall *v.* Baker, 19 Me. 402; Low *v.* Treadwell, 12 Me. 441; Brock *v.* Sturdivant, 12 Me. 81.

Maryland.— Morgan *v.* Dugan, (1894) 30 Atl. 558; Stallings *v.* Gottschalk, 77 Md. 429, 26 Atl. 524; Allen *v.* Sowerby, 37 Md. 410; Whittington *v.* Farmers' Bank, 5 Harr. & J. 489.

Massachusetts.— Thomas *v.* Barnes, 156 Mass. 581, 31 N. E. 683; Shearer *v.* Babson, 1 Allen 486. But *compare* Kimball *v.* Bradford, 9 Gray 243.

Michigan.— Town *v.* Jepson, 133 Mich. 673, 95 N. W. 742; Mouat *v.* Bamlet, 123 Mich. 345, 82 N. W. 74. See also Wolff *v.* Alpena Nat. Bank, 131 Mich. 634, 92 N. W. 287.

Missouri.— Davis *v.* Scovern, 130 Mo. 303, 32 S. W. 986; Brown *v.* Bowen, 90 Mo. 184, 2 S. W. 398; Henry *v.* Bassett, 75 Mo. 89; Van Studdiford *v.* Hazlett, 56 Mo. 322; Bunce *v.* Beck, 43 Mo. 266; Boggs *v.* Pacific Steam Laundry Co., 86 Mo. App. 616; Finks *v.* Hathaway, 64 Mo. App. 186; Pugh *v.* Ayers, 47 Mo. App. 590; Conrad *v.* Fisher, 37 Mo. App. 352, 8 L. R. A. 147.

Nebraska.— Fitzgerald *v.* Fitzgerald, etc., Constr. Co., 41 Nebr. 374, 59 N. W. 838.

New Hampshire.— McMurphy *v.* Garland, 47 N. H. 316; Cummings *v.* Putnam, 19 N. H. 569.

New Jersey.— Hoffman *v.* Hummer, 17 N. J. Eq. 269; McKinstry *v.* Runk, 12 N. J. Eq. 60; Useful Manufactures Soc. *v.* Haight, 1 N. J. Eq. 393.

New York.— Tyson *v.* Post, 108 N. Y. 217, 15 N. E. 316, 2 Am. St. Rep. 409; Hope *v.* Balen, 58 N. Y. 380; Farrington *v.* Brady, 11 N. Y. App. Div. 1, 42 N. Y. Suppl. 385; Grange *v.* Palmer, 56 Hun 481, 10 N. Y. Suppl. 201; Bedell *v.* Commercial Mut. Ins. Co., 3 Bosw. 147; Brewster *v.* Countryman, 12 Wend. 446; Franchot *v.* Leach, 5 Cow. 506.

North Carolina.— Adams *v.* Battle, 125 N. C. 152, 34 S. E. 245; Harris *v.* Murphy, 119 N. C. 34, 25 S. E. 708, 56 Am. St. Rep. 656.

Ohio.— Eleventh St. Church of Christ *v.* Pennington, 10 Ohio Cir. Ct. 408, 10 Ohio Cir. Dec. 74.

Pennsylvania.— Heilman *v.* Weinman, 139 Pa. St. 143, 21 Atl. 29; Malone *v.* Dougherty, 79 Pa. St. 46; The Dictator *v.* Heath, 56 Pa. St. 290; Le Fevre *v.* Le Fevre, 4 Serg. & R. 241, 8 Am. Dec. 696; Winans *v.* Bunnell, 13 Pa. Super. Ct. 445.

Rhode Island.— Putnam Foundry, etc., Co. *v.* Canfield, 25 R. I. 548, 56 Atl. 1033; Smith *v.* Lilley, 17 R. I. 119, 20 Atl. 227.

Tennessee.— Rogers *v.* Bedell, 97 Tenn. 240, 36 S. W. 1096; White *v.* Blakemore, 8 Lea 49; Perry *v.* Central Southern R. Co., 5 Coldw. 138; Bryan *v.* Hunt, 4 Sneed 543, 70 Am. Dec. 262; McFarland *v.* Hooke, 1 Tenn. Cas. 82, Thomps. Cas. 139.

Texas.— Self *v.* King, 28 Tex. 552; Heatherly *v.* Record, 12 Tex. 49; Liner *v.* Watkins Land Mortg. Co., 29 Tex. Civ. App. 187, 68 S. W. 311; Strauss *v.* Gross, 2 Tex. Civ. App. 432, 21 S. W. 305; Waco Ice, etc., Co. *v.* Wiggins, (Civ. App. 1895) 32 S. W. 58.

Vermont.— Grand Isme *v.* Kinney, 70 Vt. 381, 41 Atl. 131; Dunklee *v.* Goodnough, 68 Vt. 113, 34 Atl. 427; Plattsburg First Nat. Bank *v.* Post, 65 Vt. 222, 25 Atl. 1093; Flanders *v.* Fay, 40 Vt. 316; Farnham *v.* Ingham, 5 Vt. 514.

West Virginia.— Shepherd *v.* Wysong, 3 W. Va. 46.

Wisconsin.— Bannon *v.* Aultman, 80 Wis. 307, 49 N. W. 967, 27 Am. St. Rep. 37; Marsh *v.* Bellew, 45 Wis. 36.

United States.— Bradford *v.* Union Bank, 13 How. 57, 14 L. ed. 49; Pecos Valley Bank *v.* Evans-Snider-Buel Co., 107 Fed. 654, 46 C. C. A. 534; Goode *v.* U. S., 25 Ct. Cl. 261.

England.— Lloyd *v.* Sturgeon Falls Pulp Co., 85 L. T. Rep. N. S. 162. But *compare* Boun *v.* Stroud, 21 L. T. Rep. N. S. 695.

Canada.— Gole *v.* Cockburn, 8 L. C. Jur. 341; Fortier *v.* Bedard, 4 Quebec Super. Ct. 78.

See 20 Cent. Dig. tit. "Evidence," §§ 2052–2065.

A subsequent written agreement making the payment of a note conditional may be admitted under the general issue. Heaton *v.* Myers, 4 Colo. 59.

"An executed parol agreement" such as may, under Cal. Civ. Code, § 1698, be proved for the purpose of altering a previous writing must consist in the doing or suffering of something not required to be done or suffered by the terms of the writing. Mackenzie *v.* Hodgkin, 126 Cal. 591, 59 Pac. 36, 77 Am. St. Rep. 209.

Evidence of prior negotiations.— Where there is strong presumptive evidence that subsequently to the execution of a written contract the parties agreed orally upon a new contract, which was a modification of the former, testimony may be received of negotiations and conversations between these parties, previous to the written contract for the purpose of throwing light upon, and showing more clearly, the nature and character of the subsequent agreement. Collins *v.* Lester, 16 Ga. 410.

Parol evidence of a settlement under an account stated as to an amount due under a

cised their right to change or abrogate the same, or to make a new and independent contract.[60]

b. Time of Agreement. It makes no difference how soon after the execution of the written contract the parol one was made. If it was in fact subsequent and is otherwise unobjectionable it may be proved and enforced.[61]

c. Consideration. In order to render evidence of a subsequent parol agreement admissible to vary the terms of a written contract, it is necessary that such subsequent agreement be founded upon a consideration.[62]

d. Sealed Instruments. It has been held that where an executory agreement is under seal, it cannot be modified or changed by proof of a subsequent parol understanding or agreement,[63] or be released or rescinded by parol;[64] but the time for the performance of a contract under seal may be extended by parol.[65]

e. Contracts Required to Be in Writing. The principle that a contract, although in writing, may be altered by a subsequent legal contract not in writing cannot be applied to a contract required by law to be in writing, for if the contract may be altered by parol then there is a contract on the subject-matter by parol in violation of the statute.[66]

f. Applications of the Principle. In the application of the principle under discussion, evidence has been admitted to establish a new and subsequent agreement into which the former one entered as inducement,[67] or to show a subsequent modification,[68] or waiver or abandonment of the contract,[69] or of certain provisions or conditions thereof,[70] or of a right existing thereunder,[71] or a release from the obligations of an executory contract.[72] It has also been held admissible to show

written contract is not inadmissible as tending to contradict the writing. Krueger *v.* Dodge, 15 S. D. 159, 87 N. W. 965.

60. Bryant *v.* Hunt, 4 Sneed (Tenn.) 543, 70 Am. Dec. 262; Self *v.* King, 28 Tex. 552.

61. Bunce *v.* Beck, 43 Mo. 266.

An agreement made before the parties separated after executing the written contract may be enforced. Smith *v.* Lilley, 17 R. I. 119, 20 Atl. 227; Field *v.* Mann, 42 Vt. 61.

62. Phillips *v.* Longstreth, 14 Ala. 337; Fortier *v.* Bédard, 4 Quebec Super. Ct. 78. And see, generally, CONTRACTS, 9 Cyc. 308 *et seq.*

63. Ryan *v.* Cooke, 172 Ill. 302, 50 N. E. 213 [*affirming* 68 Ill. App. 592]; Baltimore, etc., R. Co. *v.* Illinois Cent. R. Co., 137 Ill. 9, 27 N. E. 38; Barnett *v.* Barnes, 73 Ill. 216; Jones *v.* Chamberlain, 97 Ill. App. 328; Winship *v.* Wineman, 77 Ill. App. 161; Alschuler *v.* Schiff, 59 Ill. App. 51; Breher *v.* Reese, 17 Ill. App. 545. See also Zihlman *v.* Cumberland Glass Co., 74 Md. 303, 22 Atl. 271; and conflicting authorities cited in CONTRACTS, 9 Cyc. 596 note 85, 597 note 86.

Until a breach an executory contract under seal cannot be discharged or even modified by parol. Kuhn *v.* Stevens, 7 Rob. (N. Y.) 544.

Medium of payment.— The rule that in an action of covenant upon a sealed instrument evidence of a parol agreement substantially changing the terms of the covenant either as to its nature or as to the time of its performance is not admissible does not apply so as to preclude evidence of a subsequent agreement which merely amounts to a designation of the kind of money to be paid in fulfilment of the covenant. McEowen *v.* Rose, 5 N. J. L. 582.

64. Sinard *v.* Patterson, 3 Blackf. (Ind.) 353; Delacroix *v.* Bulkley, 13 Wend. (N. Y.) 71. But *compare* Worrell *v.* Forsyth, 141 Ill. 22, 30 N. E. 673. And see cases cited in CONTRACTS, 9 Cyc. 596 note 85, 597 notes 86, 91.

65. Branch *v.* Wilson, 12 Fla. 543; Lawrence *v.* Miller, 86 N. Y. 131; and cases cited in CONTRACTS, 9 Cyc. 597 note 87.

Extension of lease.— The rule that an executory contract under seal cannot be varied by a subsequent parol agreement does not apply to a parol agreement for the extension of a sealed lease. Martin *v.* Topliff, 88 Ill. App. 362.

66. *California.*—Adler *v.* Friedman, 16 Cal. 138.

Georgia.—Mitchell *v.* Universal L. Ins. Co., 54 Ga. 289.

Kentucky.—Illinois Cent. R. Co. *v.* Manion, 113 Ky. 7, 67 S. W. 40, 22 Ky. L. Rep. 2267, 101 Am. St. Rep. 345.

Minnesota.— Thompson *v.* Thompson, 78 Minn. 379, 81 N. W. 204, 543.

Missouri.—Boggs *v.* Pacific Steam Laundry Co., 86 Mo. App. 616.

67. Hubbell *v.* Ream, 31 Iowa 289.

68. Kribs *v.* Jones, 44 Md. 396; Liggett Spring, etc., Co. *v.* Michigan Buggy Co., 106 Mich. 445, 64 N. W. 466; Evers *v.* Shumaker, 57 Mo. App. 454.

69. Malone *v.* Dougherty, 79 Pa. St. 46.

70. Prudential Ins. Co. *v.* Sullivan, 27 Ind. App. 30, 59 N. E. 873; Coates *v.* Sangston, 5 Md. 121; Bryan *v.* Hunt, 4 Sneed (Tenn.) 543, 70 Am. Dec. 262.

71. Whitcher *v.* Shattuck, 3 Allen (Mass.) 319.

An agreement not to issue execution on a judgment without notice may be shown. Sommer *v.* Wilt, 4 Serg. & R. (Pa.) 19.

72. Bryant *v.* Thesing, 46 Nebr. 244, 64 N. W. 967.

an extension of the terms of the contract;[73] a change in the place of performance;[74] the enlargement of a power granted;[75] the making of warranties as to property sold;[76] an agreement as to the place of delivery,[77] or the manner of shipment;[78] an agreement made after the execution of a bill of sale that title should remain in the vendor for a time;[79] an agreement by a landlord to make or pay for certain alterations or repairs,[80] or to accept a smaller rent than that stipulated for in the lease;[81] and an agreement to lower the rate of interest on a mortgage,[82] or to make the same payable semiannually instead of annually.[83] It is also competent to show a subsequent agreement between the parties to a written instrument as to the time for the payment of money due or to become due by the terms of the contract,[84] or for the performance of the contract,[85] or the delivery of goods sold.[86] Evidence has also been admitted of agreements with reference to the compensation under a contract of employment,[87] the price to be paid for property purchased,[88] and the ownership of trade fixtures on leased premises.[89] But the admission of evidence which does not tend to show the making of a subsequent parol agreement and does tend to lead the minds of the jurors to the conclusion that the rights of the parties are not to be governed by the original written contract is error.[90]

32. Sustaining Instrument — a. In General. As a general rule, where the validity or binding effect of an instrument in writing, not void on its face, is attacked for any reason, parol evidence, not contradictory of the writing, is admissible to sustain it.[91] But where a writing provides that it shall not be bind-

73. Savannah, etc., R. Co. *v.* Wideman, 99 Ga. 245, 25 S. E. 400.

The renewal of a contract which is by its terms renewable at its expiration by mutual consent may be shown. Pasteur Vaccine Co. *v.* Burkey, 22 Tex. Civ. App. 232, 54 S. W. 804.

74. Coates *v.* Sangston, 5 Md. 121; Malone *v.* Dougherty, 79 Pa. St. 46.

75. Hartford F. Ins. Co. *v.* Wilcox, 57 Ill. 180.

76. McCormick Harvesting Mach. Co. *v.* Hiatt, (Nebr. 1903) 95 N. W. 627.

77. Miles *v.* Roberts, 34 N. H. 245.

78. Town *v.* Jepson, 133 Mich. 673, 95 N. W. 742.

79. Keeney *v.* Swan, 2 N. Y. St. 214.

80. Woodworth *v.* Thompson, 44 Nebr. 311, 62 N. W. 450; Post *v.* Vetter, 2 E. D. Smith (N. Y.) 248; Caulk *v.* Everly, 6 Whart. (Pa.) 303.

81. Boos *v.* Dulin, 103 Iowa 331, 72 N. W. 533; Nicoll *v.* Burke, 78 N. Y. 580.

82. Sharp *v.* Wyckoff, 39 N. J. Eq. 376.

83. Sharp *v.* Wyckoff, 39 N. J. Eq. 376.

84. *Alabama.*— Ferguson *v.* Hill, 3 Stew. 485, 21 Am. Dec. 641.

Colorado.— Drescher *v.* Fulham, 11 Colo. App. 62, 52 Pac. 685.

Illinois.— German Ins., etc., Inst. *v.* Vahle, 28 Ill. App. 557.

Iowa.— Jones *v.* Alley, 4 Greene 181.

Maryland.— See Reed *v.* Chambers, 6 Gill & J. 490.

New Hampshire.— Grafton Bank *v.* Woodward, 5 N. H. 99, 20 Am. Dec. 566.

Ohio.— Peck *v.* Beckwith, 10 Ohio St. 497.

Rhode Island.— Putnam Foundry, etc., Co. *v.* Canfield, 25 R. I. 548, 56 Atl. 1033.

South Carolina.— Solomons *v.* Jones, 3 Brev. 54, 5 Am. Dec. 538.

Wisconsin.— Ballston Spa Bank *v.* Marine Bank, 16 Wis. 120.

See 20 Cent. Dig. tit. "Evidence," § 2065.

Extension of time for redeeming mortgaged personal property may be proven by parol. Deshazo *v.* Lewis, 5 Stew. & P. (Ala.) 91, 24 Am. Dec. 769.

85. *California.*— White *v.* Soto, 82 Cal. 654, 23 Pac. 210.

Florida.— Branch *v.* Wilson, 12 Fla. 543.

Illinois.— Baker *v.* Whiteside, 1 Ill. 174, 12 Am. Dec. 168.

Iowa.— Jones *v.* Alley, 4 Greene 181.

Kentucky.— Chiles *v.* Jones, 3 B. Mon. 51.

Maryland.— Coates *v.* Sangston, 5 Md. 121.

Massachusetts.— Stearns *v.* Hall, 9 Cush. 31.

Missouri.— Chambers *v.* Board of Education, 60 Mo. 370.

New York.— Lawrence *v.* Miller, 86 N. Y. 131; Davis *v.* Talcott, 14 Barb. 611; Flynn *v.* McKeon, 6 Duer 203; Vasseur *v.* Livingston, 4 Duer 285; Keating *v.* Price, 1 Johns. Cas. 22, 1 Am. Dec. 92.

Pennsylvania.— Malone *v.* Dougherty, 79 Pa. St. 46.

Vermont.— Barker *v.* Troy, etc., R. Co., 27 Vt. 766.

United States.— Emerson *v.* Slater, 22 How. 28, 16 L. ed. 360.

See 20 Cent. Dig. tit. "Evidence," § 2065.

86. Chiles *v.* Jones, 3 B. Mon. (Ky.) 51; Orguerre *v.* Luling, 1 Hilt. (N. Y.) 383; Smith *v.* Halligan, 1 N. Y. Suppl. 820; Neil *v.* Cheves, 1 Bailey (S. C.) 537.

87. Richardson *v.* Hooper, 13 Pick. (Mass.) 446.

88. Marsh *v.* Bellew, 45 Wis. 36.

89. Podlech *v.* Phelan, 13 Utah 332, 44 Pac. 838.

90. Pugh *v.* Ayers, 47 Mo. App. 590.

91. *Indian Territory.*— Smith *v.* Moore, 2 Indian Terr. 126, 48 S. W. 1025.

New York.—Mead *v.* American F. Ins. Co.,

ing except under certain conditions, parol evidence is not admissible to show a

13 N. Y. App. Div. 476, 43 N. Y. Suppl. 334. But *compare* Forbes *v.* Waller, 25 N. Y. 430.

Pennsylvania.— Nixon *v.* McCallmont, 6 Watts & S. 159.

Tennessee.— Jones *v.* Sharp, 9 Heisk. 660.

Virginia.—Southern Mut. Ins. Co. *v.* Trear, 29 Gratt. 255.

United States.— Case Mfg. Co. *v.* Soxman, 138 U. S. 431, 11 S. Ct. 360, 34 L. ed. 1019; Knickerbocker L. Ins. Co. *v.* Norton, 96 U. S. 234, 24 L. ed. 689. See also Brown *v.* Meserve, 91 Fed. 229, 33 C. C. A. 472.

See 20 Cent. Dig. tit. "Evidence," §§ 1863–1873.

Parol evidence may be received to repel a charge of fraud (Alabama L. Ins., etc., Co. *v.* Pettway, 24 Ala. 544; Abercrombie *v.* Bradford, 16 Ala. 560; Andes Ins. Co. *v.* Fish, 71 Ill. 620; Jackson *v.* Hays, 14 La. Ann. 577; Fouque *v.* Vigniaud, 6 Mart. (La.) 423; Clagett *v.* Hall, 9 Gill & J. (Md.) 80; Potter *v.* Everitt, 42 N. C. 152; Runyon *v.* Leary, 20 N. C. 373; Sloan *v.* Rose, 101 Va. 151, 43 S. E. 329) or duress (Hardin *v.* Hardin, 38 Tex. 616); to disprove an allegation that a bond was given in consideration of an illegal agreement by the obligee (Rundell *v.* La Fleur, 6 Allen (Mass.) 480; Buckner *v.* Ruth, 13 Rich. (S. C.) 157); to defeat a plea that a bond or mortgage sued on is usurious (Kidder *v.* Vandersloot, 114 Ill. 133, 28 N. E. 460, where the court said that evidence for this purpose is always allowable, regardless of the form the transaction may assume in the writings executed by the parties; Joyner *v.* Vincent, 20 N. C. 652; Porterfield *v.* Coiner, 4 Gratt. (Va.) 55; Campbell *v.* Shields, 6 Leigh (Va.) 517); to establish the existence of the debt intended to be secured by a mortgage (Shaver *v.* Bear River, etc., Water, etc., Co., 10 Cal. 396); to prove that the person whose name appears as the maker of a note authorized another person to sign his name (Cain *v.* Mack, 33 Tex. 135); to show that a scrawl made with a pen on an instrument was intended as a seal (Relph *v.* Gist, 4 McCord (S. C.) 267); to prove a variance between the names of the assignees of a prison-bounds bond and those of plaintiffs in an action on the bond to be but a clerical error (Guion *v.* Ford, 6 Rob. (La.) 84); to obviate a supposed variance in omitting to set out the names of all the defendants in a forthcoming bond taken on an execution, and to conform the sums recited to the execution (Meredith *v.* Richardson, 10 Ala. 828); to explain a discrepancy between the amount of a debt and a mortgage securing the same (Gunn *v.* Jones, 67 Ga. 398); or, where the liability of the principal depends on whether the execution of a written instrument by his agent was done in the exercise and within the limits of the power delegated to him, to determine these facts (Alexandria Mechanics' Bank *v.* Columbia Bank, 5 Wheat. (U. S.) 326, 5 L. ed. 100). So also parol evidence is admissible to prove that an instrument signed for a firm by one of the partners is the deed of the firm, by showing parol authority for that purpose, or ratification, either express or implied. McDonald *v.* Eggleston, 26 Vt. 154, 60 Am. 303.

Execution of sealed instrument may be proved by parol. Zihlman *v.* Cumberland Glass Co., 74 Md. 303, 22 Atl. 271.

Adoption of seal.— Where a joint and several note appeared on its face to be under the seal of one only of the makers, parol evidence is admissible to show that the other maker had adopted the seal as his own, and that it was executed as the sealed note of both. Twitty *v.* Houser, 7 S. C. 153.

Validity of an insurance policy may be sustained by parol evidence showing that the agent of the insurer knew of and assented to the existence or procurement of other insurance or of a mortgage on the property insured, notwithstanding a provision in the instrument that it shall be void in case of such other insurance or a mortgage unless the consent of the insurer be shown by a written indorsement thereon (McElroy *v.* British America Assur. Co., 94 Fed. 990, 36 C. C. A. 615); or where breach of warranty is relied on as a defense, parol evidence is admissible to show that the agent of the company was responsible for an improper statement in the application, and that the insured was in no way responsible for such mistake, but relied on the insurer or his agent to prepare the application and policy, and did not in fact know of such improper statement, and that the agent of the insurer knew the facts as they existed (Texas Banking, etc., Co. *v.* Stone, 49 Tex. 4); or where the policy contains a stipulation to the effect that it shall be void if any false statements are made in the application for insurance, it may be shown by parol that the statements given by the insured to the agent of the insurer were true and were different from those which the agent transcribed in the application which he sent to the insurer (R. N. of A. *v.* Boman, 75 Ill. App. 566 [*affirmed* in 177 Ill. 27, 52 N. E. 264, 69 Am. St. Rep. 201]; Parno *v.* Iowa Merchants' Mut. Ins. Co., 114 Iowa 132, 86 N. W. 210; Continental Ins. Co. *v.* Pearce, 39 Kan. 396, 18 Pac. 291, 7 Am. St. Rep. 557; Fidelity Mut. F. Ins. Co. *v.* Lowe, (Nebr. 1903) 93 N. W. 749; Wilder *v.* Preferred Mut. Acc. Assoc., 14 N. Y. St. 365; Smith *v.* Farmers', etc., Mut. F. Ins. Co., 89 Pa. St. 287; Planters' Ins. Co. *v.* Sorrels, 1 Baxt. (Tenn.) 352, 25 Am. Rep. 780; McBride *v.* Republic F. Ins. Co., 30 Wis. 562; New Jersey Mut. L. Ins. Co. *v.* Baker, 94 U. S. 610, 24 L. ed. 268; American L. Ins. Co. *v.* Mahone, 21 Wall. (U. S.) 152, 22 L. ed. 593; Union Mut. Ins. Co. *v.* Wilkinson, 13 Wall. (U. S.) 222, 20 L. ed. 617; Lueder *v.* Hartford L., etc., Ins. Co., 12 Fed. 465, 4 McCreary 149. *Contra*, McCoy *v.* Metropolitan L. Ins. Co., 133 Mass. 82. See also Fletcher *v.* New York L. Ins. Co., 12 Fed. 557); or where the agent inserted certain

contemporaneous understanding of the parties modifying the conditions named in the writing.[92]

b. Instrument Void on Its Face — (i) *In General.* Where an instrument is upon its face void, because it shows a violation of some statutory provision, or omits something which the law makes essential to its validity, or for any other reason, parol evidence cannot be admitted to contradict the portion which shows a violation of the statute, to supply the omission which renders the instrument void, or otherwise to make effectual that which the law declares shall be of no effect,[93] unless it can be shown that the provision which renders the instrument void was inserted by mistake.[94] But parol evidence has been held admissible to show that an instrument which appears on its face to be void because dated on Sunday was in fact delivered on a secular day and hence is valid.[95]

(ii) *Uncertainty.* Where an instrument or a portion thereof is void for indefiniteness or uncertainty in any of its terms, the deficiency cannot be cured by parol evidence;[96] but, before pronouncing an instrument void for uncertainty,

matters in the application for life insurance, on information which he obtained from third persons without the consent of the insured, parol evidence is admissible to show the circumstances under which the insertion was made, although it contradicts the written contract (Union Mut. Ins. Co. *v.* Wilkinson, 13 Wall. (U. S.) 222, 20 L. ed. 617). See, generally, Insurance.

On the question of the sufficiency of an attestation of a witness to a note, for the purpose of bringing it in the exception to a statute limiting actions on such instruments, it is admissible to prove that it was attested with the knowledge and consent of the maker, and in pursuance of an agreement of the parties at the time the note was signed. Swazey *v.* Allen, 115 Mass. 594.

Consideration.— Where it has been shown or is contended that the consideration for a deed or other instrument was illegal, or that the consideration named therein was not paid or did not exist, it is competent to introduce parol evidence to show a legal consideration, although different from that expressed. Chiles *v.* Coleman, 2 A. K. Marsh. (Ky.) 296, 12 Am. Dec. 396; Wimberly *v.* Wortham, (Miss. 1888) 3 So. 459; Leach *v.* Shelby, 58 Miss. 681; Dorsey *v.* Hagard, 5 Mo. 420; Buckner *v.* Ruth, 13 Rich. (S. C.) 157. *Contra,* Betts *v.* Union Bank, 1 Harr. & G. (Md.) 175, 18 Am. Dec. 283 (holding that if the consideration in a deed is stated in money, which does not appear to have been paid, it is not permissible, where the deed is impeached for fraud, to set up marriage as the consideration in order to support the deed); Glenn *v.* Randall, 2 Md. Ch. 220; Elysville Mfg. Co. *v.* Okisko Co., 1 Md. Ch. 392.

92. Acker *v.* Phœnix, 4 Paige (N. Y.) 305.

93. *Alabama.*— Nelson *v* Shelby Mfg., etc., Co., 96 Ala. 515, 11 So. 695, 38 Am. St. Rep. 116.

Arkansas.—Pack *v.* Crawford, 29 Ark. 489.

Louisiana.— Bethel *v.* Hawkins, 21 La. Ann. 520, where the instrument was void because based upon Confederate money as a consideration. See also Allison *v.* Fox, 5 La. 457.

New York.— Seymour *v.* Warren, 59 N. Y. App. Div. 120, 69 N. Y. Suppl. 236; Porter *v.* Havens, 37 Barb. 343.

Pennsylvania.— Jourdan *v.* Jourdan, 9 Serg. & R. 268, 11 Am. Dec. 724.

South Carolina.— Stephens *v.* Winn, 3 Brev. 17; Darby *v.* Hunt, 2 Treadw. 740.

Tennessee.— August *v.* Seeskind, 6 Coldw. 166.

United States.— Walker *v.* Moore, 29 Fed. Cas. No. 17,080, 2 Dill. 256.

See 20 Cent. Dig. tit. "Evidence," § 1868.

A defective certificate of acknowledgment of a release of dower cannot be aided by parol. Ennor *v.* Thompson, 46 Ill. 214.

A verbal lease which is defective and inoperative in itself may be confirmed or supported by parol evidence. Rabassa *v.* Orleans Nav. Co., 5 La. 461, 25 Am. Dec. 200.

94. Griffin *v.* New Jersey Oil Co., 11 N. J. Eq. 49.

95. Swedish-American Nat. Bank *v.* Germania Bank, 76 Minn. 409, 79 N. W. 399.

96. *Alabama.*— Gaston *v.* Weir, 84 Ala. 193, 4 So. 258; Clements *v.* Pearce, 63 Ala. 284; Paysant *v.* Ware, 1 Ala. 160.

Arkansas.— Tatum *v.* Croom, 60 Ark. 487, 30 S. W. 885. See also Freed *v.* Brown, 41 Ark. 495.

California.— Cadwalder *v.* Nash, 73 Cal. 43, 14 Pac. 385; Brandon *v.* Leddy, 67 Cal. 43, 7 Pac. 33; People *v.* San Francisco Sav. Union, 31 Cal. 132.

Indiana.— Munger *v.* Green, 20 Ind. 38; Porter *v.* Byrne, 10 Ind. 146, 71 Am. Dec. 305, holding that an official entry on a record, void for uncertainty, cannot be explained by extrinsic evidence.

Iowa.— Augustine *v.* McDowell, 120 Iowa 401, 94 N. W. 918.

Louisiana.— Pargoud *v.* Pace, 10 La. Ann. 613.

Maryland.— Huntt *v.* Gist, 2 Harr. & J. 498. See also Mundell *v.* Perry, 2 Gill & J. 193.

Minnesota.— George *v.* Conhaim, 38 Minn. 338, 37 N. W. 791; Herrick *v.* Morrill, 37 Minn. 250, 33 N. W. 849, 5 Am. St. Rep. 841.

Mississippi.—Howard *v.* Tomicich, 81 Miss. 703, 33 So. 493; McGuire *v.* Stevens, 42 Miss.

the court should examine it in all the light to be gathered from contemporaneous facts and circumstances.[97]

c. Evidence of Ratification. A ratification of the transaction evidenced by a void instrument may be shown by parol;[98] and where a contract is not upon its face that of the party whom it is sought to charge, parol evidence is admissible to show an adoption or ratification thereof by such party.[99] So also if one partner signs the firm-name to a sealed instrument in the course of the firm business, the subsequent assent to it by his copartner so as to bind the firm may be shown by parol.[1]

33. Time of Delivery. It may be shown by parol that a deed, contract, or other instrument was delivered not on the day of its date but at some other time.[2]

34. Time of Recording. Parol or extrinsic evidence is also admissible to show the time when an instrument was delivered to a recording officer to be recorded.[3]

35. Void and Unintelligible Contracts. The rule that when parties reduce their agreement to writing all antecedent agreements in reference to the matter are thereby merged in the writing and it must govern, and that consequently the terms of the agreement cannot be proved by parol evidence, applies only where the legal and valid written agreement, and not where the writing is void or unintelligible no matter from what cause it is void.[4]

36. Admission That Writing Does Not Express True Agreement. Where a bill for relief alleges that a written contract between the parties to an action varies

724, 2 Am. Rep. 649; Gildart *v.* Howell, 1 How. 198.

Missouri.— Campbell *v.* Johnson, 44 Mo. 247.

Nebraska.— Gillespie *v.* Sawyer, 15 Nebr. 536, 19 N. W. 449.

New York.— Bank of Commerce *v.* J. G. Shaw Blank Book Co., 54 N. Y. Super. Ct. 83; Burnett *v.* Wright, 17 N. Y. Suppl. 309. See also United Press *v.* New York Press Co., 164 N. Y. 406, 58 N. E. 527, 53 L. R. A. 288 [*affirming* 35 N. Y. App. Div. 444, 54 N. Y. Suppl. 807].

North Carolina.— Kiff *v.* Kiff, 95 N. C. 71; Harrison *v.* Hahn, 95 N. C. 28; Robeson *v.* Lewis, 64 N. C. 734.

Pennsylvania.— Morris *v.* Stephens, 46 Pa. St. 200.

South Carolina.— Broughton *v.* Buchmore, Harp. 300, 18 Am. Dec. 654.

Tennessee.— Dobson *v.* Litton, 5 Coldw. 616; Cannon *v.* Trail, 1 Head 282.

Texas.— Norris *v.* Hunt, 51 Tex. 609; McKinzie *v.* Stafford, 8 Tex. Civ. App. 121, 27 S. W. 790.

Virginia.— Mayo *v.* Murchie, 3 Munf. 358.

See also *supra*, XVI, C, 10, c, (III), (C).

97. Clements *v.* Pearce, 63 Ala. 284; Hancock *v.* Watson, 18 Cal. 137; Shore *v.* Atty.-Gen., 9 Cl. & F. 355, 5 Scott N. R. 958, 8 Eng. Reprint 450. See also Truss *v.* Harvey, 120 Ala. 626, 24 So. 927; Pollard *v.* Maddox, 28 Ala. 321; Langert *v.* Ross, 1 Wash. 250, 24 Pac. 443.

98. Jourdan *v.* Jourdan, 9 Serg. & R. (Pa.) 268, 11 Am. Dec. 724.

99. Williams *v.* Uncompahgre Canal Co., 13 Colo. 469, 22 Pac. 806; McClintock *v.* Hughes Bros. Mfg. Co., (Tex. App. 1891) 15 S. W. 200.

1. Johns *v.* Battin, 30 Pa. St. 84. See also Bond *v.* Aitkin, 6 Watts & S. (Pa.) 165, 40 Am. Dec. 550.

2. *Alabama.*— Drennen *v.* Satterfield, 119 Ala. 84, 24 So. 723.

California.—Treadwell *v.* Reynolds, 47 Cal. 171.

Illinois.— Thompson *v.* Schuyler, 7 Ill. 271.

Indiana.— Briggs *v.* Fleming, 112 Ind. 313, 14 N. E. 86.

Maine.— Brown *v.* Holyoke, 53 Me. 9; Sweetser *v.* Lowell, 33 Me. 446.

Michigan.— Cook *v.* Knowles, 38 Mich. 316.

Missouri.— Saunders *v.* Blythe, 112 Mo. 1, 20 S. W. 319.

North Carolina.— Cutlar *v.* Cutlar, 3 N. C. 154.

Pennsylvania.— Parke *v.* Neeley, 90 Pa. St. 52.

South Carolina.— McCracken *v.* Ansley, 4 Strobh. 1; McKenzie *v.* Roper, 2 Strobh. 306; Soloman *v.* Evans, 3 McCord 274.

Tennessee.— Alexander *v.* Bland, Cooke 431.

Virginia.— Bruce *v.* Slemp, 82 Va. 352, 4 S. E. 692.

See 20 Cent. Dig. tit. "Evidence," § 1859.

An auditor's deed is within the rule as well as any other deed. Thompson *v.* Schuyler, 7 Ill. 271.

When the date of the acknowledgment is different from that of the deed, it may be shown by parol that it was executed and delivered at the time of its date. Alexander *v.* Bland, Cooke (Tenn.) 431.

3. Bussing *v.* Crain, 8 B. Mon. (Ky.) 593; Metts *v.* Bright, 20 N. C. 311, 32 Am. Dec. 683.

A certificate from a justice of the peace of the time when an execution, return, or levy was recorded in his office being but *prima facie* evidence, the justice may be called as a witness to prove when the record was in fact made. Morton *v.* Edwin, 19 Vt. 77.

4. Moulding *v.* Prussing, 70 Ill. 151.

from their true agreement, and defendant admits that the contract does not express the agreement truly but sets up an agreement different from that alleged by plaintiff, the real contract may be established by parol evidence.[5]

37. Writings Collateral to Issue. It has been held that the rule against the admission of parol evidence to vary or contradict a written contract does not apply where the writing as to which it is sought to introduce the evidence is collateral to the issue involved and the action is not based upon such writing.[6] This rule has usually been applied in cases where the action was not between the parties to the instrument,[7] in which case another exception would also apply,[8] but it has also been applied where the parties to the action were the same as the parties to the writing.[9]

38. Writing Not Evidencing Contract of Parties. Where the writing is such that it does not embody the contract between the parties to the controversy in which it is introduced in evidence, such contract resting in parol, the rule excluding evidence to vary a written instrument does not of course apply, and the true contract may be shown.[10]

39. Writing Not Expressing Entire Agreement — a. In General. Where a written instrument, executed pursuant to a prior verbal agreement or negotiation, does not express the entire agreement or understanding of the parties, the parol evidence rule does not apply to prevent the introduction of extrinsic evidence with reference to the matters not provided for in the writing.[11] This principle

5. Wells *v.* Hodges, 4 J. J. Marsh. (Ky.) 120.

6. *Iowa.*— Dean *v.* Nichols, etc., Co., 95 Iowa 89, 63 N. W. 582.

Louisiana.— Stackhouse *v.* Zunts, 23 La. Ann. 481.

Massachusetts.— Baker *v.* Briggs, 8 Pick. 122, 19 Am. Dec. 311. See also Wilson *v.* Mower, 5 Mass. 407.

Missouri.— Duncan *v.* Matney, 29 Mo. 368, 77 Am. Dec. 575.

New York.— Shedrick *v.* Young, 72 N. Y. App. Div. 278, 76 N. Y. Suppl. 56.

North Carolina.— Williams *v.* Glenn, 92 N. C. 253, 53 Am. Rep. 416.

Ohio.— Harrison *v.* Castner, 11 Ohio St. 339.

Oregon.— Pacific Biscuit Co. *v.* Dugger, 42 Oreg. 513, 70 Pac. 523.

South Carolina.— Holly *v.* Blackman, 32 S. C. 584, 10 S. E. 774; Allen *v.* Fagan, 6 S. C. 206.

See 20 Cent. Dig. tit. "Evidence," § 1862.

Compare Clark *v.* Gregory, 87 Tex. 189, 27 S. W. 56.

A verdict of a jury when collaterally introduced is open to explanation. Glass *v.* Ramsey, 9 Gill (Md.) 456.

7. Badger *v.* Jones, 12 Pick. (Mass.) 371; Barber *v.* Hildebrand, 42 Nebr. 400, 60 N. W. 594; Wooster *v.* Simonson, 20 Fed. 316.

8. See *infra*, XVI, D, 3, a.

9. Noble *v.* Epperly, 6 Ind. 468; Dean *v.* Nichols, etc., Co., 95 Iowa 89, 63 N. W. 582; Dice *v.* Yarnel, Morr. (Iowa) 241; Wright *v.* Latham, 7 N. C. 298. See also Montgomery *v.* Page, 29 Oreg. 320, 44 Pac. 689. *Contra*, Boody *v.* Goddard, 57 Me. 602.

In an action for malicious prosecution where the inquiry is as to the existence of probable cause on the part of defendant in causing plaintiff's arrest for obtaining money by false pretenses, made to procure the execution of a certain contract, parol evidence is admissible as to what occurred between the parties prior to the time of the making of the contract. Whitehead *v.* Jessup, 2 Colo. App. 76, 29 Pac. 912.

Where a complaint contains two counts, one on a note, and the other for money lent, both for the same debt, although defendant asserts that plaintiff bought the note, parol evidence of the negotiations for the loan and that defendant received its proceeds is not incompetent as varying the written instrument, it being in support of the count for money lent. Chicago First Nat. Bank *v.* California Nat. Bank, (Cal. 1893) 35 Pac. 639.

10. Alvord *v.* Smith, 5 Pick. (Mass.) 232. See also Folk *v.* Wilson, 21 Md. 538, 83 Am. Dec. 599; Bennett *v.* Bell, 22 Mo. 154, 64 Am. Dec. 260.

11. *Alabama.*— Whatley *v.* Reese, 128 Ala. 500, 29 So. 606; Brown *v.* Isbell, 11 Ala. 1009.

Arkansas.— Bloch Queensware Co. *v.* Metzger, 70 Ark. 232, 65 S. W. 929.

California.— Sivers *v.* Sivers, 97 Cal. 518, 32 Pac. 571.

Colorado.— De St. Aubin *v.* Field, 27 Colo. 414, 62 Pac. 199; Montelius *v.* Atherton, 6 Colo. 224.

Connecticut.— Caulfield *v.* Hermann, 64 Conn. 325, 30 Atl. 52; Averill *v.* Sawyer, 62 Conn. 560, 27 Atl. 73; Hall *v.* Solomon, 61 Conn. 476, 23 Atl. 876, 29 Am. St. Rep. 218; Clarke *v.* Tappin, 32 Conn. 56; Collins *v.* Tillou, 26 Conn. 368, 68 Am. Dec. 398. See also Annan *v.* Merritt, 13 Conn. 478; Adams *v.* Gray, 8 Conn. 11, 20 Am. Dec. 82.

District of Columbia.— Bailey *v.* District of Columbia, 9 App. Cas. 360; Evans *v.* Schoonmaker, 2 App. Cas. 62.

Florida.— Meinhardt *v.* Mode, 22 Fla. 279.

Georgia.— Forsyth Mfg. Co. *v.* Castlen, 112 Ga. 199, 37 S. E. 485, 81 Am. St. Rep. 28; Johnson *v.* Patterson, 86 Ga. 725; Harriman

applies to all classes of written instruments, and such evidence has been admitted

v. First Bryan Baptist Church, 63 Ga. 186, 36 Am. Rep. 117; Scurry *v.* Cotton States L. Ins. Co., 51 Ga. 624; McMahan *v.* Tyson, 23 Ga. 43; Code, § 5204.

Illinois.— Schaeppi *v.* Glade, 195 Ill. 62, 62 N. E. 874 [*affirming* 95 Ill. App. 500]; Hedges *v.* Bowen, 83 Ill. 161; Gould *v.* Magnolia Metal Co., 108 Ill. App. 203 [*affirmed* in 207 Ill. 172, 69 N. E. 896]; Trimble *v.* Beardstown First Nat. Bank, 101 Ill. App. 75; Casner *v.* Stafford, 86 Ill. App. 469; St. Clair County Benev. Soc. *v.* Fietsam, 6 Ill. App. 151 [*affirmed* in 97 Ill. 474].

Indiana.— Burton *v.* Morrow, 133 Ind. 221, 32 N. E. 921; Singer Mfg. Co. *v.* Forsythe, 108 Ind. 334, 9 N. E. 372; Crofoot *v.* Truax, 27 Ind. 72; Kieth *v.* Kerr, 17 Ind. 284; Kentucky, etc., Cement Co. *v.* Cleveland, 4 Ind. App. 171, 30 N. E. 802.

Iowa.— Mt. Vernon Stone Co. *v.* Sheely, 114 Iowa 313, 86 N. W. 301; McEnery *v.* McEnery, 110 Iowa 718, 80 N. W. 1071; Fawkner *v.* Lew Smith Wall Paper Co., 88 Iowa 169, 55 N. W. 200, 45 Am. St. Rep. 230, (1891) 49 N. W. 1003; Keen *v.* Beekman, 66 Iowa 672, 24 N. W. 270; Port *v.* Robbins, 35 Iowa 208; Taylor *v.* Galland, 3 Greene 17.

Kansas.— Milich *v.* Armour Packing Co., 60 Kan. 229, 56 Pac. 1; Polk *v.* Anderson, 16 Kan. 243; McGrath *v.* Crouse, 6 Kan. App. 507, 50 Pac. 969. See also Peters *v.* McVey, 59 Kan. 775, 52 Pac. 896.

Kentucky.—McKegney *v.* Widekind, 6 Bush 107; Baugh *v.* Ramsey, 4 T. B. Mon. 155. See also Illinois Cent. R. Co. *v.* Eblen, 114 Ky. 817, 71 S. W. 919, 24 Ky. L. Rep. 1609.

Maine.— Gould *v.* Boston Excelsior Co., 91 Me. 214, 39 Atl. 554, 64 Am. St. Rep. 221.

Maryland.— Allen *v.* Sowerby, 37 Md. 410; Bladen *v.* Wells, 30 Md. 577; McCreary *v.* McCreary, 5 Gill & J. 147.

Massachusetts.— Robertson *v.* Rowell, 158 Mass. 94, 32 N. E. 898, 35 Am. St. Rep. 466; Preble *v.* Baldwin, 6 Cush. 549; Hogins *v.* Plympton, 11 Pick. 97.

Michigan.— Patek *v.* Waples, 114 Mich. 669, 72 N. W. 995; Butler *v.* Iron Cliffs Co., 96 Mich. 70, 55 N. W. 670; Richards *v.* Fuller, 37 Mich. 161; Loud *v.* Campbell, 26 Mich. 239.

Minnesota.— Potter *v.* Easton, 82 Minn. 247, 84 N. W. 1011; Vaughan *v.* McCarthy, 63 Minn. 221, 65 N. W. 249; Horn *v.* Hansen, 56 Minn. 43, 57 N. W. 315, 22 L. R. A. 617; Aultman *v.* Clifford, 55 Minn. 159, 56 N. W. 593, 43 Am. St. Rep. 478; Phœnix Pub. Co. *v.* Riverside Clothing Co., 54 Minn. 206, 55 N. W. 912; Beyerstedt *v.* Winona Mill Co., 49 Minn. 1, 51 N. W. 619; Gammon *v.* Ganfield, 42 Minn. 369, 44 N. W. 125; Boynton Furnace Co. *v.* Clark, 42 Minn. 337, 44 N. W. 121; Thompson *v.* Libby, 34 Minn. 374, 26 N. W. 1; Healy *v.* Young, 21 Minn. 389.

Mississippi.— Clark *v.* Perry, 4 How. 285.

Missouri.— State *v.* Cunningham, 154 Mo. 161, 55 S. W. 282; Davis *v.* Scovern, 130 Mo. 303, 32 S. W. 986; Ringer *v.* Holtzclaw, 112 Mo. 519, 20 S. W. 800; State *v.* Hoshaw, 98 Mo. 358, 11 S. W. 759; Bowen *v.* Bowen, 90 Mo. 184, 2 S. W. 398; O'Neil *v.* Crain, 67 Mo. 250; Life Assoc. of America *v.* Cravens, 60 Mo. 388; Briggs *v.* Munchon, 56 Mo. 467; Bunce *v.* Beck, 43 Mo. 266; Moss *v.* Green, 41 Mo. 389; Rollins *v.* Claybrook, 22 Mo. 405; Van Ravenswaay *v.* Covenant Mut. L. Ins. Co., 89 Mo. App. 73. See also Calley *v.* Loomas, 56 Mo. App. 322.

Nebraska.— Creedon *v.* Patrick, 3 Nebr. (Unoff.) 459, 91 N. W. 872.

New Hampshire.— Fiske *v.* McGregory, 34 N. H. 414; Webster *v.* Hodgkins, 25 N. H. 128.

New Jersey.— Naumberg *v.* Young, 44 N. J. L. 331, 43 Am. Rep. 380; Elizabeth Library Assoc. *v.* Crane, 29 N. J. L. 302. See also Rogers *v.* Rogers, 5 N. J. Eq. 32.

New York.— Case *v.* Phœnix Bridge Co., 134 N. Y. 78, 31 N. E. 254 [*reversing* 58 N. Y. Super. Ct. 435, 11 N. Y. Suppl. 724, 19 N. Y. Civ. Proc. 373]; Eighmie *v.* Taylor, 98 N. Y. 288; Guttentag *v.* Whitney, 79 N. Y. App. Div. 596, 80 N. Y. Suppl. 435; Lawrence *v.* Sullivan, 79 N. Y. App. Div. 453, 80 N. Y. Suppl. 499; Rochester Folding Box Co. *v.* Brown, 55 N. Y. App. Div. 444, 66 N. Y. Suppl. 867; Grand Rapids Veneer Works *v.* Forsythe, 83 Hun 230, 61 N. Y. Suppl. 601; Akberg *v.* John Kress Brewing Co., 65 Hun 182, 19 N. Y. Suppl. 956; Fisher *v.* Abeel, 66 Barb. 381; Hurd *v.* Bovee, 4 Silv. Supreme 186, 7 N. Y. Suppl. 241; Hope *v.* Smith, 35 N. Y. Super. Ct. 458; Young *v.* Bushnell, 8 Bosw. 1; Tocci *v.* Arata, 16 Daly 494, 12 N. Y. Suppl. 287; Vogel *v.* Weissman, 23 Misc. 256, 51 N. Y. Suppl. 173; Smith *v.* Hildebrand, 15 Misc. 129, 36 N. Y. Suppl. 485 [*distinguishing* Lamson, etc., Co. *v.* Hartung, 18 N. Y. Suppl. 143]; Seguine *v.* Spaeth, 14 Misc. 349, 35 N. Y. Suppl. 847; McGrath *v.* Mangels, 2 Misc. 60, 20 N. Y. Suppl. 869; Fisher *v.* Moller, 17 N. Y. Suppl. 831; Gordon *v.* Nieman, 4 N. Y. St. 844.

North Carolina.— Doubleday *v.* Asheville Ice, etc., Co., 122 N. C. 675, 30 S. E. 21; McGee *v.* Craven, 106 N. C. 351, 11 S. E. 375; Cumming *v.* Barber, 99 N. C. 332, 5 S. E. 903; Braswell *v.* Pope, 82 N. C. 57; Twidy *v.* Saunderson, 31 N. C. 5.

Ohio.— Platt *v.* Scribner, 18 Ohio Cir. Ct. 452, 9 Ohio Cir. Dec. 771; Eleventh St. Church of Christ *v.* Pennington, 18 Ohio Cir. Ct. 408, 10 Ohio Cir. Dec. 74.

Oregon.— American Bridge, etc., Co. *v.* Bullen Bridge Co., 29 Oreg. 549, 46 Pac. 138; Looney *v.* Rankin, 15 Oreg. 617, 16 Pac. 660.

Pennsylvania.— Anderson *v.* National Surety Co., 196 Pa. St. 288, 46 Atl. 306; Selig *v.* Rehfuss, 195 Pa. St. 200, 45 Atl. 919; Schwab *v.* Ginkinger, 181 Pa. St. 8; Jackson *v.* Litch, 62 Pa. St. 451; Miller *v.* Fichthorn, 31 Pa. St. 252; Venango County Com'rs *v.* McCalmont, 3 Penr. & W. 122; Bollinger *v.* Eckert, 16 Serg. & R. 422; Russell *v.* Pittsburg, etc., R. Co., 17 Pa. Super. Ct. 195; Nye *v.* Pittsburg Co., 2 Pa. Super. Ct. 384; Block *v.* Dowling, 7 Pa. Dist. 261, 20 Pa. Co.

in the case of assignments,[12] bills and notes,[13] bills of lading,[14] bills of sale,[15] bonds,[16] contracts generally,[17] contracts for buildings and the construction of other

Ct. 489. See also Whitney *v.* Shippen, 89 Pa. St. 22.

South Carolina.— Sloan *v.* Courtenay, 54 S. C. 314, 32 S. E. 431; Willis *v.* Hammond, 41 S. C. 153, 19 S. E. 310; Holly *v.* Blackman, 32 S. C. 584, 10 S. E. 774; Bulwinkle *v.* Cramer, 27 S. C. 376, 3 S. E. 776, 13 Am. St. Rep. 645; Moffatt *v.* Hardin, 22 S. C. 9; Kaphan *v.* Ryan, 16 S. C. 352; Hatcher *v.* Hatcher, McMull. Eq. 311.

Tennessee.— Barnard *v.* Roane Iron Co., 85 Tenn. 139, 2 S. W. 21; Bissenger *v.* Guiteman, 6 Heisk. 277; Cobb *v.* Wallace, 5 Coldw. 539, 98 Am. Dec. 435; Cobb *v.* O'Neal, 2 Sneed 438; Vanleer *v.* Fain, 6 Humphr. 104.

Texas.— Traders' Nat. Bank *v.* Clare, 76 Tex. 47, 13 S. W. 183; Thomas *v.* Hammond, 47 Tex. 42; Howell *v.* Denton, (Civ App. 1902) 68 S. W. 1002; Ehrenberg *v.* Baker, (Civ. App. 1899) 54 S. W. 435; Peel *v.* Giesen, 21 Tex. Civ. App. 334, 51 S. W. 44; Hansen *v.* Yturria, (Civ. App. 1898) 48 S. W. 795; Kelley *v.* Collier, 11 Tex. Civ. App. 353, 32 S. W. 428. See also Robinson *v.* Western Union Tel. Co., (Civ. App. 1898) 43 S. W. 1053.

Vermont.— Burditt *v.* Howe, 69 Vt. 563, 38 Atl. 240; Tillotson *v.* Ramsay, 51 Vt. 309; Winn *v.* Chamberlin, 32 Vt. 318. See also Edwards *v.* Golding, 20 Vt. 30.

Washington.—Knowles *v.* Rogers, 27 Wash. 211, 67 Pac. 572.

West Virginia.— Johnson *v.* Burns, 39 W. Va. 658, 20 S. E. 686.

Wisconsin.— Fosha *v.* O'Donnell, 120 Wis. 536, 97 N. W. 924; Hurlbert *v.* T. D. Kellogg Lumber, etc., Co., 115 Wis. 225, 91 N. W. 673; Brader *v.* Brader, 110 Wis. 423, 85 N. W. 681; Cuddy *v.* Foreman, 107 Wis. 519, 83 N. W. 1103; Riemer *v.* Rice, 98 Wis. 16, 59 N. W. 450; Magill *v.* Stoddard, 70 Wis. 75, 35 N. W. 346.

United States.— Harman *v.* Harman, 70 Fed. 894, 17 C. C. A. 479; Thomson *v.* Beal, 48 Fed. 614; Lafitte *v.* Shawcross, 12 Fed. 519; The Alida, 1 Fed. Cas. No. 200, 1 Abb. Adm. 173.

England.— Lindlay *v.* Lacey, 17 C. B. N. S. 578, 10 Jur. N. S. 1108, 34 L. J. C. P. 7, 11 L. T. Rep. N. S. 273, 13 Wkly. Rep. 80, 112 E. C. L. 578; Loibl *v.* Strampfer, 6 L. T. Rep. N. S. 720; Jeffery *v.* Walton, 1 Stark. 267, 2 E. C. L. 108.

Canada.— Chamberlain *v.* Smith, 21 U. C. Q. B. 103.

See 20 Cent. Dig. tit. "Evidence," §§ 1877–1895.

A mere memorandum or skeleton agreement which was not intended to contain all of the contract may be added to by parol. Peneix *v.* Rodgers, 49 S. W. 447, 20 Ky. L. Rep. 1469.

The terms of a deposit in escrow may be in writing or in parol, or partly in writing and partly in parol, and the rule that a written contract between the parties must be deemed to contain the entire agreement is inapplicable. Fred *v.* Fred, (N. J. Ch. 1901) 50 Atl. 776.

Where a contract does not specify the time it is to continue in force, parol evidence is admissible to show that the parties did not intend to bind themselves for any definite time, but left the question of time to be settled by further agreement. Real Estate Title Ins., etc., Co.'s Appeal, 125 Pa. St. 549, 17 Atl. 450, 11 Am. St. Rep. 920.

12. Platt *v.* Hedge, 8 Iowa 386; Randall *v.* Turner, 17 Ohio St. 262.

13. *Alabama.*—Mills *v.* Geron, 22 Ala. 669.

Georgia.— Kemp *v.* Byne, 54 Ga. 527.

Illinois.— Bradshaw *v.* Combs, 102 Ill. 428.

Kentucky.— Kelly *v.* White, 17 B. Mon. 124; Western *v.* Pollard, 16 B. Mon. 315.

Louisiana.— Polo *v.* Natili, 14 La. 260.

Maine.— Smith *v.* Richards, 16 Me. 200.

Missouri.— Life Assoc. of America *v.* Cravens, 60 Mo. 388.

New York.— Nicholls *v.* Van Valkenburgh, 15 Hun 230 [*distinguishing* Nicholson *v.* Waful, 70 N. Y. 604 (*reversing* 6 Hun 655)].

North Carolina.— Perry *v.* Hill, 68 N. C. 417.

South Carolina.— Holly *v.* Blackman, 32 S. C. 584, 10 S. E. 774.

Texas.— Jefferson Nat. Bank *v.* Bruhn, 64 Tex. 571, 53 Am. Rep. 771; Thomas *v.* Hammond, 47 Tex. 42.

Wisconsin.— Brader *v.* Brader, 110 Wis. 423, 85 N. W. 681; Nauman *v.* Ullman, 102 Wis. 92, 78 N. W. 159.

United States.— Brent *v.* Metropolis Bank, 1 Pet. 89, 7 L. ed. 65.

See 20 Cent. Dig. tit. "Evidence," § 1889.

14. Baltimore, etc., Steamboat Co. *v.* Brown, 54 Pa. St. 77.

15. *Iowa.*— Taylor *v.* Galland, 3 Greene 17.

Kentucky.— Woodcock *v.* Farrell, 1 Metc. 437.

Maine.— Neal *v.* Flint, 88 Me. 72, 33 Atl. 669.

Mississippi.— Tutt *v.* McLeod, 3 How. 223.

New York.— Emmett *v.* Penoyer, 76 Hun 551, 28 N. Y. Suppl. 234; Cassidy *v.* Begoden, 38 N. Y. Super. Ct. 180; Wentworth *v.* Buhler, 3 E. D. Smith 305.

See 20 Cent. Dig. tit. "Evidence," § 1878.

16. Mariner *v.* Rodgers, 26 Ga. 220; Hall *v.* Maccubin, 6 Gill & J. (Md.) 107; Kerchner *v.* McRae, 80 N. C. 219; Woodfin *v.* Sluder, 61 N. C. 200; Daughtry *v.* Boothe, 49 N. C. 87.

If a bond be executed without a condition of defeasance, and a separate instrument of defeasance be executed, the latter may be pleaded in an action on the bond. Wells *v.* Baldwin, 18 Johns. (N. Y.) 45.

17. *Alabama.*— Powell *v.* Thompson, 80 Ala. 51; West *v.* Kelly, 19 Ala. 353, 54 Am. Dec. 192.

Georgia.— Claflin *v.* Duncan, 74 Ga. 348; Barclay *v.* Hopkins, 59 Ga. 562; Cooper *v.* Berry, 21 Ga. 526, 68 Am. Dec. 468.

Illinois.— Kirkham *v.* Boston, 67 Ill. 599;

works,[18] contracts of carriage,[19] contracts of employment,[20] contracts of partnership,[21] and agreements with reference to the dissolution of a partnership,[22] contracts for the sale of real or personal property,[23] deeds,[24] insurance policies,[25]

Fowler *v.* Redican, 52 Ill. 405; Birks *v.* Gillett, 13 Ill. App. 369; Bross *v.* Cairo, etc., R. Co., 9 Ill. App. 363.

Iowa.— Davis *v.* Cochran, 71 Iowa 369, 32 N. W. 445.

Kansas.— St. Louis, etc., R. Co. *v.* Maddox, 18 Kan. 546.

Kentucky.— Hening *v.* Burnett, 13 Ky. L. Rep. 969; Blackerby *v.* Continental Ins. Co., 7 Ky. L. Rep. 653; Pyne *v.* Edwards, 7 Ky. L. Rep. 367; Honaker *v.* Buckley, 6 Ky. L. Rep. 362; Southern States Coal, etc., Co. *v.* Moore, 4 Ky. L. Rep. 716; Elliott *v.* Elliott, 2 Ky. L. Rep. 267.

Maine.— Bradstreet *v.* Rich, 72 Me. 233.

Maryland.—Creamer *v.* Stephenson, 15 Md. 211.

Minnesota.— Phœnix Pub. Co. *v.* Riverside Clothing Co., 54 Minn. 205, 55 N. W. 912; Domestic Sewing Mach. Co. *v.* Anderson, 23 Minn. 57.

Missouri.— Gardner *v.* Mathews, 81 Mo. 627 [*affirming* 11 Mo. App. 269]; Ellis *v.* Bray, 79 Mo. 227; Lash *v.* Parlin, 78 Mo. 391; Moss *v.* Green, 41 Mo. 389; Miller *v.* Goodrich Bros. Banking Co., 53 Mo. App. 450; T. W. Harvey Lumber Co. *v.* Herriman, etc., Lumber Co., 39 Mo. App. 214.

New York.— Ropes *v.* Arnold, 81 Hun 476, 30 N. Y. Suppl. 997; Unger *v.* Jacobs, 7 Hun 220; Thurber *v.* Hughes, 47 N. Y. Super. Ct. 159; Arms *v.* Arms, 13 N. Y. St. 196; Adams *v.* Van Brunt, 11 N. Y. St. 659; Bean *v.* Carleton, 6 N. Y. St. 641; New York, etc., R. Co. *v.* Carhart, 1 N. Y. St. 426; Potter *v.* Hopkins, 25 Wend. 417.

Pennsylvania.— Jordan *v.* Minster, 3 Pa. L. J. Rep. 457, 5 Pa. L. J. 542.

Tennessee.—Smith *v.* O'Donnell, 8 Lea 468; Hawkins *v.* Lee, 8 Lea 42; Fort *v.* Orndoff, 7 Heisk. 167.

Texas.— James *v.* King, 2 Tex. App. Civ. Cas. § 544.

Vermont.—Winn *v.* Chamberlin, 32 Vt. 318.

United States.— McCulloch *v.* Girard, 16 Fed. Cas. No. 8,737, 4 Wash. 289; Sheffield *v.* Page, 21 Fed. Cas. No. 12,743, 1 Sprague 285.

See 20 Cent. Dig. tit. "Evidence," § 1882.

18. Donlin *v.* Daegling, 80 Ill. 608; Thompson *v.* Brothers, 5 La. 277; Sandford *v.* Newark, etc., R. Co., 37 N. J. L. 1; Streppone *v.* Lennon, 143 N. Y. 626, 37 N. E. 638; Haag *v.* Hillemeier, 120 N. Y. 651, 24 N. E. 807; Cunningham *v.* Massena Springs, etc., R. Co., 63 Hun (N. Y.) 439, 18 N. Y. Suppl. 600; Riley *v.* Black, 1 Misc. (N. Y.) 288, 20 N. Y. Suppl. 695.

19. Georgia R., etc., Co. *v.* Reid, 91 Ga. 377, 17 S. E. 934. The rule applies to railroad tickets. Ames *v.* Southern Pac. Co., 141 Cal. 728, 75 Pac. 310, 99 Am. St. Rep. 98; Lexington, etc., R. Co. *v.* Lyons 104 Ky. 23, 46 S. W. 209, 20 Ky. L. Rep. 516; Illinois Cent. R. Co. *v.* Harper, 83 Miss. 560, 35 So. 764, 64 L. R. A. 283. See also New York, etc., R. Co. *v.* Winter, 143 U. S. 60, 12 S. Ct. 356, 36 L. ed. 71.

20. Franklin County *v.* Layman, 145 Ill. 138, 33 N. E. 1094; Van Kirk *v.* Scott, 54 Ill. App. 681; Louisville, etc., R. Co. *v.* Reynolds, 118 Ind. 170, 20 N. E. 711; Locke *v.* Wilson, (Mich. 1904) 98 N. W. 400; Page *v.* Sheffield, 18 Fed. Cas. No. 10,667, 2 Curt. 377 [*affirming* 21 Fed. Cas. No. 12,743, 1 Sprague 285].

21. Brewer *v.* McCain, 21 Colo. 382, 41 Pac. 822.

22. Ball *v.* Benjamin, 73 Ill. 39; Peaks *v.* Lord, 42 Nebr. 15, 60 N. W. 349.

23. *Illinois.*— Story *v.* Carter, 27 Ill. App. 287.

Indiana.— Lee *v.* Hills, 66 Ind. 474.

Iowa.— Pinney *v.* Thompson, 3 Iowa 74.

Kentucky.— Southern States Coal, etc., Co. *v.* Moore, 4 Ky. L. Rep. 716.

Michigan.— John Hutchison Mfg. Co. *v.* Pinch, 107 Mich. 12, 64 N. W. 729, 66 N. W. 340; Liggett Spring, etc., Co. *v.* Michigan Buggy Co., 106 Mich. 445, 64 N. W. 466.

Missouri.— Quick *v.* Glass, 128 Mo. 320, 30 S. W. 1031.

New York.— Weeks *v.* Binns, 85 Hun 70, 32 N. Y. Suppl. 644; Bagley *v.* Saranac River Pulp, etc., Co., 16 N. Y. Suppl. 657.

North Carolina.— Johnston *v.* McRary, 50 N. C. 369.

Texas.— Sherman Oil, etc., Co. *v.* Dallas Oil, etc., Co., (Civ. App. 1903) 77 S. W. 961.

United States.— Camden Iron-Works *v.* Fox, 34 Fed. 200.

See 20 Cent. Dig. tit. "Evidence," §§ 1886, 1887.

An agreement between the parties to an exchange of lands that neither party should by accepting a deed assume any personal liability in respect to any mortgage on the premises may be shown by parol. Hubbard *v.* Ensign, 46 Conn. 576.

24. *Colorado.*— Davis *v.* Hopkins, 18 Colo. 153, 32 Pac. 70.

Connecticut.— Post *v.* Gilbert, 44 Conn. 9.

Illinois.— Gardt *v.* Brown, 113 Ill. 475, 55 Am. Rep. 434.

Maine.— Tyler *v.* Carlton, 7 Me. 175, 20 Am. Dec. 357.

Minnesota.— Bretto *v.* Levine, 50 Minn. 168, 52 N. W. 525.

Pennsylvania.— West Chester, etc., R. Co. *v.* Broomall, 1 Pa. Cas. 587, 3 Atl. 444.

Tennessee.— Lewis *v.* Turnley, 97 Tenn. 197, 36 S. W. 872.

Vermont.— Linsley *v.* Lovely, 26 Vt. 123.

Wisconsin.— Brader *v.* Brader, 110 Wis. 423, 85 N. W. 681; Cuddy *v.* Foreman, 107 Wis. 519, 83 N. W. 1103; Frey *v.* Vanderhoof, 15 Wis. 397.

See 20 Cent. Dig. tit. "Evidence," § 1877.

25. Pitney *v.* Glen's Falls Ins. Co., 65 N. Y. 6 [*affirming* 61 Barb. 335, and *distinguishing* Bidwell *v.* Northwestern Co., 19 N. Y. 179; Grosvenor *v.* Atlantic F. Ins. Co., 17 N. Y. 391].

leases,[26] mortgages,[27] and subscriptions for corporate stock.[28] Where an instrument upon its face fails to show the entire agreement it is not necessary to allege fraud, accident, or mistake in order to render parol evidence as to the real contract admissible.[29]

b. Applications. In the application of the rule just stated,[30] and upon the ground that the matters in question were agreements omitted from the writing, which was in that respect incomplete, evidence has been admissible to show the amount to be paid under a contract of sale;[31] the time,[32] place,[33] or mode of payment of amounts due or to become due under a contract;[34] the time,[35] place,[36] and manner of performance;[37] the time[38] and place of delivery of goods sold;[39] the place where services contracted for were to be performed;[40] the length of time for which a lease was to run,[41] or for which insurance was taken;[42] the compensation to be paid under a contract of employment;[43] the value of services rendered

26. *Colorado.*— Equator Min., etc., Co. *v.* Guanella, 18 Colo. 548, 33 Pac. 613.

Indiana.— Heaht *v.* West, 68 Ind. 548.

Iowa.— Singer Sewing Mach. Co. *v.* Holcomb, 40 Iowa 33.

Kentucky.— Gray *v.* Oyler, 2 Bush 256.

Louisiana.— New Orleans, etc., R. Co. *v.* Darms, 39 La. Ann. 766, 2 So. 230; Corbett *v.* Costello, 8 La. Ann. 427.

Massachusetts.— Graffam *v.* Pierce, 143 Mass. 386, 9 N. E. 819.

Tennessee.— Hines *v.* Willcox, 96 Tenn. 148, 33 S. W. 914, 54 Am. St. Rep. 823, 34 L. R. A. 824.

Vermont.— See Gould *v.* Conant, 66 Vt. 644, 30 Atl. 39.

Virginia.— Crawford *v.* Morris, 5 Gratt. 90.

See 20 Cent. Dig. tit. "Evidence," § 1880.

27. Smith *v.* Rice, 56 Ala. 417; Tonkin *v.* Baum, 114 Pa. St. 414, 7 Atl. 185; Reynolds *v.* Hassam, 56 Vt. 449.

28. Hendrix *v.* Academy of Music, 73 Ga. 437; Brewers F. Ins. Co. *v.* Burger, 10 Hun (N. Y.) 56.

29. Cummings *v.* Moore, 27 Tex. Civ. App. 555, 65 S. W. 1113.

30. See *supra*, XVI, C, 39, a.

31. Cunningham *v.* Banta, 2 Ind. 604; Bowser *v.* Cravener, 56 Pa. St. 132.

32. *California.*— Sivers *v.* Sivers, 97 Cal. 518, 32 Pac. 571.

Mississippi.— Hartsell *v.* Myers, 57 Miss. 135.

New Jersey.— Bruce *v.* Pearsall, 59 N. J. L. 62, 34 Atl. 982.

New York.— Van Gorden *v.* Sackett, 2 Silv. Supreme 582, 6 N. Y. Suppl. 860.

South Carolina.— Ashe *v.* Carolina, etc., R. Co., 65 S. C. 134, 43 S. E. 393.

United States.— Halsey *v.* Hurd, 11 Fed. Cas. No. 5,967, 6 McLean 102.

See 20 Cent. Dig. tit. "Evidence," §§ 1882, 1899.

Contra.— Borden *v.* Peay, 20 Ark. 293. And see *supra*, XVI, A, 2.

33. Ebert *v.* Arends, 190 Ill. 221, 60 N. E. 211; Blackerby *v.* Continental Ins. Co., 83 Ky. 574; McKee *v.* Boswell, 33 Mo. 567; Meyer *v.* Hibsher, 47 N. Y. 265; Thompson *v* Ketcham, 4 Johns. (N. Y.) 285. *Contra*, Moore *v.* Davidson, 18 Ala. 209; Bigham *v.* Talbot, 51 Tex. 450; Specht *v.* Howard, 16 Wall. (U. S.) 564, 21 L. ed. 348.

34. *Indiana.*— Evansville, etc., R. Co. *v.* Wright, 38 Ind. 64; Cunningham *v.* Banta, 2 Ind. 604.

Kentucky.— Duncan *v.* Sheehan, 13 Ky. L. Rep. 780.

Maryland.— Paul *v.* Owings, 32 Md. 402.

Nevada.— Foulks *v.* Rhodes, 12 Nev. 255.

New Jersey.— Buchanan *v.* Adams, 49 N. J. L. 636, 10 Atl. 662, 60 Am. Rep. 666.

New York.— Hildebrant *v.* Crawford, 6 Lans. 502 [*affirmed* in 65 N. Y. 107]; Van Gorden *v.* Sackett, 2 Silv. Supreme 582, 6 N. Y. Suppl. 860.

Wisconsin.— Jones *v.* Keyes, 16 Wis. 562.

Canada.— Wilson *v.* Windsor Foundry Co., 33 Nova Scotia 21 [*affirmed* in 31 Can. Supreme Ct. 381].

See 20 Cent. Dig. tit. "Evidence," § 1882.

Contra.— Borden *v.* Peay, 20 Ark. 293.

35. Richter *v.* Union Land, etc., Co., 129 Cal. 367, 62 Pac. 39; Fleming *v.* Gilbert, 3 Johns. (N. Y.) 528; Benson *v.* Peebles, 5 Mo. 132. But see *supra*, XVI, A, 2.

36. Benson *v.* Peebles, 5 Mo. 132.

37. Havana, etc., R. Co. *v.* Walsh, 85 Ill. 58; Razor *v.* Razor, 39 Ill. App. 527; Benson *v.* Peebles, 5 Mo. 132; Lyon *v.* Western New York, etc., R. Co., 88 Hun (N. Y.) 27, 34 N. Y. Suppl. 532.

38. J. K. Armsby Co. *v.* Eckerly, 42 Mo. App. 299; Varner *v.* Dexter Gin, etc., Assoc., (Tex. Civ. App. 1896) 39 S. W. 206.

39. Kieth *v.* Kerr, 17 Ind. 284; Musselman *v.* Stoner, 31 Pa. St. 265. *Contra*, Marshall *v.* Gridley, 46 Ill. 247.

40. Cook *v.* Todd, 72 S. W. 779, 24 Ky. L. Rep. 1909.

41. Brincefield *v.* Allen, 25 Tex. Civ. App. 258, 60 S. W. 1010.

42. Bankers' Acc. Ins. Co. *v.* Rogers, 73 Minn. 12, 75 N. W. 747.

43. Guidery *v.* Green, 95 Cal. 630, 30 Pac. 786; Employers' Liability Assur. Co. *v.* Morris, 14 Colo. App. 354, 60 Pac. 21; Sheffield *v.* Page, 21 Fed. Cas. No. 12,743, 1 Sprague 285 [*affirmed* in 18 Fed. Cas. No. 10,667, 2 Curt. 377]; Wickham *v.* Blight, 29 Fed. Cas. No. 17,611, Gilp. 452. But see *supra*, XVI, A, 2.

under a contract of employment not providing for any compensation;[44] the kind of work to be done and the time for doing the same under a lease providing that part of the rent was "to be worked out on farm at one dollar per day";[45] the time when title was to pass under a contract for the construction of a vessel;[46] the time when the performance of a contract for doing certain work should begin;[47] the time of the commencement of services under a contract of employment;[48] upon whom the duty rested to furnish certain information necessary to the performance of a contract;[49] the understanding of the parties as to the basis of their accounting under a contract;[50] the size of brick to be used in carrying out a building contract, and the rule by which the work was to be measured;[51] the assent of the vendee to an act of sale,[52] or a promise to sell;[53] representations of a vendor as to the thing sold;[54] a warranty or guaranty as to articles sold or embraced in a contract of sale;[55] the intentions or understanding of the parties to a contract of sale in regard to the style and materials of the articles to be sold;[56] and the fact of a vendee's notice of an encumbrance, where the contract of sale is silent as to the character of the title.[57] Evidence has also been held admissible to show at whose risk the shipment of goods sold was to be made,[58] and whether the title passed on delivery to the carrier or not until safe arrival of the goods at their destination;[59] to identify and prove a paper which was a part of and incorporated in a building contract by a reference thereto;[60] and, where the agreement of one party only has been reduced to writing, to show the agreement made by the other party as a consideration.[61]

c. Completeness of Writing. There is authority for the view that parol evidence can be admitted only when the contract or writing on its face shows that it does not express the entire agreement of the party, and that such evidence is inadmissible in the case of a contract which by its terms purports to express the whole agreement,[62] and that consequently parol evidence is inadmissible to show that a writing of such character does not express the entire agreement unless it

Where an employee was to receive a part of the net profits of the business for his services, parol evidence is admissible as to the basis of valuation of the stock on which the profits were to be estimated, the contract being silent as to that matter. Briggs *v.* Groves, 9 N. Y. Suppl. 765.

44. Toomy *v.* Dunphy, 86 Cal. 639, 25 Pac. 130.

45. Ingram *v.* Dailey, 123 Iowa 188, 98 N. W. 627.

46. The Poconoket, 70 Fed. 640, 17 C. C. A. 309 [*affirming* 67 Fed. 262]. *Contra*, Interstate Steamboat Co. *v.* Syracuse First Nat. Bank, 87 Hun (N. Y.) 93, 33 N. Y. Suppl. 966.

47. Case *v.* Phœnix Bridge Co., 58 N. Y. Super. Ct. 435, 11 N. Y. Suppl. 724, 19 N. Y. Civ. Proc. 373.

48. Meade *v.* Rutledge, 11 Tex. 44.

49. Bien *v.* Parsons, 15 Misc. (N. Y.) 457, 37 N. Y. Suppl. 209.

50. Staples *v.* Edwards, etc., Lumber Co., 56 Minn. 16, 57 N. W. 220.

51. Brown *v.* Rowland, Ky. Dec. 293.

52. Crocker *v.* Nuley, 3 Mart. N. S. (La.) 583; Baudin *v.* Roliff, 1 Mart. N. S. (La.) 165, 14 Am. Dec. 181; Bradford *v.* Brown, 11 Mart. (La.) 217.

53. Joseph *v.* Moreno, 2 La. 460.

54. Palmer *v.* Roath, 86 Mich. 602, 49 N. W. 590; Richards *v.* Fuller, 37 Mich. 161; Phelps *v.* Whitaker, 37 Mich. 72; Liebke *v.* Methudy, 14 Mo. App. 65.

Representations as to quality and condition of the land sold and the improvements thereon, made by the vendor and relied upon by the vendee, may be shown by parol. Schoen *v.* Sunderland, 39 Kan. 758, 18 Pac. 913.

55. *Illinois.*— Ruff *v.* Jarrett, 94 Ill. 475.
Missouri.— Broughton *v.* Null, 56 Mo. App. 231.
New York.— Chapin *v.* Dobson, 78 N. Y. 74, 34 Am. Rep. 512.
Ohio.— Hauser *v.* Curran, 11 Ohio Dec. (Reprint) 139, 25 Cinc. L. Bul. 52.
Wisconsin.— Collette *v.* Weed, 68 Wis. 428, 32 N. W. 753.
Canada.—La Roche *v.* O'Hagan, 1 Ont. 300; McMullen *v.* Williams, 5 Ont. App. 518. See also Ellis *v.* Abell, 10 Ont. App. 226.
See 20 Cent. Dig. tit. "Evidence," § 1887. But *compare supra*, XVI, B, 2, h, (III), (I), (8).

56. Dietrich *v.* Stebbins, 100 Iowa 426, 69 N. W. 564.

57. Leonard *v.* Woodruff, 23 Utah 494, 65 Pac. 199.

58. De Pauw *v.* Kaiser, 77 Ga. 176, 3 S. E. 254; Allen *v.* Comstock, 17 Ga. 554.

59. De Pauw *v.* Kaiser, 77 Ga. 176, 3 S. E. 254.

60. Monocacy Bridge Co. *v.* American Iron Bridge Mfg. Co., 83 Pa. St. 517.

61. Unger *v.* Jacobs, 7 Hun (N. Y.) 220.

62. *Connecticut.*—Caulfield *v.* Hermann, 64 Conn. 325, 30 Atl. 52.

appears that fraud or mistake has intervened.[63] On the other hand it has been asserted that an omission of a portion of the agreement may be shown by parol.[64] This discrepancy is, however, more apparent than real, and probably results more from a loose use of terms than a confusion of ideas, as both lines of cases may be reconciled with what appears to be the most satisfactory general rule that can be announced in respect to this matter; which is that while the writing itself is the only criterion by which the intention of the parties is to be ascertained, yet it is not necessary that the incompleteness thereof should appear on its face from a mere inspection of it, for it is to be construed in the light of its subject-matter and the circumstances under which and the purposes for which it was executed.[65] Indeed some of the cases which state flatly that the instrument must appear on inspection to be incomplete contain expressions showing a recognition of the modification that the surrounding circumstances may also be considered.[66] The parts of the agreement proposed to be proved by parol must not be inconsistent with, or repugnant to, the intention of the parties as shown by the written instrument; for, to receive parol proof of a part not reduced to writing, which is directly repugnant to the intention of the parties as expressed in the

Iowa.—McEnery *v.* McEnery, 110 Iowa 718, 80 N. W. 1071.

Missouri.— Davis *v.* Scovern, 130 Mo. 303, 32 S. W. 986.

New Jersey.—Bandholz *v.* Judge, 62 N. J. L. 526, 41 Atl. 723.

New York.— Case *v.* Phœnix Bridge Co., 134 N. Y. 78, 31 N. E. 254 [*reversing* 58 N. Y. Super. Ct. 435, 11 N. Y. Suppl. 724, 19 N. Y. Civ. Proc. 373]; Thomas *v.* Scutt, 127 N. Y. 133, 27 N. E. 961; Eighmie *v.* Taylor, 98 N. Y. 288; Hurst *v.* Cresson, etc., Coal, etc., Co., 86 Hun 189, 33 N. Y. Suppl. 313; Munsell *v.* Flood, 45 N. Y. Super. Ct. 460.

Oregon.— Looney *v.* Rankin, 15 Oreg. 617, 16 Pac. 660 [*citing* Jeffery *v.* Walton, 1 Stark. 267, 2 E. C. L. 108].

Texas.— Collins *v.* Dignowity, (Sup. 1886) 8 S. W. 326.

Wisconsin.— Hei *v.* Heller, 53 Wis. 415, 10 N. W. 620.

United States.— Lafitte *v.* Shawcross, 12 Fed. 519.

England.— Lindley *v.* Lacey, 17 C. B. N. S. 578, 10 Jur. N. S. 1108, 34 L. J. C. P. 7, 11 L. T. Rep. N. S. 273, 13 Wkly. Rep. 80, 112 E. C. L. 578.

See 20 Cent. Dig. tit. "Evidence," §§ 1877–1895.

The only criterion of the completeness of a written contract as a full expression of the agreement of the parties is the writing itself. If it imports on its face to be a complete expression of the whole agreement — that is, contains such language as imports a complete legal obligation — it is conclusively presumed that the parties have introduced into it every material term, and parol evidence cannot be admitted to add another term, although the writing is silent as to the particular one to which the parol evidence is directed. Thompson *v.* Libby, 34 Minn. 374, 26 N. W. 1; Naumberg *v.* Young, 44 N. J. L. 331, 43 Am. Rep. 380.

63. *Illinois.*— Telluride Power Transmission Co. *v.* Crane Co., 103 Ill. App. 647.

Maryland.— Warren Glass Works Co. *v.* Keystone Coal Co., 65 Md. 547, 5 Atl. 253.

North Carolina.— Ward *v.* Ledbetter, 21 N. C. 496.

Texas.— Willis *v.* Byars, 2 Tex. Civ. App. 134, 21 S. W. 320.

Virginia.— Broughton *v.* Coffer, 18 Gratt. 184.

United States.— Sheffield *v.* Page, 21 Fed. Cas. No. 12,743, 1 Sprague 285.

See 20 Cent. Dig. tit. "Evidence," §§ 1877–1895.

64. *Massachusetts.*— Barker *v.* Prentiss, 6 Mass. 430.

Michigan.— Peabody *v.* Bement, 79 Mich. 47, 44 N. W. 416.

Missouri.— Sanders Pressed Brick Co. *v.* Columbia Real Estate, etc., Co., 86 Mo. App. 169.

New York.— Juilliard *v.* Chaffee, 92 N. Y. 529; Richardson *v.* Home Ins. Co., 47 N. Y. Super. Ct. 138.

North Carolina.— Lutz *v.* Thompson, 87 N. C. 334.

Vermont.—Winn *v.* Chamberlin, 32 Vt. 318.

See 20 Cent. Dig. tit. "Evidence," §§ 1877–1895.

A conditional note may be shown by parol to have been signed by the maker, with the distinct admission on the part of the payee that it did not contain the terms of their agreement, and the understanding that they should afterward, at a convenient time, draw another instrument which would truly express the contract. Hopper *v.* Eiland, 21 Ala. 714.

65. Potter *v.* Easton, 82 Minn. 247, 84 N. W. 1011; Wheaton Roller-Mill Co. *v.* John T. Noye Mfg. Co., 66 Minn. 156, 68 N. W. 854; Eighmie *v.* Taylor, 98 N. Y. 288.

Where the contract itself contains a reference to agreements not stated therein, parol evidence is admissible to prove what the entire agreement was. Work *v.* Beach, 13 N. Y. Suppl. 678 [*affirmed* in 129 N. Y. 651, 28 N. E. 1028].

66. See for example Forsyth Mfg. Co. *v.* Castlen, 112 Ga. 199, 37 S. E. 485, 81 Am. St. Rep. 28. See also Lafitte *v.* Shawcross, 12 Fed. 519.

written instrument, would contravene the rule that parol evidence cannot be received to contradict or vary the terms of a written agreement.[67]

d. Where Pleadings Declare on Writing Only. Where a party in his pleadings relies solely upon an alleged written contract between himself and the other party, he is bound by his pleading and cannot object to treatment of the writing as the whole contract of the parties, and hence he cannot introduce parol evidence to vary such contract.[68]

e. Statute of Frauds. The rule that where a contract upon its face is incomplete resort may be had to parol evidence to supply the omitted stipulation applies only in cases unaffected by the statute of frauds. If the subject-matter of the contract is within the statute of frauds and the contract or memorandum is deficient in some one or more of those essentials required by the statute, parol evidence cannot be received to supply the defects, for this would be to do the very thing prohibited by the statute.[69]

f. Question For Court or Jury. It has been held that the question whether the parties intended to express the whole of their agreement in the written contract is one for the court, since it relates to the admission or rejection of evidence.[70] But there is also authority for the view that whether the writing embraces the whole contract is a question for the jury.[71]

40. Writing Not in Evidence. The rule against parol evidence to vary or contradict a written instrument cannot of course apply where the writing

67. *Alabama.*— Whatley *v.* Reese, 128 Ala. 500, 29 So. 606; West *v.* Kelly, 19 Ala. 353, 54 Am. Dec. 192.

Georgia.— Forsyth Mfg. Co. *v.* Castlen, 112 Ga. 199, 37 S. E. 485, 81 Am. St. Rep. 28; Johnson *v.* Patterson, 86 Ga. 725, 13 S. E. 17; Barclay *v.* Hopkins, 59 Ga. 562; McMahan *v.* Tyson, 23 Ga. 43.

Iowa.— Mt. Vernon Stone Co. *v.* Sheely, 114 Iowa 313, 86 N. W. 301; McEnery *v.* McEnery, 110 Iowa 718, 80 N. W. 1071; Fawkner *v.* Lew Smith Wall Paper Co., 88 Iowa 169, 55 N. W. 200, 45 Am. St. Rep. 230, (1891) 49 N. W. 1003.

Maryland.— Bladen *v.* Wells, 30 Md. 577.

Michigan.— Hutchison Mfg. Co. *v.* Pinch, 107 Mich. 12, 64 N. W. 729, 66 N. W. 340.

Minnesota.— Potter *v.* Easton, 82 Minn. 247, 84 N. W. 1011.

Missouri.—Minnesota Thresher Mfg. Co. *v.* Grant City Lumber, etc., Co., 81 Mo. App. 255.

New York.— Case *v.* Phœnix Bridge Co., 134 N. Y. 78, 31 N. E. 254 [*reversing* 58 N. Y. Super. Ct. 435, 11 N. Y. Suppl. 724, 19 N. Y. Civ. Proc. 373]; Thomas *v.* Scutt, 127 N. Y. 133, 27 N. E. 961; Hand *v.* Miller, 58 N. Y. App. Div. 126, 68 N. Y. Suppl. 531; Emmett *v.* Penoyer, 76 Hun 551, 28 N. Y. Suppl. 234.

Ohio.— Platt *v.* Scribner, 18 Ohio Cir. Ct. 452, 9 Ohio Cir. Dec. 771.

Oregon.— American Bridge, etc., Co. *v.* Bullen Bridge Co., 29 Oreg. 549, 46 Pac. 138.

South Carolina.— Sloan *v.* Courtenay, 54 S. C. 314, 32 S. E. 431.

Texas.— Kelley *v.* Collier, 11 Tex. Civ. App. 353, 32 S. W. 428.

Vermont.— Winn *v.* Chamberlin, 32 Vt. 318.

See 20 Cent. Dig. tit. "Evidence," §§ 1877–1895.

Where there is a direct reference in a writing to a verbal agreement, the latter may be proved, even though the effect of it be to add material terms and conditions to the writing. Ruggles *v.* Swanwick, 6 Minn. 526.

Evidence that the written portion of the contract was unusual in its character is inadmissible, although the writing does not purport to set out the entire agreement. Bean *v.* Carleton, 51 Hun (N. Y.) 318, 4 N. Y. Suppl. 61.

68. Morton *v.* Clark, 181 Mass. 134, 63 N. E. 409; Morowsky *v.* Rohrig, 4 Misc. (N. Y.) 167, 23 N. Y. Suppl. 880.

69. *Iowa.*—McEnery *v.* McEnery, 110 Iowa 718, 80 N. W. 1071.

Kentucky.— Fowler *v.* Lewis, 3 A. K. Marsh. 443; Brown *v.* Rowland, Ky. Dec. 293.

Missouri.— Boyd *v.* Paul, 125 Mo. 9, 28 S. W. 171; Ringer *v.* Holtzclaw, 112 Mo. 519, 20 S. W. 800 [*criticizing* as having overlooked this distinction Lash *v.* Parlin, 78 Mo. 391; O'Neil *v.* Crain, 67 Mo. 250]; Carrick *v.* Mincke, 60 Mo. App. 140.

New York.— Potter *v.* Hopkins, 25 Wend. 417. See also Sale *v.* Darragh, 2 Hilt. 184.

Pennsylvania.— Musselman *v.* Stoner, 31 Pa. St. 265.

Tennessee.— Allison *v.* Rutledge, 5 Yerg. 193.

United States.— Lafitte *v.* Shawcross, 12 Fed. 519. See, generally, Frauds, Statute of.

70. Naumberg *v.* Young, 44 N. J. L. 331, 43 Am. Rep. 380.

71. Roberts *v.* Bonaparte, 73 Md. 191, 20 Atl. 918, 10 L. R. A. 689; Thomas *v.* Barnes, 156 Mass. 581, 31 N. E. 683; Hines *v.* Willcox, 96 Tenn. 148, 33 S. W. 914, 54 Am. St. Rep. 823, 34 L. R. A. 824, 832; Cobb *v.* Wallace, 5 Coldw. (Tenn.) 539, 98 Am. Dec. 435.

which it is claimed the evidence offered will vary or contradict is not itself in evidence.[72]

D. Proceedings in Which Parol Evidence Rule Not Applicable — 1. To Cancel or Reform Instrument. The rule excluding parol or extrinsic evidence to vary or contradict a written instrument has no application in a proceeding brought for the purpose of obtaining the cancellation or reformation of the instrument,[73] but in such a proceeding it may be shown that the instrument does not correctly express the intentions of the parties by reason of a mutual mistake,[74] or that it is tainted with fraud.[75] And this is true whether or not the contract is such as is required by the statute of frauds to be in writing.[76]

2. For Specific Performance. When a court of equity is asked to compel the specific performance of a contract, the inquiry may be made whether in equity and good conscience the court ought to specifically enforce it, and this involves the hearing of evidence of extrinsic facts. It has long been the established rule that it rests in the sound legal discretion of courts of equity whether or not they will compel the specific performance of any particular contract, and such a discretion is not a mere arbitrary discretion but a discretion to be reasonably exercised upon a full and fair consideration of all the facts and circumstances involved. Hence it is usually held competent for defendant in such a proceeding to show that the writing does not express the true agreement of the parties.[77] But a court of equity will not, at the instance of the party seeking to enforce performance, reform the instrument by the aid of parol evidence and then decree execution of it as reformed.[78]

3. Controversies to Which Strangers to Writing Are Parties — a. In General. The rule excluding parol evidence to vary or contradict a written instrument

72. Ropes *v.* Arnold, 81 Hun (N. Y.) 476, 30 N. Y. Suppl. 997; McVicker *v.* Cone, 21 Oreg. 353, 28 Pac. 76.

73. *Georgia.*— Cotton States L. Ins. Co. *v.* Carter, 65 Ga. 228.

Indiana.— Jones *v.* Sweet, 77 Ind. 187.

Iowa.— Hausbrandt *v.* Hofler, 117 Iowa 103, 90 N. W. 494, 94 Am. St. Rep. 289.

Maryland.— Conner *v.* Groh, 90 Md. 674, 45 Atl. 1024.

North Dakota.— Forester *v.* Van Auken, 12 N. D. 175, 96 N. W. 301.

Canada.— Merchants' Bank *v.* Morrison, 19 Grant Ch. (U. C.) 1.

See Cancellation of Instruments, 5 Cyc. 282; and, generally, Reformation of Instruments.

74. *California.*—Kee *v.* Davis, 137 Cal. 456, 70 Pac. 294.

Indian Territory.— Byrne *v.* Ft. Smith Nat. Bank, 1 Indian Terr. 680, 43 S. W. 957.

North Carolina.— Southern Finishing, etc., Co. *v.* Ozment, 132 N. C. 839, 44 S. E. 681.

Ohio.— Gill *v.* Pelkey, 54 Ohio St. 348, 43 N. E. 991.

Tennessee.— Barnes *v.* Gregory, 1 Head 230.

United States.— See The Tarquin, 23 Fed. Cas. No. 13,755, 2 Lowell 358.

England.— Gun *v.* McCarthy, 13 L. R. Ir. 304.

See also *supra*, XVI, C, 18, i.

75. *California.*— Barfield *v.* South Side Irr. Co., 111 Cal. 118, 43 Pac. 406; Hick *v.* Thomas, 90 Cal. 289, 27 Pac. 208, 376, to cancel a deed for undue influence.

Illinois.— Hicks *v.* Stevens, 121 Ill. 186, 11 N. E. 241.

Louisiana.— Thomas *v.* Kennedy, 24 La. Ann. 209.

Minnesota.— Cooper *v.* Finke, 38 Minn. 2, 35 N. W. 469.

Tennessee.— Bennett *v.* Massachusetts Mut. L. Ins. Co., 107 Tenn. 371, 64 S. W. 758; Barnes *v.* Gregory, 1 Head 230.

Texas.— American Cotton Co. *v.* Collier, 30 Tex. Civ. App. 105, 69 S. W. 1021.

See also *supra*, XVI, C, 18, e.

76. McLennan *v.* Johnston, 60 Ill. 306. See, generally, Frauds, Statute of.

77. *Connecticut.*— Osborn *v.* Phelps, 19 Conn. 63, 48 Am. Dec. 133.

Illinois.— Espert *v.* Wilson, 190 Ill. 629, 60 N. E. 923 [*affirming* 90 Ill. App. 111].

Kentucky.— Harrison *v.* Talbot, 2 Dana 258; Smith *v.* Smith, 4 Bibb 81.

Massachusetts.— Dwight *v.* Pomeroy, 17 Mass. 303, 9 Am. Dec. 148.

Michigan.— Chambers *v.* Livermore, 15 Mich. 381.

New Jersey.— King *v.* Ruckman, 21 N. J. Eq. 599.

North Carolina.— Herren *v.* Rich, 95 N. C. 500.

Virginia.— Averett *v.* Lipscombe, 76 Va. 404; Ratcliffe *v.* Allison, 3 Rand. 537.

United States.— Newton *v.* Wooley, 105 Fed. 541.

England.— Gordon *v.* Hertfort, 2 Madd. 106, 17 Rev. Rep. 195.

See, generally, Specific Performance.

78. Osborn *v.* Phelps, 19 Conn. 63, 48 Am. Dec. 133. See, generally, Specific Performance.

applies only in controversies between the parties to the instrument and those claiming under them.[79] It has no application in controversies between a party to the instrument on the one hand and a stranger to it on the other, for the stranger not having assented to the contract is not bound by it, and is therefore at liberty when his rights are concerned to show that the written instrument does not express the full or true character of the transaction. And where the stranger to the instrument is thus free to vary or contradict it by parol evidence his adversary, although a party to the instrument, must be equally free to do so.[80] This

79. *Alabama.*—Coleman *v.* Pike County, 83 Ala. 326, 3 So. 755, 3 Am. St. Rep. 746; Holly *v.* Pruitt, 77 Ala. 334; Holland *v.* Kimbrough, 52 Ala. 249.

California.— Dunn *v.* Price, 112 Cal. 46, 44 Pac. 354.

Florida.— Roof *v.* Chattanooga Wood Split Pulley Co., 36 Fla. 284, 18 So. 597.

Illinois.— Harts *v.* Emery, 184 Ill. 560, 56 N. E. 865 [*affirming* 84 Ill. App. 317]; Washburn, etc., Mfg. Co. *v.* Chicago Galvanized Wire Fence Co., 109 Ill. 71; Needles *v.* Hanifan, 11 Ill. App. 303.

Indiana.— See Frederick *v.* Devol, 15 Ind. 357.

Indian Territory.— Central Coal, etc., Co. *v.* Good, (1901) 64 S. W. 677.

Iowa.— Livingston *v.* Heck, 122 Iowa 74, 94 N. W. 1098.

Maine.— Burnham *v.* Dorr, 72 Me. 198.

Maryland.— Grove *v.* Rentch, 26 Md. 367.

Minnesota.—Pfeifer *v.* National Live Stock Ins. Co., 62 Minn. 536, 64 N. W. 1018; Clerihew *v.* West Side Bank, 50 Minn. 538, 52 N. W. 967.

New York.—Folinsbee *v.* Sawyer, 157 N. Y. 196, 51 N. E. 994; Juilliard *v.* Chaffee, 92 N. Y. 529; City Trust, etc., Co. *v.* American Brewing Co., 70 N. Y. App. Div. 511, 75 N. Y. Suppl. 140; Emerald, etc., Brewing Co. *v.* Leonard, 22 Misc. 120, 48 N. Y. Suppl. 706; New Berlin Overseers of Poor *v.* Norwich Overseers of Poor, 10 Johns. 229.

Tennessee.— Myers *v.* Taylus, 107 Tenn. 364, 64 S. W. 719.

Texas.— Johnson *v.* Portwood, 89 Tex. 235, 34 S. W. 596, 787; Hughes *v.* Sandal, 25 Tex. 162; Pierce *v.* Johnson, (Civ. App. 1899) 50 S. W. 610.

Utah.—Moyle *v.* Salt Lake City Cong. Soc., 16 Utah 69, 50 Pac. 806.

Vermont.— Fonda *v.* Burton, 63 Vt. 355, 22 Atl. 594.

United States.— Central Coal, etc., Co. *v.* Good, 120 Fed. 793, 57 C. C. A. 161.

See 20 Cent. Dig. tit. "Evidence," §§ 1966–1968.

80. *Alabama.*— British, etc., Mortg. Co. *v.* Cody, 135 Ala. 622, 33 So. 832; Coleman *v.* Pike County, 83 Ala. 326, 3 So. 755, 3 Am. St. Rep. 746; Lehman *v.* Howze, 73 Ala. 302; Carter *v.* Wilson, 61 Ala. 434; Cunningham *v.* Milner, 56 Ala. 522; Boswell *v.* Carlisle, 55 Ala. 554; Venable *v.* Thompson, 11 Ala. 147.

Arkansas.— Talbot *v.* Wilkins, 31 Ark. 411.

California.— Dunn *v.* Price, 112 Cal. 46, 44 Pac. 354; Darby *v.* Arrowhead Hot Springs Hotel Co., 97 Cal. 384, 32 Pac. 454; Hussman *v.* Wilkes, 50 Cal. 250; Smith *v.* Moynihan, 44 Cal. 53; Ellis *v.* Crawford, 39 Cal. 523.

Connecticut.— Johnson *v.* Blackman, 11 Conn. 342.

Florida.— Roof *v.* Chattanooga Wood Split Pulley Co., 36 Fla. 284, 18 So. 597.

Georgia.— Dickey *v.* Grice, 110 Ga. 315, 35 S. E. 291. See also Ford *v.* Smith, 25 Ga. 675.

Illinois.— Northern Assur. Co. *v.* Chicago Mut. Bldg., etc., Assoc., 198 Ill. 474, 64 N. E. 979 [*affirming* 98 Ill. App. 152]; Washburn, etc., Mfg. Co. *v.* Chicago Galvanized Wire Fence Co., 109 Ill. 71; Silsbury *v.* Plumb, 26 Ill. 287; Chicago, etc., R. Co. *v.* Beach, 29 Ill. App. 157.

Indiana.— Burns *v.* Thompson, 91 Ind. 146.

Indian Territory.— Smith *v.* Moore, 2 Indian Terr. 126, 48 S. W. 1025.

Iowa.— Livingston *v.* Stevens, 122 Iowa 62, 94 N. W. 925; Clark *v.* Shannon, 117 Iowa 645, 91 N. W. 923; Logan *v.* Miller, 106 Iowa 511, 76 N. W. 1005; De Goey *v.* Van Wyk, 97 Iowa 491, 66 N. W. 787.

Kentucky.— Provident Sav. L. Assur. Soc. *v.* Johnson, 115 Ky. 84, 72 S. W. 754, 24 Ky. L. Rep. 1902; Edwards *v.* Ballard, 14 B. Mon. 289; Strader *v.* Lambeth, 7 B. Mon. 589; Marks *v.* Hardy, 78 S. W. 864, 1105, 25 Ky. L. Rep. 1770, 1909.

Louisiana.— Cary *v.* Richardson, 35 La. Ann. 505; Finley *v.* Bogan, 20 La. Ann. 443; Blake *v.* Hall, 19 La. Ann. 49; Smith *v.* Conrad, 15 La. Ann. 579; Dupuy *v.* Dupont, 11 La. Ann. 226; Davis *v.* Binion, 5 La. Ann. 248; Hill *v.* Spayenberg, 4 La. Ann. 553; Groves *v.* Steel, 2 La. Ann. 480, 46 Am. Dec. 551; Mathews *v.* Boland, 5 Rob. 200; *In re* Hacket, 4 Rob. 290; Frost *v.* Bebout, 14 La. 104; Gravier *v.* Cullion, 11 La. 269; Macarty *v.* Bond, 9 La. 351; Maignan *v.* Gleises, 4 La. 1; Rogers *v.* Hendsley, 2 La. 597; Prudence *v.* Bermodi, 1 La. 234; Delahoussaye *v.* Delahoussaye, 7 Mart. N. S. 199; Guidry *v.* Grivot, 2 Mart. N. S. 13, 14 Am. Dec. 193; Barry *v.* Louisiana Ins. Co., 11 Mart. 630; Morgan *v.* Livingston, 6 Mart. 19.

Maine.— See Burnham *v.* Dorr, 72 Me. 198. But *compare* Bell *v.* Woodman, 60 Me. 465.

Maryland.— Fant *v.* Sprigg, 50 Md. 551; Groshon *v.* Thomas, 20 Md. 234; Crawford *v.* Brooke, 4 Gill 213.

Massachusetts.— O'Connell *v.* Kelly, 114 Mass. 97; Badger *v.* Jones, 12 Pick. 371.

Michigan.— Highstone *v.* Burdette, 61 Mich. 54, 27 N. W. 852; Busch *v.* Pollock, 41 Mich. 64, 1 N. W. 921.

has been held to be true in the case of writings of all kinds, as for example,

Minnesota.— Pfeifer *v.* National Live Stock Ins. Co., 62 Minn. 536, 64 N. W. 1018; Horn *v.* Hansen, 56 Minn. 43, 57 N. W. 315, 22 L. R. A. 617; Northwestern Railroader *v.* Cyclone Steam Snow Plow Co., 49 Minn. 133, 51 N. W. 658; National Car, etc., Builder *v.* Cyclone Steam Snow Plow Co., 49 Minn. 125, 51 N. W. 657; Sanborn *v.* Sturtevant, 17 Minn. 194; Van Eman *v.* Stanchfield, 10 Minn. 255.

Mississippi.— Rice *v.* Troup, 62 Miss. 186; Whitney *v.* Cowan, 55 Miss. 626.

Missouri.— McKee *v.* St. Louis, 17 Mo. 184; Cordes *v.* Straszer, 8 Mo. App. 61.

Nebraska.— Wayne First Nat. Bank *v.* Tolerton, (1903) 97 N. W. 248; Crockett *v.* Miller, 2 Nebr. (Unoff.) 292, 96 N. W. 491; Barbar *v.* Martin, (1903) 93 N. W. 722; Sheehy *v.* Fulton, 38 Nebr. 691, 57 N. W. 395, 41 Am. St. Rep. 567.

Nevada.— California Bank *v.* White, 14 Nev. 373.

New Hampshire.— French *v.* Westgate, 71 N. H. 510, 53 Atl. 310; Libby *v.* Mt. Monadnock Mineral Springs, etc., Co., 67 N. H. 587, 32 Atl. 772; Wilson *v.* Sullivan, 58 N. H. 260; Stone *v.* Aldrich, 43 N. H. 52; Fiske *v.* McGregory, 34 N. H. 414; Furbush *v.* Goodwin, 25 N. H. 425; Edgerly *v.* Emerson, 23 N. H. 555, 55 Am. Dec. 207; Low *v.* Blodgett, 21 N. H. 121; Woodman *v.* Eastman, 10 N. H. 359.

New Jersey.— Plainfield First Nat. Bank *v.* Dunn, 55 N. J. L. 404, 27 Atl. 908; Bird *v.* Davis, 14 N. J. Eq. 467.

New York.— Hankinson *v.* Vantine, 152 N. Y. 20, 46 N. E. 292 [*reversing* 10 Misc. 185, 30 N. Y. Suppl. 1040]; Lowell Mfg. Co. *v.* Safeguard F. Ins. Co., 88 N. Y. 591; Sprague *v.* Hosmer, 82 N. Y. 466; Brown *v.* Thurber, 77 N. Y. 613, 58 How. Pr. 96; McMaster *v.* Insurance Co. of North America, 55 N. Y. 222, 14 Am. Rep. 239; Coleman *v.* Elmira First Nat. Bank, 53 N. Y. 388; Lee *v.* Adsit, 37 N. Y. 78; Eaton *v.* Alger, 2 Abb. Dec. 5, 2 Keyes 41; Emmett *v.* Penoyer, 76 Hun 551, 28 N. Y. Suppl. 234; Norton *v.* Keogh, 42 Hun 611; Church *v.* Kidd, 3 Hun 254, 5 Thomps. & C. 454; McArthur *v.* Soule, 66 Barb. 423; Taylor *v.* Baldwin, 10 Barb. 582; Warburton *v.* Camp, 55 N. Y. Super. Ct. 290, 14 N. Y. St. 755; Mason *v.* Decker, 42 N. Y. Super. Ct. 115; Earle *v.* Crane, 6 Duer 564; Dumois *v.* New York, 37 Misc. 614, 76 N. Y. Suppl. 161; Williams *v.* Fisher, 8 Misc. 314, 28 N. Y. Suppl. 739; Fox *v.* McComb, 18 N. Y. Suppl. 611; Turver *v.* Field, 13 N. Y. St. 12; New Berlin Overseers of Poor *v.* Norwich Overseers of Poor, 10 Johns. 229.

North Carolina.— Reynolds *v.* Magness, 24 N. C. 26.

North Dakota.— Luther *v.* Hunter, 7 N. D. 544, 75 N. W. 916.

Ohio.— Clapp *v.* Huron County Banking Co., 50 Ohio St. 528, 35 N. E. 308.

Oregon.— Pacific Biscuit Co. *v.* Dugger, 42 Oreg. 513, 70 Pac. 523.

Pennsylvania.— Com. *v.* Contner, 21 Pa. St. 266. See also Crown Slate Co. *v.* Allen, 199 Pa. St. 239, 48 Atl. 968.

Tennessee.— Myers *v.* Taylor, 107 Tenn. 364, 64 S. W. 719; August *v.* Seeskind, 6 Coldw. 166.

Texas.— Johnson *v.* Portwood, 89 Tex. 235, 34 S. W. 596, 787; Hughes *v.* Sandal, 25 Tex. 162; Randolph *v.* Junker, 1 Tex. Civ. App. 517, 21 S. W. 551. See also Wells *v.* Battle, 5 Tex. Civ. App. 532, 24 S. W. 353.

Vermont.— Fonda *v.* Burton, 63 Vt. 355, 22 Atl. 594.

Virginia.— Bruce *v.* John L. Roper Lumber Co., 87 Va. 381, 13 S. E. 153, 24 Am. St. Rep. 657.

Washington.— Corbin *v.* Oriental Trading Co., 32 Wash. 668, 73 Pac. 781; Carmack *v.* Drum, 32 Wash. 236, 73 Pac. 377, 785; Elliott *v.* Puget Sound, etc., Steamship Co., 22 Wash. 220, 70 Pac. 410.

United States.—Barreda *v.* Silsbee, 21 How. 146, 16 L. ed. 86; Sigua Iron Co. *v.* Greene, 88 Fed. 207, 31 C. C. A. 477; Wooster *v.* Simonson, 20 Fed. 316; The Phebe, 19 Fed. Cas. No. 11,064, 1 Ware 263.

See 20 Cent. Dig. tit. "Evidence," §§ 1966–1968.

Testimony of a party is admissible to vary or contradict the terms of the writing. Hensley *v.* Brodie, 16 Ark. 511; Highstone *v.* Burdette, 61 Mich. 54, 27 N. W. 852; Luther *v.* Hunter, 7 N. D. 544, 75 N. W. 916; Sigafus *v.* Porter, 84 Fed. 430, 28 C. C. A. 443.

Evidence to support instrument.— Where a person not a party to an instrument has introduced parol evidence to vary its terms and show that it is not what it purports to be and does not express the true intent of the parties, one of the parties to the instrument may introduce parol evidence to support it and show that by its terms the true intent of the parties is expressed and generally established the *bona fides* of the transaction. Smith *v.* Moore, 2 Indian Terr. 126, 48 S. W. 1025.

A trustee in insolvency proceedings is in contemplation of the law a stranger to a bill of sale executed by the insolvent, for he takes by virtue of his office for the benefit of creditors. Grove *v.* Rentch, 26 Md. 367.

A curator ad hoc, who, although mentioned in a notarial act, as assisting the minor vendee, does not sign it, is a third person, and may show by parol that the price, stated to have been paid in cash by the minor, was paid by himself, partly cash and the balance by his note. Benoit *v.* Broussard, 19 La. 387.

One of two joint tort-feasors can avail himself of a release of the other, and is therefore not a stranger to the release to that extent, but he is a stranger to the instrument in the sense in which the term is used in the rule that in a suit between a party to a contract and a stranger thereto neither is concluded by the writing, but either may contradict it by parol evidence. O'Shea *v.* New York, etc., R. Co., 105 Fed. 559, 44 C. C. A. 601 [*dis-*

deeds,[81] mortgages,[82] leases,[83] bills of sale,[84] licenses,[85] insurance policies,[86] and contractual receipts.[87] And even a judicial record is not conclusive upon persons not parties or privies to the action or proceeding.[88]

b. Third Person Claiming Under Instrument. The rule which forbids the terms of a written contract to be varied by parol evidence[89] does not preclude one not a party to the contract from showing that he has rights under it, because it was entered into for his benefit.[90] But where a third person not a party to an instrument claims rights or benefits thereunder and seeks to take advantage thereof, the parol evidence rule applies to him as much as to a party, and he is not entitled to introduce evidence to vary or contradict the writing.[91] It has been asserted that the recitals of a deed, mortgage, or other instrument do not form a contract between, and are not conclusive in a subsequent contest, an interpleader suit for example,[92] between the grantors or the parties to the obligation on one side or their privies.[93]

E. Waiver of Benefit of Rule. Where a party who is entitled to the benefit of the rule prohibiting the admission of parol evidence to vary or contradict a

approving Denver, etc., R. Co. *v.* Sullivan, 21 Colo. 302, 41 Pac. 501; Goss *v.* Ellison, 136 Mass. 503; Brown *v.* Cambridge, 3 Allen (Mass.) 474].

Principal and agent.— In an action by a principal upon a contract made by his agent in his behalf, against the other party to the contract, the rule excluding parol evidence to vary the contract would apply, but in an action by the principal against the agent to recover the true consideration received by the agent for the sale of property owned by the principal, under a contract in the agent's name, the rule does not apply. Barbar *v.* Martin, (Nebr. 1903) 93 N. W. 722.

In a contest between a party and a privy of the other party to a contract or other writing neither can introduce evidence to vary or contradict the writing. W. C. Belcher Land Mortg. Co. *v.* Norris, (Tex. Civ. App. 1903) 78 S. W. 390.

Cases explained and reconciled.— There are a few cases in which the right of parties to a written instrument to contradict or impeach it in a controversy with strangers has been denied, but in cases of this character the true ground of the decision is that the rights of third persons have intervened so as to estop the parties from denying that the effect of the instrument is what its terms import. See *infra*, XVI, F.

81. Dickey *v.* Grice, 110 Ga. 315, 35 S. E. 291; Walton *v.* Cronly, 14 Wend. (N. Y.) 63; Kahle *v.* Stone, 95 Tex. 106, 65 S. W. 623; Hart *v.* Meredith, 27 Tex. Civ. App. 271, 65 S. W. 507; Carmack *v.* Drum, 32 Wash. 236, 73 Pac. 377, 785.

82. Powell *v.* Young, 51 Ala. 518; De Goey *v.* Van Wyk, 97 Iowa 491, 66 N. W. 787; Shearer *v.* Babson, 1 Allen (Mass.) 486.

A third person may show a mortgage to be void, although the evidence contradicts the express terms thereof. Aleshire *v.* Lee County Sav. Bank, 105 Ill. App. 32.

83. Gates *v.* Steele, 48 Ark. 539, 4 S. W. 53.

84. Gregory *v.* Murrell, 37 N. C. 233; Pacific Biscuit Co. *v.* Dugger, 42 Oreg. 513, 70 Pac. 523.

85. Wooster *v.* Simonson, 20 Fed. 316.

86. Pittman *v.* Harris, 24 Tex. Civ. App. 503, 59 S. W. 1121.

87. Furbush *v.* Goodwin, 25 N. H. 425.

88. *Alabama.*— Watson *v.* Holly, 57 Ala. 335.

Arkansas.— State *v.* Martin, 20 Ark. 629.

New Jersey.— Den *v.* Clark, 10 N. J. L. 217, 18 Am. Dec. 417.

Tennessee.— See Revis *v.* Wallace, 2 Heisk. 658.

England.— Sergeson *v.* Sealey, 2 Atk. 412, 26 Eng. Reprint 648.

See, generally, JUDGMENTS.

89. See *supra*, XVI, A, 1.

90. Stowell *v.* Eldred, 39 Wis. 614. And see, generally, PRINCIPAL AND AGENT.

Changing character of instrument.— But a third person, not a party to a plain and unambiguous covenant of indemnity, cannot, in an action against the covenantor, introduce evidence to change the import and character of the instrument so as to make it inure to his (the third person's) benefit. Traders' Nat. Bank *v.* Washington Water Power Co., 22 Wash. 467, 61 Pac. 152.

91. *Indiana.*—See Hostetter *v.* Aumon, 119 Ind. 7, 20 N. E. 506.

Maine.— McLellan *v.* Cumberland Bank, 24 Me. 566 [*followed* in Bell *v.* Woodman, 60 Me. 465].

Minnesota.— Sayre *v.* Burdick, 47 Minn. 367, 50 N. W. 245.

Missouri.— Schneider *v.* Kirkpatrick, 80 Mo. App. 145.

New Hampshire.— Libby *v.* Monadnock Mineral Spring, etc., Co., 67 N. H. 587, 32 Atl. 772.

New York.— Selchow *v.* Stymus, 26 Hun 145; Hankinson *v.* Riker, 10 Misc. 185, 30 N. Y. Suppl. 1140; Spingarn *v.* Rosenfeld, 4 Misc. 523, 24 N. Y. Suppl. 723.

But *compare* Johnson *v.* Portwood, 89 Tex. 235, 34 S. W. 596, 787.

92. See also Rymer *v.* South Penn. Oil Co., 54 W. Va. 530, 46 S. E. 559.

93. Sprague *v.* Beamer, 45 Ill. App. 17; Tilghman's Succession, 11 Rob. (La.) 124;

writing[94] waives the benefit thereof by allowing such evidence to be received without objection and without any effort to have it stricken from the minutes or disregarded by the trial court,[95] he cannot, after the trial has closed and the case has been decided against him, invoke the rule in order to secure a reversal of the judgment by an appellate court.[96] So also where one party has introduced evidence of the conversations and negotiations leading up to a written agreement, the other party may give evidence as to the same matters, notwithstanding an objection that the evidence offered by him tends to vary or contradict the writing.[97]

F. Rights of Third Persons. Even though some of the exceptions to the parol evidence rule[98] might warrant the introduction of parol evidence to show the true contract evidenced by the writing, or some collateral agreement and the like, the rights of a third person may intervene so as to preclude the admission of any evidence whatever to show the transaction or the effect of the instrument to be other than it appears to be on its face.[99]

XVII. WEIGHT AND SUFFICIENCY.*

A. Degree of Proof — 1. VARIOUS TERMS DEFINED — a. Competent Evidence. By competent evidence is meant that which the very nature of the thing to be proved requires as the fit and appropriate proof in the particular case.[1]

b. Conclusive Evidence. Conclusive evidence is evidence incontrovertible[2] — "either a presumption of law, or else evidence so strong as to overbear all other in the case to the contrary."[3]

c. Demonstration. Demonstration is that degree of evidence which excludes all possibility of error and is presented only in mathematical deductions.[4]

d. Moral Evidence. By moral evidence is meant all the evidence which is not obtained either from intuition or from demonstration.[5]

Lee *v.* Adsit, 37 N. Y. 78; Thomas *v.* Truscott, 53 Barb. (N. Y.) 200.

94. See *supra*, XVI, A, 1.

95. See *infra*, XVII, C, 1, f.

96. Beckwith *v.* Talbot, 2 Colo. 639; Brady *v.* Nally, 151 N. Y. 258, 45 N. E. 547 [*reversing* 8 Misc. 9, 28 N. Y. Suppl. 64]; Schwersenski *v.* Vineberg, 19 Can. Supreme Ct. 243 [*affirming* 7 Montreal Q. B. 137]. See also APPEAL AND ERROR, 2 Cyc. 693 *et seq.*

97. *Connecticut.*—Arbeiter *v.* Day, 39 Conn. 155.

Iowa.— See Hallenbeck *v.* Garst, 96 Iowa 509, 65 N. W. 417.

New York.— Barranco *v.* Towner, 11 Misc. 666, 32 N. Y. Suppl. 914.

Vermont.— Perkins *v.* Adams, 30 Vt. 230.

Virginia.— Witz *v.* Fite, 91 Va. 446, 22 S. E. 171.

98. See *supra*, XVI, C.

99. *Alabama.*— Summerhill *v.* Tapp, 52 Ala. 227.

Colorado.— Durkee *v.* Jones, 27 Colo. 159, 60 Pac. 618.

Louisiana.— Ragsdale *v.* Ragsdale, 105 La. 405, 29 So. 906; Prevost *v.* Ellis, 11 Rob. 56.

Maryland.— Campbell *v.* Lowe, 9 Md. 500, 66 Am. Dec. 339; Alderson *v.* Ames, 6 Md. 52.

Massachusetts.— Hannum *v.* Kingsley, 107 Mass. 355.

North Carolina.— See Greene County Com'rs *v.* Holliday, 3 N. C. 384.

Pennsylvania.— Helter *v.* Glasgow, 79 Pa. St. 79, 21 Am. Rep. 46; Heilner *v.* Imbrie, 6 Serg. & R. 401; Scott *v.* Burton, 2 Ashm. 312.

Texas.— Farley *v.* Deslonde, 69 Tex. 458, 6 S. W. 786; Cooke *v.* Bremond, 27 Tex. 457, 86 Am. Dec. 626.

Vermont.— Sanford *v.* Norton, 17 Vt. 285.

Virginia.— Siter *v.* McClanachan, 2 Gratt. 280.

Consideration.—The rights of third persons may intervene so as to preclude the admission of parol evidence to vary the statements of a deed or note as to the consideration. Macomb *v.* Wilkinson, 83 Mich. 486, 47 N. W. 336; Kilpatrick *v.* Kilpatrick, 23 Miss. 124, 55 Am. Dec. 79; Duval *v.* Bibb, 4 Hen. & M. (Va.) 113, 4 Am. Dec. 506. Thus it has been held that if a deed is impeached by creditors of the grantor for fraud, actual or constructive, it cannot be supported by evidence of a consideration different from that alleged in it. Galbreath *v.* Cook, 30 Ark. 417. *Compare*, however, Grote *v.* Meyer, 6 Ohio Dec. (Reprint) 1025, 9 Am. L. Rec. 623.

1. 1 Greenleaf Ev. § 2.

2. Wood *v.* Chapin, 13 N. Y. 509, 515, 67 Am. Dec. 62, per Denio, C. J.

3. Haupt *v.* Pohlman, 1 Rob. (N. Y.) 121, 127, per Robertson, J.

4. 1 Greenleaf Ev. § 1.

5. 1 Greenleaf Ev. § 2.

* By Charles C. Moore.

e. Mere Scintilla. A mere scintilla of evidence means the least particle of evidence — evidence which, without further evidence, is a mere trifle.[6]

f. Prima Facie Evidence. *Prima facie* evidence is that which, either alone or aided by other facts presumed from those established by the evidence, shows the existence of the fact it is adduced to prove, unless overcome by counter evidence.[7]

g. Satisfactory Evidence. Satisfactory evidence has been defined to be that amount of proof which ordinarily satisfies an unprejudiced mind beyond a reasonable doubt.[8]

h Evidence Excluding Reasonable Doubt. The term "reasonable doubt" has been defined elsewhere in this work.[9]

2 Mere Conjecture or Suspicion. A fact cannot be regarded as proved where the evidence merely gives rise to conjecture[10] or suspicion[11] of its existence.

3. Preponderance of Evidence — a. Preponderance Required — (1) *In General.* In civil cases an issue of fact cannot be regarded as proved unless the party having the burden of proof thereon produces a preponderance of evidence.[12]

6. Offutt *v.* World's Columbian Exposition Co., 175 Ill. 472, 51 N. E. 651. As to the propriety of directing a verdict against a party producing only a scintilla of evidence see, generally, Trial.

7. McIntyre *v.* Ajax Min. Co., 20 Utah 323, 60 Pac. 552. To the same effect see Lyons *v.* Williams, 15 Ill. App. 27; Emmons *v.* Westfield Bank, 97 Mass. 230, 243; Smith *v.* Gardner, 36 Nebr. 741, 55 N. W. 245; Floeck *v.* State, 34 Tex. Civ. App. 314, 30 S. W. 794.

8. 1 Greenleaf Ev. § 2. See also Missouri Pac. R. Co. *v.* Bartlett, 81 Tex. 42, 16 S. W. 638; and cases cited *infra*, XVII, A, 3, c, (I).

9. See Criminal Law, 12 Cyc. 491.

10. *Illinois.*— Warner *v.* Crandall, 65 Ill. 195.

Iowa.— Wheelan *v.* Chicago, etc., R. Co., 85 Iowa 167, 52 N. W. 119.

Maryland.— Siacik *v.* Northern Cent. R. Co., 92 Md. 213, 48 Atl. 149; Maryland Land, etc., Assoc. *v.* Moore, 80 Md. 102, 33 Atl. 59.

Michigan.— Baird *v.* Abbey, 73 Mich. 347, 41 N. W. 272.

Missouri.— Newcomb *v.* Jones, 37 Mo. App. 475, 479.

New Jersey.— Wilson *v.* Cobb, 28 N. J. Eq. 177, 181.

New York.— O'Connell *v.* Clark, 78 N. Y. Suppl. 93; Weber *v.* Third Ave. R. Co., 42 N. Y. Suppl. 789.

Pennsylvania.— Smith *v.* Holmesburg, etc., Electric R. Co., 187 Pa. St. 451, 41 Atl. 479; Snodgrass *v.* Carnegie Steel Co., 173 Pa. St. 228, 33 Atl. 1104; Erie, etc., R. Co. *v.* Smith, 125 Pa. St. 259, 17 Atl. 443, 11 Am. St. Rep. 895.

Tennessee.— Cumberland Land Co. *v.* Canter Lumber Co., (Ch. App. 1895) 35 S. W. 886.

United States.— Cunard Steamship Co. *v.* Kelley, 126 Fed. 610, 617, 61 C. C. A. 532; Carleton *v.* Davis, 5 Fed. Cas. No. 2,408, 2 Ware 225; Guibert *v.* The George Bell, 11 Fed. Cas. No. 5,856, 3 Hughes 468.

11. Smith *v.* Lawrence, 98 Me. 92, 56 Atl. 455; Jewett *v.* Dringer, 29 N. J. Eq. 199 (fraud); Homeopathic Mut. L. Ins. Co. *v.* Crane, 25 N. J. Eq. 418 (usury); Morris *v.* Taylor, 22 N. J. Eq. 438 [*affirmed* in 22 N. J. Eq. 606] (usury); Johns *v.* Norris, 22 N. J. Eq. 102 (fraud); New Jersey Patent Tanning Co. *v.* Turner, 14 N. J. Eq. 326 (usury); Jaeger *v.* Kelley, 52 N. Y. 274 (fraud); Harrison *v.* Juneau Bank, 17 Wis. 340 (mistake in written instrument).

12. *Alabama.*— Preston *v.* Land Mortg. Invest. Agency Co., 119 Ala. 290, 24 So. 707.

Georgia.— Anderson *v.* Savannah Press Pub. Co., 100 Ga. 454, 28 S. E. 216.

Illinois.— North Chicago St. R. Co. *v.* Fitzgibbons, 180 Ill. 466, 54 N. E. 483 [*affirming* 79 Ill. App. 632]; North Chicago St. R. Co. *v.* Louis, 138 Ill. 9, 27 N. E. 451; Mayers *v.* Smith, 121 Ill. 442, 13 N. E. 216; Tedens *v.* Schumers, 112 Ill. 263; Ottawa City Nat. Bank *v.* Dudgeon, 65 Ill. 11; De Clerq *v.* Mungin, 46 Ill. 112; Waterman *v.* Donalson, 43 Ill. 29; McCarthey *v.* Mooney, 41 Ill. 300; Kenyon *v.* Hampton, 70 Ill. App. 80; North Chicago St. R. Co. *v.* Louis, 35 Ill. App. 477; Wilson *v.* Higgins, 3 Ill. App. 288.

Indiana.— De Hart *v.* Johnson County, 143 Ind. 463, 41 N. E. 825; Zonker *v.* Cowan, 84 Ind. 395.

Kentucky.— Patterson *v.* Hansel, 4 Bush 654.

Maryland.— Ohlendorf *v.* Kanne, 66 Md. 495, 8 Atl. 351.

New Jersey.— Gallagher *v.* McBride, 63 N. J. L. 422, 44 Atl. 203; Daggers *v.* Van Dyck, 37 N. J. Eq. 130; Paulison *v.* Van Iderstine, 29 N. J. Eq. 594.

New York.— New York, etc., Ferry Co. *v.* Moore, 102 N. Y. 667, 6 N. E. 293; Searles *v.* Manhattan R. Co., 101 N. Y. 661, 5 N. E. 66; Hale *v.* Smith, 78 N. Y. 480; Briggs *v.* New York Cent., etc., R. Co., Sheld. 433; Shook *v.* Lyon, 16 Daly 420, 11 N. Y. Suppl. 720; Jeans *v.* Bolton, 4 Misc. 609, 24 N. Y. Suppl. 916; Drake *v.* Hansen, 62 N. Y. Suppl. 433.

South Carolina.— Fowler *v.* Harrison, 64 S. C. 311, 42 S. E. 159.

Texas.— Southwestern Tel., etc., Co. *v.* Newman, (Civ. App. 1896) 34 S. W. 661;

If the evidence preponderates against him in the slightest degree his contention is not established.[13]

(II) *Equilibrium of Evidence.* Where the evidence on an issue of fact is in equipoise[14] or there is any doubt on which side the evidence preponderates[15] the party having the burden of proof fails upon that issue.

b. Preponderance Sufficient — (I) *In General.* In ordinary civil actions[16] a fact is sufficiently proved by a preponderance of evidence.[17] Thus, under this

Dockery *v.* Tyler Car, etc., Co., (Civ. App. 1896) 34 S. W. 660.

United States.— The Charles L. Jeffrey, 55 Fed. 685, 5 C. C. A. 246; The St. John, 54 Fed. 1015, 5 C. C. A. 16; Love *v.* Dumper Scow No. 11, 48 Fed. 740; The Hunter, 47 Fed. 744; The Cement Rock, 38 Fed. 764.

See 20 Cent. Dig. tit. "Evidence," § 2446.

Preponderance in number of witnesses is not decisive. See *infra*, XVII, A, 3, e, (II).

Proof of partnership.— In actions against a firm by a third person no less strictness of proof is required to show partnership than is required in an action brought by one partner against another, preponderance of the evidence being required in both cases. Lawrence *v.* Westlake, 28 Mont. 503, 73 Pac. 119.

13. Union Nat. Bank *v.* Baldenwick, 45 Ill. 375.

14. *Alabama.*—Wheeler *v.* McGuire, (1888) 5 So. 190; Hawes *v.* Brown, 75 Ala. 385; Evans *v.* Winston, 74 Ala. 349; McWilliams *v.* Phillips, 71 Ala. 80; Lehman *v.* McQueen, 65 Ala. 570; Wilcox *v.* Henderson, 64 Ala. 535; Vandeventer *v.* Ford, 60 Ala. 610; Marlowe *v.* Benagh, 52 Ala. 112; Shulman *v.* Brantley, 50 Ala. 81; Harris *v.* Bell, 27 Ala. 520; Lindsey *v.* Perry, 1 Ala. 203. See also Garrett *v.* Garrett, 64 Ala. 263.

California.— Scott *v.* Wood, 81 Cal. 398, 22 Pac. 871.

District of Columbia.— Benter *v.* Patch, 7 Mackey 590; Kelley *v.* Divver, 6 Mackey 440.

Georgia.— Davis *v.* Central R. Co., 60 Ga. 329.

Illinois.— Bonnell *v.* Wilder, 67 Ill. 327; Bridenthal *v.* Davidson, 61 Ill. 460; Union Nat. Bank *v.* Baldenwick, 45 Ill. 375; McCarthey *v.* Mooney, 41 Ill. 300; Watt *v.* Kirby, 15 Ill. 200; Chicago City R. Co. *v.* Osborne, 105 Ill. App. 462; Dehlinger *v.* Chicago, 100 Ill. App. 314; Streator *v.* Liebendorfer, 71 Ill. App. 625; Dinet *v.* Reilly, 2 Ill. App. 316.

Indiana.— Pittsburgh, etc., R. Co. *v.* Burton, 139 Ind. 357, 37 N. E. 150, 38 N. E. 594; Jones *v.* Angell, 95 Ind. 376; Renard *v.* Grande, 29 Ind. App. 579, 64 N. E. 644; Voluntary Relief Dept. *v.* Spencer, 17 Ind. App. 123, 46 N. E. 477.

Iowa.— Cottrell *v.* Piatt, 101 Iowa 231, 70 N. W. 177; Wadsworth *v.* Nevin, 64 Iowa 64, 19 N. W. 849; Hanson *v.* Stephenson, 32 Iowa 129; Gardner *v.* Weston, 18 Iowa 533; Cooper *v.* Skeel, 14 Iowa 578.

Kentucky.— Wall *v.* Hill, 1 B. Mon. 290, 36 Am. Dec. 578.

New Jersey.— Gallagher *v.* McBride, 63 N. J. L. 422, 44 Atl. 203; Swain *v.* Edmunds, 53 N. J. Eq. 142, 32 Atl. 369; West Jersey R. Co. *v.* Thomas, 23 N. J. Eq. 431.

New York.— Brockman *v.* Metropolitan St. R. Co., 32 Misc. 728, 66 N. Y. Suppl. 339; Drake *v.* Hansen, 30 Misc. 778, 62 N. Y. Suppl. 433; Rogers *v.* Traders' Ins. Co., 6 Paige 583. See also Shearman *v.* Hart, 14 Abb. Pr. 358.

Ohio.— Hargraves *v.* Miller, 16 Ohio 338.

Oregon.— Smith *v.* Griswold, 6 Oreg. 440.

Pennsylvania.— Kaine *v.* Weigley, 22 Pa. St. 179.

Tennessee.— Lobenstein *v.* Hymson, 90 Tenn. 606, 18 S. W. 250; Gage *v.* Louisville, etc., R. Co., 88 Tenn. 724, 14 S. W. 73; Chapman *v.* McAdams, 1 Lea 500.

Virginia.— Norfolk, etc., R. Co. *v.* Poole, 100 Va. 148, 40 S. E. 627.

Wisconsin.— Sanborn *v.* Babcock, 33 Wis. 400.

United States.— U. S. *v.* Lee Huen, 118 Fed. 442; The J. E. Potts, 54 Fed. 539; Mack *v.* Lancashire Ins. Co., 4 Fed. 59, 2 McCrary 211; Huchberger *v.* Merchants' F. Ins. Co., 12 Fed. Cas. No. 6,822, 4 Biss. 265; Jones *v.* Davis, 13 Fed. Cas. No. 7,460, 1 Abb. Adm. 446; The Lizzie Major, 15 Fed. Cas. No. 8,422, 8 Ben. 333; The Napoleon, 17 Fed. Cas. No. 10,015, Olcott 208; Ray *v.* Donnell, 20 Fed. Cas. No. 11,590, 4 McLean 504; U. S. *v.* Dry Ox, etc., Hides, 25 Fed. Cas. No. 14,995.

See 20 Cent. Dig. tit. "Evidence," § 2446.

"When the evidence tends equally to sustain either of two inconsistent propositions . . . a verdict in favor of the party bound to maintain" one of them "against the other is necessarily wrong." Smith *v.* Westfield First Nat. Bank, 99 Mass. 605, 612, 97 Am. Dec. 59 [*quoted* with approval in St. Louis, etc., R. Co. *v.* Henderson, 57 Ark. 402, 21 S. W. 878].

"Very few cases are decided by the burden of proof, because the jury usually finds that one side or the other has made out the best case." U. S. *v.* Dry Ox, etc., Hides, 25 Fed. Cas. No. 14,995, per Lowell, D. J.

15. North Chicago St. R. Co. *v.* Fitzgibbons, 180 Ill. 466, 54 N. E. 483 [*affirming* 79 Ill. App. 632]. *Contra*, Shattuck *v.* McCartney, 1 Tex. App. Civ. Cas. § 557.

16. For classes of cases where a higher degree of proof is required see *infra*, XVII, A, 4, 5.

17. *Alabama.*— Louisville, etc., R. Co. *v.* Jones, (1888) 3 So. 902, action against railroad company for injuries resulting in death.

Arkansas.— Arkansas Midland R. Co. *v.* Canman, 52 Ark. 517, 13 S. W. 280 (evidence

rule, a party is not required to prove his case "beyond a reasonable doubt," [18]

to overcome presumption of negligence need not be more than a preponderance); Shinn *v.* Tucker, 37 Ark. 580.

Delaware.— Weisman *v.* Commercial F. Ins. Co., 3 Pennew. 224, 50 Atl. 93; Levy *v.* Gillis, 1 Pennew. 119, 39 Atl. 785.

Georgia.— White *v.* Fulton, 68 Ga. 511; Williams *v.* Chapman, 7 Ga. 407.

Illinois.— Grimes *v.* Hilliary, 150 Ill. 141, 36 N. E. 977 (trespass *de bonis*); Germania F. Ins. Co. *v.* Klewer, 129 Ill. 599, 22 N. E. 489; Wells *v.* Head, 17 Ill. 204 (trespass for shooting a horse); Streator *v.* Liebendorfer, 71 Ill. App. 625; McLeod *v.* Sharp, 53 Ill. App. 406; Brent *v.* Brent, 14 Ill. App. 256 (proof to sustain plea of self-defense in an action of trespass *vi et armis*).

Indiana.—Baltimore, etc., R. Co. *v.* Scholes, 14 Ind. App. 524, 43 N. E. 156, 56 Am St. Rep. 307, fact of mistake in an action at law.

Iowa.— Farmers' Co-operative Soc. *v.* German Ins. Co., 97 Iowa 749, 66 N. W. 878 (action on parol contract of insurance); Coit *v.* Churchill, 61 Iowa 296, 16 N. W. 147; McAnnulty *v.* Seick, 59 Iowa 586, 13 N. W. 743.

Maine.— French *v.* Day, 89 Me. 441, 36 Atl. 909, defense justifying the asportation in trespass *de bonis*.

Maryland.— Myers *v.* King, 42 Md. 65.

Massachusetts.— Haskins *v.* Haskins, 9 Gray 390.

Michigan.— Hoffman *v.* Loud, 111 Mich. 156, 69 N. W. 231 (trover); Petky *v.* Palmer, 109 Mich. 561, 67 N. W. 561 (malpractice of physician); Mynning *v.* Detroit, etc., R. Co., 67 Mich. 677, 35 N. W. 811.

Missouri.— Long *v.* Martin, 152 Mo. 668, 54 S. W. 473; Rothschild *v.* American Cent. Ins. Co., 62 Mo. 356; Chaney *v.* Phœnix Ins. Co., 62 Mo. App. 45 (action on parol contract of insurance); Scott *v.* Allenbaugh, 50 Mo. App. 130.

Nebraska.— Kopplekom *v.* Huffman, 12 Nebr. 95, 10 N. W. 577.

New York.— Seybolt *v.* New York, etc., R. Co., 95 N. Y. 562, 47 Am. Rep. 75 (action for injuries caused by alleged negligence); Serra *v.* Brooklyn Heights R. Co., 95 N. Y. App. Div. 159, 88 N. Y. Suppl. 500.

North Carolina.— Hodges *v.* Southern R. Co., 122 N. C. 992, 29 S. E. 939.

Rhode Island.— Nelson *v.* Pierce, 18 R. I. 539, 28 Atl. 806.

Texas.— Missouri Pac. R. Co. *v.* Brazzil, 72 Tex. 233, 10 S. W. 403 (proof of insanity); Lee *v.* Wilkins, 1 Tex. Unrep. Cas. 287.

Wisconsin.— Evans *v.* Rugee, 57 Wis. 623, 16 N. W. 49; Quaife *v.* Chicago, etc., R. Co., 48 Wis. 513, 4 N. W. 658, 33 Am. Rep. 821; Roe *v.* Bacheldor, 41 Wis. 360.

United States.— U. S. *v.* Lee Huen, 118 Fed. 442, 457; Robinson *v.* Gallier, 20 Fed. Cas. No. 11,951, 2 Woods 178, survivorship of one of several who perish in a common disaster.

See 20 Cent. Dig. tit. "Evidence," § 2446.

"Equity is not more stringent in requiring evidence, than a court of law in similar cases. Whatever, therefore, would sustain a verdict in the latter, ought to sustain a decree in like case, in the former." Gray *v.* Roden, 24 Miss. 667, 670. In Ridley *v.* Ridley, 1 Coldw. (Tenn.) 323, a case in equity, the court said plaintiff must "satisfy the mind and conscience of the court" in order to entitle him to a decree. In the later case of Chapman *v.* McAdams, 1 Lea (Tenn.) 500, 509, it seems to have been held that the language above quoted stated a higher degree of proof than is demanded by the authorities, and that in equity as at law a preponderance of evidence is sufficient. McFarland, J., dissenting, said he had "always understood" that courts of equity never act "upon a less degree of certainty than men usually act upon in other affairs of equal importance?" In the cases cited at the head of this note there is no distinct enunciation that a higher degree of proof is required in equity than at law, and in many of the equity cases the term "preponderance of evidence" is used to describe the *quantum* of proof essential to a finding in favor of a party. There is so much logomachy in the discussion by courts of the term "preponderance of evidence" that the rule in equity cannot safely be said to differ from the rule at law as a general proposition. See, however, Chaney *v.* Phœnix Ins. Co., 62 Mo. App. 45, 49.

In Louisiana the rule as commonly expressed is that a party must make his claim "certain," or "legally certain." Kearney *v.* Hauche, 18 La. Ann. 116; Holtzman *v.* Millaudon, 18 La. Ann. 29; Mummy *v.* Haggerty, 15 La. Ann. 268; Allard *v.* Orleans Nav. Co., 12 Rob. 469; Wilcox *v.* His Creditors, 2 Rob. 27; Skipwith *v.* His Creditors, 19 La. 198; Adams *v.* His Creditors, 14 La. 454.

18. *Alabama.*—Rowe *v.* Baber, 93 Ala. 422, 8 So. 865; Birmingham Fire Brick Works *v.* Allen, 86 Ala. 185, 5 So. 454.

Arkansas.— Yarbrough *v.* Arnold, 20 Ark. 592.

Georgia.— Schnell *v.* Toomer, 56 Ga. 168.

Iowa.— Long *v.* Travellers' Ins. Co., 113 Iowa 259, 85 N. W. 24; Callan *v.* Hanson, 86 Iowa 420, 53 N. W. 282.

Maryland.— Baltimore, etc., R. Co. *v.* Shipley, 39 Md. 251.

New York.— Huntington *v.* Attrill, 118 N. Y. 365, 23 N. E. 544 (action to enforce individual liability of directors); Seybolt *v.* New York, etc., R. Co., 95 N. Y. 562, 47 Am. Rep. 75 (action for negligence); Stearns *v.* Field, 90 N. Y. 640; Kruse *v.* Seeger, etc., Co., 16 N. Y. Suppl. 529 (action for conversion).

North Carolina.— Willis *v.* Atlantic, etc., R. Co., 122 N. C. 905, 29 S. E. 941 (action for negligence); Rippey *v.* Miller, 46 N. C. 479, 63 Am. Dec. 177; Neal *v.* Fesperman, 46 N. C. 446.

Tennessee.— Chapman *v.* McAdams, 1 Lea 500.

"beyond doubt,"[19] "beyond any doubt,"[20] "beyond dispute,"[21] "beyond question,"[22] "conclusively,"[23] "to a certainty,"[24] or a "moral,"[25] "reasonable,"[26] or an "absolute"[27] certainty, or by evidence such as to "exclude the truth of any other theory."[28] And it is not indispensable that his evidence should be equal to the testimony of one unimpeached witness.[29] All that is required of the party at the outset is to give competent evidence sufficient, if undisputed, to establish the truth of his averments.[30]

(II) *Where Charge of Crime Is Involved.* The general rule is that in civil cases a charge of crime need not be proved beyond reasonable doubt, and that a preponderance of evidence is sufficient.[31] This rule applies to civil actions

Texas.— Scott *v.* Pettigrew, 72 Tex. 321, 12 S. W. 161.

Wisconsin.— Whitney *v.* Clifford, 57 Wis. 156, 14 N. W. 927; Quaife *v.* Chicago, etc., R. Co., 48 Wis. 513, 4 N. W. 658, 33 Am. Rep. 821 (actions for negligence); Wright *v.* Hardy, 22 Wis. 348.

See 20 Cent. Dig. tit. "Evidence," § 2446.

In bastardy cases see BASTARDS, 5 Cyc. 664.

19. *Alabama.*— Alabama Great Southern R. Co. *v.* Hill, 93 Ala. 514, 9 So. 722, 30 Am. St. Rep. 65; Harris *v.* Russell, 93 Ala. 59, 9 So. 541; Thompson *v.* Louisville, etc., R. Co., 91 Ala. 496, 8 So. 406, 11 L. R. A. 146; Birmingham Union R. Co. *v.* Hale, 90 Ala. 8, 8 So. 142, 24 Am. St. Rep. 748; Wollner *v.* Lehman, 85 Ala. 274, 4 So. 643; Hopper *v.* Ashley, 15 Ala. 457.

Florida.— Smith *v.* Croom, 7 Fla. 81.

Georgia.— Standard Machinery Co. *v.* Holton, 84 Ga. 592, 10 S. E. 1016.

Illinois.— White *v.* Gale, 14 Ill. App. 274.

Mississippi.— Brown *v.* Walker, (1892) 11 So. 724.

Missouri.— Williams *v.* Watson, 34 Mo. 95, action against a constable's sureties on his bond for failure to return an execution within the statutory time.

New York.— Probst *v.* Delamater, 100 N. Y. 266, 3 N. E. 184 [*affirming* 17 N. Y. Wkly. Dig. 355] (action for negligence); Tholen *v.* Brooklyn City R. Co., 10 Misc. 283, 30 N. Y. Suppl. 1081 [*affirmed* in 151 N. Y. 627, 45 N. E. 1134] (action for negligence).

Pennsylvania.— Hiester *v.* Laird, 1 Watts & S. 245.

Wisconsin.— Hartwig *v.* Chicago, etc., R. Co., 49 Wis. 358, 5 N. W. 865.

See 20 Cent. Dig. tit. "Evidence," § 2446.

20. New York Guaranty, etc., Co. *v.* Gleason, 78 N. Y. 503.

21. Torrey *v.* Cameron, 73 Tex. 583, 11 S. W. 840.

22. Stevens *v.* Carson, 30 Nebr. 544, 46 N. W. 655.

23. *Iowa.*— Middleton *v.* Middleton, 31 Iowa 151.

Nevada.— Silver Min. Co. *v.* Fall, 6 Nev. 116.

New York.— New York Harbor Tow Boat Co. *v.* New York, etc., R. Co., 76 Hun 258, 27 N. Y. Suppl. 745 [*affirmed* in 148 N. Y. 574, 42 N. E. 1086].

Pennsylvania.— Hiester *v.* Laird, 1 Watts & S. 245.

Texas.— Greathouse *v.* Moore, (Civ. App. 1893) 23 S. W. 226.

See 20 Cent. Dig. tit. "Evidence," § 2446.

24. Brown *v.* Master, 104 Ala. 451, 16 So. 443; Gallagher *v.* Crooks, 132 N. Y. 338, 30 N. E. 746.

25. Johnston *v.* Bush, 57 N. Y. 633. But see Treadwell *v.* Whittier, 80 Cal. 574, 22 Pac. 266, 13 Am. St. Rep. 175, 5 L. R. A. 498.

26. Leggett *v.* Illinois Cent. R. Co., 72 Ill. App. 577; Gulf, etc., R. Co. *v.* Harriett, 80 Tex. 73, 15 S. W. 556; Allen *v.* Murray, 87 Wis. 41, 57 N. W. 979.

27. Gallagher *v.* Crooks, 132 N. Y. 338, 30 N. E. 746; Young *v.* Edwards, 72 Pa. St. 257.

28. Wright *v.* Hardy, 22 Wis. 348.

29. Fuller *v.* Rounceville, 29 N. H. 554.

30. Stearns *v.* Field, 90 N. Y. 640.

31. *Colorado.*— Brown *v.* Tourtelotte, 24 Colo. 204, 50 Pac. 195, defense of forgery in action on note.

Indiana.— McDonald *v.* McDonald, 142 Ind. 55, 41 N. E. 336, parties contesting a will and charging forgery.

Iowa.— Coit *v.* Churchill, 61 Iowa 296, 16 N. W. 147, alleged fraudulent alteration of written instrument. See also Lillie *v.* McMillan, 52 Iowa 463, 3 N. W. 601.

Massachusetts.— Schmidt *v.* New York Union Mut. F. Ins. Co., 1 Gray 529.

Michigan.— Baird *v.* Abbey, 73 Mich. 347, 41 N. W. 272.

New York.— Davis *v.* Rome, etc., R. Co., 56 Hun 372, 10 N. Y. Suppl. 334 (action for services rendered, defense that plaintiff embezzled defendant's money sufficiently proved by preponderance of evidence); Davis *v.* Davis, 7 Daly 308.

Tennessee.— McBee *v.* Bowman, 89 Tenn. 132, 14 S. W. 481 [*overruling* Hills *v.* Goodyear, 4 Lea 233, 40 Am. Rep. 5], issue of forgery in will contest.

United States.— New York Acc. Ins. Co. *v.* Clayton, 59 Fed. 559, 8 C. C. A. 213, defense to action on accident insurance policy that injuries were sustained while assured was violating the Sunday law.

See 20 Cent. Dig. tit. "Evidence," §§ 2454, 2455.

Contra.—Schultz *v.* Pacific Ins. Co., 14 Fla. 73, barratry pleaded in action for marine insurance on freight must be proved beyond reasonable doubt.

Charge of adultery in divorce cases see DIVORCE, 14 Cyc. 556.

where a judgment against defendant may establish his guilt of a crime,[32] to actions on insurance policies defended on the ground that plaintiff wilfully set fire to the property for the purpose of defrauding defendant,[33] and to a plea set-

If crime is not charged in the pleadings a preponderance of evidence undoubtedly suffices. Jones *v.* Greaves, 26 Ohio St. 2, 20 Am. Rep. 752.

32. *Colorado.*— Smith *v.* Smith, 16 Colo. App. 333, 65 Pac. 401.

Georgia.— Seymour *v.* Bailey, 76 Ga. 338, action for assault and battery. See also Drakeford *v.* Adams, 98 Ga. 722, 25 S. E. 833; Rome R. Co. *v.* Barnett, 94 Ga. 446, 20 S. E. 355.

Illinois.— Miller *v.* Balthasser, 78 Ill. 302; Wollf *v.* Van Housen, 55 Ill. App. 295, civil actions for rape.

Indiana.— Bissell *v.* Wert, 35 Ind. 54, civil action for larceny.

Iowa.— Welch *v.* Jugenheimer, 56 Iowa 11, 8 N. W. 673, 41 Am. Rep. 77 [*overruling* Barton *v.* Thompson, 46 Iowa 30, 26 Am. Rep. 131], action under civil damage act for unlawful sale of intoxicating liquor.

Maine.— Sinclair *v.* Jackson, 47 Me. 102, 74 Am. Dec. 476, trover for larceny.

Massachusetts.— Roberge *v.* Burnham, 124 Mass. 277.

Michigan.— Elliott *v.* Van Buren, 33 Mich. 49, 20 Am. Rep. 668, action for attempt to ravish.

Nebraska.— Nebraska Nat. Bank *v.* Johnson, 51 Nebr. 546, 71 N. W. 294 (civil action for larceny); Schmuck *v.* Hill, 2 Nebr. (Unoff.) 79, 96 N. W. 158 (action for criminal libel).

New York.— Dean *v.* Raplee, 145 N. Y. 319, 39 N. E. 952 (action for rape); Wright *v.* Grant, 6 N. Y. St. 362 (action for assault with intent to ravish).

Ohio.— Shaul *v.* Norman, 34 Ohio St. 157 (action for assault and battery); Lyon *v.* Fleahmann, 34 Ohio St. 151; Kolling *v.* Bennett, 18 Ohio Cir. Ct. 425, 10 Ohio Cir. Dec. 81 (last two cases actions under civil damage act for unlawful sale of intoxicating liquor).

Pennsylvania.— Catasauqua Mfg. Co. *v.* Hopkins, 141 Pa. St. 30, 21 Atl. 638, action for money obtained by false pretenses.

Rhode Island.— Nelson *v.* Pierce, 18 R. I. 539, 28 Atl. 806, action for seduction.

Tennessee.— Cox *v.* Crumley, 5 Lea 529, action for assault and battery.

Texas.— Heiligmann *v.* Rose, 81 Tex. 222, 16 S. W. 931, 26 Am. St. Rep. 804, 13 L. R. A. 272, action for maliciously poisoning a dog.

Vermont.— Weston *v.* Gravlin, 49 Vt. 507 (action for malicious mischief); Bradish *v.* Bliss, 35 Vt. 326 (action for statutory arson).

Wisconsin.— U. S. Express Co. *v.* Jenkins, 73 Wis. 471, 41 N. W. 957, action for money received with knowledge that it was stolen.

See 20 Cent. Dig. tit. "Evidence," §§ 2447, 2454, 2455; and *infra*, note 39.

Contra, where the criminal offense is charged in the pleadings. Williams *v.* Dickenson, 28 Fla. 90, 9 So. 847 [*following* Schultz *v.* Pacific Ins. Co., 14 Fla. 73, cited in the preceding note, but only in obedience to the rule of *stare decisis*]; Paul *v.* Currier, 53 Me. 526 [but see Ellis *v.* Buzzell, 60 Me. 209, 11 Am. Rep. 204, cited *infra*, note 34]; Murray *v.* Aiken Min., etc., Co., 37 S. C. 468, 16 S. E. 143, action based on charge of larceny. Where, however, the offense is not charged in the pleadings, proof beyond a reasonable doubt is not required. Sprague *v.* Dodge, 48 Ill. 142, 95 Am. Dec. 523. The cases cited at the head of this note make no distinction between crime pleaded and crime not pleaded.

Where perjury is the crime involved it must be proved by two witnesses or by one witness with corroborating circumstances, as in criminal prosecutions for perjury. Laughran *v.* Kelly, 8 Cush. (Mass.) 199.

33. *Indiana.*—Continental Ins. Co. *v.* Jachnichen, 110 Ind. 59, 10 N. E. 636, 59 Am. Rep. 194.

Kentucky.— Ætna Ins. Co. *v.* Johnson, 11 Bush 587, 21 Am. Rep. 223.

Louisiana.— Hoffman *v.* Western M. & F. Ins. Co., 1 La. Ann. 216; Wightman *v.* Western M. & F. Ins. Co., 8 Rob. 442.

Maine.— Decker *v.* Somerset Mut. F. Ins. Co., 66 Me. 406. See also Ellis *v.* Buzzell, 60 Me. 209, 11 Am. Rep. 204, cited in the next note. *Contra,* Butman *v.* Hobbs, 35 Me. 227.

Massachusetts.— See Schmidt *v.* New York Union Mut. F. Ins. Co., 1 Gray 529.

Michigan.— Monaghan *v.* Agricultural F. Ins. Co., 53 Mich. 238, 18 N. W. 797.

Minnesota.— Thoreson *v.* Northwestern Nat. Ins. Co., 29 Minn. 107, 12 N. W. 154.

Missouri.— Marshall *v.* Thames F. Ins. Co., 43 Mo. 586.

New Jersey.— Kane *v.* Hibernia Ins. Co., 39 N. J. L. 697, 23 Am. Rep. 239.

New York.— Weir *v.* Ætna Ins. Co., 91 Hun 217, 36 N. Y. Suppl. 216; Johnson *v.* Agricultural Ins. Co., 25 Hun 251.

North Carolina.— Blackburn *v.* St. Paul F. & M. Ins. Co., 116 N. C. 821, 21 S. E. 922.

Ohio.— See Lyon *v.* Fleahmann, 34 Ohio St. 151; Jones *v.* Greaves, 26 Ohio St. 2, 20 Am. Rep. 752. *Contra,* Lexington F., etc., Ins. Co. *v.* Paver, 16 Ohio 324.

Pennsylvania.— Somerset County Mut. F. Ins. Co. *v.* Usaw, 112 Pa. St. 80, 4 Atl. 355, 56 Am. Rep. 307.

Washington.— Hart *v.* Niagara F. Ins. Co., 9 Wash. 620, 38 Pac. 213, 27 L. R. A. 86.

West Virginia.— Simmons *v.* West Virginia Ins. Co., 8 W. Va. 474.

Wisconsin.—Knopke *v.* Germantown Farmers' Mut. Ins. Co., 99 Wis. 289, 74 N. W. 795; Blaeser *v.* Milwaukee Mechanics' Mut. Ins. Co., 37 Wis. 31, 19 Am. Rep. 747; Washington Union Ins. Co. *v.* Wilson, 7 Wis. 169.

ting up truth as a justification in an action for libel or slander, where the alleged defamatory statement consists of a charge of crime.[34] But in these cases there is no preponderance unless the evidence is sufficient to overcome the presumption of innocence as well as the opposing evidence.[35]

United States.— Mack *v.* Lancashire Ins. Co., 4 Fed. 59, 2 McCrary 211; Scott *v.* Home Ins. Co., 21 Fed. Cas. No. 12,533, 1 Dill. 105, the proof ought to be such as clearly to satisfy the jury.

See 20 Cent. Dig. tit. "Evidence," §§ 2454, 2455. And see, generally, FIRE INSURANCE.

Contra.— Germania F. Ins. Co. *v.* Klewer, 129 Ill. 599, 22 N. E. 489; McConnel *v.* Delaware Mut. Safety Ins. Co., 18 Ill. 228; Thurtell *v.* Beaumont, 1 Bing. 339, 2 L. J. C. P. O. S. 4, 8 Moore C. P. 612, 25 Rev. Rep. 644, 8 E. C. L. 531 [but see comments on this case in Welch *v.* Jugenheimer, 56 Iowa 11, 8 N. W. 673, 41 Am. Rep. 77; Kane *v.* Hibernia Mut. F. Ins. Co., 38 N. J. L 441, 20 Am. Rep. 409].

34. *Georgia.*— Atlanta Journal *v.* Mayson, 92 Ga. 640, 18 S. E. 1010, 44 Am. St. Rep. 104 [*reconciling* Williams *v.* Gunnels, 66 Ga. 521].

Iowa.— Riley *v.* Norton, 65 Iowa 306, 21 N. W. 649 [*overruling* Ellis *v.* Lindley, 38 Iowa 461; Fountain *v.* West, 23 Iowa 9, 92 Am. Dec. 405; Forshee *v.* Abrams, 2 Iowa 571; Bradley *v.* Kennedy, 2 Greene 231].

Maine.— Ellis *v.* Buzzell, 60 Me. 209, 11 Am. Rep. 204.

Michigan.— Finley *v.* Widner, 112 Mich. 230, 70 N. W. 433; Owen *v.* Dewey, 107 Mich. 67, 65 N. W. 8; Peoples *v.* Evening News, 51 Mich. 11, 16 N. W. 185, 691.

Missouri.— Smith *v.* Burrus, 106 Mo. 94, 16 S. W. 881, 27 Am. St. Rep. 329, 13 L. R. A. 59; Edwards *v.* Knapp, 97 Mo. 432, 10 S. W. 54 [*overruling* Polston *v.* See, 54 Mo. 291].

New Hampshire.— Folsom *v.* Brawn, 25 N. H. 114.

North Carolina.— Barfield *v.* Britt, 47 N. C. 41, 62 Am. Dec. 190; Bell *v.* McGinness, 40 Ohio St. 204, 48 Am. Rep. 673.

Vermont.— Bradish *v.* Bliss, 35 Vt. 326.

See 20 Cent. Dig. tit. "Evidence," §§ 2454, 2455. And see, generally, LIBEL AND SLANDER.

Contra.— *California.*— Merk *v.* Gelzhaeuser, 50 Cal. 631, proof beyond reasonable doubt.

Illinois.— Corbley *v.* Wilson, 71 Ill. 209, 22 Am. Rep. 98.

Indiana.— Fowler *v.* Wallace, 131 Ind. 347, 31 N. E. 53 [*following* earlier Indiana cases, but conceding them to be wrong in principle and contrary to the weight of authority]; Tucker *v.* Call, 45 Ind. 31.

South Carolina.— Burckhalter *v.* Coward, 16 S. C. 435.

England.— Willmett *v.* Harmer, 8 C. & P. 695, 34 E. C. L. 968; Chalmers *v.* Shackell, 6 C. & P. 475, 25 E. C. L. 532. But see comments on these cases in Atlanta Journal *v.* Mayson, 92 Ga. 640, 18 S. E. 1010, 44 Am. St. Rep. 104.

See 20 Cent. Dig. tit. "Evidence," §§ 2454, 2455. And see, generally, LIBEL AND SLANDER.

Justification of a charge of perjury must be sustained by the same amount of proof as is required to convict the party on indictment, that is to say, by two witnesses or by one witness and corroborating circumstances. (See, generally, PERJURY.) On that proposition all the authorities seem to concur. Harbison *v.* Shook, 41 Ill. 141; Crandall *v.* Dawson, 6 Ill. 556; Lanter *v.* McEwen, 8 Blackf. (Ind.) 495; Ellis *v.* Lindley, 38 Iowa 461; Bradley *v.* Kennedy, 2 Greene (Iowa) 231; Hopkins *v.* Smith, 3 Barb. (N. Y.) 599; Clark *v.* Dibble, 16 Wend. (N. Y.) 601; Woodbeck *v.* Keller, 6 Cow. (N. Y.) 118; Steinman *v.* McWilliams, 6 Pa. St. 170; Coulter *v.* Stuart, 2 Yerg. (Tenn.) 225. See also Laughran *v.* Kelly, 8 Cush. (Mass.) 199. See, generally, LIBEL AND SLANDER. But this requirement does not necessarily exact proof beyond a reasonable doubt (People *v.* Briggs, 114 N. Y. 56, 20 N. E. 820), and such proof has been held unnecessary (Sloan *v.* Gilbert, 12 Bush (Ky.) 51, 23 Am. Rep. 708; Folsom *v.* Brawn, 25 N. H. 114; Matthews *v.* Huntley, 9 N. H. 146; Kincade *v.* Bradshaw, 10 N. C. 63).

35. *Connecticut.*— Munson *v.* Atwood, 30 Conn. 102.

Illinois.— Sprague *v.* Dodge, 48 Ill. 142, 95 Am. Dec. 523. See also Russell *v.* Baptist Theological Union, 73 Ill. 337; Riggs *v.* Powell, 46 Ill. App. 75 [*affirmed* in 142 Ill. 453, 32 N. E. 482].

Indiana.— McDonald *v.* McDonald, 142 Ind. 55, 41 N. E. 336.

Maine.— Decker *v.* Somerset Mut. F. Ins. Co., 66 Me. 406; Ellis *v.* Buzzell, 60 Me. 209, 11 Am. Rep. 204.

Maryland.— Wagoner *v.* Wagoner, (1887) 10 Atl. 221.

Michigan.— Monaghan *v.* Agricultural F. Ins. Co., 53 Mich. 238, 18 N. W. 797.

Minnesota.— Thoreson *v.* Northwestern Nat. Ins. Co., 29 Minn. 107, 12 N. W. 154.

New Jersey.— Kane *v.* Hibernia Ins. Co., 39 N. J. L. 697, 23 Am. Rep. 239. See Raymond *v.* Cox, 44 N. J. Eq. 415, 15 Atl. 593.

New York.— New York Ferry Co. *v.* Moore, 102 N. Y. 667, 6 N. E. 293.

Ohio.— Lyon *v.* Fleahmann, 34 Ohio St. 151.

Pennsylvania.— Catasauqua Mfg. Co. *v.* Hopkins, 141 Pa. St. 30, 21 Atl. 638; Somerset County Mut. F. Ins. Co. *v.* Usaw, 112 Pa. St. 80, 4 Atl. 355, 56 Am. Rep. 307.

Tennessee.— Sparta *v.* Lewis, 91 Tenn. 370, 23 S. W. 182.

Vermont.— Bradish *v.* Bliss, 35 Vt. 326; White *v.* Comstock, 6 Vt. 405.

See 20 Cent. Dig. tit. "Evidence," §§ 2447, 2454, 2455. See also *infra*, XVII, A, 3, d.

(III) *Action For Statutory Penalty or Damages.* In a civil action to recover a statutory penalty[36] or statutory double or treble damages[37] plaintiff's case is sufficiently proved by a preponderance of evidence,[38] even where the act or omission of defendant constituted a crime,[39] unless the action is criminal in its nature and effect.[40]

(IV) *Charge of Fraud.* Although a court or jury should be cautious in arriving at conclusions prejudicial to character and honesty,[41] and should not find the existence of fraud upon mere suspicion,[42] a preponderance of evidence is sufficient in ordinary cases[43] to establish a charge of fraud,[44] after making due

"**In proportion as the crime imputed is heinous** and unnatural, the presumption of innocence grows stronger and more abiding." Continental Ins. Co. *v.* Jachnichen, 110 Ind. 59, 63, 10 N. E. 636, 59 Am. Rep. 194.

36. White *v.* Farris, 124 Ala. 461, 27 So. 259 (cutting trees on plaintiff's land); Webster *v.* People, 14 Ill. 365. And see, generally, PENALTIES.

Contra, where the recovery is strictly a penalty and not a compensation. Riker *v.* Hooper, 35 Vt. 457, 82 Am. Dec. 646; Brooks *v.* Clayes, 10 Vt. 37; White *v.* Comstock, 6 Vt. 405. See also Burnett *v.* Ward, 42 Vt. 80; The T. Francesca, 9 Fed. Cas. No. 5,030, 9 Ben. 34.

In Illinois the degree of proof required is more than a mere preponderance, but not that which excludes reasonable doubt, and there must be "a reasonable and well founded belief of the guilt of the defendant." Toledo, etc., R. Co. *v.* Foster, 43 Ill. 480, 481. To the same effect see Ruth *v.* Abingdon, 80 Ill. 418; Gilbert *v.* Bone, 79 Ill. 341; Orient Ins. Co. *v.* Weaver, 22 Ill. App. 122.

37. Burnett *v.* Ward, 42 Vt. 80.

38. See *supra*, notes 36, 37.

39. *Connecticut.*— Munson *v.* Atwood, 30 Conn. 102, action to recover treble damages for larceny.

Massachusetts.— Roberge *v.* Burnham, 124 Mass 277, action to recover penalty for unlawful sale of intoxicating liquor to a minor.

New York.— People *v.* Briggs, 114 N. Y. 56, 20 N. E. 820.

Ohio.— Deveaux *v.* Clemens, 17 Ohio Cir. Ct. 33, 9 Ohio Cir. Dec. 647.

Tennessee.— Sparta *v.* Lewis, 91 Tenn. 370, 23 S. W. 182.

See 20 Cent. Dig. tit. "Evidence," § 2447. And see, generally, PENALTIES. See also Jones *v.* Greaves, 26 Ohio St. 2, 20 Am. Rep. 752.

Contra, where the action is prosecuted by the public, not by a private individual. So held in Glenwood *v.* Roberts, 59 Mo. App. 167. See also U. S. *v.* Shapleigh, 54 Fed. 126, 4 C. C. A. 237. But the distinction was repudiated in People *v.* Briggs, 114 N. Y. 56, 20 N. E. 820.

The presumption of innocence operates in favor of defendant and must be overcome by plaintiff. Sparta *v.* Lewis, 91 Tenn. 370, 23 S. W. 182. See also White *v.* Comstock, 6 Vt. 405; and *supra*, note 35.

40. In U. S. *v.* Shapleigh, 54 Fed. 126, 4 C. C. A. 237, it was held upon great consideration that the government must prove its case beyond a reasonable doubt in order to recover double damages and forfeiture prescribed by U. S. Rev. St. (1878) § 3490 [U. S. Comp. St. (1901) p. 2328], against one presenting a false or fraudulent claim against the United States.

41. Watkins *v.* Wallace, 19 Mich. 57.

42. Toney *v.* McGehee, 38 Ark. 419; Watkins *v.* Wallace, 19 Mich. 57.

43. Strong and convincing proof is required where fraud is the ground for relief in the class of cases mentioned *infra*, XVII, A, 4, a, d, for example, where it is sought to cancel (Connor *v.* Groh, 90 Md. 674, 45 Atl. 1024) or rescind (Breemersch *v.* Linn, 101 Mich. 64, 59 N. W. 406) a contract, or vacate a deed (Parlin *v.* Small, 68 Me. 289) or defeat a sealed instrument (Pinner *v.* Sharp, 23 N. J. Eq. 274) or vary a written contract (Mayberry *v.* Nichol, (Tenn. Ch. App. 1896) 39 S. W. 881) on the ground of fraud. An executed contract will not be canceled for alleged false representations "unless their falsity is certainly proved." Atlantic Delaine Co. *v.* James, 94 U. S. 207, 24 L. ed. 112.

To prove fraud committed by a dead man the evidence "must establish the truth of the charge beyond any reasonable doubt." Gould *v.* Gould, 10 Fed. Cas. No. 5,637, 3 Story 516, 540, per Story, J.

44. *Alabama.*— Pollak *v.* Searcy, 84 Ala. 259, 4 So. 137; Phœnix Ins. Co. *v.* Moog, 81 Ala. 335, 1 So. 108.

California.— Ford *v.* Chambers, 19 Cal. 143.

Illinois.— Kingman *v.* Reinemer, 166 Ill. 208, 46 N. E. 786; Ruff *v.* Jarrett, 94 Ill. 475; Carter *v.* Gunnels, 67 Ill. 270; American Hoist, etc., Co. *v.* Hall, 110 Ill. App. 463; Orient Ins. Co. *v.* Weaver, 22 Ill. App. 122; Sherwood *v.* Morrison First Nat. Bank, 17 Ill. App. 591; Buchman *v.* Dodds, 6 Ill. App. 25.

Indiana.— Baltimore, etc., R. Co. *v.* Scholes, 14 Ind. App. 524, 43 N. E. 156, 56 Am. St. Rep. 307.

Iowa.— Coit *v.* Churchill, 61 Iowa 296, 16 N. W. 147; Bixby *v.* Carskaddon, 55 Iowa 533, 8 N. W. 354; Lillie *v.* McMillan, 52 Iowa 463, 3 N. W. 601.

Massachusetts.— Gordon *v.* Parmelee, 15 Gray 413.

Michigan.— Gumberg *v.* Treusch, 103 Mich. 543, 61 N. W. 872; Ferris *v.* McQueen, 94 Mich. 367, 54 N. W. 164; Sweeney *v.* Devens, 72 Mich. 301, 40 N. W. 454.

allowance for the presumption in favor of honesty and absence of conduct prejudicial to fair dealing.[45]

c. What Constitutes Preponderance — (I) *In General.* Preponderance "simply means the greater weight of evidence."[46] A few cases appear to

Mississippi.— Doe *v.* Dignowitty, 4 Sm. & M. 57.

Missouri.— Bauer Grocery Co. *v.* Sanders, 74 Mo. App. 657; Hitchcock *v.* Baughan, 36 Mo. App. 216.

Nebraska.— Patrick *v.* Leach, 8 Nebr. 530, 1 N. W. 853.

New York.— Freund *v.* Paten, 10 Daly 379; Freund *v.* Paten, 10 Abb. N. Cas. 311.

Ohio.— Jones *v.* Greaves, 26 Ohio St. 2, 20 Am. Rep. 752; Strader *v.* Mullane, 17 Ohio St. 624.

Pennsylvania.— See Young *v.* Edwards, 72 Pa. St. 257.

Texas.— Schmick *v.* Noel, 72 Tex. 1, 8 S. W. 83; Baines *v.* Ullmann, 71 Tex. 529, 9 S. W. 543; Rohrbough *v.* Leopold, 68 Tex. 254, 4 S. W. 460; Sparks *v.* Dawson, 47 Tex. 138; Rodriguez *v.* Espinosa, (Civ. App. 1894) 25 S. W. 669; Rider *v.* Hunt, 6 Tex. Civ. App. 238, 25 S. W. 314. See also Bluntzer *v.* Dewees, 79 Tex. 272, 15 S. W. 29.

West Virginia.— White *v.* Perry, 14 W. Va. 66.

Wisconsin.— Evans *v.* Rugee, 57 Wis. 623, 16 N. W. 49.

See 20 Cent. Dig. tit. "Evidence," § 2446. And see, generally, FRAUD.

Carefully considered cases are Harding *v.* Long, 103 N. C. 1, 9 S. E. 445, 14 Am. St. Rep. 775; Kaine *v.* Weigley, 22 Pa. St. 179.

"Clear and satisfactory" proof is required in some of the cases. Schroeder *v.* Walsh, 120 Ill. 403, 11 N. E. 70; Dohmen Co. *v.* Niagara F. Ins. Co., 96 Wis. 38, 71 N. W. 69; Rice *v.* Jerenson, 54 Wis. 248, 11 N. W. 549. To the same effect see Henry *v.* Henry, 8 Barb. (N. Y.) 588; King *v.* Davis, 16 N. Y. Suppl. 427. But it is said that a preponderance of evidence satisfies that requirement. Coit *v.* Churchill, 61 Iowa 296, 16 N. W. 147.

Proof beyond a reasonable doubt is not required. *Alabama.*— Adams *v.* Thornton, 78 Ala. 489, 56 Am. Rep. 49 [*overruling* Steele *v.* Kinkle, 3 Ala. 352; Tompkins *v.* Nichols, 53 Ala. 197].

California.— Hanscom *v.* Drullard, 79 Cal. 234, 21 Pac. 736.

Illinois.— Bryant *v.* Simoneau, 51 Ill. 324; Hutchinson Nat. Bank *v.* Crow, 56 Ill. App. 558.

Iowa.— Turner *v.* Hardin, 80 Iowa 691, 45 N. W. 758; Turner *v.* Younker, 76 Iowa 258, 41 N. W. 10.

Massachusetts.— Anderson *v.* Edwards, 123 Mass. 273.

Michigan.— Knop *v.* National F. Ins. Co., 107 Mich. 323, 65 N. W. 228; Morley *v.* Liverpool, etc., Ins. Co., 85 Mich. 210, 48 N. W. 502; Hough *v.* Dickinson, 58 Mich. 89, 24 N. W. 809; Watkins *v.* Wallace, 19 Mich. 57.

Nebraska.— Patrick *v.* Leach, 8 Nebr. 538, 1 N. W. 853.

New York.— Sommer *v.* Oppenheim, 19 Misc. 605, 44 N. Y. Suppl. 396.

North Carolina.— Lee *v.* Pearce, 68 N. C. 76.

Texas.— Wylie *v.* Posey, 71 Tex. 34, 9 S. W. 87.

Wisconsin.—Dohmen Co. *v.* Niagara F. Ins. Co., 96 Wis. 38, 71 N. W. 69.

See 20 Cent. Dig. tit. "Evidence," § 2446. See also cases cited at the head of this note; and, generally, FRAUD.

45. Bixby *v.* Carskaddon, 55 Iowa 533, 8 N. W. 354; Jones *v.* Greaves, 26 Ohio St. 2, 20 Am. Rep. 752; Kaine *v.* Weigley, 22 Pa. St. 179.

46. Bryan *v.* Chicago, etc., R. Co., 63 Iowa 464, 466, 19 N. W. 295, per Beck, J. "Such evidence as, when weighed with that opposed to it, has more convincing force." Hoffman *v.* Land, 111 Mich. 156, 158, 69 N. W. 231, per Montgomery, J. "Preponderance means the most weight. It is as correct a definition of preponderance as can be given." Thomas *v.* Paul, 87 Wis. 607, 613, 58 N. W. 1031, per Orton, C. J. "Preponderance means to outweigh. To weigh more." French *v.* Day, 89 Me. 441, 442, 36 Atl. 909, per Haskell, J. To the same effect see Weisman *v.* Commercial F. Ins. Co., 3 Pennew. (Del.) 224, 50 Atl. 93; Boyer *v.* Broffey, 109 Ill. App. 94; Ball *v.* Marquis, (Iowa 1902) 92 N. W. 691; *In re* Goldthorp, 115 Iowa 430, 88 N. W. 944; Wall *v.* Hill, 1 B. Mon. (Ky.) 290, 36 Am. Dec. 578; Strand *v.* Chicago, etc., R. Co., 67 Mich. 380, 34 N. W. 712; Western Union Tel. Co. *v.* James, 31 Tex. Civ. App. 503, 73 S. W. 79.

Other definitions.— Preponderance means: "Weight, taken in connection with the intrinsic probabilities, — the natural course of things under the circumstances" (Lee *v.* Guardian L. Ins. Co., 15 Fed. Cas. No. 8,190, per Sawyer, D. J.); "greater weight of evidence, or evidence which is more credible and convincing to the mind" (Button *v.* Metcalf, 80 Wis. 193, 197, 49 N. W. 809, per Winslow, J.); evidence which weighs the most, and at the same time satisfies the jury (Knopke *v.* Germantown Farmers Mut. Ins. Co., 99 Wis. 289, 74 N. W. 795); "evidence of such character and weight as carries conviction to the mind of the juror of the existence of the facts sought to be proved" (Small *v.* Brooklyn City, etc., R. Co., 10 Misc. (N. Y.) 266, 267, 30 N. Y. Suppl. 1076, per Van Wyck, J.). "The capacity of the submitted testimony to enforce belief on the arbiter to whom it is submitted is the touchstone of preponderance as applied to the testimony of witnesses." McKee *v.* Verdin, 96 Mo. App. 268, 271, 70 S. W. 154, per Barclay, J. To define preponderance as more and better evidence is inaccurate and misleading. Boyer *v.* Broffey, 109 Ill. App. 94.

sanction the doctrine that nothing more than a bare preponderance is required.[47] Under that rule "a case too weak to stand alone when unopposed by a defense may become invigorated and helped out by a still weaker defense."[48] Accordingly many authorities hold that a preponderance of evidence does not suffice unless the judgment of the trier of fact is "satisfied"[49] or "reasonably satisfied."[50] However, a requirement of proof which "satisfies," without qualification, has been held to be too exacting, since it appears to demand proof beyond a

"If there are fewer doubts in the minds of the jury" upon one side of the case than upon the other, a preponderance exists in favor of the former. Freund *v.* Paten, 10 Abb. N. Cas. (N. Y.) 311.

47. "When the equilibrium of proof is destroyed, it matters not how slightly, the jury in a civil action are warranted in rendering a verdict in favor of the side to which the beam tilts." Bauer Grocery Co. *v.* Sanders, 74 Mo. App. 657, 660, per Bond, J. See also Chicago City R. Co. *v.* Fennimore, 199 Ill. 9, 64 N. E. 985; McDeed *v.* McDeed, 67 Ill. 545; White *v.* Mackey, 85 Ill. App. 282; Donley *v.* Dougherty, 75 Ill. App. 379; Leggett *v.* Illinois Cent. R. Co., 72 Ill. App. 577,, 579 ("a bare preponderance is sufficient, though the scales drop but a feather's weight"); Effinger *v.* State, 9 Ohio Cir. Ct. 376, 6 Ohio Cir. Dec. 417; Chapman *v.* McAdams, 1 Lea (Tenn.) 500 (McFarland, J., dissenting); Telford *v.* Frost, 76 Wis. 172, 44 N. W. 835. But see Wisconsin cases cited *infra*, note 50.

"There are no degrees in preponderance." Russell *v.* Russell, 6 Ohio Cir. Ct. 294, 3 Ohio Cir. Dec. 460.

48. Guinard *v.* Knapp, Stout, etc., Co., 95 Wis. 482, 489, 70 N. W. 671, per Newman, J., disapproving a rule that produces such a result. Proof of a fact may tend to show the existence of another fact, indeed may preponderate over all testimony to the contrary, and yet be entirely insufficient to prove such other fact. Heath *v.* Paul, 81 Wis. 532, 51 N. W. 876. And the better opinion is that the evidence "must generate a rational belief" of the existence of the fact. McWilliams *v.* Phillips, 71 Ala. 80. See also Hawes *v.* Brown, 75 Ala. 385; Marlowe *v.* Benagh, 52 Ala. 112; Mays *v.* Williams, 27 Ala. 267; and cases cited in the following note.

49. *Georgia.*— Standard Machinery Co. *v.* Holton, 84 Ga. 592, 10 S. E. 1016.

Mississippi.— Duncan *v.* Watson, 28 Miss. 187, 209.

North Carolina.—Rippey *v.* Miller, 46 N. C. 479, 63 Am. Dec. 177; Neal *v.* Fesperman, 46 N. C. 446.

South Carolina.— Bodie *v.* Charleston, etc., R. Co., 61 S. C. 468, 39 S. E. 715.

United States.— Robinson *v.* Gallier, 20 Fed. Cas. No. 11,951, 2 Woods 178.

See 20 Cent. Dig. tit. "Evidence," § 2446.

Contra.— Brent *v.* Brent, 14 Ill. App. 256. The jury need not be "entirely" (Sommer *v.* Oppenheim, 19 Misc. (N. Y.) 605, 44 N. Y. Suppl. 396), nor "thoroughly" (O'Donohue *v.* Simmons, 58 Hun (N. Y.) 467, 12 N. Y. Suppl. 843) satisfied, nor satisfied with "clearness and certainty" (Mixon *v.* Farris, 20 Tex. Civ. App. 253, 48 S. W. 741).

"Satisfaction by preponderance" of evidence was held to be a proper expression of the strength of evidence required in the following cases:

California.— Hanscom *v.* Deullard, 79 Cal. 234, 21 Pac. 736.

Georgia.— Clark *v.* Cassidy, 62 Ga. 407.

Massachusetts.— Ross *v.* Gerrish, 8 Allen 147.

Minnesota.— Lindsley *v.* Chicago, etc., R. Co., 36 Minn. 539, 33 N. W. 7, 1 Am. St. Rep. 692.

Missouri.— Braddy *v.* Kansas City, etc., R. Co., 47 Mo. App. 519, "satisfied from the evidence," held equivalent to "satisfied by preponderance," etc.

Wisconsin.—Knopke *v.* Germantown Farmers' Mut. F. Ins. Co., 99 Wis. 289, 74 N. W. 795; Gores *v.* Graff, 77 Wis. 174, 46 N. W. 48.

See 20 Cent. Dig. tit. "Evidence," § 2446.

50. *Alabama.*— Kansas City, etc., R. Co. *v.* Henson, 132 Ala. 528, 31 So. 590; Coghill *v.* Kennedy, 119 Ala. 641, 24 So. 459; Morrow *v.* Campbell, 118 Ala. 330, 24 So. 852. See also Moore *v.* Heineke, 119 Ala. 627, 24 So. 374; Alabama Mineral R. Co. *v.* Marcus, 115 Ala. 389, 22 So. 135; Brown *v.* Master, 104 Ala. 451, 16 So. 443; Behrman *v.* Newton, 103 Ala. 525, 15 So. 838; Thompson *v.* Louisville, etc., R. Co., 91 Ala. 496, 8 So. 406, 11 L. R. A. 146; Calhoun *v.* Hannon, 87 Ala. 277, 6 So. 291. See also Life Assoc. of America *v.* Neville, 72 Ala. 517; Street *v.* Sinclair, 71 Ala. 110; Edwards *v.* Whyte, 70 Ala. 365; Acklen *v.* Hickman, 60 Ala. 568.

Iowa.— Ball *v.* Marquis, (1902) 92 N. W. 691.

Massachusetts.— Richardson *v.* Burleigh, 3 Allen 479.

Ohio.—Lexington F. & M. Ins. Co. *v.* Paver, 16 Ohio 324, 332.

Texas.— See Spanks *v.* Dawson, 47 Tex. 138. *Contra,* Moore *v.* Stone, (Civ. App. 1896) 36 S. W. 909.

Wisconsin.— Curran *v.* A. H. Strange Co., 98 Wis. 598, 74 N. W. 377; Guinard *v.* Knopp-Stout, etc., Co., 95 Wis. 482, 70 N. W. 671; Pelitier *v.* Chicago, etc., R. Co., 88 Wis. 521, 60 N. W. 250. See also McKeon *v.* Chicago, etc., R. Co., 94 Wis. 477, 69 N. W. 175, 59 Am. St. Rep. 910, 35 L. R. A. 252; Gores *v.* Graff, 77 Wis. 174, 46 N. W. 48.

United States.— Louisville, etc., R. Co. *v.* White, 100 Fed. 239, 40 C. C. A. 352, in the Alabama circuit.

See 20 Cent. Dig. tit. "Evidence," § 2446.

reasonable doubt,[51] a degree of proof greater than a preponderance.[52] Where an issue of fact is to be determined by a preponderance of evidence, a higher degree of proof than the law requires is that which produces "an abiding conviction,"[53] a "clear conviction,"[54] absolute belief,[55] or which "convinces,"[56] or "clearly,"[57] "fully,"[58] or "clearly and satisfactorily"[59] convinces the mind. "Abundant,"[60] "clear,"[61] "clear and conclusive,"[62] "clear and satisfactory,"[63] or "irresistible"[64] proof, a "great weight of testimony,"[65] or evidence constituting a "clear"[66] or

51. *Alabama.*— Carter *v.* Fulgham, 134 Ala. 238, 32 So. 684; Coghill *v.* Kennedy, 119 Ala. 641, 24 So. 459; Moore *v.* Heineke, 119 Ala. 627, 24 So. 374; Alabama Great Southern R. Co. *v.* Burgess, 119 Ala. 555, 25 So. 251, 72 Am. St. Rep. 943; Louisville, etc., R. Co. *v.* Gidley, 119 Ala. 523, 24 So. 753; Torrey *v.* Burney, 113 Ala. 496, 21 So. 348. *Compare* Life Assoc. of America *v.* Neville, 72 Ala. 517.

Arkansas.— Arkansas Midland R. Co. *v.* Canman, 52 Ark. 517, 13 S. W. 280.

Illinois.— Stratton *v.* Central City Horse R. Co., 95 Ill. 25; Ruff *v.* Jarrett, 94 Ill. 475; Protection L. Ins. Co. *v.* Dill, 91 Ill. 174; Graves *v.* Colwell, 90 Ill. 612; Herrick *v.* Gary, 83 Ill. 85; American Hoist, etc., Co. *v.* Hall, 110 Ill. App. 463; Hutchinson Nat. Bank *v.* Crow, 56 Ill. App. 558; Wollf *v.* Van Housen, 55 Ill. App. 295; Connelly *v.* Sullivan, 50 Ill. App. 627; Mitchell *v.* Hindman, 47 Ill. App. 431; Rolfe *v.* Rich, 46 Ill. App. 406; Gooch *v.* Tobias, 29 Ill. App. 268; Fernandez *v.* McGinnis, 25 Ill. App. 165; Balchradsky *v.* Carlisle, 14 Ill. App. 289; Brent *v.* Brent, 14 Ill. App. 256; Bauchwitz *v.* Tyman, 11 Ill. App. 186; Buchman *v.* Dodds, 6 Ill. App. 25; Ottawa, etc., R. Co. *v.* McMath, 4 Ill. App. 356; Jacksonville, etc., R. Co. *v.* Hall, 2 Ill. App. 618. See also Hanchatt *v.* Goetz, 25 Ill. App. 445.

Iowa.— Ball *v.* Marquis, (1902) 92 N. W. 691; Frick *v.* Kabaker, (1902) 90 N. W. 498; Rosenbaum *v.* Levitt, 109 Iowa 292, 80 N. W. 393; Jerolman *v.* Chicago, etc., R. Co., 108 Iowa 177, 78 N. W. 855. But see Callan *v.* Hanson, 86 Iowa 420, 53 N. W. 282; Coit *v.* Churchill, 61 Iowa 296, 16 N. W. 147; West *v.* Druff, 55 Iowa 335, 7 N. W. 636.

North Carolina.— McMillan *v.* Baxley, 112 N. C. 578, 16 S. E. 845.

Ohio.— Kelch *v.* State, 55 Ohio St. 146, 45 N. E. 6, 60 Am. St. Rep. 680, 39 L. R. A. 737; Russell *v.* Russell, 6 Ohio Cir. Ct. 294, 3 Ohio Cir. Dec. 460.

Texas.— Willis *v.* Chowning, 90 Tex. 617, 40 S. W. 395, 59 Am. St. Rep. 842; Emerson *v.* Mills, 83 Tex. 385, 18 S. W. 805; Missouri Pac. R. Co. *v.* Bartlett, 81 Tex. 42, 16 S. W. 638; Galveston, etc., R. Co. *v.* Matula, 79 Tex. 577, 15 S. W. 573; McBride *v.* Banguss, 65 Tex. 174; Pierpont Mfg. Co. *v.* Goodman Produce Co., (Civ. App. 1900) 60 S. W. 347; San Antonio, etc., R. Co. *v.* Lynch, (Civ. App. 1900) 55 S. W. 517; Mock *v.* Hatcher, (Civ. App. 1897) 43 S. W. 30; Texas, etc., R. Co. *v.* Ballinger, (Civ. App. 1897) 40 S. W. 822; Reliance Lumber Co. *v.* White, (Civ. App. 1896) 38 S. W. 391; Missouri, etc., R. Co. *v.* Kemp, (Civ. App. 1895) 30 S. W. 1117; Finks *v.* Cox, (Civ. App. 1895) 30 S. W. 512; Feist *v.* Boothe, (Civ. App. 1893) 27 S. W. 33; Grigg *v.* Jones, (Civ. App. 1894) 26 S. W. 885; McGill *v.* Hall, (Civ. App. 1894) 26 S. W. 132; Rodriguez *v.* Espinosa, (Civ. App. 1894) 25 S. W. 669; Rider *v.* Hunt, 6 Tex. Civ. App. 238, 25 S. W. 314; Oury *v.* Saunders, 5 Tex. Civ. App. 310, 24 S. W. 341; Fordyce *v.* Chancey, 2 Tex. Civ. App. 24, 21 S. W. 181.

"To full satisfaction" is more than a preponderance. Gage *v.* Louisville, etc., R. Co., 88 Tenn. 724, 14 S. W. 73.

Confidence in verdict.— "It is never necessary in a civil case that a jury should be satisfied of the truth of their verdict, in the sense of resting upon it confidently." Shinn *v.* Tucker, 37 Ark. 580, 589, per Eakin, J.

52. See *supra*, XVII, A, 3, b, (I).

53. Battles *v.* Tallman, 96 Ala. 403, 11 So. 247.

54. Hoener *v.* Koch, 84 Ill. 408.

55. Arndt *v.* Cullman, 132 Ala. 540, 31 So. 478, 90 Am. St. Rep. 922.

56. Murphy *v.* Waterhouse, 113 Cal. 467, 45 Pac. 866, 54 Am. St. Rep. 365; Brady *v.* Mangle, 109 Ill. App. 172; Merchants' L. & T. Co. *v.* Lamson, 90 Ill. App. 18; Gooch *v.* Tobias, 29 Ill. App. 268; French *v.* Day, 89 Me. 441, 36 Atl. 909. *Contra*, Beery *v.* Chicago, etc., R. Co., 73 Wis. 197, 40 N. W. 687.

57. Wilcox *v.* Henderson, 64 Ala. 535. See also Morrow *v.* Campbell, 118 Ala. 330, 24 So. 852; Evans *v.* Montgomery, 95 Mich. 497, 55 N. W. 362.

58. Bryan *v.* Chicago, etc., R. Co., 63 Iowa 464, 19 N. W. 295.

59. Wilkinson *v.* Searcy, 76 Ala. 176.

60. Swinney *v.* Booth, 28 Tex. 113.

61. West *v.* Druff, 55 Iowa 335, 7 N. W. 636; Gumberg *v.* Treusch, 103 Mich. 543, 61 N. W. 872; Ferris *v.* McQueen, 94 Mich. 367, 54 N. W. 164; Doe *v.* Dignowitty, 4 Sm. & M. (Miss.) 57; Bauer Grocery Co. *v.* Sanders, 74 Mo. App. 657. See also Hall *v.* Wolff, 61 Iowa 559, 16 N. W. 710.

62. Watkins *v.* Wallace, 19 Mich. 57, 77.

63. Cabell *v.* Menczer, (Tex. Civ. App. 1896) 35 S. W. 206.

64. Carter *v.* Gunnels, 67 Ill. 270.

65. Lundon *v.* Chicago, 83 Ill. App. 208.

66. *Illinois.*— Nelson *v.* Fehd, 203 Ill. 120, 67 N. E. 828; Lenning *v.* Lenning, 176 Ill. 180, 52 N. E. 46; Taylor *v.* Felsing, 164 Ill. 331, 45 N. E. 161; Mitchell *v.* Hindman, 150 Ill. 538, 37 N. E. 916; Bitter *v.* Saathoff, 98 Ill. 266; McDeed *v.* McDeed, 67 Ill. 545; Crabtree *v.* Reed, 50 Ill. 206; Schofield *v.* Baldwin, 102 Ill. App. 560; Reed *v.* Kimsey, 98 Ill. App. 364; Chicago, etc., R. Co. *v.* Stor-

"full" [67] preponderance of evidence denotes more than the preponderance rule demands. Questions of this kind most frequently arise in considering the correctness of instructions to juries given or refused.[68]

(II) *Preponderance of Probabilities.* While a conclusion of fact may be legitimately drawn from a preponderance of probabilities in its favor,[69] the probabilities must be such that the conclusion is acceptable to the judgment of the court or jury applied to the evidence in the particular case.[70] A majority of chances never can suffice alone to establish a proposition of fact, since the slightest real evidence would outweigh all contrary probabilities.[71]

d. Evidence to Overcome Adverse Presumptions — (I) *In General.* The party having the burden of proving a fact must produce evidence sufficient to overcome opposing presumptions, if any there be, as well as opposing evidence.[72]

ment, 90 Ill. App. 505 [*affirmed* in 190 Ill. 42, 60 N. E. 104]; Donley *v.* Dougherty, 75 Ill. App. 379; Dow *v.* Higgins, 72 Ill. App. 302; Harnish *v.* Hicks, 71 Ill. App. 551.

Maine.— "Clear preponderance" is objectionable. French *v.* Day, 89 Me. 441, 36 Atl. 909.

Missouri.— Scott *v.* Allenbaugh, 50 Mo. App. 130.

Nebraska.— Western Mattress Co. *v.* Potter, 1 Nebr. (Unoff.) 631, 95 N. W. 841; Marx *v.* Kilpatrick, 25 Nebr. 107, 41 N. W. 111; Search *v.* Miller, 9 Nebr. 26, 1 N. W. 975.

Ohio.— Travelers' Ins. Co. *v.* Rosch, 23 Ohio Cir. Ct. 491.

See 20 Cent. Dig. tit. "Evidence," § 2446.

Compare Hoffman *v.* Loud, 111 Mich. 156, 69 N. W. 231.

"Fair" preponderance.— It has been held improper to use the expression "fair preponderance" as equivalent to "preponderance" (Travelers' Ins. Co. *v.* Rosch, 23 Ohio Cir. Ct. 491; Lantry *v.* Lowrie, (Tex. Civ. App. 1900) 58 S. W. 837; Atkinson *v.* Reed, (Tex. Civ. App. 1898) 49 S. W. 260; Cabell *v.* Menczer, (Tex. Civ. App. 1896) 35 S. W. 206), but the weight of authority is otherwise (Zonker *v.* Cowan, 84 Ind. 395; Jamison *v.* Jamison, 113 Iowa 720, 84 N. W. 705; Bryan *v.* Chicago, etc., R. Co., 63 Iowa 464, 19 N. W. 295; Kirchner *v.* Collins, 152 Mo. 394, 53 S. W. 1081; Murray *v.* Burd, 65 Nebr. 427, 91 N. W. 278; Altschuler *v.* Coburn, 38 Nebr. 881, 57 N. W. 836; Gibson *v.* Norwalk, 13 Ohio Cir. Ct. 428, 7 Ohio Cir. Dec. 6).

67. Ridgell *v.* Reeves, 2 Tex. App. Civ. Cas. § 436.

68. See, generally, TRIAL.

69. *Florida.*— Smith *v.* Croom, 7 Fla. 81.

Illinois.— Crabtree *v.* Read, 50 Ill. 206. See also Meyer *v.* Mead, 83 Ill. 19.

Michigan.— Hoffman *v.* Loud, 111 Mich. 156, 69 N. W. 231.

Missouri.— Cass County *v.* Green, 66 Mo. 498.

New Hampshire.— Felch *v.* Concord R. Co., 66 N. H. 318, 29 Atl. 557; Fuller *v.* Rounceville, 29 N. H. 554.

New Jersey.— Harris *v.* Vanderveer, 21 N. J. Eq. 561, 574.

New York.— Gallagher *v.* Crooks, 132 N. Y. 338, 30 N. E. 746; Sommer *v.* Oppenheim, 19 Misc. 605, 610, 44 N. Y. Suppl. 396.

South Carolina.— Groesbeck *v.* Marshall, 44 S. C. 538, 22 S. E. 743.

Texas.— Conner *v.* State, 34 Tex. 659.

United States.— Blackwell *v.* Armistead, 3 Fed. Cas. No. 1,474, 3 Hughes 163; Roberts *v.* The St. James, 20 Fed. Cas. No. 11,914; Sloat *v.* Spring, 22 Fed. Cas. No. 12,948a.

England.— Newis *v.* Lark, 2 Plowd. 403, 412; The Clyde, 2 Spinks 27.

70. *Georgia.*— Parker *v.* Johnson, 25 Ga. 576.

Illinois.— Peak *v.* People, 76 Ill. 289; Warner *v.* Crandall, 65 Ill. 195; Toledo, etc., R. Co. *v.* Foster, 43 Ill. 480; Chicago *v.* Webb, 102 Ill. App. 232.

Iowa.— Butler *v.* Chicago, etc., R. Co., 71 Iowa 206, 32 N. W. 262.

Louisiana.— Holtzman *v.* Millaudon, 18 La. Ann. 29; Mummy *v.* Haggerty, 15 La. Ann. 268; Allard *v.* Orleans Nav. Co., 12 Rob. 469; Wilcox *v.* His Creditors, 2 Rob. 27; Skipwith *v.* His Creditors, 19 La. 198.

Maryland.— Corner *v.* Pendleton, 8 Md. 337.

Massachusetts.— Haskins *v.* Haskins, 9 Gray 390.

Michigan.— Strand *v.* Chicago, etc., R. Co., 67 Mich. 380, 34 N. W. 712; Dunbar *v.* McGill, 64 Mich. 676, 31 N. W. 578.

New Jersey.— See *In re* Vanderveer, 20 N. J. Eq. 463.

New York.— Briggs *v.* New York Cent., etc., R. Co., Sheld. 433; King *v.* Davis, 16 N. Y. Suppl. 427.

Wisconsin.— Baker *v.* State, 47 Wis. 111, 2 N. W. 110; Lake *v.* Meacham, 13 Wis. 355.

Comegys, C. J., said that preponderance is with the side "where the facts sworn to are the most consistent with the probability of truth, taking in view all the facts and circumstances in evidence in connection with the case." Green *v.* Maloney, 7 Houst. (Del.) 22, 24, 30 Atl. 672.

71. Day *v.* Boston, etc., R. Co., 96 Me. 207, 52 Atl. 771, 90 Am. St. Rep. 335. See also Denver, etc., R. Co. *v.* Glasscott, 4 Colo. 270; Braunschweiger *v.* Waits, 179 Pa. St. 47, 36 Atl. 155. "The most probable things sometimes don't happen." Snyder *v.* Mutual L. Ins. Co., 22 Fed. Cas. No. 13,154, per Cadwallader, J.

72. Hughes *v.* Coleman, 10 Bush (Ky.) 246; Decker *v.* Somerset Mut. F. Ins. Co., 66 Me. 406. See also *infra*, XVII, A, 4, a.

Thus it was held that "very clear and decisive evidence" was required to prove that a telegraph message regularly received was not transmitted from the office whence it purported to have been sent.[73] But it is said that the preponderance rule [74] continues to operate in such cases, the adverse presumption merely requiring more evidence to constitute a preponderance than where no presumption exists.[75] More evidence is required to overcome a strong presumption than to overcome a weak one.[76]

(II) *Improbabilities.* Highly improbable facts "should have credence in nothing less than the most convincing proofs." [77] The proof should be clear and strong in proportion to the degree of improbability.[78]

e. Number of Witnesses — (I) *Equality in Number.* Evidence on an issue of fact is not necessarily balanced because the witnesses who testify to its existence are directly contradicted by the same number of witnesses.[79] In such a situation other circumstances are to be considered, as in cases where the number of wit-

Presumption of innocence of crime see *supra*, notes 35 and 39.

Presumption of honesty as against charge of fraud see *supra*, note 45.

Presumption of moral uprightness.— Corner *v.* Pendleton, 8 Md. 337; Bailey *v.* Stiles, 2 N. J. Eq. 220; Jones *v.* Greaves, 26 Ohio St. 2, 6, 20 Am. Rep. 752.

Presumption of sanity see State *v.* Geddis, 42 Iowa 264.

Affidavit denying execution of a note in suit, as provided by statute declaring that execution is admitted unless such affidavit is filed, merely casts the burden of proof on plaintiff and does not raise a *prima facie* presumption of forgery for him to overcome. Stewart *v.* Gleason, 23 Pa. Super. Ct. 325.

73. Elwood *v.* Western Union Tel. Co., 45 N. Y. 549, 6 Am. Rep. 140.

74. See *supra*, note 17.

75. Adams *v.* Thornton, 78 Ala. 489, 56 Am. Rep. 49; Continental Ins. Co. *v.* Jachnichen, 110 Ind. 59, 10 N. E. 636, 59 Am. Rep. 194; Connor *v.* Pushor, 86 Me. 300, 29 Atl. 1083; Decker *v.* Somerset Mut. F. Ins. Co., 66 Me. 406; Doane *v.* Dunham, 64 Nebr. 135, 89 N. W. 640. See, however, *infra*, XVII, A, 4, a.

76. Continental Ins. Co. *v.* Jachnichen, 110 Ind. 59, 10 N. E. 636, 59 Am. Rep. 194; Decker *v.* Somerset Mut. F. Ins. Co., 66 Me. 406, 408 (where the court said: "To fasten upon a man a very heinous or repulsive act requires stronger proof than to fasten upon him an indifferent act, or one in accordance with his own inclinations. To fasten upon a man the act of willfully and maliciously setting fire to his own buildings, should certainly require more evidence than to establish the fact of payment of a note, or the truth of an account in set-off; because the improbability or presumption to be overcome in the one case is much stronger than it is in the other"); Knowles *v.* Scribner, 57 Me. 495.

77. Vreeland *v.* Vreeland, 53 N. J. Eq. 387, 393, 32 Atl. 3, per McGill, Ch. See also Fry *v.* Piersol, 166 Mo. 429, 66 S. W. 171; Seiferd *v.* Meyer, 87 N. Y. Suppl. 636, 639.

78. Sharpe *v.* Crispin, L. R. 1 P. 611, 621, 38 L. J. P. & M. 17, 20 L. T. Rep. N. S. 41, 17 Wkly. Rep. 368.

79. *Alabama.*— Howard *v.* Taylor, 99 Ala. 450, 13 So. 121.

Colorado.— Fleetford *v.* Barrett, 11 Colo. App. 77, 52 Pac. 293.

Georgia.— Cleghorn *v.* Janes, 68 Ga. 87; Killorin *v.* Bacon, 57 Ga. 497; Salter *v.* Glenn, 42 Ga. 64.

Illinois.— Boylston *v.* Bain, 90 Ill. 283; Durant *v.* Rogers, 87 Ill. 508; Haines *v.* People, 82 Ill. 430; Bridenthal *v.* Davidson, 61 Ill. 460; Chicago, etc., R. Co. *v.* Rains, 106 Ill. App. 539; Fowler *v.* Peterson, 25 Ill. App. 81; McElhaney *v.* People, 1 Ill. App. 550.

Indiana.— Rudolph *v.* Lane, 57 Ind. 115; Riley *v.* Butler, 36 Ind. 51.

Iowa.— Murphy *v.* De Haan, 116 Iowa 61, 89 N. W. 100.

Kansas.— Muscott *v.* Stubbs, 24 Kan. 520.

Maine.— Sweetser *v.* Lowell, 33 Me. 446.

Montana.— Story *v.* Maclay, 6 Mont. 492, 13 Pac. 198.

Nebraska.— Grand Island Mercantile Co. *v.* McMeans, 60 Nebr. 373, 83 N. W. 172.

New York.— Felbel *v.* Kahn, 29 N. Y. App. Div. 270, 51 N. Y. Suppl. 435; Schillinger *v.* McGarry, 25 Misc. 745, 55 N. Y. Suppl. 673; Clement *v.* Congress String Co., 35 N. Y. Suppl. 1004 [*affirmed* in 158 N. Y. 692, 53 N. E. 1124].

Rhode Island.— Keeley *v.* Brennan, 18 R. I. 41, 25 Atl. 346.

See 20 Cent. Dig. tit. "Evidence," § 2427; and *infra*, XVII, A, 3, e.

Unimpeached witnesses are not necessarily of equal credibility. Johnson *v.* People, 140 Ill. 350, 29 N. E. 895 [*overruling* McFarland *v.* People, 72 Ill. 368]; Durant *v.* Rogers, 87 Ill. 508 [*disapproving* Durant *v.* Rogers, 71 Ill. 122]; Norton *v.* Eastman, 83 Ill. App. 303; Lasher *v.* Cotton, 80 Ill. App. 75; Hanke *v.* Cobiskey, 57 Ill. App. 267; Sickle *v.* Wolf, 91 Wis. 396, 64 N. W. 1028.

A rebuttable legal presumption may be decisive in favor of a party for whom it operates. Ennor *v.* Welch, 48 Ill. 353; Hyatt *v.* Cochran, 37 Iowa 309; Bugger *v.* Creswell, 8 Pa. Cas. 555, 12 Atl. 829. See also Bobb *v.* Bobb, 7 Mo. App. 501.

nesses on each side is unequal.[80] But if application of the recognized tests of credibility of witnesses and of evidence fails to show a preponderance on one side or the other the issue ought to be determined against the party having the burden of proof.[81]

(II) *Disparity in Number* — (A) *In General.* In ascertaining the preponderance of evidence the maxim is *testes ponderantur non numerantur*,[82] and numerical preponderance of witnesses does not necessarily constitute a preponderance of evidence so as to require a contested question of fact to be decided in accordance therewith.[83] The intelligence, fairness, and means of observation of the witnesses and various other recognized factors in determining the weight of

80. See *infra*, notes 84 and 85. "The testimony of one witness may be more clear, consistent, and convincing than the testimony of another." Howlett *v.* Dilts, 4 Ind. App. 23, 30 N. E. 313, 315. "Facts may exist which will turn the scale on the one side,— interest, motive, prejudice, manner of testifying. These, or other kindred things are to be considered, in determining which of the two witnesses . . . is entitled to the greater credit." Boylston *v.* Bain, 90 Ill. 283, 288, per Craig, C. J. See also Gowen *v.* Kehoe, 71 Ill. 66; Bonnell *v.* Wilder, 67 Ill. 327. In the following cases a preponderance was found, although there was only one witness on each side and they were in direct conflict.

Illinois.— Stampofski *v.* Steffens, 79 Ill. 303; Proudfoot *v.* Wightman, 78 Ill. 553, 557 (testimony of one of the witnesses "so inconsistent with the usual manner in which business men transact business, that it looks incredible"); Hubbard *v.* Rankin, 71 Ill. 129 (verdict on the side of a witness before the jury as against one who testified by deposition and under the motive of self-exculpation); Smith *v.* Hughes, 24 Ill. 270 (reputation of one witness for truth and veracity impeached); Dinet *v.* Reilly, 2 Ill. App. 316 (recollection of the prevailing witness more minute and circumstantial).

Missouri.— Layson *v.* Wilson, 37 Mo. App. 636.

New Jersey.— Swain *v.* Edmunds, 53 N. J. Eq. 142, 32 Atl. 369; Daggers *v.* Van Dyck, 37 N. J. Eq. 130 (testimony of one witness opposed to common experience and observation); Vail *v.* Newark Sav. Inst., 32 N. J. Eq. 627.

New York.— Marinville *v.* Ferrand, 17 Misc. 373, 40 N. Y. Suppl. 151; Enright *v.* Seymour, 4 Misc. 597, 24 N. Y. Suppl. 704 (reputation of one witness for truth and veracity impeached); Stevens *v.* Trask, 18 N. Y. Suppl. 117 (one witness contradicted by his own writings).

United States.— Mutual Reserve Fund L. Assoc. *v.* Cleveland Woolen Mills, 82 Fed. 508; *Ex p.* Fitz, 9 Fed. Cas. No. 4,837, 2 Lowell 519.

See 20 Cent. Dig. tit. "Evidence," § 2427.

81. *Alabama.*— See Joseph *v.* Seward, 91 Ala. 597, 8 So. 682.

District of Columbia.— Kelley *v.* Driver, 6 Mackey 440.

Florida.— Coker *v.* Dawkins, 20 Fla. 141.

Illinois.— Adsit *v.* Smith, 52 Ill. 412. See also Boylston *v.* Bain, 90 Ill. 283; Broughton *v.* Smart, 59 Ill. 440.

Montana.— Story *v.* Maclay, 6 Mont. 492, 13 Pac. 198.

New York.— Griffiths *v.* Hardenbergh, 41 N. Y. 464; Losee *v.* Morey, 57 Barb. 561; Hopkins *v.* Clark, 14 Misc. 599, 36 N. Y. Suppl. 456; Campbell Printing Press, etc., Co. *v.* Yorkston, 11 Misc. 340, 32 N. Y. Suppl. 263; Lummis *v.* Van Dyke, 45 N. Y. Suppl. 489; Syms *v.* Vyse, 2 N. Y. St. 106; Raines *v.* Totman, 64 How. Pr. 493. See also Smith *v.* Leland, 2 Duer 497; Stevens *v.* Trask, 18 N. Y. Suppl. 117; Bakeman *v.* Rose, 14 Wend. 105 [*affirmed* in 18 Wend. 146]; Allen *v.* Public Administrator, 1 Bradf. Surr. 378.

Oregon.— Smith *v.* Griswold, 6 Oreg. 440.

Wisconsin.— See Sanborn *v.* Babcock, 33 Wis. 400.

United States.— The J. E. Potts, 54 Fed. 539.

See 20 Cent. Dig. tit. "Evidence," § 2427; and *infra*, notes 88 and 89.

Exact balance.— In The John Martin, 13 Fed. Cas. No. 7,357, 2 Abb. 172, 174, where a claimant on one side was directly contradicted by the libellant on the other, and they were the only witnesses, the case was decided against the libellant who had the burden of proof, Longyear, D. J., saying: "Neither is corroborated, and as both stand before the court on an equal footing as to interest and credibility, the testimony of the one balances that of the other."

82. Bakeman *v.* Rose, 14 Wend. (N. Y.) 105 [*affirmed* in 18 Wend. 146]; Allen *v.* Public Administrator, 1 Bradf. Surr. (N. Y.) 378, 379. See also Graham *v.* State, 92 Ala. 55, 9 So. 530; Life Assoc. of America *v.* Neville, 72 Ala. 521; O'Connor *v.* Felix, 87 Hun (N. Y.) 179, 33 N. Y. Suppl. 1074.

83. *Alabama.*— Kansas City, etc., R. Co. *v.* Crocker, 95 Ala. 412, 11 So. 262.

California.— Grant *v.* McPherson, 104 Cal. 165, 37 Pac. 864.

Delaware.— Russell *v.* Fagan, (1886) 8 Atl. 258; Green *v.* Maloney, 7 Houst. 22, 30 Atl. 672.

Georgia.— Georgia Northern Co. *v.* Hutchins, 119 Ga. 504, 46 S. E. 659; Savannah, etc., R. Co. *v.* Wideman, 99 Ga. 245, 25 S. E. 400; Kinnebrew *v.* State, 80 Ga. 232, 5 S. E. 56.

Illinois.— North Chicago St. R. Co. *v.* Fitzgibbons, 180 Ill. 466, 54 N. E. 483 [*affirming* 79 Ill. App. 632]; Gage *v.* Eddy, 179 Ill. 492,

evidence[84] should be taken into consideration.[85] But disparity in number of wit-

53 N. E. 1008; North Chicago St. R. Co. *v.* Anderson, 176 Ill. 635, 52 N. E. 21 [*affirming* 70 Ill. App. 336]; Chytraus *v.* Chicago, 160 Ill. 18, 43 N. E. 335; Chicago, etc., R. Co. *v.* Fisher, 141 Ill. 614, 31 N. E. 406; Phenix *v.* Castner, 108 Ill. 207; Meyer *v* Mead, 83 Ill. 19; Bishop *v.* Busse, 69 Ill. 403; Grace *v.* Moseley, 112 Ill. App. 100; La Salle *v.* Evans, 111 Ill. App. 69; Illinois Steel Co. *v.* Ryska, 102 Ill. App. 347 [*affirmed* in 200 Ill. 280, 65 N. E. 734]; Eastman *v.* West Chicago St. R. Co., 79 Ill. App. 585; North Alton *v.* Dorsett, 59 Ill. App. 612; Brady *v.* Converse, 45 Ill. App. 297; Broadwell *v.* Sanderson, 29 Ill. App. 384; Totel *v.* Bonnefoy, 23 Ill. App. 55; Herring *v.* Poritz, 6 Ill. App. 208; Clark *v.* Gotts, 1 Ill. App. 454.

Indiana.— Rudolph *v.* Lane, 57 Ind. 115; Fitzinger *v.* State, 31 Ind. App. 350, 67 N. E. 1006; Howlett *v.* Dilts, 4 Ind. App. 23, 30 N. E. 313.

Iowa.— Lamb *v.* Cedar Rapids, 108 Iowa 241, 79 N. W. 366; Truman *v.* Bishop, 83 Iowa 697, 50 N. W. 278; Crowley *v.* Burlington, etc., R. Co., 65 Iowa 658, 20 N. W. 467, 22 N. W. 918.

Michigan.— Strand *v.* Chicago, etc., R. Co., 67 Mich. 380, 34 N. W. 712.

Missouri.— Turner *v.* Overall, 172 Mo. 271, 72 S. W. 644; Layson *v.* Wilson, 37 Mo. App. 636.

Montana.— Wastl *v.* Montana Union R. Co., 17 Mont. 213, 42 Pac. 772; Story *v.* Maclay, 6 Mont. 492, 13 Pac. 198.

Nebraska.— New Hampshire Sav. Bank *v.* Dillrance, 63 Nebr. 412, 88 N. W. 653; Fremont, etc., R. Co. *v.* French, 48 Nebr. 638, 67 N. W. 472; Fitzgerald *v.* Richardson, 30 Nebr. 365, 46 N. W. 615.

New Jersey.— Campbell *v.* Delaware, etc., Tel., etc., Co., (Sup. 1903) 56 Atl. 303; Kulman *v.* Erie R. Co., 65 N. J. L. 241, 47 Atl. 497; Pancoast *v.* Graham, 15 N. J. Eq. 294; Blenderhan *v.* Price, (Ch. 1886) 2 Atl. 812.

New York.— Manning *v.* Atlantic Ave. R. Co., 91 Hun 279, 36 N. Y. Suppl. 201; Latham *v.* Delany, 59 N. Y. Super. Ct. 590, 15 N. Y. Suppl. 146; Schapiro *v.* Block, 27 Misc. 791, 58 N. Y. Suppl. 365; Ennis *v.* Dudley, 22 Misc. 4, 48 N. Y. Suppl. 622; Divver *v.* Hall, 20 Misc. 677, 46 N. Y. Suppl. 533; Mullane *v.* Houston, etc., R. Co., 20 Misc. 434, 45 N. Y. Suppl. 1039; Fried *v.* Stein, 16 Misc. 494, 38 N. Y. Suppl. 971; Small *v.* Brooklyn City R. Co., 10 Misc. 266, 30 N. Y. Suppl. 1076; Schick *v.* Brooklyn City R. Co., 10 N. Y. Suppl. 528; Hourney *v.* Brooklyn City R. Co., 7 N. Y. Suppl. 602; Bakeman *v.* Rose, 14 Wend. (N. Y.) 105 [*affirmed* in 18 Wend. 146]; Jackson *v.* Loomis, 12 Wend. 27; Carroll *v.* Norton, 3 Bradf. Surr. 291.

Ohio.— Cleveland, etc., R. Co. *v.* Richerson, 19 Ohio Cir. Ct. 385, 10 Ohio Cir. Dec. 326.

Pennsylvania.— Goldstrohm *v.* Stinner, 155 Pa. St. 28, 25 Atl. 765; Com. *v.* Read, 2 Ashm. 261, 275.

Tennessee.— Coles *v.* Wrecker, 2 Tenn. Cas. 341.

Texas.— Stewart *v.* Hamilton, 19 Tex. 96; State *v.* Moore, 7 Tex. 257; Casey-Swasey Co. *v.* Treadwell, (Civ. App. 1903) 74 S. W. 791; Largent *v.* Beard, (Civ. App. 1899) 53 S. W. 90.

Virginia.— Poague *v.* Spriggs, 21 Gratt. 220.

Wisconsin.— O'Brien *v.* Chicago, etc., R. Co., 92 Wis. 340, 66 N. W. 363; Van Doran *v.* Armstrong, 28 Wis. 236; Ely *v.* Tesch, 17 Wis. 202. See also Hardy *v.* Milwaukee St. R. Co., 89 Wis. 183, 61 N. W. 771.

United States.— Brooks *v.* Bicknell, 4 Fed. Cas. No. 1,946, 4 McLean 70; The Invincible, 13 Fed. Cas. No. 7,056, 3 Sawy. 176; Keys *v.* The Ambassador, 14 Fed. Cas. No. 7,747, 1 Bond 237; The Nabob, 17 Fed. Cas. No. 10,002, 1 Brown Adm. 115; Sibley *v.* St. Paul M. & F. Ins. Co., 22 Fed. Cas. No. 12,830, 9 Biss. 31; Smith *v.* Fay, 22 Fed. Cas. No. 13,045, 6 Fish. Pat. Cas. 446.

England.— The Wega, [1895] P. 156, 159, 7 Aspin. 597, 64 L. J. Adm. 68, 72 L. T. Rep. N. S. 332, 11 Reports 726; Bates *v.* Graves, 2 Ves. Jr. 287, 30 Eng. Reprint 637.

See 20 Cent. Dig. tit. "Evidence," § 2427; and cases cited *infra*, note 85.

"Weight of evidence is not a question of mathematics, but depends on its effect in inducing belief. It often happens that one witness standing uncorroborated may tell a story so natural and reasonable in its character, and in a manner so sincere and honest, as to command belief although several witnesses of equal apparent respectability may contradict him. The manner and appearance of the witness, the character of his story, and its inherent probability may be such as to lead a jury to believe his testimony, and accept it as the truth of the transaction to which it relates. The question for the jury is not on which side are the witnesses most numerous, but what testimony do you believe." Braunschweiger *v.* Waits, 179 Pa. St. 47, 51, 36 Atl. 155, per Williams, J.

By statute in Oregon, it is provided that the jury "are not bound to find in conformity with the declarations of any number of witnesses against a less number." Hill Ann. Laws, § 845, subd. 2; Huber *v.* Miller, 41 Oreg. 103, 113, 68 Pac. 400.

84. See *infra*, XVII, C, 1, a; and, generally, WITNESSES.

85. *Alabama.*— Alabama Great Southern R. Co. *v.* Frazier, 93 Ala. 45, 9 So. 303, 30 Am. St. Rep. 28.

Delaware.—Weisman *v.* Commercial F. Ins. Co., 3 Pennew. 224, 50 Atl. 93.

Georgia.— Wilson *v.* Burr, 97 Ga. 256, 22 S. E. 991; Corniff *v.* Cook, 95 Ga. 61, 22 S. E. 47, 51 Am. St. Rep. 55; Amis *v.* Cameron, 55 Ga. 449.

nesses is a circumstance not to be overlooked,[86] and where, without regarding the difference in number of witnesses, a preponderance of evidence on either side cannot be detected,[87] the court or jury may properly decide in conformity with the testimony of the greater number of witnesses.[88] Some courts have emphati-

Illinois.— Shevalier *v.* Seager, 121 Ill. 564, 13 N. E. 499; Long *v.* Little, 119 Ill. 600, 8 N. E. 194; Illinois, etc., R. Co. *v.* Ogle, 92 Ill. 353; Chicago, etc., R. Co. *v.* Dickson, 63 Ill. 151, 14 Am. Rep. 114; West Chicago St. R. Co. *v.* Lieserowitz, 99 Ill. App. 591. See also Illinois Steel Co. *v.* Wierzbicky, 206 Ill. 201, 68 N. E. 1101 [*affirming* 107 Ill. App. 69].

Indiana.— McLees *v.* Felt, 11 Ind. 218.

Missouri.— Dalrymple *v.* Craig, 149 Mo. 345, 50 S. W. 884.

Nebraska.— Buck *v.* Hogeboom, 2 Nebr. (Unoff.) 853, 90 N. W. 635.

North Carolina.— Hodges *v.* Southern R. Co., 122 N. C. 992, 29 S. E. 939.

Pennsylvania.— Supplee *v.* Timothy, 124 Pa. St. 375, 16 Atl. 864.

Tennessee.— Willcox *v.* Hines, 100 Tenn. 524, 45 S. W. 781, 66 Am. St. Rep. 761.

Texas.— Coles *v.* Perry, 7 Tex. 109.

Washington.— Northern Pac. R. Co. *v.* Holmes, 3 Wash. Terr. 543, 18 Pac. 76.

Wisconsin.— Schmitt *v.* Milwaukee St. R. Co., 89 Wis. 195, 61 N. W. 834; Bierbach *v.* Goodyear Rubber Co., 54 Wis. 208, 11 N. W. 514, 41 Am. Rep. 19.

United States.— Brooks *v.* Jenkins, 4 Fed. Cas. No. 1,953, 3 McLean 432; The Delaware, 7 Fed. Cas. No. 3,760, 1 Biss. 110; Lee *v.* Guardian L. Ins. Co., 15 Fed. Cas. No. 8,190; Taylor *v.* Harwood, 23 Fed. Cas. No. 13,794, Taney 437.

See 20 Cent. Dig. tit. "Evidence," § 2427.

Approved instruction.— In Meyer *v.* Mead, 83 Ill. 19, 20, the following instruction was held to be unobjectionable: "The jury must also take into consideration the opportunities or occasion of the witnesses seeing, knowing or remembering what they testify to or about, the probability or improbability of its truth, the relation or connection, if any, between the witnesses and the parties, their interest or lack of interest in the result of the case, and their conduct and demeanor while so testifying." See further, as to instructions, TRIAL; and for various considerations affecting the weight of testimony, see, generally, WITNESSES.

In weighing testimony to matter of opinion, it is especially requisite that the intelligence of the respective witnesses and their manner of testifying should be considered. Brooks *v.* Bicknell, 4 Fed. Cas. No. 1,946, 4 McLean 70; Cochrane *v.* Swartout, 5 Fed. Cas. No. 2,928.

86. *Georgia.*— Georgia Northern R. Co. *v.* Hutchins, 119 Ga. 504, 46 S. E. 659.

Illinois.— West Chicago St. R. Co. *v.* Lieserowitz, 197 Ill. 607, 64 N. E. 718 [*affirming* 99 Ill. App. 591]; Illinois, etc., R., etc., Co. *v.* Ogle, 92 Ill. 353; St. Paul F. & M. Ins. Co. *v.* Johnson, 77 Ill. 598; Carney *v.* Tully, 74 Ill. 375; Chicago, etc., R. Co. *v.* Stumps, 69 Ill. 409; Eastman *v.* West Chicago St. R. Co., 79 Ill. App. 585.

New York.— Allen *v.* Public Administrator, 1 Bradf. Surr. 378.

Washington.— Gilmore *v.* Seattle, etc., R. Co., 29 Wash. 150, 69 Pac. 743.

Wisconsin.— McCoy *v.* Milwaukee St. R. Co., 82 Wis. 215, 52 N. W. 93.

United States.— The J. L. Hasbrouck, 13 Fed. Cas. No. 7,323, 4 Ben. 359.

See 20 Cent. Dig. tit. "Evidence," § 2427.

A jury cannot capriciously disbelieve the greater number. Trott *v.* Wolfe, 35 Ill. App. 163. Where many witnesses who are in a position to know the facts to which they testify concur in their testimony, and are disputed only by a few who have had no better opportunities to know the facts, it is not permissible to reject the testimony of the many and accept that of the few without some tangible and substantial reason for so doing. Chicago, etc., R. Co. *v.* Givens, 18 Ill. App. 404. The following instruction was approved in Gage *v.* Eddy, 179 Ill. 492, 504, 53 N. E. 1008: "The evidence of the smaller number cannot be taken by the jury in preference to that of the larger number unless the jury can say, on their oaths, that it is more reasonable, more truthful, more disinterested and more credible."

Suspicion attaching to superior number,— Although there be ground for suspicion of bias and connivance among the witnesses for one party their numerical superiority may suffice to neutralize testimony on the other side that is more or less confused and contradictory. The Napoleon, 17 Fed. Cas. No. 10,015, Olcott 208.

87. An instruction that if the witnesses are equally credible the greater number should prevail is erroneous, since it ignores every condition but the personal integrity of the witnesses; whereas the facilities for knowing the facts or capacity to remember them and various other elements are to be considered. Bierbach *v.* Goodyear Rubber Co., 54 Wis. 208, 11 N. W. 514, 41 Am. Rep. 19 [*followed* in Shekey *v.* Eldredge, 71 Wis. 538, 37 N. W. 820; Spensley *v.* Lancashire Ins. Co., 62 Wis. 443, 22 N. W. 740].

88. *Alabama.*— Graham *v.* State, 92 Ala. 55, 9 So. 530.

Georgia.— West *v.* Wheatley, 59 Ga. 559.

Illinois.— English *v.* Porter, 109 Ill. 285; Chicago City R. Co. *v.* Maloney, 99 Ill. App. 623. See also Chicago, etc., R. Co. *v.* Fisher, 141 Ill. 614, 31 N. E. 406; North Chicago St. R. Co. *v.* Fitzgibbons, 54 Ill. App. 385.

Maryland.— See Insley *v.* Disharoon, (1886) 5 Atl. 469.

Missouri.— Dalrymple *v.* Craig, 149 Mo. 345, 356, 50 S. W. 884, where Valliant, J., said: "The natural inclination of the scales

cally declared this to be the only correct course in such a case.[89] In view of the comparative probabilities of mistake or perjury where a single witness is opposed to several his testimony will not readily be accepted as controlling,[90] especially

would be towards the greater number of witnesses."

New Jersey.— Katzenbach *v.* Holt, 43 N. J. Eq. 536, 12 Atl. 383. See also Hutchinson *v.* Coleman, 10 N. J. L. 74; Rowley *v.* Flannelly, 30 N. J. Eq. 612.

New York.— Woarms *v.* Becker, 84 N. Y. App. Div. 491, 82 N. Y. Suppl. 1086; Culhane *v.* New York Cent., etc., R. Co., 67 Barb. 562; O'Neill *v.* Interurban St. R. Co., 86 N. Y. Suppl. 208; Matter of Gould, 15 N. Y. St. 784.

Texas.— Coles *v.* Perry, 7 Tex. 109, 140.

Washington.— Northern Pac. R. Co. *v.* Holmes, 3 Wash. Terr. 543, 18 Pac. 76.

Wisconsin.— See Bisewski *v.* Booth, 100 Wis. 383, 76 N. W. 349; Spensley *v.* Lancashire Ins. Co., 62 Wis. 443, 22 N. W. 740.

United States.— Cochrane *v.* Swartout, 5 Fed. Cas. No. 2,928; Crawford *v.* The Buffalo, 6 Fed. Cas. No. 3,365*a*. See also Russell, etc., Mfg. Co. *v.* Mallory, 21 Fed. Cas. No. 12,166, 10 Blatchf. 140.

England.—Lee *v.* Chalcraft, 3 Phillim. 639, eight against four as to the value of the land.

See 20 Cent. Dig. tit. "Evidence," § 2427.

Where clear and convincing proof is required (see *infra*, XVII, A, 4) there should be great caution in deciding against the majority of witnesses. Sager *v.* Mead, 171 Pa. St. 349, 33 Atl. 355.

Positive and negative testimony.— Where the testimony is what is called positive and negative a greater number on the side of the latter is not usually regarded as of much importance. See Horn *v.* Baltimore, etc., R. Co., 54 Fed. 301, 4 C. C. A. 346; and *infra*, XVII, C, 1, g, (II), (B).

Fact and opinion.— In Cochrane *v.* Swartout, 5 Fed. Cas. No. 2,928, Thompson, C. J., charging a jury, said: "In reference to a fact, the jury might depend upon the number of witnesses, and in that case the evidence of the greater number would be a safe criterion to judge by; but, in a mere matter of opinion, the jury were to found their judgment on the intelligence of the respective witnesses and their manner of giving testimony, and by that means ascertain whether they could place more confidence on one side than the other."

89. *Arkansas.*— Vaughan *v.* Parr, 20 Ark. 600, 607, where English, C. J., said: "Under such circumstances, the testimony of the greater number [five against two] must prevail."

Connecticut.— Lillibridge *v.* Barber, 55 Conn. 366, 11 Atl. 850.

Georgia.— Dowdell *v.* Neal, 10 Ga. 148, two against one.

New Jersey.— Katzenbach *v.* Holt, 43 N. J. Eq. 536, 12 Atl. 383.

Pennsylvania.— Sager *v.* Mead, 171 Pa. St. 349, 33 Atl. 355, six against three, all testifying to opinion as to value of property.

Tennessee.— Wilcox *v.* Hines, 100 Tenn. 524, 45 S. W. 781, 66 Am. St. Rep. 761; Gribble *v.* Ford, (Ch. App. 1898) 52 S. W. 1007.

United States.— The Dale, 46 Fed. 670; Crawford *v.* The Buffalo, 6 Fed. Cas. No. 3,365*a* (where Betts, D. J., said that if the witnesses "are of like intelligence and probity, and there is no means supplied for reconciling discordant statements of facts by witnesses, I know of no other way for courts and juries to ascertain the truth than by reposing faith in the greater number"); The Queen, 20 Fed. Cas. No. 11,502, 8 Blatchf. 234; Russell, etc., Mfg. Co. *v.* Mallory, 21 Fed. Cas. No. 12,166, 10 Blatchf. 140.

See 20 Cent. Dig. tit. "Evidence," § 2427.

Single interested witness opposed to several. Smith *v.* Slocum, 62 Ill. 354; Gibson *v.* Western New York, etc., R. Co., 164 Pa. St. 142, 30 Atl. 308, 44 Am. St. Rep. 586.

The probability that several witnesses have conspired to commit perjury is less than the probability that a single opposing witness has committed perjury. Kentner *v.* Kline, 41 N. J. Eq. 422, 4 Atl. 781. "Undoubtedly, if all the witnesses are equally intelligent, and equally truthful and free from influence or bias, and have the same opportunities for knowing the facts testified to, and testify from such knowledge, a court could safely, and ought to credit the greater number, on the ground that none are presumed to have testified falsely, and the many would be less likely to be mistaken than a less number." Graham *v.* State, 92 Ala. 55, 56, 9 So. 530, per Coleman, J.

90. *Connecticut.*— Lillibridge *v.* Barber, 55 Conn. 366, 11 Atl. 850.

Illinois.— Ellis *v.* Locke, 7 Ill. 459. See also Haycraft *v.* Davis, 49 Ill. 455.

Iowa.— Crowley *v.* Burlington, etc., R. Co., 65 Iowa 658, 20 N. W. 467, 22 N. W. 918.

Minnesota.— Thompson *v.* Pioneer Press Co., 37 Minn. 285, 33 N. W. 856.

New Jersey.— Kentner *v.* Kline, 41 N. J. Eq. 422, 4 Atl. 781. See also Shields *v.* Bell, 19 N. J. L. 93; Morris *v.* Hinchman, 32 N. J. Eq. 204.

Pennsylvania.— Gibson *v.* Western New York, etc., R. Co., 164 Pa. St. 142, 30 Atl. 308, 44 Am. St. Rep. 586.

Tennessee.— Gribble *v.* Ford, (Ch. App. 1898) 52 S. W. 1007.

Wisconsin.— Bisewski *v.* Booth, 100 Wis. 383, 76 N. W. 349.

United States.— The Dale, 46 Fed. 670; The Queen, 20 Fed. Cas. No. 11,502, 8 Blatchf. 234.

See 20 Cent. Dig. tit. "Evidence," § 2427.

One witness may be believed, however, in opposition to several.

California.— Grant *v.* McPherson, 104 Cal. 165, 37 Pac. 864, where a finding in favor of one witness against two or three was not dis-

where he is an interested party and all or nearly all the opposing witnesses are disinterested.[91]

(B) *Considerations Favoring Greater Number.* Several concurring witnesses are less likely to be mistaken or perjured than a single opposing witness.[92] Under the facts in each case the following considerations have been advanced by courts in favor of the greater number of witnesses: that it is not possible for them to be mistaken and that their testimony is either true or wilfully false;[93] that they are disinterested and opposed only by an interested party;[94] that the opposing witnesses are interested parties;[95] that the party against whom they testify has made admissions tending to corroborate their testimony;[96] that their testimony is corroborated by the conduct of the parties;[97] that they had superior opportunities for observation;[98] and that they are for various other reasons better entitled to credit.[99] It is an argument in favor of the greater number that they are adults, while the opposing fewer are children.[1]

(C) *Considerations Favoring Smaller Number.* Under the facts of the particular case courts have argued in favor of the fewer number of witnesses as follows: That they had superior opportunities for observation;[2] that they are sustained by the probabilities of the case[3] or the surrounding circumstances;[4] that their testimony to the condition of a street for example is corroborated by a photograph;[5] that they are corroborated by documentary evidence;[6] that the party to the suit for whom the opposing witnesses testified had made damaging admissions;[7] that the memory of the opposing witnesses was shown to be at fault.

turbed on appeal, although the appellate court conceded for the sake of argument that his opportunity for observation was inferior to that of the others.

Delaware.— Russell *v.* Fagan, (1886) 8 Atl. 258.

Georgia.— Amis *v.* Cameron, 55 Ga. 449.

Illinois.— Phenix *v.* Castner, 108 Ill. 207; Keokuk Northern Line Packet Co. *v.* True, 88 Ill. 608; Herring *v.* Poritz, 6 Ill. App. 208.

Missouri.— See Greditzer *v.* Continental Ins. Co., 91 Mo. App. 534.

New York.— Mullane *v.* Houston, etc., R. Co., 20 Misc. 434, 45 N. Y. Suppl. 1039.

Pennsylvania.— Hale, etc., Mfg. Co. *v.* Norcross, 199 Pa. St. 283, 49 Atl. 80.

Tennessee.— Coles *v.* Wrecker, 2 Tenn. Cas. 341.

Wisconsin.— Adams *v.* Chicago, etc., R. Co., 89 Wis. 645, 63 N. W. 525; Van Doran *v.* Armstrong, 28 Wis. 236.

United States.— Sibley *v.* St. Paul F. & M. Ins. Co., 22 Fed. Cas. No. 12,830.

See 20 Cent. Dig. tit. "Evidence," § 2427.

91. *Illinois.*—Smith *v.* Slocum, 62 Ill. 354; Haycraft *v.* Davis, 49 Ill. 455.

Minnesota.— Thompson *v.* Pioneer Press Co., 37 Minn. 285, 33 N. W. 856.

New York.— O'Neill *v.* Interurban St. R. Co., 86 N. Y. Suppl. 208.

Pennsylvania.— Holden *v.* Pennsylvania R. Co., 169 Pa. St. 1, 32 Atl. 103.

Wisconsin.— McCoy *v.* Milwaukee St. R. Co., 82 Wis. 215, 52 N. W. 93.

See 20 Cent. Dig. tit. "Evidence," § 2427; and *infra*, note 94.

92. See *supra*, note 89.

93. Chicago, etc., R. Co. *v.* Stumps, 69 Ill. 409.

94. Chicago City R. Co. *v.* Maloney, 99 Ill. App. 623; Cassio *v.* Brooklyn Heights R. Co., 59 N. Y. App. Div. 617, 69 N. Y. Suppl. 208; Mix *v.* Royal Ins. Co., 169 Pa. St. 639, 32 Atl. 460; Gibson *v.* Western New York, etc., R. Co., 164 Pa. St. 142, 30 Atl. 308, 44 Am. St. Rep. 586. See also *supra*, note 91.

95. The Hortensia, 12 Fed. Cas. No. 6,706, 2 Hask. 141; Thompson *v.* Pioneer Press Co., 37 Minn. 285, 33 N. W. 856.

96. The J. L. Hasbrouck, 13 Fed. Cas. No. 7,323, 4 Ben. 359.

97. Tiernan *v.* Gibney, 24 Wis. 190.

98. Delafield *v.* Sherwood, 15 La. 271.

99. Ward *v.* Ogdensburg, 29 Fed. Cas. No. 17,158, 5 McLean 622, Newb. Adm. 139.

1. Chicago, etc., R. Co. *v.* Stumps, 69 Ill. 409.

2. Shields *v.* Bell, 19 N. J. L. 93; Carroll *v.* Norton, 3 Bradf. Surr. (N. Y.) 291; Taylor *v.* Harwood, 23 Fed. Cas. No. 13,794, Taney 437, where for the reason stated one witness outweighed several.

3. The Wega, [1895] P. 156, 7 Aspin. 597, 64 L. J. Adm. 68, 72 L. T. Rep. N. S. 332, 11 Reports 726.

4. Turner *v.* Overall, 172 Mo. 271, 72 S. W. 644; Greditzer *v.* Continental Ins. Co., 91 Mo. App. 534; Jackson *v.* Loomis, 12 Wend. (N. Y.) 27. The testimony of the fewer witnesses may be supported by all the other facts and circumstances in evidence to such an extent as to induce belief as being reasonable and probable while that of the greater number may not. Clark *v.* Gotts, 1 Ill. App. 454.

5. La Salle *v.* Evans, 111 Ill. App. 69, the court concluding that the opposing witnesses were mistaken as to the time when the conditions existed to which they testified.

6. Jackson *v.* Loomis, 12 Wend. (N. Y.) 27; Wilson *v.* Anderson, (Tenn. Ch. App. 1896) 37 S. W. 1100.

7. Latham *v.* Delany, 15 N. Y. Suppl. 146.

in various particulars of their testimony;[8] that some of the opposing witnesses admitted that they were paying no particular attention to the matter;[9] that some of the opposing witnesses were impeached by contradictory statements;[10] that the greater number differ among themselves as well as from the fewer number, and that the recollection of the latter is more likely to be correct;[11] that the fewer are supported by a legal presumption, while the others are identified in feeling and interest;[12] that the opposing witnesses are employees of the party for whom they testify or otherwise so situated as to make their testimony unsatisfactory;[13] that two witnesses against one are husband and wife, the latter of whom is a party to the suit;[14] that their testimony is not intrinsically improbable or incredible;[15] that their testimony is inherently probable;[16] that there is inherent improbability in the testimony of the opposing witnesses;[17] that their testimony is characterized by coherence and an air of veracity;[18] that their manner is markedly sincere and honest;[19] or that the manner of the opposing witnesses is such as to impair or destroy the force of their testimony.[20]

4. Clear and Convincing Proof — a. In General. In numerous cases where an adverse presumption is to be overcome[21] or on grounds of public policy and in view of peculiar facilities for perpetrating injustice by fraud and perjury,[22] the degree of proof required is variously expressed as "clear," "clear and conclusive," "clear, precise, and indubitable," "convincing," "entirely satisfactory," "satisfactory," "strong," "unequivocal," etc.[23] Not infrequently the courts have declared that in such cases the proof must be "beyond reasonable doubt,"[24] that

8. Hale, etc., Mfg. Co. *v.* Norcross, 199 Pa. St. 283, 49 Atl. 80.

9. Small *v.* Brooklyn City, etc., R. Co., 10 Misc. (N. Y.) 266, 30 N. Y. Suppl. 1076.

10. Small *v.* Brooklyn City, etc., R. Co., 10 Misc. (N. Y.) 266, 30 N. Y. Suppl. 1076.

11. Bugbee *v.* Howard, 32 Ala. 713, single witness overcomes two. See also Schick *v.* Brooklyn City R. Co., 10 N. Y. Suppl. 528.

12. Knowles *v.* Knowles, 86 Ill. 1, testimony by husband and wife that their absolute deed was really a mortgage, overcome by the testimony of the opposite party.

13. Keokuk Northern Line Packet Co. *v.* True, 88 Ill. 608. See also Small *v.* Brooklyn City, etc., R. Co., 10 Misc. (N. Y.) 266, 30 N. Y. Suppl. 1076.

14. Greditzer *v.* Continental Ins. Co., 91 Mo. App. 534.

15. Hardy *v.* Milwaukee St. R. Co., 89 Wis. 183, 61 N. W. 771.

16. Braunschweiger *v.* Waits, 179 Pa. St. 47, 36 Atl. 155.

17. Farley *v.* Hill, 150 U. S. 572, 14 S. Ct. 186, 37 L. ed. 186 [*affirming* decree in 39 Fed. 513]. See also Clark *v.* Gotts, 1 Ill. App. 454.

18. Sibley *v.* St. Paul F. & M. Ins. Co., 22 Fed. Cas. No. 12,830, 9 Biss. 31.

19. Braunschweiger *v.* Waits, 179 Pa. St. 47, 36 Atl. 155.

20. Bishop *v.* Busse, 69 Ill. 403.

21. Such presumptions exist in most of the instances mentioned in the following subsections. Presumption that a written instrument expresses the intention of the parties (see *infra*, XVII, A, 4, b) is a typical illustration.

22. See for example cases cited *infra*, XVII, 4, f, g, h.

23. See cases cited in the following subsections. It has been held that this degree of proof is required only in equity cases tried by the court and that the same questions of fact when submitted to a jury in an action at law are sufficiently proved by a preponderance of evidence. Holt *v.* Brown, 63 Iowa 319, 19 N. W. 235; McAnnulty *v.* Seick, 59 Iowa 586, 13 N. W. 743. It is otherwise, however, when the question is submitted to a jury in an equity case for an advisory verdict. Sweetser *v.* Dobbins, (Cal. 1884) 3 Pac. 116; Ely *v.* Early, 94 N. C. 1.

24. Lost instrument.— Jacques *v.* Horton, 76 Ala. 238 (lost will); Moses *v.* Trice, 21 Gratt. (Va.) 556, 8 Am. Rep. 609; Renner *v.* Columbia Bank, 9 Wheat. (U. S.) 581, 597, 6 L. ed. 166 (lost will).

Parol trust in land. Rice *v.* Rigley, 7 Ida. 115, 61 Pac. 290; Brinkman *v.* Sunken, 174 Mo. 709, 74 S. W. 963; Pitts *v.* Weakley, 155 Mo. 109, 55 S. W. 1055; McFarland *v.* La Force, 119 Mo. 585, 25 S. W. 530, 27 S. W. 1100 (Barclay, J., dissenting); Burdett *v.* May, 100 Mo. 13, 12 S. W. 1056; Adams *v.* Burns, 96 Mo. 361, 10 S. W. 26; Philpot *v.* Penn, 91 Mo. 38, 3 S. W. 386; Rogers *v.* Rogers, 87 Mo. 257; Shaw *v.* Shaw, 86 Mo. 594; Kennedy *v.* Kennedy, 57 Mo. 73; Forrester *v.* Scoville, 51 Mo. 268; Johnson *v.* Quarles, 46 Mo. 423; Miller *v.* Stokely, 5 Ohio St. 194; Moore *v.* Crawford, 130 U. S. 122, 9 S. Ct. 447, 32 L. ed. 878.

Reformation of instruments.— *Arkansas.*— See McGuigan *v.* Gaines, (1903) 77 S. W. 52.

California.— Cox *v.* Woods, 67 Cal. 317, 7 Pac. 722.

Connecticut.— Bishop *v.* Clay F. & M. Ins. Co., 49 Conn. 167.

Georgia.— Muller *v.* Rhuman, 62 Ga. 332;

plaintiff must prove his case "beyond reasonable controversy,"[25] "beyond doubt,"[26] or "beyond all doubt,"[27] or that his evidence must be "free from sus-

Wyche *v.* Greene, 11 Ga. 159, 171. But see Georgia case cited *infra*, note 30.

Idaho.— Houser *v.* Austin, 2 Ida. (Hasb.) 204, 10 Pac. 37.

Illinois.— Sutherland *v.* Sutherland, 69 Ill. 481; Douglas *v.* Grant, 12 Ill. App. 273; Hamlon *v.* Sullivant, 11 Ill. App. 423. See also Miner *v.* Hess, 47 Ill. 170. But *compare* Warrick *v.* Smith, 36 Ill. App. 619.

Indiana.—Webb *v.* Hammond, 31 Ind. App. 613, 68 N. E. 916, 918 [*citing* Citizens' Nat. Bank *v.* Judy, 146 Ind. 322, 43 N. E. 259].

Maryland.— Baltimore Nat. F. Ins. Co. *v.* Crane, 16 Md. 260, 77 Am. Dec. 289; Goldsborough *v.* Ringgold, 1 Md. Ch. 239.

Massachusetts.—German American Ins. Co. *v.* Davis, 131 Mass. 316; Stockbridge Iron Co. *v.* Hudson Iron Co., 102 Mass. 45.

Michigan.— Case *v.* Peters, 20 Mich. 298.

Missouri.— Steinberg *v.* Phœnix Ins. Co., 49 Mo. App. 255; Downing *v.* McHugh, 3 Mo. App. 594. See also Fanning *v.* Doan, 139 Mo. 392, 41 S. W. 742.

New Jersey.— Whelen *v.* Osgoodby, 62 N. J. Eq. 571, 50 Atl. 692; Green *v.* Stone, 54 N. J. Eq. 387, 34 Atl. 1099, 55 Am. St. Rep. 577; Rowelly *v.* Flannelly, 30 N. J. Eq. 612; Flaacke *v.* Jersey City, 28 N. J. Eq. 110. See also Durant *v.* Bacot, 15 N. J. Eq. 411.

Ohio.— Rothschild *v.* Bell, 10 Ohio Dec. (Reprint) 176, 19 Cinc. L. Bul. 137.

Tennessee.— Clack *v.* Hadley, (Ch. App. 1901) 64 S. W. 403; Campbell *v.* Foster, 2 Tenn. Ch. 402, after long delay and death of parties.

Texas.— Waco Tap R. Co. *v.* Shirley, 45 Tex. 355; American Freehold Land Mortg. Co. *v.* Pace, 23 Tex. Civ. App. 222, 56 S. W. 377.

Virginia.— Fudge *v.* Payne, 86 Va. 303, 10 S. E. 7.

West Virginia.— Koen *v.* Kerns, 47 W. Va. 575, 35 S. E. 902; Jarrell *v.* Jarrell, 27 W. Va. 743.

Wisconsin.— Cameron *v.* Cameron, 15 Wis. 1, 7, 82 Am. Dec. 652; Newton *v.* Holley, 6 Wis. 592, 604.

United States.— U. S. *v.* Maxwell Land-Grant Co., 121 U. S. 325, 381, 7 S. Ct. 1015, 30 L. ed. 949; Hearne *v.* New England Mut. Mar. Ins. Co., 20 Wall. 488, 22 L. ed. 395.

Specific performance of parol contract to will property.— Kinney *v.* Murray, 170 Mo. 674, 71 S. W. 197.

Specific performance of parol contract concerning land.— Beall *v.* Clark, 71 Ga. 818; Printup *v.* Mitchell, 17 Ga. 558, 567, 63 Am. Dec. 258; Cherbonnier *v.* Cherbonnier, 108 Mo. 252, 18 S. W. 1083; Taylor *v.* Von Schraeder, 107 Mo. 206, 16 S. W. 675; Missouri Pac. R. Co. *v.* McCarty, 97 Mo. 214, 11 S. W. 52; Berry *v.* Hartzell, 91 Mo. 132, 3 S. W. 582; Moore *v.* Galupo, 65 N. J. Eq. 194, 55 Atl. 628; Brown *v.* Brown, 33 N. J. Eq. 650; Sage *v.* McGuire, 4 Watts & S. (Pa.) 228.

25. Kent *v.* Lasley, 24 Wis. 654, parol proof to convert absolute deed into a mortgage.

Reformation of instruments.— *Alabama.*— Smith *v.* Allen, 102 Ala. 406, 14 So. 760; Hinton *v.* Citizens' Mut. Ins. Co., 63 Ala. 488. But see Alabama cases cited in note 30.

Colorado.—Connecticut F. Ins. Co. *v.* Smith, 10 Colo. App. 121, 51 Pac. 170.

Indiana.— Linn *v.* Barkey, 7 Ind. 69.

Iowa.— Tufts *v.* Larned, 27 Iowa 330.

Kentucky.— Royal Wheel Co. *v.* Miller, 50 S. W. 62, 20 Ky. L. Rep. 1831.

Maine.— Fessenden *v.* Ockington, 74 Me. 123 [*quoted* in Andrews *v.* Andrews, 81 Me. 337, 341, 17 Atl. 166].

North Carolina.—Wilson *v.* Western North Carolina Land Co., 77 N. C. 445, 453.

Utah.— Deseret Nat. Bank *v.* Dunwoodey, 17 Utah 43, 53 Pac. 215.

Wisconsin.— Meier *v.* Bell, 119 Wis. 482, 97 N. W. 186; Meiswinkel *v.* St. Paul F. & M. Ins. Co., 75 Wis. 147, 43 N. W. 669, 6 L. R. A. 200; Blake Opera House Co. *v.* Home Ins. Co., 73 Wis. 667, 41 N. W. 968.

United States.— Howland *v.* Blake, 97 U. S. 624, 24 L. ed. 1027; Hoover *v.* Reilly, 12 Fed. Cas. No. 6,677, 2 Abb. 471; Cullinane *v.* District of Columbia, 18 Ct. Cl. 577.

26. Reformation of instruments.— *Arkansas.*— Carnall *v.* Wilson, 14 Ark. 482.

Maine.— Cross *v.* Bean, 81 Me. 525, 17 Atl. 710; Tucker *v.* Madden, 44 Me. 206.

Maryland.— Keedy *v.* Nally, 63 Md. 311. See also Stiles *v.* Willis, 66 Md. 552, 8 Atl. 353.

Massachusetts.— Hudson Iron Co. *v.* Stockbridge Iron Co., 107 Mass. 290, 317.

Mississippi.— Mosby *v.* Wall, 23 Miss. 81, 55 Am. Dec. 71.

Missouri.— Bartlett *v.* Brown, 121 Mo. 353, 25 S. W. 1108.

New Jersey.— Hupsch *v.* Resch, 45 N. J. Eq. 657, 18 Atl. 372; Firmstone *v.* De Camp, 17 N. J. Eq. 317.

New York.— Mead *v.* Westchester F. Ins. Co., 64 N. Y. 453; Drachler *v.* Foote, 87 N. Y. App. Div. 270, 84 N. Y. Suppl. 977; Miaghan *v.* Hartford F. Ins. Co., 12 Hun 321; Roussel *v.* Lux, 39 Misc. 508, 80 N. Y. Suppl. 341; Heelas *v.* Slevin, 53 How. Pr. 356. But this is not now the rule in New York. See EQUITY, 16 Cyc. 71 note 21.

United States.— Pope *v.* Hoopes, 84 Fed. 927.

Contra.— Durham *v.* Taylor, 29 Ga. 166; Wyche *v.* Greene, 11 Ga. 159, 171; Spencer *v.* Colt, 89 Pa. St. 314.

Specific performance of parol contract concerning land. Seitman *v.* Seitman, 204 Ill. 504, 68 N. E. 461; Tiernan *v.* Gibney, 24 Wis. 190; Knoll *v.* Harvey, 19 Wis. 99; Blanchard *v.* McDougal, 6 Wis. 167, 70 Am. Dec. 458.

27. Sidway *v.* Sidway, 4 Silv. Supreme (N. Y.) 124, 7 N. Y. Suppl. 421; Lance's

picion."[28] But these latter have been characterized as "apparently unconsidered expressions,"[29] and it has been many times deliberately held that proof beyond a reasonable doubt is not required.[30] Indeed there is strong authority for the proposition that a preponderance of evidence suffices in this class of cases, although a higher degree of proof than in ordinary cases may be requisite to constitute that preponderance.[31] But the phrase "preponderance of evidence" is almost never used in these cases,[32] and has been expressly disapproved as a measure of the proof required.[33]

b. Parol Evidence to Vary a Writing. Language expressing more than a preponderance[34] is generally used in declaring the degree of proof necessary in order to vary or contradict the terms of a written instrument by parol evidence;[35]

Appeal, 112 Pa. St. 456, 467, 4 Atl. 375, both cases being "to convert a deed, absolute on its face, into a mortgage by parol testimony."

Lost instruments.— *In re* Johnson, 40 Conn. 587 (lost will); Osborne *v.* Rich, 53 Ill. App. 661; Davis *v.* Sigourney, 8 Metc. (Mass.) 487 (lost will); Bolton's Estate, 14 Pa. Co. Ct. 575.

Parol trust in land. Modrell *v.* Riddle, 82 Mo. 31; King *v.* Isley, 116 Mo. 155, 22 S. W. 634; Allen *v.* Logan, 96 Mo. 591, 10 S. W. 149.

Specific performance of parol contract to will property (Steele *v.* Steele, 161 Mo. 566, 61 S. W. 815) or concerning land (Hennessy *v.* Woolworth, 128 U. S. 438, 9 S. Ct. 109, 32 L. ed. 500) is within the text.

28. Crilly *v.* Board of Education, 54 Ill. App. 371, reformation of instrument.

29. Southard *v.* Curley, 134 N. Y. 148, 31 N. E. 330, 30 Am. St. Rep. 642, 16 L. R. A. 561 [*cited* in EQUITY, 16 Cyc. 71 note 21].

30. Lost instrument.— Skeggs *v.* Horton, 81 Ala. 352, 2 So. 110, lost will.

Parol trust in land. Sherrin *v.* Flinn, 155 Ind. 422, 58 N. E. 549; King *v.* Gilleland, 60 Tex. 271; Markham *v.* Carothers, 47 Tex. 21.

Reformation of instruments.—Miller *v.* Morris, 123 Ala. 164, 27 So. 401; Crockett *v.* Crockett, 73 Ga. 647; Southard *v.* Curley, 134 N. Y. 148, 31 N. E. 330, 30 Am. St. Rep. 642, 16 L. R. A. 561; Jamaica Sav. Bank *v.* Taylor, 76 N. Y. Suppl. 790. See also cases cited in EQUITY, 16 Cyc. 71 note 21. And see, generally, REFORMATION OF INSTRUMENTS.

Resulting trust in land.— Doane *v.* Dunham, 64 Nebr. 135, 89 N. W. 640.

31. Schmuck *v.* Hill, (Nebr. 1901) 96 N. W. 158; Topping *v.* Jeanette, 64 Nebr. 834, 90 N. W. 911 (reformation of instruments); Doane *v.* Dunham, 64 Nebr. 135, 89 N. W. 640 (parol evidence to establish resulting trust); Stall *v.* Jones, 47 Nebr. 706, 66 N. W. 653 (parol evidence to prove that an absolute deed was a mortgage); Wylie *v.* Charlton, 43 Nebr. 840, 62 N. W. 220 (parol gift of land).

32. See cases cited in the following subsections.

33. Dewey *v.* Spring Valley Land Co., 98 Wis. 83, 73 N. W. 565, specific performance of contract concerning land.

Parol evidence to vary a writing.— Sallenger *v.* Perry, 130 N. C. 134, 41 S. E. 11; Olinger *v.* McGuffey, 55 Ohio St. 661, 48 N. E. 1115; Parker *v.* Hull, 71 Wis. 368, 37 N. W. 351, 5 Am. St. Rep. 224.

Reformation of instruments.— *Florida.*— Jackson *v.* Maybee, 21 Fla. 622.

Illinois.— Warrick *v.* Smith, 36 Ill. App. 619.

Iowa.— Bowman *v.* Besley, 122 Iowa 42, 97 N. W. 60.

Massachusetts.— Hudson Iron Co. *v.* Stockbridge Iron Co., 102 Mass. 45.

Minnesota.— Mikiska *v.* Mikiska, 90 Minn. 258, 95 N. W. 910.

New York.— Devereux *v.* Sun Fire Office, 51 Hun 147, 4 N. Y. Suppl. 655.

North Carolina.— Kornegay *v.* Everett, 99 N. C. 30, 5 S. E. 418.

Ohio.— Stewart *v.* Gordon, 60 Ohio St. 170, 53 N. E. 797.

Virginia.— Fudge *v.* Payne, 86 Va. 303, 10 S. E. 7.

West Virginia.— Jarrell *v.* Jarrell, 27 W. Va. 743.

See, generally, REFORMATION OF INSTRUMENTS.

34. See *supra*, XVII, A, 4, a.

35. *Alabama.*— Jenkins *v.* Matthews, 80 Ala. 486, 2 So. 518, proof to establish a vendor's lien in face of recital of payment of the consideration.

Georgia.— Williams *v.* Chapman, 7 Ga. 467.

New Jersey.— Hawrathy *v.* Warren, 18 N. J. Eq. 124, 90 Am. Dec. 613.

New York.— Moore *v.* Brooklyn Advertising Co., 69 Hun 63, 23 N. Y. Suppl. 381.

Pennsylvania.— *In re* Sutch, 201 Pa. St. 305, 50 Atl. 943; Dickson *v.* Hartman Mfg. Co., 179 Pa. St. 343, 36 Atl. 246; Wyckoff *v.* Ferree, 168 Pa. St. 261, 31 Atl. 1101; Jessop *v.* Ivory, 158 Pa. St. 71, 27 Atl. 840; Hoffman *v.* Bloomsburg, etc., R. Co., 157 Pa. St. 174, 27 Atl. 564; Van Voorhis *v.* Rea, 153 Pa. St. 19, 25 Atl. 800; Huckstein *v.* Kelly, 152 Pa. St. 631, 25 Atl. 747; Claybaugh *v.* Goodchild, 135 Pa. St. 421, 19 Atl. 1015; Ferguson *v.* Rafferty, 128 Pa. St. 337, 18 Atl. 484, 6 L. R. A. 33 (evidence held sufficient, however); Sylvius *v.* Koskek, 117 Pa. St. 67, 11 Atl. 392, 2 Am. St. Rep. 245; Frey *v.* Heydt, 116 Pa. St. 601, 11 Atl. 535; Cullmans *v.* Lindsay, 114 Pa. St. 166, 6 Atl. 332; Jones *v.* Backus, 114

for example, where it is sought by parol evidence to prove that a deed absolute on its face was intended as a mortgage.[36]

c. Parol Trusts. The superior measure of proof hereinbefore mentioned[37] is requisite in order to establish by parol evidence a trust in real estate,[38] especially

Pa. St. 120, 6 Atl. 335; Thomas *v.* Loose, 114 Pa. St. 35, 6 Atl. 326; Phillips *v.* Meily, 106 Pa. St. 536; Ott *v.* Oyer, 106 Pa. St. 6; Shepler *v.* Scott, 85 Pa. St. 329; Martin *v.* Berens, 67 Pa. St. 459; Stine *v.* Sherk, 1 Watts & S. 195; Quick *v.* Van Auken, 3 Pennyp. 469; Replogle *v.* Singer, 19 Pa. Super. Ct. 442; Penn. Iron Co. *v.* Diller, 1 Pa. Cas. 82, 1 Atl. 924; Zeiger's Estate, 11 Pa. Co. Ct. 517; Yeisley *v.* Bundel, 22 Wkly. Notes Cas. 462; Thudium *v.* Yost, 20 Wkly. Notes Cas. 217. See also Meek *v.* Frantz, 171 Pa. St. 632, 33 Atl. 413.

Rhode Island.— Bacon *v.* Wood, 22 R. I. 255, 47 Atl. 388.

Texas.— International, etc., R. Co. *v.* Dawson, 62 Tex. 260.

United States.— The Cramp, 84 Fed. 696; Rawson *v.* Lyon, 23 Fed. 107.

See 20 Cent. Dig. tit. "Evidence," § 2448.

To contradict a receipt.— *District of Columbia.*— Hewett *v.* Lewis, 4 Mackey 10.

Illinois.— Vigus *v.* O'Bannon, 118 Ill. 334, 8 N. E. 778; Rosenmueller *v.* Lampe, 89 Ill. 212, 31 Am. Rep. 74; Winchester *v.* Grosvenor, 44 Ill. 425.

Nebraska.— Rouss *v.* Goldgraber, 3 Nebr. (Unoff.) 424, 91 N. W. 712.

New Jersey.— Gibbons *v.* Potter, 30 N. J. Eq. 204.

Pennsylvania.— Chapman *v.* Camden, etc., R. Co., 7 Phila. 204.

United States.— Leak *v.* Isaacson, 15 Fed. Cas. No. 8,160, Abb. Adm. 41.

See 20 Cent. Dig. tit. "Evidence," § 2448. And see, generally, PAYMENT.

Parol waiver of a provision in a written contract. Woarms *v.* Becker, 84 N. Y. App. Div. 491, 82 N. Y. Suppl. 1086; Ashley *v.* Henahan, 56 Ohio St. 559, 47 N. E. 573. But see McCord-Brady Co. *v.* Moneyhan, 59 Nebr. 593, 81 N. W. 608 (holding a preponderance of evidence sufficient); Bergeron *v.* Pamlico Ins., etc., Co., 111 N. C. 45, 15 S. E. 883.

Parol agreement superseding prior written agreement. McKinstry *v.* Runk, 12 N. J. Eq. 60. A mere preponderance has been held insufficient. See *supra*, note 33.

To establish a parol lease changing the terms stated in a written lease, a case should be made "clear of reasonable doubt." Gibson *v.* Vetter, 162 Pa. St. 26, 29 Atl. 292. But see Ferguson *v.* Rafferty, 128 Pa. St. 337, 18 Atl. 484, 6 L. R. A. 33, and *supra*, notes 29, 30.

36. *Alabama.*— Bryan *v.* Cowart, 21 Ala. 92.

Illinois.— Knowles *v.* Knowles, 86 Ill. 1.

Iowa.— Hyatt *v.* Cochran, 37 Iowa 309; Cooper *v.* Skeel, 14 Iowa 578; Corbit *v.* Smith, 7 Iowa 60, 71 Am. Dec. 431.

Missouri.— Worley *v.* Dryden, 57 Mo. 226.

Nebraska.— Wilde *v.* Homan, 58 Nebr. 634, 79 N. W. 546; Names *v.* Names, 48 Nebr. 701, 67 N. W. 751; Deroin *v.* Jennings, 4 Nebr. 97; Schade *v.* Bessinger, 3 Nebr. 140.

New Jersey.— Condit *v.* Tichenor, 19 N. J. Eq. 43.

Pennsylvania.— Logue's Appeal, 104 Pa. St. 136; Nicolls *v.* McDonald, 101 Pa. St. 514; Stewart's Appeal, 98 Pa. St. 377; Rowand *v.* Finney, 96 Pa. St. 192; Plumer *v.* Guthrie, 76 Pa. St. 441; Todd *v.* Campbell, 32 Pa. St. 250.

Tennessee.— Scott *v.* Britton, 2 Yerg. 215.

United States.— Andrews *v.* Hyde, 1 Fed. Cas. No. 377, 3 Cliff. 516; Dexter *v.* Arnold, 7 Fed. Cas. No. 3,859, 2 Sumn. 152.

See, generally, MORTGAGES.

Contra.— Wallace *v.* Berry, 83 Tex. 328, 18 S. W. 595; Prather *v.* Wilkens, 68 Tex. 187, 4 S. W. 252. See also Graves *v.* Cameron, 77 Tex. 273, 14 S. W. 59. But *compare* Miller *v.* Yturria, 69 Tex. 549, 7 S. W. 206; Grooms *v.* Rust, 27 Tex. 231; Palm *v.* Chernowsky, 28 Tex. Civ. App. 405, 67 S. W. 165.

In actions at law it has been held that the rule stated in the text does not apply. McAnnulty *v.* Seick, 59 Iowa 586, 13 N. W. 743.

An instrument not under seal, a bill of sale for example, absolute on its face may be shown to have been given as security, and the rule requiring clear, convincing, and unequivocal evidence does not apply. Seligman *v.* Ten Eyck, 74 Mich. 525, 42 N. W. 134.

37. See *supra*, XVII, A, 4, a.

38. *Alabama.*— Emfinger *v.* Emfinger, 137 Ala. 337, 34 So. 346; Bibb *v.* Hunter, 79 Ala. 351.

California.— Brison *v.* Brison, 90 Cal. 323, 27 Pac. 186.

Illinois.— Moore *v.* Wood, 100 Ill. 451; Hunter *v.* Bilyeu, 30 Ill. 228.

Indiana.— Blair *v.* Bass, 4 Blackf. 539.

Iowa.— Maple *v.* Nelson, 31 Iowa 322; Dalby *v.* Cronkhite, 22 Iowa 222; Childs *v.* Griswold, 19 Iowa 362; Sunderland *v.* Sunderland, 19 Iowa 325; Parker *v.* Pierce, 16 Iowa 227; Cooper *v.* Skeel, 14 Iowa 578; MacGregor *v.* Gardner, 14 Iowa 326; Noel *v.* Noel, 1 Iowa 423; Brace *v.* Reid, 3 Greene 422.

Maine.— Burleigh *v.* White, 64 Me. 23; Baker *v.* Vining, 30 Me. 121, 50 Am. Dec. 617.

Maryland.— Hollida *v.* Shoop, 4 Md. 465, 59 Am. Dec. 88; Faringer *v.* Ramsay, 2 Md. 365.

Michigan.— Miller *v.* Miller, 100 Mich. 563, 59 N. W. 242.

Missouri.— Dailey *v.* Dailey, 125 Mo. 96, 28 S. W. 330; Plumb *v.* Cooper, 121 Mo. 668, 26 S. W. 678; Gillespie *v.* Stone, 70 Mo. 505; Ringo *v.* Richardson, 53 Mo. 385; Woodford *v.* Stephens, 51 Mo. 443.

Nebraska.— Veeder *v.* McKinley-Lanning L. & T. Co., 61 Nebr. 803, 86 N. W. 982; Klamp *v.* Klamp, 51 Nebr. 17, 70 N. W. 525; Brownell *v.* Stoddard, 42 Nebr. 177, 60 N. W.

by the verbal admission of a decedent.[39] Parol evidence to establish a trust in personal property[40] or to engraft a trust upon a parol gift[41] must likewise be clear and convincing.

d. Reformation of Instruments. Because of the strong presumption that the terms of a written instrument correctly express the intention of the parties to it, mistake or fraud, when urged as a ground for reformation of the instrument, can be established only by clear, positive, and unequivocal evidence.[42] It is frequently

380; Falsken *v.* Harkendorf, 11 Nebr. 82, 7 N. W. 749; Hoehne *v.* Breitkreitz, 5 Nebr. 110. See Doane *v.* Dunham, 64 Nebr. 135, 89 N. W. 640, holding that the requirement of more proof than in ordinary cases does not constitute an exception to the preponderance rule.

New Jersey.— Krauth *v.* Thiele, 45 N. J. Eq. 407, 18 Atl. 351; Cubberly *v.* Cubberly, 39 N. J. Eq. 514; Parker *v.* Snyder, 31 N. J. Eq. 164; Midmer *v.* Midmer, 26 N. J. Eq. 299; Tunnard *v.* Littell, 23 N. J. Eq. 264; Cutler *v.* Tuttle, 19 N. J. Eq. 549; Peer *v.* Peer, 11 N. J. Eq. 432. See also Barnes *v.* Taylor, 27 N. J. Eq. 259.

New York.— Crouse *v.* Frothingham, 97 N. Y. 105.

North Carolina.— Kelly *v.* McNeill, 118 N. C. 349, 24 S. E. 738; Summers *v.* Moore, 113 N. C. 394, 18 S. E. 712; Hamilton *v.* Buchanan, 112 N. C. 463, 17 S. E. 159; McNair *v.* Pope, 100 N. C. 404, 6 S. E. 234; Hemphill *v.* Hemphill, 99 N. C. 436, 6 S. E. 201.

Ohio.— Stall *v.* Cincinnati, 16 Ohio St. 169; Orr *v.* Orr, 8 Ohio Dec. (Reprint) 227, 6 Cinc. L. Bul. 390.

Pennsylvania.— Braun *v.* First German Evangelical Lutheran Church, 198 Pa. St. 152, 47 Atl. 963; Schmidt *v.* Baizley, 184 Pa. St. 527, 39 Atl. 406; Lau's Estate, 176 Pa. St. 100, 34 Atl. 969; Hay *v.* Martin, (1888) 14 Atl. 333; Schmidt *v.* Baizley, 19 Pa. Co. Ct. 83.

Rhode Island.— Taft *v.* Dimond, 16 R. I. 584, 18 Atl. 183.

Texas.— Grace *v.* Hanks, 57 Tex. 14; East Line, etc., R. Co. *v.* Garrett, 52 Tex. 133; Agricultural, etc., Assoc. *v.* Brewster, 51 Tex. 257; Moreland *v.* Barnhart, 44 Tex. 275; Cuney *v.* Dupree, 21 Tex. 211; Mead *v.* Randolph, 8 Tex. 191; Neill *v.* Keese, 5 Tex. 23, 51 Am. Dec. 746; Kelly *v.* Short, (Civ. App. 1903) 75 S. W. 877; Henslee *v.* Henslee, 5 Tex. Civ. App. 367, 24 S. W. 321.

Virginia.— Parker *v.* Logan, 82 Va. 376, 4 S. E. 613; Donaghe *v.* Tams, 81 Va. 132; Sinclair *v.* Sinclair, 79 Va. 40; Phelps *v.* Seely, 22 Gratt. 573.

West Virginia.— Burt *v.* Timmons, 29 W. Va. 441, 2 S. E. 780, 6 Am. St. Rep. 664.

United States.—Smithsonian Inst. *v.* Meech, 169 U. S. 398, 18 S. Ct. 396, 42 L. ed. 793.

And see, generally, TRUSTS.

"Clearest and most positive proof" has been held to be too great a requirement. Neyland *v.* Bendy, 69 Tex. 711, 7 S. W. 497.

"A party seeking an interlocutory injunction is not required to establish his right with the same precision and certainty that is required upon a final hearing." Faison *v.* Hardy, 114 N. C. 58, 60, 19 S. E. 91.

Proof beyond reasonable doubt see *supra*, notes 24, 30.

39. Cuming *v.* Robins, 39 N. J. Eq. 46. See also *infra*, XVII, C, 1, h, (I), (B).

40. Allen *v.* Withrow, 110 U. S. 119, 3 S. Ct. 517, 28 L. ed. 90.

41. Lemon *v.* Wright, 31 Ga. 317, gift of slave.

42. In the following cases the degree of proof is expressed in divers phrases of equivalent import, as explained *supra*, XVII, A, 4, a.

Alabama.—Keith *v.* Woodruff, 136 Ala. 443, 34 So. 911; Hough *v.* Smith, 132 Ala. 204, 31 So. 500; Miller *v.* Morris, 123 Ala. 164, 27 So. 401; Kilgore *v.* Redmill, 121 Ala. 485, 25 So. 766; Hertzler *v.* Stephens, 119 Ala. 333, 24 So. 521; Moore *v.* Tate, 114 Ala. 582, 21 So. 820; Mitchell *v.* Capital City Ins. Co., 110 Ala. 583, 17 So. 678; Burnell *v.* Morris, 106 Ala. 349, 18 So. 82; Tyson *v.* Chestnut, 100 Ala. 571, 13 So. 763; Ohlander *v.* Dexter, 97 Ala. 476, 12 So. 51; Guibnartin *v.* Urquhart, 82 Ala. 570, 1 So. 897; Marsh *v.* Marsh, 74 Ala. 418; Berry *v.* Sowell, 72 Ala. 14; Campbell *v.* Hatchett, 55 Ala. 548; Arnold *v.* Fowler, 44 Ala. 167; Lockhart *v.* Cameron, 29 Ala. 355; Rumbly *v.* Stainton, 24 Ala. 712; Trapp *v.* Moore, 21 Ala. 693.

Arkansas.— Webb *v.* Kease, 66 Ark. 155, 49 S. W. 1081.

California.— Hochstein *v.* Berghauser, 123 Cal. 681, 56 Pac. 547; Sullivan *v.* Moorhead, 99 Cal. 157, 33 Pac. 796; Sweetser *v.* Dobbins, (1884) 3 Pac. 116.

Florida.— Neal *v.* Gregory, 19 Fla. 356.

Georgia.— Greer *v.* Caldwell, 14 Ga. 207, 58 Am. Dec. 553; Ligon *v.* Rogers, 12 Ga. 281; Reese *v.* Wyman, 9 Ga. 430; Trout *v.* Goodman, 7 Ga. 383.

Illinois.— Stanley *v.* Marshall, 206 Ill. 20, 69 N. E. 58; Salen *v.* Baldwin, 185 Ill. 211, 56 N. E. 1075; Harms *v.* Coryell, 177 Ill. 496, 53 N. E. 87; Schwass *v.* Hershey, 125 Ill. 653, 18 N. E. 272; Ewing *v.* Sandoval Coal, etc., Co., 110 Ill. 290; Peck *v.* Arehart, 95 Ill. 113; Palmer *v.* Converse, 60 Ill. 313; Goltra *v.* Sanasack, 53 Ill. 456; Cleary *v.* Babcock, 41 Ill. 271; Kuchenbeiser *v.* Beckert, 41 Ill. 172; Shay *v.* Pettes, 35 Ill. 360; Hunter *v.* Bilveu, 30 Ill. 228; Ruffner *v.* McConnel, 17 Ill. 212, 63 Am. Dec. 362; Northern Farmers' Tp. Mut. F. Ins. Co. *v.* Sweet, 46 Ill. App. 598.

Indiana.— Habbe *v.* Viele, 148 Ind. 116, 45 N. E. 783, 47 N. E. 1; Hamilton County *v.* Ownes, 138 Ind. 183, 37 N. E. 602; Hileman *v.* Wright, 9 Ind. 126; Wieneke *v.* Deputy, 31 Ind. App. 621, 68 N. E. 921.

Iowa.— Sauer *v.* Nehls, 121 Iowa 184, 96 N. W. 759; Montgomery *v.* Mann, 120 Iowa 609, 94 N. W. 1109; Schrimper *v.* Chicago,

said that the facts essential to plaintiff's relief must be proved beyond a reasonable doubt, sometimes indeed that his proof must exclude all doubt, but the bet-

etc., R. Co., 115 Iowa 35, 82 N. W. 916, 87 N. W. 731; Osmundson *v.* Thompson, 90 Iowa 755, 57 N. W. 863.

Kentucky.— Graves *v.* Mattingly, 6 Bush 361; Vaughn *v.* Digman, 43 S. W. 251, 19 Ky. L. Rep. 1340; Fitzpatrick *v.* Ringo, 5 S. W. 431, 9 Ky. L. Rep. 503; Payne *v.* Sebree, 14 Ky. L. Rep. 862; Stockhoff *v.* Brannin, 14 Ky. L. Rep. 717; Overstreet *v.* Mouser, 14 Ky. L. Rep. 480; Porter *v.* Rowe, 12 Ky. L. Rep. 139; Wathen *v.* Lee, 8 Ky. L. Rep. 357; Wittey *v.* Duff, 2 Ky. L. Rep. 230.

Louisiana.— Ker *v.* Evershed, 41 La. Ann. 15, 6 So. 566.

Maine.— Linscott *v.* Linscott, 83 Me. 384, 22 Atl. 252; Parlin *v.* Small, 68 Me. 289; Farley *v.* Bryant, 32 Me. 474.

Maryland.—Ellinger *v.* Crowl, 17 Md. 361; Showman *v.* Miller, 6 Md. 479; Beard *v.* Hubble, 9 Gill 420.

Massachusetts.— Richardson *v.* Adams, 171 Mass. 447, 50 N. E. 941.

Michigan.— Burns *v.* Caskey, 100 Mich. 94, 58 N. W. 642; Bates *v.* Bates, 56 Mich. 405, 23 N. W. 63; Reynolds *v.* Campbell, 45 Mich. 529, 8 N. W. 581; Ludington *v.* Ford, 33 Mich. 123; Tripp *v.* Hasceig, 20 Mich. 254, 4 Am. Rep. 388.

Minnesota.— Martini *v.* Christensen, 60 Minn. 491, 62 N. W. 1127.

Mississippi.— Crofton *v.* New South Bldg., etc., Assoc., 77 Miss. 166, 26 So. 362; Norton *v.* Coley, 45 Miss. 125.

Missouri.— Miller *v.* St. Louis, etc., R. Co., 162 Mo. 424, 63 S. W. 85; Frederick *v.* Henderson, 94 Mo. 98, 7 S. W. 186; Tesson *v.* Atlantic Mut. Ins. Co., 40 Mo. 33, 93 Am. Dec. 293; Grand Lodge A. O. U. W. *v.* Sater, 44 Mo. App. 445; Brohammer *v.* Hoss, 17 Mo. App. 1; Allen *v.* Carter, 8 Mo. App. 585. See also Underwood *v.* Cave, 176 Mo. 1, 75 S. W. 451. If the judge is entirely convinced, it is sufficient. Leitensdorfer *v.* Delphy, 15 Mo. 160, 55 Am. Dec. 137.

Montana.— Fitschen *v.* Thomas, 9 Mont. 52, 22 Pac. 450.

Nebraska.— Nebraska L. & T. Co. *v.* Ignowski, 54 Nebr. 398, 74 N. W. 852; Slobodisky *v.* Phenix Ins. Co., 52 Nebr. 395, 72 N. W. 483; Home F. Ins. Co. *v.* Wood, 50 Nebr. 381, 69 N. W. 941.

New Jersey.— Atkinson *v.* Farrington Co., (Ch. 1894) 28 Atl. 315; Cummins *v.* Bulgin, 37 N. J. Eq. 476; Ramsey *v.* Smith, 32 N. J. Eq. 28; Burgin *v.* Giberson, 26 N. J. Eq. 72; Graham *v.* Berryman, 19 N. J. Eq. 29.

New York.— Allison Bros.' Co. *v.* Allison, 144 N. Y. 21, 38 N. E. 956; Albany City Sav. Inst. *v.* Burdick, 87 N. Y. 40; Whittemore *v.* Farrington, 76 N. Y. 452; Burt *v.* Quackenbush, 72 N. Y. App. Div. 547, 75 N. Y. Suppl. 1031; Weed *v.* Whitehead, 1 N. Y. App. Div. 192, 37 N. Y. Suppl. 178; Bartholomew *v.* Mercantile Mar. Ins. Co., 34 Hun 263; Botsford *v.* McLean, 42 Barb. 445; Kent *v.* Manchester, 29 Barb. 595; Hirschbach *v.* Schmalz, 3 Silv. Supreme 554, 7 N. Y. Suppl. 377; Curtis *v.* Giles, 7 Misc. 590, 28 N. Y. Suppl. 489; Halliday *v.* White, 21 N. Y. Suppl. 878; Ranney *v.* McMullen, 5 Abb. N. Cas. 246; Pennell *v.* Wilson, 2 Abb. Pr. N. S. 466; Humphreys *v.* Hurtt, 50 How. Pr. 291; Marvin *v.* Bennett, 26 Wend. 169; Lyman *v.* United Ins. Co., 17 Johns. 373 [*affirming* 2 Johns. Ch. 630]; Phœnix F. Ins. Co. *v.* Gurnee, 1 Paige 278, 19 Am. Dec. 431; Getman *v.* Beardsley, 2 Johns. Ch. 274.

North Carolina.— Southern Finishing, etc., Co. *v.* Ozment, 132 N. C. 839, 44 S. E. 681; Pollock *v.* Warwick, 104 N. C. 638, 10 S. E. 699; Ely *v.* Early, 94 N. C. 1; Jones *v.* Perkins, 54 N. C. 337; Stamper *v.* Hawkins, 41 N. C. 7; Harrison *v.* Howard, 36 N. C. 407.

North Dakota.— Forester *v.* Van Auken, 12 N. D. 175, 96 N. W. 301.

Ohio.—Northwestern Ohio Natural Gas Co. *v.* Tiffin, 59 Ohio St. 420, 54 N. E. 77; Shulters *v.* Toledo, 57 Ohio St. 667, 50 N. E. 1133; Farr *v.* Ricker, 46 Ohio St. 265, 21 N. E. 354; Thompson *v.* Thompson, 18 Ohio St. 73; Davenport *v.* Sovil, 6 Ohio St. 459; Markey *v.* Waldo, 18 Ohio Cir. Ct. 849, 9 Ohio Cir. Dec. 762; Jung *v.* Weyand, 9 Ohio Dec. (Reprint) 485, 14 Cinc. L. Bul. 143; Bartlett *v.* Patterson, 9 Ohio Dec. (Reprint) 73, 10 Cinc. L. Bul. 367; Whitney *v.* Denton, 7 Ohio Dec. (Reprint) 547, 3 Cinc. L. Bul. 870.

Oregon.— Kleinsorge *v.* Rohse, 25 Oreg. 51, 34 Pac. 874; Epstein *v.* State Ins. Co., 21 Oreg. 179, 27 Pac. 1045; McCoy *v.* Bayley, 8 Oreg. 196; Remillard *v.* Prescott, 8 Oreg. 37; Stephens *v.* Murton, 6 Oreg. 193; Lewis *v.* Lewis, 4 Oreg. 177.

Pennsylvania.— "Clear, precise, and indubitable," but not proof "beyond any doubt" (Spencer *v.* Colt, 89 Pa. St. 314) is the phrase commonly used in this state (Williamson *v.* Carpenter, 205 Pa. St. 164, 54 Atl. 718; McClain *v.* Smith, 158 Pa. St. 49, 27 Atl. 853; Smith *v.* Ewing, 151 Pa. St. 256, 25 Atl. 62; Hunter's Estate, 147 Pa. St. 549, 23 Atl. 973; Boyertown Nat. Bank *v.* Hartman, 147 Pa. St. 558, 23 Atl. 842, 30 Am. St. Rep. 759; Mifflin County Nat. Bank *v.* Thompson, 144 Pa. St. 393, 22 Atl. 714; Breneiser *v.* Davis, 141 Pa. St. 85, 21 Atl. 508; Hollenback's Appeal, 121 Pa. St. 322, 15 Atl. 616; Ahlborn *v.* Wolff, 118 Pa. St. 242, 11 Atl. 799; Jackson *v.* Payne, 114 Pa. St. 67, 6 Atl. 340; Murray *v.* New York, etc., R. Co., 103 Pa. St. 37; Rogers *v.* Smith, 4 Pa. St. 93; Schlettiger *v.* Hopple, 3 Grant 54; Irwin *v.* Shoemaker, 8 Watts & S. 75; Moser *v.* Libenguth, 2 Rawle 428; Nettleton *v.* Caryl, 20 Pa. Super. Ct. 250; Bierman *v.* College, 20 Pa. Super. Ct. 133; Keller *v.* Baltimore, etc., R. Co., 10 Pa. Super. Ct. 240; Gehres *v.* Crawford, 6 Pa. Cas. 378, 9 Atl. 508; Kenny *v.* McClellan, 7 Phila. 655; Kirk's Estate, 5 Montg. Co. Rep. 107).

Tennessee.—Sawyers *v.* Sawyers, 106 Tenn. 597, 61 S. W. 1022; McClelland *v.* Payne, 16 Lea 709; Talley *v.* Courtney, 1 Heisk.

ter considered authorities declare that such a high degree of proof should not be required.[43]

e. Specific Performance. A multitude of authorities from which there is no dissent hold that clear and convincing proof[44] of the essential facts is necessary to entitle plaintiff to a decree for specific performance of a parol contract.[45]

715; Davidson *v.* Greer, 3 Sneed 384; Bailey *v.* Bailey, 8 Humphr. 230; Perry *v.* Pearson, 1 Humphr. 431; Moreau *v.* Edwards, 2 Tenn. Ch. 347; Feder *v.* Gass, (Ch. App. 1900) 59 S. W. 175; Rogers *v.* Smith, (Ch. App. 1898) 48 S. W. 700; Ferring *v.* Fleischman, (Ch. App. 1896) 39 S. W. 19; Townsend *v.* Cocke, 1 Tenn. Cas. 95, Thomps. Cas. 153.

Texas.— Sabine Tram Co. *v.* Bancroft, (Civ. App. 1896) 39 S. W. 177; Westchester Ins. Co. *v.* Wagner, (Civ. App. 1896) 38 S. W. 214.

Vermont.— Shattuck *v.* Gay, 45 Vt. 87; Preston *v.* Whitcomb, 17 Vt. 183; Clevland *v.* Burton, 11 Vt. 138; Griswold *v.* Smith, 10 Vt. 452.

Virginia.— Donaldson *v.* Levine, 93 Va. 472, 25 S. E. 541; Leas *v.* Eidson, 9 Gratt. 277.

West Virginia.— Harris *v.* Elliott, 45 W. Va. 245, 32 S. E. 176; Fishack *v.* Ball, 34 W. Va. 644, 12 S. E. 856; Pennybacker *v.* Laidley, 33 W. Va. 624, 11 S. E. 39; Allen *v.* Yeater, 17 W. Va. 128; Western Min., etc., Co. *v.* Peytona Cannel Coal Co., 8 W. Va. 406.

Wisconsin.— Kropp *v.* Kropp, 97 Wis. 137, 72 N. W. 381; McClellan *v.* Sanford, 26 Wis. 595; Harrison *v.* Juneau Bank, 17 Wis. 340; Fowler *v.* Adams, 13 Wis. 458; Lake *v.* Meacham, 13 Wis. 355.

United States.— Baltzer *v.* Raleigh, etc., Air Line R. Co., 115 U. S. 634, 6 S. Ct. 216, 29 L. ed. 505; Snell *v.* Atlantic F. & M. Ins. Co., 98 U. S. 85, 25 L. ed. 52; Ivinson *v.* Hutton, 98 U. S. 79, 25 L. ed. 66; Graves *v.* Boston Mar. Ins. Co., 2 Cranch 419, 2 L. ed. 324; Fulton *v.* Colwell, 112 Fed. 831, 50 C. C. A. 537; Travelers' Ins. Co. *v.* Henderson, 69 Fed. 762, 16 C. C. A. 390; Bowers *v.* New York L. Ins. Co., 68 Fed. 785; Van Vleet *v.* Sledge, 45 Fed. 743; Harrison *v.* Hartford F. Ins. Co., 30 Fed. 862; Griswold *v.* Hazard, 26 Fed. 135; Spare *v.* Home Mut. Ins. Co., 19 Fed. 14, 9 Sawy. 148; Kinney *v.* Consolidated Virginia Min. Co., 14 Fed. Cas. No. 7,827, 4 Sawy. 382; *In re* Mayo, 16 Fed. Cas. No. 9,353, 4 Hughes 382.

See also CONTRACTS, 9 Cyc. 394 note 80; EQUITY, 16 Cyc. 70 note 20. And see, generally, REFORMATION OF INSTRUMENTS.

43. See *supra*, notes 29, 30; and EQUITY, 16 Cyc. 71.

44. As to "clear and convincing" proof and synonymous phrases used in the cases cited in the next note see *supra*, XVII, A, 4, a.

45. Lake Shore, etc., R. Co. *v.* Huffert, 40 Ill. App. 631.

Agreement to purchase bonds.— Farley *v.* Hill, 150 U. S. 572, 14 S. Ct. 186, 37 L. ed. 1186.

Contract to assign patent.— Dalzell *v.* Dueber Watch-Case Mfg. Co., 149 U. S. 315, 13 S. Ct. 886, 37 L. ed. 749.

Contract of insurance.— McCann *v.* Ætna Ins. Co., 3 Nebr. 198; Neville *v.* Merchants', etc., Mut. Ins. Co., 19 Ohio 452; Suydam *v.* Columbus Ins. Co., 18 Ohio 459. And see, generally, FIRE INSURANCE.

Contract to assign benefit certificate of insurance.— Rockecharlie *v.* Rockecharlie, (Va. 1898) 29 S. E. 825.

Contract to will property.— *Kentucky.*— Hinton *v.* Gano, 6 Ky. L. Rep. 526.

Missouri.— McElvain *v.* McElvain, 171 Mo. 244, 71 S. W. 142; Kinney *v.* Murray, 170 Mo. 674, 71 S. W. 197; Alexander *v.* Alexander, 150 Mo. 579, 52 S. W. 256; Teats *v.* Flanders, 118 Mo. 660, 24 S. W. 126.

New Jersey.— McTague *v.* Finnegan, 54 N. J. Eq. 454, 35 Atl. 542.

New York.— Gall *v.* Gall, 64 Hun 600, 19 N. Y. Suppl. 332; Conlon *v.* Mission of Immaculate Virgin, etc., 39 Misc. 215, 79 N. Y. Suppl. 406.

Oregon.— Richardson *v.* Orth, 40 Oreg. 252, 66 Pac. 925, 69 Pac. 455.

Contracts concerning land, and within the statute of frauds.

Georgia.— Higginbotham *v.* Cooper, 116 Ga. 741, 42 S. E. 1000.

Illinois.— Wright *v.* Raftree, 181 Ill. 464, 54 N. E. 998.

Maryland.— Polk *v.* Clark, 92 Md. 372, 48 Atl. 67.

Missouri.— Gibbs *v.* Whitwell, 164 Mo. 387, 64 S. W. 110; Rogers *v.* Wolfe, 104 Mo. 1, 14 S. W. 805; Sitton *v.* Shipp, 65 Mo. 297.

Nebraska.— Lewis *v.* North, 62 Nebr. 552, 87 N. W. 312.

New Jersey.— Le Pard *v.* Russell, (Ch. 1898) 39 Atl. 1059; Cooper *v.* Carlisle, 17 N. J. Eq. 525; Lokerson *v.* Stillwell, 13 N. J. Eq. 357; Cole *v.* Potts, 10 N. J. Eq. 67.

New York.— See Winne *v.* Winne, 166 N. Y. 263, 59 N. E. 832, 82 Am. St. Rep. 647.

Pennsylvania.— Sample *v.* Horlacher, 177 Pa. St. 247, 35 Atl. 615; Cleland *v.* Aiken, 23 Pa. Co. Ct. 1.

Virginia.— Pennybacker *v.* Maupin, 96 Va. 461, 31 S. E. 607.

West Virginia.— McCully *v.* McLean, 48 W. Va. 625, 37 S. E. 559; Sturm *v.* McGuffin, 48 W. Va. 595, 37 S. E. 561; Gillaspie *v.* James, 48 W. Va. 284, 37 S. E. 598; Fishack *v.* Ball, 34 W. Va. 644, 12 S. E. 856; Boggs *v.* Bodkin, 32 W. Va. 566, 9 S. E. 891, 5 L. R. A. 245.

Wisconsin.— Hadfield *v.* Skelton, 69 Wis. 460, 34 N. W. 397.

United States.— White *v.* Wansey, 116 Fed. 345, 53 C. C. A. 634; Bedilian *v.*

Some authorities demand a still higher degree of proof, requiring plaintiff to prove his case beyond reasonable doubt or even beyond any doubt.[46]

f. Lost Instruments. In order to establish a lost instrument on behalf of a party asserting rights under it[47] the same measure of proof is required as in suits for reformation of instruments or to establish parol trusts;[48] that is to say, the evidence must be of the clearest and most satisfactory character,[49] and according to some authorities beyond reasonable doubt.[50]

g. Donatio Causa Mortis. It is usually declared that evidence sufficient to prove a gift *causa mortis* must be very strong,[51] even "free from uncertainty" according to some authorities.[52]

h. In Other Cases. A degree of proof usually denominated "clear and convincing," etc.,[53] is required in order to impeach an official certificate of acknowledgment of a deed,[54] to impeach an officer's return of service of process,[55] to prove acknowledgment to take a debt out of the statute of limitations,[56] to estab-

Seaton, 3 Fed. Cas. No. 1,218, 3 Wall. Jr. 279.

See, generally, SPECIFIC PERFORMANCE.

46. See *supra*, notes 24, 26, 27.

47. **Proof of loss** in order to admit secondary evidence. See *supra*, XV, F, 2, e, (II).

48. Loftin *v.* Loftin, 96 N. C. 94, 1 S. E. 837, lost deed. See also *supra*, XVII, A, 4, c, d.

49. McCarn *v.* Rundall, 111 Iowa 406, 82 N. W. 924. To the same effect see the following cases:

Alabama.— Shorter *v.* Sheppard, 33 Ala. 648.

California.— Kidder's Estate, 66 Cal. 487, 6 Pac. 326.

Colorado.— McDonald *v.* Thompson, 16 Colo. 13, 26 Pac. 146.

Illinois.— See Rankin *v.* Crow, 19 Ill. 626.

Iowa.— McCarn *v.* Rundall, 111 Iowa 406, 82 N. W. 924. See also McDonald *v.* Jackson, 56 Iowa 643, 10 N. W. 223.

Maine.— Connor *v.* Pushor, 86 Me. 300, 29 Atl. 1083.

Maryland.— Rhodes *v.* Vinson, 9 Gill 169, 52 Am. Dec. 685.

Massachusetts.— Davis *v.* Sigourney, 8 Metc. 487.

Nebraska.— Williams *v.* Miles, (1903) 94 N. W. 705; Clark *v.* Turner, 50 Nebr. 290, 69 N. W. 843, 38 L. R. A. 433.

New Jersey.— Wyckoff *v.* Wyckoff, 16 N. J. Eq. 401.

New York.— Edwards *v.* Noyes, 65 N. Y. 125; Metcalf *v.* Van Benthuysen, 3 N. Y. 424; Cutting *v.* Burns, 57 N. Y. App. Div. 185, 68 N. Y. Suppl. 269.

North Carolina.— Deans *v.* Dortch, 40 N. C. 331.

North Dakota.— McManus *v.* Commow, 10 N. D. 340, 87 N. W. 8.

Ohio.— Gillmore *v.* Fitzgerald, 26 Ohio St. 171; Slipman *v.* Telschow, 24 Ohio Cir. Ct. 536.

Pennsylvania.— Van Horn *v.* Munnell, 145 Pa. St. 497, 22 Atl. 985.

Tennessee.— Johnson *v.* McKamey, (Ch. App. 1899) 53 S. W. 221.

Virginia.— Thomas *v.* Ribble, (1896) 24 S. E. 241.

See, generally, LOST INSTRUMENTS; and as to proof of lost wills see also WILLS.

Memory of contents of written instruments see *infra*, XVII, B, 15.

Where rule inapplicable.— The rule does not apply where a party claiming under a lost or destroyed deed has exercised acts of ownership and control under it, and a long time has elapsed. Mills *v.* Herndon, 60 Tex. 353.

50. See *supra*, note 24.

51. In the following cases the degree of proof required was that which has been mentioned *supra*, XVII, A, 4, a.

Illinois.— Woodburn *v.* Woodburn, 23 Ill. App. 289.

Maine.— Drew *v.* Hagerty, 81 Me. 231, 17 Atl. 63, 10 Am. St. Rep. 255, 3 L. R. A. 230; Lamson *v.* Monroe, (1886) 5 Atl. 313.

New Jersey.— See Buecker *v.* Carr, 60 N. J. Eq. 300, 47 Atl. 34.

New York.— Grymes *v.* Hone, 49 N. Y. 17, 10 Am. Rep. 313; Grey *v.* Grey, 47 N. Y. 552; Tilford *v.* Savings Bank, 31 N. Y. App. Div. 565, 52 N. Y. Suppl. 142; Van Fleet *v.* McCarn, 2 N. Y. Suppl. 675; Kenney *v.* Public Administrator, 2 Bradf. Surr. 319.

Pennsylvania.— Wells *v.* Tucker, 3 Binn. 366.

United States.— Hassell *v.* Basket, 11 Fed. Cas. No. 6,198, 8 Biss. 303.

England.— Cosnahan *v.* Grice, 15 Moore P. C. 215, 15 Eng. Reprint 476.

See, generally, GIFTS.

Contra.— Lewis *v.* Merritt, 113 N. Y. 386, 21 N. E. 141; Jamaica Sav. Bank *v.* Taylor, 72 N. Y. App. Div. 567, 76 N. Y. Suppl. 790, in both of which cases expressions in some of the earlier New York cases requiring more than a preponderance of evidence were declared to mean only that circumstances legitimately raising a suspicion of fraud or wrong must be explained away.

52. Whalen *v.* Milholland, 89 Md. 199, 43 Atl. 45, 44 L. R. A. 208; Citizens' Sav. Bank *v.* Mitchell, 18 R. I. 739, 30 Atl. 626, should be "beyond doubt."

53. See *supra*, XVII, A, 4, a.

54. See ACKNOWLEDGMENTS, 1 Cyc. 623 *et seq.*

55. See, generally, PROCESS.

56. Keener *v.* Zartman, 144 Pa. St. 179, 22 Atl. 889. See, generally, LIMITATIONS OF ACTIONS.

lish a parol antenuptial agreement,[57] to prove that the maker of a note is not indebted to the payee to the amount thereof,[58] to establish a claim against a decedent's estate,[59] to establish delivery of a gift *inter vivos*,[60] to establish usury,[61] to establish inequality in the division of a decedent's estate by commissioners,[62] to overcome the presumption of delivery of a deed duly executed in the presence of the grantee[63] and recorded,[64] to prove a parol gift of lands,[65] to open a stated or settled account,[66] to set aside in favor of a creditor a settlement of accounts between his debtor and a third person,[67] to uphold transfers of property between husband and wife as against creditors[68] or gifts by a wife to her husband,[69] to set aside a confessed judgment on account of error in a settled account,[70] to open a judgment by confession upon a note given in settlement,[71] to annul a judgment on the ground of fraud[72] or want of jurisdiction in the face of recitals,[73] to prove a contract by a parent to pay his child for services rendered,[74] to establish the fact that no profit can be realized from a partnership as a ground for dissolving it,[75] to rebut the presumption of a gift in favor of a child or wife,[76] to bastardize a child born in lawful wedlock by evidence of non-access of the husband,[77] to rebut the legal presumption of the validity of a marriage,[78] to set aside a release on the ground of fraud,[79] to cancel an instrument for mistake or fraud,[80] to defeat a deed at law for fraud,[81] to divest title to land by adverse possession,[82] to

57. *In re* Krug, 196 Pa. St. 484, 46 Atl. 484.

58. Campbell Printing Press, etc., Co. *v.* Yorkston, 11 Misc. (N. Y.) 340, 32 N. Y. Suppl. 263.

59. "Public policy requires that claims against the estates of the dead should be established by very satisfactory evidence." Van Slooten *v.* Wheeler, 140 N. Y. 624, 633, 35 N. E. 583, per Earl, J. See, generally, EXECUTORS AND ADMINISTRATORS.

60. Board *v.* Callihan, 33 W. Va. 209, 10 S. E. 382. See also Boudreau *v.* Boudreau, 45 Ill. 480. And see, generally, GIFTS.

61. The authorities are in conflict as to whether a preponderance of evidence suffices. See, generally, USURY.

62. *In re* Thompson, 3 N. J. Eq. 637.

63. Souverbye *v.* Arden, 1 Johns. Ch. (N. Y.) 240.

64. Wells *v.* American Mortg. Co., 109 Ala. 430, 20 So. 136.

65. Poullain *v.* Poullain, 76 Ga. 420, 4 S. E. 92 (should be beyond reasonable doubt); Jones *v.* Tyler, 6 Mich. 364; Erie, etc., R. Co. *v.* Knowles, 117 Pa. St. 77, 11 Atl. 250; Sower *v.* Weaver, 78 Pa. St. 443.

66. Mendota First Nat. Bank *v.* Haight, 55 Ill. 191; Hill *v.* Hill, 10 N. Y. Wkly. Dig. 239 ("should not leave a reasonable doubt"); Bruce *v.* Child, 11 N. C. 372. See also Somers *v.* Cresse, (N. J. Ch. 1888) 13 Atl. 23; and ACCOUNTS AND ACCOUNTING, 1 Cyc. 452, 454.

67. There must be the clearest and most positive proof of fraud or mistake. Klauber *v.* Wright, 52 Wis. 303, 8 N. W. 893.

68. Stockslager *v.* Mechanics' Loan, etc., Institute, 87 Md. 232, 39 Atl. 742; Connar *v.* Leach, 84 Md. 571, 36 Atl. 591; Sweeting *v.* Sweeting, 172 Pa. St. 161, 33 Atl. 543; Kendrick *v.* Taylor, 27 Tex. 695; Barziza *v.* Graves, 25 Tex. 322; Bagly *v.* Birmingham, 23 Tex. 452; Bradshaw *v.* Mayfield, 18 Tex. 21. See also Hartman, etc., Brewing Co. *v.* Clark, 94 Md. 520, 51 Atl. 291. *Contra*, Stevens *v.* Carson, 30 Nebr. 544, 46 N. W. 655 [*overruling* Woodruff *v.* White, 25 Nebr. 745, 41 N. W. 781; Lipscomb *v.* Lyon, 19 Nebr. 511, 27 N. W. 731; Aultman *v.* Obermeyer, 6 Nebr. 260], holding a preponderance of evidence sufficient as to *bona fides*. See also Clewis *v.* Malon, 119 Ala. 312, 24 So. 767.

69. Farmer *v.* Farmer, 39 N. J. Eq. 211, court fears undue influence.

70. Willett *v.* Fister, 18 Wall. (U. S.) 91, 21 L. ed. 804.

71. English's Appeal, 119 Pa. St. 533, 13 Atl. 479, 4 Am. St. Rep. 656.

72. Chandler *v.* Hough, 7 La. Ann. 440; Hendricks *v.* Mon, 11 La. 137.

73. Hayes *v.* Kerr, 19 N. Y. App. Div. 91, 45 N. Y. Suppl. 1050.

74. Zimmerman *v.* Zimmerman, 129 Pa. St. 229, 18 Atl. 129, 15 Am. St. Rep. 720; Miller's Appeal, 100 Pa. St. 568, 45 Am. Rep. 394; Candor's Appeal, 5 Watts & S. (Pa.) 513.

75. Sieghortner *v.* Weissenborn, 20 N. J. Eq. 172.

76. Read *v.* Huff, 40 N. J. Eq. 229.

77. Watts *v.* Owens, 62 Wis. 512, 22 N. W. 720. See also Morris *v.* Davies, 5 Cl. & F. 163, 1 Jur. 911, 7 Eng. Reprint 365.

78. Agg *v.* Davies, 2 Phillim. 341; Piers *v.* Piers, 2 H. L. Cas. 331, 13 Jur. 569, 9 Eng. Reprint 1118. See, generally, MARRIAGE.

79. De Douglas *v.* Union Traction Co., 198 Pa. St. 430, 48 Atl. 262. See, generally, RELEASE.

80. See CANCELLATION OF INSTRUMENTS, 6 Cyc. 336, 337.

81. Eaton *v.* Eaton, 37 N. J. L. 108, 18 Am. Rep. 716.

82. See ADVERSE POSSESSION, 1 Cyc. 1151–1153. But see Greene *v.* Anglemire, 77 Mich.

prove actual notice of an unrecorded conveyance of land so as to defeat the title of a subsequent purchaser,[83] to set aside a deed and divest the title to real estate for breach of a condition subsequent,[84] to obtain equitable relief against the legal right of another,[85] to protect a trustee for breach of trust by proof of acquiescence of the *cestui que trust*,[86] to establish the integrity and fairness of a transaction between parties one of whom may be presumed to exercise a controlling influence over the will and conduct of the other,[87] to supply a lost record,[88] to prove "disavowals or renunciations of right,"[89] to establish a nuncupative will,[90] to prove that a person executing a will understood it to be an instrument of a different nature,[91] to authorize entry *nunc pro tunc* on court records of judicial action previously taken,[92] to sustain an award by explanation of conduct by the arbitrators *prima facie* fatal to the award,[93] to set aside a verdict on account of previously expressed opinions by jurors,[94] or to set aside a government land patent[95] or a patent for invention[96] on the ground of fraud or mistake. "Where a remedy is summary courts always require that a clear case be made out."[97] Where a claim of great magnitude is to be sustained, if at all, by the testimony of interested parties who have had time and inducement to trump up a false case, the evidence should be clear and undisputable.[98]

5. Proof Beyond a Reasonable Doubt. There are very few civil cases where courts have agreed that facts must be proved beyond a reasonable doubt.[99] In suits for the infringement of patents, where defendant assails the validity of the patent on the ground of prior use of the patented article, it is well settled that he must establish that defense by proof beyond a reasonable doubt.[1] It has been held that probate of a will must be refused if there is a reasonable doubt whether all the formalities required by statute in the execution of wills have been observed,[2] and that the same degree of proof is required in order to defeat a bankrupt's application for a discharge on the ground of perjury committed by him.[3]

6. Proof of Negative Facts. To establish a negative the same degree of proof is not ordinarily necessary as in cases where proof of an affirmative is required.[4] Generally a negative fact is sufficiently proved *prima facie* by proving some affirmative fact or state of facts inconsistent with the affirmative of the propo-

168, 43 N. W. 772, holding preponderance always sufficient.

83. Flagg *v.* Mann, 9 Fed. Cas. No. 4,847, 2 Sumn. 486, a leading case. See, generally, Mortgages; Vendor and Purchaser.

84. "The evidence should be clear, cogent, and convincing." Dickson *v.* St. Paul, etc., R. Co., 168 Mo. 90, 98, 67 S. W. 642.

85. Duvall *v.* Hamilton, (Md. 1903) 55 Atl. 431 (equitable lien on stock); Vansciver *v.* Bryan, 13 N. J. Eq. 434 (notice of constructive trust).

86. The defense must be made by "full, distinct, and satisfactory evidence." Newman *v.* Schwerin, 109 Fed. 942, 48 C. C. A. 742.

87. Such as parent and child or principal and agent. Ten Eyck *v.* Whitbeck, 156 N. Y. 341, 50 N. E. 963.

88. Whitney *v.* Jasper Land Co., 119 Ala. 497, 24 So. 259.

89. Irby *v.* McCrae, 4 Desauss. (S. C.) 422.

90. Lucas *v.* Goff, 33 Miss. 629. See, generally, Wills.

91. Boehm *v.* Kress, 179 Pa. St. 386, 36 Atl. 226.

92. Jacks *v.* Adamson, 56 Ohio St. 397, 47 N. E. 48, 60 Am. St. Rep. 749.

93. West Jersey R. Co. *v.* Thomas, 23 N. J. Eq. 431, must be beyond reasonable doubt.

94. State *v.* Mickle, 25 Utah 179, 70 Pac. 856.

95. U. S. *v.* San Jacinto Tin Co., 125 U. S. 273, 8 S. Ct. 850, 31 L. ed. 747; Colorado Coal, etc., Co. *v.* U. S., 123 U. S. 307, 8 S. Ct. 131, 31 L. ed. 182; U. S. *v.* Maxwell Land-Grant Co., 121 U. S. 325, 7 S. Ct. 1015, 30 L. ed. 949, should be beyond reasonable doubt.

96. U. S. *v.* American Bell Telephone Co., 167 U. S. 224, 17 S. Ct. 809, 42 L. ed. 144, should be beyond reasonable doubt.

97. Mackey *v.* McCarray, 23 Ill. App. 595.

98. Rutherford *v.* Maule, 4 Hagg. Eccl. 213.

99. See *supra*, XVII, A, 3, b, 4, a.

1. Washburn, etc., R. Co. *v.* Wiler, 143 U. S. 275, 12 S. Ct. 450, 36 L. ed. 161. For numerous other cases see, generally, Patents.

2. Tarrant *v.* Ware, 25 N. Y. 425 note. See also *In re* Burtis, 43 Misc. (N. Y.) 437, 89 N. Y. Suppl. 441, 458. See, generally, Wills.

3. *In re* Moore, 17 Fed. Cas. No. 9,751, 1 Hask. 134. But see Bankruptcy, 5 Cyc. 392 note 18.

4. See Adoption of Children, 1 Cyc. 936.

sition to be negatived and therefore raising a presumption that the negative is true.[5]

B. Memory of Witnesses — 1. Importance of the Subject. Inasmuch as trials involving questions of fact are seldom *de recenti facto*, it will be found that with the possible exception of actual or presumed bias of witnesses[6] no consideration affecting the weight of testimony is so frequently noticed and discussed in the reported opinions of courts as the capacity of memory with respect to facts to which the testimony relates. This is conspicuously true in those numerous cases where by the law of evidence the party having the burden of proof is required to establish his contention by more than a mere preponderance of evidence — as in criminal cases,[7] and on certain issues in patent infringement suits,[8] where proof beyond a reasonable doubt is required, or, as in several classes of civil suits, where clear and convincing proof is required.[9] "The laws which regulate the human memory"[10] determine in many cases the credibility of a witness[11] and even the propriety of applying to his testimony the maxim *falsus in uno falsus in omnibus*,[12] and may conceivably pronounce uncontradicted testimony by an unimpeached witness incredible.[13]

2. Phenomena of Memory in General. "Other things equal, at all times of life recency promotes memory."[14] Hence greater credit may be given to the sworn or unsworn statements of a party when made near to the time of the fact under investigation than to his contrary testimony at a much later time.[15] In weighing testimony allowance is constantly made for actual or presumptive want of recollection of facts occurring at a very remote date.[16] An impression is

5. Young *v.* Stephens, 9 Mich. 500.

6. See, generally, Witnesses.

7. See Criminal Law, 14 Cyc. 490.

8. Where the validity of a patent is assailed on the ground of prior use, such use must be proved beyond a reasonable doubt. See *supra*, XVII, A, 5; and, generally, Patents.

9. See *supra*, XVII, A, 4.

10. Adams *v.* Adams, 17 N. J. Eq. 324, 325, per Beasley, C. J.

11. See *infra*, XVII, B, 11.

12. As to application of this maxim see Witnesses.

13. See *infra*, XVII, B, 3.

14. 1 James Princ. Psych. 670.

15. Parke *v.* Foster, 26 Ga. 465, 71 Am. Dec. 221; Mutual Ben. L. Ins. Co. *v.* Brown, 30 N. J. Eq. 193; Hannas *v.* Hawk, 24 N. J. Eq. 124; Morris *v.* Taylor, 22 N. J. Eq. 438; Miller *v.* Cohen, 173 Pa. St. 488, 34 Atl. 219; *In re* Mobbs, 2 Spinks 59. See also State Bank *v.* McGuire, 14 Ark. 530; Sealy *v.* State, 1 Ga. 213, 44 Am. Dec. 641; Warmoth *v.* Durand, 57 N. J. Eq. 160, 42 Atl. 168; West Jersey R. Co. *v.* Thomas, 23 N. J. Eq. 431; The Douglass, 7 Fed. Cas. No. 4,031, 1 Brown Adm. 105; The Ontario, 18 Fed. Cas. No. 10,543, 2 Lowell 40; Peck *v.* Burns, 19 Fed. Cas. No. 10,889, 5 Ben. 537; Sickles *v.* Gloucester Mfg. Co., 22 Fed. Cas. No. 12,841, 4 Blatchf. 229; Wells *v.* The Ann Caroline, 29 Fed. Cas. No. 17,389*a*; Crouch *v.* Hooper, 16 Beav. 182, 1 Wkly. Rep. 10; Macneill *v.* Macgregor, 2 Bligh N. S. 393, 4 Eng. Reprint 1178; Gove *v.* Gawen, 3 Curt. Eccl. 151; The Joseph Somes, Swab. Adm. 185.

16. *California.*— People *v.* Dodge, 104 Cal. 487, 38 Pac. 203.

Illinois.— Kerr *v.* Russell, 69 Ill. 666, 18 Am. Rep. 634.

Michigan.— Wiswall *v.* Ayres, 51 Mich. 324, 16 N. W. 667.

New Hampshire.— Watson *v.* Walker, 23 N. H. 471.

New Jersey.— New Jersey Zinc, etc., Co. *v.* Morris Canal, etc., Co., 44 N. J. Eq. 398, 15 Atl. 227, 1 L. R. A. 133; Pasman *v.* Montague, 30 N. J. Eq. 385, 391; Hoyt *v.* Hoyt, 27 N. J. Eq. 399, 405; Barnes *v.* Taylor, 27 N. J. Eq. 259, 264; Morris Canal, etc., Co. *v.* Fagin, 22 N. J. Eq. 430, 435; Carlisle *v.* Cooper, 19 N. J. Eq. 256, 266; Veghte *v.* Raritan Water Power Co., 19 N. J. Eq. 142, 150; Powers *v.* Butler, 4 N. J. Eq. 465, 475.

New York.— Bowen *v.* Preferred Acc. Ins. Co., 81 N. Y. Suppl. 840, 842.

United States.— Westinghouse Electric, etc., Co. *v.* Catskill Illuminating, etc., Co., 121 Fed. 831, 58 C. C. A. 167; Young *v.* Wolfe, 120 Fed. 956; Singer Mfg. Co. *v.* Schenck, 68 Fed. 191, 194; Electrical Accumulator Co. *v.* Julian Electric Co., 38 Fed. 117, 127; Campbell *v.* James, 4 Fed. Cas. No. 2,361, 4 Ban. & A. 456, 17 Blatchf. 42; Dexter *v.* Arnold, 7 Fed. Cas. No. 3,856, 5 Mason 303; Hawes *v.* Antisdel, 11 Fed. Cas. No. 6,234, 2 Ban. & A. 10.

England.— Butlin *v.* Barry, 1 Curt. Eccl. 614, 622.

"**Lapse of time obscures all recollections,** the best as well as the worst." Wilson *v.* Cobb, 28 N. J. Eq. 177, 182, per Van Fleet, V. C.

In patent infringement cases "extremely hazardous it is, after many years, for a witness to state that any given machine is exactly like another machine," where he produces no model or drawing and has nothing

remembered the better in proportion as it is more attended to.[17] "The attention which we lend to an experience is proportional to its new or interesting character; and it is a notorious fact that what interests us most vividly at the time is, other things equal, what we remember best."[18] A person's recollection of his own acts is presumptively better than that of others who had not equal interest or concern in his doings.[19] "A woman is not likely to forget when and where she was married."[20] But a fact may easily depart from the memory when it was concurrent with another fact of vastly preponderating interest,[21] and a country girl who testifies to her sudden marriage in a strange city should not be discredited because she cannot clearly describe the house where the ceremony took place, since "it is highly probable that, as she entered this house her mind and heart were so engrossed with thoughts of her marriage as to have excluded everything else and rendered her unobservant, if not insensible, to her surroundings."[22] A young woman school teacher should not easily forget the amount of her yearly salary in the only school she ever taught.[23] Novelty diminishing, interest diminishes,[24] and ordinary circumstances attending one of a multitude of like experiences occurring in a person's daily life or vocation it is difficult or impossible to recall

to refresh his memory. Ely *v.* Monson, etc., Mfg. Co., 8 Fed. Cas. No. 4,431, per Sprague, D. J. See also Deering *v.* Winona Harvester Works, 155 U. S. 286, 301, 15 S. Ct. 118, 39 L. ed. 153; Wickes *v.* Lockwood, 65 Fed. 610, 611; Lalance, etc., Mfg. Co. *v.* Habermann Mfg. Co., 53 Fed. 375, 379; Caverly *v.* Deere, 52 Fed. 758, 760; Blake *v.* Eagle Works Mfg. Co., 3 Fed. Cas. No. 1,494, 3 Biss. 77; Potter *v.* Fuller, 19 Fed. Cas. No. 11,327; Thatcher Heating Co. *v.* Carbon Stove Co., 23 Fed. Cas. No. 13,864, 4 Ban. & A. 68. But where it was an extremely simple contrivance, there might be very little difficulty in recollecting it. Rochester Coach Lace Co. *v.* Schaefer, 46 Fed. 190.

17. 1 James Princ. Psych. 669. "Impressions made upon the mind are deep and lasting or shallow and transitory, just in proportion to the degree of attention which a person gives to the facts perceived or to the truths conceived." Dean *v.* Dean, 42 Oreg. 290, 296, 70 Pac. 1039, per Moore, C. J. See also Angell *v.* Rosenbury, 12 Mich. 241.

18. 1 James Princ. Psych. 670. "Some things that men have a full, clear, and perfect knowledge of at the time they transpire, may not be of that interesting character that they retain them in their memory." Hayden *v.* Suffolk Mfg. Co., 11 Fed. Cas. No. 6,261, per Sprague, D. J. See also Swain *v.* Edmunds, 53 N. J. Eq. 142, 32 Atl. 369; Wilson *v.* Hetterick, 2 Bradf. Surr. (N. Y.) 427, 430. In respect to fidelity of memory, "on a subject of domestic interest an old lady's testimony is more reliable than an old man's, and in matters of business interest an old man's testimony is more reliable than that of an old lady." Sperry *v.* Tebbs, 10 Ohio Dec. (Reprint) 318, 320, 20 Cinc. L. Bul. 181, per Shroder, J. As to better recollection of matters of special interest see Warmoth *v.* Durand, 57 N. J. Eq. 16, 42 Atl. 168; Egan *v.* Pease, 4 Dem. Surr. (N. Y.) 301, 303; Knapp *v.* Reilly, 3 Dem. Surr. (N. Y.) 427, 432; Rosevere *v.* Osceola Mills, 169 Pa. St. 555, 32 Atl. 548. As to matters presumptively remembered because they were calculated to make a "strong impression" see Greenleaf *v.* Grounder, 84 Me. 50, 24 Atl. 461; Haydock *v.* Haydock, 33 N. J. Eq. 494; The Colima, 82 Fed. 665, 672; Hart *v.* Hart, 2 Spinks 193. As to fainter recollection of matters of little or no interest see Hughes *v.* Coleman, 10 Bush (Ky.) 246, 249; Homeopathic Mut. L. Ins. Co. *v.* Marshall, 32 N. J. Eq. 111; Derby *v.* Derby, 21 N. J. Eq. 36, 45; U. S. *v.* Chaffee, 25 Fed. Cas. No. 14,774. "Am I to call upon a gentleman, at the distance of two or three years, to shew a reason why he shut a door?" Evans *v.* Evans, 1 Hagg. Cons. 35, 71, per Sir William Scott.

Supreme importance of a transaction to one of the persons engaged therein will make his testimony of greater weight, because his memory is more trustworthy than that of an adverse party to whom the transaction was of far less importance. Platt *v.* Stewart, 19 Fed. Cas. No. 11,220, 13 Blatchf. 481, per Hunt, J.

19. When it is clear that a person went to a place with a definite purpose, it is reasonable to believe that his recollection of that purpose and of what he did in pursuance of it is superior to that of another person on the premises who testifies from recollection of what he did or did not observe. *In re* Rawson, 9 Fed. Cas. No. 4,837, 2 Lowell 519. See also Sandford *v.* Hestonville, etc., R. Co., 136 Pa. St. 84, 20 Atl. 799; The Rhode Island, 20 Fed. Cas. No. 11,745, Olcott 505; Greville *v.* Tylee, 7 Moore P. C. 320, 344, 13 Eng. Reprint 904.

20. Holmes *v.* Holmes, 12 Fed. Cas. No. 6,638, 1 Abb. 525, 1 Sawy. 99, per Deady, J. To the same point see Rhode Island Hospital Trust Co. *v.* Thorndike, 24 R. I. 105, 52 Atl. 873.

21. See Collins *v.* Janesville, 117 Wis. 415, 94 N. W. 309.

22. Clark *v.* Clark, 52 N. J. Eq. 650, 656, 30 Atl. 81, per Van Fleet, V. C.

23. King *v.* Storey, 19 N. J. Eq. 83.

24. 1 James Princ. Psych. 673.

by effort of memory.[25] "Little reliance can be placed on the general recollection of persons in regard to ordinary occurrences under their immediate observation when their memory is not charged with the matter at the time."[26] Persons who witness signatures to ordinary written documents rarely have a definite memory of the matter for any considerate length of time.[27] Indeed the circumstances attending the execution of a will are naturally soon forgotten by one who frequently witnesses wills,[28] or probably by any one else after great lapse of time.[29] Memory of officers taking acknowledgments is open to the same observation.[30] A person's memory of a casual event is reinforced by having his attention specially called to it, while the details are still accessible to recollection.[31] So a startling occurrence may justly be supposed to prompt a person's memory to hark back and recall the presence or absence of causative circumstances within his cognizance, that alone made no impression on the memory.[32] And an extraordinary

25. "That a person, 72 years of age, should be able to recollect the minute details of a tool made by him when he was 38, would, in any circumstances, be extraordinary. But should it appear that during this long interval he had been constantly engaged in working at his trade — making hundreds and probably thousands of optical instruments — should it be shown also that nothing had occurred for 30 years to direct his attention to the particular tool in question and that the case is barren of the slightest circumstance to aid or refresh his recollection, such an exhibition of memory would be amazing, if not miraculous. . . . Is it probable that any human intellect can retain with accuracy for 30 years the petty details of an eventless and humdrum occupation? It is, of course, possible that such testimony may be true, but the chance that it may not be true should be sufficient to deter a court of equity from striking down a valuable patent upon the strength thereof alone." Mack *v.* Spencer Optical Mfg. Co., 52 Fed. 819, 820, per Coxe, D. J.

In support of the text see Thatcher *v.* Miller, 13 Mass. 270; Wells *v.* Stackhouse, 17 N. J. L. 355; Graham *v.* Graham, 50 N. J. Eq. 701, 25 Atl. 358; Hupsch *v.* Resch, 45 N. J. Eq. 657, 18 Atl. 372; Smith *v.* Poillon, 87 N. Y. 590, 594, 41 Am. Rep. 402; McKindley *v.* Drew, 69 Vt. 210, 37 Atl. 285; The Marietta Tilton *v.* The Harrisburg, 16 Fed. Cas. No. 9,084; Rickards *v.* Ladd, 20 Fed. Cas. No. 11,804, 6 Sawy. 40; Bell *v.* Graham, 13 Moore P. C. 242, 260, 1 L. T. Rep. N. S. 221, 8 Wkly. Rep. 98, 15 Eng. Reprint 91.

26. Pennsylvania R. Co. *v.* Central R. Co., 59 Fed. 190, 191, per Brown, D. J. To the same effect see Lindsay *v.* Cusimano, 12 Fed. 504 (memory of the weather); The Singapore *v.* The Hebe, L. R. 1 P. C. 378, 4 Moore P. C. N. S. 271, 275, 16 Eng. Reprint 319 (testimony given by mariners many months after transaction as to direction of wind). See also Bailey *v.* Landingham, 53 Iowa 722, 725, 6 N. W. 76; Martin *v.* Tuttle, 80 Me. 310, 14 Atl. 207; Hutcheson *v.* Meazell, 64 Tex. 604; Pierce *v.* Feagans, 39 Fed. 587; Thomson *v.* Hall, 2 Rob. Eccl. 426, 434.

27. Juzan *v.* Toulmin, 9 Ala. 662, 44 Am. Dec. 448; Landers *v.* Bolton, 26 Cal. 393, 411; Winans *v.* Winans, 19 N. J. Eq. 220, 226. See also Hutcheson *v.* Meazell, 64 Tex. 604, 606; Pierce *v.* Feagans, 39 Fed. 587; Cooper *v.* Cooper, 13 App. Cas. 88, 103, 59 L. T. Rep. N. S. 1. "Few men can swear positively to the sealing and delivery of an instrument after any considerable time." Hamsher *v.* Kline, 57 Pa. St. 397, 402, per Sharswood, J., commenting upon the want of memory by a subscribing witness.

28. Den *v.* Matlack, 17 N. J. L. 86, 109 (where Hornblower, C. J., said: "I speak for myself and know it will be corroborated by the experience of hundreds of others, that I cannot now recall to mind, ten out of every hundred attestations that I have made as a subscribing witness"); *In re* Kellum, 52 N. Y. 517, 520 (clerk in a busy lawyer's office); Zacharias *v.* Collis, 3 Phillim. 176, 183; Burgoyne *v.* Showler, 1 Rob. Eccl. 5, 11 (solicitor's clerk).

29. Den *v.* Matlack, 17 N. J. L. 86, 109; Davis *v.* Elliott, 55 N. J. Eq. 473, 36 Atl. 1092; Alpaugh's Will, 23 N. J. Eq. 507; Mundy *v.* Mundy, 15 N. J. Eq. 290, 293; Bailey *v.* Stiles, 2 N. J. Eq. 220, 233; *In re* Pepoon, 91 N. Y. 255, 258; Matter of Sears, 33 Misc. (N. Y.) 141, 68 N. Y. Suppl. 363; Nicholson *v.* Myers, 3 Dem. Surr. (N. Y.) 193; Blake *v.* Knight, 3 Curt. Eccl. 547. But there is no presumption of failure of memory where the witness testifies at a comparatively short period after execution of the will. Woolley *v.* Woolley, 95 N. Y. 231, 234. about a year. *Compare* Robbins *v.* Robbins, 50 N. J. Eq. 742, 26 Atl. 673; Tappen *v.* Davidson, 27 N. J. Eq. 459.

30. *In re* Wool, 36 Mich. 299; Tooker *v.* Sloan, 30 N. J. Eq. 394; Com. *v.* Mellet, 196 Pa. St. 243, 46 Atl. 434; Pigott *v.* Holloway, 1 Binn. (Pa.) 436, 442. See also Stone *v.* Montgomery, 35 Miss. 83, 105; Riecke *v.* Westenhoff, 10 Mo. App. 358, 363.

31. Knowlden *v.* Knowlden, (N. J. Ch. 1902) 52 Atl. 377, 379.

Identification of person. — A mysterious murder in a small village would probably cause the impressions then received by the rural inhabitants, who saw strange persons in town and in that vicinity at the time, to be vividly retained, and they might well be able to identify those persons after a long period. State *v.* Stain, 82 Me. 472, 20 Atl. 72.

32. Farwell *v.* The John H. Starin, 2 Fed. 100. See also Detroit, etc., R. Co. *v.* Van

or unusual incident in an ordinary transaction may preserve the memory of the latter, when it would otherwise perish.[33] A witness to a disputed fact may properly be allowed to state any circumstance occurring at the same time, which had a tendency to fix the occurrence in his mind,[34] unless such circumstance be of itself mere hearsay evidence of the existence of the fact in question.[35] Memory is more tenacious of the substance of events than of their precise order, when they are nearly contemporaneous,[36] especially if they are of an exciting character.[37] Memory of transactions involving a great number of names, dates, amounts, etc., must be frail.[38]

3. PRETERNATURAL MEMORY. While history records a few examples of men possessing preternatural memory,[39] common knowledge that memory is fallible[40] reduces to a minimum value testimony which cannot be believed except upon the hypothesis that the witness is gifted with a memory "amazing,"[41] "extraordi-

Steinburg, 17 Mich. 99, 108; Gombault *v.* Public Administrator, 4 Bradf. Surr. (N. Y.) 226, 234; Corcoran *v.* Pennsylvania R. Co., 203 Pa. St. 380, 53 Atl. 240; Haverstick *v.* Pennsylvania R. Co., 171 Pa. St. 101, 32 Atl. 1128.

33. "A check for a large amount is refused payment; immediately afterwards the holder is informed by the drawer of the check and the cashier of the Bank which refused it, that it was all right, and he is requested to redeposit it; in about an hour and a half he is informed by the same cashier that it will not be paid; and then after the delay of about an hour the check is paid. An experience so unusual and extraordinary must have made a lasting impression on the memory [of the holder]". Manufacturers' Nat. Bank *v.* Swift, 70 Md. 515, 523, 17 Atl. 336, 14 Am. St. Rep. 381, per Bryan, J., where the court came to the conclusion that as between the holder's testimony that the cashier did not, as in the supposable case above quoted, inform him the second time that the check would not be paid, and the cashier's testimony that he did so inform the holder, the testimony of the holder should prevail. The court thought the cashier probably mistook some other person for the holder "or he may have confounded together some of the many conversations which took place on this subject." In Hankin *v.* Squires, 11 Fed. Cas. No. 6,025, 5 Biss. 186, 189, Blodgett, D. J., charging a jury, said: "You are all aware that it is rather an extraordinary circumstance for a man to pay a draft of this kind thirteen days before its maturity, and you will take notice, as you have a right to do, of the fact that such a circumstance, if it occurred, would be likely to impress itself upon the agents of the bank who were charged with the duty of receiving the money on such a draft." See further in support of the text North American Ins. Co. *v.* Whipple, 18 Fed. Cas. No. 10,315, 2 Biss. 418; Bell *v.* Graham, 13 Moore P. C. 242, 260, 1 L. T. Rep. N. S. 221, 8 Wkly. Rep. 98, 15 Eng. Reprint 91; Dillon *v.* Dillon, 3 Curt. Eccl. 86, 100.

34. Woodward Iron Co. *v.* Andrews, 114 Ala. 243, 21 So. 440; Peck, etc., Co. *v.* Atwater Mfg. Co., 61 Conn. 31, 23 Atl. 699; Patton *v.* Lund, 114 Iowa 201, 86 N. W. 296; Cole *v.* Lake Shore, etc., R. Co., 105 Mich. 549, 63 N. W. 647; Detroit, etc., R. Co. *v.* Van Steinburg, 17 Mich. 99; Angell *v.* Rosenbury, 12 Mich. 241. See also Foster *v.* The Miranda, 9 Fed. Cas. No. 4,977, 6 McLean 221, Newb. Adm. 227.

35. Detroit, etc., R. Co. *v.* Van Steinburg, 17 Mich. 99. See also Sanborn *v.* Detroit, etc., R. Co., 99 Mich. 1, 57 N. W. 1047.

36. Rieben *v.* Hicks, 3 Bradf. Surr. (N. Y.) 353, 355. See also Cooper *v.* Bockett, 4 Moore P. C. 419, 439, 10 Jur. 931, 13 Eng. Reprint 365.

37. Vanderslice *v.* The Superior, 28 Fed. Cas. No. 16,843. See also Ehrhard *v.* Metropolitan St. R. Co., 58 N. Y. App. Div. 613, 68 N. Y. Suppl. 457.

38. Owens *v.* State, 67 Md. 307, 10 Atl. 210, 302.

39. Some classic instances are mentioned in Miller *v.* Cotten, 5 Ga. 341. More of them, and a remarkable modern instance, may be found in an article in the Journal of Speculative Philosophy for January, 1871, vol. v, p. 6. See also for "a remarkable instance of tenacity of memory" Croft *v.* Day, 1 Curt. Eccl. 782, 789.

40. "How frail and fallible is memory! . . . Usually, the impressions made on the memory resemble much more the traceless track of the arrow through the air, than the enduring hieroglyphics upon the pyramids and obelisks of ancient Egypt. Many memories are mere sieves. And I would sooner trust the smallest slip of paper for truth, than the strongest and most retentive memory, ever bestowed on mortal man." Miller *v.* Cotten, 5 Ga. 341, 348, per Lumpkin, J. "The infirmities of the human memory are so great and the liability to mistake so manifest," etc. Young *v.* Wolfe, 120 Fed. 956, 959, per Coxe, C. J.

41. Whitney *v.* Jasper Lane Co., 119 Ala. 497, 24 So. 259 (ignorant witness testifying "with amazing certainty of detail, after the lapse of several decades"); Midmer *v.* Midmer, 26 N. J. Eq. 299 (testimony to precise words used in a conversation fifteen years previously, "an almost incredible feat"); Mack *v.* Spencer Optical Mfg. Co., 52 Fed. 819, 820 (where Coxe, C. J., held that a witness recalling minute details of a trivial event which occurred in his daily vocation thirty years before, would be "amazing, if not miraculous").

nary,"[42] "miraculous,"[43] or "such as would constitute a prodigy."[44] Still it is a familiar fact that tenacity of memory varies greatly in different persons,[45] and special considerations may in a particular instance convince the court that a witness really has an exceptionally strong memory.[46]

4. Memory of Illiterate Persons. Courts take judicial notice that persons engaged in business who cannot read and write have their faculty of memory more acutely educated, for the reason that they are compelled to depend upon their memory and cannot rely upon written memoranda.[47]

5. Memory in Old Age. Old age of a witness supports a presumption that his memory is to a considerable extent untrustworthy in respect of recent events,[48] and not altogether perfect as to transactions in his adult life.[49] On the other hand such witnesses are often entitled to the credit of remembering what took

42. Parker *v.* Chambers, 24 Ga. 518, 528 (testimony "to transactions which took place when the witness was of so tender an age, that it would be most extraordinary for any human memory to retain them"); Grosvenor *v.* Harrison, 54 Mich. 194, 199, 19 N. W. 951 (testimony to words used and circumstances surrounding casual conversation seventeen years before. Cooley, C. J., says: "Truthful witnesses do not have such extraordinary memories as we are asked to believe in here." See also Miller *v.* Cotten, 5 Ga. 341); People *v.* Knox, 78 N. Y. App. Div. 344, 79 N. Y. Suppl. 989 (alleged memory of exact language and section numbers of various provisions in New York city charter pronounced unbelievable). But see McConnell *v.* American Bronze Powder Mfg. Co., 41 N. J. Eq. 447, 458, 5 Atl. 785, where Van Fleet, V. C., was convinced of the substantial truth of the testimony of a witness of "remarkably retentive memory," the witness being unquestionably careful and intelligent and his demeanor on the witness' stand highly satisfactory.

43. Singer Mfg. Co. *v.* Schenck, 68 Fed. 191, 194 (woman's testimony to details of complicated machine seen casually thirty years ago, Coxe, D. J., says: "Human memory is incapable of performing such miraculous feats"). See also Young *v.* Wolfe, 120 Fed. 956, 960 (where Coxe, C. J., said: "Unsatisfactory character of the evidence is the natural consequence of an attempt to compel the human memory to perform an impossible task").

44. Cooper *v.* Carlisle, 17 N. J. Eq. 525, minute recollection of conversation after many years "is suspicious."

45. 1 James Princ. Psych. 660.

46. Wickwick *v.* Powell, 4 Hagg. Eccl. 328, 336.

47. Matter of Cross, 85 Hun (N. Y.) 343, 32 N. Y. Suppl. 933.

48. Sperry *v.* Tebbs, 10 Ohio Dec. (Reprint) 318, 320, 20 Cinc. L. Bul. 181; Bentley *v.* Phelps, 3 Fed. Cas. No. 1,331, 2 Woodb. & M. 426, 440, where Woodbury, J., said: "It is certain that as to recent transactions, such persons notice them less and think of them less, than events in early life." See also 1 James Princ. Pysch. 661; Porter The Human Intellect, § 299; and the following cases:

Georgia.— Parke *v.* Foster, 26 Ga. 465, 71 Am. Dec. 221.

New Jersey.— Riddle *v.* Clabby, 59 N. J. Eq. 573, 44 Atl. 859; Williams *v.* Champion, 39 N. J. Eq. 350; *In re* Eddy, 32 N. J. Eq. 701; Lyons *v.* Van Riper, 26 N. J. Eq. 337. See also Brown *v.* Mutual Ben. L. Ins. Co., 32 N. J. Eq. 809.

New York.— Carroll *v.* Norton, 3 Bradf. Surr. 291. See also Children's Aid Soc. *v.* Loveridge, 70 N. Y. 387.

Pennsylvania.— Shreiner *v.* Shreiner, 178 Pa. St. 57, 35 Atl. 974.

Tennessee.— Gaar *v.* Stark, (Ch. App. 1895) 36 S. W. 149.

Vermont.— Stewart *v.* Flint, 59 Vt. 144, 8 Atl. 801.

United States.— Fisher *v.* Boody, 9 Fed. Cas. No. 4,814, 1 Curt. 206.

England.— Mackenzie *v.* Handasyde, 2 Hagg. Eccl. 211.

49. Bedilian *v.* Seaton, 3 Fed. Cas. No. 1,218, 3 Wall. Jr. 279. "While it may be conceded, that we remember with more distinctness, the occurrences of boyhood and early manhood, when we have but few things comparatively to recollect, still, it cannot be denied, that after middle age, and when we become immersed in the business and bustle of life, events ordinarily fade away from our memory, just in proportion as they recede from us in point of time." Parke *v.* Foster, 26 Ga. 465, 470, 71 Am. Dec. 221, per Lumpkin, J. "A defect of memory is probably the first evidence of an impairment of the mental faculties." Dean *v.* Dean, 42 Oreg. 290, 296, 70 Pac. 1039, per Moore, C. J. See also Lemon *v.* Wright, 31 Ga. 317; Parke *v.* Foster, 26 Ga. 465, 71 Am. Dec. 221; Sibley *v.* Somers, 62 N. J. Eq. 595, 50 Atl. 321; Lokerson *v.* Stillwell, 13 N. J. Eq. 357; Bentley *v.* Phelps, 3 Fed. Cas. No. 1,331, 2 Woodb. & M. 426; Dysart Peerage Case, 6 App. Cas. 489; Kinleside *v.* Harrison, 2 Phillim. 449; Johnston *v.* Parker, 3 Phillim. 39, 41, where Sir William Scott said: "Persons pretty far advanced in life" and "memory of persons at that time of life is subject to infirmity." Cicero in "De Senectute" quoted in Cornwell *v.* Riker, 2 Dem. Surr. (N. Y.) 354, 377, takes a more favorable view of tenacity of memory in old age affirming aged persons "remember all things which they care about," etc.

place in their childhood or youth[50] — especially if it were a matter of domestic interest[51] — as accurately as persons of unimpaired faculties.[52] And where respectable, disinterested witnesses advanced in life testified distinctly and positively to the details of a comparatively late transaction, and were in a measure corroborated, the court declared that the confidence due to them was "not to be diminished on account of their age."[53]

6. Memory of Childhood Events. A witness of mature age may well remember facts that occurred in his childhood,[54] sometimes where they were of little intrinsic interest,[55] but his testimony should be "received with caution."[56] As to matters of no special interest and without domestic connection, it is unwise to depend much upon the testimony of persons quite young at the time,[57] confidence in the testimony being reduced to zero if the witness was of extremely tender years;[58] and the general credit of the witness may be destroyed by his recklessness in this behalf.[59] The testimony of young persons is considered elsewhere in this work.[60]

7. Memory Refreshed. That a thing forgotten on one day may be remembered on another,[61] especially by attentive and careful recollection[62] or by conference with other witnesses to the same fact,[63] is an irregularity in the process of forgetting which courts fully recognize. Still, judges are accustomed to inquire by what means a memory once confessedly faded was revived,[64] and, unless the

50. Bleecker *v.* Lynch, 1 Bradf. Surr. (N. Y.) 458; Sperry *v.* Tebbs, 10 Ohio Dec. (Reprint) 318, 20 Cinc. L. Bul. 181; McClaskey *v.* Barr, 54 Fed. 781, 784. "The dotard will retrace the facts of his earlier years after he has lost all those of later date." 1 James Princ. Psych. 661. See also Ferrie *v.* Public Administrator, 4 Bradf. Surr. (N. Y.) 28; Maverick *v.* Reynolds, 2 Bradf. Surr. (N. Y.) 360; Stewart *v.* Flint, 59 Vt. 144, 8 Atl. 801; Porter The Human Intellect, § 299; Spencer Princ. Psych. § 255.

51. Davis *v.* Meaux, 22 S. W. 324, 15 Ky. L. Rep. 308 (slave one hundred and seventeen years old credited with remembering birth and marriage of slaves); Sperry *v.* Tebbs, 10 Ohio Dec. (Reprint) 318, 20 Cinc. L. Bul. 181.

52. Memory of events in childhood see *supra*, XVII, B, 6.

53. Bentley *v.* Phelps, 3 Fed. Cas. No. 1,331, 2 Woodb. & M. 426, per Woodbury, J. See also New York City National Shoe, etc., Bank *v.* August, 54 N. J. Eq. 182, 33 Atl. 803. And to the point that defective memory as to recent impressions and events is not always a concomitant of old age see Stackhouse *v.* Horton, 15 N. J. Eq. 202.

54. Parke *v.* Foster, 26 Ga. 465, 470, 71 Am. Dec. 221 (where Lumpkin, J., said: "It may be conceded, that we remember with more distinctness, the occurrences of boyhood and early manhood"); Ferrie *v.* Public Administrator, 4 Bradf. Surr. (N. Y.) 28; Sperry *v.* Tebbs, 10 Ohio Dec. (Reprint) 318, 20 Cinc. L. Bul. 181; D'Aguilar *v.* D'Aguilar, 1 Hagg. Eccl. 773. See also *supra*, XVII, B, 5.

55. 1 James Princ. Psych. 661.

56. Moffett *v.* South Park Com'rs, 138 Ill. 620, 28 N. E. 975; McElvain *v.* McElvain, 171 Mo. 244, 71 S. W. 142; Matter of Barr, 38 Misc. (N. Y.) 355, 77 N. Y. Suppl. 935; D'Aguilar *v.* D'Aguilar, 1 Hagg. Eccl. 773, 778, per Sir William Scott (Lord Stowell), a woman having certified to a fact when she was nine years old. See also Crane *v.* Crane, 81 Ill. 165; Gottfried *v.* Phillip Best Brewing Co., 10 Fed. Cas. No. 5,633, 5 Ban. & A. 4.

57. Ferrie *v.* Public Administrator, 4 Bradf. Surr. (N. Y.) 28. See also Parker *v.* Chambers, 24 Ga. 518; Dean *v.* Anderson, 34 N. J. Eq. 496; Hankinson *v.* Hankinson, 33 N. J. Eq. 66; Matter of Pfarr, 38 Misc. (N. Y.) 223, 77 N. Y. Suppl. 326 (conversation when witness was between seven and eight years old); Cutting *v.* Burns, 57 N. Y. App. Div. 185, 68 N. Y. Suppl. 269; Lewars *v.* Weaver, 121 Pa. St. 268, 15 Atl. 514 (witness eight years old at the time); Parker *v.* Hulme, 18 Fed. Cas. No. 10,740, 1 Fish. Pat. Cas. 44.

58. Patrick *v.* White, 6 B. Mon. (Ky.) 330; Ferrie *v.* Public Administrator, 4 Bradf. Surr. (N. Y.) 28; Sheehan's Estate, 139 Pa. St. 168, 20 Atl. 1003. See also Shannon *v.* Swanson, 104 Ill. App. 465.

59. Patrick *v.* White, 6 B. Mon. (Ky.) 330, when witness was less than a year old.

60. See, generally, Witnesses.

61. 1 James Princ. Psych. 681.

62. Allaire *v.* Allaire, 37 N. J. L. 312; Ward *v.* Wilcox, 64 N. J. Eq. 303, 51 Atl. 1094; Stewart *v.* Stewart, 56 N. J. Eq. 761, 40 Atl. 438 [*affirmed* in 57 N. J. Eq. 664, 40 Atl. 438]; Crouch *v.* Hooper, 16 Beav. 182, 1 Wkly. Rep. 10. See also U. S. *v.* Chaffee, 25 Fed. Cas. No. 14,773, 2 Bond 147.

63. See The Fortitude, 9 Fed. Cas. No. 4,953, 3 Sumn. 228; Wickwick *v.* Powell, 4 Hagg. Eccl. 328.

64. There is ground for suspicion where the memory of a zealous witness was aided by conversing with a party to the cause. Saph *v.* Atkinson, 1 Add. Eccl. 162. See also Williams *v.* Hall, 1 Curt. Eccl. 597.

answer is satisfactory, the testimony of the witness may be lightly regarded [65] or rejected as clearly fictitious.[66] A witness' memory of a remote transaction may be aided by the circumstance that he testified on a former occasion when his memory was presumably fresh,[67] or that the transaction has for other reasons occupied his mind from time to time.[68] A contemporaneous memorandum made by the witness [69] may "serve to refresh or to correct his memory and increase greatly the value of his testimony." [70]

8. Physical Condition of Witness. Ability of a witness to recall accurately the details of a transaction is largely affected by his physical condition at the time when it occurred or when remembrance is suggested or attempted.[71] Intoxication tends to impair accuracy both of observation and of memory.[72] Illness of a witness when his testimony is taken,[73] or admitted lapses of memory due to sunstroke,[74] may render his evidence valueless. Discrepancies attributable to fatigue induced by long cross-examination are excusable; that is to say they do not necessarily impugn the general credibility of the witness.[75]

65. Hildreth *v.* Marshall, 51 N. J. Eq. 241, 27 Atl. 465; Cane *v.* Cane, 39 N. J. Eq. 148; Stanford *v.* Lyon, 37 N. J. Eq. 94; Hannas *v.* Hawk, 24 N. J. Eq. 124; Hawes *v.* Antisdel, 11 Fed. Cas. No. 6,234, 2 Ban. & A. 10; Saph *v.* Atkinson, 1 Add. Eccl. 162; Macneill *v.* Macgregor, 2 Bligh N. S. 393, 4 Eng. Reprint 1178. See also Coulbourn *v.* Fleming, 78 Md. 210, 27 Atl. 1041.

66. Lokerson *v.* Stillwell, 13 N. J. Eq. 357 (plaintiff's memory changed "with remarkable facility" to adapt itself to a new phase of the case made by documentary evidence presented by defendant); Malin *v.* Malin, 1 Wend. (N. Y.) 625.

67. Dysart *v.* Dysart, 1 Rob. Eccl. 470.

68. State *v.* Stain, 82 Me. 472, 20 Atl. 72; Com. *v.* Connors, 156 Pa. St. 147, 29 Atl. 366. See also Knowlden *v.* Knowlden, (N. J. Ch. 1902) 52 Atl. 377; Rogers *v.* Pittis, 1 Add. Eccl. 30.

69. Pierce *v.* Brady, 23 Beav. 64.

Memorandum made by another, if erroneous, may cause a witness consulting it to deceive himself likewise. See The Singapore *v.* The Hebe, L. R. 1 P. C. 378, 4 Moore P. C. N. S. 271, 16 Eng. Reprint 319. And where the memory of a "willing witness" is positively prodded by thrusting at him another person's official entry his testimony is of no value. Macneill *v.* Macgregor, 2 Bligh N. S. 393, 4 Eng. Reprint 1178. But the manner and character of the witness may inspire confidence. Williams *v.* Hall, 1 Curt. Eccl. 597.

70. Hartman *v.* The Will, 11 Fed. Cas. No. 6,163, per Kane, D. J. See also Southworth *v.* Adams, 22 Fed. Cas. No. 13,194, 11 Biss. 256. But "it is one thing to make a memorandum correctly at the time of a transaction, and quite another to make it three years thereafter." Watson *v.* Walker, 23 N. H. 471, 496, per Eastman, J. See also Jones *v.* State, 54 Ohio St. 1, 42 N. E. 699.

71. James Princ. Psych. 404, 664; Porter The Human Intellect, §§ 291, 292; Spencer Princ. Psych. §§ 100–103, where the subject is discussed with characteristic lucidity and force. See also Dean *v.* Dean, 42 Oreg. 290, 297, 70 Pac. 1039 (where Moore, C. J., comments on "failure of the memory to recall perceptions and conceptions, resulting either from age, debility, or injury"); Kinleside *v.* Harrison, 2 Phillim. Eccl. 449, 534 (where Sir John Nicholl, speaking of memory, remarked that "its powers are very different in the same person at different times").

A witness in severe bodily pain may testify that he does not recollect a particular fact and be fully credited when he subsequently swears that he recalled the fact after he left the witness' stand. U. S. *v.* Chaffee, 25 Fed. Cas. No. 14,773, 2 Bond 147, where Leavitt, J., granted a new trial partly in order to get the benefit of the witness' later recollection.

72. State *v.* Castello, 62 Iowa 404, 17 N. W. 605; Shultz *v.* Wall, 134 Pa. St. 262, 19 Atl. 742, 19 Am. St. Rep. 686, 8 L. R. A. 97; Cox *v.* Eayres, 55 Vt. 24, 45 Am. Rep. 583; Kuenster *v.* Woodhouse, 101 Wis. 216, 77 N. W. 165; Mace *v.* Reed, 89 Wis. 440, 62 N. W. 186. Conversely clear memory of events can hardly consist with gross intoxication when they occurred. State *v.* Cronin, 64 Conn. 293, 29 Atl. 536; McGrail *v.* McGrail, 48 N. J. Eq. 532, 22 Atl. 582.

A witness noticeably affected by drink is in disfavor with the court. The Acilia, 120 Fed. 455, 56 C. C. A. 605.

73. Graham *v.* Graham, 50 N. J. Eq. 701, 25 Atl. 358, 364, where Green, V. C., said: "I do not think much weight is to be given to the testimony of this witness, on account of her physical condition. She was, at the time of her examination, seriously ill with typhoid fever, at the residence of," etc. See also Mellick *v.* Mellick, 47 N. J. Eq. 86, 19 Atl. 870.

Dying declarations are to be weighed with regard to the physical condition of the declarant. U. S. *v.* Gleason, 25 Fed. Cas. No. 15,216, Woolw. 128.

74. Lewis *v.* Eagle Ins. Co., 10 Gray (Mass.) 508, testimony "subject to great doubt, as to its credibility," the witness declaring that for the reason stated in the text he was unable to answer questions propounded on cross-examination.

75. McClaskey *v.* Barr, 54 Fed. 781; The Fortitude, 9 Fed. Cas. No. 4,953, 3 Sumn. 228. See also La Flam *v.* Missiquoi Pulp

9. Influences Warping Memory — a. In General. "The most frequent source of false memory is the accounts we give to others of our experiences."[76] And "the memory of the most honest and intelligent person is liable to mingle with the transaction subsequent facts and occurrences and statements of other parties."[77] The witness may indeed "have formed and intensified an impression by

Co., 74 Vt. 125, 52 Atl. 526; Ribot Psych. Attention (Am. transl.), p. 9.

76. 1 James Princ. Psych. 373. "Things are told to persons, till they verily believe that they witnessed them; and we repeat events until we are ready to swear, in the utmost sincerity, that we are spectators of their occurrence." Miller *v.* Cotten, 5 Ga. 341, 349, per Lumpkin, J.

77. *In re* Goold, 10 Fed. Cas. No. 5,604, 2 Hask. 34, per Fox, D. J. "It is a very common thing for an honest witness to confuse his recollection of what he actually observed with what he has persuaded himself to have happened, from impressions and conclusions not really drawn from his own knowledge." *In re* Wool, 36 Mich. 299, 302, per Campbell, J. See also *In re* Gilham, 64 N. J. Eq. 715, 52 Atl. 690; Ferrie *v.* Public Administrator, 4 Bradf. Surr. (N. Y.) 28. In Hodge *v.* Ammerman, 40 N. J. Eq. 99, 103, 2 Atl. 257, Van Fleet, V. C., reminded himself "how frequently misunderstandings occur in our verbal intercourse, from the careless use of language by the speaker, or inattention by the hearer, and how liable even a disinterested witness is, in attempting to reproduce a conversation after a considerable lapse of time, to substitute expressions made recently by other persons for those of the speaker whose words he is attempting to repeat, and how great the danger is that even a conscientious person, in trying to narrate a transaction which exists in his memory in a faded or fragmentary state, will in his effort to make the reproduction seem complete and natural, substitute fancy for fact, or fabricate the missing or forgotten links." To the same effect see Riddle *v.* Clabby, 59 N. J. Eq. 573, 44 Atl. 859; Midmer *v.* Midmer, 26 N. J. Eq. 299. "We think it more probable that both these witnesses . . . in their efforts to recollect particulars of conversations on a matter that they had doubtless heard talked of, by one or both parties, or at second hand, are mistaken, than that the complainant should have forgotten it for sixteen years." Cooper *v.* Carlisle, 17 N. J. Eq. 523, 532, per Zabriskie, Ch. "How easily after this lapse of time the witnesses . . . might confound the impression made upon their minds by this paper, shown and read to them in June, with their recollection of that they saw by candlelight on the 12th of January." Boylan *v.* Meeker, 15 N. J. Eq. 310, 356, per Green, Ord. "Of these witnesses nobody but Stout speaks with any positiveness as to Anthony's saying he had actually made a deed to Alfred, and that it was in his desk. And any one may conceive how easily Mr. Stout may, 9 years after such a deed was found in that desk, have imagined he had heard the fact from Anthony." Woodward *v.* Woodward, 8 N. J. Eq. 779, 785, per Potts, J. "Subsequent observation and information mingle themselves curiously with the impressions of early life; and men are prone to believe that they have seen that of which they have subsequently read, or have heard from others. A highly respectable gentleman in this city, testing the strength of his ancient recollections, once recurred successively to by-gone transactions that he had witnessed, until he described an occurrence which he, himself, a moment afterward, discovered to have taken place before his birth." Parker *v.* Hulme, 18 Fed. Cas. No. 10,740, 1 Fish. Pat. Cas. 44, per Kane, D. J. "We know that great variations take place in the recollection of individuals not accustomed to business, more especially after much gossiping talk has been had in the neighborhood upon the subject on which they afterwards gave their evidence. Suggestions of idle or of designing persons get to be mixed up with the recollections, which become fainter and fainter, till at last their own fancy helps to mislead them, and they lend themselves to support a false case, possibly, without incurring the guilt of forswearing themselves." McGreggor *v.* Topham, 3 H. L. Cas. 132, 149, 10 Eng. Reprint 51, per Lord Brougham. See also Crouch *v.* Hooper, 16 Beav. 182, 1 Wkly. Rep. 10. "It is very possible Stanley may have forgotten the circumstances, he may have heard remarks made in conversation as to the nature of the will, and may have had an idea so impressed in his mind, as to lead him to the belief that the will was not actually signed in his presence." Gove *v.* Gawen, 3 Curt. Eccl. 151, 158, per Sir Herbert Jenner Fust. "Upon loose recollections, too, and, in some instances, after repeated discussions of the subject-matter with interested parties." Evans *v.* Knight, 1 Add. Eccl. 229, 240, per Sir John Nicholl.

"Prior use" in patent cases.— A witness who contends that an unpatented machine made by him long ago anticipated a subsequently patented and successful machine finds it "easy for him to transfer to his early device the characteristics which he now clearly sees are necessary to the accomplishment of the purpose which was then in mind, and difficult for him accurately to separate his recollection of the machine which was made from his present knowledge of the machine which ought to be made." Campbell Printing-Press, etc., Co. *v.* Marden, 64 Fed. 782, 785, per Carpenter, D. J. To the same effect see Howe *v.* Underwood, 12 Fed. Cas. No. 6,775, 1 Fish. Pat. Cas. 160.

Present opinion of the value of property at a time long past will be influenced by the

perpetually thinking on the subject."[78] Transition from erroneous inference to erroneous memory is a common phenomenon.[79] Concomitants of one experience may in recollection get mixed with those of another similar experience.[80] The date of an event may be confounded with the date of a preceding conversation in anticipation of it.[81] A person may fancy he remembers a fact by seeing a written contemporaneous entry thereof believed to be authentic.[82]

b. Bias. The bias of a witness[83] has a well-known and pernicious influence in quickening or deadening his memory,[84] and much allowance is made therefor

subsequent advance, if the property has greatly appreciated in value. Jenkins *v.* Emstein, 13 Fed. Cas. No. 7,265, 3 Biss. 128.

78. U. S. *v.* McKee, 26 Fed. Cas. No. 15,683, per Dillon, C. J. See also strong statements by Sir John Romilly, M. R., in Pierce *v.* Brady, 23 Beav. 64, 71, and in Crouch *v.* Hooper, 16 Beav. 182, 1 Wkly. Rep. 10. "The influence of the imagination" is to be considered by the court in determining the probability of mistake when a witness swears to the precise words used in a conversation. Cunningham *v.* Burdell, 4 Bradf. Surr. (N. Y.) 343.

79. One who supposes that a man introduced to him by a woman is her husband may afterward wrongly believe that she introduced the man as her husband. Stiefel *v.* Stiefel, (N. J. Ch. 1896) 35 Atl. 287, 288, per Stevens, V. C., "the not unnatural inference" drawn from "belief as to the situation." As to memory of words spoken, "the inference drawn by the witnesses might, and naturally would, be taken by them for the fact." West Jersey R. Co. *v.* Thomas, 23 N. J. Eq. 431, 438, per Zabriskie, Ch. See also Freytag *v.* Hoeland, 23 N. J. Eq. 36; Pierce *v.* Brady, 23 Beav. 64. "If the defendants understood these papers as one instrument, and executed both at the same time, it is easy to conceive that they would not have that understanding dissipated by being told to sign in two places, and that they would now recollect it as only one execution and signature." Suffern *v.* Butler, 19 N. J. Eq. 202, 214, per Zabriskie, Ch.

80. "This man, who has probably sailed in many cruisers, may have confounded what was on board one vessel, with the guns on board another." Chacon *v.* Eighty-Nine Bales of Cochineal, 5 Fed. Cas. No. 2,568, 1 Brock 478, 491, per Marshall, C. J.

The length and circumstances of one sojourn may be readily confused with another. Black *v.* Black, 4 Bradf. Surr. (N. Y.) 174.

81. Williams *v.* The Vim, 29 Fed. Cas. No. 17,744*a*.

82. The Singapore *v.* The Hebe, L. R. 1 P. C. 378, 4 Moore P. C. N. S. 271, 16 Eng. Reprint 319, mariner's memory of direction of wind by entry in log.

83. What constitutes bias and who are biased witnesses see *infra*, XVII, D, 2, b; and, generally, WITNESSES.

84. "We easily believe what we wish to be true." Turner *v.* Hand, 24 Fed. Cas. No. 14,257, 3 Wall. Jr. 88, per Grier, J. "No one with opportunity for observation of judicial proceedings, has failed to notice the lamentable infirmities of human recollection, and the tendency after the lapse of time to believe that which it is the interest of the witness to have appear as the truth." Miller *v.* Cohen, 173 Pa. St. 488, 494, 34 Atl. 219, per Dean, J. "It is comparatively easy, when witnesses are testifying concerning a transaction that occurred six years ago, and that has become indistinct in the memory, to make their recollection of the details of the occurrence conform to their present interest." Pierce *v.* Feagans, 39 Fed. 587, 590, per Thayer, J.

In support of the text see also the following cases:

Georgia.— Lemon *v.* Wright, 31 Ga. 317.

Illinois.— Hall *v.* Rose Hill, etc., Road Co., 70 Ill. 673; Graham *v.* Anderson, 42 Ill. 514, 92 Am. Dec. 89. See also North Chicago St. R. Co. *v.* Fitzgibbons, 54 Ill. App. 385.

Kentucky.— Hughes *v.* Coleman, 10 Bush 246; Patrick *v.* White, 6 B. Mon. 330.

Maine.— Martin *v.* Tuttle, 80 Me. 310, 14 Atl. 207.

Maryland.— Rogers *v.* Rogers, 94 Md. 573, 55 Atl. 450; Frush *v.* Green, 86 Md. 494, 39 Atl. 863.

Michigan.— Johnson *v.* Van Velsor, 43 Mich. 208, 5 N. W. 265.

New Jersey,— Titus *v.* Cairo, etc., R. Co., 46 N. J. L. 393; Wells *v.* Flitcraft, (Ch. 1899) 43 Atl. 659; Graham *v.* Graham, 50 N. J. Eq. 701, 25 Atl. 358; Krauth *v.* Thiele, 45 N. J. Eq. 407, 18 Atl. 351; Lehigh Coal, etc., Co. *v.* New Jersey Cent. R. Co., 41 N. J. Eq. 167, 3 Atl. 134; Haydock *v.* Haydock, 33 N. J. Eq. 494; Gibbons *v.* Potter, 30 N. J. Eq. 204; Warwick *v.* Marlatt, 25 N. J. Eq. 188; Hannas *v.* Hawk, 24 N. J. Eq. 124; Derby *v.* Derby, 21 N. J. Eq. 36; Cutler *v.* Tuttle, 19 N. J. Eq. 549; Marsh *v.* Lasher, 13 N. J. Eq. 253; Chetwood *v.* Brittan, 2 N. J. Eq. 438. See also Brown *v.* Mutual Ben. L. Ins. Co., 32 N. J. Eq. 812.

New York.— Rumsey *v.* Goldsmith, 3 Dem. Surr. 494.

Pennsylvania.— Dick *v.* Ireland, 130 Pa. St. 299, 18 Atl. 737; Lewars *v.* Weaver, 121 Pa. St. 268, 15 Atl. 514.

Rhode Island.— Odd Fellows Beneficial Assoc. *v.* Carpenter, 17 R. I. 720, 24 Atl. 578 [*explained* in Rhode Island Hospital Trust Co. *v.* Thorndike, 24 R. I. 105, 52 Atl. 873].

United States.— Deering *v.* Winona Harvester Works, 155 U. S. 286, 15 S. Ct. 118, 39 L. ed. 153; Mast *v.* Dempster Mill Mfg.

in weighing his testimony.[85] This is especially true when he testifies to conversations with or oral statements made by others,[86] to declarations of persons since

Co., 82 Fed. 327, 27 C. C. A. 191; Universal Winding Co. *v.* Willamantic Linen Co., 82 Fed. 228; Singer Mfg. Co. *v.* Schenck, 68 Fed. 191, 194; Caverly *v.* Deere, 52 Fed. 758; Wetherell *v.* Keith, 27 Fed. 364; Thayer *v.* Hart, 20 Fed. 693; Cannon *v.* The Potomac, 5 Fed. Cas. No. 2,386, 3 Woods 158; *In re* Goodridge, 10 Fed. Cas. No. 5,547; Hawes *v.* Antisdel, 11 Fed. Cas. No. 6,234, 2 Ban. & A. 10; Hitchcock *v.* Tremaine, 12 Fed. Cas. No. 6,540, 9 Blatchf. 550; Howe *v.* Underwood, 12 Fed. Cas. No. 6,775; Little *v.* U. S., 15 Fed. Cas. No. 8,396; The North Star, 18 Fed. Cas. No. 10,331, 8 Blatchf. 209; U. S. *v.* The Anna, 24 Fed. Cas. No. 14,458, Taney 549; U. S. *v.* Mayer, 26 Fed. Cas. No. 15,753, Deady 127; Wyman *v.* Babcock, 30 Fed. Cas. No. 18,113, 2 Curt. 386. See also White *v.* Pennsylvania Nat. Bank, 29 Fed. Cas. No. 17,544, 4 Brewst. (Pa.) 234.

England.— Saph *v.* Atkinson, 1 Add. Eccl. 162; Oliver *v.* Oliver, 1 Hagg. Cons. 361; Westmeath *v.* Westmeath, 2 Hagg. Eccl. Suppl. 1; Jorden *v.* Money, 5 H. L. Cas. 185, 10 Eng. Reprint 868; Chesnutt *v.* Chesnutt, 1 Spinks 196. See also Macneill *v.* Macgregor, 2 Bligh N. S. 393, 465, 4 Eng. Reprint 1178; Rutherford *v.* Maule, 4 Hagg. Eccl. 213, 233.

Denial of receipt of letter.— In *In re* Imperial Land Co., L. R. 15 Eq. 18, 42 L. J. Ch. 372, quoted with approval in Matter of Wiltse, 5 Misc. (N. Y.) 105, 111, 25 N. Y. Suppl. 733, Malins, J., said: "I think there would be very considerable danger, where a letter is proved to have been duly posted and duly directed, in relying upon the unsupported statement of a person, who, wishing to get rid of what he finds to be a burden, says he never received it, and any such evidence, in my opinion, ought to be received with the greatest amount of caution."

85. See cases cited *supra*, note 84.

No imputation against the witness' integrity is implied in deducting something from the face value of his testimony. Hence the rule is enforced regardless of the exalted character of the witness.

Alabama.— Alexander *v.* Hooks, 84 Ala. 605, 4 So. 417.

Maine.— Grant *v.* Broadstreet, 87 Me. 583, 609, 33 Atl. 165.

Maryland.— Rogers *v.* Rogers, 97 Md. 573, 55 Atl. 450.

New Jersey.— See Ramsdell *v.* Streeter, 62 N. J. Eq. 718, 48 Atl. 575; Fisler *v.* Porch, 10 N. J. Eq. 243, 255, in which latter case Williamson, Ch., said: "Mr. Baker does not occupy a position to entitle him to the credit of a disinterested witness; and I think a remark like this may be made of witness without casting any shade upon his character."

United States.—Wyman *v.* Babcock, 30 Fed. Cas. No. 18,113, 2 Curt. 386; U. S. *v.* The Anna, 24 Fed. Cas. No. 14,458, Taney 549.

England.— Beaufort *v.* Neeld, 12 Cl. & F. 248, 9 Jur. 813, 8 Eng. Reprint 1399; Westmeath *v.* Westmeath, 2 Hagg. Eccl. Suppl. 1; Cartwright *v.* Cartwright, 1 Phillim. 90.

86. "I do not mean that language cannot be remembered, but that when, after the lapse of years, a witness attempts to give it, his testimony is apt to be unconsciously given, in the light of the emergency which calls it forth, and under the influence of his sympathies or interests, creating conditions under which qualifying expressions may be forgotten." Smith *v.* Smith, 48 N. J. Eq. 566, 585, 25 Atl. 11, per McGill, Ord.

In support of the text see also the following cases:

Alabama.— Alexander *v.* Hooks, 84 Ala. 605, 4 So. 417.

Connecticut.— Husted *v.* Mead, 58 Conn. 55, 19 Atl. 233.

Maine.— Grant *v.* Broadstreet, 87 Me. 583, 33 Atl. 165, where the court concluded that the biased witness had forgotten an important part of a conversation.

New Jersey.—Ramsdell *v.* Streeter, 62 N. J. Eq. 718, 48 Atl. 575; Riddle *v.* Clabby, 59 N. J. Eq. 573, 44 Atl. 859; Danforth *v.* Moore, 55 N. J. Eq. 127, 35 Atl. 410; Stoutenburgh *v.* Hopkins, 43 N. J. Eq. 577, 12 Atl. 689; Chetwood *v.* Brittan, 2 N. J. Eq. 438, 452; Marsh *v.* Lasher, 13 N. J. Eq. 253.

New York.— Tyrrel *v.* Emigrant Industrial Sav. Bank, 77 N. Y. App. Div. 131, 79 N. Y. Suppl. 49; Jaques *v.* Public Administrator, 1 Bradf. Surr. 499; Portens *v.* Holm, 4 Dem. Surr. 14.

United States.—Spooner *v.* Daniels, 22 Fed. Cas. No. 13,244*a*; Richardson *v.* Eldridge, 20 Fed. Cas. No. 11,781*a*; The Peytona, 19 Fed. Cas. No. 11,058, 2 Curt. 21; *In re* Moore, 17 Fed. Cas. No. 9,751, 1 Hask. 134.

England.— Pierce *v.* Brady, 23 Beav. 64; Crouch *v.* Hooper, 16 Beav. 182, 1 Wkly. Rep. 10; Beaufort *v.* Neeld, 12 Cl. & F. 248, 9 Jur. 813, 8 Eng. Reprint 1399; Colvin *v.* Fraser, 2 Hagg. Eccl. 266; Jorden *v.* Money, 5 H. L. Cas. 185, 10 Eng. Reprint 868; Jones *v.* Godrich, 5 Moore P. C. 16, 13 Eng. Reprint 394; Cartwright *v.* Cartwright, 1 Phillim. 90.

For other considerations touching the strength or weakness of testimony to admissions or declarations of a person see *infra*, XVII, C, 1, h, (I), (D), (E).

Witness seeking to entrap.— "Very little reliance can be safely placed upon the version of conversations given by a witness who was seeking through them the means of maintaining an action in favor of his employer. However honest and commendable his motives might have been, a witness so employed would be exceedingly apt to remember statements favoring the wishes of his employer, and to forget or not listen to explanations and qualifications made at the time." Sunday *v.* Goodon, 23 Fed. Cas. No. 13,616, Blatchf. & H. 569, 576, per Betts, D. J.

deceased,[87] or to the contents of a lost document.[88] "Witnesses whose memories are prodded by the eagerness of interested parties to elicit testimony favorable to themselves are not usually to be depended upon for accurate information."[89] But no presumption of law is here involved,[90] and the candor and moderation of the witness,[91] or the surrounding circumstances[92] may relieve him from suspicion and justify full confidence in his testimony.

10. Discrepancies Between Witnesses. Among the ignorant, the strongest proof of the truth of testimony derived from several witnesses, is the fact that the statements of each are nearly identical with those of the others.[93] Experienced judges, however, are peculiarly aware that exact similarity is characteristic of the testimony of corrupt witnesses whose evidence has been prearranged.[94] It is expected that honest witnesses in speaking of a past transaction will not reproduce it, in description, with the same fulness of detail,[95] and differences in their recollection do not affect the credit due to the substance of their testimony in which they agree.[96]

87. *Alabama.*— Garrett *v.* Garrett, 29 Ala. 439.

Maryland.— Whalen *v.* Milholland, 89 Md. 199, 43 Atl. 45, 44 L. R. A. 208.

New Jersey.— Moore *v.* Kraemer, 50 N. J. Eq. 776, 26 Atl. 961; Lehigh Coal, etc., Co. *v.* New Jersey Cent. R. Co., 41 N. J. Eq. 167, 3 Atl. 134. See also Matthews *v.* Everitt, 23 N. J. Eq. 473.

Pennsylvania.— *In re* Jacoby, 190 Pa. St. 382, 42 Atl. 1026.

United States.— Flora *v.* Anderson, 75 Fed. 217.

England.— Webb *v.* Haycock, 19 Beav. 342, 346.

88. Le Pard *v.* Russell, (N. J. Ch. 1898) 39 Atl. 1059.

89. Washburn, etc., Mfg. Co. *v.* Beat 'Em All Barbed Wire Co., 143 U. S. 275, 284, 12 S. Ct. 443, 36 L. ed. 154, per Brown, J.

90. **There is no rule of law** that the relation of mother to the party "would naturally give a bias to her statements, . . . [so as to affect] the accuracy of her recollection," and the court may decline so to instruct the jury. Wiseman *v.* Cornish, 53 N. C. 218, 219.

91. Young *v.* Young, 51 N. J. Eq. 491, 27 Atl. 627, 631. See also Westmeath *v.* Westmeath, 2 Hagg. Eccl. Suppl. 1; Dysart *v.* Dysart, 1 Rob. Eccl. 106 [*reversed* in 1 Rob. Eccl. 470, but this point reiterated, it seems].

92. Dillon *v.* Dillon, 3 Curt. Eccl. 86. See also Diamond Drill, etc., Co. *v.* Kelly, 120 Fed. 295.

93. Adams *v.* Adams, 17 N. J. Eq. 324, 335, per Beasley, C. J.

94. Adams *v.* Adams, 17 N. J. Eq. 324, 335 (per Beasley, C. J.); Jones *v.* Godrich, 5 Moore P. C. 16, 29, 13 Eng. Reprint 394, where Lushington, Dr., said: "Precise uniformity . . . a badge of fraud;" The Clarence, 1 Spinks 206; Saph *v.* Atkinson, 1 Add. Eccl. 162, 204. See also Socola *v.* Chess Carley Co., 39 La. Ann. 344, 1 So. 824, 827. *Compare* Fatjo *v.* Seidel, 109 La. 699, 33 So. 737, where the court explained (to its own satisfaction) the sameness in testimony to words spoken, and accorded to it the weight due to concurrent testimony of several witnesses.

95. *Illinois.*— Strauch *v.* Hathaway, 101 Ill. 11, 14, 40 Am. Rep. 193, per Mulkey, J.

Iowa.— State *v.* McDevitt, 69 Iowa 549, 29 N. W. 459.

Maryland.— Baltimore City Pass. R. Co. *v.* Cooney, 87 Md. 261, 39 Atl. 859.

New Jersey.— Dawson *v.* Drake, 29 N. J. Eq. 383; Adams *v.* Adams, 17 N. J. Eq. 324.

Pennsylvania.— Com. *v.* Read, 2 Ashm. 261; Rose *v.* West Philadelphia Pass. R. Co., 9 Pa. Cas. 313, 12 Atl. 78.

Wisconsin.— Collins *v.* Janesville, 117 Wis. 415, 94 N. W. 309.

United States.— Turner *v.* Hand, 24 Fed. Cas. No. 14,257, 3 Wall. Jr. 88; U. S. *v.* Flint, 25 Fed. Cas. No. 15,121, 4 Sawy. 42; U. S. *v.* Gleason, 25 Fed. Cas. No. 15,216, 1 Woolw. 128 (per Miller, J.); U. S. *v.* McGlue, 26 Fed. Cas. No. 15,679, 1 Curt. 1. See also The Monticello, 17 Fed. Cas. No. 9,739, 1 Lowell 184.

England.— Evans *v.* Knight, 1 Add. Eccl. 229; Williams *v.* Hall, 1 Curt. Eccl. 597, 693 (per Lushington, Dr.); Lowther Castle, 1 Hagg. Adm. 384; Elwes *v.* Elwes, 1 Hagg. Cons. 269; Rutherford *v.* Maule, 4 Hagg. Eccl. 213; Kenrick *v.* Kenrick, 4 Hagg. Eccl. 114, 131 (per Lushington, Dr.); Williams *v.* Goude, 1 Hagg. Eccl. 577, 589 (per Sir John Nicholl); Brydges *v.* King, 1 Hagg. Eccl. 256, 292; The Sylph, Swab. 233. See also Croft *v.* Day, 1 Curt. Eccl. 782.

Excitement or commotion attending an incident is especially calculated to produce discrepancies in narratives of witnesses. Giltner *v.* Gorham, 10 Fed. Cas. No. 5,453, 4 McLean 402; U. S. *v.* McGlue, 26 Fed. Cas. No. 15,679, 1 Curt. 1; Williams *v.* Hall, 1 Curt. Eccl. 597. See also The Neptune, 17 Fed. Cas. No. 10,120, Olcott 483. Apart from its effect on memory it impairs the accuracy of observation. See, generally, Witnesses.

96. *Georgia.*— Mullery *v.* Hamilton, 71 Ga. 720, 51 Am. Rep. 288.

New Jersey.— Ianch *v.* De Socarras, 56 N. J. Eq. 538, 39 Atl. 370; Cook *v.* Cook, (Ch. 1893) 27 Atl. 818; Lynch *v.* Clements, 24 N. J. Eq. 431; Boylan *v.* Meeker, 15 N. J. Eq. 310; Stackhouse *v.* Horton, 15 N. J. Eq. 202.

11. Relation Between Credit of Witness and Condition of Memory. "The law is well settled that a witness may very seriously impair his credibility by swearing positively and minutely to occurrences which were not of such a nature as to impress themselves forcibly upon his memory,"[97] or which would almost certainly have been obliterated from his mind by lapse of time and a throng of later impressions;[98] especially where many of the witnesses to the same fact forbear to testify with exactness.[99] Unfavorable inferences against such a witness are emphasized by contrast when he admits weakness of memory in regard to facts of no greater moment than those he professes to remember.[1] In balancing the testimony of any witness against opposing testimony, probabilities, or presumptions, the fact that he cannot recollect, or cannot recollect correctly, what a person of normal memory would hardly forget will detract more or less, according to circumstances,[2] from the weight to be given to what he affirms with

Pennsylvania.— Simon *v.* Simon, 163 Pa. St. 292, 29 Atl. 657.

United States.— Cohen *v.* The Mary T. Wilder, 6 Fed. Cas. No. 2,965, Taney 567; The Fortitude, 9 Fed. Cas. No. 4,953, 3 Sumn. 228; The Nabob, 17 Fed. Cas. No. 10,002, Brown Adm. 115; Turner *v.* Hand, 24 Fed. Cas. No. 14,257, 3 Wall. Jr. 88.

England.—Bird *v.* Bird, 2 Hagg. Eccl. 142; Jones *v.* Godrich, 5 Moore P. C. 16, 13 Eng. Reprint 394; Harwood *v.* Baker, 3 Moore P. C. 282, 13 Eng. Reprint 117; The Clarence, 1 Spinks 106, 213, per Lushington, Dr.

Gross discrepancies.— Testimony to conversations may exhibit discrepancies "so considerable and so numerous, that no reliance can be placed on this evidence of declarations." Crouch *v.* Hooper, 16 Beav. 182, 187, 1 Wkly. Rep. 10, per Sir John Romilly, M. R. To the same effect see Mulock *v.* Mulock, 31 N. J. Eq. 594.

97. Lee Sing Far *v.* U. S., 94 Fed. 834, 838, 35 C. C. A. 327, per Hawley, D. J.

In support of the text see the following cases:

California.— McFadden *v.* Wallace, 38 Cal. 51.

Iowa.— Holmes *v.* Connable, 111 Iowa 298, 82 N. W. 780.

Kentucky.— Patrick *v.* White, 6 B. Mon. 330.

Louisiana.— Chandler *v.* Hough, 7 La. Ann. 440, 442.

Michigan.— Grosvenor *v.* Harrison, 54 Mich. 194, 19 N. W. 951. See also *In re* Wool, 36 Mich. 299.

New Jersey.— Derby *v.* Derby, 21 N. J. Eq. 36. See also Gordon's Case, 50 N. J. Eq. 397, 26 Atl. 268; Dietz's Case, 41 N. J. Eq. 284, 7 Atl. 443; Warwick *v.* Marlatt, 25 N. J. Eq. 188.

Ohio.— Wagers *v.* Dickey, 17 Ohio 439, 49 Am. Dec. 467.

Texas.— Hutcheson *v.* Meazell, 64 Tex. 604.

United States.— Ruch *v.* Rock Island, 97 U. S. 693, 24 L. ed. 1101; Pierce *v.* Feagans, 39 Fed. 587; *In re* Goold, 10 Fed. Cas. No. 5,604, 2 Hask. 34. See also Willett *v.* Fister, 18 Wall. 91, 21 L. ed. 804.

England.— Agg *v.* Davies, 2 Phillim. 341. See also *supra*, XVII, B, 3.

98. Gordon's Case, 50 N. J. Eq. 397, 26 Atl. 268. See also Dysart Peerage Case, 6 App. Cas. 489.

99. Flagg *v.* Mann, 9 Fed. Cas. No. 4,847, 2 Sumn. 486, per Story, J. See also People *v.* Dick, 84 N. Y. App. Div. 181, 82 N. Y. Suppl. 719; Porteus *v.* Holm, 4 Dem. Surr. (N. Y.) 14.

1. Gordon's Case, 50 N. J. Eq. 397, 26 Atl. 268; Derby *v.* Derby, 21 N. J. Eq. 36; People *v.* Dick, 84 N. Y. App. Div. 181, 82 N. Y. Suppl. 719. See also Socola *v.* Chess Carley Co., 39 La. Ann. 344, 1 So. 824; Hodge *v.* Amerman, 40 N. J. Eq. 99, 2 Atl. 257; *In re* Coleman, 185 Pa. St. 437, 40 Atl. 69; *In re* Marston, 79 Me. 25, 8 Atl. 87. See also Den *v.* Matlack, 17 N. J. L. 86.

2. "One thing I think must be regarded as absolutely certain: If his evidence on this point is true, his memory is so utterly untrustworthy that no confidence can be reposed in his recollection, especially when his recollection differs from that of the complainant." Clark *v.* Clark, 52 N. J. Eq. 650, 659, 30 Atl. 81, per Van Fleet, V. C., speaking of the testimony of defendant who was unable to recollect certain incidents which must "have impressed themselves so deeply upon his memory that he could never forget them." And in Mutual Ben. L. Ins. Co. *v.* Brown, 30 N. J. Eq. 193, 200, the same vice-chancellor said: "A witness who denies, with almost imprecatory solemnity, his own acts in important transactions which he must recollect if he has any memory at all, cannot be believed in anything he affirms."

In support of the text see the following cases, in all of which the witness' defect of memory operated seriously against his testimony:

Arkansas.— State Bank *v.* McGuire, 14 Ark. 530.

Delaware.— State *v.* Harrigan, 9 Houst. 369, 31 Atl. 1052.

Illinois.— Hall *v.* Rose Hill, etc., Road Co., 70 Ill. 673.

Maine.— Greenleaf *v.* Grounder, 84 Me. 50, 24 Atl. 461.

Maryland.— Rogers *v.* Rogers, 97 Md. 573, 55 Atl. 450; Duvall *v.* Hambleton, 98 Md. 12, 55 Atl. 431.

Michigan.—Johnson *v.* Van Velsor, 43 Mich. 208, 5 N. W. 265.

confidence.[3] Lapse of memory[4] or positive misrecollection[5] of collateral and unimportant facts does not usually affect the rest of the witness' testimony.[6] It might not escape comment, however, in a close case or where indubitable proof is demanded.[7]

12. Memory of Oral Statements. It is a common experience of those dealing with human testimony that conversations are very imperfectly remembered,[8]

New Jersey.— Matter of Berdam, 65 N. J. Eq. 681, 55 Atl. 728; Union Square Nat. Bank *v.* Simmons, (Ch. 1899) 42 Atl. 489; Robbins *v.* Robbins, 50 N. J. Eq. 742, 26 Atl. 673; Main *v.* Main, (Ch. 1892) 24 Atl. 1025; Hurtzig *v.* Hurtzig, 44 N. J. Eq. 329, 15 Atl. 537; Williams *v.* Champion, 39 N. J. Eq. 350; Stanford *v.* Lyon, 37 N. J. Eq. 94; Jones *v.* Knauss, 31 N. J. Eq. 609; Mulock *v.* Mulock, 31 N. J. Eq. 594; Driver *v.* Driver, 28 N. J. Eq. 395; Vreeland *v.* Bramhall, 28 N. J. Eq. 85; Morris *v.* Taylor, 22 N. J. Eq. 438; Wells *v.* Rahway White Rubber Co., 19 N. J. Eq. 402; Van Keuren *v.* McLaughlin, 19 N. J. Eq. 187; King *v.* Storey, 19 N. J. Eq. 83; Vandegrift *v.* Herbert, 18 N. J. Eq. 466; Barcalow *v.* Sanderson, 17 N. J. Eq. 460. See also Buckheit *v.* Smith, (Ch. 1886) 3 Atl. 91.

New York.— Matter of Cross, 85 Hun 343, 32 N. Y. Suppl. 933; Botsford *v.* Burr, 2 Johns. Ch. 405.

Pennsylvania.— Rowson's Estate, 175 Pa. St. 150, 34 Atl. 433.

United States.— The Colima, 82 Fed. 665; Pierce *v.* Feagans, 39 Fed. 587; Green *v.* French, 11 Fed. 591; Dexter *v.* Arnold, 7 Fed. Cas. No. 3,856, 5 Mason 303; *In re* Goodridge, 10 Fed. Cas. No. 5,547; Holmes *v.* Holmes, 12 Fed. Cas. No. 6,638, 1 Abb. 525, 1 Sawy. 99; *In re* Jones, 13 Fed. Cas. No. 7,444, 6 Biss. 68; The Pereire, 19 Fed. Cas. No. 10,979, 8 Ben. 301; The Peytona, 19 Fed. Cas. No. 11,058, 2 Curt. 21; Saunders *v.* The Hanover, 21 Fed. Cas. No. 12,374; U. S. *v.* Rose, 27 Fed. Cas. No. 16,195; Williams *v.* The Vim, 29 Fed. Cas. No. 17,744*a*.

England.— Saph *v.* Atkinson, 1 Add. Eccl. 162; Hoby *v.* Hoby, 1 Hagg. Eccl. 146; Mynn *v.* Robinson, 2 Hagg. Eccl. 169; Cartwright *v.* Cartwright, 1 Phillim. 90; The Joseph Somes, Swab. 185.

Falsus in uno falsus in omnibus.— "A witness who feigns forgetfulness of the circumstances collateral to his main story, and which he must recollect if he has any memory at all, and in respect to which he would be open to contradiction if his testimony is untrue, is unworthy of belief." Gibbons *v.* Potter, 30 N. J. Eq. 204, 210, per Van Fleet, V. C. See also Haydock *v.* Haydock, 33 N. J. Eq. 494.

3. Voorheis *v.* Bovell, 20 Ill. App. 538; French *v.* Eastern Trust, etc., Co., 91 Me. 485, 40 Atl. 327; Boylan *v.* Meeker, 15 N. J. Eq. 310; U. S. *v.* Lee Huen, 118 Fed. 442, 461.

4. Keasbey *v.* Wilkinson, 51 N. J. Eq. 29, 27 Atl. 642; Moffatt *v.* Hardin, 22 S. C. 9; The Nabob, 17 Fed. Cas. No. 10,002, 1 Brown Adm. 115; Bird *v.* Bird, 2 Hagg. Eccl. 142. See also Den *v.* Matlack, 17 N. J. L. 86.

5. Davis *v.* Elliott, 55 N. J. Eq. 473, 36 Atl. 1092; Hoyt *v.* Hoyt, 27 N. J. Eq. 399; Matter of Barr, 38 Misc. (N. Y.) 355, 77 N. Y. Suppl. 935; Brush *v.* Holland, 3 Bradf. Surr. (N. Y.) 461; Chacon *v.* Eighty-nine Bales of Cochineal, 5 Fed. Cas. No. 2,568, 1 Brock 478; Little *v.* U. S., 15 Fed. Cas. No. 8,396; McNeil *v.* Magee, 16 Fed. Cas. No. 8,915, 5 Mason 244; Marshall *v.* Mee, 16 Fed. Cas. No. 9,129; Southworth *v.* Adams, 22 Fed. Cas. No. 13,194, 11 Biss. 256; Rogers *v.* Pittis, 1 Add. Eccl. 30; Johnston *v.* Todd, 5 Beav. 597; Kenrick *v.* Kenrick, 4 Hagg. Eccl. 114; Williams *v.* Goude, 1 Hagg. Eccl. 577; Verelst *v.* Verelst, 2 Phillim. 145.

Illustration.— "It is not an impossible thing that the most honest man might speak truly of any particular transaction, and yet be utterly mistaken, from want of recollection, as to the persons present at the time." Whitenack *v.* Stryker, 2 N. J. Eq. 8, 18, per Pennington, Ch.

6. Cases cited *supra*, notes 4, 5.

7. *Alabama.*— Alexander *v.* Hooks, 84 Ala. 605, 4 So. 417.

Illinois.— Bragg *v.* Geddes, 93 Ill. 39.

Iowa.— Alleman *v.* Stepp, 52 Iowa 626, 3 N. W. 636, 35 Am. Rep. 288.

New Jersey.—Adams *v.* Wells, 64 N. J. Eq. 211, 53 Atl. 610; Hodge *v.* Amerman, 40 N. J. Eq. 99, 103, 2 Atl. 257; Van Houten *v.* Post, 33 N. J. Eq. 344; Brown *v.* Mutual Ben. L. Ins. Co., 32 N. J. Eq. 809; Ketcham *v.* Brooks, 27 N. J. Eq. 347; Caines *v.* Pohlman, 25 N. J. Eq. 179; Shotwell *v.* Shotwell, 24 N. J. Eq. 378; Pinner *v.* Sharp, 23 N. J. Eq. 274; Clos *v.* Boppe, 23 N. J. Eq. 270. See also Ratzer *v.* Ratzer, 28 N. J. Eq. 136.

United States.—Electrical Accumulator Co. *v.* Julien Electric Co., 38 Fed. 117; Hawes *v.* Antisdel, 11 Fed. Cas. No. 6,234, 2 Ban. & A. 10; Little *v.* U. S., 15 Fed. Cas. No. 8,396; U. S. *v.* McKee, 26 Fed. Cas. No. 15,683.

England.— Rutherford *v.* Maule, 4 Hagg. Eccl. 213; Kenrick *v.* Kenrick, 4 Hagg. Eccl. 114; Harwood *v.* Baker, 3 Moore P. C. 282, 13 Eng. Reprint 117; Leech *v.* Bates, 1 Rob. Eccl. 714.

8. Sarvent *v.* Hesdra, 5 Redf. Surr. (N. Y.) 47, per Calvin, Surr. To the same effect see the following cases:

Kansas.— Solomon R. Co. *v.* Jones, 34 Kan. 443, 8 Pac. 730.

Louisiana.— Piffet's Successor, 37 La. Ann. 871.

New Jersey.— Ramsdell *v.* Streeter, 62 N. J. Eq. 718, 48 Atl. 575; Derby *v.* Derby, 21 N. J. Eq. 36; Chetwood *v.* Brittan, 2 N. J. Eq. 438.

Vermont.— State *v.* Bedard, 65 Vt. 278, 26 Atl. 719.

United States.— Judson *v.* Moore, 14 Fed. Cas. No. 7,569, 1 Bond 285; Spooner *v.* Daniels, 22 Fed. Cas. No. 13,244*a*; Turner

particularly where the exact language used is sought to be recalled after a great lapse of time,[9] or where the words spoken were of indifferent interest to the hearer.[10] For this reason among others testimony to oral statements of a person is received with great caution.[11] The effect of bias upon a witness' memory of conversations has been elsewhere noticed.[12] Inability of a witness to narrate a conversation *verbatim* from memory does not necessarily nor usually affect the general credit of the witness;[13] on the contrary, if a witness professes to do so

r. Hand, 24 Fed. Cas. No. 14,257, 3 Wall. Jr. 88; U. S. *v.* Macomb, 26 Fed. Cas. No. 15,702, 5 McLean 286.

England.— Saph *r.* Atkinson, 1 Add. Eccl. 162; Colvin *r.* Fraser, 2 Hagg. Eccl. 266. See also Jones *v.* Stroud, 2 C. & P. 196, 31 Rev. Rep. 660, 12 E. C. L. 524.

A fact is more easily remembered than hurried conversation. Van Houten *r.* Post, 33 N. J. Eq. 344. See also Cooper *v.* Carlisle, 17 N. J. Eq. 525.

"In conversation, which was noisy and excited and lasted some time, no witness can be expected to recollect all that was said." Williams *v.* The Vim, 29 Fed. Cas. No. 17,744*a*, per Choate, D. J. See also Spooner *r.* Daniels, 22 Fed. Cas. No. 13,244*a*; Williams *r.* Hall, 1 Curt. Eccl. 597.

9. *Alabama.*— Moore *r.* Tate, 114 Ala. 582, 21 So. 820; Ingram *v.* Illges, 98 Ala. 511, 13 So. 548.

Illinois.— Voorheis *r.* Bovell, 20 Ill. App. 538.

Massachusetts.— Hayes *v.* Pitts-Kimball Co., 183 Mass. 262, 264, 67 N. E. 249, where Knowlton, C. J., said: "It seldom happens after the lapse of any considerable time that a witness can give the exact words of another, unless they are very few."

Mississippi.— Allen *r.* Bobo, 81 Miss. 443, 33 So. 288, twenty years.

Missouri.— McElvain *r.* McElvain, 171 Mo. 244, 71 S. W. 142, forty years.

New Jersey.— Thompson *v.* West, 56 N. J. Eq. 660, 40 Atl. 197 (nine years); Smith *v.* Smith, 48 N. J. Eq. 566, 25 Atl. 11; Stanford *v.* Lyon, 37 N. J. Eq. 94; Dean *v.* Anderson, 34 N. J. Eq. 496; Ogden *v.* Thornton, 30 N. J. Eq. 369; Shotwell *v.* Shotwell, 24 N. J. Eq. 378 (more than six years); Shipman *v.* Cook, 16 N. J. Eq. 251; Durant *r.* Bacot, 15 N. J. Eq. 411, 416 (per Van Dyke, J., thirty years — "memory, in its frailest form"); Marsh *v.* Lasher, 13 N. J. Eq. 253 ("months previously"); Peer *v.* Peer, 11 N. J. Eq. 432; Williams *r.* Carle, 10 N. J. Eq. 543 (forty years); Woodward *v.* Woodward, 8 N. J. Eq. 779. See also Bussom *v.* Forsyth, 32 N. J. Eq. 277, nearly sixty years.

New York.— Merchant *v.* White, 77 N. Y. App. Div. 539, 79 N. Y. Suppl. 1 (thirty years); Tyrrel *r.* Emigrant Industrial Sav. Bank, 77 N. Y. App. Div. 131, 79 N. Y. Suppl. 49; Gombault *v.* Public Administrator, 4 Bradf. Surr. 226 (ten months); Ferrie *v.* Public Administrator, 4 Bradf. Surr. 28 (fifty or sixty years).

Pennsylvania.— American Union L. Ins. Co. *v.* Judge, 191 Pa. St. 484, 43 Atl. 374 (two years); Wanger *r.* Hipple, 10 Pa. Cas. 25, 13 Atl. 81 (twenty-seven years).

South Carolina.— Brabham *v.* Crosland, 25 S. C. 525, 1 S. E. 33; White *v.* Moore, 23 S. C. 456, 461, where McGowen, J., said: "Unwritten words are, at best, but vanishing sound . . and when testified to after a lapse of thirty years, furnish an uncertain and unsatisfactory foundation on which to build."

United States.— Flora *v.* Anderson, 75 Fed. 217 (more than seventy years); American Bell Telephone Co. *r.* People's Telephone Co., 22 Fed. 309; Maloney *v.* Milwaukee, 1 Fed. 611; Bedilian *v.* Seaton, 3 Fed. Cas. No. 1,218, 3 Wall. Jr. 279; *In re* Moore, 17 Fed. Cas. No. 9,751, 1 Hask. 134; Richardson *v.* Hicks, 20 Fed. Cas. No. 11,783. See also U. S. *v.* Gleason, 25 Fed. Cas. No. 15,216, Woolw. 128.

England.— Rutherford *v.* Maule, 4 Hagg. Eccl. 213 (forty or fifty years); Mackenzie *r.* Handasyde, 2 Hagg. Eccl. 211 (three or four years); Kierzkowski *r.* Dorion, 5 Moore P. C. N. S. 397, 16 Eng. Reprint 565 (eighteen years); Jones *v.* Godrich, 5 Moore P. C. 16, 13 Eng. Reprint 394; Saunders *v.* Saunders, 1 Rob. Eccl. 549; Hudson *v.* Parker, 1 Rob. Eccl. 14 (twenty-seven years).

10. *Alabama.*— Garrett *v.* Garrett, 29 Ala. 439.

Maine.— Parker *v.* Prescott, 86 Me. 241, 29 Atl. 1007.

Michigan.— Grosvenor *v.* Harrison, 54 Mich. 194, 19 N. W. 951.

New Jersey.— Kiddle *v.* Clabby, (Err. & App. 1899) 44 Atl. 859, 861; Kohl *v.* State, 59 N. J. L. 445, 36 Atl. 931, 37 Atl. 73; Jessup *r.* Cook, 6 N. J. L. 434; Wolfinger *v.* McFarland, (Ch. 1903) 54 Atl. 862; Haley *r.* Goodheart, 58 N. J. Eq. 368, 376, 44 Atl. 193, 196 (where Stevens, V. C., said: "After a lapse of thirty years, it is difficult to believe that, in the case of a mere casual introduction, any witness could be sure that the expression was, for instance, 'My wife, Mrs. Haley'"); O'Brien *r.* O'Brien, (Ch. 1894) 30 Atl. 875; Vanderbeck *v.* Vanderbeck, 30 N. J. Eq. 265; Midmer *r.* Midmer, 26 N. J. Eq. 299; Hendrickson *v.* Ivins, 1 N. J. Eq. 562. See also Bussom *r.* Forsyth, 32 N. J. Eq. 277; Eyre *v.* Eyre, 19 N. J. Eq. 102.

Wisconsin.—Benedict *v.* Horner, 13 Wis. 256.

Conversely a statement important to the witness might well be remembered by him for a long time. Wallace's Case, 49 N. J. Eq. 530, 25 Atl. 260.

11. See *infra*, XVII, C, 1, h, (I), (A), (B).

12. See *supra*, XVII, B, 9, b.

13. Williams *v.* Carle, 10 N. J. Eq. 543; Boyd *v.* Gorman, 29 N. Y. App. Div. 428, 51 N. Y. Suppl. 1083.

his credit is open to suspicion.[14] Where a witness cannot recollect what was said, but declares that he can recollect what was not said, the latter statement is of questionable validity.[15] A person's memory of his own utterances will be regarded as more authentic than that of a listener.[16]

13. Memory of Dates and Time of Day. Of all facts a date "slides the easiest from the memory."[17] Witnesses are proverbially inaccurate as to dates,[18] and discrepancies between witnesses as to the day or time of day of an event do not ordinarily affect the substance of their testimony.[19] Courts have little or no faith in a witness' recollection of dates or of the time of day of events, if he has no collateral fact by which he ascertains them.[20] And his recollection of two contemporaneous events proves nothing as to the time, unless the date of one of them be known.[21] The date of a transaction may and should be fixed by associating it with other circumstances of public and unquestioned notoriety, or with credible written documents, or with other facts occurring at a time clearly proved.[22] Time

14. Wagers *v.* Dickey, 17 Ohio 439, 49 Am. Dec. 467; Ruch *v.* Rock Island, 97 U. S. 693, 24 L. ed. 1101; *In re* Goold, 10 Fed. Cas. No. 5,604, 2 Hask. 34. See also Ruckelshaus *v.* Borcherling, 54 N. J. Eq. 344, 34 Atl. 977. *Compare* Wickwick *v.* Powell, 4 Hagg. Eccl. 328.

15. Orser *v.* Orser, 24 N. Y. 51.

16. Danforth *v.* Moore, 55 N. J. Eq. 127, 35 Atl. 410; Hodge *v.* Amerman, 40 N. J. Eq. 99, 2 Atl. 257; Perkins *v.* Partridge, 30 N. J. Eq. 559; West Jersey R. Co. *v.* Thomas, 23 N. J. Eq. 431; *In re* Clark, (N. J. Prerog. 1900) 52 Atl. 222; Moore *v.* Moore, 2 Bradf. Surr. (N. Y.) 261. See Jordan *v.* Eaton, 13 Fed. Cas. No. 7,520, 2 Hask. 236.

17. McArthur *v.* Sears, 21 Wend. (N. Y.) 190, 192, per Cowen, J. See also Marcotte *v.* Lewiston, 94 Me. 233, 47 Atl. 137.

Events are much more easily remembered than their dates. Davis *v.* Meaux, 22 S. W. 324, 15 Ky. L. Rep. 308; Bannatyne *v.* Bannatyne, 16 Jur. 864, 2 Rob. Eccl. 472, per Lushington, Dr.

18. "If there was nothing at the time to fix a circumstance on the mind of the witness, an inaccuracy as to a date is extremely probable." Kenrick *v.* Kenrick, 4 Hagg. Eccl. 114, 131, per Lushington, Dr.; McGrenra *v.* McGrenra, 7 Del. Ch. 432, 44 Atl. 816. See also Wilkinson *v.* Sherman, 45 N. J. Eq. 413, 18 Atl. 228; Sarvent *v.* Hesdra, 5 Redf. Surr. (N. Y.) 47; Parham *v.* American Buttonhole, etc., Mach. Co., 18 Fed. Cas. No. 10,713, 4 Fish. Pat. Cas. 468.

19. Day.— Grow *v.* Pottsville, 197 Pa. St. 337, 47 Atl. 195; Rogers *v.* Pittis, 1 Add. Eccl. 30; Rutherford *v.* Maule, 4 Hagg. Eccl. 213. See also Black *v.* Black, 38 Ala. 111; McNeil *v.* Magee, 16 Fed. Cas. No. 8,915, 5 Mason 244.

Time of day.— Elwes *v.* Elwes, 1 Hagg. Cons. 269. See also Bird *v.* Bird, 2 Hagg. Eccl. 142.

20. "General recollection, the most treacherous of all guides in reference to dates and times." Goble *v.* Grant, 3 N. J. Eq. 629, 633, per Vroom, Ch. To the same effect see Lucas *v.* Parsons, 27 Ga. 593, 619, per Lumpkin, J.

Dates.— *Illinois.*— Russell *v.* Baptist Theological Union, 73 Ill. 337.

Maine.—See Thornton *v.* Maine State Agricultural Soc., 97 Me. 108, 53 Atl. 979, 94 Am. St. Rep. 488.

New Jersey.— Merchants' Nat. Bank *v.* Northrup, 22 N. J. Eq. 58.

New York.— Shields *v.* Ingram, 5 Redf. Surr. 346. See also Maverick *v.* Reynolds, 2 Bradf. Surr. 360.

United States.— Rogers *v.* Fitch, 81 Fed. 959, 27 C. C. A. 23; Brooks *v.* Sacks, 81 Fed. 403, 26 C. C. A. 456; Campbell *v.* James, 4 Fed. Cas. No. 2,361, 4 Ban. & A. 456, 17 Blatchf. 42; Flagg *v.* Mann, 9 Fed. Cas. No. 4,847, 2 Sumn. 486; Hawes *v.* Antisdel, 11 Fed. Cas. No. 6,234, 2 Ban. & A. 10; Sayles *v.* Chicago, etc., R. Co., 21 Fed. Cas. No. 12,414, 1 Biss. 468; Williams' Case, 29 Fed. Cas. No. 17,709, Crabbe 243. See also Westinghouse Electric, etc., Co. *v.* Catskill Illuminating, etc., Co., 121 Fed. 831, 58 C. C. A. 167.

England.— Morris *v.* Davies, 5 Cl. & F. 163, 1 Jur. 911, 7 Eng. Reprint 365; Dillon *v.* Dillon, 3 Curt. Eccl. 86; Mackenzie *v.* Handasyde, 2 Hagg. Eccl. 211; Agg *v.* Davies, 2 Phillim. 341.

Time of day.— McCann *v.* State, 13 Sm. & M. (Miss.) 471; Woodward *v.* Woodward, 41 N. J. Eq. 224, 4 Atl. 424; Com. *v.* Orr, 138 Pa. St. 276, 20 Atl. 866; American Wood-Paper Co. *v.* Glen's Falls Paper Co., 1 Fed. Cas. No. 321*a*, 8 Blatchf. 513.

Memory close to transaction.— Where the date of a transaction to which the witness testifies was specially called to his attention and consideration shortly after it took place, and he then fixed the same date, the accuracy of his testimony is greatly enhanced. Knowlden *v.* Knowlden, (N. J. Ch. 1902) 52 Atl. 377.

21. Cunningham *v.* Burdell, 4 Bradf. Surr. (N. Y.) 343; Rogers *v.* Fitch, 81 Fed. 959, 27 C. C. A. 23.

22. *Missouri.*— Ritter *v.* Springfield First Nat. Bank, 30 Mo. App. 652; Estes *v.* Fry, 22 Mo. App. 53.

New Jersey.— Adams *v.* Wells, 64 N. J. Eq. 211, 53 Atl. 610; White *v.* White, 64 N. J. Eq. 84, 53 Atl. 23; Knowlden *v.* Knowlden, (Ch. 1902) 52 Atl. 377; Henry *v.* Imperial Council, O. of W. F., 52 N. J. Eq. 770, 29

of day may be established in this manner as well as by a timepiece.[23] Testimony to dates is destroyed or weakened by contradicting or casting suspicion upon the transactions named as constituting the data by which the time is located.[24] Memory is very likely to confuse with one another the dates of transactions of a kindred character occurring at nearly the same time.[25] A witness may testify to his "impression" as regards a date, but the weight of such testimony depends very much upon circumstances.[26] Dates do not much impress themselves upon the young.[27]

14. Estimates of Time. Courts do not expect witnesses to testify with precision and harmony in respect of the time consumed in a transaction.[28] Estimates of the duration of short periods of time into which much experience is crowded are notoriously inexact,[29] and are apt to be excessive,[30] especially if the mind was in a state of anxiety or expectation;[31] and a witness who assumes to measure time with accuracy under such circumstances tends to discredit himself.[32] Periods of time are apt to be shortened or lengthened in the estimate of biased witnesses to accord with their own interest or desire.[33]

15. Memory of Contents of Written Instruments. The difficulty of retaining in the memory the contents of a written instrument after much lapse of time is universally recognized by courts.[34] Especially is testimony to the contents of a

Atl. 508; Bussom *v.* Forsyth, 32 N. J. Eq. 277; Burgin *v.* Giberson, 26 N. J. Eq. 72; Lynch *v.* Clements, 24 N. J. Eq. 431.

New York.— Lindsay *v.* People, 63 N. Y. 143; Matter of Feierabend, 38 Misc. 524, 77 N. Y. Suppl. 1106.

North Carolina.— McRae *v.* Morrison, 35 N. C. 46.

United States.— Diamond Drill, etc., Co. *v.* Kelly, 120 Fed. 295; McClaskey *v.* Barr, 54 Fed. 781; Campbell *v.* James, 4 Fed. Cas. No. 2,361, 4 Ban. & A. 456, 17 Blatchf. 42; Sherwood *v.* Sherman, 21 Fed. Cas. No. 12,780; Williams' Case, 29 Fed. Cas. No. 17,709, Crabbe 243.

23. Young *v.* Com., 8 Bush (Ky.) 367. See also American Wood-Paper Co. *v.* Glen's Falls Paper Co., 1 Fed. Cas. No. 321*a*, 8 Blatchf. 513.

24. *In re* Berdan, 65 N. J. Eq. 681, 55 Atl. 728; Adams *v.* Adams, 17 N. J. Eq. 324; Thayer *v.* Hart, 20 Fed. 693; Garey *v.* Union Bank, 10 Fed. Cas. No. 5,241*a*, 3 Cranch C. C. 233; McGregor *v.* Topham, 3 H. L. Cas. 132, 10 Eng. Reprint 51.

25. Kohl *v.* State, 59 N. J. L. 445, 36 Atl. 931, 37 Atl. 73; Gibbons *v.* Potter, 30 N. J. Eq. 204; Black *v.* Black, 4 Bradf. Surr. (N. Y.) 174; Brooks *v.* Sacks, 81 Fed. 403, 26 C. C. A. 456. See also Maloney *v.* Herbert, (N. J. Ch. 1888) 15 Atl. 824; Osborne *v.* Glazier, 31 Fed. 402; American Bell Telephone Co. *v.* People's Telephone Co., 22 Fed. 309, 22 Blatchf. 531; Jordan *v.* Eaton, 13 Fed. Cas. No. 7,520, 2 Hask. 236; Steadman *v.* Powell, 1 Add. Eccl. 58; Verelst *v.* Verelst, 2 Phillim. 145.

26. McRae *v.* Morrison, 35 N. C. 46.

27. McClaskey *v.* Barr, 54 Fed. 781, 784, per Sage, D. J.

28. McGrail *v.* McGrail, 48 N. J. Eq. 532, 22 Atl. 582; Jacobsen *v.* Dalles, etc., Nav. Co., 106 Fed. 428; The Adriatic, 1 Fed. Cas. No. 91, 17 Blatchf. 176; Anderson *v.* Ross, 1 Fed. Cas. No. 361, 2 Sawy. 9; The Blossom, 3 Fed. Cas. No. 1,564, Olcott 188; Chapin *v.* The Hattie Ross, 5 Fed. Cas. No. 2,598; Cohen *v.* The Mary T. Wilber, 6 Fed. Cas. No. 2,965, Taney 567; The Emily, 8 Fed. Cas. No. 4,453, Olcott 132; Johnson *v.* The Industry, 13 Fed. Cas. No. 7,391, Hoffm. Op. 488; Malone *v.* The Pedro, 16 Fed. Cas. No. 8,995; Sanderson *v.* The Columbus, 21 Fed. Cas. No. 12,299; The Senator, 21 Fed. Cas. No. 12,667, 1 Brown Adm. 544; Vanderslice *v.* The Superior, 28 Fed. Cas. No. 16,843; The Blue Bell, [1895] P. 242, 7 Aspin. 601, 64 L. J. Adm. 71, 72 L. T. Rep. N. S. 540, 11 Reports 790; The Golden Light, 5 L. T. Rep. N. S. 37, 1 Lush 355; The Mobile, 10 Moore P. C. 467, Swab. 69, 14 Eng. Reprint 568; The Dumfries, Swab. 63.

29. Davis *v.* New Jersey Cent. R. Co., (N. J. Err. & App. 1902) 52 Atl. 561; Jones *v.* The Hanover, 13 Fed. Cas. No. 7,466; The Mary C., 16 Fed. Cas. No. 9,201, 1 Hask. 474.

30. Davis *v.* New Jersey Cent. R. Co., (N. J. Err. & App. 1902) 52 Atl. 561; The British American, 4 Fed. Cas. No. 1,895, 10 Ben. 417.

31. Nolder *v.* McKeesport, etc., R. Co., 201 Pa. St. 169, 50 Atl. 948; The Monticello, 17 Fed. Cas. No. 9,739, 1 Lowell 184; Porter The Human Intellect, § 565.

32. Chapin *v.* The Hattie Ross, 5 Fed. Cas. No. 2,953, per Shipman, D. J.

33. Ridge *v.* Pennsylvania R. Co., 58 N. J. Eq. 172, 43 Atl. 275.

34. Whitney *v.* Jasper Land Co., 119 Ala. 497, 24 So. 259; Tunnard *v.* Littell, 23 N. J. Eq. 264. See also Vincent *v.* Cole, 3 C. & P. 481, M. & M. 257, 14 E. C. L. 673. It is seldom that a witness can give the precise expressions or their collocation on which the meaning often depends. Smith *v.* Carter, 3 Rand. (Va.) 167. "Of all methods of proving the contents of a lost writing, the resort to the memory of one who has read it, is the most desperate." Bolton's Estate, 14 Pa. Co. Ct. 575, 576, per Ashman, J.

writing untrustworthy where the witness is aged and acquired his asserted knowledge of the contents of the instrument when he was a stripling.[35] On the other hand it has been remarked that the contents of an instrument might be satisfactorily proved by the recollection of a reasonably intelligent witness who recently read it.[36] A non-professional witness who affects to remember complicated provisions with extraordinary certainty after a great many years is open to suspicion.[37] The same is true where the witness was a youth when he read the instrument, had no special reason to impress the contents on his memory, and was unfamiliar with such documents.[38] The fact that the witnesses are interested or otherwise biased always evokes adverse comment,[39] for besides the danger of perjury by such witnesses,[40] their memories are much inclined to accord with their desires.[41] Repeated conferences by a friendly witness with the parties in interest concerning the matter to which he testifies are not calculated to guide his memory to exact truth.[42] Where a witness is clearly mistaken in some other parts of his testimony it tends to impeach the accuracy of his memory of the contents of a writing to which he testifies.[43] Faith in the testimony of a witness given with remarkable precision may be greatly shaken by his inability to recollect with equal accuracy the contents of important documents of a similar character in his own possession.[44] That a witness does not remember the minutiæ of contents after several decades ought not seriously to impair confidence in his memory of the general character of the instrument.[45] It has been intimated that the memory of a witness who testifies from hearing the instrument read would not be so reliable as if he had read the instrument itself.[46] The date of an instrument is the part least likely to make an impression on the memory.[47] The language of an instrument expressing its main object would be more likely to attract attention and adhere to the memory than qualifications of its essential provisions.[48] That the terms of the instrument were simple, for example a devise of a known tract of land to a known person, would be a circumstance conducing to accuracy of memory.[49] Where one who was named sole executor and residuary legatee in a will, which was a brief instrument, read it several times, and made a draft of the substance of it, his testimony to its contents sufficed to establish the will.[50] The memory of a conveyancer as to the form of a deed drawn by him should be deemed superior to the memory of a person who was present when the deed was made and cognizant of its contents but who had no knowledge of the different forms of conveyancing.[51] The fair and impartial testimony of an experienced lawyer who drew the document and gave the transaction his careful personal attention is perhaps the strongest direct evidence that could be produced,[52] par-

35. Apperson *v.* Dowdy, 82 Va. 776, 780, 1 S. E. 105, where the court said: "In 1880 could any person be expected to retain a perfect or a safe recollection of the contents of a paper read in his hearing in 1812?"

36. Apperson *v.* Dowdy, 82 Va. 776, 1 S. E. 105, *obiter*.

37. Whitney *v.* Jasper Land Co., 119 Ala. 497, 24 So. 259. See also *In re* Johnson, 40 Conn. 587.

38. Thomas *v.* Ribble, (Va. 1896) 24 S. E. 241.

39. *In re* Johnson, 40 Conn. 587; Wells *v.* Flitcraft, (N. J. Ch. 1899) 43 Atl. 659; Thomas *v.* Ribble, (Va. 1896) 24 S. E. 241; Poague *v.* Spriggs, 21 Gratt. (Va.) 220.

40. See, generally, WITNESSES.

41. See *supra*, XVII, B, 9, b.

42. *In re* Johnson, 40 Conn. 587.

43. Bragg *v.* Geddes, 93 Ill. 39.

44. Thomas *v.* Ribble, (Va. 1896) 24 S. E. 241.

45. McReynolds *v.* Longenberger, 57 Pa. St. 13, where the witness recollected that certain papers which he saw thirty years before were treasurer's receipts for taxes for certain years, but could not state the amounts of any of them, and the court said that it would have been remarkable had he been able to do so. See also Jackson *v.* McVey, 18 Johns. (N. Y.) 330; and *supra*, XVII, B, 11.

46. See Apperson *v.* Dowdy, 82 Va. 776, 1 S. E. 105, where the witness was also illiterate.

47. Thomas *v.* Ribble, (Va. 1896) 24 S. E. 241.

48. Veghte *v.* Raritan Water Power Co., 19 N. J. Eq. 142.

49. Apperson *v.* Dowdy, 82 Va. 776, 1 S. E. 105, *obiter*.

50. Wyckoff *v.* Wyckoff, 16 N. J. Eq. 401.

51. Kenniff *v.* Canfield, 140 Cal. 34, 73 Pac. 803.

52. Golden *v.* Knapp, 28 N. J. Eq. 605.

ticularly where the provisions of the instrument are simple,[53] or the memory of the witness is refreshed by a memorandum.[54] Testimony of an intelligent lawyer who read the instrument for a special purpose is also cogent evidence.[55] Positive testimony to a particular stipulation in an instrument overcomes testimony of persons who merely state that they did not notice it.[56]

C. Weight and Conclusiveness — 1. Weight of Evidence — a. In General. It is a maxim that evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.[57] The weight of various species of evidence is hereinafter considered in this article.[58] The weight of testimony of witnesses, hereinbefore noticed, as far as it depends upon the faculty of memory[59] is more particularly treated elsewhere in this work.[60]

b. Ex Parte Affidavits. Ex parte affidavits are universally regarded as weak evidence, to be received with caution,[61] especially where the affiant is an illiterate person.[62] The very strength of an affidavit may make the court less credulous of its contents.[63]

c. Depositions. Testimony given by deposition,[64] especially by deposition taken *ex parte*,[65] is deemed by courts to be of inferior value to testimony delivered *viva voce* in the presence of the trier of facts.[66] Nevertheless, it is error to instruct a jury that, as a matter of law, testimony embodied in depositions is

53. Southworth *v.* Adams, 22 Fed. Cas. No. 13,194, 11 Biss. 256.

54. Southworth *v.* Adams, 22 Fed. Cas. No. 13,194, 11 Biss. 256.

55. Warmoth *v.* Durand, 57 N. J. Eq. 160, 42 Atl. 168.

56. Leitch *v.* Union R. Transp. Co., 15 Fed. Cas. No. 8,224. And see generally as to positive and negative testimony *infra*, XVII, C, 1, g, (II), (A).

57. Smith *v.* Whitman, 6 Allen (Mass.) 562, 564; Haverstick *v.* Pennsylvania R. Co., 171 Pa. St. 101, 32 Atl. 1128; Blatch *v.* Archer, 1 Cowp. 63, 65. See also Pullman Palace Car Co. *v.* Nelson, 22 Tex. Civ. App. 223, 54 S. W. 624.

58. See also the several titles in this work to which cross-reference is made at the head of this title in 16 Cyc. 834 *et seq.*

59. See *supra*, XVII, B.

60. See, generally, Witnesses.

61. *Maryland.*— Foran *v.* Johnson, 58 Md. 144; Lambden *v.* Bowie, 2 Md. 334; Patterson *v.* Maryland Ins. Co., 3 Harr. & J. 71, 5 Am. Dec. 419. See also Regester *v.* Woodward Iron Co., 82 Md. 645, 33 Atl. 320.

New Jersey.— Vandervere *v.* Reading, 9 N. J. Eq. 446. See also Kipp *v.* Chamberlain, 20 N. J. L. 656; Fuller *v.* Fuller, 41 N. J. Eq. 198, 3 Atl. 409; Vandegrift *v.* Vandegrift, 30 N. J. Eq. 76; Perkins *v.* Collins, 3 N. J. Eq. 482.

Rhode Island.— Burlingame *v.* Cowee, 16 R. I. 40, 12 Atl. 234.

Utah.— State *v.* Mickle, 25 Utah 179, 70 Pac. 856.

United States.— See Society Anonyme Du Filtre, etc. *v.* Allen, 84 Fed. 812; Celluloid Mfg. Co. *v.* Eastman Dry Plate, etc., Co., 42 Fed. 159; American Middlings Purifier Co. *v.* Christian, 1 Fed. Cas. No. 307, 3 Ban. & A. 42, 4 Dill. 448; Jones *v.* Osgood, 13 Fed. Cas. No. 7,487, 6 Blatchf. 435; Sargent *v.* Carter, 21 Fed. Cas. No. 12,362, 1 Fish. Pat. Cas. 277; U. S. *v.* Burr, 25 Fed. Cas. No. 14,692c; Van Hook *v.* Wood, 28 Fed. Cas. No. 16,855.

England.— The Apollo, 1 Hagg. Adm. 306; Hay *v.* Goodon, 9 Moore P. C. N. S. 102, 17 Eng. Reprint 452.

"Affidavits are the poorest kind of evidence, and should probably never be used, except upon the hearing of motions or for the verification of pleadings or other papers." Fullenwider *v.* Ewing, 30 Kan. 15, 23, 1 Pac. 300, per Valentine, J. To the same effect see Pittsburg's Appeal, 79 Pa. St. 317.

62. Johnston *v.* Todd, 5 Beav. 597.

63. The Rosalie, 1 Spinks 188.

64. *Georgia.*— Glanton *v.* Griggs, 5 Ga. 424.

Kentucky.—See Baylor *v.* Smithers, 1 T. B. Mon. 6.

Michigan.— Sawyer *v.* Sawyer, Walk. 48.

Missouri.— See Fanning *v.* Doan, 139 Mo. 392, 41 S. W. 742.

Pennsylvania.— Thornton *v.* Britton, 144 Pa. St. 126, 22 Atl. 1048. See also Cotton *v.* Huidekoper, 2 Penr. & W. 149.

Virginia.— Love *v.* Braxton, 5 Call 537.

United States.— The Jeremiah, 13 Fed. Cas. No. 7,289, 10 Ben. 326. See also Robinson *v.* Cathcart, 20 Fed. Cas. No. 11,947, 3 Cranch C. C. 377.

England.— Attwood *v.* Small, 6 Cl. & F. 232, 2 Jur. 200, 226, 246, 7 Eng. Reprint 684; Ridgway *v.* Wharton, 6 H. L. Cas. 238, 4 Jur. N. S. 173, 27 L. J. Ch. 46, 5 Wkly. Rep. 804, 10 Eng. Reprint 1287; The Swanland, 2 Spinks 107.

65. Jolly *v.* Terre Haute Drawbridge Co., 13 Fed. Cas. No. 7,441, 6 McLean 237; Rusk *v.* The Freestone, 21 Fed. Cas. No. 12,143, 2 Bond 234; Hill *v.* Bulkeley, 1 Phillim. 280.

66. See cases cited in the preceding notes. The advantage of seeing the witness and observing his deportment while testifying has been strongly stated in many cases where a reviewing tribunal, having the testimony before

entitled to less confidence than would be the case if the testimony had been given orally at the trial.[67]

d. Written Evidence Superior to Oral. Oral testimony depending on the memory of witnesses is not as reliable as written or documentary evidence.[68] A party seeking to establish a fact in opposition to written evidence must make out his case with more than usual clearness.[69]

e. Evidence Introduced by Adverse Party. Facts are to be found by weighing all the testimony, whatever may be its source,[70] and a defect of proof on one side may be supplied by the evidence introduced on the other side.[71]

it only in record form, has held that the verdict of the jury or the finding of the trial court on the facts and upon consideration of conflicting testimony, will not be reversed unless error is clearly demonstrated.

Connecticut.— Throckmorton *v.* Chapman, 65 Conn. 441, 32 Atl. 930.

Florida.— Carter *v.* Bennett, 4 Fla. 383.

Georgia.— Willis *v.* Willis, 18 Ga. 13.

Nebraska.— Fremont Brewing Co. *v.* Pekarek, (1903) 95 N. W. 12; Faulkner *v.* Sims, (1903) 94 N. W. 113.

Pennsylvania.— Smith *v.* Times Pub. Co., 178 Pa. St. 481, 36 Atl. 296, 35 L. R. A. 819; Baker *v.* Irish, 172 Pa. St. 528, 33 Atl. 558.

United States.— Van Hook *v.* Wood, 28 Fed. Cas. No. 16,855.

England.— Atty.-Gen. *v.* Bertrand, L. R. 1 P. C. 520, 10 Cox C. C. 618, 36 L. J. C. P. 51, 16 L. T. Rep. N. S. 752, 4 Moore P. C. N. S. 460, 16 Wkly. Rep. 9, 16 Eng. Reprint 391.

67. Works *v.* Stevens, 76 Ind. 181; Voss *v.* Prier, 71 Ind. 128, 134 (where Niblack, C. J., said: "The relative value of these two classes of testimony depends upon the facts of, and the circumstances attending, each particular case, and not upon any inexorable general rule"); Millner *v.* Eglin, 64 Ind. 197, 31 Am. Rep. 121. The foregoing cases overrule Carver *v.* Louthain, 38 Ind. 530, which held that such an instruction was supported by the common law, the Hindoo law, the Roman law, and the law of God.

68. Thomas *v.* Paul, 87 Wis. 607, 58 N. W. 1031, per Orton, C. J. In support of the text see also the following cases:

Alabama.— Alexander *v.* Hooks, 84 Ala. 605, 4 So. 417.

Arkansas.— State Bank *v.* McGuire, 14 Ark. 530.

California.— Moore *v.* Gayson, 132 Cal. 602, 64 Pac. 1074; *In re* Irvine, 102 Cal. 606, 36 Pac. 1013.

Georgia.— Miller *v.* Cotten, 5 Ga. 341.

Iowa.— Buford *v.* McGetchie, 60 Iowa 298, 14 N. W. 790; Warren *v.* Booth, 53 Iowa 742, 5 N. W. 598; Whitaker *v.* Parker, 42 Iowa 585.

Maryland.— Owens *v.* State, 67 Md. 307, 10 Atl. 210, 302.

Michigan.— Wiswall *v.* Ayres, 51 Mich. 324, 334, 16 N. W. 667.

Missouri.— Davis *v.* Green, 102 Mo. 170, 14 S. W. 876, 11 L. R. A. 90.

New Jersey.— Jessup *v.* Cook, 6 N. J. L. 434, 443; Ward *v.* Cooke, 17 N. J. Eq. 93. See also Clos *v.* Boppe, 23 N. J. Eq. 270, 273.

New York.— People *v.* Dick, 84 N. Y. App. Div. 181, 82 N. Y. Suppl. 719; Horenburger *v.* Levy, 64 N. Y. Suppl. 448; Stevens *v.* Trask, 18 N. Y. Suppl. 117; Jackson *v.* Loomis, 12 Wend. 27; Hart *v.* Ten Eyck, 2 Johns. Ch. 62; Carroll *v.* Norton, 3 Bradf. Surr. 291, 314.

Pennsylvania.— Thomas *v.* Loose, 114 Pa. St. 35, 6 Atl. 326.

Texas.— Howard *v.* Colquhoun, 28 Tex. 134.

Wisconsin.— Wilson *v.* Noonan, 35 Wis. 321, 345.

United States.— Foster *v.* Ohio-Colorado Reduction, etc., Co., 17 Fed. 130, 5 McCrary 329; Lindsay *v.* Cusimano, 12 Fed. 504; Campbell *v.* James, 4 Fed. Cas. No. 2,361, 4 Ban. & A. 456, 17 Blatchf. 42; Hough *v.* Richardson, 12 Fed. Cas. No. 6,722, 3 Story 659; Konold *v.* Klein, 14 Fed. Cas. No. 7,925, 3 Ban. & A. 226; Llado *v.* Tritone, 15 Fed. Cas. No. 8,427.

England.— Attwood *v.* Small, 6 Cl. & F. 232, 361, 2 Jur. 200, 226, 246, 7 Eng. Reprint 684.

See 20 Cent. Dig. tit. "Evidence," § 2452.

A written receipt for money cannot be contradicted by oral evidence, unless the latter is very strong. Rosenmueller *v.* Lampe, 89 Ill. 212, 31 Am. Rep. 74. And see, generally, PAYMENT.

69. Chapman *v.* Camden, etc., R. Co., 7 Phila. (Pa.) 204.

70. Hill *v.* West End St. R. Co., 158 Mass. 458, 33 N. E. 582.

71. *California.*— Berniaud *v.* Beecher, 71 Cal. 38, 11 Pac. 802.

Georgia.— Anderson *v.* Savannah Press Pub. Co., 100 Ga. 454, 28 S. E. 216; Kennedy *v.* Central R. Co., 61 Ga. 590.

Louisiana.—Muse *v.* Rogers, 12 Mart. 350; Lazare *v.* Peytavin, 9 Mart. 566.

Massachusetts.— Hill *v.* West End St. R. Co., 158 Mass. 458, 33 N. E. 582.

Minnesota.— Hocum *v.* Weitherick, 22 Minn. 152; Richards *v.* White, 7 Minn. 345.

Montana.— Nord *v.* Boston, etc., Consol. Copper, etc., Min. Co., (1904) 75 Pac. 681.

New Jersey.— Sheridan *v.* Medara, 10 N. J. Eq. 469, 64 Am. Dec. 464.

New York.— Painton *v.* Northern Cent. R. Co., 83 N. Y. 7; Stadermann *v.* Heins, 78 N. Y. App. Div. 563, 79 N. Y. Suppl. 674.

North Carolina.— Wachovia L. & T. Co. *v.* Forbes, 120 N. C. 355, 27 S. E. 43.

f. Evidence Improperly Admitted. Parties have a right to try their case on evidence which is not of the quality or character required by law,[72] and where such evidence is admitted without objection it is the right and duty of the court or jury to give it the same consideration as if it were legal evidence.[73] But evidence intrinsically destitute of probative quality acquires no new attribute in point of weight by its production in the case.[74] Secondary evidence admitted without objection cannot avail to contradict primary evidence.[75] Evidence brought out incidentally and not applicable to any issue made by the pleadings cannot be considered.[76] Testimony excluded on objection but subsequently introduced surreptitiously should be disregarded.[77]

g. Positive and Negative Testimony — (i) *What Is Positive and What Is Negative.* Where a witness testifies that he saw or heard a fact this is positive evidence.[78] Where another witness testifies that he was present and did not see or hear or that the fact did not occur this is strictly negative evidence if nothing more appears or if it appears that he was paying no particular attention at the time,[79] even if the witness expresses the opinion that he would have seen or heard had the fact taken place.[80] Having opportunity more or less adequate for

Pennsylvania.— Porter *v.* Seiler, 23 Pa. St. 424, 62 Am. Dec. 341; Moses *v.* Bradley, 3 Whart. 272.

United States.— Morgan *v.* Cox, 27 Fed. 36.

See 20 Cent. Dig. tit. "Evidence," § 2429.

72. Birmingham R., etc., Co. *v.* Wildman, 119 Ala. 547, 24 So. 548.

73. *Alabama.*— Birmingham R., etc., Co. *v.* Wildman, 119 Ala. 547, 24 So. 548.

Georgia.— Leonard *v.* Mixou, 96 Ga. 239, 23 S. E. 80, 51 Am. St. Rep. 134; Woddail *v.* Austin, 44 Ga. 18.

Indiana.— Yeager *v.* Davis, 112 Ind. 230, 13 N. E. 707, recital in instrument admitted without objection supplied preliminary formal proof.

Maryland.— Farmers' Bank *v.* Duvall, 7 Gill & J. 78, entry by agent admitted without preliminary proof of specific authority.

New Jersey.— Condit *v.* Blackwell, 19 N. J. Eq. 193, 196.

New York.— Witmark *v.* New York El. R. Co., 149 N. Y. 393, 44 N. E. 78; Crane *v.* Powell, 139 N. Y. 379, 34 N. E. 911; Flora *v.* Carbean, 38 N. Y. 111; Dorendinger *v.* Tschechtelin, 12 Daly 34, 38; American Writing Mach. Co. *v.* Bushnell, 9 Misc. 462, 30 N. Y. Suppl. 228.

Pennsylvania.—Weckerly *v.* Geyer, 11 Serg. & R. 35; McCullough *v.* Wallace, 8 Serg. & R. 181.

Texas.— Crebbin *v.* Farmers' Nat. Bank, (Civ. App. 1899) 50 S. W. 402.

See 20 Cent. Dig. tit. "Evidence," § 2430.

A party's book-accounts.— Sherwood *v.* Sissa, 5 Nev. 349; Brahe *v.* Kimball, 5 Sandf. (N. Y.) 237.

Secondary evidence of writing.— *Colorado.* — Hattersley *v.* Burrows, 4 Colo. App. 538, 36 Pac. 889.

Indiana.— McFadden *v.* Fritz, 110 Ind. 1, 10 N. E. 120; Riehl *v.* Evansville Foundry Assoc., 104 Ind. 70, 3 N. E. 633; Ross *v.* Boswell, 60 Ind. 235; Pennsylvania Co. *v.* Stanley, 10 Ind. App. 421, 37 N. E. 288, 38 N. E. 421.

Kentucky.— Stern *v.* Freeman, 4 Metc. 309.

Louisiana.—Packwood *v.* White, 7 La. Ann. 31; Jouanneau *v.* Shannon, 4 La. Ann. 330.

Michigan.— See Young *v.* McKee, 13 Mich. 552.

Minnesota.— Goodall *v.* Norton, 88 Minn. 1, 92 N. W. 445.

Nevada.— Langworthy *v.* Coleman, 18 Nev. 440, 5 Pac. 65.

New Jersey.— Denn *v.* Banta, 1 N. J. L. 266.

See 20 Cent. Dig. tit. "Evidence," § 2430.

74. Hearsay.— State Bank *v.* Wooddy, 10 Ark. 638; Hutchings *v.* Castle, 48 Cal. 152; Lehman *v.* Frank, 19 N. Y. App. Div. 442, 46 N. Y. Suppl. 761. See also Sharp *v.* Baker, 22 Tex. 306, 315. *Contra*, holding that hearsay has some weight as evidence. Damon *v.* Carroll, 163 Mass. 404, 40 N. E. 185; Thompson *v.* Ackerman, 21 Ohio Cir. Ct. 740, 12 Ohio Cir. Dec. 456; Daniel *v.* Harvin, 10 Tex. Civ. App. 439, 31 S. W. 421.

75. Jamison *v.* May, 13 Ark. 600, parol evidence to contradict the terms of a written contract. *Contra*, White *v.* Balta, 7 Misc. (N. Y.) 311, 27 N. Y. Suppl. 902, parol evidence to vary written contract. See also Goddard *v.* Cutts, 11 Me. 440.

76. Marshall *v.* Mathers, 103 Ind. 458, 3 N. E. 120. Generally, however, "a party, who, without opposition suffers evidence to be adduced contrary to or beyond the allegations contained in the pleadings, is bound by its effect." Powell *v.* Aiken, 18 La. 321, 328, per Smith, J. [*followed* in Draper *v.* Richards, 20 La. Ann. 306]. See also Earnhart *v.* Robertson, 10 Ind. 8.

77. Vollmer *v.* Simon, 196 Pa. St. 481, 46 Atl. 439.

78. Frizell *v.* Cole, 42 Ill. 362, 364; Rosevere *v.* Osceola Mills, 169 Pa. St. 555, 32 Atl. 548.

79. Frizell *v.* Cole, 42 Ill. 362, 364; Haverstick *v.* Pennsylvania R. Co., 171 Pa. St. 101, 32 Atl. 1128.

80. Johnson *v.* Scribner, 6 Conn. 185; Summerville *v.* Hannibal, etc., R. Co., 29 Mo. App. 48. *Compare* Louis *v.* Lake Shore, etc., R. Co., 111 Mich. 458, 69 N. W. 642. His own

correct observation, if he testifies that he was attentive but did not see or hear his testimony is commonly termed negative testimony,[81] but "not of a purely negative character."[82] Under the same circumstances, however, if he testifies not merely that he did not see or hear, but that the fact did not occur, it is clearly positive testimony though negative in form.[83] Where a witness describes a fact observed by him and an opposing witness describes the same fact differently the testimony of both is equally positive.[84]

(II) *Relative Weight of Positive and Negative*—(A) *In General.* All other things being equal,[85] the testimony of a witness who testifies positively that a certain fact occurred is generally speaking entitled to more weight than the evidence of another witness who swears that the fact did not occur,[86] for it is far more probable that the latter has forgotten the occurrence than that it should be distinctly impressed on the mind of the former if it never took place.[87] Moreover, courts strive to avoid imputing perjury to witnesses,[88] and

testimony is not decisive and the question is to be determined from all the evidence bearing on the subject. Killian *v.* Georgia R., etc., Co., 97 Ga. 727, 25 S. E. 384; Marcott *v.* Marquette, etc., R. Co., 49 Mich. 99, 13 N. W. 374.

81. See Smith *v.* New York Cent., etc., R. Co., 58 N. Y. Suppl. 63; Culhane *v.* New York Cent., etc., R. Co., 67 Barb. (N. Y.) 562.

82. Quigley *v.* Delaware, etc., Canal Co., 142 Pa. St. 388, 21 Atl. 827, 24 Am. St. Rep. 504, per Clark, J. See also Whittaker *v.* New York, etc., R. Co., 51 N. Y. Super. Ct. 287, and *infra*, note 93.

83. Frizell *v.* Cole, 42 Ill. 362. See also Weeks *v.* State, 79 Ga. 36, 3 S. E. 323; Henavie *v.* New York Cent., etc., R. Co., 166 N. Y. 280, 59 N. E. 901. See also *infra*, note 93.

84. Humphries *v.* State, 100 Ga. 260, 28 S. E. 25; Marshall Dental Mfg. Co. *v.* Harkenson, 84 Iowa 117, 50 N. W. 559; Blackwell *v.* Armistead, 3 Fed. Cas. No. 1,474, 3 Hughes 163; Hawes *v.* Antisdel, 11 Fed. Cas. No. 6,234, 2 Ban. & A. 10. See also Cridler *v.* Colegrove, 5 N. Y. St. 232. Where a witness testifies that a light seen by him was white, and another witness testifies that the light was green, neither is negative testimony. Georgia Pac. R. Co. *v.* Bowers, 86 Ga. 22, 12 S. E. 182.

85. **All other things must be equal** in order that the positive shall prevail over the negative; for "the positive class may impress the triers with lack of confidence in their trustworthiness, their disinterestedness, their accuracy." Delaware, etc., R. Co. *v.* Devore, 114 Fed. 155, 156, 52 C. C. A. 77, per Shipman, C. J. See also Atlanta Consol. St. R. Co. *v.* Bigham, 105 Ga. 498, 30 S. E. 934; Ohio, etc., R. Co. *v.* Buck, 130 Ind. 300, 30 N. E. 19; Campbell *v.* New England Mut. L. Ins. Co., 98 Mass. 381; Urbanek *v.* Chicago, etc., R. Co., 47 Wis. 59, 1 N. W. 464.

86. Neiheisel *v.* Toerge, 4 Redf. Surr. 328, 330, per Livingston, Surr. "In the analysis and construction of testimony, it is elementary that, all other things being equal, positive testimony on a given point must always predominate over negative testimony on the same point." Guesnard *v.* Bird, 33 La. Ann. 796, 799, per Poche, J. In support of the text see also the following cases:

Delaware.— Parvis *v.* Philadelphia, etc., R. Co., 8 Houst. 436, 17 Atl. 702.

District of Columbia.— Le Cointe *v.* U. S., 7 App. Cas. 16, 21.

Georgia.— Southern R. Co. *v.* O'Bryan, 119 Ga. 147, 45 S. E. 1000; Atlanta, etc., R. Co. *v.* Newton, 85 Ga. 517, 11 S. E. 776; Matthews *v.* Poythress, 4 Ga. 287. See also Southern R. Co. *v.* O'Bryan, 115 Ga. 659, 42 S. E. 42.

Illinois.— Chicago, etc., R. Co. *v.* Dickson, 88 Ill. 431; Chicago, etc., R. Co. *v.* Stumps, 55 Ill. 367; Frizell *v.* Cole, 42 Ill. 362; Wabash, etc., R. Co. *v.* Hicks, 13 Ill. App. 407. See also Chicago, etc., R. Co. *v.* Gretzner, 46 Ill. 74.

Louisiana.—Staehle *v.* Leopold, 107 La. 399, 31 So. 882; Socola *v.* Chess-Carley Co., 39 La. Ann. 344, 1 So. 824. See also Auld *v.* Walton, 12 La. Ann. 129, 139; Hepburn *v.* Citizens' Bank, 2 La. Ann. 1007, 46 Am. Dec. 564.

Mississippi.— Lucas *v.* Goff, 33 Miss. 629.

New Jersey.— Wilson *v.* Cobb, 28 N. J. Eq. 177, 183.

New York.— See Matter of Barr, 38 Misc. 355, 77 N. Y. Suppl. 935.

Texas.— See Stewart *v.* Hamilton, 19 Tex. 96.

Vermont.— Farmers', etc., Bank *v.* Champlain Transp. Co., 23 Vt. 186, 56 Am. Dec. 68.

United States.— Stitt *v.* Huidekoper, 17 Wall. 384, 21 L. ed. 644; The Charlotte, 124 Fed. 989; Chesapeake, etc., R. Co. *v.* Steele, 84 Fed. 93, 29 C. C. A. 81; Cable *v.* Paine, 8 Fed. 788, 3 McCrary 169; *Ex p.* Shouse, 22 Fed. Cas. No. 12,815, Crabbe 482.

England.— Chambers *v.* Queen's Proctor, 2 Curt. Eccl. 415, 434.

Canada.—Lefeunteum *v.* Beaudoin, 28 Can. Supreme Ct. 89.

See 20 Cent. Dig. tit. "Evidence," § 2434.

Positive testimony of witnesses that a man was intoxicated at a particular time is better than the testimony of those who say that he was not intoxicated. Crew *v.* St. Louis, etc., R. Co., 20 Fed. 87, 88, per McCrary, J.

87. Neiheisel *v.* Toerge, 4 Redf. Surr. (N. Y.) 328, 330, per Livingston, Surr.

88. See, generally, WITNESSES.

therefore where it is evident that a witness testifying positively cannot be mistaken his testimony is likely to be accepted as correct if the testimony of the negative witness may reasonably be attributed to defective memory or other cause.[89] The marked superiority of positive testimony is most commonly affirmed in those cases where the opposing testimony is what has been hereinbefore[90] denominated "strictly negative."[91] If there is evidence that the attention of a

89. *Louisiana.*— Story *v.* Hope Ins. Co., 37 La. Ann. 254.

New Jersey.— Swain *v.* Edmunds, 53 N. J. Eq. 142, 32 Atl. 369.

New York.— Van Patten *v.* Schenectady St. R. Co., 80 Hun 494, 30 N. Y. Suppl. 501; Culhane *v.* New York Cent., etc., R. Co., 67 Barb. 562.

Pennsylvania.— Rosevere *v.* Osceola Mills, 169 Pa. St. 555, 32 Atl. 548. See also Urias *v.* Pennsylvania R. Co., 152 Pa. St. 326, 25 Atl. 566.

Vermont.— Hine *v.* Pomeroy, 39 Vt. 211.

United States.— *Ex p.* Fitz, 9 Fed. Cas. No. 4,837, 2 Lowell 519; Green *v.* The Adelaide, 10 Fed. Cas. No. 5,752, Taney 575.

England.— Gove *v.* Gawen, 3 Curt. Eccl. 151; Chambers *v.* Queen's Proctor, 2 Curt. Eccl. 415; The Annapolis, 1 Lush. 355, 5 L. T. Rep. N. S. 37.

See 20 Cent. Dig. tit. "Evidence," § 2434.

As to probability of mistake, "it is more likely to be so, than it is that a witness comes into court and intentionally manufactures a story which he knew there is no truth in." Bates *v.* Cilley, 47 Vt. 1.

90. See *supra*, text and note 79.

91. *Alabama.*— Harrison *v.* Yerby, (1893) 14 So. 321; Pool *v.* Devers, 30 Ala. 672; Hitt *v.* Rush, 22 Ala. 563. But see Louisville, etc., R. Co. *v.* York, 128 Ala. 305, 30 So. 676.

Arkansas.— See Sibley *v.* Ratliffe, 50 Ark. 477, 8 S. W. 686.

Connecticut.—Johnson *v.* Scribner, 6 Conn. 185.

Delaware.— Carswell *v.* Wilmington, 2 Marv. 360, 43 Atl. 169; State *v.* Reidell, 9 Houst. (Del.) 470, 476, 14 Atl. 550.

Florida.— Williams *v.* Williams, 23 Fla. 324, 2 So. 768.

Georgia.— Hambright *v.* Western, etc., R. Co., 112 Ga. 36, 37 S. E. 99; Killian *v.* Georgia R., etc., Co., 97 Ga. 727, 25 S. E. 384; Moon *v.* State, 68 Ga. 687; Brady *v.* Little, 21 Ga. 132; Johnson *v.* State, 14 Ga. 55.

Illinois.— Murphy *v.* People, 90 Ill. 59; Chicago, etc., R. Co. *v.* Coyer, 79 Ill. 373; Grabill *v.* Ren, 110 Ill. App. 587; Richards *v.* Richards, 19 Ill. App. 465.

Iowa.— See Marshall Dental Mfg. Co. *v.* Harkenson, 84 Iowa 117, 50 N. W. 559.

Louisiana.— See Delafield *v.* Sherwood, 15 La. 271.

Maine.— Fairbanks *v.* Bangor, etc., R. Co., 95 Me. 78, 49 Atl. 421; Linscott *v.* Orient Ins. Co., 88 Me. 497, 34 Atl. 405, 51 Am. St. Rep. 435.

Maryland.— See Van Riswick *v.* Goodhue, 50 Md. 57.

Massachusetts.— Tully *v.* Fitchburg R. Co., 134 Mass. 499.

Missouri.— Sullivan *v.* Hannibal, etc., R. Co., 72 Mo. 195. See also Daudt *v.* Musick, 9 Mo. App. 169.

New Jersey.— Dietz's Case, 42 N. J. Eq. 689, 10 Atl. 795; Rowley *v.* Flannelly, 30 N. J. Eq. 612; Bailey *v.* Stiles, 2 N. J. Eq. 220.

New York.— McKeever *v.* New York Cent., etc., R. Co., 88 N. Y. 667; McKinley *v.* Lamb, 56 Barb. 284.

North Carolina.— Cawfield *v.* Asheville St. R. Co., 111 N. C. 597, 16 S. E. 703; Henderson *v.* Crouse, 52 N. C. 623.

Pennsylvania.— Floyd *v.* Philadelphia, etc., R. Co., 162 Pa. St. 29, 29 Atl. 396.

Tennessee.— See Oliver *v.* State Bank, 11 Humphr. 74.

Texas.— *In re* Sunday Law Cases, 30 Tex. 521; Willis *v.* Lewis, 28 Tex. 185; Belton *v.* Baylor Female College, (Civ. App. 1896) 33 S. W. 680.

Vermont.— Bates *v.* Cilley, 47 Vt. 1.

Wisconsin.— Ryan *v.* La Crosse City R. Co., 108 Wis. 122, 83 N. W. 770; Draper *v.* Baker, 61 Wis. 450, 21 N. W. 527, 50 Am. Rep. 143; Pennoyer *v.* Allen, 56 Wis. 502, 14 N. W. 609, 43 Am. Rep. 728; Bierbach *v.* Goodyear Rubber Co., 54 Wis. 208, 11 N. W. 514, 41 Am. Rep. 19; Berg *v.* Chicago, etc., R. Co., 50 Wis. 419, 7 N. W. 347; Cook *v.* Racine, 49 Wis. 243, 5 N. W. 352.

United States.— Washburn, etc., Mfg. Co. *v.* Norwood, 143 U. S. 275, 12 S. Ct. 443, 36 L. ed. 154; The Alabama, 114 Fed. 214, 217; Rhodes *v.* U. S., 79 Fed. 740, 25 C. C. A. 186; Brockway *v.* New Jersey Mut. Ben. L. Ins. Co., 9 Fed. 249, 253; Chapin *v.* The Hattie Ross, 5 Fed. Cas. No. 2,598; Higbee *v.* The Nipoti Accame, 12 Fed. Cas. No. 6,465, 14 Phila. (Pa.) 517; Union Sugar Refinery *v.* Matthiesson, 24 Fed. Cas. No. 14,399, 3 Cliff. 639; U. S. *v.* Rycraft, 27 Fed. Cas. No. 16,211. See also Leitch *v.* Union R. Transp. Co., 15 Fed. Cas. No. 8,224.

England.— The Annapolis, 1 Lush. 355, 362, 5 L. T. Rep. N. S. 37; Churchward *v.* Palmer, 10 Moore P. C. 472, 486, 4 Wkly. Rep. 755, 14 Eng. Reprint 570; Valentine *v.* Cleugh, 8 Moore P. C. 167, 171, 14 Eng. Reprint 64; The Batavier, 1 Spinks 378.

See 20 Cent. Dig. tit. "Evidence," § 2434, and *infra*, XVII, C, 1, h, (I), (C).

Locomotive signals.— *Illinois.*— Rockford, etc., R. Co. *v.* Byam, 80 Ill. 528; St. Louis, etc., R. Co. *v.* Manly, 58 Ill. 300; Chicago, etc., R. Co. *v.* Still, 19 Ill. 499, 509, 71 Am. Dec. 236; Haecker *v.* Chicago, etc., R. Co., 91 Ill. App. 570; Chicago, etc., R. Co. *v.* Barnett, 56 Ill. App. 384; Ohio, etc., R. Co. *v.* Mueller, 46 Ill. App. 109; Ohio, etc., R. Co. *v.* Reed, 40 Ill. App. 47; Chicago, etc., R. Co. *v.* Givens, 18 Ill. App. 404. See also Atchi-

negative witness was specially directed to the fact, or it can be legitimately presumed or inferred that he was alert and would have observed had the fact occurred,[92] his testimony that he did not see or hear is not necessarily weaker than opposing positive and affirmative testimony,[93] and may indeed be entitled to

son. etc., R. Co. *v.* Feehan, 149 Ill. 202, 36 N. E. 1036 [*affirming* 47 Ill. App. 66].

Iowa.— See Lee *v.* Chicago, etc., R. Co., 80 Iowa 172, 45 N. W. 739.

Kansas.— Missouri Pac. R. Co. *v.* Pierce, 39 Kan. 391, 18 Pac. 305.

Maryland.— Northern Cent. R. Co. *v.* Medairy, 86 Md. 168, 37 Atl. 796.

Massachusetts.— Hubbard *v.* Boston, etc., R. Co., 159 Mass. 320, 34 N. E. 459; Menard *v.* Boston, etc., R. Co., 150 Mass. 386, 23 N. E. 214.

Missouri.— Murray *v.* Missouri Pac. R. Co., 101 Mo. 236, 13 S. W. 817, 20 Am. St. Rep. 601; Henze *v.* St. Louis, etc., R. Co., 71 Mo. 636; Summerville *v.* Hannibal, etc., R. Co., 29 Mo. App. 48; Cathcart *v.* Hannibal, etc., R. Co., 19 Mo. App. 113.

New York.— Culhane *v.* New York Cent., etc., R. Co., 60 N. Y. 133; Glennon *v.* Erie R. Co., 86 N. Y. App. Div. 397, 83 N. Y. Suppl. 875; Mehrle *v.* Brooklyn, etc., R. Co., 59 N. Y. App. Div. 617, 69 N. Y. Suppl. 210; Hoffman *v.* Fitchburg R. Co., 67 Hun 581, 22 N. Y. Suppl. 463; Tolman *v.* Syracuse, etc., R. Co., 27 Hun 325; Wellbrock *v.* Long Island R. Co., 31 Misc. 424, 65 N. Y. Suppl. 592; Brown *v.* New York Cent., etc., R. Co., 83 N. Y. Suppl. 1028; Ramsey *v.* New York Cent., etc., R. Co., 4 N. Y. Wkly. Dig. 396.

Ohio.— See Toledo Consol. St. R. Co. *v.* Rohmer, 9 Ohio Cir. Ct. 702, 6 Ohio Cir. Dec. 706.

Pennsylvania.— Hess *v.* Williamsport, etc., R. Co., 181 Pa. St. 492, 37 Atl. 568; Arias *v.* Pennsylvania R. Co., 152 Pa. St. 326, 25 Atl. 566.

Rhode Island.— Brady *v.* New York, etc., R. Co., 20 R. I. 338, 39 Atl. 186.

Wisconsin.—Sutton *v.* Chicago, etc., R. Co., 98 Wis. 157, 73 N. W. 993.

United States.— Chicago, etc., R. Co. *v.* Andrews, 130 Fed. 65, 70, 64 C. C. A. 399; Horn *v.* Baltimore, etc., R. Co., 54 Fed. 301, 4 C. C. A. 346.

See 20 Cent. Dig. tit. "Evidence," § 2434. And see, generally, RAILROADS.

Existence of notoriety, which is based on hearsay, is a question upon which negative testimony is entitled to peculiar weight (Haws *v.* Marshall, 2 A. K. Marsh. (Ky.) 413; Banta *v.* Clay, 2 A. K. Marsh. (Ky.) 409; Wooley *v.* Bruce, 2 Bibb (Ky.) 105), but not where the negative witnesses have had inferior opportunities for acquiring information (McArthur *v.* Phœbus, 2 Ohio 415).

92. See *infra*, XVII, C, 1, g, (II), (C).

93. *Arkansas.*— See Schaer *v.* Gliston, 24 Ark. 137, 140; Johnston *v.* Ashley, 7 Ark. 470.

Georgia.— See Innis *v.* State, 42 Ga. 473, 481.

Illinois.— Peoria, etc., R. Co. *v.* Siltman, 88 Ill. 529. See also Chicago City R. Co. *v.* Loomis, 201 Ill. 118, 66 N. E. 348; Rockford, etc., R. Co. *v.* Hillmer, 72 Ill. 235; Rockwood *v.* Poundstone, 38 Ill. 199.

Indiana.— See Cincinnati, etc., R. Co. *v.* Butler, 103 Ind. 31, 2 N. E. 138.

Iowa.— Mackerall *v.* Omaha, etc., R. Co., 111 Iowa 547, 82 N. W. 975; Annaker *v.* Chicago, etc., R. Co., 81 Iowa 267, 47 N. W. 68.

Massachusetts.— Hendricken *v.* Meadows, 154 Mass. 599, 28 N. E. 1054.

Michigan.— McCullough *v.* Minneapolis, etc., R. Co., 101 Mich. 234, 59 N. W. 618.

Missouri.— State *v.* Gee, 85 Mo. 647.

New Jersey.— McLean *v.* Erie R. Co,, 69 N. J. L. 57, 54 Atl. 238.

New York.— Ward *v.* Naughton, 74 N. Y. App. Div. 68, 77 N. Y. Suppl. 344; Kimbel *v.* Flintolithic Stone Marble Co., 2 N. Y. City Ct. 354. See also Pollen *v.* Le Roy, 30 N. Y. 549, 553.

Pennsylvania.— *In re* Walton, 194 Pa. St. 528, 45 Atl. 426.

Vermont.— See State *v.* Phair, 48 Vt. 366.

Wisconsin.— Winstanley *v.* Chicago, etc., R. Co., 72 Wis. 375, 39 N. W. 856.

United States.—Singer Mfg. Co. *v.* Schenck, 68 Fed. 191, 195; Union Sugar Refinery *v.* Matthiesson, 24 Fed. Cas. No. 14,399, 3 Cliff. 639.

See 20 Cent. Dig. tit. "Evidence," § 2434.

Locomotive signals.— *Iowa.*— Lee *v.* Chicago, etc., R. Co., 80 Iowa 172, 45 N. W. 739. See also McMarshall *v.* Chicago, etc., R. Co., 80 Iowa 757, 45 N. W. 1065, 20 Am. St. Rep. 445.

Massachusetts.— Johanson *v.* Boston, etc., R. Co., 153 Mass. 57, 26 N. E. 426; Menard *v.* Boston, etc., R. Co., 150 Mass. 386, 23 N. E. 214.

Michigan.—Crane *v.* Michigan Cent. R. Co., 107 Mich. 511, 65 N. W. 527.

Missouri.— Milligan *v.* Chicago, etc., R. Co., 79 Mo. App. 393; McCormick *v.* Kansas City, etc., R. Co., 50 Mo. App. 109.

New Jersey.— McLean *v.* Erie R. Co., 69 N. J. L. 57, 54 Atl. 238; Ellis *v.* Erie R. Co., 66 N. J. L. 451, 49 Atl. 437.

New York.— Greany *v.* Long Island R. Co., 101 N. Y. 419, 5 N. E. 425; Dyer *v.* Erie R. Co., 71 N. Y. 228 [*distinguishing* Culhane *v.* New York Cent., etc., R. Co., 60 N. Y. 133]; Burke *v.* Brooklyn Wharf, etc., Co., 86 N. Y. App. Div. 296, 83 N. Y. Suppl. 795; Ehrman *v.* Nassau Electric R. Co., 23 N. Y. App. Div. 21, 48 N. Y. Suppl. 379; McCallum *v.* Long Island R. Co., 38 Hun 569; Scott *v.* Pennsylvania R. Co., 9 N. Y. Suppl. 189; Ernst *v.* Hudson River R. Co., 24 How. Pr. 97; Harvey *v.* New York, etc., R. Co., 23 N. Y. Wkly. Dig. 198; Ramsey *v.* New York Cent., etc., R. Co., 4 N. Y. Wkly. Dig. 396.

more weight than the latter.[94] Where witnesses testify positively to a fact and other witnesses absolutely deny it, the rule of comparative value as between positive and negative testimony does not apply,[95] and the only question is to which side, under all the circumstances, credit is due.[96]

(B) *Number of Witnesses.* Positive testimony of a single witness should prevail over the "strictly negative"[97] testimony of any number of witnesses,[98] if credibility of the witnesses is not involved and the question depends solely upon the abstract efficacy of each species of testimony.[99] *A fortiori* positive

Pennsylvania.— Kuntz *v.* New York, etc., R. Co., 206 Pa. St. 162, 55 Atl. 915; Quigley *v.* Delaware, etc., Canal Co., 142 Pa. St. 388, 21 Atl. 827, 24 Am. St. Rep. 504; Holden *v.* Pennsylvania R. Co., 7 Kulp 52.

Utah.— Haun *v.* Rio Grande Western R. Co., 22 Utah 346, 62 Pac. 908.

Wisconsin.— Steinkofel *v.* Chicago, etc., R. Co., 92 Wis. 123, 129, 65 N. W. 852; Eilert *v.* Green Bay, etc., R. Co., 48 Wis. 606, 4 N. W. 769.

See 20 Cent. Dig. tit. "Evidence," § 2434. And see, generally, RAILROADS.

Attention conduces to accuracy of memory as well as of observation. See *supra*, XVII, B, 2.

94. See Matthews *v.* Poylthress, 4 Ga. 287, 296; Hildreth *v.* Marshall, 51 N. J. Eq. 241, 27 Atl. 465. And see *infra*, XVII, C, 1, g, (II), (C).

95. See *supra*, text and note 83.

96. *Alabama.*— Harris *v.* Bell, 27 Ala. 520.

Arkansas.— See Keith *v.* State, 49 Ark. 439, 5 S. W. 880.

Georgia.— Weeks *v.* State, 79 Ga. 36, 3 S. E. 323; Atlantic, etc., R. Co. *v.* Johnson, 66 Ga. 259, 266; Potts *v.* House, 6 Ga. 324, 50 Am. Dec. 329.

Illinois.— Frizell *v.* Cole, 42 Ill. 362; Coughlin *v.* People, 18 Ill. 266, 68 Am. Dec. 541; St. Louis, etc., R. Co. *v.* Odum, 52 Ill. App. 519.

Iowa.— See Pence *v.* Chicago, etc., R. Co., 79 Iowa 389, 44 N. W. 686.

Kentucky.— Louisville Chemical Works *v.* Com., 8 Bush 179.

New York.— Bradley *v.* Mutual Ben. L. Ins. Co., 45 N. Y. 422, 6 Am. Rep. 115 [*reversing* 3 Lans. 341]; Raines *v.* Totman, 64 How. Pr. 493.

Tennessee.— Williams *v.* Kirkman, 3 Lea 510.

Wisconsin.— Elkins *v.* Kenyon, 34 Wis. 93.

United States.— Chesapeake, etc., R. Co. *v.* Steele, 84 Fed. 93, 29 C. C. A. 81. See also The Sam Weller, 21 Fed. Cas. No. 12,290, 5 Ben. 293.

See 20 Cent. Dig. tit. "Evidence," § 2432. See also cases cited *supra*, note 83, and *infra*, XVII, C, 1, h, (I), (C).

Locomotive signals.— *Arizona.*— Maricopa, etc., R. Co. *v.* Dean, (1900) 60 Pac. 871.

Georgia.— Georgia Pac. R. Co. *v.* Freeman, 83 Ga. 583, 10 S. E. 277; Neill *v.* State, 79 Ga. 779, 4 S. E. 871. See also Southern R. Co. *v.* Moore, 115 Ga. 793, 42 S. E. 82.

Illinois.— Chicago, etc., R. Co. *v.* Lee, 87 Ill. 454. See also Chicago, etc., R. Co. *v.* Cauffman, 38 Ill. 424.

Iowa.— Selensky *v.* Chicago Great Western R. Co., 120 Iowa 113, 94 N. W. 272; Stanley *v.* Cedar Rapids, etc., R. Co., 119 Iowa 526, 93 N. W. 489.

Kansas.— Kansas City, etc., R. Co. *v.* Lane, 33 Kan. 702, 7 Pac. 587.

Michigan.— Louis *v.* Lake Shore, etc., R. Co., 111 Mich. 458, 69 N. W. 642; McDuffie *v.* Lake Shore, etc., R. Co., 98 Mich. 356, 57 N. W. 248. See also Rhoades *v.* Chicago, etc., R. Co., 58 Mich. 263, 25 N. W. 182.

Missouri.— State *v.* Kansas City, etc., R. Co., 70 Mo. App. 634.

New Jersey.— See Goldsboro *v.* New Jersey Cent. R. Co., 60 N. J. L. 49, 37 Atl. 433.

New York.— Henavie *v.* New York Cent., etc., R. Co., 166 N. Y. 280, 59 N. E. 901.

Ohio.— Cleveland, etc., R. Co. *v.* Richerson, 19 Ohio Cir. Ct. 385, 10 Ohio Cir. Dec. 326; Lake Shore, etc., R. Co. *v.* Schade, 15 Ohio Cir. Ct. 424, 8 Ohio Cir. Dec. 316.

Pennsylvania.— See Corcoran *v.* Pennsylvania R. Co., 203 Pa. St. 380, 53 Atl. 240.

United States.— Denver, etc., R. Co. *v.* Lorentzen, 79 Fed. 291, 24 C. C. A. 592.

See 20 Cent. Dig. tit. "Evidence," § 2432. And see, generally, RAILROADS.

The negative affirmative has no greater weight, as a matter of law, than the positive affirmative. Chicago, etc., R. Co. *v.* Robinson, 106 Ill. 142, locomotive signals.

97. As to what is termed "strictly negative" testimony see *supra*, note 79.

98. *Alabama.*— Kennedy *v.* Kennedy, 2 Ala. 571.

Dakota.— See Pielke *v.* Chicago, etc., R. Co., 5 Dak. 444, 41 N. W. 669.

Georgia.— McConnell *v.* State, 67 Ga. 633; Cobb *v.* State, 27 Ga. 648.

Nebraska.— See Omaha St. R. Co. *v.* Craig, 39 Nebr. 601, 58 N. W. 209.

New Jersey.—Meeker *v.* Boylan, 28 N. J. L. 274, 281.

Ohio.— Boyd *v.* Sell, Tapp. 43.

Pennsylvania.— Frantz *v.* Lenhart, 56 Pa. St. 365.

Texas.— Sunday Law Cases, 30 Tex. 521; State *v.* Moore, 7 Tex. 257.

Wisconsin.— Draper *v.* Baker, 61 Wis. 450, 21 N. W. 527, 50 Am. Rep. 143; Berg *v.* Chicago, etc., R. Co., 50 Wis. 419, 7 N. W. 347; Ralph *v.* Chicago, etc., R. Co., 32 Wis. 177, 14 Am. Rep. 725.

United States.— Horn *v.* Baltimore, etc., R. Co., 54 Fed. 301, 305, 4 C. C. A. 346.

England.— Tocker *v.* Ayre, 3 Phillim. 539, 541.

See 20 Cent. Dig. tit. "Evidence," § 2435.

99. Accuracy of memory of the positive witness may be open to such grave doubt

testimony of several witnesses ought to outweigh the negative testimony of only one.[1]

(c) *Various Circumstances Affecting Weight.* Whether the positive or the negative testimony shall prevail is frequently determined by considerations affecting the weight of testimony in general.[2] Interest or other bias of witnesses on either side may impair the weight of their testimony.[3] Positive testimony that an act was done may be fortified by the circumstance that the actor's regard for his personal safety would prompt him to do it,[4] or weakened by the fact that the witness who testifies to his own act was in the habit of performing the same act at frequent intervals daily and would be unlikely to recollect the particular instance.[5] Weight of negative testimony may be augmented by the circumstance that the witness had a reason for observing whether the fact occurred or not;[6] self-protection, for example.[7] Negative testimony may be weakened by the fact that the attention of the witnesses was diverted by excitement or alarm,[8] or by ravishing strains of music;[9] familiar sounds often fail to be noticed where there is no occasion to notice them;[10] or a sound may not have been heard because the wind was unfavorable,[11] or other sounds interfered with hearing.[12]

as to give preponderance to the negative testimony. Gottfried *v.* Phillip Best Brewing Co., 10 Fed. Cas. No. 5,633, 5 Ban. & A. 4. See also *infra*, XVII, C, 1, g, (II), (C).

1. Rockford, etc., R. Co. *v.* Coultas, 67 Ill. 398; Haas *v.* Grand Rapids, etc., R. Co., 47 Mich. 401, 11 N. W. 216. See also Baltimore City Pass. R. Co. *v.* Cooney, 87 Md. 261, 39 Atl. 859.

2. "The situations of the witnesses relative to the [fact in question] . . . their intelligence, their habits of observation, their candor, and their appearance generally." Smith *v.* Boston, etc., R. Co., 70 N. H. 53, 83, 47 Atl. 290, 85 Am. St. Rep. 596, per Chase, J. "A witness may be in any conceivable attitude of attention or inattention, which will give his evidence value, or leave it with little or no weight." Menard *v.* Boston, etc., R. Co., 150 Mass. 386, 387, 23 N. E. 214, per Knowlton, J. See also Beauchamp *v.* Saginaw Min. Co., 50 Mich. 163, 167, 15 N. W. 65, 45 Am. Rep. 30; Henderson *v.* Crouse, 52 N. C. 623. As to opportunity and capacity for observation as affecting weight of testimony see, generally, WITNESSES.

"Much depends upon the credibility of the witnesses testifying." Welborn *v.* State, 116 Ga. 522, 523, 42 S. E. 773, per Little, J. See also Renwick *v.* New York Cent. R. Co., 36 N. Y. 132, positive witness impeached. Previous contradictory statements by the witness tend to shake his credit. Britton *v.* Michigan Cent. R. Co., 122 Mich. 359, 81 N. W. 253. As to credibility of witnesses see, generally, WITNESSES.

Reasonableness of the fact testified to should be considered. Greenville *v.* Henry, 78 Ill. 150. As to improbabilities and incredibilities see, generally, WITNESSES.

3. On the positive side.— Hildreth *v.* Marshall, 51 N. J. Eq. 241, 27 Atl. 465; Renwick *v.* New York Cent. R. Co., 36 N. Y. 132 (locomotive signal); Burke *v.* Brooklyn Wharf, etc., Co., 86 N. Y. App. Div. 296, 83 N. Y. Suppl. 795; Scott *v.* Pennsylvania R. Co., 9 N. Y. Suppl. 189 (locomotive signal). Conversely, disinterestedness of the witnesses operates in their favor. Graham *v.* Anderson, 42 Ill. 514, 92 Am. Dec. 89; Britton *v.* Michigan Cent. R. Co., 122 Mich. 359, 81 N. W. 253; Urias *v.* Pennsylvania R. Co., 152 Pa. St. 326, 25 Atl. 566; The Charlotte, 124 Fed. 989. As to the effect of interest or bias on the weight of testimony see, generally, WITNESSES.

On the negative side.— Graham *v.* Anderson, 42 Ill. 514, 92 Am. Dec. 89.

Memory of biased witnesses see *supra*, XVII, B, 9, b.

Testimony as to declarations or admissions see *infra*, XVII, C, 1, h, (I), (C).

4. Fitzgerald *v.* State, 12 Ga. 213, 216; Corcoran *v.* Pennsylvania R. Co., 203 Pa. St. 380, 53 Atl. 240 (locomotive signal); The Charlotte, 124 Fed. 989 (signals to avoid collision between vessels); The Westphalia, 29 Fed. Cas. No. 17,460, 4 Ben. 404 (blowing fog-horn).

5. State *v.* Kansas City, etc., R. Co., 70 Mo. App. 634, testimony of engineer to signal at railroad crossing. As to memory of witnesses see *supra*, XVII, B, 2.

6. Daubert *v.* Delaware, etc., R. Co., 199 Pa. St. 345, 49 Atl. 72, locomotive signal — negative witness.

7. Menard *v.* Boston, etc., R. Co., 150 Mass. 386, 23 N. E. 214, locomotive signal — engineer.

8. Floyd *v.* Philadelphia R. Co., 162 Pa. St. 29, 29 Atl. 396; Green *v.* The Adelaide, 10 Fed. Cas. No. 5,752, Taney 575; The Westphalia, 29 Fed. Cas. No. 17,460, 4 Ben. 404.

9. Johnson *v.* Scribner, 6 Conn. 185, 188.

10. Marcott *v.* Marquette, etc., R. Co., 49 Mich. 99, 13 N. W. 374 (locomotive signal); Corcoran *v.* Pennsylvania R. Co., 203 Pa. St. 380, 53 Atl. 240; Urias *v.* Pennsylvania R. Co., 152 Pa. St. 326, 25 Atl. 566 (locomotive signal).

11. Cathcart *v.* Hannibal, etc., R. Co., 19 Mo. App. 113 (locomotive signal); Smith *v.* New York Cent., etc., R. Co., 58 N. Y. Suppl. 63 (locomotive signal).

12. Johnson *v.* Scribner, 6 Conn. 185, 188; Cathcart *v.* Hannibal, etc., R. Co., 19 Mo.

(iii) *Negative Testimony Alone.* *Prima facie* evidence of consideration by acknowledgment thereof in a deed may be overcome by the purely negative testimony of a subscribing witness to the instrument.[13] Negative testimony may constitute strong proof where positive evidence could hardly fail to exist if the fact actually occurred and none such is discovered,[14] and it may acquire great force from the neglect of the adverse party to call witnesses who know positively whether or not the fact in dispute occurred or to explain their absence.[15]

h. Declarations and Admissions — (i) *Weight of Testimony* — (a) *Oral Statements in General.* Because testimony to oral statements of a person, although it be honestly given, is peculiarly subject to the fallibility of human memory[16] and because it is easily fabricated, and for the further reason that what was said may have been imperfectly comprehended, wrongly interpreted, or misunderstood, courts declare that it should always be received with caution and that it is weak and even "dangerous" evidence.[17] Adverse comments on this species of

App. 113 (locomotive signal); Smith *v.* New York Cent., etc., R. Co., 58 N. Y. Suppl. 63 (locomotive signals).

13. Lyford *v.* Thurston, 16 N. H. 399.

14. Fisher *v.* Carter, 9 Fed. Cas. No. 4,815, 1 Wall. Jr. 69.

15. Haverstick *v.* Pennsylvania R. Co., 171 Pa. St. 101, 32 Atl. 1128. See also Mitchell *v.* Boston, etc., R. Co., 68 N. H. 96, 34 Atl. 674. *Contra*, where the negative witness merely testifies that he does not remember. Tully *v.* Fitchburg R. Co., 134 Mass. 499.

Proof of negative facts see *supra*, XVII, A, 6.

16. See *supra*, XVII, B, 12.

17. Most of the cases in this and the following notes were cases of alleged admissions against interest.

Alabama.— Ingram *v.* Illges, 98 Ala. 511, 13 So. 548; Lehman *v.* McQueen, 65 Ala. 570; Rogers *v.* Wilson, Minor 407, 12 Am. Dec. 61.

California.— Kauffman *v.* Maier, 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124.

Connecticut.—Husted *v.* Mead, 58 Conn. 55, 19 Atl. 233; Thorp *v.* Brookfield, 36 Conn. 320; Deming *v.* Carrington, 12 Conn. 1, 6, 30 Am. Dec. 591.

District of Columbia.— Hewett *v.* Lewis, 4 Mackey 10.

Georgia.— Cobb *v.* Battle, 34 Ga. 458, 479; Lucas *v.* Parsons, 27 Ga. 593, 619.

Illinois.— Bragg *v.* Geddes, 93 Ill. 39, 60; Straubher *v.* Mohler, 80 Ill. 21; Hodgen *v.* Guttery, 58 Ill. 431; O'Reily *v.* Fitzgerald, 40 Ill. 310; Frizell *v.* Cole, 29 Ill. 465; Chicago, etc., R. Co. *v.* Hazzard, 26 Ill. 373; Ray *v.* Bell, 24 Ill. 444; Schwachtgen *v.* Schwachtgen, 65 Ill. App. 127. See also Westbrook *v.* Howell, 34 Ill. App. 571.

Indiana.— Chandler *v.* Schoonover, 14 Ind. 324; Thompson *v.* Thompson, 9 Ind. 323, 333, 68 Am. Dec. 638.

Iowa.—Oberholtzer *v.* Hazen, 101 Iowa 340, 70 N. W. 207; Allen *v.* Kirk, 81 Iowa 658, 47 N. W. 906; Martin *v.* Algona, 40 Iowa 390; Wilmer *v.* Farris, 40 Iowa 309; Wilhelmi *v.* Thorington, 14 Iowa 537; Wallace *v.* Berger, 14 Iowa 183; Clark *v.* Larkin, 9 Iowa 391.

Kentucky.— Vaughn *v.* Hann, 6 B. Mon. 338; Allen *v.* Young, 6 T. B. Mon. 136, 17 Am. Dec. 130; Stone *v.* Ramsey, 4 T. B. Mon. 236; Logan *v.* McChord, 2 A. K. Marsh. 224; Morris *v.* Morris, 2 Bibb 311; Snelling *v.* Utterback, 1 Bibb 609, 4 Am. Dec. 661; Myers *v.* Baker, Hard. 544. See also Higgs *v.* Wilson, 3 Metc. 337.

Louisiana.— Wilder *v.* Franklin, 10 La. Ann. 279; O'Brien *v.* Flynn, 8 La. Ann. 307; McKown *v.* Mathes, 19 La. 542; Hendricks *v.* Mon, 11 La. 137; Plicque *v.* Labranche, 9 La. 559; Moorhead *v.* Thompson, 1 La. 281.

Maine.— Drew *v.* Hagerty, 81 Me. 231, 17 Atl. 63, 10 Am. St. Rep. 255, 3 L. R. A. 230.

Michigan.— Hart *v.* New Haven, 130 Mich. 181, 89 N. W. 677.

Missouri.— Kinney *v.* Murray, 170 Mo. 674, 71 S. W. 197; Gillespie *v.* Stone, 70 Mo. 505; Worley *v.* Dryden, 57 Mo. 226; Reed *v.* Morgan, 100 Mo. App. 713, 73 S. W. 381; Hitchcock *v.* Baughan, 36 Mo. App. 216.

New Jersey.—Wolfinger *v.* McFarland, (Ch. 1903) 54 Atl. 862; Ramsdell *v.* Streeter, 62 N. J. Eq. 718, 48 Atl. 575; Traphagen *v.* Voorhees, 44 N. J. Eq. 21, 12 Atl. 895; Hodge *v.* Amerman, 40 N. J. Eq. 99, 2 Atl. 257; Jones *v.* Knauss, 31 N. J. Eq. 609; Midmer *v.* Midmer, 26 N. J. Eq. 299. See also Ward *v.* Wilcox, 64 N. J. Eq. 303, 51 Atl. 1094; McTighe *v.* Dean, 22 N. J. Eq. 81.

New York.— Garrison *v.* Akin, 2 Barb. 25; Kehr *v.* Stauf, 12 Daly 115; Davis *v.* Davis, 7 Daly 308; Hoellerer *v.* Kaplan, 19 Misc. 539, 43 N. Y. Suppl. 1035; Whitman *v.* Foley, 7 N. Y. Suppl. 310; Law *v.* Merrills, 6 Wend. 268, 277; Malin *v.* Malin, 1 Wend. 625, 652; Botsford *v.* Burr, 2 Johns. Ch. 405; Marks *v.* Pell, 1 Johns. Ch. 594, 599; Boyd *v.* McLean, 1 Johns. Ch. 582; Sarvent *v.* Hesdra, 5 Redf. Surr. 47, 54; Cunningham *v.* Burdell, 4 Bradf. Surr. 343, 482; Marre *v.* Ginochio, 2 Bradf. Surr. 165; Jaques *v.* Public Administrator, 1 Bradf. Surr. 499, 522.

North Carolina.— Clement *v.* Clement, 54 N. C. 184.

Ohio.— Crowell *v.* Western Reserve Bank, 3 Ohio St. 406.

Pennsylvania.— *In re* Jacoby, 190 Pa. St. 382, 42 Atl. 1026; Churcher *v.* Guernsey, 39 Pa. St. 84, 86; Walter *v.* Snowden, 5 Pa. Cas. 154, 8 Atl. 406; Sage *v.* McGuire, 4 Watts & S. 228.

South Carolina.—Draffin *v.* Charleston, etc., R. Co., 34 S. C. 464, 13 S. E. 427; Brabham *v.* Crosland, 25 S. C. 525, 1 S. E. 33.

evidence are emphatic where a long time has elapsed since the alleged statement was made,[18] or where the statement was made in loose, casual, or random conversation.[19]

Tennessee.— Clack *v.* Hadley, (Ch. App. 1901) 64 S. W. 403.

Texas.— Welder *v.* Carroll, 29 Tex. 317; Coats *v.* Elliott, 23 Tex. 606; Hall *v.* Layton, 16 Tex. 262; Tuberville *v.* State, 4 Tex. 128.

Vermont.— State *v.* Roberts, 63 Vt. 139, 21 Atl. 424.

Virginia.— Phelps *v.* Seely, 22 Gratt. 573; Horner *v.* Speed, 2 Patt. & H. 616.

Wisconsin.— Thomas *v.* Paul, 87 Wis. 607, 58 N. W. 1031; Haven *v.* Markstrum, 67 Wis. 493, 30 N. W. 720; Nash *v.* Hoxie, 59 Wis. 384, 18 N. W. 408; Saveland *v.* Green, 40 Wis. 431; Dreher *v.* Fitchburg, 22 Wis. 675, 99 Am. Dec. 91; Benedict *v.* Horner, 13 Wis. 256; Durkee *v.* Stringham, 8 Wis. 1.

United States.— Alden *v.* Dewey, 1 Fed. Cas. No. 153, 1 Story 336; Bedilian *v.* Seaton, 3 Fed. Cas. No. 1,218, 3 Wall. Jr. 279; Carleton *v.* Davis, 5 Fed. Cas. No. 2,408, 2 Ware 225; *In re* Goold, 10 Fed. Cas. No. 5,604, 2 Hask. 34; *In re* Moore, 17 Fed. Cas. No. 9,751, 1 Hask. 134; Nachtrieb *v.* Harmony Settlement, 17 Fed. Cas. No. 10,003, 3 Wall. Jr. 66; The Northern Warrior, 18 Fed. Cas. No. 10,325, 1 Hask. 314. See also Risley *v.* Indianapolis, etc., R. Co., 20 Fed. Cas. No. 11,859, 7 Biss. 408; Spooner *v.* Daniels, 22 Fed. Cas. No. 13,244*a*; Turner *v.* Hand, 24 Fed. Cas. No. 14,257, 3 Wall. Jr. 88.

England.— Colvin *v.* Fraser, 2 Hagg. Eccl. 266, 345; Mynn *v.* Robinson, 2 Hagg. Eccl. 169, 187; Kinleside *v.* Harrison, 2 Phillim. 449; Scott *v.* Rhodes, 1 Phillim. 12, 17; Lench *v.* Lench, 10 Ves. Jr. 511, 32 Eng. Reprint 943.

See 20 Cent. Dig. tit. "Evidence," § 1050.

Cal. Code Civ. Proc. § 2061, subd. 4, requires the court to instruct the jury "on all proper occasions" that "the evidence of the oral admissions of a party [ought to be viewed] with caution." People *v.* Sternberg, 111 Cal. 11, 43 Pac. 201, holding that instructions to a jury that such admissions are to be viewed with "distrust" was properly refused, on account of the distinction between "caution" and "distrust."

Ga. Code, § 3792, declares that "all admissions should be scanned with care." Stewart *v.* De Loach, 86 Ga. 729, 12 S. E. 1067; Atlanta *v.* Brown, 73 Ga. 630; Smith *v.* Page, 72 Ga. 539; Ocean Steamship Co. *v.* McAlpin, 69 Ga. 437; Ford *v.* Kennedy, 64 Ga. 537. See also Richmond, etc., R. Co. *v.* Kerler, 88 Ga. 39, 13 S. E. 833.

18. *Alabama.*—Moore *v.* Tate, 114 Ala. 582, 21 So. 820; Alexander *v.* Hooks, 84 Ala. 605, 4 So. 417; Garrett *v.* Garrett, 29 Ala. 439.

Arkansas.— Prater *v.* Frazier, 11 Ark. 249. See also Shinn *v.* Tucker, 37 Ark. 580.

Illinois.— Harris *v.* McIntyre, 118 Ill. 275, 8 N. E. 182; Johnson *v.* Filson, 118 Ill. 219, 8 N. E. 318.

Indiana.— McMullen *v.* Clark, 49 Ind. 77.

Iowa.— Parker *v.* Pierce, 16 Iowa 227.

Kentucky.— Vaughn *v.* Hann, 6 B. Mon. 338; Colyer *v.* Langford, 1 A. K. Marsh. 237; Story *v.* Story, 61 S. W. 279, 22 Ky. L. Rep. 1731.

Louisiana.— Clark *v.* Slidell, 5 Rob. 330.

Maine.— Holmes *v.* Morse, 50 Me. 102.

Mississippi.— Allen *v.* Bobo, 81 Miss. 443, 33 So. 288.

Missouri.— Kinney *v.* Murray, 170 Mo. 674, 71 S. W. 197; Steele *v.* Steele, 161 Mo. 566, 61 S. W. 815; Burdett *v.* May, 100 Mo. 13, 12 S. W. 1056; Worley *v.* Dryden, 57 Mo. 226; Benne *v.* Benne, 56 Mo. App. 504.

New Jersey.— Van Blarcom *v.* Kip, 26 N. J. L. 351; Jessup *v.* Cook, 6 N. J. L. 434; Smith *v.* Smith, 48 N. J. Eq. 566, 25 Atl. 11; Midmer *v.* Midmer, 26 N. J. Eq. 299; Durant *v.* Bacot, 15 N. J. Eq. 411; Peer *v.* Peer, 11 N. J. Eq. 432; Gifford *v.* Thorn, 9 N. J. Eq. 702, 712; Hendrickson *v.* Ivins, 1 N. J. Eq. 562.

New York.— Metcalf *v.* Van Benthuysen, 3 N. Y. 424; Christy *v.* Clarke, 45 Barb. 529; Gombault *v.* Public Administrator, 4 Bradf. Surr. 226, 234.

North Dakota.— Forester *v.* Van Auken, 12 N. D. 175, 96 N. W. 301.

Ohio.— Thompson *v.* Thompson, 18 Ohio St. 73; Williams *v.* Robson, 6 Ohio St. 510.

Pennsylvania.— See Wanger *v.* Hipple, 10 Pa. Cas. 25, 13 Ala. 81.

South Carolina.— White *v.* Moore, 23 S. C. 456; Irby *v.* McCrae, 4 Desauss. 422.

Texas.— See Portis *v.* Hill, 14 Tex. 69, 65 Am. Dec. 99.

Virginia.— Donaghe *v.* Tams, 81 Va. 132.

Wisconsin.— McClellan *v.* Sanford, 26 Wis. 595; Benedict *v.* Horner, 13 Wis. 256.

United States.— Malony *v.* Milwaukee, 1 Fed. 611; Judson *v.* Moore, 14 Fed. Cas. No. 7,569, 1 Bond 285.

England.— Kierzkowski *v.* Dorion, L. R. 2 P. C. 291, 38 L. J. P. C. 12, 20 L. T. Rep. N. S. 170, 5 Moore P. C. N. S. 397, 16 Eng. Reprint 565; Rutherford *v.* Maule, 4 Hagg. Eccl. 213, 238.

See 20 Cent. Dig. tit. "Evidence," § 1050, 1169.

19. *Alabama.*— Shorter *v.* Sheppard, 33 Ala. 648; Garrett *v.* Garrett, 29 Ala. 439.

District of Columbia.— Purcell *v.* Coleman, 6 D. C. 59.

Iowa.— Holmes *v.* Connable, 111 Iowa 298, 82 N. W. 780; Childs *v.* Griswold, 19 Iowa 362; Cooper *v.* Skeel, 14 Iowa 578, 581 ("than this no species of testimony is more dangerous, or received with greater caution"); Corbit *v.* Smith, 7 Iowa 60, 71 Am. Dec. 431.

Missouri.— Fanning *v.* Doan, 139 Mo. 392, 41 S. W. 742; King *v.* Isley, 116 Mo. 155, 22 S. W. 634; Cornet *v.* Bertelsmann, 61 Mo. 118; Woodford *v.* Stephens, 51 Mo. 443.

New Jersey.—Wolfinger *v.* McFarland, (Ch. 1903) 54 Atl. 862; Eyre *v.* Eyre, 19 N. J.

(B) *Alleged Statements of Dead Men.* Exposed to all the infirmities just mentioned[20] is the testimony to oral statements of dead men, which is invariably subjected to the closest scrutiny in view of the impossibility in most cases of convicting the witness of perjury if his testimony is wilfully false.[21] Readier credence will be given to the testimony when it is in harmony with the established facts in the case,[22] or is supported by strong corroborating circumstances,[23] or where other persons present when the alleged statement was made are not called to contradict the witness,[24] or where several witnesses who testify to the statement have probably committed perjury if it was not made,[25] or where the temptation to falsify was great, and the witness could have sworn to more specific and numerous declarations without fear of contradiction.[26]

(C) *Positive and Negative Testimony.* Positive testimony of a witness that he heard a statement made usually outweighs the testimony of other persons who were present and who testify merely to a want of recollection[27] or that they did not hear it,[28] especially if the circumstances of the particular case indicate that

Eq. 102; Hoagland *v.* Hoagland, 2 N. J. Eq. 501.

Pennsylvania.— Moore *v.* Smith, 14 Serg. & R. 388.

Tennessee.— Earp *v.* Edgington, 107 Tenn. 23, 64 S. W. 40.

Utah.— State *v.* Mickle, 25 Utah 179, 70 Pac. 856.

Vermont.— Cleveland *v.* Burton, 11 Vt. 138.

West Virginia.— Cunningham *v.* Cunningham, 46 W. Va. 1, 32 S. E. 998; Weidebusch *v.* Hartenstein, 12 W. Va. 760.

See 20 Cent. Dig. tit. "Evidence," § 1050, 1167.

20. See *supra*, XVII, C, 1, h, (I), (A).

21. "Courts of justice lend a very unwilling ear to statements of what dead men have said." Lea *v.* Polk County Copper Co., 21 How. (U. S.) 493, 504, 16 L. ed. 203, per Catron, J.

In support of the text see the following cases:

Alabama.— Alexander *v.* Hooks, 84 Ala. 605, 4 So. 417; Bibb *v.* Hunter, 79 Ala. 351; Garrett *v.* Garrett, 29 Ala. 439.

California.—Woolsey *v.* Williams, 128 Cal. 552, 61 Pac. 670; Mattingly *v.* Pennie, 105 Cal. 514, 39 Pac. 200, 45 Am. St. Rep. 87; Thompson *v.* Lynch, 29 Cal. 189.

Georgia.— Solomon *v.* Solomon, 2 Ga. 18, 30.

Iowa.— Holmes *v.* Connable, 111 Iowa 298, 82 N. W. 780.

Kentucky.— Vaughn *v.* Hann, 6 B. Mon. 338; Story *v.* Story, 61 S. W. 279, 22 Ky. L. Rep. 1731.

Louisiana.— Piffet's Succession, 37 La. Ann. 871; Gordon *v.* Stubbs, 36 La. Ann. 625, 631; Bodenheimer *v.* Bodenheimer, 35 La. Ann. 1005; Bland *v.* Lloyd, 24 La. Ann. 603; Coeler *v.* Abels, 18 La. Ann. 617; Chapman *v.* Woodward, 16 La. Ann. 167; Bringier *v.* Gordon, 14 La. Ann. 274; Croizet's Succession, 12 La. Ann. 401; Wilder *v.* Franklin, 10 La. Ann. 279; Tuttle *v.* Burroughes, 9 La. Ann. 494; Gates *v.* Walker, 8 La. Ann. 277; Ward *v.* Valentine, 7 La. Ann. 183; Stancill *v.* Gilmore, 6 La. Ann. 763; Moran *v.* Le Blanc, 6 La. Ann. 113; Segond's Succession, 7 Rob. 111.

Missouri.— Fanning *v.* Doan, 139 Mo. 392, 41 S. W. 742; Brownlee *v.* Fenwick, 103 Mo. 420, 15 S. W. 611; Berry *v.* Hartzell, 91 Mo. 132, 3 S. W. 582; Modrell *v.* Riddle, 82 Mo. 31; Kennedy *v.* Kennedy, 57 Mo. 73; Ringo *v.* Richardson, 53 Mo. 385; Johnson *v.* Quarles, 46 Mo. 423, 427. See also Davis *v.* Green, 102 Mo. 170, 14 S. W. 876, 11 L. R. A. 90.

Nebraska.— Williams *v.* Miles, (1903) 94 N. W. 705; Clark *v.* Turner, 50 Nebr. 290, 69 N. W. 843, 38 L. R. A. 433; Falsken *v.* Harkendorf, 11 Nebr. 82, 7 N. W. 749.

New Jersey.— McKinney *v.* Slack, 19 N. J. Eq. 164. See also Matthews *v.* Everitt, 23 N. J. Eq. 473.

Pennsylvania.— Sage *v.* McGuire, 4 Watts & S. 228.

South Carolina.— Irby *v.* McCrae, 4 Desauss. 422.

Texas.— Grace *v.* Hanks, 57 Tex. 14; Coats *v.* Elliott, 23 Tex. 606; Portis *v.* Hill, 14 Tex. 69, 65 Am. Dec. 99.

Virginia.— Donaghe *v.* Tams, 81 Va. 132.

Wisconsin.— See Lake *v.* Meacham, 13 Wis. 355, 364.

United States.—Lea *v.* Polk County Copper Co., 21 How. 493, 504, 16 L. ed. 203; Garey *v.* Union Bank, 10 Fed. Cas. No. 5,241*a*, 3 Cranch C. C. 233; Johns *v.* Slack, 13 Fed. Cas. No. 7,363, 2 Hughes 467.

England.— Crouch *v.* Hooper, 16 Beav. 182, 186, 1 Wkly. Rep. 10; Rutherford *v.* Maule, 4 Hagg. Eccl. 213, 238.

22. Smith *v.* Turpin, 20 Ohio St. 478.

23. Fox's Succession, 2 Rob. (La.) 299.

24. Fox's Succession, 2 Rob. (La.) 299.

25. Dupre *v.* McCright, 6 La. Ann. 146. In weighing testimony perjury is not lightly to be imputed to witnesses. See, generally, WITNESSES.

26. Young *v.* Young, 51 N. J. Eq. 491, 27 Atl. 627.

27. Cable *v.* Paine, 8 Fed. 788, 3 McCrary 169; Tocker *v.* Ayre, 3 Phillim. 539.

28. *Connecticut.*— Johnson *v.* Scribner, 6 Conn. 185.

Missouri.— Isaacs *v.* Sprainka, 95 Mo. 517, 8 S. W. 427.

they were inattentive,[29] as well as the alleged declarant's testimony that he has no recollection of making it,[30] or his express denial where he concedes that he cannot definitely recollect what he said,[31] or where his denial, under the circumstances of the case, is in effect merely absence of recollection.[32] But the positive testimony has no clear advantage over a flat denial by the alleged declarant[33] who gives his version of what he said,[34] or a positive denial by other witnesses who had equal means of knowledge and were paying attention.[35]

(D) *Circumstances Tending to Disparage Testimony.* The following circumstances have been noticed as tending to impair the credibility of testimony to oral declarations or admissions:[36] That the testimony is improbable in view of other facts in the case;[37] that the alleged statement is inconsistent with proved

New Jersey.— Wright *v.* Wright, 4 N. J. Eq. 28; Read *v.* Cramer, 2 N. J. Eq. 277, 34 Am. Dec. 204.

New York.— Sanger *v.* Vail, 13 How. Pr. 500.

United States.— Abbe *v.* Rood, 1 Fed. Cas. No. 6, 6 McLean 106.

See 20 Cent. Dig. tit. "Evidence," §§ 1050, 2434; and *supra*, XVII, C, 1, g, (II), (A).

Contra, under peculiar circumstances. Hildreth *v.* Marshall, 51 N. J. Eq. 241, 27 Atl. 465.

29. Johnson *v.* Scribner, 6 Conn. 185.

30. *Illinois.*— Booker *v.* Booker, 208 Ill. 529, 70 N. E. 709, 100 Am. St. Rep. 250; Vanpelt *v.* Hutchinson, 114 Ill. 435, 2 N. E. 491; Gorham *v.* Peyton, 3 Ill. 363.

Nebraska.— Railsback *v.* Patton, 34 Nebr. 490, 52 N. W. 277.

New Jersey.— Meredith *v.* Sayre, 32 N. J. Eq. 557, 565; Van Dyke *v.* Van Dyke, 31 N. J. Eq. 176. See also Williams *v.* Champion, 39 N. J. Eq. 350.

New York.— See Cridler *v.* Colegrove, 5 N. Y. St. 232.

Pennsylvania.— Hibbs *v.* Woodward, 15 Wkly. Notes Cas. 338.

Texas.— Hinkle *v.* Higgins, 83 Tex. 615, 19 S. W. 147.

See 20 Cent. Dig. tit. "Evidence," §§ 1050, 2434.

Under special circumstances, however, the declarant's want of recollection prevailed over affirmative testimony. Logan *v.* McChord, 2 A. K. Marsh. (Ky.) 224. See also Dalby *v.* Cronkhite, 22 Iowa 222.

31. Stevenson *v.* Marble, 84 Fed. 23.

32. Ralph *v.* Chicago, etc., R. Co., 32 Wis. 177, 14 Am. Rep. 725.

33. Reeves *v.* Poindexter, 53 N. C. 308. See also Kelly *v.* Schupp, 60 Wis. 76, 18 N. W. 725; and *supra*, note 93; *infra*, note 45. But *compare* Staehle *v.* Leopold, 107 La. 399, 31 So. 882.

34. Downing *v.* Freeman, 13 Me. 90; Cridler *v.* Colegrove, 5 N. Y. St. 232.

35. *Alabama.*— Stoddard *v.* Kelly, 50 Ala. 452.

Illinois.— Fizell *v.* Cole, 42 Ill. 362.

New Jersey.— See Wallace's Case, 49 N. J. Eq. 530, 25 Atl. 260.

Pennsylvania.— Mead *v.* Conroe, 113 Pa. St. 220, 8 Atl. 374.

Tennessee.— Delk *v.* State, 3 Head 79.

Wisconsin.— Joannes *v.* Mildred, 90 Wis. 68, 62 N. W. 916; Shekey *v.* Eldredge, 71 Wis. 538, 37 N. W. 820.

See 20 Cent. Dig. tit. "Evidence," §§ 1050, 2434.

36. Most of the cases cited in the following notes were cases of alleged admissions against interest.

37. *Alabama.*— Alexander *v.* Hooks, 84 Ala. 605, 4 So. 417 (alleged admission of one of two parties in opposition to recitals in a prior written contract between them); Garrett *v.* Garrett, 29 Ala. 439 (making of the statement to the particular person at the particular time and place is improbable).

Iowa.— Cooper *v.* Skeel, 14 Iowa 578.

Kentucky.— Powell *v.* Swain, 5 Dana 1 (alleged statement manifestly against the party's interest and made without color of ground for doing so); Vaughn *v.* Hann, 6 B. Mon. 338; Myers *v.* Baker, Hard. 544.

New York.— Tyrrel *v.* Emigrant Industrial Sav. Bank, 77 N. Y. App. Div. 131, 79 N. Y. Suppl. 49.

Pennsylvania.— Thompson *v.* Ridelsperger, 144 Pa. St. 416, 22 Atl. 826, statement unnecessary, uncalled for, and highly prejudicial to the declarant.

Texas.— Hall *v.* Layton, 16 Tex. 262 (improbable that the party would make a declaration that would be falsified immediately by his own letter); Portis *v.* Hill, 14 Tex. 69, 65 Am. Dec. 99.

Vermont.— Cleavland *v.* Burton, 11 Vt. 138, alleged admission was made in a place where many persons were collected and the lawsuit was the subject of conversation.

Virginia.— Donaghe *v.* Tams, 81 Va. 132, the statement was an admission of base fraud and the alleged declarant a person of intelligence and standing in the church.

United States.— Johns *v.* Slack, 13 Fed. Cas. No. 7,363, 2 Hughes 467 (declarant could have had no motive in making the statement); U. S. *v.* Bernal, 24 Fed. Cas. No. 14,581 (alleged statement was a confession of gross moral turpitude).

England.— Falle *v.* Le Sueur, 12 Moore P. C. 501, 533, 14 Eng. Reprint 1002, improbability that a party would make a momentous concession under the circumstances of the case.

See 20 Cent. Dig. tit. "Evidence," § 1050.

facts in the case,[38] absurd,[39] or demonstrably false;[40] that the statement is not in harmony with the conduct of the witness or of the declarant,[41] or that it conflicts with the declarant's statements to other persons at other times;[42] that the witness is uncorroborated by any independent circumstance in the case;[43] that there is no written corroboration under the party's own hand in a case where written evidence of the fact would be expected;[44] that the alleged declarant testifies in direct contradiction of the witness,[45] especially where the former is disinterested and the latter biased;[46] that the testimony of the witness is contradicted by other persons present at the time,[47] or that the latter did not hear the alleged statement;[48] that the witnesses testifying to the statement do not agree in their memory of the essential part of the statement;[49] that the witness testifying to a statement made in conversation cannot give the entire conversation,[50] or was not

38. *Kentucky.*— Powell *v.* Swan, 5 Dana 1; Story *v.* Story, 61 S. W. 279, 22 Ky. L. Rep. 1731.

Missouri.—Kinney *v.* Murray, 170 Mo. 674, 71 S. W. 197.

New Jersey.— Ramsdell *v.* Streeter, 62 N. J. Eq. 718, 48 Atl. 575; Jones *v.* Knauss, 31 N. J. Eq. 609, 617.

New York.— Garrison *v.* Akin, 2 Barb. 25.

United States.— Luco *v.* U. S., 15 Fed. Cas. No. 8,594; Smith *v.* Burnham, 22 Fed. Cas. No. 13,019, 3 Sumn. 435.

39. Cooper *v.* Skeel, 14 Iowa 578; U. S. *v.* Bernal, 24 Fed. Cas. No. 14,581.

40. Davidson *v.* Rightmyer, 38 Misc. (N. Y.) 493, 77 N. Y. Suppl. 977; Rutherford *v.* Maule, 4 Hagg. Eccl. 213, 238; Elwes *v.* Elwes, 1 Hagg. Cons. 269, 285. *Contra*, Benglesdorf *v.* Hanway, 90 Md. 217, 44 Atl. 1011.

41. *Kentucky.*— Story *v.* Story, 61 S. W. 279, 22 Ky. L. Rep. 1731.

Louisiana.— Ward *v.* Valentine, 7 La. Ann. 183.

Maryland.— Whalen *v.* Milholland, 89 Md. 199, 43 Atl. 45, 44 L. R. A. 208.

Michigan.— Russell *v.* Miller, 26 Mich. 1.

Missouri.— Ringo *v.* Richardson, 53 Mo. 385; Johnson *v.* Quarles, 46 Mo. 423.

New Jersey.— Moore *v.* Kraemer, 50 N. J. Eq. 776, 26 Atl. 961; Maloney *v.* Herbert, (Ch. 1888) 15 Atl. 824, 826; Stanford *v.* Lyon, 37 N. J. Eq. 94; Cooper *v.* Carlisle, 17 N. J. Eq. 525.

New York.— Tyrrel *v.* Emigrant Industrial Sav. Bank, 77 N. Y. App. Div. 131, 79 N. Y. Suppl. 49.

United States.— Neale *v.* Neale, 9 Wall. 1, 19 L. ed. 590.

England.— Elwes *v.* Elwes, 1 Hagg. Cons. 269, 286.

See 20 Cent. Dig. tit. "Evidence," § 1050.

42. Wolfinger *v.* McFarland, (N. J. Ch. 1903) 54 Atl. 862; Neale *v.* Neale, 9 Wall. (U. S.) 1, 19 L. ed. 590; Jordan *v.* Eaton, 13 Fed. Cas. No. 7,520, 2 Hask. 236; Luco *v.* U. S., 15 Fed. Cas. No. 8,594.

43. *Kentucky.*— Powell *v.* Swan, 5 Dana 1.

Louisiana.— Tuttle *v.* Burroughes, 9 La. Ann. 494.

Missouri.— Davis *v.* Green, 102 Mo. 170, 14 S. W. 876, 11 L. R. A. 90.

New Jersey.— Marsh *v.* Lasher, 13 N. J. Eq. 253.

North Dakota.— Forester *v.* Van Auken, 12 N. D. 175, 96 N. W. 301.

Texas.— Portis *v.* Hill, 14 Tex. 69, 65 Am. Dec. 99.

United States.— Hostetter Co. *v.* Sommers, 84 Fed. 333.

See 20 Cent. Dig. tit. "Evidence," § 1050.

44. Lench *v.* Lench, 10 Ves. Jr. 511, 32 Eng. Reprint 943.

45. *Illinois.*— Marston *v.* Brittenham, 76 Ill. 611.

Iowa.— Oberholtzer *v.* Hazen, 101 Iowa 340, 70 N. W. 207; Wilhelmi *v.* Thorington, 14 Iowa 537.

New Jersey.— Hodge *v.* Amerman, 40 N. J. Eq. 99, 2 Atl. 257; Stanford *v.* Lyon, 37 N. J. Eq. 94; Shotwell *v.* Shotwell, 24 N. J. Eq. 378; Marsh *v.* Lasher, 13 N. J. Eq. 253.

New York.— Gombault *v.* Public Administrator, 4 Bradf. Surr. 226, 234.

North Dakota.— Forester *v.* Van Auken, 12 N. D. 175, 96 N. W. 301.

United States.— U. S. *v.* Swett, 28 Fed. Cas. No. 16,427, 2 Hask. 310.

46. Snodgrass *v.* Carnegie Steel Co., 173 Pa. St. 228, 33 Atl. 1104.

47. Mathis *v.* State, 18 Ga. 343; Stiefel *v.* Stiefel, (N. J. Ch. 1896) 35 Atl. 287. But see U. S. *v.* McGlue, 26 Fed. Cas. No. 15,679, 1 Curt. 1.

48. Hall *v.* Thompson, 1 Sm. & M. (Miss.) 443.

49. Stone *v.* Ramsey, 4 T. B. Mon. (Ky.) 236; Banks *v.* Weaver, (N. J. Ch. 1901) 48 Atl. 515; Cunningham *v.* Cunningham, 46 W. Va. 1, 32 S. E. 998; *In re* Moore, 17 Fed. Cas. No. 9,751, 1 Hask. 134; Ward *v.* The Fashion, 29 Fed. Cas. No. 17,154, 6 McLean 152, Newb. Adm. 8. See also U. S. *v.* Bernal, 24 Fed. Cas. No. 14,581; Crouch *v.* Hooper, 16 Beav. 182, 187, 1 Wkly. Rep. 10.

50. Cobb *v.* Battle, 34 Ga. 458, 479; Myers *v.* Baker, Hard. (Ky.) 544; Buckheit *v.* Smith, (N. J. Ch. 1886) 3 Atl. 91; Hodge *v.* Amerman, 40 N. J. Eq. 99, 2 Atl. 257; U. S. *v.* McKee, 26 Fed. Cas. No. 15,683. See also Chandler *v.* Schoonover, 14 Ind. 324; Harwood *v.* Baker, 3 Moore P. C. 282, 302, 13 Eng. Reprint 117. But *compare* Voorheis *v.* Bovell, 20 Ill. App. 538.

present so as to hear all of it;[51] that the witness does not profess to give the exact language, but only his understanding of its substance;[52] that the alleged statement was made in a hurried conversation;[53] that the witness was not interested in the subject-matter of the statement and had no reason for giving special attention to it;[54] that the witness was not on such terms of intimacy with the declarant that the latter would have been likely to make the witness a confidant;[55] that the witness was deaf[56] or very young,[57] when the alleged statement was made, or is grossly ignorant,[58] or has slight appreciation of the force of words and little skill in expressing in his own language what others have said;[59] that better and available evidence to prove the fact admitted in the alleged statement is not produced;[60] that the alleged statement was obtained for the purpose of being used against him in the suit;[61] that other persons present when the alleged statement was made are not produced nor their absence accounted for;[62] that witnesses testifying to the statement are interested parties or otherwise biased;[63] that the alleged statement was made in the presence of the witness

51. Burgin *v.* Giberson, 26 N. J. Eq. 72; Cover *v.* Mannaway, 115 Pa. St. 338, 8 Atl. 393, 2 Am. St. Rep. 552 (casual and loose declaration uttered in the heat of discussion); Kinleside *v.* Harrison, 2 Phillim. 449, 553. But see State *v.* Elliott, 15 Iowa 72.

52. Harris *v.* McIntyre, 118 Ill. 275, 8 N. E. 182; Hodgen *v.* Guttery, 58 Ill. 431; Powell *v.* Swan, 5 Dana (Ky.) 1; Jessup *v.* Cook, 6 N. J. L. 434; Whitman *v.* Foley, 7 N. Y. Suppl. 310.

53. Ward *v.* The Fashion, 29 Fed. Cas. No. 17,154, 6 McLean 152, Newb. Adm. 8.

54. *Alabama.*— Garrett *v.* Garrett, 29 Ala. 439.

Illinois.— Harris *v.* McIntyre, 118 Ill. 275, 8 N. E. 182.

Iowa.— Cooper *v.* Skeel, 14 Iowa 578.

Kentucky.— Vaughn *v.* Hann, 6 B. Mon. 338.

Louisiana.— O'Brien *v.* Flynn, 8 La. Ann. 307.

New Jersey.— Jessup *v.* Cook, 6 N. J. L. 434; Wolfinger *v.* McFarland, (Ch. 1903) 54 Atl. 862; Eyre *v.* Eyre, 19 N. J. Eq. 102; Gifford *v.* Thorn, 9 N. J. Eq. 702; White *v.* Williams, 3 N. J. Eq. 376; Hendrickson *v.* Ivins, 1 N. J. Eq. 562.

Texas.— Hall *v.* Layton, 16 Tex. 262.

Wisconsin.— Benedict *v.* Horner, 13 Wis. 256.

United States.— The Peytona, 19 Fed. Cas. No. 11,058, 2 Curt. 21.

England.— Hudson *v.* Parker, 1 Rob. Eccl. 14, 30.

See 20 Cent. Dig. tit. "Evidence," §§ 1050, 2434; and *supra*, p. 782, text and note 18.

55. Bryan *v.* Cowart, 21 Ala. 92; Cobb *v.* Battle, 34 Ga. 458, 480; Vaughn *v.* Hann, 6 B. Mon. (Ky.) 338; Wanmaker *v.* Van Buskirk, 1 N. J. Eq. 685, 23 Am. Dec. 748.

56. Riddle *v.* Clabby, 59 N. J. Eq. 573, 44 Atl. 859; Fee *v.* Sharkey, 59 N. J. Eq. 284, 44 Atl. 673; De Luze *v.* Bradbury, 25 N. J. Eq. 70, 84; Mulford *v.* Minch, 11 N. J. Eq. 16, 64 Am. Dec. 472; *In re* Goold, 10 Fed. Cas. No. 5,604, 2 Hask. 34; The Silver Spray, 22 Fed. Cas. No. 12,857, 1 Brown Adm. 349.

57. Grosvenor *v.* Harrison, 54 Mich. 194, 19 N. W. 951; McElvain *v.* McElvain, 171 Mo. 244, 71 S. W. 142; Kinney *v.* Murray, 170 Mo. 674, 71 S. W. 197; Donaghe *v.* Tams, 81 Va. 132. See also Dean *v.* Anderson, 34 N. J. Eq. 496, 506; Hankinson *v.* Hankinson, 33 N. J. Eq. 66, child of tender years.

58. Henry *v.* Henry, 8 Barb. (N. Y.) 588. See also Vaughn *v.* Hann, 6 B. Mon. (Ky.) 338.

59. Midmer *v.* Midmer, 26 N. J. Eq. 299.

60. Bryan *v.* Cowart, 21 Ala. 92; Stone *v.* Ramsey, 4 T. B. Mon. (Ky.) 236.

61. Donaghe *v.* Tams, 81 Va. 132; Dexter *v.* Arnold, 7 Fed. Cas. No. 3,859, 2 Sumn. 152; Howe *v.* Underwood, 12 Fed. Cas. No. 6,775, 1 Fish. Pat. Cas. 160.

62. Carnall *v.* Wilson, 14 Ark. 482; Grant *v.* Bradstreet, 87 Me. 165, 33 Atl. 165; Lowe *v.* Protestant Episcopal Church, 83 Md. 409, 35 Atl. 87; Rich *v.* Ferguson, 45 Tex. 396.

63. *Alabama.*— Alexander *v.* Hooks, 84 Ala. 605, 4 So. 417; Shorter *v.* Sheppard, 33 Ala. 648, 657; Garrett *v.* Garrett, 29 Ala. 439.

Georgia.— Cobb *v.* Battle, 34 Ga. 458, 479.

Illinois.— Straubher *v.* Mohler, 80 Ill. 21, 24.

Iowa.— Epps *v.* Dickerson, 35 Iowa 301; Wilhelmi *v.* Thorington, 14 Iowa 537.

Kentucky.— Snelling *v.* Utterback, 1 Bibb 609, 4 Am. Dec. 661; Story *v.* Story, 61 S. W. 279, 22 Ky. L. Rep. 1731.

Louisiana.— Ward *v.* Valentine, 7 La. Ann. 183.

New Jersey.— Van Blarcom *v.* Kip, 26 N. J. L. 351; Danforth *v.* Moore, 55 N. J. Eq. 127, 35 Atl. 410; Midmer *v.* Midmer, 26 N. J. Eq. 299; Fisler *v.* Porch, 10 N. J. Eq. 243.

New York.— Metcalf *v.* Van Benthuysen, 3 N. Y. 424; Tyrrel *v.* Emigrant Industrial Sav. Bank, 77 N. Y. App. Div. 131, 79 N. Y. Suppl. 49; Christy *v.* Clarke, 45 Barb. 529.

Pennsylvania.—Snodgrass *v.* Carnegie Steel Co., 173 Pa. St. 228, 33 Atl. 1104.

Texas.— See Coats *v.* Elliott, 23 Tex. 606.

Virginia.— Donaghe *v.* Tams, 81 Va. 132.

Washington.— Fleischner *v.* Beaver, 21 Wash. 6, 56 Pac. 840.

Wisconsin.— McClellan *v.* Sanford, 26 Wis. 595.

alone;[64] that the alleged statement was made by a person *in extremis* who spoke with difficulty,[65] or was made partly in a foreign language not well understood by the witness and partly in English, which the declarant imperfectly understood;[66] that there was a different subject-matter to which the alleged statement might well refer;[67] that the witness is not positive in his testimony;[68] that the witness fails to remember his own previous sworn statements of the language used;[69] that the witness at one time distrusted the accuracy of his memory of the statement to which he testifies;[70] that the memory of the witness is in a confused condition;[71] that the witness makes the alleged declarant contradict himself in the same conversation;[72] that discrepancies in the examination of the witness in chief and his cross-examination, although immaterial, betray inaccuracy or confusion of memory;[73] that the witness' testimony is loose, uncertain, and contradictory;[74] that the witness cannot state who, if anybody, was present;[75] that the manner of the witness does not inspire confidence;[76] that the witness is unable to locate definitely the time of the conversation, although it must have been recent if it occurred at all;[77] that the witness does not recollect how the conversation arose, nor who introduced the particular topic, nor how he happened to come in contact with the declarant on the occasion, nor to whom he first repeated what was said;[78] that the witness has made mistakes in other parts of his testimony;[79] that the witness pretends to repeat verbatim a casual conversation after many years;[80] that the witness testifies to several different conversations which together supply all that is necessary for the case in hand;[81] that the credibility of the witness is seriously impaired by other parts of his testimony;[82] that the witness is seriously discredited as to part of his testimony by the opposing testimony of several witnesses;[83] that the witness prevaricates and contradicts himself;[84] or gives materially different versions of the language used;[85] that the witness has made contradictory statements as to the import of the declaration;[86] that the witness has evidently been "instructed" by the party in whose interest he testifies;[87] that there is a remarkably minute concurrence in the testimony of the several witnesses creating suspicion that they are testifying

United States.— *In re* Moore, 17 Fed. Cas. No. 9,751, 1 Hask. 134; The Peytona, 19 Fed. Cas. 11,058, 2 Curt. 21.

England.— Harwood *v.* Baker, 3 Moore P. C. 282, 13 Eng. Reprint 117; Clerke *v.* Cartwright, 1 Phillim. 90, 107.

See 20 Cent. Dig. tit. "Evidence," § 1050. See also *supra*, XVII, B, 9, b; and as to the effect of interest or bias in discrediting the testimony of a witness, see, generally, WITNESSES.

64. Botts *v.* Williams, 17 B. Mon. (Ky.) 687; Powell *v.* Swan, 5 Dana (Ky.) 1; Portis *v.* Hill, 14 Tex. 69, 65 Am. Dec. 99; Alden *v.* Dewey, 1 Fed. Cas. No. 153, 1 Story 336.

65. Lemann *v.* Bonsall, 1 Add. Eccl. 389, 395.

66. Schwachtgen *v.* Schwachtgen, 65 Ill. App. 127. See also Camden, etc., Transp. Co. *v.* The Lotty, 4 Fed. Cas. No. 2,337*a*.

67. Cooper *v.* Skeel, 14 Iowa 578.

68. Harding *v.* Brooks, 5 Pick. (Mass.) 244. See also Kierzkowski *v.* Dorion, L. R. 2 P. C. 291, 38 L. J. P. C. 12, 20 L. T. Rep. N. S. 170, 5 Moore P. C. N. S. 397, 16 Eng. Reprint 565.

69. Vaughn *v.* Hann, 6 B. Mon. (Ky.) 338.

70. Horner *v.* Speed, 2 Patt. & H. (Va.) 616.

71. Midmer *v.* Midmer, 26 N. J. Eq. 299.

72. Garey *v.* Union Bank, 10 Fed. Cas. No. 5,241*a*, 3 Cranch C. C. 233.

73. Horner *v.* Speed, 2 Patt. & H. (Va.) 616.

74. Henry *v.* Henry, 8 Barb. (N. Y.) 588.

75. U. S. *v.* McKee, 26 Fed. Cas. No. 15,683.

76. White *v.* Williams, 3 N. J. Eq. 376; Williams *v.* Robson, 6 Ohio St. 510.

77. U. S. *v.* McKee, 26 Fed. Cas. No. 15,683.

78. Hodge *v.* Amerman, 40 N. J. Eq. 99, 2 Atl. 257. See also U. S. *v.* McKee, 26 Fed. Cas. No. 15,683.

79. Alexander *v.* Hooks, 84 Ala. 605, 4 So. 417; Stockton *v.* Williams, Walk. (Mich.) 120; Christy *v.* Clarke, 45 Barb. (N. Y.) 529.

80. *In re* Goold, 10 Fed. Cas. No. 5,604, 2 Hask. 34.

81. Cooper *v.* Carlisle, 17 N. J. Eq. 525. See also Epps *v.* Dickerson, 35 Iowa 301.

82. U. S. *v.* Bernal, 24 Fed. Cas. No. 14,581.

83. Hostetter Co. *v.* Sommers, 84 Fed. 333.

84. Powell *v.* Swan, 5 Dana (Ky.) 1.

85. *In re* Goold, 10 Fed. Cas. No. 5,604, 2 Hask. 34.

86. Sidway *v.* Sidway, 4 Silv. Supreme (N. Y.) 124, 7 N. Y. Suppl. 421.

87. Vaughn *v.* Hann, 6 B. Mon. (Ky.) 338.

in concert;[88] that the witness is of bad or doubtful character;[89] or that the reputation of the witness for truth and veracity has been seriously shaken[90] and appears to be inferior to that of the declarant who directly contradicts him.[91]

(E) *Circumstances Favorable to Testimony.* The following facts have been noticed as tending to accredit testimony to oral statements: That the testimony of the witness is reasonable and probable in view of the established facts,[92] or is corroborated by the other evidence in the case;[93] that the subject-matter of the statement was likely to be discussed between the witness and the declarant, who were intimate acquaintances;[94] that several witnesses concur in their testimony to the statement,[95] and must be grossly perjured if the statement was not made,[96] while the party himself, highly interested, alone denies it;[97] that the same alleged statement was made at different times to different witnesses;[98] that the conduct of the witness subsequent to the alleged statement seems to have been influenced by it;[99] that the subsequent conduct of the alleged declarant tends to confirm the testimony;[1] that the witness related the same story soon after the alleged statement was made and with no possible motive to prevaricate;[2] that the witness is a person of unimpeachable character;[3] that the witnesses are not impeached in any manner;[4] that the witnesses are disinterested and unbiased;[5] that the witness

88. Fanning *v.* Doan, 139 Mo. 392, 41 S. W. 742; Donaghe *v.* Tams, 81 Va. 132; Davis Sewing Mach. Co. *v.* Dunbar, 29 W. Va. 617, 2 S. E. 91.

89. Vaughn *v.* Hann, 6 B. Mon. (Ky.) 338; Allen *v.* Young, 6 T. B. Mon. (Ky.) 136, 17 Am. Dec. 130.

90. Marre *v.* Ginochio, 2 Bradf. Surr. (N. Y.) 165.

91. U. S. *v.* McKee, 26 Fed. Cas. No. 15,683.

92. Kellogg *v.* Hastings, 70 Ill. 598; Becker *v.* Crow, 7 Bush (Ky.) 198; Hatch *v.* Van Dervoort, 54 N. J. Eq. 511, 34 Atl. 938; Ferguson *v.* Rafferty, 128 Pa. St. 337, 18 Atl. 484, 6 L. R. A. 33. See also Lynch *v.* Clements, 24 N. J. Eq. 431, 438.

93. *Kentucky.*— Western *v.* Pollard, 16 B. Mon. 315.

Louisiana.— Coeler *v.* Abels, 18 La. Ann. 617; Moran *v.* Le Blanc, 6 La. Ann. 113.

New Jersey.— Russell *v.* Russell, 60 N. J. Eq. 282, 47 Atl. 37; Gifford *v.* Thorn, 9 N. J. Eq. 702, 712.

New York.— Boyd *v.* McLean, 1 Johns. Ch. 582.

Pennsylvania.— *In re* Krug, 196 Pa. St. 484, 46 Atl. 484; McCarty *v.* Scanlon, 187 Pa. St. 495, 41 Atl. 345.

United States.— Johnson *v.* The Industry, 13 Fed. Cas. No. 7,391.

See 20 Cent. Dig. tit. "Evidence," §§ 1050, 1167.

94. Varick *v.* Hitt, (N. J. Ch. 1903) 55 Atl. 139.

95. Becker *v.* Crow, 7 Bush (Ky.) 198; Western *v.* Pollard, 16 B. Mon. (Ky.) 315; Fox's Succession, 2 Rob. (La.) 299; Lepper *v.* Mooyer, 82 Md. 649, 33 Atl. 263; The Joseph Harvey, 1 C. Rob. 306, 311.

96. The Joseph Harvey, 1 C. Rob. 306, 311.

97. *In re* Krug, 196 Pa. St. 484, 46 Atl. 484.

98. *Georgia.*— Burk *v.* Hill, 119 Ga. 38, 45 S. E. 732.

Illinois.— Ryder *v.* Emrich, 104 Ill. 470; Kellogg *v.* Hastings, 70 Ill. 598.

Iowa.— Wallace *v.* Berger, 14 Iowa 183.

Kentucky.— Western *v.* Pollard, 16 B. Mon. 315; Petty *v.* Taylor, 5 Dana 598; Colyer *v.* Langford, 1 A. K. Marsh. 237; McCain *v.* McCain, 11 Ky. L. Rep. 582.

Minnesota.— Tozer *v.* Hershey, 15 Minn. 257.

Missouri.— Sutton *v.* Hayden, 62 Mo. 101.

New Jersey.— Domestic Tel. Co. *v.* Metropolitan Telephone Co., 41 N. J. Eq. 241, 3 Atl. 709; Lynch *v.* Clements, 24 N. J. Eq. 431, 439; Jones *v.* Jones, 17 N. J. Eq. 351.

Pennsylvania.— Ott *v.* Oyer, 106 Pa. St. 6; Gabler's Appeal, 5 Centr. Rep. 314.

See 20 Cent. Dig. tit. "Evidence," §§ 1050, 1167.

99. Hatch *v.* Van Dervoort, 54 N. J. Eq. 511, 34 Atl. 938.

1. Shipman *v.* Cook, 16 N. J. Eq. 251; Blanchard *v.* McDougal, 6 Wis. 167, 70 Am. Dec. 458; Cornell Steamboat Co. *v.* The Tillie A., 84 Fed. 684. See also Downing *v.* Freeman, 13 Me. 90.

2. Grant *v.* Bradstreet, 87 Me. 583, 33 Atl. 165.

3. Moorhead *v.* Thompson, 1 La. 281; Gifford *v.* Thorn, 9 N. J. Eq. 702, 712; Johnson *v.* The Industry, 13 Fed. Cas. No. 7,391.

4. Gillespie *v.* Moon, 2 Johns. Ch. (N. Y.) 585, 7 Am. Dec. 559; Ferguson *v.* Rafferty, 128 Pa. St. 337, 18 Atl. 484, 6 L. R. A. 33.

5. *Kentucky.*—Becker *v.* Crow, 7 Bush 198.

Maine.— Grant *v.* Bradstreet, 87 Me. 583, 33 Atl. 165.

Maryland.— Beddinger *v.* Wiland, 67 Md. 359, 10 Atl. 202.

New York.— Gillespie *v.* Moon, 2 Johns. Ch. 585, 7 Am. Dec. 559.

United States.— The Manitoba, 16 Fed. Cas. No. 9,029, 2 Flipp. 241.

See 20 Cent. Dig. tit. "Evidence," §§ 1050, 1167.

testifies very circumstantially;[6] that the testimony is "precise, definite, distinct, positive";[7] that the several witnesses who testify to the alleged statement had met the declarant for the express purpose of discussing the subject-matter of the statement;[8] that the attention of the witness was specially directed to the statement;[9] that his memory is refreshed by a memorandum made at the time;[10] that several witnesses testify to the statement and another person who was present is not called to contradict them;[11] that no attempt is made to contradict the witness where it might have been done with effect had his testimony been true;[12] that the alleged declarant, a party to the suit, although present at the trial, is not called as a witness,[13] or, testifying in the case, does not contradict the witness nor offer any explanation;[14] that the alleged declarant who denies the statement has evidently testified falsely in other particulars;[15] that his testimony in denial of the statement was not delivered in a satisfactory manner;[16] that he gives an unsatisfactory explanation of his language and attributes to it a sense improbable in itself and contrary to that in which it was understood by the witness;[17] or that his denial is not so clear and positive as the opposing testimony.[18]

(II) *Weight of Admissions Clearly Proved*—(A) *Express Admissions.* Admissions when proved to have been made are to be considered and weighed precisely as other evidence.[19] The weight of admissions depends upon their character and the circumstances under which they were made,[20] and the effect of such circumstances is to be determined by the jury.[21] Declarations and admissions against interest, when deliberately made in view of all the facts to which they relate, are of a highly satisfactory and convincing character as evidence if they are not explained.[22] On the other hand admissions have little probative force when

6. Beddinger *v.* Wiland, 67 Md. 359, 10 Atl. 202; Christy *v.* Clarke, 45 Barb. (N. Y.) 529; Perret *v.* Perret, 184 Pa. St. 131, 39 Atl. 33.

7. Ferguson *v.* Rafferty, 128 Pa. St. 337, 18 Atl. 484, 6 L. R. A. 33. See also Honesdale Glass Co. *v.* Storms, 125 Pa. St. 268, 17 Atl. 347.

8. Doerr *v.* Brune, 56 Ill. App. 657.

9. Gifford *v.* Thorn, 9 N. J. Eq. 702, 712; Eichelberger's Estate, 170 Pa. St. 242, 32 Atl. 605.

10. Gifford *v.* Thorn, 9 N. J. Eq. 702, 712.

11. Constable *v.* Tufnell, 4 Hagg. Eccl. 465, 506.

12. Mynn *v.* Robinson, 2 Hagg. Eccl. 169, 178. See also Gibbons *v.* Potter, 30 N. J. Eq. 204, 207.

13. Keller *v.* Jackson, 58 Iowa 629, 12 N. W. 618; Tozer *v.* Hershey, 15 Minn. 257; Quantity of Distilled Spirits, 20 Fed. Cas. No. 11,494, 3 Ben. 70; Scouler *v.* Plowright, 10 Moore P. C. 440, 14 Eng. Reprint 557. See also Burk *v.* Hill, 119 Ga. 38, 45 S. E. 732; Allaire *v.* Day, 30 N. J. Eq. 231, 233; Ferguson *v.* Rafferty, 128 Pa. St. 337, 18 Atl. 484, 6 L. R. A. 33; Tiernan *v.* Gibney, 24 Wis. 190.

14. Hill *v.* Day, 34 N. J. Eq. 150, 153; Whitaker *v.* Staten Island Midland R. Co., 76 N. Y. Suppl. 548; Johnson *v.* The Industry, 13 Fed. Cas. No. 7,391, Hoff. Op. 488; McCall *v.* McDowell, 15 Fed. Cas. No. 8,673, 1 Abb. 212, Deady 233 (holding that the circumstance was practically conclusive against him); *In re* Schick, 21 Fed. Cas. No. 12,455, 2 Ben. 5.

15. Johnson *v.* The Industry, 13 Fed. Cas. No. 7,391, Hoff. Op. 488.

16. Russell *v.* Russell, (N. J. Ch. 1900) 47 Atl. 37.

17. Johnson *v.* The Industry, 13 Fed. Cas. No. 7,391, Hoff. Op. 488.

18. Mutual Reserve Fund L. Assoc. *v.* Cleveland Woolen Mills, 82 Fed. 508, 27 C. C. A. 212.

19. Ayers *v.* Metcalf, 39 Ill. 307; Smith *v.* Hunt, 1 McCord (S. C.) 449; Haisten *v.* Hixen, 3 Sneed (Tenn.) 691.

20. Bullard *v.* Bullard, 112 Iowa 423, 84 N. W. 513; Parker *v.* McNeill, 12 Sm. & M. (Miss.) 355. See also cases cited in the next note.

21. Young *v.* Foute, 43 Ill. 33; Ayers *v.* Metcalf, 39 Ill. 307; Dufield *v.* Cross, 12 Ill. 397; Reardon *v.* Clover, 81 Ill. App. 526; Dick *v.* Marble, 51 Ill. App. 351 (written admission); King *v.* Ford River Lumber Co., 93 Mich. 172, 53 N. W. 10; Prewett *v.* Coopwood, 30 Miss. 369; Wall *v.* New York Cent., etc., R. Co., 56 N. Y. App. Div. 599, 67 N. Y. Suppl. 519.

22. **Oral admissions.**— *Alabama.*— Wittick *v.* Keiffer, 31 Ala. 199.

Delaware.— Levy *v.* Gillis, 1 Pennew. 119, 39 Atl. 785.

Georgia.—Smith *v.* Page, 72 Ga. 539; Ector *v.* Welsh, 29 Ga. 443; Solomon *v.* Solomon, 2 Ga. 18.

Illinois.— Straubher *v.* Mohler, 80 Ill. 21; Chicago, etc., R. Co. *v.* Button, 68 Ill. 409, 411; Mauro *v.* Platt, 62 Ill. 450, 452; Frizell *v.* Cole, 29 Ill. 465; Ray *v.* Bell, 24 Ill. 444; Patterson *v.* Houston, 92 Ill. App. 624. See also Metheny *v.* Bohn, 160 Ill. 263, 43 N. E. 380.

Indiana.— Anderson *v.* State, 26 Ind. 89. See also Hill *v.* Newman, 47 Ind. 187; Gimbel *v.* Hufford, 46 Ind. 125.

they consist of casual remarks or expressions carelessly made,[23] or "uncertain, conflicting, contradicting, vacillating utterances,"[24] or where they are not made on the party's personal knowledge of the facts.[25] The fact that the party was intoxicated[26] or under the influence of opiates,[27] or had a motive to deceive the witness,[28] detracts from the weight of an admission. But a contrary effect may be produced where the party had a strong motive for telling the truth,[29] where truth was more serviceable to him at the time than falsehood,[30] or where the

Iowa.— Keller *v.* Jackson, 58 Iowa 629, 12 N. W. 618; Martin *v.* Algona, 40 Iowa 390; Wallace *v.* Berger, 14 Iowa 183. See also Clark *v.* Clark, 40 Iowa 698.

Kentucky.— Becker *v.* Crow, 7 Bush 198; Higgs *v.* Wilson, 3 Metc. 337; Botts *v.* Williams, 17 B. Mon. 687; Western *v.* Pollard, 16 B. Mon. 315; Colyer *v.* Langford, 1 A. K. Marsh. 174, 238. See also Milton *v.* Hunter, 13 Bush 163.

Louisiana.— See Whitney *v.* Lyon, 18 La. 26.

Maine.— Robinson *v.* Stuart, 68 Me. 61; Baker *v.* Vining, 30 Me. 121, 50 Am. Dec. 617.

Maryland.— See Davis *v.* Gemmell, 70 Md. 356, 17 Atl. 259.

Massachusetts.— Wallis *v.* Truesdell, 6 Pick. 455, 457.

Minnesota.— Tozer *v.* Hershey, 15 Minn. 257.

Missouri.— See Kirkwood Gymnasium, etc., Assoc. *v.* Van Ness, 61 Mo. App. 361.

Montana.— Arnold *v.* Sinclair, 12 Mont. 248, 29 Pac. 1124; Kelley *v.* Cable Co., 8 Mont. 440, 20 Pac. 669.

New Hampshire.— Wells *v.* Jackson Iron Co., 48 N. H. 491.

New Jersey.— Moore *v.* Central R. Co., 24 N. J. L. 268, 281; Herbert *v.* Herbert, 49 N. J. Eq. 70, 22 Atl. 789; Lynch *v.* Clements, 24 N. J. Eq. 431, 436.

New York.— Davis *v.* Davis, 7 Daly 308; Hadden *v.* New York Silk Mfg. Co., 1 Daly 388. See also Latham *v.* Delany, 15 N. Y. Suppl. 146.

Ohio.— Horning *v.* Poyer, 18 Ohio Cir. Ct. 732, 6 Ohio Cir. Dec. 370.

Pennsylvania.—*In re* Krug, 196 Pa. St. 484, 46 Atl. 484; Rummer's Appeal, 121 Pa. St. 649, 15 Atl. 647; Greenawalt *v.* McEnelley, 85 Pa. St. 352, 356, Gabler's Appeal, 5 Cent. Rep. 314.

Tennessee.— Spurlock *v.* Brown, 91 Tenn. 241, 18 S. W. 868; Hamilton *v.* Zimmerman, 5 Sneed 39; Miller *v.* Denman, 8 Yerg. 233.

Texas.— Renn *v.* Sanios, 33 Tex. 760.

Virginia.— See Kane *v.* O'Connors, 78 Va. 76.

West Virginia.— See Allen *v.* Yeater, 17 W. Va. 128.

Wisconsin.— Nash *v.* Hoxie, 59 Wis. 384, 18 N. W. 408; Saveland *v.* Green, 40 Wis. 431; Dreher *v.* Fitchburg, 22 Wis. 675, 99 Am. Dec. 91; Husbrook *v.* Strauser, 14 Wis. 403. See also Rodman *v.* Rodman, 112 Wis. 378, 88 N. W. 218.

United States.—Berg *v.* Thistle, 3 Fed. Cas. No. 1,337; Nieto *v.* Clark, 18 Fed. Cas. No. 10,262, 1 Cliff. 145; Risley *v.* Indianapolis, etc., R. Co., 20 Fed. Cas. No. 11,859, 7 Biss. 408; The Sea Breeze, 21 Fed. Cas. No. 12,572*a*, 2 Hask. 510; U. S. *v.* Smith, 27 Fed. Cas. No. 16,342*a*. See also Union Mut. L. Ins. Co. *v.* Masten, 3 Fed. 881; Johnson *v.* The Industry, 13 Fed. Cas. No. 7,391, Hoff. Op. 488.

See 20 Cent. Dig. tit. "Evidence," § 1050.

Admissions in writing.—*California.*—Moore *v.* Grayson, 132 Cal. 602, 64 Pac. 1074. See also Harrison *v.* Peabody, 34 Cal. 178.

Florida.— Williams *v.* Williams, 23 Fla. 324, 2 So. 768; Chaires *v.* Brady, 10 Fla. 133, 141.

Georgia.— McGinnis *v.* Chamberlain, 30 Ga. 32.

Iowa.— Buford *v.* McGetchie, 60 Iowa 298, 14 N. W. 790.

Nebraska.— New Orleans Coffee Co. *v.* Hutchinson, (1903) 95 N. W. 1017.

New Jersey.— Ward *v.* Cooke, 17 N. J. Eq. 93.

New York.— Kehr *v.* Stauf, 12 Daly 115; Molloy *v.* New York Cent., etc., R. Co., 10 Daly 453; Davis *v.* Davis, 7 Daly 308; *In re* Pool, 8 Misc. 284, 28 N. Y. Suppl. 707; Stevens *v.* Trask, 18 N. Y. Suppl. 117; Boyd *v.* Colt, 20 How. Pr. 384; Wright *v.* Wright, 4 Redf. Surr. 345, 349.

Pennsylvania.— Peter's Estate, 20 Pa. Super. Ct. 223.

See 20 Cent. Dig. tit. "Evidence," §§ 1050, 1167. As to the probative force of receipts for money see, generally, PAYMENT.

23. Thurmond *v.* Sanders, 21 Ark. 255; Printup *v.* Mitchell, 17 Ga. 558, 567, 63 Am. Dec. 258; Frizell *v.* Cole, 29 Ill. 465; Earp *v.* Edgington, 107 Tenn. 23, 64 S. W. 40.

24. *In re* Schiehl, 179 Pa. St. 308, 36 Atl. 181.

25. Wynn *v.* Garland, 16 Ark. 440; Great Western R. Co. *v.* McDonald, 18 Ill. 172; Stephens *v.* Vroman, 18 Barb. (N. Y.) 250. See also Clinton Mut. F. Ins. Co. *v.* Zeigler, 101 Ill. App. 165; Wells *v.* Jackson Iron Mfg. Co., 48 N. H. 491.

26. Chapman *v.* Woodward, 16 La. Ann. 167.

27. Copley *v.* Union Pac. R. Co., 26 Utah 361, 73 Pac. 517.

28. Jones *v.* Tyler, 6 Mich. 364 (admission by a father to a creditor of the son which might favor the latter); Smock *v.* Smock, 11 N. J. Eq. 156, 166. See also King *v.* Ford River Lumber Co., 93 Mich. 172, 53 N. W. 10; Barziza *v.* Graves, 25 Tex. 322; Bagly *v.* Birmingham, 23 Tex. 453.

29. Berg *v.* Thistle, 3 Fed. Cas. No. 1,337.

30. New York F. Ins. Co. *v.* Tooker, 35 N. J. Eq. 408.

admission was made voluntarily to a confidential friend,[31] or is corroborated by other evidence in the case.[32] Admissions may be explained or qualified, and the party is at liberty to show that the fact admitted by him did not exist,[33] but cogent proof is required in order thus to overcome a deliberate admission,[34] especially a written admission.[35]

(B) *Tacit Admissions.* The weight of admissions by silence when statements are made in the presence of a party[36] depends upon the force of the circumstances and the motives which impel a denial if the statements are untrue.[37] Under some circumstances a party's silence may militate strongly against him,[38] but an adverse inference is always to be drawn with extreme caution,[39] especially where the statement is made by a stranger to the controversy;[40] and the evidence is of very little value where the silent party had no means of knowing the truth or falsity of the statement.[41]

2. Conclusiveness of Evidence — a. On Party Introducing It. A party may call witnesses or produce other evidence to prove a particular fact, although the testimony of witnesses who have previously testified on his behalf in the cause is thereby contradicted.[42] Where a party's own testimony makes out a case the contradictory testimony of his own witnesses does not destroy it as a matter of law;[43] and conversely a party's own testimony may be rejected and the facts may be found in accordance with the testimony of other witnesses, on whatever side called.[44] Nor is a party necessarily concluded by the testimony of his adversary whom he calls as a witness.[45] By introducing documentary evidence a party does not in general preclude himself from contradicting it.[46]

31. McDonald *v.* McDonald, 142 Ind. 55, 41 N. E. 336.

32. Schutt *v.* Shreveport Belt, etc., R. Co., 109 La. 500, 33 So. 577.

33. See Evidence, 16 Cyc. 1045, 1046.

34. Spurlock *v.* Brown, 91 Tenn. 241, 18 S. W. 868. See also Evidence, 16 Cyc. 1047.

35. Moore *v.* Grayson, 132 Cal. 602, 64 Pac. 1074.

36. **Admissions by silence or acquiescence** see Evidence, 16 Cyc. 956 *et seq.*

37. St. Joseph, etc., Co. *v.* Globe, etc., Co., 156 Ind. 665, 59 N. E. 995; Allison *v.* Barrow, 3 Coldw. (Tenn.) 414, 91 Am. Dec. 291; Pierce *v.* Pierce, 66 Vt. 369, 29 Atl. 364; Morris *v.* Norton, 75 Fed. 912, 21 C. C. A. 553.

38. Wheat *v.* Croom, 7 Ala. 349. See also Pickslay *v.* Starr, 149 N. Y. 432, 44 N. E. 163, 32 L. R. A. 703, 52 Am. St. Rep. 740.

39. *Alabama.*— Abercrombie *v.* Allen, 29 Ala. 281.

Mississippi.— Hall *v.* Thompson, 1 Sm. & M. 443.

New Hampshire.— Corser *v.* Paul, 41 N. H. 24, 77 Am. Dec. 753.

New York.—Waring *v.* U. S. Telegraph Co., 44 How. Pr. 69; Le Ban *v.* Vanderbilt, 3 Redf. Surr. 384, 395.

Vermont.— Hersey *v.* Barton, 23 Vt. 685. See also Benne *v.* Benne, 56 Mo. App. 504; and cases cited in Evidence, 16 Cyc. 960 note 54.

40. Whitney *v.* Houghton, 127 Mass. 527; Larry *v.* Sherburne, 2 Allen (Mass.) 34.

41. Corser *v.* Paul, 41 N. H. 24, 29, 77 Am. Dec. 753.

42. Rockwood *v.* Poundstone, 38 Ill. 199; Blackwell *v.* Wright, 27 Nebr. 269, 43 N. W. 116, 20 Am. St. Rep. 662; McArthur *v.* Sears, 21 Wend. (N. Y.) 190; Swift *v.* Short, 92 Fed. 567, 34 C. C. A. 545. See, generally, Witnesses.

"A deposition does not differ in that respect from the oral evidence of a witness." Von Tobel *v.* Stetson, etc., Mill Co., 32 Wash. 683, 687, 73 Pac. 788.

43. Kohler *v.* Pennsylvania R. Co., 135 Pa. St. 346, 19 Atl. 1049.

44. Hill *v.* West End St. R. Co., 158 Mass. 458, 459, 33 N. E. 582, where Barker, J., said: "The law recognizes the fact that parties, as well as other witnesses, may honestly mistake the truth." See also Ephland *v.* Missouri Pac. R. Co., 57 Mo. App. 147; Culberson *v.* Chicago, etc., R. Co., 50 Mo. App. 556. *Compare* Feary *v.* Metropolitan St. R. Co., 162 Mo. 75, 62 S. W. 452.

45. Schmidt *v.* Durnham, 50 Minn. 96, 52 N. W. 277; Becker *v.* Koch, 104 N. Y. 394, 10 N. E. 701, 58 Am. Rep. 515; Newman *v.* Clapp, 20 Misc. (N. Y.) 67, 44 N. Y. Suppl. 439; Universal Bag Co. *v.* Fensley, 18 Misc. (N. Y.) 408, 42 N. Y. Suppl. 776; Mair *v.* Culy, 10 U. C. Q. B. 321. See also Citizens' Nat. Bank *v.* Wilson, 121 Iowa 156, 96 N. W. 727.

46. *Georgia.*— Merchants' Bank *v.* Rawls, 7 Ga. 191, 50 Am. Dec. 394.

Iowa.— Henny Buggy Co. *v.* Patt, 73 Iowa 485, 35 N. W. 587. See also Dowdell *v.* Wilcox, 58 Iowa 199, 12 N. W. 271.

Kansas.— See Douglass *v.* Huhn, 24 Kan. 766.

Kentucky.— See Chrisman *v.* Gregory, 4 B. Mon. 474.

Massachusetts.— Kingman *v.* Tirrell, 11 Allen 97; Fogg *v.* Farr, 16 Gray 396; Raymond *v.* Nye, 5 Metc. 151. *Compare* Fish *v.* Bangs, 113 Mass. 123.

b. Evidence as to Value. Market value of an article[47] or the price for which it was sold on execution[48] or at auction[49] is not conclusive evidence of actual value.

D. Circumstantial Evidence and Credibility of Witnesses — 1. Circumstantial Evidence. As in criminal cases,[50] so in civil cases at law or in equity a well connected train of circumstances is as cogent of the existence of a fact as any array of direct evidence,[51] and frequently outweighs opposing direct testimony.[52] There is no rule that circumstances sufficient to establish a fact shall have the force and effect of the direct testimony of at least one credible witness.[53] A conclusion is not supported by circumstantial evidence unless the facts relied on are of such a nature and so related to each other that no other conclusion can fairly or reasonably be drawn from them,[54] and this requirement is strictly enforced where decisive direct evidence is probably obtainable, but is not produced.[55] *A fortiori* the circumstances must agree with and support the hypothesis which they are adduced to prove.[56] A fact cannot be established by circumstances which are perfectly consistent with direct, uncontradicted, and unimpeached testimony that the fact does not exist.[57] Where circumstantial evidence is relied upon the circumstances must be proved and not themselves presumed.[58]

Mississippi.— Handy *v.* Andrews, 52 Miss. 626.

New Hampshire.— Conner *v.* New England Steam, etc., Pipe Co., 40 N. H. 537.

New York.— Brown *v.* Klock, 1 Silv. Supreme 273, 5 N. Y. Suppl. 245; Walden *v.* Sherburne, 15 Johns. 409. See also Pringle *v.* Leverich, 97 N. Y. 181, 49 Am. Rep. 522. *Compare* Springer *v.* Westcott, 78 Hun 365, 29 N. Y. Suppl. 149; Jackson *v.* Harrington, 9 Cow. 86.

Pennsylvania.— See Parry *v.* Parry, 130 Pa. St. 94, 18 Atl. 628. *Compare* McCord *v.* Durant, 134 Pa. St. 184, 19 Atl. 489.

See 20 Cent. Dig. tit. "Evidence," §§ 2442, 2443.

Compare Maclin *v.* New England Mut. L. Ins. Co., 33 La. Ann. 801; Verret *v.* Belanger, 6 La. Ann. 109.

47. Waldo *v.* Gray, 14 Ill. 184; Findlay *v.* Pertz, 74 Fed. 681, 20 C. C. A. 662.

48. Stott *v.* Harrison, 73 Ind. 17.

49. Carnes *v.* Polk, 5 Heisk. (Tenn.) 244; Galveston Wharf Co. *v.* McYoung, 2 Tex. App. Civ. Cas. § 612.

50. See Criminal Law, 12 Cyc. 487 *et seq.*

51. *Florida.*— Orman *v.* Barnard, 5 Fla. 528.

Indiana.— Albrecht *v.* C. C. Foster Lumber Co., 126 Ind. 318, 26 N. E. 157.

Louisiana.— Crawford *v.* Cheney, 3 Mart. N. S. 142.

Missouri.— Rice *v.* McFarland, 41 Mo. App. 489.

Washington.— Anderson *v.* Northern Pac. R. Co., 19 Wash. 340, 53 Pac. 345.

See 20 Cent. Dig. tit. "Evidence," § 2436.

A verdict may be based on circumstantial evidence. Culbertson *v.* Hill, 87 Mo. 553.

The fact of notoriety may be established by circumstantial evidence. Crow *v.* Harrod, Hard. (Ky.) 435.

Date of an occurrence may be established by circumstantial evidence. Sherburne *v.* Brown, 43 N. H. 80.

52. *Georgia.*— Bowie *v.* Maddox, 29 Ga. 285, 74 Am. Dec. 61.

Iowa.— Babcock *v.* Chicago, etc., R. Co., 62 Iowa 593, 13 N. W. 740, 17 N. W. 909.

New York.— New York Ferry Co. *v.* Moore, 102 N. Y. 667, 6 N. E. 293; Metropolitan Bank *v.* Smith, 4 Rob. 229.

Pennsylvania.— Com. *v.* Harman, 4 Pa. St. 269.

Tennessee.— Ridley *v.* Ridley, 1 Coldw. 323.

Virginia.— Moore *v.* Ullman, 80 Va. 307.

West Virginia.— Davis Sewing Mach. Co. *v.* Dunbar, 29 W. Va. 617, 2 S. E. 91.

United States.— The Struggle *v.* U. S., 9 Cranch 71, 3 L. ed. 660; U. S. *v.* Pacific Express Co., 15 Fed. 867; Huchberger *v.* Merchants' F. Ins. Co., 12 Fed. Cas. No. 6,822, 4 Biss. 265.

See 20 Cent. Dig. tit. "Evidence," § 2436.

53. Bixby *v.* Carskaddon, 55 Iowa 533, 8 N. W. 354.

54. Wheelan *v.* Chicago, etc., R. Co., 85 Iowa 167, 52 N. W. 119; Asbach *v.* Chicago, etc., R. Co., 74 Iowa 248, 37 N. W. 182. See also Bolar *v.* Williams, 14 Nebr. 386, 15 N. W. 716; Lopez *v.* Campbell, 163 N. Y. 340, 57 N. E. 501; Plummer *v.* Baskerville, 36 N. C. 252. But the circumstances need not, as in criminal cases (see Criminal Law, 12 Cyc. 488), preclude any other conclusion beyond a reasonable doubt. Rippey *v.* Miller, 46 N. C. 479, 63 Am. Dec. 177.

55. Jones *v.* Davis, 13 Fed. Cas. No. 7,460, 1 Abb. Adm. 446.

56. Indianapolis, etc., R. Co. *v.* Collingwood, 71 Ind. 476. See also Plummer *v.* Baskerville, 36 N. C. 252.

57. Frazier *v.* Georgia R., etc., Co., 108 Ga. 807, 33 S. E. 996.

58. Lewis *v.* Lake Erie, etc., R. Co., 13 Ky. L. Rep. 144. See also Wroth *v.* Norton, 33 Tex. 192; and cases cited in Evidence, 16 Cyc. 1051 notes 7, 8.

2. Credibility of Witnesses — a. In General. "It is impossible to prescribe any fixed rule by which the credibility of the witness is to be tested."[59] Various circumstances affecting credibility have already been noticed.[60] Other and multitudinous considerations tending to enhance or impair the credibility of testimony are fully discussed elsewhere in this work.[61]

b. Witnesses Interested or Otherwise Biased. A biased witness is one who has a motive to color his statements, to suppress the truth, or to state what is false.[62] While pecuniary interest of the witness is the most common source of bias, close relationship to the party for whom he testifies,[63] hostility to the opposite party,[64] or any other circumstance which, according to common observation and experience, tends to create a partisan feeling,[65] also gives rise to bias. If a witness is biased his testimony to mere matter of opinion or judgment should usually be more or less discounted before it is accepted as a means of ascertaining truth.[66] Deliberate perjury, however, is not to be imputed to him without strong reason, and his testimony to matters of fact on his personal knowledge is ordinarily entitled *prima facie* to the credence awarded to the testimony of other witnesses,[67] but if it conflicts with probabilities or is contradicted by other apparently credible witnesses having equal means of knowledge, the disagreement is very generally reconciled by charging his testimony to mistake or defective memory.[68]

E. Sufficiency of Evidence — 1. In General. Evidence, although conflicting, is sufficient to support a finding or verdict where it meets the requirements of clearness, certainty, and convincing force in the particular case,[69] or supplies reasonable grounds for inferring the essential facts.[70] On the other hand testimony consisting of a mere legal conclusion[71] or utterly destitute of reasonable precision[72] is insufficient.

2. Of Single Witness. In the trial of civil cases at common law[73] or in equity

59. U. S. *v.* Lee Huen, 118 Fed. 442, 459, per Ray, D. J.

60. See for example *supra*, XVII, B, 11; XVII, C, 1, h, (I), (D), (E).

61. See, generally, Witnesses.

62. See Andrews *v.* Hyde, 1 Fed. Cas. No. 377, 3 Cliff. 516. And see, generally, Witnesses.

63. Thomas *v.* Ribble, (Va. 1896) 24 S. E. 241; Lockwood *v.* Lockwood, 2 Curt. Eccl. 281.

64. Lockwood *v.* Lockwood, 2 Curt. Eccl. 281.

65. Philadelphia *v.* Reeder, 173 Pa. St. 281, 34 Atl. 17. See also Evans *v.* Hettick, 8 Fed. Cas. No. 4,562, 3 Wash. 408.

66. Gilooley *v.* Pennsylvania R. Co., 10 Fed. Cas. No. 5,448*b*.

67. Lockwood *v.* Lockwood, 2 Curt. Eccl. 281. See also Evans *v.* Hettick, 8 Fed. Cas. No. 4,562, 3 Wash. 408.

68. See, generally, Witnesses, where the manifold aspects of bias are fully discussed. Memory of biased witnesses see *supra*, XVII, B, 9, b.

69. Peck *v.* Farnham, 24 Colo. 141, 49 Pac. 364.

70. Riehl *v.* Evansville Foundry Assoc., 104 Ind. 70, 3 N. E. 633. See also *infra*, XVII, E, 3. Testimony that there were five or six families residing in a village will support a finding that there were six families residing there. Mikael *v.* Equitable Securities Co., (Tex. Civ. App. 1903) 74 S. W. 67. Testimony of plaintiff that his earnings averaged twenty dollars per week, but that he kept no books of account, and therefore could not give the items, was held sufficient to sustain a finding that his earnings amounted to the sum stated, where he gave the names of some of his employers and defendant produced no evidence to contradict after being thus apprised of possible witnesses to disprove his story if untrue. Howard *v.* St. Lawrence Life Assoc., 20 Misc. (N. Y.) 118, 45 N. Y. Suppl. 110.

71. Chicago Gen. R. Co. *v.* Kluczynski, 79 Ill. App. 221, "a mere statement by a witness that the defendant owes the plaintiff, without proof of any consideration or promise, either express or implied, or of any antecedent fact."

72. A son-in-law having spent money in improving his father-in-law's land, under a promise that it would be given to his wife, it was attempted to set off against this claim certain of his grocery bills, alleged to have been paid by the father-in-law. The only evidence in support of the claim was that of the son-in-law, who was unable to tell the amount or the time of the payments, and it was held that this evidence did not support the claim. Mechanics' Sav. Bank, etc., Co. *v.* Scoggin, (Tenn. Ch. App. 1899) 52 S. W. 718.

73. By La. Rev. Civ. Code, art. 2277, testimony of one witness, unsupported by corroborating circumstances, is insufficient to prove a contract where the amount exceeds five hundred dollars. For cases applying or

suits[74] no more than one witness is required to establish any fact,[75] except the fact of reputation or notoriety.[76] Thus a lost or destroyed will may be established by testimony to its contents by a single witness.[77] In the numerous cases holding or intimating that the particular fact in dispute could not be established or negatived by the uncorroborated testimony of one witness, more especially of an interested witness, it will be found that cogent reasons of public policy controlled,[78] or that the testimony was opposed by a strong presumption of law,[79] the presumption, for example, of the truth of an officer's return of service of process,[80] of the verity of an officer's certificate of acknowledgment,[81] or that a deed duly

construing the statute see Piffet's Succession, 37 La. Ann. 871; State *v.* Judge First City Ct., 37 La. Ann. 380; Goepper *v.* Lusse, 30 La. Ann. 392; Webster *v.* Burke, 24 La. Ann. 137; Field *v.* Harrison, 20 La. Ann. 411; Goldsmith *v.* Friedlander, 20 La. Ann. 119; Brady *v.* McWilliams, 19 La. Ann. 433; Stribling *v.* Stewart, 19 La. Ann. 71; Trabue *v.* Short, 18 La. Ann. 257; De St. Romes *v.* New Orleans, 18 La. Ann. 210; Alexander *v.* School Directors, 16 La. Ann. 191; Jones *v.* Fleming, 15 La. Ann. 522; O'Brien *v.* Flynn, 8 La. Ann. 307; Stancill *v.* Gilmore, 6 La. Ann. 763; Bach *v.* Cornen, 5 La. Ann. 109; Palmer *v.* Dinn, 2 La. Ann. 536; McCrea *v.* Marshall, 1 La. Ann. 29; Brent *v.* Slack, 10 Rob. 371; Freret *v.* Meux, 9 Rob. 414; Warfield *v.* Ludewig, 9 Rob. 240; Delassize's Succession, 8 Rob. 259; Segond's Succession, 7 Rob. 111; Derbes *v.* Decuir, 5 Rob. 491; Rost *v.* Henderson, 4 Rob. 468; Leeds *v.* Debuys, 4 Rob. 257; Robbins *v.* Lambeth, 2 Rob. 304; St. Helena Police Jury *v.* Fluker, 1 Rob. 389; Littell *v.* Marshall, 1 Rob. 51; Gillispie *v.* Day, 19 La. 263; Flower *v.* Millaudon, 19 La. 185; Rouzan *v.* Rouzan, 18 La. 425; Shewell *v.* Raguet, 17 La. 457; Gasquet *v.* Kokernot, 5 La. 266; Cornier *v.* Le Blanc, 8 Mart. N. S. 457; Cavelier *v.* Collins, 3 Mart. 188.

74. In equity.— See Snyder *v.* Harris, (N. J. Ch. 1901) 48 Atl. 329. But as to the measure of proof required to overcome a responsive answer of a defendant see 16 Cyc. 392 *et seq.*

75. *Alabama.*— Garner *v.* Toney, 107 Ala. 352, 18 So. 161; Thompson *v.* Boswell, 97 Ala. 570, 12 So. 809; Godwin *v.* Yonge, 22 Ala. 553.

California.— People *v.* Westlake, 62 Cal. 303.

Colorado.— Shapleigh *v.* Hull, 21 Colo. 419, 41 Pac. 1108; Moyle *v.* Hocking, 10 Colo. App. 446, 51 Pac. 533.

Kentucky.— Albro *v.* Lawson, 17 B. Mon. 642.

Mississippi.— Louisville, etc., R. Co. *v.* Tate, 70 Miss. 348, 12 So. 333.

Montana.— Story *v.* Maclay, 6 Mont. 492, 13 Pac. 198.

New York.— Crown *v.* Orr, 24 N. Y. Suppl. 620.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Alvord, 128 Pa. St. 42, 18 Atl. 391; Weaver *v.* Craighead, 104 Pa. St. 288.

Tennessee.— Standard Loan, etc., Ins. Co. *v.* Thornton, 97 Tenn. 1, 40 S. W. 136.

Texas.— International, etc., R. Co. *v.* Mills, (Civ. App. 1903) 78 S. W. 11.

United States.— U. S. *v.* Brown, 24 Fed. Cas. No. 14,662, Deady 566 (action for a statutory penalty); Whitney *v.* Emmett, 29 Fed. Cas. No. 17,585, Baldw. 303.

Proof of adultery or other marital misconduct as ground for divorce see Brown *v.* Brown, (N. J. Err. & App. 1901) 50 Atl. 608; and cases cited in DIVORCE, 14 Cyc. 687 note 46.

Perjury directly charged cannot be proved by the uncorroborated testimony of one witness. See *supra*, XVII, A, 3, b, (II).

76. Watts *v.* Lindsey, 7 Wheat. (U. S.) 158, 162, 5 L. ed. 423.

77. Skeggs *v.* Horton, 82 Ala. 352, 2 So. 110; Dickey *v.* Malechi, 6 Mo. 177, 34 Am. Dec. 130; Graham *v.* O'Fallon, 4 Mo. 601; Varnon *v.* Varnon, 67 Mo. App. 534; Wyckoff *v.* Wyckoff, 16 N. J. Eq. 401. And see, generally, WILLS.

78. In divorce cases.— "It is a well settled rule of the court, that in questions of divorce guilt cannot be established by the unsupported testimony of either of the parties." Cummins *v.* Cummins, 15 N. J. Eq. 138, 142, per Green, Ch. And see cases cited in DIVORCE, 14 Cyc. 688, 689.

79. The most common of these presumptions is the presumption that a written instrument expresses the real intention of the parties (Hoffman *v.* Bloomsburg, etc., R. Co., 157 Pa. St. 174, 27 Atl. 564; Van Voorhis *v.* Rea, 153 Pa. St. 19, 25 Atl. 800; Walt *v.* Kulp, 9 Montg. Co. Rep. (Pa.) 45), particularly where it is sought by parol evidence of a single witness to reform the instrument on the ground of fraud or mistake (Crilly *v.* Board of Education, 54 Ill. App. 371; *In re* Sutch, 201 Pa. St. 305, 50 Atl. 943; Meiswinkel *v.* St. Louis F. & M. Ins. Co., 75 Wis. 147, 43 N. W. 669, 6 L. R. A. 200; McClellan *v.* Sanford, 26 Wis. 595), to establish a parol trust in contravention of its terms (Pierce *v.* Fort, 60 Tex. 464), or to prove that an absolute deed was intended as a mortgage (Sidway *v.* Sidway, 4 Silv. Supreme (N. Y.) 124, 7 N. Y. Suppl. 421; Mackelroy *v.* House, (Tex. Civ. App. 1899) 52 N. W. 1038. See Andrews *v.* Hyde, 1 Fed. Cas. No. 377, 3 Cliff. 516). See also *supra*, XVII, A, 4. And see, generally, MORTGAGES; REFORMATION OF INSTRUMENTS; TRUSTS.

80. Loeb *v.* Waller, 110 Ala. 487, 18 So. 268; O'Donnell *v.* Kelliher, 62 Ill. App. 641. And see, generally, PROCESS.

81. Warrick *v.* Hull, 102 Ill. 280; McPherson *v.* Sanborn, 88 Ill. 150; Phillips *v.* Bishop, 35 Nebr. 487, 53 N. W. 375; Smith

executed and acknowledged and in possession of the grantee was duly delivered to him.[82]

3. Inferences From Evidence. When a material fact is not proved by direct testimony, it may be rationally inferred by the court or jury from the facts which have been so proved,[83] even though the inference be not a necessary one.[84] But judgment must be exercised in accordance with correct and common modes of reasoning,[85] and an inference should not be adopted from a few of the facts proved when it is absolutely inconsistent with, and repelled by, other equally well proved facts.[86] Mere possibilities will not sustain a legitimate inference of the existence of a fact.[87]

4. Availability on Any Issue of Evidence Introduced Generally. Evidence introduced without restriction is available on any issue which it tends to prove,[88] and which is within the pleadings.[89] But if the evidence is limited to a particular

v. Allis, 52 Wis. 337, 9 N. W. 155; and cases cited in Acknowledgments, 1 Cyc. 624 *et seq.*

82. Benson *v.* Woolverton, 15 N. J. Eq. 158.

83. *Connecticut.*— C. & C. Electric Motor Co. *v.* Frisbie, 66 Conn. 67, 33 Atl. 604.

Illinois.— North Chicago St. R. Co. *v.* Rodert, 203 Ill. 413, 67 N. E. 812 [*affirming* 105 Ill. App. 314]; International Bank *v.* Jones, 20 Ill. App. 125.

Indiana.— McCarty *v.* State, 162 Ind. 218, 70 N. E. 131; Chicago, etc., R. Co. *v.* Thomas, (Sup. 1900) 55 N. E. 861; Riehl *v.* Evansville Foundry Assoc., 104 Ind. 70, 3 N. E. 633; Indianapolis St. R. Co. *v.* Bordenchecker, (App. 1904) 70 N. E. 995; Rauh *v.* Waterman, 29 Ind. App. 344, 61 N. E. 743, 63 N. E. 42.

Iowa.— Walkley *v.* Clarke, 107 Iowa 451, 78 N. W. 70.

Maryland.—McLaughlin *v.* McLaughlin, 80 Md. 115, 30 Atl. 607; Phelps *v.* George's Creek, etc., R. Co., 60 Md. 536.

Massachusetts.— Dix *v.* Atkins, 128 Mass. 43.

Missouri.— Tailer *v.* M. J. Murphy Furnishing Goods Co., 24 Mo. App. 420.

Nebraska.— Chicago, etc., R. Co. *v.* Hildebrand, 42 Nebr. 33, 60 N. W. 335.

New Hampshire.— Clark *v.* Manchester, 64 N. H. 471, 13 Atl. 867.

New Jersey.— Edgeworth *v.* Wood, 58 N. J. L. 463, 33 Atl. 940.

New York.— Shook *v.* Lyon, 16 Daly 420, 11 N. Y. Suppl. 720.

Texas.— Emmons *v.* Oldland, 12 Tex. 18.

Wisconsin.— West *v.* Eau Claire, 89 Wis. 31, 61 N. W. 313.

England.— Pickup *v.* Thames, etc., Mar. Ins. Co., 3 Q. B. D. 594, 4 Aspin. 43, 47 L. J. Q. B. 749, 39 L. T. Rep. N. S. 341, 26 Wkly. Rep. 689.

See 20 Cent. Dig. tit. "Evidence," § 2444. See also cases cited in Evidence, 16 Cyc. 1050 note 1.

Due execution of a deed may be inferred from the fact that a mortgage was executed at the same time by the grantee with all required formalities. Godfroy *v.* Disbrow, Walk. (Mich.) 260.

Pain may be inferred from the crushing and mangling and subsequent amputation of a person's arm. Chicago, etc., R. Co. *v.* Warner, 108 Ill. 538. See also Cook *v.* Missouri Pac. R. Co., 19 Mo. App. 329.

Identity of sender of message.— Proof of the receipt of a telegram under circumstances similar to those under which similar messages were received from the same person authorizes an inference in the absence of opposing proof, that it was sent by the person from whom it purported to come. Pullman Palace Car Co. *v.* Nelson, 22 Tex. Civ. App. 223, 54 S. W. 624.

Identity of miscreant.— A party caught shooting an animal may be inferred to have been the one who fired a shot an hour before which wounded the same animal. Landell *v.* Hotchkiss, 1 Thomps. & C. (N. Y.) 580.

Agreement to forbear suit may be inferred from acceptance of the guaranty of a third person for a certain period, and actual forbearance during that time. Breed *v.* Hillhouse, 7 Conn. 523.

84. Clark *v.* Manchester, 64 N. H. 471, 13 Atl. 867. See also Criminal Law, 12 Cyc. 490 note 80.

85. *Alabama.*— Hollingsworth *v.* Martin, 23 Ala. 591; Dubose *v.* Young, 14 Ala. 139.

Illinois.— Jolivette *v.* Young, 103 Ill. App. 394.

Kentucky.— Duncan *v.* Littell, 2 Bibb 424.

Maine.— Warren *v.* Coombs, 20 Me. 139.

Maryland.— Brooke *v.* Quynn, 13 Md. 379.

New York.— O'Reilly *v.* Brooklyn Heights R. Co., 82 N. Y. App. Div. 492, 81 N. Y. Suppl. 572.

United States.— Cunard Steamship Co. *v.* Kelley, 126 Fed. 610, 617, 61 C. C. A. 532.

See 20 Cent. Dig. tit. "Evidence," § 2444. See also cases cited in Criminal Law, 12 Cyc. 490; and Evidence, 16 Cyc. 1050 note 1.

86. Cunard Steamship Co. *v.* Kelley, 126 Fed. 610, 617, 61 C. C. A. 532.

87. Baltimore, etc., R. Co. *v.* State, 71 Md. 590, 18 Atl. 969. See also *supra*, XVII, A, 2.

88. Riverside Water Co. *v.* Gage, 108 Cal. 240, 41 Pac. 299; Sears *v.* Starbird, 78 Cal. 225, 20 Pac. 547; Diversy *v.* Kellogg, 44 Ill. 114, 92 Am. Dec. 154; Porter *v.* Seiler, 23 Pa. St. 424, 62 Am. Dec. 341.

89. Riverside Water Co. *v.* Gage, 108 Cal. 240, 41 Pac. 299; White *v.* Merrill, 82 Cal. 14, 22 Pac. 1129.

purpose its effect must be confined to that purpose,[90] especially if the evidence would not be independently competent for any other purpose.[91] An entire book cannot be used by one party merely because the other has read and introduced a part of it.[92]

F. Particular Facts or Issues — 1. Evidence as to Value. The price paid for real property, improvements made thereon, and the amount offered to the owner for the property are important considerations in estimating its value.[93] Estimate of value of property destroyed made at or near the time of its destruction is preferable to an estimate made years afterward from memory of its condition.[94]

2. Identity. The weight of testimony to personal recognition depends greatly upon the opportunity of the witness for observation of the person and the probability that he took accurate notice,[95] as well as the lapse of time since the person was last seen,[96] and his change of features in the meanwhile.[97] The testimony is received with caution when it is inconsistent with other evidence in the case.[98] Since identity is more easily disproved than established, weakness of evidence in disproof tends to strengthen the evidence of identity.[99] Credit may be given to testimony of a witness that he recognized the voice of an acquaintance talking to him by telephone.[1] Identity of name is sufficient in the first instance as presumptive evidence of identity of person.[2]

3. Ownership. Unchallenged possession and control of property is sufficient evidence of ownership,[3] but is not conclusive.[4] A certificate of enrolment of a vessel pursuant to a federal statute is some evidence of ownership.[5] Ownership may be established against a party by proof of his tacit admission thereof.[6] One whose name and business address appear on a wagon in use on a public street is *prima facie* the owner of the vehicle.[7] Parol evidence that personal property was purchased at a sheriff's sale is not sufficient proof of title to it.[8] Ownership is not proved by testimony which consists of a mere conclusion of law with the facts left in uncertainty.[9] Testimony that title to real estate "passed" from one

90. Henry *v.* Everts, 29 Cal. 610; Roff *v.* Duane, 27 Cal. 565; Williams *v.* Chapman, 7 Ga. 467; Cooper *v.* Eastern Transp. Co., 75 N. Y. 116. But *compare* Sill *v.* Reese, 47 Cal. 294.

Testimony ruled out for one purpose but admitted for another can be used only for the latter. Macdougall *v.* Maguire, 35 Cal. 274, 95 Am. Dec. 98.

91. Sherman *v.* Stafford Mfg. Co., 23 R. I. 529, 51 Atl. 48.

92. Manchester *v.* Reserve Tp., 4 Pa. St. 35.

93. New Orleans, etc., R. Co. *v.* Barton, 43 La. Ann. 171, 9 So. 19.

94. Campbell *v.* U. S., 8 Ct. Cl. 240.

95. McGrenra *v.* McGrenra, 7 Del. Ch. 432, 44 Atl. 816; Reid *v.* Reid, 17 N. J. Eq. 101; Lee Sing Far *v.* U. S., 94 Fed. 834, 35 C. C. A. 327; Dillon *v.* Dillon, 3 Curt. Eccl. 86.

96. Sperry *v.* Tebbs, 10 Ohio Dec. (Reprint) 318, 20 Cinc. L. Bul. 181.

97. Sheehan's Estate, 139 Pa. St. 168, 20 Atl. 1003; Lee Sing Far *v.* U. S., 94 Fed. 834, 35 C. C. A. 327; *In re* Jew Wong Loy, 91 Fed. 240.

98. Tisdale *v.* Mutual Ben. L. Ins. Co., 23 Fed. Cas. No. 14,059. See also Hardy *v.* Harbin, 154 U. S. 598, 14 S. Ct. 1172, 22 L. ed. 378.

99. Mullery *v.* Hamilton, 71 Ga. 720, 51 Am. Rep. 288.

1. See Murphy *v.* Jack, 142 N. Y. 215, 36 N. E. 882, 40 Am. St. Rep. 590. See also cases cited in Criminal Law, 12 Cyc. 393 note 86.

2. Hamsher *v.* Kline, 57 Pa. St. 397. See also Celis *v.* Oriol, 6 La. 403; Kelly *v.* Valney, 5 Pa. L. J. Rep. 300; Burns *v.* Hyatt, 1 Pa. L. J. Rep. 323, 2 Pa. L. J. 302; Stebbins *v.* Duncan, 108 U. S. 32, 2 S. Ct. 313, 27 L. ed. 641; and cases cited in Evidence, 16 Cyc. 1055 note 41.

3. Murphy *v.* U. S., 14 Ct. Cl. 537. See also Phillips *v.* Poindexter, 18 Ala. 579; Crow *v.* Marshall, 15 Mo. 499.

4. Booknau *v.* Clark, 58 Nebr. 610, 79 N. W. 159.

5. McClintock *v.* Lary, 23 Ark. 215. But it is not conclusive. Gilmore *v.* Brenham, 3 La. Ann. 32.

6. Ft. Worth City Nat. Bank *v.* Martin, 70 Tex. 643, 8 S. W. 507, 8 Am. St. Rep. 632. See also Hoellerer *v.* Kaplan, 19 Misc. (N. Y.) 539, 43 N. Y. Suppl. 1035.

7. Ferguson *v.* Ehret, 14 Misc. (N. Y.) 454, 35 N. Y. Suppl. 1020; Edgeworth *v.* Wood, 58 N. J. L. 463, 33 Atl. 940. But the evidence is not conclusive. Chicago Gen. St. R. Co. *v.* Capek, 68 Ill. App. 500.

8. Dane *v.* Mallory, 16 Barb. (N. Y.) 46, holding that the judgment on which the sale was founded must be proved.

9. Hawkins *v.* Larding, 37 Ill. App. 564 [*reversed* in 141 Ill. 572, 31 N. E. 307, 33 Am. St. Rep. 347].

person to another, without further particulars, has no value whatever,[10] and mere hearsay is clearly insufficient.[11]

4. PEDIGREE. In pedigree cases[12] general reputation as to marriages, births, and deaths is highly satisfactory evidence.[13] The official register of births and baptisms is usually strong evidence of the facts stated therein[14] and better than testimony to oral declarations and admissions of strangers to the record.[15] Inscriptions on tombstones uncontradicted for many years acquire a considerable degree of authenticity,[16] but in many cases have been proven to be gross frauds.[17] Testimony of interested parties to oral declarations of persons long since dead is regarded with suspicion.[18] It can hardly overcome opposing inferences derived from official entries,[19] and is inferior in weight to testimony of witnesses who speak from personal knowledge.[20] Entries in a family bible manifestly not contemporaneous with the event recorded are of doubtful value as evidence of ancient facts.[21]

EVIDENT. Clear to the mind; obvious; plain; apparent; manifest; notorious; palpable.[1]

EVIDENTIARY FACT. A fact furnishing evidence of the existence of some other fact.[2] (See, generally, EVIDENCE.)

EVIDENTLY. In an evident manner, clearly, obviously, plainly.[3]

EVIL LIVER. In ecclesiastical law, a term applied to a person deemed unfit, through improper conduct or improper mode of living, to partake of the holy communion.[4]

EVINCE. To show clearly or make evident; make clear by convincing evidence.[5]

EX.[6] In law Latin the word "*ex*," or "*e*" as it occurs before consonants, is a preposition, used at the beginning of many phrases and maxims, meaning "from,"[7]

10. Bleckley *v.* White, 98 Ga. 594, 25 S. E. 592.

11. Hickman *v.* Willett, 28 La. Ann. 365. See also Berthlett *v.* Folsom, 21 Tex. 429.

12. See EVIDENCE, 16 Cyc. 1223 *et seq.*

13. Flowers *v.* Haralson, 6 Yerg. (Tenn.) 494, 496. See also Denoyer *v.* Ryan, 24 Fed. 77.

14. Denoyer *v.* Ryan, 24 Fed. 77.

15. Denoyer *v.* Ryan, 24 Fed. 77.

16. Haslam *v.* Cron, 19 Wkly. Rep. 968.

17. Haslam *v.* Cron, 19 Wkly. Rep. 968. See also McClaskey *v.* Barr, 54 Fed. 781, 784.

18. Woolsey *v.* Williams, 128 Cal. 552, 61 Pac. 670; Webb *v.* Haycock, 19 Beav. 342; Crouch *v.* Hooper, 16 Beav. 182, 1 Wkly. Rep. 10; Johnston *v.* Todd, 5 Beav. 597; Rutherford *v.* Maule, 4 Hagg. Eccl. 213, 238.

19. Webb *v.* Haycock, 19 Beav. 342, 346.

20. Saunders *v.* Fuller, 4 Humphr. (Tenn.) 516.

21. Greenwood *v.* New Orleans, 12 La. Ann. 426.

1. Webster Dict. [*quoted* in *Ex p.* Boyett, 19 Tex. App. 17, 45; *Ex p.* Foster, 5 Tex. App. 625, 646, 42 Am. Rep. 577].

"**Evident miscalculation of figures**" see Brown *v.* Harness, 11 Ind. App. 426, 38 N. E. 1098 [*citing* Deford *v.* Deford, 116 Ind. 523, 19 N. E. 530].

"**Proof is evident**" as used in constitutional provisions relating to bail see BAIL, 5 Cyc. 63 *et seq.*

2. People *v.* Vanderpool, 1 Mich. N. P. 264, 270.

3. Webster Dict. [*quoted* in *Ex p.* Boyett, 19 Tex. App. 17, 45].

"**Evidently unsuitable**" as applied to an executor see Thayer *v.* Homer, 11 Metc. (Mass.) 104, 110. As applied to a guardian see Gray *v.* Parke, 155 Mass. 433, 438, 29 N. E. 641.

4. Jenkins *v.* Cook, 1 P. D. 80, 101, 45 L. J. P. C. 1, 34 L. T. Rep. N. S. 1, 24 Wkly. Rep. 439.

5. Century Dict. See also Sioux City, etc., R. Co. *v.* Singer, 49 Minn. 301, 306, 51 N. W. 905, 15 L. R. A. 751, 32 Am. St. Rep. 554; *In re* Covenhoven, 1 N. J. Eq. 19, 24; Kilgore *v.* Northwest Texas Baptist Educational Assoc., 90 Tex. 139, 142, 37 S. W. 598.

6. "**Ex boats Spencer and Galt,**" in a contract for the sale of "two boat loads western mixed corn, in Barber's stores, Clinton wharf" does not necessarily evidence a guaranty that the corn was taken from these boats. Hay *v.* Leigh, 48 Barb. (N. Y.) 393, 397.

"**Ex the first parcel of brimstone** we have in the Tyne on our account" see Leidemann *v.* Gray, 3 Jur. N. S. 219, 26 L. J. Exch. 162, 28 L. T. Rep. N. S. 341, 5 Wkly. Rep. 294.

"**Ex quay or warehouse**" as used in a contract for the sale of goods see Davies *v.* McLean, 28 L. T. Rep. N. S. 113, 21 Wkly. Rep. 264, 265.

7. *Ex assignatione,*— from or according to the assignment. Darell *v.* Wybarne, 2 Dyer 206b. *Ex concessis,*— from things or prem-

"out of,"[8] "of,"[9] "by,"[10] "by virtue of,"[11] "on,"[12] "on account of,"[13] "according to,"[14] "with,"[15] "at or in;"[16] and it is sometimes used in conjunction with other words as an adverb.[17] As a prefix, it may denote removal or cessation;[18] or may be equivalent to "without," "reserving," or "excepting."[19] It is also

ises granted. Great Western R. Co. *v.* Railway Com'rs, 7 Q. B. D. 182, 187, 46 J. P. 35, 50 L. J. Q. B. 483, 45 L. T. Rep. N. S. 206, 29 Wkly. Rep. 901. *Ex necessitate rei,*— from the necessity of the thing. Garwood *v.* Garwood, 29 Cal. 514, 522; Steele *v.* Steele, 85 Mo. App. 224, 225. *Ex relatione,*— from a narrative or information. Adams Gloss. [*citing* Shattock *v.* Shattock, L. R. 2 Eq. 182, 191, 35 Beav. 489, 12 Jur. N. S. 405, 35 L. J. Ch. 509, 14 Wkly. Rep. 600]. *Ex visceribus testamenti,*— from the interior parts or essential substance of the will. Baddeley *v.* Leppingwell, 3 Burr. 1533, 1541 [*quoted* in Homer *v.* Shelton, 2 Metc. (Mass.) 194, 213].

8. *Ex abundanti cautela,*— out of great or abundant caution. Commercial Union Assur. Co. *v.* Seammon, 35 Ill. App. 659, 662; Battye *v.* Gresley, 8 East 319, 326; Blatchford *v.* Plymouth, 3 Hodges 86, 93; West Derby Union *v.* Metropolitan L. Assur. Soc., 66 L. J. Ch. 199, 205; Lees *v.* Summersgill, 17 Ves. Jr. 508, 511, 34 Eng. Reprint 197. *Ex contractu,*— out of contract. Bouvier L. Dict. [*citing* Blackstone Comm. 117; 1 Chit. Pl. 2; 1 Mackeldey Civ. L. § 195]. See also Manahan *v.* Gibbons, 19 Johns. (N. Y.) 427, 435; 1 Cyc. 735 note 84, 736. *Ex delicto,*— out of fault. Burrill L. Dict. See also 1 Cyc. 735 note 84, 736. *Ex speciala gratia, certa scientia, et mero motú*— out of special grace, certain knowledge, and mere motion. U. S. *v.* Arredondo, 6 Pet. (U. S.) 691, 739, 8 L. ed. 547; Whistler's Case, 10 Coke 63*a*, 65*b*; Woods Case, 1 Coke 40*a*, 45*b*; Eden *v.* Harris, 3 Dyer 350*b*, 351*a*. *Ex nihilo nil fit,*— out of nothing nothing comes. Jackson *v.* Waldron, 13 Wend. (N. Y.) 178, 221.

9. *Ex gratia,*— of, or out of, grace or favor. Citizens' Ins. Co. *v.* Parsons, 4 Can. Supreme Ct. 215, 325; Stoker *v.* Welland R. Co., 13 U. C. C. P. 386, 392; Mores *v.* Mores, 17 L. J. Ch. 311, 313. *Ex necessitate,*— of or through necessity. *In re* Atty.-Gen., 2 N. M. 60; Bumm's Estate, 8 Pa. Dist. 191, 196; Wilson *v.* Shapiro, 2 Pa. Dist. 367, 368; Georgetown *v.* Alexandria Canal Co., 12 Pet. (U. S.) 91, 97, 9 L. ed. 1012; Fussell *v.* Dowding, 27 Ch. D. 237, 240, 53 L. J. Ch. 924, 51 L. T. Rep. N. S. 332, 32 Wkly. Rep. 790; Brown *v.* Smith, Taylor (U. C.) 187, 188. *Ex proprio motu,*— of his own accord. Consumers Cordage Co. *v.* Connolly, 31 Can. Supreme Ct. 244, 298. *Ex proprio vigore,*— of its own inherent force. Anderson L. Dict.

10. *Ex assensu patris,*— by or with the father's consent. Adams Gloss. [*citing* 4 Blackstone Comm. 133]. *Ex comitate et jure gentium,*— by comity and law of nations. Robinson *v.* Bland, 1 W. Bl. 257, 258. *Ex industria,*— by diligence, industry; with deliberate design; on purpose; purposely; intentionally. Adams Gloss. See also Savings, etc., Soc. *v.* Austin, 46 Cal. 416, 475; Martin *v.* New Orleans, 38 La. Ann. 397, 400, 58 Am. Rep. 194; U. S. *v.* Gooding, 12 Wheat. (U. S.) 460, 478, 6 L. ed. 693; Martin *v.* Hunter, 1 Wheat. (U. S.) 304, 334, 4 L. ed. 97. *Ex post facto,* by matter of after fact; by something after the fact. Calder *v.* Bull, 3 Dall. (U. S.) 386, 393, 1 L. ed. 648. See also Strong *v.* State, 1 Blackf. (Ind.) 193, 196. *Ex provisione hominis,*— by the provision of man. Bowles' Case, 11 Coke 79*b*, 80*b*.

11. *Ex officio,*— by virtue of office. Anderson L. Dict.

12. *Ex adverso,*— on the other side. Hill *v.* Harris, 2 Show. 460, 461. *Ex facie,*— on the face of it. Burnett *v.* Great North of Scotland R. Co., 10 App. Cas. 147, 165, 54 L. J. Q. B. 531, 53 L. T. Rep. N. S. 507; Reynell *v.* Sprye, 1 De G. M. & G. 660, 672, 21 L. J. Ch. 633, 50 Eng. Ch. 510, 42 Eng. Reprint 710. *Ex parte,*— on the part; on one side. Abbott L. Dict.; Mass. Pub. St. (1882) c. 150, § 11.

13. *Ex bonâ fide,*— on account of good faith. Adams Gloss. *Ex maleficio,*— on account of misconduct. Anderson L. Dict.

14. *Ex æquo et bono,*— according to what is just and good; according to equity and conscience. Black L. Dict. [*citing* 3 Blackstone Comm. 163]. See also Brown *v.* King, 63 Hun (N. Y.) 158, 160, 17 N. Y. Suppl. 678; Middleton *v.* Arnold, 13 Gratt. (Va.) 489, 494; Kleine *v.* Catara, 14 Fed. Cas. No. 7,869, 2 Gall. 6, 70; Wheatcroft *v.* Hickman, 9 C. B. N. S. 47, 87, 8 H. L. Cas. 268, 11 Eng. Reprint 431, 7 Jur. N. S. 105, 30 L. J. C. P. 125, 3 L. T. Rep. N. S. 185, 8 Wkly. Rep. 754, 99 E. C. L. 47 [*quoting* Story Partnership 74]; Wilson *v.* Mason, 38 U. C. Q. B. 14, 25 [*quoting* Moses *v.* Macpherlan, 1 W. Bl. 219, 221, 2 Burr. 1005]; Reynolds *v.* Crawford, 12 U. C. Q. B. 168, 174; 16 Cyc. 89. *Ex arbitravio judicis,*— according to or depending upon the will or discretion of the judge. Adams Gloss. [*citing* 4 Blackstone Comm. 394; 4 Broom & H. Comm. 482].

15. *Ex assensu suo,*— with his assent. Black L. Dict. See also Nicholas *v.* Chapman, Comb. 220. *Ex cathedra,*— with the weight of one in authority. Originally applied to the decisions of the Popes from their *cathedra,* or chair. Wharton L. Lex. See also Cresson *v.* Cresson, 6 Fed. Cas. No. 3,389, where it is said: "I do not propose to answer the question [who is a gentleman and who a merchant] *ex cathedra.*"

16. *Ex arbitrio,*— at the discretion. Burrill L. Dict.

17. *Ex consequenti,*—consequently. Thornby *v.* Fleetwood, 10 Mod. 114, 124; Germain *v.* Orchard, 1 Salk. 346, 347.

18. Thus, ex-mayor, ex-partner, ex-judge. Black L. Dict.

19. In this use it is probably an abbreviation of "except." Thus, *ex*-interest, *ex*-coupons. Black L. Dict. See also Porter *v.*

sometimes used as an abbreviation of EXHIBIT,[20] *q. v.* (See A; AB; ABBREVIATIONS; E)

EX ABUSU NON ARGUITUR AD USUM. A maxim meaning "No argument can be drawn from the abuse (of a thing) against its use."[21]

EXACT. As an adjective, precisely accurate.[22] As a verb, to claim; to require.[23]

EXACTION.[24] The act of demanding and receiving.[25] (See, generally, EXTORTION.)

EXAMEN. A swarm of bees.[26]

EXAMINATION.[27] A weighing, balancing; search, investigation; hearing, inquiry;[28] an investigation made in order to form a judgment.[29] As used in a criminal proceeding, always a preliminary and never a final trial on an indictment.[30] As applied to witnesses in a suit in chancery, a proceeding conducted either by a master in chancery or by examiners appointed for that purpose.[31] Sometimes the term is used to designate the written record of the evidence taken at an examination.[32] (Examination: For Admission — To Practice as Attorney, see ATTORNEY AND CLIENT; As Physician, see PHYSICIANS AND SURGEONS. In Bankruptcy, see BANKRUPTCY. Of Accused, see CRIMINAL LAW. Of Adverse Party Before Trial, see DISCOVERY. Of Application For Patent, see PATENTS. Of Bankrupt and Others on Application of Bankrupt For Discharge, see BANKRUPTCY. Of Debtor — In Assignment For Benefit of Creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS; In Insolvency Proceeding, see INSOLVENCY; In Proceeding Supplementary to Execution, see EXECUTIONS. Of Garnishee, see GARNISHMENT. Of Lunatic or Incompetent, see INSANE PERSONS. Of Married

Wormser, 94 N. Y. 431, 445, "a sale of bonds 'ex. July coupon'".

20. Thus "Ex. A" may mean "exhibit A." Dugan *v.* Trisler, 69 Ind. 553, 555.

21. Tayler L. Gloss.

22. Gallatin County School Dist. No. 7 *v.* Patterson, 10 Mont. 17, 20, 24 Pac. 698.

"Exact census" see Gallatin County School Dist. No. 7 *v.* Patterson, 10 Mont. 17, 20, 24 Pac. 698.

"Exact copy" see People *v.* Warner, 5 Wend. (N. Y.) 271, 273.

"Not exactly the actual amount," as used in an act in relation to an insolvent's schedule, see Hoyles *v.* Blore, 15 L. J. Exch. 28, 30.

23. Century Dict.

"To exact license money" see Sweet *v.* Wabash, 41 Ind. 7, 11.

"To exact more than ten hours' work" see *In re* Street R. Corporations, 24 R. I. 603, 608, 54 Atl. 602, 61 L. R. A. 612.

24. A stronger word than "caused" see Brown *v.* Tribune Assoc., 74 N. Y. App. Div. 359, 364, 77 N. Y. Suppl. 461.

25. Laidlaw *v.* Abraham, 43 Fed. 297, 298.

26. Brouwer *v.* Cotheal, 10 Barb. (N. Y.) 216, 218 [*affirmed* in 5 N. Y. 562].

27. It is "a general term." Mora *v.* Great Western Ins. Co., 10 Bosw. (N. Y.) 622, 628 [*quoting* Worcester Dict.]. And it "may be treated as *nomen collectivum*." Reg. *v.* Outwell, 9 A. & E. 836, 838, 36 E. C. L. 436.

Distinguished from "investigation" and "litigation."— "The word 'examination' is not very difficult to be understood or explained. It is clearly not as extensive as 'investigation,' and certainly not as 'litigation.' It does not imply a laborious or contested inquiry." Mora *v.* Great Western Ins. Co., 10 Bosw. (N. Y.) 622, 627.

"Examine" all claims against the state see State *v.* Doron, 5 Nev. 399, 412.

"Examine, hear, and punish" see Groenvelt *v.* Burwell, 1 Salk. 200.

"'To examine and correct errors,' is the distinguishing characteristic of appellate power." Com. *v.* Simpson, 2 Grant (Pa.) 438, 439 [*citing* 4 Blackstone Comm. 270].

28. Anderson L. Dict.

"Examination of records" see Randolph *v.* State, 82 Ala. 527, 529, 2 So. 714, 60 Am. Rep. 761.

"Examination of public records" see Cormack *v.* Wolcott, 37 Kan. 391, 15 Pac. 245.

"Examination on oath" see Laughran *v.* Kelly, 8 Cush. (Mass.) 199, 204.

Records of examinations of teachers see Washington County School Dist. No. 10 *v.* Thelander, 32 Minn. 476, 478, 21 N. W. 554.

To "open to the examination of any stockholder" see Brouwer *v.* Cotheal, 10 Barb. (N. Y.) 216, 217 [*affirmed* in 5 N. Y. 562].

29. Worcester Dict. [*quoted* in Mora *v.* Great Western Ins. Co., 10 Bosw. (N. Y.) 622, 628]. See also Morse *v.* Page, 25 Me. 496, 498; Opinion of Justices, 136 Mass. 583, 586; Bivins *v.* Harris, 8 Nev. 153, 156; People *v.* Dutchess County, 9 Wend. (N. Y.) 506, 509; Rex *v.* Canterbury, 15 East 117, 141.

30. Connelly *v.* Dakota County, 35 Minn. 365, 366, 29 N. W. 1. See also Wagener *v.* Ramsey County, 76 Minn. 368, 370, 79 N. W. 166; State *v.* Conrad, 95 N. C. 666, 669; Winn *v.* Peckham, 42 Wis. 493, 499; U. S. *v.* Stanton, 70 Fed. 890, 891, 17 C. C. A. 475 [*citing* 9 Op. Atty.-Gen. 170].

31. Clapp *v.* Sherman, 16 R. I. 370, 371, 17 Atl. 130 [*citing* 2 Daniell Ch. Pl. & Pr. 1196, 1197].

32. Reg. *v.* Outwell, 9 A. & E. 836, 838, 36

Woman, see ACKNOWLEDGMENTS. Of Party in Proceeding Supplementary to Attachment, see ATTACHMENT. Of Person Accused of Crime, see CRIMINAL LAW. Of Title, see ABSTRACTS OF TITLE. Of Witness, see DEPOSITIONS; EVIDENCE; WITNESSES. Physical Examination — at Trial, see DAMAGES; Before Trial, see DISCOVERY. Preliminary Examination, see CRIMINAL LAW.)

EXAMINATION PRO INTERESSE SUO. In practice, an inquiry described as follows: When any person claims to be entitled to an estate or other property sequestered, whether by mortgage or judgment, lease or otherwise, or has a title paramount to the sequestration, he should apply to the court to direct an inquiry whether the applicant has any and what interest in the property sequestered.[33]

EXAMINER. One charged with the examination of any matter.[34] (Examiner: In Chancery, see EQUITY. In Patent Office, see PATENTS. Of Applicant For Admission to the Bar, see ATTORNEY AND CLIENT.)

EXAMINING COURT. A term applied to a magistrate when sitting for the purpose of inquiring into a criminal accusation against a person.[35] (See, generally, COURTS; CRIMINAL LAW.)

EXAMPLA ILLUSTRANT, NON RESTRINGUNT, LEGEM. A maxim meaning "Examples illustrate but do not narrow the scope of a rule of law." [36]

EX ANTECEDENTIBUS ET CONSEQUENTIBUS FIT OPTIMA INTERPRETATIO.[37] A maxim meaning "A passage will be best interpreted by reference to that which precedes and follows it." [38]

EXCAMBION. EXCHANGE,[39] *q. v.*

EXCAMBIUM. EXCHANGE,[40] *q. v.*

EXCAMBIUM NATURALITER VULT IN SE WARRANTIUM. A maxim meaning "An exchange naturally creates in itself a warranty." [41]

EXCAMBIUM NON POTEST ESSE RERUM DIVERSÆ QUALITATIS; NEQUE EXCAMBIUM INTER TRES PARTES DATUR. A maxim meaning "An exchange cannot be of things of a different quality; nor is it granted among three parties." [42]

E. C. L. 436. *Compare* Sims *v.* Sims, 1 Treadw. (S. C.) 131, 133.

33. Hitz *v.* Jenks, 185 U. S. 155, 166, 22 S. Ct. 598, 46 L. ed. 850 [*citing* Brooks *v.* Greathed, 1 Jac. & W. 176, 178, 37 Eng. Reprint 342; Angel *v.* Smith, 9 Ves. Jr. 335, 337, 7 Rev. Rep. 214, 32 Eng. Reprint 632; Anonymous, 6 Ves. Jr. 287, 288, 31 Eng. Reprint 1055; 3 Daniell Ch. Pr. 1984]; Krippendorf *v.* Hyde, 110 U. S. 276, 283, 4 S. Ct. 27, 28 L. ed. 145 [*quoting* Daniell Ch. Pr. c. 26, § 7, p. 1057, and *citing* Martin *v.* Willis, 1 Fowl. Ex. Pr. 160].

34. English L. Dict.

That the word may mean an "auditor," *quære.* State *v.* Doron, 5 Nev. 399, 409.

35. Tex. Code Cr. Proc. (1895) art. 62 [*quoted* in Childers *v.* State, 30 Tex. App. 160, 199, 16 S. W. 903, 28 Am. St. Rep. 899].

On the hearing of a writ of habeas corpus, a judge does not constitute an examining court. Childers *v.* State, 30 Tex. App. 160, 16 S. W. 903, 28 Am. St. Rep. 899.

36. Koenig *v.* Omaha, etc., R. Co., 3 Nebr. 373, 381.

37. "**The old maxim,** . . . is a sound rule in the construction." Browne *v.* Browne, 3 Jur. N. S. 728, 736, 26 L. J. Ch. 635, 3 Smale & G. 568, 5 Wkly. Rep. 777.

38. Broom Leg. Max.

Applied in the following cases:

California.— Brannan *v.* Mesick, 10 Cal. 95, 106.

Connecticut.— Stoughton *v.* Pasco, 5 Conn. 442, 448, 13 Am. Dec. 72.

Nebraska.— Hamilton *v.* Thrall, 7 Nebr. 210, 219.

New York.— Rogers *v.* Rogers, 3 Wend. 503, 526, 20 Am. Dec. 716.

Pennsylvania.— Phillips' Estate, 30 Wkly. Notes Cas. 241, 242; McCartney's Estate, 18 Wkly. Notes Cas. 51, 52.

Wisconsin.— Gibson *v.* Gibson, 43 Wis. 23, 33, 28 Am. Rep. 527.

England.— Smith *v.* Jersey, 3 Bligh 290, 345, 4 Eng. Reprint 610, 2 B. & B. 474, 6 E. C. L. 235, 3 Moore C. P. 339, 7 Price 281; Turpine *v.* Forreyner, 1 Bulstr. 99, 101 (where the maxim is quoted as follows: "*Ex præcedentibus, & consequentibus, optima fiat interpretatio*"); Browne *v.* Browne, 3 Jur. N. S. 728, 736, 26 L. J. Ch. 635, 3 Smale & G. 568, 5 Wkly. Rep. 777.

Canada.— Bell *v.* McKindsey, 3 Grant Err. & App. (U. C.) 9, 27; Phelan *v.* Phelan, 1 U. C. C. P. 275, 282; Doe *v.* Dixon, 4 U. C. Q. B. O. S. 101, 102.

39. Coats *v.* Inland Revenue Com'rs, 66 L. J. Q. B. 434, 437.

40. Dean *v.* Shelly, 57 Pa. St. 426, 427, 98 Am. Dec. 235; Bustard's Case, 4 Coke 121*a*. See also Rhoades *v.* Castner, 12 Allen (Mass.) 130, 131.

41. Adams Gloss.

42. Adams Gloss. [*citing* Halkerston Max. 43; Lofft. 469].

EXCAVATION.[43] An uncovered cutting in the earth, in distinction from a covered cutting or tunnel.[44] (Excavation: By Adjoining Owner, see ADJOINING LANDOWNERS. Contract, see CONTRACTS. Injury From, on Private Property, see NEGLIGENCE. In or Near Street or Other Highway, see MUNICIPAL CORPORATIONS; NEGLIGENCE; STREETS AND HIGHWAYS.)

EXCEED.[45] To be more or greater; to be paramount.[46]

EXCEPT.[47] Not including.[48] The word has also been construed to mean "until."[49]

EXCEPTANT. A person making an exception.[50] (See, generally, APPEAL AND ERROR.)

EXCEPTED. Objected.[51] The term has been erroneously used in connection with commercial paper as the equivalent of "accepted."[52]

EXCEPTIO EJUS REI CUJUS PETITUR DISSOLUTIO NULLA EST. A maxim meaning "A plea of that matter, the dissolution of which is the object of the action, is of no effect."[53]

EXCEPTIO FALSI OMNIUM ULTIMA. A maxim meaning "A plea of that which is false is the last of all."[54]

EXCEPTIO FIRMAT REGULAM IN CASIBUS NON EXCEPTIS.[55] A maxim meaning "An exception confirms the general rule in those cases not excepted."[56]

EXCEPTIO FIRMAT REGULAM IN CONTRARIUM. A maxim meaning "The exception affirms the rule to be the other way."[57]

EXCEPTIO FIRMAT REGULAM IN REBUS NON EXCEPTIS. The exception confirms or strengthens the rule in matters not excepted.[58]

43. Blasting of rock has been held not to be within the meaning of the word "excavating," as used in a contract. Hellwig *v.* Blumenberg, 5 Silv. Supreme (N. Y.) 290, 7 N. Y. Suppl. 746.

44. Webster Int. Dict.

45. "Exceeding by one-half" the amount for which the judgment was given see State *v.* Judge Second Judicial Dist., 21 La. Ann. 64, 65.

"Shall have exceeded his jurisdiction" as used in a statute relating to justices of the peace see Leary *v.* Patrick, 15 Q. B. 266, 268, 14 Jur. 932, 19 L. J. M. C. 211, 4 New Sess. Cas. 258, 69 E. C. L. 265; Barton *v.* Bricknell, 13 Q. B. 393, 396, 15 Jur. 668, 20 L. J. M. C. 1, 66 E. C. L. 393; Pease *v.* Chaytor, 1 B. & S. 658, 672, 8 Jur. N. S. 482, 31 L. J. M. C. 1, 5 L. T. Rep. N. S. 280, 10 Wkly. Rep. 16, 101 E. C. L. 658; Kendall *v.* Wilkinson, 3 C. L. R. 668, 4 E. & B. 680, 689, 1 Jur. N. S. 538, 24 L. J. M. C. 89, 3 Wkly. Rep. 234, 82 E. C. L. 680; Ratt *v.* Parkinson, 20 L. J. M. C. 208, 212.

46. Webster Int. Dict.

Exceed in stating the value of a homestead see Southwick *v.* Davis, 78 Cal. 504, 507, 21 Pac. 121.

47. "Excepting free passage" over certain demised premises see Bush *v.* Cole, 12 Mod. 24, 1 Show 388; Cole's Case, 1 Salk. 196.

48. Austin *v.* Willis, 90 Ala. 421, 424, 8 So. 94. *Compare* People *v.* Whitman, 6 Cal. 659, 660.

"Except as herein provided" in an insurance policy see Fire Ins. Assoc. of England *v.* Merchants', etc., Transp. Co., 66 Md. 339, 345, 7 Atl. 905, 59 Am. Rep. 162; Western Assur. Co. *v.* J. H. Mohlman Co., 83 Fed. 811, 818, 28 C. C. A. 157, 40 L. R. A. 561.

"Except mortgages" see Polhemus *v.* Fitchburg R. Co., 123 N. Y. 502, 509, 26 N. E. 31.

"Except the widow's dower" see Starr *v.* Brewer, 58 Vt. 24, 33, 3 Atl. 479.

"Except trusts" see Bloomfield State Bank *v.* Miller, 55 Nebr. 243, 254, 75 N. W. 569, 70 Am. St. Rep. 381, 44 L. R. A. 387.

"Except two acres in the south-east corner" see Green *v.* Jordan, 83 Ala. 220, 224, 3 So. 513, 3 Am. St. Rep. 711 [*citing* Doe *v.* Clayton, 81 Ala. 391, 2 So. 24].

"Except where otherwise provided by statute" see Buckley *v.* Hull Docks Co., [1893] 2 Q. B. 93, 95, 62 L. J. Q. B. 449, 69 L. T. Rep. N. S. 347, 5 Reports 547; *In re* Tarn, [1893] 2 Ch. 280, 284, 62 L. J. Ch. 564, 68 L. T. Rep. N. S. 311, 2 Reports 407, 41 Wkly. Rep. 397.

49. Fowle *v.* Bigelow, 10 Mass. 379, 382.

50. Snelling *v.* Yetter, 25 N. Y. App. Div. 590, 593, 49 N. Y. Suppl. 917 [*citing* Webster Dict.].

51. Elsner *v.* Supreme Lodge K. & L. of H., 98 Mo. 640, 644, 11 S. W. 991.

52. Meyer *v.* Beardsley, 30 N. J. L. 236, 243. To the same effect see Vanstrum *v.* Liljengren, 37 Minn. 191, 193, 33 N. W. 555; Cortelyou *v.* Maben, 22 Nebr. 697, 700, 36 N. W. 159, 3 Am. St. Rep. 284 [*citing* Miller *v.* Butler, 17 Fed. Cas. No. 9,565, 1 Cranch C. C. 470; Daniel Neg. Instr. § 497]; 7 Cyc. 765 note 65.

53. Adams Gloss. [*citing* Jenkins Cent. Cas. 37].

54. Wharton L. Lex.

55. This maxim is frequently expressed EXCEPTIO PROBAT REGULAM, etc., *q. v.* Trayner Leg. Max.

56. Trayner Leg. Max.

57. Adams Gloss. [*citing* Bacon Aph. 7].

58. Adams Gloss. [*citing* Thornby v. Fleetwood, 10 Mod. 114, 115].

EXCEPTIONS.[59] Objections.[60] In mining, a term equivalent to reconveyances of land already conveyed.[61] (Exceptions: As Mode of Review, see APPEAL AND ERROR. Bill of, see APPEAL AND ERROR. In Contract or Conveyance, see ASSIGNMENTS; ASSIGNMENTS FOR BENEFIT OF CREDITORS; CONTRACTS; COVENANTS; CHATTEL MORTGAGES; DEEDS; MORTGAGES. In Practice, see ADMIRALTY; APPEAL AND ERROR; CRIMINAL LAW; EQUITY; TRIAL. To Account of Executor or Administrator, see EXECUTORS AND ADMINISTRATORS. To Allowance of Continuance, see CONTINUANCES IN CIVIL CASES; CONTINUANCES IN CRIMINAL CASES. To Assessment of Damages, see DAMAGES. To Award, see ARBITRATION AND AWARD; EMINENT DOMAIN. To Change of Venue, see CRIMINAL LAW; VENUE. To Party, see EQUITY; PARTIES. To Pleading, see EQUITY; PLEADING. To Report and Findings of Master, see EQUITY; Of Referee, see REFERENCES; To Sureties—On Appeal-Bond, see APPEAL AND ERROR; On Bail-Bond, see BAIL.)

EXCEPTIO NULLA EST VERSUS ACTIONEM QUÆ EXCEPTIONEM PERIMIT. A maxim meaning "There is [can be] no plea against an action which destroys [the subject or matter of] the plea."[62]

EXCEPTIO PROBAT REGULAM DE REBUS NON EXCEPTIS. A maxim meaning, "An exception proves a rule concerning things not excepted."[63] (See EXCEPTIO FIRMAT REGULAM IN CASIBUS NON EXCEPTIS.)

EXCEPTIO QUÆ FIRMAT LEGEM EXPONIT LEGEM. A maxim meaning "An exception which confirms a law, expounds (or explains) the law."[64]

EXCEPTIO QUOQUE REGULAM DECLARAT. A maxim meaning "The exception also declares the rule."[65]

EXCEPTIO SEMPER ULTIMA PONENDA EST. A maxim meaning "An exception is always to be last."[66]

EXCESS. The quality or state of exceeding the proper or reasonable limit or measure.[67]

EXCESSIT EX EPHEBIS EST PERSON. A maxim meaning "He who comes out of, exceeds his minority, becomes legally a person."[68]

EXCESSIVE. Tending to, or marked by excess.[69] (Excessive: Bail, see BAIL. Damages, see DAMAGES. Fine, see FINES. Penalty, see PENALTIES. Taxation, see TAXATION.)

59. Distinguished from "provisos" in N. & M. Friedman Co. *v.* Atlas Assur. Co., 133 Mich. 212, 221, 94 N. W. 757 [*quoting* Bouvier L. Dict.].

60. Elsner *v.* Supreme Lodge K. & L. of H., 98 Mo. 640, 644, 11 S. W. 991 [*citing* Bouvier L. Dict.; Burrill L. Dict.; Webster Dict.].

61. Morrison Min. Rights (9th ed.) 115 [*quoted* in Calhoun Gold Min. Co. *v.* Ajax Gold Min. Co., 27 Colo. 1, 20, 59 Pac. 607, 83 Am. St. Rep. 17, 50 L. R. A. 209, where it is said that a right of way is not an exception, but a reservation].

62. Adams Gloss. [*citing* Jenkins Cent. 106].

63. Bouvier L. Dict.

Applied in the following cases:

Connecticut.— Patten *v.* Smith, 5 Conn. 196, 201; Hinman *v.* Taylor, 2 Conn. 357, 361; Lloyd *v.* Keach, 2 Conn. 175, 181, 7 Am. Dec. 256.

Massachusetts.— Taunton Copper Co. *v.* Merchants' Ins. Co., 22 Pick. 108, 112; Bridge *v.* Sumner, 1 Pick. 371.

Pennsylvania.— Weist Co. *v.* Weeks, 8 Kulp 384, 385.

United States.— Hutchins *v.* Taylor, 12 Fed. Cas. No. 6,953.

England.— East London Waterworks Co. *v.* Mile-end Old Town, 17 Q. B. 512, 522, 16 Jur. 121, 21 L. J. M. C. 49, 79 E. C. L. 512, 9 E. L. & Eq. 271; Wright *v.* Nuttall, 10 B. & C. 492, 498, 21 E. C. L. 211; Metcalfe's Case, 11 Coke 38*a*, 41*a*; Lee *v.* Lee, 1 Dr. & Sm. 85, 87, 6 Jur. N. S. 621, 29 L. J. M. C. 788, 8 Wkly. Rep. 443; Rex *v.* Stone, 1 East 639, 647; Le Rousseau *v.* Rede, 2 Eden 1, 4; Crespigny *v.* Wittenoom, 4 T. R. 790, 793; Rex *v.* Eriswell, 3 T. R. 707, 722; Dand *v.* Sexton, 3 T. R. 37, 38.

Canada.— Keefer *v.* McKay, 9 Ont. App. 117, 125.

64. Trayner Leg. Max.

Applied in Rex *v.* Tooley, 2 Bulstr. 186, 189.

65. Bouvier L. Dict. [*citing* Bacon Aph. 17].

66. Wharton L. Lex.

Applied in Hickmot's Case, 9 Coke 52*b*, 53*a*.

67. Webster Dict. [*quoted* in Georgia Cent. R. Co. *v.* Johnston, 106 Ga. 130, 136, 32 S. E. 78].

Reduction of the capital of a company when in excess of its needs see *In re* Nixon's Nav. Co., [1897] 1 Ch. 872, 876, 66 L. J. Ch. 406.

68. Adams Gloss.

69. Georgia Cent. R. Co. *v.* Johnston, 106 Ga. 130, 136, 32 S. E. 78.

"An excessive charge is illegal, but there are many charges which are not excessive which are also illegal." Great Western R.

EXCESSIVE BAIL. See BAIL.

EXCESSIVE DAMAGES. See DAMAGES.

EXCESSIVE FINE. See FINES.

EXCESSIVELY. To excess; intemperately.[70]

EXCESSIVE PENALTY. See PENALTIES.

EXCESSIVE TAXATION. See TAXATION.

EXCESSIVUM IN JURE REPREBATUR. EXCESSUS IN RE QUALIBET JURE REPROBATUR COMMUNI. A maxim meaning "Excess in law is reprehended. Excess in any thing is reprehended in Common Law."[71]

EXCESSUS IN PETITA EXCUSATIO MANIFESTA FIT. A maxim meaning "An excess in seeking an excuse, becomes manifest, i. e. he who excuses before he is accused manifests his own guilt."[72]

EXCHANGE.[73] BARTER,[74] *q. v.*; EXCAMBION,[75] *q. v.*; EXCAMBIUM,[76] *q. v.* In commercial law, a negotiation by which one person transfers to another funds which he has in a certain place, either at a price agreed upon or which is fixed by commercial usage.[77] (Exchange: Bill of, see COMMERCIAL PAPER. Broker, see FACTORS AND BROKERS. Of Property, see EXCHANGE OF PROPERTY. See also, generally, EXCHANGES.)

EXCHANGE BROKER. See FACTORS AND BROKERS.

Co. *v.* Railway Com'rs, 7 Q. B. D. 182, 189, 46 J. P. 35, 50 L. J. Q. B. 483, 45 L. T. Rep. N. S. 206, 29 Wkly. Rep. 901, per Field, J.

"Excessive distress" see Field *v.* Mitchell, 6 Esp. 71, 72.

"Excessive gaming" see Foot *v.* Baker, 5 M. & G. 335, 339, 7 Jur. 131, 6 Scott N. R. 301, 44 E. C. L. 181.

"Excessive" in respect to a poor rate see Sturch *v.* Clarke, 4 B. & Ad. 113, 116, 1 N. & M. 671, 2 L. J. K. B. 9, 24 E. C. L. 58.

"Excessive valuation" see Pickens *v.* Henderson County, 112 N. C. 698, 763, 17 S. E. 438.

"Excessive violence," as used when speaking of a course of conduct by one person toward another which would constitute a cause of civil action, is generally synonymous with "wanton or malicious force." Atchison, etc., R. Co. *v.* Gants, 38 Kan. 608, 627, 17 Pac. 54, 5 Am. St. Rep. 780.

70. Moore *v.* Prudential Ins. Co., 92 N. Y. App. Div. 135, 136, 87 N. Y. Suppl. 368.

"Excessively burdened" in respect to construction of highways see Sheldon *v.* State, 59 Vt. 36, 38, 7 Atl. 901; Weybridge *v.* Addison, 57 Vt. 569, 572.

"Excessively vicious conduct" as ground for divorce see Shutt *v.* Shutt, 71 Md. 193, 196, 17 Atl. 1024, 17 Am. St. Rep. 519. See DIVORCE.

71. Adams Gloss.

Applied in Godfrey's Case, 11 Coke 42*a*, 44*a*.

72. Adams Gloss.

73. "Exchange" as used in a power of attorney see Quay *v.* Presidio, etc., R. Co., 82 Cal. 1, 6, 22 Pac. 925; Long *v.* Fuller, 21 Wis. 121, 123.

"Exchange" between judges see Wallace *v.* Helena Electric R. Co., 10 Mont. 24, 29, 24 Pac. 626, 25 Pac. 278.

"Trade and exchange" as used in a chattel mortgage see Hulsizer *v.* Opdyke, (N. J. Ch. 1888) 13 Atl. 669.

74. Cooper *v.* State, 37 Ark. 412, 418 [*citing* Burrill L. Dict.].

75. Coats *v.* Inland Revenue Com'rs, [1897] 2 Q. B. 423, 425, 61 J. P. 693, 66 L. J. Q. B. 732, 77 L. T. Rep. N. S. 270, 46 Wkly. Rep. 1; Coats *v.* Inland Revenue Com'rs, 66 L. J. Q. B. 434, 437, where Wills, J., said: "The term 'excambion' appears in Scotland to have been applicable only to heritable property, though etymologically it implies simply an exchange."

76. Gamble *v.* McClure, 69 Pa. St. 282, 284 [*citing* Coke Litt. 50*b*, 51*b*, 384].

77. Black L. Dict.

"Selling, exchanging or delivering a bank bill or a piece of money is in common parlance passing the bill or money." State *v.* Watson, 65 Mo. 115, 119.

EXCHANGE OF PROPERTY

By Herbert B. Hawes*

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CROSS-REFERENCES

For Matters Relating to:
Bailment, see Bailments.
Contract:
Generally, see Contracts.
For Sale of Land, see Vendor and Purchaser.

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*Author of "Detinue," 14 Cyc. 239.

For Matters Relating to — (*continued*)
Damages Generally, see DAMAGES.
Deed, see DEEDS.
Election of Remedies, see ELECTION OF REMEDIES.
Evidence of Value, see EVIDENCE.
Particular Remedies:
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Cancellation in Equity, see CANCELLATION OF INSTRUMENTS.
Detinue, see DETINUE.
Ejectment, see EJECTMENT.
Reformation in Equity, see REFORMATION OF INSTRUMENTS.
Replevin, see REPLEVIN.
Specific Performance, see SPECIFIC PERFORMANCE.
Trover, see TROVER AND CONVERSION.
Sale:
Generally, see SALES.
Of Land, see VENDOR AND PURCHASER.
Statute of Frauds, see FRAUDS, STATUTE OF.

I. DEFINITION.

An exchange of property is a mutual grant, transfer, or commutation of property for property other than money.[1]

1. *Louisiana.*— Saul *v.* His Creditors, 7 Mart. N. S. 594, 600.
Missouri.— Martin *v.* Ashland Mill Co., 49 Mo. App. 23, 29.
New Hampshire.—Mitchell *v.* Gile, 12 N. H. 390, 395.
Texas.— Walker *v.* Renfro, 26 Tex. 142. See also Singleton *v.* Houston, (Civ. App. 1904) 79 S. W. 98.
Wisconsin.— Long *v.* Fuller, 21 Wis. 121, 123.
United States.— Preston *v.* Keene, 14 Pet. 133, 137, 10 L. ed. 387; Buffum *v.* Merry, 4 Fed. Cas. No. 2,112, 3 Mason 478.
See 21 Cent. Dig. tit. "Exchange of Property," §§ 1, 2.

Exchange of goods has been defined to be: "A commutation, transmutation or transfer of goods for other goods, as distinguished from sale, which is a transfer of goods for money." Burrill L. Dict.
"The transfer of goods and chattels for other goods and chattels of equal value. This is more commonly called barter." Bouvier L. Dict.
"**Exchanges of goods and merchandise,** Were the original and natural way of commerce, precedent to buying; for there was no buying till money was invented; though in exchanging, both parties are as buyers and sellers, and both equally warrant." 2 Jacob L. Dict.

Exchange of land has been defined to be "a mutual grant of equal interests, the one in consideration of the other." 2 Blackstone Comm. 323. To same effect see Bixby *v.* Bent, 59 Cal. 522; Hartwell *v.* De Vault, 159 Ill. 325, 42 N. E. 789; Wilcox *v.* Randall, 7 Barb. (N. Y.) 633; Windsor *v.* Collinson, 32 Oreg. 297, 52 Pac. 26; Long *v.* Fuller, 21 Wis. 121; Bouvier L. Dict.; Burrill L. Dict.; Jacob L. Dict. See also *infra*, II, A, 1.

Parties to exchange of land.— An exchange of land can only be made between two parties in interest. If more than two parties, pursuant to an agreement between them, make conveyances each to the other, it is not a technical exchange. Doe *v.* Spencer, 2 Exch. 752; Eton College *v.* Winchester, Lofft 401, 2 W. Bl. 936, 3 Wils. C. P. 468, 483. See also Jacob L. Dict.

"Barter" and "exchange" are often used synonymously. Cooper *v.* State, 37 Ark. 412; Com. *v.* Davis, 12 Bush (Ky.) 240; Reynolds *v.* Franklin, 41 Minn. 279, 43 N. W. 53; Jenkins *v.* Mapes, 53 Ohio St. 110, 41 N. E. 137. See also BARTER, 5 Cyc. 621.

By La. Civ. Code, § 2630, an exchange of property is defined as "a contract by which the contractors give to one another one thing for another, whatever it be, except money; for in that case it would be a sale." Preston *v.* Keene, 14 Pet. (U. S.) 133, 136, 10 L. ed. 387.

The difference between an "exchange" and a "sale" is that in the former no fixed money price is placed upon either of the properties exchanged, while in the latter there is either a money consideration or the equivalent thereof in property at a fixed valuation. Fuller *v.* Duren, 36 Ala. 73, 76 Am. Dec. 318; Com. *v.* Davis, 12 Bush (Ky.) 240; Picard *v.* McCormick, 11 Mich. 68; Herrick *v.* Carter, 56 Barb. (N. Y.) 41; Thornton *v.* Moody, (Tex. Civ. App. 1893) 24 S. W. 331; Jordan *v.* Dyer, 34 Vt. 104, 40 Am. Dec. 668; Loomis *v.* Wainwright, 21 Vt. 520; Buffum *v.* Merry, 4 Fed. Cas. No. 2,112, 3 Mason 478; 2 Blackstone Comm. 446. See also Hudson Iron Co. *v.* Alger, 54 N. Y. 173. But see Aids

II. REQUISITES AND VALIDITY.

A. Formal Requisites — 1. Essential Words in Exchanges of Realty. Exchange of lands is a technical form of conveyance in which the word "exchange" must be used, and no circumlocution can operate to supply this word if it be omitted.[2]

2. The Consideration — a. In General. The primary consideration moving from each party to an exchange is the property transferred by him to the other party;[3] but the mere fact that one of the exchangers pays a sum of money in addition to the property transferred by him, or that provision is made for an adjustment of the difference in the values of the respective properties, does not necessarily prevent the transaction from being an exchange.[4]

v. Bowman, 2 La. 251, where it was held that where one party received a slave from another at a stipulated price, to be paid out of the proceeds of another slave delivered by the former to the latter, it was a contract of exchange. It has been held that there is no substantial difference between an exchange and a sale, the title to the property passing in each case, and the same rules of law being applicable. Howard v. Harris, 8 Allen (Mass.) 297; Com. v. Clark, 14 Gray (Mass.) 367; Kennerly v. Somerville, 68 Mo. App. 222. But granting this to be true, the technical distinction between the two transactions is of considerable importance in some cases. Thus, in Walker v. Renfro, 26 Tex. 142, it was held that certain reciprocal conveyances of realty did not constitute a technical exchange, and hence one of the parties, on being evicted from the land he had received, had no right of reëntry upon the land he had given in exchange. In Cooper v. State, 37 Ark. 412, it was held that a count in an indictment charging that defendant did "sell, barter, or otherwise dispose of" certain property, a sale of which was a criminal offense, was bad for uncertainty, "sell" and "barter" not being synonymous. But in Smith v. Spears, 22 Ont. 286, it was held that a power to sell and "absolutely dispose of" authorized an exchange. In Edwards v. Cottrell, 43 Iowa 194, it was held that a power of sale in a mortgage did not authorize an exchange of the mortgaged property. See also McMichael v. Wilkie, 18 Ont. App. 464. Likewise in Long v. Fuller, 21 Wis. 121, it was held that a power of attorney to exchange certain property did not authorize a sale thereof. See, generally, Sales.

"A partition and an exchange are well-known modes of assurance, perfectly distinct from each other, each having its own rules." Atty.-Gen. v. Hamilton, 1 Madd. 214, 223, 16 Rev. Rep. 208.

"Exchange" differs from "bailment" in that in the former no return of the property given in exchange is contemplated, whereas in the latter the specific property, either in its identical form or in some other form into which it may be traced, must be returned by the bailee. Schindler v. Westover, 99 Ind. 395; King v. Fuller, 3 Cai. (N. Y.) 152; Austin v. Seligman, 18 Fed. 519, 21 Blatchf. 506. See, generally, Bailments.

2. *California.*— Bixby v. Bent, 59 Cal. 522.

Illinois.— Hartwell v. De Vault, 159 Ill. 325, 42 N. E. 789.

Kentucky.— Harlin v. Eastland, Hard. 590.

New Hampshire.— Cass v. Thompson, 1 N. H. 65, 8 Am. Dec. 36.

New York.— Wilcox v. Randall, 7 Barb. 633.

Oregon.— Windsor v. Collinson, 32 Oreg. 497, 52 Pac. 26.

Pennsylvania.— Gamble v. McClure, 69 Pa. St. 282; Bixler v. Saylor, 68 Pa. St. 146; Dean v. Shelly, 57 Pa. St. 626, 98 Am. Dec. 235.

Wisconsin.— Long v. Fuller, 21 Wis. 121.

Canada.— Stafford v. Trueman, 7 U. C. C. P. 41; Leach v. Dennis, 24 U. C. Q. B. 129; Towsley v. Smith, 12 U. C. Q. B. 555.

See 21 Cent. Dig. tit. "Exchange of Property," § 3.

Technical exchanges now of rare occurrence.— As a result of this rule, technical exchanges of land have been almost entirely abandoned in modern conveyancing, the substitute being mutual deeds of bargain and sale. Gamble v. McClure, 69 Pa. St. 282.

3. Brown v. Bailey, 159 Pa. St. 121, 28 Atl. 245; Moss v. Culver, 64 Pa. St. 414, 3 Am. Rep. 601; Harvey v. Gallaher, (Tenn. Ch. App. 1898) 48 S. W. 298.

Covenants and promises accompanying an exchange form a part of the consideration. Headrick v. Wisehart, 57 Ind. 129.

Exchanges in gross.— Where no money valuation is placed upon either of the properties exchanged, the presumption is that the transaction is an exchange in gross. Atkinson v. Beckett, 34 W. Va. 584, 12 S. E. 717.

Value of corporate stock.— A contract to exchange goods for corporate stock, without naming its value, calls for the stock at its par value. Tilkey v. Augusta, etc., R. Co., 83 Ga. 757, 10 S. E. 448.

4. Lingeman v. Shirk, 15 Ind. App. 432, 43 N. E. 33; Sternberger v. McGovern, 56 N. Y. 12 [*reversing* 4 Daly 456]; Frame v. Tabler, (Tenn. Ch. App. 1898) 52 S. W. 1014. But see Windsor v. Collinson, 32 Oreg. 297, 52 Pac. 26, where it was held that the payment of money in addition to the property exchanged renders the transaction a sale. See also Wilcox v. Randall, 7 Barb. (N. Y.) 633; Long v. Fuller, 21 Wis. 121, in both of which cases it was intimated that if the money

b. Sufficiency — (I) *Title to Property.* Each party must have a transferable title to the property given by him in exchange. Where neither party has such a title there is a total failure of consideration on both sides, and the exchange is void.[5] Likewise where the title attempted to be transferred by either party fails the exchange is voidable at the election of the other party.[6]

(II) *Estates in Realty.* In exchanges of realty the estates of the parties in the respective properties exchanged must be of equal dignity, as for example a fee for a fee, or lease for a certain term for a lease for the same term.[7]

(III) *Value.* The value of the respective properties need not be equal, but there must not be such a disparity as will shock the conscience of equity.[8]

3. Mutuality. Mutuality is essential to every exchange of property. Each party is both vendor and vendee, and each must grant, convey, or transfer to the other; otherwise the transaction is not an exchange.[9]

consideration be proportionately very large, as for example equal to or greater than the value of the property consideration, the transaction will be a sale instead of an exchange.

Commercial paper.— Where one of the parties gives his notes in addition to the property constituting the primary consideration moving from him, and executes a mortgage on the property received by him to secure such notes, the notes constitute a part of the consideration of the exchange, and hence any shortage in the property received by the party giving the notes furnishes a set-off to the extent thereof in an action against the maker of the notes. Frame *v.* Tabler, (Tenn. Ch. App. 1898) 52 S. W. 1014. The note of a third party, given in exchange for other property, is itself the consideration moving from the party giving it in exchange, and if it be not paid such party will not be liable to the other party on account of the non-payment. Shuff *v.* Cross, 12 Mart. (La.) 89.

5. Bixby *v.* Bent, 59 Cal. 522; Cadieux *v.* Rawlinson, 2 Quebec 296, holding, however, that since plaintiff did not know that defendant had no title, he might maintain an action for damages for breach of the contract. See also St. Denis *v.* Higgins, 24 Ont. 230. A contract to exchange lands which the parties do not own, "provided title can be procured and made," is a contingent contract, and is not binding if the parties are unable to comply with the condition. Lacy *v.* Hall, 37 Pa. St. 360. But the fact that plaintiff, in a contract for exchange of lands, agreed to convey by full covenant deed, when the title was in his mother, was held in Macdonald *v.* Bach, 169 N. Y. 615, 62 N. E. 1097 [*affirming* 51 N. Y. App. Div. 549, 64 N. Y. Suppl. 831], not ground for defendant's refusal to perform when, at the time for passing title, plaintiff tendered a covenant deed to the property, executed by his mother, and offered to join in such deed in order to be bound by the covenants.

6. Calhoon *v.* Belden, 3 Bush (Ky.) 674; Grimes *v.* Redmon, 14 B. Mon. (Ky.) 234; Thacker *v.* Belcher, 11 S. W. 3, 10 Ky. L. Rep. 853; Gamble *v.* McClure, 69 Pa. St. 282; Green *v.* Veder, (Tenn. Ch. App. 1900) 57 S. W. 519. See also *infra*, V, B–D. But see *infra*, IV, A.

The law implies a warranty of title in exchanges of land (Gamble *v.* McClure, 69 Pa. St. 282; Bixler *v.* Saylor, 68 Pa. St. 146; Dean *v.* Shelly, 57 Pa. St. 426, 98 Am. Dec. 235); and a similar warranty is implied in exchanges of personalty (Cohen *v.* Ward, 42 Ga. 337; Hunt *v.* Sackett, 31 Mich. 18; Bixler *v.* Saylor, *supra*; Rivers *v.* Grugett, 1 McCord (S. C.) 100; Patee *v.* Pelton, 48 Vt. 182).

7. *California.*— Bixby *v.* Bent, 59 Cal. 522.

Illinois.— Hartwell *v.* De Vault, 159 Ill. 325, 42 N. E. 789.

New York.— Wilcox *v.* Randall, 7 Barb. 633.

Oregon.— Windsor *v.* Collinson, 32 Oreg. 297, 52 Pac. 26.

Wisconsin.— Long *v.* Fuller, 21 Wis. 121.

United States.— Speigle *v.* Meredith, 22 Fed. Cas. No. 13,227, 4 Biss. 120.

England.— 2 Blackstone Comm. 323; Coke Litt. 50, 51; Shepherd Touchst. 289, 294; 1 Stephen Comm. 477.

8. Turner *v.* Pabst Brewing Co., 74 N. Y. App. Div. 106, 77 N. Y. Suppl. 360. See also Armstrong *v.* Helfrich, 34 Nebr. 358, 51 N. W. 856. Where a tract of land worth one thousand six hundred dollars is exchanged for a tract worth one thousand dollars, there is no such discrepancy in their values as will authorize a cancellation of the exchange, although the owner of the latter tract purchased it for less than one thousand dollars for the purpose of speculation. Wilson *v.* Jackson, 167 Mo. 135, 66 S. W. 972.

Innocent purchasers.— Where by agreement between the parties one of them conveys to a third person who has purchased from the other party, the exchange cannot be canceled for failure of the consideration moving from the party who sells to the third person, where such third person has no knowledge of the worthlessness of the property given in exchange by his vendor. Belau *v.* Bryan, 89 Iowa 348, 56 N. W. 512.

9. Bixby *v.* Bent, 59 Cal. 522; Preston *v.* Keene, 14 Pet. (U. S.) 133, 10 L. ed. 387.

Bilateral agreement but not exchange.— A written instrument providing for an exchange of property, signed and sealed by both parties, abstracts of title to be furnished and deeds to be delivered within fifteen days, contained the following provision: "This agreement is made subject to the procuring of a satis-

4. Transfer of Title or Possession. The mutual transfer of title or possession need not be contemporaneous. A contract of exchange may be executory on one side and executed on the other.[10] The contract may even be executory on both sides.[11]

B. Parol Contracts For Exchange of Realty. Parol contracts for the exchange of realty are valid when established by clear and indubitable evidence,[12] and have been sufficiently performed to take them out of the statute of frauds.[13]

III. PERFORMANCE OF CONTRACT.

A. Time — 1. In General. In the absence of anything to show a contrary intent on the part of the parties, a contract for the exchange of property must be performed on both sides concurrently.[14] Neither party therefore can put the

factory loan to the party of the first part (plaintiffs) on the last-described property" (the property to be received by plaintiffs in the exchange). Construing this as meaning a loan to be procured by plaintiffs satisfactory to themselves, but not stating its amount or terms, it was held that, although in the form of a bilateral agreement, this instrument in legal effect amounted only to a proposal or offer by defendant, which he was at liberty to withdraw at any time before its acceptance by plaintiffs, the reason being that plaintiffs had an arbitrary right to repudiate the transaction, and hence there was lacking that mutuality of obligation essential to every contract. Storch *v.* Duhnke, 76 Minn. 521, 524, 79 N. W. 533.

Forfeiture for failure to convey.— Where one party agreed for a certain consideration to convey certain property to the other party, provided the latter would at the same time convey certain other property to the former, each to incur a certain forfeiture if he failed to convey, it was held that the failure of the second party to convey, he not having accepted any conveyance from the first party, did not render him liable to a forfeiture, the reason being that he had not agreed to convey anything to the first party, and hence the contract being without mutuality. Goodale *v.* Hill, 42 Conn. 311.

Mutual covenants.— In the absence of evidence showing a contrary intent, the presumption is that covenants in a contract for the exchange of property are mutual. Pead *v.* Trull, 173 Mass. 450, 53 N. E. 901.

Independent covenants.—Not all covenants, however, in exchanges of property are mutual. Thus, where an agreement to exchange lands contains covenants on the part of each party to pay taxes on his property to the date of the exchange, and also contains a covenant by one of the parties to sell the property he is to part with in the exchange for a specified sum for the benefit of the other party, the covenants to pay taxes and the covenant to sell are not mutually dependent covenants, so as to make payment of taxes by the party in favor of whom the covenant to sell is made a condition precedent to his recovery for a breach of such covenant; but such failure to pay taxes may be shown in diminution of damages. Hartman *v.* Ruby, 16 App. Cas. (D. C.) 45. See also Putnam *v.* Mellen, 34 N. H. 71.

10. That is, the mere fact that one of the parties is not to receive his consideration until a future date will not prevent the transaction from being an exchange. Pratt *v.* Wickham, (Mich. 1903) 94 N. W. 1059; Mitchell *v.* Gile. 12 N. H. 390; Jenkins *v.* Mapes, 53 Ohio St. 110, 41 N. E. 137. But see Preston *v.* Keene, 14 Pet. (U. S.) 133, 10 L. ed. 387, holding that under the laws of Louisiana an exchange must be executed on both sides. See also to the same effect Saul *v.* His Creditors, 7 Mart. N. S. (La.) 594.

11. See Gamble *v.* McClure, 69 Pa. St. 282.

12. Brown *v.* Bailey, 159 Pa. St. 121, 28 Atl. 245; Moss *v.* Culver, 64 Pa. St. 414, 3 Am. Rep. 601; Casey *v.* Castle, 112 Wis. 32, 87 N. W. 811. A parol contract for the exchange of lands cannot be inferred merely from the declaration of the parties, but must be proved by competent evidence. Taylor *v.* Henderson, 38 Pa. St. 60. The terms of agreement must furthermore be shown with precision, and the evidence must establish the agreement to a moral certainty; but absolute certainty is not required, and mere conflict in the evidence is not fatal, provided all the necessary facts be established with reasonable distinctness and certainty. Jermyn *v.* McClure, 195 Pa. St. 245, 45 Atl. 938.

Fixing of boundaries.— The boundaries are fixed with sufficient certainty where two persons, having adjoining lands lying on both sides of a stream, make a parol exchange, and agree that one shall own the land on a certain side of the stream and the other the land on the other side. Jermyn *v.* McClure, 195 Pa. St. 245, 45 Atl. 938.

13. See, generally, Frauds, Statute of.

Parol rescission — Estoppel.— It does not lie in the mouth of one party to a trade, when the other party, seeking to rescind the contract of exchange, has placed him *in statu quo*, to say that the trade had to do with a lease of real estate for more than five years, and that the rescission of the contract was required by law to be in writing. Hart *v.* Kimball, 72 Cal. 283, 13 Pac. 852.

14. Brennan *v.* Ford, 46 Cal. 7; Pead *v.* Trull, 173 Mass. 450, 53 N. E. 901.

Waiver.— Where one of the parties performs without insisting on contemporaneous

other party in default except by full performance on his own part or a proper tender thereof.[15]

2. LIMITATIONS AS TO TIME. Sometimes it is provided in the contract that the performance must be made within a specified time, in which case failure of either party to perform or to demand and tender performance within the specified time discharges the other party, unless the party seeking to enforce the contract have a valid excuse for his own default.[16]

B. When Complete. A contract of exchange is completely performed when the titles to the respective properties have mutually passed; that is, when there has been a delivery and an acceptance on both sides.[17] Where anything remains to be done on either side the contract is not fully performed.[18]

performance by the other party, the right of contemporaneous performance is waived, and the contract becomes executed on one side and executory on the other. Morgan *v.* Powers, 66 Barb. (N. Y.) 35. *Compare* Godfrey *v.* Rosenthal, (S. D. 1903) 97 N. W. 365, where plaintiff assented to the delay in the delivery of a deed.

15. Royal *v.* Dennison, 109 Cal. 558, 42 Pac. 39; Crabtree *v.* Levings, 53 Ill. 526; Pead *v.* Trull, 173 Mass. 450, 53 N. E. 901; Hamilton *v.* Crossman, 130 Pa. St. 320, 18 Atl. 634; Ellis *v.* Light, (Tex. Civ. App. 1903) 73 S. W. 551.

Excuse for failure to tender performance.— In Royal *v.* Dennison, 109 Cal. 558, 42 Pac. 39, it was held that the mere fact that one of the parties conveyed the land agreed to be exchanged by him to his father for the purpose of defeating the claims of creditors against the land, which conveyance was set aside as to the creditors, was no excuse for the other party's failure to perform or to make a tender thereof, in the absence of anything to show that the father was unwilling to convey according to the contract of exchange, and that the son was unable to pay the claims of the creditors.

16. Perritt *v.* Arnold, 11 U. C. C. P. 413. A contract for an exchange of real estate, containing dependent covenants to be performed within a time fixed, is not discharged by non-performance or a failure to demand performance within the time stated, where performance is prevented by the previous death of one of the covenantors, and the absence of administration upon his estate. Pead *v.* Trull, 173 Mass. 450, 53 N. E. 901.

Where such provisions are made, the time within which the contract must be performed depends upon the construction of each particular contract. A contract for the exchange of lands provided that one party should obtain a loan "as soon as possible, and when the funds are borrowed the deeds above provided for shall be exchanged and delivered, or within 40 days at the most." It was held that the forty days did not commence to run from the time the contract was made, but from the effecting of the loan by said party. Te Poel *v.* Shutt, 57 Nebr. 592, 602, 78 N. W. 288.

17. Jenkins *v.* Mapes, 53 Ohio St. 110, 41 N. E. 137; Hazard *v.* Hamlin, 5 Watts (Pa.) 201; Russell *v.* Phelps, 73 Vt. 390, 50 Atl. 1101.

In common-law exchanges of land no livery of seizin was necessary (2 Blackstone Comm. 323); but it was necessary that there should be an execution by entry or claim in the life of the parties (2 Blackstone Comm. 323; Bouvier L. Dict.; Jacob L. Dict.).

It is a question for the jury to decide whether there has been a delivery. Rhea *v.* Riner, 21 Ill. 526.

Rights of third parties which have been acquired by reason of a completed exchange cannot be defeated by a reëxchange. Hazard *v.* Hamlin, 5 Watts (Pa.) 201. Thus, in Wolf *v.* Plunkett, 30 Fed. Cas. No. 17,926, 1 Flipp. 427, it appeared that A and B exchanged lands, there being at the time a recent judgment, unknown to B, which was a lien on A's property, and the property for that reason was reëxchanged, the original parties being put into possession. It was held that a purchaser under an execution on such judgment against B's property had a title at law superior to the title of B or subsequent purchasers from him. See also Cook *v.* Pinkerton, 81 Ga. 89, 7 S. E. 171, 12 Am. St. Rep. 297, where it was held that an exchange of personalty, being complete upon mutual transfer of possession, where one of the parties without the other's consent repossesses himself of the property which he has given in exchange, he thereby commits a tort, and one purchasing such property from him acquires no right therein. But where one of the parties to an exchange of lands, each having executed title bonds, agrees that the other party may mortgage the property to be conveyed by him, the former thereby waives his equities under his title bond in favor of the mortgagee. Kirklin *v.* Atlas Sav., etc., Assoc., 107 Ga. 313, 33 S. E. 83.

18. Thus, where two parties agree to exchange lands, and one party executes a deed for all he has agreed to exchange, but receives a deed for only a part of what the other party is to convey, the contract is not extinguished. Harland *v.* Harpold, 182 Ill. 227, 55 N. E. 376. Likewise, under an agreement to exchange a growing crop of wheat for a certain amount of oats, the title to the wheat does not pass so long as the oats remain undelivered and mingled with other oats belonging to the party contracting for the wheat. Crapo *v.* Seybold, 35 Mich. 169. See also Barrett *v.* Turner, 2 Nebr. 172, where it was held that where a party who had agreed to exchange land for personalty

C. Sufficiency. Literal performance is not required. It will be sufficient if the party seeking to enforce the contract has substantially and in good faith complied with his obligations thereunder.[19]

D. Tender of Performance. A tender of performance, in order to have the effect of an actual performance, must be unconditional,[20] the property or a sufficient conveyance thereof must be produced,[21] and the party to whom the tender is made must wrongfully reject it.[22]

discovered a defect in the title to the land which he had received, and therefore placed the personalty in the hands of a third person, with instruction to deliver them to the other party to the exchange upon the payment by him of a certain price, this did not operate to transfer the title to the property or constitute a performance of the contract. And see Miles *v.* Langley, 2 Russ. & M. 626, 11 Eng. Ch. 626, 39 Eng. Reprint 533, where it was held that a mutual exchange of possession of parts of certain lands in which the parties held leasehold estates did not operate to defeat a sale to a third person of one of the leaseholds under legal process against the party who gave it in exchange.

Reservation of right to rescind, within a certain time upon certain conditions, will not prevent the contract from being fully performed upon mutual delivery and acceptance, so as to entitle the party in whose favor the reservation is made to reclaim the property given by him without returning the property received by him or tendering a return thereof. Stoddard *v.* Graham, 23 How. Pr. (N. Y.) 518. See also Johnson *v.* McLane, 7 Blackf. (Ind.) 501, 43 Am. Dec. 102. And see Walker *v.* Reed, 26 N. C. 152, where the court, construing a condition whereby each party upon a certain contingency was to have the right to resume title and possession of the property conveyed by him, held that upon the mutual conveyance of the properties the titles thereto passed, subject only to be defeated upon the happening of the specified contingency.

19. Putnam *v.* Mellen, 34 N. H. 71 (where it was held that a contract for the exchange of cattle on a certain day at a certain place was sufficiently performed by one of the parties by his having his cattle at the designated place at eight o'clock A. M., and again at a later time during such day, although during the interval when the cattle were absent the other party came prepared to accept them and left before their return); Macdonald *v.* Bach, 169 N. Y. 615, 62 N. E. 1097 [*affirming* 51 N. Y. App. Div. 549, 64 N. Y. Suppl. 831] (where it was held that where a wall on property which plaintiff has contracted to exchange extends on the property of an adjoining property-owner about three-quarters of an inch, and the latter has erected an independent wall on his property, the encroachment is not sufficient to justify defendant's refusal to perform the contract); Calloway *v.* Hamby, 65 N. C. 631 (where specific performance was decreed, notwithstanding that the slaves which plaintiff had transferred to defendant in consideration for the property in litigation had been emancipated by the federal government. This decision was based also on the ground that defendant in purchasing the slaves took them subject to the possibility of emancipation, although there was nothing to this effect in the contract).

Buildings in course of construction.—Where buildings in course of construction were exchanged for other property, and thereafter, pursuant to the contract of exchange, such buildings were completed and accepted by the party to whom they were to be transferred, the contract was held to have been completely performed, notwithstanding that the fire department, acting within its discretion, required the buildings to be equipped with fire-escapes in addition to those already existing. Riley *v.* Ackley, 12 N. Y. Suppl. 701. See also Canaday *v.* Stiger, 55 N. Y. 452 [*affirming* 35 N. Y. Super. Ct. 423], where it was held that one who accepts in exchange for other property buildings in course of construction by a contractor has no equity against the other party if the contractor fails to complete the buildings.

Stipulations as to satisfaction.— A stipulation that the agreement is subject to the condition that the titles shall be satisfactory on both sides does not give either party the arbitrary right to refuse to accept a tendered performance by the other party. If in such case the titles are good in law both parties are bound to be satisfied. Underhill *v.* Beardslee, 37 N. J. L. 309, where it was held, however, that an outstanding inchoate right of dower in the land agreed to be exchanged by one party is sufficient ground for dissatisfaction on the part of the other party.

20. Royal *v.* Dennison, 109 Cal. 558, 42 Pac. 39.

21. A party making the tender must produce the property (Hounsford *v.* Fisher, Wright (Ohio) 580); but where the other party repudiates the agreement and makes no objection because the property is not produced, a mere offer to perform, coupled with the ability to carry out the offer, is sufficient (Eames *v.* Haver, 111 Cal. 401, 43 Pac. 1120).

22. Newlin *v.* Prevo, 90 Ill. App. 515.

Opportunity to inspect must be given the party to whom a tender of personal property is made; otherwise he will not be charged with a wrongful rejection. Jenkins *v.* Mapes, 53 Ohio St. 110, 41 N. E. 137.

Loss of property agreed to be exchanged is not a sufficient excuse for a refusal to accept the property tendered by the other party. Herrington *v.* Holman, 25 Tex. Suppl. 256.

A tender of a deed of a third person to whom the party making the tender has con-

IV. ENCUMBRANCES.

A. Covenants Against Encumbrances. Where a party to an exchange of realty has accepted a conveyance with covenants against encumbrances, it has been held that he cannot refuse to convey to the other party merely because of the existence of encumbrances,[23] or because he has not been reimbursed for expenditures which he has been compelled to make on account of such encumbrances.[24] On the other hand it has been held that where either party has to make expenditures in order to protect the property received by him from encumbrances covenanted against by the other party, he may, if he has not himself conveyed to such other party, either retain the property agreed to be conveyed by him as security for such expenditures, or have the amount thereof decreed a lien on such property, and have it sold to satisfy the lien.[25]

B. Assumption of Encumbrances. The operation and effect of provisions assuming mortgages, taxes, and assessments depend upon the construction of each particular contract.[26]

V. REMEDIES.[27]

A. For Failure to Perform Contract — 1. Where One Party Has Performed. Where one of the parties to a contract of exchange of property has on his part fully performed the contract by conveying or delivering the thing which he agreed to give in exchange, upon the failure or refusal on the part of the other party to perform the contract he may affirm the contract and maintain an action at law for the value of the thing which he should have received[28] or an action

veyed the property which he agreed to exchange will place the other party in default if he refuse to accept such deed, where no objection is made at the time on account of the deed being from such third party. Royal *v.* Dennison, 109 Cal. 558, 42 Pac. 39.

23. Greenwood *v.* Hoyt, 41 Minn. 381, 43 N. W. 8. In Reynolds *v.* Franklin, 41 Minn. 279, 43 N. W. 53, it was held that even though a particular encumbrance be specially covenanted against by one of the parties, and the other party be obliged to execute a bond to the holder of the encumbrance in order to obtain possession of the property, the second party, having accepted the warranty against the encumbrance, must rely upon it, and cannot on account thereof refuse to perform. But see *infra*, V, D, 1.

24. Greenwood *v.* Hoyt, 41 Minn. 381, 43 N. W. 8.

25. Rainey *v.* Hines, 121 N. C. 318, 28 S. E. 410.

Lien on land conveyed.— In Seney *v.* Porter, 12 Grant Ch. (U. C.) 546, it was held that where one of the parties is compelled to redeem from an encumbrance covenanted against by the other, he has a lien on the land conveyed in exchange by him for the amount thus expended.

Recovery of taxes paid.—Where each party agrees to pay certain taxes on the property given by him in exchange, and one of the parties gives to the other the money to pay such taxes, but is thereafter, on account of such other party's failure to pay them, compelled to pay them again, he may set off the amount of such taxes in an action by the other party against him on notes given by him in part consideration. Thomas *v.* Ruhl, 30 Misc. (N. Y.) 567, 62 N. Y. Suppl. 929.

26. *District of Columbia.*— Hartman *v.* Ruby, 16 App. Cas. 45, a guaranty to sell encumbered property for a certain amount.

Indiana.—Morrison *v.* Wasson, 79 Ind. 477, to what property applicable.

Maryland.— Linthicum *v.* Thomas, 59 Md. 574, encumbrances up to "passing of the papers."

New York.— Ruhl *v.* Thomas, 57 N. Y. App. Div. 623, 68 N. Y. Suppl. 209 (interest on encumbrances); Benson *v.* Cromwell, 26 Barb. 218 (what encumbrances assumed).

Texas.— McGregor *v.* Johnston, (Civ. App. 1896) 34 S. W. 407, variation of certain contract by parol representation.

Wisconsin.— Gee *v.* Bolton, 17 Wis. 604, method of discharging assumed obligation.

United States.— Episcopal City Mission *v.* Brown, 158 U. S. 222, 15 S. Ct. 833, 39 L. ed. 960.

Canada.— Rochon *v.* Hudon, 9 Quebec Super. Ct. 300, encumbrances "from and after" a certain date.

27. See also cross-references at the beginning of this article.

28. *Illinois.*— Plummer *v.* Rigdon, 78 Ill. 222, 29 Am. Rep. 261.

Indiana.— Lowe *v.* Turpie, 147 Ind. 652, 44 N. E. 25, 47 N. E. 150, 37 L. R. A. 233.

Iowa.— Devin *v.* Himer, 29 Iowa 297.

Kentucky.— Bryant *v.* Everley, 57 S. W. 231, 22 Ky. L. Rep. 345.

Minnesota.— Mealey *v.* Finnegan, 46 Minn. 507, 49 N. W. 207; Greenwood *v.* Hoyt, 41 Minn. 381, 43 N. W. 8; Reynolds *v.* Franklin, 41 Minn. 279, 43 N. W. 53.

Nebraska.— Reed *v.* Beardlsey, 6 Nebr. 493.

New York.— Morgan *v.* Powers, 66 Barb. 35; Baker *v.* Scott, 2 Thomps. & C. 606.

for damages for breach of contract;[29] or he may sue in equity for specific

Pennsylvania.— Morris *v.* Parham, 4 Phila. 62.

Vermont.— Russell *v.* Phelps, 73 Vt. 390, 50 Atl. 1101.

See 21 Cent. Dig. tit. "Exchange of Property," §§ 18, 29.

Action for property.— In Morgan *v.* Powers, 66 Barb. (N. Y.) 35, it was held that a contract to exchange personalty passes the title of the properties to the respective parties, and hence that, upon the failure of one of the parties to deliver, the other party may maintain an action for the specific property which he ought to have received. See also Rhea *v.* Riner, 21 Ill. 526.

Shortage.— Where the party who has fully performed has received a portion but not all of that which he ought to have received, he may recover from the other party the value of the shortage. Reynolds *v.* Franklin, 41 Minn. 279, 43 N. W. 53; Dargan *v.* Ellis, 81 Tex. 194, 16 S. W. 789. Even though the contract be for an exchange in gross, if one of the parties has been misled as to the quantity he was receiving equity will decree him compensation. Atkinson *v.* Beckett, 34 W. Va. 584, 12 S. E. 717. This decision manifestly rests upon fraud, and in all actions for shortages arising from fraud or mistake, plaintiff must show that upon the delivery thereof he gave prompt notice to the other party, with a demand to have it corrected. Selleck *v.* Griswold, 49 Wis. 39, 5 N. W. 213. See *infra*, V, C. In Harm *v.* Voss, (Iowa 1900) 82 N. W. 753, the evidence was held not to show any shortage. In Jenne *v.* Gilbert, 26 Nebr. 457, 42 N. W. 415, it was held that where it appeared that a verbal exchange of a mercantile business for other property was made on March 22, to date from March 1 of the same year, and there was conflicting evidence as to whether plaintiff or defendant was to have the proceeds of the business from March 1 to March 22, it was reversible error to exclude defendant's testimony that he was to receive such proceeds. In Smyser *v.* Frank, 49 S. W. 1071, 20 Ky. L. Rep. 952, it was held that there can be no recovery for a shortage in the exchange of lands, in the absence of evidence of the value of the land omitted.

Boot money.— Where, upon an exchange of personalty, one of the parties agrees to pay the other a certain sum as boot money, such sum may be recovered upon the common count for goods sold and delivered. Porter *v.* Talcott, 1 Cow. (N. Y.) 359. But in Wagner's Appeal, 3 Walk. (Pa.) 130, it was held that when an assigned estate is solvent, the assignee is not liable to pay a sum of money which had been agreed by him to be paid on an exchange of the assigned land for other real estate, the latter being taken by the assignors, who thus become owners of the money in question, which was not needed to pay their debts. In Chamberlin *v.* Peltz, 1 Mo. App. 183, it appeared that the claimants had given personalty for realty, on the understanding that they were to have a mortgage on the personalty to secure the excess in value thereof over the value of the realty, but that this excess had been settled and claimants had accepted a mortgage, in ignorance, through their own carelessness, of taxes which constituted an encumbrance on the realty, and thus reduced its value. It was held that an equitable lien upon the personalty for the unsettled difference in the values of the properties would be denied. The complaint in an action for boot money need not allege that the goods transferred by plaintiff to defendant were of the kind and quality contracted for, or that they were free from liens. Sharp *v.* Radebaugh, 70 Ind. 547. An action to recover the difference resulting from an oral contract of exchange of lands should not be based upon the oral agreement, which is void, but upon the contract as executed. Ing *v.* Roberts, 1 N. Y. City Ct. 371.

Failure to make improvements as agreed upon property exchanged furnishes the party receiving such property with a cause of action against the other party for the difference between the value of the property unimproved and the value which it would have had if it had been improved as agreed. Wilson *v.* Yocum, 77 Iowa 569, 42 N. W. 446.

Demand of performance must be made upon the party failing to perform as a condition precedent to the right of the other party to sue for the value of the thing he ought to have received. Edwards *v.* Hartt, 66 Ill. 71; Morgan *v.* Powers, 66 Barb. (N. Y.) 35. But where it appears that a demand would have been useless, the failure to make it is excused. Greenwood *v.* Hoyt, 41 Minn. 381, 43 N. W. 8.

Res adjudicata.— A judgment in favor of plaintiff in an action for the value of property agreed by defendant to be delivered to plaintiff in exchange for other property is no bar to a subsequent action by defendant in the first action for breach of warranty as to the property received by him. Morgan *v.* Powers, 66 Barb. (N. Y.) 35.

29. Lingeman *v.* Shirk, 15 Ind. App. 432, 43 N. E. 33; Reynolds *v.* Franklin, 41 Minn. 279, 43 N. W. 53; Mitchell *v.* Gile, 12 N. H. 390.

Conversion.— A contract of exchange of property is governed by the same rules of law as a contract of sale, and upon breach thereof an action may be maintained by the party who has performed for damages for conversion of the property traded for. Russell *v.* Phelps, 73 Vt. 390, 50 Atl. 1101.

Sufficiency of declaration.— Allegations that plaintiff and defendant agreed to exchange lands, and that as a further consideration defendant promised to make certain improvements upon the land adjoining the tract to be conveyed to him, which improvements defendant had failed to make, will sustain an action for a breach of a contract. Wilson *v.* Yocum, 77 Iowa 569, 42 N. W. 446.

performance.[30] On the other hand he may rescind the contract and sue at law for the specific property with which he has parted,[31] or the value thereof;[32] or he may sue in equity for the rescission of the contract.[33]

Measure of damages.— Plaintiff agreed to exchange certain wheat with defendant for seed wheat. Plaintiff was to deliver all his wheat to the elevator, deliver the storage tickets to defendant, and pay storage charges until April 1, and was to take the seed wheat at defendant's residence. Plaintiff performed his agreement but defendant refused to comply with the same. It was held that the measure of damages was the difference between the value of the seed wheat when and where it was to be delivered and the market value of plaintiff's wheat at the time of refusal of defendant to accept the storage tickets. Talbot *v.* Boyd, (N. D. 1902) 88 N. W. 1026. See N. D. Rev. Codes, § 4985. See also *infra*, V, A, 2. In an action to recover damages for breach of a written contract for the exchange of land, the plaintiff cannot include as a separate item of damages counsel fees which he was required to pay in a previous equity suit brought by the defendant against the plaintiff to enforce specific performance of the contract, and resulting in a dismissal of the bill. Kaufmann *v.* Kirker, 22 Pa. Super. Ct. 201.

30. Reynolds *v.* Franklin, 41 Minn. 279, 43 N. W. 53; Te Poel *v.* Shutt, 57 Nebr. 592, 78 N. W. 288; Macdonald *v.* Bach, 51 N. Y. App. Div. 549, 64 N. Y. Suppl. 831 [*affirmed* in 169 N. Y. 615, 62 N. E. 1097].

Specific performance decreed in suit for rescission.— See Gray *v.* Reesor, 15 Grant Ch. (U. C.) 205.

The statute of limitations does not begin to run against a claim for the specific performance of a contract of exchange until one of the parties has fully performed or has made a valid tender of performance. Brennan *v.* Ford, 46 Cal. 7.

31. Saul *v.* His Creditors, 7 Mart. N. S. (La.) 594.

Condition precedent.— If one who exchanges property desires to recover what he surrendered, he must tender back what he received, although the exchange may have been an enforced one produced by violence. The fact that the amount received by plaintiff is proportionally small makes no difference. Nor does a refusal by defendant to surrender the property on demand excuse plaintiff from making his tender. Reynolds *v.* Copeland, 71 Ind. 422.

Waiver.— Although either party to an agreement for an exchange of personal property may refuse to deliver until he receives the property agreed to be given in exchange, he may waive performance by the other party and complete the agreement on his part by full performance, and having done so he cannot rescind the agreement of exchange and sue for the property delivered by him, his only remedy in such case being an action for the property agreed to be given in exchange, after demand made or for its value. Morgan *v.* Powers, 66 Barb. (N. Y.) 35.

Equitable defenses.— A party to a parol agreement for the exchange of land, in possession under the contract, who by his own act puts it out of his power to perform his part of the contract, is not entitled to retain possession of the land; and the fact that he has made permanent improvements thereon gives him no such equity therein as will defeat an action of ejectment by the other party. French *v.* Seely, 7 Watts (Pa.) 231, 32 Am. Dec. 758.

Under a conditional contract for the exchange of lands, if the party obligated to perform the condition does not do so within a reasonable time, the other party may rescind and recover back the property. Joplin *v.* Fleming, 38 Tex. 526.

32. Reynolds *v.* Franklin, 41 Minn. 279, 43 N. W. 53; Bicknall *v.* Waterman, 5 R. I. 43.

Proof of non-performance by defendant is essential to a recovery by plaintiff. Thus in Long Island R. Co. *v.* Verree, 69 N. Y. 487, it was held that where a party who had agreed to exchange old iron for fish joints at certain valuations delivered old iron in excess of fish joints received, he could not recover the value of the excess without proof of the other party's refusal to deliver sufficient fish joints to pay for such excess.

Pleading.— The value of the property conveyed cannot be recovered on allegations seeking to recover the value of the property agreed to be conveyed. Lowe *v.* Turpie, 147 Ind. 652, 44 N. E. 25, 47 N. E. 150, 37 L. R. A. 233.

Assumpsit.— It has been held that where one of the parties has performed by delivering the property which he has agreed to exchange, he may sue the other party in assumpsit for goods sold and delivered if such other party fails or refuses to perform. Reynolds *v.* Franklin, 41 Minn. 279, 43 N. W. 53; Redman *v.* Adams, 165 Mo. 60, 65 S. W. 300; Clark *v.* Fairchild, 22 Wend. (N. Y.) 576; Way *v.* Wakefield, 7 Vt. 223. See also Basford *v.* Pearson, 9 Allen (Mass.) 387, 85 Am. Dec. 764. On the other hand it has been held that assumpsit for goods sold and delivered will not lie in such case. Mitchell *v.* Gile, 12 N. H. 390. It seems settled, however, that this form of action rests upon a rescission of the contract of exchange. Reynolds *v.* Franklin, *supra*. See also Mitchell *v.* Gile, *supra*. Hence, it has been held that it will not lie where the effect will be to rescind the contract in part only. Bellows *v.* Cheek, 20 Ark. 424.

33. See Gray *v.* Reesor, 15 Grant Ch. (U. C.) 205.

Upon a bill filed by T against H to rescind the contract for the exchange of lands, it appeared that H had been in possession of his land for twelve years, and had paid all the purchase-money, but that D, from whom he purchased, had died and he had brought a

2. Where Neither Party Has Performed. Where neither party has performed, and one of them, on being called upon to perform, fails or refuses to comply with his contract, the other party may maintain an action for damages for the breach of the contract.[34] In an exchange of lands, where the parties have exchanged possession but not conveyances, upon the refusal of either party to convey, the other party may maintain ejectment for the property with which he has parted.[35]

B. For Failure of Consideration[36] — **1. What Is Failure of Consideration.** Each of the properties exchanged being the consideration for the other,[37] where the title to either property fails or the property itself is worthless, there is a failure of consideration.[38]

suit against D's widow and heirs to have the title made to T. It was held that it was error to decree a rescission of the contract, as under the circumstances H should have been allowed a reasonable time to procure the title. Stimson *v.* Thorn, 25 Gratt. (Va.) 278.

34. Warren *v.* Chandler, 98 Iowa 237, 67 N. W. 242; Sternberger *v.* McGovern, 56 N. Y. 12 [*reversing* 4 Daly 456]. In the latter case it appeared that the parties had agreed to exchange certain properties at certain valuations, but that defendant was unable to perform by reason of his wife's refusal to release her dower. It was held that defendant could not be compelled to accept a conveyance from plaintiff, and to pay him in money therefor at its cash valuation; but that plaintiff's remedy was an action for damages.

The measure of damages is the difference in value between the respective properties agreed to be exchanged.

Colorado.— Montelius *v.* Atherton, 6 Colo. 224.

Iowa.— Warren *v.* Chandler, 98 Iowa 237, 67 N. W. 242.

Massachusetts. — Brigham *v.* Evans, 113 Mass. 538.

New York.— Laraway *v.* Perkins, 10 N. Y. 371; Fagen *v.* Davison, 2 Duer 153.

North Dakota.— Talbot *v.* Boyd, (1902) 88 N. W. 1026. See N. D. Rev. Codes, § 4985. See also, generally, Damages.

Incidental expenses incurred by plaintiff in the preparation of the abstract and title papers tendered by him to defendant may be recovered without any allegation of special damages. Fagen *v.* Davison, 2 Duer (N. Y.) 153. In Warren *v.* Chandler, 98 Iowa 237, 67 N. W. 242, it was held that in an action for breach of a contract to exchange, plaintiff is entitled to recover the expenses incurred by him, after execution of the contract, in an endeavor to perform, but before he learned that prior thereto defendant had put it out of his power to perform by conveying to another. In Roche *v.* Smith, 176 Mass. 595, 58 N. E. 152, 51 L. R. A. 510, it was held that where an owner of real estate has contracted to exchange it for property owned by another, whom a broker whom he had employed has produced, the contract providing that the land should be conveyed by each to the other within twenty days by a good and sufficient warranty deed, such owner may recover from the customer the amount of the commissions paid to the broker, where such customer is unable to convey a good title to his property.

Conditions precedent.— Neither party can recover damages without a proper tender of performance on his own part; but where the other party has by conveying to another put it out of his power to perform no such tender is necessary. Way *v.* Miller, 80 Mo. App. 382.

Evidence.— In an action for refusal to accept land which plaintiff agreed to convey to defendant in exchange for other property, plaintiff to prove his title offered an abstract, which the abstractor testified was correct. Attached to the abstract was the certificate of another abstracter reciting that the title remained unchanged from the date of the abstract. It was held that as the certificate was part of the abstract which plaintiff furnished defendant at the time the contract was to be consummated, and as plaintiff's evidence of title was sufficient independent of the certificate, it was not error to refuse to strike it out. Warren *v.* Chandler, 98 Iowa 237, 67 N. W. 242.

35. See the cases cited *infra,* this note. See also Doe *v.* Neeld, 5 Jur. 751, 10 L. J. C. P. 266, 3 M. & G. 271, 3 Scott N. R. 618, 42 E. C. L. 148, decided under 6 & 7 Wm. IV, c. 115.

Conditions precedent.— Where the parties have exchanged lands, but deeds are not delivered pursuant to agreement, ejectment will not lie to recover the land for such failure, without notice and an offer to rescind the contract. Maynard *v.* Cable, Wright (Ohio) 18. See also Royal *v.* Dennison, 109 Cal. 558, 42 Pac. 39, where it was held that where plaintiff and defendant agreed to exchange certain land, and before the conveyances thereof were executed plaintiff borrowed money from defendant, and orally agreed that the loan was to be secured upon the lots which defendant was to convey, plaintiff could not, on defendant's default, rescind the contract and maintain ejectment for the property given by him in exchange without offering to repay the loan. But in Alexander *v.* Wheeler, 69 Ala. 332, it was held that plaintiff, having the legal title, need not, as a condition precedent to bringing ejectment, offer to rescind a parol exchange of lands made between persons under whom he and defendant respectively hold title.

36. Vendor's lien see *infra,* V, E.

37. See *supra,* II, A, 2.

38. Hunt *v.* Sackett, 31 Mich. 18; Turner

2. Failure of Title. Where the title to the property received by either party fails, he may rescind the exchange,[39] and sue for the recovery of the property with which he has parted,[40] or its value;[41] or he may bring an equitable action for the rescission of the exchange,[42] or affirm the contract and sue for damages for the breach thereof.[43] In technical exchanges of land either party may,

v. Pabst Brewing Co., 74 N. Y. App. Div. 106, 77 N. Y. Suppl. 360; Green *v.* Veder, (Tenn. Ch. App. 1900) 57 S. W. 519.

39. Campbell *v.* Spears, 120 Iowa 670, 94 N. W. 1126; Saul *v.* His Creditors, 7 Mart. N. S. (La.) 594; Nisley *v.* Spencer, 1 Nebr. (Unoff.) 562, 95 N. W. 798; Moody *v.* Drown, 58 N. H. 45; Green *v.* Veder, (Tenn. Ch. App. 1900) 57 S. W. 519. But see Whittemore *v.* Farrington, 7 Hun (N. Y.) 392.

Waiver of defects in title.— Neither party to an exchange of lands can rescind on account of defects in the title to the property received by him, where he has sold a part of such property (Neal *v.* Reynolds, 38 Kan. 432, 16 Pac. 785), or has encumbered it (Bollnow *v.* Novacek, 184 Ill. 463, 56 N. E. 801).

40. Thacker *v.* Belcher, 11 S. W. 3, 10 Ky. L. Rep. 853; Moody *v.* Drown, 58 N. H. 45. The former of these cases was an action to recover realty, and the latter was trover for the recovery of personalty or its value. See also Goodwin *v.* Chesneau, 3 Mart. N. S. (La.) 409; Preston *v.* Keene, 14 Pet. (U. S.) 133, 10 L. ed. 387, construing La. Civ. Code, § 2633.

41. Barcus *v.* Farrar, 4 La. Ann. 219. See La. Civ. Code, §§ 2633, 2637.

Assumpsit.— As to whether in such case assumpsit for goods sold and delivered will lie the authorities seem to be in conflict. Hunt *v.* Sackett, 31 Mich. 18. See also *supra*, V, A, 1. Where money is paid as difference in an exchange of horses by plaintiff and defendant, and defendant receives money on a subsequent sale of the horse received by him, and the horse received by plaintiff is reclaimed by an owner from whom it was stolen, an action in assumpsit for money had and received lies to recover the money paid by plaintiff as boot, together with that received by defendant from the sale. Hook *v.* Robison, Add. (Pa.) 271.

42. See Bollnow *v.* Novacek, 184 Ill. 463, 56 N. E. 801; Campbell *v.* Spears, 120 Iowa 670, 94 N. W. 1126; Neal *v.* Reynolds, 38 Kan. 432, 16 Pac. 785; Nisley *v.* Spencer, 1 Nebr. (Unoff.) 562, 95 N. W. 798.

Where plaintiff has sold part of the land received by him in the exchange, he cannot have a rescission, since the parties cannot be placed *in statu quo*. Neal *v.* Reynolds, 38 Kan. 432, 16 Pac. 785. Likewise where he has leased the land and cannot recover possession thereof to the other party. Whittemore *v.* Farrington, 7 Hun (N. Y.) 392.

Removal of defects in title.— Where, pending proceedings for the rescission of a contract for an exchange of real estate because of defects in the title to the property conveyed by defendant, the latter removed the substantial defects, it is no objection to the admission, on the trial, of documentary proof of title in defendant free from substantial defects, that such title was not exhibited before the filing of complainant's bill. Bollnow *v.* Novacek, 184 Ill. 463, 56 N. E. 801. Where plaintiff claimed that land conveyed to him under an agreement to exchange was encumbered with a tax title, but the court found that defendant's grantor had obtained a quitclaim deed from the holder of the tax title, and had conveyed to defendant by deed of warranty, plaintiff was not entitled to a decree rescinding the agreement. Pirgandi *v.* Fay, 128 Mich. 630, 87 N. W. 888.

In a suit for specific performance defendant may set up failure of title to the property received by him, and obtain a rescission of the exchange. Calhoon *v.* Belden, 3 Bush (Ky.) 674.

43. Stewart *v.* Jack, 78 Iowa 154, 42 N. W. 633; Hunt *v.* Sackett, 31 Mich. 18; Bixler *v.* Saylor, 68 Pa. St. 146.

Conditions precedent.— An action for damages being an affirmance of the contract, no tender of return of benefits received thereunder is necessary. Hunt *v.* Sackett, 31 Mich. 18.

Measure of damages.— Where plaintiff and defendant agree to an exchange of lands, and after the exchange defendant's title to the land conveyed by him fails entirely, the measure of plaintiff's damages is the reasonable market value of the land at the time of failure of title. Stewart *v.* Jack, 78 Iowa 154, 42 N. W. 633.

Burden of proof.— Plaintiff, suing for a breach of contract for the exchange of lands on the ground that defendant did not own the land given by him in exchange, has the burden of proving the alleged breach, defendant not being bound in the first instance to disprove such breach by showing title in himself. Primm *v.* Legg, 67 Ill. 500.

Parties.—Plaintiff and defendant exchanged land, and on failure of title to the land conveyed by defendant, plaintiff sued for damages. It was held that as plaintiff had owned the land conveyed by him, the fact that the conveyance by defendant was made to plaintiff's wife does not affect plaintiff's right to recover the damages, as the conveyance to the wife gave her no right of action for the damages. Stewart *v.* Jack, 78 Iowa 154, 42 N. W. 633.

Parties in pari delicto.— S exchanged horses with D, knowing that D had stolen the horse. B, with the same knowledge, bought S's horse from D. The owner of the stolen horse took it from S. It was held that S could not recover from B. Bixler *v.* Saylor, 68 Pa. St. 146.

By statute in Louisiana an exchanger who is evicted of the thing he has received in ex-

upon the failure of the title to the property received by him, make a reëntry upon the land given by him in exchange, whereupon the title thereto reverts to him;[44] but this right does not appertain to an exchange of chattels.[45]

3. FAILURE OF VALUE. Where the property received by one of the parties proves to be entirely worthless, he may rescind the exchange and sue for the value of the property which he gave in exchange,[46] or he may maintain an equitable action to have the exchange rescinded.[47]

C. For Fraud or Mistake[48]— 1. FRAUD. An exchange of property like any other transaction is vitiated by fraud, and if either party has been induced by the fraud of the other to make the exchange he may rescind the whole transaction,[49]

change may at his election either sue for damages or for the recovery of the property he gave in exchange, but he must first be evicted before he can maintain either action. Barcus *v.* Farrar, 4 La. Ann. 219; Preston *v.* Keene, 14 Pet. (U. S.) 133, 10 L. ed. 387.

44. Grimes *v.* Redmon, 14 B. Mon. (Ky.) 234; Gamble *v.* McClure, 69 Pa. St. 282; Bixler *v.* Saylor, 68 Pa. St. 146; Dean *v.* Shelly, 57 Pa. St. 426, 98 Am. Dec. 235; Pugh *v.* Mays, 60 Tex. 191; Walker *v* Renfro, 26 Tex. 142; 2 Jacob L. Dict.

Bargain and sale.— An exchange of lands effected by deeds of bargain and sale, without the use of the word "exchange," not being a technical exchange (see *supra*, II, A, 1), there is no right of reëntry for eviction, the remedy being an action for damages on the covenants of warranty. Gamble *v.* McClure, 69 Pa. St. 282. See also *infra*, V, D.

45. The remedy is by an action for damages for breach of the implied warranty of title. Bixler *v.* Saylor, 68 Pa. St. 146. See *infra*, V, D.

46. Loeschigh *v.* Blun, 1 Daly (N. Y.) 49, which was for an action for conversion.

47. Turner *v.* Pabst Brewing Co., 74 N. Y. App. Div. 106, 77 N. Y. Suppl. 360. See also Armstrong *v.* Helprich, 34 Nebr. 358, 51 N. W. 856.

Innocent purchasers.— Plaintiff agreed with one W to exchange certain land for what purported to be Texas land scrip, and it was understood that they would convey the land to whomsoever W might designate. W then sold the land to defendant, to whom plaintiffs accordingly made the deed. The scrip proved worthless, and plaintiffs sought to cancel their deed. It was held that as neither defendant nor her agent had knowledge of the agreement between plaintiffs and W, and W had acted solely for himself, plaintiffs had no cause of action. Belau *v.* Bryan, 89 Iowa 348, 56 N. W. 512.

48. Vendor's lien see *infra*, V, E.

49. *Alabama.*— Whitworth *v.* Thomas, 83 Ala. 308, 3 So. 781, 3 Am. St. Rep. 725.

California.— Hartwig *v.* Clark, 138 Cal. 668, 72 Pac. 149.

Iowa.— Campbell *v.* Spears, 120 Iowa 670, 94 N. W. 1126; Brown *v.* Holden, 120 Iowa 191, 94 N. W. 482.

Maine.— Junkins *v.* Simpson, 14 Me. 364.

Massachusetts.— Whiteside *v.* Brawley, 152 Mass. 133, 24 N. E. 1088.

Nebraska.— Nisley *v.* Spencer, 1 Nebr. (Unoff.) 562, 95 N. W. 798; Faulkner *v.* Klamp, 16 Nebr. 174, 20 N. W. 220.

Texas.— Singleton *v.* Houston, (Civ. App. 1904) 79 S. W. 98.

United States.— Stuart *v.* Hayden, 72 Fed. 402, 18 C. C. A. 618 [*affirmed* in 169 U. S. 1, 18 S. Ct. 274, 42 L. ed. 639].

See 21 Cent. Dig. tit. "Exchange of Property," § 8.

Reliance on fraudulent representations is essential to the right to rescind therefor. Wilson *v.* Jackson, 167 Mo. 135, 66 S. W. 972; Nisley *v.* Spencer, 1 Nebr. (Unoff.) 562, 95 N. W. 798. See also Lucas *v.* Crippen, 76 Iowa 507, 41 N. W. 205. There can be no rescission for representation, the truth of which the complaining party has undertaken to ascertain (Wilkin *v.* Barnard, 61 N. Y. 628) or for failure to disclose the existence of a mortgage which is duly recorded (Stephen's Appeal, 87 Pa. St. 202). But in De Frees *v.* Carr, 8 Utah 488, 33 Pac. 217, it was held that one whose mind has become enfeebled by disease will not be precluded from rescinding an exchange for fraudulent representations merely because he might by reasonable diligence have discovered the fraud.

Representations as to title.— Where one who has traded personal property for a mortgage and a small sum tenders back the mortgage and the money and replevies the property, claiming that defendant falsely represented the mortgage to be a first mortgage and good, it is incumbent on him to show that there was a prior encumbrance on the lands such as to affect the title and impair his security; and the mere proof of a prior mortgage, executed by a different person, which had been foreclosed, and the sheriff's deed executed, in the absence of any showing that such prior mortgagor ever owned the land, is not sufficient. Nor does this make out a *prima facie* case, so as to shift the burden of proof on defendant to show that it did not affect the title. Bristol *v.* Braidwood, 28 Mich. 191.

Conditions precedent.— As a general rule one cannot rescind an exchange for fraud until he has returned the property which he himself has received, or has made a valid tender of the return thereof. Samples *v.* Guyer, 120 Ala. 611, 24 So. 942; Rohrof *v.* Schulte, 154 Ind. 183, 55 N. E. 427; Balue *v.* Taylor, 136 Ind. 368, 36 N. E. 269; Thayer *v.* Turner, 8 Metc. (Mass.) 550; Johnson *v.* Flynn, 97 Mich. 581, 56 N. W. 939; Brown *v.* Woods, 1 Coldw. (Tenn.) 607; Stuart *v.*

and maintain an action for the recovery of the property which he gave in

Hayden, 169 U. S. 1, 18 S. Ct. 274, 42 L. ed. 639 [*affirming* 72 Fed. 402, 18 C. C. A. 618]. This rule, however, is subject to exceptions. Thus, in Johnson *v.* Flynn, 97 Mich. 581, 56 N. W. 939, it was intimated that no return or tender of absolutely worthless property is necessary. It was held, however, that a stove worth three dollars was not worthless within this rule. In Gates *v.* Raymond, 106 Wis. 657, 82 N. W. 530, it was held that where plaintiff in replevin got defendant drunk and induced him to trade horses, so that defendant could use the money he got to boot in playing poker, and plaintiff and his associates then won from defendant at poker boot money and the horse he was to receive in exchange, defendant could rescind the trade and recover his horse without returning the money or the horse he was to receive in exchange. In Moody *v.* Drown, 58 N. H. 45, it was held that when the defrauded party elects to treat a fraudulent exchange of chattels as void, and the title of the chattel received by him has wholly failed, he may rescind the exchange without transferring to the other party a good title which he has subsequently obtained from a third person, since he is obliged to return only that which he has received under the exchange. In Faulkner *v.* Klamp, 16 Nebr. 174, 20 N. W. 220, it was held that where a party has fraudulently represented a horse traded to another to be sound and healthy, and the horse has died, the defrauded party can rescind the contract and maintain replevin for the property procured by such fraud, notwithstanding his inability to restore the property received. The court in support of its decision cited three instances in which a return of the property received is unnecessary, viz., where such property is worthless; where the party guilty of the fraud has by his own act rendered a return impossible; and in any case where a return is impossible. The last instance cited, however, is subject to the qualification that the return must not have been rendered impossible through the fault of the complaining party. See *infra*, this note "Waiver and Estoppel." In Stroff *v.* Swafford, 79 Iowa 135, 44 N. W. 293, it was held that the fact that timber has been stolen from land conveyed by defendants to plaintiffs in exchange for other property while the title was in the latter is no reason for refusing a rescission of the contract on the ground that defendants cannot be placed *in statu quo*, where plaintiffs have never been in possession of the land, and such thefts would probably have taken place without regard to the change of title, the land being in a different state from that in which the parties resided; and it was further held in this case that it is not necessary that plaintiffs should tender to defendants the amount of an encumbrance upon the realty conveyed by plaintiffs, which has been paid off by defendants, where such realty has been conveyed by defendants to third persons, and hence cannot be restored to plaintiffs. In Saint *v.* Taylor, 12 Heisk. (Tenn.) 488, it was held that where plaintiff's inability to place defendant *in statu quo* is due to defendant's fault, plaintiff may rescind without returning the property received by him. Where a sufficient tender of return is made by the complaining party, but is refused by the other party, the subsequent retention of such property by the former will not bar an action by him based on rescission. Barnett *v.* Speir, 93 Ga. 762, 21 S. E. 168.

Material representations.— False or fraudulent representations which will justify a rescission must be representations as to facts, and not mere expressions of opinion. Lockwood *v.* Fitts, 90 Ala. 150, 70 So. 467; Lucas *v.* Crippen, 76 Iowa 507, 41 N. W. 205; Wilson *v.* Jackson, 167 Mo. 135, 66 S. W. 972. They must likewise be material. As to what are material representations see Putnam *v.* Bromwell, 73 Tex. 564, 11 S. W. 491. And *compare* Singleton *v.* Houston, (Tex. Civ. App. 1904) 79 S. W. 98, holding that misrepresentations, even though innocently made, may amount to legal if not actual fraud.

Caveat emptor.— In Bristol *v.* Braidwood, 28 Mich. 191, it appeared that defendant, in delivering to plaintiff a mortgage in exchange for certain chattels, stated with reference to prior mortgages "that there were none so far as he knew." It was held that this representation came within the maxim *caveat emptor*, and that hence plaintiff could not rescind. But see Dawson *v.* Chisholm, 1 N. Y. Suppl. 171.

Expenditures made by the exchanger guilty of the fraud have been held not to preclude a rescission. Weeks *v.* Currier, 172 Mass. 53, 51 N. E. 416.

Reappraisal.— Where an exchange of goods for land was to be made on the basis of an appraisal at cost, and one of the parties misrepresented the cost of the goods, removed the cost marks, raised the cost price, and destroyed his books, the other party to the contract is not concluded by the inventory of the appraisers and may have the goods reappraised. Sutliff *v.* Dayton, 106 Mich. 179, 65 N. W. 522.

Laches.— The right to rescind for fraud must be exercised within a reasonable time. Johnson *v.* McLane, 7 Blackf. (Ind.) 501, 43 Am. Dec. 102. What is reasonable time, however, does not depend alone upon lapse of time, but upon all the circumstances. Beardsley *v.* Clem, 137 Cal. 328, 70 Pac. 175.

Waiver and estoppel.— One who has been induced by fraud to make an exchange of property may by certain acts waive the fraud and thus be precluded from rescinding; as where after discovering the fraud he continues to use and enjoy the property received by him (Samples *v.* Guyer, 120 Ala. 611, 24 So. 942; Moore *v.* Howe, 115 Iowa 62, 87 N. W. 750; Dunks *v.* Fuller, 32 Mich. 242); where after discovering the fraud he permits the other party to make valuable improve-

exchange[50] or for its value;[51] or, as in the case of failure of consideration,[52] he may sue in equity for the rescission of the contract.[53] Another remedy open to the defrauded party is to affirm the exchange, and institute an action for damages

ments on the property received by the latter (Foley *v.* Holtry, 41 Nebr. 563, 59 N. W. 781); or where he fails to make a prompt offer to return the property received by him (Balue *v.* Taylor, 136 Ind. 368, 36 N. E. 269). Likewise, where he assumes the responsibility of investigating the truth of the other party's statements, and thereafter accepts the property without having made such investigation, he will be precluded from rescinding, unless a fair investigation was prevented by the fraud of the other party. Munkres *v.* McCaskill, 64 Kan. 516, 68 Pac. 42; Wilkin *v.* Barnard, 61 N. Y. 628. But in Stevens *v.* Thompson, 98 Mich. 9, 56 N. W. 1041, it was held that the fact that the complainant, when he tendered back to defendant a deed to her property, demanded payment for the personal property which he had given in exchange, did not estop him from rescinding. Likewise where one, after exchanging horses with another, claimed that the horse received by him was not as represented, and thereupon the other party took the horse back and gave him another, which in turn was returned as not fulfilling representations, it was held that it could not be said as a matter of law that he had affirmed the first contract. Whiteside *v.* Brawley, 152 Mass. 133, 24 N. E. 1088.

50. Warnes *v.* Brubaker, 107 Mich. 440, 65 N. W. 276; Loeschigh *v.* Blun, 1 Daly (N. Y.) 49.

Replevin lies in such case.

Massachusetts.— Thayer *v.* Turner, 8 Metc. 550.

Michigan.— Bristol *v.* Braidwood, 28 Mich. 191.

Nebraska.— Faulkner *v.* Klamp, 16 Nebr. 174, 20 N. W. 220.

New Hampshire.— Noyes *v.* Patrick, 58 N. H. 618.

New York.— Hemstreet *v.* Hurley, 21 Misc. 426, 47 N. Y. Suppl. 975.

Wisconsin.— Gates *v.* Raymond, 106 Wis. 627, 82 N. W. 530.

See 21 Cent. Dig. tit. "Exchange of Property," § 25.

Detinue.— See Whitworth *v.* Thomas, 83 Ala. 308, 3 So. 781, 3 Am. St. Rep. 725, where it was held that in detinue to recover property which plaintiff has fraudulently been induced to part with in exchange the value of such property is not in issue.

Mutual frauds.— In Whitworth *v.* Thomas, 83 Ala. 308, 3 So. 781, 3 Am. St. Rep. 725, it was held that where one of the parties to an exchange seeks to rescind it for fraud and to recover the property which he gave in exchange, the fact that he may himself have been guilty of fraud is no defense. The court said: "The maxim, *In pari delicto potior est conditio possidentis*, has no application to a case like this. The maxim applies, and only applies, where two or more are jointly concerned in the perpetration of one and the same fraud; a conspiracy or combination to accomplish an illegal object, through fraud, by which some third person is to be the sufferer. It does not permit one independent deceit or fraud to be set off against another deceit or fraud, so as, on that account, to estop the latter from maintaining his suit. It may confer a right to a cross action. It does not deny to either party all right to sue."

51. Straus *v.* Herman, 45 Ga. 222. In this case it was also held that where the defrauded party has received money in addition to property, he may retain the money and, the other party having sold the property received by him, sue for the value of the property received by him, such value representing the balance of the purchase-price of the property given in exchange by plaintiff. See Ga. Code, § 2614.

Trover lies for the conversion of the property given in exchange by plaintiff. Skinner *v.* Brigham, 126 Mass. 132; Moody *v.* Drown, 58 N. H. 45.

Assumpsit lies for the value of chattels which plaintiff has fraudulently been induced to exchange for other property. Main *v.* Aukam, 12 App. Cas. (D. C.) 375. But where a party is fraudulently induced to accept a certain lot of land in exchange, being led to believe that it is another lot, he cannot maintain assumpsit for the value of the second lot as upon an original parol agreement, especially as such an agreement would be void under the statute of frauds. Reed *v.* Ismond, 110 Mich. 16, 67 N. W. 912; Warnes *v.* Brubaker, 107 Mich. 440, 65 N. W. 276.

52. See *supra*, V, B.

53. *Alabama.*— Lockwood *v.* Fitts, 90 Ala. 150, 7 So. 467.

California.— Hartwig *v.* Clark, 138 Cal. 668, 72 Pac. 149.

Indiana.— Rohrof *v.* Schulte, 154 Ind. 183, 55 N. E. 427; Leeds *v.* Boyer, 59 Ind. 289.

Iowa.— Campbell *v.* Spears, 120 Iowa 670, 94 N. W. 1126; Mohler *v.* Carder, 73 Iowa 582, 35 N. W. 647.

Maryland.— Tifel *v.* Jenkins, 83 Md. 744, 49 Atl. 840.

Michigan.— Stevens *v.* Thompson, 98 Mich. 9, 56 N. W. 104; Rood *v.* Chapin, Walk. 79.

Nebraska.— Nisley *v.* Spencer, 1 Nebr. (Unoff.) 562, 95 N. W. 798; Foley *v.* Holtry, 41 Nebr. 563, 59 N. W. 781; Armstrong *v.* Helfrich, 34 Nebr. 358, 51 N. W. 856.

New Jersey.— Stoll *v.* Wellborn, (Ch. 1903) 56 Atl. 894.

New York.— Wilkin *v.* Barnard, 61 N. Y. 628; Dawson *v.* Chisholm, 1 N. Y. Suppl. 171.

Texas.— Putnam *v.* Bromwell, 73 Tex. 465, 11 S. W. 491. See also Singleton *v.* Houston, (Tex. Civ. App. 1904) 79 S. W. 98.

for the fraud and deceit which has been practised upon him,[54] or an action for

Canada.—Veronneau *v.* Poupart, 21 L. C. Jur. 326; Lemoine *v.* Beique, (Q. B. 1878) Quebec Consol. Dig. 568; Lapperriere *v.* Thibaudeau, 1 Rev. de Leg. 506.

The fraud of plaintiff's agent, induced and connived in by defendant, has been held sufficient to authorize a rescission. Ashley *v.* Schmalinski, 46 La. Ann. 499, 15 So. 1. See also Henninger *v.* Head, 52 N. J. Eq. 431, 29 Atl. 190.

False representations of third parties as to the kind and quality of the property which one of the parties to an exchange will receive thereunder, neither of the parties to the exchange having seen it, will not support a suit to rescind for fraud, where it appears that plaintiff was offered an opportunity to go and see the property, but declined the offer and agreed to take the property at his own risk. Crist *v.* Dice, 18 Ohio St. 536. See *infra*, V, C, 2. And *compare* Irwin *v.* Wilson, 45 Ohio St. 426, 15 N. E. 209.

The relative values of a lot which an exchanger is fraudulently led to believe that he is getting and the lot which he really gets are not involved in a suit to rescind the exchange. Nelson *v.* Carlson, 54 Minn. 90, 55 S. W. 821. But in Tifel *v.* Jenkins, 93 Md. 744, 49 Atl. 840, the relative values of the properties exchanged were considered as bearing on the question of the fraud charged against defendant, and it was held that the values would be fixed as of the time of the exchange. And in Davis *v.* Van Wie, (Tex. Civ. App. 1894) 30 S. W. 492, it was held that when the petition in addition to the charge of fraud raises the question of adequacy of consideration, evidence showing the unmarketable nature of the articles received in exchange by plaintiff, and the unreasonable burdens assumed by him, is admissible to show the attitude of defendant toward the transaction.

Evidence of fraud.— In Bunch *v.* Shannon, 46 Miss. 525, it appeared that plaintiff was a person of weak mind, having great confidence in defendant, and was overreached by him, and consequently did not acquire a good title to the property received by him. It was held that this evidence was sufficient to warrant a rescission. In Wilson *v.* Jackson, 167 Mo. 135, 66 S. W. 972, and in Houghton *v.* Graybill, 82 Va. 573, the evidence was held insufficient to show fraud. See also Anderson *v.* Black, 32 S. W. 468, 17 Ky. L. Rep. 732; Dunnigan *v.* Green, 165 Mo. 98, 65 S. W. 287; Covey *v.* Keegan, 29 Nebr. 250, 45 N. W. 454.

Findings as to fraud.— Where plaintiff sought to rescind an exchange of property on the ground of fraud, and the court finds there was no fraud, a failure to find as to all the facts alleged in the complaint is not error. Norris *v.* Crandall, (Cal. 1901) 65 Pac. 568.

Suit to recover property conveyed to defendant by third party.— Where plaintiff, defendant, and a third party entered into an agreement whereby plaintiff conveyed land to a third party, who in consideration therefor paid a certain sum of money to plaintiff and conveyed other land to defendant, who in turn conveyed certain chattels to plaintiff, it was held that plaintiff might maintain a suit to rescind the exchange on account of fraudulent representations made by defendant, notwithstanding that the title to the land sought to be recovered by plaintiff had never been in him. Cabaness *v.* Holland, 19 Tex. Civ. App. 383, 47 S. W. 379.

Placing parties in statu quo — Transfer of mortgage.— Equity, in decreeing a rescission of an exchange of land for fraud, can transfer a mortgage with the consent of the mortgagee, that has been placed on the land received by plaintiff in exchange, to the land restored to him, where the rescission could not otherwise be had, and by force of the decree the mortgage becomes a lien from its date. Stevens *v.* McCoy, 60 Ohio St. 540, 54 N. E. 517.

Rights of third parties.— Equity will rescind a contract for the exchange of lands where the minds of the parties, whether by fraud or by mistake, have never met; and it cannot be contended as a reason for refusing relief that third parties have rights, where such rights are wholly dependent upon a valid exchange. Crowe *v.* Lewin, 95 N. Y. 423.

54. Brown *v.* Holden, 120 Iowa 191, 94 N. W. 482; Moore *v.* Howe, 115 Iowa 62, 87 N. W. 750; Kimball *v.* Cunningham, 4 Mass. 502, 3 Am. Dec. 230; Reed *v.* Ismond, 110 Mich. 16, 67 N. W. 912; Warnes *v.* Brubaker, 107 Mich. 440, 65 N. W. 276; Stuart *v.* Hayden, 169 U. S. 1, 18 S. Ct. 274, 42 L. ed. 639 [*affirming* 72 Fed. 402, 18 C. C. A. 618].

The value of the consideration moving from plaintiff is not ordinarily in issue in an action for damages for fraudulent representations regarding the quality of the property received by him. Likes *v.* Baer, 8 Iowa 368. But see Caumiser *v.* Conley, 60 S. W. 375, 22 Ky. L. Rep. 1237, where defendant having alleged fraudulent representations as to the value of the land given in exchange by plaintiff, the court in estimating plaintiff's damages considered the question as to the real value of such land. Where, moreover, the issue is as to which of two chattels defendant agreed to deliver to plaintiff in exchange, evidence that the property agreed to be exchanged by plaintiff was to the knowledge of the parties worth much less than the more valuable of the two chattels of defendant in question is admissible. Norris *v.* Spofford, 127 Mass. 85.

Knowledge of the fraud complained of before the exchange is closed will deprive the complaining party of all right to sue for damages (Moore *v.* Howe, 115 Iowa 62, 87 N. W. 750); but it does not rest upon plaintiff to show that he had no notice of the falsity of defendant's representations (Patee *v.* Pelton, 48 Vt. 182).

the difference in the value of the property as represented to him by the other party and its real value.[55]

2. Mistake. Mutual mistake, in consequence of which one of the parties does not get the kind or quality of property which he thought he was getting, may be corrected by an equitable action to rescind the exchange.[56]

D. For Breach of Warranties, Covenants, and Conditions — 1. Warranties and Covenants — a. Warranties. For the breach of a warranty in a contract of exchange as to the title or quality of the property exchanged the party not in

Caveat emptor.— Where plaintiff, who owned a farm, exchanged the same for defendant's stock of goods, he could not thereafter complain of the values placed on certain fixtures, etc., by defendants, when the means of knowledge were as equally available to him as to defendants. Moore *v.* Howe, 115 Iowa 62, 87 N. W. 750.

Based on ratification of exchange.— An action for damages is an election to ratify the exchange. Stuart *v.* Hayden, 169 U. S. 1, 18 S. Ct. 274, 42 L. ed. 639 [*affirming* 72 Fed. 402, 18 C. C. A. 618].

Outstanding mortgage as a defense.— In an action for damages for breach of a contract for exchange of real estate, occasioned by the failure of defendant to convey, the existence of an outstanding mortgage on plaintiff's property is a defense, where it was shown that plaintiff assured defendant that the title was free from encumbrances, although the contract did not call for a warranty deed from plaintiff. Godfrey *v.* Rosenthal, (S. D. 1903) 97 N. W. 365.

Sufficiency of petition.—In Stewart *v.* Jack, 78 Iowa 154, 42 N. W. 633, which was an action for damages for failure of title, the petition was held to present a good cause of action.

55. McDole *v.* Purdy, 23 Iowa 277; Augur *v.* Smith, 90 Tenn. 729, 18 S. W. 398.

Assumpsit.— Plaintiffs agreed to sell their farm to defendant, and to take for it the farm of one G at the same price, provided G would not take a less price for his farm. Defendant agreed with G for his farm at a less price, but deceived plaintiffs by representing that G would not take a less price, and the trade with plaintiffs was thereupon completed, plaintiffs declaring at the time that they were not "swapping" farms, but buying and selling. There was no agreement to pay to plaintiffs anything more than the G farm for theirs. It was held that plaintiffs were entitled to recover in assumpsit the difference between the agreed price and the amount paid for the G farm by defendant. Jordon *v.* Dyer, 34 Vt. 104, 80 Am. Dec. 668.

Set-off.— Where one of the parties has given his note in addition to property in exchange for other property, in an action against him on the note he may set off the difference between the real value of the property received by him and its value as fraudulently represented by plaintiff. Davis *v.* Elliott, 15 Gray (Mass.) 90.

56. Hartwig *v.* Clark, 138 Cal. 668, 72 Pac. 149; Smith *v.* Bricker, 86 Iowa 285, 53 N. W. 250; Hood *v.* Smith, 79 Iowa 621, 44 N. W. 903. *Compare* Whittemore *v.* Farrington, 7 Hun (N. Y.) 392.

A mistaken opinion expressed by one of the parties as to the value of the property offered by him in exchange is not ground for the rescission of the exchange, although such opinion was relied on by the other party. Norris *v.* Crandall, (Cal. 1901) 65 Pac. 568.

Petition.— In a proceeding to set aside a conveyance, made in an exchange of farms, on the ground of the grantee's false representations, if he be not proved to have known the same to be false, relief may be granted on the ground of mutual mistake. Montgomery *v.* Shockey, 37 Iowa 107.

Mistakes based on false representations of third parties.— One who has exchanged land for land in another state, with which both parties are unacquainted, but whose value is stated to them by a third person, under a mistake as to its identity, can, on learning of the mistake a few months after the deeds have been made and delivered, rescind by tendering back a deed of the land and the notes and mortgage received by him, on the ground of mutual mistake, since he cannot be considered negligent in relying on the third person's statements. Irwin *v.* Wilson, 45 Ohio St. 426, 15 N. E. 209 [*distinguishing* Crist *v.* Dice, 18 Ohio St. 536]. See *supra*, V, C, 1.

Election to rescind.— Where, under an agreement for the exchange of lands, a mistake in regard to the measurement is clearly shown, plaintiff may elect to have the contract enforced according to the true boundary lines, or to have it rescinded entirely. Gilroy *v.* Alis, 22 Iowa 174.

Estoppel.— In Beardsley *v.* Clem, 137 Cal. 328, 70 Pac. 175, it was held that where one of the parties, prior to giving notice of his intention to rescind, allows the other party to make permanent valuable improvements on the land, and sells such party material for improving the land, he is estopped to sue for rescission on account of mutual mistake.

A mistake as to quantity, whereby one of the parties receives more than he is entitled to, may be remedied by an equitable action to compel such party to restore such excess. Shipp *v.* Swann, 2 Bibb (Ky.) 82.

Mistake as to encumbrances assumed.— Where plaintiff in making an exchange assumed debts on the property received, the fact that afterward there prove to be other liens than those stated to him is not ground for rescission, where there was no evidence of fraud by the other party, who settled

default may rescind the exchange,[57] and recover in an action at law the property given by him in exchange,[58] or the value thereof.[59] He is not, however, obliged to rescind, but may affirm the contract and sue for the breach thereof.[60]

b. Covenants. For breach of covenants by one party the other party may either sue for damages[61] or rescind the exchange.[62]

2. Conditions. Where an exchange is made upon the condition that one of the parties may return the property received by him upon the happening of a

most if not all of them. McGregor *v.* Johnston, (Tex. Civ. App. 1896) 34 S. W. 407.

57. Thompson *v.* Harvey, 86 Ala. 519, 5 So. 825; Marston *v.* Knight, 29 Me. 341; Smith *v.* Hale, 158 Mass. 178, 33 N. E. 493, 35 Am. St. Rep. 485. But see Emanuel *v.* Dane, 3 Campb. 299; Power *v.* Wells, 3 Cowp. 818, 1 Dougl. 24. And *compare supra*, IV, A.

Conditions precedent.— The property received by the complaining party must be returned. Thompson *v.* Harvey, 86 Ala. 519, 5 So. 825; Smith *v.* Hale, 158 Mass. 178, 33 N. E. 493, 35 Am. St. Rep. 485. In the latter case it was held that on a rescission for breach of warranty of a contract for the exchange of chattels, where the chattel received by the party not in default was a buggy, the springs of which were warranted by the other party, and a spring broke without the fault of the former, he might rescind by returning the buggy in its broken condition. Zitske *v.* Goldberg, 38 Wis. 216, was a case of an exchange of horses, defendant's horse being warranted, plaintiff's horse being estimated at a higher value than that of defendant, and the latter was to credit plaintiff on his books, and did so credit him, with the amount of a certain prior account existing in defendant's favor against plaintiff. It was held that the payment of such account was not a condition precedent to plaintiff's right to return defendant's horse, for a breach of warranty, and recover possession of his own, although the rescission of the contract of exchange revived plaintiff's liability on said account.

A suit for rescission may be maintained for breach of warranty of title. Saint *v.* Taylor, 12 Heisk. (Tenn.) 488. See also Moss *v.* Jefferies, 32 S. C. 195, 10 S. E. 939, where the petition was held obnoxious to a demurrer for failure to state facts sufficient to authorize the rescission.

58. Replevin is a proper remedy in such case. Ferguson *v.* Bullock, 1 A. K. Marsh. (Ky.) 71; Marston *v.* Knight, 29 Me. 341; Zitske *v.* Goldberg, 38 Wis. 216. See also Marson *v.* Plummer, 64 Me. 315.

Detinue also lies. Thompson *v.* Harvey, 86 Ala. 519, 5 So. 825.

59. Miller *v.* Grove, 18 Md. 242, which was an action for the conversion of the property given in exchange by plaintiff, defendant having refused to return such property upon plaintiff's demand.

Assumpsit.— An action based upon a rescission of a contract of exchange of personal property for breach of warranty of title cannot be maintained under the common counts, as the effect of an action so brought would be to affirm the contract. Hunt *v.* Sackett, 31 Mich. 18.

60. In such case the only question involved is the difference between the value of the property as warranted and its real value. Rutan *v.* Ludlam, 29 N. J. L. 398. See also Wilson *v.* Yocum, 77 Iowa 569, 42 N. W. 446.

Assumpsit lies in such case. See Gates *v.* Moore, 51 Vt. 222.

Conditions precedent.— An action upon a contract of exchange of personal property, for breach of warranty of title, is an affirmance of the contract; and no act in disaffirmance of the trade, such as tendering back the boot money, or demanding the property given in exchange, is necessary as a condition precedent to bringing the action. Hunt *v.* Sackett, 31 Mich. 18.

Equitable remedy.— Where, after an exchange of lands by deeds containing covenants of warranty and against encumbances, it appears that one of the tracts is subject to a vendor's lien, equity will compel the grantor to pay off or remove the encumbrance, or give the grantee suitable indemnity. Thomas *v.* St. Paul's M. E. Church, 86 Ala. 138, 5 So. 508.

61. In a suit for breach of a guaranty on an exchange for encumbered property, whereby the owner was to sell it at a specified sum, the measure of damages is the difference between the value of plaintiff's land conveyed to defendant and the value of defendant's land conveyed to plaintiff, over and above the encumbrances on the latter, provided that such difference does not exceed the sum for which defendant agreed to sell, and in the discretion of the jury interest on the amount, if any, found to be due, from a date not earlier than the commencement of the suit. Hartman *v.* Ruby, 16 App. Cas. (D. C.) 45.

62. Fletcher *v.* Arnett, 4 S. D. 615, 57 N. W. 915.

Suit to rescind.— Where a party to the exchange of land agreed to transfer a record title to the entire strip pointed out, and was only able to convey a record title to a part of the strip, holding title to balance by adverse possession only, it was within the province of a court of equity to decree a rescission of the entire transaction at the suit of the other party. Zunker *v.* Kuehn, 113 Wis. 421, 88 N. W. 605.

Rescission in lieu of enforcement of lien.— Where one of the parties retains a lien on land exchanged by him to secure the payment of a mortgage on the land received, which mortgage the other party covenants to pay, and the land is sold thereunder on ac-

certain contingency, relating to the kind, condition, or quality of the property he is receiving, upon the breach of such condition, that is, upon the happening of the specified contingencies, the party may rescind the exchange,[63] and sue at law for the recovery of the property which he gave in exchange,[64] or in equity for the specific purpose of having the exchange rescinded.[65]

E. Vendor's Lien.[66] It is very well settled that in a proper case a vendor's lien arises as well where by exchange land is to be received as where money in specie is to be paid.[67]

count of such party's default, equity will not enforce the lien, but will decree a rescission where it appears that the land would not have been sold under the mortgage if the covenantee had paid notes given by him as a part of the consideration for such land. Parks *v.* Walden, 39 S. W. 52, 19 Ky. L. Rep. 118.

63. Condition precedent.— The party rescinding must return the thing received by him in the exchange. Cheeseman *v.* Cade, 24 N. J. L. 632; Stoddard *v.* Graham, 23 How. Pr. (N. Y.) 518.

64. See cases cited *infra*, this note.

Admissibility of evidence.—Where, in a suit to recover for failure of conditions, property which plaintiff has given to defendant in exchange for other property, the issue is as to whether the exchange was conditional or absolute, evidence as to the qualities or condition of the property received by plaintiff is inadmissible. Fulliam *v.* Hagens, 83 Iowa 763, 50 N. W. 215; Kelley *v.* Downing, 69 Vt. 266, 37 Atl. 968. Neither is evidence of defendant's knowledge of the defects covered by the condition admissible in such case. Avery *v.* Miller, 118 Mass. 500; Rollins *v.* Wibye, 40 Minn. 149, 41 N. W. 545. But evidence that plaintiff has had the use of the property traded for by him, and that defendant has not received it back from plaintiff, is admissible. Fulliam *v.* Hagens, *supra*. Likewise where the issue is as to whether the conditions as to the kind or quality have been broken, evidence as to the kind and quality of the property received by plaintiff is admissible. Herzberg *v.* Sachse, 60 Md. 426; Rollins *v.* Wibye, 40 Minn. 149, 41 N. W. 545; Faulkner *v.* Klamp, 16 Nebr. 174, 20 N. W. 220; Kelley *v.* Downing, *supra*.

The burden of proof as to a failure of conditions is upon the party asserting such failure. Fulliam *v.* Hagens, 83 Iowa 763, 50 N. W. 215.

Jury question.— Whether the conditions have been performed is a question for the jury. Rhea *v.* Riner, 21 Ill. 526.

65. Stroff *v.* Swafford, 79 Iowa 135, 44 N. W. 293; Paige *v.* Lindsey, 69 Iowa 593, 29 N. W. 615.

Laches.— The rule as to the time for tendering a return of the property received by plaintiff and for bringing suit to have the exchange rescinded is more liberal where the suit is based on a failure of conditions than where it is based on fraud. Stroff *v.* Swafford, 79 Iowa 135, 44 N. W. 293.

66. Vendor's liens generally see VENDOR AND PURCHASER.

67. *Alabama.*— Bryant *v.* Stephens, 58 Ala. 636; Burns *v.* Taylor, 23 Ala. 255.

Georgia.— Drinkwater *v.* Moreman, 61 Ga. 395.

Iowa.— McDole *v.* Purdy, 23 Iowa 277.

Minnesota.— Dawson *v.* Girard L. Ins., etc., Co., 27 Minn. 411, 8 N. W. 142.

Mississippi.— Louisiana Nat. Bank *v.* Knapp, 61 Miss. 485.

Missouri.— Bennett *v.* Shipley, 82 Mo. 448; Pratt *v.* Clark, 57 Mo. 189; Johnson *v.* Burks, 103 Mo. App. 221, 77 S. W. 133.

Failure of title.— One conveying lands to another in consideration of a conveyance by the latter of other lands under an agreement for the exchange of land is entitled to a vendor's lien on the lands conveyed by him to secure the portion of the consideration represented by lands to which he obtains no title. Johnson *v.* Burks, 103 Mo. App. 221, 77 S. W. 133. Failure of title generally see *supra*, V, B, 2.

The defrauded party is entitled to a vendor's lien on the property conveyed by him, to secure the difference between the true value of the property received by him and its value as fraudulently represented. Williamson *v.* Woten, 132 Ind. 202, 31 N. E. 791; Florida *v.* Morrison, 44 Mo. App. 529. See also Bishop *v.* Seal, 87 Mo. App. 256. Fraud generally see *supra*, V, C. 1.

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CROSS-REFERENCES

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I. DEFINITION AND KINDS.

An exchange is an association of persons engaged in business of the same nature who for convenience have combined to provide at the common expense and under uniform rules a common place for the transaction of their individual business.[1] They are commonly formed by dealers in stocks and commodities of various kinds, and are known by various names, notably stock,[2] grain, cotton, live stock, produce, and real estate exchanges, and also boards of trade and chambers of commerce.[3]

II. NATURE AND STATUS.

An exchange without a charter is generally regarded as a voluntary association,[4] and not a partnership, joint stock company, or corporation.[5] A number of

1. People *v.* Feitner, 167 N. Y. 1, 4, 60 N. E. 205, 82 Am. St. Rep. 698; Belton *v.* Hatch, 109 N. Y. 593, 595, 17 N. E. 225, 4 Am. St. Rep. 450; White *v.* Brownell, 2 Daly (N. Y.) 329, 356, 4 Abb. Pr. N. S. (N. Y.) 162 [*affirming* 3 Abb. Pr. N. S. 318]; Bernheim *v.* Keppler, 34 Misc. (N. Y.) 321, 323, 69 N. Y. Suppl. 803; Leech *v.* Harris, 2 Brewst. (Pa.) 571, 575. See Dos Passos Stock-Br. & Stock-Exch. (2d ed.) 20.

2. **Stock exchanges** were first established in England in the latter part of the seventeenth century. In America an exchange existed in Philadelphia early in the nineteenth century, which served as a model in the formation of the New York stock exchange in 1817. Dos Passos Stock-Br. and Stock-Exch. (2d ed.) 10, 971.

3. "**Chamber of commerce**" defined see 6 Cyc. 845.

4. Matter of Renville, 46 N. Y. App. Div. 37, 61 N. Y. Suppl. 549; Commercial Tel. Co. *v.* Smith, 47 Hun (N. Y.) 494; Wilson *v.* Commercial Tel. Co., 3 N. Y. Suppl. 633; Dos Passos Stock-Br. & Stock-Exch. (2d ed.) 20.

5. Swift *v.* San Francisco Stock, etc., Bd., 67 Cal. 567, 8 Pac. 94; Belton *v.* Hatch, 109 N. Y. 593, 17 N. E. 225, 4 Am. St. Rep. 495; White *v.* Brownell, 2 Daly (N. Y.) 329, 4 Abb. Pr. N. S. (N. Y.) 162 [*affirming* 3 Abb.

important exchanges have, however, either taken advantage of general incorporation laws or secured special charters.[6]

III. CONSTITUTION, BY-LAWS, AND CUSTOMS.

A. In General. The powers of an exchange are derived from its constitution, if unincorporated; if incorporated, from its charter.[7]

B. Construction. In case of conflict between the constitution and the by-laws of an exchange the constitution must prevail.[8] In construing the by-laws the court will regard the substance of the whole matter, and disregard grammatical errors.[9] The construction of a by-law is a question for the court.[10]

Pr. N. S. 318]; Leech *v.* Harris, 2 Brewst. (Pa.) 571. See Dos Passos Stock-Br. & Stock-Exch. (2d ed.) 20 *et seq.*

A board of brokers is a voluntary association of individuals formed without a charter for the purpose of affording facilities in transacting the business of its members as brokers, and is not either a joint stock company or a partnership. It does not share in either the gains or the losses of the individual associates — each member takes his own gains and incidentally sustains his own losses. There are no profits to be divided among the members, nor losses to be borne, arising out of the acts of the association. And the association looks to a continued existence, unaffected by the death, resignation, suspension, or removal of its members. White *v.* Brownell, 3 Abb. Pr. N. S. (N. Y.) 318, 324 [*affirmed* in 2 Daly 329, 4 Abb. Pr. N. S. 162].

A society for the protection of trade, the professed object of which was to watch the progress of measures through parliament affecting the trade interest, and to protect its members from the practice of the fraudulent and dishonest, is not a partnership. Caldicott *v.* Griffiths, 1 C. L. R. 715, 8 Exch. 898, 23 L. J. Exch. 54.

Although not a corporation or a partnership, a stock exchange possesses some of the characteristics of both. Belton *v.* Hatch, 109 N. Y. 593, 17 N. E. 225, 4 Am. St. Rep. 495; Thompson *v.* Adams, 93 Pa. St. 55; Leech *v.* Harris, 2 Brewst. (Pa.) 571; Hyde *v.* Woods, 12 Fed. Cas. No. 6,975, 2 Sawy. 655 [*affirmed* in 94 U. S. 523, 24 L. ed. 264].

Exchanges as associations generally see ASSOCIATIONS.

6. **Exchanges as corporations** generally see CORPORATIONS.

Nearly all the stock exchanges are unincorporated, while a majority of the other exchanges enumerated in the text have been formed as corporations. See Dos Passos Stock-Br. & Stock-Exch. (2d ed.) 13–19.

The Chicago board of trade, although it is incorporated, is merely a voluntary association. Chicago Bd. of Trade *v.* Nelson, 162 Ill. 431, 44 N. E. 743, 53 Am. St. Rep. 312; People *v.* Chicago Bd. of Trade, 80 Ill. 134.

Validity of incorporation law. — N. Y. Laws (1886), c. 333, authorizing the organization of corporations or associations for the purpose of fostering trade and commerce, or the interest of those whose business is the erection of buildings or the furnishing of materials, and to diffuse accurate and reliable information among its members as to the standing of merchants and builders, is not against public policy as being in restraint of trade. Reynolds *v.* Plumbers' Material Protective Assoc., 30 Misc. (N. Y.) 709, 63 N. Y. Suppl. 303.

An application for a charter of incorporation of an exchange whose object is the business of buying and selling stocks, bonds, etc., should set out the constitution of the society, its laws for receiving members, and mode of raising money. *In re* Pittsburgh Stock Exch., 26 Pittsb. Leg. J. N. S. (Pa.) 308.

7. People *v.* Chicago Bd. of Trade, 80 Ill. 134; Evans *v.* Minneapolis Chamber of Commerce, 86 Minn. 448, 91 N. W. 8, also holding that an incorporated exchange has inherent power to make rules for its government.

A rule prohibiting curb transactions is within the power conferred by a charter providing that the exchange may make such rules "as may seem proper and necessary for the good government of the corporation." State *v.* Milwaukee Chamber of Commerce, 47 Wis. 670, 684, 3 N. W. 760.

A rule requiring members to execute bond to secure to shippers the proceeds of their tobacco is authorized, where the corporation, the members of which are tobacco buyers and warehousemen, is given the power by its articles to regulate its members in buying, selling, and warehousing tobacco. Warren *v.* Louisville Leaf Tobacco Exch., (Ky. 1900) 55 S. W. 912.

Power in respect of: Appointment of inspectors see *infra,* VI, E, 1. Discipline of members see *infra,* VI, B, 4. Sale of defaulter's seat see *infra,* VI, D, 2, a.

8. Powell *v.* Abbott, 9 Wkly. Notes Cas. (Pa.) 231.

9. Sexton *v.* Commercial Exch., 10 Pa. Co. Ct. 607.

Construction of provisions as to: Amendment of by-laws see *infra,* III, C. Constitutional provision as to distribution of proceeds of defaulter's seat see *infra,* VI, D, 2, a. Power to suspend or expel see *infra,* VI, B, 4, b, (I). Rules regulating conduct of members *inter se* see *infra,* VI, E, 1.

10. Gill *v.* Rourke, 6 Pa. Super. Ct. 605, where it is held that if the rule is a printed one, and a notice given thereunder by one member to another is in writing, it is for the court to construe them and determine the rights and duties arising from them, and not for the jury.

C. Amendment. A member is ordinarily bound by amendments to the constitution and by-laws regularly adopted by the exchange.[11]

D. Validity. To be binding, the constitution and by-laws of an exchange must not contravene public policy or the law of the land, or be unreasonable[12]

11. MacDowell *v.* Ackley, 93 Pa. St. 277.

Amendment prohibiting smoking on change. —A by-law fixing the hours during which the exchange rooms shall be open for business, and prohibiting smoking therein during those hours, is valid, although it extends the hours designated for the same purpose by a previous by-law. Albers *v.* Merchants' Exch., 39 Mo. App. 583.

Amendments to rules providing for a gratuity fund are ordinarily binding on the members and their representatives. Parish *v.* New York Produce Exch., 169 N. Y. 34, 61 N. E. 977, 56 L. R. A. 149; MacDowell *v.* Ackley, 93 Pa. St. 277. If, however, the exchange undertakes by its by-laws to accumulate a fund for the benefit of persons dependent upon members at the time of their death, it cannot bind dissenting members by an amendment of the by-laws so as to distribute the accumulated fund among the living members. Parish *v.* New York Produce Exch., 169 N. Y. 34, 61 N. E. 977, 56 L. R. A. 149.

Partial invalidity.— An amendment to the by-laws will fail entirely if it contains an illegal provision which from its importance may have contributed more than any of the others to secure the small majority of votes by which it was adopted. Parish *v.* New York Produce Exch., 169 N. Y. 34, 61 N. E. 977, 56 L. R. A. 149.

Retrospective operation.—An amendment of a constitution relating to the mode in which the proceeds of a sale of a seat in the exchange shall be distributed among the creditors of a former member does not govern the distribution of the proceeds of a seat sold before the amendment was made. Weston *v.* Ives, 97 N. Y. 222.

12. People *v.* Chicago Live Stock Exch., 170 Ill. 556, 48 N. E. 1662, 62 Am. St. Rep. 404, 39 L. R. A. 373.

A rule prohibiting curb transactions is not unreasonable or in restraint of trade. State *v.* Milwaukee Chamber of Commerce, 47 Wis. 670, 3 N. W. 760.

A rule prohibiting members of a live-stock exchange to employ more than three traveling solicitors in certain states, who must be members of the corporation and be paid a certain stipulated salary, is an abuse of a franchise to maintain a commercial exchange to facilitate the receiving and distribution of live stock and to secure to its members the benefits of coöperation in their business. People *v.* Chicago Live Stock Exch., 170 Ill. 556, 48 N. E. 1062, 62 Am. St. Rep. 404, 39 L. R. A. 373.

A rule prohibiting smoking on change is reasonable. Albers *v.* Merchants' Exch., 138 Mo. 140, 39 S. W. 473.

A rule that in cash sales of produce the buyer may have them inspected at his own expense, and that if he accepts them without inspection he takes them at his own risk as to quality, is not unreasonable as applied to cases where the two parties are speculating in produce, and the seller does not seem to have better means of knowledge as to the condition and quality of the article than the buyer has. Chicago Packing, etc., Co. *v.* Tilton, 87 Ill. 547.

A rule that the buyer shall pay the first ten days' storage charges on all sales of grain in bulk on elevator receipts, unless otherwise specified at the time of sale, is valid. Goddard *v.* Merchants' Exch., 9 Mo. App. 290.

Rules affecting interstate commerce.— The rules of a live-stock exchange whose members are commission merchants, relating to the conduct of their business of buying and selling stock for others in a given market and fixing their charges for such services, are not agreements affecting interstate commerce, within the anti-trust law, having no direct or necessary relation to such commerce, although some of the sales themselves may constitute interstate commerce, and the cost of such transactions may be indirectly and incidentally affected by such regulations; and by-laws of such an exchange limiting the number of persons who may be employed by any member to solicit the consignment to him of stock shipped to that market, and prohibiting members from sending prepaid telegrams giving market quotations, are but regulations or agreements relating to their business, and are not in restraint of interstate commerce. Hopkins *v.* U. S., 171 U. S. 578, 19 S. Ct. 40, 43 L. ed. 290 [*reversing* 82 Fed. 529].

Validity of constitutional provision as to transfer of seat by defaulting member.— A provision in the constitution of an exchange whose members are limited in number and elected by ballot that a member, on failing to perform his contracts or becoming insolvent, may assign his seat to be sold, and that the proceeds shall, to the exclusion of his outside creditors, be first applied to the benefit of the members to whom he is indebted, the purchaser not becoming a member, nor having the right to transact business in the board until elected by ballot, is not contrary to public policy. Hyde *v.* Woods, 94 U. S. 523, 24 L. ed. 264.

Validity of rule altering common law.— If a by-law is not unreasonable or contrary to public policy, the fact that it introduces a rule which is not the rule of the common law does not render it invalid. Goddard *v.* Merchants' Exch., 9 Mo. App. 290 [*affirmed* in 78 Mo. 609].

Right of stranger to urge invalidity.— While a dissenting or unwilling minority of the members of an exchange may in proper cases appeal to the courts for relief against the enforcement of an invalid by-law, yet strangers have no right to interfere with its enforcement; nor can the members be com-

or uncertain.[13] The members are not ordinarily bound by invalid rules of the exchange.

E. Persons Bound. One who becomes a member of an exchange submits himself to the operation of its constitution, by-laws, and customs, and agrees to be bound thereby, so far as they are within its powers to make.[14] Persons who are not members of the exchange are not bound by its laws and customs,[15] unless they contract with reference to them.[16]

F. Interference by Courts.[17] If the constitution and by-laws of an exchange are valid,[18] the courts will not interfere to control their enforcement, but the association will be left to enforce them in the manner which it has prescribed.[19]

IV. OFFICERS AND AGENTS.

Generally speaking the rules governing the liability of officers and agents of corporations and voluntary associations in general for acts done in their official

pelled at a stranger's instance to disobey it. American Livestock Commission Co. *v.* Chicago Live Stock Exch., 143 Ill. 210, 32 N. E. 274, 36 Am. St. Rep. 385, 18 L. R. A. 190.

Validity of provision for: Arbitration of differences see *infra*, VI, B, 2; VI, E, 2, a. Suspension or expulsion of member see *infra*, VI, B, 2.

13. State *v.* Milwaukee Chamber of Commerce, 47 Wis. 670, 3 N. W. 760, holding, however, that a rule prohibiting members from gathering in any public place in the vicinity of the exchange room and forming a market for the purpose of making any contract for the future delivery of grain or provisions before the time fixed for opening the exchange room for general trading or after the time fixed for closing the same daily is not void for uncertainty.

14. *Illinois.*— Chicago Bd. of Trade *v.* Nelson, 162 Ill. 431, 44 N. E. 743, 53 Am. St. Rep. 312; People *v.* Chicago Bd. of Trade, 45 Ill. 112.

Massachusetts.— Durant *v.* Burt, 98 Mass. 161.

Minnesota.— Evans *v.* Minneapolis Chamber of Commerce, 86 Minn. 448, 91 N. W. 8.

Missouri.— Goddard *v.* Merchants' Exch., 9 Mo. App. 290 [*affirmed* in 78 Mo. 609].

New York.— White *v.* Brownell, 2 Daly 329, 4 Abb. Pr. N. S. 162; Haight *v.* Dickerman, 18 N. Y. Suppl. 559.

Pennsylvania.— Moxey's Appeal, 9 Wkly. Notes Cas. 441; Colket *v.* Ellis, 10 Phila. 375.

See 21 Cent. Dig. tit. "Exchanges," § 4; and also Dos Passos Stock-Br. & Stock-Exch. (2d ed.) 57 *et seq.*, 428.

However, a member of an exchange is not bound by an exercise of power on the part of his fellow members to which he has not assented by becoming a member, or which is not derived from the law of the land. Leech *v.* Harris, 2 Brewst. (Pa.) 571.

Where he does not appear in his capacity of broker in a given transaction, a member of an exchange is not bound by its customs relating to such transactions. Waugh *v.* Seaboard Bank, 54 N. Y. Super. Ct. 283.

15. Greeley *v.* Doran Wright Co., 148 Mass. 116, 18 N. E. 878; Waugh *v.* Seaboard Bank, 54 N. Y. Super. Ct. 283; Hoffman *v.* Livingston, 46 N. Y. Super. Ct. 552.

Evidence of general custom.—Evidence that the New York produce exchange has adopted a rule to receive cargoes from lighters in two days each is insufficient to establish that rule as a binding custom in the port of New York. However, the members of it may as between themselves bind themselves to observe the rule. The Innocenta, 13 Fed. Cas. No. 7,050, 10 Ben. 410.

16. Greeley *v.* Doran Wright Co., 148 Mass. 116, 18 N. E. 878; Waugh *v.* Seaboard Bank, 54 N. Y. Super. Ct. 283 (*semble*); Forget *v.* Baxter, [1900] A. C. 467. And see, generally, CUSTOMS AND USAGES; FACTORS AND BROKERS; SALES.

17. **Interference by courts:** To prevent or control proceedings for suspension or expulsion see *infra*, VI, B, 5. With reference to mutual dealings of members see *infra*, VI, E, 2, b.

18. State *v.* Milwaukee Chamber of Commerce, 47 Wis. 670, 3 N. W. 760, holding that the power to enact by-laws is not unlimited, and that the courts will interfere with the enforcement of a by-law which the exchange has no power to make. See also Angel & A. Corp. (11th ed.) § 591, note 5; Dos Passos Stock-Br. & Stock-Exch. (2d ed.) 69; Lindley Partn. (4th ed.) 5. The utmost these associations can claim is the power to make rules which the courts will not pronounce unreasonable, unconstitutional, or violative of the principles of the common law. Dos Passos Stock-Br. & Stock-Exch. (2d ed.) 60, 70.

The courts will not be bound by a determination of an exchange *ultra* its rules, or by a determination in accordance with rules which conflict with established principles of law. Weston *v.* Ives, 97 N. Y. 222; Commercial Telegram Co. *v.* Smith, 47 Hun (N. Y.) 494; Dos Passos Stock-Br. & Stock-Exch. (2d ed.) 70.

19. Green *v.* Chicago Bd. of Trade, 174 Ill. 585, 51 N. E. 599, 49 L. R. A. 365; Chicago Bd. of Trade *v.* Weare, 105 Ill. App. 289; Hutchinson *v.* Lawrence, 67 How. Pr. (N. Y.) 38.

The courts will not attempt to enforce them. The association itself must enforce its

capacity, and the rules governing the liability of such bodies for the acts of their officers and agents, apply to incorporated and voluntary commercial exchanges respectively, and their officers and agents.[20]

V. DISSOLUTION.

An incorporated exchange may be dissolved by the court either at the suit of the state [21] or at the suit of a stock-holder.[22] The causes for which the courts will dissolve an unincorporated association are either those for which a dissolution is specifically provided by the constitution, or, where that instrument is silent on the subject, a dissolution will be decreed in an equitable action at the suit of one or more of the members against all the others on a showing that the object of the society's existence has terminated, or, where a statute provides for the dissolution of such societies, in the manner thereby indicated, or it may be dissolved by the unanimous consent of its members on its property being divided among them.[23]

VI. MEMBERSHIP.

A. Admission of Members. An exchange, whether incorporated or not, has full power to make rules defining eligibility to membership in the association, and

laws by such means as it may adopt for its government. Chicago Bd. of Trade *v.* Nelson, 162 Ill. 431, 44 N. E. 743, 53 Am. St. Rep. 312.

There must be a fair and honest administration of the rules, however, and the courts will interfere to see that this is done. White *v.* Brownell, 2 Daly (N. Y.) 329, 4 Abb. Pr. N. S. (N. Y.) 162; Hutchinson *v.* Lawrence, 67 How. Pr. (N. Y.) 38.

20. See, generally, ASSOCIATIONS; CORPORATIONS.

Liability as partner.— The general rule as to members of unincorporated associations is that they are regarded as partners, and subject to the whole law of partnership. For the acts of its officers and servants, directly authorized by the constitution, laws, or regulations of an exchange, its members would be individually liable under this general principle. This personal liability of a member of an unincorporated exchange was recognized in Kronfield *v.* Haines, 20 Misc. (N. Y.) 102, 45 N. Y. Suppl. 92, in which case it was held, however, that defendant was not liable for printing and stationery supplies furnished to the exchange, as he was not shown to be a member thereof. See, generally, PARTNERSHIP.

Liability as principal.— Where the officers or servants of an unincorporated exchange have contracted obligations or incurred liability without being authorized by the association, the question seems to be determined by the law of principal and agent rather than that of partnership. The agency must be made out by the person who relies on it, for none is implied by the mere fact of association. Dos Passos Stock-Br. & Stock-Exch. (2d ed.) 38-40; Lindley Partn. & Comp. L. (4th ed.) 57, (6th ed.) 133. See, generally, PRINCIPAL AND AGENT.

A produce exchange employing a clerk and auctioneer to conduct auction sales at a call board for the benefit of such members only as pay an extra charge for the privilege is not liable for failure of the clerk to record a sale, in the absence of proof of negligence in his appointment. However, a finding of negligence on the part of the clerk in failing to record a sale is warranted, although the accurate performance of this duty was extremely difficult, because bidding was very rapid, and great confusion attended the transactions. A failure of the member making the sale to examine the record in order to assure himself of the entry of the transaction, such being the general practice of members, does not conclusively establish contributory negligence on his part. Warren *v.* St. Louis Merchants' Exch., 52 Mo. App. 157.

Liability of officers for wrongful suspension or expulsion see *infra*, VI, B, 6.

21. People *v.* Chicago Live Stock Exch., 170 Ill. 556, 48 N. E. 1062, 62 Am. St. Rep. 404, 39 L. R. A. 373, in which it was held that the state may proceed to claim a forfeiture of the charter of an incorporated exchange by an information in the nature of quo warranto, where the corporation is abusing its franchise by dictating to its members, consisting of live-stock commission merchants, the number and kind of traveling solicitors they shall employ, and how they shall be paid.

22. Hitch *v.* Hawley, 132 N. Y. 212, 30 N. E. 401 [*affirming* 15 Daly 413, 8 N. Y. Suppl. 319], where it was held that where the interests of the stock-holders of an incorporated exchange are so discordant as to prevent effective management, and a large majority of both its trustees and members wish to wind up its affairs, dissolution and distribution of the assets among the stock-holders will be "beneficial to the interests of the stockholders," within N. Y. Code Civ. Proc. § 2429, providing that where a majority of the trustees favor dissolution, and it appears that a dissolution "will be beneficial to the interests of the stock-holders, . . . the court must make a final order dissolving the corporation."

23. Dos Passos Stock-Br. & Stock-Exch. (2d ed.) 55 *et seq.*

prescribing the mode to be followed by applicants for admission; and the courts cannot compel the admission of an applicant who is ineligible or who has failed to comply with the prescribed mode in which membership can be gained.[24]

B. Discipline of Members and Termination of Membership — 1. Grounds. The rules of the exchange generally provide that a member may be fined, suspended, or expelled for misconduct,[25] fraud,[26] infractions of just and equitable principles of trade,[27] inability to meet his contracts,[28] unjustifiable or fraudulent breach of contract,[29] refusal to submit differences to arbitration or to comply with

24. White *v.* Brownell, 2 Daly (N. Y.) 329, 4 Abb. Pr. N. S. (N. Y.) 162 [*affirming* 3 Abb. Pr. N. S. 318]; Hutchinson *v.* Lawrence, 67 How. Pr. (N. Y.) 38.

Right of purchaser of seat to admission.— Where the by-laws of an exchange provide for admission to membership on the written application of an applicant indorsed by two members, approved by seven votes by the board of directors, and upon payment of an initiation fee, or on presentation of a certificate of unimpaired or unforfeited membership, duly transferred, and by signing an agreement to abide by the rules of the association, the ownership of such a certificate does not constitute the holder a member or entitle him to any rights as such, and the only way in which he can avail himself of the certificate is by tendering it in lieu of the prescribed initiation fee in case he is admitted to membership, or, in case his application is rejected, then by selling it. American Livestock Commission Co. *v.* Chicago Livestock Exch., 143 Ill. 210, 32 N. E. 274, 36 Am. St. Rep. 385, 18 L. R. A. 190. So where a seat has been sold by the assignee in bankruptcy of the owner, the purchaser may offer himself, or may procure a purchaser of the seat, and nominate him to the exchange, and ask to have him elected and recognized as a member; and, until such proceedings for recognition have been taken by the purchaser, he is not entitled to relief by way of a judgment that he is entitled to the seat and that another claimant is not. McCabe *v.* Emmons, 51 N. Y. Super. Ct. 219.

Estoppel.— A person is estopped to deny his membership where he has frequently visited a board of trade on a visitor's ticket, and when there permitted another to deal with him as a member thereof, and accordingly he is bound by the rules and customs of the board as to those transactions. Chicago Packing, etc., Co. *v.* Tilton, 87 Ill. 547. And if a person entitled to a certificate permits it to be issued to another, he is estopped to assert his title against a *bona fide* purchaser from the holder. Allien *v.* Wotherspoon, 50 N. Y. Super. Ct. 417.

The fact that an application for membership is improperly rejected does not justify the applicant in going on the premises of the exchange in violation of its rules before his right to membership has been established in the courts. Babcock *v.* Merchants' Exch., 159 Mo. 381, 60 S. W. 732.

A rule requiring payment of the assignor's debts in the exchange as a prerequisite of a transfer of membership does not require the payment of debts as to which the assignor has been discharged in bankruptcy. State *v.* Minneapolis Chamber of Commerce, 77 Minn. 308, 79 N. W. 1026.

25. See cases cited *infra*, note 26 *et seq.*

26. Chicago Bd. of Trade *v.* Weare, 105 Ill. App. 289; Young *v.* Eames, 78 N. Y. App. Div. 229, 79 N. Y. Suppl. 1068; Sewell *v.* Ives, N. Y. Daily Reg. Feb. 11, 1879.

27. Haebler *v.* New York Produce Exch., 149 N. Y. 414, 44 N. E. 87; People *v.* New York Produce Exch., 149 N. Y. 401, 44 N. E. 84; Hurst *v.* New York Produce Exch., 100 N. Y. 605; Bernheim *v.* Keppler, 34 Misc. (N. Y.) 321, 69 N. Y. Suppl. 803; People *v.* New York Commercial Assoc., 18 Abb. Pr. (N. Y.) 271.

28. Powell *v.* Abbott, 9 Wkly. Notes Cas. (Pa.) 231.

A defaulting member who, immediately on his failure, notifies the exchange is nevertheless debarred from his privileges until he makes satisfactory settlements, where the by-laws provide that a member unable to meet his contracts shall notify the president, and in default of notice the president shall appoint a committee of investigation who, if satisfied of the member's default, shall instruct the president to post notice of the failure, and that the member shall thereupon be debarred from his privileges until he makes satisfactory settlements. Sexton *v.* Commercial Exch., 10 Pa. Co. Ct. 607.

A member is properly suspended where, on his failure to pay an account in the exchange, the creditor requests a committee of investigation, and two days thereafter the committee reports the amount of the debt, and two days subsequently the creditor reports the claim unpaid. Rorke *v.* San Francisco Stock, etc., Bd., 99 Cal. 196, 33 Pac. 881.

29. White *v.* Brownell, 2 Daly (N. Y.) 329, 4 Abb. Pr. N. S. (N. Y.) 162 [*affirming* 3 Abb. Pr. N. S. 318].

A mere breach of contract, without any moral delinquency on the part of the member, is not within a by-law authorizing the board of managers of an exchange to expel a member for "fraudulent breach of contract, or of any proceedings inconsistent with just and equitable principles of trade." People *v.* New York Produce Exch., 149 N. Y. 401, 44 N. E. 84.

Although a contract was not made during a session of the exchange or on its floor, yet a breach of it may afford ground for suspension. Haebler *v.* New York Produce Exch., 149 N. Y. 414, 44 N. E. 87; Dickenson *r.* Milwaukee Chamber of Commerce, 29 Wis. 45, 9 Am. Rep. 544.

the award of arbitrators,[30] or other cause authorized by its charter or constitution.[31] The rules also generally provide for the sale of the seat of a member who has been expelled or becomes ineligible for reinstatement, and the payment of his exchange creditors out of the proceeds.[32]

2. VALIDITY OF RULES.[33] Breach of contract[34] by a member of an exchange,

"Improper conduct."— By resorting to the courts to prevent the exchange from disposing of another seat claimed by him as assignee, a member is not guilty of "improper conduct," within a by-law providing for expulsion for that cause, where the charter and by-laws confer no authority on the exchange to determine the ownership of a seat in dispute, and there is no explicit agreement depriving him of the right to appeal to another tribunal in such a case. People *v.* New York Cotton Exch., 8 Hun (N. Y.) 216.

"Misconduct."— The refusal of a member to pay a pecuniary fine imposed on him by the directors for a violation of a by-law adopted by them, where he in good faith took the position that they had no power to impose the fine, was not "misconduct" for which he might be suspended. Albers *v.* Merchants' Exch., 39 Mo. App. 583. See also Savannah Cotton Exch. *v.* State, 54 Ga. 668.

The fact that the contract is enforceable at law does not withdraw it from the jurisdiction of the board of managers under a by-law authorizing it to suspend or expel a member upon a charge of fraudulent breach of contract or of conduct inconsistent with just and equitable principles of trade. People *v.* New York Produce Exch., 149 N. Y. 401, 44 N. E. 84.

Where a member refused to comply with a valid contract on a false pretext which was not put forth in good faith, the board of managers has jurisdiction to determine whether such conduct is inconsistent with the charter and by-laws of the exchange. Haebler *v.* New York Produce Exch., 149 N. Y. 414, 44 N. E. 87.

30. People *v.* New York Cotton Exch., 8 Hun (N. Y.) 216, holding, however, that by resorting to the courts to prevent an exchange from disposing of another seat claimed by him as assignee, a member does not act in antagonism to the power of the exchange to adjust controversies between its members, so as to afford ground for his expulsion.

Failure to comply with an award rendered against his protest that the exchange had no jurisdiction of the matter in issue is not such misconduct as would authorize the expulsion of a member. Savannah Cotton Exch. *v.* State, 54 Ga. 668.

Refusal to submit to arbitration a matter not in dispute is not ground for expulsion under a by-law requiring disputes or misunderstanding between members to be submitted to a committee of arbitration for settlement. Cannon *v.* Toronto Corn Exch., 27 Grant Ch. (U. C.) 23. See, however, Rorke *v.* San Francisco Stock, etc., Bd., 99 Cal. 196, 33 Pac. 881.

31. People *v.* New York Produce Exch., 149 N. Y. 401, 44 N. E. 84 (as to incorporated exchanges); State *v.* Milwaukee Chamber of Commerce, 20 Wis. 63. *Contra,* Evans *v.* Minneapolis Chamber of Commerce, 86 Minn. 448, 91 N. W. 8; White *v.* Brownell, 2 Daly (N. Y.) 329, 4 Abb. Pr. N. S. (N. Y.) 162; Leech *v.* Harris, 2 Brewst. (Pa.) 571.

A capricious or fraudulent exercise of the power to expel will not be upheld. Farmer *v.* Kansas City Bd. of Trade, 78 Mo. App. 557.

By resorting to the courts to prevent the exchange from disposing of another seat claimed by him as assignee, a member does not act in antagonism to the power of the exchange to establish just and equitable principles in trade, so as to afford ground for his expulsion. People *v.* New York Cotton Exch., 8 Hun (N. Y.) 216.

By-laws must state the causes for expulsion with certainty so that the members may know what conduct will subject them to the penalty. People *v.* New York Produce Exch., 149 N. Y. 401, 44 N. E. 84.

In resisting unlawful authority of the exchange, a member does not violate his duty as such. Leech *v.* Harris, 2 Brewst. (Pa.) 571.

For other cases of disciplining of members for violations of rules see *infra,* VI, B, 4, b, (I).

Inherent power of exchange to expel member for causes not provided for by its charter or constitution see *infra,* VI, B, 4, b, (I).

32. Dos Passos Stock-Br. & Stock-Exch. (2d ed.) 146, 1088, 1089. See Belton *v.* Hatch, 109 N. Y. 593, 17 N. E. 225, 4 Am. St. Rep. 495, which holds that any balance, after payment of the exchange creditors, may be applied by the exchange for its corporate purposes, but, in the case of an honestly insolvent member, should be paid to the latter on his readmission or failure to qualify for readmission. See *infra,* VI, D, 2, a.

33. **Judicial protection against invalid rules** see *infra,* VI, B, 5.

Validity of rules relating to trial of charges see *infra,* VI, B, 3.

34. Chicago Bd. of Trade *v.* Nelson, 162 Ill. 431, 44 N. E. 743, 53 Am. St. Rep. 312; People *v.* Chicago Bd. of Trade, 45 Ill. 112; People *v.* New York Commercial Assoc., 18 Abb. Pr. (N. Y.) 271 (fraudulent breach of contract); Sexton *v.* Commercial Exch., 10 Pa. Co. Ct. 607 (rule providing for the suspension of a defaulting member until satisfactory settlements are made with his creditors in the exchange is valid and reasonable).

Although a contract fails to comply with the statute of frauds and is not made during a session of the exchange, a by-law providing for the expulsion of a member for non-compliance with it is reasonable and valid. Dickenson *v.* Milwaukee Chamber of Commerce, 29 Wis. 45, 9 Am. Rep. 544.

misconduct,[35] refusal to submit differences to arbitration,[36] and other causes[37] may lawfully be made ground for fine, suspension, or expulsion by the exchange; and offending members asking judicial recognition of their rights as such cannot attack by-laws so providing as being unreasonable, or against public policy, or unconstitutional.[38]

3. PROSECUTION OF CHARGES — **a. Preliminary Investigation.** If the propriety of the conduct of a member of an exchange is called into question, a committee may, without notice to him, make a preliminary investigation to determine whether formal charges shall be preferred.[39]

b. Qualification of Prosecutor. A person not a member of the exchange, if in its employ, may prefer charges against a member for a violation of its rules.[40] So may a member of the exchange, although personally aggrieved by the alleged wrong-doing,[41] or although he is a member of the committee which is to try the charges.[42]

c. Specification of Charges. The specification of charges should be sufficient in form fairly to inform the member of what he is charged,[43] but it is not to be tested by the strict rules of criminal pleading.[44]

35. Farmer *v.* Kansas City Bd. of Trade, 78 Mo. App. 557; People *v.* New York Commercial Exch., 18 Abb. Pr. (N. Y.) 271.

36. Evans *v.* Minneapolis Chamber of Commerce, 86 Minn. 448, 91 N. W. 8; Farmer *v.* Kansas City Bd. of Trade, 78 Mo. App. 557; Haebler *v.* New York Produce Exch., 149 N. Y. 414, 44 N. E. 87. *Contra,* State *v.* Union Merchants' Exch., 2 Mo. App. 96.

37. Central Stock, etc., Exch. *v.* Chicago Bd. of Trade, 196 Ill. 396, 63 N. E. 740 [*affirming* 98 Ill. App. 212], holding that a rule providing for the expulsion of any member who shall be interested in a bucket shop, or execute an order in behalf of its proprietors, is not against public policy or any rule of law, and is not unreasonable.

A by-law making a violation of the charter or by-laws a ground for expulsion is not unreasonable or unconstitutional. People *v.* New York Commercial Assoc., 18 Abb. Pr. (N. Y.) 271.

38. See cases cited *supra,* note 34 *et seq.*

39. Green *v.* Chicago Bd. of Trade, 174 Ill. 585, 51 N. E. 599, 47 L. R. A. 365 [*affirming* 63 Ill App. 446], where it was held that a rule is not unreasonable, or against public policy, which provides that when a member commits a grave offense or an act of dishonesty involving the association, the directors shall appoint a committee from their number to make a preliminary investigation as to whether charges shall be preferred to the board.

40. Albers *v.* Merchants' Exch., 39 Mo. App. 583.

41. Jackson *v.* South Omaha Live Stock Exch., 49 Nebr. 687, 68 N. W. 1051.

42. Green *v.* Chicago Bd. of Trade, 174 Ill 585, 51 N. E. 599, 49 L. R. A. 365. *Contra,* Temple *v.* Toronto Stock Exch., 8 Ont. 705.

43. Haebler *v.* New York Produce Exch., 149 N. Y. 414, 44 N. E. 87; People *v.* New York Produce Exch., 149 N. Y. 401, 44 N. E. 84; Hutchinson *v.* Lawrence, 67 How. Pr. (N. Y.) 38; Cannon *v.* Toronto Corn Exch., 5 Ont. App. 268.

44. Thus, a charge of bad faith and dishonorable conduct in not carrying out an agreement is sufficient, where a copy of the agreement is attached. Chicago Bd. of Trade *v.* Nelson, 162 Ill. 431, 44 N. E. 743, 53 Am. St. Rep. 312. So a charge of breach of contract and conduct inconsistent with just and equitable principles of trade is sufficient, although it does not allege that the member was guilty of such conduct in matters relating to the contract mentioned, where, from the body of the complaint, it is apparent that such is charged. People *v.* New York Produce Exch., 149 N. Y. 401, 44 N. E. 84 [*reversing* 8 Misc. 552, 29 N. Y. Suppl. 307]. A complaint alleging conduct inconsistent with just and equitable principles of trade in failing to comply with a certain contract is not insufficient as charging a mere breach of contract. Haebler *v.* New York Produce Exch., 149 N. Y. 414, 44 N. E. 87. A charge of "unmercantile conduct in fraudulently charging purchaser with 300 or 400 pounds of meat to the car more than it actually weighed, and saying that was the weight actually bought of [the complainant]" is sufficiently specific. Blumenthal *v.* Cincinnati Chamber of Commerce, 8 Ohio Dec. (Reprint) 622, 9 Cinc. L. Bul. 76.

Scope of issues.— The specifications on which a charge of fraud was based, after referring to a sale of certain stock and the manner in which it was conducted, alleged "that all the aforesaid transactions were had by the parties in pursuance of an agreement for the purpose of bringing about fictitious and fraudulent sales"; and the member, in his answer, admitted that there were on his books several accounts that had excited his suspicions, but that he believed that nothing fraudulent or contrary to the rules of the exchange was taking place. It was held that the scope of the charges was not limited to the particular transaction as to the shares mentioned. Young *v.* Eames, 78 N. Y. App. Div. 229, 79 N. Y. Suppl. 1068.

Waiver of objections to complaint see *infra,* VI, B, 3, l.

d. Right to Hearing. An accused member is entitled to a hearing on the merits.[45]

e. Delegation of Power to Try Members. An exchange is generally authorized by its charter or constitution to delegate the power to try and punish offending members to a board of officers to be elected from its number.[46]

f. Notice of Hearing.[47] An accused member is entitled to notice of the hearing at which the charges are to be investigated,[48] even though the rules of the exchange do not so provide.[49]

g. Mode of Trial. An accused member is not entitled to a trial conducted in accordance with the rules which govern the proceedings of courts, but only to the trial prescribed by the constitution of the exchange.[50]

h. Right to Jury.[51] A constitutional provision securing the right of trial by jury does not apply to a proceeding taken by an exchange for the removal of a member for offenses against its constitution or by-laws.[52]

i. Right to Counsel. In the absence of a rule of the exchange to the contrary,[53] an accused member of the exchange is, it seems, entitled to be represented

45. Albers *v.* Merchants' Exch., 39 Mo. App. 583; Lewis *v.* Wilson, 121 N. Y. 284, 24 N. E. 474; Kuehnemundt *v.* Smith, 2 N. Y. Suppl. 625; Hutchinson *v.* Lawrence, 67 How. Pr. (N. Y.) 38.

There must be an investigation of the question whether the position taken by the member is justifiable before he can be deprived of membership for refusing to do an act on the ground of its illegality. Matter of Lurman, 90 Hun (N. Y.) 303, 35 N. Y. Suppl. 956 [*affirmed* in 149 N. Y. 588, 44 N. E. 1125]. If, however, accused admits the existence of ground for suspension, he need not have a formal hearing or trial. Moxey's Appeal, 9 Wkly. Notes Cas. (Pa.) 441.

If taken without notice, formal complaint, or trial, and in his absence, a proceeding against a member for his suspension is utterly void. State *v.* Milwaukee Chamber of Commerce, 47 Wis. 670, 3 N. W. 760.

46. Pitcher *v.* Chicago Bd. of Trade, 121 Ill. 412, 13 N. E. 187 [*affirming* 20 Ill. App. 319]; Blumenthal *v.* Cincinnati Chamber of Commerce, 8 Ohio Dec. (Reprint) 622, 9 Cinc. L. Bul. 76; State *v.* Milwaukee Chamber of Commerce, 47 Wis. 670, 3 N. W. 760. However, a statute providing that the exchange "shall have the right to admit as members such persons as they may see fit, and expel any members as they may see fit," does not authorize a delegation of that power to the board of directors. State *v.* Milwaukee Chamber of Commerce, 20 Wis. 63.

Delegation to lay tribunal.— The question whether goods tendered a member as buyer are of a character in which it is unlawful to trade cannot be delegated by the exchange to a lay tribunal called graders. Consequently the exchange cannot, because of their report that the goods are not unlawful, refuse to give the member the benefit of a review or a hearing on the merits, and deprive him of membership because of his refusal to accept the goods. Matter of Lurman, 90 Hun (N. Y.) 303, 35 N. Y. Suppl. 956 [*affirmed* in 149 N. Y. 588, 44 N. E. 1125].

47. Notice of preliminary investigation see *supra*, VI, B, 3, a.

48. Farmer *v.* Kansas City Bd. of Trade, 78 Mo. App. 557; Lewis *v.* Wilson, 121 N. Y. 284, 24 N. E. 474; Kuehnemundt *v.* Smith, 2 N. Y. Suppl. 625; Hutchinson *v.* Lawrence, 67 How. Pr. (N. Y.) 38; State *v.* Milwaukee Chamber of Commerce, 47 Wis. 670, 3 N. W. 760.

Notice to a partnership member of the exchange is notice to the individual partners. Blumenthal *v.* Cincinnati Chamber of Commerce, 8 Ohio Dec. (Reprint) 410, 7 Cinc. L. Bul. 327.

Sufficiency of notice.— Notice of "a meeting to take into consideration the conduct of a member" does not comply with a by-law requiring notice of a meeting for the expulsion of a member to be given. It should state distinctly what the object of the meeting is. Cannon *v.* Toronto Corn Exch., 27 Grant Ch. (U. C.) 23.

49. Haebler *v.* New York Produce Exch., 149 N. Y. 414, 44 N. E. 87; People *v.* New York Produce Exch., 149 N. Y. 401, 44 N. E. 84; Hutchinson *v.* Lawrence, 67 How. Pr. (N. Y.) 38; Cannon *v.* Toronto Corn Exch., 5 Ont. App. 268.

50. Albers *v.* Merchants' Exch., 39 Mo. App. 583; People *v.* New York Produce Exch., 149 N. Y. 401, 44 N. E. 84; Lewis *v.* Wilson, 121 N. Y. 284, 24 N. E. 474; Kuehnemundt *v.* Smith, 2 N. Y. Suppl. 625; Hutchinson *v.* Lawrence, 67 How. Pr. (N. Y.) 38.

Technicalities.— Proceedings to expel a member under charges presented, notice given, and a hearing afforded, are to be considered without too much regard to any technicalities. Substantial justice is to be followed rather than form. Albers *v.* Merchants' Exch., 39 Mo. App. 583; People *v.* New York Produce Exch., 149 N. Y. 401, 44 N. E. 84; State *v.* Cincinnati Chamber of Commerce, 6 Ohio S. & C. Pl. Dec. 363, 4 Ohio N. P. 244.

The presumption cannot be entertained that the board would not give the member a fair trial. Green *v.* Chicago Bd. of Trade, 174 Ill. 585, 51 N. E. 599, 49 L. R. A. 365.

51. See, generally, JURIES.

52. People *v.* New York Commercial Assoc., 18 Abb. Pr. (N. Y.) 271.

53. Green *v.* Chicago Bd. of Trade, 174 Ill. 585, 51 N. E. 599, 49 L. R. A. 365 [*affirming*

by counsel in a trial of the charges.[54] The trial board also is entitled to counsel if the by-laws so provide.[55]

j. Right to Examine and Cross-Examine Witnesses. An accused member is entitled to examine his own witnesses and to cross-examine the prosecuting witnesses against him.[56]

k. Evidence.[57] An exchange is not bound by strict rules of evidence in the trial of an offending member.[58]

l. Waiver of Objections. An accused member may waive irregularities and the infraction of various rights by failing to take proper action at the trial with reference thereto.[59]

m. Adjudication. An adjudication by an exchange expelling a member is like an award made by a tribunal of the party's own choosing. The exchange acts judicially, and its sentence is conclusive, like that of any other judicial tribunal.[60] One only of several partners in a firm member of the exchange may be convicted on a charge against the firm for a violation of the rules of the exchange.[61]

4. Punishment[62] **— a. Fine.** An exchange has power to fine a member for an infraction of its rules.[63]

63 Ill. App. 446], holding that an exchange may lawfully adopt a rule depriving a member of the right to professional counsel in the trial of charges against him.

54. Dos Passos Stock-Br. & Stock-Exch. (2d ed.) 97.

In New York the courts have not yet passed upon the power of an exchange to make such a rule. In Hutchinson *v.* Lawrence, 67 How. Pr. 38, it appeared that at a meeting of the governing committee of the stock exchange, preliminary to hearing charges against plaintiff, a motion in behalf of the latter to be defended by counsel was defeated. In Neukirch *v.* Keppler, 56 N. Y. App. Div. 225, 67 N. Y. Suppl. 710, it is held that an objection by plaintiff that he had no counsel could not be considered as he had not asked for counsel. In Young *v.* Eames, 78 N. Y. App. Div. 229, 79 N. Y. Suppl. 1068, it is held that such an objection should have been raised by the pleadings.

55. Albers *v.* Merchants' Exch., 138 Mo. 140, 39 S. W. 473, holding, under a by-law providing that in investigations before the board either party may be represented by a member either as professional counsel or as a friend, that the board may be advised by their counsel as to the legality of a by-law under which plaintiff is suspended, even though such counsel was a member of the board.

56. Hutchinson *v.* Lawrence, 67 How. Pr. (N. Y.) 38.

57. See, generally, Evidence.

58. Blumenthal *v.* Cincinnati Chamber of Commerce, 8 Ohio Dec. (Reprint) 622, 9 Cinc. L. Bul. 76, where it was held that, although much of the evidence was hearsay, a conviction and expulsion was valid.

59. Lewis *v.* Wilson, 121 N. Y. 284, 24 N. E. 474; Young *v.* Eames, 78 N. Y. App. Div. 229, 79 N. Y. Suppl. 1068; Newkirch *v.* Keppler, 56 N. Y. App. Div. 225, 67 N. Y. Suppl. 710; Bishop *v.* Cincinnati Chamber of Commerce, 5 Ohio S. & C. Pl. Dec. 356, 5 Ohio N. P. 365; State *v.* Cincinnati Chamber of Commerce, 6 Ohio S. & C. Pl. Dec. 363, 4 Ohio N. P. 244; Dos Passos Stock-Br. & Stock-Exch. (2d ed.) 970.

Disqualification of particular members of the tribunal before which accused is to be tried is waived, where he submits his case without objection on that ground. Pitcher *v.* Chicago Bd. of Trade, 121 Ill. 412, 13 N. E. 187 [*affirming* 20 Ill. App. 319]; Jackson *v.* South Omaha Live Stock Exch., 49 Nebr. 687, 68 N. W. 1051.

Insufficiency of the complaint is waived where accused appears and raises no objection to it, but tries the case on the merits. Haebler *v.* New York Produce Exch., 149 N. Y. 414, 44 N. E. 87.

The right to be confronted with the witnesses against him is waived by accused where he submits his case without objection. Kuehnemundt *v.* Smith, 2 N. Y. Suppl. 625.

The right to copy or take notes from the testimony collected against him is waived, where accused makes request to do so, not to the governing committee, but to its secretary, and before the committee has met. Kuehnemundt *v.* Smith, 2 N. Y. Suppl. 625.

60. Ryan *v.* Cudahy, 157 Ill. 108, 41 N. E. 760, 48 Am. St. Rep. 305, 49 L. R. A. 353; Nelson *v.* Chicago Bd. of Trade, 58 Ill. App. 399; Albers *v.* Merchants' Exch., 138 Mo. 140, 39 S. W. 473; Farmer *v.* Kansas City Bd. of Trade, 78 Mo. App. 557; Dos Passos Stock-Br. & Stock-Exch. (2d ed.) 90.

A void adjudication of guilt is not a bar to a subsequent proceeding against the member for the same offense, however. State *v.* Milwaukee Chamber of Commerce, 47 Wis. 670, 3 N. W. 760.

61. Blumenthal *v.* Cincinnati Chamber of Commerce, 8 Ohio Dec. (Reprint) 622, 9 Cinc. L. Bul. 76.

62. Delegation of power to punish see *supra*, VI, B, 3, e.

63. Jackson *v.* South Omaha Live Stock Exch., 49 Nebr. 687, 68 N. W. 1051, holding that this power need not be specifically conferred in the articles of incorporation, as

b. Suspension and Expulsion — (i) *Power to Suspend or Expel.* To a limited extent an exchange has inherent power to expel a member for certain acts, although such power is not conferred by its charter or constitution, or the power is conferred in general terms.[64] The power to expel for various causes, however, is generally conferred on the exchange by its charter or articles of association.[65]

against members of the exchange. However, a by-law giving the directors indefinite power to fine members for misconduct, without limit as to the amount of the fine, is invalid. Albers *v.* Merchants' Exch., 39 Mo. App. 583.

64. Jackson *v.* South Omaha Live Stock Exch., 49 Nebr. 687, 68 N. W. 1051 (holding that this power need not be specifically conferred in the articles of incorporation, as against members of the exchange); State *v.* Milwaukee Chamber of Commerce, 20 Wis. 63 (holding, however, that where the power is conferred in general terms, the corporation may exercise it only to accomplish the objects of its creation).

The inherent power to expel may be exercised: (1) When an offense is committed which has no immediate relation to the member's corporate duty, but which is of so infamous a nature as to render him unfit for the society of honest men; (2) when the offense is against his duty as an incorporator or member of the association; and (3) when the offense is of a mixed nature — against the member's duty as a corporator or associate, and also indictable by the law of the land. Leech *v.* Harris, 2 Brewst. (Pa.) 571; Dickenson *v.* Milwaukee Chamber of Commerce, 29 Wis. 45, 9 Am. Rep. 544; State *v.* Milwaukee Chamber of Commerce, 20 Wis. 68. But before a member can be expelled for a crime, there must be a previous conviction by a jury according to law. Leech *v.* Harris, 2 Brewst. (Pa.) 571.

Where an action at law is pending, the refusal of a member to submit the same dispute to arbitration or to abide the decision of the arbitration committee is not a violation of his duty as a corporator, which justifies his expulsion or suspension. State *v.* Milwaukee Chamber of Commerce, 20 Wis. 63.

65 See also *supra*, VI, B, 1, 2.

A concealed design in an ostensible cash transaction to force the other party to accept a note as a set-off may be made ground for disciplining a member of an exchange. Farmer *v.* Kansas City Bd. of Trade, 78 Mo. App. 557.

Circulation of false reports about an officer of an exchange by a member may be made ground for disciplining him. Farmer *v.* Kansas City Bd. of Trade, 78 Mo. App. 557.

"Dishonorable conduct."—A by-law providing for the suspension of a member for "dishonorable conduct" is within the powers of an exchange having authority to admit or expel members and to make such rules as the members may think proper for its government. Chicago Bd. of Trade *v.* Nelson, 162 Ill. 431, 44 N. E. 743, 53 Am. St. Rep. 312. It has been held, however, that the directors have no power to declare "bad faith and dishonorable conduct" that which is nothing of the kind. The rule permitting expulsion for acts of bad faith is not one by which members may be expelled at the pleasure of the board, without reference to the character of the deeds it may see fit to designate as bad faith and dishonorable conduct. Nelson *v.* Chicago Bd. of Trade, 58 Ill. App. 399.

Fraudulent breach of contract or proceedings inconsistent with just principles of trade. — Power to expel for fraudulent breach of contract or for proceedings inconsistent with just and equitable principles of trade is conferred by a charter of an exchange stating that its object is to "inculcate just and equitable principles of trade, to establish and maintain uniformity in commercial usages, . . . and to adjust controversies and misunderstandings between persons engaged in business," and which authorizes the making of all proper by-laws, and the expulsion of any member in such manner as may be provided. People *v.* New York Produce Exch., 149 N. Y. 401, 44 N. E. 84. Although he is not guilty of actionable fraud, yet the charter of the New York produce exchange, as amended in 1864, confers on the board of managers authority to discipline a member guilty of unjust and inequitable conduct in trade, including breach of contract. Haebler *v.* New York Produce Exch., 149 N. Y. 414, 44 N. E. 87; People *v.* New York Produce Exch., 149 N. Y. 401, 44 N. E. 84. And although the transaction occurred with a person not belonging to the exchange, yet an exchange formed to inculcate just and equitable principles in trade, and authorized to make needful by-laws, and to expel any member in such manner as may be provided, may expel a member for obtaining goods under false pretenses. People *v.* New York Commercial Assoc., 18 Abb. Pr. (N. Y.) 271.

Refusal to deal in adulterated food, in violation of N. Y. Laws (1893), c. 661, § 41, is not a ground for which a member may be suspended by the exchange. Matter of Lurman, 90 Hun (N. Y.) 303, 35 N. Y. Suppl. 956 [*affirmed* in 149 N. Y. 588, 44 N. E. 1125].

Refusal to submit dispute to arbitration.— Continuance of membership may be made conditional on the submission of disputes to arbitration, under Minn. Gen. St. (1894) § 2982, providing for the formation of chambers of commerce for the purpose, among other things, of adjusting controversies arising between individuals engaged in business. Evans *v.* Minneapolis Chamber of Commerce, 86 Minn. 448, 91 N. W. 8.

Non-agricultural products are within the jurisdiction of the New York produce exchange, and it may accordingly suspend a

(II) *Effect of Suspension or Expulsion.* An expulsion not only terminates the membership but destroys all rights incidental thereto.[66] A suspension, however, does not interfere with the offending member's vested rights of property.[67]

5. Interference by Courts[68] — a. General Rules. Disciplinary rules of an exchange and its decisions thereunder are ordinarily binding on its members,[69] and are not subject to collateral attack or review in the courts.[70] Ordinarily a court will not interfere in a contest between an exchange and a member thereof who has been suspended or expelled, either to grant an injunction against the enforcement of the judgment of the exchange[71] or to compel the exchange to

member for an unjustifiable breach of contract to purchase cement taken from the earth and manufactured into a salable article. Hæbler *v.* New York Produce Exch., 149 N. Y. 414, 44 N. E. 87.

An indefinite power to expel members may not be inserted in the charter. Leech *v.* Harris, 2 Brewst. (Pa.) 571.

A conflicting and doubtful construction of regulations of the exchange does not justify it in depriving a member of his rights. Powell *v.* Abbott, 9 Wkly. Notes Cas. (Pa.) 231.

The presumption is against the power to expel a member except for causes recognized by adjudged cases, since it is in the nature of a forfeiture which the law does not favor. People *v.* New York Cotton Exch., 8 Hun (N. Y.) 216.

No issue was raised as to the power of the exchange, on finding plaintiff to have made a fictitious sale, to expel him for fraud, where plaintiff alleged the refusal of the exchange to recognize him as a member, and the answer set up his expulsion for fraud, and his reply set up insufficiency of evidence of fraud. Young *v.* Eames, 78 N. Y. App. Div. 229, 79 N. Y. Suppl. 1068.

Rights of customers of expelled member.— The fact that a broker by virtue of his membership has made contracts between customers does not prevent the exchange from expelling him for violation of its rules, as such contracts may be enforced by the customers in their own names. Green *v.* Chicago Bd. of Trade, 174 Ill. 585, 51 N. E. 599, 49 L. R. A. 365 [*affirming* 63 Ill. App. 446].

66. Chicago Bd. of Trade *v.* Nelson, 162 Ill. 431, 44 N. E. 743, 53 Am. St. Rep. 312.

Proceeds of sale of seat.— Where a member violates the constitutional relationship between him and the exchange by being guilty of reckless dealing or doing business with improper parties, and he is thereupon deprived of his membership and declared ineligible for readmission, he or his assignee forfeits all right to the proceeds of his seat, and the same may be disposed of as the association may direct; and the association may then fill the vacancy or not as it pleases. Belton *v.* Hatch, 109 N. Y. 593, 17 N. E. 225, 4 Am. St. Rep. 495. In that case a distinction is made between the case of an expelled member who is ineligible for readmission, and one who becomes honestly insolvent and fails to qualify for readmission. In the former case the member is deprived of all claim upon the association, but in the latter the proceeds of the seat may be paid to the member after all claims of the association are discharged. See Dos Passos Stock-Br. & Stock-Exch. (2d ed.) 31, 146. It has been held, however, that, in the absence of any specific provision therefor, the expulsion of a member for fraud does not forfeit to the exchange his property rights in his seat, and that the proceeds, after paying any claims of the exchange or its members, belongs to the expelled member. *In re* Gaylord, 111 Fed. 717. See Dos Passos Stock-Br. & Stock-Exch. (2d ed.) 158. See also *infra*, VI, D, 2, a.

67. Haebler *v.* New York Produce Exch., 149 N. Y. 414, 44 N. E. 87 [*reversing* 15 Misc. 42, 36 N. Y. Suppl. 427], holding that a suspension is not an interference with vested rights where the member expressly agrees upon entering the corporation to abide by its by-laws, or where the suspension does not affect the member's financial interest in the property of the exchange.

Effect of agreement to suffer suspension.— A contract made between a broker and his client that, if the former would appear before the arbitration committee and suffer suspension the latter would reimburse him for incidental losses is valid, and damages may be recovered for its breach. White *v.* Baxter, 71 N. Y. 254.

68. See also *supra*, III, F; *infra*, VI, E, 2, b.

69. Green *v.* Chicago Bd. of Trade, 174 Ill. 585, 51 N. E. 599, 49 L. R. A. 365; Farmer *v.* Kansas City Bd. of Trade, 78 Mo. App. 557; Dos Passos Stock-Br. & Stock-Exch. (2d ed.) 73.

Courts of equity, as well as courts of law, will refuse to interfere with the disciplinary powers of a board of trade. Chicago Bd. of Trade *v.* Nelson, 162 Ill. 431, 44 N. E. 743, 53 Am. St. Rep. 312.

70. Nelson *v.* Chicago Bd. of Trade, 58 Ill. App. 399; Bishop *v.* Cincinnati Chamber of Commerce, 5 Ohio S. & C. Pl. Dec. 356, 5 Ohio N. P. 365; Leech *v.* Harris, 2 Brewst. (Pa.) 571; Bartlett *v.* L. Bartlett, etc., Co., 116 Wis. 450, 93 N. W. 473.

71. Pitcher *v.* Chicago Bd. of Trade, 121 Ill. 412, 13 N. E. 187; Ryan *v.* Lamson, 44 Ill. App. 204.

Adequate remedy at law.— If an expelled member has any remedy, it is at law; and until his rights are settled at law equity will not restrain the enforcement of the decision of the exchange, although he may suffer a loss of profits. Baxter *v.* Chicago Bd. of Trade,

reinstate him to membership.[72] The courts will not review the evidence on which the exchange based its determination,[73] further than to ascertain whether the case is so bare of evidence that no honest mind could have reached the conclusion arrived at by the exchange.[74] Nor ordinarily will the courts restrain the exchange from proceeding to a trial of an accused member. It cannot be assumed in advance that his trial will not be a fair one so as to justify the issuance of an injunction.[75] In all cases the member must avail himself of the rights and remedies provided by the rules of the exchange before he can appeal to the courts for relief.[76]

83 Ill. 146. Nor is a member who stands suspended until he shall submit to a public reprimand confronted with an irreparable injury with no adequate remedy at law, so as to entitle him to an injunction against the exchange. Bishop *v.* Cincinnati Chamber of Commerce, 5 Ohio S. & C. Pl. Dec. 356, 5 Ohio N. P. 365.

72. Rorke *v.* San Francisco Stock, etc., Bd., 99 Cal. 196, 33 Pac. 881; People *v.* Chicago Bd. of Trade, 80 Ill. 134; Neukirch *v.* Keppler, 174 N. Y. 509, 66 N. E. 1112; White *v.* Brownell, 2 Daly (N. Y.) 329, 4 Abb. Pr. N. S. (N. Y.) 162 [*affirming* 3 Abb. Pr. N. S. 318]; Baum *v.* New York Cotton Exch., 4 N. Y. Suppl. 207, 21 Abb. N. Cas. (N. Y.) 253; Hutchinson *v.* Lawrence, 67 How. Pr. (N. Y.) 38.

Mandamus.— If the exchange is unincorporated, mandamus is not the proper remedy to determine whether or not an expelled member is entitled to be reinstated. Weidenfeld *v.* Keppler, 84 N. Y. App. Div. 235, 82 N. Y. Suppl. 634. And even where the exchange is incorporated, so that mandamus is the proper remedy to determine that question, yet if the member had full notice of the proceedings for expulsion and was fully heard, the only questions open to him, in the absence of fraud, are the question of the jurisdiction of the tribunal of the exchange to which he was summoned to entertain the proceeding, and, upon the evidence presented to it, to adjudge his disfranchisement, and the question of the regularity of the proceedings before that tribunal. People *v.* New York Produce Exch., 149 N. Y. 401, 44 N. E. 84.

73. Chicago Bd. of Trade *v.* Nelson, 162 Ill. 431, 44 N. E. 743, 53 Am. St. Rep. 312.

There is a presumption that a decision expelling a member, after a trial of charges, was founded on sufficient evidence, and in order to sustain the expulsion in the courts, the exchange is not bound to produce sufficient of the evidence on which its decision rests to show that the charges were sustained. Young *v.* Eames, 78 N. Y. App. Div. 229, 79 N. Y. Suppl. 1068.

Even if the courts can review findings of fact of the directors of an exchange, yet they may do so only where the evidence adduced before the directors has been embodied in a bill of exceptions; and if that evidence is conflicting, the findings of the directors will not be disturbed. Jackson *v.* South Omaha Live Stock Exch., 49 Nebr. 687, 68 N. W. 1051.

Findings of fraud.— The fact that a transaction by an accused member was a fictitious sale did not preclude the committee of the exchange from making a finding of fraud, inasmuch as the same act may constitute a fictitious sale and also fraud. Young *v.* Eames, 78 N. Y. App. Div. 229, 79 N. Y. Suppl. 1068. A finding of fraudulent breach of contract, or conduct inconsistent with just and equitable principles of trade, is justified by evidence that the member failed to perform a contract to deliver to another a quantity of oil at a stipulated price, and that the price of oil had advanced between the date of the contract and the date set for the performance, and that the delinquent member endeavored to shift the blame from himself by stating that he was acting as agent for another. People *v.* New York Produce Exch., 149 N. Y. 401, 44 N. E. 84.

74. People *v.* New York Produce Exch., 149 N. Y. 401, 44 N. E. 84; Young *v.* Eames, 78 N. Y. App. Div. 229, 79 N. Y. Suppl. 1068.

Entire want of evidence as jurisdictional error see *infra*, note 77.

75. Ryan *v.* Lamson, 44 Ill. App. 204; Chicago Bd. of Trade *v.* Weare, 105 Ill. App. 289.

Adequate remedy at law.—A court of equity will not entertain a bill by a member to restrain the exchange from expelling him for a violation of its rules, since if he has any remedy it is in a court of law. Sturges *v.* Chicago Bd. of Trade, 86 Ill. 441. And although the same matters are involved in an action at law between the same parties, a temporary injunction will not be granted forbidding the exchange to investigate charges brought by one of its members against another in the manner provided by its charter and by-laws, where it is not alleged that any harm has been done to the accused, or is threatened to be done. Hurst *v.* New York Produce Exch., 100 N. Y. 605, 3 N. E. 42.

Irregularity of proceedings in exchange.— The fact that a member of the tribunal which is to try the accused member prefers the charges is no ground for enjoining the trial. Green *v.* Chicago Bd. of Trade, 174 Ill. 585, 51 N. E. 599, 49 L. R. A. 365 [*affirming* 63 Ill. App. 446]. Nor will the regularity of the proposed trial be inquired into by the courts. Chicago Bd. of Trade *v.* Riordan, 94 Ill. App. 298.

76. Moxey *v.* Philadelphia Stock Exch., 14 Phila. (Pa.) 185 [*affirmed* in 9 Wkly. Notes Cas. 441], holding that, where the rules provide an ample remedy for reinstatement, equity will not relieve a suspended member. So if an accused member fails to present facts in justification before the tribunal of the ex-

b. Exceptions. The determination of a disciplinary proceeding by the regularly constituted tribunal of the exchange, like the determination of a quasi-judicial body, is a proper subject for judicial investigation and control as regards jurisdictional error at the suit of an aggrieved member.[77] So the courts will interfere to restrain a contemplated unlawful suspension or expulsion,[78] or to reinstate a member who has been unlawfully disciplined.[79] As to whether a member who has been suspended or expelled for violating a by-law which is against public policy is entitled to come into the courts for a decree reinstating him, the cases are in conflict. In some jurisdictions, it seems, a member is entitled to relief under these circumstances,[80] while in others it is held that his right to be restored to membership is vested in the contract between himself and the exchange, which he must accept in its entirety, and that so long as he insists on the rights of a member he cannot base any right of action upon the illegal character of any of its by-laws.[81] However this may be, persons who are not members of the exchange cannot ordinarily ask the courts to restrain the enforcement of illegal rules regulating the conduct of members in their business relations with others.[82]

6. Liability For Wrongful Suspension or Expulsion. A member of an exchange may in a proper case maintain an action against the association for damages for his wrongful suspension or expulsion.[83] However, neither the mem-

change, he is not entitled to relief in the courts because his apparent misconduct was justified. Lewis *v.* Wilson, 50 Hun (N. Y.) 166, 2 N. Y. Suppl. 806 [*affirmed* in 121 N. Y. 284, 24 N. E. 474].

Waiver of objections see *supra*, VI, B, 3, l.

77. Bartlett *v.* L. Bartlett, etc., Co., 116 Wis. 450, 93 N. W. 473.

A total absence of evidence to support a sentence of expulsion should have the same force in mandamus proceedings to compel reinstatement as the absence of jurisdiction on the part of the exchange to make any inquiry at all. People *v.* New York Produce Exch., 149 N. Y. 401, 44 N. E. 84.

78. Leech *v.* Harris, 2 Brewst. (Pa.) 571; Powell *v.* Abbott, 9 Wkly. Notes Cas. (Pa.) 231; Bartlett *v.* L. Bartlett, etc., Co., 116 Wis. 450, 93 N. W. 473; Dos Passos Stock-Br. & Stock-Exch. (2d ed.) 106 *et seq.*

The courts will interfere to secure a fair hearing to a member whom it is sought to expel. White *v.* Brownell, 2 Daly (N. Y.) 329, 4 Abb. Pr. N. S. (N. Y.) 162; Hutchinson *v.* Lawrence, 67 How. Pr. (N. Y.) 38.

79. Albers *v.* Merchants' Exch., 39 Mo. App. 583.

In Illinois it has been held that where a member of an exchange is improperly expelled by proceedings contrary to its constitution and rules, the court of chancery cannot reinstate him by injunction. Fisher *v.* Chicago Bd. of Trade, 80 Ill. 85. If, however, the member's property rights are involved, the courts, whether of law or of equity, have power so far to supervise the action of the exchange as to determine whether it has proceeded according to its rules, and, if it has failed in a substantial manner, to correct the abuses which may result therefrom. Ryan *v.* Cudahy, 157 Ill. 108, 41 N. E. 760, 48 Am. St. Rep. 305, 49 L. R. A. 353. And see Nelson *v.* Chicago Bd. of Trade, 58 Ill. App. 399.

Mandamus will issue to compel restoration to membership where an exchange is incorporated and a member has been unlawfully deprived of his rights (State *v.* Milwaukee Chamber of Commerce, 20 Wis. 63); but not where the exchange is unincorporated (Weidenfeld *v.* Keppler, 84 N. Y. App. Div. 235, 82 N. Y. Suppl. 634). The proper proceeding in the latter case is by equitable action. Dos Passos Stock-Br. & Stock-Exch. (2d ed.) 110.

80. American Livestock Commission Co. *v.* Chicago Livestock Exch., 143 Ill. 210, 32 N. E. 274, 36 Am. St. Rep. 385, 18 L. R. A. 190 [*affirming* 41 Ill. App. 149]; State *v.* Union Merchants' Exch., 2 Mo. App. 96.

81. Evans *v.* Minneapolis Chamber of Commerce, 86 Minn. 448, 91 N. W. 8; Farmer *v.* Kansas City Bd. of Trade, 78 Mo. App. 557; Lewis *v.* Wilson, 121 N. Y. 284, 24 N. E. 474 [*affirming* 50 Hun 166, 2 N. Y. Suppl. 806]; Greer *v.* Stoller, 77 Fed. 1.

82. American Livestock Co. *v.* Chicago Livestock Exch., 143 Ill. 210, 32 N. E. 274, 36 Am. St. Rep. 385, 18 L. R. A. 190.

83. Blumenthal *v.* Cincinnati Chamber of Commerce, 8 Ohio Dec. (Reprint) 410, 7 Cinc. L. Bul. 327; Cannon *v.* Toronto Corn Exch., 5 Ont. App. 268.

The exchange having sold the seat of a member who had been unlawfully expelled, it is liable to him therefor; and the fact that the proceeds of the sale were applied to the payment of his creditors in the exchange does not operate either as a defense to an action by him against the exchange or in mitigation of damages. Sewell *v.* Ives, 61 How. Pr. (N. Y.) 54.

Pleading.— A declaration against an exchange and certain members for conspiracy in causing plaintiff to be suspended from membership in violation of its rules, which does not set forth the rules or what acts defendants did in violation thereof, is subject to demurrer. Olds *v.* Chicago Open Bd. of Trade, 18 Ill. App. 465.

Mandamus.— The bringing of such an action is a waiver of the right to mandamus.

bers of an exchange[84] nor its officers[85] are liable in damages to a member who has been wrongfully suspended or expelled, in the absence of malice.[86] It has been held that an action for damages may also be maintained by a member where he is denied the privileges of the exchange, and his means of livelihood as a broker, without actual suspension or expulsion.[87]

C. Rights of Members in Property of Exchange — 1. In General. The possession of property by an exchange is a mere incident and not the main purpose of the association, and a member has no severable proprietary interest in it or a right to any proportional part of it upon withdrawing. He has merely the enjoyment and use of it while he is a member, and the property remains with, and belongs to, the body while it continues to exist, and when it ceases to exists the members become entitled to their proportional shares of its assets.[88]

2. Gratuity or Trust Fund. The charter, constitution, and rules of the exchange frequently provide for the creation by assessment or otherwise of a gratuity or trust fund out of which a certain sum is to be paid to the widow or family, or next of kin of, or persons dependent upon, a deceased member in good standing. In this fund a member has no severable, proprietary interest.[89] It is a mere gift from the surviving members of the exchange to the persons mentioned,[90] and the right to the fund exists subject to the rules of the exchange.[91]

Dos Passos Stock-Br. & Stock-Exch. (2d ed.) 112.

84. Lurman *v.* Jarvie, 82 N. Y. App. Div. 37, 81 N. Y. Suppl. 468, holding that where an exchange had jurisdiction to suspend members for violation of its rules, the fact that it arbitrarily and erroneously suspended a member without affording him an opportunity to be heard did not render the members of the exchange liable for injury to his business reputation, in the absence of malice.

Damages.— Where a member was suspended for a day, but his business was not molested thereby, and he could make no estimate of any loss suffered by not being on the exchange, he could not recover therefor in an action for unlawful suspension. Albers *v.* Merchants' Exch., 138 Mo. 140, 39 S. W. 473. So where a member paid dues for a year in which he was erroneously suspended, but it was not shown that the payment was caused by the suspension, it could not be recovered as damages caused thereby. And counsel fees and other incidental disbursements incurred in a mandamus proceeding to procure the reinstatement of the member, other than those taxed as costs or disbursements, are not recoverable by the member in one action against the exchange for damages. Lurman *v.* Jarvie, 82 N. Y. App. Div. 37, 81 N. Y. Suppl. 468.

85. Albers *v.* Merchants' Exch., 138 Mo. 140, 39 S. W. 473, holding that when acting within the powers conferred by the charter, upon charges of misconduct by a member, the directors of an exchange constitute a corporate court, and for mere errors of judgment by which damages result to the member, an action does not lie in his favor. To subject them to liability they must have been guilty of malice.

86. Albers *v.* Merchants' Exch., 138 Mo. 140, 39 S. W. 473, holding that malice does not appear where an exchange made a reasonable regulation, and a member violated it for several days in a defiant manner, and on the advice of an attorney he was fined by the directors, and on failure to pay the same was suspended, although the suspension was subsequently annulled by the court.

87. Temple *v.* Toronto Stock Exch., 8 Ont. 705.

88. White *v.* Brownell, 2 Daly (N. Y.) 329, 4 Abb. Pr. N. S. (N. Y.) 162 [*affirming* 3 Abb. Pr. N. S. 318]. See Dos Passos Stock-Br. & Stock-Exch. (2d ed.) 33.

The rights of the members do not substantially differ from those of partners, so far as their rights in the property of the exchange are concerned. Belton *v.* Hatch, 109 N. Y. 593, 17 N. E. 225, 4 Am. St. Rep. 495.

Ownership of real estate.— To avoid the questions which would arise as to real estate belonging to the New York stock exchange a company was incorporated on Jan. 30, 1863, under the laws of the state of New York, empowered to hold real estate, the stock of the company belonging exclusively to the exchange. The ownership of the real estate of the London stock exchange is also in a distinct body, as is also that of the San Francisco stock exchange. Dos Passos Stock-Br. & Stock-Exch. (2d ed.) 36.

Effect of suspension or expulsion see *supra*, VI, B, 4, b, (II).

89. McCord *v.* McCord, 40 N. Y. App. Div. 275, 57 N. Y. Suppl. 1049, where it is held that the interests of a wife in the gratuity fund is not assignable by the husband even with her consent.

90. Nashua Sav. Bank *v.* Abbott, 181 Mass. 531, 63 N. E. 1058, 92 Am. St. Rep. 430.

91. Swift *v.* San Francisco Stock, etc., Bd., 67 Cal. 567, 8 Pac. 94, holding that the beneficiaries mentioned in the rules are the only persons entitled to the fund, and that a member's personal representative cannot maintain an action against the exchange for the recovery of the benefit. And the right to participate in the fund is lost by a member who fails to pay his dues and assessments,

D. Transfer of Seat — 1. Assignability. A seat in an exchange is commonly transferable by the member,[92] subject, however, to limitations imposed by rules of the exchange.[93]

2. Transfer by Exchange — a. Seat of Defaulting Member. The rules of the exchange generally authorize it to sell the seat of a defaulting member,[94] and to apply the proceeds to the payment of debts due from him to members of the exchange, the nature of the debts thus entitled to preferred payment depending upon the rules of the exchange.[95] Such regulations as these are within the

so that there is nothing to transmit to his personal representative. MacDowell *v.* Ackley, 93 Pa. St. 277. See also, generally, Dos Passos Stock-Br. & Stock-Exch. (2d ed.) 164–171.

Effect of amendment of constitution and by-laws on disposition of gratuity fund see *supra*, III, C.

92. Nashua Sav. Bank *v.* Abbott, 181 Mass. 531, 63 N. E. 1058, 92 Am. St. Rep. 430 (pledge); *In re* Page, 107 Fed. 89, 46 C. C. A. 160, 59 L. R. A. 94 [*affirmed* in 187 U. S. 596, 23 S. Ct. 200, 47 L. ed. 318].

Remedy for refusal to permit transfer.— Where a member is expelled because of his refusal to arbitrate a dispute with another member, as provided in the by-laws of the association, his remedy, if he has one, for the deprivation of his right to transfer his membership, is by a proceeding to compel the board to permit the transfer, and not by a proceeding to reinstate him to membership. Evans *v.* Minneapolis Chamber of Commerce, 86 Minn. 448, 91 N. W. 8.

93. Shoemaker *v.* Philadelphia Produce Exch., 15 Phila. (Pa.) 103; Dos Passos Stock-Br. & Stock-Exch. (2d ed.) 34, 35.

A "stand" in the auction room of a real estate exchange cannot be assigned by a member who has sold his stock, even to another member; the right to the stand being strictly personal, under a rule which provides that "no auctioneer shall be disturbed in the occupancy of the stand . . . for the term of five years, provided he pays such annual rent as may be charged therefor, and remains a member of the exchange and an auctioneer." McQuillen *v.* Real-Estate Exch., etc., Room, 15 N. Y. Suppl. 206.

Right of assignee, receiver, or trustee in bankruptcy or insolvency to seat of member as assets see, generally, Assignments For Benefit of Creditors; Bankruptcy; Receivers.

Right of purchaser: To admission to membership see *supra*, VI, A. To proceeds of subsequent sale of seat by exchange see *infra*, VI, D, 2.

Validity of constitution as to rights of purchaser of seat of defaulting member see *supra*, III, D.

94. See cases cited *infra*, note 95 *et seq.*

Sale by exchange or by member.— Where the exchange, acting pursuant to a constitutional provision, refused to permit an insolvent member to transfer his seat until the price was paid into the exchange to pay debts due members, the transfer was not a voluntary sale, but a sale under rules of the exchange which required the proceeds of the sale of the seat of an insolvent member to be applied to the payment of loans from other members. Consequently the proceeds were not subject to garnishment by an outside creditor, the member being indebted to his fellow members to the amount of the proceeds. Evans *v.* Adams, 81* Pa. St. 443; Dos Passos Stock-Br. & Stock-Exch. (2d ed.) 150.

Sale on decease of defaulting member.— Where a defaulting member is suspended, the rights of creditors in the exchange to the proceeds of his seat do not become immediately fixed unless the seat is then sold, and if the period of settlement is extended in the defaulter's favor for successive yearly periods until his death, the rights of creditors in the exchange are to be determined according to its rules as then existing and not as they were at the time of the suspension. Haight *v.* Dickerman, 18 N. Y. Suppl. 559; Dos Passos Stock-Br. & Stock-Exch. (2d ed.) 114.

95. *In re* Hayes, 37 Misc. (N. Y.) 264, 75 N. Y. Suppl. 312; Sheppard *v.* Barrett, 17 Phila. (Pa.) 145, both holding that a debt due a partnership, one of whose members is a member of the exchange, is a preferred claim against the proceeds of the sale of the seat of a defaulting member. See Dos Passos Stock-Br. & Stock-Exch. (2d ed.) 113 *et seq.*

A claim need not arise out of a stock transaction to entitle it to share in the proceeds of the sale. It is sufficient if it arises from, or relates to, the business of stock brokage. Hence friendly loans between members are entitled to participate. Sheppard *v.* Barrett, 17 Phila. (Pa.) 145.

Adjudication of right to participate.— A committee of the exchange has no power to admit, as a claim against the proceeds of the sale, a debt which the constitution expressly excludes from participation in the fund. Weston *v.* Ives, 97 N. Y. 222. And see Cochran *v.* Adams, 180 Pa. St. 289, 36 Atl. 854. The adjudication of the arbitration committee, made after the rights of a non-member have accrued under an attachment execution, is not binding on him either as to the merits or as to the amount of a claim which the exchange asserts is entitled to participate in the proceeds of sale. Sheppard *v.* Barrett, 17 Phila. (Pa.) 145.

Where the constitution of an exchange is ambiguous as to the disposition of the proceeds of the seat of an insolvent member, usage, as well as the practical construction put upon the constitution by the parties, may be proved. *In re* Hayes, 37 Misc. (N. Y.) 264, 75 N. Y. Suppl. 312.

power of the exchange,[96] and are binding on the member and all those claiming under him.[97]

b. Seat of Deceased Member. The rules of the exchange generally authorize it to sell the seat of a member on his decease, and provide that the proceeds shall be applied to the payment of debts due members of the exchange, and the balance, if any, paid to the deceased member's personal representative.[98] These regulations are binding on the personal representative of the deceased member,[99] and moreover he takes the proceeds subject to liens created by the member in his lifetime.[1] The nature of the debts entitled to participate in the proceeds of sale depends upon the rules of the exchange.[2]

E. Dealings Between Members — 1. Regulation by Exchange. The constitution and rules of an exchange commonly contain various regulations concerning mutual dealings between its members.[3] As between the members these rules

Retrospective effect of amendment of constitutional provision as to distribution of proceeds of sale see *supra*, III, C.

96. Moxey's Appeal, 9 Wkly. Notes Cas. (Pa.) 441.

Validity of constitution as to proceeds of sale of seat of defaulting member see *supra*, III, D.

97. Leech *v.* Leech, 3 Wkly. Notes Cas. (Pa.) 542, where it is held that neither the defaulting member nor his outside creditors are entitled to any part of the proceeds of the sale of his seat, if they are insufficient to pay the debts due the members of the exchange.

Effect of liquidation proceedings in exchange.— A creditor in the exchange may sue a defaulting member in respect of claims which are being dealt with in the liquidation proceedings in the exchange (Ratcliff *v.* Mendelssohn, 87 L. T. Rep. N. S. 422), and the balance due a creditor in the exchange after receiving a dividend on his debt out of the stock exchange assets of a defaulting member may be collected in the ordinary tribunals (*Ex p.* Ward, 20 Ch. D. 350, 51 L. J. Ch. 752, 47 L. T. Rep. N. S. 106, 30 Wkly. Rep. 560). Effect on right to proceed against defaulter's estate see Assignments For Benefit of Creditors; Bankruptcy.

Rights of antecedent purchaser from member.— Where a member assigns his seat in payment of a preëxisting debt, and the transferee deposits the amount of the consideration with the exchange to be applied in accordance with its rules, the balance of the deposit, after paying the debts due to the exchange and its members, cannot be taken by a judgment creditor of the retiring member as being his property. It belongs to the transferee. Hanscom *v.* Hendricks, 123 N. Y. 664, 26 N. E. 750 [*affirming* 52 Hun 80, 5 N. Y. Suppl. 109].

Interference by courts.— A threat by an individual officer or member of the exchange to make an improper distribution of the proceeds of a seat, although he be a member of the committee having charge of the matter, does not justify the issuance of an injunction *pendente lite* to restrain the officers of the exchange and the committee and members from acting. Stonebridge *v.* Smith, 55 N. Y. Super. Ct. 294, 13 N. Y. St. 329.

Expulsion of member as destroying right to proceeds see VI, B, 1, 4, b, (II).

Garnishment of proceeds see Garnishment.

Rights of assignee, trustee, or receiver in bankruptcy or insolvency see Assignments For Benefit of Creditors; Bankruptcy; Receivers.

98. See cases cited *infra*, note 99 *et seq.* See also Dos Passos Stock-Br. & Stock-Exch. (2d ed.) 34, 1088, 1089.

Rights of antecedent purchaser.— One who advances money for the purchase of a seat which at the death of the holder is sold according to the rules of the exchange is not entitled to the proceeds of sale as equitable owner until debts due by the holder to other members, which are made by the by-laws first charges upon such proceeds, have been satisfied. Thompson *v.* Adams, 93 Pa. St. 55, 12 Phila. (Pa.) 484.

Sale of seat of deceased defaulting member see *supra*, note 94.

99. Thompson *v.* Adams, 93 Pa. St. 55, 12 Phila. (Pa.) 484.

The adjudication of the arbitration committee as to the claims entitled to share in the proceeds of a deceased member's seat is binding on the member's personal representative. Singerly *v.* Johnson, 3 Wkly. Notes Cas. (Pa.) 541.

1. Nashua Sav. Bank *v.* Abbott, 181 Mass. 531, 63 N. E. 1058, 92 Am. St. Rep. 430, where it is held that the lien of a pledge of the seat of a member who subsequently dies attaches to the proceeds of the sale of the seat by the exchange on the member's death.

2. Bernheim *v.* Keppler, 34 Misc. (N. Y.) 321, 69 N. Y. Suppl. 803, holding that a creditor who was not a member of the exchange at the time of the death of the member who owed the debt is not entitled to share in the proceeds of the sale of the deceased member's seat. So a debt due a firm, a member of which is a member of the exchange, is not entitled to share in the proceeds of the sale of a deceased member's seat unless it was contracted during the existence of the partnership; and unless the debt grows out of a transaction relating to the business of a stock exchange broker, it is not entitled to participate in the proceeds of sale. Cochran *v.* Adams, 180 Pa. St. 289, 36 Atl. 854.

3. *Ex p.* Ward, 20 Ch. D. 356, 51 L. J. Ch.

have the same effect as rules of law, and in so far as they are applicable they

752, 47 L. T. Rep. N. S. 106, 30 Wkly. Rep. 560, relating to settling day.

Only contracts made in the exchange are directly governed by its rules (Rorke *v.* San Francisco Stock, etc., Bd., 99 Cal. 196, 33 Pac. 881; Mills *v.* Gould, 42 N. Y. Super. Ct. 119), and contracts touching real estate are not within the jurisdiction of a stock exchange (Leech *v.* Harris, 2 Brewst. (Pa.) 571). If, however, parties to a contract made outside of the exchange insert in it a stipulation that it is made and shall be settled according to the rules of the exchange, then such rules will govern the rights of the parties. Bassett *v.* Irons, 8 Mo. App. 127; Mills *v.* Gould, 42 N. Y. Super. Ct. 119.

Clerks of members being disabled from making contracts within its jurisdiction binding upon their employers, a contract made in violation thereof is, unless ratified by the employer, absolutely void as regards the jurisdiction of the association, so that the employer of such clerk, upon being charged before the tribunal of the association with having violated its laws by refusing to be bound by the transaction, is entitled to be exonerated upon its appearing that the transaction was neither authorized nor ratified by him; and a finding otherwise reached, by testing the rights and obligations of the parties by a standard not found in the laws of the association, is not binding on the employer. Bartlett *v.* Bartlett, 116 Wis. 450, 93 N. W. 473.

Grade of grain.— A rule that, on all contracts for grain for future delivery, a tender of a higher grade than the one contracted for is sufficient, affects only the fulfilment of contracts in the legal sense of that term, and consequently does not apply to a transaction where an offer to sell grain of a certain kind was not accepted absolutely but was met with an offer to purchase grain of a different kind. Rugg *v.* Davis, 15 Ill. App. 647. The grade of grain to be delivered under a contract for future delivery is governed by rules in force at the time of the purchase and not by those in force at the time specified for delivery. E. Hess Malting Co. *v.* Warren, 15 Ill. App. 596.

Inspection of produce.— The right of inspecting flour and appointing inspectors for that purpose, conferred on the Chicago board of trade by charter, was not taken away, so far as members of the board are concerned, by the consolidated charter of the city of Chicago, adopted in 1863. Chicago *v.* Quimby, 38 Ill. 274. The inspector's agency for the parties to the contract, if any agency exists, does not extend beyond inspecting the commodity and certifying its grade, and by failing to make the inspection within the prescribed time with the seller's consent he does not waive in behalf of the buyer the right to take advantage of the rule. Bassett *v.* Irons, 8 Mo. App. 127. A purchaser on change is presumed to rely, as a protection against imposition, on the certificate of inspection issued in accordance with the rules of the exchange. If, however, the seller makes a distinct assertion of the quality and condition of an article, whether it amounts to a warranty or not, which he knows or should know is untrue, with a view to inducing another member to buy, and the latter relies on the assertion, believing it to be true, and by reason thereof does buy, and damages ensue to him, he may sue for deceit notwithstanding that he procures an inspection of the article pursuant to the rules of the exchange. Thorne *v.* Prentiss, 83 Ill. 99. Validity of rule as to inspection of produce see also *supra*, III, D.

Deposit as security.— Under a rule of the gold exchange, providing that either party may require a deposit as security, and that a failure to make the deposit within the prescribed time shall be considered a failure to complete the contract, a failure to deposit constitutes a breach of contract and gives the injured party an immediate right of action for his damages without waiting for the time of performance to arrive. And if a buyer of gold fails to make the deposit required of him as security, the other party may resume his original rights in respect to the gold and sell it without notice. Mills *v.* Gould, 42 N. Y. Super. Ct. 119. Where, however, money is deposited in a bank as margins on a purchase of oats, and thereafter a corner is run in oats in violation of law, and in consequence the purchaser defaults in his contract, and the seller refuses to settle except at the average market price of oats as prevailing in the exchange on the last day of the month in which delivery was to be made, as authorized by the rules of the exchange in reference to settlements, the purchaser is entitled to an injunction restraining the bank from paying the deposit to the seller. Montreal Bank *v.* Waite, 105 Ill. App. 373. But where a member of the board of trade sells grain for future delivery on the account of a third person, and the transaction results in a loss, and the principal obtains an injunction against the member forbidding him from paying the loss out of the funds deposited with him as security, and the brokers with whom he dealt threaten to proceed against him under the rules of the board unless he pays the loss, he is not entitled to sustain a bill of interpleader against his principal and those brokers to determine to whom the funds in his possession belong. Ryan *v.* Lamson, 44 Ill. App. 204.

Cotton contracts.— Under the rules of the New Orleans cotton exchange, a contract for the sale of cotton is deemed final when the price has been agreed on, and the delivery of the same is considered to have been completed when it passes the scales. The buyer is bound to receive the cotton within seven working days from the day of sale; but, after demand has been made upon the press for delivery without avail, the same remains at the risk of the seller, who is liable for the loss or deterioration sustained thereto by any fault of his, or by the happening of a fortuitous

enter into and form a part of all contracts made by members in connection with transactions on change.[4]

2. Arbitration of Differences — a. In General. The constitution or by-laws of an exchange commonly provide for the arbitration of differences between members by a committee of the exchange. So far as they do not tend to oust the courts of jurisdiction,[5] such regulations are within the power of the exchange,[6] and are binding on the members.[7]

b. Arbitration Proceedings. Jurisdiction of an arbitration committee is special and limited, and if it fails to conduct the investigation in accordance with the charter and by-laws of the exchange its judgment is not binding.[8] If, how-

event. Paton *v.* Newman, 51 La. Ann. 1428, 26 So. 576. A rule of the Memphis cotton exchange provided: "All cotton shall be received within five working days from date of sale. The weighing and examining of cotton shall constitute a confirmation of sale, but delivery shall not be considered final until paid for;— the factor's policy of insurance to cover until delivered and paid for; payment being considered final act of delivery." It seems that a transaction under this rule is not an executory agreement to sell when payment is made, but it is mere stipulation for the security of the seller, which enables him at his option to refuse to part with the possession until payment is made. But, whatever be the proper construction of the rule, where parties by a habitual course of dealing with each other had wholly disregarded it on both sides, and the seller in the particular transaction, as in all others, delivered unconditionally, and without restraint as to possession and use, and manifested no concern about securing payment through the rule, it amounts to waiver by the seller of the stipulation, and the risk of loss by fire passed with the title to the buyer on actual delivery to him. Dillard *v.* Paton, 19 Fed. 619.

Validity of rules: As to curb transactions see *supra*, III, D. As to storage charges see *supra*, III, D.

4. E. Hess Malting Co. *v.* Warren, 15 Ill. App. 596; Paton *v.* Newman, 51 La. Ann. 1428, 26 So. 576; Peabody *v.* Speyers, 56 N. Y. 230.

Sales made on change are presumed, in the absence of evidence to the contrary, to have been made with reference to the rules of the exchange, and must be construed with reference thereto. However, the members may contract on change or elsewhere so as to bind themselves to obligations beyond and independent of the rules of the exchange. Thorne *v.* Prentiss, 83 Ill. 99. See Dos Passos Stock-Br. & Stock-Exch. (2d ed.) 67, 428.

Rights and liabilities of members as brokers or factors see Factors and Brokers.

Sales of stocks and commodities: As gambling transactions see Gaming. In general see Sales.

5. Savannah Cotton Exch. *v.* State, 54 Ga. 668, where it is held that awards of the arbitration committee are reviewable, so far as the legal rights of the parties are concerned, by the judicial tribunals of the state, the same as the awards of other arbitrators. So the pendency of an action at law precludes the committee on arbitration from taking jurisdiction of the matter in dispute without plaintiff's consent. State *v.* Milwaukee Chamber of Commerce, 20 Wis. 63.

Suspension for refusal to arbitrate.— A by-law providing for arbitration of business disputes and for suspension of a member for refusing to arbitrate is not invalid as ousting the courts of jurisdiction. Evans *v.* Minneapolis Chamber of Commerce, 86 Minn. 448, 91 N. W. 8.

6. Evans *v.* Minneapolis Chamber of Commerce, 86 Minn. 448, 91 N. W. 8, holding that a by-law providing for voluntary arbitration between members is authorized by articles of incorporation empowering the exchange to adjust business disputes. However, a rule providing for compulsory arbitration of disputes is not authorized by a charter empowering the exchange to appoint committees for the settlement of disputes which may be voluntarily submitted for arbitration by its members. Montreal Bank *v.* Waite, 105 Ill. App. 373.

7. Haebler *v.* New York Produce Exch., 149 N. Y. 414, 44 N. E. 87, holding that an offer to arbitrate before a tribunal of persons who are not members of the exchange does not preclude a reference of the dispute to the board of managers under a by-law requiring complaints to be referred to the board in case a member refuses to arbitrate. However, the right of a member to appeal to another tribunal will not be denied him upon a doubtful construction of a by-law. People *v.* New York Cotton Exch., 8 Hun (N. Y.) 216.

A member may revoke the power to arbitrate at any time before award, although the constitution of the exchange provides that it shall be the duty of the arbitration committee to exercise jurisdiction over all matters of difference between members and that their decision shall be binding. And since any award made after revocation would be unenforceable, the member is not entitled to an injunction to restrain the committee from making an award. Heath *v.* New York Gold Exch., 7 Abb. Pr. N. S. (N. Y.) 251, 38 How. Pr. (N. Y.) 168.

Arbitration as condition precedent to continuance of membership see *supra*, VI, B, 1, 2.

8. Ryan *v.* Cudahy, 157 Ill. 108, 41 N. E. 760, 48 Am. St. Rep. 305, 49 L. R. A. 353; Bartlett *v.* Bartlett, 116 Wis. 450, 93 N. W. 473.

ever, the committee proceeds regularly, its adjudication is conclusive on the parties;[9] the courts will not review an adjudication[10] further than to determine whether it was regularly and fairly made.[11]

3. Default in Board Transactions. The constitution and by-laws of an exchange usually contain regulations concerning the rights and duties of the parties in case a member defaults in a transaction on the board or becomes insolvent,[12] and commonly provide a mode for the liquidation of debts due creditors in the exchange from defaulting members.[13]

The committee has power to construe rules of the association as to its jurisdiction, and those claimed to have been violated by the member whose conduct is under investigation, when such rules will reasonably admit of two constructions, but not otherwise. Bartlett *v.* Bartlett, 116 Wis. 450, 93 N. W. 473.

Adjournment.— Exercise of the power of the committee to adjourn the hearing rests in its sound discretion, but its proceedings in that respect are nevertheless subject to review, and may be null if it appear that the discretion has been abused. Sonneborn *v.* Lavarello, 2 Hun (N. Y.) 201.

Refusal to hear evidence renders the action of the committee invalid, where the rules require it to hear such evidence under oath as either party may wish to submit touching the dispute. Ryan *v.* Cudahy, 157 Ill. 108, 41 N. E. 760, 48 Am. St. Rep. 305, 49 L. R. A. 353.

The committee is the judge of the competency and value of the evidence offered before it, and may properly hold that testimony tendered for its consideration shall bear such marks of authenticity as would entitle it *prima facie* to credit. Vaughn *v.* Herndon, 91 Tenn. 64, 17 S. W. 793.

A member is estopped to deny the jurisdiction of the committee over the person and subject-matter, where he voluntarily submits to a trial before the committee without calling its jurisdiction into question. Ryan *v.* Cudahy, 157 Ill. 108, 41 N. E. 760, 48 Am. St. Rep. 305, 49 L. R. A. 353.

A member waives objection to the omission of the arbitrators to take oath and to the character of the evidence received by it, where he submits to a trial on the merits without calling those matters into question. Sonneborn *v.* Lavarello, 2 Hun (N. Y.) 201.

A member is entitled to appeal on the question of the jurisdiction of a committee to arbitrate a dispute without submitting the whole merits of the controversy to the board of appeals. Savannah Cotton Exch. *v.* State, 54 Ga. 668.

9. Montreal Bank *v.* Waite, 105 Ill. App. 373; Vaughn *v.* Herndon, 91 Tenn. 64, 17 S. W. 793.

However, the judgment must be reasonably certain to render it conclusive on the parties, and so bar a subsequent suit. A reversal by the committee of appeals of a board of trade of an award made by the committee of arbitration does not determine the rights of the parties, but leaves them as they stood before the arbitration. Redmond *v.* Bedford, 40 Ill. 267.

10. Alton Grain Co. *v.* Norton, 105 Ill. App. 385; Montreal Bank *v.* Waite, 105 Ill. App. 373, both holding that the courts will not review the question whether a judgment of the board of directors is correct, or whether the evidence before the board is sufficient to authorize its findings.

11. Ryan *v.* Cudahy, 157 Ill. 108, 41 N. E. 760, 48 Am. St. Rep. 305, 49 L. R. A. 353, holding that where property rights are involved, courts have power so far to supervise the action of a board of trade as to determine whether it has proceeded according to the rules and regulations provided for its action, and, if it has failed in a substantial manner, to correct abuses which may result from its unwarranted proceedings. And see Savannah Cotton Exch. *v.* State, 54 Ga. 668.

12. Gill *v.* O'Rourke, 6 Pa. Super. Ct. 605, where it is held that a rule requiring written notice when default on a contract is intended is sufficiently complied with by a letter from seller to buyer stating, "So far as we are concerned deal is off," irrespective of the reason of the default. However, a rule requiring creditors of a defaulting member to report the default to the exchange within a certain time applies only to defaults in exchange transactions. Rorke *v.* San Francisco Stock, etc., Bd., 99 Cal. 196, 33 Pac. 881.

Settlement of differences.—In a controversy respecting the price to be charged to a defaulting seller, the committee of the board of trade should not confine the parties to evidence of the difference between the contract price and a figure established by a committee on the day of delivery, regardless of the fact whether such figure is real, fictitious, or collusive. And the fact that the seller had put up margins when demanded does not deprive him of the right, when the title to the margins is put in issue, of proving that the market value of the article sold was no higher on the day of delivery than when it was sold. Ryan *v.* Cudahy, 157 Ill. 108, 41 N. E. 760, 48 Am. St. Rep. 305, 49 L. R. A. 353.

Default as ground for expulsion or suspension of member see *supra*, VI, B, 1, 2.

13. Richardson *v.* Stormont, [1901] 1 Q. B. 701, 5 Com. Cas. 134, 69 L. J. Q. B. 369, 82 L. T. Rep. N. S. 316, 48 Wkly. Rep. 451, holding that the word "assets" in London stock exchange rules, No. 176, which provides that the official assignees in the exchange shall collect the assets of a defaulting member, and shall distribute them to the creditors in the exchange, means the whole of the member's assets, and not merely his stock exchange assets.

VII. RIGHTS AND DUTIES OF EXCHANGE AS TO THIRD PERSONS.

A. In General. Persons who are not members of an exchange have no right to enter upon its premises against its wishes;[14] nor ordinarily have they a right to relief against the enforcement of rules of the exchange.[15]

B. Quotations — 1. In General. Until voluntary publication of its market quotations, an exchange has a right of property in them.[16] It may accordingly

Sale of defaulter's seat: Generally see *supra*, VI, D, 2, a. Amendment of constitution see *supra*, III, C. Validity of constitution see *supra*, III, D.

14. Chicago Open Bd. of Trade *v.* French, 61 Ill. App. 349, holding that the exchange may exclude regular customers of a member the same as others. And the fact that members were violating the rules of the exchange by trading on the curb or through bucket-shops does not justify a non-member in entering upon the premises of the exchange for that purpose in violation of its rules, and remaining there after he has been ordered to leave. Babcock *v.* Merchants' Exch., 159 Mo. 381, 60 S. W. 732.

15. Russell *v.* New York Produce Exch., 27 Misc. (N. Y.) 381, 58 N. Y. Suppl. 842, holding that an exchange will not be restrained from posting a resolution on its bulletin board declaring certain persons who are not members guilty of certain charges, and prohibiting members from acting for them on the board, where it does not appear that the business of the exchange is so affected by a public use as to render it subject to regulation at the suit of one not a member. Where, however, an exchange adopts rules obligatory on its own members by which their rights may be summarily determined between themselves without notice and opportunity to be heard, such determination has no external force to injure or impair the rights of persons not voluntarily subject to the jurisdiction of the tribunal. Morris *v.* Grant, 34 Hun (N. Y.) 377.

The passage of a by-law in restraint of trade as forbidding members of a live-stock exchange from dealing with certain outside parties does not give such parties any right to equitable relief, since by-laws and contracts in restraint of trade are only illegal in the sense that the law will not enforce them; and the fact that the business of buying and selling live stock at that market, which is owned by a private corporation, has become so large as to have an influence on the commerce of the entire country, does not justify the courts in declaring such market public, and in applying to business transacted therein rules different from those governing similar transactions elsewhere. American Livestock Commission Co. *v.* Chicago Livestock Exch., 143 Ill. 210, 32 N. E. 274, 36 Am. St. Rep. 385, 18 L. R. A. 190 [*affirming* 41 Ill. App. 149].

16. Cleveland Tel. Co. *v.* Stone, 105 Fed. 794; Chicago Bd. of Trade *v.* C. B. Thomson Commission Co., 103 Fed. 902, 109 Fed. 705.

There is not a free publication, depriving an exchange of its property right in its quotations, where it furnishes them to customers for their exclusive use either by means of a ticker or by placing them on a blackboard in the customer's office. Chicago Bd. of Trade *v.* Hadden-Krull Co., 109 Fed. 705.

An exchange is entitled to an injunction prohibiting the use of its quotations by a person to whom they are furnished by one who obtains them surreptitiously from the exchange before their publication. Chicago Bd. of Trade *v.* Hadden-Krull Co., 109 Fed. 705.

A preliminary injunction will be refused where defendants, sued to restrain their use of board of trade quotations, deny such use, and show that they could obtain the same quotations from another source, and issues are made or can readily be forced by complainant so as to procure a speedy final hearing; nor will a preliminary injunction issue in a federal circuit court to restrain the use of quotations by bucket-shops, where a district court of the same circuit has refused the exchange an injunction sought for the same purpose, on the ground that complainant is a too nearly similar concern, and the circuit court of appeals has not yet reviewed that judgment. Chicago Bd. of Trade *v.* Ellis, 122 Fed. 319. A preliminary injunction will not be granted to a board of trade restraining the use of its quotations by others, where the question whether there has been such a prior publication of the quotations as to make them public property is in dispute, both as to the facts and their effect, and can be properly determined only on a full hearing. Chicago Bd. of Trade *v.* C. B. Thomson Commission Co., 103 Fed. 902. A preliminary injunction will be refused where a board of trade seeks to restrain the use of "continuous quotations," which are alleged to have been surreptitiously obtained by defendant, and such term was defined in contracts between complainant and telegraph companies for the transmission of the same as meaning prices electrically and uninterruptedly transmitted from complainant's exchange to such telegraph companies, and thence to their patrons at intervals of less than ten minutes, and it did not appear that the quotations received by defendant were continuous quotations, as so defined, or that they had been received prior to their having been dedicated to the public. Chicago Bd. of Trade *v.* Buffalo Consol. Stock Exch., 121 Fed. 433.

Where a greater part of the transactions of an exchange are gambling transactions, and the officers of the exchange have knowledge of that fact, the exchange is not entitled to an injunction against the use of quotations

withhold them entirely from the public,[17] or, if it elects to permit their dissemination, as it may lawfully do,[18] it may impose on its licensees such conditions regarding their use as it sees fit.[19]

2. **Right to Discriminate.** By the weight of authority, an exchange may give out its quotations to only such persons as it sees fit to nominate, excluding all others.[20] It is not a public corporation;[21] nor are its quotations impressed with a trust in favor of the public;[22] and no rule of public policy is violated by discrim-

made on its floor by an outside concern conducting a bucket-shop. Chicago Bd. of Trade *v.* O'Dell Commission Co., 115 Fed. 574. Such quotations are of no legitimate value as tending to promote the commerce of the country, and dissemination thereof cannot be restrained. Christie Grain, etc., Co. *v.* Chicago Bd. of Trade, 125 Fed. 161, 61 C. C. A. 11 [*reversing* 121 Fed. 608]; Chicago Bd. of Trade *v.* Kinsey, 125 Fed. 72; Chicago Bd. of Trade *v.* Donovan Commission Co., 121 Fed. 1012. Where, however, the rules of the exchange prohibit gambling transactions, all sales made thereunder are presumptively valid, and the burden of proof rests upon one asserting the contrary to show that neither party to the transaction contemplated an actual delivery; nor does the mere fact that gambling transactions may be carried on in its exchange, in violation of its rules, establish the claim that the organization is a bucket-shop concern, doing business in violation of law, and therefore not entitled to maintain a suit in equity to protect its property right in its market quotations, it being indisputable that it transacts a vast amount of legitimate business. Chicago Bd. of Trade *v.* Christie Grain, etc., Co., 116 Fed. 944.

17. Exchange Tel. Co. *v.* Gregory, [1896] 1 Q. B. 147, 60 J. P. 52, 65 L. J. Q. B. 262, 74 L. T. Rep. N. S. 83.

18. Cleveland Tel. Co. *v.* Stone, 105 Fed. 794.

An exchange may by contract confer on a telegraph company the right to occupy its floor for the purpose of sending out its quotations. Commercial Telegram Co. *v.* Smith, 47 Hun (N. Y.) 494.

A licensee of the right to use quotations is entitled to protection in the enjoyment of the same before publication by injunction against the unauthorized publication or dissemination of the quotations by others. Cleveland Tel. Co. *v.* Stone, 105 Fed. 794.

19. Sullivan *v.* Postal Tel. Co., 123 Fed. 411, 61 C. C. A. 1; Exchange Tel. Co. *v.* Gregory, [1896] 1 Q. B. 147, 60 J. P. 52, 65 L. J. Q. B 262, 74 L. T. Rep. N. S. 83.

An exchange is entitled to protection in equity as against one who obtains and uses its quotations without complying with reasonable regulations imposed by it as a condition to the right to receive and use them. Chicago Bd. of Trade *v.* Christie Grain, etc., Co., 116 Fed. 944.

A regulation requiring all customers, as a condition to being furnished with quotations, to sign an agreement that they will not use them in conducting a bucket-shop, is reasonable and enforceable. Sullivan *v* Postal Tel. Co., 123 Fed. 411, 61 C. C. A. 1. See also, generally, Dos Passos Stock-Br. & Stock-Exch. (2d ed.) 22–28.

20. Marine Grain, etc., Exch. *v.* Western Union Tel. Co., 22 Fed. 23; Exchange Tel. Co. *v.* Gregory, [1896] 1 Q. B. 147, 60 J. P. 52, 65 L. J. Q. B. 262, 74 L. T. Rep. N. S. 83.

An exchange will not be enjoined from excluding from its floor a telegraph company furnishing its quotations to another exchange whose members cannot transact business on its floor unless informed of such quotations. Wilson *v.* Telegram Co., 3 N. Y. Suppl. 633.

Compulsory service by telegraph companies to bucket-shops see Telegraphs and Telephones.

21. Metropolitan Grain, etc., Exch. *v.* Chicago Bd. of Trade, 15 Fed. 847, 11 Biss. 531, where it was held that a board of trade, composed of merchants dealing in the products of the country, who solely for their own convenience provide a room where they meet to transact business, although incorporated under the laws of the state, is not a public corporation, and is not obliged to allow the reporters of a telegraph company on the floor of its exchange for the purpose of collecting and transmitting the reports of the markets therefrom.

22. Matter of Renville, 46 N. Y. App. Div. 37, 61 N. Y. Suppl. 549.

An exchange performs no public service, and is charged with no public duty; and, the business transactions on its floor being exclusively those of the individual members, they have the same immunity from public inspection as exists in other branches of business, and the exchange may refuse to furnish information as to such transactions to such persons or companies as it sees fit, although for many years it has permitted persons not members to have access to its floor and gather reports of its transactions, to be distributed as news. Wilson *v.* Commercial Telegram Co., 3 N. Y. Suppl. 633.

In the absence of legislative action, a court of equity is not authorized to deny relief to a corporation conducting an exchange merely because the chancellor is of the opinion that its business, originally private, has grown to such magnitude and assumed such importance that the public is entitled to an interest therein, and to a control thereof commensurate with that interest. When such a condition arises, the measure of the public control is limited by the extent of the public interest, and the initiative in declaring a public use and the making of regulations pertaining thereto is of legislative, and not judicial, cognizance. Chicago Bd. of Trade *v.* Christie Grain, etc., Co., 116 Fed. 944.

ination in the nomination of licensees.[23] In Illinois, however, a contrary doctrine prevails. A public interest there attaches to the quotations, where they are given out, which entitles non-members to receive them for a lawful purpose without unjust discrimination, and upon the same terms given by the exchange to others.[24]

EXCHANGE VALUE. As applied to a thing, its general power of purchasing, the command which its possession gives over purchasable commodities in general.[1]

EXCHEQUER. See COURT OF EXCHEQUER.

EXCHEQUER BILL. In England, a kind of bill of credit, which is issued by the officers of the exchequer, when a temporary loan is necessary to meet the exigencies of government.[2] (See BILL OF CREDIT.)

EXCISE. See INTERNAL REVENUE.

EXCLUDE. To shut out,[3] whether by thrusting out or by preventing admission; to debar; to reject; to prohibit;[4] to thrust out or expel; to eject; to extrude;[5] to dispossess;[6] to reserve; to except;[7] to prohibit; to prohibit from.[8] (To Exclude: Alien, see ALIENS; WAR. Chinese, see ALIENS. Member From — Corporation, see CORPORATIONS; Exchange, see EXCHANGES; Voluntary Unincorporated Association, see ASSOCIATIONS. Passenger, see CARRIERS.)

EXCLUSION ACT. See ALIENS.

EXCLUSIVE.[9] Possessed and enjoyed to the exclusion of others; debarred

23. Commercial Telegram Co. *v.* Smith, 47 Hun (N. Y.) 494.

24. New York, etc., Grain Stock Exch. *v.* Chicago Bd. of Trade, 127 Ill. 153, 19 N. E. 855, 2 L. R. A. 411, 11 Am. St. Rep. 107 [*reversing* 27 Ill. App. 93], holding that where an exchange has for years permitted and invited a telegraph company to transmit its quotations to all persons who choose to pay, and the information so obtained has in consequence become of essential importance to the commercial world, such information becomes impressed with a public trust, and the board cannot afterward treat it as purely private, and withhold it from all but a favored few. And see Chicago Bd. of Trade *v.* Riordan, 94 Ill. App. 298; Chicago Bd. of Trade *v.* Hadden-Krull Co., 109 Fed. 705.

The proprietor of a bucket-shop cannot, however, enjoin a board of trade from depriving him of its quotations, since a court of equity will not lend its aid to carry on an illegal business. Christie-St. Commission Co. *v.* Western Union Tel. Bd. of Trade, 94 Ill. App. 229; Chicago Bd. of Trade *v.* O'Dell Commission Co., 115 Fed. 574. This is so even though he is a member of the board, since his rights as a member are distinct from his right as one of the public to obtain the quotations. Bryant *v.* Western Union Tel. Co., 17 Fed. 825. Nor can a board of trade restrain a telegraph company from giving, and another person alleged to be engaged in bucketing from receiving, its market quotations, on the ground that the use of the quotations in such unlawful business works an injury to such board, where the evidence fails to establish that an injury to any private right or interest of the board will result from the use of such quotations. Christie-St. Commission Co. *v.* Chicago Bd. of Trade, 92 Ill. App. 604. See also, generally, Dos Passos Stock-Br. & Stock-Exch. (2d ed.) 22–28.

1. Marriner *v.* John L. Roper Co., 112 N. C. 164, 167, 16 S. E. 906 [*citing* Mill Polit. Econ.]. See also State *v.* Carson City Sav. Bank, 17 Nev. 146, 162, 30 Pac. 703, where it is said: "Mr. Mill says: 'The utility of a thing in the estimation of the purchaser is the extreme limit of its exchange value.'"

2. Briscoe *v.* Kentucky Bank, 11 Pet. (U. S.) 257, 328*e*, 9 L. ed. 709, 928.

3. Palmer *v.* Warren Ins. Co., 18 Fed. Cas. No. 10,698, 1 Story 360, 365, where it is also said: "And in common parlance, the words [except and exclude] are often used as equivalents."

4. Portland *v.* Meyer, 32 Oreg. 368, 370, 52 Pac. 21, 67 Am. St. Rep. 538 [*quoting* Century Dict.; Webster Dict.].

5. Portland *v.* Meyer, 32 Oreg. 368, 370, 52 Pac. 21, 67 Am. St. Rep. 538.

6. Marshall *v.* Taylor, [1895] 1 Ch. 641, 645, 64 L. J. Ch. 416, 72 L. T. Rep. N. S. 670, 12 Reports 310.

"The term 'exclude,' used in the act, does not mean ouster from, or dispossession of, an office, but, that if a party is guilty, he shall be debarred, or precluded, or hindered from entering into or holding it; and the omission in the statute of a case where only a claim to an office is adjudged to be unlawful, does not prevent its application to the latter, by fair construction. The judgment of the district court, that Lindsay be 'precluded' from the office, is not therefore obnoxious to the criticisms that have been indulged in by those who object to its form, as not being authorized by the statute." Lindsay *v.* People, 1 Ida. 438, 456.

7. Smith *v.* Furbish, 68 N. H. 123, 141, 44 Atl. 398, 47 L. R. A. 226.

8. Parker *v.* China Mut. Ins. Co., 164 Mass. 237, 238, 41 N. E. 267.

9. **This word is derived from** "*ex*," out, and "*claudere*," to shut. *In re* Union Ferry Co., 98 N. Y. 139, 150 [*quoted* in Davenport

from participation or enjoyment;[10] undivided, sole;[11] not including, admitting or pertaining to any other; opposed to inclusive;[12] not to be taken into account.[13] (Exclusive: Possession, see ADVERSE POSSESSION. Privilege, see CONSTITUTIONAL LAW; FERRIES; FRANCHISES; MONOPOLIES. See EXCLUSIVELY.)

v. Kleinschmidt, 6 Mont. 502, 531, 13 Pac. 249].

10. Webster Dict. [*quoted* in Omaha Y. M. C. A. *v.* Douglas County, 60 Nebr. 642, 647, 83 N. W. 924, 52 L. R. A. 123].

11. Bass *v.* Pease, 79 Ill. App. 308, 318 [*citing* Anderson L. Dict.; Century Dict.]; Webster Dict. [*quoted* in State *v.* Hagen, 6 Ind. App. 167, 33 N. E. 223, 226].

12. Bass *v.* Pease, 79 Ill. App. 308, 318 [*citing* Anderson L. Dict.; Century Dict.]. But *compare* Walker *v.* Gibbs, 1 Yeates (Pa.) 255, 259, where the word "exclusive" was construed to mean "over and above," to effectuate the plain intention of the jury.

13. Coale *v.* Smith, 4 Pa. St. 376, 381.

In connection with other words this term has often received judicial interpretation; for example as used in the following phrases: "Exclusive agency" (see Golden Gate Packing Co. *v.* Farmers' Union, 55 Cal. 606, 607); "exclusive contract or agreement" (see Filkins *v.* Blackman, 9 Fed. Cas. No. 4,786, 13 Blatchf. 440); "exclusive control" (see Sanders *v.* State, 34 Nebr. 872, 877, 52 N. W. 721; Board of School Trustees *v.* Sherman, 91 Tex. 188, 193, 42 S. W. 546; Hutchinson *v.* Olympia, 2 Wash. Terr. 314, 319, 5 Pac. 606); "exclusive fishery" (see Holford *v.* Bailey, 18 L. J. Q. B. 109, 113); "exclusive immunity" (see Weed *v.* Binghamton, 26 Misc. (N. Y.) 208, 216, 56 N. Y. Suppl. 105); "exclusive joint traffic arrangement" (see 6 Cyc. 478 note 81); "exclusive jurisdiction" (see State *v.* Jones, 73 Me. 280, 282; Com. *v.* O'Connell, 8 Gray (Mass.) 464, 467; *Ex p.* Gon-shay-ee, 130 U. S. 343, 344, 9 S. Ct. 542, 32 L. ed. 973); "exclusive legislative authority" (see Atty.-Gen. *v.* Atty.-Gen., [1898] A. C. 700, 715, 67 L. J. P. C. 90, 78 L. T. Rep. N. S. 697); "exclusive license" (see Western Union Tel. Co. *v.* American Bell Tel. Co., 125 Fed. 342, 353, 60 C. C. A. 220; Clement Mfg. Co. *v.* Upson, etc., Co., 40 Fed. 471, 472; Smith *v.* Scott, 6 C. B. N. S. 771, 781, 5 Jur. N. S. 1356, 28 L. J. C. P. 325, 95 E. C. L. 771); "exclusive occupation" (see Sailer *v.* Sailer, 41 N. J. Eq. 398, 401, 5 Atl. 319; Rochdale Canal Co. *v.* Brewster, [1894] 2 Q. B. 852, 857, 59 J. P. 132, 64 L. J. Q. B. 37, 71 L. T. Rep. N. S. 243, 9 Reports 680; Southport *v.* Ormskirk Union Assessment Committee, [1894] 1 Q. B. 196, 201, 58 J. P. 212, 63 L. J. Q. B. 250, 69 L. T. Rep. N. S. 852, 9 Reports 46, 42 Wkly. Rep. 153; Lancashire, etc., Telephone Exch. Co. *v.* Manchester, 14 Q. B. D. 267, 270, 49 J. P. 724, 54 L. J. M. C. 63, 52 L. T. Rep. N. S. 793, 33 Wkly. Rep. 203; Smith *v.* Lambeth Parish, 10 Q. B. D. 327, 329, 47 J. P. 244, 52 L. J. M. C. 1, 48 L. T. Rep. N. S. 57; Pimlico, etc., Tramway Co. *v.* Greenwich Union, L. R. 9 Q. B. 9, 13, 43 L. J. M. C. 29, 29 L. T. Rep. N. S. 605, 22 Wkly. Rep. 87; Talargoch Lead Min. Co. *v.* St. Asaph Union, L. R. 3 Q. B. 478, 479, 9 B. & S. 210, 37 L. J. M. C. 149, 18 L. T. Rep. N. S. 711, 16 Wkly. Rep. 860; Holywell Union *v.* Halkyn Dist. Mines Drainage Co., [1895] A. C. 117, 133, 59 J. P. 566, 71 L. T. Rep. N. S. 818, 64 L. J. M. C. 113, 11 Reports 98; Metropolitan R. Co. *v.* Fowler, [1893] A. C. 416, 420, 57 J. P. 756, 62 L. J. Q. B. 553, 69 L. T. Rep. N. S. 390, 1 Reports 264, 42 Wkly. Rep. 270; Rex *v.* Chelsea Water Works Co., 5 B. & Ad. 156, 167, 2 N. & M. 767, 2 L. J. M. C. 98, 27 E. C. L. 74; Reg. *v.* West Middlesex Waterworks Co., 1 E. & E. 716, 721, 5 Jur. N. S. 1159, 28 L. J. M. C. 135; Reg. *v.* Morrish, 10 Jur. N. S. 71, 73, 32 L. J. M. C. 245, 8 L. T. Rep. N. S. 697, 11 Wkly. Rep. 960); "exclusive of costs" (see Van Tyne *v.* Bunce, 1 Edw. (N. Y.) 583, 584); "exclusive of interest" (see State *v.* Fernandez, 49 La. Ann. 249, 252, 21 So. 260; 11 Cyc. 783 note 80); "exclusive of interest and costs" (see Nashville, etc., R. Co. *v.* Mattingly, 101 Ky. 219, 222, 40 S. W. 673, 19 Ky. L. Rep. 373. See also Gordon *v.* Ross, 2 Cal. 156, 157); "exclusive of water" (see Bartlett *v.* Corliss, 63 Me. 287, 291); "exclusive of Sunday and the day of service" (see Hartley *v.* Chidester, 36 Kan. 363, 365, 13 Pac. 578); "exclusive of what I have already advanced her" (see Coale *v.* Smith, 4 Pa. St. 376, 381); "exclusive possession" (see Johnston *v.* Albuquerque, (N. M. 1903) 72 Pac. 9, 11; Marshall *v.* Taylor, [1895] 1 Ch. 641, 645, 64 L. J. Ch. 416, 72 L. T. Rep. N. S. 670, 12 Reports 310); "exclusive power" (see Park Ecclesiastical Soc. *v.* Hartford, 47 Conn. 89, 92; Ingraham *v.* Meade, 13 Fed. Cas. No. 7,045, 3 Wall. Jr. 32); "exclusive privilege" (see New York City Exempt Firemen's Benev. Fund *v.* Roome, 93 N. Y. 313, 328, 45 Am. Rep. 217; Hackett *v.* Wilson, 12 Oreg. 25, 31, 6 Pac. 652; Montgomery *v.* Multnomah R. Co., 11 Oreg. 344, 347, 3 Pac. 435); "exclusive privilege, immunity or franchise" (see State *v.* Post, 55 N. J. L. 264, 265, 26 Atl. 683; Bohmer *v.* Haffen, 161 N. Y. 390, 409, 55 N. E. 1047); "exclusive right" (see Sloan *v.* State, 8 Blackf. (Ind.) 361; Davis *v.* Brigham, 29 Me. 391, 403; Buss *v.* Putney, 38 N. H. 44, 46; Washburn *v.* Gould, 29 Fed. Cas. No. 17,214, 3 Story 122, 131; Sutherland *v.* Heathcote, [1892] 1 Ch. 475, 485, 61 L. J. Ch. 248, 66 L. T. Rep. N. S. 210); "exclusive right of way" (see Cox *v.* Forrest, 60 Md. 74, 80); "exclusive right to supply ale" (see Edwick *v.* Hawkes, 18 Ch. D. 199, 206, 50 L. J. Ch. 577, 45 L. T. Rep. N. S. 168, 29 Wkly. Rep. 914; Catt *v.* Tourle, 38 L. J. Ch. 401, 405, 20 L. T. Rep. N. S. 551, 17 Wkly. Rep. 662); "exclusive sale" (see Bathrick *v.* Coffin, 13 N. Y. App. Div. 101, 43 N. Y. Suppl. 313); "exclusive supervision" (see Brace *v.* Solner, 1 Alaska 361, 367); "exclusive use" (see People *v.* Feitner, 168 N. Y. 494, 498, 61 N. E. 762); "exclusive user" (see Cox *v.* Forrest, 60 Md. 74, 80).

EXCLUSIVE CORRESPONDENCE BETWEEN SHIPBROKERS. In shipping, a term meaning that each party is to give to the other the first offer of ships and freights respectively, and is not to engage with others unless the party to whom the offer is made does not accept it.[14]

EXCLUSIVELY. To the exclusion of all others; without admission of others to participation;[15] in a manner to exclude.[16] (See EXCLUSIVE.)

EXCOMMUNICATION. One of the varieties of CENSURE,[17] *q. v.*

EXCOMMUNICATO INTERDICITUR OMNIS ACTUS LEGITIMUS, ITA QUOD AGERE NON POTEST, NEC ALIQUEM CONVENIRE; LICET IPSE AB ALIIS PASSIT CONVENIRI. A maxim meaning "Every legitimate act is forbidden an excommunicated person, so that he cannot act, nor sue any person; but he may be sued by others."[18]

EX-CONVICT. A convict who has served out a sentence for crime or has been pardoned.[19] (See, generally, CONVICTS.)

EXCURSION TICKET. One of the varieties of special-rate tickets coming within the designation or general description of "commutation tickets."[20] (See COMMUTATION; and, generally, CARRIERS.)

EXCURSION TRAIN. A train which, like others, goes from one place to another; it may or may not stop and pick up passengers on the road, but it is a train which goes from one place to another with a view to people getting to that other place on cheap terms, and very frequently upon the condition that the rail-

14. Pearce *v.* Lindsay, 1 L. T. Rep. N. S. 456, 458.

15. Century Dict. [*quoted* in People *v.* Lawler, 74 N. Y. App. Div. 553, 557, 77 N. Y. Suppl. 840].

16. Webster Dict. [*quoted* in Omaha Y. M. C. A. *v.* Douglas County, 60 Nebr. 642, 647, 83 N. W. 924, 52 L. R. A. 123].

In connection with other words the word "exclusively" has often received judicial interpretation; as for example as used in the following phrases: "Act exclusively for" (see Mutual Reserve Fund L. Assoc. *v.* New York L. Ins. Co., 75 L. T. Rep. N. S. 528, 530); "belonging exclusively to" (see Dickinson County *v.* Baldwin, 29 Kan. 538, 539); "exclusively as graveyard" (see Bloomington Cemetery Assoc. *v.* People, 170 Ill. 377, 378, 48 N. E. 905); "exclusively engaged in foreign trade" (see U. S. *v.* Patten, 27 Fed. Cas. No. 16,007, Holmes 421); "exclusively for colleges" (see Oswalt *v.* Hallowell, 15 Kan. 154; State *v.* Board of Assessors, 35 La. Ann. 668, 671); "exclusively for school purposes" (see Red *v.* Johnson, 53 Tex. 284, 288; Edmonds *v.* San Antonio, 14 Tex. Civ. App. 155, 157, 36 S. W. 495); "paid exclusively out of my pure personal estate" (see Wills *v.* Bourne, L. R. 16 Eq. 487, 488, 43 L. J. Ch. 89; *In re* Arnold, 37 Ch. D. 637, 642, 57 L. J. Ch. 682, 58 L. T. Rep. N. S. 469, 36 Wkly. Rep. 424); "exclusively to a wife" (see Gould *v.* Hill, 18 Ala. 84, 85); "exclusively to prohibit and suppress" (see Rogers *v.* People, 9 Colo. 450, 12 Pac. 843, 59 Am. Rep. 146); "exclusively used" (see Denver, etc., R. Co. *v.* Church, 17 Colo. 1, 7, 28 Pac. 468, 31 Am. St. Rep. 252); Presbyterian Theological Seminary *v.* People, 101 Ill. 578, 582); "exclusively used for a farming purpose" (see Gillette *v.* Hartford, 31 Conn. 351, 358); "exclusively used for church purposes" (see Hartford First Unitarian Soc. *v.* Hartford, 66 Conn. 368, 375, 34 Atl. 89; Connecticut Spiritualist Camp-meeting Assoc. *v.* East Lyme, 54 Conn. 152, 155, 5 Atl. 849; People *v.* Peoria Y. M. C. A., 157 Ill. 403, 405, 41 N. E. 557; Vail *v.* Beach, 10 Kan. 214, 215; Omaha Y. M. C. A. *v.* Douglas County, 60 Nebr. 642, 647, 83 N. W. 924, 52 L. R. A. 123; United Brethren *v.* Forsyth County, 115 N. C. 489, 495, 20 S. E. 626; *In re* Pawtucket, 24 R. I. 86, 87, 52 Atl. 679); "expend money wholly, exclusively, and necessarily" (see Bowers *v.* Harding, [1891] 1 Q. B. 560, 563, 55 J. P. 376, 60 L. J. Q. B. 474, 64 L. T. Rep. N. S. 201, 39 Wkly. Rep. 558); "organized exclusively for manufacturing purposes" (see Com. *v.* Thackara Mfg. Co., 156 Pa. St. 510, 511, 27 Atl. 13; Com. *v.* Wm. Mann Co., 150 Pa. St. 64, 70, 24 Atl. 601).

17. 6 Cyc. 724. See also 1 Cyc. 912.

18. Adams Gloss. [*citing* Coke Litt. 133*a*].

19. Morrissey *v.* Providence Telegram Pub. Co., 19 R. I. 124, 32 Atl. 19. But *compare* Cameron *v.* Tribune Assoc., 3 Silv. Supreme (N. Y.) 575, 581, 7 N. Y. Suppl. 739.

20. Interstate Commerce Commission *v.* Baltimore, etc., R. Co., 43 Fed. 37, 43 [*affirmed* in 145 U. S. 263, 280, 12 S. Ct. 844, 36 L. ed. 699, where it is said that this form of ticket is issued to accommodate excursionists traveling in numbers too large to use a single ticket], where it is said: "Prior to the passage of the interstate commerce act railroad companies were in the constant habit of issuing a variety of special-rate tickets, such as mileage, excursion, monthly or quarterly, family, school children, twenty or fifty trips, good for the specified number of trips by one person or for one trip by the specified number of persons, round-trip and party tickets for ten or more persons traveling together on a single ticket, either one way or for the round trip, and all these different classes and forms of tickets come within the designation or general description of 'commutation' tickets, or 'commutation' rates. . . . Mileage and excursion tickets [do not] differ in any essential particular from 'commutation passenger

way company are not to be delayed or inconvenienced by people taking luggage with them.[21] (See, generally, CARRIERS.)

EXCUSABLE. Admitting of excuse.[22] (Excusable: Homicide, see HOMICIDE. Neglect as Ground For Opening or Vacating Judgment, see JUDGMENTS.)

EXCUSARE. In civil law, to relieve or absolve one from a thing.[23]

EXCUSAT AUT EXTENUAT DELICTUM IN CAPITALIBUS, QUOD NON OPERATUR IDEM IN CIVILIBUS. A maxim meaning "That excuses or extenuates an offense or wrong in capital causes which does not operate [have the same effect] in civil causes."[24]

EXCUSATUR QUIS QUOD CLAMEUM NON APPOSUERIT, UT SI TOTO TEMPORE LITIGII FUIT ULTRA MARE QUACUNQUE OCCASIONE. A maxim meaning "He is excused who does not bring his claim if, during the whole period in which it ought to have been brought, he has been beyond the sea wheresoever, on occasion [or at a fit time]."[25]

EXCUSE.[26] A plea offered in extenuation of a fault or neglect.[27] (Excuse: For Delay in Performance, see CONTRACTS. For Non-Performance or Defects in Performance, see CARRIERS; CONTRACTS; MASTER AND SERVANT; SALES; SHIPPING.)

EXCUSED. Exempted.[28]

EX DELICTO NON EX SUPPLICIO EMERGIT INFAMIA. A maxim meaning "Infamy arises from the crime, not from the punishment."[29]

EX DEM. See EX DEMISSIONE.

EX DEMISSIONE. Literally, "on the demise." Generally used in the abbreviated form "*ex dem.*"[30]

EX DIUTURNITATE TEMPORIS, OMNIA PRÆSUMUNTUR SOLEMNITER ESSE ACTA. A maxim meaning "From length of time [after lapse of time] all things are presumed to have been done in due form."[31]

EX DOLO MALO NON ORITUR ACTIO.[32] A maxim meaning "A right of action cannot arise out of fraud."[33]

tickets,' so as to make them a different class of tickets from the latter."

21. Burnett *v.* Great North of Scotland R. Co., 10 App. Cas. 147, 167, 54 L. J. Q. B. 531, 53 L. T. Rep. N. S. 507, where the term is compared with "passenger train."

22. Anderson L. Dict. [*cited* in Davis *v.* Steuben School Tp., 19 Ind. App. 694, 50 N. E. 1, 5].

23. Adams Gloss. [*quoted* in Reg. *v.* Hammond, 1 Can. Cr. Cas. 373, 381].

24. Adams Gloss. [*citing* Bacon Max. Reg. 7].

25. Adams Gloss. [*citing* Coke Litt. 260].

26. "Lawful authority or excuse" as used in an indictment see Reg. *v.* Harvey, L. R. 1 C. C. 284, 285, 11 Cox C. C. 662, 40 L. J. M. C. 63, 23 L. T. Rep. N. S. 856, 19 Wkly. Rep. 446.

27. Bouvier L. Dict. [*quoted* in State *v.* McDaniel, 68 S. C. 304, 313, 47 S. E. 384].

"Excuse presupposes the imposition of a duty and a qualification to perform it." Glassinger *v.* State, 24 Ohio St. 206, 207 [*citing* Bouvier L. Dict.].

28. Reg. *v.* Hammond, 1 Can. Cr. Cas. 373, 381, where it is said that this word "does not *per se* imply a prior request or claim."

Not synonymous with "set aside."— Santee *v.* Standard Pub. Co., 36 N. Y. App. Div. 555, 556, 55 N. Y. Suppl. 361, where it is said: "The terms used are not synonymous, but mean entirely different things; 'excused' in this section means, I take it, where a person is relieved from jury duty upon his own application, for his convenience, or for reasons personal to himself, or upon the court's own motion, because the person's services are not necessary, or because it sees fit to excuse him for the reason it finds him an unfit or incompetent person to serve. Such person is 'set aside' because of objections raised to his serving by one or the other of the parties to the action."

29. Wharton L. Lex.

30. Burrill L. Dict.

31. Black L. Dict. [*citing* Coke Litt. 6*b*].

Applied in Landes *v.* Perkins, 12 Mo. 238, 254; Jones *v.* Miller, 12 Mo. 408, 409; Dingee *v.* Kearney, 2 Mo. App. 515, 526; Murphy *v.* Chase, 2 Kulp (Pa.) 81; Kingston *v.* Horner, Lofft. 576, 593.

32. Wherever organized society has existed this has been a recognized maxim of the law. Harris *v.* Harris, 23 Gratt. (Va.) 737, 766 [*citing* Broom Leg. Max. p. 349]. *Compare* Kansas Sav. Bank *v.* National Bank of Commerce, 38 Fed. 800, 803.

"The maxim . . . is qualified by another, viz., *in pari delicto melior est conditio defendentis.*" Tracy *v.* Talmage, 14 N. Y. 162, 181, 67 Am. Dec. 132 [*quoted* in Irwin *v.* Curie, 171 N. Y. 409, 412, 64 N. E. 161, 58 L. R. A. 830].

33. Broom Leg. Max.

Applied in the following cases:

Arkansas.— Horn *v.* Foster, 19 Ark. 346, 357.

EXECUTED CONTRACT. See CONTRACTS.[34]

EXECUTED TRUST. See TRUSTS.

EXECUTIO EST EXECUTIO JURIS SECUNDUM JUDICIUM. A maxim meaning "An execution is the execution of the law according to the judgment."[35]

EXECUTIO EST FINIS ET FRUCTUS LEGIS. A maxim meaning "An execution is the end and the fruit of law."[36]

EXECUTIO JURIS NON HABET INJURIAM. A maxim meaning "The law will not in its executive capacity work a wrong."[37]

EXECUTION.[38] The words "execute,"[39] "executed,"[40] and "execution,"[41] when used in their proper sense, convey the meaning of carrying out some act or course of conduct to its completion. Thus when the terms are applied to a written instrument[42] they include the performance — of all acts which may be necessary to render it complete as an instrument importing the intended obligation,[43] of every

California.— Bornheimer *v.* Baldwin, 42 Cal. 27, 34.

Connecticut.— Barnes *v.* Starr, 64 Conn. 136, 155, 28 Atl. 980; Phalen *v.* Clark, 19 Conn. 421, 443, 50 Am. Dec. 253.

Massachusetts.—Cranson *v.* Goss, 107 Mass. 439, 440, 9 Am. Rep. 45; Phelps *v.* Decker, 10 Mass. 267, 276.

Missouri.— Wirt *v.* Schuman, 67 Mo. App. 163, 170; Hatch *v.* Hanson, 46 Mo. App. 323, 330; Turley *v.* Edwards, 18 Mo. App. 676, 682.

New Jersey.— Hope *v.* Linden Park Blood Horse Assoc., 58 N. J. L. 627, 631, 34 Atl. 1070, 55 Am. St. Rep. 614; Church *v.* Muir, 33 N. J. L. 318, 320; Feldman *v.* Gamble, 26 N. J. Eq. 494, 497.

New York.— Irwin *v.* Curie, 171 N. Y. 409, 413, 64 N. E. 161, 58 L. R. A. 830; Wetmore *v.* Porter, 92 N. Y. 76, 85; Tracy *v.* Talmage, 14 N. Y. 162, 181, 67 Am. Dec. 132; Merritt *v.* Millard, 3 Abb. Dec. 291, 293, 4 Keyes 208; Collier *v.* Miller, 62 Hun 99, 109, 16 N. Y. Suppl. 633; Hart *v.* Messenger, 2 Lans. 446, 450; Moss *v.* Cohen, 11 Misc. 184, 187, 32 N. Y. Suppl. 1078.

Ohio.— Bell *v.* McConnell, 37 Ohio St. 396, 400, 41 Am. Rep. 528; Westfall *v.* Dungan, 14 Ohio St. 276, 282; Goudy *v.* Gebhart, 1 Ohio St. 262, 265; Roll *v.* Raguet, 4 Ohio 400, 419, 22 Am. Dec. 759.

Pennsylvania.— Thomas *v.* Van Dyke, 16 Montg. Co. Rep. 75, 76; McDonald *v.* Campbell, 3 Pittsb. 554, 557.

Virginia.— Harris *v.* Harris, 23 Gratt. 737, 766.

United States.— Findlay *v.* Pertz, 66 Fed. 427, 437, 13 C. C. A. 559; Kansas Sav. Bank *v.* National Bank of Commerce, 38 Fed. 800, 803.

England.— Fivaz *v.* Nicholls, 2 C. B. 501, 513, 10 Jur. 50, 15 L. J. C. P. 125, 52 E. C. L. 501; Stewart *v.* Gibson, 7 Cl. & F. 707, 729, 7 Eng. Reprint 1237; Holman *v.* Johnson, 1 Cowp. 341, 343; Jackson *v.* Duchaire, 3 T. R. 551, 553.

See also 1 Cyc. 674 *et seq.*; 9 Cyc. 546.

34. **"Executed treaty"** see 9 Cyc. 819 note 98.

35. Bouvier L. Dict. [*citing* 3 Inst. 212].

36. Bouvier L. Dict. [*citing* Coke Litt. 289*b*]. See also Kentzler *v.* Chicago, etc., R. Co., 47 Wis. 641, 642, 3 N. W. 369.

37. Broom Leg. Max. [*citing* 2 Inst. 482].

Applied in Moore *v.* Adams, 8 Ohio 372, 374, 32 Am. Dec. 723; Lincoln *v.* Pennsylvania Warehousing Co., 20 Phila. (Pa.) 217, 220.

38. **"Execute" is a term frequently used in law.** Philadelphia F. Assoc. *v.* Ruby, 60 Nebr. 216, 219, 82 N. W. 629 [*quoting* Bouvier L. Dict.].

"'Executed' is a very general word" (Sutherland *v.* Wills, 5 Exch. 715, 718), and is "of wide import" (Solt *v.* Anderson, (Nebr. 1903) 93 N. W. 205, 207).

"To execute well and 'faithfully the office of auctioneer according to law,' is equally comprehensive and the same in substance with the words of the act, 'a faithful discharge of his duties.'" Yard *v.* Lea, 3 Yeates (Pa.) 335, 350.

39. Den *v.* Young, 12 N. J. L. 300, 303 [*cited* in Scott *v.* Dow, 14 N. J. L. 350, 352]; Webster Dict. [*quoted* in Brown *v.* Westerfield, 47 Nebr. 399, 403, 66 N. W. 439, 53 Am. St. Rep. 532]. See also Kemble *v.* Harris, 36 N. J. L. 526, 528.

40. Scott *v.* Guernsey, 60 Barb. (N. Y.) 163, 175 [*citing* Worcester Dict.].

41. Warvelle Vend. 482 [*quoted* in Brown *v.* Westerfield, 47 Nebr. 399, 403, 66 N. W. 439, 53 Am. St. Rep. 532]. *Compare* Clothier *v.* Webster, 12 C. B. N. S. 790, 796, 9 Jur. N. S. 231, 31 L. J. C. P. 316, 6 L. T. Rep. N. S. 461, 10 Wkly. Rep. 624, 104 E. C. L. 790.

42. **"The word 'execute' applies to a Deed,** rather than to a Will." Casement *v.* Fulton, 5 Moore P. C. 130, 141, 13 Eng. Reprint 439.

43. Joseph *v.* Dougherty, 60 Cal. 358, 360; Philadelphia F. Assoc. *v.* Ruby, 60 Nebr. 216, 219, 82 N. W. 629 [*citing* Clark *v.* State, 125 Ind. 1, 24 N. E. 744; Robert *v.* Good, 36 N. Y. 408; Prindle *v.* Caruthers, 15 N. Y. 425]; Wells *v.* Lamb, 19 Nebr. 355, 356, 27 N. W. 229; Sutherland *v.* Wills, 5 Exch. 715, 718. See also Smith *v.* Williams, 38 Miss. 48, 56; Brown *v.* Westerfield, 47 Nebr. 399, 403, 66 N. W. 439, 53 Am. St. Rep. 532 [*quoting* Warvelle Vend. 482]; Bensimer *v.* Fell, 35 W. Va. 15, 31, 12 S. E. 1078, 29 Am. St. Rep. 774.

"[The term] implies a complete contract." Nicholson *v.* Combs, 90 Ind. 515, 516, 46 Am. Rep. 229 [*citing* Prather *v.* Zulauf, 38 Ind. 155; Graham *v.* Graham, 55 Ind. 23, 28].

act required to give the instrument validity,[44] or to carry it into effect,[45] or to give it the forms required to render it valid;[46] in a technical sense, the words necessarily include the performance of three acts — signing, sealing and delivery,[47] and in some instances the acknowledgment of the instrument;[48] but the act of delivery is not always included;[49] and not infrequently the terms are employed to express merely the acts of signing and sealing,[50] or of signing only.[51] As used in

44. Webster Dict. [*quoted* in Brown *v.* Westerfield, 47 Nebr. 399, 403, 66 N. W. 439, 53 Am. St. Rep. 532]. *Compare* Traver *v.* Halsted, 23 Wend. (N. Y.) 66, 69; Ellis *v.* McCormick, 38 L. J. Q. B. 127, 129.

45. Hill *v.* Nelms, 86 Ala. 442, 446, 5 So. 796 [*citing* Rapalje & L. L. Dict. and *quoted* in Farrior *v.* New England Mortg. Security Co., 88 Ala. 275, 277, 7 So. 200].

46. Webster Dict. [*quoted* in Brown *v.* Westerfield, 47 Nebr. 399, 403, 66 N. W. 439, 53 Am. St. Rep. 532].

The officer of a corporation affixing its seal to a deed is "the party executing the deed," within the meaning of the statute requiring the party executing the deed to acknowledge it. Killingsworth *v.* Portland Trust Co., 18 Oreg. 351, 355, 23 Pac. 66, 17 Am. St. Rep. 737, 7 L. R. A. 638.

47. *Alabama.*— Hill *v.* Nelms, 86 Ala. 442, 446, 5 So. 796 [*citing* Rapalje & L. L. Dict. and *quoted* in Farrior *v.* New England Mortg. Security Co., 88 Ala. 275, 277, 7 So. 200].

Arkansas.— Tubbs *v.* Gatewood, 26 Ark. 128, 131 [*quoted* in Little *v.* Dodge, 32 Ark. 453, 460]; Jacoway *v.* Gault, 20 Ark. 190, 194, 73 Am. Dec. 494.

California.— Le Mesnager *v.* Hamilton, 101 Cal. 532, 541, 35 Pac. 1054, 40 Am. St. Rep. 81. See also Knowles *v.* Murphy, 107 Cal. 107, 115, 40 Pac. 111.

Florida.— Einstein *v.* Shouse, 24 Fla. 490, 495, 5 So. 380.

Georgia.— Buffington *v.* Thompson, 98 Ga. 416, 422, 25 S. E. 516 [*cited* in Stallings *v.* Newton, 110 Ga. 875, 880, 36 S. E. 227].

Idaho.— Elbring *v.* Mullen, 4 Ida. 199, 201, 38 Pac. 404.

Indiana.— Collins *v.* Cornwell, 131 Ind. 20, 22, 30 N. E. 796 [*citing* Bouvier L. Dict.; Rapalje & L. L. Dict.]; Nicholson *v.* Combs, 90 Ind. 515, 516, 46 Am. Rep. 229.

Mississippi.— Smith *v.* Williams, 38 Miss. 48, 56.

Nebraska.— Philadelphia F. Assoc. *v.* Ruby, 60 Nebr. 216, 219, 82 N. W. 629 [*citing* Anderson L. Dict.; Bouvier L. Dict.]; Hazelet *v.* Holt County, 51 Nebr. 716, 718, 71 N. W. 717 [*citing* Black L. Dict.]; Brown *v.* Westerfield, 47 Nebr. 399, 403, 66 N. W. 439, 53 Am. St. Rep. 532 [*quoting* Webster Dict.].

New York.— Thorp *v.* Keokuk Coal Co., 48 N. Y. 253, 255 [*citing* Binney *v.* Plumley, 5 Vt. 500, 26 Am. Dec. 313; Churchill *v.* Gardner, 7 T. R. 596; Bouvier L. Dict.]; Keenan *v.* Keenan, 12 N. Y. Suppl. 747, 749 [*quoting* Bouvier L. Dict.].

Ohio.— Tiernan *v.* Fenimore, 17 Ohio 545, 552.

West Virginia.— Bensimer *v.* Fell, 35 W. Va. 15, 31, 12 S. E. 1078, 29 Am. St. Rep. 774 [*citing* Pickens *v.* Knisely, 29 W. Va. 1, 11 S. E. 932, 6 Am. St. Rep. 622].

"A bond is not 'executed' until it is delivered." State *v.* Young, 23 Minn. 551, 560.

Distinguished from "signed."— "To say that A 'signed' a note, and that he 'executed' a note, as usually understood, may mean very different things. The former conveys the meaning that the act of signing was performed personally by the maker, while the latter imports that the maker either signed it himself, or authorized another to sign it for him. The terms are by no means equivalent." Brems *v.* Sherman, 158 Ind. 300, 301, 63 N. E. 571 [*citing* Bouvier L. Dict.; Webster Int. Dict.].

48. Farrior *v.* New England Mortg. Security Co., 88 Ala. 275, 277, 7 So. 200; Le Mesnager *v.* Hamilton, 101 Cal. 532, 540, 35 Pac. 1054, 40 Am. St. Rep. 81 [*cited* in Solt *v.* Anderson, (Nebr. 1903) 93 N. W. 205, 207]; Elbring *v.* Mullen, 4 Ida. 199, 201, 38 Pac. 404; Pickens *v.* Knisely, 29 W. Va. 1, 7, 11 S. E. 932, 6 Am. St. Rep. 622 [*cited* in Bensimer *v.* Fell, 35 W. Va. 15, 31, 12 S. E. 1078, 29 Am. St. Rep. 774]; 1 Cyc. 522 note 48, 603 note 14.

"The acknowledgment of a mortgage is no part of its execution, but only evidence of it." Benninghoff *v.* Stephenson, 161 Pa. St. 440, 443, 29 Atl. 87.

49. See Wood *v.* State, 63 Ark. 337, 343, 40 S. W. 87; Stuart *v.* Dutton, 39 Ill. 91, 93.

As applied to municipal bonds the word "executed" does not imply final delivery, since that act is by statute directed to be done by the treasurer of the municipality. Young *v.* Clarendon Tp., 132 U. S. 340, 351, 10 S. Ct. 107, 33 L. ed. 356.

The word "executed" as used in the clause "executed the foregoing deed" in an acknowledgment of a deed by a married woman "cannot embrace the delivery, for that is the last act done, and follows the acknowledgment, and is no part of the execution of the deed. When, then, she acknowledges she signed the deed, she admits her signature and seal, which is, technically, the execution of the deed." Stuart *v.* Dutton, 39 Ill. 91, 93.

50. Buffington *v.* Thompson, 98 Ga. 416, 422, 25 S. E. 516 [*citing* Anderson L. Dict. and *cited* in Stallings *v.* Newton, 110 Ga. 875, 880, 36 S. E. 227].

"A contract signed and delivered, though not sealed, . . . is effective as an executory contract, when duly acknowledged." Bensimer *v.* Fell, 35 W. Va. 15, 31, 12 S. E. 1078, 29 Am. St. Rep. 774.

51. Le Mesnager *v.* Hamilton, 101 Cal. 532, 540, 35 Pac. 1054, 40 Am. St. Rep. 81.

"'After execution by any of the obligors' in common parlance means after the signing of the bond." Tiernan *v.* Fenimore, 17 Ohio 545, 552.

a statute relating to wills, the terms are employed plainly to designate the whole operation; including both the signature or acknowledgment of the testator, and the attestation of the subscribing witnesses; they are not used to designate the testator's part alone.[52] As used in reference to the act of the executor in carrying out the provisions of a will, the terms mean the settlement of the estate under the provisions of law for the settlement of the estates of deceased persons, and the distribution of the property to the beneficiaries.[53] In criminal law "execution" means the putting to death of a criminal under sentence of a court.[54] In each of the applications — the execution of a deed,[55] of a writ,[56] or of a criminal,[57] and in every other application of the word, there is, when the word is used in its strict sense, the same meaning, namely, that of completing or performing what the law either orders or validates.[58] The sense in which the terms are used can generally be determined from the context.[59] (Execution: Of Criminal, see CRIMINAL LAW. Of Process, see PROCESS, and cross-references thereunder. Of Written Instrument — Accord and Satisfaction, see ACCORD AND SATISFACTION; Appeal-Bond, see APPEAL AND ERROR; Bond, see BONDS; Commission to Take Depositions, see DEPOSITIONS; Composition With Creditors, see COMPOSITIONS WITH CREDITORS; Contract, see CONTRACTS; Deed, see DEEDS; Indenture of Apprenticeship, see APPRENTICES; Lease, see LANDLORD AND TENANT; Mining Lease or Contract, see MINES AND MINERALS; Mortgage, see CHATTEL MORTGAGES; MORTGAGES; Negotiable Instrument, see COMMERCIAL PAPER; Will, see WILLS. Of Written Instrument by Corporation, see CORPORATIONS. Proof of Execution of Instrument Preliminary to Its Admission in Evidence, see EVIDENCE. Writ of, see EXECUTIONS.)

EXECUTION IN DUPLICATE. Used in reference to a written instrument, a term meaning that there must be two originals.[60]

EXECUTION OF AN HYPOTHECATION. In the civil law, the seizure which the creditor makes of the thing hypothecated and the judicial sale which is ordered thereof.[61]

"Executed" or "execution" are synonymous with "signed" or "signature." Nielson *v.* Schuckman, 53 Wis. 638, 643, 11 N. W. 44. And "execute" is the equivalent of "subscribe." Cheney *v.* Cook, 7 Wis. 413, 423.

52. Casement *v.* Fulton, 5 Moore P. C. 130, 142, 13 Eng. Reprint 439 [*citing* Ellis *v.* Smith, 1 Ves. Jr. 11, 16, 30 Eng. Reprint 205]. To the same effect is Lewis *v.* Lewis, 13 Barb. (N. Y.) 17, 23, where the term "executed" is distinguished from "publication." The court said: "The word 'published,' is not found in the section [of the statute], because the word 'executed' is sufficiently comprehensive in its meaning to embrace every thing that the principal actor is required to do, to render the instrument complete." See also Linton's Appeal, 104 Pa. St. 228, 239; and, generally, WILLS.

"Executed and delivered" as applied to a will see Wooster *v.* Cooper, 59 N. J. Eq. 204, 220, 45 Atl. 381.

53. *In re* Lamb, 122 Mich. 239, 241, 80 N. W. 1081. See also Lambert *v.* Harvey, 100 Ill. 338, 341. See, generally, EXECUTORS AND ADMINISTRATORS.

"Execution" is not synonymous with "probating." *In re* Lamb, 122 Mich. 239, 241, 80 N. W. 1081.

54. Brown L. Dict. [*cited* in Harris *v.* Rankin, 4 Manitoba 115, 128]. *Compare* Calhoun *v.* Buffington, 25 Mo. 443, 444.

55. See *supra*, note 42 *et seq.*

56. As applied to a writ, "executed" denotes the act of the sheriff in carrying out the command of the court contained in the writ. Brown L. Dict. p. 142 [*cited* in Harris *v.* Rankin, 4 Manitoba 115, 127]. See also Andrews *v.* Keep, 38 Ala. 315, 317 (fieri facias); Wood *v.* Lowden, 117 Cal. 232, 236, 49 Pac. 132 (attachment); State *v.* Williamsen, 57 Mo. 192, 198 (scire facias); Wilson *v.* Jackson, 10 Mo. 329, 337 (capias); Wills *v.* McKinney, 41 N. J. L. 120, 123 (execution); Kemble *v.* Harris, 36 N. J. L. 526, 528 (execution); Waterman *v.* Merrill, 33 N. J. L. 378, 381 (fieri facias); Scott *v.* Dow, 14 N. J. L. 350, 352 (execution); State *v.* Hamilton, 16 N. J. L. 153, 155 (capias); Den *v.* Young, 12 N. J. L. 300, 303 (execution); Kennedy *v.* Baker, 159 Pa. St. 146, 152, 28 Atl. 252 (scire facias); Wallace *v.* Scholl, 9 Pa. Super. Ct. 284, 288 (attachment); Cheston *v.* Gibbs, 13 L. J. Exch. 53, 54 (execution).

57. See *supra*, note 54.

58. Brown L. Dict. [*quoted* in Harris *v.* Rankin, 4 Manitoba 115, 128].

59. Le Mesnager *v.* Hamilton, 101 Cal. 532, 540, 35 Pac. 1054, 40 Am. St. Rep. 81; Solt *v.* Anderson, (Nebr. 1903) 93 N. W. 205, 207.

60. Grant *v.* Griffith, 39 N. Y. App. Div. 107, 109, 56 N. Y. Suppl. 791.

61. The Young Mechanic, 30 Fed. Cas. No. 18,180, 2 Curt. 404 [*citing* Pothier De L'Hypotheque, c. 2, § 3].

EXECUTIONS

EDITED BY JOHN G. CARLISLE*

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*Four years Secretary of the Treasury of the United States, United States Senator from Kentucky, and Speaker of the House of Representatives for six years.

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I. DEFINITION.[1]

An execution is a writ issuing out of a court, directed to an officer thereof, and running against the body or goods of a party.[2] A writ of execution has been defined as the end of the law;[3] final process and the end of the law;[4] the end and fruit of the law;[5] the act of carrying into effect the judgment or decree of a court;[6] the final judgment of a court,[7] or other jurisdiction, and the writ which authorizes the officer so to carry into effect such judgment;[8] a judicial writ issuing from the court where the judgment is rendered;[9] a writ which authorizes the officer to carry a judgment into effect;[10] a writ issued to enforce

1. **The word is derived** from "*executio*, and signifieth in law the obtaining of actuall possession of anything acquired by judgment of law, or by a fine executory levied, whether it be by the sherife or by the entry of the party." Coke Litt. 154*a*.

"**It differs from an action,** which continues only till judgment is given, and therefore a release of all actions is regularly no bar of execution." 3 Bacon Abr. tit. "Execution" A [*citing* Coke Litt. 289; 2 Rolle Abr. 404]. And *compare* Williams *v.* First School Dist., 18 Pa. St. 275, 277 [*quoted* in National Foundry, etc., Works *v.* Oconto Water Co., 52 Fed. 43, 53].

2. Brown *v.* U. S., 6 Ct. Cl. 171, 178 [*quoted* in Webber *v.* Harshbarger, 5 Kan. App. 185, 47 Pac. 166, 167].

"**The purpose of a writ of execution** is, to authorize the officer to whom it is directed and delivered, to seize and hold the property of the debtor for the satisfaction of the amount ordered to be made by such writ." Habersham *v.* Sears, 11 Oreg. 431, 432, 5 Pac. 208, 50 Am. Rep. 481.

3. Federal Ins. Co. *v.* Robinson, 82 Pa. St. 357, 359; U. S. *v.* Nourse, 9 Pet. (U. S.) 8, 28, 9 L. ed. 31 [*quoted* in Webber *v.* Harshbarger, 5 Kan. App. 185, 47 Pac. 166, 167].

At common law executions are said to be either final or *quousque*; the former where the complete satisfaction of the debt is intended to be procured by this process, the latter where the execution is only a means to an end, as where defendant is arrested on capias ad satisfaciendum. Black L. Dict.

4. Hurlbutt *v.* Currier, 68 N. H. 94, 95, 38 Atl. 502.

5. Coke Litt. 289 [*quoted* in Beard *v.* Wilson, 52 Ark. 290, 296, 12 S. W. 567].

"**Executio est fructus et finis legis.**" Freeman Ex. title page. See also *ante*, p. 875.

Similar definitions are: "*Fructus finis et effectus legis.*" Coke Litt. [*quoted* in Gamble *v.* Howland, 3 Grant Ch. (U. C.) 281, 308].

"[That which] gives the successful party the fruit of his judgment." U. S. *v.* Nourse, 9 Pet. (U. S.) 8, 28, 9 L. ed. 31 [*quoted* in Webber *v.* Harshbarger, 5 Kan. App. 185, 47 Pac. 166, 167].

"The fruit and life of every suit." Hoe's Case, 5 Coke 89*b*, 90*b*.

6. Lockridge *v.* Baldwin, 20 Tex. 303, 306, 70 Am. Dec. 385 [*quoted* in Beard *v.* Wilson, 52 Ark. 290, 296, 12 S. W. 567]; Shields *v.* Stark, (Tex. Civ. App. 1899) 51 S. W. 540; Bouvier L. Dict. [*quoted* in *Ex p.* Voltz, 37 Ind. 237, 240; Webber *v.* Harshbarger, 5 Kan. App. 185, 47 Pac. 166, 167; *In re* Teuscher, 23 Fed. Cas. No. 13,846].

7. Lockridge *v.* Baldwin, 20 Tex. 302, 306, 70 Am. Dec. 385 [*quoted* in Borden *v.* Tillman, 39 Tex. 262, 273]; Bouvier L. Dict. [*quoted* in Harris *v.* Rankin, 4 Manitoba L. Rep. 115, 127].

8. Bouvier L. Dict. [*quoted* in Harris *v.* Rankin, 4 Manitoba L. Rep. 115, 127].

Similar definitions are: "Final process to enforce payment of a judgment." Reid *v.* Northwestern R. Co., 32 Pa. St. 257, 258.

"Process authorizing the seizure and appropriation of the property of a defendant for the satisfaction of a judgment against him." Lambert *v.* Powers, 36 Iowa 18, 20 [*quoted* in Webber *v.* Harshbarger, 5 Kan. App. 185, 47 Pac. 166, 167]; Anderson L. Dict. [*quoted* in Southern California Lumber Co. *v.* Ocean Beach Hotel Co., 94 Cal. 217, 221, 29 Pac. 627, 28 Am. St. Rep. 115].

"The execution of the law according to the judgment." 3 Coke Inst. 212 [*quoted* in Beard *v.* Wilson, 52 Ark. 290, 296, 12 S. W. 567].

"The putting of the sentence of the law in force." Shields *v.* Stark, (Tex. Civ. App. 1899) 51 S. W. 540; 3 Blackstone Comm. 412 [*quoted* in Webber *v.* Harshbarger, 5 Kan. App. 185, 47 Pac. 166, 167].

9. "And in contemplation of law is issued under the order of the Court." Gooch *v.* Gregory, 65 N. C. 142.

A similar definition is: "A judicial writ grounded on the judgment of the court from which it issues." Pentland *v.* Kelly, 6 Watts & S. (Pa.) 483, 484. See also Tidd Pr. 994–995 [*quoted* in Burton *v.* Deleplain, 25 Mo. App. 376, 378].

10. Pierson *v.* Hammond, 22 Tex. 585, 587; Lockridge *v.* Baldwin, 20 Tex. 303, 306, 70 Am. Dec. 385 [*quoted* in Beard *v.* Wilson, 52 Ark. 290, 296, 12 S. W. 567; Borden *v.* Tillman, 39 Tex. 262, 273]; Bouvier L. Dict. [*quoted* in Webber *v.* Harshbarger, 5 Kan. App. 185, 47 Pac. 166, 167, where it is said: "And this definition has been adopted by nearly every state in the Union"].

Similar definitions are: "An authority to the sheriff to seize of the property of the defendant a sufficient amount to satisfy the judgment." Southern California Lumber

a judgment or decree of a court of law, or a final decree of a court of equity;[11] the process by which the debt, or damages, or other things recorded, and the costs adjudged, is obtained;[12] the embodied power of the court, in the shape of a command to a ministerial officer,[13] respecting the rights of the parties to the judgment; and imposing upon the officer certain duties and liabilities prescribed by law.[14] The term has also been applied to the last stage of a suit whereby possession is obtained of anything recovered.[15] As employed in the statute,[16] it is not to be construed in the restricted sense of process simply to collect the amount due on the judgment by levy and sale;[17] it embraces all the appropriate means to execution of the judgment,[18] all means by which the judgments or decrees of courts are enforced,[19] all processes issued to carry into effect the final judgment of a court;[20] and it is sometimes used as the equivalent of "order of

Co. *v.* Ocean Beach Hotel Co., 94 Cal. 217, 221, 29 Pac. 627, 28 Am. St. Rep. 115.

"A judicial writ founded on a judgment obtained in a civil action and issued in behalf of the party recovering the judgment for the purpose of carrying it into effect." 4 Wait Pr. p. 1 [*quoted* in Seaman *v.* Clarke, 60 N. Y. App. Div. 416, 421, 69 N. Y. Suppl. 1002].

"A writ by which the judgment of the court is enforced." Mayer *v.* Morgan, 26 Wash. 71, 77, 66 Pac. 128.

11. This is said to be the most usual sense in which the word is used. 1 Freeman Ex. § 1.

12. Steele *v.* Johnson, 62 Ala. 323, 327.

13. It is a written command or precept to the sheriff or ministerial officer, directing him to execute the judgment of the court. It is the command of the court, addressed to the ministerial officer in writing, and under the seal of the court, containing with more certainty the command of the court, and expressed with more solemnity, than if uttered verbally by the court. Kelley *v.* Vincent, 8 Ohio St. 416, 420 [*quoted* in Webber *v.* Harshbarger, 5 Kan. App. 185, 47 Pac. 166, 167; Burkett *v.* Clark, 46 Nebr. 466, 472, 64 N. W. 1113].

14. Beard *v.* Wilson, 52 Ark. 290, 296, 12 S. W. 567 [*citing* Lockbridge *v.* Baldwin, 20 Tex. 303, 70 Am. Dec. 385, and *quoting* Bouvier L. Dict.].

15. Wharton L. Lex. [*quoted* in Harris *v.* Rankin, 4 Manitoba L. Rep. 115, 127].

Similar definitions are: "A writ to give possession of a thing recovered by judgment or decree." Girard L. Ins., etc., Co. *v.* Farmers', etc., Nat. Bank, 57 Pa. St. 388, 397.

"The obtaining of actual possession of anything acquired by judgment of law." Darby *v.* Carson, 9 Ohio 149, 150 [*quoting* Coke Litt. 154, 189, and *quoted* in Webber *v.* Harshbarger, 5 Kan. App. 185, 47 Pac. 166, 167]; Bacon Abr. tit. "Execution" [*quoted* in Gamble *v.* Howland, 3 Grant Ch. (U. C.) 281, 308].

"The putting one in possession of that, which he has already acquired by judgment of law." Griffith *v.* Fowler, 18 Vt. 390, 394 [*citing* Coke Litt. 154*a*].

16. "Executions are of four kinds: First, against the property of the judgment debtor; second, against his person; third, for the delivery of the possession of real or personal property, with damages for withholding the same, and costs; fourth, executions in special cases." Kan. Gen. St. (1901) § 4892 [*quoted* in Norton *v.* Reardon, 67 Kan. 302, 304, 72 Pac. 861]; Webber *v.* Harshbarger, 5 Kan. App. 185, 47 Pac. 166, 167.

17. The words "levy and sale" when used with reference to judicial proceedings in civil matters may be equivalent to the word "execution." Miama County *v.* Wan-zop-pe-che, 3 Kan. 364, 370. *Compare* Smith *v.* Young, 12 N. J. L. 300, where it is held that the word "executed" used in a statute merely meant "levied."

18. Green *v.* Mann, 19 App. Cas. (D. C.) 243, 248 [*quoted* in Watson *v.* Keystone Ironworks Co., (Kan. Sup. 1903) 74 Pac. 269, 274]. See also Kemble *v.* Harris, 36 N. J. L. 526, 529.

Particular forms of writ see *infra*, II, E.

19. National Foundry, etc., Works *v.* Oconto Water Co., 52 Fed. 43, 55 [*citing* Williams *v.* First School Dist., 18 Pa. St. 275, 277].

20. Pierson *v.* Hammond, 22 Tex. 585, 587. See also Norburn *v.* Norburn, [1894] 1 Q. B. 448, 63 L. J. Q. B. 341, 70 L. T. Rep. N. S. 411, 10 Reports 10, 42 Wkly. Rep. 127.

An attachment on a judgment, issued by virtue of an early statute of Maryland, was considered by virtue of the use to which it could be applied, as an execution, and was governed by the same rules. Griffith *v.* Etna F. Ins. Co., 7 Md. 102; Baldwin *v.* Wright, 3 Gill (Md.) 241.

Compared with and distinguished from "sequestration" and "attachment" see Grubbs *v.* Ellyson, 23 Ark. 287 [*quoted* in Beard *v.* Wilson, 52 Ark. 290, 296, 12 S. W. 567]; Reid *v.* Northwestern R. Co., 32 Pa. St. 257, 258; Pierson *v.* Hammond, 22 Tex. 585.

Distinguished from "attachment on warrant" (Johnson *v.* Foran, 58 Md. 148, 150); "charging order" (*In re* O'Shea, [1895] 1 Ch. 325, 330, 64 L. J. Ch. 263, 71 L. T. Rep. N. S. 827, 2 Manson 4, 12 Reports 70, 43 Wkly. Rep. 232 [*cited* in Wild *v.* Southwood, [1897] 1 Q. B. 317, 320, 66 L. J. Q. B. 166, 75 L. T. Rep. N. S. 388, 3 Manson 303, 45 Wkly. Rep. 224]. See also *In re* Hutchinson, 16 Q. B. D. 515, 521, 55 L. J. Q. B. 582, 54 L. T. Rep. N. S. 302, 3 Morr. Bankr. Cas. 19, 34 Wkly. Rep. 475); from a "copy of the

sale."[21] Nevertheless a writ of execution is not necessarily based upon a judgment; it may be employed to enforce other obligations, which, by statute, have, in this respect, been made equivalent to judgments.[22]

II. General Nature and Essentials.

A. Assignability.[23] It has been said that there might be a legal difficulty in transferring the writ so that the assignee could maintain a suit founded on it, although the right of receiving the money upon it and of directing the officer in its execution is clearly allowable;[24] in other cases, however, the assignment has been expressly held to be valid,[25] and in some jurisdictions the statutes expressly provide for its assignment under certain conditions.[26]

B. Operation and Effect of Statutes. The general rules as to the constitutionality, interpretation, operation, and effect of statutes in general have been applied to statutes relating to executions.[27]

judgment" (Brown *v.* U. S., 6 Ct. Cl. 171, 179); from "distress for rent or other cause" (*Ex p.* Harrison, 13 Q. B. D. 753, 760, 53 L. J. Ch. 977, 51 L. T. Rep. N. S. 878; *Ex p.* Birmingham, etc., Gas Light Co., 40 L. J. Bankr. 52, 54, 24 L. T. Rep. N. S. 639, 12 Wkly. Rep. 603); from a "garnishee order" (Fellows *v.* Thornton, 14 Q. B. D. 335, 54 L. J. Q. B. 279, 280, 52 L. T. Rep. N. S. 389, 33 Wkly. Rep. 258); from "garnishment" (Shields *v.* Stark, (Tex. Civ. App. 1899) 51 S. W. 540); from "judgment" (Ingram *v.* Belk, 2 Rich. (S. C.) 111, 112); from "order" (Devlin *v.* Hinman, 40 N. Y. App. Div. 105, 111, 57 N. Y. Suppl. 663; Strowbridge *v.* Strowbridge, 21 Hun (N. Y.) 288, 290); and from "process for the purpose of enforcing a judgment directing a sale of real property" (Southern California Lumber Co. *v.* Ocean Beach Hotel Co., 94 Cal. 217, 223, 29 Pac. 627, 28 Am. St. Rep. 115). See also Attachment, 4 Cyc. 395 note 1.

Equivalent to a fieri facias.—"'Executions,' as used in . . . [a statute imposing a fine or penalty] is what is known by the profession generally, the country over, as fi. fa." *In re* Teuscher, 23 Fed. Cas. No. 13,846. See Fieri Facias.

In quo warranto proceedings where the statute provided that "execution may issue on any judgment that may be recovered on such trial," the court said: "The word execution when thus used must be understood to refer to the writ by which damages or costs or both are collected: Rathbun *v.* Ranney, 14 Mich. 382. And these terms imply that any judgment which can be rendered on the trials referred to, may be enforced by this writ." People *v.* Cicott, 15 Mich. 326, 328.

21. Burkett *v.* Clark, 46 Nebr. 466, 472, 64 N. W. 1113.

Compared with and distinguished from "order of sale" see Watson *v.* Keystone Ironworks Co., (Kan. Sup. 1903) 74 Pac. 269, 274; Liebman *v.* Ashbacker, 36 Ohio St. 94; Kelley *v.* Vincent, 8 Ohio St. 415; Girard L. Ins. Co. *v.* Farmers', etc., Bank, 57 Pa. St. 388; Pierson *v.* Hammond, 22 Tex. 585; Henry *v.* Moore, 1 Tex. App. Civ. Cas. § 880.

22. 1 Freeman Ex. § 1 [*citing* Bacon Abr. tit. "Execution"].

23. **Right of officer who advances amount** of writ see *infra*, XII.

24. Ayres *v.* Swayze, 5 N. J. L. 812.

The assignment of an execution, by an attorney in fact, who has only a naked power to act in the suit, in plaintiff's name, is no evidence that the assignee is a purchaser for valuable consideration. Caldwell *v.* Dean, 6 Litt. Sel. Cas. (Ky.) 239.

25. This is true, although the assignees at the time of the assignment were the executors of one of defendants in the execution, and had assets in their hands sufficient to satisfy it after the purchase. King *v.* Aughtry, 3 Strobh. Eq. (S. C.) 149.

26. Ga. Code, § 891*a*, provides that it shall be the duty of the officer who enforces the execution, on request, to transfer it to any one who pays an execution issued against another, for taxes. Fuller *v.* Dowdell, 85 Ga. 463, 11 S. E. 773.

In writing.—A transfer of an execution to be valid must be in writing. Jones *v.* Hightower, 117 Ga. 749, 45 S. E. 60.

27. See, generally, Constitutional Law; Statutes.

A limitation as to actions, prescribing the time within which actions on judgments must be brought, is not applicable to the remedy by execution, but relates to actions only (Kincaid *v.* Richardson, 25 Hun (N. Y.) 237), and hence a statute may properly authorize an execution after an action on the judgment is barred by limitation (Matter of Warner, 39 N. Y. App. Div. 91, 56 N. Y. Suppl. 585 [*affirming* 22 Misc. 488, 50 N. Y. Suppl. 940]; Agar *v.* Curtiss, 8 N. Y. App. Div. 337, 40 N. Y. Suppl. 815).

Destruction of lien.—A statute, the operation of which must be construed as a destruction of the lien which has been acquired by the issuance of an execution, would of course be unconstitutional. Warren *v.* Jones, 9 S. C. 288.

Retroactive effect.—As a rule statutes authorizing the issuance of execution after the expiration of a certain time or prohibiting such issuance in certain cases will not be considered as retroactive unless the language employed expressly so warrants (Mann *v.* McAtee, 37 Cal. 11; Lockhart *v.* Tinley, 15 Ga.

C. Judgment, Decree, or Order[28] — **1. Necessity.**[29] An execution cannot be lawfully issued on other than a final judgment or decree pronounced by a competent court which has determined the respective rights and liabilities of the parties litigant.[30] The courts adhere to this rule with strictness; the parties to the action cannot by agreement confer upon a clerk authority to issue execution for a debt not evidenced by a judgment,[31] and a mere verdict,[32] or a decree that money be brought into court,[33] or an award,[34] or an order of the probate court stating a guardian's account and ordering him to pay to his successor the balance found due from him on such accounting,[35] is not sufficient where no judgment has been rendered. So too a filing of the necessary papers authorizing an entry of judgment by confession in vacation without such entry actually being made is not sufficient.[36]

2. Nature — a. Contingent or Conditional Judgment. A judgment on condition can be enforced by execution only in pursuance to the conditions thereof,[37] but where it appears that the condition or contingency on which the judgment

496; Eakle *v.* Smith, 24 Md. 339; Corwin *v.* Benham, 2 Ohio St. 36; Stiles *v.* Murphy, 4 Ohio 92; Burnham *v.* Justus, 2 Miles (Pa.) 420; *Re* Isle of Wight Ferry Co., 11 Jur. N. S. 279, 34 L. J. Ch. 194, 12 L. T. Rep. N. S. 263); although a statute in general terms exempting certain property from levy and sale on execution has been held applicable to transactions previous to the passage thereof (Morse *v.* Goold, 11 N. Y. 281, 62 Am. Dec. 103 [*overruling* Vedder *v.* Alkenbrack, 6 Barb. (N. Y.) 327]).

Adoption of state laws by federal court. The general act of congress of May 19, 1828, adopted the state laws concerning proceedings on execution, and by the subsequent act of 1842 declared such laws applicable to states admitted since 1828. This adoption is the same as the reënactment *in haec verba* of the original act, and therefore adopts the laws in force in such states in 1842 as to all those states admitted between the period of 1828 and 1842. Gorham *v.* Wing, 10 Mich. 486.

28. Judgment authorizing execution against the person see *infra*, XI.

Supplementary proceedings see *infra*, XIII.

Judgment generally see JUDGMENTS.

29. Necessity for rendition and entry of judgment see *infra*, II, C, 3.

30. *Arkansas.*— Hightower *v.* Handlin, 27 Ark. 20.

Connecticut.— Cutler *v.* Wadsworth, 7 Conn. 6.

Florida.— Davidson *v.* Seegar, 15 Fla. 671; Davidson *v.* Floyd, 15 Fla. 667.

Georgia.— Watson *v.* Tindal, 24 Ga. 494, 71 Am. Dec. 142. See also Roberts *v.* Boylan, 24 Ga. 40.

Illinois.— Kingsberry *v.* Hutton, 140 Ill. 603, 30 N. E. 600 [*affirming* 40 Ill. App. 424].

Iowa.— Balm *v.* Nunn, 63 Iowa 641, 19 N. W. 810.

Kansas.— Darrow *v.* Scullin, 19 Kan. 57; Jackson *v.* Latta, 15 Kan. 216.

Kentucky.— Rector *v.* Gale, Hard. 78; O'Conner *v.* Stone, 43 S. W. 483, 19 Ky. L. Rep. 1929; Broseke *v.* Pendleton Bldg., etc., Assoc., 7 Ky. L. Rep. 668.

Louisiana.— Piernas *v.* Milliet, 10 La. Ann. 286; Childress *v.* Allin, 17 La. 37; De Gruy *v.* Hennen, 2 La. 544; Donaldson *v.* Rouzan, 8 Mart. N. S. 162.

Maryland.— Griffith *v.* Lynch, 21 Md. 575.

Mississippi.— Nahours *v.* Cocke, 24 Miss. 44.

Missouri.— Bain *v.* Chrisman, 27 Mo. 293; Morrison *v.* Dent, 1 Mo. 246.

New Jersey.— Little *v.* Fleming, 3 N. J. L. 552; Conner *v.* Souder, 3 N. J. L. 529; Zane *v.* Pissant, 2 N. J. L. 319; Lofton *v.* Champion, 2 N. J. L. 157; Parker *v.* Frambes, 2 N. J. L. 156.

New York.— Van Ness *v.* Cantine, 4 Paige 55.

Pennsylvania.— McGinley *v.* McDonough, 3 Lanc. L. Rev. 202. *Compare* Gibson *v.* Robbins, 9 Watts (Pa.) 156.

Texas.— Criswell *v.* Ragsdale, 18 Tex. 443.

Wisconsin.— Lincoln *v.* Cross, 11 Wis. 91. See 21 Cent. Dig. tit. "Execution," § 5.

Parol evidence is admissible to show that there was in fact no judgment rendered by a justice of the peace, as stated in the execution. Devlin *v.* Gibbs, 7 Fed. Cas. No. 3,842, 4 Cranch C. C. 626.

31. Strother *v.* Richardson, 30 La. Ann. 1269.

32. Truett *v.* Legg, 32 Md. 147; Ninde *v.* Clark, 62 Mich. 124, 28 N. W. 765, 4 Am. St. Rep. 823.

33. Owings *v.* Worthington, 4 Md. 260.

34. Book *v.* Edgar, 3 Watts (Pa.) 29.

35. Kingsberry *v.* Hutton, 140 Ill. 603, 30 N. E. 600 [*affirming* 40 Ill. App. 424].

36. Knights *v.* Martin, 155 Ill. 486, 40 N. E. 358; Cummins *v.* Holmes, 109 Ill. 15 [*affirming* 11 Ill. App. 158]; Ling *v.* King, 91 Ill. 571; Swaim *v.* Humphreys, 42 Ill. App. 370; Humphreys *v.* Swain, 21 Ill. App. 232; Baker *v.* Barber, 16 Ill. App. 621.

Where a bond must be acknowledged before a certain officer to have the force of a judgment, one not so acknowledged is not sufficient as a basis of an execution. Williams *v.* Hall, 2 Dana (Ky.) 97.

37. Triveley *v.* Krouse, 2 C. Pl. (Pa.) 254. See also Jeffries *v.* Clark, 23 Kan. 448.

might be satisfied from a different source or for a lesser amount has not been complied with, execution may at once issue for the amount of the same.[38]

b. Decree or Rule of Court For Payment of Money. While proceedings in contempt were perhaps the original method of enforcing decrees for the payment of money,[39] such decrees are properly and under the present practice more usually enforced by the more direct remedy of execution;[40] and no leave need be obtained from the court for that purpose,[41] although it has been held that such decree must be properly signed by the chancellor.[42]

c. Dormant Judgment.[43] As an execution on a judgment that is void is of no avail,[44] it follows that if the statutes specifically declare a dormant judgment void an execution and sale thereon are also void.[45] Generally speaking, however, an execution issued on a dormant judgment is not absolutely void but is voidable only,[46] but it may be set aside at the instance of defendant unless the judgment has been properly revived by a scire facias;[47] and the principle that an innocent pur-

38. Collins *v.* Webster, 38 Pa. St. 150; Baird *v.* McConkey, 20 Wis. 297; Early *v.* Rogers, 16 How. (U. S.) 599, 14 L. ed. 1074.

39. Stuart *v.* Burcham, 62 Nebr. 84, 86 N. W. 898, 89 Am. St. Rep. 739.

40. *Nebraska.*— Stuart *v.* Burcham, 62 Nebr. 84, 86 N. W. 898, 89 Am. St. Rep. 739.

New York.— Sherwood *v.* Judd, 3 Bradf. Surr. 419.

Pennsylvania.— Weyland's Appeal, 62 Pa. St. 198.

Virginia.— Tyler *v.* Forns, 75 Va. 116.

England.— Doe *v.* Hampson, 4 C. B. 745, 5 D. & L. 484, 17 L. J. C. P. 147, 56 E. C. L. 745.

See 21 Cent. Dig. tit. "Execution," §§ 5, 7 *et seq.*

A conditional order to pay money is not a sufficient basis to authorize an execution. Gibbs *v.* Flight, 13 C. B. 803, 17 Jur. 1034, 22 L. J. C. P. 256, 76 E. C. L. 803.

A decree to set aside a conveyance as fraudulent, and subject the property conveyed to the satisfaction of a debt, is not a decree for money, land, the possession of land, or any article of property, and cannot therefore be the basis of an execution at law. Conley *v.* Buck, 102 Ga. 752, 29 S. E. 710; McCann *v.* Edwards, 6 B. Mon. (Ky.) 208.

An order of the master of the rolls for the payment of money into the bank of England, in the name of the accountant general, to the credit of a case then pending in that court, is not an order to which the effect of a judgment is given by 1 & 2 Vict. c. 110, § 18, and execution cannot issue thereon. Gibbs *v.* Pike, 9 Dowl. P. C. 731, 10 L. J. Exch. 308, 8 M. & W. 223.

Effect of 1 & 2 Vict. c. 110, § 18, did not make the rules of court equivalent to judgments for the purposes of the issuance of executions thereon, except so far as concerned the remedy for the recovery of the moneys payable by virtue of such rules. Farmer *v.* Mottram, 1 D. & L. 781, 7 Jur. 994, 13 L. J. C. P. 10, 6 M. & G. 684, 7 Scott N. R. 403, 46 E. C. L. 684.

The words "judgment" and "decree" are expressly declared by Tenn. Code, § 2970, to be interchangeable and to embrace each other, unless by the context or otherwise they are expressly limited. Hyder *v.* Butler, 103 Tenn. 289, 52 S. W. 876.

Where, on a substitution of attorneys, an order is made requiring clients to pay the former attorney his compensation, the attorney in the event of failure to pay may have an execution. Kane *v.* Rose, 87 N. Y. App. Div. 101, 84 N. Y. Suppl. 111 [*affirmed* in 117 N. Y. 557, 69 N. E. 1125].

41. Matter of Spooner, 11 Q. B. 136, 5 D. & L. 310, 12 Jur. 282, 17 L. J. Q. B. 68, 63 E. C. L. 136; Wallis *v.* Sheffield, 7 Dowl. P. C. 793, 3 Jur. 1002; Watson *v.* Holcombe, 11 L. J. C. P. 190, 4 M. & G. 136, 43 E. C. L. 78.

42. Sloan *v.* Cooper, 54 Ga. 486.

43. Dormancy of judgment generally see JUDGMENTS.

44. See *infra*, II, C, 3, f.

45. Welch *v.* Butler, 24 Ga. 445. An official entry of "no property pointed out on which to levy this fieri facias" will serve to keep a judgment from becoming dormant (Ellis *v.* Atlantic, etc., R. Co., 61 Ga. 362); but neither litigation between plaintiff in fieri facias and his ward as to his right to control the execution, nor even the death of either party, will operate to prevent the judgment from becoming a dormant one (Smith *v.* White, 63 Ga. 236).

46. *Alabama.*— Leonard *v.* Brewer, 86 Ala. 390, 5 So. 306.

Indiana.— Yeager *v.* Wright, 112 Ind. 230, 13 N. E. 707.

Iowa.— Dunton *v.* McCook, 93 Iowa 258, 61 N. W. 977.

New York.— Woodcock *v.* Bennet, 1 Cow. 711, 13 Am. Dec. 568.

North Carolina.— Lytle *v.* Lytle, 94 N. C. 683; Ripley *v.* Arledge, 94 N. C. 467; Jacobs *v.* Burgwyn, 63 N. C. 193; Brown *v.* Long, 36 N. C. 190, 36 Am. Dec. 43; Dawson *v.* Shepherd, 15 N. C. 497.

Ohio.— Green *v.* Cutright, Wright 738.

United States.— Goshorn *v.* Alexander, 10 Fed. Cas. No. 5,630, 2 Bond 158.

England.— Blanchenay *v.* Burt, 4 Q. B. 707, 3 G. & D. 613, 7 Jur. 575, 12 L. J. Q. B. 291, 45 E. C. L. 707.

See 21 Cent. Dig. tit. "Execution," § 19.

47. *Illinois.*— Weis *v.* Tiernan, 91 Ill. 27.

chaser will be protected where the only informality of a judgment is its dormancy does not apply where defendant may also set up as a defense the statute of limitations.[48] But an execution issued while a judgment is yet alive is good, and may be completed by the officer after the expiration of the statutory period of limitation.[49]

d. Foreign Judgment. In the absence of statute[50] there is no way of proceeding upon a foreign judgment other than by the action of debt,[51] and the constitutional provision that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state does not apply to the subsequent acts under a judgment, such as issuing and returning executions thereon.[52]

e. Judgment by Confession.[53] An execution may issue upon a judgment by confession the same as on any other judgment unless otherwise provided by statute,[54] although in at least some jurisdictions such issuance is under the equitable control of the court in which the judgment may be rendered;[55] and a party issuing execution upon a judgment entered by warrant of attorney[56] proceeds at his peril.[57]

f. Judgment After Revival. Where judgment is revived on scire facias it is held in some jurisdictions that the execution must be issued on the original judgment,[58] although in some states it is held to be immaterial on which of the judgments the execution issues, as it is legal in either case.[59]

Mississippi.— Reeves *v.* Burnham, 3 How. 25.

North Carolina.— Jacobs *v.* Burgwyn, 63 N. C. 193; Brown *v.* Long, 36 N. C. 190, 36 Am. Dec. 43.

Ohio.— Green *v.* Cutright, Wright 738.

Pennsylvania.— Mettaner *v.* Cline, 1 Phila. 517; Comly *v.* Rissel, 1 Phila. 402; Albert *v.* March, 6 Pa. Co. Ct. 142.

See 21 Cent. Dig. tit. "Execution," § 19.

Right to show promise of payment of judgment.— An effect of a statute declaring a judgment dormant after the expiration of a certain time cannot be avoided by an execution plaintiff by proving a new promise made within the statutory period, inasmuch as the execution is not in legal contemplation an action, but the result of one, and cannot therefore be made to perform the office of a writ or summons or declaration, and hence cannot be traversed. If a new promise has been made the old judgment may be a basis upon which the promise may be available in a proceeding to obtain a new judgment; the old one being merely evidence of debt, but such issue cannot be raised by the levy of an execution. Cannon *v.* Laman, 7 Lea (Tenn.) 513.

48. Lytle *v.* Lytle, 94 N. C. 683.

49. Especially where the statute requires no order of confirmation of the sheriff's sale, nor any other proceeding by the court to perfect the purchaser's title. Brown *v.* Hopkins, 101 Wis. 498, 77 N. W. 899, 1118.

50. Where by virtue of statutory provisions executions may be sued out upon foreign judgments, it is necessary that these provisions be strictly followed; and the parties availing themselves thereof must show that they come clearly within the terms of the law. Miller *v.* Gaskins, 3 Rob. (La.) 94; Armstrong *v.* Levy, 14 La. 157. By a later act the provisions of this statute were repealed. Kilgore *v.* Planters' Bank, 3 La. Ann. 693.

51. Waddill *v.* Cabell, 21 D. C. 597. See, generally, JUDGMENTS.

52. Waddill *v.* Cabell, 21 D. C. 597; Carter *v.* Bennett, 6 Fla. 214. See also Sherrard *v.* Ponsonby, 21 Fed. Cas. No. 12,772, 1 Cranch C. C. 131.

53. Judgment by confession generally see JUDGMENTS.

Necessity of issuance of scire facias where execution is desired upon a judgment by confession see, generally, SCIRE FACIAS.

54. Allen *v.* Norton, 6 Oreg. 344.

55. McCann *v.* Farley, 26 Pa. St. 173 [*citing* Kinnersley *v.* Mussen, 5 Taunt. 264, 14 Rev. Rep. 750, 1 E. C. L. 143; Cox *v.* Rodbard, 3 Taunt. 74; Austerbury *v.* Morgan, 2 Taunt. 195].

56. The power of an attorney to confess such judgment must clearly appear, and cannot be shown by matters *in pais* amounting to a ratification of such confession. Tildon *v.* Dees, 1 Rob. (La.) 407.

57. And if he issues his writ when nothing is due, or for too much, he subjects himself to the summary correction of the court to set it aside or reduce it, and payment of costs for his untrue demand. Jones *v.* Dilworth, 63 Pa. St. 447.

58. Eastin *v.* Vandorn, Walk. (Miss.) 214. See also Vredenburgh *v.* Snyder, 6 Iowa 39, from which it would seem that this is the proper and preferable, if not in fact the necessary, procedure.

59. Scherrer *v.* Caneza, 33 La. Ann. 314.

Where an execution is used as a set-off in a suit brought by a party, and a balance is certified for defendant and judgment rendered for that amount, an execution may issue on the first judgment for the same. Doty *v.* Russell, 5 Wend. (N. Y.) 129, Marcy, J., delivering the opinion of the court.

g. Judgment Rendered on Appeal. The remedy by execution on judgments rendered by an appellate court exists the same as on judgments rendered by an inferior tribunal.[60]

h. Order Taxing Costs. An order taxing the costs of an action against a party in favor of the officers of the court, while not strictly speaking such a judgment as would be rendered between parties in an adversary suit, is in legal effect a judgment, when docketed, and execution may issue thereon.[61]

3. Form and Requisites — a. In General. The judgment of course need be in no particular form to support an execution thereon so long as its validity is unaffected,[62] although where the statute prescribes a certain form of execution and judgment a substantial compliance therewith is necessary;[63] and as an execution is but a proceeding under the judgment its validity is not affected by a mere irregularity in the assignment of the judgment.[64] There must, however, be a judicial ascertainment of the party to whom the money is due,[65] and a clear statement of the final determination of the court.[66]

b. Entry or Docketing — (i) *In General.* While the entry or docketing of a judgment is necessary for the purpose of creating a lien,[67] such docketing is not in the majority of jurisdictions essential to enable a party to issue an execution thereon where the judgment has otherwise been duly rendered;[68] although by

60. Keeler *v.* Clark, 18 Abb. Pr. (N. Y.) 154. See *infra*, VI, D, 1, b.

If the appeal is dismissed by the consent of the parties, and no action by the upper court is taken, the execution may issue the same as if no appeal had been sued out or contemplated. Clark *v.* Farrar, 3 Mart. (La.) 212.

If the judgment is simply affirmed, execution should issue from the inferior court, and the lien of the judgment remains good. Walter *v.* Tabor, 21 Mo. 75; Meyer *v.* Campbell, 12 Mo. 603. And see Wadley *v.* Davis, 38 Hun (N. Y.) 186.

If the judgment on appeal fixes the liability of parties whose liability was not determined by the judgment in the inferior court, execution should issue on the judgment rendered by the appellate tribunal, and not on that rendered by the inferior. Irvin *v.* Ferguson, 83 Tex. 491, 18 S. W. 820. See also Meyer *v.* Campbell, 12 Mo. 603.

Where the court below erroneously enters a new judgment after the appellate court has affirmed its former judgment, such latter judgment, although erroneous or irregular, is of sufficient validity to support an execution issued thereon. Mulford *v.* Estudillo, 23 Cal. 94.

61. Sheppard *v.* Bland, 87 N. C. 163; Hobson *v.* Paterson, 2 Dowl. P. C. N. S. 129, 11 L. J. C. P. 289, 4 M. & G. 333, 5 Scott N. R. 76, 43 E. C. L. 177. See also Pugsley *v.* Van Alen, 8 Johns. (N. Y.) 352. But the court will refuse to order the costs to be taxed with a view to plaintiff's issuing execution, where defendant has died before such order is applied for, although after the postponement of the cause. Hill *v.* Brown, 11 Jur. 290, 16 M. & W. 696.

An agreement is broad enough to include an execution for costs if it provides that the execution issued for the balance of a judgment shall be first levied upon the property of a certain judgment debtor, before resorting to the property of others. Gibson *v.* McClay, 47 Nebr. 900, 66 N. W. 851.

62. See Holten *v.* Pyle, 6 Houst. (Del.) 432; Tilton *v.* Barrell, 17 Fed. 59, 9 Sawy. 84.

63. Atlanta *v.* Grant, 57 Ga. 340.

64. Campbell *v.* Johnston, 3 Del. Ch. 94.

65. Hines *v.* Noah, 52 Miss. 192.

66. Brightman *v.* Meriwether, 121 Ala. 602, 25 So. 994 (holding that an execution could not issue on a mere copy of the judge's bench notes); Stark *v.* Billings, 15 Fla. 318 (holding that execution could not issue on a mere entry, "Verdict for plaintiff. Let writ issue"); Winter *v.* Coulthard, 94 Iowa 312, 62 N. W. 732 (holding that execution could not issue merely on the minutes entered on a judge's calendar); Park *v.* Holmes, 147 Pa. St. 497, 23 Atl. 769.

Upon a decree which leaves with the clerk for settlement a question which is not within the jurisdictional duties of such ministerial officer an execution cannot lawfully issue. Donalds *v.* Plumb, 8 Conn. 447.

Where one of several defendants has died previous to the rendition of the judgment against the whole of them, and such judgment is vacated as to the deceased defendant and continued against the others, the entry *nunc pro tunc* against such survivors will be regarded as a continuation of the original judgment, and only one execution can issue thereon. Hood *v.* Mobile Branch Bank, 9 Ala. 335.

67. See, generally, Judgments.

68. *Alabama.*— McLaren *v.* Anderson, 81 Ala. 106, 6 So. 188. But *compare* Emrich *v.* Gilbert Mfg. Co., 138 Ala. 316, 35 So. 322, construing Code (1896), §§ 1920, 1921, and Acts (1898–1899), p. 34.

Arkansas.— Lowenstein *v.* Caruth, 59 Ark. 588, 28 S. W. 421.

California.— Los Angeles County Bank *v.* Raynor, 61 Cal. 145.

Georgia.— Fisher *v.* George S. Jones Co., 114 Ga. 648, 40 S. E. 700.

virtue of statutes in some states it would seem that an official entry or docketing is a condition precedent to the right of the writ.[69]

(II) *Time of Entry.* In those jurisdictions where it is necessary to the validity of an execution that the judgment record be first completed, it is held that the law will not notice fractions of a day in order to determine whether or not the record was thus complete before the execution issued, unless it be clearly necessary to prevent an injustice;[70] and it would seem that, where the record is subsequently completed, the execution would become effective from that time.[71] So too for the purpose of the validity of an execution a judgment entered in term-time will be presumed to have been entered up during the actual session of the court;[72] and a failure to make formal entry is an irregularity which may be waived by failing to make a motion to vacate until several months after the execution has been issued.[73]

c. Necessity of Special Order For Writ. It is not required in a judgment at law that the court shall in terms direct the issuance of an execution,[74] and the same rule has been applied to a decree in chancery.[75]

d. Must Be Final.[76] It is also essential that the judgment, to be a sufficient basis for a valid execution, be not a mere interlocutory order, or dependent upon a contingent liability, but it must be a final determination of the contention between the parties;[77] and where a joint judgment is opened as to one of the

Illinois.— Weigley *v.* Matson, 125 Ill. 64, 16 N. E. 881 [*affirming* 24 Ill. App. 178]; Day *v.* Graham, 6 Ill. 435.

Louisiana.— Fink *v.* Lallande, 16 La. 547. See also Savoie *v.* Thibodaux, 29 La. Ann. 51.

Missouri.—Fontaine *v.* Hudson, 93 Mo. 62, 5 S. W. 692, 3 Am. St. Rep. 515.

New York.— See Clark *v.* Dakin, 2 Barb. Ch. 36, where it was held that at the time the case in question arose it was not necessary to docket a judgment of the supreme court to enable plaintiff to sell defendant's interest in lands, although a statute had subsequently been passed requiring the docketing of such judgments. See also Wheeler *v.* Heermans, 3 Sandf. Ch. 597.

North Carolina.— Lytle *v.* Lytle, 94 N. C. 683.

Wisconsin.— Drake *v.* Harrison, 69 Wis. 99, 33 N. W. 81, 2 Am. St. Rep. 717, also holding that if docketing were necessary the court had ample power to order it *nunc pro tunc*.

See 21 Cent. Dig. tit. "Execution," § 21.

69. Smith *v.* Trenton Delaware Falls Co., 20 N. J. L. 116; Marvin *v.* Herrick, 5 Wend. (N. Y.) 109; Disosway *v.* Hayward, 1 Dem. Surr. (N. Y.) 175; King *v.* French, 14 Fed. Cas. No. 7,793, 2 Sawy. 441. See also Barrie *v.* Dana, 20 Johns. (N. Y.) 307. For a similar statute applying to decrees for the payment of money see Lowndes *v.* Pinckney, 2 Strobh. Eq. (S. C.) 44.

For construction of a special statute intended to remove the city court of Yonkers from the operation of the general statute requiring judgments to be docketed see Prime *v.* Anderson, 29 Hun (N. Y.) 644.

It is a sufficient docketing, under a statute requiring that the judgment shall be entered in the judgment book, for the clerk of the court, on receiving on file a request from a plaintiff to docket a judgment against defendant, to give such plaintiff a transcript thereof, which transcript is duly filed in the office of the clerk, although no actual entry is made in the judgment book until after the issue of the execution, as such procedure is a substantial compliance with the statute, inasmuch as all necessary information is afforded to third persons at the clerk's office, where inquiries must be made or information sought. Appleby *v.* Barry, 2 Rob. (N. Y.) 689.

70. Clute *v.* Clute, 4 Den. (N. Y.) 241; Clute *v.* Clute, 3 Den. (N. Y.) 263; Small *v.* McChesney, 3 Cow. (N. Y.) 19.

71. Stoutenburgh *v.* Vandenburgh, 7 How. Pr. (N. Y.) 229; Clute *v.* Clute, 4 Den. (N. Y.) 241. But see Hathaway *v.* Howell, 4 Hun (N. Y.) 270, 6 Thomps. & C. (N. Y.) 453 [*affirmed* without opinion in 70 N. Y. 610].

An officer may be authorized to hold an execution until the record is completed, and if he indorses such execution as received on the day that the record is completed the proceeding is not irregular. Walters *v.* Sykes, 22 Wend. (N. Y.) 566.

72. Hansen *v.* Schlesinger, 125 Ill. 230, 17 N. E. 718; Jasper *v.* Schlesinger, 22 Ill. App. 637.

73. Bowman *v.* Tallman, 2 Rob. (N. Y.) 632, 19 Abb. Pr. (N. Y.) 84, 28 How. Pr. (N. Y.) 482.

74. For if it adjudges a party's right to recover a sum certain the law awards the writ for its collection, and it issues as a matter of course without a specific order. Knotts *v.* Crossly, (Nebr. 1901) 95 N. W. 848; Bludworth *v.* Poole, 21 Tex. Civ. App. 551, 53 S. W. 717; Little *v.* Cook, 1 Aik. (Vt.) 363, 15 Am. Dec. 698.

75. Hyder *v.* Butler, 103 Tenn. 289, 52 S. W. 876.

76. Finality of judgment, decree, or order authorizing appeal see APPEAL AND ERROR, 2 Cyc. 474.

77. *Alabama.*— Thompson *v.* Perryman, 45 Ala. 619.

joint debtors, execution cannot issue against the other until the final determination of the liability of his coöbligor;[78] but where the matters at issue are clearly divisible, and a judgment is rendered on one point, which it is clear is in no way affected by a judgment on the other point, execution may issue on the former judgment.[79]

e. Must Be For Specific Amount. It is essential that there be a specification of the amount to be recovered in the judgment before execution can issue thereon,[80] and where the judgment is rendered for a debt or damages, and for costs, execution cannot be issued for the collection of such costs, if the amount thereof is not designated, except in cases where the law authorizes the clerk to tax the costs and include them in the execution.[81] But in some jurisdictions an execution issued for a greater amount than is actually due is not for this reason absolutely void, but is voidable only,[82] and in such cases the practice is to apply to the court to set aside the excess.

f. Must Be Valid[83]—(I) *In General.* Where, because of want of jurisdiction,[84] defects in the judicial proceedings,[85] uncertainty of verdict,[86] or fraud,[87] or for any other cause the judgment is void, an execution issued thereon is of no validity and no title can be acquired under it.[88] Nor can such execution be vali-

Connecticut.—Mather *v.* Chapman, 6 Conn. 54.

Delaware.— Daniel *v.* Cooper, 2 Houst. 506.

Iowa.— Seals *v.* Wright, 37 Iowa 171.

Maryland.— Shafer *v.* Shafer, 6 Md. 518.

New York.— Devlin *v.* Hinman, 40 N. Y. App. Div. 101, 57 N. Y. Suppl. 663, 29 N. Y. Civ. Proc. 127.

Pennsylvania.—*In re* Sedgeley Ave., 88 Pa. St. 509; Kneib *v.* Graves, 72 Pa. St. 104; Beale *v.* Buchanan, 9 Pa. St. 123.

Vermont.— Walden *v.* Clark, 50 Vt. 383.

Virginia.— Shackelford *v.* Apperson, 6 Gratt. 451.

Wisconsin.— Rusk *v.* Sackett, 28 Wis. 400.

See 21 Cent. Dig. tit. "Execution," § 18.

78. Struthers *v.* Lloyd, 14 Pa. St. 216.

Where a judgment obtained by default against joint debtors is allowed to stand as security pending further litigation in respect to the liability of a defendant who has been permitted to come in and defend, no execution can issue thereon until the final determination of his liability. Ford *v.* Whitridge, 9 Abb. Pr. (N. Y.) 416.

79. Hereford *v.* Babin, 14 La. Ann. 333; Bourguignon *v.* Boudousquie, 7 Mart. N. S. (La.) 156.

80. McCarney *v.* McCamp, 1 Ashm. (Pa.) 4; Fitzhugh *v.* Blake, 9 Fed. Cas. No. 4,840, 2 Cranch C. C. 37.

81. Cook *v.* Brister, 19 N. J. L. 73.

Where judgment is rendered for the penalty of a bond, execution cannot issue for more than the sum mentioned with interest and costs, notwithstanding defendant consents that execution be issued for a greater sum in order to include a book debt owed by him to plaintiff. Van Wyck *v.* Montrose, 12 Johns. (N. Y.) 350.

82. Hunt *v.* Loucks, 38 Cal. 372, 99 Am. Dec. 404; Bogle *v.* Bloom, 36 Kan. 512, 13 Pac. 793; Otis *v.* Nash, 26 Wash. 39, 66 Pac. 111.

83. **Title of purchaser** as affected by defects in judgment see *infra*, X.

84. *Indiana.*— Marsh *v.* Sherman, 12 Ind. 358.

Minnesota.— Gunz *v.* Heffner, 33 Minn. 215, 22 N. W. 386.

New York.— Bellinger *v.* Ford, 14 Barb. 250; Cornell *v.* Barnes, 7 Hill 35.

Oregon.— Willamette Real Estate Co. *v.* Hendrix, 28 Oreg. 485, 42 Pac. 514, 52 Am. St. Rep. 800.

Tennessee.— Den *v.* Wharton, 1 Yerg. 125.

Texas.— Horan *v.* Wahrenberger, 9 Tex. 313, 58 Am. Dec. 145; Underwood *v.* Brown, 29 Tex. Civ. App. 163, 68 S. W. 206.

See 21 Cent. Dig. tit. "Execution," § 16.

85. Beall *v.* Blake, 13 Ga. 217, 58 Am. Dec. 513 (holding that defects in judicial proceedings which would operate to vacate the judgment could not be cured so as to relate back to the time when they occurred and sustain an execution which had issued thereon); Koechlept *v.* Hook, 10 Md. 173, 69 Am. Dec. 133. See also Halpin *v.* Coleman, 66 N. Y. App. Div. 37, 73 N. Y. Suppl. 233; Towsley *v.* McDonald, 32 Barb. (N. Y.) 604.

86. Butt *v.* Oneal, 51 Ga. 378.

87. Kingman *v.* Reinemer, 166 Ill. 208, 46 N. E. 786 [*affirming* 58 Ill. App. 173]; Dudley *v.* Cole, 21 N. C. 429.

88. *Alabama.*— Swink *v.* Snodgrass, 17 Ala. 653, 52 Am. Dec. 190.

Arkansas.— *Ex p.* Woods, 3 Ark. 532.

Colorado.— Rice *v.* American Nat. Bank, 3 Colo. App. 81, 31 Pac. 1024.

Illinois.— Desnoyers Shoe Co. *v.* Litchfield First Nat. Bank, 188 Ill. 312, 58 N. E. 994 [*affirming* 89 Ill. App. 579]; Johnson *v.* Baker, 38 Ill. 98, 87 Am. Dec. 293; Avery *v.* Babcock, 35 Ill. 175.

Kentucky.— Roberts *v.* Stowers, 7 Bush 295; Shaefer *v.* Gates, 2 B. Mon. 453, 38 Am. Dec. 164.

Massachusetts.—Albee *v.* Ward, 8 Mass. 79; Borden *v.* Borden, 5 Mass. 67, 4 Am. Dec. 32.

Missouri.— Roberts *v.* Nelson, 86 Mo. 21; Hargadine *v.* Van Horn, 72 Mo. 370; Hig-

dated by an amendment to the judgment subsequent to the issuance of the writ, the reason being that if the amendment were valid the execution would show a different judgment than the one upon which it was issued, and would therefore on that account be a nullity; and if the amendment were invalid, the judgment upon which the execution was issued would still be void.[89]

(II) *Irregular, Erroneous, or Voidable Judgment.* The rule that a valid execution cannot be issued on a void judgment applies only to judgments which are legally of no force or effect, and may therefore be attacked collaterally, and has no application to judgments which are merely erroneous[90] or voidable,[91] or subject merely to some irregularity or informality.[92] But the amendment of an imperfectly entered judgment, making it perfect as originally ordered, imparts validity to an execution previously issued.[93]

(III) *Judgments Rendered Without Notice to Defendant* — (A) *In General.* A personal service on defendant, or his appearance in the proceedings in which the judgment is obtained, is necessary to render a general execution against him valid,[94] and a mere entry on the docket of "judgment by default" has been held insufficient to support this process,[95] although by virtue of statutory provisions execution may be taken out against a non-resident defendant, or one who has had no personal notice, upon giving a proper bond.[96]

gins *v.* Peltzer, 49 Mo. 152; Sanders *v.* Rains, 10 Mo. 770.

Nebraska.— Muller *v.* Plue, 45 Nebr. 701, 64 N. W. 232 [*overruling* Wilson *v.* Macklin, 7 Nebr. 50].

New Jersey.— Shallcross *v.* Deats, 43 N. J. L. 177; Wood *v.* Hopkins, 3 N. J. L. 263.

North Carolina.— Halso *v.* Cole, 82 N. C. 161; Barrow *v.* Arrenton, 23 N. C. 223.

Pennsylvania.— Kountz *v.* Nat. Transit Co., 197 Pa. St. 398, 47 Atl. 350.

Texas.— Wilson *v.* Sparks, 9 Tex. 621.

United States.— Chesapeake, etc., Canal Co. *v.* Barcroft, 5 Fed. Cas. No. 2,644, 4 Cranch C. C. 659.

See 21 Cent. Dig. tit. "Execution," § 16.

89. Underwood *v.* Brown, 29 Tex. Civ. App. 163, 68 S. W. 206.

90. Smith *v.* People, 99 Ill. 445; Warren *v.* Hall, 6 Dana (Ky.) 450; Carter *v.* Spencer, 29 N. C. 14.

91. Welch *v.* Butler, 24 Ga. 445; Foster *v.* Jones, 23 Ga. 168; Glover *v.* Holman, 3 Heisk. (Tenn.) 519.

92. *Alabama.*— Barron *v.* Tart, 18 Ala. 668; Elliott *v.* Mayfield, 3 Ala. 223.

California.— Mulford *v.* Estudillo, 23 Cal. 94.

Kentucky.— Graham *v.* Lynn, 4 B. Mon. 17, 39 Am. Dec. 493.

New York.— People *v.* Gorman, 14 N. Y. Suppl. 547.

North Carolina.— Carter *v.* Spencer, 29 N. C. 14.

Virginia.—Harpers *v.* Patton, 1 Leigh 306.

Wisconsin.— Holmes *v.* McIndoe, 20 Wis. 657; Falkner *v.* Guild, 10 Wis. 563.

See 21 Cent. Dig. tit. "Execution," § 17.

93. Ware *v.* Kent, 123 Ala. 427, 26 So. 208, 82 Am. St. Rep. 132.

94. *Alabama.*—Grayham *v.* Roberts, 7 Ala. 719.

Arkansas.— *Ex p.* Cheatham, 6 Ark. 531, 44 Am. Dec. 525.

California.— Wiseman *v.* McNulty, 25 Cal. 230.

Colorado.— Great West. Min. Co. *v.* Woodmas of Alston Min. Co., 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204.

Illinois.—Clymore *v.* Williams, 77 Ill. 618. See also Young *v.* Campbell, 10 Ill. 80.

Kansas.— Case *v.* Hannahs, 2 Kan. 490.

Louisiana.— See Patterson *v.* Mayfield, 10 La. 220.

Mississippi.— Smith *v.* State, 13 Sm. & M. 140.

Missouri.— Blodgett *v.* Schaffer, 94 Mo. 652, 7 S. W. 436.

Nebraska.— Nelson *v.* Beatrice, (1901) 96 N. W. 288.

New Hampshire.— Eaton *v.* Badger, 33 N. H. 228.

South Carolina.— Tobin *v.* Addison, 2 Strobh. 3.

Wisconsin.— Falkner *v.* Guild, 10 Wis. 563.

England.— Winwood *v.* Holt, 3 D. & L. 85, 15 L. J. Exch. 10, 14 M. & W. 197; Rickards *v.* Patterson, 1 Dowl. P. C. N. S. 52, 5 Jur. 894, 10 L. J. Exch. 272, 8 M. & W. 313.

But see Scholle *v.* Scholle, 113 N. Y. 261, 21 N. E. 84 [*affirming* 55 N. Y. Super. Ct. 468], holding that where a judgment had been acquiesced in more than thirty years, and it did not affirmatively appear that a summons was not properly served, a purchaser under such judgment could not refuse to take title because the record contained no affidavit of service.

See 21 Cent. Dig. tit. "Execution," § 7 *et seq.*

95. Page *v.* Coleman, 9 Port. (Ala.) 275. See also Miller *v.* Gaskins, 3 Rob. (La.) 94; Jeisley *v.* Haiter, 4 Yeates (Pa.) 337.

Judgment by default generally see Judgments.

96. See Walters *v.* Munroe, 17 Md. 501.

The failure to give such bond can be taken advantage of by the debtor only, and cannot be objected to by his creditors (Marcy *v.*

(B) *Upon Service of Notice by Publication.* A service of notice on a defendant by publication only is usually held to be insufficient to authorize a personal judgment on which execution can lawfully issue.[97]

4. Transcript of Judgment of Inferior Court[98] — a. In General. Under the practice of some jurisdictions a creditor having a judgment in a justice's or inferior court may, by filing a transcript thereof in the circuit or other superior court, obtain execution against all properties for which an execution could issue when sued out on a judgment originally obtained in such superior tribunal;[99] but it is essential that the filing be made within the period prescribed by statute.[1]

b. Sufficiency. The transcript must show the jurisdictional facts on which the judgment in the justice's or inferior court was founded, as such facts cannot be supplied after the execution is issued,[2] and hence where the transcript does not show that there was a proper service of process on defendant,[3] or if the transcript

Russ, 1 Root (Conn.) 176); nor could a creditor object to a technical insufficiency of the bond (Phelps *v.* Parks, 4 Vt. 488).

Where a judgment stays execution until an indemnity bond is furnished, a defendant is not entitled to notice of its filing, that he may have an opportunity of objection to its sufficiency; plaintiff must at his peril give a sufficient bond, and if he fails to do so his proceedings may be enjoined. Rhodes *v.* Skolfield, 10 Rob. (La.) 131.

97. *Indiana.*— Sowders *v.* Edmunds, 76 Ind. 123.

Iowa.— Cassidy *v.* Woodward, 77 Iowa 354, 42 N. W. 319.

Maine.— Davis *v.* Stevens, 57 Me. 593.

Missouri.— Cravens *v.* Moore, 61 Mo. 178.

Ohio.— Wood *v.* Stanberry, 21 Ohio St. 142.

United States.— Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565; Morton *v.* Root, 17 Fed. Cas. No. 9,866, 2 Dill. 312; Morton *v.* Smith, 17 Fed. Cas. No. 9,867, 2 Dill. 316.

See 21 Cent. Dig. tit. "Execution," § 9.

But see Wrought Iron Range Co. *v.* Brooker, 2 Tex. App. Civ. Cas. § 225.

98. Issuance of execution on transcript see *infra*, VI, D, 1.

99. Lydick *v.* Chaney, 64 Nebr. 288, 89 N. W. 801; Brush *v.* Lee, 36 N. Y. 49, 1 Transcr. App. (N. Y.) 66, 3 Abb. Pr. N. S. (N. Y.) 204, 34 How. Pr. (N. Y.) 283 [*affirming* 18 Abb. Pr. 398] (holding that execution may be issued on such transcript by plaintiff or his attorney and not by the clerk); Lewin *v.* Towbin, 51 N. Y. App. Div. 477, 64 N. Y. Suppl. 740; Matter of Stumpp, 32 Misc. (N. Y.) 41, 66 N. Y. Suppl. 172; Broyles *v.* Young, 81 N. C. 315; Paine *v.* Slater, 11 Q. B. D. 120, 52 L. J. Q. B. 282, 48 L. T. Rep. N. S. 623, 31 Wkly. Rep. 941; Haywood *v.* Saint, 32 L. T. Rep. N. S. 566. And see Waddell *v.* Williams, 50 Mo. 216. See also Merrick *v.* Carter, 205 Ill. 73, 68 N. E. 750; Meugenot *v.* Vernon, 23 Pa. Super. Ct. 165.

Where it appears that the judgment debtor has no real estate liable to execution, it is not necessary that the transcript be filed in the circuit court, although the basis of the action may be for such an amount that suit might have been brought either in the justice or circuit court. Thomas *v.* Dodge, 8 Mich. 51.

1. Bick *v.* Maddox, 87 Mo. App. 30 [*following* Pears *v.* Golf, 76 Mo. 92].

Under the English practice, the removal of a judgment by virtue of 1 & 2 Vict. c. 110, § 22, into the court of queen's bench is for the purpose of execution only, and irregularities in obtaining the judgment cannot be inquired into. Simon *v.* De Witts, 4 Jur. 989. For application of 19 Geo. III, c. 70, providing for the removal of judgments from an inferior court to a superior one for the purpose of issuing execution as on a judgment from the latter see Crookes *v.* Longden, 5 Bing. N. Cas. 410, 7 Dowl. P. C. 413, 3 Jur. 317, 35 E. C. L. 224; Batten *v.* Squires, 4 Dowl. P. C. 53 (holding that the statute does not apply to judgments obtained by a defendant, but that its phraseology could admit of application to a plaintiff only); Smithers *v.* Tanner, W. W. & H. 84. But these statutes are held not to provide for the removal of judgments of a county court. Moreton *v.* Holt, 3 C. L. R. 348, 10 Exch. 707, 1 Jur. N. S. 215, 24 L. J. Exch. 169, 3 Wkly. Rep. 207.

2. Wedel *v.* Green, 70 Mich. 642, 38 N. W. 638. *Compare* Merrick *v.* Carter, 205 Ill. 73, 68 N. E. 750; Meugenot *v.* Vernon, 23 Pa. Super. Ct. 165. See *infra*, VI, D, 1, a, (IV).

The affidavit required of the party when the filing of a transcript of the justice's judgment is sought is jurisdictional, and a want of it is not a mere irregularity (Bigelow *v.* Booth, 39 Mich. 622; Monaghan *v.* McKimmie, 32 Mich. 40); it must state the amount due on the judgment (Bigelow *v.* Booth, 39 Mich. 622); and show the insufficiency of defendant's goods liable to execution within the county where the judgment was rendered. Hence it is held that an affidavit is insufficient which identifies the judgment set forth in the transcript only by the title of the cause and the date on which it was rendered (Denver *v.* Connolly, 92 Mich. 549, 52 N. W. 1003). But the mere fact that the affiant failed to sign such affidavit is not fatal. Merrick *v.* Mayhue, 40 Mich. 196.

3. This is true if it is not shown that defendant appeared either personally or by an attorney. Wedel *v.* Green, 70 Mich. 642, 38 N. W. 638. But the mere fact that it does not show the manner of service upon him, where he appeared by an attorney, is not fatal. Bauer *v.* Miller, 16 Mo. App. 252.

is not officially signed and certified by the justice or by the judge of the inferior court,[4] an execution issued thereon is void.

D. Joint Execution on Separate Judgments. Each judgment must carry its own execution, and a single execution cannot be issued on two separate judgments;[5] but, where a judgment decrees a distinct and separate amount in favor of two or more plaintiffs, a separate execution may issue in favor of each.[6] So too where, in an action against joint defendants, separate decrees are rendered against each, an execution may be issued against one of them without issuing the same against the other.[7]

E. Particular Forms of Writ.[8] While if there is a writ peculiarly applicable to the enforcement of a judgment, of a specific nature, it must be invoked by the creditor,[9] on many judgments the creditor has an option as to the form of writ he may employ.[10] So too certain writs have been more often invoked than others in different jurisdictions. On the other hand some writs in use under the common law have been wholly or partially discarded by modern practice. The reports, however, contain illustrations of the enforcement of judgments by a levari facias,[11] fieri facias,[12] venditioni exponas,[13] distringas,[14] elegit,[15] and scire

4. Wooters *v.* Pinkel, (Ill. 1890) 25 N. E. 791; Bigelow *v.* Booth, 39 Mich. 622.

5. Doe *v.* Rue, 4 Blackf. (Ind.) 263, 29 Am. Dec. 368; Merchie *v.* Gaines, 5 B. Mon. (Ky.) 126.

6. Stewart *v.* Morrison, 81 Tex. 396, 17 S. W. 15, 26 Am. St. Rep. 821.

7. Hyder *v.* Butler, 103 Tenn. 289, 52 S. W. 876.

8. **Formal parts and requisites** of writ see *infra*, VI.

9. McClelland *v.* Devilbiss, 1 Pa. Co. Ct. 613, holding that levari facias and not fieri facias was peculiarly applicable to the particular judgment.

10. Autry *v.* Walters, 46 Ala. 476; Garey *v.* Hines, 8 Ala. 837; Seawell *v.* Williams, 2 Overt. (Tenn.) 273; Dobbin *v.* Allegheny, 7 Fed. Cas. No. 3,941.

A creditor, by changing the jurisdiction in which he seeks to enforce his judgment, cannot by such proceeding oppress the judgment debtor and deprive him of privileges otherwise secured had he resorted to the enforcement of the judgment in the court in which the judgment was rendered. Canal Bank *v.* Copland, 8 La. 577.

11. Stewart *v.* Miller, 2 Pearson (Pa.) 358. See LEVARI FACIAS.

12. McClelland *v.* Devilbiss, 1 Pa. Co. Ct. 613. See FIERI FACIAS.

13. Lockridge *v.* Baldwin, 20 Tex. 303, 70 Am. Dec. 385. See VENDITIONI EXPONAS.

14. Avery *v.* Iberville Police Jury, 15 La. Ann. 223; Stewart *v.* Pickard, 1 Rob. (La.) 415; Traverso *v.* Row, 11 La. 494. See DISTRINGAS, WRIT OF.

15. **Elegit** is a writ authorized by ancient statute, under which the sheriff is commanded to take the personal property of the debtor, and to appraise the same, and to deliver it, at its appraised value, to the creditor, and also to deliver to the creditor, formerly one half, but by a later statute, the whole of the judgment debtor's freehold estate, of which he was seized at the time of the docket of the judgment. North American F. Ins. Co. *v.* Graham, 5 Sandf. (N. Y.) 197, 200 [*citing* Jacob L. Dict.; Wentworth Pl. 356]. See also Morris *v.* Ellis, 3 Ala. 560, 562; Jackson *v.* Chew, 3 Cow. (N. Y.) 298, 299; McCance *v.* Taylor, 10 Gratt. (Va.) 580. 582; Barnes *v.* Harding, 1 C. B. N. S. 568, 572, 5 Wkly. Rep. 570, 87 E. C. L. 568; Sherwood *v.* Clark, 15 M. & W. 764, 767; Renaud *v.* Denis, 23 Quebec Super. Ct. 16, 18.

"At common law no judgment lien existed in favor of the judgment creditor. The nearest approach to a modern judgment lien was found in St. 13 Edw. 1, called the 'Statute of Westminster II.,' which created the writ of elegit. The only remedy offered the judgment creditor under this was the sequestration of the profits of the land by writ of levari facias, or the possession of a moiety of the lands by writ of elegit, and in certain cases of the whole of it by extent. In all these cases the creditor held the land in trust until the debt was discharged by the receipt of rents and profits." Thompson *v.* Avery, 11 Utah 214, 229, 39 Pac. 829 [*citing* 3 Blackstone Comm. 419]. To the same effect see Russell *v.* Dyer, 33 N. H. 186, 196 [*citing* Gove *v.* Brazier, 3 Mass. 522], opinion of Fowler, J.

Compared with "fieri facias."—"If the debtor has sufficient personal estate, at its appraised value, to satisfy the judgment, then the sheriff does not proceed to deliver the freehold estate. It will be seen that the elegit, in England, is analogous to our writ of fi. fa. In both cases the operation is the same. If a fi. fa. in this state, or an elegit in England, be issued, and the debtor has no personal property, which here can be levied on and sold, or there, appraised and delivered in satisfaction of the judgment, then the sheriff proceeds against the real estate." North American F. Ins. Co. *v.* Graham, 5 Sandf. (N. Y.) 197, 200. *Compare* Dobbin *v.* Allegheny, 7 Fed. Cas. No. 3,941. See FIERI FACIAS.

As to the more extended use of this writ, especially in bankruptcy proceedings, see Wharton L. Lex. [*citing In re* Gourlay, 15 Ch. D. 447].

facias,[16] which comprise the more common forms applicable to the enforcement of this remedy.

F. Simultaneous Executions.[17] As it would be oppressive and against equity to carry on two executions at the same time, it has been held that two should not be issued at the same time on one judgment,[18] nor can a second execution be issued to the same county until a legal return and disposal of the first has been made;[19] it is well settled, however, that a party may sue out different species of execution at the same time upon a judgment, but can proceed upon but one of them at a time for the satisfaction of his debt,[20] and where different processes are served at the same time defendant may elect which shall stand, and the court may set aside the others,[21] although it has been held that the objection to the irregularity of simultaneous issuance must come from defendant, and not his creditors.[22] Two writs may, however, issue simultaneously on the same judgment to two different counties.[23]

G. Successive Executions.[24] The levy of an execution is not of itself a satisfaction of the judgment, and does not preclude a plaintiff from again resorting to this remedy if the fruits of the first levy are insufficient to satisfy his debt; his remedies are cumulative and he may successively sue out and levy writs until he reaches that point at which the law declares the debt to be satisfied.[25]

For forms of writ of "elegit" see 36 E. C. L. 509–516.

Writ obsolete.— "The writ of elegit is unknown to American jurisprudence, except in a few states, and in these was obsolete many years before the organization of this territory." Thompson *v.* Avery, 11 Utah 214, 230, 39 Pac. 829. See also Burrill L. Dict. [*citing* McCance *v.* Taylor, 10 Gratt. (Va.) 580, 582; 4 Kent Comm. 431, 436]. *Compare Ex p.* Abbott, 15 Ch. 437, 455, 50 L. J. Ch. 80, 43 L. T. Rep. N. S. 417, 29 Wkly. Rep. 143, where it is said: "Though writs of elegit in relation to goods and chattels are not in common use, and in fact are nearly obsolete, yet they are occasionally used even in the city of London."

16. See, generally, SCIRE FACIAS.

17. **Simultaneous supplementary proceedings** see *infra*, XIII.

18. Newell *v.* Morton, 3 Rob. (La.) 102; Hudson *v.* Dangerfield, 2 La. 63, 20 Am. Dec. 297; State *v.* Stout, 11 N. J. L. 362; Ledyard *v.* Buckle, 5 Hill (N. Y.) 571.

19. *Iowa.*— Merritt *v.* Grover, 61 Iowa 99, 15 N. W. 860 (holding that the first execution was in existence until it had actually been returned, and the fact that it had been ordered returned did not render the second execution valid); Downard *v.* Crenshaw, 49 Iowa 296.

Mississippi.—Parker *v.* Dean, 45 Miss. 408.

Missouri.— See State *v.* Six, 80 Mo. 61.

New York.— Ledyard *v.* Buckle, 5 Hill 571; Dorland *v.* Dorland, 5 Cow. 417.

Ohio.—Arnold *v.* Fuller, 1 Ohio 458.

United States.— Dobbin *v.* Allegheny, 7 Fed. Cas. No. 3,941.

England.— Chapman *v.* Bowlby, 1 Dowl. P. C. N. S. 83, 10 L. J. Exch. 299, 8 M. & W. 249.

Canada.— Dunbar *v.* Ross, 32 Nova Scotia 222.

See 21 Cent. Dig. tit. "Execution," § 46.

See Doe *v.* Dutton, 2 Ind. 309, 52 Am. Dec. 510, which holds that a second execution, before a return is made on the former, is not void but voidable only.

20. *Maine.*— Miller *v.* Miller, 25 Me. 110.

North Carolina.— See McNair *v.* Ragland, 17 N. C. 42, 22 Am. Dec. 728.

Pennsylvania.—Davies *v.* Scott, 2 Miles 52, holding that until execution be had under a fieri facias or capias ad satisfaciendum the right to issue an attachment could be exercised. *Compare* Little *v.* Lane, 2 Pa. Co. Ct. 609, where the ordinary fieri facias to sell individual property and the special statutory writ to sell a defendant's interest in partnership property were issued at the same time, as the purpose of the whole proceeding was merely to reach all of defendant's property.

South Carolina.— Miller *v.* Bagwell, 3 McCord 429; State *v.* Guignard, 1 McCord 176.

England.— Stamper *v.* Hodson, 8 Mod. 302.

See 21 Cent. Dig. tit. "Execution," § 46.

See also Vandever *v.* Cannon, 2 Houst. (Del.) 172.

21. Young *v.* Taylor, 2 Binn. (Pa.) 218; Grant *v.* Potts, 2 Miles (Pa.) 164.

22. Hoopes *v.* Robinson, 2 Chest. Co. Rep. (Pa.) 312.

23. Hammond *v.* Mather, 2 Cow. (N. Y.) 456; Elliott *v.* Elmore, 16 Ohio 27; Brackenridge *v.* Cobb, 2 Tex. Civ. App. 161, 21 S. W. 614. See also Dorland *v.* Dorland, 5 Cow. (N. Y.) 417.

24. **Successive supplementary proceedings** see *infra*, XIII.

25. *Indiana.*— McIntosh *v.* Chew, 1 Blackf. 289.

Iowa.— Clark *v.* Reiniger, 66 Iowa 507, 24 N. W. 16, holding that, where the former writ had been levied and the property released and the writ returned because of a failure of the creditor to give a bond of indemnity to the sheriff on the property being claimed by a third party, a second execution could be issued.

H. Effect of Acts or Proceedings After Judgment and Before Issuance — 1. In General. Any condition of affairs arising subsequent to the rendition of judgment, to operate as a suspension of the execution, must of course change the legal relationship of the parties in some particular.[26]

2. Destruction of Record. Where a judgment is once recovered it remains in force until satisfied or barred by limitation, although the evidence of its recovery may be lost or destroyed, and in such case if the party desires to enforce it the correct practice, it seems, is to make an application to the court and introduce such evidence of destruction as may be in his possession showing the fact of rendition, and the loss or destruction of the record, and where such evidence is satisfactory an execution should be awarded;[27] but this ought not to be done without notice to the party against whom the judgment was rendered.[28]

3. Discharge of Judgment[29] — a. In General. When, upon any state of facts, the judgment becomes in legal contemplation in effect satisfied, no execution can lawfully issue thereon,[30] and a sale thereunder is of no validity and conveys no

New York.—Anthony *v.* Dunbar, 1 How. Pr. 117. See also Peck *v.* Tiffany, 2 N. Y. 451; People *v.* Onondaga C. Pl., 19 Wend. 79.

Virginia.— Walker *v.* Com., 18 Gratt. 13, 98 Am. Dec. 631. See also Stuart *v.* Hamilton, 8 Leigh 503.

United States.— Tayloe *v.* Thomson, 5 Pet. 358, 8 L. ed. 154; Dobbin *v.* Allegheny, 7 Fed. Cas. No. 3,941.

England.—Hunt *v.* Passmore, 2 Dowl. P. C. 414.

Abandonment of former levy.— A creditor has no absolute right to abandon a levy and issue a new execution without showing some necessity therefor. McIver *v.* Ballard, 96 Ind. 76. See also Kendall *v.* Westbrook, 54 Ga. 587, holding that, where an execution had been duly levied on land in one county which had been claimed by a third party, plaintiff could not withdraw such fieri facias, and have the same levied on property in another county without obtaining permission of the court.

Institution of supplementary proceedings after a return has been duly made upon an execution does not prevent a subsequent levy under the same judgment. Steinhardt *v.* Michalda, 15 N. Y. Civ. Proc. 323.

26. Troy *v.* Clarke, 30 Cal. 419, holding that a plaintiff who had obtained a judgment for the possession of land might issue execution thereon notwithstanding that since the rendition of the same he had made a contract to convey the land to defendant, if there was no agreement respecting the judgment in the contract for conveyance.

Permitting a non-resident defendant to come in and enter a defense, after judgment, does not of itself open the judgment or operate to suspend the issuance of an execution. Carswell *v.* Neville, 12 How. Pr. (N. Y.) 445.

The mere taking of a security for the amount of the execution does not, of itself, and in the absence of an agreement, operate to suspend the execution (State Bank *v.* Potius, 10 Watts (Pa.) 148), although it has been held that, where a creditor receives a note drawn by a third party as a security for a debt, he should not be allowed to issue execution in satisfaction of the original obligation until he had returned such note to the debtor (Murphy *v.* Eckel, 1 Walk. (Pa.) 144), otherwise if the note is a nullity on account of fraud in its procurement (Mitchell *v.* Hockett, 25 Cal. 538, 85 Am. Dec. 151).

27. Faust *v.* Echols, 4 Coldw. (Tenn.) 397. To a similar effect see Davidson *v.* Beers, 45 Kan. 365, 25 Pac. 859; Strain *v.* Murphy, 49 Mo. 337; Cheesewright *v.* Franks, 6 Dowl. P. C. 471, holding that, where the original judgment had been destroyed, the court would allow execution to be issued on a verified copy.

28. Cyrus *v.* Hicks, 20 Tex. 483 [*cited* and *approved* in Beckham *v.* Medlock, 19 Tex. Civ. App. 61, 46 S. W. 402].

29. **Payment or satisfaction of judgment** generally see Judgments.

30. *California.*— Reynolds *v.* Lincoln, 71 Cal. 183, 9 Pac. 176, 12 Pac. 449.

Illinois.— McHenry *v.* Watkins, 12 Ill. 233; Russell *v.* Hugunin, 2 Ill. 562, 33 Am. Dec. 423.

Kentucky.— Chiles *v.* Bernard, 3 Dana 95.

Minnesota.— Franklin *v.* Warden, 9 Minn. 124.

Mississippi.— Banks *v.* Evans, 10 Sm. & M. 35, 48 Am. Dec. 734.

Missouri.— Durfee *v.* Moran, 57 Mo. 374.

New Jersey.— Simmons *v.* Vandegrift, 1 N. J. Eq. 55.

New York.— Stilwell *v.* Carpenter, 1 Thomps. & C. 615; Jackson *v.* Anderson, 4 Wend. 474; Troup *v.* Wood, 4 Johns. Ch. 228.

Ohio.— See Reed *v.* Radigan, 42 Ohio St. 292, holding that the court would refuse to confirm a sale upon execution where the debtor paid the judgment after the issuance of the execution but before the matter was presented for confirmation.

Oregon.— Snipes *v.* Beezley, 5 Oreg. 420.

South Carolina.— Tobin *v.* Myers, 18 S. C. 324.

Tennessee.— Maxwell *v.* Owen, 7 Coldw. 630; Marsh *v.* Haywood, 6 Humphr. 210. See also McIntosh *v.* Paul, 6 Lea 45.

Texas.— Hardin *v.* Clark, 1 Tex. Civ. App. 565, 21 S. W. 977; Western Electric Mfg. Co. *v.* Curtis, 1 Tex. App. Civ. Cas. § 740.

United States.— Wills *v.* Chandler, 2 Fed.

title even to a *bona fide* purchaser;[31] but the discharge must be *in toto*, and so long as there is a balance due on the judgment plaintiff has a right to his execution for its collection.[32]

b. Fees and Charges of Officer. An officer has no interest in a judgment sufficient to authorize him to interfere with or control any settlement or agreement which the parties thereto may think proper to make; his fees are but incidental to the judgment, and if it is satisfied or discharged he must look to the parties for them and cannot levy an execution for the purpose of their collection.[33] So it is held that no execution can issue for fees due a witness when the judgment has been satisfied.[34]

c. What Constitutes a Discharge — (I) *In General.* A discharge of a judgment, whereby an execution rendered thereon is a nullity, may result from a discharge of defendant in bankruptcy,[35] the collection of a note given for the amount of the judgment,[36] the payment of one of two judgments for the same debt,[37] or compliance with certain statutory provisions.[38]

(II) *Payment by Joint Debtor.* Where a judgment rendered against several defendants is paid by one of them, the payment satisfies and discharges the judgment as to all, and an execution will not issue against the others for the purpose of enforcing contribution;[39] hence a surety or indorser who pays for the principal is not entitled to take out execution on the judgment against a cosurety.[40]

273, 1 McCrary 276; French *v.* Edwards, 9 Fed. Cas. No. 5,098, 5 Sawy. 266.

See 21 Cent. Dig. tit. "Execution," § 32.

31. State *v.* Salyers, 19 Ind. 432; Laval *v.* Rowley, 17 Ind. 36; Shaffer *v.* McCrackin, 90 Iowa 578, 58 N. W. 910, 48 Am. St. Rep. 465; Neilson *v.* Neilson, 5 Barb. (N. Y.) 565; Finley *v.* Gaut, 8 Baxt. (Tenn.) 148.

Evidence of satisfaction.— While the officer's return is usually the evidence of a discharge or satisfaction of a judgment, it is not necessarily the only evidence, and a bond taken from the purchaser, which fact appears of record, is a bar to an execution on the original judgment notwithstanding the officer's return is quashed. Schobee *v.* Dedman, 2 Litt. (Ky.) 116.

Trespass does not lie against an officer for levying an alias execution where the judgment does not appear from the record to have been satisfied or reversed. Luddington *v.* Peck, 2 Conn. 700.

32. Harper *v.* Terry, 16 La. Ann. 216.

If a discharge in insolvency is adjudged void, execution may issue on a judgment which was rendered before such discharge was obtained and which still remains unpaid. Small *v.* Wheaton, 4 E. D. Smith (N. Y.) 306, 427, 2 Abb. Pr. (N. Y.) 175.

The mere service of a garnishment under an execution does not amount to a satisfaction of the debt in the sense that an execution cannot be subsequently issued; and the creditor may, if he so desires, take out an alias or pluries execution, the effect of which is to abandon the garnishment, whereupon the debtor's claim to the money or effects in the hands of the garnishee at once revives. Beaumont *v.* Eason, 12 Heisk. (Tenn.) 417.

33. Craft *v.* Merrill, 14 N. Y. 456; Jackson *v.* Anderson, 4 Wend. (N. Y.) 474; Wills *v.* Chandler, 2 Fed. 273, 1 McCrary 276. *Compare* Ellsbre *v.* Ellsbre, 28 Pa. St. 172.

34. Poor *v.* Deaver, 23 N. C. 391.

35. Curtis *v.* Slosson, 6 Pa. St. 265. See also Linn *v.* Hamilton, 34 N. J. L. 305 (holding, however, that the execution plaintiff should be allowed to show that the debt on which the process was sought to be issued is not one of those affected by a discharge in bankruptcy); Raynes *v.* Jones, 1 Dowl. P. C. N. S. 373, 6 Jur. 133, 11 L. J. Exch. 62, 9 M. & W. 134.

If the judgment is obtained prior to the petition for the benefit of the bankrupt act, the execution may be regularly issued. Freeny *v.* Ware, 9 Ala. 370.

36. Craft *v.* Merrill, 14 N. Y. 456.

37. For where there are two subsisting judgments for the same debt the satisfaction of one is the satisfaction of the other also. Lockhart *v.* McElroy, 4 Ala. 572.

38. Crotty *v.* McKenzie, 42 N. Y. Super. Ct. 192 (holding that an execution cannot be issued on a judgment which has been satisfied by filing a certificate as prescribed by statute); Ackerman *v.* Ackerman, 14 Abb. Pr. (N. Y.) 229 [*reversing* 11 Abb. Pr. 256]. See, generally, Judgments.

39. *Alabama.*— Bartlett *v.* McRae, 4 Ala. 688.

District of Columbia.— Herr *v.* Barber, 2 Mackey 545.

Iowa.— Drefahl *v.* Tuttle, 42 Iowa 177.

Maine.— Stevens *v.* Morse, 7 Me. 36, 20 Am. Dec. 337, where, although the payment of the judgment was made by a brother of one of several judgment debtors, it was done through the debtor's permission and approval, and was held to constitute a complete satisfaction of the judgment.

Massachusetts.— National Security Bank *v.* Hunnewell, 124 Mass. 260.

See 21 Cent. Dig. tit. "Execution," § 32.

40. Knight *v.* Morrison, 79 Ga. 55, 3 S. E. 689, 11 Am. St. Rep. 405; Gray *v.* Baldwin, 4 Mart. N. S. (La.) 196; Hewett *v.* Hill, 3

(III) *PAYMENT BY A THIRD PARTY.* Payment of a judgment by a third party will as a rule operate as a satisfaction in the absence of any evidence of an assignment, and no execution can issue thereon after such payment,[41] although where the third party pays in consideration for its assignment and not in satisfaction he may sue out execution.[42]

4. EXISTENCE OF OTHER REMEDY. Statutes giving the right to an execution on judgments under conditions or circumstances where they could not issue at common law are cumulative only, and do not preclude the enforcement of the same by an action.[43] So too an execution and an action, not being inconsistent remedies, the one may be instituted, although the enforcement of the judgment is at the same time being sought by a use of the other.[44]

5. MOTION FOR NEW TRIAL[45] OR APPEAL.[46] Inasmuch as it is unfair that a party who has recovered judgment should be delayed in obtaining the fruits thereof by a mere act of the opposite party, it is held in many jurisdictions that the mere act of moving for a new trial, in the absence of a statute or special order of the court to that effect, does not operate *per se* as a suspension or stay of the execution,[47] although under the practice of some jurisdictions it is error to issue execution until after the motion for a new trial has been disposed of,[48] and where a new trial has been granted, although the court may have acted illegally and erroneously, yet the clerk cannot disregard such order and issue an execution.[49] As an

Yerg. (Tenn.) 241; Ft. Worth Nat. Bank *v.* Daugherty, 81 Tex. 301, 16 S. W. 1028.

41. St. Francis Mill Co. *v.* Sugg, 83 Mo. 476. *Compare* Ferrugeard *v.* Superior Ct., (Cal. 1885) 5 Pac. 612. And see Neely *v.* Jones, 16 W. Va. 625, 37 Am. Rep. 794.

42. Fiske *v.* Lamoreaux, 48 Mo. 523.

43. Kingsland *v.* Forrest, 18 Ala. 519, 52 Am. Dec. 232.

44. *Massachusetts.*— Cushing *v.* Arnold, 9 Metc. 23.

Minnesota.—Kumler *v.* Ferguson, 22 Minn. 117.

New York.— Freeman *v.* Dutcher, 15 Abb. N. Cas. 431; Erickson *v.* Quinn, 15 Abb. Pr. N. S. 166.

North Carolina.— McDonald *v.* Dickson, 85 N. C. 248, holding that this rule was not changed by the code, which simply substituted the discretion of the court for the will of plaintiff in determining when a new action on the judgment should be brought. And see McLean *v.* McLean, 90 N. C. 530.

South Carolina.— See Robertson *v.* Shannon, 2 Strobh. 419.

Tennessee.— Hodge *v.* Dillon, Cooke 279.

See 21 Cent. Dig. tit. "Execution," § 35.

A party cannot proceed at the same time via ordinaria and via executiva, as these terms are understood in the Spanish law practice, inasmuch as the use of the former is to obtain a judgment, while a resort to the latter must be supported by something which has the force and effect of a judgment; hence it would be clearly inconsistent with just judicial proceeding to allow both methods to be pursued at the same time. Weimprender *v.* Fleming, 8 Mart. N. S. (La.) 95; Skipwith *v.* Gray, 3 Mart. N. S. (La.) 655; Gurlie *v.* Coquet, 3 Mart. N. S. (La.) 498.

A pledgee may waive his lien by which he could sell the property and proceed to dispose of the same by virtue of an execution. Sickles *v.* Richardson, 23 Hun (N. Y.) 559.

A recovery of a second judgment in an action on a former does not necessarily prevent the issuing of an execution on the former, to obtain satisfaction of the debt. Howard *v.* Sheldon, 11 Paige (N. Y.) 558.

Where an attachment has been issued, and a levy properly made, and judgment obtained by default, an execution should not be issued against the other property of defendant until that which has been obtained by virtue of the attachment has been legally disposed of. Craig *v.* Saven, Hard. (Ky.) 46. *Compare* Simpson *v.* Hiatt, 35 N. C. 470, holding that, although plaintiff who obtained judgment in an attachment levied on land might have taken judgment against certain garnishees, he still had the right to have the land sold under the levy and order founded thereon.

45. New trial generally see NEW TRIAL. See *infra*, VI, D, 2, a, (I), (C), (2).

46. Appeal generally see APPEAL AND ERROR. See *infra*, VI, D, 2, a, (I), (C), (3).

47. Jones *v.* Spears, 56 Cal. 163; People *v.* Loucks, 28 Cal. 68; Sholes *v.* Stoddard, Kirby (Conn.) 163; Logan *v.* Sult, 152 Ind. 434, 53 N. E. 456; Columbia Min. Co. *v.* Holter, 1 Mont. 429. See also Mathews *v.* Ingram, 4 Harr. (Del.) 105; People *v.* Cloud, 3 Ill. 362.

48. *Missouri.*— Stephens *v.* Brown, 56 Mo. 23; State *v.* Kumpff, 62 Mo. App. 332.

New Jersey.— Erie R. Co. *v.* Ackerson, 33 N. J. L. 33.

New York.—Poughkeepsie Bank *v.* Haight, 3 How. Pr. 167, so held with regard to a petition for a rehearing.

Pennsylvania.— Windsor *v.* Tillottson, 135 Pa. St. 208, 19 Atl. 817.

United States.—Danielson *v.* Northwestern Fuel Co., 55 Fed. 49.

See 21 Cent. Dig. tit. "Execution," § 29.

49. Smith *v.* Delahoussaye, 9 Rob. (La.) 50.

appellant would not only be hampered but oftentimes actually deprived of the benefit of his appeal if execution were issued while it is pending, any sale upon this process under such circumstances will be prevented by an injunction,[50] unless the statute provides for the execution of certain judgments notwithstanding an appeal;[51] but it is essential that the appeal be from the judgment on which the execution is sought to be issued; and an appeal from an order denying a new trial will not prevent an execution upon the original judgment.[52]

6. Vacating or Annulling Judgment.[53] As the foundation of an execution is the judgment of a court or some act or obligation which is in law equivalent thereto, it necessarily follows that where a judgment has been vacated or annulled the execution falls with it.[54]

7. Violation of Agreement.[55] An execution issued in violation of an agreement that it should not be issued on the judgment therein within a specified time or upon the non-compliance with certain conditions is voidable only and not absolutely void;[56] hence it is the duty of the officer to comply with the same, and not presume to determine the conflicting rights of the parties thereto.[57] So too it may issue at once upon a non-compliance with conditions on which its suspension depends;[58] but where it is issued in violation of an agreement it will be set aside at the instance of defendant.[59] But it is held that an execution issued in violation of an agreement is not such a fraud upon creditors as will justify or require the setting aside of the same upon their application.[60]

III. Persons Entitled To.[61]

A. Rule. The rule is that the person in whose favor a judgment is rendered,

A motion to vacate a judgment (Hart *v.* Marshall, 4 Minn. 294), or a mere rule to show cause why it should not be opened (Spang *v.* Com., 12 Pa. St. 358), does not operate to suspend the issuance of an execution or authorize an injunction to restrain the same.

50. Aubert *v.* Robinson, 6 Rob. (La.) 463.

51. State *v.* Pitot, 11 Mart. (La.) 535.

52. Espy *v.* Balkum, 45 Ala. 256.

53. Vacating judgment generally see Judgments.

54. Spaulding *v.* Lyon, 2 Abb. N. Cas. (N. Y.) 203; Wright *v.* Wright, 6 Tex. 29; Ballard *v.* Whitlock, 18 Gratt. (Va.) 235. See also Bender *v.* Askew, 14 N. C. 149, 22 Am. Dec. 714.

55. Consideration of agreement not to levy execution see Contracts, 9 Cyc. 213. An agreement of this nature must be supported by a consideration, and in the absence thereof is not binding, although entered of record. Union Bank *v.* Govan, 10 Sm. & M. (Miss.) 333.

Injunction to prevent issuance of execution in violation of agreement see *infra*, VIII, D.

56. Beebe *v.* U. S., 161 U. S. 104, 16 S. Ct. 532, 40 L. ed. 636.

Construction of agreement.— An agreement that a bond is to "remain unexecuted" until a certain contingency will be construed as meaning that no execution shall issue thereon until such contingency. Stewart *v.* Scudder, 10 La. Ann. 216.

Waiver of agreement.— A motion in arrest of judgment or for a new trial is a waiver of the benefit of a stay of execution agreed upon by the parties. Brent *v.* Coyle, 4 Fed. Cas. No. 1,838, 2 Cranch C. C. 348.

57. Patton *v.* Hammer, 28 Ala. 618 [*followed* in 33 Ala. 307]; Grosvenor *v.* Hunt, 11 How. Pr. (N. Y.) 355.

58. Halliday *v.* Johnson, 7 N. J. Eq. 22 [*affirmed* in 7 N. J. Eq. 638]; Holmes *v.* Delabourdine, 1 Browne (Pa.) 130; Bleecker *v.* Bond, 3 Fed. Cas. No. 1,535, 4 Wash. 4.

59. Merritt *v.* Baker, 11 How. Pr. (N. Y.) 456; Sizer *v.* Miller, 2 How. Pr. (N. Y.) 44; Feagley *v.* Norbeck, 127 Pa. St. 238, 17 Atl. 900; Montelius *v.* Montelius, Brightly (Pa.) 79 (holding that where it was agreed that execution should not issue until default in payment of certain notes, unless a partnership between the judgment debtor and another should be dissolved, execution should not issue before the maturity of the note without a scire facias to ascertain if the partnership had in fact been dissolved); Evans *v.* Barr, 5 Leg. Op. (Pa.) 48. And see Mackay *v.* Fletcher, 4 Montreal Leg. N. 374.

60. Elliott *v.* Brinzer, 1 Pearson (Pa.) 39.

Nature of liability.— It has been held that where a creditor agrees to indulge his debtor for a limited time, and before the expiration of such time levies an execution, that defendant's remedy should be an action upon the agreement for damages, and not an action of trespass, as an agreement to indulge the debtor for a stipulated time can hardly be said to operate as a release during that time, of the right to levy, and even if it does so operate, it does not vacate the process of the court, which still remains valid; hence a party thus suing out an execution violates only his contract and not the law of the land. Chambers *v.* McDowell, 4 Ga. 185.

61. Persons entitled to maintain supplementary proceedings see *infra*, XIII.

or those acting for him, have the exclusive control of the issuance of an execution thereon and may order it at their option;[62] and the fact that plaintiff has, after rendition of the judgment, become an alien enemy does not alter the rule.[63] But by virtue of statutes in some jurisdictions the permission of the court may under certain circumstances and conditions be necessary;[64] and where it is sought to be issued by the personal representative of the deceased judgment plaintiff, the preliminary statutory requirements must be observed.[65]

B. Application of Rule — 1. To Assignees. Inasmuch as an execution must conform to the judgment the assignment of the latter will not, in the absence of a statute, effect a change in the parties to it, and the execution should be issued at the instance of the assignee in the name of the assignor,[66] although by virtue of statutory provisions[67] in some jurisdictions if the assignment was

Right of creditor to execution against property fraudulently conveyed see, generally, Fraudulent Conveyances.

Right of officer who advances money see *infra*, XII.

Right of third person paying judgment see *supra*, II, H, 3, c, (III).

62. *California.*— Cortez *v.* San Francisco Super. Ct., 86 Cal. 274, 24 Pac. 1011, 21 Am. St. Rep. 37, holding that a commissioner in partition who is by decree allowed a certain sum for services and expenses constitutes "a party in whose favor a judgment is given" within the meaning of the code.

Indiana.— Lewis *v.* Phillips, 17 Ind. 108, 79 Am. Dec. 457.

Iowa.— *Ex p.* Hampton, 2 Greene 137.

Louisiana.— State *v.* Pilsbury, 35 La. Ann. 408.

Mississippi.— Osgood *v.* Brown, 1 Freem. 392.

United States.— Wills *v.* Chandler, 2 Fed. 273, 1 McCrary 276, holding that in the absence of statutory regulation, the clerk has no authority to issue execution without the direction of plaintiff or his attorney.

Compare Rigney *v.* Tallmadge, 19 Abb. Pr. (N. Y.) 16.

See 21 Cent. Dig. tit. "Execution," § 41.

The direct agency of an attorney is not required in the issuance of an execution, but plaintiff has a right to order the clerk to issue it. Jones *v.* Spears, 56 Cal. 163.

That a sheriff has no interest in or control over a judgment sufficient to authorize him to enforce it for the collection of his fees see *supra*, II, H, 3, b.

Where a state is the beneficiary an execution may issue on a judgment rendered in a suit instituted by the governor, after he has gone out of office, without a revival in the name of his successor, as the state is the party really and beneficially interested, and the name of the governor, either in the obligation or in the judgment, should therefore be regarded as mere surplusage; although essential in the execution as descriptive of the judgment, yet in law it can have no other force or effect whatever. *Ex p.* Pryor, 9 Ark. 257.

63. Buckley *v.* Lyttle, 10 Johns. (N. Y.) 117.

64. Cooper *v.* Bailey, 69 N. Y. App. Div. 358, 74 N. Y. Suppl. 667, holding, however, that where a creditor made application for such permission, supposing it to be necessary, he did not deprive himself of the right to issue an execution without leave, on finding that the conditions were such that leave of the court was unnecessary.

65. Williams *v.* Staton, 4 Ky. L. Rep. 225.

66. *Alabama.*— Haden *v.* Walker, 5 Ala. 86. See also Harrison *v.* Marshall, 6 Port. 65.

Iowa.— Corriell *v.* Doolittle, 2 Greene 385.

Louisiana.— King *v.* Dwight, 3 Rob. 2, where it is held that where one has paid the debt due to plaintiff, and been expressly subrogated to his rights, he might take out execution in the name of such plaintiff against defendant in the judgment. See Gilly *v.* Lee, 1 Mart. N. S. 237, holding that such a payment, however, must be established by public document or record, and a mere receipt by the marshal is insufficient.

Mississippi.— Vanhouten *v.* Reily, 6 Sm. & M. 440.

New York.— Wilgus *v.* Bloodgood, 33 How. Pr. 289, holding that this practice should be pursued unless there was some good objection thereto made by the party who had recovered it.

Canada.— Wilson *v.* Joly, 32 L. C. Jur. 75.

Compare Clarke *v.* Hogeman, 13 W. Va. 718, where, although the action was brought in the name of the assignor, it is expressly said that the assignee has the full right to say when the execution should be taken out.

See 21 Cent. Dig. tit. "Execution," § 43.

Where the assignor has expressly retained the right to issue execution, or taken other steps necessary for the collection of a judgment, the execution may of course issue in his name, regardless of the assignment, and is in no way affected thereby. Collins *v.* Smith, 75 Wis. 392, 44 N. W. 510. See also Tilden *v.* Evans, 3 Phila. (Pa.) 124.

67. The statutory provisions concerning the entry of the execution upon the docket of the county in which it is issued by the transferee, and giving him the same rights that might have been exercised by the transferrer, are intended only for the protection of third persons, and the debtor himself cannot object to the enforcement of the judgment because the filing was not made within the required time. Fuller *v.* Dowdell, 85 Ga. 463, 11 S. E. 773.

filed,[68] or is evidenced by the act of a notary,[69] or permission of the court is obtained,[70] the execution may issue in the name of the assignee.

2. To Joint Plaintiffs. If one of two joint plaintiffs dies execution should upon proper evidence of his death be issued in favor of the survivor,[71] unless the statute necessitates the substitution of his personal representatives;[72] and, where the damages adjudged in favor of several joint plaintiffs are several and distinct as to each of them, execution in favor of each may be issued on the judgment.[73]

IV. Persons Against Whom May Issue.[74]

As the execution must pursue and conform to the judgment, it follows that it can be issued only against those who are parties to it,[75] and it is not sufficient that the party against whom it is sought to be issued is interested in the judgment, or in fact the real party in interest in the suit, so long as he is not made a party to the action.[76] If the parties to the action have appeared in a representative capacity execution must issue against them in that capacity.[77] The rule that the execution must follow the judgment does not, however, necessitate the making of all the parties to a judgment parties to the execution; but, where the obligation devolves jointly and severally upon judgment debtors, execution may be issued against a part of them only.[78]

68. Lyford *v.* Dunn, 32 N. H. 81. See also Gerrish *v.* Clough, 36 N. H. 519.

69. Hebert *v.* Doussan, 8 La. Ann. 267.

70. McGregor *v.* Wells, 1 Mont. 142.

71. Mitchell *v.* Cunningham, 29 Me. 367. See *infra*, VI, D.

72. Freiler *v.* Freiler, 1 Pa. Co. Ct. 265.

73. Dawes *v.* Bell, 4 Mass. 106, holding, however, that inasmuch as the costs in the case were from their very nature joint, execution must issue jointly against them all. See also Case *v.* State, 1 Ohio Dec. (Reprint) 486, 10 West. L. J. 163.

74. Persons against whom supplementary proceedings may be had see *infra*, XIII.

75. *Alabama.*— Joseph *v.* Joseph, 5 Ala. 280; Harris *v.* Carter, 3 Stew. 233.

Kentucky.— Bridges *v.* Caldwell, 2 A. K. Marsh. 195.

Mississippi.— Treadwell *v.* Herndon, 41 Miss. 38.

New York.— Crouse *v.* Bailey, 10 N. Y. Suppl. 273, holding that goods sold to a son could not be seized on execution which is issued on a judgment for the price thereof obtained by a mistake against the father.

Pennsylvania.— Breidenthal *v.* McKenna, 14 Pa. St. 160; King *v.* Wimley, 26 Leg. Int. 254.

United States.— Walker *v.* Colby Wringer Co., 14 Fed. 517.

See 21 Cent. Dig. tit. "Execution," § 44.

A mistake in the name of defendant would, it has been held, prevent issuing an execution until the judgment is amended. Formento *v.* Robert. 27 La. Ann. 445. See also Farnham *v.* Hildreth, 32 Barb. (N. Y.) 277, where it is held that a judgment against Freeman H. does not authorize a sale of the property of Truman H.

76. Berry *v.* Wood, 106 Iowa 327, 76 N. W. 799.

77. Reid *v.* Stegman, 15 Abb. N. Cas. (N. Y.) 422; Tompkins County *v.* Smith, 11 Wend. (N. Y.) 181.

A fortiori where the obligation is incurred by the trustee as an individual; the trust property which he holds is not subject to execution issued on a judgment recovered against him as an individual. Bostick *v.* Keizer, 4 J. J. Marsh. (Ky.) 597, 20 Am. Dec. 237.

78. *California.*—Nichols *v.* Dunphy, 58 Cal. 605, where a judgment having been recovered against two as joint tort-feasors was, upon appeal by one, reversed as to him, it was held that execution might issue against the other defendant.

Georgia.— Jackson *v.* Roberts, 83 Ga. 358, 9 S. E. 671.

Louisiana.— Michel *v.* Benner, 24 La. Ann. 287 [*distinguishing* Blanchard *v.* Zacharie, 15 La. 541; Casson *v.* Cureton, 12 Mart. 435, which cases, although containing *dicta* to the contrary, simply hold that a creditor who has obtained a joint judgment against several debtors cannot at the same time have a capias ad satisfaciendum against one, and fieri facias against another, and the proceedings superseded as to the third].

Missouri.— Bray *v.* Seligman, 75 Mo. 31.

New York.— Crossitt *v.* Wiles, 13 N. Y. Civ. Proc. 327.

North Carolina.— See Binford *v.* Alston, 15 N. C. 351, holding that an execution need not necessarily pursue the form of the scire facias, but that it might be accommodated to what should be judicially ascertained to be the law for enforcing the judgment in question; and that, if it appeared of record that one of the defendants to the judgment could not be summoned, or that he had not the ability to be contributory to the payment of such judgment, the execution might issue against the other parties.

England.— Land Credit Co. *v.* Fermoy, L. R. 5 Ch. 323, 39 L. J. Ch. 477, 22 L. T. Rep. N. S. 394, 18 Wkly. Rep. 393.

See 21 Cent. Dig. tit. "Execution," § 45.

Where the liability is purely several, execution must of course issue against each,

V. PROPERTY SUBJECT TO.[79]

A. Personal Property — 1. In General. The general rule of law is that all chattels, the property of the debtor not expressly exempt by law, may be taken in execution; that is to say, all kinds of personal property of the debtor which he can make the subject of a voluntary transfer of title can by execution be made the subject of an involuntary transfer.[80] In some jurisdictions the rule has been thus stated: In the absence of statute, the right to seize and sell is coextensive only with the power to take and deliver possession.[81]

2. Money[82] — a. In General. The rule is well established that money, whether in specie or bank-notes (which are treated *civiliter* as money), if in the possession of defendant, or capable of being identified as his property, may be taken in execution, provided no trespass is committed in making the levy.[83] So long as

although only one satisfaction may be had. Columbia Bank *v.* Ross, 4 Harr. & M. (Md.) 456.

79. **Curtesy** see CURTESY, 12 Cyc. 1001.

Dower interest see DOWER, 14 Cyc. 871.

Exemption see, generally, EXEMPTIONS; HOMESTEADS.

Property after conversion see CONVERSION, 9 Cyc. 822.

Property bound by lien of judgment see, generally, JUDGMENTS.

Property subject to attachment see ATTACHMENT, 4 Cyc. 368.

Property subject to execution issued by justice of the peace see, generally, JUSTICES OF THE PEACE.

Property subject to execution on judgment to enforce mechanic's lien see, generally, MECHANICS' LIENS.

Property subject to garnishment see, generally, GARNISHMENT.

80. Twinam *v.* Swart, 4 Lans. (N. Y.) 263; Handy *v.* Dobbin, 12 Johns. (N. Y.) 220; State *v.* Dilliard, 25 N. C. 102, 38 Am. Dec. 708 (holding that execution can be levied upon a horse being ridden at the time by the owner); McDermott *v.* Crippen, 5 L. T. N. S. (Pa.) 109; Gritman *v.* Fiske, 1 Lack. Leg. Rec. (Pa.) 490 (where it was held that a creditor may seize in execution and sell any property which he may believe his debtor has an interest in; that the court will not enjoin the levy or sale on the ground that the lien had expired prior to the levy. In that event the purchaser takes no title); Turner *v.* Fendall, 1 Cranch (U. S.) 116, 2 L. ed. 53. See remarks of Ruffin, C. J., in Mebane *v.* Mebane, 39 N. C. 131, 136, 44 Am. Dec. 102.

A watch owned by a judgment debtor is subject to execution. Deposit Nat. Bank *v.* Wickham, 44 How. Pr. (N. Y.) 421.

Tools in use.— A levy under a fieri facias by entering a blacksmith shop and taking a set of tools while the smith is using them was held to be valid. Bell *v.* Douglass, 1 Yerg. (Tenn.) 397.

Unfinished beer in a state of intermediate fermentation is not subject to execution. Herman Goepper *v.* Phœnix Brewing Co., 74 S. W. 726, 25 Ky. L. Rep. 84.

Working animals.— It has been held in Louisiana that, on execution, working animals may be seized separately from the plantation to which they are attached, if the debtor himself points them out, and he cannot afterward object to the seizure. Dorsey *v.* Hills, 4 La. Ann. 106.

81. Campbell *v.* Leonard, 11 Iowa 489, where it was held that, applying this rule, the mortgagor of property in that state has no interest therein which can be levied upon and sold under execution.

82. **Insurance money** see EXEMPTIONS.

Pension money see, generally, EXEMPTIONS.

83. *Alabama.*— Barnett *v.* Bass, 10 Ala. 951.

Arkansas.— State *v.* Lawson, 7 Ark. 391, 46 Am. Dec. 293.

California.— *In re* Nerac, 35 Cal. 392, 95 Am. Dec. 111; Green *v.* Palmer, 15 Cal. 411, 76 Am. Dec. 492.

Connecticut.—Brooks *v.* Thompson, 1 Root 216.

Kentucky.— Doyle *v.* Sleeper, 1 Dana 531.

Maryland.— Harding *v.* Stevenson, 6 Harr. & J. 264.

Massachusetts.— Sheldon *v.* Root, 16 Pick. 567, 28 Am. Dec. 266.

Missouri.— State *v.* Taylor, 56 Mo. 492.

New Hampshire.— Spencer *v.* Blaisdell, 4 N. H. 198, 17 Am. Dec. 412.

New Jersey.— Crane *v.* Freese, 16 N. J. L. 305.

New York.— Noble *v.* Kelly, 40 N. Y. 415; Carroll *v.* Cone, 40 Barb. 220; Holmes *v.* Nuncaster, 12 Johns. 395 (in which case the constable who had in his possession an execution against plaintiff was present when a sum of money was paid to plaintiff, who handed it to the constable in conversation as to whether it was genuine, and it was held that the constable had a right to keep it and apply it to the payment of the execution); Handy *v.* Dobbin, 12 Johns. 220. See also Williams *v.* Rogers, 5 Johns. 163.

Pennsylvania.— Rudy *v.* Com., 35 Pa. St. 166, 78 Am. Dec. 330; Herron's Appeal, 29 Pa. St. 240 (which case held that coin and bank-notes may be seized and levied on in payment of debts, except where the money is raised by execution at the suit of the debtor, or is in his personal possession); Taylor's Appeal, 1 Pa. St. 390.

such money is not paid over to the judgment creditor, there is not such title to the money in the judgment creditor as would, previous to its delivery to him, enable the officer to seize it as his property.[84]

b. Special Ownership Necessary. Where money is deposited in a bank, it becomes the property of the bank and merely creates an indebtedness on the part of the latter, and therefore no specific fund can be levied upon in the hands of the bank.[85]

3. Fructus Industriales.[86] At common law, and generally in the United States, all annual crops which are raised by yearly manurance and labor, and essentially owe their annual existence to cultivation by man, termed "emblements,"[87] and sometimes "*fructus industriales*," irrespective of their state of maturity, whether planted by the tenant or the owner of the soil, may be levied on as personal property.[88] But in several of the United States execution levies

South Carolina.— Summers *v.* Caldwell, 2 Nott & M. 341.

Tennessee.— Dolby *v.* Mullins, 3 Humphr. 437, 39 Am. Dec. 180.

Vermont.— Prentiss *v.* Bliss, 4 Vt. 513, 24 Am. Dec. 631.

Wisconsin.— Russell *v.* Lawton, 14 Wis. 202, 80 Am. Dec. 769.

United States.— Turner *v.* Fendall, 1 Cranch 116, 2 L. ed. 53; Reno *v.* Wilson, 20 Fed. Cas. No. 11,700*a*, Hempst. 91.

England.— Courtoy *v.* Vincent, 15 Beav. 486, 21 L. J. Ch. 291; Rex *v.* Webb, 2 Show. 166; Armistead *v.* Philpot, Dougl. (3d ed.) 230.

See 21 Cent. Dig. tit. "Execution," § 57.

Bag of gold coin.— It was held in Green *v.* Palmer, 15 Cal. 411, 76 Am. Dec. 492, that one cannot claim to exempt from execution a bag of gold coin held in his hand, as he might perhaps in the case of money on his person, the court saying that, thus situated, it is like a horse held by the bridle subject to seizure under execution against its owner.

84. Moormon *v.* Quick, 20 Ind. 67.

Property in custody legis see *infra*, V, K.

85. McMillan *v.* Richards, 9 Cal. 365, 70 Am. Dec. 655; Moormon *v.* Quick, 20 Ind. 67; Scott *v.* Smith, 2 Kan. 438; Carroll *v.* Cone, 40 Barb. (N. Y.) 220.

86. Crops belonging to husband and wife see, generally, Husband and Wife.

Crops on land conveyed in fraud of creditors see Fraudulent Conveyances.

87. "Emblements" defined see 15 Cyc. 537.

88. *Alabama.*— McKenzie *v.* Lampley, 31 Ala. 526.

Georgia.— Crine *v.* Tifts, 65 Ga. 644.

Indiana.— Matlock *v.* Fry, 15 Ind. 483; Northern *v.* State, 1 Ind. 113.

Kansas.— Polley *v.* Johnson, 52 Kan. 478, 35 Pac. 8, 23 L. R. A. 258; Throop *v.* Maiden, 52 Kan. 258, 34 Pac. 801; Voils *v.* Battin, 6 Kan. App. 742, 50 Pac. 940.

Kentucky.— Thompson *v.* Craigmyle, 4 B. Mon. 391, 41 Am. Dec. 240; Craddock *v.* Riddlesbarger, 2 Dana 205; Parham *v.* Thompson, 2 J. J. Marsh. 159.

Louisiana.— Pickens *v.* Webster, 31 La. Ann. 870; Porshe *v.* Bodin, 28 La. Ann. 761. See also Adams *v.* Moulton, 1 McGloin 210.

Maryland.— Coombs *v.* Jordan, 3 Bland 284, 22 Am. Dec. 236.

Michigan.— Preston *v.* Ryan, 45 Mich. 174, 7 N. W. 819.

Minnesota.— Sparrow *v.* Pond, 49 Minn. 412, 52 N. W. 36, 32 Am. St. Rep. 571, 16 L. R. A. 103; Erickson *v.* Paterson, 47 Minn. 525, 50 N. W. 699; Gillitt *v.* Truax, 27 Minn. 528, 8 N. W. 767.

Missouri.— Selecman *v.* Kinnard, 55 Mo. App. 635.

Nebraska.— Johns *v.* Kamarad, (1901) 96 N. W. 118; Sims *v.* Jones, 54 Nebr. 769, 5 N. W. 150, 69 Am. St. Rep. 749; Johnson *v.* Walker, 23 Nebr. 736, 37 N. W. 639.

New Hampshire.— Norris *v.* Watson, 22 N. H. 364, 55 Am. Dec. 160.

New Jersey.— Bloom *v.* Welch, 27 N. J. L. 177; Westbrook *v.* Eager, 16 N. J. L. 81, where it was held that growing grain, which defendant had purchased by parol, was liable to sale under execution, as it was a mere chattel and salable by parol.

New York.—Frank *v.* Harrington, 36 Barb. 415; Shepard *v.* Philbrick, 2 Den. 174; Hartwell *v.* Bissell, 17 Johns. 128; Stewart *v.* Doughty, 9 Johns. 108; Whipple *v.* Foot, 2 Johns. 418, 3 Am. Dec. 442.

North Carolina.— Shannon *v.* Jones, 34 N. C. 206; Smith *v.* Tritt, 18 N. C. 241, 28 Am. Dec. 565. See also Walton *v.* Jordan, 65 N. C. 170.

Pennsylvania.— Pattison's Appeal, 61 Pa. St. 294, 100 Am. Dec. 637; Long *v.* Seavers, 13 Wkly. Notes Cas. 429. See also Bear *v.* Bitzer, 16 Pa. St. 175, 55 Am. Dec. 490.

Tennessee.— Edwards *v.* Thompson, 85 Tenn. 720, 4 S. W. 913, 4 Am. St. Rep. 807.

Texas.— Willis *v.* Moore, 59 Tex. 628, 46 Am. Rep. 284; Horne *v.* Gambrell, 1 Tex. App. Civ. Cas. § 996 [*quoted* with approval in Allen *v.* Watts, 98 Ala. 384, 11 So. 646].

England.— Jones *v.* Flint, 10 A. & E. 753, 9 L. J. Q. B. 252, 2 P. & D. 594, 37 E. C. L. 396; Peacock *v.* Purvis, 2 B. & B. 362, 5 Moore C. P. 79, 23 Rev. Rep. 465, 6 E. C. L. 183; Latham *v.* Atwood, Cro. Car. 515; Stansbury *v.* Matthews, 7 Dowl. P. C. 23, 8 L. J. Exch. 1, 4 M. & W. 343; Carrington *v.* Roots, 6 L. J. Exch. 95, 1 M. & H. 14, 2 M. & W. 248; Warwick *v.* Bruce, 2 M. & S. 205; Poole's Case, 1 Salk. 368; Scorell *v.* Boxall, 1 Y. & J. 396.

See 21 Cent. Dig. tit. "Execution," § 59.

Growing crop of peaches.— It was held in

are restricted to mature crops and are not allowed as to unripe crops or as to growing crops not in a fit state to be gathered.[89]

4. Fructus Naturales. Perennial plants and their ungathered product, such as trees, bushes, grasses, peaches, timber, fruit, etc., are incident to the soil and not subject to execution.[90]

5. Crops Raised on Leased Lands — a. Interest of Landlord. Unless the landlord and tenant are tenants in common of the crop, the share of the former cannot be levied upon until the crop has been divided.[91]

b. Interest of Cropper. By analogy a cropper has no such interest in the crop as can be the subject of execution and sale while it remains *en masse*, for until a division is made the whole crop is the property of the landlord.[92]

c. Interest of Tenant. Where land is leased for a share of the crops to be

State *v.* Fowler, 88 Md. 601, 42 Atl. 201, 71 Am. St. Rep. 452, 42 L. R. A. 849, that a growing crop of peaches requiring, as it does, periodical expense, industry, and attention in its yield and production, may be well classed as *fructus industriales*, and therefore subject to the levy of an execution. See also Purner *v.* Piercy, 40 Md. 223, 17 Am. Rep. 591.

89. Scolley *v.* Pollock, 65 Ga. 339 (where it was held that Ga. Code, § 3642, prohibiting "levying on any growing crop," etc., applies to cotton in the field, but not matured as early as July 28); Ellithorpe *v.* Reidesil, 71 Iowa 315, 32 N. W. 238; Burleigh *v.* Piper, 51 Iowa 649, 2 N. W. 520; Penhallow *v.* Dwight, 7 Mass. 34, 5 Am. Dec. 21; Tipton *v.* Martzell, 21 Wash. 273, 57 Pac. 806, 75 Am. St. Rep. 838 (where the decision seems to have been placed partly upon the ground that there was an existing contract between the landlord and the respondents that they would properly take care of the growing grain and harvest and deliver one third of the product to the landlord, and that in a contract of this nature the landlord depends on the character and skill of the lessee, and it would seem to be personal and not assignable).

In Alabama, formerly by statute a growing crop was not subject to execution. Evans *v.* Lamar, 21 Ala. 333; Adams *v.* Tanner, 5 Ala. 740.

Standing crop.— Under a North Carolina statute prohibiting an officer from levying an execution "on growing crops," it was held that an officer might levy upon a standing crop, provided it was matured. Shannon *v.* Jones, 34 N. C. 206.

90. *Delaware.*—State *v.* Gemmill, 1 Houst. 9.

Illinois.— Adams *v.* Smith, 1 Ill. 283.

Kentucky.— Craddock *v.* Riddlesbarger, 2 Dana 205.

Minnesota.— Sparrow *v.* Pond, 49 Minn. 412, 52 N. W. 36, 32 Am. St. Rep. 571, 16 L. R. A. 103.

New Hampshire.— Rogers *v.* Elliott, 59 N. H. 201, 47 Am. Rep. 192; Norris *v.* Watson, 22 N. H. 364, 55 Am. Dec. 160; Olmstead *v.* Niles, 7 N. H. 522; Putney *v.* Day, 6 N. H. 430, 25 Am. Dec. 470.

New Jersey.— Slocum *v.* Seymour, 36 N. J. L. 138, 13 Am. Rep. 432.

New York.— Lansingburgh Bank *v.* Crary, 1 Barb. 542; Green *v.* Armstrong, 1 Den. 556. See Jencks *v.* Smith, 1 N. Y. 90 [*affirming* 1 Den. 580].

England.— Teal *v.* Auty, 2 B. & B. 99, 4 Moore C. P. 542, 22 Rev. Rep. 656, 6 E. C. L. 54; Rodwell *v.* Phillips, 1 Dowl. P. C. N. S. 885, 11 L. J. Exch. 217, 2 M. & W. 501; Crosby *v.* Wadsworth, 6 East 602, 2 Smith K. B. 559.

See 21 Cent. Dig. tit. "Execution," § 59.

License to cut trees.— A license to enter upon another's land and sever and remove standing trees therefrom is, in its nature, a personal trust, and not the subject of a levy and sale under execution. Potter *v.* Everett, 40 Mo. App. 152.

Peaches on trees are not such goods or chattels as may be taken in execution on a fieri facias; but after they are gathered they are subject to such execution. State *v.* Gemmill, 1 Houst. (Del.) 9.

Timber lease.— An execution may be levied on standing timber held under what is called a "timber lease," which gives no interest in the land further than to cut and carry away timber. Caldwell *v.* Fifield, 24 N. J. L. 150.

Unpicked blackberries.—Blackberries, while growing on the bushes, are not subject to levy on execution as personal property. Sparrow *v.* Pond, 49 Minn. 412, 52 N. W. 36, 32 Am. St. Rep. 571, 16 L. R. A. 103.

91. *Illinois.*— Hansen *v.* Dennison, 7 Ill. App. 73.

Indiana.— Williams *v.* Smith, 7 Ind. 559.

North Carolina.— Waltson *v.* Bryan, 64 N. C. 764; Gordon *v.* Armstrong, 27 N. C. 409; Deaver *v.* Rice, 20 N. C. 567, 34 Am. Dec. 388.

South Carolina.— Devore *v.* Kemp, 3 Hill 259.

Texas.— Pace *v.* Sparks, 1 Tex. Unrep. Cas. 402.

See 21 Cent. Dig. tit. "Execution," § 60.

Where the tenant pays his rent with a share of the crop to be raised, the division to be made at harvesting time, landlord and tenant each to save his own share, the landlord has an interest in the crop itself, which is subject to sale under execution before the time for division has arrived. Lindley *v.* Kelley, 42 Ind. 294.

92. *Delaware.*— Currey *v.* Davis, 1 Houst. 598.

Georgia.— Hunter *v.* Edmundson, Ga. Dec. 74.

raised, division to be made after such crops are gathered, the title to the whole of the crops raised is in the tenant until a division is made and possession given to the landlord of his share; and prior to such division the levy of an execution on such crops in satisfaction of a judgment against the tenant is good.[93]

d. Interest of Tenants in Common. Where the owner and the occupant of land agree to jointly cultivate and divide the products of such land, such contract creates between them a tenancy in common in the products, and the share of either the owner or the occupant is liable to seizure and sale under execution against him.[94]

6. Wearing Apparel. Even in the absence of statute, it has been held that the necessary wearing apparel of a debtor is exempt from levy and sale on execution, upon the sound principle of justice and public policy.[95]

7. Vehicles Carrying United States Mail. The doctrine seems to be generally accepted that a steam, ferry, or sail boat is not exempt from execution because such boat plies on a mail route and is used to convey mail.[96]

8. Patents and Copyrights. The rule seems to be well established that patents[97] and copyrights are property in notion, and have no corporeal, tangible

Missouri.— Selecman *v.* Kinnard, 55 Mo. App. 635.

New York.— Andrew *v.* Newcombe, 32 N. Y. 417; Van Hoozer *v.* Cory, 34 Barb. 9.

North Carolina.— Brazier *v.* Ansley, 33 N. C. 12, 51 Am. Dec. 408. See, however, Hare *v.* Pearson, 26 N. C. 76.

South Carolina.— Rogers *v.* Collier, 2 Bailey 581, 23 Am. Dec. 153.

See 21 Cent. Dig. tit. "Execution," § 60.

93. Sargent *v.* Courrier, 66 Ill. 245; Dixon *v.* Niccolls, 39 Ill. 372, 89 Am. Dec. 312; Alwood *v.* Ruckman, 21 Ill. 200; Porcshe *v.* Bodin, 28 La. Ann. 761; Hawkins *v.* Giles, 45 Hun (N. Y.) 318; McCombs *v.* Becker, 3 Hun (N. Y.) 342, 5 Thomps. & C. (N. Y.) 550; Johnson *v.* Crofoot, 53 Barb. (N. Y.) 574, 37 How. Pr. (N. Y.) 59; Whipple *v.* Foote, 2 Johns. (N. Y.) 418, 3 Am. Dec. 442; Pace *v.* Sparks, 1 Tex. Unrep. Cas. 402.

The growing crop of a lessee is to him a movable, and hence is subject to be seized and sold by a judgment creditor of the lessee. Pickens *v.* Webster, 31 La. Ann. 870, 875, where the court said: "The crop of the lessee was his, and although, abstractly speaking, it may have been an immovable viewed from the lessee's point of view, it was a movable, or, at all events, an apparent immovable mobilized by anticipation."

94. Thompson *v.* Mawhinney, 17 Ala. 362, 52 Am. Dec. 176; Bernal *v.* Hovious, 17 Cal. 541, 79 Am. Dec. 147. See also Moulton *v.* Robinson, 27 N. H. 550.

95. Mack *v.* Parks, 8 Gray (Mass.) 517, 69 Am. Dec. 267; Cooke *v.* Gibbs, 3 Mass. 193 (where it was said that upon a fieri facias at common law being issued against the goods and chattels of the debtor without any exception, if the sheriff were to strip the debtor's wearing apparel from his body he would be a trespasser, for such apparel, when worn, is not liable to execution); Bumpus *v.* Maynard, 38 Barb. (N. Y.) 626; Field *v.* Adames, 12 A. & E. 649, 1 Arn. & H. 17, 4 Jur. 103, 10 L. J. Q. B. 2, 4 P. & D. 504, 40 E. C. L. 324; Hardistey *v.* Barney, Comb. 356. See also Sunbolf *v.* Alford, 3 M. & W. 248.

96. Lathrop *v.* Middleton, 23 Cal. 257, 83 Am. Dec. 112; Parker *v.* Porter, 6 La. 169, 179, where the levy was held to be valid, and not an obstruction to the passage of the mail within the act of congress making it a penal offense to "knowingly and wilfully obstruct, or retard the passage of the mail, or of any driver or carrier, or of any horse or carriage, carrying the same."

97. *California.*—Peterson *v.* San Francisco, 115 Cal. 211, 40 Pac. 1060. See also Pacific Bank *v.* Robinson, 57 Cal. 520, 40 Am. Rep. 120.

Kentucky.— See Cooper *v.* Gunn, 4 B. Mon. 594.

Massachusetts.— Carver *v.* Peck, 131 Mass. 291.

Pennsylvania.— Harrington *v.* Cambridge, 14 Wkly. Notes Cas. 456; Flagg *v.* Farnsworth, 12 Wkly. Notes Cas. 500; Wolf *v.* Bonta Plate Glass Co., 5 Lack. Leg. N. 51, 7 Northam. Co. Rep. 397.

United States.— Ager *v.* Murray, 105 U. S. 126, 26 L. ed. 942 [*affirming* 1 Mackey (D. C.) 87]; Stephens *v.* Cady, 14 How. 528, 14 L. ed. 528; Erie Wringer Mfg. Co. *v.* National Wringer Co., 63 Fed. 248, where this doctrine is recognized, but it was held that by the Pennsylvania act of 1870, under the special execution process — fieri facias — against an insolvent corporation, the sheriff can make a valid sale of a patent right belonging to the corporation.

See 21 Cent. Dig. tit. "Execution," § 67 and 9 Cyc. 930.

Trade secrets.— It was held in Hanley *v.* Fidelity Ins., etc., Co., 8 Pa. Dist. 207, that an envelope containing a complete description of a secret formula and process for the manufacture of compound oxygen gas is a substantial article capable of manual caption, sale, and delivery either at public or private sale, and hence may be the subject of levy and sale under a common-law writ of execution.

substance, and, in the absence of statute, are not subject to seizure and sale by execution.[98]

9. Unpublished Manuscripts. It has been held in some jurisdictions that unpublished manuscripts were not leviable property; that the owner's right to publish or not is an incorporeal, personal right, independent of locality.[99] While in other jurisdictions it has been held that manuscripts which are subject to a copyright may be taken on execution, although the debtor loses no rights in his property when it is so levied upon, save and excepting immediate possession and control of it, and that an officer making levy has no right to dispose of or sell the same, or copies thereof.[1]

10. Corporate Stock — a. At Common Law. At common law corporate shares were deemed to be mere choses in action, and hence not subject to levy and sale upon execution.[2]

b. By Statute. The rule of the common law, however, has been changed by statute in many of the states,[3] and where such a change has been made the

98. Ager *v.* Murray, 105 U. S. 126, 26 L. ed. 942 [*affirming* 1 Mackey (D. C.) 87]. See Banker *v.* Caldwell, 3 Minn. 94.

Creditors' suits generally see Creditors' Suits.

Supplementary proceedings see *infra*, XIII.

99. Dart *v.* Woodhouse, 40 Mich. 399, 29 Am. Rep. 544. See also Albert *v.* Strange, 1 Hall & T. 1, 13 Jur. 109, 18 L. J. Ch. 120, 1 Macn. & G. 25, 47 Eng. Ch. 19, 41 Eng. Reprint 1171.

Private papers.— It was held in Oystead *v.* Shed, 12 Mass. 505, that under an execution against defendant's goods and chattels, his private papers, such as account-books, could not be taken and sold.

1. Banker *v.* Caldwell, 3 Minn. 94.

Abstract books.— "In a set of abstract books, or any other manuscripts, we see nothing intangible, nothing which makes it difficult or improper to subject them to execution." Washington Bank *v.* Fidelity Abstract, etc., Co., 15 Wash. 487, 489, 46 Pac. 1036, 55 Am. St. Rep. 902, 37 L. R. A. 115 [*quoting* Freeman Ex. (2d ed.) § 110]. See also Booth, etc., Abstract Co. *v.* Phelps, 8 Wash. 549, 36 Pac. 489, 40 Am. St. Rep. 921, 23 L. R. A. 864.

2. *Alabama.*— Nabring *v.* Mobile Bank, 58 Ala. 204.

District of Columbia.—Barnard *v.* Virginia L. Ins. Co., 4 Mackey 63.

Illinois.— Rhea *v.* Powell, 24 Ill. App. 77.

Louisiana.— Williamson *v.* Smoot, 7 Mart. 31, 12 Am. Dec. 494.

Maryland.— Coombs *v.* Jordan, 3 Bland 284, 22 Am. Dec. 236.

Michigan.— Van Norman *v.* Jackson Cir. Judge, 45 Mich. 204, 7 N. W. 796; Blair *v.* Compton, 33 Mich. 414.

New York.—Denton *v.* Livingston, 9 Johns. 96, 6 Am. Dec. 264, where it was held that bank shares and shares in a public library could not be seized and sold on execution.

North Carolina.— Cooper *v.* Dismal Swamp Canal Co., 6 N. C. 195.

Washington.— Daniel *v.* Gold Hill Min. Co., 28 Wash. 411, 68 Pac. 884.

England.—Francis *v.* Nash, 7 Geo. II, K. B. [*cited* in Comyns Dig. tit. "Execution"].

See 21 Cent. Dig. tit. "Execution," § 61.

Choses in action see *infra*, V, I.

Shares of corporate stock are neither chattels nor debts, but incorporeal personal property, separate and distinct from the certificates thereof, whose *situs* is in the state where the corporation was created, and hence they cannot be levied on under execution in another state in which it does business, unless under the laws of such state foreign corporations doing business therein are made domestic for the purpose of suit and service of process. Caffery *v.* Choctaw Coal, etc., Co., 95 Mo. App. 174, 68 S. W. 1049.

3. *Alabama.*— Oldacre *v.* Button, 116 Ala. 652, 23 So. 3; Berney Nat. Bank *v.* Pinckard, 87 Ala. 577, 6 So. 364, holding that shares of stock in a national bank, which are not the property of an officer or director thereof, may be levied upon and sold under execution, where the sale does not interfere with the operation of the bank as a governmental agency.

Delaware.—Trimble *v.* Vandegrift, 7 Houst. 451, 32 Atl. 632.

Massachusetts.— Stedman *v.* Eveleth, 6 Metc. 114; Howe *v.* Starkweather, 17 Mass. 240.

Michigan.— Feige *v.* Burt, 118 Mich. 243, 77 N. W. 928, 74 Am. St. Rep. 390, holding, however, that shares of stock owned by a debtor, but standing in the name of a third person on the books of the company, are not subject to levy under execution.

Missouri.— Tufts *v.* Volkening, 122 Mo. 631, 27 S. W. 522. See also Caffery *v.* Choctaw Coal, etc., Co., 95 Mo. App. 174, 68 S. W. 1049.

Pennsylvania.— Braden's Estate, 165 Pa. St. 184, 30 Atl. 746; Weaver *v.* Huntingdon, etc., Coal Co., 50 Pa. St. 314; Lex *v.* Potters, 16 Pa. St. 295; Schlesinger's Estate, 1 L. T. N. S. 15.

Tennessee.—Nashville Trust So. *v.* Weaver, 102 Tenn. 66, 50 S. W. 763; Young *v.* South Tredegar Iron Co., 85 Tenn. 189, 2 S. W. 202, 4 Am. St. Rep. 752; Memphis Appeal Pub., etc., Co. *v.* Pike, 9 Heisk. 697.

Washington.— See Daniel *v.* Gold Hill Min. Co., 28 Wash. 411, 60 Pac. 884.

authorities all agree that if the statute authorizing such a levy and sale has not been substantially complied with, then the sale is unauthorized and void, and cannot, as in the case of a sale which is voidable merely on account of some irregularity, be ratified.[4]

11. Seat on Stock Exchange. It has been held in some jurisdictions that a seat on a stock exchange is not property in the eye of the law, and cannot be seized in execution for the debts of the members; that it is the mere creation of the board, and to be held and enjoyed with all the limitations and restrictions which the constitution of the board choose to put upon it.[5] However, the weight of authority and the better reasoning appear to support the proposition that such a seat or membership upon a stock exchange is property, and therefore subject to execution in the sense that it may be reached by appropriate proceedings and applied, as other property of a debtor, to the payment of his just debts.[6]

12. Fixtures — a. In General. The doctrine is now well established that fixtures, using the term as denoting those personal chattels which have been annexed to the land, and which may be afterward severed and removed by the party who has annexed them, or a personal representative, against the will of the owner of the freehold,[7] are subject to seizure and sale in execution.[8]

See 21 Cent. Dig. tit. "Execution," § 61.

The capital stock of a bank, owned by itself and in its own possession, cannot be attached for its own debts, under the act of June 16, 1836. Hawley *v.* Lumberman's Bank, 10 Watts (Pa.) 230.

Stock transferred to another to enable him to raise money thereon is liable to the execution of his creditors, they being thereby deceived, and he apparently the owner. Le Page *v.* Porée, 3 Rob. (La.) 439.

Equity of redemption in shares of stock.— Under a Missouri statute it was held that the equity of redemption of a judgment debtor in shares of stock might be levied upon and sold under execution, and the purchaser would succeed to all the rights of the debtor. Foster *v.* Potter, 37 Mo. 525.

4. Blair *v.* Compton, 33 Mich. 414; James *v.* Pontiac, etc., Plank Road Co., 8 Mich. 91; Princeton Bank *v.* Crozer, 22 N. J. L. 383, 53 Am. Dec. 254; Daniel *v.* Gold Hill Min. Co., 28 Wash. 411, 60 Pac. 884.

Stock of yachting, hunting, and fishing club. It was held in Lyon *v.* Denison, 80 Mich. 371, 45 N. W. 358, 8 L. R. A. 358, that stock issued by an association under Howell St. Mich. c. 188, for "yachting, hunting, fishing, boating, rowing, and other lawful sporting purposes" is not subject to levy and sale on execution under the Michigan statute authorizing the sale on execution of the share or interest of a stock-holder in any bank, insurance company, or any other joint stock company incorporated under the laws of that state. It was held that under the terms of this statute such an association was not a joint stock company.

Ostensible ownership.— It was held in Oerther *v.* First Nat. Bank, 1 Leg. Rec. (Pa.) 69, that corporate stock standing in the name of defendant in execution is not liable to be sold as his if it actually belongs to another, even though the rules of the corporation require transfers to be made in the presence of an officer.

5. Lowenberg *v.* Greenebaum, 99 Cal. 162, 33 Pac. 794, 37 Am. St. Rep. 42, 21 L. R. A. 399; Barclay *v.* Smith, 107 Ill. 349, 47 Am. Rep. 437; Pancoast *v.* Gowen, 93 Pa. St. 66; Thompson *v.* Adams, 93 Pa. St. 55. See, however, Habenicht *v.* Lissak, 78 Cal. 351, 20 Pac. 874, 12 Am. St. Rep. 63, 5 L. R. A. 713, where it was held that an order might properly be made upon proceedings supplementary to the execution against the owner of a seat upon the San Francisco stock exchange board, appointing a receiver and directing the execution debtor to make an assignment thereof to him, and empowering the receiver to sell the same to satisfy the judgment.

6. Habenicht *v.* Lissak, 78 Cal. 351, 357, 20 Pac. 874, 12 Am. St. Rep. 63, 5 L. R. A. 713 (where the court said: "To hold that it cannot be thus applied would establish a rule giving to the members of such associations the power to invest fortunes under the name of licenses and privileges, and by their constitutions and regulations to establish a law of exemption for the same"); Ritterband *v.* Baggett, 42 N. Y. Super. Ct. 556; Londheim *v.* White, 67 How. Pr. (N. Y.) 467 [*citing Re* Ketcham, Daily Reg. (U. S. Dist. Ct.) Feb. 9, 1880]; Grocers' Bank *v.* Murphy, 60 How. Pr. (N. Y.) 426. See also Eliot *v.* Merchants' Exch., 14 Mo. App. 234 (where it was held that a seat of a member in a merchants' exchange is not property subject to execution, but that it may be reached by a judgment creditor by a bill in equity); Powell *v.* Waldron, 89 N. Y. 328, 42 Am. Rep. 301; Hyde *v.* Woods, 94 U. S. 523, 24 L. ed. 264.

7. Hallen *v.* Runder, 1 C. M. & R. 266, 3 Tyrw. 959; Amos & F. Fixt. 321. See also, generally, Fixtures.

8. *Illinois.*— Titus *v.* Mabee, 25 Ill. 257.

Indiana.— State *v.* Bonham, 18 Ind. 231.

Massachusetts.— Doty *v.* Gorham, 5 Pick. 487, 16 Am. Dec. 417.

New York.— Ombony *v.* Jones, 19 N. Y. 234.

b. Trade Fixtures. The general rule is that a fixture erected by a tenant on demised premises for the purpose of carrying on his trade is personal property, and may be removed or levied on by fieri facias against him.[9]

c. Real Fixtures. On the other hand that species of property which is denominated a real fixture, and is necessary to the enjoyment of the freehold, passes with the realty as a portion of it, and is not governed by the law relating to personal chattels; and hence it is not subject to seizure and sale under an execution against personal property.[10] And where a real fixture is wrongfully severed from

Pennsylvania.— Lemar *v.* Miles, 4 Watts 330.

England.— Pitt *v.* Shew, 4 B. & Ald. 206, 6 E. C. L. 453. See also Place *v.* Fagg, 4 M. & R. 277; Winn *v.* Ingilby, 5 B. & Ald. 625, 1 D. & R. 247, 24 Rev. Rep. 503, 7 E. C. L. 341.

See 21 Cent. Dig. tit. "Execution," § 63.

Movable fixtures may be levied upon as personal property. Morey *v.* Hoyt, 62 Conn. 542, 26 Atl. 127, 19 L. R. A. 611.

Estoppel.— Where a party purchased a flouring mill encumbered by liens and mortgages, and afterward procured an engine and boiler which for a time he used in connection with the mill, and subsequently, after he had ceased so to use them, an execution against him was levied on them, and the day after the levy he sold them, with the consent of the lien-holders, and his vendees claimed them as against the execution plaintiff, it was held that the parties having agreed to treat the articles as personal property could not be allowed to say that they were not subject to levy and sale on execution. Test *v.* Robinson, 20 Ind. 251.

Potash kettles, set in arches in the usual way for use, are personal property, and liable to be levied upon and sold as such. Wetherby *v.* Foster, 5 Vt. 136.

Whenever fixtures are mortgaged, whether by the same deed as that which mortgages the lands or houses, or by a separate deed, in such manner that the absolute interest in them passes to the mortgagee, with power of severance from the premises, and removal therefrom, upon a sale thereof, separately from the premises, so that in fact the mortgage *quoad* those fixtures is a bill of sale, then, and in every such case, the mortgagee must duly register and also reregister, in accordance with the English Bills of Sale Act, otherwise his mortgage will *quoad* such fixtures, be postponed to the rights of the execution creditor, who may seize and sell the same upon writ of fieri facias. Hawtry *v.* Butlin, L. R. 8 Q. B. 290, 42 L. J. Q. B. 163, 28 L. T. Rep. N. S. 532, 21 Wkly. Rep. 633.

9. *Indiana.*— Taffe *v.* Warnick, 3 Blackf. 111, 23 Am. Dec. 383.

Maine.— Fifield *v.* Maine Cent. R. Co., 62 Me. 77.

New York.— Cresson *v.* Stout, 17 Johns. 116, 8 Am. Dec. 373.

Pennsylvania.— Hey *v.* Bruner, 61 Pa. St. 87; White's Appeal, 10 Pa. St. 252; Lemar *v.* Miles, 4 Watts 330. See also Thropp's Appeal, 70 Pa. St. 395.

Tennessee.— Pillow *v.* Love, 5 Hayw. 109.

United States.— Van Ness *v.* Packard, 2 Pet. 137, 7 L. ed. 374.

England.— Poole's Case, Salk. 368, where it was held that vats, tables, partitions, etc., of a soap boiler were personal goods, and liable to an execution on fieri facias as such. See Beeston *v.* Marriott, 4 Giff. 436, 9 Jur. N. S. 960, 8 L. T. Rep. N. S. 690, 11 Wkly. Rep. 896; Antrim *v.* Dobbs, 30 L. R. Ir. 424.

See 21 Cent. Dig. tit. "Execution," § 63.

Mining machinery erected on leased mining lands by the lessee may be sold on execution against him and removed from such lands before the expiration of his term. Heffner *v.* Lewis, 73 Pa. St. 302.

10. *Illinois.*— Titus *v.* Ginheimer, 27 Ill. 462; Titus *v.* Mabee, 25 Ill. 257; Hunt *v.* Bullock, 23 Ill. 320; Palmer *v.* Forbes, 23 Ill. 301 (where it was held that engines, cars, and rolling-stock of a railroad were real fixtures); Moore *v.* Cunningham, 23 Ill. 328.

Maine.— See Strickland *v.* Parker, 54 Me. 263.

Massachusetts.— See Goddard *v.* Chase, 7 Mass. 432.

Montana.— Switzer *v.* Allen, 11 Mont. 160, 27 Pac. 408.

Nebraska.— Friedlander *v.* Ryder, 30 Nebr. 783, 47 N. W. 83, 9 L. R. A. 700.

North Carolina.— Pemberton *v.* King, 13 N. C. 376.

Pennsylvania.— Voorhis *v.* Freeman, 2 Watts & S. 116, 37 Am. Dec. 490; Hillard Live-Stock Co. *v.* Amity Coal Co., 2 Lanc. L. Rev. 241.

Vermont.— See Newhall *v.* Kinney, 56 Vt. 591.

England.— Cross *v.* Barnes, 46 L. J. Q. B. 479, 36 L. T. Rep. N. S. 693; Midland Waggon Co. *v.* Potteries, etc., R. Co., 43 L. T. Rep. N. S. 511, 29 Wkly. Rep. 78.

See 21 Cent. Dig. tit. "Execution," § 63.

A church bell temporarily placed and used in a frame on a church lot, although the posts of the frame be not laid into the ground, the intention being to place it in the tower, is yet exempt from execution, since these acts indicate the intention of the society to affix it to the realty. Dubuque Cong. Soc. *v.* Fleming, 11 Iowa 553, 79 Am. Dec. 511.

Where by the terms of the agreement the lessee had renounced the ordinary rights of the tenant to disannex tenant's fixtures during the term, it was held that the sheriff had no power to take them in execution against such tenant. Dumerge *v.* Rumsey, 2 H. & C.

the freehold, it does not thereby become the personal property of the tenant, subject to seizure and sale under execution against him.[11]

13. FRANCHISES[12] — a. At Common Law. A franchise, being an incorporeal hereditament, cannot, upon the settled principles of the common law, in the absence of statute, be seized and sold under a fieri facias.[13]

b. By Statute. Statutes have now been enacted in a majority of the states, subjecting franchises, and property appurtenant thereto, held by individuals and corporations, to execution in satisfaction of judgments recovered against the owners thereof.[14] However, as such statutes are in derogation of the common

777, 10 Jur. N. S. 155, 33 L. J. Exch. 88, 9 L. T. Rep. N. S. 775, 12 Wkly. Rep. 205.

11. Farrant *v.* Thompson, 5 B. & Ald. 826, 7 E. C. L. 449, 2 D. & R. 1, 16 E. C. L. 61, 24 Rev. Rep. 571.

12. Judicial sale of corporate franchises see CORPORATIONS, 10 Cyc. 1094.

13. *California.*— Risdon Iron, etc., Works *v.* Citizens' Traction Co., 122 Cal. 94, 54 Pac. 529, 68 Am. St. Rep. 25; Gregory *v.* Blanchard, 98 Cal. 311, 33 Pac. 199; Wood *v.* Truckee Turnpike Co., 24 Cal. 474; Thomas *v.* Armstrong, 7 Cal. 286; Munroe *v.* Thomas, 5 Cal. 470.

Georgia.— See Macon, etc., R. Co. *v.* Parker, 9 Ga. 377.

Illinois.— Hatcher *v.* Toledo, etc., R. Co., 62 Ill. 477; Bruffett *v.* Great Western R. Co., 25 Ill. 353.

Indiana.— State *v.* Hare, 121 Ind. 308, 23 N. E. 145; Louisville, etc., R. Co. *v.* Boney, 117 Ind. 501, 20 N. E. 432, 3 L. R. A. 435.

Kentucky.—Winchester, etc., Turnpike Road Co. *v.* Vimont, 5 B. Mon. 1.

Louisiana.— New Orleans, etc., R. Co. *v.* Delamore, 34 La. Ann. 1225.

Massachusetts.— See Richardson *v.* Sibley, 11 Allen 65, 87 Am. Dec. 700.

Michigan.— James *v.* Pontiac, etc., Plank Road Co., 8 Mich. 91.

Mississippi.— Arthur *v.* Commercial, etc., Bank, 9 Sm. & M. 394, 48 Am. Dec. 719.

Missouri.— Stewart *v.* Jones, 40 Mo. 140; McPheeters *v.* Merimac Bridge Co., 28 Mo. 465.

New Jersey.— State *v.* Middletown Turnpike Co., 65 N. J. L. 73, 46 Atl. 569; Randolph *v.* Larned, 27 N. J. Eq. 557.

Ohio.— Seymour *v.* Milford, etc., Turnpike Co., 10 Ohio 476.

Pennsylvania.— Mausel *v.* New York, etc., R. Co., 171 Pa. St. 606, 33 Atl. 377; Youngman *v.* Elmira, etc., R. Co., 65 Pa. St. 278; Western Pennsylvania R. Co. *v.* Johnston, 59 Pa. St. 290; Spear *v.* Allison, 20 Pa. St. 200; Leedom *v.* Plymouth R. Co., 5 Watts & S. 265.

Tennessee.—Baxter *v.* Nashville, etc., Turnpike Co., 10 Lea 488.

Texas.— Palestine *v.* Barnes, 50 Tex. 538.

United States.— Gue *v.* Tide Water Canal Co., 24 How. 257, 16 L. ed. 635. See also East Alabama R. Co. *v.* Visscher, 114 U. S. 340, 5 S. Ct. 869, 29 L. ed. 136; Hall *v.* Sullivan R. Co., 11 Fed. Cas. No. 5,948, Brunn. Col. Cas. 613.

See 21 Cent. Dig. tit. "Execution," § 64.

An easement giving a right and privilege to a corporation to enter upon certain land and take possession of such portion thereof as should be necessary for a dam is an estate and interest of the corporation in real property, as properly distinguished from the franchise of such corporation, and may be sold on execution. Evangelical Lutheran St. John's Orphan Home *v.* Buffalo Hydraulic Assoc., 64 N. Y. 561 [*affirming* 4 Hun 419, 6 Thomps. & C. 589].

Turnpike road.— See Ammant *v.* New Alexandria, etc., Turnpike Road, 13 Serg. & R. (Pa.) 210, 212, 15 Am. Dec. 593, where it was held that a turnpike road was not the subject of levy under execution.

14. *Georgia.*— Atlanta *v.* Grant, 57 Ga. 340.

Indiana.— State *v.* Hare, 121 Ind. 308, 23 N. E. 145; Louisville, etc., R. Co. *v.* Boney, 117 Ind. 501, 20 N. E. 432, 3 L. R. A. 435 (where the rule is laid down that whatever a corporation might voluntarily alienate, its creditors might subject to sale by adverse process); Indianapolis, etc., Gravel Road Co. *v.* State, 105 Ind. 37, 4 N. E. 316; Rowe *v.* Major, 92 Ind. 206.

Louisiana.— Lawrence *v.* Morgan's Louisiana, etc., R., etc., Co., 39 La. Ann. 427, 2 So. 69, 4 Am. St. Rep. 265.

Massachusetts.— Williams *v.* East Wareham, etc., R. Co., 171 Mass. 61, 50 N. E. 646; Simmons *v.* Worthington, 170 Mass. 203, 49 N. E. 114.

New Jersey.— See Randolph *v.* Larned, 27 N. J. Eq. 557.

North Carolina.— McNeal Pipe, etc., Co. *v.* Howland, 111 N. C. 615, 16 S. E. 857, 20 L. R. A. 743.

Ohio.— Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518; Seymour *v.* Milford, etc., Turnpike Co., 10 Ohio 476.

Pennsylvania.— Greensburg Fuel Co. *v.* Irwin Natural Gas Co., 162 Pa. St. 78, 29 Atl. 274; Bayard's Appeal, 72 Pa. St. 453; Philadelphia, etc., R. Co.'s Appeal, 70 Pa. St. 355.

Texas.— Texas-Mexican R. Co. *v.* Wright, 88 Tex. 346, 31 S. W. 613, 31 L. R. A. 200; Gulf, etc., R. Co. *v.* Newell, 73 Tex. 334, 11 S. W. 342, 15 Am. St. Rep. 788.

Virginia.— Winchester, etc., R. Co. *v.* Colfelt, 27 Gratt. 777.

United States.— Morgan *v.* Louisiana, 93 U. S. 217, 23 L. ed. 860.

See 21 Cent. Dig. tit. "Execution," § 64.

Corporate franchises.—Cal. Civ. Code, § 388, provides that for the satisfaction of a judgment against a corporation authorized to receive tolls, its franchise and all its rights

law, their provisions must be strictly complied with in order to make the levy and sale valid.[15]

14. Property Essential to Enjoyment of Franchise — a. General Rule. In some jurisdictions the tendency has been not to exempt corporate property from execution and sale, even where such property is essential to the enjoyment of the franchise owned by such corporation.[16] According to the great weight of authority, however, in the absence of statute, all property necessary for the full enjoyment and exercise of the franchise of a public or quasi-public corporation is exempt from levy and sale under execution, no matter how such property was acquired by the owner of the franchise.[17]

b. Upon Abandonment of Franchise. But conceding that the property of a

and privileges may be levied on and sold under execution; and it has been held, under this section of the code, that the franchise of an individual to collect tolls cannot be levied on, there being no statutory provision therefor. Gregory *v.* Blanchard, 98 Cal. 311, 33 Pac. 199.

Sequestration of profit.— In 1836 the Pennsylvania legislature passed an act providing for the sequestration of the profits of corporations to satisfy judgments against them. Reed *v.* Penrose, 36 Pa. St. 214, 2 Grant 471; Loudenschlager *v.* Benton, 3 Grant 384, 4 Phila. 382.

15. Gregory *v.* Blanchard, 98 Cal. 311, 33 Pac. 199; James *v.* Pontiac, etc., Plank Road Co., 8 Mich. 91; Ammant *v.* New Alexandria, etc., Turnpike Road, 13 Serg. & R. (Pa.) 210, 15 Am. Dec. 593.

Scholarship.— A perpetual scholarship in a college, granted in recognition of a donation thereto, entitling the donor to keep one pupil in the college free of charge, is not such property as can be taken under execution and sale for debt. Cleveland Nat. Bank *v.* Morrow, 99 Tenn. 527, 42 S. W. 200, 63 Am. St. Rep. 853, 38 L. R. A. 758.

16. *California.*— Risdon Iron, etc., Works *v.* Citizens' Traction Co., 122 Cal. 94, 54 Pac. 529, 68 Am. St. Rep. 25; Wood *v.* Truckee Turnpike Co., 24 Cal. 474.

Michigan.— See also Campbell *v.* Western Electric Co., 113 Mich. 333, 71 N. W. 644.

Mississippi.— Arthur *v.* Commercial, etc., Bank, 9 Sm. & M. 394, 48 Am. Dec. 719.

Missouri.— Stewart *v.* Jones, 40 Mo. 140.

New York.— Beardsley *v.* Ontario Bank, 31 Barb. 619. See also Schmid *v.* New York, etc., R. Co., 32 Hun 335.

North Carolina.— State *v.* Rives, 27 N. C. 297.

Ohio.— Coe *v.* Peacock, 14 Ohio St. 187. See also Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518.

Pennsylvania.— Ammant *v.* New Alexandria, etc., Turnpike Road, 13 Serg. & R. 210, 15 Am. Dec. 593. See also Loudenschlager *v.* Benton, 3 Grant 384, 4 Phila. 382.

Virginia.— Winchester, etc., R. Co. *v.* Colfelt, 27 Gratt. 777.

United States.— Gue *v.* Tide Water Canal Co., 24 How. 257, 16 L. ed. 635; Covington Drawbridge Co. *v.* Shepherd, 21 How. 112, 16 L. ed. 38; Farmers' L. & T. Co. *v.* St. Joseph, etc., R. Co., 8 Fed. Cas. No. 4,469, 3 Dill. 412.

Locomotive engines, freight and passenger cars of a railroad are liable to levy and sale on execution when not in actual use, like other personal property. Boston, etc., R. Co. *v.* Gilmore, 37 N. H. 410, 72 Am. Dec. 336.

Movables of a street railway company, even though necessary to operation under the company's franchise, have been held in California not to be exempt from seizure and sale under execution. Risdon Iron, etc., Works *v.* Citizens' Traction Co., 122 Cal. 94, 54 Pac. 529, 68 Am. St. Rep. 25.

17. *Alabama.*— Gardner *v.* Mobile, etc., R. Co., 102 Ala. 635, 15 So. 271, 48 Am. St. Rep. 84.

California.— See Hart *v.* Burnett, 15 Cal. 530.

Indiana.— Louisville, etc., R. Co. *v.* Boney, 117 Ind. 501, 20 N. E. 432, 3 L. R. A. 435: Indianapolis, etc., Gravel Road Co. *v.* State, 105 Ind. 37, 4 N. E. 316.

Kentucky.— Louisville Water Co. *v.* Hamilton, 81 Ky. 517.

Maryland.— McColgan *v.* Baltimore Belt R. Co., 85 Md. 519, 36 Atl. 1026; Brady *v.* Johnson, 75 Md. 445, 26 Atl. 49, 20 L. R. A. 737, where this rule was applied to property of a corporation which was of practical use in its operation, although it was not absolutely indispensable to such operation.

Michigan.— Hackley *v.* Mack, 60 Mich. 591, 27 N. W. 871.

Montana.— Northern Pac. R. Co. *v.* Shimmell, 6 Mont. 161, 9 Pac. 889, holding that the Northern Pacific Railroad Company was a military and post road existing under act of congress, and that an office safe used in facilitating its operations could not be taken on execution against it.

Nebraska.— Sherman County Irr., etc., Co. *v.* Drake, 65 Nebr. 699, 91 N. W. 512; Overton Bridge Co. *v.* Means, 33 Nebr. 857, 51 N. W. 240, 29 Am. St. Rep. 514.

North Carolina.— Gooch *v.* McGee, 83 N. C. 59, 35 Am. Rep. 558 [*criticizing* State *v.* Rives, 27 N. C. 297].

Ohio.— Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518; Carey *v.* Pittsburgh, etc., R. Co., 2 Ohio Dec. (Reprint) 85, 1 West. L. Month. 338.

Pennsylvania.— Youngman *v.* Elmira, etc., R. Co., 65 Pa. St. 278; Shamokin Valley R. Co. *v.* Livermore, 47 Pa. St. 465, 86 Am. Dec. 552; Plymouth R. Co. *v.* Colwell, 39 Pa. St. 337, 80 Am. Dec. 526; Susquehanna Canal Co. *v.* Bonham, 9 Watts & S. 27, 28, 42 Am.

corporation necessary to the exercise of its franchise is exempt from execution, this exemption cannot continue after the use of the franchise has been abandoned.[18]

15. Property Fraudulently Conveyed. The remedy of a general creditor against an invalid preferential transfer by an insolvent debtor is by a creditor's bill, not by execution sale of the property as that of the debtor, and suit to vacate the transfer, as such relief would merely give plaintiff a like preference.[19]

16. Property Whose Sale Is Prohibited. The better rule seems to be that laws prohibiting the sale of spirituous liquors in a state, or local option laws prohibiting such sale in counties in which they are in force, do not, in the absence of special statutory provisions, apply to sales under judicial process; and that spirituous liquors are property, and as such under the protection of the law, and may be taken on mesne process or execution.[20]

B. Real Property[21] **— 1. At Common Law — a. Early Rule.** It was a well settled principle of the common law of England that the real estate of a debtor could not be taken in execution, at the suit of a citizen creditor, and sold for the satisfaction of the debt;[22] but for debt due the state or the king land could always be taken in execution.[23]

b. Modification of Rule. But the general rule at common law, in regard to the liability of real estate to be taken in execution as between party and party, was modified by a statute passed in the year 1285,[24] which made such estates liable

Dec. 315 (where a house occupied by a collector of tolls on a canal was held exempt from levy and sale under execution); Covey *v.* Pittsburg, etc., R. Co., 3 Phila. 173 (where it was held that the cars of a railroad company were exempt from execution); Longstreth *v.* Philadelphia, etc., R. Co., 11 Wkly. Notes Cas. 309; Fire Ins. Patrol *v.* Boyd, 44 Leg. Int. 252.

Tennessee.—Baxter *v.* Nashville, etc., Turnpike Co., 10 Lea 488.

United States.— Gue *v.* Tide Water Canal Co., 24 How. 257, 16 L. ed. 635, where the locks, wharf, house, and land belonging to a canal company were held to be exempt.

Reason of rule.— In Foster *v.* Fowler, 60 Pa. St. 27, 31, Thompson, C. J., states the reason for this rule at some length.

The property of a private corporation having no public duties to perform may be taken in execution and sold under an ordinary writ of fieri facias. East Side Bank *v.* Columbus Tanning Co., 170 Pa. St. 1, 32 Atl. 539.

18. Gardner *v.* Mobile, etc., R. Co., 102 Ala. 635, 15 So. 271, 48 Am. St. Rep. 84; Benedict *v.* Heineberg, 43 Vt. 231.

19. Butler *v.* Harrison Land, etc., Co., 139 Mo. 467, 41 S. W. 234, 61 Am. St. Rep. 464. See, generally, Fraudulent Conveyances. But *compare* Heath *v.* Page, 63 Pa. St. 108, 3 Am. Rep. 533.

20. Fears *v.* State, 102 Ga. 274, 29 S. E. 463; State *v.* Johnson, 33 N. H. 441; Fuller *v.* Bean, 30 N. H. 181. See, however, Nichols *v.* Valentine, 36 Me. 322, where it was held that if, in relation to any specific description of articles, the law prohibits such a sale, such articles cannot legally be attached on mesne process or seized on execution. The provisions of the Maine statute under which the above decision was rendered have, however, been held to apply only to such liquors as were liable to seizure and forfeiture, or intended for sale in violation of the provisions of the statute. Preston *v.* Drew, 33 Me. 558, 54 Am. Dec. 639.

In Kansas, under Laws (1881), c. 128, commonly known as the "Prohibitory Liquor Law," it has been held that a levy or execution by a sheriff or constable on intoxicating liquors, and a sale thereunder, are invalid. Standard Oil Co. *v.* Angevine, 6 Kan. App. 312, 51 Pac. 70.

The judicial sale of such liquors is not repugnant to provisions of statutes prohibiting the sale of spirituous liquors without license. Fears *v.* State, 102 Ga. 274, 29 S. E. 463.

21. Fixtures see *supra*, V, A, 12.

22. This rule was considered as a fair and necessary result from the nature of the feudal tenures, according to which all the lands of that country were held. Barbour *v.* Breckenridge, 4 Bibb (Ky.) 548; Coombs *v.* Jordan, 3 Bland (Md.) 284, 22 Am. Dec. 236; Duval *v.* Waters, 1 Bland (Md.) 569, 18 Am. Dec. 350; Jones *v.* Jones, 1 Bland (Md.) 443, 18 Am. Dec. 327; Utica Bank *v.* Mersereau, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189; Drayton *v.* Marshall, Rice Eq. (S. C.) 373, 33 Am. Dec. 84.

23. Murray *v.* Ridley, 3 Harr. & M. (Md.) 171; Hollingsworth *v.* Patten, 3 Harr. & M. (Md.) 125; State *v.* Rogers, 2 Harr. & M. (Md.) 196; Jones *v.* Jones, 1 Bland (Md.) 443, 18 Am. Dec. 327; Rorke *v.* Dayrell, 4 T. R. 402, 2 Rev. Rep. 417.

24. This statute, which gave the writ of elegit, enlarged the remedy of the creditor by declaring that when a debt was recovered or damages adjudged it should be in the election of plaintiff to have a fieri facias, or to have all the debtor's chattels and one half of his lands delivered to him until the debt was levied to a reasonable extent. Jones *v.* Jones, 1 Bland (Md.) 443, 18 Am. Dec. 327. See *supra*, II, E.

Under the writ of elegit, if there was suffi-

to be partially taken in execution.[25] This judicial lien was afterward mainly fortified and enlarged by a statute passed in the year 1732, applicable only to the then colonies of Great Britain, which subjected the whole of the debtor's real estate to be taken in execution and sold for the payment of his debts.[26]

2. Present Rule in United States — a. In General. Under the influence of the English statutes, and by force of statutes enacted in various states upon the subject, the general rule in this country now is that every interest of the debtor in land, whether legal or equitable, is bound by the lien of a judgment against the owner thereof, and is consequently subject to sale under execution issued upon such judgment.[27] However a levy by a sheriff of one state upon real property situated in another state,[28] or in the absence of statute, in another county,[29] is entirely void.

b. Land Held Under Unrecorded Deed[30] — (i) *Interest of Grantor.* In many jurisdictions statutes have been enacted declaring that every deed of real estate shall be void and of no effect against a judgment creditor, a *bona fide* purchaser, or a mortgagee, for a valuable consideration, not having notice thereof, unless such deed shall be recorded within a specified time after its delivery.[31] Such notice, however, may be constructive as well as actual.[32]

cient personalty, the sheriffs could not levy on lands under the Statute of Westminster II, 13 Edw. I, c. 18. Hanson *v.* Barnes, 3 Gill & J. (Md.) 359, 22 Am. Dec. 322.

25. Duvall *v.* Waters, 1 Bland (Md.) 569, 18 Am. Dec. 350; Utica Bank *v.* Mersereau, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 187; Drayton *v.* Marshall, Rice Eq. (S. C.) 373, 33 Am. Dec. 84; Stileman *v.* Ashdown, 2 Atk. 608, 26 Eng. Reprint 763.

26. Allen *v.* Summers, 3 B. Mon. (Ky.) 490; Barbour *v.* Breckenridge, 4 Bibb (Ky.) 548 (holding that land is not subject to the payment of debts contracted prior to Dec. 17, 1792, and a sale and conveyance of land made under an execution in such case conferred no title); Hanson *v.* Barnes, 3 Gill & J. (Md.) 359, 22 Am. Dec. 322 (5 Geo. II, c. 7); Davidson *v.* Beatty, 3 Harr. & M. (Md.) 594; Coombs *v.* Jordan, 3 Bland (Md.) 284, 22 Am. Dec. 236; Duvall *v.* Waters, 1 Bland (Md.) 569, 18 Am. Dec. 350; Jones *v.* Jones, 1 Bland (Md.) 443, 18 Am. Dec. 327; Utica Bank *v.* Mersereau, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 187; Doe *v.* Hazen, 8 N. Brunsw. 87.

27. *California.*— Fish *v.* Fowlie, 58 Cal. 373.

Colorado.— Stock-Growers' Bank *v.* Newton, 13 Colo. 245, 22 Pac. 444.

District of Columbia.—See Nelson *v.* Henry, 2 Mackey 259.

Georgia.— Moses *v.* Eagle, etc., Mfg. Co., 62 Ga. 455.

Indiana.— Frakes *v.* Brown, 2 Blackf. 295.

Missouri.— Eneberg *v.* Carter, 98 Mo. 647, 7 S. W. 522, 14 Am. St. Rep. 664.

New Jersey.— Close *v.* Close, 28 N. J. Eq. 472.

New York.— Sheridan *v.* House, 4 Abb. Dec. 218, 4 Keyes 569; Schenck *v.* Barnes, 25 N. Y. App. Div. 153, 49 N. Y. Suppl. 222; Griffin *v.* Spencer, 6 Hill 525.

Pennsylvania.— Gordon *v.* Inghram, 32 Pa. St. 214, 1 Grant 152; Humphreys *v.* Humphreys, 1 Yeates 427.

South Carolina.— Wieters *v.* Timmons, 25 S. C. 488, 1 S. E. 1.

See 21 Cent. Dig. tit. "Execution," § 68 *et seq.*

Estate defeasible upon contingency.— It has been held in Massachusetts that an estate in fee or in tail, defeasible upon a contingency, is liable to be taken in execution by a creditor of the tenant and held until the happening of the contingency. Phillips *v.* Rogers, 12 Metc. (Mass.) 405.

28. Runk *v.* St. John, 29 Barb. (N. Y.) 585.

29. Morgan *v.* Hannah, 11 Humphr. (Tenn.) 122.

30. Judgment lien in case of unrecorded deed see Judgments.

31. *Louisiana.*— Doughty *v.* Sheriff, 25 La. Ann. 290; Lyons *v.* Cenas, 22 La. Ann. 113.

New Jersey.— Hodge *v.* Amerman, 40 N. J. Eq. 99, 2 Atl. 257; Lewis *v.* Hall, 7 N. J. Eq. 107.

North Carolina.—Moore *v.* Collins, 15 N. C. 384.

Tennessee.— Stinson *v.* Russell, 2 Overt. (Tenn.) 40.

Texas.— See Michael *v.* Knapp, 4 Tex. Civ. App. 464, 23 S. W. 780.

Necessity for registration see Deeds, 13 Cyc. 594.

Property in two parishes.— Where a purchaser acquired property which was divided by the boundary line between two adjoining parishes, and registered his purchase in one of the parishes only, it was held that the part lying in the other parish was liable to sale under execution by a creditor of the grantor having no notice. Dooley *v.* Delaney, 6 La. Ann. 67.

32. Hodge *v.* Amerman, 40 N. J. Eq. 99, 2 Atl. 257; Lewis *v.* Hall, 7 N. J. Eq. 107; Walker *v.* Gilbert, 7 Sm. & M. (Miss.) 456.

The rule has been laid down in Tennessee, however, that creditors are not affected by even actual notice of any real estate deeds, and that land held by such title may be

(II) *INTEREST OF GRANTEE.* Land held by an unregistered deed is subject to levy and sale under execution as the property of the grantee, since such deed vests in the grantee an inchoate legal estate.[33]

c. Where Judgment Is Not a Lien. It has been held in some jurisdictions that real estate may be levied upon and sold under an execution, even though no lien existed upon such property prior to the levy.[34]

d. Conflict of Laws. The liability of property to be sold under legal process is determined by the law of the state where it is situated, and not that of the jurisdiction where the owner resides or where the judgment was rendered.[35]

C. Particular Estates or Interests[36]— **1. GENERAL RULE.** The general rule is that all possible titles to land, contingent or otherwise, where there is a real interest, are subject to seizure and sale on execution; but mere expectancies, such as that of an heir apparent, are not included.[37]

2. VESTED REMAINDERS.[38] The doctrine is well established that a vested estate in remainder is subject to levy and sale under execution.[39]

levied on and sold under execution against the grantor. Coward *v.* Culver, 12 Heisk. 540.

33. Davis *v.* Inscoe, 84 N. C. 396; Morris *v.* Ford, 17 N. C. 412; Price *v.* Sykes, 8 N. C. 87; Coward *v.* Culver, 12 Heisk. (Tenn.) 540; Wilkins *v.* May, 3 Head (Tenn.) 173; Simmons *v.* McKissick, 6 Humphr. (Tenn.) 259; Shields *v.* Mitchell, 10 Yerg. (Tenn.) 1; Vance *v.* McNairy, 3 Yerg. (Tenn.) 171, 24 Am. Dec. 553.

34. Bagley *v.* Ward, 37 Cal. 121, 99 Am. Dec. 256; Palmer *v.* Clark, 4 Abb. N. Cas. (N. Y.) 25; Corey *v.* Cornelius, 1 Barb. Ch. (N. Y.) 571; Youngs *v.* Morrison, 10 Paige (N. Y.) 325; Garset *v.* Hutchinson, 2 Wkly. Notes Cas. (Pa.) 305.

35. Sale *v.* Saunders, 24 Miss. 24, 57 Am. Dec. 157; Hervey *v.* Rhode Island Locomotive Works, 93 U. S. 664, 23 L. ed. 1003 [*following* Green *v.* Van Buskirk, 5 Wall. (U. S.) 307, 18 L. ed. 599].

36. Curtesy see CURTESY, 12 Cyc. 1001.

Dower interest see DOWER, 14 Cyc. 871.

Interest in crop see *supra*, V, A, 5.

Interest of distributee or heir see *infra*, V, L, 3.

Interest of legatee or devisee see *infra*, V, L, 2.

37. *Colorado.*— Barnes *v.* Beighly, 9 Colo. 475, 12 Pac. 906.

Illinois.— Ducker *v.* Burnham, 146 Ill. 9, 34 N. E. 558, 37 Am. St. Rep. 135; Haward *v.* Peavey, 128 Ill. 430, 21 N. E. 503, 15 Am. St. Rep. 120; Whiteford *v.* Hootman, 104 Ill. App. 562.

Massachusetts.— Williams *v.* Amory, 14 Mass. 20.

New Hampshire.— Brown *v.* Gale, 5 N. H. 416.

New York.—Woodgate *v.* Fleet, 44 N. Y. 1.

Ohio.— Columbus Nat. Bank *v.* Tennessee Coal, etc., Co., 62 Ohio St. 564, 57 N. E. 450.

Pennsylvania.— Drake *v.* Brown, 68 Pa. St. 223; De Haas *v.* Bunn, 2 Pa. St. 335, 44 Am. Dec. 201; Rickert *v.* Madeira, 1 Rawle 325; Roe *v.* Humphreys, 1 Yeates 427 (in which case property was devised to a sister of the testator for life, remainder to a nephew for life, and the heirs of his body lawfully begotten, and in default of such heirs to another nephew in fee. And it was held that the estate of the first nephew was included in the words, "lands, tenements and hereditaments," which might be taken and sold on execution); Hunt *v.* Lithgrow, 1 Yeates 24, 1 Am. Dec. 326; Bean *v.* Kulp, 7 Phila. 650 (where it was held that the interest of the owner of the fee, which was subject to a right of way of a railroad, might be sold under execution); Beam *v.* Hamilton, 10 Lanc. Bar 69. *Compare* Patterson *v.* Caldwell, 124 Pa. St. 455, 17 Atl. 18, 10 Am. St. Rep. 598 [*distinguishing* Reed's Appeal, 118 Pa. St. 215, 11 Atl. 787, 4 Am. St. Rep. 588].

United States.— Greene *v.* Daniels, 115 Fed. 449, 53 C. C. A. 379.

See 21 Cent. Dig. tit. "Execution," § 76.

38. Lien of judgment on remainder see, generally, JUDGMENTS.

Remainder of husband or wife see, generally, HUSBAND AND WIFE.

39. *Georgia.*— Wilkinson *v.* Chew, 54 Ga. 602.

Illinois.— Ducker *v.* Burnham, 146 Ill. 9, 34 N. E. 558, 37 Am. St. Rep. 135; Scofield *v.* Olcott, 120 Ill. 362, 11 N. E. 351; Railsback *v.* Lovejoy, 116 Ill. 442, 6 N. E. 504.

Indiana.— Woodford *v.* Leavenworth, 14 Ind. 311; Hooker *v.* Folsom, 4 Ind. 90.

Massachusetts.—Atkins *v.* Bean, 14 Mass. 404; Williams *v.* Amory, 14 Mass. 20.

Missouri.— White *v.* McPheeters, 75 Mo. 286.

New Jersey.— Den *v.* Hillman, 7 N. J. L. 180.

New York.— Sheridan *v.* House, 4 Abb. Dec. 218, 4 Keyes, 569.

North Carolina.— Ellwood *v.* Plummer, 78 N. C. 392.

Pennsylvania.— Drake *v.* Brown, 68 Pa. St. 223; Humphreys *v.* Humphreys, 1 Yeates 427, 2 Dall. 223, 1 L. ed. 357; Crabb *v.* Jones, 2 Miles 130.

South Carolina.— Bonham *v.* Bishop, 23 S. C. 96; Harrison *v.* Maxwell, 2 Nott & M. 347, 10 Am. Dec. 611.

Tennessee.— Brett *v.* Williamson, 12 Lea 659; Davis *v.* Goforth, 1 Lea 31; Puryear *v.* Edmundson, 4 Heisk. 43; Kissom *v.* Nelson, 2 Heisk. 4; Wiley *v.* Bridgman, 1 Head 68 (where it was held that a bill in chancery is

3. Contingent Remainders. It has been held in some jurisdictions that contingent interests, such as contingent remainders, are not liable to be sold under execution.[40]

4. Remainder in Chattels. It has also been held in some jurisdictions that a remainder interest in a live chattel cannot be levied upon by execution at law,[41] while in other jurisdictions it has been held that the interest of a tenant in remainder in slaves is liable to be seized and sold under execution.[42]

5. Reversions. A reversion being an estate vested *in præsenti*, although to take effect in possession and profit *in futuro*, may be aliened and charged as an estate in possession, and is therefore liable to be taken and sold under execution.[43]

6. Executory Devises. The estate of one claiming by executory devise, defeasible upon a contingency, takes a vested estate in fee or in tail, defeasible upon the happening of such contingency, which is subject to execution, and may be taken and held by the execution creditor until the happening of the contingency.[44]

7. Life-Estates. The general rule is that the interest of a judgment debtor in an estate for life is subject to levy and sale under execution,[45] in the absence of

not necessary to reach such interest, and will be dismissed upon demurrer, the remedy at law being complete); Kelly *v.* Morgan, 3 Yerg. 437. See also Lockwood *v.* Nye, 2 Swan 515, 58 Am. Dec. 73.

Canada.— Doe *v.* Hazen, 8 N. Brunsw. 87.

Compare Mudd *v.* Durham, 33 S. W. 1116, 17 Ky. L. Rep. 1202.

See 21 Cent. Dig. tit. "Execution," § 79.

Remainder in tail.— It was held in Holland *v.* Cruft, 3 Gray (Mass.) 162, that under the Massachusetts statute making estates tail "subject to the payment of the debts of the tenant in tail, in the same manner as other real estates" that a remainder in tail is not liable to the debts of the remainder-man.

40. *Illinois.*— Haward *v.* Peavy, 128 Ill. 430, 21 N. E. 503, 15 Am. St. Rep. 120.

Iowa.— Taylor *v.* Taylor, 118 Iowa 407, 92 N. W. 71.

Massachusetts.— Thomson *v.* Ludington, 104 Mass. 193.

New York.— Jackson *v.* Middleton, 52 Barb. 9. See, however, Sheridan *v.* House, 4 Abb. Dec. 218, 4 Keyes 569.

North Carolina.—Watson *v.* Dodd, 72 N. C. 240 [*affirming* 68 N. C. 528]. See also Watson *v.* Watson, 56 N. C. 400.

South Carolina.— Roundtree *v.* Roundtree, 26 S. C. 450, 2 S. E. 474; Allston *v.* State Bank, 2 Hill Eq. 235.

Tennessee.— Nichols *v.* Guthrie, 109 Tenn. 535, 73 S. W. 107; Henderson *v.* Hill, 9 Lea 26.

Virginia.— Young *v.* Young, 89 Va. 675, 17 S. E. 470, 23 L. R. A. 642; Roanes *v.* Archer, 4 Leigh 550. See also Scott *v.* Gibbon, 5 Munf. 86.

England.— Scott *v.* Scholey, 8 East 467, 9 Rev. Rep. 487.

See 21 Cent. Dig. tit. "Execution," § 79.

41. Dargen *v.* Richardson, Dudley (S. C.) 62 (holding that an undivided residuary interest in remainder of personal property is not subject to levy and sale under execution); Puryear *v.* Edmondson, 4 Heisk. (Tenn.) 43; Perkins *v.* Clack, 3 Head (Tenn.) 734; State Bank *v.* Nelson, 3 Head (Tenn.) 634; Lockwood *v.* Nye, 2 Swan (Tenn.) 515, 58 Am. Dec. 73; Allen *v.* Scurry, 1 Yerg. (Tenn.) 36, 39, 24 Am. Dec. 436 (where the court said: "The most analogous case in the books to the present is, that in Dyer, 67*b*, note by Ch. J. Treby, from 22 Ed. 4, 10, 'that beasts let for years cannot be taken in execution for the debt of the lessor. Same case in 10 Viner, 560, pl. 4, which says, that it cannot be done, till after the lease is determined, for, says the book, the lessor himself could not take them during the year,' and yet the debtor has the property in reversion. This case is considered law by Ch. Baron Comyns, 4th volume of his Digest, p. 121"); Smith *v.* Niles, 20 Vt. 315, 49 Am. Dec. 782. See also Leslie *v.* Briggs, 5 Leigh (Va.) 6.

42. Burns *v.* Ray, 18 B. Mon. (Ky.) 392; Wheeler *v.* Wheeler, 39 N. C. 210; Carter *v.* Spencer, 29 N. C. 14; Knight *v.* Leak, 19 N. C. 133.

43. Shipp *v.* Gibbs, 88 Ga. 114, 14 S. E. 196; Woodgate *v.* Fleet, 44 N. Y. 1, 11 Abb. Pr. N. S. (N. Y.) 41; Payn *v.* Beal, 4 Den. (N. Y.) 405; Murrell *v.* Roberts, 33 N. C. 424, 53 Am. Dec. 419; Burton *v.* Smith, 13 Pet. (U. S.) 464, 10 L. ed. 248.

44. Phillips *v.* Rogers, 12 Metc. (Mass.) 405; De Haas *v.* Bunn, 2 Pa. St. 335, 44 Am. Dec. 201. *Compare* Patterson *v.* Caldwell, 124 Pa. St. 455, 17 Atl. 18, 10 Am. St. Rep. 598 [*distinguishing* Reed's Appeal, 118 Pa. St. 215, 11 Atl. 787, 4 Am. St. Rep. 588].

45. *Alabama.*— Montgomery Branch Bank *v.* Wilkins, 7 Ala. 589; Harkins *v.* Coalter, 2 Port. 463; Mendenhall *v.* Randon, 3 Stew. & P. 251.

Connecticut.— Hitchcock *v.* Hotchkiss, 1 Conn. 470.

Georgia.— Bozeman *v.* Bishop, 94 Ga. 459, 20 S. E. 11.

Illinois.— Henderson *v.* Harness, 176 Ill. 302, 52 N. E. 68; Newman *v.* Willetts, 52 Ill. 98.

Indiana.— Thompson *v.* Murphy, 10 Ind. App. 464, 37 N. E. 1094.

Kentucky.—Boyce *v.* Waller, 2 B. Mon. 91.

Maine.— McKeen *v.* Gammon, 33 Me. 187.

any clause in the instrument creating the estate restricting the power of alienation.[46] The tendencies of modern decisions in the construction of the various statutes on this subject is to hold that, in the absence of the appointment of trustees, the power of alienation cannot be restricted so as to exempt a life-estate from levy and sale under execution against a life-tenant.[47]

8. Estates For Years — a. In General. An estate for a term of years is regarded as a chattel and may be sold on execution.[48]

b. Leasehold Interests[49] — (1) *In Real Property.* At common law, a leasehold interest in lands, no matter for what term of years, was a chattel, and in the absence of statute to the contrary may be levied upon and sold as personal property.[50]

Mississippi.— Sale *v.* Saunders, 24 Miss. 24, 57 Am. Dec. 157.

New Hampshire.— McClure *v.* Melendy, 44 N. H. 469.

Pennsylvania.— Moyer *v.* Casper, 7 Pa. Dist. 720.

South Carolina.— De Millen *v.* McAlliley, 2 McMull. 499.

See 21 Cent. Dig. tit. "Execution," § 80.

Trust estate.— Under Ky. Gen. St. c. 63, art. 1, § 21, it has been held that a life-estate in land is subject to levy and sale under execution, even when the legal title thereto is held by another in trust for the use and benefit of the execution defendant. Anderson *v.* Briscoe, 12 Bush 344.

Under various Pennsylvania statutes providing for the subjection of a life-estate to a lien of a judgment by sequestration of rents and profits thereof, or by writ of venditioni exponas after inquest by the sheriff or coroner as to the yearly value of the estate, it has been held that the sale of such estate on a writ of fieri facias is in contravention of the statute, and void. Du Four *v.* Bubb, 199 Pa. St. 107, 48 Atl. 900; Henry *v.* McClellan, 146 Pa. St. 34, 23 Atl. 385 [*distinguishing* Datesman's Appeal, 127 Pa. St. 348, 17 Atl. 1086, 1100]; Reigart *v.* Small, 2 Pa. St. 487; Parget *v.* Stambaugh, 2 Pa. St. 485; Near *v.* Watts, 8 Watts (Pa.) 319.

46. Hatcher *v.* Smith, 103 Ga. 843, 31 S. E. 447 [*distinguishing* Bozeman *v.* Bishop, 94 Ga. 459, 20 S. E. 11] (in this case the father's interest was contingent upon, and subject to be diminished by, after-born children, whose rights would be the same as those in life when the levy was made); Emerson *v.* Marks, 24 Ill. App. 642; Macomber *v.* Batavia Bank, 12 Hun (N. Y.) 294; Bunch *v.* Hardy, 3 Lea (Tenn.) 543. See also Drennen *v.* Ross, 21 Ark. 375.

47. Ehrisman *v.* Sener, 162 Pa. St. 577, 29 Atl. 719. See also Hahn *v.* Hutchinson, 159 Pa. St. 133, 28 Atl. 167.

The present rule in Illinois.— The rule has now been laid down in Illinois that, except by the intervention of trustees, an estate cannot be devised for the benefit of the legatee in such a manner that it cannot be seized for the debts of one having a life-estate therein, as the Illinois statute authorizes the sale of such estate under execution, unless the statute with reference to exemptions applies thereto. Henderson *v.* Harness, 176 Ill. 302, 52 N. E. 68.

48. *Indiana.*— Barr *v.* Doe, 6 Blackf. 335, 38 Am. Dec. 146.

New Hampshire.— Adams *v.* French, 2 N. H. 387.

New York.— Bigelow *v.* Finch, 17 Barb. 394.

North Carolina.— Doe *v.* Peters, 44 N. C. 457, 59 Am. Dec. 563.

Pennsylvania.— Williams *v.* Downing, 18 Pa. St. 60; Sowers *v.* Vie, 14 Pa. St. 99; Dalzell *v.* Lynch, 4 Watts & S. 255; Lerew *v.* Rinehart, 3 Pa. Co. Ct. 50.

England.— *In re* Newcastle, L. R. 8 Eq. 700, 39 L. J. Ch. 68, 21 L. T. Rep. N. S. 343, 18 Wkly. Rep. 8.

See 21 Cent. Dig. tit. "Execution," § 78.

Tenancy from year to year.— Where a tenant entered into an agreement for a lease and paid the stipulated rent, it was held that a tenancy from year to year was created, which the sheriff might levy upon and sell under a fieri facias. Doe *v.* Smith, 1 M. & R. 137.

49. Interest in crops see *supra*, V, A, 5.

Lien of judgment on leasehold see, generally, Judgments.

50. *Alabama.*— McCreery *v.* Berney, 116 Ala. 224, 22 So. 577, 67 Am. St. Rep. 105.

Connecticut.—See also Mun *v.* Carrington, 2 Root 15.

Indiana.— Barr *v.* Doe, 6 Blackf. 335, 38 Am. Dec. 146.

Kentucky.— Smith *v.* Scanlan, 106 Ky. 572, 51 S. W. 152, 21 Ky. L. Rep. 169, where the doctrine was applied, even where the tenant had sublet the property.

Maryland.— Coombs *v.* Jordan, 3 Bland 284, 22 Am. Dec. 236.

Massachusetts.— Shelton *v.* Codman, 3 Cush. 318; Chapman *v.* Gray, 15 Mass. 439.

Michigan.— Buhl *v.* Kenyon, 11 Mich. 249, 83 Am. Dec. 738.

New York.— Bigelow *v.* Finch, 17 Barb. 394. See also Crouse *v.* Frothingham, 97 N. Y. 105 [*reversing* 27 Hun 123].

North Carolina.— Doe *v.* Peters, 44 N. C. 457, 57 Am. Dec. 564.

Ohio.— Bisbee *v.* Hall, 3 Ohio 449 (where lease was for ninety-nine years); Acklin *v.* Waltermier, 19 Ohio Cir. Ct. 372, 10 Ohio Cir. Dec. 629.

Pennsylvania.— Bismarck Bldg., etc., Assoc. *v.* Bolster, 92 Pa. St. 123; Williams *v.* Downey, 18 Pa. St. 60; Sterling *v.* Com., 2 Grant 162; Dalzell *v.* Lynch, 4 Watts & S. 255; Lerew *v.* Rinehart, 3 Pa. Co. Ct. 50; McDermott *v.* Crippen, 5 L. T. N. S. 109.

(II) *In Personal Property.* Likewise personal property leased for a term may be seized and sold under execution against the lessee, the purchaser at the sale acquiring the right to retain and use the property to the end of the term.[51] And the better rule seems to be that a clause in the lease prohibiting alienation will not prevent the sale of such lease under execution against the tenant, unless judgment was fraudulently confessed with a view to defeat such restriction.[52] However a lease *pur autre vie* is not subject to sale as personal property under an execution.[53]

9. Estate at Will or by Sufferance. The better rule seems to be that the interest which a tenant at will or by sufferance has in another's real estate is not such an interest in land as can be sold on execution.[54]

10. Where Will Directs Conversion of Property. Where a testator directs his executor to sell his land and divide the proceeds among designated legatees, it is well settled that such legatees have no estate in the land which can be the subject of execution.[55]

11. Joint or Several Property — a. Real Property. The general rule is that the property of tenants in common is liable to be levied upon under an execution against one of them, and the share of the execution debtor sold by the sheriff.[56]

Tennessee.— Thomas *v.* Blackemore, 5 Yerg. 113.

England.— Sparrow *v.* Bristol, 1 Marsh. 10, 4 E. C. L. 454; Doe *v.* Smith, 1 M. & R. 137.

See 21 Cent. Dig. tit. "Execution," § 83.

Under Mo. Rev. St. (1889) § 6368, providing that no tenant, for a term not exceeding two years, shall assign or transfer his term or interest, or any part thereof, to another, without the written consent of the landlord, it was held that such interest was not subject to sale under execution against the tenant. Holliday *v.* Aehle, 99 Mo. 273, 12 S. W. 797.

Likewise under Sayles Civ. St. Tex. art. 3122, providing that persons leasing lands or tenements shall not rent or lease them during the term of the lease to another person without first obtaining the landlord's consent, it has been held that the lessee's interest is not subject to levy and sale under execution against the lessee in the absence of an agreement which permits assignment or subletting at the will of the lessee. Moser *v.* Tucker, 87 Tex. 94, 26 S. W. 1044, 1105.

51. Otis *v.* Wood, 3 Wend. (N. Y.) 498; Van Antwerp *v.* Newman, 2 Cow. (N. Y.) 543; Houston *v.* Simpson, 46 N. C. 513; Allen *v.* Urquhart, 19 Tex. 480; Manning's Case, 8 Coke 94*b*; Duffill *v.* Spottiswoode, 3 C. & P. 435, 14 E. C. L. 650; Dean *v.* Whittaker, 1 C. & P. 347, 12 E. C. L. 208; Gordon *v.* Harper, 7 T. R. 9, 4 Rev. Rep. 369; Ward *v.* Macauley, 4 T. R. 489.

52. Smith *v.* Putnam, 3 Pick. (Mass.) 221; Riggs *v.* Pursell, 66 N. Y. 193; Jackson *v.* Silvernail, 15 Johns. (N. Y.) 278; Jackson *v.* Corliss, 7 Johns. (N. Y.) 531; Doe *v.* Carter, 8 T. R. 57, 4 Rev. Rep. 586.

53. Com. *v.* Allen, 2 Phila. (Pa.) 22.

54. Wildy *v.* Doe, 26 Miss. 35; Bigelow *v.* Finch, 17 Barb. (N. Y.) 394, 11 Barb. (N. Y.) 498; Colvin *v.* Baker, 2 Barb. (N. Y.) 206; Waggoner *v.* Speck, 3 Ohio 292.

Under the Pennsylvania statute, however, the rule has been held to be otherwise, and the interest of a tenant at will of another is subject to sale under execution. Gerber *v.* Hartwig, 11 Wkly. Notes Cas. 197.

55. *Arkansas.*— Turner *v.* Davis, 41 Ark. 270.

Kentucky.— Mudd *v.* Durham, 33 S. W. 1116, 17 Ky. L. Rep. 1202.

Maryland.— Paisley *v.* Holzshu, 83 Md. 325, 34 Atl. 832; Cronise *v.* Hardt, 47 Md. 433.

Nebraska.— Chick *v.* Ives, 2 Nebr. (Unoff.) 879, 90 N. W. 751.

New York.— Sayles *v.* Best, 20 N. Y. Suppl. 951.

Pennsylvania.— Hunter *v.* Anderson, 152 Pa. St. 386, 25 Atl. 538; Roland *v.* Miller, 100 Pa. St. 47; Jones *v.* Caldwell, 97 Pa. St. 42; Evans' Appeal, 63 Pa. St. 183; Brolasky *v.* Gally, 51 Pa. St. 509; Stuck *v.* Mackey, 4 Watts & S. 196; Morrow *v.* Brenizer, 2 Rawle 185; Allison *v.* Wilson, 13 Serg. & R. 330; Campbell *v.* King, 1 Am. L. Reg. 122.

South Carolina.— Walker *v.* Killian, 62 S. C. 482, 40 S. E. 887.

See, however, Brett *v.* Williamson, 12 Lea (Tenn.) 659.

56. *Alabama.*— Hill *v.* Jones, 65 Ala. 214.

California.— Waldman *v.* Broder, 10 Cal. 378.

Connecticut.— Starr *v.* Leavitt, 2 Conn. 243, 7 Am. Dec. 268. See also Johnson *v.* Connecticut Bank, 21 Conn. 148.

Georgia.— Baker *v.* Shepherd, 37 Ga. 12.

Illinois.— Smith *v.* Crawford, 81 Ill. 296.

Kentucky.— Trabue *v.* Conners, 84 Ky. 283, 1 S. W. 470, 8 Ky. L. Rep. 288.

Maine.— See also Argyle *v.* Dwinel, 29 Me. 29.

Michigan.— Midgley *v.* Walker, 101 Mich. 583, 60 N. W. 296, 45 Am. St. Rep. 431.

New Hampshire.— Davis *v.* Barnard, 60 N. H. 550; Smith *v.* Knight, 20 N. H. 9; Thompson *v.* Barber, 12 N. H. 563. See also Taylor *v.* Emery, 21 N. H. 258.

b. Personal Property. Likewise the legal interest of a defendant in undivided chattels may be seized and sold under execution, since, in contemplation of law, his interest is perfectly distinct from that of his cotenant, and each has a several interest, although the occupation be joint.[57] And mere authority to sell property held jointly, given by one cotenant to another, does not exempt the share of the former from levy and sale under execution.[58]

12. Rent Reserved to Grantor. It has been held in one jurisdiction that a rent reserved to the grantor on a conveyance in fee of land cannot be taken on execution against the grantor, even where the conveyance contains a clause of distress and a provision for reëntry,[59] while in another jurisdiction it has been held that rent reserved to the grantor is such an interest as may be taken in execution against the grantor and sold.[60]

13. Interest of Licensee. Where a mere license is given by the owner of land to another, to enter thereon and plant and raise crops, or extract oil, gas, and minerals, or to operate mines, if so agreed upon, such crops, oil, gas, or minerals, as the case may be, will belong wholly to the licensee, and may be levied upon as his property.[61]

14. Interests in Public Lands — a. Prior to Issuance of Patent. A purchaser of land from the government, by the act of entry and payment of the purchase-money, acquires an inchoate legal title, and, prior to the issuance of the patent, the interests of such purchaser, for which he has received a certificate of final payment, may be levied upon and sold under execution, the patent, when issued, taking effect by relation, as of the day when the payment was made.[62] So the

Pennsylvania.—Arnold *v.* Cessna, 25 Pa. St. 34. See also McCormick *v.* Harvey, 9 Watts 482.

South Carolina.— Riley *v.* Gaines, 14 S. C. 454.

Texas.— Brown *v.* Renfro, 63 Tex. 670; Aycock *v.* Kimbrough, 61 Tex. 543; Schley *v.* Hale, 1 Tex. App. Civ. Cas. § 930.

Vermont.— Galusha *v.* Sinclear, 3 Vt. 394.

United States.— See also Gordon *v.* Lewis, 10 Fed. Cas. No. 5,612, 1 Sumn. 525.

See 21 Cent. Dig. tit. "Execution," § 87.

A grant of land to a husband and wife "in joint tenancy" makes them joint tenants, and the interest of each is subject to execution. Thornburg *v.* Wiggins, 135 Ind. 178, 34 N. E. 999, 41 Am. St. Rep. 422, 22 L. R. A. 42.

57. *Alabama.*— Thompson *v.* Mawhinney, 17 Ala. 362, 52 Am. Dec. 176.

California.—Stanton *v.* French, 83 Cal. 194, 23 Pac. 355.

Georgia.— Leonard *v.* Scarborough, 2 Ga. 73.

Illinois.— White *v.* Jones, 38 Ill. 159; James *v.* Stratton, 32 Ill. 202. See also Neary *v.* Cahill, 20 Ill. 214.

Maryland.— McElderry *v.* Flannagan, 1 Harr. & G. 308.

Massachusetts.— Hayden *v.* Binney, 7 Gray 416; Melville *v.* Brown, 15 Mass. 82.

New Hampshire.— Pettingill *v.* Bartlett, 1 N. H. 87.

New York.— Fiero *v.* Betts, 2 Barb. 633; Mersereau *v.* Norton, 15 Johns. 179; Waddell *v.* Cook, 2 Hill 47, 37 Am. Dec. 372. See also Pardee *v.* Haynes, 10 Wend. 630.

North Carolina.— Blevins *v.* Baker, 33 N. C. 291; Islay *v.* Stewart, 20 N. C. 297.

Pennsylvania.— Hopkins *v.* Forsyth, 14 Pa. St. 34, 53 Am. Dec. 513.

Tennessee.— Rains *v.* McNairy, 4 Humphr. 356, 40 Am. Dec. 651.

Vermont.— Burton *v.* Kennedy, 63 Vt. 350, 21 Atl. 529, 25 Am. St. Rep. 769.

See 21 Cent. Dig. tit. "Execution," § 87.

In Kentucky, see, however, Mullin *v.* Bullock, 19 S. W. 8, 14 Ky. L. Rep. 40; Clore *v.* Davis, 15 Ky. L. Rep. 399.

58. Thompson *v.* Mawhinney, 17 Ala. 362, 52 Am. Dec. 176.

59. Payn *v.* Beal, 4 Den. (N. Y.) 405 [*overruling* People *v.* Haskins, 7 Wend. 463].

60. Hurst *v.* Lithgrow, 2 Yeates (Pa.) 24, 1 Am. Dec. 326.

61. Harris *v.* Frink, 49 N. Y. 24, 10 Am. Rep. 318; Like *v.* McKinstry, 3 Abb. Dec. (N. Y.) 62, 4 Keyes (N. Y.) 397 [*affirming* 41 Barb. 186]; Richburg First Nat. Bank *v.* Dow, 41 Hun (N. Y.) 13; Whipple *v.* Foote, 2 Johns. (N. Y.) 418, 3 Am. Dec. 442; Acklin *v.* Waltermier, 19 Ohio Cir. Ct. 372, 10 Ohio Cir. Dec. 629. *Contra,* Meridian Nat. Bank *v.* McConica, 8 Ohio Cir. Ct. 442, 4 Ohio Cir. Dec. 106.

62. *Alabama.*— Falkner *v.* Leith, 15 Ala. 9; Land *v.* Hopkins, 7 Ala. 115; Rosser *v.* Bradford, 9 Port. 354; Goodlet *v.* Smithson, 5 Port. 245, 30 Am. Dec. 561.

Illinois.— Jackson *v.* Spink, 59 Ill. 404.

Iowa.— Cavender *v.* Smith, 5 Iowa 157; Levi *v.* Thompson, Morr. 235.

Kentucky.— Thomas *v.* Marshall, Hard. 19.

Michigan.— Kercheval *v.* Wood, 3 Mich. 509.

Mississippi.— Hamblen *v.* Hamblen, 33 Miss. 455, 69 Am. Dec. 358; Huntingdon *v.* Grantland, 33 Miss. 453; Martin *v.* Nash, 31 Miss. 324; Lindsey *v.* Henderson, 27 Miss. 502; Smith *v.* State, 13 Sm. & M. 140.

Missouri.—Block *v.* Morrison, 112 Mo. 343,

interest of a miner in his mining claim on public lands has been held to be property, and, not being exempted by statute, may be taken and sold under execution against him.[63]

b. Preëmption Claims. A preëmption claim constitutes no interest in land, and therefore such a claim cannot be levied upon and sold on execution.[64]

c. Improvements on Public Lands. In some jurisdictions the improvements of settlers on public lands are regarded as property, the proper subject-matter of binding contracts between individuals, and hence subject to seizure and sale under execution.[65] In other jurisdictions, however, by force of statute, improvements on public lands on which debtors reside or which they cultivate are not subject to execution.[66]

20 S. W. 340; Davis *v.* Smith, (1892) 20 S. W. 344; Hammond *v.* Johnston, 93 Mo. 198, 6 S. W. 83.

North Carolina.— Wilson *v.* Deweese, 114 N. C. 653, 19 S. E. 699. See, however, Deaver *v.* Parker, 37 N. C. 40.

Ohio.— Jackson *v.* Williams, 10 Ohio 69.

Tennessee.— Lee *v.* Crossna, 6 Humphr. 281; Hall *v.* Heffly, 5 Humphr. 581, 6 Humphr. 444; Shute *v.* Harder, 4 Hayw. 293. See also Bumpas *v.* Gregory, 8 Yerg. 46.

Washington.— Phœnix Min., etc., Co. *v.* Scott, 20 Wash. 48, 54 Pac. 777.

United States.— Levi *v.* Thompson, 4 How. 17, 11 L. ed. 856; Carroll *v.* Safford, 3 How. 441, 11 L. ed. 671; Kingman *v.* Holthaus, 59 Fed. 305; McWilliams *v.* Withington, 7 Fed. 326, 7 Sawy. 205.

See 21 Cent. Dig. tit. "Execution," § 85.

See, however, Sage *v.* Cartwright, 9 N. Y. 49, in which case only about one fourth of the purchase-money had been paid.

Claimants under imperfect Spanish title.— It was held in Landes *v.* Brant, 10 How. (U. S.) 348, 13 L. ed. 449, where the title of a claimant of land in Missouri under an imperfect Spanish title, after presentation of his claim to the commissioners, and before the issuing of a certificate by them under the act of congress of 1807, chapter 36, was subject to seizure and sale on execution, according to the laws of Missouri. To the same effect see Landes *v.* Perkins, 12 Mo. 238. See also Walbridge *v.* Fllsworth, 44 Cal. 353.

Land held under a special warrant may be levied upon under fieri facias in Pennsylvania and sold under a venditioni exponas, but land held under an indescriptive warrant cannot be so levied upon. Lewis *v.* Meredith, 15 Fed. Cas. No. 8,328, 3 Wash. 81.

The right to land acquired by actual settlement is the subject of lien, levy, and sale by the sheriff in Pennsylvania. Myer *v.* Myer, 8 Watts (Pa.) 430.

An indescriptive land-warrant gives no title to any particular land until surveyed, and therefore none can be seized on execution. Tryon *v.* Munson, 77 Pa. St. 250.

An unexecuted warrant for land cannot be levied upon and sold under a fieri facias in Pennsylvania as the property of the warrantee. Kinter *v.* Jenks, 43 Pa. St. 445; Heath *v.* Knapp, 10 Watts (Pa.) 405.

63. Hughes *v.* Devlin, 23 Cal. 501; State *v.* Moore, 12 Cal. 56; McKeon *v.* Bisbee, 9 Cal. 137, 70 Am. Dec. 642. See also Merced Min. Co. *v.* Fremont, 7 Cal. 130.

64. *Alabama.*—Rhea *v.* Hughes, 1 Ala. 219, 34 Am. Dec. 772.

California.— Moore *v.* Besse, 43 Cal. 511.

Colorado.— McMillen *v.* Gerstle, 19 Colo. 98, 34 Pac. 681.

Georgia.— Garlick *v.* Robinson, 12 Ga. 340.

Missouri.— Cravens *v.* Moore, 61 Mo. 178; Bray *v.* Ragsdale, 53 Mo. 170; Bower *v.* Higbee, 9 Mo. 259, 261.

Pennsylvania.— Heath *v.* Knapp, 10 Watts 405.

Tennessee.— Scott *v.* Price, 2 Head 532; Brown *v.* Massey, 3 Humphr. 470.

See 21 Cent. Dig. tit. "Execution," § 85.

Rule in Illinois.— The rule has been laid down in Illinois that the interest and improvements of an occupant of public lands are subject to execution, provided that title derived from the government is not affected thereby. Lester *v.* White, 44 Ill. 464; May *v.* Symms, 20 Ill. 95; Sargeant *v.* Kellogg, 10 Ill. 273; Delaunay *v.* Burnett, 9 Ill. 454, 492.

Interest in school lands.— It has been held in Indiana that one in possession of school lands under a certificate conditioned upon the execution of a title at the expiration of ten years, provided the holder within that time pays the purchase-price, has no legal interest in the land subject to execution. Jeffries *v.* Sherburn, 21 Ind. 112.

A mere occupant's claim on public land is not subject to be taken and sold on execution. Brown *v.* Massey, 3 Humphr. (Tenn.) 470.

65. Switzer *v.* Skiles, 8 Ill. 529, 44 Am. Dec. 723; Turney *v.* Saunders, 5 Ill. 527. See also Wilson *v.* Webster, Morr. (Iowa) 312, 41 Am. Dec. 230; Zickafosse *v.* Hulick, Morr. (Iowa) 175, 39 Am. Dec. 458; Ratcliff *v.* Bridger, 1 Rob. (La.) 57, 36 Am. Dec. 683.

These possessory rights, however, cannot be enforced against the United States or its grantee, and may cease altogether on the alienation of the land by the government. McKiernan *v.* Hesse, 51 Cal. 594; Switzer *v.* Skiles, 8 Ill. 529, 44 Am. Dec. 723; Cook *v.* Foster, 7 Ill. 652.

66. Rhea *v.* Hughes, 1 Ala. 219, 34 Am. Dec. 772; Healy *v.* Conner, 40 Ark. 352; Roseville Alta Min. Co. *v.* Iowa Gulch Min. Co., 15 Colo. 29, 24 Pac. 920, 22 Am. St. Rep. 373; Hatfield *v.* Wallace, 7 Mo. 112.

D. Equitable Estates or Interests[67]**—1. In General—a. Early Doctrine.** The general rule was well established that in the absence of statute a debtor's equitable estate in real[68] or personal property, although accompanied with possession, could not be seized and sold under a fieri facias,[69] and it was necessary for the judgment creditor to go into equity to subject such interest.[70] But in some jurisdictions the rule was early adopted, without the aid of statute, that all real estate of the debtor, whether legal or equitable, was bound by a judgment against him, and might be taken in execution and sold for the satisfaction of the debt.[71]

67. Sale of vendee's interest see *infra*, V, H, 2, b.

Sale of vendor's interest see *infra*, V, H, 2, a.

68. *Alabama.*— Wilson *v.* Beard, 19 Ala. 629; Hogan *v.* Smith, 16 Ala. 600; Elmore *v.* Harris, 13 Ala. 360; Doe *v.* McKinney, 5 Ala. 719.

Arkansas.— Pettit *v.* Johnson, 15 Ark. 55.

Georgia.— Colvard *v.* Coxe, Dudley 99.

Illinois.— Baker *v.* Copenbarger, 15 Ill. 103, 58 Am. Dec. 600.

Indiana.— Hutchins *v.* Hanna, 8 Ind. 533.

Kentucky.— Blight *v.* Banks, 6 T. B. Mon. 192, 17 Am. Dec. 136; McDermid *v.* Morrison, 1 A. K. Marsh. 173; January *v.* Bradford, 4 Bibb 566; Hancock *v.* Brinker, 3 Bibb 249; Allen *v.* Sanders, 2 Bibb 94.

Michigan.— Gorham *v.* Arnold, 22 Mich. 247 [*approving* Gorham *v.* Wing, 10 Mich. 486].

Mississippi.— Hopkins *v.* Carey, 23 Miss. 54; Goodwin *v.* Anderson, 5 Sm. & M. 730.

New Jersey.— Cairns *v.* Hay, 21 N. J. L. 174; Halsted *v.* Davison, 10 N. J. Eq. 290; Ketchum *v.* Johnson, 4 N. J. Eq. 370; Vancleve *v.* Groves, 4 N. J. Eq. 230; Disborough *v.* Outcalt, 1 N. J. Eq. 298.

New York.—Bates *v.* Ledgerwood Mfg. Co., 130 N. Y. 200, 29 N. E. 102 [*affirming* 4 N. Y. Suppl. 524]; Hendricks *v.* Robinson, 2 Johns. Ch. 283; Bogart *v.* Perry, 1 Johns. Ch. 51. See Edmeston *v.* Lyde, 1 Paige 637, 19 Am. Dec. 454.

Ohio.— Jackman *v.* Hallock, 1 Ohio 318, 13 Am. Dec. 627; Roads *v.* Symmes, 1 Ohio 281, 13 Am. Dec. 621; Cutler *v.* Brinker, Tapp. 343; McLeary *v.* Snider, 2 Ohio Dec. (Reprint) 59, 1 West. L. Month. 270.

Oregon.— Smith *v.* Ingles, 2 Oreg. 43.

South Carolina.— White *v.* Kavanagh, 8 Rich. 377.

Texas.— Edwards *v.* Norton, 55 Tex. 405. See also Hendricks *v.* Snediker, 30 Tex. 296.

United States.— Potter *v.* Couch, 141 U. S. 296, 11 S. Ct. 1005, 35 L. ed. 721; Lenox *v.* Notrebe, 15 Fed. Cas. No. 8,246*c*, Hempst. 251; Sawyer *v.* Morte, 21 Fed. Cas. No. 12,401, 3 Cranch C. C. 331.

See 21 Cent. Dig. tit. "Execution," § 88.

Early rule in Maryland.— In Maryland, as early as 1810, it was by statute declared to be lawful for any sheriff or other officer to whom a writ of fieri facias was directed, to take, seize, and expose to sale any equitable interest or interests which defendant named in such writ might have or hold in any lands, tenements, or hereditaments. McMechen *v.* Marman, 8 Gill & J. 57, 67. To the same effect see Hopkins *v.* Stump, 2 Harr. & J. 301. But see Smith *v.* McCann, 24 How. (U. S.) 398, 16 L. ed. 714, for rule prior to 1810.

69. *Maryland.*— Martin *v.* Jewell, 37 Md. 530; Myers *v.* Amey, 21 Md. 302; Rose *v.* Bevan, 10 Md. 466, 69 Am. Dec. 170; Harris *v.* Alcock, 10 Gill & J. 226, 32 Am. Dec. 158.

Massachusetts.—Badlam *v.* Tucker, 1 Pick. 389, 11 Am. Dec. 202.

Michigan.— Gypsum, etc., Co. *v.* Kent Cir. Judge, 97 Mich. 631, 57 N. W. 191; Van Norman *v.* Jackson Cir. Judge, 45 Mich. 204, 7 N. W. 796.

Mississippi.— Commercial Bank *v.* Thompson, 7 Sm. & M. 443.

Missouri.— Boyce *v.* Smith, 16 Mo. 317; Yeldell *v.* Stemmons, 15 Mo. 443.

New Jersey.— Disborough *v.* Outcalt, 1 N. J. Eq. 298.

New York.—Wilkes *v.* Ferris, 5 Johns. 335, 4 Am. Dec. 364; Hendricks *v.* Robinson, 2 Johns. Ch. 283.

North Carolina.—McKeithan *v.* Walker, 66 N. C. 95; Sprinkle *v.* Martin, 66 N. C. 55.

Ohio.— Roads *v.* Symmes, 1 Ohio 281, 13 Am. Dec. 621.

South Carolina.— Dargin *v.* Richardson, Dudley 62; Wylie *v.* White, 10 Rich. Eq. 294; Brown *v.* Wood, 5 Rich. Eq. 155.

Tennessee.— Benton *v.* Pope, 5 Humphr. 392; Planters' Bank *v.* Henderson, 4 Humphr. 75; McNairy *v.* Eastland, 10 Yerg. 310; Allen *v.* Holland, 3 Yerg. 343; Childs *v.* Derrick, 1 Yerg. 79; Shute *v.* Harder, 1 Yerg. 3, 24 Am. Dec. 427; Wilson *v.* Carver, 4 Hayw. 90.

England.— Metcalf *v.* Scholey, 2 B. & P. N. R. 461; Lyster *v.* Dolland, 3 Bro. Ch. 478, 29 Eng. Reprint 653, 1 Ves. Jr. 431, 30 Eng. Reprint 422; Scott *v.* Scholey, 8 East 467, 9 Rev. Rep. 487.

See 21 Cent. Dig. tit. "Execution," § 88.

70. Smith *v.* McCann, 24 How. (U. S.) 398, 16 L. ed. 714; Sawyer *v.* Morte, 21 Fed. Cas. No. 12,401, 3 Cranch C. C. 331.

71. Flanagin *v.* Daws, 2 Houst. (Del.) 476 (where this rule was laid down, except where the interest was the subject of an active trust); Stephens' Appeal, 8 Watts & S. (Pa.) 186; Rodebaugh *v.* Sanks, 2 Watts (Pa.) 9; Chahoon *v.* Hollenbeck, 16 Serg. & R. (Pa.) 425, 16 Am. Dec. 587; Auwerter *v.* Mathiot, 9 Serg. & R. (Pa.) 397, 402 (where the court said: "At common law, an equitable estate is not bound by a judgment, or subject to an execution; but the creditor may have relief in chancery. We have no court of chancery, and have, therefore, from necessity, established it as a principle, that both judgments

b. Modern Doctrine. The trend of modern legislation is to subject every real interest of the debtor to the satisfaction of his debts, and now, by statutory enactment in most of the states, every equitable interest in real[72] or personal property is subject to levy and sale under execution against a judgment debtor.[73]

2. Deed of Trust — a. Interest of Grantor. The general rule is that after the execution of a deed of trust, the grantor has no such interest in the trust property as is the subject of sale under execution at law;[74] but it has been held in some jurisdictions that, if the deed of trust leaves an interest in the trust property in the grantor, such interest may be sold on execution against him.[75]

b. Interest of Trustee or Possessor of Naked Legal Title. It is not every legal interest that is made liable to sale under an execution. It is essential that the debtor have a beneficial interest in the property.[76] Therefore a trust estate is not subject to sale under an execution issued against a trustee, he having no beneficial interest in such estate.[77] The better doctrine, however, seems to be that where there is a conveyance to trustees, one of whom is to take a beneficial

and execution have an immediate operation on equitable estates"); Cavene *v.* McMichael, 8 Serg. & R. (Pa.) 441; Ely *v.* Beaumont, 5 Serg. & R. (Pa.) 124; Lazarus *v.* Bryson, 3 Binn. (Pa.) 54; Burd *v.* Dansdale, 2 Binn. (Pa.) 80; Waters *v.* Collot, 2 Yeates (Pa.) 26; Roe *v.* Humphreys, 1 Yeates (Pa.) 427.

72. *Missouri.*— Street *v.* Goss, 62 Mo. 226; Morgan *v.* Bouse, 53 Mo. 219; Bobb *v.* Woodward, 50 Mo. 95.

Nebraska.— Rosenfield *v.* Chada, 12 Nebr. 25, 10 N. W. 465.

North Carolina.—Deaton *v.* Gaines, 4 N. C. 424.

Ohio.— Miner *v.* Wallace, 10 Ohio 403.

Washington.— Calhoun *v.* Leary, 6 Wash. 17, 32 Pac. 1070.

See 21 Cent. Dig. tit. "Execution," § 88.

Bond for title.— It has been held under a Mississippi statute that where a person has a bond for title to land on the payment of the purchase-money, and pays such purchase-money, he is vested with such estate in the land as can be sold under execution. Thompson *v.* Wheatley, 5 Sm. & M. (Miss.) 499.

73. Middletown Sav. Bank *v.* Jarvis, 33 Conn. 372. See also Flagg *v.* Platt, 32 Conn. 216.

74. *Alabama.*—Wilson *v.* Beard, 19 Ala. 629.

Arkansas.— Pope *v.* Boyd, 22 Ark. 535; Biscoe *v.* Royston, 18 Ark. 508.

Kentucky.— Major *v.* Deer, 4 J. J. Marsh. 585.

Massachusetts.— Johnson *v.* Whiton, 118 Mass. 340.

Mississippi.— Brown *v.* Bartee, 10 Sm. & M. 268.

See 21 Cent. Dig. tit. "Execution," § 89.

75. Kennedy *v.* Nunan, 52 Cal. 326; Warner *v.* Rice, 66 Md. 436, 8 Atl. 84. See also Janes *v.* Throckmorton, 57 Cal. 368.

76. Baker *v.* Copenbarger, 15 Ill. 103, 58 Am. Dec. 600; Houston *v.* Newland, 7 Gill & J. (Md.) 480; Morrison *v.* Herrington, 120 Mo. 665, 25 S. W. 568; Smith *v.* McCann, 24 How. (U. S.) 398, 16 L. ed. 714; Osterman *v.* Baldwin, 6 Wall. (U. S.) 116, 18 L. ed. 730. See also Pierce *v.* Brown, 7 Wall. (U. S.) 205, 19 L. ed. 134.

77. *Alabama.*— Morgan *v.* Morgan, 3 Stew. 383, 21 Am. Dec. 638.

Georgia.— Hurst *v.* De Kalb County, 110 Ga. 33, 35 S. E. 294.

Illinois.— Emmons *v.* Moore, 85 Ill. 304.

Indiana.— Hollingsworth *v.* Trueblood, 59 Ind. 542; Elliott *v.* Armstrong, 2 Blackf. 198.

Iowa.— Thomas *v.* Kennedy, 24 Iowa 397, 95 Am. Dec. 740.

Kansas.— Harrison *v.* Andrews, 18 Kan. 535.

Kentucky.— Booker *v.* Carlile, 14 Bush 154.

Maine.— Eastman *v.* Fletcher, 45 Me. 302.

Maryland.— Cooke *v.* Brice, 20 Md. 397.

Mississippi.— Hancock *v.* Titus, 39 Miss. 224.

Missouri.— Morrison *v.* Herrington, 120 Mo. 665, 25 S. W. 568.

Montana.— Princeton Min. Co. *v.* Butte First Nat. Bank, 7 Mont. 530, 19 Pac. 210 (where stress was laid upon the fact that the judgment creditor had actual notice of the existence of the trust); Story *v.* Black, 5 Mont. 26, 1 Pac. 1, 51 Am. Rep. 37; Chumasero *v.* Viar, 3 Mont. 376.

Nebraska.— Mosher *v.* Neff, 33 Nebr. 770, 51 N. W. 138.

New Hampshire.—See also Cutting *v.* Pike, 21 N. H. 347.

New Jersey.— Campfield *v.* Johnson, 5 N. J. Eq. 245.

New York.— Siemon *v.* Schurck, 29 N. Y. 598 [*affirming* 33 Barb. 9]; Lounsbury *v.* Purdy, 11 Barb. 490; Mallory *v.* Clark, 9 Abb. Pr. 358.

South Carolina.— Giles *v.* Pratt, Dudley 54; Wylie *v.* White, 10 Rich. Eq. 294.

Tennessee.—Nashville Trust Co. *v.* Weaver, 102 Tenn. 66, 50 S. W. 763; Renshaw *v.* Tullahoma First Nat. Bank, (Ch. App. 1900) 63 S. W. 194.

Texas.— Brotherton *v.* Anderson, 27 Tex. Civ. App. 587, 66 S. W. 682; Hawkins *v.* Willard, (Civ. App. 1896) 38 S. W. 365.

Vermont.— Hart *v.* Farmers', etc., Bank, 33 Vt. 252.

See 21 Cent. Dig. tit. "Execution," § 90.

Equitable title with right of possession.— A person having an equitable title to. with right of possession of, land which really belongs to, and is held in trust for, another,

interest in the property, he takes a legal estate to the extent of such interest, which may be seized and sold under execution.[78]

c. Interest of Cestui Que Trust — (1) *General Rule.* The generally accepted doctrine in the United States, in construing statutes based upon 29 Car. II, is that in order to subject the equitable estate of a *cestui que trust* to execution at law, the trust must be clear and simple, and for the benefit of the debtor alone, and that equitable interests held jointly with another person are not subject to sale under execution.[79] The tenth section of the English statute of frauds, making trust estates liable to execution for debts of the *cestui que trust*,[80] did not extend to the provinces, and in some of the states it has never been adopted.[81]

has no interest therein subject to execution. Quell *v.* Hanlin, 81 Mo. 441.

Trustee with beneficial interest.— It was held in French *v.* Edwards, 9 Fed. Cas. No. 5,098, 5 Sawy. 266, that the interest of persons to whom land was conveyed as trustees of an unincorporated association will pass on execution sale under a judgment for a debt of the association, recovered in an action against all the members, including such trustees.

Trust not appearing on face of deed.— Where a deed of bargain and sale of real estate was made for the purpose of having the grantee convey same to the wife of the grantor, but contained no trust on its face, it was held that such deed vested such an ostensible title in the grantee as might be subjected by his judgment creditors as against a reconveyance to the wife of the original grantor, which was not recorded within six months from its date. Nelson *v.* Henry, 2 Mackey (D. C.) 259.

78. Bolles *v.* State Trust Co., 27 N. J. Eq. 308; Renshaw *v.* Tullahoma First Nat. Bank, (Tenn. Ch. App. 1900) 63 S. W. 194. See also Mason *v.* Mason, 2 Sandf. Ch. (N. Y.) 432.

79. *Arkansas.*— Pettit *v.* Johnson, 15 Ark. 55.

Indiana.— Zimmerman *v.* Makepeace, 152 Ind. 199, 52 N. E. 992.

Iowa.— Meek *v.* Brooks, 87 Iowa 610, 54 N. W. 456, 43 Am. St. Rep. 410.

Mississippi.— Presley *v.* Rodgers, 24 Miss. 520; Hopkins *v.* Carey, 23 Miss. 54; Wolfe *v.* Dowell, 13 Sm. & M. 103, 51 Am. Dec. 147; Boarman *v.* Catlet, 13 Sm. & M. 149; Goodwin *v.* Anderson, 5 Sm. & M. 730.

Missouri.— McIlvaine *v.* Smith, 42 Mo. 45, 97 Am. Dec. 295; Broadwell *v.* Yantis, 10 Mo. 398.

New Jersey.— Linn *v.* Davis, 58 N. J. L. 29, 32 Atl. 129.

New York.— Guthrie *v.* Gardner, 19 Wend. 414; Lynch *v.* Utica Ins. Co., 18 Wend. 236; Jackson *v.* Walker, 4 Wend. 462; Jackson *v.* Bateman, 2 Wend. 570; Bogart *v.* Smith, 17 Johns. 351, 8 Am. Dec. 411; Kellogg *v.* Wood, 4 Paige 578; Ontario Bank *v.* Root, 3 Paige 478.

North Carolina.— Robinson *v.* Ingram, 126 N. C. 327, 35 S. E. 612; Love *v.* Smathers, 82 N. C. 369; Tally *v.* Reed, 72 N. C. 336; Williams *v.* Council, 49 N. C. 206; Melton *v.* Davidson, 41 N. C. 194; Mebane *v.* Mebane, 39 N. C. 131, 44 Am. Dec. 102; Battle *v.* Petway, 27 N. C. 576, 44 Am. Dec. 59; McGee *v.* Hussey, 27 N. C. 255; Davis *v.* Garrett, 25 N. C. 459; Den *v.* Rich, 23 N. C. 553; Freeman *v.* Perry, 17 N. C. 243; Harrison *v.* Battle, 16 N. C. 537; Gillis *v.* McKay, 15 N. C. 172; Brown *v.* Graves, 11 N. C. 342; Hawkins *v.* Sneed, 10 N. C. 149.

Pennsylvania.— Girard L. Ins., etc., Co. *v.* Chambers, 46 Pa. St. 485, 86 Am. Dec. 513; Eyrick *v.* Hetrick, 13 Pa. St. 488; Still *v.* Spear, 3 Grant 306; Ashurst *v.* Given, 5 Watts & S. 323.

South Carolina.— Bristow *v.* McCall, 16 S. C. 545; White *v.* Kavanagh, 8 Rich. 377; Rice *v.* Burnett, Speers Eq. 579, 42 Am. Dec. 336.

Tennessee.— Ross *v.* Young, 5 Sneed 627.

Texas.— Edwards *v.* Norton, 55 Tex. 405; Wallace *v.* Campbell, 53 Tex. 229; Hendricks *v.* Snediker, 30 Tex. 296; Gamble *v.* Dabney, 20 Tex. 69.

Virginia.— Johnston *v.* Zane, 11 Gratt. 552; Coutts *v.* Walker, 2 Leigh 268.

United States.— Potter *v.* Couch, 141 U. S. 296, 11 S. Ct. 1005, 35 L. ed. 721; Brooks *v.* Raynolds, 59 Fed. 923, 8 C. C. A. 370 [*reversing* 53 Fed. 783].

England.— See Doe *v.* Evans, 2 L. J. Exch. 179, 3 Tyrw. 339.

See 21 Cent. Dig. tit. "Execution," § 91.

See, however, Flournoy *v.* Johnson, 7 B. Mon. (Ky.) 693, where it was held that the interest of one of several *cestuis que trustent* may be properly decreed to be sold to pay the debts of such beneficiary.

Allotment of trust property.— It was held in Strode *v.* Churchhill, 2 Litt. (Ky.) 75, that where slaves have been conveyed in trust for the benefit of several, the *cestui que trust* may, without the intervention of the trustee, divide the use among themselves, and the slaves thus allotted to each are subject to execution for the debts of each respectively.

New York statute of uses was construed in Bogart *v.* Perry, 1 Johns. Ch. 52.

The estate of a cestui que trust may be sold and conveyed by him, as well as any other estate, and therefore such estate is liable to sale under execution. Elliott *v.* Armstrong, 2 Blackf. (Ind.) 198.

80. Doe *v.* Greenhill, 4 B. & Ald. 684, 6 E. C. L. 653; Forth *v.* Norfolk, 4 Madd. 503; 29 Car. II, c. 3.

81. Rawson *v.* Plaisted, 151 Mass. 71, 23 N. E. 722; Merrill *v.* Brown, 12 Pick. (Mass.) 216; Russell *v.* Lewis, 2 Pick. (Mass.) 508; Gorham *v.* Arnold, 22 Mich. 247; Gorham *v.*

(II) *Where Cestui Que Trust Has Whole Beneficial Interest.* In some jurisdictions, by force of statute, where the *cestui que trust* has the whole beneficial interest in the property, his estate and interest therein are subject to the levy of an execution, without resort to the remedies afforded by a court of equity.[82] And in other jurisdictions this rule is applied where the *cestui que trust* is in possession of the property.[83]

(III) *Perfect Equities.* In other jurisdictions, only perfect or passive equities are subject to execution against the *cestui que trust*, such as where lands have been purchased and the purchase-money paid, so that the vendee is entitled to a conveyance.[84]

3. Where Consideration Is Furnished by One Party and Conveyance Made to Another — a. Interest of Grantee. Where money or effects of one person are advanced and used in the purchase of property by another, who takes the title to himself, a trust results by operation of law in favor of the party whose money or property has been used, and the party in whom the naked legal title is vested has no such interest in the property as can be subjected under execution against him.[85]

b. Interest of Party Furnishing Consideration. On the other hand, where property is purchased by a judgment debtor with his own money, and the title thereto is taken in the name of another, there is a resulting trust in favor of such debtor, and the property is subject to sale under execution against him.[86] Under

Wing, 10 Mich. 486; Trask *v.* Green, 9 Mich. 358; Boarman *v.* Catlett, 13 Sm. & M. (Miss.) 149; Hogan *v.* Jaques, 19 N. J. Eq. 123, 97 Am. Dec. 644; Halsted *v.* Davison, 10 N. J. Eq. 290.

82. *Indiana.*— State Bank *v.* Macy, 4 Ind. 362.

Kentucky.—Blanchard *v.* Taylor, 7 B. Mon. 645; Eastland *v.* Jordan, 3 Bibb 186; Johnson *v.* Barnes, 4 S. W. 176, 8 Ky. L. Rep. 956.

Missouri.— Tufts *v.* Volkening, 122 Mo. 631, 27 S. W. 522; Foster *v.* Potter, 37 Mo. 525; Appleman *v.* American Sporting Goods Co., 64 Mo. App. 71.

New Hampshire.— Hutchins *v.* Heywood, 50 N. H. 491; Upham *v.* Varney, 15 N. H. 462; Pritchard *v.* Brown, 4 N. H. 397, 17 Am. Dec. 431.

Pennsylvania.— Girard L. Ins., etc., Co. *v.* Chambers, 46 Pa. St. 485, 86 Am. Dec. 513.

See 21 Cent. Dig. tit. "Execution," § 91.

Dry or passive trust.— It has been held in Delaware that the equitable interest of a *cestui que trust* in a dry or passive trust is liable to execution and sale on a judgment recovered against him. Doe *v.* Lank, 4 Houst. 648.

The rule has been laid down in Kentucky that property or funds cannot be vested in trustees for the use of another, without subjecting it to the debts of the *cestui que trust.* Samuel *v.* Salter, 3 Metc. 259.

83. Clarke *v.* Windham, 12 Ala. 798; Cook *v.* Kennerly, 12 Ala. 42; Carleton *v.* Banks, 7 Ala. 32.

84. *Alabama.*— Smith *v.* Cockrell, 66 Ala. 64; Shaw *v.* Lindsey, 60 Ala. 344; Wilson *v.* Beard, 19 Ala. 629; Doe *v.* McKinney, 5 Ala. 719.

Arkansas.— See also Pope *v.* Boyd, 22 Ark. 535.

Delaware.— Doe *v.* Lank, 4 Houst. 648.

Georgia.— Pitts *v.* McWhorter, 3 Ga. 5, 46 Am. Dec. 405.

Missouri.— McIlvaine *v.* Smith, 42 Mo. 45, 97 Am. Dec. 295; Brant *v.* Robertson, 16 Mo. 129; Broadwell *v.* Yantis, 10 Mo. 398.

Honest trust.— It was held in Page *v.* Goodman, 43 N. C. 16, that the act of 1812 (N. C. Rev. St. c. 45, § 4), authorizing the sale of trust estates by execution, only related to trusts which would be enforced between the *cestui que trust* and the trustee — an honest trust — and not one infected with fraud, in respect to which the court would not act at the instance of either party.

85. Anderson *v.* Biddle, 10 Mo. 23; McCartney *v.* Bostwick, 32 N. Y. 53 [*reversing* 31 Barb. 390]; Baker *v.* Hardin, 10 Heisk. (Tenn.) 300; Sandford *v.* Weeden, 2 Heisk. (Tenn.) 71; Thomas *v.* Walker, 6 Humphr. (Tenn.) 93. But *compare* Bracken *v.* Milner, 99 Mo. App. 187, 73 S. W. 225.

86. *Colorado.*— Hexter *v.* Clifford, 5 Colo. 168.

Indiana.— Tevis *v.* Doe, 3 Ind. 129.

Maine.— Gray *v.* Chase, 57 Me. 558; Low *v.* Marco, 53 Me. 45.

Massachusetts.— Peterson *v.* Farnum, 121 Mass. 476.

Missouri.— Herrington *v.* Herrington, 27 Mo. 560; Dunnica *v.* Coy, 24 Mo. 167, 69 Am. Dec. 420; Rankin *v.* Harper, 23 Mo. 579; Evans *v.* Wilder, 5 Mo. 313.

New Hampshire.— Pritchard *v.* Brown, 4 N. H. 397, 17 Am. Dec. 431.

New York.— Guthrie *v.* Gardner, 19 Wend. 414; Jackson *v.* Bateman, 2 Wend. 570; Foote *v.* Colvin, 3 Johns. 216, 3 Am. Dec. 478. See also Arnot *v.* Beadle, Lalor 181.

North Carolina.— Moore *v.* McDuffy, 10 N. C. 578.

Pennsylvania.— Walter *v.* Gernant, 13 Pa. St. 515, 53 Am. Dec. 491.

South Carolina.— Richardson *v.* Mounce, 19 S. C. 477.

Tennessee.—Thomas *v.* Walker, 6 Humphr. 93; Gupton *v.* McCawley, 3 Humphr. 468;

the statutes of some states, however, the equitable title must be accompanied by actual possession, and a mere equitable interest, the judgment debtor not being in possession, cannot be seized and sold on execution at law.[87]

E. Mortgaged Property — 1. Interest of Mortgagor — a. Rule at Common Law. Upon the principle of the common law that no property but that in which the debtor has a legal title is liable to be taken under execution against him, an equity of redemption is not liable to sale under execution against the mortgagor, since a mortgage, at common law, operated as a conveyance of the legal title and left in the mortgagor, whether he continued in possession or not, a mere equity.[88]

Smitheal *v.* Gray, 1 Humphr. 491, 34 Am. Dec. 664. See also Cunningham *v.* Wood, 4 Humphr. 417.

Vermont.— Dewey *v.* Long, 25 Vt. 564.

See 21 Cent. Dig. tit. "Execution," § 93.

Contra.— Mayer *v.* Williams, 37 Fla. 244, 19 So. 632 (holding that the execution creditor must seek relief in equity); Robinson *v.* Springfield Co., 21 Fla. 203.

In Alabama it has been held that the "perfect equity" in lands which the statute declares subject to levy and sale under execution at law does not include the interest of a purchaser who, having paid the purchase-money, takes the conveyance of the title to his wife. Goodbar *v.* Daniel, 88 Ala. 583, 7 So. 254, 16 Am. St. Rep. 76; Smith *v.* Cockrell, 66 Ala. 64. To the same effect see Mitchell *v.* Robertson, 15 Ala. 412.

In New York under the statute of that state it has been declared that the resulting trust at common law was abrogated, and the person paying the consideration must take the conveyance to himself or he could have no legal or equitable interest in the land, and where a husband paid the consideration and the conveyance was taken to his wife, the land could not be sold under an execution upon a judgment recovered against him. Garfield *v.* Hatmaker, 15 N. Y. 475 [*overruling* on this point Wait *v.* Day, 4 Den. 439, and *approving* Brewster *v.* Power, 10 Paige 562]; Donovan *v.* Sheridan, 37 N. Y. Super. Ct. 256.

In South Carolina the rule is laid down that a resulting trust is not subject to sale under an execution. White *v.* Kavanagh, 8 Rich. 377; Thomson *v.* Peake, 7 Rich. 373; Bauskett *v.* Holsonback, 2 Rich. 624; Harrison *v.* Hollis, 2 Nott & M. 578.

In Tennessee it has been held that, although a resulting trust is an equitable title, yet so peculiar is its character that it is the subject of levy and sale by execution at law. Butler *v.* Rutledge, 2 Coldw. 4. It was held in Russell *v.* Stinson, 3 Hayw. 1, that 29 Car. II, c. 3, is in force in Tennessee, and by force of it an equitable estate, being a trust dependent upon a legal estate, is subject to be taken in execution. Where a debt, secured by a deed of trust, is paid by the maker of the deed, the realty conveyed is thereby discharged of the trust and is liable to execution against the maker. Hannum *v.* Wallace, 4 Humphr. 143.

Where a husband bought land which he paid for with his own money, but directed the title to be made to a third person in trust for his wife, it was held that the husband had no such estate in the land as could be sold under execution against him, as the trust which would be presumed in his favor, from the fact of the purchase-money being his, was rebutted by the express trust which he declared in favor of his wife. Williams *v.* Council, 49 N. C. 206. See also Wall *v.* Fairley, 77 N. C. 105.

87. Plattsmouth First Nat. Bank *v.* Tighe, 49 Nebr. 299, 68 N. W. 490; Dworak *v.* More, 25 Nebr. 735, 41 N. W. 777. See Nessler *v.* Neher, 18 Nebr. 649, 26 N. W. 471; Haynes *v.* Baker, 5 Ohio St. 253; Baird *v.* Kirtland, 8 Ohio 21; Scott *v.* Douglass, 7 Ohio 227; Douglass *v.* Huston, 6 Ohio 156; Roads *v.* Symmes, 1 Ohio 281, 13 Am. Dec. 621.

88. *Alabama.*— Paulling *v.* Barron, 32 Ala. 9.

Arkansas.— Jennings *v.* McIlroy, 42 Ark. 236, 48 Am. Rep. 61.

Connecticut.— Scripture *v.* Johnson, 3 Conn. 211.

Georgia.— Groves *v.* Williams, 69 Ga. 614.

Illinois.—Davenport *v.* Karnes, 70 Ill. 465; Blair *v.* Chamblin, 39 Ill. 521, 89 Am. Dec. 322; Watson *v.* Reissig, 24 Ill. 281, 76 Am. Dec. 746; Merry *v.* Bostwick, 13 Ill. 398, 54 Am. Dec. 434.

Iowa.— Vanslyck *v.* Mills, 34 Iowa 375.

Maine.— Barrows *v.* Turner, 50 Me. 127; Deering *v.* Lord, 45 Me. 293; Smith *v.* Smith, 24 Me. 555; Wolfe *v.* Dorr, 24 Me. 104; Sawyer *v.* Mason, 19 Me. 49; Sargent *v.* Carr, 12 Me. 396; Melody *v.* Chandler, 12 Me. 282; Holbrook *v.* Baker, 5 Me. 309, 17 Am. Dec. 236.

Massachusetts.— Cochrane *v.* Rich, 142 Mass. 15, 6 N. E. 781; Evans *v.* Warren, 122 Mass. 303; Prout *v.* Root, 116 Mass. 410; Badlam *v.* Tucker, 1 Pick. 389, 11 Am. Dec. 202; Atkins *v.* Sawyer, 1 Pick. 351, 11 Am. Dec. 188; Hooton *v.* Grout, Quincy 343.

Michigan.— Preston *v.* Ryan, 45 Mich. 174, 7 N. W. 819; Gale *v.* Hammond, 45 Mich. 147, 7 N. W. 761 (by statute); Bacon *v.* Kimmel, 14 Mich. 201.

Mississippi.— Marlow *v.* Johnson, 31 Miss. 128; Cantzon *v.* Dorr, 27 Miss. 245; Baldwin *v.* Jenkins, 23 Miss. 206; Henry *v.* Fullerton, 13 Sm. & M. 631; Boarman *v.* Catlett, 13 Sm. & M. 149; Wolfe *v.* Doe, 13 Sm. & M. 103, 51 Am. Dec. 147; Thornhill *v.* Gilmer, 4 Sm. & M. 153.

New Hampshire.— Haven *v.* Low, 2 N. H. 13, 9 Am. Dec. 25.

New Jersey.— Woodside *v.* Adams, 40 N. J. L. 417.

This doctrine is still adhered to in some of the United States, at least as to chattel mortgages.[89] However, the mortgagor's interest in the mortgaged property is subject to execution after the debt has been discharged in full, even before satisfaction of the mortgage is executed, if he then has the whole beneficial interest and the mortgagee the naked legal title.[90]

b. Rule in United States — (i) *PERSONAL PROPERTY.* Now, however, in a majority of the states, either by force of statute or by the adoption of the equitable view of mortgages, the doctrine is well established that a mortgage of property is not a common-law conveyance on condition, but a mere security for the mortgage debt, and that, as long as the possessory right of a mortgagor of chattels remains, his interest in the mortgaged property is subject to sale under execution against him.[91] In some jurisdictions, however, the rule is laid down that after default, when the mortgagee or the trustee in a deed of trust has the right to take

New York.— Marsh *v.* Lawrence, 4 Cow. 461.

North Carolina.— Burgin *v.* Burgin, 23 N. C. 160; Camp *v.* Coxe, 18 N. C. 52; Allison *v.* Gregory, 5 N. C. 333.

Tennessee.— Smith *v.* Taylor, 11 Lea 738; Garretson *v.* Brien, 3 Heisk. 534; Combs *v.* Young, 4 Yerg. 218, 26 Am. Dec. 225; Hurt *v.* Reeves, 5 Hayw. 50.

West Virginia.— Doheny *v.* Atlantic Dynamite Co., 41 W. Va. 1, 23 S. E. 525.

United States.—Van Ness *v.* Hyatt, 13 Pet. 294, 10 L. ed. 168.

England.— Plunket *v.* Penson, 2 Atk. 290, 26 Eng. Reprint 577; Metcalf *v.* Scholey, 5 B. & P. N. R. 461; Lyster *v.* Dolland, 3 Bro. Ch. 478, 29 Eng. Reprint 653, 1 Ves. Jr. 431, 30 Eng. Reprint 422; Scott *v.* Scholey, 8 East 467, 9 Rev. Rep. 487; Solley *v.* Gower, 2 Vern. Ch. 61, 23 Eng. Reprint 649.

See 21 Cent. Dig. tit. "Execution," § 95 *et seq.*

89. *Alabama.*—Planters', etc., Bank *v.* Willis, 5 Ala. 770; Adams *v.* Tanner, 5 Ala. 740.

Arkansas.— Jennings *v.* McIlroy, 42 Ark. 236, 48 Am. Rep. 61.

District of Columbia.— Mayse *v.* Gaddis, 2 App. Cas. 20.

Illinois.— Pike *v.* Colvin, 67 Ill. 227.

Iowa.— Deering *v.* Wheeler, 76 Iowa 496, 41 N. W. 200; McConnell *v.* Denham, 72 Iowa 494, 34 N. W. 298; Wells *v.* Chapman, 59 Iowa 658, 13 N. W. 841; Gordon *v.* Hardin, 33 Iowa 550; Campbell *v.* Leonard, 11 Iowa 489.

Kentucky.— Newman *v.* Mantle, 109 Ky. 292, 58 S. W. 783, 22 Ky. L. Rep. 823, 95 Am. St. Rep. 372.

Maine.— Holbrook *v.* Baker, 5 Me. 309, 17 Am. Dec. 236.

Massachusetts.— Lamb *v.* Johnson, 10 Cush. 126; Lyon *v.* Coburn, 1 Cush. 278; Brackett *v.* Bullard, 12 Metc. 308; Marcey *v.* Darling, 8 Pick. 283.

Michigan.— Bacon *v.* Kimmel, 14 Mich. 201; Tannahill *v.* Tuttle, 3 Mich. 104, 61 Am. Dec. 480.

Missouri.— Sexton *v.* Monks, 16 Mo. 156; Spalding *v.* Taylor, 1 Mo. App. 34.

New York.— Hall *v.* Sampson, 35 N. Y. 274, 91 Am. Dec. 56; Galen *v.* Brown, 22 N. Y. 37; Craft *v.* Brandow, 61 N. Y. App. Div. 247, 70 N. Y. Suppl. 364.

Oklahoma.— Moore *v.* Calvert, 8 Okla. 358, 58 Pac. 627.

United States.— Lewis *v.* Dillard, 76 Fed. 688, 22 C. C. A. 488 (recognizing the Arkansas rule in regard to sale under execution of chattel mortgages); *In re* Wrisley, 30 Fed. Cas. No. 18,103.

See 21 Cent. Dig. tit. "Execution," § 95.

90. Johnson *v.* Seneca State Bank, 59 Kan. 250, 52 Pac. 860; Boarman *v.* Catlett, 13 Sm. & M. (Miss.) 149; Wolfe *v.* Doe, 13 Sm. & M. (Miss.) 103, 51 Am. Dec. 147.

91. *Alabama.*— Hamilton *v.* Phillips, 120 Ala. 177, 24 So. 587, 74 Am. St. Rep. 29; Marriott *v.* Givens, 8 Ala. 694; McDonald *v.* Foster, 5 Ala. 664; Magee *v.* Carpenter, 4 Ala. 469; Furnell *v.* Hogan, 5 Stew. & P. 192; McGregor *v.* Hall, 3 Stew. & P. 397.

Georgia.— De Vaughn *v.* Byrom, 110 Ga. 904, 36 S. E. 267.

Illinois.— Durfee *v.* Grinnell, 69 Ill. 371; Pike *v.* Colvin, 67 Ill. 227; Spaulding *v.* Mozier, 57 Ill. 148.

Indiana.— Foster *v.* Bringham, 99 Ind. 505; Emmons *v.* Hawn, 75 Ind. 356; Hackleman *v.* Goodman, 75 Ind. 202; Sparks *v.* Compton, 70 Ind. 393; Raymond *v.* Parisho, 70 Ind. 256; Olds *v.* Andrews, 66 Ind. 147; Landers *v.* George, 49 Ind. 309; Coe *v.* McBrown, 22 Ind. 252.

Kansas.— Rankine *v.* Greer, 38 Kan. 343, 16 Pac. 680, 5 Am. St. Rep. 571.

Kentucky.— Chisholm *v.* Mitchell, 5 J. J. Marsh. 361; Jameson *v.* Porter, 2 T. B. Mon. 71.

Michigan.— Nelson *v.* Ferris, 30 Mich. 497. See also Anderson *v.* Brenneman, 44 Mich. 198, 6 N. W. 222.

Minnesota.— Galde *v.* Forsyth, 72 Minn. 248, 75 N. W. 219.

New Jersey.—Atkinson *v.* Hires, 43 N. J. L. 297; Woodside *v.* Adams, 40 N. J. L. 417.

New York.— Hathaway *v.* Brayman, 42 N. Y. 322, 1 Am. Rep. 524; Hall *v.* Sampson, 35 N. Y. 274, 91 Am. Dec. 56; Manning *v.* Monaghan, 28 N. Y. 585; Goulet *v.* Asseler, 22 N. Y. 225; Lansingburgh Bank *v.* Crary, 1 Barb. 542; Bailey *v.* Burton, 8 Wend. 339.

Ohio.— Kelly *v.* Purcell, 6 Ohio Dec. (Reprint) 920, 8 Am. L. Rec. 705.

Rhode Island.— Arnold *v.* Chapman, 13 R. I. 586.

possession and sell the property, the mortgagor's interest therein cannot be levied upon, although only a portion of the demand is due, and the property greatly exceeds in value the amount then due and payable;[92] this line of decisions being

Texas.— Wootton *v.* Wheeler, 22 Tex. 338; Mensing *v.* Axer, 2 Tex. Unrep. Cas. 268.

Wisconsin.—Cotton *v.* Watkins, 6 Wis. 629; Cotton *v.* Marsh, 3 Wis. 221.

See 21 Cent. Dig. tit. "Execution," § 95.

A mortgagor of chattels, rightfully in possession, has a leviable interest.

Alabama.— O'Neal *v.* Wilson, 21 Ala. 288; Harbinson *v.* Harrell, 19 Ala. 753; Fontaine *v.* Beers, 19 Ala. 722.

Illinois.— Monmouth Second Nat. Bank *v.* Gilbert, 174 Ill. 485, 51 N. E. 584, 66 Am. St. Rep. 306 [*reversing* 70 Ill. App. 251]; Simmons *v.* Jenkins, 76 Ill. 479; People *v.* Dickson, 65 Ill. App. 99; Holladay *v.* Bartholomae, 11 Ill. App. 206.

Iowa.— Rindskoff *v.* Lyman, 16 Iowa 260.

Missouri.— Springate *v.* Koppelman Furniture Co., 51 Mo. App. 1; State *v.* Carroll, 24 Mo. App. 358.

New York.— Oswego First Nat. Bank *v.* Dunn, 97 N. Y. 149, 49 Am. Rep. 517 [*reversing* 29 Hun 529]; Hamill *v.* Gillespie, 48 N. Y. 556; Hall *v.* Sampson, 35 N. Y. 274, 91 Am. Dec. 56 [*reversing* 23 How. Pr. 84]; Manning *v.* Monaghan, 28 N. Y. 585 [*affirming* 10 Bosw. 231]; Galen *v.* Brown, 22 N. Y. 37; Hull *v.* Carnley, 11 N. Y. 501, 1 Abb. Pr. 158 [*reversing* 2 Duer 99]; Livor *v.* Orser, 5 Duer 501; Fairbanks *v.* Bloomfield, 5 Duer 434; Gelhaar *v.* Ross, 1 Hilt. 117; Lyman *v.* Bowe, 5 N. Y. Civ. Proc. 157; Baxter *v.* Gilbert, 12 Abb. Pr. 97; Goodrich *v.* Bowe, 1 N. Y. City Ct. 338.

Ohio.— Curd *v.* Wunder, 5 Ohio St. 92.

Wisconsin.— Smith *v.* Colbaugh, 21 Wis. 427; Saxton *v.* Williams, 15 Wis. 292.

See 21 Cent. Dig. tit. "Execution," § 95.

After default.— *Indiana.*—Louthain *v.* Miller, 85 Ind. 161; Manns *v.* Brookville Nat. Bank, 73 Ind. 243; Olds *v.* Andrews, 66 Ind. 147; Headrick *v.* Brattain, 63 Ind. 438; Landers *v.* George, 49 Ind. 309; Schrader *v.* Wolflin, 21 Ind. 238; Heimberger *v.* Boyd, 18 Ind. 420.

Louisiana.— Zollikoffer *v.* Briggs, 19 La. 521.

Michigan.— Haynes *v.* Leppig, 40 Mich. 602; Worthington *v.* Hanna, 23 Mich. 530. *Compare* Cary *v.* Hewitt, 26 Mich. 228.

Mississippi.— Hunter *v.* Hunter, Walk. 194.

Missouri.— Foster *v.* Potter, 37 Mo. 525.

New York.— Lansingburgh Bank *v.* Crary, 1 Barb. 542.

Texas.— Raysor *v.* Reid, 55 Tex. 266; Blum *v.* Conrad, 1 Tex. App. Civ. Cas. § 1217.

See 21 Cent. Dig. tit. "Execution," § 95.

"An equity of redemption has always been, in New Jersey, the subject of sale, and not by virtue of any statute either, as was supposed by counsel in the argument, but because our courts of law followed the good sense of courts of equity in this respect. in spite of mere technicalities, and considered the mortgagor, as he actually is, the real owner of the property." Doughten *v.* Gray, 10 N. J. Eq. 323, 328.

A tacit mortgage of a minor for an unliquidated amount of property opposes no legal impediment to the seizure and sale of such property at the instance of a judgment creditor of the owner. Laplace *v.* Haydel, 19 La. Ann. 363; Eagan *v.* Bell, 13 La. Ann. 508.

Corporate stock.— It has been held in Alabama that, although Rev. Code, §§ 1783, 1784, 1786, declares corporate stock personal property, and authorizes levy thereon and sale thereof under execution, no execution can be levied on corporate stock pledged or mortgaged by the execution defendant as security for debt and transferred on the corporate books, and the purchaser thereof at execution sale acquires no title. Nabring *v.* Mobile Bank, 58 Ala. 204.

Chattel mortgage on vessels.— It was held in U. S. *v.* Collins, 25 Fed. Cas. No. 14,834, 4 Blatchf. 142, that execution creditors might sell vessels on which the government had a lien under chattel mortgages made for advances to build them, subject to such lien, where a sale under the mortgages could only be had on six months' notice.

Custody of property immaterial.— It has been held in Kentucky that mortgaged personal property is subject to seizure under execution against the mortgagor, whether the same be in possession of the mortgagor or mortgagee at the time of its seizure. Squires *v.* Smith, 10 B. Mon. (Ky.) 33.

Under Okla. St. §§ 3279, 3280, mortgaged chattels may be levied on by execution, but before the officer can take possession of the property he must first pay, or tender, to the mortgagee the amount of the mortgage debt, or deposit the amount with the county treasurer for the use of the mortgagee. Moore *v.* Calvert, 8 Okla. 358, 58 Pac. 627.

92. *Alabama.*— Thompson *v.* Thornton, 21 Ala. 808; Planters', etc., Bank *v.* Willis, 5 Ala. 770; Adams *v.* Tanner, 5 Ala. 740; Perkins *v.* Mayfield, 5 Port. 182.

Colorado.— Metzler *v.* James, 12 Colo. 322, 19 Pac. 885. *Compare* Ankele *v.* Elder, (App. 1904) 75 Pac. 29.

Illinois.— Pike *v.* Colvin, 67 Ill. 227; Merritt *v.* Niles, 25 Ill. 282; Prior *v.* White, 12 Ill. 261.

Iowa.— Wells *v.* Chapman, 59 Iowa 658, 13 N. W. 841.

Kentucky.— Newman *v.* Mantle, 109 Ky. 292, 58 S. W. 783, 22 Ky. L. Rep. 823, 95 Am. St. Rep. 372.

Michigan.— Bacon *v.* Kimmel, 14 Mich. 201; Tannahill *v.* Tuttle, 3 Mich. 104, 61 Am. Dec. 480.

Mississippi.— Commercial Bank *v.* Waters, 10 Sm. & M. 559; Thornhill *v.* Gilmer, 4 Sm. & M. 153.

based on the theory that after default there is no such possessory right or interest left in the mortgagor as is capable of being seized and sold under execution against him.[93] And where this doctrine obtains the rule is adhered to, even where the mortgagor is allowed to remain in possession after default,[94] for in the eye of the law he is in possession merely by sufferance and as the bailee of the mortgagee.[95] The courts in some jurisdictions have carried this doctrine to the extent of holding that even before condition broken, where the mortgagor has not the right of possession for a definite period, his interest is an equity of redemption merely, which is not the subject of levy and sale upon execution, his possession being permissive merely and not a matter of right.[96]

(II) *Real Property.*[97] By force of statute, in a great majority of the states, the mortgagor's equity of redemption in real property is subject to seizure and sale upon execution by a third person, either before or after default;[98] and it is

Missouri.— Boyce *v.* Smith, 16 Mo. 317; Sexton *v.* Monks, 16 Mo. 156; Burge *v.* Hunter, 93 Mo. App. 639, 67 S. W. 697; Pollock *v.* Douglas, 56 Mo. App. 487; State *v.* Carroll, 24 Mo. App. 358; Rodgers *v.* Lidwell, 3 Mo. App. 600; Spalding *v.* Taylor, 1 Mo. App. 34.

Nebraska.— Peckinbaugh *v.* Quillin, 12 Nebr. 586, 12 N. W. 104.

New Hampshire.— Haven *v.* Low, 2 N. H. 13, 9 Am. Dec. 25.

New York.— Leadbetter *v.* Leadbetter, 125 N. Y. 290, 26 N. E. 265 [*affirming* 11 N. Y. Suppl. 228]; Nichols *v.* Mead, 47 N. Y. 653 [*affirming* 2 Lans. 222]; Ford *v.* Williams, 13 N. Y. 577, 67 Am. Dec. 83; Craft *v.* Brandow, 61 N. Y. App. Div. 247, 70 N. Y. Suppl. 364; Gelhaar *v.* Ross, 1 Hilt. 117; Farrell *v.* Hildreth, 38 Barb. 178; Baxter *v.* Gilbert, 12 Abb. Pr. 97; Marsh *v.* Lawrence, 4 Cow. 461.

North Carolina.— Whitesides *v.* Williams, 22 N. C. 153; Camp *v.* Coxe, 18 N. C. 52.

Tennessee.— Wilson *v.* Carver, 4 Hayw. 90.

United States.— *In re* Wrisley, 30 Fed. Cas. No. 18,103.

See 21 Cent. Dig. tit. "Execution," § 96.

Conversion.— One who sells mortgaged chattels on execution against the mortgagor after he is in default, so that the mortgagee's right of possession is complete, is liable to the mortgagee for conversion. Biehler *v.* Irwin, 84 N. Y. Suppl. 574.

Possession determinable at will.— It has been held in Missouri that the possession of mortgaged chattels by the mortgagor, with the consent of the mortgagee, and determinable at will, is not the subject of sale on execution. King *v.* Bailey, 8 Mo. 332.

93. Eggleston *v.* Mundy, 4 Mich. 295; Leadbetter *v.* Leadbetter, 125 N. Y. 290, 26 N. E. 265 [*affirming* 11 N. Y. Suppl. 228]; Manchester *v.* Tibbetts, 121 N. Y. 219, 24 N. E. 304, 11 Am. St. Rep. 816; Hall *v.* Sampson, 35 N. Y. 274, 91 Am. Dec. 56; Galen *v.* Brown, 22 N. Y. 37; Hull *v.* Carnley, 11 N. Y. 501; Baltes *v.* Ritt, 1 Abb. Dec. (N. Y.) 78, 3 Keyes (N. Y.) 210; Kleinberger *v.* Brown, 58 N. Y. Super. Ct. 4, 8 N. Y. Suppl. 866; Baxter *v.* Gilbert, 12 Abb. Pr. (N. Y.) 97; *Ex p.* Lorenz, 32 S. C. 365, 11 S. E. 206, 17 Am. St. Rep. 862; Norris *v.* Sowles, 57 Vt. 360.

94. Yeldell *v.* Stemmons, 15 Mo. 443; Champlin *v.* Johnson, 39 Barb. (N. Y.) 606; Porter *v.* Parmley, 34 N. Y. Super. Ct. 398, 43 How. Pr. (N. Y.) 445.

95. Peckinbaugh *v.* Quillin, 12 Nebr. 586, 12 N. W. 104; Champlin *v.* Johnson, 39 Barb. (N. Y.) 606; Stewart *v.* Slater, 6 Duer (N. Y.) 83.

96. *Alabama.*— Perkins *v.* Mayfield, 5 Port. 182.

Illinois.— Palmer *v.* Forbes, 23 Ill. 301.

Iowa.— Campbell *v.* Leonard, 11 Iowa 489.

Maine.— Welch *v.* Whittemore, 25 Me. 86; Paul *v.* Hayford, 22 Me. 234; Holbrook *v.* Baker, 5 Me. 309, 17 Am. Dec. 236.

Michigan.— Eggleston *v.* Mundy, 4 Mich. 295; Tannahill *v.* Tuttle, 3 Mich. 104, 61 Am. Dec. 480.

Missouri.— Yeldell *v.* Stemmons, 15 Mo. 443; King *v.* Bailey, 8 Mo. 332.

New York.— Galen *v.* Brown, 22 N. Y. 37; Mattison *v.* Baucus, 1 N. Y. 295; Farrell *v.* Hildreth, 38 Barb. 178; Marsh *v.* Lawrence, 4 Cow. 461.

South Carolina.— Spriggs *v.* Camp, 2 Speers 181.

See 21 Cent. Dig. tit. "Execution," § 96.

97. Sale of equity of redemption to pay mortgage debt see, generally, Mortgages.

98. *Alabama.*—Gassenheimer *v.* Molton, 80 Ala. 521, 2 So. 652; Childress *v.* Monette, 54 Ala. 317.

California.— Knight *v.* Fair, 9 Cal. 117.

Colorado.— Seaman *v.* Hax, 4 Colo. 536, 24 Pac. 461, 9 L. R. A. 341.

Connecticut.— Punderson *v.* Brown, 1 Day 93, 2 Am. Dec. 53.

Illinois.— Walters *v.* Defenbaugh, 90 Ill. 241; Roberts *v.* Hughes, 81 Ill. 130, 25 Am. Rep. 270; Curtis *v.* Root, 20 Ill. 53; Fitch *v.* Pinckard, 5 Ill. 69; Herdman *v.* Cooper, 29 Ill. App. 589.

Indiana.— Dean *v.* Phillips, 17 Ind. 406; Watkins *v.* Gregory, 6 Blackf. 113.

Kansas.— Jenkins *v.* Green, 22 Kan. 562.

Kentucky.— Brace *v.* Shaw, 16 B. Mon. 43; Dougherty *v.* Linthicum, 8 Dana 194.

Maine.— Bodwell Granite Co. *v.* Lane, 83 Me. 168, 21 Atl. 829 (where the mortgage was executed to secure the support of the mortgagee by the mortgagor); Stewart *v.* Crosby, 50 Me. 130.

Maryland.— Washington F. Ins. Co. *v.*

likewise subject to sale by the mortgagee upon an execution obtained upon a debt not secured by the mortgage.[99]

2. Interest of Mortgagee — a. In Personal Property — (I) *Before Default.* The better doctrine seems to be that the interest of the mortgagee in personal property, where the possession remains with the mortgagor, and before condition broken, cannot be taken in execution as the property of the mortgagee.[1]

(II) *After Default.* But it has been held in some jurisdictions that personal property pledged by way of mortgage may, after condition broken, be levied on under an execution against the mortgagee, even where the property remains in the hands of the mortgagor.[2] In other jurisdictions, however, it is held that a mortgagee's interest in personal property, after breach of condition, and before foreclosure, is not subject to execution, even where the property is in his possession.[3]

b. In Real Property. According to the weight of authority, the estate of the mortgagee in real property, before foreclosure, is not the subject of sale under execution against him, even after default.[4]

Kelly, 32 Md. 421, 3 Am. Rep. 149; Ford *v.* Philpot, 5 Harr. & J. 312.

Massachusetts.— Verry *v.* Richardson, 5 Allen 107; Crane *v.* March, 4 Pick. 131, 16 Am. Dec. 329.

Michigan.— Gorham *v.* Arnold, 22 Mich. 247.

Mississippi.— Byrd *v.* Clarke, 52 Miss. 623; Huntington *v.* Cotton, 31 Miss. 253.

Missouri.— Benton *v.* O'Fallon, 8 Mo. 650; McNair *v.* O'Fallon, 8 Mo. 188. *Compare* Bracken *v.* Milner, 99 Mo. App. 187, 72 S. W. 225.

New York.— Trimm *v.* Marsh, 54 N. Y. 599, 13 Am. Rep. 623 [*affirming* 3 Lans. 509]; Post *v.* Arnot, 2 Den. 344; Jackson *v.* Rhodes, 8 Cow. 47; Waters *v.* Stewart, 1 Cai. Cas. 47.

Ohio.—Farmers' Bank *v.* Commercial Bank, 10 Ohio 71; Phelps *v.* Butler, 2 Ohio 224.

Pennsylvania.— Garro *v.* Thompson, 7 Watts 416.

South Dakota.— Muller *v.* Flavin, 13 S. D. 595, 83 N. W. 687.

United States.— Van Ness *v.* Hyatt, 13 Pet. 294, 10 L. ed. 168.

See 21 Cent. Dig. tit. "Execution," § 99.

See, however, Bantlett *v.* Gilcreast, 72 N. H. 145, 55 Atl. 189; Ketchum *v.* Johnson, 4 N. J. Eq. 370.

A right to redeem a mortgage of an equitable interest in real estate has been held, in Massachusetts, to be leviable on execution for the benefit of creditors. Reed *v.* Bigelow, 5 Pick. (Mass.) 281.

In Georgia where the equity of redemption is levied on, it requires the consent of the mortgagor, mortgagee, and plaintiff in fieri facias to sell the entire interest in the property free from the lien of the mortgage. Milner *v.* Pitts, 117 Ga. 794, 45 S. E. 67.

In New Hampshire by the extent of an execution against a mortgagor on the land covered by the mortgage, his interest passes, but the rights of the mortgagee are not affected. Carrasco *v.* Mason, 72 N. H. 158, 54 Atl. 1101.

Rule in Tennessee.— It was held in Wilkins *v.* Johnson, (Ch. App. 1899) 54 S. W. 1001, that the levy of an execution on land subject to a mortgage is void on its face, as being a levy of an equitable interest in land, and all subsequent proceedings based on such a levy are a nullity.

99. Bernstein *v.* Humes, 71 Ala. 260; Seaman *v.* Hax, 14 Colo. 536, 24 Pac. 461, 9 L. R. A. 341; Cushing *v.* Hurd, 4 Pick. (Mass.) 253, 16 Am. Dec. 335. See Thompson *v.* Parker, 55 N. C. 475.

Where, after default and foreclosure of the mortgage, the mortgagor is, by statute, given the right of redemption within a specified time, on payment to the purchaser of the purchase-money, interest, and lawful charges, it has been held that this is a mere personal right of the debtor — a right to repurchase the land and be restored to the estate he had at the time of the sale — and that it is not the subject of levy and sale under execution at law. Shaw *v.* Lindsey, 60 Ala. 344, opinion by Brickell, C. J.

1. Chapman *v.* Hunt, 13 N. J. Eq. 370; Doughten *v.* Gray, 10 N. J. Eq. 323.

2. Phillips *v.* Hawkins, 1 Fla. 262; Ferguson *v.* Lee, 9 Wend. (N. Y.) 258. See also Adams *v.* Nebraska City Nat. Bank, 4 Nebr. 370; Ackley *v.* Finch, 7 Cow. (N. Y.) 290.

3. Prout *v.* Root, 116 Mass. 410. This line of decisions is based on the ground that; since the mortgagor's equity of redemption is subject to execution, it is impossible that two officers should have equal right of possession by virtue of executions against different parties in favor of different creditors. See also Murphy *v.* Galloupe, 143 Mass. 123, 8 N. E. 894; Voorhies *v.* Hennessy, 7 Wash. 243, 34 Pac. 931.

Under the N. C. Rev. St. c. 45, § 5, it was held that where there was a provision in the mortgage deed that the mortgagee might have the land discharged of the right of redemption, at his election, on paying a further stipulated sum, the right of redemption is not the subject of an execution sale. Thompson *v.* Parker, 55 N. C. 475.

4. *Alabama.*— Morris *v.* Barker, 82 Ala. 272, 2 So. 335.

F. Property Conveyed to Secure Payment of Indebtedness — 1. Interest of Grantor — a. At Common Law. At common law the interest of a grantor in a deed of trust to secure a debt was not subject to sale under execution against him;[5] and in many jurisdictions, following the common-law rule, it was formerly held that the interest of a grantor in a deed of trust is not analogous to the interest of a mortgagor, and is not the subject of lien or execution at law.[6]

b. Present Rule in United States. Now, however, in a majority of the states, where a debtor conveys property by deed of trust to secure the payment of his indebtedness, and in the deed of trust gives the trustee power to sell the property thereby conveyed in the event of his default in the payment of the indebtedness, such conveyance is regarded as having substantially the same effect

Arkansas.— Harman *v.* May, 40 Ark. 146; State *v.* Lawson, 6 Ark. 269.

Connecticut.—Huntington *v.* Smith, 4 Conn. 235.

Delaware.— Cooch *v.* Geery, 3 Harr. 280.

Illinois.— Nicholson *v.* Walker, 4 Ill. App. 404.

Iowa.— Scott *v.* Mewhirter, 49 Iowa 487.

Kentucky.— Buck *v.* Sanders, 1 Dana 187 (so held where the mortgagor was made a co-defendant with the mortgagee in the execution); Cooper *v.* Martin, 1 Dana 23.

Maine.— Brown *v.* Bates, 55 Me. 520, 92 Am. Dec. 613; Randall *v.* Farnham, 36 Me. 86; Coombs *v.* Warren, 34 Me. 89; McLaughlin *v.* Shepherd, 32 Me. 143, 52 Am. Dec. 646.

Massachusetts.— Eaton *v.* Whiting, 3 Pick. 484; Blanchard *v.* Colburn, 16 Mass. 345; Portland Bank *v.* Hull, 13 Mass. 207. *Contra,* Hooton *v.* Grout, Quincy 343.

Mississippi.— Brooks *v.* Kelly, 63 Miss. 616.

New Hampshire.— Glass *v.* Ellison, 9 N. H. 69; Kelly *v.* Burnham, 9 N. H. 20.

New York.— Moore *v.* New York, 8 N. Y. 110, 59 Am. Dec. 473; Jackson *v.* Willard, 4 Johns. 41; Morris *v.* Mowatt, 2 Paige 586, 22 Am. Dec. 661.

Pennsylvania.—Rickert *v.* Madeira, 1 Rawle 325.

See 21 Cent. Dig. tit. "Execution," § 100.

The interest of one holding a mortgage on land conditioned for his support is not subject to execution. Chandler *v.* Parsons, 100 Mich. 313, 58 N. W. 1011.

Where a mortgagee conveys land, the vendee gets only an equitable title, and the deed of a sheriff to a purchaser, at a sale under execution against the vendee of the mortgagee, conveys no title. Johnston *v.* Case, 131 N. C. 491, 42 S. E. 957.

5. Carpenter *v.* Bowen, 42 Miss. 28; McIntyre *v.* Agricultural Bank, Freem. (Miss.) 105.

6. *Alabama.*— Thompson *v.* Thornton, 21 Ala. 808.

California.— See Swanston *v.* Sublette, 1 Cal. 123.

Louisiana.— See Villars *v.* Marvin, 3 Mart. N. S. 529.

Mississippi.—Trice *v.* Walker, 71 Miss. 968, 15 So. 787; Marlow *v.* Johnson, 31 Miss. 128; Thornhill *v.* Gilmer, 4 Sm. & M. 153.

New York.— Hendricks *v.* Walden, 17 Johns. 438; Wilkes *v.* Ferris, 5 Johns. 335, 4 Am. Dec. 364; Hendricks *v.* Robinson, 2 Johns. Ch. 283. See also New York City Third Nat. Bank *v.* Dutcher, 8 N. Y. St. 818.

North Carolina.— Hardin *v.* Ray, 94 N. C. 456; McKeithon *v.* Walker, 66 N. C. 95; Sprinkle *v.* Martin, 66 N. C. 55; Griffin *v.* Richardson, 33 N. C. 439; Thompson *v.* Ford, 29 N. C. 418; Barham *v.* Massey, 27 N. C. 192; Burgin *v.* Burgin, 23 N. C. 160; Thorpe *v.* Ricks, 21 N. C. 613; Harrison *v.* Battle, 16 N. C. 537; Mordecai *v.* Parker, 14 N. C. 425; Brown *v.* Graves, 11 N. C. 342.

Ohio.— Morris *v.* Way, 16 Ohio 469; Loring *v.* Melendy, 11 Ohio 355; Baird *v.* Kirtland, 8 Ohio 21.

Tennessee.— Lipe *v.* Mitchell, 2 Yerg. 400.

Virginia.— Claytor *v.* Anthony, 6 Rand. 285.

United States.— King *v.* Tuscumbia, etc., R. Co., 14 Fed. Cas. No. 7,808.

See 21 Cent. Dig. tit. "Execution," § 101.

Possessory interest.— It was held in Hawkins *v.* May, 12 Ala. 673, that the possessory interest of the grantor, which may be sold under execution against the will of the grantee, is a certain ascertained possession for a definite period, and not a permissive possession which may be terminated at the pleasure of the grantee whenever he considers it necessary for his security, and which is in fact terminated by the interposition of a claim. See also O'Neal *v.* Wilson, 21 Ala. 288.

Where conveyance was absolute.— It was held in Massachusetts that on a writ of entry, the demandant claiming under an execution sale, and the tenant under a previous conveyance absolute in form, but really only made as a security for advances, that the demandant could not recover, under Pub. St. c. 171, § 1, declaring what lands may be taken on execution, unless the land is held "on a trust for him [the debtor] whereby he is entitled to a present conveyance," the conveyance under which the tenant claimed not being fraudulent as to creditors. Rawson *v.* Plaisted, 151 Mass. 71, 72, 23 N. E. 722.

Where stock of a corporation was assigned to the corporation itself as collateral security for a loan, it was held that the title of the assignor to the stock was so far divested that it could not be sold under execution against him. Early's Appeal, 89 Pa. St. 411.

as mortgages with powers of sale, and the interest or estate in the grantor is held to be subject to execution at law.[7]

2. INTEREST OF GRANTEE. In those jurisdictions in which the interest of the grantor in property conveyed by deed of trust is subject to execution, by parity of reasoning, the grantee in such deed of trust has no interest in the property so conveyed as is subject to sale under execution against him.[8]

G. Property Pledged or Pawned — 1. INTEREST OF PLEDGOR — a. At Common Law. At common law property pawned or pledged was not liable to be taken in execution in an action against the pawner;[9] at least, not unless the bailment was terminated by payment of the debt, or by some other extinguishment of the pawnee's title.[10] Where the pledgee elects to waive his lien upon the property pledged, there seems to be no reason why he may not levy upon such property under a writ against the pledgor.[11]

b. In the United States. In most of the states the doctrine is well recognized that the interest of the pledgor in the property pledged is liable to seizure and sale on execution, subject to the interest of the pledgee therein.[12]

7. *Alabama.*— McConeghy *v.* McCaw, 31 Ala. 447.

Arkansas.— Turner *v.* Watkins, 31 Ark. 429; State *v.* Lawson, 6 Ark. 269.

Illinois.— Thomas *v.* Eckard, 88 Ill. 593; Vallette *v.* Bennett, 69 Ill. 632.

Indiana.— Coe *v.* McBrown, 22 Ind. 252; Coe *v.* Johnson, 18 Ind. 218.

Iowa.— Clinton Nat. Bank *v.* Manwarring, 39 Iowa 281; Cook *v.* Dillon, 9 Iowa 407, 74 Am. Dec. 254.

Kentucky.— Waller *v.* Todd, 3 Dana 503, 28 Am. Dec. 94.

Massachusetts.— Newhall *v.* Burt, 7 Pick. 156.

Michigan.— Mueller *v.* Provo, 80 Mich. 475, 45 N. W. 498, 20 Am. St. Rep. 525.

Minnesota.— Atwater *v.* Manchester Sav. Bank, 45 Minn. 341, 48 N. W. 187, 12 L. R. A. 741.

Missouri.— Evans *v.* Wilder, 5 Mo. 313.

New York.— Smith *v.* Beattie, 31 N. Y. 542.

North Carolina.— Pool *v.* Glover, 24 N. C. 129.

Pennsylvania.—Fredericks *v.* Corcoran, 100 Pa. St. 413.

Texas.— Wright *v.* Henderson, 12 Tex. 43.

Wisconsin.— Second Ward Bank *v.* Upmann, 12 Wis. 499.

See 21 Cent. Dig. tit. "Execution," § 101.

Where a debtor conveys land to secure a debt without taking back any defeasance, he has an equity in the land, although he cannot enforce it, which equity any creditor may sell for whatever any purchaser may choose to give for it. Eberly *v.* Shirk, 206 Pa. St. 414, 55 Atl. 1071.

8. Harman *v.* May, 40 Ark. 146; Eherke *v.* Hecht, 96 Iowa 96, 64 N. W. 652; Butman *v.* James, 34 Minn. 547, 27 N. W. 66; Thompson *v.* Ford, 29 N. C. 418.

In Georgia the rule is laid down that land held by absolute deed, as security for a debt, is liable to a judgment against the grantee, and it is immaterial whether or not the judgment creditor gave credit on the faith of the property so held. Parrott *v.* Baker, 82 Ga. 364, 19 S. E. 1068.

9. Sexton *v.* Monks, 16 Mo. 156; Harris *v.* Murray, 28 N. Y. 574, 86 Am. Dec. 268; Stief *v.* Hart, 1 N. Y. 20; Seymour *v.* Newton, 17 Hun (N. Y.) 30; Moore *v.* Hitchcock, 4 Wend. (N. Y.) 292; Rogers *v.* Kennay, 9 Q. B. 592, 11 Jur. 14, 15 L. J. Q. B. 381, 58 E. C. L. 592; Young *v.* Lambert, L. R. 3 P. C. 142, 22 L. T. Rep. N. S. 499, 6 Moore P. C. N. S. 406, 18 Wkly. Rep. 497, 16 Eng. Reprint 779; Rex *v.* Hanger, 3 Bulstr. 1; Scott *v.* Scholey, 8 East 467, 9 Rev. Rep. 487; Legge *v.* Evans, 8 Dowl. P. C. 177, 4 Jur. 197, 9 L. J. Exch. 102, 6 M. & W. 36; Ladbroke *v.* Crickett, 2 T. R. 649, 1 Rev. Rep. 571.

In Pennsylvania, the officer may sell, although he cannot seize, the pledged property. Waverly Coal, etc., Co. *v.* McKennan, 110 Pa. St. 599, 1 Atl. 543; Reichenbach *v.* McKean, 95 Pa. St. 432; Baugh *v.* Kirkpatrick, 54 Pa. St. 84, 93 Am. Dec. 675; Srodes *v.* Caven, 3 Watts 258.

10. Pomeroy *v.* Smith, 17 Pick. (Mass.) 85; Bigelow *v.* Willson, 1 Pick. (Mass.) 485; Badlam *v.* Tucker, 1 Pick. (Mass.) 389, 11 Am. Dec. 202; Truslow *v.* Putnam, 4 Abb. Dec. (N. Y.) 425, 1 Keyes (N. Y.) 568; Marsh *v.* Lawrence, 4 Cow. (N. Y.) 461. See also Wheeler *v.* McFarland, 10 Wend. (N. Y.) 318; Memphis First Nat. Bank *v.* Pettit, 9 Heisk. (Tenn.) 447; Cogs *v.* Bernard, 3 Holt 528.

11. Legg *v.* Millard, 17 Pick. (Mass.) 140, 28 Am. Dec. 282; Arendale *v.* Morgan, 5 Sneed (Tenn.) 703 (where it was held that a levy, by the pledgee, upon the pledged property, was not a waiver of his rights under his pledge); Jacobs *v.* Latour, 5 Bing. 130, 6 L. J. C. P. O. S. 243, 2 M. & P. 201, 15 E. C. L. 506.

12. *Dakota.*— Van Cise *v.* Merchants' Nat. Bank, 4 Dak. 485, 33 N. W. 897.

Georgia.— People's Nat. Bank *v.* Wheedon, 115 Ga. 782, 42 S. E. 91.

Louisiana.— Horner *v.* Dennis, 34 La. Ann. 389; Auge *v.* Variol, 31 La. Ann. 865; Williams *v.* The St. Stephens, 1 Mart. N. S. 417, 2 Mart. N. S. 22.

Minnesota.— Mower *v.* Stickney, 5 Minn. 397.

2. Interest of Pledgee. The question as to whether the interest of a pledgee in the property pledged is subject to levy and sale under execution has received very little consideration by the courts, but it seems to have been formerly thought that such property was not subject to execution at all for the debt of the pawnee.[13] Now, however, it is held in some jurisdictions that since the pawnee has a beneficial interest accompanied by a rightful possession, such interest is subject to levy and sale under execution against him.[14]

H. Interests Under Contracts in General — 1. Contracts For Services. The rule seems to be well recognized that all contracts for the hire of labor, skill, or industry, without any distinction, whether they can be as well performed by any other as by the obligor, unless there be some special agreement to the contrary, are considered as personal on the part of the obligor, and such rights, which are merely personal, are not liable to sale under execution.[15]

2. Contracts of Sale in General — a. Interest of Vendor — (I) *General Rule.* The rule has been laid down in many jurisdictions that the vendor of real property who has sold land and put his vendee in possession, but has not executed a conveyance, has an interest in the land which may be sold under execution.[16] However, the equitable lien held by a vendor of real estate, after absolute conveyance thereof, is not subject to levy and sale on execution.[17] In the case of personal property the rule has been laid down that unless the transaction is in fraud or delay of creditors, a contract of sale of such property leaves no leviable interest in the vendor prior to neglect or refusal of the vendee to complete the contract by payment of the agreed purchase-money.[18]

(II) *Where Bond For Title Has Been Given.* Where, however, the vendor has given bond for title and received part of the purchase-money, the better doctrine seems to be that he has no such interest in the land as can be sold under execution.[19] In several jurisdictions it is held that, so long as the whole

Missouri.— See Bracken *v.* Milner, 99 Mo. App. 187, 73 S. W. 225.

New Jersey.—Mechanics' Bldg., etc., Assoc. *v.* Conover, 14 N. J. Eq. 219.

New York.— Stief *v.* Hart, 1 N. Y. 20.

Pennsylvania.— Dixon *v.* White Sewing-Mach. Co., 128 Pa. St. 397, 18 Atl. 502, 15 Am. St. Rep. 683, 5 L. R. A. 659; Waverly Coal, etc., Co. *v.* McKennan, 110 Pa. St. 599, 1 Atl. 543; Welsh *v.* Bell, 32 Pa. St. 12. See also Rhoads *v.* Megonigal, 2 Pa. St. 39.

Wisconsin.—Hass *v.* Prescott, 38 Wis. 146.

United States.— See Lewis *v.* Dillard, 76 Fed. 688, 22 C. C. A. 488.

See 21 Cent. Dig. tit. "Execution," § 103.

13. Harding *v.* Stevenson, 6 Harr. & J. (Md.) 264; Mores *v.* Conham, Owen 123; Comyns Dig. tit. "Mortgage."

14. Saul *v.* Kruger, 9 How. Pr. (N. Y.) 569; *In re* Rollason, 34 Ch. D. 495, 56 L. J. Ch. 768, 56 L. T. Rep. N. S. 303, 35 Wkly. Rep. 607.

15. Case *v.* Taylor, 23 La. Ann. 497, holding that a right (resulting from a contract of labor between the state and a citizen, is not liable to seizure for the debts of the latter); Paine *v.* Gunniss, 60 Minn. 257, 62 N. W. 280 (holding that neither an inchoate contingent claim on a contract, nor a claim for unliquidated damages, was subject to levy, and that the subsequent adjustment of the amount by agreement between the parties did not relate back so as to give effect to a prior attempted levy); Hasbrouck *v.* Bouton, 60 Barb. (N. Y.) 413; Griffin *v.* Williams, 44 N. C. 292. See, however, Weaver *v.* Darby, 42 Barb. (N. Y.) 411.

16. *Illinois.*— McLaurie *v.* Barnes, 72 Ill. 73.

Kentucky.— Doe *v.* Million, 4 J. J. Marsh. 395.

Michigan.— Doak *v.* Runyan, 33 Mich. 75.

North Carolina.— Linch *v.* Gibson, 4 N. C. 676.

Pennsylvania.—Leiper *v.* Irvine, 26 Pa. St. 54.

United States.— Green *v.* Daniels, 115 Fed. 449, 53 C. C. A. 379.

See 21 Cent. Dig. tit. "Execution," § 105.

17. Ross *v.* Heintzen, 36 Cal. 313; Parker *v.* Home Mut. Bldg., etc., Assoc., 114 Ga. 702, 40 S. E. 724 (holding that where land is conveyed to secure a debt it is not subject to levy and sale under a judgment obtained on the debt until it is reconveyed to the grantor); Williams *v.* Baker, 62 N. J. Eq. 563, 51 Atl. 201; Willis *v.* Sommerville, 3 Tex. Civ. App. 509, 22 S. W. 781.

18. Bickerstaff *v.* Doub, 19 Cal. 109, 79 Am. Dec. 204; Vickery *v.* Ward, 2 Tex. 212. See, however, Spicks *v.* Prospect Brewing Co., 19 Pa. Super. Ct. 399. *Contra*, Taylor *v.* Plunkett, (Del. 1903) 56 Atl. 384.

19. *Arkansas.*— Strauss *v.* White, 66 Ark. 167, 51 S. W. 64.

Colorado.— Fallon *v.* Worthington, 13 Colo. 559, 22 Pac. 960, 16 Am. St. Rep. 231, 6 L. R. A. 708.

Iowa.— Benbow *v.* Boyer, 89 Iowa 494, 56 N. W. 544.

or any part of the purchase-money conditioned in the bond to be paid remains unpaid, the vendor is the legal owner of the property, and his interest therein is subject to sale on execution against him.[20]

b. Interest of Vendee — (I) *In General.* In the absence of statute the interest of a vendee in a contract for the sale of land, being merely an equitable interest, cannot be sold under execution against the vendee.[21]

(II) *Where Partial Payment Has Been Made.* In the United States the weight of authority is that the interest of a vendee in property under a contract of sale, where the purchase-money has not been paid, or only a part of it paid, is not subject to sale under execution against him.[22] In some jurisdictions, however, under statutes subjecting equitable interests to sale under execution at law, it has been held that where the vendee has paid part of the purchase-

Kentucky.— Cooper *v.* Arnett, 95 Ky. 603, 26 S. W. 811, 16 Ky. L. Rep. 145. See also Pryor *v.* Warford, 54 S. W. 838, 21 Ky. L. Rep. 1311 (where a conveyance had been made, but no part of the purchase-money had been paid at the time the execution was levied upon the property); Russell *v.* Moore, 3 Metc. 436.

Mississippi.— Chisholm *v.* Andrews, 57 Miss. 636; Money *v.* Dorsey, 7 Sm. & M. 15.

New Hampshire.— Cutting *v.* Pike, 21 N. H. 347.

North Carolina.— Folger *v.* Bowles, 72 N. C. 603; Tally *v.* Reed, 72 N. C. 336; Edney *v.* Wilson, 27 N. C. 233.

Ohio.— Manley *v.* Hunt, 1 Ohio 257.

South Carolina.— Adickes *v.* Lowry, 15 S. C. 128; Massey *v.* McIlwain, 2 Hill Eq. 421.

Texas.— Brotherton *v.* Anderson, 27 Tex. Civ. App. 587, 66 S. W. 682.

See 21 Cent. Dig. tit. "Execution," § 105 *et seq.*

Breach of condition subsequent.— It has been held in Georgia that an estate forfeited by breach of condition subsequent is not revested in the grantor until after entry, or action brought by him or his heirs, and that before such entry or action the land is not subject to levy and sale as the grantor's property. Edmondson *v.* Leach, 56 Ga. 461. And in Maine it has been held that the right of reëntry after a breach of condition in a conveyance of land pertains only to the grantor and his legal representatives, and it is not included among the rights mentioned in Rev. St. c. 94, § 1, and cannot be taken on execution. Bangor *v.* Warren, 34 Me. 324, 56 Am. Dec. 657.

20. Brown *v.* Hardee, 75 Ga. 457; Bell *v.* McDuffie, 71 Ga. 264; Hardee *v.* McMichael, 68 Ga. 678; Welles *v.* Baldwin, 28 Minn. 408, 10 N. W. 427; Minneapolis, etc., R. Co. *v.* Wilson, 25 Minn. 382.

21. *California.*— Chadbourne *v.* Stockton Sav., etc., Soc., (1894) 36 Pac. 127.

New Jersey.— Dodge *v.* Brokaw, 32 N. J. Eq. 154; Vancleve *v.* Groves, 4 N. J. Eq. 330; Disborough *v.* Outcalt, 1 N. J. Eq. 298.

New York.— Bigelow *v.* Finch, 17 Barb. 394; Griffin *v.* Spencer, 6 Hill 525; Forsyth *v.* Clark, 3 Wend. 637; Bogert *v.* Perry, 17 Johns. 351, 8 Am. Dec. 411; Boughton *v.* Orleans Bank, 2 Barb. Ch. 458; Brewster *v.* Power, 10 Paige 562; Talbot *v.* Chamberlin, 3 Paige 219.

North Carolina.— Hinsdale *v.* Thornton, 74 N. C. 167.

Pennsylvania.— Wengert *v.* Zimmerman, 33 Pa. St. 508.

South Carolina.— Roddy *v.* Elam, 12 Rich. Eq. 343.

Tennessee.— Kissom *v.* Nelson, 2 Heisk. 4.

See 21 Cent. Dig. tit. "Execution," § 106.

A unilateral contract, giving a person an option to purchase real estate within a specified time, does not convey to such person any interest in the property which can be levied on and sold under execution against him. Provident Life, etc., Co. *v.* Mills, 91 Fed. 435.

22. *Alabama.*— Opelika Bank *v.* Kizer, 119 Ala. 194, 24 So. 11; Fields *v.* Williams, 91 Ala. 502, 8 So. 808; Shaw *v.* Lindsey, 60 Ala. 344.

Georgia.— Bradwell *v.* Bainbridge Bank, 103 Ga. 242, 29 S. E. 756 (where no part of the purchase-money had been paid); Green *v.* Hill, 101 Ga. 258, 28 S. E. 692. See Rountree *v.* Williams, 99 Ga. 222, 25 S. E. 323.

Indiana.— Hutchins *v.* Hanna, 8 Ind. 533; State Bank *v.* Macy, 4 Ind. 362; Modisett *v.* Johnson, 2 Blackf. 431; Keck *v.* State, 12 Ind. App. 119, 39 N. E. 899.

Louisiana.— See also Montgomery *v.* Brander, 4 Rob. 400.

Massachusetts.— Barrett *v.* Pritchard, 2 Pick. 512, 13 Am. Dec. 449.

Mississippi.— Thompson *v.* McGill, Freem. 401.

New York.— Cole *v.* Mann, 62 N. Y. 1 [*affirming* 3 Thomps. & C. 380]; Herring *v.* Hoppock, 15 N. Y. 409; Burchell *v.* Green, 6 Misc. 236, 27 N. Y. Suppl. 82; Bates *v.* Lidgerwood Mfg. Co., 4 N. Y. Suppl. 524; Strong *v.* Taylor, 2 Hill 326; Brewster *v.* Power, 10 Paige 562; Bogart *v.* Perry, 1 Johns. Ch. 52.

North Carolina.—Hinsdale *v.* Thornton, 75 N. C. 381; Frost *v.* Reynolds, 39 N. C. 494; Badham *v.* Cox, 33 N. C. 456.

Ohio.— Haynes *v.* Baker, 5 Ohio St. 253.

Pennsylvania.— Edwards' Appeal, 105 Pa. St. 103; Deitzler *v.* Mishler, 37 Pa. St. 82; Cope *v.* Brotzman, 1 C. Pl. 19.

See 21 Cent. Dig. tit. "Execution," § 106 *et seq.*

money his interest in the property is leviable under execution against him;[23] and in a few jurisdictions, where the statutes subjecting equities are broader in their terms, the interest of the vendee is held to be leviable, even where he has not paid any part of the purchase-money.[24]

(III) *Where Bond For Title Has Been Given.* In some jurisdictions, where bond for title has been given to the vendee, but the purchase-money has not been paid in full, the rule is laid down that the vendee or his assignee has not such an equitable estate in the property as is liable to be sold under execution against him.[25] In other jurisdictions, however, under the interpretation by the courts of the statutes relating to executions, the vendee of real estate holding a bond for title is in equity considered as the real owner, whether he has paid the purchase-money or actually taken possession or not, and his interest therein is subject to sale under execution against him, subject only to the legal and equitable rights of the vendor for the unpaid purchase-money.[26]

(IV) *After Payment in Full.* The rule is now well recognized that where the vendee, under a contract of sale for the purchase of property, has paid to the vendor the purchase-price in full, and is thereby entitled to a conveyance of

23. *Alabama.*— Ivey *v.* Coston, 134 Ala. 259, 32 So. 664.

Georgia.— Rawson *v.* Coffin, 55 Ga. 348; Estes *v.* Ivey, 53 Ga. 52.

Iowa.— Twogood *v.* Stephens, 19 Iowa 405.

Kentucky.—Hinton *v.* Mitchell, 1 Duv. 382.

Louisiana.— Prater *v.* Pritchard, 6 La. Ann. 729.

Maine.— Houston *v.* Jordan, 35 Me. 520.

Minnesota.—Reynolds *v.* Fleming, 43 Minn. 513, 45 N. W. 1099. And *compare* Hook *v.* Northwest Thresher Co., 91 Minn. 482, 98 N. W. 463.

Missouri.— Lumley *v.* Robinson, 26 Mo. 364; Brant *v.* Robertson, 16 Mo. 129.

Nebraska.— See also Rosenfield *v.* Chada, 12 Nebr. 25, 10 N. W. 465.

New Jersey.— See Peters *v.* Cape May, etc., Steamship Co., (Ch. 1902) 53 Atl. 692.

New York.—Jackson *v.* Scott, 18 Johns. 94.

Pennsylvania.— Forrester *v.* Hanaway, 82 Pa. St. 218; Vierheller's Appeal, 24 Pa. St. 105, 62 Am. Dec. 365; Russell's Appeal, 15 Pa. St. 319; Catlin *v.* Robinson, 2 Watts 373.

Tennessee.— Ament *v.* Brennan, 1 Tenn. Ch. 431.

Texas.— Mooring *v.* McBride, 62 Tex. 309.

See 21 Cent. Dig. tit. "Execution," § 106 *et seq.*

Where a note is given for the price of land which is conveyed to the purchaser by deed, retaining a lien to secure the purchase-price, the deed passes the legal title to the purchaser, and it may be sold under execution against him. Chitwood *v.* Trimble, 2 Baxt. (Tenn.) 78.

24. *Arkansas.*— Young *v.* Mitchell, 33 Ark. 222; Hardy *v.* Heard, 15 Ark. 184.

California.— Fish *v.* Fowlie, 58 Cal. 373; Logan *v.* Hale, 42 Cal. 645.

Maine.— Stevens *v.* Legrow, 19 Me. 95; Jameson *v.* Head, 14 Me. 34.

Vermont.— Woods *v.* Scott, 14 Vt. 518.

United States.— McWilliams *v.* Withington, 7 Fed. 326, 7 Sawy. 205.

See 21 Cent. Dig. tit. "Execution," § 106 *et seq.*

25. *Alabama.*— Fawcetts *v.* Kimmey, 33 Ala. 261; Collins *v.* Robinson, 33 Ala. 91; Driver *v.* Clarke, 13 Ala. 192.

Georgia.— Bradwell *v.* Bainbridge Bank, 103 Ga. 242, 29 S. E. 756. See also Goldman *v.* Dent, 102 Ga. 9, 29 S. E. 138. But *compare* Neal *v.* Murphey, 60 Ga. 388.

Indiana.— Modisett *v.* Johnson, 2 Blackf. 431.

Kentucky.— Allen *v.* Sanders, 2 Bibb 94; Burford *v.* Burford, 1 Bibb 305.

Mississippi.— Ellis *v.* Ward, 7 Sm. & M. 651; Delafield *v.* Anderson, 7 Sm. & M. 630; Moody *v.* Farr, 6 Sm. & M. 100; Goodwin *v.* Anderson, 5 Sm. & M. 730; Thompson *v.* McGill, Freem. 401. *Aliter,* now, by statute. Adams *v.* Harris, 47 Miss. 144, where vendee had paid part of the purchase-money.

North Carolina.— Ledbetter *v.* Anderson, 62 N. C. 323; Justice *v.* Carroll, 57 N. C. 429; Melton *v.* Davidson, 41 N. C. 194.

South Carolina.— Barton *v.* Rushton, 4 Desauss. 373.

Tennessee.— Norris *v.* Ellis, 7 Humphr. 463; Shute *v.* Harder, 1 Yerg. 3, 24 Am. Dec. 427.

Texas.— Daugherty *v.* Cox, 13 Tex. 209.

See 21 Cent. Dig. tit. "Execution," § 114 *et seq.*

26. Young *v.* Mitchell, 33 Ark. 222; Hardy *v.* Heard, 15 Ark. 184; Flanagan *v.* Daws, 2 Houst. (Del.) 476; Hammond *v.* Johnston, 93 Mo. 198, 6 S. W. 83. See also Houston *v.* Jordan, 35 Me. 520. But *compare* Bartlett *v.* Glascock, 4 Mo. 62, where none of the purchase-price had been paid.

Payment of interest.— It has been held in Georgia that payment of interest on notes given therefor is not part payment of the purchase-money within the code, section 3586, providing that when one holds property under a bond for title, and the purchase-money has been partially paid, the land may be levied on under judgment against him. McEntire *v.* Berry, 85 Ga. 474, 11 S. E. 799.

the property, his interest in such property is liable to seizure and sale on execution against him.[27]

(v) *Under Rescinded Contract.* Where the contract of sale has been rescinded of course the vendee has no such interest in the property as is subject to sale under execution against him.[28]

I. Choses in Action — 1. In General — a. Common-Law Rule. Choses in action are subject to execution only when made so by statute, or are voluntarily given up to be sold on execution.[29]

b. By Statute. In a majority of the states statutory provisions have been enacted by which the choses in action of the debtor may be reached by process of garnishment,[30] and in some jurisdictions, by express statutory enactments, all choses in action of a debtor may be levied upon and sold under execution against him in the same manner as for personal property.[31]

2. Promissory Notes and Other Evidences of Debt. So instruments and securities for the payment of money, such as bonds and promissory notes, are not the

27. *Connecticut*:—Bunnell *v.* Read, 21 Conn. 586.

Georgia.— Adams *v.* Cauthen, 113 Ga. 166, 39 S. E. 479; Pitts *v.* McWhorter, 3 Ga. 5, 46 Am. Dec. 405. See Neal *v.* Murphy, 60 Ga. 388.

Mississippi.— Moody *v.* Farr, 6 Sm. & M. 100; Thompson *v.* Wheatley, 5 Sm. & M. 499.

Missouri.— Morgan *v.* Mouse, 53 Mo. 219; Neef *v.* Seely, 49 Mo. 209.

North Carolina.— Phillips *v.* Davis, 69 N. C. 117; Frost *v.* Reynolds, 39 N. C. 494.

Virginia.— See Johnson *v.* National Exch. Bank, 33 Gratt. 473.

See 21 Cent. Dig. tit. "Execution," § 108.

In Alabama, prior to the adoption of the code, the equitable title of the purchaser of land, who had paid the purchase-money, but had not received a conveyance, could not be sold at law under execution against him. Fawcetts *v.* Kimmey, 33 Ala. 261; Hogan *v.* Smith, 16 Ala. 600; Elmore *v.* Harris, 13 Ala. 360.

28. Davis *v.* Inscoe, 84 N. C. 396; Sage *v.* Sheutz, 23 Ohio St. 1; Kaffensberger *v.* Cullison, 28 Pa. St. 426; Lanyon *v.* Toogood, 13 L. J. Exch. 273, 13 M. & W. 27. See also Moore *v.* Simpson, 3 Metc. (Ky.) 349.

29. *California.*— Hoxie *v.* Bryant, 131 Cal. 85, 63 Pac. 153.

Colorado.—Fallon *v.* Worthington, 13 Colo. 559, 22 Pac. 960, 16 Am. St. Rep. 231, 6 L. R. A. 708.

Indiana.— Shaw *v.* Aveline, 5 Ind. 380; Johnson *v.* Crawford, 6 Blackf. 377; McClelland *v.* Hubbard, 2 Blackf. 361.

Maryland.— Harding *v.* Stevenson, 6 Harr. & J. 264.

Minnesota.— Stromberg *v.* Lindberg, 25 Minn. 513.

New York.— McNeeley *v.* Welz, 166 N. Y. 124, 59 N. E. 697 [*affirming* 20 N. Y. App. Div. 566, 47 N. Y. Suppl. 310]; Ransom *v.* Miner, 3 Sandf. 692; Kratzenstein *v.* Lehman, 18 Misc. 590, 42 N. Y. Suppl. 237, 26 N. Y. Civ. Proc. 157; Duffy *v.* Dawson, 2 Misc. 401, 21 N. Y. Suppl. 978; Ingalls *v.* Lord, 1 Cow. 240; Bogert *v.* Perry, 17 Johns. 351, 8 Am. Dec. 411; Denton *v.* Livingston, 9 Johns. 96, 6 Am. Dec. 264.

Pennsylvania.— Butterfield *v.* Lathrop, 71 Pa. St. 225; Tradesmen's Bld., etc., Assoc. No. 3 *v.* Maher, 9 Pa. Super. Ct. 340, 43 Wkly. Notes Cas. 422.

Texas.— Price *v.* Brady, 21 Tex. 614.

Virginia.— Claytor *v.* Anthony, 6 Rand. 285.

See 21 Cent. Dig. tit. "Execution," § 117.

Schedule of assessments.— It was held in Marion Tp. Union Draining Co. *v.* Norris, 37 Ind. 424, that a schedule of assessments for benefits upon land and real estate affected by the construction of a drain company, duly recorded, is not assets subject to an ordinary execution.

30. Carl *v.* Young, 9 La. Ann. 272. See, generally, Garnishment.

31. *California.*— Davis *v.* Mitchell, 34 Cal. 81; Adams *v.* Hackett, 7 Cal. 187.

Indiana.— Bay *v.* Saulspaugh, 74 Ind. 397.

Louisiana.— Nugent *v.* McCaffrey, 33 La. Ann. 271 (holding that a right of action for the recovery of real estate and damages is liable to seizure on execution); Vance *v.* Lafferanderie, 4 Rob. 340 (holding that the salary of a clerk of a bank may be seized on execution against him); Thomas *v.* Callihan, 5 Mart. N. S. 180.

Missouri.— Hammond *v.* Johnston, 93 Mo. 198, 6 S. W. 83.

West Virginia.—Huling *v.* Cadell, 9 W. Va. 522, 27 Am. Rep. 562.

See 21 Cent. Dig. tit. "Execution," § 117.

Salary for personal services not yet due has been held in Louisiana not to be liable to seizure on execution. Allen *v.* Arnouil, 1 Rob. (La.) 399.

Attachment execution.— In Pennsylvania prior to 1836, the plaintiff in a judgment had no means of reaching that large class of property known as choses in action, and the legislature, to remedy this, passed the act of 1836, which provided for a new writ of execution to be called an "attachment execution." Karnes *v.* McGuire, 18 Pa. Co. Ct. 306, 308. See also Jones *v.* New York, etc., R. Co., 1 Grant 457, holding that a debt in suit in another court may be attached under an attachment execution.

subject of seizure and sale under execution in the absence of express statutory authority.[32] Now in some of the states, by virtue of statute, promissory notes and other evidences of debt are subject to seizure and sale under execution.[33] The unissued notes or bonds of a party, however, in his possession and control, do not constitute a part of his property or assets, and are not liable to sale under execution against him.[34]

3. JUDGMENTS — a. At Common Law. At common law judgments, like other choses in action, were not subject to levy and sale under execution.[35]

b. By Statute. In the majority of jurisdictions which allow choses in action to be subjected to execution, a judgment may be the subject of levy and sale as a credit or chose in action.[36] Many of the courts, however, in construing

32. *Alabama.*—Jones *v.* Norris, 2 Ala. 526.
Arkansas.— Field *v.* Lawson, 5 Ark. 376.
Georgia.— McGehee *v.* Cherry, 6 Ga. 550.
Illinois.— Crawford *v.* Schmitz, 139 Ill. 564, 29 N. E. 40 [*affirming* 41 Ill. App. 357].
Indiana.— Johnson *v.* Crawford, 6 Blackf. 377; McClelland *v.* Hubbard, 2 Blackf. 361. Particularly after transfer by defendant. McKnight *v.* Knisely, 25 Ind. 336, 87 Am. Dec. 364.
Maine.— Smith *v.* Kennebec, etc., R. Co., 45 Me. 547. See also Bowker *v.* Hill, 60 Me. 172.
Michigan.— People *v.* Wayne County, 5 Mich. 223.
New York.— People *v.* National Mut. Ins. Co., 19 N. Y. App. Div. 247, 46 N. Y. Suppl. 102; Ingalls *v.* Lord, 1 Cow. 240.
Ohio.— Goodenow *v.* Duffield, Wright 455.
Pennsylvania.— Rhoads *v.* Megonigal, 2 Pa. St. 39.
Tennessee.— See also Moore *v.* Pillow, 3 Humphr. 448.
Texas.— Taylor *v.* Gillean, 23 Tex. 508; Price *v.* Brady, 21 Tex. 614.
See 21 Cent. Dig. tit. "Execution," § 118.
A lost mortgage of real estate, unaccompanied by any note, bond, or other evidence of indebtedness, and not recorded, cannot be the subject of levy and sale on execution. Gale *v.* Battin, 16 Minn. 148.
Bank-notes, although equivalent to money, are within the rule. Francis *v.* Nash, Cas. t. Hardw. 53; Knight *v.* Criddle, 9 East 48; Fieldhouse *v.* Croft, 4 East 510. *Contra,* Handy *v.* Dobbin, 12 Johns. (N. Y.) 220.

33. Davis *v.* Mitchell, 34 Cal. 81; Robinson *v.* Mitchell, 1 Harr. (Del.) 365 (when aided by garnishment proceedings); State *v.* Judge Fifth Dist. Orleans Parish, 28 La. Ann. 884; Wilson *v.* Munday, 5 La. 483; Brown *v.* Anderson, 4 Mart. N. S. (La.) 416; Mower *v.* Stickney, 5 Minn. 397. *Compare* Perry *v.* Coates, 9 Mass. 537; Spencer *v.* Blaisdell, 4 N. H. 198, 17 Am. Dec. 412.
In Iowa, a thing in action, as a promissory note (Savery *v.* Hays, 20 Iowa 25, 89 Am. Dec. 511) or a railroad bond (Hetherington *v.* Hayden, 11 Iowa 235) may be levied upon under an execution. And the sheriff may, after levying upon a note, transfer it by indorsement (Earhart *v.* Gant, 32 Iowa 481) or sell it at public sale (Allison *v.* Barrett, 16 Iowa 278); but the sale on execution of a promissory note, in which the execution defendant at the time of the sale has no interest, passes no title (McCormick *v.* Williams, 54 Iowa 50, 6 N. W. 138).
In Louisiana a sale under execution of a promissory note, without possession taken by the officer or an appraisement made, is void. Stockton *v.* Stanbrough, 3 La. Ann. 390.
In Pennsylvania a note is subject to attachment execution although it is not due. Keiffer *v.* Ehler, 18 Pa. St. 388, holding, however, that an attachment execution is unavailable against a *bona fide* holder for value of negotiable paper who acquires it under attachment, before maturity and without notice.
Under the English statutes see Courtoy *v.* Vincent, 15 Beav. 486, 21 L. J. Ch. 291; Watts *v.* Jefferyes, 15 Jur. 435, 3 Macn. & G. 422, 49 Eng. Ch. 328, 42 Eng. Reprint 324.

34. Eastern Electric Cable Co. *v.* Great Western Mfg. Co., 164 Mass. 274, 41 N. E. 295; Coddington *v.* Gilbert, 17 N. Y. 489; Sickles *v.* Richardson, 23 Hun (N. Y.) 559; Cunningham *v.* Pennsylvania, etc., R. Co., 11 N. Y. St. 663; Means *v.* Cincinnati, etc., R. Co., 2 Disn. (Ohio) 465. See also Washburn *v.* Green, 133 U. S. 30, 10 S. Ct. 280, 33 L. ed. 516; Courtoy *v.* Vincent, 15 Beav. 486, 21 L. J. Ch. 291.

35. McBride *v.* Fallon, 65 Cal. 301, 4 Pac. 17; Wilson *v.* Matheson, 17 Fla. 630; Osborn *v.* Cloud, 23 Iowa 104, 92 Am. Dec. 413.

36. Safford *v.* Maxwell, 23 La. Ann. 345; Righter *v.* Slidell, 9 La. Ann. 602; Hanna *v.* Bry, 5 La. Ann. 651, 52 Am. Dec. 606; McLaughlin *v.* Alexander, 2 S. D. 226, 49 N. W. 99.
In Colorado a judgment is not subject to execution except on a writ issued out of the court where such judgment was rendered. Hamill *v.* Peck, 11 Colo. App. 1, 52 Pac. 216.
In Indiana a judgment is not subject to levy and sale on an ordinary execution unless given up by the judgment debtor for that purpose. Steele *v.* McCarty, 130 Ind. 547, 30 N. E. 516; Marion Tp. Union Draining Co. *v.* Norris, 37 Ind. 424; Johnson *v.* Crawford, 6 Blackf. 377.
In Iowa it has been held that a judgment may be levied upon and sold under execution, as any other personal property, under Code, § 3046. Ochiltree *v.* Missouri, etc., R. Co., 49 Iowa 150; Potter *v.* Phillips, 44 Iowa 353.
Under the Minnesota statute specifying,

the statutes relative to choses in action, have reached the conclusion that a judgment cannot be levied upon and sold, but can only be subjected by process of garnishment.[37]

J. Ownership or Possession of Property — 1. In General. The doctrine is well recognized that the party in possession of property has a possessory title which is subject to levy and sale on execution against him, and the purchaser at such sale acquires all the rights accruing from the possession of defendant.[38]

as subject to execution, "bills, notes, book accounts, debts, credits, and all other evidences of indebtedness," it has been held that a judgment for the recovery of money is subject to levy under execution. Henry *v.* Traynor, 42 Minn. 234, 44 N. W. 11.

In Pennsylvania a debt established by judgment may be attached, even though it be by the judgment of the court of another state. Fithian *v.* New York, etc., R. Co., 31 Pa. St. 114; Jones *v.* New York, etc., R. Co., 1 Grant (Pa.) 457.

Order of court necessary for sale.— Under a prior Minnesota statute it was held that while a judgment could be levied upon by execution, yet as it was a thing in action the sale could only be made upon the order of the court. Thompson *v.* Sutton, 23 Minn. 50.

Judgment granting alimony.— It has been held in New York that where a judgment giving a woman a divorce made provision for her support in semiannual payments by her husband, her creditors could reach the sums thus due. Stevenson *v.* Stevenson, 34 Hun (N. Y.) 157.

37. Latham *v.* Blake, 77 Cal. 646, 18 Pac. 150, 20 Pac. 417; Dore *v.* Dougherty, 72 Cal. 232, 13 Pac. 621, 1 Am. St. Rep. 48; McBride *v.* Fallon, 65 Cal. 301, 4 Pac. 17. See also Crandall *v.* Blen, 13 Cal. 15. *Compare* Adams *v.* Hackett, 7 Cal. 187.

Where a judgment debtor is also possessed of a judgment against his creditor, the latter judgment cannot be levied on under an execution against him, as the law tolerates no such absurdity as a judgment creditor seizing a judgment against himself. Lemane *v.* Lemane, 27 La. Ann. 694.

In Oregon it has been held that a judgment is not a subject of garnishment, but the question as to whether it is a subject of levy and sale does not seem to have been adjudicated. Despain *v.* Crow, 14 Oreg. 404, 12 Pac. 806; Norton *v.* Winter, 1 Oreg. 47, 62 Am. Dec. 297. See, generally, Garnishment.

38. *Alabama.*— Pilcher *v.* Hickman, 132 Ala. 574, 31 So. 469, 90 Am. St. Rep. 930; McCaskle *v.* Amarine, 12 Ala. 17.

California.— Emerson *v.* Sansome, 41 Cal. 552.

Colorado.—Weare *v.* Johnson, 20 Colo. 363, 38 Pac. 374.

Georgia.— See Collins *v.* Pace, Ga. Dec. 160, Pt. II.

Illinois.— Thomas *v.* Bowman, 29 Ill. 426, 30 Ill. 84; French *v.* Carr, 7 Ill. 664; Turney *v.* Saunders, 5 Ill. 527; Storey *v.* Agnew, 2 Ill. App. 353.

Louisiana.— See Augustin *v.* Dours, 26 La. Ann. 261.

Missouri.— Page *v.* Hill, 11 Mo. 149.

Nebraska.— Rosenfield *v.* Chada, 12 Nebr. 25, 10 N. W. 465.

New Hampshire.— Murray *v.* Emmons, 19 N. H. 483.

New York.— Parshall *v.* Shirts, 54 Barb. 99; Dickinson *v.* Smith, 25 Barb. 102; Kellogg *v.* Kellogg, 6 Barb. 116; Jackson *v.* Phillips, 9 Cow. 94; Jackson *v.* Town, 4 Cow. 599, 15 Am. Dec. 405; Jackson *v.* Scott, 18 Johns. 94; Jackson *v.* Graham, 3 Cai. 188; Talbot *v.* Chamberlin, 3 Paige 219. To the same effect see Griffin *v.* Spencer, 6 Hill 525.

Ohio.— Miner *v.* Wallace, 10 Ohio 403; Scott *v.* Douglass, 7 Ohio 227; Gray *v.* Tappan, Wright 117; Shorten *v.* Drake, 8 Ohio Dec. (Reprint) 184, 6 Cinc. L. Bul. 202.

Pennsylvania.— Stahle *v.* Spohn, 8 Serg. & R. 317; Pounder *v.* Foos, 1 Walk. 27. See also Stiles *v.* Whittaker, 1 Phila. 271.

South Carolina.— See Brooks *v.* Penn, 2 Strobh. Eq. 113.

Wisconsin.— Swift *v.* Agnes, 33 Wis. 228; Bunker *v.* Rand, 19 Wis. 253, 88 Am. Dec. 684; Dean *v.* Pyncheon, 3 Pinn. 17, 3 Chandl. 9.

United States.— See Everett *v.* Stone, 8 Fed. Cas. No. 4,577, 3 Story 466.

See 21 Cent. Dig. tit. "Execution," § 119.

But *compare* Taylor *v.* Plunkett, (Del. 1903) 56 Atl. 384, holding that where any part of property levied on under an execution belonged neither to the judgment debtor, nor to the person in whose possession it was found, but to some third person, and was at the time of the levy in the lawful possession of the person from whom it was taken, the levy was unlawful.

Easement.— It has been held in New York that an estate and interest of a corporation in real property, although it may be but an easement, is subject to levy and sale on execution. Evangelical Lutheran St. John's Orphan Home *v.* Buffalo Hydraulic Assoc., 64 N. Y. 561 [*affirming* 4 Hun 419, 6 Thomps. & C. 589].

Where there has been a complete delivery of the property under a contract for the sale of specific, ascertained goods, the title passes, although something remains to be done in order to ascertain the total value of the goods at the rate specified in the contract, and no right of property remains in the vendor which is subject under execution against him. Hatch *v.* Standard Oil Co., 100 U. S. 124, 25 L. ed. 554.

A verdict in trover for plaintiff has been held in South Carolina to change the possession of the property, and make it liable for defendant's debts in execution against him. Rogers *v.* Moore, Rice (S. C.) 60.

2. Property Held Adversely — a. Personal Property. Where personal property is held adversely to its owner, his interest therein being a mere chose in action, in the absence of statute it is not liable to sale under execution against him.[39]

b. Real Property — (I) *Early Doctrine.* At common law, and by construction of the earlier statutes in many of the states, the debtor's interest in land in adverse possession was not subject to sale under execution against him.[40]

(II) *Modern Doctrine.* The doctrine seems now to be well settled that the interest of a debtor in real property is subject to sale under execution against him, even where such property is held by a third party in adverse possession, the doctrine of adverse possession not applying to judicial sales.[41]

3. Property Consigned For Sale — a. General Rule. The general rule is that personal property consigned to a dealer, factor, or other agent, with authority from the owner to sell the same, the agent being required to account for the proceeds when sold, is not subject to sale under execution on a judgment obtained against such agent.[42] The mere fact that a party is to have an interest in the profits of certain property after it has been sold does not give him a leviable interest in the

A mere right of occupancy has been held in Tennessee not to be subject to sale under execution. Daugherty *v.* Marcum, 3 Head 323; Crutsinger *v.* Catron, 10 Humphr. 24. See also Marr *v.* Gilliam, 1 Coldw. 488.

39. Carlos *v.* Ansley, 8 Ala. 900; Horton *v.* Smith, 8 Ala. 73, 42 Am. Dec. 628; Wier *v.* Davis, 4 Ala. 442; Com. *v.* Abell, 6 J. J. Marsh. (Ky.) 476; Thomas *v.* Thomas, 2 A. K. Marsh. (Ky.) 430. See, however, State *v.* Judge Civ. Dist. Ct., 48 La. Ann. 667, 19 So. 666, holding that, when property in the hands of third persons is seized as the property of defendant in execution, he cannot interpose the adverse possession as a means of defeating the seizer. *Contra,* Hardin *v.* White Swan Min., etc., Co., 26 Wash. 583, 67 Pac. 236.

40. Campbell *v.* Point St. Iron Works, 12 R. I. 452.

In Kentucky prior to the statute of 1824 the common-law rule obtained. Ring *v.* Gray, 6 B. Mon. 368; Myers *v.* Sanders, 7 Dana 506; Griffith *v.* Huston, 7 J. J. Marsh. 385; Shephard *v.* McIntire, 4 J. J. Marsh. 110; McConnell *v.* Brown, 5 T. B. Mon. 478. After 1824 and until the adoption of the Revised Statutes the statutes relating to sales of land held adversely, being silent upon the subject of execution and judicial sales, were construed as not applying either to execution or judicial sales. Little *v.* Bishop, 9 B. Mon. 240; Myers *v.* Sanders, 7 Dana 506; Dubois *v.* Marshall, 3 Dana 336; Violett *v.* Violett, 2 Dana 323; Frizzle *v.* Veach, 1 Dana 211. The rule now is that sales under execution, which are expressly included in the statute, are void, but that the common-law rule applies in the case of judicial or decretal sales which are not mentioned in the statute. Preston *v.* Breckinridge, 86 Ky. 619, 6 S. W. 641, 10 Ky. L. Rep. 2; Dubois *v.* Marshall, 3 Dana 336; Violett *v.* Violett, 2 Dana 323; Frizzle *v.* Veach, 1 Dana 211; Farmers' Bank *v.* Pryse, 76 S. W. 358, 25 Ky. L. Rep. 807; Carlisle *v.* Cassady, 46 S. W. 490, 20 Ky. L. Rep. 562; Arnold *v.* Stephens, 17 S. W. 859, 13 Ky. L. Rep. 622; Hobson *v.* Hendrick, 7 Ky. L. Rep. 362; Kenton Furnace R. Co. *v.* Lowder, 1 Ky. L. Rep. 399.

41. *Alabama.*— High *v.* Nelms, 14 Ala. 350, 48 Am. Dec. 103.

Missouri.— Rogers *v.* Brown, 61 Mo. 187. And *compare* Houck *v.* Patty, 100 Mo. App. 302, 73 S. W. 389.

New York.— See Tuttle *v.* Jackson, 6 Wend. 213, 21 Am. Dec. 306 [*reversing* on another point 9 Cow. 233].

North Carolina.— Carson *v.* Smart, 34 N. C. 369.

Pennsylvania.— Jarrett *v.* Tomlinson, 3 Watts & S. 114.

Tennessee.— Park *v.* Larkin, 1 Overt. 101. See 21 Cent. Dig. tit. "Execution," § 120.

See, however, Hodge *v.* Amerman, 40 N. J. Eq. 99, 2 Atl. 257.

An adverse possession by defendant in execution, enjoyed in connection with his land, passes by a sale of such land on execution. Scheetz *v.* Fitzwater, 5 Pa. St. 126.

42. *California.*— Bickerstaff *v.* Doub, 19 Cal. 109, 79 Am. Dec. 204.

Georgia.— Powell *v.* Brunner, 86 Ga. 531, 12 S. E. 744. See also Augusta Nat. Bank *v.* Goodyear, 90 Ga. 711, 16 S. E. 962.

Illinois.— Loomis *v.* Barker, 69 Ill. 360; Pease *v.* Rand, etc., Desk Co., 100 Ill. App. 244; Ellsner *v.* Radcliff, 21 Ill. App. 195.

Iowa.— Robinson *v.* Chapline, 9 Iowa 91.

Louisiana.— Montgomery *v.* Brander, 4 Rob. 400. See also Chaffraix *v.* Harper, 26 La. Ann. 22.

Maryland.— Harding *v.* Stevenson, 6 Harr. & J. 264.

Massachusetts.— See also Walker *v.* Butterick, 105 Mass. 237.

Minnesota.— Heberling *v.* Jaggar, 47 Minn. 70, 49 N. W. 396, 28 Am. St. Rep. 331; Benz *v.* Geissell, 24 Minn. 169.

Nebraska.— National Cordage Co. *v.* Sims, 44 Nebr. 148, 62 N. W. 514. See also McClelland *v.* Scroggin, 35 Nebr. 536, 53 N. W. 469.

New York.— Cole *v.* Mann, 62 N. Y. 1; Jacob *v.* Watkins, 10 N. Y. App. Div. 475,

property itself.[43] In some jurisdictions the rule is thus laid down: Where the contract does not contemplate an absolute acquisition of title by the bailee or agent, or his becoming absolutely responsible for the purchase-price, the transaction cannot be regarded as an absolute sale, or as creating an interest in his favor, so as to render the property liable to execution against him.[44]

b. Where Transaction Amounts to Absolute Sale. Where, however, the instrument consigning the goods to the agent or bailee creates an apparent absolute liability on his part for the purchase-price of the goods, the transaction will be regarded in law as an unconditional and absolute sale, even though the instrument declares it to be otherwise, and expressly stipulates that title shall remain in the consignor until payment of the purchase-price; and such property in the hands of the consignee is leviable under execution against him.[45]

42 N. Y. Suppl. 6. See, however, Bonesteel *v.* Flack, 41 Barb. 435.

Pennsylvania.— Bevan *v.* Crooks, 7 Watts & S. 452 (supporting the above rule, but holding that where the consignee did not have the character of a commission merchant, and it did not appear upon what terms or for what purpose the goods were consigned, such rule did not apply); McCullough *v.* Porter, 4 Watts & S. 177, 39 Am. Dec. 68 [*distinguishing* Jenkins *v.* Eichelberger, 4 Watts 121, 28 Am. Dec. 691]; Ohio Cultivator Co. *v.* Walters, 13 York Leg. Rec. 185; Bickford, etc., Co. *v.* Walters, 13 York Leg. Rec. 173.

Texas.— See Joost *v.* Scott, 19 Tex. 473.

Virginia.— Edmunds *v.* Hobbie Piano Co., 97 Va. 588, 34 S. E. 472.

West Virginia.— Barnes Safe, etc., Co. *v.* Bloch Bros. Tobacco Co., 38 W. Va. 158, 18 S. E. 482, 45 Am. St. Rep. 846, 22 L. R. A. 850; Brown Mfg. Co. *v.* Deering, 35 W. Va. 255, 13 S. E. 383.

Wisconsin.— McGraft *v.* Rugee, 60 Wis. 406, 19 N. W. 530, 50 Am. Rep. 378.

United States.— See Merrill *v.* Rinker, 17 Fed. Cas. No. 9,471, Baldw. 528.

England.— See Dawson *v.* Wood, 3 Taunt. 256.

See 21 Cent. Dig. tit. "Execution," § 122.

Changing character of property.— See Terrill *v.* Hays, 24 La. Ann. 428.

In Mississippi it has been held, however, that Code (1880), § 1300, making liable to the debts of the trader all property "used or acquired" in his business, applies to horses in the custody of a horse-trader, to be sold by him as a part of his stock. Evans *v.* Henley, 66 Miss. 148, 5 So. 522; Wolf *v.* Kahn, 62 Miss. 814; Shannon *v.* Blum, 60 Miss. 828. See also Head *v.* Haydock Carriage Co., (1894) 16 So. 420; Citizens' Bank *v.* Studebaker Bros. Mfg. Co., 71 Miss. 544, 14 So. 733; Bufkin *v.* Lyon, 68 Miss. 255, 10 So. 38. See *infra*, note 44

Va. Code, § 2877, provides that, if any person transact business in his own name without any addition as "factor" or "agent," all the property and stock used in such business shall, as to his creditors, be liable for the debts of such person; and section 2465, as amended by Acts (1899–1900), p. 89, provides for the recording of muniments of title valid between the parties, but void as to purchasers without notice. It was held that the stock of one doing business in his own name is liable for his debts, although the title of some other person to such property be of record, under section 2465, as amended. Partlow *v.* Lickliter, 100 Va. 631, 42 S. E. 671.

43. *Georgia.*— Barnett *v.* Justices Justice's Ct., Dudley (Ga.) 175.

Louisiana.— Poincy *v.* Burke, 28 La. Ann. 673.

Minnesota.— Hankey *v.* Becht, 25 Minn. 212.

Montana.— Sweeney *v.* Darcy, 21 Mont. 188, 53 Pac. 540.

New York.— Lamb *v.* Grover, 47 Barb. (N. Y.) 317.

A common-law agister's lien is not the subject of levy and sale under execution. McNamara *v.* Godair, 161 Ill. 228, 43 N. E. 1071.

44. Lenz *v.* Harrison, 148 Ill. 598, 36 N. E. 567 [*distinguishing* Chickering *v.* Bastress, 130 Ill. 206, 22 N. E. 542, 17 Am. St. Rep. 309]; Gray *v.* Agnew, 95 Ill. 315; W. O. Dean Co. *v.* Lombard, 61 Ill. App. 94; Ellsner *v.* Radcliff, 21 Ill. App. 195.

45. *Illinois.*— Peoria Mfg. Co. *v.* Lyons, 153 Ill. 427, 38 N. E. 661.

Michigan.— Aspinwall Mfg. Co. *v.* Johnson, 97 Mich. 531, 56 S. W. 932.

Nebraska.— Mack *v.* Drummond Tobacco Co., 48 Nebr. 397, 67 N. W. 174, 58 Am. St. Rep. 691.

New York.— Bonesteel *v.* Flack, 41 Barb. 435, 27 How. Pr. 310; Ludden *v.* Hazen, 31 Barb. 650.

North Carolina.— Kellam *v.* Brown, 112 N. C. 451, 17 S. E. 416.

Pennsylvania.— Braunn *v.* Keally, 146 Pa. St. 519, 23 Atl. 389, 28 Am. St. Rep. 811.

Tennessee.— Arbuckle *v.* Kirkpatrick, 98 Tenn. 221, 39 S. W. 3, 50 Am. St. Rep. 854, 36 L. R. A. 285.

United States.— Herryford *v.* Davis, 102 U. S. 235, 243, 26 L. ed. 160.

See 21 Cent. Dig. tit. "Execution," § 122.

Mere permissive possession of property by a trader, where he has neither acquired an interest in, nor a right to use such property in his business, has been held not to be sufficient to bring it within the operation of Miss. Code (1880), § 1300, providing that all property "used or acquired" by a trader in carrying on his business shall, as to his

4. Property Alienated Prior to Judgment. Where property has been purchased by an authentic act, and passes into the possession of the vendee, it is not leviable under execution against the vendor, and if the creditors desire to attack the transaction on the ground of fraud the proper mode of procedure is by a creditors' bill.[46]

5. Property Purchased at Judicial Sale — a. Interest of Purchaser. The purchaser of property at a judicial sale has not, previous to the making and delivery to him of the sheriff's or master commissioner's deed, such an interest in the property as can be levied on and sold under execution against him;[47] and where the judgment debtor is allowed by statute a stipulated time within which to redeem his property sold under execution, the purchaser at the execution sale acquires no leviable interest in the property prior to the expiration of the time allowed for redemption.[48]

b. Interest of Debtor Where Property Is Left in His Possession. The retention of possession by the execution debtor of property sold at a sheriff sale is not an index of fraud, because the sale is not the act of such debtor, but of the law; and property thus purchased and left in the possession of the former owner is not liable to be taken under another execution against such debtor.[49]

6. Bailments — a. Interest of Bailor. Where property is in the possession of

creditors, be liable for his debts and be treated as his property. Hall's Self-Feeding Cotton Gin Co. *v.* Berg, 65 Miss. 184, 3 So. 372; Burwell *v.* Herron, (Miss. 1894) 16 So. 356. See *supra*, note 42.

46. *Alabama.*— Downey *v.* Mann, 43 Ala. 266.

Georgia.— Hirsch *v.* Fleming, 77 Ga. 594, 3 S. E. 9.

Louisiana.— Boisse *v.* Dickson, 31 La. Ann. 741; Edwards *v.* Fairbanks, 27 La. Ann. 449 (where property was transferred by a judgment debtor to a corporation whose charter did not give it the right to acquire such property, and it was held not to be leviable on execution against the debtor); Chidester *v.* Simonds, 22 La. Ann. 374; Weld *v.* Peters, 1 La. Ann. 432.

Maine.— Thomas *v.* Record, 47 Me. 500, 74 Am. Dec. 500.

Michigan.— Keeler *v.* Ullrich, 32 Mich. 88. *Compare* Spring *v.* Raymond, (1903) 95 N. W. 1003.

Mississippi.— Goodman *v.* Burford, 10 Sm. & M. 385.

New York.— Hyde *v.* Lathrop, 2 Abb. Dec. 436, 3 Keyes 597, 3 Transcr. App. 320.

Pennsylvania.— Bayer *v.* Walsh, 166 Pa. St. 38, 30 Atl. 1039; Rundle *v.* Ettwein, 2 Yeates 23; Keil *v.* Harris, 1 Pa. Co. Ct. 171.

Tennessee.— Smith *v.* Taylor, 11 Lea 738.

United States.— See Stockton *v.* Ford, 11 How. 232, 13 L. ed. 676.

England.— Steel *v.* Brown, 1 Campb. 512 note, 1 Taunt. 381, 9 Rev. Rep. 795.

See 21 Cent. Dig. tit. "Execution," § 121; and, generally, Creditors' Suits.

47. Green *v.* Steelman, 10 N. J. L. 193; Gorrell *v.* Kelsey, 40 Ohio St. 117.

48. Rountree *v.* Williams, 99 Ga. 222, 25 S. E. 323; Bowman *v.* People, 82 Ill. 246, 25 Am. Rep. 316; Shobe *v.* Luff, 66 Ill. App. 414 (where it was held that a certificate of purchase at a master's sale does not represent such an interest in real estate as is subject to the levy of an execution before the time of redemption has expired); Kidder *v.* Orcutt, 40 Me. 589. See, however, Hartman *v.* Stahl, 2 Penr. & W. (Pa.) 223, where it was held that by payment of three quarters of the purchase-money, and the delivery of possession by the sheriff, the purchaser at the execution sale acquired an interest in the property which was subject to sale under execution against him. *Contra*, Page *v.* Rogers, 31 Cal. 293.

49. *California.*— Matteucci *v.* Whelan, 123 Cal. 312, 55 Pac. 990, 69 Am. St. Rep. 60.

Connecticut.— Huebler *v.* Smith, 62 Conn. 186, 25 Atl. 658, 36 Am. St. Rep. 337, where the execution creditor was the purchaser at the sheriff sale.

New York.— Maston *v.* Webb, 60 How. Pr. 302.

North Carolina.— Smith *v.* Fore, 46 N. C. 488.

Pennsylvania.— Stoddart *v.* Price, 143 Pa. St. 537, 22 Atl. 811; Bisbing *v.* Third Nat. Bank, 93 Pa. St. 79, 39 Am. Rep. 726; Miller *v.* Irvine, 94 Pa. St. 405; Dick *v.* Lindsay, 2 Grant 431 (supporting the rule above laid down, but holding that under the particular state of facts in the case the transaction was not a bailment, but amounted to a resale to the execution defendant, and the property was therefore liable to sale under a subsequent execution against him); Myers *v.* Harvey, 2 Penr. & W. 478, 23 Am. Dec. 60; Lippincott *v.* Longbottom, 6 Pa. Co. Ct. 503. See also Dick *v.* Cooper, 24 Pa. St. 217, 64 Am. Dec. 652; Schott v. Chancellor, 20 Pa. St. 195.

England.— Latimer *v.* Batson, 4 B. & C. 652, 7 D. & R. 106, 4 L. J. K. B. O. S. 25, 10 E. C. L. 742; Woodham *v.* Baldock, Gow. 35 note, 3 Moore C. P. 11, 5 E. C. L. 859; Jezeph *v.* Ingram, 1 Moore C. P. 189. See also Leonard *v.* Baker, 1 M. & S. 251.

See 21 Cent. Dig. tit. "Execution," § 125.

one other than its owner, merely as bailee, without claim of title, the better doctrine seems to be that it is liable to execution for the debt of the bailor.[50]

b. Interest of Bailee — (I) *General Rule.* In the case of a bailee, where the general property and right of possession are in the bailor, the bailee having only an equitable interest therein, the better doctrine is that the interest of the bailee in such property is not subject to execution against him.[51]

(II) *Property Loaned.* In many jurisdictions statutes have been enacted, aimed at pretended loans of personal property, providing that uninterrupted possession by the borrower for a specified period, without demand, prosecuted by due course of law, by the lender, will render such property subject to sale on execution against the borrower, unless such alleged loan, reservation, or limitation of use or property is declared by will or deed, properly proved and recorded.[52] Where, however, the owner of a chattel loans it to another, it is not liable to an execution against the borrower in favor of a creditor whose debt was made before the loan was made, and where the credit could not have been given upon the faith of the supposed ownership.[53]

7. Materials of Contractor. The doctrine seems to be well settled that where a contractor engages to construct a house, vessel, bridge, or other thing, and to furnish the materials therefor, that no property vests in the person for whom it is to be built, until finished and delivered, even where certain portions of the contract price are agreed to be paid, and are paid to the contractor, at specific stages of the work; but such materials, prior to completion of the contracts and delivery, are subject to seizure and sale under execution against the contractor.[54]

8. Church Property. Churches and church property, although intended for the public benefit, are a part of the public interest that is committed exclusively to private enterprise, and therefore a church and the lot upon which it is erected are private property and subject to levy and sale in the same manner as other private

50. Thomas *v.* Thomas, 2 A. K. Marsh. (Ky.) 430; Jenkins *v.* Eichelberger, 4 Watts (Pa.) 121, 28 Am. Dec. 691; Buckner *v.* Croissant, 3 Phila. (Pa.) 219 (holding that the lien which a livery-stable keeper has by law upon a horse placed at livery with him does not prevent the levy under execution against the owner of the horse); Beale *v.* Digges, 6 Gratt. (Va.) 582. See, however, Hartford *v.* Jackson, 11 N. H. 145.

51. *Illinois.*— Cool *v.* Phillips, 66 Ill. 216.

Minnesota.— Williams *v.* McGrade, 13 Minn. 174.

Mississippi.— Hall's Self-Feeding Cotton-Gin Co. *v.* Berg, 65 Miss. 184, 3 So. 372.

Ohio.— Gibson *v.* Chillicothe Branch State Bank, 11 Ohio St. 311.

United States.— Arnold *v.* Hatch, 177 U. S. 276, 20 S. Ct. 625, 44 L. ed. 769 [*affirming* 89 Fed. 1013, 32 C. C. A. 602, 86 Fed. 436, 30 C. C. A. 171].

England.— Dean *v.* Whittaker, 1 C. & P. 347, 12 E. C. L. 208. See also Duffill *v.* Spottiswoode, 3 C. & P. 435, 14 E. C. L. 650; Pain *v.* Whittaker, R. & M. 99, 21 E. C. L. 710.

See 21 Cent. Dig. tit. "Execution," § 128.

See, however, Houston *v.* Simpson, 46 N. C. 513. And *compare* Hodge *v.* Adee, 2 Lans. (N. Y.) 314.

52. Montgomery *v.* Kirksey, 26 Ala. 172 (holding that the possession of the borrower must be uninterrupted for the whole of the period stipulated in the statute); Maull *v.* Hays, 12 Ala. 499 (holding, however, that the lien of the creditor must have been acquired while the property was still in the possession of the borrower); Withers *v.* Smith, 4 Bibb (Ky.) 170; Twiss *v.* Martin, 1 Humphr. (Tenn.) 189; Beale *v.* Digges, 6 Gratt. (Va.) 582.

Property on hire.— It was held in McKenzie *v.* Macon, 5 Gratt. (Va.) 379, that 1 Va. Rev. Code, p. 372, c. 101, § 2, was not applicable to property remaining in the possession of a person for more than five years, where such possession was by force of bailments for hiring, not fictitious or colorable only, but real and *bona fide*.

53. Davis *v.* Turner, 7 Kulp (Pa.) 85.

54. *New York.*— Andrews *v.* Durant, 11 N. Y. 35, 62 Am. Dec. 55; Merritt *v.* Johnson, 7 Johns. 473, 5 Am. Dec. 289.

Pennsylvania.— Watts *v.* Tibbals, 6 Pa. St. 447. See, however, White *v.* Miller, 18 Pa. St. 52.

Tennessee.— Crockett *v.* Latimer, 1 Humphr. 272.

West Virginia.— Wheeling *v.* Baer, 36 W. Va. 777, 15 S. E. 979.

England.— Mucklow *v.* Mangles, 1 Taunt. 318, 9 Rev. Rep. 784. See also Wood *v.* Bell, 5 E. & B. 772, 2 Jur. N. S. 349, 25 L. J. Q. B. 148, 85 E. C. L. 772; Tripp *v.* Armitage, 1 H. & H. 442, 3 Jur. 249, 8 L. J. Exch. 107, 4 M. & W. 687.

See 21 Cent. Dig. tit. "Execution," § 131.

But see Sandford *v.* Wiggins Ferry Co., 27 Ind. 522.

property.[55] Where, however, a religious corporation has sold the pews in the church building to individuals, it has been held that such building cannot be sold to pay the debts of the corporation.[56]

9. Property of Municipal Corporations or Counties[57] — a. General Rule. Where property of a municipal or other public corporation is sought to be subjected to execution to satisfy judgments recovered against such corporation, the question as to whether such property is leviable or not is to be determined by the usage and purposes for which it is held. Thus, property held for public uses, such as public buildings, streets, squares, parks, promenades, wharves, landing-places, fire-engines, hose and hose carriages, engine-houses, public markets, hospitals, cemeteries, and generally everything held for governmental purposes, is not subject to levy and sale under execution against such corporation.[58] Like-

55. Erie Presb. Congregation *v.* Colt, 2 Grant (Pa.) 75.

56. Revere *v.* Gannett, 1 Pick. (Mass.) 169; Bigelow *v.* Middletown Cong. Soc., 11 Vt. 283.

Communion service.— It was held in Lord *v.* Hardie, 82 N. C. 241, 33 Am. Rep. 682, that, where the pastor of a church recovers a judgment against the trustees on account of his salary, the communion service is not liable to seizure and sale under execution, the trustees of the church not being able in their corporate capacity or character to contract a debt for which it could be taken.

57. Garnishment of money due the public see, generally, Garnishment.

Lien of judgment on public property see, generally, Judgments.

58. *Alabama.*— Birmingham *v.* Rumsey, 63 Ala. 352.

California.— Fulton *v.* Hanlon, 20 Cal. 450; Hart *v.* Burnett, 15 Cal. 530; Wood *v.* San Francisco, 4 Cal. 190.

Georgia.— Curry *v.* Savannah, 64 Ga. 290, 37 Am. Rep. 74; Fleishel *v.* Hightower, 62 Ga. 324.

Illinois.— Morrison *v.* Hinkson, 87 Ill. 587, 29 Am. Rep. 77; Bloomington *v.* Brokaw, 77 Ill. 194; Odell *v.* Schroeder, 58 Ill. 353; Elrod *v.* Bernadotte, 53 Ill. 368; Olney *v.* Harvey, 50 Ill. 453, 99 Am. Dec. 530; Chicago *v.* Hasley, 25 Ill. 595; Green *v.* Marks, 25 Ill. 221; Cole *v.* Green, 21 Ill. 104; Princeville *v.* Hitchcock, 101 Ill. App. 588; Virden *v.* Fishback, 9 Ill. App. 82; Cairo *v.* Allen, 3 Ill. App. 398.

Indiana.— Lowe *v.* Howard County, 94 Ind. 553; Indianapolis, etc., R. Co. *v.* Indianapolis, 12 Ind. 620.

Iowa.— Ransom *v.* Boal, 29 Iowa 68, 4 Am. Rep. 195; Davenport *v.* Peoria M. & F. Ins. Co., 17 Iowa 276; Lamb *v.* Shays, 14 Iowa 567.

Kentucky.— *Compare* Hauns *v.* Central Kentucky Lunatic Asylum., 103 Ky. 562, 45 S. W. 890, 20 Ky. L. Rep. 246.

Louisiana.— Monroe *v.* Sheriff, 106 La. Ann. 350, 30 So. 840 (holding that whether or not property held as public property is necessary for the public use is a political rather than a judicial question); New Orleans *v.* Werlein, 50 La. Ann. 1251, 24 So. 232 (affirming this doctrine in all cases, unless it is made clearly to appear that the public use of the property has been abandoned or lost by non-user); State *v.* Finlay, 33 La. Ann. 113; McKnight *v.* Grant, 30 La. Ann. 361, 31 Am. Rep. 226; Plaquemines Parish *v.* Foulhouze, 30 La. Ann. 64; West Baton Rouge *v.* Michel, 4 La. Ann. 84.

Maryland.—Darling *v.* Baltimore, 51 Md. 1.

Missouri.— State *v.* Tiedemann, 69 Mo. 306, 33 Am. Rep. 498; State *v.* New Madrid County Ct., 51 Mo. 82; Allen *v.* Trustees School Dist. No. 1, 23 Mo. 418.

New Jersey.—Lyon *v.* Elizabeth, 43 N. J. L. 158.

New York.— Darlington *v.* New York, 31 N. Y. 164, 28 How. Pr. 352, 88 Am. Dec. 248; Brinckerhoff *v.* Board of Education, 6 Abb. Pr. N. S. 428, 37 How. Pr. 499. *Compare* Clarissy *v.* Metropolitan F. Dept., 7 Abb. Pr. N. S. 352.

North Carolina.— Brockenbrough *v.* Charlotte Water Com'rs, 134 N. C. 1, 46 S. E. 28; Wallace *v.* Sharon Tp., 84 N. C. 164; Gooch *v.* Gregory, 65 N. C. 142.

Ohio.— Cincinnati *v.* Cameron, 6 Ohio Dec. (Reprint) 727, 7 Am. L. Rec. 592.

Pennsylvania.— Foster *v.* Fowler, 60 Pa. St. 27 (where a company empowered to introduce water into a city for the use of the inhabitants was held to be a quasi-public corporation, and its property exempt from sale on execution against it); Com. *v.* Perkins, 43 Pa. St. 400; Schaffer *v.* Cadwallader, 36 Pa. St. 126.

Utah.— Emery County *v.* Burreson, 14 Utah 328, 47 Pac. 91, 60 Am. St. Rep. 898, 37 L. R. A. 732.

Wisconsin.— State *v.* Beloit, 20 Wis. 79; State *v.* Milwaukee, 20 Wis. 63; Crane *v.* Fond du Lac, 16 Wis. 196.

United States.— New Orleans *v.* Louisiana Constr. Co., 140 U. S. 654, 11 S. Ct. 968, 35 L. ed. 556; New Orleans *v.* Morris, 105 U. S. 600, 26 L. ed. 1184; Meriwether *v.* Garrett, 102 U. S. 472, 26 L. ed. 197; Klein *v.* New Orleans, 99 U. S. 149, 25 L. ed. 430; Weber *v.* Lee County, 6 Wall. 210, 18 L. ed. 781; Townsend *v.* Greeley, 5 Wall. 326, 18 L. ed. 547; Hitchcock *v.* Galveston Wharf Co., 50 Fed. 263; U. S. *v.* Ottawa, 28 Fed. 407; Amy *v.* Galena, 7 Fed. 163, 10 Biss. 263; Featherman *v.* Louisiana State Seminary, 8 Fed. Cas. No. 4,713, 2 Woods 71. See also The Protector, 20 Fed. 207, holding that a police boat owned by a city is not subject to a libel *in rem* without the consent of the city.

wise it has been held that taxes due to a municipal corporation or county cannot be seized under execution by a creditor of such corporation.[59] Where a municipal corporation or county owns private property, not useful or used for corporate purposes, the general rule is that such property may be seized and sold under execution against the corporation, precisely as similar property of individuals is seized and sold.[60]

b. Property Not Dedicated to Corporate Purposes. And property acquired by a corporation beyond what is actually dedicated to corporate purposes, and is essential to the proper exercise of its franchise, is leviable under execution against it.[61]

10. Property of Citizen on Execution Against Public Corporation — a. General Rule. In the United States, according to the weight of authority, where there is no provision in the act of incorporation which authorizes a resort to the individual property of the inhabitants of an incorporated town, county, or parish, for the purpose of discharging judgment against the corporation, then the private property of the inhabitants of such town, county, or parish is not liable on execution against the corporation.[62]

See, however, Lyell *v.* St. Clair County, 16 Fed. Cas. No. 8,621, 3 McLean 580.

See 21 Cent. Dig. tit. "Execution," § 133.

Insurance money from property destroyed. — It has been held in Alabama that where property of a municipal corporation, exempt from execution under the code on account of its useful municipal purposes, is destroyed, insurance thereon, taken out by the corporation, stands in the place of the property destroyed, to be used for its restoration, and is therefore also exempt. Ellis *v.* Pratt City, 111 Ala. 629, 20 So. 649, 56 Am. St. Rep. 76, 33 L. R. A. 264.

Public use temporarily abandoned. — It was held, in Murphree *v.* Mobile, 104 Ala. 532, 16 So. 544, that city property used for municipal purposes does not lose its exemption from levy and sale by a temporary use for private purposes.

Where the charter of a town is repealed, the town buildings are under the control of the state, and are not liable for the town debts. Lilly *v.* Taylor, 88 N. C. 489.

59. *California.* — Gilman *v.* Contra Costa County, 8 Cal. 52, 68 Am. Dec. 290.

Illinois. — Chicago *v.* Hasley, 25 Ill. 595.

Louisiana. — New Orleans, etc., R. Co. *v.* Municipality No. 1, 7 La. Ann. 148; Municipality No. 3 *v.* Hart, 6 La. Ann. 570; Egerton *v.* New Orleans Third Municipality, 1 La. Ann. 435.

Texas. — Sherman *v.* Williams, 84 Tex. 421, 19 S. W. 606, 31 Am. St. Rep. 66; Gordon *v.* Thorp, (Civ. App. 1899) 53 S. W. 357.

West Virginia. — Brown *v.* Gates, 15 W. Va. 131.

United States. — Hart *v.* New Orleans, 12 Fed. 292; Peterkin *v.* New Orleans, 19 Fed. Cas. No. 11,026, 2 Woods 100.

See 21 Cent. Dig. tit. "Executions," § 133.

60. *Alabama.* — Murphree *v.* Mobile, 108 Ala. 663, 18 So. 740; Birmingham *v.* Rumsey, 63 Ala. 352.

California. — Wheeler *v.* Miller, 16 Cal. 124; Smith *v.* Morse, 2 Cal. 524.

Indiana. — State *v.* Buckles, 8 Ind. App. 282, 35 N. E. 846, 52 Am. St. Rep. 476.

Iowa. — Davenport *v.* Peoria Mar., etc., Ins. Co., 17 Iowa 276.

Kentucky. — Louisville *v.* Com., 1 Duv. 295, 85 Am. Dec. 624.

Louisiana. — New Orleans *v.* Home Mut. Ins. Co., 23 La. Ann. 61.

New York. — Darlington *v.* New York, 31 N. Y. 164, 88 Am. Dec. 248; Brinckerhoff *v.* Board of Education, 6 Abb. Pr. N. S. 428, 37 How. Pr. 499.

Texas. — Sherman *v.* Williams, 84 Tex. 422, 19 S. W. 606, 31 Am. St. Rep. 66; Laredo *v.* Nalle, 65 Tex. 359; Loredo *v.* Benavides, (Civ. App. 1894) 25 S. W. 482.

United States. — Hart *v.* New Orleans, 12 Fed. 292; New Orleans *v.* Morris, 18 Fed. Cas. No. 10,182, 3 Woods 103; Oelrich *v.* Pittsburg, 18 Fed. Cas. No. 10,444.

See 21 Cent. Dig. tit. "Execution," § 133.

Public use abandoned. — It was held in McEnery *v.* Pargoud, 10 La. Ann. 497, where land was acquired by a parish under an unconditional grant from the United States in 1823, the fact that part of it had been used as a cemetery between 1794 and 1800, although not so consecrated, and that such use had then been abandoned, was not sufficient to set aside an execution sale of the land on a judgment against the parish, on the ground that the land was not alienable on account of being a public place.

61. Louisville, etc., R. Co. *v.* Nowell, 15 Ky. L. Rep. 493 (where it was held that coal in the yards of a railroad company may be levied on and sold under execution against the company, if there is left an abundant amount necessary to keep the company's trains running and supply all demands for operating its road until a sufficient supply can be obtained elsewhere); Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518; Shamokin Valley R. Co. *v.* Livermore, 47 Pa. St. 465, 86 Am. Dec. 552; Plymouth R. Co. *v.* Colwell, 39 Pa. St. 337, 80 Am. Dec. 526. See *supra*, V, A, 13, 14.

62. *Alabama.* — Miller *v.* McWilliams, 50 Ala. 427, 20 Am. Rep. 297.

b. Rule in New England. By the common law of the New England states, derived from immemorial usage, the estate of any inhabitant of a county, town, territorial parish, or school-district was liable to be taken on execution on a judgment against the corporation.[63]

K. Property In Custodia Legis[64] — **1. General Rule.** The doctrine is well settled that property in the hands of sheriffs, constables, clerks of court, receivers, executors and administrators, appraisers, assignees in bankruptcy, etc., is regarded as being *in custodia legis*, and cannot be reached by execution, in the absence of statutory authority; the only difficulty experienced in the application of the doctrine being in determining the question as to when property is so within the custody of the law as to be included in the purview of the rule.[65]

California.— Emeric *v.* Gilman, 10 Cal. 404, 70 Am. Dec. 742.

Mississippi.— Horner *v.* Coffey, 25 Miss. 434.

North Carolina.— See Lilly *v.* Taylor, 88 N. C. 489.

Pennsylvania.— See North Lebanon *v.* Arnold, 47 Pa. St. 488.

United States.— Meriwether *v.* Garrett, 102 U. S. 472, 26 L. ed. 197.

See 21 Cent. Dig. tit. "Execution," § 134.

63. Union *v.* Crawford, 19 Conn. 331; Beardsley *v.* Smith, 16 Conn. 368, 41 Am. Dec. 148; McLoud *v.* Selby, 10 Conn. 390, 27 Am. Dec. 689; Eames *v.* Savage, 14 Me. 212, 52 Am. Rep. 751; Fernald *v.* Lewis, 6 Me. 264; Adams *v.* Wiscasset Bank, 1 Me. 361, 10 Am. Dec. 88; Gaskill *v.* Dudley, 6 Metc. (Mass.) 546, 39 Am. Dec. 750; Chase *v.* Merrimack Bank, 19 Pick. (Mass.) 564, 31 Am. Dec. 163; Merchants' Bank *v.* Cooke, 4 Pick. (Mass.) 405; Brewer *v.* New Gloucester, 14 Mass. 216; Hawkes *v.* Kennebeck County, 7 Mass. 461; Bloomfield *v.* Charter Oak Bank, 121 U. S. 121, 7 S. Ct. 865, 30 L. ed. 923.

64. Garnishment of property in custody of law see, generally, Garnishment.

Property in hands of executor or administrator see, generally, Executors and Administrators; and *infra*, V, L.

Necessity of writ to procure distribution of fund in court see Deposits in Court, 13 Cyc. 1040.

Property in hands of receiver see, generally, Receivers.

65. *Alabama.*— Langdon *v.* Lockett, 6 Ala. 727, 41 Am. Dec. 78.

California.— Yuba County *v.* Adams, 7 Cal. 35.

Georgia.— Field *v.* Jones, 11 Ga. 413.

Iowa.— Patterson *v.* Pratt, 19 Iowa 358.

Kansas.— Overton *v.* Warner, (Sup. 1903) 74 Pac. 651.

Kentucky.— Goodwin *v.* Wilson, 114 Ky. 716, 71 S. W. 866, 24 Ky. L. Rep. 1521; May *v.* Hoaglan, 9 Bush 171; Hackley *v.* Swigert, 5 B. Mon. 86, 41 Am. Dec. 256; Fletcher *v.* Ferrel, 9 Dana 372, 35 Am. Dec. 143. See also Oldham *v.* Scrivener, 3 B. Mon. 579.

Louisiana.— Stanborough *v.* McCall, 8 La. Ann. 9; Price *v.* Emerson, 7 La. Ann. 237; Nelson *v.* Conner, 6 Rob. 339.

Maine.— Hardy *v.* Tilton, 68 Me. 195, 28 Am. Rep. 34.

Maryland.— Glenn *v.* Gill, 2 Md. 1; Bentley *v.* Shrieve, 4 Md. Ch. 412.

Massachusetts.— Columbia Book Co. *v.* De Golyer, 115 Mass. 67.

Michigan.— Campau *v.* Detroit Driving Club, 130 Mich. 417, 90 N. W. 49.

New York.— Oswego First Nat. Bank *v.* Dunn, 97 N. Y. 149, 49 Am. Rep. 517; People *v.* Gould, 75 N. Y. App. Div. 524, 78 N. Y. Suppl. 279 [*affirming* 38 Misc. 505, 77 N. Y. Suppl. 1067]; Tremaine *v.* Mortimer, 57 N. Y. Super. Ct. 340, 7 N. Y. Suppl. 681; Gouverneur *v.* Warner, 2 Sandf. 624; Fox *v.* Union Turnpike Co., 36 Misc. 308, 75 N. Y. Suppl. 464; McShane *v.* Pinkham, 22 N. Y. Civ. Proc. 173, 19 N. Y. Suppl. 969. *Compare* Eagan *v.* Stevens, 39 Hun 311.

Pennsylvania.— Robinson *v.* Atlantic, etc., R. Co., 66 Pa. St. 160.

Texas.— Taylor *v.* Gillean, 23 Tex. 508.

United States.— Wiswall *v.* Sampson, 14 How. 52, 14 L. ed. 322.

England.— Wood *v.* Wood, 4 Q. B. 397, 3 G. & D. 532, 7 Jur. 325, 12 L. J. Q. B. 141, 45 E. C. L. 397; Collingridge *v.* Paxton, 11 C. B. 683, 16 Jur. 18, 21 L. J. C. P. 39, 2 L. M. & P. 654, 73 E. C. L. 683; Harrison *v.* Paynter, 8 Dowl. P. C. 349, 4 Jur. 188, 9 L. J. Exch. 169, 6 M. & W. 387; Masters *v.* Stanley, 8 Dowl. P. C. 169, 4 Jur. 28; Watts *v.* Jefferyes, 15 Jur. 435, 3 Macn. & G. 422, 49 Eng. Ch. 328, 42 Eng. Reprint 324; France *v.* Campbell, 6 Jur. 105.

See 21 Cent. Dig. tit. "Execution," § 137.

Bank in charge of examiner.— It was held in Kimball *v.* Dunn, 89 Fed. 782, that the fact that a national bank for which no receiver had been appointed was in charge of an examiner, appointed by the controller to investigate its affairs, did not exempt its tangible assets from levy under execution upon final judgment.

Whisky in bonded warehouse.— Whisky deposited in a bonded warehouse of the United States, and held therein for internal revenue tax due the government, is virtually in the possession of the United States, and the sheriff has no right to enter such warehouse and seize in execution such whisky as the property of defendant under a writ of fieri facias in his hands, even though he may offer to pay the tax. McCullough *v.* Large, 20 Fed. 309. See also Harris *v.* Dennie, 3 Pet. (U. S.) 292, 7 L. ed. 688; Fischer *v.* Daudistal, 9 Fed. 145.

2. Property Held Under Prior Writs — a. General Rule. By the great weight of authority, property once levied on remains in the custody of the law, and is not liable to be taken by another execution or process in the hands of a different officer, and especially by an officer acting under another jurisdiction.[66] But now in some jurisdictions, by statutory enactments, property of a debtor in the custody of the law under prior writs is subject to levy under subsequent writs of execution, thus giving creditors priority, according to their diligence, in any interest the creditor may have in the property after the prior execution has been satisfied.[67]

b. Where Original Judgment Is Void. Since it is only where property is lawfully taken by virtue of legal process that it can be considered as being in the custody of the law, and not otherwise,[68] property of an execution defendant levied upon and seized by an officer under execution issued on a void judgment

66. *Alabama.*—Kemp *v.* Porter, 7 Ala. 138; Lindsay *v.* King, 3 Port. 406.

Georgia.— Brown *v.* Warren, 57 Ga. 214. See also Camp *v.* Williams, 119 Ga. 152, 46 S. E. 66.

Kansas.— J. M. W. Jones Stationery, etc., Co. *v.* Case, 26 Kan. 299, 40 Am. Rep. 310; Denny *v.* Faulkner, 22 Kan. 89. See also Overton *v.* Warner, (Sup. 1903) 74 Pac. 651.

Kentucky.— Husbands *v.* Jones, 9 Bush 218; Kane *v.* Pilcher, 7 B. Mon. 651; Oldham *v.* Scrivener, 3 B. Mon. 579.

Louisiana.— Henry *v.* Tricou, 36 La. Ann. 519; Bayly *v.* Weil, 28 La. Ann. 264; Denton *v.* Woods, 19 La. Ann. 356.

Maine.— Fuller *v.* Field, 39 Me. 297.

Missouri.— Metzner *v.* Graham, 57 Mo. 404.

Nebraska.— Beagle *v.* Smith, 50 Nebr. 446, 69 N. W. 956.

New York.— Oswego First Nat. Bank *v.* Dunn, 97 N. Y. 149, 49 Am. Rep. 517 [*reversing* 29 Hun 529]; Seymour *v.* Newton, 17 Hun 30; Dubois *v.* Harcourt, 20 Wend. 41; Gilbert *v.* Moody, 17 Wend. 354.

Ohio.— Smead *v.* Diss, 1 Ohio Dec. (Reprint) 200, 4 West. L. J. 4.

Pennsylvania.— Bain *v.* Lyle, 68 Pa. St. 60; Winegardner *v.* Hafer, 15 Pa. St. 144; Nealon *v.* Flynn, 1 Kulp 149; Ward *v.* Whitney, 13 Phila. 7; Croman's Case, 11 Pa. Co. Ct. 44; Coar *v.* Green, 5 Luz. Leg. Reg. 77.

South Carolina.—Hamilton *v.* Reedy, 3 McCord 38.

Tennessee.— Bradley *v.* Kesee, 5 Coldw. 223, 94 Am. Dec. 246.

Vermont.— Jewett *v.* Guyer, 38 Vt. 209.

Wisconsin.— Knapp *v.* White, 40 Wis. 143.

United States.— Taylor *v.* Carryl, 20 How. 583, 15 L. ed. 1028; Hagan *v.* Lucas, 10 Pet. 400, 404, 9 L. ed. 470, where the court, by McLean, J., said: "In Smith *v.* Horne, Holt 643, 3 E. C. L. 252, and Buxton *v.* Home, 1 Show. 174, it was resolved by Holt, Chief Justice, that goods being once seized and in custody of the law, they could not be seized again by the same or any other sheriff; nor can the sheriff take goods which have been distrained, pawned or gaged for debt (4 Bac. Ab. 389) nor goods before seized on execution, unless the first execution is fraudulent, or the goods were not legally seized under it." See also Peck *v.* Jenness, 7 How. 612, 12 L. ed. 841.

England.— See also Payne *v.* Drewe, 4 East 523, 1 Smith K. B. 170.

See 21 Cent. Dig. tit. "Execution," § 138.

But *compare* Planters' Bank *v.* Black, 11 Sm. & M. (Miss.) 43.

Goods in possession of a chattel mortgagee after garnishment are in the custody of the law, and are not subject to execution. Grand Island Banking Co. *v.* Costello, 45 Nebr. 119, 63 N. W. 376.

Property delivered to third person on replevin.— See Acker *v.* White, 25 Wend. (N. Y.) 614.

Temporary injunction.— Pendency of an action for foreclosure of a chattel mortgage, in which a temporary injunction has been granted restraining defendant from disposing of the property pending the action, does not withdraw the property from pursuit by general creditors of the mortgagor, as property in the custody of the law. Ryan *v.* Donley, 2 Nebr. (Unoff.) 6, 96 N. W. 49.

Title revested in judgment debtor.— It was held in Howard *v.* Jones, Ga. Dec. 190, Pt. II, that the property of A sold on an execution may be again levied on if title to the property became again revested in him.

67. *Illinois.*— White *v.* Culter, 12 Ill. App. 38.

Kentucky.— See Rogers *v.* Darnaby, 4 B. Mon. 238.

Louisiana.— See Henry *v.* Tricou, 36 La. Ann. 519.

Mississippi.— Helm *v.* Natchez Ins. Co., 8 Sm. & M. 197.

Ohio.— Davidson *v.* Kuhn, 1 Disn. 405.

Pennsylvania.— Gist *v.* Wilson, 2 Watts 30 (where it was held that a plaintiff who had two judgments, and had issued a fieri facias upon one of them, after inquisition by a jury which was extended, might have an execution under the other judgment upon the same land); Battersby *v.* Haubert, 14 Phila. 112; Taylor *v.* Bonaffon, 17 Wkly. Notes Cas. 425.

Tennessee.— Tyler *v.* Dunton, 1 Tenn. Ch. 361.

See 21 Cent. Dig. tit. "Execution," § 138.

68. Campbell *v.* Williams, 39 Iowa 646; Cooley *v.* Davis, 34 Iowa 128; Gilman *v.* Williams, 7 Wis. 329, 76 Am. Dec. 219.

will not prevent the seizure and sale of such property under a subsequent execution issued on a valid judgment.[69]

3. Property Released Under Bond. After a levy on property by attachment or execution, such property may be released from the custody of the officer under a bond given to try the right thereto,[70] or under a forthcoming and delivery bond; but the property is still regarded as being in the custody of the law, and is not subject to seizure and sale under a junior execution.[71]

4. Money in Hands of Court or Officer — a. Liability For Debts of Judgment Creditor. The doctrine is well settled that money realized by an officer by virtue of an execution, or money paid into court, cannot be levied upon as the property of the judgment creditor, it being regarded as *in custodia legis*.[72]

69. Burr *v.* Mathers, 51 Mo. App. 470.

70. *Alabama.*— McLemore *v.* Benbow, 19 Ala. 76; Hobson *v.* Kissam, 8 Ala. 357.

Illinois.— Rhines *v.* Phelps, 8 Ill. 455; Goodheart *v.* Bowen, 2 Ill. App. 578.

Indiana.— Pipher *v.* Fordyce, 88 Ind. 436.

Kansas.— See McKinney *v.* Purcell, 28 Kan. 446.

Missouri.— Bates County Nat. Bank *v.* Owen, 79 Mo. 429.

New York.— Oswego First Nat. Bank *v.* Dunn, 97 N. Y. 149, 49 Am. Rep. 517; Acker *v.* White, 25 Wend. 614.

Pennsylvania.— Ware *v.* Deacon, 7 Pa. Co. Ct. 368; Ward *v.* Whitney, 7 Wkly. Notes Cas. 95; Moore *v.* Whitney, 10 Lanc. Bar 122, 7 Luz. Leg. Reg. 158. *Contra*, Frey *v.* Leeper, 2 Dall. 131, 1 L. ed. 319.

Texas.— Le Gierse *v.* Pierce, 2 Tex. App. Civ. Cas. § 89; Bailey *v.* Miears, 1 Tex. App. Civ. Cas. § 84.

See 21 Cent. Dig. tit. "Execution," § 139.

71. Roberts *v.* Dunn, 71 Ill. 46; Kane *v.* Pilcher, 7 B. Mon. (Ky.) 651; Fleming *v.* Clark, 22 Mo. App. 218. See also Overton *v.* Warner, (Kan. Sup. 1903) 74 Pac. 651.

72. *Alabama.*— Zurcher *v.* Magee, 2 Ala. 253.

California.— Clymer *v.* Willis, 3 Cal. 363, 58 Am. Dec. 408.

Connecticut.— Willes *v.* Pitkin, 1 Root 47.

Illinois.— Campbell *v.* Hasbrook, 24 Ill. 243; Reddick *v.* Smith, 4 Ill. 451.

Indiana.— Hooks *v.* York, 4 Ind. 636; Sibert *v.* Humphries, 4 Ind. 481.

Kansas.— Eaton *v.* McElhone, 6 Kan. App. 225, 49 Pac. 695.

Kentucky.— First *v.* Miller, 4 Bibb 311.

Louisiana.— See Murphy *v.* Thielen, 6 Rob. 288.

Maine.— Hardy *v.* Tilton, 68 Me. 195, 28 Am. Rep. 34.

Maryland.— Farmers' Bank *v.* Beaston, 7 Gill & J. 421, 28 Am. Dec. 226; Jones *v.* Jones, 1 Bland 443, 18 Am. Dec. 327.

Massachusetts.— Thompson *v.* Brown, 17 Pick. 462; Wilder *v.* Bailey, 3 Mass. 289.

Minnesota.— See Davis *v.* Seymour, 16 Minn. 210.

Missouri.— State *v.* Boothe, 68 Mo. 546; *Ex p.* Fearle, 13 Mo. 467, 53 Am. Dec. 155.

New Jersey.— Crane *v.* Freese, 16 N. J. L. 305; Manly *v.* McCarty, 5 N. J. L. J. 218.

New York.— Baker *v.* Kenworthy, 41 N. Y. 215; Betts *v.* Hoyt, 19 Barb. 412; Adams *v.* Welsh, 43 N. Y. Super. Ct. 52; Muscott *v.* Woolworth, 14 How. Pr. 477; Dubois *v.* Dubois, 6 Cow. 494.

North Carolina.— Smith *v.* McMillan, 84 N. C. 593; State *v.* Lea, 30 N. C. 94; Alston *v.* Clay, 3 N. C. 171.

Ohio.— Dawson *v.* Holcomb, 1 Ohio 275, 18 Am. Dec. 618. *Contra*, Renner *v.* Burk, 11 Ohio Cir. Ct. 268, 5 Ohio Cir. Dec. 361.

Pennsylvania.— Ross *v.* Clarke, 1 Dall. 354, 1 L. ed. 173 (holding that money paid into the hands of the prothonotary, in satisfaction of a judgment, is not the subject of execution at the suit of the former defendant); Hooke *v.* Freeman, 12 Pa. Co. Ct. 310 (holding that under the act of Jan. 16, 1836, section 83, providing that when goods of a tenant are sold under execution the proceeds shall be liable for rent not exceeding one year, the proceeds of such sale in the sheriff's hands, retained pursuant to the notice from the landlord, cannot be levied on under execution against the landlord); Worrell *v.* Vandusen Oil Co., 1 Leg. Gaz. 53. See, however, Bayard *v.* Bayard, 5 Pa. L. J. 160; Monongahela Nav. Co. *v.* Ledlie, 3 Pa. L. J. 179.

South Carolina.— Burrell *v.* Letson, 1 Strobh. 239; Blair *v.* Cantey, 2 Speers 34, 42 Am. Dec. 360; Adams *v.* Crimager, 1 McMull. 309; Johnston *v.* Shubert, 2 Hill 502. *Compare* Southern Western R. Co. *v.* Watkins, 2 Rich. 328. See also Reid *v.* Ramey, 2 Rich. 4; Summers *v.* Caldwell, 2 Nott & M. 341.

Vermont.— Prentiss *v.* Bliss, 4 Vt. 513, 24 Am. Dec. 631; Conant *v.* Bicknell, 1 D. Chipm. 50.

United States.— Reno *v.* Wilson, 20 Fed. Cas. No. 11,700*a*, Hempst. 91.

See 21 Cent. Dig. tit. "Execution," § 140.

See, however, Dolby *v.* Mullins, 3 Humphr. (Tenn.) 437, 39 Am. Dec. 180; Armistead *v.* Philpot, Dougl. (3d ed.) 231. *Compare* Columbus Factory *v.* Herndon, 54 Ga. 209; Rogers *v.* Bullen, R. M. Charlt. (Ga.) 196.

Contra.— Mann *v.* Kelsey, 71 Tex. 609, 12 S. W. 43, 10 Am. St. Rep. 800; Hamilton *v.* Ward, 4 Tex. 356; Steele *v.* Brown, 2 Va. Cas. 246.

Money in possession of debtor's attorney.— It was held in Carey *v.* Tinsley, 22 Tex. 383, that money received by the agent of plaintiff's attorney, who had an assignment of the judgment in his hands, is in the posses-

b. Liability For Debts of Debtor Under Junior Execution. The doctrine seems to be, by analogy of reasoning, that money remaining in the hands of the court or court officer, after satisfaction of the execution, by virtue of which it was realized, is not subject to seizure under a junior execution against the execution debtor.[73] In several jurisdictions, however, it has been held that money produced by the sale of the property of a defendant in execution, remaining in the hands of the officer after satisfying such execution, is subject to seizure under a subsequent execution against the debtor.[74]

c. Liability For Debts of Officer. It is a self-evident proposition that money in the hands of or deposited by an officer in his official capacity, realized by virtue of an execution placed in his hands, is not liable to seizure and sale under an execution against him personally.[75]

L. Estate of Decedent[76]— **1. Interest of Intestate.** Since the regular grant of administration *eo instanti* invests the personal representative with the assets of the deceased, they are not subject to seizure and sale under an execution issued on a judgment thereafter rendered against the intestate.[77]

2. Interest of Devisee or Legatee[78]— **a. General Rule.** Since each devisee or legatee has a legal estate which may be alienated or devised by him, such estate is likewise subject to execution against him, in the same manner as other beneficial

sion of the attorney, and cannot be taken in execution for plaintiff's debts.

73. *Indiana.*— Winton *v.* State, 4 Ind. 321.

Louisiana.— Marini *v.* Mourain, 5 La. Ann. 133.

Pennsylvania.— Bosset *v.* Miller, 2 Woodw. 40.

United States.— Turner *v.* Fendall, 1 Cranch 116, 2 L. ed. 53 [*affirming* 8 Fed. Cas. No. 4,727, 1 Cranch C. C. 35].

England.— Wood *v.* Wood, 4 Q. B. 397, 3 G. & D. 532, 7 Jur. 325, 12 L. J. Q. B. 141, 45 E. C. L. 397; Swain *v.* Morland, 1 B. & B. 370, 5 E. C. L. 689, Gow. 39, 5 E. C. L. 860, 3 Moore C. P. 740, 21 Rev. Rep. 651.

Compare Carhart *v.* Grier, 56 Ga. 383.

See 21 Cent. Dig. tit. "Execution," § 140.

Money loaned to sheriff personally.—Where money was loaned to the sheriff a few days before he received a fieri facias against the lender and applied by the sheriff to his own use, it was held that such money was not liable to satisfy an execution against the lender in the hands of the sheriff. Price *v.* Crump, 2 Hen. & M. (Va.) 89.

74. Langdon *v.* Lockett, 6 Ala. 727, 41 Am. Dec. 78; King *v.* Moore, 6 Ala. 160, 41 Am. Dec. 44; Payne *v.* Billingham, 10 Iowa 360, 363 (decided under Iowa Code, § 1910, providing that "when property sells for more than the amount required to be collected, the overplus must be paid to the defendant, unless the officer has another execution in his hands on which said overplus may be rightfully applied"); Wiant *v.* Hays, 38 W. Va. 681, 18 S. E. 807, 23 L. R. A. 82.

75. Folger *v.* Marigney, 11 La. Ann. 727.

76. **Property in hands of executor or administrator** see, generally, Executors and Administrators. See also *supra*, V, L, 1.

77. *Alabama.*— Snodgrass *v.* Caviness, 15 Ala. 160 (applying this principle even where the administrator had converted or fraudulently disposed of the assets committed to him); Lewis *v.* Lewis, Minor 95.

Mississippi.— Turner *v.* Chambers, 10 Sm. & M. 308, 48 Am. Dec. 751.

North Carolina.— Hostler *v.* Smith, 3 N. C. 305.

Pennsylvania.— Stiles *v.* Brock, 1 Pa. St. 215.

Tennessee.— Combs *v.* Young, 4 Yerg. 218, 26 Am. Dec. 225.

See 21 Cent. Dig. tit. "Execution," § 141.

In case of a judgment against the heirs of the original party to a suit in their representative capacity, the execution will be levied on the personalty of the deceased in their possession; if none, then on the realty which has descended to them. Brown *v.* Rocco, 9 Heisk. (Tenn.) 187.

In Kentucky, a manumitted slave being held to be realty, could not be sold under an execution against the estate in the hands of the executor. Caleb *v.* Field, 9 Dana 346.

In Louisiana a succession is not subject to execution on a judgment against the intestate. Morgan *v.* Lelanne, 32 La. Ann. 1300; Levy *v.* Cowan, 27 La. Ann. 556; Patrick's Succession, 25 La. Ann. 154; Houston *v.* Childers, 24 La. Ann. 472.

In Virginia it was held in Penn *v.* Spencer, 17 Gratt. 85, 91 Am. Dec. 375, that the sale, under execution, of an unascertained interest in the estate of a deceased person was void.

Lands specifically devised.— It was held in Wyman *v.* Brigden, 4 Mass. 150, that lands specifically devised are liable to be levied upon by the creditors of the testator, equally with other lands of which he died seized. See also Bigelow *v.* Jones, 4 Mass. 512.

78. **Lien of judgment against legatee** see, generally, Judgments.

Life-estate see *supra*, V, C, 7.

Property devised by husband to wife see, generally, Husband and Wife.

Remainder see *supra*, V, C, 2, 3, 4.

Reversion see *supra*, V, C, 5.

Trust estate see *supra*, V, D, 2, 3.

legal estates.[79] The doctrine has been laid down in several states, notably Georgia and Louisiana, that when devisees are entitled to several parcels of land, a specific parcel cannot, before partition, be sold on execution against a single devisee, upon the theory that such a sale would be an attempt to interfere with the rights of other devisees to partition.[80]

b. Where Legacy Has Not Vested. A legacy does not vest in the legatee until the executor has assented to it, or at least until it is seen with reasonable certainty that he will not need the legacy to enable him to pay claim of a higher rank than the claim of the legatee, and until property has vested in the legatee it is not subject to be seized and sold for his debts.[81]

3. Interest of Heirs or Distributees — a. General Rule. An intestate's lands descend to his heirs, and may be sold on execution against them, subject to the rights of the administrator in case the lands are needed to pay debts.[82]

b. Where Interest Has Not Been Ascertained. In some jurisdictions it has been held that the undivided interest of an heir in a particular piece of property belonging to the succession of his ancestor is subject to seizure and sale under execution.[83] However, the better doctrine seems to be that an execution sale of a judgment debtor's interest in the estate of a deceased person, before such interest is ascertained, is void.[84]

79. *Alabama.*— McIntosh *v.* Walker, 17 Ala. 20. But *compare* Johnson *v.* Culbreath, 19 Ala. 348.

Florida.— McClelland *v.* Solomon, 23 Fla. 437, 2 So. 825, 11 Am. St. Rep. 381.

Georgia.— Du Bose *v.* Cleghorn, 65 Ga. 302.

Indiana.— Wilson *v.* Rudd, 19 Ind. 101.

Massachusetts.— Proctor *v.* Newhall, 17 Mass. 81.

Michigan.— Hewitt *v.* Durant, 78 Mich. 186, 44 N. W. 318; Butler *v.* Roys, 25 Mich. 52, 12 Am. Rep. 218.

Ohio.— Hoyt *v.* Day, 32 Ohio St. 101; Hobbs *v.* Smith, 15 Ohio St. 419; Douglass *v.* Massie, 16 Ohio 271, 47 Am. Dec. 375; Treon *v.* Emerick, 6 Ohio 391.

Pennsylvania.— Thomas *v.* Simpson, 3 Pa. St. 60.

Rhode Island.— Green *v.* Arnold, 11 R. I. 364, 23 Am. Rep. 466.

Tennessee.— Earles *v.* Meaders, 1 Baxt. 248.

See 21 Cent. Dig. tit. "Execution," § 142.

80. Hatcher *v.* Cade, 61 Ga. 145; Clarke *v.* Harker, 48 Ga. 596. See, however, Wilkinson *v.* Chew, 54 Ga. 602 [*criticizing* Clarke *v.* Harker, *supra*].

81. *Georgia.*— Suggs *v.* Sapp, 20 Ga. 100; Colvard *v.* Coxe, Dudley 99.

Indiana.— Stout *v.* LaFollette, 64 Ind. 365.

Kentucky.— Anderson *v.* Irvine, 6 B. Mon. 231.

Louisiana.— Mayo *v.* Stroud, 12 Rob. 105; Brown *v.* Cougot, 8 Rob. 14.

Massachusetts.— Mayo *v.* Marritt, 107 Mass. 505.

New York.— Hiscock *v.* Fulton, 17 N. Y. Suppl. 408; Donovan *v.* Finn, Hopk. 59, 14 Am. Dec. 531.

North Carolina.— McKay *v.* Williams, 21 N. C. 398.

Pennsylvania.— Morrow *v.* Brenizer, 2 Rawle 185.

See 21 Cent. Dig. tit. "Execution," § 142.

Contingent devise.— The interest of a devisee in a contingent devise of slaves, being of uncertain and unascertainable value, as the contingency may happen soon or never, is not subject to sale under execution. Briscoe *v.* Wickliffe, 6 Dana (Ky.) 157.

82. *Georgia.*— Du Bose *v.* Cleghorn, 65 Ga. 302; Pitts *v.* Hendrix, 6 Ga. 452.

Illinois.— Dinsmoor *v.* Rowse, 200 Ill. 555, 65 N. E. 1079; Hardy *v.* Wallis, 103 Ill. App. 141.

Kansas.— Trowbridge *v.* Cunningham, 63 Kan. 847, 66 Pac. 1015.

Massachusetts.— Wheeler *v.* Bowen, 20 Pick. 563.

Ohio.— Douglass *v.* Massie, 16 Ohio 271, 47 Am. Dec. 375.

South Carolina.— Black *v.* Steel, 1 Bailey 307.

See 21 Cent. Dig. tit. "Execution," § 143.

Where dower is set off, the heirs may be considered as holding by two distinct tenancies in common, two thirds in fee and one third in reversion, and the share of either tenant may be levied on separately Peabody *v.* Minot, 24 Pick. (Mass.) 329.

83. Pitts *v.* Hendrix, 6 Ga. 452; Fly *v.* Noble, 37 La. Ann. 667; Mayo *v.* Stroud, 12 Rob. (La.) 105; Noble *v.* Nettles, 3 Rob. (La.) 152; Wheeler *v.* Bowen, 20 Pick. (Mass.) 563 (holding that the interest of an heir at law in a distributive share of an intestate's estate in the hands of the administrator is subject to execution before a decree of distribution, although it may be uncertain whether there will be any assets for distribution); Proctor *v.* Newhall, 17 Mass. 81. See also Peabody *v.* Minot, 24 Pick. (Mass.) 329. See, however, Hancock *v.* Titus, 39 Miss. 224.

84. Brightman *v.* Morgan, 111 Iowa 481, 82 N. W. 954; Phillips *v.* Flint, 3 La. 146; Flower *v.* Griffith, 6 Mart. N. S. (La.) 89; Beon *v.* Morgan, 5 Mart. N. S. (La.) 701; Penn *v.* Spencer, 17 Gratt. (Va.) 85, 91 Am. Dec. 375. See Miller *v.* Jones, 29 Ala. 174.

VI. ISSUANCE, FORM, AND REQUISITES.[85]

A. Jurisdiction and Authority to Issue — 1. Of Courts — a. In General. A court competent to pronounce judgment is competent to issue execution.[86] Except where special provision is made for issuance in another way, execution must issue from the court which rendered the judgment.[87]

b. Abolished Court and Court Succeeding to Jurisdiction. Where a court is abolished by an act of the legislature and its jurisdiction transferred to another court, an execution issued out of the court so abolished is absolutely void,[88] and a sale thereunder is therefore a nullity. A court which succeeds to the jurisdiction of the abolished court usually has jurisdiction to issue execution on the judgment rendered by the abolished court.[89]

2. Authority and Duty of Clerk — a. In General. The clerk, not the judge, is the proper officer to issue execution.[90]

The inchoate right or interest of the distributee in land cannot be levied on and sold under execution against him. Rabb *v.* Aiken, 2 McCord Eq. (S. C.) 118.

85. Issuance after appeal determined see APPEAL AND ERROR, 3 Cyc. 498.

Persons entitled to execution see *supra*, III.

86. U. S. *v.* Drennen, 25 Fed. Cas. No. 14,992, Hempst. 320. The courts of the United States have, by the Judiciary Act of 1789 (c. 20, § 14), power to issue executions on their judgments. Wayman *v.* Southard, 10 Wheat. (U. S.) 1, 6 L. ed. 253; U. S. *v.* Drennen, *supra*.

The supreme court may either award execution to carry into effect its decisions, or may send back its decision to the proper circuit court which can execute the judgment. McNair *v.* Lane, 2 Mo. 57. See also Potter *v.* Titcomb, 11 Me. 157. See *infra*, VI, D, 2. See also APPEAL AND ERROR, 3 Cyc. 498.

Jurisdiction upon death of debtor after rendition of judgment.— Although a statute provides that the surrogate alone shall order executions to be issued against the executors or administrators as such, the provision is inapplicable to the judgments in actions originally commenced against the decedent, where the court obtained jurisdiction by attachment issued before the death of the debtor. Thacher *v.* Bancroft, 15 Abb. Pr. (N. Y.) 243, 249 [*citing* People *v.* Judges Albany Mayor's Ct., 9 Wend. (N. Y.) 486]. See also Chicago Mar. Bank *v.* Van Brunt, 61 Barb. (N. Y.) 361 [*disapproving* Flanagan *v.* Tinen, 53 Barb. (N. Y.) 587]. Under Iowa Code, § 4321, none but the court which rendered a judgment can award execution against one deceased after its rendition. Hansen's Empire Fur Factory *v.* Teabout, 104 Iowa 360, 73 N. W. 875. Death of parties see *infra*, VI, C.

Probate court.— Childress *v.* Childress, 3 Ala. 752.

Register in chancery.— Henderson *v.* Henderson, 66 Ala. 556, 558.

Transcript of record to another court.— Bailey *v.* Winn, 113 Mo. 155, 20 S. W. 21. See *infra*, VI, B, 2, b; VI, D, 1.

Issuance on a judgment rendered by a Confederate state court during the war.— Since the acts of Confederate state governments during the Civil war are valid when not in conflict with the constitution of the United States, a sale of land under a pluries execution issued since the war on a judgment rendered during the war is valid and will pass the title of defendant in execution. Parks *v.* Coffey, 52 Ala. 32.

Pennsylvania act of April 22, 1856, confers on courts the power to control and direct executions so as to subserve the rights and equities of defendants as well as plaintiffs, was construed in Roddy's Appeal, 72 Pa. St. 98.

87. 3 Bacon Abr. (Am. ed. 1854) tit. "Execution." See *infra*, VI, B, 2, b, (II).

88. Harris *v.* Cornell, 80 Ill. 54; Lee *v.* Newkirk, 18 Ill. 550; Newkirk *v.* Chapron, 17 Ill. 344.

Where the jurisdiction of the court has been curtailed, a clerk thereof has no authority to issue an execution upon a judgment previously rendered by that court for a sum greater than an amount which is, since such curtailment, beyond the jurisdiction of the court to render. Campbell *v.* Townsend, 26 Tex. 511.

89. This of course depends upon the statutory or constitutional provision. Wegman *v.* Childs, 41 N. Y. 159 [*reversing* 44 Barb. 403]. See also Hansford *v.* Burdge, 8 Kan. App. 162, 55 Pac. 472. *Compare* Matthews *v.* Gilreath, 33 N. C. 244. But see Richards *v.* Belcher, 6 Tex. Civ. App. 284, 25 S. W. 740 [*citing* Freeman Ex. § 14].

90. McKetham *v.* McNeil, 74 N. C. 663. *Compare* Aspen Min., etc., Co. *v.* Wood, 84 Fed. 48, 28 C. C. A. 276.

By common law or by the California act of 1850, which authorizes the court to issue such executions and other writs as may be necessary to carry their judgments into full force and effect, the clerk has power to issue a writ of venditioni exponas. Smith *v.* Morse, 2 Cal. 524, 556 [*citing* 2 Tidd Pr. 1020].

Disqualification.— The fact that the clerk is a practising attorney at law at the time, and is one of the attorneys of record for

b. Clerk of What Court. As a general rule an execution should be issued only by the clerk of the court in which the judgment was rendered.[91]

c. Necessity of a Judgment. The clerk of court has no authority to issue execution, except upon a judgment,[92] which remains unsatisfied.[93]

d. Subject to Plaintiff's Directions.[94] In the absence of a statutory regulation,[95] the clerk has no authority to issue execution without the direction of plaintiff or his attorney.[96] A party is not bound by proceeding under an execution issued without his authority or that of his attorney.[97] In the absence of proof it will be presumed that the clerk issued an execution under the direction of the person who had control of it.[98]

e. Issuance Pending Appeal on Taxation of Costs. If a party against whom judgment has been recovered appeals from the clerk's taxation of costs, the clerk has no right to issue execution until the question has been settled by a judge according to usage.[99]

f. Refusal to Issue — (I) *In General.* It is the clerk's duty to issue the writ in the manner pointed out by law.[1] The difficulty of executing the judgment

plaintiff in execution, does not make the execution issued by him illegal. Blount *v.* Wells, 55 Ga. 282, where the clerk was an officer *de facto* and in which jurisdiction there was no restriction upon his practising law.

Transcript of judgment of justice of the peace.— The clerk of the circuit court has authority to issue an execution on a transcript of the judgment of the justice of the peace filed in office. Coonce *v.* Munday, 3 Mo. 373. See *infra*, VI, D, 1.

91. Robinson *v.* Clement, 73 Ind. 29. See also Chandler *v.* Colcord, 1 Okla. 260, 32 Pac. 330. See also APPEAL AND ERROR, 3 Cyc. 498.

The filing of transcript of a judgment rendered in another county in the clerk's office does not authorize him to issue execution. All proceedings subsequent to the execution so issued are void. Seaton *v.* Hamilton, 10 Iowa 394. Such an execution so issued will be enjoined. Gresienger *v.* McCarter, 9 Kan. App. 886, 61 Pac. 507. See *infra*, VI, B, 2, b, (II).

The clerk of the superior court succeeding to a district court may, without an order, issue execution on a judgment in the district court. Dorn *v.* Howe, 59 Cal. 129.

92. Strother *v.* Richardson, 30 La. Ann. 1269.

Necessity of judgment see *supra*, II, C, 1; II, H, 3.

Under La. Code, art. 990, the clerk of the parish court in which a succession is being administered has authority to issue a fieri facias for the seizure and sale of any property of the succession, previously sold on a twelve-months' bond, and not paid for, without regard to its value. Cobb *v.* Richardson, 30 La. Ann. 1228.

93. Snipes *v.* Beezley, 5 Oreg. 420. See also Hughes *v.* Streeter, 24 Ill. 647, 76 Am. Dec. 777.

But where satisfaction is not entered upon the record, an execution issued is not void, but voidable. Boren *v.* McGehee, 6 Port. (Ala.) 432, 31 Am. Dec. 695.

The clerk can issue only the form of writ prescribed by the judgment; he cannot for instance issue a venditioni exponas where the judgment authorizes a fieri facias. Hurst *v.* Liford, 11 Heisk. (Tenn.) 622. And *compare* Wall *v.* Woolbright, 71 Ga. 256.

94. See *infra*, VI, D, 1, a, (VI), (C).

95. The statute may be directory only. See Nunemacher *v.* Ingle, 20 Ind. 135 [*following* Lewis *v.* Phillips, 17 Ind. 108, 79 Am. Dec. 457].

96. Wickliff *v.* Robinson, 18 Ill. 145; Lewis *v.* Phillips, 17 Ind. 108, 79 Am. Dec. 457; Wills *v.* Chandler, 2 Fed. 273, 1 McCrary 276.

The clerk will be liable for failing to issue execution to which plaintiff was entitled by the terms of the judgment when ordered to do so by plaintiff's attorney. Burton *v.* McFarland, 3 Ky. L. Rep. 536. See *infra*, VI, A, 2, f.

Where there is an agreement on the entry of judgment that execution shall not issue within a specified period except in a certain event, it is not the duty of the clerk to issue such execution without direction from plaintiff or his agent or attorney. State *v.* Wilkins, 21 Ind. 216.

It is not the duty of the clerk of the supreme court to deliver its mandates to the common pleas but to the party interested if he call for them. Levin *v.* Hanley, Wright (Ohio) 588.

97. Even though it is the clerk's custom to thus issue execution on judgments rendered at the preceding term. Davis *v.* McCann, 143 Mo. 172, 44 S. W. 795.

Ratifying unauthorized issuance.— See Clarkson *v.* White, 4 J. J. Marsh. (Ky.) 529, 20 Am. Dec. 229.

The fact that execution is issued on payment of the jury fee by the sheriff instead of by the successful party does not affect the validity of the writ. Louisville, etc., R. Co. *v.* Noel, 15 Ky. L. Rep. 493.

98. Niantic Bank *v.* Dennis, 37 Ill. 381.

99. Winslow *v.* Hathaway, 1 Pick. (Mass.) 211.

Stay of proceedings pending appeal see APPEAL AND ERROR, 2 Cyc. 885.

1. State *v.* Bondyn, 15 La. Ann. 573, 77 Am. Dec. 198, where the proper mode of

because of the uncertainty of the decree is no concern of his.[2] Nor is it any concern of the clerk that plaintiff applied for his execution after a long delay, if the application was made within the period of the statute of limitations.[3]

(II) *Remedy For Refusal.* The usual remedy for the wrongful refusal of the clerk to issue execution is mandamus.[4]

B. To What County May Issue — 1. In the First Instance — a. County of the Venue. By the common law the execution could not in the first instance go beyond the territorial jurisdiction of the particular court which rendered the judgment.[5]

b. County of Defendant's Residence. In jurisdictions where executions

executing the judgment was by writ of possession.

After the expiration of the time for appeal from a judgment, it is the duty of the clerk on application to issue execution on the judgment. People *v.* Gale, 22 Barb. (N. Y.) 502.

The fact that the motion was pending to set aside a judgment rendered on the last day of the term, and for the ground of a new trial, which motion was not passed on at that term, is no ground for the clerk's refusing to issue execution on the judgment. People *v.* Cloud, 3 Ill. 362.

2. Although the judgment appears to be rendered in favor of only one of plaintiffs, the omission does not afford excuse for the failure of the clerk to issue execution. Burton *v.* McFarland, 3 Ky. L. Rep. 536.

3. State *v.* Renick, 157 Mo. 292, 57 S. W. 713.

4. People *v.* Cloud, 3 Ill. 362; Mendenhall *v.* Burnette, 58 Kan. 355, 49 Pac. 93; State *v.* Renick, 157 Mo. 292, 57 S. W. 713; People *v.* Clerk New York Mar. Ct., 3 Abb. Pr. (N. Y.) 57. *Contra*, Fulton *v.* Hanna, 40 Cal. 278; Goodwin *v.* Glazer, 10 Cal. 333, the proper remedy being by motion.

Compelling issuance of writ see, generally, Mandamus.

Bill in equity.— Where a clerk of a district court refuses to issue execution on a judgment rendered in such court on the ground that it had been attached on the suit of another, a bill in equity will not lie to release the attachment to compel the clerk to issue execution, since the party's remedy is by an action on the official bond of the clerk. Miller *v.* Sanderson, 10 Cal. 489.

Where oral application is made to the clerk for an alias execution he is liable on his official bond for refusing to issue such writ, where he does not demand a written application and proof of interest and authority. Steele *v.* Thompson, 62 Ala. 323. See Clerks of Courts, 7 Cyc. 230.

5. Chiles *v.* Hoy, 6 T. B. Mon. (Ky.) 46. See Scott *v.* Maupin, Hard. (Ky.) 122.

The limits of the jurisdiction of the general court, being the same as those of the state, execution may be issued in the first instance to any county (Com. *v.* Caldwell, 2 Bibb (Ky.) 8); and so at one time the jurisdiction of the court of exchequer in the state of New York was a general one territorially and its process ran throughout the state (People *v.* Van Eps, 4 Wend. (N. Y.) 387). *Compare* Raub *v.* Heath, 8 Blackf. (Ind.) 575.

In Kentucky, under the statute of 1796, a fieri facias could not lawfully issue to any other county than that of the venue, unless the debtor removed himself or his effects or resided out of the county of the venue. Mason *v.* Rogers, 4 Litt. 375. See also Chiles *v.* Hoy, 6 T. B. Mon. 46.

Issuance to the locus of the debtor's property.— Where Code Pr. art. 642*d*, provides that a fieri facias may be directed to the parish where the property of defendant is situated, the writ may issue to such place, although out of the jurisdiction of the court. Lafon *v.* Smith, 3 La. 473, holding that article 746 of the code did not affect article 642, for the two articles were intended to furnish two distinct remedies. In Brush *v.* Lee, 36 N. Y. 49, 51, 1 Transcr. App. (N. Y.) 66, 3 Abb. Pr. N. S. (N. Y.) 204, 34 How. Pr. (N. Y.) 283, the court said that the judgment creditor had the right to collect his judgment where the debtor had property. Under a statute in Kentucky which provided that if defendant removes himself or his effects or shall reside out of the jurisdiction of the court where the judgment was given, execution might issue at the request of plaintiff to the sheriff of any county within the state where defendant or debtor whose goods or lands might be found, it was held that execution might issue to any county where defendant had property if he did not live in the county within the jurisdiction of the court. Sanders *v.* Norton, 4 T. B. Mon. (Ky.) 464.

Creditor may enforce a judgment lien on personal property in another county. Where property of the judgment debtor, after the lien on the property has attached by the recording of the judgment in the county of the venue, is sold and removed by the vendee to another county, the lien follows the property into any county whither it may go and the judgment creditor may make this lien effective by issuing the writ into the other county whither the vendee has taken the property. Street *v.* Duncan, 117 Ala. 571, 23 So. 523.

Where two executions are issued simultaneously on the same judgment, but directed to different counties, and action was taken on only one of them, an injunction staying a levy under both executions was erroneous, since the party had a right to proceed under

may [6] issue in the first instance to the county where defendant resides, execution may issue to the county of residence of any one of several joint defendants.[7]

2. Issuance to Other Counties — a. Preliminary Issuance and Return of Nulla Bona. At common law [8] and by statute in some of the states [9] execution on a

one of the executions. Hudson *v.* Dangerfield, 2 La. 63, 20 Am. Dec. 297.

6. An execution upon a forthcoming bond must issue to the county in which defendant lives. Fleming *v.* Saunders, 4 Call (Va.) 563.

7. Cape Fear Bank *v.* Stafford, 47 N. C. 98. See Doe *v.* Harter, 1 Ind. 427, 2 Ind. 252.

Mistake as to residence.— Where plaintiff under a mistaken belief as to the residence of defendant issued execution to the wrong county, he was not prevented, upon discovery of his mistake, from withdrawing the execution from the sheriff of that county and procuring issuance of a writ to the proper county. Parrish *v.* Saunders, 3 Humphr. (Tenn.) 431.

Where the county in which the judgment debtor resides is attached to another for judicial purposes, an execution required by statute to be issued to the sheriff of the county where the debtor resides as preliminary to supplementary proceedings may properly be issued to the sheriff of the county to which the one in which the debtor resides is attached. Beebe *v.* Fridley, 16 Minn. 518.

8. Lesher *v.* Gehr, 1 Dall. (Pa.) 330, 1 L. ed. 161; Palmet *v.* Price, 2 Salk. 589. The first fieri facias needed not be filed before the testatum writ issued. It was held, if produced, returned. 4 Comyns Dig. 137 H. In fact writs of fieri facias issued to the county of the venue were returned of course by the attorneys themselves, so that this return was a mere matter of form; so much so that an affidavit by the sheriff of the county of the venue that he had never returned any fieri facias in the cause was not sufficient to upset a writ sent into another county. Palmet *v.* Price, *supra.* See also Com. *v.* Caldwell, 2 Bibb (Ky.) 8; McCormick *v.* Meason, 1 Serg. & R. (Pa.) 92. The irregularity of issuing a testatum writ without previous original fieri facias might be cured by the subsequent production of the original fieri facias (Denn *v.* Lecony, 1 N. J. L. 39; Brand *v.* Mears, 3 T. R. 388; Bond *v.* Jacob, Barnes Notes 200; Smith *v.* Phripp, Barnes Notes 209; Sweetapple *v.* Atterbury, Barnes Notes 211); or by the suing out of an original fieri facias into the proper county (Cowperthwaite *v.* Owen, 3 T. R. 657 [*cited* in note to Allen *v.* Allen, 2 W. Bl. 694]; Meyer *v.* Ring, 1 H. Bl. 541). In Burdus *v.* Satchwell, Barnes Notes 208, it was said that "in case of a Testat. Fi. fa. the Court will not go into a nice Enquiry when the Fi. fa. in the Original County to warrant the Testat. was sued out; it is sufficient if the first Fi. fa. returned be produced."

An original fieri facias against goods warrants a testatum against lands when by statute lands are put upon the same footing as goods and equally liable to be taken in execution. Denn *v.* Lecony, 1 N. J. L. 39.

A sale of goods under the original fieri facias was not necessary in New Jersey before the testatum fieri facias might issue. Trenton Delaware Bridge Co. *v.* Ward, 4 N. J. L. 320.

Where execution is issued to extend the lien of the judgment from one county to another and not to collect the debt, a testatum fieri facias can issue without a previous writ after the lapse of five years without the issuance of a fieri facias. Heming *v.* Brown, 2 Marv. (Del.) 368, 43 Atl. 256.

9. Schneider *v.* Dorsey, 96 Tex. 544, 74 S. W. 526 [*affirming* (Civ. App. 1903) 72 S. W. 1029]; Norwood *v.* Orient Ins. Co., (Tex. Civ. App. 1898) 44 S. W. 188.

Presumption of condition performed.— Brackenridge *v.* Cobb, 85 Tex. 448, 21 S. W. 1034; Benson *v.* Cahill, (Tex. Civ. App. 1896) 37 S. W. 1088.

Where several executions are issued on the same judgment, in consecutive order, on the same day to different counties, and the first execution, which issued to the county of the venue is first levied, it will be held to be valid, although those subsequently issued are not, unless all were issued to delay other creditors of defendants in execution. Brackenridge *v.* Cobb, 85 Tex. 448, 21 S. W. 1034.

Where a suit is instituted in one county and removed on defendant's application to another and plaintiff recovers judgment, there is no need of a return of *nulla bona* in the county where the judgment was rendered. Browning *v.* Loraw, 58 Md. 524.

If a defendant removes from the county where a judgment is rendered against him, under the statute, execution may issue from the court of such county to the sheriff of the county where defendant resides; and upon the return of *nulla bona* on a fieri facias issued in the county where judgment was rendered the clerk of the court of that county may issue execution to another county. Harden *v.* Moores, 7 Harr. & J. (Md.) 4.

Suggestion upon the record of no goods is not necessary when a return of *nulla bona* is made. Bowman *v.* Tagg, 6 Wkly. Notes Cas. (Pa.) 219, 12 Phila. (Pa.) 345. See Boyer *v.* Kimber, 2 Miles (Pa.) 393.

Where a statute authorizes executions to be issued at the same time to sheriffs of different counties, the practice of inserting a testatum clause must be considered as abolished, even as a matter of form. Butterfield *v.* Howe, 19 Wend. (N. Y.) 86.

Early in North Carolina the court granted permission to a plaintiff to issue two or more writs of fieri facias to different counties at the same time. McNair *v.* Ragland, 17 N. C. 42, 22 Am. Dec. 728.

judgment rendered in one county cannot issue to another county until it had issued in the county of the venue and been returned *nulla bona*. In some states, for certain purposes at least, the preliminary requisite is issuance to and return from the county of defendant's residence.[10] And in some jurisdictions it is necessary that there should be an issue to and a return of *nulla bona* from either the county where the judgment was rendered or the county of defendant's residence.[11] At common law a fieri facias issuing without a testatum to a county other than where the venue was laid could be set aside.[12] An execution issued in the first instance to another county is not void and therefore can prevent the judgment from becoming dormant;[13] and a sale under it may be valid;[14] and the title of the purchaser is not affected by the fact that defendant had ample property in the county where the judgment was obtained to satisfy it, when he had failed to point out the property when called upon.[15] It may be presumed by all innocent purchasers and by the sheriff that an execution sent beyond the county of the venue is legally sent;[16] but if the purchaser has notice of the irregularity, the sale may be avoided.[17] No one who has no interest in the property levied

Where a court has general jurisdiction a testatum clause is not necessary. It is required only where a court issues process to a county in which it has no general jurisdiction. Roads *v.* Symmes, 1 Ohio 281, 13 Am. Dec. 621.

Where the statute directs a copy of the docket entries to be sent with an execution issuing to another county, the fact that such a copy does not contain all the entries which ought to appear of record is no reason why the execution should be quashed, provided the copy shows that there was a subsisting judgment and that upon it the execution properly issued. Mitchell *v.* Chesnut, 31 Md. 529.

10. This is the proper prerequisite for bringing in a creditor's bill upon a judgment or decree (Brown *v.* Bates, 10 Ala. 432; Reed *v.* Wheaton, 7 Paige (N. Y.) 663, 34 Am. Dec. 366); unless plaintiff should show some sufficient legal excuse for issuing his execution to a different county (Reed *v.* Wheaton, *supra*). It is not necessary to make a specific allegation upon the subject, for if the execution has issued to the wrong county it devolves upon defendant in such case to show it in his defense (Brown *v.* Bates, *supra*); and to constitute a valid defense defendant should show not only that he resided and had a place of business in some other county, but also that he had visible property there out of which the execution might have been satisfied if plaintiff had exercised due diligence to ascertain the fact (Cassidy *v.* Meacham, 3 Paige (N. Y.) 311; Rugely *v.* Robinson, 19 Ala. 404; Brown *v.* Bates, *supra*). See also Com. *v.* Caldwell, 2 Bibb (Ky.) 8.

11. Vance *v.* Gray, 9 Bush (Ky.) 656, construing Ky. Rev. St. c. 36, art. 17, § 1.

An execution upon a judgment of the general court may be issued to any county in the state and need not be sent in the first instance to the county in which the defendant resides. Com. *v.* Caldwell, 2 Bibb (Ky.) 8. See *supra*, note 5.

12. Simonds *v.* Catlin, 2 Cai. (N. Y.) 61; Allen *v.* Allen, 2 W. Bl. 694. See also Mitchell *v.* Fidelity Trust, etc., Co., 67 S. W. 263, 24 Ky. L. Rep. 62, under Ky. St. § 1656. But if a writ which has the form of an original fieri facias is issued to another county without the testatum clause and without an original fieri facias having been issued to the proper county, plaintiff may, upon paying costs, after suing out his original fieri facias and obtaining his return *nulla bona*, amend the writ first issued to the other county by inserting the return of *nulla bona* and the testatum clause. Meyer *v.* Ring, 1 H. Bl. 541. See also Cowperthwaite *v.* Owen, 3 T. R. 657 [*cited* in note to Allen *v.* Allen, 2 W. Bl. 694].

On judgment in Middlesex fieri facias returned *nulla bona*; a common fieri facias (without testatum) may issue to another county. 4 Comyns Dig. 137 H [*citing* Warwick *v.* Figg, Barnes Notes 196].

13. Cabell *v.* Orient Ins. Co., 22 Tex. Civ. App. 635, 55 S. W. 610.

14. Young *v.* Smith, 10 B. Mon. (Ky.) 293; M'Connell *v.* Brown, 5 T. B. Mon. (Ky.) 478; Cox *v.* Nelson, 1 T. B. Mon. (Ky.) 94, 15 Am. Dec. 89; Com. *v.* O'Cull, 7 J. J. Marsh. (Ky.) 149, 23 Am. Dec. 393; Mitchell *v.* Fidelity Trust, etc., Co., 67 S. W. 263, 24 Ky. L. Rep. 62.

15. Sydnor *v.* Roberts, 13 Tex. 598, 65 Am. Dec. 84.

The quashing, subsequent to the sale, of an execution thus irregularly issued does not affect the sale. Cox *v.* Nelson, 1 T. B. Mon. (Ky.) 94, 15 Am. Dec. 89.

16. Cox *v.* Nelson, 1 T. B. Mon. (Ky.) 94, 15 Am. Dec. 89.

17. Sanders *v.* Ruddle, 2 T. B. Mon. (Ky.) 139, 15 Am. Dec. 148.

Cure of irregularities.— Under Brightly Purd. Dig. (12th ed.) 850–851, which provided for executions against one or more adjoining tracts lying in adjoining counties, the approval by the court of the inquisition made in pursuance of the remedy cures prior irregularities and a venditioni exponas may issue. Hibberd *v.* Bovier, 1 Grant (Pa.) 266. See also Elliott *v.* McGowan, 22 Pa. St. 198.

upon under an execution first issued to a county other than that in which judgment is rendered can take advantage of the irregularity.[18]

b. Docketing of Transcript in the Other County — (I) *In General.* Where by statutory provision a transcript of a judgment rendered in one county may be docketed in another county, such docketing may[19] or may not[20] be a condition precedent to the issuance of an execution to such other county; it depends upon the statute and upon the construction given it.

(II) *From What County Execution Should Then Issue.* The rule is undoubted that unless otherwise provided by statute an execution can issue only from the court in which the judgment was rendered.[21] In some jurisdictions such

18. Gulf, etc., R. Co. *v.* Morris, 67 Tex. 692, 4 S. W. 156.

19. Dunham *v.* Reilly, 110 N. Y. 366, 18 N. E. 89; Nanz *v.* Oakley, 60 Hun (N. Y.) 431, 15 N. Y. Suppl. 1, 21 N. Y. Civ. Proc. 71; Bugbee *v.* Lombard, 88 Wis. 271, 60 N. W. 414; Kentzler *v.* Chicago, etc., R. Co., 47 Wis. 641, 3 N. W. 369 [*explaining* Smith *v.* Buck, 22 Wis. 577]. And *compare* People *v.* Lott, 21 Barb. (N. Y.) 130.

No presumption of the fulfilment of the requirement as to docketing will be indulged from the existence of a judgment in the county of its rendition, and an execution thereon to the sheriff of another county so as to render the execution valid. Bugbee *v.* Lombard, 88 Wis. 271, 60 N. W. 414.

20. Evans *v.* Aldridge, 133 N. C. 378, 45 S. E. 772 (execution issued against land); Bernhardt *v.* Brown, 122 N. C. 587, 29 S. E. 884, 65 Am. St. Rep. 725. See also Lytle *v.* Lytle, 94 N. C. 683; Sawyers *v.* Sawyers, 93 N. C. 321.

Filing in the courts of the District of Columbia of exemplification of judgments rendered in Virginia and Maryland see Fitzhugh *v.* Blake, 9 Fed. Cas. No. 4,840, 2 Cranch C. C. 37; Parot *v.* Habersham, 18 Fed. Cas. No. 10,771, 1 Cranch C. C. 14.

The rule that execution on justice's judgments transcribed to a court of record stands in the same situation as judgments rendered by the court (see *infra*, VI, D, 1, a, (v)) is extended to the issuing of execution to other counties. State *v.* Crow, 11 Ark. 642. But see Smith *v.* Buck, 22 Wis. 577. And *compare* Doty *v.* Dexter, 61 Mich. 348, 28 N. W. 123.

Transcript of judgment of probate court.— Okla. St. (1893) p. 1190, " regulating liens of judgments rendered in probate court," does not limit the jurisdiction of the probate court, or the right to have execution on a transcript of judgment filed in the clerk's office of the district court of any county in the territory from a judgment of any probate court in the territory. Lowenstein *v.* Young, 8 Okla. 216, 57 Pac. 164.

21. Lovelady *v.* Burgess, 32 Oreg. 418, 52 Pac. 25. And a statute which provides for establishing a lien against real estate of a judgment debtor by filing a transcript in the county other than that in which the judgment is rendered does not give authority for the issuance of the execution in the county where the transcript is filed. Shattuck *v.* Cox, 97 Ind. 242; Furman *v.* Dewell, 35 Iowa 170; Seaton *v.* Hamilton, 10 Iowa 394; Humphries *v.* Sorensen, 33 Wash. 563, 74 Pac. 690; Lovelady *v.* Burgess, 32 Oreg. 418, 52 Pac. 25; Bostwick *v.* Benedict, 4 S. D. 414, 57 N. W. 78; Briggs *v.* Murray, (Wash. 1902) 69 Pac. 765.

But the clerk of the court of the county where the judgment is transcribed may act as agent of the party taking out execution so far as to fill in the blanks of the execution when the transcript and execution are forwarded to him. Chase *v.* Ostrom, 50 Wis. 640, 7 N. W. 667.

In Maryland by the act of 1715, if a defendant in a judgment shall fly, remove, or absent himself out of the county in which the judgment is rendered, plaintiff may take a transcript of the record of the judgment, under seal, and lay it before the court of the county in which defendant may happen to be, to be entered upon the records of such county, upon which that court is authorized to award execution by capias ad satisfaciendum, fieri facias, or attachment. Harden *v.* Moores, 7 Harr. & J. 4.

In Pennsylvania where a judgment has been transferred to another county, an execution may issue to the county to which the judgment has been transferred. Fitch *v.* Early, 2 Wkly. Notes Cas. 587. The act of June 16, 1836, gives power to issue execution on a judgment for the recovery of money to another county when the judgment debtor has no property, personal or real, in the county of the venue sufficient to satisfy the judgment; under this statute a testatum fieri facias can issue only on the original, not on the derivative, judgment, although the latter had been revived. Nelson *v.* Guffey, 131 Pa. St. 273, 18 Atl. 1073. Under act of 1840 a judgment removed from the county into which it was entered into the court of another county has the same force and effect, so far as concerns execution process, in the county to which it is transferred as if it had been originally entered there. See Baker *v.* King, 2 Grant (Pa.) 254. But an execution cannot be issued by the court of a county in which a transcript of the record is filed without a revival there, when none can be issued in the county where the parent judgment remains; the latter being more than five years old, and not having been revived in the county of its origin. Beck *v.* Church, 113 Pa. St. 200, 6 Atl. 57 [*reversing* 1 Pa. Co. Ct. 56]. *Compare* Smith *v.* Gosline, 2

a statutory provision exists and consequently in such jurisdictions execution may be issued from any county where a transcript of the judgment is filed.[22]

(III) *Effect of Issuance to Another County Before Docketing Therein.* Although an execution issued to a county before a judgment is docketed therein may be irregular,[23] yet an execution is valid which issues from the clerk's office before the docketing in the other county where it is not delivered to the sheriff until after such docketing.[24] It has even been held that the irregularity caused by issuing the execution and levying thereon several hours before the transcript of the judgment was filed was cured by the subsequent filing of the transcript.[25]

(IV) *Form of Executions to Counties Where Judgment Is Docketed.* In some jurisdictions an execution which does not show upon its face,[26] or does not recite,[27] that the transcript has been filed in the county to which it is issued is void.

C. Death of Parties After Judgment Rendered and Before Its Execution[28]**—1. Of Sole Party Defendant or Plaintiff—a. In General**—(I) *Defendant.* At common law if defendant died after judgment and before issuance of execution, no execution could issue without a scire facias.[29] This has been the almost universal rule in this country and an execution so issued has almost universally been held void.[30] An execution against a dead man is a nullity, for there is no

Pa. Co. Ct. 15 [*following* Knauss' Appeal, 49 Pa. St. 419].

Where a justice's judgment transcribed to a court of record in its own county is thence certified or transcribed to a court of record in another county, execution is issuable out of the second court (Gray *v.* Lieben, 8 N. Y. Civ. Proc. 48; McKnight *v.* Leedom, 13 Wkly. Notes Cas. (Pa.) 237. See also Vedder *v.* Lansing, 44 Hun (N. Y.) 590), or execution may be issued whence the justice's judgment was first transcribed (Vedder *v.* Lansing, *supra*), for a transcript of a justice's judgment has the same effect as a judgment of the court wherein it is filed. See *infra*, VI, D, 1, a, (V).

Transfer to another county after death of plaintiff.— Where a judgment has been transferred from the county of the venue to another county after the death of the judgment creditor, suggestion of the death of plaintiff and a substitution of the administrator can be as well made in the other county after such transfer and for the purpose of proceedings for execution as might have been done before in the county of the venue. Walt *v.* Swinehart, 8 Pa. St. 97.

22. Smith *v.* Mixon, 73 Miss. 581, 19 So. 295.

23. To be available such irregularity must positively appear, otherwise it will be presumed to be regular. Dodge *v.* Chandler, 9 Minn. 97.

24. Hoerr *v.* Meihofer, 77 Minn. 228, 79 N. W. 964, 77 Am. St. Rep. 674; Gowan *v.* Fountain, 50 Minn. 264, 52 N. W. 862; Mollison *v.* Eaton, 16 Minn. 426, 10 Am. Rep. 150; McDonald *v.* Fuller, 11 S. D. 355, 77 N. W. 581, 74 Am. St. Rep. 815.

The date of the issuance of the execution will be deemed to be as of the date when delivered to the sheriff, where the blanks for dates are filled by the clerk of the county to which the execution and transcript of judgment were forwarded for docketing. Chase *v.* Ostrom, 50 Wis. 640, 7 N. W. 667.

25. Rogers *v.* Cherrier, 75 Wis. 54, 43 N. W. 828, at least as to all persons who made claim to the property levied upon by a conveyance from defendant in the execution made subsequently to the filing of the transcript. See also Blivin *v.* Bleakley, 23 How. Pr. (N. Y.) 124; Stoutenburgh *v.* Vandenburgh, 7 How. Pr. (N. Y.) 229.

26. Kentzler *v.* Chicago, etc., R. Co., 47 Wis. 641, 3 N. W. 369; Smith *v.* Buck, 22 Wis. 577.

27. Dunham *v.* Reilly, 110 N. Y. 366, 18 N. E. 89 [*reversing* 47 Hun 241] (where the transcript was not filed in another county but was of a judgment rendered at the old marine court of New York filed in the county clerk's office); Nanz *v.* Oakley, 60 Hun (N. Y.) 431, 15 N. Y. Suppl. 1 (under N. Y. Code Civ. Proc. § 1369). *Contra*, McDonald *v.* Fuller, 11 S. D. 355, 77 N. W. 581, 74 Am. St. Rep. 815, holding that an omission to state that the transcript had been filed was a mere irregularity.

A recital of the docketing of the judgment in another county as of two days after issuance of the execution is a mere irregularity. Hoerr *v.* Meihofer, 77 Minn. 228, 79 N. W. 964, 77 Am. St. Rep. 674.

28. **Necessity of leave of court after death** of party see *infra*, VI, D, 2, c, (II), (A), (3).

29. Woodcock *v.* Bennet, 1 Cow. (N. Y.) 711, 740, 13 Am. Dec. 568 [*citing* Jefferson *v.* Morton, 2 Saund. 6 and note]. See also Watson *v.* Moore, 40 Oreg. 204, 66 Pac. 814.

30. *Alabama.*— Meyer *v.* Hearst, 75 Ala. 390; Beach *v.* Dennis, 47 Ala. 262; Hurst *v.* Weathers, 15 Ala. 417; Holloway *v.* Johnson, 7 Ala. 660.

Arkansas.— Bentley *v.* Cummins, 9 Ark. 487.

California.— Smith *v.* Reed, 52 Cal. 345.

party defendant in being against whom or against whose property the process can run.[31] In a few instances an execution so issued has been held voidable only, not void.[32] Where, however, the common-law rule in this matter has been

Delaware.— Farmers' Bank *v.* Reynolds, 1 Harr. 513, where a term had gone by.

Illinois.— Laflin *v.* Herrington, 16 Ill. 301; Greenwood *v.* Spiller, 3 Ill. 502.

Indiana.— Faulkner *v.* Larrabee, 76 Ind. 154; Whitehead *v.* Cummins, 2 Ind. 58. See State *v.* Michaels, 8 Blackf. 436.

Iowa.— Boyle *v.* Maroney, 73 Iowa 70, 35 N. W. 145, 5 Am. St. Rep. 657; Welch *v.* Battern, 47 Iowa 147.

Kentucky.— Thomas *v.* Tanner, 6 T. B. Mon. 52.

Nebraska.—Vogt *v.* Daily, (1904) 98 N. W. 31.

New Jersey.— See Sharp *v.* Humpreys, 16 N. J. L. 25.

New York.— Beard *v.* Sinnott, 38 N. Y. Super. Ct. 536.

North Carolina.— Williams *v.* Weaver, 94 N. C. 134; Sawyers *v.* Sawyers, 93 N. C. 321.

Ohio.— Massie *v.* Long, 2 Ohio 287, 15 Am. Dec. 547.

Tennessee.— Puckett *v.* Richardson, 6 Lea 49, void as to realty.

Texas.— Emmons *v.* Williams, 28 Tex. 776; Bynum *v.* Govan, 9 Tex. Civ. App. 559, 561, 29 S. W. 1119 [*citing* Hooper *v.* Caruthers, 78 Tex. 432, 15 S. W. 98; Conkrite *v.* Hart, 10 Tex. 140]. See cases *contra* for present Texas rule.

See 21 Cent. Dig. tit. "Execution," § 155.

In Illinois by statute plaintiff was obliged to give three months' notice to the executors or administrators of defendant, who had died since the judgment, in order to issue execution. Issuance of an execution without giving this notice or without the common-law proceeding by scire facias rendered the writ void and the sale thereunder. Clingman *v.* Hopkie, 78 Ill. 152; Ransom *v.* Williams, 2 Wall. (U. S.) 313, 17 L. ed. 803. See Brown *v.* Parker, 15 Ill. 307.

N. C. Code, c. 30, § 440, providing for an issuing by leave of court after the lapse of three years on the entry of the judgment, does not authorize execution against a decedent estate on a judgment rendered against him in his lifetime. Cowles *v.* Hall, 113 N. C. 359, 18 S. E. 329.

31. Halsey *v.* Van Vliet, 27 Kan. 474.

In Missouri the act of 1826 prohibited execution against a dead man's estate. Miller *v.* Doan, 19 Mo. 650. Under prior statutes they were legal. Carson *v.* Walker, 16 Mo. 68. *Compare* Harrison *v.* Renfro, 13 Mo. 446.

Louisiana rule.— When defendant dies, judgment against him must be declared executory against his heirs or representatives. Legendre *v.* McDonough, 6 Mart. N. S. 513.

Where a judgment debtor is imprisoned in the penitentiary upon a conviction and sentence for murder, and where it appears that the judgment had not been revived against the legal representatives of the debtor, the execution or order of sale and all proceedings thereunder are void. Ashmore *v.* McDonnell, (Kan. Sup. 1888) 16 Pac. 687.

32. Drake *v.* Collins, 5 How. (Miss.) 253; Butler *v.* Haynes, 3 N. H. 21; Speer *v.* Sample, 4 Watts (Pa.) 367. This is now the rule in Texas (Cain *v.* Woodward, 74 Tex. 549, 12 S. W. 319; Cook *v.* Sparks, 47 Tex. 28; Thompson *v.* Jones, (Tex. Sup. 1889) 12 S. W. 77 [*reviewing* the decisions in the state, and *disapproving* Conkrite *v.* Hart, 10 Tex. 140]); and in Oregon (Bower *v.* Holladay, 18 Oreg. 491, 22 Pac. 553).

An execution so executed is voidable on motion by the heirs for its stay or on proceedings to enjoin its service to which motion the officer and the judgment plaintiff are made parties. Hodges *v.* White, 19 R. I. 717, 36 Atl. 838. See also Elliott *v.* Knott, 14 Md. 121, 74 Am. Dec. 519.

Statutory stay.— Early in New York execution could not issue until one year after the death of defendant. Nichols *v.* Chapman, 9 Wend. 452. By N. Y. Code Civ. Proc. § 1380, the period of the stay is now three years. See Duell *v.* Alvord, 41 Hun 196. The provision in such section that the three-year stay shall not apply to land conveyed by the judgment debtor in fraud of his creditors and that any judgment creditor as to whom a conveyance made by his deceased judgment debtor shall be declared fraudulent by any court of competent jurisdiction may enforce his judgment out of the property so conveyed as if the judgment debtor were living applies only where the conveyance had been declared fraudulent by a court, an allegation that such conveyance was fraudulent amounts to nothing. *In re* Holmes, 131 N. Y. 80, 29 N. E. 1003 [*affirming* 59 Hun 369, 13 N. Y. Suppl. 100]. In Illinois, when a judgment is a lien upon the land of defendant before his death, no execution can be issued thereon before the expiration of one year after defendant's death. Clingman *v.* Hopkie, 78 Ill. 152. The Georgia act of 1799 which restrains "suits or actions" against executors or administrators until the expiration of twelve months after the death of the decedent does not restrain the collection of judgments already obtained against the deceased in his lifetime by levy and sale of his goods and chattels under execution issued thereon. Ingram *v.* Hurt, 10 Ga. 568.

Form of writ — Proper recitals.— Although in case of the death of a judgment debtor before execution, the better practice is to recite in the execution the recovery of the judgment, the death of defendant, and notice to the administrator of the judgment, and to command the sheriff to levy the execution on the land owned by defendant at his death, yet an execution issued in the name of defendant is sufficient in substance. Wight *v.* Wallbaum, 39 Ill. 554. An execution on a judgment against B issued against C, "executor of the will of B deceased," should recite

changed by statute, the statute should in every particular be strictly pursued in order to claim the rights conferred by it.[33]

(II) *PLAINTIFF*—(A) *In General.* In like manner at common law and by the early rule which usually obtained in this country a valid execution could not issue in favor of a deceased plaintiff without a revival of the judgment by scire facias.[34] An execution could not issue in favor of one not *in esse*,[35] for there was no party left who could make a motion for leave to issue execution on the judgment.[36] An execution issued after the death of plaintiff without a revival of the judgment could be quashed on motion.[37] The authorities differ as to whether an execution so issued is void[38] or merely voidable.[39] This rule has been changed by statute in many states with the result that the executor or administrator may have execution on the original judgment without any revival.[40] Where this change has been made execution must be sued out in the mode prescribed by the statute.[41]

(B) *After Judgment Assigned.* Where the judgment had been assigned before

the death of B, and the revival of the judgment, otherwise the execution would not conform to the judgment, especially when as in this case the execution did not refer to the judgment as authority. Hart *v.* McDave, 61 Tex. 208. See *infra*, VI, C, 2, b.

33. Byrnes *v.* Sexton, 62 Minn. 135, 64 N. W. 155. See also Scammon *v.* Swartwout, 35 Ill. 326; Watson *v.* Moore, 40 Oreg. 204, 66 Pac. 814; Yankton Sav. Bank *v.* Cutterson, 15 S. D. 486, 90 N. W. 144. *Compare* Prentiss *v.* Bowden, 145 N. Y. 342, 40 N. E. 13 [*affirming* 8 Misc. 420, 28 N. Y. Suppl. 666]; Atlas Refining Co. *v.* Smith, 64 N. Y. Suppl. 1044, 31 N. Y. Civ. Proc. 12.

34. *Alabama.*— Stewart *v.* Nuckols, 15 Ala. 225, 50 Am. Dec. 127.

Illinois.— See Brown *v.* Parker, 15 Ill. 307.

Kentucky.— Huey *v.* Redden, 3 Dana 488.

Missouri.—Welch *v.* St. Louis, 12 Mo. App. 516.

New Jersey.— Morgan *v.* Taylor, 38 N. J. L. 317, prior to the passage of the amended Practice Act.

New York.—Gansevoort *v.* Gilliland, 1 Cow. 218.

North Carolina.— Wingate *v.* Gibson, 5 N. C. 492; Simmons *v.* Radcliff, 3 N. C. 341, 5 N. C. 113, where the execution was for the costs.

Tennessee.— Hewgly *v.* Johns, 3 Baxt. 85.

See 21 Cent. Dig. tit. "Execution," § 154.

35. See Welch *v.* St. Louis, 12 Mo. App. 516.

36. Thurston *v.* King, 1 Abb. Pr. (N. Y.) 126; Wheeler *v.* Dakin, 12 How. Pr. (N. Y.) 537.

37. Moore *v.* Bell, 13 Ala. 469.

38. Seeley *v.* Johnson, 61 Kan. 337, 59 Pac. 631, 78 Am. St. Rep. 314. See Brown *v.* Parker, 15 Ill. 307; Bellinger *v.* Ford, 21 Barb. (N. Y.) 311.

39. Jenness *v.* Lapeer County Cir. Judge, 42 Mich. 469, 473, 4 N. W. 220 [*citing* Tapley *v.* Goodsell, 122 Mass. 176; Cumber *v.* Wane, 1 Str. 426]; Day *v.* Sharp, 4 Whart. (Pa.) 339, 34 Am. Dec. 509.

40. *Illinois.*— Durham *v.* Heaton, 28 Ill. 264, 81 Am. Dec. 275; Brown *v.* Parker, 15 Ill. 307; People *v.* Peck, 4 Ill. 118, where the statute which changed the old practice is first construed, and construed to the effect that it did not enlarge the powers of executors or administrators, who could not, before its passage, sue at all in the Illinois courts, as for instance was the case of foreign administrators, they being compelled to first obtain letters in the state of Illinois. But *compare* Dinet *v.* Eigenmann, 80 Ill. 274.

Indiana.— Mavity *v.* Eastridge, 67 Ind. 211; Armstrong *v.* McLaughlin, 49 Ind. 370. See Wyant *v.* Wyant, 38 Ind. 48.

Kentucky.— Venable *v.* Smith, 1 Duv. 195 (construing Code, §§ 432–434); Morgan *v.* Winn, 17 B. Mon. 233.

Louisiana.— Legendre *v.* McDonough, 6 Mart. N. S. 513. See also Rooks *v.* Williams, 13 La. Ann. 374.

Missouri.— Gaston *v.* White, 46 Mo. 486 (construing Wagner St. 791, § 14); Simmons *v.* Heman, 17 Mo. App. 444.

Pennsylvania.— Gemmill *v.* Butler, 4 Pa. St. 232; Darlington *v.* Speakman, 9 Watts & S. 182.

See 21 Cent. Dig. tit. "Execution," § 154.

Contra.— In New York, under Code Proc. § 428, the representatives could not have execution on motion, but had to resort to an action, a proceeding similar to the old proceeding by way of a scire facias quare executionem non (Jay *v.* Martine, 2 Duer 654; Wheeler *v.* Dakin, 12 How. Pr. 537); and such an action was not an action on the judgment within the prohibition of section 71 and might be brought without leave of court (Wheeler *v.* Dakin, *supra*. See also Cameron *v.* Young, 6 How. Pr. 372). This rule was subsequently changed so that the judgment could be revived by motion. Bellinger *v.* Ford, 21 Barb. 311. But see Code Civ. Proc. §§ 1379, 1380, 1381, for the law at the present time.

By Minn. Gen. St. (1866) c. 66, § 13, an action is declared deemed to be pending until judgment therein is satisfied, and section 36 as amended by Laws (1876), c. 46, provides that in case of the death of a party the court may on motion allow the action to be continued by or against his representative. Lough *v.* Pitman, 25 Minn. 120.

41. Brown *v.* Parker, 15 Ill. 307 (or the judgment must be revived by scire facias); Dunham *v.* Bentley, 103 Iowa 136, 72 N. W.

the death of plaintiff, it has been held that the assignee may issue execution without a proceeding to revive the judgment.[42]

b. After Execution in Sheriff's Hands — (I) *Before Original Served.* If defendant dies after the execution is awarded and before it is served, it may nevertheless by the common-law rule be served upon his goods in the hands of his executor or administrator;[43] but it has been held in this country that the sheriff cannot proceed unless the execution is both sued out and levied.[44] If plaintiff dies after execution awarded, the execution would not abate but the sheriff might nevertheless proceed.[45]

(II) *After Service or Return of Original.* It would seem to follow naturally from the above common-law rule[46] that the issuance of an alias or pluries would not be affected by the death of defendant after the original is in the hands of the sheriff; and so it has been considered in one case at least.[47] But in some states it is held that an alias execution cannot issue after the death of defendant without a revival of the judgment unless a lien has been acquired by former execution issued in the lifetime of defendant and properly continued since;[48] if, however, the continuance has not been properly maintained, the lien

437; Mulholland *v.* Troutman, 10 Ky. L. Rep. 263; Williams *v.* Staton, 4 Ky. L. Rep. 225; Holman *v.* Chevaillier, 14 Tex. 337. See also Fowler *v.* Burdett, 20 Tex. 34.

42. Harris *v.* Frank, 29 Kan. 200. *Contra*, Welch *v.* St. Louis, 12 Mo. App. 516, where plaintiff died after judgment and before the judgment was affirmed in his favor on appeal, and where the court held that execution could not issue to the use of the assignee.

Under 2 N. Y. Rev. St. p. 274, § 5, the assignee may sue out a scire facias in his own name when the assignor has died after the recovery of the judgment, there being no executor or administrator. Murphy *v.* Cochran, 1 Hill 339.

Under Wis. Laws (1858), c. 62, execution must issue in the name of the judgment creditor who has died, although the judgment was previously assigned by him. Holmes *v.* McIndoe, 20 Wis. 657.

43. 3 Bacon Abr. (Am. ed. 1854) tit. "Execution."

44. The reason being that the sheriff is commanded to take the property of defendant, but by his death this becomes impossible. His right of property terminated, and other rights have commenced. But if the execution is levied on personal property, the sheriff acquired a special property thereunder which it is his duty to divest himself of according to the exigent of the writ. Massie *v.* Long, 2 Ohio 287, 15 Am. Dec. 547. See also Wagnon *v.* McCoy, 2 Bibb (Ky.) 198, to the same effect, where, however, the death was that of plaintiff not of defendant. But *compare* Reddick *v.* Long, 124 Ala. 260, 27 So. 402, construing Ala. Rev. Code, § 2875.

45. "For the writ commands him to levy and bring the money into court, which the plaintiff's death does no way hinder: Besides, an execution is an entire thing, and cannot be superseded after it is begun." Clerk *v.* Withers, 1 Salk. 322.

46. See *supra*, VI, C, 1, b, (I).

47. Verdier *v.* Fishburne, 1 Speers (S. C.) 346.

"But if the Sheriff, for any cause, return the process without a sale, no alias can issue tested after the death of defendant without a scire facias against the heir." Aycock *v.* Harrison, 65 N. C. 8, 9.

In Alabama it is said that an alias execution cannot issue after the death of defendant without a reversal of the judgment except to continue a lien acquired by a former execution issued in the lifetime of defendant. Fryer *v.* Dennis, 3 Ala. 254.

Death of plaintiff.— A having recovered a judgment against B sued out a fieri facias and before the return of it he died. After his death, he having no representative, another fieri facias was sued out in his name. This fieri facias was set aside as having issued erroneously. Wingate *v.* Gibson, 5 N. C. 492. The rule was the same in New Jersey where scire facias was necessary before the passage of the amended Practice Act. Morgan *v.* Taylor, 38 N. J. L. 317.

48. Fryer *v.* Dennis, 3 Ala. 254. See Brown *v.* Newman, 66 Ala. 275, holding that the fact that the debtor became bankrupt a few days before the return of the original without levy and more than a year before his death did not affect this principle. See also Halsey *v.* Van Vliet, 27 Kan. 474. An alias and pluries writ issued after the death of defendant, where no intervening term had been allowed to lapse without renewal, is not void; and, if voidable, the irregularity cannot be taken advantage of by a stranger. Collingsworth *v.* Horn, 4 Stew. & P. (Ala.) 237, 24 Am. Dec. 753.

Originally in Alabama an alias or pluries fieri facias issued after the death of defendant would not authorize a levy on and a sale of land of which defendant died seized. Abercrombie *v.* Hall, 6 Ala. 657; Lucas *v.* Doe, 4 Ala. 679. See Erwin *v.* Dundas, 4 How. (U. S.) 58, 11 L. ed. 875. This rule was changed by the adoption of the code which removed all distinction between land and personal property in respect to a lien of an execution and the authority of sale conferred

is lost and then scire facias is necessary to revive the judgment before any subsequent execution can issue.[49]

c. After and Before Teste of the Writ. If defendant dies after the teste of the writ and before the writ was sued out, execution could nevertheless be issued;[50] for by fiction of law the writ had relation back to its teste[51] and the relation went back to the first day of the term.[52] It was immaterial that the judgment was not signed until after the death of defendant.[53] The right to issue execution when defendant died after the teste of the writ existed on the theory that the goods of defendant were bound from the test — the common-law rule before it was changed by the statute of frauds.[54] If an execution bore teste subsequent to the death of defendant, it could be quashed on motion[55] and was generally held void.[56]

2. Of One or More of Several Plaintiffs or Defendants — a. In General. Where one or more of several plaintiffs or defendants in the judgment dies after

thereby. Clark *v.* Kirksey, 54 Ala. 219 [*following* Hendon *v.* White, 52 Ala. 597].

In Texas the act of Feb. 5, 1840, declared that the judgment should operate upon all property of defendant situated in the county of the venue if execution is issued within twelve months after rendition and due diligence is used to collect the same. Where plaintiff allowed seven years to lapse between the issuance of the original and the alias, it was held that he did not exercise due diligence. Hall *v.* McCormick, 7 Tex. 269.

The same rule has been applied in case of the death of plaintiff after the issuance of the original execution. Bennett *v.* Gamble, 1 Tex. 124.

49. Thus in Boyd *v.* Dennis, 6 Ala. 55, it was said that if a term was allowed to lapse without a proper continuance being made, the lien was lost and scire facias was necessary; in that case, however, two terms had been allowed to go by. See Farmers' Bank *v.* Reynolds, 1 Harr. (Del.) 513.

50. *Delaware.*— Graham *v.* Wilson, 5 Harr. 435.

New Jersey.— Rickey *v.* Hillman, 7 N. J. L. 180, 188 [*citing* Tidd Pr. 915], where an objection that the writ was not sealed before the death of defendant was said by the court not to alter the principle. See also Morgan *v.* Taylor, 38 N. J. L. 317.

New York.— Hay *v.* Fowler, 1 How. Pr. 127; Center *v.* Billinghurst, 1 Cow. 33. But land cannot be sold on an execution issued after the death of defendant, although the writ bear teste as of the day previous to the death. Stymets *v.* Brooks, 10 Wend. 206.

North Carolina.— A venditioni exponas to sell land tested after defendant's death without a scire facias against the heirs is null and void. Samuel *v.* Zachery, 26 N. C. 377.

South Carolina.—Dibble *v.* Taylor, 2 Speers 308, 42 Am. Dec. 368.

Tennessee.— Neil *v.* Gaut, 1 Coldw. 396. See Black *v.* Planters' Bank, 4 Humphr. 367.

United States.— Kane *v.* Love, 14 Fed. Cas. No. 7,608, 2 Cranch C. C. 429.

England.— Waghorne *v.* Langmead, 1 B. & P. 571. See 3 Bacon Abr. tit. "Execution."

See 21 Cent. Dig. tit. "Execution," § 157.

In Tennessee it has been held that the rule holds good for a levy on real estate. Montgomery *v.* Realhafer, 85 Tenn. 668, 5 S. W. 54, 4 Am. St. Rep. 780. The land does not descend to the heir but remains *in custodia legis* and an execution levied thereon is valid. See Preston *v.* Surgoine, Peck 72.

51. Erwin *v.* Dundas, 4 How. (U. S.) 58, 11 L. ed. 875. See Graham *v.* Wilson, 5 Harr. (Del.) 435.

52. Leiper *v.* Levis, 15 Serg. & R. (Pa.) 108; Bragner *v.* Langmead, 7 T. R. 20.

The Pennsylvania act of 1834 changed this rule in so far at least as to require that a widow and heirs of a decedent should be warned before his real estate would be seized on execution before his death. Cadmus *v.* Jackson, 52 Pa. St. 295. *Compare* Springer *v.* Brown, 9 Pa. St. 305 [*following* Speer *v.* Sample, 4 Watts (Pa.) 367].

Under the North Carolina code execution cannot be issued after death though tested before the death. Sawyers *v.* Sawyers, 93 N. C. 321, 324.

53. Bragner *v.* Langmead, 7 T. R. 20. *Contra*, Fox *v.* Lamar, 2 Brev. (S. C.) 417.

54. See Preston *v.* Surgoine, Peck (Tenn.) 72; Black *v.* Planters' Bank, 4 Humphr. (Tenn.) 367. *Compare* Docura *v.* Henry, 4 Harr. & M. (Md.) 480.

55. Harrington *v.* O'Reilly, 9 Sm. & M. (Miss.) 216, 48 Am. Dec. 704; Davis *v.* Helen, 3 Sm. & M. (Miss.) 17.

56. Mitchell *v.* De St. Maxent, 4 Wall. (U. S.) 237, 18 L. ed. 326 (holding that the rule of the common law applied where proceedings are commenced by attachment); Erwin *v.* Dundas, 4 How. (U. S.) 58, 11 L. ed. 875. In Aycock *v.* Harrison, 65 N. C. 8, it was said that a venditioni exponas to sell land outside after defendant's death without a scire facias against the heirs was null and void. Such a writ gives no lien upon the property of the debtor. McMahon *v.* Glasscock, 5 Yerg. (Tenn.) 304; Gwin *v.* Latimer, 4 Yerg. (Tenn.) 22.

An execution so issued is voidable only. Shelton *v.* Hamilton, 23 Miss. 496, 57 Am. Dec. 149; Smith *v.* Winston, 2 How. (Miss.) 601; Center *v.* Billinghurst, 1 Cow. (N. Y.) 33.

rendition thereof and before issuance of execution the execution may issue in favor of[57] or against[58] the survivors without revival by scire facias.[59] But this was not the rule where the real estate of the survivor was to be subjected.[60] The creditor may of course revive against the decedent's representative to increase his security.[61]

b. Form of Writ — (I) *Recitals of Parties.* To conform to the judgment, the execution should issue in the name of all the parties plaintiff or defendant in the judgment, including deceased parties whether plaintiff[62] or defendant.[63] If the death be suggested on the clerk's docket execution may be taken out in the name of the survivors.[64]

(II) *Suggestion of Death.* It is not necessary that a writ which is issued in the name of all the parties defendant should suggest the death of any of such parties.[65]

Where the writ was tested the same day on which defendant died, it was irregular. Chick *v.* Smith, 8 Dowl. P. C. 337, 4 Jur. 86.

57. Plaintiffs.— Hamilton *v.* Lyman, 9 Mass. 14; Anonymous, 3 Salk. 319; 2 Tidd Pr. (Am. ed. 1856) 1120. *Contra,* Ballinger *v.* Redhead, 1 Kan. App. 434, 40 Pac. 828. See also Seeley *v.* Johnson, 61 Kan. 337, 59 Pac. 631, 78 Am. St. Rep. 314.

On the death of one of plaintiffs in partition after judgment *quod partitio fiat,* the surviving plaintiff cannot have execution but must take out a scire facias to show cause why a writ de partitione facienda should not issue. Frohock *v.* Gustine, 8 Watts (Pa.) 121.

The rule was the same in ejectment. Howell *v.* Eldridge, 21 Wend. (N. Y.) 678.

Under the Pennsylvania act of 1834 execution cannot be issued without substitution of the personal representatives of the deceased. Freiler *v.* Freiler, 1 Pa. Co. Ct. 265.

58. Defendants.— *Delaware.*— Forbes *v.* Thompson, 2 Pennew. 530, 47 Atl. 1015.

Illinois.— Reed *v.* Garfield, 15 Ill. App. 290.

Iowa.— See Bull *v.* Gilbert, 79 Iowa 547, 44 N. W. 815.

Kentucky.— Fleece *v.* Goodrum, 1 B. Mon. 306; Johnston *v.* Lynch, 3 Bibb 334.

Mississippi.— Wade *v.* Watt, 41 Miss. 248; Davis *v.* Helm, 3 Sm. & M. 17.

New York.— Woodcock *v.* Bennet, 1 Cow. 711, 13 Am. Dec. 568.

United States.—Before and since Statute of Westminster II (which subjected lands to an elegit), a judgment against two defendants survived against the personal estate of the survivor, and execution could be taken out against him within a year, and without a scire facias. See Erwin *v.* Dundas, 4 How. 58, 11 L. ed. 875.

See 21 Cent. Dig. tit. "Execution," § 158.

59. For the rule was that scire facias was necessary when a new party was introduced or when any one outside of the original parties to the judgment was affected. Since the execution might issue in favor of or against the survivors, no new party needed to be brought in. Cushman *v.* Carpenter, 8 Cush. (Mass.) 388. See Woodcock *v.* Bennet, 1 Cow. (N. Y.) 711, 13 Am. Dec. 568; Erwin *v.* Dundas, 4 How. (U. S.) 58, 77, 11 L. ed. 875 [*citing* Penoyer *v.* Brace, Carth. 404, 1 Ld. Raym. 244, 5 Mod. 338, 1 Salk. 319].

60. Erwin *v.* Dundas, 4 How. (U. S.) 58, 78, 11 L. ed. 875 [*citing* Hildreth *v.* Thompson, 16 Mass. 191; Penoyer *v.* Brace, Carth. 404, 1 Ld. Raym. 244, 5 Mod. 338, 1 Salk. 319; Pelham's Case, 2 Coke 2*b*; Lampton *v.* Collingwood, 4 Mod. 314]. See also Woodcock *v.* Bennet, 1 Cow. (N. Y.) 711, 13 Am. Dec. 568. *Compare* Day *v.* Rice, 19 Wend. (N. Y.) 644.

61. See Huey *v.* Redden, 3 Dana (Ky.) 488.

62. Hamilton *v.* Lyman, 9 Mass. 14; Howell *v.* Eldridge, 21 Wend. (N. Y.) 678; Dickinson *v.* Bowers, 7 Baxt. (Tenn.) 307 [*following* Cabiness *v.* Garrett, 1 Yerg. (Tenn.) 491]; 2 Tidd Pr. (Am. ed. 1856) 1120.

63. *Alabama.*— Stewart *v.* Cunningham, 22 Ala. 626, 628 [*citing* Bowdoin *v.* Jordan, 9 Mass. 160; Hamilton *v.* Lyman, 9 Mass. 14].

Delaware.—Forbes *v.* Thompson, 2 Pennew. 530, 47 Atl. 1015.

Illinois.— Reed *v.* Garfield, 15 Ill. App. 290.

Indiana.— See Carnahan *v.* Brown, 6 Blackf. 93.

Mississippi.— Davis *v.* Helm, 3 Sm. & M. 17, 37 [*citing* Underhill *v.* Devereux, 2 Saund. 71, 72*h* note; 2 Tidd 1120].

Issuance in the name of part of the judgment debtors without reciting the death of one has been held to render the execution void on its face. *Ex p.* Kennedy, 14 Fed. Cas. No. 7,698, 4 Cranch C. C. 462 [*citing* 2 Tidd Pr. 1029]. But in Devlin *v.* Gibbs, 7 Fed. Cas. No. 3,842, 4 Cranch C. C. 626, it was held that such an execution was voidable, not void. See Davis *v.* Helm, 3 Sm. & M. (Miss.) 17.

64. Cushman *v.* Carpenter, 8 Cush. (Mass.) 388, parties plaintiff.

Where one of the joint judgment debtors has been declared a bankrupt and discharged, the execution should nevertheless issue in the name of all the defendants in order to conform to the judgment. Linn *v.* Hamilton, 34 N. J. L. 305.

Where all the co-defendants had died and one had been the survivor of the others, scire facias for an execution against such defendant's goods in the hands of his administrator should recite the death of the others, and the survival of the defendant against whose goods execution is asked. Graham *v.* Smith, 1 Blackf. (Ind.) 414.

65. Johnson *v.* Lynch, 3 Bibb (Ky.) 334; Wade *v.* Watt, 41 Miss. 248; Holt *v.* Lynch, 18 W. Va. 567.

c. Taking of Deceased's Property. But the execution cannot be sent against the estate of the deceased debtor without revival of the judgment, although his name properly appears in the recitals of the parties.[66]

D. Original or First Execution — 1. On Transcript of Justice of the Peace, or of a Lower Court or on Appeal Therefrom — a. Upon a Transcript Without Appeal — (I) *County in Which Transcript Should Be Filed.* The circuit court, or a similar designated court of record, of the county in which the judgment was rendered is the proper court to which a justice's judgment and proceedings should be certified for procuring execution against real estate.[67]

(II) *Prerequisites to Filing Transcript* — (A) *Issuance of Process.*[68] In some states the issuance of an execution by the justice of the peace, and a return by the officer of *nulla bona*, are prerequisites to the filing of a transcript in the court of record.[69]

(B) *Return of Officer*[70] — (1) Sufficiency of. The rule that in special statutory proceedings it must appear on the record that everything was done which the statute requires is applicable where the sufficiency of the return of the officer before the filing of the transcript is in question.[71]

(2) Premature Return. Although by statute an execution issued by a justice of the peace is made returnable within thirty days, the return of the execution unsatisfied on the same day that it was issued nevertheless authorizes the filing of a transcript of the judgment and return in the court of record.[72]

(III) *Time of Filing Transcript.* The filing of the transcript in the court of record before the expiration of the period of time during which execution can issue in a justice's court[73] and the certifying of the transcript to the wrong term of court have been held to render invalid an execution issued on such transcript.[74]

66. Johnson *v.* Swift, 12 Ala. 144. See Forbes *v.* Thompson, 2 Pennew. (Del.) 530, 47 Atl. 1015; Davis *v.* Helm, 3 Sm. & M. (Miss.) 17; Sheetz *v.* Wynkoot, 74 Pa. St. 198; Stiles *v.* Brock, 1 Pa. St. 215, holding, however, that plaintiff may have execution of the land and tenements of such deceased party which were bound by the judgment at the time it was obtained, although the contrary was the rule at common law where the judgment bound his personalty, but not his realty. By the Pennsylvania act of 1861, execution was allowed to go against the estate of a defendant who had died pending the action as if commenced against the decedent alone, the statute allowing the administrator to be substituted and a suit to proceed against him and the survivors jointly; in such case the execution would issue and be levied under the provision of the Pennsylvania act of 1834, to the estate in the administrator's hands. Dingman *v.* Amsink, 77 Pa. St. 114.

67. Stroud *v.* Davis, 6 Blackf. (Ind.) 539. See cases cited *infra*, note 69 *et seq.*

68. See *infra*, VI, D, 1, a, (VI), (A), (2).

69. Massey *v.* Gardenhire, 12 Ark. 638 (this is not necessary where the action in the justice's court is aided by attachment); Hawkins *v.* Wills, 49 Fed. 506, 1 C. C. A. 339. In Jordan *v.* Bradshaw, 17 Ark. 106, 65 Am. Dec. 419, it was held that a failure of a constable to return the execution unsatisfied before the transcript is filed is at the most an irregularity and is available to defendant alone in a direct proceeding to quash the return. See also State *v.* Norris, 19 Ark. 247.

70. See *infra*, VI, D, 1, a, (VI), (A), (2), (d).

71. Merrick *v.* Carter, 205 Ill. 73, 68 N. E. 750; Tasto *v.* Klopping, 43 N. J. L. 448; Newman *v.* Van Duyne, 42 N. J. Eq. 485, 7 Atl. 879.

72. Reeves *v.* Sherwood, 45 Ark. 520 [*quoting* Renaud *v.* O'Brien, 35 N. Y. 99].

73. Vroman *v.* Thompson, 42 Mich. 145, 3 N. W. 306; O'Brien *v.* O'Brien, 42 Mich. 15, 3 N. W. 233.

74. Johnson *v.* Dismukes, 104 Ala. 520, 16 So. 424.

Execution issued before compliance with requirement.— Although the statute requires that an execution shall be issued by the justice and returned *nulla bona* before an execution can be issued on the transcript, yet an attachment execution which has been issued on the transcript is not void, although no certificate of the justice's execution and return has been filed in the prothonotary's office prior thereto. In such cases the court will give leave to file such certificate *nunc pro tunc*. Guerin *v.* Guest, 3 Pa. L. J. Rep. 111, 4 Pa. L. J. 471.

Presumption.— After the lapse of seventeen years from the acknowledgment of a sheriff's deed, it will be presumed that the certificate of the justice as to the required preliminary proceedings was produced to the prothonotary before he issued the fieri facias on the transcript, although such certificate is neither on file nor noted on the docket nor proved to have ever been in existence. Laughlin *v.* Bunting, 1 Am. L. J. (Pa.) 271.

It is necessary that the transcript be filed within the period of limitation for the justice's judgment.[75]

(IV) *Requisites of Transcript*—(A) *In General.* A transcript must be of a judgment properly rendered;[76] but, where a transcript of the proceedings under which the judgment is revived before a justice of the peace is filed in the court of record, a transcript of the original proceedings is not necessary.[77] If the transcript contains all that is required by the statute it is sufficient.[78]

(B) *Copy of Judgment and Execution.* A certified copy of the judgment with the return need not appear in the record, and it may not be necessary that a copy of the execution issued from and returned to the lower court should be embodied in the transcript.[79]

(C) *Variance Between Judgment and Transcript.* The justice's transcript should correspond with the frame of the judgment by him rendered;[80] but so long as there is no change in meaning, a variance in form is of no consequence.[81]

(V) *Effect of Transcript.* When the transcript is filed, the usual rule is that it stands upon the same footing, as to execution, as if it were a judgment recovered in the court of record.[82] In most jurisdictions the justice of the peace,[83]

75. Davidson *v.* Horn, 47 Hun (N. Y.) 51 [not *following* Rose *v.* Henry, 37 Hun (N. Y.) 397].

76. On the same principle as that every execution must be founded on a legal judgment. Bain *v.* Chrisman, 27 Mo. 293.

77. Bauer *v.* Miller, 16 Mo. App. 252.

78. Hall *v.* Heffly, 6 Humphr. (Tenn.) 444.

79. Provided the issuance of the execution by the justice and the *nulla bona* return appear in the transcript. Burke *v.* Miller, 46 Mo. 258. At least this is so where the copy of the procedendo under which the execution issued by the justice was filed with the transcript, and the transcript itself contained the judgment rendered by the justice, a recital of the appeal to the circuit court, the return of the case by procedendo, the issue of execution and the return thereof *nulla bona*, and the certificate of the justice that it was a correct transcript of the judgment as it stood on his docket. It was held further in this case that a certificate of the justice that the execution filed with the transcript was a part of the proceedings in the suit was not enough to show a non-compliance with the statute. Umfleet *v.* Kelly, 58 Ill. 499. In Waddell *v.* Williams, 50 Mo. 216, it was held that it was not essential to the validity of the execution in the circuit court that the transcript embrace a copy of the execution by the justice and the *nulla bona* return of the constable where such facts were recited in the sheriff's deed of land sold under an execution issued from the circuit court [*criticizing* Carr *v.* Youse, 39 Mo. 346, 90 Am. Dec. 470, which holds that the fact that an execution had been issued upon a judgment rendered by a justice and returned *nulla bona* must appear by a certified copy of the execution and of the constable's return thereto; that the certificate of a justice of the peace to that effect was not admissible in evidence as a too rigid interpretation of the law]. In Murray *v.* Lafton, 15 Mo. 621, it was intimated by the court that it would be well if a transcript of the justice's execution and return thereon were filed and recorded with the transcript of the judgment, for when so made it would furnish record evidence not to be collaterally contradicted. In Ruby *v.* Hannibal, etc., R. Co., 39 Mo. 480, and in Franse *v.* Owens, 25 Mo. 329, the certificate of a justice which did not contain a copy of the execution and return was held sufficient.

80. As for instance, in respect to the names and numbers of plaintiffs and defendants. See Simpkins *v.* Page, 1 Code Rep. (N. Y.) 107.

81. Womble *v.* Little, 74 N. C. 255. See also Ruby *v.* Hannibal, etc., R. Co., 39 Mo. 480.

A transcript on appeal from a justice's court is not equivalent to a transcript filed with the county clerk to authorize the judgment to be docketed in the court of record, and an execution cannot be entered thereon. Chapman *v.* Raleigh, 3 Oreg. 34.

82. Herrick *v.* Ammerman, 32 Minn. 544, 21 N. W. 836; Brush *v.* Lee, 36 N. Y. 49, 1 Transcr. App. (N. Y.) 66, 3 Abb. Pr. N. S. (N. Y.) 204, 34 How. Pr. (N. Y.) 283. See also Hanson *v.* Bean, 51 Minn. 546, 53 N. W. 871, 38 Am. St. Rep. 516; Amick *v.* Amick, 59 S. C. 70, 37 S. E. 39. And see Rose *v.* Henry, 37 Hun (N. Y.) 397 [*disapproved* on another point in Davidson *v.* Horn, 47 Hun (N. Y.) 51]. But *compare* Bodkin *v.* McDonald, 11 Phila. (Pa.) 343, construing the Pennsylvania act of June 16, 1836.

Effect of replevying judgment.— The right of a judgment creditor under Ky. Code, § 723, which provides for the filing of transcript of a judgment in the usual manner and that upon the filing of the transcript the judgment creditor is entitled to the same remedies as if the judgment had been rendered in the circuit court, is not affected by the judgment defendant's giving bond and replevying the judgment rendered by the lower court, for the replevying bond will be treated as a judgment of the lower court although the replevy of a judgment extinguishes it. Counts *v.* Howes, 98 Ky. 397, 33 S. W. 395, 17 Ky. L. Rep. 1071.

83. Herdman *v.* Cann, 2 Houst. (Del.) 41.

or lower court,[84] as the case may be, can conduct no further proceedings on the judgment after it has been transcribed, but the court of record thenceforth has the control of all proceedings, including execution,[85]

(VI) *ISSUANCE ON THE TRANSCRIPT* — (A) *Prerequisites* — (1) FILING OF TRANSCRIPT. The transcript must be filed, but need not be recorded before execution may issue thereon.[86]

(2) ISSUANCE OF EXECUTION BY JUSTICE AND RETURN[87] — (a) IN GENERAL. The general rule is that execution cannot issue out of the court of record on the transcript unless an execution has previously issued from the justice of the peace and been returned *nulla bona*.[88] In some states this should appear by the certificate

84. Oberwarth *v.* McLean, 52 How. Pr. (N. Y.) 491.

85. *Ex p.* Thompson, 5 Cow. (N. Y.) 31. See also Dunham *v.* Reilly, 110 N. Y. 366, 18 N. E. 89 [*explaining* Palmer *v.* Clark, 4 Abb. N. Cas. (N. Y.) 25]. And *compare* Oberwarth *v.* McLean, 7 Daly (N. Y.) 70, 52 How. Pr. (N. Y.) 491.

In Pennsylvania, the act of March 20, 1810, provided for the filing of transcript for the purposes of lien and the issue of execution out of the court of record against land. For many years the inferior courts of record of the state were at variance as to whether an execution could issue against personal property, as well as real, after the transcript was filed. See Bradley *v.* Ward, 12 Phila. 255, 6 Wkly. Notes Cas. 366; Wheeler, etc., Mfg. Co. *v.* Moore, 6 Wkly. Notes Cas. 270, and in Conrad *v.* Brandt, 14 Phila. 159, 8 Wkly. Notes Cas. 439 (the court refusing to follow Techner *v.* Karpeles, 13 Phila. 169, stating that it had little to add to the opinion in the case of Wheeler, etc., Mfg. Co. *v.* Moore, *supra*); Ginder *v.* Reynolds, 2 Chest. Co. Rep. 466, 2 Del. Co. 247 (at least without a scire facias having been first issued), all holding that upon the filing of the transcript in the court of record it became a judgment of that court only so far as the enforcement thereof against real property; that as against personal property the magistrates still had control of the execution. See also Lyter *v.* Dunkel, 2 Pearson 283. But in Bair *v.* Bowman, 2 Chest. Co. Rep. 462; Techner *v.* Karpeles, 13 Phila. 169; Weir *v.* Lawrence, 9 Wkly. Notes Cas. 207; and Hamilton *v.* Dawson, 2 Pa. L. J. Rep. 357, 4 Pa. L. J. 141, it was held that the transcript became a judgment of the court of record (that is, of the common pleas) for all purposes. In Hitchcock *v.* Long, 2 Watts & S. 169, it was held that the transcript while in the court of common pleas was such a judgment of that court as an attachment might issue upon under provisions of the act of June 16, 1836. And in Reichenbauch *v.* Arnold, 2 Pa. L. J. Rep. 527, 4 Pa. L. J. 325; and Brechemin *v.* McDowell, 1 Phila. 368, it was held that statutes which gave the remedy by attachment in cases before a justice would not prevent similar proceedings upon the transcript while in the common pleas. In Brannan *v.* Kelley, 8 Serg. & R. 479, it was held that a scire facias to revive a judgment of the justice of the peace, a transcript of which has been filed in the court of common pleas under this statute, must be issued by the court in which the transcript was filed and not by the justice before whom the judgment was obtained. The supreme court does not appear to have made any other decision relative to the subject. In 1885 the legislature passed an act making transcripts of judgments before justices of the peace, magistrates, etc., of the same effect as judgments in court, thus setting at rest this much vexed question. See note to Ginder *v.* Reynolds, 2 Chest Co. Rep. 466.

86. Davis *v.* Dietz, 2 Ind. 247. See also Hamilton *v.* Matlock, 5 Blackf. (Ind.) 421; Dunham *v.* Reilly, 110 N. Y. 366, 18 N. E. 89. *Compare* Carr *v.* Youse, 43 Mo. 28, 39 Mo. 346, 90 Am. Dec. 470; Roof *v.* Meyer, 8 N. Y. Civ. Proc. 60.

Bond.— The requirement by statute of the filing of a bond before the issue by the clerk of an execution upon a transcript of a justice's judgment filed in his office does not apply where personal service has been had or where defendant has entered an appearance in a suit before the justice. The provision is restricted to cases where defendant has been constructively summoned. Hawkins *v.* Wills, 49 Fed. 506, 1 C. C. A. 339 [*following* Bush *v.* Visant, 40 Ark. 124].

Presumption of filing bond.— See Rust *v.* Reives, 24 Ark. 359.

Alias.— Where an execution has been issued on a judgment of the justice of the peace within the period of limitation and returned unsatisfied, it is sufficient to warrant an alias on the transcript after the expiration of the period of limitation. Moyer *v.* Sekenger, 16 Wkly. Notes Cas. (Pa.) 242. See Jackson *v.* Page, 4 Wend. (N. Y.) 585, holding that the county clerk was authorized to renew an execution issued by him on a transcript or to issue a new execution. See *infra*, VI, E.

87. See *supra*, VI, D, 1, a, (II), (A).

88. Massey *v.* Gardenhire, 12 Ark. 638; Wineland *v.* Coonce, 5 Mo. 296, 32 Am. Dec. 194; Clevenstine *v.* Law, 3 Pa. L. J. Rep. 417, 5 Pa. L. J. 459; Guerin *v.* Guest, 3 Pa. L. J. Rep. 111, 4 Pa. L. J. 471. But the return *nulla bona* by the constable on the justice's execution is sufficient to authorize the issuance of the execution on the transcript (Klein *v.* Wielandy, 15 Mo. App. 581); and where this appears in the transcript, a certified copy of the judgment with the re-

of the justice.[89] A failure to comply with the requirement of the statute as to the issuance and return *nulla bona* in the lower court is not a mere irregularity, but renders an execution issued upon a transcript under such conditions invalid.[90]

(b) VALIDITY OF EXECUTION. If an execution has issued and been returned *nulla bona*, it must have been a valid one or it will be of no effect in fulfilling the preliminary requirement.[91]

(c) TIME OF ISSUANCE. The execution must have issued out of the justice's court within the period of limitations.[92]

(d) OFFICER'S RETURN. The requirements of the statute as to the return must be strictly followed by the officer making it.[93] The fact that the execution was returned before the expiration of the time set by statute for return may[94] or may

turn thereon need not appear in the record to authorize the issuance on the transcript (Burke *v.* Miller, 46 Mo. 258); and where the transcript shows that an execution has been issued by the justice, it is sufficient evidence of the fact without the production of the original execution (Crowley *v.* Wallace, 12 Mo. 143). See Illingsworth *v.* Miltenberger, 11 Mo. 80, enforcement of mechanic's lien.

Defendant non-resident of county.— Where the statute forbids execution to issue on the transcript where defendant is a resident of a county unless an execution has issued from the justice and been returned *nulla bona*, an execution without such prior return is valid if defendant is a non-resident at the time of issuance (Huhn *v.* Lang, 122 Mo. 600, 27 S. W. 345; Jordan *v.* Surghnor, 107 Mo. 520, 17 S. W. 1009), even where he may have been a resident when the judgment was rendered and when it was revived (Tracy *v.* Whitsett, 51 Mo. App. 149).

The proviso of the Pennsylvania act of June 24, 1885, was a substantial reënactment of the proviso of the act of March 20, 1810, except that the later act substituted the words "any execution" in place of the words "fieri facias" in the clause which provided that no fieri facias should be issued unless the justice of the peace had first issued an execution and there had been a return thereon of no goods sufficient to satisfy the demand. Hoffman *v.* Hinnershitz, 4 Pa. Co. St. 207.

Under Minn. Sp. Laws (1889), c. 34, § 15, providing that, on filing in the district court the transcript of a judgment of the municipal court, the judgment passes "under the exclusive control of the district court, and is carried into execution by its process as if rendered in said district court," the previous issuance out of the justice's court and the return *nulla bona* is not necessary. Hanson *v.* Bean, 51 Minn. 546, 549, 53 N. W. 871, 38 Am. St. Rep. 516.

Upon a scire facias quare executio non upon a transcript filed in the common pleas and judgment upon the scire facias, an execution may issue without the usual preliminary issuance by the justice and return *nulla bona*. Green *v.* Leyner, 3 Watts (Pa.) 381, 382.

89. Mishler *v.* Wise, 9 Lanc. Bar (Pa.) 150. See also Frankem *v.* Trimble, 5 Pa. St. 520. But if it appear on the face of the transcript (Drexel *v.* Man, 6 Watts & S. (Pa.) 343), or by certificate of the justice which is not a part of the transcript (Bauer *v.* Miller, 16 Mo. App. 252), or by either (Hoffman *v.* Hinnershitz, 4 Pa. Co. Ct. 207), that the required issuance from the justice's court and return *nulla bona* has been made; it is a sufficient fulfilment of the condition precedent to issuing execution on the transcript.

Where an exemplification of the transcript filed in the court of record is filed in another county, it is not necessary that the return of "no goods" by a constable in the county where the justice's transcript was originally filed should appear by certificate in order that execution may be issued in the other county. Mougenot *v.* Vernon, 23 Pa. Super. Ct. 165.

Issuance to another county and docketing of transcript therein see *supra*, VI, B, 2, b.

90. Merrick *v.* Carter, 205 Ill. 73, 68 N. E. 750; Langford *v.* Few, 146 Mo. 142, 47 S. W. 927, 69 Am. St. Rep. 606.

No presumption will be indulged from the issuance of an execution by the clerk of the court of record that the preliminary requirement has been complied with. Reed *v.* Lowe, 163 Mo. 519, 63 S. W. 687, 85 Am. St. Rep. 578; Langford *v.* Few, 146 Mo. 142, 47 S. W. 927, 69 Am. St. Rep. 606. *Contra*, Herrick *v.* Ammerman, 32 Minn. 544, 21 N. W. 836.

91. Thus, where the transcript showed that the execution issued by the justice had not been signed by him, an execution issued thereon by the clerk of the circuit court was held invalid. Wooters *v.* Joseph, 137 Ill. 113, 27 N. E. 80, 31 Am. St. Rep. 355, (1890) 25 N. E. 791.

92. Hay *v.* Hayes, 56 Ill. 342. See *infra*, VI, D, 1, a, (VI), (B).

93. See *supra*, VI, D, 1, a, (II), (B). See also Reed *v.* Lowe, 163 Mo. 519, 63 S. W. 687, 85 Am. St. Rep. 578; Langford *v.* Few, 146 Mo. 142, 47 S. W. 927, 69 Am. St. Rep. 606 [*distinguishing* Jordan *v.* Surghnor, 107 Mo. 520, 17 S. W. 1009]; Burk *v.* Flournoy, 4 Mo. 116; Henshaw *v.* Branson, 25 N. C. 298.

94. Reeves *v.* Sherwood, 45 Ark. 520; Reed *v.* Lowe, 163 Mo. 519, 63 S. W. 687, 85 Am. St. Rep. 578. But in Whitman *v.* Taylor, 60 Mo. 127 [*distinguishing* Dillon *v.* Rash, 27 Mo. 243], it was held that the fact that the constable's return was made in less than ninety days from the date of the execution could not be brought up collaterally. See *supra*, VI, D, 1, a, (II), (B).

not[95] render the execution invalid; this depends upon the law of the jurisdiction in which the execution was issued.

(3) PRELIMINARY AFFIDAVIT. The required affidavit, preliminary to obtaining execution upon the transcript, that the judgment in the justice's court was unpaid, need not negative payment of the judgment to the clerk.[96]

(B) *Time of Issuance.* The effect of a transcript being the same as a judgment of the court,[97] the time when an execution upon the transcript may issue is governed by the statute of limitations as to judgments rendered in such court.[98]

(C) *Authority For or Control of Issuance.*[99] After the transcript has been filed, a judgment creditor or his attorney, not the clerk, has the right to direct the issue of execution thereon.[1]

(VII) *REQUISITES AND FORM OF WRIT*—(A) *Recitals*—(1) OF JUDGMENT. The fact that the execution recites the judgment as of the court of record, and not as a judgment of a justice of the peace, is not objectionable.[2]

(2) OF PARTIES. The insertion of a name in the execution which did not appear among the parties in the judgment need not render the execution invalid.[3]

(3) OF PRIOR ISSUANCE AND RETURN NULLA BONA. The execution need not recite the previous issuance by the justice of the peace and the return thereon *nulla bona*.[4]

(B) *Command to Levy.* The execution on the transcript is not objectionable for lacking a clause commanding a levy on the goods and chattels of defendant.[5]

95. Herdman *v.* Cann, 2 Houst. (Del.) 41.

96. Dehority *v.* Wright, 101 Ind. 382.

The fact that the costs on an attachment execution had not been paid, such execution having been discontinued, does not render a fieri facias on the transcript invalid. Hamilton *v.* Dawson, 2 Pa. L. J. Rep. 357, 4 Pa. L. J. 141.

The fact that the execution on the transcript has been issued without the required affidavit does not render it void. It is voidable only and a sale under it is valid. Mavity *v.* Eastridge, 67 Ind. 211.

97. See *supra*, VI, D, 1, a, (V).

98. Kerns *v.* Graves, 26 Cal. 156; McCoy *v.* Coxe, 54 Iowa 595, 7 N. W. 44; Carpenter *v.* King, 42 Mo. 219; Tracy *v.* Whitsett, 51 Mo. App. 149; Brown *v.* Hyman, 27 N. Y. Suppl. 436 [*distinguishing* Dieffenbach *v.* Roch, 112 N. Y. 621, 20 N. E. 560, 2 L. R. A. 829, and *approving* the distinctions made in Bolt *v.* Hauser, 57 Hun (N. Y.) 567, 11 N. Y. Suppl. 366, 368, and in Townsend *v.* Tolhurst, 57 Hun (N. Y.) 40, 10 N. Y. Suppl. 378, 19 N. Y. Civ. Proc. 1 (*following* Waltermire *v.* Westover, 14 N. Y. 16, and *distinguishing* Davidson *v.* Horn, 47 Hun (N. Y.) 51)]; Amick *v.* Amick, 59 S. C. 70, 37 S. E. 39. And this was so held in spite of the fact that an action on such judgment would have been barred with the running of the period given to judgments in the justice's court. Brown *v.* Hyman, *supra*; Anderson *v.* Porter, 7 Misc. (N. Y.) 218, 27 N. Y. Suppl. 646, 23 N. Y. Civ. Proc. 297; Herder *v.* Collyer, 6 N. Y. Suppl. 513, 22 Abb. N. Cas. (N. Y.) 461. *Contra, dictum* in Herrman *v.* Stalp, 15 Daly (N. Y.) 290, 6 N. Y. Suppl. 514. See *infra*, VI, D, 2, a.

The docketing of the transcript of a surrogate's decree directing payment "of money into court or to one or more persons therein designated," makes no new date for the starting of the five-year limitation upon the issuing of an execution without leave of court. People *v.* Woodbury, 70 N. Y. App. Div. 416, 75 N. Y. Suppl. 236.

99. See *supra*, VI, A, 2, d.

1. Brush *v.* Lee, 36 N. Y. 49; McDonald *v.* O'Flynn, 2 Daly (N. Y.) 42 [*disapproving* Brush *v.* Lee, 18 Abb. Pr. (N. Y.) 398]; Simpkins *v.* Page, 1 Code Rep. (N. Y.) 107. *Contra*, Thompson *v.* Jenks, 2 Abb. Pr. N. S. (N. Y.) 229; Brush *v.* Lee, 18 Abb. Pr. (N. Y.) 398; Martin *v.* New York, 20 How. Pr. (N. Y.) 86, 11 Abb. Pr. (N. Y.) 295. See also Sholts *v.* Yates County, 2 Cow. (N. Y.) 506. In Jackson *v.* Page, 4 Wend. (N. Y.) 585, it was held that a county clerk could renew an execution issued by him or issue a new execution.

2. Hamilton *v.* Dawson, 2 Pa. L. J. Rep. 357, 4 Pa. L. J. 141.

3. Hume *v.* Conduitt, 76 Ind. 598.

4. Massey *v.* Gardenhire, 12 Ark. 638.

Where the statute requires the execution on the transcript to recite the clerk with whom the transcript is filed and the time of such filing, an execution issued upon a transcript and not containing such recitals is void. Dunham *v.* Reilly, 110 N. Y. 366, 18 N. E. 89.

5. For it is a fair presumption that defendant possessed no goods after the return of *nulla bona* on the execution in the justice's court. Daniels *v.* Alexander, 2 Houst. (Del.) 39.

In Pennsylvania it has been held that the form of the writ issued on the transcript should be changed from that issued by the justice of the peace by commanding the sheriff to levy on the land of the defendant as shown by the lien of the transcript. Lyter *v.* Dunkel, 2 Pearson 283. See *infra*, VI, D, 2, b.

Teste, signature, seal.—An execution signed

b. Upon Decision of Appeal. Where an appeal is taken from the justice's judgment, the appellate court can issue an execution on its judgment,[6] for the appeal in such a case carries up the whole record for proceedings *de novo*.[7]

2. On Judgment Rendered in The Court — a. Time of Issuance — (I) *Conditions Precedent to Issuance* — (A) *Maturity of Obligation.* Execution cannot ordinarily issue until the obligation of defendant has matured,[8] unless defendant consents;[9] although it has been held that where a bond is given an indorser as security for his indorsement of two notes, judgment may be entered

by the trial justice, attested by the clerk of the circuit court under his official seal on the margin, issued on a transcript of a trial justice's judgment, docketed and enrolled in the court of common pleas is valid and in proper form. Bragg *v.* Thompson, 19 S. C. 572. In New York the execution should be signed by the party or his attorney. McDonald *v.* O'Flynn, 2 Daly (N. Y.) 42; Simpkins *v.* Page, 1 Code Rep. (N. Y.) 107. See *infra*, VI, D, 2, b, (XI)–(XIII).

6. Griffith *v.* Etna F. Ins. Co., 7 Md. 102; Pringle *v.* Lansdale, 3 McCord (S. C.) 489, 491 (where there was a positive statutory provision that the appellate court should "hear and determine said appeal according to the justice of the case, and award execution against the person or persons cast therein"); Winton *v.* Knott, 7 S. D. 179, 63 N. W. 783. *Contra*, McAnaw *v.* Matthis, 129 Mo. 142, 31 S. W. 344, where defendant appealed to the circuit court after the judgment has been transcribed thereto for the issuance of execution on the judgment. The judgment of the circuit court was a dismissal of the appeal. The court held that upon the dismissal of the appeal the original judgment came into force again. In Conn *v.* Doyle, 2 Ohio 318, it was held that where execution had been stayed by writ of error and supersedeas and the judgment was affirmed, the execution plaintiff might sue out a new writ of venditioni in the lower court and sell, for the procedendo from the appellate court merely removed the prohibition interposed by the supersedeas; that he could not sell under the procedendo as a process issuing from the appellate court.

7. Brown *v.* Wilson, 59 Ga. 604; McAnaw *v.* Matthis, 129 Mo. 142, 31 S. W. 344.

Certiorari.— Where the justice's judgment has been affirmed on certiorari, execution can issue from the appellate court at once without a remittitur (Robbins *v.* Whitman, 1 Dall. (Pa.) 410, 1 L. ed. 199); and where the proceedings in certiorari were dismissed for want of prosecution, defendant in certiorari was held entitled to take out execution in the supreme court, the court holding that "it is precisely the same thing as nonprossing a writ of error" (Anonymous, 3 N. J. L. 753). In Walker *v.* Gibbs, 2 Dall. (Pa.) 211, 1 Yeates (Pa.) 255, 1 L. ed. 352, it was held that where a judgment was obtained in a suit for foreign attachment in the common pleas and execution issued and the proceedings were removed to the supreme court by certiorari, a second execution might be properly issued out of the supreme court.

The supreme court has the power, on affirmance of a judgment, to issue execution thereon under Mo. Rev. St. § 3779. Musser *v.* Harwood, 23 Mo. App. 495, 501 [*quoting* Freeman Ex. § 10]. *Contra*, Altman *v.* Johnson, 2 Mich. N. P. 41 (unless lower court judgment was included in judgment of supreme court); Bisbee *v.* Hall, Wright (Ohio) 59. See *supra*, VI, A, 1, a.

Limitation of jurisdiction of appellate court to that of justice's court.— On an appeal by the landlord from proceedings before a justice of the peace to ascertain a set-off against land, the appellate court cannot enter judgment or issue an execution to enforce its decision; for the justice's duty being confined to ascertaining and determining whether the claimant had a claim against the landlord which should be set off against the rent, the appellate court's (the court of common pleas) jurisdiction was likewise limited. Thomas *v.* Pyle, 2 Pa. Co. Ct. 258. But *contra*, Winton *v.* Knott, 7 S. D. 179, 63 N. W. 783, where it was held that on appeal the county court could issue a body execution on a judgment for costs entered in the justice's court in an action for wrongful conversion, although execution against the person could not have been issued by the justice.

8. Otwell *v.* Messick, 4 Houst. (Del.) 542 (holding that where a judgment is entered on a note payable at a future day before the same is due, and without stay of execution, if the execution is issued thereon before the maturity of the note, the court will set it aside); Shoemaker *v.* Shirtliffe, 1 Dall. (Pa.) 133, 1 L. ed. 69. See also Bonds, 5 Cyc. 857, 858.

An accommodation indorser who receives a judgment note from defendant as security cannot be proceeded against in execution on his security before the maturity of the note which he has indorsed, as no legal liability attaches to him until that time. Reiner *v.* Heckler, 1 Leg. Rec. (Pa.) 132.

In Louisiana, it has been held that where, by a judgment, plaintiff acquires title to land and defendant is decreed a sum for the improvements which he has placed thereon, and no time is fixed for the payment, he may execute his portion of the judgment, although plaintiff has not yet taken steps to perfect his title. Milliken *v.* Rowley, 3 Rob. 253; Black *v.* Catlett, 1 Rob. 540; Righter *v.* Winter, 14 La. 548; Fletcher *v.* Cavelier, 10 La. 116.

9. Sloane *v.* Anderson, 57 Wis. 123, 13 N. W. 684, 15 N. W. 21, in the opinion of the court delivered by Orton, J.

on the same for the full amount thereof upon a default in the payment of one of the notes, and execution may issue before the maturity of the second.[10]

(B) *Signing, Entering, and Docketing Judgment and Filing Judgment-Roll.* By the old English practice, an execution might issue as soon as the judgment was signed; docketing the judgment was not a prerequisite to the issuing of execution thereon.[11] In this country it appears to be the general rule, although generally it may not be the proper practice, that an execution may be issued on a judgment which has not been docketed or entered; at least an execution so issued is not void.[12] Whether the judgment may be entered or execution issued before the judgment-roll is made up and filed is apparently a question of practice for each jurisdiction.[13] The irregularity of issuing execution before entry of judgment or before the filing of the judgment-roll may generally be cured by subsequent entry of the judgment[14] or filing of the roll.[15]

(C) *The Running of Certain Periods of Time*—(1) IN GENERAL. In a number of states there have been statutory provisions forbidding the issuance of an execution until the expiration of a certain period of time.[16]

10. Smith *v.* James, 1 Miles (Pa.) 162. See also Livingston *v.* McInlay, 16 Johns. (N. Y.) 165.

11. See Wait *v.* Garth, Barnes Notes 261; Sheridan Pr. 299. See *supra*, II, C, 3, b.

In Indiana execution upon a judgment of foreclosure of a note secured by mortgage may be issued in term-time, immediately after signing the minutes of the judgment. Willson *v.* Binford, 54 Ind. 569. See also Jones *v.* Carnahan, 63 Ind. 229.

12. Hastings *v.* Cunningham, 39 Cal. 137; and *supra*, II, C, 3, b. In South Carolina the failure to enter judgment in the "Abstract of Judgments" before issuing execution renders the execution voidable only. Mason, etc., Vocation Co. *v.* Killough Music Co., 45 S. C. 11, 22 S. E. 755. *Contra*, Knights *v.* Martin, 155 Ill. 486, 40 N. E. 358 [*affirming* 56 Ill. App. 65]. In Houghtaling *v.* Herrick, 5 Wend. (N. Y.) 109, the court said that an execution issued before entry of judgment was a mere nullity. It qualified this statement, however, by saying that, even allowing that the execution became operative when the record was filed, even though a nullity before, another execution which was issued properly before obtained the preference over the first one the record of which was not filed until subsequent to the issuance of the second.

Entry on the minutes.— No writ of execution can be sealed or recorded until the rule for judgment is actually entered in the minutes of the court. Smith *v.* Trenton Delaware Falls Co., 20 N. J. L. 116.

Issuance by clerk for his costs.— Where a suit has been determined, the clerk of court may issue execution against the party liable for the clerk's costs, although the judgment has not been actually entered up. Corrie *v.* Jacobs, Harp. (S. C.) 326.

13. In California a roll need not be made up by the clerk until after the entry of judgment. The execution may issue as soon as judgment is entered and before filing the roll. Sharp *v.* Lumley, 34 Cal. 611. See also Galpin *v.* Page, 9 Fed. Cas. No. 5,205, 1 Sawy. 309 [*reversed* on other grounds in 18 Wall. 350, 21 L. ed. 959].

In New York it is irregular to issue executions upon a judgment docketed before the judgment-roll is made up and filed, and such executions will be set aside unless the defect is procured within a reasonable time. Blashfield *v.* Smith, 27 Hun 114. See Barrie *v.* Dana, 20 Johns. 307, 309. And *compare* Small *v.* McChesney, 3 Cow. 19.

14. Doughty *v.* Meek, 105 Iowa 16, 74 N. W. 744, 67 Am. St. Rep. 282, where an entry was made *nunc pro tunc*.

15. Clute *v.* Clute, 4 Den. (N. Y.) 241. Effect of issuing an execution to another county before the docketing of the transcript see *supra*, VI, B, 2, b, (III).

Suggestion of breaches and damages assessed.— Where there is a judgment by default in an action upon a bond with a collateral condition, there must be breaches suggested, and the damages assessed as directed by 8 & 9 Wm. III, c. 2, before an execution can issue against defendant; and if it is sooner issued, it will, on motion, be quashed. Wilmer *v.* Harris, 5 Harr. & J. (Md.) 1.

16. See the statutes of the several states; and the following cases:

Indiana.— Carpenter *v.* Vanscoten, 20 Ind. 50.

Louisiana.— Sowle *v.* Pollard, 14 La. Ann. 287.

Maine.— Allen *v.* Portland Stage Co., 8 Me. 207.

New York.— Merrit *v.* Wing, 4 How. Pr. 14, 2 Code Rep. 20; Stone *v.* Green, 3 Hill 469; Row *v.* Pulver, 1 Cow. 246; *Ex p.* New York, etc., Min. Co., 22 Wend. 636. *Compare* Swift *v.* De Witt, 3 How. Pr. 280, 1 Code Rep. 25; Hutchinson *v.* Clark, 1 Code Rep. 127, 7 N. Y. Leg. Obs. 91.

North Carolina.— Heath *v.* Latham, 29 N. C. 10.

Pennsylvania.— Shove *v.* Edgell, 2 Miles 174; Kaylor *v.* Holloway, 5 Phila. 530.

Texas.— Clifford *v.* Lee, (Civ. App. 1893) 23 S. W. 843.

See 21 Cent. Dig. tit. "Execution," § 164.

An execution on a scire facias quare executionem non is within the statute. Van Valkenburgh *v.* Harris, 3 Den. (N. Y.) 162.

(2) WHETHER TIME FOR A MOTION FOR NEW TRIAL OR IN ARREST MUST RUN. According to the practice of the king's bench in England a final judgment was not entered until the lapse of four days after the rule for judgment *nisi*, during which time defendant might move for a rule to show cause.[17]

(3) WHETHER TIME FOR TAKING APPEAL MUST RUN. Where by statute or rule of court a certain period of time after rendition of judgment is allowed after an appeal taken or serving a writ of error, whether an execution could issue within such period before action taken by defendant depends upon the jurisdiction.[18]

(II) *PERIOD WITHIN WHICH EXECUTION MAY ISSUE AS OF COURSE* — (A) *Under the Early Common Law and Statute of Westminster.* At common law a plaintiff who had recovered a judgment in a personal action could neither sue out his original execution nor revive the judgment by scire facias after the lapse

By consent of defendant execution to issue before the expiration of the statutory period. Merrit *v.* Wing, 4 How. Pr. (N. Y.) 14; Kimball *v.* Munger, 2 Hill (N. Y.) 364. See also Sowle *v.* Pollard, 14 La. Ann. 287.

Execution issued before the expiration of the statutory period could be set aside with costs. Finch *v.* Graves, 1 How. Pr. (N. Y.) 198.

Strangers could not take advantage of the irregularities. Green *v.* Burnham, 3 Sandf. Ch. (N. Y.) 110. See also VI, B, 2, a; and *infra*, VIII, B, 3, b.

Waiver.— The provision that an execution against a minor heir will not issue until twelve months after judgment on scire facias may be waived by the minor's guardian. Heath *v.* Lathan, 29 N. C. 10.

Abeyance under the Virginia act of March 21, 1866.— See Utterbach *v.* Rixey, 18 Gratt. (Va.) 313.

Presumption of proper issuance.— See Esselman *v.* Wells, 8 Humphr. (Tenn.) 482.

Under Tex. Rev. St. art. 1632, allowing an execution in less than ten days after rendition of judgment on the filing of an affidavit that defendant "is about to remove his property out of the county, or is about to transfer or secrete his property for the purpose of defrauding creditors," it is not necessary to state that the property is being removed with intent to defraud creditors. Clifford *v.* Lee, (Tex. Civ. App. 1893) 23 S. W. 843.

17. Erie R. Co. *v.* Ackerson, 33 N. J. L. 33, where, however, it is stated that this delay has been abolished in New Jersey. See also Hannahan *v.* Hannahan, 2 Bay 68 [*following* Gibbes *v.* Wainwright, 1 Bay 438].

In Georgia under the Judiciary Act of 1799 an execution could not issue until four days after the adjournment of the court at which the verdict was obtained or the confession of judgment made. Harris *v.* Wetmore, 5 Ga. 64.

In Louisiana final judgments rendered by the supreme court being reviewable on motion from the rehearing made within six days, do not become executory until the expiration of that time or the disposition of the motion for rehearing. Regan *v.* Washburn, 39 La. Ann. 1071, 2 So. 178.

In Michigan where judgment is rendered at or near the close of a term of court, so that there is no time during the same term to move for a new trial or in arrest of judgment, and no such motion is made, the prevailing party is not required to wait until the following term for his execution to issue, but may have it immediately. People *v.* Bay County Cir. Ct. Clerk, 14 Mich. 169.

In Pennsylvania "in causes tried in term, four days are allowed for motions in arrest of judgment and for a new trial. So in causes tried in Nisi Prius, the first four days of the next preceding term allowed for the same purposes." Barre *v.* Affleck, 2 Yeates 274.

In Wisconsin it was held that it was not error for the court to refuse to set aside an execution on the ground that the only term of said court intervened between the entry of judgment and the issue of such execution begun less than eight days after the judgment was entered, eight days being the period of time within which motion might have been made to set aside the judgment, the court said that the time for the motion might have been lengthened. See Lathrop *v.* Snyder, 17 Wis. 110.

Pending a motion to show cause why execution should not issue it is irregular to take out execution. Stille *v.* Wood, 1 N. J. L. 162.

Issuance after entry of review by one of two defendants.— Where one of two defendants in a suit suffered a default and the other defendant appeared and entered a review and judgment was entered up, and execution issued against defendant who was defaulted, such execution was prematurely issued, for the review should operate upon the entire cause of action against all the defendants; the review should have the same effect as if there had been a single assessment of damages. Downer *v.* Dana, 22 Vt. 22.

18. See the following cases:

Georgia.— Harris *v.* Wetmore, 5 Ga. 64.

Louisiana.— Sowle *v.* Pollard, 14 La. Ann. 287; Legget *v.* Potter, 9 La. Ann. 309; State *v.* Judge Third Judicial Dist. Ct., 8 La. Ann. 89; Turpin *v.* His Creditors, 9 Mart. 517.

New Jersey.— Erie R. Co. *v.* Ackerman, 33 N. J. L. 32; Allen *v.* Hopper, 24 N. J. L. 514.

Pennsylvania.— Woods *v.* Connor, 6 Pa. St. 430.

Texas.— Shapard *v.* Bailleul, 3 Tex. 26.

of a year and a day, but he was obliged to bring an original action in which he could offer a judgment as evidence of the debt.[19] But in real actions, where land was recovered, demandant after the year might take out scire facias to revive his judgment.[20] To make the form of the procedure more uniform the Statute of Westminster II (13 Edw. I) gave scire facias to plaintiff in a personal action to revive his judgment where he had omitted to sue execution within the year after judgment was obtained.[21] The reason for forbidding the issuance without a scire facias after the lapse of a year is frequently said to be that a presumption is raised that the judgment was satisfied.[22] But this is not strictly correct. It would be more accurate to say that the lapse of time afforded some presumption or some probability of satisfaction.[23] The rule requiring scire facias to the debtor, if the original execution did not issue for a year after the rendition of the judgment, was generally adopted by the states of this country either as a part of their common law or by statutory enactment without any distinction as to the personal or real actions such as existed before the Statute of Westminster.[24]

(B) *Under Modern Statutory Regulations.* This period of a year and a day has been quite generally lengthened in this country. The exact time in which the original execution can be issued must be ascertained from the statute of each jurisdiction.[25]

Vermont.— Howard *v.* Burlington, 35 Vt. 491.

United States.— Doyle *v.* Wisconsin, 94 U. S. 50, 24 L. ed. 64; Bobbyshall *v.* Oppenheimer, 3 Fed. Cas. No. 1,591, 1 Wash. 388.

See 21 Cent. Dig. tit. "Execution," § 166; and APPEAL AND ERROR, 2 Cyc. 889 *et seq.*

19. Mitchell *v.* Chesnut, 31 Md. 521; Bolton *v.* Landsdown, 21 Mo. 399.

20. "Because the judgment being particular in the real action, *quoad* the lands with a certain description, the law required, that the execution of that judgment should be entered upon the roll, that it might be seen, whether execution was delivered for the same thing of which judgment was given; and therefore if there was no execution appearing on the roll, a scire facias issued to show cause why execution should not be." 3 Bacon Abr. tit. "Execution" [*citing* Garnon's Case, 5 Coke 88; Goodwin *v.* Grudge, Cro. Eliz. 416; Booth *v.* Booth, 6 Mod. 288; 2 Coke Inst. 471].

21. Mitchell *v.* Chesnut, 31 Md. 521; Bolton *v.* Landsdown, 21 Mo. 399; Pierce *v.* Craine, 4 How. Pr. (N. Y.) 256.

22. Bolton *v.* Landsdown, 21 Mo. 399; 3 Bacon Abr. tit. "Execution."

23. For the legal presumption is that the judgment is not satisfied until the statute of limitation has run upon it where an action of debt is brought upon it or on a scire facias to revive it. But as a year is ordinarily sufficient to enable a creditor to enforce payment of a judgment by his execution and his own interest will usually induce him to exact a speedy satisfaction, a delay beyond that time makes it necessary for the creditor to call the execution debtor before the court to show cause against his, the creditor's, issuing his execution. Catlin *v.* Merchants Bank, 36 Vt. 572.

24. *Arkansas.*— Bracken *v.* Wood, 12 Ark. 605.

Colorado.— Speelman *v.* Chaffee, 5 Colo. 247.

Illinois.— People *v.* Peck, 4 Ill. 118.

Kentucky.— Noe *v.* Conyers, 6 J. J. Marsh. 514.

Massachusetts.—Pease *v.* Morris, 138 Mass. 72.

Mississippi.— See Abbott *v.* Hackman, 2 Sm. & M. 510 [*following* Reeves *v.* Burnham, 3 How. 25].

New York.— By a statute in 1787 the Statute of Westminster was substantially reënacted and continued in force up to the year of 1830. Pierce *v.* Craine, 4 How. Pr. 256.

North Carolina.— Perkins *v.* Bullinger, 2 N. C. 367.

Pennsylvania.— The rule was changed in Pennsylvania in 1845. See Dailey *v.* Straus, 2 Pa. St. 401. As to issuance of an attachment execution after the regular period and without a scire facias see Ogilsby *v.* Lee, 7 Watts & S. (Pa.) 444 [*followed* in Gemmill *v.* Butler, 4 Pa. St. 232].

South Carolina.— Carn *v.* Mikel, 5 Rich. 247.

Texas.— Lubbock *v.* Vince, 5 Tex. 415; Shapard *v.* Bailleul, 3 Tex. 26; Scott *v.* Allen, 1 Tex. 508.

Vermont.— See Catlin *v.* Merchants Bank, 36 Vt. 572. *Compare* Yatter *v.* Smilie, 72 Vt. 349, 47 Atl. 1070, where it is said that the limitation of a year and a day is not an inference from a statute, but is a common-law rule assumed and recognized by statute but not born of it.

Presumption as to time of issuance.— See Trevino *v.* Stillman, 48 Tex. 561.

25. See the statutes of the several states; and the following cases:

Alabama.— Howard *v.* Corey, 126 Ala. 283, 290, 28 So. 682 [*citing* Enslen *v.* Wheeler, 98 Ala. 200, 13 So. 473].

District of Columbia.— Willett *v.* Otterback, 20 D. C. 324.

Georgia.— Easterlin *v.* New Home Sewing

(III) *Issuance on Holiday or in Vacation.* An execution may be issued on a legal holiday[26] or in vacation.[27]

(IV) *Reckoning of Time* — (A) *Point of Departure.* The time within which a plaintiff may issue his execution has been held to begin to run from the rendition,[28] from the entry,[29] and from the docketing[30] of the judgment.

(B) *Exclusion and Inclusion of Certain Days and Periods* — (1) Days. In reckoning the period within which or before which an execution may be issued, the first day[31] or the last day[32] of such period should be excluded. The

Mach. Co., 115 Ga. 305, 41 S. E. 595. See Powell *v.* Perry, 63 Ga. 417.

Illinois.— McIlwain *v.* Karstens, 152 Ill. 135, 38 N. E. 555 [*affirming* 41 Ill. App. 567 (*following* Wilson *v.* Schneider, 124 Ill. 628, 17 N. E. 8)].

Indiana.— Carpenter *v.* Vanscoten, 20 Ind. 50.

Iowa.— Hawkeye Ins. Co. *v.* Mackwell, 119 Iowa 672, 94 N. W. 207.

Maryland.— Miles *v.* Knott, 12 Gill & J. 442.

Michigan.— People *v.* Wayne Cir. Judge, 37 Mich. 287. See also Jerome *v.* Williams, 13 Mich. 521.

Minnesota.— Erickson *v.* Johnson, 22 Minn. 380; Hanson *v.* Johnson, 20 Minn. 194; Entrop *v.* Williams, 11 Minn. 381.

Montana.— Peters *v.* Vawter, 10 Mont. 201, 25 Pac. 438.

New York.— Baumler *v.* Ackerman, 63 Hun 40, 17 N. Y. Suppl. 436; Hansee *v.* Fiero, 56 Hun 463, 10 N. Y. Suppl. 494, 25 Abb. N. Cas. 46; Nichols *v.* Kelsey, 20 Abb. N. Cas. 14; Merritt *v.* Wing, 4 How. Pr. 14.

North Carolina.— Harris *v.* Ricks, 63 N. C. 653. And see Spicer *v.* Gambill, 93 N. C. 378.

Pennsylvania.— Dailey *v.* Straus, 2 Pa. St. 401.

South Carolina.— Dawson *v.* Broughton, 1 Nott & M. 403.

Utah.— Livingston *v.* Paxton, 2 Utah 481.

West Virginia.— Northwestern Bank *v.* Hays, 37 W. Va. 475, 16 S. E. 561; Spang *v.* Robinson, 24 W. Va. 327 [*following* Werdenbaugh *v.* Reid, 20 W. Va. 588]; Gardner *v.* Landcraft, 6 W. Va. 36.

See 21 Cent. Dig. tit. "Execution," § 164.

Alias execution, time of issuance, see *infra,* VI, E, 4.

Death of party — Extension of period of limitation.— N. Y. Code Civ. Proc. § 1380, provides that where a judgment has been made a lien for ten years, under section 1251, and the debtor dies, no leave shall be given to issue execution thereon until three years after the grant of administration, and "for that purpose such a lien existing at decedent's death continues three years and six months thereafter, notwithstanding the previous expiration of the ten years." It was held to allow the issue of execution at any time within three years and six months after the grant of administration, regardless of the ten years. *In re* Gates, 21 N. Y. Suppl. 576 [*affirming* 18 N. Y. Suppl. 873, 22 N. Y. Civ. Proc. 241].

That the lien of the judgment has expired does not prevent the judgment creditor from issuing execution against the property within the statutory period (twenty years) and thereby obtaining another lien upon the property. Hawkeye Ins. Co. *v.* Maxwell, 119 Iowa 672, 94 N. W. 207.

26. Paine *v.* Fesco, 1 Pa. Co. Ct. 562, 17 Wkly. Notes Cas. (Pa.) 502, the issuance being a mere ministerial act.

27. Christler *v.* Locke, 103 Mich. 86, 87, 61 N. W. 263 [*citing* People *v.* Bay County Cir. Ct. Clerk, 14 Mich. 169; Little *v.* Cook, 1 Aik. (Vt.) 363, 15 Am. Dec. 698; Herman Ex. § 75].

28. McCaskill *v.* McKinnon, 121 N. C. 192, 28 S. E. 265, 61 Am. St. Rep. 679, holding that a judgment rendered in foreclosure proceedings and "retained for further directions" is final as to adjudging the recovery of money so that the running of limitations begins at the date of its rendition.

29. Aultman, etc., Co. *v.* Syme, 87 Hun (N. Y.) 295, 34 N. Y. Suppl. 379; Commercial Bank *v.* Ives, 2 Hill (N. Y.) 355.

30. Kupfer *v.* Frank, 30 Hun (N. Y.) 74.

A new point of departure.— A levy of an execution on a judgment founded on notes given for the price of land of which plaintiff in execution retained title, before plaintiff has executed and recorded a deed of the land to defendant in execution, although invalid under Ga. Code, § 3654, is an assertion of plaintiff's right to collect the execution; hence the entry thereof by the sheriff constitutes a new point, from which Code, § 2914, limiting the time for enforcing judgments, will commence to run. Rogers *v.* Smith, 98 Ga. 788, 790, 25 S. E. 753 [*citing* Neal *v.* Brockhan, 87 Ga. 130, 13 S. E. 283; Stanford *v.* Connery, 84 Ga. 731, 11 S. E. 507; Long *v.* Wight, 82 Ga. 431, 9 S. E. 535; Gholston *v.* O'Kelley, 81 Ga. 19, 7 S. E. 107]. But a partial payment of a judgment, made on execution, does not arrest the running of limitations. McCaskill *v.* McKinnon, 121 N. C. 192, 28 S. E. 265, 61 Am. St. Rep. 659. See *infra,* VI, E, 4.

31. Knoxville City Mills Co. *v.* Lovinger, 83 Ga. 563, 10 S. E. 230; Allen *v.* Carty, 19 Vt. 65; Griffith *v.* Bogert, 18 How. (U. S.) 158, 15 L. ed. 307. *Contra,* Aultman, etc., Co. *v.* Syme, 163 N. Y. 54, 57 N. E. 168, 79 Am. St. Rep. 565.

32. Knoxville City Mills Co. *v.* Lovinger, 83 Ga. 563, 10 S. E. 230. Where a judgment was entered on defendant's single bill, payable three months after date, execution cannot issue until after the day upon which the

day of the entry of judgment is sometimes included in,[33] and sometimes excluded, from,[34] the reckoning. Sundays are usually excluded.[35]

(2) Period in Which Execution Is Stayed. The time that a stay of execution is in force should not be reckoned as a part of the period of time within which plaintiff may issue his execution without scire facias or motion.[36] This principle holds when the stay is due to a mere indulgence given by the creditor to the debtor.[37]

(3) Period in Which Execution Is Superseded by Writ of Error. The time within which a judgment is superseded by a writ of error cannot be considered as a part of the time within which plaintiff may issue his execution as of course.[38]

(4) Period in Which Execution Is Enjoined. At common law the time execution was prevented from issuing by injunction could not be excluded from the period of time plaintiff was entitled to issue his execution;[39] and this

note becomes due. Defendant has the right to have the whole day on which to pay the note. Zearfoss *v.* Lynn, 12 Pa. Co. Ct. 400.

33. Aultman, etc., Co. *v.* Syme, 163 N. Y. 54, 57 N. E. 168, 79 Am. St. Rep. 565, on the principle that the law takes no notice of fractions of a day.

34. Davidson *v.* Gaston, 16 Minn. 230. In Commercial Bank *v.* Ives, 2 Hill (N. Y.) 355, it was held that the day of entry of judgment should be excluded in reckoning whether thirty full days had elapsed from the date of the rendition of the judgment to the date of the issuance of the execution.

35. Dayton *v.* Commercial Bank, 6 Rob. (La.) 17; Penniman *v.* Cole, 8 Metc. (Mass.) 496. See also Allen *v.* Carty, 19 Vt. 65.

36. *Kentucky.*—Nicholson *v.* Howsley, Litt. Sel. Cas. 300.

New York.— U. S. *v.* Hanford, 19 Johns. 173.

Pennsylvania.— Dunlop *v.* Speer, 3 Binn. 169.

Vermont.— See Porter *v.* Vaughn, 24 Vt. 211.

Virginia.— See Hutsonpiller *v.* Stover, 12 Gratt. 579, 581 [*citing* Underhill *v.* Devereux, 2 Saund. 71 and note].

United States.— Muncaster *v.* Mason, 17 Fed. Cas. No. 9,920, 2 Cranch C. C. 521.

England.— Hiscocks *v.* Kemp, 3 A. & E. 676, 1 Hurl. & W. 384, 5 N. & M. 113, 30 E. C. L. 312. See Michell *v.* Cue, 2 Burr. 660; 3 Bacon Abr. (Am. ed. 1854) tit. "Execution."

See 21 Cent. Dig. tit. "Execution," § 164.

Contra.— The time during which execution is stayed constitutes a part of the five years within which execution must issue in accordance with section 209 of the Practice Act. Solomon *v.* Maguire, 29 Cal. 227 [*criticizing* Dewey *v.* Latson, 6 Cal. 130].

Pending a decision on a claim interposed by a third person to land levied on under execution, the running of Code, § 2914, against the right to enforce the judgment on which the execution issued is suspended. Rogers *v.* Smith, 98 Ga. 788, 25 S. E. 753.

37. U. S. *v.* Hanford, 19 Johns. (N. Y.) 173, 174 [*citing* Michell *v.* Cue, 2 Burr. 660].

Agreement of record for stay must be definite. Where a statute provides for the excluding from the period of limitation the time of the restraint upon the judgment creditors caused by order of court or by agreement between the parties entered of record, an agreement of the parties suspending execution under such statute must appear upon the record as certain and fixed and not uncertain or determinable by future event; for public policy requires that the public record should afford definite and certain information as to the encumbrances upon real estate. Ristine *v.* Early, 21 Ind. 103.

38. Porter *v.* Vaughn, 24 Vt. 211; Hutsonpiller *v.* Stover, 12 Gratt. (Va.) 579; Winter *v.* Lightbound, 1 Str. 301; Bacon Abr. (Am. ed. 1854) tit. "Execution." See also U. S. *v.* Hanford, 19 Johns. (N. Y.) 173.

Time between reversal by intermediate appellate court and restoration by highest court is not to be reckoned as any portion of the five years within which an execution may issue as of course. Underwood *v.* Green, 56 N. Y. 247.

Where appellant abandons the prosecution of the appeal, and does not file the transcript by the return-day of the assignment, the appeal then terminates, and the twelve months allowed for issuing execution then begins to run. Muller *v.* Boone, 63 Tex. 91.

When the time within which execution may be issued against an appellant's surety begins to run.— Under Howell Annot. St. Mich. § 7029, declaring that no execution on judgment against appellant and surety shall be levied on the surety's property unless such execution, if issued in the circuit court, is issued within thirty days, or, if issued in the supreme court, within ninety days from the time when it shall be legally issuable, the thirty days begin to run, not from the time judgment is rendered in the supreme court, but from the time remittitur is filed in the circuit court. When the bond was given to stay execution, on appeal to this court, the circuit court lost jurisdiction. It had no power to make any further order in the case until the cause was properly transmitted from the supreme court to that court. Wright *v.* King, 107 Mich. 660, 65 N. W. 556.

39. Hodson *v.* Warrington, 3 P. Wms. 34, 24 Eng. Reprint 958; Booth *v.* Booth, 1 Salk. 322; Winter *v.* Lightbound, 1 Str. 301; 3 Bacon Abr. (Am. ed. 1854) tit. "Execution."

rule has sometimes obtained in this country;[40] but the modern rule is that the injunction suspends the running of the statute.[41]

(5) Period of Action on Judgment. The time of the pending of an action on the judgment must be excluded.[42]

(6) Period of Debtor's Absence From Jurisdiction. Under a statute which provides that the time of the absence of the debtor from the state shall not be included in reckoning limitations, the time the debtor is absent from the jurisdiction must be excluded from the reckoning of the running of the ten years of the life of a judgment.[43]

(v) *Effect of Premature or Delayed Issuance.*[44] A premature issuance of an execution is an irregularity which may render the execution voidable but not void.[45] An execution which issued without scire facias after the lapse of a year and a day was at common law only voidable not void.[46]

40. Buell *v.* Buell, 92 Cal. 393, 28 Pac. 443 [*following* Dorland *v.* Hanson, 81 Cal. 202, 22 Pac. 552, 15 Am. St. Rep. 44, where the suspension of the powers of an administrator was not allowed to stop the running of the statute]; Smith *v.* Hornback, 3 A. K. Marsh. (Ky.) 392.

An action in equity by a judgment creditor to subject property to the satisfaction of the judgment does not suspend plaintiff's right to successive executions and hence does not stop the running of the limitation of time within which to issue execution. White *v.* Moore, 100 Ky. 358, 38 S. W. 505, 18 Ky. L. Rep. 790.

41. Lindsay *v.* Norrill, 36 Ark. 545; Wakefield *v.* Brown, 38 Minn. 361, 37 N. W. 788, 8 Am. St. Rep. 671; Noland *v.* Seekright, 6 Munf. (Va.) 185; Muncaster *v.* Mason, 17 Fed. Cas. No. 9,920, 2 Cranch C. C. 521. "But this doctrine [the common-law rule that an injunction is not a matter of which the court of law takes notice] has long since been exploded even in England, and courts of law will take notice of injunctions and other proceedings in chancery when properly brought to their consideration. . . . The reason on which the earlier English doctrine rested never did exist in Virginia; for the courts of chancery of this state have always been courts of record." Hutsonpiller *v.* Stover, 12 Gratt. (Va.) 579, 582. The courts were unanimous that this rule of "reviving a judgment of above a year old, by scire facias, before suing out execution upon it," which was intended to prevent a surprise upon defendant, ought not to be taken advantage of by a defendant, who was so far from being surprised by plaintiff's delay, that he himself had been trying all manner of methods whereby he might delay plaintiff; and therefore they not only discharged the rule but discharged it with costs too. Michell *v.* Cue, 2 Burr. 660.

A judgment recovered prior to Va. Code, c. 186, § 13, which judgment was suspended by an injunction at the time the act was passed will yet be governed by its provisions which direct that the time in which execution upon a judgment is suspended where legal process shall be omitted from the reckoning (where an injunction had operated for forty-six years). Hutsonpiller *v.* Stover, 12 Gratt. (Va.) 579.

42. St. Francis Mill Co. *v.* Sugg, 169 Mo. 130, 69 S. W. 359.

The death of a judgment debtor does not operate to extend the five-years' limitation contained in Minn. Laws (1862), c. 27, within which an execution must be issued in order to preserve the lien of a judgment. Erickson *v.* Johnson, 22 Minn. 380.

43. Shelden *v.* Barlow, 108 Mich. 375, 66 N. W. 338, decision reached by analogy for the suit was in equity and debtor's plea was laches and the court held that there were no laches.

44. **Effect of issuing execution before the end of the time allowed for taking an appeal** or for motion for new trial see *supra*, VI, D, 2, a, (I), (C), (2), (3).

45. *Alabama.*—Christian, etc., Grocery Co. *v.* Michael, 121 Ala. 84, 25 So. 571, 77 Am. St. Rep. 30; De Loach *v.* Robbins, 102 Ala. 288, 14 So. 777, 48 Am. St. Rep. 46.

Louisiana.— Regan *v.* Washburn, 39 La. Ann. 1071, 3 So. 178.

Missouri.— Carson *v.* Walker, 16 Mo. 68 [*criticizing* Penniman *v.* Cole, 8 Metc. (Mass.) 496].

Vermont.— See Mattocks *v.* Judson, 9 Vt. 343.

United States.— Dawson *v.* Daniel, 7 Fed. Cas. No. 3,669, 2 Flipp. 305, holding that if execution is issued pending a motion for a new trial the irregularity is cured on denial of the motion.

See 21 Cent. Dig. tit. "Execution," § 160.

Contra.— Penniman *v.* Cole, 8 Metc. (Mass.) 496.

Under Ark. Acts (1840), p. 58, a venditioni exponas issued before the expiration of a year after the property was offered for sale under the first execution will be quashed. U. S. *v.* Conway, 25 Fed. Cas. No. 14,849, Hempst. 313.

Presumption of proper issuance.— Beebe *v.* U. S., 161 U. S. 104, 16 S. Ct. 532, 40 L. ed. 636.

46. *Illinois.*— Morgan *v.* Evans, 72 Ill. 586, 22 Am. Rep. 154, under a statute declaratory of the common-law rule.

Maryland.— Elliott *v.* Knott, 14 Md. 121, 74 Am. Dec. 519.

New York.— An execution issued without leave after the lapse of the five years is not void, but only liable to be set aside on mo-

b. Form[47] and Requisites[48] — (I) *In General.* An execution, to be valid, should disclose on its face the authority to issue it.[49] An exact coincidence with a form of execution prescribed by statute is not necessary; it is sufficient if it is substantially followed.[50] The fact that an original execution is expressed to be an alias does not vary the legal effect of the writ.[51] Unnecessary recitals of proceedings in the action previous to final judgment do not affect the regularity of the execution.[52]

(II) *Special Execution Distinguished From General.* A special execution differs from the general writ only in this: that it points out and specifies the property to be sold and pursues and follows the judgment in respect of the disposition of the proceeds arising from the sale.[53] A judgment creditor has no

tion. Aultman, etc., Co. *v.* Syme, 163 N. Y. 54, 57 N. E. 168, 30 N. Y. Civ. Proc. 334, 79 Am. St. Rep. 565 [*modifying* 23 N. Y. App. Div. 344, 48 N. Y. Suppl. 231]; Genesee Bank *v.* Spencer, 18 N. Y. 150; Union Bank *v.* Sergeant, 53 Barb. 422.

North Carolina.—Weaver *v.* Cryer, 12 N. C. 337; Den *v.* Mizle, 7 N. C. 250. See Perkins *v.* Bullinger, 2 N. C. 367.

South Carolina.—Ingram *v.* Belk, 2 Strobh. 207, 47 Am. Dec. 591.

Vermont.— Fletcher *v.* Mott, 1 Aik. 339, 340 [*citing* Martin *v.* Ridge, Barnes Notes 206].

Virginia.— Beale *v.* Botetourt Justices, 10 Gratt. 278.

Wisconsin.— Mariner *v.* Coon, 16 Wis. 465.

England.— Patrick *v.* Johnson, 3 Lev. 403; Shirley *v.* Wright, 2 Ld. Raym. 775, 1 Salk. 273, 2 Salk. 700. See Blanchenay *v.* Burt, 4 Q. B. 707, 3 G. & D. 613, 7 Jur. 575, 12 L. J. Q. B. 291, 45 E. C. L. 707; 10 Viner Abr. 570.

See 21 Cent. Dig. tit. "Execution," § 169.

In Kentucky it was held in an early case that an execution issued after the lapse of a year was void as to plaintiff, although the court said that such a defect did not avoid the writ as to the sheriff who might justify under it. Possession delivered under such execution by the attornment of the tenant was therefore held of no avail. Hoskins *v.* Helm, 4 Litt. 309, 311, 14 Am. Dec. 133 [*citing* Tidd Pr. 936].

Under the modern practice in North Carolina if the vitality of a judgment has not been preserved by successive issues of execution at intervals prescribed by law for that purpose, an execution sued out without a renewing order made by the clerk is irregular but not void. See Lytle *v.* Lytle, 94 N. C. 683, 684 [*citing* Barnes *v.* Hyatt, 87 N. C. 315].

47. Form of execution see Jackson *v.* Jones, 9 Cow. (N. Y.) 182.

Forms of fieri facias see 9 A. & E. 991 *et seq.*, 36 E. C. L. 512 *et seq.*

Forms of elegit see 9 A. & E. 986, 36 E. C. L. 509 *et seq.*

48. Particular forms of writ see *supra*, II, E.

49. Kentzler *v.* Chicago, etc., R. Co., 47 Wis. 641, 646, 3 N. W. 369 [*citing* Herman Ex. § 55].

50. McMahan *v.* Colclough, 2 Ala. 68.

Language of writ.— Under La. Code Pr. art. 626, providing that the order of execution must be in French and English when the French language is the maternal tongue of the execution debtor, the enforcement of an execution in English only will be enjoined when the maternal tongue of the execution debtor is French, although the petition in the action was in the English language only, and was not objected to by defendant. Dubroca *v.* Favrot, 3 La. Ann. 272. Where there is no evidence on record that French is the mother tongue of defendant, no objection can be made that the writ is not in both languages. Lafon *v.* Smith, 3 La. 473. To have execution in French, defendant's maternal tongue, is a personal privilege which he may waive. His creditors cannot complain. Le Blanc *v.* Dubroca, 6 La. Ann. 360.

Presumption of good form after thirty years.— See Leland *v.* Cameron, 31 N. Y. 115.

When an attachment by way of execution is issued more than three years after the date of the judgment it should, under the act of 1862, contain a clause of scire facias as to defendant in the judgment. Johnson *v.* Lemmon, 37 Md. 336. But this is not necessary where the writ is issued within three years from the date of the judgment. Hagerstown First Nat. Bank *v.* Weckler, 52 Md. 30 [*following* Anderson *v.* Graff, 41 Md. 601]; Boyd *v.* Talbott, 7 Md. 404. The omission of a scire facias, however, does not render the writ void, but only voidable. Manton *v.* Hoyt, 43 Md. 254; Johnson *v.* Lemmon, *supra*; Barney *v.* Patterson, 6 Harr. & J. (Md.) 182. But such a clause in a writ is not necessary where the writ is issued within three years from the date of judgment. Hagerstown First Nat. Bank *v.* Weckler, 52 Md. 30, 38 [*citing* Anderson *v.* Graff, *supra*].

51. The clause constituting the writ an alias may be rejected as surplusage. Jackson *v.* Sternbergh, 1 Johns. Cas. (N. Y.) 153.

52. Holmes *v.* Rogers, 2 N. Y. Suppl. 501.

The fact that an affidavit has been filed to obtain an execution instanter need not appear in or upon the execution. Lebreton *v.* Lemaire, (Tex. Civ. App. 1897) 43 S. W. 31.

53. Lord *v.* Johnson, 102 Mo. 680, 15 S. W. 73. See Norton *v.* Reardon, 67 Kan. 302, 72 Pac. 861, 100 Am. St. Rep. 459.

Special execution is proper where the property has already been levied upon by a writ of attachment (Keeley Brewing Co. *v.* Carr, 198 Ill. 492, 64 N. E. 1030; Union Nat. Bank

right to a special execution except in the cases expressly allowed by statute.[54] Where the special execution is the proper one to be issued, it has been held that the general execution could not issue.[55]

(III) *Conformity to Judgment*—(A) *In General.* An execution should conform to the judgment on which it is issued.[56] A variance between the judgment and the execution need not, however, vitiate the latter;[57] it may not render it void, but only voidable.[58] However, the variance between the execution and

v. Byram, 131 Ill. 92, 22 N. E. 842), or to enforce decrees in mortgage foreclosure proceedings (Lord *v.* Johnson, 102 Mo. 680, 15 S. W. 73).

54. Brown *v.* Duncan, 132 Ill. 413, 23 N. E. 1126, 22 Am. St. Rep. 545; Mayer *v.* Farmers' Bank, 44 Iowa 212. In Fraser *v.* Thrift, 50 Cal. 476, it was held that an execution upon a money judgment could not be issued against any particular piece of land. And in Bower *v.* Holladay, 18 Oreg. 491, 22 Pac. 553, it was held that it was not proper to include in the execution the command to the sheriff to satisfy the judgment out of property held by the receiver of the court. The writ must be issued against the property of the judgment debtor generally. But in Barnes *v.* Hyatt, 87 N. C. 315, 317, the court said that "the designation of particular land only gives a more limited scope and authority to the process than the law permits, and cannot be prejudicial to any right of the judgment debtor."

55. Annis *v.* Gilmore, 47 Me. 152. See State *v.* Vogel, 14 Mo. App. 187. Thus, an action was brought after the death of the debtor to subject to execution certain lands sold after judgment and it was held that only a special execution against the land and not a general execution could be rendered as against the purchaser after judgment. Park *v.* Long, 7 Iowa 434.

Form of writ in attachment cases.— Where there is no personal judgment, but only a judgment of condemnation upon attachment proceedings, a special writ is proper. See Adriance *v.* Heiskell, 8 App. Cas. (D. C.) 240. Thus, where a judgment was recovered in an action to enforce a lien for labor in cutting logs, aided by attachment of the logs, an execution issued in common form against the goods, chattels, or lands of the debtor and, for want thereof, upon his body cannot give authority to seize the logs attached, for it contains no allusion to the logs which were the subject of the controversy and which therefore could not have been legally seized by virtue of such a writ. Annis *v.* Gilmore, 47 Me. 152. But an execution against the goods generally of defendant, although ground for error, is not void where the sale was of the attached goods alone (Boothe *v.* Estes, 16 Ark. 104), but where the judgment is general, a special writ is usually held improper (Philips *v.* Stewart, 69 Mo. 149; Kritzer *v.* Smith, 21 Mo. 296; Adriance *v.* Heiskell, *supra*, where there were two judgments, one personal and the other a judgment of condemnation of property attached). But in Corriell *v.* Doolittle, 2 Greene (Iowa) 385, it was held that, although the judgment be general a special execution pursuant to the writ of attachment might issue on the ground that the "authority for a general execution necessarily included a warrant for one of a more limited or special character. In Kerr *v.* Swallow, 33 Ill. 379, a suit was begun by attachment. Defendants were served not personally but by publication. They subsequently appeared and defended. It was held that a special execution on the judgment was properly issued for the sale of the attached property, although after the appearance and plea the suit was *in personam* and the judgment against defendants was properly *in personam* and the award of execution was general, for the property attached was not released by defendants' appearance. Where a general judgment was rendered in attachment, where there was service by publication only, and the court had jurisdiction of the *res*, but not of the person of defendant, although the judgment was general in form, it was held to be the duty of the clerk to look to the nature of the proceedings and the jurisdiction of the court, and to issue only that special execution which the law and the character of the service warrants. State *v.* Vogel, 14 Mo. App. 187, 190 [*citing* Massey *v.* Scott, 49 Mo. 278; Clark *v.* Holliday, 9 Mo. 711].

56. *Georgia.*— Williams *v.* Atwood, 57 Ga. 190; Winslow *v.* O'Pry, 56 Ga. 138; Reese *v.* Burts, 39 Ga. 565.

Kansas.— Norton *v.* Reardon, 67 Kan. 302, 72 Pac. 861, 100 Am. St. Rep. 459, special execution after foreclosure.

Missouri.— Maloney *v.* Real Estate Bldg., etc., Assoc., 57 Mo. App. 384.

Texas.— Criswell *v.* Ragsdale, 18 Tex. 443.

Virginia.— Snavely *v.* Harkrader, 30 Gratt. 487.

Description of parties see *infra*, VI, D, 2, b, (V).

Description of property see *infra*, VI, D, 2, b, (IX).

57. Thornton *v.* Lane, 11 Ga. 459; Corbin *v.* Pearce, 81 Ill. 461.

58. Starke *v.* Gildart, 4 How. (Miss.) 267. **So long as an execution correctly refers to a judgment in such a manner as to identify it,** that is, if it appears that in fact the judgment in question is the judgment upon which the writ was issued, in such case the variance, although an irregularity, does not render the writ void. Corbin *v.* Pearce, 81 Ill. 461, 464 [*citing* Newman *v.* Willits, 60 Ill. 519. See also De Loach *v.* Robbins, 102 Ala. 288, 14 So. 777, 48 Am. St. Rep. 46; Franklin *v.* Merida, 50 Cal. 289; Bogle *v.* Bloom, 36 Kan. 512, 13 Pac. 793; Graham *v.*

the judgment on which it is issued may be so material as to render the execution fatally defective.[59]

(B) *Statement of Amount.* The rule that the execution should follow the judgment applies to the statement of the amount due.[60] But where the judgment appears from the whole record to be not without authority, and it is clear that the execution is really issued on the particular judgment in question, the general rule is that a variance in the amounts recited in the judgment and in the execution does not necessarily render the execution void, where such variance is caused by mistake.[61] The validity of the execution should be tested by the intent with which it was issued; if issued with fraudulent intent, of course it would be void;[62] and an execution for a less amount[63] or even an execution for a greater

Price, 3 A. K. Marsh. (Ky.) 522, 13 Am. Dec. 199; Dunlap *v.* Sims, 2 La. Ann. 239.

If the judgment be in debt and the execution in damages, it is but a clerical misprision and not error. Gano *v.* Slaughter, Hard. (Ky.) 76.

If there is a sufficient correspondence between the judgment, execution, and replevin bond to connect them, no motion to quash can be sustained for a variance. Com. *v.* Hamilton, 4 T. B. Mon. (Ky.) 132.

59. Moughon *v.* Brown, 68 Ga. 207; Brown *v.* Duncan, 132 Ill. 413, 23 N. E. 1126, 22 Am. St. Rep. 545 (an execution which did not show for whose benefit it was issued, upon what judgment it was based, or out of what court it issued); Horton *v.* Garrison, 1 Tex. Civ. App. 31, 35, 20 S. W. 373 [*citing* Hart *v.* McDade, 61 Tex. 208].

A variance between the recital of an execution in a sheriff's deed and the judgment on which it was issued is cured by the statute, which provided that such a deed should be good, "notwithstanding any variance between the said execution or executions, and the judgment or judgments," etc. Den *v.* Taylor, 16 N. J. L. 532, 533.

60. *Arkansas.*— Hightower *v.* Handlin, 27 Ark. 20.

California.— Van Cleave *v.* Bucher, 79 Cal. 600, 21 Pac. 954.

Kentucky.— Tipton *v.* Grubbs, 2 B. Mon. 83.

Louisiana.— Dwight *v.* Brashear, 12 La. Ann. 860.

New York.— National Park Bank *v.* Salomon, 1 Silv. Supreme 494, 5 N. Y. Suppl. 632, 17 N. Y. Civ. Proc. 8, holding that where part of the judgment is due execution should issue for the amount due and not for the whole judgment. In Jaffray *v.* Saussman, 52 Hun (N. Y.) 561, 5 N. Y. Suppl. 629.

North Carolina.— Walker *v.* Marshall, 29 N. C. 1, 45 Am. Dec. 502, fatal variance.

Ohio.— Monaghan *v.* Monaghan, 25 Ohio St. 325.

Tennessee.— Perry *v.* Royle, 9 Yerg. 18, where part of judgment has been credited.

United States.—McSherry *v.* Queen, 16 Fed. Cas. No. 8,926, 2 Cranch C. C. 406.

See 21 Cent. Dig. tit. "Execution," § 179.

Proper amount in replevin.— An execution issued on a forfeited claim bond should, under Ala. Code, §§ 3215, 3290, 3291, 3344, be for the assessed value of the property replevied by the claimant, not exceeding the amount of plaintiff's judgment, damages, and costs, save when the property is replevied by a defendant, when the execution may be for the whole amount of the judgment and costs. Maas *v.* Long, 70 Ala. 237. *Compare* Tipton *v.* Grubbs, 2 B. Mon. (Ky.) 83.

Execution on a bond payable by instalments should be for the whole sum for which judgment was given with an indorsement of the instalment due. McKinney *v.* Carroll, 5 T. B. Mon. (Ky.) 96. See also Griffith *v.* Jones, 3 N. J. L. 932, holding that an indorsement for a greater sum than is due does not make the writ void. See BONDS, 5 Cyc. 857.

Where there are several defendants in an execution and they are not equally liable, the execution should specify the amount to be collected of each. Martin *v.* Rice, 16 Tex. 157.

Where the sum mentioned in the clause of in toto se attingunt varies from the sum recited in the execution but agrees with the sum in the judgment, it is immaterial. Jackson *v.* Pratt, 10 Johns. (N. Y.) 381.

61. Anderson *v.* Gray, 134 Ill. 550, 25 N. E. 843, 23 Am. St. Rep. 696; Bachelder *v.* Chaves, 5 N. M. 562, 25 Pac. 783.

A slight discrepancy would not therefore render the writ void or the sale under it. Becker *v.* Quigg, 54 Ill. 390; Williams *v.* Brown, 28 Iowa 247; Poor *v.* Hudson, 4 Ky. L. Rep. 349. See also Clements *v.* Pearce, 63 Ala. 284. *Contra,* Hightower *v.* Handlin, 27 Ark. 20; Wilson *v.* Fleming, 16 Vt. 649, 42 Am. Dec. 531. See also Davie *v.* Long, 4 Bush (Ky.) 574.

62. Harris *v.* Alcock, 10 Gill & J. (Md.) 226, 32 Am. Dec. 158.

Difference in kind of coin or currency.— Under a statute authorizing the supreme court to change the form of writs "as the law or other causes require," an execution upon a judgment rendered upon a contract to pay in "hard Spanish dollars" may issue specifically for the equivalent in coin or in currency of the United States. Stringer *v.* Coombs, 62 Me. 160, 16 Am. Rep. 414.

63. *Alabama.*— Clements *v.* Pearce, 63 Ala. 284.

Illinois.— Newman *v.* Willitts, 60 Ill. 519.

Massachusetts.— See Newton *v.* Rice, 118 Mass. 417.

Missouri.— Montgomery *v.* Farley, 5 Mo.

amount[64] is generally held not void upon this principle. Mistakes in the reckoning of interest[65] or of the costs[66] do not as a general rule render the execution

233 (where there was a variance of two cents); Easton *v.* Collier, 1 Mo. 467.

Pennsylvania.— Schnader *v.* Bitzer, 9 Lanc. Bar 37.

Tennessee.— Trotter *v.* Nelson, 1 Swan 7.

See 21 Cent. Dig. tit. "Execution," § 178 *et seq.*

Defendant cannot take advantage of the error where an execution is for less than the judgment. Gano *v.* Slaughter, Hard. (Ky.) 76. See also Martin *v.* Rice, 16 Tex. 157. *Contra*, Newkirk *v.* Pepper, 19 Leg. Int. (Pa.) 228.

64. *California.*— Hunt *v.* Loucks, 38 Cal. 372, 99 Am. Dec. 404.

Iowa.— Williams *v.* Brown, 28 Iowa 247; Cunningham *v.* Felker, 26 Iowa 117.

Kansas.— Bogle *v.* Bloom, 36 Kan. 512, 13 Pac. 793.

Maryland.— Harris *v.* Alcock, 10 Gill & J. 226, 32 Am. Dec. 158, where an indorsement of the part of the amount paid was not made. The court said that the execution was available for the amount actually due. See Miles *v.* Knott, 12 Gill & J. (Md.) 442.

New Hampshire.— Avery *v.* Bowman, 40 N. H. 453, 77 Am. Dec. 728.

New York.— Peck *v.* Tiffany, 2 N. Y. 451.

See 21 Cent. Dig. tit. "Execution," § 179.

Contra.— Hightower *v.* Handlin, 27 Ark. 20, 23, where the court said: "When several levies and sales are made for separate sums, only such sales, or levies, would be considered void as are made to satisfy the amount in excess of the judgment. If, however, but one sale is made to satisfy the sum actually due, and the execution has been issued for a sum greatly in excess of that sum, the error can only be remedied by setting aside and declaring void the entire proceeding under the execution." See also Knight *v.* Applegate, 3 T. B. Mon. (Ky.) 335; Hastings *v.* Johnson, 1 Nev. 613. In Davie *v.* Long, 4 Bush (Ky.) 574 [*distinguishing* Walker *v.* McKnight, 15 B. Mon. (Ky.) 467, 61 Am. Dec. 190], a sale of land was set aside on motion of the judgment debtor.

65. McMichael *v.* Hardee, 68 Ga. 831 (where the interest as recited in execution was three cents less than that recited in judgment); Brace *v.* Shaw, 16 B. Mon. (Ky.) 43 (where the interest was omitted); Noe *v.* Conyers, 6 J. J. Marsh. (Ky.) 514 (where the variance was as to the time whence the interest should be computed); Marshall *v.* Green, 1 S. W. 602, 8 Ky. L. Rep. 346; Coffin *v.* Freeman, 84 Me. 535, 24 Atl. 986 (where the error was less than one per cent of the amount for which it should have been made and where the execution issued for one dollar less than the amount of the debt and costs); Dailey *v.* State, 56 Miss. 475 (where a justice omitted his calculations of interest in entering judgment but embraced them in issuing the execution). *Contra*, Prescott *v.* Prescott, 62 Me. 428 (where a specific sum in lieu of alimony was decreed to be paid in twenty days from the final adjournment of court; if not so paid, execution was then to issue "for said sum." Execution issued requiring the officer to collect the amount with interest from the day of final adjournment, not from the expiration of the twenty days, and the interest was so reckoned and made a part of the amount satisfied by the levy); Hastings *v.* Johnson, 1 Nev. 613 (unless the amount is so slight as to come under the maxim *de minimis non curat lex*).

If the judgment says nothing about interest the execution cannot. Solen *v.* Virginia, etc., R. Co., 14 Nev. 405 (holding that the clerk cannot add interest on the judgment until it is paid; that, consequently, when a judgment on a promissory note includes interest to the date of the judgment only, a direction to collect interest of the whole judgment until it is paid is void absolutely); Collais *v.* McLeod, 30 N. C. 221, 49 Am. Dec. 376 (where an execution issued for debt and interest, the judgment being only for the debt; wherefore the execution was held defective and the purchaser's title at the sheriff's sale was held bad). *Contra*, State *v.* Vogel, 14 Mo. App. 187, where it is held under a statute providing what interest shall be allowed on money due on judgments, that it is the clerk's duty in issuing execution on a judgment which is silent as to interest to ascertain from the record what interest it bears and to issue execution for interest in accordance therewith. See also Wallace *v.* Baker, 2 Munf. (Va.) 334, construing the act of 1805.

At common law a judgment did not carry interest when an execution or a scire facias to revive it was issued upon it. But if a new action was brought upon the judgment, then interest was allowed. Collais *v.* McLeod, 30 N. C. 221, 49 Am. Dec. 376.

Day whence interest is reckoned.— Interest is collected in this state, upon a judgment, by means of an indorsement on the execution, and when a rule to show cause is discharged the interest may be indorsed to commence at the time the rule for judgment *nisi* was entered. Erie R. Co. *v.* Ackerson, 33 N. J. L. 33.

66. Mitchell *v.* Toole, 63 Ga. 93; Noe *v.* Conyers, 6 J. J. Marsh. (Ky.) 514; Hollister *v.* Giddings, 24 Mich. 501.

The additional expense of suing out an alias or pluries writ may be added to the amount of costs in the original execution. Such addition is not a variance which invalidates the writ. Bryan *v.* Smith, 3 Ill. 47.

Judgment in a penal sum liquidated and entered.— Where a judgment is given in the penal sum of ten thousand dollars conditioned to cover advances made and to be made, with interest and expense of collection, and where afterward the parties liquidated the balance then due and agreed that a judgment should be entered for four thousand two hundred and seventy-one dollars and

void. Where the writ issues for too large an amount, the proper practice is not to move for a vacation of the writ, but to move to set aside to the extent of the excess;[67] or if the levy is on land for the aggrieved party to go into equity for his relief.[68]

(c) *Execution Joint or Several According to Judgment.*[69] Joint executions cannot be issued on separate or several judgments.[70] Where the judgment is joint the execution issued thereon should be joint;[71] and under some statutes a

thirty-eight cents, an additional sum added by the prothonotary for the costs as commissions for collection cannot be collected, as it was not included in the judgment. Mahoning County Bank's Appeal, 32 Pa. St. 158.

Failure to tax a bill of costs does not invalidate an execution against the judgment debtor for the debt, interest, and office costs. Irwin *v.* Hess, 12 Pa. Super. Ct. 163.

An omission in a bill of costs of twenty-five cents for recording the confession of judgment does not render the execution void. Perry *v.* Whipple, 38 Vt. 278 [*distinguishing* Wilson *v.* Fleming, 16 Vt. 649, 42 Am. Dec. 531].

Failure to itemize a bill of costs, as the statute requires, is not fatal. The statute is merely directory. Meadows *v.* Earles, 12 Lea (Tenn.) 299. But where the code provides that on every execution the clerk must state the several items composing the bill of costs and that without such copy of the bill of costs the execution is illegal, an execution which states the aggregate of the witness' fees without the names of the witness and the fees allowed in each, or without itemizing the several fees of the clerk or sheriff, is void. Maxwell *v.* Pounds, 116 Ala. 551, 23 So. 730. And where a pluries execution is issued after the return of two other executions unsatisfied, and the clerk's and sheriff's fees of the two prior executions are stated in gross, and not itemized, the execution is void and will not support a lien. Marks *v.* Wood, 133 Ala. 533, 31 So. 978. But under the same section of the code an execution issued out of a circuit court upon a cause appealed from a justice of the peace is not vitiated by the fact that the justice's fees are set forth only by a statement of their gross amount, for there is no law requiring any officer of the circuit court to keep an itemized account of costs accruing in cases appealed from a justice's court. Griffin *v.* Dauphin, 133 Ala. 543, 31 So. 849.

Failure to set out the bill of costs in words is not fatal, and it has been held that an omission of the word "hundred" after the word "five" and before the word "thirty-four" may be supplied from the figures in the indorsement. Warder *v.* Millard, 8 Lea (Tenn.) 581. Although an execution does not have indorsed thereon the costs in words at length, as required by N. C. Acts (1784), c. 223, § 8, it is good as to everything but costs. Wingate *v.* Galloway, 10 N. C. 6.

67. Bogle *v.* Bloom, 36 Kan. 512, 13 Pac. 793; Bruere *v.* Britton, 20 N. J. L. 268. See also Barnard *v.* Darling, 1 How. Pr. (N. Y.) 223.

If money has been raised thereon it is proper to notify the sheriff to pay the money into court and then to move the court that the excess be restored or, if the execution has been irregularly issued, to move the court to set it aside; and in such cases if the money has actually been paid over to the judgment creditor, the court will order the amount improperly received by him restored and if necessary will enforce the order by attachment, but not by writ of restitution. Bruere *v.* Britton, 20 N. J. L. 268, 269 [*citing* Anonymous, 2 Salk. 588; 1 Archbold Pr. 265].

The court will not set aside the writ, however, if it appears that the sheriff was instructed to levy only for the amount actually due, although such instrument was sent by letter to the sheriff and was not indorsed on the writ. Green *v.* Beals, 2 Cai. (N. Y.) 254. Nor will the execution be set aside for an indorsement for an amount less than is due where the execution has been returned *nulla bona.* Barnard *v.* Darling, 1 How. Pr. (N. Y.) 223.

68. Avery *v.* Bawman, 40 N. H. 453, 77 Am. Dec. 728.

Quashing execution for mistakes in costs and interest.— The inclusion of an improper item of costs by mistake of the clerk is not a ground for quashing the writ. Warrensburg *v.* Simpson, 22 Mo. App. 695. But where the judgment recited that plaintiff assumed the costs and the execution which issued on the judgment assessed costs against defendant, the execution was quashed. Smith *v.* Lockett, 73 Ga. 104. An execution which states a different rate of interest from that stated in the judgment may be quashed. Fowlkes *v.* Poppenheimer, 4 Lea (Tenn.) 422.

69. **Joint execution on separate judgments** see *supra,* II, D.

70. Dugat *v.* Babin, 8 Mart. N. S. (La.) 391.

An execution against two defendants for distinct and separate amounts, with one of which amounts one defendant has no concern, will be quashed. Taney *v.* Woodmansee, 23 W. Va. 709.

An execution in the name of one person cannot properly include two distinct claims decreed to different persons. Baltimore, etc., R. Co. *v.* Vanderwarker, 19 W. Va. 265.

To embrace in one execution the claims of two parties, prosecuted in different suits, although against the same garnishee, is manifest error. Bain *v.* Chrisman, 27 Mo. 293.

Where the petition asked for execution against the principal only, a valid execution cannot be directed to issue against the property of the principal and the indorser. Lewis *v.* Dennis, 54 Tex. 487.

71. Shaffer *v.* Watkins, 7 Watts & S. (Pa.) 219; Saul *v.* Geist, 1 Woodw. (Pa.) 306. See, however, Land Credit Co. *v.* Fermoy,

several execution issued on a joint judgment is void;[72] at any rate, such an execution may be quashed.[73] A judgment creditor, however, may direct an officer to collect a debt from a part of the judgment debtors.[74]

(D) *Several Judgments Against Same Debtor and Different Sureties.* A plaintiff who holds several judgments against a debtor, and different sureties or indorsers, may in the absence of any agreement to the contrary issue execution upon any one of the judgments.[75]

(IV) *Recital of Judgment*—(A) *In General.* A description or recital of the judgment is inserted in the execution, not only that the officer may know what he is to enforce, but also that by inspection the writ may be connected with the authority for issuing it.[76] Properly, this part of the execution should have the precision of the judgment itself;[77] but by the general rule the failure to recite the judgment accurately does not render the writ void[78] so long as it can be clearly and unmistakably identified with the judgment purported to be recited, the process being merely irregular. Even total omission of the recital may not render the execution void.[79] An execution which recites the judgment as rendered in one court when it was rendered in another is not necessarily void.[80]

L. R. 5 Ch. 323, 39 L. J. Ch. 477, 22 L. T. Rep. N. S. 394, 18 Wkly. Rep. 393.

Two executions should not be issued at one and the same time against several persons upon one judgment rendered on one scire facias and one recognizance. In such a case one writ should be issued which should command the sheriff to make the money from each of the parties. State *v.* Stout, 11 N. J. L. 362, 364 [*citing* Archbold Forms 261, 263; 1 Archbold Pr. 293].

Where two bonds were executed for the purchase-money of land sold under a decree in equity and both bonds are due and payable to the commissioner, it is proper to issue a single execution for the aggregate amount of the two bonds. Poor *v.* Hudson, 4 Ky. L. Rep. 349.

72. Tanner *v.* Grant, 10 Bush (Ky.) 362.

73. Boyken *v.* State, 3 Yerg (Tenn.) 426.

Remedy in appellate court.— The irregularity of issuing a several execution on a joint judgment is not within the reach of a writ of error, and when no motion is made in the trial court to correct it it must be considered as valid. *In re* St. Albans First Nat. Bank, 49 Fed. 120.

Where plaintiff recovers a money demand and defendant was given costs, the costs should be set off against plaintiff's recovery and only one execution awarded for the extension of the recovery over the costs. Johnson *v.* Ferrell, 10 Abb. Pr. (N. Y.) 384.

Executions may issue severally to a complainant in original bill and to a complainant in cross bill for the sums adjudged to them respectively. Stuart *v.* Heiskell, 86 Va. 191, 9 S. E. 984.

74. Dunn *v.* Springmeier, 7 Ohio Dec. (Reprint) 339, 2 Cinc. L. Bul. 127. See also Root *v.* Wagner, 30 N. Y. 9, 86 Am. Dec. 348, holding that the judgment creditor might recover as damages such amount as he had directed to be collected from the sheriff, who refused to obey his directions, especially where there is no proof that such amount could have been so made.

Joint execution for costs, several for damages.— In an action of trespass against two, who pleaded severally, the jury having assessed damages severally, one execution was issued against both for costs, and several executions for the several damages. Kempton *v.* Cook, 4 Pick. (Mass.) 305.

75. In such a case the proceeds of the personal property realized upon such execution will be applied by law to the debt upon which it issued. Marshall *v.* Franklin Bank, 25 Pa. St. 384.

76. Deakins *v.* Rex, 60 Md. 593, 597 [*citing* Freeman Ex. § 43].

Recital as evidence.— As against a stranger to the writ the recital of the judgment is not evidence of its existence and validity. Frazee *v.* Nelson, 179 Mass. 456, 61 N. E. 40, 88 Am. St. Rep. 391.

77. Farmers Nat. Bank *v.* Lancaster Nat. Bank, 4 Ky. L. Rep. 451. See *infra*, VI, D, 2, b, (V).

78. The title of the purchaser is not affected thereby and the execution is admissible in evidence. Miles *v.* Knott, 12 Gill & J. (Md.) 442.

A misdescription of a judgment by confession as one obtained in an action (Healy *v.* Preston, 14 How. Pr. (N. Y.) 20), or as one rendered for "the non-performance of a certain promise and assumption" (McMahan *v.* Colclough, 2 Ala. 68) is not a substantial variance or defect.

Where the judgment is by confession, it is not necessary to go into particulars in regard to the facts relating to the actual indebtedness or how the indebtedness arose. Healy *v.* Preston, 14 How. Pr. (N. Y.) 20, 26 [*citing* Schoolcraft *v.* Thompson, 9 How. Pr. (N. Y.) 61].

79. Sowle *v.* Champion, 16 Ind. 165.

80. As where the judgment is described as rendered by the county court, when it was rendered by the supreme court. Ross *v.* Shurtleff, 55 Vt. 177. *Contra*, Bisbee *v.* Hall, Wright (Ohio) 59. In Stackhouse *v.* Zuntz, 41 La. Ann. 415, 6 So. 666, it was held that

But where the judgment cannot be identified from the recital the writ is void.[81]

(B) *Date of Rendition.* By the strict rule that used to prevail, a misrecital as to the term in which a judgment was rendered made the writ void.[82] The modern rule is part and parcel of the general rule that if the judgment can be clearly identified mistakes in its recital will not vitiate the writ; that is, so long as the judgment may be identified a mistake[83] in the date of its rendition, or even an omission[84] of the date does not make the execution void, but such mistake or omission is a mere irregularity.[85]

(V) *Recital and Description of Parties* — (A) *In General.* The rule that the execution must follow the judgment applies with peculiar fitness to the recitals and description of the parties.[86] But if the parties as recited in the writ

such an error would not vitiate the proceedings when the advertisement and deed contain sufficient data to ascertain which the court is under whose judgment the execution issued, particularly where the writ under which the sheriff must have acted and of which he must have preserved copy is in the record and where the objections are made by parties to the record who had notice of the proceedings and who did not object.

81. Deakins *v.* Rex, 60 Md. 593 (where a judgment *in rem* under an attachment was described in the execution as a judgment *in personam*); Wear *v.* Gillon, (Tex. Civ. App. 1897) 40 S. W. 817; McSherry *v.* Queen, 16 Fed. Cas. No. 8,926, 2 Cranch C. C. 406 (where an execution on a supersedeas judgment failed to recite the original judgment).

Where a judgment has been revived by scire facias and an execution subsequently issues, the revival must, it seems, be stated in the execution. Richardson *v.* McDougall, 19 Wend. (N. Y.) 80; Davis *v.* Norton, 1 Bing. 133, 8 E. C. L. 439; 1 Rolle Abr. 900. An execution issued on a judgment reviving a former judgment, which recites the recovery of the former judgment, its date, amount, the amount of costs, and its revival by the last judgment, giving the date of revival, and which then proceeds in the usual form, sufficiently describes the original and reviving judgments. Bludworth *v.* Poole, 21 Tex. App. 551, 53 S. W. 717.

Failure to state the county where the judgment-roll was filed, as required by Cal. Code Civ. Proc. § 682, does not make the execution void, where it is stated in the execution that the judgment was recovered in the superior court of a certain county named. Van Cleave *v.* Bucher, 79 Cal. 600, 21 Pac. 954.

82. Cutler *v.* Wadsworth, 7 Conn. 6; Rider *v.* Alexander, 1 D. Chipm. (Vt.) 267, 274, where, however, it is not absolutely certain that the court held the writ void for this reason. There were three reasons for holding the writ void, of which this was the first. In speaking of this defect the court used the expression that it considered the defect an irregularity. In the second reason for holding the writ void the court said: "This is also a fatal irregularity."

83. Franklin *v.* Merida, 50 Cal. 289; Sprott *v.* Reid, 3 Greene (Iowa) 489, 56 Am. Dec. 549; Barker *v.* Planters' Bank, 5 How. (Miss.) 566; Millis *v.* Lombard, 32 Minn. 259, 20 N. W. 187. Especially would this be so as between the parties where the execution followed a misrecital of the record which afterward was amended. Nims *v.* Spurr, 138 Mass. 209. Therefore an execution which by clerical mistake recites the judgment as of the preceding term (Friedlander *v.* Fenton, 180 Ill. 312, 54 N. E. 329, 72 Am. St. Rep. 207 [*affirming* 79 Ill. App. 357]), or recites the judgments as rendered a year earlier than they actually were (Davis *v.* Kline, 76 Mo. 310) or a day later in the same month and year (Stewart *v.* Severance, 43 Mo. 322, 97 Am. Dec. 392) or three days later (Alexander *v.* Miller, 18 Tex. 893, 70 Am. Dec. 314, where there was no such judgment rendered on the day recited and the day recited was the day of adjournment of the court, which accounted for the mistake), an execution which recited the judgment as rendered in 1809 instead of 1839 (Whitehall Bank *v.* Pettes, 13 Vt. 395, 37 Am. Dec. 600), or an execution which appears to have been issued before the judgment was rendered (Dailey *v.* State, 56 Miss. 475) is not void.

Misrecital of date of docketing.—An execution levied upon personal property exclusively is not void because it omits to state the true date of docketing the judgment in the county to which such execution runs. Mollison *v.* Eaton, 16 Minn. 426, 10 Am. Rep. 150.

84. Mooney *v.* Moriarty, 36 Ill. App. 175. In Drawdy *v.* Littlefield, 75 Ga. 215, it was held that a fieri facias need not name the term at which the judgment was rendered, where it declared that it was lately rendered in court and was for a stated amount of principal, a stated amount of interest, up to a certain date, and also interest, or together with interest, from that date.

85. In Franklin *v.* Merida, 50 Cal. 289, it was said that it was not even an irregularity that needed amendment.

Proper term when motion for new trial is decided.— Where, on the rendition of a verdict, a motion for a new trial is made which is not overruled until a succeeding term, when judgment is rendered, an attachment on the judgment properly describes it as having been rendered at the later term. Hagerstown First Nat. Bank *v.* Weckler, 52 Md. 30.

86. Hart *v.* McDade, 61 Tex. 208. See also Horton *v.* Garrison, 1 Tex. Civ. App. 31, 20

can be plainly identified with those of the judgment, the general rule is that the writ is valid in spite of mistakes or omissions or other irregularities in this respect.[87]

(B) *Omission of Name.* While the omission of plaintiff's name from the recital of the parties may not vitiate the writ where plaintiff's identity can be fairly made out from the rest of the writ,[88] an execution on a money judgment which does not show against whose property it is sent is void.[89] Where there are several defendants the execution should be against all.[90] But the omission of the name of a defendant does not render the writ void so long as the writ can be clearly identified with the judgment.[91] On the same principle the addition of a

S. W. 773. *Compare* Brett *v.* Ming, 1 Fla. 447, applying the rule even where the judgment itself contains a misrecital as to the parties.

Execution on a decree in chancery for the collection of money, under the act of 1785, must adopt the substance and follow the form of a fieri facias at law, varying with the character of defendant as executor, devisee, etc. Lowndes *v.* Pinckney, 2 Strobh. Eq. (S. C.) 44.

The writ may be quashed if it fails in this particular. Com. *v.* Fisher, 2 J. J. Marsh. (Ky.) 137.

Which judgment to follow.— An execution which includes the costs of a proceeding to enjoin a former execution on the same judgment is regularly issued, although it is entitled as of the latter proceeding in which the parties plaintiff and defendant of the former proceeding are transposed. In any event there is a mere irregularity insufficient to avoid the execution. Garvin *v.* Garvin, 21 S. C. 83.

87. Hayes *v.* Bernard, 38 Ill. 297, 303; Haskins *v.* Wallet, 63 Tex. 213 (holding that a deed should not be excluded from evidence merely because there is a variance between the parties as stated in the judgment and sometimes as stated in the execution when, pending the action, the docket showed the parties first one way then the other); Harris *v.* Dunn, (Tex. Civ. App. 1898) 45 S. W. 731.

Descriptio personæ.— An execution against a certain person named in the writ, "agent for" a certain other person named is an execution against the first person alone, the words "agent for" being merely *descriptio personæ.* Armour Packing Co. *v.* Lovell, 118 Ga. 164, 44 S. E. 990.

A transposition of the words "plaintiff" and "defendant" does not render the writ void where no one has been misled. McIntyre *v.* Sanford, 9 Daly (N. Y.) 21.

88. As for instance where plaintiff's name appears in the indorsement (McGuire *v.* Galligan, 53 Mich. 453, 19 N. W. 142), or as where in an execution issued on a judgment in favor of H as administrator of S's estate the name of plaintiff H was omitted, but the writ recited that the judgment was in favor of S's administrator. (Stovall *v.* Hibbs, 32 S. W. 1087, 17 Ky. L. Rep. 906).

89. Douglas *v.* Whitney, 28 Ill. 362, where the name was left entirely blank. See Capps *v.* Leachman, 90 Tex. 499, 501, 39 S. W. 917, 59 Am. St. Rep. 830, under Tex. Rev. St. (1895) art. 2338, which prescribes as one of the requisites that, "if the judgment be for money simply, it shall require the officer to satisfy the judgment out of the property of the debtor, subject to execution." So an execution against A and B for a sum which it recites plaintiff has recovered against "him" is void on its face, as it is uncertain against whom the judgment was rendered. Farmers Nat. Bank *v.* Lancaster Nat. Bank, 4 Ky. L. Rep. 451.

An execution against an administrator is properly suspended, unless it clearly shows on its face whether it is to be satisfied out of the individual property of defendant or out of the property of his intestate in his hands. Higgins *v.* Driggs, 21 Fla. 103.

Signature of plaintiff's attorneys is sufficient to show who is the "judgment debtor" out of whose property the sheriff is directed to satisfy the judgment, where an execution simply stated the rendition of a judgment between two parties, without designating in whose favor it was. Morrison *v.* Austin, 14 Wis. 601.

90. It is error if any one is omitted from the execution, unless cause for the omission appears on the record. See Gibbs *v.* Atkinson, 1 Pa. L. J. Rep. 476, 3 Pa. L. J. 139 [*citing* Penoyer *v.* Brace, Carth. 404, 1 Ld. Raym. 244, 5 Mod. 338, 1 Salk. 319]. See *supra,* VI, C, 2, b, (I).

The sureties on the appeal from a justice's judgment who have been discharged through failure to issue the execution within the statutory time are not properly parties to the execution when issued on a judgment against the appellant. The writ should issue against the appellant alone. Herrick *v.* Graves, 16 Wis. 157.

91. Den *v.* Cole, 35 N. C. 425; Dunn *v.* Springmeier, 7 Ohio Dec. (Reprint) 339, 2 Cinc. L. Bul. 127; Wilson *v.* Nance, 11 Humphr. (Tenn.) 189; Lee *v.* Crossna, 6 Humphr. (Tenn.) 281. At least this is so as against a *bona fide* purchaser (Wilson *v.* Nance, *supra*); and a sale under such execution is valid (Lee *v.* Crossna, *supra*); and passes title to the land sold (Morse *v.* Dewey, 3 N. H. 535). See McCoy *v.* Elder, 2 Blackf. (Ind.) 183. *Contra,* see Farmers Nat. Bank *v.* Lancaster Nat. Bank, 4 Ky. L. Rep. 451; Roberson *v.* Woollard, 28 N. C. 90 (holding that under the North Carolina act of 1784 which first subjected lands of the deceased debtor in the hands of the heirs, or devisees,

name to the execution which did not appear in the judgment has been held not to vitiate the writ;[92] but as against the person whose name is thus added it is void.[93]

(c) *Mistake in Name.* A mistake in the name of a party plaintiff[94] or defendant[95] need not avoid the writ where the identity of such party is not in doubt.[96] Surely the writ would not be void as against such of the parties whose names are correctly recited.[97] But it has been held that an execution which varies from the judgment in the names of both plaintiffs and defendants cannot be identified with the judgment and is void.[98]

(d) *Misdescription.* A misrecital of the party plaintiff as an individual instead of as an administrator,[99] or as obligee instead of an assignee of an instrument,[1] has been held to render the writ void. But where defendants were misdescribed as "executors," the term "executors" did not affect the validity of an execution issued against them in their individual capacity.[2] Failure to follow the

to the payment of his simple contract debts, an execution commanding the sheriff to sell the lands of the deceased "in the hands of his heirs," without naming the heirs, is void); Cleveland *v.* Simpson, 77 Tex. 96, 13 S. W. 851.

92. McCoy *v.* Elder, 2 Blackf. (Ind.) 183 (where after judgment rendered the person whose name was added in the writ became replevin surety); Caldwell *v.* Fea, 54 Mo. 55 (holding, however, that the writ should be amended so as to be directed against defendants bound to the judgment). *Compare* Davis *v.* Bradford, 58 N. H. 476.

93. Bridges *v.* Caldwell, 2 A. K. Marsh. (Ky.) 195.

94. *Alabama.*— Couch *v.* Atkinson, 32 Ala. 633.

Georgia.— Smith *v.* Sweat, 60 Ga. 539.

Illinois.— Anderson *v.* Gray, 134 Ill. 550, 25 N. E. 843, 23 Am. St. Rep. 696.

Missouri.— Ellis *v.* Jones, 51 Mo. 180.

Nebraska.— Miller *v.* Willis, 15 Nebr. 13, 16 N. W. 840.

See 21 Cent. Dig. tit. "Execution," § 177.

Change of name by marriage.— Execution is not invalidated by issuing in the name a party bore at the commencement of the action, although the fact that she thereafter married a certain person is suggested of record. De Witt *v.* Moore, 44 S. W. 964, 19 Ky. L. Rep. 1953.

95. McMahan *v.* Colclough, 2 Ala. 68 (insertion of initial of middle name for one of defendants); Bradford *v.* Columbus Water Lot Co., 58 Ga. 280 (judgment against "Water-Lot Company of the City of Columbus" and execution against "Water-Lot Company"); Gorman *v.* Stanton, 5 Mo. App. 585 (error in an initial of defendant's name, correctly given elsewhere in body of writ). But an execution against P. B. Clements is not supported by a judgment against J. P. Clements, in the absence of suitable evidence showing that the same man is described in both. Battle *v.* Guedry, 58 Tex. 111. And execution against W K will not bind the goods of B K as against a *bona fide* purchaser, although B K was the real person against whom the judgment and execution were intended. Shirley *v.* Phillips, 17 Ill. 471.

Idem sonans.— Where a judgment is rendered and an execution issued against "Rosina Coons," it is not sufficient reason for setting aside a sale of real estate made on such execution that the right name of defendant is shown to be "Rosina Kuhn." Kuhn *v.* Kilmer, 16 Nebr. 699, 21 N. W. 443.

96. Even when the misdescription renders the identity doubtful, the error may not be so grave that it cannot be amended. Manry *v.* Shepperd, 57 Ga. 68.

97. Blake *v.* Blanchard, 48 Me. 297.

98. Crittenden *v.* Leitensdorfer, 35 Mo. 239, where there was also a variance in the amount.

Presumption of correct recital.— An execution issued on a judgment against one Hunnings was lost. The entry on the docket did not show against whom the writ was issued. The sheriff's deed recited that the execution was issued on a judgment against one Hemmings, commanding a levy on his property, and in the *habendum* recited that he would hold the same to the purchaser as fully as could the "said Hunnings, above mentioned." It was held, that as the deed was evidence of the execution, and consistent with the conclusion that it was issued either against Hemmings or Hunnings, it would be presumed that the execution followed the judgment, and was correctly issued. Turner *v.* Crane, 19 Tex. Civ. App. 369, 47 S. W. 822.

99. Palmer *v.* Palmer, 2 Conn. 462. But see Saffold *v.* Banks, 69 Ga. 289. See McElhaney *v.* Flynn, 23 Ala. 819.

1. Pemberton *v.* Searce, Hard. (Ky.) 3.

2. Tharpe *v.* Tharpe, 54 Ga. 501; Averett *v.* Thompson, 15 Ala. 678, where the fact that defendant was described as "administrator of B" was no excuse for the sheriff's disobeying the command of the writ to levy on defendant's goods. See also Olmsted *v.* Vredenburgh, 10 How. Pr. (N. Y.) 215.

"Agent for" — Descriptio personæ.—An execution against a person who is named as agent for another is against such person alone; the words "as agent for," being merely *descriptio personæ*. Wynn *v.* Irvine's Georgia Music House, 109 Ga. 287, 34 S. E. 582.

Execution against a partnership.— Where a judgment is against a firm and the individual members, naming them, and describing them as members of the firm, an execution thereon

judgment in not describing defendants as makers and indorsers does not render the execution void.[3] Where a judgment is rendered in favor of a guardian, execution issuing in the name of the infant does not follow the judgment and may be quashed[4] or enjoined.[5] Where judgment is recovered in favor of a person for the use of another, an execution which issues in the name of the usee does not follow the judgment,[6] and under the old practice has been held void,[7] although it was not universally so held;[8] but under the reformed procedure this would not be the rule.[9]

(VI) *DIRECTION TO OFFICER*—(A) *Necessity.* The direction in the writ to the officer,[10] usually the sheriff,[11] is what gives him his authority.[12] The levy of a writ by an officer to whom it was not directed has been held void,[13] but the modern tendency seems to be to consider it only voidable.[14] But if the direction be defective in not designating the officer to execute the writ, the defect is not

which directs the seizure of the property of the firm and of each person named in the judgment is not materially variant from the judgment, although it omits to add that they are members of the firm. Waxelbaum *v.* Connor, 94 Ga. 529, 19 S. E. 805 [*distinguishing* Clayton *v.* May, 68 Ga. 27, where the judgment was against the firm only and the execution was against not only the partnership but the individual members thereof, not as members, but as distinct persons].

Where an inhabitant who has paid an execution against a town (Me. Rev. St. (1857), c. 84) sues for his own indemnity, the execution should issue against the "inhabitants of the town." Spencer *v.* Brighton, 49 Me. 326.

3. Powell *v.* Perry, 63 Ga. 417.

4. Smith *v.* Knight, 11 Ala. 618. In Newsom *v.* Newsom, 26 N. C. 381, it was said that an execution in the name of "William Barnes, Guardian," was "not supported by a judgment in the name of Charity, Penelope and Sarah Newsom, by their Guardian, William Barnes," and was therefore void.

5. Where the decree was to pay to the foreign guardian an execution issued in the names of the infants who had removed from the state, defendants were granted an injunction on the ground that the usual remedy of motion to quash was inadequate, for such a motion must be upon notice to plaintiffs, and as they lived without the state, notice could be only by publication. Snavely *v.* Harkrader, 30 Gratt. (Va.) 487.

6. Jennings *v.* Pray, 8 Yerg. (Tenn.) 85.

Where a judgment was assigned, execution should under the old practice issue in the name of the assignor. The assignment did not change the form of the execution or the parties to it. Elliot *v.* Sneed, 2 Ill. 517.

7. Shackleford *v.* Hooper, 65 Ga. 366; Mysroll *v.* Violette, 55 Me. 108.

8. Barnes *v.* Hayes, 1 Swan (Tenn.) 304. See also Harlan *v.* Harlan, 14 Lea (Tenn.) 107. And an execution on a judgment in favor of one for the use of another is not void because the latter recital was omitted. Stevenson *v.* McLean, 5 Humphr. (Tenn.) 332, 42 Am. Dec. 434.

An execution in the name of "Henry W. Collier, use of officers of court," is not void, but gives protection to the officer levying it, if issued by a court of competent jurisdiction. The words "use of officers of court" may be treated as surplusage. McElhaney *v.* Flynn, 23 Ala. 819.

9. Whittle *v.* Tarver, 75 Ga. 818, under Ga. Code, § 4215.

10. To a special person.— The authority issuing a writ of execution may authorize someone specially to serve the same, when it is against a town. Walter *v.* Denison, 24 Vt. 551.

11. A direction to the deputy sheriff is simply an irregularity. See Parsons First Nat. Bank *v.* Franklin, 20 Kan. 264.

12. See Pillsbury *v.* Smyth, 25 Me. 427.

Under Mich. Comp. Laws (1871), § 568, empowering sheriffs to serve process which constables may execute, no special direction is necessary. Foster *v.* Wiley, 27 Mich. 244, 15 Am. Rep. 185.

13. Satterwhite *v.* Melczer, 3 Ariz. 162, 24 Pac. 184; Pillsbury *v.* Smyth, 25 Me. 427. And *compare* Stephenson *v.* Wait, 8 Blackf. (Ind.) 508, 46 Am. Dec. 489; Kent *v.* Roberts, 14 Fed. Cas. No. 7,715, 2 Story 591. See also King *v.* Cartee, 1 Pa. St. 147.

And where the coroner or other officer has to execute the writ on account of the disqualification of the sheriff, the coroner or other officer has no power to execute unless the writ is directed to him. Pope *v.* Stout, 1 Stew. (Ala.) 375. Furthermore, the coroner cannot be held liable for not executing a writ not directed to him. Brown *v.* Barker, 10 Humphr. (Tenn.) 346. An execution directed to the "coroner or jailer" cannot be executed by the jailer under Ky. Civ. Code, § 667, as the presumption is that the coroner is not disqualified. Gowdy *v.* Sanders, 88 Ky. 346, 11 S. W. 82, 10 Ky. L. Rep. 912.

14. Pecotte *v.* Oliver, 2 Ida. (Hasb.) 251, 10 Pac. 302 (where a constable attached and subsequently held goods under an execution directed to the sheriff); Christy *v.* Springs, (Okla. 1902) 69 Pac. 864 (where execution was directed to the sheriff of K county and was executed by the sheriff of C county, to whom it should have been directed). See, however, Gillis *v.* Smith, 67 Ga. 446, where a writ against a sheriff and directed to all and singular the sheriffs and coroners of the counties of the state was executed by the successor of defendant sheriff in office.

objectionable where what is lacking appears in another part of the writ[15] or from an accompanying instrument.[16] The fact that the direction does not exactly conform to the statutory requirement is not necessarily fatal.[17]

(B) *When Regular Officer Disqualified.* When the sheriff is a party, the writ should be directed to someone else, usually to the coroner;[18] or, if he be disqualified, to another officer.[19] In some jurisdictions the writ should contain a suggestion of the disqualification or non-existence of the officer whose prior right and duty it is to act;[20] but the omission to make this appear on the face of the writ is not fatal.[21]

(C) *To Person Whose Term of Office Has Expired.* It is a general rule that an officer who commences the execution of process must complete it, even though his term of office may have expired before such completion.[22] The reason of such

15. White *v.* Coulter, 1 Hun (N. Y.) 357.

16. Forsythe *v.* Sykes, 9 N. C. 54.

17. Thus, an execution directed "to any lawful officer to execute and return," instead of "to all and singular the sheriffs and constables of this state," such execution being in fact properly levied by a sheriff, and properly sold thereunder (Byars *v.* Curry, 75 Ga. 515); or an execution against a sheriff directed to all and singular the sheriffs and coroners of this state instead of to the coroner of the county of defendant sheriff and to all and singular the sheriffs of the state except defendant sheriff, it having appeared that defendant had ceased to be sheriff, and the fieri facias levied by his successor (Gillis *v.* Smith, 67 Ga. 446); or an execution issued by a legally authorized court martial, and directed to the sheriff of one district, instead of to "all and singular the sheriffs of the [said] State" (Carr *v.* Scott, Riley (S. C.) 193) is not void.

18. Pope *v.* Stout, 1 Stew. (Ala.) 375; Brown *v.* Barker, 10 Humphr. (Tenn.) 346. See *supra*, note 13. The writ may be directed to the coroner where such coroner was appointed by resolution of the legislature, although he failed to give bond before acting under such appointment. McBee *v.* Hoke, 2 Speers (S. C.) 138. But where a judgment is obtained against one as the executor of an estate after the resignation of the trust, the judgment has no effect upon a succeeding administrator and therefore an execution may lawfully issue to the sheriff, although he is the succeeding representative of the same estate. Wilson *v.* Auld, 8 Ala. 842. See also CORONERS, 9 Cyc. 981, 982.

Under Ga. Code, § 3633, requiring that an execution against the sheriff to be directed to the coroner of the county of the sheriff's residence and to all and singular the sheriffs of the state except the sheriff so disqualified, an execution directed to all and singular the sheriffs and coroners of the state was held sufficient, although not strictly complying with the statute, where it appeared that defendant had ceased to be sheriff and the fieri facias was levied by his successor. Gillis *v.* Smith, 67 Ga. 446.

Where a statute authorizes the coroner to perform all the duties of the sheriff if there is a vacancy in the shrievalty, it may be taken as fairly implied that when the vacancy shall have been filled the function of the coroner under such statute shall cease and that all unexecuted process is to be turned over to the sheriff. Therefore, when the vacancy is filled before the levy is made by the coroner, an execution (which contained the proper recitals as to vacancy) directed to the coroner may be executed by the sheriff. Carr *v.* Youse, 39 Mo. 346, 90 Am. Dec. 470.

19. See Gowdy *v.* Sanders, 88 Ky. 346, 11 S. W. 82, 10 Ky. L. Rep. 912.

20. Thompson *v.* Bremage, 14 Ark. 59.

21. Thompson *v.* Bremage, 14 Ark. 59. In Blance *v.* Mize, 72 Ga. 96, it was held that where the writ is directed to the coroner of the county of defendant sheriff's residence and to all and singular the sheriffs of the state, except the sheriff of such county, is sufficient to give the coroner authority to make the levy; but where the fieri facias is not thus directed and it does not appear on the face of the proceedings that the sheriff is disqualified to act, a levy under such writ is void. If, however, the coroner makes affidavit of the disqualification to the clerk and the clerk issues the process, the coroner can then make the levy. *Compare* Boaz *v.* Nail, 2 Metc. (Ky.) 245, construing Ky. Rev. St. art. 2, § 10, and Ky. Civ. Code, §§ 66, 73.

Presumption of proper direction.— Cook *v.* Chicago, 57 Ill. 268.

22. Holmes *v.* McIndoe, 20 Wis. 657. See also Chicago *v.* Rock Island R. Co., 20 Ill. 286.

But in Delaware prior to the statute of 1788 execution could be issued to only the sheriff in office. Lofland *v.* Jefferson, 4 Harr. 303.

The officer who served the attachment, although his term has expired, must serve the fieri facias. Pecotte *v.* Oliver, 2 Ida. (Hasb.) 251, 10 Pac. 302; McKay *v.* Harrower, 27 Barb. (N. Y.) 463. *Compare* American Exch. Bank *v.* Morris Canal, etc., Co., 6 Hill (N. Y.) 362. *Contra,* Johnson *v.* Foran, 58 Md. 148, under Md. Code, art. 88, § 8.

The person to whom the fieri facias was issued when in office is the proper person to execute the venditioni exponas, although his term of office has expired. Busey *v.* Tuck, 47 Md. 171. If the sheriff in office attempts to execute the venditioni exponas all his acts under it are void. Purl *v.* Duvall, 5 Harr. & J. (Md.) 69, 9 Am. Dec. 490. See Johnson *v.* Foran, 58 Md. 148.

a rule is apparent where chattels have been seized: the seizure vests the property in the sheriff.[23] Such a reason is wanting in case of a levy upon land;[24] in such a case, however, the venditioni might go to either the ex-sheriff or the acting sheriff.[25]

(VII) *NAME IN WHICH WRIT SHOULD RUN.* It is a very general rule that a mistake as to the name in which a writ should run is merely clerical error and does not affect the validity of the writ.[26]

(VIII) *COMMAND TO LEVY AND MAKE AMOUNT.* The fact that the command of the writ does not follow exactly the order of the court,[27] or the form of the statute,[28] or that in the command the amount of the sum to be made is left blank,[29] or that the command to dispose of the goods was omitted[30] does not render the writ void.

(IX) *DIRECTIONS AS TO PROPERTY TO BE TAKEN*—(A) *In General.* At common law the writ of fieri facias commanded the officer to make the money of the "goods and chattels" of defendant.[31] The modern form of the general fieri facias generally includes the real estate along with the goods and chattels.[32]

23. Tarkinton *v.* Alexander, 19 N. C. 87; Holmes *v.* McIndoe, 20 Wis. 657; Clerk *v.* Withers, 2 Ld. Raym. 1072, 6 Mod. 290, 1 Salk. 322 (holding that a sheriff out of office may sell without a venditioni exponas); Rolle Abr. 893, 894. See Bacon Abr. tit. "Sheriff."

If an officer other than the sheriff serve the original process upon which judgment is rendered, the execution on the judgment must be directed to and served by the same officer (Boaz *v.* Nail, 2 Metc. (Ky.) 245), although the cause for directing the original process to him has ceased. *Compare* Tuggle *v.* Smith, 6 T. B. Mon. (Ky.) 76, 77.

The rule as to chattels real would be the same, for they are personal property. Tarkington *v.* Alexander, 19 N. C. 87 [*citing* Scott *v.* Scholey, 8 East 467, 9 Rev. Rep. 487]. And when taken under a fieri facias the property vests in the sheriff which enables him to make a sale without a venditioni or after he is out of office. Doe *v.* Donston, 1 B. & Ald. 230, 19 Rev. Rep. 300.

24. Tarkington *v.* Alexander, 19 N. C. 87; Holmes *v.* McIndoe, 20 Wis. 657. *Contra*, Busey *v.* Tuck, 47 Md. 171; Purl *v.* Duvall, 5 Harr. & J. (Md.) 69, 9 Am. Dec. 490.

25. Holmes *v.* McIndoe, 20 Wis. 657.

26. Thus execution is not void merely because it does not run in the name of the state. See Bean *v.* Loftus, 48 Wis. 371, 4 N. W. 334. So the mistake of using "territory" for "state" is a mere irregularity. Carnahan *v.* Pell, 4 Colo. 190; State *v.* Cassidy, 4 S. D. 58, 54 N. W. 928.

The constitutional provision that all process shall issue in the name of the state is directory to the officers intrusted with the issuing of judicial process and regulates a mere matter of style; and its non-observance in the issuance of an execution does not affect the title of a purchaser at a sale made by the sheriff pursuant thereto. Broughton *v.* King, 2 La. Ann. 569. And such mistake can be taken advantage of only by defendant and at the time prescribed by law. Thompson *v.* Bickford, 19 Minn. 17. *Contra*, Sidwell *v.* Schumacher, 99 Ill. 426; McFadden *v.* Fortier, 20 Ill. 509; Reddick *v.* Cloud, 7 Ill. 670.

27. Allen *v.* Best, 6 Ala. 234.

28. West *v.* Krebaum, 88 Ill. 263. An objection that the command to levy limited the officer to making the amount out of property in his own county when there was no such limitation in the statute was not sustained in Bunker *v.* Rand, 19 Wis. 253, 18 Am. Dec. 684.

29. When the amount of the decree and the amount still due thereon were specifically stated in the writ twice and also indorsed upon the writ by the clerk, and where the decree, the time at which, and the court by which, it was rendered, the names of the parties, and the land to be sold were not only intelligibly but fully and accurately described. Cooley *v.* Brayton, 16 Iowa 10.

30. Chase *v.* Plymouth, 20 Vt. 469, 50 Am. Dec. 52.

31. 3 Blackstone Comm. 417. See *supra*, I.

Directions as to kind of money to be levied. — Defendants executed a bond, with warrant of attorney, payable in specie, current gold and silver money of the United States, which recited that no law or laws then enacted or that might thereafter be enacted should operate to allow payments to be made in any manner other than designated. Judgment was entered on such bond and warrant, and fieri facias issued, in which the sheriff was required to levy the debt and interest "in specie, current gold and silver money." It was held that the fieri facias should be set aside as irregular, owing to the limitation, since a final judgment is necessarily for lawful money, payable in any money which the law has made a legal tender. Shoenberger *v.* Watts, 5 Phila. (Pa.) 51. *Contra*, see Bronson *v.* Rodes, 7 Wall. (U. S.) 229, 19 L. ed. 141 (which decision, however, referred simply to the judgment not to the execution); dissenting opinion in Shoenberger *v.* Watts, *supra*.

32. See Brown *v.* Duncan, 132 Ill. 413, 23 N. E. 1126, 22 Am. St. Rep. 545; Lord *v.* Johnson, 102 Mo. 680, 15 S. W. 73; Taylor *v.* Ames, 5 R. I. 361. Where the execution directs the officer to cause it to be satisfied "of the goods, chattels, or lands" of the judgment debtor, the word "lands" embraces any interest au-

When the writ is to be executed against specific property,[33] the description should sufficiently identify it.[34]

(B) *Priorities to Be Observed.* In directing the officer as to the property to be seized, certain priorities should be observed. Thus the judgment should be satisfied as far as possible out of personalty before execution is sent against the realty.[35] Where property of debtor has been attached, it should be taken before any other of its own kind — that is, real or personal — which has not been attached,[36] but nevertheless even where both real and personal property belong-

thorized in law to be taken. Holmes *v.* Jordan, 163 Mass. 147, 39 N. E. 1005. But in Chicago *v.* Rock Island R. Co., 20 Ill. 286, it was held that a special collector of taxes was not authorized to levy on land under a warrant which directed him to levy only on the goods and chattels of defendant.

Early in Pennsylvania it was decided that under a general execution which describes the property to be taken as "the goods and chattels," etc., land might be taken. "Lands are to be considered chattels in Pennsylvania for the payment of debts." Andrews *v.* Fleming, 2 Dall. 93, 1 L. ed. 303.

Following a special statutory provision.— Where a statute provided for the issuance of execution against the real estate situated in a town, an execution running against the real estate of the inhabitants of the town is defective, for it should be directed against all the real estate of the town whether belonging to the inhabitants thereof or not. Unless such defect is amended no title can be conveyed. Caldwell *v.* Blake, 69 Me. 458 [*following* Hayford *v.* Everett, 68 Me. 505].

33. Levari facias, not fieri facias, proper writ for the sale of specific lands.— See McClelland *v.* Devilbiss, 1 Pa. Co. Ct. 613. See also *supra*, II, E.

34. *Georgia.*— Lyle *v.* Clanton, 73 Ga. 141; Morton *v.* Gahona, 70 Ga. 569 [*following* Haynes *v.* Richardson, 61 Ga. 390].

Louisiana.— Edwards *v.* Caulk, 5 La. Ann. 123; McDonough *v.* Gravier, 9 La. 531.

Maryland.— Dorsey *v.* Dorsey, 28 Md. 388.

Pennsylvania.— Evans *v.* Howell, 5 Lanc. L. Rev. 285.

Texas.— Andrews *v.* Beck, 23 Tex. 455.

See 21 Cent. Dig. tit. "Execution," § 182.

A description as "the undivided half-interest of B" in land held by A and B as tenants in common was sufficient, although it did not show what the interest of B was, as the presumption of law was that the shares of A and B were equal. Baker *v.* Shepherd, 37 Ga. 12.

A description which follows the judgment is not void for uncertainty, although the description may be loose. Western Union Tel. Co. *v.* Hill, 86 Ga. 500, 12 S. E. 877. See *supra*, VI, D, 2, b, (IV).

A tract of land need not be described as a cotton or sugar estate, although such is the case; at least a sale of the plantation will not be enjoined on that account. Arnous *v.* Lesassier, 12 La. 124.

Land of which defendant is seized at date of acknowledgment of recognizance.— An execution which was issued to satisfy a judgment on recognizance may command the taking of the lands of which defendant was seized when the recognizance was acknowledged, instead of when the judgment was rendered, since the recognizance creates a lien on the lands of the recognizor from the time of its acknowledgment. State *v.* Stout, 11 N. J. L. 362.

Where a statute provides for the satisfaction of an execution out of realty of debtor belonging to him when the judgment was docketed, a direction against realty belonging to the debtor on a named day which is several days after such docketing is a mere irregularity. Flanders *v.* Batten, 50 Hun (N. Y.) 542, 3 N. Y. Suppl. 728 [*affirmed* in 123 N. Y. 627, 25 N. E. 952]. See also Green *v.* Burnham, 3 Sandf. Ch. (N. Y.) 110.

Execution issued after lien of judgment lapsed.— Under N. Y. Code Civ. Proc. § 1252, which provides that after a judgment has ceased by lapse of time to be a lien on the debtor's land, an execution may nevertheless be issued by filing and recording a notice describing the judgment, the execution, and the property levied on, and that the judgment then becomes a charge on the title of the judgment debtor only from the time of recording notice; an execution which is intended to take advantage of the code provision must correctly state the interest which the creditor is entitled to have sold, and it will be set aside if it describes the interest as of the time when the judgment is rendered. Garczynski *v.* Russell, 75 Hun (N. Y.) 497, 27 N. Y. Suppl. 465.

35. But an execution which commands the sheriff "to levy upon the real estate, goods, and chattels" of defendants in the writ, instead of directing a resort to the personal property of such defendants first and then a levy on the realty, is informal, but not void. Wright *v.* Young, 6 Oreg. 87. See, however, Place *v.* Riley, 98 N. Y. 1, the decision of which is *contra* in principle. But N. Y. Code Civ. Proc. § 1369, as to the principle stated in the text, does not apply to a writ issued under section 1252 which relates to executions on judgments which have ceased to be liens on land and makes special provision therefor. Garczynski *v.* Russell, 75 Hun (N. Y.) 497, 27 N. Y. Suppl. 465.

Execution on a joint judgment.— See Flanders *v.* Batten, 50 Hun (N. Y.) 542, 3 N. Y. Suppl. 728 [*affirmed* in 123 N. Y. 627, 25 N. E. 952].

36. Gilman *v.* Tucker, 59 N. Y. Super. Ct. 575, 13 N. Y. Suppl. 804.

ing to the execution debtor has been seized by the officer under an attachment the order of personal before real must still be observed.[37]

(x) *Directions For Return.* The return-day of the execution is generally required to be stated in it for the certainty and regularity of the proceedings, but mainly for the security of the rights of the party entitled to the fruits of it.[38] Therefore, to direct the return within a period less than[39] or greater than[40] the period of time fixed by statute ought not to and usually does not make the writ void but merely voidable. The rule would be the same where the return-day is entirely omitted,[41] or where the writ is made returnable out of term,[42] or on Sunday,[43]

37. An execution omitting the personal property unattached was held void, and a sale of land under it conveyed no title. Place *v.* Riley, 98 N. Y. 1. In Lucier *v.* Pierce, 60 N. H. 13, it was said that a sheriff is bound to levy under execution in his hands on the proceeds of the sale of goods attached under a writ, even without special directions.

38. Brown *v.* Thomas, 26 Miss. 335.

39. Brown *v.* Hurt, 31 Ala. 146 [*following* Chambers *v.* Stone, 9 Ala. 260]; Goode *v.* Miller, 78 Ky. 235 (where by mistake the return-day was made three days too soon); Estes *v.* Long, 71 Mo. 605 (where it was held that the execution continued in force until the time when by law it is returnable, and levy could be made at any day before that time); Rider *v.* Mason, 4 Sandf. Ch. (N. Y.) 351 (holding that defendant, in order to have the writ set aside, must apply to the court whence it issued); Williams *v.* Hogeboom, 8 Paige (N. Y.) 459. *Contra*, Harris *v.* West, 25 Miss. 156 (where the writ was made returnable in less than fifteen days; this case being difficult to reconcile with Brown *v.* Thomas, 26 Miss. 335); Bond *v.* Wilder, 16 Vt. 393; Jameson *v.* Paddock, 14 Vt. 491; Tichout *v.* Cilley, 3 Vt. 415; *Ex p.* Hatch, 2 Aik. (Vt.) 28. See Goode *v.* Miller, 78 Ky. 235, where an execution was held not void for being made returnable three days too soon.

By stipulation the writ may be made returnable in less time than that given by statute. Jordan *v.* Posey, 1 How. Pr. (N. Y.) 123.

To mature the right to begin supplementary proceedings, a writ cannot be returned before the time allowed by statute to make return has expired. Spencer *v.* Cuyler, 9 Abb. Pr. (N. Y.) 382, 17 How. Pr. (N. Y.) 157.

40. Wilson *v.* Huston, 4 Bibb (Ky.) 332, where the sheriff was not excused from executing the writ because it was made returnable at a time more than ninety days (the statutory time) from its teste. *Contra*, Lehr *v.* Doe, 3 Sm. & M. (Miss.) 468.

Intervening term.— At common law it was not necessary that the writ of execution should be made returnable to the next term after that at which it is tested; if a term intervened it was not material. State *v.* Ferrell, 63 N. C. 640; Shirley *v.* Wright, 2 Ld. Raym. 775, 1 Salk. 273, 2 Salk. 700. In cases where the North Carolina statute applies, it is only in affirmance of the common law, as to the return of writs. State *v.* Ferrell, 63 N. C. 640. In Pennsylvania it has been held that the intervention of a term was unobjectionable. Thorpe *v.* Ellithorpe, 21 Pa. Co. Ct. 216. The intervention of a term is not an irregularity. Miner *v.* Walter, 8 Phila. (Pa.) 571. See Ingham *v.* Snyder, 1 Whart. (Pa.) 116. In Alabama, where a statute gave a court of equity power to issue execution in cases of accounting, such execution to be returnable on the first Monday in some month, the day to be specified in the writ, the execution is not void if the day specified is beyond the next term of court. Brevard *v.* Jones, 50 Ala. 221. But under Tex. Laws (1873), p. 209, requiring all executions to be made returnable on or before the first day of the next term of court, the clerk cannot, by an indorsement "returnable in sixty days," make the writ returnable after the expiration of the statutory limit, without rendering the writ and the sale under it void. Cain *v.* Woodward, 74 Tex. 549, 12 S. W. 319.

Meaning of "next term."— Where by statute executions are returnable to the next term of court, this means the next term after the money can be lawfully made. Chamberlin *v.* Beck, 68 Ga. 346.

What "term" includes.— The act of April 17, 1856, provided for an additional judge for the counties of Erie and Crawford, and that said judge should hold "courts" in the county of Crawford; "one term commencing on the third Monday in January to continue two weeks; one term commencing on the third Monday in May, to continue two weeks," etc. A fieri facias made returnable on the third Monday in May is returnable to the term required to be held by the additional judge. "They are as much terms of the court as those held by the other judge." Bunce *v.* Wightman, 29 Pa. St. 335.

41. Brown *v.* Thomas, 26 Miss. 335; Vandeusen *v.* Brower, 6 Cow. (N. Y.) 50. Under N. Y. Code, § 290, requiring a sheriff to make return of an execution within sixty days from the time he received it, it is not necessary to state in the execution the time and place of the return. Fake *v.* Edgerton, 3 Abb. Pr. (N. Y.) 229. See N. Y. Code Civ. Proc. § 1366.

42. Milburn *v.* State, 11 Mo. 188, 47 Am. Dec. 148; Cramer *v.* Van Alstyne, 9 Johns. (N. Y.) 386 [*citing* Campbell *v.* Cumming, 2 Burr. 1187]. The rule of the common law that executions should be returnable in term-time was regarded as directory only. Goode *v.* Miller, 78 Ky. 235.

43. Boyd *v.* Vanderkemp, 1 Barb. Ch. (N. Y.) 273.

or even where it is made returnable within an impossible year.[44] If the statute fixes a time within which the officer who executes the writ must make return, a direction to make "due return" thereof is sufficient.[45] If the direction shows when the writ is returnable, the omission of proper words in the direction is immaterial.[46]

(XI) *TESTE*—(A) *In General.* The teste of the writ is the formal concluding clause beginning "witness," etc.[47] By the ancient English practice a fieri facias should be tested in term-time on a day after the judgment was or may be supposed to have been given.[48] If it were tested out of term it was void.[49] The proper practice was to have the writ tested in the name of the senior judge.[50]

(B) *Date.* By the old rule the writ should be tested as of the first day of the term next preceding the time when it was actually sued out.[51] The more modern

44. See Samples *v.* Walker, 9 Ala. 726.

Reckoning of statutory period.—The code of Oregon is in force in Alaska and section 278 of the code provides that execution should be returnable "within sixty days after its receipt by the sheriff to the clerk's office from whence it issued." Under this section the period within which an execution issued to a United States marshal in Alaska was returnable must be reckoned from the date of its receipt by the marshal, not from the date of its issuance from the clerk's office. Mason *v.* Bennett, 52 Fed. 343.

Conflict of statutory provisions.—See Burns *v.* Morse, 6 Paige (N. Y.) 108.

Substantial following of statutory form.—See Hill *v.* Labarre, 12 La. Ann. 419.

45. Stephens *v.* Dennison, 1 Oreg. 19.

46. A writ returnable "to the next regular term said in January, 1880," omitting the word "of" before "said," and the word "court" after it, is not fatally defective. Henderson *v.* Zachry, 80 Ga. 98, 4 S. E. 883.

Remedy by quashing see *infra*, VIII, B, 2, e, (I).

47. Black L. Dict.; Bouvier L. Dict.

At common law the writ from the date of the teste became a lien on the personal property. This was done away with as unfair to *bona fide* purchasers by 29 Car. II, c. 3, § 16, by which no lien could arise on personal property until actually delivered to the sheriff. This statute has been generally followed in the United States. The legislature of the separate states in many instances have gone still farther by providing that the lien does not arise until the personal property is actually levied upon. Such is the law in Missouri. Burton *v.* Deleplain, 25 Mo. App. 376. See *infra*, VII, A, 2.

48. By fiction of law the judgment related to the first day of the term wherein it was signed; therefore it might be tested on any day in that term. 2 Tidd Pr. 998. See Cutler *v.* Wadsworth, 7 Conn. 6.

Process should not be tested so as to appear to precede the term at which the entry shows the judgment on which it is based was entered. Dibble *v.* Taylor, 2 Speers (S. C.) 308, 42 Am. Dec. 368.

By the modern rule of having execution bear teste as of the day on which it is issued, an execution does not relate to the entry of the judgment. Brown *v.* Parker, 15 Ill. 307.

49. Simonds *v.* Catlin, 2 Cai. (N. Y.) 61; Shirley *v.* Wright, 2 Ld. Raym. 775, 1 Salk. 273, 2 Salk. 700; 2 Tidd Pr. 999. *Contra*, Inskeep *v.* Lecony, 1 N. J. L. 111 [*citing* Wilson *v.* Huston, 4 Bibb (Ky.) 332; Wright *v.* Macevoy, Say. 12, 25 Geo. II].

50. Teste in federal courts.— U. S. Rev. St. § 911 *et seq.* See Stephens *v.* Dennison, 1 Oreg. 19, where under the Practice Act of 1851 writs issued by the territorial courts bore teste in the name of the clerk.

In New York the omission in the teste of the name of the judge as required by Code Civ. Proc. § 23, was held a mere irregularity, the substantial requirements of section 1366 being fulfilled. Douglass *v.* Haberstro, 88 N. Y. 611 [*affirming* 25 Hun 262, 62 How. Pr. 455]. See to the same effect Park *v.* Church, 5 How. Pr. 381, Code Rep. N. S. 47. *Compare* Carpenter *v.* Simmons, 1 Rob. 360, 28 How. Pr. 12.

A writ of mesne process not bearing teste of the chief, first, or senior justice of the court, as required by N. H. Const. art. 87, is not void. The court distinguished between mesne and final process: "Because to a writ of final process, the defendant has no opportunity to object by plea or motion that it wants a seal or other constitutional requisite; whereas in the case of mesne process he may plead the defect, or make it the ground of a motion." This of course is on the theory that what can be amended is not void and *vice versa*. The court said further that it was possible that the case of Hutchins *v.* Edson, 1 N. H. 139 (which decided that a writ of final execution not under seal was void as not meeting requirements of constitution) ought not to be extended beyond the point expressly decided and that the court did not find it necessary to extend it to mesne process for the reason given above. Parsons *v.* Swett, 32 N. H. 87, 89, 64 Am. Dec. 352.

Teste in name of judge disqualified.—A fieri facias is not invalid because it bears teste in the name of the regular judge of the circuit who, being disqualified, did not preside when it was rendered. Drawdy *v.* Littlefield, 75 Ga. 215.

51. See Moses *v.* Blackwell, 9 Rich. (S. C.) 42. See Dibble *v.* Taylor, 2 Speers (S. C.) 308, 42 Am. Dec. 368. Such is the rule required by N. C. Code Civ. Proc. § 449. Williams *v.* Weaver, 94 N. C. 134.

rule is to have the writ tested as of the day on which it is issued.[52] The fact that the year of Christ is omitted when already the year of the commonwealth is stated,[53] or that the execution is not dated at all,[54] or that a mistaken or impossible date was given,[55] does not render the execution void.

(XII) *SIGNING OF WRIT BY OFFICER OR PARTY.* At the present time[56] in this country, when the writ is sealed and otherwise regular, the absence of the clerk's signature, which is properly placed immediately after the attestation clause, may render the writ void[57] or merely irregular,[58] according to the jurisdiction. Where process bore the seal of court and regular teste and was signed by the deputy clerk instead of by the clerk, it has been held unobjectionable,[59] or at least not void.[60]

In New York by an early statute writs issued in term had to be tested as of some day in the same term; if issued in vacation, of some day in the preceding term. A mistake in the test, however, did not render the writ void. Gordon *v.* Valentine, 16 Johns. 145.

52. Brown *v.* Parker, 15 Ill. 307; Mollison *v.* Eaton, 16 Minn. 426, 10 Am. Rep. 150, which is the day the execution is taken from the clerk's office.

53. Craig *v.* Johnson, Hard. (Ky.) 520.

54. State *v.* Brophy, 38 Wis. 413. See also Usry *v.* Saulsbury, 62 Ga. 179.

55. Roberts *v.* Church, 17 Conn. 142.

56. By ancient English practice a fieri facias from the king's bench needed only to be sealed, but in the common pleas all executions were required to be signed by the prothonotary and had to be so signed before they could be sealed. 2 Tidd Pr. 999. See also O'Donnell *v.* Merguire, 131 Cal. 527, 63 Pac. 847, 82 Am. St. Rep. 389.

57. Rawles *v.* Jackson, 104 Ga. 593, 30 S. E. 820, 69 Am. St. Rep. 185, holding, however, that where the execution is based upon a foreclosure of a mortgage on the property sold, and defendant is present and knows of the defect and makes no objection, he is estopped to raise the objection against a *bona fide* vendee from the purchaser who bought the property in at the sale.

"In modern times the seal has lost its significance, and cannot be regarded as a sufficient authentication without the signature of the officer affixing it." O'Donnell *v.* Merguire, 131 Cal. 527, 529, 63 Pac. 847, 82 Am. St. Rep. 389.

The signature of the clerk is an absolute necessity to the validity of the writ, and this is all the more so since the legislature dispensed with the other *indicium* of the writ's authenticity, that is the seal, when the writ was to be executed within the county in which it issued. Shepherd *v.* Lane, 13 N. C. 148.

When what purports to be the signature of the clerk thereto is not affixed by him or by his authority, the effect is the same as if there were no signature at all. Williams *v.* McArthur, 111 Ga. 28, 36 S. E. 301; Hernandez *v.* Drake, 81 Ill. 34. An execution signed in print with the name of a former clerk of the court, and in writing by a deputy of the present clerk, was void, and a sale thereunder conveyed no title. O'Donnell *v.* Merguire, 131 Cal. 527, 63 Pac. 847, 82 Am. St. Rep. 389, 60 Pac. 981.

58. Taylor *v.* Buck, 61 Kan. 694, 60 Pac. 736, 78 Am. St. Rep. 346; McCormick *v.* Meason, 1 Serg. & R. (Pa.) 92. See Whiting *v.* Beebe, 12 Ark. 421, distinguishing between judicial process, which had been held by former decisions void for want of a signature, and original writs.

A levy was properly set aside on motion where the execution was not subscribed by plaintiff or his attorney as required by Wis. Rev. St. c. 134, § 8, although defendant in ignorance of the irregularity had "voluntarily turned out the property levied upon to the sheriff, without demand." Bonesteel *v.* Orvis, 23 Wis. 506, 99 Am. Dec. 201.

In Arkansas the affixing of the name of plaintiff in execution to the writ, instead of the name of the clerk, is a mere irregularity. Jett *v.* Shinn, 47 Ark. 373, 1 S. W. 693.

In New York the clerk's signature is surplusage upon execution issued by plaintiff. Ryan *v.* Parr, 16 N. Y. Suppl. 829. Where an attorney residing out of the state subscribed an execution in an action in which he was attorney before he left the state, such subscription is an irregularity which does not render the execution void, but only voidable on motion to set it aside. Hommedieu *v.* Stowell, 18 Abb. Pr. (N. Y.) 336, the code requiring an execution to be "subscribed by the party issuing it or his attorney."

Position of signature.— A writ of execution is good, although a memorandum intervenes between the bottom of it and the clerk's signature. Botts *v.* Williams, 5 J. J. Marsh. (Ky.) 62.

59. Dever *v.* Akin, 40 Ga. 423.

Under 3 U. S. St. at L. 643, authorizing the clerk of the district court for the district of Louisiana "to appoint a deputy to aid him in the discharge of the duties of his office, for whose acts the clerk shall in all respects be liable," such deputy clerk was authorized to sign process in his own name as such deputy. Bragg *v.* Lorio, 30 Fed. Cas. No. 1,800, 1 Woods 209, 213.

60. Griswold *v.* Connolly, 11 Fed. Cas. No. 5,833, 1 Woods 193.

An execution signed by a deputy clerk for a clerk of the court whose term expired several months prior to the issuance of the execution is void under Cal. Code Civ. Proc. § 682, declaring that an execution shall be

(XIII) *SEAL.* At the present time[61] the effect of a want of a seal upon the writ depends upon the wording of the statute or constitutional provisions relative to the subject, or upon the construction given to such statutes or provisions; thus under the interpretation placed upon some statutes an execution without a seal is of no validity;[62] while under other statutes it has been held that an execution without a seal is not void but merely voidable.[63] If the lack of a seal does not render the writ void, it would follow that a sale under such writ would not be void;[64]

sealed with the seal of the court and subscribed by the clerk. O'Donnell *v.* Merguire, (Cal. 1900) 60 Pac. 981, 131 Cal. 527, 63 Pac. 847, 82 Am. St. Rep. 389.

A writ signed by an attorney under verbal deputation of the clerk to all the members of the bar is a nullity. Shepherd *v.* Lane, 13 N. C. 148.

If the execution has been signed by the commissioners, the signature of the clerk is not necessary to its validity under Ga. Acts (1886), p. 261, authorizing the county commissioners to issue execution against a delinquent tax-collector. Pulaski County *v.* Thompson, 83 Ga. 270, 9 S. E. 1065.

Teste by deputy clerk.— Under the Ohio act of Feb. 17, 1831, providing that a clerk of the court of common pleas may appoint a deputy, and when qualified such deputy may perform all the duties appertaining to the office of his principal, the deputy clerk of the court of common pleas has authority to teste a fieri facias. Chapin *v.* Allison, 15 Ohio 566.

61. **By the common law** every writ issued by a court of record must be authenticated by a seal of the court affixed to the writ. See Ætna Ins. Co. *v.* Hallock, 6 Wall. (U. S.) 556, 18 L. ed. 948; Wolf *v.* Cook, 40 Fed. 432.

62. *Illinois.*— Roseman *v.* Miller, 84 Ill. 297 (*dictum*); Davis *v.* Ransom, 26 Ill. 100; Mann *v.* Reed, 49 Ill. App. 406.

Kansas.— Frankhouser *v.* Dewitt, 9 Kan. App. 636, 58 Pac. 1027.

Louisiana.—King *v.* Baker, 7 La. Ann. 570; Bonin *v.* Durand, 2 La. Ann. 776; Fink *v.* Lallande, 16 La. 547.

New Hampshire.— Hutchins *v.* Edson, 1 N. H. 139.

Ohio.— Boal *v.* King, 6 Ohio 11 [*affirming* Wright 223].

See 21 Cent. Dig. tit. "Execution," § 189.

In North Carolina it is said: "The legislature by the act of 1797, has dispensed with this essential form of authentication only in cases where the writ is confined within the county from the court of which it issues. When the writ is issued to a different county, it is void without the seal and confers no power upon the sheriff of such county to act." Taylor *v.* Taylor, 83 N. C. 116, 118. See also Finley *v.* Smith, 15 N. C. 95 [*approving* Doe *v.* Cape Fear Bank, 14 N. C. 279, 22 Am. Dec. 722]; Shackelford *v.* McRae, 10 N. C. 226.

Mandatory provision.— Where the statutory or constitutional provision requiring the writ to be sealed is mandatory, as has been held in some cases, an execution issued without the seal is void. Weaver *v.* Peasley, 163 Ill. 251, 45 N. E. 119, 54 Am. St. Rep. 469 [*affirming* 64 Ill. App. 80]; Gordon *v.* Bodwell, 59 Kan. 51, 51 Pac. 906, 68 Am. St. Rep. 341; Bingham *v.* Burlingame, 33 Hun (N. Y.) 211.

The surety on a forthcoming bond may plead that the execution was without the seal of the court, such bond having been executed under the Louisiana act of March 5, 1842, by a married woman for property seized in execution against her husband. King *v.* Baker, 7 La. Ann. 570, under La. Code Pr. art. 626. See *infra*, VI, H.

A scrawl, inclosing the letters "L. S." affixed to a fieri facias, will be as good a seal, where from its being used in other writs it is to be presumed that the court had no engraved seal. Drouet *v.* Rice, 2 Rob. (La.) 374. Such a scrawl is no evidence that the court issuing the writ had a seal. Fink *v.* Lallande, 16 La. 547. See, generally, SEALS.

Where it is the usage of the court to affix a wafer to its process as a seal, this will be sufficient to give validity to a fieri facias, until the usage is changed by order of the court. Barton *v.* Keith, 2 Hill (S. C.) 537.

Wrong seal.— Where an execution is issued out of the court of common pleas, with the seal of the supreme court attached to it instead of the seal of the common pleas, the process is erroneous and is the same as though it had no seal, but such a writ is not void; it is merely voidable. Dominick *v.* Eacker, 3 Barb. (N. Y.) 17. See also Brown *v.* Ferguson, 2 How. Pr. (N. Y.) 178.

63. *Arkansas.*— Hall *v.* Lackmond, 50 Ark. 113, 6 S. W. 510, 7 Am. St. Rep. 84; Bridewell *v.* Mooney, 25 Ark. 524.

Florida.— Mitchell *v.* Duncan, 7 Fla. 13.

Georgia.— Dever *v.* Akin, 40 Ga. 423.

Indiana.— Warmoth *v.* Dryden, 125 Ind. 355, 25 N. E. 433; Rose *v.* Ingram, 98 Ind. 276; Reily *v.* Burton, 71 Ind. 118; Sidener *v.* Columbus, etc., Turnpike Co., 56 Ind. 598; Hunter *v.* Burnsville Turnpike Co., 56 Ind. 213.

Michigan.— Arnold *v.* Nye, 23 Mich. 286.

Montana.— Kipp *v.* Burton, 29 Mont. 96, 74 Pac. 85, 63 L. R. A. 325.

New York.— People *v.* Dunning, 1 Wend. 16, 17 [*citing* Jackson *v.* Brown, 4 Cow. 550]. When issued by the surrogate see Code Civ. Proc. § 2554.

See 21 Cent. Dig. tit. "Execution," § 189.

64. Taylor *v.* Courtnay, 15 Nebr. 190, 16 N. W. 842; Corwith *v.* Illinois State Bank, 18 Wis. 560, 86 Am. Dec. 793.

but on the other hand it would be void, if under the statute the absence of a seal renders the writ void.[65]

(XIV) *INDORSEMENTS.* The fact that the indorsement of a levy is pasted on is not necessarily objectionable.[66] An execution issued after the death of plaintiff is not void because it is not indorsed that it was issued by the personal representative of deceased plaintiff.[67] Unauthorized indorsements do not affect the writ and may be treated as surplusage.[68] An indorsement of the description of the property attached and of the persons by whom it is replevied upon an ordinary fieri facias on a judgment in a suit commenced by attachment does not change the character of the writ.[69] Where the amount stated in the indorsement varies from that stated in the body of the writ the latter controls and the sheriff should heed it alone.[70] The fact that a statutory provision as to indorsements has not been followed may not render the writ void.[71] A statutory provision that unless plaintiff indorses on the execution that he will receive certain kinds of bank-notes in payment, defendant may give a replevin bond for the debt payable in two years, does not apply to executions on judgments of federal courts.[72] Proof that the indorsement of the time of the receipt of the writ is in the handwriting of the sheriff is admissible if the time when the writ was in his hands is a material fact in evidence.[73] An officer's indorsement which he is required by law to make as to a fact or act or event is generally held to be conclusive.[74]

65. Peasley *v.* Weaver, 64 Ill. App. 80 [*affirmed* in 163 Ill. 251, 45 N. E. 119, 54 Am. St. Rep. 469]; Boal *v.* King, 6 Ohio 11; Ætna Ins. Co. *v.* Hallock, 6 Wall. (U. S.) 556, 19 L. ed. 948.

66. Stanely *v.* Moynihan, 45 Ill. App. 192.

67. Deyo *v.* Borley, 18 N. Y. Suppl. 300.

Where deceased plaintiff before his death assigned his judgment to his attorney who took out an alias after having indorsed it as plaintiff's attorney and not as assignee, the execution was in form an execution issued in favor of plaintiff and not one issued by the assignee and was set aside, although if it had been issued by the indorser it might possibly have been sustained, notwithstanding the fact that N. Y. Code Proc. § 283, as amended in 1866, provided that in case of death of plaintiff the personal representative might take out execution within five years. Durgee *v.* Botsford, 24 Hun (N. Y.) 317.

68. McDaniel *v.* Johnston, 110 Ala. 526, 531, 19 So. 35 [*citing* McGowan *v.* Hoy, 2 Dana (Ky.) 347].

Indorsement by a clerk upon a writ purporting to be an original of "alias" or "pluries" (Simpson *v.* Simpson, 64 N. C. 427) or of "alias fieri facias" (Walls *v.* Smith, 19 Ga. 8) does not affect the character of the writ.

69. Garey *v.* Himes, 8 Ala. 837.

70. Griffith *v.* Lyle, 7 Phila. (Pa.) 244.

71. Thus, the fact that the rate of interest as evidenced by the judgment (Snodgrass *v.* Emery, 66 Mo. App. 462); that the name of the court to which a bond was returned, the bond being given by the claimant for the trial of the right of property and the indorsement being on the bond and the claimant having found the proper court and defended his suit there (Carney *v.* Marsalis, 77 Tex. 62, 13 S. W. 636); or that the time of the receipt of the writ by the officer, such requirement being merely directory (Hester *v.* Keith, 1 Ala. 316), and its object being merely to fix the time at which the lien and liability of the officer attached (Wilson *v.* Swasey, (Tex. Sup. 1892) 20 S. W. 48 [*citing* Freeman Ex. §§ 98, 200], were not indorsed does not render the writ or the sale under it (Wilson *v.* Swasey, *supra*) void. In Nebraska it has been held that such a provision as to indorsing the time of receipt of the writ is applicable only to executions issued out of a court of record on which a sale of land may be had and does not apply to an execution levied on a growing crop on a judgment rendered in a non-term case in the county court, but that such a judgment is controlled by section 1067 and following, under which no such requirement is made. Johnson *v.* Walker, 23 Nebr. 736, 37 N. W. 639. So the omission of the clerk to indorse on the execution the date and amount of the judgment, as required by Ga. Code, § 3685, does not make the whole execution illegal or prevent collection of the principal and interest. Manry *v.* Shepperd, 57 Ga. 68.

Indorsement not to levy on equity of redemption.— 2 N. Y. Rev. St. p. 368, § 31, declares that it shall not be lawful for a sheriff to sell the equity of redemption of a mortgagor, his heirs or assigns, by virtue of an execution on a judgment; and section 32 provides that plaintiff's attorney shall make an indorsement on the execution issued on a deficiency judgment in foreclosure proceedings directing the sheriff not to levy on the mortgaged premises. Where an execution was issued on such judgment and plaintiff's attorney failed to indorse the direction required, a sale of lands to a third person under such execution was void and passed no title to the purchaser. Delaplaine *v.* Hitchcock, 6 Hill (N. Y.) 14.

72. Wayman *v.* Southard, 10 Wheat. (U. S.) 1, 6 L. ed. 253.

73. Stewart *v.* Conner, 9 Ala. 803.

74. Thus a sheriff's indorsement on a writ of the hour of receiving it is conclusive, and

c. Obtaining Issuance — (I) *PRELIMINARY DEMAND OF SATISFACTION FROM DEBTOR.*[75] In some jurisdictions, and under certain circumstances, execution will not be allowed to issue until after a demand of satisfaction of the debt has been made.[76] After demand has once been made and execution issued, it is not necessary to renew the demand before issuing an alias.[77] The objection that a demand was not made before issuing execution affects only the costs and then only in case the money has been tendered.[78]

(II) *LEAVE OF COURT* — (A) *Necessity of* — (1) IN GENERAL. Execution in the enforcement of an interlocutory decree,[79] or upon a judgment which has been opened to let in a defendant,[80] or where judgment has been given upon a condition,[81] cannot be issued without special leave of court. Where the collection of a judgment at law has been enjoined and the injunction has been subsequently dissolved, leave of court for issuance of an execution upon the judgment at law is not necessary.[82] Leave of court to issue an execution is required neither after the judgment of the trial court had been affirmed, with damages, on appeal,[83] nor after the judgment of the trial court has been reversed, a remittitur of the record having been filed in the trial court.[84] Where a judgment is entered on a bond payable in instalments, leave of court is not necessary for the issuance of execution for the instalments as they become due.[85] Execution issued without leave of court, when leave should be obtained, is held sometimes void,[86]

parol evidence is inadmissible to show that it was received earlier (*In re* Kinney, 2 Leg. Op. (Pa.) 102); or that another execution against the same defendant was received earlier but inadvertently withdrawn from a pigeon-hole and indorsed as of later receipt (Person's Appeal, 78 Pa. St. 145). In Vanderveere *v.* Gaston, 24 N. J. L. 818, it was held that a clerk's certificate indorsed on an execution against goods and lands is sufficient *prima facie* evidence that it was recorded before it was delivered to the sheriff; his testimony that it was his custom when in a hurry to omit making the record until after the return of the writ was not sufficient to invalidate his certificate, when he would not swear that he did not in fact record the present execution before it was delivered. See *infra*, VI, D, 2, d, (II), (B).

Indorsement by the attorney of date of issuance.— By the act of 1777 (Rev. c. 115, § 13) it is made the duty of the clerk or attorney issuing process, to mark thereon the day on which it shall be issued. When process has been issued by an attorney, his indorsement thereon of the day on which it issued is *prima facie* evidence, but no more. Boyden *v.* Odeneal, 12 N. C. 171.

Where the indorsement and the sheriff's deed do not agree as to the date of the levy, this is no objection to the admissibility of the execution in evidence. Driver *v.* Spence, 1 Ala. 540.

75. Notice to surety as condition precedent to issue see, generally, PRINCIPAL AND SURETY.

76. Eaton *v.* Youngs, 41 Wis. 507.

A demand of the costs ordered on a motion is not necessary before issuing process for their collection. The act of 1840, not the code, regulates the manner of their collection. Lucas *v.* Johnson, 6 How. Pr. (N. Y.) 121.

77. Adams *v.* Tracy, 13 Mo. App. 579.

The alteration in the date of the writ after the demand by the officer upon the debtor does not render it necessary to repeat the demand for subsequent proceedings which are all under the same writ. Roberts *v.* Church, 17 Conn. 142. For alteration of writ after issuance see *infra*, VI, G.

78. Adams *v.* Tracy, 13 Mo. App. 579.

A demand made upon the very person who is treasurer of the town, although not made upon him as treasurer, but as an officer of the town (if made twelve days before the levy of the execution), for payment of the execution, is sufficient. Walter *v.* Denison, 24 Vt. 551.

79. Shackelford *v.* Apperson, 6 Gratt. (Va.) 451.

80. Savage *v.* Kelly, 11 Phila. (Pa.) 525.

81. Triveley *v.* Krouse, 2 C. Pl. (Pa.) 254.

Where a judgment was by its terms to be released on performance of a certain act by defendant, leave of court is not necessary to the issue of an execution, if the act has not been performed within a reasonable time. Miller *v.* Milford, 2 Serg. & R. (Pa.) 35.

82. Young *v.* Davis, 1 T. B. Mon. (Ky.) 152.

83. Wilburn *v.* Hall, 17 Mo. 471.

84. Reading *v.* Den, 6 N. J. L. 186.

85. Chambers *v.* Harger, 18 Pa. St. 15. See also Cochran *v.* Elliott, 17 Pa. Co. Ct. 79.

86. In North Carolina where the vitality of the judgment had not been preserved by successive issues at intervals of three years and where the judgment was more than ten years old and the creditor issued a notice of motion to issue execution and the clerk made no order to that effect but issued the execution, a sale thereunder was void. Lytle *v.* Lytle, 94 N. C. 683.

In West Virginia an execution may be quashed which is issued after two years from rendition of judgment without an order of court. State *v.* Brookover, 38 W. Va. 141, 18 S. E. 476, under W. Va. Code, c. 139, § 10. See *infra*, VIII, B, 2, e, (II).

sometimes merely voidable, and not void, in the discretion of the court from which it issued.[87]

(2) After Lapse of Time. It is not unusual to have a statutory provision requiring leave of court to issue execution after the lapse of a certain period of time from the rendition of the judgment.[88] Some jurisdictions, however, have a period within which execution may issue as of course, which period cannot be extended by leave of court.[89] Under this rule a motion for leave to issue within the required time, to which motion the attention of the court was not called until after the statutory period had run, has been denied on the ground that it was the business of plaintiff to see that the motion was called to the attention of the court and acted upon within the statutory period.[90] In those jurisdictions where leave of court is required for issuance after a certain period from the rendition of the judgment, leave of court will not be granted where the period of limitation of the life of the judgment has run.[91] The fact that plaintiff has brought an action on his judgment and recovered a new judgment thereon does not prevent his obtaining leave to issue execution on a dormant judgment.[92] The exercise of the court's discretion in denying or giving leave for issuance of execution is not generally reviewable;[93] at least the action of the court will not be reversed unless there was an abuse of discretion.[94] If an execution, first issued more than five years after the judgment without leave of court, would have been

Execution issued without leave of the surrogate, as required by N. Y. Laws (1850), c. 295, against the property of a deceased judgment debtor, is void and the purchaser at the execution sale takes no title. Beard *v.* Sinnott, 38 N. Y. Super. Ct. 536.

87. An execution issued after five years from rendition of judgment (Genesee Bank *v.* Spencer, 18 N. Y. 150; Wooster *v.* Wuterich, 2 Abb. N. Cas. (N. Y.) 206; Winebrener *v.* Johnson, 7 Abb. Pr. N. S. (N. Y.) 202), after three years (Lawrence *v.* Grambling, 13 S. C. 120 [*following* Ingram *v.* Belk, 2 Strobh. (S. C.) 207, 47 Am. Dec. 591, where execution issued without scire facias was held merely voidable, not void]), or after ten years (Jones *v.* Davis, 22 Wis. 421), the statutory period prescribed within which it may issue after rendition of judgment, has been held to be voidable, not void.

88. In California see Solomon *v.* Maguire, 29 Cal. 227, construing Pr. Act, § 214. See also Cal. Code Civ. Proc. § 685.

In Minnesota see Entrop *v.* Williams, 11 Minn. 276, construing Laws (1862), c. 27, and Comp. St. c. 61, § 85.

In Missouri see Bolton *v.* Landsdown, 21 Mo. 399, construing Pr. Act (1849), art. 8, § 2.

In New York Code Civ. Proc. § 1377, requires leave of court for the issuance of an execution five years after judgment rendered. This section is a reënactment of Code Proc. § 284, which had been held to apply only where the parties were living. Marine Bank *v.* Van Brunt, 11 Hun 379; Jay *v.* Martine, 2 Duer 654; Ireland *v.* Litchfield, 22 How. Pr. 178. For provision as to issuing execution after death see Code Civ. Proc. § 1380.

Consent of debtor to issuance after statutory period.— N. Y. Code Proc. § 284, providing that after five years from the rendition of the judgment execution can be obtained only on motion, does not preclude the issue of execution after that time by consent of the judgment debtor. Hulbut *v.* Fuller, 3 Code Rep. (N. Y.) 55.

89. Peters *v.* Vawter, 10 Mont. 201, 25 Pac. 438; Livingston *v.* Paxton, 2 Utah 481.

90. Peters *v.* Vawter, 10 Mont. 201, 25 Pac. 438.

91. Kennedy *v.* Mills, 4 Abb. Pr. (N. Y.) 132. See also, generally, Executors and Administrators.

An administrator may set up the statute of limitation in opposition to a motion for leave to issue execution after ten years from the time the judgment was rendered against his intestate, although executions have been issued at regular intervals of three years and although the intestate, if living, could interpose no objection. Berry *v.* Corpening, 90 N. C. 395, 398 [*citing* Williams *v.* Mullis, 87 N. C. 159; McDonald *v.* Dickson, 85 N. C. 248; Sturges *v.* Crowninshield, 4 Wheat. (U. S.) 122, 4 L. ed. 529], where the court recognized that there was an anomaly in the law which allowed execution to be issued against a defendant so long as he lives, provided the judgment has been properly kept alive, but allowed the administrator to exonerate the estate from liability by setting up the statute. It was said that such a result was the logical sequence from the well-established doctrine that the statute of limitation relates only to the remedy.

Whether period of limitation extended by death.— See Tompkins *v.* Austin, 10 N. Y. St. 339, construing N. Y. Code Civ Proc. § 402.

92. Small *v.* Wheaton, 2 Abb. Pr. (N. Y.) 316.

93. Van Rensselaer *v.* Shafer, 121 N. Y. 712, 25 N. E. 5; Van Rensselaer *v.* Wright, 121 N. Y. 626, 25 N. E. 3.

94. Wheeler *v.* Eldred, 137 Cal. 37, 69 Pac. 619 [*following* Wheeler *v.* Eldred, 121 Cal.

issued upon application, it is not an abuse of the court's discretion to refuse to set aside the execution.[95]

(3) After Death of Party.[96] In New York after the expiration of one year after the death of a party against whom final judgment has been rendered for a sum of money, the judgment may be enforced with like effect as if the judgment debtor were still living, by execution against any property upon which it is a lien; but execution cannot be issued without leave having been obtained both from the court which rendered the judgment and from the surrogate by whom letters of administration or letters testamentary were duly granted.[97] It seems that the application to the court which rendered the judgment need not be preceded by an application to the surrogate. The leave of the surrogate may be obtained at any time.[98] In Kansas, after judgment has been revived against the executors who hold, by the terms of the will, the legal title to the lands belonging to the estate, no resort to the probate court is necessary, either for a classification of plaintiff's demand or for an order for the sale of the property, for execution against such lands as are bound by the lien of the judgment.[99]

(B) *Proceedings to Obtain*—(1) Under Old Practice. Scire facias was the proper proceeding at common law when leave was necessary to issue execution.[1]

28, 50 Pac. 431, 66 Am. St. Rep. 20, where the judgment was in a mortgage foreclosure].

95. Frean *v.* Garrett, 24 Hun (N. Y.) 161.

96. **Death of party** generally see *supra*, VI, C.

97. Kenny *v.* Geoghegan, 9 N. Y. Civ. Proc. 378, under N. Y. Code Civ. Proc. 278, §§ 1380, 1825. But see Columbus Watch Co. *v.* Hodenpyl, 135 N. Y. 430, 32 N. E. 239 [*affirming* 61 Hun 557, 16 N. Y. Suppl. 337], holding that where the interest of a deceased partner in a partnership was continued by will, debts arising subsequent to his death are not within the provision of the statute.

This provision is designed to permit the court where judgment was recovered to pass on the legal rights of the party and to permit the surrogate to pass on the rights of the creditor, in view of the claims of others on the estate. Kenny *v.* Geoghegan, 9 N. Y. Civ. Proc. 378.

Assets insufficient.— Under N. Y. Code Civ. Proc. § 1826, providing that if the assets of an estate, after payment of all expenses and claims entitled to priority as against plaintiff, are not sufficient to pay all debts, legacies, or other claims of the class to which plaintiff's claim belongs, the sum to be collected by execution shall not exceed plaintiff's just proportion of the assets, the surrogate cannot authorize executions to issue on judgments against an executor where the assets are sufficient to pay but a small proportion of the claims of the class to which such judgments belong, and the court is unable to determine the amount for which executions should issue. *In re* Hesdra, 23 N. Y. Suppl. 842, 1 Pow. Surr. (N. Y.) 359.

Under N. Y. Laws (1850), p. 639, permission of the court which rendered the judgment was unnecessary. Wilgus *v.* Bloodgood, 33 How. Pr. 289.

98. See Kerr *v.* Kreuder, 28 Hun (N. Y.) 452, where, however, it appears that leave had been obtained already from the surrogate. *Contra,* Mott's Estate, 1 Tuck. Surr. (N. Y.) 344 [*following* Ballinger *v.* Ford, 21 Barb. (N. Y.) 311; Alden *v.* Clark, 11 How. Pr. (N. Y.) 209]. In *In re* Wallace, 6 Misc. (N. Y.) 397, 26 N. Y. Suppl. 774, 1 Pow. Surr. (N. Y.) 541, it was said that leave should be first obtained in the court in which the execution is to be issued.

When surrogate may order issuance.— By N. Y. Laws (1879), c. 542, N. Y. Code Civ. Proc. § 1380, was amended by the clause providing "where the lien of the judgment was created as prescribed in section twelve hundred and fifty-one of this act, neither the order nor the decree can be made until the expiration of three years after letters testamentary or letters of administration have been duly granted upon the estate of the decedent." Under this clause a surrogate has authority to grant an order after three years from the death of the judgment debtor when he left no personal estate and no letters of administration have ever been issued. *In re* Holmes, 131 N. Y. 567, 30 N. E. 66 [*affirming* 16 N. Y. Suppl. 51]. The above amendment was held not to apply to cases where the judgment debtor died before the date upon which it took effect. Smith *v.* Reid, 19 N. Y. Civ. Proc. 363, 11 N. Y. Suppl. 739.

Property fraudulently conveyed by debtor in lifetime.— N. Y. Code Civ. Proc. § 1380, was amended by Laws (1890), c. 515, to the effect that the section should not apply to real estate conveyed by the judgment debtor during his lifetime in fraud of his creditors. Such amendment applies only where such conveyance has been declared fraudulent by judgment of a court of competent jurisdiction. *In re* Holmes, 131 N. Y. 567, 30 N. E. 66 [*affirming* 16 N. Y. Suppl. 51]; Matter of Holmes, 131 N. Y. 80, 29 N. E. 1003 [*affirming* 59 Hun 369, 13 N. Y. Suppl. 100].

99. Mendenhall *v.* Bunette, 58 Kan. 355, 49 Pac. 93.

1. See *supra*, VI, C; VI, D, 2, a.

Scire facias to show cause why an execution should not be issued may be served on the judgment defendant alone if alive, and if dead, on his executors or administrators; it is not necessary to serve the terre-tenants.[2] The object of the scire facias was merely to give defendant a day in court to show cause.[3]

(2) UNDER MODERN PRACTICE — (a) IN GENERAL. Other forms of proceedings for obtaining execution have been quite generally substituted for the old proceeding by scire facias.[4]

(b) THE APPLICATION. The application for leave to issue execution may be made by the assignee in the name of the judgment creditor unless he objects.[5] The executrix of a deceased person may join with the survivor in an application for leave to issue after five years.[6] The statute may permit the application to be made in vacation when sufficient reason is shown to exist.[7]

(c) REQUISITES OF MOVING PAPERS. The petition to the surrogate should be prop-

Where a judgment is confessed by warrant of attorney, scire facias is unnecessary. Chester Bank *v.* Ralston, 7 Pa. St. 482 (where execution was issued thirteen years after judgment); Reynolds *v.* Lowry, 6 Pa. St. 465.

When judgment by warrant of attorney is on a note payable in instalments creditors may take out execution for the instalments due without a scire facias. Cochran *v.* Elliott, 17 Pa. Co. Ct. 49, holding that the statute 8 & 9 Wm. III does not apply to a judgment confessed upon a warrant of attorney. See also Skidmore *v.* Bradford, 4 Pa. St. 296; Longstreth *v.* Gray, 1 Watts (Pa.) 60. See Kinnersley *v.* Mussen, 5 Taunt. 264, 14 Rev. Rep. 750, 1 E. C. L. 143; Austerbury *v.* Morgan, 2 Taunt. 195.

Old English practice see Gibson *v.* Green, 22 Ind. 422, 425 [*citing* Lowe *v.* Robins, 1 B. & B. 381, 5 E. C. L. 695; 14 Peterdorff 33, 34]; Bagnall *v.* Gray, 2 W. Bl. 1140; Coysgarne *v.* Fly, 2 W. Bl. 995.

Early practice in New York.— See Sacia *v.* Nestle, 13 How. Pr. 572, 575 [*citing* New York Bank *v.* Eden, 17 Johns. 106].

2. Righter *v.* Rittenhouse, 3 Rawle (Pa.) 273. See *infra*, note 21.

3. See Beale *v.* Botetourt, 10 Gratt. (Va.) 278.

Defendant might waive this benefit, and if he had no cause to show, it might be to his interest to waive it, for he would save the costs of the scire facias. Beale *v.* Botetourt, 10 Gratt. (Va.) 278.

4. **In Montana** Code Civ. Proc. § 1890, abolishes the writ of scire facias and provides that "the remedies obtainable in that form may hereafter be obtained by civil action." See Peters *v.* Vawter, 10 Mont. 201, 25 Pac. 438.

In New York scire facias was abolished and proceeding by motion was provided for by the code. See Swift *v.* Flanagan, 12 How. Pr. 438.

In Pennsylvania the practice was strictly conformable to the common law before the act of 1791, and the scire facias was absolutely necessary to make an executor or administrator a party to a judgment. Under the practice which grew up subsequent to that statute the administrator of a plaintiff who died after judgment did not proceed by scire facias to issue execution; the death of plaintiff might be suggested on the record and the administrator could go ahead; if, however, there was any defense available to the defendant, the proceedings might be stayed. Deiser *v.* Sterling, 10 Serg. & R. 119.

In England upon the death of a party plaintiff, his executors may now obtain leave to issue execution on an *ex parte* application. Mercer *v.* Lawrence, 26 Wkly. Rep. 506.

Collection of costs should be by fee bill or action against the party liable. Wickliff *v.* Robinson, 18 Ill. 145. See also Reddick *v.* Cloud, 7 Ill. 670, holding that plaintiff has no right or control over the fee bill against defendant; that that right belongs to the officers. See *supra*, II, H, 3, b.

Notice — Concurrent remedy with scire facias.— Where a defendant dies after judgment, plaintiff, on giving defendant's personal representative three months' notice of the existence of the judgment, may sue out an execution against his lands and tenements. This remedy is concurrent with the common-law proceeding by scire facias. Brown *v.* Parker, 15 Ill. 307.

5. Wilgus *v.* Bloodgood, 33 How. Pr. (N. Y.) 289, holding that the presumption is that plaintiffs have assented to the use of their names in the proceedings, unless it is shown that they objected thereto.

6. *In re* Armstrong, 35 Misc. (N. Y.) 327, 71 N. Y. Suppl. 951 [*distinguishing* Thurston *v.* King, 1 Abb. Pr. (N. Y.) 126].

Replevin bail.— Where a controversy as to the facts upon which the right of a replevin bail to execution rests is likely to arise, there is a manifest propriety in obtaining an order for execution before proceeding to enforce the judgment he has replevied for his own use; but there is no statutory provision requiring such an order to be first obtained. Jones *v.* Rhoads, 74 Ind. 510.

7. Under Miss. Code, § 1751, providing that one year after the death of a judgment debtor execution may be had by leave of court or the judge thereof in vacation "on cause shown" against any property on which such judgment was a lien at the time of the debtor's death, the clause "on cause shown" means that on application to the judge in vacation cause must be shown why execution should issue then, without waiting for the

erly verified.[8] The affidavit need not set forth the judgment or a copy of it;[9] but it must show that the judgment remains wholly or partly unsatisfied.[10] Under a statute which provides that, after the expiration of one year from the death of the party against whom a final judgment for a sum of money has been rendered, execution may issue against any property upon which judgment is a lien; the moving papers should show facts supporting a lien of the judgment. A simple allegation of its existence is insufficient.[11] If execution is to be issued against the real estate of a deceased judgment debtor, the petition to the surrogate should show that the personal property is insufficient to pay the debts.[12] An application by one not plaintiff for leave to issue execution, which avers that applicant owns the judgment, is sufficient without setting out the facts supporting that conclusion.[13] The irregularity caused by the omission to state that the judgment was rendered in the court in which the motion is made is cured by a finding to that effect.[14]

(d) NOTICE[15]— aa. *In General.* Under modern practice a notice frequently performs the office of the scire facias after the death of a party,[16] or after the lapse of a period of time within which execution should issue.[17]

bb. *To Non-Resident.* A sale of land under execution without notice to the judgment debtor who was a non-resident of the county is not necessarily void.[18]

court. Alsop *v.* Cowan, 66 Miss. 451, 6 So. 208.

8. Matter of Howell, 2 Redf. Surr. (N. Y.) 299.

9. Verden *v.* Coleman, 23 Ind. 49.

10. See Reeves *v.* Plough, 46 Ind. 350 [*limiting* Plough *v.* Reeves, 33 Ind. 181] (holding that no execution could issue upon a judgment ten years old unless it were established by the oath of the judgment plaintiff or other satisfactory proof that the judgment or a part thereof remained unpaid); Newcomb *v.* Newcomb, 12 Gray (Mass.) 28 (holding that an execution for the enforcement of alimony under St. (1858) c. 47, would not issue without an affidavit that it was still unpaid); Wadley *v.* Davis, 30 Hun (N. Y.) 570 (where an affidavit which stated "that said judgment is wholly unsatisfied and unpaid and is valid and subsisting" was held sufficient).

11. Alsop *v.* Cowan, 66 Miss. 451, 6 So. 208 (holding that a petition which failed to allege that the judgment was enrolled and became thereby a lien on the land at defendant's death and which showed that a former execution had been quashed was insufficient); Kenny *v.* Geoghegan, 9 N. Y. Civ. Proc. 378.

12. *In re* Bentley, 16 Abb. Pr. (N. Y.) 89, holding that it is good practice to set out a description of the real estate sought to be subjected to the satisfaction of the judgment.

13. Martin *v.* Orr, 96 Ind. 491.

14. Van Devanter *v.* Nixon, 5 Ind. App. 304, 31 N. E. 203.

15. In Louisiana notice of judgment must be served on the party against whom it is rendered before a fieri facias can legally issue. Guidry *v.* Guidry, 16 La. 157; Maignan *v.* Glaise, 3 La. 257 (holding that appellee cannot take execution against appellant until after ten days' notice of judgment, even if appellant had failed to give the security on suspensive appeal necessary to stop execution); State Bank *v.* Seghers, 6 Mart. (La.) 724 (holding that notice was necessary under the act of March 13, 1818, No. 39, which gave banks the right of process on bills and notes).

In Pennsylvania it has been held that execution on a report of referees cannot issue before notice to the adverse party or until the expiration of four days. Barre *v.* Affleck, 2 Yeates 274.

16. Pickett *v.* Hartsock, 15 Ill. 279.

N. Y. Code Civ. Proc. § 1380, provides for the issuance of execution against the estate of a judgment debtor upon leave of court and of the surrogate. No notice need be given of the proposed presentation of a petition to the surrogate for leave to issue execution unless the surrogate so directs. Under section 1381 the surrogate upon presentation of the petition for leave to issue execution must issue citations to all persons interested, unless such persons appear voluntarily. Kerr *v.* Kreuder, 28 Hun 452. *Compare* Chicago Mar. Bank *v.* Van Brunt, 49 N. Y. 160, under Acts (1850), c. 295.

17. Pollard *v.* Pollard, 2 T. B. Mon. (Ky.) 16.

In California under Pr. Act, § 214, notice to the opposite party was not necessary upon application for issue of an execution on judgment over five years old. Bryan *v.* Stidger, 17 Cal. 270.

In Ireland leave will not be given, in the absence of special circumstances, to issue execution more than six years after rendition of judgment except upon notice to the party liable. National Bank *v.* Cullen, [1894] 2 Ir. 683.

18. See Hobein *v.* Murphy, 20 Mo. 447, 64 Am. Dec. 194.

A party who changes his domicile to another county after suit is commenced against him is not entitled to special personal notice of the issuance of execution in the county of the venue before lands are sold under the execution. Buchanan *v.* Atchison, 39 Mo. 503 [*following* Harris *v.* Chouteau, 37 Mo. 165].

cc. *Form.* So long as the notice served is the notice required by law, its form may generally be said to be immaterial.[19]

dd. *Service.* The proper person to serve a notice,[20] the proper parties to be served,[21] or whether the service should be personal or constructive[22] are questions to be determined in a large measure by the practice in the different jurisdictions.

(e) Appearance, Defense, and Pleading by Judgment Debtor. Under a former practice in some of the states defendant might appear and, in answer to a motion for leave to issue execution upon a dormant judgment, might plead payment in satisfaction of the judgment.[23] Although a statute which regulates the practice neither contemplates nor requires the use of pleadings on the hearing, yet the fact that the lower court determined the question on pleadings is not a ground for error.[24] The validity of the judgment and the proceedings leading up to it cannot be questioned.[25] The sole question as to the judgment is, whether it had been satisfied or not.[26] If the party against whom it is moved to have execution

No notice to defendant in an execution based on a justice's transcript is necessary where defendant does not reside in the county when the process issued. McAnaw *v.* Matthis, 129 Mo. 142, 31 S. W. 344 [*following* Huhn *v.* Lang, 122 Mo. 600, 27 S. W. 345], construing Mo. Rev. St. (1889) § 6287.

Notice to non-residents is given by the clerk of the court on sufficient affidavit and need not be signed by a party in interest. Fitch *v.* Gray, 162 Ill. 337, 44 N. E. 726.

Affidavit for notice of publication.— Under Ill. Rev. St. c. 77, § 39, providing for a stay of twelve months after the death of a judgment debtor and for giving "at least three months' notice of the existence of such judgment before issuing execution" to the representatives or heirs in writing if within the state, otherwise by publication in accordance with chapter 22, sections 12, 13, which provides for service on non-resident defendants by publication, on affidavit of complainant that defendant resides without the state, such affidavit may be made on information and belief. Fitch *v.* Gray, 162 Ill. 337, 44 N. E. 726.

19. Nash *v.* Johnson, 9 Rob. (La.) 8; McDonough *v.* Fost, 1 Rob. (La.) 295.

Form of notice see Simpson *v.* Wilson, 16 Ind. 428.

It is not necessary to state the time when the execution will be issued; and hence it is immaterial that the execution is not issued on the day stated in the notice. Fitch *v.* Gray, 162 Ill. 337, 44 N. E. 726.

The notice may be made out by the clerk of the court, and need not be signed by the sheriff, although it may be served by him. Nash *v.* Johnson, 9 Rob. (La.) 8.

20. Nash *v.* Johnson, 9 Rob. (La.) 8, by the sheriff under La. Code Pr. art. 735.

21. **The terre-tenants** named in a petition to have execution against the lands of a decedent should have notice of the petition. Elliott *v.* Moore, 5 Blackf. (Ind.) 270. *Compare* Ketcham *v.* Madison, etc., Co., 20 Ind. 260. See *supra*, note 2.

22. Wilson *v.* Lowmaster, 181 Ill. 170, 54 N. E. 922 (personal service); Gibson *v.* Green, 22 Ind. 422 (constructive service).

For seizure of incorporeal rights under a writ of fieri facias, unlike cases of attachment, notification to the debtor of the credits is sufficient. McDonald *v.* Mechanics', etc., Ins. Co., 32 La. Ann. 594.

In Louisiana, the service of a copy of a judgment on defendant's bail is not legal service on defendant and will not authorize execution against him. Frisby *v.* Sheridan, 3 Mart. N. S. 242.

23. Reeves *v.* Plough, 46 Ind. 350 [*limiting* Plough *v.* Reeves, 33 Ind. 181].

24. Van Devanter *v.* Nixon, 5 Ind. App. 304, 21 N. E. 203.

Plea to scire facias.— Under the old practice defendant could plead to a scire facias. See Sacia *v.* Nestle, 13 How. Pr. (N. Y.) 572. On a scire facias to obtain execution, a plea that defendant was a householder, etc., and that the property was exempt from execution must aver that defendant was a resident householder. For residents only are entitled to the privilege of the statute. A plea that no execution was issued, and that defendant was ready and willing at the time of the judgment, and was still ready and willing to surrender sufficient property to pay the debt and costs is good. Hoagland *v.* Roe, 8 Ind. 275.

25. Matter of Armstrong, 35 Misc. (N. Y.) 327, 71 N. Y. Suppl. 951 (holding that a debtor cannot be permitted to show that no summons was ever served upon him); Glacius *v.* Fogel, 4 Redf. Surr. (N. Y.) 516.

26. Lee *v.* Watkins, 13 How. Pr. (N. Y.) 178, 3 Abb. Pr. (N. Y.) 243.

The effect the execution may have on real property sold by the debtor before his discharge in insolvency was declared invalid will not be inquired into. Small *v.* Wheaton, 4 E. D. Smith (N. Y.) 427, 2 Abb. Pr. (N. Y.) 316.

Execution cannot issue unless it be established by the oath of the judgment plaintiff, or other satisfactory evidence that the judgment or part thereof remains unpaid. Reeves *v.* Plough, 46 Ind. 350; Van Voorhis *v.* Kelly, 65 How. Pr. (N. Y.) 300 [*following* Field *v.* Paulding, 3 Abb. Pr. (N. Y.) 139].

The ex parte affidavit of plaintiff is not proper proof of the non-payment of the judgment; the party should be sworn on the hearing. Simpson *v.* Wilson, 16 Ind. 428.

issue shows that he is the owner of a judgment against the movant, the court may require the former to make a motion to set off his judgment against the one upon which execution is sought.[27]

(III) *THE ORDER TO ISSUE.* While the order to issue, or granting leave to issue, execution must conform to the usual requirements of a valid order,[28] no technical form of order seems to be necessary.[29] Under certain circumstances the order may be in the alternative,[30] or it may leave to the clerk the duty of reckoning the amount from the record from which the execution may issue.[31] Upon plaintiff's motion for issuance of execution, it is proper for the court of its own motion to issue an order to defendant to show cause why the motion should not be granted.[32]

d. Issuance — (I) *IN GENERAL.* An execution cannot be considered as being issued until it is placed where it might have been executed and some efficient act done under it.[33]

(II) *DELIVERY TO OFFICER* — (A) *In General.* It is generally held[34] that a writ is not issued until it has been delivered to the officer who is to execute it.[35]

On an appeal from the decision the usual rule that the court will not look into evidence on which a fact was found in the court below, unless the same is incorporated in a statement or bill of exceptions and an exception properly taken to its admissibility when offered applies. Ladd *v.* Higley, 5 Oreg. 296.

27. Betts *v.* Garr, 26 N. Y. 383 [*reversing* 1 Hilt. 411], holding, however, that if the movant, in applying for his execution, has complied with the requirements of the code, the court cannot, upon mere proof of the existence of the judgment against the movant, deny his application for execution.

28. See, generally, ORDERS.

A minute on the docket, "issue execution," should not be considered an order of the court. Badham *v.* Jones, 64 N. C. 655.

Presumption of validity.— See Knox *v.* Randall, 24 Minn. 479.

29. A statement of reasons need not be set out in an order of seizure and sale. Garrish *v.* Hyman, 29 La. Ann. 28.

The indorsement of the judge's fiat on the petition for an order of seizure and sale, to which an authentic act importing the confession of judgment is attached as a part thereof, constitutes a valid order. Riley *v.* Christie, 13 La. Ann. 256.

Clerical error.— The fact that the one to whom the case has been referred in the capacity of master to assess damages, etc., was designated as "assessor" does not invalidate an order for execution. Fisk *v.* Gray, 100 Mass. 191.

30. Crouse *v.* Wheeler, 33 How. Pr. (N. Y.) 337, an order requiring the application of property to the payment of a judgment, the alternative being that defendant pay over or that an attachment issue.

31. Where a balance was due on a decree in favor of plaintiff, an order directing the clerk to issue execution to satisfy such decree as to the right, title, claim, and demand of such plaintiff is proper, although it leaves to the clerk the duty of reckoning the amount from the record. Aspen Min.. etc., Co. *v.* Wood, 84 Fed. 48, 28 C. C. A. 276.

32. McAuliffe *v.* Coughlin, 105 Cal. 268, 38 Pac. 730.

33. Mauch Chunk First Nat. Bank *v.* Dwight, 83 Mich. 189, 47 N. W. 111.

34. In North Carolina it has been said: "It is settled by the decisions of this Court, that a writ, or execution is not issued until the clerk hands it to the sheriff, or to the party, or his agent." State *v.* McLeod, 50 N. C. 318, 321, construing Rev. Code, c. 45, § 29.

In South Carolina under the old practice process was generally signed by the attorney and tested by the clerk by signing his name and affixing his seal in the margin. That was "issuing" the process. Bragg *v.* Thompson, 19 S. C. 572, 578.

35. Peterson *v.* Carpenter, 108 Mich. 608, 66 N. W. 487; Mauch Chunk First Nat. Bank *v.* Dwight, 83 Mich. 189, 47 N. W. 111; Burton *v.* Deleplain, 25 Mo. App. 376, 379 [*citing* Angell Lim. § 312; Webster Dict.] (holding that an execution taken out of the clerk's office, but not received by the sheriff until nearly a month after the expiration of the statute of limitations, was not "issued" within the required period of the statute); Kelley *v.* Vincent, 8 Ohio St. 415 (holding that taking a writ of execution from the clerk's office by the judgment creditor and returning the same to the clerk without delivery to the sheriff is not "suing out" an execution so that the judgment will be prevented from becoming dormant).

The word "issued" means that an execution is to be made out, properly attested by the clerk and delivered to the sheriff to be executed by him. Pease *v.* Richie, 132 Ill. 638, 24 N. E. 433, 8 L. R. A. 566.

Instructions or directions to officer at time of delivery.— A delivery with instructions to do nothing is no delivery. Cook *v.* Wood, 16 N. J. L. 254. But *compare* Koren *v.* Roemheld, 6 Ill. App. 275. The fact that plaintiff, after delivery to the sheriff and his indorsement of the time of receipt of the writ, directed a levy on a part only of the execution debtor's property does not prevent a subsequent levy under the same writ on other

Leaving the writ at the sheriff's office is a good delivery to him,[36] but leaving it at the sheriff's residence in his absence is not a delivery to him.[37] Delivery to the deputy is equivalent in law to a delivery to the sheriff himself.[38]

(B) *Evidence of Delivery.* A sheriff's indorsement on an execution of the hour of leaving it is conclusive that the writ was in his hands at that time.[39] In the absence of an indorsement by the sheriff of the time the execution was received, parol evidence is admissible to show the actual day of the sheriff's receipt of it.[40]

(III) *Recording of Writ.* In some jurisdictions the writ must be recorded[41] or indexed[42] before it can be executed against real estate.

E. Alias, Pluries, and Renewed Writs[43] — **1. Definition of Alias and Pluries.** The writ which follows the original fieri facias was called at common law an alias fieri facias; writs which followed the alias were called pluries fieri facias.[44]

2. Renewed and Reëstablished Writs. A renewed execution is not a different

property of the execution debtor. Moses *v.* Thomas, 26 N. J. L. 124 [*affirmed* in 26 N. L. J. 570].

Effect.— The delivery of an execution to the sheriff gives him no right to or interest in the goods and chattels until a levy is made. Hathaway *v.* Howell, 54 N. Y. 97. See *infra*, VII, B, 11.

36. Miflin *v.* Will, 2 Yeates (Pa.) 177.

37. Grassmeyer's Appeal, 4 Pennyp. (Pa.) 288.

Leaving the writ at a butcher shop kept by a deputy sheriff who was absent therefrom at the time is not a good delivery to the sheriff. Burrell *v.* Hollands, 78 Hun (N. Y.) 583, 29 N. Y. Suppl. 515.

The setting apart of a pigeon-hole in the prothonotary's office for the use of the sheriff is a mere matter of convenience and the putting of a writ therein is not delivery to him. Person's Appeal, 78 Pa. St. 145.

38. Ferguson *v.* Williams, 3 B. Mon. (Ky.) 302, 39 Am. Dec. 466; Million *v.* Com., 1 B. Mon. (Ky.) 310, 36 Am. Dec. 580; Humphreys *v.* Cobb, 22 Me. 380. See Burrell *v.* Hollands, 78 Hun (N. Y.) 583, 29 N. Y. Suppl. 515.

39. Williams *v.* Lowndes, 1 Hall (N. Y.) 579; Person's Appeal, 78 Pa. St. 145. See *supra*, VI, D, 2, b, (XIV).

40. Hale's Appeal, 44 Pa. St. 438.

Presumption as to date.— Unless the contrary appear it will be presumed that the writ was delivered to the sheriff on the day the levy was made. Storey *v.* Agnew, 2 Ill. App. 353.

Presumption of delivery and issuance.—The facts that a sheriff advertised property, had it appraised, sold it, executed a certificate of purchase, returned the order of sale with proper receipts for the proceeds of sale, and executed a deed are sufficient to show that the execution had properly issued, and was in the hands of the officer when he made the sale, although there was no finding in direct language in the verdict that an order of sale properly issued was in the sheriff's hands. Peters *v.* Banta, 120 Ind. 416, 22 N. E. 95.

Presumption of continuance in hands of sheriff.— Where an execution issued by the clerk passes in due course from him to the sheriff, it will be presumed to have remained in the sheriff's hands during his continuance in office unless shown to have been returned or delivered to plaintiff or to some other person within that period. Anderson *v.* Blythe, 54 Ga. 507.

41. Vanderveere *v.* Gaston, 24 N. J. L. 818, 821.

The recording of an execution against real estate, before it is delivered to the sheriff, is essentially requisite to give validity to the execution under the statute. Elmer *v.* Burgin, 2 N. J. L. 186.

A memorandum by the clerk of the style of the action, names of parties, and amount to be raised, leaving a blank to be filled afterward, is not a recording and gives no authority to levy or sell. Vanderveere *v.* Gaston, 24 N. J. L. 818; Voorhees *v.* Chaffers, 24 N. J. L. 507.

A tax fieri facias transferred, but not recorded within thirty days, cannot be enforced by the transferee as a lien on defendant's property. Hoyt *v.* Byron, 66 Ga. 351.

Place of record.— Where under the statute it was necessary that an execution for the sale of land be recorded in the office whence it issued, an execution issued on a judgment of the county court, but recorded in the office of the town-clerk, cannot be received as evidence of title. Barney *v.* Cuttler, 1 Root (Conn.) 489.

42. Ross' Appeal, 106 Pa. St. 82, construing the Pennsylvania act of April 22, 1856, as to execution levied on real estate and holding that a docketing is not an indexing within the meaning of the act.

43. **Execution against the person** see *infra*, XIV.

Simultaneous executions see *supra*, II, F.

Successive executions see *supra*, II, G.

44. See Swift *v.* Flanagan, 12 How. Pr. (N. Y.) 438. See also 2 Cyc. 79.

"Alias pluries writ" is the name sometimes given to the writ issued subsequent to the first pluries writ. See Clark *v.* Kirksey, 54 Ala. 219.

The second writ used to run as follows: "We command you as we have before [sicut alias] commanded you, etc." The writ which originally ran in Latin took its name from this phrase sicut alias. Bouvier L. Dict.

one from the original but derives its efficacy, not from the mere change of its date, but from the original signature of the clerk.[45] If an execution has been lost or destroyed and the fact is properly shown, plaintiff may reëstablish his writ in lieu of the lost original;[46] and the writ thus reëstablished is not an alias.[47] The new copy is made out *nunc pro tunc*.[48]

3. Right to Alias, Pluries, or Renewed Writs[49] — a. In General. If satisfaction[50] is not obtained by the original, the party interested has the right to an alias and a pluries until satisfaction is obtained.[51] If an execution is directed to be levied for less than the sum to which plaintiff is entitled, another execution cannot be issued for the balance.[52] Where an execution is discharged[53] or satisfied[54] by mistake or accident, the creditor is entitled to an alias. An alias execution may issue, although the record of the judgment has been lost.[55] Neither the forfeiture of a claim bond[56] nor the beginning of supplementary proceedings[57] affects plaintiff's right to have an alias. A creditor whose execution is enjoined for failure to credit a partial payment is not entitled to an alias writ, but his remedy

In the case of a pluries the writ ran "we command you, as we have often (pluries) commanded you before." Bouvier L. Dict.

45. A renewed execution is distinguished from an alias in that the latter is another and different execution actually issued at a different time after the original has been returned into court or has for some cause become legally extinguished as a writ. Roberts *v.* Church, 17 Conn. 142.

46. Morrison *v.* Taylor, (Del. 1903) 55 Atl. 335 (where the purchaser of land under a sale on a levari facias showed that the writ had been lost and that the deed had been delivered to him on payment for the land, and where a substitute writ was issued and returned by the sheriff showing the sale); Kellogg *v.* Buckler, 17 Ga. 187; Rushin *v.* Shields, 11 Ga. 636, 56 Am. Dec. 436; White *v.* Lovejoy, 3 Johns. (N. Y.) 448. See also Hart *v.* Smith, 17 Fla. 767; Cooper *v.* Huff, 55 Ga. 119.

Establishment of lost instrument generally see Lost Instruments.

Notice of motion to reëstablish or to obtain a new writ see *infra*, VI, E, 6, a, (II).

47. Kellogg *v.* Buckler, 17 Ga. 187; Rushin *v.* Shields, 11 Ga. 636, 56 Am. Dec. 436.

48. White *v.* Lovejoy, 3 Johns. (N. Y.) 448 (where a fieri facias after it had been levied was burned by accident in the house of the deputy sheriff); Clark *v.* Field, 1 Miles (Pa.) 244.

49. Right to an alias upon a decree in equity for a sum of money see *infra*, VI, E, 6, c.

50. After judgment debtor has been committed on an alias a pluries issued is void. King *v.* Goodwin, 16 Mass. 63.

51. Steele *v.* Thompson, 62 Ala. 323. See also Locke *v.* Brady, 30 Miss. 21.

Elegit.— After the return of a fieri facias sued out on a judgment or decree, in part satisfied, the creditor may sue out another form of execution, as an elegit, without pursuing the fieri facias to a *nihil*. Coleman *v.* Cocke, 6 Rand. (Va.) 618, 18 Am. Dec. 757.

A writ returned by the sheriff after an injunction and before seizure does not lose its efficacy, and after the dissolution of the injunction the sheriff may proceed under it, no alias writ of seizure and sale being necessary. Stackhouse *v.* Zuntz, 41 La. Ann. 415, 6 So. 666.

Pending a rule to set aside a second pluries, which has been returned by order of the court, a third writ may be issued. Bole *v.* Bogardis, 86 Pa. St. 37.

52. People *v.* Onondaga C. Pl. Ct., 3 Wend. (N. Y.) 331. But see People *v.* Judges Chautauqua C. Pl., 1 Wend. (N. Y.) 73.

If plaintiff omits the direction to collect interest on the judgment, he cannot subsequently have an alias for the interest. Todd *v.* Botchford, 86 N. Y. 517, under N. Y. Civ. Proc. § 1368.

Where, on account of a sum having been credited by mutual agreement on a mortgage held by plaintiff against defendant, an execution was not issued for the full amount, and where it was held subsequently on foreclosure proceedings that the amount so credited was not secured thereby, it was held that plaintiff was entitled to an alias and if an order of the court was necessary the court should make such order. Sheboygan Bank *v.* Trilling, 75 Wis. 163, 43 N. W. 830.

The proper way to correct the error when an execution was issued for an amount less than that to which plaintiff is entitled and has been returned satisfied is to quash the execution, not to issue an alias. Browns *v.* Julian, 5 J. J. Marsh. (Ky.) 312.

53. Langdon *v.* Langdon, 1 Root (Conn.) 453.

54. Langdon *v.* Langdon, 1 Root (Conn.) 453; Pillsbury *v.* Smyth, 25 Me. 427; Hutchins *v.* Carver County Com'rs, 16 Minn. 13, holding that the district court has in the interest of justice power to vacate an execution under which an invalid sale of real estate is made and the proceedings thereon, and to order the issuance of an alias even though the original execution has been returned satisfied.

55. Childress *v.* Marks, 2 Baxt. (Tenn.) 12, 14 [*citing* Faust *v.* Echols, 4 Coldw. (Tenn.) 397, where, however, the execution issued was not an alias].

56. Patton *v.* Hamner, 33 Ala. 307.

57. Smith *v.* Mahony, 3 Daly (N. Y.) 285.

is to have the injunction dissolved for the balance due.[58] Since the right at common law of issuing an alias execution is unquestionable, the right still exists if statutes do not assume to take it away.[59] Where by statute the party or his attorney of record has the right to issue execution, an alias issued by the clerk without authority from the execution plaintiff is an irregularity but does not render the writ so issued void.[60] The rule that plaintiff is entitled to a special execution only in cases expressly allowed by statute[61] applies to alias executions.[62] The right to an alias may be waived;[63] but if the creditor has granted an indulgence to defendant upon the original execution, there is no presumption that the indulgence is extended to alias execution after its issue.[64]

b. Return or Execution of Former Writ — (i) *Return.* An alias execution should not be issued until a previous one has been returned.[65] An improper return will not prevent the issuance of an alias.[66] In the absence of evidence to

58. Salter *v.* McHenry, 17 La. 507.

59. Walter *v.* Greenwood, 29 Minn. 87, 12 N. W. 145. *Compare* Brooks *v.* Hardwick, 5 La. Ann. 675, issuance of second execution for the amount of costs in issuing the first. See also *infra*, VI, E, 6, c.

Attachment instead of alias by court in another county under Md. Code, art. 18, § 5, see Griffith *v.* Lynch, 21 Md. 575.

Where a statute provides for the renewal of writs, the fact that it is silent on the subject of the issuing of alias writs cannot be construed to change the law and take away the power of the clerk to issue an alias. Yetzer *v.* Young, 3 S. D. 263, 270, 52 N. W. 1054.

60. Johnson *v.* Murray, 112 Ind. 154, 13 N. E. 273, 2 Am. St. Rep. 174.

61. See *supra*, VI, D, 2, b, (II).

62. Keeley Brewing Co. *v.* Carr, 198 Ill. 492, 64 N. E. 1030 [*affirming* 94 Ill. App. 225].

The special fieri facias clause in the writs of venditioni exponas has not the force and effect of an alias fieri facias, but is dependent upon the result of the sale under the venditioni exponas, to which it is annexed. If such sale is insufficient to satisfy the debt, then for the first time the fieri facias becomes operative. Dunn *v.* Nichols, 63 N. C. 107. In Allemong *v.* Allison, 8 N. C. 325, 328, it was held that a special writ of fieri facias which the sheriff levied, together with a venditioni exponas, which special writ was afterward issued on the same judgment, was a "mere blank and perfectly deaf until life and activity was given to it" by the execution of the venditioni exponas.

63. Harrison *v.* Soles, 6 Pa. St. 393.

64. Isler *v.* Moore, 67 N. C. 74.

65. *Iowa.*— Merritt *v.* Grover, 57 Iowa 493, 10 N. W. 879.

Louisiana.— State *v.* Judge St. Tammany Probate Ct., 3 Rob. 355; Mackey *v.* Presbyterian Church, 3 Mart. N. S. 390.

Maryland.— Waters *v.* Caton, 1 Harr. & M. 407.

New York.— Cumpston *v.* Field, 3 Wend. 382 [*explaining* Jackson *v.* Stiles, 9 Johns. 391, where a second habere facias possessionem was allowed on special application]; Cairns *v.* Smith, 8 Johns. 337 [*citing* Gilbert Ex. 24; 2 Tidd Pr. 934].

Ohio.— Harland *v.* Newcombe, 2 Ohio Cir. Ct. 330, 1 Ohio Cir. Dec. 514.

Pennsylvania.— Coleman *v.* Mansfield, 1 Miles 56; Gibbs *v.* Atkinson, 1 Pa. L. J. Rep. 476, 3 Pa. L. J. 139.

South Carolina.— Jenkins *v.* Mayrant, 3 McCord 560.

Tennessee.— See Wiseman *v.* Bean, 2 Heisk. 390.

Virginia.— Sutton *v.* Marye, 81 Va. 329, where there was no return that the fieri facias was not executed, such as is required by the statute to authorize the issue of a new execution. But *compare* Windrum *v.* Parker, 2 Leigh 361, where it was said that if an execution has not been executed or returned, a new execution may be sued out; but if an execution has been executed, although not returned, other executions cannot be sued out.

United States.— See Corning *v.* Burdick, 6 Fed. Cas. No. 3,246, 4 McLean 133 [*citing* Archbold Pr. 436; Graham Pr. 351], holding that an alias execution cannot issue until the return of the first, unless the first be shown to have been lost or destroyed.

England.— Oviat *v.* Vyner, 1 Salk. 318.

See 21 Cent. Dig. tit. "Execution," § 197.

Defendant is estopped to object that the execution was never returned to the clerk, if an execution is renewed without objection. Bull *v.* Rowe, 13 S. C. 355, opinion of the court by McGowan, A. J.

The return of the marshal covering the date of the receipt and the levy of the prior writs duly indorsed upon the alias writs and certified to by the clerk of the court under his hand and seal is sufficient to show the issue of the prior writs in the absence of any objection that the writs themselves should be produced. Beebe *v.* U. S., 161 U. S. 104, 16 S. Ct. 532, 40 L. ed. 636.

Where plaintiff upon inquiry was informed that the first fieri facias was returned nulla bona, he was justified in issuing an alias, especially as the return was actually indorsed on the original fieri facias, although the fieri facias was not in fact returned to the prothonotary's office until the following day. Supplee *v.* Ashby, 8 Wkly. Notes Cas. (Pa.) 407.

66. Aycock *v.* Harrison, 63 N. C. 145. See also McKeagg *v.* Collehan, 13 Ala. 828.

the contrary it will be presumed that alias writs were preceded by others regularly issued,[67] and that the alias was not issued until the return of the prior writ.[68] Nevertheless it has been held that, although it is irregular to issue an alias before return of the former execution, such irregularity does not render the alias writ void.[69]

(II) *Disposition of Levy*—(A) *Where Levy Sufficient.* Where sufficient property has been levied upon under the first writ no other can issue until such levy is disposed of[70] or released.[71] This rule has been considered necessary to prevent abuse and oppression.[72] The proper writ to dispose of a levy is a venditioni exponas, not an alias.[73] Until the levy is disposed of by a sale of the property or a return of it to the debtor, a satisfaction of the judgment is presumed;[74] but this is only presumption,[75] and has been held not to apply to a levy upon real estate.[76] If execution is levied on the property of the debtor, it is held, although

67. Beebe *v.* U. S., 161 U. S. 104, 16 S. Ct. 532, 40 L. ed. 636. In Corning *v.* Burdick, 6 Fed. Cas. No. 3,246, 4 McLean 133, the return of the marshal that he had made the levy on the property, sold it for a certain sum, thereby showing a balance left on the judgment unsatisfied, and that there was no other personal property out of which he could make the residue, was held conclusive upon application by plaintiff for an alias fieri facias.

68. Douglass *v.* Owens, 5 Rich. (S. C.) 534. See also Gruner *v.* Westin, 66 Tex. 209, 18 S. W. 512; Laughter *v.* Seela, 59 Tex. 177.

69. Miller *v.* Hanley, 94 Mich. 253, 53 N. W. 962; Stace *v.* Page, 1 Speers (S. C.) 408, 40 Am. Dec. 608. See Slater *v.* Lamb, 150 Mass. 239, 22 N. E. 892. And see Johnson *v.* Huntington, 13 Conn. 47; Martin *v.* McBride, 2 Phila. (Pa.) 343.

70. *Delaware.*— Fiddeman *v.* Biddle, 1 Harr. 500.

Illinois.— Babcock *v.* McCamant, 53 Ill. 214.

Indiana.— McIver *v.* Ballard, 96 Ind. 76 (holding that the levy should be quashed); Macy *v.* Hollingsworth, 7 Blackf. 349.

Iowa.— McWilliams *v.* Myers, 10 Iowa 325.

Kentucky.— Hopkins *v.* Chambers, 7 T. B. Mon. 257.

Michigan.— Friyer *v.* McNaughton, 110 Mich. 22, 67 N. W. 978.

Mississippi.— McGehe *v.* Handley, 5 How. 625.

New York.— Cairns *v.* Smith, 8 Johns. 337.

Ohio.— Cutler *v.* Brinker, Tapp. 343; Sturgeon *v.* Mason, 8 Ohio Cir. Ct. 118, 4 Ohio Cir. Dec. 353.

Pennsylvania.— Gray *v.* Krugerman, 4 Pa. Co. Ct. 290. See also McCullough *v.* Guetner, 1 Binn. 214.

71. See Hopkins *v.* Chambers, 7 T. B. Mon. (Ky.) 257; Scott *v.* Hill, 6 N. C. 143.

72. Cairns *v.* Smith, 8 Johns. (N. Y.) 337, 338 [*citing* 2 Tidd K. B. Pr. 912].

Pending interpleader or appeal.— An alias fieri facias issued pending a claim under the sheriff's interpleader act after the first fieri facias will be set aside. Burns *v.* Toner, 9 Phila. (Pa.) 37. See also Shier *v.* Hettle, 1 Wkly. Notes Cas. (Pa.) 6. So where an appeal from the judgment quashing the levy and return of an execution is pending in the supreme court, no other execution can legally issue. But after such judgment is affirmed plaintiff in execution may take out an alias. Bryan *v.* Bridge, 10 Tex. 149.

73. Babcock *v.* McCamant, 53 Ill. 214 (the court saying that the venditioni exponas may have a fieri facias clause if desired); Macy *v.* Hollingsworth, 7 Blackf. (Ind.) 349; Cutler *v.* Brinker, Tapp. (Ohio) 343; Gray *v.* Krugerman, 4 Pa. Co. Ct. 290.

The issue of an alias instead of a venditioni exponas, where the levy remained undisposed of, is at most a mere irregularity, and must be taken advantage of in time. Kerr *v.* South Park Com'rs, 14 Fed. Cas. No. 7,733, 8 Biss. 276.

74. Bryan *v.* Bridge, 10 Tex. 149. See Ambrose *v.* Weed, 11 Ill. 488; Corning *v.* Burdick, 6 Fed. Cas. No. 3,246, 4 McLean 133.

This presumption does not arise from a mere levy, but from proof that the property levied upon is sufficient to satisfy the execution. Lindley *v.* Kelley, 42 Ind. 294.

75. Peck *v.* Tiffany, 2 N. Y. 451, 456 [*citing* Voorhees *v.* Gros, 3 How. Pr. (N. Y.) 262; Ostrander *v.* Walter, 2 Hill (N. Y.) 329; Taylor *v.* Ranney, 4 Hill (N. Y.) 619; Green *v.* Burke, 23 Wend. (N. Y.) 490].

76. Reynolds *v.* Cobb, 15 Nebr. 378, 19 N. W. 502; Hogshead *v.* Carruth, 5 Yerg. (Tenn.) 227, 229 [*distinguishing* Young *v.* Read, 3 Yerg. (Tenn.) 297, which held that a levy on personal property to an amount sufficient to satisfy an execution is a discharge], where the court said: "The sheriff has not possession of the property levied on, has no control over it and it cannot be wasted in his hands so as to injure the debtor. Moreover, after such levy, the sheriff may discover personal property upon which it will become his duty to levy and make the money, before he can lawfully sell the lands." But in Indiana a levy upon real estate of sufficient value to pay the judgment creates a presumption of satisfaction, and there exists no distinction between the effect of a levy upon real estate and that of a levy upon personal property. Lindley *v.* Kelley, 42 Ind. 294. See also Ladd *v.* Blunt, 4 Mass. 402; Shepard *v.* Rowe, 14 Wend. (N. Y.) 260.

not universally,[77] that a replevin bond[78] or a forthcoming bond[79] given by the debtor operates for the time being as a satisfaction of the original judgment and so long as the bond is in force a second execution cannot issue. A levy subsequently relinquished is not a satisfaction, and a second execution may issue.[80] If the property levied upon is lost through the fault of defendant or converted to his own use, there is a sufficient disposition of the levy to authorize the issue of another execution.[81]

(B) *Where Levy Insufficient or Void.* Where the levy is insufficient to satisfy the judgment,[82] or is upon property not belonging to the debtor[83] or upon property not subject to execution,[84] the creditor is entitled to an alias. But it must clearly appear that the property levied upon is not sufficient to pay the judgment,[85] for *prima facie* a valid levy is sufficient.[86]

4. Time of Issuance — a. When May First Issue. An alias fieri facias cannot be regularly issued for the same term to which the original is issued.[87] An alias may issue before the return-day of the original if the original has been returned before the return-day.[88]

b. Limitation — (I) *At Common Law When Continued on the Rolls.* At common law if the original writ of fieri facias was issued within a year and a day[89] of the rendition of the judgment and returned[90] and thence continued regularly upon the records of the court, a new writ of execution might be taken out at any time without reviving the judgment by scire facias.[91] The practice of

77. Burks *v.* Bass, 4 Bibb (Ky.) 338.

78. Taylor *v.* Dundass, 1 Wash. (Va.) 92.

Second writ against another defendant cannot issue while replevin bond given by co-defendant is in force. Taylor *v.* Dundass, 1 Wash. (Va.) 92.

79. Downman *v.* Chinn, 2 Wash. (Va.) 189.

A faulty forthcoming bond while in force is a satisfaction of the judgment, so that a second execution cannot issue till the bond is quashed. See Downman *v.* Chinn, 2 Wash. (Va.) 189.

80. Wright *v.* Young, 6 Oreg. 87. And see Martin *v.* Kilbourne, 11 Vt. 93.

81. Cooley *v.* Harper, 4 Ind. 454. Thus, where goods are removed by defendant by his permission or connivance or delivered to him under a forthcoming bond which he forfeits (Leach *v.* Williams, 8 Ala. 759; Webb *v.* Bumpass, 9 Port. (Ala.) 201, 33 Am. Dec. 310), or where defendant has recovered possession of the goods either with or without the consent of the sheriff (Binford *v.* Alston, 15 N. C. 351; *In re* King, 13 N. C. 341, 21 Am. Dec. 335), a new execution may issue. See also Carns *v.* Pickett, 2 Sneed (Tenn.) 655.

82. Rice *v.* Cook, 75 Me 45; Yetzer *v.* Young, 3 S. D. 263, 52 N. W. 1054.

83. *Maine.*— Soule *v.* Buck, 55 Me. 30. See also Steward *v.* Allen, 5 Me. 103, under St. (1823), c. 210.

Nebraska.— Ziegler *v.* McCormick, 13 Nebr. 25, 13 N. W. 28.

New York.— Adams *v.* Smith, 5 Cow. 280.

Pennsylvania.— Coleman *v.* Mansfield, 1 Miles (Pa.) 56.

United States.— U. S. *v.* Poole, 5 Fed. 412.

See 21 Cent. Dig. tit. "Execution," § 195 *et seq.*

On return of levari facias that it remains unsatisfied for want of title, plaintiff may have a new execution. Peddle *v.* Hollinshead, 9 Serg. & R. (Pa.) 277.

Where an execution creditor refuses to accept seizin of land seized under his writ the original writ should not (under Me. St. (1821), c. 60, § 27) be superseded and a new execution issued, but an alias execution will issue. Darling *v.* Rollins, 18 Me. 405.

84. Watson *v.* Reissig, 24 Ill. 281, 76 Am. Dec. 746.

85. Anderson *v.* Fowler, 8 Ark. 388; Bryan *v.* Bridge, 10 Tex. 149.

86. Bryan *v.* Bridge, 10 Tex. 149.

87. Shaffer *v.* Watkins, 7 Watts & S. (Pa.) 219. See *infra*, VI, E, 5, b.

88. Pennington *v.* Yell, 11 Ark. 212, 52 Am. Dec. 262; Rammel *v.* Watson, 31 N. J. L. 281. Such an execution is at most voidable and not void. Berry *v.* Perry, 81 Ala. 103, 1 So. 118 [*following* Steele *v.* Tutwiler, 68 Ala. 107].

89. **Early in New York** the time for issuing the first writ was extended to two years from the filing of the record. Swift *v.* Flanagan, 12 How. Pr. 438.

90. By the English practice the first execution must be returned in order to warrant the continuances on the roll. Blayer *v.* Baldwin, 2 Wils. C. P. 82. In Pennsylvania this was not necessary. Lewis *v.* Smith, 2 Serg. & R. 142. Nor in New York was it necessary, prior to 1830. See Winebrener *v.* Johnson, 7 Abb. Pr. N. S. 202.

91. Mitchell *v.* Chesnut, 31 Md. 521; Swift *v.* Flanagan, 12 How. Pr. (N. Y.) 438; 2 Tidd Pr. 1104.

If the original did not issue within a year and a day it was irregular to issue a second fieri facias. Gibbs *v.* Atkinson, 1 Pa. L. J. Rep. 476, 3 Pa. L. J. 139, where, on a judgment against several, the original execution was issued against one only and the alias was issued against all.

entering the continuances on the judgment-roll was merely formal, for they might be entered after the writs were issued [92] and after objection had been made.[93] By statute the practice became unnecessary in England [94] and fell into disuse in this country.[95] If the original was sued out within a year after the rendition of the judgment and returned *nulla bona*, it was immaterial that more than a year and a day elapsed between the return of the original and the issuance of the alias.[96] But an alias execution cannot issue after the period of the limitation of the life of the judgment has run.[97]

(II) *Under Modern Statutes.* An analogous rule sometimes prevails under modern regulations as to practice; if the original is sued out within the time limited by statute, the limitation of the statute does not apply to the alias which may issue as of course.[98] By some decisions, however, it is held that the limita-

Under the South Carolina act of 1827 a fieri facias might be renewed without scire facias at any time within three years after expiration of the four years in which it had its active energy. Verdier *v.* Fishburne, 1 Speers 346.

92. Scull *v.* Godbolt, 4 Ala. 326, 327 [*citing* Craig *v.* Johnson, Hard. (Ky.) 520].

93. Swift *v.* Flanagan, 12 How. Pr. (N. Y.) 438; 2 Tidd Pr. 1104.

But if there was a total suspension of final process upon the judgment and no continuances were entered and the period of limitation was allowed to lapse, that is at common law a year and a day from the rendition of the judgment or three years in the state of Maryland, a scire facias was necessary to revive the judgment before further process could be obtained upon it. Mitchell *v.* Chesnut, 31 Md. 521, 525 [*quoting* Mullikin *v.* Duvall, 7 Gill & J. (Md.) 355].

"It appears, too, that this practice crept upon the English courts unawares, and upon its being first mentioned to them, they were inclined to disregard it, perceiving that its effect was to render a scire facias almost useless; but upon receiving information from their prothonotaries, that the practice was of considerable standing, they thought it best, upon the whole, to support it." Lewis *v.* Smith, 2 Serg. & R. (Pa.) 142, 156.

94. Harmer *v.* Johnson, 3 D. & L. 38, 14 L. J. Exch. 292, 14 M. & W. 336, construing 2 Wm. IV, c. 39, and 3 & 4 Wm. IV, c. 67.

95. For example see Lampsett *v.* Whitney, 3 Ill. 441; Jackson *v.* Stiles, 9 Johns. (N. Y.) 391; Gonnigal *v.* Smith, 6 Johns. (N. Y.) 106, both New York cases holding that the continuance on the roll, being only a matter of form, will be presumed to have been done.

96. *Alabama.*— Scull *v.* Godbolt, 4 Ala. 326, where there was a period of eight years.

Florida.— See Jordan *v.* Petty, 5 Fla. 326.

Illinois.— Lampsett *v.* Whitney, 3 Ill. 441, where there was a lapse of several years.

Kentucky.— Nicholson *v.* Howsley, Litt. Sel. Cas. 300 (where it was held that the second execution might issue whether or not the first was ever in the sheriff's hands so long as it was issued within the year); Craig *v.* Johnson, Hard. 520.

New York.— Thorp *v.* Fowler, 5 Cow. 446.

Pennsylvania.— Shaw *v.* Richards, 2 Miles 103 (holding that a scire facias was not necessary under the act of June 16, 1836, to issue the second execution if the first is irregularly issued); Dodge *v.* Casey, 1 Miles 13 (where more than five years had intervened). See Baltz *v.* Monaghan, 15 Wkly. Notes Cas. 501, where a scire facias was issued on the same day as the alias.

See 21 Cent. Dig. tit. "Execution," § 198.

Contra.— Yatter *v.* Smilie, 72 Vt. 349, 47 Atl. 1070 (holding that the judgment must be kept alive by successive executions after the return of the original within the period of a year and a day, and the fact that defendant was absent from the state was no excuse for not issuing executions often enough to keep the judgment alive); Anonymous, Brayt. (Vt.) 66, holding that a levy of land under an alias issued more than a year after the return of the former execution is void.

97. Scammon *v.* Swartwout, 35 Ill. 226 [*distinguishing* Lampsett *v.* Whitney, 3 Ill. 441]. See Williams *v.* Mullis, 87 N. C. 159.

98. Jordan *v.* Petty, 5 Fla. 326; Northern Pac. R. Co. *v.* Bender, 13 Mont. 432, 34 Pac. 848; Claflin *v.* Voorhees, 35 N. J. L. 484; Wade *v.* De Leyer, 40 N. Y. Super. Ct. 541; Hommedieu *v.* Stowell, 18 Abb. Pr. (N. Y.) 326; McSmith *v.* Van Deusen, 9 How. Pr. (N. Y.) 245; Pierce *v.* Craine, 4 How. Pr. (N. Y.) 257. For New York cases *contra*, see *infra*, note 99.

To executions on what judgments does statute apply.— Where judgment was rendered before the adoption of the code, and divers executions have been issued and returned since the date of the judgment, the judgment is subject to the presumption of satisfaction under the act of 1826 and not to the statute of limitations as prescribed by the code; and an affidavit of plaintiff that the judgment had not been entirely satisfied, such affidavit being admitted in evidence without objection, was all that was needed to justify the leave given by the court to issue execution. Johnson *v.* Jones, 87 N. C. 393.

Execution not returned within the limited period.— Under Mont. Code Civ. Proc. § 349, which provides that after five years from the entry of the judgment execution can issue only by leave of court on proof that some part thereof remains unsatisfied, but such "leave shall not be necessary when the execution has been issued on the judgment within the five

tion applies to the alias and pluries writs as well as to the originals.[99] In some jurisdictions the time within which a writ may issue after the date of issuance of the last preceding writ is specially limited.[1] An execution for costs issued by the clerk against the successful plaintiff has been held not to be an execution from which to date the time within which an execution in favor of plaintiff may be issued.[2]

(III) *Reckoning of Period of Limitation.* The time for renewing an execution so as to render a scire facias unnecessary begins to run from the last day the execution has to run in court before its final return.[3] Any delay caused by an injunction out of chancery cannot be taken into an account.[4] By statute in some states the period of the Civil war is excluded from the period of limitation.[5] Where an execution was issued and then discovered to be void, and an order for a new execution was obtained, but no new execution was issued until five years after rendition of judgment, the order did not extend the time within which the execution could issue.[6]

5. Form and Requisites — a. In General. The fact that the writ does not reveal the form of an alias or a pluries is an amendable irregularity[7] and it should not be quashed merely because not entitled to an alias execution.[8] An execution which is not an original should show on its face that others have preceded it,[9] and in some jurisdictions the number of executions which have preceded it.[10] At common law an execution not an original should recite the proceedings under a former fieri facias[11] and, according to the old rule in England, the clerk should subscribe under subsequent writs the time when the first one was issued.[12] That the writ does not recite the proceedings under a former fieri facias as required at common law[13] or that it does not show, as required by statute, the number of executions which have preceded it[14] does not render the writ void. For-

years, and returned unsatisfied in whole or in part," the fact that execution issued within the five years and was not returned at all does not prevent the granting of an execution after that time. Northern Pac. R. Co. *v.* Bender, 13 Mont. 432, 433, 34 Pac. 848.

99. Redmond *v.* Wheeler, 2 Abb. Pr. (N. Y.) 117; Sacia *v.* Nestle, 13 How. Pr. (N. Y.) 572; Swift *v.* Flanagan, 12 How Pr. (N. Y.) 438 [*criticizing* McSmith *v.* Van Deusen, 9 How. Pr. (N. Y.) 245; Pierce *v.* Craine, 4 How. Pr. (N. Y.) 257, and *approving* Currie *v.* Noyes, Code Rep. N. S. (N. Y.) 198]. See also Field *v.* Paulding, 1 Hilt. (N. Y.) 187, 3 Abb. Pr. (N. Y.) 139; Garvin *v.* Garvin, 34 S. C. 388, 13 S. E. 625.

1. See Seavy *v.* Bennett, 64 Miss. 735, 2 So. 177.

2. Seavy *v.* Bennett, 64 Miss. 735, 2 So. 177, holding that it is not within the meaning of Miss. Code (1880), § 2674, which provides that no execution shall issue upon any judgment or decree after seven years from the date of the issuance of the last preceding execution.

3. Gibbes *v.* Mitchell, 2 Bay (S. C.) 120. In Simpson *v.* Sutton, 61 N. C. 112, it was held that under N. C. Rev. Code, c. 31, § 109, the time in which an alias could be issued began to run from the issuance of the original not from its return.

4. Gibbes *v.* Mitchell, 2 Bay (S. C.) 120. See *supra*, VI, D, 2, a, (IV), (B), (2).

5. See Shipley *v.* Pew, 23 W. Va. 487.

6. Field *v.* Paulding, 1 Hilt. (N. Y.) 187, 3 Abb. Pr. (N. Y.) 139, holding that a new order was necessary, as in any case where five years had elapsed, to issue another execution.

7. Graves *v.* Hall, 13 Tex. 379, the court having before it something to amend by, will amend it on the principle that as to mere matters of form, for the purpose of sustaining right, that will be considered as done which ought to have been done.

8. Bushong *v.* Taylor, 82 Mo. 671. In Westbrook *v.* Hays, 89 Ga. 101, 14 S. E. 879, it is held that whether an execution which issued after the quashing of the original was called an original or alias was immaterial.

Calling a writ an alias does not make it an alias writ. Kellogg *v.* Buckler, 17 Ga. 187. See also Cooper *v.* Huft, 55 Ga. 119.

9. Scott *v.* Allen, 1 Tex. 508.

A command in the execution to collect "50 cents for a former writ" sufficiently showed it to be an alias execution. Bellows *v.* Sowles, 71 Vt. 214, 44 Atl. 68.

10. Driscoll *v.* Morris, 2 Tex. Civ. App. 603, 21 S. W. 629.

11. Cumpston *v.* Field, 3 Wend. (N. Y.) 382; Coleman *v.* Mansfield, 1 Miles (Pa.) 56; Oviat *v.* Vyner, 1 Salk. 318.

12. Moses *v.* Blackwell, 9 Rich. (S. C.) 42, 43 [*citing* 1 Sellon Pr. 81].

13. Coleman *v.* Mansfield, 1 Miles (Pa.) 56.

14. Corder *v.* Steiner, (Tex. Civ. App. 1899) 54 S. W. 277.

The writ may be amended by reciting the

mal errors in prior executions do not invalidate a later execution correctly issued.[15]

b. Teste. Under the old practice an alias was properly tested as of the term to which the original was returnable,[16] or as of the day on which the original was returnable,[17] and the pluries as of the term to which or the day on which the alias was returnable and so on.[18]

c. Recital of Amount. Where an execution has been satisfied in part, an alias must state the proper amount of the judgment remaining unsatisfied and command the officer to collect such unsatisfied part in the usual form.[19] A renewal execution should issue for the balance due upon the original with interest from the date of the last credit on the principal debt.[20] As in the case of original executions, the issuance of an alias for too great an amount does not render the writ void.[21]

d. Indorsements. If a statute provides that a plaintiff must indorse on the execution that he will receive bank-notes of a certain kind in payment of the judgment, or if he refuse defendant may give a replevin bond for the debt payable in two years, plaintiff is not bound to make the indorsement upon an alias after the return *nulla bona* on the original which was properly indorsed.[22]

6. Issuance — a. Proceedings to Obtain[23] — (i) *In General.* The most common proceeding to obtain an alias, especially by the old practice, is scire facias.[24]

proceedings under the former execution. McMichael *v.* Knapp. 7 Cow. (N. Y.) 413.

15. Corthell *v.* Egery, 74 Me. 41.

16. Moses *v.* Blackwell, 9 Rich. (S. C.) 42.

17. Cowgill *v.* Mason, 4 Houst. (Del.) 320.

But if it was tested as of a day previous to the return-day of the original it was not void, but at most only voidable for the irregularity and, if necessary to make it regular, the return of the original execution might be amended as of the same day. Rammel *v.* Watson, 31 N. J. L. 281.

Since 2 Wm. IV, c. 39, and 3 & 4 Wm. IV, c. 67, succeeding writs of execution need not be tested on the return-day with the preceding writ. See Harmer *v.* Johnson, 3 D. & L. 38, 14 L. J. Exch. 292, 14 M. & W. 336.

18. Moses *v.* Blackwell, 9 Rich. (S. C.) 42.

19. Fairbanks *v.* Devereaux, 48 Vt. 550.

A receipt indorsed upon an execution for nearly the full amount was held not to necessarily preclude the taking out of another execution if it was shown that the indorsement was a mistake, although it would be prudent for the clerk in such case to wait for an order of court to correct the mistake. Frankfort Bank *v.* Markley, 1 Dana (Ky.) 373.

20. Trimmier *v.* Winsmith, 23 S. C. 449.

If, however, a statute provides that another execution will be issued for the amount then due on the original without interest, an alias issued for the amount due on the judgment together with interest is void. Haskell *v.* Littlefield, 155 Mass. 320, 29 N. E. 626.

21. Hunt *v.* Loucks, 38 Cal. 372, 99 Am. Dec. 404, where the clerk failed to indorse money collected upon the original, although the amount had been credited upon the judgment. See *supra*, VI, D, 2, b, (III), (B). *Contra*, see Haskell *v.* Littlefield, 155 Mass. 320, 29 N. E. 626, holding that an alias issued with interest on the original is void as being in contravention of a statutory provision.

A discrepancy between the first and second executions as to the amount of costs is a clerical error which may be amended. It furnishes no ground for the quashing of the writ. Sheppard *v.* Melloy, 12 Ala. 561. See *infra*, VI, F; VIII, B, 2.

22. Eubank *v.* Poston, 5 T. B. Mon. (Ky.) 285.

23. Issuance after death of party see *supra*, VI, C, 1, b, (II).

24. Langdon *v.* **Langdon,** 1 Root (Conn.) 453 (where an execution was indorsed satisfied by mistake); Dennis *v.* Arnold, 12 Metc. (Mass.) 449 (holding that where real estate was levied on which was not the property of the judgment debtor or not liable to be seized on execution and could not be held thereby scire facias for an alias was the proper remedy). See also Perry *v.* Perry, 2 Gray (Mass.) 326, holding that under Mass. Rev. St. c. 23, § 21, scire facias was the only remedy. But see Royce *v.* Strong, 11 Vt. 248, holding that under the Vermont statute of 1837 scire facias was not the appropriate remedy to obtain new execution when the former one had been levied upon real estate in a defective manner, especially where the defect does not appear upon the face of the levy.

Scire facias is proper where an equity of redemption is levied on and sold and no interest passes from a mistake in the proceedings (Pillsbury *v.* Smyth, 25 Me. 427), where the levy on the equity of redemption has been in a manner not authorized by law (Dewing *v.* Durant, 10 Gray (Mass.) 29), where part of the real estate levied on cannot be held (Rice *v.* Cook, 75 Me. 45; Ware *v.* Pike, 12 Me. 303), or where the judgment creditor voluntarily reimburses a purchaser at execution sale under his judgment for moneys paid for property against which the execution did not run (Piscataquis County *v.* Kingsbury, 73 Me. 326). In Vermont,

Plaintiff may also obtain relief by motion;[25] and sometimes an action of debt on the judgment is held a concurrent remedy with scire facias.[26] In the absence of collusion between plaintiff and defendant, an execution may be renewed by the written consent of the judgment debtor indorsed upon it.[27] The maxim, "He who asks for equity must do equity," may be applied to a creditor asking for an alias.[28]

(II) *Notice.* The motion for a new execution after the former execution has been returned satisfied by levy on land, the levy having been defective, will not be granted except upon notice to defendant.[29] The rule is the same where a motion is made for reëstablishing or obtaining a new writ which has been destroyed or lost.[30]

(III) *Pleading and Proof.* A plaintiff must aver and prove that the property on which the original execution was levied did not belong to the debtor, where this is made the ground for a new execution.[31] Where a new execution is asked for on the ground that the property seized under the former writ was encumbered by a prior lien, the declaration must show that the property was taken from the execution defendant by virtue of such lien.[32]

b. Defense. On a scire facias to obtain a new execution on the ground of the invalidity of the original, no facts can be properly relied on in defense which existed prior to the judgment.[33]

c. Order or Leave of Court. Where execution has been returned "satisfied" the clerk cannot on the ground of mistake issue a new execution without leave of court.[34] After satisfaction by a sale no further levy can be made until the court

where A levied on property as belonging to B and was sued therefor by C who, however, agreed to discontinue and release his claim and did discontinue, but afterward recommenced his suit and recovered of A the value of the property, whereupon A sued him on his agreement to discontinue and release and recovered back the same amount, scire facias by A for an alias execution against B on the ground of failure of title in the property levied was sustainable. Mack *v.* Nichols, 5 Vt. 200.

Application for scire facias.— Under an old Massachusetts statute the creditor could not sue out a scire facias for an alias without a previous application to the court whence the first execution issued; for the writ authorized by that statute did not issue as a matter of right but rested in the discretion of the court. Kendrick *v.* Wentworth, 14 Mass. 57.

25. Langdon *v.* Langdon, 1 Root (Conn.) 453.

26. Rice *v.* Cook, 75 Me. 45; Piscataquis County *v.* Kingsbury, 73 Me. 336; Ware *v.* Pike, 12 Me. 303. *Contra,* Dennis *v.* Arnold, 12 Metc. (Mass.) 449, holding that scire facias is the only remedy. See also Perry *v.* Perry, 2 Gray (Mass.) 326. Both cases were under Mass. Rev. St. c. 73, § 21.

27. Carrier *v.* Thompson, 11 S. C. 79 [*following* Guignard *v.* Glover, Harp. (S. C.) 457], the service of a new summons not being necessary in such a case.

28. Thus where an execution has been levied on goods and chattels which have been sold and the proceeds paid over to the creditor, he cannot maintain an action to obtain a new execution on the ground that the goods were not the property of the debtor until he has refunded the money thus received or tendered it back. Batchelder *v.* Wason, 8 N. H. 121.

29. Williams *v.* Cable, 7 Conn. 119, holding that an application for a new execution on such a ground was substantially a scire facias and must be proceeded with accordingly, and a new execution granted on motion without the notice required in civil actions is void. See Browns *v.* Julian, 5 J. J. Marsh. (Ky.) 312, where, however, the alias was illegal for other reasons.

After notice has been given to the administrator of a deceased debtor of the existence of a judgment against the decedent to obtain the right, given by statute, to issue an original execution, no further notice is necessary either for the original or an alias or a pluries. Letcher *v.* Morrison, 27 Ill. 209.

Notice of alias execution for enforcement of alimony is not required by law. Chase *v.* Chase, 105 Mass. 385.

Where a creditor discharges the body of a debtor committed on execution, under the third section of the Vermont act of 1803, he is entitled, as matter of right and without notice to the debtor, to an alias execution against his property. Martin *v.* Kilbourne, 11 Vt. 93.

Presumption of regularity.— See Surratt *v.* Crawford, 87 N. C. 372.

30. Hard *v.* Smith, 17 Fla. 767; Douw *v.* Burt, 1 Wend. (N. Y.) 89.

31. Baxter *v.* Tucker, 1 D. Chipm. (Vt.) 353.

32. Baxter *v.* Shaw, 28 Vt. 569.

33. Richardson *v.* Wolcott, 10 Allen (Mass.) 439; Trimmier *v.* Winsmith, 23 S. C. 449.

34. Haden *v.* Walker, 5 Ala. 86; Harkins *v.* Clemens, 1 Port. (Ala.) 30; Mayo *v.* Chiles, 3 T. B. Mon. (Ky.) 258.

has set aside the sale, vacated the satisfaction and ordered a new execution.[35] If the first writ is returned not executed, a new order of seizure and sale is not necessary to the validity of an alias.[36] Where plaintiff in execution has been compelled to refund the value of a portion of the property levied upon under the original execution, no order or leave of court is necessary for the issuance of a second execution for the amount so refunded.[37] Under an equity rule which provides that if the decree be solely for the payment of money, final process to execute the decree may be by a writ of execution in the form used in suits at common law, an alias cannot be issued except by order of the court which rendered the decree.[38]

7. Effect of Issuance. The general rule seems to be that the mere issuance of an alias before the return of the original is not of itself sufficient to establish an abandonment of the execution and the levy thereunder,[39] although such issuance of an alias is competent evidence on the question of abandonment.[40] An alias, although improperly issued, may be a legal justification to the officer to whom it is directed.[41] An alias continues the lien of the original so as to preclude the satisfaction of another execution between the two.[42] The issuing of an alias does not preclude the judgment debtor from showing, on an issue of illegality, that the judgment had been paid before the alias was issued.[43]

F. Amendment of Writ — 1. Authority to Amend — a. In General. The power to correct errors and mistakes in executions is unquestionable and necessarily belongs to every court of record,[44] and the court which issued the execu-

35. Hughes *v.* Streeter, 24 Ill. 647, 76 Am. Dec. 777.

A second execution cannot be issued for the cost incurred in issuing the first execution which was returned satisfied, without taking some proceeding against the debtor to ascertain the costs and to obtain an order for their collection; and an execution issued without such a proceeding is void. Brooks *v.* Hardwick, 5 La. Ann. 675.

36. Riddell *v.* Ebinger, 6 La. Ann. 407.

37. Richardson *v.* McDougall, 19 Wend. (N. Y.) 80, where the judgment creditor was obliged to refund on account of the judgment against him. In Wilson *v.* Green, 19 Pick. (Mass.) 433 [*distinguishing* Kendrick *v.* Wentworth, 14 Mass. 57], it was held that where the creditor was obliged to refund the money he obtained by a levy on account of the levy having been upon property which was not the debtor's, he was entitled, as of right, to sue out a writ of scire facias on his judgment without first applying to the court.

In Georgia, where there was an early provision for renewing an execution where one had been issued and returned within seven years, an alias could not regularly issue without an order of the court for that purpose, which order should set forth all the previous proceedings which had taken place under the original execution, but an objection to an alias which had been issued without this order came too late after the parties had litigated a claim case under it, the defect being considered at that time by the court as having been waived. Watson *v.* Halsted, 9 Ga. 275.

38. An alias issued without the order is void. White *v.* Staley, 21 Fla. 396, holding that the rule makes provision for the issue of but one execution and an issuance of that one by the clerk exhausts his power.

39. West *v.* St. John, 63 Iowa 287, 19 N. W. 238; Friyer *v.* McNaughton, 110 Mich. 22, 67 N. W. 978. See Dunham *v.* Bentley, 103 Iowa 136, 72 N. W. 437; Elliot *v.* Cox, 5 Mart. N. S. (La.) 285. See also Ewing *v.* Hatfield, 17 Ind. 513, holding that the issuance of a subsequent void writ while the original valid one was still in the officer's hands did not vitiate action under the original. *Contra,* Missimer *v.* Ebersole, 87 Pa. St. 109, where it was held that the lien of a fieri facias being lost by an abandonment of the levy by issuing a new execution without disposing of the levy of the old one, the rights of the intervening assignee for creditors attached and an alias fieri facias could not be levied on such assigned property. But in Miller *v.* Milford, 2 Serg. & R. (Pa.) 35, where after levy and extent on land under execution the inquisition and extent were set aside, and where there was a levy and sale of the same land under an alias thereafter issued, plaintiff relinquished the first execution in form merely but not in substance for he laid the second execution on the same land.

An alias writ directed to the sheriff of one county does not abandon a levy already made under a writ issued to the sheriff of another county, where by statute the creditor has the right to have several executions issued to different counties at the same time. Hicks *v.* Ellis, 65 Mo. 176.

40. Friyer *v.* McNaughton, 110 Mich. 22, 67 N. W. 978.

41. As where plaintiff sues out an alias on his original judgment after a delivery bond has been taken and forfeited and he does not pursue his remedy against the property seized. *Ex p.* Cummins, 4 Ark. 103.

42. Brasfield *v.* Whitaker, 11 N. C. 309.

43. Lowry *v.* Richards, 62 Ga. 370.

44. Murphy *v.* Lewis, 17 Fed. Cas. No. 9,950*a*, Hempst. 17 [*citing* Smith *v.* Carr,

tion is the proper one to make any amendment as one court cannot be permitted to correct the errors in the process of another court.[45]

b. Void or Voidable Writs. No court will attempt to amend a void process, for such process is a mere nullity and it would be absurd to speak of amending a process or proceeding which has no legal validity.[46] But the rule is practically universal that a writ which is only voidable for clerical errors or omissions or for mistakes of form can be amended;[47] thus amendments have been allowed in cases of non-conformity to judgment,[48] such as a variance in the amount,[49] in cases of error in reckoning interest,[50] in cases of non-conformity to præcipe,[51] in cases of misrecital of date of rendition of judgment,[52] in cases of mistake in or omission

Hard. (Ky.) 305]. See also Clarke *v.* Miller, 18 Barb. (N. Y.) 269.

"**It is very difficult to prescribe limits to this salutary power** possessed by the courts, of permitting amendments in their process, whether mesne, or final. It is a power exercised for the promotion of justice, with no parsimonious hand." Cawthorn *v.* Knight, 11 Ala. 579, 582. See also O'Donnell *v.* Merguire, 131 Cal. 527, 63 Pac. 847, 82 Am. St. Rep. 389.

Review of the court's discretion in this particular will not as a general rule be allowed. Hayford *v.* Everett, 68 Me. 505. See, generally, APPEAL AND ERROR.

45. Clark *v.* Miller, 18 Barb. (N. Y.) 269, 271.

The supreme court cannot correct the errors in the process of another court. Bisbee *v.* Hall, Wright (Ohio) 59. The county court cannot amend the process of the supreme court. Clarke *v.* Miller, 18 Barb. (N. Y.) 269.

46. Whitehall Bank *v.* Pettes, 13 Vt. 395, 398, 37 Am. Dec. 600 [*citing* Burk *v.* Barnard, 4 Johns. (N. Y.) 309; Bunn *v.* Thomas, 2 Johns. (N. Y.) 190]. See also Bybee *v.* Ashby, 7 Ill. 151, 43 Am. Dec. 47 (writ issued to officer to whom it was not directed); Maupin *v.* Emmons, 47 Mo. 304 (directions as to additional property omitted from a venditioni exponas); Vanderveere *v.* Gaston, 24 N. J. L. 818 (writ not recorded as required by statute); Clarke *v.* Miller, 18 Barb. (N. Y.) 269 (writ issued by one trial court on judgment of another trial court).

Amendment in such a case would mean nothing more or less than the creation of an execution where none existed before. McCormick *v.* Wheeler, 36 Ill. 114, 85 Am. Dec. 388.

47. Blanks *v.* Rector, 24 Ark. 496, 88 Am. Dec. 780; Hutchens *v.* Doe, 3 Ind. 528. Conversely, a writ amendable is only voidable. Van Cleave *v.* Bucher, 79 Cal. 600, 21 Pac. 954; Deakins *v.* Rex, 60 Md. 593.

48. McCollum *v.* Hubbert, 13 Ala. 282, 48 Am. Dec. 56; Hollis *v.* Sales, 103 Ga. 75, 29 S. E. 482; Woolworth *v.* Taylor, 62 How. Pr. (N. Y.) 90; Jones *v.* Dove, 7 Oreg. 467; Black *v.* Wistar, 4 Dall. (Pa.) 267, 1 L. ed. 828; Reigel's Appeal, 1 Walk. (Pa.) 72. But *compare* Shorter *v.* Mims, 18 Ala. 655.

Necessity for conformity to judgment see *supra*, VI, D, 2, b, (III).

49. Bridewell *v.* Mooney, 25 Ark. 524; Saunders *v.* Smith, 3 Ga. 121; McCall *v.* Trevor, 4 Blackf. (Ind.) 496; Doe *v.* Rue, 4 Blackf. (Ind.) 263, 29 Am. Dec. 368; Hall *v.* Clagett, 63 Md. 57; Jones *v.* Dove, 7 Oreg. 467; Black *v.* Wistar, 4 Dall. (Pa.) 267, 1 L. ed. 828; Lane *v.* Potter, (N. J. Sup. 1892) 23 Atl. 420 (where the amount was indorsed); Fries *v.* Woodworth, 31 N. J. L. 273; Laroche *v.* Wasbrough, 2 T. R. 737. Even when amount in the execution exceeds that in the judgment (Sheppard *v.* Melloy, 12 Ala. 561; Hunt *v.* Loucks, 38 Cal. 372, 99 Am. Dec. 404; Brown *v.* Betts, 13 Wend. (N. Y.) 29; Jackson *v.* Walker, 4 Wend. (N. Y.) 462; Bissell *v.* Kip, 5 Johns. (N. Y.) 89; Coleman *v.* Mansfield, 1 Miles (Pa.) 56), or is less than the amount of the judgment (Look *v.* Luce, 140 Mass. 461, 5 N. E. 163; Kokomo Strawboard Co. *v.* Inman, 21 N. Y. Suppl. 705 [*following* Hatch *v.* Central Nat. Bank, 78 N. Y. 487]; Patton *v.* Massey, 2 Hill (S. C.) 475).

Statement of amount see *supra*, VI, D, 2, b, (III), (B).

Where the judgment creditor indorses the full amount of the debt instead of the amount due as required by law in the case of a judgment rendered by confession the amount indorsed may be amended at the instance of a subsequent execution creditor, although the debtor had acquiesced in the issuance of the execution indorsed for the full amount. Jaffray *v.* Saussman, 52 Hun (N. Y.) 561, 5 N. Y. Suppl. 629, 17 N. Y. Proc. 1 [*affirmed* in 117 N. Y. 648, 22 N. E. 1132].

Remittitur.— Where a trial justice rendered a judgment of damages and costs against an estate and the execution issued thereon is declared illegal, an order of the superior court, upon a petition for a writ of scire facias to obtain a new execution on the judgment, that execution should issue against the estate for the damages, will be affirmed by the supreme court upon plaintiffs entering a remittitur for the amount of the costs. Look *v.* Luce, 140 Mass. 461, 5 N. E. 163.

50. Robb *v.* Halsey, 11 Sm. & M. (Miss.) 140; Kokomo Strawboard Co. *v.* Inman, 21 N. Y. Suppl. 705; Crosdale *v.* Cadwallader, 10 Phila. (Pa.) 343; Patton *v.* Massey, 2 Hill (S. C.) 475.

But as to alias and pluries executions see *supra*, VI, E.

51. Shaffer *v.* Watkins, 7 Watts & S. (Pa.) 219.

52. Hagerstown First Nat. Bank *v.* Weckler, 52 Md. 30. And the date in the execution may be amended to conform to the date of

of the names of parties,[53] in cases of mistake in or omission of the direction to the officer,[54] in cases of error as to the name in which the writ runs,[55] in cases of omission to command to levy and to make amount,[56] in cases of mistake in or omission in the directions given to the officer with respect to the property to be taken[57] or as to making his return,[58] in cases of erroneous teste,[59] as well as in

the delivery bond. Bridewell *v.* Mooney, 25 Ark. 524. But where the date of an alias execution issued after the judgment creditor's death and void for that reason expressed the true time of its issuance, the court had no power to amend the writ so as to give it validity. Morgan *v.* Taylor, 38 N. J. L. 317.

Recital of date of rendition of judgment see *supra*, VI, D, 2, b, (IV), (B).

53. Plaintiff's name when omitted may be supplied. Smith *v.* Bell, 107 Ga. 800, 33 S. E. 684, 73 Am. St. Rep. 151; Stovall *v.* Hibbs, 32 S. W. 1087, 17 Ky. L. Rep. 906. See also Holmes *v.* Jordan, 163 Mass. 147, 39 N. E. 1005; Porter *v.* Goodman, 1 Cow. (N. Y.) 413, where amendment was made on condition of payment of costs both of the motion and of the action brought for trespass for levy under such defective execution. A mistake in plaintiff's name may be corrected according to a delivery bond which properly recites the name. Commonwealth Bank *v.* Lacy, 1 T. B. Mon. (Ky.) 7.

An omission of defendant's name may be supplied (Morse *v.* Dewey, 3 N. H. 535) and the name of a defendant improperly joined may be stricken out (Goodman *v.* Walker, 38 Ala. 142; Deloach *v.* State Bank, 27 Ala. 437; Cawthorn *v.* Knight, 11 Ala. 579). An execution which fails to state the given names of defendant correctly may be amended, so as to conform to the statement of the case on the minutes which precede the verdict. Gross *v.* Mims, 63 Ga. 563.

Amendment to make execution go against the survivor of two defendants.— Loomis *v.* Ross, 12 Pa. Super. Ct. 95.

Recital and description of parties see *supra*, VI, D, 2, b, (V).

54. Hibberd *v.* Smith, 50 Cal. 511; Cheney *v.* Beall, 69 Ga. 533 (where the direction was simply to "all and singular the sheriffs of said state," omitting "and their lawful deputies"); Rollins *v.* Rich, 27 Me. 557. See also Morrell *v.* Cook, 31 Me. 120.

Direction to officer see *supra*, VI, D, 2, b, (VI).

Where a writ was directed to the coroner instead of the sheriff, and a motion was made to quash the writ and return because it did not show why the writ was so issued, it was proper to allow plaintiff to amend the writ by stating that the sheriff was one of defendants. Moss *v.* Thompson, 17 Mo. 405.

55. Thus where writ does not run in the name of the people (Hibberd *v.* Smith, 50 Cal. 511), or where the word "territory" instead of the proper word "state" is used (Carnahan *v.* Pell, 4 Colo. 190; State *v.* Cassidy, 4 S. D. 58, 54 N. W. 928) the mistake may be amended. See *supra*, VI, D, 2, b, (VII).

56. Thus an omission in a levari of a command to levy the debt is a mere clerical error and may be amended. Peddle *v.* Hollinshed, 9 Serg. & R. (Pa.) 277.

Command to levy and make amount see *supra*, VI, D, 2, b, (VIII).

57. If personal property is mentioned in a writ of habere facias with real estate, it will be stricken out, and the writ held good. Herring *v.* Reade, 13 Phila. (Pa.) 67. If, in making title under a sheriff's deed, the execution under which the sale was made omits the usual words, "lands and tenements," the court will amend it, being a clerical mistake. Toomer *v.* Purkey, 1 Mills (S. C.) 323, 12 Am. Dec. 634.

Recital of property see *supra*, VI, D, 2, b, (IX).

58. An error of the clerk in fixing the return-day of an execution may, by order of the court, be corrected and the lien retained. Goode *v.* Miller, 78 Ky. 235. An execution on its face returnable at a time anterior to the term to which by law it should have been made returnable (Forward *v.* Marsh, 18 Ala. 645) or returnable out of term (Cramer *v.* Van Alstyne, 9 Johns. (N. Y.) 386), although it would be otherwise if it were mesne process or on Sunday (Boyd *v.* Vanderkemp, 1 Barb. Ch. (N. Y.) 273), or an execution from which the return-day is omitted (Van Deusen *v.* Brower, 6 Cow. (N. Y.) 50) may be amended. But see Rangeley *v.* Goodwin, 18 N. H. 217. An error in the return-day may be amended by the præcipe. Berthon *v.* Keeley, 4 Yeates (Pa.) 205.

Direction for return see *supra*, VI, D, 2, b, (X).

An execution made returnable to the wrong county has been amended. Cawthorn *v.* Knight, 11 Ala. 579, 582 [*citing* Atkinson *v.* Newton, 2 B. & P. 336; Hart *v.* Weston, 5 Burr. 2588].

An omission of name of the county to which the execution was returnable may be supplied. Walker *v.* Isaacs, 36 Hun (N. Y.) 233 [*following* Benedict, etc., Mfg. Co. *v.* Thayer, 20 Hun (N. Y.) 547].

59. Baker *v.* Smith, 4 Yeates (Pa.) 185. Thus the omission to state the title of the office of the presiding officer in a court in the teste of a writ of execution (See People *v.* Judges Albany Mayor's Ct., 9 Wend. (N. Y.) 486), a fieri facias tested out of term (Denn *v.* Leconey, 1 N. J. L. 39, 41 [*citing* Wright *v.* Macevoy, Say. 12, 25 Geo. II, Tidd Pr. 913]); or on Sunday, on plaintiff's paying the costs of the motion (Williams *v.* Hogeboom, 22 Wend. (N. Y.) 648), or after plaintiff's death (Center *v.* Billinghurst, 1 Cow. (N. Y.) 33) may be cured by amendment. But see *supra*, VI, C. And so a wrong date may be amended. Suydam *v.* McCoon, Col. Cas. (N. Y.) 64; Cherry *v.* Wooland, 23 N. C.

cases of the omission of the clerk's signature.[60] So too an execution issued without attaching the clerk's official seal may be amended.[61]

c. Third Person Prejudiced. It has been said, however, that an amendment will not be made when it will prejudice the rights of third persons.[62] At least the court will scan well the grounds upon which its action is sought.[63]

2. Time of Amendment. The amendment should be seasonably made.[64] Amendments, however, may be made upon motion to quash,[65] after the levy,[66] upon return-day,[67] after satisfaction and return,[68] after return-day,[69] or even after sale under the execution.[70]

3. Amendment How Obtained. An amendment is obtained by motion or by some other form of application to the court from which the process issued.[71]

438. See Smith *v.* Knight, 20 N. H. 9. If the place at which the writ was tested is wrongly given it may be corrected. Porter *v.* Goodman, 1 Cow. (N. Y.) 413. The teste may be corrected by the præcipe (Berthon *v.* Kelly, 4 Yeates (Pa.) 205) or by the attorney's precept (Shoemaker *v.* Knorr, 1 Dall. (Pa.) 197, 1 L. ed. 97).

Teste *see supra*, VI, D, 2, b, (XI).

Necessity of a rule or order of court to allow the amendment of an erroneous teste see People *v.* Montgomery C. Pl., 18 Wend. (N. Y.) 633.

60. Taylor *v.* Buck, 61 Kan. 694, 60 Pac. 736.

Signing of writ by officer or party see *supra*, VI, D, 2, b, (XII).

61. In those jurisdictions where the lack of a seal is considered merely an irregularity, the defect can be supplied by affixing the seal (Hall *v.* Lackmond, 50 Ark. 113, 6 S. W. 510, 7 Am. St. Rep. 84; Bridewell *v.* Mooney, 25 Ark. 524); even though a motion to quash is pending (Rose *v.* Ingram, 98 Ind. 276; Arnold *v.* Nye, 23 Mich. 286; Purcell *v.* McFarland, 23 N. C. 34, 35 Am. Dec. 734; Taylor *v.* Courtnay, 15 Nebr. 190, 16 N. W. 842; Corwith *v.* Illinois State Bank, 18 Wis. 560, 86 Am. Dec. 793), where no third person would be injured. But where the lack of seal is fatal to the validity of the writ the seal cannot be affixed, at least after sale. Weaver *v.* Peasley, 163 Ill. 251, 45 N. E. 119, 54 Am. St. Rep. 469.

Seal see *supra*, VI, D, 2, b, (XIII).

62. Williams *v.* Sharp, 70 N. C. 582 (holding that no amendment would be allowed so as to divest the title acquired by a subsequent innocent purchaser); Cape Fear Bank *v.* Williamson, 24 N. C. 147 (where writ omitted to show it was an alias, and an execution of another creditor was issued subsequent to original but prior to alias); Webber *v.* Hutchins, 1 Dowl. P. C. N. S. 95, 10 L. J. Exch. 354, 8 M. & W. 319 (where the court refused to amend a writ which was smaller in amount than the judgment and where defendant had become bankrupt since the execution of the writ).

63. Cawthorn *v.* Knight, 11 Ala. 579, 582 [*citing* Meyer *v.* Ring, 1 H. Bl. 541; Newnham *v.* Law, 5 T. R. 577]. *Contra*, Hall *v.* Lackmond, 50 Ark. 113, 115, 6 S. W. 510, 7 Am. St. Rep. 84 [*quoting* Tilton *v.* Cofeld, 93 U. S. 163, 23 L. ed. 858].

64. Hubbert *v.* McCollum, 6 Ala. 221.

65. Harrell *v.* Martin, 6 Ala. 587; Davelaar *v.* Blue Mt. Invest. Co., 110 Wis. 470, 86 N. W. 185.

66. Morrell *v.* Cook, 31 Me. 120 (where an execution was executed by an officer to whom it was directed, and the direction to the officer was subsequently inserted); Morse *v.* Dewey, 3 N. H. 535 (where there was an omission of parties defendant); Porter *v.* Goodman, 1 Cow. (N. Y.) 413 (where the name of a plaintiff was supplied and the name of a place at which the writ was tested was corrected after an action of trespass brought for the levy under the defective writ); Baker *v.* Smith, 4 Yeates (Pa.) 185 (where an erroneous teste was corrected).

67. Saunders *v.* Smith, 3 Ga. 121.

68. Kokomo Strawboard Co. *v.* Inman, 21 N. Y. Suppl. 705 [*following* Hatch *v.* Central Nat. Bank, 78 N. Y. 487]; Phelps *v.* Ball, 1 Johns. Cas. (N. Y.) 31, Col. Cas. (N. Y.) 66; Patton *v.* Massey, 2 Hill (S. C.) 475. But see Dickerson *v.* Downs, 108 Ga. 782, 33 S. E. 707.

69. Thompson *v.* Smiley, 50 Me. 67, where a misrecital of the date of the judgment was corrected. But see Rangeley *v.* Goodwin, 18 N. H. 217.

70. Adams *v.* Higgins, 23 Fla. 13, 1 So. 321; Holmes *v.* Jordan, 163 Mass. 147, 39 N. E. 1005 (misrecital of parties); Dewey *v.* Pealer, 161 Mass. 135, 36 N. E. 800, 42 Am. St. Rep. 399; Toomer *v.* Purkey, 1 Mills (S. C.) 323, 12 Am. Dec. 634; Sabin *v.* Austin, 19 Wis. 421. But see Morris *v.* Balkham, 75 Tex. 10, 12 S. W. 970, 16 Am. St. Rep. 874.

Seal may be affixed after sale (Corwith *v.* Illinois State Bank, 18 Wis. 560, 86 Am. Dec. 793) and even after confirmation of the sale (Taylor *v.* Courtnay, 15 Nebr. 190, 16 N. W. 842). *Contra*, Weaver *v.* Peasley, 163 Ill. 251, 46 N. E. 119, 54 Am. St. Rep. 469.

Variances in amount were corrected in Lewis *v.* Lindley, 28 Ill. 264; Durham *v.* Heaton, 28 Ill. 147, 81 Am. Dec. 275. See also Bybee *v.* Ashby, 7 Ill. 151, 43 Am. Dec. 47; Doe *v.* Rue, 4 Blackf. (Ind.) 263, 29 Am. Dec. 368; Lane *v.* Potter, (N. J. Sup. 1892) 23 Atl. 420.

71. Robb *v.* Halsey, 11 Sm. & M. (Miss.) 140. And see Hunt *v.* Loucks, 38 Cal. 372, 99 Am. Dec. 404; Arnold *v.* Nye, 23 Mich. 286; Coleman *v.* Mansfield, 1 Miles (Pa.) 56.

The party asking for the amendment of a writ of execution must pay the costs of the application or motion.[72]

4. Effect of Amendment. The amendment *nunc pro tunc* of a writ of execution makes it effective as between the parties, as if the defect had never existed.[73]

5. Validating Statute. A statute which provides that all irregularities and defects in the issuance of executions upon valid judgments and against real property shall, as to sales previously made, be disregarded validates, without amendment by the court, an execution issued without a seal.[74]

G. Alteration of Writ After Issuance. In some jurisdictions plaintiff may properly make certain alterations in an execution after its issuance;[75] in others the strict rule as to the alteration of instruments in a material part is enforced.[76] An apparent alteration in an execution will be presumed to have been innocently made before issuance.[77]

Notice.— A court has no power to amend process returned at a former term, without giving notice to persons whose rights have previously accrued. Simpson *v.* Simpson, 64 N. C. 427, 429 [*citing* Cape Fear Bank *v.* Williamson, 24 N. C. 147; Phillipse *v.* Higdon, Bus. 380].

72. Porter *v.* Goodman, 1 Cow. (N. Y.) 413, where the party had to pay also the costs of the action for trespass for the levy under the defective execution. See also Mackie *v.* Smith, 4 Taunt. 322; Hunt *v.* Kendrick, 2 W. Bl. 836.

73. Adams *v.* Higgins, 23 Fla. 13, 1 So. 321.

Relation.—An amendment to a valid writ of execution, made by order of court after levy, relates back to the date of the writ. Hall *v.* Lackmond, 50 Ark. 113, 6 S. W. 510, 7 Am. St. Rep. 84; Tilton *v.* Cofeld, 93 U. S. 163, 23 L. ed. 858 [*quoted* in Sannoner *v.* Jacobson, 47 Ark. 31, 47, 14 S. W. 458]. But execution against W K will not bind the goods of B K as against a *bona fide* purchaser, although B K was the real person against whom the judgment and execution were intended; and an amendment of the judgment will not affect by retroaction the title of such purchaser. Shirley *v.* Phillips, 17 Ill. 471.

In Alabama the amendment of an execution by striking out the name of a person not a party to the judgment, which name had been improperly inserted in the execution, does not affect its lien. Andress *v.* Roberts, 18 Ala. 387.

In Georgia it was provided by statute (Ga. Code (1882), § 3495), that an amendment of the writ caused the levy to fall (Jones *v.* Parker, 60 Ga. 500; Bradford *v.* Water-Lot Co., 58 Ga. 280; Beasley *v.* Bowden, 58 Ga. 154; Manry *v.* Shepperd, 57 Ga. 68. But see Artope *v.* Barker, 72 Ga. 186); but this applied to only the final process not to mesne process (Dawson *v.* Garland, 70 Ga. 447). This statute is now repealed (Ga. Code (1895), § 5114), and the repeal applied to cases pending at the time as well as to those which subsequently arose (Baker *v.* Smith, 91 Ga. 142, 16 N. E. 967). Therefore at the present time amendment by way of supplying the omitted name of plaintiff does not cause the levy to fall. Smith *v.* Bell, 107 Ga. 800, 33 S. E. 684, 73 Am. St. Rep. 151.

In Illinois the title of the officer seizing the goods remains unimpaired even if an amendment has the effect of destroying the writ. Corbin *v.* Pearce, 81 Ill. 461.

In Maine an execution executed by the proper officer, although the direction is omitted, may be amended by inserting the direction, under leave of the court; and an unauthorized erasure of a correct direction and an insertion of a different direction may be corrected in the same manner. Rollins *v.* Rich, 27 Me. 557.

74. Kipp *v.* Burton, 29 Mont. 96, 74 Pac. 85, 63 L. R. A. 325.

75. Keyes *v.* Chapman, 5 Conn. 169, altering directions for return of writ. In Hall *v.* Richardson, Quincy (Mass.) 329, it was said that an execution should not be altered out of court.

Plaintiff's attorney may with the consent of defendant alter a fieri facias without entering a rule for the purpose after it is placed in the sheriff's hands, so as to make it correspond with the judgment record. Oakley *v.* Becker, 2 Cow. (N. Y.) 454. Plaintiff's attorney without fraud, but without authority from the clerk, inserted in the writ the direction to the proper officer. It was held that this did not avoid or affect the execution. Blanchard *v.* Waters, 10 Metc. (Mass.) 185 [*distinguishing* Brier *v.* Woodbury, 1 Pick. (Mass.) 362].

76. It is illegal for a party or his attorney to alter an execution after he has received it from the clerk, and before delivery to the officer (People *v.* Lamborn, 2 Ill. 123); and an execution altered in a material part after being issued becomes thereby void (White *v.* Jones, 38 Ill. 159).

A clerk of court has no authority to authorize a sheriff to alter an execution in any way. Vance *v.* Vanarsdale, 1 Bush (Ky.) 504.

A solicitor has no authority to alter the teste of an execution in a court of chancery. Merrill *v.* Townsend, 5 Paige (N. Y.) 80.

77. McDonald *v.* Fuller, 11 S. D. 355, 77 N. W. 581, 74 Am. St. Rep. 815 [*citing* 1 Freeman Ex. § 47].

H. Collateral Attack. Mere irregularities in an execution or in the issuance thereof cannot be taken advantage of in a collateral proceeding;[78] thus, issuing an execution too soon,[79] issuing an execution after the proper time,[80] issuing an execution after the death of the debtor,[81] a variance between the amounts in the judgment and in the execution,[82] the lack of a seal,[83] and a mistake in the signature[84] have been held to be irregularities which cannot be taken advantage of collaterally. It is only where the proceedings are so defective that they are absolutely void that defects in them can be relied on in a collateral proceeding.[85] A void execution may be objected to by any person whose interests are affected by it.[86] Of mere irregularities defendant alone or his representative, as a general rule, can take advantage in a direct proceeding;[87] a probable exception to this

78. *Delaware.*— Boyce *v.* Cannon, 5 Houst. 409.

Illinois.— Swiggart *v.* Harber, 5 Ill. 364, 39 Am. Dec. 418.

Indiana.— Doe *v.* Dutton, 2 Ind. 309, 52 Am. Dec. 510; Doe *v.* Harter, 2 Ind. 252.

Missouri.— Cabell *v.* Grubbs, 48 Mo. 353.

Pennsylvania.—Stewart *v.* Stocker, 1 Watts 135.

South Carolina.— Wagner *v.* Pegues, 10 S. C. 259.

Tennessee.— Wells *v.* Griffin, 2 Head 568.

See 21 Cent. Dig. tit. "Execution," § 206.

This is true even though the execution issued is so irregular that it could be quashed on motion. Swiggart *v.* Harber, 5 Ill. 364, 39 Am. Dec. 418; Wright *v.* Nostrand, 94 N. Y. 31; Griffith *v.* Bogert, 18 How. (U. S.) 158, 165, 15 L. ed. 307.

A mistake in the recitals of the parties cannot be taken advantage of collaterally where the judgment and execution thereon are clearly and unmistakably identified (Railsback *v.* Lovejoy, 116 Ill. 442, 6 N. E. 504); and so with the irregularity of issuing a special execution in the name of the assignee of a judgment creditor (Schuck *v.* Gerlach, 101 Ill. 338) where the irregularity was invoked to defeat a redemption of land from a foreclosure sale.

79. *Kentucky.*— Guelot *v.* Pearce, (1897) 38 S. W. 892.

Maine.— Allen *v.* Portland Stage Co., 8 Me. 207.

New York.— Green *v.* Burnham, 3 Sandf. Ch. 110.

North Carolina.—Den *v.* Mizle, 7 N. C. 250. *Compare* Cody *v.* Quinn, 28 N. C. 191. 44 Am. Dec. 75.

Pennsylvania.— Hanika's Estate, 138 Pa. St. 330, 22 Atl. 90, 21 Am. St. Rep. 907; Wilkinson's Appeal, 65 Pa. St. 189.

South Carolina.— Mason, etc., Vocalion Co. *v.* Killough Music Co., 45 S. C. 11, 22 S. E. 755.

Tennessee.— Carpenter *v.* Mechanics' Sav. Bank, 1 Lea 202.

Texas.— House *v.* Robertson, (Civ. App. 1896) 34 S. W. 640.

See 21 Cent. Dig. tit. "Execution," § 206.

80. Willard *v.* Whipple, 40 Vt. 219. So an issue of execution on a judgment more than five years old, without preliminary scire facias, cannot be objected to by another creditor, but only by the debtor. Sherrard *v.* Johnson, 193 Pa. St. 166, 44 Atl. 252. See also Griffith *v.* Bogert, 18 How. (U. S.) 158, 15 L. ed. 307. An execution issuing after a year and a day is voidable only at the instance of the party against whom it issued. Den *v.* Mizle, 7 N. C. 250.

81. Butler *v.* Haynes, 3 N. H. 21. See *supra*, VI, C.

82. Railsback *v.* Lovejoy, 116 Ill. 442, 6 N. E. 504; Becker *v.* Quigg, 54 Ill. 390; Oakley *v.* Becker, 2 Cow. (N. Y.) 454; Brandt *v.* Brandt, 40 Oreg. 477, 67 Pac. 508. But a subsequent execution creditor can take advantage of defect in an execution which was issued for too large a sum. Jaffray *v.* Saussman, 52 Hun (N. Y.) 561, 565, 5 N. Y. Suppl. 629.

83. Rose *v.* Ingram, 98 Ind. 276.

Affixing wrong seal.— A clerk of the circuit court by mistake attached to an execution the seal of the district court. Upon a motion in which a plaintiff who had obtained against the same defendant a judgment in the supreme court intervened, the circuit court directed the execution to be corrected *nunc pro tunc*. It was held that the circuit court acquired jurisdiction of the subject-matter and the intervener, and the order could only be modified on direct appeal. Rose *v.* Dubuque V. R. Co., 47 Iowa 420.

84. The affixing of the name of plaintiff in execution to the writ, instead of the name of the clerk, does not render the writ subject to collateral attack. It will be treated as amended when collaterally assailed. Jett *v.* Shinn, 47 Ark. 373, 1 S. W. 693.

85. Cabell *v.* Grubbs, 48 Mo. 353, 356 [*citing* Draper *v.* Bryson, 17 Mo. 71, 57 Am. Dec. 257]; Wells *v.* Griffin, 2 Head (Tenn.) 568; Fulkerson *v.* Taylor, 102 Va. 300, 46 S. E. 309, holding that a merely voidable execution cannot be attacked in another case in which the judgment on which it is based is sought to be enforced. See also Candler *v.* Fisher, 11 Md. 332.

86. Candler *v.* Fisher, 11 Md. 332; Bennett *v.* Gamble, 1 Tex. 124.

87. Jones *v.* Carnahan, 63 Ind. 229; Conrey *v.* Copeland, 3 La. Ann. 452; Lowber's Appeal, 8 Watts & S. (Pa.) 387, 42 Am. Dec. 302 [*disapproving* Azcarati *v.* Fitzsimmons, 2 Fed. Cas. No. 689, 3 Wash. 134]. And see Cody *v.* Quinn, 28 N. C. 191, 44 Am. Dec. 75; Mason Vocalion Co. *v.* Killough Music Co., 45 S. C. 11, 22 S. E. 755.

rule exists in the case of a subsequent execution creditor.[88] The rules just stated have been applied to executions issued on transcript from a justice of the peace[89] to executions issued to other counties,[90] as well as to alias executions.[91]

I. Waiver of and Estoppel to Assert Defects.[92] The debtor may waive an irregularity in the execution either by some positive act,[93] or by silence when he should speak,[94] or by laches.[95] It is said that the waiver by defendant will be inferred from very slight evidence.[96]

VII. LIEN, LEVY OR EXTENT, AND CUSTODY OF PROPERTY.

A. Lien — 1. Nature of Lien — a. In General. The lien created by an execution is not a right in the property itself, but a right to levy upon it to the exclusion of interests subsequently acquired. It does not vest in the judgment creditor

An irregularity in an execution in respect to the return-day can be taken advantage of only by defendant in the judgment. If he waives the irregularity a third person cannot object to it. Berry *v.* Riley, 2 Barb. (N. Y.) 307, 308 [*citing* Kimball *v.* Munger, 2 Hill (N. Y.) 364].

That the execution was directed to an improper officer cannot be raised as an objection by a stranger to the process. Crane *v.* Warner, 14 Vt. 40.

Where a defendant in execution acquiesced in a real-estate levy and sale, he was estopped from questioning the title of the purchaser at the sale on the ground that such writ issued unlawfully against some other defendant therein named. Stark *v.* Carroll, 66 Tex. 393, 1 S. W. 188. See *infra*, VI, I.

88. Jaffray *v.* Saussman, 52 Hun (N. Y.) 561, 5 N. Y. Suppl. 629. *Contra*, Abels *v.* Westervelt, 15 Abb. Pr. (N. Y.) 230; Roemer *v.* Denig, 18 Pa. St. 482. See also Wilkinson's Appeal, 65 Pa. St. 189; Morrison *v.* Baker, 9 Pa. Super. Ct. 637, 44 Wkly Notes Cas. (Pa.) 104, where the objection was not made for thirty days.

89. Langford *v.* Few, 146 Mo. 142, 47 S. W. 927, 69 Am. St. Rep. 606 (subject to collateral attack); Gorman *v.* Stanton, 5 Mo. App. 585 (not subject to collateral attack).

90. Earle *v.* Thomas, 14 Tex. 583; Rogers *v.* Cherrier, 75 Wis. 54, 43 N. W. 828.

91. *Connecticut.*— Marcy *v.* Russ, 1 Root 176, failure to file bond.

Georgia.— Rushen *v.* Shields, 11 Ga. 636, 56 Am. Dec. 436.

Maine.— Gardiner Mfg. Co. *v.* Heald, 5 Me. 381, 17 Am. Dec. 248, failure to file bond.

New York.—Crouse *v.* Schoolcraft, 51 N. Y. App. Div. 160, 64 N. Y. Suppl. 640, issuance of duplicate execution without an order of court.

Pennsylvania.— Potts' Appeal, 20 Pa. St. 253; McCrossin *v.* McCrossin, 7 Pa. Dist. 688, 21 Pa. Co. Ct. 33.

See 21 Cent. Dig. tit. "Execution," § 206.

92. Estoppel generally see Estoppel.

Laches generally see Equity.

93. *Louisiana.*— Conrey *v.* Copland, 4 La. Ann. 307, inaccuracy in title of the case.

New York.— Bell *v.* Bell, 1 How. Pr. 71.

Pennsylvania.—Roemer *v.* Denig, 18 Pa. St. 482, premature issuance.

South Carolina.— Lawrence *v.* Grambling, 13 S. C. 120, issuance without leave.

Texas.— Stark *v.* Carroll, 66 Tex. 393, 1 S. W. 188.

Vermont.— Willard *v.* Whipple, 40 Vt. 219.

See 21 Cent. Dig. tit. "Execution," § 203.

A warrant of attorney for the confession of judgment which contained a release of errors did not justify the issuing of an execution within thirty days, or release errors in the issuing. Bell *v.* Bell, 1 How. Pr. (N. Y.) 71.

That defendant filed a motion to stay proceedings under an execution, and otherwise treated the execution as a valid writ, was held not to estop him from thereafter objecting to it, on the ground that it was invalid because it was not sealed on his discovering such fact. Peasley *v.* Weaver, 64 Ill. App. 80.

The filing of an injunction to restrain the sale under an execution cures the irregularity of the issuance and levy more than a year after the rendition of the judgment. Overton *v.* Perkins, Mart. & Y. (Tenn.) 367, under a statute which provided that the filing of an injunction in equity shall be equal to a release of errors.

Waiver by creditor.— See McKinneys *v.* Scott, 1 Bibb (Ky.) 155.

Waiver by guardian of infant.— See Heath *v.* Latham, 29 N. C. 10.

94. Powell *v.* Perry, 63 Ga. 417 (claimant of property seized failing to call the court's attention to the failure of the execution to follow the judgment); Doe *v.* Dutton, 2 Ind. 309, 52 Am. Dec. 510; Doe *v.* Harter, 2 Ind. 252; Wright *v.* Young, 6 Oreg. 87.

95. *Georgia.*— Watson *v.* Halsted, 9 Ga. 275.

New Hampshire.— Parsons *v.* Swett, 32 N. H. 87, 64 Am. Dec. 352.

New York.—Deyo *v.* Borley, 18 N. Y. Suppl. 300 [*following* Wright *v.* Nostrand, 94 N. Y. 31]. See also Bowman *v.* Tallman, 3 Rob. 633, 19 Abb. Pr. 84, 28 How. Pr. 482.

Pennsylvania.— Morrison *v.* Baker, 9 Pa. Super. Ct. 637, 44 Wkly. Notes Cas. 104.

Texas.— Portis *v.* Parker, 8 Tex. 23, 58 Am. Dec. 95.

See 21 Cent. Dig. tit. "Execution," § 203.

96. Catlin *v.* Merchants' Bank, 36 Vt. 572.

either a *jus in re* or a *jus ad rem*; it is simply a right by law to charge the property with the payment of the debt.[97]

b. As Applied to Real Estate — (I) *Where Judgment Is a Lien.* Where the judgment is a lien upon real estate, it has been generally recognized by the courts that an execution and levy thereunder upon such real estate creates no new or separate lien from the lien of the judgment.[98]

(II) *Where Judgment Is Not a Lien*[99] — (A) *In General.* Where, however, land is levied on under an execution issued on a judgment which is not a lien on such land, the execution creates a lien on it.[1]

(B) *Testatum Execution.* The lien of a testatum execution upon land is an independent one.[2]

2. Commencement of Lien[3] — **a. Rule at Common Law.** At common law, an execution issued on a judgment of a court of record related back to the teste of the writ, and bound the debtor's personal property from the time it was awarded.[4]

97. It is simply a right given by law to charge the property of the judgment debtor which is subject to levy and sale with the payment of the debt; operating as an encumbrance on it, of which all who subsequently deal with him must at their peril take notice. Thames *v.* Rembert, 63 Ala. 561; Otey *v.* Moore, 17 Ala. 280, 52 Am. Dec. 173; McMahan *v.* Green, 12 Ala. 71, 74, 46 Am. Dec. 242 (where the court said: "A lien is a tie, hold, or security, upon goods which a man has for some particular purpose — he may hold it until the purpose is satisfied, or the lien is lost, or in some manner waived: U. S. *v.* Barney, 24 Fed. Cas. No. 14,525, 3 Hughes 545"); Lynn *v.* Gridley, Walk. (Miss.) 548, 12 Am. Dec. 591.

98. *California.*— Bagley *v.* Ward, 37 Cal. 21, 99 Am. Dec. 256.

Illinois.— Conwell *v.* Watkins, 71 Ill. 488.

Iowa.— See also Stahl *v.* Roost, 34 Iowa 475.

New York.— Catlin *v.* Jackson, 8 Johns. 520.

Pennsylvania.— Jameson's Appeal, 6 Pa. St. 280.

See 21 Cent. Dig. tit. "Execution," § 208 *et seq.*

Compare Miller *v.* Estill, 8 Yerg. (Tenn.) 452, holding that the lien of the judgment and the incipient title in the creditor which attaches by levy of his execution on the land are not the same in effect. The specific lien created by levy cannot be defeated by an injunction, although the general lien by judgment may, as to purchasers, where a levy is not made within a year.

99. Necessity for execution to render a judgment a lien see, generally, Judgments.

1. Riland *v.* Eckert, 23 Pa. St. 215; Frey *v.* Wurtzel, 1 Woodw. (Pa.) 147.

2. But this is only so because the lien of the judgment is, in the absence of statutory provision, limited to lands in the county where the judgment is rendered. Reichert *v.* McClure, 23 Ill. 516; Lilliard *v.* Shannon, 60 Mo. 522; Jameson's Appeal, 6 Pa. St. 280; Cowden *v.* Brady, 8 Serg. & R. (Pa.) 505.

3. Commencement of lien where property was previously attached in same suit see *infra*, VII, A, 4, b, (III).

4. *Maryland.*— Canson *v.* Barnes, 3 Gill & J. 359, 22 Am. Dec. 322; Jones *v.* Jones, 1 Bland 443, 18 Am. Dec. 327.

New York.— Bond *v.* Willett, 31 N. Y. 102, 1 Abb. Dec. 165, 1 Keyes 377, 29 How. Pr. 47, so holding in cases where writs of creditors or purchasers have not intervened.

North Carolina.— Coughlan *v.* White, 66 N. C. 102; Spencer *v.* Hawkins, 39 N. C. 288 (holding that a lien of a subsequent execution relates back to the teste of the first execution on the same judgment, where all have been *bona fide* acted on, but the lien does not relate back beyond the execution on which the sheriff has acted); Harding *v.* Speivey, 30 N. C. 63; Deaver *v.* Rice, 20 N. C. 567, 34 Am. Dec. 388; Palmer *v.* Clarke, 13 N. C. 354, 21 Am. Dec. 340; Gilky *v.* Dickerson, 9 N. C. 341; Green *v.* Johnson, 9 N. C. 309, 11 Am. Dec. 763; Stamps *v.* Irvine, 9 N. C. 232; Hattan *v.* Dew, 7 N. C. 260; Williams *v.* Bradley, 3 N. C. 556; Ingles *v.* Donalson, 3 N. C. 57.

Texas.— Mercein *v.* Burlon, 17 Tex. 206.

England.— Anonymous, Cro. Eliz. 174; Baskerville *v.* Brocket, Cro. Jac. 449; Vincent *v.* Dale, 1 Dyer 76*b*; Payne *v.* Drewe, 4 East 523, 1 Smith K. B. 170.

See 21 Cent. Dig. tit. "Execution," § 213 *et seq.*

In Tennessee this rule of the common law has never been changed by statute and in that jurisdiction the property of the judgment debtor subject to execution is subject to the lien from the teste of the writ. Stahlman *v.* Watson, (Tenn. Ch. App. 1897) 39 S. W. 1055; Edwards *v.* Thompson, 85 Tenn. 720, 4 S. W. 913, 4 Am. St. Rep. 807; Harvey *v.* Berry, 1 Baxt. (Tenn.) 252; James *v.* Kennedy, 10 Heisk. (Tenn.) 607; Peck *v.* Robinson, 3 Head (Tenn.) 438; Sandeford *v.* Hess, 2 Head (Tenn.) 630; Evans *v.* Barnes, 2 Swan (Tenn.) 292; Cox *v.* Hodge, 1 Swan (Tenn.) 371; Barnes *v.* Haynes, 1 Swan (Tenn.) 304; Berry *v.* Clements, 9 Humphr. (Tenn.) 312; Union Bank *v.* McClung, 9 Humphr. (Tenn.) 91; Daley *v.* Perry, 9 Yerg. (Tenn.) 442; Coffee *v.* Wray, 8 Yerg. (Tenn.) 464; Johnson *v.* Ball, 1 Yerg. (Tenn.) 291, 24 Am. Dec. 451; Anderson *v.* Taylor, 1 Tenn. Ch. 436.

b. By Statute in England. By an early English statute,[5] the common-law rule was modified to the extent of providing that no fieri facias or other writ should bind the debtor's property, except from the time such writ should be delivered to the officer to be executed, who upon its receipt should indorse thereon the day he received the same.[6] Yet it has been held that as against defendant, although not as to a *bona fide* purchaser or stranger, the property is bound from the teste of the writ, as before the statute.[7]

c. Rule in United States — (I) *DELIVERY TO OFFICER.* This statute[8] was afterward incorporated in the jurisprudence of almost all of the United States, and is still, with immaterial variations, the law in a majority of the states, and when possession of the property is taken under levy the lien relates back to the time of the delivery of the execution.[9] In some jurisdictions the above doctrine

Where several executions were issued on the same judgment, and all were acted on *bona fide* without being satisfied, it was held that the last of them related to the teste of the first, and bound the property of defendant from that time. Dawson *v.* Shepherd, 15 N. C. 497.

5. St. 29 Car. II, c. 3, § 16.

6. Love *v.* Williams, 4 Fla. 126; Berry *v.* Clements, 9 Humphr. (Tenn.) 312; Waghorne *v.* Langmead, 1 B. & P. 571; Samuel *v.* Duke, 6 Dowl. P. C. 536, 1 H. & H. 127, 7 L. J. Exch. 177, 3 M. & W. 622; Payne *v.* Drewe, 4 East 523, 1 Smith K. B. 170; Lowthal *v.* Tonkins, 2 Eq. Cas. Abr. 381, 22 Eng. Reprint 324; Smallcomb *v.* Cross, 1 Ld. Raym. 251, 1 Salk. 320; Farrer *v.* Brooks, 1 Mod. 188; Hutchinson *v* Johnston, 1 T. R. 729, 1 Rev. Rep. 380. And see Bingham Judgm. & Ex. 190. *Compare* Rawlinson *v.* Oriel, Comb. 144.

7. Berry *v.* Clements, 9 Humphr. (Tenn.) 312; Vincent *v.* Dale, 1 Dyer 76*b*; Farrer *v.* Brooks, 1 Mod. 188; Houghton *v.* Rushby, Skin. 257; 4 Comyns Dig. 238.

8. St. 29 Car. II, c. 3, § 16.

9. *Alabama.*— Perkins *v.* Brierfield Iron, etc., Co., 77 Ala. 403; Walker *v.* Elledge, 65 Ala. 51; King *v.* Kenan, 38 Ala. 63; Curry *v.* Landers, 35 Ala. 280; McKenzie *v.* Lampley, 31 Ala. 526; Daily *v.* Burke, 28 Ala. 328; Newcombe *v.* Leavitt, 22 Ala. 631; Andress *v.* Roberts, 18 Ala. 387; Watson *v.* Simpson, 5 Ala. 233.

Arkansas.— Harris *v.* Phillips, 49 Ark. 58, 4 S. W. 196; Hanaeuer *v.* Casey, 26 Ark. 352; Davis *v.* Oswalt, 18 Ark. 414. 68 Am. Dec. 182; Dodd *v.* McCraw, 8 Ark. 83, 44 Am. Dec. 301.

Colorado.— Joslin *v.* Spangler, 13 Colo. 491, 22 Pac. 804.

Delaware.— Taylor *v.* Horsey, 5 Harr. 131; Stuarts *v.* Reynold, 4 Harr. 112; Layton *v.* Steel, 3 Harr. 512 (holding, however, that the delivery of the writ to the sheriff does not change the property in the goods until actually levied); Green *v.* Walker, 5 Del. Ch. 26.

Florida.— Kimball *v.* Jenkins, 11 Fla. 111, 89 Am. Dec. 237; Love *v.* Williams, 4 Fla. 126.

Illinois.— Hanchett *v.* Ives, 133 Ill. 332, 24 N. E. 396; Leach *v.* Pine, 41 Ill. 65, 89 Am. Dec. 375; People *v.* Bradley, 17 Ill. 485; Marshall *v.* Cunningham, 13 Ill. 20; Garner *v.* Willis, 1 Ill. 368.

Indiana.— Moss *v.* Jenkins, 146 Ind. 589, 45 N. E. 789; J. W. Dann Mfg. Co. *v.* Parkhurst, 125 Ind. 317, 25 N. E. 347; Durbin *v.* Haines, 99 Ind. 463; Dixon *v.* Duke, 85 Ind. 434; McCrisaken *v.* Osweiler, 70 Ind. 131; Willson *v.* Binford, 54 Ind. 569; Lindley *v.* Kelley, 42 Ind. 294; Cones *v.* Wilson, 14 Ind. 465; Vandibur *v.* Love, 10 Ind. 54; Johnson *v.* McLean, 7 Blackf. 501, 43 Am. Dec. 102, so held, even where the sheriff failed to indorse on the writ the time of its delivery.

Kentucky.— Soaper *v.* Howard, 85 Ky. 256, 3 S. W. 161, 8 Ky. L. Rep. 937; Chenault *v.* Bush, 84 Ky. 528, 2 S. W. 160, 8 Ky. L. Rep. 490; Whitehead *v.* Woodruff, 11 Bush 209; Million *v.* Riley, 1 Dana 359, 25 Am. Dec. 149; Kennon *v.* Ficklin, 6 B. Mon. 414, 44 Am. Dec. 776; Tabb *v.* Harris, 4 Bibb 29, 7 Am. Dec. 732; Richart *v.* Goodpaster, 76 S. W. 831, 25 Ky. L. Rep. 889; Mt. Vernon Banking Co. *v.* Henderson Hominy Mills, 15 Ky. L. Rep. 333; Lacky *v.* Mimms, 5 Ky. L. Rep. 855.

Louisiana.— Bradbury *v.* Morgan, 2 La. 476; U. S. *v.* Hawkins, 4 Mart. N. S. 317; Duffy *v.* Townsend, 9 Mart. 585.

Maine.— French *v.* Allen, 50 Me. 437.

Maryland.—Prentiss Tool, etc., Co. *v.* Whitman, etc., Mfg. Co., 88 Md. 240, 41 Atl. 49; Furlong *v.* Edwards, 3 Md. 99; Selby *v.* Magruder, 6 Harr. & J. 454; Arnott *v.* Nicholls, 1 Harr. & J. 471.

Missouri.— Gott *v.* Williams, 29 Mo. 461; Brown *v.* Burrus, 8 Mo. 26.

New Jersey.— James *v.* Burnet, 20 N. J. L. 635; Cliver *v.* Applegate, 5 N. J. L. 479; Newell *v.* Sibley, 4 N. J. L. 381; Hall *v.* Nash, 58 N. J. Eq. 554, 43 Atl. 683 [*affirming* (Ch. 1898) 39 Atl. 374].

New York.— Sickles *v.* Sullivan, 136 N. Y. 649, 32 N. E. 1016 [*affirming* 19 N. Y. Suppl. 749, 22 N. Y. Civ. Proc. 322]; Hale *v.* Sweet, 40 N. Y. 97; Roth *v.* Wells, 29 N. Y. 471 [*affirming* 41 Barb. 194]; Hodge *v.* Adee, 2 Lans. 314; *In re* Muehlfeld, etc., Piano Co., 42 N. Y. Suppl. 802; Ray *v.* Birdseye, 5 Den. 619; Camp *v.* Chamberlain, 5 Den. 198; Lambert *v.* Paulding, 18 Johns. 311; Cresson *v.* Stout, 17 Johns. 116, 8 Am. Dec. 373; Haggerty *v.* Wilber, 16 Johns. 287, 8 Am. Dec. 321; Beals *v.* Guernsey, 8 Johns. 446, 5 Am. Dec. 348.

is applied, except as against a *bona fide* purchaser, or mortgagee without notice, whose rights attached between the delivery and the levy of the execution.[10]

(II) *Actual Levy.* Now, by statute, in quite a number of the states, an execution is a lien upon property only from the time of the levy thereof.[11]

3. Property or Interests to Which Lien Attaches[12] — a. In General. As a general rule the lien of an execution operates upon and binds all property, real or personal, which is the subject of levy and sale in obedience to its mandate, and consequently it is sometimes termed a "general lien," to distinguish it from liens which only operate on specific or particular property.[13]

North Carolina.—Watt *v.* Johnson, 49 N. C. 190; Williamson *v.* James, 32 N. C. 162 (in which case the debtor had only an equitable interest); Morisey *v.* Hill, 31 N. C. 66 (in which case the debtor had only an equitable interest); McLean *v.* Upchurch, 6 N. C. 353; Arnold *v.* Bell, 2 N. C. 396.

Pennsylvania.— Braden's Estate, 165 Pa. St. 184, 30 Atl. 746; Childs *v.* Dilworth, 44 Pa. St. 123; Duncan *v.* McCumber, 10 Watts 212; Cowden *v.* Brady, 8 Serg. & R. 505; Lewis *v.* Smith, 2 Serg. & R. 142; Lefever *v.* Armstrong, 15 Pa. Super. Ct. 565; *In re* Avery, 1 C. Pl. 151; Picard *v.* Prescott, 1 Pa. L. J. Rep. 1, 1 Pa. L. J. 1; Swick *v.* McLaughlin, 4 Lack. Leg. N. 240.

South Carolina.— Lynch *v.* Hanahan, 9 Rich. 186; State *v.* O'Conner, Rice 150; Woodward *v.* Hill, 3 McCord 241.

Virginia.— Boisseau *v.* Bass, 100 Va. 207, 40 S. E. 647, 93 Am. St. Rep. 956; Frayser *v.* Richmond, etc., R. Co., 81 Va. 388; Puryear *v.* Taylor, 12 Gratt. 401; Pegram *v.* May, 9 Leigh 176.

West Virginia.— Wiant *v.* Hays, 38 W. Va. 681, 18 S. E. 807, 23 L. R. A. 82.

United States.— Waller *v.* Best, 44 U. S. 111, 11 L. ed. 518; U. S. Bank *v.* Tyler, 4 Pet. 366, 7 L. ed. 888; The Daniel Kaine, 35 Fed. 785; Bartlett *v.* Russell, 2 Fed. Cas. No. 1,080, 4 Dill. 267; Bayard *v.* Bayard, 2 Fed. Cas. No. 1,129 (holding that an execution issued out of a state court is a lien, from its delivery to the sheriff, on surplus proceeds in a marshal's hands under prior process from a federal court); *In re* Paine, 18 Fed. Cas. No. 10,672, 9 Ben. 144.

See 21 Cent. Dig. tit. "Execution," § 215.

Indorsement unnecessary.— It was held in Hanson *v.* Barnes, 3 Gill & J. (Md.) 359, 22 Am. Dec. 322, that neither an indorsement of the time of delivery of the writ to the sheriff, nor evidence of the time, is necessary to give title to the purchaser of property sold under the writ, except against purchasers from the owner.

Levy before return-day of writ.— It has been held under the Pennsylvania statute of June 16, 1836, that the levy must be made before the return-day of the writ in order to make the lien good from the time the writ is placed in the sheriff's hands; but when a proper levy is made before the return-day of the writ, the levy itself relates to the hour at which the writ was placed in the sheriff's hands and indorsed thereon. Spicks *v.* Prospect Brewing Co., 19 Pa. Super. Ct. 399.

10. *New Jersey.*— Van Waggoner *v.* Moses, 26 N. J. L. 570.

New York.— Williams *v.* Shelly, 37 N. Y. 375; Osborn *v.* Alexander, 40 Hun 323; Stewart *v.* Beal, 7 Hun 405; Thompson *v.* Van Vechten, 6 Bosw. 373 [*affirming* 5 Abb. Pr. 458]; Ray *v.* Birdseye, 5 Den. 119; Butler *v.* Maynard, 11 Wend. 548, 27 Am. Dec. 100; Hendricks *v.* Robinson, 2 Johns. Ch. 283.

North Carolina.— Weisenfield *v.* McLean, 96 N. C. 248, 2 S. E. 56. See also Sawyer *v.* Sawyer, 93 N. C. 321.

Virginia.—Trevillian *v.* Guerrant, 31 Gratt. 525; Charron *v.* Boswell, 18 Gratt. 216.

West Virginia.—Huling *v.* Cabell, 9 W. Va. 522, 27 Am. Rep. 562.

United States.— Crane *v.* Penney, 2 Fed. 187.

See 21 Cent. Dig. tit. "Execution," § 215.

11. *California.*— Bagley *v.* Ward, 37 Cal. 121, 99 Am. Dec. 256; Johnson *v.* Gorham, 6 Cal. 195, 65 Am. Dec. 501.

Iowa.— Reeves *v.* Sebren, 16 Iowa 234, 85 Am. Dec. 513.

Minnesota.— Albrecht *v.* Long, 25 Minn. 163; Tullis *v.* Brawley, 3 Minn. 277.

New Jersey.— Princeton Bank *v.* Crozer, 22 N. J. L. 383, 53 Am. Dec. 254.

New York.— Steffin *v.* Steffin, 4 N. Y. Civ. Proc. 179. See also Millspaugh *v.* Mitchell, 8 Barb. 333; Birdseye *v.* Ray, 4 Hill 158.

North Carolina.— Weisenfield *v.* McLean, 96 N. C. 248, 2 S. E. 56; Sawyers *v.* Sawyers, 93 N. C. 321.

Ohio.— Smith *v.* Hogg, 52 Ohio St. 527, 40 N. E. 406 (holding that where a levy on land is made after judgment is revived, the lien dates from the seizure on execution, and not from the time of revival); Jackman *v.* Hallock, 1 Ohio 318, 13 Am. Dec. 627.

Pennsylvania.—Wilson's Appeal, 90 Pa. St. 370; Patton's Estate, 2 Pars. Eq. Cas. 103.

Texas.— McMahon *v.* Hall, 36 Tex. 59; Mercein *v.* Burton, 17 Tex. 206.

Wisconsin.— Knox *v.* Webster, 18 Wis. 406, 86 Am. Dec. 779; Russell *v.* Lawton, 14 Wis. 202, 80 Am. Dec. 769.

See 21 Cent. Dig. tit. "Execution," § 213.

In the levy of an execution upon land, the levy is to be considered as taking effect by relation, from the time when the legal proceedings for making the levy commenced, if followed up seasonably by a compliance with the requisites of the law. Hall *v.* Crocker, 3 Metc. (Mass.) 245; Colburn *v.* Pomeroy, 44 N. H. 19; Willard *v.* Lull, 20 Vt. 373.

12. **Exemptions** generally see Exemptions; Homesteads.

Property subject to execution see *supra*, V.

13. *Alabama.*— Mathews *v.* Mobile Mut. Ins. Co., 75 Ala. 85.

b. After-Acquired Property. In some jurisdictions the lien of an execution attaches to property acquired by the debtor after the execution comes into the hands of the officer.[14] In other jurisdictions, however, it is held that property acquired by an execution debtor, after the date of the levy of the writ, and not mentioned in the original levy, is not subject to the lien of the execution.[15]

c. Territorial Extent. As a general rule the lien of the execution is coextensive with the writ.[16]

Indiana.— Moss *v.* Jenkins, 146 Ind. 589, 45 N. E. 789; Boesker *v.* Pickett, 81 Ind. 554; Terrell *v.* State, 66 Ind. 570; State *v.* Melogue, 9 Ind. 196.

Kentucky.— Whitehead *v.* Woodruff, 11 Bush 209.

Louisiana.— Cobb *v.* Hynes, 4 La. Ann. 150.

Maryland.— Green *v.* Western Nat. Bank, 86 Md. 279, 38 Atl. 131, holding that an execution issued on a judgment becomes a lien on the interest of the judgment debtor in market stalls.

See 21 Cent. Dig. tit. "Execution," § 216.

Rule in Illinois.— The above rule applies in Illinois to the personal property of a judgment debtor (Monmouth Second Nat. Bank *v.* Gilbert, 174 Ill. 485, 51 N. E. 584, 66 Am. St. Rep. 306; Blatchford *v.* Boyden, 122 Ill. 657, 12 N. E. 801); but it is held in that state that the levy of an execution upon real estate has no force in the creation of a lien, except in the single instance where the execution was issued to a foreign country, and the certificate of levy recorded as the statute requires, and with that exception the lien, if any exists, is that of the judgment, and the lien of an execution will not operate to continue the lien of the judgment beyond the statutory period of seven years (Conwell *v.* Watkins, 71 Ill. 488; Tenney *v.* Hemenway, 53 Ill. 97). See *supra*, V.

Debt payable in future.— It has been held in Virginia that a debt, due to the judgment debtor, having present existence, although payable at a future day, is subject to the lien of the execution, but a debt which may become due to the judgment debtor, but is dependent on some contingency which may or may not happen, and over which the court has no control, is not subject to the lien. Boisseau *v.* Bass, 100 Va. 207, 40 S. E. 647, 93 Am. St. Rep. 956.

14. *Illinois.*—Monmouth Second Nat. Bank *v.* Gilbert, 174 Ill. 485, 51 N. E. 584, 66 Am. St. Rep. 306; Blatchford *v.* Boyden, 122 Ill. 657, 13 N. E. 801.

Kentucky.— Orchard *v.* Williamson, 6 J. J. Marsh. 558, 22 Am. Dec. 102.

Missouri.— State *v.* Blundin, 32 Mo. 387; Brown *v.* Burrus, 8 Mo. 26.

New Jersey.— Green *v.* Steelman, 10 N. J. L. 193, applied to real property only. See *infra*, note 15.

New York.— Roth *v.* Wells, 29 N. Y. 471 [*affirming* 41 Barb. 194]; Hodge *v.* Adee, 2 Lans. 314; Youngs *v.* Williams, 21 N. Y. Wkly. Dig. 249.

Pennsylvania.— Lea *v.* Hopkins, 7 Pa. St. 492; Shafner *v.* Gilmore, 3 Watts & S. 438; Bausman *v.* Eshelmann, 1 Leg. Chron. 121. But see Farrel *v.* Copeland, 18 Wkly. Notes Cas. 194.

South Carolina.— Carriel *v.* Thompson, 11 S. C. 79 (holding that the lien of an execution issued prior to the adoption of the act attaches to personal property of the debtor acquired after its adoption); Grooms *v.* Dixon, 5 Strobh. 149; Brown *v.* Gilliland, 3 Desauss. 539 (holding that an execution binds personal property acquired by the debtor after an execution has been returned *nulla bona*).

Virginia.— Boisseau *v.* Bass, 100 Va. 207, 40 S. E. 647, 93 Am. St. Rep. 956.

Canada.— Ruttan *v.* Levisconte, 16 U. C. Q. B. 495.

See 21 Cent. Dig. tit. "Execution," § 218.

Offspring of animals.— Under the well settled rule that the increase of the females of live stock belongs to the owner of the dam (Stewart *v.* Ball, 33 Mo. 154; Edmonston *v.* Wilson, 49 Mo. App. 491; White *v.* Storms, 21 Mo. App. 288; 2 Cyc. 309), the offspring of an animal, born after an execution on its mother, and while she is still in the custody of the levying officer, is subject to the lien of the execution (Talbot *v.* Magee, 59 Mo. App. 347; Blum *v.* Light, 81 Tex. 414, 16 S. W. 1090, where this principle was recognized, but lien of the execution was held not to extend to the increase, as they were not in existence at the time of the attempted levy).

15. Caldwell *v.* Fifield, 24 N. J. L. 150; Cook *v.* Wood, 16 N. J. L. 254; Matthews *v.* Warne, 11 N. J. L. 295; Lloyd *v.* Wyckoff, 11 N. J. L. 218; Gentry *v.* Callahan, 98 N. C. 448, 4 S. E. 535; Springer *v.* Smith, 3 Lea (Tenn.) 737. But see Green *v.* Steelman, 10 N. J. L. 193, as to real estate.

16. That is to say, any property situated within a given territory, which is subject to seizure under execution, is subject to the lien thereof, and where the writ is confined to the county where issued, the lien is likewise restricted.

Alabama.— Andress *v.* Roberts, 18 Ala. 387; Wood *v.* Gray, 5 Ala. 43; Pond *v.* Griffin, 1 Ala. 678.

Illinois.— Pike *v.* Baker, 53 Ill. 163; McClure *v.* Engelhardt, 17 Ill. 47.

Missouri.— Gott *v.* Williams, 29 Mo. 461; Brown *v.* Burrus, 8 Mo. 26.

New York.— Roth *v.* Wells, 29 N. Y. 471.

North Carolina.— Blanton *v.* Morrow, 42 N. C. 47, 53 Am. Dec. 391; Hardy *v.* Jasper, 14 N. C. 158.

South Carolina.—Stout *v.* Simpson, 1 Rich. 393.

United States.— Prevost *v.* Gorrell, 19 Fed. Cas. No. 11,400.

4. Priorities — a. Between Executions[17] — (I) *As Affected by Delivery of Writ* — (A) *General Rule.* In a majority of the states of the Union the general rule is that all executions coming into the hands of an officer become liens on property of the execution debtor within the jurisdiction of such officer, in the order in which the executions are received;[18] and this rule likewise prevails in

See 21 Cent. Dig. tit. "Execution," § 217.

Temporary removal of property from jurisdiction.— An execution in the hands of an officer gives a lien on the property of defendant in the county which is not lost by the temporary removal of such property. Hood *v.* Winsatt, 1 B. Mon. (Ky.) 208.

17. Abandonment or waiver of levy and lien see *infra,* VII, B, 12.

Arrest of debtor on execution against the person see *infra,* XIV.

Disposition of proceeds see *infra,* X, F.

Priority between execution and distress warrant see generally Landlord and Tenant.

18. *Alabama.*— Leach *v.* Williams, 8 Ala. 759; Langdon *v.* Brumby, 7 Ala. 53; Bell *v.* King, 8 Port. 147.

Arkansas.— Trapnall *v.* Jordan, 7 Ark. 430.

Delaware.— Stuarts *v.* Reynolds, 4 Harr. 112.

Georgia.— See also Glenn *v.* Black, 31 Ga. 393.

Illinois.— Leach *v.* Pine, 41 Ill. 65, 89 Am. Dec. 375; Rogers *v.* Dickey, 6 Ill. 636, 41 Am. Dec. 204; Garner *v.* Willis, 1 Ill. 368.

Indiana.— Bragg *v.* State, 30 Ind. 427.

Kansas.— Atchison Sav. Bank *v.* Wyman, 65 Kan. 314, 69 Pac. 326.

Kentucky.—Million *v.* Com., 1 B. Mon. 310, 36 Am. Dec. 580; Tabb *v.* Harris, 4 Bibb 29, 7 Am. Dec. 732.

Louisiana.— Henry *v.* Tricou, 36 La. Ann. 519.

Maryland.—See Selby *v.* Magruder, 6 Harr. & J. 454.

New Hampshire.— Rogers *v.* Edmunds, 6 N. H. 70.

New Jersey.— Williamson *v.* Johnston, 12 N. J. L. 86; Clement *v.* Kaighn, 15 N. J. Eq. 47.

New York.— Camp *v.* Chamberlain, 5 Den. 198; Beals *v.* Allen, 18 Johns. 363, 9 Am. Dec. 221; Lambert *v.* Paulding, 18 Johns. 311; Waterman *v.* Haskin, 11 Johns. 228.

North Carolina.— State *v.* Vick, 25 N. C. 488; Ricks *v.* Blount, 15 N. C. 128; Irwin *v.* Sloan, 13 N. C. 349.

Ohio.— Meier *v.* Cardington First Nat. Bank, 55 Ohio St. 446, 45 N. E. 907.

Pennsylvania.— Childs *v.* Dilworth, 44 Pa. St. 123; Schuylkill County's Appeal, 30 Pa. St. 358; Brown's Appeal, 17 Pa. St. 480 (holding that where judgment was obtained against one doing business in his own name, but who had a silent partner, and afterward another judgment was obtained against both partners, the creditor whose execution was first in the hands of the sheriff had priority); McCahen *v.* Bennett, 1 Phila. 22. See also McFee *v.* Harris, 25 Pa. St. 102; Packer's Appeal, 6 Pa. St. 277. See, however, Wilson's Appeal, 90 Pa. St. 370.

South Carolina.— Lynch *v.* Hanahan, 9 Rich. 186; Greenwood *v.* Naylor, 1 McCord 414.

Texas.— Garner *v.* Cutler, 28 Tex. 175.

United States.— Cunningham *v.* Offutt, 6 Fed. Cas. No. 3,484, 5 Cranch C. C. 524. See Riddle *v.* District of Columbia, 20 Fed. Cas. No. 11,808, 1 Cranch C. C. 96, holding that a fieri facias first delivered to the marshal will supersede a fieri facias delivered to a constable subsequently, but first levied.

See 21 Cent. Dig. tit. "Execution," § 226.

In Tennessee, however, where judgment was rendered in the supreme court and execution awarded, and subsequently judgments were secured against the same debtor, and executions thereon, although not awarded until after execution in the prior judgment, came to the hands of the sheriff before the prior execution, it was held that on a sale of the land under all the executions, the one first awarded was entitled to priority in satisfaction. Johnson *v.* Ball, 1 Yerg. 291, 24 Am. Dec. 451. It has been held that plaintiffs in execution are entitled to a ratable division of the moneys realized on executions issued on judgments rendered on a prior day in the same term, as if the same were all rendered as of the first day of the term. Porter *v.* Earthman, 4 Yerg. 358. See, however, Berry *v.* Clements, 9 Humphr. 312, holding that under such circumstances the priority of the executions will relate to the date of which they bear teste.

Executions in the hands of different deputies.— It was held in Kennon *v.* Ficklin, 6 B. Mon. (Ky.) 414, 44 Am. Dec. 776, that where two executions came into the hands of different deputies of the same sheriff, against the same defendant, the proceeds of the levy by either deputy should be applied to that execution which first came into the hands of either.

Executions issued to another county.— Under the Mississippi statute providing that a judgment lien shall not attach to property out of the county in which it is rendered until an abstract of the judgment is filed with the clerk of the circuit court in the county in which the property may be situated, it has been held that where several judgments are rendered in one county and execution is issued to another without filing abstracts of the judgments, the execution first coming to the hands of the sheriff and levied has the priority, although issuing on a junior judgment. Gresham *v.* Roberts, 2 Sm. & M. 471.

Indorsement of time of receipt.— It has been held in Pennsylvania that omission by the sheriff to indorse on an execution the time of receiving it does not give priority to a subsequent execution whereon the time is indorsed. Hale's Appeal, 44 Pa. St. 438.

Priority obtained by fraud.— Where one of

England.[19] In some jurisdictions executions delivered to the officer at the same time stand on an equal footing, even though issued on judgments recovered at different times, and are entitled to share *pro rata* in the proceeds of the execution sale.[20]

(B) *Unrecorded Executions.* Under statutes requiring executions to be recorded before delivery to the officer, it has been held that an execution duly recorded, when delivered to the sheriff, is entitled to priority, as to real estate, over an execution previously delivered, but not recorded until after the delivery of the second execution.[21]

(II) *As Affected by Date of Levy*—(A) *General Rule.* In some jurisdictions the rule has been laid down that, as between different writs, the one first levied is entitled to priority, without regard to the dates of the writs or the time of their delivery to the officers; that the lien given by delivery binds the property against a voluntary transfer, but not one made under legal process.[22]

two creditors, on their way to procure executions against a common debtor, caused the other's arrest by crying "stop thief" after him, and thereby obtained a prior execution, it was held that his priority of lien would be postponed as against the creditor wrongfully detained. Davis' Estate, 15 Pa. Co. Ct. 634.

Proof of direction to sheriff to sell.— It was held in Freeburger's Appeal, 40 Pa. St. 244, that where plaintiffs in a prior execution alleged that they had given orders to the sheriff to proceed and sell before a second execution came into his hands, they must prove the fact affirmatively or their execution will lose its priority.

Simultaneous levy.— Where an equity of redemption is levied on simultaneously by two creditors and sold under their executions, the proceeds are to be equally divided between them. Sigourney *v.* Eaton, 14 Pick. (Mass.) 414, 25 Am. Dec. 414.

Where, in violation of an agreement not to enter a judgment until the judgment of another creditor should be entered and execution issued thereon, judgment was entered and execution issued before the time stipulated, it was held that the creditor violating his agreement would be postponed, in the distribution of proceeds, to the creditor for whose benefit the agreement was made, although the execution of the latter came to the sheriff's hands after that of the former. Ayers' Appeal, 28 Pa. St. 179.

Where the first execution issued was fraudulent as to creditors, and the second execution creditor having a valid lien, with knowledge of this fact, induced the first execution creditor to get out of the way, it was held that his act could not be impeached by a third execution creditor, or cause him to lose his priority. Kelchner's Estate, 11 Pa. Super. Ct. 595.

19. Wintle *v.* Freeman, 11 A. & E. 539, 1 G. & D. 93, 10 L. J. Q. B. 161, 39 E. C. L. 294; Heenan *v.* Evans, 1 Dowl. P. C. N. S. 204, 11 L. J. C. P. 1, 3 M. & G. 398, 4 Scott N. R. 2, 42 E. C. L. 213. See also Ashworth *v.* Uxbridge, 2 Dowl. P. C. N. S. 377; Kempland *v.* Macauley, 1 Peake N. P. 65.

20. State *v.* Cisney, 95 Ind. 265; Bagley *v.* Bailey, 16 Me. 151; Jones *v.* Edmonds, 7 N. C. 43; Wilson *v.* Blake, 53 Vt. 305.

Delivery on same day.— In several jurisdictions where this doctrine is adhered to, writs delivered to the officer on the same day are regarded as being delivered at the same time, and entitled to share *pro rata* in the proceeds of the sale. State *v.* Hunger, 17 Nebr. 216, 22 N. W. 457; Meier *v.* Cardington First Nat. Bank, 55 Ohio St. 446, 45 N. E. 907; Bachman *v.* Sulzbacher, 5 S. C. 58; *Ex p.* Stagg, 1 Nott & M. (S. C.) 405. And see Rawles *v.* People, 2 Colo. App. 501, 31 Pac. 941. But in other jurisdictions it has been held that where both executions are issued on the same day the particular hour when each was issued will be material in determining the question of their priority and will be inquired into for that purpose. Clute *v.* Clute, 4 Den. (N. Y.) 241; Marvin *v.* Herrick, 5 Wend. (N. Y.) 109; Lemon *v.* Staats, 1 Cow. (N. Y.) 592; Ulrich *v.* Dreyer, 2 Watts (Pa.) 303.

Under Ohio St. § 5382, where two or more executions against the same debtor are sued out during the term at which judgment was rendered, no preference is given to either, but if a sufficient sum be not made to satisfy all, the amount must be proportionately distributed among them. Ryan *v.* Root, 56 Ohio St. 302, 47 N. E. 51.

21. Murray *v.* Bridges, 69 Ga. 644; Johnston *v.* Darrah, 8 N. J. L. 282; Elmer *v.* Burgin, 2 N. J. L. 186.

22. *Alabama.*— McBroom *v.* Rives, 1 Stew. 72, holding that where a plaintiff neglects to sue out execution from term to term, an execution on a subsequent judgment, sued out during such neglect, will acquire preference. See also Bliss *v.* Watkins, 16 Ala. 229.

California.— Bagley *v.* Ward, 37 Cal. 121, 99 Am. Dec. 256, holding that where there are no judgment or attachment liens on real estate levied on under executions, the execution first levied is entitled to priority.

Indiana.— Lowry *v.* Reed, 89 Ind. 442; McCall *v.* Trevor, 4 Blackf. 496.

Kansas.— Atchison Sav. Bank *v.* Wyman, 65 Kan. 314, 69 Pac. 326. See also J. M. W. Jones Stationery, etc., Co. *v.* Hentig, 29 Kan. 75.

(B) *After-Acquired Property.* The rule just stated is likewise applied in some jurisdictions in the case of property acquired by the judgment debtor after the rendition of the judgment and the issuance of execution, and the judgment creditor first levying upon such property obtains priority, even where the execution is a junior one.[23]

(C) *Where Writs Are of Same Date.* In some jurisdictions the rule is laid down that between judgment creditors whose writs are of the same date he who first takes the property in execution has the preference to be first paid out of its proceeds, and this has been held to be true whether the property taken under

Kentucky.— Million *v.* Com., 1 B. Mon. 310, 36 Am. Dec. 580; Tilford *v.* Burnham, 7 Dana 109; Kilby *v.* Haggin, 3 J. J. Marsh. 208; Arberry *v.* Noland, 2 J. J. Marsh. 421.

Louisiana.—Gay *v.* Pike, 30 La. Ann. 1332; Lafleur *v.* Hardy, 11 Rob. 493; Stafford *v.* Dunwoodie, 3 Rob. 276; Campbell *v.* His Creditors, 3 Rob. 106.

Minnesota.— Albrecht *v.* Long, 25 Minn. 163.

Missouri.— Field *v.* Milburn, 9 Mo. 492.

New Jersey.— Bogert *v.* Lydecker, 45 N. J. L. 314; Wills *v.* McKinney, 41 N. J. L. 120; Larison *v.* Dilts, (Ch. 1895) 32 Atl. 1059; Ayers *v.* Hawk, (Ch. 1887) 11 Atl. 744. See also Canfield *v.* Browning, 69 N. J. L. 553, 55 Atl. 101.

New York.— Becker *v.* Torrance, 31 N. Y. 631; Martin *v.* Mallery, 60 Hun 245, 14 N. Y. Suppl. 599.

North Carolina.— Lash *v.* Gibson, 5 N. C. 266.

Ohio.— Sellers *v.* Corwin, 5 Ohio 398, 24 Am. Dec. 301; Shuee *v.* Ferguson, 3 Ohio 136; Bish *v.* Burns, 7 Ohio Cir. Ct. 285. *Compare* Weber *v.* King, 8 Ohio Dec. (Reprint) 346, 7 Cinc. L. Bul. 148; Riddle *v.* Bryan, 5 Ohio 48.

Pennsylvania.— Near *v.* Watts, 8 Watts 319; Stambaugh *v.* Yeates, 2 Rawle 161; Roman Catholic Religious Soc. *v.* Hitchcock, 2 Browne 333; Levinstein *v.* Born, 18 Phila. 265; McCahen *v.* Bennett, 1 Phila. 22; Hildebrand *v.* Myers, 2 Del. Co. 46.

Texas.— Decatur First Nat. Bank *v.* Cloud, 2 Tex. Civ. App. 627, 21 S. W. 770.

Wisconsin.— Knox *v.* Webster, 18 Wis. 406, 86 Am. Dec. 779.

United States.—Rockhill *v.* Hanna, 15 How. 189, 14 L. ed. 656 (holding that a judgment creditor who levies his execution on lands of the debtor has the priority over a prior judgment creditor who, having previously committed the debtor to prison, from which he was discharged by act of law, makes a subsequent levy on the same land); *In re* Hughes, 12 Fed. Cas. No. 6,843; *In re* Tills, 23 Fed. Cas. No. 14,052.

England.— Payne *v.* Drewe, 4 East 523, 1 Smith K. B. 170; Smallcomb *v.* Cross, 1 Ld. Raym. 251, 1 Salk. 320; Rowe *v.* Tapp, 9 Price 317.

See 21 Cent. Dig. tit. "Execution," § 230.

A venditioni exponas, when issued, relates to, and as it were, identifies and incorporates itself with the previous execution and levy, so as to have a precedence or priority over the process concurrent with it only in its teste and in its return. Taylor *v.* Mumford, 3 Humphr. (Tenn.) 66.

Partial levy.— It was held in Walpole *v.* Ink, 9 Ohio 142, that a judgment creditor, by levying on a part of the debtor's lands only, loses his preference as to other lands first levied on by other execution creditors. See also Linnendoll *v.* Doe, 14 Johns. (N. Y.) 222. To the same effect see Slingerland *v.* Swart, 13 Johns. (N. Y.) 255.

Where execution was levied within the year.— It was held in Kentucky Northern Bank *v.* Roosa, 13 Ohio 334, that a judgment cannot by prior levy obtain a preference over another judgment of the same term levied within the year.

Suits to set aside conveyances.— It has been held in New Jersey that where creditors obtain judgments and make levies, and then bring suits to set aside fraudulent conveyances which are void as to all of them, their priorities in the property conveyed are in the order of their levies, without regard to the order in which they filed suits to set aside the conveyances, the assets being legal assets, and that this rule is not affected by the fact that in certain cases the executions were returned, with the levies annexed, to the effect that they were unsatisfied. Kinmouth *v.* White, 61 N. J. Eq. 358, 48 Atl. 952.

Under Miss. Code (1871), § 830 et seq., where the junior judgment creditor gives ten days' notice to the senior judgment creditor to make a levy and the latter fails to do so within the ten days, the former, by making a levy under an execution issued on his judgment, acquires a prior lien on the property of the judgment debtor. Curry *v.* Lampkin, 51 Miss. 91; Dabney *v.* Stackhouse, 19 Miss. 513.

23. Elston *v.* Castor, 101 Ind. 426, 51 Am. Rep. 754; Michaels *v.* Boyd, 1 Ind. 259; Matthews *v.* Warne, 11 N. J. L. 295; South Amboy Bldg., etc., Assoc. *v.* Murphy, (N. J. Ch. 1887) 9 Atl. 590.

In Pennsylvania this rule is applied in the case of real estate, on the ground that judgments are not liens on lands acquired by defendant after their rendition. Sherrard *v.* Johnston, 193 Pa. St. 166, 44 Atl. 252, 74 Am. St. Rep. 680; Lea *v.* Hopkins, 7 Pa. St. 492; Packer's Appeal, 6 Pa. St. 277. It is not, however, applied to personal property, and where a debtor acquires personal property after executions have been issued, the lien of such executions attach to such property in the order in which they were placed in the sheriff's hands. Wilson's Appeal, 13

the writ be real or personal estate, or choses in action not subject to actual or manual seizure.[24]

(III) *As Affected by Date of Judgment.* In some states, where an execution is levied on the property of defendant, and, before the sale of such property, another execution, issued on a senior judgment, comes into the hands of the officer, the rule is laid down that plaintiff in the senior judgment is entitled to the proceeds of the sale.[25] Where, however, neither of the judgments is a lien on the property by reason of non-compliance with statutory requirements regarding enrolment, the execution first levied is entitled to priority regardless of the seniority of the judgment.[26]

(IV) *As Affected by Invalidity of Levy.* An execution, the levy of which is defective by reason of non-compliance with some statutory provision, such as irregularity in return, or failure to record, will be postponed to a junior execution, which has been levied in strict compliance with the statute.[27]

(V) *As Affected by Judicial Stay.*[28] An execution does not lose any lien acquired at the time of its issuance by being subsequently suspended in its

Pa. St. 426; Shafner *v.* Gilmore, 3 Watts & S. 438.

24. *Illinois.*— Smith *v.* Lind, 29 Ill. 24.

Indiana.— Lowry *v.* Reed, 89 Ind. 442.

Iowa.—Lippencott *v.* Wilson, 40 Iowa 425; Cook *v.* Dillon, 9 Iowa 407, 74 Am. Dec. 354.

Mississippi.— Burney *v.* Boyett, 1 How. 39.

Missouri.— Shirley *v.* Brown, 80 Mo. 244; Bruce *v.* Vogel, 38 Mo. 100.

New York.— Waterman *v.* Haskin, 11 Johns. 228; Adams *v.* Dyer, 8 Johns. 347, 5 Am. Dec. 344.

Ohio.— See Waymire *v.* Staley, 3 Ohio 366.

Tennessee.— Taylor *v.* Mumford, 3 Humphr. 66.

See 21 Cent. Dig. tit. "Execution," § 230.

But see Rawles *v.* People, 2 Colo. App. 501, 31 Pac. 941, under Colorado statute. See also *supra*, VII, A, 4, a, (I).

Deceased judgment creditor.— In construing the Mississippi statute giving a junior judgment creditor who has sued out execution, etc., priority of lien over elder judgment creditors "who fail, refuse, or neglect to sue out execution," the courts have held that this statute refers to living judgment creditors only, and does not apply to a case where the senior judgment creditor is dead and cannot properly be said to "fail, refuse, or neglect" to sue out execution. Dibble *v.* Norton, 44 Miss. 158.

Party giving indemnifying bond.— It was held in Townsend *v.* Henry, 26 Miss. 203, that where two parties had each a judgment of the same date against a third party, and the executions were levied at the same time, and the sheriff refused to sell without indemnity — which one of the parties gave and the other refused to give — the party giving the bond was entitled to priority in the satisfaction of his judgment. See also Dabney *v.* Stackhouse, 49 Miss. 513; Robertson *v.* Lawton, 91 Hun (N. Y.) 67, 36 N. Y. Suppl. 175.

25. *Alabama.*— Bagby *v.* Reeves, 20 Ala. 427.

Georgia.— Lowe *v.* Moore, 8 Ga. 194. See also Hollis *v.* Salsbury, 64 Ga. 444.

Illinois.— Kirk *v.* Vonberg, 34 Ill. 440. *Contra*, Garner *v.* Willis, 1 Ill. 368.

Louisiana.— Payne *v.* Raudon, 10 La. Ann. 349.

Maryland.— Hall *v.* Jones, 21 Md. 439; Miller *v.* Allison, 8 Gill & J. 35.

Mississippi.—Bonaffee *v.* Fisk, 13 Sm. & M. 682; Heizer *v.* Fisher, 13 Sm. & M. 672; Rollins *v.* Thompson, 13 Sm. & M. 522; Andrews *v.* Doe, 6 How. 554, 38 Am. Dec. 450; Goode *v.* Mayson, 6 How. 543; Commercial, etc., Bank *v.* Helderburn, 6 How. 536; Commercial Bank *v.* Yazoo County, 6 How. 530, 38 Am. Dec. 447; Smith *v.* Ship, 1 How. 234.

Nebraska.— Hibbard *v.* Weil, 5 Nebr. 41.

New York.— Shotwell *v.* Murray, 1 Johns. Ch. 512.

North Carolina.— Dysart *v.* Brandreth, 118 N. C. 968, 23 S. E. 966; Bernhardt *v.* Brown, 118 N. C. 700, 24 S. E. 527, 715, 36 L. R. A. 402 (holding, however, that if the execution on the senior judgment is in the sheriff's hands at the time of sale under execution on a junior judgment, the purchaser gets full title, and the lien of the senior judgment is transferred to the proceeds of the sale); Cannon *v.* Parker, 81 N. C. 320; Halyburton *v.* Greenlee, 72 N. C. 316.

Pennsylvania.— Hildebrand *v.* Wertz, 1 Lanc. Bar, Jan. 22, 1870. *Contra*, McLaughlin *v.* McLaughlin, 91 Pa. St. 462.

Tennessee.— Johnson *v.* Ball, 1 Yerg. 291, 24 Am. Dec. 451; Hickman *v.* Murfree, Mart. & Y. 26.

Texas.— Walker *v.* Anderson, 31 Tex. 646.

See 21 Cent. Dig. tit. "Execution," § 227.

But see Canfield *v.* Browning, 69 N. J. L. 553, 55 Atl. 101.

26. Botters *v.* Edrington, 30 Miss. 580.

27. Gansevoort *v.* Gilliland, 1 Cow. (N. Y.) 218; Gault *v.* Woodbridge, 10 Fed. Cas. No. 5,275, 4 McLean 329.

Failure to record.— Pope *v.* Cutler, 22 Me. 105; Doe *v.* Flake, 17 Me. 249; Elmer *v.* Burgin, 2 N. J. L. 186.

Irregularity in return.— Chatten *v.* Gerber, 2 Ind. App. 386, 28 N. E. 571; Presnell *v.* Landers, 40 N. C. 251.

28. Appeal from judgment as affecting lien of execution see, generally, APPEAL AND ERROR.

operation by a judicial stay, such as an injunction, or by the setting aside of the judgment upon which it issued. Upon the dissolution of the injunction, or the restoration of the judgment, such execution is entitled to priority over junior executions whose liens have attached to the property of the judgment debtor in the *interim*;[29] and the same rule applies in the case of an execution where the lien is subsequently suspended in its operation on particular property by proceedings to try the right of such property.[30]

(VI) *As Affected by Delay in Executing Writ* — (A) *Rule in England.* With a view to prevent collusion and fraud and other abuses of the writ, a statute was early enacted in England,[31] declaring that executions taken out with intent to hinder, delay, or defraud creditors or others should be as against such persons utterly void.[32]

(B) *Rule in United States* — (1) General Rule. It is a well settled rule of law, adhered to in the United States with some modifications of the strict English doctrine, that the office of an execution is not to secure but to enforce the payment of a debt, and, as a consequence, an attempt to make use of it for the purposes of security merely is a perversion of the writ, and postpones it, and the lien thereof, to other liens or executions subsequently issued or accruing.[33] However,

29. Low *v.* Adams, 6 Cal. 277; Lynn *v.* Gridley, Walk. (Miss.) 548, 12 Am. Dec. 591; Kightlinger's Appeal, 101 Pa. St. 540; Hetzell *v.* Gregory, 7 Phila. (Pa.) 148; Duckett *v.* Dalrymple, 1 Rich. (S. C.) 143.

Opening up judgment.— Where, after a levy on personal property under an execution, the judgment was opened by the court to let defendant into a defense, "all proceedings to be stayed, the sheriff to be secure in his levy," and a bond was given by defendant, to the sheriff, conditioned for the delivery of the property on demand, or for the payment of the amount of the execution, it was held that the lien of such levy was preserved as against a subsequent levy on the same property under another execution. Slutter *v.* Kirkendall, 100 Pa. St. 307.

Proceeding to enjoin sale.— Where the validity of an execution which had been levied on land was in issue in a proceeding to enjoin the sale thereof, it was held that the rights of the execution plaintiff were in no way affected by a sale of the land under another execution. Sampson *v.* Wyett, 49 Tex. 627.

Where indemnifying bond was given.— In Tennessee some of the decisions make the effect of the injunction dependent on security being given when it issues, holding that where defendant is indemnified from loss by a sufficient bond his lien is thereby lost, while in the absence of such bond the lien continues and again becomes effective upon the injunction being dissolved. Conway *v.* Jett, 3 Yerg. 481, 24 Am. Dec. 590.

30. *Alabama.*— Decatur Branch Bank *v.* McCollum, 20 Ala. 280; Mills *v.* Williams, 2 Stew. & P. 390.

Kansas.— Kayser *v.* Bauer, 5 Kan. 202.

Kentucky.— Rogers *v.* Darnaby, 4 B. Mon. 238.

Mississippi.— See also Reynolds *v.* Ingersoll, 11 Sm. & M. 249, 49 Am. Dec. 57.

North Carolina.— See Parker *v.* Jones, 58 N. C. 276, 75 Am. Dec. 441.

Pennsylvania.—Lantz *v.* Worthington, 4 Pa. St. 153, 45 Am. Dec. 682; Sedgwick's Appeal, 7 Watts & S. 260; Moore *v.* Whitney, 10 Lanc. Bar 122, 1 Leg. Chron. 1.

South Carolina.— See McCants *v.* Rogers, 3 Brev. 388.

See 21 Cent. Dig. tit. "Execution," § 234.

31. St. 13 Eliz. c. 5.

32. Williamson *v.* Johnston, 12 N. J. L. 86; Matthews *v.* Warne, 11 N. J. L. 295; Snyder *v.* Kunkleman, 3 Penr. & W. (Pa.) 487; Lovick *v.* Crowder, 8 B. & C. 132, 6 L. J. K. B. O. S. 263, 2 M. & R. 84, 15 E. C. L. 73; Hunt *v.* Hooper, 1 D. & L. 626, 8 Jur. 203, 13 L. J. Exch. 183, 12 M. & W. 664 (where a fieri facias was delivered to the sheriff with directions to suspend the execution, and in the meantime another writ was delivered by another creditor, and it was held that the sheriff was bound to levy under the latter writ in preference to the former, although the former writ was not delivered with any fraudulent intent or purpose to protect the goods of the debtor); Imray *v.* Magnay, 2 Dowl. P. C. N. S. 531, 7 Jur. 240, 12 L. J. Exch. 188, 11 M. & W. 267; Payne *v.* Drewe, 4 East 523, 1 Smith K. B. 170; Kempland *v.* Macauley, 1 Peake N. P. 65; Pringle *v.* Isaac, 11 Price 445; West *v.* Skip, 1 Ves. 239, 27 Eng. Reprint 1006; Bradley *v.* Wyndham, 1 Wils. C. P. 44; 1 Smith Lead. Cas. 19.

33. Any act which shows that the judgment creditor does not intend that a writ shall be executed before the return-day, or in accordance with the statutory provisions relating to final process, will, as between such party and a third party, or other judgment creditors of the debtor, discharge the property seized from the lien of such execution.

Alabama.— Alabama Gold L. Ins. Co. *v.* McCreary, 65 Ala. 127; Albertson *v.* Goldsby, 28 Ala. 711, 65 Am. Dec. 380 (where a chattel mortgage was allowed to intervene); Patten *v.* Hayter, 15 Ala. 18; Wood *v.* Gary, 5 Ala. 43.

Colorado.— Williams *v.* Mellor, 12 Colo. 1, 19 Pac. 839; Speelman *v.* Chaffee, 5 Colo. 247.

Illinois.— Gilmore *v.* Davis, 84 Ill. 487; Conwell *v.* Watkins, 71 Ill. 488; Ross *v.*

an execution which is delayed by no fault or direction of the judgment creditor

Weber, 26 Ill. 221; McHale *v.* Westover, 101 Ill. App. 276; Kiehn *v.* Bestor, 30 Ill. App. 458; Koren *v.* Roemheld, 6 Ill. App. 275. See also Flood *v.* Prettyman, 24 Ill. 597.

Indiana.— Syfers *v.* Bradley, 115 Ind. 345, 16 N. E. 805, 17 N. E. 619; Moore *v.* Fitz, 15 Ind. 43; McCall *v.* Trevor, 4 Blackf. 496.

Iowa.— Burleigh *v.* Piper, 51 Iowa 649, 2 N. W. 520.

Kentucky.— Owens *v.* Patteson, 6 B. Mon. 488, 44 Am. Dec. 780.

Massachusetts.— Bayley *v.* French, 2 Pick. 586; Caldwell *v.* Eaton, 5 Mass. 399. See also Waterhouse *v.* Waite, 11 Mass. 207.

Mississippi.—Talbert *v.* Melton, 9 Sm. & M. 9; Michie *v.* Planters' Bank, 4 How. 130, 34 Am. Dec. 112. See also Martin *v.* Lofland, 8 Sm. & M. 352.

Missouri.— Field *v.* Liverman, 17 Mo. 218; Wise *v.* Darby, 9 Mo. 131; Brown *v.* Cape Girardeau County Sheriff, 1 Mo. 154.

New Jersey.— Fischel *v.* Keer, 45 N. J. L. 507; Williamson *v.* Johnston, 12 N. J. L. 86; Matthews *v.* Warne, 11 N. J. L. 295.

New York.— Ball *v.* Shell, 21 Wend. 222 (holding that an execution which would be deemed dormant as against a judgment creditor is fraudulent as against a subsequent *bona fide* purchaser); Benjamin *v.* Smith, 4 Wend. 332; Russell *v.* Gibb, 5 Cow. 390; Kellogg *v.* Griffin, 17 Johns. 274; Farrington *v.* Sinclair, 15 Johns. 429; Whipple *v.* Foot, 2 Johns. 418, 3 Am. Dec. 442. See also Benjamin *v.* Smith, 12 Wend. 404; Russell *v.* Gibbs, 5 Cow. 290.

North Carolina.— Smith *v.* Spencer, 25 N. C. 256. See, however, Dancy *v.* Hubbs, 71 N. C. 424.

Ohio.—McCormick *v.* Alexander, 2 Ohio 65; Sturgeon *v.* Mason, 8 Ohio Cir. Ct. 118, 4 Ohio Cir. Dec. 353, holding that a mere levy of a foreign execution and order that the same be returned without further proceedings do not create a lien as against a subsequent mortgage. See also Earnfit *v.* Winans, 3 Ohio 135.

Pennsylvania.— Sweet *v.* Williams, 162 Pa. St. 94, 29 Atl. 350; Stroudsburg Bank's Appeal, 126 Pa. St. 523, 17 Atl. 868; Stern's Appeal, 64 Pa. St. 447; Freeburger's Appeal, 40 Pa. St. 244; Brown's Appeal, 26 Pa. St 490; Shinn *v.* Holmes, 25 Pa. St. 142; Lantz *v.* Worthington, 4 Pa. St. 153. 45 Am. Dec. 682; Mentz *v.* Hamman, 5 Whart. 150, 34 Am. Dec. 546; McClure *v.* Ege, 7 Watts 74; Weir *v.* Hale, 3 Watts & S. 285 (holding that any arrangement with defendant, or other conduct of the judgment creditor evincing his intention not to have a sale of the property, will postpone his execution in favor of a junior execution properly levied, and that it is not necessary for plaintiff to give actual notice to the sheriff to stay the proceedings); Snyder *v.* Kunkleman, 3 Penr. & W. 487; Corlies *v.* Stanbridge. 5 Rawle 286. 290 [*quoted* with approval in Broadhead *v.* Cornman, 171 Pa. St. 322, 33 Atl. 360] (where the rule is thus stated: "If the plaintiff delivers an execution to the sheriff with direction not to levy at all, or not until further orders, it creates no lien on the defendant's personal property as against a creditor issuing and proceeding with a subsequent execution. . . . The rule is the same if there is a levy accompanied with instructions to stay proceedings. . . . In both cases the plaintiff's object is considered to be to obtain security, not satisfaction for his debt, and the employment of an execution for this purpose is a perversion of its design, and a fraud against third persons"); Hickman *v.* Caldwell, 4 Rawle 376, 27 Am. Dec. 274; Com. *v.* Stremback, 3 Rawle 341, 24 Am. Dec. 351; Howell *v.* Alkyn, 2 Rawle 282; Eberle *v.* Mayer, 1 Rawle 366; Platt-Barber Co. *v.* Groves, 7 Pa. Super. Ct. 599.

South Carolina.— Moore *v.* Kelly, 2 McMull. 350.

Tennessee.— Daley *v.* Perry, 9 Yerg. 442.

United States.— Barnes *v.* Billington, 2 Fed. Cas. No. 1.015, 1 Wash. 29, 4 Day (Conn.) 81 note; Berry *v.* Smith, 3 Fed. Cas. No. 1,359, 3 Wash. 60. See also Michie *v.* Planters' Bank, 4 How. (Miss.) 130, 34 Am. Dec. 112.

See 21 Cent. Dig. tit. "Execution," § 235 *et seq.*

Reason of rule.— In Fletcher's Appeal, 17 Leg. Int. (Pa.) 300, it was held that a creditor who makes use of his execution to protect property for a debtor's use will be postponed to junior execution creditors, because his taking is a fraud on them, but not because his lien is gone.

Delay in issuing execution.— In Illinois a judgment ceases to be a lien on real estate if execution is not issued thereon within one year from its date, and where an execution is not issued for a year after judgment, no lien attaches to property conveyed between the expiration of the year and the time of the actual issuance of the execution. Ford *v.* Marcall, 107 Ill. 136.

Evidence of unreasonable delay.— Where personalty seized on execution is left in the possession of the judgment debtor and there is evidence of unreasonable delay in offering it for sale, it is error for the court to foreclose inquiry and withdraw the question before the jury by instructing them that the levy was valid at the time the lien of a junior execution attached. Acton *v.* Knowles, 14 Ohio St. 18.

Failure to give indemnity bond.— The discharge of a levy on account of the judgment creditor's failure to give a bond of indemnity, when required by the sheriff, destroys the lien on the property and thus gives effect, as against a subsequent levy, to a deed executed by defendant while the execution was in the sheriff's hands. but before his levy. Cotten *v.* Thompson, 25 Ala. 671.

Postponement of sale — Presumption of fraud.— The rule has been laid down in Illinois that fraud arises, as a legal conclusion,

will not be fraudulent as against a junior execution;[34] and it has been held that a mere failure, neglect, or refusal, on the part of plaintiff, to give directions as to the manner or time of executing the writ does not constitute such interference with its execution as will have the effect of rendering it dormant.[35]

(2) MODIFICATION OF DOCTRINE. In some jurisdictions the rule has been laid down that where the action of the execution creditor shows nothing more than a disposition on the part of plaintiff to treat the family of defendant in the execution with due consideration, by not subjecting them to unnecessary inconvenience

from the consent of the judgment creditor to a postponement of the sale under his execution, even where he is actuated only by motives of kindness and leniency toward his debtor, and gives preference to a junior execution levied during the pendency of such postponement. Sweetser *v.* Matson, 153 Ill. 568, 39 N. E. 1086, 46 Am. St. Rep. 911, 27 L. R. A. 374.

34. Williams *v.* Mellor, 12 Colo. 1, 19 Pac. 839; Talbert *v.* Melton, 9 Sm. & M. (Miss.) 9; Thompson *v.* Van Vechten, 5 Abb. Pr. (N. Y.) 458; Herkimer County Bank *v.* Brown, 6 Hill (N. Y.) 232; Benjamin *v.* Smith, 12 Wend. (N. Y.) 404; Russell *v.* Gibbs, 5 Cow. (N. Y.) 390; Sweet *v.* Williams, 162 Pa. St. 94, 29 Atl. 350; Childs *v.* Dilworth, 44 Pa. St. 123; McCoy *v.* Reed, 5 Watts (Pa.) 300. See also Johnson *v.* Williams, 8 Ala. 529; Parkerson *v.* Sessions, 40 Ga. 171 (where a judgment creditor agreed with his debtor that if the latter would, when his land was sold under execution, make no attempt to have the homestead exempted, or to open the judgment under the provision of the relief law applicable to the case, the former would either rebate a portion of his judgment, or if he became purchaser of the property, convey a portion of it to the debtor. The court held that the agreement was neither fraudulent *per se*, nor in abrogation of the rights of junior judgment creditors); Everingham *v.* Ottawa Nat. City Bank, 124 Ill. 527, 17 N. E. 26 [*affirming* 25 Ill. App. 637]; Lancaster Sav. Inst. *v.* Wiegand, 2 Pa. L. J. Rep. 246, 3 Pa. L. J. 523 (where it was held that a direction by plaintiff to the sheriff not to push or proceed with his execution does not destroy his priority or lien, if the sheriff refuses or neglects to comply, but proceeds without delay to levy and sell).

Delay in issuing writ of venditioni exponas. — It has been held in Indiana that a delay of twenty-six days in issuing a writ of venditioni exponas does not operate *ipso facto* to divest the lien of the levy on the execution in a race of diligence between execution creditors. Zug *v.* Laughlin, 23 Ind. 170.

Delay of five years in making sale.— It has been held in Michigan that, where notice of a levy on real estate is filed in accordance with the Michigan statute, a delay of five years in making sale does not avoid the levy if the judgment creditor has acted in good faith, and a levy and sale made meanwhile cannot affect it. Ward *v.* Citizens' Bank, 46 Mich. 332, 9 N. W. 437.

Failure to take a rule on the sheriff to return the writ, where plaintiff in execution does not consent to the sheriff's delay in selling the goods levied on, will not cause him to lose his priority. Gillespie *v.* Keating, 17 Pa. Co. Ct. 418.

Junior creditor's consent to delay.— Where a junior execution creditor consents to a senior execution creditor making use of his execution to protect property for their debtor's use, the first writ does not lose its priority of lien on that account. Fletcher's Appeal, 17 Leg. Int. (Pa.) 300.

Negligence followed by diligence.— It has been held in Pennsylvania that whatever laches an execution creditor may have been guilty of, if he wakes up and orders the sheriff to proceed before another writ comes into his hands, he is safe. Deacon *v.* Govett, 4 Phila. (Pa.) 7. See also Miller *v.* Kosch, 74 Hun (N. Y.) 50, 26 N. Y. Suppl. 183.

Negligence of sheriff.— The mere failure of the sheriff to levy a fieri facias on a sufficient amount of defendant's property to satisfy it will not postpone an elder to a junior execution, especially if plaintiff in the former is merely passive, without attempting to control the sheriff's action. Leach *v.* Williams, 8 Ala. 759.

35. To produce that result, plaintiff must actually give some direction or command which is inconsistent with the mandate of the writ, and which it would be a breach of duty on the part of the sheriff to obey. Leach *v.* Williams, 8 Ala. 759; Kiehn *v.* Bestor, 30 Ill. App. 458 (holding that plaintiff is only required to avoid such interference with the officer holding the execution as would render it improper for the latter to enforce payment according to the mandate of the writ); Koren *v.* Roemheld, 6 Ill. App. 275; Paton *v.* Westervelt, 2 Duer (N. Y.) 362 (where the senior execution creditor consented, in writing, to a delay on the part of the sheriff to sell, and the sale did not take place for forty-seven days after return-day of the execution. The court held that this did not render the execution dormant and give priority to a junior execution); Stroudsburg Bank's Appeal, 126 Pa. St. 523, 17 Atl. 868. See also Huntsville Branch Bank *v.* Robinson, 5 Ala. 623.

Bill to remove cloud from title.— Where an execution creditor, before selling land levied on, filed a bill in equity to have an obstruction removed as a fraudulent conveyance, and afterward, but before the determination of the equity suit, another creditor obtained judgment, and levied on and sold the land within twelve months, it was held that the former's lien would have priority. Shepherd *v.* Woodfolk, 10 Lea (Tenn.) 593.

or annoyance, the lien of such execution is not lost.[36] It has been held in several cases that where an execution levied upon property is stayed by order of the judgment creditor, this of itself is no evidence of fraud, and that there must be some proof of actual fraud, or intention to hinder and delay other creditors, in order to subject a senior execution to postponement.[37]

(VII) *As Affected by Leaving Property in Debtor's Possession*— (A) *English Doctrine.* The rule in England is that where property is levied upon and allowed to remain in the custody of the judgment debtor, such levy is regarded as fraudulent, and the property is subject to levy under a junior execution, which thereby gains priority.[38]

(B) *Rule in United States.* This stringent doctrine, however, has been somewhat modified in the United States, arising from the sentiments of humanity and the peculiar necessities of the country; and the mere fact that the property is left in the possession of the judgment debtor is now held to be not sufficient evidence to establish fraud in the use of the writ;[39] and in most jurisdictions, in order to invalidate the lien, it is necessary to show that the sale was postponed,

Postponement.— It was held in Lantz *v.* Worthington, 4 Pa. St. 153, 45 Am. Dec. 682, that a postponement of the sale of personal property by an execution creditor to a time before the return-day, being but an adjournment, will not avoid his right for the benefit of a subsequent execution creditor, it being consistent with an intention to levy the debt under the writ.

36. Landis *v.* Evans, 113 Pa. St. 332, 6 Atl. 908.

37. *Delaware.*— Hickman *v.* Hickman, 3 Harr. 484; Houston *v.* Sutton, 3 Harr. 37.

Michigan.— See Ludeman *v.* Hirth, 96 Mich. 17, 55 N. W. 449, 35 Am. St. Rep. 588.

New Jersey.—Caldwell *v.* Fifield, 24 N. J. L. 150; James *v.* Burnet, 20 N. J. L. 635; Cumberland Bank *v.* Hann, 19 N. J. L. 166; Sterling *v.* Van Cleve, 12 N. J. L. 285.

New York.— Power *v.* Van Buren, 7 Cow. 560.

North Carolina.—Dancy *v.* Hubbs, 71 N. C. 424.

Pennsylvania.— Snyder *v.* Kelly, 4 Pa. Super. Ct. 636; Swick *v.* McLaughlin, 4 Lack. Leg. N. 240.

United States.— Crane *v.* Penney, 2 Fed. 187.

See 21 Cent. Dig. tit. "Execution," § 235 *et seq.*

Where an assignee for the benefit of creditors has intervened, and by arrangements with the sheriff and the first execution creditor, has been permitted to take possession and make sale of the goods, it has been held in some jurisdictions that the above rule does not apply, upon the theory that the assignee is an officer of the law, subject to the supervision and control of the court, and having presumably no interest but to get the most out of the property for the benefit of those entitled by law to the proceeds. Broadhead *v.* Cornman, 171 Pa. St. 322, 33 Atl. 360; Leidich's Estate, 161 Pa. St. 451, 29 Atl. 89, 90; Mathews' Estate, 144 Pa. St. 139, 22 Atl. 903; Kent's Appeal, 87 Pa. St. 165.

38. U. S. *v.* Conyngham, 25 Fed. Cas. No. 14,850, 4 Dall. 358, Wall. Sr. 178; Fields *v.* Crawford, 30 Fed. Cas. No. 18,296, 2 Hayw. & H. 256; Rice *v.* Serjeant, 7 Mod. 37; West *v.* Skip, 1 Ves. 239, 27 Eng. Reprint 1006; Bradley *v.* Wyndham, 1 Wils. C. P. 44; 10 Viner Abr. 551.

39. *Arkansas.*— Tucker *v.* Bond, 23 Ark. 268.

Illinois.— See also Everingham *v.* Ottawa Nat. City Bank, 124 Ill. 527, 17 N. E. 26.

Kentucky.— Carlisle *v.* Wathen, 78 Ky. 365; Swigert *v.* Thomas, 7 Dana 220.

Mississippi.—Jayne *v.* Dillon, 28 Miss. 283.

New Jersey.— Cumberland Bank *v.* Hann, 19 N. J. L. 166.

New York.— Artisans' Bank *v.* Treadwell, 34 Barb. 553; Thursby *v.* Mills, 11 How. Pr. 116; Herkimer County Bank *v.* Brown, 6 Hill 232 (where execution was held not to be dormant as to subsequent execution, because the sheriff, with the mere acquiescence of the creditor, suffered goods to remain in the debtor's hands one year after levy); Butler *v.* Maynard, 11 Wend. 548, 27 Am. Dec. 100; Farrington *v.* Sinclair, 15 Johns. 428; Doty *v.* Turner, 8 Johns. 20. See also Elias *v.* Farley, 2 Abb. Dec. 11, 3 Keyes 398, 2 Transcr. App. 116, 5 Abb. Pr. N. S. 39.

Ohio.— Murphy *v.* Swadener, 33 Ohio St. 85.

Pennsylvania.— McGinnis *v.* Prieson, 85 Pa. St. 111; Campbell's Appeal, 32 Pa. St. 88; Brown's Appeal, 26 Pa. St. 490; Trovillo *v.* Tilford, 6 Watts 468, 31 Am. Dec. 484; Wood *v.* Vanarsdale, 3 Rawle 401; Com. *v.* Stremback, 3 Rawle 341, 24 Am. Dec. 351; Howell *v.* Alkyn, 2 Rawle 282; Cox *v.* McDougal, 2 Yeates 434; Perit *v.* Wallis, 2 Yeates 524; Schwartz *v.* Gabler, 8 Pa. Super. Ct. 227, 42 Wkly. Notes Cas. 485; Meyers *v.* Rasely, 2 Lanc. L. Rev. 331. See also Morrison *v.* Hoffman, 1 Pa. St. 13.

Tennessee.— Etheridge *v.* Edwards, 1 Swan 426.

Virginia.— Bullitt *v.* Winston, 1 Munf. 269.

See 21 Cent. Dig. tit. "Execution," § 237.

Mere omission to remove ponderous article levied on under execution is not *per se* evidence of fraud. Farrington *v.* Sinclair, 15 Johns. (N. Y.) 429.

and the judgment debtor's possession of the property continued for such a period as to raise the presumption that the action of the officer was inspired by the judgment creditor;[40] but in a few jurisdictions the English doctrine has been adhered to.[41]

(VIII) *ALIAS WRITS.* In some jurisdictions, by statute, if a term has not elapsed,[42] and an alias writ is delivered to the sheriff before the sale of the prop-

Rule in New Jersey.— Some of the New Jersey cases have modified the common-law doctrine to the extent of holding that where a judgment debtor is permitted after the levy to deal with the property as his own, buying and selling according to his course of business, does not constitute a legal fraud, which, without regard to the *bona fides* of the transaction, will postpone the execution in favor of a subsequent levy, and that such acts simply afford evidence of a fraudulent intent, which may be rebutted. Caldwell *v.* Fifield, 24 N. J. L. 150.

Where debtor pays rent for property.— It was held in Sterling *v.* Van Cleve, 12 N. J. L. 285, that an agreement, by the execution creditor with an execution debtor, to suffer the goods levied on to remain in the possession of the latter for a specified time, in consideration that defendant would pay plaintiff the rent therefor, equivalent to their being kept in good order and of the same value as before, the levy is not a fraud on the subsequent execution creditor, and will not postpone the prior execution.

Where the sheriff took a bond and left the property levied on in the hands of defendant for one year, it was held that a purchaser from defendant after that time took the property free from the lien of the execution. Snyder *v.* Beam, 1 Browne (Pa.) 366.

40. *Alabama.*— Campbell *v.* Spence, 4 Ala. 543, 39 Am. Dec. 301.

Arkansas.— Slocomb *v.* Blackburn, 18 Ark. 309.

California.— Dutertre *v.* Driard, 7 Cal. 549.

Delaware.— Sanders *v.* Clark, 6 Houst. 462.

Illinois.— Davidson *v.* Waldron, 31 Ill. 120, 83 Am. Dec. 206.

Indiana.— Wunderlich *v.* Roberts, 67 Ind. 421; Zug *v.* Loughlin, 23 Ind. 170.

Kentucky.— Bourne *v.* Hocker, 11 B. Mon. 23; Swigert *v.* Thomas, 7 Dana 220.

Michigan.— Quackenbush *v.* Henry, 42 Mich. 75, 3 N. W. 262.

Missouri.— Parker *v.* Waugh, 34 Mo. 340.

New Jersey.— Fischel *v.* Keer, 45 N. J. L. 507; Cumberland Bank *v.* Hann, 19 N. J. L. 166; Matthews *v.* Warne, 11 N. J. L. 295.

New York.— Dunderdale *v.* Sauvestre, 13 Abb. Pr. 116; Knower *v.* Barnard, 5 Hill 377; Kimball *v.* Munger, 2 Hill 364; Cornell *v.* Cook, 7 Cow. 310; Russell *v.* Gibbs, 5 Cow. 390; Rew *v.* Barber, 3 Cow. 272; Dickenson *v.* Cook, 17 Johns. 332; Kellogg *v.* Griffin, 17 Johns. 274; Whipple *v.* Foot, 2 Johns. 418, 3 Am. Dec. 442. See also Bond *v.* Willett, 31 N. Y. 102, 1 Abb. Dec. 165, 1 Keyes 377, 29 How. Pr. 47.

Ohio.— Murphy *v.* Swadener, 33 Ohio St. 85; Acton *v.* Knowles, 14 Ohio St. 18.

Pennsylvania.— Larzelere Co.'s Appeal, (1888) 13 Atl. 85; Parys' Appeal, 41 Pa. St. 273, 80 Am. Dec. 615; Potts' Appeal, 20 Pa. St. 253; Lyon *v.* Hampton, 20 Pa. St. 46; Earl's Appeal, 13 Pa. St. 483; Keyser's Appeal, 13 Pa. St. 409, 53 Am. Dec. 487; Bingham *v.* Young, 10 Pa. St. 395; Weir *v.* Hale, 3 Watts & S. 285; Corlies *v.* Stanbridge, 5 Rawle 286; Dean *v.* Patton, 13 Serg. & R. 341; Lewis *v.* Smith, 2 Serg. & R. 142; Knox *v.* Summers, 4 Yeates 477; Guardians of Poor *v.* Lawrence, 4 Yeates 194; Chancellor *v.* Phillips, 4 Dall. 213, 1 L. ed. 805; Water *v.* McClellan, 4 Dall. 208, 1 L. ed. 803; Levy *v.* Wallis, 4 Dall. 167, 1 L. ed. 785; Glazier *v.* Sawyer, 11 Pa. Co. Ct. 34; Stone *v.* Mahan, 4 C. Pl. 165.

Vermont.— Webster *v.* Denison, 25 Vt. 493.

Washington.—Wunsch *v.* McGraw, 4 Wash. 72, 29 Pac. 832.

United States.—Berry *v.* Smith, 3 Fed. Cas. No. 1,359, 3 Wash. 60; U. S. *v.* Conyngham, 25 Fed. Cas. No. 14,850, 4 Dall. 358, Wall. Sr. 178.

See 21 Cent. Dig. tit. "Execution," § 237.

An execution levied on provisions belonging to the debtor, which are suffered to remain with the debtor and to be consumed in his family, is constructively if not actually fraudulent as against a subsequent attachment or execution. Farrington *v.* Sinclair, 15 Johns. (N. Y.) 429.

Household furniture.— In Cowden *v.* Brady, 8 Serg. & R. (Pa.) 505, Gibson, J., said that the only exception in Pennsylvania to the rule that the levy is held to be fraudulent where the goods are left in the hands of defendant is confined to household furniture, and even there plaintiff must use reasonable diligence.

41. And the rule has been laid down that if the levying officer fails to take and retain possession of the property, his levy is invalid as against purchasers or creditors subsequently levying, even where the judgment creditor does not direct or acquiesce in the retention of the property by the judgment debtor. Border *v.* Benge, 12 Iowa 330; Deville *v.* Hayes, 23 La. Ann. 550; Mangum *v.* Hamlet, 30 N. C. 44; Barham *v.* Massey, 27 N. C. 192; Wilson *v.* Hensley, 26 N. C. 66; Roberts *v.* Scales, 23 N. C. 88; Barnes *v.* Billington, 2 Fed. Cas. No. 1,015, 1 Wash. 29, 4 Day (Conn.) 81 note; U. S. *v.* Conyngham, 25 Fed. Cas. No. 14,850, 4 Dall. 358, Wall. Sr. 178; Fields *v.* Crawford, 30 Fed. Cas. No. 18,296, 2 Hayw. & H. 256.

42. Where plaintiff suffers a term to elapse between the return of his first execution and the issuance and delivery to the sheriff of an alias, the lien of the first is lost, and a junior execution issued and delivered to the

erty under a junior execution,[43] in favor of another creditor, the lien of the original writ continues, notwithstanding the alias may not have been delivered to the officer until after such junior execution.[44]

(IX) *Writs From Different Jurisdictions.*[45] Where a controversy arises as to the priority of executions issued by courts of different jurisdiction — for example, between state and federal courts — the doctrine is well settled that the tribunal which first acquires possession of the property, by seizure of its officer, may dispose of it so as to vest the title in the purchaser, discharged from the claims of creditors of the same grade.[46]

(X) *Effect of Sale Under Junior Execution.* Where an officer having two executions in his hands against the same debtor levies and sells under the junior execution, such sale is valid, and the property cannot afterward be taken from the purchaser by the senior judgment creditor, nor is his execution a lien upon the proceeds thereof. The only remedy for the party thus injured is against the officer.[47]

sheriff before the alias is sued out acquires a superior lien. Montgomery Branch Bank *v.* Broughton, 15 Ala. 127.

43. Where the alias execution is not delivered to the officer before sale under a junior execution, the purchaser at such sale acquires a title superior to that of a purchaser, at a subsequent sale, under a senior execution. Lancaster *v.* Jordan, 78 Ala. 197; Allen *v.* Plummer, 63 N. C. 307.

44. Lancaster *v.* Jordan, 78 Ala. 197; Walker *v.* Elledge, 65 Ala. 51; Toney *v.* Wilson, 51 Ala. 499; Dargan *v.* Waring, 11 Ala. 988, 46 Am. Dec. 234; Wood *v.* Gary, 5 Ala. 43; Allen *v.* Plummer, 63 N. C. 307; Beebe *v.* U. S., 161 U. S. 104, 16 S. Ct. 532, 40 L. ed. 636. See also Mills *v.* Williams, 2 Stew. & P. (Ala.) 390; Swick *v.* McLaughlin, 4 Lack. Leg. N. (Pa.) 240.

In Illinois, by statute, where an execution is issued within one year after judgment rendered, and subsequently an alias execution is levied on real estate within seven years, and after the seven years the execution is returned during its lifetime, and a venditioni exponas is immediately issued, under which a sale is made, there is a continuous lien under and by virtue of the original judgment, and such lien has priority over the liens of junior judgments and executions. Barth *v.* Commercial Nat. Bank, 115 Ill. 472, 4 N. E. 509; Hastings *v.* Bryant, 115 Ill. 69, 3 N. E. 507; Dobbins *v.* Peoria First Nat. Bank, 112 Ill. 553.

Where defendant was indulged on original writ.— It has been held in North Carolina that where an alias fieri facias is of the same teste with other executions, it will not be postponed because on the original writ on which it was issued defendant had been indulged. Roberts *v.* Oldham, 63 N. C. 297.

45. Conflicting jurisdiction see, generally, COURTS.

46. *Illinois.*— Logan *v.* Lucas, 59 Ill. 237; Munson *v.* Harroun, 34 Ill. 422, 85 Am. Dec. 327.

New Jersey.— See also Close *v.* Close, 28 N. J. Eq. 472.

North Carolina.— Jones *v.* Judkins, 20 N. C. 591, 34 Am. Dec. 302.

Ohio.— See Derckson *v.* Ried, 2 Handy 159, 12 Ohio Dec. (Reprint) 380.

Oklahoma.— Burnham *v.* Dickson, 5 Okla. 112, 47 Pac. 1059.

Pennsylvania.— Duncan *v.* McCumber, 10 Watts 212.

Tennessee.— Longstreet *v.* Hill, 11 Heisk. 53; James *v.* Kennedy, 10 Heisk. 607; Schaller *v.* Wickersham, 7 Coldw. 376.

Virginia.— See Charron *v.* Boswell, 18 Gratt. 216.

United States.— Pulliam *v.* Osborne, 17 How. 471, 15 L. ed. 154; Brown *v.* Clarke, 4 How. 4, 11 L. ed. 850; Hagan *v.* Lucas, 10 Pet. 400, 9 L. ed. 470; Leopold *v.* Godfrey, 50 Fed. 145; Ruggles *v.* Simonton, 20 Fed. Cas. No. 12,120, 3 Biss. 325. See also Taylor *v.* Carryl, 20 How. 583, 15 L. ed. 1028; Lewis *v.* Dillard, 76 Fed. 688, 22 C. C. A. 488. *Compare In re* Jordan, 13 Fed. Cas. No. 7,513.

See 21 Cent. Dig. tit. "Execution," § 239.

47. *Florida.*— Love *v.* Williams, 4 Fla. 126.

Illinois.— Gingrich *v.* People, 34 Ill. 448; Rogers *v.* Dickey, 6 Ill. 636, 41 Am. Dec. 204; People *v.* Smith, 29 Ill. App. 577.

Kentucky.—Kilby *v.* Haggin, 3 J. J. Marsh. 208.

New York.— Marsh *v.* Lawrence, 4 Cow. 461; Hotchkiss *v.* McVickar, 12 Johns. 403; Sandford *v.* Roosa, 12 Johns. 162. See also Adams *v.* Dyer, 8 Johns. 347, 5 Am. Dec. 344.

Pennsylvania.— Stroudsburg Bank's Appeal, 126 Pa. St. 523, 17 Atl. 868; Schuylkill County's Appeal, 30 Pa. St. 358; McClelland *v.* Slingluff, 7 Watts & S. 134, 42 Am. Dec. 224.

Texas.— Decatur First Nat. Bank *v.* Cloud, 2 Tex. Civ. App. 627, 21 S. W. 770.

England.— Payne *v.* Drewe, 4 East 523, 1 Smith K. B. 170; Smallcomb *v.* Cross, 1 Ld. Raym. 251, 1 Salk. 320.

See, however, Crane Iron Works *v.* Wilkes, 64 N. J. L. 193, 45 Atl. 1033, where a constable levied on chattels in the possession of a sheriff, under prior executions, and having acquiesced in an absolute sale of the chattels by the sheriff, by virtue of such prior and of subsequent executions in the sheriff's hands, it was held that his execution was entitled

b. Between Executions and Other Liens and Claims[48] — (i) *General Rule.* The general rule is that a person who has acquired a lien by virtue of judicial process occupies no better position, as regards subsisting adverse claims to the ownership, than does a purchaser with notice;[49] and an execution creditor causing his execution to be levied upon the property of the judgment debtor acquires a lien thereon, subject to prior valid liens against the property, such as a duly recorded mortgage, including mortgages of real property[50] as well as chattel mort-

to the proceeds of sale in advance of such subsequent executions. *Compare* Green *v.* Johnson, 9 N. C. 309, 11 Am. Dec. 763.

Contra.— Arnold *v.* McKellar, 9 S. C. 335.

48. Agricultural lien see, generally, AGRICULTURE.

Landlord's lien see, generally, LANDLORD AND TENANT.

Lien for taxes see, generally, TAXATION.

Mechanic's lien see, generally, MECHANICS' LIENS.

Vendor's lien see, generally, SALES; VENDOR AND PURCHASER.

Enforcement of claim against several pieces of property see, generally, MARSHALING ASSETS AND SECURITIES.

Priority of lien between executions and assignments for benefit of creditors see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 274.

Title of receiver see, generally, RECEIVERS.

49. *Alabama.*— Hill *v.* Jones, 65 Ala. 214.

California.— O'Rourke *v.* O'Connor, 39 Cal. 442.

Georgia.— Hunter *v.* Edmundson, Ga. Dec. 74.

Kentucky.— Atkins *v.* Emison, 10 Bush 9; Thomas *v.* Feese, 51 S. W. 150, 21 Ky. L. Rep. 206; Bean *v.* Everett, 56 S. W. 403, 21 Ky. L. Rep. 1790. See also Woods *v.* Davis, 14 S. W. 667, 12 Ky. L. Rep. 607.

Michigan.— Nall *v.* Granger, 8 Mich. 450, 77 Am. Dec. 462.

New Jersey.— Lloyd *v.* Conover, 25 N. J. L. 47.

North Carolina.— Metts *v.* Bright, 20 N. C. 311, 32 Am. Dec. 683.

Pennsylvania.—Mix *v.* Ackla, 7 Watts 316; Gillespie *v.* Keating, 17 Pa. Co. Ct. 418.

South Carolina.— Blake *v.* De Liesseline, 4 McCord 496.

Tennessee.— Harris *v.* Gaines, 2 Lea 12.

Texas.— See Ryan *v.* Engleson, 26 Tex. Civ. App. 192, 62 S. W. 1072.

United States.— Reed *v.* McIntyre, 98 U. S. 507, 25 L. ed. 171.

See 21 Cent. Dig. tit. "Execution," § 241.

Bona fide lien, although unrecorded, will prevail over the claim of an execution creditor who has actual notice of the lien, at any time before the property is sold under his execution. Armstrong *v.* Darbro, 10 Ky. L. Rep. 984.

Lien of bailee or pledgee.— McClintock *v.* Kansas City Cent. Bank, 120 Mo. 127, 24 S. W. 1052; State *v.* Michel, 7 Mo. App. 239; Lewis *v.* Dillard, 76 Fed. 688, 22 C. C. A. 488.

50. *Connecticut.*— Newberry *v.* Bulkley, 5 Day 384.

Georgia.— Groves *v.* Williams, 69 Ga. 614; Daniel *v.* Spalding, 22 Ga. 563; Johnston *v.* Crawley, 22 Ga. 348.

Iowa.— See Ritter *v.* Henshaw, 7 Iowa 97.

Kentucky.— Thompson *v.* Heffner, 11 Bush 353; Campbell *v.* Moseby, Litt. Sel. Cas. 358.

Louisiana.— De Blanc *v.* Dumartrait, 3 La. Ann. 542; La Gourgue *v.* Summers, 8 Rob. 175.

Maine.— Douglass *v.* Libbey, 59 Me. 200. See also Hall *v.* Sands, 52 Me. 355.

Michigan.— Stack *v.* Olmsted, 127 Mich. 359, 86 N. W. 851.

Missouri.— Steele *v.* Farber, 37 Mo. 71.

Nebraska.— See Reed *v.* Rice, 48 Nebr. 586, 67 N. W. 459.

New Jersey.— Lovejoy *v.* Lovejoy, 31 N. J. Eq. 55.

Ohio.— Stevens *v.* McCoy, 60 Ohio St. 540, 54 N. E. 517; Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518.

Pennsylvania.— Kuhn's Appeal, 2 Pa. St. 264. See also Dean *v.* Patton, 13 Serg. & R. 341.

South Carolina.—Bennett *v.* Calhoun Loan, etc., Assoc., 9 Rich. Eq. 163.

Texas.— Willis *v.* Heath, (Sup. 1891) 18 S. W. 801; Ilse *v.* Seinsheimer, 76 Tex. 459, 13 S. W. 329.

Vermont.— Jewett *v.* Brock, 32 Vt. 65; Benton *v.* McFarland, 26 Vt. 610.

United States.— Eells *v.* Johann, 27 Fed. 327.

See 21 Cent. Dig. tit. "Execution," § 242.

Consent to a postponement of sale under his execution, by an execution creditor, renders the lien of his execution dormant, and gives the lien of a junior judgment preference, and the dormancy thus created applies in favor of sales and encumbrances of the property as well as the lien of junior executions. McHale *v.* Westover, 101 Ill. App. 276.

Failure to file memorandum of levy.— Under Ky. St. § 2358*a*, an execution levy does not affect a subsequent purchaser, or any purchaser without notice, unless a memorandum of the levy is filed in the county clerk's office as therein provided. Ponder *v.* Boaz, 67 S. W. 833, 23 Ky. L. Rep. 2429.

Reformation of mortgage in equity.— A mortgage, after foreclosure and sale thereunder, was reformed in equity so as to include property inadvertently omitted therefrom, and it was held that the lien of the mortgage on such property, after reformation, was superior to that of a judgment obtained after the execution of the mortgage, before its reformation, although it was founded on a debt contracted on the faith of the debtor's apparent unencumbered ownership of such property, since a judgment creditor is not a

gages[51] or an attachment properly levied.[52] Ordinarily the seizure of property under an execution founded upon a valid judgment creates a lien on such property superior to any lien or privilege acquired and recorded against it subsequent to such seizure,[53] and this includes a lien acquired by a subsequent writ of attach-

bona fide purchaser within Ga. Code, § 3119. Phillips *v.* Roquemore, 96 Ga. 719, 23 S. E. 855. See to the same effect Milmine *v.* Burnham, 76 Ill. 362.

Suspension of levy.— The lien of an execution is postponed to that of a mortgage attaching in the interval of plaintiff's suspension of the levy for a consideration moving to him. Burnham *v.* Martin, 54 Ala. 189.

51. *Colorado.*— Doyle *v.* Herod, 9 Colo. App. 257, 47 Pac. 846.

Indiana.— Richardson *v.* Seybold, 76 Ind. 58.

Kansas.— Dayton *v.* People's Sav. Bank, 23 Kan. 421.

Missouri.— Kane *v.* Hanley, 63 Mo. App. 43; Taylor *v.* Smith, 47 Mo. App. 141.

Nebraska.— Hayes *v.* Bertrand First State Bank, (1904) 98 N. W. 423.

England.— Whitworth *v.* Gaugain, 3 Hare 416, 25 Eng. Ch. 416; Langton *v.* Horton, 1 Hare 549, 6 Jur. 910, 11 L. J. Ch. 299, 23 Eng. Ch. 549.

See 21 Cent. Dig. tit. "Execution," § 243.

Renewal of mortgage.— It was held in Osborn *v.* Alexander, 40 Hun (N. Y.) 323, that N. Y. Code Civ. Proc. § 1409, declaring that one who in good faith and without notice of the issue of an execution purchased the execution debtor's personalty before the levy is not affected by it, does not protect a mortgagee who after issue of the execution took a renewal of a mortgage antedating the execution.

52. *Delaware.*— Rust *v.* Pritchett, 5 Harr. 260.

Kentucky.— Bourne *v.* Hocker, 11 B. Mon. 23.

Maine.— Poor *v.* Chapin, 97 Me. 295, 54 Atl. 753.

Massachusetts.—Wadsworth *v.* Williams, 97 Mass. 339.

Missouri.— Field *v.* Milburn, 9 Mo. 492.

Oklahoma.— Burnham *v.* Dickson, 5 Okla. 112, 47 Pac. 1059.

Pennsylvania.— Straley's Appeal, 43 Pa. St. 89; Harbison *v.* McCartney, 1 Grant 172.

South Carolina.— Gorre *v.* McDaniel, 1 McCord 480.

See 21 Cent. Dig. tit. "Execution," § 246.

Compare McComb *v.* Reed, 28 Cal. 281, 87 Am. Dec. 115.

The ratification by a creditor of the issuance by an attorney of execution on judgment confessed by a debtor, without such creditor's knowledge, does not render the lien prior to that of an attachment sued out by another creditor and levied after the execution, but prior to the ratification. Galle *v.* Tode, 148 N. Y. 270, 42 N. E. 673 [*affirming* 74 Hun 542, 26 N. Y. Suppl. 633].

53. *Georgia.*— Tarver *v.* Ellison, 57 Ga. 54.

Illinois.— Elder *v.* Derby, 98 Ill. 228.

Indiana.— McCrisaken *v.* Osweiler, 70 Ind. 131; Mead *v.* McFadden, 68 Ind. 340; Reed *v.* Ward, 51 Ind. 215.

Iowa.— Wood *v.* Young, 38 Iowa 102.

Kentucky.— Roney *v.* Bell, 9 Dana 3; Greer *v.* Simrall, 59 S. W. 759, 22 Ky. L. Rep. 1037.

Louisiana.— O'Hara *v.* Booth, 29 La. Ann. 817.

Maine.— Nason *v.* Hobbs, 75 Me. 396; French *v.* Allen, 50 Me. 437.

Maryland.— Purtis Tool, etc., Co. *v.* Whitman, etc., Mfg. Co., 88 Md. 240, 41 Atl. 49.

Massachusetts.—See Proctor *v.* Newhall, 17 Mass. 81.

Mississippi.— Walker *v.* Brungard, 13 Sm. & M. 723.

New Hampshire.— Bennett *v.* Cutler, 44 N. H. 69; Bowman *v.* Manter, 33 N. H. 530, 66 Am. Dec. 743.

New Jersey.— Van Waggoner *v.* Moses, 26 N. J. L. 570.

New York.— Davenport *v.* Kelly, 42 N. Y. 193. See also Becker *v.* Torrance, 31 N. Y. 631 (holding that where a judgment creditor is pursuing his legal remedy by execution, something more than a notice of *lis pendens* is required to prejudice his levy); De Peyster *v.* Hilders, 2 Barb. Ch. 109.

Pennsylvania.—Indiana County Bank's Appeal, 95 Pa. St. 500; Spang *v.* Com., 12 Pa. St. 358; McCall *v.* Lenox, 9 Serg. & R. 302. To the same effect see Anderson *v.* Neff, 11 Serg. & R. 208.

Virginia.— Frayser *v.* Richmond, etc., R. Co., 81 Va. 388.

Revival of mortgage.— Where the mortgagor paid and took up a note secured by the mortgage, and the next day redelivered it to the mortgagee, taking back part of the money paid on the note and having the balance indorsed on it, and agreed with the mortgagee that the mortgage should remain as security for the money repaid to him, and for a collateral liability of the mortgagee, it was held that the mortgage having once been discharged by payment of the debt secured, it was not revived by the subsequent transaction as against a creditor of the mortgagor who levied his first execution on the land without notice. Bowman *v.* Manter, 33 N. H. 530, 66 Am. Dec. 743.

Right of action differentiated from specific lien.— It has been held in Pennsylvania that where the goods of one party are wrongfully and inextricably confused with those of another, the right of the injured person to claim and take enough out of the whole mass to make him whole must be postponed to the right of one who first obtains a specific lien on the whole by execution or otherwise. Wood *v.* Fales, 1 Phila. (Pa.) 499.

Satisfaction of mortgage.— It was held in Woods *v.* Gibson, 17 Ill. 218, where mortgaged property subject to an execution lien was discharged of the mortgage by a stranger and the property delivered to him, that no

ment.[54] Moreover, in jurisdictions where the lien of the execution attaches at the time of its delivery to the officer, such lien will have priority over a chattel mortgage which is recorded, and possession under which is given after the delivery of the execution to the officer, although before its levy,[55] or an attachment which is levied during the interim.[56]

(II) *Unrecorded Instruments* — (A) *Chattel Mortgages.*[57] Where statutes regarding chattel mortgages or conditional sales require that such mortgages or sales must be recorded to be valid against *bona fide* creditors and purchasers for value, the rule is laid down that the lien of an execution levied on property of a judgment debtor is superior to that of a prior unrecorded mortgage or sale of which the judgment creditor had no notice at the date of his levy, even where the mortgage or sale was subsequently filed before sale.[58] In some jurisdictions, however, it has been held that the lien of a *bona fide* mortgagee under unrecorded mortgage was entitled to priority over the lien of an execution subsequently levied, provided the mortgage is duly recorded before sale under such execution.[59]

title vested in him and it could be properly seized on such execution.

54. *Alabama.*— Parks *v.* Coffey, 52 Ala. 32.
Georgia.— Merritt *v.* Peabody, 40 Ga. 177.
Massachusetts.— Cushman *v.* Carpenter, 8 Cush. 388; Brown *v.* Maine Bank, 11 Mass. 153. See also Eastman *v.* Eveleth, 4 Metc. 137.
Missouri.— Huxley *v.* Harrold, 62 Mo. 516.
Vermont.— Barnard *v.* Russell, 19 Vt. 334.
See 21 Cent. Dig. tit. "Execution," § 246.

Irregularity in issuing execution.— It has been held in Pennsylvania that a creditor who before defendant absconded obtained a domestic attachment cannot set aside a prior execution obtained without authority, and merely on the ground that the judgment on which the execution was obtained was only ripe for execution on the day the execution issued, and that such execution, although irregular, was not void, but voidable, and could only be attacked by defendant. Alexander *v.* Alexander, 2 Chest. Co. Rep. (Pa.) 401.

Mortgage of after-acquired goods.— It has been held in New Jersey that where there is a mortgage of goods thereafter to be acquired by the mortgagor, an execution levied on the goods after they are so acquired will prevail over the mortgage, since, to constitute a valid sale or mortgage in New Jersey, the vendor or mortgagor must have a present property in the thing sold or mortgaged. Looker *v.* Peckwell, 39 N. J. L. 134. *Compare* Smithurst *v.* Edmunds, 14 N. J. Eq. 408; Alexandria First Nat. Bank *v.* Turnbull, 32 Gratt. (Va.) 695, 34 Am. Rep. 791.

Where a sale was delayed.— It has been held in New York that an execution cannot be postponed to an attachment afterward levied, on affidavit of the officer levying the execution that it was intended merely to protect the debtors, where the proceedings prior to execution indicate a *bona fide* intention to collect the debt, and the affidavits of plaintiff in execution and of one of the debtors and their counsel deny collusion and show that the officer was urged to proceed, but declined to do so, and adjourned the sale from time to time against the remonstrance of the execution creditor. Kennedy *v.* Burr, 2 N. Y. Suppl. 798.

55. Williams *v.* Mellor, 12 Colo. 1, 19 Pac. 839; Wells *v.* Marshall, 4 Cow. (N. Y.) 411.

56. Hanchett *v.* Ives, 133 Ill. 332, 24 N. E. 396 [*reversing* 33 Ill. App. 471, and *following* Rogers *v.* Dickey, 6 Ill. 636, 41 Am. Dec. 204]; Puryear *v.* Taylor, 12 Gratt. (Va.) 401.

57. **Unrecorded chattel mortgage** generally see Chattel Mortgages.

58. *Arkansas.*— Cleveland *v.* Shannon, (1889) 12 S. W. 497; Hawkins *v.* Files, 51 Ark. 417, 11 S. W. 681.
California.— Smith *v.* Randall, 6 Cal. 47, 65 Am. Dec. 475.
Georgia.— Stewart *v.* Kramer, 99 Ga. 125, 24 S. E. 871; New England Mortg. Security Co. *v.* Ober, 84 Ga. 294, 10 S. E. 625.
Indiana.— Matlock *v.* Straughn, 21 Ind. 128; Chenyworth *v.* Daily, 7 Ind. 284.
Iowa.— See Wood *v.* Young, 38 Iowa 102.
Maine.— Trull *v.* Fuller, 28 Me. 545.
New Hampshire.— Piper *v.* Hilliard, 52 N. H. 209.
New Mexico.— Moore *v.* Davey, 1 N. M. 303.
New York.— Field *v.* Ingreham, 15 Misc. 529, 37 N. Y. Suppl. 1135; Steffin *v.* Steffin, 4 N. Y. Civ. Proc. 179. *Contra*, Jackson *v.* Dubois, 4 Johns. 216.
North Carolina.— Tait *v.* Brittain, 10 N. C. 55; Davidson *v.* Beard, 9 N. C. 520.
Ohio.— Houk *v.* Conden, 40 Ohio St. 569.
Pennsylvania.—Uhler *v.* Hutchinson, 23 Pa. St. 110. *Compare* Bismarck Bldg., etc., Assoc. *v.* Bolster, 92 Pa. St. 123.
Texas.— Stephens *v.* Keating, (Sup. 1891) 17 S. W. 37. See also Simpson *v.* Chapman, 45 Tex. 560.
United States.— Stevenson *v.* Texas, etc., R. Co., 105 U. S. 703, 26 L. ed. 1215.
See 21 Cent. Dig. tit. "Execution," § 244.

Actual notice of mortgage.— It was held in Bunker *v.* Gordon, 81 Me. 66, 16 Atl. 341, that where the execution creditor had actual notice of the existence of a mortgage upon the property levied on, although such mortgage was unrecorded, that the lien of the mortgage was entitled to priority over the lien of the execution.

59. Holden *v.* Garrett, 23 Kan. 98; Righter *v.* Forrester, 1 Bush (Ky.) 278; Sappington

(B) *Deeds.*[60] So, under the various registry statutes, a prior deed to property which is recorded after the levy of an execution on the property can give such deed no effect as against the levy, provided the execution creditor had no notice of the deed at the time of his levy.[61]

(C) *Executions.* In jurisdictions where the statute requires that the execution shall be entered on an execution docket within a prescribed period after its issuance, and, where this statutory requirement is not complied with, a subsequent purchaser or mortgagee of such property without actual notice of the levy will take the property free from the lien of such execution.[62]

(III) *Property Previously Attached.*[63] In some states, where real estate has been attached and the attachment preserved, an execution levied under a judgment recovered in such suit operates as a lien from the date of the attachment, prior to all encumbrances created by the debtor subsequent to the levy of the writ of attachment.[64]

c. Proceedings to Determine — (I) *General Rule.* The rule seems to be reasonable and equitable that a judgment creditor should be permitted to test the validity of claims which have apparent priority over the lien of his execution and which he believes to be founded in fraud; and in most jurisdictions he can, by proper proceedings and upon sufficient showing to the court, have any cloud upon the title to the property seized, such as a fraudulent transfer or mortgage, removed before a sale of the property.[65]

v. Oeschli, 49 Mo. 244. But *compare* Sedgwick City Bank *v.* Pollard, 8 Kan. App. 34, 54 Pac. 14.

60. Unrecorded deed generally see DEEDS.

61. *Alabama.*— Wallis *v.* Rhea, 10 Ala. 451.

Georgia.— Boston *v.* Cummins, 16 Ga. 102, 60 Am. Dec. 717.

Illinois.— Reichert *v.* McClure, 23 Ill. 516.

Louisiana.— Wade *v.* Marshall, 5 La. Ann. 157.

Massachusetts.— See also Cushing *v.* Hurd, 21 Mass. 253, 16 Am. Dec. 335.

Michigan.— Gardner *v.* Mason, 130 Mich. 436, 90 N. W. 28.

Mississippi.— Clement *v.* Reid, 17 Miss. 535.

Missouri.—Page *v.* Hill, 11 Mo. 149; Waldo *v.* Russell, 5 Mo. 387. See, however, Davis *v.* Owenby, 14 Mo. 170, 55 Am. Dec. 105.

Tennessee.— See Scruggs *v.* Williams, 5 Lea 478.

Texas.— Grimes *v.* Hobson, 46 Tex. 416; Borden *v.* McRae, 46 Tex. 396; Grace *v.* Wade, 45 Tex. 522; Shepard *v.* Hunsacker, 1 Tex. Unrep. Cas. 578; Ranney *v.* Hogan, 1 Tex. Unrep. Cas. 253.

Contra.— Davey *v.* Ruffell, 162 Pa. St. 443, 29 Atl. 894.

Actual notice, however, to the person to be affected by it, is as effective, and ought to be attended with the same consequences as public notice in the registry, and therefore a judgment creditor with notice of a previous unregistered conveyance for a valuable consideration, cannot, by the levy of his execution, obtain a title superior to that of the grantee. Priest *v.* Rice, 1 Pick. (Mass.) 164, 11 Am. Dec. 156; Brown *v.* Maine Bank, 11 Mass. 153; Davis *v.* Blunt, 6 Mass. 487, 4 Am. Dec. 168; Farnsworth *v.* Childs, 4 Mass. 637, 3 Am. Dec. 249; Dixon *v.* Doe, 1 Sm. & M. (Miss.) 70; Hoagland *v.* Latourette, 2 N. J. Eq. 254. See also Corey *v.* Smalley, 106 Mich. 257, 64 N. W. 13, 58 Am. St. Rep. 474.

Time of notice.— It has been held in Maine that the title of an execution creditor under a levy on the real estate of his debtor is not affected by notice of a prior conveyance not recorded, the creditor having no notice thereof at the time of the attachment on his writ. Emerson *v.* Littlefield, 12 Me. 148. See also to the same effect Coffin *v.* Ray, 1 Metc. (Mass.) 212.

Unrecorded lease.— An execution purchaser of an interest in land and the improvements thereunder is not affected by a prior lease of the land and buildings which has not been recorded as required by statute. Dorsey *v.* Pritchard, 6 La. Ann. 729.

62. Eason *v.* Vandiver, 108 Ga. 109, 33 S. E. 873 (holding, however, that such subsequent purchaser must prove that he acted in good faith and without notice in making the purchase, and that it is not sufficient to prove want of notice on the part of an agent); Harvey *v.* Sanders, 107 Ga. 740, 33 S. E. 713; Laundon *v.* Denman, 18 Ohio Cir. Ct. 857, 4 Ohio Cir. Dec. 65.

63. Commencement of lien generally see *supra*, VII, A, 2.

64. Salem First Nat. Bank *v.* Redman, 57 Me. 405; Brackett *v.* Ridlon, 54 Me. 426; Brown *v.* Williams, 31 Me. 403; Nason *v.* Grant, 21 Me. 160; Huxley *v.* Harrold, 62 Mo. 516; Lackey *v.* Seibert, 23 Mo. 85; Harbison *v.* McCartney, 1 Grant (Pa.) 172. See also Mattocks *v.* Farrington, 16 Fed. Cas. No. 9,298, 2 Hask. 331.

65. Taylor *v.* Dunlap Stone, etc., Co., 38 Kan. 547, 16 Pac. 751; Crume *v.* Spaulding, 6 Ky. L. Rep. 294 (holding that, where an execution has been levied upon land subject to a prior lien, plaintiff is not obliged to enforce his levy by an execution sale, but

(II) *Forum of Jurisdiction.* Where executions issue out of different courts and a contest arises between them as to priority in the appropriation of the money raised by sale of the property, the better doctrine seems to be that the court under whose execution the money was raised and into which the sheriff was commanded to pay it has jurisdiction.[66] In some jurisdictions the rule has been laid down that a contest as to priority between several executions, or as to relative priority between an execution and other liens, is purely a question of law and furnishes no ground for relief in equity;[67] while in other jurisdictions it has been held that, where there are conflicting claims to property on which an execution has been levied, equity is the proper forum to settle the rights of the various claimants.[68]

d. Transfer of Property Subject to Execution, or Lien Thereof[69] — (I) *After Lien Has Attached.* The general rule is that where property, either real[70] or

may resort to a suit in equity, as only a lien would be acquired by the execution sale, and the resort to a court of equity would finally be necessary); Bussieré *v.* Williams, 37 La. Ann. 387; New Orleans Canal, etc., Co. *v.* Recorder of Mortgages, 27 La. Ann. 291; O'Donnell *v.* Poike, 12 Pa. Co. Ct. 638. See, however, Albrecht *v.* Long, 25 Minn. 163, holding that the remedy of a creditor whose execution was first placed in the hands of the sheriff, but on which levy was not made until after levy on an execution subsequently delivered, so that the lien of the latter comes prior to his, is against the sheriff. *Compare* Morgan *v.* Wintercast, 6 La. Ann. 485. See also, generally, Fraudulent Conveyances.

66. Woodruff *v.* Chapin, 23 N. J. L. 566, 57 Am. Dec. 416. See, however, Matthews *v.* Warne, 11 N. J. L. 295.

Parties.— The court will not undertake to determine the question of priority between two executions on the application of one of the parties interested. McDonald *v.* Lawry, 6 N. J. L. 414.

67. Hendricks *v.* Chilton, 8 Ala. 641; Child *v.* Dwight, 21 N. C. 171; French *v.* Winsor, 36 Vt. 412.

68. Crume *v.* Spaulding, 6 Ky. L. Rep. 294; Kuhne *v.* Law, 14 Rich. (S. C.) 18.

69. **Abandonment or waiver of levy** or lien see *infra*, VII, B, 12.

Assignment for benefit of creditors as affecting rights of the parties see, generally, Assignments For Benefit of Creditors.

Lien on after-acquired property see *supra*, VII, A, 3, b.

Levy on property fraudulently conveyed see, generally, Fraudulent Conveyances.

Notice to purchaser pending levy see, generally, Lis Pendens.

Right of creditor in property after levy see *infra*, VII, C.

Right of debtor in property after levy see *infra*, VII, C.

Transfer of exempt property pending execution see, generally, Exemptions.

70. *Alabama.*— Spencer *v.* Godwin, 30 Ala. 355.

Connecticut.— Smith *v.* Starkweather, 5 Day 207.

Georgia.— Castlebury *v.* Weaver, 30 Ga. 534.

Illinois.— Dobbins *v.* Wilson, 107 Ill. 17.

Indiana.— Hamilton *v.* Byram, 122 Ind. 283, 23 N. E. 795.

Iowa.— Rogers *v.* Hussey, 36 Iowa 664.

Maine.— See also Howe *v.* Willis, 51 Me. 226.

Maryland.— Warfield *v.* Brewer, 4 Gill 265.

Missouri.—Young *v.* Schofield, 132 Mo. 650, 34 S. W. 497; Page *v.* Hill, 11 Mo. 149.

New York.— Parshall *v.* Shirts, 54 Barb. 99.

North Carolina.—Carson *v.* Smart, 34 N. C. 369; Finley *v.* Smith, 24 N. C. 225; Gilkey *v.* Dickerson, 10 N. C. 293.

Ohio.— Vincent *v.* Goddard, 7 Ohio 188, Pt. II.

Pennsylvania.— Kellam *v.* Janson, 17 Pa. St. 467; Harrison *v.* Waln, 9 Serg. & R. 318.

Tennessee.— McClelland *v.* Payne, 16 Lea 709; McClain *v.* Easly, 4 Baxt. 520; Smithea *v.* Gray, 1 Humphr. 491, 34 Am. Dec. 664; Overton *v.* Perkins, Mart. & Y. 367.

Vermont.— Barnard *v.* Whipple, 29 Vt. 401, 70 Am. Dec. 422.

Virginia.— McClung *v.* Beirne, 10 Leigh 394, 34 Am. Dec. 739.

See 21 Cent. Dig. tit. "Execution," § 257 *et seq.*

Lease after execution.— The purchaser under execution can recover the land, notwithstanding a lease made by defendant after the levy. Locke *v.* Coleman, 2 T. B. Mon. (Ky.) 12, 15 Am. Dec. 118.

Sale by parol agreement.— Where an oral sale of land is made before the levy of an execution on it, but there is no payment on the purchase, and afterward the land is conveyed to the purchaser, and he then pays and secures consideration, the execution lien is superior to the deed. Jones *v.* Allen, 88 Ky. 381, 11 S. W. 289, 10 Ky. L. Rep. 962.

The subsequent acknowledgment of an ineffectual conveyance to a voluntary grantee will not relate back to the signing and delivery of the deed so as to prejudice the rights of execution creditors. Hendon *v.* White, 52 Ala. 597.

Vendee in possession under executory contract.— It was held in an early Kentucky case that a vendee of land under an executory contract, in possession, who obtained a deed for such property from the vendor between the levy of execution thereon and the sale, could not defend his title at law against a

personal,[71] has been levied on under an execution issued on a valid judgment, a subsequent purchaser is bound to take notice of such outstanding lien, and acquires the property subject thereto. However, the levy of an officer under an execution does not convert the title of defendant in execution into a mere right of action, and he may still transfer his title to the property as if no levy had been made, so long as the property remains *in custodia legis*, subject to the question of right arising from the levy.[72]

(II) *Transfer or Levy Without Visible Change of Possession.* By the common-law rule, a grant or assignment of goods and chattels is valid between the parties without actual delivery, but as to creditors the title is not considered as perfect unless possession accompanies and follows the deed; and notice to a third person of a sale or assignment of chattels, where possession has never been taken under the sale or assignment, does not affect the right of the officer to seize

purchaser under the execution. Butts *v.* Chinn, 4 J. J. Marsh. (Ky.) 641.

71. *Indiana.*— Vandibur *v.* Love, 10 Ind. 54.

New Jersey.— Newell *v.* Sibley, 4 N. J. L. 381. See also Bloom *v.* Welsh, 27 N. J. L. 177.

New York.— Guilford *v.* Mills, 137 N. Y. 554, 33 N. E. 337 [*affirming* 18 N. Y. Suppl. 275]; Steffin *v.* Steffin, 4 N. Y. Civ. Proc. 179; Butler *v.* Maynard, 11 Wend. 548, 27 Am. Dec. 100; Warner *v.* Paine, 3 Barb. Ch. 630.

North Carolina.— Farley *v.* Lea, 20 N. C. 307, 32 Am. Dec. 680. See also Bevis *v.* Landis, 59 N. C. 312, 82 Am. Dec. 418.

Pennsylvania.— Reinheimer *v.* Hemingway, 35 Pa. St. 432. See Smith *v.* Humphries, 6 Lanc. L. Rev. 106, holding that if property subject to the lien of an execution in the state of Delaware be brought into Pennsylvania within two years from the date of the levy and sold there to a *bona fide* purchaser, under the *lex loci rei sitæ* a good title passes, even though it be admitted that under the laws of Delaware the lien of the execution creditor was good against even the *bona fide* purchaser for two years from the date of levy.

Tennessee.— Cecil *v.* Carson, 86 Tenn. 139, 5 S. W. 532.

West Virginia.— Wiant *v.* Hays, 38 W. Va. 681, 18 S. E. 807, 23 L. R. A. 82.

United States.— Philadelphia Third Nat. Bank *v.* Atlantic City, 126 Fed. 413.

See 21 Cent. Dig. tit. "Execution," § 257 *et seq.*

Exchange of property.— Under a Kentucky statute it was held that where A while an officer had an execution in his hands against him, exchanged horses with B, both horses were subject to the lien of the execution. Orchard *v.* Williamson, 6 J. J. Marsh. 558, 22 Am. Dec. 102. See also State *v.* Blundin, 32 Mo. 387, laying down the same rule.

Levy on growing crop.— Under the Tennessee statute, an execution cannot be levied on a growing crop "until the fifteenth of November, after such crop is mature." It has been held under this statute that a levy made in December under an execution tested as of the July preceding did not take precedence of a sale of such crop in September, before its maturity, the effect of the statute being to postpone the lien of the execution. Edwards *v.* Thompson, 85 Tenn. 720, 722, 4 S. W. 913, 4 Am. St. Rep. 807.

Property of tenants in common.— It has been held in North Carolina that the lien created by issuance of execution is not divested by a sale of slaves belonging to tenants in common, against one of whom an execution has been issued, under the statute providing for such sale on petition of the tenants in common. Harding *v.* Spivey, 30 N. C. 63.

Where a chattel mortgage was executed and recorded without the mortgagee's knowledge, and the property covered thereby was afterward sold on execution against the mortgagor, it was held that the acceptance of the mortgage, after such sale by the administrator of the mortgagee, could not affect the rights of the purchaser under the execution sale. McFadden *v.* Ross, 14 Ind. App. 312, 41 N. E. 607.

72. *Alabama.*— Atwood *v.* Pierson, 9 Ala. 656.

Kentucky.— Addison *v.* Crow, 5 Dana 271; Harrison *v.* Wilson, 2 A. K. Marsh. 547. See also Warner *v.* Bryant, 9 Bush 212.

Maryland.— Arnott *v.* Nicholls, 1 Harr. & J. 471. See also McElderry *v.* Smith, 2 Harr. & J. 72.

Mississippi.—Gardner *v.* McManus, 57 Miss. 647.

New York.— Steffin *v.* Steffin, 4 N. Y. Civ. Proc. 179.

North Carolina.— Alexander *v.* Springs, 27 N. C. 475. See also Ingles *v.* Donalson, 3 N. C. 57, holding that sale of property, made pending an execution against it unsatisfied, will be good to vest the property in the vendee, provided the execution is eventually satisfied by some other means.

Pennsylvania.— Blank *v.* Cline, 155 Pa. St. 613, 26 Atl. 692; Towar *v.* Barrington, Brightly 253.

See 21 Cent. Dig. tit. "Execution," § 257 *et seq.*

Sale between issuance of original and alias fieri facias.— It was held in Hardy *v.* Jasper, 14 N. C. 158, that where an original fieri facias is issued to one county and an alias issued to another, a sale by the judgment

the property in execution as the property of the vendor or assignor.[73] Conversely, where personal property levied on under execution is suffered to remain in the possession of the execution debtor by order of the judgment creditor, a subsequent purchaser of such property for a valuable consideration will generally acquire title, free from the lien of the execution.[74]

(III) *DELAY IN ENFORCING WRIT.* The general rule[75] is that the judgment creditor acquires no lien, even as against volunteers, by causing his writ to be issued and then countermanding the levy thereof, or by giving instructions to the officer not to levy until directed to do so.[76] An inactive levy, lying dormant and without notice to an innocent purchaser, is evidence of grosser negligence and greater wrong to the purchaser than no levy at all, and a *bona fide* purchaser of property, without notice of any judgment or levy thereon, holds the property discharged from the lien of any execution under a judgment against his vendor,

debtor of his property situated in the latter county, made while the first writ was in the hands of the sheriff, was valid.

73. *Alabama.*— Harbinson *v.* Harrell, 19 Ala. 753.

Kentucky.— Mt. Vernon Banking Co. *v.* Henderson Hominy Mills, 15 Ky. L. Rep. 333.

Louisiana.—Corcoran *v.* Sheriff, 19 La. Ann. 139.

Virginia.— Tavenner *v.* Robinson, 2 Rob. 280.

United States.— Meeker *v.* Wilson, 16 Fed. Cas. No. 9,392, 1 Gall. 419.

See 21 Cent. Dig. tit. "Execution," § 257 *et seq.*

See, however, McGee *v.* Riddlesbarger, 39 Mo. 365, holding that where a party conveyed real estate by deed of mortgage and also "all his notes, bonds and evidences of debt," the title to such choses in action, although not delivered, passed to the mortgagee as against a subsequent execution creditor.

Possession obtained before execution issued.— However, upon the *bona fide* sale of property, where the vendee does not take possession at the time of the sale, yet if he acquires possession before an execution is issued against the vendor, it has been held that his title is good against the execution creditor. McKinley *v.* Ensell, 2 Gratt. (Va.) 333.

Under a verbal contract for the sale of an article to be manufactured by the seller, if the contract is within the statute of frauds the title does not pass to the buyer until delivery, and where a valid execution against the vendor is placed in the sheriff's hands in the interim between the manufacture and delivery of the article, the execution lien is superior to the vendee's title. Sawyer *v.* Ware, 36 Ala. 675.

Unregistered bill of sale.— It was held in Johnson *v.* Morgan, 2 Humphr. (Tenn.) 115, that, where a bill of sale of slaves is not registered before the lien of an execution attaches, they will be subject to the execution.

Wrongful possession.— Where a party wrongfully obtains possession of personal property which has been previously levied on under execution and sells the same, his vendee takes title subject to the lien of the execution. Ross *v.* Richolson, 3 Kan. App. 239, 49 Pac. 97.

74. Dougherty *v.* Marsh, 11 Ga. 277; Hickok *v.* Coates, 2 Wend. (N. Y.) 419, 20 Am. Dec. 632. See also Butler *v.* Lawshe, 74 Ga. 352.

75. **However, under statutes** which provide that the goods and chattels of a judgment debtor are bound by the execution from the time it is issued to the sheriff, although no levy is made, except as against *bona fide* purchasers for value and subsequent judgment creditors, it has been held that subsequent instructions to the sheriff not to levy will not, as to volunteers, impair or affect the lien created by delivery of the writ to the officer. Crane *v.* Penny, 2 Fed. 187, holding that an assignee in bankruptcy is not a purchaser for value but a volunteer, and that as the bankrupt could not avail himself of the objection that the execution was dormant, neither could the assignee.

76. *Kentucky.*— Carlisle Deposit Bank *v.* Lee, 13 Ky. L. Rep. 495.

Louisiana.— Hanna *v.* His Creditors, 12 Mart. 32. See also Gaulden's Succession, 9 La. Ann. 205.

New Jersey.— Cook *v.* Wood, 16 N. J. L. 254.

New York.— Smith *v.* Erwin, 77 N. Y. 466. See McIntyre *v.* Sanford, 9 Daly 21, holding that the rules applicable to dormant executions do not apply to a levy upon real estate, for the reason that an execution against real estate, no matter when issued, relates back to the docketing of the judgment and is a mere power of sale in the hands of the sheriff; while as against personal property an execution becomes a lien only when levied, and such an execution is not allowed to lie dormant in the hands of the sheriff to be levied only when subsequent executions come into his hands.

Pennsylvania.— See Larzelere Co.'s Appeal, (1888) 13 Atl. 85.

United States.— Howes *v.* Cameron, 23 Fed. 324.

See 21 Cent. Dig. tit. "Execution," § 264.

See, however, Keel *v.* Larkin, 72 Ala. 493, holding that as against defendant in execution, his heirs or personal representatives, the lien of an execution is not lost or sus-

where he has been in possession for the statutory period pending an inactive levy.[77]

(IV) *SALE AFTER ISSUANCE, BUT BEFORE LEVY.* In those jurisdictions in which the lien of an execution does not attach until actual levy, the title of a *bona fide* vendee or assignee of property of the judgment debtor acquired after the issuance, but before the levy of the execution, is superior to the lien of the execution.[78] And in several states in which the execution is a lien from the time of its delivery to the officer, the same result is accomplished by statutory provision, declaring that the lien of the execution cannot be enforced as against *bona fide* purchasers and encumbrancers acquiring their title prior to the levy and without notice of the writ.[79]

5. DURATION OF LIEN[80] — a. General Rule. Since the object of the lien is to prevent the transfer of the property subject to execution, the general rule is that the lien continues as long as the writ remains in force, in order that property may be taken and sold thereunder, and that the lien ceases when the writ is *functus officio*.[81]

b. Where No Actual Levy.[82] In the absence of statutory provisions to the con-

pended by plaintiff's direction to the sheriff to hold it up, since they cannot be thereby prejudiced.

Delay in executing writ see *supra*, VII, A, 4, a, (VI).

A reasonable indulgence of defendant debtor, given him in good faith to allow him to raise money to save his goods from sacrifice, will not defeat the lien of the levy. Connell *v.* O'Neil, 154 Pa. St. 582, 26 Atl. 607.

77. Patterson *v.* Fowler, 23 Ark. 459 (where there was a delay of over three years between the return of the execution under which the lands were levied on and the suing out of an alias under which they were sold, with no effort in the interim to enforce the levy and no excuse offered for the laches, and it was held that the lien of the levy was displaced as against the intervening rights of a more diligent creditor); Braswell *v.* Plummer, 56 Ga. 594; Ruker *v.* Womack, 55 Ga. 399. See, however, Harman *v.* May, 40 Ark. 146, holding that a delay for twenty-six months to sell land which had been levied on, the title to which was in a fraudulent grantee, would not displace the lien of the execution.

78. Osborn *v.* Alexander, 40 Hun (N. Y.) 323; Stewart *v.* Beale, 7 Hun (N. Y.) 405; Millspaugh *v.* Mitchell, 8 Barb. (N. Y.) 333; Birdseye *v.* Ray, 4 Hill (N. Y.) 158. See also Vance *v.* Red, 2 Speers (S. C.) 90.

79. Van Waggoner *v.* Moses, 26 N. J. L. 570; Weisenfield *v.* McLean, 96 N. C. 248, 2 S. E. 56; Trevillian *v.* Guerrant, 31 Gratt. (Va.) 525; Huling *v.* Cabell, 9 W. Va. 522, 27 Am. Rep. 562.

80. Abandonment, discharge, relief, and waiver see *infra*, VII, B, 10 *et seq.*

Effect of stay see *supra*, VII, A, 4, a, (V); *infra*, VIII, A, 8.

81. Pickard *v.* Peters, 3 Ala. 493 (holding that if the sheriff demand a bond of indemnity from plaintiff in execution which is not given, he may deliver the property levied upon to the person from whose possession he took it, but if he does not do so and retains it, the lien of the execution continues); Humphrey *v.* Hitt, 6 Gratt. (Va.) 509, 52 Am. Dec. 133; Carr *v.* Glasscock, 3 Gratt. (Va.) 343.

In Illinois, where an execution is issued to another county and there levied on lands and the certificate of levy is duly filed, the lien of the levy will continue for seven years from the time the judgment becomes a lien in the county in which it was rendered (Rainey *v.* Nance, 54 Ill. 29); and under the act of 1872, declaring judgments liens on real estate for seven years from their rendition or revival where execution is issued within one year, and providing that real estate levied on may be sold within a year after such seven years, it has been held that the lien on lands levied on continues for one year after the expiration of the seven years (Dobbins *v.* Peoria First Nat. Bank, 112 Ill. 553).

In Indiana under Rev. St. (1881) § 741, the lien on personalty obtained by levy of an execution continues only thirty days from the return of the writ unless an alias writ is issued. Wheeler *v.* Haines, 114 Ind. 108, 15 N. E. 827.

In Ohio under Rev. St. § 1212, where a judgment is rendered in one county and execution is issued thereon to the sheriff of another county, and by him levied on land in his county, and such execution is duly entered on the foreign execution docket, it thereby becomes a lien on such land, and will continue for a period of five years from the date of such levy as against subsequent purchasers from the execution debtor, notwithstanding the execution is returned by the sheriff without further proceedings by order of the judgment creditor. Johnson *v.* Burnside, 8 Ohio S. & C. Pl. Dec. 412, 7 Ohio N. P. 74.

In Virginia under Code (1887), § 3602, the lien of an execution continues so long as the judgment can be enforced. Boisseau *v.* Bass. 100 Va. 207, 40 S. E. 647, 93 Am. St. Rep. 956.

82. Lien as dependent on levy see *supra*, VII, A, 2, c, (II).

Necessity of levy before sale see *infra*, VII, B, 3.

trary, the lien of an execution ceases upon the return-day of the writ, unless there is an actual levy.[83]

c. Effect of Return or Expiration of Writ[84]—(I) *General Rule.* While, in the absence of express statutory enactment, an execution has no legal effect, as such, after its return-day,[85] and on the return of an execution *nulla bona* its lien expires,[86] yet the title vested in an officer by virtue of his levy remains until divested by subsequent proceedings, and he may proceed to advertise and sell the property by virtue of his title acquired by the levy after the return-day of the writ.[87]

83. *Kentucky.*— Daniel *v.* Cochran, 4 Bibb 532; Tabb *v.* Harris, 4 Bibb 29, 7 Am. Dec. 732.

Louisiana.— Hanna *v.* His Creditors, 12 Mart. 32.

Maryland.— Coombs *v.* Jordan, 3 Bland 284, 22 Am. Dec. 236.

Missouri.— McDonald *v.* Gronefeld, 45 Mo. 28, holding that where an execution was levied prior to the return-day thereof, on certain property, it would not continue in force for the purpose of a fresh and independent levy on other property after the return-day of the execution.

New Jersey.— Cook *v.* Wood, 16 N. J. L. 254; Matthews *v.* Warne, 11 N. J. L. 295.

New York.— Walker *v.* Henry, 85 N. Y. 130; Watrous *v.* Lathrop, 4 Sandf. 700.

North Carolina.— Ross *v.* Alexander, 65 N. C. 576, holding that even the lien acquired by levy is waived by taking out an alias execution instead of following up the levy by a venditioni exponas.

Pennsylvania.— Sturges' Appeal, 86 Pa. St. 413; Com. *v.* Magee, 8 Pa. St. 240, 44 Am. Dec. 509. See also Brown *v.* Campbell, 1 Watts 41.

South Carolina.—Ross *v.* McCartan, 1 Brev. 507.

See 21 Cent. Dig. tit. "Execution," § 267.

Compare Walker *v.* Elledge, 65 Ala. 51.

Property not sold for want of bidders.— It has been held under an Indiana statute that where an execution is levied on property and returned with an indorsement that the property was not sold for want of bidders, the lien continues without an alias writ until the return-term next after the term to which the writ is returnable. Wolfe *v.* Wolfe, 4 Ind. 255.

84. Return-day affecting time of levy see *infra*, VII, B, 6.

85. See *supra*, VII, A, 5, b.

86. Union Bank *v.* McClung, 9 Humphr. (Tenn.) 91.

87. *Delaware.*— West *v.* Shockley, 4 Harr. 287.

Illinois.— Corbin *v.* Pearce, 81 Ill. 461; Logsdon *v.* Spivey, 54 Ill. 104; Chicago *v.* Rock Island R. Co., 20 Ill. 286.

Iowa.— Moomey *v.* Maas, 22 Iowa 380, 92 Am. Dec. 395.

Kentucky.— Harrodsburg Sav. Inst. *v.* Chinn, 7 Bush 539.

Maryland.— Gaither *v.* Martin, 3 Md. 146.

Massachusetts.— Heywood *v.* Hildreth, 9 Mass. 393.

Minnesota.— Spencer *v.* Haug, 45 Minn. 231, 47 N. W. 794; Knox *v.* Randall, 24 Minn. 479; Barrett *v.* McKenzie, 24 Minn. 20; Pettingill *v.* Morse, 3 Minn. 222, 74 Am. Dec. 747.

Missouri.— Tierney *v.* Spiva, 97 Mo. 98, 10 S. W. 433; Huff *v.* Morton, 94 Mo. 405, 7 S. W. 283; Riggs *v.* Goodrich, 74 Mo. 108; Groner *v.* Smith, 49 Mo. 318; Wood *v.* Messerly, 46 Mo. 255; McDonald *v.* Gronefeld, 45 Mo. 28 (holding that under the act of March 23, 1863, after the return-day of the execution, the writ would afterward be dead for all purposes except the preservation of rights which attached prior to the return-day by virtue of the antecedent levy); Stewart *v.* Severance, 43 Mo. 322, 97 Am. Dec. 392; Hombs *v.* Corbin, 20 Mo. App. 497. See also Hicks *v.* Ellis, 65 Mo. 176.

North Carolina.— Lanier *v.* Stone, 8 N. C. 229.

Pennsylvania.— Paxson's Appeal, 49 Pa. St. 195; Moore *v.* Whitney, 10 Lanc. Bar 122, 1 Leg. Chron. 1, holding that the lien of an execution, when once attached on personal property, continues until there is a judicial sale of the property, unless it is discharged by the laches of the party or of the sheriff. See also Messner's Appeal, (1885) 1 Atl. 389.

Vermont.— Barnard *v.* Stevens, 2 Aik. 429, 16 Am. Dec. 733.

See 21 Cent. Dig. tit. "Execution," § 269.

Property levied on claimed by another.— The return by the sheriff that "the property levied on was claimed by another, and not sold for want of indemnity," does not authorize the conclusion that he has parted with the possession of it, and unless he returns the property to the defendant in the execution or delivers it to the claimant, the lien of the execution continues. Decatur Branch Bank *v.* McCollum, 20 Ala. 280.

Venditioni exponas.— It has been held in Missouri that a writ of venditioni exponas is a writ of execution, and the lien and levy of the original writ continue thereunder. Hicks *v.* Ellis, 65 Mo. 176.

In South Carolina Code, § 311, provides that an execution shall have active energy from the time it is first lodged until the regular term of the court from which it is issued, which shall follow next after the full completion of five years from its lodging. McLaurin *v.* Kelly, 40 S. C. 486, 19 S. E. 143. It is provided by 15 St. at L. 499 that executions, when levied on personal property, should be a lien on such property for the period of four months from the date of such levy. Warren *v.* Jones, 9 S. C. 288.

(III) *Necessity For Alias or Pluries Writs.*[88] In some jurisdictions the rule is that where an original writ of fieri facias is returned unsatisfied, in order that its lien may be preserved plaintiff must sue out an alias writ to the next term and continue to renew the same from term to term, and in the event that an alias writ is not sued out to each succeeding term, the lien created by the first writ is discharged.[89]

d. Effect of Expiration of Judgment Lien. Where a general lien is created by the judgment,[90] it is held in some jurisdictions that the levy of an execution during the existence of a judgment lien does not create a new lien or extend the lien of the judgment,[91] and at the expiration of the lien of the judgment, the lien of the execution likewise expires.[92]

e. Abatement of Writ by Death of a Party[93]—(I) *Judgment Creditor.* Since the writ is deemed to be in process of execution from its teste at common law, and from its delivery to the officer under statutes where the common-law fiction of relation to the day of the teste has been abolished,[94] in the absence of express statutory provision, a writ of execution in the hands of an officer is not abated by the death of the judgment creditor, and it is the duty of the officer to proceed to execute the writ against the personal or real property of defendant notwithstanding the death of the judgment creditor, no scire facias or other revival being necessary, and the lien of the execution continues.[95] However, in several jurisdictions it has been held that where a personal judgment is taken and

In Virginia it was held in Hicks *v.* Roanoke Brick Co., 94 Va. 741, 27 S. E. 596, that under Code (1887), § 3602, the lien of the execution continues so long as the judgment can be enforced. See also Charron *v.* Boswell, 18 Gratt. 216; Puryear *v.* Taylor, 12 Gratt. 401.

88. Alias or pluries writs see *supra*, VI, E.

Waiver or abandonment by issuing alias or other writs see *infra*, VII, B, 12, a, (III).

89. *Alabama.*— Perkins *v.* Brierfield Iron, etc., Co., 77 Ala. 403; Childs *v.* Jones, 60 Ala. 352; Herndon *v.* White, 52 Ala. 597; Parks *v.* Coffey, 52 Ala. 32; Montgomery Branch Bank *v.* Broughton, 15 Ala. 127; Carey *v.* Gregg, 3 Stew. 433. See also Dryer *v.* Graham, 58 Ala. 623.

Kentucky.— Daniel *v.* Cochran, 4 Bibb 532.

North Carolina.— See McIver *v.* Ritter, 60 N. C. 605.

Texas.— Harvey *v.* Edens, 69 Tex. 420, 6 S. W. 306; Deutsch *v.* Allen, 57 Tex. 89; Bassett *v.* Proetzel, 53 Tex. 569.

United States.— Beebe *v.* U. S., 161 U. S. 104, 16 S. Ct. 532, 40 L. ed. 636; Massingill *v.* Downs, 7 How. 760, 12 L. ed. 903.

Lapse of one day.— It has been held in Kentucky that if, after the return-day of an execution which was not levied, one entire day elapses before another is placed in the hands of an officer where the property is situated, the lien ceases. Hood *v.* Winsatt, 1 B. Mon. (Ky.) 208.

Under an Alabama statute, enacting that "the lien acquired by any execution issuing from either of said courts [in Mobile] shall not be lost, if alias executions issue to the sheriff without interval of more than ninety days," it was held that where original execution was returned on April 14, and an alias issued on July 14, the lien was not lost, the court presuming that the alias issued precisely at the instant at which July 14 commenced. Lang *v.* Phillips, 27 Ala. 311.

90. Bagley *v.* Ward, 37 Cal. 121, 99 Am. Dec. 256; Wood *v.* Colvin, 5 Hill (N. Y.) 228; Catlin *v.* Jackson, 8 Johns. (N. Y.) 520.

91. Eby *v.* Foster, 61 Cal. 282; Rogers *v.* Druffel, 46 Cal. 654; Bagley *v.* Ward, 37 Cal. 121, 99 Am. Dec. 256; Isaac *v.* Swift, 10 Cal. 71, 70 Am. Dec. 698; Gridley *v.* Watson, 53 Ill. 186; Stahl *v.* Roost, 34 Iowa 475; Riland *v.* Eckert, 23 Pa. St. 215; Jameson's Appeal, 6 Pa. St. 280. See *supra*, VII, A, 1, b, (I); and, generally, Judgments.

92. *California.*— Bagley *v.* Ward, 37 Cal. 121, 99 Am. Dec. 256; Isaac *v.* Swift, 10 Cal. 71, 70 Am. Dec. 698.

Illinois.— Tenney *v.* Hemingway, 53 Ill. 97.

Missouri.— State Bank *v.* Wells, 12 Mo. 361, 51 Am. Dec. 163.

New York.— Pierce *v.* Fuller, 36 Hun 179. See also Scott *v.* Howard, 3 Barb. 319; Tufts *v.* Tufts, 18 Wend. 621.

North Carolina.— Spicer *v.* Gambill, 93 N. C. 378.

Pennsylvania.—Reynolds' Appeal, 10 Wkly. Notes Cas. 424; White *v.* Bennett, 1 Susq. Leg. Chron. 31; Brandon *v.* Lawrence, 1 Leg. Rec. 312.

See 21 Cent. Dig. tit. "Execution," § 271.

93. Death of party after judgment see Abatement and Revival, 1 Cyc. 78 *et seq.*

94. See *supra*, VI, D, 2, b, (XI); VII, A, 2.

95. *Arkansas.*— Pace *v.* Rust, 28 Ark. 71.

Georgia.— Hatcher *v.* Lord, 115 Ga. 619, 41 S. E. 1007, 61 L. R. A. 353; Rogers *v.* Truett, 73 Ga. 386.

Illinois.—Reynolds *v.* Henderson, 7 Ill. 110.

Indiana.— Murray *v.* Buchanan, 7 Blackf. 549.

Kentucky.— Morgan *v.* Winn, 17 B. Mon. 233; Buckner *v.* Terrill, Litt. Sel. Cas. 29, 12

plaintiff dies before the levy of an execution, the action must be revived in the name of the personal representative of such plaintiff before the writ can be executed.[96]

(II) *Judgment Debtor.* Where a writ of execution has become a lien upon property of the judgment debtor by its teste, as at common law,[97] or by its delivery to the proper officer, or by a levy as provided by statute,[98] the writ does not abate by reason of the death of the judgment debtor, and it is the duty of the officer to proceed to the execution of the writ, even where the property of such judgment debtor has come into possession of his executor or administrator.[99]

Am. Dec. 269. See also Venable *v.* Smith, 1 Duv. 195; Jones *v.* Martin, 4 Ky. L. Rep. 831.

Maine.— Wing *v.* Hussey, 71 Me. 185.

Massachusetts.— Com. *v.* Whitney, 10 Pick. 434.

New York.— Jones *v.* Newman, 36 Hun 634; Becker *v.* Becker, 47 Barb. 497.

Ohio.— Bigelow *v.* Renker, 25 Ohio St. 542; Craig *v.* Fox, 16 Ohio 563 (holding that an execution or order of sale once begun is not abated by the death of plaintiff or marriage of plaintiff administratrix); Massie *v.* Long, 2 Ohio 287, 15 Am. Dec. 547.

South Carolina.— Fox *v.* Lamar, 2 Brev. 417.

Tennessee.— Gregory *v.* Chadwell, 3 Coldw. 390; Neil *v.* Gaut, 1 Coldw. 396.

Virginia.—Trevillian *v.* Guerrant, 31 Gratt. 525; Turnbull *v.* Claibornes, 3 Leigh 392.

United States.—Entwisle *v.* Bussard, 8 Fed. Cas. No. 4,503, 2 Cranch C. C. 331.

England.— Cleve *v.* Veer, Cro. Car. 457; Ellis *v.* Griffith, 4 D. & L. 279, 10 Jur. 1014, 16 L. J. Exch. 66, 16 M. & W. 106; Clerk *v.* Withers, 6 Mod. 290, 11 Mod. 35; Bragner *v.* Langmead, 7 T. R. 20.

See 21 Cent. Dig. tit. "Execution," § 272.

Special execution in the name of administrator.— It has been held, under the Missouri statute, that where the vendor of real estate obtains a judgment to enforce his lien for the purchase-money, and sues out execution, but dies prior to the sale thereunder, a special execution may be issued in the name of his administrators without a revival of the judgment. Gaston *v.* White, 46 Mo. 486.

96. Wagnon *v.* McCoy, 2 Bibb (Ky.) 198 (former rule); Trail *v.* Snouffer, 6 Md. 308 (holding that a fieri facias cannot be enforced in the name of a deceased plaintiff where the fact of his death at the date of the writ is relied on against its validity at the return of the process); Cist *v.* Beresford, 1 Ohio Cir. Ct. 32, 1 Ohio Cir. Dec. 19. See also Berryhill *v.* Wells, 5 Binn. (Pa.) 56, holding that where one of two joint judgment creditors dies after judgment, the survivor may have execution without the issuance of a scire facias suggesting the death of his co-plaintiff on the record or reciting it in the writ; but if the survivor is a *feme sole* who afterward marries, she cannot have execution without a scire facias.

97. Collingsworth *v.* Horn, 4 Stew. & P. (Ala.) 237, 24 Am. Dec. 753; McCarson *v.* Richardson, 18 N. C. 561; Nashville Trust Co. *v.* Weaver, 102 Tenn. 66, 50 S. W. 763; Waghorne *v.* Langmead, 1 B. & P. 571; Parkes *v.* Mosse, Cro. Eliz. 181; Parsons *v.* Gill, 1 Ld. Raym. 695; Eaton *v.* Southby, Willes 131. See also *supra*, VII, A, 2, a.

98. See *supra*, VII, A, 2, c.

99. *Alabama.*— Hullett *v.* Hood, 109 Ala. 345, 19 So. 419; Strange *v.* Graham, 56 Ala. 614; Jones *v.* Ray, 50 Ala. 599; Collier *v.* Windham, 27 Ala. 291, 62 Am. Dec. 767; Stewart *v.* Nuckols, 15 Ala. 225, 50 Am. Dec. 127; Boyd *v.* Dennis, 6 Ala. 55; Caperton *v.* Martin, 5 Ala. 217 (holding that where execution upon a judgment is begun, the lien upon the personal estate is fixed and absolute and is not destroyed by the subsequent death and insolvency of defendant); Mansony *v.* U. S. Bank, 4 Ala. 735; Collingsworth *v.* Horn, 4 Stew. & P. 237, 24 Am. Dec. 753.

Arkansas.— Barber *v.* Peay, 31 Ark. 392; Davis *v.* Oswalt, 18 Ark. 414, 68 Am. Dec. 182, holding that if the execution is levied before defendant's death, the officer may sell the goods after his death to satisfy the execution. See also Powell *v.* Macon, 40 Ark. 541, holding that where an execution has been levied on lands in the life of the judgment debtor, a specific lien is thereby created, and the judgment may be revived by scire facias against the administrator and the land sold under a venditioni exponas.

Georgia.— Brooks *v.* Rooney, 11 Ga. 423, 56 Am. Dec. 436.

Illinois.— Davis *v.* Moore, 103 Ill. 445; Dodge *v.* Mack, 22 Ill. 93.

Indiana.— Doe *v.* Hayes, 4 Ind. 117 (where the venditioni exponas was issued after the judgment debtor's death); Doe *v.* Heath, 7 Blackf. 154.

Iowa.— Sprott *v.* Reid, 3 Greene 489, 56 Am. Dec. 549.

Maryland.— Hanson *v.* Barnes, 3 Gill & J. 359, 22 Am. Dec. 322; Jones *v.* Jones, 1 Bland 443, 18 Am. Dec. 327; Boyd *v.* Harris, 1 Md. Ch. 466.

Mississippi.— Thompson *v.* Ross, 26 Miss. 198.

New Jersey.— Wait *v.* Savage, (Ch. 1888) 15 Atl. 225.

New York.— Wood *v.* Morehouse, 45 N. Y. 368 [*affirming* 1 Lans. 405]; Holman *v.* Holman, 66 Barb. 215; Becker *v.* Becker, 47 Barb. 497.

North Carolina.— Benner *v.* Rhinehart, 107 N. C. 705, 12 S. E. 456, 22 Am. St. Rep. 909; Aycock *v.* Harrison, 65 N. C. 8; Parish *v.* Turner, 27 N. C. 279.

Where, by statute, a writ of execution does not become a lien upon the property of the judgment debtor until its delivery to the proper officer, a writ tested during the life of the judgment debtor, but not delivered to the officer until after his death, abates;[1] and in jurisdictions where the writ does not become a lien upon the property of the judgment debtor until the actual levy, a writ delivered to the officer prior to the death of the judgment debtor, but not levied before his decease, abates.[2]

Ohio.— Bigelow *v.* Renker, 25 Ohio St. 542; Massie *v.* Long, 2 Ohio 287, 15 Am. Dec. 547.

Pennsylvania.— Connell *v.* O'Neil, 154 Pa. St. 582, 26 Atl. 607; Meanor *v.* Hamilton, 27 Pa. St. 137; Deering *v.* Wisler, 21 Pa. Co. Ct. 156; *In re* Avery, 1 C. Pl. 151. See, however, Wood *v.* Colwell, 34 Pa. St. 92 [*quoted* in Smith *v.* Siegel, 1 Woodw. 203], holding that under the act of 1834, section 33, where defendant's lands were levied on and condemned, a venditioni exponas could not issue thereon after the death of defendant without a scire facias against his personal representatives.

Texas.— Taylor *v.* Snow, 47 Tex. 462, 26 Am. Rep. 311; Burdett *v.* Chandler, 22 Tex. 14. See, however, Pierce *v.* Logan, 2 Tex. Unrep. Cas. 354.

United States.— Taylor *v.* Miller, 13 How. 287, 14 L. ed. 149; Bleecker *v.* Bond, 3 Fed. Cas. No. 1,535, 4 Wash. 6; Sumner *v.* Moore, 23 Fed. Cas. No. 13,610, 2 McLean 59.

See 21 Cent. Dig. tit. "Execution," § 273.

See, however, Mendenhall *v.* Burnette, 58 Kan. 355, 49 Pac. 93, holding that an execution on a judgment, revived after the death of defendant against his executors, who hold title to lands under his will, can only be levied on the property bound by the lien of the judgment, and cannot be levied on personal property which passed into the hands of the executors, nor on lands to which the lien did not attach.

In Kentucky the rule has been laid down that the lien created by the levy of an execution on the land of defendant in his lifetime is not discharged by his death before a sale thereof, and may be enforced in equity; yet the death of defendant divests the power of the sheriff to make a sale under such levy until a revival of the judgment against the heirs of the deceased. Burge *v.* Brown, 5 Bush 535, 96 Am. Dec. 369; Holeman *v.* Holeman, 2 Bush 514; Huston *v.* Duncan, 1 Bush 205. See also Howe *v.* Lane, 8 Ky. L. Rep. 783, holding that the death of defendant in an execution which has been levied on personal property does not discharge the levy, but until it is revived, suspends all power of the sheriff except to maintain the status existing under the levy when defendant died. See, however, Bristow *v.* Payton, 2 T. B. Mon. 91, 15 Am. Dec. 134, holding that after the death of defendant in execution the sheriff cannot seize, even where a levy has been previously made, without a revivor.

In Tennessee it has been held that where the execution debtor dies after a levy on his land, but before a sale, a sale made thereunder without a scire facias issued against the heirs is void. Stockard *v.* Pinkard, 6 Humphr. 119. See also McKnight *v.* Hughes, 4 Lea 522, holding that where a lien has been fixed upon land by the levy of an execution and the debtor dies before sale, his heirs may demand exhaustion of personal assets before the sale of the land.

Dissolution of debtor corporation after levy.— Under the laws of South Carolina, after an execution has been levied on real estate of a corporation defendant, neither the lien created thereby nor the validity of the sale thereunder to convey title is affected by the dissolution of the corporation. Boyd *v.* Hankinson, 92 Fed. 49, 34 C. C. A. 197 [*reversing* 83 Fed. 876].

Execution tested and issued after death of defendant.— It was held in Shelton *v.* Hamilton, 23 Miss. 496, 57 Am. Dec. 149, that a sale made under execution tested and issued after the death of defendant therein, and without a revival of the judgment, is voidable but not void.

Alias writs.— It has been held under Ala. Code (1876), §§ 3213, 2633, that where, during the lifetime of a judgment debtor, an execution is received by the sheriff, the land may be sold under levy after the debtor's death if the lien of the execution is preserved by the issue of alias executions. Keel *v.* Larkin, 72 Ala. 493; Childs *v.* Jones, 60 Ala. 352. See also Hendon *v.* White, 52 Ala. 597; Hurt *v.* Nave, 49 Ala. 459. Where an original fieri facias issues in the lifetime of defendant, but is returned unsatisfied after his death, an alias or pluries afterward issuing cannot be levied on lands of which defendant died seized. Lucas *v.* Doe, 4 Ala. 679.

1. People *v.* Bradley, 17 Ill. 485.

2. *Arkansas.*— James *v.* Marcus, 18 Ark. 421 (holding that, where a fieri facias comes to the hands of the sheriff by the death of defendant, it is not regular to make a levy on and a sale of his goods after his death, under the Arkansas probate and administration law, except where the judgment or decree is *in rem* and the execution a special one); Davis *v.* Oswalt, 18 Ark. 414, 68 Am. Dec. 182 (holding that the death of defendant before the officer makes a levy and seizes the property into his custody suspends the execution of the process).

Indiana.— See James *v.* Anderson, Smith 394.

Massachusetts.— Jewett *v.* Smith, 12 Mass. 309; Grosvenor *v.* Gold, 9 Mass. 209.

Ohio.— Massie *v.* Long, 2 Ohio 287, 15 Am. Dec. 547.

Pennsylvania.— Lynch *v.* Waters, 6 Luz. Leg. Reg. 39.

f. Arrest of Debtor Under Capias Satisfaciendum.[3] By the common-law rule a judgment creditor, by committing the body of his debtor to prison on his execution, released his lien on the property and could not thereafter levy on it unless the debtor died in custody or escaped.[4]

g. Satisfaction of Judgment.[5] Where, before the sale of property under an execution levied thereon, the judgment under which the execution was issued is satisfied, the lien of the execution is thereby terminated and a sale thereunder is void.[6]

B. Levy or Extent — 1. Definition. The levy of an execution has been defined to be the acts by which an officer sets apart or appropriates, for the purpose of satisfying the command of the writ, a part or the whole of a judgment debtor's property.[7]

2. Who May Control Writ — a. General Rule. An execution is the judgment creditor's process and he has exclusive control of it.[8] The doctrine seems to be

Texas.— Conkrite *v.* Hart, 10 Tex. 140. See Chandler *v.* Burdett, 20 Tex. 42.

United States.— Sumner *v.* Moore, 23 Fed. Cas. No. 13,610, 2 McLean 59.

See 21 Cent. Dig. tit. "Execution," § 273.

3. Execution against the person see *infra*, XIV.

4. *Maine.*—Clement *v.* Garland, 53 Me. 427. See also Miller *v.* Miller, 25 Me. 110.

New York.—Jackson *v.* Benedict, 13 Johns. 533.

South Carolina.— Johnston *v.* Shubert, 2 Hill 502; Aiken *v.* Moore, 1 Hill 432; Schroter *v.* Crawford, 1 Hill 422; Cohen *v.* Grier, 4 McCord 509. See also Berry *v.* Hoke, 1 Rich. 76.

Vermont.— Willard *v.* Lull, 20 Vt. 373.

United States.— Snead *v.* McCoull, 53 U. S. 407, 13 L. ed. 1043; Magniac *v.* Thomson, 15 How. 281, 14 L. ed. 696 [*affirming* 16 Fed. Cas. No. 8,856, Baldw. 344].

See 21 Cent. Dig. tit. "Execution," § 274.

See, however, Higgs *v.* Huson, 8 Ga. 317.

Escape of defendant.— Where plaintiff lodged a capias ad satisfaciendum under which defendant was arrested and escaped, it was held that the proceeds of a sale under a junior execution levied after the escape must be applied to plaintiff's fieri facias in preference to the execution junior thereto, under which the sale was made. Richbourgh *v.* West, 1 Hill (S. C.) 309.

Revival of lien.— Under the South Carolina act of 1815, if a debtor confined under a capias ad satisfaciendum be discharged with his own consent, the lien of a fieri facias previously issued is revived, as well as the lien of the judgment. Hall *v.* Moye, 2 Bailey (S. C.) 9.

5. Discharge of judgment as affecting right to issue a writ see *supra*, II, H, 3.

6. Tiffany *v.* St. John, 65 N. Y. 314, 22 Am. Rep. 612; Parmenter *v.* Fitzpatrick, 60 Hun (N. Y.) 580, 14 N. Y. Suppl. 748; Hunter *v.* Stevenson, 1 Hill (S. C.) 415. See also Northampton Tp. *v.* Woodward, 5 N. J. L. 788; Tudor *v.* Taylor, 26 Vt. 444.

Payment to clerk.— It has been held in North Carolina that a debtor has no right to pay money on a judgment to the clerk while the execution is in the hands of the sheriff, and thereby extinguish the lien of the execution. Bynum *v.* Barefoot, 75 N. C. 576.

Taking and forfeiture of forthcoming bond. — It has been held in Mississippi that the levy of a writ of fieri facias, followed by the taking and forfeiture of a forthcoming bond, is a full satisfaction of the judgment upon which the execution was issued. Witherspoon *v.* Spring, 3 How. (Miss.) 60, 32 Am. Dec. 310.

7. Burkett *v.* Clark, 46 Nebr. 466, 64 N. W. 1113; Lloyd *v.* Wykoff, 11 N. J. L. 218. See also Horgan *v.* Lyons, 59 Minn. 217, 60 N. W. 1099; Anderson L. Dict.

Other definitions are: "A seizure or designation, by the sheriff, of so much of the property of the defendant in an execution as is intended to be applied, by a sale, to the liquidation of the judgment debt." Karnes *v.* Alexander, 92 Mo. 660, 672, 4 S. W. 518.

"The taking possession of property by the officer." Pratcht *v.* Pister, 30 Kan. 568, 573, 1 Pac. 638.

8. *Georgia.*— Smith *v.* Martin, 54 Ga. 600.

Illinois.— Morgan *v.* People, 59 Ill. 58; Wickliff *v.* Robinson, 18 Ill. 145; Reddick *v.* Cloud, 7 Ill. 670. See Scheubert *v.* Honel, 50 Ill. App. 597.

New York.—Root *v.* Wagner, 30 N. Y. 9, 86 Am. Dec. 348.

Pennsylvania.— Shryock *v.* Jones, 22 Pa. St. 303.

South Carolina.— Farrar *v.* Wingate, 4 Rich. 35, 53 Am. Dec. 709.

Texas.— Daugherty *v.* Moon, 59 Tex. 397.

United States.—See Harrington *v.* McDuel, 11 Fed. Cas. No. 6,108, 3 Cranch C. C. 355; U. S. *v.* Baker, 24 Fed. Cas. No. 14,502, 1 Cranch C. C. 268.

See 21 Cent. Dig. tit. "Execution," § 276.

Control by attorney see Attorney and Client, 4 Cyc. 889. See also *supra*, VI, A, 2, d.

Control by surety.— It has been held in Kentucky that a surety may pay the debt and obtain an assignment from the creditor and thereby acquire the right to control the execution. Jones *v.* Spencer, 1 Ky. L. Rep. 344.

well settled that a person not a party to the record can exercise no control over the execution.[9]

b. Directions to Officer — (I) *In General.* The judgment creditor has a right to give directions to the officer as to the time and manner of executing the writ when he delivers the process to him, and the officer receiving it under such instructions is bound to follow them if they are not in conflict with the law, and on failure is answerable for the consequences.[10] However, he is not obligated to go with the officer to defendant or to point out property to be levied upon.[11]

(II) *Withdrawal of Writ.* The rule has been laid down in some jurisdictions that where the judgment creditor has placed an execution in the hands of the sheriff, he may withdraw it before it is so acted on[12] that its withdrawal would be injurious to third parties, and the direction to the sheriff not to act on the writ is equivalent to its withdrawal.[13]

3. Necessity of Levy — a. General Rule. According to the great weight of

Assignor of judgment.— It has been held in State *v.* Herod, 6 Blackf. (Ind.) 444, that the assignor of a judgment has no control of an execution taken out by the assignee.

A replevin bail cannot direct or control an execution issued on a judgment after the expiration of the stay of execution thereon unless he has first paid off the judgment. Palmer *v.* Galbreath, 74 Ind. 84.

9. Bressler *v.* Beach, 21 Ill. App. 423; Willis *v.* Nicholson, 24 La. Ann. 548; Fluker *v.* Turner, 5 Mart. N. S. (La.) 707.

An officer of court has no right to exercise control over an execution simply because his fees are included therein. Newkirk *v.* Chapron, 17 Ill. 344.

Equitable owner.— It was held in Reinhard *v.* Baker, 13 W. Va. 805, that the clerk's mere indorsement on an execution that it is for the use of the party claiming to be the equitable owner of the judgment is not conclusive thereof, and that any person other than plaintiff of record claiming to control the execution must show the court that he is such equitable owner.

Order of judge at chambers.— It was held in Irons *v.* McQuewan, 27 Pa. St. 196, 67 Am. Dec. 456, that when a court of competent jurisdiction has solemnly awarded an execution, returnable to the next term, with the incidental right of lien, no judge of that court, whether president or associate, can, at chambers, in a summary manner, reverse the award and make the writ returnable presently to the destruction of the lien.

10. *Alabama.*— Patton *v.* Hamner, 28 Ala. 618; Crenshaw *v.* Harrison, 8 Ala. 343.

Arkansas.— Lawson *v.* State, 10 Ark. 28, 50 Am. Dec. 238.

Connecticut.— See also Tucker *v.* Bradley, 15 Conn. 46.

Kentucky.— Poston *v.* Southern, 7 B. Mon. 289; Richardson *v.* Bartley, 2 B. Mon. 328.

New Hampshire.— Rogers *v.* McDearmid, 7 N. H. 506.

New Jersey.— Cumberland Bank *v.* Hann, 19 N. J. L. 166.

New York.— Ansonia Brass, etc., Co. *v.* Babbitt, 74 N. Y. 402; Root *v.* Wagner, 30 N. Y. 9, 86 Am. Dec. 348; Gorham *v.* Gale, 7 Cow. 739, 17 Am. Dec. 549.

North Carolina.— See Bryan *v.* Hubbs, 69 N. C. 423.

South Carolina.— Farrar *v.* Wingate, 4 Rich. 35, 53 Am. Dec. 709.

Vermont.— Walworth *v.* Readsboro, 24 Vt. 252.

See 21 Cent. Dig. tit. "Execution," § 276.

But *compare infra*, VII, B, 5. a.

If they are oppressive or will produce a great sacrifice of the property instructions by plaintiff in execution need not be obeyed by the sheriff. McDonald *v.* Neilson, 2 Cow. (N. Y.) 139, 14 Am. Dec. 431.

11. He does all that the law requires of him when he places his execution in the hands of the officer, whose duty it is to make the money out of defendant's property. Start *v.* Sherwin, 1 Pick. (Mass.) 521 (applying this rule to personal property); Albany City Bank *v.* Dorr, Walk. (Mich.) 317; Vance *v.* McNairy, 3 Yerg. (Tenn.) 171, 24 Am. Dec. 553. See also Cake *v.* Cannon, 2 Houst. (Del.) 427.

12. When the writ has been executed by the proper officer it has been held that the control of it by the judgment creditor ceases, and he has no authority thereafter to countermand it. Kirkland *v.* Robinson, 24 Ind. 105 (holding that after an execution in the hands of the sheriff has been levied on property, he has a right to proceed with the collection thereof until legal steps are taken to arrest his action in the premises, and that he is not bound to take even the receipts of the judgment plaintiff); Crossitt *v.* Wiles, 13 N. Y. Civ. Proc. 327; Smith *v.* Columbia Bank, 22 Fed. Cas. No. 13,011, 4 Cranch C. C. 143. See also Godfrey *v.* Gibbons, 22 Wend. (N. Y.) 569.

13. *Georgia.*—Smith *v.* Martin, 54 Ga. 600.

Maine.— See Bingham *v.* Smith, 64 Me. 450.

New Jersey.— Cumberland Bank *v.* Hann, 19 N. J. L. 166.

New York.— Smith *v.* Erwin, 77 N. Y. 471; Wehle *v.* Conner, 69 N. Y. 546; Root *v.* Wagner, 30 N. Y. 9, 86 Am. Dec. 348.

North Carolina.— Isler *v.* Colgrove, 75 N. C. 334.

Pennsylvania.— Shryock *v.* Jones, 22 Pa. St. 303.

authority, to enable the sheriff to sell the property and vest in the purchaser at the sale a valid title, a levy upon the property so sold is indispensable.[14] In some jurisdictions, however, it is held that as far as real property is concerned the validity of the title of the vendee at a sheriff's sale is not dependent upon a valid levy.[15]

b. Waiver. A judgment debtor may, however, waive a levy upon his property, and where there is such a waiver the sale passes title as effectually as if a valid levy had been actually made.[16]

4. Who May Execute Process — a. General Rule. The levy of the writ of execution must be made by an officer duly qualified to act under it and cannot be made by a private person.[17]

b. Effect of Interest. At common law and under statutes declaratory of the

See 21 Cent. Dig. tit. "Execution," § 276.

14. Without a valid levy or seizure no title can be acquired by a purchaser at the sheriff's sale.

Alabama.— Ware *v.* Bradford, 2 Ala. 676, 36 Am. Dec. 427.

Arkansas.— Hughes *v.* Watt, 26 Ark. 228.

Georgia.— Kellogg *v.* Buckler, 17 Ga. 187.

Louisiana.—Williams *v.* Clark, 11 La. Ann. 761. See also Gaines *v.* Merchants' Bank, 4 La. Ann. 369.

Maine.— Benson *v.* Smith, 42 Me. 414, 66 Am. Dec. 285.

Maryland.— Jarboe *v.* Hall, 37 Md. 345; Langley *v.* Jones, 33 Md. 171; Waters *v.* Duvall, 11 Gill & J. 37, 35 Am. Dec. 693.

Mississippi.— Hamblen *v.* Hamblen, 33 Miss. 455, 461, 69 Am. Dec. 358.

Missouri.— Newman *v.* Hook, 37 Mo. 207, 90 Am. Dec. 378; Yeldell *v.* Stemmons, 15 Mo. 443.

New Jersey.— Cook *v.* Wood, 16 N. J. L. 254; Matthews *v.* Warne, 11 N. J. L. 295; Glorieux *v.* Schwartz, 53 N. J. Eq. 231, 28 Atl. 470, 34 Atl. 1134.

North Carolina.— Brazier *v.* Thomas, 44 N. C. 28.

Ohio.— Murphy *v.* Swadener, 33 Ohio St. 85.

Pennsylvania.— Buehler *v.* Rogers, 68 Pa. St. 9. See also Streaper *v.* Fisher, 1 Rawle 605, 18 Am. Dec. 604; Lippincott *v.* Tanner, 1 Miles 286.

Tennessee.— Lafferty *v.* Conn, 3 Sneed 221.

Texas.— Borden *v.* McRae, 46 Tex. 396.

See 21 Cent. Dig. tit. "Execution," § 277.

Evidence of levy.— It has been held in Texas that after the lapse of thirty years a valid levy of a lost execution on land is sufficiently shown by the execution docket, showing issuance of the execution and the sheriff's deed reciting the levy and sale. West *v.* Loeb, 16 Tex. Civ. App. 399, 42 S. W. 612.

Presumption of levy.— The presumption, however, is that an officer who sells property on execution has previously made a valid levy thereof. McCombs *v.* Becker, 3 Hun (N. Y.) 342, 5 Thomps. & C. (N. Y.) 550.

Tender of money.— It is always the duty of the sheriff to receive money tendered on a fieri facias, and this will obviate the necessity of a levy. Jackson *v.* Law, 5 Cow. (N. Y.) 248.

15. In order to uphold his title it is only necessary to show his deed, and that the officer was authorized to sell, of which fact the judgment and execution are sufficient evidence. Blood *v.* Light, 38 Cal. 649, 99 Am. Dec. 441; Hunt *v.* Loucks, 38 Cal. 372, 99 Am. Dec. 404; Den *v.* Durham, 29 N. C. 151, 45 Am. Dec. 512. See also Clark *v.* Sawyer, 48 Cal. 133; Carter *v.* Spencer, 29 N. C. 14.

In Minnesota where a judgment is a lien on real property, the formal levy of an execution on such property is not necessary, the courts holding that the statute which provided that until a levy the property is not affected by the execution applies to a levy on personal property only. Knox *v.* Randall, 24 Minn. 479; Hutchins *v.* Carver County Com'rs, 16 Minn. 13; Lockwood *v.* Bigelow, 11 Minn. 113; Bidwell *v.* Coleman, 11 Minn. 78; Folsom *v.* Carli, 5 Minn. 333, 80 Am. Dec. 429; Tullis *v.* Brawley, 3 Minn. 277.

16. Greer *v.* Wintersmith, 85 Ky. 516, 4 S. W. 232, 9 Ky. L. Rep. 96, 7 Am. St. Rep. 613; Shamburger *v.* Kennedy, 12 N. C. 1; Stuckert *v.* Keller, 105 Pa. St. 386; Dorrance *v.* Com., 13 Pa. St. 160; Trovillo *v.* Tilford, 6 Watts (Pa.) 468, 31 Am. Dec. 484; Harlan *v.* Harlan, 82 Tenn. 107.

17. Where a private citizen, without authority or appointment from any source, assumes to act as an officer in levying the writ, be becomes a trespasser. McMillan *v.* Rowe, 15 Nebr. 520, 19 N. W. 504; Copley *v.* Rose, 2 N. Y. 115. See also Lofland *v.* Jefferson, 4 Harr. (Del.) 303.

De facto officer.— The duly appointed constable who is exercising the duty of his office, although he has not given the bond required by law, is a *de facto* officer, and a levy by him is not void. Gunn *v.* Tackett, 67 Ga. 725; Nason *v.* Dillingham, 15 Mass. 170.

The justice of the peace has no authority to appoint a person to levy a writ of execution issued from the district court. Webb *v.* Harris, 1 Tex. App. Civ. Cas. § 1289.

Where the statute prescribes the particular officer or class of officers who must execute the writ, the officer attempting to levy thereunder must be the officer or one of the class

common law, an officer cannot personally, or by his deputy, levy an execution in which he is to any degree interested.[18]

5. Scope of Authority[19] — **a. Latitude Permitted in Selecting Property.** An officer to whom a writ is delivered for execution is not compelled to levy on the particular property pointed out by the judgment creditor, provided he levies on other property sufficient to satisfy the process,[20] nor is he to follow the instructions of the judgment creditor in the execution of the writ if they are oppressive or will produce a great sacrifice of the property of the judgment debtor.[21]

of officers thus designated by statute, and to whom the writ is directed. Gresham *v.* Leverett, 10 Ala. 384; Satterwhite *v.* Melczer, (Ariz. 1890) 24 Pac. 184; Porter *v.* Stapp, 6 Colo. 32; Johnson *v.* Elkins, 90 Ky. 163, 13 S. W. 448, 11 Ky. L. Rep. 967, 8 L. R. A. 552; Menderson *v.* Specker, 79 Ky. 509; Levy *v.* Acklen, 37 La. Ann. 545; Steel *v.* Metcalf, 4 Tex. Civ. App. 313, 23 S. W. 474. See Ross *v.* Wellman, 102 Cal. 1, 36 Pac. 402.

Authority regulated by amount of execution.— Under a Massachusetts statute giving a constable authority to serve process within his own town in any proper case where the subject-matter involved does not exceed three hundred dollars, it has been held that his authority to serve process under an execution is determined by the amount for which the execution was issued, and not by the amount of the judgment before any of it was collected. Dalton-Ingersoll Co. *v.* Hubbard, 174 Mass. 307, 54 N. E. 862.

Dual tenure of office.— It was held in Godwin *v.* Gregg, 28 Me. 188, 48 Am. Dec. 489, that the fact that the officer making the levy of an execution is a coroner, holding at the time one commission as a coroner and another as a justice of the peace, did not render the levy void.

Levy and sale by bailiff.— It was held in Pruit *v.* Lowry, 1 Port. (Ala.) 101, that a levy and sale by one constable acting as bailiff for another, which were recognized and returned by the other, were void, and the purchaser's title under such sale and return was invalid.

The holding of an inquisition on real estate levied under a fieri facias has been held in Pennsylvania to be a judicial act which involves the exercise of discretion, and which the sheriff cannot do by a deputy. Haberstroh *v.* Toby, 9 Phila. (Pa.) 614.

18. *Georgia.*— State *v.* Jeter, 60 Ga. 489.

Kentucky.— Samuel *v.* Com., 6 T. B. Mon. 173; Chambers *v.* Thomas, 3 A. K. Marsh. 536.

New York.— Albany City Nat. Bank *v.* Kearney, 9 Hun 535 (holding that the sheriff cannot pay with his own money the judgment on which he holds an execution and then levy and collect the amount from the debtor's property; nor will he be permitted, after he is in default for not collecting or returning an execution, to pay the amount and wield the process for his own indemnity); Jackson *v.* Bowker, 53 N. Y. Suppl. 585.

North Carolina.— Bowen *v.* Jones, 35 N. C. 25, 55 Am. Dec. 426; Den *v.* McLeod, 30 N. C. 221, 49 Am. Dec. 376, in which case an execution to a sheriff in his own name, although he assigned all interest in the judgment before he sold land under the execution, was held null and void. See also Anonymous, 2 N. C. 422.

Rhode Island.— Stephanian's Petition, 25 R. I. 541, 56 Atl. 1034 [*following* Carroll *v.* Sheehan, 12 R. I. 218].

South Carolina.— Cauble *v.* Hoke, 1 Speers 168; Singletary *v.* Carter, 1 Bailey 467, 21 Am. Dec. 480.

Tennessee.— Riner *v.* Stacy, 8 Humphr. 288.

Virginia.— Carter *v.* Harris, 4 Rand. 199.

England.— Weston *v.* Coulson, 1 W. Bl. 506.

See 21 Cent. Dig. tit. "Execution," § 278.

Execution for costs.— It was held in Vining *v.* Officers of Ct., 86 Ga. 127, 12 S. E. 298. that it was the invariable rule in Georgia for the sheriff or other levying officer to levy an execution for costs, whether he be interested in the costs or not, and that his interest therein would not invalidate the levy.

Right to commissions.— It was held in Badley *v.* Ladd, 70 Miss. 688, 12 So. 832, that the fact that a person deputized to make a levy to satisfy a judgment had prior thereto been retained as an attorney to collect the claim on which the judgment was rendered, and would be entitled to commissions for collection thereof, was no ground to quash the levy, as the law allows commissions to the officers for collecting money, and the right to such commissions could not properly be held a disqualification to act as special deputy.

Sheriff member of banking corporation.— It was held in Adams *v.* Wiscasset Bank, 1 Me. 361, 10 Am. Dec. 88, that a sheriff who was a member of a banking corporation might serve process thereon, because, not being personally liable, he was not a party to the action.

Usees in judgment.— Where the sheriff and his wife were the usees in a judgment, it was held that the former could not make a valid levy on or sale of lands under execution on such judgment. Knight *v.* Morrison, 79 Ga. 55, 3 S. E. 689, 11 Am. St. Rep. 405.

19. Exhausting property of principal before levying on property of surety see, generally, Principal and Surety.

20. Lawson *v.* State, 10 Ark. 28, 50 Am. Dec. 238. But *compare supra*, VII, B, 2, b.

21. McDonald *v.* Neilson, 2 Cow. (N. Y.) 139, 14 Am. Dec. 431. See also Tucker *v.* Bradley, 15 Conn. 46; Richardson *v.* Bartley, 2 B. Mon. (Ky.) 328; Rogers *v.* McDearmid, 7 N. H. 506.

b. Territorial Extent. The general rule is that an officer has no authority to levy on and sell property situated beyond the bounds of his county or district.[22]

c. Expiration of Term of Office.[23] Under the common law and statutes declaratory thereof, all officers and their deputies may execute all precepts remaining in their hands at the time of the expiration of their terms of office.[24]

d. Force Permissible in Executing Writ — (i) *Breaking Outer Door of Dwelling-House* — (A) *Of Judgment Debtor.* At common law every man's house is his castle and fortress;[25] and, in the absence of statutory provisions giving such authority, an officer cannot legally break open an outer door of the judgment debtor's house for the purpose of levying a fieri facias on his goods,[26]

22. *Kansas.*— Denny *v.* Faulkner, 22 Kan. 89.

Massachusetts.— See Lewis *v.* Norton, 159 Mass. 432, 34 N. E. 544.

New York.— Loewer's Gambrinus Brewing Co. *v.* Lithauer, 36 Misc. 539, 73 N. Y. Suppl. 947.

South Carolina.— Finley *v.* South Carolina Canal, etc., Co., 2 Rich. 567.

Texas.— Alred *v.* Montague, 26 Tex. 732, 84 Am. Dec. 603. *Compare* Cundiff *v.* Teague, 46 Tex. 475.

United States.— Short *v.* Hepburn, 75 Fed. 113, 21 C. C. A. 252. See also Plant *v.* Anderson, 16 Fed. 914.

See 21 Cent. Dig. tit. "Execution," § 278 *et seq.*

Authority of city marshal to sell real estate under Mo. Acts (1850), p. 203, establishing the Weston court of common pleas, see Blanchard *v.* Baker, 29 Mo. 441. In Texas see Dudley *v.* Jones, 6 Tex. Civ. App. 466, 26 S. W. 445.

Where property was found in the bailiwick of the officer making the levy, it was held that an execution might be levied by him outside the district where the judgment was entered. Lewis *v.* Wall, 70 Ga. 646.

Where a tract of land is divided by the line of a county in which defendant in execution resides, it has been held in some jurisdictions that the whole tract may be levied on and sold as his property by the sheriff of that county, but not by the sheriff of the adjoining county. Farnbrough *v.* Ammis, 58 Ga. 519; Worthington *v.* Worthington, 3 Pa. L. J. Rep. 208, 5 Pa. L. J. 74. See, however, Alred *v.* Montague, 26 Tex. 732, 84 Am. Dec. 603.

23. **Direction to officer whose term of office has expired** see *supra*, VI, D, 2, b, (VI), (C).

24. Hence an officer having an execution in his hands and commencing its service before the termination of his office may proceed afterward to complete such service. Lofland *v.* Jefferson, 4 Harr. (Del.) 303; Hogan *v.* Hisle, 4 Ky. L. Rep. 370; Clark *v.* Pratt, 55 Me. 546; Blair *v.* Compton, 33 Mich. 414.

Levy not commenced before death of officer. — Where an act for the relief of the executors of a deceased sheriff authorized them to finish those executions of which "the execution had been commenced by their testator, and had not been completed," it was held that an execution which had lain dormant in the hands of a deputy sheriff until after the return-day and the death of the sheriff did not come within the act. Mason *v.* Sudam, 2 Johns. Ch. (N. Y.) 172.

25. **The maxim that a man's house is his castle** only extends to his dwelling-house, and therefore any other building, such as a store, barn, or outhouse, not connected with the dwelling-house, may be broken open in order to levy an execution. Haggerty *v.* Wilber, 16 Johns. (N. Y.) 287, 8 Am. Dec. 321; Fullerton *v.* Mack, 2 Aik. (Vt.) 415; Hodder *v.* Williams, [1895] 2 Q. B. 663, 65 L. J. Q. B. 70, 73 L. T. Rep. N. S. 394, 14 Reports 757, 44 Wkly. Rep. 98; Penton *v.* Brown, 1 Keb. 698, 1 Sid. 186.

Building used as store and dwelling.— Where distinct portions of a building were used for store and dwelling, it was held that the sheriff, for the purpose of levying an execution, could not force an outer door of the portion occupied as a dwelling, but that he might break down a common outer entrance for that purpose. Stearns *v.* Vincent, 50 Mich. 209, 15 N. W. 86, 45 Am. Rep. 37.

26. *Delaware.*— Boggs *v.* Vandyke, 3 Harr. 288; Groves *v.* Bloxom, 3 Houst. 544.

Illinois.— Snydacker *v.* Brosse, 51 Ill. 357, 99 Am. Dec. 551.

Indiana.— McGee *v.* Givan, 4 Blackf. 16, 18 note.

Kentucky.— Keith *v.* Johnson, 1 Dana 604, 25 Am. Dec. 167; Calvert *v.* Stone, 10 B. Mon. 152.

Massachusetts.— Swain *v.* Mizner, 18 Gray 182, 69 Am. Dec. 244; Ilsley *v.* Nichols, 12 Pick. 270, 22 Am. Dec. 425; Widgery *v.* Haskell, 5 Mass. 144, 4 Am. Dec. 1; Heminway *v.* Saxton, 3 Mass. 222.

Michigan.— Bailey *v.* Wright, 39 Mich. 96.

New York.— Curtis *v.* Hubbard, 4 Hill 437, 40 Am. Dec. 292 [*affirming* 1 Hill 336]; People *v.* Hubbard, 24 Wend. 369, 35 Am. Dec. 628.

North Carolina.— State *v.* Whitaker, 107 N. C. 802, 12 S. E. 456; Frost *v.* Etheridge, 12 N. C. 30; State *v.* Armfield, 9 N. C. 246, 11 Am. Dec. 762.

South Carolina.— De Graffenreid *v.* Mitchell, 3 McCord 506, 15 Am. Dec. 648.

Vermont.— Hooker *v.* Smith, 19 Vt. 151, 47 Am. Dec. 679; State *v.* Hooker, 17 Vt. 658.

England.— Semayne's Case, 5 Coke 91, 1 Smith Lead. Cas. 228; Ryan *v.* Shilcock, 7 Exch. 72, 15 Jur. 1200, 21 L. J. Exch. 55; Kirby *v.* Denby, 2 Gale 31, 5 L. J. Exch. 162, 1 M. & W. 336, 1 Tyrw. & G. 688; Anonymous, 6 Mod. 105. See also 3 Blackstone Comm. 417.

except at the suit of the king, for when the king is a party the officer may break the house either to arrest defendant or to do other execution of process.[27]

(B) *Of Third Person.* However, an officer is justified, after demand for admittance and refusal, in breaking open the outer doors of a third person's house in order to execute a writ of fieri facias upon the judgment debtor's property removed thither to avoid an execution.[28]

(III) *Forcing Inner Doors of Dwelling-House.* Where, however, in executing a writ of fieri facias, an officer has gained a peaceful entry into a house, if he finds the inner doors closed or fastened so that he is unable to seize the goods, he may, in case they are not opened on demand, break them open.[29]

6. Time of Levy.[30] The general rule is well settled that an officer has no authority to make a levy of a fieri facias after the return-day thereof.[31] In some

See 21 Cent. Dig. tit. "Execution," § 279.

A vacant dwelling-house used fraudulently to cover the property of the judgment debtor from execution is not the protected castle of the owner and may be broken open by an officer, without demand to have it opened, for the purpose of levying an execution. Stitt *v.* Wilson, Wright (Ohio) 505.

Dwelling used as shop.— It has been held in Minnesota that the fact that one transacts his business in the building that is his dwelling does not divest it of its character as a dwelling, so as to make it lawful for an officer to break the outer door for the purpose of serving civil process against the owner. Welsh *v.* Wilson, 34 Minn. 92, 24 N. W. 327.

Execution on judgment in detinue.— It has been held in Kentucky that a sheriff having an execution has a right to make a forcible entry into the judgment debtor's house to levy on a slave for which it had issued on a judgment in detinue. Keith *v.* Johnson, 1 Dana (Ky.) 604, 25 Am. Dec. 167.

Where officer is forcibly ejected.— Where an officer who has entered a house to levy an execution is forcibly ejected, he may break open the door in order to reënter. Pugh *v.* Griffith, 7 A. & E. 827, 7 L. J. Q. B. 169, 3 N. & P. 187, 34 E. C. L. 431; Eagleton *v.* Gutteridge, 2 Dowl. P. C. N. S. 1053, 12 L. J. Exch. 359, 11 M. & W. 465; Bannister *v.* Hyde, 2 E. & E. 627, 6 Jur. N. S. 171, 29 L. J. Q. B. 141, 1 L. T. Rep. N. S. 438, 105 E. C. L. 627; Aga Kurboolie Mahomed *v.* Reg., 4 Moore P. C. 239, 13 Eng. Reprint 293.

27. Launock *v.* Brown, 2 B. & Ald. 592, 21 Rev. Rep. 410; Burdett *v.* Abbot, 14 East 1, 5 Dow 165, 4 Taunt. 410, 12 Rev. Rep. 450; 2 Hale P. C. 117.

28. Still he does so at his peril, and if it appears that defendant had no property there he is a trespasser.

Georgia.— Benson *v.* Dyer, 69 Ga. 190.

Kentucky.— Keith *v.* Johnson, 1 Dana 604, 25 Am. Dec. 167.

Massachusetts.— Platt *v.* Brown, 16 Pick. 553.

Ohio.— Stitt *v.* Wilson, Wright 505.

South Carolina.— De Graffenreid *v.* Mitchell, 3 McCord 506, 15 Am. Dec. 648.

Tennessee.— Douglass *v.* State, 6 Yerg. 525.

Vermont.— Burton *v.* Wilkinson, 18 Vt. 186, 46 Am. Dec. 145. See also Fullerton *v.* Mack, 2 Aik. 415.

England.— Semayne's Case, 5 Coke 91, 1 Smith Lead. Cas. 228; Ratcliffe *v.* Burton, 3 B. & P. 223, 6 Rev. Rep. 771; Morrish *v.* Murrey, 13 L. J. Exch. 261, 13 M. & W. 52; Johnson *v.* Leigh, 1 Marsh. 565, 6 Taunt. 246, 16 Rev. Rep. 614, 1 E. C. L. 598. See also Biscop *v.* White, Cro. Eliz. 759; Cooke *v.* Birt, 1 Marsh. 333, 5 Taunt. 765, 15 Rev. Rep. 652, 1 E. C. L. 392; White *v.* Whitshire, Palm. 52, 2 Rolle 138; Hutchinson *v.* Birch, 4 Taunt. 619, 13 Rev. Rep. 703.

See 21 Cent. Dig. tit. "Execution," § 279.

29. *Delaware.*— Prettyman *v.* Dean, 2 Harr. 494.

Illinois.— Snydacker *v.* Brosse, 51 Ill. 357, 69 Am. Dec. 551.

Michigan.— See Stearns *v.* Vincent, 50 Mich. 209, 15 N. W. 86, 45 Am. Rep. 37.

New York.— Hubbard *v.* Mace, 17 Johns. 127; Williams *v.* Spencer, 5 Johns. 352.

South Carolina.— State *v.* Thackam, 1 Bay 358.

England.— Lee *v.* Gansel, 1 Cowp. 1, Lofft. 374; Rex *v.* Bird, 2 Show. 87; Hutchison *v.* Birch, 4 Taunt. 619, 13 Rev. Rep. 703. See also Ratcliffe *v.* Burton, 3 B. & P. 223, 6 Rev. Rep. 771.

See 21 Cent. Dig. tit. "Execution," § 279.

Apartment house or lodgings.— It was held in Cantrell *v.* Conner, 6 Daly (N. Y.) 39, that, where various tenants hire rooms in a house from a landlord who dwells in the house, the common street door is the outer door for all the tenants, and after the sheriff has obtained lawful entry through this, he may break open the door of the rooms occupied by one tenant to levy an execution on goods within. *Contra*, Swain *v.* Mizner, 8 Gray (Mass.) 182, 69 Am. Dec. 244.

Levy and inventory begun.— Where an officer has properly commenced his levy and taken an inventory of chattels attached on execution, and departs before completing it, the property is still in the custody of the law, and he may return on a subsequent day, and if denied admittance to the house may force an outer door. Glover *v.* Whittenhall, 6 Hill (N. Y.) 597. See also Steffin *v.* Steffin, 4 N. Y. Civ. Proc. 179.

30. Duration of lien as affected by the return see *supra*, VII, A, 5.

31. *California.*— Tower *v.* McDowell, (1892) 31 Pac. 843, levy not made until after the expiration of the life of the execution.

jurisdictions it is held that an execution, made returnable to a court on a certain day, may be executed at any time during that day while such court is in session, but not after its adjournment.[32] Where an officer has sold property under a writ of execution, the law presumes, his return being silent upon the subject, that he did his duty by levying the execution while it was still in full force.[33]

7. Mode and Sufficiency of Levy[34] — **a. In General.** The mode in which all writs and precepts shall be served and executed is now regulated by statute, and unless the officer or his deputies in levying a writ of fieri facias substantially complies with the provisions of the statute their acts are invalid and they become trespassers.[35] Plaintiff in execution has the unconditional and absolute right to have his process executed in the usual and customary way, that is, by levy and sale of any property belonging to defendant which may be subject to execution.[36]

b. Against Joint Debtors. Where judgment is taken and execution issued jointly, against two defendants, it is immaterial so far as they are concerned, whether the sheriff first levies on joint property or not.[37]

Delaware.— Lofland *v.* Jefferson, 4 Harr. 303; West *v.* Shockley, 4 Harr. 287.

Kentucky.— Gaines *v.* Clark, 1 Bibb 608; Glenn *v.* White, Ky. Dec. 296; Castleman *v.* Griffith, Ky. Dec. 293.

Louisiana.— Frellsen *v.* Anderson, 14 La. Ann. 65; Dugat *v.* Babin, 8 Mart. N. S. 391; Johnson *v.* Wall, 1 Mart. N. S. 541.

Missouri.— Jefferson City *v.* Curry, 71 Mo. 85; State Bank *v.* Bray, 37 Mo. 194.

New Jersey.— Kemble *v.* Harris, 36 N. J. L. 526; Matthews *v.* Warne, 11 N. J. L. 295.

New York.— Smith *v.* Smith, 60 N. Y. 161; Crouse *v.* Bailey, 10 N. Y. Suppl. 273, 11 N. Y. Suppl. 910 (upholding this rule even where plaintiff gave an indemnity bond); Shelton *v.* Westervelt, 1 Duer 109 (holding that a levy of execution made after the return-day on property substituted by agreement between the sheriff and the judgment debtor for that which had been levied on the return-day was void); Hartwell *v.* Root, 19 Johns. 345, 10 Am. Dec. 232; Slingerland *v.* Swart, 13 Johns. 255; Vail *v.* Lewis, 4 Johns. 450, 14 Am. Dec. 300; Devoe *v.* Elliot, 2 Cai. 243.

North Carolina.— Love *v.* Gates, 24 N. C. 14.

Oregon.— Faull *v.* Cooke, 19 Oreg. 455, 26 Pac. 662, 20 Am. Rep. 836.

Pennsylvania.— Boyer *v.* Miller, 200 Pa. St. 589, 50 Atl. 184; Lennig *v.* Taylor, 18 Wkly. Notes Cas. 94.

South Carolina.— McElwee *v.* Sutton, 2 Bailey 361; Ross *v.* McCartan, 1 Brev. 507.

Tennessee.— People *v.* Parchman, 3 Head 609.

Texas.— Tillman *v.* McDonough, 2 Tex. App. Civ. Cas. § 52.

Vermont.— Downer *v.* Hazen, 10 Vt. 418; Barnard *v.* Stevens, 2 Aik. 429, 16 Am. Dec. 733.

See 21 Cent. Dig. tit. "Execution," § 280 *et seq.*

Mistake in date of writ.— Where an execution issued on July 29 was, through a clerical error, dated June 10 and made returnable within sixty days, and within sixty days after issuance, but not within sixty days from its date, it was levied on property of the judgment debtor, it was held that such levy was valid. Norris *v.* Sullivan, 47 Conn. 474.

32. Prescott *v.* Wright, 6 Mass. 20; Blaisdell *v.* Sheafe, 5 N. H. 201. See also Chase *v.* Gilman, 15 Me. 64. And *compare* Bell *v.* Walsh, 130 Mass. 163.

33. Greer *v.* Wintersmith, 85 Ky. 516, 4 S. W. 232, 9 Ky. L. Rep. 96, 7 Am. St. Rep. 613; Evans *v.* Davis, 3 B. Mon. (Ky.) 344. See Marsh *v.* Lawrence, 4 Cow. (N. Y.) 461.

Where execution is lost.— It has been held in Kentucky that the law will presume that the sheriff complied with his duty and entered a sufficient levy where the execution under which the sale was made has been lost. Greer *v.* Howard, 4 Ky. L. Rep. 350.

34. **Amount of property to be taken** see *infra*, VII, B, 8.

Delivery of property in satisfaction of debt see *infra*, XII.

35. Benson *v.* Smith, 42 Me. 414, 66 Am. Dec. 285. See also Lowry *v.* Erwin, 6 Rob. (La.) 192, 39 Am. Dec. 556.

36. Maloney *v.* Real Estate Bldg., etc., Assoc., 57 Mo. App. 384.

The mode of proceeding to satisfy an execution, whether by levying on an equity of redemption or an extent on the land by appraisement, must be determined by the state of the title at the time of the seizure on execution. Bagley *v.* Bailey, 16 Me. 151.

Proceedings begun by attachment.— An officer receiving an execution without any special directions from the creditor should levy it on such property as may have been attached on the original writ. Richmond *v.* Davis, Quincy (Mass.) 279.

"Service" and "levy" differentiated.— It was held in Terrell *v.* State, 66 Ind. 570, that the service of an execution is the communication of its contents to the execution creditor, accompanied by or followed by a demand for its satisfaction, and in its natural order precedes the levy of the execution.

37. Low *v.* Adams, 6 Cal. 277; West Duluth Land Co. *v.* Bradley, 75 Minn. 275, 77 N. W. 964 (holding that under an execution in which an officer was commanded to satisfy it out of the property of two named judgment debtors, he may seize and sell the separate property of either); Godfrey *v.* Gibbons, 22

c. **Demand Before Levy** — (I) *Necessity.* As a general rule[38] the officer is not required to give notice to the judgment debtor of the issuance of the writ, or to make any formal demand on him for the payment of the execution, but may proceed forthwith to levy the same.[39]

(II) *Sufficiency.* Under statutes requiring a formal demand upon the judgment debtor for payment before the levy of the execution, it has been held that this demand must be made upon the debtor personally, or at his usual place of abode.[40] The omission, however, of such demand and notice before levy is a mere irregularity, and will not render the levy invalid or void, and no relief will be granted to the judgment debtor where he does not appear to have been in any way prejudiced by the omission of the officer.[41]

d. **Selection of Property**[42] — (I) *Right of Judgment Debtor.* In a majority of the states, by force of statute, the judgment debtor is now entitled to the right to select and point out to the officer property upon which he desires the levy to

Wend. (N. Y.) 569; Crossitt *v.* Wiles, 13 N. Y. Civ. Proc. 327; Mitchusson *v.* Wadsworth, 1 Tex. App. Civ. Cas. § 976.

Directions to levy on joint property.— See Sherry *v.* Schuyler, 2 Hill (N. Y.) 204.

Taking property of one defendant and body of the other.— Under an act authorizing a capias ad satisfaciendum on a judgment, it was held that the officer, under an execution against two joint debtors, could not take the property of one defendant and the body of the other. Usher *v.* Thomas, 10 Mo. 761.

Where execution is against principal and surety, plaintiff may proceed against the property of either, at his option. Manry *v.* Shepperd, 57 Ga. 68.

38. By statutory requirement in some jurisdictions, however, the officer must make a formal demand upon the judgment debtor before proceeding to levy upon his property.

Alabama.— White *v.* Farley, 81 Ala. 563, 8 So. 215.

Connecticut.— Dutton *v.* Tracy, 4 Conn. 365.

Illinois.— Davis *v.* Chicago Dock Co., 129 Ill. 180, 21 N. E. 830; People *v.* Palmer, 46 Ill. 398, 95 Am. Dec. 418; Pitts *v.* Magie, 24 Ill. 610 (holding that failure of the sheriff to make demand on the debtor before proceeding to levy renders him liable to whatever special damages may result from the omission); Bingham *v.* Maxcy, 15 Ill. 290; Boggess *v.* Pennell, 46 Ill. App. 150; Morrissey *v.* Feeley, 36 Ill. App. 556.

Indiana.— Guerin *v.* Kraner, 97 Ind. 533; Terrell *v.* State, 66 Ind. 570.

Oregon.— See Kohn *v.* Hinshaw, 17 Oreg. 308, 20 Pac. 629.

Vermont.— Collins *v.* Perkins, 31 Vt. 624. But see Bates *v.* Carter, 5 Vt. 602.

See 21 Cent. Dig. tit. "Execution," § 287 *et seq.*

39. Nichols *v.* McCall, 13 La. Ann. 215; Seymour *v.* Mulford, etc., Turnpike Co., 10 Ohio 476; Lynch *v.* Waters, 6 Luz. Leg. Reg. 39; Barbee *v.* Heflin, 1 Tex. App. Civ. Cas. § 744. But see Conniff *v.* Doyle, 8 Phila. (Pa.) 630, decided under the Pennsylvania act of June, 1836.

Where the judgment debtor is absent from the jurisdiction at the time of the issuance of the execution, it is not the duty of the officer to hunt him up, nor need he wait for his return, but he may proceed forthwith to execute the writ. Frink *v.* Roe, 70 Cal. 296, 11 Pac. 820; People *v.* Palmer, 46 Ill. 398, 95 Am. Dec. 418; Opothlarholer *v.* Gardiner, 15 La. 512; Kendrick *v.* Rice, 16 Tex. 254; Cook *v.* De la Garza, 13 Tex. 431.

40. Dutton *v.* Tracey, 4 Conn. 365; Dodge *v.* Prince, 4 Vt. 191; Galusha *v.* Sinclear, 3 Vt. 394. See also Spencer *v.* Champion, 9 Conn. 536; Walter *v.* Denison, 24 Vt. 551, holding that a demand on the person who is treasurer of a town, although not made on him as treasurer, but as an officer of the town, was sufficient.

Judgment debtor in prison.—Where an officer having execution against a person who is in the state's prison, and whose family resided in the same dwelling-house which he had previously occupied, made demand upon the execution at such dwelling-house and immediately after proceeded to levy the execution on the land of the debtor, it was held that the conduct of the officer was reasonable under the circumstances, although the sentence of the debtor was within two months of its expiration at the time of such demand. Grant *v.* Dalliber, 11 Conn. 234.

41. *Alabama.*— White *v.* Farley, 81 Ala. 563, 8 So. 215; Love *v.* Power, 5 Ala. 58.

Georgia.— Solomon *v.* Peters, 37 Ga. 251, 92 Am. Dec. 69.

Illinois.— Rock *v.* Haas, 110 Ill. 528; Gardner *v.* Eberhart, 82 Ill. 316.

Indiana.— Guerin *v.* Kraner, 97 Ind. 533.

Vermont.— Collins *v.* Perkins, 31 Vt. 624; Dow *v.* Smith, 6 Vt. 519.

See 21 Cent. Dig. tit. "Execution," § 288.

Statute directory merely.—It has been held that the provisions of the Texas statute, requiring demand, by the sheriff, of the judgment debtor against whom a money judgment has been rendered, before levy, are directory, and failure to comply with their requirements, in the absence of fraud, will not render a sale thereunder void. Odle *v.* Frost, 59 Tex. 684. See also Collins *v.* Perkins, 31 Vt. 624; Dow *v.* Smith, 6 Vt. 519.

42. Officer's duty as to exemptions see, generally, Exemptions.

be made, the officer being liable to the judgment debtor for a refusal to levy on the property so pointed out.[43]

(II) *Waiver or Neglect or Refusal to Exercise Right.* Clearly, however, the judgment debtor, under a statute giving him the right of designating the property to be levied upon, cannot defeat a levy by neglect or refusal to exercise his statutory right.[44] And the right of the judgment debtor to designate the property to be levied upon is personal to himself and may be waived.[45]

43. *Arkansas.*— Trapnall *v.* Richardson, 13 Ark. 543, 58 Am. Dec. 338.

California.— Frink *v.* Roe, 70 Cal. 296, 11 Pac. 820.

Georgia.— Barfield *v.* Barfield, 77 Ga. 83 (holding that if the officer violates his duty by refusing to levy on property pointed out by defendant, he is liable for such special damages as defendant may thereby incur, but this would be no valid objection to the process); Thompson *v.* Mitchell, 73 Ga. 127; Benson *v.* Dyer, 69 Ga. 190.

Illinois.— Beaird *v.* Foreman, 1 Ill. 385, 12 Am. Dec. 197.

Indiana.— State *v.* Willis, 33 Ind. 118; Davis *v.* Campbell, 12 Ind. 192.

Iowa.— See Cavender *v.* Smith, 1 Iowa 306.

Kentucky.— Bodley *v.* Downing, 4 Litt. 28.

Louisiana.— Pumphrey *v.* Delahoussaye, 9 Rob. 42; Miller *v.* Morgan, 6 Mart. N. S. 86; Morgan *v.* Woorhies, 3 Mart. 462.

Missouri.— Ashby *v.* Dillon, 19 Mo. 619.

Texas.— Beck *v.* Avondino, 82 Tex. 314, 18 S. W. 690 [*reversing* 29 Tex. Civ. App. 500, 68 S. W. 827]; Bryan *v.* Bridge, 6 Tex. 137; Jackson *v.* Browning, 1 Tex. App. Civ. Cas. 605.

See 21 Cent. Dig. tit. "Execution," § 287 *et seq.*

Execution creditor as mortgagee.— Under La. Code, § 648, providing that the debtor shall not have the right of pointing out to the sheriff the property he wishes seized on execution if the execution creditor has a mortgage on part of the debtor's property, it was held that where the creditor had a mortgage on the property seized, no objection could be based on the refusal to allow the debtor to point out the property he wished seized. Lambeth *v.* Sentell, 38 La. Ann. 691.

Insolvency of defendant.— It has been held under La. Code Pr. arts. 726, 727, that the fact that defendant in execution is insolvent does not excuse the sheriff from calling on plaintiff to point out property of defendant subject to execution. Taylor *v.* Hancock, 19 La. Ann. 466.

Right of plaintiff to make selection.—Under an Illinois statute plaintiff might select what property he desired levied on, where the statute did not particularly direct him. Thorpe *v.* Wheeler, 23 Ill. 544; Evans *v.* Landon, 6 Ill. 307.

Sufficiency of designation.— Where the sheriff held execution against a debtor, who gave him a written surrender of the amount and directed him to levy, and although the debtor owned several tracts which lay adjoining, yet it was held sufficient that he directed the levy on a particular portion described in the surrender. Vallandingham *v.* Worthington, 85 Ky. 83, 2 S. W. 772, 8 Ky. L. Rep. 707.

Where partial levy has been made.— It has been held in Texas that defendant in execution desiring to exercise his right to point out property to be levied on, after a partial levy has been made, must point out other property as a substitute liable to execution and sufficient, or if such other property is insufficient, he must request the sheriff to levy on it also and sell it first, and if he proposes to exercise his right he must put the officer in possession of the property or give him such control over it as may enable him to deliver it to the purchaser. Ross *v.* Lister, 14 Tex. 469.

44. In the absence of a showing that such right was exercised by defendant and disregarded by the officer, the former cannot be heard to complain, nor can a stranger to the writ, having no interest in or lien upon the property, be permitted to question the regularity of the levy for such cause. Frink *v.* Roe, 70 Cal. 296, 11 Pac. 820; Wheeling Pottery Co. *v.* Levi, 48 La. Ann. 777, 19 So. 752 (where defendant failed to point out property to be levied upon, and it was held that the sheriff was not bound to seize property already under attachment for a larger amount than its value); Hefner *v.* Hesse, 29 La. Ann. 149; Deville *v.* Hayes, 23 La. Ann. 550; Noble *v.* Nettles, 3 Rob. (La.) 152; Pearson *v.* Flanagan, 52 Tex. 266; Barbee *v.* Heflin, 1 Tex. App. Civ. Cas. § 744; Kingsland *v.* Harrell, 1 Tex. App. Civ. Cas. § 736. See also Drake *v.* Murphy, 42 Ind. 82.

Insufficient designation of property.— In Anderson *v.* Oldham, 82 Tex. 228, 18 S. W. 557, it was held that a request by a judgment debtor to the officer to levy on horses in a lot in town, in the absence of more specific designation, did not make it the officer's duty to levy thereon before levying on real estate under the statute requiring that levy shall first be made on property designated by defendant, provided that if it be personal property defendant deliver it into the officer's possession.

Property encumbered in excess of value.— If the property pointed out by a debtor to the officer is encumbered by recorded liens which exceed its value, the creditor may disregard the debtor's election and seize other property belonging to him. Todd *v.* Gordy, 29 La. Ann. 498.

45. Frink *v.* Roe, 70 Cal. 296, 11 Pac. 820; State *v.* Willis, 33 Ind. 118; Morgan *v.* Woor-

e. Personal Property—(I) *Possession or Control*[46]—(A) *General Rule.* The rule is well settled that to constitute a valid levy upon personal property the property must be within the power and control of the officer when the levy is made, and he must take it into his possession within a reasonable time thereafter, and in such an open, public, and unequivocal manner as to apprise everybody that it has been taken in execution.[47] In some of the cases the rule has been thus stated: The officer must deal with the property in such a manner, in order to constitute a valid levy, as would, without the protection of the execution, make him a trespasser.[48]

hies, 3 Mart. (La.) 462; Ashby *v.* Dillon, 19 Mo. 619.

46. Failure to retain possession as constituting a waiver or abandonment of levy or lien see *infra*, VII, B, 12.

47. *Alabama.*— Cobb *v.* Cage, 7 Ala. 619.

Arkansas.— Meyer *v.* Missouri Glass Co., 65 Ark. 286, 45 S. W. 1062, 67 Am. St. Rep. 927.

California.— Herron *v.* Hughes, 25 Cal. 555. See also Taffts *v.* Manlove, 14 Cal. 47, 73 Am. Dec. 610.

Georgia.— Jones *v.* Howard, 99 Ga. 451, 27 S. E. 765, 59 Am. St. Rep. 231; Yeomans *v.* Bird, 81 Ga. 340, 6 S. E. 179; Levy *v.* Shockley, 29 Ga. 710.

Illinois.— Windmiller *v.* Chapman, 139 Ill. 163, 28 N. E. 979; Davidson *v.* Waldron, 31 Ill. 120, 83 Am. Dec. 206; Havely *v.* Lowry, 30 Ill. 446; Minor *v.* Herriford, 25 Ill. 344; Persels *v.* McConnell, 16 Ill. App. 526. See also Leach *v.* Pine, 41 Ill. 65, 89 Am. Dec. 375.

Iowa.— Bickler *v.* Kendall, 66 Iowa 703, 24 N. W. 518; Techmeyer *v.* Waltz, 49 Iowa 645; Crawford *v.* Newell, 23 Iowa 453.

Louisiana.— Gordon *v.* Gilfoil, 27 La. Ann. 265; Leverich *v.* Toby, 6 La. Ann. 462. See also Williams *v.* Douglas, 11 La. Ann. 632.

Maryland.— Horsey *v.* Knowles, 74 Md. 602, 22 Atl. 1104.

Massachusetts.— Wright *v.* Morley, 150 Mass. 513, 23 N. E. 232; Lane *v.* Jackson, 5 Mass. 157.

Michigan.—Quackenbush *v.* Henry, 42 Mich. 75, 3 N. W. 262.

Minnesota.— Wilson *v.* Powers, 21 Minn. 193.

Missouri.— Newman *v.* Hook, 37 Mo. 207, 90 Am. Dec. 378. See also Douglas *v.* Orr, 58 Mo. 573, 575, where the court said: "The word 'levy' as defined by our statute means actual seizure, that is, the officer must take actual possession of the goods, and this language would seem to exclude all idea of a constructive possession."

New Jersey.— Lloyd *v.* Wyckoff, 11 N. J. L. 218.

New York.— Bond *v.* Willett, 31 N. Y. 102, 1 Abb. Dec. 165, 1 Keyes 377, 29 How. Pr. 47; Roth *v.* Wells, 29 N. Y. 471; Barker *v.* Binninger, 14 N. Y. 270; Rodgers *v.* Bonner, 55 Barb. 9; Camp *v.* Chamberlain, 5 Den. 198; Ray *v.* Harcourt, 19 Wend. 495; Westervelt *v.* Pinckney, 14 Wend. 123, 28 Am. Dec. 516; Beekman *v.* Lansing, 3 Wend. 446, 20 Am. Dec. 707; Bliss *v.* Ball, 9 Johns. 132; Minturn *v.* Stryker, 1 Edm. Sel. Cas. 356; Randall's Case, 5 City Hall Rec. 141.

North Carolina.— Sawyer *v.* Bray, 102 N. C. 79, 8 S. E. 885, 11 Am. St. Rep. 713; Perry *v.* Hardison, 99 N. C. 21, 5 S. E. 230; Rives *v.* Porter, 29 N. C. 74.

Ohio.— Pugh *v.* Calloway, 10 Ohio St. 488.

Pennsylvania.— Dixon *v.* White Sewing-Mach. Co., 128 Pa. St. 397, 18 Atl. 502, 15 Am. St. Rep. 683, 5 L. R. A. 659; Titusville Novelty Iron Works' Appeal, 77 Pa. St. 103; Linton *v.* Com., 46 Pa. St. 294; Duncan's Appeal, 37 Pa. St. 500; Lowry *v.* Coulter, 9 Pa. St. 349; Wood *v.* Vanarsdale, 3 Rawle 401; *In re* McCleaster, 3 Pa. Dist. 307, 15 Pa. Co. Ct. 121; McHugh *v.* Malony, 4 Phila. 59; Lynch *v.* Waters, 6 Luz. Leg. Reg. 39.

South Carolina.— Brian *v.* Strait, Dudley 19; Collins *v.* Montgomery, 2 Nott & M. 392.

Tennessee.— Etheridge *v.* Edwards, 1 Swan 426.

Texas.— Brown *v.* Lane, 19 Tex. 203. See also Davis *v.* Jones, (Civ. App. 1903) 75 S. W. 63.

Wisconsin.— Brown *v.* Pratt, 4 Wis. 513, 65 Am. Dec. 330.

See 21 Cent. Dig. tit. "Execution," § 290.

Mere paper levy of an execution cannot defeat the claim of a subsequent purchaser from the party in possession where the sheriff has never had the goods in his possession. Glazier *v.* Sawyer, 11 Pa. Co. Ct. 34.

Money or coin.— It was held in Satterwhite *v.* Melczer, 3 Ariz. 162, 24 Pac. 184, that in order to make a valid levy of money in bank belonging to a judgment debtor, the officer must reduce it into possession as required by Acts (1889), p. 39, § 9, cl. 2. See also Cahn *v.* Person, 56 Miss. 360.

Where no delivery bond is executed the officer who levies on personal property must, to affect the rights of third persons, take the property into his possession. Davidson *v.* Waldron, 31 Ill. 120, 83 Am. Dec. 206.

Where peaceable possession was refused.— A levy on a chattel may be valid, although there is no actual seizure, where the sheriff does all he can to get peaceable possession of the chattel. Stuckert *v.* Keller, 105 Pa. St. 386.

Cure of defect in levy.— It was held in Dawson *v.* Sparks, 77 Ind. 88, that while the levy of an execution on personalty, without actual seizure, is invalid, yet such defect is cured where the officer afterward takes possession of the property before the sale thereof.

48. *Georgia.*—Jones *v.* Howard, 99 Ga. 451, 27 S. E. 765, 59 Am. St. Rep. 231. See also

(B) *Actual Seizure When Necessary.* It has been held in some jurisdictions that it is sufficient, to constitute a valid levy, that the officer has the property in view and where he can control it at the time of making the levy, and that he assumes dominion over it for the express purpose of holding it under the writ.[49]

(C) *Property in View of Officer.* While the general rule seems to be that in order to constitute a valid levy, as against third persons at least, the officer must have the property within view at the time of making the levy;[50] nevertheless the rule is laid down in some jurisdictions that it is not necessary to the validity of the levy that the officer should be within view of the property at the time of the

Corniff *v.* Cook, 95 Ga. 61, 22 S. E. 47, 51 Am. St. Rep. 55.

Illinois.— Logsdon *v.* Spivey, 54 Ill. 104; Davidson *v.* Waldron, 31 Ill. 120, 83 Am. Dec. 206; Havely *v.* Lowry, 30 Ill. 446; Minor *v.* Herriford, 25 Ill. 344; Larsen *v.* Ditto, 90 Ill. App. 384.

Iowa.— Hibbard *v.* Zenor, 75 Iowa 471, 39 N. W. 714, 9 Am. St. Rep. 497; Rix *v.* Silknitter, 57 Iowa 262, 10 N. W. 653; Allen *v.* McCalla, 25 Iowa 464, 96 Am. Dec. 56.

Kentucky.— McBurnie *v.* Overstreet, 8 B. Mon. 300.

Nebraska.— Battle Creek Valley Bank *v.* Madison First Nat. Bank, 62 Nebr. 825, 88 N. W. 145, 56 L. R. A. 124; Pitkin *v.* Burnham, 62 Nebr. 385, 87 N. W. 160, 89 Am. St. Rep. 763, 55 L. R. A. 280; Grand Island Banking Co. *v.* Costello, 45 Nebr. 119, 63 N. W. 376.

New York.— Roth *v.* Wells, 29 N. Y. 471 [*affirming* 41 Barb. 194]; Camp *v.* Chamberlain, 5 Den. 198, 203 (where the court said: "A levy cannot rest in a mere undivulged intention to seize property. Something more is required: there must be possessory acts to indicate a levy, or it must be asserted by word of mouth, so that what is thus done by the officer, if not justified by the process in his hands, will make him a trespasser"); Westervelt *v.* Pinckney, 14 Wend. 123, 28 Am. Dec. 516.

Texas.— Portis *v.* Parker, 8 Tex. 23, 58 Am. Dec. 95; Bryan *v.* Bridge, 6 Tex. 137.

See 21 Cent. Dig. tit. "Execution," § 290.

49. *Alabama.*— Cawthorn *v.* McCraw, 9 Ala. 519.

Illinois.— Gaines *v.* Becker, 7 Ill. App. 315.

Kentucky.— Hill *v.* Harris, 10 B. Mon. 120, 50 Am. Dec. 542.

Michigan.— Vanosdall *v.* Hamilton, 118 Mich. 533, 77 N. W. 9.

Nebraska.— Boslow *v.* Shenberger, 52 Nebr. 164, 71 N. W. 1012, 66 Am. St. Rep. 487.

New York.— Elias *v.* Farley, 2 Abb. Dec. 11, 3 Keyes 398, 2 Transcr. App. 116, 5 Abb. Pr. N. S. 39; Dean *v.* Campbell, 19 Hun 534; Matter of Pond, 21 Misc. 114, 46 N. Y. Suppl. 999; Van Wyck *v.* Pine, 2 Hill 666.

Pennsylvania.— Titusville Novelty Iron Works' Appeal, 77 Pa. St. 103; Duncan's Appeal, 37 Pa. St. 500; Samuel *v.* Knight, 9 Pa. Super. Ct. 352. See also Carey *v.* Bright, 58 Pa. St. 70; Trovillo *v.* Tilford, 6 Watts 468, 31 Am. Dec. 484.

South Carolina.— Weatherby *v.* Covington, 3 Strobh. 27, 49 Am. Dec. 623 (holding that in order to perfect a levy it is immaterial whether the right of possession be acquired by an actual exercise of official authority or by the voluntary act of defendant, and that a written acknowledgment of a levy by defendant is as effectual as an actual levy, and if the goods in either case remain in the possession of defendant he is the bailee of the sheriff); Moss *v.* Moore, 3 Hill 276.

Tennessee.—Nighbert *v.* Hornsby, 100 Tenn. 82, 42 S. W. 1060, 66 Am. St. Rep. 736; Miller *v.* O'Bannon, 72 Tenn. 398.

Texas.— Grove *v.* Harris, 35 Tex. 320.

Virginia.— Bullitt *v.* Winston, 1 Munf. 269.

United States.— Very *v.* Watkins, 23 How. 469, 16 L. ed. 522; McDonald *v.* Moore, 16 Fed. Cas. No. 8,763, 8 Ben. 579.

See 21 Cent. Dig. tit. "Execution," § 290 *et seq.*

Property left with defendant.— In Dorrance *v.* Com., 13 Pa. St. 160, it was held that it is not necessary, to constitute a valid levy of an execution, that the property levied on should be taken into actual possession, but that it is sufficient if it be forthcoming to answer the exigencies of the writ. But see Auby *v.* Rathbun, 11 S. D. 474, 78 N. W. 952, where the officer merely stated to the debtor that he came to levy on his property, at the same time giving the debtor a written notice and stating that the sheriff would probably never come for the property, and he assumed no control over the property, either personally or by an agent, and the levy was held to be insufficient. See *supra*, VII, A, 4, a, (VII); and *infra*, VII, C, 2.

50. *Maryland.*— Horsey *v.* Knowles, 74 Md. 602, 24 Atl. 1104.

New York.— Bond *v.* Willett, 31 N. Y. 102, 1 Abb. Dec. 165, 1 Keyes 377, 29 How. Pr. 47; Dresser *v.* Ainsworth, 9 Barb. 619 (where the sheriff, at the time of levying on the property, did not see the same nor know where it was, but sat on his horse in the road while defendant in execution named over to him what property he had and the officer made a memorandum of it on a piece of paper, and it was held that the levy, although sufficient against the judgment debtor, was not an actual levy so as to affect persons acquiring title subsequently derived from the judgment debtor); Van Wyck *v.* Pine, 2 Hill 666; Haggerty *v.* Wilber, 16 Johns. 287, 8 Am. Dec. 321.

North Carolina.— Gilkey *v.* Dickerson, 10 N. C. 293.

Pennsylvania.— Carey *v.* Bright, 58 Pa. St. 70; Duncan's Appeal, 37 Pa. St. 500; Lowry

levy, provided he makes an inventory of the property levied on, and the control of the property by the officer is acknowledged or acquiesced in by the judgment debtor.[51]

(D) *Partial Seizure.* The rule is well settled that where an officer makes a seizure of a part of the property of the judgment debtor in a building, by virtue of a fieri facias, in the name of the whole property, it is a valid levy upon all of the property, and the inventory made out by the officer furnishes the means of ascertaining what goods were levied on.[52]

(E) *Failure to Take Forthcoming Bond.* Failure of the officer to take a forthcoming and delivery bond as authorized by statute does not affect the validity of the levy.[53]

(F) *Secret Levy.* Since the general rule is that a levy, in order to be valid, should be open and notorious,[54] a secret levy will as a rule be held to be invalid as against third persons.[55]

(II) *Particular Classes of Property*—(A) *Fixtures and Machinery.* The general rule is that fixtures and ponderous machinery, being incapable of actual possession, any notorious act of the officer asserting title under a levy is sufficient.[56]

v. Coulter, 9 Pa. St. 349; Conniff *v.* Doyle, 8 Phila. 630.

South Carolina.— Brian *v.* Strait, Dudley 19.

Texas.— Lynch *v.* Payne, (Civ. App. 1899) 49 S. W. 406.

Vermont.— Keniston *v.* Stevens, 66 Vt. 351, 29 Atl. 312.

Wisconsin.— Brown *v.* Pratt, 4 Wis. 513, 65 Am. Dec. 330.

See 21 Cent. Dig. tit. "Execution," § 291.

51. McGirr *v.* Hunter, 13 Ill. App. 195 (holding that as between the parties to an execution it is not necessary that the chattels levied on should be within the officer's sight, presence, or manual control, provided the officer's control of them is acknowledged by the debtor); Jayne *v.* Dillon, 28 Miss. 283; Dean *v.* Thatcher, 32 N. J. L. 470; Caldwell *v.* Fifield, 24 N. J. L. 150; Brewster *v.* Vail, 20 N. J. L. 56, 38 Am. Dec. 547; Cliver *v.* Applegate, 5 N. J. L. 479; Newell *v.* Sibley, 4 N. J. L. 381; Rhame *v.* McRoy, 7 Rich. (S. C.) 37.

Agreement with debtor.— Thursby *v.* Mills, 11 How. Pr. (N. Y.) 116.

Execution of forthcoming bond.— In several states it is held that where defendant acknowledges the levy by executing a forthcoming bond, it is not necessary to the validity of the levy that the officer have the property within his view at the time thereof. Cawthorn *v.* McCraw, 9 Ala. 519; Roebuck *v.* Thornton, 19 Ga. 149; Walker *v.* Shotwell, 13 Sm. & M. (Miss.) 544; Ballard *v.* Dibrell, 94 Tenn. 229, 28 S. W. 1087.

Whisky in bonded warehouse.— It was held in Keil *v.* Harris, 1 Pa. Co. Ct. 171, that a sheriff's sale of whisky in a bonded warehouse under execution against the distiller conveyed his title thereto, although the sheriff in making the levy was prevented by a federal officer from taking possession of the goods or getting an actual view thereof.

52. *New York.*— Haggerty *v.* Wilber, 16 Johns. 287, 8 Am. Dec. 321, holding, however, that a proclamation of the levy of goods locked up and out of the sheriff's view is no levy, and that the levy in this case was bad.

Pennsylvania.— Lewis *v.* Smith, 2 Serg. & R. 142.

South Carolina.— Brian *v.* Strait, Dudley 19; Moss *v.* Moore, 3 Hill 276.

Wisconsin.— See Johnson *v.* Iron Belt Min. Co., 78 Wis. 159, 47 N. W. 363.

England.— Gladstone *v.* Padwick, L. R. 6 Exch. 203 (where this doctrine was carried to the extent of holding that a levy upon goods of the judgment debtor in his mansion-house, was valid to bind goods situated in his farm-house about a mile distant); Cole *v.* Davies, 1 Ld. Raym. 724.

See 21 Cent. Dig. tit. "Execution," § 292.

53. Although it is always safer and better to take such bond. Nighbert *v.* Hornsby, 100 Tenn. 82, 42 S. W. 1060, 66 Am. St. Rep. 736; Brown *v.* Allen, 3 Head (Tenn.) 429.

54. See *supra*, VII, B, 7, e, (I), (A).

55. *Kansas.*— Crisfield *v.* Neal, 36 Kan. 278, 13 Pac. 272.

New York.— Price *v.* Shipps, 16 Barb. 585; Minturn *v.* Stryker, 1 Edm. Sel. Cas. 356. See Butler *v.* Maynard, 11 Wend. 548, 27 Am. Dec. 100.

North Carolina.— Rives *v.* Porter, 29 N. C. 74.

Ohio.— Minor *v.* Smith, 13 Ohio St. 79.

Pennsylvania.— Duncan's Appeal, 37 Pa. St. 500.

See 21 Cent. Dig. tit. "Execution," § 290.

56. Hopke *v.* Lindsay, 83 Mo. App. 85 (holding that, where personalty cannot be actually seized by the officer making the levy, he must take all the possession he can and evidence his seizure by posting notices on the property that it is levied on, or by attaching to it some other marks indicating the special property vested in him by his levy); Kile *v.* Giebner, 114 Pa. St. 381, 7 Atl. 154; Steers *v.* Daniel, 4 Fed. 587, 2 Flipp. 310. See Minor *v.* Smith, 13 Ohio St. 79, in which case it was held that the act of the officer

(B) *Growing Crops.* The rule requiring an actual seizure to constitute a valid levy of personal property capable of being readily removed does not apply in the case of a growing crop.[57]

(C) *Live Stock on Range.* In several jurisdictions, in the case of levy upon live stock running at large, an absolute manucaption is not necessary; but there must be some act done by the officer equivalent to a seizure, such as a memorandum upon the writ of the number of animals seized upon, and a notice to the judgment debtor or his agent of the levy.[58]

(D) *Corporate Stock.* Corporate stock being of such character and often so situated as not to be capable of actual seizure by the officer, the mode of levy upon such property is regulated entirely by special statutory enactments, the usual method of making levy being by leaving a copy of the writ with a designated officer of the corporation, together with a notice setting forth the shares of stock held by the judgment debtor which are levied on under the writ.[59]

in making the levy was not sufficiently open and notorious to render it valid.

Placing a watchman in charge or otherwise manifesting a control or detaching the fixtures is not necessary. Steers *v.* Daniel, 4 Fed. 587, 2 Flipp. 310.

57. Levy upon such crop is sufficient where the officer goes into the field to make the levy and notifies the persons interested of the fact of the levy.

Illinois.— Godfrey *v.* Brown, 86 Ill. 454; Davidson *v.* Waldron, 31 Ill. 120, 83 Am. Dec. 206.

Iowa.— Barr *v.* Cannon, 69 Iowa 20, 28 N. W. 413.

Maryland.— State *v.* Fowler, 88 Md. 601, 42 Atl. 201, 71 Am. St. Rep. 452, 42 L. R. A. 849.

Missouri.— Bilby *v.* Hartman, 29 Mo. App. 125.

Nebraska.— Johnson *v.* Walker, 23 Nebr. 736, 37 N. W. 639.

New York.— Whipple *v.* Foot, 2 Johns. 418, 3 Am. Dec. 442.

North Carolina.— State *v.* Porr, 20 N. C. 519, 34 Am. Dec. 387.

See 21 Cent. Dig. tit. "Execution," § 299.

Grain in bin.— It was held in Richardson *v.* Rardin, 88 Ill. 124, that it was a sufficient levy where an officer in actual view of the property levied on a large crib of corn, indorsed the levy on the execution, notified defendant in execution, forbidding him from further interfering with the corn, and at the same time nailed boards across the crib to secure it and gave notice in the hearing of several persons near by that he had levied on it and it must not be disturbed. See also Stanley *v.* Moynihan, 45 Ill. App. 192.

Grain in straw.— A levy on stacks of grain by an officer, with direction to the judgment debtor and others not to touch them, is sufficient, without any manual seizure, to enable the officer to maintain trespass or replevin against the stranger taking them away. Gallagher *v.* Bishop, 15 Wis. 276.

58. Sheffield *v.* Key, 14 Ga. 528.

Tex. Rev. St. art. 2293, provides that a levy upon live stock running at large on a range, and which cannot be herded or penned without great inconvenience and expense, may be made by designating, by reasonable estimate, the number of animals, and describing them by their marks and brands or either, and that such levy should be made in the presence of two or more credible persons, and notice thereof given in writing to the owner or his herder or agent if residing within the county and known to the officer. Gunter *v.* Cobb, 82 Tex. 598, 17 S. W. 848. See also Lindsey *v.* Cope, 91 Tex. 463, 43 S. W. 29, 44 S. W. 276; Sparks *v.* McHugh, (Tex. Civ. App. 1898) 43 S. W. 1045.

59. *California.*— West Coast Safety Faucet Co. *v.* Wulff, 133 Cal. 315, 65 Pac. 622, 85 Am. St. Rep. 171.

Connecticut.— See Stamford Bank *v.* Ferris, 17 Conn. 259.

Idaho.— See also Wells *v.* Price, 6 Ida. 490, 56 Pac. 266.

Illinois.— Union Nat. Bank *v.* Byram, 131 Ill. 92, 22 N. E. 842; People *v.* Goss, etc., Mfg. Co., 99 Ill. 355 [*reversing* 4 Ill. App. 510].

Iowa.— Croft *v.* Colfax Electric Light, etc., Co., 113 Iowa 455, 85 N. W. 761.

Louisiana.— Parker *v.* Sun Ins. Co., 42 La. Ann. 1172, 8 So. 618 (holding that corporate stock can be levied upon either by taking possession of the certificates of stock themselves or by seizing the interest of the shareholder in the assets and property of the corporation by giving notice to the proper officer thereof); Harris *v.* Mobile Bank, 5 La. Ann. 538.

Missouri.— See Smith *v.* Pilot Min. Co., 47 Mo. App. 409.

New Jersey.— Princeton Bank *v.* Crozer, 22 N. J. L. 383, 53 Am. Dec. 254.

Tennessee.— Memphis Appeal Pub. Co. *v.* Pike, 9 Heisk. 697.

See 21 Cent. Dig. tit. "Execution," § 305.

Notice must be in writing.— Moore *v.* Marshalltown Opera-House Co., 81 Iowa 45, 46 N. W. 750.

Stock held in name of one other than real owner.— Under the Pennsylvania act of 1836 see Eby *v.* Guest, 94 Pa. St. 160.

Stock in foreign corporation.— It was held in Caffery *v.* Choctaw Coal, etc., Co., 95 Mo. App. 174, 68 S. W. 1049, that while under Indian Terr. Annot. St. § 2118, which pro-

(E) *Promissory Notes and Other Evidences of Indebtedness.* In jurisdictions where the rule is adhered to that, in order to constitute a valid levy on tangible property, such property must be taken into actual possession by the officer, a sale of a bond, note, or other evidence of indebtedness belonging to the judgment debtor, but never in the possession of the officer, confers no title and is void for the reason that it has never been a valid levy upon such property.[60]

(F) *Rights of Action in General.* At common law choses in action were not subject to levy under execution,[61] and now in a majority of jurisdictions they are reached by creditors' suits,[62] garnishment,[63] or proceedings supplementary to execution.[64] In some jurisdictions, however, a valid levy of incorporeal rights is effected by service of notice of the levy upon the person indebted to the judgment debtor and also upon the judgment debtor.[65]

(G) *Intermingled Property.* Where a judgment debtor's property is intermingled with that of a third person, although without such person's knowledge, the officer may levy upon and hold the whole until the stranger identifies his property and demands a redelivery.[66]

(H) *Property Previously Attached.* Where an execution creditor has a lien upon property by virtue of a prior valid attachment thereof, the delivery of the execution to the proper officer constitutes a valid levy upon such property.[67]

vides that where, on a judgment rendered in Indian Territory, execution is issued against any corporate stock, etc., the secretary of the corporation shall on request furnish the officer a statement of the shares of stock held by the judgment debtor, and provides that the officer may thereupon levy the execution on such shares by leaving a copy of the writ with the secretary, yet in the absence of any statutory provision making foreign corporations doing business within the territory domestic for the purpose of suit and levy of process, the statute applied solely to domestic corporations, and did not authorize a levy upon stock in a foreign corporation doing business in the territory by leaving a copy of the writ with the secretary of the corporation who happened to be in the territory at the time.

60. Pleasants *v.* Kemp, 28 La. Ann. 124; Mille *v.* Hebert, 19 La. Ann. 58; Miller *v.* Streeder, 18 La. Ann. 56; Lockhart *v.* Harrell, 6 La. Ann. 530; Scott *v.* Niblett, 6 La. Ann. 182; Stockton *v.* Stanbrough, 3 La. Ann. 390; Taylor *v.* Stone, 2 La. Ann. 910; Offut *v.* Monquit, 2 La. Ann. 785; Galbraith *v.* Snyder, 2 La. Ann. 492; Fluker *v.* Bullard, 2 La. Ann. 338; Simpson *v.* Allain, 7 Rob. (La.) 500; Goubeau *v.* New Orleans, etc., R. Co., 6 Rob. (La.) 345. See, however, Smith *v.* Clark, 100 Iowa 605, 69 N. W. 1011, holding that a levy on a safe which is locked and its contents described in the return as "notes and money and books" is a good levy on notes payable to the execution defendant, contained in the safe.

61. Hillman *v.* Moore, 3 Tenn. Ch. 454. See *supra*, V, I, 1, a.

62. See, generally, CREDITORS' SUITS.

63. Hillman *v.* Moore, 3 Tenn. Ch. 454. See, generally, GARNISHMENT.

64. See *infra*, XIII.

65. Dore *v.* Dougherty, 72 Cal. 232, 13 Pac. 621, 1 Am. St. Rep. 48; Levy *v.* Acklen, 37 La. Ann. 545; Harris *v.* Mobile Bank, 5 La. Ann. 538; Wilson *v.* Munday, 5 La. 483; Wheaton *v.* Spooner, 52 Minn. 417, 54 N. W. 372; Swart *v.* Thomas, 26 Minn. 141, 1 N. W. 830. See also McLaughlin *v.* Alexander, 2 S. D. 226, 49 N. W. 99.

Book-accounts.— A sheriff's return on an execution of a levy "upon the books" of the judgment debtor has been held not to show a levy on, nor warrant a sale of, the debts and accounts evidenced by such books, and that the proper manner to levy upon such accounts would be by serving a notice upon the debtors. Tullis *v.* Browley, 3 Minn. 277.

Judgment.— It has been held in Louisiana that the proper mode of seizing on execution a debt existing in the form of a judgment is by notification of the seizure by the sheriff to the judgment debtor, and such notice is effected by the service of garnishment on the judgment debtors. Monticon *v.* Mullen, 12 La. Ann. 275; Rightor *v.* Slidell, 9 La. Ann. 602; Hanna *v.* Bry, 5 La. Ann. 651, 52 Am. Dec. 606.

66. Robinson *v.* Holt, 39 N. H. 557, 75 Am. Dec. 233; Lewis *v.* Whittemore, 5 N. H. 364, 22 Am. Dec. 466; Duke *v.* Welsh, 48 N. Y. Super. Ct. 516 (where a party allowed his chattels to be intermingled with those of another against whose goods an execution was levied, and no attempt was made to point out those of the intermingled chattels not belonging to the execution debtor and consequently all were seized, and it was held that no action for conversion could be maintained against the officer); Brown *v.* Bacon, 63 Tex. 595 (holding that an execution creditor desirous of levying on the goods of a husband which were inextricably confused with those of his wife might levy in the same way as an individual creditor of partnership property). See also Shumway *v.* Rutter, 8 Pick. (Mass.) 443, 19 Am. Dec. 340.

67. Keniston *v.* Stevens, 66 Vt. 351, 29 Atl. 312, in which case, however, while enunciating this principle, it was held that the placing of the execution issued on the judgment in the attachment suit in the hands

(I) *Property Held by Tenants in Common or Joint Owners.* The rule has been laid down in some jurisdictions that where a judgment debtor owns property as tenant in common or joint owner with others, it is the duty of the officer to levy upon and take into his custody the whole of the property, although he can only sell the judgment debtor's undivided interest therein.[68] In other jurisdictions, however, it has been held that, where personal property is owned in common, an execution against one part owner cannot be rightfully levied on the whole property, but only on the debtor's share therein.[69]

f. Exhaustion of Personalty Before Levy on Realty — (I) *General Rule.* Under the general policy of the law, the judgment creditor is not permitted to levy upon real or personal property indiscriminately, at his option, and since, under the influence of the common law, the interests of the judgment debtor are supposed to be best conserved by allowing him to retain his realty in preference to his personalty, the general rule is that the officer must exhaust the personal estate of the judgment debtor subject to execution before proceeding to levy upon his real estate.[70] However, it has been held under several statutes requiring the exhaustion of personalty before the levy of execution upon realty of the judg-

of the officer did not constitute a taking in execution, since the previous attachment of the property by the officer was invalid. See, however, Santa Fé Bank *v.* Haskell County Bank, 59 Kan. 354, 53 Pac. 132, in which it was held by a divided court that where property is in the hands of an officer by virtue of an attachment in another suit, the mere receipt of an execution and indorsement thereon of the time of its receipt does not operate as a constructive levy of the execution on such property.

68. *Alabama.*— Andrews *v.* Keith, 34 Ala. 722.

Colorado.— Felt *v.* Cleghorn, 2 Colo. App. 4, 29 Pac. 813.

Illinois.— Newhall *v.* Buckingham, 14 Ill. 405.

Minnesota.— Caldwell *v.* Auger, 4 Minn. 217, 77 Am. Dec. 515.

Missouri.— Wiles *v.* Maddox, 26 Mo. 77; Powers *v.* Braley, 41 Mo. App. 556.

New York.— Ray *v.* Birdseye, 5 Den. 619 [*affirming* 4 Hill 158]. See also Waid *v.* Gaylord, 1 Hun 607; Henderson *v.* Brennecke, 26 N. Y. App. Div. 309, 49 N. Y. Suppl. 681.

See 21 Cent. Dig. tit. "Execution," § 304.

69. *Kentucky.*— Vicory *v.* Strausbaug, 78 Ky. 425; Farmer *v.* Slack, 12 Ky. L. Rep. 319; Jones *v.* Martin, 5 Ky. L. Rep. 227.

Maine.— Thompson *v.* Baker, 74 Me. 48.

Massachusetts.— Briggs *v.* Strange, 17 Mass. 405; Melville *v.* Brown, 15 Mass. 82.

Mississippi.— Willis *v.* Loeb, 59 Miss. 169, holding, however, that if the chattel is in the hands of a person to whom the judgment defendant has committed it after long holding exclusive possession, the officer may take active possession thereof, and in such case the cotenant can neither institute replevin nor interpose a claimant's issue. The rule was otherwise before the adoption of the code of 1857. Sanders *v.* Young, 31 Miss. 111.

Ohio.— Nixon *v.* Nash, 12 Ohio St. 647, 80 Am. Dec. 390.

Pennsylvania.— Dixon *v.* White Sewing-Mach. Co., 128 Pa. St. 397, 18 Atl. 502, 15 Am. St. Rep. 683, 5 L. R. A. 659.

Texas.— Currie *v.* Stuart, (Civ. App. 1894) 26 S. W. 147. See also Middlebrook *v.* Zapp, 79 Tex. 321, 15 S. W. 258.

See 21 Cent. Dig. tit. "Execution," § 304.

70. *California.*— Bartholomew *v.* Hook, 23 Cal. 277.

Connecticut.— Coe *v.* Wickham, 33 Conn. 389. *Compare* Spencer *v.* Champion, 13 Conn. 11, holding that an execution may be levied on real estate, although the creditor has attached personal property sufficient to satisfy it.

Georgia.— Eaves *v.* Garner, 111 Ga. 273, 36 S. E. 688; Robinson *v.* Burge, 71 Ga. 526.

Indiana.— Sansberry *v.* Lord, 82 Ind. 521; Nelson *v.* Bronnenburg, 81 Ind. 193.

Kansas.— Collins *v.* Ritchie, 31 Kan. 371, 2 Pac. 623; Greeno *v.* Barnard, 18 Kan. 518; Kœhler *v.* Boyle, 2 Kan. 160, 83 Am. Dec. 451.

Kentucky.— Breckenridge *v.* Floyd, 7 Dana 456. See also Dailey *v.* Palmer, Hard. 507.

Louisiana.— Morgan *v.* Woorhies, 3 Mart. 462.

Minnesota.— Jakobsen *v.* Wigen, 52 Minn. 6, 53 N. W. 1016.

Nebraska.— Runge *v.* Brown, 29 Nebr. 116, 45 N. W. 271, holding that under the Nebraska statute a levy may be made on a judgment debtor's real estate before the personalty is sold, but the personalty must be sold before the realty.

New York.— See Wood *v.* Torrey, 6 Wend. 562.

North Carolina.— Farrior *v.* Houston, 100 N. C. 369, 6 S. E. 72, 6 Am. St. Rep. 597; Sloan *v.* Stanly, 33 N. C. 627.

Pennsylvania.— Maybury *v.* Jones, 4 Yeates 21.

Rhode Island.— Aldrich *v.* Wilcox, 10 R. I. 405; Kenyon *v.* Clarke, 2 R. I. 67.

Tennessee.— Hassell *v.* Kentucky Southern Bank, 2 Head 381; Dice *v.* Penn, 2 Swan 561; Stockard *v.* Pinkard, 6 Humphr. 119.

Texas.— See Texas-Mexican R. Co. *v.* Wright, 88 Tex. 346, 31 S. W. 613, 31 L. R. A. 200.

ment debtor, that where the judgment debtor fails to call the sheriff's attention to his personalty, even though he may possess sufficient personalty to satisfy the execution, the execution may be levied first upon realty.[71] Statutory enactments in regard to the order in which property of the judgment debtor shall be subjected to levy under execution are, however, usually regarded as directory only, and where the officer fails to comply therewith it renders the levy thereunder voidable only, and not void, and a sale based upon such levy will be sustained when collaterally attacked.[72]

(II) *Where Sufficient Personalty Cannot Be Found.* An officer is justified in subjecting real property of the execution debtor under his writ if he has no knowledge of personal property out of which his levy might be made, and where there is no evidence that by the exercise of reasonable diligence he could have discovered such property;[73] and a return by the officer of "no personal

See 21 Cent. Dig. tit. "Execution," § 308.

See, however, Hoar *v.* Tilden, 178 Mass. 157, 59 N. E. 641, holding that an officer can levy an execution on real estate and personal chattels and enforce it against them both at the same time, although there can be only one satisfaction.

Contra.— Powell *v.* Governor, 9 Ala. 36.

"**But** . . . 5 Geo. 2, c. 7, stripped lands in the Plantations, of the sanctity with which they had been guarded, and by subjecting them to sale, no longer considered them as a secondary fund for the payment of debts in the hands of the debtor, but rendered them equally liable with his personalty. It is at the election of the plaintiff, whether he will seize lands or goods, and this has always been the construction of the statute, unless under peculiar circumstances of equity he shall be restrained from exercising his election, to the prejudice of an alienee, devisee or heir." Hanson *v.* Barnes, 3 Gill & J. (Md.) 359, 367, 22 Am. Dec. 322.

Under an execution against goods and chattels, it has been held that a seizure of real estate is invalid. Thompson *v.* Chauveau, 7 Mart. N. S. (La.) 331, 18 Am. Dec. 246.

Under the Illinois statute, however, the above rule is reversed and personal property cannot be taken under execution until after the judgment debtor has been given the opportunity to turn over real estate. Pitts *v.* Magie, 24 Ill. 610; Tuttle *v.* Wilson, 24 Ill. 553; Ryder *v.* Buckmaster, 4 Ill. 196; Metz *v.* McAvoy Brewing Co., 98 Ill. App. 584. The judgment debtor, however, who surrenders certain personal property to the officer in satisfaction of the execution cannot recall that property and turn over real estate in lieu thereof. Larson *v.* Laird, 36 Ill. App. 402.

Under the Vermont statute a debtor's real estate is liable for his debts as well as his personalty, and subject to execution at the judgment creditor's election. And where an officer holding an execution is directed by the creditor to levy on realty, it is his duty to do so. However, in the absence of such direction he is not bound to levy on realty until after the personalty is sold and executed. Newbury Bank *v.* Baldwin, 31 Vt. 311.

Where personalty is encumbered.— It was held in Detrick *v.* State Bank, 6 Ind. 439, that a sheriff need not levy an execution on personalty before proceeding against the real estate of the debtor, if the personalty is so encumbered with mortgages that it would not probably sell for anything.

Effect of fraudulent conveyance.— It has been held in North Carolina that where defendant in execution has conveyed all his property, both real and personal, to a third person, the judgment creditor is entitled to direct the officer to levy on the real estate before the personalty, since the debtor, by fraudulent conveyance of his property, waives the right to have his personalty levied on and exhausted before his realty. Stancil *v.* Branch, 61 N. C. 306, 93 Am. Dec. 592.

71. Oliver *v.* Dougherty, (Ariz. 1902) 68 Pac. 553; Landrum *v.* Broadwell, 110 Ga. 538, 35 S. E. 638.

72. *California.*— Smith *v.* Randall, 6 Cal. 47, 65 Am. Dec. 475.

Georgia.— See Henderson *v.* Hill, 59 Ga. 595.

Iowa.— Cavender *v.* Smith, 1 Iowa 306.

Kentucky.—Faris *v.* Banton, 6 J. J. Marsh. 235; Beeler *v.* Bullitt, 3 A. K. Marsh. 280, 13 Am. Dec. 161; Hayden *v.* Dunlap, 3 Bibb 216.

Minnesota.— Jakobsen *v.* Wigen, 52 Minn. 6, 53 N. W. 1016.

North Carolina.— Simpson *v.* Hiatt, 35 N. C. 470; McEntire *v.* Durham, 29 N. C. 151, 45 Am. Dec. 512.

Ohio.— Wheeling, etc., Coal Co. *v.* Smithfield First Nat. Bank, 55 Ohio St. 233, 45 N. E. 630.

South Carolina.— Lawrence *v.* Grambling, 13 S. C. 120.

Texas.— Odle *v.* Frost, 59 Tex. 684.

United States.— U. S. *v.* Drennen, 25 Fed. Cas. No. 14,992, Hempst. 320.

See 21 Cent. Dig. tit. "Execution," § 308.

The vendee of the judgment debtor is entitled to an order requiring that the debtor's personal property be exhausted before an execution be levied on the land, and if he fails to ask for such order the sale may be valid. Sansberry *v.* Lord, 82 Ind. 521.

73. *Connecticut.*— Graves *v.* Merwin, 19 Conn. 96.

Georgia.— See Henderson *v.* Hill, 59 Ga. 595.

property found" is sufficient to justify a levy upon the real property of the judgment debtor.[74]

(III) *LEVY AT DIRECTION OF JUDGMENT DEBTOR.* The rule seems to be well settled that the officer holding an execution against the judgment debtor may at the request of the latter levy upon his real estate to the exclusion of his personalty, even where there is a sufficient amount of personalty to satisfy the execution.[75]

(IV) *EXECUTION AGAINST JOINT DEBTORS.* Under an execution against several joint defendants, where there is a finding of no personal property as to one of the defendants, the writ may be levied on his real estate before exhausting the personal estate of the other defendant.[76]

g. Real Property — (I) *GENERAL RULE.* In the absence of statute to the contrary, it seems to be the general rule in the United States that a levy upon or seizure of real property under an execution may be legally made without the officer going upon the premises, by simply indorsing a description of the property upon the writ and stating that it is levied upon for the purpose thereof.[77] In

Indiana.— Nelson *v.* Bronnenburg, 81 Ind. 193; West *v.* Cooper, 19 Ind. 1.

Kansas.— Collins *v.* Ritchie, 31 Kan. 371, 2 Pac. 623 (holding that search for personal property of the judgment debtor is not necessary where the sheriff has reasonable knowledge of the fact that none exists); Sullenger *v.* Buck, 22 Kan. 28 (where the personal property proved insufficient).

Mississippi.— See Brian *v.* Davidson, 25 Miss. 213.

New Jersey.— Bulat *v.* Londridan, 63 N. J. Eq. 22, 50 Atl. 909.

North Carolina.— Sloan *v.* Stanly, 33 N. C. 627.

Tennessee.— Dice *v.* Penn, 2 Swan 561.

Texas.— Willis *v.* Nichols, 5 Tex. Civ. App. 154, 23 S. W. 1025.

See 21 Cent. Dig. tit. "Execution," § 308 *et seq.*

74. *Connecticut.*— Coe *v.* Wickham, 33 Conn. 389; Booth *v.* Booth, 7 Conn. 350.

Georgia.— Beck *v.* Bower, 68 Ga. 738; Gwinn *v.* Smith, 55 Ga. 145 (holding that it is not error to permit a sheriff to make an entry of no personal property after the levy of an execution on realty where knowledge of the facts was had by the levying officer, and that such entry might be made *nunc pro tunc* so as to be a fact as though made before the levy on the real estate); Carmichael *v.* Strawn, 27 Ga. 341; Boling *v.* Strickland, Ga. Dec. 1870, Pt. II; Daniel *v.* Justices Talliaferro County Inferior Ct., Dudley 2. See also Smith *v.* Jones, 40 Ga. 39, holding that when a municipal corporation has power under its charter to levy and collect a tax and to issue an execution against a defaulter which shall be a lien and may be levied on all his property, real and personal, the coroner is not bound to make a return of no personal property found before he can levy on the real estate.

Kansas.— Treptow *v.* Buse, 10 Kan. 170.

Louisiana.— Thompson *v.* Chretien, 12 Mart. 250.

New Jersey.— See Bulat *v.* Londridan, 63 N. J. Eq. 22, 50 Atl. 909.

North Carolina.— Lanier *v.* Stone, 8 N. C. 329.

Pennsylvania.— Clark *v.* Fell, 139 Pa. St. 469, 22 Atl. 649, holding that a levy on realty would not be deemed invalid and set aside merely because no return had been made that there was no personalty.

South Dakota.— Deadwood First Nat. Bank *v.* Black Hill Fair Assoc., 2 S. D. 145, 48 N. W. 852.

Tennessee.—Frogg *v.* Haggard, 2 Yerg. 577.

See 21 Cent. Dig. tit. "Execution," § 308 *et seq.*

75. *California.*— Smith *v.* Randall, 6 Cal. 47, 65 Am. Dec. 475.

Delaware.— Springer *v.* Johnson, 3 Harr. 315.

Iowa.— Cavender *v.* Smith, 1 Iowa 306.

Louisiana.— Morgan *v.* Woorhies, 3 Mart. 462.

Pennsylvania.—Maybury *v.* Jones, 4 Yeates 21.

See 21 Cent. Dig. tit. "Execution," § 308 *et seq.*

76. Drake *v.* Murphy, 42 Ind. 82 (holding that the sheriff may levy on the real estate of any one of the defendants who has no personal property); Faris *v.* Banton, 6 J. J. Marsh. (Ky.) 235; Crowder *v.* Sims, 7 Humphr. (Tenn.) 257; Warren *v.* Edgerton, 22 Vt. 199, 54 Am. Dec. 66 (holding that an officer who is about to levy an execution on the land of one of several execution debtors cannot be required to regard the offer of such debtor to expose to him the personal property of his co-debtor and to indemnify him for levying the execution for its entire amount on such personal property, as each debtor in an execution is to be regarded as liable for the whole debt *in solido*, and the officer having an execution to levy is not bound to regard any equities subsisting between the debtors themselves or between the debtors and their other creditors). See, however, Hassell *v.* Kentucky Southern Bank, 2 Head (Tenn.) 381, holding that if some of the defendants have personal property liable to the satisfaction of the debt and others have not, it is the duty of the officer to proceed against the former, or either of them, until sufficient property is found to discharge the debt.

77. *Arkansas.*— Fenno *v.* Coulter, 14 Ark. 38.

some jurisdictions, where the judgment is a lien upon real property,[78] a formal levy upon such property is not required.[79]

(II) *Moiety of, or Interest in*— (A) *General Rule.* According to the better doctrine a levy upon all the debtor's right, title, and interest in real property is sufficient, where the officer is unable to determine the real interest of the judgment debtor in such property, such a levy being in legal effect a levy upon the property itself.[80] The rule is laid down in some jurisdictions that, where a judgment debtor has exclusive ownership of a parcel or tract of land, a levy by a judgment creditor upon an undivided portion of it is invalid.[81]

California.— Blood *v.* Light, 38 Cal. 649, 99 Am. Dec. 441; Smith *v.* Morse, 2 Cal. 524.

Georgia.— Isam *v.* Hooks, 46 Ga. 309.

Kentucky.— Vallandingham *v.* Worthington, 85 Ky. 83, 2 S. W. 772, 8 Ky. L. Rep. 707. See also Jones *v.* Allen, 88 Ky. 381, 11 S. W. 289, 10 Ky. L. Rep. 962.

Maine.— Fitch *v.* Tyler, 34 Me. 463.

Massachusetts.— Hall *v.* Crocker, 3 Metc. 245.

Mississippi.— Hamblen *v.* Hamblen, 33 Miss. 455, 69 Am. Dec. 358.

Missouri.— Duncan *v.* Matney, 29 Mo. 368, 77 Am. Dec. 575.

New York.— Rodgers *v.* Bonner, 45 N. Y. 379.

Ohio.— Morgan *v.* Kinney, 38 Ohio St. 610, 614 [*quoting* Gwynne Sher. 308]; Acklin *v.* Waltermier, 19 Ohio Cir. Ct. 372, 10 Ohio Cir. Dec. 629.

Rhode Island.— Lynch *v.* Earle, 18 R. I. 531, 28 Atl. 763.

South Carolina.— Martin *v.* Bowie, 37 S. C. 102, 15 S. E. 736.

Texas.— Cavanaugh *v.* Peterson, 47 Tex. 197 [*overruling* Leland *v.* Wilson, 34 Tex. 79]; Catlin *v.* Bennatt, 47 Tex. 165; Cundiff *v.* Teague, 46 Tex. 475.

United States.— Armstrong *v.* Rickey, 1 Fed. Cas. No. 546; U. S. *v.* Hess, 26 Fed. Cas. No. 15,358, 5 Sawy. 533.

See 21 Cent. Dig. tit. "Execution," § 311.

In Louisiana it has been held that in order to constitute a valid seizure of real property under execution the officer must take the property into his possession and custody, and that mere notice of seizure is insufficient. Morgan *v.* Johnson, 27 La. Ann. 539; Corse *v.* Stafford, 24 La. Ann. 262; Kilbourne *v.* Frellsen, 22 La. Ann. 207; Williams *v.* Clark, 11 La. Ann. 761. See also Stockton *v.* Downey, 6 La. Ann. 581. See, however, Budd *v.* Stinson, 20 La. Ann. 573. *Compare* Pipkin *v.* Sheriff, 36 La. Ann. 781.

Registry of seizure.— White *v.* Waggaman, 36 La. Ann. 984.

In Maryland the rule is laid down that to enable the sheriff to sell land under an execution and vest a valid title in the purchaser, a seizure is indispensable, and without such seizure the purchaser acquires no title. Elliott *v.* Knott, 14 Md. 121, 74 Am. Dec. 519; Waters *v.* Duvall, 11 Gill & J. 37, 33 Am. Dec. 693; Berry *v.* Griffith, 2 Harr. & G. 337, 18 Am. Dec. 309. *Compare* Estep *v.* Weems, 6 Gill & J. 303.

In New Brunswick it has been held that the sheriff need not make an actual entry on the land in order to levy upon it, and that the advertisement is proof of levy. Doe *v.* Hazen, 8 N. Brunsw. 87.

Where the sheriff published a newspaper notice of sale under execution, stating that he had levied on certain described property, and afterward filed a copy of the notice with the clerk and recorder, it was held that there was a valid levy of the execution. Jones *v.* Olson, 17 Colo. App. 144, 67 Pac. 349.

For acts of officer held insufficient to constitute a valid levy upon real estate of judgment debtor see Mills *v.* Thursby, 11 How. Pr. (N. Y.) 121.

78. Judgment lien generally see JUDGMENTS.

79. Knox *v.* Randall, 24 Minn. 479; Hutchins *v.* Carver County Com'rs, 16 Minn. 13; Lockwood *v.* Bigelow, 11 Minn. 113; Bidwell *v.* Coleman, 11 Minn. 78; Folsom *v.* Carli, 5 Minn. 333, 80 Am. Dec. 429; Tullis *v.* Brawley, 3 Minn. 277; Van Gelder *v.* Van Gelder, 26 Hun (N. Y.) 356; Wood *v.* Colvin, 5 Hill (N. Y.) 228. See also McEntire *v.* Durham, 29 N. C. 151, 45 Am. Dec. 512.

80. This is certainly the safer mode of procedure for the officer's own protection, and it is not necessary, and in most cases it would not be advisable, for the levying officer to undertake to determine the nature or extent of the defendant's interest in the property.

Kentucky.— Humphrey *v.* Wade, 84 Ky. 391, 1 S. W. 648, 8 Ky. L. Rep. 384; Brown *v.* Smith, 7 B. Mon. 361.

Maryland.— Balch *v.* Zentmeyer, 11 Gill & J. 267.

Tennessee.— Swan *v.* Parker, 7 Yerg. 490, 27 Am. Dec. 522.

Texas.— Smith *v.* Crosby, 86 Tex. 15, 23 S. W. 10, 40 Am. St. Rep. 818.

Wisconsin.— Vilas *v.* Reynolds, 6 Wis. 214.

See 21 Cent. Dig. tit. "Execution," § 313 *et seq.*

Abuse of process.— In Wallace *v.* Atlanta Medical College, 52 Ga. 164, a levy and sale under a writ of execution against a medical college was rescinded as wantonly injurious to property, where the dividing line of the parts levied on ran through the body of the building, leaving three-tenths of the building on the part of the lot sold and seven-tenths on the other.

81. De Jarnette *v.* Verner, 40 Kan. 224, 19 Pac. 666; Jewett *v.* Whitney, 51 Me. 233 [*approving* 43 Me. 242]; Brown *v.* Clifford, 38 Me. 210. *Compare* Snyder *v.* Castor, 2 Binn. (Pa.) 216 note, 4 Yeates (Pa.) 443.

(B) *Rule in New England.* In several of the New England states, however, it is provided by statute that the officer shall set off the land levied upon by metes and bounds, and not an undivided portion of it, except in cases where the property cannot be divided without great injury to the parties, when the officer may set off such an undivided portion of the real estate as shall be sufficient to satisfy the execution.[82]

(C) *Interest of Joint Tenants or Tenants in Common.* The rule is well settled that an execution against a judgment debtor holding land in joint tenancy, or tenancy in common, cannot be levied on part of such land by metes and bounds, but must be extended over the whole tract, and such undivided proportion taken as will satisfy the debt.[83] Where a levy is made upon property of a judgment debtor in which third parties are interested as cotenants or tenants in common, it is essential that the interest on which the levy is made be definitely specified.[84]

(D) *Interest of Tenant For Life.* An execution against a tenant for life may be levied either on the land or on the rents and profits.[85]

If a building is excluded from a levy on the supposition that it is personal property, when in fact it is part of the realty, the levy is void. Hemenway *v.* Cutler, 51 Me. 407.

82. Mansfield *v.* Jack, 24 Me. 98; Hilton *v.* Hanson, 18 Me. 397; Morgan *v.* Armington, 33 Vt. 13; Edwards *v.* Allen, 27 Vt. 381; Sleeper *v.* Newbury Seminary Trustees, 19 Vt. 451; Arms *v.* Burt, 1 Vt. 303, 18 Am. Dec. 680; Paine *v.* Webster, 1 Vt. 101. See also Howe *v.* Blanden, 21 Vt. 315, holding that a creditor who levies his execution on land must levy on the whole estate which the debtor has in the premises, and if he carves out a less estate, leaving a reversion in the debtor, the levy will be void as against the debtor and no title will pass under it.

Levy upon equity of redemption.— It has been held in Vermont that the levy of an execution upon the equity of redemption in mortgaged premises, if upon any portion less than the whole, must be upon an aliquot portion of the whole, and not upon a part described by metes and bounds. Swift *v.* Dean, 11 Vt. 323, 34 Am. Dec. 693; Smith *v.* Benson, 9 Vt. 138, 31 Am. Dec. 614; Collins *v.* Gibson, 5 Vt. 243. See *infra*, note 87.

83. *Connecticut.*—Fish *v.* Sawyer, 11 Conn. 545; Griswold *v.* Johnson, 5 Conn. 363; Mitchell *v.* Hazen, 4 Conn. 495, 10 Am. Dec. 169; Giddings *v.* Canfield, 4 Conn. 482; Starr *v.* Leavitt, 2 Conn. 243, 7 Am. Dec. 268.

Maine.— Swanton *v.* Crooker, 49 Me. 455 (where an entire estate was appraised, set out by metes and bounds and levied on as the property of an execution debtor, he owning only an undivided part thereof, and it was held that the levy was valid to transfer the debtor's title to such part, it being a less estate than that mentioned by the appraisers); Thayer *v.* Mayo, 34 Me. 139; Gregory *v.* Tozier, 24 Me. 308; Staniford *v.* Fullerton, 18 Me. 229. See also Glidden *v.* Philbrick, 56 Me. 222. See Godwin *v.* Gregg, 28 Me. 188, 48 Am. Dec. 489, holding that the levy of an execution on an undivided portion of a farm specified by metes and bounds, the whole of which was holden by the debtor as tenant in common with another, will be considered valid until the cotenant has obtained partition and ousted the creditor of the part so levied on.

Massachusetts.— Brown *v.* Bailey, 1 Metc. 254; Peabody *v.* Minot, 24 Pick. 329; Blossom *v.* Brightman, 21 Pick. 283; Melville *v.* Brown, 15 Mass. 82; Atkins *v.* Bean, 14 Mass. 404; Baldwin *v.* Whiting, 13 Mass. 57; Varnum *v.* Abbot, 12 Mass. 474, 7 Am. Dec. 87; Bartlet *v.* Harlow, 12 Mass. 348, 7 Am. Dec. 76.

New Hampshire.— See Martin *v.* Collester, 38 N. H. 455, holding that where a debtor has an undivided share in several tracts of land, and his creditor, having two executions against him at the same time, levies one execution on the whole of the debtor's interest in one tract and the other on the whole of his interest in all the other tracts, the levy being in other respects duly made, is valid.

Pennsylvania.— Kershaw *v.* Supplee, 1 Rawle 131, holding that where land is undivided among heirs and devisees, an execution on a general judgment against the ancestor or testator cannot be levied on the undivided share of any one heir or devisee.

Tennessee.—Earles *v.* Meaders, 1 Baxt. 248.

Vermont.— Howe *v.* Blanden, 21 Vt. 315; Smith *v.* Benson, 9 Vt. 138, 31 Am. Dec. 614; Galusha *v.* Sinclair, 3 Vt. 394.

See 21 Cent. Dig. tit. "Execution," § 314.

Contra.— Treon *v.* Emerick, 6 Ohio 391.

Levy on estate in reversion.— It has been held in Maine that it is no objection to a levy that it was made upon an undivided third of an estate in reversion, of which the debtor owned one undivided half, as such rule would practically defeat the rights of all creditors whose demands were less in value than the interest of the debtor. Rawson *v.* Clark, 38 Me. 223.

84. Simms *v.* Phillips, 51 Ga. 433; Thayer *v.* Mayo, 34 Me. 139. See also Payne *v.* Pollard, 3 Bush (Ky.) 127.

85. In either case, as no more than the debtor's interest can be taken, and as the creditor will be entitled to possession of the land in order to receive the rents and profits, the effect would be the same. Roberts *v.* Whiting, 16 Mass. 186; Chapman *v.* Gray, 15 Mass. 439; Barber *v.* Root, 10 Mass. 260.

(E) *Equity of Redemption.* In some jurisdictions, by statute, in the case of mortgaged realty, the execution creditor has the election to restrict his levy to the equity of redemption or to levy on the land.[86] In other jurisdictions, however, the statute provides that where the land sought to be subjected is encumbered by a mortgage, the equity of redemption should be levied on *eo nomine*, and a levy on the land does not operate to pass to the purchaser the equity of redemption.[87]

(III) *Excessive Levy.* Where an execution is levied on more land than the judgment debtor owns, or on more than his share in a certain tract of land, the levy is nevertheless valid for as much of the land as he does own, or for his share thereof.[88]

h. Property Held Under Valid Levy — (I) *Subsequent Writs in Hands of Levying Officer.* Where an officer has property of a judgment debtor in his possession by virtue of a valid levy, the reception of a second writ of execution operates as a constructive levy upon all the property held by him by virtue of the first writ.[89] Where, however, the levy under the original writ in the hands of

86. If the levy is restricted to the equity of redemption, the purchaser acquires no greater interest than that specifically defined in the levy, and is estopped to dispute the validity of the encumbrance. If, however, the judgment creditor desires to contest the validity of the encumbrance, he may cause his execution to be levied upon the land, and a sale thereunder will pass whatever interest defendant may have, the purchaser being subrogated to the rights of the mortgagor. Gassenheimer *v.* Molton, 80 Ala. 521, 2 So. 652; Brown *v.* Snell, 46 Me. 490; Brown *v.* Clifford, 38 Me. 210; Bullard *v.* Hinkley, 6 Me. 289, 20 Am. Dec. 304; Cowles *v.* Dickinson, 140 Mass. 373, 5 N. E. 302; Hackett *v.* Buck, 128 Mass. 369; Pettee *v.* Peppard, 125 Mass. 66; Adams *v.* Barnes, 17 Mass. 365; Russell *v.* Dudley, 3 Metc. (Mass.) 147; Litchfield *v.* Cudworth, 15 Pick. (Mass.) 23; Hovey *v.* Bartlett, 34 N. H. 278. See also Lovelace *v.* Webb, 62 Ala. 271.

Extinguishment of mortgage.— Where the title of the debtor is changed by extinguishment of a mortgage, after the attachment of the mortgaged land from an equity of redemption to an absolute estate, the execution must be levied by extent on the land, and not as on an equity of redemption. Mansfield *v.* Dyer, 133 Mass. 374; Grover *v.* Flye, 5 Allen (Mass.) 543; Freeman *v.* McGaw, 15 Pick. (Mass.) 82; Chickering *v.* Lovejoy, 13 Mass. 51; Forster *v.* Mellen, 10 Mass. 421.

87. Beers *v.* Botsford, 13 Conn. 146; Scripture *v.* Johnson, 3 Conn. 211; Glazebrook *v.* Brandon, 3 Ky. L. Rep. 466. See also Hobart *v.* Frisbie, 5 Conn. 592; Kimball *v.* Smith, 21 Vt. 449; Collins *v.* Gibson, 5 Vt. 243, holding that a levy described as on all the debtor's equity of redemption in the premises is good; stating also the nature and amount of the encumbrance, and that the execution cannot be satisfied with less than the whole of such equity, and if the execution be not enough to cover the whole it must be levied on an undivided portion of the whole. See *supra*, note 82.

88. Virgie *v.* Stetson, 77 Me. 520, 1 Atl. 481; Grover *v.* Howard, 31 Me. 546; Pond *v.* Pond, 14 Mass. 403. See also Clark *v.* Chambers, 1 Pittsb. (Pa.) 222, holding that where a person occupying and holding a tract of land purchased an adjoining tract and made it part of the same farm, the whole was properly levied on as one tract.

89. *Illinois.*— Leach *v.* Pine, 41 Ill. 65, 89 Am. Dec. 375; Field *v.* Macullar, 20 Ill. App. 292; Goodheart *v.* Bowen, 2 Ill. App. 578.

Mississippi.— Cahn *v.* Person, 56 Miss. 360.

Missouri.— State *v.* Doan, 39 Mo. 44; State *v.* Curran, 45 Mo. App. 142.

New Jersey.— Millville Nat. Bank *v.* Shaw, 42 N. J. L. 550.

New York.— Peck *v.* Tiffany, 2 N. Y. 451 (where at the time the second execution was received by the sheriff the first execution had become dormant); Lansingburgh Bank *v.* Crary, 1 Barb. 542; Van Winkle *v.* Udall, 1 Hill 559; Russell *v.* Gibbs, 5 Cow. 390 (where the original writ was left by one deputy and the second writ was delivered to another deputy of the same sheriff); Cresson *v.* Stout, 17 Johns. 116, 8 Am. Dec. 373.

Ohio.— Ryan *v.* Root, 56 Ohio St. 302, 47 N. E. 51.

Pennsylvania.— McCormick *v.* Miller, 3 Penr. & W. 230.

United States.— Scriba *v.* Deane, 21 Fed. Cas. No. 12,559, 1 Brock. 166.

Compare Zackry *v.* Zackry, 68 Ga. 158.

See 21 Cent. Dig. tit. "Execution," § 318.

Property deposited with custodian.— It has been held in Illinois that property deposited by the sheriff with a custodian, as provided by the Illinois act of Feb. 22, 1861, is in the actual possession of the custodian and the sheriff's possession becomes constructive only, and no levy by him under any subsequent process is valid unless he indorses it thereon in the sight of the property and with notice to the custodian. Chittenden *v.* Rogers, 42 Ill. 100.

Where property was previously attached it was held that the delivery of execution to the officer within thirty days after judgment was a sufficient taking of the property to support the creditor's lien, and delivery to another deputy of the same sheriff was sufficient. Bliss *v.* Stevens, 4 Vt. 88.

the officer is void, a constructive levy of subsequent execution made by indorsement will not bind the property against subsequent executions actually levied thereon.[90]

(II) *Subsequent Writs in Hands of Different Officers.* Since an officer holding a subsequent writ is not authorized to take property into his control to the exclusion of an officer in possession thereof by virtue of a prior writ, a notification by the officer holding a subsequent writ to the officer in possession, and the indorsement of the levy upon the writ, constitutes a valid levy.[91]

i. Successive Levies Under Same Writ — (I) *General Rule.* The rule is universally recognized that an officer, notwithstanding the prior levy, is authorized, at any time before the return-day of the writ, to make such further levies upon the property of the judgment debtor as may be necessary to satisfy the execution in his hands.[92]

(II) *Where Sufficient Property Is Levied on.* However, after a sufficient levy upon the judgment debtor's property, his property is not subject to further levy so long as the property first levied upon is detained from him, but upon such property being restored to him, his property is liable to a further levy within the life of the writ.[93]

90. Murphy *v.* Swadener, 33 Ohio St. 85.

91. *Illinois.*— White *v.* Culter, 12 Ill. App. 38.

Missouri.— Allen *v.* Davis, 53 Mo. App. 15; State *v.* Curran, 45 Mo. App. 142.

North Carolina.— Penland *v.* Leatherwood, 101 N. C. 509, 8 S. E. 234, 9 Am. St. Rep. 38.

Ohio.— Benedict *v.* Deckand, 4 Ohio Dec. (Reprint) 163, 1 Clev. L. Rep. 83. See, however, Townsend *v.* Corning, 40 Ohio St. 335.

Pennsylvania.— Bayard *v.* Bayard, 3 Pa. L. J. Rep. 261, 5 Pa. L. J. 160.

See 21 Cent. Dig. tit. "Execution," § 319.

Compare Pitkin *v.* Burnham, 62 Nebr. 385, 87 N. W. 160, 89 Am. St. Rep. 763, 55 L. R. A. 280, holding that when personal property has been legally levied upon during the existence of the lien created thereby, it is not subject to a lawful second levy by another officer under a different process, and when a subsequent levy by another officer is accomplished by force or fraudulent means, or by an unauthorized procedure, such levy is illegal and void.

92. *Alabama.*— Governor *v.* Powell, 9 Ala. 83.

Georgia.— Wyatt *v.* Chapman, 66 Ga. 727; Webb *v.* Camp, 26 Ga. 354; Marshall *v.* Morris, 13 Ga. 185; Lynch *v.* Pressley, 8 Ga. 327. See Smith *v.* Camp, 84 Ga. 117, 10 S. E. 539.

Illinois.— Everingham *v.* Ottawa Nat. State Bank, 124 Ill. 527, 17 N. E. 26; Howard *v.* Bennett, 72 Ill. 297; Montgomery *v.* Wayne, 14 Ill. 373; Colburn *v.* Barton, 17 Ill. App. 391. See also Smith *v.* Hughes, 24 Ill. 270, holding that an officer levying an execution on property may seize other property if defendant prevents him from selling that first levied on.

Indiana.— Indiana Cent. R. Co. *v.* Bradley, 15 Ind. 23.

Louisiana.— Dabbs *v.* Hemken, 3 Rob. 123; Fink *v.* Lallande, 16 La. 547.

Massachusetts.— Dodge *v.* Doane, 3 Cush. 460.

Michigan.— Baldwin *v.* Talbot, 46 Mich. 19, 8 N. W. 565.

Missouri.— Lillard *v.* Shannon, 60 Mo. 522 (holding that the levy of an execution on personal property does not invalidate its subsequent levy on realty); Hombs *v.* Corbin, 20 Mo. App. 497.

New Jersey.— Van Waggoner *v.* Moses, 26 N. J. L. 570; Moses *v.* Thomas, 26 N. J. L. 124.

New York.— Denvrey *v.* Fox, 22 Barb. 522 [*criticizing* and *explaining* Hoyt *v.* Hudson, 12 Johns. 207]. See also Shelton *v.* Westervelt, 1 Duer 109.

Ohio.— Pugh *v.* Galloway, 10 Ohio St. 488.

Texas.— Garrity *v.* Thompson, 67 Tex. 1, 2 S. W. 750.

See 21 Cent. Dig. tit. "Execution," § 320.

An insufficient levy cannot be fortified by a levy made after the return of the execution. Canfield *v.* Browning, 69 N. J. L. 553, 55 Atl. 101.

93. *Indiana.*— Miller *v.* Ashton, 7 Blackf. 29.

Kentucky.— Jones *v.* Lusk, 2 Metc. 356 (where the officer, after a levy upon personal property, restored it to defendant to prevent a sacrifice thereof, and it was held that he afterward had a right to levy upon lands of defendant, and a sale under such levy was valid); Morrow *v.* Hart, 1 A. K. Marsh. 291.

Maine.— See Bingham *v.* Smith, 64 Me. 450.

Mississippi.— Ferriday *v.* Selcer, Freem. 258.

New York.— Hoyt *v.* Hudson, 12 Johns. 207. See also Godfrey *v.* Gibbons, 22 Wend. 569.

Pennsylvania.— Rudy *v.* Com., 35 Pa. St. 166, 78 Am. Dec. 330.

Texas.— Bryan *v.* Bridge, 6 Tex. 137.

England.— Mountney *v.* Andrews, Cro. Eliz. 237.

See 21 Cent. Dig. tit. "Execution," § 320 *et seq.*

(III) *PROPERTY OF JOINT DEFENDANTS.* Where an execution issues on a judgment against two or more joint defendants, or a principal and surety, and the execution is levied upon the property of one of the defendants or the principal, but nothing is realized under such levy, the fact of the former levy will not invalidate a subsequent levy upon and sale of the property of the other co-defendant or surety.[94]

j. Notice of Levy[95]— (I) *NECESSITY.* In some jurisdictions the judgment debtor is by statutory enactment entitled to notice of levy upon his property, and of the time fixed for the sale thereof.[96] In one jurisdiction the statute requires notice of levy to be given only where the property sought to be levied upon is situated in a county other than that of the residence of the judgment debtor, or than that from which the execution issued;[97] in another, notice of the levy is required to be given to the judgment debtor only when he is in actual occupation and possession of the property;[98] and in yet another jurisdiction, where the officer levies upon property of joint debtors in the possession of one of them, the

Consent of defendant in execution necessary.— It has been held in Illinois that where plaintiff has elected and made his levy, he has no power to release the levy and to have other property seized, unless it be with the consent of defendant in execution. Smith *v.* Hughes, 24 Ill. 270.

94. Starry *v.* Johnson, 32 Ind. 438; Jones *v.* Grant, 34 Miss. 592; Moss *v.* Craft, 10 Mo. 720; Godfrey *v.* Gibbons, 22 Wend. (N. Y.) 569.

95. Notice of appraisement see *infra*, VII, B, 7, m, (IV).

Notice of levy upon corporate stock see *supra*, VII, B, 7, e, (II), (D).

96. *Georgia.*— Estes *v.* Ivey, 53 Ga. 52.

Illinois.— Hobson *v.* McCambridge, 130 Ill. 367, 22 N. E. 823; Hamilton *v.* Quimby, 46 Ill. 90.

Louisiana.— Graff *v.* Moylan, 28 La. Ann. 75 (holding that one not served with notice of the seizure of his property is not affected by proceedings to obtain a forced sale thereof); Birch *v.* Bates, 22 La. Ann. 188; Mississippi M. & F. Ins. Co. *v.* State Bank, 11 Rob. 47 (holding that where a notice of seizure under fieri facias is illegal, the sale will be set aside); Lamorandier *v.* Meyer, 8 Rob. 152; Tompkins *v.* Stroud, 16 La. 274. See also Webb *v.* Coons, 11 La. Ann. 252; Labiche *v.* Lewis, 12 Rob. 8.

North Carolina.— Barden *v.* McKinne, 11 N. C. 279, 15 Am. Dec. 519.

Tennessee.— Hinson *v.* Hinson, 5 Sneed 322, 73 Am. Dec. 129; Lafferty *v.* Conn, 3 Sneed 221; Shultz *v.* Elliott, 11 Humphr. 183; Helms *v.* Alexander, 10 Humphr. 44.

Texas.— Sumner *v.* Crawford, (Civ. App. 1897) 41 S. W. 825. And *compare* Davis *v.* Jones, (Civ. App. 1903) 75 S. W. 63.

Reason of rule.— In McDonogh *v.* Garland, 7 La. Ann. 143, it was stated that the object of the notice required to be given to the judgment debtor of the seizure of his property under execution is to apprise him of what property the sheriff takes in execution and of what he claims to take possession by virtue of the seizure.

Land subject to a judgment lien.— It has been held under Cal. Code Civ. Proc. § 691, that in levying execution on land subject to the judgment lien, it is not necessary that the sheriff file a copy of the writ with the recorder of the county, a description of the property levied on, or a notice that it is levied on, as in the case of land attached. Lehnhardt *v.* Jennings, 119 Cal. 192, 48 Pac. 56, 51 Pac. 195.

Under Ky. St. § 58a, subs. 2, no execution or levy or sale thereunder shall affect the right of a subsequent purchaser of any land upon which such execution may have been levied, except from the time notice of such execution shall be filed in the office of the clerk of the court from which such execution issued. Park *v.* McReynolds, 111 Ky. 651, 64 S. W. 517, 23 Ky. L. Rep. 894.

Evidence of notice.— It was held in Ward *v.* Saunders, 28 N. C. 382, that the records of the court ordering the venditioni exponas are sufficient evidence of notice to defendant of the levy on land.

97. Smith *v.* Thompson, 169 Mo. 553, 69 S. W. 1049; Harness *v.* Cravens, 126 Mo. 233, 28 S. W. 971; Lohmann *v.* Stocke, 94 Mo. 672, 8 S. W. 9; Harper *v.* Hopper, 42 Mo. 124; Harris *v.* Chouteau, 37 Mo. 165. See also Young *v.* Schofield, 132 Mo. 650, 34 S. W. 497 (where a judgment was rendered in the county where defendant resided, on personal service of notice, and the execution was issued to, and levied on, defendant's land in another county, and it was held that he was entitled to notice of the levy); Duncan *v.* Matney, 29 Mo. 368, 77 Am. Dec. 575.

Where mortgaged land is sold under a special fieri facias notice of execution required to be given to a judgment debtor residing out of the county need not be given. Hobein *v.* Drewell, 20 Mo. 450; Hobein *v.* Murphy, 20 Mo. 447, 64 Am. Dec. 194.

98. Bennett *v.* Burton, 44 Iowa 550; Babcock *v.* Gurney, 42 Iowa 154; Fleming *v.* Maddox, 30 Iowa 239 (holding that one who erects a sawmill on land and has male employees residing thereon, although himself absent and residing in another county, is "in actual possession" and "occupation" of the land within the meaning of Iowa St. (1860) § 3318, entitling such persons to written notice of levy); Jansen *v.* Woodbury, 16 Iowa 515.

statute requires him to notify the other joint debtors of such levy, and a sale without such notification is invalid.[99] However, the better doctrine is that the failure of the officer to give personal notice of the levy to the judgment debtor, where so required by statute, is a mere irregularity and does not render the sale made thereunder void.[1]

(II) *SERVICE.* Under statutes requiring service of notice of the levy upon the judgment debtor, it has been usually held that this service must be upon the judgment debtor personally, or his authorized agent.[2]

(III) *WAIVER.* The statutory notice required to be given to the judgment debtor is for his benefit exclusively, and may be waived by him without prejudicing the rights of a purchaser or vitiating his title.[3] Waiver of notice on the part of the judgment debtor will be presumed from various overt acts, such as the execution of a forthcoming bond,[4] the appearance of the judgment debtor in person or by agent at the sale and bidding upon the property,[5] or where the judgment debtor voluntarily points out property for levy.[6]

k. Entry or Indorsement of Levy[7] — (I) *NECESSITY.* In a majority of jurisdictions the officer is required to indorse or enter upon the writ an inventory of the property seized, or at least a memorandum of the levy, at the time thereof, or within a reasonable time thereafter, and he will be held liable for any loss resulting from his failure to do so;[8] several jurisdictions extend this rule so far as

99. Williams *v.* Smith, 4 Bush (Ky.) 540; Payne *v.* Pollard, 3 Bush (Ky.) 127.

1. *Alabama.*—White *v.* Farley, 81 Ala. 563, 8 So. 215; Love *v.* Powell, 5 Ala. 58. See also Ware *v.* Bradford, 2 Ala. 676, 36 Am. Dec. 427.

Georgia.— Cox *v.* Montford, 66 Ga. 62; Solomon *v.* Peters, 37 Ga. 251, 92 Am. Dec. 69.

Illinois.— Rock *v.* Haas, 110 Ill. 528; Gardner *v.* Eberhart, 82 Ill. 316.

Indiana.— Guerin *v.* Kraner, 97 Ind. 533.

Maryland.— See State *v.* Boulden, 57 Md. 314, holding that there is nothing in the Maryland statute in regard to execution requiring the officer to notify the judgment debtor of the execution and levy.

Vermont.— Collins *v.* Perkins, 31 Vt. 624.

Washington.— See Byrd *v.* Forbes, 3 Wash. Terr. 318, 13 Pac. 715.

See 21 Cent. Dig. tit. "Execution," § 325.

2. Lapene *v.* McCan, 28 La. Ann. 749 (holding that where judgment is against two defendants *in solido*, and partnership property is seized to satisfy the same, notice served on one party is not available as against the other; each must be notified); McCalop *v.* Fluker, 12 La. Ann. 551 (holding that where notice of an order of seizure and sale is given to defendant as executrix, she having full authority as such to represent the estate in the proceeding, her qualifying as administratrix did not render it necessary that she should be notified in this latter capacity also); Ball *v.* Crockett, 9 La. Ann. 293; Lockhart *v.* Harrell, 6 La. Ann. 530 (holding that notice of seizure on execution must be given to the judgment debtor himself when he is within the state, and notice to his attorney is insufficient); Walker *v.* Allen, 19 La. 307; Lafferty *v.* Conn, 3 Sneed (Tenn.) 221 (holding that notice of levy must be served on defendant himself and not on "the tenants" or "a woman with whom defendant had been living"). See, however, White *v.* Chesnut, 11 Humphr. (Tenn.) 79, holding that personal service is not necessary, and that it is sufficient for the officer to leave a written notice at the house of defendant.

Notice to executor or administrator.— It has been held in Massachusetts that where an execution against the property of one deceased is levied on an equity of redemption, the notice required by statute must be given to the executor or administrator of the deceased or his legal representative, and not to his heirs. Atkins *v.* Sawyer, 1 Pick. (Mass.) 351, 11 Am. Dec. 188. However, it has been held in North Carolina that where the party is dead at the time of the levy on his lands under execution, the notice to his heirs is as effectual as if given to the party himself when living. Parish *v.* Turner, 27 N. C. 279.

If the debtor conceals himself, besides service on the *curator ad hoc* appointed to represent him in the selection of an appraiser on execution, notice should also be left at the place where defendant last resided. Farrell *v.* Klumpp, 13 La. Ann. 311.

Where defendant resides out of the state, notice by the sheriff of the levy and inquisition to the tenant residing on the premises is sufficient. Evans *v.* Sidwell, 9 Lanc. Bar (Pa.) 113.

3. McDonogh *v.* Garland, 7 La. Ann. 143; Lockhart *v.* Harrell, 6 La. Ann. 530, holding, however, that parol proof of waiver should not be admitted.

4. Williams *v.* Smith, 4 Bush (Ky.) 540.

5. Walker *v.* Allen, 19 La. 307.

6. Hewitt *v.* Stephens, 5 La. Ann. 640.

7. **Record of writ and return** see *infra*, XI.

8. *Alabama.*— Toulmin *v.* Lesesne, 2 Ala. 359.

Illinois.— Davidson *v.* Waldron, 31 Ill. 120, 83 Am. Dec. 206; Douglas *v.* Whiting, 28 Ill. 362.

Kentucky.— Com. *v.* Hurt, 4 Bush 64; Mc-

to hold that a levy on realty is not complete or valid until the indorsement thereof has been made on the writ.[9]

(II) *SUFFICIENCY*—(A) *Real Property*—(1) DESCRIPTION OF LAND—(a) IN GENERAL. Where an officer levies upon real estate, his indorsement upon the writ should describe the land levied upon with a sufficient degree of certainty to enable every person to know what property has been taken by virtue of the writ.[10]

Burnie *v.* Overstreet, 8 B. Mon. 300; Randall *v.* Ewell, 55 S. W. 552, 21 Ky. L. Rep. 1425; Demint *v.* Ringo, 5 Ky. L. Rep. 514; Greer *v.* Howard, 4 Ky. L. Rep. 350.

Michigan.— Vroman *v.* Thompson, 51 Mich. 452, 16 N. W. 808.

Minnesota.— Hutchins *v.* Carver County Com'rs, 16 Minn. 13.

Pennsylvania.— Lynch *v.* Waters, 6 Luz. Leg. Reg. 39, holding that, although an indorsement on an execution is not a levy but only evidence thereof, it should be made at once, to show that the levy was made in the lifetime of the writ and of the debtor. See, however, Weidensaul *v.* Reynolds, 49 Pa. St. 73, holding that there is nothing in the Pennsylvania statute which requires the sheriff to indorse upon a writ of fieri facias a schedule of the personal property upon which he has made a levy under it, nor is there any rule of common law that imposes on him such a duty.

South Carolina.— Kennedy *v.* Roundtree, 59 S. C. 324, 37 S. E. 942, 82 Am. St. Rep. 841.

See 21 Cent. Dig. tit. "Execution," § 330.

Defect in the omission of indorsement cured by return.— Herr *v.* Broadwell, 5 Colo. App. 467, 39 Pac. 70.

Entry on one of several writs has been deemed sufficient. Maddox *v.* Sullivan, 2 Rich. Eq. (S. C.) 4, 44 Am. Dec. 234.

9. Isam *v.* Hooks, 46 Ga. 309; Redlick *v.* Williams, (Tex. Sup. 1887) 5 S. W. 375; Sanger *v.* Trammell, 66 Tex. 361, 1 S. W. 378. See also Davis *v.* Harnbell, (Tex. Civ. App. 1894) 24 S. W. 972, holding, however, that failure of the officer to indorse a levy on the writ cannot affect the rights of the purchaser at the sale when it is attacked collaterally.

10. Illustrations of sufficient descriptions see the following cases:

Delaware.— Doe *v.* Kollock, 3 Houst. 326.

Georgia.— Elwell *v.* New England Mortg. Security Co., 101 Ga. 496, 28 S. E. 833; Belk *v.* Estes, 82 Ga. 238, 8 S. E. 867; Phillips *v.* White, 66 Ga. 753; Longworthy *v.* Featherston, 65 Ga. 165; Smith *v.* Outlaw, 64 Ga. 677; Few *v.* Walton, 62 Ga. 447; Scolly *v.* Butler, 59 Ga. 849; Oatis *v.* Brown, 59 Ga. 711.

Illinois.— Hill *v.* Blackwelder, 113 Ill. 283.

Iowa.— McCormick *v.* McCormick Harvesting Mach. Co., 120 Iowa 593, 95 N. W. 181.

Kentucky.— Holcomb *v.* Hays, 62 S. W. 1028, 23 Ky. L. Rep. 352; Sayers *v.* Hahn, 5 Ky. L. Rep. 319; Watson *v.* Turner, 5 Ky. L. Rep. 245.

Louisiana.— Henderson *v.* Hoy, 26 La. Ann. 156.

Maine.— Jones *v.* Buck, 54 Me. 301; Grover *v.* Howard, 31 Me. 546; Rollins *v.* Mooers, 25 Me. 192; Wing *v.* Burgis, 13 Me. 111.

Michigan.—Hoffman *v.* Buschman, 95 Mich. 538, 55 N. W. 458.

Missouri.— Rector *v.* Hartt, 8 Mo. 448, 41 Am. Dec. 650. See also Barber Asphalt Pav. Co. *v.* Kiene, 99 Mo. App. 528, 74 S. W. 872.

New Jersey.— Canfield *v.* Browning, 69 N. J. L. 553, 55 Atl. 101.

North Carolina.— Hilliard *v.* Phillips, 81 N. C. 99; Pemberton *v.* McRae, 75 N. C. 497; Den *v.* Paul, 27 N. C. 22; Den *v.* Ketchum, 20 N. C. 550.

Pennsylvania.— Wildasin *v.* Bare, 171 Pa. St. 387, 33 Atl. 365; St. Clair *v.* Shale, 20 Pa. St. 105; Inman *v.* Kutz, 10 Watts 90; Hyskill *v.* Givin, 7 Serg. & R. 369.

South Carolina.— Sartor *v.* McJunkin, 8 Rich. 451; Bratton *v.* Garrison, 2 Rich. 146.

Tennessee.— Christian *v.* Mynatt, 11 Lea 615; Davis *v.* Goforth, 1 Lea 31; Easley *v.* McLaren, 1 Baxt. 1; Trotter *v.* Nelson, 1 Swan 7; Wright *v.* Watson, 11 Humphr. 529; Parker *v.* Swan, 1 Humphr. 80, 34 Am. Dec. 619; Vance *v.* McNairy, 3 Yerg. 171, 24 Am. Dec. 553.

Texas.— Bludworth *v.* Poole, 21 Tex. Civ. App. 551, 53 S. W. 717; Brown *v.* Elmendorf, (Civ. App. 1894) 25 S. W. 145.

See 21 Cent. Dig. tit. "Execution," § 334.

Illustrations of insufficient descriptions see the following cases:

Georgia.— Bird *v.* Burgsteiner, 100 Ga. 486, 28 S. E. 219; Brinson *v.* Lassiter, 81 Ga. 40, 6 S. E. 468; Thomas *v.* Dockins, 75 Ga. 347; Collins *v.* Dixon, 72 Ga. 475; Brown *v.* Moughon, 70 Ga. 756; Overby *v.* Hart, 68 Ga. 493; Osborn *v.* Elder, 65 Ga. 360; Williams *v.* Hart, 65 Ga. 201; Anderson *v.* Lee, 53 Ga. 189.

Illinois.— Stout *v.* Cook, 37 Ill. 283; Fitch *v.* Pinckard, 5 Ill. 69.

Kentucky.— Meade *v.* Wright, 56 S. W. 523, 21 Ky. L. Rep. 1806; Humpich *v.* Drake, 44 S. W. 632, 19 Ky. L. Rep. 1782; Johnson *v.* Rowe, 1 Ky. L. Rep. 274.

Maine.— Forbes *v.* Hall, 51 Me. 568; Chadbourne *v.* Mason, 48 Me. 389.

Maryland.— Langley *v.* Jones, 33 Md. 171; Dorsey *v.* Dorsey, 28 Md. 388; Clarke *v.* Belmear, 1 Gill & J. 443; Williamson *v.* Perkins, 1 Harr. & J. 449.

Massachusetts.— Nye *v.* Drake, 9 Pick. 35.

Michigan.— Burrowes *v.* Gibson, 42 Mich. 121, 3 N. W. 293.

Missouri.— Henry *v.* Mitchell, 32 Mo. 512.

New Hampshire.—Smith *v.* Smith, 66 N. H. 611, 27 Atl. 222.

North Carolina.— Chasteen *v.* Phillips, 49 N. C. 459, 69 Am. Dec. 760; Den *v.* Hooks,

A defective description of certain tracts of land indorsed on the writ will not vitiate the levy with regard to such tracts as are fully and properly described in the indorsement.[11]

(b) Boundaries. When some particulars of a boundary line of land levied upon are erroneously recited in the indorsement on the writ, and yet from the whole description the premises levied on can be definitely ascertained, the levy is valid.[12]

(c) Reference to Other Instruments. The doctrine is universally recognized that an indorsement upon a writ which describes the land levied upon in general terms and refers for a more accurate description to a public record is sufficient.[13]

(2) Interest of Debtor Therein. It is the duty of the officer, in levying on the interest of a judgment debtor in real property, to designate in his indorsement on the writ the nature of the right and the interest of the judgment debtor in the property.[14]

33 N. C. 373; Den *v.* Peden, 32 N. C. 466; Den *v.* Ketchum, 20 N. C. 550; Borden *v.* Smith, 20 N. C. 27.

South Carolina.— Tyler *v.* Williams, 53 S. C. 367, 31 S. E. 298.

Tennessee.— Lafferty *v.* Conn, 3 Sneed 221; Brigance *v.* Erwin, 1 Swan 375, 57 Am. Dec. 779; Helms *v.* Alexander, 10 Humphr. 44; Huddleston *v.* Garrott, 3 Humphr. 629; Brown *v.* Dickson, 2 Humphr. 395, 37 Am. Dec. 560; Pound *v.* Pullen, 3 Yerg. 338.

Texas.— Wooters *v.* Arledge, 54 Tex. 395; Union Baptist Assoc. *v.* Hunn, 7 Tex. Civ. App. 249, 26 S. W. 755.

United States.— Gault *v.* Woodbridge, 10 Fed. Cas. No. 5,275, 4 McLean 329.

See 21 Cent. Dig. tit. "Execution," § 334.

Insufficiency of description of improvements on lands has been held in Pennsylvania not to invalidate the levy. Donaldson *v.* Danville Bank, 20 Pa. St. 245.

11. Cleveland *v.* Allen, 4 Vt. 176.

12. Boggess *v.* Lowrey, 78 Ga. 539, 3 S. E. 771, 6 Am. St. Rep. 279 (where the land was correctly described in the levy by metes and bounds and by mentioning the adjacent landed proprietors, but in giving the number of the district a mistake was made, and it was held that the sheriff would not be enjoined from executing the process on that ground, the land being capable of ready identification notwithstanding such mistake); Forbes *v.* Hall, 51 Me. 568; Stephens *v.* Taylor, 6 Lea (Tenn.) 307 (where, on the trial of an action of ejectment, the judge charged that a levy "that leaves one of the boundaries unin-closed and not capable of being determined, would be void for uncertainty," and on appeal this charge was held to be erroneous for the reason that, three sides being given, the fourth must necessarily be determined); Gibbs *v.* Thompson, 7 Humphr. (Tenn.) 179 (holding that the return of an execution which gives a sufficient description of the property to enable the purchaser to know what land is to be sold, so as to form an estimate of its value, and identifies it sufficiently to prevent one piece of land from being sold and another conveyed, is sufficient); Barnard *v.* Russell, 19 Vt. 334. But see Stevenson *v.* Fuller, 75 Me. 324.

Reforming description.— Where land on which execution was levied was described in the levy as commencing at the "southeast corner" of a certain lot, which statement was inconsistent with the other parts of the description and with references to monuments, it was held that the court would substitute the word "southwest" for "southeast" if by so doing all the parts of the description could be harmonized. Warren *v.* Ireland, 29 Me. 62.

13. *Georgia.*— Conley *v.* Redwine, 109 Ga. 640, 35 S. E. 92, 77 Am. St. Rep. 398; Cedardown Land Imp. Co. *v.* Cherokee Land, etc., Co., 99 Ga. 122, 24 S. E. 983; Wiggins *v.* Gillette, 93 Ga. 20, 19 S. E. 86, 44 Am. St. Rep. 123 (where the survey referred to in indorsement had never been recorded); Sears *v.* Bagwell, 69 Ga. 429. See also Solomon *v.* Breazeal, 27 Ga. 200.

Kentucky.— Crume *v.* Spaulding, 6 Ky. L. Rep. 295.

Massachusetts.— Allen *v.* Taft, 6 Gray 552 (holding that the levy of an execution on real estate may refer for particulars to the description to a will recorded in the registry of probate); Bates *v.* Willard, 10 Metc. 62; Jenks *v.* Ward, 4 Metc. 404.

New York.— See Candee *v.* Burke, 1 Hun 546.

Vermont.— Hyde *v.* Barney, 17 Vt. 280, 44 Am. Dec. 335; Gilman *v.* Thompson, 11 Vt. 643, 34 Am. Dec. 714.

See 21 Cent. Dig. tit. "Execution," § 336.

Reference to newspaper advertisement held void for uncertainty see Taylor *v.* Cozart, 4 Humphr. (Tenn.) 433, 40 Am. Dec. 655.

14. *Georgia.*— Bird *v.* Burgsteiner, 100 Ga. 486, 28 S. E. 219; Williams *v.* Baynes, 84 Ga. 116, 10 S. E. 541, where a levy on "a certain and all the interest" of a judgment debtor in land, and sale and conveyance accordingly, was held to pass nothing, the levy being void for uncertainty.

Kentucky.— Wickliffe *v.* Bascom, 7 B. Mon. 681. See, however, Brace *v.* Shaw, 16 B. Mon. 43.

Maine.— Chase *v.* Williams, 71 Me. 190 (holding that there is no imperative necessity for reciting in the indorsement that the estate levied upon is held in joint tenancy and not in common, yet the whole estate should be described and the share of it owned

(B) *Personal Property.* While in a majority of jurisdictions a failure to indorse on the writ a description of the personal property levied on thereunder will not invalidate the levy, yet in cases where the property is not taken immediately into actual custody by the officer he should indorse on the writ a list or description of the property, so that it be readily identified.[15]

(C) *Signature.* In the absence of express statutory provision, the omission of the signature of the officer from his indorsement made on the writ is a mere irregularity and not fatal to the levy, and the officer may amend the indorsement by adding his signature thereafter.[16]

(III) *TIME OF.* In the absence of a statute it is not necessary that the indorsement on the writ should be made on the date of the levy, and it is sufficient if such indorsement be made at any time before the return-day of the writ.[17]

(IV) *AMENDMENT.* After the return-day of the writ[18] the better doctrine seems to be that amendment can only be had by leave of the court. However, the court will usually upon proper motion allow such amendment to be made *nunc pro tunc.*[19]

by the debtor and levied on should be set forth); Rawson *v.* Lowell, 34 Me. 201.

Maryland.— Murphy *v.* Cord, 12 Gill & J. 182.

Texas.— See Smith *v.* Crosby, 4 Tex. Civ. App. 251, 22 S. W. 1042.

See 21 Cent. Dig. tit. "Execution," § 337.

The description of the wrong mortgage in the levy on an equity of redemption vitiates the levy, as at the auction sale of the equity the public may be misled. Bartlett *v.* Gilcreast, 72 N. H. 145, 55 Atl. 189.

Where an execution against several defendants is levied on certain lands, and the entry of levy does not show as whose property the land was levied on, a sale and deed made under such levy will not divest the real owner of title to the land. Cooper *v.* Yearwood, 119 Ga. 44, 45 S. E. 716.

15. Illustrations of sufficient descriptions see the following cases:

Georgia.— Crine *v.* Tifts, 65 Ga. 644.

Illinois.— Pierce *v.* Roche, 40 Ill. 292.

Indiana.— Zug *v.* Laughlin, 23 Ind. 170.

Michigan.— Perkins *v.* Spaulding, 2 Mich. 157.

Missouri.— Gaty *v.* Garrison, 14 Mo. 33.

New Jersey.—Caldwell *v.* Fifield, 24 N. J. L. 150; Lloyd *v.* Wyckoff, 11 N. J. L. 218.

Ohio.— Morgan *v.* Spangler, 14 Ohio St. 102.

Pennsylvania.— Braden's Estate, 165 Pa. St. 184, 30 Atl. 746; Conniff *v.* Doyle, 8 Phila. 630.

United States.— Wilder *v.* Kent, 15 Fed. 217.

See 21 Cent. Dig. tit. "Execution," § 338.

Illustrations of insufficient descriptions see the following cases:

Georgia.— Gunn *v.* Jones, 67 Ga. 398. See also Tillman *v.* Fontaine, 98 Ga. 672, 27 S. E. 149.

Illinois.— Davidson *v.* Waldron, 31 Ill. 120, 83 Am. Dec. 206.

Iowa.— Payne *v.* Billingham, 10 Iowa 360.

North Carolina.— Knight *v.* Leak, 19 N. C. 133.

South Carolina.— Tyler *v.* Williams, 53 S. C. 367, 31 S. E. 298.

Virginia.— Eckhols *v.* Graham, 1 Call 492.

See 21 Cent. Dig. tit. "Execution," § 338.

16. Sharp *v.* Kennedy, 50 Ga. 208; People *v.* Goss, etc., Mfg. Co., 99 Ill. 355 [*reversing* 4 Ill. App. 510]; Miller *v.* Alexander, 13 Tex. 497, 65 Am. Dec. 73 (holding that there is no necessity for the indorsement of the levy being signed separately from the return); Howard *v.* North, 5 Tex. 290, 51 Am. Dec. 769. See also Cox *v.* Montford, 66 Ga. 62.

17. Demint *v.* Thompson, 80 Ky. 255, 3 Ky. L. Rep. 778; Duncan *v.* Matney, 29 Mo. 368, 77 Am. Dec. 575; Kightlinger's Appeal, 101 Pa. St. 540 (holding that the indorsement of the fact of levy on a writ was not invalid because not dated, if the time of levy can be otherwise sufficiently ascertained); Nighbert *v.* Hornsby, 100 Tenn. 82, 42 S. W. 1060, 66 Am. St. Rep. 736. See also Solomon *v.* Harp, 99 Ga. 238, 25 S. E. 402; Scott *v.* Scott, 85 Ky. 385, 3 S. W. 598, 5 S. W. 423, 9 Ky. L. Rep. 363. See, however, Barden *v.* McKinne, 11 N. C. 279, 15 Am. Dec. 519.

18. Previous to the return-day of the writ the general rule is that the officer may at any time amend or change his indorsement made thereon, so as to make it conform to the actual levy. Hollis *v.* Rodgers, 106 Ga. 13, 31 S. E. 783; Nelson *v.* Cook, 19 Ill. 440; Miller *v.* Alexander, 13 Tex. 497, 65 Am. Dec. 73.

Where a sheriff dies after making a defective levy, his successor, who was his deputy when the levy was made, cannot amend it. Hudspeth *v.* Scarborough, 69 Ga. 777.

19. *Georgia.*— Williams *v.* Moore, 68 Ga. 585; Gwinn *v.* Smith, 55 Ga. 145; Gorham *v.* Hood, 27 Ga. 299; Hopkins *v.* Burch, 3 Ga. 222.

Missouri.— Phillips *v.* Evans, 64 Mo. 17.

North Carolina.— Stancill *v.* Branch, 61 N. C. 217.

Pennsylvania.— Donaldson *v.* Danville Bank, 20 Pa. St. 245.

South Carolina.— Sartor *v.* McJunkin, 8 Rich. 451.

See 21 Cent. Dig. tit. "Execution," § 341.

(v) *Conclusiveness.* The indorsement made upon the writ of execution by the officer is *prima facie* evidence of the levy therein recited.[20]

l. Inventory — (i) *In General.* The rule is laid down in some of the cases that it is the duty of the officer levying upon personal property of a judgment debtor to make an inventory of the goods and chattels levied on.[21] In many jurisdictions, however, it is held that the failure of the officer to make an inventory of the goods levied upon will not invalidate the levy, but will only render the officer liable for any damages resulting from his failure to perform his duty.[22]

(ii) *Where Part of Property Is Exempt.* The rule has been laid down that in levying upon property of a judgment debtor, of which a certain amount is exempt by statute, failure to make the inventory required by statute, and to allow the judgment debtor to select from the property the amount so exempted, will invalidate the levy;[23] but where none of the property levied upon is included in the statutory exemption, a failure of the officer to make an inventory will not invalidate the levy.[24]

m. Appraisement[25] — (i) *Necessity of* — (a) *Real Property* — (1) General Rule. In many jurisdictions, by statutory enactment, where real estate of a judgment debtor has been levied upon by virtue of a writ of execution, such property must be appraised prior to a sale thereof, in order to ascertain the true value of the property and to protect it from a sale disproportionate to such ascertained value;[26] and a sale on execution without appraisement, where the statute

20. Cornell *v.* Cook, 7 Cow. (N. Y.) 310; Hill *v.* Grant, 49 Pa. St. 200; Lawrence *v.* Wofford, 17 S. C. 586.

21. Lloyd *v.* Wyckoff, 11 N. J. L. 218; Wintermute *v.* Hankinson, 6 N. J. L. 140; Hustick *v.* Allen, 1 N. J. L. 168; Bond *v.* Willett, 31 N. Y. 102, 1 Abb. Dec. (N. Y.) 165, 1 Keyes (N. Y.) 377, 29 How. Pr. (N. Y.) 47; Beekman *v.* Lansing, 3 Wend. (N. Y.) 446, 20 Am. Dec. 707; Haggerty *v.* Wilbur, 16 Johns. (N. Y.) 287, 8 Am. Dec. 321; Randall's Case, 5 City Hall Rec. (N. Y.) 141; Wood *v.* Vanarsdale, 3 Rawle (Pa.) 401, holding that the inventory need only be made within a reasonable time after the levy.

Lost inventory.— It was held in Gam *v.* Cain, 2 Marv. (Del.) 182, 42 Atl. 447, that where a verified copy of a lost inventory and appraisement satisfactorily appeared to be exact, it might be substituted for the lost original.

22. *Alabama.*— Toulmin *v.* Lesesne, 2 Ala. 359.

New Jersey.—Delaney *v.* Martin, 51 N. J. L. 148, 16 Atl. 189.

New York.— Roth *v.* Wells, 29 N. Y. 471; Watts *v.* Cleaveland, 3 E. D. Smith 553.

Ohio.— Pugh *v.* Calloway, 10 Ohio St. 488.

Pennsylvania.— Weidensaul *v.* Reynolds, 49 Pa. St. 73.

See 21 Cent. Dig. tit. "Execution," § 342.

Levy on joint property.— It was held in Jones *v.* Martin, 5 Ky. L. Rep. 227, that where the sheriff fails to inventory and appraise personal property jointly owned by the debtor and another, levied on under Ky. Civ. Code, § 660, and to return the inventory and appraisement with the execution as required thereby, the creditor is entitled to the lien thereon provided for by that section, but that a sale thereunder is void. See also Richart *v.* Goodpaster, 76 S. W. 831, 25 Ky. L. Rep. 889.

23. Town *v.* Elmore, 38 Mich. 305.

24. Ferguson *v.* Washer, 49 Mich. 390, 13 N. W. 788. See, generally, Exemptions.

25. Appraisement of exemption see Exemptions; Homesteads.

26. *Delaware.*— Robinson *v.* Tunnell, 2 Houst. 138.

Indiana.— Milburn *v.* Phillips, 136 Ind. 680, 34 N. E. 983, 36 N. E. 360; Scheffermeyer *v.* Schaper, 97 Ind. 70; Davis *v.* Campbell, 12 Ind. 192; Doe *v.* Collins, 1 Ind. 24.

Iowa.— Sprott *v.* Reid, 3 Greene 489, 56 Am. Dec. 549. See also Brown *v.* Butters, 40 Iowa 544.

Kansas.— De Jarnette *v.* Verner, 40 Kan. 224, 19 Pac. 666; Hefferlin *v.* Sinsinderfer, 2 Kan. 401, 85 Am. Dec. 593.

Kentucky.— Tobin *v.* Helm, 4 J. J. Marsh. 288.

Maine.— Darling *v.* Rollins, 18 Me. 405.

Nebraska.— Reuland *v.* Waugh, 52 Nebr. 358, 72 N. W. 481; Broken Bow First Nat. Bank *v.* Hamer, 51 Nebr. 23, 70 N. W. 497; Burkett *v.* Clark, 46 Nebr. 466, 64 N. W. 1113.

Pennsylvania.— Myers *v.* Com., 34 Pa. St. 270; McLaughlin *v.* Shields, 12 Pa. St. 283 (holding that the want of an inquisition is not cured by showing that the land was held adversely to the title of defendant in execution); Baird *v.* Lent, 8 Watts 422 (holding that a sale under execution of a vendee's interest in a contract for the purchase of land was void unless there had been an inquisition or a waiver of it); Naples *v.* Minier, 3 Penr. & W. 475 (holding that under a fieri facias an inquisition must be held on lands, even though they are mortgaged).

Texas.— Ayres *v.* Duprey, 27 Tex. 593, 86 Am. Dec. 657; Catlin *v.* Munger, 1 Tex. 598.

United States.— Gantley *v.* Ewing, 3 How. 707, 11 L. ed. 794.

See 21 Cent. Dig. tit. "Execution," § 343.

requires an appraisement, is void, unless the judgment under which the execution issues so directs.[27]

(2) ESTATES OF UNCERTAIN DURATION. In several jurisdictions the rule is laid down that where estates of uncertain duration, such as estates for life and contingent interests, are levied upon, no inquisition or condemnation is necessary to validate the sale thereunder.[28]

(3) PROPERTY FRAUDULENTLY CONVEYED. In some jurisdictions, by statutory enactment, real estate which the debtor has conveyed or caused to be conveyed, with intent to defraud his creditors, may be sold under execution without an appraisement, although the original judgment and execution did not so provide.[29]

(B) *Personal Property.* In a few states, by force of statute, personal property levied upon and advertised for sale on execution must be duly appraised before sale.[30]

(II) *WHAT STATUTE GOVERNS.* The rule seems to be well settled in some states that the statute in force at the date of a contract on which judgment has been rendered will govern as to the necessity and method of appraisement of property levied upon under execution issued on such judgment;[31] but where it does not appear when the contract on which a judgment is obtained was made,

See, however, Brown *v.* Bemiss, 2 La. Ann. 365, holding that where an undivided half of land was seized under execution, the owner of the other half, claiming a lien on the entire tract for a levee constructed thereon, was not entitled to an appraisement before sale. Such appraisement should be made afterward.

In a sale on twelve months' credit, as the property is to be sold for whatever it will bring, an appraisement is immaterial. Fink *v.* Lallande, 16 La. 547.

Unimproved lands.— It was held in Roads *v.* Symmes, 1 Ohio 281, 13 Am. Dec. 621, that the statute of 1795 did not require an inquisition to be held on unimproved lands to be sold on execution. Dwinel *v.* Soper, 32 Me. 119, 52 Am. Dec. 643.

If an inquisition has been held on one fieri facias, and the land condemned, another judgment creditor may take out a venditioni exponas and sell without a new inquisition. McCormick *v.* Meason, 1 Serg. & R. (Pa.) 92.

Redemption by junior judgment creditor.— It has been held under Ind. Acts (1879), p. 176, that where a junior judgment creditor, after redeeming from a sale under a prior judgment, has sued out execution and levied upon the property redeemed, the officer is not bound to make an appraisement of rents and profits in order to validate the sale. Taylor *v.* Morgan, 95 Ind. 456.

27. *Indiana.*— Stotsenburg *v.* Stotsenburg, 75 Ind. 538 (holding that a sale under such circumstances is voidable if not void); Reily *v.* Burton, 71 Ind. 118; Tyler *v.* Wilkenson, 27 Ind. 450; Fletcher *v.* Holmes, 25 Ind. 458; Evans *v.* Ashby, 22 Ind. 15; Indiana Cent. R. Co. *v.* Bradley, 15 Ind. 23.

Iowa.— Maple *v.* Nelson, 31 Iowa 322.

Kansas.— De Jarnette *v.* Verner, 40 Kan. 224, 19 Pac. 666; Capitol Bank *v.* Huntoon, 35 Kan. 577, 11 Pac. 369.

Ohio.— Patrick *v.* Oosterhout, 1 Ohio 27.

Pennsylvania.— Gardner *v.* Sisk, 54 Pa. St. 506; Wray *v.* Miller, 20 Pa. St. 111.

United States.— Smith *v.* Cockrill, 6 Wall. 756, 18 L. ed. 973.

See 21 Cent. Dig. tit. "Execution," § 343.

28. Stewart *v.* Kenower, 7 Watts & S. (Pa.) 288; Howell *v.* Woolfort, 2 Dall. (Pa.) 75, 1 L. ed. 295. See also Kern *v.* Murphy, 2 Miles (Pa.) 157.

29. Milburn *v.* Phillips, 136 Ind. 680, 34 N. E. 983, 36 N. E. 360; Mugge *v.* Helgemeier, 81 Ind. 120. See also Robinson *v.* Bush, 17 Ind. 517, where three judgments were simultaneously rendered and executions on all of them were placed in the hands of the sheriff at the same time, one subject to appraisement, and the other two, by direction of the judgments, not so subject, and sale of the land was had without appraisement and proceeds applied in full satisfaction of all the executions, and it was held that the sale was valid.

30. *Iowa.*— Minneapolis Threshing Mach. Co. *v.* Beck, 95 Iowa 725, 64 N. W. 637. See also Maple *v.* Nelson, 31 Iowa 322.

Louisiana.— Stockton *v.* Standrough, 3 La. Ann. 390; Hilligsberg's Succession, 1 La. Ann. 340; Phelps *v.* Rightor, 9 Rob. 531.

Pennsylvania.— Frisch *v.* Miller, 5 Pa. St. 310.

Texas.— Robinson *v.* Perry, 4 Tex. 273; Catlin *v.* Munger, 1 Tex. 598.

United States.— Collier *v.* Standrough, 6 How. 14, 12 L. ed. 324 [*affirming* 6 Rob. (La.) 230].

See 21 Cent. Dig. tit. "Execution," § 343.

Goods claimed by third party.— Under the Pennsylvania statute, where goods seized under execution are claimed by a third person, they must be duly appraised, and the appraised value thus ascertained shall be *prima facie* evidence of their real value in any proceedings touching the ownership of said goods. Boginski *v.* Toholski, 21 Pa. Co. Ct. 531.

31. Rawley *v.* Hooker, 21 Ind. 144; Law *v.* Smith, 4 Ind. 56; Tevis *v.* Doe, 3 Ind. 129; Doe *v.* Craft, 2 Ind. 359; Landis *v.* Abrahams, 11 Iowa 284; Rosier *v.* Hale, 10 Iowa 470,

the appraisement law in force at the date of the rendition of such judgment must control.[32]

(III) *Waiver*—(A) *General Rule.* The rule is generally recognized that the judgment debtor, for whose benefit appraisement clauses are usually included in statutes prescribing the mode of execution, may at his option legally waive the right of having his property appraised before sale under the execution.[33]

(B) *Where Debtor Has Parted With Title.* Where the judgment debtor has previously parted with his interest in the premises levied on, subject to the lien of the judgment, a waiver of appraisement by such judgment debtor is of no effect, and a sale of the property without appraisement confers no title on the purchaser.[34]

(C) *How Evidenced.* The judgment debtor's exercise of the waiver of his right to have his property appraised may be evidenced by his expressly authorizing it in writing, and it is frequently incorporated in the contract by which the debt on which the judgment is based is created,[35] or constructively by his acquiescence in the sale of the property by the officer, of which he has full notice; the latter on the ground of estoppel.[36]

77 Am. Dec. 127; Hefferlin *v.* Sinsinderfer, 2 Kan. 401, 85 Am. Dec. 593 (holding that an execution under a judgment on a note executed in Missouri is not subject to the Kansas appraisement law passed subsequent to the execution of the note, but prior to the judgment thereon, as the note was a Missouri contract); Robinson *v.* Perry, 4 Tex. 273.

32. Indiana Cent. R. Co. *v.* Bradley, 15 Ind. 23; Morss *v.* Doe, 2 Ind. 65; Hunt *v.* Gregg, 8 Blackf. (Ind.) 105. See also Hutchins *v.* Barnett, 19 Ind. 15; Babcock *v.* Doe, 8 Ind. 110; Doe *v.* Collins, Smith (Ind.) 58. See, however, Sprott *v.* Reid, 3 Greene (Iowa) 489, 56 Am. Dec. 549.

33. Stockwell *v.* Byrne, 22 Ind. 6; Harris *v.* Makepeace, 13 Ind. 560 (holding that if a note is mortgaged or executed, the latter containing a waiver clause and the former not, the mortgaged property may be sold under execution without benefit of appraisement); Minneapolis Threshing Mach. Co. *v.* Beck, 95 Iowa 725, 64 N. W. 637 (holding that under Iowa Code (1873), § 3100, providing that "personal property levied upon and advertised for sale on execution must be appraised before sale," etc., such appraisement cannot be waived); Jouet *v.* Mortimer, 29 La. Ann. 206; New Orleans Ins. Co. *v.* Bagley, 19 La. Ann. 89; Desplate *v.* St. Martin, 17 La. Ann. 91; Albright *v.* Lehigh Coal, etc., Co., 203 Pa. St. 65, 52 Atl. 33; Bennett *v.* Fulmer, 49 Pa. St. 155 (holding that an administrator, who appeared to a scire facias for the revival of a judgment obtained against his decedent in his lifetime and confessed judgment, may waive an inquisition on an execution on the judgment confessed); Bowyer's Appeal, 21 Pa. St. 210; Wray *v.* Miller, 20 Pa. St. 111; Crowell *v.* Meconkey, 5 Pa. St. 168; Building, etc., Assoc. *v.* Flanagan, 2 L. T. N. S. (Pa.) 5.

34. St. Bartholomew's Church *v.* Wood, 61 Pa. St. 96; Wolf *v.* Payne, 35 Pa. St. 97; Spragg *v.* Shriver, 25 Pa. St. 282. 64 Am. Dec. 698; Pepper *v.* Copeland, 2 Miles (Pa.) 419, holding that no one but the owner of the land to be sold by the sheriff under fieri facias, or one duly authorized by him, can waive inquisition); Stilwell's Estate, 8 Phila. (Pa.) 178. See Kostenbader *v.* Spotts, 80 Pa. St. 430, where judgment was entered against the judgment debtor by warrant of attorney, which contained the clause, "without stay of execution, exemption or extension," and it was held that this was a valid waiver of an inquisition, on the ground that the waiver contained in the warrant of attorney being "effective as against the debtor," bound the property coextensively with the lien of the judgment.

35. Baker *v.* Roberts, 14 Ind. 552; Vesey *v.* Reynolds, 14 Ind. 444; Smith *v.* Doggett, 14 Ind. 442; Deam *v.* Morrison, 10 Ind. 367; Kostenbader *v.* Spotts, 80 Pa. St. 430; Hageman *v.* Salisberry, 74 Pa. St. 280; Kimball *v.* Kelsey, 1 Pa. St. 183; Overton *v.* Tozer, 7 Watts (Pa.) 331; Carr *v.* Wright, 19 Wkly. Notes Cas. (Pa.) 576 (where judgment was entered on a judgment note waiving appraisement); Cole *v.* Schumacher, 1 Lack. Leg. Rec. (Pa.) 497. See, however, Levicks *v.* Walker, 15 La. Ann. 245, 77 Am. Dec. 187 (holding that a stipulation in a note that the property of the debtor shall be sold without appraisement in the event of non-payment at maturity ought not to be recognized in the rendition of judgment thereon, as the waiver in such a case must be in a more solemn and authentic form); Hilligsberg's Succession, 1 La. Ann. 340 (holding that want of appraisement cannot be supplied by any waiver made by the debtor if he is in failing circumstances).

36. De Jarnette *v.* Verner, 40 Kan. 224, 19 Pac. 666; Wray *v.* Miller, 20 Pa. St. 111; Crowell *v.* Meconkey, 5 Pa. St. 168; Cole *v.* Schumacher, 1 Lack. Leg. Rec. 497.

Estoppel.— It was held in Berg *v.* McLafferty, (Pa. 1886) 2 Atl. 187, that where a sale has been made upon a venditioni exponas, without waiver or condemnation, it is the duty of defendant to appear and object within a reasonable time, and even where he does appear and object, he may be

(iv) *Notice of.* Wherever the statute makes appraisement a prerequisite to a valid sale of property levied upon under execution, the judgment debtor is entitled to reasonable notice to choose an appraiser or appraisers, as the statute may direct;[37] and, unless the circumstances are such as to justify the officer in dispensing with the notice,[38] an appraisal and sale without such notice to the judgment debtor is void.[39]

(v) *Appraisers* — (a) *Number and Qualifications of* — (1) In General. Most of the statutes provide for the appointment of three appraisers, and it is essential to the validity of the appraisement that each appraiser possess the statutory qualifications, which cannot be waived even by the consent of the parties.[40]

(2) Freeholders or Householders. One of the qualifications usually required by statute is that the appraiser shall be a freeholder or householder of the county or town in which the property to be appraised is situated.[41]

(3) Effect of Interest. All the statutes enumerating the qualifications of the appraiser require that he shall be impartial and disinterested.[42] The ground

estopped by circumstances from either impeaching the regularity of the proceedings or subsequently attacking the title of the purchaser at the sheriff's sale under the writ.

37. *Delaware.*— Collins *v.* Steel, 4 Harr. 536; Burton *v.* Wolfe, 4 Harr. 221.

Illinois.— Smith *v.* Dauel, 29 Ill. App. 290.

Indiana.— Evans *v.* Wadkins, Wils. 114.

Maine.— Howe *v.* Wildes, 34 Me. 566; Fitch *v.* Tyler, 34 Me. 463.

Massachusetts.— Blanchard *v.* Brooks, 12 Pick. 47.

Pennsylvania.— Heydrick *v.* Eaton, 2 Binn. 215. See also Krebs *v.* Hechler, 2 Leg. Rec. 363, holding that the notice of inquisition required to be given under the act of assembly prior to issuing a venditioni exponas need only be served on defendant in execution, and it need not be served on one to whom he has sold the land.

Vermont.— Briggs *v.* Green, 33 Vt. 565; Stanton *v.* Bannister, 2 Vt. 464.

See 21 Cent. Dig. tit. "Execution," § 347.

Presumption of notice.—See Foster *v.* Rousel, 3 La. Ann. 546.

Proof of notice.— Where the officer's return shows that he notified the debtor to be present at the time and place to select an appraiser, this is a sufficient proof of notice. Keen *v.* Briggs, 46 Me. 467.

Sufficiency of notice.— See Buck *v.* Hardy, 6 Me. 162. See also Dwinel *v.* Soper, 32 Me. 119, 52 Am. Dec. 643.

38. Absence of the judgment debtor from the jurisdiction, or the inability of the officer to locate him, is *prima facie* sufficient to justify the appointment of appraisers without notice to the judgment debtor, or of the service of such notice upon his agent or tenant, or at his last known place of residence. Pendleton *v.* Button, 3 Conn. 406; Wolf *v.* Heathers, 4 Harr. (Del.) 325; Howe *v.* Reed, 12 Me. 515; Buck *v.* Hardy, 6 Me. 162. See also Dodge *v.* Farnsworth, 19 Me. 278; Gilman *v.* Thompson, 11 Vt. 643, 34 Am. Dec. 714; Galusha *v.* Sinclear, 3 Vt. 394.

39. Howe *v.* Wildes, 34 Me. 566; Means *v.* Osgood, 7 Me. 146; Shields *v.* Hastings, 10 Cush. (Mass.) 247; Leonard *v.* Bryant, 2 Cush. (Mass.) 32; Blanchard *v.* Brooks, 12 Pick. (Mass.) 47; Gilbert *v.* Berlin, 70 N. H. 396, 48 Atl. 279; Cogswell *v.* Mason, 9 N. H. 48; Briggs *v.* Green, 33 Vt. 565; Stanton *v.* Bannister, 2 Vt. 464.

40. Mitchell *v.* Kirtland, 7 Conn. 229; Metcalf *v.* Gillet, 5 Conn. 400; Chapman *v.* Griffin, 1 Root (Conn.) 196; Gallagher *v.* Abadie, 26 La. Ann. 343; Conover *v.* Walling, 28 N. J. Eq. 333. See, however, Durant *v.* Shurtleff, 49 Vt. 141.

Age.— The fact that an appraiser of property to be sold on execution was over sixty years of age was not a disqualification, although the statute requires that the appraisal shall be made by persons qualified to act as jurors. Flynn *v.* Kalamazoo Cir. Judge, (Mich. 1904) 98 N. W. 740.

41. *Connecticut.*— Chapman *v.* Griffin, 1 Root 196.

Indiana.— Richmond *v.* Marston, 15 Ind. 134.

Iowa.— Woods *v.* Cochrane, 38 Iowa 484.

Kansas.— Kutter *v.* Buckout, 4 Kan. 120.

Maine.— Nickerson *v.* Whittier, 20 Me. 223; Russ *v.* Gilman, 16 Me. 209.

Missouri.— State *v.* Jungling, 116 Mo. 162, 22 S. W. 688.

New Hampshire.— Rix *v.* Johnson, 5 N. H. 520, 22 Am. Dec. 472; Simpson *v.* Coe, 3 N. H. 85; Porter *v.* Bean, 1 N. H. 362.

See 21 Cent. Dig. tit. "Execution," § 348.

In Maine the rule has been laid down that in a levy on real estate it is not necessary that the appraisers should be residents of the county in which the land lies. Woodman *v.* Smith, 37 Me. 21; Fitch *v.* Tyler, 34 Me. 463.

42. *Connecticut.*— Mitchell *v.* Kirtland, 7 Conn. 229.

Louisiana.— Zacharie *v.* Winter, 17 La. 76.

Massachusetts.— Cowdrey *v.* Sheldon, 122 Mass. 267; Boston *v.* Tileston, 11 Mass. 468.

New Jersey.— Conover *v.* Walling, 28 N. J. Eq. 333.

Vermont.— Briggs *v.* Green, 33 Vt. 565, holding that a justice making appointments of appraisers of property subject to execution acts in a judicial capacity and is the sole judge of their disinterestedness.

most frequently urged against the eligibility of an appraiser on account of interest is his relationship to one of the parties to the suit.[43]

(4) Where Different Parcels of Land Are to Be Appraised. Under some jurisdictions, where separate and distinct parcels of real estate are seized to satisfy an execution, a different set of appraisers may be chosen to appraise each separate parcel.[44]

(B) *By Whom Chosen* — (1) General Rule. In a majority of the United States, by statutory provision, one of the appraisers is selected by the judgment creditor, and another by the judgment debtor, and the third appraiser is selected by the officer holding the writ.[45] The appraiser which each party to the action is

See 21 Cent. Dig. tit. "Execution," § 348.

Attorney.— It was held in Bayne *v.* Patterson, 40 Mich. 658, that an attorney conducting attachment proceedings should not act as appraiser under an execution in force at the same time, against the same defendant. See, however, Porter *v.* Bean, 1 N. H. 362.

Deputy sheriff.— In the following cases it was held that the fact that the appraiser was the deputy of the sheriff executing the fieri facias was not a cause for complaint. Sullenger *v.* Buck, 22 Kan. 28; Davis *v.* Smallgood, 3 Ky. L. Rep. 539; Grover *v.* Howard, 31 Me. 546. See, however, Posey *v.* Loutey, 12 Phila. (Pa.) 410, 5 Wkly. Notes Cas. (Pa.) 291.

Personal enemies.— It was held in Briggs *v.* Green, 33 Vt. 565, that it is not a disqualification of appraisers to property subject to execution that they are personal enemies of the judgment debtor and are engaged in litigation with him at the time.

Reversioner.—It was held in Massachusetts that the extent of an execution on an estate for life is not rendered invalid by the circumstance that the reversioner acted as one of the appraisers. Chamberlain *v.* Doty, 18 Pick. 495.

Estoppel.— It was held in Cheesborough *v.* Clark, 1 Root (Conn.) 141, that since there is no statute excluding a tenant from acting as appraiser of land taken on execution, parties who consented to such appraisement were estopped from objecting thereto.

Reappraisement.— Under 2 Ind. Rev. St. (1876) p. 211, § 447, requiring that disinterested householders be selected as appraisers of property seized under execution, one who has acted as an appraiser of real estate so seized is not competent to reappraise the same. Bowles *v.* Stout, 60 Ind. 267.

43. In the following cases the appraiser was held to be disqualified to act as such on account of relationship to one of the parties. Johnson *v.* Huntington, 13 Conn. 47 (where wife of appraiser was mother of wife of creditor); Fox *v.* Hills, 1 Conn. 295 (where appraiser was nephew by marriage of judgment creditor); Tweedy *v.* Picket, 1 Day (Conn.) 109 (where appraiser was uncle-in-law of judgment creditor); McGough *v.* Wellington, 6 Allen (Mass.) 505 (where appraiser was brother of attaching creditor); Wolcott *v.* Ely, 2 Allen (Mass.) 338 (where appraiser was son-in-law of judgment creditor); Schaeffer *v.* Heine, 22 Pa. Co. Ct. 133 (where the appraiser's son had married the daughter of defendant in execution). In the following cases the relationship between appraiser and one of the parties to the suit was held to be no disqualification. Kinsman *v.* Warner, 113 Mass. 347 (where appraiser was cousin to the judgment creditor's mother); Baker *v.* Davis, 19 N. H. 325 (where a wife of one appraiser was second cousin of the wife of one of defendants, and the wife of another appraiser was sister to the other defendant, the decision being placed upon the ground that their respective relationship to defendants was only by affinity); Durant *v.* Shurtleff, 49 Vt. 141; Blodget *v.* Brinsmaid, 9 Vt. 27 (where appraiser was surviving husband of judgment creditor's sister).

44. Boylston *v.* Carver, 11 Mass. 515. See also Hathorn *v.* Corson, 77 Me. 582, 1 Atl. 738.

45. *Connecticut.*— Strong *v.* Birchard, 5 Conn. 357 (holding that a defendant for whom an overseer has been appointed is competent to select an appraiser); Mun *v.* Carrington, 2 Root 15 (holding that a married woman may appoint an appraiser when the execution is against her). See also Watson *v.* Watson, 6 Conn. 334.

Indiana.— Evans *v.* Wadkins, Wils. 114.

Maine.—Howe *v.* Wildes, 34 Me. 566; Fitch *v.* Tyler, 34 Me. 463; Buck *v.* Hardy, 6 Me. 162.

Massachusetts.—Dewey *v.* Tobey, 126 Mass. 93; Richardson *v.* Payne, 114 Mass. 429; Blanchard *v.* Brooks, 12 Pick. 47.

New Hampshire.— Cogswell *v.* Mason, 9 N. H. 48; Cooper *v.* Bisbee, 4 N. H. 329, opinion of the court by Richardson, C. J.

Vermont.— Eastman *v.* Curtis, 4 Vt. 616.

See 21 Cent. Dig. tit. "Execution," § 349.

In Delaware it was held in Flinn *v.* Fennimore, 7 Houst. 262, 31 Atl. 586, that a writ of fieri facias which shows that the inventory and appraisement were made by the sheriff alone and verified by defendant, and which was indorsed with a return reciting "levied on goods and chattels as per inventory and appraisement annexed," was sufficient to cut out subsequent levies, where it appeared that it was in conformity with a long continued practice in the county.

In Louisiana the third appraiser is chosen by the other two appraisers, provided they can agree, and if they cannot agree, then he must be selected by the officer making the levy. Bermudez *v.* Ibanez, 2 Mart. 316.

entitled to select may likewise be chosen by a duly authorized agent of such party.[46]

(2) In Case of Joint Debtors. Where execution issues against joint debtors, and the same is levied upon their joint property, the selection of one appraiser may be made by either of such debtors;[47] but where the execution is levied on the property of only one of several joint debtors, the appraiser must be selected by such debtor, and a selection by the other debtor, without the concurrence of the debtor whose property has been levied upon, is void.[48]

(3) Where Debtor Is Absent From Jurisdiction. In most jurisdictions, where the judgment debtor is absent from or resides out of the state at the time of the levy, the levying officer is authorized to select an appraiser for him.[49]

(4) Neglect or Refusal to Make Selection. Where the judgment debtor, after due notice, neglects or refuses to exercise his right of selection, the officer making the levy is generally authorized to select an appraiser for him.[50]

(c) *Oath of Office* — (1) Necessity of. It is necessary for the appraisers, after being duly appointed, to take the oath of office prescribed by statute before proceeding to the performance of their duties, and it is essential that the return

Under Ky. Rev. St. c. 36, art. 13, § 2, subd. 3, making it the duty of the officer to cause lands levied on, before making sale thereof, to be valued under oath by two disinterested, intelligent householders of the county, not related to either of the parties, he is not required to permit the debtor to select one of them. Knight *v.* Whitman, 6 Bush 51, 99 Am. Dec. 652.

A debtor whose property is assigned, under the Massachusetts Insolvent Law of 1838, after his real estate is seized on execution, but before it is set off by appraisement, may choose an appraiser to act in the levy of the execution. Hall *v.* Hoxie, 3 Metc. (Mass.) 251.

46. Roop *v.* Johnson, 23 Me. 335; Dodge *v.* Farnsworth, 19 Me. 278; Russell *v.* Hook, 4 Me. 372 (in which case the judgment debtor was out of the state at the time of the levy, and it was held that the appointment of an appraiser by his wife was valid); Chappell *v.* Hunt, 8 Gray (Mass.) 427; Odiorne *v.* Mason, 9 N. H. 24. See Dewey *v.* Tobey, 126 Mass. 93, holding that an appraiser appointed by one claiming to be an agent of the debtor, and not known by the sheriff to be such agent, and not so stated in his return, is void.

Curator ad hoc.— Where plaintiff in execution procured the appointment of a curator *ad hoc* to represent defendant in the appointment of an appraiser, it was held that the absence of defendant or other sufficient cause must be shown to justify the appointment. Farrell *v.* Klumpp, 13 La. Ann. 311.

47. Crafts *v.* Ford, 21 Me. 414; Herring *v.* Polley, 8 Mass. 113.

48. Boynton *v.* Grant, 52 Me. 220; Ware *v.* Barker, 49 Me. 358; Harriman *v.* Cummings, 45 Me. 351; Kellenberger *v.* Sturtevant, 11 Cush. (Mass.) 160 (holding, however, that the levy of an execution against two debtors upon the land of one only was not void because the return stated that one appraiser was chosen by "the debtor within named," without specifying such debtor, where it sufficiently appeared from the whole return that such appraiser was chosen by the debtor whose land was taken); Herring *v.* Polley, 8 Mass. 113; Whittier *v.* Varney, 10 N. H. 291.

49. Nickerson *v.* Whittier, 20 Me. 223 (decided under a statute requiring the sheriff to give notice to the debtor to appoint an appraiser, provided he lives within the county, and holding that where the officer stated in his return that the debtor did not live within the county, it was unnecessary for him to state that the debtor neglected to appoint an appraiser); Dodge *v.* Farnsworth, 19 Me. 278; Howe *v.* Reed, 12 Me. 515; Buck *v.* Hardy, 6 Me. 162; Brooks *v.* Norris, 124 Mass. 172; Randall *v.* Wyman, 16 Gray (Mass.) 334; Cooper *v.* Bisbee, 4 N. H. 329; Parish *v.* Harriman, 3 N. H. 317; Gilman *v.* Thompson, 11 Vt. 643, 34 Am. Dec. 714. See also Spencer *v.* Champion, 9 Conn. 536, a case of a corporation having no acting officers within the state. See, however, Leonard *v.* Bryant, 2 Cush. (Mass.) 32.

50. Peaks *v.* Gifford, 78 Me. 362, 5 Atl. 879; Thomas *v.* Johnson, 64 Me. 539; Keen *v.* Briggs, 46 Me. 467; Dodge *v.* Farnsworth, 19 Me. 278; Thompson *v.* Oakes, 13 Me. 407; Sturdivant *v.* Sweetsir, 12 Me. 520; Wadsworth *v.* Williams, 100 Mass. 126; Blanchard *v.* Brooks, 12 Pick. (Mass.) 47 (holding, however, that it must substantially appear in the officer's return that the debtor was given notice of the levy so as to afford him opportunity to choose an appraiser if he so elected); Whitman *v.* Tyler, 8 Mass. 284 (holding, however, that where the officer selected the appraiser on behalf of the debtor without certifying that the debtor had refused to appoint, or assigning any other reason, the levy was void); Gilbert *v.* Berlin, 70 N. H. 396, 48 Atl. 279; Fellows *v.* Hoyt, 69 N. H. 179, 44 Atl. 929 (holding that where the assignee of an insolvent, after notice, fails to appoint an appraiser for the property of his assignor seized upon execution prior to the assignment, the officer making the levy may appoint one without him). See also Pendleton *v.* Button, 3 Conn. 406.

of the officer should show that such oath of office was duly administered by the officer designated by statute to administer it.[51]

(2) By Whom Administered. The statutes usually authorize the administration of the oath by the officer making the levy or by a magistrate or justice of the peace.[52] However, the statute may require that the oath shall be administered by a justice of the peace in the county where the property to be appraised is situated.[53]

(3) How Administration of Oath Shown. As a general rule a recital in the return of the officer that the appraisers were duly sworn or were sworn according to law is sufficient,[54] although some statutes have required a certificate of the oath to be attached to the return or indorsed on the execution.[55]

(vi) *Proceedings of Appraisers*—(a) *View of Property.* After the appraisers have duly qualified, it is usually their duty to view or examine the property to be appraised so as to enable them to form an intelligent and just

51. *Connecticut.*— Tweedy *v.* Picket, 1 Day 109.

Louisiana.— Lambert *v.* De Santos, 10 La. Ann. 725.

Maine.— Hall *v.* Staples, 74 Me. 178; Brackett *v.* McKenney, 55 Me. 504; Smith *v.* Keen, 26 Me. 411; Phillips *v.* Williams, 14 Me. 411; Bamford *v.* Melvin, 7 Me. 14; Howard *v.* Turner, 6 Me. 106.

Massachusetts.— Chamberlain *v.* Doty, 18 Pick. 495.

New Hampshire.— Porter *v.* Bean, 1 N. H. 362.

Ohio.— Patrick *v.* Oosterout, 1 Ohio 27.

United States.— U. S. *v.* Slade, 27 Fed. Cas. No. 16,312, 2 Mason 71.

See 21 Cent. Dig. tit. "Execution," § 350.

Sufficiency of oath.— Where, in the levy of an execution, the appraisers were sworn to appraise the real estate to satisfy "the execution," omitting "and all fees," the levy was nevertheless valid. Munroe *v.* Reding, 15 Me. 153; Sturdivant *v.* Sweetsir, 12 Me. 520.

Affirmation.— It has been held in Massachusetts that where the magistrate certifies that a person appointed as an appraiser made affirmation under pains and penalties of perjury that he would faithfully and impartially appraise such real estate, etc., that it was sufficient, although he did not certify that such person was conscientiously scrupulous of taking an oath. Hall *v.* Hoxie, 3 Metc. (Mass.) 251. See also Cooper *v.* Bisbee, 4 N. H. 329, holding that the oath to be administered to an appraiser on an extent on an execution is to be in that form which he thinks will bind his conscience most, and a return upon an extent is sufficient which states that one of the appraisers made "solemn affirmation." But *compare* U. S. *v.* Slade, 27 Fed. Cas. No. 16,312, 2 Mason 71.

52. Chamberlain *v.* Doty, 18 Pick. (Mass.) 495; Bond *v.* Bond, 2 Pick. (Mass.) 382 (holding that if the appraisers be justices of the peace they may administer the oath to each other, or the judgment debtor, if a magistrate, may administer the oath to them); Barnard *v.* Fisher, 7 Mass. 71.

An attorney who has conducted the suit

has been held, in New Hampshire, to be competent to administer the oath to the appraisers of land extended on by the execution. Porter *v.* Bean, 1 N. H. 362.

53. Bamford *v.* Melvin, 7 Me. 17; Howard *v.* Turner, 6 Me. 106. See also Roop *v.* Johnson, 23 Me. 335.

54. Paine *v.* Spratley, 5 Kan. 525; Leonard *v.* Bryant, 2 Cush. (Mass.) 32 (holding a return stating that "the appraisers were first sworn according to law" sufficient); Williams *v.* Amory, 14 Mass. 20; Brainard *v.* Fisher, 7 Mass. 71.

55. Hall *v.* Staples, 74 Me. 178 (holding, however, that the provisions of the Maine statute requiring a certificate of the oath administered by the appraisers to be indorsed on the back of the execution is directory only, and will not be considered as necessary to the validity of the levy in an action between the judgment debtor and an innocent purchaser from him, in whose behalf the levy was made); Brackett *v.* McKenney, 55 Me. 504 (holding that where the certificate of the appraisers of an execution stated that they "made oath in due form of law that they would faithfully and impartially appraise such real estate of the within named" debtor "as should be shown to them to satisfy the within execution and all fees" it sufficiently complied with the statute); Fitch *v.* Tyler, 34 Me. 463; Smith *v.* Keen, 26 Me. 411; Roop *v.* Johnson, 23 Me. 335; Killenburgh *v.* Sturtevant, 11 Cush. (Mass.) 160 (holding that prior to the Revised Statutes it should appear from the return and the certificates attached to the same that the oath was administered in the form required by statute). See also Cowls *v.* Hastings, 9 Metc. (Mass.) 476, holding that where the sheriff made the certificates of the magistrate and the appraisers a part of his return and the certificate of the magistrate stated that the appraisers were sworn on Oct. 16, while the certificate of the appraisers was dated Sept. 25, and stated that they, having been first sworn, viewed the land, etc., it sufficiently appeared from the return that the appraisers were sworn before viewing and appraising the land. *Compare* Phillips *v.* Williams, 14 Me. 411.

estimate of its value,[56] although in appraising real estate it has been held not necessary that the appraisers should actually go upon the land if they can make a proper appraisement without doing so.[57] Where the appraisers have no personal knowledge as to the value of the property, it is their duty to hear testimony in respect to its value.[58]

(B) *Property of Joint Debtors.* Where an execution against several debtors is levied on land of which they are severally seized, the land of each debtor must be separately appraised;[59] but where an execution is levied upon the property of two joint debtors held by them in common, it is not necessary to appraise each one's share separately.[60]

(C) *Several Parcels of Land.* Where several parcels of land belonging to the judgment debtor are levied upon under execution, they may be appraised either severally or jointly.[61]

(D) *Entire Interest of Judgment Debtor.* The appraisement should embrace the entire interest of defendant in the property levied upon, and the appraisers should ascertain the value of the interest set off in order that the debtor may redeem, and a failure to do so invalidates the levy.[62]

(E) *Deductions For Encumbrances*—(1) GENERAL RULE. In making an appraisement upon property subject to prior encumbrances, it is the duty of the appraisers to ascertain the amount of such encumbrances and to deduct the same from the appraised value of the property.[63] Thus, where an execution against the

56. Smith *v.* Dauel, 29 Ill. App. 290 (holding that where an appraisement of property was made in the absence of a part of the scheduled property of the debtor and without such part being examined by one of the appraisers, it was invalid); Roop *v.* Johnson, 23 Me. 335; Creditors *v.* Search, 2 Ohio Dec. (Reprint) 495, 3 West. L. Month. 319 But see Johnson *v.* Carson, 3 Greene (Iowa) 499, holding that the fact that appraisement was not made upon actual view of the premises as directed by statute will not invalidate the same.

57. Pendleton *v.* Button, 3 Conn. 406; Hammatt *v.* Bassett, 2 Pick. (Mass.) 564; Bond *v.* Bond, 2 Pick. (Mass.) 382.

58. Hosea *v.* Purnell, 5 Harr. (Del.) 364. See also Robinson *v.* Tunnell, 2 Houst. (Del.) 138.

59. Burnham *v.* Aiken, 6 N. H. 306.

60. Dwinel *v.* Soper, 32 Me. 119, 52 Am. Dec. 643.

61. Hathorn *v.* Corson, 77 Me. 582, 1 Atl. 738; Barnard *v.* Fisher, 7 Mass. 71; Bond *v.* Bond, 2 Pick. (Mass.) 382; Atherton *v.* Jones, 1 N. H. 363 note.

62. Marcy *v.* Kinney, 9 Conn. 394; Benjamin *v.* Hathaway, 3 Conn. 528; French *v.* Lord, 69 Me. 537; Fairbanks *v.* Devereaux, 48 Vt. 550. See also Bill *v.* Pratt, 5 Conn. 123; Wheeler *v.* Gorham, 2 Root (Conn.) 328; Peaks *v.* Gifford, 78 Me. 362, 5 Atl. 879; Symonds *v.* Harris, 51 Me. 14, 81 Am. Dec. 553, where the appraisers appraised a parcel of real estate on a levy and set out an undivided proportional part of it to the creditor at an appraised value which did not agree with their appraisement of the whole parcel, and it was held that the latter, being unnecessary, might be treated as surplusage and disregarded. Where the appraisers described certain premises and set off all except a portion, which was only described by giving two of its boundary lines, the officer making the appraisement a part of his return, the levy was held to be fatally defective. Stevenson *v.* Fuller, 75 Me. 324.

Rents and profits.— Where the statute provided that rents and profits might be sold under execution as other property, the appraisers setting down the value of each year separately, it was held that an appraisement of the rental value of property in gross for a term of years, and not the value of each year separately, rendered the levy invalid. Evans *v.* Wadkins, Wils. (Ind.) 114.

63. Ross *v.* Banta, 140 Ind. 120, 34 N. E. 865, 39 N. E. 732 (holding that under the Indiana statute providing that in case of execution sale the land shall be appraised at its cash value at the time, "deducting allowances and encumbrances," the fact that the appraisers, after fixing the value of the land and the amount of the encumbrances, failed to deduct the one from the other did not invalidate the sale); Stumph *v.* Reger, 92 Ind. 286; Maple *v.* Nelson, 31 Iowa 322; Hickman *v.* Freret, 30 La. Ann. 1067; Hefner *v.* Hesse, 29 La. Ann. 149; Fraaman *v.* Fraaman, 64 Nebr. 472, 90 N. W. 245, 97 Am. St. Rep. 650, holding, however, that the authority given by statute to the appraisers to deduct the amount of all liens does not confer the right on the appraisers to deduct a part of the liens or apportion them upon the several parcels of an entire tract of land.

Deduction for highways.— See Fletcher *v.* State Capital Bank, 37 N. H. 369.

Prior tax deeds.— It has been held under Nebr. Laws (1875), p. 60, § 3, requiring county officers to furnish a person making a levy on real estate with a list of the amount and character of all prior liens on the premises levied on, prior tax deeds need

owner of an equity of redemption is levied on the land, it should appear from the return that the appraisers excluded the mortgage from their consideration in making the appraisement.[64]

(2) JUDGMENT CREDITOR BOUND BY. An execution creditor levying on an equity of redemption in real estate is bound by the action of the appraisers as to the amount and validity of a prior encumbrance and is estopped from afterward showing that such encumbrance is less than the valuation of the appraisers, or founded on a usurious contract.[65]

(3) CONTINGENT LIEN. The better rule seems to be that in levying an execution on land, the appraisers may deduct from the appraised value of the property a contingent lien upon the same, such as the encumbrance of the inchoate right of the judgment debtor's wife to dower.[66]

(4) EXCESSIVE ALLOWANCE. Where, in the appraisement of property, an allowance is made for an encumbrance upon or estate in the property which does not exist, the levy is invalid.[67] Likewise, where there is a valid and subsisting encumbrance upon the property, but such encumbrance is materially overestimated by the appraisers, the levy is invalid.[68]

(F) *Agreement of Appraisers.* In some jurisdictions the rule is laid down that, in order to constitute a valid appraisement, all of the appraisers must agree as to the value of the property.[69]

(VII) *CERTIFICATE OF APPRAISEMENT* — (A) *Requisites in General.* After the duly appointed appraisers have completed the appraisement of the property taken under execution, the statutes usually require them to make out and sign a

not be stated in such list, since the parties claiming under them hold adversely, and they are not liens or encumbrances. Sessions *v.* Irwin, 8 Nebr. 5.

Unpaid purchase-money due on articles of agreement between vendor and vendee is not such a lien as is proper to be laid before a sheriff's inquest to determine whether the rental of the debtor's estate levied on will in seven years be sufficient, beyond all reprises, to pay the debt, interest, and costs sought to be collected by the execution. Springer *v.* Walters, 34 Pa. St. 328.

The provision of Nebr. Code Civ. Proc. § 491c, that on sale of realty on execution certain county or city officers shall certify under their hands and official seals the amount and character of all liens in their several offices prior to the lien under which the sale is had, does not require those of the officers who have no seal to do more than certify under their hands. Northwestern Mut. L. Ins. Co. *v.* Marshall, 1 Nebr. (Unoff.) 36, 95 N. W. 357.

64. Scripture *v.* Johnson, 3 Conn. 211; Wadsworth *v.* Williams, 97 Mass. 339; Hannum *v.* Tourtellott, 10 Allen (Mass.) 494 (holding that a levy of execution made on several parcels of land, some of which are subject to a mortgage and some are not, by appraising them collectively and deducting the amount due on the mortgage from the appraisement so made, is valid, if the amount due is not greater than that of the mortgaged parcels); Jenks *v.* Ward, 4 Metc. (Mass.) 404 (holding that where land was conveyed on condition that the grantee should pay a mortgage on a part of it and on other land of the grantor, the appraisers, in extending an execution against the grantee on the land, properly deducted from its value the whole mortgage debt of the grantor, although it was larger than the portion of the land subject to the mortgage). See Mechanics' Bank *v.* Williams, 17 Pick. (Mass.) 438; White *v.* Bond, 16 Mass. 400; Warren *v.* Childs, 11 Mass. 222, all holding that a levy on real estate which is under mortgage, if the appraisement be made without any deduction for the encumbrance, may vest a sufficient title in the creditor as against the debtor and any claiming under him by a subsequent conveyance, supposing the creditor willing to lose the value of the encumbrance and to take the estate as absolute in his debtor. And see Pettee *v.* Peppard, 125 Mass. 66.

65. Delaware, etc., Canal Co. *v.* Bonnell, 46 Conn. 9; Waterman *v.* Curtis, 26 Conn. 241.

66. Sturdivant *v.* Sweetsir, 12 Me. 520; Jenks *v.* Ward, 4 Metc. (Mass.) 404. See, however, Boody *v.* York, 8 Me. 272; Barnard *v.* Fisher, 7 Mass. 71.

67. Root *v.* Colton, 1 Metc. (Mass.) 345 (where the appraisers set off land as subject to a life-estate and made a deduction therefor in the appraisement, when in fact no such encumbrance existed, and it was held that the levy was thereby vitiated); Grover *v.* Flye, 5 Allen (Mass.) 543; Whithed *v.* Mallory, 4 Cush. (Mass.) 138; Brown *v.* Worcester Bank, 8 Metc. (Mass.) 47; Root *v.* Colton, 1 Metc. (Mass.) 345; Barnard *v.* Fisher, 7 Mass. 71.

68. McGregor *v.* Williams, 10 Cush. (Mass.) 526.

69. Evans *v.* Landon, 6 Ill. 307; U. S. *v.* Slade, 27 Fed. Cas. No. 16,312, 2 Mason 71, where only two of the appraisers concurred in the appraisement, and no reason was as-

certificate of appraisement, describing the property so appraised, the interest of the debtor therein, and the value thereof, stating also the value of and making proper deductions for encumbrances, and that they delivered such certificate to the officer making the levy.[70]

(B) *Signatures of Appraisers.* While the general rule is that the certificate of appraisement should be signed by all the appraisers, yet it has been held that where such certificate or the return of the officer shows that all of the duly appointed appraisers acted as such, the levy is not invalidated by the failure of one of the appraisers to sign the certificate.[71]

(C) *Amendment of.* The rule seems to be well settled that the certificate of appraisement may be amended by the appraisers as of right, where the rights of third parties acquired *bona fide* and without notice will not be impaired.[72]

signed for the non-concurrence of the third. See also Harrison *v.* Stipp, 8 Blackf. (Ind.) 455.

In Massachusetts, however, the rule has been laid down that where three appraisers are duly appointed and sworn, and there is evidence that all of them acted under their appointment, where only two of the appraisers sign the certificate of appraisement, and the third fails to sign it because he does not concur in it, the levy is valid. Moffitt *v.* Jaquins, 2 Pick. 331; Barrett *v.* Porter, 14 Mass. 143.

70. *Connecticut.*—Peck *v.* Wallace, 9 Conn. 453; Metcalf *v.* Gillet, 5 Conn. 400.

Indiana.— Harrison *v.* Stipp, 8 Blackf. 455. See also Coan *v.* Elliott, 101 Ind. 275.

Kansas.— Jones *v.* Carr, 41 Kan. 329, 21 Pac. 258 (holding that the certificate or return of the appraisers should be deposited with the clerk of court); Paine *v.* Spratley, 5 Kan. 525.

Maine.— Chase *v.* Williams, 71 Me. 190 (holding that in the levy of an execution on real estate, the appraisers' return must state the value of the estate appraised, and that a recital that they set it off as in full satisfaction of the execution and costs of levy is not equivalent, and that the return of the officer that they appraised the property at a certain sum does not remedy the default); Patterson *v.* Chandler, 55 Me. 53; Brackett *v.* Ridlon, 54 Me. 426; Corbett *v.* Maine, etc., Bank, 53 Me. 542; Stinson *v.* Rouse, 52 Me. 261; Boynton *v.* Grant, 52 Me. 220; Hanly *v.* Sidelinger, 52 Me. 138 (where the recital in the certificate of the proceedings of the appraisers was held to be sufficient); Howe *v.* Wildes, 34 Me. 566; Cowan *v.* Wheeler, 31 Me. 439 (holding that the description in the certificate of the property appraised was sufficient); Waterhouse *v.* Gibson, 4 Me. 230 (holding that parol evidence was not admissible to show that certain buildings were not included in the appraisement of property sold under execution, but were reserved, by mutual consent, to be removed by the debtor, the return of the appraisers not stating any such exception). See Rawson *v.* Clark, 38 Me. 223, holding that a levy is not invalidated because the amount of the debt, fees and charges are not stated in the appraisers' certificate, where more than land enough to satisfy the debt and costs as taxed was not taken.

Massachusetts.— Brinley *v.* Mann, 2 Cush. 337, 48 Am. Dec. 669.

Nebraska.— See Burkett *v.* Clark, 46 Nebr. 466, 64 N. W. 1113 [*overruling* La Flume *v.* Jones, 5 Nebr. 256].

New Hampshire.— Mead *v.* Harvey, 2 N. H. 495, where the appraisers certified that they set out the lands in satisfaction of the execution, with the officers' fees and incidental charges, and it in no other way appeared at what sum the real estate was appraised, and it was held that the levy was invalid. See also Baker *v.* Davis, 19 N. H. 325.

North Carolina.— Gudger *v.* Penland, 118 N. C. 832, 23 S. E. 921.

Ohio.— Creditors *v.* Search, 2 Ohio Dec. (Reprint) 495, 3 West. L. Month. 319, holding that it is a prerequisite to a valid sale of land levied on under execution that a copy of the certificate of appraisement be filed with the clerk of the court from which the execution was issued. See also Sterling *v.* Emick, Tapp. 326.

Vermont.— Fairbanks *v.* Devereaux, 48 Vt. 550.

See 21 Cent. Dig. tit. "Execution," § 354.

Levy on rents of a life-estate.— Bachelder *v.* Thompson, 41 Me. 539.

To what court returnable.— It has been held in North Carolina that, although the statute requires the return of the appraisers to be made by the constable to the clerk of the superior court, a return to a justice's court does not render the appraisal and allotment void. McAuley *v.* Morris, 101 N. C. 369, 7 S. E. 883.

Objections to form of certificate.— An objection that certificates of liens obtained by an officer in appraising property about to be sold at sheriff's sale were not in proper form is one going to the appraisement, and must be raised before sale. Northwestern Mut. L. Ins. Co. *v.* Marshall, 1 Nebr. (Unoff.) 36, 95 N. W. 357.

Return of writ generally see *infra*, XI.

71. McLellan *v.* Nelson, 27 Me. 129; Phillips *v.* Williams, 14 Me. 411; Moffitt *v.* Jaquins, 2 Pick. (Mass.) 331; Barrett *v.* Porter, 14 Mass. 143. See, however, Whitman *v.* Tyler, 8 Mass. 284.

72. Camp *v.* Bates, 13 Conn. 1; Kellogg *v.* Wadhams, 9 Conn. 201; Bill *v.* Pratt, 5 Conn. 123; Chase *v.* Williams, 71 Me. 190 (holding that if the certificate contains sufficient mat-

n. Setting Aside Appraisement. The general rule is that where an appraisement of property has been made by duly qualified appraisers acting in accordance with statutory requirements, such appraisement will not be set aside except for fraud or mistake other than mere error of judgment on the part of the appraisers.[73]

o. Second Appraisement. Where an appraisement has been set aside in consequence of irregularity or fraud, it is proper for the court to enter an order for a new appraisement.[74] Where, however, the sale is set aside for any reason, such as inadequacy of price, no new appraisement is necessary.[75]

8. Amount of Property to Be Levied On — a. General Rule. In determining the amount of property to be levied on to satisfy an execution, the officer is left to exercise his own judgment, free from the constraint or control of either plaintiff or defendant; but it is his duty to take property sufficient to satisfy the execution, allowing for reasonable and probable depreciation of such property at a forced sale, but he should not make the levy so unreasonable and excessive as to bear on its face the appearance of oppression and unnecessary rigor.[76]

b. Interest. In the absence of statute to the contrary, where an execution is issued in an action for debt or penalty, the officer is not authorized to levy for

ter to indicate that in making the appraisement the requisites of the statute were complied with, an amendment thereto may be made, notwithstanding any intervening interest of the subsequent purchaser or creditor, but in such case permission to amend ought not to be given as a matter of course, nor granted without first notifying the adverse party and giving him an opportunity to show cause against the amendment); Gudger *v.* Penland, 118 N. C. 832, 23 S. E. 921.

73. *Delaware.*— Stuart *v.* Russum, 3 Harr. 483.

Kentucky.— Lawrence *v.* Edelen, 6 Bush 55.

Nebraska.— Kearney Land, etc., Co. *v.* Aspinwall, 45 Nebr. 601, 63 N. W. 827 (holding that the correctness of the appraisement of land seized under execution cannot be assailed after sale except for fraud); Vought *v.* Foxworthy, 38 Nebr. 790, 57 N. W. 538 (holding that in order to set aside a sale on the ground that the property was appraised too low, its actual value must so far exceed its appraised value as to raise the presumption of fraud in the appraisement). See also Moore *v.* Hornsby, (Nebr. 1903) 95 N. W. 858.

Pennsylvania.— Unser *v.* Buch, 5 Lanc. L. Rev. 277. See, however, Sleeper *v.* Nicholson, 1 Phila. 348.

Vermont.— Hopkins *v.* Haywood, 36 Vt. 318.

See 21 Cent. Dig. tit. "Execution," § 356.

Time of filing objection.— It has been held in Nebraska that the objection that the appraised value of property is too high or too low should be made and filed in the case with a motion to vacate the appraisement before sale of the property occurs. Vought *v.* Foxworthy, 38 Nebr. 790, 57 N. W. 538.

Where the sheriff wrongfully allows an appraisement, the remedy of plaintiff is to move to set it aside. Seibert's Appeal, 73 Pa. St. 359.

74. Thompson *v.* Bragg, 32 Ind. 482; Weaver *v.* Lawrence, 1 Dall. (Pa.) 379, 1 L. ed. 185. See also Daniels *v.* McBain, 2 Ohio St. 406.

In Nebraska to authorize a sheriff to make a second appraisement of lands about to be sold under execution, it must affirmatively appear by the return of such sheriff that the property has been twice advertised and offered for sale, and that it remains unsold for want of bidders, in accordance with the requirements of Code, § 495. Gundry *v.* Brown, 1 Nebr. (Unoff.) 877, 96 N. W. 610.

75. State Bank *v.* Green, 11 Nebr. 303, 9 N. W. 36.

76. *Alabama.*— Governor *v.* Power, 9 Ala. 83; Griffin *v.* Ganaway, 8 Ala. 625.

Arkansas.— Lawson *v.* State, 10 Ark. 28, 50 Am. Dec. 238.

Illinois.— French *v.* Snyder, 30 Ill. 339, 83 Am. Dec. 193.

Kentucky.— Com. *v.* Lightfoot, 7 B. Mon. 298.

Ohio.— See Pugh *v.* Calloway, 10 Ohio St. 488.

Tennessee.— Brown *v.* Allen, 3 Head 429.

Texas.— Atcheson *v.* Hutchison, 51 Tex. 223; Dewitt *v.* Oppenheimer, 51 Tex. 103 (holding that in making a levy there should be a proper allowance for depreciation in value incident to a forced sale, and that the levy should cover costs and incidental expenses); Cornelius *v.* Burford, 28 Tex. 209, 91 Am. Dec. 309.

Sum indorsed on writ.— The rule laid down in some jurisdictions that the officer in levying the writ should be governed in the amount to be levied by the sum indorsed on the back of the writ rather than by that recited in the body thereof, seems to be consonant with reason and justice, since the amount recited in the body of the writ is often nominal, whereas the indorsement states the credits, items of cost and charges, and dates of interest, and contains the real demand of plaintiff. Com. *v.* McCoy, 8 Watts (Pa.) 153, 34 Am. Dec. 445.

interest which has accrued since the rendition of the judgment, but only for the amount of the execution.[77]

c. Excessive Levy — (I) *What Constitutes.* It is difficult to lay down any general rule as to what amounts to an excessive levy, and the question must usually be determined by the circumstances of the particular case under consideration; but where the property levied upon proves upon appraisement to be of substantially greater value than the amount of the execution, the fees of the officer, and other expenses of the levy, such levy will be regarded as excessive.[78]

(II) *Remedy For.* The usual remedy for an excessive levy made through mistake is in equity, where by proper decree a creditor may be compelled to relinquish so much of the property levied on as would be equal to the excess levied, or pay an equivalent therefor in money.[79]

(III) *Waiver of.* Where the judgment debtor acquiesces in the sale of his property under execution and fails to make objection to the same, on the ground of excessive levy, for a considerable period of time, where no fraud is shown in the transaction, such delay on his part will be held to be a waiver of the objection.[80]

77. Watson *v.* Fuller, 6 Johns. (N. Y.) 283; Creuze *v.* Lowth, 4 Bro. Ch. 316, 29 Eng. Reprint 911, 2 Cox Ch. 242, 2 Ves. Jr. 157, 30 Eng. Reprint 570, 2 Rev. Rep. 38. See also Lansing *v.* Rattoone, 6 Johns. (N. Y.) 43.

78. Marcy *v.* Kinney, 9 Conn. 394; Boyd *v.* Page, 30 Me. 460.

The levy was held to be excessive and the proceedings thereunder invalid in the following cases:

Connecticut.— Sumner *v.* Lyon, 7 Conn. 281.

Iowa.— Cook *v.* Jenkins, 30 Iowa 452.

Maine.— Webster *v.* Hill, 38 Me. 78 (holding that an excess of one dollar in the amount of the levy on real estate invalidated the levy); Glidden *v.* Chase, 35 Me. 90, 56 Am. Dec. 690 (where the land set off on execution was appraised at fourteen cents more than the amount of the debt, costs, and expenses); Thayer *v.* Mayo, 34 Me. 139.

Massachusetts.— Chenery *v.* Stevens, 97 Mass. 77 (holding that the maxim *de minimis non curat lex* should not be applied to an excess of five dollars and eighty-nine cents in a sale of land on execution for about two thousand dollars); Whithed *v.* Mallory, 4 Cush. 138; Pickett *v.* Breckenridge, 22 Pick. 297, 33 Am. Dec. 745.

Missouri.— Silver *v.* McNeil, 52 Mo. 518 (where levy was made on a steamboat worth about forty thousand dollars under an execution for one hundred and nine dollars); Hannibal, etc., R. Co. *v.* Brown, 43 Mo. 294.

See 21 Cent. Dig. tit. "Execution," § 360.

The levy was held not to be sufficiently excessive as to invalidate the proceedings thereunder in the following cases:

Connecticut.—Spencer *v.* Champion, 9 Conn. 536 (where the appraised value of the land was fourteen cents more than the amount of the execution and officer's fees); Huntington *v.* Winchell, 8 Conn. 45, 20 Am. Dec. 84.

Georgia.— Landrum *v.* Broadwell, 110 Ga. 538, 35 S. E. 638.

Maine.— Dwinel *v.* Soper, 32 Me. 119, 52 Am. Dec. 643.

New Hampshire.— Avery *v.* Bowman, 40 N. H. 453, 77 Am. Dec. 728.

South Carolina.— Ingram *v.* Belk, 2 Strobh. 207, 47 Am. Dec. 591.

See 21 Cent. Dig. tit. "Execution," § 360.

Test of excessive levy.— It was held in Clower *v.* Fleming, 81 Ga. 247, 7 S. E. 278, that when land is sold as the property of a tenant for life, both for taxes and by virtue of general fieri facias, the value of the life-estate and not of the fee is the test of excessive levy.

An execution in rem against specific property may properly be levied on the entire property covered thereby, although its value greatly exceeds the amount of the execution. Wilkinson *v.* Holton, 119 Ga. 557, 46 S. E. 620.

Overestimate by appraisers on levy of execution of the value of the homestead right and consequent deduction of too large a sum from their estimate of the entire estate was held not to vitiate the levy. Fletcher *v.* State Capitol Bank, 37 N. H. 369.

79. Hathaway *v.* Hemingway, 20 Conn. 191; Fitch *v.* Ayer, 2 Conn. 143; Bogle *v.* Bloom, 36 Kan. 512, 13 Pac. 793; Avery *v.* Bowman, 40 N. H. 453, 77 Am. Dec. 728. See Livingston *v.* Lamb, 1 Kan. 221, holding that the fact that a sale was made under an excessive levy, in that too much property was levied on and sold to satisfy the debt and costs, is not sufficient to bring the case within any of the causes for which a judgment or order could be reversed on motion after the term at which the judgment or order was made.

Audita querela.— It has been held in Vermont that audita querela is an appropriate remedy to vacate and set aside the levy of an execution where the officer has made a false return of the parcel, and in consequence has set off more of the lands of defendant than is required to satisfy the execution. Hopkins *v.* Hayward, 34 Vt. 474. See Audita Querela, 4 Cyc. 1058 *et seq.*

80. Allagood *v.* Cook, 92 Ga. 570, 17 S. E. 920; Doe *v.* Rue, 4 Blackf. (Ind.) 263, 29

(IV) *EFFECT OF.* The rule has been broadly laid down in a number of cases that an excessive levy will not invalidate the levy or the sale thereunder, and that until it is set aside it is perfectly valid.[81]

9. OBJECTIONS TO IRREGULARITIES[82] — a. Who May Object. The general rule is that where irregularities have occurred in levying an execution, such as failure to comply with statutory requirements, the judgment debtor alone can make objection thereto, third parties not being competent to urge such objection.[83]

b. Waiver of.[84] Irregularities in the manner of levying an execution may be waived expressly[85] or constructively by the judgment debtor or any other party in interest;[86] as where the execution debtor furnishes the officer with a descrip-

Am. Dec. 368; Cornelius *v.* Burford, 28 Tex. 202, 91 Am. Dec. 309.

Property appraised at less than its value.— It has been held in New Hampshire that where a creditor causes his execution to be extended on lands of his debtor, and the appraiser, in valuing the lands, by mistake estimates them at less than their value, the debtor has no remedy to correct the mistake save by redeeming the lands. Horn *v.* Swett, 2 N. H. 301.

Release of property.— Where the sheriff levies on land not owned by the judgment debtor, or makes an excessive levy, such defect may be cured by the judgment creditor releasing part of the property from the levy. Black *v.* Nettles, 25 Ark. 606.

Right to have a seizure reduced to an amount sufficient to satisfy the judgment and costs is reserved to the debtor alone, and if he makes no complaint, no other party can object. Brown *v.* Cougot, 8 Rob. (La.) 14.

81. *Indiana.*— Drake *v.* Murphy, 42 Ind. 82.

Maine.— See Pierce *v.* Strickland, 26 Me. 277.

Michigan.— Backus *v.* Barber, 107 Mich. 468, 65 N. W. 379; Campau *v.* Godfrey, 18 Mich. 27, 100 Am. Dec. 133.

New Hampshire.— Moore *v.* Kidder, 58 N. H. 115; Avery *v.* Bowman, 40 N. H. 453, 77 Am. Dec. 728.

New York.— Dezell *v.* Odell, 3 Hill 215, 38 Am. Dec. 628; Green *v.* Burke, 23 Wend. 490. *Compare* Denvrey *v.* Fox, 22 Barb. 522.

Ohio.— Pugh *v.* Calloway, 10 Ohio St. 488, holding that an excessive levy does not render it void in favor of a subsequent levy.

Pennsylvania.— Donaldson *v.* Danville Bank, 20 Pa. St. 245.

Tennessee.— Brown *v.* Allen, 3 Head 429.

Washington.— McConnell *v.* Kaufman, 5 Wash. 686, 32 Pac. 782.

See 21 Cent. Dig. tit. "Execution," § 363.

82. Irregularities as ground for: Collateral attack see *supra*, VI, H; *infra*, X, B, 6. Setting aside sale see *infra*, X, B, 2.

83. *California.*— Frink *v.* Roe, 70 Cal. 296, 11 Pac. 820.

Georgia.— See Hammond *v.* Myrick, 14 Ga. 77.

Missouri.— Young *v.* Schofield, 132 Mo. 650, 34 S. W. 497.

North Carolina.—State *v.* Morgan, 29 N. C. 387, 47 Am. Dec. 329; Governor *v.* Carter, 10 N. C. 328, 14 Am. Dec. 588.

Ohio.— Pugh *v.* Calloway, 10 Ohio St. 488.

Pennsylvania.— Philadelphia Loan Co. *v.* Amies, 2 Miles 292.

Vermont.— See Perrin *v.* Reed, 35 Vt. 2 (holding that the fact that execution is levied on real estate without noticing a mortgage existing on it is a matter of which the debtor cannot complain, since this is prejudicial to the rights of the judgment creditor, which he may waive at his option); Paine *v.* Webster, 1 Vt. 101 (holding that where, in a parcel of several lots seized under execution, some were sufficiently described and others were not, but the judgment creditor wished to affirm the levy and hold what was well described and lose the remainder, the debtor could not complain).

See 21 Cent. Dig. tit. "Execution," § 365.

Estoppel.— Where a person who had as administrator attached real estate was appointed by the debtor to appraise the same when set off on the execution of a previously attaching creditor, it was held that neither the debtor nor subsequently attaching creditors could object that he was interested. Cutting *v.* Rockwood, 2 Pick. (Mass.) 443.

84. Forthcoming bond as waiver see *infra*, VII, C, 3, d, (III).

Waiving excessive levy see *supra*, VII, B, 8, c, (III).

85. Alexander *v.* Miller, 18 Tex. 893, 70 Am. Dec. 314.

86. *Louisiana.*— Morgan *v.* Woorhies, 3 Mart. 462. See also Michel *v.* Orleans Sheriff Parish, 23 La. Ann. 53.

Maine.— Littlewood *v.* Wardwell, 67 Me. 212 (where several creditors made simultaneous levies on undivided portions of the debtor's real estate, but the portions so taken did not together constitute the whole of the parcel, and it was held that the transfer by the debtor of the portion of such parcel remaining unlevied on constituted a waiver of the objection to the manner of the levy, and that he could not afterward contend that the levies were improperly made, in that they should have been on undivided portions of the whole of the parcel, and not on fractions of a portion thereof); Wilson *v.* Gannon, 54 Me. 384.

Massachusetts.— Bell *v.* Walsh, 130 Mass. 163.

North Carolina.— Chambers *v.* Penland, 74 N. C. 340.

Ohio.— Wheeling, etc., Coal Co. *v.* Smithfield First Nat. Bank, 55 Ohio St. 233, 45 N. E. 630.

tion of the property and executes a forthcoming bond,[87] or where the objection to the irregularity of the levy is not urged within the period prescribed by statute.[88]

10. Quashing or Vacating Levy[89] **— a. Motion to Quash** — (I) *General Rule.* Where a levy is sought to be set aside on the ground of irregularity, or because it was improperly made, the usual method[90] of testing the validity of such levy is by a motion to quash or vacate the same.[91]

(II) *Grounds For Motion* — (A) *In General.* A motion to quash or set aside the levy may be made on the ground that the levying officer was not competent to act,[92] or that he omitted some statutory requirement essential to the validity of the levy,[93] such as a failure to allow the judgment debtor to designate the property to be levied on,[94] that the property levied upon was *in custodia legis*,[95] or that the judgment debtor had been discharged in bankruptcy.[96]

(B) *Where There Is No Evidence of Levy.* Since, however, the levy is the foundation of the proceeding, on motion to quash the same, if there is no evidence of such levy, the motion must be overruled.[97]

(C) *Where Debtor Has No Interest in Property.* A motion to quash the levy is not a proper proceeding to try the question of title to property, and the courts will not set aside a levy upon the motion of a party, not on the ground of irregularity in the levy, but on the ground that the officer has seized property of

Pennsylvania.— Philadelphia Loan Co. *v.* Amies, 2 Miles 292.

Tennessee.— Overton *v.* Perkins, Mart. & Y. 367.

Texas.— Miller *v.* Alexander, 13 Tex. 497, 65 Am. Dec. 73. See also Davis *v.* Jones, (Civ. App. 1903) 75 S. W. 63.

Vermont.— Clark *v.* Lyman, 8 Vt. 290; Cleveland *v.* Allen, 4 Vt. 176.

See 21 Cent. Dig. tit. "Execution," § 366 *et seq.*

Estoppel.— One who directs an officer to levy an execution on property designated by him cannot afterward complain that such levy was made. Murphy *v.* Hill, 77 Ind. 129. But where an execution against several defendants is levied on certain land, and the entry does not show as whose property the land was levied on, the fact that a claim was interposed, reciting that the land was levied on as the property of one of defendants, does not estop claimant from raising the point of the defect in the levy. Cooper *v.* Yearwood, 119 Ga. 44, 45 S. E. 716.

87. Ballard *v.* Dibrell, 94 Tenn. 229, 28 S. W. 1087.

88. Allan *v.* Couret, 24 La. Ann. 24; Com. *v.* Keystone Electric Light, etc., Co., 4 Lack. Leg. N. (Pa.) 353, 2 Dauph. Co. Rep. (Pa.) 1 (where the objection to the levy on account of irregularity was not urged before the acknowledgment of the sheriff's deed); Perrin *v.* Reed, 35 Vt. 2; Hyde *v.* Barney, 17 Vt. 280, 44 Am. Dec. 335.

89. Opening or vacating sale see *infra*, X, B.
Vacating or quashing writ see *infra*, VIII, B.

90. In some jurisdictions, however, by statutory enactment, special proceedings have been provided for testing the validity of the levy of a writ of execution, such as a petition filed in the proper court (Whitefield *v.* Adams, 65 Vt. 632, 27 Atl. 323; Parker *v.* Parker, 54 Vt. 341; Briggs *v.* Green, 33 Vt. 565; Tudor *v.* Taylor, 26 Vt. 444; Downer *v.* Hazen, 10 Vt. 418), or by the judgment debtor filing an affidavit of illegality (Griffith *v.* Shipp, 49 Ga. 231; Hill *v.* De Launay, 34 Ga. 427, holding, however, that this remedy is merely cumulative and does not prevent proceedings by motion to quash).

91. *Indiana.*— Stockwell *v.* Walker, 3 Ind. 384.

Iowa.— Ritter *v.* Henshaw, 7 Iowa 97.

Pennsylvania.— Hower *v.* Ulrich, 156 Pa. St. 410, 27 Atl. 37.

Tennessee.— Sellars *v.* Fite, 3 Baxt. 131.

Texas.— Scott *v.* Allen, 1 Tex. 508.

Wisconsin.— Bonesteel *v.* Orvis, 23 Wis. 506, 99 Am. Dec. 201.

See 21 Cent. Dig. tit. "Execution," § 368 *et seq.*

Rule nisi.— It was held in Ralston *v.* Field, 32 Ga. 453, that a levy will not be dismissed on account of the time that has elapsed since it was made, except on a motion made by the claimant in the nature of a rule *nisi*, calling on the opposite party to show cause why he should not proceed. *Compare* Hughes *v.* Streeter, 24 Ill. 647, 76 Am. Dec. 777.

92. State *v.* Jeter, 60 Ga. 489.

93. Shacklett *v.* Scott, 23 Mo. App. 322; Bliss *v.* Enslow, 3 Ohio 269; Bryan *v.* Bridge, 6 Tex. 137.

94. Parker *v.* Parker, 54 Vt. 341.

95. McLemore *v.* Benbow, 19 Ala. 76; Gouverneur *v.* Warner, 2 Sandf. (N. Y.) 624; Robinson *v.* Atlantic, etc., R. Co., 66 Pa. St. 160.

96. Linn *v.* Hamilton, 34 N. J. L. 305.

97. Blandon *v.* Martin, 50 Mo. App. 114.

Void levy.— It was held in Parker *v.* Parker, 54 Vt. 341, that the provision of the law under which the supreme court may vacate an irregular, informal, or doubtful levy is inapplicable when the levy is void, as when execution has not been recorded in the town clerk's office or returned within sixty days.

a stranger to the writ;[98] or on the ground that the judgment debtor has no interest in the property levied on.[99]

(III) *NOTICE OF MOTION.* Notice of motion to quash or vacate the levy should be given to all persons interested in or claiming under the writ, since they are entitled to be heard in opposition to the motion.[1]

(IV) *JURISDICTION.* The doctrine seems to be well recognized that the court issuing the execution is the proper tribunal to pass upon the question of alleged defects or irregularities in the levy thereof, and that a court of coördinate authority has no jurisdiction to hear and determine a motion to quash such levy.[2]

b. Operation and Effect. Where under proper proceedings the levy of an execution has been quashed or vacated, the parties stand in the same situation as if no levy had been made, and the sheriff cannot proceed to a sale of the property under such levy.[3]

11. OPERATION AND EFFECT OF LEVY — a. Interest of Judgment Debtor — (I) *PERSONALTY.* The general rule is that the levy of an execution on personal property does not change the title of the judgment debtor into a mere right of action, the title remaining in him, with a capacity of disposition in any manner which does not impair the lien of the execution.[4]

See also Whitefield *v.* Adams, 65 Vt. 632, 27 Atl. 323.

98. Cawthorne *v.* Knight, 11 Ala. 268; Hewson *v.* Deygert, 8 Johns. (N. Y.) 333; Harrison *v.* Waln, 9 Serg. & R. (Pa.) 318 (holding that a levy on lands will not be set aside on the ground that the lands belong to a third person, the parties being left to contest the title in ejectment); Pennsylvania Ins. Co. *v.* Ketland, 1 Binn. (Pa.) 499. See, however, Keaton *v.* Forrester, 63 Ga. 206.

99. Mitchell *v.* Skinner, 17 Kan. 563. See also Langdon *v.* Conklin, 10 Ohio St. 439.

1. Ralston *v.* Field, 32 Ga. 453; De Witt *v.* Monroe, 20 Tex. 289 (where it was held that failing to serve notice was fatal to the motion, and that the defective service did not appear to have been sufficiently waived); Phelps *v.* Laird, 51 Vt. 285; Bonesteel *v.* Orvis, 23 Wis. 506, 99 Am. Dec. 201.

Notice to sheriff.— It has been held in Kentucky that as the sheriff has no direct interest in upholding the validity of the levy, notice of motion to quash the same need not be given to him, especially where the levy is upon real property. Demint *v.* Thompson, 80 Ky. 255.

2. *Iowa.*— Pomroy *v.* Parmlee, 9 Iowa 140, 74 Am. Dec. 328.

Michigan.— Campau *v.* Godfrey, 18 Mich. 27, 100 Am. Dec. 133.

Missouri.— Mellier *v.* Bartlett, 89 Mo. 134, 1 S. W. 220; Keyte *v.* Plemmons, 28 Mo. 104; Nelson *v.* Brown, 23 Mo. 13; McDonald *v.* Tiemann, 17 Mo. 603; Fink *v.* Alderson, 20 Mo. App. 364. See also Pettus *v.* Elgin, 11 Mo. 411.

New York.— Jones *v.* McCarl, 7 Abb. Pr. 418.

North Carolina.— Adams *v.* Smallwood, 53 N. C. 258.

Vermont.— Tudor *v.* Taylor, 26 Vt. 444.

See 21 Cent. Dig. tit. "Execution," § 369.

3. Kellogg *v.* Buckler, 17 Ga. 187; Walpole *v.* Smith, 4 Blackf. (Ind.) 304; Waymire *v.* Staley, 3 Ohio 366; Patton *v.* Pickaway County, 2 Ohio 395; Mays *v.* Wherry, 3 Tenn. Ch. 80, holding that where an execution sale is declared void and the entry of satisfaction set aside, the levy is not restored. See also Wilson *v.* Herrington, 86 Ga. 777, 13 S. E. 129 (holding that an order quashing a levy will be vacated by the court entering the same when shown to have been improvidently made); McConnell *v.* Denham, 72 Iowa 494, 34 N. W. 298 (where, after a levy on chattels mortgaged, the execution creditor authorizes the release of the chattels "without prejudice to his lien thereon," it was held that the lien, if one existed, would cease at the time of the release, notwithstanding this reservation); Mangum *v.* Hamlet, 30 N. C. 44 (holding that where an officer levies on personal property and leaves it in the possession of defendant, he only loses his lien thereon when the property is levied on under other executions).

4. *Alabama.*— Atwood *v.* Pierson, 9 Ala. 656.

Indiana.— Schenck *v.* Sithoff, 75 Ind. 485.

New Hampshire.— Folsom *v.* Chesley, 2 N. H. 432; Churchill *v.* Warren, 2 N. H. 298, 9 Am. Dec. 73.

New York.—Mumper *v.* Rushmore, 79 N. Y. 19.

North Carolina.— Alexander *v.* Springs, 27 N. C. 475; McKay *v.* Williams, 21 N. C. 398; Popelston *v.* Skinner, 20 N. C. 293.

Pennsylvania.— Robinson *v.* Hart, 23 Pa. Super. Ct. 299.

South Carolina.— Bates *v.* Moore, 2 Bailey 614.

England.— *In re* Clarke, [1898] 1 Ch. 336, 67 L. J. Ch. 234, 78 L. T. Rep. N. S. 275, 46 Wkly. Rep. 337.

See 21 Cent. Dig. tit. "Execution," § 376 *et seq.*

In custodia legis.— Property levied on under a fieri facias is in the custody of the law, and the court can by attachment, punishment for contempt, and writ of restitution, maintain its jurisdiction against its own officers and other persons. August *v.* Gilmer, 53 W. Va. 65, 44 S. E. 143. See *supra*, V, K.

(II) *Realty.* Likewise the levy of an execution on real property of the judgment debtor does not operate as a disseizin, nor does it deprive the judgment debtor of the power of transferring or selling the same, subject to the lien of the execution.[5]

b. Interest of Judgment Creditor. The general rule is that the judgment creditor, by virtue of levy under his execution, does not acquire any title to the property seized, but only an inchoate right to payment out of its avails by legal proceeding.[6] In some jurisdictions, notably the New England states, lands are extended under execution and set off to the creditor instead of being sold, and it is not until the officer has delivered seizin and the same has been accepted by the creditor that the extent becomes final and the title of the judgment debtor is divested.[7]

12. Release or Abandonment of Levy — a. By Acts of Judgment Creditor — (I) *Return of Writ Without Sale.* The return of an execution by the officer after levy without sale, by the direction of the judgment creditor, is a surrender of his authority, and leaves such property as free from his control as if no levy had been made upon it.[8] However, where part of the property taken under execution is improperly levied on, a direction by the judgment creditor to the officer not to sell such property does not constitute an abandonment of the levy as to the other property rightfully taken.[9]

(II) *Delay in Advertisement and Sale.* Likewise, a failure for a long period of time to enforce the levy of an execution by an advertisement and sale of the property will be treated, as to third parties, as a waiver or abandonment of

5. *Alabama.*— Fry *v.* Mobile Branch Bank, 16 Ala. 282.

Kentucky.— Addison *v.* Crow, 5 Dana 271.

Louisiana.— U. S. *v.* Hawkins, 4 Mart. N. S. 317.

Massachusetts.— See Larcom *v.* Cheever, 16 Pick. 260.

New York.— Catlin *v.* Jackson, 8 Johns. 520.

Texas.— Cundiff *v.* Teague, 46 Tex. 475.

See 21 Cent. Dig. tit. "Execution," § 376 *et seq.*

Equity of redemption.— It has been held in Massachusetts that where an equity of redemption is levied upon, under Mass. Pub. St. c. 172, § 45, providing that the levy shall be considered as made at the time the land is taken, the effect of such levy is to divest the owner of such equity at the time the land is taken. Lunt *v.* Cook, 175 Mass. 1, 55 N. E. 468, 78 Am. St. Rep. 472.

6. Labiche *v.* Lewis, 12 Rob. (La.) 8; Sheldon *v.* New Orleans Canal, etc., Co., 11 Rob. (La.) 181; French *v.* De Bow, 38 Mich. 708 (holding that a mere levy of execution does not give the levying creditor any rights analogous to those of a *bona fide* purchaser); Mitchell *v.* Roberts, 50 N. H. 486; Walker *v.* Com., 18 Gratt. (Va.) 13, 98 Am. Dec. 631. See also Jones *v.* Chenault, 124 Ala. 610, 27 So. 515, 82 Am. St. Rep. 211 (holding that one levying an execution on goods in the possession of his judgment debtor acquires no more interest in the goods than the debtor had, as he is not a *bona fide* purchaser); Watkins *v.* Wassell, 15 Ark. 73.

7. Howe *v.* Willis, 51 Me. 226; Cushman *v.* Carpenter, 8 Cush. (Mass.) 388; Bigelow *v.* Jones, 10 Pick. (Mass.) 161; Allen *v.* Thayer, 17 Mass. 299; Bott *v.* Burnell, 9 Mass. 96, 11 Mass. 163; Ladd *v.* Blunt, 4 Mass. 402; Gore *v.* Brazier, 3 Mass. 523, 3 Am. Dec. 182. See also Allen *v.* Taft, 6 Gray (Mass.) 552. *Compare* Bartlett *v.* Perkins, 13 Me. 87.

8. *Alabama.*— Carlisle *v.* Godwin, 68 Ala. 137.

Arkansas.— State Bank *v.* Etter, 15 Ark. 268.

Colorado.— Speelman *v.* Chaffee, 5 Colo. 247. See also Doyle *v.* Herod, 9 Colo. App. 257, 47 Pac. 846.

Indiana.— See McCabe *v.* Goodwine, 65 Ind. 288.

Kentucky.— May *v.* Ball, 108 Ky. 180, 56 S. W. 7, 21 Ky. L. Rep. 1673, 54 S. W. 851, 21 Ky. L. Rep. 1180; Ashland Bldg., etc., Assoc. *v.* Jones, 41 S. W. 437, 19 Ky. L. Rep. 615.

Louisiana.— Black *v.* Catlett, 1 Rob. 540. *Compare* Nichols *v.* McCall, 13 La. Ann. 215.

Missouri.— Brown *v.* Cape Girardeau County Sheriff, 1 Mo. 154.

Nebraska.— Rickards *v.* Cunningham, 10 Nebr. 417, 6 N. W. 475.

New York.— Hickok *v.* Coates, 2 Wend. 419, 421, 20 Am. Dec. 632.

Pennsylvania.— Kauffelt's Appeal, 9 Watts 334.

United States.— See Maul *v.* Scott, 16 Fed. Cas. No. 9,306, 2 Cranch C. C. 367.

See 21 Cent. Dig. tit. "Execution," § 387.

See, however, Wheeling, etc., Coal Co. *v.* Smithfield First Nat. Bank, 55 Ohio St. 233, 45 N. E. 630, holding that under the Ohio statute the return of the writ by direction of the judgment creditor without a sale of property does not operate as a discharge of the lien.

9. Richardson *v.* Rardin, 88 Ill. 124.

the levy.[10] However, as against the judgment debtor and parties claiming under him, the mere suspension of the execution or abandonment of sale will not affect the lien thereof.[11]

(III) *Issuance of Second Writ.* In several jurisdictions where plaintiff, after the levy of his writ, abandons it and sues out an alias writ, the benefit of the first levy is lost.[12] In other jurisdictions, however, the issuance of a second writ prior to the return or satisfaction of the first one may be evidence tending to show an abandonment of the former, but it is not usually regarded as conclusive, and may be overcome by testimony showing the contrary.[13]

(IV) *Resort to Other Remedies.* The rule has been laid down in some

10. *Arkansas.*— Slocomb *v.* Blackburn, 18 Ark. 309.

Georgia.— Smith *v.* Dickson, 9 Ga. 400. See, however, Rawson *v.* Davis, 36 Ga. 511.

Kentucky.— Cook *v.* Clemens, 87 Ky. 566, 9 S. W. 820, 10 Ky. L. Rep. 604; Cynthiana Deposit Bank *v.* Berry, 2 Bush 236. See also Greer *v.* Simrall, 59 S. W. 759, 22 Ky. L. Rep. 1037.

Maine.— Plaisted *v.* Hoar, 45 Me. 380.

Mississippi.— Allen *v.* Levy, 59 Miss. 613.

New Jersey.— See Paterson Bank *v.* Hamilton, 13 N. J. L. 159.

New York.— Platt *v.* Burckle, 1 How. Pr. 226.

Pennsylvania.—Com. *v.* Stremback, 3 Rawle 341, 24 Am. Dec. 351. See also Com. *v.* Lebo, 13 Serg. & R. 175. *Compare* McLaughlin *v.* McLaughlin, 85 Pa. St. 317 (holding that where the writ has been levied on land as between plaintiff therein and defendant, particular equities may be raised by particular circumstances, but as against judgment creditors and other outside parties plaintiff has the right, after levy, to delay proceedings to secure condemnation so long as may suit his reasonable convenience); Geissel *v.* Jones, 14 Phila. 172 (holding that a first execution cannot be set aside in favor of a subsequent one because the first execution creditor agreed to give further time to the debtor).

See 21 Cent. Dig. tit. "Execution," § 381 *et seq.*

Advertisement of part of property.— It was held in Bilby *v.* Hartman, 29 Mo. App. 125, that the fact that an officer advertises for sale only a part of the property levied on does not amount to an abandonment of the levy as to the rest of the property.

11. *Alabama.*— Keel *v.* Larkin, 72 Ala. 493; Dryer *v.* Graham, 58 Ala. 623.

Georgia.— Terry *v.* Americus Bank, 77 Ga. 528, 3 S. E. 154.

Idaho.— See Ollis *v.* Kirkpatrick, 3 Ida. 247, 28 Pac. 435.

Indiana.— Griffin *v.* Wallace, 66 Ind. 410.

Kentucky.— Locke *v.* Coleman, 2 T. B. Mon. 12, 15 Am. Dec. 118.

New Hampshire.— Hurlbutt *v.* Currier, 68 N. H. 94, 38 Atl. 502.

New Jersey.— See James *v.* Burnet, 20 N. J. L. 635.

New York.— Richards *v.* Allen, 3 E. D. Smith 399.

North Carolina.— Arrington *v.* Sledge, 13 N. C. 359.

Pennsylvania.— See Connell *v.* O'Neil, 154 Pa. St. 582, 26 Atl. 607.

Virginia.— Walker *v.* Com., 18 Gratt. 13, 98 Am. Dec. 631. See also Fisher *v.* Vanmeter, 9 Leigh 18, 33 Am. Dec. 221, opinions of Parker and Tucker, JJ.

See 21 Cent. Dig. tit. "Execution," § 381 *et seq.*

Delay at request of mortgagee.— Where a constable who had levied on property delayed the advertisement and sale of same in obedience to a request by the mortgagee, who intended to replevy it, it was held that the rights acquired by the levy were not lost. Baldwin *v.* Talbot, 46 Mich. 19, 8 N. W. 565.

12. Branch *v.* Riley, 19 Ga. 161; McChain *v.* McKeon, 2 Duer (N. Y.) 645; Pasour *v.* Rhyne, 82 N. C. 149; Martin *v.* Meredith, 71 N. C. 214; Scott *v.* Hill, 6 N. C. 143; Eckhols *v.* Graham, 1 Call (Va.) 492. See Ayers *v.* Lamb, 65 Ga. 627.

13. *Illinois.*— Wilson *v.* Gilbert, 161 Ill. 49, 43 N. E. 792. See Smith *v.* Hughes, 24 Ill. 270.

Iowa.— West *v.* St. John, 63 Iowa 287, 19 N. W. 237, holding that the issuance of a second writ, where the first has not been returned, indicates mistaken zeal in attempting to obtain satisfaction rather more than a desire to permit the first writ to become dormant or to abandon any advantage gained by it. See also Dunham *v.* Bentley, 103 Iowa 136, 72 N. W. 437, holding that the issuance of a void writ does not operate as an abandonment of a prior writ. See, however, Hanson *v.* Taper Sleeve Pulley Incorporation, 72 Iowa 622, 34 N. W. 448.

Michigan.— Friyer *v.* McNaughton, 110 Mich. 22, 67 N. W. 978.

Ohio.— Mason *v.* Hull, 55 Ohio St. 256, 45 N. E. 632 (holding that the lien obtained by the levy of a foreign execution on the lands of the judgment debtor is not waived or abandoned by suing out another execution on the judgment and causing it to be levied on the same lands); Bouton *v.* Lord, 10 Ohio St. 453.

Pennsylvania.— Menge *v.* Wiley, 100 Pa. St. 617; Com. *v.* Lelar, 13 Pa. St. 22; Ingham *v.* Snyder, 1 Whart. 116; Philadelphia Loan Co. *v.* Amies, 2 Miles 292; Matter of Glen Iron Works, 17 Phila. 551.

Tennessee.— Alley *v.* Carroll, 3 Sneed 110; Evans *v.* Barnes, 2 Swan 292; Breedlove *v.* Stump, 3 Yerg. 257, 276 [*quoted* with *approval* in Dawson *v.* Daniel, 7 Fed. Cas. No.

states that, after the levy of an execution, a resort to other remedies, such as filing a creditor's bill in aid of execution, is not a waiver or abandonment of the levy.[14]

b. By Acts of Officer — (I) *In General.* The rule in some jurisdictions is that a neglect or dereliction of duty on the part of the officer subsequent to the levy of the writ, to which the judgment creditor is not a party, will not invalidate the levy.[15] In some cases, however, it has been held that if an officer elects to relinquish a levy, or if by any act of his it is in effect relinquished, it is discharged beyond reclamation, and the remedy of the judgment creditor is then against the officer upon his official bond.[16]

(II) *Leaving Goods in Possession of Defendant.* The presumption that an officer has done his duty in executing the writ must be indulged until the contrary is shown, and the better doctrine seems to be that the fact that the officer without fraud has left the goods in care of the execution defendant will not constitute an abandonment of the levy.[17] Where, however, through the instrumen-

3,669, 2 Flipp. 305, 309]. See also Lester's Case, 4 Humphr. 383.

United States.— U. S. *v.* Morrison, 4 Pet. 124, 7 L. ed. 804.

See 21 Cent. Dig. tit. "Execution," § 392.

14. Amick *v.* Young, 69 Ill. 542; Ramsdell *v.* Creasey, 10 Mass. 170; Van Waggoner *v.* Moses, 26 N. J. L. 570 (holding that the right of a judgment creditor under his execution is not waived by his claim as a general creditor under an assignment made by defendant for the benefit of creditors); Moses *v.* Thomas, 26 N. J. L. 124. See also Price *v.* Church, Clarke, (N. Y.) 429. See, however, *In re* Sheehan, 21 Fed. Cas. No. 12,737.

15. *Alabama.*— Montgomery Branch Bank *v.* Curry, 13 Ala. 304; Hester *v.* Keith, 1 Ala. 316.

Georgia.— See Pinkston *v.* Harrell, 106 Ga. 102, 31 S. E. 808, 71 Am. St. Rep. 242.

Illinois.— Howard *v.* Bennett, 72 Ill. 297.

Indiana.— Johnson *v.* McLane, 7 Blackf. 501, 43 Am. Dec. 102 (holding that the lien of an execution is not destroyed by the failure of the sheriff to indorse upon the writ the date of its delivery to him); Brown *v.* Loesch, 3 Ind. App. 145, 29 N. E. 450.

Kentucky.— See Chamberlin *v.* Brewer, 3 Bush 561.

Louisiana.— Baham *v.* Langfield, 16 La. Ann. 156.

Mississippi.— Talbert *v.* Melton, 9 Sm. & M. 9.

Montana.— A. M. Holter Hardware Co. *v.* Ontario Min. Co., 24 Mont. 184, 61 Pac. 3.

New York.— Lopez *v.* Rowe, 163 N. Y. 340, 57 N. E. 501 [*reversing* 18 N. Y. App. Div. 427, 46 N. Y. Suppl. 91], where appellants obtained liens on personal property of an insolvent corporation by virtue of executions to satisfy judgments, and it was held that the fact that such executions were returned *nulla bona* through the mistake of a deputy, and the returns so made were set aside *nunc pro tunc* as of the date when made, did not postpone appellants' liens in favor of a subsequent attaching creditor. See also Bond *v.* Willet, 31 N. Y. 102, 1 Abb. Dec. 165, 1 Keyes 377, 29 How. Pr. 47, holding that the officer's delay to take possession of the goods he has levied on until an order staying proceedings is dissolved is not an abandonment of the levy. See, however, Bliven *v.* Bleakley, 23 How. Pr. 124.

Pennsylvania.— Morrison *v.* Hoffman, 1 Pa. St. 13.

Tennessee.— See Conway *v.* Jett, 3 Yerg. 481, 24 Am. Dec. 590.

United States.— Freeman *v.* Dawson, 110 U. S. 264, 28 L. ed. 141 [*affirming* Steers *v.* Daniel, 4 Fed. 587, 2 Flipp. 310].

See 21 Cent. Dig. tit. "Execution," § 383.

Levy upon realty before personalty.— Where the sheriff was directed by the attorney of plaintiffs in execution to first exhaust the personal property of defendant and then resort to real estate, and by mistake the officer levied upon and advertised the real estate first and then levied upon and sold the personalty, it was held that the prior levy upon and advertisement of the real estate was not an abandonment of the lien of the prior execution on the personalty. Childs *v.* Dilworth, 44 Pa. St. 123.

Where an execution was returned, "stayed by plaintiff's attorney," without plaintiff's authority, and he did not for several months after stay had expired issue a new execution, it was held that the delay in issuing an alias was not evidence of fraud, especially as he was a non-resident, and it was not shown at what time he had notice that a stay had been given. Reynolds *v.* Ingersoll, 11 Sm. & M. (Miss.) 249, 49 Am. Dec. 57.

16. Weber *v.* Henry, 16 Mich. 399; Moore *v.* Calvert, 8 Okla. 358, 58 Pac. 627; Bain *v.* Lyle, 68 Pa. St. 60; Lockhart *v.* Smith, 50 S. C. 112, 27 S. E. 567.

17. *Alabama.*— McCullough *v.* McClintock, 88 Ala. 567, 7 So. 149.

Illinois.— Columbia Hardwood Lumber Co. *v.* Brandenberger, 82 Ill. App. 357 (where the property seized under execution was turned over by the officer to the judgment debtor's assignee three days after its seizure); Baldwin *v.* Freydendall, 10 Ill. App. 106.

Indiana.— Cooley *v.* Harper, 4 Ind. 454; State *v.* Nelson, 1 Ind. 522; Brown *v.* Loesch, 3 Ind. App. 145, 29 N. E. 450.

tality of the judgment creditor the property is permitted to remain with the judgment debtor as his own, until a subsequent execution is levied or a *bona fide* sale is made, this is regarded in some jurisdictions as tantamount to an abandonment of the levy.[18]

(III) *PROPERTY SET OFF AS EXEMPT.* Where property seized under execution is claimed by an execution debtor as exempt, and the same is set off to him by the officer, it is relieved from the lien of the execution.[19]

(IV) *ALLOWING PROPERTY TO BE REMOVED BEYOND JURISDICTION.* The rule is well settled that where property levied upon under execution is allowed to be removed beyond the jurisdiction the levy is thereby abandoned.[20]

c. Reversal or Vacation of Judgment. Where the judgment under which the

Maine.— Ames *v.* Taylor, 49 Me. 381.

Missouri.— Nicholson *v.* Merstetter, 68 Mo. App. 441.

Nebraska.— Meyer *v.* Michaels, (1903) 95 N. W. 63.

New York.— People *v.* National Mut. Ins. Co., 19 N. Y. App. Div. 247, 46 N. Y. Suppl. 102.

Pennsylvania.— Smith *v.* Nicola Bros. Co., 193 Pa. St. 562, 44 Atl. 574; Gillespie *v.* Keating, 180 Pa. St. 150, 36 Atl. 641, 57 Am. St. Rep. 622 (holding that where an execution is delivered with directions to realize thereon, the lapse of two return-days between the levy and sale, and the fact that the officer permitted defendant meantime to keep the goods and conduct his business as usual, and that plaintiff did not rule the officer to return the writ, would not constitute an abandonment of the levy); McGinnis *v.* Prieson, 85 Pa. St. 111.

South Carolina.— Moss *v.* Moore, 3 Hill 276.

United States.— Vance *v.* Royal Clay Mfg. Co., 82 Fed. 251.

See 21 Cent. Dig. tit. "Execution," § 384.

Surrender of goods to another officer.— It was held in Miller *v.* Getz, 135 Pa. St. 558, 19 Atl. 955, 20 Am. St. Rep. 887, that a constable's levy is not abandoned merely because he gives his execution to the sheriff, who makes a subsequent levy, subject to the constable's levy, on the same goods and sells them.

Question of fact.— It has been held in England that where a sheriff who has seized goods under a writ of fieri facias goes out of possession, the question whether in so doing he has abandoned possession is a question of fact. Bagshawes *v.* Deacon, [1898] 2 Q. B. 173, 67 L. J. Q. B. 658, 78 L. T. Rep. N. S. 776, 46 Wkly. Rep. 618.

18. *Minnesota.*— Hastings First Nat. Bank *v.* Rogers, 15 Minn. 381.

New York.— Excelsior Needle Co. *v.* Globe Cycle Works, 48 N. Y. App. Div. 304, 62 N. Y. Suppl. 538.

North Carolina.— See Mangum *v.* Hamlet, 30 N. C. 44.

Pennsylvania.— Chancellor *v.* Phillips, 4 Dall. 213, 1 L. ed. 805; Guardians of Poor *v.* Lawrence, 4 Yeates 194; McHugh *v.* Malony, 4 Phila. 59. *Compare* Larzelere Co.'s Appeal, (1888) 13 Atl. 85.

South Carolina.— See Mayson *v.* Irby, 1 Rich. 435.

Virginia.— Fisher *v.* Vanmeter, 9 Leigh 18, 33 Am. Dec. 221.

West Virginia.—Patton *v.* Moore, 16 W. Va. 428, 37 Am. Rep. 789.

United States.— Barnes *v.* Billington, 2 Fed. Cas. No. 1,015, 4 Day (Conn.) 81 note, 1 Wash. 29; *In re* Ferguson, 95 Fed. 429 [*affirmed* in 102 Fed. 1002, 43 C. C. A. 89].

See 21 Cent. Dig. tit. "Execution," § 384.

Compare McConnell *v.* Denham, 72 Iowa 494, 34 N. W. 298, where, after a levy on chattels mortgaged, the execution creditor authorizes the release of the chattels "without prejudice to his lien thereon," it was held that the lien, if one existed, would cease at the time of the release, notwithstanding this reservation.

Private sale of property.— It was held in Dunham *v.* Rundle, 4 Pa. Super. Ct. 174, that an execution creditor who permits control of the property to remain with the execution defendant after levy, so that private sales are made in contravention of law, will be postponed to a junior execution.

Where execution debtor had given security for the release of his stock of goods and had continued in business for more than a year, it was held that no lien existed on the goods to which the surety could be subrogated. Hubbard *v.* Fravell, 12 Lea (Tenn.) 304.

19. Hall *v.* Hough, 24 Ind. 273. See also, generally, EXEMPTIONS; HOMESTEADS.

20. Chaney *v.* Beauford Lumber Co., 132 Ala. 315, 31 So. 369; Hill *v.* Slaughter, 7 Ala. 632; Morton *v.* Walker, 7 How. (Miss.) 554; Wood *v.* Keller, 2 Miles (Pa.) 81; Fields *v.* Crawford, 30 Fed. Cas. No. 18,296, 2 Hayw. & H. 256. See also McMahan *v.* Green, 12 Ala. 71, 46 Am. Dec. 242.

Cattle on range.— It has been held in Texas that a valid levy on cattle on a range is not lost in favor of a mortgagee by the removal of cattle to other counties by the owners, where the owners were acting for the mortgagee in such removal. Brown *v.* Hudson, 14 Tex. Civ. App. 605, 38 S. W. 653.

Suspension of lien.— It was held in Newcombe *v.* Leavitt, 22 Ala. 631, that if executions are regularly issued from term to term, the lien created by placing the execution in the officer's hands is not lost, but suspended merely, by the removal of the property from one county to another within the state; but where such property is removed to another state, where it is acquired and held by *bona fide* purchaser until the statute of limitations

execution was issued and the levy made is reversed or vacated, the lien created by the levy of the execution is extinguished.[21]

13. Revival of Levy or Lien — a. In General. Wherever the levy of an execution has been suspended in its operation by an injunction or the execution of a forthcoming bond, and such injunction is dissolved or forthcoming bond quashed, the lien of such execution is thereby restored.[22]

b. By Alias or Pluries Writs. Where the lien created by the levy on property of the judgment debtor is lost by the return of the writ *nulla bona*, it is not revived by the delivery of an alias fieri facias so as to overreach interests which have intervened in the interim.[23]

C. Custody of Property[24] **— 1. By Officer Making Levy — a. In General.** The officer making a levy on personalty is presumed in law to have the possession or custody of it, but under conflicting decisions in the various jurisdictions, the degree of care which he must exercise in protecting and preserving such property seems to be by no means settled.[25] The rule seems to be universally recognized, however, that the levying officer is answerable to either party for any damages suffered from his negligence, or that of his agents, in the care of the property while held by him by virtue of his levy.[26]

b. Title Acquired. A levy of an execution upon property of the judgment debtor vests in the officer making the levy a special property in the goods seized, and the right of possession thereof, for the purpose of sale under such levy.[27]

in that state has barred its recovery, and it is then brought back into the state where the execution issued, such purchaser's title is perfect against the execution creditor, even though he has had executions regularly issued from term to term.

Temporary removal.— It has been held in Kentucky that the lien given by the levy of an execution is not lost by the temporary removal of defendant's property. Forman *v.* Proctor, 9 B. Mon. (Ky.) 124; Hood *v.* Winsatt, 1 B. Mon. (Ky.) 208. See also Mitchell *v.* Ashby, 78 Ky. 254.

21. Field *v.* Macullar, 20 Ill. App. 392; Humerton *v.* Hay, 65 N. Y. 380 (holding that an execution and levy under a judgment of a county court are defeated by a reversal of the judgment on appeal to the general term); May *v.* Cooper, 24 Hun (N. Y.) 7; Mosely *v.* Gainer, 10 Tex. 393.

22. McMicken *v.* Morgan, 9 La. Ann. 208; McComb *v.* Doe, 16 Miss. 505. See also Post *v.* Naglee, 1 Pa. St. 168.

23. *Alabama.*— Cary *v.* Gregg, 3 Stew. 433.
Louisiana.— Black *v.* Catlett, 1 Rob. 540.
North Carolina.—Pasour *v.* Rhyne, 82 N. C. 149.
Pennsylvania.— See Truitt *v.* Ludwig, 25 Pa. St. 145.
United States.— Maul *v.* Scott, 16 Fed. Cas. No. 9,306, 2 Cranch C. C. 367.
See 21 Cent. Dig. tit. "Execution," § 396.
If the judgment creditor desires to preserve his lien on the judgment debtor's property, he should do so by suing out writs to successive terms. Cary *v.* Gregg, 3 Stew. (Ala.) 433.

24. **Delivery to bailee or receiptor** see *infra*, VII, C, 2.

25. It may be generally stated that he should have such supervision over and custody of the property as will enable him to retain and assert his power and control over it, so that it cannot be withdrawn or taken by another without his knowledge. Hemmenway *v.* Wheeler, 14 Pick. (Mass.) 408, 25 Am. Dec. 411; Wilson *v.* Powers, 21 Minn. 193; Cumberland Bank *v.* Hann, 19 N. J. L. 166.

26. Witkowski *v.* Hern, 82 Cal. 604, 23 Pac. 132; Fuller *v.* Loring, 42 Me. 481; Eastman *v.* Judkins, 59 N. H. 576; Wood *v.* Bodine, 32 Hun (N. Y.) 354.

27. *Alabama.*— Whitsett *v.* Womack, 8 Ala. 466; Moore *v.* Sample, 3 Ala. 319.
Delaware.— Davis *v.* White, 1 Houst. 228.
Illinois.— Pearl *v.* Wellman, 8 Ill. 311.
Kentucky.— Rogers *v.* Darnaby, 4 B. Mon. 238; Richardson *v.* Bartley, 2 B. Mon. 328.
Maine.— Fuller *v.* Loring, 42 Me. 481.
Maryland.— Boyd *v.* Harris, 1 Md. Ch. 466.
Minnesota.— Mower *v.* Stickney, 5 Minn. 397; Rohrer *v.* Turrill, 4 Minn. 407.
Nebraska.— Pitkin *v.* Burnham, 62 Nebr. 385, 87 N. W. 160, 89 Am. St. Rep. 763, 55 L. R. A. 280.
New Hampshire.— Mitchell *v.* Roberts, 50 N. H. 486.
New Jersey.— Hamilton *v.* Hamilton, 25 N. J. L. 544.
New York.— Steffin *v.* Steffin, 4 N. Y. Civ. Proc. 179.
North Carolina.— Love *v.* Johnston, 72 N. C. 415; Seawell *v.* Cape Fear Bank, 14 N. C. 279, 22 Am. Dec. 722. See also Haywood *v.* Sledge, 14 N. C. 338.
South Carolina.— Bates *v.* Gest, 3 McCord 493, holding, however, that as soon as the object of the levy is answered his right of property ceases.
Tennessee.— Brown *v.* Allen, 3 Head 429.
United States.— Barnes *v.* Billington, 2 Fed. Cas. No. 1,015, 1 Wash. 29, 4 Day (Conn.) 81 note.
See 21 Cent. Dig. tit. "Execution," § 399.

Thus it has been held that the seizure of property under execution vests in the officer making the levy the right to receive the rents and profits of such property from the date of seizure;[28] and it has also been held in several jurisdictions that an officer levying on a mortgagor's equity of redemption in mortgaged property is entitled to take such property into his possession for the purpose of effecting a sale of the mortgagor's equity.[29]

c. Action For Recovery. Since the effect of the levy of an officer upon property of the debtor is to vest him with title therein for certain purposes, he may maintain an action of trespass against any person disturbing him in such possession;[30] or an action of trover for its conversion;[31] or bring an action of replevin for its recovery.[32]

Property subject to lease.—It has been held in Louisiana that a sheriff who has seized under fieri facias property occupied by lessees may institute suit for expulsion of the tenants. State *v.* Skinner, 33 La. Ann. 146.

Where personal property seized on execution is taken from the sheriff by writ of replevin, but is returned on his executing an undertaking under Ohio Rev. St. (1892) § 5820, and conditioned as therein required, it is the duty of such sheriff to retain said property in his possession until the determination of the replevin suit. Uphaus *v.* Roof, 68 Ohio St. 401, 67 N. E. 717.

28. Anderson *v.* Comeau, 33 La. Ann. 1119; Courtney *v.* Hunt, 5 La. Ann. 174.

29. McIsaacs *v.* Hobbs, 8 Dana (Ky.) 268; Philips *v.* Marsh, 7 J. J. Marsh. (Ky.) 279; Wilson *v.* Montague, 57 Mich. 638, 24 N. W. 851; Cary *v.* Hewitt, 26 Mich. 228.

30. Trespass.— *Illinois.*— Garner *v.* Willis, 1 Ill. 368; Bennet *v.* Gilbert, 94 Ill. App. 505; Gates *v.* People, 6 Ill. App. 383.

Louisiana.—Paul *v.* Hoss, 28 La. Ann. 852; Winn *v.* Elgee, 6 Rob. 100. See also State *v.* Judge Fifth Dist. Ct., 15 La. Ann. 34.

Mississippi.— Parker *v.* Dean, 45 Miss. 408.

New Jersey.—Casher *v.* Peterson, 4 N. J. L. 317.

New York.— Marsh *v.* White, 3 Barb. 518; Earl *v.* Camp, 16 Wend. 562 (holding, however, that it is incumbent on the officer bringing the action to show a valid judgment); Lockwood *v.* Bull, 1 Cow. 322, 13 Am. Dec. 529. See also People *v.* Church, 2 Wend. 262.

Pennsylvania.— Taylor *v.* Manderson, 1 Ashm. 130. See Lewis *v.* Carsaw, 15 Pa. St. 31, holding, however, that the officer must have either the actual possession of the goods or the right thereto, at the time of the commission of the trespass complained of.

See 21 Cent. Dig. tit. "Execution," § 401.

See also, generally, TRESPASS.

31. Trover.—*Delaware.*—Hargadine *v.* Ford, 5 Houst. 380.

Illinois.—Davidson *v.* Waldron, 31 Ill. 120, 83 Am. Dec. 206; Gates *v.* People, 6 Ill. App. 383.

Massachusetts.— Caldwell *v.* Eaton, 5 Mass. 399.

New Jersey.— Brewster *v.* Vail, 20 N. J. L. 56, 38 Am. Dec. 547; Brink *v.* Decker, 3 N. J. L. 902.

New York.— Clearwater *v.* Brill, 63 N. Y. 627 [*reversing* 4 Hun 728] (holding that an officer who was in actual possession of goods by virtue of executions valid on their face, was not bound, in order to maintain an action against a stranger for taking the goods, to prove the judgment); Dezell *v.* Odell, 3 Hill 215, 38 Am. Dec. 628. See also Hill *v.* Haynes, 54 N. Y. 153, holding, however, that where property has been removed by the judgment debtor out of the county, the officer cannot recover possession thereof forcibly, since he has no jurisdiction out of his county.

South Carolina.— McClintock *v.* Graham, 3 McCord 243.

See 21 Cent. Dig. tit. "Execution," § 401.

See also, generally, TROVER AND CONVERSION.

Action against another officer.— It has been held in New York that the officer who makes a subsequent levy on property cannot sustain an action of trover against another officer who illegally sells the property under a prior levy. Dubois *v.* Harcourt, 20 Wend. 41.

Election of remedies.— It was held in Dezell *v.* Odell, 3 Hill (N. Y.) 215, 38 Am. Dec. 628, that where a sheriff delivered goods seized under an execution to a receiptor, under a receipt, by which the latter agreed to redeliver the goods, and thereafter refused to comply with such agreement, the officer might maintain either replevin or trover for the goods or assumpsit on the receipt, at his election.

Stranger in possession.— It has been held in California that where a stranger to the execution is in possession of the property, claiming to own it by virtue of a transfer to him from the debtor, which would prevent the latter from retaking possession, the sheriff cannot justify without producing both the execution and the judgment authorizing its issue. Knox *v.* Marshall, 19 Cal. 617; Bickerstall *v.* Doud, 19 Cal. 109, 79 Am. Dec. 204. See also to the same effect Kane *v.* Desmond, 63 Cal. 464.

32. Replevin.— Polite *v.* Jefferson, 5 Harr. (Del.) 388; Gates *v.* People, 6 Ill. App. 383 (holding, however, that the officer is not entitled to invoke a summary proceeding by attachment for contempt of court against another officer for taking the property under another writ subsequently issued); Dunkin *v.* McKee, 23 Ind. 447; Tuttle *v.* Jackson, 4 N. J. L. 115 (holding that where goods are improperly taken away after a levy by the officer he, and not plaintiff in execution, must

2. Delivery to Third Person or Defendant as Bailee or Receiptor — a. General Rule. It is not necessary for an officer levying upon property of a judgment debtor to retain actual possession of such property himself. He may leave it in the possession of a third person,[33] or of defendant as his bailee.[34]

b. Rights and Liabilities of Bailee or Receiptor. Where a party receives goods as bailee or receiptor from the officer levying upon the same by virtue of an execution, giving receipt or stipulation for the redelivery of such property upon demand, he has no property, general or special, in the goods in his custody, and must surrender possession to the officer on demand, and is thereafter estopped to question the regularity of the judgment or execution, or to deny the delivery to him of the property.[35]

maintain suit for same). See also, generally, Replevin.

33. *Alabama.*— Easley *v.* Walker, 10 Ala. 671.

Indiana.— Davis *v.* Crow, 7 Blackf. 129.

Kentucky.— Bedford *v.* Kesler, 15 Ky. L. Rep. 31.

Maine.— See also Plaisted *v.* Hoar, 45 Me. 380.

Michigan.— See Burk *v.* Hebb, 32 Mich. 173.

Minnesota.— Horgan *v.* Lyons, 59 Minn. 217, 60 N. W. 1099.

Missouri.— Talbot *v.* Magee, 59 Mo. App. 347.

New York.— Lockwood *v.* Bull, 1 Cow. 322, 13 Am. Dec. 539.

Ohio.— Bassett *v.* Baker, Wright 337.

Vermont.— Pierson *v.* Hovey, 1 D. Chipm. 51.

See 21 Cent. Dig. tit. "Execution," § 402.

Appointment of receiver for corporation.— It has been held in New York that it is not necessary, after the appointment of a receiver, that the sheriff should appoint keepers to maintain levy of execution theretofore made on property of the corporation. Gorman *v.* Finn, 171 N. Y. 628, 63 N. E. 1117 [*affirming* 56 N. Y. App. Div. 155, 67 N. Y. Suppl. 546].

34. *Delaware.*— West *v.* Shockley, 4 Harr. 287.

Illinois.— Smith *v.* Hughes, 24 Ill. 270.

Kentucky.— Richardson *v.* Bartley, 2 B. Mon. 328.

Louisiana.— Smith *v.* Berwick, 12 Rob. 20.

Minnesota.— Horgan *v.* Lyons, 59 Minn. 217, 60 N. W. 1099.

Nebraska.— See Meyer *v.* Michaels, (Nebr. 1903) 95 N. W. 63.

New Jersey.— Browning *v.* Skillman, 24 N. J. L. 351 (holding that where goods are levied on by an officer and left with defendant, he has such title as bailee of the officer as will enable him to maintain trespass for their being taken away); Cumberland Bank *v.* Hann, 19 N. J. L. 166.

New York.— Smith *v.* Reeves, 33 How. Pr. 183. See also Cornell *v.* Dakin, 38 N. Y. 253.

See 21 Cent. Dig. tit. "Execution," § 402.

If credit be thereby given to defendant, a sheriff must not leave property taken under a fieri facias in the hands of defendant. Knox *v.* Summers, 4 Yeates (Pa.) 477.

35. *Alabama.*— Whitsett *v.* Womack, 8 Ala. 466.

Connecticut.— Reed *v.* Tousley, 1 Root 374, 381; Maples *v.* Peck, 1 Root 140; Hartshorn *v.* Halsey, 1 Root 92. See also Stevens *v.* Curtiss, 3 Conn. 260; Phelps *v.* Landon, 2 Day 370.

Kentucky.— Stephens *v.* Vaughan, 4 J. J. Marsh. 206, 20 Am. Dec. 216.

Maine.— Ames *v.* Taylor, 49 Me. 381; Hinckley *v.* Bridgham, 46 Me. 450; Penobscot Boom Corp. *v.* Wilkins, 27 Me. 345.

Michigan.— Burk *v.* Webb, 32 Mich. 173.

New Jersey.— Hampton *v.* Swisher, 4 N. J. L. 66.

New York.— Cornell *v.* Dakin, 38 N. Y. 253 (holding that one giving a receipt for property seized on execution could not show that the property receipted for was of less value than the sum stipulated to be paid in case of its non-delivery); Dezell *v.* Odell, 3 Hill 215, 38 Am. Dec. 628; Miller *v.* Adsit, 16 Wend. 335 [*overruling* Dillenback *v.* Jerome, 7 Cow. 294] (holding that one receipting for property levied on by an officer by virtue of an execution, and engaging to redeliver it, has no such title therein as to enable him to maintain trover in his own name where the property is converted by a stranger). See also Russell *v.* Winne, 37 N. Y. 591, 97 Am. Dec. 755; Lockwood *v.* Bull, 1 Cow. 322, 13 Am. Dec. 539.

Vermont.— See Bowman *v.* Conant, 31 Vt. 479.

Wisconsin.— Main *v.* Bell, 27 Wis. 517, holding, however, that in an action against the receiptor by the sheriff, the receiptor might show that the goods delivered to him were exempt and had been delivered to the execution defendant. *Compare* Perry *v.* Williams, 39 Wis. 339.

See 21 Cent. Dig. tit. "Execution," § 404.

Excess of liability.— Browning *v.* Hanford, 5 Hill (N. Y.) 588, 40 Am. Dec. 369, holding that a promise by a receiptor of goods taken on execution, purporting on its face to render him responsible to the officer beyond the liability of the officer to the judgment creditor, was void, at least as far as the excess of such liability was concerned.

Release by second levy.— However, one in whose possession the officer leaves property levied on under execution, which levy is released, is not estopped, as against the officer, to claim title to the property by purchase from the execution debtor after such release, on the officer subsequently levying a second execution, and taking possession un-

3. Execution of Forthcoming and Delivery Bond[36] — a. Authority of Officer to Accept. In nearly every jurisdiction, by statutory enactment, where the officer levies on personal property by virtue of a fieri facias, he may instead of removing the property take a bond with sureties for the delivery of such property on a stipulated day for sale.[37]

b. Who May Execute — (I) *General Rule.* As a general rule statutes providing for the giving of a forthcoming bond authorize only the person whose property is levied upon to execute such bond.[38]

(II) *One of Several Defendants.* The better doctrine seems to be that one of several defendants in execution may replevy the property levied upon, even where his co-defendants fail to unite with him in executing the bond.[39]

c. Form and Requisites of Bond — (I) *In General.* While the form and requisites of the bond vary according to the provisions of different statutes, yet, since the proceeding is statutory, it is essential that the bond should substantially conform to the requirements of the statute by which it is authorized.[40]

der it, since thereafter the relation of bailor and bailee no longer exists. Bloedorn *v.* Jewell, 34 Nebr. 649, 52 N. W. 367.

36. Claimant's bond see *infra*, IX, A, 7.

37. Harris *v.* Stewart, 65 Ark. 566, 47 S. W. 634; Fountain *v.* Napier, 109 Ga. 225, 34 S. E. 351 (holding, however, that a forthcoming bond is not a binding contract until accepted by the officer); Harrodsburg Sav. Inst. *v.* Chinn, 7 Bush (Ky.) 539 (holding that where a sheriff levied an execution during its life, after the return-day thereof he could take a bond from the execution defendant replevying the execution); Richardson *v.* Bartley, 2 B. Mon. (Ky.) 328; Lyon *v.* Stewart, 5 J. J. Marsh. (Ky.) 676; Hastings *v.* Quigley, 2 Pa. L. J. Rep. 431, 4 Pa. L. J. 220. See Martin *v.* Sturm, 5 Rand. (Va.) 693.

38. Nabours *v.* Cocke, 24 Miss. 44; Harris *v.* Shackleford, 6 Tex. 133, where defendant died after the issue of execution against him and before it was levied, and the widow gave a forthcoming bond, and it was held that no execution could issue thereon, it not being such bond as is contemplated by statute. See also Robinson *v.* Terrell, 8 Fla. 350; Gilmer *v.* Allen, 9 Ga. 208.

Executor or administrator.— It has been held in Mississippi that a forthcoming bond may be executed by an executor or administrator. Thompson *v.* Ross, 26 Miss. 198; Jones *v.* Stanton, 7 How. 601.

Direction not to take security.— It has been held in Kentucky that where the execution contains a direction that no security of any kind is to be taken, the officer has no authority to accept a forthcoming bond, and if he does it will not be valid as a statutory bond, although it may be good at common law as a direction to the officer. Ditto *v.* Geoghegan, 1 Metc. 169; Poston *v.* Southern, 7 B. Mon. 289.

39. Sheppard *v.* Melloy, 12 Ala. 561; Head *v.* Beaty, 5 How. (Miss.) 480.

In Kentucky, however, it was held that all co-defendants must unite in the execution of the bond; otherwise it may be quashed on motion of judgment creditor. Kouns *v.* Commonwealth Bank, 2 B. Mon. 303; Com. *v.* Fisher, 2 J. J. Marsh. 137; Stevens *v.* Wallace, 5 T. B. Mon. 404. See also Williamson *v.* Logan, 1 B. Mon. 237, holding that a replevin bond executed by heirs to stay a judgment against an administrator, without his joining, is not void and cannot be quashed at the instance of the obligors, but may be avoided by the obligees. *Contra*, Edwards *v.* Greenwell, Hard. 188.

40. The bond was held to be void on account of failure to comply with the statute in the following cases:

Alabama.— Mobile Branch Bank *v.* Darrington, 14 Ala. 192.

Kentucky.—Vertrees *v.* Shean, 2 Metc. 291.

Louisiana.— Hefner *v.* Hesse, 29 La. Ann. 149.

Mississippi.—Williams *v.* Crutcher, 5 How. 71, 35 Am. Dec. 422 (where the bond was delivered with the penalty and the amount of the execution left blank); Long *v.* U. S. Bank, Freem. 375 (where the bond was signed in blank and afterward filled up for the delivery of property which had no existence); Patterson *v.* Denton, Sm. & M. Ch. 592.

Missouri.— Selmes *v.* Smith, 21 Mo. 526 (in which case the bond was held not to be such as was contemplated by the statute, and hence not enforceable by summary proceeding or on motion); Robards *v.* Samuel, 17 Mo. 555 (where the bond was extorted by the sheriff to compel the delivery of the property levied on, which was exempt from execution). See also D. M. Sechler Carriage Co. *v.* Hymes, 87 Mo. App. 193.

Texas.— Jenkins *v.* McNeese, 34 Tex. 189.

Virginia.— Garland *v.* Lynch, 1 Rob. 545 (where the bond was signed by one co-defendant as principal and the other as surety, it being held that such surety was already bound and was not such security as the statute required); Downman *v.* Chinn, 2 Wash. 189.

West Virginia.— Adler *v.* Green, 18 W. Va. 201 (where the day of delivery was different from the day of sale fixed in the bond); Wallace *v.* McCarty, 8 W. Va. 193.

See 21 Cent. Dig. tit. "Execution," § 408 *et seq.*

There was no ground for quashing the writ

(II) *OBLIGEE IN BOND.* In most jurisdictions the statute provides that the bond shall be made payable to the judgment creditor.[41]

(III) *DESCRIPTION OF PROPERTY.* The forthcoming bond should describe the property levied upon, and for the proper delivery of which it is conditioned, and should specify the owner thereof.[42]

on account of irregularities in the following cases:

Arkansas.— Cheek *v.* Claiborne, 22 Ark. 384.

Indiana.— Eldridge *v.* Yantes, 6 Blackf. 72.

Kentucky.— Handley *v.* Rankins, 4 T. B. Mon. 554.

Mississippi.— Walker *v.* Shotwell, 13 Sm. & M. 544 (where a forthcoming bond given by S as principal recited that the execution was against W & S, and the sheriff did not disclose the fact that it was against S alone, and it was held that the fraud, if any, did not discharge the bond in the absence of proof that the creditor was implicated in it); McComb *v.* Doe, 8 Sm. & M. 505 (where the omission of seal was held to be merely an irregularity, and that the bond could not be quashed after the return-term); Jones *v.* Mississippi, etc., R. Co., 5 How. 407.

Missouri.— Grant *v.* Brotherton, 7 Mo. 458.

New York.— Ring *v.* Gibbs, 26 Wend. 502; Burrall *v.* Acker, 23 Wend. 606 [*affirming* 21 Wend. 605], both holding that a covenant entered into by a third person, on receiving property levied on by a sheriff, to deliver it to the sheriff on request or pay the debt, was a valid obligation within the statute concerning bonds, etc., taken by a sheriff, etc.

North Carolina.— Grady *v.* Threadgill, 35 N. C. 228 (holding that a bond conditioned that defendant shall deliver the property to the officer at the time and place of sale is sufficient, without the words "to answer the said execution"); Foster *v.* Frost, 15 N. C. 424.

Tennessee.— Cheaires *v.* Alderson, 7 Humphr. 273.

Virginia.— Ballard *v.* Whitlock, 18 Gratt. 235 (where the condition in the bond was for the delivery of the property on a day after the return-day of the writ); Booth *v.* Kinsey, 8 Gratt. 560 (holding that the fact that the obligee in the bond was also a surety did not invalidate the bond); Harpers *v.* Patton, 1 Leigh 306 (holding that a bond taken against three parties, which did not distinctly state to which of the three the property taken under execution belonged, nor that it was restored to the debtor, was nevertheless sufficient); Bronaugh *v.* Freeman, 2 Munf. 266 (holding that it was proper to include in the bond the sheriff's fee for taking same); Washington *v.* Smith, 3 Call 13 (holding that a bond given by defendant without surety would support a judgment thereon); Worsham *v.* Egleston, 1 Call 48 (holding that where the officer in taking bond included his commission on the debt, such bond was not invalidated where judgment on the same was entered for the sum due, without commission); Bell *v.* Marr, 1 Call 47 (holding that the bond was not invalid for including an excess where plaintiff, after judgment, and during the same term, released the excess); Scott *v.* Hornsby, 1 Call 41; Burwell *v.* Court, 1 Wash. 254 (where the condition in the bond did not specify any place where the property was to be delivered); Irvin *v.* Eldridge, 1 Wash. 161 (holding that the day appointed for the delivery of the property should be in effect the day appointed for the sale, but it is not necessary that it should be so stated in the condition of the bond where the day of delivery is mentioned); Wood *v.* Davis, 1 Wash. 69.

West Virginia.—Harwood *v.* Creel, 8 W. Va. 579.

See 21 Cent. Dig. tit. "Execution," § 408 *et seq.*

41. Koeniger *v.* Creed, 58 Ind. 554 (holding, however, that a bond made payable to the officer holding the writ, instead of to the creditor, was not invalid); Handley *v.* Rankins, 4 T. B. Mon. (Ky.) 554 (holding that a forthcoming bond for property levied on under execution in favor of parties as executors, which is payable to the execution creditors individually, will not be quashed); Handley *v.* Rankins, 2 T. B. Mon. (Ky.) 151 (holding that a replevin bond to plaintiffs in their proper right, taken after an execution in their favor as administrators, is erroneous); Jones *v.* Powell, 5 Litt. (Ky.) 289 (holding that, although a replevin bond may be assigned to a third person, execution thereon must still issue in the name of the obligee, and a delivery bond taken to the assignee, by virtue of such execution, is irregular); Lynchburg Trust, etc., Bank *v.* Elliott, 94 Va. 700, 27 S. E. 467; Meze *v.* Howver, 1 Leigh (Va.) 442; Downman *v.* Chinn, 2 Wash. (Va.) 189. See, however, Thompson *v.* Wilson, 1 Blackf. (Ind.) 358.

Death of plaintiff prior to execution of bond.— It has been held in Mississippi that where plaintiff in execution dies after the execution issues, but before the making of a forthcoming bond by defendant, a judgment on such forthcoming bond executed to the deceased plaintiff is void. Smith *v.* Montgomery, 11 Sm. & M. (Miss.) 284. See, however, Turnbull *v.* Claibornes, 3 Leigh (Va.) 392.

Where name of obligee was omitted.— Where a writing under seal certified that the subscriber was surety for the forthcoming of all goods and chattels of defendant in execution named therein, on the day therein specified, it was held that this was a covenant with the constable to whom it was delivered, and not with the execution plaintiff, as a deed takes effect by the delivery thereof. Crawford *v.* Slack, 1 Harr. (Del.) 122.

42. Tompkins *v.* Roberts, Litt. Sel. Cas. (Ky.) 12; Jones *v.* Miles, 1 How. (Miss.) 50; Bronaugh *v.* Freeman, 2 Munf. (Va.) 266; Lewis *v.* Thompson, 2 Hen. & M. (Va.)

(IV) *DESCRIPTION OF EXECUTION.* The forthcoming bond should recite the issuance and levy of the writ,[43] and the name of the judgment debtor;[44] and it should also state the amount for which the execution issued.[45] Any material variance between the writ and the description thereof in the bond will be fatal to the latter.[46]

(V) *BOND COVERING TWO EXECUTIONS.* It has been held in some jurisdictions that it is proper to unite two executions against the same party in one forthcoming bond, provided the bond recites distinctly the amount of each execution.[47]

(VI) *BOND LACKING STATUTORY REQUISITES.* Although a forthcoming bond be not good as a statutory bond for failure to comply with some provision of the statute, it may yet be good as a common-law obligation.[48]

(VII) *DEFECTS IN BOND* — (A) *Objections in General.* A defect in a forthcoming bond cannot be urged by motion to quash an execution issuing upon it after forfeiture of the bond.[49] Where a defect in the bond will not inure to the injury of the obligors therein, as where the penal sum is too small,[50] or where the officer has taken the bond without the sureties required by statute, and the judgment creditor has accepted it,[51] the obligors cannot object to the validity of the bond on such grounds.

100; Hubbard *v.* Taylor, 1 Wash. (Va.) 259; Central Land Co. *v.* Calhoun, 16 W. Va. 361.

43. *Georgia.*— Harden *v.* Webster, 29 Ga. 427.

Indiana.— Midland R. Co. *v.* Eller, 7 Ind. App. 216, 33 N. E. 265.

Kentucky.— Handley *v.* Rankins, 4 T. B. Mon. 554. *Compare* Meaux *v.* Rutgers, Ky. Dec. 288.

Mississippi.— Barker *v.* Planters' Bank, 5 How. 566.

Virginia.— Buchanan *v.* Maynadier, 6 Call 1.

United States.— Ambler *v.* McMechen, 1 Fed. Cas. No. 273, 1 Cranch C. C. 320.

See 21 Cent. Dig. tit. "Execution," § 412.

44. Nicolson *v.* Burke, 15 Ala. 353; Moffitt *v.* Mobile Branch Bank, 7 Ala. 593; Morrel *v.* Barner, 4 Litt. (Ky.) 10; Lewis *v.* Thompson, 2 Hen. & M. (Va.) 100; Hubbard *v.* Taylor, 1 Wash. (Va.) 259. See also Walker *v.* Shotwell, 13 Sm. & M. (Miss.) 544.

45. *Alabama.*— Lunsford *v.* Richardson, 5 Ala. 618. See also Anderson *v.* Rhea, 7 Ala. 104.

Kentucky.— Morehead *v.* Prather, Ky. Dec. 135.

Mississippi.— Barker *v.* Planters' Bank, 5 How. 566.

West Virginia.— Holt *v.* Lynch, 18 W. Va. 567.

United States.— Williams *v.* Lyles, 2 Cranch 9, 2 L. ed. 191.

See 21 Cent. Dig. tit. "Execution," § 412.

46. Russell *v.* Locke, 57 Ala. 420; Handley *v.* Rankins, 2 T. B. Mon. (Ky.) 151; Couch *v.* Miller, 2 Leigh (Va.) 545; Glascock *v.* Dawson, 1 Munf. (Va.) 605; Holt *v.* Lynch, 18 W. Va. 567. See also Hairston *v.* Woods, 9 Leigh (Va.) 308, in which case the variance was held not to be substantial.

Variance between fieri facias and bond.— Where a fieri facias described the property levied on as two hundred pounds of cotton in the seed, and gave the date of levy as October 7, and the delivery bond described the property as three thousand pounds seed cotton in the field, and the date of the levy as October 18, it was held that the surety on the bond could not take advantage of the variance, since he obtained the property under the bond, and if it contained a misdescription of the date and of the levy it was his act and not plaintiff's. Bowden *v.* Taylor, 81 Ga. 199, 6 S. E. 277.

47. Trotter *v.* Hannegan, 2 A. K. Marsh. (Ky.) 319; Winston *v.* Com., 2 Call (Va.) 290.

48. *Alabama.*— Mobile Branch Bank *v.* Darrington, 14 Ala. 192; Meredith *v.* Richardson, 10 Ala. 828; Butler *v.* O'Brien, 5 Ala. 316; Sugg *v.* Burgess, 2 Stew. 509.

Illinois.— Turner *v.* Armstrong, 9 Ill. App. 24.

Kentucky.— Drake *v.* Moore, 1 Bibb 351.

Missouri.— Waterman *v.* Frank, 21 Mo. 108.

Virginia.— Lynchburg Trust, etc., Bank *v.* Elliott, 94 Va. 700, 27 S. E. 467; Johnston *v.* Meriwether, 3 Call 523.

West Virginia.— Adler *v.* Green, 18 W. Va. 201.

See 21 Cent. Dig. tit. "Execution," § 408 *et seq.*

49. Ruddell *v.* Magruder, 11 Ark. 578; *Ex p.* Reardon, 9 Ark. 450 (holding that relief from the conditions of a bond on the ground of defects apparent on the face of such bond cannot be granted except at the term to which the bond is returnable); Robinson *v.* Parker, 3 Sm. & M. (Miss.) 114, 41 Am. Dec. 614; Jones *v.* Stanton, 7 How. (Miss.) 601; Weathersby *v.* Proby, 1 How. (Miss.) 98.

50. Anderson *v.* Rhea, 7 Ala. 104 (where the sheriff's return showed that he had levied on seventy-five head of hogs, and the delivery bond was for twenty-five hogs); Jones *v.* Mississippi, etc., R. Co., 5 How. (Miss.) 407.

51. Coffee *v.* Planters' Bank, 11 Sm. & M. (Miss.) 458, 49 Am. Dec. 68; Walker *v.* McDowell, 4 Sm. & M. (Miss.) 118, 43 Am.

(B) *Amendment.* After the execution of a forthcoming bond, where there is a clerical error patent upon the face of the bond, the court will allow an amendment to correct it, and permit the bond to be reformed so as to make it conform to the true and evident intention of the parties at the time of its execution.[52]

(C) *Waiver.* So the execution defendant may waive any defects in the bond.[53]

(D) *Quashal on Account of.* The proper procedure in the case of a defective forthcoming bond is a motion to quash, and it will usually be granted at the instance of the judgment creditor, provided it be made at the proper time.[54] In several jurisdictions a motion to quash a defective forthcoming bond and execution thereon must be made at the first term of court after the execution issues.[55]

d. Operation and Effect[56]—(I) *Extinguishment of Lien of Judgment and Execution*—(A) *General Rule.* In quite a number of jurisdictions, by statute, where a forthcoming and delivery bond is given, the property covered thereby is released by the bond and the lien of the judgment and execution destroyed, and upon the forfeiture of the bond the latter operates as a new judgment upon which execution may immediately issue.[57] In some cases the rule is

Dec. 476. See also Wilson *v.* King, 3 Litt. (Ky.) 457, 14 Am. Dec. 84.

52. Bell *v.* Tanguy, 46 Ind. 49; Grant *v.* Brotherton, 7 Mo. 458 (where the penal sum, as expressed in the bond, was "two thousand" and the condition was for the forthcoming of property to the value of one thousand dollars, and it was held that the word "dollars" might be inserted after "two thousand"); Helm *v.* Wright, 2 Humphr. (Tenn.) 72. See also Buchanan *v.* Maynadier, 6 Call (Va.) 1, holding that, if the clerk of the court alter a forthcoming bond, it will not prejudice plaintiff, but the bond will be restored to what it was originally. See, however, Flournoy *v.* Mims, 17 Ala. 36.

53. Such as the insertion therein of a statutory provision that he may sell the goods at private sale, and where he has waived such irregularity by the execution of the bond, no other person has the right to object. Paul *v.* Arnold, 12 Ind. 197; Patterson *v.* Brown, 1 Ind. 567, Smith (Ind.) 288.

54. Reed *v.* Hatcher, 1 Bibb (Ky.) 346 (holding that where the circuit court, on motion of plaintiff, quashed a replevin bond and execution, it was error for the same court at a succeeding term on the application of defendant, without notice to the sureties, to reverse the order of quashal); Couch *v.* Miller, 2 Leigh (Va.) 545; Sutton *v.* Mandeville, 23 Fed. Cas. No. 13,649, 1 Cranch C. C. 32.

Inherent defects.— It has been held in Mississippi that it is error to quash a forthcoming bond on the ground that it did not appear by the return of the sheriff on the bond that it was forfeited, and that such bond could only be quashed for inherent defect. Shields *v.* Graves, 6 How. 262.

55. Hopkins *v.* Chambers, 7 T. B. Mon. (Ky.) 257; Byrne *v.* Caldwell, 2 Litt. (Ky.) 125; Coyle *v.* Porter, 2 A. K. Marsh. (Ky.) 360; Blackburn *v.* Bilbo, Hard. (Ky.) 516; Moody *v.* Harper, 28 Miss. 615; Dowd *v.* Hunt, 10 Sm. & M. (Miss.) 414; Fellows *v.* Griffin, 9 Sm. & M. (Miss.) 362 (holding that a void judgment quashing a forthcoming bond may be wholly disregarded); Parkinson *v.* Waldron, 7 Sm. & M. (Miss.) 189; Bell *v.* Tombigbee R. Co., 4 Sm. & M. (Miss.) 549 (holding that an illegal order quashing a forthcoming bond, after return-term thereof, does not affect the validity of the bond, and an execution may notwithstanding issue); Clow *v.* Tharpe, 3 Sm. & M. (Miss.) 64; Com. *v.* Pender, 1 Sm. & M. (Miss.) 386; Field *v.* Morse, 1 Sm. & M. (Miss.) 347; Kerningham *v.* Scanland, 6 How. (Miss.) 540; Bingaman *v.* Hyatt, Sm. & M. Ch. (Miss.) 437. See Smith *v.* Tupper, 4 Sm. & M. (Miss.) 261, 43 Am. Dec. 483, holding that where the name of a partner has been signed to a forthcoming bond by a copartner without authority, this fact may be shown at any time after the return-term.

56. Bond as waiver of exemptions see Exemptions.

57. *Arkansas.*—Lipscomb *v.* Grace, 26 Ark. 231, 7 Am. Rep. 607; Douglas *v.* Twombly, 25 Ark. 124 (in which case this rule was adhered to, even though the bond was defective in omitting the conditions prescribed by the statute that in case property shall not be delivered the bond shall have the force and effect of a judgment); Biscoe *v.* Sandefur, 14 Ark. 568; Wright *v.* Yell, 13 Ark. 503, 58 Am. Dec. 336.

Kentucky.— Richardson *v.* Bartley, 2 B. Mon. 328; Harrison *v.* Wilson, 2 A. K. Marsh. 547; Joyce *v.* Farquhar, 1 A. K. Marsh. 20.

Louisiana.— Brander *v.* Bobo, 12 La. Ann. 616; Briggs *v.* Spencer, 3 Rob. 265, 38 Am. Dec. 339. But see Copley *v.* Dinkgrave, 7 La. Ann. 595.

Mississippi.— Coffee *v.* Planters' Bank, 11 Sm. & M. 458, 49 Am. Dec. 68; Pritchard *v.* Myers, 11 Sm. & M. 169; Dowd *v.* Hunt, 10 Sm. & M. 114; McComb *v.* Doe, 8 Sm. & M. 505; Chilton *v.* Cox, 7 Sm. & M. 791; Bell *v.* Tombigbee R. Co., 4 Sm. & M. 549; Walker *v.* McDowell, 4 Sm. & M. 118, 43 Am. Dec. 476; King *v.* Terry, 6 How. 513; U. S. Bank *v.* Patton, 5 How. 200, 35 Am. Dec. 428; Davis *v.* Dixon, 1 How. 64, 26 Am. Dec. 695; Sampson *v.* Breed, Walk. 267; Connell *v.* Lewis, Walk. 251; Hubert *v.* McGahey, Walk. 246 (holding that the levy of an execution

thus stated: The lien of a fieri facias is not released by the giving of a forthcoming bond, but continues until such bond is forfeited, when the lien of the fieri facias becomes merged in that of the bond.[58] In several jurisdictions, however, in construing statutes concerning forthcoming bonds, it has been held that such a bond is not a satisfaction of the execution, and upon condition broken the judgment creditor may sue out a new execution on the judgment against defendant and the sureties on the bond, and the officer may levy again on the same property.[59]

(B) *Void or Defective Bond.* It has been held that a forthcoming bond, without any, or with a fictitious, security, is absolutely void, and its forfeiture does not discharge the lien of the judgment or execution;[60] and the same rule applies where the bond is afterward quashed for any irregularity.[61]

(II) *Where Judgment or Levy Is Void.* Since a forthcoming bond must be founded upon a valid judgment and execution thereunder, such a bond, given under a void judgment or under a void levy of execution, is also void.[62]

(III) *Waiver of Objections to Execution and Levy.* The better doctrine seems to be that, where a forthcoming bond has been given, the obligors therein are estopped to attack the validity of the writ on which it was taken, or the levy thereunder, and that by the execution of the bond all irregularities in the writ and levy are waived.[63]

on a first judgment and loss of property by sheriff's neglect presents no ground for quashing another execution issued on the forfeited bond, which became a separate judgment); Stewart *v.* Fuqua, Walk. 175. See also Burns *v.* Stanton, 2 Sm. & M. 457.

Pennsylvania.— Meyer *v.* Knight, 21 Pa. Super. Ct. 1. Former rule in this state see Bain *v.* Lyle, 68 Pa. St. 60; Hastings *v.* Quigley, 2 Pa. L. J. Rep. 431, 4 Pa. L. J. 220.

Tennessee.— Pigg *v.* Sparrow, 3 Hayw. 144. See also Memphis Water Co. *v.* Magens, 15 Lea 37; Haynes *v.* Jordan, 2 Leg. Rep. 282.

Virginia.— Lusk *v.* Ramsay, 3 Munf. 417; Cooke *v.* Piles, 2 Munf. 151; Irvin *v.* Eldridge, 1 Wash. 161.

United States.— Brown *v.* Clarke, 4 How. 4, 9, 11 L. ed. 850 (where the court said: "The lien of the first judgment ceases, and a new and more comprehensive lien arises upon this statutory judgment, embracing the property of both principal and sureties in the forthcoming bond. And no action of the court on the forfeited bond is necessary"); U. S. *v.* Graves, 26 Fed. Cas. No. 15,250, 2 Brock. 379.

See 21 Cent. Dig. tit. "Execution," § 417.

Relief in equity.— It has been held in Virginia that where the obligor in a forthcoming bond, after award of execution, becomes insolvent and the bond is thereby forfeited, equity will consider the bond as a nullity and grant relief to the creditor under the lien of the original judgment. Jones *v.* Myrick, 8 Gratt. 179.

Where judgment is recovered against several joint debtors, and the execution levied on the property of only one, who gives a forthcoming bond, which is forfeited, the original judgment and execution are not thereby discharged as to the other joint debtors. Robinson *v.* Sherman, 2 Gratt. (Va.) 178, 44 Am. Dec. 381.

58. Skinner *v.* Jayne, 24 Miss. 567 (holding that the object in giving a forthcoming bond is merely to enable defendant to retain in his possession the property levied on until the day of sale); Bingaman *v.* Hyatt, Sm. & M. Ch. (Miss.) 437; Lester's Case, 4 Humphr. (Tenn.) 383; Malone *v.* Abbott, 3 Humphr. (Tenn.) 532; Lusk *v.* Ramsay, 3 Munf. (Va.) 417. See also Adler *v.* Green, 18 W. Va. 201.

A forthcoming bond has the force of a judgment so as to create a lien upon the lands of the obligors only from the time the bond is returned to the clerk's office. Jones *v.* Myrick, 8 Gratt. (Va.) 179; Cabell *v.* Given, 30 W. Va. 760, 5 S. E. 442.

59. Caperton *v.* Martin, 5 Ala. 217; Hopkins *v.* Land, 4 Ala. 427; Chesapeake Guano Co. *v.* Wilder, 85 Ga. 550, 11 S. E. 618 (holding that property released from execution under a forthcoming bond may be again levied on after the bond has been forfeited and suit has been instituted thereon); Trenary *v.* Cheever, 48 Ill. 28; Brush *v.* Seguin, 24 Ill. 254; Pierson *v.* Hovey, N. Chipm. (Vt.) 77.

60. Carleton *v.* Osgood, 6 How. (Miss.) 285.

61. Southern Bank *v.* White, 1 Duv. (Ky.) 290; Bingaman *v.* Hyatt, Sm. & M. Ch. (Miss.) 437; Lester's Case, 4 Humphr. (Tenn.) 383. See also Frisch *v.* Miller, 5 Pa. St. 310.

62. *Arkansas.*— *Ex p.* Cheatham, 6 Ark. 531, 44 Am. Dec. 525.

Indiana.— Miller *v.* Ashton, 7 Blackf. 29.

Mississippi.— Buckingham *v.* Bailey, 4 Sm. & M. 538; Patterson *v.* Denton, Sm. & M. Ch. 592; Long *v.* U. S. Bank, Freem. 375.

Tennessee.—Bradley *v.* Kesee, 5 Coldw. 223, 94 Am. Dec. 246.

Virginia.— Booth *v.* Kinsey, 8 Gratt. 560.

63. *Alabama.*— Bolling *v.* Vandiver, 91 Ala. 375, 8 So. 290.

Georgia.— See Jones *v.* Kendrick, 94 Ga. 645, 21 S. E. 831.

e. Liability on Bond[64] — (I) *Breach of Conditions.* The bond is forfeited by a failure to deliver the property specified therein at the time and place of sale, and no subsequent act of the obligors can relieve them from such forfeiture, and the plea of tender after the day of sale is bad.[65]

(II) *Partial Breach.* Where only part of the property for which the forthcoming bond is executed is delivered according to the terms of the bond, the obligors therein are only released *pro tanto*, and will remain liable for the remainder of the property.[66]

Kentucky.— Darland *v.* Governor, 2 Bibb 541.

Virginia.— Downman *v.* Downman, 2 Call 507.

West Virginia.— Shaw *v.* McCullough, 3 W. Va. 260.

See 21 Cent. Dig. tit. "Execution," § 420; and, generally, Estoppel.

Contra.— Olson *v.* Nunnally, 47 Kan. 391, 28 Pac. 149, 27 Am. St. Rep. 296, holding that the giving of a forthcoming bond by execution debtor does not estop him from afterward asserting, either directly or collaterally, that the judgment and execution are void.

64. Liability on claimant's bond see *infra*, IX, D.

65. *Delaware.*—Whiteman *v.* Slack, 1 Harr. 144.

Georgia.— Whelchel *v.* Duckett, 91 Ga. 132, 16 S. E. 643 (holding that the pendency of an application for the allotment of a homestead or exemption will not excuse the maker and surety on the forthcoming bond from producing the property on the day of sale); Aycock *v.* Austin, 87 Ga. 566, 13 S. E. 582 (holding that the bond is forfeited by failure to produce the property on the day of sale, notwithstanding a third person may on that day interpose a claim thereto, and the sheriff accepts the claim affidavit and bond); Mapp *v.* Thompson, 9 Ga. 42. See also Clark *v.* Horn, 99 Ga. 165, 25 S. E. 203.

Mississippi.— Minor *v.* Lancashire, 4 How. 347.

Missouri.— Seaman *v.* Paddock, 55 Mo. App. 296.

North Carolina.— Grady *v.* Threadgill, 35 N. C. 228 (holding that the fact that the return-day of the executions levied was prior to the day on which by the terms of the condition the property was to be delivered was immaterial); Poteet *v.* Bryson, 29 N. C. 337; Mitchell *v.* Patillo, 9 N. C. 40.

Ohio.— Wright *v.* Lepper, 2 Ohio 297.

Pennsylvania.— Stocker *v.* Dech, 167 Pa. St. 212, 31 Atl. 555.

Tennessee.— Galloway *v.* Myers, 7 Heisk. 709.

Virginia.— McKinster *v.* Garrott, 3 Rand. 554.

West Virginia.— See Adler *v.* Green, 18 W. Va. 201.

See 21 Cent. Dig. tit. "Execution," § 421 *et seq.*

Death of slave.— It was held in Kentucky that the death of a slave for which a delivery bond had been taken would exonerate the security when the bond was not otherwise forfeited, but a failure to deliver any part of the property without legal excuse would render the surety liable for the whole debt. Laughlin *v.* Ferguson, 6 Dana 111.

Emancipation of a slave after levy and the institution of proceedings to try the right of property has been held in Alabama not to preclude the right of action on the forthcoming bond previously given to obtain a discharge of the slave from the levy. Madden *v.* Hooper, 42 Ala. 397.

Runaway slave.— It was held in Cole *v.* Fenwick, Gilm. (Va.) 134, that a judgment on a bond for the forthcoming of a slave ought not to be relieved against because the forfeiture occurred by the running away of the slave.

Effect of temporary injunction.— It was held in Indiana, in an action on a delivery bond, that defendant was not excused from a subsequent delivery by the fact that, on the day named in the bond for the return of the property, a temporary injunction, procured by defendant, was in force, the court holding that he could not thus take advantage of his own wrongful act. Midland R. Co. *v.* Eller, 7 Ind. App. 216, 33 N. E. 265.

Failure to pay sheriff's commission.— It was held in Virginia that payment to the creditor on the day of sale, of the debt, interest, and costs, without paying the sheriff's commission, would not prevent a forfeiture of the delivery bond. Bernard *v.* Scott, 3 Rand. 522.

Property seized under superior liens.— Where property in possession of one who has given a forthcoming bond is, before the time has arrived for compliance with the obligation, seized by virtue of liens of superior dignity to the lien of the process under which the property was first seized, the principal obligor and his sureties are not liable for failure to comply with the conditions of the bond. Allen *v.* Allen, 119 Ga. 278, 45 S. E. 959.

Where property is subsequently declared exempt.— Where defendant replevied property levied on, giving a forthcoming bond therefor, but before sale it was exempted to him, it was held that there was no breach of the bond by which a recovery could be had by reason of his failure to produce the property on the day of sale. Chalker *v.* Thompson, 72 Ga. 478.

66. Bolling *v.* Vandivir, 91 Ala. 375, 8 So. 290; Whitesides *v.* Boardman, 15 Phila. (Pa.) 208 (holding that where all the goods were not produced, plaintiff in execution might decline to sell any of them and proceed at once on the bond, and that having

(III) *Effect of Reversal of Original Judgment.* The reversal of the judgment upon which the forthcoming bond was given avoids the bond and execution issued thereon, without a motion to quash.[67]

(IV) *Extent of Liability of Obligor.* In some jurisdictions, by statute, the obligation entered into by the execution of a forthcoming bond is to produce the property on the day of sale, or to pay the amount of the judgment, with interest and costs, but not the amount of the bond, nor the value of the property if it exceeds the amount of the judgment; and the surety on the bond cannot be held for another or different amount than his principal.[68]

(V) *Relief of Sureties*—(A) *Delay in Proceeding on Bond.* An unreasonable delay on the part of the judgment creditor to sue out execution on a forthcoming bond after it has been forfeited will discharge the sureties.[69] However, a reasonable delay in proceeding upon the forthcoming bond will not release the sureties, especially where it is not shown that they were damaged thereby.[70]

(B) *Irregularities in Judgment or Levy.* The doctrine is well settled that a court of equity will not grant relief to an obligor in a forthcoming bond on the ground of an irregularity in the judgment or levy on which such bond was founded.[71]

(C) *Fraud or Accident.* In some cases, however, equity has undertaken to

sold some of them he could not refuse to sell the rest of the goods produced and proceed on the bond for their value); Pleasants *v.* Lewis, 1 Wash. (Va.) 273.

67. *Kentucky.*— Flowers *v.* Fletcher, Ky. Dec. 225, where the judgment in execution was superseded after forthcoming bond was given.

Mississippi.— Hoy *v.* Couch, 5 How. 188.

Pennsylvania.—Ludwig *v.* Britton, 3 Watts & S. 447; Mewhorter *v.* Jamison, 7 Watts 353, where the judgment was set aside on certiorari, and it was held that there could be no recovery on the bond taken by the constable for the return of the property levied on. See also Blaine *v.* Hubbard, 4 Pa. St. 183.

Virginia.— Rucker *v.* Harrison, 6 Munf. 181, where supersedeas to the judgment was issued before the day of sale, and the property on the bond being forthcoming, it was held that the penalty of the bond was severed and no motion would lie upon it. See Spencer *v.* Pilcher, 10 Leigh 490.

United States:— Barton *v.* Petit, 7 Cranch 288, 3 L. ed. 347, holding, however, that where the original judgment is reversed, the execution on which the bond was given must be brought up by certiorari, so that the connection between the two judgments may be shown.

See 21 Cent. Dig. tit. "Execution," § 422.

Injunction.— It was held in Wilson *v.* Stevenson, 2 Call (Va.) 213, that, although a forthcoming bond cannot be forfeited if an injunction to stay proceedings is issued before the day appointed for the delivery of the property, an injunction will not discharge liability on a bond forfeited before its issue.

68. Lemle *v.* Routon, 33 La. Ann. 1005; Schmidt *v.* Brown, 33 La. Ann. 416; Jones *v.* Hays, 27 Tex. 1. See also Kercheval *v.* Harney, Meigs (Tenn.) 403. See, however, Evans *v.* Matson, 51 Pa. St. 366, 88 Am. Dec. 584.

Bond executed by executor.— Where an execution is issued on a forthcoming bond executed by executors on a levy of property of their decedent, their liability is personal, and not in their representative capacity, since the legal effect of the bond was to create a personal obligation, and as indemnity the executors held the property on which the levy had been made. Thompson *v.* Ross, 26 Miss. 198.

69. Brown *v.* Fulkerson, 8 B. Mon. (Ky.) 393, where a failure to sue out execution for twelve months was held to discharge the surety, notwithstanding the death of the principal.

Seizure of property under writ of detinue.— It has been held in Alabama that the sureties on a forthcoming bond were discharged from their obligation and excused from delivering the property by its seizure, while in the hands of the principal in the bond, under a writ of detinue issued at the instance of a third person claiming the property as his own. Watson *v.* Simmons, 91 Ala. 567, 8 So. 347.

70. Wright *v.* Yell, 13 Ark. 503, 58 Am. Dec. 336; Blandford *v.* Barger, 9 Dana (Ky.) 22, 33 Am. Dec. 519; Newell *v.* Hamer, 4 How. (Miss.) 684, 35 Am. Dec. 415 (holding that a voluntary postponement of execution on the forthcoming bond by the creditor, at the suggestion of the principal, would not discharge the surety, where there was no consideration for the indulgence of any binding agreement to delay the execution of the judgment until a particular period); Melton *v.* Howard, 7 How. (Miss.) 103.

Premature return of writ.— It was held in Stewart *v.* Lacoume, 30 La. Ann. 157, that the surety on a forthcoming bond is not released by reason of the return of a fieri facias against the principal before the return-day of the writ, unless he is shown to have been injured thereby.

71. Mead *v.* Figh, 4 Ala. 279, 37 Am. Dec. 742; Jemison *v.* Cozens, 3 Ala. 636; Baine

relieve obligors on a forfeited bond, as where, under an allegation that the signature appearing on the bond was unauthorized by the petitioner;[72] where the surety was prevented by accident from delivering property at the hour appointed;[73] or where the obligee in the bond was a cosurety and the principal was insolvent.[74]

f. Action on Bond[75]—(I) *Right of Action*—(A) *General Rule.* Where the statute authorizes the issuance of execution against the obligors in a forfeited forthcoming bond, this remedy is generally regarded as cumulative merely, and not to preclude the proper party from instituting an action on the bond.[76]

(B) *Liability of Officer Over.* The rule has been laid down in several jurisdictions that the officer has no right of action on a forthcoming bond until he has been held liable to the execution creditor for the amount of the property, and then only to the amount of his actual damage.[77]

(II) *Conditions Precedent*—(A) *Notice to Obligors.* In some jurisdictions a condition precedent to an action on a forthcoming bond is a notice to the obligors of the time and place of sale of the property for which such bond was given;[78] but a legal advertisement of such sale has been held to be sufficient notice to the obligors.[79]

(B) *Return of Execution and Bond.* Under some statutes it is required that the forfeited bond be returned with the execution upon which it is based;[80] and,

v. Williams, 10 Sm. & M. (Miss.) 113 (where the ground for relief sought in equity was that the original judgment was founded on a usurious contract); U. S. Bank *v.* Patton, 5 How. (Miss.) 200, 35 Am. Dec. 428; Syme *v.* Montague, 4 Hen. & M. (Va.) 180. See also Gordon *v.* Jeffery, 2 Leigh (Va.) 410, holding that equity will not relieve a surety in a bond on the ground that he was induced to sign the same in blank by false and fraudulent representations of the principal and the sheriff serving the execution as to the amount of the judgment, the judgment creditor not being a party to the fraud. See, however, Perry *v.* Hensley, 14 B. Mon. (Ky.) 474, 61 Am. Dec. 164, holding that where exempt property was levied on without the owner's consent, and a delivery bond given, the bond was not obligatory, and a surety might have relief in a court of equity.

72. Brooks *v.* Harrison, 2 Ala. 209. See also Love *v.* Smith, 4 Yerg. (Tenn.) 117.

73. Chancellor *v.* Vanhook, 2 B. Mon. (Ky.) 447; Lusk *v.* Ramsay, 3 Munf. (Va.) 417.

74. Booth *v.* Kinsey, 8 Gratt. (Va.) 560, in which case equity relieved petitioner, the obligor, upon his payment of one half the amount of the bond.

75. Actions on bonds generally see Bonds, 5 Cyc. 811 *et seq.*

76. *Arkansas.*— Dugan *v.* Fowler, 8 Ark. 181; Patton *v.* Walcott, 4 Ark. 579.

Georgia.— Turner *v.* Camp, 110 Ga. 631, 36 S. E. 76 (holding that the levying officer to whom a forthcoming bond has been given may sue in his own name for the breach thereof, and may designate in his petition, as usee, plaintiff in the execution levied); Clark *v.* Horn, 99 Ga. 165, 25 S. E. 203.

Indiana.— Midland R. Co. *v.* Eller, 7 Ind. App. 216, 33 N. E. 265.

Ohio.— Darling *v.* Peck, 15 Ohio 65.

Tennessee.— Fossett *v.* Turnage, 9 Humphr. 686.

Virginia.— Booker *v.* McRoberts, 1 Call 243; Hewlett *v.* Chamberlayne, 1 Wash. 367, holding that debt may be brought on a forthcoming bond after a motion for judgment on the bond has been overruled. See Jackson *v.* Ewell, 4 Munf. 426.

See 21 Cent. Dig. tit. "Execution," § 425.

77. Staats *v.* Herbert, 4 Del. Ch. 508; Walker *v.* Howell, 1 Coldw. (Tenn.) 238. *Contra*, Grady *v.* Threadgill, 35 N. C. 228.

Action in name of officer.— It has been held in Illinois that an action on a forthcoming bond, brought in the name of the sheriff without his consent, will be dismissed unless indemnity against costs is given to him. Young *v.* Campbell, 9 Ill. 156.

Personal obligation.— It has been held in South Carolina that an action cannot be maintained by the successor in office of a sheriff upon a bond given by defendant in execution to the sheriff for the delivery to him or his deputy of property levied upon under execution and left with defendant therein. Such a bond is a mere personal obligation for the indemnity of the sheriff, and not an official bond which passes to his successor in office. Guffin *v.* Ingram, 8 S. C. 249.

78. Mapp *v.* Thompson, 9 Ga. 42; Thompson *v.* Mapp, 6 Ga. 260; Lemoigne *v.* Montgomery, 5 Call (Va.) 528. See also Hunter *v.* Brown, 68 Ind. 225, holding that demand for delivery of the goods need only be made where the surrender is desired before the day specified in the bond.

79. Mapp *v.* Thompson, 9 Ga. 42; Thompson *v.* Mapp, 6 Ga. 260. See also Hunter *v.* Brown, 68 Ind. 225, holding that, where a delivery bond given by execution debtor specified the time and place for the delivery of the property which is the subject of the bond, the officer need not make any demand at such time and place as a prerequisite to an action on the bond.

80. Talbert *v.* Melton, 9 Sm. & M. (Miss.) 9; Barker *v.* Planters' Bank, 5 How. (Miss.)

where such statutes have contained clauses requiring the forfeiture of such bond to be indorsed upon it, they have been held to be merely directory[81]

(III) *Defenses.* It has been held that neither a denial of liability of the property to seizure,[82] the invalidity of the original judgment,[83] fraud or mistake in the execution of the bond,[84] destruction of the property,[85] nor the filing of a claim by a third party for the property after the execution of the bond[86] is a valid defense to an action on a forthcoming bond, although a waiver of the condition of the bond may constitute a good defense.[87] The sureties on a forthcoming bond cannot as a rule defeat a recovery against them by objecting to proceedings in the levy of the execution, on account of irregularities therein, and if the principals are bound the sureties are likewise bound, and they cannot set up any defenses which are not available to their principals.[88]

(IV) *Parties.*[89] Where a forthcoming bond is executed to secure a release of property which has been seized on several executions having equal priority, on breach of the condition it is proper to join the several judgment creditors as parties plaintiff in an action upon the bond.[90]

566; Cabell *v.* Given, 30 W. Va. 760, 5 S. E. 442.

81. Midland R. Co. *v.* Eller, 7 Ind. App. 216, 33 N. E. 265; Cabell *v.* Given, 30 W. Va. 760, 5 S. E. 442.

82. In an action against the obligors on a forthcoming bond, the general rule is that defendants cannot set up as a defense that the property for which the bond was given was not the property of defendant in the execution. Burrall *v.* Acker, 23 Wend. (N. Y.) 606, 35 Am. Dec. 582 [*affirming* 21 Wend. 605] (holding that such a plea is bad unless it also states that the judgment debtor had no interest whatever in the property at the time of the levy); Nagle *v.* Stroh, 4 Watts (Pa.) 124, 28 Am. Dec. 695; Syme *v.* Montague, 4 Hen. & M. (Va.) 180; Weston *v.* Ralston, 51 W. Va. 157, 41 S. E. 338. *Contra*, Lackey *v.* Mize, 75 Ga. 692 (holding that to an action on a forthcoming bond defendant may show property in another); Koeniger *v.* Creed, 58 Ind. 554.

Plea that property was mortgaged.— It has been held in Illinois that it is no defense to an action on a forthcoming bond to show that the property for which the bond was given was mortgaged at the time of the levy of the execution, and that subsequently the mortgagee had seized the property under his mortgage and sold it for less than enough to pay the mortgage. Dehler *v.* Held, 50 Ill. 491.

Judgment in rem.— It was held in Humphreys *v.* Humphreys, 1 Greene (Iowa) 477, that a special plea in an action on a delivery bond is good which alleges that a judgment *in rem* had been rendered against particular property, and that instead of taking the property so held for the debt the sheriff levied upon other property not affected by the judgment.

83. Harden *v.* Webster, 29 Ga. 427; Reynolds *v.* Hurst, 18 W. Va. 648. See also Reid *v.* Farmers', etc., Tobacco Warehouse, 44 S. W. 124, 19 Ky. L. Rep. 1939. *Contra*, Atkinson *v.* Starbuck, 7 Blackf. (Ind.) 420.

84. The surety on a forthcoming bond cannot set up fraud or false representations on the part of the principal in the bond, or the officer in charge of the writ, as a defense to the proceedings for its enforcement. May *v.* Johnson, 3 Ind. 449; Seeright *v.* Fletcher, 6 Blackf. (Ind.) 380; Pratt *v.* Cook, 10 Kan. App. 144, 62 Pac. 438 (holding that it is no defense, in an action on a forthcoming bond, that the sheriff agreed with the signers of such bond that it could be considered that he still had the constructive possession of the property levied on); Gordon *v.* Jeffery, 2 Leigh (Va.) 410. *Contra*, Atkinson *v.* Starbuck, 7 Blackf. (Ind.) 420.

85. Defendant cannot set up the defense that the property was destroyed while in his possession before the day of delivery, without showing that such destruction was caused by the act of God, or was in no wise the result of his own misconduct or negligence. Burgess *v.* Sugg, 2 Stew. & P. (Ala.) 341; Carr *v.* Houston Guano, etc., Co., 105 Ga. 268, 31 S. E. 178.

86. Barfield *v.* Covington, 103 Ga. 190, 29 S. E. 759. See also Aycock *v.* Austin, 87 Ga. 566, 13 S. E. 582.

87. If a failure on the part of the obligor to deliver the property at the time and place stipulated in the bond is occasioned by anything said or done by plaintiff, amounting to a waiver of that obligation, it will be a good defense to an action on the bond. Mapp *v.* Thompson, 9 Ga. 42.

88. *Arkansas.*— Dugan *v.* Fowler, 14 Ark. 132 (holding that a subsisting undischarged levy upon property sufficient to satisfy the judgment is not such a satisfaction as can be pleaded in bar of recovery in an action on a forthcoming bond, but is merely matter in abatement); Sullivan *v.* Pierce, 10 Ark. 500.

Georgia.— Garner *v.* Clark, 115 Ga. 666, 42 S. E. 56.

Iowa.—Humphreys *v.* Humphreys, 1 Greene 477.

Louisiana.—McCloskey *v.* Wingfield, 32 La. Ann. 38.

Pennsylvania.— Hill *v.* Robinson, 44 Pa. St. 380.

See 21 Cent. Dig. tit. "Execution," § 427.

89. Parties generally see PARTIES.

90. Koeniger *v.* Creed, 58 Ind. 554; Mandlove *v.* Lewis, 9 Ind. 194.

(v) *PLEADING*[91] — (A) *Declaration or Complaint.* The declaration or complaint in an action on a forthcoming bond should set out the condition of the bond and allege the facts which constitute a breach of such condition,[92] such as a failure to deliver the property on the day specified in the condition,[93] the recovery of judgment and the issuance of execution thereunder, showing that the officer had authority to seize the property and take the bond.[94]

(B) *Plea or Answer.* In debt on a forthcoming bond, a plea that defendants have always been and still are ready to deliver the goods according to the condition of the bond is bad.[95] However, in such an action a plea of payment is good.[96] Likewise the plea that defendants delivered the property on the day, at the place, and to the officer named in the condition of the bond is good.[97]

(VI) *EVIDENCE.*[98] In an action on a forthcoming bond, the writ on which the levy in the original case was made is indispensable evidence;[99] and evidence of the return of the writ *nulla bona* is admissible to show a breach of the bond.[1]

(VII) *MEASURE OF RECOVERY.*[2] In most jurisdictions the statutes provide that the measure of recovery for the breach of a forthcoming bond shall be the value of the property at the time the bond was executed, provided such value is not in excess of the amount of the execution, principal, interest, and costs.[3]

91. Pleading generally see PLEADING.

92. Hunter *v.* Brown, 68 Ind. 225, where the allegation in an action on a delivery bond that the execution defendant had failed to "pay the cash value" of the property, which had been duly appraised, was held equivalent to an allegation of his failure to pay the "appraised value." See Hawkins *v.* Johnson, 3 Blackf. (Ind.) 46, holding that an omission to aver the value of the property in a forthcoming bond is not cause for general demurrer.

93. Eldridge *v.* Yantes, 6 Blackf. (Ind.) 72 (where the declaration was held to be fatally defective in failing to aver that the property had not been delivered to the sheriff); Hawkins *v.* Johnson, 3 Blackf. (Ind.) 46 (holding that an allegation that the property was not delivered on the day specified in the condition, nor at any other time since the delivery bond was executed, is sufficient on general demurrer).

Sufficiency of allegation.—In an action upon a forthcoming bond it is sufficient to negative the delivery of the property, according to the condition of the bond, in words coextensive with its legal import and effect, and to affirm that the sheriff returned the bond as forfeited. Cunningham *v.* Cheatham, 8 Ark. 187.

94. Strange *v.* Lowe, 8 Blackf. (Ind.) 243; Midland R. Co. *v.* Eller, 7 Ind. App. 216, 33 N. E. 265.

95. English *v.* Finicey, 5 Blackf. (Ind.) 298; Case *v.* Johnson, 19 Pa. St. 174.

96. McLain *v.* Taylor, 9 Ark. 358.

97. English *v.* Finicey, 5 Blackf. (Ind.) 298.

98. Evidence generally see EVIDENCE.

99. Harden *v.* Webster, 29 Ga. 427. See, however, Pratt *v.* Cook, 10 Kan. App. 144, 62 Pac. 438.

Presumptions.— Where the bond sued on was dated prior to the execution on which it purported to be taken, the presumption of law is that there was a mistake in the date of one of them, and such mistake will not render the bond void. Cook *v.* State Bank, 5 J. J. Marsh. (Ky.) 163.

1. Bowden *v.* Taylor, 81 Ga. 199, 6 S. E. 277. See also Jolley *v.* Rutherford, 112 Ga. 342, 37 S. E. 358; Masse *v.* Barthet, 2 Rob. (La.) 69, where it was held that the return of the writ *nulla bona* is sufficient evidence of the breach of the bond.

Proof of performance of condition.— Where the sheriff took a forthcoming bond for the delivery of property on the day of sale, and such property was not sold for want of bidders, it was held that the taking of a second bond for its delivery at an adjourned sale was conclusive proof of the performance of condition of the first bond. Adler *v.* Green, 18 W. Va. 201.

2. Damages generally see DAMAGES.

3. *Arkansas.*— Ruddell *v.* Magruder, 11 Ark. 578.

Florida.— Collins *v.* Mitchell, 3 Fla. 4.

Georgia.— Whelchel *v.* Duckett, 91 Ga. 132, 16 S. E. 643.

Indiana.— Hunter *v.* Brown, 68 Ind. 225; Mitchell *v.* Denbo, 3 Blackf. 259; McCoy *v.* Elder, 2 Blackf. 183 (holding that the measure of recovery, if it does not exceed the penalty of the bond, is the amount due on the original judgment, with interest and costs, but that this amount cannot exceed the penalty); Midland R. Co. *v.* Eller, 7 Ind. App. 216, 33 N. E. 265.

Missouri.— Lee *v.* Moore, 12 Mo. 458.

Texas.— Jones *v.* Hays, 27 Tex. 1.

West Virginia.— Weston *v.* Ralston, 51 W. Va. 157, 41 S. E. 338.

See 21 Cent. Dig. tit. "Execution," § 431.

See, however, Phillips *v.* Hall, 8 Wend. (N. Y.) 610, 24 Am. Dec. 108, holding that the party whose property has been levied on, and who has indemnified the receiptor, is in such case entitled to recover the full amount of the sum agreed to be paid by the receiptor in case of the non-delivery of the property.

g. Summary Remedies — (I) *Statutory Judgment* — (A) *Judicial Judgment Unnecessary.* In some jurisdictions, by statutory enactment, a forthcoming bond, when returned forfeited by the officer, accompanied by the execution, has the force and effect of a judgment, and no further judgment is necessary to the issuance of execution thereon.[4] However, to authorize a judgment upon a forthcoming bond, the record should affirmatively show a forfeiture of the bond and a return of the execution unsatisfied.[5]

(B) *Where Formal Judgment Is Required* — (1) Motion and Notice. In several jurisdictions, however, the statute requires a formal judgment to be entered by the court upon the forfeited bond, and an essential condition precedent thereto is the service of a notice of motion for judgment upon the obligors in the forfeited bond, such motion to be made returnable to a designated term of court.[6]

(2) Hearing of Motion. On the hearing of the motion for judgment on the forthcoming bond, the pleadings are *ore tenus*, and formal issue need not be joined, and the court may render judgment on the evidence without the intervention of a jury;[7] and the judgment rendered upon a forfeited bond creates a lien

Full amount of judgment debt.— Under the Tennessee act of 1801, the surety in a delivery bond was liable for the whole judgment debt in case of forfeiture, although the property included in the bond was of less value, and equity would not relieve him, except for fraud. Love *v.* Smith, 4 Yerg. 117.

On replevin bond.— It has been held in Illinois that in an action on a replevin bond, as the officer represents not only the interest of the execution creditor, but also the general owner of the property, he is entitled to recover the full value of the property replevied, and if the proceeds of the judgment exceed the amount due the execution creditor, the officer must hold such excess in trust for, or pay to, the general owner, or to whomsoever may appear to be entitled to it. Bennet *v.* Gilbert, 94 Ill. App. 505 [*affirmed* in 194 Ill. 403, 62 N. E. 847].

Attorney's fees.— In Georgia where the judgment on which a writ of execution is founded includes attorney's fees, it is proper to include such fees in a judgment rendered on the forthcoming bond given to release the property seized under the writ, but not otherwise. Bowden *v.* Taylor, 81 Ga. 204, 6 S. E. 280.

Costs.— It has been held in Indiana that in an action on a delivery bond, the statute authorizing damages does not authorize damages being given for the costs recovered in the suit in which the bond was given. Patterson *v.* Brown, Smith 288.

4. Eddins *v.* Graddy, 28 Ark. 500; Cochran *v.* Jordan, 16 Ark. 625; Brander *v.* Bobo, 12 La. Ann. 616; Hyman *v.* Seaman, 33 Miss. 185; McComb *v.* Doe, 8 Sm. & M. (Miss.) 505; Barker *v.* Planters' Bank, 5 How. (Miss.) 566; Burton *v.* Miller, 14 Tex. 299. See also U. S. Bank *v.* Patton, 5 How. (Miss.) 200, 35 Am. Dec. 428, holding that a judgment on a forthcoming bond cannot be vacated for irregularities in the original judgment, but the party is not precluded by the judgment on the bond from inquiring whether there was any judgment originally. See, however, Patton *v.* Walcott, 4 Ark. 579.

Evidence of forfeiture.— Under the Arkansas act of Dec. 16, 1846, giving forfeited delivery bonds the force and effect of judgments, the sheriff's return of forfeiture of a delivery bond is conclusive evidence of the fact. Ruddell *v.* Magruder, 11 Ark. 578; *Ex p.* Reardon, 9 Ark. 450.

5. McKisick *v.* Brodie, 6 Ark. 375; Pelham *v.* Page, 6 Ark. 148; McKnight *v.* Smith, 5 Ark. 409; Hyman *v.* Seaman, 33 Miss. 185, holding that the return of the bond with an execution is *prima facie* evidence of forfeiture and a sufficient foundation for a judgment of forfeiture, although no return of forfeiture is indorsed on the bond or execution.

6. Camp *v.* Laird, 6 Yerg. (Tenn.) 246; Young *v.* Read, 3 Yerg. (Tenn.) 297; Goolsby *v.* Strother, 21 Gratt. (Va.) 107; Jones *v.* Myrick, 8 Gratt. (Va.) 179; Wootten *v.* Bragg, 1 Gratt. (Va.) 1; Parker *v.* Pitts, 1 Hen. & M. (Va.) 4 (holding that the motion for judgment must be made on the day on which it was returnable, unless defendant is called and the motion then entered and continued); Glassel *v.* Delima, 2 Call (Va.) 368 (holding that on a joint notice to all the obligors on the bond judgment may be taken against one of them only); Winston *v.* Com., 2 Call (Va.) 290; Cabell *v.* Given, 30 W. Va. 760, 5 S. E. 442.

Formerly, in Arkansas, a motion for judgment on a forfeited bond was necessary, and where such motion set forth all the facts necessary to constitute defendant's liability, the court might take jurisdiction and render judgment without actual notice to defendant. Wright *v.* Yell, 13 Ark. 503, 58 Am. Dec. 336; Hall *v.* Fowlks, 8 Ark. 175. See also Miller *v.* Barkeloo, 8 Ark. 318 (holding, however, that a judgment so rendered must show affirmatively that the execution was returned unsatisfied); McLain *v.* Irwin, 6 Ark. 171.

7. McKinster *v.* Garrott, 3 Rand. (Va.) 554; Burke *v.* Levy, 1 Rand. (Va.) 1 (holding that where *non est factum* is pleaded to a motion on a forthcoming bond, the court may render judgment without the interven-

on the realty of the obligors from the time the bond and execution are returned to the clerk's office.[8]

(II) *Execution on Judgment.* The general rule is that execution may issue at any time after the forfeiture of the bond, and the same has become in effect a statutory judgment.[9] The better rule seems to be that an execution issued upon a forfeited forthcoming bond may include defendants to the original judgment as well as obligors in the bond.[10]

VIII. Stay, Quashing, Vacation, and Relief Against.[11]

A. The Stay — 1. Definition. The stopping or arresting for a limited period an execution on a judgment; that is, of the judgment creditor's right to issue execution, is called a stay of execution.[12]

2. Kinds of Stay — a. Enumeration. Stays of execution are said to be of three kinds:[13] (1) Those which are a consequence of or attend appellate proceedings;[14] (2) those which are granted upon the ground that execution should be postponed for some cause other than appellate proceedings or even perpetually[15] stayed;[16] and (3) those which result from statutes granting defendant a further time upon his giving security or upon the existence of security[17] to satisfy the judgment.[18]

b. First Kind. In some jurisdictions it is provided by statute that execution shall not issue within a certain time after judgment, that defendant may within the time specified have a sufficient opportunity to take out a writ of error.[19]

c. Second Kind — (I) *Court's Authority Over Its Process.* Under the general supervisory powers over their process, all courts of common law have the power to temporarily stay execution on judgments by them rendered whenever it is necessary to accomplish the ends of justice.[20] The authority which a judge in

tion of a jury, or may impanel the jury to try the issue, at their discretion); Nicolas *v.* Fletcher, 1 Wash. (Va.) 330 (holding that plaintiff need not prove forfeiture or breach, but defendant must prove performance).

8. Jones *v.* Myrick, 8 Gratt. (Va.) 179; Cabell *v.* Given, 30 W. Va. 760, 5 S. E. 442; Central Land Co. *v.* Calhoun, 16 W. Va. 361.

9. Sheppard *v.* Melloy, 12 Ala. 561; Ruddell *v.* Magruder, 11 Ark. 578; Simmons *v.* Shain, 9 Dana (Ky.) 164. See also Jemison *v.* Cozens, 3 Ala. 636.

Form of execution.— Doak *v.* Duncan, Litt. Sel. Cas. (Ky.) 176, holding that an execution on replevin bond, to be strictly formal, ought to issue for the penalty, to be discharged by the sum mentioned in the condition; but if it issues on the condition only it is substantially correct.

In Texas, however, the rule is that after twelve months plaintiff may have a citation or scire facias to the principal and sureties to show cause why execution should not issue against them. Burton *v.* Miller, 14 Tex. 299.

10. Sheppard *v.* Melloy, 12 Ala. 561 (holding that if the execution does not, on its face or by the indorsement of the clerk, show who were the obligors in the bond, it may be amended by the judgment and forthcoming bond); Trotter *v.* Hannegan, 2 A. K. Marsh. (Ky.) 319.

In Tennessee, however, a judgment by motion is not authorized to be entered against a defendant in execution unless he has joined in executing the delivery bond. Camp *v.* Laird, 6 Yerg. 246; Young *v.* Read, 3 Yerg. 297.

11. **Constitutionality of stay laws** see Constitutional Law, 8 Cyc. 1010–1016.

Postponement of judicial sale see Judicial Sales.

Stay of execution against the person see *infra*, XIV.

Stay of judgment generally see Judgments.

Stay pending appeal or writ of error see Appeal and Error, 2 Cyc. 885 *et seq.*

Supersedeas generally see Supersedeas.

12. Black L. Dict.

The phrase is used to denote the term during which the issuance of an execution upon a judgment is inhibited. Bouvier L. Dict.

13. 1 Freeman Ex. § 32.

14. See *infra*, VIII, A, 2, b.

15. See *infra*, VIII, A, 3, b.

16. See *infra*, VIII, A, 2, c.

17. See *infra*, VIII, A, 2, d, (II).

18. See *infra*, VIII, A, 2, d.

19. See Jackson *v.* Schauber, 7 Cow. (N. Y.) 417, 490; Oswego River Pulp Co. *v.* Delaware Water Gap Pulp Co., 10 Pa. Co. Ct. 312; Appeal and Error, 2 Cyc. 885 *et seq.*

20. Eaton *v.* Cleveland, etc., R. Co., 41 Fed. 42. See also Gravett *v.* Malone, 54 Ala. 19; Robinson *v.* Yon, 8 Fla. 350, 355; Robinson *v.* Chesseldine, 5 Ill. 332, 333; Granger *v.* Craig, 85 N. Y. 619; Patterson *v.* Patterson, 27 Pa. St. 40; U. S. *v.* McLemore, 4 How. (U. S.) 286, 11 L. ed. 977.

chambers exercises over process of the court in a case pending is usually that of the court itself.[21] A court in an equity action has power to make provisions for the time when the judgment is to be carried into effect.[22]

(II) *Not a Substitute For Other Appropriate Remedies.* A stay cannot be substituted for a proper legal remedy, such as an appeal,[23] audita querela,[24] action at law,[25] or bill in equity.[26]

(III) *Grounds*—(A) *General Nature of.* The ground of relief must rest either on facts occurring subsequent to the decree, or judgment, or on antecedent facts which show fraud in its rendition, or want of jurisdiction of the court apparent on the record.[27]

It is in the discretion of the court to grant or stay execution according to the circumstances and equities of each particular case. But this discretion must be judicially exercised; and, unless facts are brought to the knowledge of the court which furnish a just ground for interposition, they will not interfere with the regular course of proceedings. Sawin *v.* Mt. Vernon Bank, 2 R. I. 382. The discretion of the court will not be reviewed on appeal, unless capriciously exercised or abused. Granger *v.* Craig, 85 N. Y. 619.

"The ground of this jurisdiction is the power and duty of all Courts to prevent the abuse of their process, where an improper or unjust use is attempted to be made of it." Therefore where two judgments exist for the same debt, the payment of one is the satisfaction of both, and the attempt to coerce payments afterward by execution is an abuse of the process of the court and process issued for such a purpose may be superseded. Lockhart *v.* McElroy, 4 Ala. 572, 573.

21. Sanchez *v.* Carriaga, 31 Cal. 170; Logan *v.* Hillegass, 16 Cal. 200; Robinson *v.* Chesseldine, 5 Ill. 332; Irons *v.* McQuewan, 27 Pa. St. 196, 67 Am. Dec. 456; Com. *v.* Magee, 8 Pa. St. 240, 44 Am. Dec. 509.

Mo. Rev. St. § 4967, providing that, if any person against whose property an execution shall be issued applies to any judge of the court out of which the same may have been issued, by petition setting forth good cause why the same ought to be stayed, such judge shall thereupon hear the complaint, applies only to a petition for stay of execution when made in vacation to the judge of the court out of which the execution issued. Johnson *v.* Greve, 60 Mo. App. 170.

N. Y. Code Civ. Proc. § 775, forbids a judge out of court to make an order to stay proceedings in an action for a longer time than twenty days, except to stay proceedings under an order or judgment appealed from, or where it is made upon notice of the application to the adverse party, or in cases where special provision is otherwise made by law. See Carter *v.* Hodge, 150 N. Y. 532, 537, 44 N. E. 1101.

22. Thus a court in an equity action, on adjudging that plaintiff is the owner of a fund in dispute, may stay execution on the judgment to a specified period in order to afford defendant the opportunity of establishing by legal proceedings his claim against plaintiff for moneys which defendant alleges plaintiff had from him. Markey *v.* Markey, 13 N. Y. Suppl. 925.

23. Lewis *v.* Linton, 204 Pa. St. 234, 53 Atl. 999.

Appeal generally see Appeal and Error.

24. Wardell *v.* Eden, 2 Johns. Cas. (N. Y.) 258.

Audita querela generally see Audita Querela.

25. Myers *v.* Kelsey, 19 Johns. (N. Y.) 197. See Hewson *v.* Deygert, 8 Johns. (N. Y.) 333 [partially *overruled* in Davis *v.* Tiffany, 1 Hill (N. Y.) 642].

Granting a stay to force a resort to an action in ejectment.— People *v.* Lee, 7 How. Pr. (N. Y.) 49.

26. See Pennsylvania Co. *v.* Harshaw, 6 Wkly. Notes Cas. (Pa.) 272.

Equity generally see Equity. See also *infra*, VIII, A, 2, c, (III), (B).

A sale of land will not be stayed as being in fraud of dower, etc., where the petitioner can be amply protected if her contention is correct, by a decree that the sheriff's sale shall vest the title subject to the dower right. Tombaugh *v.* Tombaugh, 24 Pa. Co. Ct. 110.

27. Gravette *v.* Malone, 54 Ala. 19, 21 [*citing* Matthews *v.* Robinson, 20 Ala. 130; Burt *v.* Hughes, 11 Ala. 571], where a probate court at the instance of the surety granted a supersedeas to stay an execution which it had issued against the principal, the court holding the rule stated in the text and further added another ground, namely, the denial of fact of suretyship. An execution will not be stayed for reasons which arose prior to the judgment and would have constituted a defense to the action in which the judgment was rendered. Marshall *v.* Caudler, 21 Ala. 490.

The reason of this rule is the familiar one that a judgment is conclusive at law of the rights of the parties and fully determines all defenses which might have been urged against the demand before the judgment was rendered. Mervine *v.* Parker, 18 Ala. 241. See also McClure *v.* Colclough, 5 Ala. 65.

Usury.— A rule to show cause why execution should not be stayed upon a judgment until another action, brought by defendant against plaintiff to show usury in the transaction on which the judgment was founded, should be determined, will be denied. Shoemaker *v.* Shirtliffe, 1 Dall. (Pa.) 127, 1 L. ed. 66. But in Starr *v.* Schuyler, 3 Johns. (N. Y.) 139, it was held that where the consideration of a bond on which judgment has been entered by warrant of attorney is alleged to be usurious, the court will award a feigned

(B) *On Equitable Grounds.* There is no case which decides that, by a simple rule for a stay, a similar purpose may be accomplished to that sought by a bill in equity.[28] Nevertheless a stay is frequently allowed on grounds which are in their nature peculiarly equitable, as for instance to give defendant opportunity to set off a claim against plaintiff.[29] The stay on this ground is all the more just when plaintiff is insolvent;[30] but, if plaintiff on his part furnishes security to the amount of the execution, there is then no reason for the stay.[31] A stay has been granted to prevent fraud or great injustice,[32] to save the expense of numerous sales to satisfy different liens on the same property, or to determine the equities of numerous parties in a complex situation by a suit in chancery.[33]

(C) *Garnishment of Judgment Debtor.*[34] The fact that the debtors have been garnished at the suit of a third person is quite generally held to be good ground for a stay.[35] However, a stay is not universally allowed on this ground. In Pennsylvania, if attachment execution is served on defendant by creditors of plaintiff, the practice is to rule the sheriff to pay the proceeds of the execution

issue to try the fact, and stay execution until after the trial.

28. Pennsylvania Co. *v.* Harshaw, 6 Wkly. Notes Cas. (Pa.) 272. A court will not by rule stay an execution on the ground that such execution and sale thereunder, if consummated, will be a cloud on plaintiff's title, since such remedy should be sought by a bill in equity for injunction. Smith *v.* Kiskadden, 5 Pa. Co. Ct. 138.

29. *Louisiana.*— Bass *v.* Chambliss, 9 La. Ann. 376.

Missouri.— Wilkson *v.* State, 12 Mo. 353.

New Jersey.— Blackburn *v.* Reilly, 48 N. J. L. 82, 2 Atl. 817.

New York.— Knox *v.* Hexter, 42 N. Y. Super. Ct. 496, 504 [*citing* 1 Chitty Pr. 666; Masterman *v.* Malin, 7 Bing. 435, 1 Dowl. P. C. 222, 9 L. J. C. P. 171, 5 M. & P. 324, 20 E. C. L. 197]; Markey *v.* Markey, 13 N. Y. Suppl. 925.

Rhode Island.— Cozzens *v.* Hodges, 2 R. I. 3.

See 21 Cent. Dig. tit. "Execution," § 447.

30. Steere *v.* Stafford, 12 R. I. 131.

Mere insolvency of plaintiff in such a case has been held sufficient cause to stay execution. Wiggin *v.* Janvrin, 47 N. H. 295.

31. Patterson *v.* Patterson, 27 Pa. St. 40.

32. Lansing *v.* Orcott, 16 Johns. (N. Y.) 4; Smith *v.* Page, 15 Johns. (N. Y.) 395. Where it was shown that a party applying for an execution upon a judgment was in collusion with one of them to have it levied upon the other, contrary to the equities between them, the court stayed execution until the rights of the parties could be determined in chancery. Sawin *v.* Mt. Vernon Bank, 2 R. I. 382.

33. Lansing *v.* Orcott, 16 Johns. (N. Y.) 4.

Under Mo. Rev. St. (1879) § 3215, an execution sale under a judgment foreclosing a mechanic's or contractor's lien against a railroad is only for the benefit of such lien-holders as have obtained judgment at the time of the sale. Judgment was obtained by two lienholders, while in twenty or more suits to enforce other liens against the same property judgment had not been reached. It was held that, to prevent a sacrifice of the judgment debtors' interest, and to avoid the expense of numerous sales, and complications of title resulting from same, the court would temporarily stay execution on the first judgment until other claims were reduced to judgment. Eaton *v.* Cleveland, etc., R. Co., 41 Fed. 421.

34. Garnishment as ground for: Injunction see *infra*, VIII, D, 2, g. Quashing see *infra*, VIII, B, 2, f.

35. *Alabama.*— See Crawford *v.* Slade, 9 Ala. 887, 44 Am. Dec. 463.

Delaware.— Belcher *v.* Grubb, 4 Harr. 461.

Louisiana.— Rightor *v.* Sledell, 3 Rob. 375. But *compare* Brown *v.* Lowe, 5 La. Ann. 34.

Minnesota.— Blair *v.* Hilgedick, 45 Minn. 23, 47 N. W. 310.

Mississippi.— Yazoo, etc., R. Co. *v.* Fulton, 71 Miss. 385, 14 So. 271.

Pennsylvania.— Daly *v.* Derringer, 1 Phila. 324; Parson *v.* Sanderson, 1 Phila. 177; Rockhill *v.* Burden, 1 Pa. L. J. Rep. 391, 3 Pa. L. J. 20. For present rule in Pennsylvania see *infra*, note 36.

South Carolina.— Weems *v.* Jennings, 2 Brev. 92.

See 21 Cent. Dig. tit. "Execution," § 449.

Compare Early *v.* Rogers, 16 How. (U. S.) 599, 609, 14 L. ed. 1074, where it is said: "The mere levy of an attachment upon an existing debt, by a creditor, does not authorize the garnishee to claim an exemption from the pursuit of his creditor. . . . It is the duty of the court wherein the suit against the garnishee by his creditor may be pending, upon a proper representation of the facts, to take measures that no injustice shall grow out of the double vexation."

Bona fide debt.— The court should ascertain if the garnishment is for a *bona fide* debt, without collusion with the debtor. Early *v.* Rogers, 16 How. (U. S.) 599, 14 L. ed. 1074. *Compare* Nevian *v.* Poschinger, 23 Ind. App. 695, 55 N. E. 1033.

Pendency of an appeal by plaintiff from a decree dissolving a garnishment does not require another court in which defendant is suing the garnishee to stay execution against him for his protection against double satisfaction. Payment of the judgment will protect the garnishee from further liability, although the order or decree dissolving the garnishment be afterward reversed. Montgomery Gaslight Co. *v.* Merrick, 61 Ala. 534.

into court and then refer the matter to an auditor to determine the respective rights of the parties.[36] In Texas the garnished defendant has the right of the stakeholder to require the claimants to interplead.[37] The garnishment of the debt in another state has been held sufficient ground for a stay until the garnishee is released from the garnishment;[38] but the general rule would seem to forbid the garnishment of a judgment debt by process from a court of different jurisdiction, the situation being governed by the rule of priority in acquiring jurisdiction.[39]

(D) *Pending a Motion or Proceeding.* Execution will be stayed pending a motion[40] or certain other proceedings[41] in the cause.

(E) *Other Grounds.* It has been held that neither the temporary absence of defendant from the jurisdiction,[42] nor the fact that the land on which the levy was made is in the adverse possession of another claiming under a paramount

The stay may be as to the whole or a part of the judgment, as circumstances may require, until the proceedings of garnishment are disposed of. Blair *v.* Hilgedick, 45 Minn. 23, 47 N. W. 310.

36. Brooks *v.* Salin, 14 Wkly. Notes Cas. (Pa.) 390; Phelps *v.* Morgan, 18 Phila. (Pa.) 655. But where a judgment creditor garnished a firm as being indebted to the execution debtor and there were conflicting claims between such debtors, defendants were entitled to a stay of execution for a reasonable time in which to institute proceedings to settle such conflicts, as the creditor was subject to all the equities in the claims which affected defendant. Allen *v.* Erie City Bank, 57 Pa. St. 129. *Compare* Woolston *v.* Adler, 1 Phila. (Pa.) 284.

37. Foy *v.* East Dallas Bank, (Tex. Civ. App. 1894) 28 S. W. 137.

38. Howland *v.* Chicago, etc., R. Co., 134 Mo. 474, 36 S. W. 29.

39. Shrewsbury *v.* Tufts, 41 W. Va. 212, 23 S. E. 692, where a non-resident defendant moved for a stay on the ground that he was garnished as debtor of the judgment plaintiff in the state where defendant resided.

A debtor by judgment in a federal court cannot be subjected to garnishment at the suit of a creditor who proceeds against him in the state court. Henry *v.* Gold Park Min. Co., 15 Fed. 649, 5 McCrary 70. Nevertheless it appears that a federal court might "in its discretion" entertain a motion to stay an execution on the ground that the debt was garnished in a state court. Early *v.* Rogers, 16 How. (U. S.) 599, 14 L. ed. 1074, where the lower court having refused to stay an execution on this ground the supreme court said that such a motion was addressed to discretion of the court and was not reviewable by the supreme court.

40. Logan *v.* Hillegass, 16 Cal. 200 (motion to quash or vacate); Pearce *v.* Miller, 201 Ill. 188, 66 N. E. 221 (motion to quash); Carter *v.* Hodge, 150 N. Y. 532, 44 N. E. 1101.

41. Thus a superior court will stay execution pending a certiorari from a lower court. Herrington *v.* Block, 98 Ga. 236, 25 S. E. 426.

Pending amendment of return of officer the service of an execution may be stayed. Wotton *v.* Parsons, 4 McCord (S. C.) 368.

Pending an application to arrest and vacate the sheriff's proceedings under an execution irregularly and informally issued, plaintiff may have a stay of proceedings. This method is better than injunction. See Greenup *v.* Brown, 1 Ill. 252. See also Robinson *v.* Chesseldine, 5 Ill. 332.

Pending a proceeding to open a judgment. — In Bradley *v.* Stephenson, 3 Pa. Co. Ct. 397, the court said that a stay of execution might be granted until the application to open the judgment might be investigated and determined; otherwise the judgment might be freely executed before the court could determine the rights of the parties in the premises.

Pending a suit in replevin where personal property levied upon by virtue of an execution and delivered to plaintiff in replevin is again levied upon by another execution, an order to stay proceedings upon the second execution until the determination of the replevin suit will be granted upon the application of plaintiff in replevin. People *v.* New York Super. Ct., 19 Wend. (N. Y.) 701.

A venditioni exponas on a transcript of a justice's judgment will not be stayed till the determination of a pending suit between plaintiff and a third person on the ground that it would be shown on the trial of that suit that the date for which the justice's judgment was rendered had been paid. Kennett Square Nat. Bank *v.* Pierson, 2 Chest. Co. Rep. (Pa.) 320.

The fact that a suit in interdiction (that is, a suit to establish the incapacity of a person) had been instituted against the owner of property seized under execution does not warrant a sheriff in stopping the sale. "It did not follow that interdiction would result from the suit. If the parties in interest had desired to stop the sale they should have enjoined it." Rau *v.* Katz, 26 La. Ann. 463, 466. See Merrick La. Civ. Code, tit. IX. See also INTERDICTION.

To give time for the exercise of the right of eminent domain a stay of proceedings on a judgment of ejectment has been held to be improper. Strong *v.* Brooklyn, 12 Hun (N. Y.) 453.

42. King *v.* Jeffrey, 77 Me. 106, holding further that it was unnecessary that a bond should be filed before the issuance of the execution.

title,[43] constitutes a ground for a stay of execution. But when an execution is unauthorized by the judgment it will be stayed;[44] and a stay may be granted under special statutory provision in certain cases.[45]

d. Third Kind — (I) *In General.* By statute a stay of execution is sometimes authorized upon defendant's furnishing sufficient security.[46] Some states at one time gave defendant the right to a stay unless plaintiff indorsed on the execution that he would receive bank paper in discharge of the execution.[47]

(II) *Stay of Freeholder Defendant* — (A) *In General.* In some jurisdictions a stay of a definite length of time on money judgments is allowed the judgment debtor if he possesses a freehold of sufficient value to secure the creditor.[48] To justify a plea of freehold to an execution, the property must be unencumbered.[49]

(B) *Who Entitled to Privilege.* The stay will be allowed to all judgment defendants on the application of one of them who as a freeholder is entitled to it.[50] A defendant who has defaulted is entitled to the stay.[51] If a statute gives the

43. Jarrett *v.* Tomlinson, 3 Watts & S. (Pa.) 114.

Where real estate which had been assigned for the benefit of creditors was about to be sold on a venditioni exponas issued by a creditor who denied the validity of the assignment, it was held to be error for the court to stay the execution until a sale could be made by the assignee. Neel *v.* Lewistown Bank, 11 Pa. St. 17.

44. This may be done by supersedeas; or when the court from which the execution issued is in session, a motion to quash will be entertained. Crenshaw *v.* Hardy, 3 Ala. 653, 654 [*citing* Nicholson *v.* Eichelberger, 6 Serg. & R. (Pa.) 546]. See Greenup *v.* Brown, 1 Ill. 252, as to staying an execution informally issued.

An execution issued for an amount largely in excess of the liability of the obligors on a claim bond should be superseded. Alabama Great Southern R. Co. *v.* Queen City Electric Light Co., 112 Ala. 300, 25 So. 824.

45. In Illinois it was provided by statute that whenever a judgment by confession on a warrant of attorney should be entered on a demand not then due, execution might be stayed until the demand should become due. Wood *v.* Child, 20 Ill. 209. Under a statute which permits defendant to offer his real estate for levy and sale to satisfy the judgment, a defendant who complies with the statute may stay an execution which has been levied on his personalty until the real property has been exhausted. Farrell *v.* McKee, 36 Ill. 226.

46. In Florida it was provided in the statute of 1844 that, upon defendant's furnishing security, no judicial sales should take place except upon certain days of the year. These days were the first Mondays of December, January, February, or March. Robinson *v.* Yon, 8 Fla. 350.

In Pennsylvania a stay of thirty days was allowed under the act of June 16, 1836, if defendant would give sufficient security or was a freeholder of sufficient amount. See for example Wriggins *v.* Stevens, 2 Miles 427. See *infra*, VIII, A, 2, d, (II). Under this act defendant in an amicable action is entitled to enter security for the stay given. Moss *v.* Biddle, 2 Miles 175. But see Slone *v.* King, 35 Pa. St. 270, holding that defendant in a judgment entered on a warranty of attorney is not entitled to a stay.

47. See Collins *v.* Waggoner, 1 Ill. 51; Kentucky Ins. Co. *v.* Sanders, 4 Bibb (Ky.) 471; Eubank *v.* Poston, 5 T. B. Mon. (Ky.) 285 (holding that if plaintiff made the required indorsement on the original execution which was returned *nulla bona*, he was not obliged to make the same indorsement on alias and pluries writs); Salter *v.* Richardson, 3 T. B. Mon. (Ky.) 204.

48. See Perlasca *v.* Sparcella, 3 Binn. (Pa.) 427, construing the Pennsylvania act of March 21, 1806. See also Chaffee *v.* Michaels, 31 Pa. St. 282, construing the Pennsylvania act of October 13, 1857. See, generally, Constitutional Law, 8 Cyc. 695.

What constitutes a freehold.— A fee simple in land out of which a ground-rent has been reserved has been held a freehold estate which will entitle the owner of it to a stay. Farmers', etc., Co. *v.* Schreiner, 1 Miles (Pa.) 291. See also Estates, 16 Cyc. 595.

49. Jenks *v.* Grace, 1 Wkly. Notes Cas. (Pa.) 20; Girard *v.* Heyl, 6 Binn. (Pa.) 253.

Where a freehold is a fee simple out of which ground-rent has been reserved, the arrears in the payment of the rent would constitute an encumbrance. Farmers', etc., Co., *v.* Schreiner, 1 Miles (Pa.) 291.

Where two judgments in favor of different plaintiffs were entered against the same defendants on the same day, defendants were held not entitled to a freehold stay of execution. The lien of either judgment is an encumbrance as against the other. Thornton *v.* Knapp, 3 Luz. Leg. Reg. (Pa.) 23. The same was held where one plaintiff recovered two judgments against defendant; and this was so even though it was admitted on the argument that defendant's real estate was worth more than the amount of both judgments. Penn Bank *v.* Crawford, 2 Wkly. Notes Cas. (Pa.) 371.

50. Robertson *v.* Narber, 65 Pa. St. 85, for the stay is granted, not on the ground of privilege but on the ground of security.

51. Farmers', etc., Bank *v.* Schreiner, 1 Miles (Pa.) 291.

right to a stay on this ground, a quasi-public corporation owning a freehold may also claim the privilege.[52]

(c) *Judgments Not Stayed.* Under a statute which provides for a freehold stay in actions instituted by writ for the recovery of money due by contract or for damages arising from a breach of contract, no stay can be had where the land is specially charged with the judgment on which the execution sought to be stayed is issued,[53] or where the judgment has been rendered against defendant in scire facias on a recognizance bail.[54]

(d) *Claiming Privilege.* The freehold must be claimed by defendant,[55] and the fact of defendant's being a freeholder should appear from the record.[56] But to claim his privilege defendant need not show title as in ejectment; possession under color of title is in general sufficient.[57] Although it is usually the convenient practice for a defendant to file a plea of freehold and to justify it when ruled to do so, this is not necessary; he is entitled to the stay without any plea filed by him.[58] If the estate of freehold is in the county[59] where the plea is filed[60] defendant need only show the existence and value of the freehold, and it then rests upon plaintiff to show an encumbrance, if he makes an objection to the plea on that ground.[61]

(e) *Procedure of Plaintiff.* After the plea of freehold has been filed plaintiff may move to dismiss it for insufficiency.[62]

(f) *Effect of Claiming Privilege.* After the plea has been filed plaintiff may issue execution,[63] but he issues it at his peril.[64]

52. Allinson *v.* Philadelphia, etc., R. Co., 5 Pa. Co. Ct. 344.

A township has not a right to a stay on this ground, because it is provided by statute that in actions against townships plaintiff shall have immediate execution. Morgan *v.* Moyamensing Tp., 2 Miles (Pa.) 297.

Where damages have been assessed by viewers against a quasi-public corporation for taking land in the exercise of the right of eminent domain the corporation is not entitled to a freehold stay. Harrisburg, etc., R. Co. *v.* Peffer, 84 Pa. St. 295; Boyer *v.* Northern Cent. R. Co., 1 Pearson (Pa.) 113.

53. Horst *v.* Brinser, 7 Pa. Dist. 327.

In an action to enforce a mechanic's lien defendant cannot plead his freehold. Haughton *v.* Otterson, 2 Wkly. Notes Cas. (Pa.) 490 [*disapproving* Northern Liberties *v.* Pennock, Troubat & H. Pr. (Pa.) 833].

54. Gorgas *v.* Zeop, 2 Miles (Pa.) 101.

In an action upon an administration bond defendant is not entitled to a stay. Com. *v.* Rigg, 2 Leg. Op. (Pa.) 57.

55. Otherwise how is the justice to know whether defendant is a freeholder. Hearn *v.* Ralph, 2 Harr. (Del.) 6.

56. Hearn *v.* Ralph, 2 Harr. (Del.) 6.

57. Bidichimer *v.* Sterne, Troubat & H. Pr. (Pa.) 250.

58. Riegal *v.* Wilson, 60 Pa. St. 388.

59. If the freehold is in another county, defendant must not only show its existence and value, but must produce evidence by the usual certificates of search of its being clear of encumbrances. If plaintiff requires it he may examine defendant under oath on the subject of the alleged freehold. The court may pronounce on the value from inspection of the title-papers merely or, at its discretion, it will order additional evidence on the subject. Hill *v.* Ramsey, 2 Miles (Pa.) 342.

60. Com. *v.* Meredith, 5 Binn. (Pa.) 432.

61. Marseilles *v.* Garrigues, 2 Miles (Pa.) 347; Hill *v.* Ramsey, 2 Miles (Pa.) 342.

62. Marseilles *v.* Garrigues, 2 Miles (Pa.) 347; Harrison *v.* Hyneman, 1 Phila. (Pa.) 204; Hansell *v.* Garwood, Troubat & H. Pr. (Pa.) 832.

It is then a question for the court to decide whether defendant is a freeholder, so far as to entitle him to the benefit of the statute; and the decision of the court is not reviewable by the supreme court. Robinson *v.* Narber, 65 Pa. St. 85.

63. In Wilson *v.* Serrill, 2 Wkly. Notes Cas. (Pa.) 488, it was said that after the filing of the plea execution could not be issued until defendants had been called to justify under their plea and had failed.

64. For if the freehold be found sufficient, the execution will be set aside with costs to plaintiff. Marseilles *v.* Garrigues, 2 Miles (Pa.) 347.

In Delaware it was provided that a freeholder should have the stay unless he waived his privilege or unless plaintiff or someone for him should make oath or affirmation that he had good ground to believe or verily believed that if the stay of execution for six months were allowed the sum due by the judgment would be lost. In Mousely *v.* Allmond, 4 Harr. 92, it was decided that this oath must be made within two days after the rendition of the judgment. But in Humphries *v.* Hitchens, 1 Houst. 526, a case decided fifteen years later and probably under another statute, it was held that the affidavit might be made within the six-months' stay of execution granted. The objection made was that plaintiff had not made his affidavit within five days. In Hearn *v.* Ralph, 2 Harr. 6, it was said that the wife who was joined as plaintiff with the husband appeared to be

3. Length of Stay — a. In General. The length of the stay depends upon the statute which confers the right to it.[65]

b. Perpetual Stay. The power of the court to stay execution in the interest of justice has been exercised even to the extent of giving relief by a perpetual stay, when it was clear that it was just so to do.[66]

c. Reckoning of Time of Stay. When the time of the stay is reckoned from a certain day that day should be excluded;[67] if from an act done, the day on which it is done must be included.[68] Where a statute provides that a stay authorized by it is to be reckoned from the return-day of the original process, the reckoning should begin from the return-day of the first original process which was effective in bringing defendant into court.[69] In some jurisdictions a stay is reckoned from the rendition of the judgment.[70]

4. Claimants and Opponents of Stay. Under a statute authorizing a "party" to apply to a judge in vacation for an order staying proceedings as preliminary to a motion in term-time to quash the writ or other proceedings, no one but a party to the action can apply for a stay.[71] A statute providing that wage-earners' claims shall be preferred and first paid out of the proceeds of sale gives holders

a creditable person who, within the provisions of the act, might make the oath for the issuance of the execution before the expiration of the six-months' stay.

65. See Reynolds *v.* Quaely, 18 Kan. 361; Mooar *v.* Covington City Nat. Bank, 3 Ky. L. Rep. 674; Sales *v.* Woodin, 8 How. Pr. (N. Y.) 349; Hill *v.* Crean, 2 Pa. L. J. Rep. 328, 4 Pa. L. J. 115.

A conventional stay of execution which varies from the general law is a mere contract and is distinguished from a stay of execution under the statute. Roberts *v.* Cross, 1 Sneed (Tenn.) 233.

Successive stays.— Where the statute forbids a stay being granted by a judge in chambers for a longer period than twenty days, except upon notice to the adverse party, the judge cannot grant *ex parte* a series of twenty-day orders. Sales *v.* Woodin, 8 How. Pr. (N. Y.) 349. *Compare* Holmes *v.* McIndoe, 20 Wis. 657. Under Tenn. Acts (1861), c. 2, §§ 1–3, providing for additional stays of execution, a stay of execution on a judgment which had been stayed, and on which the stay had expired, was unauthorized and of no effect. Noel *v.* Scoby, 2 Heisk. (Tenn.) 20.

66. Keeler *v.* King, 1 Barb. (N. Y.) 390; Welch *v.* Tittsworth, 22 How. Pr. (N. Y.) 474; Voorhees *v.* Gros, 3 How. Pr. (N. Y.) 262; Wood *v.* Torrey, 6 Wend. (N. Y.) 562, 563 [*citing* Clerk *v.* Withers, 2 Ld. Raym. 1072]; Davis *v.* Tiffany, 1 Hill (N. Y.) 642 [*overruling* in part Hewson *v.* Deygert, 8 Johns. (N. Y.) 233].

For example a perpetual stay has been allowed where a discharge in bankruptcy was obtained too late to be pleaded (Monroe *v.* Upton, 50 N. Y. 593, 595; Cornell *v.* Dakin, 38 N. Y. 253 [*citing* Baker *v.* Taylor, 1 Cow. (N. Y.) 165; Palmer *v.* Hutchins, 1 Cow. (N. Y.) 42]; Parks *v.* Goodwin, 1 Mich. 32 [*following* Bostwick *v.* Dodge, 2 Dougl. (Mich.) 331]), where judgment was rendered against plaintiff in a suit prosecuted in his name but without his authority (Campbell *v.* Bristol, 19 Wend. (N. Y.) 101), where the execution was issued on a void judgment (Murdock *v.* De Vries, 37 Cal. 527; Sanchez *v.* Carriaga, 31 Cal. 170; Logan *v.* Hillegrass, 16 Cal. 200), or where the judgment has been satisfied (Harrison *v.* Soles, 6 Pa. St. 393).

A discharge in insolvency in the state where the cause of action arose, and the parties resided, has been held ground for a perpetual stay in the state of New York. Starr *v.* Patterson, 58 Hun (N. Y.) 604, 11 N. Y. Suppl. 371.

An execution emanating from a forfeited forthcoming bond cannot be perpetually superseded, where the error alleged precedes the statutory judgment on the bond, and where the judgment cannot be set aside on motion. Jones *v.* Stanton, 7 How. (Miss.) 601.

The property of a married woman may be protected by a perpetual stay granted after the term at which judgment was entered when the property was not subject to the payment of the judgment, although the court cannot modify or change the judgment after the term. Lewis *v.* Linton, 24 Pa. Co. Ct. 188.

67. Boyer *v.* Northern Cent. R. Co., 1 Pearson (Pa.) 113. See also Mooar *v.* Covington City Nat. Bank, 3 Ky. L. Rep. 674.

68. Mooar *v.* Covington City Nat. Bank, 3 Ky. L. Rep. 674.

69. Morris *v.* Cameron, Troubat & H. Pr. (Pa.) 838. It is error to reckon from the day of judgment. Wright *v.* Laufer, 2 Northam. Co. Rep. (Pa.) 236. *Compare* Smith *v.* Barncastle, 2 Miles (Pa.) 74; Pollot *v.* Bumm, 3 Phila. (Pa.) 98.

70. Okey *v.* Sigler, 82 Iowa 94, 47 N. W. 911.

71. Bonnell *v.* Neely, 43 Ill. 288.

Appellant.— Where an appellee and plaintiff in a judgment appealed from takes instead of a simple affirmance of the judgment of the court below a new judgment in the supreme court against appellant and his sureties, the latter are entitled to stay of execution the same as if the judgment had been rendered in the lower court. Peoria F. & M. Ins. Co. *v.* Dickerson, 29 Iowa 98.

Defendant in judgment held by the state is not entitled to a stay under the stay laws. Com. *v.* Smith, 4 Phila. (Pa.) 421.

of such claims no right to object to the staying of a writ of execution issued on a judgment obtained by another person against their debtor.[72] In New York the court has ordered a partial stay in behalf of *bona fide* purchasers where the lien of the judgment has ceased by lapse of time.[73]

5. WAIVER OF STAY. A waiver of defendant's right to a stay will not be readily implied.[74] An intended waiver of a stay of execution is not affected by a statute which gives a stay of execution on contracts waiving it, for such a statutory provision is unconstitutional.[75]

6. PROCEEDINGS TO OBTAIN STAY[76] — a. Jurisdiction.[77] As a general rule a lower court has no power to stay an execution on a judgment of an appellate court.[78] If an execution is issued to another county the court that issued the execution has jurisdiction to stay the execution, not the court of the county to which the execution has been sent;[79] and if the judgment has been docketed in another county, the rule that the court which rendered the judgment has control of the execution would still appear to apply.[80]

b. Security — (I) *NECESSITY OF*.[81] The usual prerequisite to obtain a stay is that defendant shall furnish plaintiff security for the debt.[82]

Defendant will not be granted a stay on the ground that the goods levied upon while in his possession belonged to another. Commonwealth Ins. Co. *v.* Ketland, 1 Binn. (Pa.) 499.

Obligor on stay bond.— Under the Florida act of 1855, providing that there shall be no second replevy granted, after the forfeiture of the first replevy upon any execution, the sureties in the first replevin bond stand in no better condition than the principal, and on forfeiture of the bond and issuance of execution thereon are not entitled to a second replevy. Robinson *v.* Terrell, 8 Fla. 350.

The indorser has a right to the judgment against the maker of a note, and to the benefit of the recognizance for stay entered upon it. Shaw *v.* McClellan, 1 Pa. L. J. Rep. 384, 2 Pa. L. J. 387.

72. Mettfett *v.* Mohn, 171 Pa. St. 395, 33 Atl. 367.

73. Wilson *v.* Smith, 2 Code Rep. (N. Y.) 18.

74. Huntzinger *v.* Brock, 3 Grant (Pa.) 243.

75. Griffith *v.* Thomas, 13 Phila. (Pa.) 536. The Pennsylvania stay law of March 23, 1877, does not apply to a suit on a mortgage waiving a stay under law then existing or to be enacted. Gordon *v.* Green, 13 Phila. (Pa.) 554.

In Indiana, however, it has been held that the agreement of a maker of a note to pay it without relief from the stay laws does not authorize a judgment without stay of execution. Develin *v.* Wood, 2 Ind. 102.

76. **Costs** on motion to stay or quash execution see COURTS, 11 Cyc. 59.

77. **Court's authority over its process** see *supra*, VIII, A, 2, c, (I).

78. Dibrell *v.* Eastland, 3 Yerg. (Tenn.) 507. See also Marysville *v.* Buchannon, 3 Cal. 312.

A judge of the lower court has power to stay an execution issued by the clerk of the lower court upon a judgment of the supreme court which reversed the judgment of the lower court, the execution in question having been issued for the costs and the ground of the stay having been that the costs which accrued in the court below prior to the notice of appeal had been included in the execution together with the costs of the appeal. *Ex p.* Burrill, 24 Cal. 350, the question coming up on application for a mandamus to compel the judge to vacate his order.

79. Com. *v.* Smith, 4 Phila. (Pa.) 419; State *v.* Brophy, 38 Wis. 413.

In Louisiana, however, the court having jurisdiction over the parish where defendant resides and has his domicile has jurisdiction to stay the execution of a judgment that has been rendered against him in another parish. Simpson *v.* Hope, 23 La. Ann. 557.

80. See *supra*, VI, B, 2, b. See also King *v.* Mimick, 34 Pa. St. 297; Crago *v.* Darte, 1 Pa. Co. Ct. 54. But see Baker *v.* King, 2 Grant (Pa.) 254, where it was held that after a judgment had been transferred from one county to another and execution issued thereon, an associate judge of the county where the judgment was rendered had no authority to make an order for a stay. [The judgment appears from the opinion to be affected by the fact that an associate judge attempted to stay the execution.] In Com. *v.* Smith, 4 Phila. (Pa.) 419, 420, it was said: "When a judgment is transferred to another county than that in which it was originally obtained, the execution issues directly from the judgment so entered, and it is treated for almost every purpose as a judgment of that court; of course, the stay of execution would be there ordered."

A justice of the peace has power to recall an execution issued on a void judgment rendered by him, and stay further proceedings, even if the judgment has been docketed in the office of the county clerk and the execution has been issued by the clerk. Gates *v.* Lane, 49 Cal. 266.

81. **Necessity for security to stay pending appeal** see APPEAL AND ERROR, 2 Cyc. 885 *et seq.*

82. Crane *v.* Hamilton, 3 N. J. L. 882.

Chancery will not supersede the execution of its own decree for money, except upon bond, with good security sufficient to secure

(II) *SUFFICIENCY OF.*[83] Statutory provisions for furnishing security must be substantially complied with.[84] It may not be necessary, however, to comply with all the provisions of the statute, as some may be merely directory.[85]

(III) *EFFECT.*[86] In some jurisdictions the mere giving of security operates *ipso facto* in some instances as a stay.[87] Again by statute in some states the bond, recognizance, or obligation given to obtain a stay has the effect and force of a judgment confessed in a court of record against the person or persons acknowledging the same and against their estates;[88] but it is not a judgment

the debt sought to be enjoined. "The ordinances of Lord Bacon required decrees to be executed before they could be impeached, and wherever these rules have been modified by statute, or departed from in practice, it has always been upon the terms of requiring security for the amount of the judgment or decree, either by the payment of the money into court, or by personal bond with good security." Clark *v.* Henderson, 1 Tenn. Ch. 506, 507.

In Florida, under the statute of 1844, which provided that no judicial sale should take place except upon the first Mondays of December, January, February, or March, provided defendant in execution tendered to the sheriff the bond therein prescribed conditioned for the forthcoming of the property levied upon, a bond is not necessary to obtain stay of proceedings, where the levy has been upon real estate, for the delivery bond in the statute was meant to provide for security for the forthcoming of property which was in its nature personal and subject to replevin. Robinson *v.* Yon, 8 Fla. 350.

In New York the court can stay proceeding on a judgment pending a motion in the action with or without security. Carter *v.* Hodges, 150 N. Y. 532, 537, 44 N. E. 1101 (where it is said: "This power, so far as we know, has hitherto been unchallenged. It is subject to statutory limitation and has been limited in respect to the period during which the stay may be made to extend, as, for example, by section 775 of the Code"); Margolies *v.* Ernst, 34 Misc. 405, 69 N. Y. Suppl. 646. But *compare* Eastman *v.* Starr, 22 Hun 465.

83. Sufficiency of security to stay pending appeal see APPEAL AND ERROR, 2 Cyc. 897 *et seq.*

84. *Indiana.*— Vincennes Nat. Bank *v.* Cockrum, 80 Ind. 355; Sterne *v.* McKinney, 79 Ind. 578. *Compare* Ensley *v.* McCorkle, 74 Ind. 240.

Nebraska.— Gregory *v.* Cameron, 7 Nebr. 414.

Ohio.— Bear *v.* Bookmiller, 3 Ohio Cir. Ct. 484, 2 Ohio Cir. Dec. 277.

Pennsylvania.— Casey *v.* Brelsford, 2 Miles 174.

Vermont.— Perry *v.* Ward, 20 Vt. 92; Aiken *v.* Richardson, 15 Vt. 500.

See 21 Cent. Dig. tit. "Execution," § 451.

A record entry will not operate as a valid recognizance of replevin bail, unless it shows upon its face that it is such. Montgomery *v.* Pierson, 7 Ind. 97.

Compliance with the spirit of the law if not with the letter may be sufficient. Perlasca *v.* Sparcella, 3 Binn. (Pa.) 427 [*reversing* 1 Brown 260].

Where no form is prescribed by statute an obligation under the hand and seal of a surety and entered upon the record of judgment, by which obligation the surety is bound for the payment of debt, interest, and costs, is sufficient to obtain a stay. Commonwealth Bank *v.* Reed, 1 Watts & S. (Pa.) 101.

The Pennsylvania act of 1806 providing for bail for stay of execution does not mention the kind of security to be given, whether it shall be by bond or recognizance, whether on the docket or *in pais*, nor whether it shall be filed in the prothonotary's office or kept by plaintiff. Stettler *v.* Schmoyer, 3 Walk. 356, 361 [*quoting* Com. *v.* Finney, 17 Serg. & R. 282]. In Com. *v.* Finney, 7 Serg. & R. 282, a recognizance entered on the docket below the judgment: "S. F. of, &c., bound in the sum of three thousand eight hundred dollars, and ninety-eight cents, conditioned for the payment of the debt, interest, and costs," and signed by S. F. and attested by the clerk of the court was held to be a valid recognizance for a stay of execution.

85. Williams *v.* Beisel, 3 Ind. 118; Du Boise *v.* Bloom, 38 Iowa 512.

Signature of defendant is not necessary to a bail-bond offered as security for a stay of execution on a judgment. Walker *v.* Nestor, 6 Wkly. Notes Cas. (Pa.) 541.

86. Effect of stay at instance of creditor see *infra*, VIII, E, 2.

Effect of stay on forthcoming or delivery bond see *supra*, VII, C, 3, d.

87. As for instance the delivery to a sheriff of a suspending bond, on levy of execution, by a claimant of the property as provided by W. Va. Code (1899), c. 107, § 4. August *v.* Gilmer, 53 W. Va. 65, 44 S. E. 143.

88. Hutchins *v.* Hanna, 8 Ind. 533, 534; Doe *v.* Allen, 2 Ind. 166; Carnahan *v.* Brown, 6 Blackf. (Ind.) 93; Lewis *v.* Oliver, 1 Blackf. (Ind.) 412. See also Stevenson *v.* McKissick, 12 Ark. 394; Barringer *v.* Allison, 78 N. C. 79, 81 [*citing* Humphreys *v.* Buine, 12 N. C. 378]; Roberts *v.* Cross, 1 Sneed (Tenn.) 233. In Vincennes Nat. Bank *v.* Cockrum, 64 Ind. 229, it was held that the replevin bail could not by restrictions in the recognizance reduce his liability to one half of the judgment, and that if he attempted to do so, the restrictions were void and the bail became liable for the whole judgment, interest, and costs according to the statute. But in Sterne *v.* McKinney, 79 Ind. 578, it was held that a recognizance of the replevin bail for less than the whole of the judgment, interest, and costs was not authorized by statute and was void; the court holding flatly that in so far as Vincennes Nat. Bank *v.* Cockrum, *supra*, was inconsistent with its opinion it was overruled. The liability of the

which under the constitution of the United States is entitled to "full faith and credit" in the courts of another state.[89]

(iv) *AMENDMENT.* Under a general power of amendment given by the code, a judgment debtor who has in good faith filed a bond for stay of execution, which has been approved by the proper officer, but is subsequently discovered to be insufficient in law, may amend it to conform to the law so that he may have the stay.[90]

(v) *FILING AND APPROVAL OF BONDS.* It is a usual statutory provision that the security offered by defendant must be approved by some person or officer.[91] If the security is not approved as required by law plaintiff may treat it as a nullity and issue execution.[92] The creditor may waive the approval since it is for his benefit;[93] but neither the debtor nor the security can take advantage of the want of it.[94] The undertaking need not be filed unless the statute requires it.[95]

bail was not in issue in Sterne *v.* McKinney, *supra.* See Perkins *v.* State Bank, 5 La. Ann. 222.

Such a statute is not void on the ground that it denies or takes away a trial by due course of law. Cavender *v.* Smith, 5 Iowa 157. See also McGlothin *v.* Madden, 16 Kan. 466.

The judgment and stay and execution if valid on their faces cannot be subsequently impeached by the stayer in a proceeding to condemn land levied upon as of the stayer of the execution on the original judgment. Anderson *v.* Kimbrough, 5 Coldw. (Tenn.) 260.

The proceedings cannot be impeached in collateral proceedings by the stayer. Holt *v.* Davis, 3 Head (Tenn.) 629; Turner *v.* Ireland, 11 Humphr. (Tenn.) 447.

89. Foote *v.* Newell, 29 Mo. 400.

Full faith and credit of judgment generally see JUDGMENTS.

90. State *v.* Russell, 17 Nebr. 201, 22 N. W. 455 [*following* O'Dea v. Washington County, 3 Nebr. 118].

In Pennsylvania a recognizance for a stay of execution was taken for six months by mistake of the prothonotary, instead of for nine months. The security was given to enable defendant to have the benefit of the stay given to a judgment debtor under the act of June 16, 1836. Defendant offered a new recognizance for nine months. It was held by the court that under his new recognizance defendant could have the stay for the full statutory period, but without prejudice to any right which plaintiff might have under the recognizance already entered into after the stay for nine months should have expired. The court said that it had no power to amend the first recognizance entered into. Welsh *v.* Brown, 2 Miles 108.

By statute in Tennessee additional security may be required where the creditor deems his debt in danger from the insolvency of the stayer. Rothchilds *v.* Forbes, 2 Heisk. 13; Gaw *v.* Rawley, 3 Head 716; Ellis *v.* Bivens, 4 Sneed 146.

91. Who this person or officer is depends upon the statutes. Thus in Indiana the clerk must approve the security. See Ensley *v.* McCorkle, 74 Ind. 240. In Pennsylvania the court in which the judgment was obtained or a judge thereof must approve it. Stroop *v.* Gross, 1 Watts & S. 139; Eichman *v.* Belvedere Bank, 3 Whart. 68; Stettler *v.* Schmoyer, 3 Walk. 356.

Bail for a stay of execution may be taken by the prothonotary, and perfected afterward by the approval of the court or judge. Stroop *v.* Gross, 1 Watts & S. (Pa.) 139.

Presumption of approval.—Under Ind. Rev. St. (1876) p. 202, § 421, providing that the bail for stay of executions may be taken and approved by the clerk and recognizance entered of record at any time before the term of stay of execution expired, there being no formal approval or attestation of such entry required by the clerk, it is sufficient proof of the clerk's approval where such entry stands upon the docket. Ensley *v.* McCorkle, 74 Ind. 240.

Under the Pennsylvania act of 1836 if only one surety be offered for a stay of execution, the court will not approve, unless he satisfies the court or one of the judges that he is worth double the amount of the judgment over and above all his debts and liabilities. If more than one, the sureties offered must satisfy the court or one of the judges that taken conjunctively they are worth double the amount of the judgment over and above all their debts and liabilities. Hollingsworth *v.* McKean, 2 Miles 370.

92. Eichman *v.* Belvedere Bank, 3 Whart. (Pa.) 68; Stettler *v.* Schmoyer, 3 Walk. (Pa.) 356.

93. Stroop *v.* Gross, 1 Watts & S. (Pa.) 139; Stettler *v.* Schmoyer, 3 Walk. (Pa.) 356 [*citing* Walker *v.* Nester, 6 Wkly. Notes Cas. (Pa.) 541].

94. It would be against common justice that he should take advantage of a defect, which has arisen from his own default, after he had, by the forbearance or with the assent of the creditor, derived every benefit which would have resulted from a recognizance executed and approved with all the formalities required by the act. Nor can we perceive that the bail who has identified himself with his principal is in any better situation than the principal himself whose duty it was to perfect the recognizance. Stroop *v.* Gross, 1 Watts & S. (Pa.) 139. See also Stettler *v.* Schmoyer, 3 Walk. (Pa.) 356.

95. And if it is the practice to file the undertaking and the undertaking in question has not been filed, the court may order it

c. Application or Motion.[96] Motion or application to the court or judge is the common procedure to obtain a stay.[97] An order or rule to show cause is sometimes used.[98] Proceedings to obtain a permanent stay of an execution sale of land should be by bill in equity, not by petition and rule.[99] The applicant must make out a good case, for the court will not stay summarily if the case is doubtful, but will leave the party to seek his remedy by action.[1] The affidavit,[2] petition, or application[3] should set forth the applicant's ground for relief with sufficient particularity.

d. Time For Application. Application for the stay must be made within the time prescribed by law.[4] This rule would not prevent the execution from being stayed by agreement after the time set by statute.[5]

filed *nunc pro tunc* as of the day of its approval. Such a proceeding is in substance, although not in form, a bill to supply a lost record. The equity side of the court has jurisdiction in a proceeding of this character. Stettler *v.* Schmoyer, 3 Walk. (Pa.) 356.

96. Scope of proceedings.— If defendant obtain an order suspending the sale of property taken on an order of seizure and sale, the merits of the case cannot be gone into on a rule to set aside such order, but such rule is only to be allowed for irregularity in the issue of the order suspending the sale. Abat *v.* Poeyfarre, 8 Mart. (La.) 433.

Waiver of formal proceedings.— Formal proceedings to obtain a stay as provided by statute will be held to have been waived if by the terms of the judgment entered by consent of both parties execution is stayed. Warford *v.* Eads, 10 Iowa 592.

97. An action is inadmissible as a mode of obtaining relief against an execution for irregularity. The code has not changed the practice. Notice of the order *nisi* made thereunder operates in the meantime as an injunction against the process. Foard *v.* Alexander, 64 N. C. 69.

98. Lewis *v.* Linton, 207 Pa. St. 320, 56 Atl. 874, holding that, where a prayer to stay execution because of alleged payment of the judgment is filed, the court should grant a rule to show cause why the prayer should not be granted and form an issue for determination by the court. See U. S. *v.* Wells, 28 Fed. Cas. No. 16,664, 3 Wash. 245. But not in Louisiana; execution can be suspended only upon petition, affidavit, and bond given for injunction. Wiley *v.* Woodman, 19 La. Ann. 210. See also Clement *v.* Oakey, 2 Rob. (La.) 90; Minot *v.* U. S. Bank, 4 Rob. (La.) 490.

99. "An injunction cannot be issued without the entry of security, conditioned to indemnify the other party for all damages that may be sustained thereby. But if the proceeding by rule is allowed to go on and the rule is made absolute, an injunction would in effect be granted without the security expressly required by law." Smith *v.* Eline, 5 Pa. Dist. 92 [*quoting* Umberger *v.* Bord, 2 Chest. Co. Rep. (Pa.) 318].

1. Pearce *v.* Affleck, 4 Binn. (Pa.) 344. An affidavit by the tenant in possession that he does not hold possession of the whole of the premises under defendant in the execution is insufficient to stay proceedings. The justices are bound to disregard such an affidavit or to call on the tenant to explain what part he held under defendant or other person. Hawk *v.* Stouch, 5 Serg. & R. (Pa.) 157.

The record should show the ground for granting a supersedeas to suspend or arrest an execution. Holloway *v.* Washington, 3 Ala. 668.

2. An affidavit is generally required; but not when process of court appears on the face of it to have been wrongfully issued. Piernas *v.* Milliet, 10 La. Ann. 286.

3. Atkinson *v.* Rhea, 7 Humphr. (Tenn.) 59.

A rule to show cause why execution should not be stayed on a judgment taken by confession, on the ground that defendant is entitled to further credit, will not be granted except upon affidavit stating the precise credits and their nature. U. S. *v.* Wells, 28 Fed. Cas. No. 16,664, 3 Wash. 245.

4. Taylor *v.* Sanford, 8 Blackf. (Ind.) 169; Osborn *v.* May, 5 Ind. 217; State *v.* Laflin, 40 Nebr. 441, 58 N. W. 936; Cameron *v.* Sandwich Mfg. Co., 6 Nebr. 444; Patrick *v.* Driskill, 7 Yerg. (Tenn.) 140.

This is the rule in Pennsylvania. Thus under the act of June 16, 1836, requiring as a condition of stay that bail shall be entered within thirty days from judgment rendered, a stay granted where bail was not entered until thirty-three days after judgment was erroneous. Erie City Bank *v.* Compton, 27 Pa. St. 195. A judgment affirmed more than thirty days after its rendition cannot be stayed. Sweigard *v.* Consumers' Ice Mfg., etc., Co., 198 Pa. St. 253, 48 Atl. 495. If security for a stay of execution is entered after the expiration of thirty days from the date of the judgment it will be stricken out on motion, although no execution has been previously issued. Blackwell *v.* Johnson, 2 Miles (Pa.) 346. And a fieri facias issued before the expiration of thirty days is valid. Fleetwood *v.* Waters, 2 Miles (Pa.) 111. See Picard *v.* Precott, 1 Pa. L. J. Rep. 1, 1 Pa. L. J. 1, for a complete explanation of practice.

Under the Michigan circuit court rule 47, providing for a stay of proceedings after judgment, and permitting the granting of a further stay, not exceeding sixty days, on good cause shown after notice, a stay may be granted after the expiration of sixty days from entry of judgment. Roach *v.* Wayne Cir. Judge, 117 Mich. 242, 75 N. W. 465.

5. Duckwall *v.* Rogers, 15 Ohio St. 544 [*citing* U. S. *v.* Linn, 15 Pet. (U. S.) 290, 10

e. Notice. As a general rule the order for a stay cannot be made without notice to the opposite party, either before or accompanying the order.[6]

f. The Order.[7] An order staying a judgment is sufficient, if the judgment is described with reasonable certainty.[8] A stay of execution granted by a judge *pro tem.* until a case-made is settled has reference to an effectual settlement made before the judge has lost jurisdiction.[9] In New York the order should not be for a given number of days.[10] In Pennsylvania it is considered good practice to accompany a judge's order temporarily staying execution with the stipulation that the lien remain.[11] Service of the order should be made upon the proper person and in the proper manner.[12]

7. Remedy of Plaintiff Prejudiced by Stay. If plaintiff is prejudiced by a stay, his remedy is by application to the court which granted it for an order vacating or modifying the stay as the case may require; he has no remedy in equity.[13]

8. Effect of Stay — a. In General.[14] A stay usually operates upon all subsequent proceedings.[15] If a sale of property is stayed a sale during the stay is

L. ed. 742; U. S. *v.* Bradley, 10 Pet. (U. S.) 343, 9 L. ed. 448]; State *v.* Findley, 10 Ohio 51; Barret *v.* Reed, 2 Ohio 409; Croy *v.* State, Wright (Ohio) 135; Keeling *v.* Stokes, 14 Lea (Tenn.) 419; Cannon *v.* Trail, 1 Head (Tenn.) 282 [*citing* Taliaferro *v.* Herring, 10 Humphr. (Tenn.) 272].

If a recognizance conditioned for the payment of the debt, etc., be entered into after the expiration of the time limited for a stay of execution and plaintiff proceed upon it, he cannot afterward treat it as a nullity. Roup *v.* Waldhouer, 12 Serg. & R. (Pa.) 24.

6. *California.*— Livermore *v.* Hodgkins, 54 Cal. 637.

Mississippi.— Kramer *v.* Holster, 55 Miss. 243.

New York.— Sales *v.* Woodin, 8 How. Pr. 349; Rosevelt *v.* Fulton, 5 Cow. 438. See also Bailey *v.* Caldwell, 3 Johns. 451.

North Carolina.— Foard *v.* Alexander, 64 N. C. 69.

Pennsylvania.— Com. *v.* Magee, 8 Pa. St. 240, 44 Am. Dec. 509.

See 21 Cent. Dig. tit. "Execution," § 454.

The reasons for the rule are stated in Kramer *v.* Holster, 55 Miss. 243, 248 [*citing* Moore *v.* Bell, 13 Ala. 459; Wagnon *v.* McCoy, 2 Bibb (Ky.) 198]; Irons *v.* McQuewan, 27 Pa. St. 196, 197, 67 Am. Dec. 456.

Form and requisites.— The notice accompanying the order should indicate the end to be attained by the stay. Sales *v.* Woodin, 8 How. Pr. (N. Y.) 349; Chubback *v.* Morrison, 6 How. Pr. (N. Y.) 367.

In Kansas, however, it has been held that the fact that a judgment of foreclosure was stayed by order of court without a formal written motion affords no sufficient reason for setting aside the order. Morrill *v.* Seip, 26 Kan. 148.

7. A military order staying proceedings for the sale of property under execution, when served on the sheriff, operates as a stay of execution, since it is a command issued by a paramount authority. Humphreys *v.* Browne, 19 La. Ann. 158.

8. Gwinn *v.* Harrell, 12 Lea (Tenn.) 738.

It is no objection that the stay describes the judgment as rendered against A, when in fact it was against A, B, and C, B and C being only indorsers. Cannon *v.* Trail, 1 Head (Tenn.) 282.

Judgment payable by instalments.— Although defendant in a judgment of foreclosure rendered for the full amount due and to become due is entitled to a stay on each instalment as it becomes due on entering the proper replevin bail, an order providing "that, upon replevin bail being given for the amount of the first note and interest thereon, and costs, no further bail or stay be required until further demand be made in the premises," is not erroneous, since under such order, when any instalment becomes due, previous ones having been paid, defendant will be entitled to give replevin bail for the instalment and thereby stay the execution. Allen *v.* Parker, 11 Ind. 504.

9. Missouri Pac. R. Co. *v.* Preston, 63 Kan. 819, 66 Pac. 1050 [*affirming* (Sup. 1901) 63 Pac. 444].

10. It should be limited to the time when the party can make application for the relief he seeks. Sales *v.* Woodin, 8 How. Pr. (N. Y.) 349.

11. Lancaster's Estate, 2 Luz. Leg. Reg. 227, 21 Pittsb. Leg. J. 105.

12. A party was directed to serve an order staying an execution sale on plaintiff or his attorney. He went three times to the attorney's office and found it locked and then left a copy with the attorney's wife at her residence, and served a copy on the sheriff who was to sell, and upon plaintiff himself. The service was sufficient. Campbell *v.* Smith, 9 Wis. 305.

Showing the order to the sheriff having the execution is sufficient service to terminate the sheriff's right to proceed further. Hopkinson *v.* Sears, 14 Vt. 494, 39 Am. Dec. 236.

13. Steffin *v.* Steffin, 4 N. Y. Civ. Proc. 179. See *infra*, VIII, D, 1.

14. Effect of stay at instance of creditor see *infra*, VIII, E, 2.

Effect of stay on forthcoming or delivery bond see *supra*, VII, C, 3, d.

15. Parker *v.* Dean, 45 Miss. 408, 419; Plaisted *v.* Nowlan, 2 Mont. 359; Spradlin *v.* Bratton, 6 Lea (Tenn.) 685; Kreglo *v.* Fulk,

void.[16] Where a judgment is entered with a stay upon the record, the time within which an execution may issue begins to run from the time when the stay expires.[17] Where a stay is entered on a judgment against principal and surety it is *prima facie* a stay for all parties.[18]

b. On Lien, Levy, and Priority.[19] The levy and lien of an execution are not affected by an order of court staying the execution;[20] but the execution of a supersedeas bond may destroy the effect of a levy on personal property.[21] A stay of execution in the entry of the judgment suspends the running of the statute limiting the duration of the judgment lien.[22]

9. Issuance Before End of Stay. An execution issued within the period of the stay is void,[23] and plaintiff may be held liable in damages for the issuance

3 W. Va. 74. *Compare* Burton *v.* Burton, 28 Ind. 342 [*citing* Nill *v.* Comparet, 16 Ind. 107, 79 Am. Dec. 411].

Separate executions for debt and costs.— Under Mass. Gen. St. c. 128, § 8, providing for the issuance of an execution for costs and an execution on the debt in actions against an executor, the right to take out an execution for costs is not lost by a stay of the execution for the debt. Greenwood *v.* McGilvray, 120 Mass. 516.

Subsequent writs.— The Pennsylvania act of March 23, 1877, providing for the stay of execution in certain cases, is applicable to unexecuted writs of venditioni exponas in the sheriff's hands at the time of its passage. Thompson *v.* Buckley, 12 Phila. (Pa.) 456. See *infra*, VIII, A, 9. But the fact that an earlier writ was stayed did not affect the levy on another writ which was at that time in the sheriff's hands and on which the levy was noted. Miller *v.* Westerhoff, 14 Pa. Super. Ct. 604.

Suit removed to supreme court.— It has been held that the order of the lower court superseding the execution continues in force, although the suit should be removed to the supreme court and be pending there upon exceptions. Perry *v.* Ward, 20 Vt. 92.

Stay affects attachment.— Where a statute places attachments on judgments on the same footing as other executions, a stay which has been granted operates as a stay of an attachment. Goldsborough *v.* Green, 32 Md. 91. But *compare* Steere *v.* Stafford, 12 R. I. 131.

16. August *v.* Gilmer, 53 W. Va. 65, 44 S. E. 143.

Other property can be proceeded against.— The execution of a bond to suspend a sale of property levied on under execution does not prevent the sheriff from proceeding with the execution against any other property of defendants, nor from allowing the execution to be replevied by them. Southern Bank *v.* White, 1 Duv. (Ky.) 290.

17. Pennock *v.* Hart, 8 Serg. & R. (Pa.) 369. See also Bombay *v.* Boyer, 14 Serg. & R. (Pa.) 253, 16 Am. Dec. 494.

Reckoning of time see *supra*, VI, D, 2, a, (IV).

A conventional stay of an execution which varies from the general law is a mere contract and not the final and conclusive judgment which the law contemplates. Roberts *v.* Cross, 1 Sneed (Tenn.) 233. See *supra*, VIII, A, 6, b, (III).

18. Stephens *v.* Taylor, (Tenn. Ch. App. 1897) 45 S. W. 228 [*citing* Woodward *v.* Walton, 7 Heisk. (Tenn.) 50].

19. Effect of stay at instance of creditor on lien, levy, and priority of writ see *infra*, VIII, E, 2.

20. "Actus curiæ neminem gravabit. Actus legis nemini facit injuriam." Love *v.* Love, 15 Fed. Cas. No. 8,549. See also *In re* Hambright, 11 Fed. Cas. No. 5,973; 1 Cyc. 762. *Compare* Steere *v.* Stafford, 12 R. I. 131, 132, where it is said: "This court has by law general power to stay executions in any stage of proceeding, and we cannot suppose it could have been the intention of the legislature that a party should lose his levy by the act of the court over which he could have no control." See also State *v.* Records, 5 Harr. (Del.) 146; Hickman *v.* Hickman, 3 Harr. (Del.) 484.

This rule has been applied to personal property (Steffin *v.* Steffin, 4 N. Y. Civ. Proc. 179, [*citing* Rhoads *v.* Woods, 41 Barb. (N. Y.) 471]. *Contra*, Mulford *v.* Estudillo, 32 Cal. 131; Hamilton *v.* Henry, 27 N. C. 218), as well as to a levy and lien upon crops (Spradlin *v.* Bratton, 6 Lea (Tenn.) 685).

In the absence of a levy the lien of the fieri facias does not continue after the return-day. Sturges' Appeal, 86 Pa. St. 413. See also Steere *v.* Stafford, 12 R. I. 131. See *supra*, VII, A, 5.

Stipulation.— Although it is the proper practice to stipulate for the continuance of the lien, an execution which has been levied does not lose its priority by being stayed by judicial order without the stipulation. Reid *v.* Lindsey, 104 Pa. St. 156; Bain *v.* Lyle, 68 Pa. St. 60; Dickinson *v.* Princes Metallic Paint Co., 22 Wkly. Notes Cas. (Pa.) 36. See also Batdorff *v.* Focht, 44 Pa. St. 195.

21. Fry *v.* Manlove, 1 Baxt. (Tenn.) 256, 25 Am. Rep. 775, the court saying that a bond for supersedeas is a totally different instrument from an ordinary delivery bond: although it destroys the levy, it is in no sense a merger of the original liability as it existed prior to the levy. See Parker *v.* Dean, 45 Miss. 408. And *compare* Hagan *v.* Lucas, 10 Pet. (U. S.) 400, 9 L. ed. 470.

22. Even though the stay be longer than the period of limitation. Mercantile Trust Co. *v.* St. Louis, etc., R. Co., 69 Fed. 193.

23. Milliken *v.* Brown, 10 Serg. & R. (Pa.) 188. Where defendant secured a rule to set

thereof[24] — even in exemplary damages.[25] But the recognizance of defendant is not thereby discharged.[26] The fact that surety gave bond to take advantage of the insolvent laws[27] or that he died before the end of stay and defendant did not furnish additional security[28] is no reason for the issuing of execution before the end of the stay.

10. Liability on Bonds[29] — a. In General. The courts are careful not to hold the security liable for any more than his undertaking requires.[30] A stay bond binds the property of the surety from the date of its execution.[31] Where the execution is superseded on account of some matter of discharge after judgment, the security of the petitioner for the supersedeas is bound only for the costs of the new proceeding.[32] Where a defendant retains his property, under a statute,[33] upon giving bond for a stay of execution upon condition that he will neither remove, secrete, assign, nor in any way dispose of it until plaintiff's demand shall have been satisfied, an assignment of the property to other creditors is a breach of the bond.[34]

b. Defenses — (i) *In General.* The law of suretyship governs the liability of the stayer, and what would release a surety under that law will generally release him.[35] And it has been held that a refusal to accept offer to pay debt in

the execution aside and open the judgment, the rule must be disposed of before the court can order a venditioni exponas to issue. Eaby *v.* Siegler, 9 Pa. Dist. 536.

Presumption against premature issuance.— Jones *v.* Bailey, 5 How. (Miss.) 564.

24. Bouvier L. Dict.

25. See Milliken *v.* Brown, 10 Serg. & R. (Pa.) 188.

26. Milliken *v.* Brown, 10 Serg. & R. (Pa.) 188, although the money thus obtained operates as a payment to be discounted from the amount of the judgment.

27. Warner *v.* Bancroft, 2 Miles (Pa.) 95.

28. Wriggins *v.* Stevens, 2 Miles (Pa.) 427.

29. Bonds generally see Bonds, 5 Cyc. 811 *et seq.*

Recognizances generally see Recognizances.

Undertakings generally see Undertakings.

30. Skelton *v.* Ward, 51 Ind. 46; Crutcher *v.* Com., 6 Whart. (Pa.) 340.

In some jurisdictions the undertaking has the force and effect of a judgment confessed in a court of record against the person or persons acknowledging it and against their estates. See *supra*, VIII, A, 6, b, (III).

31. Hayden *v.* Anderson, 57 Ga. 378.

Bail for stay of execution becomes bound as soon as he acknowledges the obligation before the prothonotary, if plaintiff chooses to dispense with approval by the court or a judge. Stettler *v.* Schmoyer, 3 Walk. (Pa.) 356.

32. Edde *v.* Cowan, 1 Sneed (Tenn.) 290, 296 [*citing* Kincaid *v.* Morris, 10 Yerg. (Tenn.) 252].

33. Pennsylvania act of July 12, 1842.

34. There is no substantial difference between such a disposition of property, and a general assignment of it for the use of creditors. The theory of the law is, that a vigilant creditor who has prosecuted his claim to judgment shall not be deprived of the fruits of his vigilance, by defendants entering bail to stay execution, and then assigning his property to other creditors, or in any other way disposing of it, to defeat such judgment creditor, except for the sustenance of himself or family, pending the stay of execution. White *v.* Doak, 3 Pa. L. J. Rep. 259, 5 Pa. L. J. 154.

Estoppel.— One who knows his name is being used as stayer and does nothing to avoid the liability but permits his land to be sold to satisfy the execution, merely saying to the sheriff when given notice of sale that he is not bound, as he did not authorize his name to be signed, will, on attempting on that ground several years later to void the sale, be held by reason of his acquiescence to have ratified the signing of his name. Fite *v.* Wiel, (Tenn. Ch. App. 1898) 46 S. W. 330. See Brown *v.* Montgomery, 89 Tex. 250, 34 S. W. 443. And see Estoppel.

35. Baker *v.* Merriam, 97 Ind. 539; Whiton *v.* Ripley, 1 Ohio Dec. (Reprint) 133, 2 West. L. J. 406. See Stockard *v.* Granberry, 3 Lea (Tenn.) 668. See also, generally, Principal and Surety.

Extension of time to debtor has been held to discharge surety. Perkins *v.* State Bank, 5 La. Ann. 222. A stay of execution indefinite in duration, in that it directed the sheriff "not to execute the execution until ordered to do so," would not release a surety in the execution so stayed. McGee *v.* Metcalf, 12 Sm. & M. (Miss.) 535, 51 Am. Dec. 122. See also Whiton *v.* Ripley, 1 Ohio Dec. (Reprint) 133, 2 West. L. J. 406.

The creditor after judgment can give the principal debtor no preference, nor do any acts by which the liability of the surety is increased, and that such acts as discharge the surety before judgment will discharge him after judgment. Freeman Judgm. § 226 [*cited* in Stockard *v.* Granberry, 3 Lea (Tenn.) 668, 677, where it is said: "But in Tennessee the rule is different, for while a valid contract for delay between creditor and his principal debtor before judgment will discharge a surety, such a contract after judgment will not"]. Further as to rule in Tennessee see Stockard *v.* Granberry, 3 Lea 668; Chafflin

full[36] or satisfaction of the original judgment[37] may constitute a valid defense. Revival of judgment[38] against the principal by scire facias issued against him alone[39] or neglect on the part of the execution debtor to file the twelve months' bond with the execution[40] does not release the surety. An obligor under a bond given to stay execution is estopped from setting up the unconstitutionality of the law under which the stay was allowed.[41]

(II) *ATTACK ON THE INSTRUMENT.* A penalty and a condition being indispensable to constitute a recognizance, the plea of *nul tiel record* to an action on a recognizance lacking these requisites will be sustained.[42] Mere mistakes or immaterial omissions in a bond do not constitute a valid defense.[43] Where a stay is attempted to be taken under a stay law it is held in some jurisdictions to be a good defense to an action against the stayer that the bond, recognizance, or undertaking was not entered into in pursuance to the requirements of those laws.[44] In other jurisdictions, however, it is held that one may be held on his

v. Rose, 5 Baxt. 696; Sharp *v.* Fagan, 3 Sneed 541.

An admission of liability as stayer subsequent to a time when defendant's name was entered as stayer under circumstances which did not bind him does not preclude him from contesting his liability on the ground of the illegality of the stay. Mayfield *v.* McLary, 3 Head (Tenn.) 159.

Failure of plaintiff in execution to enroll judgment upon a forfeited forthcoming bond until more than a year after its rendition does not discharge the surety on the bond, although such failure lets in the lien of younger judgments, which take all the principal's property. McGee *v.* Metcalf, 12 Sm. & M. (Miss.) 535, 51 Am. Dec. 122.

That his insolvency is ascertained before the expiration of the time limited for the stay does not exonerate the stayer, under a statute which provides for requiring defendant to justify or give other security if plaintiff deems his debt in danger from the insolvency of the stayer. Rothchilds *v.* Forbes, 2 Heisk. (Tenn.) 13.

When an order was made in vacation staying an execution until next term, the obligor in a bond given to indemnify plaintiff for all damages arising from the stay cannot defend on the ground that the stay extended not beyond the next term and that, if plaintiff could have made the money any time after that and failed to do so, the obligor was not liable. Lindsey *v.* Reid, 101 Pa. St. 438.

36. A plea that the creditor refused to accept the offer made by the principal to pay the debt in full is good without a tender of the money into court. West *v.* Gordon, 3 Lea (Tenn.) 370.

37. Satisfaction of the original judgment is a good defense to an execution against the surety on the bond given to stay the original judgment. Meredith *v.* Santa Clara Min. Assoc., 60 Cal. 617, 621 [*citing* Noyes *v.* Leob, 24 La. Ann. 48], the satisfaction of record had not been entered.

38. Revival of judgment generally see JUDGMENTS.

39. On a second fieri facias the creditor is entitled to execution against principal and bail. Stockwell *v.* Walker, 3 Ind. 215.

40. Evans *v.* Nash, 3 Mart. N. S. (La.) 669.

41. Daniels *v.* Tearney, 102 U. S. 415, 26 L. ed. 187. But see Strong *v.* Daniel, 5 Ind. 348.

In a collateral replevin suit the constitutionality of a stay law cannot be raised. McGlothlin *v.* Madden, 16 Kan. 466 [*following* Westenberger *v.* Wheaton, 8 Kan. 169].

42. Caldwell *v.* Brindle, 11 Pa. St. 293.

43. Thus an omission from the bond of a credit on the judgment cannot be objected to. Doe *v.* Cunningham, 6 Blackf. (Ind.) 430.

The fact that by mistake the amount of the judgment entered was a much smaller sum than that recovered is no defense to a bond given for the amount entered. Crutcher *v.* Com., 6 Whart. (Pa.) 340.

That the authority given by defendant to enter his name as stayer was not sufficiently descriptive of the judgment is not a good defense in a collateral proceeding. Holt *v.* Davis, 3 Head (Tenn.) 629.

44. Taylor *v.* Sanford, 8 Blackf. (Ind.) 169; Erie City Bank *v.* Compton, 27 Pa. St. 195; Apperson *v.* Smith, 5 Sneed (Tenn.) 372; Howard *v.* Brownlow, 4 Sneed (Tenn.) 548. See also Halmes *v.* Dovey, 64 Nebr. 122, 89 N. W. 631.

Date of confession.— Where the statute requires that the entry of a supersedeas must contain the date of confessing it, the omission of the date is good ground for restraining execution upon the supersedeas. Dilley *v.* Shipley, 4 Gill (Md.) 48. But see Tucker *v.* Zollicoffer, 12 Sm. & M. (Miss.) 591.

Stay of execution by consent of plaintiff after the judgment has been revived is within the letter of the statute which provides that in all cases where a justice of the peace renders judgment he may receive and enter security for the stay of the judgment at any time before the same is paid or execution is issued with the consent of plaintiff or his agent. It is no attempt to stay the judgment of revivor on the ground of that judgment conferring any right to a party, then to give security for the stay. If that were the question the counsel for plaintiff in error would be correct. But this is the stay by consent of plaintiff, of the original judgment, before execution issued. Winchester *v.* Beardin, 10 Humphr. (Tenn.) 247, 51 Am. Dec. 702.

undertaking as a common-law contract, although it may not be binding and effective as a statutory undertaking if supported by a sufficient consideration.[45]

(III) *Attack on Judgment and Proceedings.* So long as a judgment remains in force the stayer cannot go behind it in search of irregularities in the proceedings in order to be discharged from his liability.[46] The fact that the judgment has since been set aside as void is not a defense to an action on the bond given for the stay of execution on the judgment.[47]

(IV) *Execution Unauthorized by Judgment.* The fact that the execution which was stayed is unauthorized by the judgment is a good defense to an action on the replevin bond.[48]

c. Proceedings to Enforce Liability. Plaintiff may enforce the liability on the bond by action[49] or motion,[50] and in a proper case by scire facias,[51] according to the practice in the particular jurisdiction. It is necessary only to file a copy of the recognizance.[52] Where the bond has the force and effect of a judgment against the principal and stayer,[53] a joint execution may issue against the judgment debtor and the stayer.[54] If the principal is dead it has been held that

45. Boling *v.* Young, 38 Ohio St. 135. See also Cameron *v.* Sandwick Mfg. Co., 6 Nebr. 444.

An action in debt would be the appropriate remedy. Stettler *v.* Schmoyer, 3 Walk. (Pa.) 356. See, generally, Debt, Action of.

Consideration.— The release of a levy and further delay of execution on a judgment for the period fixed by statute is a sufficient consideration when considered as a valid common-law contract for an undertaking to stay execution. Duckwall *v.* Rogers, 15 Ohio St. 544.

46. Lownes *v.* Hunter, 2 Head (Tenn.) 343.

Defendant obligor cannot give parol evidence to contradict, alter, or explain the original judgment to stay which a recognizance was given. Withers *v.* Livezey, 1 Watts & S. (Pa.) 433.

Usury.— The obligor on the bond cannot allege in defense of his liability that the contract on which the original judgment was given was usurious. Winsor *v.* Farmers', etc., Nat. Bank, 81* Pa. St. 304.

47. Jones *v.* Bomberger, 97 Pa. St. 432 [*citing* Unangst *v.* Fitler, 84 Pa. St. 135; Leonard *v.* Duffin, 9 Wkly. Notes Cas. (Pa.) 155]; Jones' Appeal, 1 Walk. (Pa.) 355. In Jones *v.* Raiguel, 97 Pa. St. 437 [*affirming* 1 Leg. Rec. 241], it was held that the obligor could not relieve himself from liability by showing that the judgment which had been rendered against a husband and wife was void as against the wife by reason of her disability.

48. Faught *v.* Byrne, Hard. (Ky.) 330, 331.

49. Kenney *v.* Burke, 61 Me. 134.

Action on bond generally see Bonds, 5 Cyc. 811 *et seq.*

In Indiana, where by statute a bond given to stay an execution was to have the force and effect of a judgment, it was held that the bond could not be sued on in Missouri. Foote *v.* Newell, 29 Mo. 400, holding further that the full-faith-and-credit clause of the constitution could not be applied to it.

Pleading.— An objection that a declaration counts on an undertaking as a common-law obligation and not as a statutory stay of execution must be raised on demurrer. Sweeney *v.* Lustfield, 116 Mich. 696, 75 N. W. 136. See, generally, Pleading.

Evidence.—Where the recognizance was conditioned that no part of the property of defendant in the judgment should be removed, evidence is admissible in an action on the recognizance that defendant had property when the recognizance was entered into. Hallowell *v.* Williams, 4 Pa. St. 339. Evidence of any collateral security given to the obligors to indemnify them against their liability on the recognizance is immaterial. Withers *v.* Livezey, 1 Watts & S. (Pa.) 433. See, generally, Evidence.

Stay.— Under the stay laws giving a stay for a certain time after rendition of judgment to all joint debtors upon their furnishing security, defendant stayer is entitled to a stay upon a judgment on the recognizance of bail. Wolfe *v.* Nesbit, 4 Watts & S. (Pa.) 312.

50. See Coleman *v.* Davidson Academy, Cooke (Tenn.) 258; White *v.* Sydenstricker, 6 W. Va. 46.

Where the proceeding is by motion, a notice of motion which is signed is sufficient, although the date when the motion will be made and the name of the mover are left blank. White *v.* Sydenstricker, 6 W. Va. 46.

51. Lewis *v.* Oliver, 1 Blackf. (Ind.) 412. See, generally, Scire Facias.

Form and requisites of scire facias see Smith *v.* Smith, 8 Blackf. (Ind.) 59.

52. Jones *v.* Raiguel, 97 Pa. St. 437.

53. See *supra*, VIII, A, 6, b, (III).

54. Doe *v.* Allen, 2 Ind. 166; McCoy *v.* Elder, 2 Blackf. (Ind.) 183.

In Iowa it was held that execution properly issued against the principal and stayer in the bond, although the clerk had never had a judgment against the stayer, and there was never any journal entry of judgment other than the one originally entered against the principal in the stay bond. Cavender *v.* Smith, 5 Iowa 157.

In Nebraska Code Civ. Proc. § 477, requires that "at the expiration of the stay bond the clerk shall issue a joint execution against all the joint debtors and sureties, describing them as debtors or sureties therein."

an execution may issue against the stayer alone on a suggestion made of the principal's death.[55]

d. Remedies of Stayer — (I) *Requiring Judgment Debtor to Be First Proceeded Against.* In some jurisdictions the security cannot be held liable until after the judgment debtor has been proceeded against.[56] In some jurisdictions the stayer is entitled to have a judgment defendant who was only surety on the cause of action proceeded against before he himself is held for his liability of stayer if the stay has not violated the contract of suretyship.[57] Where a release of a levy upon the original surety's property was effected by the stay the surety is liable before the stayer.[58] In other jurisdictions plaintiff may proceed against either principal or stayer or both at his option.[59]

(II) *Exoneration.* If the stayer is obliged to discharge the judgment, he is entitled to be subrogated to the rights of the creditor against the judgment debtor.[60]

See State *v.* Fleming, 21 Nebr. 321, 32 N. W. 73.

55. Stevenson *v.* McKissick, 12 Ark. 394; Hill *v.* Staples, 3 Lea (Tenn.) 271; Cabiness *v.* Garrett, 1 Yerg. (Tenn.) 491.

In Indiana it is proper for the execution to be issued nominally against the principal and stayer for the sake of conforming to the judgment, although the principal is dead, but it can be enforced against only the surviving stayer. Carnahan *v.* Brown, 6 Blackf. 93.

56. Burr *v.* Moody, Wright (Ohio) 449, where issuance against the principal first was specially required by statute. See Ensley *v.* McCorkle, 74 Ind. 240, where this requirement is made by statute. And *compare* Atkinson *v.* Rhea, 7 Humphr. (Tenn.) 59, where such a statutory requirement was held to be merely directory to the officer.

If the property of the principal is not immediately subject to process, as where by the death of the principal it cannot be reached without revivor (Cheatham *v.* Brien, 3 Head (Tenn.) 552), or where his property is encumbered and an attempt to sell it would result only in costs (Folger *v.* Palmer, 35 La. Ann. 814), the creditor is not bound to seize the principal's property, but it is the officer's duty to proceed against the stayer at once.

Mere delay in not going against principal does not discharge the surety, especially where the surety fails to use the remedy given him in such a case by statute. Anderson *v.* Lithgo, 5 Baxt. (Tenn.) 603.

Return of the execution unsatisfied at the expiration of the stay has been held sufficient to satisfy the requirement. Gockel *v.* Averment, 7 Ohio Dec. (Reprint) 554, 3 Cinc. L. Bul. 894.

Where a principal still has an equity of redemption, although the land has been duly and legally sold by the sheriff for much less than its value under a prior judgment in favor of another plaintiff against the same defendant who has no other property subject to execution, the execution plaintiff is not required to proceed first against such property, although he had the right to redeem it from the sale. Edwards *v.* Haverstick, 53 Ind. 348. *Contra*, see Barns *v.* Cavanagh, 53 Iowa 27, 3 N. W. 801.

Investigation of allegations.— The allegations of the surety's petition on the ground that the principal has sufficient property should be investigated; it is error without inquiring into the facts or answer to the petition to dismiss the same, for if the allegations are true the surety is entitled to the relief asked. Moss *v.* Agricultural Bank, 4 Sm. & M. (Miss.) 726.

57. Stinnett *v.* Crookshank, 1 Heisk. (Tenn.) 496; Stephens *v.* Taylor, (Tenn. Ch. App. 1897) 45 S. W. 228.

If the stay has been granted without the consent of the original security, the stayer cannot have him proceed against either at common law or under the statute. See Higgs *v.* Landrum, 1 Coldw. (Tenn.) 81; Chaffin *v.* Campbell, 4 Sneed (Tenn.) 184.

Under the Indiana statute of 1839, which forbids an execution to be stayed if the surety on the cause of action objects, or unless he is protected, the judgment and execution must show that he was a surety. State *v.* Williams, 2 Ind. 175.

Judgment against cosureties stayed.—Sharp *v.* Embry, 1 Swan (Tenn.) 254.

58. Chase *v.* Welty, 57 Iowa 230, 10 N. W. 648, where the original surety made no objection to the stay and it was presumably for his benefit.

Release of levy on original surety's property.— Where a judgment was rendered against one person as principal and another as surety, and stayed by a third, it was held that a release by the owner of the judgment of a levy of the execution upon the personal property of the security discharged the stayer. Woodward *v.* Walton, 7 Heisk. (Tenn.) 50.

59. Stevenson *v.* McKissick, 12 Ark. 394; Waynick *v.* Connelly, 8 Blackf. (Ind.) 75; Sweeney *v.* Lustfield, 116 Mich. 696, 75 N. W. 136; Patterson *v.* Swan, 9 Serg. & R. (Pa.) 16.

Where the bond has the force and effect of a judgment confessed plaintiff may issue execution against the principal and stayer jointly. See *supra*, VIII, A, 6, b, (III).

That the clerk failed to enter judgment against the surety does not prevent his being liable on the bond. Both principal and surety are liable. See Cavender *v.* Smith, 5 Iowa 157.

60. Barger *v.* Buckland, 28 Gratt. (Va.) 850.

B. Quashing Execution[61]— **1. Definition.** The term "quash" as applied to writs is predicated of some defect in the writ itself, or in the form of the writ, which defect does not reach to the merits of the case.[62]

2. Grounds[63] — **a. In General.** If the court has improperly made an order directing execution to issue, it will on motion recall the execution, although the order is appealable.[64] Where an appeal from the judgment has been taken and an undertaking given for a stay of proceedings, an execution issued upon the judgment may be set aside on motion.[65] If plaintiff and sheriff have been enjoined from executing the original fieri facias, an alias issued after the injunction will be quashed.[66] An agreement not to issue execution will be enforced, but where after reasonable time the agreement has not been carried out on the part of defendant, a rule to set aside will be discharged.[67] But that there are other lands in the hands of purchasers from defendant after the judgment and liable to contribute to the payment of the debt is not a ground for a motion to quash,[68] nor is the fact that a defendant corporation is in process of voluntary dissolution, no permanent receiver having been appointed,[69] for the creditor is entitled to any benefits derived from an execution up to the time of the appointment of a permanent receiver.[70]

b. Defective Judgment — (I) *Judgment of Court of Record.* Irregularities and errors in the rendition of a judgment or in the proceedings leading thereto, unless such errors are jurisdictional[71] or unless the judgment is utterly void,[72]

In Tennessee, under Code, §§ 3063–3067, the stayer of a judgment may pay it off and have his motion against the principal debtor, or he may, on his affidavit that if execution is stayed longer he fears he may be obliged to pay the debt, have execution issued at any time; but he has no authority to control the judgment, or direct the issuance of execution thereon, without the assent of plaintiff, except in the mode prescribed by statute, and where he does so plaintiff may direct its return, after it has been issued, without affecting the liability of such stayer. Chaffin *v.* Rose, 5 Baxt. 696.

Right of exoneration exists against only defendants in judgment, although there may be other persons who were liable on the cause of action but not joined in the judgment, as he had not contracted to pay any money for them, and the fact that he had created no contract. Reeves *v.* Isenhour, 59 Ind. 478.

Right of exoneration exists against all co-defendants in the judgment, although he stayed it at the request of one alone and although some of the co-defendants were sureties. Reissner *v.* Dessar, 80 Ind. 307.

Jurisdiction of stayer's action against debtor. — The court of common pleas has jurisdiction of an action by the obligor of a bond given to stay an execution on a judgment of the superior court to recover the amount thereof from the judgment debtor, after having paid it to the judgment creditor, where the bond misdescribed the execution, so that an action thereon could not lie in the superior court, as such action did not seek to interfere with the judgment, but only sought relief on the ground of the mistake in the bond. Chapman *v.* Allen, Kirby (Conn.) 399, 1 Am. Dec. 24.

61. Quashal of execution against the person see *infra,* XIV.

Quashal of execution for costs see Costs.

Quashal of garnishment see Garnishment.

Quashal of levy see *supra,* VII, B, 10.

Quashal of sale see *infra,* X, B.

Quashal of writ of possession see Ejectment, 15 Cyc. 189.

62. Bosley *v.* Bruner, 24 Miss. 457, 462 [*citing* Tidd Pr. 161, 1163].

"**To set aside**" **and** "**to recall**" are used in this connection as synonyms of "to quash." See *infra,* VIII, *passim.*

63. Grounds for quashing levy see *supra,* VII, B, 10, a, (II).

64. Buell *v.* Buell, 92 Cal. 393, 28 Pac. 443; Dorland *v.* Hanson, 81 Cal. 202, 22 Pac. 552, 15 Am. St. Rep. 44.

If a bond is improperly returned forfeited and a summary execution is thereupon issued against the obligors, the execution will be quashed. Rhodes *v.* Smith, 66 Ala. 174.

65. Bentley *v.* Jones, 8 Oreg. 47. But where an appellee on appeal from a justice moves to dismiss and the motion has been sustained but thereafter a judgment of affirmance is entered, it has been held that this is no ground for quashing an execution issued. Hathaway *v.* St. Louis, etc., R. Co., 94 Mo. App. 343, 68 S. W. 109.

66. Byrne *v.* Mithoff, 24 La. Ann. 297.

67. Carrick *v.* Dougherty, 1 Phila. (Pa.) 399.

68. "At this rate, a plaintiff may be kept for many years, in pursuit of his rights; by new parties being suggested, as subject to contribution." Wilson *v.* Hurset, 30 Fed. Cas. No. 17,808, Pet. C. C. 140, 141.

69. Fox *v.* Union Turnpike Co., 37 Misc. (N. Y.) 308, 75 N. Y. Suppl. 464.

70. Fox *v.* Union Turnpike Co., 37 Misc. (N. Y.) 308, 75 N. Y. Suppl. 464.

71. Ewing *v.* Donnelly, 20 Mo. App. 6.

72. Shultze *v.* State, 43 Md. 295; U. S. Bank *v.* Patton, 5 How. (Miss.) 200, 35 Am. Dec. 428.

cannot be made grounds for a motion to quash an execution upon the judgment.[73] Such a motion cannot be made to perform the office of a writ of error.[74] A rendition of a judgment for a greater amount than that to which plaintiff was entitled would not be a ground for quashing the execution.[75] An objection that the complaint[76] or the petition[77] did not state a cause of action or an objection that there has been a mistake as to the parties,[78] or that the judgment was not authorized by the verdict because the verdict was irresponsive to the issue,[79] cannot be made upon a motion to quash. But an execution issued on a void judgment may be quashed.[80]

(II) *JUDGMENT TRANSCRIBED FROM JUSTICE OF THE PEACE.* Likewise errors and irregularities in a justice's court which are not jurisdictional in their nature cannot be made a ground for a motion to quash an execution issued upon the transcript of a judgment out of the court of record where the transcript was filed.[81] But that the proceeding before the justice was a nullity on account of lack of jurisdiction[82] or that a condition precedent to the filing of the transcript

The rule is the same as to a scire facias judgment; that is, judgment granting execution upon a writ of scire facias to revive the original judgment. The remedies for any errors supposed to exist are the same as in the case of the original judgment. The objections to these judgments made by the appellant cannot be heard and decided on the motion to quash the fieri facias. Jones *v.* George, 80 Md. 294, 297, 30 Atl. 635 [*citing* Campbell *v.* Booth, 8 Md. 107]. The objection by devisees of land subject to execution that the heirs were not also made parties to the scire facias cannot be by motion to set the writ aside, but must be raised by plea in abatement. Cumming *v.* Eden, 1 Cow. (N. Y.) 70 [*citing* Whitney *v.* Camp, 3 Johns. (N. Y.) 86].

73. *Alabama.*— Shorter *v.* Mims, 18 Ala. 655.

California.— Hayward *v.* Pimental, 107 Cal. 386, 40 Pac. 545.

Georgia.— Steers *v.* Morgan, 66 Ga. 552.

Maryland.— Jones *v.* George, 80 Md. 294, 30 Atl. 635; Hall *v.* Clagett, 63 Md. 57.

Mississippi.— U. S. Bank *v.* Patton, 5 How. 200, 35 Am. Dec. 428.

Missouri.— Brackett *v.* Brackett, 53 Mo. 265; Johnson *v.* Greve, 60 Mo. App. 170; Adams *v.* Tracy, 13 Mo. App. 579. See also Gregory *v.* Gregory, 10 Mo. App. 589.

Virginia.— May *v.* North Carolina State Bank, 2 Rob. 56, 40 Am. Dec. 726.

West Virginia.— See Blair *v.* Henderson, 49 W. Va. 282, 38 S. E. 552.

See 21 Cent. Dig. tit. "Execution," § 467 *et seq.*

When the copy of the docket entries, sent with a writ of execution to another county, does not contain all the entries which ought to appear of record, it is no reason for quashing the execution, provided the copy shows that there was a valid subsisting judgment, and upon it the execution properly issued. Mitchell *v.* Chestnut, 31 Md. 521.

74. Horstmeyer *v.* Connors, 51 Mo. App. 394; Merrick *v.* Merrick, 5 Mo. App. 123.

75. Horstmeyer *v.* Connors, 51 Mo. App. 394. See also Dorman *v.* Benham Furniture Co., 102 Tenn. 303, 52 S. W. 38.

76. Hayward *v.* Pimental, 107 Cal. 386, 4 Pac. 545; Edwards *v.* Hellings, 103 Cal. 204, 37 Pac. 218, holding that remedy was by appeal.

77. Horstmeyer *v.* Connors, 51 Mo. App. 394.

78. Shorter *v.* Mims, 18 Ala. 655; Jones *v.* George, 80 Md. 294, 30 Atl. 635. See also Henry *v.* Gibson, 55 Mo. 570.

79. Hodgson *v.* Banking-House, 9 Mo. App. 573.

80. *Alabama.*— Martin *v.* Atkinson, 108 Ala. 314, 8 So. 888.

California.— Kreiss *v.* Hotaling, 96 Cal. 617, 31 Pac. 740.

Kentucky.— Amyx *v.* Smith, 1 Metc. 529; Ballard *v.* Davis, 1 J. J. Marsh. 376.

Missouri.— Holzhour *v.* Meer, 59 Mo. 434; *Ex p.* James, 59 Mo. 280.

New York.— Campbell *v.* Bristol, 19 Wend. 101.

Tennessee.— Mabry *v.* State, 9 Yerg. 207.

See 21 Cent. Dig. tit. "Execution," § 468.

Judgment against a person subsequently found insane.— A judicial finding upon an inquest *de lunatico inquirendo*, which was pending at the same time as the proceedings which led to the execution judgment, that defendant was *non compos mentis* is a sufficient ground for quashing the execution; for by the finding defendant at the time he was made a party to the proceedings upon which judgment was rendered was incapable of being a party in the eye of the law. Ash *v.* Conyers, 2 Miles (Pa.) 94.

81. Grissom *v.* Allen, 10 Mo. 303; Bauer *v.* Miller, 16 Mo. App. 252. See also Sappington *v.* Lenz, 53 Mo. App. 44; Seaman *v.* Paddock, 51 Mo. App. 465; Klein *v.* Wielandy, 15 Mo. App. 581; McCunn *v.* Barnett, 2 E. D. Smith (N. Y.) 521.

82. Holzhour *v.* Meer, 59 Mo. 434; Rowe *v.* Peckham, 30 N. Y. App. Div. 173, 51 N. Y. Suppl. 889. See *infra*, VIII, B, 3, a. See also Bauer *v.* Bauer, 40 Mo. 61.

In Pennsylvania it has been said: "The proceedings (of the justice's court) are not in such case properly before the court at all, and the transcript is to be treated as if it contained only a record of the judgment, upon which we cannot restrain execution, even if the judgment is in fact void, because

in the court of record had not been fulfilled[83] is ground for quashing an execution issued on the transcript.

c. Matters of Defense to Action. An execution will not be vacated on account of any defense which could have been made at the time of the trial.[84]

d. Matters Arising After Judgment and Before Issuance. Where the matter of discharge of a judgment debtor is subsequent to the judgment, motion to quash is the proper remedy[85] — a remedy which very early in this country was substituted for the audita querela.[86]

e. Errors and Informalities in the Execution and Its Issuance — (i) *Errors in the Writ Itself.* An execution issued on a judgment which does not authorize it may be quashed on motion[87] and the money made thereon ordered to be refunded.[88] But by the general rule where there is only a clerical mistake, the execution will not be quashed, but amended so as to conform to the judgment[89] unless the variance is so great that the execution cannot be identified with the judgment, in which case it must be quashed.[90] Where an execution does not conform to the judgment in that it is issued for a greater amount than that for which the judgment was rendered, the very general rule is that when this variance is

there is nothing to show us that the judgment has no foundation." The applicant, a married woman, not having asserted her rights with due regard for the rules of procedure, was not allowed to do so on a motion to quash, although the objections which she alleged might have been fatal upon certiorari. She was therefore left to defend an action of ejectment or bring trespass for levying upon her land. Brandes *v.* Struphauer, 2 Chest. Co. Rep. 319.

83. Thus where the condition precedent is the issue upon the justice's judgment and return *nulla bona* defendant may show upon a motion to quash the execution issued upon the transcript any defect or irregularity in the justice's process or constable's return. Ruby *v.* Hannibal, etc., R. Co., 39 Mo. 480. But an execution issued by the circuit court upon a justice's judgment will not be quashed because the justice's transcript does not show the manner of service upon defendant where he appeared in defendant's action. Bauer *v.* Miller, 16 Mo. App. 252.

Evidence that the execution issued by the justice was returned *nulla bona* before its return-day is admissible. The certificate of the justice that there had been a *nulla bona* return was only *prima facie* evidence of that fact. Johnson *v.* Latta, 84 Mo. 139 [*citing* Ruby *v.* Hannibal, etc., R. Co., 39 Mo. 480].

84. Kennett Square Nat. Bank *v.* Pierson, 2 Chest. Co. Rep. (Pa.) 320. See also Clancy *v.* Cox, 1 Ill. 235.

Bankruptcy or insolvency.—The rule stated in the text would seem to be applicable to a certificate in bankruptcy — if the bankrupt can plead his certificate at the time of the trial he should do so. Ewing *v.* Peck, 17 Ala. 339; Paschall *v.* Bullock, 80 N. C. 329. So too under the insolvent laws as a general rule the defendant is bound to plead his discharge if obtained in season. Linn *v.* Hamilton, 34 N. J. L. 305 [*citing* Lloyd *v.* Ford, 12 N. J. L. 151]. But if the discharge in bankruptcy or in insolvency is not obtained until subsequent to the entry of judgment on which the execution issued a motion to quash is proper. Ewing *v.* Peck, *supra*; Linn *v.* Hamilton, *supra*; Palmer *v.* Hutchins, 1 Cow. (N. Y.) 42. See Baker *v.* Taylor, 1 Cow. (N. Y.) 165; Dawson *v.* Hartsfield, 79 N. C. 334. *Compare* Hiatt *v.* Waggoner, 82 N. C. 173. See also Davis *v.* Shapley, 1 B. & Ad. 54, 20 E. C. L. 394; Humphreys *v.* Knight, 6 Bing. 569, 572, 19 E. C. L. 258, 259. The court, however, will give plaintiff an opportunity to show that the discharge was inoperative as against his debt. Mabry *v.* Herndon, 8 Ala. 848, 849; Linn *v.* Hamilton, *supra* [*citing* Lister *v.* Mundell, 1 B. & P. 427; Yeo *v.* Allen, 3 Dougl. 214, 26 E. C. L. 147; Bamfield *v.* Anderson, 5 Moore C. P. 531, 16 E. C. L. 403]. In New York it has been held that an objection to the validity of a discharge in insolvency, whether on the ground of jurisdiction or otherwise, cannot be raised on a motion to set aside an execution because of such discharge. Stuart *v.* Salhinger, 14 Abb. Pr. 291; Manhattan Oil Co. *v.* Thorn, 14 Abb. Pr. 291 note; Rich *v.* Salinger, 11 Abb. Pr. 344.

85. Barnes *v.* Robinson, 4 Yerg. (Tenn.) 153.

86. Smock *v.* Dade, 5 Rand. (Va.) 639, 16 Am. Dec. 780; Linn *v.* Hamilton, 34 N. J. L. 305.

Relief by audita querela generally see Audita Querela.

87. Crenshaw *v.* Hardy, 3 Ala. 653; Murphy *v.* Lewis, 17 Fed. Cas. No. 9,950*a*, Hempst. 17. See Flint *v.* Phipps, 20 Oreg. 340, 25 Pac. 725, 23 Am. St. Rep. 124, where the execution was radically defective in not conforming to the judgment.

88. Murphy *v.* Lewis, 17 Fed. Cas. No. 9,950*a*, Hempst. 17.

89. Murphy *v.* Lewis, 17 Fed. Cas. No. 9,950*a*, Hempst. 17.

90. See Dawes *v.* Dawes, (N. J. Sup. 1899) 43 Atl. 984. See also Bogle *v.* Blum, 36 Kan. 512, 13 Pac. 793 (an execution issued upon a judgment in replevin); Boyd *v.* Williams, 5 J. J. Marsh. (Ky.) 56 (an execution issued upon a judgment in detinue); Dorman *v.* Benham Furniture Co., 102 Tenn. 303, 52 S. W. 38 (an execution issued upon an alternative judgment in replevin).

due to a clerical mistake and there is no question of fraud the execution will not be quashed.[91] Writs of execution may be set aside when they have been issued for an amount less than the amount of the judgment,[92] unless the reason for the variance should appear on the face of the writ.[93] The writ may be quashed, however, for irregularities in the direction for its return.[94] A misrecital of parties in the writ should not be a ground for quashing thereof so long as the writ can be identified with the judgment.[95] A variance between a judgment and the recital of it in the execution, which variance is immaterial and does not work any preju-

91. Sanders *v.* Kentucky Ins. Co., 4 Bibb (Ky.) 471 (where the variance was one cent); Murphy *v.* Lewis, 17 Fed. Cas. No. 9,950*a*, Hempst. 17.

The proper practice where an execution issues for too large an amount is to apply to the court to set aside as to the excess, and not for a vacation of the writ.

Kansas.— St. Louis, etc., R. Co. *v.* Rierson, 38 Kan. 359, 16 Pac. 443; Bogle *v.* Bloom, 36 Kan. 512, 13 Pac. 793.

New Jersey.— Griffith *v.* Jones, 3 N. J. L. 932.

New York.— Jaffray *v.* Saussmann, 52 Hun 561, 5 N. Y. Suppl. 629.

Tennessee.— Barnes *v.* Robinson, 4 Yerg. (Tenn.) 186.

Texas.—Jackson *v.* Finley, (Civ. App. 1897) 40 S. W. 427, 1032.

England.— King *v.* Harrison, 15 East 612. A writ of execution taken out for too large a sum can in general be quashed only for excess; but where a capias ad satisfaciendum was indorsed to levy the penalty of a warrant of attorney where the defeasance authorized execution only for the arrears, the rule was made absolute for setting aside the execution *in toto*. Tilby *v.* Best, 16 East 163. See Webber *v.* Hutchins, 1 Dowl. P. C. N. S. 95, 10 L. J. Exch. 354, 8 M. & W. 319.

See 21 Cent. Dig. tit. "Execution," § 469.

The fact that more costs are taxed against a party against whom an execution is issued than are properly due is not a ground for quashing the execution; the proper remedy is to have the costs retaxed on motion. Anonymous, 2 Stew. (Ala.) 228; Meeker *v.* Harris, 23 Cal. 285; Adriance *v.* Heiskell, 8 App. Cas. (D. C.) 240; Walton *v.* Brashears, 4 Bibb (Ky.) 18; Warrensburg *v.* Simpson, 22 Mo. App. 695; Field *v.* Partridge, 7 Exch. 689, 16 Jur. 413, 21 L. J. Exch. 269.

When the execution issues for a whole amount without any allowance of a credit which was due, the execution will not be quashed. St. Louis, etc., R. Co. *v.* Rierson, 38 Kan. 359, 16 Pac. 443; Bogle *v.* Bloom, 36 Kan. 512, 13 Pac. 793; Knight *v.* Applegate, 3 T. B. Mon. (Ky.) 335; Jackson *v.* Finlay, (Tex. Civ. App. 1897) 40 S. W. 427, 1032. *Contra*, Davie *v.* Long, 4 Bush (Ky.) 574 (where the judgment applied a credit to the extinguishment *pro tanto* of a note and execution issued for the full amount of the note and costs); Craig *v.* Reardon, Ky. Dec. 328.

Wrong amount of interest.— Variance between execution and judgment as to the time from which interest is to be calculated has been held a good cause for quashing the writ. Noe *v.* Conyers, 6 J. J. Marsh. (Ky.) 514. See also Mason *v.* Eakle, 1 Ill. 83; Gano *v.* Davis, Ky. Dec. 207.

92. See Browns *v.* Julian, 5 J. J. Marsh. (Ky.) 312; Cobbold *v.* Chilver, 1 Dowl. P. C. N. S. 726, 6 Jur. 346, 11 L. J. C. P. 173, 4 M. & G. 62, 4 Scott N. R. 678, 43 E. C. L. 41.

93. Webber *v.* Hutchins, 1 Dowl. P. C. N. S. 95, 10 L. J. Exch. 354, 8 M. & W. 319.

94. Harrell *v.* Martin, 4 Ala. 650; Stretter *v.* Fisher, 3 How. Pr. (N. Y.) 67. See Cramer *v.* Van Alstyne, 9 Johns. (N. Y.) 386.

N. Y. Code Proc. § 289, presenting the requisites of an execution, does not require a direction to return; any error therein is immaterial. Carpenter *v.* Simmons, 1 Rob. (N. Y.) 360, 28 How. Pr. (N. Y.) 12. See N. Y. Code Civ. Proc. § 1366.

An execution issuing from the orphans' court for the collection of money which is not made returnable to the regular semi-annual return of the county court proper, if there are fifteen days between the beginning of a term and the teste of the writ, or, if there are not fifteen days, then to the next succeeding term of the county court, should be quashed on motion. Powell *v.* Summers, 17 Ala. 647 [*following* Little *v.* Heard, 16 Ala. 358; Westmoreland *v.* Hall, 11 Ala. 122].

Where by stipulation the writ is made returnable in less time than that given by statute, the execution will not be vacated. Jordan *v.* Posey, 1 How. Pr. (N. Y.) 123.

95. Thus the name of a defendant improperly joined was stricken out by the order of the court upon a motion to quash the execution. Goodman *v.* Walker, 38 Ala. 142; Thompson *v.* Bondurant, 15 Ala. 346, 50 Am. Dec. 136; Waysman *v.* Updegraff, McCahon (Kan.) 88.

An execution issuing against a person who is not a party to the judgment on which it is issued is fatally defective and must be quashed. Bridges *v.* Caldwell, 2 A. K. Marsh. (Ky.) 195.

If the judgment is against one and the execution on it and replevy bond against two, both ought to be quashed. Morrel *v.* Barner, 4 Litt. (Ky.) 10.

If the variance is so great as to preclude identification, it is necessary to quash the writ. Smith *v.* Knight, 11 Ala. 618. And so where a judgment is in the name of one for the use of two others and the execution issue in the name of the latter alone, it has no connection with the judgment and should be quashed. Jennings *v.* Pray, 8 Yerg. (Tenn.) 85.

dice to the debtor,[96] or an unauthorized indorsement upon an execution,[97] or the fact that it lacks a seal,[98] is not a ground for a motion to quash.

(II) *Errors in the Issuance of the Writ.* An execution issued by a person without authority to issue will be quashed.[99] An execution bearing teste after the death of defendant,[1] or an execution which issued a year and a day after the rendition of the judgment and without a revivor,[2] or an execution prematurely issued,[3] or one which was not subscribed by the party issuing it or by his attorney, as the statute required,[4] should be quashed.

f. Matters Arising After Issuance. The quashal of a writ of execution is often based upon matters arising after its issuance,[5] such as the payment or satisfaction of the judgment,[6] or the garnishment of the execution defendant for the judgment debt.[7] A mere tender of payment, however, will not authorize the

96. Graham *v.* Price, 3 A. K. Marsh. (Ky.) 522, 13 Am. Dec. 199.

97. The indorsement should be quashed or annulled. McGowan *v.* Hoy, 2 Dana (Ky.) 347, where there was an indorsement that the execution was for the benefit of a third party and the motion to quash was made after the execution had been collected. See McDaniel *v.* Johnston, 110 Ala. 526, 19 So. 35, where an indorsement was made by the clerk that "there shall be no exemption of personal property against this execution."

98. Hall *v.* Lackmond, 50 Ark. 113, 6 S. W. 510, 7 Am. St. Rep. 84, for the execution may be amended by affixing the seal during the motion to quash.

99. Taney *v.* Woodmansee, 23 W. Va. 709.

1. Harrington *v.* O'Reilly, 9 Sm. & M. (Miss.) 216, 48 Am. Dec. 704 (unless a sale has taken place thereunder to a *bona fide* purchaser); Newnham *v.* Law, 5 T. R. 577. See also Wilson *v.* Hurst, 30 Fed. Cas. No. 17,808, Pet. C. C. 140.

The fact that one of the defendants died is not sufficient ground to set aside the execution at the instance of defendant. Lucas *v.* Johnson, 6 How. Pr. (N. Y.) 121.

2. Noe *v.* Conyers, 6 J. J. Marsh. (Ky.) 514.

3. Brown *v.* Evans, 18 Fed. 56, 8 Sawy. 502.

A mere oral announcement of a decision by judges sitting in the general term and the entry of the decision in the minutes of the clerk is not such a judgment of the general term as will authorize action under it. An execution therefore issued by plaintiff upon an original judgment at special term in his favor after an oral announcement by the judges at general term of an affirmance of the judge without the necessary formalities as stated above is an irregularity to be taken advantage of on motion. See Bowman *v.* Tallman, 2 Rob. (N. Y.) 632.

Motion must be made in season, for "ordinarily courts of law refuse to set aside executions, when that, and that only, has been done, which is required to be done now, although done prematurely." Hapgood *v.* Goddard, 26 Vt. 401, 405.

Waiver of irregularity.— On a note payable "one day after date," judgment was entered the day when the judgment was due, the next day, under power of attorney, and execution issued. Afterward defendant in writing admitted that the execution was issued with his full consent, and that it was the understanding that there was to be no stay of execution. The court refused to set the execution aside. Roemer *v.* Denig, 18 Pa. St. 482.

4. Bonesteel *v.* Orvis, 23 Wis. 506, 99 Am. Dec. 201.

5. See cases cited *infra*, note 6 *et seq.*

6. That satisfaction of the judgment, whether before (Wyatt *v.* Fromme, 70 Mo. App. 613) or after (Sinclair *v.* Missouri, etc., R. Co., 74 Mo. App. 500. See Porter *v.* Smythe, 21 Wkly. Notes Cas. (Pa.) 379) issuance, is a ground for quashing an execution seems unnecessary to state; but where an officer, without authority of plaintiff, receives bank-notes in payment of the execution, the court will refuse to quash a second writ (Griffin *v.* Thompson, 2 How. (U. S.) 244, 11 L. ed. 253).

If plaintiff consent, after issuance of the execution, to a reduction in the amount recovered, the writ should not be quashed, but reduced *pro tanto*. Homans *v.* Tyng, 56 N. Y. App. Div. 383, 67 N. Y. Suppl. 792.

The fact that the clerk indorsed a credit after issuance, which credit should have been indorsed to conform to a judgment by confession, is not a ground for quashing the execution. Williamson *v.* Ong, 1 W. Va. 84.

The fact that plaintiff attached money of defendant in the hands of a third person furnishes no ground to set aside the execution if no money was realized on the attachment. Grove *v.* Nes, 11 York Leg. Rec. (Pa.) 9.

Replevin bond satisfaction while in force. — An execution being levied upon the property of one defendant and a replevin bond taken, the second execution against the other defendant cannot issue so long as the replevin bond is in force, it being a satisfaction of the original judgment; if the execution issue, it will be quashed. Taylor *v.* Dundass, 1 Wash. (Va.) 92.

7. Garnishment of defendant for the judgment debt has been held ground for quashing an execution levied by plaintiff with knowledge of the garnishment. Ulrich *v.* Hower, 156 Pa. St. 414, 27 Atl. 243.

Garnishment as ground for injunction see *infra*, VIII, D, 2, g.

Garnishment as ground for stay see *supra*, VIII, A, 2, c, (III), (C).

court to quash the execution, unless the money is paid into court.[8] Nor will an order of execution be vacated because subsequently defendant filed an appeal-bond which was approved.[9] The court has no power to set aside or to vacate an execution for acts of omission and commission on the part of the sheriff after the writ had duly come to his hands;[10] hence a levy upon property not subject to execution is not ground for quashing the writ.[11]

3. Proceedings to Quash[12] — a. Jurisdiction. The court having cognizance of the judgment is the proper tribunal to enforce it by execution[13] and to set aside executions issued without authority.[14] It is not necessary or proper to go into equity if the vacation of an execution is all the relief asked.[15] As a general rule courts have the power to quash an execution at any time, but they may refuse to exercise the power when it would be unjust to do so, as for instance in the case of laches.[16] Application to quash may be made to a judge in vacation under the practice in some jurisdictions.[17] Although it is usual that a judgment

8. Shumaker *v.* Nichols, 6 Gratt. (Va.) 592.

By depositing the money conditionally with the sheriff to abide the former's attachment of the judgment the debtor can have the execution quashed. Richardson *v.* Gurney, 8 La. 255.

9. Unless of course the order was erroneous when made. Castor *v.* Allegan Cir. Judge, 54 Mich. 318, 20 N. W. 60.

10. Nixon *v.* Harrell, 50 N. C. 76.

That the sheriff retained too large a sum for his fees and expenses for levy and sale is not a ground for a motion by defendant to set aside an alias execution. Sheboygan Bank *v.* Trilling, 75 Wis. 163, 43 N. W. 830.

11. Tradesmen's Bldg., etc., Assoc. *v.* Maher, 9 Pa. Super. Ct. 340, 43 Wkly. Notes Cas. (Pa.) 422.

The mere allegation that exempted land has been levied on and sold is not a ground for quashing the execution. Hasty *v.* Simpson, 84 N. C. 590. In Roth *v.* Insley, 86 Cal. 134, 24 Pac. 853, it was contended that, when execution was levied on exempt property, the proper remedy was to apply for the recall of the execution and that an injunction was not necessary on account of the aforesaid remedy at law. But the court decided that inasmuch as a sale of the homestead property constituted a cloud upon the title, the proper remedy was injunction and that the justice who issued the execution could not have been authorized to recall it. See *infra*, VIII, D, 3, a. In Straat *v.* Rinkle, 16 Mo. App. 115, it was held that a motion to quash an execution levied on homestead property was properly overruled when the ground was that the appraisement of the property was erroneous.

Effect of death of execution plaintiff after levy see *supra*, VI, C. In Kennedy *v.* Holloway, 6 J. J. Marsh. (Ky.) 321, it was held that a stranger to the execution could not insist on quashing the execution or levy on this ground.

12. **Jurisdiction of one court to quash execution of another court** see Courts, 11 Cyc. 683.

13. See *supra*, VI, A, 1. See also Dorland *v.* Hanson, 81 Cal. 202, 22 Pac. 552, 15 Am. St. Rep. 44 (where the order for issue was made by one department of the superior court and the order vacating the same by another department of the same court); Gorman *v.* Glenn, 78 S. W. 873, 25 Ky. L. Rep. 1755 (where the execution was issued to a county other than that in which the judgment was rendered or in which defendant resided).

It being the uniform practice in the court of appeals to take cognizance of all errors assigned which appear on the face of the proceedings it will continue to do so until the practice shall be changed by law. Hence if an indorsement of a credit is made upon an alias execution without fixing the time at which the amount so credited should be applied to the credit of judgment for a debt which bears interest until paid, the injustice can be arrested by the court of appeals. Gano *v.* Davis, Ky. Dec. 207.

14. Ismond *v.* Scougale, 119 Mich. 541, 78 N. W. 546. See also Dorland *v.* Hanson, 81 Cal. 202, 22 Pac. 552, 15 Am. St. Rep. 44; Loomis *v.* Lane, 29 Pa. St. 242, 72 Am. Dec. 625; Mattocks *v.* Judson, 9 Vt. 343; Hendricks *v.* Dundass, 2 Wash. (Va.) 50.

"It is a power inherent in all courts, exercised for the advancement of justice, to correct the errors of ministerial officers, and to control their own process, preventing its irregular and unjust use." Rhodes *v.* Smith, 66 Ala. 174, 179 [*citing* Mobile Cotton Press, etc., Co. *v.* Moore, 9 Port. (Ala.) 679]. See also Harrison *v.* Hamner, 99 Ala. 603, 12 So. 917.

Intervention of a jury is unnecessary. The court may exercise this control over its process in a summary way. Loomis *v.* Lane, 29 Pa. St. 242, 72 Am. Dec. 625.

15. See Murphy *v.* Blair, 12 Ind. 184; Shedd *v.* Brattleboro Bank, 32 Vt. 709. See *infra*, VIII, D.

But a court of equity authorized to issue execution on its decrees has the same jurisdiction over the process as a court of law. Windrum *v.* Parker, 2 Leigh (Va.) 361.

16. See Henderson *v.* Henderson, 66 Ala. 556. See *infra*, VIII, B, 3, c.

17. *Ex p.* James, 59 Mo. 280. But see Heuring *v.* Williams, 65 Mo. 446; Parker *v.* Hannibal, etc., R. Co., 44 Mo. 415. But *compare* Folger *v.* Roos, 40 La. Ann. 602, 4 So. 457, holding that the statute authorizing the courts of New Orleans to hear in vacation

of a justice of the peace transcribed to a court of record is deemed a judgment of the court where the transcript is filed to be enforced[18] and that the court of record will quash executions issued after it acquires jurisdiction in cases where it it is just and proper to do so,[19] the court of record is not absolutely bound by the transcript, but has the right to examine the proceedings to see whether the justice acted within his jurisdiction.[20]

b. Parties.[21] A motion to quash a writ should generally be in the name of the parties of record.[22] But a person whose property is affected by a fieri facias may move the court to set it aside, although he is not a party to the suit.[23] An execution prematurely issued will not necessarily be set aside at the instance of creditors.[24] A judgment debtor who is entitled to have an execution quashed because the judgment has been satisfied by a co-debtor, although he has neglected to quash, may nevertheless on the same ground supersede and quash an execution issued on a judgment against a garnishee under that execution.[25]

c. The Motion or Application — (I) *Whether Proper Proceeding.* The proper proceeding to quash an execution is by motion; but a motion would be unnecessary after notice that execution has been withdrawn,[26] or after it has been returned.[27]

motions to quash certain writs, etc., had no reference to orders of seizure and sale which were otherwise regulated by statute.

18. See *supra*, VI, D, 1, a, (v).

19. Gobbi *v.* Refrano, 33 Oreg. 26, 52 Pac. 761.

20. Rowe *v.* Peckham, 30 N. Y. App. Div. 173, 51 N. Y. Suppl. 889 [*citing* Agar *v.* Tibbets, 56 Hun (N. Y.) 272, 9 N. Y. Suppl. 591]. See *supra*, VIII, B, 2, b, (II).

In North Carolina it was held that where fieri facias on a justice's judgment was levied on land, and the regular proceedings had in the county court for subjecting the land and a sale made by virtue thereof, the county court at a subsequent term had no authority, on motion, to set aside the fieri facias on the justice's judgment. Bennett *v.* Taylor, 53 N. C. 281.

In Pennsylvania a judgment was obtained against husband and wife before a justice for the husband's debt; no appeal was taken and a transcript was entered in the court of common pleas and an execution issued. It was held that the common pleas had no jurisdiction to open the judgment; that the wife's only remedy against the judgment was by appeal, and that for all purposes but lien the judgment remained before the justice where alone it is assailable; that one court cannot overhaul a judgment while it remains within the jurisdiction of the court that rendered it. Boyd *v.* Miller, 52 Pa. St. 431.

Transcript from marine court. — See McCunn *v.* Barnett, 2 E. D. Smith (N. Y.) 521.

21. Parties generally see Parties. See also *infra*, VIII, B, 3, c, (II), (B).

22. Watkins *v.* Walker, 1 Bibb (Ky.) 411; Kerningham *v.* Scanland, 6 How. (Miss.) 540 (surety on forthcoming bond is not a proper party); Shelton *v.* Fells, 61 N. C. 178, 93 Am. Dec. 586 (trustee for benefit of creditors not a proper party); Wallop *v.* Scarburgh, 5 Gratt. (Va.) 1 (holding that the fact that a stranger acquires an equitable right to the benefit of an execution or to the property levied upon does not change the rule).

23. As for instance an heir. Canan *v.* Carryell, 1 N. J. L. 3.

A corporation in voluntary dissolution has sufficient interest in the disposition of its property to entitle it to move to vacate an execution and restrain a sale under it. Fox *v.* Union Turnpike Co., 37 Misc. (N. Y.) 308, 75 N. Y. Suppl. 464, although its receiver be not a party to the motion and the corporate property is in his hands.

A purchaser of the property under a former execution against the same defendant stands in privity of estate with the administrator of the defendant and when the property is levied upon is entitled to move that the execution be quashed. Harrington *v.* O'Reilly, 9 Sm. & M. (Miss.) 216, 48 Am. Dec. 704.

The interest which a bankrupt has in increasing the divisible funds under the fiat is sufficient to entitle him to set aside an execution levied on his goods against good faith. Pinches *v.* Harvey, 1 Q. B. 868, 1 G. & D. 236, 6 Jur. 389, 10 L. J. Q. B. 316, 41 E. C. L. 815.

24. Healey *v.* Preston, 14 How. Pr. (N. Y.) 20, where judgment was entered by confession without action to secure plaintiff against a contingent liability as security on a note, execution issued on the judgment before the maturity of the note, the court refused to set it aside at the instance of creditors.

25. Baldwin *v.* Merrill, 8 Humphr. (Tenn.) 132, 140, where the court said: "He is the only person to be injured; the garnishee has no interest in the matter, as the judgment would be a sufficient protection for him."

26. Brown *v.* Ferguson, 2 How. Pr. (N. Y.) 178.

27. Chouteau *v.* Hooe, 1 Pinn. (Wis.) 663.

Action to annul judgment no bar. — An action to annul a judgment, which plaintiff under his prayer for general relief has declared no judgment at all, is no bar to his rule to quash the fieri facias thereon, with

(II) *NOTICE OF MOTION*—(A) *Necessity.* It is necessary that a notice of motion to quash should be given to the parties to be affected.[28]

(B) *Upon Whom Served.* The notice of motion must be served upon the real parties in interest, not upon their attorneys.[29]

(C) *Requisites.* The grounds of irregularity relied upon must be stated in the notice;[30] it is not sufficient if stated in the moving affidavits alone.[31] It is no objection that the notice of motion is signed by attorneys other than those who appeared in the original action and that there has been no order of substitution, for the motion to recall an execution is an original proceeding.[32]

(III) *FORM AND REQUISITES.* In some jurisdictions the motion may be made *ore tenus* in term-time without any preceding petition for a supersedeas in the same court.[33] The petition for a supersedeas may be considered a motion to quash.[34] A party to a judgment in the common pleas who moves to set aside an execution issued on a judgment of the supreme court as conflicting with his interest must entitle his papers in both causes.[35] The petition or application must allege facts, not conclusions of law.[36] In some jurisdictions a copy or an

a provisional order staying execution. Piernas *v.* Milliet, 10 La. Ann. 286.

In Tennessee certiorari is the proper process by which to bring the execution into court for the purpose of enabling defendant to make the motion to quash. Barnes *v.* Robinson, 4 Yerg. 186. See CERTIORARI, 6 Cyc. 730 *et seq.*

28. *Arkansas.*— State Bank *v.* Marsh, 10 Ark. 129, where the motion was to quash the execution and return and set aside the sale under the execution.

Illinois.— Dazey *v.* Orr, 2 Ill. 535.

Indiana.— Cline *v.* Green, 1 Blackf. 53.

Kentucky.— Downing *v.* Brown, Hard. 181, holding that if the ground to quash an execution be on account of irregularity not appearing on the face of the proceedings, but which is to be established by parol, a notice to show cause must be served on the opposite party that he may be prepared with his witnesses to controvert the facts.

Pennsylvania.— National Furniture Co. *v.* McClintock, 162 Pa. St. 141, 29 Atl. 348, holding that it is error to set aside an execution issued on a recorded judgment bill on the ground that such bill was fraudulently obtained and used, without giving the execution plaintiff reasonable notice and opportunity to be heard.

See 21 Cent. Dig. tit. "Execution," § 475.

29. Duncan *v.* Brown, 15 S. C. 414, holding this to be true in spite of section 432 of the code, which provides that "where a party shall have an attorney in the action, the service of papers shall be made upon the attorney instead of the party."

The sheriff holding the execution is not a necessary party and need not be served with notice of an order to quash an execution. See Buffandeau *v.* Edmondson, 17 Cal. 436, 79 Am. Dec. 139.

30. Montrait *v.* Hutchins, 49 How. Pr. (N. Y.) 105.

31. Montrait *v.* Hutchins, 49 How. Pr. (N. Y.) 105.

Changing grounds at hearing.—Where, upon a motion to quash an execution, certain reasons therefor are assigned, and after argument, both parties being present, the mover, upon the suggestion of the court, withdraws the reasons assigned and assigns others varying from them in form only and not in substance and requiring no change in the arguments or authorities relied upon by the adverse party, the latter is not entitled to new notice before proceeding to further argument; and if he declines to contest the matter further without such notice the court may nevertheless decide the motion against him. Watts *v.* Santa Fé County, 1 N. M. 286.

Ground — lack of jurisdiction or authority. — A notice of motion to recall the execution, specifying the grounds of the motion to be "for the reason that the said execution was wrongfully and unlawfully and improperly issued," is sufficient to raise the question of the authority of the court to issue the execution. Buell *v.* Buell, 92 Cal. 393, 28 Pac. 443.

32. Buell *v.* Buell, 92 Cal. 393, 28 Pac. 443 [*following dictum* in McDonald *v.* McConkey, 54 Cal. 143]. See also Duncan *v.* Brown, 15 S. C. 414, holding that the attorney in the execution is not necessarily the attorney in a proceeding intended to attack the execution.

33. Phillips *v.* Brazeal, 14 Ala. 746.

34. Even if it be improvidently issued. Oswitchee Co. *v.* Hope, 5 Ala. 629. But plaintiff is not confined to ground disclosed in petition for supersedeas; it is competent for him to submit a motion to quash not only upon the ground disclosed in the petition but upon any other that will avail him. Roundtree *v.* Weaver, 8 Ala. 314.

A petition for a supersedeas which alleges that the judgment is satisfied will be sufficient as a motion to quash. Rice *v.* Dillahunty, 20 Ala. 399 [*citing* Lockhart *v.* McElroy, 4 Ala. 572].

35. Parent *v.* Kellogg, 1 How. Pr. (N. Y.) 70.

36. Wilson *v.* Auld, 7 Ala. 302.

Allegation of clerical misprision.—A motion to quash execution on the ground that service of notice of recovery of the action against the personal representatives of defendant who died pending the action was not had on the part of defendants sufficiently presents the objection that the judgment is a clerical misprision. If it is admitted, as it was not in this case, the rendition of the judgment was a

accurate description of the execution must accompany the petition or application;[37] in others this is unnecessary.[38]

(IV) *TIME OF.* A motion to quash an execution for an irregularity must be prosecuted with diligence; any considerable delay on the part of the appellant will be treated as a waiver of the irregularity and an irrevocable renunciation of his right to quash the writ.[39] Whether an execution may[40] or may not[41] be quashed after its return depends upon the law of the particular jurisdiction. A motion to quash an execution on the ground that it was issued more than a year and a day after rendition of judgment is not barred by the lapse of the time for bringing writs of error.[42] But an execution upon a dormant judgment cannot be set aside after property has been sold under it.[43] On a motion to quash a return cannot be questioned before the return-day, even though the execution be filed before that time;[44] and an execution cannot be quashed at one term when not returnable until the next term.[45]

d. The Hearing — (I) *NATURE AND SCOPE OF QUESTIONS AND ISSUES CONSIDERED.* On a motion to quash an execution questions which should properly be considered on an appeal cannot be presented.[46] The court will examine previous proceedings subsequent to the judgment to ascertain whether there has been any irregularity in the orders of the court or in the action of the clerk.[47] As a general rule questions of title[48] will not be determined upon a motion to

mere clerical misprision. Amyx *v.* Smith, 1 Metc. (Ky.) 529.

37. Otherwise the petition is bad on demurrer for uncertainty. Summerhill *v.* Trapp, 48 Ala. 363.

38. Fuller *v.* Indianapolis, etc., R. Co., 18 Ind. 91, holding that the execution is not the foundation of the action in the contemplation of the code which requires a copy to be filed with the complaint.

39. *Alabama.*— Berry *v.* Perry, 81 Ala. 103, 1 So. 118; Henderson *v.* Henderson, 66 Ala. 556.

Georgia.— Milner *v.* Akin, 58 Ga. 555; Field *v.* Sisson, 40 Ga. 67.

Illinois.— Indian Grave Drainage Dist. *v.* Root, 28 Ill. App. 596.

Indian Territory.— Little *v.* Atchison, etc., R. So., (1903) 76 S. W. 283.

Kentucky.— McKinneys *v.* Scott, 1 Bibb 155.

Mississippi.— After a judgment has been satisfied by forfeiture of a forthcoming bond, a motion to quash or set aside the execution on the ground of exorbitant charges in the bill of costs comes too late, and will be overruled. Clark *v.* Anderson, 2 How. 852.

New York.— Bowman *v.* Tallman, 2 Rob. 632. See also Aultman, etc., Co. *v.* Syme, 56 N. Y. App. Div. 165, 67 N. Y. Suppl. 530.

Pennsylvania.— McQuillan *v.* Hunter, 1 Phila. 49.

Vermont.—Hapgood *v.* Goddard, 26 Vt. 401.

England.— Jones *v.* Davis, 1 Saund. & C. 290.

See 21 Cent. Dig. tit. "Execution," § 476.

A motion to quash because the real estate levied on was not sold is not barred by the lapse of time after the levy thereon. Smith *v.* Ford, 2 Bibb (Ky.) 333, construing the Kentucky act of assembly of 1802.

40. Page *v.* Coleman, 9 Port. (Ala.) 275; Isaacs *v.* Jefferson County Ct. Judge, 5 Stew. & P. (Ala.) 402.

41. Meader *v.* Aringdale, 58 Tex. 447; Scott *v.* Allen, 1 Tex. 508.

After the close of the term at which the judgment for costs was rendered in the court of appeals it is too late to move to quash the execution on the judgment against the party on the ground that he was not a party to the suit although improperly joined. Stephens *v.* Wilson, 14 B. Mon. (Ky.) 88.

For defects in a forthcoming bond a motion to quash cannot be made after the return-term. See Wanzer *v.* Barker, 4 How. (Miss.) 363. See Waters *v.* Peach, 3 Gill & J. (Md.) 408.

42. Miller *v.* Anderson, Litt. Sel. Cas. (Ky.) 169. See, however, Swiggart *v.* Harber, 5 Ill. 364, 39 Am. Dec. 418, where a contrary opinion is expressed, but where the question came up collaterally.

The limitation of time upon the right to have a judgment reinvestigated by writ of certiorari has no application to a petition for a supersedeas, with a view to have an execution superseded and quashed, where the judgment has been discharged. Baldwin *v.* Merrill, 8 Humphr. (Tenn.) 132.

43. Murphrey *v.* Wood, 47 N. C. 63. See also Waters *v.* Peach, 3 Gill & J. (Md.) 408.

44. Fink *v.* Remick, 33 Mo. App. 624.

45. Linthecum *v.* Jones, 15 Fed. Cas. No. 8,376, 4 Cranch C. C. 572.

46. Union Nat. Bank *v.* Shriver, 68 Md. 435, 13 Atl. 332, 334.

47. See Buckingham *v.* Granville Alexandria Soc., 2 Ohio 360.

The validity of the first execution and bond will not be inquired into upon a motion to quash a second execution and bond. Jett *v.* Walker, 1 Rand. (Va.) 211.

Whether a sale under prior execution was fraudulent will not be considered. See Cairns *v.* Smith, 8 Johns. (N. Y.) 337.

48. Flagg *v.* Cooper, 11 N. Y. Civ. Proc. 421.

quash, nor will equities be adjusted.[49] If the motion is upon the ground that the judgment has been released by the creditor, the court will investigate whether the judgment has been assigned, or whether the release was obtained by fraud or misrepresentation.[50]

(II) *EVIDENCE.*[51] A motion to quash an execution resting on facts outside the record in the case must be established by evidence upon the hearing of the motion.[52] In some jurisdictions the proper practice is for the court to require evidence in support to be in the form of affidavits.[53] The unsupported affidavit of defendant may[54] or may not[55] be sufficient to support the motion to quash, according to the jurisdiction. The burden of proof is upon defendant who moves to quash an execution on the ground that the judgment has been paid.[56] Where it is shown by defendant that he has paid the judgment to plaintiff's attorney of record, it is then the duty of plaintiff to show a revocation of authority of the attorney to receive the money before it was paid to him and that defendant had notice of the revocation.[57]

(III) *DIRECTING AN ISSUE.* Although the court has the right to consider the motion and decide it in a summary way,[58] it will sometimes for its own satisfaction direct an issue.[59]

e. The Order. Where it is determined upon a motion to quash that the exe-

But in Pennsylvania, in a case of an extent, the court will inquire whether the judgment is a lien. Pray *v.* Brock, 1 Pa. L. J. Rep. 354, 2 Pa. L. J. 341.

49. Vanhouten *v.* Reily, 6 Sm. & M. (Miss.) 440.

The question of a fraudulent conveyance to a purchaser from the judgment debtor will not be considered upon a motion by the purchaser to quash the execution on the ground that it issued since the death of the judgment creditor and that the attorney of the late creditor had issued it. Duryee *v.* Botsford, 24 Hun (N. Y.) 317.

50. Bogle *v.* Bloom, 36 Kan. 512, 13 Pac. 793, holding that if it finds that the release was thus obtained it may declare the pretended satisfaction to be a nullity and direct the officer to proceed to execution. See also Brown *v.* Burdick, 18 Wend. (N. Y.) 511.

51. Evidence generally see EVIDENCE.

52. Hathaway *v.* St. Louis, etc., R. Co., 94 Mo. App. 343, 68 S. W. 109.

Defects apparent on the face of execution and of the record have been said to be the only ones that can be reached by a motion to quash the execution. Meader *v.* Aringdale, 58 Tex. 447 [*citing* Hill *v.* Cunningham, 25 Tex. 25].

Offer of proof that land levied on is wife's. — On a motion to quash an execution, an offer in evidence by defendant of the execution, with the return thereon, and a deed from a stranger to defendant's wife for the land on which the levy was made, supplemented with an offer to show that defendant and his wife, with their children, were living on the land, and that defendant had no interest therein, save that as husband, is properly refused; for, although the legal title may be in the wife alone, the husband may have a substantial interest therein. Ryan *v.* Bradbury, 89 Mo. App. 665.

Proof of payment under former execution, there being no return. — On motion to quash an execution on the ground that a previous writ had issued, and that the debtor had paid to the sheriff the whole or a part of the debt, it not appearing that any return had been made, it is competent to prove, by parol or other evidence, that the first execution was levied before the return-day thereof. Cockerell *v.* Nichols, 8 W. Va. 159.

53. Union Nat. Bank *v.* Shriver, 68 Md. 435, 13 Atl. 332.

54. Bentley *v.* Jones, 8 Oreg. 47.

55. Keefer *v.* Mason, 36 Ill. 406, although the affidavit may be sufficient ground for an order in vacation for a stay of execution.

56. Sturdevant Bank *v.* Peterman, 21 Mo. App. 512.

Presumption. — On a motion to quash an execution, issued within ten years after rendition of judgment, on the ground that the judgment has become dormant because the execution was not issued thereon within one year after its rendition, the presumption is that a prior execution was issued within such time. McDaniel *v.* Johnston, 110 Ala. 526, 19 So. 35.

57. Yoakum *v.* Tilden, 3 W. Va. 167, 100 Am. Dec. 738.

58. Gover *v.* Barnes, 15 Md. 576 [*following* Lambden *v.* Bowie, 2 Md. 334]; Loomis *v.* Lane, 29 Pa. St. 242, 72 Am. Dec. 625. See *supra*, VIII, B, 3, d, (I).

59. See Loomis *v.* Lane, 29 Pa. St. 242, 72 Am. Dec. 625.

Where ground of motion to quash is that defendant has been discharged in bankruptcy, the court will, upon giving plaintiff an opportunity to show that the discharge is inoperative as against his debt, direct an issue, when necessary, to try the facts. Mabry *v.* Herndon, 8 Ala. 848; Linn *v.* Hamilton, 34 N. J. L. 305 [*citing* Lister *v.* Mundell, 1 B. & P. 427; Yeo *v.* Allen, 3 Dougl. 214, 26 E. C. L. 147; Bamfield *v.* Anderson, 5 Moore C. P. 331, 16 E. C. L. 403].

"Where the evidence is contradictory, or where it may authorise conflicting inferences, and either of the parties are desirous of re-

cution is valid and binding upon defendants, that question and others proper to be litigated at the time are henceforth *res adjudicata.*[60]

f. Appeal or Writ of Error.[61] Whether an appeal or writ of error will lie from an order quashing or refusing to quash an execution is a question upon which the authorities are in conflict; some authorities, among them the federal courts, hold that the order is not a final judgment from which a writ of error will lie,[62] others hold the contrary.[63]

g. Costs.[64] As a general rule costs are allowed to the successful party on the motion,[65] but the allowance of costs is usually in the discretion of the court.[66]

ferring it to that forum," it is particularly proper to direct an issue. Smock *v.* Dade, 5 Rand. (Va.) 639, 16 Am. Dec. 780.

Where the expense of the issue is too great a feigned issue will not be awarded. Feeter *v.* Brower, 1 Wend. (N. Y.) 18.

60. Parker *v.* Obenchain, 140 Ind. 211, 39 N. E. 869.

But in Kentucky it has been said that an order of court overruling a motion to quash an execution adds nothing to its validity and is not a bar to an action to enjoin its collection. Schneider *v.* Artsman, 16 Ky. L. Rep. 350.

The term "irregular," unexplained, in an order of court setting aside an execution for irregularity, will be construed to mean "void"; and hence the purchaser at the suit takes no title. See Woodcock *v.* Bennet, 1 Cow. (N. Y.) 711, 13 Am. Dec. 568 [*citing* Read *v.* Markle, 3 Johns. (N. Y.) 523; Parsons *v.* Loyd, 3 Wils. C. P. 341].

Imposing conditions.—In England the court has sometimes imposed terms upon the granting of applicant's motion; as for instance the condition that defendant being discharged from a capias ad satisfaciendum should not bring an action against the sheriff. Bartlett *v.* Stinton, L. R. 1 C. P. 483, 12 Jur. N. S. 342, 35 L. J. C. P. 238, 14 L. T. Rep. N. S. 287, 14 Wkly. Rep. 614; Langley *v.* Headland, 19 C. B. N. S. 42, 11 Jur. N. S. 431, 34 L. J. C. P. 183, 12 L. T. Rep. N. S. 385, 13 Wkly. Rep. 752, 115 E. C. L. 42; Wilcox *v.* Odden, 15 C. B. N. S. 837, 109 E. C. L. 837; Andrews *v.* Martin, 12 C. B. N. S. 371, 6 L. T. Rep. N. S. 433, 104 E. C. L. 371; Hayward *v.* Duff, 12 C. B. N. S. 364, 6 L. T. Rep. N. S. 433, 10 Wkly. Rep. 562, 104 E. C. L. 364.

61. Appeal generally see APPEAL AND ERROR.

62. Good *v.* Martin, 2 Colo. 292; Bowen *v.* Lanier, 4 N. C. 673; Janesville Bridge Co. *v.* Stoughton, 1 Pinn. (Wis.) 667; Barton *v.* Forsyth, 5 Wall. (U. S.) 190, 18 L. ed. 545; Boyle *v.* Zacharie, 6 Pet. (U. S.) 648, 8 L. ed. 532.

The refusal of the court to hear an argument in support of a motion to quash an execution is the exercise of a discretionary power inherent in all courts and from the refusal no appeal will lie. Union Nat. Bank *v.* Shriver, 68 Md. 435, 13 Atl. 332.

63. *Alabama.*— Phillips *v.* Brazeal, 14 Ala. 746 [*citing* Lockhart *v.* McElroy, 4 Ala. 572; Briley *v.* Hodges, 3 Port. 335].

California.— See Dorland *v.* Hanson, 81 Cal. 202, 22 Pac. 552, 15 Am. St. Rep. 44.

Indiana.— See Cline *v.* Green, 1 Blackf. 53.

Missouri.— See *Ex p.* James, 59 Mo. 280; Wyatt *v.* Fromme, 70 Mo. App. 613; Johnson *v.* Greve, 60 Mo. App. 170; Straat *v.* Rinkle, 16 Mo. App. 115.

New York.— See Homans *v.* Tyng, 56 N. Y. App. Div. 383, 67 N. Y. Suppl. 792. *Contra,* Brooks *v.* Hunt, 17 Johns. 484.

Pennsylvania.— Loomis *v.* Lane, 29 Pa. St. 242, 72 Am. Dec. 625.

West Virginia.— Taney *v.* Woodmansee, 23 W. Va. 709.

See also APPEAL AND ERROR, 2 Cyc. 602 note 42.

A writ of error cannot be brought on a judgment of the court refusing to quash an execution sued out in plaintiff's name after his death, for in such a case there is no party defendant to the writ of error, and as the authority of an attorney dies with the principal, this objection is not cured by the appearance in this court. The remedy is by application for a writ of mandamus. Moore *v.* Bell, 13 Ala. 469.

64. Costs generally see COSTS.

65. Hall *v.* Lackmond, 50 Ark. 113, 6 S. W. 510, 7 Am. St. Rep. 84.

Quashing for excess, as where credit should have been allowed.— See Williamson *v.* Ong, 1 W. Va. 84. In Barnes *v.* Robinson, 4 Yerg. (Tenn.) 186, defendant who had an execution quashed except for a small balance which alone was due was given costs. But see Littleton *v.* Yost, 3 Lea (Tenn.) 267. And *compare* Craig *v.* Reardon, Ky. Dec. 328.

66. See Hall *v.* Lackmond, 50 Ark. 113, 6 S. W. 510, 7 Am. St. Rep. 84; Brown *v.* Ferguson, 2 How. Pr. (N. Y.) 178 (where costs were not adjudged against the applicant upon a motion to quash made after notice that execution had been withdrawn); Boyd *v.* Vanderkemp, 1 Barb. Ch. (N. Y.) 273 (where an execution issued upon a decree for damages was set aside for irregularity and the court directed that no costs be allowed for the execution or any proceedings thereon, although the court ordered complainant to have costs for further proceedings of the master). *Compare* Picard *v.* Prescott, 1 Pa. L. J. 1, as to costs under the Pennsylvania stay laws.

Costs to abide event may be imposed under proper circumstances. Brown *v.* Burdick, 18 Wend. (N. Y.) 511.

Laches on the part of the applicant may authorize the imposition of costs against him. Seipt *v.* McFadden, 2 Leg. Rec. (Pa.) 123.

Collateral attack.— The decision of a court having jurisdiction on a motion to quash cannot be questioned collaterally. Loomis *v.* Lane, 29 Pa. St. 242, 72 Am. Dec. 625, hold-

4. Effect.[67] The quashing or dismissal of final process for irregularities does not affect the judgment on which it was issued,[68] and the judgment creditor may obtain the issuance of another execution;[69] nor does it vitiate a sale of property made in pursuance of the execution.[70] A judgment quashing an execution after the supreme court had reversed the trial court's refusal to quash relates back to the original judgment and its effect, so far as respects the parties to that judgment, is to vacate all process issued for its satisfaction.[71] The quashing of the execution destroys the levy upon personal property.[72]

C. Affidavit of Illegality[73] — **1. Nature of Remedy.** The proceeding by affidavit of illegality[74] is a substitute for audita querela,[75] and the legislature in adopting this mode of proceeding has confined the effect of illegality to executions and judgments issuing out of and returnable to the court.[76]

2. Grounds — a. In General. Where a levy is made of a fieri facias founded on a debt contracted prior to June, 1865, and there was no affidavit of payment of taxes as required by the relief act of 1870, defendant may stop the progress of the fieri facias by affidavit of illegality.[77] Inasmuch as plaintiff has the option of proceeding against the property of the principal or of the surety when the execution is against both, the dismissal of a levy on the lands of the principal is no ground for illegality on the part of the surety.[78] Where land is conveyed to one who agrees in consideration therefor to pay off a judgment, instead of which he takes an assignment of the judgment and proceeds to enforce the same by levy

ing that the remedy is by error or appeal. See *supra*, VI, H.

67. Effect of quashing levy see *supra*, VII, B, 10, b.

68. Vertner *v.* Martin, 10 Sm. & M. (Miss.) 103.

69. Davie *v.* Long, 4 Bush (Ky.) 574. See also *supra*, VI, E.

70. Van Campen *v.* Snyder, 3 How. (Miss.) 66, 32 Am. Dec. 311.

Although an execution sent to another county be quashed because of irregularity in its issuance, it does not necessarily follow that the title of a purchaser thereunder who is a stranger to the writ and ignorant of the irregularity should fall with the writ. Execution so issued is not void but only voidable; and a sale to the *bona fide* purchaser made under it is valid. Cox *v.* Nelson, 1 T. B. Mon. (Ky.) 94, 15 Am. Dec. 89.

71. Ewing *v.* Peck, 26 Ala. 413.

72. Wellington *v.* Sedgwick, 12 Cal. 469. *Compare* Levi *v.* Converse, 20 La. Ann. 558.

A lien on land acquired by the levy of execution is not lost or substituted by certiorari or supersedeas bonds given in proceedings brought to quash the execution. Littleton *v.* Yost, 3 Lea (Tenn.) 267.

Effect of quashing excess alone.— Where proceedings were brought to quash an execution levied on land on the ground that the judgment had been paid and there was a finding that part of it had been paid, the effect was simply to quash the execution as to the excess, and an order for sale of the land may be granted to satisfy the balance of the judgment. Littleton *v.* Yost, 3 Lea (Tenn.) 267.

The quashing of an alias which issued contrary to a personal agreement between the parties has been held not to avoid the lien of the first execution at the suit of the other creditors in the absence of any mention of the first execution in the proceedings to quash. Baer *v.* Ingram, 99 Va. 200, 37 S. E. 905.

73. Affidavit of illegality in distress proceedings see Landlord and Tenant.

74. Ga. Code, §§ 4736, 4738, provides that "when an execution against the property of any person shall issue illegally, or shall be proceeding illegally, and such execution shall be levied on property, such person may make oath in writing, and shall state the cause of such illegality, and deliver the same to the sheriff, or other executing officer, as the case may be, together with bond and good security for the forthcoming of such property," and that thereupon the proceedings will be suspended until the questions raised by the affidavit shall be determined at the next term of court. See also Robison *v.* Banks, 17 Ga. 211.

See Fla. Rev. St. (1892) § 1195, where provision is made for a similar procedure.

75. See, generally, Audita Querela.

76. Manning *v.* Phillips, 65 Ga. 548.

If the affidavit is insufficient in law to arrest the fieri facias the sheriff may disregard it and proceed with the sale of the property. Sullivan *v.* Hearnden, 11 Ga. 294.

Inspection of the paper and not inquiry into the truth of its recitals must govern the levying officer in determining whether or not to accept the affidavit. Williams *v.* MacArthur, 111 Ga. 28, 36 S. E. 301.

77. Brown *v.* Gill, 44 Ga. 613.

78. Steele *v.* Atlanta Land Imp. Co., 91 Ga. 64, 16 S. E. 257; Manry *v.* Shepperd, 57 Ga. 68, holding that the exceptions to this rule established by the code as to judgments recovered on bonds of administrators, executors, or guardians do not apply to judgments founded on the bonds of other trustees.

Agreement to look to principal.— Withdrawal by a surety of his appeal from a judgment against himself and principal, induced

and sale, the proper remedy is by an affidavit of illegality, not by injunction.[79] An execution founded upon an award against administrators in their representative capacity, but levied upon the individual property of the administrator, is ground for an affidavit.[80] When an execution issues upon the foreclosure of a mortgage on personal property, the mortgagor or his special agent may file an affidavit of illegality wherein he may set up and avail himself of any defense which he might have set up according to law upon an ordinary suit upon the demand secured by the mortgage and which goes to show that the amount claimed is not due.[81] The affidavit of illegality is not a remedy for an excessive levy.[82] To be good as a ground of illegality, the variance between a fieri facias and the judgment on which it is founded must be material.[83] That the levying officer violated his duty in refusing to levy on the property pointed out by defendant,[84] or that the land levied on does not belong to defendant,[85] is not a ground for an affidavit. Nor is it a ground of illegality that a levy on property of a co-defendant was dismissed by plaintiff without an order of court and the execution afterward levied on property of affiant.[86]

b. Defective Judgment. If defendant has not been served and does not appear, he may take advantage of the defect by affidavit of illegality;[87] but if he has had his day in court he cannot go behind the judgment by affidavit of illegality.[88] The remedy by affidavit of illegality is not a substitute for an appeal or

by plaintiff's promise that, in case of such withdrawal, he would look to the principal alone for payment, was held to be a relief of the surety which he might set up in an affidavit of illegality, averring both the agreement and the illegal issuance of execution on the original judgment. Wimberly *v.* Adams, 51 Ga. 423.

Execution founded on a bond signed by the sureties alone cannot issue against the estate of a person who did not sign the bond and for whom the obligors were sureties. The fact that the deceased was a defaulting tax-collector and could have been held liable under the law for funds in his hands does not alter the case; to hold him or his estate liable for the funds, a proper execution must be issued. Lee County *v.* Walden, 68 Ga. 664.

That the sheriff disobeys instructions to make the amount out of the principal first is not ground for an affidavit of illegality. Keaton *v.* Cox, 26 Ga. 162.

79. Flournoy *v.* Silman, 59 Ga. 195.

80. Horne *v.* Spivey, 44 Ga. 616.

81. Harper *v.* Grambling, 66 Ga. 236.

82. Rogers *v.* Felker, 77 Ga. 46; Manry *v.* Shepperd, 57 Ga. 68. At least a mere allegation that the levy is excessive without any facts to sustain the allegation is insufficient. Rogers *v.* Felker, 77 Ga. 46.

83. It was alleged that the fieri facias did not follow the judgment in this, that the judgment was against A. H. Zachry and L. H. Zachry and the fieri facias against A. H. and L. H. Zachry. Zachry *v.* Zachry, 68 Ga. 158.

84. Douglas *v.* Singer Mfg. Co., 102 Ga. 560, 27 S. E. 664; Barfield *v.* Barfield, 77 Ga. 83 (holding that if the officer violates his duty or abuses his discretion by making an excessive levy or by refusing to levy on the property pointed out, he is liable for such special damages as defendant may incur thereby, but that this is not a valid objection to the process); Thompson *v.* Mitchell, 73 Ga. 127.

85. Zachry *v.* Zachry, 68 Ga. 158.

86. Steele *v.* Atlanta Land Imp. Co., 91 Ga. 64, 16 S. E. 257.

87. Maund *v.* Keating, 55 Ga. 396; Hambrick *v.* Crawford, 55 Ga. 335; Treutlen *v.* Smith, 54 Ga. 575; Parker *v.* Jenning, 26 Ga. 140. See Hartsfield *v.* Morris, 89 Ga. 254, 15 S. E. 363 [*distinguishing* Jackson *v.* Hitchcock, 48 Ga. 491].

Death of a party.— If defendant dies before judgment and his personal representative is not made a party (Lockridge *v.* Lyon, 68 Ga. 137), or if plaintiff dies and the executor is made a party without notice to defendant who has a defense (Meeks *v.* Johnson, 75 Ga. 629) an affidavit of illegality is the proper remedy.

88. Ga. Code, § 4742; Douglas *v.* Singer Mfg. Co., 102 Ga. 560, 27 S. E. 664; Griffin *v.* Frick, 97 Ga. 219, 23 S. E. 833; Steele *v.* Atlanta Land Imp. Co., 91 Ga. 64, 16 S. E. 257; Hicks *v.* Riley, 83 Ga. 332, 9 S. E. 771; Bowen *v.* Groover, 77 Ga. 126; Inman *v.* Foster, 74 Ga. 829; Brantley *v.* Greer, 71 Ga. 11; Saulsbury *v.* Blandys, 65 Ga. 45; Brown *v.* Wilson, 59 Ga. 604; Lynch *v.* Gannon, 57 Ga. 608; Swinney *v.* Watkins, 22 Ga. 570; Mangham *v.* Reed, 11 Ga. 137; Rodgers *v.* Evans, 8 Ga. 143, 52 Am. Dec. 390; Macon *v.* Bibb County Academy, 7 Ga. 204; Sellers *v.* Bishop, Ga. Dec. 130, Pt. II.

An affidavit, based on misconduct of the trial magistrate which prevented the judgment debtor from pleading his discharge in bankruptcy by leading him to believe it was unnecessary and that no judgment would be rendered against him, is insufficient. Hood *v.* Parker, 63 Ga. 510.

Defenses which should have been urged at the trial cannot be brought up by affidavit of illegality. But it cannot be alleged that the debt on which the judgment was found was illegal or that plaintiff was an illegal holder of it. These questions are conclusively settled by the judgment. Brock *v.* Brock, 104

a writ of error or other formal proceedings.[89] An ordinary affidavit of illegality is sufficient to raise the question of service where there is no official return thereon;[90] but if there is a return, a traverse must be filed thereto at the next term after notice of it,[91] and proof must be made that the sheriff's return was traversed at the next term after notice of the return.[92] A defendant who has had his day in court and against whom a judgment has been rendered cannot go behind the judgment by an affidavit of illegality because he was by plaintiff's fraud, unmixed with negligence on his own part, deprived of a hearing. His proper remedy is by a petition in equity to set aside the judgment.[93]

3. Time of Filing. Where an affidavit of illegality is based on an alleged want of service, the traverse of the return of the sheriff that defendant was served must be made at the first term after notice of the entry of service is had by defendant.[94]

4. Form, Requisites, and Sufficiency — a. Formal Requisites. The venue of the affidavit must be that of the court issuing the execution.[95] The grounds of illegality alleged must be sworn to.[96]

b. Sufficiency of Allegations — (i) *Generally.* An affidavit which makes allegations to the best of the knowledge and belief of defendant will be stricken out on demurrer. It is necessary to make a positive statement as to the grounds of illegality.[97] The affidavit should not state mere conclusions of

Ga. 10, 30 S. E. 424; Chancy *v.* Carrigan, 53 Ga. 84; Lewis *v.* Armstrong, 45 Ga. 131; Inman *v.* Jones, 44 Ga. 44; Miller *v.* Albritton, 43 Ga. 273. See Manning *v.* Weyman, 99 Ga. 57, 26 S. E. 58.

That the verdict was unauthorized by the pleadings or that the judgment did not follow the verdict cannot be made grounds of an affidavit by defendant who has been served and had his day in court. Bird *v.* Burgsteiner, 108 Ga. 654, 34 S. E. 183.

Trial held in unlawful place.— A judgment of the superior court rendered on appeal from a justice's court is not void so as to be attacked by affidavit of illegality of execution issued thereon, on the ground that the justice's court was not held "at a court house established according to law," both parties having had their day in the superior court. Green *v.* Alexander, 88 Ga. 161, 13 S. E. 946.

When the judgment is void for other reasons than that defendant had not his day in court, there seems to be a conflict as to whether the affidavit of illegality is the proper remedy. See Sanford *v.* Bates, 99 Ga. 145, 25 S. E. 35; Griggs *v.* Willbanks, 96 Ga. 744, 22 S. E. 327; Planters' Loan, etc., Bank *v.* Berry, 91 Ga. 264, 18 S. E. 137; Hartsfield *v.* Morris, 89 Ga. 254, 13 S. E. 363 [*distinguishing* Jackson *v.* Hitchcock, 48 Ga. 491]; Morris *v.* Morris, 76 Ga. 733; Lockridge *v.* Lyon, 68 Ga. 137; Greene *v.* Oliphant, 64 Ga. 563.

An execution which conforms to an irregular but not void judgment is not proceeding illegally and is not a ground for an affidavit of illegality. Emory *v.* Smith, 51 Ga. 323.

A judgment, defective simply in not being signed, is not void; and hence an affidavit of illegality to an execution issued upon such judgment, on the ground that there is no judgment, cannot be sustained. Pollard *v.* King, 62 Ga. 103.

Judgment not describing indorser or surety as such.— An affidavit of illegality is insufficient which states that the judgment on which the execution is founded is irregular in that, although the suit was against an indorser or a surety, the judgment fails to describe him as indorser or a surety. Hill *v.* Mott, 54 Ga. 494. See also Camp *v.* Simmons, 62 Ga. 73; Keaton *v.* Cox, 26 Ga. 162. When the maker and indorser of a promissory note are dead, and the administrator of the maker is also executor of the indorser, and suit is brought on the note against him in both capacities, although the judgment does not specify the relation of maker and indorser, it is good against him, at least so far as he is the representative of the maker, and if levy be made accordingly he cannot arrest it on that ground by affidavit of illegality. Woolfolk *v.* Kyle, 48 Ga. 419.

89. Ogletree *v.* Andrews, 99 Ga. 133, 24 S. E. 842 (where a plea to the jurisdiction in a civil action was made and adjudicated against defendant and no exception was taken to the judgment, and where it was held he could not afterward raise the question of jurisdiction by an affidavit of illegality); Hollifield *v.* Spencer, 90 Ga. 253, 15 S. E. 820 (where the court erroneously refused to allow defendant to plead to the merits); Tumlin *v.* O'Bryan, 68 Ga. 65 (where it was held that at the time of its rendition by the court, as upon default, there was in fact an issuable plea on file and undisposed of); Dahlonega Gold Min. Co. *v.* Purdy, 68 Ga. 296. See Green *v.* Shields, 37 Ga. 35.

90. See O'Bryan *v.* Calhoun, 68 Ga. 215.

91. O'Bryan *v.* Calhoun, 68 Ga. 215.

92. Knight *v.* Jones, 63 Ga. 481.

93. Southern R. Co. *v.* Daniel, 103 Ga. 541, 29 S. E. 761.

94. Lamb *v.* Dozier, 55 Ga. 677.

95. Manning *v.* Phillips, 65 Ga. 548, Hawkins, J., delivering the opinion of the court.

96. Craig *v.* Fraser, 73 Ga. 246.

97. Sprinz *v.* Vannucki, 80 Ga. 774, 6 S. W. 816; Craig *v.* Fraser, 73 Ga. 246;

law.[98] If one of the grounds of an affidavit presents a legal defense against the further progress of the execution a motion to dismiss should be denied.[99]

(II) *Lack of Jurisdiction.* An affidavit which alleges lack of jurisdiction of person must distinctly negative all grounds of jurisdiction and all methods of service.[1] An affidavit which alleges that the judgment was rendered by a justice of the peace at a place in his district where he had no authority to sit is good, without alleging the place at which the justice ought to have held court.[2]

(III) *Payment.* An allegation to the effect that the amount for which the execution has been issued has been paid must be clear and unequivocal.[3] But an allegation that the execution has been fully paid off since the rendition of judgment is sufficient on general demurrer, although it is not alleged to whom payment was made.[4]

(IV) *Other Allegations.* An allegation that there was no judgment or that the judgment on which the execution was issued was set aside on motion for a new trial is not demurrable.[5] An affidavit alleging falsity of a constable's return that there was no personal property to be found must distinctly aver that defendant had personal property subject to execution at the time of the levy on the realty.[6] If the land levied upon is misdescribed in the execution the affidavit should set out the misdescription.[7] An affidavit which does not identify the premises levied upon otherwise than by reference to the entry of levy where the premises are fully described is sufficient.[8] An affidavit that execution was levied on property set apart as a homestead to affiant's deceased husband is not demurrable for failing to state that the execution plaintiff had not made affidavit that his claim was within one of the exceptions to the homestead act.[9]

c. Parties. The remedy by affidavit of illegality, which is a substitute for audita querela, lies only in favor of defendant in execution[10] whose property has been

Stancel *v.* Puryear, 58 Ga. 445. See Brinson *v.* Birge, 102 Ga. 802, 30 S. E. 261.

98. Baker *v.* Akerman, 77 Ga. 89.

99. American Mortg. Co. *v.* Tennille, 87 Ga. 28, 13 S. E. 158, 12 L. R. A. 529.

1. Jordan *v.* Carter, 66 Ga. 254; Cobb *v.* Pitman, 49 Ga. 578. An affidavit which alleges that defendant was never served with any copy of the declaration and process and never knew of the suit until long after judgment (Dozier *v.* Lamb, 59 Ga. 461), or an averment that he never had any notice of the pendency of the suit until execution issued (Duke *v.* Randolph, 52 Ga. 523), is sufficient.

Alleging that defendant was not the administrator against whom judgment was recovered.— See McLaren *v.* Beall, 50 Ga. 632.

2. Hilson *v.* Kelley, 111 Ga. 866, 36 S. E. 966.

Alleging disqualification of judge.— McMillan *v.* Nichols, 62 Ga. 36.

3. Brinson *v.* Birge, 102 Ga. 802, 30 S. E. 261; Parker *v.* Rosenheim, 97 Ga. 769, 25 S. E. 763 (holding insufficient an affidavit which stated as its only ground "that no part of the amount of the execution was due"); Terry *v.* Americus Bank, 77 Ga. 528, 3 S. E. 154 (holding that an affidavit setting out that "the fi. fa. and promissory note, the cause of action, was paid off in full" and that there was nothing due on the same, was not only uncertain but also elusive, it not appearing therefrom whether the note was paid before or after the fieri facias was issued). See also Mitchell *v.* Duncan, 7 Fla. 13.

4. Griffin *v.* Frick, 97 Ga. 219, 23 S. E. 833.

Where a tax fieri facias was levied at the instance of its transferee, an affidavit of illegality averring that it had been paid in full to him after the transfer is valid. Weems *v.* Stokes, 66 Ga. 88.

5. Hamlin *v.* Coleman, 74 Ga. 831.

A ground, taken in an affidavit, that the execution "issued upon a bogus judgment, which was not obtained after a due course of law, but was obtained in chambers, contrary to the statute in such cases made and provided, and by fraud," is too general and indefinite, and does not show that the judgment is void, and therefore cannot be inquired into in a proceeding by illegality. McLaren *v.* Beall, 50 Ga. 632.

6. McKoy *v.* Edwards, 65 Ga. 328.

7. Zachry *v.* Zachry, 68 Ga. 158.

The omission in the levy of the words "as defendant's property" when the claimant's affidavit describes the land levied on as the property of defendant, naming him, cannot be made a ground of objection by him. Scolly *v.* Butler, 59 Ga. 849.

8. Wacter *v.* Marshall, 102 Ga. 746, 29 S. E. 703.

9. Buchanan *v.* Willingham, 65 Ga. 303.

10. **If filed by one who is not a defendant,** the court to which the issue thus sought to be made is returned is without jurisdiction and should dismiss the affidavit. State *v.* Sallade, 111 Ga. 700, 36 S. E. 922 [*citing* Artope *v.* Earker, 72 Ga. 186].

The affidavit may be filed by an attorney in fact or an executor or administrator or other trustee. Clinch *v.* Ferril, 48 Ga. 365.

seized.[11] A co-defendant whose goods have not been seized cannot make affidavit.[12] If the illegality is alleged to be want of service upon defendant and the return of the sheriff that defendant was served is traversed, the sheriff should be made a party to the traverse.[13]

5. Amendment. Defendant is bound at his peril to state all the grounds of illegality which may exist at the time of filing his affidavit; if he fails, he will not be allowed to file a second affidavit for the same causes.[14] The affidavit is amendable by new and independent matter if defendant did not know of the existence of the matter at the time the affidavit was filed,[15] and if he will swear that he did not know of it at that time.[16] Nevertheless in spite of this provision of the code[17] amendments of a different character which only alter grounds already filed may be made without the oath.[18] If, pending the issue on an affidavit of illegality, leave is granted to withdraw the execution to be levied on other property of defendant, he may make another affidavit when the levy is made and the property advertised for sale.[19] A prior affidavit by one defendant whose property was not seized[20] will not bar a subsequent affidavit by a co-defendant after his property has been levied upon.[21] Defendant should set forth specific reasons why the facts were not known to him at the time of filing the first affidavit.[22] A second affidavit filed after the dismissal of the first must show diligence to ascertain the facts on which it was granted at the time of filing the first affidavit.[23]

6. Bond. The failure of defendant to give a forthcoming bond to replevy the property levied on is not a good legal ground for dismissing the affidavit.[24] He may replevy it by giving bond and security for its forthcoming, but is not bound

11. Walker *v.* Equitable Mortg. Co., 112 Ga. 645, 37 S. E. 862.

12. Van Dyke *v.* Besser, 34 Ga. 268.

Execution against a corporation.— Where by statutory provision an execution against a corporation is made to operate against a stock-holder, an affidavit of illegality lies in his favor. Force *v.* Dahlonega Tanning, etc., Mfg. Co., 22 Ga. 86.

13. Lamb *v.* Dozier, 55 Ga. 677.

14. Hambrick *v.* Crawford, 55 Ga. 335; Horn *v.* Bird, 45 Ga. 610; Hurt *v.* Mason, 2 Ga. 367.

That defendant did not know that all the grounds ought to have been put in at the time of filing the first affidavit will not excuse him. Cone Export, etc., Co. *v.* McCalla, 113 Ga. 17, 38 S. E. 336.

Sufficient notice to sheriff of previous affidavit.— Copies of judgments overruling previous affidavits, attached by the clerk to a fieri facias, are sufficient notice of the existence of such affidavits to the sheriff to justify him in refusing a new affidavit. Tucker *v.* Respass, 28 Ga. 613.

15. Field *v.* Price, 50 Ga. 135 (holding that where there have been two judgments of the court on illegalities to an execution, both ordering it to proceed as a valid execution, it is too late for defendant to set up a new defense to the execution which existed before the judgments and of which he was informed at the time of the judgments); Adams *v.* Fitzgerald, 14 Ga. 36.

16. Mosley *v.* Fryer, 102 Ga. 564, 27 S. E. 667. See also Ray *v.* Hixon, 107 Ga. 768, 33 S. E. 692; Higgs *v.* Huson, 8 Ga. 217.

A second counter affidavit to an execution based on the foreclosure of a factor's lien cannot be filed without an allegation that the facts therein set forth were unknown to defendant at the time the first was filed. Story *v.* Flournoy, 55 Ga. 56.

17. Ga. Code (1895), § 5120; Code (1882), § 3501.

18. Inman *v.* Miller, 71 Ga. 293. See also Peters *v.* Baker, 54 Ga. 339.

Where a co-defendant filed an affidavit in his own name, when the execution was not proceeding against him, he cannot amend the affidavit by adding the word "agent" under the provision of the code which allows an amendment by the insertion of new and independent grounds. Van Dyke *v.* Besser, 34 Ga. 268.

19. Gunn *v.* Woolfolk, 66 Ga. 682.

20. See *supra*, VIII, C, 4, c.

21. Clary *v.* Haines, 61 Ga. 520.

22. Hunter *v.* Davidson, 59 Ga. 260.

23. Binder *v.* Ragsdale, 100 Ga. 400, 28 S. E. 165; Burnett *v.* Fouché, 77 Ga. 550, under rule 31 of the superior court declaring that a second affidavit of illegality cannot be filed "for causes which existed, or were known or, in the exercise of reasonable diligence, might have been known at the time of filing the first." See also Baker *v.* Smith, 91 Ga. 142, 16 S. E. 967; Fuller *v.* Vining, 87 Ga. 600, 13 S. E. 635.

A counter affidavit to an execution based on the foreclosure of a factor's lien cannot be amended after it has been returned into court, either by the filing of the new affidavit or otherwise, so as to change the issue thereby presented. Story *v.* Flournoy, 55 Ga. 56.

Conformity to statute.— The bond given where an affidavit of illegality is tendered to the execution issued on the foreclosure of a chattel mortgage must conform to the statute. Brantley *v.* Baker, 75 Ga. 676.

24. Crayton *v.* Fox, 100 Ga. 781, 28 S. E. 510; Wynn *v.* Knight, 53 Ga. 568.

to do so.[25] If the affidavit is filed to an execution based on the foreclosure of a mortgage on personal property and the affiant either gives bonds with security for the forthcoming of the property, or makes affidavit of his inability from poverty so to do, his affidavit is properly dismissed.[26]

7. Withdrawal. If the illegality is withdrawn, plaintiff in execution may proceed as in cases where claims may be dismissed or withdrawn.[27]

8. The Hearing and Determination — a. Order of Proceedings. When the case on trial is made by an affidavit of illegality, a motion by plaintiff in the fieri facias to dismiss the illegality takes precedence of a motion by defendant to quash it.[28]

b. Proof — (i) *In General.* Where an affidavit has been filed and a bond given, the court should hear the evidence as to the facts stated in the affidavit.[29] The evidence must be confined to the grounds stated in the affidavit.[30]

(ii) *Burden of.* The burden of proof is necessarily on plaintiff to make a *prima facie* case by putting an execution, fair on its face, in evidence and showing a legal levy thereon.[31] It is then the duty of defendant to go forward and show that the execution is proceeding illegally.[32] If the execution defendant does not appear, the proceedings must be dismissed, not tried *ex parte*.[33]

c. Submission to Jury. If plaintiff or his attorney desires to controvert the facts contained in the affidavit, issue must be joined and tried by a jury.[34] Where the affidavit alleges among other grounds of illegality that there was no jurisdiction over the person of defendant, it is not an abuse of discretion upon the part of the trial judge but is good practice to direct a separate issue to be

25. Tarver *v.* Tarver, 53 Ga. 43 (holding further that defendant is not required to pay the costs due on the fieri facias before his affidavit can be received); Herring *v.* Saulsbury, 52 Ga. 396.

In Florida the giving of a bond is a prerequisite to obtaining a stay. Griffin *v.* Lacourse, 31 Fla. 125, 12 So. 665.

26. Shannon *v.* Vincent, 76 Ga. 837, under Ga. Code (1882), §§ 3975, 3976. See Ga. Code (1895), §§ 2765, 2766.

27. Thomas *v.* Parker, 69 Ga. 283.

28. Sims *v.* Hatcher, 77 Ga. 389, 391, 3 S. E. 92, where Bleckley, C. J., said: "It is an excellent rule, when a case is on trial, to try that case and not switch off on some other."

29. Houstoun *v.* Bradford, 35 Fla. 490, 17 So. 664; Mathews *v.* Hillyer, 17 Fla. 498.

30. Sullivan *v.* Hugely, 48 Ga. 486; Dever *v.* Akin, 40 Ga. 423; Higgs *v.* Huson, 8 Ga. 317.

Estoppel.— A defendant in fieri facias, who has recited a levy, both in his affidavit of illegality and the bond given for the forthcoming of the property, will not be heard to controvert the fact of such levy at the trial of the affidavit of illegality. Smith *v.* Camp, 84 Ga. 117, 10 S. E. 539.

Where a person is the administrator de bonis non of one intestate and the administrator of another, his returns made in the first capacity are not admissible to show payment of an execution levied by him in his second capacity. Rhodes *v.* Harrison, 60 Ga. 428.

31. Bertody *v.* Ison, 69 Ga. 317, 319.

The right to open and close belongs to plaintiff in execution, unless the claimant introduces no evidence, then the latter has the right to have the conclusion. Bertody *v.* Ison, 69 Ga. 317.

32. **As where he has grounded his affidavit upon payment,** he must show that the execution has been paid off. Harris *v.* Gormerly, 62 Ga. 160.

If payment in satisfaction of the fieri facias is proved the affidavit should be sustained. Conley *v.* Maher, 93 Ga. 781, 20 S. E. 647.

Where want of jurisdiction of person of defendant alleged.— When it is alleged that defendant had not been served and had neither appeared and pleaded nor authorized another to do so for him, it is necessary to prove affirmatively the truth of these allegations. Le Master *v.* Orr, 101 Ga. 762, 29 S. E. 32. Where the ground of an affidavit of illegality is want of service, it is incumbent on defendant to produce the record of the suit and to support the allegations in his affidavit by evidence; the presumption of law being in favor of the validity of the judgment. Brown *v.* Gill, 49 Ga. 549.

33. Wade *v.* Wisenant, 86 Ga. 482, 12 S. E. 645.

34. Ga. Code (1895), § 4738. In an early case it was held that, although the magistrate has a right to decide upon the facts, he may nevertheless submit the issue to the jury. Burke *v.* McEachem, Ga. Dec. 129, Pt. II. See also Harris *v.* Ferguson, Ga. Dec. 111, Pt. II. But where, on levy of fieri facias, defendant averred in his oath of illegality that the consideration of the debt was slaves, the judge cannot stop the cause for want of jurisdiction, because the evidence satisfies him that the consideration was slaves. He must submit the issue to the jury. Corbin *v.* Habersham, 43 Ga. 166.

formed and first tried upon that ground.[35] When no evidence in support of an affidavit of illegality is admitted, there should be no submission of the case to the jury, but the illegality should be dismissed or sustained as matter of law.[36] On the other hand a verdict may be directed in a proper case.[37]

d. The Adjudication — (I) *In General.* A motion to set aside an affidavit of illegality which sets up that what purported to be a judgment was entered without authority involves the legal sufficiency of that judgment, and a denial of the motion is a decision that the judgment is void.[38]

(II) *Conclusiveness of.* The questions determined as well as those which should have been litigated in a proceeding upon an affidavit of illegality are, as to the parties and their privies, henceforth *res adjudicata*.[39] But a judgment sustaining a demurrer to an affidavit for insufficiency is no bar to a new proceeding containing allegations stating a good case.[40] A judgment overruling a demurrer and sustaining the affidavit except as to a certain sum will bar a subsequent application to amend the demurrer by introducing new and distinct grounds.[41]

(III) *Appeal From.*[42] Where the bill of exceptions differs from the record sent up, the record, not the bill of exceptions, will be followed in the appellate court.[43]

e. Costs[44] **and Penalties.** It it be made to appear upon trial of an issue formed on an affidavit of illegality that the interposition was only for delay, the jury trying the case may assess upon the principal debt such damages, not exceeding twenty-five per cent, as may seem reasonable and just.[45]

D. Injunction[46] — **1. The Rule Against Injunction if Adequate Remedy Exists at Law.** The usual rule that injunction will not be granted if an adequate remedy at law exists obtains when it is sought to restrain the enforcement of an execution.[47] If defendant can obtain a satisfactory remedy by a simple motion

35. Le Master *v.* Orr, 101 Ga. 762, 29 S. E. 32.

36. Sprinz *v.* Frank, 81 Ga. 162, 7 S. E. 177.

Two issues raised by two defendants, one issue outside affidavit.— Where one of two defendants in execution had filed an affidavit of illegality, and his co-defendant had made an extraordinary motion for a new trial on grounds involving other facts than those set up in the affidavit, refusal to submit both to the jury together was not error. Cauthen *v.* Barnesville Sav. Bank, 68 Ga. 287.

37. Crayton *v.* Fox, 106 Ga. 853, 33 S. E. 42. *Compare* Sigman *v.* Treadwell, 102 Ga. 766, 29 S. E. 761.

38. McGee *v.* Ancrum, 33 Fla. 499, 15 So. 231.

39. Sparks *v.* Etheredge, 89 Ga. 790, 15 S. E. 672 [*citing* Barfield *v.* Jefferson, 84 Ga. 609, 11 S. E. 149].

Such questions therefore cannot be raised later in a motion to set aside the execution and judgment for the same causes embraced in the execution (Field *v.* Sisson, 40 Ga. 67) or in defense to an action on the bond given at the filing of the affidavit (Bowden *v.* Taylor, 81 Ga. 204, 6 S. E. 280).

A judgment that the fieri facias had not been paid is a bar to a motion that the fieri facias shall be entered satisfied (Tucker *v.* Respass, 28 Ga. 613) or to an injunction against the issuance of the execution (Neal *v.* Henderson, 72 Ga. 209).

Erroneous judgment acquiesced in.— Where one making an affidavit of illegality failed to appear to prosecute the same and the justice, instead of dismissing the affidavit, rendered judgment against affiant on the merits, the judgment was not absolutely void, so that, on its being acquiesced in by affiant, it became conclusive on him. Morris *v.* Murphey, 95 Ga. 307, 22 S. E. 635. See also Jones *v.* Hammack, 83 Ga. 255, 9 S. E. 537.

40. Peters *v.* Baker, 54 Ga. 339.

41. Goldsmith *v.* Georgia R. Co., 62 Ga. 542.

42. Appeal generally see Appeal and Error.

43. Sims *v.* Hatcher, 77 Ga. 389, 3 S. E. 92.

44. Costs generally see Costs.

Costs unsettled.— See Sims *v.* Hatcher, 77 Ga. 389, 3 S. E. 92.

45. Ga. Code (1895), § 4739. See also White *v.* Haslett, 49 Ga. 280.

46. Injunction generally see Injunctions.

Injunction by partner to restrain improper seizure of partnership property see Partnership.

Injunction by surety to compel creditor to exhaust principal's property see Principal and Surety.

Equitable relief against judgment generally see Judgments.

Exemption rights generally see Exemptions; Homesteads.

47. Cincinnati, etc., R. Co. *v.* Cathcart, 111 Ga. 818, 35 S. E. 640; Hitchcock *v.* Culver, 107 Ga. 184, 33 S. E. 35.

to the court which issued the execution, it would be absurd to go into equity to obtain relief. Equity will not listen to such a case.[48] Injunction will not lie where the remedy is by appeal,[49] or where defendant may have relief by affidavit of illegality.[50] Where motion to quash would take too long[51] or where the situation presents several questions complicated of law and fact[52] injunction is proper.

2. Application of the Rule to Specific Instances and Situations — a. Where the Execution or Its Issuance Is Objected to — (I) *Void or Irregular Writ* — (A) *In General.* Injunction is not the remedy to prevent a sale under an execution void upon its face[53] or under an execution issued upon a void judgment.[54] The appropriate method is by application to the court of issuance,[55] or

48. *California.*—Moulton *v.* Knapp, 85 Cal. 385, 24 Pac. 803, 88 Cal. 446, 26 Pac. 210; Sanchez *v.* Carriaga, 31 Cal. 170.

Florida.— Robinson *v.* Yon, 8 Fla. 350.

Georgia.— Leonard *v.* Collier, 53 Ga. 387.

Illinois.— Farrell *v.* McKee, 36 Ill. 225; Beaird *v.* Foreman, 1 Ill. 385, 388, 12 Am. Dec. 197.

Indiana.— Cline *v.* Lowe, 3 Ind. 527. Chancery will not interfere unless it be until the motion can be made. Lasselle *v.* Moore, 1 Blackf. 226.

Kansas.— Treat *v.* Wilson, 4 Kan. App. 586, 46 Pac. 322.

Kentucky.— Poston *v.* Southern, 7 B. Mon. 289.

Mississippi.— Ricks *v.* Richardson, 70 Miss. 424, 11 So. 935.

Missouri.— Stockton *v.* Ransom, 60 Mo. 535.

North Carolina.— Parker *v.* Bledsoe, 87 N. C. 221 (holding that if defendant wishes to modify the terms of the judgment, he should apply to the court which rendered it to reform the judgment and for an order suspending proceedings); Walker *v.* Gurley, 83 N. C. 429 [*citing* Wilder *v.* Lee, 64 N. C. 50].

Oklahoma.— Crist *v.* Cosby, 11 Okla. 635, 69 Pac. 885.

Pennsylvania.— Nelson *v.* Guffey, 131 Pa. St. 273, 18 Atl. 1073.

Texas.— Wingfield *v.* Hackney, 30 Tex. Civ. App. 207, 69 S. W. 446.

West Virginia.— Howell *v.* Thomason, 34 W. Va. 794, 12 S. E. 1088.

See 21 Cent. Dig. tit. "Execution," § 497.

If defendant has been discharged in insolvency motion, not injunction, is the remedy. Green *v.* Thomas, 17 Cal. 86; Imlay *v.* Carpentier, 14 Cal. 173.

Transcribed judgment void on its face at law.— Where a judgment obtained against a party is void on the face of the proceedings in the justice's court for want of jurisdiction and the judgment has been transcribed to a court of record, the remedy against the issuance of an execution out of the court of record upon the transcript is not by injunction, for the aggrieved party has the adequate remedy at law in the justice's court. The fact that the judgment has been transcribed does not prevent the justice from recalling execution issued. Gates *v.* Lane, 49 Cal. 266 [*citing* Logan *v.* Hillegass, 16 Cal. 200].

When relief may be had by a motion to retax costs injunction cannot issue. Ward *v.* Rees, 11 Wyo. 459, 72 Pac. 581.

49. Murdock *v.* De Vries, 37 Cal. 527; Chappell *v.* Cox, 18 Md. 513. But see Williams *v.* Pile, 104 Tenn. 273, 56 S. W. 833.

The facts that the complainant failed to execute his appeal-bond within the specified time and that the appellate court denied his motion for leave to file a new undertaking does not alter the rule. Beck *v.* Fransham, 21 Mont. 117, 53 Pac. 96.

That the petition for a suspensive appeal and the appeal-bond were lost before the appeal was granted constitutes no ground for an injunction to suspend an execution. State *v.* Judge Dist. Ct., 18 La. 542.

50. Hitchcock *v.* Culver, 107 Ga. 184, 33 S. E. 35; Gunn *v.* Woolfolk, 66 Ga. 682; Flournoy *v.* Silman, 59 Ga. 195; Leonard *v.* Collier, 53 Ga. 387. But where an affidavit of illegality was filed, issue on which was pending, and the judge dismissed the "case and levy for want of jurisdiction" and plaintiff attempted afterward to proceed upon the same levy, it was held that defendant had exhausted his remedy at law by procuring an order dismissing the levy and that therefore equity would enjoin plaintiff from proceeding in defiance of the judgment of dismissal without requiring defendant to seek any further order at law. Scogin *v.* Beall, 50 Ga. 88.

51. Snavely *v.* Harkrader, 30 Gratt. (Va.) 487.

52. Crawford *v.* Thurmond, 3 Leigh (Va.) 85.

53. Davidson *v.* Seegar, 15 Fla. 671; Hanson *v.* Johnson, 20 Minn. 194; Williams *v.* Wright, 9 Humphr. (Tenn.) 493; Harrison *v.* Crumb, 1 Tex. App. Civ. Cas. § 991. *Contra*, see Capps *v.* Leachman, (Tex. Civ. App. 1896) 35 S. W. 397.

54. Missouri, etc., R. Co. *v.* Hoereth, 144 Mo. 136, 45 S. W. 1085; St. Louis, etc., R. Co. *v.* Lowder, 138 Mo. 533, 39 S. W. 799; Howlett *v.* Turner, 93 Mo. App. 20.

Mere irregularities in the entry of the judgment cannot be attacked collaterally by injunction where it is not claimed that the judgment was unjust or that the debt sued on was not a valid demand. Kendall *v.* Smith, 67 Kan. 90, 72 Pac. 543.

55. Williams *v.* Wright, 9 Humphr. (Tenn.) 493.

sometimes by appeal.[56] And the rule is the same where the writ or its issuance is merely irregular,[57] for equity interferes cautiously to arrest by the harsh writ of injunction the final process of a court of law.[58]

(B) *Execution For Too Large Amount.* Injunction should not issue against an execution issued for too large an amount. The remedy is a motion or application to court of issuance.[59]

56. Wordehoff *v.* Evers, 18 Fla. 339.

57. *Alabama.*— Triest *v.* Enslen, 106 Ala. 180, 17 So. 356.

California.— Gregory *v.* Ford, 14 Cal. 138, 73 Am. Dec. 639.

Delaware.— Hastings *v.* Cropper, 3 Del. Ch. 165.

Illinois.— Robinson *v.* Chesseldine, 5 Ill. 332; Greenup *v.* Brown, 1 Ill. 252.

Louisiana.—Salter *v.* McHenry, 17 La. 507.

North Carolina.— Foard *v.* Alexander, 64 N. C. 69.

Ohio.— Dunn *v.* Springmeier, 7 Ohio Dec. (Reprint) 339, 2 Cinc. L. Bul. 127.

South Carolina.— Atty.-Gen. *v.* Baker, 9 Rich. Eq. 521.

Texas.— Dunson *v.* Spradley, (Civ. App. 1897) 40 S. W. 327.

Wisconsin.— McIndoe *v.* Hazelton, 19 Wis. 567, 88 Am. Dec. 701.

See 21 Cent. Dig. tit. "Execution," § 501.

Insufficient or inaccurate description of land.— When the return describes the land levied on as wild, uncultivated, or unoccupied land, injunction will issue upon proof that land was occupied and that therefore the levy was unlawful. Sherman *v.* Union Nat. Bank, 66 Miss. 648, 6 So. 501. A mistake in the description of land levied on is not ground for issuing an injunction if the land can be readily identified. Boggess *v.* Lowery, 78 Ga. 539, 3 S. E. 771, 6 Am. St. Rep. 279, where a portion of the lot of land in controversy was described correctly as to the number, the portion of the lot from which it was taken, and the boundaries, but there was a mistake as to the district. If the inaccuracies are not such as would have deceived the judgment debtor injunction will not issue. Deville *v.* Hayes, 23 La. Ann. 550. A slight variance between the description of the property in the advertisement and the seizure and notice is insufficient to sustain an injunction, when it is apparent what property is intended. McCarty *v.* McCarty, 19 La. 300 (where description of land was correct except it said land seized was on West Bank of a certain bayou instead of on east bank); Dabbs *v.* Hemken, 3 Rob. (La.) 129. It is also held in Louisiana that as an insufficient description renders the sale void and leaves defendant unharmed he has no ground for an injunction. Henderson *v.* Hoy, 26 La. Ann. 156.

Where a failure to describe a growing crop can do no harm injunction will not issue. Saffold *v.* Foster, 75 Ga. 233.

Sale under a levy without the indorsement required by law on an execution issued after death of the judgment plaintiff will be enjoined upon application of defendant. Meek *v.* Bunker, 33 Iowa 169. But see Marks *v.* Stephens, 38 Oreg. 65, 63 Pac. 824, 84 Am. St. Rep. 750, where it was held that a motion to quash was the remedy.

58. Saffold *v.* Foster, 75 Ga. 233. And *compare* Lapene *v.* McCan, 28 La. Ann. 749.

Injunction in vacation.— An execution issued by the clerk after adjournment, without authority, which could not be quashed by the court because it was not in session, was properly restrained by the judge in vacation by injunction. Shackelford *v.* Apperson, 6 Gratt. (Va.) 451.

59. Triest *v.* Enslen, 106 Ala. 180, 17 So. 356; Henrie *v.* Orangeville Loan Assoc., 1 C. Pl. (Pa.) 43.

The fact that by mistake or omission credits were not entered on an execution is not ground for enjoining the writ. Brown *v.* Wilson, 56 Ga. 534; Rowley *v.* Kemp, 2 La. Ann. 360; Gorsuch *v.* Thomas, 57 Md. 334. The remedy is by motion in the court which rendered the judgment for a rule on the judgment creditor to show cause why the credits should not be allowed (Gorsuch *v.* Thomas, *supra*) and upon the rule an execution should be stayed until the facts are ascertained; but where an execution issued against principal and security, and part of the money was made by the sheriff by levy and sale of the principal's effects, but he returned it "No money made," and an alias issued against the security for the whole debt, the sheriff having absconded, the security was entitled to relief in equity, and the court had jurisdiction to enjoin for the amount made by the sale (Fryer *v.* Austill, 2 Stew. (Ala.) 119).

The maxim that he who asks for equity must do equity has been held applicable to a defendant who asks an injunction against an excessive execution. See Russell *v.* Cleary, 105 Ind. 502, 5 N. E. 414. Where execution issued for costs, it will not be enjoined for being excessive where it does not appear that the judgment debtor has paid the interest on the costs, for a judgment for costs bears interest. Eaton *v.* Markeley, 126 Ind. 123, 25 N. E. 150. *Contra*, Harper *v.* Terry, 16 La. Ann. 216; Barrow *v.* Robichaux, 14 La. Ann. 207. See also Michel *v.* Meyer, 27 La. Ann. 173. But an injunction will not issue for a trivial error, in the costs, especially where no presentation of the claim and demand of payment is shown; the error may be corrected under an order of court in the clerk's office. Calderwood *v.* Trent, 9 Rob. (La.) 227. The injunction should be perpetuated as to the excess alone; the creditor should be entitled to proceed with the sale for the amount actually due. Murphy *v.* Maskell, 2 La. Ann. 763. Where execution issues for the whole amount of a judgment, under which defend-

(II) *Execution Issued on Dormant Judgment.* If execution is not issued until after the lapse of the time provided by law for issuing it, the remedy is by motion in the original cause, not by injunction.[60]

b. Wrongful Levy on Property of Defendant in Execution — (I) *Personal Property.* By an almost universal rule an execution against personal property will not be enjoined unless it possesses some peculiar value or attribute, unless its sale would cause irreparable damage to its owner, or unless for some reason the owner has not an adequate remedy at law.[61] But if the seizure of goods would

ants are to pay a part into court and to retain the balance as distributees in their own right, an injunction for the amount paid and that to which they are entitled will be sustained, but dissolved for the rest. Millaudon *v.* Percy, 9 La. 441.

Injunction does not lie for an excessive seizure. Lambeth *v.* Sentell, 38 La. Ann. 691; Gusman *v.* De Poret, 33 La. Ann. 333; Hefner *v.* Hesse, 29 La. Ann. 149; Dabbs *v.* Hemken, 3 Rob. (La.) 123. If the debtor thinks that the sheriff has seized more property than was reasonably necessary to satisfy the judgment and costs, he may apply to the judge to issue a writ and demand an appraisement. Having this remedy, he is not entitled to an injunction. Lambeth *v.* Sentell, *supra*; Dabbs *v.* Hemken, *supra*.

60. Mayo *v.* Bryte, 47 Cal. 626. *Contra*, Krinke *v.* Parish, 9 Ohio Cir. Ct. 141, 6 Ohio Cir. Dec. 30 [*citing* Miller *v.* Longacre, 26 Ohio St. 291]; North *v.* Swing, 24 Tex. 193. In Seymour *v.* Hill, 67 Tex. 385, 3 S. W. 313, it was said that the reason that injunction would issue was that after the expiration of the year from rendition of the judgment, it is presumed from the delay in taking out execution that the judgment has been paid; that this presumption is rebuttable by proof that it has not in fact been paid and, when rebutted, the injunction will be dissolved and any money which had come into the hands of the sheriff under the execution will be applied to the judgment under a proper prayer therefor on the part of the creditor. See Gabel *v.* McMahan, 1 Tex. App. Civ. Cas. § 716. In Clegg *v.* Varnell, 18 Tex. 294, it was queried whether a claimant of property levied on as that of another could enjoin the sale, when the execution was not issued within the twelve months provided by law. In Hayes *v.* Bass, 1 Tex. App. Civ. Cas. § 15, it was said that an injunction was unauthorized unless a case as presented comes within some of the exceptions pointed out by the statute.

61. *Alabama.*— Bissell *v.* Lindsay, 9 Ala. 162.

Arkansas.— Driggs Bank *v.* Norwood, 49 Ark. 136, 4 S. W. 448, 4 Am. St. Rep. 30; Jacks *v.* Bigham, 36 Ark. 481; Stillwell *v.* Oliver, 35 Ark. 184; Oliver *v.* Memphis, etc., R. Co., 30 Ark. 128; Murphy *v.* Hardison, 29 Ark. 340.

Illinois.— See Fahs *v.* Roberts, 54 Ill. 192.

Louisiana.— Calderwood *v.* Prevost, 9 Rob. 182.

Minnesota.— La Crosse, etc., Packet Co. *v.* Reynolds, 12 Minn. 213.

Mississippi.— Beatty *v.* Smith, 2 Sm. & M. 567.

New Jersey.— Reeves *v.* Cooper, 12 N. J. Eq. 223.

Texas.— Williams *v.* Farmers' Nat. Bank, 22 Tex. Civ. App. 581, 56 S. W. 261.

Virginia.— Beckley *v.* Palmer, 11 Gratt. 625 [*citing* Morrison *v.* Spear, 10 Gratt. 228].

United States.— Chafee *v.* Coggshall, 5 Fed. Cas. No. 2,571*a*, holding that if it does not appear from the allegations in the bill or from the argument that any legal injury will result to the execution debtor from the sale, it will not be enjoined.

England.— Garstim *v.* Asplin, 1 Madd. 150.

See 21 Cent. Dig. tit. "Execution," § 497 *et seq.*

Contra.— Grant *v.* Cole, 23 Wash. 542, 63 Pac. 263, holding that, although there is a remedy at law, the remedy by injunction is the speedier and better.

Family relics.— Ottomans, vases, and solar lamps and a china tea set are not exempt from execution on the ground that they are family relics. An injunction will not issue to protect them, especially as they had been presented to the testator's wife in his lifetime by friends and relatives as family presents and she was not a party to the suit, and as the complainants have not offered to do equity by paying the value of the articles they wish to protect. Johnson *v.* Connecticut Bank, 21 Conn. 148.

Property in custodia legis.— A temporary injunction may be granted to restrain the sale of personal property, when it appears that such property is *in custodia legis*, and is not subject to the satisfaction of the judgment under which the execution issued, and a sale of the same would confer no title in the purchaser. Ryan *v.* Parris, 48 Kan. 765, 30 Pac. 172.

Sale of fixtures as personal property may be prevented by injunction. Landell *v.* Harrison, 16 Phila. (Pa.) 85 [*citing* Morris' Appeal, 88 Pa. St. 368].

Sale under execution of a valuable oil painting will not be enjoined, although no market exists for property of that kind except in another state. Nashville Trust Co. *v.* Weaver, 102 Tenn. 66, 50 S. W. 763.

Slaves were held in many of the states to be property of such a peculiar character that their sale might be enjoined. Sanders *v.* Sanders, 20 Ark. 610 [*overruling* Lovette *v.* Longmire, 14 Ark. 339, to this extent]; Beatty *v.* Smith, 2 Sm. & M. (Miss.) 567. See Jarrell *v.* Ebbins, 2 Patt. & H. (Va.) 579. But this was so only to a limited ex-

work irremediable damage, as by destroying the credit and business of a merchant, injunction would be proper.[62]

(II) *Land.* An injunction will not lie to restrain the sale of land under execution where there is an adequate legal remedy to protect the title.[63] But to prevent a cloud upon the title, equity will sometimes enjoin a sale of lands on execution.[64] A sale of real property under an execution void upon its face would not pass a cloud upon the title and therefore a court of equity will not interfere to enjoin the sale.[65] A sale of an entire tract of land at one time instead of by

tent in some jurisdictions. Williams *v.* Wright, 9 Humphr. (Tenn.) 493; Randolph *v.* Randolph, 6 Rand. (Va.) 194. In Du Pre *v.* Williams, 58 N. C. 96, it was held that a slave possessed no peculiar value so that a sale of it will cause irreparable injury, that if a wrongful sale was made adequate reparation could be obtained at law.

Several levies and several sheriff's indemnitors.— In New York the court is bound to approve an undertaking indemnifying the sheriff from liability for a levy, etc., if the indemnitors are responsible, and the sheriff is thereby discharged from all liability. It was held that, where several levies are made for which there are several indemnitors and where consequently it is uncertain for what property each indemnitor is liable, there is no certain and adequate remedy at law for the levy, if wrongful, and a creditor, on sufficient security being given, should be restrained from enforcing his execution until the rights of the parties are determined. Newcombe *v.* Irving Nat. Bank, 51 Hun (N. Y.) 220, 4 N. Y. Suppl. 37, 39. But in Wiley *v.* Bridgman, 1 Head (Tenn.) 68, it was held that where several creditors had executions at law on a piece of land any one of them was protected adequately at law by his rights in the distribution of the fund; that therefore a bill in equity to restrain a sale of the land and asking a decree of sale in chancery should be dismissed on demurrer.

62. McCreery *v.* Sutherland, 23 Md. 471, 87 Am. Dec. 578; Sumner *v.* Crawford, (Tex. Civ. App. 1897) 41 S. W. 825. See also *Ex p.* Grimball, T. U. P. Charlt. (Ga.) 153.

Where there is a remedy by replevin at common law or by the proceeding called an intervention and third opposition, which in the jurisprudence of Louisiana has been substituted for the common-law remedy, there is no necessity for resorting to equity to restrain the sale of personal property belonging to a state seminary of learning after it has been levied on. Featherman *v.* Louisiana State Seminary, 8 Fed. Cas. No. 4,713, 2 Woods 71.

63. Rice *v.* Macon, 117 Ga. 401, 43 S. E. 773; Covert *v.* Bray, 26 Ind. App. 671, 60 N. E. 709; Hahn *v.* Willis, 31 Tex. Civ. App. 643, 73 S. W. 1084. In San Francisco *v.* Pixley, 21 Cal. 56, it was said that whether an application for relief against a voidable execution sale of tracts of land should be presented by motion or by bill depended upon the circumstances of each case.

An injunction to restrain the sale of improvements on land as personalty would not fall within the provisions of S. D. Code Civ. Proc. § 4649, which allows an injunction under certain conditions. Beatty *v.* Smith, 14 S. D. 24, 84 N. W. 208.

If a homestead right has been judicially recognized and the judgment affirmed on appeal and the judgment still remains in force seizure and sale of the property may be enjoined. Calvit *v.* Williams, 35 La. Ann. 322.

64. *California.*— Roth *v.* Insley, 86 Cal. 134, 24 Pac. 853; Porter *v.* Pico, 55 Cal. 165; Pixley *v.* Huggins, 15 Cal. 127. In Goldstein *v.* Kelly, 51 Cal. 301, it was held to be discretionary with the court to grant the injunction.

Delaware.— Sharpe *v.* Tatnall, 5 Del. Ch. 302.

Florida.— Budd *v.* Long, 13 Fla. 288.

Illinois.— Groves *v.* Webber, 72 Ill. 606; Bennett *v.* McFadden, 61 Ill. 334; Christie *v.* Hale, 46 Ill. 117.

Indiana.— Knightstown First Nat. Bank *v.* Deitch, 83 Ind. 131; Davis *v.* Clark, 26 Ind. 424, 89 Am. Dec. 471. And this even though the sale passed no title to the purchaser. Zimmerman *v.* Makepeace, 152 Ind. 199, 52 N. E. 992.

Iowa.— Key City Gaslight Co. *v.* Munsell, 19 Iowa 305.

Massachusetts.— Stevens *v.* Mulligan, 167 Mass. 84, 44 N. E. 1086; O'Hare *v.* Downing, 130 Mass. 16.

Missouri.— Vogler *v.* Montgomery, 54 Mo. 577. *Contra,* Kuhn *v.* McNeil, 47 Mo. 389; Drake *v.* Jones, 27 Mo. 428. In State *v.* Tiedemann, 69 Mo. 306, 33 Am. Rep. 498, injunction issued to prevent the sale of public school property on the ground that if the "school house was not vendible under execution, equity would interfere to prevent a cloud from being cast on the title by reason of a void sale, and also to prevent a multiplicity of suits springing from such void act."

New Hampshire.—See Tucker *v.* Kenniston, 47 N. H. 267, 93 Am. Dec. 425.

New York.— Oakley *v.* Williamsburgh, 6 Paige 262; Pettit *v.* Shepherd, 5 Paige 493, 28 Am. Dec. 437.

Ohio.— Norton *v.* Beaver, 5 Ohio 178; U. S. Bank *v.* Schultz, 2 Ohio 471.

Rhode Island.— See Kenyon *v.* Clarke, 2 R. I. 67.

United States.— Walker *v.* Colby Wringer Co., 14 Fed. 517.

See 21 Cent. Dig. tit. "Execution," § 497 *et seq.*

65. *Florida.*— Davidson *v.* Seegar, 15 Fla. 671.

Indiana.— Mead *v.* McFadden, 68 Ind. 340.

separate parcels will usually be enjoined,[66] especially where it appears that the land will be sold at a sacrifice by that method.[67] If the remedy at law cannot be obtained before the land will be sold injunction ought to be granted.[68]

c. Levy on Property of Third Persons — (I) *GENERALLY* — (A) *On Land.* The sale of land of complainant under execution against another will not create a cloud on his title and will not be enjoined.[69] Much less would a court of equity

Minnesota.— Honson *v.* Johnson, 20 Minn. 194.

Missouri.— Russell *v.* Interstate Lumber Co., 112 Mo. 40, 20 S. W. 26.

Montana.— McCormick *v.* Riddle, 10 Mont. 467, 26 Pac. 202.

Texas.— Hahn *v.* Willis, 31 Tex. Civ. App. 643, 73 S. W. 1084.

See 21 Cent. Dig. tit. "Execution," § 497 *et seq.*

An injunction to restrain a levy of execution on a contingent remainder in land should not be granted, as no title would pass to the purchaser at a sale under such execution; and there would be an ample remedy at law to recover the land from him. Bristol *v.* Hallyburton, 93 N. C. 384.

Equity will take jurisdiction by injunction to preserve the inheritance; and when a mill is about to be dismantled by execution creditors of the owner, who have levied on the fixtures attached thereto, equity will interfere to prevent it. Patton *v.* Moore, 16 W. Va. 428, 37 Am. Rep. 789.

Pending an action to set aside the judgment on which it issued, equity will not enjoin an execution sale of land, since the purchaser at the sale will be bound by the result of the other action, and hence no irreparable injury can result. Hart *v.* Marshall, 4 Minn. 294.

66. Williams *v.* Klein, 9 Kulp (Pa.) 442 [*following* Donaldson *v.* Danville Bank, 20 Pa. St. 245].

67. Reynolds, etc., Estate Mortg. Co. *v.* Kingsberry, 118 Ga. 254, 45 S. E. 235.

68. Plummer *v.* Talbott, 50 S. W. 1097, 21 Ky. L. Rep. 30.

69. *California.*— Roman Catholic Archbishop *v.* Shipman, 69 Cal. 586, 11 Pac. 343.

Florida.— Barnes *v.* Mayo, 19 Fla. 542; Shalley *v.* Spillman, 19 Fla. 500 [*criticizing* Budd *v.* Long, 13 Fla. 288].

Kentucky.— Bouldin *v.* Alexander, 7 T. B. Mon. 424; Watkins *v.* Logan, 3 T. B. Mon. 20.

Minnesota.— Pelican River Milling Co. *v.* Maurin, 67 Minn. 418, 69 N. W. 1149, holding further that an injunction would not be granted because by reason of the threatened sale the insurance of the property had been canceled.

Missouri.— Kuhn *v.* McNeil, 47 Mo. 389; Drake *v.* Jones, 27 Mo. 428; Witthaus *v.* Washington Sav. Bank, 18 Mo. App. 181.

Nebraska.—Rickards *v.* Coon, 13 Nebr. 420, 14 N. W. 163.

New Jersey.— American Dock, etc., Co. *v.* Public School Trustees, 35 N. J. Eq. 181; Dawes *v.* Taylor, 35 N. J. Eq. 40.

New York.— Osborn *v.* Taylor, 5 Paige 515.

North Carolina.— Bostic *v.* Young, 116 N. C. 766, 21 S. E. 552.

Pennsylvania.— Small *v.* Greenough, 6 Pa. Cas. 467, 9 Atl. 337. See also Taylor's Appeal, 93 Pa. St. 21.

Texas.— Hardy *v.* Broaddus, 35 Tex. 668.

West Virginia.—Dunn *v.* Baxter, 30 W. Va. 672, 5 S. E. 214.

See 21 Cent. Dig. tit. "Execution," § 507.

In Texas the rule stated in the text was firmly established by a long line of decisions, but since Sayles Civ. St. art. 1340*a*, gives an order of sale under a judgment foreclosing a lien the force of a writ of possession, injunction will lie to restrain a sale under such order of land belonging to a stranger to the foreclosure judgment. Wofford *v.* Booker, 10 Tex. Civ. App. 171, 30 S. W. 67.

Levy on heir's interest.— A bill in equity will lie to enjoin a sale on an execution obtained by a creditor of A and levied upon what was claimed to be his interest in the estate of his father, who had died intestate, leaving real estate, but who before his decease had made an advancement to A exceeding what would have been his portion of his father's estate. Dyer *v.* Armstrong, 5 Ind. 437.

Levy on life-estate an embarrassment to administration.— The levy of an execution upon a life-estate in land belonging to a decedent's estate will not be enjoined at the instance of the executors, on the ground that it will embarrass the settlement of the estate concerning the personalty. The proper place for the trial of the validity of a title, by virtue of the levy of an execution, is in an action of ejectment. Johnson *v.* State Bank, 21 Conn. 148. See also Koch *v.* Brockhan, 111 Ga. 334, 36 S. E. 695.

Owner of fee cannot enjoin an execution against a life-tenant, although the levy embraces the fee and is not restricted to the estate for life, for a sale and a conveyance by the sheriff would pass only such an estate as defendant in execution has, and interest in the fee would not be affected thereby. Stone *v.* Franklin, 89 Ga. 195, 15 S. E. 47. *Contra*, Bell *v.* Murray, 13 Colo. App. 217, 57 Pac. 488; Scobey *v.* Walker, 114 Ind. 254, 15 N. E. 674; Bishop *v.* Moorman, 98 Ind. 1, 49 Am. Rep. 731 [*citing* 3 Pomeroy Eq. § 1399]; Key City Gaslight Co. *v.* Munsell, 19 Iowa 305.

Where judgment debtor has been privy to the title.— The owner of real property has a right to restrain by injunction the sale thereof under an execution levied upon a judgment against a third party who has been privy to the title, which is not a lien thereon, and for which the owner is not liable. Wilhelm *v.* Woodcock, 11 Oreg. 518, 5 Pac. 202.

listen to a complainant who, out of possession, claims land levied on and is suing the defendant in execution for the possession thereof.[70] But equity will protect an equitable interest in land, as otherwise the complainant would be without remedy.[71] So will the court interfere on recognized grounds of equitable relief as fraud or irreparable injury[72] or to prevent a multiplicity of suits.[73]

(B) *On Personal Property.*[74] Neither will equity enjoin the sale of the personal property of a complainant under an execution against another,[75] unless the property possesses peculiar value,[76] or unless the sale would result in consequential damages or the claim of one party involves or depends on some equitable interest or feature.[77] The complainant should resort to the remedy given him at law by replevin,[78] or sue the officer in trespass,[79] or proceed by affidavit and bond to try the right of property.[80] Where the remedy at law is not adequate an injunction

Injunction for a purchaser at sale under execution from federal court against an execution from state court.— See Hall *v.* Boyd, 52 Ga. 456.

70. McPhee *v.* Veal, 76 Ga. 656.

71. Orr *v.* Pickett, 3 J. J. Marsh. (Ky.) 269.

72. See American Dock, etc., Co. *v.* Public School Trustees, 35 N. J. Eq. 181.

73. Bean *v.* Everett, 56 S. W. 403, 21 Ky. L. Rep. 1790.

74. Claims of third persons see *infra*, IX.

75. *California.*— Markley *v.* Rand, 12 Cal. 275.

Indiana.— Henderson *v.* Bates, 3 Blackf. 460.

Kentucky.— Boyce *v.* Waller, 9 Dana 478.

Mississippi.— See Sevier *v.* Ross, Freem. 519.

Pennsylvania.— Eckfelt *v.* Starr, 5 Phila. 497; Anderson *v.* Pfanner, 12 Montg. Co. Rep. 157.

Texas.— George *v.* Dyer, 1 Tex. App. Civ. Cas. § 780.

Virginia.— Poage *v.* Bell, 3 Rand. 586; Miller *v.* Crews, 2 Leigh 576.

United States.— Van Norden *v.* Morton, 99 U. S. 378, 25 L. ed. 453.

See 21 Cent. Dig. tit. "Execution," § 507.

Contra.— Twitty *v.* Clarke, 14 La. Ann. 503.

Where complainant has same name as one of defendants he may have an injunction upon alleging that he was not a party to the note upon which the action was founded and that he was not given notice of the pendency of the suit by service of process or otherwise. Givens *v.* Tidmore, 8 Ala. 745.

Where the property of a stranger is taken under execution from the possession of the judgment debtor, he (the debtor) cannot maintain an action to enjoin the sale, since he is not in any way injured by the proceeding. Mitchell *v.* Lay, 3 La. Ann. 593.

76. Allen *v.* Winstandly, 135 Ind. 105, 34 N. E. 699; Baker *v.* Rinehard, 11 W. Va. 238.

Where slaves were levied upon as the property of the execution defendant the rule of the text was applied in favor of the claimant, notwithstanding the remedy at law. Bell *v.* Greenwood, 21 Ark. 249; Sanders *v.* Sanders, 20 Ark. 610 [partially *overruling* Lovette *v.* Longmire, 14 Ark. 339]; Sevier *v.* Ross, Freem. (Miss.) 519; Caperton *v.* Huddleston, 7 Humphr. (Tenn.) 452; Allen *v.* Freeland, 3 Rand. (Va.) 170; Wilson *v.* Butler, 3 Munf. (Va.) 559; Randolph *v.* Randolph, 3 Munf. (Va.) 99. And this without alleging or proving that the slaves have a peculiar value to him. Sims *v.* Harrison, 4 Leigh (Va.) 346; Harrison *v.* Sims, 6 Rand. (Va.) 506; Sevier *v.* Ross, *supra*. *Contra*, see Kendrick *v.* Atnold, 4 Bibb (Ky.) 235; Nesmieth *v.* Bowler, 3 Bibb (Ky.) 487, unless some circumstances show that the remedy at law in trespass or detinue would be inadequate.

77. Allen *v.* Winstandly, 135 Ind. 105, 34 N. E. 699.

Where ultimately a resort to equity would be necessary, as by action of account, injunction will issue where money belonging to one person is claimed by another under an execution. Worthington *v.* Broom, 1 Root (Conn.) 279.

78. Allen *v.* Winstandly, 135 Ind. 105, 34 N. E. 699; Van Norden *v.* Morton, 99 U. S. 378, 25 L. ed. 453.

Where a wife made an apparent sale of her paraphernal property to her husband's creditor, but in fact received no consideration for the same, and the real purpose was to secure her husband's debt, and the creditor never took possession, she is entitled to have enjoined the sale of the property under execution against the creditor. Broussard *v.* Le Blanc, 44 La. Ann. 880, 11 So. 460.

Where the code gives a married woman authority to resort to all remedies known to a court of equity or of law for redress of injury or assertion of a right, it is not intended to confound the two jurisdictions. If she has a remedy at law by replevin or by action she should not go into equity. Frazier *v.* White, 49 Md. 1.

79. Miller *v.* Crews, 2 Leigh (Va.) 576; Van Norden *v.* Morton, 99 U. S. 378, 25 L. ed. 453.

80. Bayless *v.* Alston, 1 Tex. App. Civ. Cas. § 1031. At least some good reason must be alleged in the petition why he did not resort to his legal remedies. George *v.* Dyer, 1 Tex. App. Civ. Cas. § 780.

Where there is a proper case for an interpleader at law, injunction will not issue. Eckfelt *v.* Starr, 5 Phila. (Pa.) 497, a proper case for the interpleader law.

can be obtained;[81] as for instance where the levy would mean loss of credit and commercial ruin.[82]

(II) *Wife of Debtor.* Equity will enjoin an execution upon a judgment against a husband levied on the separate property of the wife.[83] In Pennsylvania it is held that if the title of the wife is disputed[84] the court should not assume jurisdiction and enjoin execution, for it would thus withdraw from a trial by jury questions which would properly arise in ejectment proceedings by the purchaser at the execution sale.[85] In Texas injunction will not lie, except where the wife applies for an injunction to restrain the sale of the homestead upon execution against the husband,[86] for trespass to try title is an adequate remedy.[87] Where husband is part owner of the property, there ought to be no objection to selling the husband's interest.[88] If the wife has conveyed the property levied on she has no right to an injunction;[89] but it seems her grantee would.[90] If the husband make a fraudulent conveyance to his wife, injunction will not issue against execution levied on the property thus conveyed.[91]

81. Notwithstanding a statute providing for the taking of an indemnifying bond by the officer levying on the property. Walker *v.* Hunt, 2 W. Va. 491, 98 Am. Dec. 779.

82. Watson *v.* Sutherland, 5 Wall. (U. S.) 74, 18 L. ed. 580. See also Southwestern Tel., etc., Co. *v.* Howard, 3 Tex. Civ. App. 335, 22 S. W. 524 [*citing* Story Eq. Jur. § 928].

Where defendant, a constable, who was financially irresponsible, under execution against a third person, seized plaintiff's stock of goods, took possession of her store and of the books and papers of the business and locked up the store, thus completely interrupting the business, plaintiff's remedy at law is inadequate, and an injunction will lie. Sickels *v.* Combs, 10 Misc. (N. Y.) 551, 32 N. Y. Suppl. 181.

83. *Alabama.*— See Lewen *v.* Stone, 3 Ala. 485.

California.— Einstein *v.* State Bank, 137 Cal. 47, 50, 69 Pac. 616 [*quoting* High Injunct. § 1387].

Idaho.— Young *v.* Hailey First Nat. Bank, 4 Ida. 323, 39 Pac. 557.

Louisiana.— Barrow *v.* Stevens, 27 La. 343.

New Jersey.— Cass *v.* Demarest, 37 N. J. Eq. 393.

North Carolina.— Smith *v.* Wadesborough Bank, 57 N. C. 303.

See 21 Cent. Dig. tit. "Execution," § 513.

In Arkansas in Lovette *v.* Longmire, 14 Ark. 339, it was said that if a wife has a complete and adequate remedy at law for the sale of her separate property to pay her husband's debts, equity will not interfere to enjoin a sale on execution.

In Illinois it is held that the wife has an adequate remedy at law by action of trespass or other appropriate action. Greenberg *v.* Holmes, 100 Ill. App. 186.

84. **Where the wife's title is clear,** injunction will be granted on her application. And the mere allegation that the wife's title is disputed does not present a condition of a disputed title. Allen *v.* Benners, 10 Phila. (Pa.) 10.

85. Shober *v.* Harrison, 3 Pa. Super. Ct. 188; Smith *v.* Eline, 4 Pa. Dist. 490; Boyle *v.* Ramsey, 2 Leg. Gaz. (Pa.) 73, 1 Leg. Gaz. (Pa.) 45; Bell *v.* Savage, 1 Woodw. (Pa.) 30. It has been said that equity will not enjoin a sheriff's levy on a husband's property on extrinsic evidence as to whether the property levied on belonged to the husband or the wife, and as to the source of the money with which the husband purchased it originally. See Sommers *v.* Howey, 1 Pa. Super. Ct. 318, 38 Wkly. Notes Cas. (Pa.) 165 [*affirming* 4 Pa. Dist. 723, 17 Pa. Co. Ct. 171].

The rule is the same under the act of 1850 which forbids the levy upon the separate property of a married woman for the debts of her husband. Walker's Appeal, 112 Pa. St. 579, 4 Atl. 13.

The rule would be peculiarly appropriate where the creditor has a right to proceedings against the property to test the title. Winch's Appeal, 61 Pa. St. 424.

86. Baxter *v.* Dear, 24 Tex. 17, 76 Am. Dec. 89. See also Samuelson *v.* Bridges, 6 Tex. Civ. App. 425, 430, 25 S. W. 636.

87. Spencer *v.* Rosenthall, 58 Tex. 4. See Purinton *v.* Davis, 66 Tex. 455, 1 S. W. 343; Perrin *v.* Stevens, (Tex. Civ. App. 1895) 29 S. W. 927.

88. Braden *v.* Gose, 57 Tex. 37, where one third of the land levied on was community property. See also Boyle *v.* Ramsey, 1 Leg. Gaz. (Pa.) 45.

If the community property be the homestead of the complainant wife and of her husband, the situation is altered and injunction will lie. Ross *v.* Howard, 25 Wash. 1, 64 Pac. 794.

89. Flanagan *v.* State Bank, 32 Ala. 508.

A conveyance which is in reality a mortgage has not this effect. Ross *v.* Howard, 25 Wash. 1, 64 Pac. 794.

90. For to permit an execution sale would cast a cloud on plaintiff's title, the invalidity of which could only be shown by evidence *dehors* the record. Roe *v.* Dailey, 1 Tex. Unrep. Cas. 247.

91. Jones *v.* Word, 61 Ga. 26; Good *v.* Merkowitz, 35 Mo. App. 658. See Simson *v.* Bates, 10 Phila. (Pa.) 66.

(III) *DEBTOR'S VENDEE*—(A) *Generally*—(1) LAND. Where creditor's judgment is not for any reason a lien upon the land of the debtor, a *bona fide* purchaser from the debtor may in many jurisdictions enjoin the creditor from selling the land purchased on the ground that the sale would cast a cloud on his title.[92] In other jurisdictions the purchaser is left to his remedy at law;[93] even in these jurisdictions, however, equity will interpose where there are other grounds for its intervention, as, for instance, in the case of fraud.[94] Where lien has attached of course it can be enforced.[95]

92. *Alabama.*— Martin *v.* Hewitt, 44 Ala. 418. *Contra,* Gunn *v.* Harrison, 7 Ala. 585, 587, where the court said: "The statute which authorizes him [the vendee] to interpose his claim and arrest the progress of the execution, is a cheap and adequate remedy at law." See also Eufaula Nat. Bank *v.* Pruett, 128 Ala. 470, 30 So. 731.

California.— Einstein *v.* State Bank, 137 Cal. 47, 69 Pac. 616; Pixley *v.* Huggins, 15 Cal. 127 (where there is a very clear exposition of what constitutes a cloud upon a title); Shattuck *v.* Carson, 2 Cal. 588. But see Fitzgibbon *v.* Laumeister, (Cal. 1898) 51 Pac. 1078.

Florida.— Wilson *v.* Matheson, 17 Fla. 630. But a purchaser at an execution sale under a void judgment is not entitled to enjoin the sale of property under an execution on a valid judgment. Orlando First Nat. Bank *v.* Greig, 43 Fla. 412, 31 So. 239.

Illinois.— Groves *v.* Webber, 72 Ill. 606.

Indiana.— Whitehill *v.* Fauber, 97 Ind. 169.

Nebraska.—Predohl *v.* O'Sullivan, 59 Nebr. 311, 80 N. W. 903.

Rhode Island.— Linnell *v.* Battey, 17 R. I. 241, 21 Atl. 606.

Tennessee.— Merriman *v.* Polk, 5 Heisk. 717.

Wisconsin.— Goodell *v.* Blumer, 41 Wis. 436, a court of equity having inherent power as such to give this remedy.

See 21 Cent. Dig. tit. "Execution," § 508.

An act of sale or procès verbal set up as conveying title has no effect as to third persons until duly recorded or registered in the parish where the property is located and consequently as to them plaintiff is not the legal owner thereof at the date of the seizure of defendant. An injunction therefore will not lie to prevent the sale of property seized by third persons. Lyons *v.* Cenas, 22 La. Ann. 113. As to contents, form, and requisites of the procès verbal see La. Code Proc. § 942.

Where the deed of the purchaser was held to be a mortgage there was no ground for restraining the sale to prevent a cloud upon the title. Purdy *v.* Irwin, 18 Cal. 350.

93. Swayze *v.* Hackettstown Nat. Bank, 44 N. J. Eq. 9, 13 Atl. 670; Sheldon *v.* Stokes, 34 N. J. Eq. 87. See Freeman *v.* Elmendorf, 7 N. J. Eq. 475. *Compare* Carroll *v.* Chaffe, 35 La. Ann. 83.

Remedy by trespass to try title.— Mann *v.* Wallis, 75 Tex. 611, 12 S. W. 1123; Whitman *v.* Willis, 51 Tex. 421, 429. See Merchants', etc., Bank *v.* May, 1 Lack. Leg. Rec. (Pa.) 500. In Chamberlain *v.* Baker, 28 Tex. Civ. App. 499, 500, 67 S. W. 532, the Texas court of civil appeals followed the authorities of the state, but with regret: "If the question were an open one in this State, we would be inclined to agree with the contention of appellant that the facts stated constituted a threatened cloud upon title, and that equity by injunction would be the proper remedy to prevent it. Such a ruling, in our opinion, would be in keeping with principle and the better reason that should govern this subject."

94. Wheeler *v.* Alderman, 34 S. C. 533, 13 S. E. 673, 27 Am. St. Rep. 842. But see Freeman *v.* Elmendorf, 7 N. J. Eq. 475.

Where a contract for sale of land was made but the title did not pass until after the judgment upon which execution was sought to be issued against the land in question and where the vendee had entered and made valuable improvements but had paid no part of the consideration money, it was held that the judgment creditor would be equally benefited by taking the purchase-money as by executing the judgment against the land, and that upon the vendee's paying of the money into court together with the interest due he would be entitled for protection against the judgment by a perpetual injunction. Lane *v.* Ludlow, 14 Fed. Cas. No. 8,052, 2 Paine 591. See also McSorley *v.* Ludlow, 16 Fed. Cas. No. 8,927, 2 Paine 600, where the money had been paid over and injunction was granted. And see Downing *v.* Mann, 43 Ala. 266. In Brown *v.* Prescott, 63 N. H. 61, an oral contract for the sale of land was made and the buyer entered and made improvements, all of which the creditor of the seller knew, but took no action to prevent. The court held that under the circumstances the buyer's right to a specific performance of the contract of sale was not affected and that to protect his right the court would enjoin the creditor of the seller from levying execution on the land. In Lane *v.* Ludlow, *supra,* it was said that the vendee was the equitable owner of the land and equity would therefore protect his right. See Rodriguez *v.* Buckley, (Tex. Civ. App. 1895) 30 S. W. 1123.

Where the judgment appeared satisfied of record, but the vendee did not allege in his bill that he was misled, and where it appeared that he had not yet paid the purchase-money and could recoup the amount of the judgments from it and so be uninjured, he was not allowed an injunction. Yeates *v.* Mead, 65 Miss. 89, 3 So. 651.

95. Moore *v.* Wright, 14 Rich. Eq. (S. C.) 132. See Fox *v.* Kline, 85 N. C. 173. See also Wagner *v.* Pegues, 10 S. C. 259.

(2) PERSONAL PROPERTY. The buyer of personal property is not entitled to enjoin an execution against the property he has bought from the debtor unless the property has some peculiar value,[96] or unless it can be shown that the damage would be irreparable,[97] or in other words unless there is no speedy or adequate remedy at law.[98]

(B) *When Conveyance Fraudulent.* By the statute of Elizabeth[99] the creditor had a legal right to proceed at law and to sell the property of a debtor conveyed on voluntary consideration in fraud of his creditors, or he might, as before the passage of the statute, go into equity to have the fraud adjudged. If he exercised his right under the statute the old courts of equity would not interpose at the instance of the purchaser to prevent or remove a cloud on his title.[1] This may be said to be the usual rule at the present day.[2]

(C) *When Other Property Remaining to Debtor.* The doctrine of marshaling[3] has been successfully invoked in many jurisdictions in aid of the vendee of a judgment debtor to compel the creditor to resort to the property still in the possession of the debtor before selling the land of the debtor's vendee to satisfy the judgment. Injunction may issue against the creditor who insists on proceeding first against the vendee.[4] The doctrine will not be extended so far as to inter-

96. As for instance where the property was slaves. See *supra*, note 61. See also Sevier *v.* McWhorter, 27 Miss. 442.

97. Lewis *v.* Levy, 16 Md. 85. This can appear only upon a clear showing of plaintiff's right and of defendant's insolvency. More *v.* Ord, 15 Cal. 204, where the buyer had bought the debtor's interest in the partnership.

98. Ford *v.* Rigby, 10 Cal. 449.

Where fraud infects the transactions of the parties equity will take jurisdiction. See McFarland *v.* Dilly, 5 W. Va. 135.

99. St. 13 Eliz. c. 5; 29 Eliz. c. 5.

1. Southerland *v.* Harper, 83 N. C. 200. See, generally, FRAUDULENT CONVEYANCES.

2. *Colorado.*— See Crawford *v.* Lamar, 9 Colo. App. 83, 47 Pac. 665.

Louisiana.— Lewis *v.* Dinkgrave, 24 La. Ann. 489; Dewey *v.* Bird, 22 La. Ann. 168.

Maryland.— Welde *v.* Scotten, 59 Md. 72.

North Carolina.— Southerland *v.* Harper, 83 N. C. 200.

Oregon.— Coolidge *v.* Forward, 11 Oreg. 118, 2 Pac. 292.

Tennessee.— Taylor *v.* Harwell, 5 Humphr. 331, where the property was personalty.

Texas.— See Chamberlain *v.* Baker, 28 Tex. Civ. App. 499, 67 S. W. 532.

See 21 Cent. Dig. tit. "Execution," § 510.

One who has purchased slaves of a judgment debtor a short time before the judgments were rendered to obtain an injunction to restrain the levy of execution issued upon the judgments on the slaves must make out a clear and undisputed title, or a purchase for a fair and *bona fide* consideration, above suspicion or doubt in relation to its fairness. Warnick *v.* Michael, 11 Gill & J. (Md.) 153.

3. That if one creditor may resort to two funds or pieces of property to satisfy his claim and another creditor has access to only one of the funds or pieces of property, he who has the double means of satisfaction may be compelled to first exhaust the fund to which the other creditor has not access. Aldrich *v.* Cooper, 8 Ves. Jr. 382, 2 White & T. Lead. Cas. 82, 96 note, 7 Rev. Rep. 86, 32 Eng. Reprint 402; Bispham Eq. Pt. 2, c. 6, § 340 *et seq.* See, generally, MARSHALING ASSETS AND SECURITIES.

There is, however, eminently respectable authority to the effect that the creditor cannot be compelled to resort to any one of several sources to obtain satisfaction; that on the contrary, he has the right to select what property of the judgment debtor shall be sold under his execution. Latimer *v.* Ballew, 41 S. C. 517, 521, 19 S. E. 792, 44 Am. St. Rep. 748 [*citing* McAliley *v.* Barber, 4 S. C. 45; Longworth *v.* Screven, 2 Hill (S. C.) 298, 27 Am. Dec. 381; Moore *v.* Wright, 14 Rich. Eq. (S. C.) 132]. See Evans *v.* Thibaults, 2 Miles (Pa.) 251. In Gunn *v.* Harrison, 7 Ala. 585, 588, where the court held that the vendee had an adequate remedy at law (see *supra*, VIII, D, 1), the court further held that there were no grounds for interference by a court of equity upon a showing that there was personal property in the hands of the vendor, which under his contract should have been delivered to the vendee, which the creditors might have levied on. "The creditors have the right to subject any property which belongs to the debtor, to the satisfaction of their debts. For aught this court can know, the property in his possession, is covered by other claims. Be this as it may, the right of the creditor to levy at his peril, on any property he claims to be the property of the debtor is indisputable."

4. Hurd *v.* Eaton, 28 Ill. 122; Sidener *v.* White, 46 Ind. 588 (where the court refused an injunction on the ground that the sheriff since the sale to the vendee complainant had wrongfully committed the execution defendant to remove from the state and sell other property subject to the lien of the execution); Russell *v.* Houston, 5 Ind. 180; Jackson *v.* Sloan, 76 N. C. 306 (holding that the purchaser of land from a partnership against which judgment has been obtained may restrain the judgment creditor from selling the

fere with the creditor's rights under his lien, or impose unreasonable delay or litigation and expense in the enforcement of his remedies.[5]

(iv) *Debtor's Surety.* That the principal has not been proceeded against has been held to authorize an injunction for the surety whose land has been levied on.[6]

(v) *Land Taken by Eminent Domain.* Land taken by eminent domain is in the custody of the law and no private claim can be permitted to conflict with the right of the public. An execution issued against the land will be stayed by injunction.[7]

d. Levy on Joint Property. The fact that the property levied on is jointly owned does not in some jurisdictions make an exception to the general rule[8] that injunction will not issue to prevent the sale of personal property,[9] particularly where the resistance to the levy has a fraudulent aspect.[10] Injunction has been issued to prevent the removal of the property that the debtor's share in it might first be determined,[11] and to protect the equity of one coöwner when the execution was issued at the instance of another coöwner.[12] Injunction is properly issued to protect infants' shares in real property held in trust.[13]

e. Levy on Trust Property. A sale of land under execution against the trustee would cloud the equitable title of a *cestui que trust* and will therefore be enjoined.[14] But the grantee of land subject to a trust who subsequently receives an interest in the land discharged of the trust cannot enjoin an execution against his interest in it.[15] Injunction is properly issued to protect infants' shares in real property held in trust.[16]

f. Payment or Tender of Debt. If the judgment has been satisfied and execution issues, the remedy is not by injunction but by motion to recall the execution and have satisfaction entered of record.[17] This rule, however, is not

land purchased, until an account can be taken of the proceeds in the hands of the sheriff and realize by the sale of other land of the partnership under execution by the creditor in order that it may be ascertained whether or not the creditor has satisfied his judgment); Jones *v.* Maney, 7 Lea (Tenn.) 341. See also Van Mater *v.* Holmes, 6 N. J. Eq. 575.

5. McCulloh *v.* Dashiell, 1 Harr. & G. (Md.) 96, 18 Am. Dec. 271; Meech *v.* Allen, 17 N. Y. 300, 72 Am. Dec. 465; U. S. *v.* Duncan, 25 Fed. Cas. No. 15,005, 4 McLean 207. See also Francis *v.* Herren, 101 N. C. 497, 8 S. E. 353.

6. Barnes *v.* Cavanagh, 53 Iowa 27, 3 N. W. 801, and this although the only available property of the principal debtor is encumbered, it being shown that the interest of the principal debtor in this property could be sold for the amount of the execution.

7. Moore *v.* Barrett, 6 Phila. (Pa.) 204.

8. See *supra*, VIII, D, 2, b, (I).

9. Schley *v.* Hale, 1 Tex. App. Civ. Cas. § 930.

10. Chappell *v.* Cox, 18 Md. 513.

11. Wheeler *v.* Wheeler, 39 N. C. 210.

12. Greene *v.* Haskell, 5 R. I. 447.

13. Simms *v.* Phillips, 51 Ga. 433, where none of the interests had been ascertained.

14. Clinch *v.* Ferril, 48 Ga. 365. See also Simms *v.* Phillips, 51 Ga. 433; Parks *v.* People's Bank, 97 Mo. 130, 11 S. W. 41, 10 Am. St. Rep. 295; South Presb. Church *v.* Hintze, 72 Mo. 363 [*affirming* 5 Mo. App. 578, where the title was vested in a trustee under a parol trust]; Dierks *v.* Martin, 16 Nebr. 120, 19 N. W. 598 [*distinguishing* Lansdale *v.* Smith, 106 U. S. 391, 1 S. Ct. 350, 27 L. ed. 219] (where person holding legal title had been plaintiffs' (complainants') agent in the purchase of the property and was their trustee, having taken title in his own name and constantly acknowledged their right to the premises; and where it was held that it was not necessary that the petition should show an excuse for plaintiff's delay); Hawkins *v.* Willard, (Tex. Civ. App. 1896) 38 S. W. 365; Rodriguez *v.* Buckley, (Tex. Civ. App. 1895) 30 S. W. 1123.

The trustee or cestui que trust under a trust bond conveying personal property cannot go into equity to enjoin a sale of the trust effects under an execution issued and levied by virtue of a subsequently acquired judgment, there being a complete and adequate remedy at law. Kuhn *v.* Mack, 4 W. Va. 186. See Johnson *v.* State Bank, 21 Conn. 148.

15. Stevens *v.* Mulligan, 167 Mass. 84, 44 N. E. 1086.

16. Simms *v.* Phillips, 51 Ga. 433, where none of the interests had been ascertained.

17. Parker *v.* Jones, 58 N. C. 276, 75 Am. Dec. 441; McRae *v.* Davis, 58 N. C. 140 [*citing* Fitzherbert Nat. Brev.]; Hall *v.* Taylor, 18 W. Va. 544. See Lansing *v.* Eddy, 1 Johns. Ch. (N. Y.) 49.

Defendant has three remedies: He can (1) sue the officer in trespass, (2) move to quash the execution, or (3) replevy the property sold thereunder. Parker *v.* Oxen-

universal.[18] It would be highly proper to enjoin an execution issued upon a decree after the decree has been satisfied, for thus a court of equity is taking its own method of regulating its own process.[19] Equity would properly take jurisdiction where the execution was being fraudulently used to oppress defendant.[20] The rule ought to be the same where a proper tender has been made; the defendant should employ his remedy at law, not an injunction.[21]

g. Garnishment of Debtor. In some jurisdictions a debtor who has been garnished may enjoin execution by his creditor until it is determined who is entitled to the money owed.[22] In others injunction is held not to be the proper remedy, but defendant is remitted to his remedy by stay.[23]

h. Where Remedy at Law Has Been Vainly Sought. But the rule under which a court of equity declines to interfere until after the application for relief has been made to the court in which the judgment was rendered has no application when relief has been sought and denied in that court. The denial of that court to grant relief gives to the court of equity the same authority to interfere as if the other court were powerless to render aid.[24]

dine, 85 Mo. App. 212 [*citing* St. Louis, etc., R. Co. *v.* Lowder, 138 Mo. 533, 39 S. W. 799, 60 Am. St. Rep. 565].

18. New Orleans *v.* Smith, 24 La. Ann. 405; Runyan *v.* Vandyke, 6 Ohio Dec. (Reprint) 601, 7 Am. L. Rec. 9; Harrison Mach. Works *v.* Templeton, 82 Tex. 443, 18 S. W. 601; Williams *v.* Bradbury, 9 Tex. 487.

Two executions at same time.— Injunction has issued to enjoin one of two executions in existence at same time. Newell *v.* Morton, 3 Rob. (La.) 102. Where two executions were issued each to a county and one was levied upon sufficient property, the other the court refused to stay when it appeared that defendant had obtained by default a stay of proceedings during which stay the property levied on had been withdrawn from the effect of the execution. Mills *v.* Thursby, 11 How. Pr. (N. Y.) 119.

19. McClellan *v.* Crook, 4 Md. Ch. 398. See Collier *v.* Sapp, 49 Ga. 93.

20. Especially where the bill alleges that the transaction is wholly within the knowledge of the defendants so that relief cannot be obtained at law. Rogers *v.* Atkinson, 1 Ga. 12.

21. See Shumaker *v.* Nichols, 6 Gratt. (Va.) 592, where it was doubted whether a court of equity would interfere to arrest an execution on a judgment at law on the ground that payment was tendered before execution issued; and where the court refused to interfere without proof that the money had been left in the hand by defendant. See Smith *v.* Dewey, 64 N. C. 463, holding that it is no ground for an injunction against an execution under a judgment in favor of an assignee in bankruptcy of a bank that the execution defendant (complainant), "being unable to obtain bills upon said bank," had tendered to the sheriff one-half the amount of the judgment in currency in satisfaction of the whole, and that it had been refused. In Jackson *v.* Law, 5 Cow. (N. Y.) 248, it was said that if the sheriff refused to receive the money tendered, a restraining order would be issued to him against making a sale or the remedy would be by directing satisfaction to be entered of record on payment to plaintiff.

In Iowa where injunctions are freely used to stay execution the remedy is applied in case of tender. Fisher *v.* Moore, 19 Iowa 84.

22. Morgan *v.* Peet, 8 Mart. N. S. (La.) 395; Preston *v.* Harris, 24 Miss. 247.

Injunction for claimant of property in hands of garnishee.— A garnishee denied having any property or money belonging to defendant, but a traverse to his answer was sustained. A new trial being denied, he took a bill of exception, but gave no supersedeas bond. Plaintiff who was insolvent recovered judgment. It was held that a temporary injunction restraining the levy of an execution on property in the hands of the garnishee was properly granted at the suit of one who claimed to own the property, and who gave bond to protect garnishees from any damages that might be thereby sustained. Hitt *v.* Ehrlich, 89 Ga. 824, 15 S. E. 770.

Where the debtor garnishee brought a bill of interpleader against plaintiff and the garnishor, the court enjoined the execution of the judgment until the interpleader was determined. Henderson *v.* Garrett, 35 Miss. 554.

23. Blair *v.* Hilgedick, 45 Minn. 23, 47 N. W. 310. See *supra*, VIII, A, 2, c, (III), (C).

24. Merriman *v.* Walton, 105 Cal. 403, 38 Pac. 1109, 45 Am. St. Rep. 50, 30 L. R. A. 802. See also Eppinger *v.* Scott, 130 Cal. 275, 62 Pac. 460 [*following* and *quoting* from Merriman *v.* Walton, *supra*]; Uphaus *v.* Roof, 68 Ohio St. 401, 67 N. E. 717 (where a sheriff was restrained from selling property before the determination of a replevy suit); Alsup *v.* Allen, 43 Tex. 598.

Where a sheriff refuses to receive a good affidavit of illegality to executions already levied, he may be enjoined from proceeding with the sale (Clary *v.* Haines, 61 Ga. 520), but where it appears from a copy of the affidavit attached to the petition for injunction that the affidavit does not clearly set forth any reason showing that the execution was proceeding illegally the refusal of the sheriff to accept the affidavit is not a ground for an

i. Temporary Injunction Until Remedy at Law Can Be Obtained. The rule does not prevent the granting of a temporary injunction until the remedy at law can be obtained.[25]

j. Where Process Issued by Court of Equity. Nor does the rule affect the control of a court of equity over process issued upon its own decree.[26]

3. Grounds For and Right to Injunction — a. In General. Whether an injunction will be granted is often a matter of discretion with the court;[27] but sometimes the court has no discretion to refuse an application for an injunction.[28] The sale under an injunction will be enjoined to prevent a conflict of jurisdictions.[29] Equity which follows the law will not enjoin judgment creditors from pressing their executions, until the applicant for homestead exemption can have the property set apart for the benefit of another creditor, no matter how just the claim of that creditor may be.[30] If the petitioner's equity of contribution can be asserted after the proceeds of the execution sale are in the hands of the officer a refusal to grant an injunction is not an abuse of discretion.[31] An injunction, not a rule to show cause, is the proper proceeding to arrest an order of seizure.[32]

b. Protection of Other Creditors — (i) *Simple Contract Creditors.* A simple contract creditor should reduce his claim to a judgment to get a standing in a court of equity to enjoin the disposition of his debtor's property under judgments alleged to have been obtained in fraud of his claim.[33]

(ii) *Lien Creditors* — (a) *In General.* The senior encumbrancer has no occasion for an injunction, for the sale cannot affect his lien.[34] Nevertheless injunction has been granted in such cases.[35] Equity will not generally enjoin a

injunction (McCandless *v.* McKibben, 99 Ga. 129, 24 S. E. 872). And if defendant voluntarily withdraws his affidavit and no additional facts appear which entitle defendant to a second affidavit of illegality, injunction will not issue. Mitchell *v.* Cooper, 73 Ga. 796. See Miller *v.* Baxter, 108 Ga. 600, 34 S. E. 169.

25. Henderson *v.* Garrett, 35 Miss. 554, where the court granted a temporary injunction until an interpleader could be returned. See Marks *v.* Stephens, 38 Oreg. 65, 63 Pac. 824, 84 Am. St. Rep. 750; Nelson *v.* Guffey, 131 Pa. St. 273, 18 Atl. 1073; Citizens' Nat. Bank *v.* Interior Land, etc., Co., 14 Tex. Civ. App. 301, 37 S. W. 447.

26. Anderson *v.* Mullenix, 5 Lea (Tenn.) 287.

27. Bentley *v.* Crenshaw, 85 Ga. 871, 11 S. E. 650.

28. As under the Louisiana statutes. State *v.* Gaudet, 108 La. 601, 32 So. 328; Sallis *v.* McLean, 23 La. Ann. 192.

29. Hall *v.* Boyd, 52 Ga. 456.

30. Christian *v.* Hutchison, 73 Ga. 130.

31. Poullain *v.* English, 57 Ga. 492.

32. Clement *v.* Oakey, 2 Rob. (La.) 90.

Because of an unliquidated claim of damages, an order of seizure and sale cannot be enjoined. Cox *v.* McIntyre, 6 La. Ann. 470.

33. Meyers *v.* Rauch, 4 Pa. Dist. 331, 332 [*quoting* from 1 High Injunct. § 131, as follows: "Until the creditor's rights are established by judgment at law, interference by equity would necessarily lead to oppressive and often fruitless interruption of the debtor in the rightful enjoyment of his property. Nor does an attaching creditor, who has not yet reduced his claim to judgment, stand in any better light than one who sues by the ordinary practice of the courts; and he will not be allowed to enjoin the disposal of the debtor's property on execution, even though the judgments under which the execution issued were fraudulently confessed by the debtor"]. See also Wiggins *v.* Armstrong, 2 Johns. Ch. (N. Y.) 144; Artman *v.* Giles, 155 Pa. St. 409, 26 Atl. 668.

All persons amply secured.— See O'Bryan *v.* Hardwick, 94 Ga. 729, 21 S. E. 986.

34. Sanders *v.* Foster, 66 Ga. 292; Union Bank *v.* Poultney, 8 Gill & J. (Md.) 324.

35. As for instance to protect the vendor's lien on the land sold, the lien having been transferred with the assignment of a note given for part of the purchase-price. Parker *v.* Kelly, 10 Sm. & M. (Miss.) 184. But see Byrne *v.* Anderson, 10 Sm. & M. (Miss.) 81, where levy was on slaves which were subject to an older deed of trust. See also Bowling *v.* Garrett, 49 Kan. 504, 31 Pac. 135, 33 Am. St. Rep. 377; Phillips *v.* Winslow, 18 B. Mon. (Ky.) 431, 68 Am. Dec. 729; Parrish *v.* Saunders, 3 Humphr. (Tenn.) 431.

A bill by a mortgagee of personal property to restrain a sale on execution upon a subsequent judgment will not be sustained, the remedy at law being adequate. McTeer *v.* Moorer, Bailey Eq. (S. C.) 62.

Injunction at the instance of the assignee for the benefit of creditors will not issue against an execution. The remedy at law by action to recover damages or upon giving security by replevin is ample. Chittenden *v.* Davidson, 52 N. Y. Super. Ct. 421. Under Cal. Civ. Code, § 3457, creditors must avail themselves of the assets without preference or not at all. Execution issued by creditors

senior encumbrancer at the instance of the junior.[36] But the junior may restrain the sale on the ground that the senior lien has been paid,[37] or that it was void.[38]

(B) *Mortgagees* — (1) IN GENERAL. Injunction will not generally lie in favor of a mortgagee against an execution levied on land by the holder of a junior encumbrance, for the senior lien will not as a rule be impaired.[39] If through another who acts without authority the mortgagee's rights are not evidenced in whole by title of record, as they formerly were, execution may be enjoined to prevent a cloud on his title.[40] The mortgagee who comes into equity to foreclose his lien may have injunction to prevent a sale of the property under executions and attachments at law, in order to prevent a multiplicity of suits and a cloud upon the title.[41]

in attachment suit will therefore be enjoined to prevent a cloud on the title of the assignees. Wilhoit *v.* Cunningham, 87 Cal. 453, 25 Pac. 675.

Equity will not enjoin a sale of personalty for the benefit of a prior encumbrancer. Bowyer *v.* Creigh, 3 Rand. (Va.) 25. See also Rollins *v.* Hess, 27 W. Va. 570.

Injunction for surety of purchase lien.— Henry *v.* Compton, 2 Head (Tenn.) 549.

Restraining subsequent executions during trial of claim by third person.— See Huntington *v.* Bell, 2 Port. (Ala.) 51.

Until priority determined.— Where attachments have been issued against a debtor, and notices of garnishment served upon a garnishee, and other creditors thereafter obtain separate judgments against the debtor and levy executions upon the goods in the hands of the garnishee, the attaching creditors, in an action to determine the priority of liens and for an injunction, may enjoin defendants from selling under their executions until the final determination of the case. Northfield Knife Co. *v.* Shapleigh, 24 Nebr. 635, 39 N. W. 788, 8 Am. St. Rep. 224.

Where a debtor is adjudged a bankrupt and a levy by a judgment creditor who did not prove his claim in bankruptcy is made upon land formerly belonging to the bankrupt, but which has since been conveyed by the assignee in bankruptcy, the invalidity of the creditor's lien on the property acquired by his execution is not so clear as to justify the court in granting an injunction restraining the sale, but the creditor should be permitted to sell the property, the question of title acquired to be determined in a subsequent suit at law. Reeser *v.* Johnson, 76 Pa. St. 313.

Where an execution has been levied on personalty which is subsequently seized on another execution equity will not enjoin the sale under the latter, but will leave the complainants to their remedy pointed out by law. Endres *v.* Lloyd, 56 Ga. 547.

36. Domec *v.* Stearns, 30 Cal. 114. See Wood *v.* Rice, 68 Ind. 320.

That there are claims which will cause it to go off at a reduced price constitutes no ground for restraining the sale of a debtor's property. Robinson *v.* Thompson, 30 Ga. 933. See also Sanders *v.* Foster, 66 Ga. 292.

37. Brigham *v.* White, 44 Iowa 677, where the petitioner was a mortgagee and where the court said that if he were a general creditor the rule would be otherwise.

If the amount has been reduced by payments or otherwise, a junior may restrain the senior from raising the full amount of the judgment, until the payments are ascertained and credit given for them. Peshine *v.* Binns, 11 N. J. Eq. 101.

38. As where the judgment foreclosing a prior attachment was void as having been rendered in a court without jurisdiction. Orr *v.* Moore, 1 Tex. App. Civ. Cas. § 587.

39. Ramsdell *v.* Tama Water-Power Co., 84 Iowa 484, 51 N. W. 245 [*commenting* on Ruthven *v.* Mast, 55 Iowa 715, 8 N. W. 659]; Smith *v.* Hoey, 28 La. Ann. 95; Ashford *v.* Tibbitts, 11 La. Ann. 167. See Cornish *v.* Dews, 18 Ark. 172.

One who has purchased mortgaged property at a foreclosure sale, but who has not yet received the sheriff's deed, is not entitled to maintain a bill for an injunction to restrain a sale of the mortgagor's remaining equity of redemption, ordered in a suit brought to enforce a mechanic's lien, to which suit he was not made a party. Macovich *v.* Wemple, 16 Cal. 104.

40. Ivory *v.* Kempner, 2 Tex. Civ. App. 474, 21 S. W. 1006, where mortgage was wrongfully marked "Satisfied" by a person without authority from him and a subsequent mortgage taken on the faith of a contract with the mortgagors that the prior mortgage should remain in force until the entire debt was satisfied. See Wiedner *v.* Thompson, 66 Iowa 283, 23 N. W. 670, where it was held that, although the senior mortgage had by mistake been canceled of record, injunction would not be granted where the junior lien-holder was neither a party to nor in any way responsible for the mistake.

41. See Alabama L. Ins., etc., Co. *v.* Pettway, 24 Ala. 544.

Remedy by third opposition.—Gil *v.* Gil, 10 Rob. (La.) 28; Vanhille *v.* Vanhille, 5 Rob. (La.) 496. See also White *v.* Blanchard, 19 La. Ann. 59; Gleises *v.* McHatton, 14 La. Ann. 560; Wallis *v.* Bourg, 14 La. Ann. 104; Fisher *v.* Gordy, 2 La. Ann. 762.

The lien of the mortgagee of a chattel will be protected by an injunction, where the sheriff has advertised the entire interest in the chattel for sale, especially where a multiplicity of suits can be prevented. Stratton *v.* Packer, (N. J. Ch. 1888) 14 Atl. 587. But

(2) To Restrain Levy Upon or Removal of Fixtures. Under a statute which makes all the railroad property subject to a mortgage upon it, injunction will be granted the bondholders of the road if execution is levied upon the rolling-stock.[42] The trustee of a deed of trust of all the property of a company may enjoin the sheriff from seriously damaging the freehold by the removal of machinery from the premises in execution of a judgment, although the sheriff claims that the deed is fraudulent.[43]

e. Fraud and Oppression. Fraud in obtaining judgment is ground for enjoining the execution;[44] and chancery will grant an injunction to prevent a party making use of a legal writ of execution for the purposes of vexation and injustice.[45]

d. Issuance of Execution Contrary to Agreement. An agreement made at the time and in consideration of a confession of judgment that execution should be stayed for a certain length of time may be enforced by injunction,[46] so an agreement made upon consideration subsequent to judgment.[47] It is not proper where an agreement for delay was made before judgment and could have been pleaded.[48]

e. Defense Not Available at Trial. The fact that defendant has a good

compare Freeman *v.* Freeman, 17 N. J. Eq. 44.

42. New York Cent. Trust Co. *v.* Moran, 56 Minn. 188, 192, 57 N. W. 471, 29 L. R. A. 212, where by statute the railroad is one property; and where it was held that the remedy of the creditors is against the whole property not against its several parts. "We shall assume, therefore, that, but for the statute, the rolling stock covered by a railroad mortgage might be levied on as other mortgaged personal property may be." See also Brady *v.* Johnson, 75 Md. 445, 26 Atl. 49, 20 L. R. A. 737.

Office furniture is subject to a mortgage on a railroad, and injunction against a levy upon it will be granted the bondholder of the road if it appears that the other mortgaged property would be insufficient to pay in full the mortgage debt. Ludlow *v.* Hurd, 1 Disn. (Ohio) 552, 12 Ohio Dec. (Reprint) 791. In Coe *v.* Knox County Bank, 10 Ohio St. 412, it was held that in the absence of any averment that the property left after the levy upon the rolling-stock would be insufficient to pay the principal and interest upon the next default, the injunction could not issue.

43. Jenney *v.* Jackson, 6 Ill. App. 32, 39 [*citing* Story Eq. Jur. §§ 828, 861; Adams Eq. 208], where the sheriff was tearing down the walls of a building. See Penn Mut. L. Ins. Co. *v.* Semple, 38 N. J. Eq. 314 (where on foreclosure of a mortgage on a factory it was decided that certain property on which execution had been levied was not covered by the mortgage, from which decision the mortgagee appealed; and where it was held that pending the appeal he was entitled to an injunction to restrain the execution creditor from disposing of the property); Hillard Live-Stock Co. *v.* Amity Coal Co., 2 Lanc. L. Rev. 241 (where it was said that if a sheriff undertook to separate fixtures from the freehold and sell the same without a levy on the freehold itself, the court can restrain the sheriff from selling the same, independent of the land, by rule to show cause instead of a bill in equity, and that at the instance of a mortgagee of defendant).

44. Sawyer *v.* Gill, 21 Fed. Cas. No. 12,399, 3 Woodb. & M. 97.

Concealment.— Where plaintiff suing in trover for the value of a chattel has possession of the chattel in question at the time of the recovery of the judgment, the concealment of this fact entitles defendant to relief by injunction. Walden *v.* McDonald, 30 Ga. 542.

45. Colt *v.* Cornwell, 2 Root (Conn.) 109.

46. Thurman *v.* Burt, 53 Ill. 129. See also Girard *v.* Hirsch, 6 La. Ann. 651, where an entry was made on the minutes that execution was to be stayed for six months, but the stay was not mentioned in the judgment, and execution was issued before the time had expired, the proper remedy was by injunction.

47. Thomas *v.* Brashear, 4 T. B. Mon. (Ky.) 65; Gibson *v.* McClay, 47 Nebr. 900, 66 N. W. 851.

Defendant in execution unharmed.— A judgment was obtained conditioned that no execution should issue until the creditor had furnished security to protect the debtor from eviction. The creditor executed a mortgage and sent the sheriff with a copy thereof, together with a fieri facias, to the debtor. It was held that, as no attempt was made to execute the fieri facias before the debtor had actual notice of it, he was not injured by the fact that it was issued before the mortgage was given to him, and the debtor was not on that ground entitled to enjoin the execution. Leblanc *v.* Walsh, 8 La. Ann. 67.

Where the terms of the contract are ambiguous and the evidence conflicting, but it nevertheless appeared that the injunction would by a single decree prevent a multiplicity of suits involving the title to a number of lots of land, the discretion of the court in issuing injunction will not be interfered with. Kendall *v.* Dow, 46 Ga. 607.

48. Livingston *v.* Winfrey, 5 La. Ann. 670.

An agreement by a third person with de-

defense and that it was not available at the time of trial entitles him to an injunction restraining the collection of the judgment.[49] Injunction will not be granted for matters which were available in defense of the original suit.[50]

4. Actions[51] to Restrain — a. Prerequisites — (I) *Offering to Do Equity.* The maxim that he who asks for equity must first do equity applies to an applicant for an injunction against an execution.[52]

(II) *Filing Requisite Bond*[53] *or Making Deposit.* A bond is almost always required of a party asking an injunction against an execution.[54] The amount depends upon the various statutory provisions.[55] As a general rule an injunction issued without a bond or deposit may be set aside;[56] but there are cases where equity will issue and maintain an injunction without the filing of a bond by the complainant.[57]

fendant in the execution to pay it off is no ground for an injunction. Triplett *v.* Turner, 2 J. J. Marsh. (Ky.) 475.

49. Walker *v.* Heller, 90 Ind. 198.

50. Lebanon Mut. Ins. Co. *v.* Erb, 2 Chest. Co. Rep. (Pa.) 537. "At least in the absence of any showing that an irreparable injury is about to be inflicted." Taylor *v.* Clark, 11 La. Ann. 560.

51. Nature of proceeding.— It has been said that an injunction against an execution is not a new suit, but a part of the original action. Citizens Nat. Bank *v.* Interior Land, etc., Co., 14 Tex. Civ. App. 301, 37 S. W. 447. It is in the nature of an opposition to the first suit and forms part of it. Johnston *v.* Hickey, 4 La. 292; Rowlett *v.* Shepherd, 4 La. 86. It cannot be treated as a motion in an original action, if it is not so entitled, and the only relief prayed for is a perpetual injunction. Foard *v.* Alexander, 64 N. C. 69. In Louisiana it is held that an execution on a judgment for money can be arrested only by a petition, affidavit, and bond given for injunction as provided by Code, § 304. Wiley *v.* Woodman, 19 La. Ann. 188.

52. *Georgia.*— Wilkinson *v.* Holton, 49 Ga. 557, 46 S. E. 620; Gibson *v.* Carreker, 92 Ga. 801, 19 S. E. 42.

Illinois.— See Scott *v.* Bennett, 8 Ill. 243.

Indiana.— Russell *v.* Cleary, 105 Ind. 502, 5 N. E. 414; Baragree *v.* Cronkhite, 33 Ind. 192.

Iowa.— Anamosa *v.* Wurzbocher, 37 Iowa 25.

Michigan.— Hinkle *v.* Baldwin, 93 Mich. 422, 53 N. W. 534.

New York.— Gee *v.* Southworth, 10 Paige 297.

United States.— Lane *v.* Ludlow, 14 Fed. Cas. No. 8,052, 2 Paine 591.

See 21 Cent. Dig. tit. "Execution," § 519 *et seq.*; and Equity, 16 Cyc. 140 *et seq.*

When rule not applicable.— The rule that one suing to set aside a sale of his property to an innocent third person must tender the consideration which such purchaser paid does not apply to an action to restrain the sheriff and a pretended purchaser of the property at an execution sale from consummating the sale. The principle invoked does not apply to a suit like this, which is not an action in revendication to recover back property sold and delivered to a third party. This is an action to prevent the consummation of an illegal and void sale, to stop the sheriff and others from perpetrating a wrong against the right of plaintiff, by dispossessing her of her property illegally. Drouet *v.* Lacroix, 28 La. Ann. 126.

53. Liability on the bond see *infra*, VIII, D, 4, p.

54. *Alabama.*— *Ex p.* Fechheimer, 103 Ala. 154, 15 So. 647.

Indiana.— See State Bank *v.* Macy, 4 Ind. 362.

Iowa.— See Hardin *v.* White, 63 Iowa 633, 16 N. W. 580, 19 N. W. 822.

Kentucky.— Pell *v.* Lander, 8 B. Mon. 554.

Michigan.— Hinkle *v.* Baldwin, 93 Mich. 422, 53 N. W. 534.

New Jersey.— Marlatt *v.* Perrine, 17 N. J. Eq. 49.

See 21 Cent. Dig. tit. "Execution," § 518.

55. See Halsey *v.* Murray, 112 Ala. 185, 20 So. 575; State Bank *v.* Macy, 4 Ind. 362; Hardin *v.* White, 63 Iowa 633, 16 N. W. 580, 19 N. W. 822; Faison *v.* McIlwaine, 72 N. C. 312.

56. Cook *v.* Dickinson, 2 Sandf. (N. Y.) 690.

57. Cape Sable Co.'s Case, 3 Bland (Md.) 606; Burns *v.* Morse, 6 Paige (N. Y.) 108. See also Hegeman *v.* Wilson, 8 Paige (N. Y.) 29, holding that upon a bill for an injunction to restrain a sale of the property of plaintiff taken on execution against a stranger, a deposit or security by plaintiff is not required by the statute, although the injunction master may require it in a proper case; and if a deposit is made defendant (the execution creditor) cannot take it out of court upon giving security for the repayment thereof in case plaintiff should succeed in the suit.

La Code Pr. § 739, provides eight grounds some of which the petitioner is to allege to obtain injunction against a sale without filing a bond. Beatty *v.* Dufief, 10 La. Ann. 266. The reasons set out in the article for arresting a sale under seizure refer solely to the issuance of writs of injunction without bond, so that injunctions may issue on bonds restraining execution of writs of seizure and sale for causes other than those enumerated in the article. Taft *v.* Donnes, 105 La. 699, 30 So. 112. Where the debtor in an injunction suit alleges some of the eight causes, but

b. Jurisdiction[58] and Venue. In many of the states the general rule is that the injunction must be obtained in the venue of the court which rendered the judgment and out of which the execution issued. This rule, however, is often subject to exceptions.[59] There is no hard, unbending rule[60] which limits the

in addition alleges other causes for the injunction, a bond must be given. Berens *v.* Boutte, 31 La. Ann. 112.

58. Jurisdiction of one court to enjoin execution issued by another court see COURTS, 11 Cyc. 633.

59. Lebanon Mut. Ins. Co. *v.* Erb, 2 Chest. Co. Rep. (Pa.) 537, where the court said: "But whether or not the court shall do so, depends upon the clear and undoubted proof of facts which would render the collection of the judgment unconscionable and inequitable, and the additional reason that the defendant in the judgment has had no opportunity to show the same, or, in other words, has not had 'a day in court.'"

60. *Indiana.*— The court of common pleas cannot enjoin the sale of land upon an execution issued out of the circuit court. Indiana, etc., R. Co. *v.* Williams, 22 Ind. 198. But the circuit court, being a court of general jurisdiction, may grant an application for an injunction to restrain the sale of land on execution upon a judgment recovered in the court of common pleas. Davis *v.* Clark, 26 Ind. 424, 89 Am. Dec. 471. The court of one county may enjoin the legal exercise of power in that county under an execution from the court of another county. Zimmerman *v.* Makepeace, 152 Ind. 199, 52 N. E. 992.

Iowa.— Bennett *v.* Hanchett, 49 Iowa 71; Anderson *v.* Hall, 48 Iowa 346; Lockwood *v.* Kitteringham, 42 Iowa 257. In Anderson *v.* Hall, 48 Iowa 346, 348, where the execution was general, the court said: "We are unable to see that the statute makes any distinction between a general and special judgment or execution, when the injunction is brought by a party to the judgment who seeks to enjoin the collection thereof." The district court of one county has no jurisdiction to restrain the execution of a judgment entered in the district court of another county. Hawkeye Ins. Co. *v.* Huston, (1902) 89 N. W. 29.

Kentucky.— Chesapeake, etc., R. Co. *v.* Reasor, 84 Ky. 369, 1 S. W. 599, 8 Ky. L. Rep. 374, holding that under Civ. Code, § 285, providing that an injunction to stay proceedings on a judgment shall be granted only in a suit brought in the court where the judgment was rendered, a circuit court cannot enjoin a sale under an execution on a judgment rendered by a justice of the peace. But see Shackelford *v.* Phillips, 112 Ky. 563, 66 S. W. 419, 68 S. W. 441, 23 Ky. L. Rep. 154; Bean *v.* Everett, 56 S. W. 403, 21 Ky. L. Rep. 1790.

Louisiana.— Jack *v.* Harrison, 34 La. Ann. 736; Palfrey *v.* Gordy, 28 La. Ann. 659; Simpson *v.* Hope, 23 La. Ann. 557; State *v.* Judge New Orleans Third Dist. Ct., 16 La. Ann. 233; Coleman *v.* Brown, 16 La. Ann. 110; Donnell *v.* Parrott, 13 La. Ann. 251; West Baton Rouge Police Jury *v.* Michel, 4 La. Ann. 84.

Ohio.— Sample *v.* Ross, 16 Ohio 419, holding that the court of common pleas cannot issue an injunction to restrain an execution of the supreme court, but the remedy is by application to the supreme court on return of the writ.

Pennsylvania.— Barnes *v.* Barnes, 16 Pa. Co. Ct. 534 [*following* Nelson *v.* Guffey, 131 Pa. St. 273, 18 Atl. 1073], where a sale of land on a testatum fieri facias from another county was sought to be restrained by the wife of the judgment debtor on the ground that the judgments under which the land was to be sold had been recovered against her husband by collusion between plaintiff in the execution and her husband who had previously transferred the land to her, and that the object of this collusion was to sell her land and thus cast a cloud upon her title. But the court of common pleas, as a court of equity, has power to restrain plaintiff in an action at law in the district court from issuing an execution in that court. Hensell *v.* Warden, 17 Leg. Int. 332.

Texas.— An injunction to stay execution should be made returnable to the district court of the county in which judgment was rendered. Hendrick *v.* Cannon, 2 Tex. 259. The statutory requirement (Sayles Civ. St. art. 2880) is imperative (Hugo *v.* Dignowitty, 1 Tex. App. Civ. Cas. § 158); it is not a personal privilege, belonging to litigants, which can be waived by consent of parties (Capps *v.* Leachman, (Civ. App. 1896) 35 S. W. 397). It has been held that the application for the injunction must be made to the court which rendered the judgment. Winnie *v.* Grayson, 3 Tex. 429; Brown *v.* Young, 1 Tex. App. Civ. Cas. § 1240. The statute says that the injunction must be made returnable to and tried by the court which rendered the judgment. It has been held that the injunction may be granted in another county but must be made returnable to the court where the judgment was rendered. George *v.* Dyer, 1 Tex. App. Civ. Cas. § 780. Furthermore a judge of another court may grant an interlocutory injunction. Capps *v.* Leachman, (Civ. App. 1896) 35 S. W. 397. A county court of one county has not jurisdiction of a suit to enjoin execution of a judgment of a county court of another county. Aultman *v.* Higbee, (Civ. App. 1903) 74 S. W. 955. The district court cannot enjoin the execution of a judgment of the county court. Bell *v.* York, (Civ. App. 1897) 43 S. W. 68. The district court has no jurisdiction of a suit to set off judgments held by plaintiff against one of defendants, who was insolvent, against a judgment obtained by such defendant against plaintiff in a county court, and to enjoin the other de-

equitable power of the court to interfere with and stay by injunction the collection of a judgment. A bill may be filed in the courts of one state to enjoin proceedings on a judgment recovered on a judgment rendered in the court of another state.[61] The objection to the jurisdiction should be made before answering on the merits, or defendant will generally be considered to have waived the defense.[62]

c. Time of Action. The party asking an injunction must be diligent.[63] Injunction will not issue until a levy is actually made[64] or until plaintiff

fendants, as assignees of the judgment against plaintiff, from having execution issued thereon. Smith *v.* Morgan, 28 Tex. Civ. App. 245, 67 S. W. 919. The statute applies to a judgment which has been rendered by the court of appeals which was not void and is *prima facie* a judgment against a surety on a supersedeas bond on appeal, and execution is issued thereon by the clerk below as directed by the appellate court under Rev. St. art. 1045, so as to deprive a court of the county outside of that in which the execution was issued of jurisdiction of an injunction against the execution. Adoue *v.* Wettermark, 22 Tex. Civ. App. 545, 55 S. W. 511. The statute does not apply where the injunction is asked on the ground that the property levied on was the homestead of the execution debtor. Leachman *v.* Capps, 89 Tex. 690, 36 S. W. 250; Van Ratcliff *v.* Call, 72 Tex. 491, 10 S. W. 578; Fannin County Bank *v.* Lowenstein, (Civ. App. 1899) 54 S. W. 316; Capps *v.* Leachman, (Civ. App. 1896) 35 S. W. 397. And the jurisdiction of a court other than the one in which a judgment was rendered to grant an injunction to stay proceedings on execution is not avoided by the allegation as a second cause of action that the execution was void for irregularities on its face, although the court has no jurisdiction to grant an injunction on such second ground under the statute. Leachman *v.* Capps, 89 Tex. 690, 36 S. W. 250. Nor does it apply where it is sought to sell plaintiff's land under an execution levied on a judgment rendered in a case to which he was not a party. In such a case he may properly seek to enjoin the sale in the court in whose jurisdiction the land lies instead of in that in which the judgment was rendered. Huggins *v.* White, 7 Tex. Civ. App. 563, 27 S. W. 1066. See Winnie *v.* Grayson, 3 Tex. 429; Brown *v.* Young, 1 Tex. App. Civ. Cas. § 1240. The law does not apply to a writ issued to restrain the collection of a judgment rendered in a justice's court, for a justice of the peace has no equity power. Foust *v.* Warren, (Civ. App. 1903) 72 S. W. 404.

Virginia.— Beckley *v.* Palmer, 11 Gratt. 625. But see Wessell *v.* Sharp, (Tenn. Ch. App. 1897) 39 S. W. 543, holding that equity can enjoin the levy of an execution issued from the supreme court on a judgment for the costs of a former suit, which the judgment creditors alleged they had paid by mistake, but which the judgment debtor had in fact paid, when the judgment was rendered on motion without notice to the judgment debtor, and without his being before the court.

See 21 Cent. Dig. tit. "Execution," § 520.

County of residence.— In Georgia by Code, § 4183, all bills must be filed in the county of the residence of one of defendants against whom substantial relief is prayed, except in cases of injunctions to stay proceedings, when the bill may be filed in the county where the proceedings are pending, provided no relief is prayed as to matters not included in such litigation. "Under this section, jurisdiction may be entertained against a non-resident of the county if the proceeding sought to be stayed is a suit instituted by him in a court of that county; but we do not think the levy of an execution and other ministerial acts to affect a sale are a pending proceeding within the meaning of this section." Rounsaville *v.* McGinnis, 93 Ga. 579, 581, 21 S. E. 123 [*distinguishing* Mayo *v.* Renfroe, 66 Ga. 408; Wright *v.* Southwestern R. Co., 64 Ga. 783]. Where the state has actually received the amount due upon an execution issued by the controller general for the hire of convicts, and the execution has been assigned to a private citizen, a petition by defendant in execution to enjoin the assignee from proceeding with a levy of the execution, being a controversy exclusively between private citizens, should be brought in the county of the assignee's residence, and is not maintainable in another county, although the property seized be located therein, and the sheriff thereof, by whom the levy was made, be enjoined as a party defendant. Dade Coal Co. *v.* Anderson, 103 Ga. 809, 30 S. E. 640.

In New Hampshire a stay of execution may be had by an injunction from the supreme court, or by an order suspending the issuing of the execution in the court where the judgment is. Grant *v.* Lathrop, 23 N. H. 67.

61. Unless the applicant has not been guilty of laches in asserting his rights, and the judgment of the foreign court has been reversed. McJilton *v.* Love, 13 Ill. 486, 54 Am. Dec. 449.

62. Wood *v.* Currey, 49 Cal. 359; Byrne *v.* Anderson, 10 Sm. & M. (Miss.) 81; Miller *v.* Longacre, 26 Ohio St. 291. The objection to the jurisdiction is waived if defendants after having their attention called to the question of venue proceed to trial without objection or plea to the jurisdiction. Foust *v.* Warren, (Tex. Civ. App. 1903) 72 S. W. 404.

63. Jenkins *v.* Harris, 64 Ga. 440; Thursby *v.* Mills, 11 How. Pr. (N. Y.) 116. See also Boley *v.* Griswold, 2 Mont. 447; McCray *v.* Freeman, 17 Tex. Civ. App. 268, 43 S. W. 37.

64. Crook *v.* Lipscomb, 30 Tex. Civ. App. 567, 70 S. W. 993.

threatens to enforce his judgment.[65] A statutory limitation within which an injunction against the execution of a judgment must be brought has been held not to apply to a suit by one not a party to the judgment,[66] or to a suit to enjoin for causes which have arisen since the rendition of the judgment.[67]

d. The Bill — (i) *General Principles of Pleading.* The pleading must not be vague or uncertain.[68] Facts not conclusions of law must be pleaded.[69] The principle that the pleading will be construed against the pleader is sometimes maintained,[70] particularly where injunction is sought on purely technical grounds.[71] But allegations which are necessarily implied need not be specifically set out.[72]

(ii) *Negativing Facts.* To show his equity it is sometimes necessary for the complainant to negative the existence of certain facts.[73] This often happens where there is a question of jurisdiction[74] or of notice to an adverse party.[75]

(iii) *Bill to Enjoin Sale of Land.*[76] If sale of land is sought to be enjoined, a description of the property is a necessary part of the complaint.[77] If

65. Ke-tuc-e-mun-guah *v.* McClure, 122 Ind. 541, 23 N. E. 1080, 7 L. R. A. 782 (holding that where there is no pretense that a creditor is threatening to levy on land not liable to execution, there is no ground for an injunction); Elson *v.* O'Dowd, 40 Ind. 300 (holding that it must be shown that the execution is in the hands of the officer who threatened or is about to levy illegally).

If the property of the debtor has been seized but not taken possession of by the sheriff, the debtor is not entitled to an injunction to enjoin the sale. Derville *v.* Hayes, 23 La. Ann. 550.

66. Kempner *v.* Ivory, (Tex. Civ. App. 1895) 29 S. W. 538. See also Lewis *v.* Labauve, 13 La. Ann. 382, holding that, under Civ. Code, art. 3366, which provides that the third possessor, who is not personally liable to the debt, may notwithstanding, within ten days of his being served with an order of seizure, oppose the sale of the property, a third possessor who is not personally liable for the debt may for good cause enjoin the execution of the order of seizure, even after the delay of ten days mentioned in the code.

Petition within a year from affirmance on appeal.— In a suit to restrain executions on judgments, the objection that the judgments were rendered more than a year before the filing of the petition is not good where the petition was filed within a year from the affirmance on appeal of one judgment, and the others were made to depend on that by stipulation of the parties. Willis Point Bank *v.* Bates, 76 Tex. 329, 13 S. W. 309.

67. Williams *v.* Bradbury, 9 Tex. 487.

68. Bill in equity generally see Equity, 16 Cyc. 216. Taylor *v.* Clark, 11 La. Ann. 560. See Carter *v.* McMichael, 20 Ga. 96, where the administrator of an estate recovered a judgment against one of the distributees for three thousand dollars. The distributee filed a bill to enjoin the sale of his property under said judgment, in which it was averred that there were funds in the hands of the administrator coming to him (the distributee) amounting to five thousand dollars; that the administrator had held possession of the estate six or seven years, and was believed to be insolvent; and where it was held that the bill showed a complete equity as against the administrator, and need not aver that the securities to the administration bond were insolvent.

If a set-off is pleaded it should be for a certain sum. See Faison *v.* McIlwaine, 72 N. C. 312.

69. Krug *v.* Davis, 85 Ind. 309.

70. Pursel *v.* Deal, 16 Oreg. 295, 18 Pac. 461.

71. Gothard *v.* Reiley, 14 Tex. 461.

72. O'Hare *v.* Downing, 130 Mass. 16, 19.

73. Jordan *v.* Corley, 42 Tex. 284 (holding that where application to enjoin a sale is made on the ground that the execution was issued more than twelve months after judgment is insufficient, unless it is alleged that no other execution had issued before that time); Williams *v.* Bradbury, 9 Tex. 487 (holding that where injunction is asked on the ground that certain payments have been made upon the execution, it is necessary to distinctly aver that the payments had not been credited upon the execution, otherwise a general demurrer may be sustained). See Abercrombie *v.* Knox, 3 Ala. 728, 37 Am. Dec. 721, where it was said that it must also be charged that plaintiff refused to make the credit, or that he is attempting to enforce payment a second time.

74. Farrington *v.* Brown, 65 Cal. 320, 4 Pac. 26 (holding that an allegation that plaintiff had no knowledge of the judgment until more than thirty days after rendition is insufficient; it should be alleged that plaintiff was neither served with the summons nor appeared in the action in which the judgment was rendered); Krug *v.* Davis, 85 Ind. 309.

75. Pursel *v.* Deal, 16 Oreg. 295, 18 Pac. 461, holding that where an irregularity in the service of summons on defendant on motion for leave to issue it is alleged, the complaint must deny that defendant appeared at the hearing of the motion or must show in some way that the proceeding was taken against him without notice.

76. Showing title see *infra*, VIII, D, 4, d, (iv).

77. Armstrong *v.* Farmers' Nat. Bank, 130 Ind. 508, 30 N. E. 695. See McRae *v.* Brown, 12 La. Ann. 181.

the bill shows that a sale would cast a cloud upon the complainant's title to the land levied on it is sufficient.[78]

(iv) *Showing Title.* The complainant must show his title to or his interest in the property upon which the execution sought to be enjoined has been levied.[79] If ownership is substantially averred, it is sufficient if the averment is not met by an exception calling for greater particularity of statement.[80]

(v) *Pleading Defense Not Available at Trial.* A bill which discloses matters which would if proved have established a good defense to the original action does not show equity if no reason is given why the defense was not interposed in the original action or why the complainant has not resorted to the legal remedies afforded him.[81]

(vi) *Pleading Defects in Proceedings or Judgment.* If it is claimed that the judgment was void it must be alleged and shown either that it shows on its face, or that the record in the cause otherwise affirmatively shows, a want of jurisdiction, or that some equity against the judgment or some available defense to the cause of action upon which it is predicated exists.[82] Where defects in proceedings are relied on they must be specifically alleged.[83] An uncontroverted allegation that plaintiff in execution was dead at the time of issuance is sufficient.[84]

(vii) *Offering Equity.* Where the maxim that he who asks for equity must first offer to do equity applies, the complainant must make his offer in the bill to do equity or must show that he has already done equity.[85]

(viii) *Special Averments.* The necessity and sufficiency of particular allegations in a bill of this character have been frequently passed upon by the courts;[86] for example an allegation that complainant is a *bona fide* purchaser from the judgment debtor;[87] an allegation that complainant is a trustee of the

78. Bell *v.* Murray, 13 Colo. App. 217, 57 Pac. 488; Paddock *v.* Jackson, 16 Tex. Civ. App. 655, 41 S. W. 700. But it is not sufficient to allege that there is an apprehension of a multiplicity of suits in consequence of the contemplated sale. Cook *v.* Texas, etc., R. Co., 3 Tex. Civ. App. 145, 22 S. W. 58.

79. Davis *v.* Beall, 21 Tex. Civ. App. 183, 50 S. W. 1086, where the allegation that the execution had been levied on divers tracts of land belonging to other persons than the complainant was of no avail. But in Nashville Trust Co. *v.* Weaver, 102 Tenn. 66, 74, 50 S. W. 863, an administrator's bill to enjoin a sale of corporate stock alleging that complainant "does not know to whom it belongs, but presumes that it belongs to . . . [his intestate's] estate" was held sufficient to require an answer.

Pleading homestead.— A complaint which alleges that the property levied on was the complainant's homestead and dwelling-house and that he and his co-defendant had offered other property to be levied on in satisfaction of the debt, is bad for not alleging that the property offered belonged to the execution defendants, or to one of them. Alexander *v.* Mullen, 42 Ind. 398. In Alexander *v.* Banner, 10 Tex. Civ. App. 111, 30 S. W. 563, it was said that where it was alleged that the land levied on was occupied as a homestead, the pleading should disclose whether the record title was in the name of plaintiff or of his wife.

80. Hart *v.* Conolly, 49 La. Ann. 1587, 22 So. 809.

A defendant in replevin who has given a forthcoming bond and holds the property may have an injunction against a sale of the property in execution against plaintiff, without alleging in his bill that the property is his, for the bill shows that he is in lawful possession of the property and bound to have it forthcoming in the event that the action of replevy should be decided against him. In this condition of the property it must be considered as in custody of the law and not subject to be taken from the complainant's possession under an execution against plaintiff in the action of replevy. Such an interference with the course of the law would be productive of confusion and should not be indulged. Furthermore the complainant would be deprived of the power to keep the property and to have it ready to be delivered according to the exigencies of the action in replevy as he was bound to do so by his bond. Cooper *v.* Newell, 36 Miss. 316.

81. Dawson *v.* Merchants', etc., Bank, 30 Ga. 664; Menifee *v.* Myers, 33 Tex. 690.

82. Foust *v.* Warren, (Tex. Civ. App. 1903) 72 S. W. 404.

83. Manistique Lumber Co. *v.* Lovejoy, 55 Mich. 189, 20 N. W. 899.

84. Dailey *v.* Wynn, 33 Tex. 614.

85. Gardner *v.* Jenkins, 14 Md. 58.

86. See cases cited *infra*, note 87 *et seq.*

87. **Bona fide purchaser.**— Where the complaint claims as *bona fide* purchaser from the judgment debtor he must show a prior equity. If he is purchaser of goods he must show

property levied upon;[88] an allegation that complainant's right to point out other property to be levied upon was denied;[89] an allegation that a former execution had been enjoined;[90] as well as allegations of tender of payment,[91] or satisfaction of the judgment.[92]

e. Exhibits. No written instrument unless some pleading is founded upon it, is properly an exhibit.[93]

f. The Answer[94] — (i) *In General.* It is not always necessary for every party defendant to answer.[95] Where the answer pleads in the alternative, each alternative pleaded must be a complete and sufficient ground of defense.[96] Where the bill alleges that a previous execution on the same bond had been satisfied, an answer alleging that the previous execution and return had been quashed, but failing to show that the execution debtor was before the court or notified of the motion to quash, is insufficient.[97] In a suit to enjoin an execution on the ground that the judgment has become dormant, defendant may plead the

that he purchased prior to the judgment creditor's judgment claim. Wenzel *v.* Milbury, 93 Md. 427, 49 Atl. 618. If he is the purchaser of land he must show a sale to himself prior to the attachment of the lien of the judgment on which execution was issued. Jones *v.* McCrady, 48 S. C. 533, 26 S. E. 802.

88. Trustee.— A bill to restrain the sale of trust property levied on as the individual property of the trustee should set forth the judgment and execution under which the alleged sale is about to take place with sufficient particularity to give color of right in the sheriff to make the levy and sale and should sufficiently show color of right to the property in the person alleged to be trustee. Trueblood *v.* Hollingsworth, 48 Ind. 537, holding that it is not sufficient for matters which should be alleged in the complaint to be set forth in an exhibit.

89. Denial of right to point out property.— If defendant in the execution asks the injunction on the ground that his right to point out other property to be levied on had been denied him, he must allege that he made an effort to prevent the sale of the property levied on by a tender to the sheriff of other property subject to execution. Anderson *v.* Oldham, 82 Tex. 228, 18 S. W. 557; Smith *v.* Frederick, 32 Tex. 256; Alexander *v.* Banner, 10 Tex. Civ. App. 111, 30 S. W. 563. See Beaird *v.* Foreman, 1 Ill. 385, 12 Am. Dec. 197. And, in case he alleges that he pointed out other property to the sheriff, that he had title to that property. Forbes *v.* Hill, Dall. (Tex.) 486.

Where a person wishes a particular tract of land levied on every reasonable evidence of title should be exhibited to the officer. The officer is not bound to take any loose memorandum which a defendant may offer as evidence as his title to the land. Beaird *v.* Foreman, 1 Ill. 385, 12 Am. Dec. 197.

90. Former execution enjoined.— An allegation that a prior execution in favor of another plaintiff against a part of the same defendants had been enjoined is not sufficient where there is nothing to show that the ground for the prior injunction did not have reference to the judgment or process itself and not to the property levied on. Dunn *v.* Mobile Bank, 2 Ala. 152.

91. Tender.— A bill to enjoin the levy of an execution which alleges tender of the amount due must aver all the facts necessary in pleading a tender at law. McGehee *v.* Jones, 10 Ga. 127. See Cooper *v.* Whaley, 90 Ga. 285, 15 S. E. 824, for case where tender was pleaded.

92. Payment.— An allegation that the judgment had been "paid off and satisfied in full" has been held to justify a decree enjoining the issuance of an execution on the judgment. Deleshaw *v.* Edelen, 31 Tex. Civ. App. 416, 72 S. W. 413. But see Dunham *v.* Collier, 1 Greene (Iowa) 54, holding that where there is a judgment, and also a decree against a party for the same demand, the collection of the money under the decree cannot be enjoined, unless the complainant allege in his bill that the judgment has been satisfied. See, however, *supra*, VIII, B, 2, f, as to proper remedy for issuance of execution after satisfaction thereof.

93. Upon a complaint to enjoin a sheriff's sale of property levied upon under execution, the execution need not be made an exhibit. Trueblood *v.* Hollingsworth, 48 Ind. 537. A complaint for an injunction to restrain the sale under an execution of certain property of plaintiff on the ground that plaintiff had received a mortgage of it from the execution defendant, the property not being subject to be taken on execution, had foreclosed the same, and had purchased the property at the foreclosure sale, need not contain copies of the judgments, executions, returns, and the sheriff's deed. Hall *v.* Hough, 24 Ind. 273.

94. Answer in equity generally see EQUITY, 16 Cyc. 297 *et seq.*

95. Beaird *v.* Foreman, 1 Ill. 385, 12 Am. Dec. 197.

96. Lock *v.* Slusher, (Ky. 1897) 43 S. W. 471, where the answer alleged that a sheriff returned "was made by fraud or mistake on the part of" the officer "and defendant does not know which" and it was held that this is not a sufficient impeachment of the return.

97. Lock *v.* Slusher, (Ky. 1897) 43 S. W. 471.

judgment in reconvention.[98] An answer which shows that the irregularities which are the ground of the injunction sought were waived by agreement is sufficient.[99]

(II) *Effect.* Where the allegations of the bill are traversed by the answer, injunction should not be granted, and in case a temporary injunction exists it should be dissolved,[1] for the answer is regarded and taken as true so far as it is responsive to the bill.[2] If the answer by its admissions shows that equity remains with the complainant after all the allegations have been taken as true the injunction will not be dissolved.[3] Where the answer raises issues properly triable at law, the injunction will be dissolved.[4] The allegations of the answer may cure the defects of the bill.[5]

g. Verification of Pleadings.[6] In equity as a general rule pleadings should be verified.[7]

h. The Parties[8] — (I) *Plaintiff.* A person who was not a party to the decree cannot enjoin a sale under execution, unless he can show that his rights will be directly affected by the sale;[9] for a person who has no title or interest in the property to be sold cannot enjoin the execution against the property.[10] A person not a party to the execution who owns[11] or has an interest in[12] land

98. Oldham *v.* Erhart, 18 Tex. 147.

99. Egbert *v.* Mercer, 66 Ind. 305.

1. *District of Columbia.*— See Magruder *v.* Schley, 18 App. Cas. 288.

Georgia.— Alexander *v.* Markham, 25 Ga. 148; Rodaham *v.* Driver, 23 Ga. 352. See also Thomas *v.* Wilkinson, 65 Ga. 405.

Maryland.—Wenzel *v.* Milbury, 93 Md. 427, 49 Atl. 618.

New York.— Manchester *v.* Dey, 6 Paige 295.

North Carolina.— Faison *v.* McIlwaine, 72 N. C. 312. See also Cooper *v.* Cooper, 127 N. C. 490, 37 S. E. 492.

Pennsylvania.— Dull *v.* Holl, 1 Phila. 258, 259 [*citing* Carpenter *v.* Burden, 2 Pars. Eq. Cas. 24]. Where, on a bill by a married woman to enjoin the levy of an execution against her husband on property claimed by her, the judgment creditor answered, denying her ownership, equity will not interfere to enjoin the levy, but will leave the parties to contest the title at law. Shuster *v.* Bennett, 9 Phila. 208; Dyer *v.* People's Bank, 9 Phila. 159. The bill need not proceed to hearing upon proof. Hoffner *v.* Girard Bank, 1 Del. Co. 187.

Tennessee.— See Grant *v.* Chester, (Ch. App. 1899) 58 S. W. 485.

Texas.— Fulgham *v.* Chevallier, 10 Tex. 518.

See 21 Cent. Dig. tit. "Execution," § 526.

2. Wenzel *v.* Milbury, 93 Md. 427, 49 Atl. 618.

3. Peshine *v.* Binns, 11 N. J. Eq. 101.

When an answer admits that a sale about to take place was illegal for insufficient description of the property, a prayer for permission to sell without readvertisement on amendment of the proceedings to conform to the correct description cannot be granted by a court at an interlocutory hearing. Johnson *v.* Hayne, 103 Ga. 542, 29 S. E. 914.

4. Freeman *v.* Elmendorf, 7 N. J. Eq. 475.

5. Bell *v.* Murray, 13 Colo. App. 217, 57 Pac. 488.

6. **Verification of pleadings in equity** see Equity, 16 Cyc. 365.

7. Eccles *v.* Daniels, 16 Tex. 136, 142.

One making a third opposition is not required to make an oath in order to obtain an injunction. Vidal *v.* Ocean Ins. Co., 5 Rob. (La.) 68.

8. **Parties** generally see Parties.

9. Searles *v.* Jacksonville, etc., R. Co., 21 Fed. Cas. No. 12,586, 2 Woods 621.

10. *California.*— Hall *v.* Theisen, 61 Cal. 524, where complainant was claimant under an invalid tax title.

Georgia.— Tompkins *v.* Tumlin, 49 Ga. 460.

Kansas.— McGill *v.* Sutton, 67 Kan. 234, 72 Pac. 853, holding that where a judgment debtor sues to restrain the sale of land as not being liable for the judgment, his judgment co-debtors are not necessary parties.

Louisiana.— Losee *v.* Santon, 24 La. Ann. 370. See also State *v.* Judge Civil Dist. Ct., 48 La. Ann. 667, 19 So. 666; Gusman *v.* De Poret, 33 La. Ann. 333; Offutt *v.* Duson, 35 La. Ann. 986; Dussuau *v.* Rilieux, 9 Mart. 318.

Maine.— Miller *v.* Waldoborough Packing Co., 88 Me. 605, 34 Atl. 527, holding that an insolvent corporation which has conveyed all its property to the assignee in insolvency has no right to restrain a levy on property, which the corporation undertook to convey to other parties before its insolvency.

Mississippi.—Duncan *v.* Robertson, 57 Miss. 820, holding that a husband who bought land sold under a judgment against his wife, but did not get any title, cannot maintain a bill to enjoin a sale under another judgment against his wife.

Texas.— Corder *v.* Steiner, (Civ. App. 1899) 54 S. W. 277.

United States.— Selz *v.* Unna, 6 Wall. 327, 18 L. ed. 799.

See 21 Cent. Dig. tit. "Execution," § 522.

11. For he cannot apply to the court as a party can to have the execution recalled. King *v.* Clay, 34 Ark. 291; *In re* Sheriff's Sale, 1 C. Pl. (Pa.) 13.

12. **A beneficiary heir who has only a residuary interest** in the succession may enjoin the

levied on may maintain a bill to enjoin the execution. Where trust property has been levied upon, the trustee is the proper party to ask for an injunction; if he neglects or refuses to act, or if he has resigned and his successor has not been appointed, the *cestui que trust* may take measures to protect the estate.[13] A railway company cannot enjoin an execution upon its locomotives where it does not allege that execution was not issued upon a valid judgment, or for a just debt.[14] Where a judgment creditor is proceeding by execution to raise the full amount of his judgment, when that amount is not due, but has been reduced by payments or otherwise, a subsequent execution creditor has a right to an injunction to restrain the prior creditor from selling under his execution until the payments are ascertained, and the creditor gives credit for them.[15] Where the complainant's equity is a mere incident to the equity of another it must be set up through or under the other and therefore the other is a necessary party plaintiff.[16] Persons who have no common interest or whose causes of action did not arise out of the same transaction cannot be joined as parties.[17]

(II) *DEFENDANT*—(A) *In General.* Plaintiff in execution is a necessary party.[18] A bill to enjoin execution upon a judgment on a delivery bond should make the surety of the bond a party.[19] Where the complainant is a person other

seizure and sale of succession to the property. Vance *v.* Cawthon, 32 La. Ann. 124, where it was admitted that the debt due the seizing creditor had been paid.

A person holding an equity of redemption in his homestead has an interest therein sufficient to restrain its sale under execution. Ingraham *v.* Dyer, 125 Mo. 491, 28 S. W. 840.

Mortgagees.— Where the debtor seeks to enjoin the creditor from selling property upon which there are mortgages, which the judgment creditor claims to be fraudulent, the mortgagees should be made parties to the action, that the rights of all concerned may be determined in one action. Gaster *v.* Hardie, 75 N. C. 460.

The assignee of a mortgage deposited as an escrow may enjoin the mortgagee from enforcing his judgment which has been entered on the warrant of attorney accompanying the bond prior to the assignment of the mortgage. Booth *v.* Williams, 11 Phila. (Pa.) 266. See ESCROWS, 15 Cyc. 560 *et seq.*

The vendor who sold land with covenants of warranty is entitled to an injunction to restrain a sale thereof when the sale would create a cloud on the vendee's title. Huggins *v.* White, 7 Tex. App. 563, 27 S. W. 1066, where the judgment had been paid. See Bach *v.* Goodrich, 9 Rob. (La.) 391. But see Kelly *v.* Wiseman, 14 La. Ann. 661. See also Howard *v.* Walsh, 28 La. Ann. 847. In a court which recognizes the right of the vendor who sold with covenants of warranty to enjoin, the vendor has no equity if he sold before the judgment was rendered and the pending of the suit; for the title which he warranted is in no danger of being clouded and therefore he is under no liability to make good his covenants. Small *v.* Sumerville, 58 Iowa 362, 12 N. W. 315.

Interveners.— In an injunction suit to restrain a sale of a plantation under execution, it is improper to allow third persons who claim a vendor's privilege on the mules and crops on the plantation to intervene. Barron *v.* Sollibellos, 26 La. Ann. 289.

13. Zimmerman *v.* Makepeace, 152 Ind. 199, 52 N. E. 992.

Under-tutor.— Where the property of a minor has been seized by a judgment creditor of the tutor on a personal judgment, and the question of the validity of the minor's title of the property is in issue, the under-tutor is the proper party to bring an injunction to enjoin the sale thereof. McEnery *v.* Letchford, 23 La. Ann. 617.

14. Midland R. Co. *v.* Stevenson, 130 Ind. 97, 29 N. E. 385, which action, it should be observed, was brought by the company, and not by mortgagees, bondholders, or trustees representing the rights of creditors.

15. Peshine *v.* Binns, 11 N. J. Eq. 101.

16. As where A as principal and B as surety gave a note on an executory contract for the purchase of real property in which a fraud was practised on A it was necessary for B who brought the bill to join A. Emmons *v.* McKesson, 58 N. C. 92.

17. Titus *v.* Bennett, 8 N. J. Eq. 267. See also Speyrer *v.* Miller, 108 La. 204, 32 So. 524 (holding that the practice of including in one injunction several separate seizures made by creditors between whom there is no privity can be sanctioned only where no inconvenience can be occasioned to defendants and no complication can possibly arise); Baker *v.* Rinehard, 11 W. Va. 238.

18. Howell *v.* Foster, 122 Ill. 276, 13 N. E. 527 [*affirming* 25 Ill. App. 42]; Schubert *v.* Taylor, 10 Ohio S. & C. Pl. Dec. 585, 8 Ohio N. P. 100; Ryburn *v.* Getzendaner, 1 Tex. Unrep Cas. 349.

The attorney who obtained the judgment for plaintiff is not a proper party except in a case of fraud. Lyon *v.* Tevis, 8 Iowa 79, 81 [*citing* Mitford Ch. Pl. 189; 2 Story Eq. Jur. §§ 1499, 1500; Story Eq. Pl. §§ 231, 232].

19. Jamison *v.* May, 13 Ark. 600, it being held in the case that the original judgment was not in force, the judgment on the de-

than the judgment debtor, the judgment debtor may be a necessary party.[20] A bill cannot join separate respondents acting in different capacities upon different rights and not chargeable with any joint liability or interests in the relief sought.[21]

(B) *Sheriff and Other Officers.* It seems to be quite usual to make the sheriff who holds the execution a party;[22] but it has been specifically held in some jurisdictions that he is not a necessary party,[23] and in some that he is not even a proper party.[24] A decree against plaintiff in the execution as sole defendant would be as effectual as though the officer having the process had been made a party and included in the decree.[25] A notice to the sheriff of the order for an injunction is sufficient.[26] The clerk being a mere minister of the law and having no interest in the suit is not a proper party.[27]

i. Notice. Notice to the counsel of plaintiff has been held sufficient.[28]

j. Issues. If complainant seeks to restrain execution on the ground that the property seized belonged to him, not to the judgment debtor, no other issue can be made but that of ownership.[29] The capacity of sheriffs duly commissioned

livery bond after its subsequent forfeiture being the only one in force under the statute.

20. Scott *v.* Bennett, 6 Ill. 646, holding that the debtor is a necessary party where the purchaser of land from the judgment debtor brings the bill, for the debtor-grantor who has conveyed the land with covenants of warranty has an interest in sustaining the title of the complainant. *Contra,* Bean *v.* Everett, 56 S. W. 403, 21 Ky. L. Rep. 1790. See also Warner *v.* Payne, 3 Barb. Ch. (N. Y.) 630.

21. Artman *v.* Giles, 155 Pa. St. 409, 26 Atl. 668. But where defendants obtained separate judgments against C and attached property thereon and in actions by defendants against plaintiff to whom the property had been transferred by C to try title to the property, all the actions were made to depend on the result of one and judgments were entered against plaintiff for the value of the property attached, which was in each instance in excess of the judgment against C, it was held that defendants were properly joined in one action to restrain the executions on the ground of this excess. Wills Point Bank *v.* Bates, 76 Tex. 329, 13 S. W. 309.

22. *California.*— Fitzgibbon *v.* Laumeister, (1898) 51 Pac. 1078.

Georgia.— Dade Coal Co. *v.* Anderson, 103 Ga. 809, 30 S. E. 640; Thomas *v.* Wilkinson, 65 Ga. 405.

Illinois.— Beaird *v.* Foreman, 1 Ill. 385, 12 Am. Dec. 197.

Indiana.— Zimmerman *v.* Makepeace, 152 Ind. 199, 52 N. E. 992.

Louisiana.— Twitty *v.* Clarke, 14 La. Ann. 503.

New Jersey.— Titus *v.* Bennet, 8 N. J. Eq. 267.

Texas.— Hahn *v.* Willis, 31 Tex. Civ. App. 643, 73 S. W. 1084. "The officer is usually made a party defendant in injunction suits, although he has no interest." Ryburn *v.* Getzendaner, 1 Tex. Unrep. Cas. 349, 352.

See 21 Cent. Dig. tit. "Execution," § 523.

23. Smalley *v.* Line, 28 N. J. Eq. 348; Edney *v.* King, 39 N. C. 465; Hext *v.* Walker, 5 Rich. Eq. (S. C.) 5; Citizens Nat. Bank *v.* Interior Land, etc., Co., 14 Tex. Civ. App. 301, 37 S. W. 447. See Howell *v.* Foster, 122 Ill. 276, 13 N. E. 527 [*affirming* 25 Ill. App. 42]. *Contra,* Burpee *v.* Smith, Walk. (Mich.) 227.

24. Jarman *v.* Saunders, 64 N. C. 367; Newlin *v.* Murray, 63 N. C. 566; Lackay *v.* Curtis, 41 N. C. 199; Beam *v.* Blanton, 38 N. C. 59; Olin *v.* Hungerford, 10 Ohio 268; Ashton *v.* Parkinson, 8 Phila. (Pa.) 338. But see Bramlett *v.* McVey, 91 Ky. 151, 15 S. W. 49, 12 Ky. L. Rep. 760, holding that under the usual code provision as to parties the sheriff is properly made defendant if the judgment rendered against the petitioner was for a fine.

He is already under the mandate of one court and should not be put in peril for disobedience by discordant orders of conflicting jurisdictions. Artman *v.* Giles, 155 Pa. St. 409, 26 Atl. 668.

25. Holthaus *v.* Hornbostle, 60 Mo. 439. See Beam *v.* Blanton, 38 N. C. 59.

26. Hext *v.* Walker, 5 Rich. Eq. (S. C.) 5. See also Edney *v.* King, 39 N. C. 465.

27. Edney *v.* King, 39 N. C. 465. See also Olin *v.* Hungerford, 10 Ohio 268. But see Bramlett *v.* McVey, 91 Ky. 151, 16 S. W. 49, 12 Ky. L. Rep. 760, where in a suit to enjoin the enforcement of an execution upon a judgment against the petitioner for a fine the clerk of the court which rendered the judgment, the county attorney of that county, and the commonwealth's attorney for the district were held to have been properly made defendants.

28. See Sawyer *v.* Gill, 21 Fed. Cas. No. 12,399, 3 Woodb. & M. 97.

Under N. C. Code, § 340, an injunction cannot be allowed after defendant has answered, unless upon notice or on an order to show cause, except that defendant may be restrained only until the decision of the judge granting or refusing the injunction. An injunction indefinitely staying an execution without notice to defendant is error. Faison *v.* McIlwaine, 72 N. C. 312.

29. Basso *v.* Banker, 33 La. Ann. 432; McRae *v.* Brown, 12 La. Ann. 181.

cannot be inquired into in this proceeding.[30] Matters at issue and adjudicated upon in the original suit cannot be reopened on the ground of newly discovered evidence.[31]

k. Evidence.[32] The evidence should be confined to the issues.[33] Where a third person complainant asks an injunction against an execution on his property, he must establish his title with legal certainty.[34] If the application for the injunction is grounded on fraud the fraud if denied must be clearly proved.[35]

30. Turner *v.* Hill, 21 La. Ann. 543.

31. Gusman *v.* De Poret, 33 La. Ann. 333.

An opposition without bond to a seizure and sale presents the issue only whether the notes on which the writ issued have been paid or obtained by fraud, or other defenses exist, specified in La. Code Pr. arts. 738, 739. Koch *v.* Godchaux, 46 La. Ann. 1382, 16 So. 181. See Hodgson *v.* Roth, 33 La. Ann. 941.

In a suit to enjoin the sale under execution of paraphernal property conveyed by a wife without consideration to the execution debtor to secure a debt of her husband, she having remained in possession of the same, the execution creditors cannot set up as a defense the bar of an alleged judicial mortgage. Broussard *v.* Le Blanc, 44 La. Ann. 880, 11 So. 460.

32. **Evidence** generally see EVIDENCE.

Producing evidence.— If plaintiff in execution has been enjoined upon false allegations, the proper practice is to serve a rule on defendant to show cause why the injunction should not be dissolved and thus compel him to produce his evidence. Forsyth *v.* Lacost, 2 La. 319.

33. Jones *v.* Olson, 17 Colo. App. 144, 67 Pac. 349; Dorsey *v.* Hills, 4 La. Ann. 106; Landry *v.* L'Eglise, 3 La. 219. See also Samuelson *v.* Bridges, 6 Tex. Civ. App. 425, 25 S. W. 636.

Admissibility under a general denial.— In a suit by the vendee of property sold by a judgment debtor after judgment, but before execution, an abstract of the judgment is admissible under a general denial to show plaintiff's want of good faith in making purchase. Loan, etc., Co. of America *v.* Campbell, 27 Tex. Civ. App. 52, 65 S. W. 65.

Informalities in issuance of an execution may be considered on the trial of an injunction to arrest it, although not set forth in the petition for the injunction. Galbraith *v.* Snyder, 2 La. Ann. 492.

Under La. Code Pr. art. 739, specifying the grounds upon which executory process may be enjoined without bond, defendant is not entitled to an injunction on the ground that the obligation sued upon was null and without consideration *ab initio*; and, if an injunction is issued without bond, no evidence is admissible upon the trial of the injunction suit, except in support of allegations containing reasons enumerated in said article. Hodgson *v.* Roth, 33 La. Ann. 941.

Where, for the purpose of obtaining an equitable set-off, the judgment debtor filed a petition to enjoin the enforcement of a judgment against it by a member of the firm against which he had suits pending and which subsequently resulted in favor of the firm, it was competent on petition for permanent injunction to prove that he expected to move for a new trial. It was further proper to prove that defendants had no partnership assets, that one of them was insolvent and the other a non-resident and had no property in the state. These were facts tending to show that the complainant might be entitled to injunction to preserve his equitable right of set-off. Harris *v.* Gano, 117 Ga. 934, 44 S. E. 11.

34. Goldsmith *v.* Michel, 19 La. Ann. 272. See *supra*, VIII, D, 2, c, (I), (B). The grantee in a deed conveying a plantation, with "improvements, cattle, mules," etc., who seeks to enjoin execution against certain mules seized as the property of one who, before and after the conveyance, was manager of the plantation, has the burden of showing that the mules were attached to the plantation and passed with it as part of the realty. Citizens' Bank *v.* Grand, 23 La. Ann. 141. But the vendee of the judgment debtor's land is not obliged when suing to enjoin from sale of the land under an execution against the debtor-grantor to prove the existence of the judgment. Miller *v.* Wilkerson, 10 Kan. App. 576, 62 Pac. 253.

In those states where the courts would enjoin the sale of a slave (see *supra*) the title of the complainant had to be made clear, uncontrovertible, and above suspicion of fraud (Saunders *v.* Woods, 5 Yerg. (Tenn.) 142; Pope *v.* Eakin, 3 Humphr. (Tenn.) 413); or he would be left to his remedy at law (Wood *v.* Cruisman, 6 Humphr. (Tenn.) 279; Bryan *v.* Earthman, 6 Yerg. (Tenn.) 24). Nevertheless the court has directed an issue to try the question whether a negro had been given or loaned to the complainant (defendant in execution) when the legal title was not in the complainant. Prewett *v.* Loony, 8 Yerg. (Tenn.) 63. See also Beale *v.* Digges, 6 Gratt. (Va.) 582.

The burden of going forward.— An affidavit of an attorney introduced on the hearing of a petition for injunction against a sale under execution, positively averring that a deputy sheriff made an oral agreement with him extending the time for interposing an affidavit of illegality, was not met by an affidavit by the sheriff personally alleging that he had made no such agreement, but not denying that the same was made by the deputy. Manning *v.* Lacey, 97 Ga. 384, 23 S. E. 845.

35. Hamilton *v.* Bishop, 22 Iowa 211; Lebanon Mut. Ins. Co. *v.* Erb, 2 Chest. Co. Rep. (Pa.) 537 [*affirmed* in 2 Chest. Co. Rep. 570].

l. The Decree. Although a court of equity, when it takes jurisdiction for any reason which makes its intervention necessary or proper, will always endeavor to do full justice to all parties and will shape its decree to that end,[36] it is always exceedingly wary of granting a decree which gives any relief by the extraordinary remedy of injunction greater than the necessity of the situation requires, and of course the complainant cannot get more than he asks for.[37] On the other hand an injunction will not be entirely dissolved for error when a modification will better serve the ends of justice.[38] When there is no equity in the bill, it should be dismissed and the injunction dissolved; but it is not proper to decree a sale under the execution.[39]

m. Dissolution.[40] When an injunction has accomplished its purpose it may be dissolved.[41] It is necessary for the bill to be filed; and if it is not filed the temporary injunction obtained will be dissolved.[42] An injunction granted on the allegation of nullity of the judgment on which the execution issued will be dissolved with damages, if the action of nullity is barred by prescription.[43] A legislator's privilege does not prevent a court from acting on a motion to dissolve an injunction in his favor to stay proceedings.[44] An injunction against a provisional seizure is null if it does not reach the sheriff until after seizure and may be dissolved on motion.[45] The dissolution of the injunction restores as a general

36. Bispham Eq. (6th ed.) 51, 52. See also Byrne *v.* Anderson, 10 Sm. & M. (Miss.) 81; Eckfelt *v.* Starr, 5 Phila. (Pa.) 497, where the ground of the injunction asked for was that the judgment had not been entered or read and signed by the judge and the answer asked to have the judgment read and signed then and there, it was proper for the court to enjoin the execution and order the entry of the judgment to be read and then sign the same on motion. Kent. *v.* Fullenlove, 38 Ind. 522.

37. *Georgia.*—Jones *v.* Crawley, 68 Ga. 175.
Indiana.— Berry *v.* Nichols, 96 Ind. 287.
Louisiana.—Salter *v.* McHenry, 17 La. 507; Palfrey *v.* Shuff, 2 Mart. N. S. 51.
Mississippi.— Byrne *v.* Anderson, 10 Sm. & M. 81.
New Jersey.— Morris Canal, etc., Co. *v.* Biddle, 4 N. J. Eq. 222.
North Carolina.— Whitehurst *v.* Green, 69 N. C. 131.
Texas.— Warren *v.* Kohr, 26 Tex. Civ. App. 331, 64 S. W. 62.
United States.— Ford *v.* Douglas, 5 How. 143, 12 L. ed. 89.

An injunction against a premature execution, if the creditor can immediately afterward take out another, will not be perpetuated. The debtor, having had all the delay to which he was entitled, will be relieved only from damages and costs. Dayton *v.* Natchez Commercial Bank, 6 Rob. (La.) 17.

38. Perry *v.* Kearney, 14 La. Ann. 400. See also Marsh *v.* Mead, 57 Iowa 535, 10 N. W. 922 [*distinguishing* Sloan *v.* Coolbaugh, 10 Iowa 31]. See *infra*, VIII, D, 4, m.

If a sale of perishable goods has been enjoined, the court would modify its decree so as to permit the sheriff to sell and pay the proceeds into court to abide the event of the suit. Heath *v.* Hand, 1 Paige (N. Y.) 329.

39. Lovette *v.* Longmire, 14 Ark. 339. See also Noerdlinger *v.* Huff, 31 Wash. 360, 72 Pac. 73, holding that if the motion to dissolve is equivalent to a demurrer to the complaint on the ground that it does not state a cause of action and there is no request for leave to amend the complaint, it is proper to dismiss the suit.

Where the answer squarely met the allegations of the bill it was proper that the injunction should have been dissolved; but it was error to dismiss the bill when the case had not been set down for hearing upon bill and answer and the bill was not devoid of equity upon its face, and when the case had not been at issue long enough to justify a trial on bill and answer without proof. Upon dissolving an injunction without a dismissal of the bill, the proper course was to require a refunding bond as a condition of allowing defendant to collect the judgment. Grant *v.* Chester, (Tenn. Ch. 1899) 58 S. W. 485.

40. See *supra*, VIII, D, 4, l.

41. Thus a temporary injunction restrained the collection of an execution upon a judgment which was not final and therefore did not warrant the issuance of an execution; but when the action was tried and final judgment rendered, there was no longer any necessity for the injunction. Jacobs *v.* Jacobs, 62 S. W. 263, 23 Ky. L. Rep. 186. But in Georgia it has been held that an injunction procured because the sheriff refused an affidavit of illegality tendered him should not be dissolved on the ground that the sheriff afterward returned the affidavit to court. Newton Mfg. Co. *v.* White, 47 Ga. 400.

42. At least after a delay of four months. Stimson *v.* Bacon, 9 N. J. Eq. 144.

43. Weber *v.* Frost, 22 La. Ann. 348.

44. Botts *v.* Tabb, 10 Leigh (Va.) 616.

45. Bagley *v.* Johnston, 4 La. 332.

Abandonment or waiver.— Where plaintiff obtained an injunction against an execution sale on the ground of a clerical error in the published notice, and the sheriff then readvertised the sale properly for a more distant day, and plaintiff then gave a bond for the

rule the parties to the same position which they occupied before it was granted.[46] But the lien which was created by the levy and discharged by the injunction is not restored. It is therefore necessary for the creditor to sue out a new fieri facias not a venditioni exponas,[47] which if issued would be void and the proceedings thereunder quashed on motion.[48] When an injunction is dissolved, the creditor has an election to proceed either on the bond or on his execution.[49]

n. Second Bill. If complainant brings a second bill, he must show that the new matter alleged did not exist at the time the first bill was filed or that if it existed it was unknown to him.[50]

o. Damages and Costs. Upon dissolution of the injunction, plaintiff in execution is as a rule entitled to damages or costs for the delay in collecting his judgment.[51] But the allowance of damages or costs being a matter to be governed largely by the discretion of the court, its refusal to make an allowance must be an abuse of the most palpable character to authorize a reversal.[52] But if plaintiff in execution has not been delayed in the collection of his judgment,[53] or if the costs claimed were not due to the injunction, but would have been incurred in any event,[54] or if the injunction has been against the collection of the amount out of a particular piece of property without any restraint of satisfaction elsewhere,[55] plaintiff in execution is not entitled to costs when the injunction has been dissolved. If an execution upon a forthcoming bond against the principal and surety has been enjoined at the instance of the principal alone, the surety is not liable for the damages incurred by the principal for retarding the execution.[56] If an execution on a void money judgment is enjoined and a judgment upon a claim for affirmative relief was granted the complainant, the

production of the property at the sale, he will be held to have abandoned his injunction. Beard *v.* Gresham, 5 La. Ann. 160.

Notice of dissolution.— Where execution of a judgment for a sum of money has been enjoined, the surety in the injunction bond, being *ipso facto* co-plaintiff, is not entitled to notice of the dissolution before issuance of the execution. Friedman *v.* Adler, 36 La. Ann. 384.

Form of decree.— Where an injunction is obtained in the form of a separate petition by defendant in execution against plaintiff, a judgment dissolving the injunction need not contain the reasons upon which it was rendered. Mallein *v.* Carstens, 4 La. 172.

46. Duckett *v.* Dalrymple, 1 Rich. (S. C.) 143.

47. Lockridge *v.* Biggerstaff, 2 Duv. (Ky.) 281, 87 Am. Dec. 498.

48. Keith *v.* Wilson, 3 Metc. (Ky.) 201.

In Minnesota if the levy has been on real estate and the injunction staying the proceedings on the execution dissolved the sheriff may complete the proceedings by sale. Knox *v.* Randall, 24 Minn. 479. He should readvertise the property and proceed to sale under the original levy. Pettingill *v.* Moss, 3 Minn. 222, 74 Am. Dec. 747.

49. Porteous *v.* Snipes, 1 Bay (S. C.) 215.

50. Bass *v.* Nelms, 56 Miss. 502 (construing Miss. Code (1871), § 1048); U. S. Bank *v.* Schultz, 3 Ohio 61.

51. And if a credit had not been allowed plaintiff in execution and the execution had not been enjoined for the entire amount, he should be allowed damages on the amount that is due. Michel *v.* Meyer, 27 La. Ann. 173. See also Rowley *v.* Kemp, 2 La. Ann. 360, where the credit was allowed upon dissolution of the injunction. Under La. Code Pr. arts. 739, 740, authorizing injunction without bond and summary trial, to stay an order of seizure and sale, on the ground that the debt has been extinguished by transaction and novation, the party in opposition may discontinue without being required to pay special or other damages. Dashiell *v.* Lesassier, 15 La. 101.

If injunction be dissolved on the ground that the complainant has an adequate remedy at law, the complainant is liable to costs of the proceeding. Modisett *v.* Kalamazoo Nat. Bank, 23 Tex. Civ. App. 589, 56 S. W. 1007.

The fact that defendant's (complainant's) counsel did not attend to his interests, although he had promised so to do, does not excuse him from his liability for costs. Bleiler *v.* George, 2 Woodw. (Pa.) 401.

Upon a partial dissolution plaintiff and his sureties on an injunction bond are bound *in solido* to defendant for damages on the amount for which the judgment is dissolved. Perry *v.* Kearney, 14 La. Ann. 400.

52. Fall *v.* Ratliff, 10 Tex. 291. See Mulholland *v.* Troutman, 10 Ky. L. Rep. 263; Citizens' Nat. Bank *v.* Interior Land, etc., Co., 14 Tex. Civ. App. 301, 37 S. W. 447.

53. Kilpatrick *v.* Tunstall, 5 J. J. Marsh. (Ky.) 80.

54. Moriarty *v.* Galt, 125 Ill. 417, 17 N. E. 714 [*affirming* 23 Ill. App. 213], where the particular item in question was the attorney's fee.

55. Stanley *v.* Bonham, 52 Ark. 354, 12 S. W. 706; Hammond *v.* St. John, 4 Yerg. (Tenn.) 107.

56. Garnett *v.* Jones, 4 Leigh (Va.) 633.

costs of the injunction suit should be taxed against defendant in injunction.[57] If a third person attempts to enjoin an execution against his property instead of pursuing his remedy at law, the only damages which plaintiff in execution can recover are in reconvention for the wrongful suing out of the injunction.[58] The measure of damages for the delay caused by a temporary injunction is the amount of debt and interest lost by reason of the wrongful issuance of the injunction.[59]

p. Liability on Bonds.[60] If an injunction is granted to restrain the sale of property levied on in order that plaintiff may have the benefit of its value if found entitled to it, the obligors on the bond are liable only for the costs and damages occasioned by enjoining the sale.[61] The obligor is bound only for those damages against which he stipulates in his bond.[62] The accrued interest is an element of damages for the delay caused by the injunction and for which the obligor on the bond is liable.[63] In some jurisdictions the bond has "the force and effect" of a judgment.[64]

5. Effect — a. In General. An injunction restraining the levy of an execution precludes the creditor from placing it in the officer's hands, although no sale is made.[65] If an officer proceeds to sell property he has levied on before the injunction he becomes a trespasser *ab initio*.[66] A sheriff enjoined from further proceedings under a seizure should not return the writ, but retain it, to be proceeded with if unfettered.[67] If plaintiff and sheriff have been restrained from executing the original fieri facias an alias cannot be issued.[68] But enjoining the

57. Hickman *v.* White, (Tex. Civ. App. 1895) 29 S. W. 692.

If the equities of the case are with the complainant and the execution is quashed he is entitled to his costs. See Dearborn *v.* Phillips, 21 Tex. 449.

58. Ferguson *v.* Herring, 49 Tex. 126.

59. Winslow *v.* Mulchey, (Tenn. Ch. App. 1895) 35 S. W. 762; Washington *v.* Parks, 6 Leigh (Va.) 581.

Amount of damages not to exceed ten per cent on the amount enjoined is in the discretion of the court. Mulholland *v.* Troutman, 10 Ky. L. Rep. 263.

Commissions of sheriff.— Where the collection of a part of the amount was restrained upon the condition that the complainants (defendants) would pay into the office from which the fieri facias issued a certain amount of it admitted to be due, the sheriff who had levied the whole sum was held entitled to his commissions on the amount paid into the office. Dibble *v.* Aycock, 58 N. C. 399.

60. **Bonds** generally see Bonds.

The liability of the sureties on the injunction bond, where the property was lost or destroyed during the pendency of the injunction without fault of execution plaintiff, is not affected by the statute, by which a levy was continued in force after the execution of the injunction bond and the issuing of the injunction. Pugh *v.* White, 78 Ky. 210.

61. Hubbard *v.* Fravell, 12 Lea (Tenn.) 304.

62. Neal *v.* Taylor, 56 Ark. 521, 20 S. W. 352.

Exoneration.— If the sale of a lot levied on is enjoined, upon dissolution of the injunction the surety is entitled to have the lot first sold and to be deemed liable for the balance only, in spite of his liability for the entire debt. Wood *v.* McFerrin, 2 Baxt. (Tenn.) 493.

In Texas injunction against the sureties who are strangers to the original execution cannot be rendered, without first requiring plaintiff in the original judgment to execute a refunding bond as required by statute. Foster *v.* Shephard, 33 Tex. 687.

63. Hill *v.* Thomas, 19 S. C. 230.

But if after dissolution of injunction plaintiff takes out his execution and obtains satisfaction of his judgment at law, he cannot in an action upon the injunction bond recover the interest which accrued upon his judgment while he was delayed by the injunction. Grundy *v.* Young, 11 Fed. Cas. No. 5,851, 2 Cranch C. C. 114. See also Johnson *v.* Moser, 72 Iowa 654, 34 N. W. 459.

64. McCalley *v.* Wilburn, 77 Ala. 549.

A bond in a suit by partners to restrain levy on their individual property under a judgment and execution against the firm is not within the provisions. Halsey *v.* Murray, 112 Ala. 185, 20 So. 575. That a bill by partners to enjoin levy on their individual property under a judgment against the firm was drawn under mistaken belief of counsel that the judgment was collectable out of the individual property of the partners is not ground for granting relief to a surety on the bond erroneously executed under Ala. Code, § 3522, with condition for payment of the judgment, who voluntarily paid the same on demand. Halsey *v.* Murray, 112 Ala. 185, 20 So. 575.

In Texas it was early the practice to enter judgment against the principal and sureties in the injunction bond. Fall *v.* Ratliff, 10 Tex. 291.

65. Sugg *v.* Thrasher, 30 Miss. 135.

66. Turner *v.* Gatewood, 8 B. Mon. (Ky.) 613.

67. Cochrane *v.* U. S. Bank, 11 Rob. (La.) 64; Dugat *v.* Babin, 8 Mart. N. S. (La.) 391.

68. And if a second fieri facias has improvidently issued the proper action of the

execution of the original judgment does not affect an execution issued on a forfeited forthcoming bond given at issuance of the execution upon the original judgment.[69] The time that an execution is stayed by an injunction of a federal court cannot be included in the reckoning of the time within which the sheriff must make return.[70] The full intent of an injunction is not necessarily confined to the letter, but may sometimes be judged from its spirit and purpose.[71]

b. On Lien and Levy, Etc. By the general rule an injunction releases the levy and the lien created by it.[72] It is held also that the sheriff is bound to restore to the owner the chattels levied on.[73] If an elder execution is enjoined, the sheriff should go ahead and levy a junior which he has in his office,[74] and the proceeds cannot be applied to the elder execution,[75] which is protected by security given

court is to quash it. Byrne *v.* Michoff, 24 La. Ann. 297.

But where an execution was enjoined for being issued prematurely before notice of judgment was served on defendant, and pending the injunction the writ of fieri facias was regularly returned into court and a notice of judgment regularly served upon defendant, plaintiff was not prevented from suing out an alias fieri facias, and seizing and selling property under the writ. Smith *v.* Purves, 20 La. Ann. 278.

69. Davis *v.* Dixon, 1 How. (Miss.) 64, 26 Am. Dec. 695.

70. Ansonia Brass, etc., Co. *v.* Conner, 1 N. Y. City Ct. Suppl. 74.

Computation of time see *supra*, VI, D, 2, a.

71. Davis *v.* Hoopes, 33 Miss. 173 (holding that where an execution was obtained against one as executor, and also in his individual capacity as a surety, and he obtained an injunction restraining the execution, it was held that it must be intended that he did so in both capacities); Campbell *v.* Tarbell, 55 Vt. 455 (where an injunction in terms enjoined only the collection of an execution, the execution had run out, and it was clearly apparent that the whole purpose of the proceedings was to restrain the enforcement of the judgment upon which the execution issued, and it was held that the injunction should be construed accordingly).

Effect on title of debtor.— Where an execution under which property is seized is enjoined, and proceedings *via executiva* are instituted by a third party in another court, under which the property is sold, the debtor's title is not thereby prejudiced. Dosson *v.* Bieller, 10 La. Ann. 570.

72. Mallory *v.* Dauber, 83 Ky. 239; Keith *v.* Wilson, 3 Metc. (Ky.) 201 (although the injunction is wrongfully issued); Lockridge *v.* Biggerstaff, 2 Duv. (Ky.) 281, 87 Am. Dec. 498. *Contra,* Lamorere *v.* Cox, 32 La. Ann. 246.

"The reason is that it would ruin both debtor and creditor if the sheriff should be required to hold the goods to the termination of an injunction bill in chancery. The same reason, it is obvious, would equally apply if the injunction be sued out at the instance of a third person." Telford *v.* Cox, 15 Lea (Tenn.) 298, 299.

The bond given to satisfy the execution, in event the injunction is dissolved, releases the levy, and the remedy is on the bond, and not by a sale of the property on which the levy was made. Mallory *v.* Dauber, 83 Ky. 239.

"When an officer returns an execution levied and stopped or stayed by injunction or supersedeas, the return imports a cessation of the levy and a release of the property" seized. Ela *v.* Welch, 9 Wis. 395, 400.

In Mississippi the act of 1824 gave a lien on all property, real and personal, from the time judgment was entered. Under this act an injunction would not destroy a judgment lien or postpone it to a subsequently attaching one, but merely restrains its enforcement until the injunction is dissolved. Smith *v.* Everly, 4 How. 178. See also Lynn *v.* Gridley, Walk. 548, 12 Am. Dec. 591.

73. Keith *v.* Wilson, 3 Metc. (Ky.) 201; Bisbee *v.* Hall, 3 Ohio 449.

If the property has been sold the money should be paid to defendant. Keith *v.* Wilson, 3 Metc. (Ky.) 201.

In Minnesota if a sheriff has levied an execution and is enjoined from further proceedings, it is his duty, upon service of the injunction, to note the fact on the execution, and retain the levy, but desist from further proceedings; and, if at the end of sixty days from receipt of execution he has received no notice of dissolution, he should return the execution, detailing the facts. Pettingill *v.* Moss, 3 Minn. 222, 74 Am. Dec. 747.

But in Mississippi, under the act of 1824, which gave a lien on all property, real and personal, from the time the judgment is entered, the lien extends to the money produced by a sale of property under execution as well as to the property itself, and when the sale is in virtue of several executions the court will direct the money to be applied to the discharge of the elder judgment. Smith *v.* Everly, 4 How. 178.

If defendant has given a forthcoming bond, the issue of an injunction against the enforcement of the execution excuses him for not delivering the property levied on, and this without forfeiting his bond. Hull *v.* Bloss, 27 W. Va. 654.

74. Mitchell *v.* Anderson, 1 Hill (S. C.) 69, 26 Am. Dec. 158.

75. Newlin *v.* Murray, 63 N. C. 566, holding that the fact that before the return of the process the injunction by consent is dissolved by an order of the court can make no change in the rule. *Contra,* as to this latter

when the injunction was obtained.[76] That is why security must first be given before the lien created by the execution can be suspended.[77] An injunction will not affect levy on realty.[78] That the time during which an injunction operates shall not be considered in the reckoning of the limitation of a judgment lien on land, the injunction must be against the enforcement of the judgment itself.[79]

E. Stay, Quashing, or Withdrawal at Instance of Creditor — 1. In General. A party cannot on his own motion quash his execution, if it be regular and if defendant would be injured.[80] And if it be irregular he cannot quash it after a sale.[81] But a fieri facias which has issued illegally may be withdrawn by plaintiff;[82] and he may stop the sale of property not subject to the execution.[83]

2. Effect — a. In General. Staying the execution after levy does not discharge the debt.[84] An agreement between plaintiff and the debtor to suspend a levy is no bar to the enforcement of the execution.[85]

b. On Lien and Levy, Etc. In some jurisdictions an agreement by a judgment creditor for a stay postpones his lien on the personal property levied on to the claims of other creditors.[86] Such an agreement is deemed, irrespective of its motive, constructively fraudulent as against junior creditors,[87] particularly is this true if the stay agreed upon be indefinite.[88] A stay for a limited time, however,

point, see Duckett *v.* Dalrymple, 1 Rich. (S. C.) 143.

76. See Newlin *v.* Murray, 63 N. C. 566; Bisbee *v.* Hall, 3 Ohio 449.

77. Conway *v.* Jett, 3 Yerg. (Tenn.) 481, 24 Am. Dec. 590. See *supra*, VIII, D, 4, a, (II).

78. Knox *v.* Randall, 24 Minn. 479.

79. An injunction by a third person restraining the judgment plaintiff from selling a tract of land not owned by the judgment debtor does not take the case out of the statute. Shanklin *v.* Sims, 110 Ind. 143, 11 N. E. 32.

80. Taylor *v.* Winters, 1 Ill. 130.

81. Thomas *v.* Bogert, 33 Hun (N. Y.) 11.

A withdrawal by plaintiff of a levari facias on the same day on which it was issued does not affect his right to issue a second one; the staying of the first execution did not, *per se*, do any harm to defendant. Wilkinson *v.* Hiyer, 22 Pa. Co. Ct. 667.

82. Cairns *v.* Smith, 8 Johns. (N. Y.) 337; De Frain *v.* Longaker, 2 Chest. Co. Rep. (Pa.) 382.

83. State Bank *v.* Turney, 7 Humphr. (Tenn.) 271.

A verbal order by plaintiff to the sheriff to stay or return an execution in his hands is sufficient. Hogan *v.* Hisle, 4 Ky. L. Rep. 370.

Presumption as to an agreement to stay execution see Spangler *v.* Sheffer, 69 Pa. St. 255.

Quashing an insufficient replevy bond. Plaintiff, suing out execution on a replevy bond given by one defendant on an execution against two, is not estopped from afterward having such bond quashed on motion. Skinner *v.* Robinson, Hard. (Ky.) 4.

84. McGinnis *v.* Lillard, 4 Bibb (Ky.) 490.

85. Derby Bank *v.* Landon, 2 Conn. 417.

An agreement for a stay of execution for the principal of the judgment does not prevent execution issuing in behalf of the court officers for their costs. Clegg *v.* De Bruhl, 45 Tex. 141.

Withdrawal of an elegit when moiety not set off. An elegit was levied on land, but the moiety was not set off to the creditor, nor possession delivered to him. Subsequently the debtor conveyed the land to a third person, and on motion of the creditor the elegit and return were quashed. It was held that the execution was as if never issued, and the judgment was not satisfied, and plaintiff was therefore free to pursue any remedy which was open before him. Claiborne *v.* Gross, 7 Leigh (Va.) 331.

86. Ross *v.* Weber, 26 Ill. 221.

An extension of time for payment or stay of execution on real estate to a time short of the statutory period of limitation of a judgment lien may be made without prejudice to the creditor, and does not postpone the judgment to other and junior judgments. Marshall *v.* Moore, 36 Ill. 321 [*distinguishing* Ross *v.* Weber, 26 Ill. 221, where personal property was levied on].

If property is suffered to remain in the hands of defendant in the execution the lien is lost. See Green *v.* Allen, 10 Fed. Cas. No. 5,753, 2 Wash. 280.

Judgments rendered with a stay of execution retain, under the law of 1824, their lien from the date of rendition and a stay will not defeat the lien of the first judgment. Pickett *v.* Planters' Bank, 5 Sm. & M. (Miss.) 470, 43 Am. Dec. 523.

The lien of a judgment which bound real estate is not lost, if after a testatum fieri facias has been levied and returned plaintiff in the writ ordered further proceedings to be stayed. Green *v.* Allen, 10 Fed. Cas. No. 5,753, 2 Wash. 280.

87. Montgomery Branch Bank *v.* Broughton, 15 Ala. 127, 131 [*citing* Wood *v.* Gary, 5 Ala. 43].

88. Cook *v.* Wood, 16 N. J. L. 254.

is not infrequently held not to postpone the lien;[89] and indeed some jurisdictions hold that a stay by the creditor will not postpone his lien unless the stay has been for fraudulent purposes.[90]

IX. CLAIMS BY THIRD PERSONS.[91]

A. General Considerations — 1. **Right to Intervene.** The right of a third person, not a party to the action in which execution has issued, to intervene and claim property levied on, is unknown to the common law.[92] Consequently such persons only can intervene, and then only under such circumstances as are provided for in the statutes.[93] But where a case is clearly within the statutes intervention is a matter of right not of grace.[94]

2. **Right or Title of Claimant.** The nature of the title which the claimant must have to be entitled to intervene is wholly dependent on statute. In some jurisdictions his title must be legal,[95] while in others an equitable title or right is

89. Love *v.* Harper, 4 Humphr. (Tenn.) 113, where the stay was for a period of four months. See also Burk's Appeal, 89 Pa. St. 398.

90. State *v.* Records, 5 Harr. (Del.) 146; Hickman *v.* Hickman, 3 Harr. (Del.) 484 [*following* Janvier *v.* Sutton, 3 Harr. (Del.) 37]; Foute *v.* Campbell, 7 How. (Miss.) 377 [*distinguishing* Michie *v.* Planters' Bank, 4 How. (Miss.) 130, 34 Am. Dec. 112], where the stay expired before the recovery of a subsequent judgment against the same defendant.

As to bona fide purchaser.— A party holding an execution may withhold it from participation in the fund in court, or withdraw it from the sheriff's hands; but if the rights of a *bona fide* purchaser of the property from defendant are thereby affected he would have an equity against its future enforcement. Byars *v.* Bancroft, 22 Ga. 34.

Stay of proceedings after levy.— Where an execution was not stayed by order of plaintiff, but the proceedings under it were stayed, and the execution was retained by the officer, the levy still existed, and a sale might be made under it. Daviess *v.* Myers, 13 B. Mon. (Ky.) 511 [*distinguishing* Eldridge *v.* Chambers, 8 B. Mon. (Ky.) 411; Burks *v.* Bass, 4 Bibb (Ky.) 338, where the executions were returned stayed by plaintiff, and where it was held that the levies were released].

91. **Claim against proceeds of sale** see *infra*, X, F.

Claim before justice of the peace see, generally, Justices of the Peace.

Claim in garnishment proceeding see, generally, Garnishment.

Injunction by third person see *supra*, VIII, D, 2, c.

Priority between executions see *supra*, VII, A, 4, a.

92. **In a suit in equity,** where an execution has issued and land has been sold under it, a third party, who claims to be the true owner, cannot intervene for the purpose of moving to set aside the execution, when there is no privity of estate between him and the party against whom the execution issued. *Ex p.* Mensing, 55 Fed. 17.

93. *Georgia.*— Wynn *v.* Irvine's Georgia Music House, 109 Ga. 287, 34 S. E. 582; American Mortg. Co. *v.* Hill, 92 Ga. 297, 18 S. E. 425.

Iowa.— Ball *v.* Cedar Valley Creamery Co., 98 Iowa 184, 67 N. W. 232.

Louisiana.— See Hefferman *v.* Brenham, 1 La. Ann. 146.

Mississippi.— Thomas *v.* Shell, 76 Miss. 556, 24 So. 876; Leffel *v.* Miller, (1890) 7 So. 324.

Pennsylvania.— Smith *v.* Levy, 6 Pa. Super. Ct. 23, 41 Wkly. Notes Cas. 294; Meyer *v.* Jeske, 8 Pa. Dist. 239.

Texas.— White *v.* Jacobs, 66 Tex. 462, 1 S. W. 344; Casentini *v.* Ullman, 21 Tex. Civ. App. 582, 54 S. W. 420.

See 21 Cent. Dig. tit. "Execution," § 543.

Married woman may be a claimant. Shingler *v.* Holt, 7 H. & N. 65, 7 Jur. N. S. 866, 30 L. J. Exch. 322, 4 L. T. Rep. N. S. 76, 9 Wkly. Rep. 871; Bird *v.* Crabb, 7 Jur. N. S. 866, 30 L. J. Exch. 318, 5 L. T. Rep. N. S. 76.

94. Reigel's Appeal, 1 Walk. (Pa.) 72. "In general the granting or refusing of an issue is a matter of discretion in the court below with which this Court will not interfere. But there are certain fundamental and well-settled principles upon which such questions should be determined. An interpleader is for the protection of the stakeholder and the only requisite to entitle him to such protection is that he shall be in danger of attack from two quarters, without fault of his own. . . . The interpleader act was intended to protect him in this dilemma, and the court is not to inquire into the merits of the respective claims further than to see that they are not merely colorable or frivolous or collusive, but may be the basis of *bona fide* suits. If they may be, the interpleader must be granted, even though the court be of opinion that the claims cannot prevail." Book *v.* Day, 189 Pa. St. 44, 46, 41 Atl. 998.

95. *Georgia.*— Oatts *v.* Wilkins, 110 Ga. 319, 35 S. E. 345; MacIntyre *v.* Ferst, 101 Ga. 682, 28 S. E. 989; Hayden *v.* Anderson, 57 Ga. 378; Bailey *v.* Brockett, 20 Ga. 148.

Michigan.— Marquette First Nat. Bank *v.* Crowley, 24 Mich. 492.

sufficient.[96] In either case the title must be accompanied by the right to the possession or control of the property.[97]

3. RIGHT TO INTERPOSE TITLE OF THIRD PERSON.[98] A claimant on the trial of the right of property is not permitted to prove title in a third person, with whom, at the time the evidence is offered, he has neither shown nor proposed to show any privity.[99]

Mississippi.— Claughton *v.* Black, 24 Miss. 185.

Missouri.— State *v.* Jenkins, 170 Mo. 16, 70 S. W. 152.

Pennsylvania.— Faust *v.* Stevens, 8 Kulp 218; Rhoads *v.* Heffner, 1 Walk. 377.

Vermont.— Cleaveland *v.* Deming, 2 Vt. 534.

See 21 Cent. Dig. tit. "Execution," § 544.

A lessee cannot interpose a claim, since the property may be sold subject to his rights. Meyers *v.* Prentjell, 33 Pa. St. 482.

Intermingled goods.— If a purchaser from an insolvent debtor intentionally intermingles the goods with his own property to prevent a levy thereon, he can claim no exemption, save upon furnishing evidence to separate the goods. Lehman *v.* Kelly, 68 Ala. 192. See also McDowell *v.* Kissell, 37 Pa. St. 164; Ratto *v.* Holland, 2 Tex. App. Civ. Cas. § 469.

Joint ownership.— If the claimant has an undivided interest in the property, as where it belongs to him and a third person, he may interpose his title and defeat the execution. Cotten *v.* Thompson, 21 Ala. 574. It is otherwise where the joint owner is the execution debtor, since the sheriff is entitled to possession for the purpose of selling the execution debtor's interest. McDermott *v.* Kline, 6 Phila. (Pa.) 553.

Parol donee cannot claim, unless the actual possession shall have been delivered to, and remained in, him, his executors or assigns. Motte *v.* Aiken, 2 Speers (S. C.) 113.

Property secured by fraud.— Property sold on faith of misrepresentations of the buyer as to his financial condition, if taken in execution by his creditors, may be recovered by the seller on a feigned issue. Johnson *v.* Ensign, 2 Pa. Cas. 510, 4 Atl. 37; Ensign *v.* Hoffield, 2 Pa. Cas. 504, 4 Atl. 189.

Sale pending claim.— One who in good faith files a claim to property levied on, and pending the case sells it, may still maintain his title to the property as it stood when claimed. Thomas *v.* Parker, 69 Ga. 283. See also Jackson *v.* Gewin, 9 Ala. 114.

Title at time of filing claim.— No one can claim who confessedly has no title at the time of filing his claim; and this is true although he could at the time of the levy have conscientiously made oath that the property belonged to him. The commencement of a claim case is not the levy, but the interposition of the claim. Oatts *v.* Wilkins, 110 Ga. 319, 35 S. E. 345. See also Ruker *v.* Womack, 55 Ga. 399.

Title by distress is sufficient to support the claim of a landlord to property taken on execution against his tenant. Grimsley *v.* Klein, 2 Ill. 343.

96. *Alabama.*— Eldridge *v.* Grice, 132 Ala. 667, 32 So. 683; Patapsco Guano Co. *v.* Ballard, 107 Ala. 710, 19 So. 777, 54 Am. St. Rep. 131; Ballard *v.* Mayfield, 107 Ala. 396, 18 So. 29; Floyd *v.* Morrow, 26 Ala. 353. But see Bush *v.* Henry, 85 Ala. 605, 5 So. 321; Wetzler *v.* Kelly, 83 Ala. 440, 3 So. 747; Columbus Iron Works Co. *v.* Renfro, 71 Ala. 577; King *v.* Hill, 20 Ala. 133; Fontaine *v.* Beers, 19 Ala. 722.

Louisiana.— The claimant must own or have a privilege on the property. Boubede *v.* Aymes, 29 La. Ann. 274; Case *v.* Kloppenburg, 27 La. Ann. 482; Hickman *v.* Thompson, 26 La. Ann. 260; Marot *v.* Ferriere, 18 La. Ann. 665; Brown *v.* Cougot, 8 Rob. 14; Wafer *v.* Pratt, 1 Rob. 41, 36 Am. Dec. 681; Alabama Branch Bank *v.* Kraft, 18 La. 565; Skillman *v.* Parnell, 3 La. 494.

New Jersey.— Kuhl *v.* Martin, 29 N. J. Eq. 586.

Rhode Island.— Greene *v.* Haskell, 5 R. I. 447.

Texas.— Durham *v.* Flannagan, 2 Tex. App. Civ. Cas. § 22.

England.— Ford *v.* Baynton, 1 Dowl. P. C. 357; Schroeder *v.* Hanrott, 28 L. T. Rep. N. S. 704.

See 21 Cent. Dig. tit. "Execution," § 544.

97. Philbrick *v.* Goodwin, 7 Blackf. (Ind.) 18; Hamilton *v.* Mitchell, 6 Blackf. (Ind.) 131; Garrity *v.* Thompson, 64 Tex. 597; Sparks *v.* Pace, 60 Tex. 298; Belt *v.* Raguet, 27 Tex. 471; Allen *v.* Russell, 19 Tex. 87; Durham *v.* Flannagan, 2 Tex. App. Civ. Cas. § 22; Sayward *v.* Nunan, 6 Wash. 87, 32 Pac. 1022.

Borrower of goods has no such right. Green *v.* Stevens, 2 H. & N. 146, 5 Wkly. Rep. 497.

Mortgagee out of possession has no such right. See Garrity *v.* Thompson, 64 Tex. 597; Sparks *v.* Pace, 60 Tex. 298; Sayward *v.* Nunan, 6 Wash. 87, 32 Pac. 1022.

Owner of reversion has not sufficient title. Allen *v.* Russell, 19 Tex. 87.

Although possession was not taken under the levy, a claimant is entitled to a trial of the right of property. Marsh *v.* Thomason, 6 Tex. Civ. App. 379, 25 S. W. 43.

98. Right to interpose title of third person in action to restrain execution see *supra*, VIII, D, 4.

99. Jones *v.* Franklin, 81 Ala. 161, 1 So. 199; Pollak *v.* Graves, 72 Ala. 347; Crosby *v.* Hutchinson, 53 Ala. 5; Thomas *v.* Degraffenreid, 17 Ala. 602; Foster *v.* Smith, 16 Ala. 192; Frow *v.* Downman, 11 Ala. 880; Beers *v.* Dawson, 8 Ga. 556; Forsyth *v.* Marbury, R. M. Charlt. (Ga.) 324.

Undivided interest.—He may, however, show that he possesses an undivided interest in

4. Attack on Judgment or Execution. A claimant under the statutes cannot inquire into the regularity of a judgment or execution which is merely voidable and which has not been quashed or set aside, although he may as to one which is void, or which has been quashed or set aside.[1]

5. Time For Interposing Claim. A claim is too late which is interposed after a sale or other legal disposition of the property,[2] or upon appeal.[3] So too a premature trial of a claim will render a judgment founded thereon void,[4] although the fact that a claim under a deed of trust has been interposed before, but tried after, the breach of the condition entitling the trustee to possession will not invalidate it.[5] The mere delivery of an execution to the sheriff will not stop the running of the statute of limitations in favor of a claimant in possession. To effect this, an actual seizure is necessary.[6]

6. Notice or Demand, and Affidavit of Claim[7] — a. In General. As a prerequisite to the prosecution by a third person of a claim to property taken in

the property with a person not a party to the suit (McGrew *v.* Hart, 1 Port. (Ala.) 175), and on the strength of such interest recover all the property (Shive *v.* Finn, 134 Pa. St. 158, 19 Atl. 489).

1. *Alabama.*— Johnson *v.* Whitfield, 124 Ala. 508, 27 So. 406, 82 Am. St. Rep. 196; Christian, etc., Grocery Co. *v.* Michael, 121 Ala. 84, 88, 25 So. 571, 77 Am. St. Rep. 30 [*citing* Dollins *v.* Pollock, 89 Ala. 351, 7 So. 904; Sandlin *v.* Anderson, 76 Ala. 403]; Brown *v.* Hurt, 31 Ala. 146; Taylor *v.* Huntsville Branch Bank, 14 Ala. 633; Huff *v.* Cox, 2 Ala. 310; Stone *v.* Stone, 1 Ala. 582; Perkins *v.* Mayfield, 5 Port. 182; Hooper *v.* Pair, 3 Port. 401, 29 Am. Dec. 258.

Florida.— Baars *v.* Creary, 23 Fla. 311, 2 So. 662; Price *v.* Sanchez, 8 Fla. 136.

Illinois.— Merricks *v.* Davis, 65 Ill. 319; Harrison *v.* Singleton, 3 Ill. 21.

Maine.— Coffin *v.* Freeman, 84 Me. 535, 24 Atl. 986.

Mississippi.— Atwood *v.* Meredith, 37 Miss. 635.

Nebraska.— Miller *v.* Willis, 15 Nebr. 13, 16 N. W. 840.

Pennsylvania.— Fees *v.* Shadel, 20 Pa. Super. Ct. 193; Ludlow *v.* Dutton, 1 Phila. 226. *Compare* Hartley *v.* Weideman, 3 Pa. Dist. 336.

Texas.— Carney *v.* Marsalis, 77 Tex. 62, 13 S. W. 636; Portis *v.* Parker, 22 Tex. 699; Earle *v.* Thomas, 14 Tex. 583; McCormick *v.* Nichols, (Civ. App. 1896) 35 S. W. 526. But see Tillman *v.* McDonough, 2 Tex. App. Civ. Cas. § 52.

See 21 Cent. Dig. tit. "Execution," § 547.

In Georgia, however, it is "settled that a claimant may attack an execution for any reason which the defendant in execution could urge against it at the time of the trial of the claim case" (New England Mortg. Security Co. *v.* Watson, 99 Ga. 733, 735, 27 S. E. 160); but he has no right to make a motion to quash the attachment or judgment on which the execution is based, or the execution itself. His only concern being that the process shall not be enforced by a seizure and sale of his property, his remedy, in a case where such a motion would be good if presented by the proper party, is to move to dismiss the levy (Morrison *v.* Anderson, 111 Ga. 847, 36 S. E. 462 [*citing* Davidson *v.* Rogers, 80 Ga. 287, 7 S. E. 264; Gazan *v.* Royce, 78 Ga. 512, 3 S. E. 753; Krutina *v.* Culpepper, 75 Ga. 602; Morton *v.* Gahona, 70 Ga. 569; Bosworth *v.* Clark, 62 Ga. 286]). And see, generally, Hilton, etc., Lumber Co. *v.* Clements, 108 Ga. 791, 33 S. E. 951; Parker *v.* Matthews, 106 Ga. 49, 31 S. E. 784 [*distinguishing* Smith *v.* Lockett, 73 Ga. 104; Hines *v.* Kimball, 47 Ga. 587]; McCrory *v.* Hall, 104 Ga. 666, 30 S. E. 881; Hudspeth *v.* Scarborough, 69 Ga. 777; Zimmerman *v.* Tucker, 64 Ga. 432; Suydam *v.* Palmer, 63 Ga. 546; Smith *v.* Wilson, 58 Ga. 322; Winship *v.* Phillips, 54 Ga. 237; Hackenhull *v.* Westbrook, 53 Ga. 285; Horton *v.* Kohn, 48 Ga. 183; Phillips *v.* Hyde, 45 Ga. 220; Johnston *v.* Crawley, 22 Ga. 348.

In New Hampshire, a grantee, under a conveyance fraudulent against creditors, may take advantage of any defects in a levy made by such a creditor on the property. Russell *v.* Dyer, 40 N. H. 173.

Attack by plaintiff in execution.— Where the claimant claims through a judgment of foreclosure of a mortgage made by defendant in execution to his vendor, plaintiff in execution may impeach that judgment and mortgage and prove it fraudulent. Williams *v.* Martin, 7 Ga. 377.

2. Lemane *v.* Lemane, 27 La. Ann. 694; Coleman *v.* Brown, 16 La. Ann. 110; Barry *v.* McGrade, 14 Minn. 163. *Compare* Diggs *v.* Green, 15 La. 416, to the effect that a workman with a privilege on property, bought in by plaintiff under his executory process, may intervene, even after the latter has settled with the sheriff, where the intervention has been delayed by plaintiff's promise to pay the claim.

Estoppel by delay to assert.— See Tift *v.* Keaton, 78 Ga. 235, 2 S. E. 690.

3. Hawkins *v.* May, 12 Ala. 673.

4. Johnson *v.* Johnson, 108 Ala. 124, 19 So. 306.

5. Dodds *v.* Pratt, 64 Miss. 123, 8 So. 167.

6. Dodd *v.* McCraw, 8 Ark. 83, 46 Am. Dec. 301.

7. **Notice as condition precedent to liability of officer** see Sheriffs and Constables.

execution he is very generally required to give written notice of his claim to the officer levying the execution, or his deputy,[8] and serve therewith, or as a part thereof, an affidavit describing the property claimed and his right and title thereto.[9] No notice, however, is required where the property levied upon was, at the time of the levy, in the possession of the claimant himself.[10] In case of a sheriff's interpleader notice of the claim must be given by him to the execution creditor.[11]

Notice of claim proceedings see *infra*, IX, B, 4.

8. Service on deputy.— Rust *v.* Morgan, 114 Iowa 101, 86 N. W. 209; Peterman *v.* Jones, 94 Iowa 591, 63 N. W. 338; Williams *v.* McGrade, 13 Minn. 174. *Compare* Headington *v.* Langland, 65 Iowa 276, 21 N. W. 650, to the effect that, where the execution has been levied by a deputy, the notice of claim may be served on the sheriff.

Proof of service.— The admission of the deputy, when testifying, that he received the notice is sufficient proof of its delivery. Peterman *v.* Jones, 94 Iowa 591, 63 N. W. 338.

9. *Alabama.*— Ivey *v.* Coston, 134 Ala. 259, 32 So. 664; Graham *v.* Hughes, 77 Ala. 590.

Florida.— Moody *v.* Hoe, 22 Fla. 309.

Georgia.— Jolley *v.* Hardeman, 111 Ga. 749, 36 S. E. 952.

Illinois.— Dunlap *v.* Berry, 5 Ill. 327, 39 Am. Dec. 413. *Compare* Ice *v.* McLain, 14 Ill. 62, where it was held that, although the statute requires that a claimant must give notice to the constable of his claim to attached property in writing, yet, if he does not, and the constable gives proper notice to the justice of the peace, he may proceed to trial and render judgment.

Iowa.— Baxter *v.* Ray, 62 Iowa 336, 17 N. W. 576; Allen *v.* Wheeler, 54 Iowa 628, 7 N. W. 111; Peterson *v.* Espeset, 48 Iowa 262; Kaster *v.* Pease, 42 Iowa 488.

Minnesota.— Lampsen *v.* Brander, 28 Minn. 526, 11 N. W. 94; Ohlson *v.* Manderfeld, 28 Minn. 390, 10 N. W. 418; Tyler *v.* Hanscom, 28 Minn. 1, 8 N. W. 825; Butler *v.* White, 25 Minn. 432; Barry *v.* McGrade, 14 Minn. 163.

Mississippi.— Ellis *v.* Abercrombie, 10 Sm. & M. 474.

Montana.— Yank *v.* Bordeaux, 23 Mont. 205, 58 Pac. 42, 75 Am. St. Rep. 522.

Oregon.— See Vulcan Iron Works *v.* Edwards, 27 Oreg. 563, 36 Pac. 22, 39 Pac. 403, to the effect that after notice the claimant cannot deprive the sheriff of the right to protect himself, by trial of the claim, by a subsequent notice not to proceed with the trial, while at the same time insisting on his claim to the property.

Pennsylvania.— Burchley *v.* Walker, 1 Leg. Rec. 329. But see Waterman *v.* Langdon, 15 Phila. 211, to the effect that, where a third person makes *a bona fide* claim of ownership, he may be allowed to interplead without supporting his claim by affidavit.

Texas.— Belt *v.* Raguet, 27 Tex. 471; Hargadine-McKittrick Dry-Goods Co. *v.* Jacksboro First Nat. Bank, 14 Tex. Civ. App. 416, 37 S. W. 622.

England.— Hockey *v.* Evans, 18 Q. B. D. 390, 56 L. J. Q. B. 253, 56 L. T. Rep. N. S. 179, 35 Wkly. Rep. 265; Powell *v.* Lock, 3 A. & E. 315, 1 Hurl. & W. 281, 4 N. & M. 852, 30 E. C. L. 159. See also Price *v.* Plummer, 26 Wkly. Rep. 45. But see Webster *v.* Delafield, 7 C. B. 187, 6 D. & L. 597, 13 Jur. 635, 18 L. J. C. P. 186, 62 E. C. L. 187; Angus *v.* Wootton, 1 H. & H. 46, 7 L. J. Exch. 82, 3 M. & W. 310.

See 21 Cent. Dig. tit. "Execution," § 549.

A married woman is not required to give notice of her title to property levied on as that of her husband. Schneider *v.* Fowler, 1 Tex. App. Civ. Cas. § 856. See also Beal *v.* Stebley, 21 Pa. St. 376.

Conclusiveness on affiant.— "The affidavit made for the trial of the right of property is not to be considered as a pleading, and the source or character of title set up therein is not binding upon the affiant or claimant; but the claim to the property must be tried on the pleadings tendering issues." Hargadine-McKittrick Dry-Goods Co. *v.* Jacksboro First Nat. Bank, 14 Tex. Civ. App. 416, 418, 37 S. W. 622 [*citing* Wetzel *v.* Simon, 87 Tex. 403, 28 S. W. 274, 942; Hamburg *v.* Wood, 66 Tex. 168, 18 S. W. 623].

Failure to return affidavit.— A trial of the right of property will not be dismissed because an affidavit of the claimant does not appear in the case. Although that is necessary to justify the officer in taking a bond, the statute does not require him to return it with the bond. Ellis *v.* Abercrombie, 10 Sm. & M. (Miss.) 474.

That claimant's title appears of record will not relieve him of the necessity of giving the notice. Peterson *v.* Espeset, 48 Iowa 262.

That the officer was already in possession of the property under a writ of attachment at the time of levying an execution does not dispense with the necessity of the statutory notice on the part of a claimant. Allen *v.* Wheeler, 54 Iowa 628, 7 N. W. 111.

Where several executions in favor of different persons are levied on property, the claimant should make the required affidavit separately in each case. Moody *v.* Hoe, 22 Fla. 309. *Contra*, Baxter *v.* Ray, 62 Iowa 336, 17 N. W. 576.

10. Ledley *v.* Hayes, 1 Cal. 160; Mann *v.* Martin, 14 Bush (Ky.) 763; Wood *v.* Matter, 88 Minn. 123, 92 N. W. 523; Granning *v.* Swenson, 49 Minn. 381, 52 N. W. 30; Ohlson *v.* Manderfeld, 28 Minn. 390, 10 N. W. 418; Tyler *v.* Hanscom, 28 Minn. 1, 8 N. W. 825; Barry *v.* McGrade, 14 Minn. 163.

11. Dalton *v.* Furniss, 35 Beav. 461, 12 Jur. N. S. 386, 35 L. J. Ch. 463, 14 L. T. Rep. N. S. 319, 14 Wkly. Rep. 600.

b. Sufficiency. A substantial compliance with the law in reference to notice and affidavit of claim by third persons claiming property seized on execution, as to the description of the property claimed, and the nature of their right or title, is all that is necessary.[12] Patent errors, such as in names or dates, which may be corrected by other papers in the case, are immaterial.[13]

c. Amendment. It has been held that amendments, which are germane to the issue,[14] may be allowed by the court to a notice and affidavit of claim of a third person,[15] provided such amendments are authorized by statute.[16] Error,

12. *Alabama.*— Albritton *v.* Williams, 132 Ala. 647, 32 So. 636.

California.— Henderson *v.* Hart, 122 Cal. 332, 54 Pac. 1110; Vermont Marble Co. *v.* Brow, 109 Cal. 236, 41 Pac. 1031, 50 Am. St. Rep. 37.

Georgia.— Selman *v.* Shackelford, 17 Ga. 615.

Illinois.— Pearce *v.* Swan, 2 Ill. 266. See also Dunlap *v.* Berry, 5 Ill. 327, 39 Am. Dec. 413.

Indiana.— Hankins *v.* Ingols, 4 Blackf. 35.

Iowa.— Murray *v.* Thiessen, 114 Iowa 657, 87 N. W. 672; Waterhouse *v.* Black, 87 Iowa 317, 54 N. W. 342. See also Doolittle *v.* Hall, 78 Iowa 571, 43 N. W. 535; Gray *v.* Parker, 49 Iowa 624, 53 Iowa 505, 5 N. W. 697.

Louisiana.— Gravely *v.* Southern Ice Mach. Co., 46 La. Ann. 549, 17 So. 166; Goode *v.* Nelson, 29 La. Ann. 143.

Minnesota.— Schneider *v.* Anderson, 78 Minn. 124, 79 N. W. 603; Williams *v.* McGrade, 13 Minn. 174.

Missouri.— See Smith *v.* White, 48 Mo. App. 404, in which the omissions were held to be material.

Oregon.— Vulcan Iron Works *v.* Edwards, 27 Oreg. 563, 36 Pac. 22, 39 Pac. 403.

Pennsylvania.— Nimick *v.* Kemble Coal, etc., Co., 2 Pa. Co. Ct. 197; Kreile *v.* Pearson, 1 Pa. Co. Ct. 152; Lafferty *v.* Cormick, 1 Wkly. Notes Cas. 267. See also Berger *v.* Juergen, 7 Pa. Super. Ct. 388, 42 Wkly. Notes Cas. 198. *Compare* Bank *v.* Allen, 1 Del. Co. 277.

Texas.— Wright *v.* Henderson, 10 Tex. 204; Merchant *v.* Scott, (Civ. App. 1894) 28 S. W. 717.

See 21 Cent. Dig. tit. "Execution," § 549 *et seq.*

Bare assertions of claim.— A sheriff is not bound to notice bare assertions of individuals as to their claim to property in the possession of a defendant in an execution. He is only required to notice legal claims fairly exhibited. Dunlap *v.* Berry, 5 Ill. 327, 39 Am. Dec. 413. See also Bentley *v.* Hook, 2 Cromp. & M. 426, 2 Dowl. P. C. 339, 3 L. J. Exch. 87, 4 Tyrw. 229.

By whom made.— In Pennsylvania an affidavit of claim under the interpleader act may be made either by the claimant or by any one having cognizance of the facts. Bueckley *v.* Walker, 1 Leg. Rec. (Pa.) 329.

Where a wife claims goods, she must show affirmatively how she derived title, and a mere averment that she did not derive title from her husband is insufficient. Ruffner *v.* Brown, 10 Pa. Dist. 186, 24 Pa. Co. Ct. 507.

Signature.— Unless required in terms to be signed by the party making it, an affidavit not signed, but properly certified by the officer before whom it was made, is sufficient. Albritton *v.* Williams, 132 Ala. 647, 649, 32 So. 636 [*citing* Hyde *v.* Adams, 80 Ala. 111; Watts *v.* Womack, 44 Ala. 605]. But where required to be signed an affidavit signed by a firm-name is insufficient. Flint *v.* McCarty, 1 Tex. App. Civ. Cas. § 1018.

A bill of sale to the claimant of property levied on under execution, delivered to the officer making the levy, is an insufficient notice of claim. Gray *v.* Parker, 49 Iowa 624, 53 Iowa 505, 5 N. W. 697.

Occupation of land as sufficient notice see Jones *v.* Johnson Harvester Co., 8 Nebr. 446, 1 N. W. 443.

Execution in foreign state.— A claim, affidavit, and bond, purporting to be executed in another state, before a notary public thereof, cannot be received by a levying officer without due authentication. The seal of the notary is not authentication, nor is the certificate and seal of the clerk of a court of record, without a further certificate from the judge of such court. Charles *v.* Foster, 56 Ga. 612.

Notice of fiat in bankruptcy is not equivalent to a claim. Bentley *v.* Hook, 2 Cromp. & M. 426, 2 Dowl. P. C. 339, 3 L. J. Exch. 87, 4 Tyrw. 229.

Waiver of defects.— An officer levying an execution has no authority, as against the execution creditor, to waive any defects in a notice of claim filed by a third party. Olcott *v.* Frazier, 5 Hill (N. Y.) 562.

13. **Name of execution plaintiff** see Gayle *v.* Bancroft, 22 Ala. 316 (date of affidavit); Rives *v.* Wilborne, 6 Ala. 45.

14. **Must be germane to issue** see Cox *v.* Cox, 48 Ga. 619.

15. Equitable Mortg. Co. *v.* Brown, 105 Ga. 474, 30 S. E. 687; Veal *v.* Perkerson, 47 Ga. 92; Leedom *v.* Zierfuss, 3 Del. Co. (Pa.) 129.

By counsel.—A claim affidavit is not amendable by counsel of the claimant, who refuses to make the amendment under oath. Kimbrough *v.* Pitts, 63 Ga. 496.

16. **Necessity of authorization.**— A claim affidavit for property levied upon is the foundation of a legal proceeding, and cannot be amended, in the absence of any express statutory provision authorizing it. Blackwell *v.* Pennington, 66 Ga. 240.

however, cannot be predicated upon the allowance or refusal of immaterial amendments to a claimant's affidavit.[17]

7. Security by Claimant[18] — a. In General. In addition to notice and affidavit of claim, a claimant is required to give a bond, conditioned according to law,[19] as a prerequisite to the trial of title.[20] Where, however, the claimant is unable to give bond, he may be allowed to prosecute his claim nevertheless, upon filing a proper affidavit setting out the facts.[21]

b. Parties to Bond. The claimant himself, if the legal owner, is the proper person to give the statutory security,[22] and in Alabama may even do so when only the beneficial owner of the property seized.[23] To whom the bond is to be made payable, whether to plaintiff in execution[24] or to the sheriff,[25] is regulated by statute.

17. Hadden *v.* Larned, 87 Ga. 634, 13 S. E. 806; Trice *v.* Walker, 71 Miss. 968, 15 So. 787.

18. **Indemnity bond** generally see Sheriffs and Constables.

19. **Necessity of conforming to statute.**— See King *v.* Castlen, 91 Ga. 488, 18 S. E. 313.

20. *Florida.*— Moody *v.* Hoe, 22 Fla. 309.

Georgia.— King *v.* Castlen, 91 Ga. 488, 18 S. E. 313; Hand *v.* Frank W. Hall Merchandise Co., 91 Ga. 130, 16 S. E. 644. But see Bonner *v.* Little, 29 Ga. 538.

Missouri.— Williamson *v.* Wylie, 69 Mo. App. 368.

Pennsylvania.— Ellis *v.* Jester, 7 Pa. Dist. 277; Rinehart *v.* Bodine, 3 Kulp 85; Weldin *v.* Booth, 1 Pa. Co. Ct. 169; Chandler *v.* Ziegler, 10 Wkly. Notes Cas. 338; Richardson *v.* Brunswick, 10 Wkly. Notes Cas. 81; Emerson *v.* Grattan, 4 Wkly. Notes Cas. 574; Sharpless *v.* Merriman, 2 Chest. Co. Rep. 375; Bank *v.* Allen, 1 Del. Co. 277; Usner *v.* Bush, 5 Lanc. L. Rev. 277. But see City *v.* Hitner, 9 Wkly. Notes Cas. 541, where it is said that the requiring of a bond in a sheriff's interpleader is within the discretion of the court.

Texas.— Zadek *v.* Dixon, (Sup. 1886) 3 S. W. 247; Green *v.* Banks, 24 Tex. 508.

See 21 Cent. Dig. tit. "Execution," § 552.

In England a claimant may retain the possession of goods seized in execution by payment of a sum of money into court to abide the event of an interpleader issue. Kotchin *v.* Golden Sovereigns, 2 Q. B. 164, 67 L. J. Q. B. 722, 78 L. T. Rep. N. S. 409, 46 Wkly. Rep. 616.

Where there are several executions one bond is sufficient. Rinehart *v.* Bodine, 3 Kulp (Pa.) 85; Richardson *v.* Brunswick, 10 Wkly. Notes Cas. (Pa.) 81; Green *v.* Banks, 24 Tex. 508. *Contra*, Moody *v.* Hoe, 22 Fla. 309.

Order of sale.— Where the sheriff, by order of court, in making sale, gives notice that he sells only the interest of the execution defendant, the claimant may assert his right, although he failed to give bond in an interpleader previously awarded — the interpleader having been superseded by the order of sale. Hower *v.* Wallis, 105 Pa. St. 397.

21. Hadden *v.* Larned, 83 Ga. 636, 10 S. E. 278; Barnum's Universal Exposition Co. *v.* O'Brien, 7 Wkly. Notes Cas. (Pa.) 82.

22. See cases cited *infra*, this note.

In Pennsylvania a claimant may, on the granting of an interpleader issue, give his own bond, provided he does not claim title under the defendant. See Doane *v.* Spanogla, 12 Wkly. Notes Cas. 36; Vent *v.* Pashley, 9 Wkly. Notes Cas. 559; Smith *v.* Stoddart, 8 Wkly. Notes Cas. 390; Dallett *v.* Bond, 1 Wkly. Notes Cas. 358; Landsdorf *v.* Bach, 1 Wkly. Notes Cas. 147; Becker *v.* Miller, 1 Wkly. Notes Cas. 83; Landenberger *v.* Landenberger, 16 Phila. 11; Bank *v.* Allen, 1 Del. Co. 285; Phillips *v.* Quigley, 38 Leg. Int. 102; Bueckley *v.* Walker, 1 Leg. Rec. 329.

Husband as surety see Whitesides *v.* Vickers, 13 Phila. (Pa.) 32.

Married women.— Under the Pennsylvania act of June 3, 1887, a married woman claiming goods on which execution has been levied may on proper cause shown file her own bond. Hearing *v.* Buckley, 22 Wkly. Notes Cas. 444. Previously she could not (Warder *v.* Davis, 35 Pa. St. 74; Hughes *v.* Davidson, 20 Wkly. Notes Cas. 275; Sinclair *v.* Heyer, 19 Wkly. Notes Cas. 181; Ward *v.* Whitney, 5 Wkly. Notes Cas. 492; Bacharach *v.* Levy, 19 Phila. 340), unless a *feme sole* trader (Hahs *v.* Schmeyer, 6 Wkly. Notes Cas. 271; Seeger *v.* Mornhinweg, 2 Wkly. Notes Cas. 406).

Trustee of married woman see Rogers *v.* Bostain, 11 Ky. L. Rep. 764.

Non-resident claimant cannot file his own bond. De Saville *v.* Shive, 12 Wkly. Notes Cas. (Pa.) 250; Scatchard *v.* Landenberger Mfg. Co., 10 Wkly. Notes Cas. (Pa.) 452.

One of two joint claimants may give bond. Marrs *v.* Gantt, Minor (Ala.) 406. See also Gayle *v.* Bancroft, 22 Ala. 648. *Compare* Vicory *v.* Strausbaugh, 78 Ky. 425, to the effect that one claiming jointly with the execution debtor whose one-half interest has been levied on cannot give bond.

23. Graham *v.* Lockhart, 8 Ala. 9.

24. In Kentucky the bond must be made payable to plaintiff in execution. It is insufficient even if made to his assignee. Lair *v.* Wilson, 13 Bush (Ky.) 589; Watson *v.* Gabby, 18 B. Mon. (Ky.) 658.

25. Anthony *v.* Brooks, 5 Ga. 576.

c. Amount of Bond. The general rule is that the claimant must give security in double the amount of the debt, if the goods are worth so much; otherwise in double the value of the goods.[26]

d. Time For Giving Bond. The time for giving the bond is regulated by statute or governed by the practice of the particular jurisdiction.[27]

e. Objections and Amendments. The mere fact that a bond is voidable will not defeat the claimant's right, although it may cause a stay of proceedings;[28] and where the bond given is merely defective, it may be amended or a new bond given in its place.[29] Objections must be taken within a reasonable time.[30]

8. ESTOPPEL[31] TO ASSERT OR DENY CLAIM. A claimant may by his conduct estop himself to assert his claim;[32] but to have this effect and create an estoppel the acts done or omitted by him must have been with a view to mislead, and must have been acted upon by the opposite party.[33] And under the general rules

26. Bank *v.* Allen, 1 Del. Co. (Pa.) 277. See also Ellis *v.* Jester, 7 Pa. Dist. 277; Weldin *v.* Booth, 1 Pa. Co. Ct. 169; Chandler *v.* Ziegler, 10 Wkly. Notes Cas. (Pa.) 338; Sharpless *v.* Merriman, 2 Chest. Co. Rep. (Pa.) 375; Unser *v.* Bush, 5 Lanc. L. Rev. (Pa.) 277.

27. In Georgia the bond should be given at the time of the interposition of the claim. Hand *v.* F. W. Hall Merchandise Co., 91 Ga. 130, 16 S. E. 644.

In Pennsylvania it should be given at the return of the rule requiring it to be given. Wolf *v.* Wolf, 1 Del. Co. 380.

Before rule absolute.— The execution and delivery of a bond before the entry of the rule absolute is merely premature, and does not invalidate it. It relates to the time of the rule absolute when that is finally entered. Com. *v.* Beary, 9 Pa. Super. Ct. 246.

28. Moore *v.* Chambers, 11 Sm. & M. (Miss.) 408.

29. Bradford *v.* Dawson, 2 Ala. 203; Veal *v.* Perkerson, 47 Ga. 92 (insertion of omitted penalty with consent of sureties); Sweeney *v.* Jarvis, 6 Tex. 36.

30. Sharp *v.* Hicks, 94 Ga. 624, 21 S. E. 208.

After pleading to the claimant's petition, the interpleader defendant has the burden of showing that the bond filed is worthless, where he makes the objection for the first time after pleading. Jones *v.* Moyer, 4 Kulp (Pa.) 288.

31. Estoppel generally see ESTOPPEL.

32. *Alabama.*— Smith *v.* Locke, 4 Ala. 288.

Georgia.— Wright *v.* McCord, 113 Ga. 881, 39 S. E. 510 (representing property as that of defendant); Drawdy *v.* Littlefield, 75 Ga. 215 (admissions in affidavit of claim).

Illinois.— Peddicord *v.* Security Live-Stock Co., 26 Ill. App. 407.

Louisiana.—Amonett *v.* Young, 14 La. Ann. 175, pointing out property for seizure.

Missouri.— Page *v.* Butler, 15 Mo. 73, signing delivery bond.

New York.— Roraback *v.* Stebbins, 4 Abb. Dec. 100, 3 Keyes 62, 33 How. Pr. 278, turning over property for seizure.

Washington.— Murne *v.* Schwabacher, 2 Wash. Terr. 191, 3 Pac. 270.

See 21 Cent. Dig. tit. "Execution," § 557.

Pointing out property for seizure.— A party who, being himself the owner of property, points it out to be seized in execution for the debt of another, will be estopped from denying the title of defendant. Amonett *v.* Young, 14 La. Ann. 175. But the pointing out of the property by a servant of the owner will not estop the owner from setting up his claim. New York Car-Oil Co. *v.* Richmond, 6 Bosw. (N. Y.) 213.

Signing delivery bond.— Where a claimant signs a delivery bond, he will not be allowed to assert his claim after forfeiture of the bond. Page *v.* Butler, 15 Mo. 73. But see Schwein *v.* Sims, 2 Metc. (Ky.) 209. *Compare* Clark *v.* Weaver, 17 Hun (N. Y.) 481.

33. See ESTOPPEL, 16 Cyc. 671 *et seq.* And see the following illustrative cases:

Alabama.— Ramey *v.* W. O. Peoples Grocery Co., 108 Ala. 476, 18 So. 805.

Georgia.— Corsicana First Nat. Bank *v.* Fleming, 103 Ga. 722, 30 S. E. 669; Sears *v.* Bagwell, 69 Ga. 429; Sims *v.* Dorsey, 61 Ga. 488; Sterling *v.* Arnold, 54 Ga. 690.

Kentucky.— Schwein *v.* Sims, 2 Metc. 209.

Louisiana.— Sandel *v.* Douglass, 27 La. Ann. 628.

Michigan.— Michigan Paneling Mach., etc., Co. *v.* Parsell, 38 Mich. 475.

Mississippi.—Taylor *v.* Strong, 10 Sm. & M. 63.

New York.— Clark *v.* Weaver, 17 Hun 481; Whedon *v.* Champlin, 59 Barb. 61; Pike *v.* Acker, Lalor 90.

South Dakota.— Plunkett *v.* Hanschka, 14 S. D. 454, 85 N. W. 1004.

Texas.— Blum *v.* Merchant, 58 Tex. 400.

See 21 Cent. Dig. tit. "Execution," § 557.

Failure to assert claim at time of seizure.— If the owner of property is present when it is levied on as the property of another, and makes no objection, and sets up no claim at the time, this does not estop him from setting up his claim. Irwin *v.* Morell, Dudley (Ga.) 72. See also Straus *v.* Minzesheimer, 78 Ill. 492; Blum *v.* Merchant, 58 Tex. 400. But see Murne *v.* Schwabacher, 2 Wash. Terr. 191, 3 Pac. 270.

Mere failure to file a claim to land levied on will not estop the owner from subsequent assertion of title thereto. Sears *v.* Bagwell, 69 Ga. 429.

Estoppel of execution defendant.— In an action to recover personal property by a

governing estoppels an estoppel may similarly arise against the execution plaintiff to deny the claimant's right.[34]

9. Lien on and Custody of Property Pending Claim. Pending the adjudication of a claim to property under execution, the lien of the execution is not lost. It is at most merely suspended, and the property is regarded as still in the custody of the law.[35] The claimant is as a rule entitled to the actual custody of the property,[36] and until the trial of the issue the sheriff has no authority to receive it back from him.[37] Nor will the fact that an indemnity bond has been given by the execution creditor affect the claimant's right to the property, either as against such creditor or the purchaser at the execution sale.[38]

B. Proceedings For Establishment and Determination of Claims[39] — **1. Nature and Form of Remedy — a. In General.** A claim case is said to partake of the nature of an equitable proceeding,[40] and being of purely statutory origin it is necessary to look to the statutes which themselves create the right for the form of remedy.[41] But the remedy thereby given is cumulative merely,

plaintiff claiming under an execution sale on a judgment against defendant, defendant is not estopped by the fact of the execution against him from denying that he owned the property, and asserting that it belonged to a third person; and this although he had declared previously to the execution sale that the property belonged to him. Hill *v.* Neuman, 67 Tex. 265, 3 S. W. 271.

34. Haddow *v.* Morton, [1894] 1 Q. B. 565, 63 L. J. Q. B. 431, 9 Reports 275, 70 L. T. Rep. N. S. 470.

Estoppel to deny title.— An execution creditor, who pending interpleader proceedings purchases the goods in the claimant's hands at sales under executions obtained by the claimant's creditors against him and resells the same at a profit, is estopped from denying in the interpleader proceedings that the property belonged to claimant. Moore *v.* Whitney, 10 Lanc. Bar (Pa.) 122, 1 Leg. Chron. (Pa.) 1, 7 Luz. Leg. Reg. (Pa.) 158. But the attachment and sale of property to pay the purchase-price thereof does not estop the attaching creditor, as against a claimant, to deny the debtor's title when he sold it to the claimant. Bjork *v.* Benn, 56 Minn. 244, 57 N. W. 657.

35. Montgomery Branch Bank *v.* Broughton, 15 Ala. 127; Doremus *v.* Walker, 8 Ala. 194, 42 Am. Dec. 634; Mills *v.* Williams, 2 Stew. & P. (Ala.) 390; Moore *v.* Whitney, 10 Lanc. Bar (Pa.) 122, 1 Leg. Chron. (Pa.) 1, 7 Luz. Leg. Reg. (Pa.) 158. See also Gray *v.* Krugerman, 4 C. Pl. (Pa.) 150, as to the proper practice upon the discharge of a rule to interplead. But see Planters' Bank *v.* Black, 11 Sm. & M. (Miss.) 43.

Rights of third persons.— The pendency of a proceeding to try the right of property to goods taken on execution cannot prevent a third person from maintaining an action at law to recover the goods of the claimant. Oden *v.* Stubblefield, 2 Ala. 684.

36. Phillips *v.* Saunders, 15 Ga. 518 (limiting the claimant's right, under the Georgia act of 1811, to those cases in which he, and not defendant, is in possession at the time of levy); Haywood *v.* Ashman, 8 Phila. (Pa.) 235 (claimant entitled where claim not derived from defendant); Bank *v.* Allen, 1 Del. Co. (Pa.) 277 (as to duty of sheriff). See also Bueckley *v.* Walker, 1 Leg. Rec. (Pa.) 329, as to the proper practice where the claimant cannot give bond, and claims through defendant.

Right of surety to control disposition.— A surety in a claim bond, in which the principal is trustee for *a feme covert*, has no equitable right to prevent the *feme covert* from removing the property covered by the condition of the bond out of the state, previous to a forfeiture of the condition. Hughes *v.* Garrett, 8 Ala. 483.

37. Durst *v.* Padgitt, 5 Tex. Civ. App. 304, 24 S. W. 666. *Compare* Murray *v.* Beck, 17 Fed. Cas. No. 9,957, 2 Cranch C. C. 677, in which the court enforced a return to the officer in a case of collusion between the claimant and the execution defendant.

38. Hanson *v.* McKerrall, 57 Mo. App. 56. *Compare* Moses *v.* Brashears, 2 Handy (Ohio) 36, 12 Ohio Dec. (Reprint) 317, decided under special statutory provisions (Ohio Code, §§ 426, 427, 428), which permitted plaintiff to give bond in double the value found by the sheriff's jury, and then have the property sold under the execution.

39. Determination of priority between executions and other liens see *supra*, VII, A, 4, b.

Distribution of proceeds see *infra*, X, F.

40. "A claim is really an intervention authorized by statute in a proceeding to which the claimant is not a party, and therefore a claim case partakes of the nature of an equitable proceeding." Ford *v.* Holloway, 112 Ga. 851, 852, 38 S. E. 373 [*citing* Colquitt *v.* Thomas, 8 Ga. 258; Williams *v.* Martin, 7 Ga. 377].

41. *Alabama.*— *Ex p.* Oehmig, 91 Ala. 558, 8 So. 820; Yarborough *v.* Moss, 9 Ala. 382.

Georgia.— Adams *v.* Worrill, 46 Ga. 295.

Mississippi.— Gilliam *v.* Moore, 10 Sm. & M. 130.

Pennsylvania.— Strouse *v.* Bard, 8 Pa. Super. Ct. 48.

Texas.— Lackey *v.* Campbell, (Civ. App. 1899) 54 S. W. 46.

and does not take from the claimant his right to assert title either at common law[42] or in equity.[43] Where, however, an election of remedy has once been made, the claimant will be bound thereby.[44] In cases where the statutory remedy is inapplicable, the claimant is necessarily remitted to such other remedies as the law affords.[45]

b. Replevin.[46] In many jurisdictions an action of replevin will lie in favor of a third person whose property has been taken in execution as that of the execution defendant for the recovery of the possession thereof.[47]

West Virginia.— Erb *v.* Hendricks Co., 50 W. Va. 28, 40 S. E. 338.

See 21 Cent. Dig. tit. "Execution," § 559 *et seq.*

42. *Georgia.*— Whittington *v.* Doe, 9 Ga. 23; Donaldson *v.* Kendall, Ga. Dec. 227, Pt. II.

Indiana.— Hanna *v.* Steinberger, 6 Blackf. 520.

Kentucky.— Hoskins *v.* Robinson, 101 Ky. 667, 42 S. W. 113, 19 Ky. L. Rep. 877.

Missouri.— Bradley *v.* Holloway, 28 Mo. 150; Hawk *v.* Applegate, 37 Mo. App. 32.

Ohio.— Sammis *v.* Sly, 4 Ohio Cir. Dec. 60.

Texas.— Lang *v.* Dougherty, 74 Tex. 226, 12 S. W. 29; Moore *v.* Gammel, 13 Tex. 120; Schley *v.* Hale, 1 Tex. App. Civ. Cas. § 930.

West Virginia.— Erb *v.* Hendricks Co., 50 W. Va. 28, 40 S. E. 338.

See 21 Cent. Dig. tit. "Execution," § 559 *et seq.*

Effect of indemnity bond.— The right to elect cannot be defeated by the execution plaintiff's giving the bond of indemnity before the owner makes the statutory claim to the property after the levy. Hawk *v.* Applegate, 37 Mo. App. 32.

43. Anderson *v.* Hooks, 9 Ala. 704; Jenkins *v.* Nolan, 79 Ga. 295, 5 S. E. 34; Vickery *v.* Ward, 2 Tex. 212.

Injunction.— "Ordinarily, a bill in equity will not lie to restrain an execution creditor from proceeding in due course to sell, in satisfaction of his claim, real estate alleged to belong to his debtor. . . . But where the process of the law is being used against right and justice, to the injury of another, the right of the latter to invoke the intervention of a court of equity cannot be doubted." Natalie Anthracite Coal Co. *v.* Ryon, 188 Pa. St. 138, 139, 41 Atl. 462. See also Funk *v.* Brooklyn Glass, etc., Co., 25 Misc. (N. Y.) 91, 53 N. Y. Suppl. 1086. *Compare* Racine Iron Co. *v.* McCommons, 111 Ga. 536, 36 S. E. 866, 51 L. R. A. 134. See also *supra*, VIII, D.

Proceedings in aid of claim.— "While under our practice a claimant may file equitable proceedings in aid of his claim, and may make such allegations therein as he deems necessary to show that in equity his claim of title is superior to the judgment levied upon the property claimed, we think that he should not be allowed to stop the trial of a claim case in order to foreclose a mortgage and obtain judgment thereon which judgment would be superior to the judgment levied upon the land." Cabot *v.* Armstrong, 100 Ga. 438, 444, 28 S. E. 123.

44. Jenkins *v.* Nolan, 79 Ga. 295, 5 S. E. 34; Donaldson *v.* Kendall, Ga. Dec. 227, Pt. II.

Election of remedies generally see ELECTION OF REMEDIES.

45. State *v.* Booker, 61 Miss. 16 (execution issued from supreme court); Schley *v.* Hale, 1 Tex. App. Civ. Cas. § 930 (execution upon interest of coöwner).

46. **Replevin** generally see REPLEVIN.

47. *California.*— Rhodes *v.* Patterson, 3 Cal. 469.

Colorado.— See A. Leschen, etc., Rope Co. *v.* Craig, 18 Colo. App. 353, 71 Pac. 885.

Indiana.— Hadley *v.* Hadley, 82 Ind. 95. *Compare* Branch *v.* Wiseman, 51 Ind. 1, where it was held that replevin would not lie where the execution issued on a judgment against plaintiff's joint owner of the property.

Iowa.— Ralston *v.* Black, 15 Iowa 47.

Missouri.— Belkin *v.* Hill, 53 Mo. 492; Bradley *v.* Holloway, 28 Mo. 150. *Compare* Talbot *v.* Magee, 59 Mo. App. 347, in which, however, the claimant gave the statutory notice, and the officer took an indemnifying bond, which facts were held to estop the claimant from bringing replevin against the execution plaintiff, to whom the officer had delivered the property.

New Jersey.— Bruen *v.* Ogden, 11 N. J. L. 370, 20 Am. Dec. 593.

New York.— Stewart *v.* Wells, 6 Barb. 79.

See 21 Cent. Dig. tit. "Execution," § 559 *et seq.*

Contra.— Cromwell *v.* Owings, 7 Harr. & J. (Md.) 55; Clark *v.* Clinton, 61 Miss. 337 (under Miss. Code (1880), § 2633); Covell *v.* Heymen, 111 U. S. 176, 4 S. Ct. 355, 28 L. ed. 390; St. Paul, etc., R. Co. *v.* Drake, 72 Fed. 945, 19 C. C. A. 252. But see Saunders *v.* Jordan, 54 Miss. 428.

Actual possession in the sheriff or plaintiff in execution is not necessary to sustain the action. Hadley *v.* Hadley, 82 Ind. 95; Ralston *v.* Black, 15 Iowa 47.

A mortgagee out of possession cannot maintain replevin against the sheriff, who takes the property out of the possession of the mortgagor by virtue of a writ of fieri facias against the mortgagor, before a sale thereof, although the sheriff may threaten to sell it absolutely, without regard to the mortgage. Fugate *v.* Clarkson, 2 B. Mon. (Ky.) 41, 36 Am. Dec. 589. See also McIsaacs *v.* Hobbs, 8 Dana (Ky.) 268, where the point was raised, but not passed on.

c. Sheriff's Interpleader.[48] In some jurisdictions, notably Pennsylvania and England, the proper mode of procedure to determine claims to property taken in execution is by interpleader[49] whereby, upon claim being made, the sheriff applies to the court for a rule on plaintiff and claimant to appear before the court, contest their respective rights, and abide the further order of the court.

48. Interpleader generally see INTERPLEADER.

49. Maurer *v.* Sheafer, 116 Pa. St. 339, 9 Atl. 869; Phillips *v.* Reagan, 75 Pa. St. 381; Furman *v.* Holmes, 6 Pa. Co. Ct. 162; Kisterbock *v.* Todd, 16 Wkly. Notes Cas. (Pa.) 47; Vent *v.* Pashley, 9 Wkly. Notes Cas. (Pa.) 559; Rodgers *v.* Douglass, 9 Wkly. Notes Cas. (Pa.) 191; Prickett *v.* McWilliams, 2 Wkly. Notes Cas. (Pa.) 353; Kutz *v.* Malony, 1 Wkly. Notes Cas. (Pa.) 84; Bank *v.* Allen, 1 Del. Co. (Pa.) 277; Fenwick *v.* Laycock, 2 Q. B. 108, 1 G. & D. 532, 6 Jur. 341, 11 L. J. Q. B. 146, 42 E. C. L. 594; Smith *v.* Critchfield, 14 Q. B. D. 873, 54 L. J. Q. B. 366, 54 L. T. Rep. N. S. 122, 33 Wkly. Rep. 920; Holmes *v.* Menye, 4 A. & E. 127, 4 Dowl. P. C. 300, 1 Hurl. & W. 608, 5 L. J. K. B. 62, 5 N. & M. 563, 31 E. C. L. 74; Bond *v.* Woodall, 2 C. M. & R. 601, 4 Dowl. P. C. 351, 5 L. J. Exch. 9, 1 Tyrw. & G. 11; Claridge *v.* Collins, 7 Dowl. P. C. 698, 3 Jur. 894; *In re* Oxfordshire, 6 Dowl. P. C. 136; Allen *v.* Gibbon, 2 Dowl. P. C. 292; Dobbins *v.* Green, 2 Dowl. P. C. 509; Donninger *v.* Hinxman, 2 Dowl. P. C. 424; Bishop *v.* Hinxman, 2 Dowl. P. C. 166; Tupton *v.* Harding, 6 Jur. N. S. 116, 29 L. J. Ch. 225, 1 L. T. Rep. N. S. 264, 8 Wkly. Rep. 122; Lea *v.* Rossi, 11 Exch. 13, 1 Jur. N. S. 384, 24 L. J. Exch. 280; Aylwin *v.* Evans, 52 L. J. Ch. 105, 47 L. T. Rep. N. S. 568; Bateman *v.* Farnsworth, 29 L. J. Exch. 365, 2 L. T. Rep. N. S. 390; Stocker *v.* Heggerty, 67 L. T. Rep. N. S. 27; Smith *v.* Saunders, 37 L. T. Rep. N. S. 359; Moore *v.* Hawkins, 15 Reports 166, 43 Wkly. Rep. 235.

Object of act.— The interpleader act was passed for the benefit of the sheriff, and not for claimants (Bain *v.* Funk, 61 Pa. St. 185), and it is not imperative upon him to ask an issue, since in clear cases he should not demand it (Bank *v.* Allen, 1 Del. Co. (Pa.) 277).

Conduct of sheriff must be honest and unprejudiced. Holt *v.* Frost, 3 H. & N. 821, 28 L. J. Exch. 55. See also Haythorn *v.* Bush, 2 Cromp. & M. 689, 2 Dowl. P. C. 641, 3 L. J. Exch. 210; Cox *v.* Balne, 2 D. & L. 718, 9 Jur. 182, 14 L. J. Q. B. 95.

Not granted interested sheriff.— Dudden *v.* Long, 1 Bing. N. Cas. 299, 3 Dowl. P. C. 139, 1 Scott 281, 27 E. C. L. 648. See also Ostler *v.* Bower, 4 Dowl. P. C. 605, 1 Hurl. & W. 653.

Sheriff not bound to accept indemnity.— Levy *v.* Champneys, 2 Dowl. P. C. 454.

Time for application.—Sheriff need not wait for proceedings against him before applying for relief (Green *v.* Brown, 3 Dowl. P. C. 337); but he must not apply before claim made (Isaac *v.* Spilsbury, 10 Bing. 3, 2 Dowl. P. C. 211, 3 Moore & S. 341, 25 E. C. L. 12).

Effect of delay.— A sheriff will not be entitled to relief, unless he comes "immediately" on receiving notice of an adverse claim. Devereux *v.* John, 1 Dowl. P. C. 548. See also Mutton *v.* Young, 4 C. B. 371, 11 Jur. 414, 16 L. J. C. P. 165, 56 E. C. L. 371; Cook *v.* Allen, 1 Cromp. & M. 542, 2 Dowl. P. C. 11, 2 L. J. Exch. 199, 3 Tyrw. 586; Beale *v.* Overton, 5 Dowl. P. C. 599, 1 Jur. 544, 6 L. J. Exch. 118, M. & H. 172, 2 M. & W. 534; Drackenbury *v.* Laurie, 3 Dowl. P. C. 180; Dixon *v.* Ensell, 2 Dowl. P. C. 621; Tufton *v.* Harding, 6 Jur. N. S. 116, 29 L. J. Ch. 225, 1 L. T. Rep. N. S. 264, 8 Wkly. Rep. 122.

Claim must be actually made.— Isaac *v.* Spilsbury, 10 Bing. 3, 2 Dowl. P. C. 211, 3 Moore & S. 341, 25 E. C. L. 12.

Possession of goods or proceeds.— A sheriff can only interplead while he is in possession of goods seized under a fieri facias, or intends to seize goods or holds the proceeds of an execution. Moore *v.* Hawkins, 15 Reports 166, 43 Wkly. Rep. 235. See also Scott *v.* Lewis, 2 C. M. & R. 289, 4 Dowl. P. C. 259, 1 Gale 204, 4 L. J. Exch. 321, 5 Tyrw. 1083; Braine *v.* Hunt, 2 Cromp. & M. 418, 2 Dowl. P. C. 391, 3 L. J. Exch. 85; Anderson *v.* Calloway, 1 Cromp. & M. 182, 1 Dowl. P. C. 636, 2 L. J. Exch. 32, 3 Tyrw. 237; Holton *v.* Gantrip, 6 Dowl. P. C. 130, M. & H. 324, 3 M. & W. 145; Lea *v.* Rossi, 11 Exch. 13, 1 Jur. N. S. 384, 24 L. J. Exch. 280; Day *v.* Carr, 7 Exch. 883; Inland *v.* Bushell, 5 Dowl. P. C. 147, 2 Hurl. & W. 118; Kirk *v.* Almond, 2 L. J. Exch. 13. And see Phillips *v.* Reagan, 75 Pa. St. 387, to the effect that an actual levy is unnecessary.

After withdrawal sheriff cannot call upon parties to interplead. Crump *v.* Day, 4 C. B. 760, 56 E. C. L. 760. See also Cropper *v.* Warner, 1 Cab. & E. 152.

The question of precedence between writs does not entitle sheriff to interplead. Day *v.* Waldock, 1 Dowl. P. C. 523. See also Salmon *v.* James, 1 Dowl. P. C. 369. *Compare* Slowman *v.* Back, 3 B. & Ad. 103, 23 E. C. L. 54, in which an interpleader was allowed on a claim by a third person against both writs.

Goods held in representative capacity.— Fenwick *v.* Laycock, 2 Q. B. 108, 1 G. & D. 532, 6 Jur. 341, 11 L. J. Q. B. 146, 42 E. C. L. 594.

Goods in possession of stranger.— Allen *v.* Gibbon, 2 Dowl. P. C. 292.

Mortgaged goods.— A sheriff is not entitled to a rule for an interpleader in case of a levy upon goods claimed to be subject to mortgage, since his proper course is to sell the interest of the execution defendant subject to the lien. Brill *v.* West End Pass. R. Co., 4 Wkly. Notes Cas. (Pa.) 139. See also.

d. Motion. Motion is not a proper remedy by which to procure the delivery of the property seized to the claimant,[50] although a rule will lie to compel an officer to comply with the requirements of law with reference to the return of the execution and claim papers.[51] A motion or other proceeding to stay, quash, or vacate the execution will not lie in favor of a claimant to the property levied on.[52]

e. Sheriff's Jury. In England and some of the states, the sheriff, upon claim being made, may impanel a jury to determine the ownership of the property levied upon.[53] But unless specifically provided for by law,[54] such proceedings, not being judicial in their nature,[55] are never conclusive upon the parties, and are at best merely a method whereby the sheriff seeks to avoid the danger of trespassing upon the property of a stranger.[56]

2. JURISDICTION.[57] Claims of third persons to property seized on execution should as a rule be adjudicated in the court from which the execution issued.[58]

Victor *v.* Excelsior Hosiery Co., 10 Pa. Co. Ct. 325, as to goods subject to pledge. And see Scarlett *v.* Hanson, 12 Q. B. D. 213, 53 L. J. Q. B. 62, 50 L. T. Rep. N. S. 75, 32 Wkly. Rep. 310.

A full inventory of the goods should be made by the sheriff, which with claimant's affidavit should be annexed to his petition for a rule. Bank *v.* Allen, 1 Del. Co. (Pa.) 277.

Order of sale.— The court may order the sale of the goods claimed and the application of the proceeds of the sale in such manner and upon such terms as may be just. Forster *v.* Clowser, [1897] 2 Q. B. 362, 66 L. J. Q. B. 693, 76 L. T. Rep. N. S. 825 [*explained* in Stern *v.* Tegner, [1898] 1 Q. B. 37, 66 L. J. Q. B. 859, 77 L. T. Rep. N. S. 347, 46 Wkly. Rep. 82, to the effect that where goods subject to a bill of sale have been seized at the instance of an execution creditor, and it is doubtful whether the security is sufficient, the court will not interfere with the rights of the bill-of-sale holder, unless the execution creditor guarantees him against loss]. See also Pearce *v.* Watkins, 2 F. & F. 377.

Instead of sale, a receiver or manager may be appointed. Howell *v.* Dawson, 13 Q. B. D. 67.

Trial by affidavit.— The court cannot try the rights of different claimants upon affidavit, but must direct an issue. Allen *v.* Gibbon, 2 Dowl. P. C. 292; Bramidge *v.* Adshead, 2 Dowl. P. C. 59, 3 L. J. Exch. 54.

50. Lawson *v.* Johnson, 5 Ark. 168; Hewson *v.* Deygert, 8 Johns. (N. Y.) 333. But see Davis *v.* Tiffany, 1 Hill (N. Y.) 642.

51. Brannon *v.* Barnes, 111 Ga. 850, 36 S. E. 689.

52. Pulaski County *v.* Vaughn, 83 Ga. 270, 9 S. E. 1065; Murphy *v.* Borden, 49 N. J. L. 527, 13 Atl. 42; Howland *v.* Ralph, 3 Johns. (N. Y.) 20; Oswego River Pulp Co. *v.* Delaware Water Gap Pulp Co., 10 Pa. Co. Ct. 312, But see Flickinger *v.* Huber, 31 Pa. St. 344; Ellis *v.* Cadwalader, 14 Wkly. Notes Cas. (Pa.) 12. See *supra*, VIII.

In Georgia the remedy of a claimant is by motion to dismiss. He cannot move to quash. Morrison *v.* Anderson, 111 Ga. 847, 36 S. E. 462; Pulaski County *v.* Vaughn, 83 Ga. 270, 9 S. E. 1065. But see Columbus Iron Works Co. *v.* Goetchius, 48 Ga. 576.

53. *California.*—Sheldon *v.* Loomis, 28 Cal. 122; Perkins *v.* Thornburgh, 10 Cal. 189; Strong *v.* Patterson, 6 Cal. 156.

Kentucky.— Philips *v.* Harriss, 3 J. J. Marsh. 122, 19 Am. Dec. 166.

Michigan.— Smith *v.* Cicotte, 11 Mich. 383.

Missouri.— See Pierce *v.* Kingsbury, 63 Mo. 259.

New York.— Cohen *v.* Climax Cycle Co., 19 N. Y. App. Div. 158, 46 N. Y. Suppl. 4; Platt *v.* Sherry, 7 Wend. 236; Van Cleef *v.* Fleet, 15 Johns. 147; Townsend *v.* Phillips, 10 Johns. 98; Bayley *v.* Bates, 8 Johns. 185.

England.— Glossop *v.* Pole, 3 M. & S. 175; Roberts *v.* Thomas, 6 T. R. 88; Farr *v.* Newman, 4 T. R. 621, 2 Rev. Rep. 479.

54. In Oregon, when any person other than a defendant notifies a sheriff in writing that he claims personal property seized by such officer under an execution, the sheriff may for his own protection summon a jury to try such claim, without the request, and even against the objection, of the claimant; and the verdict of such jury, if against the claimant, is a complete defense to an action by him against the sheriff for the recovery of such property. Vulcan Iron Works *v.* Edwards, 27 Oreg. 563, 36 Pac. 22, 39 Pac. 403.

55. Rowe *v.* Bowen, 28 Ill. 116. See also Cohen *v.* Climax Cycle Co., 19 N. Y. App. Div. 158, 46 N. Y. Suppl. 4.

56. *Illinois.*— Rowe *v.* Bowen, 28 Ill. 116; Cassell *v.* Williams, 12 Ill. 387.

Indiana.— Chinn *v.* Russell, 2 Blackf. 172.

Kentucky.— Sanders *v.* Hamilton, 3 Dana 550.

New York.— Cohen *v.* Climax Cycle Co., 19 N. Y. App. Div. 158, 46 N. Y. Suppl. 4.

England.— Bessey *v.* Windham, 6 Q. B. 166, 8 Jur. 824, 14 L. J. Q. B. 7, 51 E. C. L. 166; Latkow *v.* Eamer, 2 H. Bl. 437; Glossop *v.* Pole, 3 M. & S. 175.

57. Jurisdiction of proceeding to determine priority see *supra*, VII, A, 4, c, (II).

58. Brannan *v.* Cheek, 103 Ga. 353, 29 S. E. 937; Oger *v.* Daunoy, 7 Mart. N. S. (La.) 656; Clark *v.* Clinton, 61 Miss. 337; Erb *v.* Hendricks Co., 50 W. Va. 28, 40 S. E. 338.

But where the levy is made in a county other than that in which the execution issued, the coördinate court of the former has jurisdiction.[59] In case the court from which the execution issued has no jurisdiction of the amount of the claim, the claimant can compel his adversary to come into a higher court to litigate it.[60]

3. PARTIES[61] — a. Necessary and Proper Parties — (I) *IN GENERAL.* All persons interested in the disposition of property under execution which is claimed by a person not a party to the writ should be made parties to the proceedings.[62]

(II) *CLAIMANTS.* Proceedings to determine the ownership of property levied on can only be prosecuted by one not a party to the writ,[63] except where a party holds for the benefit of a third person.[64] The holder of the legal title is himself the proper party to assert claim,[65] although this may be done by an equitable owner under some statutes.[66] Where two or more are jointly interested, one may prosecute a claim for the benefit of all;[67] while on the other hand the several beneficiaries under a mortgage for an aggregate amount may properly join as claimants.[68]

(III) *JUDGMENT CREDITOR.* Except in replevin[69] the judgment creditor should always be made a party to claim proceedings.[70]

In Alabama the circuit court has jurisdiction of all claims to property levied on, whether the execution issued from that court or another. Cullum *v.* Smith, 6 Ala. 625.

In Pennsylvania the common pleas has no power to grant an interpleader where the process issued from a magistrate's court. Harmony Bldg. Assoc. *v.* Berger, 8 Wkly. Notes Cas. 376.

In Texas, under Rev. St. (1895) arts. 5293–5295, the officer is required to indorse on the claimant's bond the value of the property assessed by him, and return the bond to the proper court having jurisdiction of the amount. When made as required, such assessment determines the jurisdiction of the court to which the return is made. Cleveland *v.* Tufts, 69 Tex. 580, 7 S. W. 72. If only partially made the court is not bound to determine its jurisdiction by his assessment, but can hear evidence of value. Cullers *v.* Gray, (Civ. App. 1900) 57 S. W. 305. The claimant has a right to trial in the court of his domicile. Brown *v.* Young, 1 Tex. App. Civ. Cas. § 1240. *Compare* Yarborough *v.* Downes, 1 Tex. App. Civ. Cas. § 675.

Where a judgment is recovered before a justice, and after being certified to the circuit court execution is issued from such court and levied, the justice is without jurisdiction to try title to the property on claim of a third person. Erb *v.* Hendricks Co., 50 W. Va. 28, 40 S. E. 338.

Where the commonwealth is execution plaintiff the courts of chancery have jurisdiction to determine claims of third persons. Moore *v.* Auditor, 3 Hem. & M. (Va.) 232.

59. Merchants' Bank *v.* Davis, 3 Ga. 112; Oger *v.* Daunoy, 7 Mart. N. S. (La.) 656. *Contra,* Wagoner *v.* Hower, 12 Wkly. Notes Cas. (Pa.) 304.

60. Brown *v.* Washington, 51 La. Ann. 483, 485, 24 So. 976 [*citing* State *v.* Judge Judicial Dist. Ct., 50 La. Ann. 109, 23 So. 97].

61. Parties generally see PARTIES.

Parties in proceeding to determine priority see *supra,* VII, A, 4.

62. Heard *v.* Foster, 74 Ga. 830; Van Winkle *v.* Young, 37 Pa. St. 214; Bank *v.* Allen, 1 Del. Co. (Pa.) 277.

A trustee in bankruptcy may be made a party. Ibbotson *v.* Chandler, 9 Dowl. P. C. 250; Bird *v.* Mathews, 46 L. T. Rep. N. S. 512. See also Walker *v.* Ker, 7 Jur. 156, 12 L. J. Exch. 204.

63. Pierce *v.* Kingsbury, 63 Mo. 259; Pitts *v.* Burgess, 2 Tex. App. Civ. Cas. § 700.

64. Walmsley *v.* Hubbard, 24 Tex. 612; Parker *v.* Portis, 14 Tex. 166.

65. Alford *v.* Colson, 8 Ala. 550; Parker *v.* Portis, 14 Tex. 166. See also Jones *v.* Coney, 111 Ga. 843, 36 S. E. 321. *Compare* Walmsley *v.* Hubbard, 24 Tex. 612, in which the execution defendant asserted claim as the agent of the owner.

Infant claimants.— A trial of right of property may be presented in the name of an infant by a *prochein ami,* who may execute the bond, and if necessary make the affidavit required by statute. Strode *v.* Clark, 12 Ala. 621. And see as to the sheriff's right to interplead in the case of an infant claimant Claridge *v.* Collins, 7 Dowl. P. C. 698, 3 Jur. 894.

Property belonging to a wife and children should not be subjected to the debts of the husband and father, because the proper party has not claimed it. Bailey *v.* Brockett, 20 Ga. 148.

Substitution of parties.—See Bettis *v.* Taylor, 8 Port. (Ala.) 564.

66. State *v.* McKellop, 40 Mo. 184. See also Hawkins *v.* May, 12 Ala. 673.

67. Hawkins *v.* May, 12 Ala. 673.

68. Gaar *v.* Centralia First Nat. Bank, 20 Ill. App. 611.

69. **Replevin** will lie against either the judgment creditor or the officer as his agent. Stewart *v.* Wells, 6 Barb. (N. Y.) 79.

70. Staples *v.* Bouligny, 10 Rob. (La.) 424; Eveleigh *v.* Salsbury, 3 Bing. N. Cas. 298, 5 Dowl. P. C. 369, 3 Scott 674, 32 E. C. L. 144; Field *v.* Cope, 2 Cromp. & J. 480, 1 Dowl. P. C. 567, 1 L. J. Exch. 175, 2 Tyrw. 548. See also Owens *v.* Clark, 78

(iv) *Judgment Debtor.* The judgment debtor cannot be joined with the claimant in one proceeding.[71]

(v) *Officers.* The officer who levied an execution has such an interest in the property seized as to render him a proper party to the claim proceedings.[72] But the officer should not be joined in a suit to enjoin the sale of land, where the judgment creditor is the only one whose acts are claimed to give the court jurisdiction.[73]

b. Death of Party.[74] Upon the death of the execution creditor or the claimant, the proceeding must be prosecuted in the name of his personal representative.[75] In case of the death of one of several plaintiffs, the case should proceed in the name of the survivor.[76]

4. Notice.[77] Timely and sufficient notice of claim proceedings must in all cases be given to the adverse party, whether such party be the claimant, the sheriff, or the judgment creditor.[78]

5. Pleadings[79] **— a. In General.** Unless required by statute, formal pleadings are unnecessary in claim proceedings.[80] They should, however, be in writing,[81] and should so far as practicable conform to the pleadings in other civil actions, clearly setting out the basis of the claim and the claimant's title or right, and all matters of defense thereto.[82] In Pennsylvania the issue is made up by regular

Tex. 547, 15 S. W. 101, where an assignee of a judgment was permitted to docket the claim case in the name of plaintiff in the writ for his use, and on proof of his purchase of the judgment was recognized as the proper plaintiff in the case.

An execution creditor is not bound to appear, where there are no goods liable to his execution. Glasier *v.* Cooke, 5 N. & M. 680, 36 E. C. L. 629.

71. Anderson *v.* Anderson, 23 Tex. 639.

72. Ferguson *v.* Ehrenberg, 39 Ark. 420 (where the court refused to substitute the purchaser for the officer, as permitted by Gantt Ark. Dig. § 4486); Mullins *v.* Bullock, 19 S. W. 8, 14 Ky. L. Rep. 40; Stewart *v.* Wells, 6 Barb. (N. Y.) 79.

73. Natalie Anthracite Coal Co. *v.* Ryon, 188 Pa. St. 138, 41 Atl. 462.

74. Effect of death of party generally see Abatement and Revival, 1 Cyc. 47 *et seq.*

75. Gayle *v.* Bancroft, 22 Ala. 316; Ray *v.* Anderson, 114 Ga. 975, 41 S. E. 60; Ellis *v.* Francis, 9 Ga. 325; Pashley *v.* White, 15 Phila. (Pa.) 134.

76. Ray *v.* Anderson, 114 Ga. 975, 41 S. E. 60.

77. Notice or demand and affidavit of claim see *supra*, IX, A, 6.

78. Van Winkle *v.* Young, 37 Pa. St. 214; Keker *v.* Weightman, 9 Wkly. Notes Cas. (Pa.) 274; Bank *v.* Allen, 1 Del. Co. (Pa.) 277, forty-eight hours' written notice to claimant and plaintiff. But see Small *v.* Finch, 31 Ind. App. 18, 66 N. E. 1015, where actual knowledge of the seizure of the property under execution on the part of the claimant was held to excuse the twenty days' written notice provided for by Burns Rev. St. Ind. (1901) §§ 1613, 1614.

For form of notice see Murray *v.* Thiessen, 114 Iowa 657, 87 N. W. 672.

Sufficiency of notice.—A notice by the sheriff to plaintiff's attorney that he had decided to summon a jury to try the validity of the claimant's rights to property seized on execution, specified the time and place of the trial, and was given five or six days prior thereto. The notice was repeated to the claimant in person on the day before, and again on the morning of the trial; a postponement to suit plaintiff's convenience, if desired, being offered. It was held that the notice was sufficient. Sommer *v.* Oliver, 39 Oreg. 453, 65 Pac. 600.

Proof of service.— A sheriff's affidavit that a rule was served compelling a claimant to interplead is insufficient proof of service, there being no return or record of such service. Erby *v.* Ziegler, 9 Pa. Dist. 536.

Defendant's receipting service on the back of the notice and retaining a copy is a sufficient receipt of service to render the notice admissible in evidence. Murray *v.* Thiessen, 114 Iowa 657, 87 N. W. 672.

79. Pleading generally see Pleading.

80. Lawler *v.* Bashford-Burmister Co., (Ariz. 1896) 46 Pac. 72; Sayward *v.* Nunan, 6 Wash. 87, 32 Pac. 1022; Chapin *v.* Bokee, 4 Wash. 1, 29 Pac. 936. "It is in cases where for some equitable cause a verdict is to be molded in a claim case that there must be pleadings sufficient to indicate the character of the finding sought, and supported perhaps by a proper prayer. But where the naked question is whether the land levied on is subject to the legal process which has seized it, and this issue is raised upon an ordinary claim proceeding, we know of no reason why there should be separate pleadings." Wright *v.* McCord, 113 Ga. 881, 883, 39 S. E. 510.

The clamant's affidavit and notice to the sheriff are a substitute for a formal bill in equity for an interpleader to try plaintiff's right. Leedom *v.* Zierfuss, 3 Del. Co. (Pa.) 129.

81. Martin *v.* Fox, 40 Mo. App. 664, construing Rev. St. (1879) § 2367.

82. *Alabama.*— Langdon *v.* Brumby, 7 Ala. 53; Desha *v.* Scales, 6 Ala. 356; Montgomery Branch Bank *v.* Parker, 5 Ala. 731.

common-law pleadings, although some latitude is allowed as to the time of filing.[83]

b. Amendment. Where they are germane to the issue,[84] and offered in due time,[85] amendments may be allowed to the pleadings within the discretion of the court.[86]

6. Dismissal or Withdrawal by Claimant.[87] A claimant may withdraw his claim, the right to do so being once allowed in some jurisdictions by statute.[88] But the withdrawal must be had before verdict,[89] or before the decision, where a jury is waived,[90] and consequently cannot be had on appeal without the consent of the opposite party.[91] The effect of a withdrawal is to terminate the

Georgia.— Morrison *v.* Knight, 82 Ga. 96, 8 S. E. 211; Blandford *v.* McGehee, 67 Ga. 84.

Indiana.— Fordyce *v.* Pipher, 84 Ind. 86.

Kansas.— Carr *v.* Huffman, 1 Kan. App. 713, 41 Pac. 982.

Louisiana.— Maskell *v.* Pooley, 12 La. Ann. 661.

Mississippi.— Martin *v.* Lofland, 10 Sm. & M. 317.

Missouri.— Martin *v.* Fox, 40 Mo. App. 664.

Texas.— Wrought Iron Range Co. *v.* Brooker, 2 Tex. App. Civ. Cas. § 225.

See 21 Cent. Dig. tit. "Execution," § 567.

Allegation of ownership.— It is not necessary for a claimant of property levied on to allege his ownership in order to raise an issue, but merely to deny that the property is liable to the execution. Montgomery Branch Bank *v.* Parker, 5 Ala. 731.

Answer must show execution lien. Fordyce *v.* Pipher, 84 Ind. 86.

Failure to tender issue defeats claimant's right. See Martin *v.* Lofland, 10 Sm. & M. (Miss.) 317.

Plea of prescription.— See Maskell *v.* Pooley, 12 La. Ann. 661.

Replication.— Where a claimant of property taken on execution claims by virtue of a deed, a replication that if there is any such deed it is not valid does not admit the execution of the deed. Desha *v.* Scales, 6 Ala. 356.

83. Kiker *v.* Weightman, 9 Wkly. Notes Cas. (Pa.) 274; Hallowell *v.* Schnitzer, 6 Wkly. Notes Cas. (Pa.) 469.

Estoppel.— When a claimant to goods seized in execution joins issue, and in his bond and pleadings asserts the existence of the execution and levy, he cannot deny these assertions after he has delayed defendant and put him to trial. Blum *v.* Warner, 1 Leg. Rec. (Pa.) 113. See, generally, Estoppel.

84. Wall *v.* Harvey, 107 Ga. 404, 33 S. E. 421; Hardman *v.* Cooper, 107 Ga. 251, 33 S. E. 73; Bryan *v.* Simpson, 92 Ga. 307, 18 S. E. 547; Turner *v.* Williams, 63 Ga. 726; Soperstein *v.* Salsberg, 17 Pa. Super. Ct. 288; Horton *v.* McCurdy, 14 Phila. (Pa.) 221, where an amendment changing nature of claim was refused.

85. An amendment will not be allowed after rule absolute (Grant *v.* Hancock, 5 Phila. (Pa.) 193), or at the trial (Grant *v.* Hill, 5 Phila. (Pa.) 173).

86. Pomeroy *v.* Cauley, 17 Phila. (Pa.) 158; Leedom *v.* Zierfuss, 3 Del. Co. (Pa.) 129. And see Battles *v.* Sliney, 126 Pa. St. 460, 17 Atl. 620.

In Georgia either plaintiff in execution or the claimant can by way of amendment to the issue introduce in aid of their respective demands any equitable matters germane to the issue, which is whether or not the property is subject to the execution. Ford *v.* Holloway, 112 Ga. 851, 38 S. E. 373. See also Wilkins *v.* Gibson, 113 Ga. 31, 38 S. E. 374, 84 Am. St. Rep. 204.

87. Dismissal generally see Dismissal and Nonsuit.

88. *Alabama.*— Gayle *v.* Bancroft, 22 Ala. 316, disclaimer by claimant of suit brought in his name of which he was ignorant.

Georgia.— Mercer *v.* Baldwin, 85 Ga. 651, 11 S. E. 846; Mize *v.* Ells, 22 Ga. 565.

Kansas.— Aydelotte *v.* Brittain, 29 Kan. 98, stipulation with constable to withdraw.

Oregon.— Singer Mfg. Co. *v.* Driver, 40 Oreg. 333, 67 Pac. 111; Vulcan Iron Works *v.* Edwards, 27 Oreg. 563, 36 Pac. 22, 39 Pac. 403.

Pennsylvania.— Laflin Co. *v.* Saplee, 17 Wkly. Notes Cas. 157.

Texas.— Mosely *v.* Gainer, 10 Tex. 578.

See 21 Cent. Dig. tit. "Execution," § 569.

Restoration of replevied property.— Where plaintiff has given bond and replevied the property he cannot dismiss his claim before restoring it to the sheriff. Mosely *v.* Gainer, 10 Tex. 578.

Second withdrawal.— A claimant who has once withdrawn his claim and interposed a second claim to the same levy cannot again withdraw it. Brady *v.* Brady, 68 Ga. 831. See also Hart *v.* Thomas, 61 Ga. 470.

Stipulation not to withdraw.— Royce *v.* Small, 94 Ga. 677, 20 S. E. 12.

Where claimant refuses to join issue plaintiff may proceed with the trial without any joinder in issue, or he may at his option move to dismiss the claim; but claimant cannot have it dismissed for his own default. Royce *v.* Small, 94 Ga. 677, 20 S. E. 12.

89. Hiley *v.* Bridges, 60 Ga. 375; Houser *v.* Brown, 60 Ga. 366; Attaway *v.* Dyer, 8 Ga. 184.

Before retirement of jury see Mize *v.* Ells, 22 Ga. 565.

90. See Hiley *v.* Bridges, 60 Ga. 375; Houser *v.* Brown, 60 Ga. 366.

91. See Adams *v.* Carnes, 171 Ga. 505, 36 S. E. 597; Bethune *v.* Barker, 14 Ga. 694; Attaway *v.* Dyer, 8 Ga. 184.

case,[92] but it will not prevent the claimant from interposing another claim,[93] or from pursuing any other available remedy with reference to the property.[94]

7. Issues, Proof, and Variance. The issue to be tried under the claim statutes is an issue of the liability of the property to plaintiff's execution as against the claimant's title or right, if any he has, and the claimant cannot as a rule urge irregularities in or the invalidity of the levy.[95] The claimant must in all cases prove his title as claimed, or the variance will be fatal.[96] But it is not a fatal variance that the proof shows an ownership of only a part of the goods upon a claim to all,[97] or an ownership in trust upon a claim to absolute ownership,[98] or a several instead of a joint ownership as claimed.[99]

8. Evidence [1]**— a. Burden of Proof.** Where a third person interposes a claim to property seized on execution, the burden of proof is as a rule upon him to establish the validity of his title.[2] Where, however, the claimant or his agent was in

92. Melpass *v.* Georgia L. & T. Co., 108 Ga. 303, 33 S. E. 967, in which the writ of error was dismissed, it appearing from the bill of exceptions that the claim had been withdrawn.

93. Laflin Co. *v.* Suplee, 17 Wkly. Notes Cas. (Pa.) 157. See also Brady *v.* Brady, 68 Ga. 831; Hart *v.* Thomas, 61 Ga. 470.

94. Cox *v.* Griffin, 17 Ga. 249; Singer Mfg. Co. *v.* Driver, 40 Oreg. 333, 67 Pac. 111; Vulcan Iron Works *v.* Edwards, 27 Oreg. 563, 36 Pac. 22, 39 Pac. 403.

95. *Alabama.*— Hobson *v.* Kissam, 8 Ala. 357; Planters', etc., Bank *v.* Borland, 5 Ala. 531.

Florida.— Volusia County Bank *v.* Bigelow, [1903] 33 So. 704; Baars *v.* Creary, 23 Fla. 311, 2 So. 662; Moody *v.* Hoe, 22 Fla. 309.

Georgia.— Southern Min. Co. *v.* Brown, 107 Ga. 264, 33 S. E. 73; Lamar *v.* Coleman, 88 Ga. 417, 14 S. E. 608; Bowen *v.* Frick, 75 Ga. 786; Moses *v.* Eagle, etc., Mfg. Co., 62 Ga. 455; Martin *v.* Tweedell, 55 Ga. 559. See also and *compare* Pearce *v.* Renfroe, 68 Ga. 194; Anderson *v.* Wilson, 45 Ga. 25; Robinson *v.* Schley, 6 Ga. 515.

Illinois.— Marshall *v.* Cunningham, 13 Ill. 20.

Louisiana.— Asher *v.* Fredenstein, 19 La. Ann. 256; Patterson *v.* Tompkins, 11 La. Ann. 452.

Mississippi.— Shattuck *v.* Miller, 50 Miss. 386.

Pennsylvania.— Phillips *v.* Reagan, 75 Pa. St. 381; Van Winkle *v.* Young, 37 Pa. St. 214; Rhoads *v.* Heffner, 1 Walk. 377; Schollenberger *v.* Fisher, 1 Leg. Rec. 353; Blum *v.* Warner, 1 Leg. Rec. 113.

Texas.— Webb *v.* Mallard, 27 Tex. 80; Mosely *v.* Gainer, 10 Tex. 578; Huston *v.* Curl, 8 Tex. 239, 58 Am. Dec. 110; Grant *v.* Williams, 1 Tex. App. Civ. Cas. § 363.

England.— Green *v.* Rogers, 2 C. & K. 148, 61 E. C. L. 148.

See 21 Cent. Dig. tit. "Execution," § 570.

Attack on judgment or execution see *supra*, IX, A, 4.

A formal issue need not be joined on a trial of right of property under the statute. Belton *v.* Willis, 1 Fla. 226. See also Windham *v.* Clarke, 16 Ala. 659; Sirmans *v.* Bush, 61 Ga. 136; Wright *v.* Henderson, 12 Tex. 43, in which the execution plaintiff tendered an immaterial issue, but the court determined the suit on the material issue tendered by the claimant. But see Sears *v.* Gunter, 39 Miss. 338, in which the levy was released and the claimant discharged from his bond, upon plaintiff's failure to tender an issue at the term of court next succeeding.

The question of damages is not involved in the issue. Shattuck *v.* Miller, 50 Miss. 386.

96. Johnson *v.* Whitfield, 124 Ala. 508, 27 So. 406, 82 Am. St. Rep. 196; Dent *v.* Smith, 15 Ala. 286; Raymond *v.* Parisho, 70 Ind. 256; Waverly Coal, etc., Co. *v.* McKennan, 110 Pa. St. 599, 1 Atl. 543; Stewart *v.* Wilson, 42 Pa. St. 450; Leach *v.* Alexander, 12 Pa. Super. Ct. 377; Lobb *v.* Ullman, 2 Chest. Co. Rep. (Pa.) 253; Bank *v.* Allen, 1 Del. Co. (Pa.) 277. But see Seattle First Nat. Bank *v.* Hagan, 16 Wash. 45, 47 Pac. 223, where a claimant asserting title as owner was permitted to show his right to possession as mortgagee.

Evidence descriptive of the property claimed is properly excluded where it varies materially from the description in the affidavit of claim. Johnson *v.* Whitfield, 124 Ala. 508, 27 So. 406, 82 Am. St. Rep. 196.

97. Rush *v.* Vought, 55 Pa. St. 437, 93 Am. Dec. 769.

98. Campbell *v.* Ellis, 149 Pa. St. 51, 24 Atl. 82; Campbell *v.* Wasserman, 149 Pa. St. 51, 24 Atl. 81; Campbell *v.* Clevenstine, 149 Pa. St. 46, 24 Atl. 80.

99. Van Winkle *v.* Young, 37 Pa. St. 214.

1. Evidence generally see Evidence.

Witnesses generally see Witnesses.

2. *Alabama.*— Brashear *v.* Williams, 10 Ala. 630.

Georgia.— Moore *v.* Brown, etc., Furniture Co., 107 Ga. 139, 32 S. E. 835.

Kentucky.— Borches *v.* Bellis, 110 Ky. 620, 62 S. W. 486, 23 Ky. L. Rep. 37; Mitchell *v.* Vance, 5 T. B. Mon. 528, 17 Am. Dec. 96.

Minnesota.— Orth *v.* Pease, 81 Minn. 374, 84 N. W. 122.

New York.— Williams *v.* Shelly, 37 N. Y. 375.

Pennsylvania.— Gallagher *v.* Davis, 179 Pa. St. 504, 36 Atl. 319; Bloomingdale *v.* Victor,

possession at the time of the levy, the burden is placed upon plaintiff in execution ;[3] while in some states the burden is cast upon plaintiff in all cases to show the validity of his execution,[4] and to make out a *prima facie* case that the property levied on is that of defendant, whereupon the burden shifts to the claimant to establish his claim.[5] In other jurisdictions it has been held that the court may direct which party shall be considered plaintiff and assume the burden of proof.[6]

147 Pa. St. 371, 23 Atl. 547; Tremont Coal Co. *v.* Manly, 60 Pa. St. 384; Blum *v.* Warner, 1 Leg. Rec. 113.

Texas.— Panhandle Nat. Bank *v.* Foster, 74 Tex. 514, 12 S. W. 223; Love *v.* Hudson, 24 Tex. Civ. App. 377, 59 S. W. 1127; Pinkard *v.* Willis, 24 Tex. Civ. App. 69, 57 S. W. 891; Cullers *v.* Gray, (Civ. App. 1900) 57 S. W. 305. See also Miller *v.* Koertge, 70 Tex. 162, 7 S. W. 691, 8 Am. St. Rep. 587.

See 21 Cent. Dig. tit. "Execution," § 572.

In an action by a temporary administrator to try the right of property to goods levied on under an execution against him personally, while the goods were in his possession, and before his qualification as temporary administrator, the burden is on plaintiff to prove title in the estate. Pinkard *v.* Willis, 24 Tex. Civ. App. 69, 57 S. W. 891.

3. Southern Min. Co. *v.* Brown, 107 Ga. 264, 33 S. E. 73; Millspaugh *v.* Mitchell, 8 Barb. (N. Y.) 333; Lewis *v.* Brown, 4 Strobh. (S. C.) 293; King *v.* Sapp, 66 Tex. 519, 2 S. W. 573; Producers' Marble Co. *v.* Bergen, (Tex. Civ. App. 1894) 31 S. W. 89. See also Kreile *v.* Pearson, 1 Pa. Co. Ct. 152; Panhandle Nat. Bank *v.* Foster, 74 Tex. 514, 12 S. W. 223; Cullers *v.* Gray, (Tex. Civ. App. 1900) 57 S. W. 305.

4. **Proof of execution.**—Brightman *v.* Meriwether, 121 Ala. 602, 603, 25 So. 994 [*citing* Jackson *v.* Bain, 74 Ala. 328]; Latham *v.* Selkirk, 11 Tex. 314.

Non-satisfaction of judgment.— Where a sheriff justifies under an execution, and seeks to attack the title of plaintiff in replevin on the ground of fraud, plaintiff being a stranger to the judgment on which the execution is based, he must show that the judgment remains unsatisfied; the sheriff in such case being the mere agent of the judgment creditor. Wyatt *v.* Freeman, 4 Colo. 14.

5. *Alabama.*— Eldridge *v.* Grice, 132 Ala. 667, 32 So. 683; Vought *v.* Oehmig, 95 Ala. 306, 11 So. 416; Wollner *v.* Lehman, 85 Ala. 274, 4 So. 643; Apfel *v.* Crane, 83 Ala. 312, 3 So. 863; Jones *v.* Franklin, 81 Ala. 161, 1 So. 199; Jackson *v.* Bain, 74 Ala. 328; Foster *v.* Smith, 16 Ala. 192.

California.— Newell *v.* Desmond, 74 Cal. 46, 15 Pac. 369.

Georgia.— Thompson *v.* American Mortg. Co., 107 Ga. 832, 33 S. E. 689; Lamkin *v.* Clary, 103 Ga. 631, 30 S. E. 596; Tillman *v.* Fontaine, 98 Ga. 672, 27 S. E. 149; Walker *v.* Hughes, 90 Ga. 52, 15 S. E. 912; Williams *v.* Hart, 65 Ga. 201; Knowles *v.* Jourdan, 61 Ga. 300; Primrose *v.* Browning, 56 Ga. 369; Bartlett *v.* Russell, 41 Ga. 196. See also Williams *v.* Kelsey, 6 Ga. 365.

Kentucky.— Borches *v.* Bellis, 110 Ky. 620, 62 S. W. 486, 23 Ky. L. Rep. 37.

Mississippi.— Butler *v.* Lee, 54 Miss. 476; Atwood *v.* Meredith, 37 Miss. 635; Thornhill *v.* Gilmer, 4 Sm. & M. 153; Ross *v.* Garey, 7 How. 47.

See 21 Cent. Dig. tit. "Execution," § 572.

Where the property was in the possession of defendant or his agent at the time of the levy, such possession is presumptive evidence of title, and makes out a sufficient *prima facie* case to cast the burden of establishing his title upon the claimant.

Alabama.— Eldridge *v.* Grice, 132 Ala. 667, 32 So. 683; Christian, etc., Grocery Co. *v.* Michael, 121 Ala. 84, 25 So. 571, 77 Am. St. Rep. 30; Wollner *v.* Lehman, 85 Ala. 274, 4 So. 643; Apfel *v.* Crane, 83 Ala. 312, 3 So. 863.

Georgia.— Thompson *v.* American Mortg. Co., 107 Ga. 832, 33 S. E. 689; Clements *v.* Stubbs, 106 Ga. 448, 32 S. E. 584; Richardson *v.* Subers, 82 Ga. 427, 9 S. E. 172; Crawford *v.* Kimbrough, 76 Ga. 299; Brown *v.* Houser, 61 Ga. 629; Kiser *v.* Miller, 58 Ga. 509; Morgan *v.* Sims, 26 Ga. 283; Carter *v.* Stanfield, 8 Ga. 49; Deloach *v.* Myrick, 6 Ga. 410; Roe *v.* Doe, Dudley 168.

Indiana.— See Foley *v.* Knight, 4 Blackf. 420.

Kentucky.— Borches *v.* Bellis, 110 Ky. 620, 62 S. W. 486, 23 Ky. L. Rep. 37.

Minnesota.— Rollofson *v.* Nash, 75 Minn. 237, 77 N. W. 954.

New York.— Merritt *v.* Lyon, 3 Barb. 110.

Pennsylvania.—Tremont Coal Co. *v.* Manly, 60 Pa. St. 384; Welch *v.* Kline, 57 Pa. St. 428; Gillespie *v.* Miller, 37 Pa. St. 247.

Texas.— McDuffie *v.* Greenway, 24 Tex. 625.

See 21 Cent. Dig. tit. "Execution," § 572.

Admission of defendant's possession.— When the claimant admits the possession of the property by defendant at the time of the levy, he assumes the burden of showing that the title is in him, and that it was not in defendant at any time from the date of the judgment to the date of the levy. Melton *v.* Albany Fertilizer Co., 113 Ga. 603, 38 S. E. 958. See also Powell *v.* Westmoreland, 60 Ga. 572.

Evidence which leaves it uncertain whether the tenant in possession held for the execution defendant or for the claimant is not sufficient to change the burden of proof from the execution plaintiff to the claimant. Dean *v.* American Harrow Co., 112 Ga. 155, 37 S. E. 176.

6. Norton *v.* McNutt, 55 Ark. 59, 17 S. W. 362. See also Miller *v.* Sturm, 36 Tex. 291, to the effect that where it is uncertain in

In England the burden lies upon the party having the affirmative of the interpleader issue.[7]

b. Admissibility — (I) *In General* — (A) *Acts, Declarations, and Admissions.* The admissibility of acts, declarations, and admissions of the execution defendant,[8] of the claimant,[9] of the officer,[10] of a party in possession of the property,[11] or of the person from whom defendant derives title[12] are governed by the general rules relating to the admissibility of evidence.

(B) *Judgment, Execution, and Return.* On the trial of the right of property in a claim case the execution and return are admissible in evidence against the claimant;[13] but an execution which fails to follow the judgment either as to the

whose possession the property was when seized, the court should direct which party shall assume the burden of proof.

7. Adnitt *v.* Hands, 57 L. T. Rep. N. S. 370.

8. **Admissible.**—The declarations of defendant in execution, in whose possession the property levied on was found, when made before, or at the time of the levy, are competent evidence to show the nature and character of his possession. Gayle *v.* Bancroft, 22 Ala. 316. See also Williams *v.* Kelsey, 6 Ga. 365, in which plaintiff offered evidence to show that a witness had rented of the execution defendant, and paid him therefor, a lot of land specified in the mortgage of the claimant; but there was no evidence that such land had been sold under judgment of foreclosure. The court below admitted the evidence and excluded a question put by the claimant whether defendant did not state at the time of renting the land that he was acting as agent. The admission of the evidence and the exclusion of the question were each held to be error. So too his declarations or admissions are admissible to show the character of the transfer by him to the claimant, where the deed is attacked for fraud or want of consideration, if made before the pendency of the litigation, or the existence of the claim sought to be enforced against him. Hayes *v.* Hill, 105 Ga. 299, 31 S. E. 166; Pearson *v.* Forsyth, 61 Ga. 537. But see Coole *v.* Braham, 3 Exch. 183, 18 L. J. Exch. 105.

Inadmissible.—But declarations made after the suit has been brought and before judgment, to the effect that he had sold the property in controversy to the claimant, are inadmissible in the latter's favor (Tillman *v.* Fontaine, 98 Ga. 672, 676, 27 S. E. 149 [*citing* James *v.* Taylor, 93 Ga. 275, 20 S. E. 309]); and conversely declarations made under oath as a witness at a former trial of the same case in disparagement of the claimant's title are not admissible against him (Tillman *v.* Fontaine, *supra*).

9. **Admissible.**— As plaintiff in execution succeeds only to the rights of defendant, any act, declaration, or admission of the claimant, which would be admissible evidence for or against himself in a suit between him and the execution defendant, is also admissible on the trial of the claim suit. Allen *v.* Smith, 22 Ala. 416. See also Gates *v.* Bowers, 58 N. Y. Suppl. 287.

10. **Inadmissible.**— A statement made by the officer after the levy, not shown to be part of the *res gestæ*, is hearsay and inadmissible. Goldberg *v.* Bussey, (Tex. Civ. App. 1898) 47 S. W. 49.

11. **Admissible.**— The declaration of the person in whose possession the property was found, made at the time of the levy, that he received it from defendant, is admissible evidence against the claimant. Derrett *v.* Alexander, 25 Ala. 265.

12. **Admissible.**— Declarations or admissions made by the person from whom the defendant in execution traces title, and which as a whole tend to show title to the property in him, are admissible in favor of plaintiff in execution. Elwell *v.* New England Mortg. Security Co., 101 Ga. 496, 28 S. E. 833.

13. Thomas *v.* Henderson, 27 Ala. 523; Gayle *v.* Bancroft, 22 Ala. 316; Savage *v.* Forward, 7 Ala. 463; Luther *v.* Clay, 100 Ga. 236, 28 S. E. 46, 39 L. R. A. 95; Rice *v.* Warren, 91 Ga. 759, 17 S. E. 1032; Johnson *v.* Sommers, 3 Ill. App. 55; Ross *v.* Garey, 7 How. (Miss.) 47.

Amended return.— Where property sold on execution is afterward levied on by another creditor, and claimed by the purchaser, a return, amended by the officer during the trial of the claim, may be read in evidence. Savage *v.* Forward, 7 Ala. 463.

Failure to docket judgment.— The failure of plaintiff in fieri facias to have a judgment entered on the general execution docket, as provided by the Georgia act of Oct. 1, 1889, is no reason for rejecting the fieri facias as evidence on trial of a claim to property on which it had been levied. Rice *v.* Warren, 91 Ga. 759, 17 S. E. 1032.

If the execution introduced is for any reason void, or if no execution is offered in evidence, there can be no legal verdict in favor of plaintiff in execution. Collins *v.* Hill, 115 Ga. 465, 41 S. E. 678.

Proof of levy.— Where an execution had been read in evidence, it was error to refuse to permit the sheriff to testify that he levied on the property by virtue of such an execution. Johnson *v.* Sommers, 3 Ill. App. 55.

Previous levies may be proved without producing the executions.— See Yarborough *v.* Moss, 9 Ala. 382, in which the question was as to the possession of the claimant and defendant when the levy was made, the property being in the hands of the sheriff under previous levies.

parties or in amount is properly excluded.[14] A tax fieri facias, with which the claimant is unconnected, is inadmissible in evidence.[15] On the trial of a claim suit, the record of plaintiff's judgment against defendant in execution is irrelevant and inadmissible;[16] and the same is true of evidence as to the transactions by which the indebtedness merged in the judgment was created.[17]

(C) *Payment of Debt.* In a claim case the claimant may prove that the execution debtor has paid off and satisfied the debt due the execution creditor.[18]

(D) *Financial Condition of Debtor.* The financial condition of the debtor is admissible in evidence, where it tends to show his relationship to the property as against the claimant.[19]

(E) *Title in Third Person.* In a trial of right of property, the claimant must recover on the strength of his own title and he cannot show to support his claim a title paramount to that of defendant in execution in a third person, a stranger to the proceeding.[20] On the other hand it is competent for the creditor to show that the claimant has parted with his title to a third person.[21]

(F) *Value of Property.* As plaintiff in execution, if successful upon the trial of the right of property, is entitled to a return of the specific thing which was delivered to the claimant, or its assessed value, it is allowable for him to offer evidence to the jury to show its value at the time of trial.[22]

(II) *To Show Particular Matters.* What evidence is and what evidence is not admissible in a claim case to show the claimant's title,[23] to show a

Where the levy is made in another county than that from which the execution issued, and a trial of the right of property is demanded, the copy of the execution returned by the sheriff to the county of the trial has the same effect as if it was an original execution, without any certificate that it is a copy. Henderson *v.* Montgomery Bank, 11 Ala. 855. See also Garrett *v.* Rhea, 9 Ala. 134. *Compare* Bettis *v.* Taylor, 8 Port. (Ala.) 564, to the effect that this does not exclude other modes of proving a copy of the execution, as by an examined or sworn copy.

14. Williams *v.* Atwood, 52 Ga. 585.

15. White *v.* Interstate Bldg., etc., Assoc., 106 Ga. 146, 32 S. E. 26.

16. Snodgrass *v.* Decatur Branch Bank, 25 Ala. 161, 60 Am. Dec. 505; Taliaferro *v.* Lane, 23 Ala. 369. See also Fengan *v.* Cureton, 19 Ga. 404, in which the notes which were the subject of the judgment and the judgment itself were both held inadmissible.

17. Stephens *v.* Johnson, (Tex. Civ. App. 1898) 45 S. W. 328. But see Taylor *v.* Huntsville Branch Bank, 14 Ala. 633, in which it was held that plaintiff was entitled to show when the debt on which his judgment was founded originated.

18. England *v.* Brinson, 1 Tex. App. Civ. Cas. § 320.

19. Gates *v.* Bowers, 58 N. Y. Suppl. 287.

20. Eldridge *v.* Grice, 132 Ala. 667, 669, 32 So. 683 [*citing* Seisel *v.* Folmar, 103 Ala. 491, 15 So. 850; Jones *v.* Franklin, 81 Ala. 161, 1 So. 199]; Burt *v.* Rubley, 113 Ga. 1144, 1145, 39 S. E. 409 [*citing* Thompson *v.* Waterman, 100 Ga. 586, 28 S. E. 286]; Carne *v.* Brice, 8 Dowl. P. C. 884, 1 Hurl. & W. 23, 4 Jur. 1115, 10 L. J. Exch. 28, 7 M. & W. 183. See also *supra*, IX, A, 3.

21. Gadsden *v.* Barrow, 2 C. L. R. 1063, 9 Exch. 514, 23 L. J. Exch. 134, 2 Wkly. Rep. 241. *Compare* Edwards *v.* English, 7 E. & B. 564, 3 Jur. N. S. 934, 26 L. J. Q. B. 193, 5 Wkly. Rep. 507, 90 E. C. L. 564.

22. Thomas *v.* De Graffenreid, 27 Ala. 651; Borland *v.* Mayo, 8 Ala. 104.

Proceeds of services.— When a creditor is pursuing property by levy on the ground that it is the proceeds of his debtor's services, rendered in a mercantile business conducted by the debtor nominally as agent for his wife, evidence of the value of his services is admissible for the creditor, in a claim case between himself as plaintiff in fieri facias and the debtor's wife as claimant. Keller *v.* Mayer, 55 Ga. 406.

Value of the use of the property from the time it was received by the claimant under his bond is properly admitted, as the judgment should show such value to enable the claimant to choose whether to return the property, and pay for its use, or to pay for the property, with interest on its value. Keating *v.* Julien, (Tex. Civ. App. 1893) 23 S. W. 607, construing Tex. Rev. St. art. 4845.

23. In a claim case the claimant must show ownership at the time of the levy. Whitney *v.* Moore, 77 Pa. St. 479. And any evidence having a direct bearing upon the source and history of the claimant's title is admissible for this purpose. Jones *v.* Chenault, 124 Ala. 610, 27 So. 515, 82 Am. St. Rep. 211 (source from which claimant obtained money to pay for property); Kelly *v.* William Sharp Saddlery Co., 99 Ga. 393, 27 S. E. 741 (evidence of wife that she paid with her own money for property conveyed to her by her husband); Tattle *v.* Ft. Valley Exch. Bank, 90 Ga. 653, 16 S. E. 955 (history of transaction by which claimant acquired title); Powell *v.* Watts, 72 Ga. 770

fraudulent transfer of the property to the claimant,[24] to show possession of the property in defendant in execution,[25] to show fraud or *mala fides* in the acquisition of the property by defendant in execution,[26] to show the indebtedness

(motive in purchasing property); Anderson *v.* Lewis, 20 Ga. 383 (judgment against representations of defendant establishing copy of deed); Gillespie *v.* Miller, 37 Pa. St. 247 (deed conveying separate estate with which property levied on as that of claimant's husband was bought).

A trust deed not legally acknowledged and recorded is inadmissible in evidence, without proof of actual knowledge on the part of the execution plaintiff. Wasson *v.* Connor, 54 Miss. 351.

Notes in claimant's hands, claimed to have been given for the price of the property and returned upon payment thereof, and from which the signatures have been torn, are not evidence of claimant's ownership, as against execution creditors of her husband. New *v.* Driver, 89 Ga. 434, 15 S. E. 535.

Record of a proceeding by third persons against claimant to have an execution canceled, which had been transferred to claimant by a sale under which he claims the title in dispute, which proceedings ended in a judgment refusing the petition, is irrelevant, although its admission is harmless. Ansley *v.* Hart, 77 Ga. 42.

24. Where the transfer of the property to the claimant is attacked for fraud, any evidence tending to show or rebut the fraud is admissible, its force and effect being for the jury to determine. Lamkin *v.* Clary, 103 Ga. 631, 30 S. E. 596. See also Snodgrass *v.* Decatur Branch Bank, 25 Ala. 161, 60 Am. Dec. 505; Benning *v.* Nelson, 23 Ala. 801; Knox *v.* Fair, 17 Ala. 503; Creagh *v.* Savage, 14 Ala. 454; White *v.* Interstate Bldg., etc., Assoc., 106 Ga. 146, 32 S. E. 26; Tillman *v.* Fontaine, 98 Ga. 672, 27 S. E. 149; Littlefield *v.* Drawdy, 84 Ga. 644, 11 S. E. 504; Sterling *v.* Arnold, 54 Ga. 690; Bostwick *v.* Blake, 145 Ill. 85, 34 N. E. 38; Heidenheimer *v.* Bledsoe, 1 Tex. App. Civ. Cas. § 316. *Compare* Simpkins *v.* Berggren, 2 Ill. App. 101.

An application for dower is admissible on the question of good faith of a wife's claim to property levied on as that of the husband. White *v.* Interstate Bldg., etc., Assoc., 106 Ga. 146, 32 S. E. 26.

Forthcoming bond signed by claimant as security.— See Sterling *v.* Arnold, 54 Ga. 690.

Insolvency of defendant at or about time of transfer.— See Tillman *v.* Fontaine, 98 Ga. 672, 27 S. E. 149. See also Knox *v.* Fair, 17 Ala. 503, where proof of the ostensible insolvency of defendant, with evidence of his ability to purchase property notwithstanding, was held admissible to show a motive for taking the title in the claimant's name.

Tax books are admissible to show that claimant paid no taxes and had no means to purchase lands in dispute. Tillman *v.* Fontaine, 98 Ga. 672, 27 S. E. 149.

The record of a suit in equity between the same parties, in which it was alleged that the property had been sold under the same execution, that claimant caused it to be purchased for her benefit, and that the sale was procured by fraud, and a decree was rendered setting aside the sheriff's deed for fraud, is admissible. Littlefield *v.* Drawdy, 84 Ga. 644, 11 S. E. 504.

Transcript of decree discharging defendant as bankrupt is admissible as evidence of the time and fact of discharge, where it is claimed that the property was fraudulently conveyed and it is shown that it went back into the possession of the bankrupt a short time after his discharge. Snodgrass *v.* Decatur Branch Bank, 25 Ala. 161, 60 Am. Dec. 505.

In Illinois plaintiff in execution must show a valid judgment and execution issued thereon, before he can attack the transfer to the claimant for fraud (Calumet Paper Co. *v.* Knight, etc., Co., 43 Ill. App. 566), but a special plea of fraud is unnecessary (Bostwick *v.* Blake, 145 Ill. 85, 34 N. E. 38).

In Nevada, in Chamberlain *v.* Stern, 11 Nev. 268, it was held that when personal property is found in the possession of the execution debtor, and after levy is claimed by a stranger, the officer is not bound to surmise that there may have been a sale, and so attack it for fraud in his answer. He is not bound to assail the transaction till it is brought to his knowledge, and, if it makes its first appearance at the trial, he may meet it there with the proof of the fraud.

25. To show the possession of defendant in execution, a statement in an entry of levy that he was in possession at the date of the levy is *prima facie* evidence of that fact (Burt *v.* Rubley, 113 Ga. 1144, 1145, 39 S. E. 409 [*citing* Lamkin *v.* Clary, 103 Ga. 631, 30 S. E. 596; Williams *v.* Hart, 65 Ga. 201]); as is a forthcoming bond executed by him, and under which he retained the property in dispute (Sandlin *v.* Anderson, 76 Ala. 403).

The act of a third person in his behalf with reference to the property, such act being subsequently ratified by him, is also admissible upon the question of the retention of the possession by defendant up to the time when the lien of the execution attacked, the evidence tending to establish his possession for the statutory period without demand made and pursued by the claimant by due course of law. Knox *v.* Fair, 17 Ala. 503.

26. False representations, made by the execution defendant to the claimant, in reference to his pecuniary condition, to induce the claimant to sell him the goods in controversy on credit, are admissible on the trial of the claim case to show the contract void on account of the misrepresentation of a material fact. Chisolm *v.* Chittenden, 45 Ga. 213.

of defendant in execution to the claimant,[27] or to show the indebtedness of defendant in execution to plaintiff in execution[28] must be determined by the general rules governing the admissibility of evidence.

c. Weight and Sufficiency — (I) *On Part of Execution Plaintiff.* Plaintiff in execution makes out a *prima facie* case where he shows a valid execution and that the property levied on was in the possession of the execution defendant at the time the levy was made;[29] but to make a *prima facie* case against the claimant in favor of plaintiff in mortgage fieri facias, it is not sufficient to prove possession of the mortgaged property by the mortgagor at the time of the levy, but either possession or title in the mortgagor at the date of the mortgage must be shown.[30] The fact that the claimant concealed the property in order to escape the levy is not of itself sufficient to authorize a finding that the property is subject to levy.[31] Plaintiff in execution need not prove the judgment upon which his execution is based.[32]

(II) *On Part of Claimant.* The sufficiency of the evidence to support a verdict for the claimant is wholly dependent upon the facts and circumstances of the individual case.[33] But the uncontradicted testimony of the claimant that the

27. Unless void on its face, the claimant's mortgage is admissible in evidence to show the indebtedness of defendant to him. Floyd *v.* Morrow, 26 Ala. 353. See also Ballard *v.* Mayfield, 107 Ala. 396, 18 So. 29, in which it was held that a mortgage of defendant's interest in crops grown on his land by a tenant was not invalid for insufficient description, as the property might be identified by parol evidence as having been raised on the land during the mortgage period, and delivered to defendant for rent.

Such indebtedness cannot be shown by a private memorandum of debts made out by defendant, nor by the schedule attached to his petition in bankruptcy, where both were made after the claimant's purchase, and after plaintiff had obtained judgment. Barber *v.* Terrell, 54 Ga. 146.

28. The existence of defendant's indebtedness to plaintiff prior to the sale to the claimant may be proved by showing that a proposition was made to compromise such indebtedness by paying less than the whole amount admitted to be due. Snodgrass *v.* Decatur Branch Bank, 25 Ala. 161, 60 Am. Dec. 505.

29. See *supra*, IX, B, 8, a.

Evidence was held sufficient to warrant verdict for plaintiff in Parsons *v.* Smith, 119 Ga. 42, 45 S. E. 697; Bray *v.* Walker, 112 Ga. 364, 37 S. E. 370; Jaffray *v.* Brown, 91 Ga. 57, 16 S. E. 223; Cringen *v.* Smith, 76 Ga. 49; Allen *v.* Matthews, 7 Ga. 149; Simpson *v.* De Haven, 93 Ind. 411.

Evidence was held insufficient to warrant verdict for plaintiff in Cannon *v.* Shahan, 118 Ga. 99, 44 S. E. 824; Melton *v.* Albany Fertilizer Co., 113 Ga. 603, 38 S. E. 958; Sams *v.* Thompson Hiles Co., 110 Ga. 648, 36 S. E. 104; Sinclair *v.* Hewitt, 102 Ga. 90, 29 S. E. 139; Mitchell *v.* McDavitt, 70 Miss. 608, 12 So. 831; Harmon *v.* Church, (Nebr. 1903) 93 N. W. 209; Globe Ins. Co. *v.* Hazlett, 1 Phila. (Pa.) 347.

If claimant's title is shown to have passed to a third person, or in the absence of evidence of any title in claimant, the execution creditor is entitled to succeed. Richards *v.* Jenkins, 18 Q. B. D. 451, 56 L. J. Q. B. 293, 56 L. T. Rep. N. S. 591, 35 Wkly. Rep. 355.

30. Morris *v.* Winkles, 88 Ga. 717, 15 S. E. 747. See also Jones *v.* Hightower, 117 Ga. 749, 45 S. E. 60; Ford *v.* Nesmith, 117 Ga. 210, 43 S. E. 483.

The reason is that "the lien is lodged in the mortgage, and not in the levy, execution or judgment of foreclosure." Morris *v.* Winkles, 88 Ga. 717, 15 S. E. 747 [*citing* Richards *v.* Myers, 63 Ga. 762].

31. Cronan *v.* Burt, 107 Ga. 295, 33 S. E. 56.

32. Bettis *v.* Taylor, 8 Port. (Ala.) 564; Hardy *v.* Gascoignes, 6 Port. (Ala.) 447. See also Dexter *v.* Parkins, 22 Ill. 143, to the effect that a recital in the execution of the rendition of the judgment is sufficient proof of the judgment. The claimant by giving notice admits the existence and regularity of the proceedings against defendant. But see, *contra*, Blalack *v.* Stevens, 81 Miss. 711, 33 So. 508.

33. The evidence was held sufficient in the following cases:

Alabama.— City Furniture Co. *v.* Simmons, 111 Ala. 438, 20 So. 347; Larkin *v.* Baty, 111 Ala. 303, 18 So. 666.

Georgia.— Collins *v.* Moore, 119 Ga. 39, 45 S. E. 718; Fambrough *v.* Ames, 58 Ga. 519.

Iowa.— Balwerk *v.* Durgee, 63 Iowa 358, 19 N. W. 252.

Kentucky.— Mullins *v.* Bullock, 19 S. W. 8, 14 Ky. L. Rep. 40.

Louisiana.— Bostick *v.* Shannon, 23 La. Ann. 35.

Minnesota.— Wood *v.* Malter, 88 Minn. 123, 92 N. W. 523.

Texas.— Gamage *v.* Trawick, 19 Tex. 58.

See 21 Cent. Dig. tit. "Execution," § 573 *et seq.*

The evidence was held insufficient in Smith *v.* Johnston, 110 La. 557, 34 So. 677; Davis *v.* Jones, (Tex. Civ. App. 1903) 75 S. W. 63.

property levied on had been bought by him with his own means, and had never been owned since his purchase by any one else, is sufficient to entitle him to recover;[34] as is the undisputed testimony of the claimant and the execution defendant that the property had been bought for the claimant with his money by defendant as his agent.[35] So too evidence that the claimant was a *bona fide* purchaser for value from one to whom defendant in execution had, before the date of plaintiff's judgment, on a valuable and adequate consideration, in good faith, conveyed the property in dispute, requires a verdict for the claimant.[36] On the other hand a judgment by default or confession is not evidence of the justness or existence of a debt in favor of the claimant as against the plaintiff in execution;[37] and where the evidence shows that the property belongs to a third person the claimant cannot recover.[38]

9. Trial[39] — a. Conduct Generally. The conduct of the trial or hearing of a claim case is a matter resting largely in the discretion of the court.[40] But it is error to render a personal judgment by default against the claimant without a writ of inquiry as to the value of the property;[41] and where the claimant has shown, by an exemplification of the record of the suit in which the judgment was obtained under which the execution was levied, that defendant therein had not been served, the court should refuse a continuance to allow plaintiff to show the contrary, since the record can only be perfected in the court rendering the original judgment.[42]

b. Right to Open and Conclude. In a claim case, if defendant in execution was in possession of the property at the date of the levy, the burden is upon the claimant,[43] and he is entitled to the opening and conclusion of the argument.[44] But if, where the execution defendant was in possession, the claimant fails to

34. Thomas *v.* Patton, 71 Ind. 241.

35. Jones *v.* Chenault, 124 Ala. 610, 27 So. 515, 82 Am. St. Rep. 211.

36. Walker *v.* Hughes, 108 Ga. 768, 33 S. E. 417.

37. Hooper *v.* Pair, 3 Port. (Ala.) 401, 29 Am. Dec. 258.

38. Eldridge *v.* Grice, 132 Ala. 667, 32 So. 683; Burt *v.* Rubley, 113 Ga. 1144, 39 S. E. 409; Thompson *v.* Waterman, 100 Ga. 586, 28 S. E. 286; Stirks *v.* Johnson, 99 Ga. 298, 25 S. E. 648.

39. **Trial** generally see TRIAL.

40. See cases cited *infra*, this note.

The suspension of the trial in order to allow the execution to be amended is a question addressed to the discretion of the court. Smith *v.* Bell, 107 Ga. 800, 33 So. 684, 73 Am. St. Rep. 151.

The examination of witnesses is a matter within the court's discretion. Thus it is not error to allow counsel for the creditor or defendant in the common-law suit, as well as counsel for plaintiff, to participate in examining witnesses in the claim case arising under a judgment against a garnishee (Smith *v.* Wellborn, 75 Ga. 799); nor after the argument of a motion for a nonsuit for levying execution illegally, to recall the sheriff and draw from him the fact as to the person on whom he served notice of levy, and then to direct him to amend the return accordingly (Primrose *v.* Browning, 59 Ga. 69); nor to refuse to allow the debtor to be recalled to show in case the court should rule in plaintiff's favor, that the property was exempt (McCaughan *v.* Picard, (Miss. 1897) 21 So. 796). But a rule on the claimant to submit himself to a cross-examination, taken before the time allowed for filing his bond, is premature (Stokes *v.* McKinney, 34 Wkly. Notes Cas. (Pa.) 128).

After submitting his proof to the jury upon an issue involving the precedence of an execution or of deeds, without a motion to dismiss or withdraw the levy, plaintiff in fieri facias cannot complain after verdict, that the levy should have been dismissed. Groves *v.* Williams, 69 Ga. 614.

Counsel for purchaser from claimant will not be heard. Gayton *v.* Espin, 1 F. & F. 722. See also Clarke *v.* Lord, 2 Dowl. P. C. 55.

Order to withdraw.— A judge at chambers has power to order the sheriff to withdraw without directing an interpleader issue. Engelback *v.* Nixon, L. R. 10 C. P. 645, 44 L. J. C. P. 396, 32 L. T. Rep. N. S. 831.

41. Upon default plaintiff in execution is entitled to a writ of inquiry, and after that to a judgment condemning the property to pay the amount of the execution. Little *v.* King, (Miss. 1887) 3 So. 258.

42. Aycock *v.* Turner, 52 Ga. 591.

43. See *supra*, IX, B, 8, a.

Claimant should be plaintiff, and execution creditor defendant. Bentley *v.* Hook, 2 Cromp. & M. 426, 2 Dowl. P. C. 339, 3 L. J. Exch. 87, 4 Tyrw. 229.

44. Lamkin *v.* Clary, 103 Ga. 631, 636, 30 S. E. 596 [*citing* Williams *v.* Hart, 65 Ga. 201; Primrose *v.* Browning, 56 Ga. 369; Bartlett *v.* Russell, 41 Ga. 196]; Powell *v.* Westmoreland, 60 Ga. 572; Edwards *v.* Matthews, 4 D. & L. 721, 11 Jur. 398, 16 L. J. Exch. 291.

assume the burden of proof, plaintiff, on being directed to assume the affirmative, is entitled to open and close;[45] and where, neither by the entry of levy nor the admission of the claimant, the possession of the property is shown to be in the execution defendant, and plaintiff, taking the burden of proof, establishes the fact by evidence introduced on the trial, he and not the claimant is entitled to the conclusion, unless the claimant introduces no evidence.[46]

c. Province of Court and Jury. All controverted questions of fact in a claim case are as a rule to be submitted to the determination of the jury.[47] It is, however, for the court to determine in the first instance whether the undisputed facts are such as to condemn the transaction between the execution defendant and the claimant as a legal fraud;[48] and where the answer of the claimant in a sheriff's interpleader does not raise any dispute as to the facts, and the only question to be decided is one of law, no issue should be awarded, and the question raised is for the decision of the court.[49] So too where it is apparent from the evidence that the claimant has no cause of action, or that plaintiff in execution cannot sustain his levy, the court may properly direct a verdict,[50] dismiss the levy,[51] or award a nonsuit.[52]

d. Instructions. On the trial of a claim case it is error to refuse to give instructions submitting the issues raised by the evidence to the jury,[53] or to give

Where the officer does not take possession of the property it is not error, on the trial of the right of property, to permit claimant's counsel to open and close the argument, although the execution creditor assumed the burden of proof. Marsh *v.* Thomason, 6 Tex. Civ. App. 379, 25 S. W. 43.

45. James *v.* Kiser, 65 Ga. 515.

46. New *v.* Driver, 89 Ga. 434, 15 S. E. 535.

47. *Alabama.*— Cole *v.* Propst, 119 Ala. 99, 24 So. 884; Wollner *v.* Lehman, etc., Co., 85 Ala. 274, 4 So. 643; Tait *v.* Murphy, 80 Ala. 440, 2 So. 317; Thomas *v.* Degraffenreid, 17 Ala. 602; Carter *v.* Mannings, 7 Ala. 851.

Georgia.— Richardson *v.* Harrison, 112 Ga. 520, 37 S. E. 736; Guckenheimer *v.* Burton, 110 Ga. 319, 35 S. E. 270; Deveney *v.* Burton, 110 Ga. 56, 35 S. E. 268; Perryman *v.* Morgan, 103 Ga. 555, 19 S. E. 708; Robinson *v.* Bryant, 99 Ga. 111, 24 S. E. 866; Hodges *v.* Holiday, 29 Ga. 696.

Missouri.— Newberry *v.* Durand, 87 Mo. App. 290.

New York.—See Curtis *v.* Patterson, 8 Cow. 65.

Pennsylvania.— Fidelity Ins., etc., Co. *v.* Madden, 190 Pa. St. 69, 42 Atl. 547; Gillespie *v.* Agnew, 22 Pa. Super. Ct. 557; Mann *v.* Salsberg, 17 Pa. Super. Ct. 280; Stoy *v.* Dobson, 15 Pa. Super. Ct. 326; McKinney *v.* Tuttle, 10 Pa. Super. Ct. 535; Samuel *v.* Knight, 9 Pa. Super. Ct. 352, 43 Wkly. Notes Cas. 392; Gernert *v.* Knerr, 3 Pa. Super. Ct. 47, 39 Wkly. Notes Cas. 318.

Texas.— Stadtler *v.* Wood, 24 Tex. 622.

See 21 Cent. Dig. tit. "Execution," § 576.

Although the verdict must as matter of law be against claimant, the case must be submitted to a jury, unless he waives that right. Hodges *v.* Holiday, 29 Ga. 696.

Value of goods.—Under Ala. Code, §§ 3004–3012, providing for the claim by a third person of personal property taken in execution, and delivery thereof to him on the execution of a bond, although the amount claimed, as fixed by the affidavit and bond, is conclusive, the value of the property must be found by the jury. Wollner *v.* Lehman, etc., Co., 85 Ala. 274, 4 So. 643. See also Mann *v.* Salsberg, 17 Pa. Super. Ct. 280.

48. Kendig *v.* Binkley, 10 Pa. Super. Ct. 463.

49. Mellon *v.* Kress, 30 Pittsb. Leg. J. (Pa.) 81.

50. Marks *v.* Wood, 133 Ala. 533, 31 So. 978 (for claimant); Burt *v.* Kuhnen, 113 Ga. 1143, 39 S. E. 414 (for claimant); Oatts *v.* Wilkins, 110 Ga. 319, 35 S. E. 345 (for plaintiff); Webb *v.* Frierson, (Miss. 1894) 15 So. 934 (for claimant); Washington Nat. Bank *v.* Moyer, 22 Wash. 622, 61 Pac. 712 (for claimant).

Failure of plaintiff to introduce execution. — Where plaintiff in execution offers to introduce the execution in evidence, and on objection withdraws the same, and the evidence is closed without the execution being again offered, it is error to direct a verdict in favor of the plaintiff in execution. Collins *v.* Hill, 115 Ga. 465, 41 S. E. 678.

If there is evidence tending to show property in the claimant, it is erroneous to instruct the jury that he fails to show any right, and that they must find against him. Craig *v.* Peake, 22 Ill. 185.

51. Freeman *v.* Sturgis Nat. Bank, 86 Ga. 622, 13 S. E. 22.

Where a fieri facias is rejected from evidence for irregularity therein, the levy should be dismissed, and to allow a verdict to be taken by the claimant under such circumstances is error. Gunn *v.* McMichael, 68 Ga. 826; Hackenhull *v.* Westbrook, 53 Ga. 285.

52. Parker Mills *v.* Jacot, 8 Bosw. (N. Y.) 161.

Nonsuit generally see DISMISSAL AND NONSUIT.

53. Cullers *v.* Gray, (Tex. Civ. App. 1900) 57 S. W. 305.

an instruction which improperly restricts the jury in the determination of the issues.[54] The instructions must be predicated upon some evidence,[55] and must correctly state the law thereon;[56] and an instruction which is misleading,[57] or in any way prejudicial to either party,[58] or which in any manner invades the province of the jury by withdrawing from their consideration any question of fact,[59] is erroneous. Where fraud is alleged, the instructions should be accompanied by a statement of the facts necessary to constitute fraud in law,[60] and it is proper to direct the jury's attention to peculiar circumstances which if unexplained tend to show fraud.[61] It is also proper for the court to instruct the jury as to the effect of proof of possession in the execution defendant.[62]

e. Verdict and Findings — (i) *In General.* In order to support a judgment, the verdict in a claim case must be certain,[63] and responsive to the issue or issues,[64] and to the evidence.[65] The jury may, however, bring in a verdict as to part of the property only, without mentioning the rest.[66]

54. First State Bank *v.* Carver, 111 Ga. 876, 36 S. E. 960.

55. Johnson *v.* Phillips, 89 Ga. 286, 15 S. E. 368. See also Newberry *v.* Durand, 87 Mo. App. 290; Currie *v.* Gunter, 77 Tex. 490, 14 S. W. 127.

56. Allen *v.* Hamilton, 109 Ala. 634, 19 So. 903; Dean *v.* American Harrow Co., 112 Ga. 155, 37 S. E. 176; Green *v.* Mann, 76 Ga. 246; Perkins *v.* Attaway, 14 Ga. 27. *Compare* Shaw *v.* Gunn, 41 Ga. 584, to the effect that where the evidence was conflicting on material issues, and the jury were charged that if they believed the claimants had a right to demand the chattels under a contract with defendant, and that he was bound to deliver them to claimants, they would so find, their verdict will not be disturbed on claimants' motion for a new trial.

Where an instruction is substantially correct it is sufficient. Craig *v.* Fowler, 59 Iowa 200, 13 N. W. 116.

57. Nichols *v.* Whelchel, 70 Ga. 719.

58. Nelson *v.* Warren, 93 Ala. 408, 8 So. 413. *Compare* Huston *v.* Curl, 8 Tex. 239, 58 Am. Dec. 110, in which an immaterial and irrelevant proposition contained in an instruction otherwise correct was held not prejudicial.

59. Gilliam *v.* Moore, 10 Sm. & M. (Miss.) 130. And see *supra*, IX, B, 9, c.

60. Smith *v.* Wellborn, 75 Ga. 799; Holly *v.* Augustine, 2 Ill. App. 108.

61. Jones *v.* Stewart, 19 Ala. 701.

62. See Ross *v.* Lawson, 105 Ala. 351, 16 So. 890. And see *supra*, IX, B, 8, a.

63. Jones *v.* Cleveland, 62 Ga. 237; Boginski *v.* Tobolski, 21 Pa. Co. Ct. 531.

A general verdict "for the plaintiff" is sufficient. It is mere surplusage to state in the verdict the amount for which the claimant and his sureties are bound. Willer *v.* Kray, 73 Tex. 533, 11 S. W. 540. See also Williams *v.* Jones, 2 Ala. 314, to the effect that a finding for plaintiff is a condemnation of the property absolutely in discharge of his execution.

A verdict finding the property levied on not subject, is not illegal because the claimant showed title to but one undivided half of the land, when plaintiff showed neither the possession of defendant nor any title in him, except as to the one-half interest, which claimant showed had been previously sold at a tax-sale, under which he acquired title. Mitchell *v.* King, 53 Ga. 470.

A claim covering one half of certain lots, without stating which, might be demurrable; but a verdict in favor of the claimant should not be set aside for uncertainty. Jones *v.* Cleveland, 62 Ga. 237.

Where there are several execution plaintiffs, the verdict of the jury should declare what sum fixed by deducting from the entire fund in court, or from the total value of the goods delivered to the claimant, the amount representing the proceeds or value of the goods found to be his property, each defendant is entitled to receive, either out of the money in court or from the claimant in possession of the goods. Boginski *v.* Tobolski, 21 Pa. Co. Ct. 531, construing Pa. Act, May 26, 1897.

64. First State Bank *v.* Carver, 111 Ga. 876, 36 S. E. 960; McCoy *v.* Rives, 1 Sm. & M. (Miss.) 592. See also Pritchett *v.* Samuel Weichselbaum Co., 119 Ga. 293, 46 S. E. 99.

The issue, on the trial of an ordinary claim case, is whether the property is subject or not, and no finding by the jury as to the amount due on the fieri facias is requisite. Lamar *v.* Coleman, 88 Ga. 417, 14 S. E. 608. See also *supra*, IX, B, 7.

A verdict that "the execution is a lien upon and binds the property" is good as being within the spirit and intent of a statute which provides that "if the jury find the goods and chattels to be the property of the defendant in the execution, the verdict shall, as against the claimant, justify the officer in selling such goods and chattels." Tucker *v.* Bond, 23 Ark. 268, 272. See also as to sufficiency of verdict to justify officer in selling the property Schroeder *v.* Clark, 18 Mo. 184.

65. McLaughlin *v.* Ham, 84 Ga. 786, 11 S. E. 889, to the effect that where the levy and claim both cover the fee, and a life-estate in the property only is subject, the jury ought so to find, instead of finding generally in favor of either party.

66. Lewis *v.* Lewis, Minor (Ala.) 95; Gilliam *v.* Moore, 10 Sm. & M. (Miss.) 130.

(II) *Assessing Value of Property.* The jury need not assess the value of the property claimed,[67] unless required to do so by statute. When so required the verdict must if practicable assess the value of each article separately.[68]

(III) *Setting Aside Verdict of Sheriff's Jury.* The verdict of a jury impaneled by the sheriff to try the validity of a claim by a third person to property levied on is not such a judicial determination as may be reviewed, in the absence of an express statutory provision authorizing a review, since it is not conclusive of the ownership of the property, and therefore a motion will not lie to set aside such verdict.[69]

10. Judgment and Enforcement[70] — **a. Judgment** — (I) *In General.* The judgment in a claim case should be in accordance with any statutory provisions regulating its form,[71] although a mere clerical misprision may be amended on motion.[72] Where the claimant fails to appear and join issue, plaintiff in execution is entitled to a judgment by default against him as in other cases.[73]

(II) *Assessment of Value of Property.* Where in the trial of the right of property the bond does not state the separate value thereof, and there is no issue upon that point, the judgment need not ascertain it.[74]

(III) *In Favor of Claimant.* A judgment in favor of the claimant should be so framed as to affect only his rights as against plaintiff in execution. Thus it is error for the court to dismiss a levy where it appears that a part only of the property levied on is claimed, but it should be dismissed only as to that part as to which the claimant establishes his claim;[75] and similarly on a claim by a mortgagee, it is error to discharge the property from all liens by reason of the levy, where the levy is good as to the judgment debtor, although inferior to the claim-

A verdict that part of the property is liable is equivalent to finding the residue not liable. Lewis *v.* Lewis, Minor (Ala.) 95.

67. Latham *v.* Selkirk, 11 Tex. 314. See also Ratcliff *v.* Hicks, 23 Tex. 173.

Striking out valuation.— On a feigned issue for property levied on as that of the claimant's husband, where verdict is for claimant for all but two articles, it is proper to strike out a valuation placed on the husband's interest in the two articles. Clouser *v.* Patterson, 122 Pa. St. 372, 15 Atl. 444.

68. Brightman *v.* Meriwether, 121 Ala. 602, 25 So. 994; Tait *v.* Murphy, 80 Ala. 440, 2 So. 317; Townsend *v.* Brooks, 76 Ala. 308; Willis *v.* Planters', etc., Bank, 19 Ala. 141; Hardy *v.* Gascoignes, 6 Port. (Ala.) 447; Weil *v.* Shedd, (Miss. 1890) 8 So. 329; Kibble *v.* Butler, 14 Sm. & M. (Miss.) 207; Pritchard *v.* Myers, 3 Sm. & M. (Miss.) 42; Walker *v.* Sinking Fund Com'rs, 1 Sm. & M. (Miss.) 372; Penrice *v.* Cocks, 1 How. (Miss.) 227.

The statute must be reasonably construed. See Kibble *v.* Butler, 14 Sm. & M. (Miss.) 287.

If the jury assess the aggregate value of the property, instead of the separate value of each article, that portion of their verdict is without legal warrant and wholly nugatory, and must be treated as surplusage; but the judgment will not be reversed on account of such defect, if the verdict is in other respects formal, and sufficient to authorize the judgment rendered upon it. Willis *v.* Planters', etc., Bank, 19 Ala. 141. See also Hardy *v.* Gascoignes, 6 Port. (Ala.) 447, where it was held that if the jury are unable to assess the value of each article separately the claimants cannot be heard to complain.

In Mississippi a contrary rule prevails, and a judgment against the claimant and his surety will be reversed where the jury fail to assess the value of the distinct articles separately. Weil *v.* Shedd, (1890) 8 So. 329. See also Walker *v.* Sinking Fund Com'rs, 1 Sm. & M. 372, where the value was assessed in gross. And see Penrice *v.* Cocks, 1 How. 227.

Several articles constituting one whole may be assessed as one article, as in the case of a "saw-mill irons and the apparatus for running the saw." Kibble *v.* Butler, 14 Sm. & M. (Miss.) 207.

When the property consists of several bales of lint cotton and several thousand pounds of seed cotton, the different kinds should be assessed separately, although the different bales need not be. Townsend *v.* Brooks, 76 Ala. 308.

69. Cohen *v.* Climax Cycle Co., 19 N. Y. App. Div. 158, 46 N. Y. Suppl. 4.

As to sheriff's jury see *supra*, IX, B, 1, e.

70. Judgment generally see Judgments.

71. See Hinzie *v.* Ward, 1 Tex. App. Civ. Cas. § 1314.

72. Ramey *v.* W. O. Peeples Grocery Co., 108 Ala. 476, 18 So. 805. See also Gray *v.* Raiborn, 53 Ala. 40; Wallis *v.* Rhea, 10 Ala. 451.

73. Betterton *v.* Buck, 2 Tex. App. Civ. Cas. § 198.

Until after issue has been directed by the court, no judgment by default can be rendered against a claimant, who by giving the statutory bond has obtained possession of the property. De Forest *v.* Miller, 42 Tex. 34.

74. Chapman *v.* Allen, 15 Tex. 278.

75. Hutchinson *v.* Jackson, 53 Ga. 56.

ant's mortgage.[76] Where a new trial is granted unless plaintiff will dismiss his levy as to a portion of the property, which is done, and the parties agree that the residue shall be subject to the execution, judgment on the pleading, as modified, is proper.[77]

(iv) *AGAINST CLAIMANT.* The judgment for plaintiff in execution in a claim case should under some statutes be that the property is subject to the execution,[78] and that plaintiff in execution recover from the claimant the damages assessed by the jury, together with his costs.[79] Under other statutes the judgment must be in the alternative, for the specific property or its assessed value;[80] while under others yet judgment may be rendered against the claimant and his sureties on the bond, in the event of his forfeiture or breach of condition.[81] Where a judgment for the claimant is set aside on appeal, plaintiff in execution is entitled to a judgment for the value of the property, and legal interest thereon from the date of the bond, together with damages.[82]

(v) *AGAINST EXECUTION DEFENDANT.* It is error, in a trial of the right of property, to render a new judgment against the execution debtor, thus making him liable for the costs and the penalty.[83]

b. Enforcement. A judgment of condemnation in a claim case may be enforced by execution;[84] and it has been held that where the claimant has

76. Lapowski *v.* Taylor, 13 Tex. Civ. App. 624, 35 S. W. 934.

77. Blance *v.* Liddell, 77 Ga. 103.

78. Parker *v.* Wimberly, 78 Ala. 64; Lee *v.* Bryan, 3 Ala. 278; People's Nat. Bank *v.* Wheedon, 115 Ga. 782, 42 S. E. 91; Maymore *v.* Baldwin, 1 Tex. App. Civ. Cas. § 722.

Amendment on appeal.— A judgment in a statutory claim suit that plaintiff in execution recover the property or its assessed value, instead of that the property is subject to his execution, will be amended on appeal. Parker *v.* Wimberly, 78 Ala. 64.

79. Lee *v.* Bryan, 3 Ala. 278.

Plaintiff may waive everything which the verdict has ascertained, and take judgment for the costs alone. Phelan *v.* Fancher, 5 Ala. 449.

80. Been *v.* Lindsey, 2 Sm. & M. (Miss.) 581. See also Thomas *v.* Estes, 2 Sm. & M. (Miss.) 439, where the judgment was held erroneous for not being in the alternative as to each separate article. *Compare* Muenster *v.* Tremont Nat. Bank, (Tex. Civ. App. 1898) 46 S. W. 277, in which a judgment for the value of the property alone, without providing for its return, was held not to be erroneous, since the right to return it in satisfaction of the judgment existed independently of the judgment, under Tex. Rev. St. (1895) art. 5310.

In Mississippi the judgment should be against the claimant alone, and not against him and his surety jointly. Kibble *v.* Butler, 14 Sm. & M. 207.

81. Langworthy *v.* Goodall, 76 Ala. 325.

In Pennsylvania the court will mold the verdict and judgment that, when a recovery is had against a claimant who has taken the goods, a verdict and judgment may be entered against the claimant up to the value of the goods, but not exceeding the claim of defendant (plaintiff in execution) for the amount of his execution and costs. Mann *v.* Salsberg, 17 Pa. Super. Ct. 280; Pennsylvania Knitting Co. *v.* Bibb Mfg. Co., 12 Pa. Super. Ct. 346 [*affirming* 21 Pa. Co. Ct. 537].

In Texas, upon failure of the claimant to establish a right to the property, judgment should, under Tex. Rev. St. art. 4843, be entered up on the bond for its assessed value. Schley *v.* Hale, 1 Tex. App. Civ. Cas. § 930; Betterton *v.* Buck, 2 Tex. App. Civ. Cas. § 198. A single judgment of the aggregate value of separate articles, separately valued, is proper. Betterton *v.* Buck, *supra.*

In Washington, where the claimant fails to make good his title, judgment is properly rendered in favor of the execution creditors for the amount of their judgments, not exceeding the value of the property, without ordering payment to the claimant of the amount of a prior mortgage; his remedy being in an independent action. Sayward *v.* Nunan, 6 Wash. 87, 32 Pac. 1022.

In West Virginia, under Code (1887), c. 107, § 6, if the finding is against the claimant, the officer is directed to sell the property under his process, if he has it in his possession. If a forthcoming bond has been given, and the property is not produced, the claimant is liable on the bond. If a suspending bond has been given, any damages caused by the suspension of the sale may be recovered under it. In a proceeding under the statute, no judgment can be rendered against an unsuccessful claimant for the value of the property. Bartlett *v.* Loundes, 34 W. Va. 493, 12 S. E. 762.

82. Willis *v.* Pinkard, 21 Tex. Civ. App. 423, 52 S. W. 626.

83. Marx *v.* Lange, 61 Tex. 547, where the claim was interposed by the wife of the execution debtor.

84. Patton *v.* Hamner, 33 Ala. 307 (where an agreement between the parties to the effect that a judgment of condemnation should be rendered for plaintiff in execution for a sum less than the real value of the property in controversy, and that the title to the prop-

obtained a verdict for the property, he may on entering judgment issue execution for costs.[85]

11. Reinstatement and New Trial.[86] When in a claim case the execution levy has been improperly dismissed, the court may correct the error at the same time by reinstating the case on motion.[87] So upon a proper showing the court may award a new trial in a claim case, as in other civil cases.[88]

12. Appeal and Error.[89] In respect to appellate procedure, the right of review,[90] the jurisdiction of the proceedings for review,[91] the sufficiency of the

erty should vest in the claimant on payment of this agreed value within a reasonable time, was held not to render void an execution afterward issued on the judgment of condemnation, nor to affect the authority of the sheriff to levy on and sell the property, notwithstanding a tender of the agreed value by the claimant); Russell *v.* Slayton, 17 Ga. 277 (construing Georgia statutes and holding that they do not apply to an order to the sheriff requiring him to dispossess a claimant who has intervened in the levy of an execution on land, and to put the purchaser in possession); Planters' Bank *v.* Black, 11 Sm. & M. (Miss.) 43 (to the effect that a distringas confers no authority to sell, unless by special order of the court).

After reversal of principal judgment, a judgment of condemnation cannot be enforced, beyond the amount of the costs in the proceeding in which it was rendered. Clements *v.* Elliott, 11 Ala. 360.

Enforcement in equity.— Although where all the parties are before the court, equitable rights may be adjudicated, yet, if specific performance of a voluntary agreement under which improvements were made is to be enforced against one not a party, equity must be resorted to. Hughes *v.* Clark, 67 Ga. 19.

Relief of surety.— Gentry *v.* Lockett, 37 Tex. 503.

85. Craig *v.* Economy Bldg. Assoc., 10 Wkly. Notes Cas. (Pa.) 296.

86. New trial generally see New Trial.

87. Wilson *v.* Herrington, 86 Ga. 777, 13 S. E. 129.

88. Caudle *v.* Maddox, 115 Ga. 926, 42 S. E. 219; Janes *v.* Whitbread, 11 C. B. 406, 15 Jur. 612, 20 L. J. C. P. 217, 73 E. C. L. 406.

An objection to the validity of the execution cannot be raised on a motion for a new trial. Latham *v.* Selkirk, 11 Tex. 314.

New trial of issue of damages.— Where, after evidence has been introduced, the claim is withdrawn, and damages are awarded against the claimant on an issue tendered by plaintiff, the court cannot consider, in the motion for a new trial of the damage case, complaints of rulings made in the trial of the claim case. Ray *v.* Atlanta Trust, etc., Co., 111 Ga. 853, 36 S. E. 769.

That a judgment for costs is entered up against claimant and his sureties is not a cause for a new trial. Ray *v.* Atlanta Banking Co., 110 Ga. 305, 35 S. E. 117.

Where the verdict is supported by the evidence a new trial should not be granted. Adams *v.* Carnes, 111 Ga. 505, 36 S. E. 597.

89. Appeal and error generally see Appeal and Error.

90. The parties to a proceeding to establish or determine a third person's claim to property seized on execution have the same right of appeal as in actions commenced in an ordinary way. Book *v.* Day, 189 Pa. St. 44, 41 Atl. 998; New Orleans *v.* Louisiana Constr. Co., 129 U. S. 45, 9 S. Ct. 223, 32 L. ed. 607; Dawson *v.* Fox, 14 Q. B. D. 377, 54 L. J. Q. B. 299, 33 Wkly. Rep. 514; Robenson *v.* Tucker, 14 Q. B. D. 371, 53 L. J. Q. B. 317, 50 L. T. Rep. N. S. 380, 32 Wkly. Rep. 697 [*disapproving* Burstall *v.* Bryant, 12 Q. B. D. 103, 48 J. P. 119, 49 L. T. Rep. N. S. 712, 32 Wkly. Rep. 495]; Withers *v.* Parker, 4 H. & N. 810, 6 Jur. N. S. 22, 28 L. J. Exch. 383, 2 L. T. Rep. N. S. 601; Witt *v.* Parker, 46 L. J. Q. B. 450, 36 L. T. Rep. N. S. 538, 25 Wkly. Rep. 518. See also as to special case stated by consent Gumm *v.* Tyrie, 6 B. & S. 298, 34 L. J. Q. B. 124, 13 Wkly. Rep. 436, 118 E. C. L. 298.

An order of court merely refusing to direct an issue is not reviewable. Book *v.* Day, 189 Pa. St. 44, 46, 41 Atl. 998 [*citing* White *v.* Rech, 171 Pa. St. 82, 32 Atl. 1130; Bain *v.* Funk, 61 Pa. St. 185].

Right to dismiss on appeal.— Where on appeal claimants proposed to withdraw their claim, and plaintiffs in execution refused to allow the claim to be dismissed, and the case remained pending on the appeal, the latter are estopped at the subsequent term to take an order dismissing the claim, against the will of the claimants. Bethune *v.* Barker, 14 Ga. 694.

The discharge of a rule to interplead deprives the claimant of the substantial right of an action against the sheriff, so as to entitle him to an appeal, at any event, to show that the discharge of the rule was an abuse of judicial discretion, in that it was shown the claim was not colorable or collusive. Book *v.* Day, 189 Pa. St. 44, 41 Atl. 998.

91. The appeal must be taken to, or the writ of error sued out from, the court having the proper jurisdiction, whether by reason of the subject-matter, or of the amount in controversy. See Empire Tailoring Co. *v.* First Nat. Bank, 90 Ill. App. 433; Collis *v.* Lewis, 20 Q. B. D. 202, 57 L. J. Q. B. 167, 57 L. T. Rep. N. S. 716, 36 Wkly. Rep. 472; White *v.* Milne, 58 L. T. Rep. N. S. 225. *Compare* Lumb *v.* Teal, 22 Q. B. D. 675, 58 L. J. Q. B. 298, 60 L. T. Rep. N. S. 451.

Amount in controversy as determining jurisdiction generally see Appeal and Error, 2 Cyc. 558.

record,[92] and the scope and extent of the review[93] are generally governed by the rules relating to proceedings for review in ordinary cases.

13. Costs, Damages, and Expenses — a. Costs[94]**—(i)** *In General.* While the costs in a claim suit are largely in the discretion of the court, and do not necessarily follow the verdict,[95] yet as a rule they will be awarded against the defeated party.[96]

Appellate jurisdiction of particular courts see Courts, 11 Cyc. 633.

92. A judgment against the claimant will be reversed, where the record fails to show the amount of the claims of the several plaintiffs in execution. Casentini *v.* Ullman, 21 Tex. Civ. App. 582, 54 S. W. 420.

93. Matters which do not properly appear of record (Kibble *v.* Butler, 14 Sm. & M. (Miss.) 207), or which are first brought in question on appeal (Ballard *v.* Mayfield, 107 Ala. 396, 18 So. 29; Dent *v.* Smith, 15 Ala. 286; Humble *v.* Williams, 4 Blackf. (Ind.) 473), will not as a rule be considered by the appellate court; nor will a judgment be reversed for immaterial and harmless errors (Jordan *v.* Grogan, 87 Ga. 533, 13 S. E. 552; Powell *v.* Westmoreland, 60 Ga. 572; Jack *v.* El Paso Fuel Co., (Tex. Civ. App. 1896) 38 S. W. 1139). So too an appellate court will not interfere with the discretion of the trial court in reference to an affidavit of claim filed after the time fixed by its rules for such affidavits to be filed (Strouse *v.* Bard, 8 Pa. Super. Ct. 48), nor will it review conflicting evidence to determine its weight (Smokey *v.* Johnson, (Miss. 1888) 4 So. 788). But where the proceedings were not instituted in accordance with the provisions of the statute regulating the trial of claim cases, and the parties were thereby misled from the true issue to be tried, the appellate court will set them aside, and reverse the judgment founded thereon. Paxton *v.* Boyce, 1 Tex. 317.

A judgment for damages will not be awarded against the claimant on appeal, where plaintiff did not move for such judgment in the court below. Gillian *v.* Henderson, 12 Tex. 47.

94. Costs generally see Costs.

95. Grim *v.* Adkins, 21 Ind. App. 106, 51 N. E. 494; Miller *v.* Black, 3 Kulp (Pa.) 20; Sterling *v.* Heath, 5 Pa. Co. Ct. 12; Bank *v.* Emerson, 13 Phila. (Pa.) 168; Barnett *v.* Clafflin, 13 Lanc. Bar (Pa.) 8; Ford *v.* Dilly, 5 B. & Ad. 885, 2 N. & M. 662, 27 E. C. L. 372; Lewis *v.* Holding, 9 Dowl. P. C. 652, 10 L. J. C. P. 204, 2 M. & G. 875, 3 Scott N. R. 191, 40 E. C. L. 900; Carr *v.* Edwards, 8 Dowl. P. C. 29, 8 Scott 337; Clarke *v.* Lord, 2 Dowl. P. C. 227, 3 L. J. Exch. 20; Seaward *v.* Williams, 1 Dowl. P. C. 528; Morland *v.* Chitty, 1 Dowl. P. C. 520.

Apportionment of costs.— See Dixon *v.* Yates, 5 B. & Ad. 313, 2 L. J. K. B. 198, 2 N. & M. 177, 27 E. C. L. 137.

No appeal lies from order as to costs. Hartmont *v.* Foster, 51 L. J. Q. B. 12, 8 Q. B. D. 82, 45 L. T. 429, 30 Wkly. Rep. 129.

Where a claimant is partially successful, he may in the discretion of the court be taxed with full costs (Taylor *v.* Forman, 12 Mo. 547), or he may have judgment without costs (Shellenberger *v.* Fleisher, 11 Pa. Co. Ct. 36; Peters *v.* Shaner, 1 Del. Co. (Pa.) 252), or the costs may be apportioned between the parties (Boginski *v.* Tobolski, 21 Pa. Co. Ct. 531; Sterling *v.* Heath, 5 Pa. Co. Ct. 12; Derr *v.* Frank, 17 Lanc. L. Rev. 193). But see *contra*, McCarthy *v.* Baze, 26 La. Ann. 382, to the effect that where a claimant sustains his claim as to a portion of the property he is entitled to costs. And see Staley *v.* Bedwell, 10 A. & E. 145, 8 L. J. Q. B. 233, 2 P. & D. 309, 37 E. C. L. 98.

96. Bank *v.* Emerson, 13 Phila. (Pa.) 168; Auerbach *v.* Sartorious, 14 Pa. Co. Ct. 529; Shellenberger *v.* Fleisher, 11 Pa. Co. Ct. 36; Marsh *v.* Ernhart, 17 Lanc. L. Rev. 195; Studham *v.* Stanbridge, [1895] 1 Q. B. 870, 64 L. J. Q. B. 473, 15 Reports 406, 43 Wkly. Rep. 543; Goodman *v.* Blake, 19 Q. B. D. 77, 56 L. J. Q. B. 441, 57 L. T. Rep. N. S. 494, 35 Wkly. Rep. 812; Smith *v.* Darlow, 26 Ch. D. 605, 53 L. J. Ch. 696, 50 L. T. Rep. N. S. 571, 32 Wkly. Rep. 665; Bland *v.* Delano, 6 Dowl. P. C. 293, 1 W. W. & H. 75; Lambert *v.* Cooper, 5 Dowl. P. C. 547, W. W. & D. 204; Beswick *v.* Thomas, 5 Dowl. P. C. 458; Oram *v.* Sheldon, 3 Dowl. P. C. 640, 1 Hodges 92, 1 Scott 697; Bowdler *v.* Smith, 1 Dowl. P. C. 417; Wills *v.* Hopkins, 3 Dowl. P. C. 346; Bowen *v.* Brambidge, 2 Dowl. P. C. 213; Perkens *v.* Burton, 2 Dowl. P. C. 108, 3 Tyrw. 51; Bryant *v.* Ikey, 1 Dowl. P. C. 428; Lawson *v.* Carter, 63 L. J. Q. B. 159; Jones *v.* Lewis, 5 Jur. 873, 10 L. J. Exch. 320, 8 M. & W. 264; Melville *v.* Smark, 3 M. & G. 57, 5 Scott N. R. 357, 42 E. C. L. 39; Todd *v.* M'Keevir, [1895] 2 Ir. 400; Hyland *v.* Lennox, 28 L. R. Ir. 286.

An agent is liable to the sheriff on an unsuccessful claim. Lewis *v.* Eickey, 2 Cromp. & M. 321, 2 Dowl. P. C. 337, 3 L. J. Exch. 23, 4 Tyrw. 157. See also Philby *v.* Ikey, 2 Dowl. P. C. 222.

If a sheriff be made a party to an issue to try the right to money made by him on an execution, and the issue be found against him, he is liable to pay the costs, if there is no special provision on the subject in the order of the court directing the issue. Hipple *v.* Hoffman, 2 Watts (Pa.) 85.

Recovery by officer.— Under Iowa Code (1873), § 3055, an officer cannot recover for his time and expenses in successfully defending a replevin suit for property levied on, where plaintiff in replevin had served no notice of claim of ownership. Rickabaugh *v.* Bada, 50 Iowa 56.

Expenses of keeping property.— When a sheriff accepts of a claimant a forthcoming bond, and releases the property under exe-

(II) *Liability of Sureties.* The costs of the trial of the right of property cannot be awarded against the sureties on the claimant's bond.[97]

(III) *Security For Costs.* The rules in regard to security for costs in claim proceedings follow the analogy of the rules on the same subject in actions generally.[98] But a non-resident plaintiff in execution is not required to give security for the costs in a claim case,[99] unless the burden of proof is on him.[1]

(IV) *Sale of Property For Costs.* In case of a finding against the claimant of property taken in execution, the property cannot be sold to pay the costs of the trial of the right of property.[2]

b. Damages. Damages may be awarded against an unsuccessful claimant where the statutes so provide.[3]

C. Operation and Effect of Determination — 1. In General. The determination of the right of property in a claim proceeding does not affect the title to the property as between the claimant and the execution defendant, or the rights of third parties;[4] but as between the execution plaintiff and the claimant it is conclusive as to the liability of the property to the execution,[5] and, where

cution, he cannot, before breach of the bond, again seize the property, nor accept a voluntary surrender of it from the claimant, and in either case charge plaintiff in execution with the expense of keeping it. Houser *v.* Williams, 84 Ga. 601, 11 S. E. 129, 90 Ga. 21, 15 S. E. 821. See also Sims *v.* Mead, 29 Kan. 124, in which it was held that the claimant was not required to pay the sheriff the expense of harvesting and threshing the wheat levied on, for which the claimant brought replevin. And see, generally, as to costs incurred in keeping possession of property pending determination of claim Field *v.* Cope, 2 Cromp. & J. 480, 1 Dowl. P. C. 567, 1 L. J. Exch. 175, 2 Tyrw. 548; Bland *v.* Delano, 6 Dowl. P. C. 293, 1 W. W. & H. 75; Underden *v.* Burgess, 4 Dowl. P. C. 104; Gaskell *v.* Sefton, 3 D. & L. 267, 9 Jur. 996, 15 L. J. Exch. 107, 14 M. & W. 802; Blaker *v.* Seager, 76 L. T. Rep. N. S. 392; Long *v.* Bray, 10 Wkly. Rep. 841.

97. Petree *v.* Wilson, 104 Ala. 157, 16 So. 143; Hooper *v.* Pair, 3 Port. (Ala.) 401, 29 Am. Dec. 258; Gayden *v.* Marshall, 8 Sm. & M. (Miss.) 489. *Contra*, under Tex. Rev. St. art. 4827, see Wrought Iron Range Co. *v.* Brooker, 2 Tex. App. Civ. Cas. § 225.

98. Rhodes *v.* Dawson, 16 Q. B. D. 548, 55 L. J. Q. B. 134, 34 Wkly. Rep. 240; Tomlinson *v.* Land, etc., Corp., 14 Q. B. D. 539, 53 L. J. Q. B. 561.

99. McAdams *v.* Beard, 34 Ala. 478. But see Williams *v.* Crosling, 3 C. B. 957, 4 D. & L. 660, 16 L. J. C. P. 112, 54 E. C. L. 957; Melin *v.* Dumont, 20 L. T. Rep. N. S. 366, 17 Wkly. Rep. 673.

The reason being that plaintiff is brought into court by the action of another. McAdams *v.* Beard, 34 Ala. 478.

1. Palmer *v.* Cole, 3 Kulp (Pa.) 55; Goss, etc., Mfg. Co. *v.* Gerhard, 7 Wkly. Notes Cas. (Pa.) 51.

2. Fryer *v.* Dennis, 2 Ala. 144.

3. *Georgia.*— Hart *v.* Thomas, 75 Ga. 529; Whitaker *v.* David, 49 Ga. 559; Kitchens *v.* Hutchins, 49 Ga. 191.

Illinois.— Broadwell *v.* Paradice, 81 Ill. 474.

Mississippi.—Johnston *v.* Standard Oil Co., 71 Miss. 397, 14 So. 533; Butler *v.* Lee, 54 Miss. 476.

Ohio.— Coe *v.* Peacock, 14 Ohio St. 187.

Texas.— Wright *v.* Henderson, 12 Tex. 43; Latham *v.* Selkirk, 11 Tex. 314.

In Georgia damages are authorized against the claimant, where it affirmatively appears that the claim was interposed solely for the purpose of delay (Ray *v.* Atlanta Trust, etc., Co., 111 Ga. 853, 36 S. E. 769; Burt *v.* Lorentz, 102 Ga. 121, 29 S. E. 137; Planters', etc., Bank *v.* Willeo Cotton Mills, 60 Ga. 168; Perkins *v.* Attaway, 14 Ga. 27), and the value of the property in dispute exceeds the amount of the execution (Adams *v.* Carnes, 111 Ga. 505, 36 S. E. 597).

Frivolous or vexatious claims.— A claim case, commenced in good faith, but continued longer than a reasonable time after discovery of its weakness in law, subjects the claimant to liability, just as if he had interposed the claim for delay only. If, however, the continuance is by advice of counsel, the claimant is not liable. Perkins *v.* Attaway, 14 Ga. 27. See also as to the effect of advice of counsel Dobbs Lumber Co. *v.* Appling, 97 Ga. 375, 24 S. E. 441.

Nominal damages.—The "right and proper" damages given by the statute (2 Swan & C. Ohio St. 100) to defendant, in an action of replevin brought by the mortgagee against the officer, when it appears that the mortgage lien on the property exceeds its value, is not the value of such property or the amount of the execution levy, but nominal merely. Coe *v.* Peacock, 14 Ohio St. 187.

4. Davidson *v.* Shipman, 6 Ala. 27; Cassell *v.* Williams, 12 Ill. 387; Seeley *v.* Garey, 109 Pa. St. 301, 5 Atl. 666; Passavant *v.* Gammey, 2 Pa. Dist. 389, 32 Wkly. Notes Cas. (Pa.) 217. But see and *compare* Cooper *v.* Davis, 88 Ala. 569, 7 So. 145.

5. Winship *v.* Phillips, 54 Ga. 237; Huntington *v.* McLeod, 12 Ga. 212; Ewing *v.* Cargill, 13 Sm. & M. (Miss.) 79; Stevens *v.* Springer, 23 Mo. App. 375; Carpy *v.* Edlinger, 5 N. Y. Suppl. 419. *Compare* Kibble *v.* Butler, 27 Miss. 586.

A finding against claimant does not vest the property in him, although he becomes

the judgment is against the claimant, as to the validity and binding force of the judgment in the principal action.[6] A judgment for the claimant does not operate as a bar to an action of trespass for the tort committed in taking the property under the execution,[7] although a judgment against him will bar not only an action against the officer,[8] but also one against a purchaser at the execution sale.[9] On the other hand plaintiff in execution may, notwithstanding a judgment for the claimant, compel the officer to sell by giving him a sufficient indemnifying bond.[10] Where the levy is dismissed, plaintiff in execution cannot proceed to the trial of the claim case without procuring a reversal of the judgment of dismissal.[11]

2. Dismissal and Nonsuit. The dismissal of a claim case by a court of competent jurisdiction is in effect a judgment against the claim.[12] So too a nonsuit in a sheriff's interpleader is a final determination of the issue against the claimant,[13] although it will not prevent his contesting his claim in some other form.[14]

3. Parties Bound. The verdict and judgment in a claim case will as a rule bind those only who are parties to the proceeding;[15] but where several claimants

liable to the amount of its value; and it is not error therefore to direct the same to be sold by the sheriff. Fryer *v.* Dennis, 2 Ala. 144.

A judgment rendered by a justice of the peace is not conclusive on the parties. Hayes *v.* Green, (Kan. App. 1898) 53 Pac. 764, construing Kan. Laws (1872), c. 164. See also State *v.* Gillespie, 9 Nebr. 505, 4 N. W. 239, construing Nebr. Code Civ. Proc. §§ 996–998.

A sale after judgment by default against the claimant will be valid, although the default is afterward set aside and a trial of the right of property is had. Hughes *v.* Miller, 2 Greene (Iowa) 9.

Sale by defendant after levy.— Where, after a valid levy, defendant in execution had sold the property, a verdict, on the trial of the right of property, justifying the officer in levying and selling, is also a justification to plaintiff in execution or other purchasers interfering in defendant's sale. Tucker *v.* Bond, 23 Ark. 268.

6. Henderson *v.* Hill, 64 Ga. 292; Pollard *v.* King, 63 Ga. 224.

Reversal of original judgment.— Where a claim for an undivided interest in an animal, levied on under execution, was not allowed, the reversal of the original judgment in the action did not affect a verdict for plaintiff in execution previously rendered on the claimant's issue. Willis *v.* Loeb, 59 Miss. 169.

7. Lenoir *v.* Wilson, 36 Ala. 600; Hibbard *v.* Thrasher, 65 Ill. 479; Abbey *v.* Searls, 4 Ohio St. 598.

The discharge of a rule to interplead, and an order that the sheriff sell the goods, will not affect the title of the claimant of the goods, nor prejudice his right of action against the sheriff, nor impose any terms or conditions upon him whatever. Bain *v.* Funk, 61 Pa. St. 185.

8. Patty *v.* Mansfield, 8 Ohio 369. See also Moore *v.* Lelor, 1 Phila. (Pa.) 72.

Nebr. Code Civ. Proc. § 998, provides that a claimant of property levied on under attachment cannot, after being defeated in a trial of the right of property, maintain replevin against the officer; and it is held that the same rule applies where the attached property is sold on an "execution" issued on a judgment rendered in the case, the possession of the officer being continuous. Bray *v.* Seaman, 13 Nebr. 518, 14 N. W. 474.

9. McGregor *v.* Hampton, 70 Mo. App. 98.

10. Lampton *v.* Taylor, Litt. Sel. Cas. (Ky.) 273; Waterman *v.* Frank, 21 Mo. 108. But see Ludeling *v.* Graves, 3 La. Ann. 597; Fisher *v.* Gordon, 8 Mo. 386.

11. Patterson *v.* Bagley, 53 Ga. 483.

12. Brannan *v.* Cheek, 103 Ga. 353, 29 S. E. 937. See also Anderson *v.* Banks, 92 Ga. 121, 18 S. E. 364; Aycock *v.* Austin, 87 Ga. 566, 13 S. E. 582, to the effect that where a claimant takes possession of the property under a forthcoming bond, and subsequently dismisses his claim, and admits that he has disposed of the property, he cannot, in an action on the bond, contend that the property was not subject to levy. *Compare* Houser *v.* Williams, 84 Ga. 601, 11 S. E. 129, where it was held that a forthcoming bond does not cease to have effect on the withdrawal of the claim, but continues in force throughout the whole litigation, whether a second claim is filed or not.

Right to reinterpose claim.— A claim which has been dismissed by the court on plaintiff's motion for failure to make parties and prosecute may notwithstanding be again interposed by the claimant. Lynch *v.* Bond, 19 Ga. 314.

13. O'Neill *v.* Wilt, 75 Pa. St. 266; Brezier *v.* Cahill, 6 Wkly. Notes Cas. (Pa.) 147; Bank *v.* Allen, 1 Del. Co. (Pa.) 277.

14. Bank *v.* Allen, 1 Del. Co. (Pa.) 277.

15. Smith *v.* Coker, 110 Ga. 654, 36 S. E. 107; Graves *v.* Butcher, 24 Kan. 291; Passavant *v.* Gummey, 2 Pa. Dist. 389, 32 Wkly. Notes Cas. (Pa.) 217; Pounder *v.* Foos, 1 Walk. (Pa.) 27.

A claimant is not bound by a judgment in proceedings instituted by the sheriff without his consent, since Nebr. Code, § 486, provides that a trial of the right of property can be had only at the instance of the claimant. Storms *v.* Eaton, 5 Nebr. 453.

have filed claims against a fund in the hands of the sheriff under a judgment, a verdict on an issue between two of the claimants will bind all.[16]

4. Relevy and Sale Under Original Judgment. After a judgment adverse to the claimant in a trial of the right of property, the property may be reseized and sold under the original judgment;[17] and the execution plaintiff cannot be compelled to pursue his remedy on the claimant's bond,[18] or, where he has been sued in replevin, to issue execution on the replevin judgment.[19]

D. Liability of Claimant and Sureties — 1. On Claim and Forthcoming Bonds — a. In General — (i) *Liability of Claimant.* The liability of a claimant on his bond is analogous to that of an attachment defendant on a forthcoming bond, and hence is fixed by a final judgment against him.[20]

A security on a claim bond is sufficiently a party to the claim case to be bound by a verdict and judgment therein for damages and costs. Harvey *v.* Head, 68 Ga. 247. He cannot, in an action on the bond, object that the jury, in determining the claim case, omitted to notice a portion of the property (Elliott *v.* Gray, 4 Stew. & P. (Ala.) 168), nor can he, two years after the levy and sale, and after the title of his principal has been declared void, intervene and again try such title (Saisarence *v.* Mayer, 19 Wkly. Notes Cas. (Pa.) 537). But a surety is not precluded, by a judgment improperly obtained against his principal, from resorting to a court of chancery to establish that the property levied on and condemned had been previously levied on by a senior judgment creditor and condemned, pending a trial of which the last levy was made, and that the property had been delivered in satisfaction of the judgment of the senior creditor (Babcock *v.* Williams, 9 Ala. 150).

Cestui que trust is bound by judgment against claim of trustee. See Marriott *v.* Givens, 8 Ala. 694.

Claimant's grantor is bound by judgment against claimant. See Welchel *v.* Gordon, 63 Ga. 610.

16. Field *v.* Armstrong, 69 Ga. 170.

17. *Alabama.*—Carlos *v.* Ansley, 8 Ala. 900.

Georgia.— Seymour *v.* House, 103 Ga. 676, 30 S. E. 655 [*following* Chesapeake Guano Co. *v.* Wilder, 85 Ga. 550, 11 S. E. 618 (which *distinguished* and *limited* Houser *v.* Williams, 84 Ga. 601, 11 S. E. 129, because in that case there had been no breach of the forthcoming bond)].

Indiana.— Dawson *v.* Sparks, 77 Ind. 88.

Mississippi.— Walker *v.* McDowell, 4 Sm. & M. 118, 43 Am. Dec. 476.

New York.— Burkle *v.* Luce, 1 N. Y. 163.

Pennsylvania.— Gray *v.* Krugerman, 4 Pa. Co. Ct. 290; Bank *v.* Allen, 1 Del. Co. 277.

Texas.— Willis *v.* Chowning, 90 Tex. 617, 40 S. W. 395, 59 Am. St. Rep. 842 [*modifying* (Civ. App. 1897) 38 S. W. 1141].

See 21 Cent. Dig. tit. "Execution," § 588.

18. Dawson *v.* Sparks, 77 Ind. 88; Walker *v.* McDowell, 4 Sm. & M. (Miss.) 118, 43 Am. Dec. 476; Bank *v.* Allen, 1 Del. Co. (Pa.) 277.

19. Dawson *v.* Sparks, 77 Ind. 88.

Where plaintiff in replevin dies pending the action, the sheriff has no remedy upon the replevin bond, but must retake and sell the property to satisfy the execution. Burkle *v.* Luce, 1 N. Y. 163.

20. See Attachment, 4 Cyc. 690.

There must be a judgment by a court of competent jurisdiction, in order to fix the liability of the claimant on the forthcoming bond made by him. Brannan *v.* Cheek, 103 Ga. 353, 29 S. E. 937.

Failure to maintain title.— Where a claimant gave a bond conditioned that he should at all times maintain his title to the goods, but neglected to file a statement of title for more than two weeks after the rule to interplead was made absolute, it was held that this was a failure to maintain his title which wrought a breach of the bond, although there had been no service of the rule upon him. Com. *v.* Beary, 9 Pa. Super. Ct. 246.

Conversion and sale by claimant.— A sale of the property by the claimant is a breach of the bond, for which he can be proceeded against without first demanding the property and readvertising it for sale (Lassiter *v.* Byrd, 55 Ga. 606); and where he sells for more than the amount of the creditor's debt, and then withdraws his claim, he is liable to the creditor for the amount of the debt (Tift *v.* Keaton, 78 Ga. 235, 2 S. E. 690). See also Bowen *v.* Penny, 76 Ga. 743, to the effect that where the property was delivered to the claimant, and consumed by him, he was personally liable on the forthcoming bond, although he signed as trustee for his wife.

In case the same property is levied on by several creditors, and a claim bond is given to one of the executions only, and that creditor alone contests the title with the claimant, and succeeds in condemning the property, the other creditors have no right to claim the money which he receives from the claimant in discharge of the claim bond. Barnett *v.* Handley, 8 Ala. 685, where the bond was executed to the junior execution only.

Sale of property under superior lien.— Where claimant gives the levying officer a forthcoming bond and retains possession, and thereafter the same officer sells the property under a superior lien, applying the proceeds to such lien, the maker of the forthcoming bond is not liable for failure to produce the property at the time and place of sale. Floyd *v.* Cook, 118 Ga. 526, 45 S. E. 441, 63 L. R. A. 450.

(II) *Liability of Sureties*[21] — (A) *In General.* Where, in a statutory proceeding to try rights of property, a claimant's bond is filed, the court has jurisdiction over the person of a surety on such bond.[22] But the liability of the surety is dependent upon that of his principal, and cannot be enforced until a liability is fixed upon the principal.[23] A surety on several bonds is liable to each creditor for a breach of the condition of the bond, although he may thereby be compelled to pay the value of the goods levied on several times.[24]

(B) *Release From Liability.* A surety cannot be discharged by substituting another bond, with other surety, without the consent of the other party;[25] and since, after final judgment, on the bond, sureties become principal debtors, they are not discharged by an extension or stay of execution;[26] nor because plaintiff in a senior execution did not have the proceeds of the sale of the property under a junior execution applied to the senior execution.[27]

(III) *Surrender of Property.* The condition of a bond that the goods levied on shall be forthcoming to answer the writ, in case the issue shall be determined against the claimant and in favor of the execution creditor, is broken, if upon such determination all the goods are not forthcoming.[28] The doctrine is well settled that in order that the surrender may discharge the liability on the forthcoming bond there must be an actual return of the identical[29] property to the possession and control of the officer,[30] in as good condition as when it was

Where it appears that the property is owned jointly by the claimant and the debtor, the limit of the assessment of value is the value of the debtor's interest, and the sheriff is not entitled to have it assessed at the amount named in the execution. Ploss *v.* Thomas, 6 Mo. App. 157.

21. Liability of sureties generally see Bonds.

22. Johnson *v.* Blum, 17 Tex. Civ. App. 260, 42 S. W. 791.

23. Muenster *v.* Tremont Nat. Bank, 92 Tex. 422, 49 S. W. 362 [*reversing* (Civ. App. 1898) 46 S. W. 277], to the effect that, where a claimant died pending the action, he had not "failed" to establish his claim within the act (Tex. Rev. St. art. 5307), so as to authorize judgment against the sureties alone, on their failure to appear and continue the action, which should have been continued by claimant's representatives. See also and *compare* Ramsey *v.* Zapp, (Tex. Civ. App. 1900) 57 S. W. 82.

Although the statute does not require sureties a bond with sureties is valid. Jenkins *v.* Lockard, 66 Ala. 377.

Confession of judgment by principal fixes liability. See Bradford *v.* Frederick, 101 Pa. St. 445.

Damages for delay.— Under the Alabama act of 1828, judgment cannot be rendered against a claimant's sureties for damages assessed on the trial against the claimant for the delay. Hughes *v.* Rhea, 1 Ala. 609.

Discontinuance of claim.— Where the claim is discontinued, and an issue made up under Ga. Code, § 3741, and the jury find that the claim was interposed for delay only, the security on the damage bond is as much bound as if the claim case had been tried. Shealy *v.* Toole, 62 Ga. 170.

Fraudulent representations.— Sureties on a delivery bond who have been induced to become such by representations that the property had been levied on, when in fact no levy had been made, are not bound, and may have an injunction against the enforcement of their liability. Bradley *v.* Kesee, 5 Coldw. (Tenn.) 223, 94 Am. Dec. 246.

24. Collins *v.* Schlichter, 11 Phila. (Pa.) 349.

25. Fryer *v.* Dennis, 2 Ala. 144, where the substitution was for the purpose of making the first surety a competent witness.

26. Geary *v.* Smith, 45 Tex. 56; The Col. Howard *v.* Hayden, 6 Fed. Cas. No. 3,026.

27. The reason being that plaintiff having elected to proceed on the bond, it was immaterial to him what disposition was made of the proceeds of the sale. Reese *v.* Worsham, 110 Ga. 449, 35 S. E. 680, 78 Am. St. Rep. 109.

28. Munter *v.* Leinkauff, 78 Ala. 546; Hill *v.* Robinson, 44 Pa. St. 380; Edwards *v.* Connolly, 61 Tex. 30; Betterton *v.* Buck, 2 Tex. App. Civ. Cas. § 198.

A claimant is entitled to credit on the execution for the amount for which the part of the property returned by him sold, regardless of its assessed value. Wilcox, etc., Guano Co. *v.* Piedmont Lumber Co., 97 Ala. 552, 98 Ala. 281, 11 So. 779. See also Munter *v.* Leinkauff, 78 Ala. 546.

Where plaintiff retained the goods returned, without a sale by the sheriff, and their value as assessed by the sheriff was less than the amount of the execution and the damages awarded by the jury, it was held that the return of the goods and the appropriation of them by plaintiff without a sale by the sheriff did not amount to an actual satisfaction of the judgment against the claimant, under Howard & H. St. Miss. p. 655. Gayden *v.* Marshall, 8 Sm. & M. (Miss.) 489.

29. Estoppel to deny identity.— Anthony *v.* Bartholow, 69 Mo. 186.

30. Garrity *v.* Thompson, 67 Tex. 1, 2 S. W. 750; Edwards *v.* Connolly, 61 Tex. 30.

A direction to the sheriff to retake goods in a store easily accessible to him constitutes

received,[31] within a reasonable time,[32] at the place of sale, if the bond is so conditioned,[33] and as a discharge of that bond.[34] A notice to surrender the property is unnecessary,[35] and it is immaterial whether the judgment creditor consents to the return or not,[36] or whether or not a return made by a surety was with the consent of the claimant.[37] An execution plaintiff cannot sell a portion of the goods returned, and recover on the bond for the portion which he refuses to sell.[38]

b. Enforcement of Liability — (I) *In Proceedings For Trial of Right.* In some jurisdictions the liability of the claimant and his sureties upon the claim bond may be enforced summarily in the proceedings for the trial of the right of property.[39]

(II) *By Action*[40] — (A) *In General.* The liability of a claimant and his sureties is most usually enforced by action on the bond.[41] The execution plaintiff may maintain an action on a forthcoming bond in his own name;[42] but it is the duty of the officer to institute an action on the claimant's replevin bond.[43]

a sufficient delivery. Willis *v.* Chowning, 18 Tex. Civ. App. 625, 46 S. W. 45.

A mere tender to the officer, when the property is not visible, but some miles away, is insufficient. Edwards *v.* Connolly, 61 Tex. 30.

Redelivery of cattle seized under range levy.— See Willis *v.* Chowning, 18 Tex. Civ. App. 625, 46 S. W. 45, construing Tex. Rev. St. 1895, art. 5310.

31. Claimant is not entitled to return the property in a damaged condition, although the damage is caused by reasonable wear and tear incident to a careful use thereof. Parlin, etc., Co. *v.* Coffey, 25 Tex. Civ. App. 218, 61 S. W. 512.

32. Redelivery of the property after the expiration of the time prescribed by statute does not satisfy the judgment. Bullard *v.* White, 2 Tex. App. Civ. Cas. § 286.

33. King *v.* Castlen, 91 Ga. 488, 18 S. E. 313.

34. A delivery to the officer on a bond given in another claim case arising on the levy of a junior execution will not relieve the principal and surety from liability. Reese *v.* Worsham, 110 Ga. 449, 35 S. E. 680, 78 Am. St. Rep. 109 [*distinguishing* and *explaining* King *v.* Castlen, 91 Ga. 488, 18 S. E. 313]. *Compare* Ferriday *v.* Selcer, Freem. (Miss.) 258.

35. Janes *v.* Horton, 32 Ga. 245, 79 Am. Dec. 300.

36. Willis *v.* Chowning, 90 Tex. 617, 40 S. W. 395, 50 Am. St. Rep. 842.

37. Willis *v.* Chowning, 90 Tex. 617, 40 S. W. 395, 59 Am. St. Rep. 842.

38. Whitesides *v.* Bardman, 15 Phila. (Pa.) 208.

39. In Alabama, in order to authorize a summary judgment against the security on a bond for the delivery of the property taken in execution and claimed by a third person, the sheriff must have returned the bond forfeited. Catching *v.* Bowden, 89 Ala. 604, 8 So. 58; Allen *v.* Hays, 1 Stew. 10.

In Florida, McClellan Dig. p. 526, § 28, provides that whenever a person who has interposed a claim to property levied on by execution, and given bond to plaintiff in execution, shall not deliver the property according to the terms of the bond, the bond shall have the force of a judgment, and the clerk may issue execution thereon for the amount of the debt. Under this statute, the execution can only issue against the obligor and his sureties, and only for "the amount of the debt." Moody *v.* Hoe, 22 Fla. 314, in which it was further held that where several different executions have been levied, under McClellan Dig. p. 524, § 22, and the bond is made jointly to all plaintiffs, the clerk cannot issue execution in favor of one only of such plaintiffs, although the jury found against the claimant in his favor, and in favor of the claimant against the others.

In Kentucky, under Code, § 716, a party to whom a bond is executed may move the court to which it is returned for a judgment, on ten days' notice of the motion. Smith *v.* Wells, 4 Bush 92. See also Rogers *v.* Bostain, 11 Ky. L. Rep. 764. *Compare* Howe *v.* Lane, 8 Ky. L. Rep. 783, to the effect that a claimant's bond, taken by the sheriff after the death of defendant, is not a statutory obligation enforceable by motion; but that the special proceeding will not bar an action at law on the bond, if the facts will sustain it.

In Texas, Rev. St. (1895) art. 5307, provides: "In all cases where any claimant of property under the provisions of this title . . . shall fail to establish his right thereto, judgment shall be rendered against him and his sureties for the value of the property, with legal interest thereon from the date of the bond." Davis *v.* Jones, (Civ. App. 1903) 75 S. W. 63. See also Lewis *v.* Taylor, 17 Tex. 57, where it was held that a judgment on a bond, returned as forfeited, does not merge the original judgment, but is a cumulative security merely.

40. Liability on forthcoming bond generally see *supra*, VII, C, 3, e.

41. Under Ga. Code, § 3326, which provides that an action may be maintained on a forthcoming bond given in a claim case for deterioration in the value of the property, such an action is not authorized on a delivery bond for property taken under execution, where an affidavit of illegality has been filed. Walker *v.* Chambers, 85 Ga. 136, 11 S. E. 582.

42. Hart *v.* Thomas, 75 Ga. 529.

43. Swezey *v.* Lott, 21 N. Y. 48, 78 Am. Dec. 160.

(B) *Defenses.* Defendant can set up no defense which would permit him to prove the very issue which it was incumbent upon him to prove in the claim case;[44] nor can he show that the jury found by their verdict that the claimant was interested with defendant, and that the interest which the latter had on a settlement of accounts was nothing.[45]

(C) *Pleading.* The general rules of pleading are applicable in actions upon claim and forthcoming bonds.[46]

(D) *Evidence.*[47] In actions upon claim and forthcoming bonds, presumptions,[48] burden of proof,[49] the admissibility of evidence,[50] and the weight and sufficiency of proof[51] are governed by the general rules relating to such matters in other actions.

(E) *Instructions.*[52] An instruction upon an issue whether an unsuccessful claimant had offered to return the property in as good condition as he had received it is not objectionable because it described the property slightly differently from what the pleadings and evidence showed it to be.[53]

(F) *Judgment and Enforcement* — (1) IN GENERAL. A judgment for plain-

44. Waterman *v.* Frank, 21 Mo. 108, where the claimant attempted to set up ownership in himself in mitigation of damages.

Mere interlineation is no defense, unless it appears that it was made after the execution of the bond, and that an advantage or detriment to the parties was accomplished thereby. Com. *v.* Beary, 9 Pa. Super. Ct. 246.

That the goods have been turned over under order of court to an assignee in bankruptcy appointed for the execution defendant, after the giving of the bond, or that plaintiff agreed with such assignee that the goods should be sold and the money proceeds substituted therefor is no defense. Davis *v.* Fouche, 38 Leg. Int. (Pa.) 186.

45. Ward *v.* Zune, 4 Phila. (Pa.) 68.

46. Pleading generally see PLEADING.

It is only necessary in the declaration, statement, or complaint to set out facts sufficient to show a breach of the conditions of the bond (Bowen *v.* Penny, 76 Ga. 743), and to allege the value of the goods, where plaintiff's recovery is limited to such value (Byrne *v.* Hayden, 124 Pa. St. 170, 16 Atl. 750). No affidavit of defense is required (Davis *v.* Wood, 39 Wkly. Notes Cas. (Pa.) 328); but a special plea must allege all the facts necessary to sustain it (Young *v.* Waldrip, 91 Ga. 765, 18 S. E. 23).

47. Evidence generally see EVIDENCE.

48. There is no presumption, on default by the obligors in an action on a bond given by a claimant for the delivery of goods on the settlement of the claim in favor of the execution creditor, that the goods for which the bond was given were worth as much as the amount due on the judgment. Byrne *v.* Hayden, 124 Pa. St. 170, 16 Atl. 750.

49. In an action on a forthcoming bond the burden of proof is upon the claimant to account for his failure to surrender the property. Young *v.* Waldrip, 91 Ga. 765, 18 S. E. 23. In a motion for judgment, where the pleadings are oral, the court should require each party to state his case, and from that statement prescribe what shall be the issue, and who shall assume the burden of proof. Borches *v.* Bellis, 110 Ky. 620, 62 S. W. 486, 23 Ky. L. Rep. 37.

50. In an action on a forthcoming bond the bond itself is properly admitted in evidence on behalf of plaintiff (Ingram *v.* Harris, 9 Pa. Super. Ct. 301, 43 Wkly. Notes Cas. (Pa.) 550), while under a plea of payment defendants may give in evidence the return of the sheriff, showing a levy and sale, and money made thereby (Hill *v.* Grant, 49 Pa. St. 200); but they will not be permitted to prove that the property levied on, and for which they gave their bond, really belonged to themselves, or to others than the execution defendant (Waterman *v.* Frank, 21 Mo. 108; Ingram *v.* Harris, 9 Pa. Super. Ct. 301, 43 Wkly. Notes Cas. (Pa.) 550. But see Williams *v.* Smith, 4 Bush (Ky.) 540; Robinson *v.* Sharp, 32 S. W. 416, 761, 17 Ky. L. Rep. 736).

Equitable ownership.— On a motion for judgment on a claimant's bond, the claimant may claim that, although the debtor is the legal owner of the property, claimant is a partner, and equitable owner of two-thirds' interest therein. Williams *v.* Smith, 4 Bush (Ky.) 540.

51. See cases cited *infra*, this note.

To show breach.— The breach of a bond, conditioned that the goods shall be produced at the time and place of sale, if the claim be disallowed, can be proved only by showing that the property was advertised for sale, and was not produced at the time and place provided therefor, or by showing that the property had been disposed of by the claimant. Bowdoin *v.* Roberts, 85 Ga. 657, 11 S. E. 784.

To sustain finding that property belonged to debtor.— In an action on a bond given by a claimant of property levied on, evidence that the execution debtor was exercising dominion over the property, and that defendant had disclaimed title thereto and declared that it belonged to such debtor, sustains a finding that it belonged to the latter. Extence *v.* Stewart, (Tex. Civ. App. 1894) 26 S. W. 896.

52. Trial generally see TRIAL.

53. Parlin, etc. *v.* Coffey, 25 Tex. Civ. App. 218, 61 S. W. 512, where the pleadings and evidence showed that the engine levied on was composed of a carriage, boiler, steam-

tiff on a bond given by a claimant of property seized under execution must be for an ascertained amount,[54] upon which interest is to be allowed from the date of the judgment.[55] Plaintiff is entitled to a satisfaction of his original judgment, with the interest on such judgment from its date, and interest on the damages from the time of the judgment giving damages.[56]

(2) Stay of Proceedings. Where judgment has been rendered on an interpleader bond, the court will not stay proceedings until the determination of other feigned issues growing out of a levy upon the same goods by other execution creditors, in order to relieve defendant from his liability on other interpleader bonds.[57]

(3) Application of Proceeds. The proceeds of a judgment on a forthcoming bond should be applied on the execution, whether the judgment on which the execution issued was a lien on the property seized or not. Defendant in execution has no claim to the proceeds.[58]

2. On Indemnity Bonds.[59] Where the claimant of property levied on under execution has possession of it, and refuses to deliver it to the sheriff, and gives a bond of indemnity to the sheriff for not assessing and selling it, he is liable to the sheriff on such bond.[60]

E. Remedy of Claimant on Indemnity Bond[61] — **1. Right of Action.** The execution of an indemnity bond to the officer levying an execution does not postpone the right of action against the officer by a claimant of the property, but simply shifts the liability from the officer to the obligors.[62] The right of action accrues immediately upon the execution of the bond,[63] and the fact that the claimant has executed a bond to retain possession of the property will not prevent his instituting an action on the indemnity bond for the damages previously sustained.[64]

2. Defenses — Validity of Bond. The validity of a bond of indemnity cannot be attacked on the ground of duress,[65] nor because of a variance in the description of the property, where it is otherwise described in the bond the same as in the officer's return, and the evidence shows that the property taken was that for which the bond was given,[66] nor because the statement of claim omits some material matter, if the bond was given by the execution plaintiff without objection upon the demand of the officer.[67]

3. Pleading[68] **— Answer.** In an action on an indemnifying bond an answer denying plaintiff's ownership of the property is defective, if it fails to negative his ownership of any part thereof.[69]

4. Evidence.[70] Where a claimant brings trespass against plaintiff in execution, the officer making the levy and the sureties on the bond of indemnity given the

engine, etc., and the court described the property as a steam-engine, carriage, boiler, etc.

54. Smith *v.* Wells, 4 Bush (Ky.) 92.

55. Lowenstein *v.* Seff, 6 Pa. Dist. 533.

56. Lewis *v.* Taylor, 17 Tex. 57.

57. Collins *v.* Schlichter, 11 Phila. (Pa.) 349.

58. Heard *v.* Duke, 98 Ga. 134, 26 S. E. 485.

59. **Indemnity bond** generally see Sheriffs and Constables.

60. Lampton *v.* Taylor, Litt. Sel. Cas. (Ky.) 273. But see Griffin *v.* Hasty, 94 N. C. 438, where the sheriff, upon the property's being claimed by a third person, released the levy and took a bond to indemnify him, in case he should be amerced, and it was held that the bond was void.

61. **Indemnity bond** generally see Sheriffs and Constables.

62. Brock *v.* Church, 5 Ky. L. Rep. 855.

63. Chisholm *v.* Gooch, 3 Ky. L. Rep. 247.

64. Brock *v.* Church, 5 Ky. L. Rep. 855. See also Shattuck *v.* Miller, 50 Miss. 386.

Conversely the fact that an indemnifying bond has been taken and returned by the officer does not bar the right of the claimant to maintain an action of claim and delivery against the officer to recover possession of the property levied on. Hoskins *v.* Robinson, 101 Ky. 667, 42 S. W. 113, 19 Ky. L. Rep. 877.

65. Smith *v.* Rogers, 99 Mo. App. 252, 73 S. W. 243.

66. Smith *v.* Rogers, 99 Mo. App. 252, 73 S. W. 243 [*citing* State *v.* Benedict, 51 Mo. App. 642].

67. Smith *v.* White, 48 Mo. App. 404.

68. **Pleading** generally see Pleading.

69. Harris *v.* McClure, 52 S. W. 941, 21 Ky. L. Rep. 686.

70. **Evidence** generally see Evidence.

officer, the bond is competent evidence to connect the sureties with the alleged trespass.[71]

5. Trial[72]**— Instructions.** Although the evidence as a whole tends to show that plaintiff is either the owner of all the property or of some of it, it is proper to instruct the jury that if they believe plaintiff is the owner of the property, "or any part thereof," they will find for him the value of the property, or of such part as they believe from the evidence he owned at the time of the levy.[73]

6. Damages.[74] Where a sale of the property under the execution is void, and the property is returned to the claimant, and no substantial damage is shown, in an action on the bond of indemnity the claimant is entitled to nominal damages only.[75]

X. SALE.[76]

A. Manner, Conduct, and Validity — 1. Authority of Officer to Sell — a. In General. An officer making a sale under execution acts solely by virtue of the statutory authority conferred, which must be strictly pursued; and where such power does not exist nothing passes by the sale.[77]

b. After Expiration of Term of Office. Where a sufficient levy of execution is made upon property during the life of the writ, and prior to the expiration of the term of office of the officer to whom it is delivered, such officer is empowered to make a sale of the property so levied upon after his term has expired.[78]

c. Where Officer Is a Party at Interest. Under the principle of public policy which makes it unlawful for a sheriff to levy an execution issued in his favor, it

71. Reeves *v.* McNeill, 127 Ala. 175, 28 So. 623.

72. Trial generally see Trial.

73. Harris *v.* McClure, 52 S. W. 941, 21 Ky. L. Rep. 686.

74. Damages generally see Damages.

75. Burge *v.* Hunter, 93 Mo. App. 639, 67 S. W. 697.

76. An execution sale is a sale of property conducted by a sheriff or deputy sheriff in virtue of his authority as an officer holding process. Black L. Dict. See also Batchelder *v.* Carter, 2 Vt. 168, 19 Am. Dec. 707.

The distinction between an execution and a judicial sale is that the former is a ministerial and the latter a judicial act. At common law, if the officer in conducting an execution sale conformed to the established regulations, the sale was final and valid as soon as made, confirmation being required only in judicial sales. Hershy *v.* Latham, 42 Ark. 305; Norton *v.* Reardon, 67 Kan. 302, 72 Pac. 861, 100 Am. St. Rep. 459; Preston *v.* Breckenridge, 86 Ky. 619, 6 S. W. 641, 10 Ky. L. Rep. 2.

Liability for misconduct generally see Sheriffs and Constables.

Right to demand indemnity bond generally see Sheriffs and Constables.

Venditioni exponas see *infra*, X, A, 1, e.

77. *Alabama.*— Hurt *v.* Nave, 49 Ala. 459.

Georgia.— Bell *v.* Chandler, 23 Ga. 356.

Illinois.— See Wickliff *v.* Robinson, 18 Ill. 145.

Minnesota.— Thompson *v.* Sutton, 23 Minn. 50.

New Jersey.— Meyer *v.* Bishop, 27 N. J. Eq. 141.

New York.— Husted *v.* Dakin, 17 Abb. Pr. 137; Carter *v.* Simpson, 7 Johns. 535.

Pennsylvania.— See Kunselman *v.* Stine, 183 Pa. St. 1, 38 Atl. 414.

Tennessee.— Riner *v.* Stacy, 8 Humphr. 288.

United States.— Gantly *v.* Ewing, 3 How. 707, 11 L. ed. 794; Wills *v.* Chandler, 2 Fed. 273, 1 McCrary 276.

See 21 Cent. Dig. tit. "Execution," § 601.

The owner of an execution cannot himself sell the property under the execution, even though he is a deputy sheriff, and the assignee of the execution, and not the execution plaintiff. Riner *v.* Stacy, 8 Humphr. (Tenn.) 288.

Waiver of lien.— Where certificates of liens against land sold under execution, as provided for by the Nebraska code of civil procedure, are waived, it is not error for the sheriff to proceed with the sale without them. Moore *v.* Hornsby, (Nebr. 1903) 95 N. W. 858.

78. *Alabama.*—Bondurant *v.* Buford, 1 Ala. 359, 35 Am. Dec. 33.

Illinois.— Phillips *v.* Dana, 4 Ill. 551.

Kentucky.— Colyer *v.* Higgins, 1 Duv. 6, 85 Am. Dec. 601; Lofland *v.* Ewing, 5 Litt. 42, 15 Am. Dec. 41.

Massachusetts.—Lawrence *v.* Rice, 12 Metc. 535.

Michigan.— Vroman *v.* Thompson, 51 Mich. 452, 16 N. W. 808; Blair *v.* Compton, 33 Mich. 414.

Missouri.— Bilby *v.* Hartman, 29 Mo. App. 125. See, however, Merchant's Bank *v.* Harrison, 39 Mo. 433, 93 Am. Dec. 285.

New Jersey.— Hunt *v.* Swayze, 55 N. J. L. 33, 25 Atl. 850.

New York.— Wood *v.* Colvin, 2 Hill 566, 38 Am. Dec. 598.

Ohio.— See Miner *v.* Cassat, 2 Ohio St. 198.

is unlawful for an officer or his deputy to conduct a sale under an execution to which he is a party.[79]

d. Sale by Successor in Office. The question as to whether or not an officer can complete the service of an execution which has been begun by his predecessor has been often before the courts, and the decisions thereon cannot be harmonized. In the case of personal property the rule seems to be well settled that the sale must be made by the officer who levied the writ, the reason given being that the officer, by virtue of his levy, has acquired an interest in the property.[80] However, since the levy of an execution upon real estate does not vest any special property in the officer making the levy, as in the case of personal property, the rule has been laid down in many jurisdictions that the powers of his successor in office are concurrent with those of the officer making the levy in respect to the sale of such property.[81] While some courts have gone to the extent of holding that in the case of real property the new officer is the proper party to make the sale and execute the conveyance, and that a sale by the officer whose term has expired is a nullity,[82] others, following the common-law rule in regard to chattels, have held that only the outgoing officer has power to complete the execution by the sale and conveyance of the land levied upon.[83]

United States.— Kent *v.* Roberts, 14 Fed. Cas. No. 7,715, 2 Story 591. *Contra,* See U. S. *v.* Arkansas Bank, 24 Fed. Cas. No. 14,515, Hempst. 460.

See 21 Cent. Dig. tit. "Execution," § 602.

Completion of sale.— It has been held in Illinois that it is the officer's duty, when he has made the levy, whatever has become of the execution, to complete the sale and bring the money into court. Phillips *v.* Dana, 4 Ill. 551.

79. Chambers *v.* Thomas, 3 A. K. Marsh. (Ky.) 536; May *v.* Walters, 2 McCord (S. C.) 407; Riner *v.* Stacy, 8 Humphr. 288.

80. *Alabama.*— Leavitt *v.* Smith, 7 Ala. 175.

California.— People *v.* Boring, 8 Cal. 406, 68 Am. Dec. 331.

Louisiana.— Sauvinet *v.* Maxwell, 26 La. Ann. 280.

Maine.— Clark *v.* Pratt, 55 Me. 546; Tukey *v.* Smith, 18 Me. 125, 36 Am. Dec. 704.

Missouri.— Bilby *v.* Hartman, 29 Mo. App. 125.

New Jersey.— State *v.* Roberts, 12 N. J. L. 114, 21 Am. Dec. 62.

New York.—Newman *v.* Beckwith, 61 N. Y. 205.

North Carolina.— Sanderson *v.* Rogers, 14 N. C. 38.

England.— Doe *v.* Donston, 1 B. & Ald. 230, 19 Rev. Rep. 300.

See 21 Cent. Dig. tit. "Execution," § 603.

81. *California.*— Clark *v.* Sawyer, 48 Cal. 133. See, however, Anthony *v.* Wessel, 9 Cal. 103 [*citing* with approval People *v.* Boring, 8 Cal. 406, 68 Am. Dec. 331], holding that the new officer has no power to execute the deed where the sale has been made by his predecessor.

Illinois.— Bellingall *v.* Duncan, 8 Ill. 477.

Kentucky.— Winslow *v.* Austin, 5 J. J. Marsh. 408, construing a federal statute in relation to United States marshals.

Missouri.— Kane *v.* McCown, 55 Mo. 181. See also Merchant's Bank *v.* Harrison, 39 Mo. 433, 93 Am. Dec. 285; Duncan *v.* Matney, 29 Mo. 368, 77 Am. Dec. 575. See, however, Evans *v.* Ashley, 8 Mo. 177.

New Jersey.— State *v.* Roberts, 12 N. J. L. 114, 21 Am. Dec. 62.

New York.— See Mason *v.* Sudam, 2 Johns. Ch. 172, holding that the common-law rule does not apply where the execution of the writ had not been commenced by the deceased sheriff.

North Carolina.— Tarkinton *v.* Alexander, 19 N. C. 87 [*distinguishing* Sanderson *v.* Rogers, 14 N. C. 38], holding that an ex-sheriff cannot sell lands levied upon by him under a fieri facias while he was in office, without a venditioni exponas, directed to him.

Ohio.— Fowlbe *v.* Bayberg, 4 Ohio 45.

South Carolina.— Henderson *v.* Trimmier, 32 S. C. 269, 11 S. E. 540; Leger *v.* Doyle, 11 Rich. 109, 70 Am. Dec. 240.

Washington.— Lewis *v.* Bartlett, 12 Wash. 212, 40 Pac. 934, 50 Am. St. Rep. 885.

Wisconsin.— Holmes *v.* McIndoe, 20 Wis. 657.

United States.— Sumner *v.* Moore, 23 Fed. Cas. No. 13,610, 2 McLean 59.

See 21 Cent. Dig. tit. "Execution," § 612.

Death or disability of officer.— Under a Michigan statute providing that when the officer shall have begun to serve an execution and dies, or is incapable of completing the service and return thereof, the same may be completed by any other officer who might by law have executed the same if originally delivered to him, a levy made upon real estate by a sheriff who afterward enlisted and went to war, and a sale made by his successor in office while the former was in the army, is good. Taylor *v.* Boardman, 23 Mich. 317.

82. Leshey *v.* Gardner, 3 Watts & S. (Pa.) 314, 38 Am. Dec. 764 (holding that the new sheriff must execute the unexecuted writ of venditioni exponas received from his predecessor and make the conveyance to the purchaser); State Bank *v.* Beatty, 3 Sneed (Tenn.) 305, 65 Am. Dec. 58.

83. This line of decisions is based on the common-law maxim that an execution is an

e. Venditioni Exponas[84] — (I) *Nature of Writ.* A venditioni exponas is not an execution in the proper sense of the word.' It is more in the nature of a mandate[85] or order requiring the sheriff to proceed to the execution of the former writ, which is still regarded as the foundation of his proceedings.[86]

(II) *Office of Writ.* The execution and levy constitute the predicate of the venditioni exponas, and the latter, as the former, rests upon the judgment, and its only office is to sell that which has been already seized to satisfy the judgment and costs upon which the execution issued, and the same is the case with any subsequent venditioni exponas that may issue.[87] Hence where the officer, acting under a writ of venditioni exponas, sells property in a case where no fieri facias was issued,[88] where the property sold has not been levied upon,[89] or where the judgment has been satisfied or merged in another judgment,[90] such sale is null and void.

(III) *Form of Writ.* A venditioni exponas, made by the proper tribunal,

entire thing and must be completed by the hand which begins it. Byers *v.* Fowler, 12 Ark. 218, 54 Am. Dec. 271 (holding, however, that while a sale by the successor in office is irregular, and may be set aside in a direct proceeding for that purpose, it cannot be attacked collaterally, and the purchaser acquires a good title); Coyler *v.* Higgins, 1 Duv. (Ky.) 6, 85 Am. Dec. 601; Winslow *v.* Austin, 5 J. J. Marsh. (Ky.) 408; Allen *v.* Trimble, 4 Bibb (Ky.) 21, 7 Am. Dec. 726; Purl *v.* Duvall, 5 Harr. & J. (Md.) 69, 9 Am. Dec. 490.

By personal representative of officer.— It was held in an old New Jersey case that land seized in execution by a sheriff might, after his death before sale, be sold by his executor or administrator. Read *v.* Stevens, 1 N. J. L. 264.

84. Authority to sell in general see *supra*, X, A, 1.

85. Mandatory nature of writ.— In legal contemplation the writ is issued by the court itself. It is the express command of the court to sell, is under its seal, and cannot be questioned or disobeyed by the sheriff. St. Bartholomew's Church *v.* Wood, 61 Pa. St. 96.

Where a clerk has refused to issue a venditioni exponas the party may without previous notice move the court to direct the clerk to issue same. Com. *v.* Hewitt, 2 Hen. & M. (Va.) 181.

86. *Alabama.*— Dryer *v.* Graham, 58 Ala. 623; Quinn *v.* Wiswall, 7 Ala. 645.

Arkansas.— Fenno *v.* Coulter, 14 Ark. 38; Whiting *v.* Beede, 12 Ark. 421.

Illinois.— Phillips *v.* Dana, 4 Ill. 551.

Kentucky.— Colyer *v.* Higgins, 1 Duv. 6, 85 Am. Dec. 601; Keith *v.* Wilson, 3 Metc. 201; Adams *v.* Chestnut, 7 Ky. L. Rep. 97, holding, however, that a venditioni exponas is unnecessary to confer on the sheriff authority to sell under the original execution which has never been returned to the clerk's office.

Maryland.— Busey *v.* Tuck, 47 Md. 171; Manahan *v.* Sammon, 3 Md. 463.

Missouri.— See Maupin *v.* Emmons, 47 Mo. 304.

Texas.— Borden *v.* McRae, 46 Tex. 396.

Wisconsin.— Holmes *v.* McIndoe, 20 Wis. 657.

See 21 Cent. Dig. tit. "Execution," § 607.

Where sale is suspended by supersedeas or injunction.— Where an execution is levied upon land, the sale of which is suspended by supersedeas or injunction, a venditioni exponas is the proper writ to carry into effect the judgment. Overton *v.* Perkins, Mart. & Y. (Tenn.) 367.

While the general rule is, as above stated, that the writ of venditioni exponas is a mere command to the officer to perform a part of his duty which has been omitted, yet it has been held in some jurisdictions that it may also be a fieri facias for the residue of the debt when the goods taken are not sufficient to satisfy the whole. Quinn *v.* Wiswall, 7 Ala. 645; Wilbraham *v.* Snow, 2 Saund. 47*a*.

87. *Mississippi.*— Locke *v.* Brady, 30 Miss. 21.

Missouri.— Caffery *v.* Choctaw Coal, etc., Co., 95 Mo. App. 174, 68 S. W. 1049.

North Carolina.— Riddick *v.* Hinton, 61 N. C. 291; Mardre *v.* Felton, 61 N. C. 279; Canady *v.* Nuttall, 37 N. C. 265. See also Tysor *v.* Short, 50 N. C. 279.

Ohio.— Monaghan *v.* Monaghan, 25 Ohio St. 325.

Canada.— Doe *v.* McLeod, 3 U. C. Q. B. 297.

See 21 Cent. Dig. tit. "Execution," § 607.

Where purchase-money is not paid.— It has been held in Indiana that where real estate levied upon is auctioned off for a stipulated price, and the purchase-money is not paid, title to the land does not pass from the owner, and a venditioni exponas can properly issue. Dawson *v.* Jackson, 62 Ind. 171.

An alias execution under the Kansas statute performs the office of a venditioni exponas at common law and a sale under it is valid. Rain *v.* Young, 61 Kan. 428, 59 Pac. 1068, 78 Am. St. Rep. 325.

88. Hurst *v.* Laford, 11 Heisk. (Tenn.) 622.

89. Jones *v.* Calloway, 56 Ala. 46; Wood *v.* Augustine, 61 Mo. 46; Caffery *v.* Choctaw Coal, etc., Co., 95 Mo. App. 174, 68 S. W. 1049 (where the levy was void); Borden *v.* McRae, 46 Tex. 396.

90. Wright *v.* Yell, 13 Ark. 503, 58 Am. Dec. 336.

which recites the issuance of an execution[91] by the justice of the jurisdiction in which the land lies and its levy by the proper officer of that county, is sufficient, although it does not designate by name the county or district in which the land lies;[92] and where clerical errors appear in the writ, the proper corrections should be made on the application of the purchasers at the sale.[93]

(iv) *Right of Judgment Creditor to.* Where an officer, whose duty it is to sell property seized to satisfy an execution, either omits, neglects, or refuses to make sale thereof, according to law, the rule is well settled that the creditor whose debt or demand the property was seized to satisfy may have a writ of venditioni exponas to compel the officer to discharge his duty and coerce him to sell the property.[94] Under some statutes in order to warrant the sale of real property a venditioni exponas must be issued.[95]

2. Conduct of Sale — a. What Law Governs. The law in force at the time of the sale of land on execution will control the proceedings of the officer conducting the sale, and not the law in force at the time the judgment was rendered.[96]

b. Designation or Description of Property. It is a cardinal rule, in an execution sale of real property, that the land sold should be designated with reasonable certainty.[97] The rule is likewise elementary that, in the sale of personal property under execution, the property must be pointed out to the bidders and specifically

91. Recital of issuance of execution.— It has been held that a writ of venditioni exponas which does not set forth the execution on which the levy was made, and the officer's return thereon, is fatally defective. Sterling *v.* Emick, Tapp. (Ohio) 326.

92. McConnaughy *v.* Baxter, 55 Ala. 379; Weir *v.* Clayton, 19 Ala. 132.

For form of writ see Maupin *v.* Emmons, 47 Mo. 304.

Signature of clerk.— It has been held in Pennsylvania that it is no error that a writ of venditioni exponas was not signed by the prothonotary. McCormick *v.* Measin, 1 Serg. & R. (Pa.) 92.

93. De Haas *v.* Bunn, 2 Pa. St. 335, 44 Am. Dec. 201; Perkins *v.* Woodfolk, 8 Baxt. (Tenn.) 480.

94. State *v.* Hammett, 7 Ark. 492; Cummins *v.* Webb, 4 Ark. 229; Fiddeman *v.* Biddle, 1 Harr. (Del.) 500 (holding, however, that an alias fieri facias for the residue of the judgment above the amount of property seized under the execution should not be included in the venditioni exponas); Doe *v.* Cunningham, 6 Blackf. (Ind.) 430; McCrossin *v.* McCrossin, 7 Pa. Dist. 688, 21 Pa. Co. Ct. 33. See also Marks *v.* Baker, 2 Pa. Super. Ct. 167, 39 Wkly. Notes Cas. (Pa.) 12; Copeland *v.* McGhaffey, 6 Pa. Dist. 167.

95. Kunselman *v.* Stine, 183 Pa. St. 1, 38 Atl. 414 (holding that this rule applies to life-estates); Glancey *v.* Jones, 4 Yeates (Pa.) 212; Porter *v.* Meehan, 4 Yeates (Pa.) 108. See also Kreamer *v.* Schroeder, 200 Pa. St. 414, 50 Atl. 233. This was the rule under the Indiana act of 1810. Armstrong *v.* Jackson, 1 Blackf. (Ind.) 210, 12 Am. Dec. 225.

96. *Illinois.*— Martin *v.* Gilmore, 72 Ill. 193.

Iowa.— Fonda *v.* Clark, 43 Iowa 300. *Compare* Holland *v.* Dickerson, 41 Iowa 367.

Kentucky.— Reardon *v.* Searcy, 2 Bibb 202.

Maine.— Poor *v.* Chapin, 97 Me. 295, 54 Atl. 753.

Massachusetts.— Howe *v.* Starkweather, 17 Mass. 240 [*distinguishing* Titcomb *v.* Union M. & F. Ins. Co., 8 Mass. 326]. See Hussey *v.* Manufacturers', etc., Bank, 10 Pick. 415.

Michigan.— Crane *v.* Hardy, 1 Mich. 56.

Missouri.— See Kennerly *v.* Shepley, 15 Mo. 640, 57 Am. Dec. 219.

Ohio.— Allen *v.* Parish, 3 Ohio 187.

Washington.— Whitworth *v.* McKee, 32 Wash. 83, 72 Pac. 1046.

United States.— Smith *v.* Cockrill, 6 Wall. 756, 18 L. ed. 973.

See 21 Cent. Dig. tit. "Execution," § 600.

In Indiana the rule is laid down that the sale of property on execution on a judgment in a suit on contract must be governed by the law in force when the contract was made. Doe *v.* Collins, 1 Ind. 24; Harrison *v.* Stipp, 8 Blackf. 455; Lane *v.* Fox, 8 Blackf. 58; Stewart *v.* Vermilyea, 8 Blackf. 56. See also Rawley *v.* Hooker, 21 Ind. 144, holding that as the law in force at the time the contract was made did not require any appraisement, plaintiff in the judgment had the constitutional right to have it collected on execution without appraisement.

Under executions issued from federal courts sales should be governed by the law of the state in which they are made. Evans *v.* Labaddie, 10 Mo. 425.

97. So as to enable prospective purchasers to know just what is offered for sale, and that they may thus be able to regulate their bids upon the property. McConnaughy *v.* Baxter, 55 Ala. 379; Deloach *v.* State Bank, 27 Ala. 437; Marmaduke *v.* Tennant, 4 B. Mon. (Ky.) 210; Jackson *v.* Striker, 1 Johns. Cas. (N. Y.) 284; Pemberton *v.* McRae, 75 N. C. 497; Davis *v.* Abbott, 25 N. C. 137; McLeod *v.* Pearce, 9 N. C. 110, 11 Am. Dec. 742.

designated, and it must not be left to any future act to ascertain what property was actually sold.[98]

c. Sale of Less Than Whole Interest. A sale under execution is not void merely because the officer sells a smaller interest in the property than the execution defendant really owns.[99]

d. Excessive Sale. A sale, under execution, by an officer, of more property than is sufficient for the satisfaction of a judgment and execution is void.[1] However, where the amount of property sold in excess is not appreciable, the sale will not be avoided on that account.[2]

e. Rents and Profits. Under some statutes the fee simple of real estate cannot be sold to satisfy an execution until the rents and profits for a term of years stipulated in the statute have been first offered for sale at public auction, and, if such rents and profits do not sell for a sum sufficient to satisfy the execution, then the fee simple may be sold.[3]

f. Lumping Realty and Personalty. It is irregular to sell real and personal estate together, indiscriminately.[4]

g. Sale Under Several Executions. It has been held in several jurisdictions that one sale of real estate may be made to satisfy several executions.[5] However,

98. Earle *v.* Gorham Mfg. Co., 2 N. Y. App. Div. 460, 37 N. Y. Suppl. 1037; Warring *v.* Loomis, 4 Barb. (N. Y.) 484; Cresson *v.* Stout, 17 Johns. (N. Y.) 116, 8 Am. Dec. 373; Sheldon *v.* Soper, 14 Johns. (N. Y.) 352; Blount *v.* Mitchell, 1 N. C. 80; Wolf *v.* Hano, 11 Pa. Co. Ct. 204. See also Bostick *v.* Keizer, 4 J. J. Marsh. (Ky.) 597, 20 Am. Dec. 237; Keating *v.* J. Stone, etc., Livestock Co., 83 Tex. 467, 18 S. W. 797, 29 Am. St. Rep. 670.

Chose in action.— It was held in California that a sale upon execution of a chose in action was a nullity where neither the paper evidence of the debt was present ready to be exhibited and assigned, nor any accurate description of it with its covenants, etc., and the circumstances on which its value depended given to the bystanders. Crandell *v.* Blen, 13 Cal. 15. See also Gaines *v.* Merchants' Bank, 4 La. Ann. 369, holding that a judicial sale, under a fieri facias, of all the creditor's right to any further dividend in insolvent estate is a sale of the debt due him; but where due by a bill or note never in the actual possession of the sheriff, the seizure is invalid and the sale null, and the purchaser may recover back the price.

99. O'Conner *v.* Youngblood, 16 Ala. 718. See Knight *v.* Leak, 19 N. C. 133, holding, on the other hand, that nothing would pass by the sheriff's deed but that which he has levied upon, and which was known at the time of the sale as the subject-matter thereof. See also Guerrant *v.* Anderson, 4 Rand. (Va.) 208.

Equity of redemption.— In Pillsbury *v.* Smyth, 25 Me. 427, where defendant's supposed equity of redemption in some real estate was sold, and it was afterward ascertained that there was no equity of redemption, but that he owned the entire estate, the sale was held to be a nullity.

Sale of less property than was levied on.— It has been held in Texas that where less land was sold by the sheriff than had been levied on and appraised, the sale was void. Howard *v.* North, 5 Tex. 290, 51 Am. Dec. 769.

Undivided interest.— In Willbanks *v.* Untriner, 98 Ga. 801, 25 S. E. 841, it was held that where defendant in execution owns the entire fee of a tract levied on, the sheriff cannot sell an undivided interest therein.

1. Dawson *v.* Litsey, 10 Bush (Ky.) 408; Shropshire *v.* Pullen, 3 Bush (Ky.) 512; Adams *v.* Keiser, 7 Dana (Ky.) 208; Addison *v.* Crow, 5 Dana (Ky.) 271; Stover *v.* Boswell, 3 Dana (Ky.) 232; Cooper *v.* Martin, 1 Dana (Ky.) 23; Davidson *v.* McMurtry, 2 J. J. Marsh. (Ky.) 68; Patterson *v.* Carneal, 3 A. K. Marsh. (Ky.) 618, 13 Am. Dec. 208; Stubbins *v.* Mitchell, 6 Ky. L. Rep. 491; Plummer *v.* Whitney, 33 Minn. 427, 23 N. W. 841; Tiernan *v.* Wilson, 6 Johns. Ch. (N. Y.) 411; Woods *v.* Monell, 1 Johns. Ch. (N. Y.) 502; Richards *v.* Brittin, 3 Pa. L. J. Rep. 207, 5 Pa. L. J. 73.

2. Humphry *v.* Beeson, 1 Greene (Iowa) 199, 48 Am. Dec. 370; Morrison *v.* Bruce, 9 Dana (Ky.) 211; Adams *v.* Keiser, 7 Dana (Ky.) 208; Lawrence *v.* Speed, 2 Bibb (Ky.) 401; Vanduyne *v.* Vanduyne, 16 N. J. Eq. 93; Cornelius *v.* Burford, 28 Tex. 202, 91 Am. Dec. 309. See also Moore *v.* Jenks, 173 Ill. 157, 50 N. E. 698 [*reversing* 68 Ill. App. 445].

3. Hunter *v.* Burnsville Turnpike Co., 56 Ind. 213; Piel *v.* Watson, 44 Ind. 447; Thurston *v.* Barnes, 10 Ind. 289 (holding that where a term of seven years was offered at the sheriff's sale, as provided by statute, and there was no bid to discharge the execution for that interest in the land, the officer need not offer a less term, but might at once sell the fee); Doe *v.* Smith, 4 Blackf. (Ind.) 228; Gantly *v.* Ewing, 3 How. (U. S.) 707, 11 L. ed. 794. See also Milburn *v.* Phillips, 136 Ind. 680, 34 N. E. 983, 36 N. E. 360.

4. Lee *v.* Fellowes, 10 B. Mon. (Ky.) 117; Cresson *v.* Stout, 17 Johns. (N. Y.) 116, 8 Am. Dec. 373.

5. *Kentucky.*— Brace *v.* Shaw, 16 B. Mon. 43; Southard *v.* Pope, 9 B. Mon. 261; Knight

it seems to be well settled the property cannot be sold at one time, under different writs, against different execution defendants.[6]

h. Chattel Interests in Realty. At common law chattel interests were always sold as personalty, and, in the absence of statutory provisions, a sale on execution of such interests, in accordance with the statutory provisions for the sale of real estate, were void.[7]

i. Encumbered Property. A sheriff who holds in his hands a fieri facias and who is directed to execute the same by levy and sale of defendant's land is not bound to search the public records to ascertain whether the property is encumbered by prior liens, nor is he bound to sell the same by virtue of any mortgage, but he may sell subject to all encumbrances under the execution.[8]

j. Private Sale. A sheriff has no authority to make a private sale under execution.[9]

v. Applegate, 3 T. B. Mon. 335; Locke *v.* Coleman, 2 T. B. Mon. 12, 15 Am. Dec. 118; Shepherd *v.* Delph, 58 S. W. 991, 22 Ky. L. Rep. 977.

Maryland.— Deakins *v.* Rex, 60 Md. 593.

Michigan.— Geney *v.* Maynard, 44 Mich. 578, 7 N. W. 173.

Mississippi.— Hand *v.* Grant, 10 Sm. & M. 514, holding that a sale under several executions passes the property to the purchaser, although the property is subject to sale under only one of them.

New York.— Varnum *v.* Hart, 119 N. Y. 101, 23 N. E. 183; Rowe *v.* Richardson, 5 Barb. 385; Jackson *v.* Roberts, 7 Wend. 83.

Ohio.— See Douglass *v.* McCoy, 5 Ohio 522, holding that when several executions have been levied upon the same lands, an appraisal and sale may be had under one, and the surplus appropriated to the other.

Pennsylvania.— Watmough *v.* Francis, 2 Pa. L. J. Rep. 261, 4 Pa. L. J. 16, holding that a sale by the sheriff, unless specially qualified, is under all writs in his hands.

Tennessee.— Tuck *v.* Chaffin, 89 Tenn. 566, 15 S. W. 97; Simpson *v.* Sparkman, 12 Lea 360.

Texas.— Crain *v.* Hogan, (Sup. 1891) 16 S. W. 1019.

See 21 Cent. Dig. tit. "Execution," § 619.

Executions governed by different laws.— It has been held in Indiana that where a sheriff has several executions in his hands governed by different laws as to the terms upon which the property levied upon is required to be sold, and it is evident that he cannot possibly comply, at a single sale, with the requisitions of each execution, if the property is divisible he may sell under each execution a sufficient portion for its satisfaction. Harrison *v.* Stipp, 8 Blackf. (Ind.) 455.

Interests of joint owners.— It has been held in Louisiana that a sheriff holding two separate writs of seizure and sale, one directing him to sell the interest of one joint owner, and the other to sell that of the other joint owner, cannot advertise and sell the property as an entirety. Danneel *v.* Klein, 47 La. Ann. 928, 17 So. 466.

6. Bledsoe *v.* Willingham, 62 Ga. 550 (holding that a sheriff cannot legally sell a larger estate than that embraced in his levy, nor can three levies of three separate executions, each against a different defendant, be consolidated so as to make a single act of sale under the whole pass title); Building Assoc. *v.* Henry, 3 Phila. (Pa.) 34. See Chapman *v.* Androscoggin R. Co., 54 Me. 160, holding that an equity of redemption cannot be sold upon two or more executions jointly in favor of different creditors.

Sale under junior judgment.— One holding several judgments on land may properly have the land sold under execution to satisfy a junior judgment, notifying the bidders of the existence of the liens of the older judgments. Hardwick *v.* Jones, 65 Mo. 54.

7. Chapman *v.* Gray, 15 Mass. 439; Buhl *v.* Kenyon, 11 Mich. 249, 83 Am. Dec. 738. See, however, Mitnacht *v.* Cocks, 65 How. Pr. (N. Y.) 84 (holding that in order to maintain summary proceedings to remove a judgment debtor, after a sale of leasehold interests on execution, the sale must be advertised and conducted as a sale of real property); Reilley *v.* Anderson, 33 Wash. 58, 73 Pac. 799 (under a statute); Hyatt *v.* Vincennes Nat. Bank, 113 U. S. 408, 5 S. Ct. 573, 28 L. ed. 1009 (under a statute).

8. *Iowa.*— Ramsdell *v.* Tana Water-Power Co., 84 Iowa 484, 51 N. W. 245.

Massachusetts.— Cowles *v.* Dickinson, 140 Mass. 373, 5 N. E. 302; Swan *v.* Stephens, 99 Mass. 7.

New Jersey.— See Heintze *v.* Bentley, 34 N. J. Eq. 562.

Pennsylvania.— Cake *v.* Cake, 156 Pa. St. 47, 26 Atl. 781, holding, however, that there is no impropriety in the sheriff giving notice of the encumbrance.

South Carolina.— Treasury Com'rs *v.* Hart, 1 Brev. 492.

See 21 Cent. Dig. tit. "Execution," § 621.

Under the Louisiana statute the sheriff is required to read at the sale a certificate obtained from the register of mortgages showing the existence of all mortgages on the property offered for sale. Southern Mut. Ins. Co. *v.* Pike, 33 La. Ann. 823; Perry *v.* Holloway, 10 Rob. 107; Smith *v.* Moore, 9 Rob. 65. See also Gusman *v.* Le Blanc, 27 La. Ann. 280, holding, however, that the sheriff is not required to announce the amount of taxes due on the property offered and his doing so is mere surplusage on his part.

9. Norton *v.* Reardon, 67 Kan. 302, 72 Pac. 861, 100 Am. St. Rep. 459; Allen *v.* Thomp-

k. Place of Sale — (I) *In General.* The general rule is that a failure of the officer to sell under the execution at the place specified in the notice of sale avoids the sale.[10]

(II) *Real Estate* — (A) *County Court-House.* By statutory provision in almost every state real estate is to be sold at the door of the court-house of the county in which such land is situate.[11]

(B) *Sale in Another County or District.* The rule is well established that a sale under execution in one county or judicial district, of property located in another county or district, is at least voidable,[12] and in many cases it has been held to be absolutely void, and open to collateral attack.[13]

son, 6 Ky. L. Rep. 362; Reeves *v.* Kershaw, 4 Mart. (La.) 513 (holding that a constable must sell land seized under execution with the same formalities as the sheriff in cases of seizure); Ormond *v.* Faircloth, 5 N. C. 35; Ricketts *v.* Unangst, 15 Pa. St. 90, 53 Am. Dec. 572; Folmer *v.* Shenandoah Valley Bank, 2 Leg. Rec. (Pa.) 37. See also Reamer's Appeal, 18 Pa. St. 510. See, however, Jones *v.* Loftin, 9 N. C. 199, holding that a sheriff who has levied executions on the property of a debtor may, by consent of the debtor and plaintiffs in the executions, act as the agent of the debtor and dispose of the property at private sale on credit. And *compare* Davis *v.* Collier, 13 Ga. 485, where the parties agreed that the sheriff should sell property at public auction sooner than it could have been sold at law, and it was held that the court had no power to treat the funds so raised as proceeds of an execution sale and distribute the same among the creditors.

An execution sale is a nullity if not made in the manner calculated to bring the best price, unless all the parties interested consent to a sale in some other way. State *v.* Morgan, 29 N. C. 387, 47 Am. Dec. 329.

10. Cowgill *v.* Cahoon, 3 Harr. (Del.) 23 (made at an unusual place); Murphy *v.* Hill, 77 Ind. 129; Zacharie *v.* Winter, 17 La. 76; Wederstrandt *v.* Marsh, 11 Rob. 533; Lawrence *v.* Bowman, 6 Rob. 21; Molette *v.* Hodges, 1 Tex. App. Civ. Cas. § 398. See, however, Woodward *v.* Sartwell, 129 Mass. 210 (holding that an execution sale of land is not invalid for the reason that it is made at the residence of the officer making the sale, when his office was in his residence); Goss *v.* Cardell, 53 Vt. 447 (where it was held that in view of the due notice of sale, and the accessibility of the place of sale, the objection that the sale did not take place at a public place could not be upheld).

Leasehold property.— Under a statute requiring personal property to be sold upon the premises, it was held in Pennsylvania that leasehold property need not be sold upon the premises. Sowers *v.* Vie, 14 Pa. St. 99.

Sale by consent.— It has been held in Alabama that a sale under execution, by consent of parties, at a place other than that described in the statute, is not void, if there was no intention to defraud, and no other lien on the property at the time of the sale. Cawthorn *v.* McCraw, 9 Ala. 519.

Where sale was adjourned.— It was held in Tinkom *v.* Purdy, 5 Johns. (N. Y.) 345, that a sale may be adjourned, after it has commenced, to a different place, and if there has been no fraud and the officer has not abused his discretion, he will not be a trespasser, and the sale is valid.

11. *Arkansas.*— Sessions *v.* Peay, 23 Ark. 39.

California.— Smith *v.* Morse, 2 Cal. 524.

Mississippi.— Koch *v.* Bridges, 45 Miss. 247.

Missouri.— Mers *v.* Bell, 45 Mo. 333.

North Carolina.— Biggs *v.* Brickell, 68 N. C. 239; Morris *v.* Allen, 32 N. C. 203.

Texas.— Moody *v.* Moeller, 72 Tex. 635, 10 S. W. 727, 13 Am. St. Rep. 839.

United States.— Bornemann *v.* Norris, 47 Fed. 438.

See 21 Cent. Dig. tit. "Execution," §§ 622, 623.

Presumption as to place of sale.— Where there is nothing shown to the contrary, it is to be presumed that a sheriff's sale was made at the court-house door, in the proper county, as required by law, and at the proper hour. Kendrick *v.* Latham, 25 Fla. 819, 6 So. 871.

Where the location of the court-house is changed, either temporarily or permanently, subsequent to the levy of an execution, it has been held that the sale should take place at the new location, not the old one. Longworthy *v.* Featherston, 65 Ga. 165; Union Bank *v.* Smith, 3 La. Ann. 147; Kane *v.* McCown, 55 Me. 181.

Where there are two courts of coördinate jurisdiction in the same county, it has been held that the sale may take place at the door of either. Anniston Pipe Works *v.* Williams, 106 Ala. 324, 18 So. 111, 54 Am. St. Rep. 51. In some jurisdictions, however, it has been held that as the federal statutes require sales on executions to conform to the state laws, a sale made by a United States marshal should be made before the door of the county court-house, and such sale, if made before the door of the federal court, is void. Moody *v.* Moeller, 72 Tex. 635, 10 S. W. 727, 13 Am. St. Rep. 839; Sinclair *v.* Stanley, 64 Tex. 67. See also Bornemann *v.* Norris, 47 Fed. 438.

12. Street *v.* McClerken, 77 Ala. 580, holding that, although a sale under execution by a special constable is irregular under Ala. Code, § 3637, where made in a precinct of the county other than that of defendant's residence, it is only voidable, and not void.

13. *Alabama.*— Pollard *v.* Cocke, 19 Ala. 188.

(III) *Personal Property*[14] — (A) *General Rule.* The better rule[15] seems to be that where personal property is sold by the sheriff under execution, in the absence of such property from the place of sale, the sale is absolutely invalid.[16] In some jurisdictions an exception has been made to this rule when all the parties interested have consented to the sale taking place in the absence of the property.[17]

(B) *Sale at Different Places.* Where the character and situation of the property, and the interests of the party require, the officer may, in his sound discretion and in good faith, advertise and sell at different places.[18]

1. Date of Sale — (I) *General Rule.* Where the statute directs that a sale

Indiana.— Thacher *v.* Devol, 50 Ind. 30 (holding that an execution sale, in one county, of land located in another, is void, although the sale was at the door of the court-house by virtue of an execution obtained in the United States court); Jenners *v.* Doe, 9 Ind. 461.

Kansas.— Paulsen *v.* Hall, 39 Kan. 365, 18 Pac. 225.

Texas.— Terry *v.* O'Neal, 71 Tex. 592, 9 S. W. 673; Casseday *v.* Norris, 49 Tex. 613.

Vermont.— Collins *v.* Perkins, 31 Vt. 624.

See 21 Cent. Dig. tit. "Execution," § 624.

But see Buse *v.* Bartlett, 1 Tex. Civ. App. 325, 21 S. W. 52, in which case it was shown that Wichita county was in 1874 attached to Clay county for judicial purposes, and an execution sale at that time in Clay county of land situated in Wichita to satisfy a judgment recovered in Montague county was held to be valid, and not subject to collateral attack on the ground that the sale was not in the county where the land was situate, as provided by statute. See also Henson *v.* Sackville, 2 Tex. Civ. App. 416, 21 S. W. 187.

14. Designation of property see *supra*, X, A, 2, b.

15. Voidable.— In some jurisdictions the rule is laid down that personal property sold under execution should be present at the place of sale, yet a sale conducted in the absence of the property will render such sale voidable only, and not absolutely void. Brock *v.* Berry, 132 Ala. 95, 31 So. 517, 90 Am. St. Rep. 896; Winfield *v.* Adams, 34 Mich. 437; Eads *v.* Stephens, 63 Mo. 90.

Where a paper evidencing a contingent and complicated contract was not present to be assigned to the purchaser and exhibited to the bystanders at an execution sale, it was held that a full and accurate description of the particular instrument, with all of its conditions and covenants, and a full explanation of the facts which determine the value of such contract, should be given by the levy and announced at the sale. Crandall *v.* Blen, 13 Cal. 15.

16. *Arkansas.*— Rowan *v.* Refeld, 31 Ark. 648; Kennedy *v.* Clayton, 29 Ark. 270.

California.— Crandall *v.* Blen, 13 Cal. 15.

Illinois.— Tibbetts *v.* Jageman, 58 Ill. 43; Herod *v.* Bartley, 15 Ill. 58.

Indiana.— Murphy *v.* Hill, 77 Ind. 129; Gaskill *v.* Aldrich, 41 Ind. 338.

Kentucky.— Burns *v.* Ray, 18 B. Mon. 392; Bostick *v.* Keizer, 4 J. J. Marsh. 597, 20 Am. Dec. 237.

Louisiana.— Lapene *v.* McCan, 28 La. Ann. 749.

Maine.— Penney *v.* Earle, 87 Me. 167, 32 Atl. 879; Lawry *v.* Ellis, 85 Me. 500, 27 Atl. 518.

New York.— Stonebridge *v.* Perkins, 141 N. Y. 1, 35 N. E. 980 [*affirming* 2 Misc. 162, 21 N. Y. Suppl. 628]; Morgan *v.* Holladay, 48 How. Pr. 86; Bakewell *v.* Ellsworth, 6 Hill 484; Cresson *v.* Stout, 17 Johns. 116, 8 Am. Dec. 373.

North Carolina.— Alston *v.* Morphew, 113 N. C. 460, 18 S. E. 235; Blanton *v.* Morrow, 42 N. C. 47, 53 Am. Dec. 391; McNeeley *v.* Hart, 30 N. C. 492, 49 Am. Dec. 404; Smith *v.* Tritt, 18 N. C. 241, 28 Am. Dec. 565; Ainsworth *v.* Greenlee, 7 N. C. 470, 9 Am. Dec. 615.

See 21 Cent. Dig. tit. "Execution," § 625.

In open view of property.— In some jurisdictions the courts, while recognizing the above rule, have held that where the officer is sufficiently near to the property to be in open view thereof, so that the bidders at the sale can see distinctly what property they are bidding on, it is not necessary for him to be in the actual presence of the property in order to validate the sale thereof. Skinner *v.* Skinner, 26 N. C. 175; Tredwell *v.* Rascoe, 14 N. C. 50; Klopp *v.* Witmoyer, 43 Pa. St. 219, 82 Am. Dec. 561. See also Winfield *v.* Adams, 34 Mich. 437; Henry *v.* Patterson, 57 Pa. St. 346.

Usage in trade sales.— Where the objection was raised that stereotyped plates, when sold on execution, were not in view of the purchasers, in accordance with the provisions of the statutes, testimony was admissible to show usage in trade sales to sell such plates without inspection, as their value above type metal depended upon the salable character of the work stereotyped. Bruce *v.* Westervelt, 2 E. D. Smith (N. Y.) 440.

Where part of property is present.— It has been held in New York that where property is sold under execution, part of which is present and part absent from the sale, the sale is at least valid as to the property which was present. Linnendoll *v.* Doe, 14 Johns. (N. Y.) 222.

17. Cook *v.* Timmons, 67 Ill. 203; Gift *v.* Anderson, 5 Humphr. (Tenn.) 577.

18. Hall *v.* Ray, 40 Vt. 576, 94 Am. Dec. 440; Drake *v.* Mooney, 31 Vt. 617, 76 Am. Dec. 145. See also Jewett *v.* Guyer, 38 Vt. 209, holding that where the place appointed for an adjourned sale was one which might lawfully have been appointed for the sale in the original notification thereof, the ad-

under execution shall be made within a fixed period after the levy, or after due notice of sale given, such provisions have usually been held to be mandatory,[19] and a sale made after the expiration of such time conveys no title or right to possession as against the execution debtor. An execution sale cannot take place on Sunday, but it may take place on a non-judicial day, since such a sale is not a judicial act.[20] In some jurisdictions, by statutory provision, sales of land under execution are required to be made on certain designated days of the terms of court of the county in which the land is situate, and a sale made at any other time is invalid.[21] The rule has been laid down in some jurisdictions that within the statutory limitation the time of sale under an execution is a matter within the discretion of the officer, and the sale will not be vacated if ordinary prudence be shown in the exercise of the discretion.[22]

journment on the part of the officer is proper, if made openly and publicly in good faith, and in the exercise of sound and reasonable discretion.

19. Pettit *v.* Johnson, 15 Ark. 55; Morey *v.* Hoyt, 65 Conn. 516, 33 Atl. 496; Webster *v.* Peck, 31 Conn. 495 (holding that under the statute of 1861, providing that whenever an execution shall be levied upon any personal property in its nature perishable, or upon live stock, the custody and preservation of which would be expensive, the same shall be sold by the officer at the expiration of seven days, instead of twenty-one days, as provided by the general law; that the term "perishable" means subject to natural and speedy decay, and that in the case of live stock receipted for to be forthcoming at the sale so as to involve no expense chargeable to the property, then the officer must sell at the end of twenty-one days, as in other cases under the general law); Howe *v.* Starkweather, 17 Mass. 240; Davis *v.* Maynard, 9 Mass. 242; Titcomb *v.* Union M. & F. Ins. Co., 8 Mass. 326.

Consent of parties.— It was held in Cawthorn *v.* McCraw, 9 Ala. 519, that a sale under execution, by consent of the parties, at a time other than that prescribed in the statute is not void, if there was no intention to defraud and no other lien on the property at the time of sale.

Effect of stay.— Under a Tennessee statute land subject to a judgment lien must be sold within a year after judgment recovered, unless prevented by an injunction or a writ of error, or an appeal in the nature of a writ of error, in which case the land may be sold within a year after the judgment shall be affirmed on such proceeding, or the injunction be dissolved, and under this statute it has been held that a stay of execution by writ of error coram nobis and supersedeas come within the saving of the statute. Planters' Bank *v.* Union Bank, 5 Humphr. 304.

20. King *v.* Platt, 37 N. Y. 153, 4 Transcr. App. (N. Y.) 19, 3 Abb. Pr. N. S. (N. Y.) 434, 35 How. Pr. (N. Y.) 23 (holding that an execution sale made on the day of the New York charter election was not necessarily void); Crabtree *v.* Whiteselle, 65 Tex. 111; McKennon *v.* McGown, (Tex. Sup. 1889) 11 S. W. 532. See, however, Rice *v.* Gable, 1 Pa. Co. Ct. 567, holding that a sheriff's sale of real estate, made on a legal holiday, must be set aside on exceptions being filed thereto.

21. Sarpy *v.* Detchamendy, 31 Mo. 196; Loudermilk *v.* Corpening, 101 N. C. 649, 8 S. E. 117; Mayers *v.* Carter, 87 N. C. 146; State *v.* Rives, 27 N. C. 297; St. Bartholomew's Church *v.* Wood, 61 Pa. St. 96; Howard *v.* North, 5 Tex. 290, 51 Am. Dec. 769. But *compare* Boyd *v.* Jones, 49 Mo. 202 (where a sale under execution was made at the first term of court that could have been made after the levy, and it was held not invalid because the levy had been made a year prior to the sale, and by the sheriff's predecessor in office); Valentine *v.* Cooley, 1 Humphr. (Tenn.) 38 (holding that a sale of land under execution, made by an officer on the second day of the term of the court to which the execution is returnable, is valid).. In Tayloe *v.* Gaskins, 12 N. C. 295, it was held that a sale made by the sheriff on the first day of the term to which the fieri facias is returnable is good.

Under a Kentucky statute requiring sales of land on execution to be made on the first day of the term of court, it was held that a sale could not be made on any other day without the written consent of both plaintiff and defendant in the execution. Wile *v.* Sweeny, 2 Duv. 161; Chambers *v.* Hays, 6 B. Mon. 115. But the consent of defendant will be presumed if he was present at the sale and assisted in making arrangements for it. Casey *v.* Gregory, 13 B. Mon. 505, 56 Am. Dec. 581.

Term of circuit court.— It has been held in Missouri that an execution sale made during the term of the county court, and not during the term of the circuit court, is absolutely void. Bruce *v.* Leary, 55 Mo. 431; Merchants' Bank *v.* Evans, 51 Mo. 335.

Continuation of sale.— Under a South Carolina statute, providing that certain sales of land by the sheriff shall be made on the first Monday in each month, "and if the sales commenced on that day, cannot be concluded on the same, they may be finished on the day following," it has been held that a sale made on Tuesday is valid, although there may have been sufficient time to have concluded the sale on Monday. Cain *v.* Maples, 1 Hill 304, 26 Am. Dec. 184.

22. Powell *v.* Governor, 9 Ala. 36; Nesbitt *v.* Dallan, 7 Gill & J. (Md.) 494, 28

(II) *After Death of Judgment Debtor.* The weight of reason and authority seem to uphold the rule that a sale under an execution issued and levied in the lifetime of defendant, which is not made until after such defendant's death, is not void.[23]

(III) *After Return-Day of Writ.* Upon the question as to whether the sheriff has authority to make a sale of real property after the return-day of the writ, there is considerable conflict of authority; one line of cases holding that after the return-day the writ is *functus officio*, and that the officer has no authority to proceed further thereunder without the issuance of a venditioni exponas.[24] Some of the cases make a distinction between personal property and real property, and hold that since a levy on chattels vests in the sheriff a special property therein, he may sell, after return-day of the writ, without a venditioni exponas, but that in the case of real property a levy gives him neither property nor a right of possession, and therefore the sale of such property, after return of a fieri facias and without a new writ, is without authority and passes no title.[25] Another line of authorities lays down the rule that if property, whether real or personal, is seized under a fieri facias before the return-day of the writ, the officer may proceed to sell at any time afterward without new process.[26]

Am. Dec. 236. See also Adickes *v.* Lowry, 12 S. C. 97, holding that where a levy is made under an execution having active energy, the sheriff may sell at any subsequent time while the judgment lien remains.

23. *Georgia.*— Hudgins *v.* McLain, 116 Ga. 273, 42 S. E. 489; Brooks *v.* Rooney, 11 Ga. 423, 56 Am. Dec. 436.

Maine.— Coffin *v.* Freeman, 84 Me. 535, 24 Atl. 986, where this was stated to be the rule, provided the execution issued and the notices of time and place of sale were given in the debtor's lifetime.

Missouri.— Mundy *v.* Bryan, 18 Mo. 29.

Ohio.— See Massie *v.* Long, 2 Ohio 287, 15 Am. Dec. 547.

Pennsylvania.— Speer *v.* Sample, 4 Watts 367.

24. *Alabama.*— Hawes *v.* Rucker, 94 Ala. 166, 10 So. 85; Sheppard *v.* Rhea, 49 Ala. 125; Smith *v.* Mundy, 18 Ala. 182, 52 Am. Dec. 221; Morgan *v.* Doe, 15 Ala. 190.

Kentucky.— Cox *v.* Joiner, 4 Bibb 94.

Mississippi.— Williamson *v.* Williamson, 52 Miss. 725; Kane *v.* Preston, 24 Miss. 133.

Missouri.— Wack *v.* Stevenson, 54 Mo. 481; Lackey *v.* Lubke, 36 Mo. 115. *Contra*, Webster *v.* Woolbridge, 29 Fed. Cas. No. 17,340, 3 Dill. 74, construing Gen. St. (1865) c. 646.

North Carolina.— Doe *v.* McKinne, 14 N. C. 279, 15 Am. Dec. 519.

Pennsylvania.— Rhodes *v.* Barnett, 196 Pa. St. 429, 46 Atl. 438 [*affirming* 23 Pa. Co. Ct. 379] (holding that under the act of April 16, 1845, providing that sales of real estate by sheriffs shall be made on or before the return-day of the writs, or within six days thereafter, the sale of land by a sheriff on the Friday after the return-day of the writ was valid); Cash *v.* Tozer, 1 Watts & S. 519.

South Carolina.— Sims *v.* Randal, 1 Brev. 226, 2 Bay 524, in which case, however, the levy was not made until after the day on which the execution was made returnable.

Tennessee.— Rogers *v.* Cawood, 1 Swan 142, 55 Am. Dec. 729; Overton *v.* Perkins, 10 Yerg. 328.

Texas.— Cain *v.* Woodward, 74 Tex. 549, 12 S. W. 319; Mitchell *v.* Ireland, 54 Tex. 301; Hester *v.* Duprey, 46 Tex. 625; Young *v.* Smith, 23 Tex. 598, 76 Am. Dec. 81; Snodgrass *v.* Rutherford, (Civ. App. 1899) 54 S. W. 1054; Terry *v.* Cutler, 4 Tex. Civ. App. 570, 23 S. W. 539; Haney *v.* Millikin, 2 Tex. App. Civ. Cas. § 221.

See 21 Cent. Dig. tit. "Execution," § 627; and *supra*, X, A, 1, e.

Where defendant consents.— It was held in Dale *v.* Medcalf, 9 Pa. St. 108, that a sale under a fieri facias, made by the consent of defendant after the return-day is void against a subsequent purchaser at a sheriff's sale under an encumbrance which would have been discharged by the former sale, had it been valid, and the act of 1845, so far as it professes to validate such sale made in 1840, is unconstitutional. See, however, Pickard *v.* Peters, 3 Ala. 493, holding that property levied on may be sold after the return-day of the execution by the consent of defendant without a venditioni exponas. In this case, however, there were no other liens upon the property.

25. Dennis *v.* Chapman, 19 Ala. 29, 54 Am. Dec. 186; Lehr *v.* Doe, 3 Sm. & M. (Miss.) 468; Barden *v.* McKinne, 11 N. C. 279, 15 Am. Dec. 519; Young *v.* Smith, 23 Tex. 598, 76 Am. Dec. 81; Towns *v.* Harris, 13 Tex. 507; Haney *v.* Millikin, 2 Tex. App. Civ. Cas. § 221, holding that it was error to decide that the sale of a house, made under execution after return-day of the writ, was void, without first deciding whether, under the circumstances of the erection and ownership of the house, it was realty or personalty.

26. *Idaho.*— Ollis *v.* Kirkpatrick, 3 Ida. 247, 28 Pac. 435.

Illinois.— Willoughby *v.* Dewey, 63 Ill. 246; Bellingall *v.* Duncan, 8 Ill. 477; Bryant *v.* Dana, 8 Ill. 343; Reddick *v.* Cloud, 7 Ill. 670; Phillips *v.* Dana, 4 Ill. 551.

(IV) *PRIOR TO TIME AUTHORIZED BY STATUTE* — (A) *General Rule.* A sale of property under execution by an officer prior to the time at which he is authorized by statute to make a sale is invalid.[27]

(B) *Perishable Property.* Where a statute requires a designated number of days' notice to be given of the sale of property under execution, the general rule is that an exception is made in the case of perishable property.[28]

m. Hour of Sale. The rule seems to be well recognized that a sale should not take place at any unseasonable or unreasonable hour, and sales made at a very early hour in the morning or after sunset have frequently been set aside on motion.[29]

n. Notice of Sale — (I) *PRESUMPTION OF.* The general rule is that unless

Indiana.— Rose *v.* Ingram, 98 Ind. 276; Lowry *v.* Reed, 89 Ind. 442; Tillotson *v.* Doe, 5 Blackf. 590.

Iowa.— Cox *v.* Currier, 62 Iowa 551, 17 N. W. 767; Wright *v.* Howell, 35 Iowa 288; Moomey *v.* Maas, 22 Iowa 380, 92 Am. Dec. 395; Thorington *v.* Allen, 21 Iowa 291; Butterfield *v.* Walsh, 21 Iowa 97, 89 Am. Dec. 557; Stein *v.* Chambless, 18 Iowa 474, 87 Am. Dec. 411.

Kentucky.— Harrodsburg Sav. Inst. *v.* Chinn, 7 Bush 539; Irvin *v.* Picket, 3 Bibb 343.

Louisiana.— Labiche *v.* Lewis, 12 Rob. 8; Sheldon *v.* New Orleans Canal, etc., Co., 11 Rob. 181; Cochrane *v.* U. S. Bank, 11 Rob. 64; Black *v.* Catlett, 1 Rob. 540; Fink *v.* Lallande, 16 La. 547; Rothschild *v.* Ramsay, 2 La. 277; Aubert *v.* Buhler, 3 Mart. N. S. 489; Johnston *v.* Wall, 1 Mart. N. S. 541. See also Dorsey *v.* Carrollton Bank, 5 La. Ann. 237. *Compare* Jacobshagen *v.* Moylan, 26 La. Ann. 735, holding that title of the judgment debtor is not vested by a sale made after the return-day of the writ unless the constable returned the writ and retained a copy thereof, as required by the statute.

Minnesota.— Pettingill *v.* Moss, 3 Minn. 222, 74 Am. Dec. 747.

Nebraska.— Wyant *v.* Tuthill, 17 Nebr. 495, 23 N. W. 342.

New York.— Wood *v.* Colvin, 5 Hill 228; Jackson *v.* Browner, 7 Wend. 388.

South Carolina.— Gassaway *v.* Hall, 3 Hill 289; Toomer *v.* Purkey, 1 Mill 323, 12 Am. Dec. 634 [*distinguishing* Sims *v.* Randal, 1 Brev. 226, 2 Bay 524].

Vermont.— Barnard *v.* Stevens, 2 Aik. 429, 16 Am. Dec. 733.

United States.— Wheaton *v.* Sexton, 4 Wheat. 503, 4 L. ed. 626; Remington *v.* Linthicum, 14 Pet. 84, 10 L. ed. 364; U. S. *v.* Hogg, 112 Fed. 909, 50 C. C. A. 608 [*affirming* 111 Fed. 292] (holding that where the execution was levied on the return-day of the writ, the sale of the property may take place after such return-day); Mason *v.* Bennett, 52 Fed. 343.

See 21 Cent. Dig. tit. "Execution," § 627.

27. Camp *v.* Ganley, 6 Ill. App. 499 (holding that a sale made by an officer one day before he was authorized by law to sell made him a trespasser *ab initio*); Williams *v.* Jones, 1 Bush (Ky.) 621 (holding that a sale of property on execution made before the hour at which it is advertised to take place is invalid, if thereby the property is sold for less than its real value); Wienskawski *v.* Wisner, 114 Mich. 271, 72 N. W. 177 (holding that an execution sale made before the time advertised is void); Mushback *v.* Ryerson, 11 N. J. L. 346.

28. The statute is held not to be applicable in such cases, and it is the duty of the officer to obtain authority from the court for an immediate sale. Jolley *v.* Hardeman, 111 Ga. 749, 36 S. E. 592 (holding, however, that an ordinary cotton press is not within the section of the Georgia code relating to perishable property, and hence where plaintiff levied on a cotton press belonging to defendant, an immediate sale thereof under the statute was not authorized); Arnold *v.* Fowler, 94 Md. 497, 51 Atl. 299, 89 Am. St. Rep. 444 (holding that the ten days' notice of sale required by the Maryland code does not apply where an execution was levied on a crop of peaches). *Compare* Webster *v.* Peck, 31 Conn. 495.

29. *Illinois.*— Rigney *v.* Small, 60 Ill. 416, a sale made at four o'clock in the morning.

Indian Territory.— Hancock *v.* Shockman, (1902) 69 S. W. 826, a sale at an hour other than that fixed by law.

Michigan. — McNaughton *v.* McLean, 73 Mich. 250, 41 N. W. 267.

New York.— Carnrick *v.* Myers, 14 Barb. 9, a sale after sunset.

Pennsylvania.— Greenwood *v.* Lehigh Coal Co., 1 Pa. L. J. Rep. 393, 3 Pa. L. J. 22.

See 21 Cent. Dig. tit. "Execution," § 626.

Compare Sayers *v.* Hahn, 5 Ky. L. Rep. 319 (holding that the fact that a sale was made between the hours specified in the advertisement, and after the sheriff had announced that it would not be made, was insufficient to invalidate it, it not appearing that defendant was injured thereby); Woodward *v.* Sartwell, 129 Mass. 210 (holding that a sale of real estate under execution was not invalid because made at eight o'clock A. M., when it did not appear that the time was improper or that there was not a fair attendance of purchasers).

Particular hour of sale.— It was held in Coxe *v.* Halsted, 2 N. J. Eq. 311, that a sale of real estate on execution will not be set aside because it is advertised to take place between twelve and five o'clock of the day of sale, without specifying the particular hour, where there was no proof of fraud or unfair practice.

the contrary appears, it will be presumed that an officer making a sale under execution gave all the requisite statutory notices.[30] In some jurisdictions, however, where objection is made to the confirmation of a sale for the want of legal notice, the rule is laid down that the officer must prove that the proper notice was given;[31] likewise, that the burden of proof is upon the party setting up title to land based upon an execution sale, that proper notice of such sale was given.[32]

(II) *NECESSITY OF.* In many jurisdictions, by statutory enactment, notice in writing is required to be given to defendant in execution of a sale thereunder.[33] The general rule seems to be that failure of the officer to give the notice or notices required by law will render such sale voidable,[34] and under some statutes the effect of failure to give notice is to render the sale void;[35] but in some jurisdictions it is held that the neglect of the officer making a sale to give the notice

30. *Louisiana.*— Soniat *v.* Miles, 32 La. Ann. 164.

Maryland.— Hanson *v.* Barnes, 3 Gill & J. 359, 22 Am. Dec. 322.

Massachusetts.— Holmes *v.* Jordan, 163 Mass. 147, 39 N. E. 1005.

Michigan.— Grand Rapids Nat. Bank *v.* Kritzer, 116 Mich. 688, 75 N. W. 90.

New York.— Wood *v.* Moorhouse, 45 N. Y. 368 [*affirming* 1 Lans. 406].

Pennsylvania.— Evans *v.* Sidwell, 9 Lanc. Bar 113.

See 21 Cent. Dig. tit. "Execution," § 629.

Awarding a venditioni exponas or an order of sale by the county court imports that notice has been duly given to defendant, unless the contrary clearly appears. McLean *v.* Paul, 27 N. C. 22.

Presumption of character of paper.—Chandler *v.* Bailey, 89 Mo. 641, 1 S. W. 745.

31. Roger *v.* Ocheltree, 4 Houst. (Del.) 452; Burton *v.* Wolfe, 4 Harr. (Del.) 221; Hazen *v.* Webb, 68 Kan. 308, 74 Pac. 1111.

32. Ransom *v.* Williams, 2 Wall. (U. S.) 313, 17 L. ed. 803.

33. *Louisiana.*— Guidery *v.* Guidery, 2 Mart. 132.

Missouri.— Young *v.* Schofield, 132 Mo. 650, 34 S. W. 497, holding that such notice should be given where the execution was issued to, and the sale made in a county other than that in which defendant resided or the judgment was rendered.

New Jersey.— Mushback *v.* Ryerson, 11 N. J. L. 346.

North Carolina.— Borden *v.* Smith, 20 N. C. 27. *Compare* Skinner *v.* Warren, 81 N. C. 373.

Pennsylvania.— Faucett *v.* Harris, 7 Pa. Dist. 150; Passmore *v.* Gordon, 1 Browne 320 (holding, however, that the notice need not be in writing); Smith *v.* Tinicum Fishing Co., 1 Del. Co. 127; Evans *v.* Sidwell, 9 Lanc. Bar 113 (holding, however, that it is not necessary that the sheriff who sells property under execution should give notice of the sale to the attorney of record of defendant).

Tennessee.— Hinson *v.* Hinson, 5 Sneed 322, 73 Am. Dec. 129; Shultz *v.* Elliott, 11 Humphr. 183; Trott *v.* McGavock, 1 Yerg. 469.

United States.— Ransom *v.* Williams, 2 Wall. 313, 17 L. ed. 803.

See 21 Cent. Dig. tit. "Execution," § 630.

See, however, Bowman *v.* Knott, 8 S. D. 330, 66 N. W. 457.

Where defendant is not in possession.— It has been held in Tennessee that the notice of execution required to be given defendant in possession of land applies only to the tract of land of which he is in actual possession. Christian *v.* Mynatt, 11 Lea 615; Farquhar *v.* Toney, 5 Humphr. 502.

34. Jensen *v.* Woodbury, 16 Iowa 515; Hazen *v.* Webb, 68 Kan. 308, 74 Pac. 1111; Hall *v.* Moore, 70 Miss. 75, 11 So. 655; Young *v.* Schofield, 132 Mo. 650, 34 S. W. 497. See also Turner *v.* McCrea, 1 Nott & M. (S. C.) 11. And *compare* Wright *v.* Leclaire, 3 Iowa 221.

35. *Louisiana.*— Bourg *v.* Monginot, 1 Rob. 331; Guidery *v.* Guidery, 2 Mart. 132.

Maine.— Thayer *v.* Roberts, 44 Me. 247.

Massachusetts.— Wellman *v.* Lawrence, 15 Mass. 326.

New Jersey.— Henderson *v.* Hays, 41 N. J. L. 387. *Compare* Pell *v.* Vreeland, 35 N. J. Eq. 22.

North Carolina.—Borden *v.* Smith, 20 N. C. 27.

Pennsylvania.— Kintz *v.* Long, 30 Pa. St. 501; McMichael *v.* McDermott, 17 Pa. St. 353, 55 Am. Dec. 560, holding that at a sheriff's sale, of which no notice had been given, where there was no bidder present but plaintiff in execution and no bystanders, it was incumbent on plaintiff in execution to inquire whether the requisite notice had been given, and a sale made to him under such circumstances was fraudulent and void. *Contra,* McDonald *v.* Winton, 4 Lanc. L. Rev. 194, holding that requirements as to advertising and giving notice of sale under execution are merely directory.

Tennessee.— Downing *v.* Stephens, 1 Baxt. 454. See also Prater *v.* McDonough, 7 Lea 670; Shultz *v.* Elliott, 11 Humphr. 183 (holding, however, that there need not be personal service); Mitchell *v.* Lipe, 8 Yerg. 179, 29 Am. Dec. 116; Trott *v.* McGavock, 1 Yerg. 469. *Contra,* Jones *v.* Planters' Bank, 3 Humphr. 76.

United States.— Ransom *v.* Williams, 2 Wall. 313, 17 L. ed. 803.

See 21 Cent. Dig. tit. "Execution," § 630.

Where defendant had actual notice of the sale, the court will not consider the fact of want of notice, as required by the statute.

required by law does not affect the validity of such sale to an innocent purchaser without notice of such omission, as the party aggrieved has his remedy against the officer for any injuries sustained by reason of the neglect.[36]

(III) *TIME OF GIVING.* Where the statute requires notice to be given to the judgment debtor at a specified time prior to the sale,[37] or requires such notice to be posted in certain public places[38] during a designated period before the sale, a sale which takes place before the period required by the statute has elapsed is irregular and voidable.[39]

(IV) *BY PUBLICATION*—(A) *General Rule.* In a majority of jurisdictions the statutes require the notice of sale to be given by publication in newspapers for a designated period, or for a designated number of times, and the general rule is that such statutory provisions must be strictly pursued, and even slight deviations therefrom have been held to invalidate the notice and render the sale at least voidable;[40] and it has been held that where the time during which notice

Neafie *v.* Conrad, 6 Wkly. Notes Cas. (Pa.) 303.

36. *Arkansas.*— Steward *v.* Pettigrew, 28 Ark. 372.

California.— Frink *v.* Roe, 70 Cal. 296, 11 Pac. 820; Simson *v.* Eckstein, 22 Cal. 580; Shores *v.* Scott River Water Co., 17 Cal. 626; Harvey *v.* Fisk, 9 Cal. 93; Smith *v.* Randall, 6 Cal. 47, 65 Am. Dec. 475.

Georgia.— Solomon *v.* Peters, 37 Ga. 251, 92 Am. Dec. 69; Brooks *v.* Rooney, 11 Ga. 423, 56 Am. Dec. 436.

Indiana.— Ross *v.* Banta, 140 Ind. 120, 34 N. E. 865, 39 N. E. 732.

Kentucky.— Webber *v.* Cox, 6 T. B. Mon. 110, 17 Am. Dec. 127; Lawrence *v.* Speed, 2 Bibb 401.

Missouri.— Draper *v.* Bryson, 17 Mo. 71, 57 Am. Dec. 257. See also Curd *v.* Lackland, 49 Mo. 451.

New York.— Frederick *v.* Wheelock, 3 Thomps. & C. 210.

Rhode Island.— Horton *v.* Bassett, 16 R. I. 419, 16 Atl. 715, holding that an execution sale is not vitiated by the fact that the public notice described the execution plaintiff as "Richard Bartlett" instead of Richard Bassett.

Texas.— Morris *v.* Hastings, 70 Tex. 26, 7 S. W. 649, 8 Am. St. Rep. 570; Howard *v.* North, 5 Tex. 290, 51 Am. Dec. 769.

Washington.— See Whitworth *v.* McKee, 32 Wash. 83, 72 Pac. 1046.

See 21 Cent. Dig. tit. "Execution," § 630 *et seq.*

Compare Maddox *v.* Sullivan, 2 Rich. Eq. (S. C.) 4, 44 Am. Dec. 234 (holding that the failure of the sheriff to advertise sale of land more than twenty days, when the statute requires twenty-one, did not invalidate the sale); Bigelow *v.* Chatterton, 51 Fed. 614, 2 C. C. A. 402.

Special notice.— Where a sheriff conducted a sale in the usual way and at the usual place, it was held that the sale would not be set aside because the sheriff did not give special notice to plaintiff's attorney of such sale unless it appeared that the sheriff promised to give such special notice and failed so to do. Meir *v.* Zelle, 31 Mo. 331.

37. *Delaware.*— Clements *v.* Williamson, 5 Houst. 25.

Indiana.— Keen *v.* Preston, 24 Ind. 395.

Kentucky.— Norton *v.* Sanders, 5 J. J. Marsh. 287.

Maine.— Sawyer *v.* Wilson, 61 Me. 529.

Tennessee.—Richards *v.* Meeks, 11 Humphr. 455, 54 Am. Dec. 49; Shultz *v.* Elliott, 11 Humphr. 183; Trott *v.* McGavock, 1 Yerg. 469.

Texas.— Leeper *v.* O'Donohue, 18 Tex. Civ. App. 531, 45 S. W. 327.

See 21 Cent. Dig. tit. "Execution," § 633.

Perishable property.— Under the Maryland statute, where an execution is levied on a peach crop or other perishable goods, the provisions of the statute requiring ten days' notice of sale to be given do not apply, but the sheriff should obtain from the court authority for an immediate sale. Arnold *v.* Fowler, 94 Md. 497, 51 Atl. 299, 89 Am. St. Rep. 444.

38. A "public place," within the meaning of the Vermont statute, which requires that the property taken on execution shall be advertised at some public place to be sold, is such a place as that an advertisement posted in it would be likely to attract general attention, so that its contents might reasonably be expected to become a matter of notoriety in the vicinity. Austin *v.* Soule, 36 Vt. 645.

39. Underwood *v.* Jeans, 4 Harr. (Del.) 201; Smith *v.* Rowles, 85 Ind. 264; Frederick *v.* Wheelock, 3 Thomps. & C. (N. Y.) 210; Schmidt *v.* Barry, 21 N. Y. Civ. Proc. 21, 15 N. Y. Suppl. 122; Matter of Raubenhold, 1 Woodw. (Pa.) 478; McDonald *v.* Winton, 4 Lanc. L. Rev. (Pa.) 194.

40. *California.*— Hernandez *v.* His Creditors, 57 Cal. 333; Townsend *v.* Tallant, 33 Cal. 45, 91 Am. Dec. 617.

Georgia.— Boyd *v.* McFarland, 58 Ga. 208.

Illinois.— Gibson *v.* Roll, 30 Ill. 172, 83 Am. Dec. 181; Monahon *v.* Vandyke, 27 Ill. 154.

Indiana.— Lahr *v.* Ulmer, 21 Ind. App. 107, 60 N. E. 1009.

Kansas.— Watkins *v.* Williams, 33 Kan. 149, 5 Pac. 771; Whitaker *v.* Beach, 12 Kan. 492; Treptow *v.* Buse, 10 Kan. 170.

Kentucky.— Scott *v.* Powers, 78 S. W. 408, 25 Ky. L. Rep. 1640.

Louisiana.— Nugent *v.* McCaffrey, 33 La. Ann. 271; McDonough *v.* Gravier, 9 La. 531.

must be given is fixed by the statute, the court has no authority to abbreviate it, although it has been held that the court in its discretion may extend it.[41] So, where the statute requires the notice of sale to be published for a certain number of weeks, for example, three weeks, it has been held in several jurisdictions that this provision of the statute is not satisfied by a publication for a period less than twenty-one days.[42] It has been held also that a notice of sale, defective by reason of failure to publish it for the time designated by the statute, cannot be cured by

See also Dabbs *v.* Hemken, 3 Rob. 123, and McCarty *v.* McCarty, 19 La. 300, holding that a sale of real property cannot be made until the thirty-fourth day after the seizure, and if this time be given it is no objection if the advertisement is made a day or more earlier.

Maine.— Benson *v.* Smith, 42 Me. 414, 66 Am. Dec. 285.

Nebraska.— Lawson *v.* Gibson, 18 Nebr. 137, 24 N. W. 447.

New Jersey.— Parsons *v.* Lanning, 27 N. J. Eq. 70.

New York.— Havens *v.* Sherman, 42 Barb. 636; Olcott *v.* Robinson, 20 Barb. 148.

Ohio.— See Wilson *v.* Scott, 29 Ohio St. 636 (holding, however, that the fact that the first number of a weekly newspaper containing the notice of sale was printed and published in advance of the day of the week on which the publication was usually made does not render the notice insufficient); Hagerman *v.* Ohio Bldg., etc., Assoc., 25 Ohio St. 186.

Pennsylvania.— See Barrett *v.* Smith, 17 Montg. Co. Rep. 22.

Rhode Island.— See Barrows *v.* National Rubber Co., 12 R. I. 173, where the notice was held to be sufficient.

South Carolina.— State *v.* Beckett, 3 McCord 290.

South Dakota.— Bowman *v.* Knott, 8 S. D. 330, 66 N. W. 457.

Wisconsin.— Herrick *v.* Graves, 16 Wis. 157.

United States.— Early *v.* Homans, 16 How. 610, 14 L. ed. 1079.

See 21 Cent. Dig. tit. "Execution," § 631 *et seq.*

Where defendant owned the only newspaper in the county and refused to allow publication of the notice of sale under the levy, it was held that under the circumstances a notice by hand-bills was sufficient. Walton *v.* Harris, 73 Mo. 489.

Where there is no official journal.— It has been held in Louisiana that the objection of defendant that the property seized was not advertised in the official journal, as required by statute, cannot be sustained if, at the time of the advertisement, there was no official journal in the parish, and the fact that an official journal was selected before the day of sale will not affect the validity of a sale which had been advertised in other respects according to law, before such journal was selected. Wells *v.* Merz, 23 La. Ann. 392.

41. Reynolds *v.* Wilson, 15 Ill. 394, 60 Am. Dec. 753; Havens *v.* Sherman, 42 Barb. (N. Y.) 636.

42. *Georgia.*— Conley *v.* Redwine, 109 Ga. 640, 35 S. E. 92, 77 Am. St. Rep. 398; Boyd *v.* McFarland, 58 Ga. 208, weekly for twenty-eight days. See, however, Bird *v.* Burgsteiner, 100 Ga. 486, 28 S. E. 219, for the rule since the act of 1891.

Indiana.— Hill *v.* Pressley, 96 Ind. 447; Smith *v.* Rowles, 85 Ind. 264; Meredith *v.* Chancey, 59 Ind. 466.

Michigan.— Bacon *v.* Kennedy, 56 Mich. 329, 22 N. W. 824.

Missouri.— Bradley *v.* Hefferman, 156 Mo. 653, 57 S. W. 763.

Pennsylvania.— *In re* North Woodhall Tp., 47 Pa. St. 156; Currens *v.* Blocher, 21 Pa. Super. Ct. 30; Haas *v.* Fisher, 10 Pa. Dist. 150, 24 Pa. Co. Ct. 602; Francis *v.* Norris, 2 Miles 150; Good *v.* Maule, 8 Pa. Co. Ct. 624; Barclay *v.* Robb, 5 Pa. Co. Ct. 646; Erie Sav. Fund, etc., Assoc. *v.* Thompson, 13 Phila. 511; Wallace's Estate, 2 Pittsb. 145; Smith *v.* Tinicum Fishing Co., 1 Del. Co. 121; Evans *v.* Sidwell, 9 Lanc. Bar 113. See also McKee *v.* Kerr, 192 Pa. St. 164, 43 Atl. 953. See, however, Hollister *v.* Vanderlin, 165 Pa. St. 248, 30 Atl. 1102, 44 Am. St. Rep. 657, holding that the Pennsylvania act of June 16, 1836, requiring notice of judicial sale to be given once a week "during three successive weeks" does not require that twenty-one days should have passed after the date of the first insertion before the sale.

Wisconsin.— Collins *v.* Smith, 57 Wis. 284, 15 N. W. 192.

See 21 Cent. Dig. tit. "Execution," § 633.

See, however, Pearson *v.* Bradley, 48 Ill. 250 (holding that the amendatory act of 1857 was not intended to require notice of sale to be published for three full weeks from the first publication of the day of sale, but simply to secure three successive weekly publications of such notice); Garrett *v.* Morse, 20 Ill. 549 (to the same effect); Wood *v.* Morehouse, 45 N. Y. 368 (holding that publication of notice of sale of real estate is sufficient if inserted once in each week for the six weeks before the sale, although six full weeks should not have elapsed between the date of the first publication and the day of sale).

In Kansas publication of a notice of sale must commence thirty days before the sale, and be inserted in each issue of the paper in which it is made. Watkins *v.* Williams, 33 Kan. 149, 5 Pac. 771; Roundsaville *v.* Hazen, 33 Kan. 71, 5 Pac. 422; Whitaker *v.* Beach, 12 Kan. 492; McCurdy *v.* Baker, 11 Kan. 111.

The term "week," as used in statutes designating the period during which publication of notice must be made, has usually been construed to mean seven days. Early *v.* Homans, 16 How. (U. S.) 610, 14 L. ed. 1079.

a postponement of the sale to a day sufficiently remote to answer the statutory requirements.[43]

(B) *Control of by Officer.* Where the statute makes it the duty of the officer to publish the notice of sale under execution, he alone has the power to determine and select the places and newspapers in which to publish the required notice.[44]

(C) *Waiver of.* An advertisement of sale under an execution required by statute may be waived by the consent of the judgment debtor, where there are no other legal liens on the property.[45]

(V) CONTENTS OF — (A) *Description of Property.* As a general rule the officer's notice of sale should contain a full and complete description of the property to be sold, or at least a sufficiently complete description to enable prospective purchasers, in the exercise of ordinary diligence, to identify it;[46] and a sale on execution, where the description of the property in the notice is erroneous or

43. Sawyer *v.* Wilson, 61 Me. 529.

44. And the judgment creditor has no right to contract for the publication of the notice in a particular newspaper or to direct the sheriff to make such publication. Northern Counties Invest. Trust Co. *v.* Cadman, 101 Cal. 200, 35 Pac. 557; Winton *v.* Wilson, 44 Kan. 146, 24 Pac. 91, holding that a sheriff holding an order for sale of real estate cannot be required by a writ of mandamus to publish the notice of sale in the newspaper selected by plaintiff, although the latter may have paid the newspaper in advance for the publication. See also State *v.* Tual, 16 Ohio Cir. Ct. 680, 9 Ohio Cir. Dec. 42, holding that the circuit court has no original jurisdiction to grant an order directing the sheriff to publish a notice of sale in any particular newspaper, or to prevent him from publishing it in any paper he may have selected.

45. *Louisiana.*— Borron *v.* Sollidellos, 28 La. Ann. 355; Wederstrandt *v.* Marsh, 11 Rob. 533.

North Carolina.— Shamburger *v.* Kennedy, 12 N. C. 1.

South Carolina.— Davis *v.* Murray, 2 Mill 143, 12 Am. Dec. 661.

Tennessee.— See also Mitchell *v.* Lipe, 8 Yerg. 179, 29 Am. Dec. 116, holding, however, that the request to levy is no waiver of notice of the time and place of sale on execution on the part of the judgment debtor.

Vermont.— Burroughs *v.* Wright, 16 Vt. 619. See also Munger *v.* Fletcher, 2 Vt. 524.

In Louisiana, if dotal property is to be sold under execution, notice of sale is indispensable to divest the title of the wife, and it cannot be waived. Esneault *v.* Cooley, 16 La. Ann. 165.

Waiver by one of several joint owners.— It was held in Byrne *v.* Hooker, 2 Rob. (La.) 229, that in an action against the two joint owners of a steamer, a waiver of advertisement by one only does not bind the rest.

46. *Georgia.*— Sheffield *v.* Key, 14 Ga. 528; Collier *v.* Vason, 12 Ga. 440, 58 Am. Dec. 481.

Illinois.—Pollard *v.* King, 63 Ill. 36 (slight mistake held not to vitiate the sale); Grundy County Nat. Bank *v.* Rulison, 61 Ill. App. 388.

Kansas.— Wheatley *v.* Terry, 6 Kan. 427.

Louisiana.— Walling *v.* Morefield, 33 La. Ann. 1174 (defective and insufficient description cured by the prescription of five years, relating to informalities in public sales); Henderson *v.* Hoy, 26 La. Ann. 156; Dearmond *v.* Courtney, 12 La. Ann. 251; McDonough *v.* Gravier, 9 La. 531. *Compare* Dauchite Lumber Co. *v.* Lane, etc., Co., 52 La. Ann. 1937, 28 So. 232.

Maryland.— Stevens *v.* Bond, 44 Md. 506; Berry *v.* Griffith, 2 Harr. & G. 337, 18 Am. Dec. 309.

Massachusetts.— Buffum *v.* Deane, 8 Cush. 35 (held to be immaterial); Pomeroy *v.* Winthrop, 12 Mass. 514, 7 Am. Dec. 91.

Minnesota.— Herrick *v.* Ammerman, 32 Minn. 544, 21 N. W. 836; Herrick *v.* Morrill, 37 Minn. 250, 33 N. W. 849, 5 Am. St. Rep. 841.

Missouri.— State *v.* Keeler, 49 Mo. 548; Duncan *v.* Matney, 29 Mo. 368, 77 Am. Dec. 575; Lisa *v.* Lindell, 21 Mo. 127, 64 Am. Dec. 222; Evans *v.* Ashley, 8 Mo. 177.

Nebraska.— Stull *v.* Seymour, 63 Nebr. 87, 88 N. W. 174; Helmer *v.* Rehm, 14 Nebr. 219, 15 N. W. 334.

New Jersey.— Allen *v.* Cole, 9 N. J. Eq. 286, 59 Am. Dec. 416; Merwin *v.* Smith, 2 N. J. Eq. 182.

New York.— Francis *v.* Watkins, 171 N. Y. 682, 64 N. E. 1120 [*affirming* 72 N. Y. App. Div. 15, 76 N. Y. Suppl. 106].

Pennsylvania.— Landis *v.* Lewis, 3 Pa. Dist. 241 (misdescription so slight as not to invalidate the sale); Miller *v.* Kipple, 2 Pearson 118 (error held to be so slight as not to invalidate sale); Herr *v.* Adams, 13 Lanc. Bar 59; Seipt *v.* McFadden, 2 Leg. Rec. 123; Fidelity Ins., etc., Co. *v.* Wilson, 13 Montg. Co. Rep. 184.

See 21 Cent. Dig. tit. "Execution," § 632.

Compare Steward *v.* Pettigrew, 28 Ark. 372; Citizens' Nat. Bank *v.* Interior Land, etc., Co., 14 Tex. Civ. App. 301, 37 S. W. 447.

Surplusage.— In Thompson *v.* Barron, 7 La. Ann. 669, where the words "acres and arpents," were inserted in an advertisement when the word "acres" should alone have been used, the word "arpents," taken in connection with the entire advertisement, was considered as mere surplusage.

insufficient, will be set aside on proper motion of the judgment debtor in the court which rendered judgment.[47]

(B) *Improvements.* Some statutes require that the advertisement of the sale of real property under execution, in addition to a description of the property, must specify the principal improvements thereon, and that a failure to do so will render the sale voidable.[48]

o. Postponement of Sale — (I) *General Rule.* The power of the officer holding an execution to postpone or adjourn a sale of property levied upon by virtue thereof is too well settled to be questioned.[49]

(II) *Grounds of.* The object to be attained in allowing the postponement of an execution sale is to prevent a sacrifice of the property when the officer ascertains that a fair price cannot be obtained by reason of the absence of bidders or other cause.[50]

47. *Delaware.*— Sipple *v.* Scotten, 1 Harr. 107.

Louisiana.— Dearmond *v.* Courtney, 12 La. Ann. 251.

Missouri.— Stoffel *v.* Reiners, 3 Mo. App. 33.

Pennsylvania.— Hoeflich *v.* Hoeflich, 12 Pa. Co. Ct. 370; Connell *v.* Hughes, 1 Phila. 225; Chestnutwood *v.* Sangree, 9 Lanc. Bar 85; Yundt *v.* Yundt, 9 Lanc. Bar 57; Schaeffer *v.* Latshaw, 1 Woodw. 487.

Rhode Island.— Childs *v.* Ballou, 5 R. I. 537, where the description was held to be so uncertain and vague as to render the sale absolutely void.

United States.— McPherson *v.* Foster, 16 Fed. Cas. No. 8,921, 4 Wash. 45.

See 21 Cent. Dig. tit. "Execution," § 632.

48. Oldham *v.* Hossenger, 5 Houst. (Del.) 434; Karsner *v.* Bailey, 5 Houst. (Del.) 405; Ely *v.* Schoener, 1 Woodw. (Pa.) 73; Fidelity Ins., etc., Co. *v.* Wilson, 13 Montg. Co. Rep. (Pa.) 184. See, however, Parker *v.* Lynch, 13 Pa. Co. Ct. 86, holding that a failure to specify the improvements on the land in the notice of sale, when it does not appear that there is any misdescription of the land so that it failed to bring an adequate price, will not invalidate the sale.

49. *Illinois.*— Phelps *v.* Conover, 25 Ill. 309.

Maine.— Russell *v.* Richards, 11 Me. 371, 26 Am. Dec. 532.

Massachusetts.— Davis *v.* Maynard, 9 Mass. 242.

New Jersey.— Annin *v.* Jones, 2 N. J. L. J. 22. See also Cline *v.* Prall, 27 N. J. Eq. 415, refusal to adjourn in the exercise of his discretion upheld.

New York.— Frederick *v.* Wheelock, 3 Thomps. & C. 210; McDonald *v.* Neilson, 2 Cow. 139, 14 Am. Dec. 431.

North Carolina.—Hope *v.* Bradley, 10 N. C. 16.

Pennsylvania.— Hollister *v.* Vanderlin, 165 Pa. St. 248, 30 Atl. 1002, 44 Am. St. Rep. 657; McCormick *v.* Meason, 1 Serg. & R. 92 (may advertise a sale on a venditioni exponas before the return-day and continue the sale by adjournment afterward); Dainty *v.* Riegel, 1 Woodw. 74.

Rhode Island.— Aldrich *v.* Grimes, 14 R. I. 219; Reynolds *v.* Hoxsie, 6 R. I. 463.

Vermont.— Jewett *v.* Guyer, 38 Vt. 209.

See 21 Cent. Dig. tit. "Execution," § 634.

Compare Fisher *v.* Vanmeter, 9 Leigh (Va.) 18, 33 Am. Dec. 221.

In Nebraska it has been held that there are no statutory provisions for an adjournment of an execution sale, either by the court or the sheriff. Fraaman *v.* Fraaman, 64 Nebr. 472, 90 N. W. 245, 97 Am. St. Rep. 650.

Consent of parties.— It has been held in Texas that under an order of sale required to be made on four days' notice, the sheriff may by consent adjourn the sale to a time less than four days distant. Hillard *v.* Wilson, 76 Tex. 180, 13 S. W. 25.

On application of persons who are not parties to the record a sheriff's sale on execution will not be postponed. *In re* Sheriff's Sale, 1 C. Pl. (Pa.) 13.

Plaintiff's attorney may direct an adjournment under the Massachusetts statute. Frazee *v.* Nelson, 179 Mass. 456, 61 N. E. 40, 88 Am. St. Rep. 391. But *compare* Wolf *v.* Van Metre, 27 Iowa 348.

To a different place.— In Russell *v.* Richards, 11 Me. 371, 26 Am. Dec. 532, it was held that the officer had power to adjourn to a different place.

Where there are several execution creditors the sheriff cannot postpone a sale, unless by the consent of all. Scofield *v.* Casselberry, 9 Wkly. Notes Cas. (Pa.) 95.

Where the sale is postponed at defendant's request, in consequence of which the property levied upon materially depreciates in value, the loss resulting from such postponement should not be sustained by the execution creditor. Williams *v.* Gartrell, 4 Greene (Iowa) 287.

Where the statute authorizes an adjournment, if necessary, from day to day, not exceeding three days, and the returns show that the officer adjourned the sale for six days from the date of sale advertised, it was held that sale on the later date was illegal. Crafts *v.* Elliotsville, 47 Me. 141.

Expense incurred by postponement.— Under the New York statute, where the sale is postponed the expense of continuing the publication or publishing the notice of postponement must be paid by the person requesting it. Van Gelder *v.* Van Gelder, 26 Hun 356.

50. Hence where the officer sees that the property will be sacrified by a sale on the

(III) *WHEN AND WHERE MADE.* A postponement, to be regular, should be made at the time and place first fixed for the sale.[51]

(IV) *IRREGULARITY IN.* An irregularity in the postponement will not vitiate the sale, unless the officer is guilty of fraud in respect to it, and even then the sale would not be void as to a *bona fide* purchaser without notice of the fraud.[52]

(V) *NECESSITY OF NEW NOTICE.* The general rule seems to be that where the sale of property under execution is postponed, a new notice of sale, having all the formalities of the former notice, should be issued.[53]

p. Sale in Parcels — (I) *GENERAL RULE* — (A) *Where Divided Into Distinct Parcels.* The general rule is well settled that where land levied on by fieri facias is divided into distinct parcels, it must be sold in that way.[54]

day advertised, it is his duty to adjourn the sale.

Mississippi.— Reynolds *v.* Nye, Freem. 462.

Missouri.— Shaw *v.* Potter, 50 Mo. 281; Conway *v.* Nolte, 11 Mo. 74.

New Jersey.— Todd *v.* Hoagland, 36 N. J. L. 352.

New York.— Pixley *v.* Butts, 2 Cow. 421.

Pennsylvania.— McMichael *v.* McDermott, 17 Pa. St. 353, 55 Am. Dec. 560; Conniff *v.* Doyle, 8 Phila. 630.

United States.— U. S. *v.* Drennen, 25 Fed. Cas. No. 14,992, Hempst. 320.

See 21 Cent. Dig. tit. "Execution," § 635.

Adjournment for want of bidders.— It has been held, in Gilbert *v.* Watts-De Goyler Co., 169 Ill. 129, 48 N. E. 430, 61 Am. St. Rep. 154 [*affirming* 66 Ill. App. 625], that the Illinois statute authorizing a sheriff to postpone a sale for want of bidders does not authorize adjournment on the sole ground that only one bidder is present who is willing to make an offer fairly adequate to the value of the property.

51. Wetherby *v.* Slape, 58 N. J. L. 550, 43 Atl. 898; Frederick *v.* Wheelock, 3 Thomps. & C. (N. Y.) 210.

52. *Illinois.*— Jackson *v.* Spink, 59 Ill. 404; Osgood *v.* Blackmore, 59 Ill. 261.

Iowa.— Reese *v.* Dobbins, 51 Iowa 282, 1 N. W. 540.

New York.— Frederick *v.* Wheelock, 3 Thomps. & C. 210.

North Carolina.— Mordecai *v.* Speight, 14 N. C. 428, 24 Am. Dec. 266; Pope *v.* Bradley, 10 N. C. 16.

Pennsylvania.— Fidelity Ins., etc., Co. *v.* Wilson, 13 Montg. Co. Rep. 184.

Wisconsin.— Cord *v.* Hirsch, 17 Wis. 403.

See 21 Cent. Dig. tit. "Execution," § 634.

But see Enloe *v.* Miles, 20 Miss. 147, holding that a sheriff cannot postpone his sales from day to day without special statutory authority, and that where he sells on the postponed day without giving full advertisement for the time required by law, a purchaser who has notice of the irregularity of the sheriff in postponing the sale acquires no title by such purchase.

Postponement of sale affecting execution see *supra*, VII, A, 4, a, (VI); VII, B, 12, a, (II).

Adjournment by attorney.— It was held in Wolf *v.* Van Metre, 27 Iowa 348, that the sheriff has no authority to authorize the attorney of one of the parties to adjourn the sale, and for such an irregularity the sale on the day to which the adjournment was made was held to be invalid.

Postponement at instance of execution debtor.— Where property was levied upon under execution and the sale postponed for fifteen months at the instance and for the benefit of the judgment debtor, it was held that the validity of the sale as between the parties was not affected thereby; *aliter* as to other creditors of defendant. Payne *v.* Billingham, 10 Iowa 360.

53. Montgomery *v.* Barrow, 19 La. Ann. 169; Humphreys *v.* Browne, 19 La. Ann. 158; Frederick *v.* Wheelock, 3 Thomps. & C. (N. Y.) 210; Horton *v.* Bassett, 16 R. I. 419, 16 Atl. 715. See also Van Camp *v.* Searle, 147 N. Y. 150, 41 N. E. 427.

In New Jersey, however, it has been held that, where sale on execution is adjourned to a future day, publication of the adjournment is not necessary. Allen *v.* Cole, 9 N. J. Eq. 286, 59 Am. Dec. 416; Coxe *v.* Halsted, 2 N. J. Eq. 311.

Postponement made before the day of sale must be treated as a new notice — an abandonment of the prime notice of sale, and a sale thereafter on the day originally set for the sale would be invalid. Frederick *v.* Wheelock, 3 Thomps. & C. (N. Y.) 210.

Where, after notice of sale, sale is enjoined, it is not proper to give oral notice of the adjournment to another day, and after dissolution of the injunction to sell without a new publication, but that in such case the notice required by statute must be given *de novo*. Patten *v.* Stewart, 26 Ind. 395.

Where land is sold under an alias writ of venditioni exponas, pursuant to advertisement made while the officer held the previous writ in his hands, it has been held that such a sale was valid without any advertisement after the issuing of the alias. Luther *v.* McMichael, 6 Humphr. (Tenn.) 298.

54. *California.*— San Francisco *v.* Pixley, 21 Cal. 56.

Idaho.— Ollis *v.* Kirkpatrick, 3 Ida. 976, 28 Pac. 435.

Illinois.— Cohen *v.* Menard, 136 Ill. 130, 24 N. E. 604; Brown *v.* Duncan, 132 Ill. 413, 23 N. E. 1126, 22 Am. St. Rep. 545; Garrett *v.* Moss, 20 Ill. 549.

Indiana.— Catlett *v.* Gilbert, 23 Ind. 614; Patton *v.* Stewart, 19 Ind. 233.

Iowa.— Whitney *v.* Armstrong, 32 Iowa 9.

Kentucky.— White *v.* Roberts, 112 Ky. 788,

(B) *Where Susceptible of Division.* Likewise where property, whether real or personal, is susceptible of division, it is the duty of the sheriff in some states to so divide it into parcels, and to sell only so much of it as is necessary to satisfy the execution or executions in his hands,[55] but this rule does not seem generally to

66 S. W. 758, 23 Ky. L. Rep. 2187; Humpich *v.* Drake, 44 S. W. 632, 19 Ky. L. Rep. 1782.

Maryland.— Nesbitt *v.* Dallam, 7 Gill & J. 494, 28 Am. Dec. 236.

Michigan.— Wolf *v.* Holton, 117 Mich. 321, 75 N. W. 762.

Minnesota.— Tillman *v.* Jackson, 1 Minn. 183.

New Jersey.— Coxe *v.* Halsted, 2 N. J. Eq. 311.

New York.— Jackson *v.* Newton, 18 Johns. 355; Mohawk Bank *v.* Atwater, 2 Paige 61; Woods *v.* Monell, 1 Johns. Ch. 503.

Pennsylvania.— Norris *v.* Adams, 13 Phila. 111; Baker *v.* Chester Gas Co., 2 Del. Co. 269; Eckman *v.* Fautz, 9 Lanc. Bar 65.

South Carolina.— Hammett *v.* Farmer, 26 S. C. 566, 2 S. E. 507.

South Dakota.— Deadwood First Nat. Bank *v.* Black Hills Fair Assoc., 2 S. D. 145, 48 N. W. 852.

Tennessee.— Brien *v.* Robinson, 102 Tenn. 157, 52 S. W. 802.

Texas.— Moore *v.* Perry, 13 Tex. Civ. App. 204, 35 S. W. 838.

See 21 Cent. Dig. tit. "Execution," § 636.

Presumption as to regularity of sale will be indulged. Love *v.* Cherry, 24 Iowa 204.

55. *Alabama.*— Brock *v.* Berry, 132 Ala. 95, 31 So. 517, 90 Am. St. Rep. 896; Wheeler *v.* Kennedy, 1 Ala. 292.

California.— Brown *v.* Ferrea, 51 Cal. 552.

District of Columbia.— Hart *v.* Hines, 10 App. Cas. 366.

Georgia.— Palmour *v.* Roper, 119 Ga. 10, 45 S. E. 790; Forbes *v.* Hall, 102 Ga. 47, 28 S. E. 915, 66 Am. St. Rep. 152.

Illinois.— Smith *v.* Huntoon, 134 Ill. 24, 24 N. E. 971, 23 Am. St. Rep. 646; Hay *v.* Baugh, 77 Ill. 500; Morris *v.* Robey, 73 Ill. 462; Rigney *v.* Small, 60 Ill. 416; McLean County Bank *v.* Flagg, 31 Ill. 290, 83 Am. Dec. 224; Phelps *v.* Conover, 25 Ill. 309; Cowen *v.* Underwood, 16 Ill. 22; Day *v.* Graham, 6 Ill. 435. But see McLean County Bank *v.* Flagg, 31 Ill. 290, 83 Am. Dec. 224 (holding that the statute was not designed to authorize the sheriff to divide entire parcels of real and personal property in such a mode as to become oppressive or injurious to the parties); Garrett *v.* Moss, 20 Ill. 549 (holding that the officer is not bound, unless required, to divide a single tract into parcels).

Indiana.— Brake *v.* Brownlee, 91 Ind. 359; Stotsenburg *v.* Stotsenburg, 75 Ind. 538; Bardeus *v.* Huber, 45 Ind. 235, 60 Ind. 132; Drake *v.* Murphy, 42 Ind. 82; Gregory *v.* Purdue, 32 Ind. 453; Piel *v.* Brayer, 30 Ind. 332, 95 Am. Dec. 699; Sherry *v.* Nick of the Woods, 1 Ind. 575.

Iowa.— Williams *v.* Allison, 33 Iowa 278; Bradford *v.* Limpus, 13 Iowa 424; Grapengether *v.* Fejervary, 9 Iowa 163, 74 Am. Dec. 336.

Kentucky.— White *v.* Roberts, 112 Ky. 788, 66 S. W. 758, 23 Ky. L. Rep. 2187; Patterson *v.* Carneal, 3 A. K. Marsh. 618, 13 Am. Dec. 208; Gorman *v.* Glenn, 78 S. W. 873, 25 Ky. L. Rep. 1755.

Louisiana.— Bauduc *v.* Conrey, 10 Rob. 466. See Howard *v.* Walsh, 28 La. Ann. 847; Morrison *v.* Flournoy, 25 La. Ann. 545.

Maine.— Stone *v.* Bartlett, 46 Me. 438.

Maryland.— Nesbitt *v.* Dallam, 7 Gill & J. 494, 28 Am. Dec. 236; Berry *v.* Griffith, 2 Harr. & G. 337, 18 Am. Dec. 309.

Michigan.— Harvey *v.* McAdams, 32 Mich. 472; Udell *v.* Kahn, 31 Mich. 195.

Missouri.— Gordon *v.* O'Neil, 96 Mo. 350, 9 S. W. 920; State *v.* Yancy, 61 Mo. 397; Fine *v.* St. Louis Public Schools, 30 Mo. 166.

New Jersey.— Schilling *v.* Lintner, 43 N. J. Eq. 444, 11 Atl. 153; Penn *v.* Craig, 2 N. J. Eq. 495.

New York.— Cunningham *v.* Cassidy, 17 N. Y. 276, 7 Abb. Pr. 183; McIntyre *v.* Sanford, 9 Daly 21; Welch *v.* Woodruff, 3 N. Y. Suppl. 622; Tugwell *v.* Bussing, 48 How. Pr. 89; Hewson *v.* Deygert, 8 Johns. 333.

Pennsylvania.— Baker *v.* Chester Gas Co., 73 Pa. St. 116, 2 Del. Co. 269; Rowley *v.* Brown, 1 Binn. 61; Smith *v.* Tinicum Fishing Co., 1 Del. Co. 121; Chestnutwood *v.* Sangree, 9 Lanc. Bar 85; Eckman *v.* Fantz, 9 Lanc. Bar 65; Whitehouse *v.* Stevens, 2 Leg. Rec. 342. See also Dickey's Case, Journ. Jur. 89.

Tennessee.— Stephens *v.* Taylor, 6 Lea 307; Cooke *v.* Walters, 2 Lea 116; Mays *v.* Wherry, 2 Baxt. 133; Winters *v.* Burford, 6 Coldw. 328.

Wisconsin.— Raymond *v.* Pauli, 21 Wis. 531; Bunker *v.* Rand, 19 Wis. 253, 88 Am. Dec. 684.

United States.— Stead *v.* Course, 4 Cranch 403, 2 L. ed. 660.

See 21 Cent. Dig. tit. "Execution," § 638.

Demand upon sheriff for division is not necessary under some statutes (State *v.* Leach, 10 Ind. 308; Reed *v.* Diven, 7 Ind. 189); although under others a request to sell in parcels seems to be required (Bauduc *v.* Conrey, 10 Rob. (La.) 466; Lennon *v.* Heindel, 56 N. J. Eq. 8, 37 Atl. 147).

Interest of tenant in remainder.— It was held in Burns *v.* Ray, 18 B. Mon. (Ky.) 392, that on an execution sale of the interest of tenant in remainder in slaves, the slaves should be sold separately.

Part of a governmental subdivision which has never been subdivided has been held not to be within the rule. Henderson *v.* Harness, 184 Ill. 520, 56 N. E. 786.

Personal property should not be sold on execution *en masse* where the articles can be sold separately at greater advantage. Brock *v.* Berry, 132 Ala. 95, 31 So. 517, 90 Am. St. Rep. 896.

The right to sell an equity of redemption in real estate exists only by statute in Maine, and as no statute authorizes the sale of two

apply to the sale of an undivided interest in real or personal property, and the interest of the judgment debtor therein may be offered for sale as a whole.[56]

(II) *LIMITATIONS OF RULE*—(A) *Best Price and Least Injury to Debtor.* However, it is the manifest duty of the officer to sell the property so as to produce the largest price and the least injury to the debtor. If this can be done by a division, such a course should be adopted, but if the sale of the entire property would produce such result, it should not be divided.[57]

(B) *Failure to Receive Bids For Separate Parcels.* Where the officer, after offering the parcels separately and in various combinations, fails to receive any bids, he is then justified in offering and selling them *en masse*.[58]

or more equities for one entire sum, it has been held that such sale is void without any statutory provision prohibiting it. Smith *v.* Dow, 51 Me. 21.

56. Borron *v.* Sollibellos, 28 La. Ann. 355; Jones *v.* Lewis, 30 N. C. 70, 47 Am. Dec. 338. *Contra,* Miller *v.* McAlister, 197 Ill. 72, 64 N. E. 254 (under Ill. Rev. St. c. 77, § 12, requiring real estate sold under execution to be offered for sale in separate lots); Macdonough *v.* Elam, 1 La. 489, 20 Am. Dec. 284 (execution for taxes). See also Neilson *v.* Neilson, 5 Barb. (N. Y.) 565, holding that premises owned in common by defendants in execution may be sold in a body, unless someone claiming to be the owner of some portion of them, or of the right to redeem such portion, shall require the same to be sold separately. But see Ballard *v.* Scruggs, 90 Tenn. 585, 18 S. W. 259, 25 Am. St. Rep. 703, holding that where a joint judgment is rendered against two tenants in common of land, the interest of each should be sold separately, so that each may redeem his own interest without redeeming that of the other.

57. *California.*— Gleason *v.* Hill, 65 Cal. 17, 2 Pac. 413. See also Smith *v.* Randall, 6 Cal. 47, 65 Am. Dec. 475.

Georgia.— Macon, etc., R. Co. *v.* Parker, 9 Ga. 377.

Illinois.— Hay *v.* Baugh, 77 Ill. 500; McLean County Bank *v.* Flagg, 31 Ill. 290, 83 Am. Dec. 224; Bressler *v.* Martin, 42 Ill. App. 356; Ridenour *v.* Shideler, 5 Ill. App. 180.

Indiana.— Nelson *v.* Bronnenburg, 81 Ind. 193.

Kansas.— Bell *v.* Taylor, 14 Kan. 277.

Kentucky.— Doyle *v.* Sleeper, 1 Dana 531; Lawrence *v.* Speed, 2 Bibb 401.

Michigan.— Geney *v.* Maynard, 44 Mich. 578, 7 N. W. 173; Perkins *v.* Spaulding, 2 Mich. 157.

New Jersey.— Coxe *v.* Halsted, 2 N. J. Eq. 311.

New York.— O'Donnell *v.* Lindsay, 39 N. Y. Super. Ct. 523; Tifft *v.* Barton, 4 Den. 171. *Compare* Bruce *v.* Westervelt, 2 E. D. Smith 440.

North Carolina.— Davis *v.* Abbott, 25 N. C. 137; Huggins *v.* Ketchum, 20 N. C. 550; Wilson *v.* Twitty, 10 N. C. 44, 14 Am. Dec. 569; McLeod *v.* Pearce, 9 N. C. 110, 11 Am. Dec. 742. See also Jones *v.* Lewis, 30 N. C. 70, 47 Am. Dec. 338.

Ohio.— Stall *v.* Macalester, 9 Ohio 19.

Pennsylvania.— Smith *v.* Meldren, 107 Pa. St. 348; Yost *v.* Smith, 105 Pa. St. 628, 51 Am. Rep. 219; Matter of Erb, 2 Pearson 160; Evans *v.* Crone, 17 Pa. Co. Ct. 86; Erb's Estate, 5 Leg. Gaz. 209.

See 21 Cent. Dig. tit. "Execution," § 638.

Compare Hammett *v.* Farmer, 26 S. C. 566, 2 S. E. 507.

Buildings and improvements attached to the plantation constitute a part of the immovable and cannot be sold separately. Whiteman *v.* Le Blanc, 28 La. Ann. 430.

Corporation franchise.— It was held in Longstreth *v.* Philadelphia, etc., R. Co., 11 Wkly. Notes Cas. (Pa.) 94, 309, that the Pennsylvania act of April 7, 1870, extending the right of execution against a corporation to all its property, does not permit the sale of separate items of such property, but the franchise must be sold as an entirety.

Equity of redemption.— It has been held in Maine that an execution sale of a right in equity to redeem a parcel of land on which there are two or more mortgages, at the same time, for a gross sum is not illegal. Hobart *v.* Bennett, 77 Me. 401; Bartlett *v.* Stearns, 73 Me. 17.

The title papers of the judgment debtor should determine the fact whether, for the purpose of execution sale, realty should be treated as one lot or several lots. Ament *v.* Brennan, 1 Tenn. Ch. 431.

Where property subject to a chattel mortgage is levied on under execution, the sale of such property, since it conveys only the equity of redemption remaining in the mortgagor, must be of the property in bulk, and not in parcels. Carpenter *v.* Simmons, 1 Bosw. (N. Y.) 360, 28 How. Pr. (N. Y.) 12.

Under some statutes discretion is given to the officer as to whether he should sell in separate parcels or *en masse.* Feild *v.* Dortch, 34 Ark. 399; Balfour *v.* Burnett, 28 Oreg. 72, 41 Pac. 1 [*following* Bays *v.* Trulson, 25 Oreg. 109, 35 Pac. 26; Leineweber *v.* Brown, 24 Oreg. 548, 34 Pac. 475, 38 Pac. 4; British Columbia Bank *v.* Page, 7 Oreg. 454]. See also Rector *v.* Hartt, 8 Mo. 448, 41 Am. Dec. 650.

Upon application to the court whence the execution issued, a sale by the sheriff will be ordered in such subdivision as will be most likely to produce the largest sum. Baker *v.* Chester Gas Co., 2 Del. Co. (Pa.) 269.

58. *Idaho.*— Ollis *v.* Kirkpatrick, 3 Ida. 247, 28 Pac. 435.

Illinois.— Henderson *v.* Harness, 184 Ill.

(III) *Effect of Violation of Rule.* However, a sale on execution *en masse* of property which should have been sold in separate parcels is not void, but voidable only, and may be set aside, on motion, made by the proper party and at the proper time.[59] Some courts, however, require satisfactory evidence that the land could have been advantageously divided and that the sale *en masse* was injudicious before setting the sale aside.[60]

520, 56 N. E. 786; Cohen *v.* Menard, 136 Ill. 130, 24 N. E. 604; Van Valkenberg *v.* School Trustees, 66 Ill. 103. See also Ballance *v.* Loomiss, 22 Ill. 82.

Indiana.— Nix *v.* Williams, 110 Ind. 234, 11 N. E. 36; Mugge *v.* Helgemeir, 81 Ind. 120; Weaver *v.* Guyer, 59 Ind. 195. *Compare* Voss *v.* Johnson, 41 Ind. 19.

Iowa.— Wilson *v.* Cory, 114 Iowa 208, 86 N. W. 289; Connecticut Mut. L. Ins. Co. *v.* Brown, 81 Iowa 42, 46 N. W. 749; Lamb *v.* McConkey, 76 Iowa 47, 40 N. W. 77; Burmeister *v.* Dewey, 27 Iowa 468.

South Dakota.—Deadwood First Nat. Bank *v.* Black Hills Fire Assoc., 2 S. D. 145, 48 N. W. 852.

United States.— White *v.* Crow, 110 U. S. 183, 4 S. Ct. 71, 28 L. ed. 113.

See 21 Cent. Dig. tit. "Execution," § 638.

In Michigan, however, the rule has been laid down that where an execution has been levied on detached parcels of land, the sale of the whole in one lot, for one bid, after an offer in parcels has failed to bring bidders, is not allowable, this rule being based on the ground that the owner cannot thus be deprived of the statutory right to redeem any one of the parcels without being compelled to redeem the others. Udell *v.* Kahn, 31 Mich. 195.

Where the rents and profits of the real estate for a period not exceeding seven years was first offered for sale, and there were no bids, the sheriff was justified in then offering the fee simple, even though the rents and profits for seven years exceeded in value the judgment. Marmon *v.* White, 151 Ind. 445, 51 N. E. 930.

Offering the three tracts together after having offered three separate tracts and having received no bids was held to invalidate the sale on the theory that the sheriff should have offered two of the three tracts before offering the three together. Douthett *v.* Kettle, 104 Ill. 356. To the same effect see Cohen *v.* Menard, 136 Ill. 130, 24 N. E. 604 [*affirming* 31 Ill. App. 503].

59. *Arkansas.*—Reynolds *v.* Tenant, 51 Ark. 84, 9 S. W. 857.

California.— Hudepohl *v.* Liberty Hill Water, etc., Co., 94 Cal. 588, 29 Pac. 1025, 28 Am. St. Rep. 149; Riddell *v.* Harrell, 71 Cal. 254, 12 Pac. 67; San Francisco *v.* Pixley, 21 Cal. 56.

Illinois.— Palmer *v.* Riddle, 180 Ill. 461, 54 N. E. 227; Lurton *v.* Rodgers, 139 Ill. 554, 29 N. E. 866, 32 Am. St. Rep. 214; Smith *v.* Huntoon, 134 Ill. 24, 24 N. E. 971, 23 Am. St. Rep. 646; Fairman *v.* Peck, 87 Ill. 156; Rigney *v.* Small, 60 Ill. 416; Osgood *v.* Blackmore, 59 Ill. 261; McMullen *v.* Gable, 47 Ill. 67; Prather *v.* Hill, 36 Ill. 402; Gillespie *v.* Smith, 29 Ill. 473, 81 Am. Dec. 328; Phelps *v.* Conover, 25 Ill. 309; Ross *v.* Mead, 10 Ill. 171.

Indiana.— Patton *v.* Stewart, 19 Ind. 233.

Kansas.— Bell *v.* Taylor, 14 Kan. 277.

Massachusetts.— Fletcher *v.* Stone, 3 Pick. 250, holding, however, that such a sale cannot be avoided by a stranger.

Michigan.—Hoffman *v.* Buschman, 95 Mich. 538, 55 N. W. 458.

Minnesota.— Tillman *v.* Jackson, 1 Minn. 183.

Missouri.— Lewis *v.* Whitten, 112 Mo. 318, 20 S. W. 617; Gordon *v.* O'Neil, 96 Mo. 350, 9 S. W. 920; Bouldin *v.* Ewart, 63 Mo. 330; Evans *v.* Wilder, 5 Mo. 313.

New York.— Hargin *v.* Wicks, 92 Hun 155, 36 N. Y. Suppl. 375; Welch *v.* Woodruff, 3 N. Y. Suppl. 622; Groff *v.* Jones, 6 Wend. 522, 22 Am. Dec. 545; Jackson *v.* Newton, 18 Johns. 355; Tiernan *v.* Wilson, 6 Johns. Ch. 411.

North Carolina.— Wilson *v.* Twitty, 10 N. C. 44, 14 Am. Dec. 569.

North Dakota.— Power *v.* Larabee, 3 N. D. 502, 57 N. W. 789, 44 Am. St. Rep. 577.

Oregon.— Dolph *v.* Barney, 5 Oreg. 191; Griswold *v.* Stoughton, 2 Oreg. 61, 84 Am. Dec. 499.

Pennsylvania.— Ryerson *v.* Nicholson, 2 Yeates 516; Tate *v.* Carberry, 1 Phila. 133. *Contra,* Prior *v.* Britton, 2 Yeates 549. *Compare* Klopp *v.* Witmoyer, 43 Pa. St. 219, 82 Am. Dec. 561, holding that such a sale is void in law and passes no title to the purchaser.

Rhode Island.— Aldrich *v.* Wilcox, 10 R. I. 405.

See 21 Cent. Dig. tit. "Execution," § 638.

In Tennessee, however, such sales are declared to be absolutely void. Jaques *v.* Walters, 2 Lea 116; Mays *v.* Wherry, 2 Baxt. 133; Winters *v.* Burford, 6 Coldw. 328.

60. *Illinois.*— Greenup *v.* Stoker, 12 Ill. 24, 3 Am. Dec. 474.

Indiana.— Kiser *v.* Ruddick, 8 Blackf. 382.

Missouri.— Sheehan *v.* Stackhouse, 10 Mo. App. 469.

New Jersey.— See Lennon *v.* Heindel, 56 N. J. Eq. 8, 37 Atl. 147, where the court was not satisfied that the property would have sold for more if it had been sold in parcels.

North Carolina.— Thompson *v.* Hodges, 10 N. C. 51.

Texas.— Glasscock *v.* Price, (Civ. App. 1898) 45 S. W. 415; New England L. & T. Co. *v.* Avery, (Civ. App. 1897) 41 S. W. 673.

See 21 Cent. Dig. tit. "Execution," § 638.

Compare Balfour *v.* Burnett, 28 Oreg. 72, 41 Pac. 1.

q. Order of Offering For Sale.[61] Where lands subject to a judgment lien have been alienated at different times, they must be sold under execution to satisfy such judgment in the inverse order of the dates of the former sales thereof.[62] Some of the statutes, however, provide that the judgment debtor may direct the order in which different parcels of property levied on shall be sold under execution, and may choose whether his realty or personalty shall be first offered for sale.[63]

r. Terms of Sale. The general rule is that purchasers at an execution sale are bound, as to terms of payment, by the terms announced by the sheriff at the time of the sale.[64] However, a purchaser at an execution sale is not bound by any promise or conditions imposed by the sheriff, which are not imposed by the law.[65]

3. Who May Become Purchasers — a. In General. The general rule is that all persons are permitted to become purchasers at an execution sale, provided they are competent to contract and do not occupy such a relationship with the execution defendant as would prevent them from making their interests antagonistic to his.[66]

61. Sale of property of surety before that of principal see, generally, PRINCIPAL AND SURETY.

62. *Indiana.*— Ritter *v.* Cost, 99 Ind. 80, holding, however, that if, at an execution sale, lots carved out of the land covered by the execution are offered in inverse order of their alienation, but no sale can be made in that order, the sheriff may vary the order.

New York.— James *v.* Hubbard, 1 Paige 228.

Ohio.— Commercial Bank *v.* Western Reserve Bank, 11 Ohio 444, 38 Am. Dec. 739.

Pennsylvania.— Randalls *v.* Davidson, 1 C. Pl. 13.

Virginia.— McClung *v.* Beirne, 10 Leigh 394, 34 Am. Dec. 739.

See 21 Cent. Dig. tit. "Execution," § 640.

Compare Marshall *v.* Moore, 36 Ill. 321; McWilliams *v.* Myers, 10 Iowa 325.

63. The failure of the sheriff in such a case to allow the judgment debtor to exercise this privilege is good ground to set the sale aside in a direct proceeding for that purpose. Wooddy *v.* Jameson, 5 Ida. 466, 50 Pac. 1008; Davis *v.* Campbell, 12 Ind. 192. See also Neilson *v.* Neilson, 5 Barb. (N. Y.) 565, holding, however, that a sale of real estate by the sheriff before the sale of personalty does not affect the validity of the sale, but the remedy of the execution debtor is against the officer.

Under Iowa Rev. § 2281, providing that a homestead "shall not be sold except to supply a deficiency remaining after exhausting the other property," etc., such a sale was good, notwithstanding one of the tracts sold was the homestead, since the act of the sheriff in offering the separate tracts and receiving no bids therefor was an exhaustion of the other property named in the writ within the meaning of the statute. Burmeister *v.* Dewey, 27 Iowa 468.

64. Backen *v.* Hamilton, 18 La. Ann. 553.

A change in the terms of the sale, but more favorable to the judgment debtor than the terms announced in the first advertisement of sale, will not invalidate such sale, and it will be presumed to have been done at the instance of the judgment debtor. Nichols *v.* McCall, 13 La. Ann. 215.

65. Stevenson *v.* Black, 1 N. J. Eq. 338; Umbehauer *v.* Aulenbaugh, 3 Watts & S. (Pa.) 359; Fretz *v.* Heller, 2 Watts & S. (Pa.) 397 (holding that the sheriff is bound, on the delivery of the writ of venditioni exponas, to sell the whole interest of the debtor without stipulation or restriction, and can reserve nothing for him in the land or in the price of it); Aulenbaugh *v.* Umbehauer, 8 Watts (Pa.) 48. See also Peck *v.* Inlow, 8 Dana (Ky.) 192, where the officer levied upon movable property, and although apprised of a mortgage upon it, sold the absolute title, and it was held that he had no right to require of the purchaser a bond, such as the purchaser of an equity of redemption was required to give.

Where execution creditor is purchaser.— It was held in Cable *v.* Byrne, 38 Minn. 534, 38 N. W. 620, 8 Am. St. Rep. 696, where, on a sale of chattels on execution, the sheriff made the sale in terms, but without authority, "subject" to a certain mortgage, the execution creditor having purchased the property under that condition, and it was held that he could not deny its effect.

66. *California.*— Bradbury *v.* Barnes, 19 Cal. 120; Gunter *v.* Laffan, 7 Cal. 588.

Kentucky.— Jones *v.* Webb, 59 S. W. 858, 22 Ky. L. Rep. 1100.

Louisiana.— Concordia Parish *v.* Bertron, 46 La. Ann. 356, 15 So. 60.

Mississippi.— White *v.* Trotter, 14 Sm. & M. 30, 53 Am. Dec. 112.

Missouri.— Burke *v.* Daly, 14 Mo. App. 542.

Nebraska.— Best *v.* Zutavern, 53 Nebr. 604, 74 N. W. 64.

New York.— See Sheldon *v.* Saenz, 59 How. Pr. 377.

North Carolina.— Baird *v.* Baird, 21 N. C. 524, 31 Am. Dec. 399.

Pennsylvania.— Leisenring *v.* Black, 5 Watts 303, 30 Am. Dec. 322.

Texas.— Smith *v.* Perkins, 81 Tex. 152, 16 S. W. 805, 26 Am. St. Rep. 794; Jones *v.* Martin, 26 Tex. 57, 80 Am. Dec. 641.

See 21 Cent. Dig. tit. "Execution," § 642.

b. Officer Making Sale. The rule of law that an agent is not deemed to have authority to represent two principals whose interests are conflicting applies with peculiar force to execution sales, and the officer making the sale can neither bid for himself nor for another.[67]

c. Creditors or Their Representatives. The party who has absolute control of the sale for his own benefit cannot be a purchaser unless there is a fair competition of bidders or a lawful opportunity given for such competition.[68]

Purchase by a county.— It has been held in Minnesota, under a statute authorizing the county to purchase lands "for public use," that a county has no power to purchase the land sold on execution on a judgment in its favor. James *v.* Wilder, 25 Minn. 305; Shelley *v.* Lash, 14 Minn. 498; Williams *v.* Lash, 8 Minn. 496.

67. *Alabama.*—Daniel *v.* Modawell, 22 Ala. 365, 58 Am. Dec. 260; Creagh *v.* Savage, 9 Ala. 959.

Connecticut.— Mills *v.* Goodsell, 5 Conn. 475, 13 Am. Dec. 90.

Georgia.—Coleman *v.* Maclean, 101 Ga. 303, 28 S. E. 861; Harrison *v.* McHenry, 9 Ga. 164, 52 Am. Dec. 435. See also Giles *v.* Southwestern Georgia Bank, 102 Ga. 702, 29 S. E. 600, holding that a sheriff's crier cannot purchase at a sale which he conducts.

Illinois.— Wickliff *v.* Robinson, 18 Ill. 145, even though a third person may be jointly interested in the purchase.

Kentucky.— Price *v.* Thompson, 84 Ky. 219, 1 S. W. 408, 8 Ky. L. Rep. 201; Worland *v.* Kimberlin, 6 B. Mon. 608, 44 Am. Dec. 785; Smith *v.* Pope, 5 B. Mon. 337 (one deputy sheriff cannot bid or buy at sale made by his co-deputy); Dixon *v.* Sharp, 1 A. K. Marsh. 211 (bid by a sheriff for a third person); Stapp *v.* Toler, 3 Bibb 450.

Louisiana.— McCluskey *v.* Webb, 4 Rob. 201.

Maine.— Knight *v.* Herrin, 48 Me. 533.

Maryland.— Isaac *v.* Clarke, 2 Gill 1, holding, however, that a sale to the sheriff's own agent is not necessarily void at law, but is voidable for fraud in fact.

Missouri.— Shotwell *v.* Munroe, 42 Mo. App. 669. See also Hardwick *v.* Jones, 65 Mo. 54, holding, however, that the fact that the sheriff is a stock-holder in the corporation purchasing does not render the sale void.

New Hampshire.— Perkins *v.* Thompson, 3 N. H. 144.

New York.— See Jackson *v.* Collins, 3 Cow. 89 (holding that the New York statute prohibiting a sheriff levying execution, or any of his deputies, from purchasing property sold under the execution, did not prevent a deputy sheriff who was also plaintiff in execution from bidding in order to secure his money, although he may have been within the letter of the act); Davoue *v.* Fanning, 2 Johns. Ch. 252.

North Carolina.— Robinson *v.* Clark, 52 N. C. 562, 78 Am. Dec. 265; Stewart *v.* Rutherford, 49 N. C. 483; McLeod *v.* McCall, 48 N. C. 87; Ormond *v.* Faircloth, 5 N. C. 35.

Pennsylvania.— Crook *v.* Williams, 20 Pa. St. 342.

South Carolina.— Ledger *v.* Doyle, 11 Rich. 109, 70 Am. Dec. 240; Matheney *v.* McDonald, 5 Strobh. 77.

Tennessee.— Chambers *v.* State, 3 Humphr. 237; Johnson *v.* Pryor, 5 Hayw. 243, holding that where a sheriff and a purchaser at execution sale were in partnership in the sale the title derived therefrom is absolutely void.

Vermont.— Caswell *v.* Jones, 65 Vt. 457, 26 Atl. 529, 36 Am. St. Rep. 879, 20 L. R. A. 503; Downing *v.* Lyford, 57 Vt. 507.

See 21 Cent. Dig. tit. "Execution," § 643.

Compare Michoud *v.* Girod, 4 How. (U. S.) 503, 11 L. ed. 1076.

An ex-sheriff may buy land sold subsequently under a levy made when he was in office. Leger *v.* Doyle, 11 Rich. (S. C.) 109, 70 Am. Dec. 240.

As agent of execution plaintiff.— In Brannin *v.* Broadus, 94 Ky. 33, 21 S. W. 344, 14 Ky. L. Rep. 726, it was held that Ky. Gen. St. c. 38, art. 15, § 2, providing that no officer shall bid or buy in any property which may be sold under execution by himself or deputy, applies only to bids and purchases for himself, and does not prohibit plaintiff in execution, who intends to be absent from the sale, from authorizing the officer to offer a specified amount in his behalf.

A turnkey or assistant jailer has been held not to be within the operation of the rule. Jackson *v.* Anderson, 4 Wend. (N. Y.) 474.

Consent of parties.— It has been held in Vermont that parties conjointly, and perhaps better alone, may authorize an officer to become himself the purchaser of the property. Woodbury *v.* Parker, 19 Vt. 353, 47 Am. Dec. 695.

Where the purchaser is present at the sale and makes his bids, the crying of the bid by the sheriff, as authorized, is a violation of neither the letter nor the spirit of the statute, which provides that no officer shall directly or indirectly bid for or buy any property which may be sold by him under execution. Mullins *v.* Buskirk, 5 Ky. L. Rep. 605.

68. McMichael *v.* McDermott, 17 Pa. St. 353, 55 Am. Dec. 560; Ricketts *v.* Unangst, 15 Pa. St. 90, 53 Am. Dec. 572; Smull *v.* Jones, 1 Watts & S. (Pa.) 128, 136 (where the court, by Gibson, C. J., said: "It is not to be doubted that lien creditors, as well as others, may purchase jointly at sheriff's sale, if all be open and fair"); Wharmby *v.* McNertney, 4 Kulp (Pa.) 101; Conniff *v.* Doyle, 8 Phila. (Pa.) 630; Corry *v.* Funk, 6 Phila. (Pa.) 560. See Cavender *v.* Smith, 1 Iowa 306 (where the purchase by the judgment creditor's attorney was upheld); Bradley *v.* Heffernan, 156 Mo. 653, 57 S. W. 763 (hold-

d. Agent of or Person in Fiduciary Relation to Judgment Debtor. The rule is laid down in some jurisdictions that a purchase at an execution sale, for the use of, or on behalf of, defendant in execution, will render such sale invalid.[69] So the doctrine that a person standing in a fiduciary relation to another will not be permitted, in the management of the property, to derive an undue advantage at the expense of the *cestui qui trust*, has been applied to execution sales.[70]

e. Co-Defendants. It is a well recognized rule that one of two co-defendants may purchase the property of the other defendant, when sold to satisfy a joint execution against both.[71]

4. Bids[72]**— a. General Rule.** The sale of property under execution should be made to the highest bidder, and where the officer refuses to receive a bid and sells the property to some other bidder, such bidder may by appropriate proceedings vacate the sale and compel the bidding to be resumed at the point where his bid was rejected.[73]

b. Bids Made in Writing. The officer conducting an execution sale is authorized to receive bids made by letter or other writing, as well as oral bids, provided such written bids are publicly cried, as the other bids are.[74]

ing that the fact that an execution purchaser took an assignment of the judgment between the time of levy and the date of sale did not operate as a payment of the judgment so as to affect the validity of the sale); Hudson *v.* Morriss, 55 Tex. 595. See, however, Power *v.* Larabee, 3 N. D. 502, 57 N. W. 789, 44 Am. St. Rep. 577, holding that where by statute a sale on execution is required to be made to the highest bidder, it is not void because there was no one present but the sheriff and the execution creditor.

69. Flowers *v.* Sproule, 2 A. K. Marsh. (Ky.) 54; Woodley *v.* Hassell, 94 N. C. 157; Morris *v.* Allen, 32 N. C. 203.

Purchase by debtor's wife.— It has been held in Massachusetts that a sheriff cannot by virtue of an execution sell and convey an equity of redemption in land of the judgment debtor to the debtor's wife, since a wife has been held under the Massachusetts statute to be incompetent to take title directly from her husband during coverture. Stetson *v.* O'Sullivan, 8 Allen 321. But in Missouri where a wife with her own funds purchases her husband's land at execution sale, without collusion, she acquires a good title in which her husband has no interest which can be subjected to the payment of his debts. Bracken *v.* Milner, 99 Mo. App. 187, 73 S. W. 225.

Purchase by defendant's attorney.— It has been held in California that the attorney of a defendant in proceedings to subject lands to debts holds no such duty to his client's creditors as will debar such attorney from making a valid purchase of the land at the execution sale in such proceedings. Fisher *v.* McInerney, 137 Cal. 28, 69 Pac. 622, 907, 92 Am. St. Rep. 68.

Purchase of property of insolvent debtor.— In Thorpe *v.* Beavans, 73 N. C. 241, it was held that a purchaser at an execution sale may lawfully buy the property of the insolvent debtor with the intent of afterward giving the whole of it, or any part thereof, to such debtor or his family.

To prevent a sacrifice.— In Lee *v.* Lee, 19 Mo. 420, it was held that a debtor who gets another to buy in his property at an execution sale, with no other view than to prevent a sacrifice of it, is not guilty of a fraud.

70. Jamison *v.* Glascock, 29 Mo. 191; Ricketts' Appeal, 9 Pa. Cas. 247, 12 Atl. 60.

Purchase by executor or administrator see, generally, Executors and Administrators.

Purchase by guardian see, generally, Guardian and Ward.

Purchase by trustee see, generally, Trusts.

71. *Georgia.*— Kilgo *v.* Castleberry, 38 Ga. 512, 95 Am. Dec. 406.

Illinois.— Mathis *v.* Stufflebeam, 94 Ill. 481.

Iowa.— Bacon *v.* Early, 116 Iowa 532, 90 N. W. 353.

Mississippi.— Robinson *v.* Parker, 3 Sm. & M. 114, 41 Am. Dec. 614.

New York.— Neilson *v.* Neilson, 5 Barb. 565.

Pennsylvania.— Gibson *v.* Winslow, 38 Pa. St. 49.

Texas.— Grines *v.* Hobson, 46 Tex. 416.

See 21 Cent. Dig. tit. "Execution," § 645.

But *compare* Evans *v.* Gibson, 29 Mo. 223, 77 Am. Dec. 565.

72. Assignment of bid see *infra*, X, A, 6.

73. Duffey *v.* Rutherford, 21 Ga. 363, 68 Am. Dec. 459; Parker *v.* Pratt, 8 N. J. Eq. 104; Thompson *v.* McManama, 2 Disn. (Ohio) 213; U. S. *v.* Vestal, 12 Fed. 59, 4 Hughes 467. *Compare* Swires *v.* Brotherline, 41 Pa. St. 135, 80 Am. Dec. 601 (holding that while it is true that if only a single bid be taken and no opportunity given for a second one, such action on the part of the sheriff will be fraudulent, yet where only one bid can be obtained, the one is enough to constitute a valid sale); Eckman *v.* Fautz, 9 Lanc. Bar (Pa.) 65; Lane *v.* White, 12 Wis. 381.

Bid payable in land.— It was held, in Downing *v.* Brown, Hard. (Ky.) 181, that if, at an execution sale, one bidder offers cash and a higher bid is offered payable in land, the sheriff must accept the cash bid.

74. Wenner *v.* Thornton, 98 Ill. 156; Dickerman *v.* Burgess, 20 Ill. 266; Faunce *v.*

e. Conditional Bids. Conditional bids at execution sales are contrary to the policy of the law.[75]

d. Withdrawal of Bid. A bidder at an execution sale has a right to withdraw his bid at any time before the property is struck down to him.[76]

e. Rejection of Bid. The officer is not obliged to accept the bid of an irresponsible person.[77] Nor should the officer sell property levied on for an inadequate or a merely nominal price.[78]

f. Agreements or Combinations Concerning.[79] It is the policy of the courts to discountenance combinations or agreements on the part of purchasers at execution sales, the object and effect of which are to stifle competition, and the courts will deny to any party to such agreement or combination any benefit from the sale and set it aside upon proper motion.[80] However, the above rule does not

Sedgwick, 8 Pa. St. 407, holding that a bid reduced to writing before the sale was concluded was a waiver of prior bids by the same person. See Sparling *v.* Todd, 27 Ohio St. 521, holding that while an officer may receive bids in writing or through any other medium, provided they come to him as bids at the time of the sale, he cannot receive such bids prior to the sale and then cry them at the sale.

75. Where a bidder imposes conditions to his bid, the bid should be disregarded by the officer conducting the sale. Dewey *v.* Willoughby, 72 Ill. 250; Isler *v.* Colgrove, 75 N. C. 334 (holding that the sheriff is not bound to receive a bid from plaintiff in one of several executions claiming priority, made upon condition that the same shall be credited on that execution; he has a right to require the purchase-money to be paid in cash); Faunce *v.* Sedgwick, 8 Pa. St. 407. See also Fox *v.* Kline, 85 N. C. 173.

76. The sheriff has no authority to prescribe conditions which will deprive him of that right. Hibernia Sav., etc., Soc. *v.* Behnke, 121 Cal. 339, 53 Pac. 812; Barnes *v.* Zoercher, 126 Ind. 434, 26 N. E. 172; Fisher *v.* Seltzer, 23 Pa. St. 308, 62 Am. Dec. 335. See also Hills *v.* Jacobs, 7 Rob. (La.) 406; Nebraska L. & T. Co. *v.* Hamer, 40 Nebr. 281, 58 N. W. 695.

Withdrawal by implication.— Where a bid has been made at a sheriff's sale under execution and the sale adjourned, the bid is withdrawn by implication. Donaldson *v.* Kerr, 6 Pa. St. 486.

After a bid has been accepted, however, the general rule is that the bidder cannot thereafter withdraw the same and treat the sale as a nullity, except with the consent of the execution creditor and the debtor. Downard *v.* Crenshaw, 49 Iowa 296; Gray *v.* Case, 51 Mo. 463; Ely *v.* Perrine, 2 N. J. Eq. 396. See also Dills *v.* Jasper, 33 Ill. 262; Nebraska L. & T. Co. *v.* Hamer, 40 Nebr. 281, 58 N. W. 695; Francis *v.* Watkins, 72 N. Y. App. Div. 15, 76 N. Y. Suppl. 106.

Mistake in bid.— Where, at a sale of land upon execution, the judgment creditor's agent by mistake exceeded his instructions by bidding more for the property than he was authorized to pay, it was held that he might withdraw his bid, if done promptly, by paying the costs. Fuson *v.* Connecticut Gen. L. Ins. Co., 53 Iowa 609, 6 N. W. 7.

77. Hobbs *v.* Beavers, 2 Ind. 142, 52 Am. Dec. 500 (holding his refusal to cry a bid made by a stranger, where the latter does not make himself known and gives no evidence of his ability to conform to the terms of the sale, will not invalidate the sale on account of the property being struck down to a person who is not the highest bidder); Flommerfelt *v.* Zellers, 7 N. J. L. 153; Merwin *v.* Smith, 2 N. J. Eq. 182.

78. Lankford *v.* Jackson, 21 Ala. 650; Davis *v.* McCann, 143 Mo. 172, 44 S. W. 795; Rogers, etc., Hardware Co. *v.* Cleveland Bldg. Co., 132 Mo. 442, 34 S. W. 57, 53 Am. St. Rep. 494, 31 L. R. A. 335; Cole County *v.* Madden, 91 Mo. 585, 4 S. W. 397; State *v.* Moore, 72 Mo. 285; Shaw *v.* Potter, 50 Mo. 281; Conway *v.* Nolte, 11 Mo. 74.

Where the inadequacy of the bid is so gross as to shock the conscience, the sheriff should reject such bid and return the fieri facias with a statement that the property was not sold for want of purchasers. Henderson *v.* Sublett, 21 Ala. 626.

79. Validity of contract to prevent competition see CONTRACTS, 9 Cyc. 213.

80. *California.*— Packard *v.* Bird, 40 Cal. 378.

Kansas.— Capitol Bank *v.* Huntoon, 35 Kan. 577, 11 Pac. 369.

Kentucky.— Mills *v.* Rogers, 2 Litt. 217, 13 Am. Dec. 263.

Mississippi.— Stovall *v.* Farmers', etc., Bank, 8 Sm. & M. 305, 47 Am. Dec. 85.

Missouri.— Griffith *v.* Judge, 49 Mo. 536.

New Jersey.— Hamburgh Mfg. Co. *v.* Edsall, 5 N. J. Eq. 249.

New York.— Hawley *v.* Cramer, 4 Cow. 717; Troup *v.* Wood, 4 Johns. Ch. 228.

North Carolina.— Smith *v.* Greenlee, 13 N. C. 126, 18 Am. Dec. 564.

Pennsylvania.— Phelps *v.* Benson, 161 Pa. St. 418, 29 Atl. 86; Slingluff *v.* Eckel, 24 Pa. St. 472.

South Carolina.— Barrett *v.* Bath Paper Co., 13 S. C. 128.

See 21 Cent. Dig. tit. "Execution," §§ 649, 650.

Application to set aside must, however, be seasonably made. Capital Bank *v.* Huntoon, 35 Kan. 577, 11 Pac. 369.

Assent of all concerned.—In Maffet *v.* Ijams, 103 Pa. St. 266, it was held that while ordinarily an agreement not to bid at a sheriff's sale, if in fraud of the execution defendant

apply to an association or combination of bidders formed for honest and proper purposes.[81]

g. Representations or Conduct Concerning. Since all execution sales should be open to free and full competition, the rule is universally recognized that where the purchaser does any act or makes any false representation, the effect of which is to destroy such competition and stifle bids, by reason of which the property sells at an undervalue, the sale will be invalid.[82] However, if a party has an interest in property about to be sold under execution, or a valid claim against it, or one believed to be valid, it is not improper for him to announce such interest or claim before the sale takes place, and such statement will not estop him from becoming a purchaser of the property nor invalidate the sale.[83]

5. Payment of Purchase-Money — a. General Rule. In the absence of express statutory provision, an officer has no legal right to sell on credit property taken on execution, unless by the agreement of the parties or the direction of the judgment creditor, and if he does so it is at his own risk against loss from the credit given.[84]

or his creditors, is void, it is not so where all concerned knew of it and assented thereto.

81. As in the case of a union of several persons formed on account of the magnitude of the sale, or where the quantity offered to a single bidder would exceed the amount which individuals might wish to purchase on their own account (Buckner *v.* Chambliss, 30 Ga. 652; Metropolis Nat. Bank *v.* Sprague, 20 N. J. Eq. 159; Smith *v.* Greenlee, 13 N. C. 126, 18 Am. Dec. 564; Smull *v.* Jones, 1 Watts & S. (Pa.) 128. See also Phippen *v.* Stickney, 3 Metc. (Mass.) 384; Holmes *v.* Holmes, 3 Rich. Eq. (S. C.) 61; Kearney *v.* Taylor, 15 How. (U. S.) 494, 14 L. ed. 787), or where several execution creditors, for the purpose of preventing a sacrifice of the property of their debtor, enter into an agreement to bid off the property, and under this agreement it brings approximately its full value at the sale (Hunt *v.* Elliott, 80 Ind. 245, 41 Am. Rep. 794; Capital Bank *v.* Huntoon, 35 Kan. 577, 11 Pac. 369; Young *v.* Smith, 10 B. Mon. (Ky.) 293; Kitchen *v.* St. Louis, etc., R. Co., 69 Mo. 224; Stewart *v.* Severance, 43 Mo. 322, 97 Am. Dec. 392; Gulick *v.* Webb, 41 Nebr. 706, 60 N. W. 13, 43 Am. St. Rep. 720; Bailey *v.* Morgan, 44 N. C. 352; Braden *v.* O'Neil, 183 Pa. St. 462, 38 Atl. 1023, 63 Am. St. Rep. 761; Woodruff *v.* Warner, 175 Pa. St. 302, 34 Atl. 667, 52 Am. St. Rep. 845; Mead *v.* Conroe, 113 Pa. St. 220, 8 Atl. 374; Barton *v.* Hunter, 101 Pa. St. 406; Boynton *v.* Housler, 73 Pa. St. 453; Smull *v.* Jones, 1 Watts & S. (Pa.) 128; Wicker *v.* Hoppock, 6 Wall. (U. S.) 94, 18 L. ed. 752; Thames *v.* Miller, 23 Fed. Cas. No. 13,860, 2 Woods 564).

Question for jury.— In Oram *v.* Rothermel, 98 Pa. St. 300, it was held to be a question for the jury under all the circumstances of the case, to say whether fraud was contemplated or committed.

82. *California.*— Pekin Min., etc., Co. *v.* Kennedy, 81 Cal. 356, 22 Pac. 679.

Connecticut.— Spencer *v.* Champion, 13 Conn. 11.

Illinois.— Bethel *v.* Sharp, 25 Ill. 173, 76 Am. Dec. 790.

Kentucky.— Stockton *v.* Owings, Litt. Sel. Cas. 256, 12 Am. Dec. 302.

Missouri.— Nelson *v.* Brown, 23 Mo. 13.

New Hampshire.— Jones *v.* Portsmouth, etc., R. Co., 32 N. H. 544.

Pennsylvania.— Barton *v.* Hunter, 101 Pa. St. 406; Hogg *v.* Wilkins, 1 Grant 67; Johnson *v.* Oberholtzer, 1 Walk. 103. And *compare* Dick *v.* Lindsay, 2 Grant 431, holding that where one is buying for himself, but falsely declares that his purchase shall inure to the benefit of the debtor or his family, which is a mere trick to prevent competition, he acquires no title. *Aliter*, where he intends to give the property purchased to the debtor, or to let him redeem it.

South Carolina.— Martin *v.* Ranlett, 5 Rich. 541, 57 Am. Dec. 770; Kinard *v.* Hiers, 3 Rich. Eq. 423, 55 Am. Dec. 643; Farr *v.* Sims, Rich. Eq. Cas. 122, 24 Am. Dec. 396.

See 21 Cent. Dig. tit. "Execution," § 651.

But see O'Kelley *v.* Gholston, 89 Ga. 1, 15 S. E. 123 (holding that deterring bidders at a sheriff's sale for the benefit of defendant, and with his consent, would not vitiate the sale as between such defendant and the purchaser); Hill *v.* Whitfield, 48 N. C. 120 (holding that a sheriff's deed is not invalidated at law by the fact that the purchaser, who was plaintiff in execution under which the land was sold, fraudulently suppressed competition at the sale, provided there was no collusion between him and the sheriff, and that the judgment debtor, desiring to have the sale set aside, should seek relief in equity).

83. Leake *v.* Anderson, 43 S. C. 448, 21 S. E. 439; Reagan *v.* Bishop, 25 S. C. 585. See also Reed *v.* Hardeman, (Tex. Sup. 1887) 5 S. W. 505; Collins *v.* Smith, 75 Wis. 392, 44 N. W. 510.

84. *California.*— Meherin *v.* Saunders, 131 Cal. 681, 63 Pac. 1084, (1899) 56 Pac. 1110.

Georgia.— Simmons *v.* Cook, 109 Ga. 553, 34 S. E. 1033; Willbanks *v.* Untriner, 98 Ga. 801, 25 S. E. 841; Jones *v.* Thacker, 61 Ga. 329; Phillips *v.* Behn, 19 Ga. 298. See also Coker *v.* McConnell, 104 Ga. 482, 31 S. E. 411.

b. Where Judgment Creditor Is Purchaser. The rule is laid down in some jurisdictions that where the judgment creditor becomes a purchaser at the execution sale, the officer should, at the direction of such judgment creditor, credit the amount of his debt upon the execution, if the costs of the sale are paid.[85] Where, however, there are other liens on the property of equal dignity with the lien of the judgment creditor, the officer may require him to pay over the purchase-

Illinois.— McCluskey *v.* McNeely, 8 Ill. 578.

Indiana.— McCormick *v.* Walter A. Wood Mowing, etc., Mach. Co., 72 Ind. 518; Swope *v.* Ardery, 5 Ind. 213; Chapman *v.* Harwood, 8 Blackf. 82, 44 Am. Dec. 736. See, however, Lemasters *v.* Johnson, 12 Ind. 385, decided under St. (1843) §§ 3, 4.

Kentucky.— Downing *v.* Brown, Hard. 181.

Louisiana.— Marx *v.* Sanders, 108 La. 140, 32 So. 331.

Massachusetts.— Bayley *v.* French, 2 Pick. 586.

Mississippi.— Tiffany *v.* Johnson, 27 Miss. 227.

Missouri.— State *v.* Spencer, 79 Mo. 314.

New Hampshire.—Chandler *v.* Goodrich, 58 N. H. 525; Chase *v.* Monroe, 30 N. H. 427.

New Jersey.— Disston *v.* Strauck, 42 N. J. L. 546.

New York.— Robinson *v.* Brennan, 90 N. Y. 208; Holmes *v.* Richmond, 19 Hun 634; Denton *v.* Livingston, 9 Johns. 96, 6 Am. Dec. 264.

North Carolina.— State *v.* Read, 28 N. C. 80; State *v.* Pool, 27 N. C. 105.

Tennessee.—Roberts *v.* Westbrook, 1 Coldw. 115; Shaw *v.* Smith, 9 Yerg. 97.

See 21 Cent. Dig. tit. "Execution," § 654.

Bank check may be given and received by agreement of the parties in payment of a bid made at an execution sale. Sutton *v.* Baldwin, 146 Ind. 361, 45 N. E. 518.

Allowing the purchaser to retain price pending the trial of a suit to determine the distribution of the proceeds, by consent of parties, will not render the sale void. Marx *v.* Sanders, 108 La. 140, 32 So. 331.

Bank-notes.— Indorsement to satisfy with bank notes implies a sale for money. Fant *v.* Wilson, 3 T. B. Mon. (Ky.) 342.

Medium of payment.— Where the terms of sale prescribe that it shall be for cash, it is generally understood that cash means current legal tender. Farr *v.* Sims, Rich. Eq. Cas. (S. C.) 122, 24 Am. Dec. 396.

Purchaser cannot set off against his bid a claim against the execution creditor. Perkins *v.* Webb, 67 Ill. App. 474.

Where the sheriff took the note of the purchaser instead of money the sale was invalid. Tiffany *v.* Johnson, 27 Miss. 227.

Written directions to the sheriff by the judgment creditors to make a deed to the purchaser, in which directions they stated that the amount of the bid had been arranged with them, were held to be a sufficient payment to make the sale valid and to entitle defendant, on a reversal subsequently of the judgment, to a restitution of the amount of the bid from plaintiffs. Doe *v.* Natchez Ins. Co., 16 Miss. 197.

Sheriff is a special agent and has no power to execute a receipt for the money bid on the sale of property on execution without receiving the same. McCormick *v.* Walter A. Wood Mowing, etc., Mach. Co., 72 Ind. 518.

85. *Arkansas.*— Fowler *v.* Pearce, 7 Ark. 28, 44 Am. Dec. 526.

Georgia.— Pinkston *v.* Harrell, 106 Ga. 102, 31 S. E. 808, 71 Am. St. Rep. 242.

Indiana.— Boots *v.* Ristine, 146 Ind. 75, 44 N. E. 15; Robertson *v.* Vancleave, 129 Ind. 217, 26 N. E. 899, 29 N. E. 781, 15 L. R. A. 68.

Louisiana.— See Kershaw *v.* Delahoussaye, 9 Rob. 77, holding that where property sold for cash to satisfy a judgment is purchased by the judgment creditor, the sheriff has no right to resell the property, even on refusal of the judgment creditor to pay the costs.

Nevada.— See Sweeney *v.* Hawthorne, 6 Nev. 129, where the sheriff's costs did not appear to have been paid.

New York.— Russell *v.* Gibbs, 5 Cow. 390; Nichols *v.* Ketcham, 19 Johns. 84.

North Carolina.— Thorpe *v.* Beavens, 73 N. C. 241. See, however, Isler *v.* Andrews, 66 N. C. 552.

South Carolina.— Small *v.* Small, 16 S. C. 64; Cobb *v.* Pressly, 2 McMull. 416.

Texas.— Blum *v.* Rogers, 71 Tex. 668, 9 S. W. 595.

See 21 Cent. Dig. tit. "Execution," § 658.

A sheriff cannot be compelled to accept the receipt of the execution creditor in payment for personal property purchased by him. Wilson *v.* American Photo-Relief Printing Co., 4 Wkly. Notes Cas. (Pa.) 13.

Mortgagee of land who buys it in at a sale on execution under a prior judgment may apply his mortgage to the satisfaction of the amount of his bid in excess of the sum necessary to satisfy the execution. Harrison *v.* Roberts, 6 Fla. 711. See also Wheatland *v.* Light, 23 Pa. Co. Ct. 337.

Where a mortgagee whose mortgage has priority over the execution becomes the purchaser at the execution sale, he has a right to retain the purchase-money up to the amount of his debt, and the title to the property should be made to him. Blair *v.* Taylor, 25 La. Ann. 144.

Where mortgaged property is bid in by a judgment creditor of the mortgagor, the amount which should be applied on the judgment is the bid, minus the amount which the creditor deposits with the clerk to pay the mortgage. Tyler *v.* Budd, 96 Iowa 29, 64 N. W. 679.

Where the attorney of the judgment creditor purchases at a sheriff's sale, he is not entitled to a deed without paying the money or giving a receipt on behalf of his principal. Pearson *v.* Morrison, 2 Serg. & R. (Pa.) 20.

money in order that he may deposit the same in court to await a judicial decision as to the distribution thereof.[86]

c. Time of Payment. Where the terms of the sale are cash, the general rule is that the money to satisfy the bid should be paid immediately to the officer.[87]

d. Security For Purchase-Money. Where property is sold at an execution sale on credit, if the purchaser fails to offer the proper sureties as required by statute, it is the duty of the officer to again expose the property for sale.[88]

e. Failure to Comply With Bid — (i) *General Rule.* Where the sale is for cash, upon the failure of the purchaser to comply with the terms of sale, the sheriff may at his option proceed against the purchaser for the full amount of his bid, or resell the property and proceed against the first purchaser for any deficiency.[89]

86. *Arkansas.*— Fowler *v.* Pearce, 7 Ark. 28, 44 Am. Dec. 526.

California.— Williams *v.* Smith, 6 Cal. 91.

Georgia.— Atlanta Trust, etc., Co. *v.* Nelms, 115 Ga. 53, 41 S. E. 247.

New York.— Russell *v.* Gibbs, 5 Cow. 390.

Pennsylvania.— Fry *v.* Specht, 1 Pa. Cas. 95, 1 Atl. 441.

Compare, Pugh *v.* Millspaugh, 4 L. T. N. S. 42, holding that where a lien creditor purchases land subject to his lien, the sheriff is not bound to give him a receipt for the amount of his lien where other creditors dispute his claim.

87. *Ex p.* State, 15 Ark. 263 (that is on the day of the sale); Mehern *v.* Sanders, 131 Cal. 681, 63 Pac. 1084, 54 L. R. A. 272 (holding that the execution purchaser must pay the amount of his bid when the certificate of sale is issued); Chapman *v.* Harrison, 4 Rand. (Va.) 336 (holding that payment to the sheriff of the amount of an execution after the return-day thereof has passed is not binding on the judgment creditor); Sauer *v.* Steinbauer, 14 Wis. 70 (otherwise the officer must at once resell). See also Scott *v.* Wilson, 1 McCord (S. C.) 194, holding that by the act of 1796, the judgment creditor, by giving notice in writing to the sheriff, can compel him to collect ten per cent immediately on a sale made by him, and if he cannot do so forthwith to resell the property, and so on *ad infinitum*. *Compare* Yongue *v.* Cathcart, 2 Strobh. (S. C.) 221.

Reasonable time.— In some jurisdictions, however, it is held that the sheriff may at his discretion give a reasonable time to the purchaser for the payment of the amount bid, at least in the absence of objection by the parties to the execution. Ruckle *v.* Barber, 48 Ind. 274; Maynard *v.* Moore, 76 N. C. 158.

88. Hanna *v.* Guy, 3 Bush (Ky.) 91; Bartlett *v.* Loubon, 7 J. J. Marsh. (Ky.) 641 (holding, however, that where defendant had no title to the property sold and the sale was made at the instance of the judgment creditor, the enforcement of the bond would be enjoined); Cumber *v.* Chandler, 5 Ky. L. Rep. 185; Michel *v.* Kaiser, 25 La. Ann. 57 (holding that the sheriff is alone the proper judge of the sufficiency of the bond); Haynes *v.* Breaux, 16 La. Ann. 142; Walker *v.* Allen, 19 La. 370; Lafon *v.* Smith, 3 La. 473 (holding that the sheriff must immediately sell again if the purchaser do not offer good credit, and cannot wait three days till he find other security); Felps *v.* Clinton, etc., R. Co., 10 Rob. (La.) 89; Wells *v.* Moore, 3 Rob. (La.) 156; Dubreuil *v.* Soulie, 4 Mart. N. S. (La.) 91, 16 Am. Dec. 165.

Agent of judgment creditor.— It was held in Merwin *v.* Smith, 2 N. J. Eq. 182, that a sheriff cannot require security of a duly authorized agent of plaintiff in execution for the performance of his contract, nor can he refuse the bid of such agent for want of the required security.

Where there are several judgment creditors as many bonds should be taken as may be necessary to deliver to each party his proper portion after deducting the costs. Burthe *v.* Burnham, 1 Rob. (La.) 395. See also Spradlin *v.* Pieratt, 12 Bush (Ky.) 496, opinion of the court by Lindsay, C. J.

Separate bond for excess.— In Kentucky it has been held that where property levied on under execution is sold on credit for an amount in excess of the demand, a separate bond should be taken by the officer for such excess, payable to defendant. Fant *v.* Wilson, 3 T. B. Mon. (Ky.) 342, holding, however, that, although in such case the bond be taken for the whole amount, payable to the judgment creditor, while he or the judgment debtor may have such bond quashed, the obligors therein cannot.

89. *Alabama.*— Robinson *v.* Garth, 6 Ala. 204, 41 Am. Dec. 47.

Arkansas.— State *v.* Borden, 15 Ark. 611; State *v.* Lawson, 14 Ark. 114; Newton *v.* State Bank, 14 Ark. 9, 58 Am. Dec. 363.

California.— People *v.* Hays, 5 Cal. 66. See also Askew *v.* Ebberts, 22 Cal. 263.

Georgia.— Simmons *v.* Cook, 109 Ga. 553, 34 S. E. 1033; Barlow *v.* Toole, 80 Ga. 9, 5 S. E. 246; McLendon *v.* Harrell, 67 Ga. 440; Jones *v.* Thacker, 61 Ga. 329; Humphrey *v.* McGill, 59 Ga. 649. See also Granniss *v.* Massett, 20 Ga. 401.

Illinois.— Bradley *v.* George Challoner's Sons Co., 103 Ill. App. 618; Webb *v.* Perkins, 60 Ill. App. 91. But see Herdman *v.* Cooper, 39 Ill. App. 330.

Indiana.— Benton *v.* Shreeve, 4 Ind. 66.

Iowa.— Reese *v.* Dobbins, 51 Iowa 282, 1 N. W. 540, applying the rule where plaintiff

(II) *Award to Next Highest Bidder.* The rule is well settled that where the purchaser to whom property is sold at an execution sale refuses or neglects to complete his purchase by the payment of the amount of his bid, the sheriff is not authorized to accept the bid of the next highest bidder and treat him as the purchaser. But where he elects to avoid the sale on account of the non-payment of the purchase-money, a resale of the property becomes indispensable.[90]

f. Liability on Contract of Purchase — (I) *General Rule.* A purchaser at a sheriff's sale who refuses to comply with his contract of purchase is liable to an action by the sheriff, and the sheriff's right to recover the full price cannot be controverted if he at the time of the trial has the ability to deliver the property, or if it has been previously placed at the disposal of the purchaser by a tender thereof.[91] However, where the judgment creditor is the purchaser, the officer

is himself the purchaser and refuses to pay the costs.

Kentucky.— Downing *v.* Brown, Hard. 181.

Louisiana.— Haynes *v.* Breaux, 16 La. Ann. 142; Stoute *v.* Voorhies, 4 La. 392; Gallier *v.* Garcia, 2 Rob. 319; Durnford *v.* Degruys, 8 Mart. 220, 13 Am. Dec. 285; Dufau *v.* Massicote, 3 Mart. 289.

Maryland.— Hardisty *v.* Wilson, 2 Gill 481, 41 Am. Dec. 439.

Massachusetts.— Croacher *v.* Oesting, 143 Mass. 195, 9 N. E. 532; Wilson *v.* Loring, 7 Mass. 392.

Missouri.— Leach *v.* Koenig, 55 Mo. 451.

Nevada.— Dazet *v.* Landry, 21 Nev. 291, 30 Pac. 1064.

New Jersey.— Den *v.* Young, 12 N. J. L. 300; Woodhull *v.* Neafie, 2 N. J. Eq. 409.

New York.— Robinson *v.* Brennan, 90 N. Y. 208.

North Carolina.— Isler *v.* Andrews, 66 N. C. 552.

Ohio.— Bisbee *v.* Hall, 3 Ohio 449; Thompson *v.* McManama, 2 Disn. 213.

Pennsylvania.— Kelly *v.* Green, 63 Pa. St. 299; Wright's Appeal, 25 Pa. St. 373; Gaskell *v.* Morris, 7 Watts & S. 32; Robins *v.* Bellas, 2 Watts 359; Negley *v.* Stewart, 10 Serg. & R. 207; South *v.* Lavens, 6 Wkly. Notes Cas. 528.

South Carolina.— Lewis *v.* Brown, 4 Strobh, 293; Elfe *v.* Gadsden, 1 Strobh. 225. See Brown *v.* Barnwell Mfg. Co., 46 S. C. 415, 24 S. E. 191.

Tennessee.— Roberts *v.* Westbrook, 1 Coldw. 115.

Utah.— Kershaw *v.* Dyer, 6 Utah 239, 21 Pac. 1000, 24 Pac. 621.

See 21 Cent. Dig. tit. "Execution," § 659 *et seq.*

Compare Wortman *v.* Conyngham, 30 Fed. Cas. No. 18,056, Pet. C. C. 241.

Delivery of chattel to purchaser.— It was held in Cochran *v.* Roundtree, 3 Strobh. (S. C.) 217, that if the sheriff makes an unconditional delivery of a chattel sold at execution sale, the sale is thereby rendered complete and the sheriff cannot afterward reseize and resell because the price has not been paid.

90. Swortzell *v.* Martin, 16 Iowa 519; New Orleans *v.* Pellerin, 12 La. Ann. 92; Mathews *v.* Clifton, 13 Sm. & M. (Miss.) 330; Dazet *v.* Landry, 21 Nev. 291, 30 Pac. 1064; Thompson *v.* McManama, 2 Disn. (Ohio) 213. *Contra,* Cummings *v.* McGill, 6 N. C. 357; Zantzinger *v.* Pole, 1 Dall. (Pa.) 419, 1 L. ed. 204.

91. *Alabama.*— Lamkin *v.* Crawford, 8 Ala. 153.

Georgia.— Barnes *v.* Bluthenthal, 101 Ga. 598, 28 S. E. 1017, 68 Am. St. Rep. 339; Cureton *v.* Wright, 73 Ga. 8.

Illinois.— Webb *v.* Perkins, 60 Ill. App. 91.

Indiana.— Hunt *v.* Gregg, 8 Blackf. 105.

Kansas.— Walker *v.* Braden, 34 Kan. 660, 9 Pac. 613.

Kentucky.— Georgetown Water Co. *v.* Fidelity Trust, etc., Co.'s Trustee, 78 S. W. 113, 25 Ky. L. Rep. 1739.

Minnesota.— Armstrong *v.* Vroman, 11 Minn. 220, 83 Am. Dec. 81.

Nebraska.— Jones *v.* Null, 9 Nebr. 254, 2 N. W. 350.

New York.— Chappell *v.* Dann, 21 Barb. 17.

North Carolina.— McKee *v.* Lineberger, 69 N. C. 217.

Pennsylvania.— Forster *v.* Hayman, 26 Pa. St. 266; Coffman *v.* Hampton, 2 Watts & S. 377, 37 Am. Dec. 511; Davis *v.* Baxter, 5 Watts 515; Schœning *v.* Leeds, 7 Wkly. Notes Cas. 243; Laflin, etc., Powder Co. *v.* Scholtes, 1 Leg. Rec. 129. See also Piper *v.* Martin, 8 Pa. St. 206.

Rhode Island.— Lynch *v.* Earle, 18 R. I. 531, 28 Atl. 763; Upham *v.* Hamill, 11 R. I. 565, 23 Am. Rep. 525.

South Carolina.— Thayer *v.* Charleston Dist., 2 Bay 169, where the inchoate right of dower of debtor's wife attached to the land.

Tennessee.— Shaw *v.* Smith, 9 Yerg. 97.

Texas.— Lockridge *v.* Baldwin, 20 Tex. 303, 70 Am. Dec. 385; Cayce *v.* Curtis, Dall. 403. See also Yarborough *v.* Wood, 42 Tex. 91, 19 Am. Rep. 44.

See 21 Cent. Dig. tit. "Execution," § 662.

Amount of bid, not the value of the property, is the measure of recovery. Mazelin *v.* Martin, Wils. (Ind.) 423.

A mistake as to supposed encumbrances which did not exist might afford ground for setting aside the sale, but the purchaser could not be compelled to take the property at a price consisting of his bid plus the amount of such an encumbrance removed. Gregg *v.* Strange, 3 Ind. 366.

Sales on credit have been held to be within the rule of the text. Kilgore *v.* Peden, 1 Strobh. (S. C.) 18.

can only hold him liable for the amount of his bid in excess of the amount due on his judgment.[92]

(II) *Loss on Resale* — (A) *General Rule.* Where the sheriff resells property which the purchaser at the first sale has refused or neglected to pay for, there is an implied contract by the first purchaser to pay the difference which is thus ascertained between his bid and the price realized at the subsequent sale.[93]

(B) *Notice of Resale.* The rule has been laid down in several jurisdictions that a purchaser at an execution sale who refuses to complete the sale by the payment of his bid cannot be held liable for loss on a resale of such property, unless notice is given to him of such resale and that he will be held liable.[94] In many jurisdictions, however, where the statutes provide that execution sales shall take place between specified hours of the day, where a bidder refuses or fails, after demand, to make payment, a resale may be made on the same day within those hours and without any additional notice to the first purchaser.[95]

92. Hunt *v.* Gregg, 8 Blackf. (Ind.) 105; Henry *v.* Meighen, 46 Minn. 548, 49 N. W. 323, 646; Cobb *v.* Pressly, 2 McMull. (S. C.) 416.

Officer's costs have been included. Cobb *v.* Pressly, 2 McMull. (S. C.) 416.

Ten per cent damages also have been allowed. Hunt *v.* Gregg, 8 Blackf. (Ind.) 105.

93. *Alabama.*— Lamkin *v.* Crawford, 8 Ala. 153; Robinson *v.* Garth, 6 Ala. 204, 41 Am. Dec. 47. See also Adams *v.* McMillan, 7 Port. 73.

Georgia.— Barnes *v.* Bluthenthal, 101 Ga. 598, 28 S. E. 1017, 68 Am. St. Rep. 339; Cureton *v.* Wright, 73 Ga. 8; Sharman *v.* Walker, 68 Ga. 148.

Illinois.— Herdman *v.* Cooper, 39 Ill. App. 330.

Indiana.— Williams *v.* Lines, 7 Blackf. 46.

Kentucky.— Linn Boyd Tobacco Warehouse Co. *v.* Terrill, 13 Bush 463.

Missouri.— Strawbridge *v.* Clark, 52 Mo. 21.

Pennsylvania.— Hughes *v.* Miller, 186 Pa. St. 375, 40 Atl. 492; Peck *v.* Whitaker, 103 Pa. St. 297; Spang *v.* Schneider, 10 Pa. St. 193; Coffman *v.* Hampton, 2 Watts & S. 377, 37 Am. Dec. 511; Whitaker *v.* Thompson, 2 Kulp 250; Keim *v.* Naefie, 16 Wkly. Notes Cas. 46; Taylor *v.* Shoener, 12 Wkly. Notes Cas. 504; Schœning *v.* Leeds, 7 Wkly. Notes Cas. 243.

South Carolina.— Towles *v.* Turner, 3 Hill 178; Minter *v.* Dent, 2 Bailey 291; Gardner *v.* Sanders, 2 Brev. 180.

Utah.— Kershaw *v.* Dyer, 6 Utah 239, 21 Pac. 1000, 24 Pac. 621.

See 21 Cent. Dig. tit. "Execution," § 663.

In North Carolina and Tennessee it has been held that if the sheriff resells he cannot hold the first purchaser liable for the difference between his bid and a lesser sum realized on the resale. Grier *v.* Yontz, 50 N. C. 371; Harvey *v.* Adams, 9 Lea (Tenn.) 289; Roberts *v.* Westbrook, 1 Coldw. (Tenn.) 115.

In South Carolina it has been held that the sheriff must resell on the same day or the next succeeding sale day in order to recover loss on the resale from the recusant purchaser. Yongue *v.* Cathcart, 2 Strobh. 221.

Mention of the first incomplete sale should be made by the sheriff in his return. Linn Boyd Tobacco Warehouse Co. *v.* Terrill, 13 Bush (Ky.) 463.

Mistake of law has been held to be a good defense against an action to recover from a bidder the difference between his bid and the price realized on the second sale. Collier *v.* Perkerson, 31 Ga. 117.

The Missouri statute does not authorize a judgment on motion against one who has been substituted in the place of the purchaser at the sale, with the consent of such purchaser, and who has been reported as the purchaser by the sheriff; this summary remedy by motion can be had only against the actual purchaser at the sale. Wimer *v.* Obear, 23 Mo. 242.

Where the proceeds of the second sale are sufficient to satisfy the execution and costs, the sheriff cannot sustain the action against the first purchaser for the difference between his bid and the amount obtained at the second sale. Reed *v.* Shepperd, 38 Mo. 463.

94. Harbison *v.* Timmons, 139 Ill. 167, 28 N. E. 982 [*affirming* 38 Ill. App. 244]; Maulding *v.* Steele, 105 Ill. 644; Thrifts *v.* Fritz, 101 Ill. 457; Hill *v.* Hill, 58 Ill. 239; Hunt *v.* Gregg, 8 Blackf. (Ind.) 105; Williams *v.* Lines, 7 Blackf. (Ind.) 46, holding that such notice must contain an offer by the sheriff to convey the property to the purchaser before the second sale. See also Givan *v.* Doe, 5 Blackf. (Ind.) 260; Phillips *v.* Goldman, 75 Mo. 686; Shaw *v.* Potter, 50 Mo. 281. See, however, Illingworth *v.* Miltenberger, 11 Mo. 80; Galpin *v.* Lamb, 29 Ohio St. 529.

95. *Georgia.*— Humphrey *v.* McGill, 59 Ga. 649.

Iowa.— May *v.* Sturdivant, 75 Iowa 116, 39 N. W. 221, 9 Am. St. Rep. 463.

Louisiana.— Durnford *v.* Degruys, 8 Mart. 220, 13 Am. Dec. 285.

Massachusetts.— Wilson *v.* Loring, 7 Mass. 392.

Nebraska.— Jones *v.* Null, 9 Nebr. 254, 2 N. W. 350.

Pennsylvania.— Gaskell *v.* Morris, 7 Watts & S. 32; Taylor *v.* Shoener, 12 Wkly. Notes Cas. 504. See Holdship *v.* Doran, 2 Penr. & W. 9, holding that unless the bidder is

(c) *Terms of Resale.* However, any alteration in the terms of the first sale upon the resale of the property will release the first purchaser from all liabilities for the loss occasioned by the second sale.[96]

g. Actions to Recover — (i) *In General.* Upon the failure of the purchaser to comply with the terms of his bid, the sheriff may proceed by appropriate action against such purchaser to recover the damages thereby occasioned;[97] and some of the statutes provide for a proceeding by motion on notice for judgment for the purchase-money.[98]

(ii) *Measure of Damages.*[99] In an action by the sheriff against the purchaser at an execution sale for failure to make payment for the property purchased, the loss actually sustained by the judgment creditor is in general the measure of damages.[1]

(iii) *Defenses* — (a) *Defective Title.* The general rule is that a purchaser at an execution sale cannot avoid his bid by showing a defective title in the judgment debtor.[2]

(b) *Total Failure of Title.* The rule is likewise well recognized that, in the

notoriously insolvent, the sheriff cannot long before the return-day of his writ make a return that the purchaser has not paid, and that the property is returned for want of buyers, and where he does so the bidder cannot be held for the difference in price at the two sales. See, however, Girard L. Ins. Co. *v.* Young, 8 Phila. 16.

South Carolina.— Minter *v.* Dent, 2 Bailey 291.

See 21 Cent. Dig. tit. "Execution," § 663.

96. Hare *v.* Bedell, 98 Pa. St. 485; Freeman *v.* Husband, 77 Pa. St. 389; Union Sav. Bank *v.* Fife, 42 Leg. Int. (Pa.) 363; Zimmerman *v.* Eckert, 2 Pennyp. (Pa.) 221. See also Banes *v.* Gordon, 9 Pa. St. 426; Paul *v.* Shallcross, 2 Rawle (Pa.) 326; Yongue *v.* Cathcart, 2 Strobh. (S. C.) 221, holding, where the sheriff brought an action to recover from the first purchaser a difference between his bid and the sum obtained at a resale, that the action could not be sustained, as the sheriff at the resale failed to proclaim that he was selling at the risk of the first purchaser.

The same property must be resold as the property of the identical parties whose property had been bid off at the first sale by the purchaser. Hendrick *v.* Davis, 27 Ga. 167, 73 Am. Dec. 726.

97. *Alabama.*— Lamkin *v.* Crawford, 8 Ala. 153. See also Andrews *v.* Keith, 34 Ala. 722.

Georgia.— Glenn *v.* Black, 31 Ga. 393, holding that in such action the writ must be produced or its absence accounted for.

Illinois.— Perkins *v.* Webb, 169 Ill. 86, 48 N. E. 322 [*affirming* 67 Ill. App. 474].

Kansas.— Walker *v.* Braden, 34 Kan. 660, 9 Pac. 613.

Mississippi.— Hand *v.* Grant, 5 Sm. & M. 508, 43 Am. Dec. 528. See Adams *v.* Griffin, 11 Miss. 556, holding that the sheriff cannot maintain the action without showing that he had suffered damages by the acts of defendant.

Pennsylvania.— Leeds *v.* Seery, 2 Wkly. Notes Cas. 223; Lowry *v.* Haberlin, 8 Pa. Dist. 382.

See 21 Cent. Dig. tit. "Execution," § 665.

98. Johns *v.* Trick, 22 Cal. 511; Steele *v.* Hanna, 8 Blackf. (Ind.) 326; Hunt *v.* Gregg, 8 Blackf. (Ind.) 105. See Sutton *v.* Baldwin, 146 Ind. 361, 45 N. E. 518.

99. Damages generally see DAMAGES.

1. Lamkin *v.* Crawford, 8 Ala. 153.

In Texas, however, the statute provides that the purchaser of property at an execution sale refusing to take it shall be liable to pay plaintiff twenty per cent of the value of the property thus bid off. Towell *v.* Smith, (Civ. App. 1900) 55 S. W. 186.

2. *Indiana.*— Rodgers *v.* Smith, 2 Ind. 526.

Iowa.— Cameron *v.* Logan, 8 Iowa 434; Dean *v.* Morris, 4 Greene 312.

Louisiana.— See Denegre *v.* Fairex, 52 La. Ann. 1760, 28 So. 316.

New Jersey.— See Delaware, etc., R. Co. *v.* Blair, 28 N. J. L. 139.

New York.— Syracuse Sav. Bank *v.* Burton, 6 N. Y. Civ. Proc. 216.

Pennsylvania.— Smith *v.* Painter, 5 Serg. & R. 223, 9 Am. Dec. 334.

South Carolina.— Long *v.* McKissick, 50 S. C. 218, 27 S. E. 636; Yates *v.* Bond, 2 McCord 382.

See 21 Cent. Dig. tit. "Execution, § 665.

The rule in Louisiana is that the purchaser cannot retain the price nor obtain the canceling of his twelve months' bond for defective title from informalities in the sale or the existence of prior mortgages, unless disturbed in his possession or justified in believing that he will be, in which case he may retain the price until relieved from his apprehension or protected by adequate security. Fortier *v.* Slidell, 7 Rob. 398; Collins *v.* Daly, 4 Rob. 112; Foster *v.* Murphy, 5 Mart. N. S. 79; Stille *v.* Brownson, 5 Mart. N. S. 47; Davenport *v.* Fortier, 3 Mart. N. S. 695; Adat *v.* Casteres, 3 Mart. N. S. 220. However, under La. Civ. Code, § 2535, the above rule does not apply where the purchaser was informed of the defect in title to the property or the danger of eviction before sale. Bonnecaze *v.* Grannery, 5 La. Ann. 166; Bemiss *v.* Dwight, 3 La. Ann. 337.

absence of fraud,[3] a court of equity cannot relieve a purchaser at a judicial sale on the ground that title fails.[4]

(c) *Fraud or Mutual Mistake.* However, notwithstanding the rule of *caveat emptor*, the purchaser at an execution sale will be protected from paying the purchase-price where he was induced to purchase through the misrepresentations of the judgment creditor or debtor, even though he might have ascertained their falsity by the examination of the public records.[5] Likewise where a plain mistake, not as to the title, but as to the property levied on and sold, has been made by the sheriff, the execution defendant, and the purchaser, where the mistake materially affects the value of the property actually sold, and the purchaser applies to have the sale set aside before the money has been actually paid he is entitled in equity to such relief.[6]

(d) *Defects in Proceedings Prior to Sale.* In an action by the sheriff to recover the price bid by a purchaser at an execution sale, or to recover the difference between his bid and the amount realized at a resale of the property, defects in the proceeding, prior to the sale, such as in the levy,[7] or in the judgment, where the judgment is not void, cannot be urged in defense.[8]

(iv) *Parties.*[9] The general rule is that whether the action against the purchaser at an execution sale be for the whole purchase-price, or for the deficiency resulting from a resale only, it should be brought in the name of the officer conducting the sale;[10] many of the decisions going the length of holding that the

3. See *infra*, X, A, 5, g, (III), (C).

4. The maxim *caveat emptor* applies the same at law as in equity in respect to such sales, and there is no warranty of title, either express or implied.

Arkansas.— Danley *v.* Rector, 10 Ark. 211, 50 Am. Dec. 242.

California.— Meherin *v.* Saunders, 131 Cal. 681, 63 Pac. 1084, 54 L. R. A. 272.

Illinois.— Holmes *v.* Shaver, 78 Ill. 578; England *v.* Clark, 5 Ill. 486.

Indiana.— Dunn *v.* Frazier, 8 Blackf. 432.

Iowa.— Hamsmith *v.* Espy, 19 Iowa 444.

Kentucky.— McGhee *v.* Ellis, 4 Litt. 244, 14 Am. Dec. 124.

Mississippi.— Hand *v.* Grant, 10 Sm. & M. 514.

Pennsylvania.— Smith *v.* Painter, 5 Serg. & R. 223, 9 Am. Dec. 344.

South Carolina.— Jones *v.* Burr, 5 Strobh. 147, 53 Am. Dec. 699; Murphy *v.* Higginbottom, 2 Hill 397, 27 Am. Dec. 395; Davis *v.* Murray, 2 Mill 143, 12 Am Dec. 661.

Tennessee.— Whitson *v.* Fowlkes, 1 Head 553, 73 Am. Dec. 184; Henderson *v.* Overton, 2 Yerg. 394, 24 Am. Dec. 492.

Vermont.— Stearns *v.* Edson, 63 Vt. 259, 22 Atl. 420, 25 Am. St. Rep. 758.

United States.— U. S. *v.* Duncan, 25 Fed. Cas. No. 15,005, 4 McLean 207.

See 21 Cent. Dig. tit. "Execution," § 662.

See, however, Starr *v.* U. S., 8 App. Cas. (D. C.) 552, holding that if for any cause the sale is so void that it cannot transfer the title and interest of defendant, the purchaser is not bound by his bid.

If the sheriff should refuse to make title it seems that the rule would be different. Moore *v.* Akin, 2 Hill (S. C.) 403.

5. *California.*— Webster *v.* Haworth, 8 Cal. 21, 68 Am. Dec. 287.

Kentucky.— Wolford *v.* Phelps, 2 J. J. Marsh. 31.

New Jersey.— See Delaware, etc., R. Co. *v.* Blair, 28 N. J. L. 139.

New York.— Dwight's Case, 15 Abb. Pr. 259.

South Carolina.— Menter *v.* Dent, 2 Bailey 291; Evans *v.* Rogers, 2 Nott & M. 563.

See 21 Cent. Dig. tit. "Execution, § 665.

Compare Vanslyck *v.* Mills, 34 Iowa 375.

6. Mulks *v.* Allen, 12 Wend. (N. Y.) 253; Reid *v.* House, 2 Humphr. (Tenn.) 576. *Compare* Lansing *v.* Quackenbush, 5 Cow. (N. Y.) 38, where a court of law refused to correct the indorsement of the execution when property had been sold which did not belong to defendant, on the ground that a court of equity was the proper tribunal to grant relief.

7. Emley *v.* Drum, 36 Pa. St. 123; Cooper *v.* Borrall, 10 Pa. St. 491. See also Hughes *v.* Miller, 186 Pa. St. 375, 40 Atl. 492, opinion of the court by Sterrett, C. J.

8. Hower *v.* Houpt, 1 Leg. Gaz. (Pa.) 101. See also Wood *v.* Levis, 14 Pa. St. 9, holding that where a sheriff imposed terms at a sale different from those the law imposed, the remedy of the purchaser is by application to the court, after the return of the writ, and that he is not entitled to defend on that account, on a proceeding on his bond for part of the purchase-money.

9. Parties generally see PARTIES.

10. *Alabama.*— Bell *v.* Owen, 8 Ala. 312; Lamkin *v.* Crawford, 8 Ala. 153; Robinson *v.* Garth, 6 Ala. 204, 41 Am. Dec. 47.

Illinois.— Webb *v.* Perkins, 60 Ill. App. 91.

Minnesota.— Armstrong *v.* Vroman, 11 Minn. 220, 83 Am. Dec. 81.

Missouri.— Wiley *v.* Robert, 27 Mo. 388.

New Jersey.— Townshend *v.* Simon, 38 N. J. L. 239.

North Carolina.— McKee *v.* Lineberger, 69 N. C. 217.

execution creditor cannot maintain such action against the purchaser, as there is no privity between them.[11]

(v) *Evidence.*[12] In many jurisdictions the rule is stated that in an action by a sheriff to recover the purchase-price of property sold under execution, the return of the officer is sufficient *prima facie* evidence to support the action.[13]

6. Assignment[14] by Purchaser. The rule is well settled that a purchaser at an execution sale may assign his contract to another, and that the sheriff's deed to such assignee will be valid.[15] However, a conveyance to one who was not the purchaser at an execution sale is void, unless authorized by an assignment.[16]

7. Entry or Record of Sale. In a majority of jurisdictions, by statutory provisions, the officer conducting the sale is required to make an entry or record thereof, or file a duplicate copy of the certificate of sale required by statute, in the office of the clerk or registrar of deeds within a reasonable time thereafter, in order that the parties whose interests are affected may have proper notice.[17]

8. Certificate of Sale[18] — a. In General. In most jurisdictions where the

Pennsylvania.— Gaskell *v.* Morris, 7 Watts & S. 32; Holdship *v.* Doran, 2 Penr. & W. 9.

South Carolina.— Towles *v.* Turner, 3 Hill 178; Gardner *v.* Sanders, 2 Brev. 180.

See 21 Cent. Dig. tit. "Execution," § 666.

11. *Indiana.*— Laverty *v.* Chamberlain, 7 Blackf. 556.

Ohio.— Galpin *v.* Lamb, 29 Ohio St. 529.

Oregon.— Burbank *v.* Dodd, (1884) 4 Pac. 303.

Pennsylvania.— Freeman *v.* Husband, 77 Pa. St. 389; Gaskill *v.* Morris, 7 Watts & S. 32; Adams *v.* Adams, 4 Watts 160; Hutchinson *v.* Allen, 1 Wkly. Notes Cas. 123; Moser *v.* Quirk, 2 Leg. Rec. 1.

Tennessee.— Harvey *v.* Adams, 9 Lea 289. See Roberts *v.* Westbrook, 1 Coldw. 115.

See 21 Cent. Dig. tit. "Execution," § 666.

12. **Evidence** generally see Evidence.

13. Hand *v.* Grant, 5 Sm. & M. (Miss.) 508, 43 Am. Dec. 528; Hyskill *v.* Givin, 7 Serg. & R. (Pa.) 369; Nichol *v.* Ridley, 5 Yerg. (Tenn.) 63, 26 Am. Dec. 254.

To prove the sale and produce the writ is all that is necessary. Davis *v.* Baxter, 5 Watts (Pa.) 515. *Compare* Glenn *v.* Black, 31 Ga. 393, **holding that** in a suit by the sheriff for the use of a plaintiff in execution, against a purchaser at a sheriff's sale, the execution under which the sale is made must be introduced in evidence, or its absence satisfactorily accounted for.

14. **Assignment** generally see Assignments, 4 Cyc. 1 *et seq.*

15. *Arizona.*— Oliver *v.* Dougherty, (1902) 68 Pac. 553.

Georgia.— Parker *v.* Johnson, 81 Ga. 254, 7 S. E. 317.

Illinois.— Carpenter *v.* Sherfy, 71 Ill. 427; Mansfield *v.* Hoagland, 52 Ill. 320.

Indiana.— Conger *v.* Babcock, 87 Ind. 497, holding that a sheriff's certificate of sale is assignable, either before or after the expiration of the period of redemption.

Kentucky.— Jamison *v.* Tudor, 3 B. Mon. 355.

New York.— People *v.* Muzzy, 1 Den. 239.

North Carolina.— Carter *v.* Spencer, 29 N. C. 14; Den *v.* Poe, 19 N. C. 103; Blount *v.* Davis, 13 N. C. 19; Shamburger *v.* Kennedy, 12 N. C. 1; Smith *v.* Kelly, 7 N. C. 507.

Tennessee.— Trotter *v.* Nelson, 1 Swan 7.

See 21 Cent. Dig. tit. "Execution," § 667.

16. Carpenter *v.* Sherfy, 71 Ill. 427; Dickerman *v.* Burgess, 20 Ill. 266; Morgan *v.* Hannah, 11 Humphr. (Tenn.) 122, where the sheriff's deed to a third person recited that it was so made by order of the execution plaintiff.

17. *Arizona.*— Webber *v.* Kastner, (1898) 53 Pac. 207.

California.— Foorman *v.* Wallace, 75 Cal. 552, 17 Pac. 680.

Illinois.— York *v.* Briscoe, 67 Ill. 533.

Kansas.— Hazen *v.* Webb, 68 Kan. 308, 74 Pac. 1111, holding that such return or entry should show when or how long the officer caused a notice of sale to be published.

Louisiana.— Huntington *v.* Bordeaux, 42 La. Ann. 346, 7 So. 553.

Michigan.— Drake *v.* McLean, 47 Mich. 102, 10 N. W. 126.

Minnesota.— Bidwell *v.* Coleman, 11 Minn. 78.

New York.— Bowers *v.* Arnoux, 33 N. Y. Super. Ct. 530.

South Carolina.— Long *v.* McKissick, 50 S. C. 218, 27 S. E. 636.

Wisconsin.— Knowlton *v.* Ray, 4 Wis. 288.

See 21 Cent. Dig. tit. "Execution," § 667 *et seq.*

Compare Tuttle *v.* Gates, 24 Me. 395, qualifying the rule in the case of certain kinds of personalty.

Except as between the parties it has been held in Louisiana that a failure of the sheriff to make the proper record will render the sale utterly void. Raiford *v.* Wood, 14 La. Ann. 116.

Unless the execution debtor or innocent third persons have been injured thereby, it has been held in Michigan that the sheriff's failure to file the certificate cannot affect the purchaser's title. Taylor *v.* Gladwin, 40 Mich. 232.

Where the statute is merely directory the purchaser will not be prejudiced by the sheriff's omission to file a certificate. Jackson *v.* Young, 5 Cow. (N. Y.) 269, 15 Am. Dec. 473.

18. **"The certificate is a memorial** signed by the sheriff, in which what has taken place

execution debtor is allowed a designated time from the date of sale in which to redeem the property, the statutes provide for the execution and delivery of a certificate of sale by the officer to the purchaser at such sale.[19]

b. Form and Contents.[20] This certificate should recite the parties to the action, the date and amount of judgment, a description of the property sold, the date of the sale and amount bid, the name of the purchaser, and the redemption period.[21] The court which issued the fieri facias will upon motion on a proper showing compel the sheriff to correct an error or omission in a certificate of sale of lands made by him.[22]

9. CONFIRMATION — a. In General. While, in a majority of the United States, no order of confirmation of an execution sale is necessary,[23] yet in several jurisdictions, by statutory enactment, the proceedings of the officer conducting an execution sale are required to be reported to the court from whence the writ under which the officer acted emanated, for the confirmation or disapproval of the sale, and under such statutes an execution sale is not complete until it has been confirmed by the court.[24]

at the sale is set forth. It is the evidence of a sale whereby, subject to the right of redemption and of possession in the judgment debtor for the time allowed therefor, the entire equitable title is conditionally vested in the purchaser, subject to be defeated by a redemption, but if not so redeemed, the certificate is evidence of his right to a deed which shall vest in him the dry legal title which remained in the judgment debtor." Foorman *v.* Wallace, 75 Cal. 552, 556, 17 Pac. 680.

19. *Arizona.*— Webber *v.* Kastner, (1898) 53 Pac. 207.

California.— Foorman *v.* Wallace, 75 Cal. 552, 17 Pac. 680.

Illinois.— Curtis *v.* Swearingen, 1 Ill. 207; Whitenack *v.* Agartt, 56 Ill. App. 72.

Indiana.— Hays *v.* Wilstach, 82 Ind. 13; Hockett *v.* Alston, 3 Ind. App. 432, 58 S. W. 675.

Michigan.— Drake *v.* McLean, 47 Mich. 102, 10 N. W. 126.

Minnesota.— Ritchie *v.* Ege, 58 Minn. 291, 59 N. W. 1020; Armstrong *v.* Vroman, 11 Minn. 220, 88 Am. Dec. 81; Barnes *v.* Kerlinger, 7 Minn. 82, holding, however, that the omission of the sheriff to file a certificate may not affect the validity of a sale of realty.

Nevada.— Nesbitt *v.* Delamar's Nevada Gold Min. Co., 24 Nev. 273, 52 Pac. 609, 53 Pac. 178, 77 Am. St. Rep. 807.

New York.— Bartlett *v.* Gale, 4 Paige 503.

See 21 Cent. Dig. tit. "Execution," § 668.

A sheriff's bill of sale of goods need not be in the form of a certificate of sale if it contains all the essentials of a certificate. Lay *v.* Neville, 25 Cal. 545.

The certificate of sale shows color of title in the purchaser. Nesbitt *v.* Delamar's Nevada Gold Min. Co., 24 Nev. 273, 52 Pac. 609, 53 Pac. 178, 77 Am. St. Rep. 807. See also ADVERSE POSSESSION, 1 Cyc. 968.

20. **For form of certificate of sale** see Jackson *v.* Jones, 9 Cow. (N. Y.) 182.

21. *Illinois.*— Fitch *v.* Pinckard, 5 Ill. 69.

Indian Territory.— See Hockett *v.* Alston, 3 Ind. Terr. 432, 58 S. W. 675.

Minnesota.— Bartleson *v.* Thompson, 30 Minn. 161, 14 N. W. 795.

New York.— Goldman *v.* Kennedy, 49 Hun 157, 1 N. Y. Suppl. 599; Mascraft *v.* Van Antwerp, 3 Cow. 334. See also Holman *v.* Holman, 66 Barb. 215.

Tennessee.— Maxwell *v.* King, 3 Yerg. 460.

Wisconsin.— Knowlton *v.* Ray, 4 Wis. 288. See also Sexton *v.* Rhames, 13 Wis. 99.

See 21 Cent. Dig. tit. "Execution," § 668.

Leaving the amount of the judgment and also the amount of the costs in blank has been held to render the certificate void. Maxwell *v.* King, 3 Yerg. (Tenn.) 460.

Sealing an attestation by witnesses was held to be unnecessary to constitute a valid certificate. Bidwell *v.* Coleman, 11 Minn. 78.

Acknowledgment, as in the case of deeds, has been required. Knowlton *v.* Ray, 4 Wis. 288.

Certificate executed by deputy.—It has been held in Missouri that a sheriff's certificate of sale must be made in the name of the sheriff, although a deputy may execute it. Evans *v.* Ashley, 8 Mo. 177; Evans *v.* Wilder, 5 Mo. 313, 7 Mo. 359.

22. Puterbaugh *v.* Elliott, 22 Ill. 157; Bixby *v.* Roe, 2 Mich. N. P. 152 (where the sheriff was allowed to amend his certificate on plaintiff's motion after his term of office had expired); Richards *v.* Varnum, 8 How. Pr. (N. Y.) 79; Smith *v.* Hudson, 1 Cow. (N. Y.) 430. See also White *v.* Crow, 110 U. S. 183, 4 S. Ct. 71, 28 L. ed. 113 [*affirming* 17 Fed. 98, 5 McCreary 310].

A slight variance between the sheriff's return and the recitals in the certificate of purchase as to the date of sale or the amount of the execution has been held to be immaterial. Chicago Dock, etc., Co. *v.* Kinzie, 93 Ill. 415; Kinney *v.* Knoebel, 47 Ill. 417. See also People *v.* Muzzy, 1 Den. (N. Y.) 239.

23. Webster *v.* Daniel, 47 Ark. 131, 14 S. W. 550.

24. *Georgia.*— Palmour *v.* Roper, 119 Ga. 10, 45 S. E. 790.

Kansas.— Johnson *v.* Lindsay, 27 Kan. 514; Wheatley *v.* Tutt, 4 Kan. 195.

b. Motion For. The motion for the confirmation of the sale may be made at any time after the sheriff has made his return, by any person interested therein, or such sale may be confirmed by the court *ex mero motu*, without the consent of the sheriff.[25]

c. Determination of Motion. Upon the hearing of the motion by the court, it should either confirm or set aside the sale, but should not modify its terms;[26] and under some statutes, on such hearing, the court cannot look beyond the return of the officer, and if such return on its face shows that the proceedings were regular, it is the duty of the court to confirm the sale.[27]

d. Conclusiveness and Effect of Order — (i) *General Rule.* Since the order of confirmation of an execution sale is merely an adjudication that the proceedings of the officer in conducting the sale, as they appear of record, are regular, and a direction to the sheriff to complete the sale, such order is not *res judicata* in an action to recover the land founded on such sale so as to preclude

Maryland.— Dorsey *v.* Dorsey, 28 Md. 388.

Nebraska.— Moore *v.* Boyer, 52 Nebr. 446, 72 N. W. 586; Yeazel *v.* White, 40 Nebr. 432, 58 N. W. 1020, 24 L. R. A. 449; Bachle *v.* Webb, 11 Nebr. 423, 9 N. W. 473.

North Dakota.— Warren *v.* Stinson, 6 N. D. 393, 70 N. W. 279.

Ohio.— McBain *v.* McBain, 15 Ohio St. 337, 86 Am. Dec. 478; Northrop *v.* Devore, 11 Ohio 359; Curtis *v.* Norton, 1 Ohio 278; Bear *v.* Bookmiller, 3 Ohio Cir. Ct. 484, 2 Ohio Cir. Dec. 277; Marshall *v.* Flinn, 1 Cinc. Super. Ct. 415.

South Dakota.— Baxter *v.* O'Leary, 10 S. D. 150, 72 N. W. 91, 66 Am. St. Rep. 702, holding, however, that where the proceedings are shown to be regular in other respects, mere failure to have the sale confirmed will not defeat the purchaser's title, especially on collateral attack by one who does not claim through or under the judgment debtor.

Washington.— Knowles *v.* Rogers, 27 Wash. 211, 67 Pac. 572; Brooks *v.* Lewis, 22 Wash. 192, 60 Pac. 121; Morrow *v.* Moran, 5 Wash. 692, 36 Pac. 770, holding, however, that the purchase of land at an execution sale and the payment of the price gives the purchaser an equitable title, whether the sale is confirmed or not.

United States.— Deputron *v.* Young, 134 U. S. 241, 10 S. Ct. 539, 33 L. ed. 923 [*affirming* 37 Fed. 46].

See 21 Cent. Dig. tit. "Execution," § 669.

25. *Kansas.*— Cowdin *v.* Cowdin, 31 Kan. 528, 3 Pac. 369; Ferguson *v.* Cutt, 8 Kan. 370.

North Dakota.— Warren *v.* Stinson, 6 N. D. 293, 70 N. W. 279.

Oklahoma.— Payne *v.* Long-Bell Lumber Co., 9 Okla. 683, 60 Pac. 235.

Oregon.— Miller *v.* British Columbia Bank, 2 Oreg. 291.

South Dakota.— Baxter *v.* O'Leary, 10 S. D. 150, 72 N. W. 91, 66 Am. St. Rep. 702.

Washington.— Whitworth *v.* McKee, 32 Wash. 83, 72 Pac. 1046.

See 21 Cent. Dig. tit. "Execution," § 670.

A mere judgment creditor not a party to the action cannot oppose the confirmation. Miller *v.* Oregon City Paper Mfg. Co., 3 Oreg. 24.

Judgment debtor, or his representatives in case of his death, may object to the confirmation. Miller *v.* British Columbia Bank, 2 Oreg. 291.

Notice to the judgment debtor of the motion for confirmation has been held to be unnecessary. Whitworth *v.* McKee, 32 Wash. 83, 72 Pac. 1046.

26. Benz *v.* Hines, 3 Kan. 390, 89 Am. Dec. 594; Kinnear *v.* Lee, 28 Md. 488; Ohio L. Ins., etc., Co. *v.* Goodin, 10 Ohio St. 557. See also Palmour *v.* Roper, 119 Ga. 10, 45 S. E. 790; Brooks *v.* Lewis, 22 Wash. 192, 60 Pac. 121.

27. *Kansas.*— McDonald *v.* Citizens' Nat. Bank, (1897) 51 Pac. 289; Keene Five-Cent Sav. Bank *v.* Marsh, 31 Kan. 771, 3 Pac. 511; Cowdin *v.* Cowdin, 31 Kan. 528, 3 Pac. 369; Collins *v.* Ritchie, 31 Kan. 371, 2 Pac. 623; White-Crow *v.* White-Wing, 3 Kan. 276; Challiss *v.* Wise, 2 Kan. 193; Kœhler *v.* Ball, 2 Kan. 160, 83 Am. Dec. 451.

Nebraska.— Hoover *v.* Hale, 56 Nebr. 67, 76 N. W. 457; Bachle *v.* Webb, 11 Nebr. 423, 9 N. W. 473.

North Dakota.— Warren *v.* Stinson, 6 N. D. 293, 70 N. W. 279.

South Dakota.— Baxter *v.* O'Leary, 10 S. D. 150, 72 N. W. 91, 66 Am. St. Rep. 702.

Washington.— Krutz *v.* Batts, 18 Wash. 460, 51 Pac. 1054.

See 21 Cent. Dig. tit. "Execution," § 669.

Failure to comply literally with all the provisions of the law relating to the sale of real property on execution will not justify a court in denying a motion where it is evident that such failure was not prejudicial to defendant. Stull *v.* Seymour, 63 Nebr. 87, 88 N. W. 174.

Sound discretion must govern the court in granting or refusing the motion. Brigel *v.* Kittredge, 8 Ohio S. & C. Pl. Dec. 512, 5 Ohio N. P. 412.

Vacating confirmation order.— It has been held in Kansas that confirmation of a sale of land is an order that can only be reversed by the court making it after the term at which it was made. Livingston *v.* Lamb, 1 Kan. 221. See Linton *v.* Cathers, (Nebr. 1903) 95 N. W. 1044, for circumstances warranting the setting aside of an order of confirmation.

the introduction of evidence to show fraud in the conduct of the sale, or that it was based on a void judgment or execution.[28]

(II) *Cure of Irregularities.* The rule has been laid down in some jurisdictions that the confirmation of an execution sale of real estate cures all defects and irregularities in the proceedings relating thereto, where the court making the order is one of competent jurisdiction, and such order cannot be collaterally attacked.[29]

B. Opening or Vacating — 1. Parties Entitled — a. Parties of Record or Having Substantial Interest — (I) *General Rule.* The general rule is that strangers to an action have no right to interfere with its conduct, and a person not a party to the record has no standing in court on a motion to vacate an execution sale on the ground of irregularities, or of an alleged interest in the property sold.[30]

(II) *Limitation of Rule.* While it is true that the question as to conflicting title will not be determined by an application to set aside the sale, since, if the

28. Capital Bank *v.* Huntoon, 35 Kan. 577, 11 Pac. 369; Rice *v.* Poynter, 15 Kan. 263; Benz *v.* Hines, 3 Kan. 390, 89 Am. Dec. 594; White-Crow *v.* White-Wing, 3 Kan. 276; Kœhler *v.* Ball, 2 Kan. 160, 83 Am. Dec. 451; Dorsey *v.* Dorsey, 28 Md. 388; Linden *v.* Cathers, (Nebr. 1903) 95 N. W. 1044; Dawson *v.* Morris, 4 Yeates (Pa.) 341; Brooks *v.* Lewis, 22 Wash. 192, 60 Pac. 121. See also Schneider *v.* Artsman, 16 Ky. L. Rep. 250.

In Louisiana, however, it has been held that the judgment on the monition appearing to be regular in form it operated as a bar to further proceedings touching its validity, and that the defenses urged, such as want of description, etc., should have been urged at the trial of the suit for the monition. Willis *v.* Nicholson, 24 La. Ann. 545. But *compare* Jackson *v.* Ludeling, 21 Wall. (U. S.) 616, 22 L. ed. 492, holding that the judgment of confirmation under the Louisiana statute is conclusive only that there have been no fatal informalities, and not that the title of the purchaser was not obtained fraudulently, or as a trustee for others.

Effect by relation.— The general rule is that an order of confirmation of an execution sale relates back to the date thereof. Yeazel *v.* White, 40 Nebr. 432, 58 N. W. 1020, 24 L. R. A. 449; Fitch *v.* Minshall, 15 Nebr. 328, 18 N. W. 80; Christy *v.* Springs, 11 Okla. 710, 69 Pac. 864.

29. *Kansas.*— Capital Bank *v.* Huntoon, 35 Kan. 577, 11 Pac. 369.

Louisiana.— D'Arensbourg *v.* Chauvin, 9 La. Ann. 98.

Nebraska.— Wilcox *v.* Raben, 24 Nebr. 368, 38 N. W. 844, 8 Am. St. Rep. 270; Wyant *v.* Tuthill, 17 Nebr. 495, 23 N. W. 342; Neligh *v.* Keene, 16 Nebr. 407, 20 N. W. 277.

North Dakota.— Dakota Invest. Co. *v.* Sullivan, 9 N. D. 303, 83 N. W. 233, 81 Am. St. Rep. 584.

Oregon.— Leinenweber *v.* Brown, 24 Oreg. 548, 34 Pac. 475, 38 Pac. 4; McRae *v.* Daviner, 8 Oreg. 63; Dolph *v.* Barney, 5 Oreg. 191; Mathews *v.* Eddy, 4 Oreg. 225.

United States.— Hilton *v.* Otoe County Nat. Bank, 26 Fed. 202. See also Doolittle *v.* Bryan, 14 How. 563, 14 L. ed. 543.

See 21 Cent. Dig. tit. "Execution," § 672.

30. *Alabama.*—McLaughlin *v.* Bradford, 82 Ala. 431, 2 So. 515; Smith *v.* Houston, 16 Ala. 111; Fournier *v.* Curry, 4 Ala. 321, Ormond, J., delivering the opinion of the court.

Arkansas.— Smith *v.* Fletcher, (1889) 11 S. W. 824. See also Lawson *v.* Jordan, 19 Ark. 297, 70 Am. Dec. 596.

Georgia.— Morris *v.* Rogers, 104 Ga. 705, 30 S. E. 937.

Illinois.— Shirk *v.* Metropolis, etc., Gravel Road R. Co., 110 Ill. 661; McCormick *v.* Wheeler, 36 Ill. 114, 85 Am. Dec. 388; Durham *v.* Heaton, 28 Ill. 264, 1 Am. Dec. 275; Hitchcock *v.* Roney, 17 Ill. 231; Phillips *v.* Coffee, 17 Ill. 154, 63 Am. Dec. 357; Swiggart *v.* Harter, 5 Ill. 364, 39 Am. Dec. 418; Magnusson *v.* Cronholm, 51 Ill. App. 473.

Indiana.— Weaver *v.* Guyer, 59 Ind. 195.

Kentucky.— See Robbins *v.* Lebus, 2 S. W. 898, 8 Ky. L. Rep. 604.

Louisiana.— Maillon *v.* Lynch, 15 La. Ann. 547; Oakey *v.* Aiken, 12 La. Ann. 11; Whitehead *v.* Wiley, 9 La. Ann. 214; Copeland *v.* Labatut, 6 La. Ann. 61; Coiron *v.* Millaudon, 3 La. Ann. 664. See also Seawell *v.* Payne, 5 La. Ann. 255.

New York.— Miller *v.* Earle, 24 N. Y. 110; Smith *v.* McGowan, 3 Barb. 404, 1 Code Rep. 27.

North Carolina.— Hollowell *v.* Skinner, 26 N. C. 165, 40 Am. Dec. 431; Whitaker *v.* Petway, 26 N. C. 182; Harry *v.* Graham, 18 N. C. 76, 26 Am. Dec. 226.

Pennsylvania.— Riland *v.* Eckert, 23 Pa. St. 215; Wray *v.* Miller, 20 Pa. St. 111; Crawford *v.* Boyer, 14 Pa. St. 308; Flick *v.* McComsey, 10 Lanc. Bar 197; Herr *v.* Hall, 17 Lanc. L. Rev. 116.

South Carolina.— Vaughan *v.* Hewitt, 17 S. C. 442. See also Wilson *v.* Hyatt, 4 S. C. 369.

Tennessee.—Floyd *v.* Goodwin, 8 Yerg. 484, 29 Am. Dec 130.

Texas.— Boggess *v.* Howard, 40 Tex. 153; Hawley *v.* Bullock, 29 Tex. 216; Bennett *v.* Gamble, 1 Tex. 124. But see Cravens *v.* Wilson, 48 Tex. 324.

property sold was really the property of plaintiff in the motion, he may make his title appear and defend his possession when the purchaser asserts his right, yet, where the injury complained of is in the execution of the process, and not for defect in the process itself, it is competent for any person whose interests are thereby prejudiced to move to set aside the sale.[31]

(III) *VENDEE OF EXECUTION DEBTOR.* Where the execution debtor had no interest in the property at the time of the sale, or of the issue of the execution, the court will not interfere, by summary motion, and set aside such sale at the instance of the purchaser merely on the ground that he got no title.[32]

(IV) *JUDGMENT DEBTOR.* As a general rule the execution defendant may avail himself of irregularities in the conduct of the sale or in the levy of the execution and is entitled to prosecute a motion or action to set the sale aside.[33]

(V) *EXECUTION CREDITOR.* Under certain circumstances an execution creditor may prosecute a motion or action to have the sale vacated on account of some irregularity, misconduct, or mistake resulting in a sale for an inadequate price, leaving his judgment wholly or partially unsatisfied.[34]

(VI) *OTHER LIEN CREDITORS.* In some states that one who claims in the

Vermont.— Wolcott *v.* Hamilton, 61 Vt. 79, 17 Atl. 39.

United States.— Glassell *v.* Wilson, 10 Fed. Cas. No. 5,477, 4 Wash. 59; Sawyer *v.* Shannon, 21 Fed. Cas. No. 12,405, Brunn. Col. Cas. 111, 1 Overt. (Tenn.) 465.

See 21 Cent. Dig. tit. "Execution," § 673.

In Kansas, however, see Harrison *v.* Andrews, 18 Kan. 535 [*following* White-Crow *v.* White-Wing, 3 Kan. 276].

31. Henderson *v.* Sublett, 21 Ala. 626 (holding that a party may be heard on a motion to set aside an execution sale for inadequacy of price, whether his interest be legal or equitable); Lee *v.* Davis, 16 Ala. 516; Nuckols *v.* Mahone, 15 Ala. 212; Stotsenburg *v.* Stotsenburg, 75 Ind. 538 (holding that where the lien of a judgment on which lands are sold under execution is senior to that of the mortgage of such lands, assignees of the mortgage, holding it in trust, have an interest entitling them to sue in their own names, and as trustees of an express trust to set aside the execution sale for good cause); Beckwith *v.* King's Mountain Min. Co., 87 N. C. 155 (holding that a plaintiff at whose expense an execution issues, or any other party interested, may move to set aside the sale on the ground of inadequacy of price); Flanagan *v.* Pearson, 50 Tex. 383; Driscoll *v.* Morris, 2 Tex. Civ. App. 603, 21 S. W. 629. See also Chambers *v.* Stone, 9 Ala. 260; Miller *v.* Earle, 24 N. Y. 110.

See 21 Cent. Dig. tit. "Execution," § 673.

32. *Alabama.*—McLaughlin *v.* Bradford, 82 Ala. 431, 2 So. 515; Holly *v.* Bass, 68 Ala. 206; Sheffey *v.* Davis, 60 Ala. 548; Shaw *v.* Lindsay, 46 Ala. 290; Nuckols *v.* Mahone, 15 Ala. 212; Mobile Cotton Press, etc., Co. *v.* Moore, 9 Port. 675.

Indiana.— Stockton *v.* Stockton, 59 Ind. 574.

New York.— Flanders *v.* Batten, 123 N. Y. 627, 25 N. E. 952 [*affirming* 50 Hun 542, 3 N. Y. Suppl. 728].

Pennsylvania.— Hamilton *v.* Seitz, 25 Pa. St. 226, 64 Am. Dec. 694.

Tennessee.— Simmons *v.* Wood, 6 Yerg. 518. See also King *v.* Coleman, 98 Tenn. 561, 40 S. W. 1082.

Texas.— Hawley *v.* Bullock, 29 Tex. 216.

Vermont.— Wolcott *v.* Hamilton, 61 Vt. 79, 17 Atl. 39.

See 21 Cent. Dig. tit. "Execution," § 674.

A purchaser of land subject to the lien of a judgment which land was afterward sold under such judgment cannot set aside the levy and sale on the ground that defendant in the execution had, at the time, other lands and personalty sufficient to satisfy the execution. Longworth *v.* Screven, 2 Hill (S. C.) 298, 27 Am. Dec. 381.

A pledgee of stock in a corporation has standing to attack the validity of a sheriff's sale of the property of the corporation. Chester Pipe, etc., Co. *v.* Saltzburg Gas Co., 8 Pa. Dist. 427.

33. Johnson *v.* Murray, 112 Ind. 154, 13 N. E. 273, 2 Am. St. Rep. 174. See Randall *v.* Ewell, 55 S. W. 552, 21 Ky. L. Rep. 1425 (where the sheriff has reported that the purchase-money was paid, and the amount has been credited on the execution, defendant cannot complain that payment was not in fact made); Wolf *v.* Holton, 117 Mich. 321, 75 N. W. 762; Lennon *v.* Heindel, 56 N. J. Eq. 8, 37 Atl. 147. And *compare* Conley *v.* Redwine, 109 Ga. 640, 35 S. E. 92, 77 Am. St. Rep. 398; Cavenaugh *v.* Jakeway, Walk. (Mich.) 344.

Co-defendants.— It has been held in Missouri that where the property of one or two defendants is sold on the execution, the other cannot object to the legality of the sale. Hicks *v.* Perry, 7 Mo. 346.

34. *Illinois.*— Bressler *v.* Martin, 133 Ill. 278, 24 N. E. 518.

Kentucky.— Bent *v.* Maupin, 86 Ky. 271, 5 S. W. 425, 9 Ky. L. Rep. 469. See Hegan *v.* Louisville Bldg. Assoc., 58 S. W. 804, 22 Ky. L. Rep. 884.

New York.— Williams *v.* Williams, 42 How. Pr. 411; Ontario Bank *v.* Lansing, 2 Wend. 260.

North Carolina.— Beckwith *v.* King's Mountain Min. Co., 87 N. C. 155.

character of a judgment creditor cannot avail himself of the irregularities in the proceedings of the officer to defeat or set aside a consummated sale.[35]

(VII) *EXECUTION PURCHASER.* The purchaser at an execution sale may move to vacate the sale on account of such irregularities in the proceedings as to fail to give him a title, or for any other reason rendering it unconscionable to enforce his bid.[36]

b. Waiver and Estoppel[37]—(I) *GENERAL RULE.* The rule is well recognized that the formalities required to be observed in the conduct of execution sales are designed for the protection and benefit of those interested in the property and its proceeds, and may be waived by their common consent;[38] and that the parties interested may also by their acts estop themselves from attacking the validity of the sale.[39]

(II) *EXECUTION DEFENDANT*—(A) *In General.* The execution defendant may waive errors and irregularities in the levy of the execution and in making the sale, and, where he does not procure the process to be set aside by motion in due season, he will be presumed to have waived them; and such a sale is valid, even when made to a purchaser with notice of the irregularities, where no fraud is shown.[40] Likewise, where the judgment debtor has induced a party to become a

Pennsylvania.— See Smith *v.* Exchange Bank, 110 Pa. St. 508, 1 Atl. 760.

35. *Alabama.*— Savage *v.* Forward, 7 Ala. 463.

Indiana.— Hollcraft *v.* Douglass, 115 Ind. 139, 17 N. E. 275. See also Jones *v.* Carnahan, 63 Ind. 229.

Louisiana.— Wederstrandt *v.* Marsh, 11 Rob. 533.

New York.— Bennett *v.* Bagley, 22 Hun 408.

Pennsylvania.— Solomon *v.* Parnell, 2 Miles 264. See also Welsh *v.* Murray, 4 Yeates 196. See, however, Tigue *v.* Banta, 176 Pa. St. 414, 35 Atl. 131 [*reversing* 8 Kulp 65].

Vermont.— Wood *v.* Doane, 20 Vt. 612.

See 21 Cent. Dig. tit. "Execution," § 676.

Contra.— Cravens *v.* Wilson, 48 Tex. 324.

36. Bent *v.* Maupin, 86 Ky. 271, 5 S. W. 425, 9 Ky. L. Rep. 469; Dwight's Case, 15 Abb. Pr. (N. Y.) 259; Mulks *v.* Allen, 12 Wend. (N. Y.) 253; Shakespear *v.* Fisher, 11 Phila. (Pa.) 251. See also Bachle *v.* Webb, 11 Nebr. 423, 9 N. W. 473.

Sale on credit.— It has been held in Kentucky that a purchaser cannot sustain a motion to quash a sale of property under execution on credit, admitting that the laws authorizing it to be sold are unconstitutional. Moore *v.* Miller, 1 Litt. (Ky.) 356; Rudd *v.* Schlatter, 1 Litt. (Ky.) 19.

Validity of resale.— See Drouet *v.* Rice, 2 Rob. (La.) 374.

37. Estoppel generally see ESTOPPEL.

38. Klopp *v.* Witmoyer, 43 Pa. St. 226; Richardson *v.* Inglesby, 13 Rich. Eq. (S. C.) 59; Lewis *v.* Brown, 4 Strobh. (S. C.) 293; O'Bannon *v.* Kirkland, 2 Strobh. (S. C.) 29.

A debtor in failing circumstances cannot dispense with any of the formalities established by law for the sale of property under execution. Hiligsberg's Succession, 1 La. Ann. 340.

39. *Illinois.*— Dobbins *v.* Wilson, 107 Ill. 17.

Maine.— Wilton Mfg. Co. *v.* Butler, 34 Me. 431.

Michigan.— Payment *v.* Church, 38 Mich. 776.

Mississippi.— Duke *v.* Clark, 58 Miss. 465.

Missouri.— Carter *v.* Shotwell, 42 Mo. App. 663.

Pennsylvania.— Lawrence *v.* Keener, 149 Pa. St. 402, 24 Atl. 290.

See 21 Cent. Dig. tit. "Execution," § 681.

40. *Arkansas.*— Reynolds *v.* Tennant, 51 Ark. 84, 9 S. W. 857.

Georgia.— Davis *v.* Comer, 108 Ga. 117, 33 S. E. 852, 75 Am. St. Rep. 33; Whittington *v.* Doe, 9 Ga. 23.

Illinois.— Clark *v.* Glos, 180 Ill. 556, 54 N. E. 631, 72 Am. St. Rep. 223; Winchell *v.* Edwards, 57 Ill. 41.

Indiana.— Richey *v.* Merritt, 108 Ind. 347, 9 N. E. 368; Joyce *v.* Madison First Nat. Bank, 62 Ind. 188; West *v.* Cooper, 19 Ind. 1; Doe *v.* Dutton, 2 Ind. 309, 52 Am. Dec. 510.

Kansas.— De Jarnette *v.* Verner, 40 Kan. 224, 19 Pac. 666.

Kentucky.— Magowen *v.* Hay, 3 A. K. Marsh. 452.

Maine.— Baker *v.* Bessey, 73 Me. 472, 40 Am. Rep. 377.

Missouri.— Austin *v.* Loring, 63 Mo. 19; Downing *v.* Still, 43 Mo. 309.

New Jersey.— Holmes *v.* Steele, 28 N. J. Eq. 173.

New York.— Hargin *v.* Wicks, 92 Hun 155, 36 N. Y. Suppl. 375.

Oregon.— Leinenweber *v.* Brown, 24 Oreg. 548, 34 Pac. 475, 38 Pac. 4.

Pennsylvania.— Wilson *v.* Howser, 12 Pa. St. 109; Baker *v.* Chester Gas Co., 2 Del. Co. 269.

Tennessee.— Noe *v.* Purchapile, 5 Yerg. 215.

Wisconsin.— Mariner *v.* Coon, 16 Wis. 465; Vilas *v.* Reynolds, 6 Wis. 214.

See 16 Cent. Dig. tit. "Execution," § 681.

Attempted redemption.— See Thayer *v.* Coldren, 57 Iowa 110, 10 N. W. 300.

purchaser at a sale of his property under execution, he is estopped to set up the invalidity of the judgment on which such execution issued;[41] and where he participated in, or had knowledge of, and assented to, irregularities in the conduct of the sale, he is estopped to attack its validity by the fact that he was a party to the acts complained of.[42] This rule also applies to a judgment debtor who accepts the surplus realized from the sale of his property on execution, his retention thereof with knowledge of defects which would render the sale voidable constituting a ratification of the sale.[43]

Change in terms of sale.— Nicholls *v.* Mercier, 15 La. Ann. 370.

41. *Illinois.*— Hill *v.* Blackwelder, 113 Ill. 283.

Indiana.— McClure *v.* McCormick, 5 Blackf. 129.

Kentucky.— Williamson *v.* Logan, 1 B. Mon. 237.

Michigan.— Payment *v.* Church, 38 Mich. 776.

Missouri.— Carter *v.* Shotwell, 42 Mo. App. 663.

New Jersey.— Bulat *v.* Londrigan, (Ch. 1902) 50 Atl. 909.

New York.— Smith *v.* Hill, 22 Barb. 656.

Pennsylvania.— St. Bartholomew's Church *v.* Wood, 80 Pa. St. 219; Spragg *v.* Shriver, 25 Pa. St. 282, 64 Am. Dec. 698; Buchanan *v.* Moore, 13 Serg. & R. 304, 15 Am. Dec. 601.

South Carolina.— Crenshaw *v.* Julian, 26 S. C. 283, 2 S. E. 133, 4 Am. St. Rep. 719.

See 21 Cent. Dig. tit. "Execution," § 681.

Compare Stone *v.* Britton, 22 Ala. 543.

Exempt property.— See Jordan *v.* Autrey, 10 Ala. 276; Com. *v.* Dickinson, 5 B. Mon. (Ky.) 506, 43 Am. Dec. 139; Rogers *v.* Collier, 2 Bailey (S. C.) 581, 23 Am. Dec. 153.

Surrender of possession.— See Geoghegan *v.* Ditto, 2 Metc. (Ky.) 433, 74 Am. Dec. 413.

Consent to appointment of appraiser.— See Walker *v.* Sauvinet, 27 La. Ann. 314.

42. *Arkansas.*— Turner *v.* Watkins, 31 Ark. 429; White *v.* Beede, 12 Ark. 421.

California.— Lay *v.* Neville, 25 Cal. 545.

Colorado.— Fallon *v.* Worthington, 13 Colo. 559, 22 Pac. 960, 16 Am. St. Rep. 231, 6 L. R. A. 708.

Georgia.— Roney *v.* Tutt, 113 Ga. 815, 39 S. E. 293; O'Kelley *v.* Gholston, 89 Ga. 1, 15 S. E. 123.

Illinois.— See Roby *v.* Colehour, 135 Ill. 300, 25 N. E. 777.

Indiana.— Joyce *v.* Madison First Nat. Bank, 62 Ind. 188; Stockwell *v.* Byrne, 22 Ind. 6. See, however, Murphy *v.* Hill, 77 Ind. 129.

Iowa.— Crawford *v.* Ginn, 35 Iowa 543. See, however, Drefahl *v.* Tuttle, 42 Iowa 177. And *compare* Butcher *v.* Buchanan, 17 Iowa 81.

Kentucky.— Thomas *v.* Thomas, 87 Ky. 343, 10 S. W. 282, 10 Ky. L. Rep. 223; Vallandingham *v.* Worthington, 85 Ky. 83, 2 S. W. 772, 8 Ky. L. Rep. 707; Carroll *v.* Carroll, 10 Ky. L. Rep. 937. See also Neilson *v.* Churchill, 5 Dana 333.

Louisiana.— Parson *v.* Henry, 43 La. Ann. 307, 8 So. 918; Taylor *v.* Graham, 18 La. Ann. 656, 89 Am. Dec. 699; Desplate *v.* St. Martin, 17 La. Ann. 91; Berlin *v.* Gilly, 13 La. Ann. 461; Mullen *v.* Harding, 12 La. Ann. 271; Bermudez *v.* Union Bank, 11 La. Ann. 64; Lambert *v.* De Santos, 10 La. Ann. 725. See, however, Humphreys *v.* Brown, 19 La. Ann. 158.

Maine.— Wilton Mfg. Co. *v.* Butler, 34 Me. 431.

Maryland.— Cushwa *v.* Cushwa, 5 Md. 55.

Nebraska.— Best *v.* Zutavern, 53 Nebr. 619, 74 N. W. 81.

New York.— Bennett *v.* Bagley, 22 Hun 408.

North Carolina.— McCanless *v.* Flinchum, 98 N. C. 358, 4 S. E. 359.

Pennsylvania.— Lawrence *v.* Keener, 149 Pa. St. 402, 24 Atl. 290; Phillips *v.* Hull, 101 Pa. St. 567; Berg *v.* McLafferty, 1 Pa. Cas. 286, 2 Atl. 187; Righter *v.* Rittenhouse, 3 Rawle 273. See also Butler *v.* Patrick, 4 Kulp 417.

Tennessee.— McMillan *v.* Gaylor, (Ch. App. 1895) 35 S. W. 453; Russell *v.* Stinson, 3 Hayw. 1. See also Carney *v.* Carney, 10 Yerg. 491, 31 Am. Dec. 590.

Texas.— Pope *v.* Davenport, 52 Tex. 206; Cornelius *v.* Burford, 28 Tex. 202, 91 Am. Dec. 309.

Vermont.— **Farnum** *v.* **Perry**, 43 Vt. 473.

See 21 Cent. Dig. tit. "Execution," § 681.

A mortgagee in possession cannot, by consenting to the sale of the equity of redemption in the property on execution, waive the mortgagor's right to object to the validity of the execution sale. Metzler *v.* James, 12 Colo. 322, 19 Pac. 885.

Sureties.— Morford *v.* Bliss, 12 B. Mon. (Ky.) 225, where this principle was applied in the case of sureties for the principal debt.

Laches.— See Lehman *v.* Tammany, 7 Kulp (Pa.) 235.

Where debtor failed to plead.— See Weaver *v.* Peasley, 163 Ill. 251, 45 N. E. 119, 54 Am. St. Rep. 469.

Parol directions by defendant in execution to levy upon an interest not subject to execution are incompetent and will not be effectual to pass such interest on a sale by the officer unless defendant was present thereat and assented thereto. Com. *v.* Dickinson, 5 B. Mon. (Ky.) 506, 43 Am. Dec. 139.

43. *Arkansas.*—Huffman *v.* Gaines, 47 Ark. 226, 1 S. W. 100.

Colorado.— McCoy *v.* Wilson, 8 Colo. 335, 7 Pac. 298.

Louisiana.— Wafer *v.* Wafer, 7 La. Ann. 541; Headen *v.* Oubre, 2 La. Ann. 142; Collins *v.* Moore, 16 La. 75. See also Bornet *v.* Davis, 1 La. Ann. 339.

(B) *Where Judgment Is Dormant or Void.* An execution debtor whose property is sold under a dormant or void judgment is not estopped from asserting title to the property, as against the holder of a sheriff's deed, merely because he failed to take steps to arrest the sale under such dormant or void judgment.[44]

(III) *EXECUTION CREDITOR.* When not transcending the mandate of his writ, the sheriff may be considered in some degree as the judgment creditor's agent, and the latter is as a rule estopped from assailing the validity of a sale made by virtue of such writ.[45] Thus, where the execution creditor receives from the sheriff the proceeds of an execution sale, with full knowledge of the manner of its conduct, and without making any objection to the sale, he is thereafter estopped from attacking its validity.[46]

(IV) *PURCHASER.* A purchaser at an execution sale cannot have the sale set aside on the ground that the title to the property sold was in himself or in a third person,[47] and where he has executed a sale bond, he is estopped from urging any informalities in the sale.[48]

(V) *LIENOR OF CLAIMANT.* Likewise a lienor or claimant to property sold

Ohio.— Merry *v.* Walker, 2 Ohio Dec. (Reprint) 308, 2 West. L. Month. 384.

Pennsylvania.— Duff *v.* Wynkoop, 74 Pa. St. 300; Wilkins *v.* Anderson, 11 Pa. St. 399.

See 21 Cent. Dig. tit. "Execution," § 685.

The execution of a delivery bond by an execution defendant does not estop him from afterward claiming his exemption out of the bonded property. Applewhite *v.* Harrell Mill Co., 49 Ark. 279, 5 S. W. 292; Jacks *v.* Bingham, 36 Ark. 401; Atkinson *v.* Gatcher, 23 Ark. 101.

44. *Alabama.*—Herzberg *v.* Holles, 119 Ala. 496, 24 So. 842.

Kentucky.— Gearheart *v.* Tharp, 9 B. Mon. 31.

Michigan.— James *v.* Pontiac, etc., Plank Road Co., 8 Mich. 91.

Missouri.— Benoist *v.* Rothschild, 145 Mo. 399, 46 S. W. 1081.

New Jersey.— Junior Order Bldg., etc., Assoc. *v.* ——, 63 N. J. Eq. 500, 52 Atl. 832.

North Carolina.— McCanley *v.* Williams, 122 N. C. 293, 30 S. E. 345.

Washington.— Briggs *v.* Murray, (1902) 69 Pac. 765; Daniel *v.* Gold Hill Min. Co., 28 Wash. 411, 68 Pac. 884.

West Virginia.— August *v.* Glomer, 53 W. Va. 65, 44 S. E. 143.

Compare McLaughlin *v.* Shields, 12 Pa. St. 283.

Confession of judgment.— See Cordray *v.* Neuhaus, 25 Tex. Civ. App. 247. 61 S. W. 415.

45. Hudson *v.* Crow, 26 Ala. 515; Niantic Bank *v.* Denniss, 37 Ill. 381; McIlhenny *v.* Barbin, 15 La. Ann. 548; Lewis *v.* Gordy, 5 La. Ann. 570 (holding that the judgment creditor, by appointing an appraiser, waives any error in the advertisement); Rapp *v.* Crawford, 146 Pa. St. 21, 23 Atl. 319, 28 Am. St. Rep. 780 (holding that the above rule is not affected by the fact that the owner of the judgment was not named as plaintiff in the execution); Lewis *v.* Protheroe. (Pa. 1899) 17 Atl. 200; Kilpatrick *v.* Black, 10 Watts (Pa.) 329, 36 Am. Dec. 182. See also Greer *v.* Oldham, 11 S. W. 73, 10 Ky. L. Rep. 889; Hunsucker *v.* Tipton, 35 N. C. 481.

Acquiescence of agent.— Wyman *v.* Hart, 12 How. Pr. (N. Y.) 122.

After-acquired property.— It has been held in Tennessee that a judgment creditor is not estopped from asserting an after-acquired title to land sold under execution against the purchaser at such sale. Henderson *v.* Overton, 2 Yerg. (Tenn.) 394, 24 Am. Dec. 492.

Void sale.— A judgment creditor cannot ratify a void execution sale, and his appearing before an auditor and claiming the proceeds out of such sale does not constitute a ratification thereof, since the ratification can only be made by the owner of the land. Diese *v.* Yerger, 6 Phila. (Pa.) 207.

46. *Kentucky.*— Neilson *v.* Churchill, 5 Dana 333.

Louisiana.— Chanut *v.* Levasseur, 28 La. Ann. 711; Coleman *v.* Dewees, 3 La. Ann. 698. See also Thompson *v.* Daniel, 47 La. Ann. 1401, 17 So. 830.

Missouri.— See Shotwell *v.* Munroe, 42 Mo. App. 669.

Pennsylvania.— Smith *v.* Warden, 19 Pa. St. 424; Stroble *v.* Smith, 8 Watts 280. See also Berg *v.* McLafferty, 9 Pa. Cas. 135, 12 Atl. 460.

United States.— See Russell *v.* Topping, 21 Fed. Cas. No. 12,163, 5 McLean 194.

See 21 Cent. Dig. tit. "Execution," § 685.

A purchaser who has entered under the sheriff's deed is estopped to deny the authority of the sheriff to sell. Morehouse *v.* Cotheal, 22 N. J. L. 521.

Creditors cannot set up the nullity of a judgment and at the same time claim the proceeds of the sale of property made under such judgment. Blessey *v.* Kearny, 24 La. Ann. 289.

47. Islay *v.* Stewart, 20 N. C. 160.

48. Coons *v.* Graham, 12 Rob. (La.) 206; Jones *v.* Frellsen, 9 Rob. (La.) 185.

Purchaser at first sale.— Where property has been twice sold at a sheriff's sale, a bidder at the first sale who failed to comply with his bid is not thereby estopped from contesting the validity of the second sale upon defects existing in the advertisement of sale which existed at the first sale at which he bid. Connell *v.* Hughes, 1 Phila. (Pa.) 225.

under execution may by his acts or his acquiescence in the sale be estopped from attacking its validity.[49]

(VI) *SURETY.* A surety on a stay of execution is not estopped to show that the judgment recited is a nullity;[50] and a surety on a delivery bond which merely binds the obligor to have the property or its value forthcoming for the satisfaction of the judgment is not estopped to assert a right in himself to the property and show that it should not be used to satisfy the judgment.[51]

2. GROUNDS — a. In General. Where the motion is made in due season, and by a proper party, a sale of property under execution will be set aside if there has been a mistake, irregularity, or fraud in the conduct thereof, to the prejudice of either party to the action or a third person.[52]

b. Mistake. Where, through inadvertence or mistake, the officer sells property at an execution sale to which the execution debtor has no title,[53] or where, through mistake of fact, the purchaser is misinformed by the officer, or the judgment creditor, as to prior encumbrances upon the property,[54] or where, through

49. *Georgia.*— Conley *v.* Redwine, 109 Ga. 640, 35 S. E. 92, 77 Am. St. Rep. 398; Studdard *v.* Lemmond, 48 Ga. 92.

Illinois.— Dobbins *v.* Wilson, 107 Ill. 17.

Indiana.— Woodward *v.* Wilcox, 27 Ind. 207 (holding, however, that the purchaser defending his property against the claims of the prior owner or lienholder, upon the ground that the claimant is estopped from asserting his title by the fact that he was present at the sale and gave no notice of his claim, must show that he himself purchased in good faith and in ignorance of such claim); West *v.* Cooper, 19 Ind. 1.

Louisiana.— Jure *v.* Balletin, 6 La. Ann. 394; Labiche *v.* Lewis, 12 Rob. 8; Levistones *v.* Claiborne, 5 Rob. 196; Adams *v.* Moulton, McGloin 239.

Mississippi.— Duke *v.* Clark, 58 Miss. 465.

North Carolina.— Walker *v.* Bernard, 1 N. C. 82.

Pennsylvania.— Nickey *v.* York Bldg., etc., Assoc., 8 Pa. Dist. 438; Chester Pipe, etc., Co. *v.* Saltsburg Gas Co., 8 Pa. Dist. 427. See Biddle *v.* Tomlinson, 115 Pa. St. 299, 8 Atl. 774.

See 21 Cent. Dig. tit. "Execution," § 681.

Compare Worthington *v.* Miller, 134 Ala. 420, 32 So. 748; Robbins *v.* Lebus, 2 S. W. 898, 8 Ky. L. Rep. 604.

50. Hamilton *v.* Parrish, 12 N. C. 415.

51. Applewhite *v.* Harrell Mill Co., 49 Ark. 279, 15 S. W. 292; Norris *v.* Norton, 19 Ark. 319; Schwein *v.* Sims, 2 Metc. (Ky.) 209; Decherd *v.* Blanton, 3 Sneed (Tenn.) 373.

52. *Alabama.*— Draine *v.* Smelser, 15 Ala. 423 (holding, however, that a sale of land will not be set aside merely because made under several executions at one and the same time); Mobile Cotton Press, etc., Co. *v.* Moore, 9 Port. 679.

District of Columbia.—Mackall *v.* Richards, 3 Mackey 271.

Georgia.— Fears *v.* State, 102 Ga. 274, 29 S. E. 463.

Illinois.— Thomas *v.* Hebenstreit, 68 Ill. 115.

Indiana.— Ferrier *v.* Deutchman, 111 Ind. 330, 12 N. E. 497.

Iowa.— Chambers *v.* Cochran, 18 Iowa 159; Ritter *v.* Henshaw, 7 Iowa 97.

Kentucky.— See Bach *v.* Whittaker, 109 Ky. 612, 60 S. W. 410, 22 Ky. L. Rep. 1226.

Missouri.— McKee *v.* Logan, 82 Mo. 524.

Montana.— Bernard *v.* Herzog, 12 Mont. 519, 31 Pac. 74.

New Hampshire.— Thompson *v.* Currier, 70 N. H. 259, 47 Atl. 76.

New York.— Stahl *v.* Charles, 5 Abb. Pr. 348.

Ohio.— Bear *v.* Bookmiller, 3 Ohio Cir. Ct. 484, 2 Ohio Cir. Dec. 277; Creditors *v.* Search, 2 Ohio Dec. (Reprint) 495, 3 West. L. Month. 319.

Pennsylvania.— Hutchinson *v.* Moses, 1 Browne 187; McEnroe *v.* McCoy, 2 Del. Co. 379.

Texas.— Johnson *v.* Crawl, 55 Tex. 571; Chamblee *v.* Tarbox, 27 Tex. 139, 84 Am. Dec. 614. See, however, Crain *v.* Hogan, (Sup. 1891) 16 S. W. 1019.

Utah.— Post *v.* Foote, 18 Utah 235, 54 Pac. 975.

United States.— Milmine *v.* Bass, 29 Fed. 632.

See 21 Cent. Dig. tit. "Execution," § 690.

Lesion is not ground for annulment. D'Arensbourg *v.* Chauvin, 9 La. Ann. 98.

Mere irregularity on the part of the officer does not render a sale under execution invalid, especially where the complaining party does not appear to be injured. Daviess *v.* Womack, 8 B. Mon. (Ky.) 383.

Proceeds in excess of execution.— Adamson *v.* Cummins, 10 Ark. 541; Southard *v.* Pope, 9 B. Mon. (Ky.) 261.

53. *District of Columbia.*— Starr *v.* U. S., 8 App. Cas. 552, where defendant only had an equitable interest in the property.

Iowa.— See also Lathrop *v.* Brown, 23 Iowa 40.

Kentucky.— Bent *v.* Maupin, 86 Ky. 271, 5 S. W. 425, 9 Ky. L. Rep. 469. See, however, Weisiger *v.* McClure, 5 J. J. Marsh. 292.

Minnesota.— Hastings First Nat. Bank *v.* Rogers, 22 Minn. 224.

New York.— Dwight's Case, 15 Abb. Pr. 259.

United States.— Rocksell *v.* Allen, 20 Fed. Cas. No. 11,983, 3 McLean 357.

See 21 Cent. Dig. tit. "Execution," § 691.

54. Reed *v.* Diven, 7 Ind. 189; Bay *v.* Har-

a misdescription, land is sold other than that levied upon, such sale will be set aside at the instance of the purchaser upon motion, or by bill in equity.[55]

c. Attack on Judgment. The fact that a judgment is liable to reversal on error does not invalidate an execution sale thereunder made while the judgment is still in force, and the filing of a bill to set aside such judgment is no ground for a motion to set the sale aside.[56]

d Advance on Bid. Where a sale of property by the sheriff is in all respects fairly and legally made, and an offer of an increased bid is made in case a resale is offered, the better rule is that it is a matter of discretion with the court to which the offer is made to accept it or not, and unless an abuse of such discretion is fairly shown an appellate court has no right to interfere.[57]

e. Defects or Irregularities in Execution or Levy. The courts as a rule will refuse a motion to set aside an execution sale for mere irregularities, as shown by the record, in the execution or levy, where the proceedings were not fraudulent or void, and the court rendering the judgment had jurisdiction over the parties and the subject-matter, particularly where no injury was shown to any of the parties interested.[58] Where, however, the writ under which the levy is made is

nett, 58 Iowa 344, 12 N. W. 336; Tinker *v.* Irvin, 1 How. Pr. (N. Y.) 112; Cumming's Appeal, 23 Pa. St. 509; Finley *v.* McCulley, 2 Phila. (Pa.) 212; Davis *v.* Ruth, 17 Lanc. L. Rev. (Pa.) 181, 13 York Leg. Rec. (Pa.) 206; McEnroe *v.* McCoy, 2 Del. Co. (Pa.) 379; Neiderhoffer *v.* Bange, 12 Lanc. Bar (Pa.) 37. See, however, Benedict *v.* Jones, 18 Hun (N. Y.) 527. *Compare* Weaver *v.* Guyer, 59 Ind. 195.

55. *Iowa.*— Parks *v.* Davis, 16 Iowa 20.

Minnesota.— Shaubhut *v.* Hilton, 7 Minn. 506; Lay *v.* Shaubhut, 6 Minn. 273, 80 Am. Dec. 446.

Nebraska.— Frasher *v.* Ingham, 4 Nebr. 531.

New York.— Mulks *v.* Allen, 12 Wend. 253.

Pennsylvania.— Rhode *v.* Neff, 1 Woodw. 477.

Tennessee.— Reid *v.* House, 2 Humphr. 576.

Compare Keith *v.* Brewster, 114 Ga. 176, 39 S. E. 850 (where it was held that the facts did not warrant setting the sale aside); Shepherd *v.* Delph, 58 S. W. 991, 22 Ky. L. Rep. 977 (holding that an execution sale will not be set aside because through a mistake in calculation it was made for more than was due).

56. Piatt *v.* Piatt, 9 Ohio 37; Jermon *v.* Lyon, 81 Pa. St. 107. See also Paul *v.* Lynch, 2 Wkly. Notes Cas. (Pa.) 587. *Compare* Stephens *v.* Stephens, 1 Phila. (Pa.) 108.

Where second judgment is obtained.—Winterson *v.* Hitchings, 13 Misc. (N. Y.) 201, 34 N. Y. Suppl. 183, 25 N. Y. Civ. Proc. 1.

57. Broomall *v.* Reybold, 5 Houst. (Del.) 435; State Bank *v.* Green, 11 Nebr. 303, 9 N. W. 36; Hollister *v.* Vanderlin, 165 Pa. St. 248, 30 Atl. 1002, 44 Am. St. Rep. 657. See Whitacre *v.* Pratt, 1 Am. L. J. 190.

58. *California.*— McFall *v.* Buckeye Granger's Warehouse Assoc., 122 Cal. 468, 55 Pac. 253, 68 Am. St. Rep. 47; Hunt *v.* Loucks, 38 Cal. 372, 99 Am. Dec. 404.

Illinois.— Stewart *v.* Croes, 10 Ill. 442.

Indiana.— Woodburn Sarven Wheel Co. *v.* McKernan, Wils. 48.

Iowa.—Griffith *v.* Milwaukee Harvester Co., 92 Iowa 634, 61 N. W. 243, 54 Am. St. Rep. 573; Hill *v.* Baker, 32 Iowa 302, 7 Am. Rep. 193; Ehleringer *v.* Moriarty, 10 Iowa 78.

Kansas.— Gapen *v.* Stephenson, 17 Kan. 613.

Kentucky.— Young *v.* Smith, 10 B. Mon. 293; Knight *v.* Applegate, 3 T. B. Mon. 335; Allen *v.* Farley, 76 S. W. 538, 25 Ky. L. Rep. 930. See also Jones *v.* Martin, 5 Ky. L. Rep. 227.

Louisiana.—Schlater *v.* Brusle, 49 La. Ann. 1704, 22 So. 925; Amato *v.* Ermann, 47 La. Ann. 967, 17 So. 505; Gusman *v.* Le Blanc, 27 La. Ann. 280; Girard *v.* Hirsch, 6 La. Ann. 651; Broughton *v.* King, 2 La. Ann. 569.

Minnesota.— Mills *v.* Lombard, 32 Minn. 259, 20 N. W. 187.

Mississippi.— Harper *v.* Hill, 35 Miss. 63; Swayze *v.* McCrossin, 13 Sm. & M. 317.

Missouri.— Young *v.* Schofield, 132 Mo. 650, 34 S. W. 497.

Nevada.— Hastings *v.* Johnson, 1 Nev. 613.

New York.— Isaacs *v.* Mintz, 16 Daly 468, 12 N. Y. Suppl. 276 [*affirming* 11 N. Y. Suppl. 423]; Van Gelder *v.* Van Gelder, 26 Hun 356.

North Carolina.—Worke *v.* Hunter, 1 N. C. 527.

Ohio.— Waggoner *v.* Dubois, 19 Ohio 67.

Pennsylvania.— Sterrett *v.* Howarth, 76 Pa. St. 438. See also Mencke *v.* Rosenberg, 202 Pa. St. 131, 51 Atl. 767, 90 Am. St. Rep. 618.

South Carolina.— Gist *v.* McJunkin, 1 McMull. 342.

Tennessee.— Mason *v.* Jackson, (Ch. App. 1900) 57 S. W. 217.

Texas.— Alexander *v.* Miller, 18 Tex. 893, 70 Am. Dec. 314; Barnes *v.* Nix, (Civ. App. 1900) 56 S. W. 202.

Washington.— Whitworth *v.* McKee, 32 Wash. 83, 72 Pac. 1046.

Wisconsin.— Corwith *v.* State Bank, 18 Wis. 560, 86 Am. Dec. 793.

United States.— Milmine *v.* Bass, 29 Fed. 632.

See 21 Cent. Dig. tit. "Executions," § 696.

so defective as to render it void,[59] as for instance, where the description of the land levied on is so indefinite that it cannot be located,[60] or where there is a failure to substantially follow the provisions of the statute in the service of the writ, the sale is void and will be set aside upon proper proceedings.[61]

f. Irregularities or Misconduct Affecting Sale — (I) *In General.* The rule is well recognized that a court of law is competent to control the acts of its officers in the execution of its process, and may, when satisfied that the officer, in the conduct of an execution sale, has been guilty of irregularities, to the injury of any party having an interest in the action, set such sale aside.[62] However, technical irregularities in a sale which are not shown to have been prejudicial to any of the parties in interest will not furnish sufficient ground for setting it aside. This is especially true where property was purchased by a stranger to the action without notice of any irregularities.[63]

(II) *Fraud.* Collusive combinations or other devices resorted to for the

Property sold under several executions.— Shepherd *v.* Delph, 58 S. W. 991, 22 Ky. L. Rep. 977.

59. Sidwell *v.* Schumacher, 99 Ill. 426; Brown *v.* McKay, 16 Ind. 484; Sims *v.* Randal, 1 Brev. (S. C.) 226.

60. Hughes *v.* Streeter, 24 Ill. 647, 76 Am. Dec. 777; Johnson *v.* Rowe, 1 Ky. L. Rep. 274; Fox *v.* Meyer, 1 Woodw. (Pa.) 50.

61. Place *v.* Riley, 98 N. Y. 1 [*affirming* 32 Hun 17]; Raisin *v.* Statham, 22 Fed. 144. See also Austin *v.* Georgia L. & T. Co., 115 Ga. 1, 41 S. E. 264.

62. *Alabama.*— Draine *v.* Smelser, 15 Ala. 423; Foster *v.* Mabe, 4 Ala. 402, 37 Am. Dec. 749.

Illinois.— Rigney *v.* Small, 60 Ill. 416; McLean County Bank *v.* Flagg, 31 Ill. 290, 83 Am. Dec. 224.

Indiana.— Reed *v.* Diven, 7 Ind. 189.

Iowa.— Cornoy *v.* Wetmore, 101 Iowa 202, 70 N. W. 178.

Kentucky.— Allison *v.* Taylor, 3 B. Mon. 363; Howell *v.* McCreery, 7 Dana 388.

Mississippi.— Trimble *v.* Turner, 13 Sm. & M. 348, 53 Am. Dec. 90; Reynolds *v.* Ingersoll, 11 Sm. & M. 249, 49 Am. Dec. 57.

New Jersey.— Voorhis *v.* Terhune, 50 N. J. L. 147, 13 Atl. 391, 7 Am. St. Rep. 781.

New York.— Harris *v.* Murray, 28 N. Y. 574, 86 Am. Dec. 268; Breese *v.* Bange, 2 E. D. Smith 474; Marsh *v.* Ridgway, 18 Abb. Pr. 262; Welch *v.* James, 22 How. Pr. 474.

North Dakota.—Warren *v.* Stinson, 6 N. D. 293, 70 N. W. 279, holding, however, that failure to secure confirmation of an execution sale will not of itself warrant setting the sale aside.

Ohio.— Thompson *v.* McManama, 2 Disn. 213.

Pennsylvania.— Shakespeare *v.* Delany, 86 Pa. St. 108; Monroe *v.* Durkin, 5 Luz. Leg. Reg. 99; Hoeckley *v.* Henry, 3 Phila. 34; Greenwood *v.* Lehigh Coal Co., 1 Pa. L. J. Rep. 393, 3 Pa. L. J. 22; Yeakel *v.* Hawkins, 13 Montg. Co. Rep. 53; Kenton *v.* Meisse, 12 Montg. Co. Rep. 114.

South Carolina.— Loveland *v.* Mansell, 1 Hill Eq. 129.

Texas.— Ayres *v.* Duprey, 27 Tex. 593, 86 Am. Dec. 657; Howard *v.* North, 5 Tex. 290, 51 Am. Dec. 769; State Nat. Bank *v.* Hathaway, (Civ. App. 1901) 61 S. W. 525; Rugely *v.* Moore, 23 Tex. Civ. App. 10, 54 S. W. 379.

Virginia.— Carter *v.* Harris, 4 Rand. 199.

United States.—Farrand *v.* Land, etc., Imp. Co., 86 Fed. 393, 30 C. C. A. 128.

See 21 Cent. Dig. tit. "Execution," § 697.

Compare Pickersgill *v.* Brown, 7 La. Ann. 297.

Purchase by officer.— Daniel *v.* Modawell, 22 Ala. 365, 58 Am. Dec. 260; Creagh *v.* Savage, 9 Ala. 959.

The sheriff's failure to pay into court the proceeds of an execution sale, as required by law, so that the execution debtor could withdraw the amount of his homestead exemption, was held not to avoid the sale, the remedy in such case being a citation to the sheriff, or an action against him. Flynn *v.* Kalamazoo Cir. Judge, (Mich. 1904) 98 N. W. 740.

63. *Alabama.*— Foster *v.* Mabe, 4 Ala. 402, 37 Am. Dec. 749.

Indiana.— Hobbs *v.* Beavers, 2 Ind. 142, 52 Am. Dec. 500.

Kansas.— Trowbridge *v.* Cunningham, 63 Kan. 847, 66 Pac. 1015.

Kentucky.— Guelot *v.* Pearce, (1897) 38 S. W. 892; Walker *v.* McKnight, 15 B. Mon. 467, 41 Am. Dec. 190; Merrill *v.* Housley, 2 Litt. 277; Beeler *v.* Bullitt, 3 A. K. Marsh. 280, 13 Am. Dec. 161.

Nebraska.— Runge *v.* Brown, 29 Nebr. 116, 45 N. W. 271; Le Flume *v.* Jones, 5 Nebr. 256; Cochran *v.* Cochran, 1 Nebr. (Unoff.) 508, 95 N. W. 778.

New Jersey.— Bullock *v.* Woodward, 25 N. J. Eq. 279.

New York.— O'Brien *v.* Hashagen, 20 Hun 564; Dixon *v.* Dixon, 38 Misc. 652, 78 N. Y. Suppl. 255.

Pennsylvania.— Pentz *v.* Clark, 100 Pa. St. 446; Saunders *v.* Timmins, 1 C. Pl. 1; Evans *v.* Sidwell, 9 Lanc. Bar 113.

South Carolina.—Agnew *v.* Adams, 17 S. C. 364; Towles *v.* Turner, 3 Hill 178; Maddox *v.* Sullivan, 2 Rich. Eq. 4, 44 Am. Dec. 234.

Tennessee.— Goodwin *v.* Floyd, 10 Yerg. 520.

Texas.— Howard *v.* North, 5 Tex. 290, 51 Am. Dec. 769.

Virginia.— Hamilton *v.* Shrewsbury, 4 Rand. 427, 15 Am. Dec. 779.

purpose of suppressing bidding,[64] or any other fraud perpetrated upon any of the parties to the sale, or upon persons having an interest therein, will furnish ground for setting it aside.[65]

(III) *SALE IN GROSS.* The rule is well recognized that a sale *en masse* of separate tracts or parcels of land, or in some states of land susceptible of natural division, will be set aside on motion of the person interested, or by bill in equity, where a substantial injury is shown to have been sustained by such party.[66]

Washington.— Otis *v.* Nash, 26 Wash. 39, 66 Pac. 111.

Wisconsin.— Phillips *v.* Hyland, 102 Wis. 253, 78 N. W. 431.

See 21 Cent. Dig. tit. "Execution," § 697.

Compare Statesville Bank *v.* Graham, 82 N. C. 489.

Sale on credit.— It has been held in Kentucky that, although a law allowing property to be sold on execution on credit is unconstitutional, it does not injure the purchaser, and a sale made under it cannot be set aside for that reason on his application. Rudd *v.* Schlatter, 1 Litt. 19.

64. *Connecticut.*— Spencer *v.* Champion, 13 Conn. 11.

District of Columbia.—Horsey *v.* Beveridge, 4 Mackey 291.

Illinois.— Bethel *v.* Sharp, 25 Ill. 173, 76 Am. Dec. 790; Garrett *v.* Moss, 20 Ill. 549.

Indiana.— Lynch *v.* Reese, 97 Ind. 360 (holding, however, that the sheriff's sale will not be set aside simply on the ground that the purchaser prevented others from bidding, unless he thereby secured the land at less than its value); Forelander *v.* Hicks, 6 Ind. 448; Vantrees *v.* Hyatt, 5 Ind. 487; Plaster *v.* Burger, 5 Ind. 232; Bunts *v.* Cole, 7 Blackf. 265, 41 Am. Dec. 226.

Kentucky.— Martin *v.* Blight, 4 J. J. Marsh. 491, 20 Am. Dec. 226; Mills *v.* Rogers, 2 Litt. 217, 13 Am. Dec. 263.

Louisiana.— Liles *v.* Rhodes, 7 La. 87.

Michigan.— Aldrich *v.* Maitland, 4 Mich. 205.

Missouri.— Durfee *v.* Moran, 57 Mo. 374; Griffith *v.* Judge, 49 Mo. 536; Neal *v.* Stone, 20 Mo. 294.

Nebraska.— See Runge *v.* Brown, 29 Nebr. 116, 45 N. E. 271.

New Hampshire.— Jones *v.* Portsmouth, etc., R. Co., 32 N. H. 544.

New Jersey.—Vineland Nat. Bank *v.* Shinn, 55 N. J. Eq. 415, 36 Atl. 953.

New York.— Marsh *v.* Ridgway, 18 Abb. Pr. 262; Crary *v.* Sprague, 12 Wend. 41, 27 Am. Dec. 110.

North Carolina.— Currie *v.* Clark, 90 N. C. 355.

Pennsylvania.— Jackson *v.* Morter, 82 Pa. St. 291; Walter *v.* Gernant, 13 Pa. St. 515, 53 Am. Dec. 491; Millspaugh's Appeal, 1 Pa. Cas. 44, 1 Atl. 227; Corry *v.* Funk, 6 Phila. 560; Kauffman *v.* Fahl, 1 Leg. Rec. 305; Houston *v.* Thomas, 12 Montg. Rep. 159. See also Oram *v.* Rothermel, 98 Pa. St. 300. See, however, Sharp *v.* Long, 28 Pa. St. 433.

South Carolina.—Toole *v.* Johnson, 61 S. C. 34, 39 S. E. 254; Barrett *v.* Bath Paper Co., 13 S. C. 128; Farr *v.* Sims, Rich. Eq. Cas. 122, 24 Am. Dec. 396.

Texas.— Hudson *v.* Morriss, 55 Tex. 595.

Virginia.— Carter *v.* Harris, 4 Rand. 199.

See 21 Cent. Dig. tit. "Execution," § 698.

Where price of property is not actually affected.— Conley *v.* Redwine, 109 Ga. 640, 35 S. E. 92, 77 Am. St. Rep. 398.

65. *Alabama.*—Ray *v.* Womble, 56 Ala. 32; McCollum *v.* Hubbert, 13 Ala. 289, holding, however, that a fraud which will authorize the court to set aside a sheriff's sale on motion must exist at the time of the sale, and that the matter arising subsequently cannot be considered.

Georgia.— Johnson *v.* Dooly, 72 Ga. 297; Cumming *v.* Fryer, Dudley 182.

Indiana.— Stuart *v.* Brown, 135 Ind. 232, 34 N. E. 976.

Kentucky.— Duncan *v.* Forsyth, 3 Dana 229; Blight *v.* Tobin, 7 T. B. Mon. 612, 18 Am. Dec. 219. See also Lock *v.* Slusher, (1897) 43 S. W. 471.

Louisiana.— Eastin *v.* Dugat, 10 La. 186, 29 Am. Dec. 461.

Mississippi.— Foster *v.* Pugh, 20 Miss. 416 (holding, however, that mere inadequacy of price is not necessarily evidence of fraud, although very gross inadequacy, under certain circumstances, may be so); Reynolds *v.* Nye, Freem. 462.

Missouri.— Stewart *v.* Nelson, 25 Mo. 309.

North Carolina.— Dudley *v.* Cole, 21 N. C. 429; Doe *v.* Fulgham, 6 N. C. 364. See also Markham *v.* Shannonhouse, 39 N. C. 411. *Compare* Nixon *v.* Harrell, 50 N. C. 76.

Pennsylvania.— Donaldson *v.* McRoy, 1 Browne 346; Moyer *v.* Nichol, 1 Leg. Rec. 55; Labar *v.* Snell, 1 L. T. N. S. 75.

See 21 Cent. Dig. tit. "Execution," § 694.

Prior mortgage fraudulent.—Taylor *v.* Dean, 7 Allen 251.

66. *California.*— San Francisco *v.* Pixley, 21 Cal. 56.

Illinois.— Day *v.* Graham, 6 Ill. 435; Meacham *v.* Sunderland, 10 Ill. App. 123.

Kansas.— Johnson *v.* Hovey, 9 Kan. 61.

Kentucky.— Dougherty *v.* Linthicum, 8 Dana 194.

Minnesota.— Mohan *v.* Smith, 30 Minn. 259, 15 N. W. 118.

Missouri.— Rector *v.* Hartt, 8 Mo. 448, 41 Am. Dec. 650.

New Jersey.— Boylan *v.* Kelly, 36 N. J. Eq. 331.

New York.— Groff *v.* Jones, 6 Wend. 522, 22 Am. Dec. 545.

North Carolina.— Brodie *v.* Seagraves, 1 N. C. 144.

Pennsylvania.— Donaldson *v.* Danville Bank, 20 Pa. St. 245; Connell *v.* Hughes, 1 Phila. 225.

However, where it appears that no benefit would have resulted from a division of the property, a sale *en masse* will not *per se* invalidate the sale.[67]

(IV) *Want or Inadequacy of Notice.* In almost every jurisdiction failure by the officer to give the proper notice of sale is sufficient ground for setting it aside where the motion is made by an interested party in due season.[68] Likewise the insufficiency of the notice, such as misdescription of the property or failure to advertise for the statutory period, has been held sufficient to warrant the vacation of the sale.[69]

g. Inadequacy of Price — (I) *General Rule.* The rule is well settled that the mere inadequacy of the price at which property is sold at an execution sale will not of itself, in the absence of any irregularities in the conduct of the sale, warrant the court in setting such sale aside; particularly after the property has come into the hands of an innocent purchaser without notice of any irregularities.[70] Some of the courts, however, have laid down the rule that, where the

Texas.— Jones *v.* Martin, 26 Tex. 57, 80 Am. Dec. 641.

Washington.— Otis *v.* Nash, 26 Wash. 39, 66 Pac. 111, holding, however, that the proper procedure would be by objecting to the confirmation of the sale, and not afterward by petition to set the sale aside.

See 21 Cent. Dig. tit. "Execution," § 699.

67. *Illinois.*— McMullen *v.* Gable, 47 Ill. 67; Prather *v.* Hill, 36 Ill. 402; Ross *v.* Mead, 10 Ill. 171.

Indiana.— Russell *v.* Houston, 5 Ind. 180.

Iowa.— Wallace *v.* Berger, 25 Iowa 456.

Minnesota.—Coolbaugh *v.* Roemer, 32 Minn. 445, 21 N. W. 472. See also Tillman *v.* Jackson, 1 Minn. 183.

Missouri.— Rector *v.* Hartt, 8 Mo. 448, 41 Am. Dec. 650.

New York.— Husted *v.* Dakin, 17 Abb. Pr. 137.

Pennsylvania.— Monument Cemetery Co. *v.* Potts, 1 Phila. 251.

See 21 Cent. Dig. tit. "Execution," § 699; and *supra*, X, A, 2, p.

68. *Iowa.*— Jensen *v.* Woodbury, 16 Iowa 515.

Maryland.— Moreland *v.* Bowling, 3 Gill 500.

Mississippi.— Enloe *v.* Miles, 12 Sm. & M. 147.

Pennsylvania.— Meanor *v.* Hamilton, 27 Pa. St. 137; Yocum *v.* Specht, 1 Wkly. Notes Cas. 6.

South Carolina.— Farr *v.* Sims, Rich. Eq. Cas. 122, 24 Am. Dec. 396.

See 21 Cent. Dig. tit. "Execution," § 701.

Compare Hayden *v.* Dunlap, 3 Bibb (Ky.) 216.

But see Crabtree *v.* Whiteselle, 65 Tex. 111.

In California, however, the rule is that failure to give proper notice of the sale of real estate under execution does not invalidate the sale, nor does it afford sufficient cause for setting it aside. Frink *v.* Roe, 70 Cal. 296, 11 Pac. 820; Smith *v.* Randall, 6 Cal. 47, 65 Am. Dec. 475.

69. *Delaware.*—Reed *v.* Fiddeman, 2 Houst. 408.

Illinois.— McCormick *v.* Wheeler, 36 Ill. 114, 85 Am. Dec. 388.

Missouri.— Hobein *v.* Murphy Co., 20 Mo. 447, 64 Am. Dec. 194.

New York.— Wright *v.* Hooker, 4 Cow. 415.

Ohio.— Lemert *v.* Clarke, 1 Ohio Cir. Ct. 569, 1 Ohio Cir. Dec. 318.

Pennsylvania.— Passmore *v.* Gordon, 1 Browne 320; Kingston *v.* Hoffman, 3 Kulp 331; Wells *v.* McCarragher, 1 Kulp 91; Twells *v.* Mulligan, 2 Wkly. Notes Cas. 167; Association *v.* Campbell, 1 Wkly. Notes Cas. 81; Hoeckley *v.* Henry, 3 Phila. 34; Chadwick *v.* Patterson, 2 Phila. 275; Kenderdine *v.* McClintock, 2 Phila. 224; Carlin *v.* Leng, 1 Phila. 375; Shaeffer *v.* Leippe, 6 Lanc. Bar 78. See also Sergeant *v.* Schatzle, 1 Wkly. Notes Cas. 403.

See 21 Cent. Dig. tit. "Execution," § 701.

But see Holly *v.* Bass, 68 Ala. 206 (holding that an execution sale will not be set aside because the advertisement was in pale ink, which before the sale had become nearly illegible); Kilby *v.* Haggin, 3 J. J. Marsh. (Ky.) 208 (holding that irregularity or defect in the advertisement of sale under an execution will not affect the validity of the sale unless the purchaser was privy to it); Ogilvie *v.* Rillieux, 10 Rob. (La.) 363.

70. *Alabama.*— Draine *v.* Smelser, 15 Ala. 423.

Arkansas.— Randolph *v.* Thomas, 23 Ark. 69; Newton *v.* State Bank, 22 Ark. 19; Miller *v.* Fraling, 21 Ark. 22; Brittin *v.* Handy, 20 Ark. 381, 73 Am. Dec. 497 (holding that, in the absence of fraud, mere inadequacy of price, however gross, does not invalidate the sale); Hardy *v.* Heard, 15 Ark. 184.

California.— Central Pac. R. Co. *v.* Creed, 70 Cal. 497, 11 Pac. 772; Smith *v.* Randall, 6 Cal. 47, 65 Am. Dec. 475.

Colorado.— Phillips *v.* Rhodes, 2 Colo. App. 70, 29 Pac. 1011.

Delaware.— Booth *v.* Webster, 5 Harr. 129.

Florida.— Coker *v.* Dawkins, 20 Fla. 141.

Georgia.— Palmour *v.* Roper, 119 Ga. 10, 45 S. E. 790; Gunn *v.* Slaughter, 83 Ga. 124, 9 S. E. 772; Van Dyke *v.* Martin, 53 Ga. 221.

Illinois.— Clark *v.* Glos, 180 Ill. 556, 54 N. E. 631, 72 Am. St. Rep. 223; Smith *v.* Huntoon, 134 Ill. 24, 24 N. E. 971, 23 Am. St. Rep. 646; Dobbins *v.* Wilson, 107 Ill. 17; Davis *v.* Pickett, 72 Ill. 483; Gibbons *v.* Bressler, 61 Ill. 110; McMullen *v.* Gable, 47 Ill. 67; Noyes *v.* True, 23 Ill. 503; Hopper *v.*

inadequacy of price at an execution sale is so gross as to shock the understanding or the conscience, it will of itself authorize the court to set aside the sale in order to promote the ends of justice.[71]

Davies, 70 Ill. App. 682. See also Pickering *v.* Driggers, 59 Ill. 65.

Indiana.— Kerr *v.* Haverstick, 94 Ind. 178.

Iowa.— Ackerman *v.* Hendricks, 117 Iowa 106, 90 N. W. 522; Sheppard *v.* Messenger, 107 Iowa 717, 77 N. W. 515; Griffith *v.* Milwaukee Harvester Co., 92 Iowa 634, 61 N. W. 243, 54 Am. St. Rep. 573; Wood *v.* Young, 38 Iowa 102; Wallace *v.* Berger, 25 Iowa 456; Cavender *v.* Smith, 1 Iowa 306.

Kentucky.— Herndon *v.* College Bible, 45 S. W. 67, 20 Ky. L. Rep. 30; Robb *v.* Hannah, 14 S. W. 360, 12 Ky. L. Rep. 361; Craig *v.* Garnett, 9 Bush 97; Waller *v.* Tate, 4 B. Mon. 529; Hart *v.* Bleight, 3 T. B. Mon. 273; Stockton *v.* Owings, Litt. Sel. Cas. 256, 12 Am. Dec. 302; Reed *v.* Brooks, 3 Litt. 127; Hansford *v.* Barbour, 3 A. K. Marsh. 515.

Minnesota.— Coolbaugh *v.* Roemer, 32 Minn. 445, 21 N. W. 472.

Mississippi.—Huntington *v.* Allen, 44 Miss. 654; Delafield *v.* Anderson, 7 Sm. & M. 630.

Missouri.— Kearney *v.* Boeckeler, 143 Mo. 60, 44 S. W. 721; Cubbage *v.* Franklin, 62 Mo. 364; Whitman *v.* Taylor, 60 Mo. 127; Durfee *v.* Moran, 57 Mo. 374; Parker *v.* Hannibal, etc., R. Co., 44 Mo. 421; Meir *v.* Zelle, 31 Mo. 331; Chouteau *v.* Nuckolls, 20 Mo. 442.

Nevada.— Dazet *v.* Landry, 21 Nev. 291, 30 Pac. 1064.

New Jersey.— Flommerfelt *v.* Zellers, 7 N. J. L. 153; Lennon *v.* Heindel, 56 N. J. Eq. 8, 37 Atl. 147; Fullerton *v.* Seiper, (Ch. 1896) 34 Atl. 680; Morrise *v.* Inglis, 46 N. J. Eq. 306, 19 Atl. 16; Weber *v.* Weitling, 18 N. J. Eq. 441; Smith *v.* Duncan, 16 N. J. Eq. 240; Mercereau *v.* Prest, 3 N. J. Eq. 460; Simmons *v.* Vandegrift, 1 N. J. Eq. 55; New Brunswick Bank *v.* Hassert, 1 N. J. Eq. 1.

New York.— Ceburre *v.* Pearson, 50 N. Y. Suppl. 112; Livingston *v.* Byrne, 11 Johns. 555.

North Dakota.— Power *v.* Larrabee, 3 N. D. 502, 57 N. W. 789, 44 Am. St. Rep. 577.

Pennsylvania.— Media Title, etc., Co. *v.* Kelly, 185 Pa. St. 131, 39 Atl. 832, 64 Am. St. Rep. 618; Stroup *v.* Raymond, 183 Pa. St. 279, 38 Atl. 626, 63 Am. St. Rep. 758; Felton *v.* Felton, 175 Pa. St. 44, 34 Atl. 312; Hollister *v.* Vanderlin, 165 Pa. St. 248, 30 Atl. 1002, 44 Am. St. Rep. 657 (holding that mere inadequacy of price, without more, is not sufficient ground to set aside a sheriff's sale); Cake *v.* Cake, 156 Pa. St. 47, 26 Atl. 781; Mead *v.* Conroe, 113 Pa. St. 220, 8 Atl. 374; Cooper *v.* Wilson, 96 Pa. St. 409; Craig's Appeal, 77 Pa. St. 448; Swires *v.* Brotherline, 41 Pa. St. 135, 80 Am. Dec. 601; Weaver *v.* Lyon, 2 Pa. Cas. 403, 5 Atl. 782; Dick *v.* Lindsay, 2 Grant 431; *In re* Carson, 6 Watts 140; Murphy *v.* McCleary, 3 Yeates 405; Campbell *v.* Williams, 3 Kulp 92; Long *v.* Miller, 10 Pa. Co. Ct. 586; Tripp *v.* Silkman, 29 Leg. Int. 29; Union Bank *v.* Bertolet, 1 Woodw. 88; Dainty *v.* Riegel, 1 Woodw. 74; Heath's Appeal, 2 C. Pl. 173; Saunders *v.* Timmins, 1 C. Pl. 1; Garman *v.* Garman, 4 Lanc. L. Rev. 305; Gorrecht *v.* Diffenbach, 2 Lanc. Bar 39; Timlow *v.* Heidig, 2 Leg. Op. 108; *In re* Dickey, 1 Jour. Juris. 92. See also Smith *v.* Tinicum Fishing Co., 1 Del. Co. 121.

South Carolina.— Coleman *v.* Hamburg Bank, 2 Strobh. Eq. 285, 49 Am. Dec. 671; Stockdale *v.* Yongue, Rice Eq. 3.

South Dakota.— Deadwood First Nat. Bank *v.* Black Hills F. Assoc., 2 S. D. 145, 48 N. W. 852.

Tennessee.— Mason *v.* Jackson, (Ch. App. 1900) 57 S. W. 217.

Texas.— Brackenridge *v.* Cobb, 85 Tex. 448, 21 S. W. 1034; Smith *v.* Perkins, 81 Tex. 152, 16 S. W. 805, 26 Am. St. Rep. 794; Jones *v.* Pratt, 77 Tex. 210, 13 S. W. 887; Weaver *v.* Nugent, 72 Tex. 272, 10 S. W. 458, 13 Am. St. Rep. 792; Allen *v.* Pierson, 60 Tex. 604; Pearson *v.* Hudson, 52 Tex. 352; Pearson *v.* Flanagan, 52 Tex. 266; Agricultural, etc., Assoc. *v.* Brewster, 51 Tex. 257; Atcheson *v.* Hutchison, 51 Tex. 223; Baker *v.* Clepper, 26 Tex. 629, 84 Am. Dec. 591; Pridgen *v.* Adkins, 25 Tex. 388; Martin *v.* Bryson, 31 Tex. Civ. App. 98, 71 S. W. 615; Valdez *v.* Cohen, 23 Tex. Civ. App. 475, 56 S. W. 375; Hunstock *v.* Roberts, (Civ. App. 1900) 55 S. W. 514; House *v.* Robertson, (Civ. App. 1896) 34 S. W. 640.

Wisconsin.— Collins *v.* Smith, 75 Wis. 392, 44 N. W. 510.

United States.— Samuels *v.* Revier, 92 Fed. 199, 34 C. C. A. 294; Mason *v.* Bennett, 52 Fed. 343; Cooper *v.* Galbraith, 6 Fed. Cas. No. 3,193, 3 Wash. 546.

See 21 Cent. Dig. tit. "Execution," § 703.

71. *Alabama.*— Simmons *v.* Sharpe, 138 Ala. 451, 35 So. 415; Lankford *v.* Jackson, 21 Ala. 650; Henderson *v.* Sublett, 21 Ala. 626. See also O'Bryan *v.* Davis, 103 Ala. 429, 15 So. 860; Ray *v.* Womble, 56 Ala. 32. And *compare* Howard *v.* Corey, 126 Ala. 283, 28 So. 682.

Georgia.— Suttles *v.* Sewell, 109 Ga. 707, 35 S. E. 224.

Indiana.— Fletcher *v.* McGill, 110 Ind. 395, 10 N. E. 651, 11 N. E. 779; Swoper *v.* Ardery, 5 Ind. 213; Reed *v.* Carter, 3 Blackf. 376, 26 Am. Dec. 422; Sherry *v.* Doe, Smith 289. See also Dawson *v.* Jackson, 62 Ind. 171.

Missouri.— Davis *v.* McCann, 143 Mo. 172, 44 S. W. 795.

Pennsylvania.— Phillips *v.* Wilson, 164 Pa. St. 350, 30 Atl. 264; Frey *v.* Wurtzel, 1 Woodw. 147. See also Weitzell *v.* Fryer, 4 Dall. 218, 1 L. ed. 807.

Texas.— Blum *v.* Rogers, 71 Tex. 668, 9 S. W. 595; Carpenter *v.* Anderson, (Civ. App. 1903) 77 S. W. 291.

Wisconsin.— Collins *v.* Smith, 75 Wis. 392, 44 N. W. 510.

(II) *Appraised Value as Standard.* In some jurisdictions the statutes relating to execution sales require that property sold on execution shall bring a designated proportion of its appraised value, exclusive of liens and encumbrances, and where property is sold under these statutes for less than such designated proportion of its appraised value, the sale may be vacated by proper proceedings.[72]

h. Inadequacy of Price Connected With Irregularities or Fraud. The rule is recognized in a majority of jurisdictions that to avoid an execution sale as against an innocent purchaser, even where the price paid is inadequate, knowledge of the vice in the sale or some misconduct traceable to him must be shown, and while the courts will often seize upon a slight circumstance to add to the weight of inadequacy of price to turn the scale, yet it must be shown that such purchaser is in some measure responsible for it.[73] Various circumstances have been seized upon by the courts to grant relief where there has been substantial inadequacy of price at an execution sale, and the additional circumstances need not be sufficient *per se* to authorize the sale to be set aside, if they tend to show that an unfair advantage was taken, or that the sale was conducted in a manner prejudicial to the rights or interests of the parties interested; for while inadequacy of price will not of itself be sufficient, yet when coupled with other circumstances tending to prove fraud, it becomes controlling and conclusive evidence, and justifies interference by the courts to prevent the consummation of an inequitable result.[74] Thus any irregularity on the part of the officer conducting the

United States.— Graffam *v.* Burgess, 117 U. S. 180, 6 S. Ct. 686, 27 L. ed. 839.

Compare Kinney *v.* Knoebel, 51 Ill. 112.

Acts of debtor affecting price.— Fabel *v.* Boykin, 55 Ala. 383.

Objection by fraudulent grantee.— Laurence *v.* Lippencott, 6 N. J. L. 473; Miller *v.* Koertge, 70 Tex. 162, 7 S. W. 691, 8 Am. St. Rep. 587.

72. *Arkansas.*— Crow *v.* State, 23 Ark. 684.

Indiana.— Bollman *v.* Gemmill, 155 Ind. 33, 57 N. E. 542; Ross *v.* Banta, 140 Ind. 120, 34 N. E. 865, 39 N. E. 732; Woodruff *v.* Hoard, 9 Ind. 186. *Compare* Hobson *v.* Doe, 4 Blackf. 487.

Iowa.— Brown *v.* Butters, 40 Iowa 544.

Kansas.— De Jarnette *v.* Verner, 40 Kan. 224, 19 Pac. 666; Capital Bank *v.* Huntoon, 35 Kan. 577, 11 Pac. 369.

Louisiana.— Phelps *v.* Rightor, 9 Rob. 531.

Michigan.—Willard *v.* Longstreet, 2 Dougl. 172.

Mississippi.— Helm *v.* Natchez Ins. Co., 8 Sm. & M. 197.

Pennsylvania.— Woltjen *v.* O'Malley, 12 Lanc. Bar 6; Arnold *v.* Weirman, 1 Leg. Rec. 348.

United States.— Northwestern Mut. L. Ins. Co. *v.* Seaman, 80 Fed. 357, holding, however, that under the Nebraska statute an appraisement cannot be set aside as too low where fraud in the appraisement is not alleged. See, however, U. S. Bank *v.* Halsted, 10 Wheat. 51, 6 L. ed. 264 (construing the Kentucky act of Dec. 21, 1821); McCracken *v.* Hale, 2 How. 608, 11 L. ed. 397.

See 21 Cent. Dig. tit. "Execution," § 704.

Compare Vallandingham *v.* Worthington, 85 Ky. 83, 2 S. W. 772, 8 Ky. L. Rep. 707; Sydnor *v.* Roberts, 13 Tex. 598, 65 Am. Dec. 84.

73. *Arkansas.*— Carden *v.* Lane, 48 Ark. 216, 2 S. W. 709, 3 Am. St. Rep. 228; Hudgins *v.* Morrow, 47 Ark. 515, 2 S. W. 104; Adams *v.* Thomas, 44 Ark. 267.

Illinois.— Bach *v.* May, 163 Ill. 547, 45 N. E. 248; Thomas *v.* Helmstreit, 68 Ill. 115.

Indiana.— Fletcher *v.* McGill, 110 Ind. 395, 10 N. E. 651, 11 N. E. 779.

Iowa.— Lehner *v.* Loomis, 83 Iowa 416, 49 N. W. 1018; Cavender *v.* Smith, 1 Iowa 306.

Kansas.— Iona Sav. Bank *v.* Blair, 56 Kan. 430, 43 Pac. 686; Jones *v.* Carr, 41 Kan. 329, 21 Pac. 258.

Michigan.—Aldrich *v.* Maitland, 4 Mich. 205.

Mississippi.— See Drake *v.* Collins, 5 How. 253.

Missouri.— Durfee *v.* Moran, 57 Mo. 374. See also Knoop *v.* Kelsey, 121 Mo. 642, 26 S. W. 683.

Pennsylvania.— Tripp *v.* Silkman, 29 Leg. Int. 29. See also Westmoreland Guarantee Bldg., etc., Assoc. *v.* Nesbit, 21 Pa. Super. Ct. 150.

Texas.— Irvin *v.* Ferguson, 83 Tex. 491, 18 S. W. 820; McLaury *v.* Miller, 64 Tex. 381.

United States.— Graffam *v.* Burgess, 117 U. S. 108, 6 S. Ct. 686, 29 L. ed. 839.

See 21 Cent. Dig. tit. "Execution," § 708.

Compare Cummins *v.* Little, 16 N. J. Eq. 48; White *v.* Wilson, 14 Ves. Jr. 151, 33 Eng. Reprint 479.

Ignorance of the law is not usually a ground for relief, but where a purchaser at a judicial sale has made an unconscionable bargain through such ignorance, the court has power to grant relief by ordering a resale. Cummings' Appeal, 23 Pa. St. 509.

74. *Alabama.*— Lee *v.* Davis, 16 Ala. 516.

District of Columbia.— Hart *v.* Hines, 10 App. Cas. 366.

Georgia.— Smith *v.* Georgia L. & T. Co., 114 Ga. 189, 39 S. E. 846; Haunson *v.* Nelms,

sale,[75] or the absence of, or error in, the notice of sale,[76] or a sale in gross of property which should be sold in parcels,[77] or irregularity as to the time of

109 Ga. 802, 35 S. E. 227; Suttles *v.* Sewells, 109 Ga. 707, 35 S. E. 224; Johnson *v.* Dooly, 72 Ga. 297.

Illinois.— Miller *v.* McAllister, 197 Ill. 72, 64 N. E. 254; Parker *v.* Shannon, 137 Ill. 376, 27 N. E. 525; Davis *v.* Chicago Dock Co., 129 Ill. 180, 21 N. E. 830; Roseman *v.* Miller, 84 Ill. 297; Eldred *v.* Mochring, 83 Ill. App. 264.

Iowa.— Fitzgerald *v.* Kelso, 71 Iowa 731, 29 N. W. 943.

Kentucky.— Howell *v.* McCreery, 7 Dana 388; Scott *v.* Powers, 78 S. W. 408, 25 Ky. L. Rep. 1640; Hamilton *v.* Perry, 76 S. W. 52, 25 Ky. L. Rep. 547; Morgan *v.* Stuart, 7 Ky. L. Rep. 521.

Mississippi.—Reynolds *v.* Nye, Freem. 462.

Missouri.— Beedle *v.* Mead, 81 Mo. 297; Cubbage *v.* Franklin, 62 Mo. 364; Parker *v.* Hannibal, etc., R. Co., 44 Mo. 421; Warder-Bushnell-Glesser Co. *v.* Allen, 63 Mo. App. 456.

New Jersey.— Raphael *v.* Zehner, 56 N. J. Eq. 836, 42 Atl. 1015; Flaherty *v.* Cramer, (Ch. 1898) 41 Atl. 482; Lennon *v.* Heindel, 56 N. J. Eq. 8, 37 Atl. 147; Kloepping *v.* Stellmacher, 21 N. J. Eq. 328; Marlatt *v.* Warwick, 18 N. J. Eq. 108.

New York.— Chapman *v.* Boetcher, 27 Hun 606; Griffith *v.* Hadley, 10 Bosw. 587; Collier *v.* Whipple, 13 Wend. 224.

North Carolina.— Currie *v.* Clark, 90 N. C. 355.

Ohio.— Hurst *v.* Fisher, 64 Ohio St. 530, 60 N. E. 626.

Pennsylvania.— Stroup *v.* Raymond, 183 Pa. St. 279, 38 Atl. 626, 63 Am. St. Rep. 758; Weitzell *v.* Fry, 4 Dall. 218, 1 L. ed. 807; Campbell *v.* Williams, 3 Kulp 92; Twells *v.* Conrad, 2 Wkly. Notes Cas. 30; Smith *v.* Tinicum Fishing Co., 1 Del. Co. 121; Fox *v.* Meyer, 1 Woodw. 50; Herr *v.* Adams, 13 Lanc. Bar 59; Gorrecht *v.* Diffenbach, 2 Lanc. Bar 39; Smith *v.* Humphries, 6 L. T. N. S. 75; Feury *v.* McLane, 5 Luz. Leg. Reg. 257; Vanneman *v.* Cooper, 8 Pittsb. Leg. J. 190; Whitacre *v.* Pratt, 8 Pittsb. Leg. J. 19.

Tennessee.— Bedford *v.* McDonald, 102 Tenn. 358, 52 S. W. 157.

Texas.— Hughes *v.* Duncan, 60 Tex. 72; Taul *v.* Wright, 45 Tex. 388; Allen *v.* Stephanes, 18 Tex. 658; Beckham *v.* Medlock, 19 Tex. Civ. App. 61, 46 S. W. 402; Leeper *v.* O'Donohue, 18 Tex. Civ. App. 531, 45 S. W. 327; Houghton *v.* Rice, 15 Tex. Civ. App. 561, 40 S. W. 349, 1057.

Utah.— Young *v.* Schroeder, 10 Utah 155, 37 Pac. 252.

Wisconsin.—Grede *v.* Dannenfelser, 42 Wis. 78.

United States.— Schroeder *v.* Young, 161 U. S. 334, 16 S. Ct. 512, 40 L. ed. 721; Graffam *v.* Burgess, 117 U. S. 180, 6 S. Ct. 686, 29 L. ed. 839.

See 21 Cent. Dig. tit. "Execution," § 708.

75. Irregularity on part of officer.— *Alabama.*— Hurt *v.* Nave, 49 Ala. 459.

Florida.— Lawyers' Co-operative Pub. Co. *v.* Bennett, 34 Fla. 302, 16 So. 185.

Georgia.— Suttles *v.* Sewell, 109 Ga. 707, 35 S. E. 224; Parker *v.* Glenn, 72 Ga. 637.

Illinois.— Bullen *v.* Dawson, 139 Ill. 633, 29 N. E. 1038.

Indiana.— Hamilton *v.* Burk, 28 Ind. 233.

Iowa.— Miller *v.* Colville, 21 Iowa 135.

Kentucky.— Dougherty *v.* Linthicum, 8 Dana 194; Gist *v.* Frazier, 2 Litt. 118.

Maryland.— Nesbit *v.* Dallam, 7 Gill & J. 494, 28 Am. Dec. 236.

Missouri.— Nelson *v.* Brown, 23 Mo. 13.

Rhode Island.— Aldrich *v.* Wilcox, 10 R. I. 405.

Texas.— Weaver *v.* Nugent, 72 Tex. 272, 10 S. W. 458, 13 Am. St. Rep. 792; Kauffman *v.* Morriss, 60 Tex. 119; Pearson *v.* Hudson, 52 Tex. 352; Day *v.* Johnson, (Civ. App. 1903) 72 S. W. 426; Johnson *v.* Daniel, 25 Tex. Civ. App. 587, 63 S. W. 1032; Martin *v.* Anderson, 4 Tex. Civ. App. 111, 23 S. W. 290.

United States.— Byers *v.* Surger, 19 How. 303, 15 L. ed. 670.

Where irregularity does not conduce to inadequacy in price.— Allen *v.* Pierson, 60 Tex. 604; Driscoll *v.* Morris, 2 Tex. Civ. App. 603, 21 S. W. 629; McKennon *v.* McGown, (Tex. Sup. 1889) 11 S. W. 532.

76. Error in notice of sale.— *Illinois.*— Parker *v.* Shannon, 137 Ill. 376, 27 N. E. 525; Hobson *v.* McCambridge, 130 Ill. 367, 22 N. E. 823; Davis *v.* Chicago Dock Co., 129 Ill. 180, 21 N. E. 830.

Kansas.— Weir *v.* Travelers' Ins. Co., 32 Kan. 325, 4 Pac. 267.

Mississippi.— Busick *v.* Watson, 72 Miss. 244, 16 So. 420.

Missouri.— Donham *v.* Hoover, 135 Mo. 210, 36 S. W. 627; Rogers, etc., Hardware Co. *v.* Cleveland Bldg. Co., (Sup. 1895) 32 S. W. 1.

Pennsylvania.— Ellis *v.* Blein, 2 Wkly. Notes Cas. 290; Association *v.* Adams, 1 Wkly. Notes Cas. 144; Brown *v.* Sheppard, 1 Wkly. Notes Cas. 103; Com. *v.* Dasher, 11 Lanc. Bar 107.

Texas.— Steffens *v.* Jackson, 16 Tex. Civ. App. 280, 41 S. W. 520; Jackson *v.* Steffens, (Civ. App. 1895) 32 S. W. 862; Schmidt *v.* Burnett, (Civ. App. 1893) 23 S. W. 228.

United States.— Burgess *v.* Graffan, 10 Fed. 216.

See 21 Cent. Dig. tit. "Execution," § 709.

77. Sale in gross.— *California.*— Georgeson *v.* Consumers' Lumber Co., [1892] 31 Pac. 257; San Francisco *v.* Pixley, 21 Cal. 56.

District of Columbia.— Hart *v.* Hines, 10 App. Cas. 366.

Illinois.— Miller *v.* McAllister, 197 Ill. 72, 64 N. E. 254; Lurton *v.* Rodgers, 139 Ill. 554, 29 N. E. 866, 32 Am. St. Rep. 214; Cohen *v.* Menard, 136 Ill. 130, 24 N. E. 604 [*affirming* 31 Ill. App. 503]; Berry *v.* Lovi, 107 Ill. 612; Bradley *v.* Luce, 99 Ill. 234; Morris

sale,[78] or errors in description of the property sold,[79] or defects in the writ under which the sale was made, coupled with inadequacy of price,[80] will furnish sufficient grounds for vacating the sale.

3. Defenses. An execution purchaser in defending an action to set the sale aside has only to show the judgment of a competent court and an execution authorizing the sale of the land.[81] It is, however, no bar to such action that the purchaser, being the execution plaintiff and chargeable with notice of irregularities, offered to reconvey on payment of the debt.[82]

4. Proceedings to Set Aside Sale — a. Motion[83] — (i) *General Rule.* The general rule is that a proceeding to set aside a sale under execution should be by motion made in the court from which the execution issued.[84]

v. Roby, 73 Ill. 462. See, however, Greenup *v.* Stoker, 12 Ill. 24, 52 Am. Dec. 474.

Indiana.— Wrigh *v.* Dick, 116 Ind. 538, 19 N. E. 306; Lashley *v.* Cassell, 23 Ind. 600; Reed *v.* Diven, 7 Ind. 189.

Iowa.— King *v.* Tharp, 26 Iowa 283.

Kentucky.— Muir *v.* Pettit, 35 S. W. 907, 18 Ky. L. Rep. 169.

New York.— Morgan *v.* Holladay, 38 N. Y. Super. Ct. 53, 48 How. Pr. 86; Groff *v.* Jones, 6 Wend. 522, 22 Am. Dec. 545; Tiernan *v.* Wilson, 6 Johns. Ch. 411.

Pennsylvania.— Smith *v.* Tinicum Fishing Co., 1 Del. Co. 121.

Texas.— Ballard *v.* Anderson, 18 Tex. 377; Moore *v.* Perry, (Civ. App. 1898) 46 S. W. 878.

78. Irregularity in time of sale.— *Florida.*— Lawyers' Co-operative Pub. Co. *v.* Bennett, 34 Fla. 302, 16 So. 185.

Kansas.— Pickett *v.* Pickett, 31 Kan. 727, 3 Pac. 549.

Missouri.— American Wine Co. *v.* Scholer, 85 Mo. 496 [*affirming* 13 Mo. App. 345]; Parker *v.* Hannibal, etc., R. Co., 44 Mo. 415.

Pennsylvania.— Ritter *v.* Getz, 161 Pa. St. 648, 29 Atl. 112. See also Matter of Raubenhold, 1 Woodw. 478.

Texas.— Ward *v.* Duer, 70 Tex. 231, 11 S. W. 116.

79. Errors in description.— Fidelity Bldg., etc., Assoc. *v.* Uhler, 199 Pa. St. 417, 49 Atl. 224; Whitaker *v.* Birkey, 2 Wkly. Notes Cas. (Pa.) 476, 11 Phila. (Pa.) 199; Moyer *v.* Ibbotson, 2 Wkly. Notes Cas. (Pa.) 29; Fair Association *v.* Johns, 1 Wkly. Notes Cas. (Pa.) 74; Board of Health *v.* Cobb, 7 Leg. Int. (Pa.) 187; Esrey *v.* Gray, 2 Del. Co. (Pa.) 135; Krause *v.* Neidig, 3 Montg. Co. Rep. (Pa.) 132; House *v.* Robertson, 89 Tex. 681, 36 S. W. 251 [*reversing* (Civ. App. 1896) 34 S. W. 640].

80. Defects in writ.— Flint *v.* Phipps, 20 Oreg. 340, 25 Pac. 725, 3 Am. St. Rep. 124, 23 Am. St. Rep. 124; Irvin *v.* Ferguson, 83 Tex. 491, 18 S. W. 820; Allen *v.* Clark, 36 Wis. 101.

81. Frakes *v.* Brown, 2 Blackf. (Ind.) 295, holding that the purchaser need not show that defendant in execution had no personal property out of which the debt might have been paid. See also Fischer *v.* Moore, 12 Rob. (La.) 95.

A plea of an outstanding title made by a purchaser at an execution sale cannot prevail against an action to set aside the sale, where the person in whom such title is alleged, on being made a party, disclaims any title, except that of a mere naked trustee. Strickland *v.* Hardwicke, 3 Tex. Civ. App. 326, 22 S. W. 541.

82. Hamilton *v.* Burch, 28 Ind. 233, holding that the judgment debtor had the right to insist that the execution should be legally levied upon his property, the sale fairly conducted, and the money collected in the manner provided by law. See also Bollman *v.* Gemmill, 155 Ind. 33, 57 N. E. 542.

In Louisiana, it has been held that where the judgment creditor is the purchaser, it is no defense to an action to set the sale aside that there has been no offer to return the amount of the purchase-money. Gallagher *v.* Abadie, 26 La. Ann. 343.

83. Motion generally see Motions.

84. *Alabama.*— Gardner *v.* Mobile, etc., R. Co., 102 Ala. 635, 15 So. 271, 48 Am. St. Rep. 635; White *v.* Farley, 81 Ala. 563, 8 So. 215; Holly *v.* Bass, 68 Ala. 206; Lee *v.* Davis, 16 Ala. 516.

Arkansas.— Anthony *v.* Shannon, 8 Ark. 52.

California.—Boles *v.* Johnston, 23 Cal. 226, 83 Am. Dec. 111.

Colorado.— Herr *v.* Broadwell, 5 Colo. App. 467, 39 Pac. 70.

District of Columbia.— Starr *v.* U. S., 8 App. Cas. 552.

Idaho.— Wooddy *v.* Jameson, 5 Ida. 466, 50 Pac. 1008.

Illinois.— Prather *v.* Hill, 36 Ill. 402; Swiggart *v.* Harber, 5 Ill. 364, 39 Am. Dec. 418; Meacham *v.* Sunderland, 10 Ill. App. 123.

Indiana.— Davis *v.* Campbell, 12 Ind. 192.

Kansas.— Capital Bank *v.* Huntoon, 35 Kan. 577, 11 Pac. 369; Baker *v.* Hall, 29 Kan. 617; White-Crow *v.* White-Wing, 3 Kan. 276.

Kentucky.— Bach *v.* Whittaker, 109 Ky. 612, 60 S. W. 410, 22 Ky. L. Rep. 1226; Cassiday *v.* McDaniel, 8 B. Mon. 519; Hope *v.* Hollis, 5 Ky. L. Rep. 319.

Michigan.— Cavenaugh *v.* Jakeway, Walk. 344.

Missouri.— American Wine Co. *v.* Scholer, 85 Mo. 496 [*affirming* 13 Mo. App. 345]; Groner *v.* Smith, 49 Mo. 318; Nelson *v.* Brown, 23 Mo. 13.

Nevada.—Miller *v.* Cherry, 2 Nev. 165; Hastings *v.* Burning Moscow Gold, etc., Min. Co., 2 Nev. 100.

(II) *Time Within Which to Move* — (A) *In General.* In the absence of statute,[85] there is no inflexible rule as to the time within which a motion to set aside and vacate a sale under execution must be made, the general rule being that there must be promptness of action and no unreasonable delay, which is to be determined by the particular circumstances of each case; ordinarily the proceeding is to be regarded as equitable in its nature, and the question of laches, when involved, is to be determined on equitable principles.[86] In some jurisdic-

New Jersey.— Vanduyne *v.* Vanduyne, 16 N. J. Eq. 93.

New York.— Gould *v.* Mortimer, 16 Abb. Pr. 448, 26 How. Pr. 167; Morgan *v.* Holladay, 48 How. Pr. 86.

North Carolina.— Perkins *v.* Bullinger, 2 N. C. 367.

North Dakota.— Warren *v.* Stinson, 6 N. D. 293, 70 N. W. 279.

South Dakota.— McCarthy *v.* Speed, 16 S. D. 584, 94 N. W. 411.

Texas.— Cravens *v.* Wilson, 48 Tex. 324; Wilson *v.* Aultman, (Civ. App. 1897) 39 S. W. 1103.

See 21 Cent. Dig. tit. "Execution," § 723.

Compare Leinenweber *v.* Brown, 24 Oreg. 548, 34 Pac. 475, 38 Pac. 4.

But see Stapleton *v.* Butterfield, 34 La. Ann. 822 (holding that an action to enter sale made under executory process is not an entry to another judgment and hence need not be brought in the same court that granted the order of seizure and sale); Gridley *v.* Duncan, 8 Sm. & M. (Miss.) 456 (holding that a sale under execution, whether valid or not, cannot be set aside on motion, it not being a remedy compatible with the end sought); Flournoy *v.* Smith, 3 How. (Miss.) 62.

Predatory action.— Under the Louisiana statute see Jewell *v.* De Blanc, 110 La. 810, 34 So. 787.

In trespass to try title, by a judgment creditor who purchased land at execution sale knowing that defendant was insane, against the debtor to recover the land, an answer setting out the facts which made the sale voidable and asking that it be set aside constitutes a direct attack thereon, authorizing the relief asked. Houghton *v.* Rice, 15 Tex. Civ. App. 561, 40 S. W. 349, 1057.

Attack by cross complaint is direct rather than collateral. Branch *v.* Foust, 130 Ind. 538, 30 N. E. 631.

Application to court not issuing process.— See Borlin's Appeal, 9 Wkly. Notes Cas. (Pa.) 545.

85. Under La. Civ. Code, art. 3543, see Munholland *v.* Scott, 33 La. Ann. 1043.

Sale of personalty in Pennsylvania see Lawrence *v.* Gallagher, 2 Wkly. Notes Cas. 261; Dateman *v.* Trine, 2 Luz. Leg. Reg. 103.

86. *Alabama.*— Anniston Pipe Works *v.* Williams, 106 Ala. 324, 18 So. 111, 54 Am. St. Rep. 51; Bolling *v.* Gantt, 93 Ala. 89, 9 So. 604; Cowan *v.* Sapp, 74 Ala. 44; Steele *v.* Tutwiler, 68 Ala. 107; Hurt *v.* Nave, 49 Ala. 459; McCaskell *v.* Lee, 39 Ala. 131; Daniel *v.* Modawell, 22 Ala. 365, 58 Am. Dec. 260; Abercrombie *v.* Conner, 10 Ala. 293; Hubbert *v.* McCollum, 6 Ala. 221.

Indiana.— Marley *v.* State, 147 Ind. 145, 46 N. E. 466.

Kansas.— Hazel *v.* Lyden, 51 Kan. 233, 32 Pac. 898, 37 Am. St. Rep. 273; Dickens *v.* Crane, 33 Kan. 344, 6 Pac. 630.

Kentucky.— Carlile *v.* Carlile, 7 J. J. Marsh. 624; Bristow *v.* Payton, 2 T. B. Mon. 91, 15 Am. Dec. 134; Black *v.* Stefle, 6 S. W. 23, 9 Ky. L. Rep. 610. See also Lasley *v.* Lackey, 4 Ky. L. Rep. 896.

Louisiana.— Riddell *v.* Ebinger, 6 La. Ann. 407.

Maryland.— Penn *v.* Isherwood, 5 Gill 206.

Michigan.— Spafford *v.* Beach, 2 Dougl. 150.

Minnesota.— Plummer *v.* Whitney, 33 Minn. 427, 23 N. W. 841.

New Jersey.— Penn *v.* Craig, 2 N. J. Eq. 495.

New York.— Wood *v.* Morehouse, 45 N. Y. 368 [*affirming* 1 Lans. 405]; Mohawk Bank *v.* Atwater, 2 Paige 54.

Pennsylvania.— Shields *v.* Miltenberger, 14 Pa. St. 76; Critchlow *v.* Critchlow, 8 Pa. Cas. 304, 11 Atl. 235; Fahinger *v.* Fahinger, 14 Phila. 622; Shakespear *v.* Fisher, 11 Phila. 251; Chadwick *v.* Patterson, 2 Phila. 275; George *v.* Graham, 1 Phila. 69; Young *v.* Wall, 1 Phila. 69. See also Flick *v.* McComsey, 10 Lanc. Bar 197.

South Carolina.— Ingram *v.* Belk, 2 Strobh. 207, 47 Am. Dec. 591.

Texas.— Hancock *v.* Metz, 15 Tex. 205.

United States.— Walker *v.* Cronkite, 40 Fed. 133.

See 21 Cent. Dig. tit. "Execution," §§ 686, 721.

After acknowledgment and delivery of deed. — It has been held in Pennsylvania that after a sheriff's deed has been acknowledged and delivered and the purchase-money paid, it is too late for the judgment creditor to obtain a rule to set the sale aside. Fahinger *v.* Fahinger, 14 Phila. (Pa.) 622. See also Carr *v.* O'Neill, 1 Wkly. Notes Cas. (Pa.) 41; Walker *v.* Cronkite, 40 Fed. 133.

Res adjudicata.— It has been held in Pennsylvania that an execution defendant who has had his day in court and his objections to the sale considered and disposed of on a motion to restrain the sheriff from making the sale cannot be heard afterward on the same grounds on a motion to set aside the sale. Morse *v.* Freck, 7 Pa. Co. Ct. 456.

Where purchaser who had failed to take sheriff's deed applied to the court twelve years afterward for an order directing the person then holding the office of sheriff to make the deed, it was held that defendant in execution or his heirs at law had the right to

tions the rule is laid down that defendant waives all irregularities in the execution sale, unless within the statutory period allowed for redemption he moves to have the sale set aside.[87]

(B) *After Confirmation or Execution of Deed.* The rule has been laid down in several jurisdictions[88] that fraud or mistake in the conduct of an execution sale furnishes sufficient ground for setting it aside, even after the confirmation thereof, or after the sheriff has executed the deed of conveyance to the purchaser.[89]

(III) *NOTICE OF MOTION.* The court cannot entertain a motion to set aside a sale under execution if notice is not given to all the parties interested,[90] unless such notice is waived by appearance.[91]

b. Bill In Equity[92] — (I) *WHEN BILL WILL LIE.* The rule is well recognized that a bill in equity will not lie to set aside an execution sale where the party seeking the aid of equity has a speedy and adequate remedy at law; but, where the grounds upon which the sale is sought to be vacated are not apparent from an inspection of the proceedings, such as a combination to suppress bidding or any other species of fraud,[93] or for any misconduct or illegality on the part of the

tender an issue as to the legality and fairness of the sale. Clements *v.* Lyon, 51 Ga. 126.

87. Rigney *v.* Small, 60 Ill. 416; Osgood *v.* Blackmore, 59 Ill. 261; Roberts *v.* Fleming, 53 Ill. 196; Peterson *v.* Little, 74 Iowa 223, 37 N. W. 169; Stewart *v.* Marshall, 4 Greene (Iowa) 75; Power *v.* Larabee, 3 N. D. 502, 57 N. W. 789, 44 Am. St. Rep. 577; Raymond *v.* Holborn, 23 Wis. 57, 99 Am. Dec. 105; Raymond *v.* Pauli, 21 Wis. 531. See also Foster *v.* Hall, 44 Wis. 568. See, however, Sioux City, etc., Town Lot, etc., Co. *v.* Walker, 78 Iowa 476, 43 N. W. 294.

In Missouri the rule is laid down that a motion to set aside a sale under execution is too late if made after the term at which the sale occurred has passed, the remedy then being by bill in equity. Force *v.* Van Patton, 149 Mo. 446, 50 S. W. 906; Downing *v.* Still, 43 Mo. 309; Nelson *v.* Brown, 23 Mo. 13.

88. The contrary rule, however, prevails in some jurisdictions where it has been held that after the court has approved the sale of property under execution, and the sheriff's deed has been acknowledged and delivered to the purchaser, it cannot, on motion or otherwise, set aside the sale and divest the title of the purchaser on the ground of fraud, accident, or mistake, and that the proper remedy in such case is an action of ejectment or a bill in equity. State Bank *v.* Noland, 13 Ark. 299; Evans *v.* Maury, 112 Pa. St. 300, 3 Atl. 850; Cardwell *v.* Hickman, 3 Wkly. Notes Cas. (Pa.) 258; Otis *v.* Nash, 26 Wash. 39, 66 Pac. 111. See also Brand *v.* Baker, 42 Oreg. 426, 71 Pac. 320. See, however, Connelly *v.* Philadelphia, 86 Pa. St. 110.

89. *Alabama.*— Mobile Cotton Press, etc., Co. *v.* Moore, 9 Port. 679.

District of Columbia.— Hart *v.* Hines, 10 App. Cas. 366.

Kansas.— Jenkins *v.* Green, 24 Kan. 493.

Missouri.— Ray *v.* Stobbs, 28 Mo. 35.

Ohio.— Hurst *v.* Fisher, 64 Ohio St. 530, 60 N. E. 626.

90. *Arkansas.*— Bently *v.* Cummins, 8 Ark. 490.

California.— Eckstein *v.* Calderwood, 34 Cal. 658.

Georgia.— Harrell *v.* Word, 54 Ga. 649.

Idaho.— Wooddy *v.* Jameson, 5 Ida. 466, 50 Pac. 1008.

Illinois.—Hays *v.* Cassell, 70 Ill. 669 (holding that notice to the purchaser is sufficient without service of notice to an assignee of the certificate of purchase); McCormick *v.* Wheeler, 36 Ill. 114, 85 Am. Dec. 388; Turner *v.* Saunders, 8 Ill. 239; Sears *v.* Low, 7 Ill. 281.

Iowa.— Osborn *v.* Cloud, 23 Iowa 104, 92 Am. Dec. 413; Lyster *v.* Brewer, 13 Iowa 461.

Kentucky.— Williams *v.* Cummins, 4 J. J. Marsh. 637; Iron *v.* Callard, 1 A. K. Marsh. 423.

Michigan.— Wilkie *v.* Ingham Cir. Judge, 52 Mich. 641, 18 N. W. 397.

Missouri.— American Wine Co. *v.* Scholer, 85 Mo. 496 [*affirming* 13 Mo. App. 345]; Clamorgan *v.* O'Fallon, 10 Mo. 112.

See 21 Cent. Dig. tit. "Execution," § 718.

See, however, Overton *v.* Gorham, 18 Fed. Cas. No. 10,626, 6 McLean 509.

In Kentucky see Payne *v.* Payne, 8 B. Mon. 391; Iron *v.* Callard, 1 A. K. Marsh. 423.

91. Iron *v.* Callard, 1 A. K. Marsh. (Ky.) 423; McKee *v.* Logan, 82 Mo. 524, holding that where the purchaser appeared and resisted the motion, he could not be heard to complain of want of notice to the sheriff and plaintiff in the execution. See also Ingersoll *v.* Sherry, 1 Phila. (Pa.) 68.

92. Equity generally see EQUITY.

93. *Alabama.*— Anniston Pipe Works *v.* Williams, 106 Ala. 324, 18 So. 111, 54 Am. St. Rep. 51.

Arkansas.— State Bank *v.* Noland, 13 Ark. 299.

Georgia.— New England Mortg. Security Co. *v.* Robson, 79 Ga. 757, 4 S. E. 251; Harrell *v.* Word, 54 Ga. 649.

Illinois.— Jenkins *v.* Merriweather, 109 Ill. 647; Goldsborough *v.* Darst, 9 Ill. App. 205.

Indiana.— Plaster *v.* Burger, 5 Ind. 232; Bunts *v.* Cole, 7 Blackf. 265, 41 Am. Dec. 226.

officer conducting the sale,[94] or where a deed has been executed and the purchaser placed in possession of the property,[95] a bill in equity is the appropriate remedy for the relief sought.

(II) *CONDITION PRECEDENT.* As he who asks equity must do equity, a debtor seeking to set aside an execution sale for irregularities, where fraud is not charged, can only have such sale vacated upon tendering the purchase-money.[96]

(III) *LIMITATIONS AND LACHES.*[97] Where a party unnecessarily delays to seek relief from an execution sale or allows the rights of third parties to intervene, the court will not grant him equitable relief after the time for his legal remedies has expired, except in the case of strong injustice as well as irregularities.[98]

c. Parties.[99] All parties of record in the action should be made parties to a

Kansas.— Adams *v.* Secor, 6 Kan. 542.

Kentucky.— Partlow *v.* Lane, 3 B. Mon. 424, 39 Am. Dec. 473; Vaughan *v.* Myers, 2 Dana 113; Wolford *v.* Phelps, 2 J. J. Marsh. 31; Estill *v.* Miller, 3 Bibb 177.

New Jersey.— Flaherty *v.* Cramer, (Ch. 1898) 41 Atl. 482.

New York.— Cantine *v.* Clark, 41 Barb. 629.

North Carolina.— James *v.* Markham, 128 N. C. 380, 38 S. E. 917; Crews *v.* Charlotte First Nat. Bank, 77 N. C. 110.

Tennessee.— McMinn *v.* Phipps, 3 Sneed 196; English *v.* Tomlinson, 8 Humphr. 378.

Virginia.— Hamilton *v.* Shrewsbury, 4 Rand. 427, 15 Am. Dec. 779.

United States.— Cocks *v.* Izard, 7 Wall. 559, 19 L. ed. 275.

94. Reed *v.* Carter, 1 Blackf. (Ind.) 410; Partlow *v.* Lane, 3 B. Mon. (Ky.) 424, 39 Am. Dec. 473; Wolford *v.* Phelps, 2 J. J. Marsh. (Ky.) 31; Cook *v.* Toumbs, 36 Miss. 685.

95. *Arkansas.*— Fenno *v.* Coulter, 14 Ark. 38.

California.— Bryan *v.* Berry, 8 Cal. 130.

Illinois.— Day *v.* Graham, 6 Ill. 435; Meacham *v.* Sunderland, 10 Ill. App. 123.

Iowa.— Visek *v.* Doolittle, 69 Iowa 602, 29 N. W. 762.

Missouri.— Groner *v.* Smith, 49 Mo. 318.

North Dakota.— Warren *v.* Stinson, 6 N. D. 293, 70 N. W. 279.

South Dakota.— McCarthy *v.* Speed, 16 S. D. 584, 94 N. W. 411.

Tennessee.— Crow *v.* Talley, (Ch. App. 1897) 59 S. W. 675.

Texas.— Woodhouse *v.* Cocke, (Civ. App. 1897) 39 S. W. 948.

See 21 Cent. Dig. tit. "Execution," §§ 724–726.

Compare O'Kelley *v.* Gholston, 89 Ga. 1, 15 S. E. 123.

96. *Georgia.*— O'Kelley *v.* Gholston, 89 Ga. 1, 15 S. E. 123.

Louisiana.— Barelli *v.* Gauche, 24 La. Ann. 324; Webb *v.* Coons, 11 La. Ann. 252.

Pennsylvania.— See Jackson *v.* McGinness, 14 Pa. St. 331.

Tennessee.— Blackburn *v.* Clarke, 85 Tenn. 506, 3 S. W. 505.

Texas.— See Garvin *v.* Hall, 83 Tex. 295, 18 S. W. 731; Herndon *v.* Rice, 21 Tex. 455; Woodhouse *v.* Cocke, (Civ. App. 1897) 39 S. W. 948.

Compare Ray *v.* Womble, 56 Ala. 32.

In Indiana the rule has been laid down, however, that a tender of the purchase-price is not a requisite in a suit to set aside an execution sale and annul the sheriff's deed. Seller *v.* Lingerman, 24 Ind. 264; Banks *v.* Bales, 16 Ind. 423.

Where purchaser seeks vacation of sale.— See Davis *v.* Ruth, 17 Lanc. L. Rev. (Pa.) 181, 13 York Leg. Rec. (Pa.) 206.

97. Laches generally see EQUITY, 16 Cyc. 150 *et seq.*

Limitation generally see LIMITATIONS OF ACTIONS.

98. *Alabama.*— Gardner *v.* Mobile, etc., R. Co., 102 Ala. 635, 15 So. 271, 48 Am. St. Rep. 84.

Illinois.— Dobbins *v.* Wilson, 107 Ill. 17; Noyes *v.* True, 23 Ill. 503; Stoker *v.* Greenup, 18 Ill. 27.

Indiana.— Frantz *v.* Harrow, 13 Ind. 507.

Iowa.— Brown *v.* Butters, 40 Iowa 544.

Kansas.— Capital Bank *v.* Huntoon, 35 Kan. 577, 11 Pac. 369.

Kentucky.— Meehan *v.* Edwards, 92 Ky. 574, 18 S. W. 519, 19 S. W. 179, 13 Ky. L. Rep. 803; Black *v.* Stefle, 6 S. W. 23, 9 Ky. L. Rep. 610. See Myers *v.* Sanders, 7 Dana 506 (holding that the right of a party who has been injured by a fraud in the sale of his property under execution, to avoid the sheriff's conveyance by an appropriate action, is not lost by any lapse of time short of that which would in general be a bar to the action itself); Blight *v.* Tobin, 7 T. B. Mon. 612, 18 Am. Dec. 219.

Michigan.— Campau *v.* Godfrey, 18 Mich. 27, 100 Am. Dec. 133.

Minnesota.— See Plummer *v.* Whitney, 33 Minn. 427, 23 N. W. 841.

Pennsylvania.— Meanor *v.* Hamilton, 27 Pa. St. 137.

South Carolina.— Thrower *v.* Cureton, 4 Strobh. Eq. 155, 53 Am. Dec. 660. *Compare* Bradley *v.* McBride, Rich. Eq. Cas. 202.

Texas.— Brackenridge *v.* Cobb, 85 Tex. 448, 21 S. W. 1034 [*affirming* 2 Tex. Civ. App. 161, 21 S. W. 614]. See Garvin *v.* Hall, 83 Tex. 295, 18 S. W. 731.

United States.— Richards *v.* Mackall, 124 U. S. 183, 8 S. Ct. 437, 31 L. ed. 396.

See 21 Cent. Dig. tit. "Execution," § 728.

Compare Carden *v.* Lane, 48 Ark. 216, 2 S. W. 709, 3 Am. St. Rep. 228.

Failure to object to confirmation.—See Otis *v.* Nash, 26 Wash. 39, 66 Pac. 111.

99. Parties generally see PARTIES.

motion or bill in equity to set aside an execution sale;[1] and in some jurisdictions it has been held that all persons holding under such parties should likewise be made parties.[2]

d. Pleadings.[3] A motion to vacate an execution sale on account of irregularity or fraud[4] or a bill in equity for the same purpose must state specifically the irregularity or fraud relied upon,[5] general allegations of the grounds upon which it is sought to vacate the sale being insufficient. And where a third party is the purchaser at the execution sale, there must be a distinct allegation of his knowledge of, or participation in, the irregularity or fraud.[6]

e. Evidence[7]— (i) *Admissibility.* In an action to vacate an execution sale, representations by the officer, or by the purchaser before and at the time of the sale, are admissible in evidence, in connection with the inadequacy of price, on the issue as to whether the sale was fair and valid.[8] Likewise the execution,

1. Chambers *v.* Hays, 6 B. Mon. (Ky.) 115; Wilson *v.* Percival, 1 Dana (Ky.) 419; Knight *v.* Applegate, 3 T. B. Mon. (Ky.) 335; Jewitt *v.* Marshall, 3 A. K. Marsh. (Ky.) 153; Stark *v.* Mitchel, 2 A. K. Marsh. (Ky.) 15 (holding that on a motion to quash a sale under an execution against two, it is error to quash on the application of only one); Sittig *v.* Morgan, 5 La. Ann. 574; McDonough *v.* Gravier, 9 La. 531; White *v.* Trotter, 14 Sm. & M. (Miss.) 30, 53 Am. Dec. 112; Teas *v.* McDonald, 13 Tex. 349, 65 Am. Dec. 65. See also White-Crow *v.* White-Wing, 3 Kan. 276. See, however, Stainton *v.* Simmons, 24 Ala. 410; Draper *v.* Vanhorn, 15 Ind. 155.

Property of third party.— It has been held in Iowa that the execution defendant is not a necessary party to a proceeding to set aside an execution sale on the ground that the real estate sold was the property of a third party. Baldwin *v.* Thompson, 15 Iowa 504.

The surety on a replevy bond on which an execution has issued is not an indispensable party to a motion to set aside the sale by the principal for irregularity. Bronston *v.* Robinson, 4 B. Mon. (Ky.) 142.

2. Pardee *v.* Leitch, 6 Lans. (N. Y.) 303; Ceburre *v.* Pearson, 50 N. Y. Suppl. 112. See also Cohen *v.* Menard, 136 Ill. 130, 24 N. E. 604 [*affirming* 31 Ill. App. 503] (holding that a bill to set aside an execution sale may, after the death of the judgment debtor, be brought by his executor and legatee and a creditor, where it appears that his personal estate is insufficient to pay his debts); State *v.* Yancy, 61 Mo. 397.

3. **Pleading** generally see EQUITY; PLEADING.

4. *Kansas.*— Livingston *v.* Lamb, 1 Kan. 221.

Minnesota.— Cunningham *v.* Water-Power Sandstone Co., 74 Minn. 282, 77 N. W. 137.

Missouri.— American Wine Co. *v.* Scholer, 85 Mo. 496 [*affirming* 13 Mo. App. 345].

Nebraska.— State Bank *v.* Green, 11 Nebr. 303, 9 N. W. 36.

Wisconsin.— Lane *v.* White, 14 Wis. 585.

See 21 Cent. Dig. tit. "Execution," § 730.

Compare Ryan *v.* Woodin, (Ida. 1904) 75 Pac. 261; Ritter *v.* Henshaw, 7 Iowa 97.

Plea.— On a motion to set aside a sale made under execution by a constable, to which the purchaser at the sale and the constable are made defendants, it is not a good plea that plaintiff in the motion had brought an action of trespass in the circuit court against the constable for levying on and selling the property and had recovered a judgment against him, as such fact is immaterial, the action being no bar to the motion to set aside. Staunton *v.* Simmons, 20 Ala. 243.

5. *California.*— Hudepohl *v.* Liberty Hill Water, etc., Co., 94 Cal. 588, 29 Pac. 1025, 28 Am. St. Rep. 149.

Georgia.— Kilgo *v.* Castleberry, 38 Ga. 512, 95 Am. Dec. 406; Orr *v.* Brown, 5 Ga. 400.

Illinois.— Henderson *v.* Harness, 184 Ill. 520, 56 N. E. 786; Farmers' Nat. Bank *v.* Sperling, 113 Ill. 273; Davis *v.* Pickett, 72 Ill. 483.

Indiana.— Bollman *v.* Gemmill, 155 Ind. 33, 57 N. E. 542. See also Guerin *v.* Kraner, 97 Ind. 533.

Iowa.— Bull *v.* Gilbert, 79 Iowa 547, 44 N. W. 815. See also May *v.* Sturdivant, 75 Iowa 116, 39 N. W. 221, 9 Am. St. Rep. 463.

Michigan.— Cooperstown First Nat. Bank *v.* State Sav. Bank, 123 Mich. 321, 82 N. W. 125.

Tennessee.— Huff *v.* Miller, (Ch. App. 1900) 58 S. W. 876.

Texas.— Woodhouse *v.* Cocke, (Civ. App. 1897) 39 S. W. 948.

See 21 Cent. Dig. tit. "Execution," § 730.

Compare Viguerie *v.* Hall, 107 La. 767, 31 So. 1019.

6. Lusk *v.* Reel, 36 Fla. 418, 18 So. 582, 51 Am. St. Rep. 32; Orr *v.* Brown, 5 Ga. 400; Brown *v.* Butters, 40 Iowa 544; Lang Syne Gold Min. Co. *v.* Ross, 20 Nev. 127, 18 Pac. 358, 19 Am. St. Rep. 337. *Compare* Sherry *v.* Nick of the Woods, 1 Ind. 575; Doe *v.* Smith, 4 Blackf. (Ind.) 228.

7. **Evidence** generally see EVIDENCE.

8. Seller *v.* Lingerman, 24 Ind. 264; White-Crow *v.* White-Wing, 3 Kan. 276; Hoffman *v.* Strohecker, 9 Watts (Pa.) 183. See also Grim *v.* Reinbold, 148 Pa. St. 446, 23 Atl. 1129. *Compare* Hamilton *v.* Burch, 28 Ind. 233; Aultman *v.* Humphrey, 8 Kan. App. 2, 53 Pac. 789.

advertisement, and appraisement of the property are admissible in evidence for the party seeking to vacate the sale.[9]

(II) *Burden of Proof.* The burden of proof is upon the party making the motion or filing the bill in equity to vacate an execution sale, to show the irregularities or fraud relied upon.[10]

f. Decision. The decision upon a motion to set aside an execution sale rests in the discretion of the court and is not conclusive on the ultimate rights of the parties claiming the property.[11]

5. Effect of Vacating Sale. Where an execution sale is vacated for an irregularity or fraud in the conduct thereof, as a general rule the judgment creditor should be restored to his full judgment,[12] the purchaser should be refunded the purchase-price,[13] and the execution debtor restored to his title and to possession of the property.[14]

6. Collateral Attack on Sale — a. General Rule. Where the court has jurisdiction of the case and the parties, and the power to issue a venditioni exponas, a sale made thereunder, and a deed properly acknowledged by the sheriff cannot be set aside in a collateral action,[15] either for irregularities occurring before the sale,[16]

9. Barkley *v.* Mahon, 95 Ind. 101; Massey *v.* Young, 73 Mo. 260.

10. *Arkansas.*— Newton *v.* State Bank, 22 Ark. 19.

Delaware.— Short *v.* Short, 2 Pennew. 62, 45 Atl. 541.

Indiana.— Jones *v.* Kokomo Bldg. Assoc., 77 Ind. 340; Talbott *v.* Hale, 72 Ind. 1.

Iowa.— Merritt *v.* Grover, 57 Iowa 493, 10 N. W. 879; Barber *v.* Tryon, 41 Iowa 349.

Kentucky.— Black *v.* Stefle, 6 S. W. 23, 9 Ky. L. Rep. 610.

New Jersey.— Coxe *v.* Halsted, 2 N. J. Eq. 311.

Pennsylvania.— Evans *v.* Sidwell, 9 Lanc. Bar 113.

See 21 Cent. Dig. tit. "Execution," § 731.

Agent of both parties.— It has been held in Mississippi that where one who was agent for both debtor and creditor in effecting an execution sale became himself the purchaser at such sale, in an action to set aside the sale the burden would be upon him to show that the sale was not fraudulent. White *v.* Trotter, 14 Sm. & M. 30, 53 Am. Dec. 112.

11. Hart *v.* Hines, 10 App. Cas. (D. C.) 366; Harrison *v.* Andrews, 18 Kan. 535; Aultman *v.* Humphrey, 8 Kan. App. 2, 53 Pac. 789; Shirley *v.* Taylor, 5 B. Mon. (Ky.) 99; Laird's Appeal, 2 Pa. Super. Ct. 300.

12. Keith *v.* Wilson, 3 Metc. (Ky.) 201; Wambaugh *v.* Gates, 11 Paige (N. Y.) 505; Keith *v.* Proctor, 8 Baxt. (Tenn.) 189.

13. Keith *v.* Wilson, 3 Metc. (Ky.) 201. See Hines *v.* Moye, 125 N. C. 8, 34 S. E. 103.

14. Trueman *v.* Berry, 6 B. Mon. (Ky.) 536 (holding that when the execution on which money has been paid is superseded defendant is entitled to the proceeds); Whiting *v.* Taylor, 8 Dana (Ky.) 403; King *v.* Dicken, 7 J. J. Marsh. (Ky.) 372. See also Bacon *v.* Kimmel, 14 Mich. 201; McKeown *v.* Craig, 20 Pa. St. 170; Aldridge *v.* Pardee, 24 Tex. Civ. App. 254, 60 S. W. 789, holding likewise that a subsequent deed by the execution vendee conveys no title.

15. *Arkansas.*— Feild *v.* Dortch, 34 Ark. 399.

California.—Boles *v.* Johnston, 23 Cal. 226, 83 Am. Dec. 111.

Colorado.— See Paddack *v.* Staley, 13 Colo. App. 363, 58 Pac. 363.

Illinois.— Oakes *v.* Williams, 107 Ill. 154.

Indiana.— Caley *v.* Morgan, 114 Ind. 350, 16 N. E. 790.

Kansas.— Stetson *v.* Freeman, 35 Kan. 523, 11 Pac. 431.

Kentucky.— Overton *v.* Woolfolk, 6 Dana 371. But *compare* Addison *v.* Crow, 5 Dana 271.

Louisiana.— Gillis *v.* Carter, 29 La. Ann. 698; Lacroix *v.* White, 24 La. Ann. 445; McClendon *v.* Kemp, 18 La. Ann. 162; Delespare *v.* Warner, 14 La. Ann. 413; Lawrence *v.* Birdsale, 6 La. Ann. 688; Winn *v.* Elgee, 6 Rob. 100.

Maine.— Caldwell *v.* Blake, 69 Me. 458.

Massachusetts.— Buffum *v.* Deane, 8 Cush. 35.

Mississippi.— Saffarans *v.* Terry, 12 Sm. & M. 690.

Missouri.— Lewis *v.* Coombs, 60 Mo. 44; Reed *v.* Austin, 9 Mo. 722, 45 Am. Dec. 336.

Nebraska.— Link *v.* Connell, 48 Nebr. 574, 67 N. W. 475.

Oklahoma.— Christy *v.* Springs, 11 Okla. 710, 69 Pac. 864.

Pennsylvania.— Weaver *v.* Brenner, 145 Pa. St. 299, 21 Atl. 1010 [*overruling* Cock *v.* Thornton, 108 Pa. St. 637]; Hageman *v.* Salisberry, 74 Pa. St. 280; Hinds *v.* Scott, 11 Pa. St. 19, 51 Am. Dec. 506.

Texas.— Taylor *v.* Snow, 47 Tex. 462, 26 Am. Rep. 311; Good *v.* Coombs, 28 Tex. 34; Ford *v.* Wright, 2 Tex. Unrep. Cas. 235.

Washington.—Diamond *v.* Turner, 11 Wash. 189, 39 Pac. 379.

United States.— Thompson *v.* Phillips, 23 Fed. Cas. No. 13,974, Baldw. 246.

See 21 Cent. Dig. tit. "Execution," § 736.

16. Irregularities before sale.—*Alabama.*— Parks *v.* Coffey, 52 Ala. 32; Brevard *v.* Jones, 50 Ala. 221.

or irregularities in the conduct of the sale,[17] or for mere inadequacy of price realized at such sale.[18]

b. Where Sale Is Void. Where, however, a sale is void and not merely voidable, it may be attacked in collateral proceedings.[19]

Arkansas.— Stout *v.* Brown, 64 Ark. 96, 40 S. W. 701; Webster *v.* Daniel, 47 Ark. 131, 14 S. W. 550; Hall *v.* Doyle, 35 Ark. 445.

Colorado.— Christ *v.* Flannagan, 23 Colo. 140, 46 Pac. 683.

Illinois.— Clark *v.* Glos, 180 Ill. 556, 54 N. E. 631, 72 Am. St. Rep. 223 [*citing* Dobbins *v.* Wilson, 107 Ill. 17; Durham *v.* Yeaton, 28 Ill. 264, 81 Am. Dec. 275].

Indiana.— Ribelin *v.* Peugh, 126 Ind. 216, 25 N. E. 1103; Wells *v.* Bower, 126 Ind. 115, 25 N. E. 603, 22 Am. St. Rep. 570; Martin *v.* Prather, 82 Ind. 535; Talbott *v.* Hale, 72 Ind. 1; Hatfield *v.* Jackson, 50 Ind. 507; Doe *v.* Harter, 2 Ind. 252, 1 Ind. 427; Lahr *v.* Ulmer, 27 Ind. App. 107, 60 N. E. 1009.

Iowa.— Williams *v.* Dickerson, 66 Iowa 105, 23 N. W. 286.

Kansas.— Trowbridge *v.* Cunningham, 63 Kan. 847, 66 Pac. 1015; Pracht *v.* Pister, 30 Kan. 568, 1 Pac. 638.

Kentucky.— Thompson *v.* Heffner, 11 Bush 353.

Louisiana.— Brosnaham *v.* Turner, 16 La. 433.

Maryland.— Estep *v.* Weems, 6 Gill & J. 303.

Massachusetts.— Buffum *v.* Deane, 8 Cush. 35.

Mississippi.— Hughes *v.* Wilkinson, 37 Miss. 482; Harper *v.* Hill, 35 Miss. 63; Hodge *v.* Mitchell, 27 Miss. 560, 61 Am. Dec. 524; Shelton *v.* Hamilton, 23 Miss. 496, 57 Am. Dec. 149; Cockerel *v.* Doe, 12 Sm. & M. 117; Drake *v.* Collins, 5 How. 253.

Missouri.— Norton *v.* Quimby, 45 Mo. 388; Landes *v.* Perkins, 12 Mo. 238.

Nebraska.— Gillespie *v.* Switzer, 43 Nebr. 772, 62 N. W. 228.

New York.— Roraback *v.* Stebbins, 4 Abb. Dec. 100, 3 Keyes 62, 33 How. Pr. 278; Nims *v.* Sabine, 44 How. Pr. 252.

Oregon.— Eddy *v.* Coldwell, 23 Oreg. 163, 31 Pac. 475, 37 Am. St. Rep. 672.

Pennsylvania.— Shearer *v.* Peffer, 155 Pa. St. 501, 26 Atl. 658; Stewart *v.* Stocker, 13 Serg. & R. 199, 15 Am. Dec. 589.

South Carolina.— Ward *v.* Cohen, 3 S. C. 338.

Texas.— Maverick *v.* Flores, 71 Tex. 110, 8 S. W. 636; Williams *v.* Ball, 52 Tex. 603, 36 Am. Rep. 730; Riddle *v.* Turner, 52 Tex. 145; Odum *v.* Menafee, 11 Tex. Civ. App. 119, 33 S. W. 129.

Wisconsin.— Mariner *v.* Coon, 16 Wis. 465.

United States.— Landes *v.* Brant, 10 How. 348, 13 L. ed. 449; Walker *v.* Cronkite, 40 Fed. 133; Griswold *v.* Connolly, 11 Fed. Cas. No. 5,833, 1 Woods 193; Sumner *v.* Moore, 23 Fed. Cas. No. 13,610, 2 McLean 59.

See 21 Cent. Dig. tit. "Execution," § 737.

Compare Atwood *v.* Bearss, 45 Mich. 469, 8 N. W. 55.

17. Irregularities in conduct of sale.—*Alabama.*— Costello *v.* Thompson, 9 Ala. 937.

Arkansas.— Byers *v.* Fowler, 12 Ark. 218, 44 Am. Dec. 271.

California.— Gregory *v.* Bovier, 77 Cal. 121, 19 Pac. 232; Kelsey *v.* Dunlap, 7 Cal. 160.

Illinois.— McCormick *v.* Wheeler, 36 Ill. 114, 85 Am. Dec. 388; Rigg *v.* Cook, 9 Ill. 336, 46 Am. Dec. 462; Swiggart *v.* Harber, 5 Ill. 364, 39 Am. Dec. 418.

Indiana.— Jones *v.* Kokomo Bldg. Assoc., 77 Ind. 340. See also Weaver *v.* Guyer, 59 Ind. 195.

Iowa.— Foley *v.* Kane, 53 Iowa 64, 4 N. W. 821.

Kansas.— Trowbridge *v.* Cunningham, 63 Kan. 847, 66 Pac. 1015.

Maryland.— Queen Anne's County *v.* Pratt, 10 Md. 5.

Missouri.— Lewis *v.* Whitten, 112 Mo. 318, 20 S. W. 617; Reed *v.* Austin, 9 Mo. 722, 45 Am. Dec. 336.

New York.— Jackson *v.* Vanderheyden, 17 Johns. 167, 8 Am. Dec. 378; Jackson *v.* Mills, 13 Johns. 463.

Tennessee.— Simpson *v.* Sparkman, 12 Lea 360.

Texas.— Smith *v.* Olsen, 23 Tex. Civ. App. 458, 56 S. W. 568.

United States.— Griffith *v.* Bogert, 59 U. S. 158, 15 L. ed. 307.

See 21 Cent. Dig. tit. "Execution," § 738.

Compare Myers *v.* Sanders, 7 Dana (Ky.) 506; Lamberton *v.* Merchants' Nat. Bank, 24 Minn. 281; Power *v.* Larabee, 3 N. D. 502, 57 N. W. 789, 44 Am. St. Rep. 577; Hairston *v.* Hairston, 1 Brev. (S. C.) 305.

18. Inadequacy of price.— Worthington *v.* Miller, 134 Ala. 420, 32 So. 748; McHany *v.* Schenk, 88 Ill. 357; Elston *v.* Castor, 101 Ind. 426, 51 Am. Rep. 754; Smith *v.* Perkins, 81 Tex. 152, 16 S. W. 805, 26 Am. St. Rep. 794; Moore *v.* Johnson, 12 Tex. Civ. App. 694, 34 S. W. 771.

19. *Arkansas.*— Russell *v.* Williamson, 67 Ark. 80, 53 S. W. 561.

Indiana.— Doe *v.* Harter, 2 Ind. 252.

Iowa.— Lowell *v.* Shannon, 60 Iowa 713, 15 N. W. 566.

Louisiana.— Cronan *v.* Cochran, 27 La. Ann. 120.

Maryland.— Candler *v.* Fisher, 11 Md. 332.

Missouri.— Weston *v.* Clark, 37 Mo. 568; Caffery *v.* Choctaw Coal, etc., Co., 95 Mo. App. 174, 68 S. W. 1049.

New Jersey.— See Denn *v.* Lecony, 1 N. J. L. 39.

New York.— Farnham *v.* Hildreth, 32 Barb. 277.

Texas.— Hooper *v.* Caruthers, 78 Tex. 432, 15 S. W. 98. *Compare* Stone *v.* Day, 69 Tex. 13, 5 S. W. 642, 5 Am. St. Rep. 17.

7. Presumption of Validity. The courts will as a general rule indulge all presumptions in favor of the regularity of an execution sale, and of the judgment, execution, and levy upon which it was founded;[20] and the execution purchaser is not affected by matters subsequent to the sale arising between parties to the judgment to which he is a stranger.[21]

C. Title and Rights of Purchaser[22]**— 1. Actions to Try or Confirm Title — a. In General.** In almost every jurisdiction the statutes authorize an execution purchaser to maintain an action at law or a bill in equity to quiet title, whether he be in or out of possession of the property.[23]

b. What It Is Necessary to Prove. In the appropriate action by a purchaser at an execution sale to try the title to property, it is necessary for him to show

Vermont.—Boardman *v.* Keeler, 1 Aik. 158, 15 Am. Dec. 670.

See 21 Cent. Dig. tit. "Execution," § 736 *et seq.*

20. *Alabama.*— Brandon *v.* Snows, 2 Stew. 255.

Florida.— Coker *v.* Dawkins, 20 Fla. 141; Dupuis *v.* Thompson, 16 Fla. 69.

Georgia.— Wiggins *v.* Gillette, 93 Ga. 20, 19 S. E. 86, 44 Am. St. Rep. 123.

Indiana.— Meikel *v.* Meikel, 119 Ind. 421, 20 N. E. 720; Ferrier *v.* Deutchman, 81 Ind. 390; Talbott *v.* Hale, 72 Ind. 1; Evans *v.* Ashby, 22 Ind. 15; Banks *v.* Bales, 16 Ind. 423; Small *v.* Eby, 9 Ind. 177; Mercer *v.* Doe, 6 Ind. 80.

Iowa.— Brock *v.* Barr, 70 Iowa 399, 30 N. W. 652; Preston *v.* Wright, 60 Iowa 351, 14 N. W. 352; Eggers *v.* Redwood, 50 Iowa 289; Wright *v.* Howell, 35 Iowa 288; Childs *v.* McChesney, 20 Iowa 431, 89 Am. Dec. 545; Cole *v.* Porter, 4 Greene 510.

Kansas.— Bowersock *v.* Adams, 55 Kan. 681, 41 Pac. 971.

Kentucky.— Vincent *v.* Eaves, 1 Metc. 247; Allison *v.* Taylor, 3 B. Mon. 363; Evans *v.* Davis, 3 B. Mon. 344; Bustard *v.* Gates, 4 Dana 429; Terry *v.* Bleight, 3 T. B. Mon. 270, 16 Am. Dec. 101; Holcomb *v.* Hays, 62 S. W. 1028, 23 Ky. L. Rep. 352.

Louisiana.— Dorsey *v.* Vaughan, 5 La. Ann. 155; Baum's Succession, 11 Rob. 314; Goodrich's Succession, 6 Rob. 107; New Orleans Gas Light, etc., Co. *v.* Allen, 4 Rob. 387; Walker *v.* Allen, 19 La. 307; Harman *v.* O'Maran, 18 La. 526; Childress *v.* Allen, 17 La. 37; Brosnaham *v.* Turner, 16 La. 433; McDonough *v.* Gravier, 9 La. 531; Poultney *v.* Cecil, 8 La. 321; Grant *v.* Walden, 6 La. 623; Wilson *v.* Munday, 5 La. 483.

Massachusetts.— Doty *v.* Gorham, 5 Pick. 487, 16 Am. Dec. 417.

Minnesota.— Bradley *v.* Sandilands, 66 Minn. 40, 68 N. W. 321, 61 Am. St. Rep. 386; Clossen *v.* Whitney, 39 Minn. 50, 38 N. W. 759; Holmes *v.* Campbell, 12 Minn. 221.

Mississippi.— Hamblen *v.* Hamblen, 33 Miss. 455, 69 Am. Dec. 358.

Missouri.— Baker *v.* Underwood, 63 Mo. 384.

New Jersey.— Hunt *v.* Swayze, 55 N. J. L. 33, 25 Atl. 850.

New York.— Leland *v.* Cameron, 31 N. Y. 115; Smith *v.* Hill, 22 Barb. 656; Goldman *v.* Banta, 12 N. Y. Suppl. 346; Hawley *v.* Cramer, 4 Cow. 717.

North Carolina.— Ferguson *v.* Wright, 113 N. C. 537, 18 S. E. 691.

Pennsylvania.— Williams *v.* Lawrenceville, etc., Pass. R. Co., 21 Pittsb. Leg. J. 187. See also Hoyt *v.* Koons, 19 Pa. St. 277.

South Carolina.—Nixon *v.* Bynum, 1 Bailey 148.

Tennessee.— Burnett *v.* Austin, 78 Tenn. 564.

Texas.— Halloway *v.* McIlhenny Co., 77 Tex. 657, 14 S. W. 240; Fuller *v.* East Texas Land, etc., Co., (Civ. App. 1893) 23 S. W. 571.

Vermont.— Fairbanks *v.* Benjamin, 50 Vt. 99; Drake *v.* Mooney, 31 Vt. 617, 76 Am. Dec. 145.

See 21 Cent. Dig. tit. "Execution," § 740.

Execution issued by leave of court.— Rollins *v.* McIntire, 87 Mo. 496.

Sale in violation of statute.—Piel *v.* Brayer, 30 Ind. 332, 95 Am. Dec. 699.

Where property is held adversely to purchaser.— Landreaux *v.* Foley, 13 La. Ann. 114.

21. McClintock *v.* Kansas City Cent. Bank, 120 Mo. 127, 24 S. W. 1052; Jackson *v.* Bartlett, 8 Johns. (N. Y.) 361.

22. Effect of redemption see *infra*, X, F, 11.

Necessity of conveyance to pass title see *infra*, X, E, 1.

23. Oliver *v.* Dougherty, (Ariz. 1902) 68 Pac. 553; Strauss *v.* Tuckhorn, 200 Ill. 75, 65 N. E. 683, where, however, it was held that the purchaser was guilty of laches in not bringing his action for seven years after the issuance of his certificate of sale, and therefore was precluded from relief. See also Krupp *v.* Brand, 200 Ill. 403, 65 N. E. 780 (where real estate sold on execution was worth more than the value of the judgment debtor's homestead interest therein, and the sheriff having neglected to set off such interest, it was held that the purchaser after conveyance to him was entitled to maintain a bill in equity to have such interest set off or to pay the debtor the value thereof in cash); Kunze *v.* Solomon, 126 Mich. 290, 85 N. W. 739; Edsell *v.* Nevins, 80 Mich. 146, 44 N. W. 1115; Hunstock *v.* Roberts, (Tex. Civ. App. 1901) 65 S. W. 675; and cases cited *infra*, note 24 *et seq.*

Ejectment generally see Ejectment.

Quieting title generally see Quieting Title.

that defendant in execution had some interest or estate in the land sold on which the judgment could operate.[24] Likewise plaintiff in an action claiming under a sheriff's deed given the purchaser at the execution sale must prove a valid judgment, execution, and levy, independent of recitals in the deed.[25] However, it is not necessary for such purchaser to deduce a regular chain of title subsisting in the execution debtor, as it is sufficient if he shows a legal title in defendant at the time of the rendition of the judgment.[26]

2. Estate or Interest Acquired by Purchaser — a. In General. A *bona fide* purchaser at a valid sale of property under execution, who has received the sheriff's deed therefor, acquires all the right, title, and interest of the judgment

Trespass to try title generally see Trespass to Try Title.

24. *Alabama.*— Hendon *v.* White, 52 Ala. 597. See also Whiteside *v.* Decatur Branch Bank, 10 Ala. 249.

California.— Pekin Min., etc., Co. *v.* Kennedy, 81 Cal. 356, 22 Pac. 679.

Indiana.— Shipley *v.* Shook, 72 Ind. 511; Calloway *v.* Doe, 1 Blackf. 372.

Maine.— Parlin *v.* Ware, 39 Me. 363.

Missouri.— State *v.* Casteel, 51 Mo. App. 143.

New Jersey.— Belford *v.* Crane, 16 N. J. Eq. 265, 84 Am. Dec. 155.

North Carolina.— Wall *v.* Fairley, 77 N. C. 105.

Oklahoma.— Mosier *v.* Monsen, 13 Okla. 41, 74 Pac. 905.

Pennsylvania.— Levick *v.* Bensing, (1889) 17 Atl. 10; Kerr *v.* Stiffey, 2 Penr. & W. 174.

South Carolina.— Galt *v.* Lewis, 3 Brev. 261; Sims *v.* Randal, 1 Brev. 85.

Tennessee.— Broyles *v.* Jones, 6 Baxt. 393; Yoe *v.* Dyer, 6 Heisk. 16; Kimbrough *v.* Benton, 3 Humphr. 110.

Texas.— Perryman *v.* Rayburn, (Civ. App. 1895) 30 S. W. 915.

See 21 Cent. Dig. tit. "Execution," § 744.

Compare Colvin *v.* Baker, 2 Barb. (N. Y.) 206.

A purchaser of land at execution sale under a levy against a resulting trustee is not entitled to hold the land as against the beneficiary of the trust, unless he pay the consideration therefor other than the giving of a credit for the price of the judgment. Hicks *v.* Pogue, (Tex. Civ. App. 1902) 76 S. W. 786.

25. *Alabama.*— Ayers *v.* Roper, 111 Ala. 651, 20 So. 460; Elliott *v.* Dycke, 78 Ala. 150.

California.—Cloud *v.* El Dorado County, 12 Cal. 128, 73 Am. Dec. 526.

Delaware.— Williams *v.* Hickman, 2 Harr. 463.

Florida.— Davis *v.* Shuler, 14 Fla. 438.

Illinois.— Carbine *v.* Morris, 92 Ill. 555; Ledford *v.* Weber, 7 Ill. App. 87.

Indiana.— Wilhite *v.* Hamrick, 92 Ind. 594; Leary *v.* New, 90 Ind. 502; Shipley *v.* Shook, 72 Ind. 511; Carpenter *v.* Doe, 2 Ind. 465.

Kentucky.—Locke *v.* Coleman, 4 T. B. Mon. 315, 15 Am. Dec. 118; Terry *v.* Bleight, 3 T. B. Mon. 270, 16 Am. Dec. 101; Smith *v.* Moreman, 1 T. B. Mon. 154; Martin *v.* McCargo, 5 Litt. 293; Dunn *v.* Meriweather, 1 A. K. Marsh. 158; McCreery *v.* Pursley, 1 A. K. Marsh. 114. See McGuire *v.* Kouns, 7 T. B. Mon. 386, 18 Am. Dec. 187.

Louisiana.— Hyman *v.* Bailey, 13 La. Ann. 450; Dede *v.* Boguille, 8 La. Ann. 138; Drouet *v.* Rice, 2 Rob. 374; Thompson *v.* Rogers, 4 La. 9; Casanova *v.* Aregno, 3 La. 211. See Thompson *v.* Chauveau, 6 Mart. N. S. 458.

Maine.— Parlin *v.* Ware, 39 Me. 363.

Mississippi.— Kane *v.* Doe, 9 Sm. & M. 387. See also Cockerel *v.* Doe, 12 Sm. & M. 117.

New Jersey.— Swan *v.* Despreaux, 12 N. J. L. 182, 22 Am. Dec. 485.

North Carolina.— Simpson *v.* Hiatt, 35 N. C. 470; Lyerly *v.* Wheeler, 33 N. C. 288, 53 Am. Dec. 414; Williamson *v.* Bedford, 32 N. C. 198; Owen *v.* Barksdale, 30 N. C. 81, 47 Am. Dec. 348; McEntire *v.* Durham, 29 N. C. 151, 45 Am. Dec. 512; Blanchard *v.* Blanchard, 25 N. C. 105, 38 Am. Dec. 710; Dobson *v.* Murphy, 18 N. C. 586; Bryan *v.* Brown, 6 N. C. 343; Hamilton *v.* Adams, 6 N. C. 161. See, however, Hardin *v.* Cheek, 48 N. C. 135, 64 Am. Dec. 600; Green *v.* Cole, 35 N. C. 425.

Ohio.— U. S. Bank *v.* White, Wright 51.

Oregon.— Faull *v.* Cooke, 19 Oreg. 455, 26 Pac. 662, 20 Am. St. Rep. 836.

Pennsylvania.— Hampton *v.* Speekenagle, 9 Serg. & R. 212, 11 Am. Dec. 704.

South Carolina.—Richardson *v.* Broughton, 2 Nott & M. 417; Barkley *v.* Screven, 1 Nott & M. 408.

Tennessee.— Gass *v.* Gass, 1 Heisk. 613. See also Hamilton *v.* Bradley, 5 Hayw. 127; Clark *v.* Wright, 8 Humphr. 528. See, however, Russell *v.* Stinson, 3 Hayw. 56.

Texas.— Stark *v.* Ellis, 69 Tex. 543, 7 S. W. 76; Sellman *v.* Hardin, 58 Tex. 86.

Vermont.— Perry *v.* Whipple, 38 Vt. 278.

See 21 Cent. Dig. tit. "Execution," § 744.

Compare Hobart *v.* Frisbie, 5 Conn. 592.

Where judgment is rendered on a former judgment, and execution issued thereon, it is not necessary for a purchaser at a sale under this execution to produce the first judgment in support of his title. Jennings *v.* Stafford, 23 N. C. 404.

26. Elliott *v.* Dycke, 78 Ala. 150; Brock *v.* Yongue, 4 Ala. 584; Perryman *v.* Rayburn, (Tex. Civ. App. 1895) 30 S. W. 915. See also Yoe *v.* Dyer, 6 Heisk. (Tenn.) 16.

debtor therein, whether legal or equitable, and nothing more.[27] Thus, in jurisdictions where equitable interests are subject to sale on execution, the purchaser of an equity of redemption at an execution sale will acquire all of the mortgagor's right, title, and interest in the mortgaged property,[28] but he has no such title to

27. *Alabama.*— Searcey *v.* Oates, 68 Ala. 111; Foster *v.* Moody, 51 Ala. 473; Doe *v.* King, 21 Ala. 429; Lawson *v.* Orear, 4 Ala. 156; Avent *v.* Read, 2 Port. 480, 27 Am. Dec. 663. See Pool *v.* Cummings, 20 Ala. 563.

Arizona.— Oliver *v.* Dougherty, (1902) 68 Pac. 553.

Arkansas.— Dawson *v.* Parham, 55 Ark. 286, 18 S. W. 48; Tuley *v.* Ready, 27 Ark. 98.

California.— Frink *v.* Roe, 70 Cal. 296, 11 Pac. 820; Le Roy *v.* Dunkerly, 54 Cal. 452; Davis *v.* Mitchell, 34 Cal. 81; Fore *v.* Manlove, 18 Cal. 436; Boggs *v.* Fowler, 16 Cal. 559, 76 Am. Dec. 561; Bryan *v.* Sharp, 4 Cal. 349.

Georgia.— Ashley *v.* Cook, 109 Ga. 653, 35 S. E. 89; McLennan *v.* Graham, 106 Ga. 211, 32 S. E. 118; Gitten *v.* Lowry, 15 Ga. 336; Andrews *v.* Murphy, 12 Ga. 431. See also Oglesby *v.* Hynds Mfg. Co., 96 Ga. 748, 22 S. E. 328.

Illinois.— Maghee *v.* Robinson, 98 Ill. 458; Gould *v.* Hendrickson, 96 Ill. 599; Carbine *v.* Morris, 92 Ill. 555; Vansyckle *v.* Richardson, 13 Ill. 171.

Indiana.— Wright *v.* Tichenor, 104 Ind. 185, 3 N. E. 853; Sharpe *v.* Davis, 76 Ind. 17; Bradshaw *v.* Warner, 54 Ind. 58. See Dickerson *v.* Nelson, 4 Ind. 160.

Iowa.— McCormick *v.* Williams, 54 Iowa 50, 6 N. W. 138; Curtis *v.* Millard, 14 Iowa 128, 81 Am. Dec. 460.

Kansas.— Treptow *v.* Buse, 10 Kan. 170.

Kentucky.— Phillips *v.* Johnson, 14 B. Mon. 172; Wickliffe *v.* Bascom, 7 B. Mon. 681; Murray *v.* Fishback, 5 B. Mon. 403; York *v.* East Jellico Coal Co., 76 S. W. 532, 25 Ky. L. Rep. 927. See Walker *v.* McKnight, 15 B. Mon. 467, 61 Am. Dec. 190.

Louisiana.— Parish Bd. School Directors *v.* Edrington, 40 La. Ann. 633, 4 So. 574; Denton *v.* Woods, 19 La. Ann. 356; Bailly *v.* Percy, 14 La. 17; Ballio *v.* Poisset, 8 Mart. N. S. 336, 19 Am. Dec. 185; Bujac *v.* Mayhew, 3 Mart. 613.

Maine.— Coombs *v.* Gordan, 59 Me. 111; Symonds *v.* Hall, 37 Me. 354, 59 Am. Dec. 53; Rollins *v.* Clay, 33 Me. 132.

Maryland.— Martin *v.* Martin, 7 Md. 368, 61 Am. Dec. 364; Balch *v.* Zentmeyer, 11 Gill & J. 267.

Massachusetts.— Champney *v.* Smith, 15 Gray 512; Peabody *v.* Patten, 2 Pick. 517.

Minnesota.— Banning *v.* Edes, 6 Minn. 402; Dickinson *v.* Kinney, 5 Minn. 409.

Mississippi.— Bramlett *v.* Wetlin, 71 Miss. 902, 15 So. 934; Taylor *v.* Lowenstein, 50 Miss. 278; Adams *v.* Harris, 47 Miss. 144; Harper *v.* Tapley, 35 Miss. 506; Taylor *v.* Eckford, 11 Sm. & M. 21. See also Duke *v.* Clark, 58 Miss. 465.

Missouri.— Mechanics' Bank *v.* Merchants' Bank, 45 Mo. 513, 100 Am. Dec. 388; Foster *v.* Potter, 37 Mo. 525.

Montana.— Chumasero *v.* Vail, 3 Mont. 376.

Nebraska.— Hart *v.* Beardsley, (1903) 93 N. W. 423; Mansfield *v.* Gregory, 8 Nebr. 432, 1 N. W. 382; Hibbard *v.* Weil, 5 Nebr. 41.

New Hampshire.— Bryant *v.* Whitcher, 52 N. H. 158; True *v.* Congdon, 44 N. H. 48.

New Jersey.— Leport *v.* Todd, 32 N. J. L. 124.

New York.— Stonebridge *v.* Perkins, 141 N. Y. 1, 35 N. E. 980 [*affirming* 2 Misc. 162, 21 N. Y. Suppl. 628]; Snedeker *v.* Snedeker, 18 Hun 355; Sands *v.* Hildreth, 14 Johns. 493; Jackson *v.* Graham, 3 Cai. 188; Sweet *v.* Green, 1 Paige 473, 19 Am. Dec. 442.

North Carolina.— Cannon *v.* Parker, 81 N. C. 320; Wall *v.* Fairley, 77 N. C. 105; Smith *v.* Smith, 72 N. C. 228; Walke *v.* Moody, 65 N. C. 599; Homesley *v.* Hogue, 49 N. C. 481; Giles *v.* Palmer, 49 N. C. 386, 69 Am. Dec. 756; Reed *v.* Kinnaman, 43 N. C. 13; Rutherford *v.* Green, 37 N. C. 121; Flynn *v.* Williams, 23 N. C. 509; Dudley *v.* Cole, 21 N. C. 429; Islay *v.* Stewart, 20 N. C. 297.

Ohio.— McLouth *v.* Rathbone, 19 Ohio 21; Barr *v.* Hatch, 3 Ohio 527; Green *v.* Cutright, Wright 738; Gutshall *v.* Salsberry, Wright 122; Lee *v.* Citizens' Bank, 5 Ohio Dec. (Reprint) 21, 1 Am. L. Rep. 385.

Pennsylvania.— Miller *v.* Baker, 166 Pa. St. 414, 31 Atl. 121, 45 Am. St. Rep. 680; Fehley *v.* Barr, 66 Pa. St. 196; Pittsburg, etc., R. Co. *v.* Jones, 59 Pa. St. 433; Lodge *v.* Barnett, 46 Pa. St. 477; Reed's Appeal, 13 Pa. St. 476; Reigle *v.* Seiger, 2 Penr. & W. 340; Kerr *v.* Stiffey, 2 Penr. & W. 174; Handley *v.* Connolly, 3 L. T. N. S. 201; McCay *v.* Orr, 11 Wkly. Notes Cas. 524.

South Carolina.— Starke *v.* Harrison, 5 Rich. 7; Jones *v.* Burr, 5 Strobh. 147, 53 Am. Dec. 699; Johnson *v.* Payne, 1 Hill 111.

Tennessee.— McCallum *v.* Woolsey, 6 Baxt. 308; Arendale *v.* Morgan, 5 Sneed 703; Bostick *v.* Winton, 1 Sneed 524. See also Pratt *v.* Phillips, 1 Sneed 543, 60 Am. Dec. 162.

Texas.— Smith *v.* Crosby, 86 Tex. 15, 23 S. W. 10, 40 Am. St. Rep. 818 [*affirming* 4 Tex. Civ. App. 251, 22 S. W. 1042]; Sullivan *v.* O'Neal, 66 Tex. 433, 1 S. W. 185; Bates *v.* Bacon, 66 Tex. 348, 1 S. W. 256; Tobar *v.* Losano, 6 Tex. Civ. App. 698, 25 S. W. 973.

Vermont.— Sanborn *v.* Kittredge, 20 Vt. 632, 50 Am. Dec. 58; Lull *v.* Matthews, 19 Vt. 322; Griffith *v.* Fowler, 18 Vt. 390.

United States.— Milwaukee, etc., R. Co. *v.* James, 6 Wall. 750, 18 L. ed. 854.

See 21 Cent. Dig. tit. "Execution," § 747.

Where an entry upon vacant land had lapsed before a sale of the land on execution against the enterer, and he afterward reentered, it was held that the purchaser on execution could not compel the debtor to assign to him the title acquired under the second entry. Nunn *v.* Mulholland, 17 N. C. 381.

28. *Alabama.*— Gassenheimer *v.* Molton, 80

the property as will support an action of ejectment;[29] however, if prior to the sale of the equity of redemption the mortgage be paid, the sale is a nullity and nothing passes thereby.[30] Where property is sold under execution in which the judgment debtor has only a life-estate,[31] or an estate for years,[32] such a sale will not pass the fee, and the purchaser does not hold adversely to a reversioner or remainder-man who can maintain ejectment against him. Conversely, the purchaser at an execution sale acquires no title where the judgment debtor had none, and he is charged with all equities or defects in the title existing at the time the lien of the judgment under which he purchased attached.[33]

b. Before Expiration of Redemption Period — (I) *General Rule.* Under statutes allowing redemption, by the judgment debtor, of property sold under execution, a purchaser at such sale acquires an equitable estate which continues until the time of redemption has expired.[34]

(II) *Liability For Waste.*[35] The purchaser of land at an execution sale, being the owner of the land so purchased by him, subject only to the right of statutory redemption outstanding in the judgment debtor, and other parties

Ala. 521, 2 So. 652; Junkins *v.* Lovelace, 72 Ala. 303.

Kentucky.— Dougherty *v.* Linthicum, 8 Dana 194; Cooper *v.* Martin, 1 Dana 23.

Maine.— Dyer *v.* Chick, 52 Me. 350.

Massachusetts.— Laflin *v.* Crosby, 99 Mass. 446, holding, however, that such sale does not pass any interest not covered by the mortgage which the debtor has in the land and of which he retains the legal title.

Nebraska.— Renard *v.* Brown, 7 Nebr. 449.

New York.— Carpenter *v.* Simmons, 28 How. Pr. 12.

Pennsylvania.— Horbach *v.* Riley, 7 Pa. St. 81 [*overruling* Wilson *v.* Stoxe, 10 Watts 434].

See 21 Cent. Dig. tit. "Execution," § 747 *et seq.*

After maturity.— It has been held that a purchaser at execution sale of the equity of redemption after maturity of the mortgage does not thereby acquire such title as will support ejectment or a statutory real action in the nature of an ejectment. Atcheson *v.* Broadhead, 56 Ala. 414.

Mortgaged property subject to execution see *supra*, V, E.

29. *Alabama.*— Atcheson *v.* Broadhead, 56 Ala. 414.

Massachusetts.— Forster *v.* Mellen, 10 Mass. 421. *Compare* Cowles *v.* Dickinson, 140 Mass. 373, 5 N. E. 302.

Mississippi.— Wolfe *v.* Doe, 13 Sm. & M. 103, 51 Am. Dec. 147.

New Jersey.— Leport *v.* Todd, 32 N. J. L. 124.

United States.— Carson *v.* Boudinot, 5 Fed. Cas. No. 2,462, 2 Wash. 33.

See 21 Cent. Dig. tit. "Execution," § 747 *et seq.*

30. Brown *v.* Snell, 46 Me. 490; Pillsbury *v.* Smyth, 25 Me. 427; Perry *v.* Hayward, 12 Cush. (Mass.) 344; Tufts *v.* Hayes, 31 N. H. 138.

31 Phillips *v.* Johnson, 14 B. Mon. (Ky.) 172; Burhans *v.* Van Zandt, 7 N. Y. 523 [*affirming* 7 Barb. 91]; Canada *v.* Holman, (Tenn. Ch. App. 1901) 62 S. W. 372.

Tenant by curtesy.— Where a husband conveys lands to his wife during coverture and she dies after issue born alive, his interest as tenant by curtesy, if any, is only an equitable estate, and the purchaser of such interest on execution does not acquire a title on which he can maintain ejectment. Carrington *v.* Richardson, 79 Ala. 101. *Compare* McLaughlin *v.* Shields, 12 Pa. St. 283.

32. Hayden *v.* Shiff, 12 La. Ann. 524; Bigelow *v.* Finch, 17 Barb. (N. Y.) 394; State *v.* Rives, 27 N. C. 297; Simons *v.* Van Ingen, 86 Pa. St. 330. But *compare* Murrell *v.* Roberts, 33 N. C. 424, 53 Am. Dec. 419.

33. *Alabama.*—Hendrix *v.* Southern R. Co., 130 Ala. 205, 30 So. 596, 89 Am. St. Rep. 27; Gray *v.* Denson, 129 Ala. 406, 30 So. 395; Mobile Electric Lighting Co. *v.* Rust, 117 Ala. 680, 23 So. 751. See also Murphy *v.* Green, 120 Ala. 112, 22 So. 112.

Arizona.— Costello *v.* Friedman, [1903] 71 Pac. 935.

Connecticut.— Schroeder *v.* Tomlinson, 70 Conn. 348, 39 Atl. 484.

Tennessee.— Gross *v.* Washington, (Ch. App. 1896) 38 S. W. 442. See Green *v.* Veder, (Ch. App. 1900) 57 S. W. 519.

Texas.— Watts *v.* Bruce, 31 Tex. Civ. App. 347, 72 S. W. 258; Barnes *v.* Krause, (Civ. App. 1899) 53 S. W. 92.

See 21 Cent. Dig. tit. "Execution," § 747 *et seq.*

Sale under subsequent execution.—Where a creditor has several judgments against the debtor, he may enforce them all, but if any particular property of the debtor is legally sold under execution, the interest of the debtor therein is divested, and a subsequent sale of the same property under other executions conveys nothing. Finch *v.* Turner, 21 Colo. 287, 40 Pac. 565.

34. And the judgment debtor has only a barren legal title, liable to be divested at any time after the expiration of the redemption period by the execution and delivery to the purchaser of a conveyance by the officer who made the sale. Page *v.* Rogers, 31 Cal. 293; Matter of Scrugham, Hopk. (N. Y.) 88.

35. Waste generally see WASTE.

designated in the statute as entitled to redeem, is therefore not liable to the redemptioner for waste committed in the management of the property.[36]

c. Scope and Effect of Description. The general rule is that the levy of an execution controls the subsequent proceedings in determining what property passes by the sale.[37]

d. Fixtures and Improvements.[38] The general rule is that a levy upon and sale of realty will pass to the purchaser at the execution sale all fixtures and improvements thereon.[39]

e. Growing Crops.[40] The rule is well recognized that growing crops belonging to the owner of the land pass as part of the realty to a purchaser of such lands at an execution sale.[41] However, a purchaser of land at a sheriff's sale under exe-

36. O'Connor *v.* Attalla Bank, 116 Ala. 585, 22 So. 902, 67 Am. St. Rep. 146; Otis *v.* McMillan, 70 Ala. 46; Morris *v.* Beebe, 54 Ala. 300; Kannon *v.* Pillow, 7 Humphr. (Tenn.) 281.

37. Crush *v.* Stewart, 7 Ky. L. Rep. 825; Burrows *v.* Parker, 31 Oreg. 57, 48 Pac. 1100, 65 Am. St. Rep. 812; McArthur *v.* Sherwood, 177 Pa. St. 513, 35 Atl. 812; Hoffman *v.* Danner, 14 Pa. St. 25; Heartley *v.* Beaum, 2 Pa. St. 165; Kohler *v.* Kleppinger, 1 Pa. Cas. 567, 5 Atl. 750; Buckholder *v.* Sigler, 7 Watts & S. (Pa.) 154 (holding that if the holder of a tract of land purchases a small lot adjoining for the purpose of using it in connection with the original tract, and he so uses it, the whole will pass by a levy and sale of the tract of land, without a particular description of the small part purchased); Sergeant *v.* Ford, 2 Watts & S. (Pa.) 122; Zeigler *v.* Houtz, 1 Watts & S. (Pa.) 533; Carpenter *v.* Cameron, 7 Watts (Pa.) 51; Grubb *v.* Guilford, 4 Watts (Pa.) 223, 28 Am. Dec. 700; Streaper *v.* Fisher, 1 Rawle (Pa.) 155, 18 Am. Dec. 604; Swartz *v.* Moore, 5 Serg. & R. (Pa.) 257. See also Boyce *v.* Hornberger, 29 Tex. Civ. App. 337, 68 S. W. 701; Fuller *v.* East Texas Land, etc., Co., (Tex. Civ. App. 1893) 23 S. W. 571. *Compare* Trudeau *v.* McVicar, 1 La. Ann. 426; Kinter *v.* Jenks, 43 Pa. St. 445 (holding that an execution sale of land purporting to be in one county cannot pass the title thereto if the land at the time of the sale is in another county); Hunter *v.* Hulings, 37 Pa. St. 307 (holding that where in the levy of an execution against the judgment debtor's land, the land of the judgment creditor was included by mistake and sold under the execution, a purchaser who had been warned of the mistake took no title by a sheriff's deed); Boyce *v.* Hornberger, 29 Tex. Civ. App. 337, 68 S. W. 701.

Mode and sufficiency of levy see *supra*, VII, B, 7.

Offspring of slave.— It was held in Nouvet *v.* Bollinger, 15 La. Ann. 293, that the adjudication of a slave woman at a sheriff's sale does not pass the title to her child under ten years of age, who has been neither seized, advertised, nor sold.

38. Fixtures generally see FIXTURES.

Improvements generally see IMPROVEMENTS.

Fixtures subject to execution see *supra*, V, A, 12.

39. *Colorado.*— Hayes *v.* New York Gold Min. Co., 2 Colo. 273.

Kansas.— Rounsaville *v.* Hazen, 39 Kan. 610, 18 Pac. 689.

Louisiana.— Polhman *v.* De Bouchel, 32 La. Ann. 1158.

Nebraska.— See Dewey *v.* Walton, 31 Nebr. 819, 48 N. W. 960, where the improvements were sold and removed from the premises prior to the execution sale.

Pennsylvania.— Pittsburg, etc., R. Co. *v.* Jones, 59 Pa. St. 433; Wright *v.* Chestnut Hill Iron Ore Co., 45 Pa. St. 475; Heaton *v.* Findlay, 12 Pa. St. 304.

See 21 Cent. Dig. tit. "Execution," § 750.

Bricks on land at the time of its sale, not for use on it, but for market, do not pass to the execution purchaser of the land. Key *v.* Woolfolk, 6 Rob. (La.) 424.

Where fixture is detached.— Harlan *v.* Harlan, 20 Pa. St. 303.

40. Crops generally see CROPS.

Crops subject to execution see *supra*, V, A, 5.

41. *Alabama.*— Thweat *v.* Stamps, 67 Ala. 96.

Georgia.— Frost *v.* Render, 65 Ga. 15; Pitts *v.* Hendrix, 6 Ga. 452.

Indiana.— Thomas *v.* Noel, 81 Ind. 382.

Iowa.— Ellithorpe *v.* Reidesil, 71 Iowa 315, 32 N. W. 238.

Louisiana.— Frank *v.* Magee, 50 La. Ann. 1066, 23 So. 939; Adams *v.* Moulton, McGloin 239.

Massachusetts.— Nichols *v.* Dewey, 4 Allen 386.

New Jersey.— Bloom *v.* Welsh, 27 N. J. L. 177.

Pennsylvania.— Long *v.* Seavers, 103 Pa. St. 517; Bear *v.* Bitzer, 16 Pa. St. 175, 55 Am. Dec. 490; King *v.* Bosserman, 13 Pa. Super. Ct. 480; Loose *v.* Scharff, 6 Pa. Super. Ct. 153. See also Hershey *v.* Metzgar, 90 Pa. St. 217.

See 21 Cent. Dig. tit. "Execution," § 752.

Contra.— Houts *v.* Showalter, 10 Ohio St. 12.

In Nebraska.—See Jaques *v.* Dawes, 3 Nebr. (Unoff.) 752, 92 N. W. 570, holding that the purchaser of land at an execution sale is entitled to all crops planted thereon after confirmation. See, however, Yeazel *v.* White, 40 Nebr. 432, 58 N. W. 1020, 24 L. R. A. 449.

Timber which has been felled after the lien

cution against the owner thereof acquires no interest in the growing crops beyond that of the judgment debtor.[42]

f. Rights Under Contract of Purchase[43]— (I) *Interest of Vendor.*[44] A creditor who buys at an execution sale the interest of the vendor in a tract of land contracted to be sold, the title to which is held as security for the purchase-money, acquires only the legal title, subject to the equities of the vendee.[45]

(II) *Interest of Vendee.*[46] Where property in possession of an execution debtor under contract of purchase is sold on execution the sheriff's vendee acquires no title, unless he can show a performance of the terms of the contract, or a tender of performance.[47] A purchaser under an execution sale of land encumbered with a vendor's lien acquires all the title of the execution defendant, subject to such lien.[48]

g. Partnership Rights and Interests.[49] Where a judgment is obtained against one partner individually, the purchaser of the partnership property at an execution sale had thereunder becomes a tenant in common with the other partners in an undivided share of the property purchased, subject to all the rights of the other parties and to all outstanding partnership debts.[50]

of the judgment detaches, but which has not been specially withdrawn from the execution sale, passes with the realty to the purchaser at the execution sale. Frank *v.* Magee, 49 La. Ann. 1250, 22 So. 739; Leidy *v.* Proctor, 97 Pa. St. 486 [*overruling* 1 Chest. Co. Rep. 85]; Duff *v.* Bindley, 16 Fed. 178.

42. Garrison *v.* Parker, 117 Ga. 537, 43 S. E. 849; Blitch *v.* Lee, 115 Ga. 112, 41 S. E. 275; Johnson *v.* Cook, 96 Mo. App. 442, 70 S. W. 526; Kesler *v.* Cornelison, 98 N. C. 383, 3 S. E. 839; Dail *v.* Freeman, 92 N. C. 351 (holding that as between an execution creditor and a landowner who purchases at an execution sale and the tenant who has raised a crop on the land since the rendition of the judgment on which the execution was based, the crop passes to the tenant); Adams *v.* McKesson, 53 Pa. St. 81, 91 Am. Dec. 183; Yeager *v.* Cassidy, 16 Lanc. L. Rev. (Pa.) 305, 13 York Leg. Rec. (Pa.) 61.

43. Contract of purchase generally, see Vendor and Purchaser.

44. Interest of vendor subject to execution see *supra*, V, H, 2, a.

45. Steele *v.* Taylor, 1 Minn. 274; Tally *v.* Reed, 74 N. C. 463; Blackmer *v.* Phillips, 67 N. C. 340; Garrard *v.* Lantz, 12 Pa. St. 186; McMullen *v.* Wenner, 16 Serg. & R. (Pa.) 18, 16 Am. Dec. 543; Morgan *v.* Snell, 3 Baxt. (Tenn.) 382. *Compare* Spratt *v.* Livingston, 32 Fla. 507, 14 So. 160, 22 L. R. A. 453.

46. Interest of vendee subject to execution see *supra*, V, H, 2, b.

47. *California.*— Chase *v.* Cameron, 133 Cal. 231, 65 Pac. 460.

Georgia.— Wilkerson *v.* Burr, 10 Ga. 117.

Illinois.— Pontiac Nat. Bank *v.* King, 110 Ill. 254; Carbine *v.* Morris, 92 Ill. 555.

Minnesota.—Reynolds *v.* Fleming, 43 Minn. 513, 45 N. W. 1099; Smith *v.* Lytle, 27 Minn. 184, 6 N. W. 625.

Missouri.— Phillips *v.* Edmonson, 17 Mo. 579.

Pennsylvania.— Cobb *v.* Deiches, 7 Pa. Super. Ct. 252, 42 Wkly. Notes Cas. 228. See also McGuire *v.* Fabel, 25 Pa. St. 436; Morrison *v.* Funk, 23 Pa. St. 421.

Texas.— McKelvain *v.* Allen, 58 Tex. 383. See 21 Cent. Dig. tit. "Execution," § 753.

48. Pontiac Nat. Bank *v.* King, 110 Ill. 254; Twogood *v.* Stephens, 19 Iowa 405; Bondurant *v.* Owens, 4 Bush (Ky.) 662; Lissa *v.* Posey, 64 Miss. 352, 1 So. 500; Cromwell *v.* Craft, 47 Miss. 44. *Compare* Doe *v.* Haskins, 15 Ala. 619, 50 Am. Dec. 154; Jameson *v.* Head, 14 Me. 34.

49. Partnership generally see Partnership.

Interests of co-defendant.— A sale on execution under joint judgment against two defendants of land levied on "as the property" of one and sold as such passes no title to the interest of the other defendant. Frederick *v.* Missouri River, etc., R. Co., 82 Mo. 402. Where an execution was issued against three on a joint judgment and the court stayed the execution as to one of the judgment debtors in the army, but allowed the execution to go against the other two, it was held that the sale of the undivided interest of the two in the land held jointly by all, passed a good title. Sheetz *v.* Wynkoop, 74 Pa. St. 198.

50. *Alabama.*— Farley *v.* Moog, 79 Ala. 148, 58 Am. Rep. 585; Caldwell *v.* Palmer, 56 Ala. 405; Andrews *v.* Keith, 34 Ala. 722.

California.— Robinson *v.* Tevis, 38 Cal. 611.

Georgia.— Shaw *v.* McDonald, 21 Ga. 395.

Illinois.— Rainey *v.* Nance, 54 Ill. 29; Newhall *v.* Buckingham, 14 Ill. 405.

Iowa.— Hubbard *v.* Curtis, 8 Iowa 1, 74 Am. Dec. 283.

Maine.— Hacker *v.* Johnson, 66 Me. 21.

Mississippi.— Sitler *v.* Walker, Freem. 77.

Missouri.— Wiles *v.* Maddox, 26 Mo. 77.

New Jersey.— Deane *v.* Hutchinson, 40 N. J. Eq. 83, 2 Atl. 292; Clements *v.* Jessup, 36 N. J. Eq. 569; Renton *v.* Chaplain, 9 N. J. Eq. 62.

North Carolina.— Tredwell *v.* Rascoe, 14 N. C. 50.

Ohio.— Nixon *v.* Nash, 12 Ohio St. 647, 80 Am. Dec. 390.

h. Undivided Interests. The rule is well recognized that where personal property owned by two or more persons is sold on execution against one of them only, the purchaser at the execution sale takes only the interest which the judgment debtor had in such property, and becomes a tenant in common with the other owners thereof.[51]

i. Rights Passing as Incidents. The general rule is that upon the sale of property on execution, all the rights and privileges necessary to the full and free enjoyment of the same pass as incidents thereto.[52] Under this rule it has been held that the purchaser at an execution sale has the right to affirm or disaffirm the lease of property;[53] is entitled to the benefit of covenants of warranty running with the land,[54] and also the right of action to set aside a previous fraudulent conveyance of the property.[55] However, the right of action for damages to the property or for waste accruing prior to his acquisition of the title,[56] the right to mortgage notes,[57] the right to a contract for pasturage,[58] the right to the franchise of a corporation,[59] or the right to collateral agreements made between the owner of stock sold and the company issuing the same,[60] do not pass as incidents of the execution sale.

j. Subsequently Acquired Title. A legal title subsequently acquired by the judgment debtor cannot inure to the benefit of the purchaser of the equitable title at the execution sale.[61] However the rule has been laid down in some juris-

Pennsylvania.—Durborrow's Appeal, 84 Pa. St. 404; Whigham's Appeal, 63 Pa. St. 194; Smith *v.* Emerson, 43 Pa. St. 456; Reinheimer *v.* Hemingway, 35 Pa. St. 432; Deal *v.* Bogue, 20 Pa. St. 228, 57 Am. Dec. 702; Rundall *v.* Stedge, 2 Pa. Co. Ct. 608.

Texas.— Howell *v.* Jones, 3 Tex. App. Civ. Cas. § 208; Mitchusson *v.* Wadsworth, 1 Tex. App. Civ. Cas. § 976.

United States.— Gilmore *v.* North American Land Co., 10 Fed. Cas. No. 5,448, Pet. C. C. 460. *Compare* Moore *v.* Rosenweber, 17 Fed. Cas. No. 9,774, 7 Phila. (Pa.) 576.

See 21 Cent. Dig. tit. "Execution," § 754.

Interest of dormant partners.—Where partners conduct two different businesses under different firm-names, certain of the partners being dormant, an execution sale on the judgment against such firm would pass the title of all the partners, including that of the dormant partners not named in the judgment. Carey *v.* Bright, 58 Pa. St. 70.

51. *Illinois.*— Fischer *v.* Eslaman, 68 Ill. 78.

Indiana.— Wilson *v.* Peelle, 78 Ind. 384.

Louisiana.—See Baudoin *v.* Nicolas, 12 Rob. 594.

Michigan.— See also Butler *v.* Roys, 25 Mich. 53, 12 Am. Rep. 218.

Missouri.— Cowden *v.* Cairns, 28 Mo. 471.

New Hampshire.— Pettingill *v.* Bartlett, 1 N. H. 87.

New York.— Fiero *v.* Betts, 2 Barb. 633; Mersereau *v.* Norton, 15 Johns. 179.

North Carolina.— Southerland *v.* Cox, 14 N. C. 394.

Ohio.— Treon *v.* Emerick, 6 Ohio 391.

Pennsylvania.— Trout *v.* Kennedy, 47 Pa. St. 387; Gibson *v.* Wenslow, 46 Pa. St. 380, 84 Am. Dec. 552.

South Carolina.— Black *v.* Steel, 1 Bailey 307.

Texas.— Flaniken *v.* Neal, 67 Tex. 629, 4 S. W. 212.

See 21 Cent. Dig. tit. "Execution," § 756.

52. Farnum *v.* Hefner, 79 Cal. 575, 21 Pac. 955, 12 Am. St. Rep. 174; Seller *v.* Corwin, 5 Ohio 398, 24 Am. Dec. 301; Harlan *v.* Harlan, 15 Pa. St. 507, 53 Am. Dec. 612 (holding that, where real estate on which a cotton and woolen factory was situated was sold under execution, the machinery of the plant which was attached to the structure and necessary to its operation, passed by the sale); Wilder *v.* Kent, 15 Fed. 217; Gleason *v.* Lapeer First Nat. Bank, 13 Fed. 719. *Compare* Stephens *v.* Cady, 14 How. (U. S.) 528, 14 L. ed. 528.

Easements.— Hoover *v.* Hale, 56 Nebr. 67, 76 N. W. 457.

53. Farmers', etc., Bank *v.* Ege, 9 Watts (Pa.) 436, 36 Am. Dec. 130; Market Co. *v.* Lutz, 4 Phila. (Pa.) 332.

54. Lewis *v.* Cook, 35 N. C. 193. See also Campbell *v.* Hand, 49 Pa. St. 234.

55. McCoy *v.* Watson, 51 Ala. 466; Scott *v.* Purcell, 7 Blackf. (Ind.) 66, 39 Am. Dec. 453; Beckwith *v.* Burrough, 14 R. I. 366, 51 Am. Rep. 392.

56. Frank *v.* Magee, 50 La. Ann. 1066, 23 So. 939.

Merger of claim.— It has been held in Texas that where a purchaser of land at an execution sale had taken coal therefrom prior to such sale under a claim to the land by a deed from another person, the claim of damages for such taking became merged in the sheriff's deed. Smith *v.* Olson, 23 Tex. Civ. App. 458, 56 S. W. 568.

57. King *v.* Cushman, 41 Ill. 81, 89 Am. Dec. 366.

58. Abadie *v.* Lobero, 36 Cal. 390.

59. Palestine *v.* Barnes, 50 Tex. 538.

60. Pittsburg, etc., R. Co. *v.* Allegheny County, 63 Pa. St. 126.

61. *Alabama.*— Murphy *v.* Green, 120 Ala. 112, 22 So. 112.

California.— Kenyon *v.* Quinn, 41 Cal. 325.

dictions that where a judgment debtor holding land under a land-office certificate, which is sold under execution against him, thereafter acquires a patent for such land, the perfected title will inure to the benefit of the execution purchaser and cannot be set up adversely to him.[62]

k. Time at Which Title Vests. A purchaser of land sold on execution acquires by his purchase no more than a lien upon the land for the amount of his bid until the termination of the time within which the judgment debtor is entitled to redeem;[63] and, where the statute requires that the sale shall be confirmed by the court, title does not vest in the purchaser until after such confirmation.[64]

3. Prior Liens or Encumbrances[65] — a. In General. The better rule is that prior liens or encumbrances, whether created by judgment or otherwise, are not impaired by the sale of the property on execution.[66] In at least one jurisdiction, however, the rule is laid down that the sale of property under execution divests all liens upon said property, general or specific, and that the exceptions to the

Kentucky.— Cheny *v.* Smith, 7 Ky. L. Rep. 293.

Michigan.— McArthur *v.* Oliver, 60 Mich. 605, 27 N. W. 689.

Nebraska.— Westheimer *v.* Reed, 15 Nebr. 662, 19 N. W. 626.

North Carolina.— Gentry *v.* Callahan, 98 N. C. 448, 4 S. E. 535.

Tennessee.— Pratt *v.* Phillips, 1 Sneed 543, 60 Am. Dec. 162.

Texas.— Bates *v.* Bacon, 66 Tex. 348, 1 S. W. 256.

See 21 Cent. Dig. tit. "Execution," § 758.

Compare Draper *v.* Draper, 5 Harr. (Del.) 358.

Judgment creditor enforcing after-acquired title.— See Henderson *v.* Overton, 2 Yerg. (Tenn.) 394, 24 Am. Dec. 492.

62. *Iowa.*— Cavender *v.* Smith, 5 Iowa 157 [*following* 3 Greene 349, 56 Am. Dec. 541].

Missouri.— Callahan *v.* Davis, 90 Mo. 78, 2 S. W. 216.

Ohio.— Jackson *v.* Williams, 10 Ohio 69.

Tennessee.— Hall *v.* Heffly, 6 Humphr. 444.

Texas.— Morton *v.* Welborn, 21 Tex. 772.

United States.— Massey *v.* Papin, 24 How. 362, 16 L. ed. 734; Kingman *v.* Holthaus, 59 Fed. 305. See also McWilliams *v.* Withington, 7 Fed. 326, 7 Sawy. 205.

63. Duprey *v.* Moran, 4 Cal. 196; Vaughn *v.* Ely, 4 Barb. (N. Y.) 159; Schermerhorn *v.* Merrill, 1 Barb. (N. Y.) 511; *Ex p.* Peru Iron Co., 7 Cow. (N. Y.) 540. See Wilson *v.* Davol, 5 Bosw. (N. Y.) 619.

64. Hendryx *v.* Evans, 120 Iowa 310, 94 N. W. 853; Yeazel *v.* White, 40 Nebr. 432, 58 N. W. 1020, 24 L. R. A. 449. See *infra*, X, E, 7, d.

65. **Priorities between executions and other liens** see *supra*, VII, A, 4, b.

66. *Alabama.*—Baylor *v.* Scott, 2 Port. 315.

Arkansas.— Pindall *v.* Trevor, 30 Ark. 249; Doswell *v.* Adler, 28 Ark. 82; Etter *v.* Smith, 5 Ark. 90.

California.— Knight *v.* Fair, 9 Cal. 117.

Florida.— Holland *v.* State, 15 Fla. 455, where this rule is applied to the sale of a franchise under a statutory power.

Georgia.— Faircloth *v.* St. Johns, 44 Ga. 603; Field *v.* Howell, 6 Ga. 423.

Iowa.— Manning *v.* Ferguson, 103 Iowa 561, 72 N. W. 762.

Kansas.— Hentig *v.* Pipher, 58 Kan. 788, 51 Pac. 229 [*affirming* (App. 1897) 48 Pac. 868].

Kentucky.— Campbell *v.* Wooldridge, 6 Bush 321; Brown *v.* Story, 4 Metc. 316; Glenn *v.* Coleman, 3 B. Mon. 133; Fletcher *v.* Ferrel, 9 Dana 372, 35 Am. Dec. 143; Anderson *v.* West, 3 Ky. L. Rep. 670.

Louisiana.—Coons *v.* Graham, 12 Rob. 206; Fenn *v.* Rils, 9 La. 95; Offutt *v.* Hendsley, 9 La. 1; Lewis *v.* Fram, 4 Mart. 397.

Mississippi.— Davis *v.* Hamilton, 50 Miss. 213; Meade *v.* Thompson, Walk. 450. But see Ford *v.* McGehee, Freem. 460.

Missouri.— Huffman *v.* Nixon, 152 Mo. 303, 53 S. W. 1078, 75 Am. St. Rep. 454; Garrett *v.* Wagner, 125 Mo. 450, 28 S. W. 762; Lewis *v.* Chapman, 59 Mo. 371; State *v.* Cryts, 87 Mo. App. 440.

Nebraska.— Equitable Trust Co. *v.* Omaha, (1903) 95 N. W. 650; Omaha Sav. Bank *v.* Omaha, (1903) 95 N. W. 593; Hibbard *v.* Weil, 5 Nebr. 41.

New York.— Bartlett *v.* Gale, 4 Paige 503.

North Carolina.— Isler *v.* Colgrove, 75 N. C. 334; Southerland *v.* Cox, 14 N. C. 394; Young *v.* Tate, 7 N. C. 498.

South Carolina.— Harth *v.* Gibbes, 3 Rich. 316; Davis *v.* Keller, 5 Rich. Eq. 434.

Tennessee.— Bloomer *v.* Bloomer, 6 Baxt. 98; Chitwood *v.* Trimble, 2 Baxt. 78; Simmons *v.* Tillery, 1 Overt. 274.

Texas.— Thomas *v.* Morrison, 92 Tex. 329, 48 S. W. 500 [*modifying* (Civ. App. 1898) 46 S. W. 46]; Jordan *v.* Hudson, 11 Tex. 82.

Washington.— Griffith *v.* Burlingame, 18 Wash. 429, 51 Pac. 1059.

United States.— Crosby *v.* The Lillie, 40 Fed. 367.

See 21 Cent. Dig. tit. "Execution," § 762.

Land charged with payment of legacy.— Barnet *v.* Washebaugh, 16 Serg. & R. (Pa.) 410.

Where land bound by a recognizance was sold under execution and satisfied by a junior lien, it was held that such sale discharged the recognizance and the purchaser of the title was not subject to it. Reading *v.* State, 1 Harr. (Del.) 190.

rule are grounded on special and peculiar circumstances;[67] but even in this jurisdiction it is held that where an encumbrance cannot for any cause be satisfied out of the purchase-money, it remains a charge on the land.[68]

b. Mortgages — (I) *General Rule.* Applying the general rule just stated, in most jurisdictions a purchaser of mortgaged lands at an execution sale under judgment against the mortgagor takes the property subject to the paramount lien of the mortgage, and such purchaser cannot recover the premises from the mortgagee rightfully in possession, unless the mortgage debt is paid.[69] In one

67. Foulke *v.* Millard, 108 Pa. St. 230; Beekman's Appeal, 38 Pa. St. 385; Zeigler's Appeal, 35 Pa. St. 173; Hanna's Appeal, 31 Pa. St. 53; Wood's Appeal, 30 Pa. St. 274; Loomis' Appeal, 22 Pa. St. 312; Spring Garden's Appeal, 8 Watts & S. (Pa.) 444; Luce *v.* Snively, 4 Watts (Pa.) 396, 28 Am. Dec. 725; Mentzer *v.* Menor, 8 Watts (Pa.) 296; Myers *v.* Harvey, 2 Penr. & W. (Pa.) 478, 23 Am. Dec. 60; Willard *v.* Morris, 1 Penr. & W. (Pa.) 480; McLanahan *v.* McLanahan, 1 Penr. & W. (Pa.) 96, 21 Am. Dec. 363; Hellman *v.* Hellman, 4 Rawle (Pa.) 440; McCay *v.* Forwood, 15 Phila. (Pa.) 137; South Chester *v.* Broomall, 1 Del. Co. (Pa.) 58; Downingtown Bldg., etc., Assoc. *v.* McCaughey, 1 Chest. Co. Rep. (Pa.) 504; Wilder *v.* Kent, 15 Fed. 217; Gleason *v.* Lapeer First Nat. Bank, 13 Fed. 719; Thompson *v.* Phillips, 23 Fed. Cas. No. 13,974, Baldw. 246. See Cella's Estate, 17 Pa. Super. Ct. 428; Franklin *v.* Mackey, 9 Lanc. Bar (Pa.) 197, holding that if there be a clear understanding between the sheriff and the purchaser at a sale of land under execution, that the land is sold subject to liens, and such is capable of satisfactory proof, the purchaser takes it subject to the liens. See also cases cited *infra*, notes 68, 70.

Purchaser of a leasehold interest at a sheriff's sale is charged with notice of the contents of the lease and is subject to all covenants and conditions therein. Aderhold *v.* Oil Well Supply Co., 158 Pa. St. 401, 28 Atl. 22.

Purchaser with notice.— It has been held, however, that a purchaser at a sheriff's sale with notice of prior encumbrances takes the land subject to such encumbrances. *In re* Donaldson, 158 Pa. St. 292, 27 Atl. 959; Green *v.* Watrous, 17 Serg. & R. (Pa.) 393.

68. Wertz's Appeal, 65 Pa. St. 306; Helfrich *v.* Weaver, 61 Pa. St. 385; Hart *v.* Homiller, 23 Pa. St. 39 [*affirming* 1 Phila. 445]; Dewalt's Appeal, 20 Pa. St. 236; Kline *v.* Bowman, 19 Pa. St. 24; Northern Liberties *v.* Swain, 13 Pa. St. 113 (holding that an execution sale subject to a fixed lien is likewise subject to all other liens preceding such fixed lien); Mentzer *v.* Menor, 8 Watts (Pa.) 296; Fisher *v.* Kean, 1 Watts (Pa.) 259; Medlar *v.* Aulenbach, 2 Penr. & W. (Pa.) 355; Poor Ministers' Relief Corp. *v.* Wallace, 3 Rawle (Pa.)109; Lake's Estate, 2 Del. Co. (Pa.) 12; South Chester *v.* Wiegand, 1 Del. Co. (Pa.) 64; South Chester *v.* Broomall, 1 Del. Co. (Pa.) 58.

Arrears of ground-rent.— It has been held that an execution sale will not discharge the land from arrears of ground-rent, since it is an estate in the land and not a mere lien. Devine's Appeal, 30 Pa. St. 348; Williamson *v.* Hehl, 1 Pa. Cas. 361, 2 Atl. 222; Wistar *v.* Mercer, 6 Phila. (Pa.) 44; Pancoast *v.* Hagaman, 4 Leg. & Ins. Rep. (Pa.) 75.

Vendor's lien.— See Bradley *v.* O'Donnell, 32 Pa. St. 279; *In re* Paterson, 25 Pa. St. 71; Vierheller's Appeal, 24 Pa. St. 105, 62 Am. Dec. 365.

Dues of the commonwealth depend not upon a lien, but a paramount title, which no sheriff's sale can affect. Connelly *v.* Withers, 9 Lanc. Bar (Pa.) 117.

Registered taxes of the city of Philadelphia, whether they were filed as "claims" against land sold under execution or not, were nevertheless liens on the land, and not divested or in any manner affected by the sale. Duffy *v.* Philadelphia, 42 Pa. St. 192.

69. *Alabama.*— Rust *v.* Electric Lighting Co., 124 Ala. 202, 27 So. 263; Lovelace *v.* Webb, 62 Ala. 271; McDonald *v.* Foster, 5 Ala. 664.

Arkansas.— Whitmore *v.* Tatum, 54 Ark. 457, 16 S. W. 198, 26 Am. St. Rep. 56.

California.—Allen *v.* Phelps, 4 Cal. 256.

Connecticut.— Chester *v.* Wheelwright, 15 Conn. 562.

Georgia.— Hitch *v.* Bailey, 115 Ga. 891, 42 S. E. 252; Tarver *v.* Ellison, 57 Ga. 54; Johnston *v.* Crawley, 25 Ga. 316, 71 Am. Dec. 173.

Illinois.— Funk *v.* McReynold, 33 Ill. 481; Merritt *v.* Niles, 25 Ill. 282.

Indiana.—Rahm *v.* Butterfield, 82 Ind. 163; Sinking Fund Com'rs *v.* Wilson, Smith 221; McFadden *v.* Ross, 14 Ind. App. 312, 41 N. E. 607, holding, however, that the purchaser at an execution sale of mortgaged chattels has a lien thereon for the excess remaining after satisfaction of the mortgage.

Iowa.— Hendryx *v.* Evans, 120 Iowa 310, 94 N. W. 853; Bush *v.* Herring, 113 Iowa 158, 84 N. W. 1036.

Kentucky.— Thomas *v.* McKay, 5 Bush 475; Forrest *v.* Phillips, 2 Metc. 194; Dougherty *v.* Linthicum, 8 Dana 194; Worsham *v.* Lancaster, 47 S. W. 448, 20 Ky. L. Rep. 701; Hubbard *v.* Ratcliffe, 13 Ky. L. Rep. 640.

Louisiana.— Terrio *v.* Guidry, 5 La. Ann. 589.

Mississippi.— Montgomery *v.* McGimpsey, 7 Sm. & M. 557; Meade *v.* Thompson, Walk. 450. See House *v.* Fultz, 13 Sm. & M. 39.

Missouri.— Hubble *v.* Vaughan, 42 Mo. 138; State *v.* Cryts, 87 Mo. App. 440.

Nebraska.— Orr *v.* Broad, 52 Nebr. 490, 72 N. W. 850.

jurisdiction, however, in order that the mortgage may continue as a subsisting lien upon the property after its sale under a junior execution, such mortgage must be a prior lien to all other liens, save other mortgages, ground-rents, and purchase-money due to the commonwealth.[70]

(II) *Unrecorded Mortgages.* In jurisdictions, however, requiring the recording of mortgages, where a mortgage is not recorded within the time prescribed by the statute, a judgment against the mortgagor obtained before the foreclosure by a judgment creditor without notice of the mortgage, takes priority thereof, and an execution sale under such judgment will extinguish the lien of the mortgage.[71]

c. Judgment Liens. In some jurisdictions the effect of a sale on execution under a junior judgment is to divest the lien of a senior judgment, and to transfer the lien of such senior judgment from the property to the proceeds of the sale in the hands of the sheriff.[72] In other jurisdictions, however, the effect of a sale under a junior judgment is to pass the debtor's estate in the property encum-

New York.— Porter *v.* Parmley, 52 N. Y. 185; Lansingburgh Bank *v.* Crary, 1 Barb. 542; Weaver *v.* Toogood, 1 Barb. 238; Cole *v.* White, 26 Wend. 511 [*reversing* 24 Wend. 116]; Jackson *v.* Hull, 10 Johns. 481; Jackson *v.* Dubois, 4 Johns. 216; Snyder *v.* Stafford, 11 Paige 71; Matter of Scrugham, Hopk. 88; Barker *v.* Doty, 4 Alb. L. J. 63.

North Carolina.— Halyburton *v.* Greenlee, 72 N. C. 316; Anderson *v.* Holloman, 46 N. C. 169; Ormond *v.* Faircloth, 5 N. C. 35.

South Carolina.— State *v.* Laval, 4 McCord 336; Seymour *v.* Preston, Speers Eq. 481, holding, however, that the purchaser at the sheriff's sale who paid the mortgage debt after the foreclosure will be protected against the purchaser under the mortgage, who had notice of the sheriff's sale before his purchase was complete.

Texas.— Erwin *v.* Blanks, 60 Tex. 583; Wilkins *v.* Bryarly, (Civ. App. 1898) 46 S. W. 266; Murrell *v.* Kelly-Goodfellow Shoe Co., 18 Tex. Civ. App. 114, 44 S. W. 27.

Washington.—Hamilton *v.* Carter, 12 Wash. 510, 41 Pac. 911.

See 21 Cent. Dig. tit. "Execution," § 763.

A chattel mortgage is not discharged by a fraudulent execution sale of the mortgaged property and the purchaser acquires no title as against the mortgagee. Isaacs *v.* Messick, 1 Marv. (Del.) 259, 40 Atl. 1109.

Where mortgage is paid.— Glover *v.* Patton, 104 Ga. 17, 30 S. E. 414. *Compare* Seymour *v.* Preston, Speers Eq. (S. C.) 481.

70. Meigs *v.* Bunting, 141 Pa. St. 233, 21 Atl. 588, 23 Am. St. Rep. 273; Hohman's Appeal, 127 Pa. St. 209, 17 Atl. 902; Saunders *v.* Gould, 124 Pa. St. 237, 16 Atl. 807; Com. *v.* Susquehanna, etc., R. Co., 122 Pa. St. 306, 15 Atl. 448, 1 L. R. A. 225; Rhein Bldg. Assoc. *v.* Lea, 100 Pa. St. 210; Zeigler's Appeal, 35 Pa. St. 173; Kurtz's Appeal, 26 Pa. St. 465; Shryock *v.* Jones, 22 Pa. St. 303; Carpenter *v.* Koons, 20 Pa. St. 222; Towers *v.* Tuscarora Academy, 8 Pa. St. 297; Bratton's Appeal, 8 Pa. St. 164; Selms *v.* McCulloch, 5 Pa. St. 473. See Knaub *v.* Esseck, 2 Watts (Pa.) 282. See also cases cited *supra*, note 67.

Prior to the Pennsylvania act of April 6, 1830, a sheriff's sale of land extinguished prior mortgages, and it was not in the power of the sheriff, purchaser, or parties to keep them alive as mortgages, so as to affect third persons subsequently buying, by any memorandum in the conditions of the sale or bargain among themselves, of which such subsequent purchaser had notice. Mode's Appeal, 6 Watts & S. 280; Miller *v.* Musselman, 6 Whart. 354; Willard *v.* Morris, 1 Penr. & W. 480; Poor Ministers' Relief Corp *v.* Wallace, 3 Rawle 109; Willard *v.* Norris, 2 Rawle 56.

Land sold for mortgage debt.— Where land is sold under a judgment and execution obtained upon the debt which the mortgage was given to secure, the purchaser takes the land discharged of the lien of the mortgage. Steele *v.* Walter, 204 Pa. St. 257, 53 Atl. 1097; McGrew *v.* McLanahan, 1 Penr. & W. (Pa.) 44; Bittinger's Appeal, 6 Wkly. Notes Cas. (Pa.) 231; Reed *v.* Kimble, 1 Del. Co. (Pa.) 461. See also Fosdick *v.* Risk, 15 Ohio 84, 45 Am. Dec. 562.

71. *Alabama.*— Jordan *v.* Mead, 12 Ala. 247.

Georgia.— Smith *v.* Jordan, 25 Ga. 687; Shepherd *v.* Burkhalter, 13 Ga. 443, 58 Am. Dec. 523.

Iowa.— Hendryx *v.* Evans, 120 Iowa 310, 94 N. W. 853.

Louisiana.— Godthaus *v.* Dichhary, 34 La. Ann. 579.

Nebraska.— Hargreaves *v.* Merken, 45 Nebr. 668, 63 N. W. 951; Bennett *v.* Fooks, 1 Nebr. 465.

South Carolina.— McKnight *v.* Gordon, 13 Rich. Eq. 222, 94 Am. Dec. 164.

United States.— Taylor *v.* Miller, 54 U. S. 287, 14 L. ed. 149.

See 21 Cent. Dig. tit. "Execution," § 763.

72. *Alabama.*— Campbell *v.* Spence, 4 Ala. 543, 39 Am. Dec. 301.

Delaware.— Farmers' Bank *v.* Wallace, 3 Harr. 370.

Georgia.— Tarver *v.* Ellison, 57 Ga. 54 (holding, however, that the sale of land under an execution issued on a judgment junior to a mortgage not foreclosed, divests the lien of the judgment older than the mortgage,

bered with the lien of an older docketed judgment.[73] In several jurisdictions the statutes require that executions issue upon judgments within a designated period after their rendition, and, where no execution issues on such judgment within the statutory period, a sale of the debtor's land under execution on a junior judgment will pass the same wholly discharged of such lien.[74]

d. Estoppel of Purchaser by Recognition of Lien. Where the sale of property under execution is made expressly subject to a subsisting lien, or where the purchaser has notice of and recognizes the existence of such lien, he is thereafter estopped from assailing its validity.[75]

e. Discharge of Lien by Payment or Expiration. The removal of encumbrances or liens from property sold under execution by payment or the expiration thereof inures to the benefit of the purchaser at the execution sale, and to that extent confirms his title to the property.[76]

f. Equities Against Debtor. The rule is well recognized that the purchaser at an execution sale buys precisely and only the interest which the judgment debtor has in the property sold, and takes subject to all outstanding equities

only upon that interest or estate in the land which is sold); Dowdell *v.* Neal, 10 Ga. 148.

Pennsylvania.— Duncan *v.* McCumber, 2 Watts & S. 264; Mix *v.* Ackla, 7 Watts 316; Com. *v.* Alexander, 14 Serg. & R. 257 (upholding the above rule except in cases where property was sold expressly subject to the prior judgment); Whitehead *v.* Purnell, 2 Miles 434; Com. *v.* Rogers, Brightly 450. See Tospon *v.* Sipe, 116 Pa. St. 588, 11 Atl. 873, where the sheriff at the sale stated that the land was sold subject to a dower judgment which was also fully set forth in the records, and it was held that the purchaser took subject to the judgment. See also Thompson *v.* Phillips, 22 Fed. Cas. No. 13,974, Baldw. 246, stating the law in Pennsylvania.

South Carolina.— See also Cromer *v.* Boynest, 27 S. C. 436, 3 S. E. 849; Blohme *v.* Lynch, 26 S. C. 300, 2 S. E. 136.

See 21 Cent. Dig. tit. "Execution," § 764.

Where vendee has not paid all the purchase-money.— Creigh *v.* Shatto, 9 Watts & S. (Pa.) 82. See also Canon *v.* Campbell, 34 Pa. St. 309.

73. *California.*— Littlefield *v.* Nicols, 42 Cal. 372.

Iowa.— Lathrop *v.* Brien, 23 Iowa 40.

Louisiana.— See also Young *v.* Hays, 14 La. Ann. 654.

Missouri.— Bruce *v.* Vogel, 38 Mo. 100. See McMurray *v.* St. Louis Oil Mfg. Co., 33 Mo. 377.

New York.— Shotwell *v.* Murray, 1 Johns. Ch. 512.

North Carolina.— Bernhardt *v.* Brown, 118 N. C. 700, 24 S. E. 527, 715, 36 L. R. A. 402; Cannon *v.* Parker, 81 N. C. 320; Isler *v.* Moore, 67 N. C. 74.

United States.—Rankin *v.* Scott, 12 Wheat. 177, 6 L. ed. 592; Allen *v.* Halliday, 28 Fed. 261.

See 21 Cent. Dig. tit. "Execution," § 764.

Before adoption of North Carolina code see Phillip *v.* Johnston, 77 N. C. 127; Isler *v.* Moore, 67 N. C. 74; Jones *v.* Judkins, 20 N. C. 591, 34 Am. Dec. 302; Bell *v.* Hill, 2 N. C. 72.

74. Dobbins *v.* Peoria First Nat. Bank, 112 Ill. 553; Riggin *v.* Mulligan, 9 Ill. 50; Miller *v.* Finn, 1 Nebr. 254.

Priority of liens see *supra*, VII, A, 4.

75. *Alabama.*— Gassenheimer *v.* Molton, 80 Ala. 521, 2 So. 652.

Georgia.— See Johnson *v.* Equitable Sureties Co., 114 Ga. 604, 40 S. E. 787, 56 L. R. A. 933.

Massachusetts.— Russell *v.* Dudley, 3 Metc. 147.

Michigan.— Messmore *v.* Haggard, 46 Mich. 558, 9 N. W. 853.

Nebraska.— Koch *v.* Losch, 31 Nebr. 625, 48 N. W. 471.

New Hampshire.— Flanders *v.* Jones, 30 N. H. 154.

New Jersey.— Throckmorton *v.* O'Reilly, (Ch. 1903) 55 Atl. 56.

New York.— Horton *v.* Davis, 76 N. Y. 495; Star Printing Co. *v.* Andrews, 58 N. Y. Super. Ct. 188, 9 N. Y. Suppl. 731. See Wagner *v.* Jones, 77 N. Y. 590 [*affirming* 7 Daly 375].

United States.— Patterson *v.* De la Ronde, 8 Wall. 292, 19 L. ed. 415.

See 21 Cent. Dig. tit. "Execution," § 765.

Contra.— Atkins *v.* Emison, 10 Bush (Ky.) 9; Thomas *v.* McKay, 5 Bush (Ky.) 475; Huffman *v.* Nixon, 152 Mo. 303, 53 S. W. 1078, 75 Am. St. Rep. 454; Nicols *v.* Iremonger, 3 Hun (N. Y.) 609.

Purchase of interest of defendant.— It was held in Carpenter *v.* Simmons, 28 How. Pr. (N. Y.) 12, that an execution plaintiff who purchases merely the interest of defendant in property sold on execution is not estopped from questioning the validity of a prior chattel mortgage given by defendant on the property, where the property was not expressly sold subject to such mortgage.

Second mortgage.—It has been held in Massachusetts that a purchaser at an execution sale of "all the right in equity" of land subject to two mortgages is not estopped from contesting the validity of the second mortgage. Stebbins *v.* Miller, 12 Allen 591.

76. Fish *v.* Fowlie, 58 Cal. 373; Atkins *v.* Emison, 10 Bush (Ky.) 9; Bush *v.* Williams,

against such debtor of which the purchaser had notice;[77] and some of the decisions go the length of holding that he takes subject to such equities, whether he had notice of them or not.[78]

4. Bona Fide Purchasers — a. Rights of in General. *Bona fide* purchasers at an execution sale, and those claiming under them, are only chargeable with the knowledge of facts disclosed by the record, and by the papers upon which it is necessary for them to rely for the purpose of establishing their title, and they are not affected by any equities, secret vices, frauds, or defects in the judgment, or other proceedings subsequent thereto, of which they had no actual or constructive notice.[79]

b. Application of Rule. Applying the above principle, in jurisdictions where recording statutes have been enacted, a *bona fide* purchaser will be protected against an outstanding title evidenced by a prior unrecorded deed.[80] And so too

6 Bush (Ky.) 405; Gallagher *v.* Galletley, 128 Mass. 367; Choteau *v.* Nuckolls, 20 Mo. 442. *Compare* Glover *v.* Patton, 104 Ga. 17, 30 S. E. 414; House *v.* Fultz, 13 Sm. & M. (Miss.) 39; Seymour *v.* Preston, Speers Eq. (S. C.) 481.

77. *Alabama.*— Clemmons *v.* Cox, 114 Ala. 350, 21 So. 426.

Arkansas.—Beidler *v.* Beidler, 71 Ark. 318, 74 S. W. 13; Allen *v.* McGaughey, 31 Ark. 252.

Illinois.— See Whalen *v.* Bishop, 58 Ill. 162.

Indiana.— Heck *v.* Finck, 85 Ind. 6.

Iowa.— Bush *v.* Herring, 113 Iowa 158, 84 N. W. 1036. See also Walker *v.* Elston, 21 Iowa 529; Butterfield *v.* Walsh, 21 Iowa 97, 89 Am. Dec. 557.

Kentucky.— Chinn *v.* Butts, 6 Dana 547.

Louisiana.— See Flower *v.* Arnaud, 4 Mart. N. S. 73.

New York.— Moyer *v.* Hinman, 13 N. Y. 180 [*modifying* 17 Barb. 137].

Tennessee.— Galt *v.* Dibrell, 10 Yerg. 146.

Texas.— Oberthier *v.* Stroud, 33 Tex. 522.

United States.— Osterman *v.* Baldwin, 6 Wall. 116, 18 L. ed. 730.

See 21 Cent. Dig. tit. "Execution," § 768; and cases cited *supra*, note 27.

Judgment on bond accompanying mortgage. — Boyer *v.* Webber, 22 Pa. Super. Ct. 35.

78. Burgin *v.* Burgin, 82 N. C. 196; Rollins *v.* Henry, 78 N. C. 342; Hicks *v.* Skinner, 71 N. C. 539, 17 Am. Rep. 16; Johnson *v.* Lee, 45 N. C. 43; Vannoy *v.* Martin, 41 N. C. 169, 51 Am. Dec. 418; Polk *v.* Gallant, 22 N. C. 395, 34 Am. Dec. 410; Dudley *v.* Cole, 21 N. C. 429. See also John B. Hood Camp Confederate Veterans *v.* De Cordova, 92 Tex. 202, 47 S. W. 522.

79. *Alabama.*— Boren *v.* McGehee, 6 Port. 432, 3 Am. Dec. 695.

Arkansas.— Carden *v.* Lane, 48 Ark. 216, 2 S. W. 709, 3 Am. St. Rep. 228; Youngblood *v.* Cunningham, 38 Ark. 571.

California.—Reeve *v.* Kennedy, 43 Cal. 643.

Georgia.— See also Atkinson *v.* Beall, 33 Ga. 153.

Illinois.— Home Sav., etc., Bank *v.* Peoria Agricultural, etc., Soc., 206 Ill. 9, 69 N. E. 17; Hay *v.* Baugh, 77 Ill. 500. See also Carter *v.* Reynolds, 106 Ill. App. 444.

Indiana.— McMillan *v.* Hadley, 78 Ind. 590; Claflin *v.* Cottman, 77 Ind. 58; Rooker *v.* Rooker, 75 Ind. 571.

Kentucky.— Bishops *v.* Gregory, 5 B. Mon. 359.

Maryland.— Spindler *v.* Atkinson, 3 Md. 409, 56 Am. Dec. 755.

Missouri.— Lincoln *v.* Thompson, 75 Mo. 613; Jones *v.* Hart, 60 Mo. 362; Lenox *v.* Clarke, 52 Mo. 115.

Nebraska.— Lavender *v.* Holmes, 23 Nebr. 345, 36 N. W. 516.

New York.— Frost *v.* Yonkers Sav. Bank, 8 Hun 26.

North Carolina.—Barnes *v.* Hyatt, 87 N. C. 315; Dobson *v.* Erwin, 20 N. C. 341.

Ohio.— Oviatt *v.* Brown, 14 Ohio 285, 45 Am. Dec. 539.

Oregon.—See Stephens *v.* Dennison, 1 Oreg. 19, holding that a *bona fide* purchaser is only chargeable with substantial defects in the proceedings of the officer.

Tennessee.— Dice *v.* Penn, 2 Swan 561; Darby *v.* Russel, 5 Hayw. 139, 9 Am. Dec. 767.

Texas.— Smith *v.* Olson, 23 Tex. Civ. App. 458, 56 S. W. 568.

United States.— Ryan *v.* Staples, 78 Fed. 563, 23 C. C. A. 551.

See 21 Cent. Dig. tit. "Execution," § 769.

Presumptions.— In an action based on an execution sale, it will be presumed in behalf of a *bona fide* purchaser that the sale was under a judgment properly rendered by a competent court, and that the execution and writs of sale were regularly issued. Coker *v.* Dawkins, 20 Fla. 141.

80. *Alabama.*— Danner *v.* Crew, 137 Ala. 617, 34 So. 822; Motley *v.* Jones, 98 Ala. 443, 13 So. 782; Fash *v.* Ravesies, 32 Ala. 451.

Florida.— Doyle *v.* Wade, 23 Fla. 90, 1 So. 516, 11 Am. St. Rep. 334.

Georgia.— McCandless *v.* Inland Acid Co., 108 Ga. 618, 34 S. E. 142; Ellis *v.* Doe, 10 Ga. 253.

Illinois.— McFadden *v.* Worthington, 45 Ill. 362.

Indiana.— Doe *v.* Hall, 2 Ind. 556, 54 Am. Dec. 460.

Iowa.— Koch *v.* West, 118 Iowa 468, 92 N. W. 663, 96 Am. St. Rep. 394; Foreman *v.*

for the same reason a *bona fide* purchaser will be protected against secret trusts or equities in favor of third parties.[81]

c Doctrine of Caveat Emptor. The rule is well settled that purchasers at execution sales must take notice of the title for which they bid, and the doctrine of *caveat emptor* applies as well to such sales as to private sales. Neither the officer conducting the sale nor the judgment debtor gives any warranty of title, nor does the officer profess to sell any interest beyond that of the judgment debtor.[82]

Highan, 35 Iowa 382; Evans *v.* McGlasson, 18 Iowa 150. See, however, Pinckney *v.* Pinckney, 114 Iowa 441, 87 N. W. 406.

Kansas.— Lee *v.* Bermingham, 30 Kan. 312, 1 Pac. 73.

Maine.— Parker *v.* Prescott, 87 Me. 444, 32 Atl. 1001.

Missouri.—Wilson *v.* Jackson, 167 Mo. 135, 66 S. W. 972; Vance *v.* Corrigan, 78 Mo. 94.

New York.— Hetzell *v.* Barber, 6 Hun 534; Jackson *v.* Chamberlain, 8 Wend. 620.

North Carolina.— Cowen *v.* Withrow, 112 N. C. 736, 17 S. E. 575, 109 N. C. 636, 13 S. E. 1022.

Ohio.— Fosdick *v.* Barr, 3 Ohio St. 471; Scribner *v.* Lockwood, 9 Ohio 184.

Pennsylvania.— Goepp *v.* Gartiser, 35 Pa. St. 130; Stewart *v.* Freeman, 22 Pa. St. 120; Irvine *v.* Campbell, 6 Binn. 118. See also Marks *v.* Baker, 2 Pa. Super. Ct. 167, 39 Wkly. Notes Cas. 12.

South Carolina.— Harrison *v.* Hollis, 2 Nott & M. 578.

Tennessee.— Butler *v.* Maury, 10 Humphr. 420.

Texas.— Central City Trust Co. *v.* Waco Bldg. Assoc., 95 Tex. 48, 64 S. W. 998; John B. Hood Camp Confederate Veterans *v.* De Cordova, 92 Tex. 202, 47 S. W. 522; Wright *v.* Lassiter, 71 Tex. 640, 10 S. W. 295; Linn *v.* Le Compte, 47 Tex. 440; Grace *v.* Wade, 45 Tex. 522; Ayres *v.* Duprey, 27 Tex. 593, 86 Am. Dec. 657; West *v.* Loeb, 16 Tex. Civ. App. 399, 42 S. W. 612; Thomson *v.* Shackelford, 6 Tex. Civ. App. 121, 24 S. W. 980. *Compare* Weinert *v.* Simang, 29 Tex. Civ. App. 435, 68 S. W. 1011.

United States.— Meek *v.* Skeen, 60 Fed. 322, 8 C. C. A. 641; Withnell *v.* Courtland Wagon Co., 25 Fed. 372.

See 21 Cent. Dig. tit. "Execution," § 769 *et seq.*

An equitable estate cannot be converted into a legal estate by the application of this principle. Morrison *v.* Funk, 23 Pa. St. 421.

Chattels in debtor's possession.— Creegan *v.* Robertson, 74 Hun 22, 26 N. Y. Suppl. 326.

Where both instruments are unrecorded.— Thomas *v.* Vanlieu, 28 Cal. 616.

Where the execution creditor was ignorant of a prior unrecorded deed the fact that the purchaser had notice was immaterial. Doyle *v.* Wade, 23 Fla. 90, 1 So. 516, 11 Am. St. Rep. 33; Blum *v.* Schwartz, (Tex. Sup. 1892) 20 S. W. 54, 16 L. R. A. 668.

81. *Georgia.*— Shipp *v.* Gidd, 88 Ga. 184, 14 S. E. 196; Gorman *v.* Wood, 68 Ga. 524.

Indiana.— Milner *v.* Hyland, 77 Ind. 458.

Iowa.—Ettenheimer *v.* Northberes, 75 Iowa 28, 39 N. W. 120.

Kansas.— Baker *v.* Woolston, 27 Kan. 185.

Kentucky.— Walker *v.* McKnight, 15 B. Mon. 467, 61 Am. Dec. 190.

Louisiana.— Pike *v.* Monget, 4 La. Ann. 227; Snoddy *v.* Brashear, 3 La. Ann. 569.

Missouri.— Harrison *v.* Cachelin, 23 Mo. 117.

New York.— Maroney *v.* Boyle, 17 N. Y. Suppl. 275.

Pennsylvania.—Boynton *v.* Winslow, 37 Pa. St. 315; Smith *v.* Painter, 5 Serg. & R. 223, 9 Am. Dec. 344; Clark *v.* Campbell, 2 Rawle 215; Dunning *v.* Reese, 7 Kulp 201; Kilheffer *v.* Carpenter, 10 Lanc. Bar 21.

South Carolina.—Hart *v.* Felder, 4 Desauss. 202.

See 21 Cent. Dig. tit. "Execution," § 769 *et seq.*

Articles of agreement not recorded see Swartz *v.* Moore, 5 Serg. & R. (Pa.) 257.

82. *Alabama.*— Lang *v.* Waring, 25 Ala. 625, 60 Am. Dec. 533; O'Neal *v.* Wilson, 21 Ala. 288.

Arkansas.— Allen *v.* McGaughey, 31 Ark. 252; Danley *v.* Rector, 10 Ark. 211, 50 Am. Dec. 242.

Georgia.— McWhorter *v.* Beavers, 8 Ga. 300.

Illinois.— Conwell *v.* Watkins, 71 Ill. 488; Alday *v.* Rock Island County, 45 Ill. App. 62.

Indiana.— Lewark *v.* Carter, 117 Ind. 206, 20 N. E. 119, 10 Am. St. Rep. 40, 3 L. R. A. 440; Neal *v.* Gillaspy, 56 Ind. 451, 26 Am. Rep. 37.

Iowa.— Pinckney *v.* Pinckney, 114 Iowa 441, 87 N. W. 406; Jones *v.* Blumenstein, 77 Iowa 361, 42 N. W. 321; Dean *v.* Morris, 4 Greene 312.

Kentucky.— Anderson *v.* West, 80 Ky. 171.

Minnesota.— Hastings First Nat. Bank *v.* Rogers, 22 Minn. 224.

Mississippi.— Davis *v.* Hamilton, 50 Miss. 213.

Missouri.— Hensley *v.* Baker, 10 Mo. 157.

Nebraska.— Petersborough Sav. Bank *v.* Pierce, 54 Nebr. 712, 75 N. W. 20; Miller *v.* Finn, 1 Nebr. 254.

New York.— Stafford *v.* Williams, 12 Barb. 240.

North Carolina.— Dudley *v.* Cole, 21 N. C. 429.

Ohio.— Creps *v.* Baird, 3 Ohio St. 277.

Oregon.—Hexter *v.* Schneider, 14 Oreg. 184, 12 Pac. 668.

Pennsylvania.—Wells *v.* Van Dyke, 106 Pa. St. 111; Weidler *v.* Farmers' Bank, 11 Serg. & R. 134; Autwerter *v.* Mathiot, 9 Serg. & R. 397; Friedly *v.* Scheetz, 9 Serg. & R. 156, 11 Am. Dec. 691; Elkin *v.* Meredith, 2 Miles 167; Niederhofer *v.* Bange, 12 Lanc. Bar 37;

d. Definition of Bona Fides. In order to constitute a purchaser at an execution sale a *bona fide* purchaser, he must purchase for a valuable consideration and without notice, actual or constructive, of any equities outstanding against the property, or of any irregularities in the proceedings which would vitiate the sale.[83]

e. Who Are Purchasers For Value. A purchaser at an execution sale who has not paid the amount of his bid is not entitled to protection against prior equities of which he had no notice, or to be considered a *bona fide* purchaser.[84] Likewise the rule has been laid down that an execution creditor who applies his bid for the property sold on execution to the satisfaction of his judgment is not a purchaser for a valuable consideration.[85]

f. Where Judgment Is Satisfied Prior to Sale. The courts seem to be divided upon the question as to the effect upon the title of a *bona fide* purchaser at an execution sale of the satisfaction of the judgment prior to the sale of the property thereunder; in some jurisdictions the rule is laid down that a *bona fide* purchaser will acquire a good title even though the execution be paid off or the judgment satisfied before sale;[86] but the better doctrine seems to be that the satisfaction of the judgment prior to an execution sale of property thereunder

Laflin, etc., Powder Co. *v.* Scholtes, 1 Leg. Rec. 129.

South Carolina.— Cox *v.* Edwards, 8 S. C. 1; Wingo *v.* Brown, 14 Rich. 103; Robinson *v.* Cooper, 1 Hill 286; Yates *v.* Bond, 2 McCord 382; Davis *v.* Murray, 2 Mill 143, 12 Am. Dec. 661; Thayer *v.* Charleston Dist., 2 Bay 169.

Tennessee.— Boro *v.* Harris, 13 Lea 36; Click *v.* Click, 1 Heisk. 607; Shaw *v.* Smith, 9 Yerg. 97; Henderson *v.* Overton, 2 Yerg. 394, 24 Am. Dec. 492.

Texas.— Oberthier *v.* Stroud, 33 Tex. 522.

United States.— Barstow *v.* Beckett, 122 Fed. 140.

See 21 Cent. Dig. tit. "Execution," § 770.

On the failure of title under an execution sale, the doctrine of *caveat emptor* is not applicable to bar the creditor from relief. Ritter *v.* Henshaw, 7 Iowa 97. See also *infra*, X, C, 13.

83. *Georgia.*—Renew *v.* Butler, 30 Ga. 954; Morris *v.* Bradford, 19 Ga. 527.

Illinois.—Hays *v.* Cassell, 70 Ill. 669; Dickerman *v.* Burgess, 20 Ill. 266; Stoker *v.* Greenup, 18 Ill. 27; Riggin *v.* Mulligan, 9 Ill. 50.

Iowa.— Koch *v.* West, 118 Iowa 468, 92 N. W. 663, 96 Am. St. Rep. 394, holding that inadequacy of consideration alone is not sufficient.

Kansas.— Markley *v.* Carbondale Invest. Co., 67 Kan. 535, 73 Pac. 96.

Missouri.— Crow *v.* Drace, 61 Mo. 225; Thornton *v.* Miskimmon, 48 Mo. 219.

Nebraska.— Taylor *v.* Courtnay, 15 Nebr. 190, 16 N. W. 842.

New York.— Genet *v.* Davenport, 56 N. Y. 676 [*affirming* 66 Barb. 412]; Lounsbury *v.* Purdy, 18 N. Y. 515 [*affirming* 11 Barb. 490]; Averill *v.* Loucks, 6 Barb. 19; Curtis *v.* Hitchcock, 10 Paige 399. See Wood *v.* Morehouse, 45 N. Y. 368 [*affirming* 1 Lans. 405].

Pennsylvania.— Kauffman *v.* Fahl, 1 Leg. Rec. 305.

South Carolina.— O'Neal *v.* Cothran, 4 Desauss. 552.

Texas.— Ennis *v.* Bestwick, 37 Tex. 662; Beckham *v.* Medlock, 19 Tex. Civ. App. 61, 46 S. W. 402.

Virginia.— Lamar *v.* Hale, 79 Va. 147.

See 21 Cent. Dig. tit. "Execution," § 771.

Compare Allen *v.* McGaughey, 31 Ark. 252; Click *v.* Click, 1 Heisk. (Tenn.) 607.

Holder of legal title.— It was held in Myers *v.* Cochran, 29 Ind. 256, that, in order to constitute a party a *bona fide* purchaser, it is not sufficient that he has bid off the property and paid the purchase-money before notice of existing equities; he must also have received the sheriff's deed before such notice.

84. *Iowa.*— O'Brien *v.* Harrison, 59 Iowa 686, 12 N. W. 256, 13 N. W. 764.

Mississippi.— Clement *v.* Reid, 9 Sm. & M. 535. See Davis *v.* Hamilton, 50 Miss. 213.

Texas.— McBride *v.* Banguss, 65 Tex. 174. See Nicols-Steuart *v.* Crosby, 87 Tex. 443, 29 S. W. 380.

Virginia.— Lamar *v.* Hale, 79 Va. 147.

United States.— Swayze *v.* Burk, 12 Pet. 11, 9 L. ed. 980.

See 21 Cent. Dig. tit. "Execution," § 772.

85. Carnahan *v.* Yerkes, 87 Ind. 62; McKamey *v.* Thorp, 61 Tex. 648; Delespine *v.* Campbell, 52 Tex. 4; Ayres *v.* Duprey, 27 Tex. 593, 86 Am. Dec. 657; Hicks *v.* Pogue, (Tex. Civ. App. 1903) 76 S. W. 786; Aultman *v.* George, 12 Tex. Civ. App. 457, 34 S. W. 652; Cobb *v.* Trammell, 9 Tex. Civ. App. 527, 30 S. W. 482.

The payment of costs of an execution sale by plaintiff in execution or his attorney has been held not to be sufficient to constitute him a *bona fide* purchaser. Christian *v.* Newberry, 61 Mo. 446.

86. Boren *v.* McGehee, 6 Port. (Ala.) 432, 31 Am. Dec. 695; Capital Bank *v.* Huntoon, 35 Kan. 577, 11 Pac. 369; Bishops *v.* Gregory, 5 B. Mon. (Ky.) 359; Nichols *v.* Dissler, 31 N. J. L. 461, 86 Am. Dec. 219; Dean *v.* Connelly, 6 Pa. St. 239; Samms *v.* Alexander, 3 Yeates (Pa.) 368; Woltjen *v.* O'Malley, 12 Lanc. Bar (Pa.) 6.

Payment after sale.— A sheriff's sale under

will render such sale void, and the purchaser will take no title thereunder, even though he bought in good faith and without notice.[87]

g. Where Title Is Out of Debtor. Where the judgment debtor alienates property prior to the attachment of the lien of a judgment against him, the purchaser of such property at an execution sale under such judgment acquires no title, even though he purchased in good faith and without notice of such prior alienation.[88]

h. Vendee of Execution Purchaser. The general rule is that a *bona fide* purchaser from the sheriff's vendee is not affected by equities which might be set up against the property in the hands of such vendee.[89]

i. Notice — (i) *Defects or Irregularities in Proceedings.* A purchaser of property at an execution sale is not bound to examine into the regularity of the proceedings by which the judgment and execution thereunder were obtained, and as a rule is not affected by defects or irregularities in the proceedings not appearing of record.[90] However, notice to put the purchaser at an execution

execution cannot be set aside on the execution debtor's payment of the judgment, and reimbursement of the purchaser for any expense he may have incurred by reason of his purchase. Hillard *v.* Gallagher, 4 Kulp (Pa.) 440. See also Gibson *v.* Winslow, 38 Pa. St. 49.

87. *Indiana.*— State *v.* Prime, 54 Ind. 450. See also Chapin *v.* McLaren, 105 Ind. 563, 5 N. E. 688.

Iowa.— See Long *v.* Valleau, 97 Iowa 328, 66 N. W. 195.

Louisiana.— Williams *v.* Gallien, 1 Rob. 94.

Massachusetts.— See Hammatt *v.* Wyman, 9 Mass. 138.

Mississippi.— Morton *v.* Grenada Male, etc., Academies, 8 Sm. & M. 773.

New York.— Craft *v.* Merrill, 14 N. Y. 456; Carpenter *v.* Stilwell, 11 N. Y. 61; Wood *v.* Colvin, 2 Hill 566, 38 Am. Dec. 598; Jackson *v.* Cadwell, 1 Cow. 622. See also Swan *v.* Saddlemire, 8 Wend. 676; Jackson *v.* Morse, 18 Johns. 441, 9 Am. Dec. 225.

South Carolina.—Mouchat *v.* Brown, 3 Rich. 117; Zylstra *v.* Keith, 2 Desauss. 140.

United States.— Lee *v.* Rogers, 15 Fed. Cas. No. 8,201, 2 Sawy. 549.

Reason of rule.— See McClure *v.* Logan, 59 Mo. 234, 237 [*criticizing* Reed *v.* Austin, 9 Mo. 722, 45 Am. Dec. 336]. See also Durette *v.* Briggs, 47 Mo. 356.

Dormant judgment.— It has been held in North Carolina that, where a justice's judgment is not docketed until after it has become dormant by lapse of time, a purchaser at an execution sale thereunder, although he be a stranger without notice, takes no title. Cowen *v.* Withrow, 114 N. C. 558, 19 S. E. 645.

88. Churchill *v.* Morse, 23 Iowa 229, 92 Am. Dec. 422; Martin *v.* Nash, 31 Miss. 324; Hundley *v.* Mount, 8 Sm. & M. (Miss.) 387; Chambers *v.* Lewis, 28 N. Y. 454, 16 Abb. Pr. (N. Y.) 433 [*affirming* 11 Abb. Pr. 210]. See also Stone *v.* Ebberly, 1 Bay (S. C.) 317.

Alienation after judgment.— See Stotts *v.* Brookfield, 55 Ark. 307, 18 S. W. 179.

89. *Arkansas.*— Miller *v.* Fraley, 23 Ark. 735.

Illinois.— Guiteau *v.* Wisely, 47 Ill. 433. See, however, Coggeshall *v.* Ruggles, 62 Ill. 401. *Compare* York *v.* Briscoe, 67 Ill. 533.

Indiana.— Parmlee *v.* Sloan, 37 Ind. 469; Lewis *v.* Phillips, 17 Ind. 108, 79 Am. Dec. 457.

Kentucky.— Blight *v.* Tobin, 7 T. B. Mon. 612, 18 Am. Dec. 219. See Smith *v.* Pope, 5 B. Mon. 337.

Maine.— Brackett *v.* Ridlon, 54 Me. 426.

New York.— Rankin *v.* Arndt, 44 Barb. 251. See, however, Wood *v.* Colvin, 2 Hill 566, 38 Am. Dec. 598.

North Carolina.— Cowles *v.* Hardin, 101 N. C. 388, 7 S. E. 896, 9 Am. St. Rep. 36.

Pennsylvania.— Kaine *v.* Denniston, 22 Pa. St. 202; Barlow *v.* Beall, 20 Pa. St. 178; Peebles *v.* Reading, 8 Serg. & R. 484; Lazarus *v.* Bryson, 3 Binn. 54.

South Carolina.— Cochran *v.* Roundtree, 3 Strobh. 217.

See 21 Cent. Dig. tit. "Execution," § 780; and *infra*, X, C, 13.

Assignee of execution plaintiff.— See Reynolds *v.* Harris, 14 Cal. 667, 76 Am. Dec. 459.

Transferee of bid.— Suttles *v.* Sewell, 109 Ga. 707, 35 S. E. 224.

90. *California.*— Reeve *v.* Kennedy, 43 Cal. 643, where the reasons for the rule are stated.

Delaware.— Williams *v.* Hickman, 2 Harr. 463.

Georgia.— Brooks *v.* Rooney, 11 Ga. 423, 56 Am. Dec. 436.

Indiana.— Joyce *v.* Madison First Nat. Bank, 62 Ind. 188.

Iowa.— See also Wickersham *v.* Reeves, 1 Iowa 413; Coriell *v.* Ham, 4 Greene 455, 61 Am. Dec. 134.

North Carolina.— Reid *v.* Largent, 49 N. C. 454.

South Carolina.— Bonham *v.* Bishop, 23 S. C. 96; Henry *v.* Ferguson, 1 Bailey 512; Barkley *v.* Screven, 1 Nott & M. 408.

Texas.— Day *v.* Johnson, (Civ. App. 1903) 72 S. W. 426; Lebreton *v.* Lemaire, (Civ. App. 1897) 43 S. W. 31.

West Virginia.— Hall *v.* Hall, 30 W. Va. 779, 5 S. E. 260.

United States.— Thompson *v.* Tolmie, 2 Pet. 157, 7 L. ed. 381.

sale in the same position as the execution debtor is merely that which is sufficient to put such person on inquiry leading to the whole truth, and it is not necessary that the notice should contain full, entire, and circumstantial information of every fact which would affect the *bona fides* of the purchaser and which it might be material for him to know.[91]

(II) *Liens, Encumbrances, and Equities.* The same rule applies to liens and encumbrances on and equities outstanding against property sold on execution, as in the case of irregularities and defects in the judgment, execution, and sale; and the purchaser at the execution sale takes the property subject to all such liens, encumbrances, and equities which could be enforced against the property in the hands of the judgment debtor of which he has actual or constructive notice.[92]

(III) *Where Judgment Creditor Is Without Notice.* It has been held in some jurisdictions that where the judgment creditor was without notice of the irregularities in the proceedings, or of liens or equities against the property, the fact that the purchaser at the execution sale had notice of such irregularities or of such liens or equities against the property would not affect his title and he

See 21 Cent. Dig. tit. "Execution," § 781.

Notice to sheriff at a sheriff's sale of real property is not notice to the purchaser. Stahle *v.* Spohn, 8 Serg. & R. (Pa.) 317.

Purchase by attorney of record.— See Day *v.* Graham, 6 Ill. 435.

Surety as purchaser.— See Hollcraft *v.* Douglass, 115 Ind. 139, 17 N. E. 275.

91. Facts held sufficient to charge the purchaser with notice of irregularities in the sale. See the following cases:

Alabama.— Williamson *v.* Mobile Branch Bank, 7 Ala. 906, 42 Am. Dec. 617.

Arkansas.— Ringgold *v.* Patterson, 15 Ark. 209.

Illinois.— Morris *v.* Robey, 73 Ill. 462; Kinney *v.* Knoebel, 51 Ill. 112.

Kentucky.— Smith *v.* Pope, 5 B. Mon. 337.

Minnesota.— Plummer *v.* Whitney, 33 Minn. 427, 23 N. W. 841.

Missouri.— Baird *v.* Given, 170 Mo. 302, 70 S. W. 697.

New York.— Colvin *v.* Luther, 9 Cow. 61; Osborn *v.* Taylor, 5 Paige 515.

North Carolina.— Lyon *v.* Russ, 84 N. C. 588.

Pennsylvania.— Barnes *v.* McClinton, 3 Penr. & W. 67, 23 Am. Dec. 62.

Texas.— Hart *v.* McDade, 61 Tex. 208; Snow *v.* Hawpe, 22 Tex. 168.

Virginia.— Lamar *v.* Hale, 79 Va. 147.

See 21 Cent. Dig. tit. "Execution," § 782.

92. *Arkansas.*— Apperson *v.* Burgett, 33 Ark. 328; Byers *v.* Engles, 16 Ark. 543.

Georgia.— Patterson *v.* Esterling, 27 Ga. 205.

Illinois.— Blue *v.* Blue, 38 Ill. 9, 87 Am. Dec. 267; Curtis *v.* Root, 28 Ill. 367, holding, however, that if a mortgage does not upon its face show a lien prior to that of the judgment, the purchaser thereunder is not bound to indulge in suspicion touching its fairness.

Kentucky.—Perry *v.* Trimble, 76 S. W. 343, 25 Ky. L. Rep. 725; Anderson *v.* Terry, 68 S. W. 845, 24 Ky. L. Rep. 494; Anderson *v.* West, 3 Ky. L. Rep. 670.

Massachusetts.—Houghton *v.* Bartholemew, 10 Metc. 138.

Michigan.— Ismon *v.* Loder, (1904) 97 N. W. 769; May *v.* Cleland, 117 Mich. 45, 75 N. W. 129, 44 L. R. A. 163.

New Jersey.— Geishaker *v.* Pancoast, 57 N. J. Eq. 60, 40 Atl. 200; Anglescy *v.* Colgan, 44 N. J. Eq. 203, 9 Atl. 105, 14 Atl. 627.

New York.— Cottle *v.* Simon, 153 N. Y. 403, 47 N. E. 815; Terrett *v.* Cowenhoven, 11 Hun 320; Morgan *v.* Turner, 35 Misc. 399, 71 N. Y. Suppl. 996; Parks *v.* Jackson, 11 Wend. 442, 25 Am. Dec. 656; Jackson *v.* Hull, 10 Johns. 481.

Pennsylvania.— Myers *v.* Leas, 101 Pa. St. 172; Gibson *v.* Winslow, 46 Pa. St. 380, 84 Am. Dec. 552; Zeigler's Appeal, 35 Pa. St. 173; Coleman *v.* Lewis, 27 Pa. St. 291; Shryock *v.* Jones, 22 Pa. St. 303; Biddle *v.* Moore, 3 Pa. St. 161; Hoffman *v.* Strohecker, 7 Watts 86, 32 Am. Dec. 740; First Nat. Bank *v.* Cockley, 2 Leg. Op. 208. See also Com. *v.* Calhoun, 184 Pa. St. 629, 39 Atl. 563.

South Carolina.— Thrower *v.* Vaughan, 1 Rich. 18.

Texas.— Yoe *v.* Montgomery, 68 Tex. 338, 4 S. W. 622; Price *v.* Cole, 35 Tex. 461; Blankenship *v.* Douglas, 26 Tex. 225, 82 Am. Dec. 608; Sanger *v.* Collum, (Civ. App. 1904) 78 S. W. 401; Brotherton *v.* Anderson, 27 Tex. Civ. App. 587, 66 S. W. 682; Norton *v.* Keller, (Civ. App. 1901) 65 S. W. 490; Davis *v.* Wheeler, (Civ. App. 1893) 23 S. W. 435.

Vermont.— Kezar *v.* Elkins, 52 Vt. 119.

See 21 Cent. Dig. tit. "Execution," § 783.

Facts held insufficient to charge the purchaser with notice of existing equities see McCormick *v.* Wheeler, 36 Ill. 114, 85 Am. Dec. 388; McCormick *v.* McCormick Harvesting Mach. Co., 120 Iowa 593, 95 N. W. 181; Rogers *v.* Hussey, 36 Iowa 664; Dewaters *v.* Kuhnle, 199 Pa. St. 439, 49 Atl. 264; Kelly *v.* Creen, 63 Pa. St. 299; Coyne *v.* Souther, 61 Pa. St. 455; Fickes *v.* Ersick, 2 Rawle (Pa.) 166.

Equitable title.— Garner's Appeal, 1 Walk. 438.

would take the property free from any liens or equities of which the judgment creditor was ignorant.[93]

(IV) *ACTUAL NOTICE.* Actual notice of a *bona fide* outstanding title derived from the judgment debtor is good as against a purchaser at an execution sale, although such notice was not given to the purchaser until the time of the sale.[94]

(V) *CONSTRUCTIVE NOTICE*—(A) *Possession.* The purchaser at an execution sale is chargeable with notice of the adverse claim of a third person who is at the time of the sale in open and exclusive occupancy of the property, claiming it as his own.[95]

(B) *Recording Instrument.* In accordance with the same principle, the recordation of an instrument when required by law, professing to convey an interest in the land, will be constructive notice to purchasers at execution sales of such interest or equity, and they will take the property subject to it.[96]

Liens of record.— See Barber *v.* Tryon, 41 Iowa 349.

93. *Alabama.*— Daniel *v.* Sorrells, 9 Ala. 436. But see Williams *v.* Hatch, 38 Ala. 338.

Louisiana.— Ohio Ins. Co. *v.* Edmondson, 5 La. 295, construing a Kentucky statute.

Mississippi.—Henderson *v.* Downy, 24 Miss. 106.

New Jersey.— Sharp *v.* Shea, 32 N. J. Eq. 65.

Texas.— Grace *v.* Wade, 45 Tex. 522; Blum *v.* Schwartz, (Sup. 1892) 20 S. W. 54, 16 L. R. A. 668; Barnett *v.* Squyres, (Civ. App. 1899) 52 S. W. 612.

94. *Alabama.*— Toulmin *v.* Austin, 5 Stew. & P. 410.

Arkansas.— Tennant *v.* Watson, 58 Ark. 252, 24 S. W. 495; Williams *v.* McIlroy, 34 Ark. 85.

California.— Blakeman *v.* Puget Sound Iron Co., 72 Cal. 321, 13 Pac. 872; Weston *v.* Bear, etc., Min. Co., 6 Cal. 425.

Georgia.— Blalock *v.* Newhill, 78 Ga. 245, 1 S. E. 383.

Kentucky.— Graham *v.* Samuel, 1 Dana 166; Helm *v.* Logan, 4 Bibb 78; Stacey *v.* Holiday, 5 S. W. 481, 9 Ky. L. Rep. 517.

Missouri.— Kinealy *v.* Macklin, 89 Mo. 433, 14 S. W. 507; Hill *v.* Paul, 8 Mo. 479.

New York.— Terrett *v.* Cowenhoven, 79 N. Y. 400 [*affirming* 11 Hun 320].

Ohio.— Atlantic, etc., R. Co. *v.* Phillips, 7 Ohio Dec. (Reprint) 591, 4 Cinc. L. Bul. 95.

Pennsylvania.— Hay *v.* Martin, (1888) 14 Atl. 333; Sill *v.* Swackhammer, 103 Pa. St. 7; Ross *v.* Baker, 72 Pa. St. 186; Owens *v.* Meyers, 20 Pa. St. 134, 57 Am. Dec. 693; Moyer *v.* Schick, 3 Pa. St. 242; Brown *v.* Chambersburg Bank, 3 Pa. St. 187; Barnes *v.* McClinton, 3 Penr. & W. 67, 23 Am. Dec. 62. See also Tarr *v.* Robinson, 158 Pa. St. 60, 27 Atl. 859.

South Carolina.—McPherson *v.* McPherson, 21 S. C. 261; Reeves *v.* Sims, 10 S. C. 308; Ingrem *v.* Phillips, 3 Strobh. 565.

Texas.— See Borden *v.* McRae, 46 Tex. 396. And see Linn *v.* Le Compte, 47 Tex. 440.

Vermont.— Hart *v.* Farmers', etc., Bank, 33 Vt. 252.

See 21 Cent. Dig. tit. "Execution," § 781.

Compare Richardson *v.* Wicker, 74 N. C. 278.

Facts held insufficient to constitute notice to the execution purchaser see the following cases:

California.— Vassault *v.* Austin, 36 Cal. 691.

Iowa.— Brown *v.* Wade, 42 Iowa 647.

Louisiana.— Thistle *v.* Irosen, 37 La. Ann. 170.

Michigan.— Luton *v.* Sharp, 94 Mich. 202, 53 N. W. 1054.

Pennsylvania.— Forest Oil Co.'s Appeal, 118 Pa. St. 138, 12 Atl. 442, 4 Am. St. Rep. 584; Moyer *v.* Schick, 3 Pa. St. 242; Heister *v.* Fortner, 2 Binn. 40, 4 Am. Dec. 417.

Texas.— McCrory *v.* Lutz, (Sup. 1901) 64 S. W. 780 [*affirming* (Civ. App. 1901) 62 S. W. 1094]; Holt *v.* Hunt, 18 Tex. Civ. App. 363, 44 S. W. 889.

United States.— Meek *v.* Skeen, 60 Fed. 322, 8 C. C. A. 641.

See 21 Cent. Dig. tit. "Execution," § 785.

95. *Alabama.*—Murphy *v.* Greene, 120 Ala. 112, 22 So. 112; Brunson *v.* Brooks, 68 Ala. 248; Powell *v.* Allred, 11 Ala. 318.

Arkansas.— Tennant *v.* Watson, 58 Ark. 252, 24 S. W. 495.

Indiana.— Glidewell *v.* Spaugh, 26 Ind. 319.

Iowa.— Chamberlain *v.* Collinson, 45 Iowa 429. See also Thomas *v.* Kennedy, 24 Iowa 397, 95 Am. Dec. 740.

Minnesota.— See Seager *v.* Burns, 4 Minn. 141.

New York.— Terrett *v.* Cowenhoven, 79 N. Y. 400 [*affirming* 11 Hun 320]; Cook *v.* Travers, 20 N. Y. 400 [*affirming* 22 Barb. 338].

Pennsylvania.— Hood *v.* Fahnestock, 1 Pa. St. 470, 44 Am. Dec. 147; Krider *v.* Lafferty, 1 Whart. 303. See, however, Lance *v.* Gorman, 136 Pa. St. 200, 20 Atl. 792, 20 Am. St. Rep. 914.

Texas.— Markham *v.* Parker, (Civ. App. 1895) 31 S. W. 82.

See 21 Cent. Dig. tit. "Execution," § 785.

96. *California.*— Page *v.* Rogers, 31 Cal. 293.

Indiana.— Ray *v.* Yarnell, 118 Ind. 112, 20 N. E. 705.

Iowa.— See Nelson *v.* Wade, 21 Iowa 49.

Massachusetts.— Safford *v.* Weare, 142 Mass. 231, 7 N. E. 730.

j. Judgment Creditor as Purchaser — (i) *General Rule.* Where the judgment creditor becomes a purchaser at an execution sale, he of course takes subject to all equities and is affected by all irregularities of which he had either actual or constructive notice.[97] However, the courts are divided upon the question as to whether the judgment creditor who purchases at his own sale is affected by irregularities, liens, and equities of which he had no actual or constructive notice. According to the better doctrine, he is chargeable with notice of all irregularities in the judgment, execution, and sale, and of all liens upon and equities subsisting against the property in the hands of the judgment debtor,[98] thus, under this line of decisions it has been held that a sale to an execution plaintiff will be rendered invalid by the reversal of the judgment under which the sale took place.[99] Yet

Nebraska.— Mansfield *v.* Gregory, 8 Nebr. 432, 1 N. W. 382.

Ohio.— Byers *v.* Wackman, 16 Ohio St. 442.

Pennsylvania.— Gingrich *v.* Foltz, 19 Pa. St. 38, 57 Am. Dec. 631; Banks *v.* Ammon, 27 Pa. St. 172, holding, however, that the recording of a deed on land which does not fix the locality of the land, its amount, or contain any description except by referring to trees, etc., cannot be considered as notice to the purchaser of an outstanding title at such sale.

South Carolina.— Armstrong *v.* Carwile, 56 S. C. 463, 35 S. E. 196.

Texas.— Bonner *v.* Stephens, 60 Tex. 616.

See 21 Cent. Dig. tit. "Execution," § 785.

Determination of fact of notice.— It has been held in Indiana that whether certain facts in evidence are sufficient to charge a purchaser of land at a sheriff's sale with notice of the existence of the vendor's lien thereon is for the jury. Boling *v.* Howell, 93 Ind. 329.

97. *Alabama.*— Dickerson *v.* Carroll, 76 Ala. 377.

Kentucky.— Low *v.* Blinco, 10 Bush 331; Perry *v.* Trimble, 76 S. W. 343, 25 Ky. L. Rep. 725.

Missouri.— Rhodes *v.* Outcalt, 48 Mo. 367; Trigg *v.* Ross, 35 Mo. 165. See also Curd *v.* Lackland, 49 Mo. 451.

Montana.— McAdow *v.* Black, 4 Mont. 475, 1 Pac. 751.

New York.— Devoe *v.* Brandt, 53 N. Y. 462 [*reversing* 58 Barb. 493].

Oregon.— Silsby *v.* Strong, 38 Oreg. 508, 62 Pac. 633.

Texas.— Puster *v.* Anderson, 27 Tex. Civ. App. 626, 66 S. W. 684; Hirsch *v.* Howell, (Civ. App. 1900) 60 S. W. 887; Caldwell *v.* Bryan, 20 Tex. Civ. App. 168, 49 S. W. 240.

United States.— Barslow *v.* Beckett, 122 Fed. 140; Newman *v.* Davis, 24 Fed. 609.

See 21 Cent. Dig. tit. "Execution," § 789.

98. *Arkansas.*— Hill *v.* Coolidge, 33 Ark. 621.

Colorado.—Hartsock *v.* John Wright Hardware Co., 16 Colo. App. 48, 64 Pac. 245.

Illinois.— Vanscoyoc *v.* Kimler, 77 Ill. 151; King *v.* Cushman, 41 Ill. 31, 89 Am. Dec. 366; McLean County Bank *v.* Flagg, 31 Ill. 290, 83 Am. Dec. 224; Dickerman *v.* Burgess, 20 Ill. 266; Bybee *v.* Ashby, 7 Ill. 151, 43 Am. Dec. 471; Day *v.* Graham, 6 Ill. 435.

Kentucky.— Gillispie *v.* Walker, 3 B. Mon. 505; Sanders *v.* Ruddle, 2 T. B. Mon. 139, 15 Am. Dec. 148. *Compare* Low *v.* Blinco, 10 Bush 331; Sanders *v.* Norton, 4 T. B. Mon. 464.

Minnesota.— Pettingill *v.* Moss, 3 Minn. 222, 74 Am. Dec. 747.

Mississippi.—Walton *v.* Hargroves, 42 Miss. 18, 97 Am. Dec. 429; Winston *v.* Otley, 25 Miss. 451.

Missouri.— Harness *v.* Cravens, 126 Mo. 233, 28 S. W. 971.

Nevada.— See Hastings *v.* Burning Moscow Gold, etc., Min. Co., 2 Nev. 100.

North Carolina.— Stern *v.* Austern, 120 N. C. 107, 27 S. E. 31.

South Carolina.—Williams *v.* Hollinsworth, 1 Strobh. Eq. 103, 47 Am. Dec. 527. See also Ingrem *v.* Belk, 2 Strobh. 207, 47 Am. Dec. 591.

Tennessee.— Keeling *v.* Heard, 3 Head 592; Trotter *v.* Nelson, 1 Swan 7; Waite *v.* Dolby, 8 Humphr. 406.

Texas.— McKamey *v.* Thorp, 61 Tex. 648; Pearson *v.* Hudson, 52 Tex. 352; Ayres *v.* Duprey, 27 Tex. 593, 86 Am. Dec. 657; Hicks *v.* Pogue, (Civ. App. 1903) 76 S. W. 786; Hirsch *v.* Howell, (Civ. App. 1900) 60 S. W. 887; Focke *v.* Garcia, (Civ. App. 1898) 48 S. W. 755; Avery *v.* Popper, (Civ. App. 1898) 45 S. W. 951. See also Senter *v.* Lambeth, 59 Tex. 259.

Vermont.— See Hart *v.* Farmers', etc., Bank, 33 Vt. 252.

Washington.— Hacker *v.* White, 22 Wash. 415, 60 Pac. 1114, 79 Am. St. Rep. 945; Benney *v.* Clein, 15 Wash. 581, 46 Pac. 1037; Scott *v.* McGraw, 3 Wash. 675, 29 Pac. 260. See also Elwood *v.* Stewart, 5 Wash. 736, 32 Pac. 735, 1000.

Wisconsin.—Collins *v.* Smith, 57 Wis. 284, 15 N. W. 192.

See 21 Cent. Dig. tit. "Execution," § 789.

Compare Walker *v.* Elledge, 65 Ala. 51.

Burden of proof.— McGirr *v.* Hunter, 13 Ill. App. 195.

99. *Delaware.*— Stoeckel *v.* Russell, 6 Houst. 32, 142 [*affirmed* in 6 Houst. 221].

Illinois.— Gould *v.* Sternberg, 128 Ill. 510, 21 N. E. 628, 15 Am. St. Rep. 138; Kingsbury *v.* Stoltz, 23 Ill. App. 411; Major *v.* Collins, 17 Ill. App. 239. See also Puterbaugh *v.* Moss, (1887) 11 N. E. 197.

Kentucky.—Cavanaugh *v.* Willson, 108 Ky. 759, 57 S. W. 620, 22 Ky. L. Rep. 474 (where the attorney for the execution creditor was

in a number of the cases the rule is laid down that where a judgment creditor merges his judgment into a title by purchase at an execution sale without actual or constructive notice of prior irregularities or equities, he is entitled to the benefits and protection given by statute to *bona fide* purchasers.[1]

(II) *Under Registry Acts.* Under the various registry acts providing that all deeds and title papers shall be in force and take effect from and after the time of filing the same for record and not before, as to all creditors and subsequent *bona fide* purchasers without notice, the judgment creditor purchasing the property at the execution sale will be protected against an unrecorded deed or mortgage of which he had no actual notice.[2]

(III) *Purchasers From Judgment Creditor.* In jurisdictions where a

the purchaser); Spicer *v.* Seale, 106 Ky. 246, 50 S. W. 47, 20 Ky. L. Rep. 1869.

Louisiana.— Graham *v.* Eagan, 15 La. Ann. 97; Steel *v.* Smith, 9 La. Ann. 171; Beaulieu *v.* Furst, 8 Rob. 485; Baillio *v.* Wilson, 5 Mart. N. S. 214.

Minnesota.— See Peck *v.* McLean, 36 Minn. 228, 30 N. W. 759, 1 Am. St. Rep. 665.

Missouri.— Holland *v.* Adail, 55 Mo. 40; Vogler *v.* Montgomery, 54 Mo. 577; Gott *v.* Powell, 41 Mo. 416.

New York.— McCracken *v.* Flanagan, 141 N. Y. 174, 36 N. E. 10 [*affirming* 21 N. Y. Suppl. 1108]; Winterson *v.* Hitchings, 10 Misc. 396, 31 N. Y. Suppl. 127.

Texas.— Stroud *v.* Casey, 25 Tex. 740, 78 Am. Dec. 556; Cordray *v.* Neuhaus, (Civ. App. 1901) 61 S. W. 415.

See 21 Cent. Dig. tit. "Execution," § 789; and *infra*, note 18.

Compare Reynolds *v.* Hosmer, 45 Cal. 616; Reynolds *v.* Harris, 14 Cal. 667, 76 Am. Dec. 459; Hutchens *v.* Doe, 3 Ind. 528; Schoonover *v.* Osborne, 117 Iowa 427, 90 N. W. 844; O'Brien *v.* Harrison, 59 Iowa 686, 12 N. W. 256, 13 N. W. 764; Munson *v.* Plummer, 58 Iowa 736, 13 N. W. 71; Twogood *v.* Franklin, 27 Iowa 239; Stephens *v.* Stephens, 1 Phila. (Pa.) 108. But see other cases in these jurisdictions cited *infra*, note 1.

Contra, in Kentucky, where the execution creditor is protected equally with the stranger, where he is the purchaser at the sale. Yocun *v.* Foreman, 14 Bush 494; Gossom *v.* Donaldson, 18 B. Mon. 230, 68 Am. Dec. 723; Clark *v.* Farrow, 10 B. Mon. 446, 52 Am. Dec. 552; Benningfield *v.* Reed, 8 B. Mon. 102; Amos *v.* Stockton, 5 J. J. Marsh. 638; Williams *v.* Cummins, 4 J. J. Marsh. 637; Parker *v.* Anderson, 5 T. B. Mon. 445.

Sale under special execution based on two judgments.— Falk *v.* Ferd. Heim Brewing Co., 67 Kan. 131, 72 Pac. 531.

Subsequent sale under an execution against the judgment creditor to purchase at a prior sale extinguishes the title of a second purchaser. Cordray *v.* Neuhaus, (Tex. Civ. App. 1901) 61 S. W. 415.

Title ceases at time of reversal. Stoud *v.* Casey, 25 Tex. 740, 78 Am. Dec. 556.

1. *California.*— Riley *v.* Martinelli, 97 Cal. 575, 32 Pac. 579, 33 Am. St. Rep. 209, 21 L. R. A. 33; Reynolds *v.* Hosmer, 45 Cal. 616; Hunter *v.* Watson, 12 Cal. 363, 73 Am. Dec. 543. *Contra*, Reynolds *v.* Harris, 14 Cal. 667, 76 Am. Dec. 459. *Compare* Reynolds *v.* Hosmer, 45 Cal. 616.

Georgia.— Conley *v.* Redwine, 109 Ga. 640, 35 S. E. 92, 77 Am. St. Rep. 398; Humphrey *v.* McGill, 59 Ga. 649.

Indiana.— Pugh *v.* Highley, 152 Ind. 252, 53 N. E. 171, 71 Am. St. Rep. 327, 44 L. R. A. 392; Vitito *v.* Hamilton, 86 Ind. 137; Rooker *v.* Rooker, 75 Ind. 571; Catherwood *v.* Watson, 65 Ind. 576. *Contra*, Shirk *v.* Thomas, 121 Ind. 147, 22 N. E. 976, 16 Am. St. Rep. 381; Carnahan *v.* Yerkes, 87 Ind. 62; Bole *v.* Newberger, 81 Ind. 274; Neff *v.* Hagaman, 78 Ind. 57; Weaver *v.* Guyer, 59 Ind. 195; Harrison *v.* Doe, 2 Blackf. 1. *Compare* Hutchens *v.* Doe, 3 Ind. 528.

Iowa.— Frazier *v.* Crafts, 40 Iowa 110; Butterfield *v.* Walsh, 36 Iowa 534; Gower *v.* Doheney, 33 Iowa 36; Halloway *v.* Platner, 20 Iowa 121, 89 Am. Dec. 517; Evans *v.* McGlasson, 18 Iowa 150 (holding that the above rule applies unless there are equities of so strong and persuasive a nature as to prevent the application of the rule and these, if they be relied upon, must be alleged and proven); Cavender *v.* Smith, 1 Iowa 306. See also Hendryx *v.* Evans, 120 Iowa 310, 94 N. W. 853; Wallace *v.* Bartle, 21 Iowa 346, 89 Am. Dec. 584. *Compare* Schoonover *v.* Osborne, 117 Iowa 427, 90 N. W. 844; O'Brien *v.* Harrison, 59 Iowa 686, 12 N. W. 256, 13 N. W. 764; Munson *v.* Plummer, 58 Iowa 736, 13 N. W. 71; Twogood *v.* Franklin, 27 Iowa 239.

Montana.— See Roush *v.* Fort, 2 Mont. 482.

New York.— Sinnott *v.* German American Bank, 164 N. Y. 386, 58 N. E. 286; Wood *v.* Morehouse, 45 N. Y. 368 [*affirming* 1 Lans. 405]. *Contra*, Simonds *v.* Cadman, 2 Cai. 61.

Pennsylvania.— Allentown Bank *v.* Beck, 49 Pa. St. 394. *Compare* Stephens *v.* Stephens, 1 Phila. 108.

United States.— Newman *v.* Davis, 24 Fed. 609.

See 21 Cent. Dig. tit. "Execution," § 789.

2. *Alabama.*— Hall *v.* Griffin, 119 Ala. 214, 24 So. 27.

California.— Riley *v.* Martinelli, 97 Cal. 575, 32 Pac. 579, 33 Am. St. Rep. 209, 21 L. R. A. 33; Foorman *v.* Wallace, 75 Cal. 552, 17 Pac. 680.

Connecticut.— See Pendleton *v.* Button, 3 Conn. 406.

Illinois.— Columbus Buggy Co. *v.* Graves, 108 Ill. 459.

Indiana.— Rooker *v.* Rooker, 75 Ind. 571.

judgment creditor purchasing at an execution sale is not regarded as a *bona fide* purchaser, a party claiming under such judgment creditor is not an innocent purchaser, and acquires no better title than that of the judgment creditor.[3]

5. As Affected by Irregularities — a. In Proceedings Prior to Sale — (i) *General Rule.* The general rule is that the title of a *bona fide* purchaser at an execution sale is not affected by any irregularities in the proceedings prior to the sale, such as a defective writ or irregularity in the issuance thereof,[4] or by any irregularity in or failure to make appraisement of the property, where the statute requires it.[5]

Iowa.— Gower *v.* Doheney, 33 Iowa 36.

Mississippi.— Hart *v.* Gardner, 81 Miss. 650, 33 So. 442, 497.

Missouri.— Rouse *v.* Caton, 168 Mo. 288, 67 S. W. 578, 90 Am. St. Rep. 456.

Ohio.— Sternberger *v.* Ragland, 57 Ohio St. 148, 48 N. E. 811.

Texas.— Sanger *v.* Collum, (Civ. App. 1904) 78 S. W. 401.

United States.— Newman *v.* Davis, 24 Fed. 609.

See 21 Cent. Dig. tit. "Execution," § 789.

But see Belcher *v.* Curtis, 119 Mich. 1, 77 N. W. 310, 75 Am. St. Rep. 376.

Contra.— Hacker *v.* White, 22 Wash. 415, 60 Pac. 1114, 79 Am. St. Rep. 945; Dawson *v.* McCarty, 21 Wash. 314, 57 Pac. 816, 75 Am. St. Rep. 841.

3. Reynolds *v.* Harris, 14 Cal. 667, 76 Am. Dec. 459; Culver *v.* Phelps, 130 Ill. 217, 22 N. E. 809; Conniff *v.* Doyle, 2 Luz. Leg. Reg. (Pa.) 107. See also Ellis *v.* Singletary, 45 Tex. 27. See, however, Vogler *v.* Montgomery, 54 Mo. 577.

4. *Alabama.*— Pollard *v.* Cocke, 19 Ala. 188; Weir *v.* Clayton, 19 Ala. 132; Nuckles *v.* Mahone, 15 Ala. 212; Chambers *v.* Stone, 9 Ala. 260. See also Ayers *v.* Roper, 111 Ala. 651, 20 So. 460.

Arkansas.— Adamson *v.* Cummins, 10 Ark. 541.

Connecticut.— Beers *v.* Botsford, 13 Conn. 146.

Delaware.— Lore *v.* Hambleton, 2 Harr. 474.

Georgia.— Tift *v.* Hill, 43 Ga. 203; Sullivan *v.* Hearnden, 11 Ga. 294.

Illinois.— Rock *v.* Haas, 110 Ill. 528; Holman *v.* Gill, 107 Ill. 467.

Indiana.— Armstrong *v.* Jackson, 1 Blackf. 210, 12 Am. Dec. 225; Gillispie *v.* Splahn, Wils. 228.

Iowa.— Cooley *v.* Brayton, 16 Iowa 10; Shaffer *v.* Bolander, 4 Greene 201; Hopping *v.* Burnam, 2 Greene 39.

Kentucky.— Brown *v.* Miller, 3 J. J. Marsh. 435; Sanders *v.* Norton, 4 T. B. Mon. 464; Locke *v.* Coleman, 2 T. B. Mon. 12, 15 Am. Dec. 118; Cox *v.* Nelson, 1 T. B. Mon. 94, 15 Am. Dec. 89; Holcomb *v.* Hays, 62 S. W. 1028, 23 Ky. L. Rep. 352. See also Williams *v.* Gill, 6 J. J. Marsh. 687.

Louisiana.— Mullen *v.* Harding, 12 La. Ann. 271.

Maine.— May *v.* Thomas, 48 Me. 397; Ludden *v.* Kincaid, 45 Me. 411.

Minnesota.— Tullis *v.* Brawley, 3 Minn. 277.

Missouri.— Whitman *v.* Taylor, 60 Mo. 127; Hardin *v.* McCanse, 53 Mo. 255; Landes *v.* Perkins, 12 Mo. 238.

Montana.— Roush *v.* Fort, 2 Mont. 482.

New York.— Jackson *v.* Rosevelt, 13 Johns. 97.

North Carolina.— Sheppard *v.* Bland, 87 N. C. 163.

Pennsylvania.— Hering *v.* Chambers, 103 Pa. St. 172; Springer *v.* Brown, 9 Pa. St. 305; Smull *v.* Mickley, 1 Rawle 95.

South Carolina.— Lawrence *v.* Granblin, 13 S. C. 120.

Tennessee.— Anderson *v.* Clark, 2 Swan 156; Trotter *v.* Nelson, 1 Swan 7.

Texas.— Sydnor *v.* Roberts, 13 Tex. 598, 65 Am. Dec. 84.

Virginia.— Carr *v.* Glasscock, 3 Gratt. 343.

United States.— Morrell *v.* Craefe, 17 Fed. Cas. No. 9,819, 2 Wash. 380; Sumner *v.* Moore, 23 Fed. Cas. No. 13,610, 2 McLean 59.

See 21 Cent. Dig. tit. "Execution," §§ 773, 791 *et seq.*

Forged execution.— No title passes by the sale under a forged execution, even to an innocent purchaser. Silvan *v.* Coffee, 20 Tex. 4, 70 Am. Dec. 371.

Sale under dormant execution.—It was held in Richards *v.* Allen, 3 E. D. Smith (N. Y.) 399, that the sale of personal property made ostensibly under a dormant execution, while another execution in the sheriff's hand was valid, vested the title in the purchaser.

5. *Kansas.*— Capitol Bank *v.* Huntoon, 35 Kan. 77, 11 Pac. 369.

Kentucky.— Guelot *v.* Pearce, (1897) 38 S. W. 892; Sayers *v.* Hahn, 5 Ky. L. Rep. 319.

Michigan.— Constantine First Nat. Bank *v.* Jacobs, 50 Mich. 340, 15 N. W. 500 (where it was held to be no defense where the judgment debtor did not select his homestead before the execution sale); Crane *v.* Hardy, 1 Mich. 56.

Nebraska.— Hoover *v.* Hale, 56 Nebr. 67, 76 N. W. 457.

Ohio.— Allen *v.* Parish, 3 Ohio 187.

Pennsylvania.— Hatch *v.* Bartle, 45 Pa. St. 166, 84 Am. Dec. 484.

Texas.— Bludworth *v.* Poole, 21 Tex. Civ. App. 551, 53 S. W. 717.

See 21 Cent. Dig. tit. "Execution," § 791 *et seq.*

See, however, Cavender *v.* Cavender, 1 Pennew. (Del.) 86, 39 Atl. 776; Doe *v.* Collins, Smith (Ind.) 58.

Failure to file account.— It was held in Ashe *v.* Drennis, 2 Bay (S. C.) 329, that

(II) *Illustration of Rule.* Where the statute provides that execution shall issue within a designated period after the rendition of judgment, its issuance after the expiration of such period without a revival by *scire facias* renders it voidable merely, and a sale thereunder will give a valid title to the purchaser.[6] Nor will any mere irregularity in the indorsement of the writ, or clerical error in its recitals, which render it voidable only, invalidate the title of a *bona fide* purchaser at a sale thereunder.[7] So the general rule is that the title of a purchaser of property at an execution sale is not affected by irregularities in the levy with which he was not connected, such as failure of the officer to make a seizure of the property in the mode or by the steps prescribed by statute,[8] or by the failure of an officer to make a demand of payment before levying the execution,[9] although in some jurisdictions the rule is that there must be a valid levy as prescribed by statute in order to support the sheriff's deed, and that where such statutory levy is wanting the execution purchaser acquires no title.[10]

(III) *Exception to Rule.* However, while the general rule is that a *bona fide* purchaser at an execution sale is not chargeable with notice of mere irregularities in the suit,[11] yet if there be jurisdictional or other defects rendering the

bona fide purchasers at execution sales are not affected by the neglect of the administrator of the estate against which the execution ran, to file an account and plea of *plene administravit*.

6. *Alabama.*— De Loach *v.* Robbins, 102 Ala. 288, 14 So. 777, 48 Am. St. Rep. 46; Leonard *v.* Brewer, 86 Ala. 390, 5 So. 306.

Illinois.— Morgan *v.* Evans, 72 Ill. 586, 22 Am. Rep. 154.

Maryland.— Elliott *v.* Knot, 14 Md. 121, 74 Am. Dec. 519.

New York.— Woodcock *v.* Bennett, 1 Cow. 711, 13 Am. Dec. 568. See also Jackson *v.* Bartlett, 8 Johns. 361.

Tennessee.— Simmons *v.* Wood, 6 Yerg. 518; Overton *v.* Perkins, Mart. & Y. 367.

Texas.— Andrews *v.* Richardson, 21 Tex. 287.

See 21 Cent. Dig. tit. "Execution," § 793.

An execution made returnable in a greater number of days than the statute provides does not invalidate the sale if it is made within the statutory time. Youngblood *v.* Cunningham, 38 Ark. 571.

7. *Alabama.*— Forest *v.* Camp, 16 Ala. 642.

Florida.— Adams *v.* Higgins, 23 Fla. 13, 1 So. 321.

Iowa.— Sprott *v.* Reid, 3 Greene 489, 56 Am. Dec. 549.

Kentucky.— Cox *v.* Nelson, 1 T. B. Mon. 94, 15 Am. Dec. 89; Magowen *v.* Hay, 3 A. K. Marsh. 452.

Maryland.— Ranoul *v.* Griffie, 3 Md. 54.

Massachusetts.— Berry *v.* Gates, 175 Mass. 373, 56 N. E. 581.

Michigan.— Elliott *v.* Hart, 45 Mich. 234, 7 N. W. 812.

Mississippi.— Hamblen *v.* Hamblen, 33 Miss. 455, 69 Am. Dec. 358; Mitchell *v.* Evans, 5 How. 548, 37 Am. Dec. 169.

North Carolina.—Hinton *v.* Roach, 95 N. C. 106.

Tennessee.— Courtland Wagon Co. *v.* Shields, (Ch. App. 1896) 56 S. W. 275; Lee *v.* Crossna, 6 Humphr. 281; Seawell *v.* Williams, 2 Overt. 273.

Texas.— Fitch *v.* Boyer, 51 Tex. 336; Coffee *v.* Silvan, 15 Tex. 354, 65 Am. Dec. 169.

See 21 Cent. Dig. tit. "Execution," § 791 *et seq.*

In Illinois, however, the rule is laid down that the purchaser takes no title to property sold under a writ of execution which is defective on its face. Sidwall *v.* Schumacher, 99 Ill. 427; Bybee *v.* Ashby, 7 Ill. 151, 43 Am. Dec. 47; Peasley *v.* Weaver, 64 Ill. App. 80, where the execution had no seal. See also Finch *v.* Martin, 19 Ill. 105. But *compare* Durham *v.* Heaton, 28 Ill. 264, 81 Am. Dec. 275.

8. Blood *v.* Light, 38 Cal. 649, 99 Am. Dec. 441; Cavender *v.* Smith, 1 Iowa 306; Beeler *v.* Bullitt, 3 A. K. Marsh. (Ky.) 380, 13 Am. Dec. 161; Holcomb *v.* Hays, 62 S. W. 1028, 23 Ky. L. Rep. 352; Donnebaum *v.* Tinsley, 54 Tex. 362; Riddle *v.* Bush, 27 Tex. 675.

9. Rock *v.* Haas, 110 Ill. 528; Howe *v.* Starkwell, 17 Mass. 240; Titcomb *v.* Union M. & F. Ins. Co., 8 Mass. 326; Buller *v.* Woods, 43 Mo. App. 494; Cowles *v.* Hardin, 101 N. C. 388, 7 S. E. 896, 9 Am. St. Rep. 36; Burke *v.* Elliott, 26 N. C. 355, 42 Am. Dec. 142.

10. Hughes *v.* Watt, 26 Ark. 228; Clendening *v.* Ohl, 118 Ind. 46, 20 N. E. 639; Morgan *v.* Johnson, 27 La. Ann. 539; Cronan *v.* Cochrane, 27 La. Ann. 120; Taylor *v.* Stone, 2 La. Ann. 910; Offut *v.* Mouquit, 2 La. Ann. 785. See also Barret *v.* Emerson, 8 La. Ann. 503; Burd *v.* Dansdale, 2 Binn. (Pa.) 80.

11. *Alabama.*— Howard *v.* Corey, 126 Ala. 283, 28 So. 682; Randolph *v.* Carlton, 8 Ala. 606.

California.— Moore *v.* Martin, 38 Cal. 428.

Georgia.— Tinsley *v.* Lee, 51 Ga. 482.

Idaho.— Hazard *v.* Cole, 1 Ida. 276.

Kentucky.— Wilson *v.* McGee, 2 A. K. Marsh. 600; Sneed *v.* Reardon, 1 A. K. Marsh. 217.

Massachusetts.— Park *v.* Darling, 4 Cush. 197.

Missouri.— Emory *v.* Joyce, 70 Mo. 537;

judgment or execution void *ab initio*, such purchaser will take no title by the sale.[12]

(IV) *Sale Under Several Executions.* Where property is sold under several executions, the title of the purchaser will be good if one of the executions is valid, although the others under which the property is sold are void.[13]

b. Irregularities in Sale. The title of a *bona fide* purchaser at an execution sale cannot be impaired at law or in equity, by any mere error or irregularity in the conduct of the sale, such as want of or defective notice or advertisement of sale,[14] or failure of the officer to keep the property in his possession for the length

Draper *v.* Bryson, 26 Mo. 108, 69 Am. Dec. 483, 17 Mo. 71, 57 Am. Dec. 357; McNail *v.* Biddle, 8 Mo. 257.

New Jersey.— Flomerfelt *v.* Zellers, 7 N. J. L. 153.

New York.— Jackson *v.* Davis, 18 Johns. 7; Pierce *v.* Alsop, 3 Barb. Ch. 184.

North Carolina.— Hinton *v.* Rhodes, 95 N. C. 106.

Ohio.— Douglass *v.* Massie, 16 Ohio 271, 47 Am. Dec. 375.

Pennsylvania.— Piper *v.* Martin, 8 Pa. St. 206; Heister *v.* Fortner, 2 Binn. 40, 4 Am. Dec. 417.

Tennessee.—Valentine *v.* Cooley, Meigs 613, 33 Am. Dec. 166.

Texas.— Seguin *v.* Maverick, 24 Tex. 526, 76 Am. Dec. 117; Bowers *v.* Chaney, 21 Tex. 363; Bludworth *v.* Poole, 21 Tex. Civ. App. 551, 53 S. W. 717.

United States.— South Fork Canal Co. *v.* Gordon, 22 Fed. Cas. No. 13,189, 2 Abb. 479. *Compare* Sumner *v.* Moore, 23 Fed. Cas. No. 13,610, 2 McLean 59.

See 21 Cent. Dig. tit. "Execution," § 791; and cases cited *supra*, note 3 *et seq.*

The right of redemption from sale under execution is purely statutory and the mode prescribed by the statute must be pursued to make a valid redemption. Wooters *v.* Joseph, 137 Ill. 113, 27 N. E. 80, 31 Am. St. Rep. 355.

12. *Alabama.*— Cauly *v.* Blue, 62 Ala. 77; Barclay *v.* Plant, 50 Ala. 509.

Arkansas.— Wilson *v.* Spring, 38 Ark. 181; Hightower *v.* Handlin, 27 Ark. 20.

California.— Gray *v.* Hawes, 8 Cal. 562.

Georgia.— Conley *v.* Redwine, 109 Ga. 640, 35 S. E. 92, 77 Am. St. Rep. 398; Carithers *v.* Venable, 52 Ga. 389.

Illinois.— See Wooters *v.* Joseph, 137 Ill. 113, 27 N. E. 80, 31 Am. St. Rep. 355.

Indiana.— Sowders *v.* Edmunds, 76 Ind. 123.

Kansas.— Hargis *v.* Morse, 7 Kan. 415.

Louisiana.—Matthews *v.* Creston City Mut. Ins. Co., 26 La. Ann. 386; Wright *v.* Higginbothan, 10 Rob. 30.

Michigan.— Millar *v.* Babcock, 29 Mich. 525.

Nebraska.— Plattsmouth First Nat. Bank *v.* Gibson, 60 Nebr. 767, 84 N. W. 259.

New York.—Farnham *v.* Hildreth, 32 Barb. 277.

North Carolina.— Bernhardt *v.* Brown, 119 N. C. 506, 26 S. E. 162, 36 L. R. A. 402; Avery *v.* Rose, 15 N. C. 549.

Pennsylvania.— Tenan *v.* Cain, 188 Pa. St. 242, 41 Atl. 594 (holding that, where a defect in the judgment is apparent on its face, the purchaser at the execution sale acquires no title); Snyder *v.* Christ, 39 Pa. St. 199; Camp *v.* Wood, 10 Watts 118. But see Gibson *v.* Winslow, 38 Pa. St. 49; Herring *v.* Chambers, 16 Phila. 124.

Texas.— Collins *v.* Miller, 64 Tex. 118; Hollingsworth *v.* Bagley, 35 Tex. 345.

See 21 Cent. Dig. tit. "Execution," § 791 *et seq.*

13. De Loach *v.* Robbins, 102 Ala. 288, 14 So. 777, 48 Am. St. Rep. 46; Kane *v.* Doe, 9 Sm. & M. (Miss.) 387; Bailey *v.* Morgan, 44 N. C. 352; Floyd *v.* Goodwin, 8 Yerg. (Tenn.) 484, 29 Am. Dec. 130. See also Herrick *v.* Graves, 16 Wis. 157.

Sale under several judgments.— It has been held in Indiana that, where a sheriff's sale is made under several judgments upon writs issued at the same time, and some of the judgments are void, the sale will also be void, although one of the judgments may be valid. Ferrier *v.* Deutchman, 111 Ind. 330, 12 N. E. 497. *Contra*, Johnson *v.* Iron Belt Min. Co., 78 Wis. 159, 47 N. W. 363.

14. *Arkansas.*— Youngblood *v.* Cunningham, 38 Ark. 571; Files *v.* Harbison, 29 Ark. 307; Newton *v.* State Bank, 14 Ark. 9, 58 Am. Dec. 363; Byers *v.* Fowler, 12 Ark. 218, 44 Am. Dec. 271. See also Newton *v.* State Bank, 22 Ark. 19.

Delaware.— Pennington *v.* Chandler, 5 Harr. 394.

Georgia.— Brooks *v.* Rooney, 11 Ga. 423, 56 Am. Dec. 430.

Illinois.— Osgood *v.* Blackmore, 59 Ill. 261.

Indiana.— Hollcraft *v.* Douglass, 115 Ind. 139, 17 N. E. 275; White *v.* Cronkhite, 35 Ind. 482. See also Tillotson *v.* Doe, 5 Blackf. 509. *Compare* Sowles *v.* Hardy, 20 Ind. 217, 83 Am. Dec. 315.

Iowa.— Cooley *v.* Wilson, 42 Iowa 425.

Kentucky.— Webber *v.* Cox, 6 T. B. Mon. 110, 17 Am. Dec. 127.

Michigan.— Cook *v.* Knowles, 38 Mich. 316.

Mississippi.— Quarles *v.* Hiern, 70 Miss. 891, 14 So. 23; Natchez *v.* Minor, 4 Sm. & M. 602, 10 Sm. & M. 246, 43 Am. Dec. 488.

Missouri.— Evans *v.* Robberson, 92 Mo. 192, 4 S. W. 941, 1 Am. St. Rep. 701; Hendrickson *v.* St. Louis, etc., R. Co., 38 Mo. 188, 84 Am. Dec. 76; Draper *v.* Bryson, 26 Mo. 108, 69 Am. Dec. 483, 17 Mo. 71, 57 Am. Dec. 257.

of time before sale required by statute,[15] or where the sale is made of property in gross, where it should have been made in separate parcels or tracts.[16]

6. Effect of Reversal or Vacation of Judgment. The rule is also well recognized that a *bona fide* purchaser at an execution sale under a judgment valid upon its face is not affected by defects in such judgment which do not appear of record, and where the judgment is subsequently reversed on appeal, or set aside by the trial court, his title to the property is not thereby impaired.[17] However,

North Carolina.— Burton *v.* Spiers, 92 N. C. 503; Jones *v.* Fulghan, 6 N. C. 364.

South Carolina.—Gourdin *v.* Davis, 2 Rich. 481, 45 Am. Dec. 745; Giles *v.* Pratt, 1 Hill 239, 26 Am. Dec. 170; Bearfield *v.* Stevens, 1 Harp. Eq. 52.

Texas.— Howard *v.* North, 5 Tex. 290, 51 Am. Dec. 769.

Vermont.— Fitzpatrick *v.* Peabody, 51 Vt. 195; Wood *v.* Doane, 20 Vt. 612.

Virginia.— See Hamilton *v.* Shrewsbury, 4 Rand. 427, 15 Am. Dec. 779.

See 21 Cent. Dig. tit. "Execution," § 774.

Misconduct of officer.— Outcalt *v.* Disborough, 3 N. J. Eq. 214.

Retention of property by judgment debtor. — It was held in Matteucci *v.* Whelan, 123 Cal. 312, 55 Pac. 99, 66 Am. St. Rep. 60, that Cal. Civ. Code, § 3440, making void sales of chattels against the seller's creditors where there is no continued change of possession does not apply to a purchase at an execution sale made by a stranger to the proceedings, in view of Cal. Code Civ. Proc. § 698, providing that an execution sale conveys to the purchaser all the rights which the debtor had.

In Louisiana the rule has been laid down that the failure to give the statutory notice of an execution sale will avoid such sale even as to a *bona fide* purchaser. Spiller *v.* Baumgard, 4 La. 206; Morris *v.* Crocker, 4 La. 147; Delogny *v.* Smith, 3 La. 418; Mayfield *v.* Cormier, 8 Mart. N. S. 246; Mayfield *v.* Comeau, 7 Mart. N. S. 180.

15. Richardson *v.* Kimball, 28 Me. 463; Tuttle *v.* Gates, 24 Me. 395. See also Cowan *v.* Wheeler, 31 Me. 439. *Compare* Eckman *v.* Fantz, 9 Lanc. Bar (Pa.) 65.

16. *California.*— Hudepohl *v.* Liberty Hill Water, etc., Co., 94 Cal. 588, 29 Pac. 1025, 28 Am. St. Rep. 149.

Illinois.— Rigney *v.* Small, 60 Ill. 416.

Iowa.— Olmstead *v.* Kellog, 47 Iowa 460.

Kentucky.—Floyd *v.* McKinney, 10 B. Mon. 89. See also Locke *v.* Coleman, 2 T. B. Mon. 12, 15 Am. Dec. 118.

Maine.— May *v.* Thomas, 48 Me. 397.

Michigan.—Hoffman *v.* Buschman, 95 Mich. 538, 55 N. W. 458.

Minnesota.— Tillman *v.* Jackson, 1 Minn. 183.

See 21 Cent. Dig. tit. "Execution," § 795.

See, however, Sheldon *v.* Soper, 14 Johns. (N. Y.) 352.

17. *Alabama.*— Morton *v.* Underwood, 49 Ala. 419, holding, however, that where the appeal is sued out by plaintiff in the judgment and the sale under such judgment is made pending the appeal, the purchaser is chargeable with notice of the pending proceedings and the sale is liable to be set aside. See also Phillip *v.* Benson, 85 Ala. 416, 5 So. 78.

Arkansas.— Estes *v.* Boothe, 20 Ark. 583.

California.— Reeve *v.* Kennedy, 43 Cal. 643; Reynolds *v.* Harris, 14 Cal. 667, 76 Am. Dec. 459; Farmer *v.* Rogers, 10 Cal. 335; Wells *v.* Stout, 9 Cal. 479.

Florida.— Ponder *v.* Moseley, 2 Fla. 207, 48 Am. Dec. 194.

Illinois.— Guiteau *v.* Wisely, 47 Ill. 433; Goodman *v.* Mix, 38 Ill. 115. See also McCormick *v.* Wheeler, 36 Ill. 114, 85 Am. Dec. 388.

Kentucky.— Commonwealth Bank *v.* Vanmeter, 10 B. Mon. 66; Brown *v.* Combs, 7 B. Mon. 318; Outten *v.* Palmateer, 7 J. J. Marsh. 241; Williams *v.* Cummins, 4 J. J. Marsh. 637; Sneed *v.* Reardon, 1 A. K. Marsh. 217; Coleman *v.* Trabue, 2 Bibb 518; Reardon *v.* Searcy, 2 Bibb 202.

Louisiana.— Richardson *v.* Smith, 26 La. Ann. 746; McWaters *v.* Smith, 25 La. Ann. 515; Frost *v.* McLeod, 19 La. Ann. 69; Farrar *v.* Stacy, 2 La. Ann. 210; Williams *v.* Gallien, 1 Rob. 94; Poultney *v.* Cecil, 8 La. 321; Baillio *v.* Wilson, 5 Mart. N. S. 214.

Maine.— Stinson *v.* Ross, 51 Me. 556, 81 Am. Dec. 591.

Maryland.— Wampler *v.* Wolfinger, 13 Md. 337; Barney *v.* Patterson, 6 Harr. & J. 182.

Minnesota.— Gowen *v.* Conlow, 51 Minn. 213, 53 N. W. 365.

Mississippi.— Harper *v.* Hill, 35 Miss. 63.

Missouri.— Heard *v.* Sack, 81 Mo. 610; Shields *v.* Powers, 29 Mo. 315; Pierce *v.* Stinde, 11 Mo. App. 364.

Nebraska.— Security Abstract of Title Co. *v.* Longacre, 56 Nebr. 469, 76 N. W. 1073; Keene *v.* Sallenbach, 15 Nebr. 200, 18 N. W. 75; McAusland *v.* Pundt, 1 Nebr. 211, 93 Am. Dec. 358.

New Jersey.— Eisberg *v.* Shultz, 38 N. J. Eq. 293; Shultz *v.* Sanders, 38 N. J. Eq. 154.

New York.— Reinmiller *v.* Skidmore, 7 Lans. 161; Kissock *v.* Grant, 34 Barb. 144; Woodcock *v.* Bennett, 1 Cow. 711, 13 Am. Dec. 568. See also Miller *v.* Moeschler, 12 N. Y. St. 703.

North Carolina.— England *v.* Garner, 90 N. C. 197; Oxley *v.* Mizle, 7 N. C. 250.

Pennsylvania.— Shannon *v.* Newton, 132 Pa. St. 375, 19 Atl. 138; Duff *v.* Wynkoop, 74 Pa. St. 300; St. Bartholomew Church *v.* Wood, 61 Pa. St. 96; Kelly's Appeal, 16 Pa. St. 59; Kramer *v.* Wellendorff, 8 Pa. Cas. 1, 10 Atl. 892; Feger *v.* Keefer, 6 Watts 297; Com. *v.* Rogers, Brightly 450.

where the execution plaintiff is the purchaser, the vacation or reversal of the judgment operates to vacate the sale as between the parties.[18]

7. Effect of Modification of Judgment. In some jurisdictions where the amount of the judgment is on appeal, the purchaser's title to the property is not affected thereby, even though he be the judgment creditor, and he is only bound to restore to the execution debtor the difference between the original judgment and the judgment as modified;[19] and if there is no order for restitution, where such order is provided for by statute, the purchaser's title is not affected by the modification of the judgment.[20]

8. Right to Possession — a. General Rule — (i) *Personal Property.* The general rule is that the purchaser of personal property at an execution sale who has complied with the terms of the sale and has paid the amount of his bid is entitled to immediate possession of the property purchased.[21]

(ii) *Real Property.* Since purchasers at execution sales succeed to the rights of the execution defendant, in the absence of statutes allowing redemption by him, they become entitled to the possession of the property purchased, immediately upon the perfection of their title by compliance with the terms of the sale, provided defendant was entitled to such possession; and in jurisdictions allowing the execution debtor a designated period in which to redeem the property, the purchaser becomes entitled to possession, immediately upon the expiration of the

South Carolina.— Hunter *v.* Ruff, 47 S. C. 525, 25 S. E. 65, 58 Am. St. Rep. 907.

Tennessee.— Campbell *v.* McIrwin, 4 Hayw. 60.

Texas.— Stroud *v.* Casey, 25 Tex. 740, 78 Am. Dec. 556. See also Sage *v.* Clopper, 19 Tex. Civ. App. 502, 48 S. W. 36, holding that a subsequent amendment of the judgment *nunc pro tunc* would not affect the title of the purchaser. *Compare* Carpenter *v.* Anderson, (Civ. App. 1903) 77 S. W. 291.

Wisconsin.— Corwith *v.* Illinois State Bank, 18 Wis. 560, 86 Am. Dec. 793; Jesup *v.* Racine City Bank, 15 Wis. 604, 82 Am. Dec. 703. But see Johnson *v.* Eldred, 15 Wis. 481.

United States.— Galpin *v.* Page, 18 Wall. 350, 21 L. ed. 959 [*reversing* 9 Fed. Cas. No. 5,205, 1 Sawy. 309]; McGoon *v.* Scales, 6 Wall. 23, 19 L. ed. 545.

See 21 Cent. Dig. tit. "Execution," § 797; and *supra*, note 99.

Interest on interest.— Hastings *v.* Johnson, 1 Nev. 613.

Judgment against administrator.— Miland *v.* Eckert, 23 Pa. St. 215.

Order confirming sale is superseded pending appeal.— Troup *v.* Horbach, 62 Nebr. 564, 87 N. W. 316.

Writ of review.— Under the Maine statute, by levy and sale of real estate in satisfaction of the judgment, a valid title will pass, although in a subsequent action of review on the judgment by him, the judgment defendant recovers a judgment against the judgment plaintiff for a sum equal to the whole amount of the first judgment. Curtis *v.* Curtis, 47 Me. 525.

18. *California.*— Black *v.* Vermont Marble Co., 137 Cal. 683, 70 Pac. 776.

Nebraska.— Nelson *v.* Beatrice, 2 Nebr. (Unoff.) 47, 96 N. W. 288.

New Hampshire.— Mullin *v.* Atherton, 61 N. H. 20.

Ohio.— McBain *v.* McBain, 15 Ohio St. 337, 86 Am. Dec. 478.

Washington.— Benney *v.* Clein, 15 Wash. 581, 46 Pac. 1037.

Wisconsin.—Corwith *v.* Illinois State Bank, 15 Wis. 289.

See 21 Cent. Dig. tit. "Execution," § 797; and *supra*, note 99.

See, however, Puterbaugh *v.* Moss, (Ill. 1887) 11 N. E. 197.

19. Tilley *v.* Bonney, 123 Cal. 118, 55 Pac. 798; Pasley *v.* McConnell, 38 La. Ann. 470; Bemiss *v.* Dwight, 5 La. Ann. 170.

20. Tilley *v.* Bonney, 123 Cal. 118, 55 Pac. 798; Purser *v.* Cady, (Cal. 1897) 49 Pac. 180; Johnson *v.* Lamping, 34 Cal. 293. See also Miller *v.* Courtnay, 152 U. S. 172, 14 S. Ct. 517, 38 L. ed. 401.

21. *Delaware.*—Hazzard *v.* Burton, 4 Harr. 62.

Louisiana.— Bryon *v.* Carter, 22 La. Ann. 98. But *compare* Bayon *v.* Breedlow, 3 Rob. 383.

Maine.— Fifield *v.* Maine Cent. R. Co., 62 Me. 77.

Missouri.— Carillon *v.* Thomas, 6 Mo. App. 573.

New Jersey.— Halsted *v.* Tyng, 18 N. J. Eq. 375.

New York.— Smith *v.* Hill, 22 Barb. 656.

Pennsylvania.—Bisbing *v.* Third Nat. Bank, 93 Pa. St. 79, 39 Am. Rep. 726.

Texas.— See Brooks *v.* Lewis, 83 Tex. 335, 18 S. W. 614, 29 Am. St. Rep. 650.

Vermont.— Caswell *v.* Jones, 65 Vt. 457, 26 Atl. 529, 36 Am. St. Rep. 879, 20 L. R. A. 503, holding, however, that change of possession is not necessary to pass title to the purchaser.

See 21 Cent. Dig. tit. "Execution," § 800.

Pledged property.— After a sale, by an officer seizing pledged property under execution, the pledgee is entitled to the possession

period allowed for redemption.[22] Where, however, only an undivided interest in the land is sold, the execution purchaser is only entitled to the right of possession to which the execution debtor was entitled, and his possession must therefore be that of a tenant in common or joint tenant.[23]

b. During Redemption Period. Under the statutes which give the execution debtor a designated period during which he is permitted to redeem his property from the execution sale, the purchaser is not entitled to the immediate possession of the property.[24]

c. Before Delivery of Deed. A purchaser at an execution sale is not entitled to the property until the execution and delivery of the deed, and his title will not support an action for such possession until then.[25]

d. Property Subject to Mortgage — (i) *Mortgagor in Possession.* Where property sold under execution is subject to a mortgage, and the mortgage reserves to the mortgagor the right of possession until default, the execution purchaser of

until the purchaser redeems it from the pledge. Stief *v.* Hart, 1 N. Y. 20.

22. *Indiana.*— Merritt *v.* Richey, 127 Ind. 400, 27 N. E. 131; Ross *v.* Donaldson, 123 Ind. 238, 24 N. E. 109.

Iowa.— Nelson *v.* Larsen, 78 Iowa 25, 42 N. W. 574; Wheeler *v.* Kirkendall, 67 Iowa 612, 25 N. W. 829.

Kentucky.— Snowdon *v.* McKinney, 7 B. Mon. 258; Woolfolk *v.* Overton, 3 A. K. Marsh. 68, 13 Am. Dec. 134.

Louisiana.— Gauthier *v.* Cason, 107 La. 52, 31 So. 386; Whiting *v.* Prentice, 12 Rob. 141. See also Pasley *v.* McConnell, 39 La. Ann. 1097, 3 So. 484, 485.

Maine.— Baker *v.* Cooper, 57 Me. 388; Abbott *v.* Sturtevant, 30 Me. 40.

Maryland.— Miller *v.* Wilson, 32 Md. 297. See also McMechen *v.* Marman, 8 Gill & J. 57.

New Hampshire.— Cressy *v.* Sawyer, 18 N. H. 95.

New York.—Parshall *v.* Shirts, 54 Barb. 99; Russell *v.* Doty, 4 Cow. 576.

North Carolina.— Barden *v.* McKinnie, 11 N. C. 279, 15 Am. Dec. 519.

Ohio.— Gray *v.* Tappan, Wright 117.

Pennsylvania.— Feigenspan *v.* Driesigacker, 195 Pa. St. 17, 45 Atl. 481, 17 Am. St. Rep. 799; Leidy *v.* Proctor, 97 Pa. St. 486; Culbertson *v.* Martin, 2 Yeates 443; McDonald *v.* O'Neill, 5 Kulp 97; Handley *v.* Connolly; 3 L. T. N. S. 201. *Compare* Young *v.* Algeo, 3 Watts 223.

Texas.— Andrews *v.* Richardson, 21 Tex. 287.

See 21 Cent. Dig. tit. "Execution," § 800.

Defendant out of possession.— See Wright Rodney, 5 Houst. (Del.) 573.

The purchaser of an estate in remainder see Bledsoe *v.* Wellingham, 62 Ga. 550.

23. Hanna *v.* Steele, 84 Ala. 305, 4 So. 271; Stevenson *v.* Riddell, 68 S. W. 649, 24 Ky. L. Rep. 404; Simmons *v.* Wood, 6 Yerg. (Tenn.) 518; Modisett *v.* Kalamazoo Nat. Bank, 23 Tex. Civ. App. 589, 56 S. W. 1007.

24. *Idaho.*— Cantwell *v.* McPherson, 3 Ida. 721, 34 Pac. 1095.

Illinois.— Off *v.* Finkelstein, 200 Ill. 40, 65 N. E. 439.

Indiana.— Merritt *v.* Richey, 127 Ind. 400, 27 N. E. 131; Johnson *v.* Briscoe, 92 Ind. 367; Ragsdown *v.* Mathes, 52 Ind. 495. See, however, Raub *v.* Heath, 8 Blackf. 575.

Kentucky.— Abel *v.* Wilder, 7 B. Mon. 530.

New York.— Smith *v.* Colvin, 17 Barb. 157; Evertson *v.* Sawyer, 2 Wend. 507.

Vermont.— Aldis *v.* Burdick, 8 Vt. 21.

Washington.— Briggs *v.* Murray, (1902) 69 Pac. 765 (where, however, it was held that the tenant was not entitled to the benefit of the statute awarding possession to a tenant in possession, holding under an unexpired lease, during the period of redemption from the execution sale, as the tenancy intended by statute must be a legal and valid one); Woodhurst *v.* Cramer, 29 Wash. 40, 69 Pac. 501.

See 21 Cent. Dig. tit. "Execution," § 801.

Contra.— Kannon *v.* Pillar, 7 Humphr. (Tenn.) 281; Lowry *v.* McDurmott, 5 Yerg. (Tenn.) 225.

Under the Oregon statute, the execution purchaser is entitled to the possession of the property purchased, unless the same be in the possession of a tenant holding under an unexpired lease, and in such case is entitled to receive from such tenant the rents or the value of the use and occupation thereof, during the same period. British Columbia Bank *v.* Harlow, 9 Oreg. 338; Cartwright *v.* Savage, 5 Oreg. 397.

25. *Delaware.*—Crawford *v.* Green, 1 Harr. 464.

Kansas.— Robinson *v.* Hall, 33 Kan. 139, 5 Pac. 763.

Kentucky.— Young *v.* Withers, 8 Dana 165.

North Carolina.— Presnell *v.* Ramsour, 30 N. C. 505.

Pennsylvania.— Hardenburg *v.* Beter, 104 Pa. St. 20; Garrett *v.* Dewart, 43 Pa. St. 342, 82 Am. Dec. 570; Storch *v.* Carr, 28 Pa. St. 135; Hewitt *v.* McIlvain, 10 Pa. Co. Ct. 562.

South Carolina.— Charleston Bank *v.* Dowling, 52 S. C. 345, 29 S. E. 788; Charleston Nat. Bank *v.* Dowin, 45 S. C. 677, 23 S. E. 982. See, however, Lorick *v.* McCreery, 20 S. C. 424.

Tennessee.— Edwards *v.* Miller, 4 Heisk. 314.

Wisconsin.— Dean *v.* Pyncheon, 3 Pinn. 17, 3 Chandl. 9.

See 21 Cent. Dig. tit. "Execution," § 802.

Contra.— Barto *v.* Abbe, 16 Ohio 408.

such property may recover possession thereof from the mortgagor or any one claiming under him.[26]

(II) *Mortgagee in Possession.* Where, however, the mortgagee is in possession of the property, or has a right to the possession by reason of default in the mortgage, the execution purchaser cannot maintain ejectment, or any other action for the recovery of the property, until he has complied with the terms of the mortgage.[27]

e. Taking Summary Possession. The general rule is that a purchaser at an execution sale, upon compliance with the terms of the sale, and under the redemption statutes, where his title becomes absolute by the expiration of the redemption period, may take possession of the property purchased whenever he can do so peaceably, as where the property is in the actual possession of no one at the time, and he can take possession without any breach of the peace; but he is never justified in taking forcible possession, and in such case it is necessary for him to resort to ejectment or other appropriate action.[28] The officer conducting the sale is sometimes authorized by statute to evict defendant, his heirs, or their tenants or assignees after the judgment, when they are in possession of the property.[29]

f. Remedies For Recovery — (I) *Form of Action.* In the absence of express statutory provision, the proper remedy of a purchaser of the legal title of land sold under execution to secure possession thereof is ejectment,[30] or forcible entry

26. *Alabama.*— Bernstein *v.* Humes, 60 Ala. 582, 31 Am. Rep. 52.

California.— Halsey *v.* Martin, 22 Cal. 645.

Maine.— Dyer *v.* Chick, 52 Me. 350 (where the mortgagee purchased the equity of redemption at the execution sale); Abbott *v.* Sturtevant, 30 Me. 40.

Maryland.— Deakins *v.* Rex, 60 Md. 593.

Massachusetts.— Porter *v.* Millet, 9 Mass. 101; Willington *v.* Gale, 7 Mass. 138.

New Hampshire.— See Marston *v.* Osgood, (1897) 38 Atl. 378.

New York.— Jackson *v.* Davis, 18 Johns. 7.

North Carolina.— Black *v.* Justice, 86 N. C. 504; Davis *v.* Evans, 27 N. C. 525.

See 21 Cent. Dig. tit. "Execution," § 804.

27. *Illinois.*— Dickason *v.* Dawson, 85 Ill. 53; Vansant *v.* Allmon, 23 Ill. 30.

Indiana.— Broadhead *v.* McKay, 46 Ind. 595; Coe *v.* McBrown, 22 Ind. 252.

Kentucky.—Phillips *v.* Winslow, 18 B. Mon. 431, 68 Am. Dec. 729; Wilson *v.* Flanders, 71 S. W. 426, 24 Ky. L. Rep. 1302; Kennedy *v.* Weber, 64 S. W. 514, 23 Ky. L. Rep. 879.

Maine.— Greenleaf *v.* Grounder, 86 Me. 298, 21 Atl. 1082.

Massachusetts.— Dadmun *v.* Lamson, 9 Allen 85.

New Hampshire.— Carrasco *v.* Mason, 72 N. H. 158, 54 Atl. 1101.

Pennsylvania.— Street *v.* Sprout, 5 Watts 272.

See 21 Cent. Dig. tit. "Execution," § 804.

Personal property.— In Kentucky, before the purchaser under an execution sale of personalty mortgaged by the execution defendant, can take possession, he must give bond with security payable to the mortgagee and owner, stipulating that the property should be preserved until the forthcoming to answer the encumbrance and for redemption. Hubbard *v.* Ratcliffe, 13 Ky. L. Rep. 640. See also Mercer *v.* Tinsler, 14 B. Mon. 273.

28. *Alabama.*— Coleman *v.* Hair, 22 Ala. 596.

Delaware.— Russell *v.* Stoeckel, 5 Houst. 464.

Massachusetts.— Doty *v.* Gorham, 5 Pick. 487, 16 Am. Dec. 417.

New York.— Evertson *v.* Sawyer, 2 Wend. 507; People *v.* Nelson, 13 Johns. 340; McDougall *v.* Sticher, 1 Johns. 42.

Pennsylvania.— Frick *v.* Fiscus, 164 Pa. St. 623, 30 Atl. 515; Leidy *v.* Proctor, 97 Pa. St. 486; State *v.* Kirkpatrick, Add. 193. *Compare* St. Clair *v.* Shale, 20 Pa. St. 165.

See 21 Cent. Dig. tit. "Execution," § 805.

The owner of personal property wrongfully sold on execution, being entitled to the present possession of same, when he has been deprived of it, has a right to retake it whenever he can obtain possession without a breach of the peace, whether he believes his title *bona fide* or otherwise. Ewing *v.* Sandford, 19 Ala. 605.

29. Smith *v.* Coker, 110 Ga. 654, 36 S. E. 107; Seymour *v.* Morgan, 45 Ga. 201; Bigelow *v.* Smith, 23 Ga. 318; Chambers *v.* Collier, 4 Ga. 193. See also Garner *v.* Willis, 1 Ill. 368.

30. *Alabama.*—Freeman *v.* Pullen, 130 Ala. 653, 31 So. 451; Gunn *v.* Hardy, 130 Ala. 642, 31 So. 443; Goodbar *v.* Daniel, 88 Ala. 583, 7 So. 254, 16 Am. St. Rep. 76; Teague *v.* Martin, 87 Ala. 500, 6 So. 362, 13 Am. St. Rep. 63; Betts *v.* Nichols, 84 Ala. 278, 4 So. 195; Pettus *v.* Glover, 68 Ala. 417; Grigg *v.* Swindal, 67 Ala. 187; Smith *v.* Cockrell, 66 Ala. 64; Doe *v.* Mitchell, 6 Ala. 70.

Connecticut.—Downing *v.* Sullivan, 64 Conn. 1, 29 Atl. 130.

Florida.—Donald *v.* McKinnon, 17 Fla. 746.

Kentucky.— Snowden *v.* McKinney, 7 B. Mon. 258; Martin *v.* Shelton, 2 B. Mon. 63; Dehart *v.* Lewis, 14 S. W. 531, 12 Ky. L. Rep. 478.

and detainer.[31] In several jurisdictions, however, statutory provisions have been enacted, providing for the recovery of the possession of property purchased at an execution sale by summary proceedings.[32] Where, however, a purchaser has only secured an equitable title at the execution sale, his proper remedy is a bill in equity and not an action at law.[33]

(II) *DEFENSES* — (A) *Setting Up Title in Third Person.* The general rule is that, in an action by a purchaser at an execution sale against the original defendant in possession of the property, the latter cannot set up title in a third person;[34]

Missouri.— Matney *v.* Graham, 59 Mo. 190.

North Carolina.— Davis *v.* Evans, 27 N. C. 525.

Pennsylvania.— Leidy *v.* Proctor, 1 Chest. Co. Rep. 85. See also Worman *v.* McCloskey, 12 Lanc. Bar 42.

Tennessee.— Odonnell *v.* McMurdie, 6 Humphr. 134.

Vermont.— Mattacks *v.* Stearns, 9 Vt. 326.

See 21 Cent. Dig. tit. "Execution," § 806.

Ejectment generally see EJECTMENT.

Petitory action in Louisiana see Cronan *v.* Cochran, 27 La. Ann. 120.

Replevin.— A purchaser at a sheriff's sale of real estate including machinery which formed part of the freehold may maintain replevin for the machinery against the person detaching same after the sale. Harlan *v.* Harlan, 15 Pa. St. 507, 53 Am. Dec. 612.

Distress for rent.— Where land sold at a sheriff's sale is in possession of the tenant, the purchaser has a remedy by distress or attachment to recover rent, but not so against any other than a person occupying by actual demise. He may, however, recover from any occupant a reasonable compensation in the action for use and compensation. Stayton *v.* Morris, 4 Harr. (Del.) 224.

31. *Colorado.*— Liss *v.* Wilcoxen, 2 Colo. 85.

Illinois.— Kratz *v.* Buck, 111 Ill. 40; Carter *v.* Reynolds, 106 Ill. App. 444; Barrett *v.* Trainor, 50 Ill. App. 420; Sturtzum *v.* Sennott, 41 Ill. App. 496.

Massachusetts.— Hunt *v.* Mann, 132 Mass. 53.

Michigan.— Royce *v.* Bradburn, 2 Dougl. 377, holding, however, that this action will lie only where there is a privity between the parties.

Mississippi.— Glenn *v.* Caldwell, 74 Miss. 49, 20 So. 152.

New Hampshire.— See Carrasco *v.* Mason, 72 N. H. 158, 54 Atl. 1101.

See 21 Cent. Dig. tit. "Execution," § 806.

32. *Arkansas.*— Ferguson *v.* Blakeney, 6 Ark. 296, holding, however, that the right of summary proceedings given by the statute is against defendant in the execution or his lessee and does not lie against the person holding adversely.

Indiana.— Merritt *v.* Richey, 127 Ind. 400, 27 N. E. 131.

Kentucky.— Scott *v.* Powers, 78 S. W. 408, 25 Ky. L. Rep. 1640, holding, however, that the purchaser is not entitled to a writ of possession where the record does not disclose a conveyance to him by the sheriff.

Maryland.— McMechen *v.* Marman, 8 Gill & J. 57; Waters *v.* Duvall, 6 Gill & J. 76; Dorsey *v.* Campbell, 1 Bland 356. See also Morrill *v.* Gelston, 32 Md. 116.

New York.—Spraker *v.* Cook, 16 N. Y. 567; Brown *v.* Betts, 13 Wend. 29.

See 21 Cent. Dig. tit. "Execution," § 806.

In Pennsylvania the summary proceedings consist of a hearing before two justices upon due notice, and where the party in possession makes an affidavit that he did not come into possession of the premises and does not claim the same under the execution defendant, but in his own right, or under a title derived to him from the execution defendant before the rendition of the judgment under which the sale took place, it is the duty of the justices to certify the cause to the court of common pleas for the trial of the title. Walbridge's Appeal, 95 Pa. St. 466; Oakland R. Co. *v.* Keenan, 56 Pa. St. 198; Dean *v.* Connelly, 6 Pa. St. 239; Seltzer *v.* Robbins, 2 Pa. Cas. 381, 3 Atl. 870 (holding, however, that a statute authorizing summary proceedings in favor of the execution purchaser does not apply to leasehold estates); Moore *v.* Moore, 23 Pa. Super. Ct. 73 (where the petition was held to be sufficient); Mulberry *v.* Carrier, 18 Pa. Super. Ct. 51; Gerber *v.* Hartwig, 11 Wkly. Notes Cas. 197. See Elliott *v.* Ackla, 9 Pa. St. 42. See also Downs *v.* McAllister, 28 Pittsb. L. J. 130; Mutual Bldg., etc., Assoc. *v.* McClelland, 20 Pa. Co. Ct. 526.

33. *Alabama.*— Goodbar *v.* Daniel, 88 Ala. 583, 7 So. 254, 16 Am. St. Rep. 76.

Maryland.— Hopkins *v.* Stump, 2 Harr. & J. 301.

Mississippi.— Wolfe *v.* Doe, 13 Sm. & M. 103, 51 Am. Dec. 147.

North Carolina.— Crews *v.* Charlotte First Nat. Bank, 77 N. C. 110.

Pennsylvania.— See McFadden *v.* Nolan, 15 Phila. 187.

See 21 Cent. Dig. tit. "Execution," § 806.

34. *Alabama.*— Avent *v.* Read, 2 Port. 400, 27 Am. Dec. 663.

Arkansas.— Ferguson *v.* Blakeney, 6 Ark. 296.

California.— McDonald *v.* Badger, 23 Cal. 393, 83 Am. Dec. 123. See also Dodge *v.* Walley, 22 Cal. 224, 83 Am. Dec. 61.

Indiana.— Joyce *v.* Madison First Nat. Bank, 62 Ind. 188.

North Carolina.— Wade *v.* Saunders, 70 N. C. 270. See also Spivey *v.* Jones, 82 N. C. 179.

Pennsylvania.— Dunlap *v.* Cook, 18 Pa. St. 454; Wetherill *v.* Curry, 2 Phila. 98.

nor can he dispute the purchaser's title to the property.[35] Likewise a party claiming under the execution defendant who was in actual possession of the property at the time of the rendition of the judgment is estopped from denying the title of the purchaser.[36] However, tenants in possession of the land may show in defense that they hold as tenants under a prior purchaser by a *bona fide* conveyance.[37]

(B) *Property Exempt From Sale.*[38] The judgment debtor, or a party claiming under him, may successfully defend an action by the purchaser for the possession of property by showing that defendant's interest or estate in the property was exempt from execution.[39]

(C) *Irregularities in Proceedings.* The general rule is that the execution debtor, or a third person in possession of the property, cannot set up as a defense in an action for the recovery thereof irregularities in the judgment, execution, or sale.[40] The judgment debtor or those claiming under him may, however, defend

South Carolina.— Stuckey *v.* Crossell, 12 Rich. 273; Sumner *v.* Palmer, 10 Rich. 38; O'Neal *v.* Duncan, 4 McCord 246.

Texas.— Bonner *v.* Ogilvie, 24 Tex. Civ. App. 237, 58 S. W. 1027.

See 21 Cent. Dig. tit. "Execution," § 807.

35. *Illinois.*— Keith *v.* Keith, 104 Ill. 397; Gould *v.* Hendrickson, 96 Ill. 599 (upholding the above rule except where the debtor, after abandoning the land, is asserting an outstanding title); Hayes *v.* Bernard, 38 Ill. 297; Ferguson *v.* Miles, 8 Ill. 358, 44 Am. Dec. 702.

Kentucky.— Moore *v.* Simpson, 3 Metc. 349.

New Jersey.—Den *v.* Winans, 14 N. J. L. 1.

North Carolina.— Lyerly *v.* Wheeler, 33 N. C. 288, 53 Am. Dec. 414.

Pennsylvania.— Mutual Bldg., etc., Assoc. *v.* McClelland, 20 Pa. Co. Ct. 526.

Wisconsin.— Bunker *v.* Rand, 19 Wis. 253, 88 Am. Dec. 684.

Compare Leonard *v.* Flynn, 89 Cal. 535, 26 Pac. 1097, 23 Am. St. Rep. 500. And see Porter *v.* Seeley, 13 Conn. 564.

See 21 Cent. Dig. tit. "Execution," § 807.

36. Arnot *v.* Beadle, Lalor (N. Y.) 181; Utica Bank *v.* Mersereau, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189; Feigenspan *v.* Driesigacker, 194 Pa. St. 17, 45 Atl. 481, 78 Am. St. Rep. 799. See also Forrester *v.* Hanaway, 82 Pa. St. 218; Walker *v.* Bush, 30 Pa. St. 352; Stewart *v.* Freeman, 22 Pa. St. 120. And *compare* Leonard *v.* Flynn, 89 Cal. 535, 26 Pac. 1097, 23 Am. St. Rep. 500.

37. Strickland *v.* Nance, 19 Ala. 233; McGee *v.* Eastis, 5 Stew. & P. (Ala.) 426; Wilson *v.* Downing, 40 Wkly. Notes Cas. (Pa.) 342; Elton *v.* Stokes, 12 Wkly. Notes Cas. (Pa.) 240.

Subsequently acquired title.— It has been held in California that a sheriff's deed transferring to a purchaser all the interest which the execution debtor has in land at the date of the levy will not estop the latter from asserting a subsequently acquired right or interest in the land as against such deed. Emerson *v.* Sansome, 41 Cal. 552.

38. **Exemptions** generally see EXEMPTIONS; HOMESTEADS.

39. *Alabama.*— Clements *v.* Pearce, 63 Ala. 284; Cook *v.* Webb, 18 Ala. 810; Elmore *v.* Harris, 13 Ala. 360; Doe *v.* McKinney, 5 Ala. 719.

Kansas.— See also Adams *v.* Devalley, 40 Kan. 486, 20 Pac. 239.

Kentucky.— Major *v.* Deer, 4 J. J. Marsh. 585.

Massachusetts.— See Swan *v.* Stephens, 99 Mass. 7.

Nebraska.— Dworak *v.* More, 25 Nebr. 735, 41 N. W. 777.

New Jersey.— Falkinburge *v.* Camp, 3 N. J. L. 798.

New York.— Bates *v.* Ledgerwood Mfg. Co., 130 N. Y. 200, 29 N. E. 102; Harris *v.* Murray, 28 N. Y. 574, 86 Am. Dec. 268; Dickinson *v.* Smith, 25 Barb. 102; Bigelow *v.* Finch, 11 Barb. 498; Colvin *v.* Baker, 2 Barb. 206.

North Carolina.— Badham *v.* Cox, 33 N. C. 456.

Pennsylvania.— Snavely *v.* Wagner, 3 Pa. St. 275, 45 Am. Dec. 640.

United States.— Stone *v.* Perkins, 85 Fed. 616.

See 21 Cent. Dig. tit. "Execution," § 807.

Sale partially set aside.—See Benz *v.* Hines, 3 Kan. 390, 89 Am. Dec. 594.

Subsequently acquired title.— See Simmons *v.* Brown, 7 R. I. 427, 84 Am. Dec. 569.

40. *Alabama.*— Hubbert *v.* McCollum, 6 Ala. 221.

Georgia.— Bledsoe *v.* Willingham, 62 Ga. 550.

Indiana.— Lovely *v.* Speisshoffer, 85 Ind. 454. See, however, Meredith *v.* Chancey, 59 Ind. 466.

Kentucky.— Daniel *v.* McHenry, 4 Bush 277.

New York.— Brown *v.* Betts, 13 Wend. 29; Jackson *v.* Walker, 4 Wend. 462; Jackson *v.* Bartlett, 8 Johns. 361.

North Carolina.— Benners *v.* Rhinehart, 107 N. C. 705, 12 S. E. 456, 22 Am. St. Rep. 909.

Pennsylvania.— Dean *v.* Connelly, 6 Pa. St. 239; Bowen *v.* Bowen, 6 Watts & S. 504; Snyder *v.* Rodgers, 17 Lanc. L. Rev. 405. See also Mulberry *v.* Carrier, 18 Pa. Super. Ct. 51.

Vermont.— Phelps *v.* Parks, 4 Vt. 488.

See 21 Cent. Dig. tit. "Execution," § 807.

against an action of ejectment by showing that the judgment,[41] execution, or any essential proceedings taken thereunder[42] is void.

(III) *Limitations and Laches.*[43] Where the purchaser at an execution sale sleeps upon his rights for a long period of time and fails to take the statutory steps necessary to obtain possession of the property, he will be presumed to have abandoned any right he might have acquired by virtue of the sale;[44] the statutes in some of the states requiring the action for possession to be brought within a designated period after the delivery of the sheriff's deed, under penalty of forfeiture of all rights under the sale.[45]

(IV) *Demand For Possession, or Notice to Quit.* In some jurisdictions the purchaser at an execution sale may maintain ejectment for the land without making a previous demand for possession, or giving a previous notice to quit to the party in possession.[46] However, in jurisdictions giving a summary remedy to the execution purchaser for the recovery of the property the statutes require that a notice of the proceeding must be served personally upon defendant, or the person or persons in possession under him by titles derived from him subsequently to the judgment;[47] and such notice should be in writing and personally

Where the judgment creditor is the purchaser at an execution sale, it has been held in Texas that the judgment debtor is not precluded in an action against him for possession for setting up facts sufficient to constitute a bill of review and praying vacation of the judgment. Cundiff *v.* Teague, 46 Tex. 475.

41. *Georgia.*— Rimes *v.* Williams, 99 Ga. 281, 25 S. E. 685.

Illinois.— Wooters *v.* Joseph, 137 Ill. 113, 27 N. E. 80, 31 Am. St. Rep. 355.

Louisiana.— See James *v.* Meyer, 41 La. Ann. 1100, 7 So. 618.

Minnesota.— Barber *v.* Morris, 37 Minn. 194, 33 N. W. 559, 5 Am. St. Rep. 836.

Nebraska.— Muller *v.* Plue, 45 Nebr. 701, 64 N. W. 232; Howell *v.* Gilt Edge Mfg. Co., 32 Nebr. 627, 49 N. W. 704.

New Jersey.— Hoppock *v.* Cray, (Ch. 1891) 21 Atl. 624.

North Carolina.— McCauley *v.* Williams, 122 N. C. 293, 30 S. E. 345.

See 21 Cent. Dig. tit. "Execution," § 807.

42. Leonard *v.* Bryant, 2 Cush. (Mass.) 32. See also Prentiss *v.* Bowden, 145 N. Y. 342, 40 N. E. 13; Peebles *v.* Pate, 90 N. C. 348; Perry *v.* Whipple, 38 Vt. 278; Howe *v.* Blanden, 21 Vt. 315.

Violation of agreement.— It is a good equitable defense to an action of ejectment for land claimed by plaintiff under purchase at an execution sale that the sale was made in violation of a compromise agreement, of which plaintiff was aware and which he was charged with the duty of executing. Nesbit *v.* Neill, 67 Mo. 275.

43. Laches generally see EQUITY.

Limitations generally see LIMITATIONS OF ACTIONS.

44. Bigler *v.* Brashear, 11 Rob. (La.) 500; Crutsinger *v.* Catron, 10 Humphr. (Tenn.) 24. See also Chambers *v.* Collier, 4 Ga. 193.

45. Stebbins *v.* Miller, 12 Allen (Mass.) 591. See also Castle *v.* Palmer, 6 Allen (Mass.) 401 (holding, however, that, prior to the enactment of the general statutes, a judgment creditor who had levied his execution upon land fraudulently conveyed by his debtor need not bring an action for the recovery of possession within one year after the return of the execution); Wellington *v.* Geary, 3 Allen (Mass.) 508 (to the same effect).

Under the Pennsylvania act of June 11, 1879, a party in possession of land may pray for a rule on the execution creditor to compel him to bring his action of ejectment within ninety days. Finch's Petition, 2 Pa. Co. Ct. 322.

46. Elston *v.* Piggott, 94 Ind. 14; Hays *v.* Wilstach, 82 Ind. 13; Smith *v.* Allen, 1 Blackf. (Ind.) 22. See also Barrows *v.* National Rubber Co., 12 R. I. 173.

47. Fitzgerald *v.* Beebe, 7 Ark. 305, 46 Am. Dec. 285; Phelps *v.* Jones, 91 Ky. 244, 15 S. W. 668, 12 Ky. L. Rep. 818; McGhee *v.* Sutherland, 84 Ky. 198, 1 S. W. 5; Mooar *v.* Covington City Nat. Bank, 80 Ky 305; Bunnell *v.* Thompson, 12 Bush (Ky.) 116; Bauer *v.* Angeny, 100 Pa. St. 429; Oakland R. Co. *v.* Keenan, 56 Pa. St. 198; Com. *v.* McClintock, 13 Phila. (Pa.) 26; Tremont Sav. Fund Assoc. *v.* Imschweiler, 2 Leg. Rec. (Pa.) 352, 1 Leg. Rec. (Pa.) 325; Langowski *v.* Strupinski, 2 Leg. Rec. (Pa.) 348; Dando *v.* Jones, 2 Leg. Rec. (Pa.) 266.

The sufficiency of the notice of an execution purchaser of a motion against the execution defendant on writ of possession cannot be complained of by persons who come into the case by petition, claiming an interest in the land, and on issues framed on that petition are defeated. Read *v.* Cochran, 71 S. W. 487, 24 Ky. L. Rep. 1412.

Stranger to record in possession.— It has been held in Georgia that a purchaser of land at an execution sale cannot move orally and without notice for an order directing the eviction from the land of one who is a stranger to the record and the case in which the sale was made, and who does not appear to be liable to eviction under Ga. Code, § 3651, in a summary proceeding. Smith *v.* Equitable Mortg. Co., 98 Ga. 240, 25 S. E. 423.

served upon the parties entitled thereto a designated period of time prior to the institution of proceedings.[48]

(v) *Parties.*[49] The general rule is that under statutes allowing summary proceedings for the recovery of the possession of property sold under execution, or in real actions therefor, such proceedings or action may be maintained by the judgment creditor or any person claiming under him;[50] and may be maintained against the judgment debtor in possession, his representatives, and parties in possession under him, who took possession subsequent to the lien of the judgment.[51]

(vi) *Pleading.*[52] In an action or summary proceeding to recover possession of land purchased at an execution sale, plaintiff should in his complaint or petition describe with sufficient certainty the property claimed to have been purchased by him; should allege that the same was sold by the sheriff or other officer authorized by law to sell the same, that he purchased such property at said sale and paid the purchase-money, and received the officer's deed therefor, and that defendant in execution or one claiming under him is in possession thereof.[53]

(vii) *Evidence*[54] — (a) *Admissibility.* In an action to recover possession of property sold on execution which had previously been conveyed by the judgment debtor, evidence that such conveyance was fraudulent and void is admissible.[55] The return of the sheriff is admissible to show the sale as between parties and privies.[56] Under the Pennsylvania statute,[57] the only question at issue before the trial court is the title averred by defendant in his affidavit, and all evidence inconsistent therewith should be rejected.[58]

(b) *Sufficiency.* The general rule is that in an action of ejectment, or a kindred action, for the recovery of the property purchased at an execution sale, it is sufficient for the purchaser or a party claiming under him to show a valid judgment, execution, and sale, which latter may be done either by a sheriff's deed or his return.[59] In some jurisdictions plaintiff is required to show in addition that

48. Langowski *v.* Strupinski, 2 Leg. Rec. (Pa.) 348; Courtney *v.* Detzner, 2 Leg. Rec. (Pa.) 347.

49. Parties generally see Parties.

50. Kent *v.* Pyle, 2 Pennew. (Del.) 242, 45 Atl. 716. See also Hunt *v.* Mann, 132 Mass. 53 (holding that the execution purchaser's grantee cannot maintain a writ of entry in his own name to recover possession of the property); Brown *v.* Betts, 13 Wend. (N. Y.) 29 (holding that the application for process may be made by any person in whom the title is at the time of the application).

51. *Arkansas.*— Fitzgerald *v.* Beebe, 7 Ark. 305, 46 Am. Dec. 285; Ferguson *v.* Blakeney, 6 Ark. 296.

Illinois.— Kratz *v.* Buck, 111 Ill. 40.

Mississippi.— Glenn *v.* Caldwell, 74 Miss. 49, 20 So. 152.

New York.— People *v.* McAdam, 60 How. Pr. 444. *Compare* Brown *v.* Betts, 13 Wend. 29.

North Carolina.— See Cecil *v.* Smith, 81 N. C. 285.

Pennsylvania.— Com. *v.* McClintock, 13 Phila. 26.

See 21 Cent. Dig. tit. "Execution," § 812.

Compare Doe *v.* McKinney, 5 Ala. 719.

Joint tenants as co-defendants.— Davant *v.* Cubbage, 2 Hill 311.

52. Pleading generally see Pleading.

53. *Arkansas.*— Fitzgerald *v.* Beebe, 7 Ark. 305, 46 Am. Dec. 285.

Kentucky.— See Kennedy *v.* Weber, 64 S. W. 514, 23 Ky. L. Rep. 879. See also Mooar *v.* Covington City Nat. Bank, 80 Ky. 305.

New York.— Hallenbeck *v.* Garner, 20 Wend. 22.

Pennsylvania.— See Minier *v.* Saltmarsh, 5 Watts 293.

Texas.— Ballad *v.* Anderson, 18 Tex. 377.

See 21 Cent. Dig. tit. "Execution," § 813; and Ejectment, 15 Cyc. 90 *et seq.*

54. Evidence generally see Evidence.

55. Staples *v.* Bradley, 23 Conn. 167, 60 Am. Dec. 630. See Porter *v.* Seeley, 13 Conn. 564; Morris *v.* Hastings, 70 Tex. 26, 7 S. W. 649, 8 Am. St. Rep. 570.

56. Knowlton *v.* Ray, 4 Wis. 288.

57. See *supra*, note 32.

58. Dean *v.* Connelly, 6 Pa. St. 239; Kimball *v.* Kelsey, 1 Pa. St. 183 (holding that evidence offered on a trial in court, inconsistent with the affidavit and claim of title made by the purchaser in proceedings before two justices to recover possession of land sold at a sheriff's sale, was rightly rejected); Lenox *v.* McCall, 3 Serg. & R. (Pa.) 95; Hale *v.* Henrie, 2 Watts (Pa.) 143, 27 Am. Dec. 289. See also Cooke *v.* Reinhart, 1 Rawle (Pa.) 317.

59. *Alabama.*— De Vendell *v.* Doe, 27 Ala. 156.

California.— Purser *v.* Cady, (1897) 49 Pac. 180; Colton Land, etc., Co. *v.* Swartz, 99 Cal. 278, 33 Pac. 878; Los Angeles County Bank *v.* Raynor, 61 Cal. 145; Quirk *v.* Falk, 47 Cal. 453; Mayo *v.* Foley, 40 Cal. 281.

Indiana.— Shipley *v.* Shook, 72 Ind. 511.

defendant in the action was in possession of the property at the time a judgment lien attached, or at some time subsequent thereto.[60]

(VIII) *WRIT OF POSSESSION*[61]—(A) *In General.* In many jurisdictions by statutory provision, the purchaser of property at an execution sale, upon proper notice to the party in possession, is entitled to a writ by virtue of which the officer is commanded to place the purchaser in possession of such property. This writ is now generally designated as a writ of possession.[62]

(B) *Hearing of Motion For.* Upon a hearing of a motion for a writ of possession, all questions of fact should be submitted to a jury for decision,[63] and where allowed by statute, damages for the wrongful detention of the property are properly included in their verdict.[64]

9. RENTS AND PROFITS — a. In General. The common-law rule that a purchaser of land buys all that is growing on or issuing out of it, belonging to the vendor, unless specially exempted, including rent in money or in kind, accruing out of an unexpired term, applies also to land sold at an execution sale. But in a majority of jurisdictions, by statute or judicial construction, the purchaser becomes entitled to such rents and profits only which accrue after the execution and delivery of his deed.[65] In several jurisdictions, however, by statutory provision, the purchaser

Maryland.— Miles *v.* Knott, 12 Gill & J. 442; Fenwick *v.* Floyd, 1 Harr. & G. 172.

Mississippi.— Helm *v.* Natchez Ins. Co., 8 Sm. & M. 197.

New Jersey.— Brookfield *v.* Morse, 12 N. J. L. 331.

New York.— Jackson *v.* Hasbrouck, 12 Johns. 213; Townshend *v.* Wesson, 4 Duer 342.

North Carolina.— Davis *v.* Baker, 67 N. C. 388; Doe *v.* Worthy, 60 N. C. 114, 84 Am. Dec. 357; Den *v.* Duncan, 25 N. C. 317. See also McKee *v.* Lineberger, 87 N. C. 181.

Pennsylvania.— Green *v.* Watrous, 17 Serg. & R. 393.

South Carolina.— Rhett *v.* Jenkins, 25 S. C. 453; Bull *v.* Rowe, 13 S. C. 355; Thomas *v.* Jeter, 1 Hill 380; Vance *v.* Reardon, 2 Nott & M. 299.

Tennessee.— Etheridge *v.* Edwards, 1 Swan 426; Kimbrough *v.* Benton, 3 Humphr. 129; Hurt *v.* Brien, 1 Tenn. Ch. 443. See also Gillespie *v.* Baggett, 2 Lea 652; Tillery *v.* Wilson, 1 Overt. 236.

Wisconsin.—Atchison *v.* Rosalip, 3 Pinn. 288, 4 Chandl. 12.

United States.— Cooper *v.* Galbraith, 6 Fed. Cas. No. 3,193, 3 Wash. 546.

See 21 Cent. Dig. tit. "Execution," § 813.

In Kentucky it has been held that a recovery cannot be had against an adverse claimant, for the possession of property purchased at an execution sale on exhibition of the sheriff's deed alone, without the judgment and execution, since such judgment and execution are the officer's authority for selling. Dunn *v.* Meriwether, 1 A. K. Marsh. 158. But where the action is against one holding under a claim derived from an execution defendant, subsequent to the sale, recovery may be had without production of the judgment on which the execution was issued, since such holder occupies the position of defendant. Magowen *v.* Hay, 3 A. K. Marsh. 452.

Certificate of purchase, under the California code see McMinn *v.* O'Connor, 27 Cal. 238.

Writ of assistance.— It has been held in California that on application for a writ of assistance for the purchase of land sold under execution in possession, the purchaser must produce the execution and judgment and the record of proceedings on which the execution was issued. People *v.* Doe, 31 Cal. 220.

Notice of motion for judgment.— See Doe *v.* McCoy, 13 N. C. 391.

60. *Florida.*— Hartly *v.* Ferrell, 9 Fla. 374.

Georgia.— Whatley *v.* Doe, 10 Ga. 74.

Kentucky.— See Randell *v.* Ewell, 55 S. W. 552, 21 Ky. L. Rep. 1425.

New York.— Kellogg *v.* Kellogg, 6 Barb. 116.

Tennessee.— Hamilton *v.* Jack, 1 Swan 81; Kimbrough *v.* Benton, 3 Humphr. 129.

Compare Robinson *v.* Parker, 3 Sm. & M. (Miss.) 114, 41 Am. Dec. 614.

61. Writ of possession see 15 Cyc. 184 *et seq.*

62. *Arkansas.*— Ferguson *v.* Blakeney, 6 Ark. 296.

Delaware.— Wright *v.* Rondey, 5 Houst. 573.

Georgia.— Chambers *v.* Collier, 4 Ga. 193.

Kentucky.— Sharpe *v.* Roe, 13 Bush 461; Smith *v.* White, 5 Dana 376; Mooar *v.* Covington City Nat. Bank, 3 Ky. L. Rep. 674; Curran *v.* Culp, 15 S. W. 657, 13 Ky. L. Rep. 84. See also Scott *v.* Richardson, 2 B. Mon. 507, 38 Am. Dec. 170.

Maryland.— Penn *v.* Isherwood, 5 Gill 206; Waters *v.* Duvall, 6 Gill & J. 76.

Vermont.— Tenney *v.* Smith, 63 Vt. 520, 22 Atl. 659.

See 21 Cent. Dig. tit. "Execution," § 814.

63. See Mooar *v.* Covington City Nat. Bank, 3 Ky. L. Rep. 674; Den *v.* Love, 26 N. C. 38; Faust *v.* Haas, 73 Pa. St. 295; Dean *v.* Connelly, 6 Pa. St. 239; Manning *v.* Dove, 10 Rich. (S. C.) 395.

64. Walker *v.* Bush, 30 Pa. St. 352; Hull *v.* Russell, 4 Pa. L. J. Rep. 453, 3 Pa. L. J. 130.

65. *Alabama.*— Kirkpatrick *v.* Boyd, 90 Ala. 449, 7 So. 913; Spoor *v.* Phillips, 27 Ala. 193.

of land at an execution sale is entitled to the rents and profits accruing from the date of sale, whether a deed has been executed or not.[66]

b. During Redemption. In jurisdictions where the judgment debtor is allowed a designated period in which to redeem his property from the execution sale, the statutes are not uniform in regard to the disposition of the rents and profits during the redemption period. In some jurisdictions a purchaser may recover the rents and profits from the party in possession, accruing between the sale and the expiration of the redemption period, even where the property is redeemed at the expiration of that period,[67] while in others the execution purchaser is given a right of action for the rents and profits during the redemption period against the judgment debtor only, and then only in case he fails to redeem at the expiration

Georgia.— Blitch *v.* Lee, 115 Ga. 112, 41 S. E. 275 (holding, however, that where defendant had leased the property subsequent to the date of the judgment, and had only the right to collect a stated sum for the year, the purchaser had the right to collect this amount but no further claim against the tenant, and no other interest in a crop planted than might be necessary to secure the payment thereof); Ferguson *v.* Hardy, 59 Ga. 758.

Missouri.— See Tissier *v.* Hill, 13 Mo. App. 36.

New York.—Millard *v.* McMullin, 68 N. Y. 345; Smith *v.* Colvin, 17 Barb. 157; Jack *v.* Cashin, 1 N. Y. City Ct. 72. See also Clute *v.* Emmerich, 99 N. Y. 342, 2 N. E. 6 [*affirming* 26 Hun 10].

Pennsylvania.—Hardenburg *v.* Beecher, 104 Pa. St. 20; Hayden *v.* Patterson, 51 Pa. St. 261; Garrett *v.* Dewart, 43 Pa. St. 342, 82 Am. Dec. 570; Heartley *v.* Beaum, 2 Pa. St. 165; Menough's Appeal, 5 Watts & S. 432; Braddee *v.* Wiley, 10 Watts 362; Commonwealth Bank *v.* Wise, 3 Watts 394; Scheerer *v.* Stanley, 2 Rawle 276; Israel *v.* Clough, 5 Pa. Dist. 325; Hart *v.* Israel, 2 Browne 22; Hewitt *v.* McIlvain, 10 Pa. Co. Ct. 562; Mozart Bldg. Assoc. *v.* Friedjen, 12 Phila. 515. See also Potter *v.* Lambie, 142 Pa. St. 535, 21 Atl. 888; Borreel *v.* Dewart, 37 Pa. St. 134 (holding that if rent is yet becoming due out of the term or portion of the term not completed when the purchase is made, it is the rent "accruing thereafter" which passes by the execution sale); Matter of Stockton, 3 Brewst. 320 (holding that an execution purchaser who notifies the tenant to quit may thereafter claim for the occupation of the land from the time of the acknowledgment of the deed to the date of the removal); Boston Third Nat. Bank *v.* Hanson, 1 Wkly. Notes Cas. 613 (holding that rent accruing between the date of the sheriff's sale and the acknowledgment of the deed is the property of defendant). And *compare* Fullerton *v.* Shauffer, 12 Pa. St. 220.

South Carolina.— Riley *v.* Snyder, 1 Speers 272, 40 Am. Dec. 602.

Wisconsin.— Swift *v.* Agnes, 33 Wis. 228.

United States.— Butt *v.* Ellett, 19 Wall. 544, 22 L. ed. 183.

See 21 Cent. Dig. tit. "Execution," § 815.

An agreement by parol between the judgment creditor and debtor that the creditor shall become the purchaser at a sale under execution and hold the land as collateral to the debt will be enforced, and the rents and profits received by the creditor will be applied to the satisfaction of the debt. Harrison *v.* Soles, 6 Pa. St. 393.

Where rent is paid in advance at the beginning of the year, and the land is sold in the middle of the year at a sheriff's sale, the purchaser is not entitled to the rent in arrear. Farmers', etc., Bank *v.* Ege, 9 Watts (Pa.) 436, 36 Am. Dec. 130.

66. *California.*— Walker *v.* McCusker, 71 Cal. 594, 12 Pac. 723; Webster *v.* Cook, 38 Cal. 423; Clark *v.* Boyreau, 14 Cal. 634; Reynolds *v.* Lathrop, 7 Cal. 43. See also Emerson *v.* Sansome, 41 Cal. 552.

Delaware.— Stayton *v.* Morris, 4 Harr. 224.

Indiana.— Davis *v.* Newcomb, 72 Ind. 413; Gale *v.* Parks, 58 Ind. 117. See also Hollenback *v.* Blackmore, 70 Ind. 234.

Iowa.—Kane *v.* Mink, 64 Iowa 84, 19 N. W. 852. See also Dobbins *v.* Lusch, 53 Iowa 304, 5 N. W. 205. And *compare* Martin *v.* Knapp, 57 Iowa 336, 10 N. W. 721; Townsend *v.* Isenberg, 45 Iowa 670.

Kansas.— See Missouri Valley Land Co. *v.* Barwick, 50 Kan. 57, 31 Pac. 685.

Maryland.— Dailey *v.* Grimes, 27 Md. 440; Martin *v.* Martin, 7 Md. 368, 61 Am. Dec. 364.

Massachusetts.— See Hayward *v.* Cain, 110 Mass. 273.

North Carolina.— Lancashire *v.* Mason, 75 N. C. 455.

Tennessee.— Wright *v.* Williams, 7 Lea 700. *Compare* Odonnell *v.* McMurdie, 6 Humphr. 134.

See 21 Cent. Dig. tit. "Execution," § 815.

Recovery from date of confirmation.— In Ohio the rule has been laid down that the purchaser at an execution sale is entitled to recover the rents and profits from the date of the confirmation of the sale. Heidelbach *v.* Slader, 1 Handy (Ohio) 456, 12 Ohio Dec. (Reprint) 234. See Beggs *v.* Thompson, 2 Ohio 95, 15 Am. Dec. 539.

67. Webster *v.* Cook, 38 Cal. 423; Mayo *v.* Woods, 31 Cal. 269; Knight *v.* Truett, 18 Cal. 113; Kline *v.* Chase, 17 Cal. 596 (holding that the judgment debtor in possession is within the purview of the statute); Harris *v.* Reynolds, 13 Cal. 514, 73 Am. Dec. 600. See Henry *v.* Everts, 30 Cal. 425 (differentiating

of the redemption period.[68] However, in jurisdictions where the purchaser's right to the rents and profits is not regarded as perfected until the execution of the deed, it is held that he has no right to such rents and profits during the redemption period.[69]

10. WASTE.[70] A purchaser of land at an execution sale is entitled to an injunction against the party in possession to prevent waste upon the property purchased;[71] and he may likewise bring an appropriate action for damages occasioned by the waste, subsequent to the sale of the property.[72]

11. RIGHTS AND REMEDIES ON FAILURE OF TITLE — a. In General. While the doctrine of *caveat emptor* has its legitimate force and effect in precluding any idea of a warranty by defendant in execution, or by the sheriff who sells the property under an execution in his hands, yet it has no application where a purchaser acquires no title to the property sold, and the purchaser is entitled to relief in appropriate proceedings therefor.[73] And this is true even where the judgment creditor is the purchaser,[74] provided he was without notice of any

an action of ejectment and an action for the recovery of rent); Whitney *v.* Huntington, 34 Minn. 450, 26 N. W. 621, 57 Am. St. Rep. 68.

68. Davis *v.* Newcomb, 72 Ind. 413 (where the purchaser sought to reach the rents themselves and he was allowed to follow them into the hands of an assignee for the benefit of the creditors); Graves *v.* Kent, 67 Ind. 38; Wilson *v.* Powers, 66 Ind. 75; Powell *v.* De Hart, 55 Ind. 94; Clements *v.* Robinson, 54 Ind. 599. See Wright *v.* Williams, 7 Lea (Tenn.) 700.

69. Abel *v.* Wilder, 7 B. Mon. (Ky.) 530; Bissell *v.* Payn, 20 Johns. (N. Y.) 3; Sowles *v.* Hanley, 64 Vt. 412, 23 Atl. 725.

Under the Washington statute the judgment debtor is entitled to retain possession during the period of redemption of land used at the time of the sale for farming purposes. Kennedy *v.* Troumble, 32 Wash. 614, 73 Pac. 698. *Compare* Hardy *v.* Herriott, 11 Wash. 460, 39 Pac. 958 (construing Code Proc. 519); Byers *v.* Rothschild, 11 Wash. 296, 39 Pac. 688.

70. Waste generally see WASTE.

71. Miles *v.* Wilson, 3 Harr. (Del.) 382; Hughlett *v.* Harris, 1 Del. Ch. 349, 12 Am. Dec. 104; Thompson *v.* Lynam, 1 Del. Ch. 64.

Holder of certificate of purchase.— Under a Wisconsin statute see Law *v.* Wilgees, 15 Fed. Cas. No. 8,132, 5 Biss. 13.

72. *Delaware.*— Hughlett *v.* Harris, 1 Del. Ch. 349, 12 Am. Dec. 104, holding, however, that the party committing the waste is not liable in equity to account to the purchaser for waste committed prior to the purchase.

Kansas.— Marshall *v.* Shepard, 23 Kan. 321.

Maine.— McKeen *v.* Gammon, 33 Me. 187, holding, however, that a creditor to whom the life-interest of his debtor in land has been set off on execution cannot recover damages from the debtor for cutting trees belonging to the inheritance, the cutting of which by the creditor would be waste.

Michigan.— Ward *v.* Carp River Iron Co., 50 Mich. 522, 15 N. W. 889; Marquette, etc., R. Co. *v.* Atkinson, 44 Mich. 166, 6 N. W. 230; Stout *v.* Keyes, 2 Dougl. 184, 43 Am. Dec. 465.

Minnesota.— Whitney *v.* Huntington, 34 Minn. 458, 26 N. W. 631, 57 Am. Rep. 68.

New Jersey.— See Polhemus *v.* Empson, 27 N. J. Eq. 190.

New York.— Rice *v.* Baker, 3 Den. 79.

Wisconsin.— Dean *v.* Pyncheon, 3 Pinn. 17, 3 Chandl. 9.

See 21 Cent. Dig. tit. "Execution," § 818.

Where a house on land sold under execution was accidentally burned, without the negligence of the debtor's grantee, who remained in possession after such sale and during his wrongful occupancy, it was held that the grantee was not liable. Merritt *v.* Richey, 127 Ind. 400, 27 N. E. 131.

73. Edwards *v.* Olin, 121 Iowa 143, 96 N. W. 742; Fleming *v.* Maddox, 32 Iowa 493; Ritter *v.* Henshaw, 7 Iowa 97; Wilson *v.* Percival, 1 Dana (Ky.) 419 (holding that upon the execution sale being set aside, the bond for the purchase-price must on motion be quashed); Thompson *v.* Harlan, 1 Dana (Ky.) 190 (holding, however, that the purchaser praying relief on the ground that the property belongs to a stranger must make out a clear case, as doubt and uncertainty as to the interest of the execution defendant will not entitle him to relief); McRae *v.* Chapman, 10 Rob. (La.) 65 (holding that a bond given for the purchase-price of property sold on execution, where the purchaser was evicted by a mortgage not mentioned in the certificate, would be annulled as given in error and without consideration; the omission of itself invalidating the adjudication); Safe Deposit, etc., Co. *v.* Miller, 8 Pa. Super. Ct. 160 (holding that a purchaser at a judgment sale who pays in but a part of his bid is entitled to return of the money so paid, less costs, in case of a resale by the sheriff). See also Wall *v.* Fairley, 77 N. C. 105.

Partial failure of title.— The rule of *caveat emptor* does apply where there is only a partial failure of title, and in such case the purchaser cannot have recourse to the judgment debtor for part of the amount of his bid. Parker *v.* Rodman, 84 Ind. 256; Lewis *v.* Fram, 4 Mart. (La.) 397.

74. Kerr *v.* Kerr, 81 Ill. App. 35; Utica Bank *v.* Mersereau, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189; Townsend *v.* Smith, 20

irregularities in the proceedings rendering the sale void, or that defendant did did not have title to the property sold.[75]

b. Reimbursement — (I) *General Rule.* In case of failure of title, or where the sale is set aside on account of irregularities in the proceedings which renders it void, a *bona fide* purchaser is entitled to recover the purchase-price from the officer, if the funds are still in his hands,[76] or from the judgment debtor,[77] and equity will not decree a restitution of the property to the judgment debtor, except upon the repayment of the purchase-money.[78] This rule, however, has not

Tex. 465, 70 Am. Dec. 400. See Methvin *v.* Bexly, 18 Ga. 551.

75. *Alabama.*— McCartney *v.* King, 25 Ala. 681.

California.— See Black *v.* Vermont Marble Co., 137 Cal. 683, 70 Pac. 776.

Indiana.— Weaver *v.* Guyer, 59 Ind. 195, where there was only a partial failure of title.

Pennsylvania.—Caldwell *v.* Walters, 18 Pa. St. 79, 55 Am. Dec. 592.

South Carolina.— See Davis *v.* Murray, 2 Mill 143, 12 Am. Dec. 661.

See 21 Cent. Dig. tit. "Execution," § 819.

76. *Arkansas.*— Hightower *v.* Handlin, 27 Ark. 20.

Connecticut.— Bartholomew *v.* Warner, 32 Conn. 98, 85 Am. Dec. 251.

Indiana.— State *v.* Prime, 54 Ind. 450.

Kentucky.— McGhee *v.* Ellis, 4 Litt. 244, 14 Am. Dec. 124.

Louisiana.— Friedlander *v.* Bell, 17 La. Ann. 42.

Massachusetts.— See Sexton *v.* Nevers, 20 Pick. 451, 32 Am. Dec. 225.

Missouri.—Thurley *v.* O'Connell, 48 Mo. 27.

New York.— Bowne *v.* O'Brien, 5 Daly 474, nor will the sheriff in such action be allowed to retain the expenses of the sale.

Pennsylvania.— Jacoby's Estate, 9 Phila. 311.

South Carolina.— Bragg *v.* Thompson, 19 S. C. 572.

Virginia.— Penn *v.* Spencer, 17 Gratt. 85, 91 Am. Dec. 375.

See 21 Cent. Dig. tit. "Execution," § 820.

Purchaser in bad faith.— See Jewell *v.* De Blanc, 110 La. 810, 34 So. 787.

77. *Illinois.*— Aortson *v.* Ridgway, 18 Ill. 23. See also Warner *v.* Helm, 6 Ill. 220.

Indiana.— Short *v.* Sears, 93 Ind. 505; Coan *v.* Grimes, 63 Ind. 21 (holding, however, that in an action against the judgment debtor, the sheriff is not a necessary party defendant); Hawkins *v.* Miller, 26 Ind. 173; Pennington *v.* Clifton, 10 Ind. 172; Preston *v.* Harrison, 9 Ind. 1; Muir *v.* Craig, 3 Blackf. (Ind.) 293, 25 Am. Dec. 111.

Iowa.— Reed *v.* Crostawait, 6 Iowa 619, 71 Am. Dec. 406.

Kentucky.— Salter *v.* Dunn, 1 Bush 311; Geoghegan *v.* Ditto, 2 Metc. 433, 74 Am. Dec. 413; McLaughlin *v.* Daniel, 8 Dana 182; Samuel *v.* Sayre, 5 Dana 226; Price *v.* Boyd, 1 Dana 434; Head *v.* McDonald, 7 T. B. Mon. 203; McGhee *v.* Ellis, 4 Litt. 244, 14 Am. Dec. 124.

Louisiana.— Eastin *v.* Dugat, 10 La. 186, 29 Am. Dec. 461; Lambeth *v.* New Orleans, 6 La. 731.

Maine.— Piscataquis *v.* Kingsbury, 73 Me. 326.

Mississippi.— Cook *v.* Toumbs, 36 Miss. 685.

Missouri.— Wilchinsky *v.* Cavender, 72 Mo. 192; McLean *v.* Martin, 45 Mo. 393.

New Jersey.— See Bruere *v.* Britton, 20 N. J. L. 268.

New York.— See Wood *v.* Genet, 8 Paige 137.

Pennsylvania.—See Hutchman's Appeal, 27 Pa. St. 209.

Texas.— Cline *v.* Upton, 59 Tex. 27; Burns *v.* Ledbetter, 56 Tex. 282; Stone *v.* Darnell, 25 Tex. Suppl. 430, 78 Am. Dec. 582. *Compare* Brown *v.* Lane, 19 Tex. 203.

Virginia.—Jincey *v.* Winfield, 9 Gratt. 708.

See 21 Cent. Dig. tit. "Execution," § 820.

See, however, Lewis *v.* McDowell, 88 N. C. 261.

Fraud in sale.— See Toole *v.* Johnson, 61 S. C. 34, 39 S. E. 254.

The amounts of interest on money refunded to the purchaser at an execution sale subsequently set aside for the time it was in the hands of the judgment creditor is not made a statutory right in Nebraska, but rather as an equitable adjustment to damages presumed to have been sustained by being deprived of the use of the money. State Bank *v.* Green, 10 Nebr. 130, 4 N. W. 942.

78. *Iowa.*— O'Brien *v.* Harrison, 59 Iowa 686, 12 N. W. 256, 13 N. W. 764; Fleming *v.* Maddox, 32 Iowa 493.

Kentucky.— Barbour *v.* Morris, 6 B. Mon. 120; Buckner *v.* Forker, 7 Dana 50; Shepard *v.* McIntire, 4 Dana 574; Moore *v.* Allen, 4 Bibb 41; Cavenaugh *v.* Willson, 71 S. W. 870, 24 Ky. L. Rep. 1507.

Louisiana.— Elliott *v.* Labarre, 3 La. 541; Donaldson *v.* Rouzan, 8 Mart. N. S. 162; Daquin *v.* Coiron, 6 Mart. N. S. 674; Dufour *v.* Camfranc, 11 Mart. 607, 13 Am. Dec. 360.

Mississippi.— McGee *v.* Wallis, 57 Miss. 638, 34 Am. Rep. 484.

New York.— Carnes *v.* Platt, 59 N. Y. 405.

Pennsylvania.— See Phillips *v.* Hull, 101 Pa. St. 567.

Rhode Island.— Cosgrove *v.* Merz, (1897) 37 Atl. 704.

Texas.— Northcraft *v.* Oliver, 74 Tex. 162, 11 S. W. 1121; Johnson *v.* Caldwell, 38 Tex. 217; Morton *v.* Welborn, 21 Tex. 772; Andrews *v.* Richardson, 21 Tex. 287; Bailey *v.* White, 13 Tex. 114; Howard *v.* North, 5 Tex. 290, 51 Am. Dec. 769; Bynum *v.* Govan, 9 Tex. Civ. App. 559, 29 S. W. 1119. See also Stegall *v.* Huff, 54 Tex. 193.

been applied where the purchaser was guilty of fraud or collusion in the purchase, and the judgment debtor in such case is not required to tender the purchase-money as a condition of the restitution of the property.[79]

(II) *Action Against Judgment Creditor.* In some jurisdictions where the debtor had no title to the property sold, the purchaser at the execution sale has no cause of action against the judgment creditor for the purchase-price, but his only remedy is against the judgment debtor.[80] In other jurisdictions, however, by judicial construction or express statutory enactment, a *bona fide* purchaser is given a cause of action against the execution creditor as well as the judgment debtor in case of failure of title;[81] although in at least one jurisdiction he must exhaust his remedy against the judgment debtor before being allowed to proceed against the judgment creditor.[82]

c. Subrogation[83] to Rights of Lien Creditors. The better doctrine seems to be that a purchaser at a void execution sale, who has in good faith paid off previous valid liens, or whose money, paid for the purchase-price, has been used to pay the debts of the estate, is entitled to be subrogated to the rights of the creditors so paid off.[84]

d. Revival of Original Judgment. In several jurisdictions it is provided by statute that where a purchaser of property at an execution sale, or his successor in interest, fails to recover possession, in consequence of irregularity in proceedings, or because the property sold was not subject to execution and sale, the court having jurisdiction thereof must after notice, and on motion of such party in interest, revive the original judgment in the name of the petitioner for the amount paid by such purchaser at the sale.[85]

See 21 Cent. Dig. tit. "Execution," § 820.

Claim barred by statute.— Cheny *v.* Smith, 7 Ky. L. Rep. 293.

79. McIntyre *v.* Sanford, 89 N. Y. 634; Seylar *v.* Carson, 69 Pa. St. 81; McCaskey *v.* Graff, 23 Pa. St. 221, 62 Am. Dec. 336; Smull *v.* Jones, 1 Watts & S. (Pa.) 128; Elam *v.* Donald, 58 Tex. 316, holding, however, that to bring an action within this exception fraud must be clearly proved and is not to be inferred from doubtful facts.

Action by judgment debtor.— Under the California code upon the reversal of judgment, the judgment debtor may have an action against the judgment creditor enforcing the judgment for the proceeds of the sale less the expenses thereof. Dowdell *v.* Carpy, 137 Cal. 333, 70 Pac. 167, attorneys' fees, however, not being recoverable in such action.

80. *Illinois.*— England *v.* Clark, 5 Ill. 486.

Indiana.— Lewark *v.* Carter, 117 Ind. 206, 20 N. E. 119, 10 Am. St. Rep. 40, 3 L. R. A. 440; Dunn *v.* Frazier, 8 Blackf. 432.

Pennsylvania.— Weidler *v.* Farmers' Bank, 11 Serg. & R. 134; Levinstein *v.* Born, 18 Phila. 265.

South Carolina.—Murphy *v.* Higginbottom, 2 Hill 397, 27 Am. Dec. 395.

Tennessee.—Whitmore *v.* Parks, 3 Humphr. 95. But see Henderson *v.* Overton, 2 Yerg. 394, 24 Am. Dec. 492.

See 21 Cent. Dig. tit. "Execution," § 821.

81. Hackley *v.* Swigert, 5 B. Mon. (Ky.) 86, 41 Am. Dec. 256; Sanders *v.* Hamilton, 6 Dana (Ky.) 550; Brummel *v.* Hurt, 3 J. J. Marsh. (Ky.) 709; Chisholm *v.* Gooch, 3 Ky. L. Rep. 247; Elling *v.* Harrington, 17 Mont. 322, 42 Pac. 851.

82. Citizens' Bank *v.* Freitag, 37 La. Ann. 271; Haynes *v.* Courtney, 15 La. Ann. 630; Webb *v.* Coons, 11 La. Ann. 252; Gaines *v.* Merchants' Bank, 4 La. Ann. 369; McIntosh *v.* Smith, 2 La. Ann. 756; Smith *v.* Wilson, 11 Rob. (La.) 522; Guerin *v.* Bagneries, 18 La. 509. See also Terrio *v.* Guidry, 5 La. Ann. 589.

83. Subrogation generally see Subrogation.

84. *California.*— Swain *v.* Stockton Sav., etc., Soc., 78 Cal. 600, 21 Pac. 365, 12 Am. St. Rep. 118.

Indiana.— Paxton *v.* Sterne, 127 Ind. 289, 26 N. E. 557; Hawkins *v.* Miller, 26 Ind. 173; Seller *v.* Lingerman, 24 Ind. 267; Bunts *v.* Cole, 7 Blackf. 265, 41 Am. Dec. 226.

Kentucky.— Geoghegan *v.* Ditto, 2 Metc. 433, 74 Am. Dec. 413.

Mississippi.— Lambeth *v.* Elder, 44 Miss. 80.

New Jersey.— Junior Order Bldg., etc., Assoc. *v.* Sharpe, 63 N. J. Eq. 500, 52 Atl. 832. See also American Dock, etc., Co. *v.* Public School Trustees, 39 N. J. Eq. 490.

Texas.— Jones *v.* Smith, 55 Tex. 383; Burns *v.* Ledberin, 54 Tex. 374.

Vermont.— Payne *v.* Hathaway, 3 Vt. 212.

United States.— Davis *v.* Games, 104 U. S. 386, 26 L. ed. 757; Bright *v.* Boyd, 4 Fed. Cas. No. 1,875, 1 Story 478.

See, however, Beckmann *v.* Mayer, 75 Mo. 333.

85. Merguire *v.* O'Donnell, 139 Cal. 6, 72 Pac. 337 (holding that a totally void execution is "irregularity in the proceedings concerning the sale"); Hitchcock *v.* Caruthers, 100 Cal. 100, 34 Pac. 627; Cross *v.* Zane, 47 Cal. 602; McWilliams *v.* Withington, 7 Fed. 326, 7 Sawy. 205.

e. Compensation For Improvements.[86] Where the owner of property seeks aid in a court of equity against a *bona fide* holder of an invalid title under a void execution sale, equitable relief will not be granted except upon the terms of compensation for improvements made on the premises in ignorance or mistake as to the title.[87]

12. Liability of Purchasers — a. In General. Since an officer is not protected by process where he goes beyond the commands thereof and sells property not included in his writ, such sale will give the purchaser no right thereto, and the retention of possession and ownership by such person will render him liable in an appropriate action to the owner of the property.[88] The purchaser is likewise bound by any agreements of the judgment debtor made prior to the sale with third parties, affecting the property which are tantamount to a lien thereon.[89] However, an execution purchaser who pays the full amount of his bid[90] is not bound to look to the application of the purchase-money, and is not liable in an action by parties entitled to a portion of the price;[91] nor is he responsible for any irregularity of the officer by which the purchaser from the execution debtor was deprived of notice of the levy and lien.[92]

b. Liens and Encumbrances. A purchaser at an execution sale is not personally liable for a mortgage or other subsisting lien upon the property, subject to which, and not for the payment of which, the property is sold.[93]

c. Rents, Profits, and Improvements.[94] Where for any reason an execution sale is subsequently set aside, the general rule is that the execution purchaser is liable in an action by the judgment debtor, or the owner of the property, for the rents and profits accruing while the property was in his possession;[95] such pur-

86. Improvements generally see Ejectment; Improvements.

87. Stout *v.* Cook, 57 Ill. 386 (holding, however, that a purchaser is not entitled to compensation for improvements made by his tenant, but only for those for which he has paid or is liable to pay); Junior Order Bldg., etc., Assoc. *v.* Sharpe, 63 N. J. Eq. 500, 52 Atl. 832; Freichnecht *v.* Meyer, 39 N. J. Eq. 551; Bailey *v.* White, 13 Tex. 114. However, the purchaser cannot recover for improvements where the conveyance shows that the rents of which he was in receipt largely exceeded the value of such improvements. Thompson *v.* Thompson, 117 Iowa 65, 90 N. W. 493.

88. Blitch *v.* Lee, 115 Ga. 112, 41 S. E. 275; Van Antwerp *v.* Newman, 2 Cow. (N. Y.) 543 (holding that where leased chattels are seized on execution by a creditor of the lessee they revert to the lessor after the expiration of the lease, and if they are not returned uninjured the lessor has a cause of action against the purchaser); Spalding *v.* Allred, 23 Utah 354, 64 Pac. 1100 (holding, however, that the possession and claim to the ownership by a purchaser of common property at an execution sale, where the interest of the judgment debtor was sold, is not a conversion of the property).

89. Beaver Falls Water-Power Co. *v.* Wilson, 83 Pa. St. 83; Hill *v.* Oliphant, 41 Pa. St. 364.

90. Penalty for failure to comply with bid see Lockridge *v.* Baldwin, 20 Tex. 303, 70 Am. Dec. 385.

91. Graham *v.* W. W. Dickinson Hardware Co., 69 Ark. 119, 63 S. W. 58; Gilmore *v.* Carlisle, 63 Kan. 885, 65 Pac. 640; Salter *v.* Clinch, 18 La. Ann. 662.

Nudum pactum.— Where an execution purchaser afterward promised the debtor's wife to secure to her the balance, if any, of the price he should obtain for the property after reimbursing himself, it was held that the promise was *nudum pactum* and void. Heathman *v.* Hall, 38 N. C. 414.

92. Greer *v.* Howard, 4 Ky. L. Rep. 350.

93. Loucks *v.* Union Bank, 2 La. Ann. 617; Fortier *v.* Slibell, 7 Rob. (La.) 398; Mounot *v.* Williamson, 7 Mart. N. S. (La.) 381. See Johnson *v.* Duncan, 24 La. Ann. 381; State *v.* Poole, 27 N. C. 105; Jordan *v.* Wilson, 26 N. C. 322; Wager *v.* Chew, 15 Pa. St. 323. See also Tiffany *v.* Kent, 2 Gratt. (Va.) 231.

Interest subsequent to sale.— See Yeatman *v.* Erwin, 14 La. Ann. 149.

94. Rents, profits, and improvements generally see Ejectment, 15 Cyc. 1.

95. *Georgia.*— McCaulla *v.* Murphy, 86 Ga. 475, 12 S. E. 655.

Kentucky.— Cavenaugh *v.* Willson, 71 S. W. 870, 24 Ky. L. Rep. 1507; Searcy *v.* Reardon, 1 A. K. Marsh. 1. But see Zimmerman *v.* McMasters, 76 S. W. 5, 25 Ky. L. Rep. 456.

South Carolina.— Bath South Carolina Paper Co. *v.* Langley, 23 S. C. 129 (holding, however, that the status of the purchaser in possession from the time of his purchase to the time of the avoidance of the sale is not that of a tort-feasor or trespasser, but rather that of a trustee, bound only to exercise ordinary care of the property, and not liable for rents which, without his fault, he did not receive); Boyce *v.* Boyce, 5 Rich. Eq. 263; Martin *v.* Evans, 1 Strobh. Eq. 350.

Texas.— House *v.* Robertson, 89 Tex. 681, 76 S. W. 251.

chaser should, however, be credited with the cost of improvements made by him tending to enhance the value of the property.[96]

d. Remedies Against Purchasers. Where property has been sold under an execution founded upon a void judgment, or where the sale was invalid on account of irregularities or defects in the proceedings, the proper remedy of the owner, out of possession, is ejectment in the case of real property,[97] and in the case of personal property, replevin, or trover, at the election of the owner.[98]

13. Title and Rights of Purchaser's Vendee — a. General Rule. The vendee of a purchaser at an execution sale takes all the right and title acquired by his vendor at such sale, and where the purchaser has not received the sheriff's deed at the time of the sale or assignment, the deed afterward received by such vendee perfects his title.[99] However, the purchaser's vendee acquires no better

Virginia.— Penn *v.* Spencer, 17 Gratt. 85, 91 Am. Dec. 375.

See 21 Cent. Dig. tit. "Execution," § 825.

See, however, Allen *v.* Thayer, 17 Mass. 299.

Extent of purchaser's liability.— See Davis *v.* Goldberg, 75 Tex. 48, 12 S. W. 952.

Ground-rent.— It has been held in Pennsylvania that since an execution purchaser has no right to the possession or profits until the acknowledgment of the deed, he is not personally liable for ground-rent accruing between the day of the sale and the date of the deed. Thomas *v.* Connell, 5 Pa. St. 13 [*affirming* 1 Pa. L. J. Rep. 319, 3 Pa. L. J. 299, and *overruling* by implication Walton *v.* West, 4 Whart. 221].

Insurance money.— Bath South Carolina Paper Co. *v.* Langley, 23 S. C. 129.

In Louisiana see Haydel *v.* Betts, 6 Rob. 438; Balfour *v.* Chinn, 7 Mart. N. S. 358; Dufour *v.* Camfranc, 11 Mart. 675. See also Galveston, etc., R. Co. *v.* Cowdrey, 11 Wall. (U. S.) 459, 20 L. ed. 199.

96. Searcy *v.* Reardon, 1 A. K. Marsh. (Ky.) 1; Cavenaugh *v.* Willson, 71 S. W. 870, 24 Ky. L. Rep. 1507; Lynum *v.* Smoot, 11 S. W. 17, 10 Ky. L. Rep. 879; Martin *v.* Evans, 1 Strobh. Eq. (S. C.) 350.

97. *California.*— Donahue *v.* McNulty, 24 Cal. 411, 85 Am. Dec. 78.

Indiana.— Moore *v.* Ross, 139 Ind. 200, 38 N. E. 817.

Kentucky.— Addison *v.* Crow, 5 Dana 271.

Michigan.— Millar *v.* Babcock, 29 Mich. 526.

Missouri.— Hardwick *v.* Jones, 65 Mo. 54.

New York.— Weidersum *v.* Naumann, 62 How. Pr. 369. See also Jackson *v.* Graham, 3 Cai. 188.

North Carolina.— See Heath *v.* Bishop, 72 N. C. 456. *Compare* Chasteen *v.* Phillips, 49 N. C. 459, 69 Am. Dec. 760.

Pennsylvania.— Muse *v.* Letterman, 13 Serg. & R. 167.

See 21 Cent. Dig. tit. "Execution," § 826.

Ejectment generally see Ejectment.

98. Eggleston *v.* Mundy, 4 Mich. 295; Heberling *v.* Jaggar, 47 Minn. 70, 49 N. W. 396, 28 Am. St. Rep. 331; Underhill *v.* Reinor, 2 Hilt. (N. Y.) 319. But see Storm *v.* Livingston, 6 Johns. (N. Y.) 44. And *compare* Carter *v.* Clark, 28 Conn. 512.

Replevin generally see Replevin.

Trover generally see Trover.

Burden of proof.— Brandon *v.* Snows, 2 Stew. (Ala.) 255.

Face value of note.— Fulton *v.* Irwin, Add. (Pa.) 19.

Tenant in common.— Where a purchaser sells goods owned by two jointly on a fieri facias against one of them as the sole property of the latter, and delivers possession to the purchaser, the other tenant in common, whose interest does not pass by the sale, cannot maintain either trespass or trover for the goods against such purchaser. Fiero *v.* Betts, 2 Barb. (N. Y.) 633.

99. *California.*— Leonard *v.* Flynn, 89 Cal. 535, 26 Pac. 1097, 23 Am. St. Rep. 500.

Illinois.— See Blue *v.* Blue, 38 Ill. 9, 87 Am. Dec. 267.

Indiana.— Butler *v.* Holtzman, 55 Ind. 125.

Kentucky.— Waller *v.* Tate, 4 B. Mon. 529; McLaughlin *v.* Daniel, 8 Dana 182.

Louisiana.— Smith *v.* Wilson, 11 Rob. 522.

Minnesota.— Lindley *v.* Crombie, 31 Minn. 232, 17 N. W. 372; Dickinson *v.* Kinney, 5 Minn. 409.

Mississippi.— Hart *v.* Gardner, 81 Miss. 650, 33 So. 442, 497.

Pennsylvania.— Stewart *v.* Reed, 91 Pa. St. 287; Atkinson *v.* Tomlinson, 91 Pa. St. 284; St. Bartholomew's Church *v.* Wood, 80 Pa. St. 219 [*affirming* 4 Leg. Gaz. 18].

Texas.— Williamson *v.* Gore, (Civ. App. 1903) 73 S. W. 563; Cage *v.* Shapard, (Civ. App. 1898) 46 S. W. 839.

See 21 Cent. Dig. tit. "Execution," § 827.

A voluntarily substituted purchaser at an execution sale has no cause of action against the original vendee for the amount of the purchase-money paid over to him under a mutual mistake as to the identity of the estate sold. Cravens *v.* Gordon, 53 Mo. 287.

Sale to defendant's wife.— See Olsen *v.* Kern, 10 Ill. App. 578.

The mere assignment of the interest of the execution plaintiff in a judgment under which land was sold to him on execution does not operate to convey his interest in the land purchased. Meacham *v.* Sunderland, 10 Ill. App. 123.

An equitable assignee of all an execution purchaser's title in land after time for redemption has expired has been held in Michigan to be entitled in equity to a decree for a deed from the sheriff and for possession of the land, but not for a release from the execution debtor in possession, nor for mesne

title than such purchaser, and a claimant of the property may set up the same defenses or equities against such vendee as he might against the purchaser.[1]

b. Assignee of Certificate of Sale. A sheriff's certificate of sale issued to the purchaser at an execution sale is assignable, and such assignment authorizes the sheriff to make a deed to the property to the assignee, who thereby acquires all the rights and remedies of his assignor in such property.[2] And it has been held in some cases that title may pass by such a defective assignment of the certificate of sale as would not compel the officer to execute a deed to the assignee, and if he voluntarily does so the deed is good.[3] The assignee of a certificate of sale does not, however, acquire any greater rights than his assignor, and the same defenses and equities subsist against the certificate in his hands as in the hands of his assignor.[4] Upon failure of title the assignee has a cause of action against his assignor for the consideration paid for the assignment.[5]

D. Redemption — 1. Statutory Provisions — a. Construction. The right of the owner of property to redeem the same from sale under execution is purely statutory, and to enable one to redeem he must conform to all the requirements of the statute.[6]

profits. Whipple *v.* Farrar, 3 Mich. 436, 64 Am. Dec. 99.

Claim for improvements.— See Mitchell *v.* Fidelity Trust, etc., Co., 67 S. W. 263, 24 Ky. L. Rep. 62.

1. *Iowa.*— Soukup *v.* Union Invest. Co., 84 Iowa 448, 51 N. W. 167, 35 Am. St. Rep. 317.

Kentucky.—Carrico *v.* Froman, 2 Litt. 178; Hendrix *v.* Moore, 6 Ky. L. Rep. 362.

Missouri.— Newman *v.* Hook, 37 Mo. 207, 90 Am. Dec. 378.

Nebraska.— Gue *v.* Jones, 25 Nebr. 634, 41 N. W. 555.

Pennsylvania.— Crooks *v.* Douglass, 56 Pa. St. 51; Towers *v.* Tuscarora Academy, 8 Pa. St. 297.

Texas.— Day *v.* Johnson, (Civ. App. 1903) 72 S. W. 426.

Washington.— Singly *v.* Warren, 18 Wash. 434, 51 Pac. 1066, 63 Am. St. Rep. 896.

See 21 Cent. Dig. tit. "Execution," § 827.

Agreement between purchaser and lienor.— See Roberts *v.* Williams, 5 Whart. (Pa.) 170, 34 Am. Dec. 549.

Transfer of bid.— See Mathews *v.* Clifton, 13 Sm. & M. (Miss.) 330.

2. *California.*— Abadie *v.* Lobero, 36 Cal. 390 (assignee, however, does not acquire any interest in the judgment debt or security therefor, but only the right to compel the issuance of a deed on the expiration of the redemption period); Baber *v.* McLellan, 30 Cal. 135 (holding, however, that an assignee who has taken the certificate only as security against liability for debts of the judgment debtor, and agreed to cancel the same, and discharge the judgment upon payment of those debts, has only a lien on the land, which is satisfied by the payment of the debts, and neither he nor his assignee with notice can subsequently acquire any title to the land by obtaining a sheriff's deed).

Illinois.— Palmer *v.* Riddle, 180 Ill. 461, 54 N. E. 227; Mansfield *v.* Hoagland, 46 Ill. 359.

Indiana.— Blumenthal *v.* Tibbits, 160 Ind. 70, 66 N. E. 159; Maddux *v.* Watkins, 88 Ind. 74; Gillespie *v.* Splahn, Wils. 228.

Iowa.— Rush *v.* Mitchell, 71 Iowa 333, 32 N. W. 367.

Minnesota.— Messerschmidt *v.* Baker, 22 Minn. 81.

Nevada.— *In re* Smith, 4 Nev. 254, 97 Am. Dec. 531.

New York.— Pennell *v.* Hinman, 7 Barb. 644.

Wisconsin.— Phillips *v.* Hyland, 102 Wis. 253, 78 N. W. 431.

United States.— See Laflin *v.* Herrington, 1 Black 326, 17 L. ed. 45.

See 21 Cent. Dig. tit. "Execution," § 828.

Assignment to secure loan.— Wagner *v.* Winter, 122 Ind. 57, 23 N. E. 754.

3. Chicago, etc., R. Co. *v.* Chamberlain, 84 Ill. 333; McClure *v.* Engelhardt, 17 Ill. 47; Phillips *v.* Schiffer, 7 Lans. (N. Y.) 347; People *v.* Ransom, 4 Den. (N. Y.) 145 (holding, however, that the sheriff cannot be compelled to make a deed to the assignee prior to its being filed according to the statute); Vergennes Bank *v.* Warren, 7 Hill (N. Y.) 91. See also People *v.* Muzzy, 1 Den. (N. Y.) 239.

As to third persons it will be presumed from the mere recital of an assignment in the sheriff's deed that the sheriff was authorized by the purchaser to make a deed to the assignee under and by virtue of the sale. Trotter *v.* Nelson, 1 Swan (Tenn.) 7.

4. *California.*— Reynolds *v.* Harris, 14 Cal. 667, 76 Am. Dec. 459.

Indiana.— Stotsenburg *v.* Stotsenburg, 75 Ind. 538; Hasselman *v.* Lowe, 70 Ind. 414.

Iowa.— Ayres *v.* Campbell, 9 Iowa 213, 74 Am. Dec. 346.

Michigan.—McGoren *v.* Avery, 37 Mich. 120.

New Jersey.— See Flaherty *v.* Cramer, (Ch. 1898) 41 Atl. 482.

Washington.— Singly *v.* Warren, 18 Wash. 434, 51 Pac. 1066, 63 Am. St. Rep. 896.

See 21 Cent. Dig. tit. "Execution," § 828.

5. McGoren *v.* Avery, 37 Mich. 120. See also Colvin *v.* Holbrook, 2 N. Y. 126 [*affirming* 3 Barb. 475].

6. *Alabama.*— Aycock *v.* Adler, 87 Ala. 190, 5 So. 794; Spoor *v.* Phillips, 27 Ala. 193.

b. Retroactive Operation. Where statutes give the right of redemption on execution sales or change the mode of procedure or the redemption period, the better doctrine is that such statutes have no retroactive effect.[7]

2. Sale En Masse and Redemption in Part — a. General Rule. Under the redemption statutes the general rule is that where different parcels of land are sold *en masse* they must be redeemed *en masse* and cannot be redeemed in separate parcels.[8]

b. Lands Held in Common. The statutes now usually provide that, where lands held in common are sold under execution, the judgment creditor of one of the joint owners may redeem the interest of his debtor without redeeming the whole tract of land sold.[9]

3. Agreements as to. Where a purchaser at an execution sale enters into an agreement with the judgment debtor to allow him to redeem the property within a specified period after the expiration of the statutory right to redeem, upon the payment of the purchase-price, with interests and charges, equity will decree the execution of such agreement, upon the fulfilment of his part thereof by the judgment debtor;[10] and it has been held in some jurisdictions that such agree-

California.— Haskell *v.* Manlove, 14 Cal. 54.

Colorado.— Paddack *v.* Staley, 13 Colo. App. 363, 58 Pac. 363.

Connecticut.— Punderson *v.* Brown, 1 Day 93, 2 Am. Dec. 53. See also Allyn *v.* Burbank, 9 Conn. 151.

Illinois.— Wooters *v.* Joseph, 137 Ill. 113, 27 N. E. 80, 31 Am. St. Rep. 355, (1890) 25 N. E. 791; Durley *v.* Davis, 69 Ill. 133; Littler *v.* People, 43 Ill. 188.

Iowa.— See Harrison *v.* Wilmering, 72 Iowa 727, 32 N. W. 279.

Maryland.— See Rowland *v.* Crawford, 7 Harr. & J. 52.

Nebraska.—Gosmunt *v.* Gloe, 55 Nebr. 709, 76 N. W. 424.

See 21 Cent. Dig. tit. "Execution," § 829 *et seq.*

Under execution from a federal court.— In Tennessee it has been held that land sold under execution from a federal court before the passage of the federal act of 1828 is not subject to redemption under the state act of 1820. Polk *v.* Douglass, 6 Yerg. 209. *Aliter* as to land sold after that act. Hepburn *v.* Kerr, 9 Humphr. 726, 51 Am. Dec. 685. *Compare* Gorham *v.* Wing, 10 Mich. 486.

7. *California.*— Thresher *v.* Atchison, 117 Cal. 73, 48 Pac. 1020, 59 Am. St. Rep. 159; Seale *v.* Mitchell, 5 Cal. 401; People *v.* Hays, 4 Cal. 127. See, however, Moore *v.* Martin, 38 Cal. 428.

Idaho.— Wilder *v.* Campbell, 3 Ida. 695, 43 Pac. 677.

Indiana.— Scobey *v.* Gibson, 17 Ind. 572, 79 Am. Dec. 490.

Kentucky.— Collins *v.* Collins, 79 Ky. 88.

Nebraska.— Pomeroy *v.* Bridge, 1 Nebr. 462.

New York.— Huntington *v.* Forkson, 6 Hill 149 [*distinguishing* People *v.* Livingston, 6 Wend. 526]. See, however, People *v.* Haskins, 7 Wend. 463.

Oregon.— State *v.* Sears, 29 Oreg. 580, 43 Pac. 482, 46 Pac. 785, 54 Am. St. Rep. 808.

Wisconsin.—See Robinson *v.* Howe, 13 Wis. 341.

United States.— Barnitz *v.* Beverly, 163 U. S. 118, 16 S. Ct. 1042, 41 L. ed. 93.

See 21 Cent. Dig. tit. "Execution," § 830; Constitutional Law, 8 Cyc. 908, 940 note 56, 1009, 1020 *et seq.*; Cooley Const. Lim. (7th ed.) 412.

Compare Beck *v.* Burnett, 22 Ala. 822.

In some jurisdictions, however, it is held that such statutes affect only the remedy, and therefore apply as well to sales made before the passage of the act as to those made thereafter. Turner *v.* Watkins, 31 Ark. 429 [*overruling* Oliver *v.* McClure, 28 Ark. 555]. See Dennis *v.* Tomlinson, 49 Ark. 568, 6 S. W. 11. See Constitutional Law, 8 Cyc. 1009, 1020 *et seq.*

The legislature may alter statutes creating the right to redeem. Anderson *v.* Anderson, 129 Ind. 573, 29 N. E. 35, 28 Am. St. Rep. 211. See Constitutional Law, 8 Cyc. 908.

8. Oldfield *v.* Eulert, 148 Ill. 614, 36 N. E. 615, 39 Am. St. Rep. 231; Cross *v.* Weare, 62 N. H. 125.

Lot to which defendant had no title.—Richardson *v.* Dunn, 79 Ala. 167.

Where an execution has been extended on two or more parcels of land, the debtor is not entitled to redeem one of them alone without the others, even though its value is separately stated in the certificate of the appraiser. Foss *v.* Stickney, 5 Me. 390.

Aliter, where several parcels of land are sold separately.— For in such case the party having a right to redeem may redeem a single parcel thus sold without redeeming the whole. Robertson *v.* Dennis, 20 Ill. 313; Case *v.* Fry, 91 Iowa 132, 59 N. W. 333; Dickenson *v.* Gilliland, 1 Cow. (N. Y.) 481.

9. Schuck *v.* Gerlach, 101 Ill. 338; People *v.* Bunn, Lalor (N. Y.) 265.

Under a former Illinois statute see Durley *v.* Davis, 69 Ill. 133; Hawkins *v.* Vineyard, 14 Ill. 26, 56 Am. Dec. 487.

Under a former New York act see Huntington *v.* Forkson, 6 Hill 149; Erwin *v.* Schriver, 19 Johns. 379.

10. *Arkansas.*—Trapnall *v.* Brown, 19 Ark. 39.

ments are valid when made by parol.[11] Such agreement, however, must be based upon a valuable consideration, in order to enable the judgment debtor to enforce it.[12] However, since time [13] may be the essence of such agreements, the failure on the part of the judgment debtor to comply with the terms of the agreement within the time stipulated will prevent its enforcement.[14]

4. Who May Exercise Right — a. Judgment Debtor. In a majority of the

Georgia.— Dowdell *v.* Neal, 10 Ga. 148.

Illinois.— Hart *v.* Seymour, 147 Ill. 598, 35 N. E. 246; Pearson *v.* Pearson, 131 Ill. 464, 23 N. E. 418; Greenup *v.* Porter, 4 Ill. 64; Honniham *v.* Friedman, 13 Ill. App. 226.

Indiana.— Taggett *v.* McKinsey, 85 Ind. 392.

Iowa.— Alston *v.* Wilson, 44 Iowa 130.

Kentucky.—Ferguson *v.* Smith, 7 Bush 76; Bruce *v.* Morrison, 5 B. Mon. 33; Hopkins *v.* Tarlton, 4 Bibb 500; Dorsey *v.* Cock, 4 Bibb 45; Ferguson *v.* Mason, 60 S. W. 847, 22 Ky. L. Rep. 1571; De Long *v.* Hyden, 18 S. W. 942, 13 Ky. L. Rep. 865; Layne *v.* Weddington, 6 Ky. L. Rep. 590.

Louisiana.— Gravier *v.* Lartet, 15 La. 400.

Maine.— Randell *v.* Farnham, 36 Me. 86.

Mississippi.— Wallis *v.* Wilson, 34 Miss. 357.

Missouri.— Gillespie *v.* Stone, 70 Mo. 505.

New Jersey.—Marlatt *v.* Warwick, 18 N. J. Eq. 108; Combs *v.* Little, 4 N. J. Eq. 310, 40 Am. Dec. 207.

New York.— Miller *v.* Lewis, 4 N. Y. 554.

North Carolina.— Mulholland *v.* York, 82 N. C. 510; Turner *v.* King, 37 N. C. 132, 38 Am. Dec. 679; Wilcox *v.* Morris, 5 N. C. 116, 3 Am. Dec. 678.

Pennsylvania.— Cowperthwaite *v.* Carbondale First Nat. Bank, 2 Pa. Cas. 48, 4 Atl. 476. See also McAninch *v.* Laughlin, 13 Pa. St. 371.

Tennessee.— Lock *v.* Edmundson, 1 Baxt. 282.

See 21 Cent. Dig. tit. "Execution," § 834.

After such redemption the property may be again subjected to levy and sale as the property of the redemptioner. Dowdell *v.* Neal, 10 Ga. 148.

A purchaser at a subsequent execution sale of a judgment debtor's rights under an agreement to redeem has been held to be in the same position as that of an assignee of the agreement. Kelsoe *v.* Beaman, 10 La. 450.

A purchaser from defendant is entitled to redeem. Dupuy *v.* McMillan, 2 Duv. (Ky.) 555.

Failure to fulfil the agreement on the part of the judgment debtor deprives him of all advantages thereunder and renders the title of the purchaser absolute. Alston *v.* Wilson, 44 Iowa 130.

Property sold to a bona fide purchaser.— See Keith *v.* Purvis, 4 Desauss. (S. C.) 114.

The consent of junior judgment creditors is not necessary. Miller *v.* Lewis, 4 N. Y. 554.

The purchaser having given bonds to restore the land on certain conditions is not bound to do so unless the conditions are strictly complied with. Kenny *v.* Marsh, 2 A. K. Marsh. (Ky.) 46.

The purchaser only acquires a mortgage interest in the property under such an agreement, and another creditor may maintain a bill to redeem or require a sale and distribution of the proceeds. Yoder *v.* Standiford, 7 T. B. Mon. (Ky.) 478.

There must be clear proof of such an agreement for redemption. Abernathy *v.* Hoke, 37 N. C. 157.

Under the Alabama statute see Farley *v.* Nagle, 119 Ala. 622, 24 So. 567.

11. McMakin *v.* Schenck, 98 Ind. 264; Butt *v.* Butt, 91 Ind. 305; Southard *v.* Pope, 9 B. Mon. (Ky.) 261; Holcomb *v.* Hays, 62 S. W. 1028, 23 Ky. L. Rep. 352; Mayo *v.* Hamlin, 73 Me. 182; Tice *v.* Russell, 43 Minn. 66, 44 N. W. 886. *Contra,* Lucas *v.* Nichols, 66 Ill. 41. Unless the purchaser has been guilty of fraud, in which case he will be held as trustee of the creditors and of the debtor also, unless the latter is a party to the fraud. Kistler's Appeal, 73 Pa. St. 393; Fox *v.* Heffner, 1 Watts & S. (Pa.) 372; Haines *v.* O'Conner, 10 Watts (Pa.) 313, 36 Am. Dec. 180; Robertson *v.* Robertson, 9 Watts (Pa.) 32; Kisler *v.* Kisler, 2 Watts (Pa.) 323, 27 Am. Dec. 308.

12. *Illinois.*— Pearson *v.* Pearson, 131 Ill. 464, 23 N. E. 418; Lucas *v.* Nichols, 66 Ill. 41.

Indiana.— McMakin *v.* Schenck, 98 Ind. 264.

Kentucky.— Herring *v.* Johnston, 72 S. W. 793, 24 Ky. L. Rep. 1940; Blackburn *v.* Collins, 12 B. Mon. 16; Flowers *v.* Sproule, 2 A. K. Marsh. 54.

New Jersey.— Throckmorton *v.* O'Reilly, (Ch. 1903) 55 Atl. 56.

New York.— Getman *v.* Getman, 1 Barb. Ch. 499.

See 21 Cent. Dig. tit. "Execution," § 834.

A warrant of attorney to confess judgment is a sufficient consideration to support an agreement to be permitted to redeem land sold under execution. Wright *v.* McNeely, 11 Ill. 241.

13. It is not necessary, however, to the validity of an agreement by an execution purchaser to permit the debtor to redeem from the sale that a time for such redemption be fixed. Throckmorton *v.* O'Reilly, (N. J. Ch. 1903) 55 Atl. 56.

14. Gillespie *v.* Stone, 70 Mo. 505; Halsted *v.* Tyng, 18 N. J. Eq. 375 (holding, however, that failure to comply within the stipulated time, caused by default of the other party, would not defeat defendant's rights under the agreement, but that the time for redemption would be extended); Heath's Appeal, 2 C. Pl. (Pa.) 173. See also Hart *v.* Seymour, 147 Ill. 598, 35 N. E. 246. See, however, Spath *v.* Hankins, 55 Ind. 155.

states, by statutory provision, a judgment debtor may redeem property sold on execution against him, by compliance with such statutory provisions within the time designated therein.[15] However, the statutes giving the judgment debtor the right to redemption do not make actual ownership at the time of sale or redemption a condition precedent, the right following the person and not the land and continuing for the period prescribed by the statute, although the debtor meanwhile may have parted with his title.[16] Under some statutes defendant's right to redeem his property sold under an execution sale within the statutory period is lost in case he appeals or causes the execution to be stayed.[17]

b. Judgment Creditors. In practically every jurisdiction giving the right of redemption by statute, provisions are made according to a subsequent judgment creditor of the same debtor the right to redeem the property from the first purchaser, at any time before the expiration of the statutory period of the judgment debtor's right to redeem;[18] and under such statutes the assignee of a judg-

15. *Alabama.*—Henderson *v.* Prestwood, 114 Ala. 464, 22 So. 15.

California.— Pollard *v.* Harlow, 138 Cal. 390, 71 Pac. 454, 648.

Georgia.— See Crawford *v.* Pritchard, 81 Ga. 14, 16 S. E. 689.

Illinois.— Merry *v.* Bostwick, 13 Ill. 398, 54 Am. Dec. 434.

Indiana.— Jarrell *v.* Brubaker, 150 Ind. 260, 49 N. E. 1050.

Iowa.— Case *v.* Fry, 91 Iowa 132, 59 N. W. 333; Coriell *v.* Ham, 4 Greene 455, 61 Am. Dec. 134.

Massachusetts.— Da Silva *v.* Turner, 166 Mass. 407, 44 N. E. 532.

Nebraska.— Pomeroy *v.* Bridge, 1 Nebr. 462.

New York.—Livingston *v.* Arnoux, 56 N. Y. 507 [*affirming* 15 Abb. Pr. N. S. 158]; Howell *v.* Baker, 4 Johns. Ch. 118.

North Carolina.— Wilcox *v.* Morris, 5 N. C. 116, 3 Am. Dec. 678.

Tennessee.— Ewing *v.* Cook, 85 Tenn. 332, 3 S. W. 507, 4 Am. St. Rep. 765; Reaves *v.* Hartsville Bank, (Ch. App. 1900) 64 S. W. 307.

See 21 Cent. Dig. tit. "Execution," § 835.

Another creditor who is in a position to redeem cannot reach and subject to sale this statutory right, and the filing of a bill in equity for that purpose is no obstacle to a redemption by the debtor or an assignment by him of his right to redeem. Ewing *v.* Cook, 85 Tenn. 382, 3 S. W. 507, 4 Am. St. Rep. 765.

A person not entitled to redeem cannot effect a redemption by a mere deposit of the redemption money, even if made within the statutory period. *In re* Eleventh Ave., 81 N. Y. 436.

Equity of redemption foreclosed.— See Husted *v.* Dakin, 17 Abb. Pr. (N. Y.) 137.

Subsequent sale of the property under another execution cannot defeat this right. Merry *v.* Bostwick, 13 Ill. 398, 54 Am. Dec. 434.

Under Ky. St. (1899) §§ 2364, 2365, the judgment debtor and his representative are given the right to redeem real property from an execution sale, only where such property brings less than two thirds of its appraised valuation at the execution sale. Lawrence *v.* Edelen, 6 Bush 55; Bondurant *v.* Owens, 4 Bush 662; Reid *v.* Heasley, 9 Dana 324; Pollard *v.* Lucas, 7 Dana 454; Warden *v.* Troutman, 74 S. W. 1085, 25 Ky. L. Rep. 247.

16. Henderson *v.* Prestwood, 114 Ala. 464, 22 So. 15; Southern California Lumber Co. *v.* McDowell, 105 Cal. 99, 38 Pac. 627; Yoakum *v.* Bower, 51 Cal. 539; Floyd *v.* Sellers, 7 Colo. App. 491, 44 Pac. 371; Livingston *v.* Arnoux, 56 N. Y. 507 [*affirming* 15 Abb. Pr. N. S. 158].

17. Brown *v.* Markley, 58 Iowa 689, 12 N. W. 721 (holding that the above rule applies to stays of execution in a justice's court as well as in courts of record); Chase *v.* Welty, 57 Iowa 230, 10 N. W. 648; Thayer *v.* Coldren, 57 Iowa 110, 10 N. W. 300; Sieben *v.* Becker, 53 Iowa 24, 3 N. W. 804 (holding, however, that the right given to lien creditors to redeem places no restrictions on their right in case of an appeal or stay of execution, and that such lien creditor's right to redeem is not affected by the fact that defendant has appealed or secured a stay of execution).

18. *Alabama.*— Pollard *v.* Taylor, 13 Ala. 604.

California.— McMillen *v.* Richards, 9 Cal. 365, 70 Am. Dec. 655.

Illinois.— Strauss *v.* Tuckhorn, 200 Ill. 75, 65 N. E. 683; Kratz *v.* Buck, 111 Ill. 40; Thomley *v.* Moore, 106 Ill. 496. See also Oliver *v.* Croswell, 42 Ill. 41.

Indiana.— Warford *v.* Sullivan, 147 Ind. 14, 46 N. E. 27. But see State Bank *v.* Nutt, 8 Blackf. 450.

Iowa.— Phelps *v.* Finn, 45 Iowa 447; Seevers *v.* Wood, 12 Iowa 295.

Minnesota.— Hunter *v.* Mauseau, 91 Minn. 124, 97 N. W. 651.

New York.— Morss *v.* Purvis, 68 N. Y. 225 [*affirming* 5 Thomps. & C. 140]; People *v.* Beebe, 1 Barb. 379; Barker *v.* Gates, 1 How. Pr. 77; People *v.* Fleming, 4 Den. 137; Law *v.* Jackson, 9 Cow. 641 [*affirming* 5 Cow. 248]; *Ex p.* Carmichael, 5 Cow. 17; Snyder *v.* Warren, 2 Cow. 518, 14 Am. Dec. 519; Cook *v.* Mancius, 5 Johns. Ch. 89. See also Schermerhorn *v.* Miller, 2 Cow. 439.

Tennessee.— McClean *v.* Harris, 14 Lea 510; Woods *v.* McGavock, 10 Yerg. 133;

ment is a judgment creditor within the contemplation of the law, and as such is entitled to redeem property sold under execution before the expiration of the redemption period.[19] The only creditors, however, who can claim the right to redeem are those the *bona fides* of whose debts has been ascertained by the reduction of their claims to judgment.[20]

c. Execution Plaintiff. Under some statutes a creditor by virtue of whose judgment the property of the debtor is sold has a statutory right to redeem the same from the purchaser.[21] Other statutes have been differently construed, and the right of redemption is not accorded to the judgment creditor.[22]

d. Mortgagee. Under most of the redemption statutes, a mortgagee whose

Reaves *v.* Hartsville Bank, (Ch. App. 1900) 64 S. W. 307.

Wisconsin.— Sexton *v.* Rhames, 13 Wis. 99.

United States.— King *v.* Bender, 116 Fed. 813, 54 C. C. A. 317; Bender *v.* King, 111 Fed. 60.

See 21 Cent. Dig. tit. "Execution," § 836.

A creditor by judgment in a justice's court of another state is not within the meaning of the act allowing a *bona fide* judgment creditor to redeem. Freeman *v.* Jordan, 17 Ala. 500.

A purchaser at an execution sale is entitled to question the right of one attempting to redeem and to ask that an attempted redemption be set aside as a cloud on his title where those entitled to redeem have failed to do so. Robertson *v.* Moline, etc., Co., 88 Iowa 463, 55 N. W. 495.

A senior judgment creditor may redeem from a sale under a junior judgment. *Ex p.* Peru Iron Co., 7 Cow. (N. Y.) 540.

Concurrent redemption under the New York statute see *Ex p.* Ives, 1 Hill 639.

Having other security for his debt does not deprive the judgment creditor of his right to redeem. Muir *v.* Leitch, 7 Barb. (N. Y.) 341.

In case of the death of his debtor after rendition of judgment a subsequent judgment creditor must revive his judgment against his debtor's estate before exercising his right to redeem. Bledsoe *v.* McCorry, 9 Baxt. (Tenn.) 320.

Leasehold estate.— See *Ex p.* Wilson, 7 Hill 150; People *v.* Westervelt, 17 Wend. 674; Merry *v.* Hallet, 2 Cow. 497.

Purchase by the junior judgment creditor at the execution sale does not affect his right to redeem. Citizens' Sav. Bank *v.* Percival, 61 Iowa 183, 16 N. W. 76.

Redemption by other creditors of a portion of land sold does not deprive another judgment creditor of the right to redeem the remainder of the land. Schuck *v.* Gerlach, 101 Ill. 338.

Reversal of the judgment under which the creditor acquires his right to redeem see Barringer *v.* Burke, 21 Ala. 765; McLagan *v.* Brown, 11 Ill. 519.

Subagent's redemption is valid if his acts are afterward ratified by the purchaser. Teucher *v.* Hiatt, 23 Iowa 527, 92 Am. Dec. 440.

That a judgment creditor is an administrator does not affect his right to redeem. Harris *v.* Harris, 8 Baxt. (Tenn.) 474.

Where his judgment has ceased to be a lien a subsequent judgment creditor's right to redeem, it seems, also ceases. Byers *v.* McEniry, 117 Iowa 499, 91 N. W. 797; *Ex p.* Elwood, 1 Den. (N. Y.) 633; *Ex p.* Wood, 4 Hill (N. Y.) 542; People *v.* Easton, 2 Wend. (N. Y.) 297; *Ex p.* Stevens, 4 Cow. (N. Y.) 133; Marsh *v.* Wendover, 3 Cow. (N. Y.) 69; Hurd *v.* Magee, 3 Cow. (N. Y.) 35. But see Pease *v.* Ritchie, 132 Ill. 638, 24 N. E. 433, 8 L. R. A. 566. See also Tenney *v.* Hemmenway, 53 Ill. 97.

19. Sweezey *v.* Chandler, 11 Ill. 445; *Ex p.* Raymond, 1 Den. (N. Y.) 272; Van Rensselaer *v.* Albany County, 1 Cow. (N. Y.) 501; Van Rensselaer *v.* Onondaga County, 1 Cow. (N. Y.) 443.

20. *Alabama.*— Mack *v.* Owen, 83 Ala. 177, 3 So. 295; Seals *v.* Pheiffer, 77 Ala. 278; Mobile Mut. Ins. Co. *v.* Steele, 61 Ala. 253; Thomason *v.* Scales, 12 Ala. 309.

California.— Bennett *v.* Wilson, 122 Cal. 509, 55 Pac. 390, 68 Am. St. Rep. 61.

Illinois.— McLagan *v.* Brown, 11 Ill. 519.

Iowa.— Byers *v.* McEniry, 117 Iowa 499, 91 N. W. 797.

Massachusetts.— Downs *v.* Fuller, 2 Metc. 135, 35 Am. Dec. 393.

Michigan.— Spring *v.* Raymond, (1903) 95 N. W. 1003.

Creditor by judgment void for fraud as against a prior redemptioner cannot redeem. Bennett *v.* Wilson, 122 Cal. 509, 55 Pac. 390, 68 Am. St. Rep. 61.

Judgment by confession.— The rule is laid down that it is immaterial whether the judgment is the result of contested litigation or was confessed for the purpose of creating a right to redeem after the sale was made, provided such judgment was confessed or entered in good faith. Bennett *v.* Wilson, 122 Cal. 509, 55 Pac. 390, 68 Am. St. Rep. 61 (this rule, however, is inapplicable to judgments void for fraud as against a prior redemptioner); McMillan *v.* Richards, 9 Cal. 365, 70 Am. Dec. 655. See also People *v.* Doane, 17 Cal. 476; Phillips *v.* Demoss, 14 Ill. 410. *Contra*, Mobile Mut. Ins. Co. *v.* Steele, 61 Ala. 253.

21. Posey *v.* Pressley, 60 Ala. 243; Freeman *v.* Jordan, 17 Ala. 500; Warden *v.* Troutman, 74 S. W. 1085, 25 Ky. L. Rep. 247.

22. Hervey *v.* Krost, 116 Ind. 268, 19 N. E. 125; Hayden *v.* Smith, 58 Iowa 285, 12 N. W. 289; Clayton *v.* Ellis, 50 Iowa 590; *Ex p.* Paddock, 4 Hill (N. Y.) 544.

mortgage has been properly recorded, after the sale on execution, is entitled to redeem from such sale.[23]

e. Vendee or Assignee of Judgment Debtor. The various redemption statutes either specially provide for the redemption of property by the judgment debtor's vendee or assignee or are construed by the courts as giving him right.[24]

f. Assignment of Right. The general rule is that the statutory right to redeem property sold at an execution sale is assignable, and the assignee succeeds to all the right and interest of his assignor.[25]

g. Waiver and Estoppel.[26] A party who is given the right to redeem under the redemption statutes may by his conduct waive his right to redeem, or by his language or conduct be estopped from asserting his rights under the statute.[27]

5. Time Within Which to Redeem — a. In General. A party who is given the statutory right to redeem from a sale on execution must avail himself of the right within the time prescribed by law,[28] and his right to redemption is lost if

23. *Connecticut.*— Lord *v.* Sill, 23 Conn. 319.

Indiana.— Hervey *v.* Krost, 116 Ind. 268, 19 N. E. 125.

Iowa.— Crossen *v.* White, 19 Iowa 109, 87 Am. Dec. 420. See, however, Lysinger *v.* Hayer, 87 Iowa 335, 54 N. W. 145.

Massachusetts.— Bigelow *v.* Willson, 1 Pick. 485.

Minnesota.—Williams *v.* Lash, 8 Minn. 496.

New York.— See People *v.* Beebe, 1 Barb. 379 (holding that, under the act of 1836, the mortgagee cannot redeem, unless his mortgage is a lien upon the whole of the premises sold and not upon a part only); Hodge *v.* Gallup, 3 Den. 527 (holding that the mortgagee's assignee has no right to redeem). But see Van Rensselaer *v.* Albany County, 1 Cow. 501.

See 21 Cent. Dig. tit. "Execution," § 840.

Under the New Jersey statute, making an unrecorded mortgage void as against the judgment creditor without notice, the holder of an unrecorded mortgage cannot redeem from an execution sale where the judgment creditor was the purchaser. Condit *v.* Wilson, 36 N. J. Eq. 370.

24. *Iowa.*— Robertson *v.* Moline, etc., Co., 88 Iowa 463, 55 N. W. 495; Thayer *v.* Coldren, 57 Iowa 110, 10 N. W. 300; Harvey *v.* Spaulding, 16 Iowa 397, 85 Am. Dec. 526.

Massachusetts.— Sewall *v.* Sewall, 139 Mass. 157, 29 N. E. 648.

Mississippi.— Watson *v.* Hannum, 10 Sm. & M. 521.

New Hampshire.— Russell *v.* Fabyan, 34 N. H. 218.

New York.—Livingston *v.* Arnoux, 56 N. Y. 507 [*affirming* 15 Abb. Pr. N. S. 158].

See 21 Cent. Dig. tit. "Execution," § 841.

Party with equitable title.— It has been held in New York that the party having an equitable right to a sheriff's deed, but who has not obtained the deed itself, is not entitled as standing in the place of the grantee of the judgment debtor to redeem the land from the effect of a subsequent sale, although he was delayed in obtaining his deed by an injunction on a bill filed by the judgment debtor. Lathrop *v.* Ferguson, 22 Wend. 116. However, in Maine it is held that an equitable owner of land sold on execution, who seasonably tenders or pays the purchaser the amount of his purchase-money, has an equity in the land superior to the purchaser, and his bill to redeem from the sale will be sustained, although he may not have the legal title. Morrill *v.* Everett, 83 Me. 290, 22 Atl. 172.

25. *California.*— Southern California Lumber Co. *v.* McDowell, 105 Cal. 99, 38 Pac. 627.

Iowa.— Stoddard *v.* Forbes, 13 Iowa 296.

Massachusetts.— Tucker *v.* Buffum, 16 Pick. 46.

Oregon.— Rosenberg *v.* Croisan, 18 Oreg. 470, 23 Pac. 847.

Tennessee.—Lincoln Sav. Bank *v.* Ridgway, 3 Lea 623; Hupburn *v.* Kerr, 9 Humphr. 726, 51 Am. Dec. 685.

See 21 Cent. Dig. tit. "Execution," § 843.

But see Searcey *v.* Oates, 68 Ala. 111.

26. Estoppel generally see Estoppel.

27. *California.*—Wilkins *v.* Willson, 51 Cal. 212.

Illinois.— Hawley *v.* Simons, (1887) 14 N. E. 7; Union Mut. L. Ins. Co. *v.* Slee, 123 Ill. 57, 13 N. E. 222.

Iowa.—Gillett *v.* Edgar, 22 Iowa 293. *Compare* Curtis *v.* Millard, 14 Iowa 128, 81 Am. Dec. 460.

New York.— Ten Eyck *v.* Craig, 62 N. Y. 406 [*affirming* 2 Hun 452, 5 Thomps. & C. 65]; Jackson *v.* Weeks, 1 N. Y. St. 511.

Tennessee.— Saunders *v.* Wolman, 7 Lea 300.

Wisconsin.— Sexton *v.* Rhames, 13 Wis. 99.

See 21 Cent. Dig. tit. "Execution," § 845.

Conduct not constituting a waiver of the statutory right to redeem see Sanford *v.* Farmers' Bank, 1 Bush (Ky.) 335; Wallis *v.* Wilson, 34 Miss. 357.

28. The legislation in the various states has been by no means uniform as to the duration of the redemption period; and this applies not only to the first redemption (see Maina *v.* Elliott, 51 Cal. 8; Boyle *v.* Dalton, 44 Cal. 332; Paddack *v.* Staley, 13 Colo. App. 363, 58 Pac. 363; Moore *v.* Hopkins, 93 Ill. 505; George *v.* Hart, 56 Iowa 706, 10 N. W. 265; Eveleth *v.* Little, 16 Me. 374; Van Rensselaer *v.* Onondaga County, 1 Cow. (N. Y.) 443; Stocker *v.* Puckett, (S. D. 1903) 96 N. W. 91; Rogers *v.* Tindell, 99 Tenn. 356, 42 S. W. 86; Griffin *v.* Haines, 6

proper tender is not made of the purchase-price within that time.[29] In several jurisdictions the statutes give a subsequent judgment creditor a limited period after the expiration of the judgment debtor's right to redeem, where the latter has not exercised such right, in which to redeem the property from the execution sale.[30]

b. Method of Computation. The general rule is that where the statute gives the right of redemption within one year, or within a certain number of days, from the day of sale, the day of the sale is to be excluded from the computation.[31] Under statutes giving a certain number of months within which redemption may be made, calendar and not lunar months are intended.[32] Where the last day of redemption falls on a holiday, redemption may be made on the following secular day.[33]

c. After Expiration of Redemption Period. Where, by reason of irregularities and fraudulent conduct on the part of the officer conducting the sale, or of other parties to the proceedings, the judgment debtor has been prevented from exercising his rights during the redemption period, or where through no fault of his own he had no notice of the sale in time to allow him to redeem within the period,[34] equity in its discretion will grant relief on a proper bill, and allow the judgment debtor to redeem after the expiration of the redemption period. In several jurisdictions, however, it has been held that a party is not entitled to redemption after the expiration of the statutory period, merely on the ground

Baxt. (Tenn.) 409; Lowry *v.* McGhee, 8 Yerg. (Tenn.) 242), but also to subsequent redemptions (Boyle *v.* Dalton, 44 Cal. 332; Tharp *v.* Forrest, 76 Iowa 195, 40 N. W. 718; Gilfillan *v.* Ryder, 22 Minn. 87; State *v.* O'Connor, 5 N. D. 629, 69 N. W. 824; Stocker *v.* Puckett, (S. D. 1903) 96 N. W. 91).

In New York see Porter *v.* Pierce, 120 N. Y. 217, 24 N. E. 281, 7 L. R. A. 847 [*affirming* 43 Hun 11].

In case of a sale by the United States marshal on execution for a claim accruing in Michigan in 1842 against a public officer, two years should be allowed for redemption. Gorham *v.* Wing, 10 Mich. 486.

29. *California.*— Maina *v.* Elliott, 51 Cal. 8; Boyle *v.* Dalton, 44 Cal. 332.

Illinois.— Blair *v.* Chamblin, 39 Ill. 521, 89 Am. Dec. 322; Ross *v.* Mead, 10 Ill. 171.

Iowa.— Teabout *v.* Jaffray, 74 Iowa 28, 36 N. W. 783, 7 Am. St. Rep. 466.

New York.— *Ex p.* Raymond, 1 Den. 272; Snyder *v.* Warren, 2 Cow. 518, 14 Am. Dec. 519; Van Rensselaer *v.* Onondaga County, 1 Cow. 443; Russell *v.* Alley, 10 Paige 249.

Tennessee.— Griffin *v.* Haines, 6 Baxt. 409. See 21 Cent. Dig. tit. "Execution," § 846.

Compare Vallandingham *v.* Worthington. 85 Ky. 83, 2 S. W. 772, 8 Ky. L. Rep. 707.

Redemption after expiration of period when allowable see *infra*, X, D, 5, c.

30. Paddack *v.* Staley, 13 Colo. App. 363, 58 Pac. 363; Moore *v.* Hopkins, 93 Ill. 505; Karnes *v.* Lloyd, 52 Ill. 113; Niantic Bank *v.* Dennis, 37 Ill. 381; Phillips *v.* Demoss, 14 Ill. 410; McLagan *v.* Brown, 11 Ill. 519; *Ex p.* Raymond, 1 Den. (N. Y.) 272; Van Rensselaer *v.* Onondaga County, 1 Cow. (N. Y.) 443.

A judgment created for the express purpose of enabling the creditor to redeem is valid. Snyder *v.* Warren, 2 Cow. (N. Y.) 518, 14 Am. Dec. 519.

Confession of judgment by a debtor who has failed to redeem within a statutory period may be made in favor of another creditor upon a *bona fide* debt for the purpose of enabling the latter to redeem. Martin *v.* Judd, 60 Ill. 78.

Under the Iowa statutes see George *v.* Hart, 56 Iowa 706, 10 N. W. 265.

Under the Nebraska statutes see Gosmunt *v.* Gloe, 55 Nebr. 709, 76 N. W. 424; Philadelphia Mortg., etc., Co. *v.* Gustus, 55 Nebr. 435, 75 N. W. 1107.

31. *Indiana.*—Backer *v.* Pyne, 130 Ind. 288, 30 N. E. 21, 30 Am. St. Rep. 231; Liggett *v.* Firestone, 96 Ind. 260.

Iowa.— Teucher *v.* Hiatt, 23 Iowa 527, 92 Am. Dec. 440.

Kentucky.— See Bethel *v.* Smith, 7 Ky. L. Rep. 14.

Maine.— Eveleth *v.* Little, 16 Me. 774.

Michigan.— Gorham *v.* Wing, 10 Mich. 486.

New York.— People *v.* Perrin, 1 How. Pr. 75; *Ex p.* Monroe Bank, 7 Hill 177, 42 Am. Dec. 61; Van Rensselaer *v.* Onondaga County, 1 Cow. 443. *Compare* Morss *v.* Purvis, 68 N. Y. 225 [*affirming* 5 Thomps. & C. 140].

Tennessee.— Jones *v.* Planters' Bank, 5 Humphr. 619, 42 Am. Dec. 471.

32. Gross *v.* Fowler, 21 Cal. 392; Morss *v.* Purvis, 68 N. Y. 225 [*affirming* 5 Thomps. & C. 140]; Snyder *v.* Warren, 2 Cow. (N. Y.) 518, 14 Am. Dec. 519.

33. Backer *v.* Pyne, 130 Ind. 288, 30 N. E. 21, 30 Am. St. Rep. 231; Porter *v.* Pierce, 120 N. Y. 217, 24 N. E. 281, 7 L. R. A. 847 [*affirming* 43 Hun 11]. See, however, People *v.* Luther, 1 Wend. (N. Y.) 42.

34. *Illinois.*— Henderson *v.* Harness, 184 Ill. 520, 56 N. E. 786; Smith *v.* Huntoon, 134 Ill. 24, 24 N. E. 971, 23 Am. St. Rep. 646;

that he had no actual notice of the sale or that he was mistaken as to the time when the right of redemption expired.[35] The statutory right to redeem property from an execution sale within the prescribed period cannot be extended by any act of the party claiming that right, such as a suit to redeem or the like.[36]

6. Amount Required to Redeem — a. In General. The various redemption statutes usually provide that the parties accorded the right to redeem may do so upon the payment of the amount of the bid on the original purchase, together with a certain percentage fixed by the statute in the way of interest and charges, this percentage varying in the different states.[37] In several jurisdictions the redemption statutes provide that where the purchaser is a *bona fide* judgment creditor, and within a stipulated time after the sale makes an advance on his bid, not exceeding the amount of his judgment, he can then hold the property subject to redemption at the price bid, plus such advance, just as if he had bid the whole sum at the time of the sale.[38]

b. By Judgment Debtor. Where the judgment debtor seeks to redeem property which has been bid in and purchased at an execution sale, he may do so by paying the purchaser the amount of his bid, plus the statutory percentage,[39]

Campbell *v.* Leonard, 132 Ill. 232, 24 N. E. 65; Haworth *v.* Taylor, 108 Ill. 275; Palmer *v.* Douglas, 107 Ill. 204; Mathison *v.* Prescott, 86 Ill. 493; Trotter *v.* Smith, 59 Ill. 240; Briscoe *v.* York, 53 Ill. 484. See also Stevens *v.* Irwin, 76 Ill. 604.

Indiana.— Branch *v.* Foust, 130 Ind. 538, 30 N. E. 631.

Iowa.— Bradford *v.* Bradford, 60 Iowa 201, 14 N. W. 254 (holding, however, that the proof of fraud must be clear in order to support the acts); Wrede *v.* Cloud, 52 Iowa 371, 3 N. W. 400; Hammersham *v.* Fairall, 44 Iowa 462. See also Teabout *v.* Jaffray, 74 Iowa 28, 36 N. W. 783, 9 Am. St. Rep. 466.

Kentucky.— Smith *v.* Mason, 25 S. W. 493, 15 Ky. L. Rep. 719; Bramel *v.* Burden, 7 Ky. L. Rep. 97. See also Myers *v.* Williams, 1 Duv. 356.

New Hampshire.— Carroll *v.* McCullough, 63 N. H. 95.

South Carolina.— Keith *v.* Purvis, 4 Desauss. 114.

Tennessee.—Alexander *v.* Bailey, 2 Lea 636; Guinn *v.* Locke, 1 Head 110. But see Lowry *v.* McGhee, 8 Yerg. 242.

United States.— Graffan *v.* Burgess, 117 U. S. 180, 6 S. Ct. 686, 29 L. ed. 839 [*affirming* 10 Fed. 216]; Barstow *v.* Beckett, 122 Fed. 140.

See 21 Cent. Dig. tit. "Execution," § 849.

Contra.—Davidson *v.* Gaston, 16 Minn. 230, holding that courts cannot extend the time for redemption of lands sold on execution.

Mental or physical disability.— Humpich *v.* Drake, 44 S. W. 632, 19 Ky. L. Rep. 1782. *Contra,* Wallace *v.* Monroe, 22 Ill. App. 602.

During the Civil war by statute in some states the running of the time for redemption was suspended during the continuance of hostilities. Mixer *v.* Sibley, 53 Ill. 61; Henderson *v.* Felker, 1 Heisk. (Tenn.) 271; Reynolds *v.* Baker, 6 Coldw. (Tenn.) 221.

35. Ayres *v.* Campbell, 9 Iowa 213, 74 Am. Dec. 346; Casey *v.* Gregory, 13 B. Mon. (Ky.) 505, 56 Am. Dec. 581.

36. *California.*— Tilley *v.* Bonney, 123 Cal. 118, 55 Pac. 798.

Indiana.— See also Cummings *v.* Pottinger, 83 Ind. 294.

Iowa.— Keith *v.* Losier, 88 Iowa 649, 59 N. W. 952; Hughes *v.* Feeter, 23 Iowa 547.

Kentucky.— Bethel *v.* Smith, 7 Ky. L. Rep. 14. See also Sayre *v.* Green, 5 Ky. L. Rep. 930.

Minnesota.— Davidson *v.* Gaston, 16 Minn. 230.

See 21 Cent. Dig. tit. "Execution," § 849.

37. *California.*— McMillan *v.* Vischer, 14 Cal. 232.

Colorado.— O'Mahoney *v.* People, 24 Colo. 524, 52 Pac. 796.

Iowa.— Hays *v.* Thode, 18 Iowa 51.

Kentucky.— Southard *v.* Pope, 9 B. Mon. 261; Pollard *v.* Lucas, 7 Dana 454.

New York.— Youmans *v.* Terry, 32 Hun 624; Van Rensselaer *v.* Onondaga County, 1 Cow. 443.

Tennessee.— See Hill *v.* Walker, 6 Coldw. 424, 98 Am. Dec. 465.

See 21 Cent. Dig. tit. "Execution," § 851.

Partial payment.— See Pfaffenberger *v.* Platter, 114 Ind. 473, 16 N. E. 835.

The suppression of competition see Rice *v.* Marsh, 39 N. C. 396, 45 Am. Dec. 520.

38. Hannum *v.* Cameron, 12 Sm. & M. (Miss.) 509; Watson *v.* Hannum, 10 Sm. & M. (Miss.) 521; Rogers *v.* Tindall, 99 Tenn. 356, 42 S. W. 86; Ewing *v.* Cook, 85 Tenn. 332, 3 S. W. 507, 4 Am. St. Rep. 765; Anderson *v.* Ryan, 1 Lea (Tenn.) 658; Holmes *v.* Jarrett, 7 Heisk. (Tenn.) 509; Hill *v.* Walker, 6 Coldw. (Tenn.) 424, 98 Am. Dec. 465; Wood *v.* Chilcoat, 1 Coldw. (Tenn.) 423 (must be a *bona fide* creditor); Killibrew *v.* Elliott, 11 Humphr. (Tenn.) 442; Cooley *v.* Weeks, 10 Yerg. (Tenn.) 141. See also Cooper *v.* Murfreesboro Sav. Bank, 5 Baxt. (Tenn.) 636.

39. Foulke *v.* De Witt, (Cal. 1898) 52 Pac. 476; Loring *v.* Cooke, 3 Pick. (Mass.) 48. See cases cited *supra,* note 37.

Permanent improvements.—Under Ala. Code, § 1889, a redeeming debtor must pay the party in possession the value of all permanent improvements, and, in case of disagree-

and other lawful charges.[40] He need not, however, pay any other liens upon the property held by the purchaser.[41]

c. By Judgment Creditor. Where, however, a subsequent judgment creditor or other lienor having the statutory right to redeem seeks to redeem the property, he is required to pay all the liens of the owner of the certificate of sale paramount to the lien under which he seeks to redeem.[42] He is not, however, required to pay off junior liens.[43]

7. Tender and Payment[44] — a. Sufficiency — (i) *In General.* A party attempting to redeem property from an execution sale must make tender of the whole amount required by the statute to effect such redemption, and the payment of a less sum than that fixed by the statute is fatal to the proceedings; and the mistake being one of law does not afford ground for equitable relief upon the tender of the amount sufficient to cover the deficit.[45] Where, however, the redemptioner has tendered to the person authorized to receive it the statutory amount, his declination to receive the same for any reason does not invalidate the tender.[46] Nor is the right to redeem forfeited by failure to make seasonable ten-

ment as to the amount, each must appoint a referee. Steele *v.* Hannah, 91 Ala. 190, 9 So. 174.

40. Richardson *v.* Dunn, 79 Ala. 167; Sharp *v.* Miller, 47 Cal. 82; People *v.* Doane, 17 Cal. 476; Foulke *v.* De Witt, (Cal. 1898) 52 Pac. 476; Natter *v.* Turner, (N. J. Ch. 1903) 55 Atl. 650. See also Parmer *v.* Parmer, 74 Ala. 285; Pierce *v.* Schoonover, 149 Pa. St. 115, 24 Atl. 164.

"Lawful charges," what are, see Richardson *v.* Dunn, 79 Ala. 167. See also Fuller *v.* Evatt, 42 Ark. 230.

Redemption by agreement.— See Combs *v.* Little, 4 N. J. Eq. 310, 40 Am. Dec. 207.

41. Campbell *v.* Oaks, 68 Cal. 222, 9 Pac. 305; Sharp *v.* Miller, 47 Cal. 82; Warren *v.* Fish, 7 Minn. 432.

42. *California.*— Knight *v.* Fair, 9 Cal. 117; Vandyke *v.* Herman, 3 Cal. 295. See Tuolumne Redemption Co. *v.* Sedgwick, 15 Cal. 515.

Indiana.—Warford *v.* Sullivan, 147 Ind. 14, 46 N. E. 27.

Iowa.— Case *v.* Fry, 91 Iowa 132, 59 N. W. 333; Goode *v.* Cummings, 35 Iowa 67; Wilson *v.* Conklin, 22 Iowa 452.

Kentucky.— Warden *v.* Troutman, 74 S. W. 1085, 25 Ky. L. Rep. 247.

Michigan.—People *v.* Fralick, 12 Mich. 234.

New York.— People *v.* Ransom, 2 Hill 51.

See 21 Cent. Dig. tit. "Execution," § 853.

See, however, Walker *v.* Ball, 39 Ala. 298; Ritchie *v.* Ege, 58 Minn. 291, 59 N. W. 1020.

Compare Bender *v.* King, 111 Fed. 60.

43. Warford *v.* Sullivan, 147 Ind. 14, 46 N. E. 27; People *v.* Ransom, 4 Den. (N. Y.) 145; Jackson *v.* Budd, 7 Cow. (N. Y.) 658; Rosekrans *v.* Hughson, 1 Cow. (N. Y.) 428. See also Holmes *v.* Jarrett, 7 Heisk. (Tenn.) 506.

Sale under several judgments.— It has been held in several jurisdictions that where several executions are issued against land, and it is sold on a junior execution, and later sold under a senior one, where the purchaser at the first sale fails to redeem the land from the sale under the senior execution, a junior judgment creditor can redeem from the sale under the senior execution, without redeeming from the sale under the second execution. Sweezey *v.* Chandler, 11 Ill. 445; Abraham *v.* Holloway, 41 Minn. 156, 42 N. W. 867; Parke *v.* Hush, 29 Minn. 434, 13 N. W. 668. But see Barker *v.* Gates, 1 How. Pr. (N. Y.) 77; Silliman *v.* Wing, 7 Hill (N. Y.) 159. See also *Ex p.* Ives, 1 Hill (N. Y.) 639.

44. Payment generally see Payment.

Tender generally see Tender.

45. *California.*— Bennett *v.* Wilson, 122 Cal. 509, 55 Pac. 390, 68 Am. St. Rep. 61, holding likewise that while it is immaterial whence the money comes, it must be tendered by a lawful redemptioner. See, however, Walsh *v.* Erwin, 115 Fed. 531.

Illinois.— Scofield *v.* Bessenden, 15 Ill. 78.

Iowa.— Case *v.* Fry, 91 Iowa 132, 59 N. W. 333.

Mississippi.— Walker *v.* Brown, 45 Miss. 615.

New York.— *Ex p.* Peru Iron Co., 7 Cow. 540; Dickenson *v.* Gilliland, 1 Cow. 481. See also Hall *v.* Fisher, 9 Barb. 17 [*modifying* 1 Barb. Ch. 53].

South Carolina.— Ruger *v.* McBurney, Harp. Eq. 21.

Texas.— Valdez *v.* Cohen, 23 Tex. Civ. App. 475, 56 S. W. 375.

See 21 Cent. Dig. tit. "Execution," §§ 857, 858.

Presumption of payment.— Middlesboro Waterworks *v.* Neal, 105 Ky. 586, 49 S. W. 428, 20 Ky. L. Rep. 1403.

Where the deficiency is nominal, however, the mistake will not invalidate the redemption. *Ex p.* Becker, 4 Hill (N. Y.) 613.

46. *Alabama.*— Steele *v.* Hanna, 91 Ala. 190, 9 So. 174; Posey *v.* Pressley, 60 Ala. 243; Walker *v.* Ball, 39 Ala. 298; Couthway *v.* Berghaus, 25 Ala. 393.

California.— People *v.* Doane, 17 Cal. 476.

Iowa.— Armstrong *v.* Pierson, 5 Iowa 317. See also Fitzgerald *v.* Kelso, 71 Iowa 731, 29 N. W. 943.

Louisiana.— Boone *v.* Pelichet, 13 La. Ann. 203.

Minnesota.— Ritchie *v.* Ege, 58 Minn. 291, 59 N. W. 1020; Abraham *v.* Holloway, 41 Minn. 156, 42 N. W. 867.

See 21 Cent. Dig. tit. "Execution," § 863.

der, when such tender was prevented by inability, after diligent effort to find the purchaser or any person authorized to act in his behalf.[47]

(II) *MEDIUM OF PAYMENT.* Redemption should be made in money, and, in the absence of statute, it has been held that such redemption money is what is regarded as current money at the time and place, although not strictly a legal tender, unless the judgment under which the sale was made was rendered payable in a particular kind of money.[48]

b. Parties to Whom Payment Should Be Made. The various redemption statutes differ to some extent in designating the persons to whom the redemption money should be tendered or paid. Most of the statutes make the officer conducting the sale, or his agent or personal representative, a proper person to receive it.[49] Under such statutes tender or payment to the execution purchaser is equally valid.[50] Where, however, the purchaser has parted with the certificate of purchase, payment should be made to his grantee or vendee, if known to the redemptioner.[51] Some statutes provide for payment of the money to the clerk of the court in the county where the sale took place;[52] although, in the absence of such statutory provision, payment to the clerk of the court has been held to be of no effect.[53]

8. PROCEEDINGS TO EFFECT — a. Notice. Where the statute directs that the payment of the redemption money be made to the officer conducting the sale, the general rule is that no formal notice need be given to the purchaser, and the

See, however, Simpson *v.* Sparkman, 12 Lea (Tenn.) 360.

Personal tender.— See Rothwell *v.* Gettys, 11 Humphr. (Tenn.) 135.

47. Adams *v.* Kable, 6 B. Mon. (Ky.) 384, 44 Am. Dec. 772; Southworth *v.* Smith, 7 Cush. (Mass.) 391.

In Kentucky it has been held that to preserve and enforce the right of redemption no formal tender is necessary where the property is claimed absolutely by the vendee and all right of redemption resisted. Sandford *v.* Farmers' Bank, 1 Bush 335; Stapp *v.* Phelps, 7 Dana 296.

48. People *v.* Mayhew, 26 Cal. 655; Webb *v.* Watson, 18 Iowa 537. See also Ritchie *v.* Ege, 58 Minn. 291, 59 N. W. 1020.

A payment in current bank-bills, if accepted by the sheriff without objection, has been held in New York to be a good payment for the purpose of redeeming real estate sold on execution. Hall *v.* Fisher, 9 Barb. (N. Y.) 17; *Ex p.* Board, 4 Cow. (N. Y.) 420.

By agreement, according to a New York decision, the judgment debtor may redeem from an execution sale by the payment of property or securities other than money. Stone *v.* Smith, 2 How. Pr. (N. Y.) 117.

Checks and certificates of deposit, not being regarded as current money, are not as a rule available to redeem property sold on execution (People *v.* Hays, 4 Cal. 127; Dougherty *v.* Hughes, 3 Greene (Iowa) 92; Lytle *v.* Etherly, 10 Yerg. (Tenn.) 389); although where the officer authorized by statute to receive redemption money is regarded as the agent of the purchaser and the reception by him of checks, drafts, or currency which is not legal tender has been held to fulfil the requirements of the statute (People *v.* Mayhew, 26 Cal. 655; Bowen *v.* Van Gundy, 133 Ind. 670, 33 N. E. 687; Webb *v.* Watson, 18 Iowa 537; *Ex p.* Becker, 4 Hill (N. Y.) 613; Buford *v.* Henzier, 4 Fed. Cas. No. 2,114, 8 Biss. 177).

49. Roan *v.* Rohrer, 72 Ill. 582; Robertson *v.* Dennis, 20 Ill. 313; Stone *v.* Gardner, 20 Ill. 304, 71 Am. Dec. 268; Elkin *v.* People, 4 Ill. 207, 36 Am. Dec. 541 (officer may receive the redemption money whether in or out of office at the time of redemption); Dougherty *v.* Hughes, 3 Greene (Iowa) 92; Davis *v.* Seymour, 16 Minn. 210; Williams *v.* Lash, 8 Minn. 496; Morss *v.* Purvis, 68 N. Y. 225 [*affirming* 5 Thomps. & C. 140]; Livingston *v.* Arnoux, 56 N. Y. 507 [*affirming* 15 Abb. Pr. N. S. 158]; Gilchrist *v.* Comfort, 34 N. Y. 235; Griffin *v.* Chase, 23 Barb. (N. Y.) 278 (also holding that payment to the county clerk is not sufficient unless he has been commissioned as a deputy); Hall *v.* Fisher, 9 Barb. (N. Y.) 17; People *v.* Baker, 20 Wend. (N. Y.) 602 (holding that payment may be made to a deputy sheriff, although the term of office of his principal has expired); *Ex p.* Board, 4 Cow. (N. Y.) 420. See People *v.* Lynch, 68 N. Y. 473.

50. Robertson *v.* Dennis, 20 Ill. 313; Stone *v.* Gardner, 20 Ill. 304, 71 Am. Dec. 268; Armstrong *v.* Pierson, 5 Iowa 317.

51. Camp *v.* Simon, 34 Ala. 126; Barringer *v.* Burke, 21 Ala. 765 (where land sold under execution was purchased and held by the trustee of a married woman, and it was held that tender to the trustee was sufficient); People *v.* Baker, 20 Wend. (N. Y.) 602.

52. Jessup *v.* Carey, 61 Ind. 584; Armstrong *v.* Pierson, 5 Iowa 317; Sample *v.* Davis, 4 Greene (Iowa) 117; Rogers *v.* Rogers, (Tenn. Ch. App. 1895) 35 S. W. 890; Rothwell *v.* Gettys, 11 Humphr. (Tenn.) 135.

53. Stone *v.* Gardner, 20 Ill. 304, 71 Am. Dec. 268; People *v.* Rathbun, 15 N. Y. 528.

payment of the money and the filing of the papers required by statute are sufficient.[54]

b. Production of Papers. Where the statutes conferring the right of redemption and designating the parties having the right to redeem require the production and tender by the party seeking to redeem of certain specified proofs of certain requisite facts,[55] the due production of those particular proofs are as much a prerequisite to his right as the existence of the facts to be proved.[56] Such proofs, however, may be waived by the purchaser, or the party claiming under him.[57] They cannot, however, be waived by the officer conducting the sale.[58]

c. Receipt or Certificate. In the absence of statute to the contrary, the receipt or certificate of the sheriff conducting the sale is sufficient evidence of the payment of the redemption money, and establishes a complete redemption of the property from the sale under the execution.[59]

9. Waiver and Estoppel.[60] The general rule is that the legality of a redemption cannot be called in question by the purchaser, where he has accepted the redemption money, or any part thereof upon agreed terms, and such redemption may be completed according to the terms of the agreement, even after the expiration of the redemption period;[61] nor can it be collaterally attacked by a

54. Rice *v.* Puett, 81 Ind. 230; Warren *v.* Fish, 7 Minn. 432; Hurt *v.* Brien, 1 Tenn. Ch. 443, holding, however, that the redemptioner's receipt filed with the clerk must contain on its face sufficient to operate as a notice in law that credit is given to the debtor and to enable him to redeem. But see Scott *v.* Patterson, 1 Wash. 487, 20 Pac. 593, under the Washington statute.

55. For example where a subsequent judgment creditor is seeking to redeem, many of the statutes require that he present a duly certified copy of the docket of the judgment under which he seeks to redeem. Haskell *v.* Manlove, 14 Cal. 54; Nehrboss *v.* Bliss, 88 N. Y. 600, 2 N. Y. Civ. Proc. 39; Miller *v.* Lewis, 4 N. Y. 554; Brackett *v.* Miller, 24 Hun (N. Y.) 560; People *v.* Ransom, 4 Den. (N. Y.) 145; People *v.* Sheriff, 19 Wend. (N. Y.) 87; Waller *v.* Harris, 7 Paige (N. Y.) 167 [*affirmed* in 20 Wend. 555, 32 Am. Dec. 590]; Prescott *v.* Everts, 4 Wis. 314.

Affidavit of amount due.—Under some statutes a judgment creditor seeking to redeem on a sale under a prior judgment must produce, among other documents, an affidavit of the amount due on the judgment or decree under which he claims the right to redeem. Fry *v.* Warfield-Howell-Watt Co., 105 Iowa 559, 75 N. W. 485; Craig *v.* Alcorn, 46 Iowa 560 (holding, however, that such affidavit need not be in any particular form, and is sufficient if it clearly indicates the amount due); Smith *v.* Miller, 25 N. Y. 619; Muir *v.* Leitch, 7 Barb. (N. Y.) 341; People *v.* Covell, 18 Wend. (N. Y.) 598.

An affidavit made by an agent as to the amount due on a judgment should show that he has means of knowledge, and state the amount positively, and not according to his belief merely. *Ex p.* Monroe Bank, 7 Hill (N. Y.) 177, 42 Am. Dec. 61; *Ex p.* Shumway, 4 Den. (N. Y.) 258, holding likewise that such affidavit cannot be made by the attorney of record, as such.

Assignment of judgment.— See People *v.* Fleming, 2 N. Y. 484; Hall *v.* Thomas, 27 Barb. (N. Y.) 55; Aylesworth *v.* Brown, 10 Barb. (N. Y.) 167; *Ex p.* Aldrich, 1 Den. (N. Y.) 662; *Ex p.* Newell, 4 Hill (N. Y.) 608 (holding that the production of the original is sufficient); *Ex p.* Peru Iron Co., 7 Cow. (N. Y.) 540.

Mortgage.— Where the party seeking to redeem from a judgment sale presented the affidavit of a third person, stating that he saw the owner of the mortgage upon such property execute an assignment thereof to the party seeking to redeem, and that such party was then the owner and holder thereof, it was held that this was not a sufficient compliance with the requirements of the statute, but the redemption was valid. Williams *v.* Lash, 8 Minn. 496.

Under the Illinois statute, a judgment creditor, when he pays money to the sheriff to redeem land sold on execution, must at the same time deliver to him an execution on his own judgment. Oldfield *v.* Eulert, 148 Ill. 614, 36 N. E. 615, 39 Am. St. Rep. 231; Stone *v.* Gardner, 20 Ill. 304, 71 Am. Dec. 268.

56. Haskell *v.* Manlove, 14 Cal. 54; People *v.* Ransom, 2 N. Y. 490 [*affirming* 4 Den. 145].

57. Bagley *v.* Ward, 37 Cal. 121, 99 Am. Dec. 256; Chautauqua County Bank *v.* Risley, 4 Den. (N. Y.) 480; Vergennes Bank *v.* Warren, 7 Hill (N. Y.) 91. See also People *v.* Fralick, 12 Mich. 234.

58. Vergennes Bank *v.* Warren, 7 Hill (N. Y.) 91; People *v.* Broome, 19 Wend. (N. Y.) 87; Waller *v.* Harris, 7 Paige (N. Y.) 167 [*affirmed* in 20 Wend. 555, 32 Am. Dec. 590].

59. Ritchie *v.* Ege, 58 Minn. 291, 59 N. W. 102; Sprandel *v.* Houde, 54 Minn. 308, 56 N. W. 34; Elsworth *v.* Muldoon, 15 Abb. Pr. N. S. (N. Y.) 440; Livingstone *v.* Arnoux, 15 Abb. Pr. N. S. N. Y. 158.

In Illinois, however, under the act of Feb. 12, 1853, see Ralph *v.* Lefler, 23 Ill. 52.

60. Estoppel generally see Estoppel.

61. *Arkansas.*— Allen *v.* McGaughey, 31 Ark. 252.

third party;[62] nor can a defect or irregularity in redemption proceedings be urged by the debtor or one claiming under him, where neither of them sought to redeem during the statutory period.[63] In some jurisdictions, however, it is held that the acceptance by the purchaser of the redemption money or any portion thereof will not estop the purchaser thereafter from questioning the legality of the redemption on the ground of irregularities or defects in the proceedings.[64]

10. Actions to Redeem — a. Right of Action — (i) *General Rule.* The right to redeem property from an execution sale is not perfect and cannot be enforced by an action at law or a bill in equity,[65] until there has been either a full performance by plaintiff of all the statutory requirements, or a valid and sufficient excuse for non-performance without any fault or neglect on the part of such plaintiff.[66]

(ii) *Condition Precedent.*[67] In some jurisdictions, in an action to enforce the right to redeem property from an execution sale, if the declaration, complaint, or petition fails to show that payment or tender was made before the pleadings were filed, a tender made in such pleadings is not sufficient to authorize a judgment or decree for the redemption, unless, in connection with such offer, the pleadings show a valid and sufficient excuse for the omission to make such tender before the action was brought.[68] In other jurisdictions, however, it is held that a tender of payment contained in the complaint or petition, or payment

California.— Bennett *v.* Wilson, 122 Cal. 509, 55 Pac. 390, 68 Am. St. Rep. 61, holding, however, that the sheriff is not such an agent of the purchaser as that by receiving the money he would necessarily bind the purchaser or previous redemptioner to accept it.

Illinois.— Pearson *v.* Pearson, 131 Ill. 464, 23 N. E. 418; Kell *v.* Worden, 110 Ill. 310; Karnes *v.* Lloyd, 52 Ill. 113; Massey *v.* Westcott, 40 Ill. 160; Kaufman *v.* Smallwood, 36 Ill. 504, 87 Am. Dec. 230.

Indiana.— Warford *v.* Sullivan, 147 Ind. 14, 46 N. E. 27; Hervey *v.* Krost, 116 Ind. 268, 19 N. E. 125; Ringle *v.* Kendallville First Nat. Bank, 107 Ind. 425, 8 N. E. 236; Carver *v.* Howard, 92 Ind. 173; Felton *v.* Smith, 84 Ind. 485; Goddard *v.* Renner, 57 Ind. 532; Spath *v.* Hankins, 55 Ind. 155; Hughart *v.* Lenburg, 45 Ind. 498.

Iowa.— Wilson *v.* Eddy, 122 Iowa 415, 98 N. W. 150; Kilbride *v.* Munn, 55 Iowa 445, 8 N. W. 305; Burton *v.* Emerson, 4 Greene 393.

Kentucky.— Fitzpatrick *v.* Apperson, 79 Ky. 272, 2 Ky. L. Rep. 249; Southard *v.* Pope, 9 B. Mon. 261.

Utah.— McCormick *v.* Greenhow, 2 Utah 263.

Wisconsin.— Ott *v.* Rape, 24 Wis. 336, 1 Am. Rep. 186.

United States.— See White *v.* Crow, 110 U. S. 103, 4 S. Ct. 71, 28 L. ed. 113 [*affirming* 17 Fed. 98, 2 McCrary 310]. And *compare* Bender *v.* King, 111 Fed. 60.

See 21 Cent. Dig. tit. "Execution," § 878 *et seq.*

62. Off *v.* Finkelstein, 200 Ill. 40, 65 N. E. 439 [*affirming* 100 Ill. App. 14]; People *v.* Bunn, Lalor (N. Y.) 265.

63. Massey *v.* Westcott, 40 Ill. 160.

64. People *v.* Rathbun, 15 N. Y. 528; Griffin *v.* Chase, 23 Barb. (N. Y.) 278; Waller *v.* Harris, 7 Paige (N. Y.) 167 [*affirmed* in 20 Wend. 555, 32 Am. Dec. 590]. *Compare* Phyfe *v.* Riley, 15 Wend. (N. Y.) 248, 30 Am. Dec. 55. See also *In re* Eleventh Ave., 81 N. Y. 436; Rambo *v.* Donelly, 9 Baxt. (Tenn.) 418 (holding that the purchaser waives no rights by accepting from the debtor partial payments of the redemption money); Smith *v.* Kincaid, 10 Humphr. (Tenn.) 73; Thomas *v.* Bowman, 30 Ill. 84.

65. Bill in equity or action at law.—Where a party entitled by statute to redeem property from an execution sale has fulfilled all the statutory requirements, and the purchaser, or the party claiming under him, fails or refuses to make restitution of the property, the proper remedy of such redemptioner is a bill in equity (Vick *v.* Beverly, 112 Ala. 458, 21 So. 325; Aycock *v.* Adler, 87 Ala. 190, 5 So. 794; Walker *v.* Ball, 39 Ala. 298; Moore *v.* Gore, 35 Ala. 701; Morrill *v.* Everett, 83 Me. 290, 22 Atl. 172; Ewing *v.* Cook, 85 Tenn. 332, 3 S. W. 507, 4 Am. St. Rep. 765; Mitchell *v.* Brown, 6 Coldw. (Tenn.) 505; Paris *v.* Burger, 4 Humphr. (Tenn.) 325; Hawkins *v.* Jameson, Mart. & Y. (Tenn.) 83; Evans *v.* Pike, 118 U. S. 241, 6 S. Ct. 1090, 30 L. ed. 234. See Alexander *v.* Colcock, 2 Baxt. (Tenn.) 282), in the absence of statute giving him an action at law therefor (Posey *v.* Pressley, 60 Ala. 243; Jonsen *v.* Nabring, 50 Ala. 392; Parker *v.* Dacres, 130 U. S. 43, 9 S. Ct. 433, 32 L. ed. 848 [*affirming* 2 Wash. Terr. 439, 7 Pac. 893]).

66. Spoor *v.* Phillips, 27 Ala. 193; Stone *v.* Gardner, 20 Ill. 304, 71 Am. Dec. 268. See also Harmon *v.* Barstow, 23 Miss. 276.

67. Conditions precedent generally see Actions, 1 Cyc. 692 *et seq.*

68. Moore *v.* Gore, 35 Ala. 701; Spoor *v.* Phillips, 27 Ala. 193; Sayre *v.* Green, 5 Ky. L. Rep. 930; Ruger *v.* McBurney, Harp. Eq. (S. C.) 21. See also Freeman *v.* Jordan, 17 Ala. 500, holding that where the action of the court is necessary to ascertain what sum is

of the money in court prior to the rendition of the judgment or decree, is sufficient.[69]

b. Time to Bring Action. An action at law or bill in equity to enforce redemption must, however, be brought within a reasonable time after the refusal of the purchaser to make restitution, and laches on the part of the redemptioner will bar the right of action.[70]

c. Parties.[71] Where the execution debtor has tendered the redemption money to the purchaser within the redemption period, his vendee may maintain a bill to redeem without making such debtor a party;[72] and where property has been redeemed from the execution purchaser, such purchaser is not a necessary party to a suit by his redemptioner to enforce the right of redemption against a subsequent redemptioner.[73]

d. Pleadings.[74] In an action at law or a suit in equity to enforce the right of redemption, the complaint or bill should allege an attempt to exercise the right of redemption in the usual statutory mode.[75] Thus, under a statute giving the judgment debtor the right to redeem only upon condition that possession of the land was delivered to the purchaser within a stipulated period after the sale without suit a bill to enforce the right of redemption which fails to allege the fulfilment of such condition precedent is fatally defective.[76]

to be paid in a suit to redeem land sold on execution, an offer by the complainant to pay such sum as the chancellor may decree and to bring the same into court is sufficient to entitle him to its aid. See, however, Worthington *v.* Miller, 134 Ala. 420, 32 So. 748.

69. *Maine.*— Foss *v.* Stickney, 5 Me. 390.

Minnesota.— Ritchie *v.* Ege, 58 Minn. 291, 59 N. W. 1020.

Mississippi.— Watson *v.* Hannum, 10 Sm. & M. 521.

Pennsylvania.— Hicks *v.* Griswold, 2 Lack. Leg. N. 129.

Tennessee.— Guinn *v.* Locke, 1 Head 110. See also Rogers *v.* Timball, 99 Tenn. 356, 42 S. W. 86.

Texas.— See Brackenridge *v.* Cobb, 2 Tex. Civ. App. 261, 21 S. W. 614.

See 21 Cent. Dig. tit. "Execution," § 884.

Compare Boone *v.* Pelichet, 13 La. Ann. 203.

70. *Indiana.*— Warford *v.* Sullivan, 147 Ind. 14, 46 N. E. 27.

Iowa.— Ettenheimer *v.* Northgraves, 75 Iowa 28, 39 N. W. 120; Tarkington *v.* Corley, 59 Iowa 28, 12 N. W. 737.

Maine.— Boothby *v.* Bangor Commercial Bank, 30 Me. 361.

Massachusetts.— Houghton *v.* Field, 2 Cush. 141, one year from time of sale.

Nebraska.— Parker *v.* Kuhn, 21 Nebr. 413, 32 N. W. 74, 59 Am. Rep. 838.

Pennsylvania.— Salsbury *v.* Black, 119 Pa. St. 200, 13 Atl. 67, 4 Am. St. Rep. 631.

Texas.— Brackenridge *v.* Cobb, 2 Tex. Civ. App. 261, 21 S. W. 614.

United States.—Parker *v.* Dacres, 130 U. S. 43, 9 S. Ct. 433, 32 L. ed. 848 [*affirming* 2 Wash. Terr. 439, 7 Pac. 893].

See 21 Cent. Dig. tit. "Execution," § 885.

71. Parties generally see PARTIES.

72. Jones *v.* Planters' Bank, 5 Humphr. (Tenn.) 619, 42 Am. Dec. 471. See also Williams *v.* Howard, 7 N. C. 74.

73. Bennett *v.* Wilson, 122 Cal. 509, 55 Pac. 390, 68 Am. St. Rep. 61.

74. Pleading generally see PLEADING.

75. Hence a complaint or bill containing no averment that the complainant had paid or tendered the redemption money to any person authorized to receive it within the redemption period, or that he had taken any of the steps prescribed by the statute to effect the redemption, and which merely alleges a readiness to redeem and an offer to pay the redemption money is bad on demurrer.

Alabama.— Stocks *v.* Young, 67 Ala. 341; Paulling *v.* Meade, 23 Ala. 505.

Illinois.— Hyman *v.* Bogue, 135 Ill. 9, 26 N. E. 40.

Minnesota.— Dunn *v.* Dewey, 75 Minn. 153, 77 N. W. 795.

New Hampshire.— Perry *v.* Carr, 41 N. H. 371.

Washington.— Bryant *v.* Stetson, etc., Mill Co., 13 Wash. 692, 43 Pac. 931.

See 21 Cent. Dig. tit. "Execution," § 887.

Compare Bennett *v.* Wilson, 122 Cal. 509, 55 Pac. 390, 68 Am. St. Rep. 61 (holding that a complaint to establish a right of redemption over another redemptioner by showing that the judgment under which the latter redeemed was void need not allege that there was a defense to such judgment on the merits); Lock *v.* Edmundson, 1 Baxt. (Tenn.) 282.

An answer denying that plaintiff is a junior lien-holder as alleged, and denying the payment by plaintiff and acceptance by defendant of the redemption money as alleged, is not demurrable. Bolton *v.* Owen, 68 Iowa 230, 26 N. W. 89.

76. Richardson *v.* Dunn, 79 Ala. 167 (holding, however, that an allegation that the land at the time of the sale was in possession of a tenant to whom notice was given by the purchaser, and from whom the purchaser afterward collected rents, was sufficient, and in that case it was unnecessary to allege that

e. Decree.[77] Under a statute authorizing a judgment debtor to redeem the interest in his land which may have been sold under execution, a decree that the purchaser shall convey the land by a quitclaim deed is erroneous, since he may have acquired some other interest than that which passed at the sale.[78]

f. Accounting For Rents and Profits. Under statutes giving to the execution purchaser the right of possession of the property and the rents and profits from the day of sale until the redemption of the property, such purchaser must account to the redemptioner for the rents and profits thus received by him during the interim between the sale and the redemption.[79] In some jurisdictions, however, the liability of the purchaser to account for the rents and profits, except by way of offset to improvements made, does not arise until he is put in default by a proper tender of the amount necessary to redeem.[80]

11. Operation and Effect — a. On Title of Purchaser. Upon the redemption of property from an execution sale, the estate of the execution purchaser in such property is destroyed and determined, and the redemptioner succeeds to whatever right, title, or interest the purchaser acquired at the sale,[81] and a deed made by the sheriff to the execution purchaser, or one claiming under him, after the statutory redemption thereof, passes no rights.[82]

b. Assignment of Certificate of Sale to Party Entitled to Redeem. The rule

complainant delivered possession to the purchaser within ten days after sale); Stocks *v.* Young, 67 Ala. 341; Sandford *v.* Ochtalomi, 23 Ala. C69 (holding, however, that an allegation that the purchaser consented to the retention of possession by the debtor as tenant was sufficient); Paulling *v.* Meade, 23 Ala. 505. *Compare* Aycock *v.* Adler, 87 Ala. 190, 5 So. 794.

77. Decree generally see Equity, 16 Cyc. 471.

78. Weathers *v.* Spears, 27 Ala. 455, holding that in a suit to redeem the court of equity is not authorized to determine conflicting titles and to put the judgment debtor in a better position than he occupied when the land was sold. See May *v.* Eastin, 2 Port. (Ala.) 414. See also Graves *v.* Dugan, 6 Dana (Ky.) 331 (where defendant purchased plaintiff's land at an execution sale under an agreement to allow plaintiff to redeem, and plaintiff did attempt to redeem but the trust could not be enforced because not in writing, and it was held that plaintiff was entitled, in his prayer for general relief in an action to enforce the trust, to a return of the money paid with interest); Sewall *v.* Sewall, 130 Mass. 201.

79. *Kentucky.*— Adams *v.* Kable, 6 B. Mon. 384, 44 Am. Dec. 772.

Massachusetts.— Tucker *v.* Buffum, 16 Pick. 6.

New Hampshire.— See Mason *v.* Davis, 11 N. H. 383.

New Jersey.—Natter *v.* Turner, (Ch. 1903) 55 Atl. 650.

Oregon.— Cartwright *v.* Savage, 5 Oreg. 397.

Tennessee.— Mabry *v.* Churchwell, 6 Heisk. 417, this privilege is a personal right of the debtor and does not extend to his heirs or assignees. See, however, Kannon *v.* Pillow, 7 Humphr. 281. *Compare* Burk *v.* State Bank, 3 Head 686; Cooley *v.* Weeks, 10 Yerg. 141.

Washington.— Kennedy *v.* Trumble, 32 Wash. 614, 73 Pac. 698.

United States.— See Balfour *v.* Rogers, 64 Fed. 925, construing an Oregon statute.

See 21 Cent. Dig. tit. "Execution," § 888½.

Where the judgment debtor was allowed to retain the property, he could not compel upon redeeming the same to account to the purchaser for the rents and profits of the premises. Hall *v.* Fisher, 1 Barb. Ch. (N. Y.) 53.

80. Gardner *v.* Lanford, 86 Ala. 508, 5 So. 879; Weathers *v.* Spears, 27 Ala. 455; Spoor *v.* Phillips, 27 Ala. 193; Cushing *v.* Thompson, 34 Me. 496; Dakin *v.* Goddard, 32 Me. 138. See also Wilhelm *v.* Humphries, 97 Ind. 520; Hicks *v.* Griswold, 2 Lack. Leg. N. (Pa.) 129.

81. *Alabama.*— Morris *v.* Beebe, 54 Ala. 300.

Colorado.—Hartsock *v.* John Wright Hardware Co., 16 Colo. App. 48, 64 Pac. 245.

Minnesota.— White *v.* Leeds Importing Co., 72 Minn. 352, 75 N. W. 595, 761, 71 Am. St. Rep. 488.

New Hampshire.— Proctor *v.* Green, 59 N. H. 350.

New York.— Rankin *v.* Arndt, 44 Barb. 251; Boyce *v.* Wight, 2 Abb. N. Cas. 163; Phyfe *v.* Riley, 15 Wend. 248, 30 Am. Dec. 55.

Oregon.— Brand *v.* Baker, 42 Oreg. 426, 71 Pac. 320, holding likewise that an execution sale cannot be vacated after redemption therefrom, which terminates the effect of the sale.

United States.— Lauriat *v.* Stratton, 11 Fed. 107, 6 Sawy. 339.

See 21 Cent. Dig. tit. "Execution," § 892.

82. Pekin Min., etc., Co. *v.* Kennedy, 81 Cal. 356, 22 Pac. 679; Colorado Mfg. Co. *v.* McDonald, 15 Colo. 516, 25 Pac. 712; Sweeney *v.* Craddocks, 6 B. Mon. (Ky.) 590; Warren *v.* Fish, 7 Minn. 432.

in some jurisdictions[83] is that the taking of an assignment of a certificate of sale, although by a party entitled to redeem, is not a redemption of the property under the statute, and that anyone having a judgment against the debtor whose property was sold may redeem from such sale within the statutory period on complying with the terms of the statute.[84]

c. Interest Acquired by Redemptioner — (I) *In General* — (A) *Other Than Debtor or His Successor in Interest.* Upon the redemption of property from an execution sale, a sheriff's deed to a redemptioner, other than the debtor or his successor in interest, passes the same title as it would pass to the purchaser, if executed to him without redemption; and, since the sale of land on execution destroys all liens subsequent to the judgment under which it is sold, a judgment creditor redeeming property from an execution sale takes title discharged from all prior liens, whether by judgment or otherwise.[85]

(B) *Debtor or His Successor in Interest.* In some jurisdictions the rule is that where redemption is made by the judgment debtor or his successor in interest, such redemption does not have the effect of transferring to him the rights of the purchaser, subject to be defeated by other redemptioners, but that such redemption simply destroys the effect of the sale as such, and applies the money realized thereby as a payment upon the judgment upon which the property was sold, and extinguishes all rights of the purchaser;[86] and in jurisdictions where this rule is adhered to, upon a redemption by the judgment debtor or his grantee, the original liens are restored and the property may be sold again for any balance remaining unpaid on the original judgment, or under any other judgment which was a lien upon the property prior to the original sale.[87]

83. In other jurisdictions, however, it is held that the assignment of the sheriff's certificate of sale to a person having the right to redeem operates as a redemption from the execution sale. Smith *v.* Michigan State Bank, 102 Mich. 5, 60 N. W. 438; Banning *v.* Sabin, 51 Minn. 129, 53 N. W. 1, 45 Minn. 431, 48 N. W. 8; *Ex p.* Peru Iron Co., 7 Cow. (N. Y.) 540. See, however, Rankin *v.* Arndt, 44 Barb. (N. Y.) 251.

84. Moore *v.* Hopkins, 93 Ill. 505; Chicago, etc., R. Co. *v.* Chamberlain, 84 Ill. 333; McRoberts *v.* Conover, 71 Ill. 524; Lloyd *v.* Karnes, 45 Ill. 62. See Thomas *v.* Thomas, 87 Ky. 343, 10 S. W. 282, 10 Ky. L. Rep. 223. See also Finch *v.* Turner, 21 Colo. 287, 40 Pac. 565.

85. *California.*— Bagley *v.* Ward, 37 Cal. 121, 99 Am. Dec. 256; Abadie *v.* Lobero, 36 Cal. 390, holding, however, that, where the execution plaintiff was the purchaser, the redemptioner does not acquire any interest in the judgment debt or security therefor, but only the right to compel the issuance of a deed on the expiration of the redemption period.

Colorado.— Floyd *v.* Sellers, 7 Colo. App. 498, 44 Pac. 373.

Illinois.— Off *v.* Finkelstein, 200 Ill. 40, 65 N. E. 439 [*affirming* 100 Ill. App. 14]; Lamb *v.* Richards, 43 Ill. 312; Merry *v.* Bostwick, 13 Ill. 398, 54 Am. Dec. 434; Sweezey *v.* Chandler, 11 Ill. 445. See also Hill *v.* Blackwelder, 113 Ill. 283; Massey *v.* Westcott, 40 Ill. 160.

Indiana.— Hervey *v.* Krost, 116 Ind. 268, 19 N. E. 125.

Iowa.— Boggs *v.* Douglass, 89 Iowa 150, 56 N. W. 412; Scribner *v.* Vandercook, 54 Iowa 580, 4 N. W. 925, 6 N. W. 896; Hays *v.* Thode, 18 Iowa 51.

Minnesota.— Sprandel *v.* Houde, 54 Minn. 308, 56 N. W. 34.

New York.— See Neilson *v.* Neilson, 5 Barb. 565.

Tennessee.— Custer *v.* Russey, (Ch. App. 1898) 51 S. W. 126.

See 21 Cent. Dig. tit. "Execution," § 894.

86. Botts *v.* Botts, 74 S. W. 1093, 25 Ky. L. Rep. 300; Standish *v.* Vosberg, 27 Minn. 175, 6 N. W. 489; Horton *v.* Maffitt, 14 Minn. 289, 100 Am. Dec. 222; Rutherford *v.* Newman, 8 Minn. 47, 82 Am. Dec. 122; Warren *v.* Fish, 7 Minn. 432; Flanders *v.* Aumack, 32 Oreg. 19, 51 Pac. 447, 67 Am. St. Rep. 504; Settlemire *v.* Newsome, 10 Oreg. 446. See also Reed *v.* Ward, 51 Ind. 215; Davis *v.* Langsdale, 41 Ind. 399; State *v.* Sherill, 34 Ind. 57.

Debtor's vendee.— See Jones *v.* Planters' Bank, 5 Humphr. (Tenn.) 619, 42 Am. Dec. 471.

Sale of equity of redemption.— See Cavanaugh *v.* Willson, 35 S. W. 918, 18 Ky. L. Rep. 175; Marshall *v.* Green, 1 S. W. 602, 8 Ky. L. Rep. 346.

87. *Arkansas.*— Allen *v.* McGaughey, 31 Ark. 252.

Georgia.— See also Christie *v.* Whaley, 79 Ga. 188, 3 S. E. 896.

Illinois.— Davenport *v.* Karnes, 70 Ill. 465.

Indiana.— Lemmon *v.* Osborn, 153 Ind. 172, 54 N. E. 1058; Cauthorn *v.* Indianapolis, etc., R. Co., 58 Ind. 14; Goddard *v.* Renner, 57 Ind. 532.

Iowa.— Byers *v.* McEniry, 117 Iowa 499, 91 N. W. 797.

New York.— Titus *v.* Lewis, 3 Barb. 70; Wood *v.* Colvin, 5 Hill 228.

(II) *WHERE REDEMPTIONER'S JUDGMENT OR EXECUTION IS INVALID.* In some jurisdictions a judgment creditor who in good faith redeems land from an execution sale under a prior judgment and receives a sheriff's deed acquires a good title, although the judgment under which he redeemed was void for irregularity.[88]

(III) *REVERSAL OF JUDGMENT FROM WHICH REDEMPTION WAS HAD.* A redemptioner is entitled to protection as a purchaser, and his rights as such are not impaired by a reversal, after he has effected his redemption, of the judgment under which the sale from which he redeemed was made.[89]

(IV) *SATISFACTION OF JUDGMENT.* In some jurisdictions it is held that, where a judgment creditor has redeemed property from an execution sale by virtue of his judgment, this does not constitute a satisfaction thereof, and he may redeem again under the same judgment from a sale of the property under a judgment senior to his own and the one from which he first redeemed;[90] nor is such redemption a bar to an action at law to enforce the payment of the judgment.[91]

d. Conveyance to Redemptioner. Where the redemptioner has fulfilled all the statutory requirements necessary to effect a redemption, he is entitled to a deed to the property from the sheriff;[92] or, in case the purchaser has already received a conveyance from the sheriff, then the redemptioner is entitled to a conveyance from the purchaser, and may proceed by a bill in equity, or other statutory remedy, to enforce his rights.[93]

e. Application of Redemption Money. Under the various redemption statutes the payment of the amount necessary to redeem by a party so entitled is purely voluntary and constitutes a waiver of all defects in the proceedings, and such money is not recoverable back on account of such alleged defects;[94] and, where

Oregon.— Flanders *v.* Aumack, 32 Oreg. 19, 51 Pac. 447, 67 Am. St. Rep. 504; Settlemire *v.* Newsome, 10 Oreg. 446.

South Dakota.— Scaman *v.* Galligan, 8 S. D. 277, 66 N. W. 458.

See 21 Cent. Dig. tit. "Execution," § 898.

In Iowa a distinction is drawn between a redemption by the debtor and a redemption by his grantee or assignee, and in the latter case the property is divested of all liens attaching thereto prior to the execution sale, while in the former case such liens are thereby restored. Harms *v.* Palmer, 73 Iowa 446, 35 N. W. 515, 5 Am. St. Rep. 691; Clayton *v.* Ellis, 50 Iowa 590 [*overruling* Stein *v.* Chambless, 18 Iowa 474, 87 Am. Dec. 411; Crosby *v.* Elkader Lodge No. 72, 16 Iowa 399, and *distinguishing* Hays *v.* Thode, 18 Iowa 51].

88. Hare *v.* Hall, 41 Ark. 372 (where the judgment, being by confession in vacation, was void by statute); McLagan *v.* Brown, 11 Ill. 519 (where the redemptioner's judgment was subsequently reversed). See Hughes *v.* Helms, (Tenn. Ch. App. 1898) 52 S. W. 460.

89. Hudepohl *v.* Liberty Hill Water, etc., Co., 94 Cal. 588, 29 Pac. 1025, 28 Am. St. Rep. 149; White *v.* Leeds Importing Co., 72 Minn. 352, 75 N. W. 595, 761, 71 Am. St. Rep. 488; Ryan *v.* Staples, 78 Fed. 563, 23 C. C. A. 551.

In Illinois and Tennessee, however, it is held that where the sale is void by reason of a defective judgment or decree, a redemption and sale by a judgment creditor will also be void, and no title will pass. Mulvey *v.* Carpenter, 78 Ill. 580; Borders *v.* Murphy, 78 Ill. 81; Keeling *v.* Heard, 3 Head (Tenn.) 592.

90. *Ex p.* Peru Iron Co., 7 Cow. (N. Y.) 540.

91. Emmet *v.* Bradstreet, 20 Wend. (N. Y.) 50; Van Horne *v.* McLaren, 8 Paige (N. Y.) 285, 35 Am. Dec. 685. See, however, Benton *v.* Hatch, 122 N. Y. 322, 25 N. E. 486 [*affirming* 43 Hun 142].

92. Kilbride *v.* Munn, 55 Iowa 445, 8 N. W. 305; Sewall *v.* Sewall, 139 Mass. 157, 29 N. E. 649, 130 Mass. 201. See also Hammond *v.* Horton, 137 Mo. 151, 37 S. W. 825; Jackson *v.* Merritt, 1 Wend. (N. Y.) 46 (defendant cannot object that the deed was made to a person not a creditor, with the consent of the creditor who had regularly redeemed the land); Buck *v.* Clark, 23 Barb. (N. Y.) 259; Boyd *v.* Boyd, 26 Misc. (N. Y.) 679, 56 N. Y. Suppl. 760; People *v.* Bunn, Lalor (N. Y.) 265; *Ex p.* Newell, 4 Hill (N. Y.) 589 (holding that such redemptioner is entitled to a sheriff's deed, even though he has enjoined the sheriff not to pay over the money to a third person); *Ex p.* Ives, 1 Hill (N. Y.) 639. See Williams *v.* Tatnall, 29 Ill. 553.

93. Moore *v.* Gore, 35 Ala. 701; Cartwright *v.* Savage, 5 Oreg. 397; Mitchell *v.* Brown, 6 Coldw. (Tenn.) 505; Burk *v.* State, 3 Head (Tenn.) 686; Pillow *v.* Langtree, 5 Humphr. (Tenn.) 389; Paris *v.* Burger, 4 Humphr. (Tenn.) 325; Hawkins *v.* Jamison, Mart. & Y. (Tenn.) 83. See Legro *v.* Lord, 10 Me. 161.

94. Fowler *v.* Hall, 7 Ill. App. 332; *In re* St. Albans First Nat. Bank, 49 Fed. 120; American Exch. Bank *v.* Morris Canal, etc., Co., 6 Hill (N. Y.) 362. See, however, Neal *v.* Read, 7 Baxt. (Tenn.) 333.

a judgment creditor has redeemed property from an execution sale, he has no further interest in or control over the redemption money.[95]

E. Conveyance to Purchaser[96] — **1. Necessity of — a. Personal Property.** In a case of personal property the general rule is that the title vests in the purchaser by virtue of the levy and sale without any bill of sale.[97]

b. Real Property. In regard to real estate the rule is not uniform, it being held in some jurisdictions that a deed from the sheriff to the execution purchaser is not necessary to pass the legal estate, but that the same becomes vested in the vendee by operation of law.[98] In a majority of jurisdictions, however, a conveyance from the sheriff is necessary in order to perfect the title of a purchaser of real estate at an execution sale,[99] and the sheriff's certificate of sale is not sufficient for that purpose.[1]

95. Brooks *v.* Sanders, 110 Ill. 453; Bowman *v.* People, 82 Ill. 246, 25 Am. Rep. 316; Groves *v.* Barber, 98 Ind. 309; Brown *v.* Harrison, 93 Ind. 142 (holding likewise that the holder of the certificate of sale and not the assignee of the judgment is entitled to the redemption money); Silliman *v.* Wing, 7 Hill (N. Y.) 159.

96. Conveyance to redemptioner see *supra*, X, D, 11, d.

97. Kennedy *v.* Clayton, 29 Ark. 270; Goodwin *v.* Floyd, 10 Yerg. (Tenn.) 520, 8 Yerg. (Tenn.) 484, 29 Am. Dec. 130; Shaw *v.* Smith, 9 Yerg. (Tenn.) 97.

98. *Louisiana.*— Davis *v.* Wilcoxen, 5 La. Ann. 583.

Maryland.— Stump *v.* Henry, 6 Md. 201, 61 Am. Dec. 300; Barney *v.* Patterson, 6 Harr. & J. 182, 205; Boring *v.* Lemmon, 5 Harr. & J. 223.

Minnesota.— Dickinson *v.* Kinney, 5 Minn. 409.

South Carolina.— Small *v.* Small, 16 S. C. 64.

Texas.— Willis *v.* Smith, 66 Tex. 31, 17 S. W. 247; Miller *v.* Alexander, 8 Tex. 36.

United States.— Remington *v.* Linthicum, 14 Pet. 84, 10 L. ed. 264.

See 21 Cent. Dig. tit. "Execution," § 901.

99. *Alabama.*— Kelly *v.* Governor, 14 Ala. 541; Robinson *v.* Garth, 6 Ala. 204, 41 Am. Dec. 47.

California.—Cummings *v.* Coe, 10 Cal. 529; Anthony *v.* Wessel, 9 Cal. 103.

Colorado.— Hayes *v.* New York Gold Min. Co., 2 Colo. 273.

Indiana.— Goss *v.* Meadors, 78 Ind. 528; Jones *v.* Kokoma Bldg Assoc., 77 Ind. 340, holding, however, that the title of a purchaser is not defeated by the omission of the sheriff to execute a deed until four months after the expiration of the time allowed for redemption.

Iowa.— See Conner *v.* Long, 63 Iowa 295, 19 N. W. 221.

Kansas.— Board of Regents *v.* Linscott, 30 Kan. 240, 1 Pac. 81.

Maine.— Hill *v.* Reynolds, 93 Me. 25, 44 Atl. 135, 74 Am. St. Rep. 329, holding, however, that where there are two sales of the same property at the same time, to the same purchaser, on executions in favor of the same creditor, the sales may be embraced in one deed.

Missouri.— Dunnica *v.* Coy, 24 Mo. 167, 69 Am. Dec. 420.

New Jersey.— Green *v.* Steelman, 10 N. J. L. 193.

New York.— Curtiss *v.* Bush, 39 Barb. 661; Smith *v.* Colvin, 17 Barb. 157; Schermerhorn *v.* Merrill, 1 Barb. 511 (holding that the purchaser has only a lien upon the land until the receipt of the sheriff's deed); Farmers' Bank *v.* Merchant, 13 How. Pr. 10; Hawley *v.* Cramer, 4 Cow. 717; Catlin *v.* Jackson, 8 Johns. 520 [*affirming* 2 Johns. 248, 3 Am. Dec. 415]; Simonds *v.* Catlin, 2 Cai. 61.

Oregon.— Dray *v.* Dray, 21 Oreg. 59, 27 Pac. 223.

Pennsylvania.— Hall *v.* Benner, 1 Penr. & W. 402, 21 Am. Dec. 394. But see Morrison *v.* Wurtz, 7 Watts 437. See also Hoyt *v.* Koons, 19 Pa. St. 277.

South Dakota.— Wood *v.* Conrad, 2 S. D. 405, 50 N. W. 903.

Tennessee.— Edwards *v.* Miller, 4 Heisk. 314; Morgan *v.* Hannah, 11 Humphr. 122; Crutsinger *v.* Catron, 10 Humphr. 24.

See 21 Cent. Dig. tit. "Execution," § 901.

Although the cancellation or destruction of a deed after its delivery does not annul it as a conveyance, yet, where a sheriff's deed to a nominal purchaser of lands sold under execution is destroyed by him at the instance of the grantee and the person who furnished the purchase-money, and for whom the purchase was made, and another deed is executed to the latter, a court of equity will, in the absence of intervening equities in favor of third persons, treat the second deed as conveying the title. Carithers *v.* Lay, 51 Ala. 390.

Lost deed.—It has been held in North Carolina that if the sheriff's deed is lost before registration so that it does not pass the title the purchaser is entitled to a substitute. McMillan *v.* Edwards, 75 N. C. 81.

Term for years.— It has been held in Pennsylvania that the return of the sheriff on a sale of a term for years passes the property without executing a deed. Williams *v.* Downing, 18 Pa. St. 60; Sowers *v.* Vie, 14 Pa. St. 99.

1. *Illinois.*— Hays *v.* Cassell, 70 Ill. 669; Huftalin *v.* Misner, 70 Ill. 55.

Indiana.— Hill *v.* Swihart, 148 Ind. 319, 47 N. E. 705.

Michigan.—Cook *v.* Knowles, 38 Mich. 316; Gorham *v.* Wing, 10 Mich. 486.

2. Authority to Make — a. Officer Conducting Sale — (I) *General Rule.* The general rule is that the officer conducting an execution sale is the proper party to execute a conveyance of the property sold.[2]

(II) *After Expiration of Term of Office.* In the absence of statute to the contrary,[3] the officer conducting the sale may execute a conveyance, even after the expiration of his term of office;[4] and, in case of the death of such officer prior to the execution of a deed, the proper remedy for the purchaser is to apply to the court for the appointment of a commissioner or master to execute a conveyance.[5]

b. Deputy. The general rule is that a deed of property sold on execution may be made by a deputy, whether he conducted the sale or not.[6] However, the execution of a deed when made by the deputy must appear to be the act of his principal, and a deed made by the deputy in his own name is void.[7]

c. Successor in Office. In many jurisdictions, by statutory provision, the deed may be executed either by the retiring officer or his successor in office;[8]

Missouri.— Evans *v.* Ashley, 8 Mo. 177.

South Dakota.— Wood *v.* Conrad, 2 S. D. 405, 50 N. W. 903.

See 21 Cent. Dig. tit. "Execution," § 901.

2. *Georgia.*—Morrison *v.* Knight, 82 Ga. 96, 8 S. E. 211, holding, however, that a deed executed by a sheriff at an execution sale under a judgment in which he and his wife are usees is void.

Illinois.— Martin *v.* Gilmore, 72 Ill. 193.

Kentucky.— Young *v.* Smith, 10 B. Mon. 293.

Minnesota.— Messerschmidt *v.* Baker, 22 Minn. 81.

New Jersey.—Den *v.* Winans, 14 N. J. L. 1.

New York.— Stafford *v.* Williams, 12 Barb. 240, holding, however, that there must be a power subsisting in the sheriff at the time he executes a deed or no title passes.

Texas.— Burrow *v.* Brown, 59 Tex. 457, holding likewise that the law presumes the existence of the official character of one who purports to execute a deed to the sheriff.

See 21 Cent. Dig. tit. "Execution," §§ 903, 904.

Alcalde under the civil law see Lee *v.* Wharton, 11 Tex. 61.

Sale of land out of county.— See Hanby *v.* Tucker, 23 Ga. 132, 68 Am. Dec. 514.

3. Conger *v.* Converse, 9 Iowa 554; Fowble *v.* Rayberg, 4 Ohio 45; Norton *v.* Gray, 2 Ohio Dec. (Reprint) 118, 1 West. L. Month. 408; Faull *v.* Cooke, 19 Oreg. 455, 26 Pac. 662, 20 Am. St. Rep. 836; Moore *v.* Willamette Transp., etc., Co., 7 Oreg. 359.

4. *California.*— Anthony *v.* Wessel, 9 Cal. 103; People *v.* Boring, 8 Cal. 406, 68 Am. Dec. 331. See also Byers *v.* Neal, 43 Cal. 210.

Kentucky.—Allen *v.* Trimble, 4 Bibb 21, 7 Am. Dec. 726.

Missouri.— Porter *v.* Mariner, 50 Mo. 364.

South Carolina.— Bearfield *v.* Stevens, Harp. Eq. 52.

Vermont.— Wilson *v.* Spear, 68 Vt. 145, 34 Atl. 429.

See 21 Cent. Dig. tit. "Execution," § 905.

5. *California.*— People *v.* Boring, 8 Cal. 406, 68 Am. Dec. 331.

Kansas.— Head *v.* Daniels, 38 Kan. 1, 15 Pac. 911.

Mississippi.— Thornton *v.* Boyd, 25 Miss. 598.

Missouri.— *In re* Guenzler, 70 Mo. 39 [*affirming* 6 Mo. App. 99].

New York.— Sickles *v.* Hogeboon, 10 Wend. 562.

Compare Stewart *v.* Stokes, 33 Ala. 494, 73 Am. Dec. 429; Harris *v.* Irwin, 29 N. C. 432.

6. *Alabama.*—McGee *v.* Eastis, 3 Stew. 307.

California.— Mills *v.* Tukey, 22 Cal. 373, 83 Am. Dec. 74. See, however, Cloud *v.* El Dorado County, 12 Cal. 128, 73 Am. Dec. 526.

Iowa.— Carr *v.* Hunt, 14 Iowa 206.

Kentucky.— Young *v.* Smith, 10 B. Mon. 293.

Louisiana.— Kellar *v.* Blanchard, 21 La. Ann. 38.

Missouri.— Evans *v.* Wilder, 7 Mo. 359.

New York.— Sandford *v.* Roosa, 12 Johns. 162; Jackson *v.* Bush, 10 Johns. 223; Gorham *v.* Gale, 7 Cow. 739, 17 Am. Dec. 549.

Ohio.— Haines *v.* Lindsey, 4 Ohio 88, 19 Am. Dec. 586.

Tennessee.— Glasgow *v.* Smith, 1 Overt. 144.

Texas.— Terrell *v.* Martin, 64 Tex. 121.

See 21 Cent. Dig. tit. "Execution," § 906.

7. *California.*— Lewes *v.* Thompson, 3 Cal. 266.

Kansas.— Robinson *v.* Hall, 33 Kan. 139, 5 Pac. 763.

Missouri.— Samuels *v.* Shelton, 48 Mo. 444; Evans *v.* Wilder, 7 Mo. 359.

Ohio.—Anderson *v.* Brown, 9 Ohio 151.

England.— Parker *v.* Kett, 1 Salk. 95.

See 21 Cent. Dig. tit. "Execution," § 906.

8. *California.*— Clark *v.* Sawyer, 48 Cal. 133; Mills *v.* Tukey, 22 Cal. 373, 83 Am. Dec. 74.

Georgia.— Fretwell *v.* Doe, 7 Ga. 264.

Kentucky.— Thomas *v.* Thomas, 87 Ky. 343, 10 S. W. 282, 10 Ky. L. Rep. 223; Phillips *v.* Jamison, 14 B. Mon. 579; Jamison *v.* Tudor, 3 B. Mon. 355; Lemon *v.* Craddock, Litt. Sel. Cas. 251, 12 Am. Dec. 301; Trimble *v.* Breckenridge, 4 Bibb 479 (holding, however, that the sheriff in office cannot execute a deed unless the purchaser produces a receipt or certificate from the former sheriff of the actual purchase and the payment of

some of the statutes, however, require an order of court upon proper application to enable the sheriff to execute a deed for property sold by his predecessor in office.[9]

d. During Redemption Period. A sheriff's deed executed after an execution sale before the expiration of the statutory redemption period is void for want of authority in the officer to execute it at that time.[10]

e. Enjoining Execution or Delivery of Deed. Where sufficient ground exists to prevent the completion of a sale by the execution of a deed by the sheriff, it is within the discretion of a court of equity to grant an injunction restraining the sheriff from executing it.[11] However, after an execution sale and the expiration of the redemption period, the judgment debtor has no such interest in the land as will entitle him to raise objections to the completion of the sale by the execution of the deed, he then occupying the position of a mere stranger.[12]

3. Right of Purchaser to — a. General Rule. After the expiration of the redemption period, where the purchaser has complied with all the requisites of the statute, such as the payment of the purchase-money,[13] he is entitled to demand that the sheriff make a deed to him for the property.[14] However, by due assignment of the certificate of purchase, or proper directions by the pur-

the money); Davis *v.* Smallgood, 3 Ky. L. Rep. 539.

Mississippi.— See Thornton *v.* Boyd, 25 Miss. 598.

Missouri.— Fortune *v.* Fife, 105 Mo. 433, 16 S. W. 687.

New York.— People *v.* Grant, 61 N. Y. App. Div. 238, 70 N. Y. Suppl. 504; Dixon *v.* Dixon, 38 Misc. 652, 78 N. Y. Suppl. 255.

Oregon.—Moore *v.* Willamette Transp., etc., Co., 7 Oreg. 359.

South Carolina.— Carolina Sav. Bank *v.* McMahon, 37 S. C. 309, 16 S. E. 31; Martin *v.* Wilbourne, 2 Hill 395, 27 Am. Dec. 393.

Texas.— Haskins *v.* Wallet, 63 Tex. 213.

Wisconsin.— Prescott *v.* Everts, 4 Wis. 314.

See 21 Cent. Dig. tit. "Execution," § 907.

9. Evans *v.* Ashley, 8 Mo. 177; Evans *v.* Wilder, 7 Mo. 359; Watson *v.* Mulford, 21 N. J. L. 500; Field *v.* Earle, 4 Serg & R (Pa.) 82; Woods *v.* Lane, 2 Serg. & R. (Pa.) 53.

10. Perham *v.* Kuper, 61 Cal. 331; Hall *v.* Yoell, 45 Cal. 584; Moore *v.* Martin, 38 Cal. 428; Bernal *v.* Gleim, 33 Cal. 668; Gross *v.* Fowler, 21 Cal. 392; Gorham *v.* Wing, 10 Mich. 486. See also Dortch *v.* Robinson, 31 Ark. 296 (holding that a sheriff's deed issued before the expiration of the redemption period would not support an action of unlawful detainer for the land); Allen *v.* Leu, 9 Kan. App. 246, 59 Pac. 680.

11. *California.*— Goldstein *v.* Kelly, 51 Cal. 301. See also Schuyler *v.* Broughton, 65 Cal. 252. 3 Pac. 870.

Georgia.— Curran *v.* Georgia L. & T. Co., 104 Ga. 682, 30 S. E. 886 (where the granting of an interlocutory injunction restraining the sheriff from making a deed to the purchaser was held not to be error); Manning *v.* Lacey, 97 Ga. 384, 23 S. E. 845; Ware *v.* Bazemore, 58 Ga. 316.

Illinois.— Groves *v.* Maghee, 64 Ill. 180.

Indiana.— Carnahan *v.* Yerkes, 87 Ind. 62.

New Jersey.— Shinn *v.* Vineland Nat. Bank, 55 N. J. Eq. 825, 41 Atl. 1116 [*affirming* 55 N. J. Eq. 415, 36 Atl. 953].

Tennessee.— Brien *v.* Robinson, 102 Tenn. 157, 52 S. W. 802.

See 21 Cent. Dig. tit. "Execution," § 910.

Compare Bennett *v.* Child, 19 Wis. 362, 88 Am. Dec. 692.

12. Jamison *v.* Tudor, 3 B. Mon. (Ky.) 355; Messerschmidt *v.* Baker, 22 Minn. 81; Brooks *v.* Ratcliff, 33 N. C. 321. But see Landrum *v.* Hatcher, 11 Rich. (S. C.) 54, 70 Am. Dec. 237.

A junior purchaser, in the absence of a valid redemption from an execution sale, cannot insist, as against a judgment debtor and the purchaser at a prior sale, that the right of such prior purchaser to a deed from the sheriff had been lost. Whiting *v.* Butler, 29 Mich. 122.

13. State *v.* Lawson, 14 Ark. 114; Carnahan *v.* Yerkes, 87 Ind. 62; Davis *v.* Pryor, 6 Sm. & M. (Miss.) 114; Crawford *v.* Boyer, 14 Pa. St. 380.

The purchaser acquires no rights whatever unless at the time of the sale he has paid down in cash the whole purchase-money. People *v.* Hays, 5 Cal. 66.

Where the creditor has granted the purchaser time within which to pay his bid, and has informed the sheriff that such arrangement is satisfactory, the latter must convey the property as if the adjudication had been complied with. Gallier *v.* Garcia, 2 Rob. (La.) 319.

14. People *v.* Irwin, 14 Cal. 428; *In re* Carpenter, 2 Marv. (Del.) 149; 42 Atl. 423, People *v.* Grant, 61 N. Y. App. Div. 238, 70 N. Y. Suppl. 504; Garner's Appeal, 1 Walk. (Pa.) 438. See also Schleipman *v.* Banks, 3 L. T. N. S. (Pa.) 133. *Compare* Long *v.* Valleau, 97 Iowa 328, 66 N. W. 195; Kennedy *v.* Stranahan, 39 Iowa 205. *Compare* Burckhalter *v.* O'Connor, 100 Ga. 366, 28 S. E. 154, where the authority of a court of ordinary is discussed.

Sale on wrong day.— See State *v.* Byrd, 42 Ga. 629.

Waiver of right.— Fitzpatrick *v.* Apperson, 2 Ky. L. Rep. 249.

chaser, the sheriff is authorized and may be compelled to execute the deed to a designated third party.[15]

b. After Death of Judgment Debtor. Where a sale is had and approved, and a deed ordered, and before its execution the judgment debtor dies, it is not necessary to revive proceedings in the name of the heirs or legal representatives of the deceased before the deed is executed.[16]

c. After Death of Party Entitled. Upon the death of the purchaser, or the party entitled to a sheriff's deed, before the issuance thereof, the deed should at the instance of the executor or administrator be made to the heirs or devisees of the party so entitled.[17]

d. Time to Move For. A motion to require the sheriff to execute a conveyance of land sold at an execution sale should be made within a reasonable time after the expiration of the redemption period, and laches on the part of the party entitled will bar his right to a deed.[18]

e. Remedies to Compel Execution. The power of the sheriff to conduct an execution sale, receive purchase-money, and execute a conveyance, is not a mere naked power, but a power coupled with a trust, and, in case of the refusal or neglect of such officer to make proper conveyance, a court of equity will compel him so to do.[19] In some jurisdictions, however, it is held that the only proper remedy is by a motion in the cause and not by distinct action.[20]

15. *Illinois.*— Carpenter *v.* Sherfy, 71 Ill. 427. But *compare* Davis *v.* McVickers, 11 Ill. 327. *Contra,* Johnson *v.* Adleman, 35 Ill. 265.

Iowa.— Ehleringer *v.* Moriarty, 10 Iowa 78.

Mississippi.— Endicott *v.* Penny, 14 Sm. & M. 144.

Missouri.— Massey *v.* Young, 73 Mo. 260.

New York.— See Wright *v.* Douglass, 2 N. Y. 373 [*reversing* 3 Barb. 554].

North Carolina.— Henderson *v.* Hoke, 21 N. C. 119.

South Carolina.— Sumner *v.* Palmer, 10 Rich. 38.

United States.— Voorhees *v.* Jackson, 10 Pet. 449, 9 L. ed. 490 [*affirming* 2 Fed. Cas. No. 939, 1 McLean 221].

See 21 Cent. Dig. tit. "Execution," § 912.

See, however, Rice *v.* Smith, 18 N. H. 369.

16. Thomas *v.* Thomas, 87 Ky. 343, 10 S. W. 282, 10 Ky. L. Rep. 223; Insley *v.* U. S., 150 U. S. 512, 14 S. Ct. 158, 37 L. ed. 1163 [*affirming* 54 Fed. 221, 4 C. C. A. 296]. But see Crawford *v.* Dalrymple, 70 N. C. 156.

17. *Illinois.*— Potts *v.* Davenport, 79 Ill. 455.

Kentucky.— Jones *v.* Webb, 59 S. W. 858, 22 Ky. L. Rep. 1100.

Missouri.— Swink *v.* Thompson, 31 Mo. 336.

South Carolina.— McElmurray *v.* Ardis, 3 Strobh. 212.

Washington.— See Diamond *v.* Turner, 11 Wash. 189, 39 Pac. 379.

See 21 Cent. Dig. tit. "Execution," § 913.

In New York, however, by statutory provision, a deed should be made to the personal representative of the party entitled to the same, in trust for the use of his heirs and devisees. Dixon *v.* Dixon, 89 N. Y. App. Div. 603, 85 N. Y. Suppl. 609 [*reversing* 38 Misc. 652, 78 N. Y. Suppl. 255].

18. McCall *v.* White, 73 Ala. 562; Harmon *v.* Larned, 58 Ill. 167; Rucker *v.* Dooley, 49 Ill. 377, 95 Am. Dec. 614 (holding that in analogy to the statute of limitations the lapse of twenty years without the presentation of a certificate is an insuperable bar to the execution of the sheriff's deed); Dixon *v.* Dixon, 89 N. Y. App. Div. 603, 85 N. Y. Suppl. 609. *Compare* Finch *v.* Turner, 21 Colo. 287, 40 Pac. 565; Day *v.* Thompson, 11 Nebr. 123, 7 N. W. 533; Fowble *v.* Rawberg, 4 Ohio 45.

Heirs of the judgment debtor take as mere volunteers, and a sheriff's deed for land sold under execution, made eight years and three months after judgment, was held to be valid as against such heirs. Cottingham *v.* Springer, 88 Ill. 90 [*distinguishing* Rucker *v.* Dooley, 49 Ill. 377, 99 Am. Dec. 614; Harmon *v.* Larned, 58 Ill. 167].

19. *Alabama.*— Stewart *v.* Stokes, 33 Ala. 494, 73 Am. Dec. 429.

Arkansas.— Whiting *v.* Lawson, 6 Ark. 425.

Indiana.— Conklin *v.* Smith, 7 Ind. 107, 63 Am. Dec. 416, holding, however, that the purchaser, to be entitled to the aid of a court of equity, must have paid or tendered the purchase-money within a reasonable time.

Louisiana.— Branner *v.* Hardy, 18 La. Ann. 537, holding, however, that the purchaser is bound to comply with the terms of the sale, or offer to comply with them, before he can maintain his action. See also Hickman *v.* Thompson, 26 La. Ann. 260.

Missouri.— See Blodgett *v.* Perry, 97 Mo. 263, 10 S. W. 891, 10 Am. St. Rep. 307, holding, however, that the purchaser cannot proceed *ex parte* without any notice to parties claiming adversely.

Pennsylvania.— Garner's Appeal, 1 Walk. 438, holding, however, that a bill will not lie to compel the sheriff to execute a deed to a different person than the one named in his return.

See 21 Cent. Dig. tit. "Execution," § 915.

20. Fox *v.* Kline, 85 N. C. 173; Patrick *v.* Kerr, 60 N. C. 633, 86 Am. Dec. 454 (holding

4. Form and Requisites of Deed[21] — **a. Recitals** — (I) *In General.* While, in the absence of statute, no particular form of words is required in a sheriff's deed to pass the title, it must appear from the language employed that such was the intention, and it must contain apt and proper words of grant, release, or conveyance.[22]

(II) *Specific Recitals.* It should contain a recital of the judgment, its date, the names of the parties, the amount thereof, and the court rendering the same;[23] it should likewise recite the execution, levy, and date thereof,[24] the date of sale,[25] notice of sale,[26] and the name of the purchaser.[27]

(III) *Effect of Omission or Misrecital.* However, statutory provisions prescribing the recitals to be inserted in the sheriff's deed have been held to be directory only; hence a misrecital or omission as to immaterial matters will not affect the validity of the deed,[28] the general rule being that the recital in a sheriff's deed is not a necessary part thereof, and if the deed misrecites or omits to recite the judgment or execution under which the sale was made,[29] or the sale

that a court of equity will not entertain a bill by a purchaser at an execution sale to compel the sheriff to convey, and that a remedy must be sought in the court from which the execution issued); Buckingham *v.* Granville Alexandria Soc., 2 Ohio 360; *Ex p.* Voorhies, 46 S. C. 114, 24 S. E. 170. See also, generally, Mandamus.

21. Form and requisites of deed generally see Deeds, 13 Cyc. 526.

22. Johnson *v.* Bantock, 38 Ill. 111. See also Frazee *v.* Nelson, 179 Mass. 456, 61 N. E. 40, 88 Am. St. Rep. 391.

For form of a sheriff's deed held to be sufficient see Jackson *v.* Jones, 9 Cow. (N. Y.) 182.

Cause of sale.— See Caldwell *v.* Blake, 69 Me. 458, under the Maine statute.

23. Hihn *v.* Peck, 30 Cal. 280; Donahue *v.* McNulty, 24 Cal. 411, 85 Am. Dec. 78; Brosnaham *v.* Turner, 16 La. 433; Drouet *v.* Rice, 2 Rob. (La.) 374; Hall *v.* Klepzig, 99 Mo. 83, 12 S. W. 372. See also Todd *v.* Philhower, 24 N. J. L. 796; Thorpe *v.* Ricks, 21 N. C. 613.

24. Hihn *v.* Peck, 30 Cal. 280; Donahue *v.* McNulty, 24 Cal. 411, 85 Am. Dec. 78; Woodward *v.* Sartwell, 129 Mass. 210; Reed *v.* Lowe, 163 Mo. 519, 63 S. W. 687, 85 Am. St. Rep. 578; Hall *v.* Klepzig, 99 Mo. 83, 12 S. W. 372; Wack *v.* Stevenson, 54 Mo. 481; Wilhite *v.* Wilhite, 53 Mo. 71; Carpenter *v.* King, 42 Mo. 219; Tanner *v.* Stine, 18 Mo. 580, 89 Am. Dec. 320. See Goodall *v.* Rowell, 15 N. H. 572.

25. *Alabama.*— Driver *v.* Spence, 1 Ala. 540.

Indiana.— Camp *v.* Smith, 98 Ind. 409.

Missouri.— Tanner *v.* Stine, 18 Mo. 580, 59 Am. Dec. 320.

Tennessee.— Harlan *v.* Harlan, 14 Lea 107.

Texas.— Frazier *v.* Moore, 11 Tex. 755.

See 21 Cent. Dig. tit. "Execution," § 920.

26. Russell *v.* Williamson, 67 Ark. 80, 53 S. W. 561; Woodward *v.* Sartwell, 129 Mass. 210; Evans *v.* Robberson, 92 Mo. 192, 4 S. W. 941, 1 Am. St. Rep. 701 (holding, however, that the deed need not recite that the posting of the notice of sale was at the court-house door, as the statute requires); Osborne *v.* Tunis, 25 N. J. L. 633.

27. *Kentucky.*— Poore *v.* Hudson, 4 Ky. L. Rep. 349.

Louisiana.— Alexander *v.* Bourdier, 43 La. Ann. 321, 8 So. 876.

Missouri.— Davis *v.* Kline, 76 Mo. 310.

New York.— Simonds *v.* Catlin, 2 Cai. 61.

Tennessee.—Morgan *v.* Hannah, 11 Humphr. 122.

Texas.— Ballew *v.* Casey, (Sup. 1888) 9 S. W. 189.

See 21 Cent. Dig. tit. "Execution," § 921.

28. *Alabama.*— Davidson *v.* Kahn, 119 Ala. 364, 24 So. 583; Driver *v.* Spence, 1 Ala. 540.

California.— Clark *v.* Sawyer, 48 Cal. 133.

Indiana.— Camp *v.* Smith, 98 Ind. 409.

Kansas.— Towne *v.* Milner, 31 Kan. 207, 1 Pac. 613.

Louisiana.— Alexander *v.* Bourdier, 43 La. Ann. 321, 8 So. 876.

Massachusetts.— Welsh *v.* Joy, 13 Pick. 477.

Michigan.— Johnson *v.* Crispell, 39 Mich. 82.

Missouri.— Davis *v.* Kline, 76 Mo. 310; Foulk *v.* Colburn, 48 Mo. 225.

Ohio.— Perkins *v.* Dibble, 10 Ohio 433, 36 Am. Dec. 97.

Pennsylvania.— Burke *v.* Ryan, 1 Dall. 94, 1 L. ed. 51.

South Carolina.— Harrison *v.* Maxwell, 2 Nott & M. 347, 10 Am. Dec. 611; Martin *v.* Wilbourne, 2 Hill 395, 27 Am. Dec. 393.

Tennessee.— Harlan *v.* Harlan, 14 Lea 107; Hughes *v.* Dice, 1 Swan 329.

Texas.— Ballew *v.* Casey, (Sup. 1888) 9 S. W. 189; Frazier *v.* Moore, 11 Tex. 755.

See 21 Cent. Dig. tit. "Execution," § 919.

The procès verbal of a sheriff, containing all necessary recitals, signed by the sheriff and the purchaser, and attested by two witnesses, has the legal value of a formal sheriff's deed. Strauss *v.* Soye, 29 La. Ann. 270.

29. *Alabama.*—Wilson *v.* Campbell, 33 Ala. 249, 70 Am. Dec. 586.

California.— Clark *v.* Sawyer, 48 Cal. 133.

Illinois.— Holman *v.* Gill, 107 Ill. 467; Keith *v.* Keith, 104 Ill. 397; Loomis *v.* Riley, 24 Ill. 307; Phillips *v.* Coffee, 17 Ill. 154,

and proceedings had thereunder, the deed is not invalidated by reason of such omission or misrecital.[30]

b. Description of Property — (I) *Certainty.* The deed must contain a description of the property sold, and such property must in all cases be specified with such precision that from the description it can be reduced to a certainty.[31] If

63 Am. Dec. 357. See also Harmon *v.* Larned, 58 Ill. 167; Johnson *v.* Adleman, 35 Ill. 265.

Indiana.— Doe *v.* Rue, 4 Blackf. 263, 29 Am. Dec. 368.

Iowa.— Humphrey *v.* Beeson, 1 Greene 199, 48 Am. Dec. 370.

Kansas.— See also Dickens *v.* Crane, 33 Kan. 344, 6 Pac. 630.

Kentucky.— McGuire *v.* Kouns, 7 T. B. Mon. 386, 18 Am. Dec. 187; Sneed *v.* Reardon, 1 A. K. Marsh. 217.

Maine.—Hill *v.* Reynolds, 93 Me. 25, 44 Atl. 135, 74 Am. St. Rep. 329.

Massachusetts.— Hayward *v.* Cain, 110 Mass. 273.

Missouri.— Lewis *v.* Morrow, 89 Mo. 174, 1 S. W. 93; Gaines *v.* Fender, 82 Mo. 497; Perkins *v.* Quigley, 62 Mo. 498; Acock *v.* Stuart, 57 Mo. 150; Allen *v.* Sales, 56 Mo. 28; Union Bank *v.* McWharters, 52 Mo. 34; Waddell *v.* Williams, 50 Mo. 216; Foulk *v.* Colburn, 48 Mo. 225; Hunter *v.* Miller, 36 Mo. 143. But *compare* Martin *v.* Bonsack, 61 Mo. 556.

Nebraska.— Lamb *v.* Sherman, 19 Nebr. 681, 28 N. W. 319.

New York.— Peck *v.* Mallams, 10 N. Y. 509; Jackson *v.* Jones, 9 Cow. 182; Jackson *v.* Streeter, 5 Cow. 529; Jackson *v.* Pratt, 10 Johns. 381.

North Carolina.— Wilson *v.* Taylor, 98 N. C. 275, 3 S. E. 492; Jones *v.* Scott, 71 N. C. 192; Carter *v.* Spencer, 29 N. C. 14; Cherry *v.* Woolard, 23 N. C. 438; Huggins *v.* Ketchum, 20 N. C. 550.

Ohio.— Armstrong *v.* McCoy, 8 Ohio 28, 38 Am. Dec. 435.

Tennessee.— Craig *v.* Vance, 1 Overt. 209. But see Lemons *v.* Wilson, 6 Baxt. 143; Byers *v.* Wheatley, 3 Baxt. 160.

Texas.— Howard *v.* North, 5 Tex. 290, 51 Am. Dec. 769.

See 21 Cent. Dig. tit. "Execution," § 919.

Contra.— Dufour *v.* Camfranc, 11 Mart. (La.) 607, 13 Am. Dec. 360; Brookfield *v.* Moss, 12 N. J. L. 331; Stout *v.* Farlee, 12 N. J. L. 326.

A constable's deed of land sold under execution is void if it does not recite the judgment upon which the execution issued. Wiseman *v.* McNulty, 25 Cal. 230.

30. *Georgia.*— Carmichael *v.* Strawn, 27 Ga. 341.

Maine.— Stinson *v.* Ross, 51 Me. 556, 81 Am. Dec. 591.

Missouri.— Matney *v.* Graham, 50 Mo. 559; Groner *v.* Smith, 49 Mo. 318; Buchanan *v.* Tracey, 45 Mo. 437. But see Ladd *v.* Shippie, 57 Mo. 523, where a sheriff's deed to a *bona fide* purchaser at an adjourned sale was held to be invalid for failure to recite that a new notice was duly given. *Compare* Tanner *v.* Stine, 18 Mo. 580, 59 Am. Dec. 320.

New York.— Holman *v.* Holman, 66 Barb. 215.

Tennessee.— Richards *v.* Williams, 3 Baxt. 186. See, however, Sampson *v.* Marr, 7 Baxt. 486.

Wisconsin.— Herrick *v.* Graves, 16 Wis. 157.

See 21 Cent. Dig. tit. "Execution," § 920.

Compare Newcomb *v.* Downam, 13 N. J. L. 135.

Contra.— Curtis *v.* Doe, 1 Ill. 139.

31. Descriptions sufficiently certain see the following cases:

Alabama.— Driver *v.* Spence, 1 Ala. 540.

Colorado.— Finch *v.* Turner, 21 Colo. 287, 40 Pac. 565.

Illinois.— Swift *v.* Lee, 65 Ill. 336.

Iowa.— Hackworth *v.* Zollars, 30 Iowa 433.

Kentucky.— Reid *v.* Heasley, 9 Dana 324.

Louisiana.— Gravier *v.* Roche, 5 La. 441.

Maryland.— Marshall *v.* Greenfield, 8 Gill & J. 349, 29 Am. Dec. 559.

Mississippi.— Robertson *v.* Haun, Freem. 265.

Missouri.— Stewart *v.* Perkins, 110 Mo. 660, 19 S. W. 989; Hays *v.* Perkins, 109 Mo. 102, 18 S. W. 1127; Adkins *v.* Moran, 67 Mo. 100; McPike *v.* Allman, 53 Mo. 551; State Bank *v.* Bates, 17 Mo. 583; Rector *v.* Hartt, 8 Mo. 448, 41 Am. Dec. 650; Hart *v.* Rector, 7 Mo. 531.

New York.— Terrett *v.* Brooklyn Imp. Co., 18 Hun 6; Dygert *v.* Pletts, 25 Wend. 402.

North Carolina.— Huggins *v.* Ketchum, 20 N. C. 550.

Texas.— Wilson *v.* Smith, 50 Tex. 365; Turner *v.* Crane, 19 Tex. Civ. App. 369, 47 S. W. 822; Harris *v.* Dunn, (Civ. App. 1898) 45 S. W. 731; Watson *v.* McClane, 18 Tex. Civ. App. 212, 45 S. W. 176.

Virginia.— Shirley *v.* Long, 6 Rand. 735.

See 21 Cent. Dig. tit. "Execution," § 921.

Waiver of defect in description see Logan *v.* Pierce, 66 Tex. 126, 18 S. W. 343.

Insufficient descriptions see the following cases:

District of Columbia.— Mackall *v.* Richards, 3 Mackey 271.

Georgia.— Whatley *v.* Doe, 10 Ga. 74.

Illinois.— Blue *v.* Blue, 38 Ill. 9, 87 Am. Dec. 267.

Louisiana.— McGary *v.* Dunn, 1 La. Ann. 338.

Missouri.— Clemens *v.* Rannells, 34 Mo. 579.

New York.— Peck *v.* Mallams, 10 N. Y. 509; Jackson *v.* De Lancey, 13 Johns. 530, 7 Am. Dec. 403 [*affirming* 11 Johns. 365]; Jackson *v.* Rosevelt, 13 Johns. 97; Simonds *v.* Catlin, 2 Cai. 61.

North Carolina.— Edmundson *v.* Hooks, 33 N. C. 373.

Ohio.— Throckmorton *v.* Moon, 10 Ohio 42.

the description of the property in the deed is equally applicable to two or more tracts of land, and there is nothing in the officer's return under the writ from which the particular tract to which the description refers can be ascertained, the deed is void for uncertainty.[32]

(II) *VARIANCE.* The decisions are not at all uniform upon the question of the effect of a variance between the sheriff's deed and the officer's return, notice of sale, etc., some of the courts holding that any material variance between them will invalidate the deed,[33] and others holding that an immaterial variance will not affect the deed,[34] and that even a material variance may be cured by amendment, or by evidence of the true state of facts.[35]

5. EXECUTION AND DELIVERY — a. Condition Precedent. In some jurisdictions the statutes require as a condition precedent to the execution of the deed that the proceedings be examined and approved by the court and an order obtained directing the deed to be made.[36]

b. Must Be in Name of Officer Making Sale. The deed should be executed by the sheriff, or, where executed by a deputy, it must be in the name of the sheriff.[37]

c. Acknowledgment.[38] The statutes usually require sheriffs' deeds to be acknowledged by that officer before the clerk of some court of the county or district in which the land lies, and the certificate of such acknowledgment to be indorsed thereon by the clerk.[39] In some jurisdictions the sheriff's deed is inoperative to pass the title unless acknowledged in the manner prescribed by

Tennessee.— Helms *v.* Alexander, 10 Humphr. 44.

Texas.— Edrington *v.* Hermann, (Sup. 1903) 77 S. W. 408 [*affirming* (Civ. App. 1903) 74 S. W. 936]; Chambers *v.* Brown, (Sup. 1886) 2 S. W. 518; Allday *v.* Whitaker, 66 Tex. 669, 1 S. W. 794; Pfeiffer *v.* Lindsay, 66 Tex. 123, 1 S. W. 264; Brown *v.* Chambers, 63 Tex. 131; Donnebaum *v.* Tinsley, 54 Tex. 662 (holding, however, that although the deed may be void for uncertainty, yet if all other proceedings are regular and the money has been paid by the purchaser, he has an equitable title to the land as against the execution debtor); Mitchell *v.* Ireland, 54 Tex. 301; Norris *v.* Hunt, 51 Tex. 609; Bassett *v.* Sherrod, 13 Tex. Civ. App. 327, 35 S. W. 312; Beze *v.* Call, 2 Tex. Civ. App. 202, 20 S. W. 130.

See 21 Cent. Dig. tit. "Execution," § 921.

32. *Arkansas.*— Tatum *v.* Croon, 60 Ark. 487, 30 S. W. 885.

California.— Cadwalder *v.* Nash, 73 Cal. 43, 14 Pac. 385.

Georgia.— Holder *v.* American Invest., etc., Co., 94 Ga. 640, 21 S. E. 897.

New York.— Mason *v.* White, 11 Barb. 173.

South Carolina.— Broughton *v.* Buchmore, Harp. 300, 18 Am. Dec. 654.

Texas.— Edrington *v.* Hermann, (Sup. 1903) 77 S. W. 408; Beze *v.* Calvert, 2 Tex. Civ. App. 202, 20 S. W. 1130.

See 21 Cent. Dig. tit. "Execution," § 921.

33. Landreaux *v.* Foley, 13 La. Ann. 114; McMicken *v.* Bradford, 1 La. 42; Whiting *v.* Hadley, 3 Allen (Mass.) 357; Pfeiffer *v.* Lindsay, 66 Tex. 123, 1 S. W. 264. See also Mackall *v.* Richards, 3 Mackey (D. C.) 271. See, however, Gravier *v.* Roche, 5 La. 441 (holding that the difference between the description in the return of a seizure in execution and the deed is immaterial, if the identity of the land is certain); Davis *v.* Bargas, 12 Tex. Civ. App. 59, 33 S. W. 548.

34. *Alabama.*— Davidson *v.* Kahn, 119 Ala. 364, 24 So. 583; Driver *v.* Spence, 1 Ala. 540.

Georgia.— Elwell *v.* New England Mortg. Security Co., 101 Ga. 496, 28 S. E. 833. See, however, Brown *v.* Moughon, 70 Ga. 756.

Kentucky.— Reid *v.* Heasley, 9 Dana 324.

Maine.— Hill *v.* Reynolds, 93 Me. 25, 44 Atl. 135, 75 Am. St. Rep. 329.

New York.— Jackson *v.* Page, 4 Wend. 585.

North Carolina.— Jackson *v.* Jackson, 35 N. C. 159.

Pennsylvania.— Arnold *v.* Gorr, 1 Rawle 223.

South Carolina.— Manning *v.* Dove, 10 Rich. 395.

See 21 Cent. Dig. tit. "Execution," § 922.

35. Hill *v.* Reynolds, 93 Me. 25, 44 Atl. 135, 74 Am. St. Rep. 329; Matthews *v.* Thompson, 3 Ohio 272.

36. Curtis *v.* Norton, 1 Ohio 278; Wright *v.* Young, 6 Oreg. 87, holding, however, that the omission to indorse the approval of the circuit court upon a sheriff's deed does not render the deed inoperative.

37. *California.*— Lewes *v.* Thompson, 3 Cal. 266.

Kansas.— Robinson *v.* Hall, 33 Kan. 139, 5 Pac. 763.

Missouri.— Evans *v.* Wilder, 7 Mo. 359.

Ohio.— Anderson *v.* Brown, 9 Ohio 151.

Texas.— See Benson *v.* Cahill, (Civ. App. 1896) 37 S. W. 1088.

38. **Acknowledgments** generally see ACKNOWLEDGMENTS.

39. *Illinois.*— Fail *v.* Goodtitle, 1 Ill. 201.

Iowa.— Cavender *v.* Smith, 5 Iowa 157.

Missouri.— Hammond *v.* Gordon, 93 Mo. 223, 6 S. W. 93; Lewis *v.* Curry, 74 Mo. 49; Baker *v.* Underwood, 63 Mo. 384; Adams *v.*

statute;[40] while in others it is held that acknowledgment is not essential to the validity of the deed where its execution is otherwise duly proven.[41] The acknowledgment of the sheriff's deed cures all irregularities,[42] which do not render the sale and proceedings prior thereto void *ab initio*.[43] Statutes as a rule do not designate the time within which the sheriff's deed must be acknowledged,[44] and it has been held that the acknowledgment may be made after the sheriff's term of office has expired.[45]

d. Delivery. A sheriff's deed takes effect only from the time of its actual delivery, and the execution of the deed and information to the grantee that the deed is ready does not amount to such delivery.[46]

6. Recordation or Registration — a. Application of Statutes. Purchasers at execution sales are entitled to the same extent as purchasers at private sales to the benefit of registry and recording acts;[47] and where such deeds are not recorded or registered within the time required by the statute, they are void as to subsequent *bona fide* purchasers of the property.[48] However, as against the execution

Buchanan, 49 Mo. 64; Ryan *v.* Carr, 46 Mo. 483; Laughlin *v.* Stone, 5 Mo. 43.

Pennsylvania.— Bellas *v.* McCarty, 10 Watts 13 (holding that the acknowledgment by a sheriff of his deed to property sold by him under execution is a judicial act, and must be made in open court to be valid against a *bona fide* purchaser without notice); Murphy *v.* McCleary, 3 Yeates 405.

Texas.— Terrell *v.* Martin, 64 Tex. 121.

See 21 Cent. Dig. tit. "Execution," § 926.

40. Adams *v.* Buchanan, 49 Mo. 64; Ryan *v.* Carr, 46 Mo. 483; Allen *v.* Moss, 27 Mo. 354; Boal *v.* King, 6 Ohio 11 [*affirming* Wright 223]; Roads *v.* Symmes, 1 Ohio 281, 13 Am. Dec. 621; Dehaven's Appeal, 38 Pa. St. 373; Storch *v.* Carr, 28 Pa. St. 135; Bellas *v.* McCarty, 10 Watts (Pa.) 13; Woods *v.* Lane, 2 Serg. & R. (Pa.) 53; Murphy *v.* McCleary, 3 Yeates (Pa.) 405. *Compare* Duncan *v.* Robeson, 2 Yeates (Pa.) 454.

41. White *v.* Farley, 81 Ala. 563, 8 So. 215; Stephenson *v.* Thompson, 13 Ill. 186; Greer *v.* Howard, 4 Ky. L. Rep. 350.

42. McFee *v.* Harris, 25 Pa. St. 102 (holding that, after the acknowledgment of the deed in open court, the title of the sheriff's vendee cannot be affected by mere irregularities however gross); Shields *v.* Miltenberger, 14 Pa. St. 76; Critchlow *v.* Critchlow, 8 Pa. Cas. 304, 11 Atl. 235; Van Billiard *v.* Van Billiard, 10 Pa. Co. Ct. 620. See also Stroble *v.* Smith, 8 Watts (Pa.) 280 (holding that after acknowledgment and delivery of the deed it is to be presumed that the provisions of the statute in relation to the acknowledgment thereof had been complied with); Blair *v.* Greenway, 1 Browne (Pa.) 218; Thompson *v.* Phillips, 23 Fed. Cas. No. 13,974, Baldw. 246.

43. Carson *v.* Hughes, 90 Mo. 173, 2 S. W. 127; St. Bartholomew's Church *v.* Wood, 61 Pa. St. 96. See also De Frehn *v.* Leitenberger, 2 Leg. Chron. (Pa.) 335, 7 Leg. Gaz. (Pa.) 69.

44. Smith *v.* Grim, 26 Pa. St. 95, 67 Am. Dec. 400; Hoyt *v.* Koons, 19 Pa. St. 277; Glancey *v.* Jones, 4 Yeates (Pa.) 212, holding, however, that the acknowledgment cannot be made until the return-day of the writ.

45. Woods *v.* Lane, 2 Serg. & R. (Pa.) 53.

46. *California.*— Jefferson *v.* Wendt, 51 Cal. 573.

Iowa.— Warfield *v.* Woodward, 4 Greene 386.

Kansas.— Cain *v.* Robinson, 20 Kan. 456.

Maine.— Hobbs *v.* Walker, 60 Me. 184, holding, however, that a deed not acknowledged, delivered, and recorded until three months and fourteen days after the sale was good as against a party having notice of sale.

New Jersey.— See Walker *v.* Hill, 22 N. J. Eq. 513.

New York.— Jackson *v.* Catlin, 2 Johns. 248, 3 Am. Dec. 415.

Pennsylvania.— Dolan *v.* Ward, 1 Leg. Rec. 83.

See 21 Cent. Dig. tit. "Execution," § 927.

Bill of sale.— A delivery by the sheriff of a bill of sale at an execution sale of personalty, there being no adverse possession, is a delivery of the thing sold. Cummings *v.* MacGill, 6 N. C. 357.

47. *Iowa.*— Walker *v.* Stannis, 3 Greene 440.

Mississippi.— Duke *v.* Clark, 58 Miss. 465.

New York.— Hetzel *v.* Barber, 69 N. Y. 1.

Ohio.— Scribner *v.* Lockwood, 9 Ohio 184.

Pennsylvania.— Robisson *v.* Miller, 158 Pa. St. 177, 27 Atl. 887; Foust *v.* Ross, 1 Watts & S. 501.

See 21 Cent. Dig. tit. "Execution," §§ 928, 929.

48. *Alabama.*— Pollard *v.* Cocke, 19 Ala. 188.

Iowa.— Lindley *v.* Mays, 66 Iowa 265, 23 N. W. 660.

Louisiana.— Colomer *v.* Morgan, 13 La. Ann. 202.

Massachusetts.—Owen *v.* Neveau, 128 Mass. 427; De Witt *v.* Harvey, 4 Gray 486.

Missouri.— Bailey *v.* Winn, 101 Mo. 649, 12 S. W. 1045; Smith *v.* Willing, 10 Mo. 394.

New York.— Jackson *v.* Terry, 13 Johns. 471.

North Carolina.— McMillan *v.* Edwards, 75 N. C. 81.

South Carolina.— Massey *v.* Thompson, 2 Nott & M. 105.

See 21 Cent. Dig. tit. "Execution," §§ 928, 929.

defendant, his heirs or devisees, and purchasers with notice, the sheriff's deed is operative even where it is not recorded.[49]

b. Effect of Delay. The failure of the execution purchaser to record his deed within the time required by statute will not invalidate his title where there are no intermediate conveyances.[50]

7. Construction and Operation — a. Evidence of Title. According to the better doctrine, a sheriff's deed is of itself *prima facie* evidence that the grantee therein holds the title and interest in the property which was held by the judgment debtor at the time of the rendition of the judgment, or at any time thereafter up to the time of the sale of the premises;[51] and in several jurisdictions it is *prima facie* evidence of the validity of the judgment itself.[52] Where a sheriff's deed is supported by the introduction of a judgment and an execution thereunder, which would have authorized the deed if the provisions of the law relating to the sale of the judgment debtor's property were complied with, such deed is *prima facie* proof of compliance with all provisions of the law necessary to make it a valid transfer of the title to the sheriff's vendee.[53]

b. Property or Interest Conveyed. The general rule is that a sheriff's deed conveys only the estate which it purports to convey, although defendant in execution had a greater interest subject to levy and sale.[54] In construing such deed,

A bill of sale of slaves need not be registered. Floyd *v.* Goodwin, 8 Yerg. (Tenn.) 484, 29 Am. Dec. 130.

Constable's deed.— See Bottom *v.* Breed, 4 La. 343.

49. Dixon *v.* Doe, 5 Blackf. (Ind.) 106; McCall *v.* Irion, 41 La. Ann. 1126, 6 So. 845; Houghton *v.* Bartholomew, 10 Metc. (Mass.) 138.

50. *Maine.*— Caldwell *v.* Blake, 69 Me. 458.

Massachusetts.—Houghton *v.* Bartholomew, 10 Metc. 138.

South Carolina.— Leger *v.* Doyle, 11 Rich. 109, 70 Am. Dec. 240.

Texas.— Brackenridge *v.* Cobb, 85 Tex. 448, 21 S. W. 1034.

Washington.—Wallace *v.* Lawrence, 29 Fed. Cas. No. 17,101, 1 Wash. 503.

See 21 Cent. Dig. tit. "Execution," § 931.

Compare Lindley *v.* Mays, 66 Iowa 265, 23 N. W. 660.

51. *California.*— Montgomery *v.* Robinson, 49 Cal. 258.

Georgia.— Hamilton *v.* Moreland, 15 Ga. 343, holding that the execution and deed are sufficient *prima facie* evidence of title to the land. See also Doe *v.* Briggers, 6 Ga. 188. See Parker *v.* Martin, 68 Ga. 453.

Indiana.— Hadden *v.* Johnson, 7 Ind. 394.

Kansas.— Shields *v.* Miller, 9 Kan. 390.

Louisiana.—Brown *v.* Kendall, 12 La. Ann. 347.

Mississippi.— Pickett *v.* Doe, 5 Sm. & M. 470, 43 Am. Dec. 523.

Missouri.— Owen *v.* Baker, 101 Mo. 407, 14 S. W. 175, 20 Am. St. Rep. 618; Union Bank *v.* Manard, 51 Mo. 548; White *v.* Davis, 50 Mo. 333, holding, however, that the deed operates only on the existing title and does not pass a subsequently acquired title.

Nebraska.— Everson *v.* State, 66 Nebr. 154, 92 N. W. 137.

North Carolina.— Allison *v.* Snider, 118 N. C. 952, 24 S. E. 711; Maynard *v.* Moore, 70 N. C. 546.

Ohio.— Longworth *v.* U. S. Bank, 6 Ohio 536; Thompson *v.* Leinard, Wright 458.

Pennsylvania.— McFee *v.* Harris, 25 Pa. St. 102; Wilson *v.* Howser, 12 Pa. St. 109.

Texas.— Lee *v.* Wharton, 11 Tex. 61; Miller *v.* Alexander, 8 Tex. 36.

See 21 Cent. Dig. tit. "Execution," § 935.

52. Shields *v.* Miller, 9 Kan. 390; Everson *v.* State, 66 Nebr. 154, 92 N. W. 137.

53. *Arkansas.*— Webster *v.* Daniel, 47 Ark. 131, 14 S. W. 550. See also Hughes *v.* Watt, 26 Ark. 228.

Georgia.— Hamilton *v.* Moreland, 15 Ga. 343.

Illinois.— Kimmel *v.* Meier, 106 Ill. App. 251.

Louisiana.— See Brosnaham *v.* Turner, 16 La. 433.

Mississippi.— Duke *v.* Clark, 58 Miss. 465; Cooper *v.* Granberry, 33 Miss. 117.

Missouri.— Evans *v.* Robberson, 92 Mo. 192, 4 S. W. 941, 1 Am. St. Rep. 701; Bush *v.* White, 85 Mo. 339.

New York.— Jackson *v.* Shaffer, 11 Johns. 513.

Texas.— Sadler *v.* Anderson, 17 Tex 245. See also Ruby *v.* Von Valkenberg, 72 Tex. 459, 10 S. W. 514.

See 21 Cent. Dig. tit. "Execution," § 935.

54. *Alabama.*— Carrington *v.* Richardson, 79 Ala. 101.

California.— See Dodge *v.* Walley, 22 Cal. 224, 83 Am. Dec. 61.

Louisiana.— See Durell *v.* New Orleans, 13 La. Ann. 335.

Missouri.— Parks *v.* Watson, 29 Mo. 108.

New York.— Jackson *v.* Striker, 1 Johns. Cas. 284.

North Carolina.— Sheppard *v.* Simpson, 12 N. C. 237.

South Carolina.— See also Ward *v.* Cohen, 3 S. C. 338.

See 21 Cent. Dig. tit. "Execution," § 936.

Exceptions.— Where a sheriff's deed excepted certain land conveyed by A to C, it

however, the whole description of the property should be taken together, so that every clause and word should be given effect, if possible, in order to ascertain the true intent of the instrument.[55]

c. Conclusiveness of Recitals[56] — (I) *In General.* Upon the sale of property by an officer, the recital in his deed of compliance with the various requirements of the statute is sufficient *prima facie* evidence of the fact,[57] and cannot be impeached collaterally.[58] However, such recitals being only *prima facie* evidence, may be overcome by testimony proving their falsity.[59]

(II) *Judgment, Execution, and Sale.* In some jurisdictions the statutes require the sheriff's deed to recite the judgment, execution, and sale, and such recitals are made evidence of the facts therein stated, and relieve the party claiming under the deed from the necessity of producing the judgment and writ of execution, and put the onus upon the party contesting the deed to establish the invalidity of the sale, or the judgment by virtue of which it was made.[60] In other jurisdictions, however, both the judgment and writ of execution must be produced, and thereafter all recitals in the sheriff's deed as to his acts thereunder, such as the levy, advertisement, and sale, are *prima facie* evidence of such facts.[61]

was held that the exception covered a piece conveyed by A to B and by B to C, there being no land conveyed directly from A to C. Bartlett *v.* Judd, 21 N. Y. 200, 78 Am. Dec. 131 [*overruling* Mason *v.* White, 11 Barb. (N. Y.) 173]. See also Chouteau *v.* Burlando, 20 Mo. 482.

Where a ditch has been cut by the owners of land from certain creeks for use in connection with mines thereon, a sheriff's deed will pass all rights to the ditch and its waters without special mention. White *v.* Barlow, 72 Ga. 887.

55. *Florida.*— Adams *v.* Higgins, 23 Fla. 13, 1 So. 321.

Louisiana.— Bryan *v.* Wisner, 44 La. Ann. 832, 11 So. 290.

Maine.— Franklin Bank *v.* Blossom, 23 Me. 546.

Missouri.— Julian *v.* Boren, 55 Mo. 110; Mellon *v.* Hammond, 17 Mo. 191.

New York.— Ocean Causeway *v.* Gilbert, 54 N. Y. App. Div. 118, 66 N. Y. Suppl. 401.

Ohio.— See Spiller *v.* Nye, 16 Ohio 16.

Pennsylvania.— See Lancaster Bank *v.* Myley, 13 Pa. St. 544.

South Carolina.— Carolina Sav. Bank *v.* McMahon, 37 S. C. 309, 16 S. E. 31; Cain *v.* Maples, 1 Hill 304, 26 Am. Dec. 184.

56. Estoppel generally see Estoppel.

57. *Colorado.*— Bay State Min., etc., Co. *v.* Jackson, 27 Colo. 139, 60 Pac. 573.

Georgia.— Parler *v.* Johnson, 81 Ga. 254, 7 S. E. 317.

New Jersey.— Den *v.* Tunis, 25 N. J. L. 633.

North Carolina.— McKee *v.* Lineberger, 87 N. C. 181; Hardin *v.* Cheek, 48 N. C. 135, 64 Am. Dec. 600.

Oregon.— Dolph *v.* Barney, 5 Oreg. 191.

Tennessee.— White *v.* Chesnut, 11 Humphr. 79; Simmons *v.* McKissick, 6 Humphr. 259.

See 21 Cent. Dig. tit. "Execution," § 940.

58. *Alabama.*— Love *v.* Powell, 5 Ala. 58; Ware *v.* Bradford, 2 Ala. 676, 36 Am. Dec. 427.

Missouri.— Sachse *v.* Clingingsmith, 97 Mo. 406, 11 S. W. 69. See also Hardin *v.* McCanse, 53 Mo. 255.

New York.— Shottenkirk *v.* Wheeler, 3 Johns. Ch. 275.

Texas.— Boggess *v.* Howard, 40 Tex. 153; Ayres *v.* Duprey, 27 Tex. 593, 86 Am. Dec. 657.

United States.— Plant *v.* Anderson, 16 Fed. 914.

See 21 Cent. Dig. tit. "Execution," § 940.

59. *Arkansas.*— Hughes *v.* Watt, 26 Ark. 228; Hardy *v.* Heard, 15 Ark. 184.

Illinois.— McDaniel *v.* Bryan, 8 Ill. App. 273.

Kentucky.— Brandenburgh *v.* Beach, 32 S. W. 168, 17 Ky. L. Rep. 560.

Louisiana.— Herriman *v.* Janney, 31 La. Ann. 276.

Missouri.—See Owen *v.* Baker, 101 Mo. 407, 14 S. W. 175, 20 Am. St. Rep. 618.

Pennsylvania.— Hare *v.* Bedell, 98 Pa. St. 485.

Rhode Island.— East Greenwich Sav. Inst. *v.* Allen, 22 R. I. 337, 47 Atl. 885.

Tennessee.— Loyd *v.* Anglin, 7 Yerg. 428.

Texas.— Leland *v.* Wilson, 34 Tex. 79.

See 21 Cent. Dig. tit. "Execution," § 940.

Contra.— Perron *v.* Maillan, 10 La. 520.

60. Jordan *v.* Bradshaw, 17 Ark. 106, 65 Am. Dec. 419 (holding that, where the deed fails to recite the judgment under which the property was sold, the party claiming under the deed must prove that fact *aliunde*); Hardy *v.* Heard, 15 Ark. 184; Wainwright *v.* Bobbitt, 127 N. C. 274, 37 S. E. 336. See, however, Curlee *v.* Smith, 91 N. C. 172; Miller *v.* Miller, 89 N. C. 402.

Loss or destruction of writ.— Sweeney *v.* Sweeney, 119 Ga. 76, 46 S. E. 76, 100 Am. St. Rep. 159; Dail *v.* Sugg, 85 N. C. 104; Rollins *v.* Henry, 78 N. C. 342.

61. *California.*— Vassault *v.* Austin, 32 Cal. 597; People *v.* Doe, 31 Cal. 220. See also Hihn *v.* Peck, 30 Cal. 280.

Colorado.— Bay State Min., etc., Co. *v.* Jackson, 27 Colo. 139, 60 Pac. 573.

(III) *Persons Concluded.* The general rule is that the recitals in a sheriff's deed are conclusive as to all parties to the deed and those claiming under them;[62] but the sheriff's deed is not conclusive evidence of the matters therein recited as against strangers, particularly parties claiming adversely thereto.[63]

(IV) *Where Deed Is Executed by Successor in Office.* Recitals in a deed by a sheriff of the acts of his predecessor in office are not sufficient evidence of the facts recited, in the absence of statute making them presumptive or *prima facie* evidence thereof.[64]

(V) *Curing Defective Proceedings.* While recitals in a sheriff's deed will not validate a sale which is void on account of failure to observe some statutory requirement,[65] yet an irregularity which renders the sale voidable and not void, such as a misdescription of the property, is cured by a correct recital in the deed.[66]

d. Effect of Deed by Relation Back — (I) *General Rule.* The doctrine is

Florida.—Kendrick *v.* Latham, 25 Fla. 819, 6 So. 871.

Georgia.— Summerlin *v.* Hesterly, 20 Ga. 689, 65 Am. Dec. 639. *Compare* Ellis *v.* Doe, 10 Ga. 253.

Illinois.— Fisher *v.* Eslaman, 68 Ill. 78.

Indiana.— Huddleston *v.* Ingels, 47 Ind. 498.

Louisiana.— Carroll *v.* Scheen, 34 La. Ann. 423.

Maryland.— See Sanderson *v.* Marks, 1 Harr. & G. 252.

Massachusetts.— Frazee *v.* Nelson, 179 Mass. 456, 60 N. E. 40, 88 Am. St. Rep. 391.

Mississippi.— Carson *v.* Doe, 6 Sm. & M. 111, 45 Am. Dec. 273.

Missouri.— Owen *v.* Baker, 101 Mo. 407, 14 S. W. 175, 20 Am. St. Rep. 618; Sachse *v.* Clingingsmith, 97 Mo. 406, 11 S. W. 69; Evans *v.* Robberson, 92 Mo. 192, 4 S. W. 941, 1 Am. St. Rep. 701. *Contra,* McCormick *v.* Fitzmorris, 39 Mo. 24.

Nevada.— *In re* Smith, 4 Nev. 254, 97 Am. Dec. 531.

Oklahoma.— Christy *v.* Springs, 11 Okla. 710, 69 Pac. 864.

Pennsylvania.— Kelly *v.* Creen, 53 Pa. St. 302; Wilson *v.* McVeagh, 2 Yeates 86.

South Carolina.— Stuckey *v.* Crosswell, 12 Rich. 273; Sawyer *v.* Leard, 8 Rich. 267. See, however, Hopkins *v.* De Graffenreid, 2 Bay 441.

Tennessee.— Anderson *v.* Clark, 2 Swan 156; Rogers *v.* Cawood, 1 Swan 142, 55 Am. Dec. 729 (holding that the recital of dates in the sheriff's deed will prevail over his return on the writ); Rogers *v.* Jennings, 3 Yerg. 308.

Texas.— Leland *v.* Wilson, 34 Tex. 79.

See 21 Cent. Dig. tit. "Execution," §§ 941, 942.

The New York statute provides that a sheriff's deed shall be presumptive evidence of the facts therein stated, only after it has been recorded twenty years (Dixon *v.* Dixon, 89 N. Y. App. Div. 603, 85 N. Y. Suppl. 609), and where such deed has not been recorded for the required period it is not helped by a recital therein that it was made pursuant to an order of the supreme court (Hume *v.* Fleet, 23 N. Y. App. Div. 185, 48 N. Y. Suppl. 889; Goldman *v.* Kennedy, 49 Hun 157, 1 N. Y. Suppl. 599, 14 N. Y. Civ. Proc. 392, 21 Abb. N. Cas. 362); and prior to the passage of the above statute the recitals in the sheriff's deed were not evidence of the facts stated at all (Hasbrouck *v.* Burhans, 42 Hun 376; Jackson *v.* Roberts, 11 Wend. 422. See also Phillips *v.* Shiffer, 14 Abb. Pr. 101).

The recital of an assignment of the certificate of sale in a sheriff's deed for land sold on execution is *prima facie* evidence of the fact. Stephenson *v.* Thompson, 13 Ill. 186; Messerschmidt *v.* Baker, 22 Minn. 81.

62. *Missouri.*— Durette *v.* Briggs, 47 Mo. 356.

New York.— Sandford *v.* Roosa, 12 Johns. 162; Thompson *v.* Hammond, 1 Edw. 497.

Pennsylvania.— Hale *v.* Henrie, 2 Watts 143, 27 Am. Dec. 289.

South Carolina.—Hailey *v.* Curry, 3 Strobh. 99.

Tennessee.— Pratt *v.* Phillips, 1 Sneed 543, 60 Am. Dec. 162.

See 21 Cent. Dig. tit. "Execution," § 943.

But see Spragins *v.* Russell, 4 Ky. L. Rep. 255; McPherson *v.* Hussey, 17 N. C. 323.

63. *California.*— Donahue *v.* McNulty, 24 Cal. 411, 85 Am. Dec. 78.

Missouri.— Durette *v.* Briggs, 47 Mo. 356.

North Carolina.— Edwards *v.* Tipton, 77 N. C. 222.

South Carolina.— Galt *v.* Lewis, 1 Treadw. 160.

Tennessee.— Pratt *v.* Phillips, 1 Sneed 543, 60 Am. Dec. 162.

See 21 Cent. Dig. tit. "Execution," § 943.

64. McPherson *v.* Hussey, 17 N. C. 323. See also Seechrist *v.* Baskin, 7 Watts & S. (Pa.) 403, 42 Am. Dec. 251; Leshey *v.* Gardner, 3 Watts & S. (Pa.) 314, 38 Am. Dec. 764; Downing *v.* Stephens, 1 Baxt. (Tenn.) 454; Edwards *v.* Tipton, 77 N. C. 222; Claflin *v.* Robinhorst, 40 Wis. 482.

65. Fitch *v.* Pinckard, 5 Ill. 69; Cassidy *v.* Woodward, 77 Iowa 354, 42 N. W. 319; Morrell *v.* Ingle, 23 Kan. 32; Johnson *v.* Rowe, 1 Ky. L. Rep. 274.

66. Hopping *v.* Burnam, 2 Greene (Iowa) 39; Farrior *v.* Houston, 100 N. C. 369, 6 S. E. 72, 6 Am. St. Rep. 597; Fitch *v.* Boyer, 51 Tex. 336.

well settled that a sheriff's deed when executed takes effect by relation, and must be treated as if executed on the date when the lien under which the sale was made was created.[67]

(II) *Subsequent Encumbrancers and Purchasers.* Under the rule just stated, the title of a party claiming under a sheriff's deed will prevail against the claims of encumbrancers and purchasers, whose interest attached subsequent to the sale of the property.[68]

(III) *Where Property Was Previously Attached.* Likewise a sheriff's deed for property sold under an execution issued in an attachment suit relates back to the levy of the attachment and cuts off all subsequent liens.[69]

F. Proceeds — 1. Disposition of — a. General Rule. The general rule is that plaintiff of record, or his assignee, is the party legally entitled to the proceeds of

67. *Arizona.*— Webber *v.* Kastner, (1898) 53 Pac. 207.

California.— Bagley *v.* Ward, 37 Cal. 121, 99 Am. Dec. 256; McMillan *v.* Richards, 9 Cal. 365, 70 Am. Dec. 655.

Delaware.— See Robinson *v.* Robinson, 3 Harr. 391 (holding that the title of the purchaser has relation back to the day of sale); Miles *v.* Wilson, 3 Harr. 382.

Illinois.— Edwardsville R. Co. *v.* Sawyer, 92 Ill. 377; Goff *v.* O'Conner, 16 Ill. 421; Rogers *v.* Brent, 10 Ill. 573, 50 Am. Dec. 422.

Indiana.— Doe *v.* Horn, 1 Ind. 363, 50 Am. Dec. 470; Smith *v.* Allen, 1 Blackf. 22.

Iowa.— Bonnell *v.* Allerton, 51 Iowa 166, 49 N. W. 857; Byington *v.* Walsh, 11 Iowa 27.

Kansas.— Farlin *v.* Sook, 30 Kan. 401, 1 Pac. 123, 46 Am. St. Rep. 100.

Kentucky.— Greer *v.* Wintersmith, 85 Ky. 516, 4 S. W. 232, 7 Ky. L. Rep. 613; Halley *v.* Oldham, 5 B. Mon. 233, 41 Am. Dec. 262.

Maine.— Benson *v.* Smith, 42 Me. 414, 66 Am. Dec. 285. See also Abbott *v.* Sturtevant, 30 Me. 40.

Missouri.— Crowley *v.* Wallace, 12 Mo. 143; Page *v.* Hill, 11 Mo. 149.

New Jersey.— Hackensack Sav. Bank *v.* Morse, 46 N. J. Eq. 161, 18 Atl. 367. See Blatchford *v.* Conover, 40 N. J. Eq. 205, 1 Atl. 16, 7 Atl. 354. *Contra,* Green *v.* Steelman, 10 N. J. L. 193.

New York.— Thomas *v.* Crofut, 14 N. Y. 474; Wright *v.* Douglass, 2 N. Y. 373 [*reversing* 3 Barb. 554]; Holman *v.* Holman, 66 Barb. 215. See Pfeffer *v.* Kling, 171 N. Y. 668, 64 N. E. 1125 [*affirming* 58 N. Y. App. Div. 179, 68 N. Y. Suppl. 641]; Schermerhorn *v.* Merrill, 1 Barb. 511.

North Carolina.—Cowles *v.* Coffey, 88 N. C. 340.

Ohio.— Oviatt *v.* Brown, 14 Ohio 285, 45 Am. Dec. 539; Boyd *v.* Longworth, 11 Ohio 235.

Pennsylvania.—Pennsylvania Schuylkill Valley R. Co. *v.* Cleary, 125 Pa. St. 442, 17 Atl. 468, 11 Am. St. Rep. 913; Smith *v.* Grim, 26 Pa. St. 95, 67 Am. Dec. 400. *Contra,* Garrett *v.* Dewart, 43 Pa. St. 342, 82 Am. Dec. 570.

Tennessee.— Parker *v.* Swan, 1 Humphr. 80, 34 Am. Dec. 619.

See 21 Cent. Dig. tit. "Execution," §§ 760, 946.

Contra.— Leger *v.* Doyle, 11 Rich. (S. C.) 109, 70 Am. Dec. 240; Holmes *v.* McMaster, 1 Rich. Eq. (S. C.) 340.

68. *Illinois.*— Ryhiner *v.* Frank, 105 Ill. 326; Fell *v.* Price, 8 Ill. 186.

Indiana.— Wilhelm *v.* Humphries, 97 Ind. 520.

Iowa.— Marshall *v.* McLean, 3 Greene 363.

Kentucky.— Greer *v.* Wintersmith, 85 Ky. 516, 4 S. W. 232, 9 Ky. L. Rep. 96, 7 Am. St. Rep. 613.

New York.— Dumond *v.* Church, 4 N. Y. App. Div. 194, 38 N. Y. Suppl. 557; Jackson *v.* Dickenson, 15 Johns. 309, 8 Am. Dec. 236. See, however, Hawley *v.* Cramer, 4 Cow. 717.

North Carolina.— Richardson *v.* Thornton, 52 N. C. 458; Testerman *v.* Poe, 19 N. C. 103.

In Missouri the rule is laid down that while as to the execution defendant and his privies, and as to strangers purchasing with notice, the sheriff's deed relates back to the date of sale and vests the title in the purchaser from that time, yet this relation back is not allowed where the rights of strangers who are purchasers for valuable consideration and without notice intervene. Lewis *v.* Curry, 74 Mo. 49; Leach *v.* Koenig, 55 Mo. 451; Strain *v.* Murphy, 49 Mo. 337; Schumate *v.* Reavis, 49 Mo. 333; Winston *v.* Affalter, 49 Mo. 263; Hartt *v.* Rector, 13 Mo. 497, 53 Am. Dec. 157; Alexander *v.* Merry, 9 Mo. 514.

See 21 Cent. Dig. tit. "Execution," § 947.

69. *California.*— Reilly *v.* Wright, 117 Cal. 77, 48 Pac. 970; Riley *v.* Nance, 97 Cal. 203, 31 Pac. 1126, 32 Pac. 315; Robinson *v.* Thornton, (1893) 31 Pac. 936; Porter *v.* Pico, 55 Cal. 165.

Idaho.— Palouse City First Nat. Bank *v.* Lienallen, 4 Ida. 431, 39 Pac. 1108.

Maine.— Poor *v.* Chapin, 97 Me. 295, 54 Atl. 753.

Missouri.— Hall *v.* Stephens, 65 Mo. 670, 27 Am. Rep. 302; Pepperdine *v.* Seymour Bank, 100 Mo. App. 387, 73 S. W. 890.

New Hampshire.— Goodall *v.* Rowell, 15 N. H. 572.

New York.— See Lemont *v.* Cheshire, 65 N. Y. 30 [*affirming* 6 Lans. 234].

Washington.— See Pennsylvania Mortg. Invest. R. Co. *v.* Gilbert, 13 Wash. 684, 43 Pac. 941, 45 Pac. 43.

See 21 Cent. Dig. tit. "Execution," § 948.

an execution sale, and the sheriff should pay over to such party the money so collected, less the amount of his fees and charges.[70] Where the execution debtor stands passively by and allows his property to be sold, and makes no opposition to the sale, and subsequently surrenders possession, he cannot claim the proceeds of the sale on the ground that the judgment had been satisfied by payment prior to the sale,[71] or on the ground of irregularity in the proceedings.[72]

b. Limitation of Rule. Where, however, there is proper ground for setting a sale aside on account of irregularities in the proceedings, but the property has passed into the hands of innocent purchasers, then the execution debtor can have recourse to the proceeds of the sale in lieu of the recovery of the property.[73]

c. Where Sale Terminates Liens on Property. Under some statutes upon the sale of property on execution, all existing liens thereon, with a few designated exceptions, are terminated, and such liens are transferred from the property to the proceeds of the sale, and such proceeds should be applied to existing liens according to their priority.[74] Such statutes, however, embrace only judgment or lien creditors of defendant in execution, and have no application to his contract creditors.[75]

70. *Georgia.*— Brocker *v.* Bradford, 53 Ga. 274; Robinson *v.* Towns, 30 Ga. 818 (holding likewise that, where an execution and judgment have been assigned, plaintiff's interest in the further enforcement thereof is conveyed, but not his interest in the money already collected by the sheriff thereunder); Price *v.* Bradford, 5 Ga. 364 (holding likewise that the assignee is entitled to the same rights as the original plaintiff would have been entitled to in the distribution of money in the sheriff's hands). See also Tift *v.* Gould, 47 Ga. 507.

Illinois.—See Peoria Sav., etc., Co. *v.* Elder, 165 Ill. 55, 45 N. E. 1083 [*affirming* 65 Ill. App. 567].

Louisiana.—Silliven *v.* Bellocq, 20 La. Ann. 305; Yeatman *v.* Erwin, 14 La. Ann. 149.

Mississippi.— Dunn *v.* Vannerson, 7 How. 579.

New Jersey.— See Kirkpatrick *v.* Cason, 30 N. J. L. 331.

Pennsylvania.— McCahill *v.* Maguire, 193 Pa. St. 428, 44 Atl. 499; Riley *v.* Ogden, 185 Pa. St. 506, 40 Atl. 76; Cunningham *v.* Ihmsen, 63 Pa. St. 351.

South Carolina.— McKenna *v.* Secrest, 4 Strobh. Eq. 160.

See 21 Cent. Dig. tit. "Execution," § 951.

Assignee of judgment creditor.— Spinning *v.* Pierce County, 20 Wash. 126, 54 Pac. 1006.

Insolvency of judgment debtor.— Hoffa *v.* Person, 1 Pa. Super. Ct. 357.

Payment to husband where a judgment was in favor of both husband and wife but the execution issued in the husband's name alone. See Burgess *v.* Kane, 52 Mo. 43.

Reversioner.— See Jackson *v.* Kipp, 3 Wend. (N. Y.) 230.

71. Parson *v.* Henry, 43 La. Ann. 307, 8 So. 918. See also Barada *v.* Carondelet, 16 Mo. 323; Warren First Nat. Bank *v.* Fair, 127 Pa. St. 324, 18 Atl. 3.

72. Slagel *v.* Murdock, 65 Mo. 522; Hendrix *v.* Wright, 50 Mo. 311.

73. Murphy *v.* Loos, 104 Ill. 514; Holloway *v.* Stevens, 48 How. Pr. (N. Y.) 129.

A grantee claiming under a judgment debtor prior to the judgment under which the sale was had is not entitled to the proceeds of the sale in preference to the judgment creditor, and if he has a valid title it should be set up against the title of the purchaser at the sale. Helfrich's Appeal, 15 Pa. St. 382.

Where property of a third party is seized and sold as the property of the execution debtor, such third party's right to the proceeds of the execution sale is the same as his previous right to the property. Sartwell *v.* Moses, 62 N. H. 355.

74. Reading *v.* State, 1 Harr. (Del.) 190; Lewis *v.* Thatcher, 18 La. Ann. 575; Barelli *v.* Delassus, 16 La. Ann. 280; Fulton *v.* Fulton, 7 Rob. (La.) 73; Latrobe First Nat. Bank *v.* New York, etc., Gas, etc., Co., 137 Pa. St. 601, 20 Atl. 870; Finnel *v.* Brew, 81 Pa. St. 362; Fry's Appeal, 76 Pa. St. 82; Strauss' Appeal, 49 Pa. St. 353; Douglass' Appeal, 48 Pa. St. 223 (holding, however, that an after-acquired lien cannot attach to such proceeds); Carneghan *v.* Brewster, 2 Pa. St. 41; Reed *v.* Reed, 1 Watts & S. (Pa.) 235; Stevenson *v.* Stonehill, 5 Whart. (Pa.) 301; McGrew *v.* McLanahan, 1 Penr. & W. (Pa.) 44; Werth *v.* Werth, 2 Rawle (Pa.) 151; Fetterman *v.* Bachdell, 4 Brewst. (Pa.) 54 (holding, however, that interest on such liens can only be computed to the date of sale); Cloud's Estate, 4 Leg. Gaz. (Pa.) 369; Schrader *v.* Burr, 10 Phila. (Pa.) 620; Reed *v.* Kimble, 1 Del. Co. (Pa.) 461; Reilly *v.* Elliott, 1 Del. Co. (Pa.) 77. See Kohlman *v.* Meridian First Nat. Bank, 71 Miss. 843, 15 So. 131; Hoffman's Appeal, 44 Pa. St. 95 (holding that an execution sale under a judgment obtained after the execution of a fraudulent conveyance will not discharge prior liens, such as arrears of ground-rent and other taxes, and consequently are not payable out of the proceeds of the sale); Fischer's Appeal, 33 Pa. St. 294.

Sale by last redemptioner.— See Warford *v.* Sullivan, 147 Ind. 14, 46 N. E. 27, under the Indiana statute.

Trust fund.— See Deal *v.* Briggs, 3 C. Pl. (Pa.) 29.

75. Smith *v.* Reiff, 20 Pa. St. 364; Kilheffer *v.* Carpenter, 10 Lanc. Bar (Pa.) 21; Balmer *v.* Balmer, 2 Lanc. L. Rev. (Pa.) 11; Brinkle *v.* Wagner, 5 Phila. (Pa.) 452. See

d. Costs, Expenses, and Attorney's Fees. The sheriff has a lien upon the funds in his hand realized from an execution sale for his lawful fees, and the expense incurred in making the levy and sale, and he may retain such amount upon settlement with the execution creditor;[76] and, where liens upon the property having priority to the judgment and execution under which the land was sold exhaust the fund realized by the sale, the costs of the execution and sale thereunder should be deducted before distribution of the fund to the prior lienors.[77] However, attorney's fees or commissions cannot be paid out of such fund,[78] unless such fees are expressly included in the judgment.[79]

e. Agreements. Where lien creditors enter into an agreement for the distribution of the proceeds of an execution sale in a certain manner, such agreement will bind the parties thereto, and the distribution by the sheriff in accordance therewith will be upheld.[80]

f. Mortgages, Vendors', and Mechanics' Liens. Where there is a valid recorded mortgage upon land at the time of the rendition of the judgment, only the equity of redemption in such land is subject to levy and sale, and therefore the judgment creditor is entitled to the proceeds of sale, and not the mortgagee, whose lien still attaches to the land.[81] This rule likewise applies to vendors'[82] and mechanics' liens.[83] Where, however, a sale takes place under a judgment

Dentler's Appeal, 23 Pa. St. 505. See also Grayson *v.* Hangstorfer, 9 Wkly. Notes Cas. (Pa.) 333.

76. *Alabama.*—Chenault *v.* Walker, 22 Ala. 275.

Kentucky.— Lynn *v.* Sisk, 9 B. Mon. 135.

Louisiana.— Jamison *v.* Barelli, 20 La. Ann. 452.

South Carolina.— Maner *v.* Wilson, 16 S. C. 469.

United States.— Johnson *v.* McDonough, 13 Fed. Cas. No. 7,395, Gilp. 101.

See 21 Cent. Dig. tit. "Execution," § 952.

In a case of personal property the costs and expenses of storage or for other care of property is the proper charge on a fund arising from a sheriff's sale thereof. Ramsay *v.* Overaker, 1 Disn. (Ohio) 569, 12 Ohio Dec. (Reprint) 801.

Where plaintiff is insolvent.— In North Carolina see Clerk's Office *v.* Cape Fear Bank, 66 N. C. 214, 8 Am. Rep. 506; Clerk's Office *v.* Allen, 52 N. C. 156, where the opinion of the court was delivered by Battle, J.

77. Bryant's Appeal, 104 Pa. St. 372 (holding that where two or more pieces of real estate are sold in parcels for distinct sums upon a junior judgment not reached in the distribution, the costs incurred upon the execution process alone should be divided by the number of separate pieces of realty sold and the resulting amount charged to the fund realized from each); Fry's Appeal, 76 Pa. St. 82; *In re* McDannell, 1 Chest. Co. Rep. (Pa.) 494; *In re* Woodward, 1 Chest. Co. Rep. (Pa.) 402. See also Lahr's Appeal, 90 Pa. St. 507, holding, however, that costs incurred prior to the issuance of execution cannot be included. But see Kunsman *v.* Kunsman, 2 Lanc. L. Rev. (Pa.) 291, where personal property was sold under two executions, one of which had a prior lien, and the proceeds of the sale were insufficient to pay the first lien, and it was held that no part of the costs of the second execution were payable out of the proceeds. *Compare* Merriman *v.* Mullett, 2 Pa. Co. Ct. 360.

Under exemption statute.— See McFarland *v.* Short, 1 Chest. Co. Rep. (Pa.) 410.

78. Long *v.* Lewis, 1 Stew. & P. (Ala.) 229; Valentine *v.* McGrath, 52 Miss. 112; Philadelphia, etc., R. Co.'s Appeal, 2 Pa. Cas. 5, 3 Atl. 838.

79. Miller *v.* Miller, 147 Pa. St. 545, 548, 23 Atl. 841; Schmidt's Appeal, 82 Pa. St. 524.

80. Baker *v.* Wimpee, 22 Ga. 69; Farr *v.* Day, 47 N. J. L. 149; Towanda First Nat. Bank *v.* Ladd, 126 Pa. St. 188, 17 Atl. 750. See also Hoerner *v.* Cordell, 10 Pa. Super. Ct. 314, 44 Wkly. Notes Cas. (Pa.) 213; Trimmier *v.* Winsmith, 23 S. C. 449.

81. De Vaughn *v.* Byrom, 110 Ga. 904, 36 S. E. 267; Hynds Mfg. Co. *v.* Oglesby, etc., Grocery Co., 93 Ga. 542, 21 S. E. 63; Hidell *v.* Dwinell, 85 Ga. 452, 11 S. E. 836; Harwell *v.* Fitts, 20 Ga. 723; Jewitt *v.* McGowen, R. M. Charlt. (Ga.) 391; Read *v.* Dews, R. M. Charlt. (Ga.) 355; Kring *v.* Green, 10 Mo. 195; Hilliard *v.* Tustin, 172 Pa. St. 354, 33 Atl. 574; Fullerton's Appeal, 46 Pa. St. 144; Bank *v.* Patterson, 9 Pa. St. 311; Bratton's Appeal, 8 Pa. St. 164; Ruth's Appeal, 7 Pa. Cas. 547, 10 Atl. 886; Shultze *v.* Diehl, 2 Penr. & W. (Pa.) 273; Boyle *v.* Abercrombie, 5 Rawle (Pa.) 144; Auwerter *v.* Mathiot, 9 Serg. & R. (Pa.) 397; Miner *v.* Clark, 7 Kulp (Pa.) 140; McCue *v.* McCue, 4 Phila. (Pa.) 295; Field *v.* Oberteuffer, 2 Phila. (Pa.) 271.

Under La. Code Pr. §§ 401 *et seq.* see Cobb *v.* Depue, 22 La. Ann. 244; Young *v.* Municipality No. 1, 5 La. Ann. 736; Willis *v.* Willis, 7 Rob. 87.

82. Estes *v.* Ivey, 53 Ga. 52; Wilkerson *v.* Burr. 10 Ga. 117. See Payne *v.* Buford, 106 La. 83, 30 So. 263.

83. *In re* West Side Electric Light, etc., Co., 12 N. Y. Suppl. 478. See also Birney's Appeal, 114 Pa. St. 519, 7 Atl. 150.

and execution having priority to the mortgage, the proceeds go first to the satisfaction of such execution, and any surplus should be applied to the satisfaction of such mortgage and other liens which were discharged by the sale in the order of their priority.[84]

2. Preferred Claims — a. Wages — (1) *In General.* In some jurisdictions by statutory enactment money due for wages to certain persons, in certain specified businesses, for a designated period preceding an execution sale of property connected with such business, is made a preferred claim, and is first to be paid out of the proceeds of such sale.[85] Such statutes, however, are strictly construed, and persons not specifically designated as entitled to the benefit thereof will not be given a priority in the distribution of the proceeds of the execution sale,[86] and they do not give a lien for wages earned after a particular property has been seized by the sheriff on execution, since property so levied on is in the custody of

Under the Georgia act of Dec. 27, 1834, see Durham *v.* Mayo, 32 Ga. 192.

84. Barnitz *v.* Smith, 1 Watts & S. (Pa.) 142; Shultze *v.* Diehl, 2 Penr. & W. (Pa.) 273; Lindle *v.* Neville, 13 Serg. & R. (Pa.) 227; Hoerner *v.* Cordell, 10 Pa. Super. Ct. 314, 44 Wkly. Notes Cas. (Pa.) 213; Fowler *v.* Barksdale, Harp. Eq. (S. C.) 164. See also Green *v.* Hill, 101 Ga. 258, 28 S. E. 692.

Chattel mortgage.— Isaacs *v.* Messick, 1 Marv. (Del.) 259, 40 Atl. 1109.

85. Taylor *v.* Hill, 115 Cal. 143, 44 Pac. 336, 46 Pac. 922; Riddlesburg Coal, etc., Co.'s Appeal, 114 Pa. St. 58, 6 Atl. 381; Rheeling's Appeal, 107 Pa. St. 161; Wagner's Appeal, 103 Pa. St. 185; Seiders' Appeal, 46 Pa. St. 57; Vastine's Appeal, 38 Pa. St. 164 (holding that such preference, under the act of April 7, 1849, is applicable only to the fund for distribution arising from the sale of the debtor's personalty); Walker's Appeal, 1 Pa. Cas. 295, 2 Atl. 857; James Rees, etc., Co. *v.* Hulings, 9 Pa. Super. Ct. 265; Atkinson *v.* Atkinson, 4 Pa. Dist. 291; Strang *v.* Adams, 4 Pa. Dist. 212, 16 Pa. Co. Ct. 21; Osborne *v.* Atkinson, 15 Pa. Co. Ct. 639; Egleston *v.* Levan, 15 Pa. Co. Ct. 206; Weaver *v.* Wheaton, 2 Pa. Co. Ct. 428; National Bank of Republic *v.* Oxford Co-Operative Car Co., 2 Pa. Co. Ct. 360; Merriman *v.* Mullett, 2 Pa. Co. Ct. 360; Keeler *v.* Beishline, 1 Pa. Co. Ct. 287; Thompson *v.* Wingert, 14 Wkly. Notes Cas. (Pa.) 483; Matsinger *v.* Covenant Pub. Co., 14 Wkly. Notes Cas. (Pa.) 90 (holding that the claim is not limited to wages earned before the levy, but includes wages earned up to the day of sale); O'Brien *v.* Hamilton, 12 Phila. (Pa.) 387 (holding that a chief workman who has paid the wages of his helpers is entitled to his wages and theirs as a preferred claim on a fund raised on execution); Nesmith's Appeal, 6 Leg. Gaz. (Pa.) 117; Ege *v.* Marsh, 1 Chest. Co. Rep. (Pa.) 524; Nogle *v.* Cumberland Ore Bank Co., 1 Chest. Co. Rep. (Pa.) 491; Taylor *v.* Smith, 1 Chest. Co. Rep. (Pa.) 106; Gray *v.* Kruegerman, 4 C. Cl. (Pa.) 150; Tupper *v.* Krise, 3 Lanc. L. Rev. (Pa.) 113; *In re* Evans, 3 L. T. N. S. (Pa.) 43; Teets *v.* Teets, 6 Luz. Leg. Reg. (Pa.) 19; Farmers' Bank's Appeal, 1 Walk. (Pa.) 33. See also Austin *v.* Da Rocha, 23 La. Ann. 44; *In re* Modes, 76 Pa. St. 502 (holding that the act of 1872 does not give laborers preference for their claims over an execution creditor whose judgment was on a contract made before the passage of the act); Nogle *v.* Cumberland Ore Bank Co., 1 Chest. Co. Rep. (Pa.) 491.

A miner may assign his claim against his employer and in such case the assignee is entitled to the miner's preference. Wolfe's Appeal, 1 Walk. (Pa.) 451.

Where a firm is the debtor, an execution sale of the separate interest of one partner does not entitle miners employed by the firm and protected by statute, to a preferred payment out of the money so paid. Beatty's Appeal, 3 Grant (Pa.) 213.

86. Hartman's Appeal, 107 Pa. St. 327; Llewellyn's Appeal, 103 Pa. St. 458; Gibbs, etc., Mfg. Co.'s Appeal, 100 Pa. St. 528; Pardee's Appeal, 100 Pa. St. 408; Wade's Appeal, 29 Pa. St. 328; Witmer *v.* Miller, 2 Pa. Dist. 239, 12 Pa. Co. Ct. 363; Thomas *v.* Washabaugh, 24 Pa. Co. Ct. 419; Breckenridge *v.* Keating, 5 Pa. Co. Ct. 260; Lantz *v.* Post, 2 Pa. Co. Ct. 481; Merriman *v.* Mullett, 2 Pa. Co. Ct. 360; Balcom *v.* Moon, 1 Pa. Co. Ct. 296; White's Appeal, 15 Wkly. Notes Cas. (Pa.) 313; Kaercher *v.* Sullivan, 2 Chest. Co. Rep. (Pa.) 461; Brindle *v.* Lichtenberger, 1 Chest. Co. Rep. (Pa.) 485; Bowers *v.* Bowers, 1 Chest. Co. Rep. (Pa.) 273; Taylor *v.* Smith, 1 Chest. Co. Rep. (Pa.) 106; Cleveland *v.* O'Neil, 4 C. Pl. (Pa.) 148; Brandon *v.* Davis, 2 Leg. Rec. (Pa.) 142; Conroy *v.* Goodman, 1 Leg. Rec. (Pa.) 352; Brown *v.* Brown, 1 Lehigh Val. L. Rep. (Pa.) 167; Umbenhauer *v.* Miller, 1 Woodw. (Pa.) 69. See Ulrich *v.* Feaser, 2 Lanc. L. Rev. (Pa.) 25.

A hand-laborer's wages as preferred by the Pennsylvania act of May 12, 1891, cannot be claimed by a father for work done by his minor sons. Henry *v.* Sheaffer, 3 Pa. Dist. 347, 14 Pa. Co. Ct. 237.

Farm laborers and menial servants.— See Sullivan's Appeal, 77 Pa. St. 107; Schwartz *v.* Rhoades, 6 Pa. Co. Ct. 385; Fendrick *v.* Henry, 5 Pa. Co. Ct. 265; Matter of Solms, 13 Phila. (Pa.) 539; Irvings *v.* Purdy, 2 Chest. Co. Rep. (Pa.) 210; Shields *v.* Scott, 1 Chest. Co. Rep. (Pa.) 123; *In re* Seble, 1 Chest. Co. Rep. (Pa.) 52; Hirsh *v.* Myers, 12 Lanc. Bar (Pa.) 112.

the law, and when sold the proceeds are preserved against creditors whose liens attach subsequent to the levy.[87]

(II) *Notice of Claim.* In order to have a claim for wages accruing against a judgment debtor allowed, it is necessary for the claimant to file with the sheriff a written notice of his claim prior to the execution sale.[88] While such notice need not be in any particular form, so long as the matters essential to give the claimant a lien are recited, yet it should set forth facts sufficient to make a case within the statute, so that the officer and persons interested may know that the labor was performed within the time limited, in a business defined by the act, the sum due, and that property subject to the lien is embraced in the levy.[89]

b. Rent — (I) *General Rule.* Under many of the statutes, where the personal property of a lessee or tenant is sold on execution, the lessor or landlord is entitled to a preference in the distribution of the proceeds of the execution sale for rent of the premises upon which such property is situated.[90] Thus, on the

87. Kindig *v.* Atkinson, 13 Phila. (Pa.) 542; Schwartz *v.* Banks, 13 Phila. (Pa.) 540; Schrader *v.* Burr, 10 Phila. (Pa.) 620; Brandon *v.* Davis, 2 Leg. Rec. (Pa.) 142.

88. Taylor *v.* Hill, 115 Cal. 143, 44 Pac. 336, 46 Pac. 922 (holding likewise that notice of claim must be given to the judgment debtor); Stichler *v.* Malley, 94 Pa. St. 82 (holding that by failure to file a notice of claim the parties waive the right to preference in distribution); Allison *v.* Johnson, 92 Pa. St. 314 (holding that a notice of claim given after the execution sale of the goods on which the lien was claimed, but where the proceeds were still in the constable's hands, was filed too late); Crater *v.* Deemer, 4 Pa. Co. Ct. 375 (holding that such notice must be in writing, and that parol testimony is insufficient to support such written notice); Corry First Nat. Bank *v.* Childs, 10 Phila. (Pa.) 452; Ulrich *v.* Feaser, 2 Lanc. L. Rev. (Pa.) 25 (holding that the notice is too late if not given until after the execution sale); Brandon *v.* Davis, 2 Leg. Rec. (Pa.) 142.

89. Allison *v.* Johnson, 92 Pa. St. 314; Hartranft's Appeal, 2 Pa. Cas. 327, 4 Atl. 479; Livingood's Appeal, 2 Pa. Cas. 323, 4 Atl. 26; Allentown Nat. Bank *v.* Helios Dry Color, etc., Co., 9 Pa. Super. Ct. 275; Coates *v.* Wright, 3 Pa. Dist. 392; Garretson *v.* Harris, 13 Pa. Co. Ct. 333; Brown *v.* McFadden, 5 Pa. Co. Ct. 9 (holding, that while such notices are not required to be sworn to, yet it is a better practice to swear to them); Shives *v.* Clouser, 4 Pa. Co. Ct. 149 (holding that certainty to a reasonable intent is all that is required in notices of preferred claims for wages, and the circumstances under which a notice was given should be considered in determining its sufficiency); Sulzberger *v.* Scranton Store Co., 2 Pa. Co. Ct. 478, 3 C. Pl. (Pa.) 203; Weaver *v.* Wheaton, 2 Pa. Co. Ct. 428; Bright *v.* Osterman, 1 Pa. Co. Ct. 148; Shields *v.* Scott, 1 Chest. Co. Rep. (Pa.) 123; Hoffacker *v.* Hoffacker, 2 Leg. Rec. (Pa.) 153; Brandon *v.* Davis, 2 Leg. Rec. (Pa.) 142.

Notices held to be sufficient see Timmes *v.* Metz, 156 Pa. St. 384, 27 Atl. 248; Hoffa *v.* Person, 1 Pa. Super. Ct. 357; Wolf *v.* Tillinghast, 3 Pa. Dist. 388; Wilson *v.* Gibson, 10 Pa. Co. Ct. 191; Crater *v.* Deemer, 4 Pa. Co. Ct. 375; Shives *v.* Clouser, 4 Pa. Co. Ct. 149; Nimick *v.* Kemble Coal, etc., Co., 2 Pa. Co. Ct. 197.

Notice held to be insufficient see Adamson's Appeal, 110 Pa. St. 459, 1 Atl. 327; Zealberg's Appeal, 2 Pa. Cas. 385, 10 Atl. 419; Kauffman *v.* Mosser, 3 Pa. Dist. 90; Garrettson *v.* Harris, 2 Pa. Dist. 719; Breckenridge *v.* Keating, 5 Pa. Co. Ct. 260; Lantz *v.* Post, 2 Pa. Co. Ct. 481; Bright *v.* Osterman, 1 Pa. Co. Ct. 148; Swartz *v.* Dannehower, 1 Pa. Co. Ct. 147; Kaercher *v.* Sullivan, 2 Chest. Co. Rep. (Pa.) 461; Irvings *v.* Purdy, 2 Chest. Co. Rep. (Pa.) 210; Ulrich *v.* Feaser, 2 Lanc. L. Rev. (Pa.) 25; Brown *v.* Brown, 1 Lehigh Val. L. Rep. (Pa.) 167.

90. *Delaware.*— State *v.* Vandever, 2 Harr. 397.

District of Columbia.— Gibson *v.* Gautier, 1 Mackey 35.

Georgia.— See Linder *v.* Sanders, 77 Ga. 57.

Kentucky.— Burket *v.* Boude, 3 Dana 209.

Louisiana.— Wagner *v.* Newman, 18 La. Ann. 508; Robb *v.* Wagner, 5 La. Ann. 111. See Simon *v.* Leopold, 19 La. Ann. 154.

New Jersey.— Fischel *v.* Keer, 45 N. J. L. 507. But see Kirkpatrick *v.* Cason, 30 N. J. L. 331.

New York.— Bussing *v.* Bushnell, 6 Hill 382; Millard *v.* Robinson, 4 Hill 604.

Pennsylvania.— Edwards' Appeal, 105 Pa. St. 103 (holding, however, that a third party who claimed title to the goods on which execution was levied was thereby estopped thereafter from claiming a lien on the fund as landlord); Weltner's Appeal, 63 Pa. St. 302; McComb's Appeal, 43 Pa. St. 435; Moss' Appeal, 35 Pa St. 162; Wood's Appeal, 30 Pa. St. 274; Parker's Appeal, 5 Pa. St. 390 (holding that it is immaterial that the time for which the rent was claimed is included in two successive leases, provided not more than a year's rent is claimed); Richie *v.* McCauley, 4 Pa. St. 471; Rowland *v.* Goldsmith, 2 Grant 378; Gray *v.* Wilson, 4 Watts 39; Binns *v.* Hudson, 5 Binn. 505; Bantleon *v.* Smith, 2 Binn. 146, 4 Am. Dec. 430; Kendig *v.* Kendig, 2 Pearson 89 (holding that

usual conveyance in fee on ground-rent, with right of reëntry, the landlord is entitled to be paid the arrears out of the proceeds of an execution sale, although without interest.[91] As a general rule, however, the lessor or landlord is only entitled to a preference for the rent due at the time of the levy of the execution and not for rent to the date of sale.[92]

(II) *NOTICE OF CLAIM.* In order to avail himself of this preference, it is necessary for the lessor or landlord to give notice to the officer of his claim prior to the sale of the property levied upon.[93]

the acceptance of a promissory note by a landlord for rent due, which was not intended by the parties as payment, will not prevent the landlord from claiming his rent out of the proceeds of the sheriff's sale); Allen *v.* Lewis, 1 Ashm. 184 (holding that the above rule applies, even where there is sufficient personal property left after the sale to satisfy the rent); Linton *v.* Pollock, 5 Pa. Co. Ct. 243; Baum *v.* Brown, 11 Wkly. Notes Cas. 202; Trimble's Appeal, 5 Wkly. Notes Cas. 396; Nailor *v.* Skelly, 1 Chest. Co. Rep. 408 (holding that this rule is applicable only when the property sold is on the leased premises); Woodmansie *v.* Boyer, 2 Lanc. L. Rev. 365.

South Carolina.— Margart *v.* Swift, 3 McCord 378.

See 21 Cent. Dig. tit. "Execution," § 963.

By a surrender of a tenant to his landlord after a levy has been made by an execution creditor of the tenant on the goods found on the demised premises, and before the sale of the same by the sheriff, the landlord loses his right in the proceeds of the sale of said goods of his preferred claim for rent. Greider's Appeal, 5 Pa. St. 422.

Money due for use and occupation is not to be preferred as rent to execution process, in the application of sales. Farmers' Bank *v.* Cole, 5 Harr. (Del.) 418.

Rent due under a coal-lease mortgage is not a preferred claim against the property of the lessee, so as to require such rent to be paid out of the proceeds of a sale of the tenant's goods under execution. Miners' Bank *v.* Heilner, 47 Pa. St. 452.

Where a landlord's interest in real estate had been sold under execution and he made a claim for arrearages of rent due from prior tenant which had accrued before the sale of the landlord's interest, it was held that he was not entitled to payment out of money in the hands of the sheriff arising from a sale under execution of the personal property of a tenant who took possession after the sale of the landlord's interest, since such sale destroyed his right to a remedy for distress for arrearages of rent. Hampton *v.* Henderson, 4 Pa. L. J. Rep. 438, 2 Am. L. J. 562.

Where goods exempt from distress for rent are sold by a sheriff the landlord has no right to come in by notice to the sheriff, and he cannot become a party to the distribution. Rowland *v.* Goldsmith, 2 Grant (Pa.) 378; Drew *v.* Peer, 9 Wkly. Notes Cas. (Pa.) 33.

91. Ter-Hoven *v.* Kerns, 2 Pa. St. 96; *In re* Dougherty, 9 Watts & S. (Pa.) 189, 42 Am. Dec. 326; Pancoast's Appeal, 8 Watts & S. (Pa.) 381; Sands *v.* Smith, 3 Watts & S. (Pa.) 9; Watson *v.* Bradley, 1 Phila. (Pa.) 177; Mayer *v.* Powell, 10 Lanc. Bar (Pa.) 41; Western Bank *v.* Willitts, 1 Pa. L. J. Rep. 188, 2 Pa. L. J. 45. See Fisher's Appeal, 33 Pa. St. 294 [*reversing* 3 Phila. 224] (holding that a sheriff's sale of land under a judgment obtained after the execution of a conveyance by defendant which is fraudulent as to creditors does not discharge prior liens for arrears of ground-rent and taxes, and consequently they are not payable out of the proceeds of the sale); Field *v.* Oberteuffer, 2 Phila. (Pa.) 271. But see Pattison *v.* McGregor, 9 Watts & S. (Pa.) 180.

92. Theriat *v.* Hart, 2 Hill (N. Y.) 380; Beekman *v.* Lansing, 3 Wend. (N. Y.) 446, 20 Am. Dec. 707; Trappan *v.* Morie, 18 Johns. (N. Y.) 1; Wickey *v.* Eyster, 58 Pa. St. 501; Case *v.* Davis, 15 Pa. St. 80; Merrill *v.* Trimmer, 2 Pa. Co. Ct. 49; Leaming's Appeal, 5 Wkly. Notes Cas. (Pa.) 221 (holding that the rent due should be reckoned up to the date of the levy made under the last execution participating in the fund); Morris *v.* Billings, 1 Phila. (Pa.) 464 (holding that, where rent is payable quarterly in advance, the landlord is only entitled to the quarter's rent which is due at the time of the sale); Worley *v.* Meekley, 1 Phila. (Pa.) 398 (holding, however, that where two executions were levied upon the same property, the landlord was entitled to his rents up to the date of the second instead of the first levy); Horan *v.* Barrett, 5 Leg. & Ins. Rep. (Pa.) 27 (where this rule was applied, notwithstanding that, owing to an interpleader suit, the goods were not sold until two years after the levy); Megarge *v.* Tanner, 1 Pa. L. J. Rep. 331, 2 Pa. L. J. 308; Lewin *v.* Acheson, 30 Pittsb. Leg. J. (Pa.) 215 (holding likewise that the landlord is not entitled to preference for water-rent which has become due, the lease providing that the tenant should pay the same and which the landlord has paid for him). See Gibson *v.* Gautier, 1 Mackey (D. C.) 35.

Merger.— See Shaw *v.* Oakley, 7 Phila. (Pa.) 89.

Rent charge.— See Walton *v.* West, 2 Miles (Pa.) 91.

Rent payable yearly.— See Anderson's Appeal, 3 Pa. St. 218.

93. Burket *v.* Boude, 3 Dana (Ky.) 209 (holding, however, that the notice need not be given in writing, and that it is sufficient if the sheriff is in any way apprised of it and of the amount due); Borlin *v.* Com., 110 Pa. St. 454, 1 Atl. 404; Miller *v.* Johnson, 12 Wend. (N. Y.) 197 (holding that the notice was sufficient, even though not in

c. Debts Due to State or Municipality. In the absence of statute, debts due to the national government, a state, or municipality are not entitled to priority over subsisting liens upon the property sold on execution in the distribution of the proceeds realized therefrom.[94] However, in practically every jurisdiction by express statutory enactment such debts are now made a first lien upon the property and have a preference over all other claims in the distribution of the proceeds of the sale.[95]

3. Distribution Among Different Judgments, or Executions — a. Prior Judgments or Executions — (i) *General Rule.* In the appropriation of the proceeds of property sold under several executions, the rule is well established that the money must be applied to those executions under which the property was sold according to the priority of the judgment lien,[96] and, where property is sold on an execution levied under a junior judgment, such judgment is entitled to be first satisfied out of the proceeds of the sale before a senior judgment upon which no execution has been issued, since the lien of such senior judgment is not thereby divested.[97] Moreover it has been held that the fact that some of the judgments

the form prescribed by the statute, in that it failed to state the time in which the rent accrued); Beekman *v.* Lansing, 3 Wend. (N. Y.) 446, 20 Am. Dec. 707; Bussing *v.* Bushnell, 6 Hill (N. Y.) 382; Millard *v.* Robinson, 4 Hill (N. Y.) 604; Ege *v.* Ege, 5 Watts (Pa.) 134 [*overruling* on this point Mitchell *v.* Stewart, 13 Serg. & R. (Pa.) 295] (holding that a notice is given in due time if served at any time prior to the distribution of the proceeds); Schuyler *v.* Philadelphia Coach Co., 29 Wkly. Notes Cas. (Pa.) 343; Fisher *v.* Allen, 2 Phila. (Pa.) 115; Margart *v.* Swift, 3 McCord (S. C.) 378.

94. De St. Romes *v.* Macarty, 23 La. Ann. 482; Ketcham *v.* Fitch, 13 Ohio St. 201; Parker's Appeal, 5 Pa. St. 390; Bleeker *v.* Bond, 3 Fed. Cas. No. 1,536, 4 Wash. 322.

95. Holding *v.* Thomas, 62 Ala. 4; State *v.* Dickson, 38 Ga. 171; State *v.* Pemberton, Dudley (Ga.) 15; Dungan's Appeal, 88 Pa. St. 414; Dungan's Appeal, 68 Pa. St. 204, 8 Am. Rep. 169; Northern Liberties *v.* Swain, 13 Pa. St. 113; *In re* County Com'rs, 8 Kulp (Pa.) 217, 17 Pa. Co. Ct. 656; Dowlin *v.* Harley, 2 Pa. Co. Ct. 194; Vanarsdalen's Appeal, 3 Wkly. Notes Cas. (Pa.) 463; *In re* Houlette, 2 Chest. Co. Rep. (Pa.) 511; Scott *v.* Kerlin, 1 Del. Co. (Pa.) 545; Reilly *v.* Elliott, 1 Del. Co. (Pa.) 77; South Chester *v.* Weigand, 1 Del. Co. (Pa.) 64; South Chester *v.* Harvey, 1 Del. Co. (Pa.) 62; South Chester *v.* Broomall, 1 Del. Co. (Pa.) 58; Com. *v.* Steacy, 1 Lanc. L. Rev. (Pa.) 86; Commonwealth's Appeal, 29 Leg. Int. (Pa.) 381.

96. *Arkansas.*— Lawson *v.* Jordan, 19 Ark. 297, 70 Am. Dec. 596.

Delaware.— Smith *v.* Simmons, 2 Pennew. 462, 46 Atl. 746.

Georgia.— Allen *v.* Sharp, 65 Ga. 417; Moses *v.* Flewellen, 48 Ga. 23; Parkerson *v.* Sessions, 40 Ga. 171; Thomson *v.* McCordel, 27 Ga. 273; Newton *v.* Nunnally, 4 Ga. 356. See also De Vaughn *v.* Byrom, 110 Ga. 904, 36 S. E. 267.

Illinois.— People *v.* Courson, 87 Ill. App. 254.

Indiana.— Carnahan *v.* Yerkes, 87 Ind. 62; State *v.* Salyers, 19 Ind. 432; Steele *v.* Hanna, 8 Blackf. 326.

Louisiana.— See Deneufbourg *v.* Didion, 7 La. Ann. 344.

Mississippi.— Reed *v.* Haviland, 38 Miss. 323; Mobile, etc., R. Co. *v.* Trotter, 36 Miss. 416; Brown *v.* Bacon, 27 Miss. 589; Brown *v.* Hamlin, 23 Miss. 392; Hand *v.* Grant, 10 Sm. & M. 514; Jennings *v.* Dennis, 6 Sm. & M. 379; Robinson *v.* Green, 6 How. 223; Grand Gulf Bank *v.* Henderson, 5 How. 292.

Missouri.— Friar *v.* Ray, 5 Mo. 510.

New Jersey.— Richards *v.* Morris Canal, etc., Co., 20 N. J. L. 136.

New York.— Rowe *v.* Richardson, 5 Barb. 385; Ward *v.* Storey, 18 Johns. 120.

North Carolina.— Motz *v.* Stowe, 83 N. C. 434; Cannon *v.* Parker, 81 N. C. 320; Faircloth *v.* Ferrell, 63 N. C. 640; Allen *v.* Plummer, 63 N. C. 307; Dunn *v.* Nichols, 63 N. C. 107; Green *v.* Johnson, 9 N. C. 309, 11 Am. Dec. 763; Allemong *v.* Allison, 8 N. C. 325. See also Penland *v.* Leatherwood, 101 N. C. 509, 8 S. E. 234, 9 Am. St. Rep. 38.

Pennsylvania.— Jacoby's Appeal, 67 Pa. St. 434; Carneghan *v.* Brewster, 2 Pa. St. 41; Neff's Appeal, 9 Watts & S. 36; Sedgwick's Appeal, 7 Watts & S. 260; Westmoreland Bank *v.* Rainey, 1 Watts 26; Girard Bank *v.* Philadelphia, etc., R. Co., 2 Miles 447; Phillip Kling Brewing Co. *v.* Mosher, 23 Pa. Co. Ct. 265; Geissel's Appeal, 11 Wkly Notes Cas. 196; Connelly *v.* Withers, 9 Lanc. Bar 117. See Paul *v.* Kunz, 195 Pa. St. 207, 45 Atl. 728.

South Carolina.— Arnold *v.* McKellar, 9 S. C. 335; Furman *v.* Christie, 3 Rich. 1; Greenwood *v.* Naylor, 1 McCord 414. See also Clarkson *v.* Cantey, Harp. 312.

Wisconsin.— Sheboygan Bank *v.* Trilling, 75 Wis. 163, 43 N. W. 830.

See 21 Cent. Dig. tit. "Execution," § 966.

97. *Alabama.*— Caldwell *v.* Houser, 108 Ala. 125, 19 So. 796, holding, however, that this doctrine for obvious reasons does not apply to such sales of personalty.

Arkansas.—Hanauer *v.* Casey, 26 Ark. 352;

are rendered in state courts and some of them are rendered in federal courts does not vary the above rules.[98]

(II) *Where One Judgment or Execution Was Fraudulent.* Where property is sold under several executions and it appears that one of the executions or judgments was fraudulent, or that such judgment had previously been satisfied, then it is not entitled to share in the proceeds of the sale.[99]

(III) *Waiver.* Where an execution creditor having a prior lien allows the proceeds of a sale to be applied in satisfaction of a junior lien to the prejudice of third persons, it will be considered an extinguishment *pro tanto* of such creditor's lien.[1]

b. Pro Rata Distribution. In many jurisdictions, by statutory enactment, where several judgments are rendered at the same time against one defendant in favor of different creditors, and real estate of the judgment debtor is sold under an execution issued on one of the judgments, executions on the other judgments being all in the sheriff's hands at the time of sale, the holders of such judgments are entitled to share *pro rata* in the proceeds of the sale, without regard to the execution under which the land was sold.[2] However, the common-law rule is

Lawson *v.* Jordan, 19 Ark. 297, 70 Am. Dec. 596.

Mississippi.— Mobile, etc., R. Co. *v.* Trotter, 36 Miss. 416; Hand *v.* Grant, 10 Sm. & M. 514; Calmes *v.* Ford, 6 Sm. & M. 190; Bibb *v.* Jones, 7 How. 397; Commercial Bank *v.* Yazoo County, 6 How. 530, 38 Am. Dec. 447; Robinson *v.* Green, 6 How. 223.

Missouri.— Bruce *v.* Vogel, 38 Mo. 100.

New Jersey.— Williamson *v.* Johnston, 12 N. J. L. 86.

New York.— Van Camp *v.* Searle, 147 N. Y. 150, 41 N. E. 427. But see Peck *v.* Tiffany, 2 N. Y. 451.

North Carolina.— Worsley *v.* Bryan, 86 N. C. 343; Allen *v.* Plummer, 63 N. C. 307.

Pennsylvania.— Sweet *v.* Williams, 162 Pa. St. 94, 29 Atl. 350; Stroudsburg Bank's Appeal, 126 Pa. St. 523, 17 Atl. 868. See Worrall's Appeal, 41 Pa. St. 524. See also McClelland *v.* Slingluff, 7 Watts & S. 134, 42 Am. Dec. 224. *Compare* Rudy's Appeal, 94 Pa. St. 338.

See 21 Cent. Dig. tit. "Execution," § 966.

98. McNair *v.* Bateman, 27 Ga. 181; Coughlan *v.* White, 66 N. C. 102; *Ex p.* Voorhies, 46 S. C. 114, 24 S. E. 170. But see Hagan *v.* Lucas, 10 Pet. (U. S.) 400, 9 L. ed. 470. *Contra,* Whitely *v.* Riddick, 29 Fed. Cas. No. 17,567, Chase 540.

99. Parrott *v.* Nesbitt, 81 Ga. 306, 6 S. E. 840; Capital Bank *v.* Huntoon, 35 Kan. 577, 11 Pac. 369. *Compare* Boyd *v.* Roberts, 2 Pa. Co. Ct. 535, holding, however, that one claiming a prior execution to be fraudulent has the burden of establishing such a fact. See also Tomb's Appeal, 9 Pa. St. 61; People *v.* Lansing, 3 Abb. Dec. (N. Y.) 533, 5 Transcr. App. (N. Y.) 96.

Writ of capias ad satisfaciendum.— Where the sheriff had two writs of fieri facias against a debtor and levied on and sold his goods, where plaintiff in the first fieri facias had taken defendant on a capias ad satisfaciendum after the issuance of his former writ, and had discharged him, it was held that plaintiff in the second fieri facias was entitled to the proceeds of the sale. Strong *v.* Linn, 5 N. J. L. 799. See also Freeman *v.* Ruston, 4 Dall. (Pa.) 214, 1 L. ed. 806.

1. Walker *v.* Inman, 78 Ga. 53; Rushin *v.* Shields, 11 Ga. 636, 56 Am. Dec. 436 (holding likewise that it is immaterial under which execution the money was raised and brought into court); Jackson *v.* Jackson, 2 Pa. St. 212; Mann's Appeal, 1 Pa. St. 24. See also Williamson *v.* Johnston, 12 N. J. L. 86; Uniontown Bldg., etc., Assoc.'s Appeal, 92 Pa. St. 200; Geissel *v.* Jones, 14 Phila. (Pa.) 172; Kehler *v.* Miller, 1 Leg. Chron. (Pa.) 35, 4 Leg. Gaz. (Pa.) 125.

The withdrawal of an execution issued in the case in which an attachment had been granted does not affect the right of the creditor to share in the proceeds of the property, according to the priority of his attachment lien, where the property was sold under executions outstanding, and the first execution was withdrawn. Van Camp *v.* Searle, 79 Hun (N. Y.) 134, 29 N. Y. Suppl. 757, 24 N. Y. Civ. Proc. 16.

2. *Colorado.*— Claflin *v.* Doggett, 3 Colo. 413; Rawles *v.* People, 2 Colo. App. 501, 31 Pac. 941.

Illinois.— Gay *v.* Rainey, 89 Ill. 221, 31 Am. Rep. 76. See also Lawrence *v.* McIntire, 83 Ill. 399; Weaver *v.* Bloomington Third Nat. Bank, 56 Ill. App. 664; Hellman *v.* Schiffer, 21 Ill. App. 503.

Kansas.— Clevenger *v.* Hansen, 44 Kan. 182, 24 Pac. 61.

Nebraska.— Moores *v.* Peycke, 44 Nebr. 405, 62 N. W. 1072.

North Carolina.— Johnson *v.* Sedberry, 65 N. C. 1. See also Hill *v.* Child, 14 N. C. 265.

Ohio.— Wilcox *v.* May, 19 Ohio 408.

Pennsylvania.— Wall's Appeal, 84 Pa. St. 101; Missimer *v.* Smale, 6 Pa. Co. Ct. 145; Greenwood *v.* Rambo, 1 Chest. Co. Rep. 275; Krum *v.* Roth, 16 Lanc. L. Rev. 252, holding likewise that, where one judgment creditor has had partial satisfaction of his judgment by the sale of the debtor's personalty upon the sale of the debtor's realty, he is entitled to a dividend based on the balance of the

that where the money arising from the proceeds of the sale of property under two or more executions, the liens of which are equal, is not sufficient in amount to pay the debts that have been levied, it must be applied equally to the several debts, irrespective of their several amounts, unless a surplus remains after the full payment of one or more of the claims; in case there be such surplus that must be applied equally to the balance of the unpaid debts.[3]

c. Application to Execution Against Judgment Creditor. Money collected by an officer on an execution sale is *in custodia legis*, and the better rule is that it cannot be applied by the officer to the satisfaction of a contemporaneous execution against the execution creditor.[4] In some jurisdictions, however, it is held that the sheriff may apply the proceeds of an execution sale to the payment of an execution held by him against the execution creditor, and upon motion the court may order him to make such application.[5]

d. Liability to Refund. Where the proceeds of land sold at an execution sale are paid over to a party having a junior lien, a senior lienor or the sheriff, in case he is held liable, may, by appropriate action at law or a bill in equity, recover the money so paid.[6]

4. Right to Surplus — a. Right of Judgment Debtor. Where a sheriff has satisfied all executions placed in his hands, and there are no liens upon the property which were transferred to the proceeds by virtue of the sale, then the judgment debtor is entitled to any surplus remaining in the sheriff's hands; and the sheriff cannot retain such surplus proceeds for a debt due to himself, or for expenses which he incurred without legal authority.[7]

b. Rights of Judgment Creditors and Other Lienors. Upon the sale of prop-

judgment unpaid and not on the face of the judgment. See also Cohen's Appeal, 10 Wkly. Notes Cas. 544.

South Carolina.— Lawrence *v.* Wofford, 17 S. C. 586.

See 21 Cent. Dig. tit. "Executions," § 969½.

3. Jones *v.* Hutchinson, 43 Ala. 721; Bizzell *v.* Hardaway, 42 Ala. 471; Rutledge *v.* Townsend, 38 Ala. 706; Perry *v.* Adams, 3 Metc. (Mass.) 51; Sigourney *v.* Eaton, 14 Pick. (Mass.) 414, 25 Am. Dec. 414; Campbell *v.* Ruger, 1 Cow. (N. Y.) 215.

4. *Illinois.*— Campbell *v.* Hasbrook, 24 Ill. 343.

Maine.— Hardy *v.* Tilton, 68 Me. 195, 28 Am. Rep. 34.

New Jersey.— Crane *v.* Freese, 16 N. J. L. 305.

North Carolina.— Smith *v.* McMillan, 84 N. C. 593; State *v.* Lea, 30 N. C. 94.

Pennsylvania.— Worrell *v.* Vandusen Oil Co., 1 Leg. Gaz. 53. See, however, Bayard *v.* Bayard, 3 Pa. L. J. Rep. 155, 5 Pa. L. J. 160; Monongahela Nav. Co. *v.* Ledlie, 1 Pa. L. J. Rep. 168, 3 Pa. L. J. 179.

Vermont.— Prentiss *v.* Bliss, 4 Vt. 513, 24 Am. Dec. 631.

United States.— Reno *v.* Wilson, 20 Fed. Cas. No. 11,700*a*, Hempst. 91.

See 21 Cent. Dig. tit. "Execution," § 971.

5. *Georgia.*—Columbus Factory *v.* Hurnden, 54 Ga. 209.

Ohio.— Renner *v.* Burke, 11 Ohio Cir. Ct. 268, 5 Ohio Cir. Dec. 361.

South Carolina.— Summers *v.* Caldwell, 2 Nott & M. 341.

Tennessee.— Dolly *v.* Mullins, 3 Humphr. 437, 39 Am. Dec. 180.

Texas.— Mann *v.* Kelsey, 71 Tex. 609, 12 S. W. 43, 10 Am. St. Rep. 800; Hamilton *v.* Ward, 4 Tex. 356.

Virginia.— Steele *v.* Brown, 2 Va. Cas. 246.

See 21 Cent. Dig. tit. "Execution," § 971.

6. *Illinois.*— Ridenour *v.* Shideler, 5 Ill. App. 180, holding that equity will under such circumstances compel junior lienors to restore so much as is necessary to pay off the senior liens.

Kentucky.— See Hays *v.* Griffith, 85 Ky. 375, 3 S. W. 431, 11 S. W. 306, 9 Ky. L. Rep. 65.

Minnesota.— Auerbach *v.* Gieseke, 40 Minn. 258, 41 N. W. 946.

Mississippi.— Gay *v.* Edwards, 30 Miss. 218.

New York.— Gillig *v.* Grant, 23 N. Y. App. Div. 596, 49 N. Y. Suppl. 78.

South Carolina.— Stokes *v.* Cane, 6 Rich. 513; Furman *v.* Christie, 3 Rich. 1.

United States.— U. S. *v.* Mechanics' Bank, 26 Fed. Cas. No. 15,756, Gilp. 51.

See 21 Cent. Dig. tit. "Executions," § 973.

Contra.— Diechman *v.* Northampton Bank, 1 Rawle (Pa.) 54.

7. *Alabama.*— Robinson *v.* Tipton, 31 Ala. 595.

Arkansas.— Tuohey *v.* Inman, 25 Ark. 604.

Indiana.— Martin *v.* Reissner, 54 Ind. 217.

Kansas.— Jenkins *v.* Green, 22 Kan. 562; Tucker *v.* McCrie, 8 Kan. App. 228, 55 Pac. 493.

Louisiana.— Parker *v.* Grelier, 18 La. Ann. 167. *Compare* Winter *v.* Zacherie, 4 Rob. 35.

Massachusetts.— See King *v.* Rice, 12 Cush. 161.

North Carolina.— Love *v.* Johnston, 72

erty under execution, after the satisfaction of the execution under the senior judgment, junior judgment creditors and other creditors whose liens attach to the proceeds have a right to apply any surplus remaining to the satisfaction of their liens according to priority.[8]

c. Rights of Mortgagee. Where land is sold subject to a prior mortgage, the surplus proceeds in the absence of other liens thereon must be returned to the judgment debtor, and not paid to the mortgagee, who must look to the land for the satisfaction of the mortgage.[9] Where, however, property is sold under a judgment senior to a mortgage, the lien of the mortgage is transferred from the property to the proceeds, and the mortgagee is entitled to share in any surplus arising from the sale in the order of priority.[10]

d. Rights of Grantee. The rule is well settled that a grantee of property which has been sold under a judgment against the grantor, which was a prior lien upon the property, is entitled to any surplus remaining after the satisfaction of such judgment.[11] This is equally true where the grantee himself becomes the purchaser at the execution sale.[12]

e. Proceedings For Recovery. A lienor or grantee from the judgment debtor who is entitled to the surplus remaining after satisfaction of the execution under which the property was sold may make application for the payment of such surplus by motion in the action in which the execution was issued, if such lienor or grantee was not a party to any action against the judgment debtor.[13] Where,

N. C. 415; Taylor *v.* Williams, 23 N. C. 249.

Ohio.— Sparrow *v.* Hosack, 40 Ohio St. 253; Creps *v.* Baird, 3 Ohio St. 277.

Pennsylvania.— Hopkins *v.* Forsyth, 14 Pa. St. 34, 53 Am. Dec. 513; Fitch's Appeal, 10 Pa. St. 461, 51 Am. Dec. 495; Willing *v.* Yohe, 1 Phila. 223. See Omwake *v.* Harbaugh, 148 Pa. St. 278, 23 Atl. 985.

South Carolina.— Dickison *v.* Parmer, 2 Rich. Eq. 407. See also Etters *v.* Wilson, 12 Rich. 145.

Tennessee.— See Carter *v.* Wyrick, (Ch. App. 1897) 42 S. W. 159.

Texas.— Cook *v.* Gatewood, 43 Tex. 185.

See 21 Cent. Dig. tit. "Execution," § 974.

8. *Alabama.*— Rutledge *v.* Townsend, 38 Ala. 706.

Georgia.— Macon Sav. Bank *v.* Carter, 107 Ga. 778, 33 S. E. 679.

Illinois.— Hart *v.* Wingart, 83 Ill. 282. See, however, O'Neil *v.* People, 71 Ill. App. 208.

Indiana.— Louden *v.* Ball, 93 Ind. 232.

Louisiana.— Fulton *v.* Fulton, 7 Rob. 73.

Maryland.— Leonard *v.* Groome, 47 Md. 499.

Massachusetts.— Bacon *v.* Leonard, 4 Pick. 277; Denny *v.* Hamilton, 16 Mass. 402.

Mississippi.— Mobile, etc., R. Co. *v.* Trotter, 36 Miss. 416.

New Jersey.— Millville Nat. Bank *v.* Shaw, 42 N. J. L. 550; Stebbins *v.* Walker, 14 N. J. L. 90, 25 Am. Dec. 499.

New York.— Whitehall First Nat. Bank *v.* Whitehall Transp. Co., 18 Hun 161; Averill *v.* Loucks, 6 Barb. 470; People *v.* Ulster C. Pl., 18 Wend. 628; Slade *v.* Van Vechter, 11 Paige 21. See also Salter *v.* Bowe, 32 Hun 236; Van Nest *v.* Yeomans, 1 Wend. 87; Williams *v.* Rogers, 5 Johns. 163; Ball *v.* Rogers, 3 Cai. 84.

Pennsylvania.— Eberly *v.* Shirk, 206 Pa. St. 414, 55 Atl. 1071; Brown's Appeal, 91 Pa. St. 485 (where a judgment creditor's lien had expired, but it was held that he was entitled to the surplus); Com. *v.* Alexander, 14 Serg. & R. 257; Young *v.* Levy, 6 Pa. Super. Ct. 23, 41 Wkly. Notes Cas. 294; Machen's Estate, 6 Pa. Dist. 701; Monongahela Nav. Co. *v.* Ledlie, 1 Pa. L. J. Rep. 168, 3 Pa. L. J. 179; Bayard *v.* Bayard, 3 Pa. L. J. Rep. 155, 5 Pa. L. J. 160; Dietrich *v.* Dietrich, 1 Woodw. 198.

South Carolina.— Pringle *v.* Sizer, 2 S. C. 59.

Tennessee.— Simpson *v.* Sparkman, 12 Lea 360.

Washington.— Mayer *v.* Morgan, 26 Wash. 71, 66 Pac. 128.

See 21 Cent. Dig. tit. "Execution," § 975.

9. Jenkins *v.* Green, 22 Kan. 562; State *v.* Pool, 27 N. C. 105. But see Norman *v.* Norman, 26 S. C. 41, 11 S. E. 1096.

10. *Georgia.*— Sims *v.* Kidd, 55 Ga. 626.

Kansas.— Walker *v.* Braden, 44 Kan. 707, 25 Pac. 195.

Kentucky.— See Roney *v.* Bell, 9 Dana 3.

New York.— Brewster *v.* Cropsey, 4 How. Pr. 219; Bartlett *v.* Gale, 4 Paige 503.

North Carolina.— Jones *v.* Thomas, 26 N. C. 12.

Pennsylvania.— Com. *v.* Robinson, 7 Kulp 253.

See 21 Cent. Dig. tit. "Execution," § 976.

11. Fulcher *v.* Felker, 28 Ga. 252; Butler *v.* Craig, 29 Kan. 205; Ross *v.* Ross, 10 Daly (N. Y.) 314; Every *v.* Egerton, 7 Wend. (N. Y.) 259; Williams *v.* Rogers, 5 Johns. (N. Y.) 163; Frick's Appeal, 101 Pa. St. 485.

12. Wheeler *v.* Kennedy, 1 Ala. 292; Bitting's Appeal, 17 Pa. St. 211. See also Smith *v.* Caswell, 1 How. Pr. (N. Y.) 133. And *compare* Colgrove *v.* Cox, 22 Ind. 43.

13. Stebbins *v.* Walker, 14 N. J. L. 90, 25 Am. Dec. 499 [*overruling* Thompson *v.* Pier-

however, such surplus has been paid over to a party not entitled thereto, if the claimant's right to such surplus is not clear, his remedy is an action against the sheriff or the party who has received the surplus and not by summary proceedings.[14]

5. Proceedings For Distribution — a. Distribution by Officer. The general rule is that a sheriff may distribute the proceeds of an execution sale to the parties entitled thereto, in the absence of conflicting claims, although he does so at his own risk and is liable to the party injured for any mistake.[15] However, where the proceeds of an execution sale is the subject of conflicting claims of which the sheriff has due notice, he cannot proceed to the distribution thereof, but should hold the money until the claims are settled, unless otherwise directed by the court;[16] and where the sheriff is in doubt as to the proper application of the proceeds of an execution sale, he should apply to the court for instructions as to the proper disposition of the fund.[17]

b. Payment Into Court.[18] Upon application of a claimant to the fund, a court having jurisdiction thereof may direct the sheriff to bring the proceeds of the sale into court; and it may likewise make such order of its own motion.[19]

son, 3 N. J. L. 571] (holding that the court has control over surplus money arising from an execution sale if the property at the time of the sale was subject to or bound by subsequent judgments and executions); Ross *v.* Ross, 10 Daly (N. Y.) 314; Ball *v.* Ryers, 3 Cai. (N. Y.) 84, Col. Cas. (N. Y.) 258, Col. & C. Cas. (N. Y.) 435. See also Adams *v.* Elliott, 1 How. Pr. (N. Y.) 220.

14. Frankel *v.* Elias, 60 How. Pr. (N. Y.) 74; Creps *v.* Baird, 3 Ohio St. 277. See also Hopkins *v.* Forsyth, 14 Pa. St. 34, 53 Am. Dec. 513.

15. *Illinois.*— Lindauer *v.* Lang, 29 Ill. App. 118.

Nebraska.— Luce *v.* Foster, 42 Nebr. 818, 60 N. W. 1027.

New Jersey.— See Stebbins *v.* Walker, 14 N. J. L. 90, 25 Am. Dec. 499.

New York.— Hodgman *v.* Barker, 17 N. Y. Suppl. 911.

North Carolina.— Washington *v.* Sanders, 13 N. C. 343, 21 Am. Dec. 336; Yarborough *v.* State Bank, 13 N. C. 23.

Oregon.— Richards *v.* Nye, 5 Oreg. 382.

Pennsylvania.— Lewis *v.* Rogers, 16 Pa. St. 18; Gannon *v.* Desh, 11 Wkly. Notes Cas. 20; Marble Co. *v.* Burke, 5 Wkly. Notes Cas. 124, 12 Phila. 302; Williams *v.* Gilmore, 1 Am. L. J. 269; McCauley *v.* Boeshore, 2 Lanc. L. Rev. 337; Commonwealth Nat. Bank *v.* Dengler, 1 Leg. Rec. 346; Cohen *v.* Green, 5 L. T. N. S. 11. See also Weis *v.* Weis, 3 Wkly. Notes Cas. 76.

United States.— Wortman *v.* Conyngham, 30 Fed. Cas. No. 18,056, Pet. C. C. 241.

See 21 Cent. Dig. tit. "Execution," § 983.

16. *Alabama.*—Turner *v.* Lawrence, 11 Ala. 427.

Illinois.— John Spry Lumber Co. *v.* Chappell, 84 Ill. 539, 56 N. E. 794 [*affirming* 85 Ill. App. 223].

Louisiana.— Citizens' Bank *v.* Payne, 21 La. Ann. 380.

Pennsylvania.— *In re* Bastian, 90 Pa. St. 472 [*reversing* 8 Luz. Leg. Reg. 110]; Zantzinger *v.* Old, 2 Dall. 265, 1 L. ed. 375.

South Carolina.— Cooper *v.* Scott, 2 McMull. 150.

See 21 Cent. Dig. tit. "Execution," § 982.

17. *Alabama.*—Leonard *v.* Johnson, 43 Ala. 596.

New Jersey.— Matthews *v.* Warne, 11 N. J. L. 295.

New York.— Phillips *v.* Wheeler, 67 N. Y. 104 [*affirming* 2 Hun 603]; Marsh *v.* Lawrence, 4 Cow. 461.

North Carolina.— Milliken *v.* Fox, 84 N. C. 107 (holding, however, that the court will not give advice to a sheriff as to the application of moneys in his hands raised by an execution sale in favor of different creditors, except in cases where the money has been collected and is in the sheriff's hands subject to the court's order); Bates *v.* Lilly, 65 N. C. 232; Whitaker *v.* Petway, 26 N. C. 182. *Compare* Ramsour *v.* Young, 26 N. C. 133.

Pennsylvania.— Weltner's Appeal, 63 Pa. St. 302.

Tennessee.— Wiley *v.* Bridgman, 1 Head 68.

See 21 Cent. Dig. tit. "Execution," § 984.

Interpleader by sheriff.— In several jurisdictions the statute gives the sheriff holding money raised under execution in favor of different creditors against the same defendant the right to file a bill of interpleader against such creditors to contest their respective claims. Bates *v.* Lilly, 65 N. C. 232. See also Shaw *v.* Chester, 2 Edw. (N. Y.) 405.

18. Deposit in court generally see Deposits in Court.

19. *Georgia.*— Lowe *v.* Moore, 8 Ga. 194.

Louisiana.— Berard *v.* Young, 26 La. Ann. 598. See also Thompson *v.* Daniel, 47 La. Ann. 1401, 17 So. 830.

Missouri.— State *v.* Taylor, 56 Mo. 492.

New Jersey.— Stebbins *v.* Walker, 14 N. J. L. 90, 25 Am. Dec. 499; Williamson *v.* Johnston, 12 N. J. L. 86; Gifford *v.* McGuinness, 63 N. J. Eq. 834, 53 Atl. 87, 92 Am. St. Rep. 686.

New York.— Heath *v.* Hand, 1 Paige 329.

Pennsylvania.— Jones *v.* English, 168 Pa. St. 438, 32 Atl. 39; Kauffman's Appeal, 70 Pa. St. 261 (holding that a fund raised by several executions cannot, without the assent

c. Rule Against Officer. Where the sheriff holds a fund which was raised on a sale under execution, and adverse claims are asserted to it, the proper mode of procedure is for each of the claimants to take his rule against the sheriff to distribute the fund, and they may all be tried together.[20]

d. Reference to Auditor[21] — (i) *In General.* In Pennsylvania, in the case of conflicting claims to a fund raised by an execution sale, the court will usually appoint an auditor to pass on the law and facts of the case and report his findings to the court.[22]

of all the creditors, be distributed before it has been paid into court); Atkins' Appeal, 58 Pa. St. 86 (holding that the court has no power, even by agreement between the parties interested, to make disposition of the proceeds of the sheriff's sale unless the money has been actually paid into court); Linton *v.* Pollock, 5 Pa. Co. Ct. 243; Kirk *v.* Ruckholdt, 7 Wkly. Notes Cas. 81; Kochenderfer *v.* Feigel, 5 Wkly. Notes Cas. 404; Dunn *v.* Megargee, 12 Phila. 343; *Ex. p.* Poulson, 11 Phila. 297; Freytag *v.* Bamford, 9 Phila. 211; Meixell *v.* Meixell, 1 Lehigh Val. L. Rep. 127. See Allegheny Bank's Appeal, 48 Pa. St. 328 (holding that a court, on whose execution a sheriff has sold lands of a defendant and deposited the proceeds in the bank to the credit of his account as the sheriff, cannot after his death rule the bank to pay the proceeds into court for the purpose of distribution); Commonwealth Nat. Bank *v.* Dengler, 1 Leg. Rec. 346 (holding that the proceeds of a sale of personal property must be distributed by the sheriff and will not be ordered into court except under special circumstances). See also Kohl *v.* Harding, 8 Watts. 329; Devereux *v.* Nichols, 3 Pa. Co. Ct. 439.

South Carolina.— Greenwood *v.* Colcock, 2 Bay 67.

Tennessee.— Atkinson *v.* Cooper, 2 Humphr. 361.

Wisconsin.— McDonald *v.* Allen, 37 Wis. 108, 19 Am. Rep. 754.

United States.— Wortman *v.* Conyngham, 30 Fed. Cas. No. 18,056, Pet. C. C. 241.

See 21 Cent. Dig. tit. "Execution," § 985.

20. *Alabama.*— Wheeler *v.* Kennedy, 1 Ala. 292.

Florida.— Willis *v.* Shepard, 2 Fla. 397.

Georgia.— Crawford *v.* Williams, 76 Ga. 792; Coleman *v.* Slade, 75 Ga. 61; Brown *v.* Wylie, 64 Ga. 435; Williams *v.* Brown, 57 Ga. 304; Franklin *v.* Norton, 47 Ga. 643; Foster *v.* Rutherford, 20 Ga. 668.

Illinois.— Smith *v.* Lind, 29 Ill. 24; People *v.* Courson, 87 Ill. App. 254.

Louisiana.— Conrad *v.* Patzelt, 29 La. Ann. 465; Bucker *v.* Gordy, 28 La. Ann. 619.

New York.— Richards *v.* Allen, 3 E. D. Smith 399; Auburn Bank *v.* Throop, 18 Johns. 505; Slingerland *v.* Swart, 13 Johns. 255. See Mills *v.* Davis, 53 N. Y. 349; Barstow *v.* Thorne, 2 How. Pr. 64.

North Carolina.— Fox *v.* Kline, 85 N. C. 173; Dewey *v.* White, 65 N. C. 225; Palmer *v.* Clarke, 13 N. C. 354, 21 Am. Dec. 340.

Pennsylvania.— Zealberg's Appeal, 2 Pa. Cas. 385, 10 Atl. 419; Deckerman *v.* Edinger, 3 Pa. Dist. 11, 13 Pa. Co. Ct. 541; Bank *v.* Williams, 2 L. T. N. S. 198. See Franklin Tp. *v.* Osler, 91 Pa. St. 160.

Texas.— Rickards *v.* Bemis, (Civ. App. 1903) 78 S. W. 239.

Virginia.— Wilson *v.* Stokes, 4 Munf. 455.

See 21 Cent. Dig. tit. "Execution," § 987.

See, however, Trapnall *v.* Jordan, 7 Ark. 430; Howard *v.* Proskauer, 57 Miss. 247.

In South Carolina see Oliver *v.* Sale, 19 S. C. 17; Caskey *v.* McMullen, 3 S. C. 196; Dawkins *v.* Pearson, 2 Bailey 619; Bruton *v.* Cannon, Harp. 389; Payne *v.* Kershaw, Harp. 275. See also *Ex p.* Clark, Dudley 111.

Time of application.— See Tisch *v.* Raisch, 7 Kulp (Pa.) 131.

21. Reference generally see REFERENCES.

22. People's Sav. Bank *v.* Mosier, 190 Pa. St. 375, 49 Atl. 132; Semple *v.* Semple, 193 Pa. St. 630, 44 Atl. 1077 (holding, however, that if the sheriff has paid the money over to prior lien-holders and taken their receipt, it is too late for the judgment creditor to petition the court for the appointment of an auditor); Andrews *v.* Fishing Creek Lumber Co., 161 Pa. St. 204, 28 Atl. 1018; Dermond's Appeal, 153 Pa. St. 238, 25 Atl. 1133; Hoch's Appeal, 72 Pa. St. 53 (holding, however, that, where the proceeds are not in the court, an auditor cannot be appointed for the purpose of making distribution of the same); Souder's Appeal, 57 Pa. St. 498; Benson's Appeal, 48 Pa. St. 159; Logue's Appeal, 22 Pa. St. 50; Brant's Appeal, 20 Pa. St. 141; Myer's Appeal, 2 Pa. St. 463; Smith's Appeal, 11 Wkly. Notes Cas. (Pa.) 378; Peck's Appeal, 11 Wkly. Notes Cas. (Pa.) 31; Dunn *v.* McGarge, 6 Wkly. Notes Cas. (Pa.) 204; Schrader *v.* Burr, 10 Phila. (Pa.) 620; Thompson *v.* Keller, 6 Phila. (Pa.) 218 (holding that where in proceedings for the distribution of the proceeds of land sold under execution, an issue has been allowed by the auditor and tried in court and a verdict had, the verdict is conclusive on all facts involved in the issue); Flanagan *v.* McAffee, 1 Phila. (Pa.) 75; *In re* Pennsylvania Spiritual, etc., Assoc., 4 Lanc. L. Rev. (Pa.) 265; Ulrich *v.* Feaser, 2 Lanc. L. Rev. (Pa.) 25; Moser *v.* Quirk, 2 Leg. Rec. (Pa.) 1 (holding, however, that where the proceeds of a sheriff's sale are in court for distribution, an auditor will not be appointed when the only matter in dispute is whether a judgment creditor who had bid at the first sale, and had failed to carry out his bid, should be charged with the difference between the amount of his bid and that of the purchaser at the second sale); Bank *v.* Williams, 2 L. T. N. S. (Pa.) 198. See Cohen *v.* Green, 5 L. T. N. S. (Pa.) 11; Com. *v.* Steacy, 1 Lanc. L. Rev. (Pa.) 86.

(II) *Proceedings Before Auditor.* An auditor has no authority to inquire into the validity of a judgment in due form rendered by a court of record;[23] it is, however, within his jurisdiction to determine the ownership of the judgment.[24] His report to the court should recite the facts proved and not the evidence; this part of his report should be in effect a case stated or special verdict.[25]

e. Directing Issues — (I) *In General.* The court having in hand the distribution of the proceeds of a sheriff's sale should direct an issue to try material facts in dispute, where a demand is made for it by an interested party.[26] And the question must be one of fact and not of law.[27] The court, however, is not bound to direct an issue unless there is a formal demand for it.[28]

(II) *Application or Affidavit to Obtain Issue.* In at least one jurisdiction the statute requires the applicant for an issue on distribution of proceeds of sheriffs' sales to make affidavit that there are material facts in dispute, and to set forth their nature and character, it being within the province of the court to determine whether to grant the issue on the affidavit.[29] Under the Pennsylvania

23. Ford's Appeal, 152 Pa. St. 641, 25 Atl. 884; Meckley's Appeal, 102 Pa. St. 536; Titusville Second Nat. Bank's Appeal, 96 Pa. St. 460; Kindig's Appeal, 2 Wkly. Notes Cas. (Pa.) 680; *In re* Harris, 6 Kulp (Pa.) 409 (holding, however, that the auditor may disregard a judgment void upon its face); Sabbaton's Estate, 2 Am. L. J. (Pa.) 83; Hoover *v.* Diffenderfer, 5 Lanc. L. Rev. (Pa.) 245. See Teter *v.* Boltz, 2 Leg. Rec. (Pa.) 61.

A mortgage being an instrument *inter partes*, and in no sense, even when recorded, a judgment of the court, an auditor may examine into its validity on a question of distribution. Osterhout *v.* Germon, 5 L. T. N. S. (Pa.) 31.

24. Souder's Appeal, 57 Pa. St. 498.

25. Field *v.* Oberteuffer, 2 Phila. (Pa.) 271, holding further that the conclusion of the auditor on the facts where no issue was asked cannot be controverted by the exceptants.

26. *Georgia.*—Valentino *v.* Stafford, 93 Ga. 735, 21 S. E. 154. See also Paris *v.* Citizens' Banking Co., 106 Ga. 206, 32 S. E. 141.

Missouri.— Williamson *v.* Wylie, 69 Mo. App. 368.

New Jersey.— Tradesmen's Bank *v.* Fairchild, 31 N. J. L. 371.

Pennsylvania.— Corfield *v.* Klein, 173 Pa. St. 363, 34 Atl. 435; Mulligan *v.* Barnes, 171 Pa. St. 53, 32 Atl. 1109; Bush's Appeal, 65 Pa. St. 263; Schick's Appeal, 49 Pa. St. 380; Bichal *v.* Renk, 5 Watts 140; Stewart *v.* Stocker, 1 Watts 135; Stiles *v.* Bradford, 4 Rawle 394; Wile *v.* Locks, 9 Pa. Super. Ct. 193, 43 Wkly. Notes Cas. 424; Ambrose's Estate, 7 Pa. Dist. 609; McDaniel *v.* Haly, 1 Miles 353; People's Sav. Bank *v.* Mosier, 10 Kulp 54 (holding that a party interested may have an auditor appointed or an issue directed but cannot have both); Poley *v.* Lally, 5 Kulp 201; Filbert *v.* Filbert, 9 Pa. Co. Ct. 149 (holding that a creditor without a lien is not a party having an "interest" in the proceeds within the meaning of the statute, and, hence, is not entitled to an issue); Ziegler *v.* Pierce, 5 Pa. Co. Ct. 518; Atherholt *v.* Atherholt, 42 Wkly. Notes Cas. 70; Reigle's Appeal, 13 Lanc. Bar 22; Kilheffer *v.* Carpenter, 10 Lanc. Bar 21; Connelly *v.* Withers, 9 Lanc. Bar 117; Bank *v.* Williams, 2 L. T. N. S. 198 (where the court refused to direct an issue); Knebel *v.* Manger, 1 Leg. Rec. 180. See Mellon *v.* Shenango Nat. Gas. Co., 157 Pa. St. 627, 27 Atl. 793; Ferree *v.* Thompson, 52 Pa. St. 353; Wolf *v.* Payne, 35 Pa. St. 97; Tomb's Appeal, 9 Pa. St. 61; Dickerson's Appeal, 7 Pa. St. 255.

South Carolina.— Starnes *v.* Prince, 6 Rich. 319; Maddox *v.* Williamson, 1 Strobh. 23.

See 21 Cent. Dig. tit. "Execution," § 990.

A mere naked allegation, without evidence, or against evidence, cannot create a dispute within the meaning of the act of 1836, relating to executions, and making it the duty of the court to direct an issue for the trial of any "fact in dispute," growing out of the distribution of the proceeds of sheriffs' sales. Knight's Appeal, 19 Pa. St. 493.

Res judicata.— Robinson *v.* Vandiver, 2 Pearson (Pa.) 95.

27. Wolfe *v.* Oxnard, 152 Pa. St. 623, 25 Atl. 806; Christophers *v.* Selden, 28 Pa. St. 165; Robinson *v.* Vandiver, 2 Pearson (Pa.) 95. See also Shertzer *v.* Herr, 19 Pa. St. 34. See, however, Devereux *v.* Nichols, 3 Pa. Co. Ct. 439.

28. Mahler's Appeal, 38 Pa. St. 220; *In re* Brown, 2 Pa. St. 463.

29. Lœffler *v.* Schmertz, 152 Pa. St. 615, 25 Atl. 636; Moore *v.* Dunn, 147 Pa. St. 359, 23 Atl. 596 [*affirming* 10 Pa. Co. Ct. 79]; Ryman's Appeal, 124 Pa. St. 635, 17 Atl. 180; Dormer *v.* Brown, 72 Pa. St. 404; Robinson's Appeal, 36 Pa. St. 81; Wright's Appeal, 25 Pa. St. 373; Schwartz's Appeal, 10 Pa. Cas. 80, 13 Atl. 302 (where the affidavit was held sufficient to entitle the creditors to an issue); Irvin's Appeal, 7 Pa. Cas. 350, 11 Atl. 430 (where the affidavit was held to be insufficient); Ambrose's Estate, 7 Pa. Dist. 609; O'Donnell *v.* Poike, 2 Pa. Dist. 790 (holding that allegations that the judgment was confessed for the purpose of defrauding creditors, and that the sale was under all the executions, did not state facts); *In re* Marks, 8 Kulp (Pa.) 501; Friedlander *v.* Blau, 8

statute, the demand or application for an issue may be made even after all the evidence has been submitted, the argument concluded, and the court prepared to render its decision;[30] and where a matter has been referred to an auditor, the demand for an issue is in time if made on the return of the auditor's report, even though the question of fact involved has been litigated before the auditor.[31] Where, however, after a full hearing before the auditor, participated in by the applicant, the demand for an issue made after the auditor has passed upon facts comes too late.[32]

f. Bill in Equity.[33] In some jurisdictions it is held that a bill in equity will lie to determine the rights of rival claimants to the proceeds of an execution sale.[34]

g. Third Opposition. In Louisiana, where property on which a party claims a privilege is sold under execution, he should proceed by way of a third opposition to claim a priority of privilege on the proceeds of the sale.[35]

h. Order or Decree For Distribution. No change in the mode of appropriating the proceeds of a sale specifically disposed of by a decree can be made except by opening and correcting the decree.[36]

i. Appeal.[37] Where a party claiming an interest in the proceeds of an execution sale has complied with the statute in regard to the allowance of his claim,[38] he has a right of appeal from an order or decree of court distributing the fund.[39]

Kulp (Pa.) 478; *In re* Wormser, 8 Kulp (Pa.) 236; Atherholt *v.* Atherholt, 42 Wkly. Notes Cas. (Pa.) 70; Biddle *v.* King, 1 Phila. (Pa.) 394; *In re* Pennsylvania Spiritual, etc., Assoc., 4 Lanc. L. Rev. (Pa.) 265; Dawson *v.* Melvin, 2 L. T. N. S. (Pa.) 201 (where the affidavit was held to be insufficient); Marcy *v.* Heermans, 2 L. T. N. S. (Pa.) 108. But see Lippincott *v.* Lippincott, 1 Phila. (Pa.) 396.

30. Trimble's Appeal, 6 Watts (Pa.) 133; Salsburg *v.* Franik, 4 Kulp (Pa.) 502; Reigle's Appeal, 13 Lanc. Bar (Pa.) 22.

31. Souder's Appeal, 57 Pa. St. 498; Reigart's Appeal, 7 Watts & S. (Pa.) 267; Knebel *v.* Manger, 1 Leg. Rec. (Pa.) 180; Marcy *v.* Heermans, 2 L. T. N. S. (Pa.) 108.

32. People's Sav. Bank *v.* Mosier, 199 Pa. St. 375, 49 Atl. 132; Seip's Appeal, 26 Pa. St. 176; Port Carbon Sav. Fund, etc., Assoc. *v.* Stevens, 1 Leg. Rec. (Pa.) 301; Anthracite Sav. Fund *v.* Thornton, 1 Leg. Rec. (Pa.) 100; McLawrence's Estate, 2 Luz. Leg. Reg. (Pa.) 262.

33. Equity generally see EQUITY.

34. *Colorado.*— Claflin *v.* Dorgitt, 3 Colo. 413.

Iowa.— Preston *v.* Daniels, 2 Greene 536.

New Hampshire.— Tasker *v.* Lord, 64 N. H. 279, 8 Atl. 823.

New York.— See Weil *v.* Levenson, 8 N. Y. St. 894.

United States.— Wickham *v.* Morehouse, 16 Fed. 324. See Murphy *v.* Lewis, 17 Fed. Cas. No. 9,950*a*, Hempst. 17.

See 21 Cent. Dig. tit. "Execution," § 993½.

35. Alford *v.* Montejo, 28 La. Ann. 593; Rains *v.* Chaffe, 23 La. Ann. 657; Slocomb *v.* Williams, 23 La. Ann. 245; Provosty *v.* Carmouche, 22 La. Ann. 135; Bach *v.* Verbois, 19 La. Ann. 163; Gleason *v.* Sheriff, 19 La. Ann. 143; Ethridge *v.* Milling, 15 La. Ann. 513; Gleises *v.* McHatton, 14 La. Ann. 560; Lyons *v.* McRae, 14 La. Ann. 423 (holding, however, that where a third opposition has been notified to the sheriff only after the property has been seized, sold, and the proceeds distributed, it is too late to enable a third opponent to participate in the proceeds); Converse *v.* Hill, 14 La. Ann. 89; Livandais *v.* Livandais, 3 La. Ann. 454; Sheldon *v.* New Orleans Canal, etc., Co., 11 Rob. (La.) 181 (holding that a preference on the proceeds of an execution by virtue of a prior seizure of the property must be asserted by a third opposition or it will be lost); Gil *v.* Gil, 10 Rob. (La.) 28; Vanhille *v.* Her Husband, 5 Rob. (La.) 496. See Adams *v.* Moulton, McGloin (La.) 239. See also Campbell *v.* His Creditors, 3 Rob. (La.) 106; Kentucky Northern Bank *v.* Labitut, 2 Fed. Cas. No. 842, 1 Woods 11.

36. Gregory *v.* Gover, 19 Ill. 608; Lithauer *v.* Royle, 17 N. J. Eq. 40. See also Linford *v.* Linford, 28 N. J. L. 113; Pierman *v.* Schmoltze, 9 Pa. Co. Ct. 473, holding, however, that until the proceeds of a sale have been paid into court an order of distribution cannot be made without the agreement of all parties interested.

An ex parte order to the sheriff to pay the proceeds to another does not bind a party to the suit, nor protect the sheriff. Delassize *v.* Cenas, 4 Mart. N. S. (La.) 508.

37. Appeal generally see APPEAL AND ERROR.

38. Reamer's Appeal, 18 Pa. St. 510; Cash's Appeal, 1 Pa. St. 166.

39. Biggs *v.* McKenzie, 16 Ill. App. 286 (holding, however, that a creditor not satisfied with a partial distribution of the fund must wait until a decree is made distributing the entire fund before he can appeal); Heizer *v.* Fisher, 13 Sm. & M. (Miss.) 672; Martin *v.* Lofland, 10 Sm. & M. (Miss.) 317; White's Appeal, 15 Wkly. Notes Cas. (Pa.) 313. See Gauche *v.* Trautman, 7 La. Ann. 18.

j. Costs.[40] In the distribution by an auditor or by the court of the proceeds of an execution sale, costs do not necessarily fall upon the unsuccessful claimant; where he shows probable cause for litigation, the costs are usually charged against the fund.[41] Where, however, the ground of the contest was merely the suspicion of fraud, collusion, or lack of consideration, unsupported by the evidence, the costs of the proceedings will not be allowed out of the fund, but will be charged to the unsuccessful claimant.[42]

XI. RETURN.[43]

A. Definition. A return on a writ of execution is the short official statement of the officer, indorsed thereon or attached thereto, of what he has done in obedience to the mandate of the writ or of the reason why he has done nothing.[44]

B. Necessity — 1. In General. It is the duty of the officer to whom an execution is directed to make a return thereto on or before the time fixed by law, to the proper court or officer, in all cases, whether it has been executed or not;[45] and if the officer fails to make due return he may be compelled to do so by the court out of which the execution issued.[46]

2. Effect of Failure to Make — a. In General. While it is the duty of the officer in all cases to return the writ by the return-day, yet neither of the parties

40. Costs generally see COSTS.

41. Buena Vista Loan, etc., Bank *v.* Grier, 114 Ga. 398, 40 S. E. 284; Sansenbacher *v.* Schickendantz, 141 Pa. St. 418, 21 Atl. 765; Perkins *v.* Nichols, 2 Chest. Co. Rep. (Pa.) 229; German Fairhill Bldg. Assoc. No. 2 *v.* Heebner, 12 Montg. Co. Rep. (Pa.) 24; Cohen *v.* Green, 5 L. T. N. S. (Pa.) 11.

42. Kræmer *v.* Mullin, 12 Pa. Co. Ct. 190; Duffy *v.* Duffy, 9 Pa. Co. Ct. 256; Strupler *v.* Ainey, 4 Pa. Co. Ct. 315; Hoover *v.* Diffenderfer, 9 Lanc. L. Rev. (Pa.) 245.

43. Affecting right to creditors' suit see CREDITORS' SUITS.

As affected by statute of frauds see FRAUDS, STATUTE OF.

Directions for return see *supra*, VI, D, 2, b, (x).

In justices' courts see JUSTICES OF THE PEACE.

Liability of officer generally see SHERIFFS AND CONSTABLES.

Return of body execution see *infra*, XIV, O.

Return of process generally see PROCESS.

44. Rowe *v.* Hardy, 97 Ga. 674, 34 S. E. 625, 75 Am. St. Rep. 811. See also Beall *v.* Shattuck, 53 Miss. 358; Union Bank *v.* Barnes, 10 Humphr. (Tenn.) 244; Windle *v.* Ricardo, 1 B. & B. 17, 5 E. C. L. 478. See also Hutton *v.* Campbell, 10 Lea (Tenn.) 170, 173.

"The return of an execution is not merely the bringing back into court the paper on which the authority of the sheriff is written, but it is necessary that he should make on that paper an indorsement in writing of what he has done in obedience to the order therein contained." State *v.* Melton, 8 Mo. 417. See also Nelson *v.* Brown, 23 Mo. 13.

It is the actual filing in the office from which the execution issued, not simply the officer's indorsement on the process, which constitutes a return to an execution. Nelson *v.* Cook, 19 Ill. 440. See also Balkum *v.* Harper, 50 Ala. 429; Prescott *v.* Pettee, 3 Pick. (Mass.) 331. But see Mercer *v.* Hooker, 5 Fla. 277.

Payment into court.— See Hatfield *v.* Hatfield, 15 N. Y. St. 788.

45. *Alabama.*— Balkum *v.* Harper, 50 Ala. 429; Brown *v.* Baker, 9 Port. 503.

Illinois.— Nelson *v.* Cook, 19 Ill. 440.

Louisiana.— Billgerg *v.* Ferguson, 30 La. Ann. 84; Bourgeois *v.* Bourgeois, 17 La. 494.

Massachusetts.— Prescott *v.* Pettee, 3 Pick. 331.

Mississippi.— Beall *v.* Shattuck, 53 Miss. 358.

New Hampshire.— Morse *v.* Child, 7 N. H. 581.

New York.— Hatfield *v.* Hatfield, 15 N. Y. St. 788.

North Carolina.— Gilky *v.* Dickerson, 9 N. C. 341.

Ohio.— See Thompson *v.* McManama, 2 Disn. 213, to the effect that the officer must demand and receive the purchase-money before he makes his return.

Pennsylvania.—Fleisher *v.* Friedman, 7 Pa. Dist. 421.

Virginia.— Rowe *v.* Hardy, 97 Va. 674, 34 S. E. 625, 75 Am. St. Rep. 811.

See 21 Cent. Dig. tit. "Execution," § 999.

Necessity of corporal return.— See Beall *v.* Shattuck, 53 Miss. 358.

An execution levied on lands must be returned into the clerk's office in order to complete the title of the creditor. Prescott *v.* Pettee, 3 Pick. (Mass.) 331; Morse *v.* Child, 7 N. H. 581. And see *infra*, XI, H.

Void writ need not be returned. Holloway *v.* Johnson, 7 Ala. 660.

46. See SHERIFFS AND CONSTABLES.

A special return showing what property was sold and what amounts received cannot be compelled. Shindler *v.* Blunt, 1 Sandf. (N. Y.) 683, in which *nulla bona* was held a proper return, where the officer, after levy, ascertained that the property was subject to prior liens sufficient to exhaust it.

can be deprived of the return by his neglect or failure so to return it, nor will a levy made thereunder be invalidated by such neglect or failure.[47]

b. On Title of Purchaser. The failure of the officer to make a return of the writ will not in most jurisdictions invalidate the title of a purchaser at the execution sale.[48]

c. Presumption Against Officer. Where an officer fails to return an execution, it will be presumed against him that he has collected the money.[49]

C. Requisites and Sufficiency — 1. In General. The return to an execution must be in writing,[50] upon the writ itself or upon a paper attached thereto,[51] and must show upon its face either that the mandate of the writ has been fully complied with or, if not, the existence of such a state of facts as, without fault or negligence on the part of the officer, prevented a compliance.[52] The return should be a statement of facts, and not of any conclusions of law which the offi-

47. Pratt *v.* Pond, 45 Conn. 386; Rowe *v.* Hardy, 97 Va. 674, 34 S. E. 625; Jones *v.* Hull, 1 Hen. & M. (Va.) 212; Fisher *v.* Davis, 1 Hen. & M. (Va.) 212 note. See also Sewell *v.* Harrington, 11 Vt. 141, 34 Am. Dec. 675.

Liability for failure to make return see Sheriffs and Constables.

48. *California.*— Clark *v.* Lockwood, 21 Cal. 220; Cloud *v.* El Dorado County, 12 Cal. 128, 73 Am. Dec. 526.

Indiana.— State *v.* Salyers, 19 Ind. 432; Doe *v.* Heath, 7 Blackf. 154.

Kentucky.— The title of an execution purchaser is invalidated by the absence of a return evidencing the sale, unless the fact that the execution is lost be made to appear, and the loss be supplied in a proper mode. Spragins *v.* Russell, 4 Ky. L. Rep. 255. *Compare* Lynn *v.* Sisk, 9 B. Mon. 135.

Maine.— True *v.* Emery, 67 Me. 28, where the sale was of an equity. See also Clark *v.* Foxcroft, 6 Me. 296, 20 Am. Dec. 309.

Missouri.— Bray *v.* Marshall, 75 Mo. 327.

New York.— Phillips *v.* Schiffer, 64 Barb. 548, 14 Abb. Pr. N. S. 101.

North Carolina.— Doe *v.* Hamilton, 1 N. C. 10.

Pennsylvania.— Hinds *v.* Scott, 11 Pa. St. 19, 51 Am. Dec. 506; Cock *v.* Thornton, 16 Wkly. Notes Cas. 117. See also Gibson *v.* Winslow, 38 Pa. St. 49.

Rhode Island.— East Greenwich Sav. Inst. *v.* Allen, 22 R. I. 337, 47 Atl. 885; Foster *v.* Berry, 14 R. I. 601.

Texas.— Willis *v.* Smith, 66 Tex. 31, 17 S. W. 247.

Vermont.— Barnes *v.* Barnes, 6 Vt. 388.

Contra.—Walsh *v.* Anderson, 135 Mass. 65; Howe *v.* Starkweather, 17 Mass. 240; Davis *v.* Maynard, 9 Mass. 242; Hammatt *v.* Wyman, 9 Mass. 138. *Compare* Sanford *v.* Durfee, 19 Pick. (Mass.) 485.

It will be presumed, until the contrary appears, that the writ was in the sheriff's hands when he made the sale, and consequently the want of a return to the venditioni exponas will not invalidate the sale. Gibson *v.* Winslow, 38 Pa. St. 49.

49. Com. *v.* McCoy, 8 Watts (Pa.) 153, 34 Am. Dec. 445.

50. Wellington *v.* Gale, 13 Mass. 483; Wilson *v.* Loring, 7 Mass. 392; Purrington *v.* Loring, 7 Mass. 388; Shover *v.* Funk, 5 Watts & S. (Pa.) 457.

51. Dickson *v.* Peppers, 29 N. C. 429; Union Bank *v.* Barnes, 10 Humphr. (Tenn.) 244.

52. Union Bank *v.* Barnes, 10 Humphr. (Tenn.) 244. See also the following cases:

Alabama.— Abercrombie *v.* Chandler, 9 Ala. 625.

Louisiana.— Hill *v.* Labarre, 12 La. Ann. 419; Conway *v.* Jones, 17 La. 413.

North Carolina.— Patton *v.* Marr, 44 N. C. 377.

Pennsylvania.— Fox *v.* Meyer, 1 Woodw. 50.

Tennessee.— McCrory *v.* Chaffin, 1 Swan 307; State *v.* McDonald, 9 Humphr. 606; Raines *v.* Childress, 2 Humphr. 449.

Virginia.— Rucker *v.* Harrison, 6 Munf. 181.

England.— Levy *v.* Abbott, 7 D. & L. 185, 4 Exch. 588, 19 L. J. Exch. 62; Munk *v.* Cass, 9 Dowl. P. C. 332.

See 21 Cent. Dig. tit. "Execution," § 1006 *et seq.*

"Enjoined" is a good return. Patton *v.* Marr, 44 N. C. 377.

No power of ascertaining whether defendant has goods is a bad return, as the sheriff should state either that defendant has goods or that he has none. Munk *v.* Cass, 9 Dowl. P. C. 332.

"Not levied by reason of the stay law" is a sufficient return. Hamilton *v.* McConkey, 83 Va. 533, 2 S. E. 724. But see Aycock *v.* Harrison, 63 N. C. 145, in which a return to a venditioni exponas of "no sale on account of stay law" was held bad.

Return of satisfaction by defendant is bad, as it is the officer's duty to execute the writ, and leave the settlement of questions arising from the satisfaction to the parties to the record. Abercrombie *v.* Chandler, 9 Ala. 625.

"Stopped by order of plaintiff" is a good return. State *v.* McDonald, 9 Humphr. (Tenn.) 606. See also Levy *v.* Abbott, 7 D. & L. 185, 4 Exch. 588, 19 L. J. Exch. 62.

When several writs are issued.— If a sheriff returns a seizure under that and another writ it is bad (Wintle *v.* Chetwynd, 7 Dowl. P. C. 554, 1 W. W. & H. 581); but it is a sufficient return that he has seized goods of defendant by virtue of several previous writs of

cer might form as to what constituted a levy;[53] and, while a reasonable degree of certainty is all that is required,[54] the return must answer the whole writ,[55] and set out the acts of the officer with sufficient precision to show whether they have or have not been legal and regular.[56]

2. By Whom Made. The return of an execution should be made by the officer to whom it is directed, and, if the writ has been executed by an under-sheriff or deputy, he should return it in the name of his principal by himself as deputy.[57] In some jurisdictions, however, a return by a deputy in his own name is sufficient;[58] nor will it vitiate a return that it is signed by the deputy for the sheriff, and not in the name of the sheriff, by the deputy.[59]

3. To What Court. An execution should be returned to the court from which it issued.[60]

fieri facias, according to their priority (Chambers *v.* Coleman, 9 Dowl. P. C. 588).

53. Castner *v.* Symonds, 1 Minn. 427.

54. Reynolds *v.* Barford, 2 D. & L. 327, 8 Jur. 961, 13 L. J. C. P. 177, 7 M. & G. 449, 8 Scott N. R. 233, 49 E. C. L. 449. See also Rucker *v.* Harrison, 6 Munf. (Va.) 181.

It is not necessary that the sheriff should specify in his return the particular goods taken, the sum for which each article sold, or the time of their seizure. Fitler *v.* Patton, 8 Watts & S. (Pa.) 455. See also Willett *v.* Sparrow, 2 Marsh. 293, 6 Taunt. 576, 1 E. C. L. 761.

"Bond taken and forfeited" is a sufficient return of forfeiture of a forthcoming bond. Wanzer *v.* Barker, 4 How. (Miss.) 363. See also as to sufficiency of return to show forfeiture of bond Hammond *v.* Starr, 79 Cal. 556, 21 Pac. 971.

Facts imported by necessary intendment need not be set out in the return. Brackett *v.* McKenney, 55 Me. 504; Sanborn *v.* Chamberlin, 101 Mass. 409.

The certificate of the number of shares held by the debtor in a corporation, which the officer who keeps the record of the shares of the stock-holders is required to give upon exhibition to him of an execution (Ill. Rev. St. c. 77, § 55), need not be returned by the sheriff. Thompson *v.* Wells, 57 Ill. App. 436.

55. Anderson *v.* Cunningham, Minor (Ala.) 48; Buckley *v.* Hampton, 23 N. C. 322; Mullins *v.* Johnson, 3 Humphr. (Tenn.) 396; Trigg *v.* McDonald, 2 Humphr. (Tenn.) 386.

56. *Connecticut.*—Metcalf *v.* Gillet, 5 Conn. 400.

Maine.— Russ *v.* Gilman, 16 Me. 209.

Massachusetts.— Frazee *v.* Nelson, 179 Mass. 456, 61 N. E. 40, 88 Am. St. Rep. 391; Perry *v.* Dover, 12 Pick. 206, Williams *v.* Amory, 14 Mass. 20; Wellington *v.* Gale, 13 Mass. 483; Davis *v.* Maynard, 9 Mass. 242; Gardner *v.* Hosmer, 6 Mass. 325; Lancaster *v.* Pope, 1 Mass. 86.

Mississippi.— Merritt *v.* White, 37 Miss. 438.

New York.— Deleplaine *v.* Hitchcock, 6 Hill 14.

Pennsylvania.— Goodright *v.* Probst, 1 Yeates 300; Fox *v.* Meyer, 1 Woodw. 50; Rudderow *v.* Hodges, 12 Phila. 422.

Vermont.— Henry *v.* Tilson, 19 Vt. 447.

See 21 Cent. Dig. tit. "Execution," § 1006 *et seq.*

But see Bettison *v.* Budd, 17 Ark. 546, 65 Am. Dec. 442; Tullis *v.* Brawley, 3 Minn. 277; Jones *v.* Meyer Bros. Drug Co., 25 Tex. Civ. App. 234, 61 S. W. 553.

Compliance with law.— An official return must show in some intelligible form of words just what the officer has done, and that the thing done has been according to law. Fox *v.* Meyer, 1 Woodw. (Pa.) 50. See also Williams *v.* Amory, 14 Mass. 20; Wellington *v.* Gale, 13 Mass. 483; Davis *v.* Maynard, 9 Mass. 242; Lancaster *v.* Pope, 1 Mass. 86. But see Tullis *v.* Brawley, 3 Minn. 277.

Where real estate is sold under execution a compliance with the statute in all respects in regard to the levy and sale must appear from the officer's return. Frazee *v.* Nelson, 179 Mass. 456, 61 N. E. 40, 88 Am. St. Rep. 391. But see Bettison *v.* Budd, 17 Ark. 546, 65 Am. Dec. 442.

57. *California.*—Rowley *v.* Howard, 23 Cal. 401; Joyce *v.* Joyce, 5 Cal. 449.

Georgia.— Duncan *v.* Webb. 7 Ga. 187.

Illinois.— Ditch *v.* Edwards, 2 Ill. 127, 26 Am. Dec. 414; Ryan *v.* Eads, 1 Ill. 217.

New York.—Ferguson *v.* Lee, 9 Wend. 258; Simonds *v.* Catlin, 2 Cai. 61.

Pennsylvania.— Emley *v.* Drum, 36 Pa. St. 123.

Tennessee.— Campbell *v.* Cobb, 2 Sneed 18. See 21 Cent. Dig. tit. "Execution," § 1000.

After expiration of term of office see Campbell *v.* Cobb, 2 Sneed (Tenn.) 18. See also State *v.* Parchmen, 3 Head (Tenn.) 609.

Ratification by sheriff.—See Lanier *v.* Stone, 8 N. C. 329.

Where a deputy dies before completing his return, it may be completed by the sheriff. Lovett *v.* Pike, 41 Me. 340, 66 Am. Dec. 248; Ingersoll *v.* Sawyer, 2 Pick. (Mass.) 276.

Where the officer cannot write, a return written for him in his presence and signed with his mark is good. Cox *v.* Montford, 66 Ga. 62.

58. Calender *v.* Olcott, 1 Mich. 344; Ford *v.* De Villers, 2 McCord (S. C.) 144; Miller *v.* Alexander, 13 Tex. 497.

59. Guelot *v.* Pearce, (Ky. 1897) 38 S. W. 892 [*citing* Humphrey *v.* Wade, 84 Ky. 391, 1 S. W. 648, 8 Ky. L. Rep. 384].

60. Fleisher *v.* Friedman, 7 Pa. Dist. 421. *Compare* Bartels *v.* Cunningham, 59 How. Pr. (N. Y.) 129.

Magistrate's executions see Lanier *v.* Stone, 8 N. C. 329. And see Justices of the Peace.

4. Time For Making — a. In General. An execution should regularly and properly be returned at the time fixed by law and designated in the writ.[61] But while this is the rule, the officer may in many jurisdictions return the execution before the return-day, even unsatisfied, where he has been unable after diligent search to find property subject to the writ,[62] and it has been held that, where the

61. *Alabama.*— Shelton *v.* Merrill, 63 Ala. 343; Neale *v.* Caldwell, 3 Stew. 134.

Connecticut.— Dayton *v.* Lynes, 31 Conn. 578; Worthington *v.* Hollister, 1 Root 101.

Georgia.— Thornton *v.* Lane, 11 Ga. 459.

Kansas.— See Norton *v.* Reardon, 67 Kan. 302, 72 Pac. 861, 100 Am. St. Rep. 459.

Louisiana.— Wallis *v.* Bourg, 16 La. Ann. 176.

Massachusetts.— Adams *v.* Cummiskey, 4 Cush. 420; Bull *v.* Clarke, 2 Metc. 587; Prescott *v.* Wright, 6 Mass. 20.

Michigan.— Peck *v.* Cavell, 16 Mich. 9.

Mississippi.— Steen *v.* Briggs, 3 Sm. & M. 326.

Missouri.— Blodgett *v.* Perry, 97 Mo. 263, 10 S. W. 891, 10 Am. St. Rep. 307; Dillon *v.* Rash, 27 Mo. 243.

North Carolina.— Person *v.* Newsom, 87 N. C. 142. See also Ledbetter *v.* Arledge, 53 N. C. 475.

Pennsylvania.— See Miner *v.* Walter, 8 Phila. 571.

Rhode Island.— Rowley *v.* Nichols, 14 R. I. 14.

Tennessee.— Browning *v.* Jones, 4 Humphr. 69.

Texas.— See Tillman *v.* McDonough, 2 Tex. App. Civ. Cas. § 52.

See 21 Cent. Dig. tit. "Execution," § 1002.

In computing the time between the teste of an execution and the return under a statute requiring at least thirty days to pass between them, the day of the teste is to be included, and the day of the return excluded, or *vice versa.* Ogden *v.* Redman, 3 A. K. Marsh. (Ky.) 234. See also Muzzy *v.* Howard, 42 Vt. 23.

Returnable at any time on return-day.— Bull *v.* Clarke, 2 Metc. (Mass.) 587; Peck *v.* Cavell, 16 Mich. 9; Rex *v.* Berks, 5 East 386.

Where an execution is returnable to a given term, the sheriff has all the days of the term in which to return it, unless he be ruled, on motion and cause shown, to return it on some intermediate day (Person *v.* Newsom, 87 N. C. 142. See also Ledbetter *v.* Arledge, 53 N. C. 475); but an execution returned on the first day of the term is not returned prematurely (Rowley *v.* Nichols, 14 R. I. 14).

Execution of writ on return-day.— When an execution is returnable in a specified number of days, it is executable at any time on the last day; but, when returnable to a court to be held at a certain time and place, it may be executed at any time on that day before the court has adjourned to the next day, but not after. Prescott *v.* Wright, 6 Mass. 20. See also Gaines *v.* Clark, 1 Bibb (Ky.) 608; Valentine *v.* Cooley, 1 Humphr. (Tenn.) 38; Wolley *v.* Mosely, Cro. Eliz. 760; Parkins *v.* Woolaston, 6 Mod. 130, 1 Salk. 321; Harvy *v.* Broad, 2 Salk. 626. But see as to execution of writ after adjournment of court on return-day Mand *v.* Barnard, 2 Burr. 812.

"Within sixty days" means the same as "in sixty days," or "at the end of sixty days." Adams *v.* Cummiskey, 4 Cush. (Mass.) 420.

Where the return-day falls on Sunday, the execution is returnable on Monday. Williams *v.* State, 5 Ind. 235. See also Peck *v.* Cavell, 16 Mich. 9, to the effect that a return on Sunday is void.

Statutory change.— Where an execution was made returnable at a term then to be held in August, and this term was altered by statute to October, with a provision that all writs and processes made returnable in August should be returnable in October, the execution remained in full force until the October term. Brown *v.* Roberts, 24 N. H. 131.

62. *Delaware.*— Lord *v.* Townsend, 5 Harr. 457. See also Graves *v.* Spry, (1903) 55 Atl. 334.

Indiana.— Wilcox *v.* Ratliff, 5 Blackf. 561.

Kansas.— Buist *v.* Citizens' Sav. Bank, 4 Kan. App. 700, 46 Pac. 718. See also Guerney *v.* Moore, 131 Mo. 650, 32 S. W. 1132, construing the Kansas law.

Louisiana.— The sheriff may return "*nulla bona,*" under the instructions of plaintiff, immediately after it has become evident that the debtor has no property which can be seized. Wheeling Pottery Co. *v.* Levi, 48 La. Ann. 777, 19 So. 752.

Mississippi.— Ward *v.* Whitfield, 64 Miss. 754, 2 So. 493.

Missouri.— See Guerney *v.* Moore, 131 Mo. 650, 32 S. W. 1132, decided under Kan. Gen. St. § 4567. But see Dillon *v.* Rash, 27 Mo. 243, to the effect that an execution cannot regularly be returned before its return-day.

New York.— Renaud *v.* O'Brien, 35 N. Y. 29; Tyler *v.* Willis, 33 Barb. 327; High Rock Knitting Co. *v.* Bronner, 18 Misc. 631, 43 N. Y. Suppl. 684; Ansonia Brass, etc., Co. *v.* Conner, 3 N. Y. Civ. Proc. 88. *Compare* Green *v.* Burnham, 3 Sandf. Ch. 110.

North Carolina.— Whitehead *v.* Hellen, 74 N. C. 679.

West Virginia.— Newlon *v.* Wade, 43 W. Va. 283, 27 S. E. 244; Findley *v.* Smith, 42 W. Va. 299, 26 S. E. 370.

United States.— Tomlinson, etc., Mfg. Co. *v.* Shatto, 34 Fed. 380.

See 21 Cent. Dig. tit. "Execution," § 1002.

Contra.—Smith *v.* Thompson, Walk. (Mich.) 1; Steward *v.* Stevens, Harr. (Mich.) 169.

"The time allowed for the return of an execution is for the benefit of the sheriff, and to prevent action or compulsory proceedings against him before he has had a reasonable

ends of justice will be furthered thereby, and there is no evidence that the sheriff can derive any advantage from holding the execution until the return-day, it is within the power of the court to compel an earlier return.[63] So too a return may be made after the return day,[64] and under special circumstances and for good cause shown the court may extend the time within which the return is to be made.[65]

b. Effect of Delay on Title of Purchaser. The time within which the officer makes return to an execution does not affect the validity of a sale made under it,[66] and even though a return is necessary to the validity of the sale the sale is not invalidated by a delay, but the return when made relates back to the time named in the writ.[67]

c. Excuses For Non-Compliance With Law. A stay, granted by a court of competent jurisdiction, which restrains a sheriff from enforcing an execution, suspends the running of the time in which he is required to return the writ;[68] and the same is true of the pendency of an interpleader issue.[69] But neither the authorization of plaintiff,[70] nor the fact that the execution came to the officer's hands but a few days before the return-day,[71] nor the fact that the sale was not

time to execute the process; that the point beyond which it would not continue is provided, but that the statute is silent as to how soon he is to be permitted to make the return." Buist *v.* Citizens' Sav. Bank, 4 Kan. App. 700, 46 Pac. 718, 719.

63. Compulsory return.— National Exch. Bank *v.* Burkhalter, 20 N. Y. Suppl. 593, 22 N. Y. Civ. Proc. 414. But see *contra*, Ansonia Brass, etc., Co. *v.* Conner, 3 N. Y. Civ. Proc. 88; Spencer *v.* Cuyler, 9 Abb. Pr. (N. Y.) 382, 17 How. Pr. (N. Y.) 157.

64. *District of Columbia.*— Rich *v.* Henry, 4 Mackey 155.

Louisiana.— Aubert *v.* Buhler, 3 Mart. N. S. 489.

Massachusetts.— Prescott *v.* Pettee, 3 Pick. 331, if made before it is offered in evidence.

Pennsylvania.— West *v.* Nixon, 3 Grant 236.

Texas.— Vaughan *v.* Warnell, 28 Tex. 119.

Virginia.— A sheriff may be permitted by order of court to make a return at any time after the return-day. Bullitt *v.* Winston, 1 Munf. 269.

See 21 Cent. Dig. tit. "Execution," § 1002.

But see State *v.* Wylie, 2 McMull. (S. C.) 1.

After the judgment has become dormant a return of *nulla bona* cannot be made. Groves *v.* Williams, 68 Ga. 598.

65. *Indiana.*— Bosley *v.* Farquar, 2 Blackf. 61.

Maryland.— Jessop *v.* Brown, 2 Gill & J. 404.

Mississippi.— Forniquet *v.* Tegarden, 24 Miss. 96.

North Carolina.— Dewey *v.* White, 65 N. C. 225.

Pennsylvania.— Miller *v.* Com., 5 Pa. St. 294; Hall *v.* Galbraith, 8 Watts 220; Spangler *v.* Com., 16 Serg. & R. 68, 16 Am. Dec. 548.

South Carolina.— Adair *v.* McDaniel, 1 Bailey 158, 19 Am. Dec. 664.

Texas.— Bryan *v.* Bridge, 6 Tex. 137.

England.— Burr *v.* Freethy, 1 Bing. 71, 6 Moore C. P. 79, 8 E. C. L. 408; Rex *v.* Devon, 1 Chit. 643, 18 E. C. L. 350; Ledbury *v.* Smith, 1 Chit. 294, 18 E. C. L. 164; Venables *v.* Wilks, 4 Moore C. P. 339, 16 E. C. L. 375; King *v.* Bridges, 1 Moore C. P. 43, 7 Taunt. 294, 2 E. C. L. 369; Etchells *v.* Levatt, 9 Price 54; MacGeorge *v.* Birch, 4 Taunt. 585; Thurston *v.* Thurston, 1 Taunt. 120; Wells *v.* Pickman, 7 T. R. 174, 4 Rev. Rep. 410; Shaw *v.* Tunbridge, 2 W. Bl. 1064.

See 21 Cent. Dig. tit. "Execution," § 1002.

66. *California.*—Cloud *v.* El Dorado County 12 Cal. 128, 73 Am. Dec. 526; Low *v.* Adams, 6 Cal. 277.

Illinois.— Hogue *v.* Corbit, 156 Ill. 540, 41 N. E. 219, 47 Am. St. Rep. 232.

Louisiana.— Briant *v.* Hebert, 30 La. Ann. 1127.

Maine.— Caldwell *v.* Blake, 69 Me. 458.

Massachusetts.—Firth *v.* Haskell, 148 Mass. 501, 20 N. E. 164.

Ohio.— Lemert *v.* Clarke, 1 Ohio Cir. Ct. 569, 1 Ohio Cir. Dec. 318.

Pennsylvania.— Smull *v.* Mickley, 1 Rawle 95.

Virginia.— Rowe *v.* Hardy, 97 Va. 674, 34 S. E. 625, 75 Am. St. Rep. 811.

Contra.— Moreland *v.* Bowling, 3 Gill (Md.) 500.

Effect of defects upon title of purchaser generally see *infra*, XI, G, 5.

67. Firth *v.* Haskell, 148 Mass. 501, 20 N. E. 164.

68. Ansonia Brass, etc., Co. *v.* Conner, 103 N. Y. 502, 9 N. E. 238 [*affirming* 11 Daly 226, 3 N. Y. Civ. Proc. 88, 6 N. Y. Civ. Proc. 173, 67 How. Pr. 157]. *Contra*, Launtz *v.* Gross, 16 Ill. App. 329.

Effect of stay law.— See Hamilton *v.* McConkey, 83 Va. 533, 2 S. E. 724.

69. Pending an interpleader issue the execution creditor has no right to the immediate return of the writ. Angell *v.* Baddeley, 3 Ex. D. 49, 47 L. J. Exch. 86, 37 L. T. Rep. N. S. 653, 26 Wkly. Rep. 137.

70. Bershears *v.* Warner, 5 Sneed (Tenn.) 676, in which plaintiff authorized the sheriff to return the execution to be renewed.

71. Chaffin *v.* Stuart, 1 Baxt. (Tenn.) 296.

made until after the return-term,[72] will excuse the failure to return an execution at the prescribed time.

5. Date of Delivery of Execution. The date of delivery of an execution to a sheriff need not be noted by him on his return.[73]

6. Sending Return by Mail. The law does not require the sheriff of another county to whom an execution is issued to return it either in person or by deputy. If he deposits it in the post-office properly directed, in time to reach the clerk of the court from which it issued by the return-day, it is sufficient.[74]

7. Contents — a. Nulla Bona. Where, to a writ directed against the personal property of defendant,[75] the sheriff is unable after diligent search to find goods subject to levy, "*nulla bona*," or some equivalent expression,[76] is a proper return to the writ.[77]

b. Statements Relating to Levy — (i) *In General.* The officer is required to return only the ultimate facts,[78] and a return, in general terms that he "levied" is sufficient, without stating the acts done in making the levy, as the necessary proceedings will be implied.[79] And, if the return states that the officer sold and

72. Neale *v.* Caldwell, 3 Stew. (Ala.) 134.

73. Person *v.* Newsom, 87 N. C. 142. See also Wilson *v.* Swasey, (Tex. Sup. 1892) 20 S. W. 48.

74. Underwood *v.* Russell, 4 Tex. 175. See also Wilson *v.* Huston, 4 Bibb (Ky.) 332; Cockerham *v.* Baker, 52 N. C. 288.

75. "The terms 'nulla bona' are not of sufficiently extensive meaning to respond to the mandate of an execution. They import that the defendant in execution has 'no goods' which could be subjected to its satisfaction. Now this may have been true, and yet he may have been in the possession, or the owner of real estate, from the sale of which satisfaction could have been obtained." Woodward *v.* Harbin, 1 Ala. 104, 108.

76. Instances of sufficient returns. *Georgia.*— Richardson *v.* Harrison, 112 Ga. 520, 37 S. E. 736, return of "no property to be found."

Illinois.— Horton *v.* Brown, 45 Ill. App. 171.

Missouri.— State *v.* Steel, 11 Mo. 553.

New York.—Winchester *v.* Crandall, Clarke 371.

North Carolina.— McDowell *v.* Robison, 48 N. C. 535.

Tennessee.— —— *v.* Peebles, Peck 196.

United States.— Goshorn *v.* Alexander, 10 Fed. Cas. No. 5,630, 2 Bond 158.

See 21 Cent. Dig. tit. "Execution," § 1008.

Insufficient returns.—"Finding no property whereon to levy to make the amount of this execution, I now return this writ." Beers *v.* Bunker, 6 Kan. App. 697, 50 Pac. 505 [*citing* Hoyt *v.* Bunker, 50 Kan. 574, 32 Pac. 126]. "Nothing made, nor no property found of defendant's; and, this writ expiring, the same is returned." Gayoso *v.* Hickey, 4 La. 301. "Wholly unsatisfied." McDowell *v.* Clark, 68 N. C. 117. "No personal property to be found in my county of E. W. Tipton [one of the defendants] on which I can levy for said debt and cost." Hassell *v.* Southern Bank, 2 Head (Tenn.) 381. "Came to hand 8th November, 1830 — no money made on this writ." Harman *v.* Childress, 3 Yerg. (Tenn.) 327. See also Merrick *v.* Carter, 205 Ill. 73, 68 N. E. 750.

77. See cases cited *infra*, this note.

The meaning of a return of "nulla bona" is that there are no goods applicable to plaintiff's writ. Shattock *v.* Carden, 6 Exch. 725, 21 L. J. Exch. 200, 2 L. M. & P. 466.

Necessity of effort to find goods.— See Parks *v.* Alexander, 29 N. C. 412. See also Thornton *v.* Lane, 11 Ga. 459.

"Nulla bona" is a proper return where one creditor postpones the sale, and another then proceeds to sell and exhausts the property (Newbern Bank *v.* Pallen, 15 N. C. 297); where the sheriff has paid the proceeds of an execution, either in discharge of rent or of a prior writ (Wintle *v.* Freeman, 11 A. & E. 539, 1 G. & D. 93, 10 L. J. Q. B. 161, 39 E. C. L. 294); or after a fiat in bankruptcy against the debtor (Smallcombe *v.* Olivier, 2 D. & L. 217, 8 Jur. 606, 13 L. J. Exch. 305, 13 M. & W. 77).

"Nulla bona" cannot be justified by proof of a prior lien, unless the executions creating it were actually levied. Bell *v.* King, 8 Port. (Ala.) 147.

78. Hossfeldt *v.* Dill, 28 Minn. 469, 10 N. W. 781. See also Cavender *v.* Smith, 1 Iowa 306; Holmes *v.* Jordan, 163 Mass. 147, 39 N. E. 1005; Haddy *v.* Jones, 5 Wkly. Notes Cas. (Pa.) 491; Eastman *v.* Curtis, 4 Vt. 616.

The appraisement of land sold on execution is no part of the sheriff's return. Coan *v.* Elliott, 101 Ind. 275. But see French *v.* Allen, 50 Me. 437, construing Rev. St. (1841) c. 94, § 7. And see Bedford *v.* Kesler, 15 Ky. L. Rep. 31, construing Civ. Code, § 860.

Prior encumbrances upon the property levied upon need not be stated in the return. Boyer *v.* Lincoln, 3 Ky. L. Rep. 537.

79. Byer *v.* Etmyre, 2 Gill (Md.) 150, 41 Am. Dec. 410; Hutchins *v.* Carver County Com'rs, 16 Minn. 13; Folsom *v.* Carli, 5 Minn. 333, 80 Am. Dec. 429; Rohrer *v.* Turrill, 4 Minn. 407; Tullis *v.* Brawley, 3 Minn. 277; Jones *v.* Meyer Bros. Drug Co., 25 Tex. Civ. App. 234, 61 S. W. 553. But see Portis *v.* Parker, 8 Tex. 23, 58 Am. Dec. 95.

The same particularity is not required in a sheriff's return of a levy on a fieri facias as in a constable's. Judge *v.* Houston, 34 N. C. 108.

delivered the possession of the property, it sufficiently shows an actual seizure, although it does not state in terms that he made a levy.[80] Where the execution is not fully satisfied, the return must state that defendant has no other property from which the residue of the execution can be made.[81]

(II) *Sale and Conveyance* — (A) *In General.* While the sheriff's return should regularly state all the facts necessary to show a valid levy and sale, yet, in a majority of the jurisdictions, the purchaser's right is held to rest upon his purchase, under a valid execution issuing upon a valid judgment and consequently all that the return need show in this respect is the satisfaction, in whole or in part, of the judgment or the cause or the failure to make satisfaction of any part of it.[82] In the New England states, however, the return must state in substance that every act was done required by the statute to constitute a valid levy and sale; but it is not necessary that the performance of such acts shall be stated by the officer in direct terms; it is sufficient if it appear from the language used, or can be reasonably and fairly inferred from it, that the act was done.[83]

(B) *Notice of Sale.* The return should show that the required notice of sale, whether by advertisement or notice to the debtor, or by both, has been given;[84]

80. Howard *v.* Baum, 73 Mo. App. 235.

81. Casky *v.* Haviland, 13 Ala. 314; Bank *v.* Sevier County, 1 Tenn. Cas. 24, Thomps. Cas. (Tenn.) 40.

82. *Illinois.*— Gardner *v.* Eberhardt, 82 Ill. 316.

Indiana.— State *v.* Nelson, 1 Ind. 522.

Kentucky.— Reid *v.* Heasley, 9 Dana 324.

Maryland.— Scott *v.* Bruce, 2 Harr. & G. 262.

Missouri.— Buchanan *v.* Tracy, 45 Mo. 437.

New Jersey.— See Tulane *v.* Dean, 4 N. J. L. J. 23.

Pennsylvania.— Vandike's Appeal, 17 Pa. St. 271; Hall *v.* Galbraith, 8 Watts 220; Hunt *v.* Hunt, 1 Pa. L. J. Rep. 315, 2 Pa. L. J. 297.

South Carolina.— Ingram *v.* Belk, 2 Strobh. 207, 47 Am. Dec. 591; Williamson *v.* Farrow, 1 Bailey 611, 21 Am. Dec. 492.

Tennessee.— Eaken *v.* Boyd, 5 Sneed 204.

Texas.— Wilson *v.* Swasey, (Sup. 1892) 20 S. W. 48.

England.— Oviat *v.* Vyner, 1 Salk. 318.

See 21 Cent. Dig. tit. "Execution," § 1009.

The purchaser's right "rests upon his purchase, under a valid execution, issuing upon a valid judgment, and being fairly made, can not be defeated by the subsequent omissions or delinquencies of the officer." Reid *v.* Heasley, 9 Dana (Ky.) 324, 325.

A complete sale, which satisfied the judgment, is shown by a return that on a certain day the sheriff levied on land specifically described, and, on a subsequent day named, he sold said land to the judgment plaintiff, naming him, for a certain sum, which exceeded the amount of the judgment; although there was nothing to show that the costs were paid, or what further, if anything, was done under the sale. Harpham *v.* Worthington, 100 Iowa 313, 69 N. W. 535. See also Strong *v.* Baird, 16 Lea (Tenn.) 600.

If the property is not paid for after the sale, the return should be, that "the premises were knocked down to A. B., for so much, that the said A. B. has not paid the purchase money, and that, therefore, the premises remained unsold." Zantzinger *v.* Pole, 1 Dall. (Pa.) 419, 1 L. ed. 204 [*cited* with approval in Scott *v.* Bruce, 2 Harr. & G. (Md.) 262], per M'Kean, C. J.

"Not sold for want of time," if a time return, is sufficient. Stone *v.* Mahon, 4 C. Pl. (Pa.) 165.

In Pennsylvania, under the act of March 23, 1877, if the sheriff is unable to realize two thirds of the valuation at the sheriff's sale, he must so return. Dolan *v.* Ward, 1 Leg. Rec. 83.

83. Millett *v.* Blake, 81 Me. 531, 18 Atl. 293, 10 Am. St. Rep. 275. See also Backus *v.* Danforth, 10 Conn. 297; Townsend *v.* Meader, 58 Me. 288; Whittier *v.* Vaughan, 27 Me. 301; Stevens *v.* Legrow, 19 Me. 95; Sturdivant *v.* Sweetsir, 12 Me. 520; Ela *v.* Graw, 158 Mass. 190, 33 N. E. 511; Sanborn *v.* Chamberlin, 101 Mass. 409; Beattie *v.* Robin, 2 Vt. 181.

The day, hour, and particular place of sale need not be specified. See Townsend *v.* Meader, 58 Me. 288. See also as to omission of place of sale Beattie *v.* Robin, 2 Vt. 181.

Deed to vendee need not be stated to have been given. Whittier *v.* Vaughan, 27 Me. 301.

84. *Illinois.*— Palmer *v.* Riddle, 180 Ill. 461, 54 N. E. 227, advertisement "according to law" sufficient.

Kansas.— Kœhler *v.* Ball, 2 Kan. 160, 83 Am. Dec. 451.

Maine.— Millett *v.* Blake, 81 Me. 531, 18 Atl. 293, 10 Am. St. Rep. 275 (notice "by mail, postage paid," the residence of the debtor being in another county, and known to the officer, and described in the execution and other proceedings, sufficient); Bailey *v.* Myrick, 50 Me. 171 (omission of "public" before "newspaper" immaterial); Means *v.* Osgood, 7 Me. 146.

Massachusetts.— Owen *v.* Neveau, 128 Mass. 427; Chase *v.* Merrimack Bank, 19 Pick. 564, 31 Am. Dec. 163 (advertisement for statutory period before the "time," in-

although in most jurisdictions it seems that a failure so to do will not invalidate the sale.[85]

(c) *Disposition of Proceeds.* The sheriff's return must show the disposition made by him of the proceeds of the sale.[86]

c. Description of Property — (i) *Personalty.* The return to a levy on personal property should specially designate the particular property seized;[87] but where the description is in too general terms, parol evidence is admissible to apply it to the subject-matter.[88]

(ii) *Realty.* Where realty is levied on under an execution it must be described in the return with such precision that the property can be clearly identified.[89]

stead of "day," of sale sufficient); Davies *v.* Maynard, 9 Mass. 242.

Nebraska.— Kuhn *v.* Kilmer, 16 Nebr. 699, 21 N. W. 443, a case of immaterial variance between return and proof.

Oregon.— U. S. Mortgage Co. *v.* Marquam, 41 Oreg. 391, 69 Pac. 37, 41, return need not set out facts showing that places of posting notices were public.

Rhode Island.— Wilcox *v.* Emerson, 10 R. I. 270, 14 Am. Rep. 683.

Vermont.— Drake *v.* Mooney, 31 Vt. 617, 76 Am. Dec. 145.

See 21 Cent. Dig. tit. "Execution," § 1011.

Contra.— Tupper *v.* Taylor, 6 Serg. & R. (Pa.) 173.

85. Humphry *v.* Beeson, 1 Greene (Iowa) 199, 48 Am. Dec. 370; Drake *v.* Hale, 38 Mo. 346. And see *infra*, XI, G, 5.

"When the law directs the sheriff to give notice of the sale, it is presumed that he performed his duty. But this presumption may be rebutted by evidence to the contrary; when such evidence is produced as renders it probable that notice was not given, the burthen of proving the notice is thrown upon the person who claims under the deed." Topper *v.* Taylor, 6 Serg. & R. (Pa.) 173, 174.

86. Harrison *v.* Thompson, 9 Ga. 310, to the effect that it is the duty of the officer distinctly to state in his return the particular items of costs for which the money arising from the sale of defendant's property was appropriated. See also Hinkle *v.* Blake, 2 Humphr. (Tenn.) 574.

87. *California.*— Munroe *v.* Thomas, 5 Cal. 470.

Kentucky.— Dailey *v.* Palmer, Hard. 507.

Missouri.— State *v.* Curran, 45 Mo. App. 142.

New Jersey.— Hustick *v.* Allen, 1 N. J. L. 168; Watson *v.* Hoel, 1 N. J. L. 136.

Pennsylvania.— Rhoads *v.* Megonigal, 2 Pa. St. 39.

Texas.— Brown *v.* Hudson, 14 Tex. Civ. App. 605, 38 S. W. 653 [*limiting* Gunter *v.* Cobb, 82 Tex. 598, 17 S. W. 848].

United States.— Barnes *v.* Billington, 2 Fed. Cas. No. 1,015, 4 Day (Conn.) 81 note, 1 Wash. 29.

See 21 Cent. Dig. tit. "Execution," § 1013.

Form of range levy see Brown *v.* Hudson, 14 Tex. Civ. App. 605, 38 S. W. 653.

Where the property is already under seizure by another officer, the return need not specify or describe the property. It is sufficient to refer to it as all which was in the custody of the officer in possession, and show what was done with respect to such subsequent levy. State *v.* Curran, 45 Mo. App. 142.

88. Laughlin *v.* Hawley, 9 Colo. 170, 11 Pac. 45.

In England the value of the goods seized must be stated. Barton *v.* Gill, 1 D. & L. 593, 13 L. J. Exch. 83, 12 M. & W. 315. See also Wintle *v.* Chetwynd, 7 Dowl. P. C. 554, 1 W. W. & H. 581. *Compare* Willett *v.* Sparrow, 2 Marsh. 293, 6 Taunt. 576, 1 E. C. L. 761.

89. *Alabama.*—Randolph *v.* Carlton, 8 Ala. 606.

Illinois.— Fitch *v.* Pinckard, 5 Ill. 69.

Indiana.— Peck *v.* Sims, 120 Ind. 345, 22 N. E. 313; Bond *v.* Heuser, 86 Ind. 398.

Iowa.— Payne *v.* Billingham, 10 Iowa 360.

Kentucky.— Humphrey *v.* Wade, 84 Ky. 391, 1 S. W. 648, 8 Ky. L. Rep. 384; Bell *v.* Weatherford, 12 Bush 505; Withers *v.* Payne, 12 B. Mon. 343; Johnson *v.* Rowe, 1 Ky. L. Rep. 274.

Maryland.— Langley *v.* Jones, 33 Md. 171; Dorsey *v.* Dorsey, 28 Md. 388; Huddleson *v.* Reynolds, 8 Gill 332, 50 Am. Dec. 702; Waters *v.* Duvall, 6 Gill & J. 76; Clarke *v.* Belmear, 1 Gill & J. 443; Berry *v.* Griffith, 2 Harr. & G. 337, 18 Am. Dec. 309; Thomas *v.* Tarvey, 1 Harr. & G. 435; Fenwick *v.* Floyd, 1 Harr. & G. 172; Duvall *v.* Waters, 1 Bland 569, 18 Am. Dec. 350.

Minnesota.— Hutchins *v.* Carver County Com'rs, 16 Minn. 13.

Mississippi.— Hand *v.* Grant, 5 Sm. & M. 508, 43 Am. Dec. 528.

Missouri.— Henry *v.* Mitchell, 32 Mo. 518.

North Carolina.— Smith *v.* Low, 24 N. C. 457.

Pennsylvania.— Titusville Novelty Iron Works' Appeal, 77 Pa. St. 103; Conniff *v.* Doyle, 2 Luz. Leg. Reg. 107.

Tennessee.— Swan *v.* Parker, 7 Yerg. 490, 27 Am. Dec. 522; Hughes *v.* Helms, (Ch. App. 1898) 52 S. W. 460.

Texas.— San Antonio, etc., R. Co. *v.* Harrison, 72 Tex. 478, 10 S. W. 556; Traylor *v.* Lide, (Sup. 1887) 7 S. W. 58; Stipe *v.* Shirley, 27 Tex. Civ. App. 97, 64 S. W. 1012; Hayes *v.* Gallaher, 21 Tex. Civ. App. 88, 51 S. W. 280; Focke *v.* Garcia, (Civ. App. 1897) 41 S. W. 187 [*following* Hermann *v.* Likens, 90 Tex. 448, 39 S. W. 282, and *disapproving* Brown *v.* Chambers, 63 Tex.

8. Verification. A return must be authenticated by the signature of the officer,[90] but unless required by statute it need not be under seal[91] or sworn to.[92]

9. Record. In order to become matter of record, a return must be actually filed in the proper clerk's office.[93] In the New England states this filing is essential to the passage of title by levy on real estate;[94] elsewhere it is only necessary as against creditors and *bona fide* purchasers without notice.[95]

D. Amendment — 1. Right to Amend. It is not only the right, but the duty, of an officer to correct an erroneous return so as to make it conform to the facts, and, where an application to the court is necessary for the purpose, permission will be granted in all cases, unless intervening rights of third persons will be thereby prejudiced.[96] Until an execution is deposited in the clerk's office, the return is not matter of record, and it may be amended by the officer without per-

131; Norris *v.* Hunt, 51 Tex. 609; Munnink *v.* Jung, 3 Tex. Civ. App. 393, 22 S. W. 293]. See also Buckner *v.* Vancleave, (Tex. Civ. App. 1904) 78 S. W. 541.

Vermont.— See Galusha *v.* Sinclear, 3 Vt. 394.

See 21 Cent. Dig. tit. "Execution," § 1013.

But see Jackson *v.* Walker, 4 Wend. (N. Y.) 462.

Aider by extrinsic evidence see *infra*, XI, G, 3, c.

Description by reference.— See Traylor *v.* Lide, (Tex. Sup. 1887) 7 S. W. 58.

Description of mortgage on premises.— Coffin *v.* Freeman, 84 Me. 535, 24 Atl. 986.

"**The law does not require** that in such sales [sheriff's] the description must be such that the land may be identified by inspection of the levy and deed; and if the description be general but sufficiently accurate to enable the parties to identify the land levied upon and conveyed, by the use of such means as would be admissible in a court of justice for that purpose, then the description should be deemed sufficient." Smith *v.* Crosby, 86 Tex. 15, 21, 23 S. W. 10, 40 Am. St. Rep. 818 [*quoted* with approval in Focke *v.* Garcia, (Tex. Civ. App. 1897) 41 S. W. 187].

Where the levy is upon a part of a tract, the return must show what part was levied on. Langley *v.* Jones, 33 Md. 171; Waters *v.* Duvall, 6 Gill & J. (Md.) 76; Clarke *v.* Belmear, 1 Gill & J. (Md.) 443; Thomas *v.* Tarvey, 1 Harr. & G. (Md.) 435; Fenwick *v.* Floyd, 1 Harr. & G. (Md.) 172.

90. Bennett *v.* Vinyard, 34 Mo. 216.

Sufficiency.— Where a return on the back of a writ was made partly in one column and partly in another, with the indorsements on the writ between the two, it was held that the subscription to the left-hand column was a proper authentication of the whole return. Stott *v.* Harrison, 73 Ind. 17.

91. Eastman *v.* Curtis, 4 Vt. 616.

92. Belser *v.* Graves, 1 Nott & M. (S. C.) 125.

93. Harland *v.* Arthur, 3 S. W. 151, 8 Ky. L. Rep. 697; Welsh *v.* Joy, 13 Pick. (Mass.) 477.

Proper form of record see Becker *v.* Quigg, 54 Ill. 390.

A sufficient record of a return of a writ under which real estate is sold appears where the record shows that a sale was held, and that a deed was acknowledged to the purchaser in open court, and duly entered in the sheriff's deed book. Boyer *v.* Webber, 22 Pa. Super. Ct. 35.

As evidence of date of return see Maury *v.* Cooper, 3 J. J. Marsh. (Ky.) 224.

Record not conclusive of facts stated in return.— See Taylor *v.* Dundass, 1 Wash. (Va.) 92.

94. Riddle *v.* Fellows, 42 N. H. 309; Morse *v.* Child, 7 N. H. 581; Morton *v.* Edwin, 19 Vt. 77. See also Pope *v.* Cutler, 22 Me. 105. And see *infra*, XI, H, 7, b. *Compare* Vermont State Bank *v.* Clark, Brayt. (Vt.) 236.

95. McClure *v.* Engelhardt, 17 Ill. 47. See also Jackson *v.* Terry, 13 Johns. (N. Y.) 471. But see Bagley *v.* Ward, 37 Cal. 121, 99 Am. Dec. 256.

The failure to duly record an execution issued to another county does not deprive the execution creditor of his lien. Soaper *v.* Howard, 85 Ky. 256, 3 S. W. 161, 8 Ky. L. Rep. 937.

96. *Alabama.*— Brandon *v.* Snows, 2 Stew. 255.

Kansas.— Stetson *v.* Freeman, 35 Kan. 523, 11 Pac. 431.

Kentucky.— Boyer *v.* Lincoln, 3 Ky. L. Rep. 537.

Louisiana.— Elmore *v.* Bell, 2 Rob. 484.

Maine.— Means *v.* Osgood, 7 Me. 146.

Maryland.— Berry *v.* Griffith, 2 Harr. & G. 337, 18 Am. Dec. 309.

Massachusetts.— Frazee *v.* Nelson, 179 Mass. 456, 61 N. E. 40, 88 Am. St. Rep. 391.

Michigan.— See Flynn *v.* Kalamazoo Cir. Judge, (1904) 98 N. W. 740.

Missouri.— State *v.* Jenkins, 170 Mo. 16, 70 S. W. 152.

New Hampshire.— Ladd *v.* Dudley, 45 N. H. 61.

New York.— Williams *v.* Rogers, 5 Johns. 163.

North Carolina.— Walters *v.* Moore, 90 N. C. 41.

Oklahoma.— Payne *v.* Long-Bell Lumber Co., 9 Okla. 683, 60 Pac. 235.

Texas.— Thomas *v.* Browder, 33 Tex. 783.

England.— Hopwood *v.* Watts, 5 B. & Ad. 1056, 27 E. C. L. 443; Cavenagh *v.* Collett, 4 B. & Ald. 279, 6 E. C. L. 484; Green *v.* Glassbrook, 2 Bing. N. Cas. 143, 1 Hodges 193, 2 Scott 261, 29 E. C. L. 475; Thorpe *v.* Hook, 1 Dowl. P. C. 501; Rex *v.* Monmouth, 1 Marsh. 344, 15 Rev. Rep. 678, 4 E. C. L. 466.

mission of the court;[97] but after a return has been filed and become a matter of record, the officer can no longer amend it of his own motion,[98] and must make application to the court, which will in its discretion grant the required permission.[99]

2. **Power to Compel Amendment.** A court has no power to compel an officer to amend his return to conform to the facts.[1]

3. **Persons Entitled.** Only the officer,[2] one of the parties,[3] or a purchaser[4] is entitled to ask leave to amend.[5]

4. **Time of Amendment.** There is no fixed time within which an application to amend must be made, and, if the facts are clear and the rights of third persons will not be injuriously affected thereby, an amendment may be allowed by the court at any time subsequent to the return of the execution which may seem proper.[6]

See 21 Cent. Dig. tit. "Execution," § 1015.

Must conform to facts.— See *Ex p.* Bayley, 132 Mass. 457.

Must conform to order allowing.— See Lowry *v.* Coulter, 9 Pa. St. 349.

97. *Connecticut.*— Kellogg *v.* Wadhams, 9 Conn. 201.

Georgia.— Spencer *v.* Fuller, 68 Ga. 73.

Illinois.— Nelson *v.* Cook, 19 Ill. 440; Johnson *v.* Sommers, 3 Ill. App. 55.

Massachusetts.—Bates *v.* Willard, 10 Metc. 62; Welsh *v.* Joy, 13 Pick. 477.

Missouri.— State *v.* Melton, 8 Mo. 417.

New York.— Spoor *v.* Holland, 8 Wend. 445, 24 Am. Dec. 37.

See 21 Cent. Dig. tit. "Execution," § 1018.

98. Watkins *v.* Gayle, 4 Ala. 153; Barnard *v.* Stevens, 2 Aik. (Vt.) 429, 16 Am. Dec. 733; Hammen *v.* Minnick, 32 Gratt. (Va.) 249.

99. *Illinois.*— Turney *v.* Organ, 16 Ill. 43.

Kentucky.— Miller *v.* Shackleford, 4 Dana 264.

Maine.— Woods *v.* Cooke, 61 Me. 216.

Pennsylvania.— Vastine *v.* Fury, 2 Serg. & R. 426.

Texas.— Schiffer *v.* Fort, 1 Tex. Unrep. Cas. 198.

Vermont.— Barnard *v.* Stevens, 2 Aik. 429, 16 Am. Dec. 733.

Virginia.— Hammen *v.* Minnick, 32 Gratt. 249.

England.— Wylie *v.* Pearson, 1 Dowl. P. C. N. S. 807, 6 Jur. 806.

See 21 Cent. Dig. tit. "Execution," § 1018.

Jurisdiction to allow.— *Arkansas.*— Steward *v.* Pettigrew, 28 Ark. 372.

Indiana.— Newhouse *v.* Martin, 68 Ind. 224, as to the power of the circuit court.

Massachusetts.— Purrington *v.* Loring, 7 Mass. 388, as to power of the circuit court.

North Carolina.— Stancill *v.* Branch, 61 N. C. 217.

Virginia.— Walker *v.* Com., 18 Gratt. 13, 98 Am. Dec. 631.

1. Walter *v.* Palmer, 18 Ind. 279; Sawyer *v.* Curtis, 2 Ashm. (Pa.) 127. But see Davis *v.* Weyburn, 1 How. Pr. (N. Y.) 153.

2. Sheriff may have leave to amend return of deputy after a motion has been made against him founded upon the original return; and the amendment may be made by another deputy. Stone *v.* Wilson, 10 Gratt. (Va.) 529.

3. Baker *v.* Davis, 22 N. H. 27.

4. Lowenstein *v.* Krell, 162 Pa. St. 267, 29 Atl. 878, construing the Pennsylvania act of April 21, 1846, permitting a purchaser or other person interested to apply on the facts to amend.

5. Cawthorne *v.* Knight, 11 Ala. 268.

6. *Alabama.*— Woodward *v.* Harbin, 4 Ala. 534, 37 Am. Dec. 753; Brandon *v.* Snows, 2 Stew. 255.

Georgia.— McLeod *v.* Brooks Lumber Co., 98 Ga. 253, 26 S. E. 745, after sale.

Illinois.— Tennent-Stribbling Shoe Co. *v.* Hargardine-McKittrick Dry Goods Co., 58 Ill. App. 368 (after appeal); Noyes *v.* Kingman, 40 Ill. App. 187 (after ten years).

Kentucky.— Malone *v.* Samuel, 3 A. K. Marsh. 350, 13 Am. Dec. 172. *Compare* Smith *v.* Burbridge, 2 Ky. L. Rep. 65.

Maine.— See Miller *v.* Miller, 25 Me. 110.

Mississippi.— Planters' Bank *v.* Walker, 3 Sm. & M. 409.

Missouri.— Scruggs *v.* Scruggs, 46 Mo. 271.

Nebraska.— O'Brien *v.* Gaslin, 20 Nebr. 347, 30 N. W. 274, after eight or nine years.

New Hampshire.— Johnson *v.* Stone, 40 N. H. 197, 77 Am. Dec. 706.

North Carolina.—See Williams *v.* Houston, 71 N. C. 163; Davidson *v.* Cowan, 12 N. C. 304.

Pennsylvania.—Prather *v.* Chase, 3 Brewst. 206.

Tennessee.— An amendment may be made at any time before a motion for judgment against the officer is entered, but not afterward. Howard *v.* Union Bank, 7 Humphr. 26; Broughton *v.* Allen, 6 Humphr. 96.

Virginia.— Wordsworth *v.* Miller, 4 Gratt. 99 (after action against officer founded on return); Smith *v.* Triplett, 4 Leigh 590 (after five years); Rucker *v.* Harrison, 6 Munf. 181 (after seven years); Bullitt *v.* Winston, 1 Munf. 269.

See 21 Cent. Dig. tit. "Execution," § 1018.

After attack upon validity.— Elmore *v.* Bell, 2 Rob. (La.) 484; Aubert *v.* Buhler, 3 Mart. N. S. (La.) 489.

After death of deputy making see Jarboe *v.* Hall, 37 Md. 345, in which, however, the amendment was refused because neither the sheriff nor any other disinterested person was reliably cognizant of the facts.

After expiration of term of office.— *Illinois.*— Johnson *v.* Donnell, 15 Ill. 97.

Kentucky.— Newton *v.* Prather, 1 Duv. 100.

Louisiana.— Elmore *v.* Bell, 2 Rob. 484.

5. Scope and Purpose of Amendment. While it has been said that an amendment which will destroy or materially alter a return will not be allowed,[7] the true rule seems to be that an amendment will be allowed or disallowed "as may best tend to the furtherance of justice."[8] An amendment will be permitted, irrespective of the time which has elapsed, provided it is clearly in accordance with the facts and does not prejudice the rights of third persons, acquired *bona fide* without notice.[9] On the other hand, facts occurring subsequent to a return cannot be incorporated into it by amendment;[10] nor will an amendment be allowed which only partially corrects a return, where if the whole return were to be corrected so as to conform to the truth an invalid levy would be shown.[11] So too a court has no power to allow an amendment by which the provisions of a statute would be defeated or evaded.[12]

6. Determination. A motion for leave to amend a return is determinable by the court without a jury.[13]

7. Effect. An amendment relates back to the original return, and dates from it, and the officer is freed from any responsibility on the original.[14]

E. Construction — 1. In General. The well settled rule is that the return of an officer when ambiguous is to be so construed as to make it consistent with the proper discharge of the duty imposed upon him by law, if the return by reasonable intendment and construction can be made to bear this interpretation.[15]

Missouri.— Scruggs *v.* Scruggs, 46 Mo. 271; Miles *v.* Davis, 19 Mo. 408.

Rhode Island.— Lake, Petitioner, 15 R. I. 628, 10 Atl. 653.

Texas.— Lawrence *v.* Aguirre, (Civ. App. 1900) 59 S. W. 289.

See 21 Cent. Dig. tit. "Execution," § 1018.

Contra, Shores *v.* Whitworth, 8 Lea (Tenn.) 660.

Pending motion against officer.— Wilson *v.* Strobach, 59 Ala. 488; Niolin *v.* Hamner, 22 Ala. 578; Trotter *v.* Parker, 38 Miss. 473.

7. Barton *v.* Lockhart, 2 Stew. & P. (Ala.) 109. See also Holt *v.* Robinson, 21 Ala. 106, 56 Am. Dec. 240.

8. Jackson *v.* Esten, 83 Me. 162, 21 Atl. 830, 23 Am. St. Rep. 756 [*citing* Hobart *v.* Bennett, 77 Me. 401; Hayford *v.* Everett, 68 Me. 505; Johnson *v.* Day, 17 Pick. (Mass.) 106].

For purpose of making evidence.— See Paul *v.* Slason, 22 Vt. 231, 54 Am. Dec. 75.

9. *Arkansas.*—Clayton *v.* State, 24 Ark. 16.

California.— Newhall *v.* Provost, 6 Cal. 85.

Georgia.— Hopkins *v.* Burch, 3 Ga. 222.

Louisiana.— Rochelle *v.* Cox, 5 La. 283. See also Elmore *v.* Bell, 2 Rob. 484.

Maine.— Jackson *v.* Esten, 83 Me. 162, 21 Atl. 830, 23 Am. St. Rep. 765; Wilson *v.* Bucknam, 71 Me. 545; Storer *v.* Haynes, 67 Me. 420; Boynton *v.* Grant, 52 Me. 220; Lumbert *v.* Hill, 41 Me. 475; Whittier *v.* Vaughan, 27 Me. 301; Spear *v.* Sturdivant, 14 Me. 263.

Minnesota.— Hutchins *v.* Carver County Com'rs, 16 Minn. 13.

Missouri.— Phillips *v.* Evans, 64 Mo. 17.

New Hampshire.— Mathes *v.* Dover Nat. Bank, 62 N. H. 491.

New York.— Barker *v.* Binninger, 14 N. Y. 270.

North Carolina.— Williams *v.* Weaver, 101 N. C. 1, 7 S. E. 565; Dickinson *v.* Lippett, 27 N. C. 560.

Ohio.— Ohio L. Ins., etc., Co. *v.* Urbana Ins. Co., 13 Ohio 220.

Pennsylvania.— Peck *v.* Whitaker, 103 Pa. St. 297; Wright's Appeal, 25 Pa. St. 373.

Rhode Island.— Wilcox *v.* Emerson, 11 R. I. 501.

Tennessee.—Broughton *v.* Allen, 6 Humphr. 96.

United States.— Linthicum *v.* Remington, 15 Fed. Cas. No. 8,377, 5 Cranch C. C. 546 [*affirmed* in 14 Pet. 84, 10 L. ed. 364].

See 21 Cent. Dig. tit. "Execution," § 1019.

Amendment tending to defeat liability of officer and his sureties will not be allowed. Carr *v.* Meade, 77 Va. 142. See also Peck *v.* Whitaker, 103 Pa. St. 297.

Notice to third person.— See Coopwood *v.* Morgan, 34 Miss. 368.

Signature.— See Wilton Mfg. Co. *v.* Butler, 34 Me. 431. See also Humphrey *v.* Wade, 84 Ky. 391, 1 S. W. 648, 8 Ky. L. Rep. 384; Elliott *v.* Jordan, 7 Baxt. (Tenn.) 376.

10. Bibb *v.* Collins, 51 Ala. 450. See also Barton *v.* Lockhart, 2 Stew. & P. (Ala.) 109.

Premature return.— See Cota *v.* Ross, 66 Me. 161.

11. Wolcott *v.* Ely, 2 Allen (Mass.) 338.

12. Phillipse *v.* Higdon, 44 N. C. 380.

13. Morrill *v.* Fitzgerald, 36 Tex. 275.

14. Cody *v.* Quinn, 28 N. C. 191, 44 Am. Dec. 75.

Withdrawal of amendment reinstates original return. Hanly *v.* Sidelinger, 52 Me. 138.

15. Griffin *v.* Wise, 115 Ga. 610, 41 S. E. 1003. See also the following cases illustrative of the rule:

Alabama.— Gunn *v.* Howell, 35 Ala. 144, 73 Am. Dec. 484; Decatur Branch Bank *v.* McCollum, 20 Ala. 280; Thornton *v.* Winter, 9 Ala. 613; Price *v.* Cloud, 6 Ala. 248.

California.— Moore *v.* Martin, 38 Cal. 428; Munroe *v.* Thomas, 5 Cal. 470.

Connecticut.— Brace *v.* Catlin, 7 Conn. 358 note.

2. Presumptions. In construing a return every presumption will be made in favor of its truth and validity, and that the officer has in all things acted legally and properly.[16]

F. Defects, Objections, and Waiver — 1. In General. Irregularities in, and objections to, the return of an execution are available only to defendant, and not to his creditors.[17] A failure to object to a return in due time constitutes a waiver of objections.[18]

2. Quashing or Setting Aside — a. In General. Where the levy and returns made by the officer are not in accordance with the requirements of the law, they may be quashed; or, where facts are stated in the return which show there was no levy in fact, the return to the writ may be vacated or set aside.[19] The most

Delaware.— Farmers' Bank *v.* Massey, 1 Harr. 186.

Georgia.— Ferguson *v.* Beck, etc., Hardware Co., 92 Ga. 531, 17 S. E. 914; Gibson *v.* Robinson, 90 Ga. 756, 16 S. E. 969, 35 Am. St. Rep. 250.

Illinois.— Reinhardt *v.* Kennedy, 106 Ill. App. 96; Thompson *v.* Gates, 61 Ill. App. 262.

Indiana.— Dawson *v.* Jackson, 62 Ind. 171; Bowman *v.* Mallory, 14 Ind. 424.

Kentucky.— Scott *v.* Scott, 85 Ky. 385, 3 S. W. 598, 5 S. W. 423, 9 Ky. L. Rep. 363.

Louisiana.— Gates *v.* Walker, 8 La. Ann. 277.

Maine.— Franklin Bank *v.* Blossom, 23 Me. 546.

Maryland.— Berry *v.* Griffith, 2 Harr. & G. 337, 18 Am. Dec. 309.

Massachusetts.— Shove *v.* Dow, 13 Mass. 529.

Michigan.— Blair *v.* Compton, 33 Mich. 414.

Minnesota.— Hastings First Nat. Bank *v.* Rogers, 15 Minn. 381.

Mississippi.— Doe *v.* Lane, 3 Sm. & M. 763; Tutt *v.* Fulgham, 5 How. 621.

New Hampshire.— Lyford *v.* Thurston, 16 N. H. 399.

New Jersey.— Waterman *v.* Merrill, 33 N. J. L. 378.

New York.— Austin *v.* Figueira, 7 Paige 56; Conant *v.* Sparks, 3 Edw. 104.

North Carolina.— Patapsco Guano Co. *v.* Magee, 86 N. C. 350.

Pennsylvania.— Farmers', etc., Bank *v.* Fordyce, 1 Pa. St. 454; Keeler *v.* Beishline, 1 Pa. Co. Ct. 287.

Tennessee.— Heffly *v.* Hall, 5 Humphr. 581.

Texas.— Alexander *v.* Miller, 18 Tex. 893, 70 Am. Dec. 314.

Vermont.— Collins *v.* Perkins, 31 Vt. 624.

United States.— Coggswell *v.* Warren, 6 Fed. Cas. No. 2,958, 1 Curt. 223.

See 21 Cent. Dig. tit. "Execution," § 1024.

16. *Florida.*— Belton *v.* Willis, 1 Fla. 226.

Illinois.— Clark *v.* Glos, 180 Ill. 556, 54 N. E. 631, 72 Am. St. Rep. 223; Conwell *v.* Watkins, 71 Ill. 488. See also Reinhardt *v.* Kennedy, 106 Ill. App. 96.

Indiana.— Camp *v.* Smith, 98 Ind. 409; Hale *v.* Talbott, 86 Ind. 447.

Iowa.— Corriell *v.* Doolittle, 2 Greene 385.

Kentucky.— Maury *v.* Cooper, 3 J. J. Marsh. 224.

Louisiana.— Hewitt *v.* Stephens, 5 La. Ann. 640.

Maryland.— Parker *v.* Sedwick, 5 Md. 281.

Mississippi.— Drake *v.* Collins, 5 How. 253.

Missouri.— Blodgett *v.* Perry, 97 Mo. 263, 10 S. W. 891, 10 Am. St. Rep. 307.

New York.— Boyd *v.* Foot, 5 Bosw. 110.

North Carolina.— Gifford *v.* Alexander, 84 N. C. 330; Sloan *v.* Stanly, 33 N. C. 627; Jones *v.* Austin, 32 N. C. 20.

Oregon.— Crossen *v.* Oliver, 37 Oreg. 514, 61 Pac. 885.

Pennsylvania.— Fitler *v.* Patton, 8 Watts & S. 455; Keeler *v.* Beishline, 1 Pa. Co. Ct. 287.

Texas.— Portis *v.* Parker, 8 Tex. 23, 58 Am. Dec. 95.

Virginia.— Rowe *v.* Hardy, 97 Va. 674, 34 S. E. 625, 75 Am. St. Rep. 811.

Washington.— Whitworth *v.* McKee, 32 Wash. 83, 72 Pac. 1046.

See 21 Cent. Dig. tit. "Execution," § 1025.

Presumption as to erasures see Crossen *v.* Oliver, 37 Oreg. 514, 61 Pac. 885.

17. Crouse *v.* Schoolcraft, 51 N. Y. App. Div. 160, 64 N. Y. Suppl. 640; Tyler *v.* Willis, 33 Barb. (N. Y.) 327.

18. Baker *v.* Herkimer, 43 Hun (N. Y.) 86. See also Beisel *v.* Taggert, 2 Leg. Rec. (Pa.) 242.

Notice of fieri facias is not notice of return. See Idom *v.* Causey, 59 Ga. 607.

19. Bryan *v.* Bridge, 6 Tex. 137. See also the following cases:

Alabama.— Minter *v.* Mobile Branch Bank, 23 Ala. 762, 58 Am. Dec. 315; Holt *v.* Robinson, 21 Ala. 106, 56 Am. Dec. 240.

Kentucky.— Sanders *v.* Hamilton, 3 Dana 550; De Wolf *v.* Mallett, 3 Dana 214; Rudd *v.* Johnson, 5 Litt. 19. See also Bell *v.* Belew, 4 Ky. L. Rep. 828. *Compare* Payne *v.* Cowan, 1 J. J. Marsh. 12; McGhee *v.* Ellis, 4 Litt. 244, 14 Am. Dec. 124; Bailey *v.* Robinson, 14 Ky. L. Rep. 670.

Massachusetts.— *In re* Sawyer, 136 Mass. 339.

Missouri.— Creath *v.* Dale, 69 Mo. 41.

Montana.— McGregor *v.* Wells, 1 Mont. 142.

New York.— Platt *v.* Cadwell, 9 Paige 386. *Compare* Clark *v.* Dakin, 2 Barb. Ch. 36, as to disregarding mere errors of form.

United States.—See Buckhannon *v.* Tinnin, 2 How. 258, 11 L. ed. 259. But see Warfield *v.* Wirt, 29 Fed. Cas. No. 17,174, 2 Cranch C. C. 102.

usual ground, however, for quashing or setting aside a return is that it is false in fact.[20]

b. Notice of Motion. All parties interested must be notified of a motion to quash or set aside a return.[21]

c. Effect. The vacation of a false return of satisfaction leaves the lien still in force against the property;[22] but the quashing of the return of an execution sale, where the purchaser has given a sale bond, does not revive the lien of the levy, but gives the judgment creditor a right to have another execution issued.[23] Quashing such a return does not, however, *per se* set aside the sale or quash the bond. An order to that effect is necessary.[24]

G. Operation and Effect — 1. In General. The officer is the legal agent and representative of plaintiff and defendant in the judgment, and also of the accepted bidder and has the right to bind all the parties by his return of the execution.[25] After a return has been made, the execution becomes *functus officio*.[26] But the mere levy of an execution on lands does not operate as a satisfaction of such execution;[27] nor does the return of an execution unsatisfied give the judgment creditor a lien upon the equitable property of the debtor.[28]

2. Admissibility in Evidence. An officer's return is evidence of the facts therein stated as between the parties to the suit,[29] so far as the statement of such facts is a part of his official duty.[30] As against the purchaser at an execution sale,

See 21 Cent. Dig. tit. "Execution," § 1027.

20. *Alabama.*— McMichael *v.* Montgomery Branch Bank, 14 Ala. 496.

Delaware.— Voshell *v.* Cavender, 1 Pennew. 167, 39 Atl. 989.

Kentucky.— Newman *v.* Hazelrigg, 1 Bush 412.

Michigan.— William Wright Co. *v.* Frazer, 109 Mich. 139, 66 N. W. 954.

Mississippi.— Morton *v.* Walker, 7 How. 554; Anderson *v.* Carlisle, 7 How. 408.

New York.— See Burnham *v.* Brennan, 42 N. Y. Super. Ct. 49 [judgment *reversed* in 74 N. Y. 597]; Evans *v.* Parker, 20 Wend. 622.

North Carolina.— Dysart *v.* Brandreth, 118 N. C. 968, 23 S. E. 966.

Pennsylvania.— See Furbush *v.* Brown, 15 Phila. 184.

See 21 Cent. Dig. tit. "Execution," § 1027.

Proper mode of impeaching return of delivery bond forfeited is by supersedeas to the execution issued upon the forfeited bond. Anderson *v.* Rhea, 7 Ala. 104.

21. State Bank *v.* Marsh, 7 Ark. 390; Mann *v.* Nichols, 1 Sm. & M. (Miss.) 257; Parks *v.* Person, Sm. & M. Ch. (Miss.) 76; McKenney *v.* Jones, 7 Tex. 598, 58 Am. Dec. 83; Toler *v.* Ayres, 1 Tex. 398.

The officer need not be made a party when a return of *nulla bona* is traversed. Sprinz *v.* Frank, 81 Ga. 162, 7 S. E. 177.

22. Parks *v.* Person, Sm. & M. Ch. (Miss.) 76.

23. Ettlinger *v.* Tansey, 17 B. Mon. (Ky.) 364.

24. Schobee *v.* Dedman, 2 Litt. (Ky.) 116.

25. Linn Boyd Tobacco Warehouse Co. *v.* Terrill, 13 Bush (Ky.) 463. See also Frazee *v.* Nelson, 179 Mass. 456, 61 N. E. 40, 88 Am. St. Rep. 391.

When plaintiff chargeable with notice of contents see Betterton *v.* Buck, 2 Tex. App. Civ. Cas. § 198.

Liability of stock-holder as affected by a *nulla bona* return see Corporations, 10 Cyc. 695.

26. Mobile Branch Bank *v.* Ford, 13 Ala. 431; Phillips *v.* Dana, 4 Ill. 551; Garner *v.* Willis, 1 Ill. 368; Carnahan *v.* People, 2 Ill. App. 630; Cook *v.* Wood, 16 N. J. L. 254. But see Mercer *v.* Hooker, 5 Fla. 277.

A return, "Stayed by agreement of parties," releases the property levied on, and destroys the lien. Eldridge *v.* Chambers, 8 B. Mon. (Ky.) 411.

No change can be made in the levy after return without notice to the execution creditor. Wills *v.* McKinney, 41 N. J. L. 120. *Compare* Phillips *v.* Dana, 4 Ill. 551.

Return of an execution as satisfied will not discharge the execution levy where the execution sale has been set aside in equity by other creditors as being void for want of authority in the sheriff to make it because the property was in the hands of a receiver. Campau *v.* Detroit Driving Club, (Mich. 1904) 98 N. W. 267.

27. Bellows *v.* Sowles, 71 Vt. 214, 44 Atl. 68.

28. Weed *v.* Pierce, 9 Cow. (N. Y.) 722.

29. Henderson *v.* Cairns, 14 Barb. (N. Y.) 15; Grundy *v.* McPherson, 52 N. C. 347; Mason *v.* Jackson, (Tenn. Ch. App. 1900) 57 S. W. 217; Avril *v.* Warwick, 3 N. & M. 871, 28 E. C. L. 628.

Admissibility of copy with original return see Garrett *v.* Rhea, 9 Ala. 134.

As evidence of debtor's insolvency see Lovell *v.* Payne, 30 La. Ann. 511; Riggs *v.* Whitaker, 130 Mich. 327, 89 N. W. 954; Zweig *v.* Horicon Iron, etc., Co., 17 Wis. 362. But see and *compare* Hogan *v.* Vance, 2 Bibb (Ky.) 34; Stockard *v.* Pinkard, 6 Humphr. (Tenn.) 119.

To contradict deed of succeeding sheriff see Edwards *v.* Tipton, 77 N. C. 222.

30. Wickersham *v.* Reeves, 1 Iowa 413; Walker *v.* McKnight, 15 B. Mon. (Ky.) 467,

the officer's return is inadmissible;[31] but where the title to property is claimed through a sheriff's sale, the return to the execution is admissible in evidence in favor of the purchaser or of one holding under him.[32]

3. WEIGHT AND SUFFICIENCY — a. In General. An officer's return on an execution is sufficient evidence of the truth of the facts stated therein;[33] and the fact that his return appears on an execution sufficiently shows that he was the the officer holding the same, and that he held it for the purpose of its legal enforcement.[34]

b. As Against Other Evidence. As an official record made by the officer in the discharge of his official duties, greater weight will as a rule be attached to a return than to evidence generally.[35]

c. Aider by Extrinsic Evidence. Applying the general rules relating to admissibility of parol evidence[36] such evidence has been held to be admissibe to explain,[37]

61 Am. Dec. 190; Barr *v.* Combs, 29 Oreg. 399, 45 Pac. 776; Portis *v.* Ennis, 27 Tex. 574.

Facts admissible in proceedings before an auditor appointed to distribute the proceeds of a sheriff's sale gain no additional weight by being incorporated in the sheriff's return. Schwartz *v.* Gabler, 8 Pa. Super. Ct. 227, 42 Wkly. Notes Cas. (Pa.) 485.

31. Mitchell *v.* Lipe, 8 Yerg. (Tenn.) 179, 29 Am. Dec. 116.

32. Camp *v.* Smith, 98 Ind. 409.

33. *Arkansas.*— Tucker *v.* Bond, 23 Ark. 268.

Georgia.— Janes *v.* Horton, 32 Ga. 245, 79 Am. Dec. 300.

Kentucky.— Humphrey *v.* Wade, 84 Ky. 391, 1 S. W. 648; Morgan *v.* Hart, 9 B. Mon. 79; McBurnie *v.* Overstreet, 8 B. Mon. 300.

Louisiana.— Roberts *v.* Zansler, 34 La. Ann. 205; Waddell *v.* Judson, 12 La. Ann. 13; Kohn *v.* Byrne, 10 Rob. 113; Baldwin *v.* Gordon, 12 Mart. 378. *Compare* Lamorandier *v.* Meyer, 8 Rob. 152.

Maine.— Wilson *v.* Bucknam, 71 Me. 545.

Mississippi.—Martin *v.* Lofland, 8 Sm. & M. 352; Minor *v.* Natchez, 4 Sm. & M. 602, 43 Am. Dec. 488.

New York.— Cornell *v.* Cook, 7 Cow. 310.

North Carolina.— Miller *v.* Powers, 117 N. C. 218, 23 S. E. 182; Curlee *v.* Smith, 91 N. C. 172; Simpson *v.* Hiatt, 35 N. C. 473; Jackson *v.* Jackson, 35 N. C. 159.

South Carolina.— Huger *v.* Osborne, 1 Bay 319.

Tennessee.— Thomas *v.* Blackemore, 5 Yerg. 113.

See 21 Cent. Dig. tit. "Execution," § 1032.

A return of nulla bona is *prima facie* evidence that the debtor has no property subject to levy (Randolph *v.* Daly, 16 N. J. Eq. 313; Crouse *v.* Bailey, 10 N. Y. Suppl. 273, 11 N. Y. Suppl. 910; Zweig *v.* Horicon Iron, etc., Co., 17 Wis. 362); but it is no evidence that the return was made on the same day (Thornton *v.* Lane, 11 Ga. 459), or before the return-day (Izod *v.* Addison, 5 How. (Miss.) 432).

A return that the money was made and paid to plaintiff is sufficient evidence of the receipt of the money by plaintiff upon a rule to restore it to defendant; but a bare return of "Satisfied," without stating that it was paid to plaintiff, or a return that the money was paid by defendant to plaintiff or his attorney is not sufficient. Morgan *v.* Hart, 9 B. Mon. (Ky.) 79.

Indorsement of levy prima facie evidence of levy.— Tucker *v.* Bond, 23 Ark. 268; Cornell *v.* Cook, 7 Cow. (N. Y.) 310. But see Bland *v.* Whitfield, 46 N. C. 122.

34. Came *v.* Brigham, 39 Me. 35.

35. *Kansas.*— Treptow *v.* Buse, 10 Kan. 170.

Kentucky.— Com. *v.* Jackson, 10 Bush 424.

Louisiana.— Ware *v.* Wilson, 22 La. Ann. 102; Bailly *v.* Percy, 14 La. 17; McDonough *v.* Gravier, 9 La. 531. But see McCall *v.* Irion, 41 La. Ann. 1126, 6 So. 845.

Rhode Island.— Cole *v.* East Greenwich Fire-Engine Co., 12 R. I. 202.

Vermont.— Gilson *v.* Parkhurst, 53 Vt. 384. But see Ellison *v.* Wilson, 36 Vt. 60.

Virginia.— Harrison *v.* Garnett, 97 Va. 697, 34 S. E. 612.

See 21 Cent. Dig. tit. "Execution," § 1042.

36. **Parol evidence** generally see EVIDENCE, *ante*, p. 567 *et seq.*

37. *Georgia.*— Summerlin *v.* Hesterly, 20 Ga. 689, 65 Am. Dec. 639.

Indiana.— Johnson *v.* State, 80 Ind. 220.

Kentucky.—Chamberlain *v.* Brewer, 3 Bush 561.

Mississippi.— Duke *v.* Clark, 58 Miss. 465.

North Carolina.— Edwards *v.* Tipton, 77 N. C. 222.

Ohio.— Douglass *v.* McCoy, 5 Ohio 522; Matthews *v.* Thompson, 3 Ohio 272; Hammer *v.* Nevill, Wright 169.

Pennsylvania.— Com. *v.* Rooney, 167 Pa. St. 244, 31 Atl. 562; Titusville Novelty Iron Works' Appeal, 77 Pa. St. 103, 7 Leg. Gaz. 11; Shoemaker *v.* Ballard, 15 Pa. St. 92; Hoffman *v.* Danner, 14 Pa. St. 25.

Texas.— Buckner *v.* Vancleave, (Civ. App. 1904) 78 S. W. 541.

See 21 Cent. Dig. tit. "Execution," § 1043.

Explanation by sheriff.— Where a return shows a levy and sale, and a return of the money to the purchaser, as the property did not belong to defendant, the sheriff may, in an action by plaintiff in execution for the money received from the sale, explain that at the time of the sale he did not know that defendant did not own the property. McCarthy *v.* O'Marr, 19 Mont. 215, 47 Pac. 953,

corroborate,[38] or supply defects in a return,[39] provided it does not contradict its terms.[40] So too evidence of extrinsic facts not required to be stated therein is admissible in aid of a return.[41]

4. Conclusiveness — a. In General — (i) *Rule Stated.* A return to an execution is generally, except as to third persons, conclusive of the facts which it recites.[42]

(ii) *As to Date.* Where, after a judgment has become dormant, an officer makes an entry on the execution and antedates it, that fact may be shown by parol evidence.[43] Similarly parol evidence is admissible to show that a date appearing in his return was no part thereof, but was inserted by the sheriff without authority after the return was made.[44]

(iii) *As to Levy.* While it is true that statements made in an officer's return on an execution as to the levy made thereunder are as a rule conclusive;[45] never-

61 Am. St. Rep. 502 [*citing* Union Bank *v.* Benham, 23 Ala. 143; Evans *v.* Davis, 3 B. Mon. (Ky.) 344; Canada *v.* Southwick, 16 Pick. (Mass.) 556; Fuller *v.* Holden, 4 Mass. 498; Shotwell *v.* Hamblin, 23 Miss. 156, 55 Am. Dec. 83; Decker *v.* Armstrong, 87 Mo. 316; Lummis *v.* Kasson, 43 Barb. (N. Y.) 373; Baker *v.* McDuffie, 23 Wend. (N. Y.) 289].

38. What was said by the constable, at the time of making a levy, as to the fact of the levy, is admissible as corroborative of the evidence afforded by the return. Grandy *v.* McPherson, 52 N. C. 347.

Sheriff competent to prove truth of return. — Cunningham *v.* Mitchell, 4 Rand. (Va.) 189.

39. Governor *v.* Gibson, 14 Ala. 326; Lowry *v.* Walker, 4 Vt. 76. *Compare* Collins *v.* Hudson, 69 Ga. 684.

40. Harkness *v.* Farley, 11 Me. 491; Waterhouse *v.* Gibson, 4 Me. 230; Purrington *v.* Loring, 3 Mass. 388.

41. Darling *v.* Peck, 15 Ohio 65; Flick *v.* Troxsell, 7 Watts & S. (Pa.) 65.

In the New England states parol evidence is inadmissible in aid of a return of a levy on real estate. Wilcox *v.* Emerson, 10 R. I. 270, 14 Am. Rep. 683. See also Pride *v.* Lunt, 19 Me. 115; Wellington *v.* Gale, 13 Mass. 483; White River Bank *v.* Downer, 29 Vt. 332.

42. *Alabama.*— Martin *v.* Barney, 20 Ala. 369. *Compare* Gilchrist *v.* Montgomery Branch Bank, 11 Ala. 408.

Arkansas.— Ringgold *v.* Edwards, 7 Ark. 86.

Indiana.— Stockton *v.* Stockton, 59 Ind. 574. But see Butler *v.* State, 20 Ind. 169.

Louisiana.— A sheriff's return cannot be contradicted, where he has not been called on to correct it. Webb *v.* Coons, 11 La. Ann. 252. But see Goodrich's Succession, 6 Rob. 107.

Maine.— Rollins *v.* Mooers, 25 Me. 192.

Massachusetts.— Packard *v.* Wood, 4 Gray 307.

Michigan.—Flynn *v.* Kalamazoo Cir. Judge, (1904) 98 N. W. 740.

Missouri.—Anthony *v.* Bartholow, 69 Mo. 186; Phillips *v.* Evans, 64 Mo. 17. But see Decker *v.* Armstrong, 87 Mo. 316.

Pennsylvania.— Sawyer *v.* Curtis, 2 Ashm. 127; Lowber *v.* Richardson, 1 Pa. L. J. Rep. 263, 2 Pa. L. J. 209.

Tennessee.— Wilson *v.* Moss, 7 Heisk. 417; Pratt *v.* Phillips, 1 Sneed 543, 60 Am. Dec. 162. But see Loyd *v.* Anglin, 7 Yerg. 428; Martin *v.* England, 5 Yerg. 313.

Texas.— See O'Conner *v.* Silver, 26 Tex. 606.

Virginia.— Smith *v.* Triplett, 4 Leigh 590.

Wisconsin.— Irvin *v.* Smith, 66 Wis. 113, 27 N. W. 35, 28 N. W. 351.

United States.— Corning *v.* Burdick, 6 Fed. Cas. No. 3,246, 4 McLean 133.

See 21 Cent. Dig. tit. "Execution," § 1033.

Contra.— White-Crow *v.* White-Wing, 3 Kan. 276; Browning *v.* Flanagin, 22 N. J. L. 567; Smith *v.* Low, 27 N. C. 197.

A sheriff's amendment, made while he was out of office, to show that he levied on certain property may be impeached by parol evidence. Armstrong *v.* Easton, 1 B. Mon. (Ky.) 66.

When fraud and collusion are charged, a return is not necessarily conclusive. Conniff *v.* Doyle, 2 Luz. Leg. Reg. (Pa.) 107.

43. Sprinz *v.* Frank, 81 Ga. 162, 7 S. E. 177; Welch *v.* Butler, 24 Ga. 445.

A return dated Sunday may be shown to have been in fact made on the preceding day. Macomber *v.* Wright, 108 Mich. 109, 65 N. W. 610.

44. Henderson *v.* Henderson, 133 Pa. St. 399, 19 Atl. 424, 19 Am. St. Rep. 650.

45. *Arkansas.*— Hunt *v.* Weiner, 39 Ark. 70.

Kentucky.— Lock *v.* Slusher, (1897) 43 S. W. 471 [*distinguishing* Com. *v.* Jackson, 10 Bush 424].

Michigan.— William Wright Co. *v.* Frazer, 109 Mich. 139, 66 N. W. 954; Luton *v.* Soper, 94 Mich. 202, 53 N. W. 1054.

New Jersey.— Wills *v.* McKenney, 41 N. J. L. 120.

Pennsylvania.— Bogue's Appeal, 83 Pa. St. 101; McClenahan *v.* Humes, 25 Pa. St. 85; Flick *v.* Troxsell, 7 Watts & S. 65; Prather *v.* Chase, 3 Brewst. 206; Savage *v.* Devereaux, 5 Phila. 420. *Compare* Weidensaul *v.* Reynolds, 49 Pa St. 73; Williams *v.* Carr, 1 Rawle 420.

Tennessee.— Love *v.* Smith, 4 Yerg. 117. But see Mankin *v.* Fletcher, 7 Coldw. 162.

theless it has been held that mere statements of opinion or statements of reasons are not conclusive.[46]

(iv) *As to Delivery Bond.* The statements in a sheriff's return as to the taking and forfeiture of a delivery bond may be impeached.[47]

(v) *As to Sale.* As a general rule, and in the absence of fraud or mistake, the official return of a sheriff concerning the sale of the property levied on is conclusive.[48] In an action by the sheriff to recover the purchase-money his return is *prima facie* evidence that defendant was the purchaser.[49]

b. As to Parties and Privies. An officer's return on an execution is, until changed by proper proceedings operating directly on the record, conclusive upon the parties to the action and their privies.[50] The return may, however, be contradicted when the question of jurisdiction of the party arises, and it may be shown that jurisdiction was never in fact obtained, notwithstanding recitals to

United States.— Crawford *v.* Foster, 84 Fed. 939, 28 C. C. A. 576.

See 21 Cent. Dig. tit. "Execution," § 1035.

Contra.— Perry *v.* Hardison, 99 N. C. 21, 5 S. E. 230; Young *v.* Kennedy, 2 McMull. (S. C.) 80.

A constable's return on an execution is only *prima facie* evidence of a levy. Joyner *v.* Miller, 55 Miss. 208.

Where a sheriff does not affix his signature, the return is not conclusive as to the validity of his acts in making the levy. Watson *v.* Bondurant, 21 Wall. (U. S.) 123, 22 L. ed. 509.

46. Hessong *v.* Pressly, 86 Ind. 555; Lindley *v.* Kelley, 42 Ind. 294.

47. Anderson *v.* Rhea, 7 Ala. 104; Patterson *v.* Denton, Sm. & M. Ch. (Miss.) 592; Williams *v.* Crutcher, 5 How. (Miss.) 71, 35 Am. Dec. 422; Adler *v.* Green, 18 W. Va. 201. See also Burks *v.* Bass, 4 Bibb (Ky.) 338.

48. Ayres *v.* Duprey, 27 Tex. 593, 86 Am. Dec. 657. See also the following cases:

Georgia.— Jinks *v.* American Mortg. Co., 102 Ga. 694, 28 S. E. 609.

Kentucky.— Trigg *v.* Lewis, 3 Litt. 129.

Maryland.— Miles *v.* Knott, 12 Gill & J. 442.

Massachusetts.— Sykes *v.* Keating, 118 Mass. 517.

Pennsylvania.— Hare *v.* Bedell, 98 Pa. St. 485; Ruth's Appeal, 7 Pa. Cas. 547, 10 Atl. 886.

Vermont.— Wilson *v.* Spear, 68 Vt. 145, 34 Atl. 429.

See 21 Cent. Dig. tit. "Execution," § 1037.

Returns have been held not conclusive as to who was the purchaser at the sale (Wyatt *v.* Stewart, 34 Ala. 716; McIntire *v.* Barkley, 5 Houst. (Del.) 145. But see Trigg *v.* Lewis, 3 Litt. (Ky.) 129); as to the date of publications (Meredith *v.* Chancey, 59 Ind. 466), or of sale (Goodtitle *v.* Cummins, 8 Blackf. (Ind.) 179); as to the execution of a deed to the bidder (Gregg *v.* Strange, 3 Ind. 366); as to making advertisement (Delogny *v.* Smith, 3 La. 418); as to the title to the land sold (Gibson *v.* Winslow, 38 Pa. St. 49); as to the number of sales under the execution (Ulrich *v.* Feaser, 2 Lanc. L. Rev. (Pa.) 25).

49. Hyskill *v.* Givin, 7 Serg. & R. (Pa.) 369.

50. *Alabama.*— Crow *v.* Hudson, 21 Ala. 560.

Georgia.— Tillman *v.* Davis, 28 Ga. 494, 73 Am. Dec. 786.

Indiana.— Fry *v.* Gallaspie, 61 Ind. 478.

Maine.— True *v.* Emery, 67 Me. 28.

Massachusetts.— Whitaker *v.* Sumner, 7 Pick. 551, 19 Am. Dec. 298.

Michigan.— Flynn *v.* Kalamazoo Cir. Judge, (1904) 98 N. W. 740.

Minnesota.— Hutchins *v.* Carver County Com'rs, 16 Minn. 13.

New Hampshire.— Johnson *v.* Stone, 40 N. H. 197, 77 Am. Dec. 706. See also Newbury Bank *v.* Eastman, 44 N. H. 431.

Ohio.— Gallipolis Bank *v.* Domigan, 12 Ohio 220, 40 Am. Dec. 475. *Compare* Root *v.* Columbus, etc., R. Co., 45 Ohio St. 222, 12 N. E. 812.

Pennsylvania.— Hill *v.* Grant, 49 Pa. St. 200; Paxson's Appeal, 49 Pa. St. 195; Mentz *v.* Hamman, 5 Whart. 150, 34 Am. Dec. 546; Hill *v.* Robertson, 2 Pittsb. 103.

Rhode Island.— Barrows *v.* National Rubber Co., 13 R. I. 48.

Texas.— Flaniken *v.* Neal, 67 Tex. 629, 4 S. W. 212. But see Cravans *v.* Wilson, 35 Tex. 52.

Vermont.— Yatter *v.* Pitkin, 72 Vt. 255, 47 Atl. 787; Wood *v.* Doane, 20 Vt. 612.

Virginia.— Taylor *v.* Dundass, 1 Wash. 92.

See 21 Cent. Dig. tit. "Execution," § 1039.

Contra.—Grant *v.* Harris, 16 La. Ann. 323; Lawrence *v.* Young, 1 La. Ann. 297; Lafon *v.* Smith, 3 La. 473; Williams *v.* Brent, 7 Mart. N. S. (La.) 205.

As against a third person, one who claims title to property by virtue of an execution sale may show that the sale was made in a different manner from that stated in the officer's return. Drake *v.* Mooney, 31 Vt. 617, 76 Am. Dec. 145.

Where the creditor and officer are charged with fraud and collusion, the officer's return is not conclusive of the rights of the execution defendant in a contest between him and the creditor, who purchased the property at the sale. Conniff *v.* Doyle, 8 Phila. (Pa.) 630.

that effect in the return;[51] and the same is true where the question arises as to whether a given person is in fact a privy or not.[52]

e. As to Third Persons. The return of an officer on an execution is not conclusive against third persons.[53]

d. As Evidence For or Against Officer. An officer's return on an execution will as a general rule conclude him and his sureties,[54] but is only *prima facie*

51. The principle is that the record is no record unless the party to be bound by it was served with process, and this fact is open to investigation. St. Lure *v.* Lindsfelt, 82 Wis. 346, 52 N. W. 308, 33 Am. St. Rep. 50, 19 L. R. A. 515; Pollard *v.* Wegener, 13 Wis. 569; Rape *v.* Heaton, 9 Wis. 328, 76 Am. Dec. 269.

52. Toepfer *v.* Lampert, 102 Wis. 465, 78 N. W. 779.

53. *California.*— Meherin *v.* Saunders, 131 Cal. 681, 63 Pac. 1084, 54 L. R. A. 272, (1899) 56 Pac. 1110.

Georgia.— Gray *v.* Cole, 20 Ga. 203.

Kentucky.— Caldwells *v.* Harlan, 3 T. B. Mon. 349.

Louisiana.— Pailkes *v.* Thielen, 1 La. Ann. 34; Cockerell *v.* Smith, 1 La. Ann. 1.

Michigan.— Nall *v.* Granger, 8 Mich. 450, 77 Am. Dec. 462.

Minnesota.— Stewart *v.* Duncan, 47 Minn. 285, 50 N. W. 227, 28 Am. St. Rep. 367.

Tennessee.— Bates *v.* Fuller, 8 Lea 644. *Compare* Love *v.* Smith, 4 Yerg. 117.

Texas.— Holt *v.* Hunt, 18 Tex. Civ. App. 363, 44 S. W. 889.

See 21 Cent. Dig. tit. "Execution," § 1040.

After the lapse of more than twenty years, the sheriff's entry on the fieri facias is better evidence than the parol testimony of a single witness as to what property was sold; and the entry is not traversable by third persons in an action against them for the premises. Parler *v.* Johnson, 81 Ga. 254, 7 S. E. 317.

In a controversy between several judgment creditors, parol evidence is inadmissible to contradict the notes on a sheriff's writ of execution, which state the time of his receipt thereof. *In re* Kinney, 2 Leg. Op. (Pa.) 102.

The delivery of seizin must be shown by the return, and the declarations of the creditor are not evidence on the question of title under the execution. Jackson *v.* Woodman, 29 Me. 266.

54. *Alabama.*— Holt *v.* Robinson, 21 Ala. 106, 56 Am. Dec. 240; Martin *v.* Barney, 20 Ala. 369.

Arkansas.— State *v.* Lawson, 8 Ark. 380, 47 Am. Dec. 728.

Connecticut.— Benjamin *v.* Hathaway, 3 Conn. 528. And see Sanford *v.* Nichols, 14 Conn. 324, in which the return of the officer levying the execution was held *prima facie* evidence against the officer who had attached the property.

Indiana.— Splahn *v.* Gillespie, 48 Ind. 397; Butler *v.* State, 20 Ind. 169. But see Waymire *v.* State, 80 Ind. 67.

Iowa.— Lucas *v.* Cassaday, 2 Greene 208.

Kansas.— Sponenbarger *v.* Lemert, 23 Kan. 55.

Kentucky.— Murrell *v.* Smith, 3 Dana 462; Blue *v.* Com., 2 J. J. Marsh. 26; Com. *v.* Fuqua, 3 Litt. 41.

Louisiana.— Kimball *v.* Lopez, 7 La. 173.

Maine.— Meyer *v.* Andrews, 13 Me. 168, 29 Am. Dec. 497.

Massachusetts.— Gardner *v.* Hosmer, 6 Mass. 325.

Mississippi.— Shotwell *v.* Hamblin, 23 Miss. 156, 55 Am. Dec. 83.

Missouri.— Boone County *v.* Lowry, 9 Mo. 24, 43 Am. Dec. 532; Hopke *v.* Lindsay, 83 Mo. App. 85.

New York.— People *v.* Reeder, 25 N. Y. 302. See also Barker *v.* Binninger, 14 N. Y. 270.

North Carolina.— Walters *v.* Moore, 90 N. C. 41; Sutton *v.* Allison, 47 N. C. 339; State Bank *v.* Twitty, 9 N. C. 5, 12 N. C. 153. *Compare* Mulholland *v.* York, 82 N. C. 510.

Ohio.—Wells *v.* Benefield, Wright 201. But see Langdon *v.* Summers, 10 Ohio St. 77; Conkling *v.* Parker, 10 Ohio St. 28.

Pennsylvania.— Welsh *v.* Bell, 32 Pa. St. 12; Flick *v.* Troxsell, 7 Watts & S. 65; Brechtel *v.* Cortright, 13 Pa. Super Ct. 384; Keim *v.* Fleming, 1 Pa. Co. Ct. 263; *In re* Clevenger, 1 Lanc. L. Rev. 277. See also Beale *v.* Com., 11 Serg. & R. 299. *Compare* Myers *v.* Clark, 3 Watts & S. 535.

South Carolina.— Sawyer *v.* Leard, 8 Rich. 267.

Tennessee.— Fassell *v.* Greenfield, 1 Sneed 437. But see Granberry *v.* Crosby, 7 Heisk. 579.

Texas.— Cox *v.* Patten, (Civ. App. 1902) 66 S. W. 64.

Wisconsin.— Mendelson *v.* Paschen, 71 Wis. 591, 37 N. W. 815; Ohlson *v.* Pierce, 55 Wis. 205, 12 N. W. 429; Eastman *v.* Bennett, 6 Wis. 232.

See 21 Cent. Dig. tit. "Execution," § 1041.

Contra.— Cassell *v.* Williams, 12 Ill. 387.

Mistake.—A recital in the return of an execution may be proved by the sheriff to have been made by mistake or inadvertence. King *v.* Russell, 40 Tex. 124. See also Moore *v.* Martin, 38 Cal. 428; Decker *v.* Armstrong, 87 Mo. 316.

As against a person who fraudulently procured him to make it, a sheriff may deny the truth of his return. Evans *v.* Matson, 51 Pa. St. 366, 88 Am. Dec. 584.

Ownership of goods.—The sheriff may show that the goods levied on did not belong to the judgment debtor. Cassell *v.* Williams, 12 Ill. 387; Decker *v.* Armstrong, 87 Mo. 316; Windsor *v.* Gainor, 9 Pa. Co. Ct. 374. But see People *v.* Reeder, 25 N. Y. 302.

evidence in his favor and consequently is subject to be rebutted and overturned by proof *aliunde*.[55]

e. Collateral Attack. The return of a sheriff on an execution, as to matters required to be returned in the discharge of his official duties,[56] cannot be collaterally impeached.[57] Its legal effect may, however, be inquired into and determined.[58]

5. Effect of Defects Upon Title of Purchaser. The title of a purchaser at an execution sale cannot be affected by defects or informalities in the return[59] of

55. *Alabama.*— Andress *v.* Crawford, 11 Ala. 853. See also Barnes *v.* Baker, Minor 373.

Arkansas.—State *v.* Lawson, 8 Ark. 380, 47 Am. Dec. 728.

Indiana.— Splahn *v.* Gillespie, 48 Ind. 397. *Compare* Andrew *v.* Parker, 6 Blackf. 461.

Kentucky.— Chamberlin *v.* Brewer, 3 Bush 561; Wright *v.* Strange, 5 B. Mon. 250. *Compare* Feist *v.* Miller, 4 Bibb 311.

Mississippi.— Hand *v.* Grant, 5 Sm. & M. 508, 43 Am. Dec. 528.

Missouri.— State *v.* Ferguson, 13 Mo. 166; State *v.* Steel, 11 Mo. 553; Hensley *v.* Baker, 10 Mo. 157; State *v.* Rainey, 99 Mo. App. 218, 73 S. W. 250. See also State *v.* Still, 11 Mo. App. 283.

New Hampshire.— Lucier *v.* Pierce, 60 N. H. 13; Smith *v.* Burnham, 58 N. H. 205; Messer *v.* Bailey, 31 N. H. 9.

New York.— Glover *v.* Whittenhall, 2 Den. 633; Browning *v.* Hanford, 7 Hill 120; Cornell *v.* Cook, 7 Cow. 310.

Pennsylvania.— Hopkins *v.* Forsythe, 14 Pa. St. 34, 53 Am. Dec. 513; Hyskill *v.* Given, 7 Serg. & R. 369. *Compare* Cluley *v.* Lockhart, 59 Pa. St. 376, 98 Am. Dec. 350.

Tennessee.— Nichol *v.* Ridley, 5 Yerg. 63, 26 Am. Dec. 254.

Vermont.— Burroughs *v.* Wright, 19 Vt. 510.

Virginia.— Lathrop *v.* Lumpkin, 2 Rob. 49.

United States.—Fife *v.* Bohlen, 22 Fed. 878.

See 21 Cent. Dig. tit. "Execution," § 1041.

To make the return of a sheriff competent evidence for himself, it must appear that it was his official duty to perform the acts set forth in the return, and that it was obligatory on him as such sheriff to do the acts and make the return. Messer *v.* Bailey, 31 N. H. 9. See also Newbern Bank *v.* Pullen, 15 N. C. 297.

56. Facts which the law does not require to be stated may be contradicted collaterally or otherwise. Creditors *v.* Search, 2 Ohio Dec. (Reprint) 495, 3 West. L. Month. 319; Shannon *v.* McMullen, 25 Gratt. (Va.) 211.

57. *Arkansas.*— Newton *v.* State Bank, 14 Ark. 9, 58 Am. Dec. 363.

California.— Egery *v.* Buchanan, 5 Cal. 53.

Indiana.— Gillespie *v.* Splahn, Wils. 228.

Kansas.— Thompson *v.* Pfeiffer, 60 Kan. 409, 56 Pac. 763.

Kentucky.— Armstrong *v.* Easton, 1 B. Mon. 66; Smith *v.* Hornback, 3 A. K. Marsh. 392. *Compare* Lock *v.* Slusher, (1897) 43 S. W. 471.

Michigan.— Albany City Bank *v.* Dorr, Walk. 317.

Minnesota.— Spooner *v.* Bay St. Louis Syndicate, 44 Minn. 401, 46 N. W. 848; Folsom *v.* Carli, 5 Minn. 333, 80 Am. Dec. 429; Rohrer *v.* Turrill, 4 Minn. 407; Tullis *v.* Brawley, 3 Minn. 277.

Mississippi.— Reynolds *v.* Ingersoll, 11 Sm. & M. 249, 40 Am. Dec. 57.

Missouri.— Decker *v.* Armstrong, 87 Mo. 316.

New York.— Sperling *v.* Levy, 10 Abb. Pr. 426; Methodist Book Concern *v.* Hudson, 1 How. Pr. N. S. 517.

Pennsylvania.— Ruth's Appeal, 7 Pa. Cas. 547, 10 Atl. 886; Keim *v.* Fleming, 1 Pa. Co. Ct. 263. *Compare* Lowry *v.* Coulter, 9 Pa. St. 349.

Tennessee.— A sheriff's return may be impeached collaterally where the acts of the officer constituting the return were *mala fide*, or in violation of law, or beyond the scope of his official duty. Wood *v.* Chilcoat, 1 Coldw. 423.

Texas.—Houssels *v.* Pitts, (Civ. App. 1899) 52 S. W. 588; Sparks *v.* McHugh, 21 Tex. Civ. App. 265, 51 S. W. 873; Rutledge *v.* Mayfield, (Civ. App. 1894) 26 S. W. 910.

See 21 Cent. Dig. tit. "Execution," § 1038.

But see contra, McDonald *v.* Prescott, 2 Nev. 109, 90 Am. Dec. 517.

58. Reynolds *v.* Ingersoll, 11 Sm. & M. (Miss.) 249, 49 Am. Dec. 57.

59. *Arkansas.*— Stewart *v.* Houston, 25 Ark. 311.

California.— Clark *v.* Lockwood, 21 Cal. 220; Welch *v.* Sullivan, 8 Cal. 165.

Connecticut.—Finch *v.* Bishop, 13 Conn. 576; Camp *v.* Bates, 13 Conn. 1.

Georgia.— Brooks *v.* Rooney, 11 Ga. 423, 56 Am. Dec. 430.

Illinois.— Holman *v.* Gill, 107 Ill. 467; Stribling *v.* Prettyman, 57 Ill. 371; Cook *v.* Chicago, 57 Ill. 268; Phillips *v.* Coffee, 17 Ill. 154, 63 Am. Dec. 357.

Indiana.— Reed *v.* Ward, 51 Ind. 215; State *v.* Salyers, 19 Ind. 432; Thurston *v.* Barnes, 10 Ind. 289; Doe *v.* Heath, 7 Blackf. 154.

Iowa.— Preston *v.* Wright, 60 Iowa 351, 14 N. W. 352.

Kentucky.— Bell *v.* Weatherford, 12 Bush 505; Reed *v.* Heasley, 9 Dana 324; Dailey *v.* Palmer, Hard. 507; Neal *v.* Robinson, 28 S. W. 335, 16 Ky. L. Rep. 435.

Louisiana.— Brown *v.* Union Bank, 11 La. Ann. 543; Hughes *v.* Harrison, 7 Mart. N. S. 227.

Maryland.— Busey *v.* Tuck, 47 Md. 171; Miller *v.* Wilson, 32 Md. 297; Huddleson *v.* Reynolds, 8 Gill 332, 50 Am. Dec. 702;

the officer, if there is a sufficient description of the property sold whereby it can be identified.[60]

H. Return of Extent — 1. Necessity. Nothing will pass by an extent of an execution upon land, unless the execution, with the doings of the officer, is returned to the court from which it issued, so that the extent may become a matter of record there.[61]

2. Time For Making. The return of an extent on land should be made during the life of the execution.[62]

3. Form and Requisites — a. In General. All the material facts necessary to show that the law has been substantially complied with in the levy of an execution upon real estate must appear explicitly or by necessary intendment by the officer's return.[63]

b. Description of Property. The return of an officer of an extent upon real estate must describe the property by metes and bounds, or in such other mode as

Barney *v.* Patterson, 6 Harr. & J. 182; Bull *r.* Sheredine, 1 Harr. & J. 410; Nelson *v.* Turner, 2 Md. Ch. 73. But see Jarboe *v.* Hall, 37 Md. 345.

Massachusetts.— The return must show a strict compliance with the statutory requirements, or the sale will be invalid. Rand *v.* Cutler, 155 Mass. 451, 29 N. E. 1085; Howe *r.* Starkweather, 17 Mass. 240.

Michigan.— Atwood *r.* Bearss, 45 Mich. 469, 8 N. W. 55.

Minnesota.— Spencer *v.* Haug, 45 Minn. 231, 47 N. W. 794; Millis *r.* Lombard, 32 Minn. 259, 20 N. W. 187; Hutchins *v.* Carver County Com'rs, 16 Minn. 13.

Mississippi.— Hamblen *r.* Hamblen, 33 Miss. 455, 69 Am. Dec. 358.

New York.— Jackson *r.* Sternbergh, 1 Johns. Cas. 153.

North Carolina.— Shaffer *r.* Bledsoe, 118 N. C. 279, 23 S. E. 1000.

Pennsylvania.— Fister *v.* Greenawalt, 1 Wkly. Notes Cas. 322.

Tennessee.— Hughes *r.* Helms, (Ch. App. 1898) 52 S. W. 460.

Texas.— Holmes *r.* Buckner, 67 Tex. 107, 2 S. W. 452; Riddle *v.* Bush, 27 Tex. 675; Alexander *v.* Miller, 18 Tex. 893, 70 Am. Dec. 314; Coffee *v.* Silvan, 15 Tex. 354, 65 Am. Dec. 169; Davidson *v.* Chandler, 27 Tex. Civ. App. 418, 65 S. W. 1080; Bludworth *v.* Poole, 21 Tex. Civ. App. 551, 53 S. W. 717; House *v.* Robertson, (Civ. App. 1896) 34 S. W. 640; King *r.* Duke, (Civ. App. 1895) 31 S. W. 335; Whitney *r.* Krapf, 8 Tex. Civ. App. 304, 27 S. W. 843; Willis *r.* Nichols, 5 Tex. Civ. App. 154, 23 S. W. 1025.

Vermont.— Murray *v.* Chadwick, 52 Vt. 293.

Wisconsin.— Vilas *r.* Reynolds, 6 Wis. 214.

See 21 Cent. Dig. tit. "Execution," § 1044.

But see Mechanics' Bank *r.* Pitt, 44 Mo. 364.

Effect of delay on title of purchaser see *supra*, XI, C, 4, b.

60. Tatum *v.* Croom, 60 Ark. 487, 30 S. W. 885; Busey *r.* Tuck, 47 Md. 171; Waters *v.* Duvall, 11 Gill & J. (Md.) 37, 33 Am. Dec. 693; Morrisey *v.* Love, 26 N. C. 38; Blanchard *v.* Blanchard, 25 N. C. 105, 38 Am. Dec. 710.

61. Rand *r.* Hadlock, 6 N. H. 514; Russell *v.* Brooks, 27 Vt. 640.

An extent against a delinquent tax-collector for revenues collected and due the town treasury does not require a return. Hackett *r.* Amsden, 57 Vt. 432.

62. Hall *v.* Hall, 5 Vt. 304.

In Maine the time of returning an extent is not material, if it has been recorded in the registry of deeds within three months after the extent. Emerson *v.* Towle, 5 Me. 197.

In New Hampshire it is sufficient if executions are **returned in time** for copies wanted to prove the extent. Odiorne *v.* Mason, 9 N. H. 24, construing St. Dec. 7, 1816.

63. *Connecticut.*— Bissell *r.* Mooney, 33 Conn. 411; Coe *r.* Wickham, 33 Conn. 389; Camp *v.* Bates, 13 Conn. 1; Booth *v.* Booth, 7 Conn. 350.

Maine.— Jones *r.* Buck, 54 Me. 301; Wellington *v.* Fuller, 38 Me. 61; Gault *v.* Hall, 26 Me. 561; Munroe *r.* Reding, 15 Me. 153.

Massachusetts.—Pickering *v.* Reynolds, 111 Mass. 83; Parker *v.* Osgood, 3 Allen 487; Cowls *v.* Hastings, 9 Metc. 476; Williams *r.* Amory, 14 Mass. 20; Pratt *v.* Putnam, 13 Mass. 361; Boylston *v.* Carver, 11 Mass. 515.

New Hampshire.—Avery *v.* Bowman, 39 N. H. 393; Smith *v.* Smith, 11 N. H. 459; Cooper *v.* Bisbee, 4 N. H. 329.

Rhode Island.—Wilcox *v.* Emerson, 10 R. I. 270, 14 Am. Rep. 683.

Vermont.— Jewett *v.* Guyer, 38 Vt. 209; Sleeper *v.* Newbury Seminary Trustees, 19 Vt. 451; Henry *v.* Tilson, 19 Vt. 447.

See 21 Cent. Dig. tit. "Execution," § 1051.

Acknowledgment of receipt of seizin.— See Pond *v.* Pond, 14 Mass. 403.

Attachment on mesne process need not be recited. Derry Bank *v.* Webster, 44 N. H. 264.

Quantity of land set off must be shown with reasonable certainty. Coe *v.* Wickham, 33 Conn. 389.

Return need not state recordation in clerk's office. Finch *v.* Bishop, 13 Conn. 576.

Taxing expenses in gross will not avoid levy. Tibbets *r.* Merrill, 12 Me. 122.

In Vermont a return of a levy on land is sufficient, if made according to the form in Chipman's reports. Chase *r.* Bowen, 7 Vt. 431; Cleveland *r.* Allen, 4 Vt. 176.

will distinctly point out and identify it.[64] Where an officer makes an extent on the same parcel of land under two executions for and against the same parties, he need not levy on each execution separately, and describe distinct boundaries in each return.[65]

4. Inventory and Appraisement — a. In General. The return of the officer must show expressly or by necessary implication that the requirements of the statute in relation to the inventory and appraisement of the land set off were complied with.[66]

b. Appointment of Appraisers. A substantial compliance with all the requirements of the statute as to the appointment of appraisers must be shown by the officer's return, either expressly or by necessary inference.[67]

c. Residence of Appraisers. Where the statute requires that the appraisers shall be residents of the county or town where the land lies, the return must show that fact.[68]

64. *Connecticut.*— Eels *v.* Day, 4 Conn. 95.

Maine.— Cowan *v.* Wheeler, 31 Me. 439; Roop *v.* Johnson, 23 Me. 335; Buck *v.* Hardy, 6 Me. 162.

Massachusetts.— Ela *v.* Yeaw, 158 Mass. 190, 33 N. E. 511; Hedge *v.* Drew, 12 Pick. 141, 22 Am. Dec. 416.

New Hampshire.— Lyford *v.* Thurston, 16 N. H. 399.

Vermont.— Maeck *v.* Sinclear, 10 Vt. 103.

See 21 Cent. Dig. tit. "Execution," § 1052.

Reference to appraisers' certificate sufficient.— French *v.* Allen, 50 Me. 437; Herring *v.* Polley, 8 Mass. 113.

Reference to description in recorded deeds sufficient.— Boylston *v.* Carver, 11 Mass. 515; Hyde *v.* Barney, 17 Vt. 280, 44 Am. Dec. 335; Maeck *v.* Sinclear, 10 Vt. 103.

Reference to inventory of decedent's estate insufficient.— Tate *v.* Anderson, 9 Mass. 92.

65. Doe *v.* Foot, 1 Tyler (Vt.) 14, in which a return that "to satisfy this and one other execution between the same parties he had extended on a certain parcel of land," describing it, was held sufficient.

66. *Connecticut.*— Coe *v.* Wickham, 33 Conn. 389; Metcalf *v.* Gillet, 5 Conn. 400. *Compare* Norton *v.* Pettibone, 7 Conn. 319, 18 Am. Dec. 116, construing the curative act of May, 1825.

Maine.— Brackett *v.* McKenney, 55 Me. 504; Keen *v.* Briggs, 46 Me. 467; Huntress *v.* Tiney, 39 Me. 237; Rollins *v.* Rich, 27 Me. 557; Munroe *v.* Reding, 15 Me. 153; Sturtivant *v.* Frothingham, 10 Me. 100.

Massachusetts.—Bates *v.* Willard, 10 Metc. 62; Childs *v.* Barrows, 9 Metc. 413; Nye *v.* Drake, 9 Pick. 35; Tate *v.* Anderson, 9 Mass. 92.

New Hampshire.— McConihe *v.* Sawyer, 12 N. H. 396.

Vermont.— Paine *v.* Webster, 1 Vt. 101.

See 21 Cent. Dig. tit. "Execution," § 1053.

It is not essential that the magistrate who administered the oath to the appraisers, or the appraisers, certify their doing on the execution, and that their certificates be made part of the officer's return; but it may be convenient, in case of an insufficient certificate by the officer, to supply the defect. Williams *v.* Amory, 14 Mass. 20. See also U. S. *v.* Slade, 27 Fed. Cas. No. 16,312, 2 Mason 71.

Return may refer to certificate of appraisers. See Booth *v.* Booth, 7 Conn. 350; Brackett *v.* McKenney, 55 Me. 504; Boynton *v.* Grant, 52 Me. 220; Fitch *v.* Tyler, 34 Me. 463; Shove *v.* Dow, 13 Mass. 529.

Return must be consistent with certificate. Chase *v.* Williams, 71 Me. 190. *Compare* Smith *v.* Knight, 20 N. H. 9.

67. *Connecticut.*— Johnson *v.* Huntington, 13 Conn. 47; Booth *v.* Booth, 7 Conn. 350; Mather *v.* Chapman, 6 Conn. 54; Church *v.* Russel, 2 Root 434.

Maine.— Bingham *v.* Smith, 64 Me. 450; Boynton *v.* Grant, 52 Me. 220; French *v.* Allen, 50 Me. 437; Ware *v.* Barker, 49 Me. 358; Harriman *v.* Cummings, 45 Me. 351; Fitch *v.* Tyler, 34 Me. 463; Gould *v.* Hall, 26 Me. 561; Smith *v.* Keen, 26 Me. 411; Pierce *v.* Strickland, 26 Me. 277; Banister *v.* Higginson, 15 Me. 73, 32 Am. Dec. 134; Means *v.* Osgood, 7 Me. 146.

Massachusetts.— Brooks *v.* Norris, 124 Mass. 172; Ufford *v.* Dickinson, 12 Allen 543; Randall *v.* Wyman, 16 Gray 334; Chappell *v.* Hunt, 8 Gray 427; Kellenberger *v.* Sturtevant, 11 Cush. 160; Shields *v.* Hastings, 10 Cush. 247; Blanchard *v.* Brooks, 12 Pick. 47; Allen *v.* Thayer, 17 Mass. 299; Williams *v.* Amory, 14 Mass. 20; Whitman *v.* Tyler, 8 Mass. 284; Eddy *v.* Knap, 2 Mass. 154.

New Hampshire.— Smith *v.* Smith, 11 N. H. 459; Whittier *v.* Barney, 10 N. H. 291; Shapley *v.* Bellows, 4 N. H. 347; Daniels *v.* Ellison, 3 N. H. 279.

Vermont.— Aldis *v.* Burdick, 8 Vt. 21; Young *v.* Judd, Brayt. 151.

See 21 Cent. Dig. tit. "Execution," § 1054.

Where it appears in a levy on land that the debtor chose an appraiser, the title is good, although it does not appear in the return that the officer made a previous demand of the money. Beach *v.* Camp, 1 Root (Conn.) 241.

68. Simpson *v.* Coe, 3 N. H. 85; Libbey *v.* Copp, 3 N. H. 45. But see Seymour *v.* Beach, 4 Vt. 493, where a return was held sufficient which did not state that the appraisers lived in the town where the land levied on lay, but followed Chipman's form.

d. Competency of Appraisers. The return of an extent must show that the appraisers were freeholders and possessed the qualifications required by the statute as to discretion and disinterestedness.[69]

e. Oath of Appraisers. The return must show, either in itself or by reference to the justice's certificate, that the appraisers were sworn as required by law,[70] and that the person by whom they were sworn was a magistrate.[71]

5. Amendment. An officer's return of an extent may be amended, in order to perfect the title, according to the truth and justice of the case, when no rights of third persons have intervened, and the evidence is full and satisfactory;[72] and even as against third persons, the return may and will be thus amended, if such persons have knowledge of the facts, or if the return contains in itself sufficient motive to show that in making the levy all the requirements of the statute were probably complied with.[73]

6. Construction. In construing the return of an extent on land, every intendment will be made in favor of the sufficiency of the return, and of the regularity and legality of the officer's acts.[74]

In Massachusetts the return need not show that the appraisers resided within the county or the commonwealth. Campbell *v.* Webster, 15 Gray 28.

69. Donahue *v.* Coleman, 49 Conn. 464; Fitch *v.* Smith, 9 Conn. 42; Pendleton *v.* Button, 3 Conn. 406; Glidden *v.* Philbrick, 56 Me. 222; Pierce *v.* Strickland, 26 Me. 277; Bradley *v.* Bassett, 2 Cush. (Mass.) 417; Lobdell *v.* Sturtevant, 4 Pick. (Mass.) 243; Williams *v.* Amory, 14 Mass. 20; Day *v.* Roberts, 8 Vt. 413.

Shown by reference to appraisers' certificate see Booth *v.* Booth, 7 Conn. 350.

Return sufficient without certificate of appointing justice see Pendleton *v.* Button, 3 Conn. 406.

70. Fitch *v.* Tyler, 34 Me. 463; Kellenberger *v.* Sturtevant, 11 Cush. (Mass.) 160.

Although the return makes the magistrate's certificate a part thereof, it will control in case of any discrepancy. Cowls *v.* Hastings, 9 Metc. (Mass.) 476. See also Phillips *v.* Williams, 14 Me. 411.

If it appear by the return that the appraisers were duly sworn, although there be no certificate of the fact by the magistrate who administered the oath, the levy will be valid, if there be no other objection. Barnard *v.* Fisher, 7 Mass. 71.

Failure to explain delay in swearing appraisers, after the seizure of the land, will not invalidate the return. Inman *v.* Mead, 97 Mass. 310.

71. Howard *v.* Turner, 6 Me. 106.

72. Briggs *v.* Hodgdon, 78 Me. 514, 7 Atl. 387; Williamson *v.* Wright, 75 Me. 35; Glidden *v.* Philbrick, 56 Me. 222; Lumbert *v.* Hill, 41 Me. 475; Fitch *v.* Tyler, 34 Me. 463; Eveleth *v.* Little, 16 Me. 374; Gilman *v.* Stetson, 16 Me. 124; Banister *v.* Higginson, 15 Me. 73, 32 Am. Dec. 134; Means *v.* Osgood, 7 Me. 146; Buck *v.* Hardy, 6 Me. 162; Howard *v.* Turner, 6 Me. 106; *In re* Bayley, 132 Mass. 457; Bates *v.* Willard, 10 Metc. (Mass.) 62; Saunders *v.* Nashua First Nat. Bank, 61 N. H. 31; Vogt *v.* Ticknor, 48 N. H. 242; Derry Bank *v.* Webster, 44 N. H. 264; Avery *v.* Bowman, 39 N. H. 393; Baker *v.* Davis, 22 N. H. 27; Smith *v.* Knight, 20 N. H. 9; Huntington *v.* Burt, 18 N. H. 276; Whittier *v.* Barney, 10 N. H. 291.

After what time an amendment will be allowed depends upon the facts and circumstances of the particular case. See Pierce *v.* Strickland, 26 Me. 277; Russ *v.* Gilman, 16 Me. 209; Gilman *v.* Stetson, 16 Me. 124; Libbey *v.* Copp, 3 N. H. 45.

Amended returns are binding on the parties to the levy. Symonds *v.* Harris, 51 Me. 14, 81 Am. Dec. 553.

Amendment relates back to time of levy or return. Whittier *v.* Varney, 10 N. H. 291. But see Means *v.* Osgood, 7 Me. 146.

An unauthorized alteration of the officer's return on the original writ will not vacate a levy made thereunder, whereby a title has vested. Gilman *v.* Thompson, 11 Vt. 643, 34 Am. Dec. 714.

Rescission of amendment.— An amendment having been made at one term, after notice and a full hearing of the parties, and no exception taken, a motion at a subsequent term to rescind the order and erase the amendment, on a suggestion that they were made on false testimony, will not be heard. Russell *v.* Dyer, 39 N. H. 528.

73. Peaks *v.* Gifford, 78 Me. 362, 5 Atl. 879; Knight *v.* Taylor, 67 Me. 591; Brown *v.* Washington, 110 Mass. 529; Pratt *v.* Wheeler, 6 Gray (Mass.) 520; Saunders *v.* Nashua First Nat. Bank, 61 N. H. 31; Avery *v.* Bowman, 39 N. H. 393.

74. Peck *v.* Wallace, 9 Conn. 453; Isham *v.* Downer, 8 Conn. 282; Whittlesey *v.* Starr, 8 Conn. 134; Booth *v.* Booth, 7 Conn. 350; Jessup *v.* Batterson, 5 Day (Conn.) 368; Glidden *v.* Philbrick, 56 Me. 222; Brackett *v.* Ridlon, 54 Me. 426; McKeen *v.* Gammon, 33 Me. 187; McLellan *v.* Codman, 22 Me. 308.

If the return has no date, it will be presumed to refer to the date of the appraisement. Gorham *v.* Blazo, 2 Me. 232.

The fact that notice to choose an appraiser was duly given may be implied from the return that the debtor had neglected and refused to choose an appraiser. Thompson *v.*

7. Operation and Effect — a. In General. It is the return of the officer of the appraisement and proceedings which operates as a statute conveyance of land set off on execution, and divests the debtor of his title;[75] and the delivery of seizin is an acceptance of title by the creditor in satisfaction of the debt, as of the date of those proceedings.[76]

b. Conclusiveness. The return of a levy on real estate is conclusive upon the parties and their privies, and against the whole world as evidence that thereby, as between the parties, the title of the debtor in the estate levied on passed to the judgment creditor.[77] As against the officer the return is conclusive,[78] but not as against third persons.[79]

8. Record. The statutes require the officer to make his return to the clerk's office from which the execution issued and to cause the execution, with his return thereon, to be recorded in the registry of deeds, or in the town clerk's office, of the county, district, or town in which the land lies, on or before the return-day. Unless this is done, no title passes except as against the debtor and his heirs and persons having actual knowledge of the facts.[80] It is otherwise as to the record

Oakes, 13 Me. 407; Bugnon *v.* Howes, 13 Me. 154; Sturdivant *v.* Sweetsir, 12 Me. 520.

Where a return incorporates and adopts the appraisement, the whole must be taken together in construing the description of the premises. Vogt *v.* Ticknor, 48 N. H. 242.

75. Pope *v.* Cutler, 22 Me. 105. See also Hathaway *v.* Hemingway, 20 Conn. 191; Coe *v.* Stow, 8 Conn. 536; Booth *v.* Booth, 7 Conn. 350; Jewett *v.* Whitney, 51 Me. 233; Lawrence *v.* Pond, 17 Mass. 433; Sleeper *v.* Newbury Seminary Trustees, 19 Vt. 451.

Admissibility in evidence see Hanly *v.* Sidelinger, 52 Me. 138.

An obvious mistake in the date of a return will not defeat the levy. Shove *v.* Dow, 13 Mass. 529. And see as to relief from mistake Young *v.* McGown, 62 Me. 56.

76. Pope *v.* Cutler, 22 Me. 105.

Delivery to agent or attorney.— Where an officer returns that he has delivered seizin to the agent or attorney of the creditor, the return furnishes *prima facie* evidence that such person was the agent or attorney for that purpose. Wilson *v.* Gannon, 54 Me. 384; Roop *v.* Johnson, 23 Me. 335; Herring *v.* Polley, 8 Mass. 113; Odiorne *v.* Mason, 9 N. H. 24.

The return will not have relation back to the levy, so as to vest the title from that time in the execution creditor, where such relation back would operate to the prejudice of persons who are not parties or privies to the proceeding. Coe *v.* Stow, 8 Conn. 536.

77. *Maine.*— Hotchkiss *v.* Hunt, 56 Me. 252; Chadbourne *v.* Mason, 48 Me. 389; Huntress *v.* Tiney, 39 Me. 237; McKeen *v.* Gammon, 33 Me. 187; Grover *v.* Howard, 31 Me. 546; Mansfield *v.* Jack, 24 Me. 98; Dodge *v.* Farnsworth, 19 Me. 278; Boody *v.* York, 8 Me. 272; Gorham *v.* Blazo, 2 Me. 232.

Massachusetts.— Baker *v.* Baker, 125 Mass. 7; Steel *v.* Steel, 4 Allen 417; Dooley *v.* Wolcott, 4 Allen 406; Campbell *v.* Webster, 15 Gray 28; Bates *v.* Willard, 10 Metc. 62; Tyler *v.* Smith, 8 Metc. 599; Carpenter *v.* Sutton First Parish, 7 Pick. 49; Lawrence *v.* Pond, 17 Mass. 433; Bott *v.* Burnell, 9 Mass. 96, 11 Mass. 163.

New Hampshire.—Ladd *v.* Wiggin, 35 N. H. 421, 69 Am. Dec. 551; Angier *v.* Ash, 26 N. H. 99; Parker *v.* Guillow, 10 N. H. 103; Brown *v.* Davis, 9 N. H. 76; Howard *v.* Daniels, 2 N. H. 137.

Vermont.— Swift *v.* Cobb, 10 Vt. 282; Stevens *v.* Brown, 3 Vt. 420, 23 Am. Dec. 215; Hathaway *v.* Phelps, 2 Aik. 84; Hurlbut *v.* Mayo, 1 D. Chipm. 387.

United States.— Mattocks *v.* Farrington, 16 Fed. Cas. No. 9,298, 2 Hask. 331.

See 21 Cent. Dig. tit. "Execution," § 1061.

Direct proceeding.— Upon a petition to the supreme court to vacate the levy of an execution for the want of notice to the debtor to choose an appraiser, the fact that no such notice was given may be shown by parol, notwithstanding the return states that notice was given. Briggs *v.* Green, 33 Vt. 565.

Not conclusive as to time of levy and of delivery of seizin see Balch *v.* Pattee, 38 Me. 353.

Recitals as to encumbrances not conclusive see Hannum *v.* Tourtellott, 10 Allen (Mass.) 494.

Return against delinquent tax-collector not conclusive see Hackett *v.* Amsden, 57 Vt. 432.

Where there is a variance as to the estimated value of the land between the report of the appraisers and the officer's return, the return is to govern, and is conclusive as to the levy. Chase *v.* Hazelton, 7 N. H. 171, opinion of the court by Upham, J.

78. Allen *v.* Doyle, 33 Me. 420; Cowan *v.* Wheeler, 31 Me. 439.

79. Bott *v.* Burnell, 11 Mass. 163, holding it not to be conclusive on a lawful owner other than a judgment debtor.

80. *Connecticut.*—Spencer *v.* Champion, 13 Conn. 11; Tapliff *v.* Davis, 1 Root 556.

Maine.— Hanly *v.* Sidlinger, 52 Me. 138; Balch *v.* Pattee, 38 Me. 353; Stevens *v.* Bachelder, 28 Me. 218.

Massachusetts.— Robbins *v.* Rice, 7 Gray 202; Sargent *v.* Peirce, 2 Metc. 80; Blanchard *v.* Brooks, 12 Pick. 47; McGregor *v.* Brown, 5 Pick. 170; Foster *v.* Briggs, 3 Mass. 313.

in the office of the clerk of the court, or of the justice issuing the execution. It is sufficient if the record be made before suit is brought by which the title is to be tested.[81]

XII. PAYMENT, SATISFACTION, AND DISCHARGE.[82]

A. What Constitutes. An execution is satisfied either by a payment of money or by a conversion of the debtor's property.[83] The payment of an amount[84] or the conversion by sale[85] of the debtor's property into an amount equal to the amount due satisfies the judgment and the process is henceforth as *functus officio*.[86] A payment of a portion of the debt is a satisfaction *pro tanto* and plaintiff must credit the amount so paid.[87] If a sale is had and the property is not of sufficient value to pay the debt, of course the execution is not satisfied as to the balance.[88]

B. Satisfaction by Payment — 1. As to Interest and Costs. The law contemplates but one final judgment and but one final execution for its collection, and to prevent a defendant from being harassed by successive executions it will

New Hampshire.— Morse *v.* Child, 7 N. H. 581; Sullivan *v.* McKean, 1 N. H. 371.

Vermont.— It is indispensable to the passing of the title that the officer's return of the levy of an execution upon real estate be recorded in the town clerk's office during the life of the execution. Perrin *v.* Reed, 33 Vt. 62. See also Perry *v.* Whipple, 38 Vt. 278; Little *v.* Sleeper, 37 Vt. 105, 86 Am. Dec. 697; Ellison *v.* Wilson, 36 Vt. 60; Skinner *v.* McDaniel, 5 Vt. 539; Skinner *v.* Watson, 4 Vt. 421.

United States.—U. S. *v.* Slade, 27 Fed. Cas. No. 16,312, 2 Mason 71.

See 21 Cent. Dig. tit. "Execution," § 1063.

If the proceedings of the levy cannot be completed, so that record can be made before the return-day, it should be done as soon thereafter as practicable, and at least prior to the next term of court; otherwise no title passes by the levy. Morse *v.* Child, 7 N. H. 581.

It is the duty of the officer to procure the return to be recorded in the office of the clerk of the court and of the town where the land lies. Hubbard *v.* Dewey, 2 Aik. (Vt.) 312. *Contra*, Tobey *v.* Leonard, 15 Mass 200.

Record may be made from copy see Skinner *v.* Watson, 4 Vt. 421.

The justice's certificate of the appointment of appraisers, and the appraisers' certificate, appended to the officer's return, are not part of his doings, and need not be recorded. Isham *v.* Downer, 8 Conn. 282.

81. Little *v.* Sleeper, 37 Vt. 105, 86 Am. Dec. 697; Perrin *v.* Reed, 33 Vt. 62.

82. **Conclusiveness of return of satisfaction of judgment** see Judgments.

Forthcoming bond as satisfaction of execution see *supra*, VII, C, 3, d.

83. See Baham *v.* Langfield, 16 La. Ann. 156; Richardson *v.* Inglesby, 13 Rich. Eq. (S. C.) 59. See also cases cited in succeeding notes.

An acceptance of a garnishment by plaintiff is a satisfaction to the extent of the amount, and it is immaterial whether he offered it in part payment or not. Barr *v.* Rader, 33 Oreg. 375, 54 Pac. 210.

An inquisition finding that land levied on under execution would be sufficient to pay in seven years is not equivalent to a satisfaction of the execution. Lyons *v.* Ott, 6 Whart. (Pa.) 163.

An unlawful interference with the sale of personal property by a creditor who has levied thereon, which property at its full value was insufficient to satisfy the execution, does not operate as a satisfaction of the execution or invalidate a levy which he has made upon the real estate of the debtor. Spencer *v.* Champion, 13 Conn. 11.

If promissory notes are deposited as escrows with the sheriff by one of two judgment debtors, to be delivered to the creditor payee when he shall have levied the execution upon the land of the other debtor and executed and delivered to the first-mentioned debtor a deed of the land, the notes cannot be considered as having been accepted in satisfaction of the execution when they were never delivered over. Huntington *v.* Smith, 4 Conn. 235. See *infra*, XII, B, 4, d; and Escrows, 16 Cyc. 578, 588.

Implied judgment on a forfeited delivery bond not a satisfaction.— Cole *v.* Robertson, 6 Tex. 356, 55 Am. Dec. 784.

Payment by transfer of accounts on books. — Wilkinson *v.* Thigpen, 71 Ga. 497.

84. Den *v.* Roberts, 33 N. C. 424, 53 Am. Dec. 419; McMullen *v.* Cathcart, 4 Rich. Eq. (S. C.) 117.

85. Jinks *v.* American Mortg. Co., 102 Ga. 694, 28 S. E. 609.

86. Jinks *v.* American Mortg. Co., 102 Ga. 694, 28 S. E. 609; Hoyt *v.* Peterson, 4 Johns. (N. Y.) 188; Den *v.* Roberts, 33 N. C. 424, 53 Am. Dec. 419.

87. Sandburg *v.* Papineau, 81 Ill. 446 (where a portion of the debt was paid under garnishment); Gray *v.* Griswold, 7 How. Pr. (N. Y.) 44.

88. Chandler *v.* Higgins, 109 Ill. 602.

A sheriff's acceptance of a part in full satisfaction of an execution is unauthorized, although the judgment may be void for want of service. Runyan *v.* Vandyke, 6 Ohio Dec. (Reprint) 601, 7 Am. L. Rec. 8.

consider the debt satisfied when one execution has been issued and the money made upon it by the sheriff, and therefore if defendant does not include his costs,[89] or the interest on the judgment,[90] these items will be considered satisfied also. Inasmuch as the payment of a portion of the debt is a satisfaction *pro tanto*, interest cannot afterward be collected upon the amount thus recovered, for a delay which is not caused by defendant.[91]

2. Payment by Certain Persons and the Effect — a. By Co-Defendant. If an execution has been satisfied by one of several co-defendants who were all principals upon the cause of action, it cannot be subsequently issued against any of the other co-defendants for the benefit of the one who made the payment.[92] But a payment of the debt by a surety operates as an assignment of the judgment and the execution may be continued for his use.[93]

b. By Third Person — (i) *Generally.* If the judgment debt be paid by a person not a party to the judgment and not liable upon it, the judgment will be extinguished or not, according to the intention of the party paying.[94] The old New York code of procedure[95] provided that "after the issuing of execution

89. Slater *v.* Alston, 103 Ala. 605, 15 So. 944, 49 Am. St. Rep. 55; Bradley *v.* Clearfield, etc., R. Co., 8 Pa. Dist. 493.

90. Todd *v.* Botchford, 86 N. Y. 517, 1 N. Y. Civ. Proc. 402 [*affirming* 24 Hun 495]; People *v.* Onondaga Ct. C. Pl., 3 Wend. (N. Y.) 331.

Alias executions see *supra*, VI, E.

Simultaneous executions see *supra*, II, F.

Successive executions see *supra*, II, G.

91. Gray *v.* Griswold, 7 How. Pr. (N. Y.) 44. *Compare* Beetim *v.* Buchanan, 4 Watts (Pa.) 59.

92. *Georgia.*— See Adams *v.* Keeler, 30 Ga. 86.

Maine.— Stevens *v.* Morse, 7 Me. 36, 20 Am. Dec. 337.

Massachusetts.— Adams *v.* Drake, 11 Cush. 504; Brackett *v.* Winslow, 17 Mass. 153; Hantmatt *v.* Wyman, 9 Mass. 138.

Mississippi.— Planters' Bank *v.* Spencer, 3 Sm. & M. 305.

New Hampshire.— Stanley *v.* Nutter, 16 N. H. 22.

See 21 Cent. Dig. tit. "Execution," § 1065.

Compare Walker *v.* Bradley, 2 Ark. 578. See *infra*, XII, B, 4.

The reason for this rule is that "actual satisfaction of the debt or judgment by the sale of the property of one debtor or defendant is a discharge of the other debtor and defendants." Walker *v.* Bradley, 2 Ark. 578, 595.

But in Michigan, if a co-defendant pay the execution upon agreement that it shall be kept alive for his benefit, the agreement is treated as one to permit defendant who made the payment to enforce the execution against the other co-defendants to the extent that the law justified a resort to them; that is, each for his proportional share. Thornton *v.* Damm, 120 Mich. 510, 79 N. W. 797, opinion of the court by Montgomery, J.

Upon payment by a co-defendant of the entire sum due, the judgment becomes thereby extinguished, whatever may be the intention of the parties to the transaction. It is not in their power by any arrangement between them to keep the judgment on foot for the benefit of the party making the payment. See Harbeck *v.* Vanderbilt, 20 N. Y. 395.

93. Sotheren *v.* Reed, 4 Harr. & J. (Md.) 307.

Compulsory payment.— Under the Georgia act of 1839 see Stiles *v.* Eastman, 1 Ga. 205.

But if the surety would be subrogated to the rights of the creditor and thereby have the privilege of controlling the execution against his co-defendant, the principal debtor, he must make it satisfactorily appear to the court whence the execution issued that he was merely a surety upon the debts sued on. Clemens *v.* Prout, 3 Stew. & P. (Ala.) 345; Adams *v.* Healer, 30 Ga. 86; Nickerson *v.* Whittier, 20 Me. 223.

A surety who has paid only a part of the amount due cannot invoke the doctrine of subrogation to control the execution so as to reimburse himself. Cherry *v.* Singleton, 66 Ga. 206, under Ga. Code, § 2155.

94. Southern Star Lightning-Rod Co. *v.* Duvall, 64 Ga. 262; McLendon *v.* Frost, 59 Ga. 350; Williamson *v.* Perkins, 1 Harr. & J. (Md.) 449; Harbeck *v.* Venderbilt, 20 N. Y. 395; Kirkpatrick *v.* Ford, 2 Speers (S. C.) 110.

The taking of an assignment, whether valid or void, affords under all circumstances unequivocal evidence of an intention not to satisfy the judgment. Harbeck *v.* Vanderbilt, 20 N. Y. 395.

The priority of a lien is not lost to a junior by transferring the fieri facias to a person who paid the claim with the intention that the judgment should not be satisfied, but should be kept alive. Marshall *v.* McGriff, 23 Ga. 473.

A grantee of a partnership who redeems the land conveyed to him from a judgment against the firm acquires no lien or precedence by his redemption. It is only a mortgagee of a judgment creditor who under the statute acquires a lien on real estate by advancing money to redeem it. Goddard *v.* Renner, 57 Ind. 532.

Tender.— See Porter *v.* Ingraham, 10 Mass. 88.

95. See Voorhies Code (9th ed.), § 293.

against property, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much thereof as shall be necessary to satisfy the execution; and the sheriff's receipt shall be a sufficient discharge for the amount so paid." [96] This provision has been adopted in many states [97] and exists in somewhat altered form in the New York code of civil procedure at the present time.[98]

(II) *By Officer and His Right of Subrogation.* In some jurisdictions it has been considered against public policy for an officer who pays the debt of defendant to have the use of the execution for his own reimbursement.[99] In other jurisdictions, whether the sheriff may be subrogated to the rights of the creditor seems to be a matter of intention between the parties. If the sheriff takes an assignment at the time he makes the payment or in some cases if it is agreed that the judgment shall remain open the sheriff can have execution for his exoneration.[1] In still other jurisdictions there appears to be no question of

96. See Mallory *v.* Norton, 21 Barb. (N. Y.) 424.

97. *California.*— Code Civ. Proc. § 716. See also Brown *v.* Ayres, 33 Cal. 525, 91 Am. Dec. 655.

North Carolina.— Code Civ. Proc. § 265; Clark Code Civ. Proc. § 489. The section does not authorize the sheriff to apply the proceeds of one execution to the satisfaction of another. Smith *v.* McMillan, 84 N. C. 593. See also Howey *v.* Miller, 67 N. C. 459.

North Dakota.— Rev. Codes (1895), § 5514 (Comp. Laws, § 5124). See also Faber *v.* Wagner, 10 N. D. 287, 86 N. W. 963.

Ohio.— Rev. St. § 4582. In Burke *v.* Renner, 1 Ohio S. & C. Pl. Dec. 93, 2 Ohio N. P. 306, it was said that this provision did not refer to cases of involuntary payment.

South Dakota.— Comp. Laws, § 5175. In Bostwick *v.* Benedict, 4 S. D. 414, 57 N. W. 78, it was held that a person indebted to the judgment debtor might pay the amount to the sheriff, although his debt had been reduced to judgment.

Wisconsin.— Under a similar provision it has been held that where a sheriff has an execution against the owner and holder of a note, the maker may pay to such sheriff the amount of the note, or so much as may be necessary to satisfy the execution. Dunbar *v.* Harnesberger, 12 Wis. 373, under Rev. St. c. 104, § 90. See also Judd *v.* Littlejohn, 11 Wis. 176.

98. N. Y. Code Civ. Proc. § 2446. See Kennedy *v.* Carrick, 18 Misc. (N. Y.) 38, 40 N. Y. Suppl. 1127.

Money deposited by a third person in lieu of bail for a defendant in a criminal action does not become, under this section, the property of such defendant for the purpose of paying and satisfying his obligations in civil actions entirely disconnected from the criminal action and the subject-matter thereof. McShane *v.* Pinkham, 19 N. Y. Suppl. 969, 46 N. Y. St. 65.

This section does not limit the power of the judge in N. Y. Code Civ. Proc. § 2464, to make an order requiring the judgment debtor to subject himself to examination in supplementary proceedings. De Vivier *v.* Smith, 6 N. Y. Civ. Proc. 394, 1 How. Pr. N. S. 48.

99. *Alabama.*— Crutchfield *v.* Haynes, 14 Ala. 49; Roundtree *v.* Weaver, 8 Ala. 314; Boren *v.* McGhee, 6 Port. 433, 31 Am. Dec. 695. But see Fournier *v.* Curry, 4 Ala. 321.

Missouri.— Garth *v.* McCampbell, 10 Mo. 154.

New Jersey.— Little *v.* Gibbs, 4 N. J. L. 211.

New York.— Albany City Nat. Bank *v.* Kearney, 9 Hun 535; Bigelow *v.* Provost, 5 Hill 566. See also Voorhees *v.* Gros, 3 How. Pr. 262.

South Carolina.— Martin *v.* Gowdy, 1 Hill 417.

England.— Waller *v.* Weedale, Noy 107.

See 21 Cent. Dig. tit. "Execution," § 1067.

This line of authorities is based on the decision of Chief Justice Kent in Reed *v.* Pruyn, 7 Johns. (N. Y.) 426, 430, 5 Am. Dec. 287, where it is said: "The practice of sheriffs of paying executions themselves, and taking security and judgment bonds from the party over whom they have at the time such means of coercion, is to be strictly and vigilantly watched by the courts. Such humanity is imposing, but it may be turned into cruelty. Nothing is more important to the honor of the administration of justice, than that the officers of the court should not use its process as the means of making unequal bargains, and taking undue advantage."

It is a salutary rule that when the sheriff has neglected or violated his duty so as to be required to pay plaintiff, he ought not to be permitted to use the judgment for his own benefit, except under peculiar circumstances and by express leave of the court. Carpenter *v.* Stilwell, 12 Barb. (N. Y.) 128.

Notwithstanding an agreement that the execution should continue in life in the hands of the officer, the officer cannot afterward enforce the execution against defendant for his own indemnity. Sherman *v.* Boyce, 15 Johns. (N. Y.) 443.

1. *Georgia.*— Arnett *v.* Cloud, 2 Ga. 53.

Maine.— Whittier *v.* Heminway, 22 Me. 238, 38 Am. Dec. 309.

Mississippi.— Morris *v.* Lake, 9 Sm. & M. 521, 48 Am. Dec. 724.

North Carolina.— Heilig *v.* Lemly, 74 N. C. 250, 21 Am. Rep. 489 [*reviewing* and *criticizing* cases which follow Reed *v.* Pruyn, 7

the right of the sheriff to enforce his execution in any case where he is not using his office for the purpose of oppression.[2]

3. Authority of Officer to Receive Payment. The proper officer to whom payment should be made is the sheriff or marshal;[3] and a payment to him when the execution is in his hands will discharge the debtor,[4] although the execution may have been irregularly issued,[5] and although the creditor never received the money.[6] It is well settled that a sheriff, as sheriff, has no authority to receive

Johns. (N. Y.) 426, 5 Am. Dec. 287]. *Compare* Rogers *v.* Nutall, 32 N. C. 347.

Tennessee.— Lintz *v.* Thompson, 1 Head 456, 73 Am. Dec. 182. See also Harwell *v.* Worsham, 2 Humphr. 524, 27 Am. Dec. 572 [*distinguishing* Smith *v.* Alexander, 4 Sneed 482].

Virginia.— Clevinger *v.* Miller, 27 Gratt. 740.

West Virginia.— Beard *v.* Arbuckle, 19 W. Va. 135; Neely *v.* Jones, 16 W. Va. 625, 37 Am. Rep. 794, where, however, the court queried: "Does not public policy forbid that such sheriff should have the same rights and remedies as against subsequent judgment creditors who have acquired liens on the debtor's lands, or against the purchaser of such lands for valuable consideration without notice, that the sheriff set up such claim?" In Beard *v.* Arbuckle, *supra*, the court said: "The *quære* must still remain unanswered, because, although there are subsequent creditors here, none of them complain of the decree." *Compare* Hall *v.* Taylor, 18 W. Va. 544.

See 21 Cent. Dig. tit. "Execution," § 1067.

Doctrine explained.— In Morris *v.* Lake, 9 Sm. & M. 521, 526, 48 Am. Dec. 724, the court took the view that if a third person (in this case a sheriff) voluntarily pays an execution without an agreement that it is not to operate as a discharge, or without taking an assignment, the execution will be satisfied, and cannot afterward be enforced. Where the sheriff takes an assignment several months afterward as an afterthought, he cannot thus revive a liability previously discharged. "It is a question of intention and agreement between the parties. Once a payment always a payment."

"The sheriff has the same right of purchasing the debt that others have; and such purchase necessarily carries with it all the remedies for its enforcement to which the assignor was entitled." Clevinger *v.* Miller, 27 Gratt. (Va.) 740, 745. "A sheriff may purchase a debt in his hands for collection by execution if he act *bona fide*. . . The creditor holds the title and he may transfer it to whom he will." Rhea *v.* Preston, 75 Va. 757, 771 [*citing* Moss *v.* Moorman, 24 Gratt. (Va.) 97, 103].

2. Finn *v.* Stratton, 5 J. J. Marsh. (Ky.) 364; Bruce *v.* Dyall, 5 T. B. Mon. (Ky.) 125; Evarts *v.* Hyde, 51 Vt. 183.

"We are unable to discover any difficulty, or injustice that could proceed from sustaining a suit for the benefit of the officer, who has become liable, and has advanced the money to the creditor, on taking his assignment of the debt. If execution is obtained in such suit, it must go into the hands of some officer, who is not interested, for collection. This will avoid a good share of the difficulties the court was so cautious to avoid in those cases cited from Johnson's Reports [Sherman *v.* Boyce, 15 Johns. (N. Y.) 443, and Reed *v.* Pruyn, 7 Johns. (N. Y.) 426]; . . . The officer can never use the name of the creditor, to collect by suit, unless he first makes his peace with the creditor. But, when he uses the name of the creditor, without any objection from him, to collect a debt from him who ought to pay it, there is no hardship in presuming that the creditor has made an assignment to the officer, who had an equitable claim to such assignment." State's Treasurer *v.* Holmes, 4 Vt. 110, 115. See also Bellows *v.* Allen, 23 Vt. 169; Oliver *v.* Chamberlin, 1 D. Chipm. (Vt.) 41.

3. Corlies *v.* Waddell, 1 Barb. (N. Y.) 355, where it is said that the duties of a United States marshal were analogous to those of a sheriff.

A clerk of the superior or inferior court is not authorized by law to collect money on judgments or executions obtained in or sued out of their respective courts. Georgiatown Bank *v.* Ault, 31 Ga. 359. But see Murray *v.* Charles, 5 Ala. 678.

If the judgment debt has been assigned and the judgment creditor and assignee issue executions on the judgment, the debtor, to discharge himself, should pay the sheriff. See Walker *v.* Creevy, 6 La. Ann. 535.

The payment may be made to plaintiff if he still owns the judgment, and in any case no one but the purchaser of the judgment for a valuable consideration can object to a payment being made to plaintiff. Caldwell *v.* Dean, Litt. Sel. Cas. (Ky.) 239.

4. See Henry *v.* Rich, 64 N. C. 379.

As soon as money comes into the hands of the sheriff in payment of an execution, the law applies it to the payment of the debt. Motz *v.* Stowe, 83 N. C. 434; Henry *v.* Rich, 64 N. C. 379.

5. Worthington *v.* Hosmer, 1 Root (Conn.) 192.

6. Beard *v.* Millikan, 68 Ind. 231; O'Neall *v.* Lusk, 1 Bailey (S. C.) 220.

In New Hampshire a creditor who has obtained a judgment has a right to direct a levy of a part only in order that he may obtain a suit on the judgment to compel the payment of interest. If he directs the sheriff to levy only a portion, the sheriff has no authority to receive payment of any more. Rogers *v.* McDearmid, 7 N. H. 506.

money without an operative execution in his hands.[7] A payment therefore to him as sheriff prior to his having the execution in his hands does not satisfy the debt.[8] After the return-day an execution which has not been levied is as *functus officio*, and the sheriff has no authority, as sheriff, to receive the payment of it,[9] and the receipt of money by the sheriff does not operate as a payment;[10] and plaintiff will not be prevented from enforcing his judgment, unless he is proved to have received the money.[11] But if the execution has been levied, payment may properly be made to the sheriff after return-day;[12] the sheriff not only has authority then to receive money when tendered in payment of the debt, but it is his duty to receive it, instead of satisfying the debt out of defendant's property.[13] With an operative execution in the sheriff's hands, a payment made to him before the return-day is a satisfaction of the judgment.[14] After the expiration of his term as sheriff, a person has no authority to receive payment of money on an execution, and payments made to him do not discharge the judgment unless actually paid over by him to plaintiff.[15]

4. Media of Payment[16] and the Officer's Authority as to Acceptance — a. The General Rule. The sheriff is not permitted to negotiate between the parties so as to accept anything but money as the satisfaction of an execution in his hands.[17] The exigency of his writ requires him to make the money, and he can receive only money in satisfaction.[18]

7. Chapman *v.* Cowles, 41 Ala. 103, 91 Am. Dec. 508; Irwin *v.* McKee, 25 Ga. 646; Crane *v.* Bedwell, 25 Miss. 507. See Corlies *r.* Waddell, 1 Barb. (N. Y.) 355.

8. Irwin *v.* McKee, 25 Ga. 646; Craig *v.* Graves, 4 J. J. Marsh. (Ky.) 603, where a payment was made to a deputy. See also Turner *v.* Belew, 3 J. J. Marsh. (Ky.) 50.

9. Chapman *v.* Fambro, 16 Ark. 291; Wyer *v.* Andrews, 13 Me. 168, 29 Am. Dec. 497; Wood *v.* Robinson, 3 Sm. & M. (Miss.) 271; McFarland *v.* Wilson, 2 Sm. & M. (Miss.) 269; Planters' Bank *v.* Scott, 5 How. (Miss.) 246; Grandstaff *v.* Ridgely, 30 Gratt. (Va.) 1. See also Chapman *v.* Harrison, 4 Rand. (Va.) 336.

10. Wyer *v.* Andrews, 13 Me. 168, 29 Am. Dec. 497; Cockerell *v.* Nichols, 8 W. Va. 159.

The officer holds the money as an agent and not as an officer if defendant pays after the return-day, for the plain reason that if he had made his return on the execution according to the fact that he had received the money and the day on which it was paid the return would not have precluded plaintiff from issuing another execution. The process was *functus officio* and could therefore confer upon the sheriff no power or authority to act in his official capacity. The officer being responsible only as agent, can only in this character be held liable. His failure to pay over the money to plaintiff is simply a breach of contract and is governed by the statute of limitations applicable in such case. Edwards *v.* Ingraham, 31 Miss. 372. See also Stephens *v.* Boswell, 2 J. J. Marsh. (Ky.) 29.

11. Rothschild *v.* Ramsay, 2 La. 277; Edwards *v.* Ingraham, 31 Miss. 272.

12. Cockerell *v.* Nichols, 8 W. Va. 159. See Grandstaff *v.* Ridgely, 30 Gratt. (Va.) 1.

The court is not authorized to presume that the sheriff made a levy of the execution upon property of the debtor, or a part thereof, before the return-day passed. Cockerell *r.* Nichols, 8 W. Va. 159.

13. Phillips *v.* Dana, 4 Ill. 551, 558.

14. Webb *v.* Bumpass, 9 Port. (Ala.) 201, 33 Am. Dec. 310.

Although the sheriff neglects to credit the money on the execution or pay it to plaintiff, the rule still holds good. O'Neall *v.* Lusk, 1 Bailey (S. C.) 220.

15. Dubberly *v.* Black, 38 Ala. 193; Slusher *v.* Washington County, 27 Pa. St. 205, holding that where a sheriff received money from a defendant, both before and after the return-day, and the expiration of his term, and in settlement with plaintiffs paid over less than he had received, plaintiffs, who knew nothing about the subsequent payments, had a right to appropriate what they received to the sheriff's prior receipts, which would bind them, and hold the judgment unextinguished for the balance. See also Brier *v.* Woodbury, 1 Pick. (Mass.) 362. But see *contra*, in Kentucky, where it was held that an ex-sheriff has a right to receive payment unless the execution has been actually returned or he has been properly ordered by plaintiff to return it. Hogan *r.* Hisle, 4 Ky. L. Rep. 370.

16. Payment generally see Payment.

17. Williams *r.* Charles, 7 Ala. 202.

A purchase of land by the sheriff from defendant and a promise by the sheriff to apply the purchase-money to the satisfaction of the execution is not a discharge thereof, "it is an executory contract, which does not satisfy the execution till performed." Williams *v.* Bradley, 3 N. C. 363.

Where a person conveys property to a sheriff who holds an execution against him, the sheriff agreeing to satisfy the execution out of his own property, this does not satisfy the execution; plaintiff in the execution not having assented to the arrangement. Hood *v.* Moore, 9 Ill. 99.

18. Thorpe *v.* Wheeler, 23 Ill. 495, 497.

b. The Kind of Money. Payment of an execution must be in lawful money of the United States, and the sheriff or other officer cannot receive anything else in satisfaction of a judgment except with the consent of plaintiff.[19] Lawful money of the United States was at one time considered to be gold and silver only;[20] but this is no longer the case, since the decision of the legal tender cases[21] by the supreme court of the United States. Payment in bank-bills[22] or in Confederate currency[23] without the consent of plaintiff is unauthorized, particularly if the bank-bill or currency is depreciated.[24] Plaintiff has the right to direct the officer to receive a certain kind of money in satisfaction of his debt.[25] If the sheriff or marshal receive bank-notes or other non-legal tender currency, and plaintiff sanctions the transaction either expressly or impliedly the execution is discharged.[26]

c. Acceptance of Property by Officer. The officer has no authority to receive specific property in satisfaction of an execution directed to him;[27] but this does

19. *Alabama.*— Chapman *v.* Cowles, 41 Ala. 103, 91 Am. Dec. 508.

Arkansas.— Randolph *v.* Ringgold, 10 Ark. 279, 52 Am. Dec. 235 [*overruling* Ringgold *v.* Edwards, 7 Ark. 86].

Michigan.—Heald *v.* Bennett, 1 Dougl. 513.

Mississippi.— Prewett *v.* Standifer, 8 Sm. & M. 493; Anketell *v.* Torrey, 7 Sm. & M. 467; Keller *v.* Scott, 2 Sm. & M. 81; Planters' Bank *v.* Scott, 5 How. 246. See also Osgood *v.* Brown, Freem. 392.

New Jersey.— See Hevener *v.* Kerr, 4 N. J. L. 58.

United States.— McFarland *v.* Gwin, 3 How. 717, 7 L. ed. 799; Gwin *v.* Breedlove, 2 How. 29, 11 L. ed. 167.

See 21 Cent. Dig. tit. "Execution," § 1072.

20. Randolph *v.* Ringgold, 10 Ark. 279, 52 Am. Dec. 235; Gasquet *v.* Warren, 2 Sm. & M. (Miss.) 514; Gwin *v.* Breedlove, 2 How. (U. S.) 29, 11 L. ed. 167. See U. S. Const. art. 1, § 10.

21. Knox *v.* Lee, 12 Wall. (U. S.) 457, 20 L. ed. 287. See People *v.* Mayhew, 26 Cal. 655.

22. Randolph *v.* Ringgold, 10 Ark. 279, 52 Am. Dec. 235; Walker *v.* Bradley, 2 Ark. 578; Gasquet *v.* Warren, 2 Sm. & M. (Miss.) 514; Catlett *v.* Alexander, 4 How. (Miss.) 404; McNutt *v.* Wilcox, Freem. (Miss.) 116; Hevener *v.* Kerr, 4 N. J. L. 58; Griffin *v.* Thompson, 2 How. (U. S.) 244, 11 L. ed. 253.

23. Chapman *v.* Cowles, 41 Ala. 103, 91 Am. Dec. 508; Wingfield *v.* Crosby, 5 Coldw. (Tenn.) 241; Morrill *v.* Fitzgerald, 36 Tex. 275.

24. Trumbull *v.* Nicholson, 27 Ill. 149; Wood *v.* Robinson, 3 Sm. & M. (Miss.) 271; Morton *v.* Walker, 7 How. (Miss.) 554; Anderson *v.* Carlisle, 7 How. (Miss.) 408. But *compare* Greenlee *v.* Sudderth, 65 N. C. 470.

Money current in the community.— There is a line of cases which hold that where a certain kind of money is current in the community and passes as currency, it may be accepted by the sheriff in payment of an execution unless plaintiff has instructed to the contrary. Boyd *v.* Sayles, 39 Ga. 72; King *v.* King, 37 Ga. 205; Atkin *v.* Mooney, 61 N. C. 31; State *v.* Moseley, 10 S. C. 1 [*citing* Rice *v.* McClintock, Dudley (S. C.) 354; Farr *v.* Sims, Rich. Eq. Cas. (S. C.) 122, 24 Am. Dec. 396], all of which were cases of payment in Confederate money. In Utley *v.* Young, 68 N. C. 387, it was said that whether the sheriff was authorized to receive Confederate paper, when not instructed to the contrary by plaintiff, depended upon the fact whether at that time in that county prudent business men were taking Confederate notes in payment of similar debts. "Yet there must be some limit to this discretion of the sheriff; for, if he receives funds which are so depreciated that it would amount to notice that the plaintiff would not receive them, he would be liable to the plaintiff in the execution." Atkin *v.* Mooney, 61 N. C. 31, 33 [*citing* Governor *v.* Carter, 10 N. C. 328, 14 Am. Dec. 588]. In Tennessee it has been held that current, convertible bank paper is money, and a receipt of it by the sheriff is a satisfaction of the execution unless the creditor objects before the reception of it. Haynes *v.* Bridge, 1 Coldw. 32. See Haynes *v.* Wheat, 9 Ala. 239; Osgood *v.* Brown, Freem. (Miss.) 392. In Crutchfield *v.* Robins, 5 Humphr. (Tenn.) 15, 42 Am. Dec. 417, it was held that a payment of a judgment in current convertible bank paper was a good payment in the absence of any notice by the creditor that he would require gold. See U. S. Bank *v.* Georgia Bank, 10 Wheat. (U. S.) 333, 347, 6 L. ed. 334 [*citing* Miller *v.* Race, 1 Burr. 452]. But payment in bank-notes will not be recognized as good in the absence of proof that they were universally circulated as money. Laird *v.* Folwell, 10 Heisk. (Tenn.) 92. In McKay *v.* Smitherman, 64 N. C. 47, it was said that an execution can be satisfied only by seizure and sale or by payment in such currency as plaintiff has authorized the officer to accept.

25. Gwinn *v.* Buchanan, 4 How. (U. S.) 1, 11 L. ed. 849.

26. Buckhannan *v.* Tinnin, 2 How. (U. S.) 258, 11 L. ed. 259.

Plaintiff's laches in not disavowing the officer's act in receiving such currency may be construed as his sanction of it. Bright *v.* Ross, 11 Sm. & M. (Miss.) 289; Prewett *v.* Standifer, 8 Sm. & M. (Miss.) 493.

27. Bobo *v.* Thompson, 3 Stew. & P. (Ala.) 385, 388, where the court said: "No such

not prevent him from accepting if plaintiff consents, in which case the debtor is entitled to a credit *pro tanto*.[28]

d. Acceptance of Choses in Action by Officer. Choses in action, such as mortgages, promissory notes, etc., are not an exception to the rule that money alone can be received by the sheriff, under his writ, in satisfaction of the judgment.[29] But a chose in action may be taken in payment of an execution with the consent of plaintiff.[30] Whether a chose in action has been received in satisfaction of the execution is always a question of fact.[31] By the general rule the giving of a promissory note does not of itself raise any presumption of settlement of the account between the parties.[32]

e. Other Executions in Set-Off.[33] It is a common statutory provision that an officer who has in his possession two executions of different parties for mutual claims may set them off one against the other.[34] From the nature of the case

trade and traffic with the constable can be encouraged." But see Trigg *v.* Harris, 49 Mo. 176. See also *infra*, XI, D.

Plea of a tender of property to the sheriff in satisfaction of an execution is bad. Thorpe *v.* Wheeler, 23 Ill. 544.

28. Banta *v.* Snapp, 2 Duv. (Ky.) 98. See also Edwards *v.* Bryan, 88 Ga. 248, 14 S. E. 595.

29. Dibble *v.* Briggs, 28 Ill. 48; Orange County Bank *v.* Wakeman, 1 Cow. (N. Y.) 46. See Codwise *v.* Field, 9 Johns. (N. Y.) 263. *Contra*, Trigg *v.* Harris, 49 Mo. 176.

A check given by defendant to the sheriff does not satisfy the judgment. It is not a payment and the debtor is neither protected nor released thereby. But if a check is accepted by the sheriff for the amount of the debt and afterward the check is paid to him by the bank and he indorses the execution "satisfied," there is as much a payment by defendant as if he had handed the sheriff the money. Bailey *v.* Robinson, 14 Ky. L. Rep. 670.

Although defendant afterward pays the note to a third person to whom it has been transferred, the rule still applies. Orange County Bank *v.* Wakeman, 1 Cow. (N. Y.) 46.

Assignments of judgments against other persons.— See Taylor *v.* Kelly, 51 N. C. 324.

A twelve months' bond is not a payment of the debt on which execution has issued. It does not operate as a novation, but leaves in force the original obligation against the debtor. Williams *v.* Brent, 7 Mart. N. S. (La.) 205; Poutz *v.* Duplantier, 2 Mart. (La.) 178. See also Turner *v.* Parker, 10 Rob. (La.) 154.

30. See Clark *v.* Pinney, 6 Cow. (N. Y.) 297.

Where the creditor accepted a stay bond in satisfaction of his debt after a sale under execution, the execution was extinguished, and the creditor must look to the bond for his debt. Ettlinger *v.* Tansey, 17 B. Mon. (Ky.) 364. But in Baham *v.* Langfield, 16 La. Ann. 156, it was held that a sale and execution of a twelve-months' bond did not satisfy the execution.

31. White *v.* Jones, 38 Ill. 159. See also Jones *v.* Smith, 17 Ill. 263.

32. White *v.* Jones, 38 Ill. 159.

In Massachusetts the rule is that the taking of a promissory note for the amount of a debt due is *prima facie* a payment. O'Conner *v.* Hurley, 147 Mass. 145, 16 N. E. 764, where, however, the note was given for a simple contract debt.

Where the attorney of the judgment creditor indorsed on the execution that he had received for collection a promissory note made by a third person and payable to the debtor for a greater amount than the judgment, and that in consideration thereof he consented that the execution should be returned unsatisfied, the execution was not discharged. The attorney "had, without doubt, authority to discharge the defendants from this judgment; but he had no authority to make his clients the bailiffs of the defendants to collect the note of their debtors, and subject them to an action of account by the defendants." Even though plaintiffs themselves had made this receipt upon the execution, it would not have operated as a discharge of the execution, for it does not purport to be received in satisfaction of the debt, but merely to be taken for collection. "Another execution might lawfully have been sued out immediately after this should have been returned." Langdon *v.* Potter, 13 Mass. 319, 320.

Where, however, a promissory note is accepted by the sheriff with the consent of plaintiff in the payment of an execution, and the execution is indorsed "satisfied," the transaction is equivalent to the payment of money, although the note be not negotiable. Clark *v.* Pinney, 6 Cow. (N. Y.) 297.

33. **Right of set-off overriding the right of exemption** given by statute see EXEMPTIONS.

Right of set-off and attorney's lien.— See Dunklee *v.* Locke, 13 Mass. 525.

The refusal of a circuit judge to compel a sheriff to make a set-off of executions under such a statute cannot be reviewed on mandamus, but the refusal will not in any way bar the right to proceed in equity for the same relief. See Lyon *v.* Smith, 66 Mich. 676, 33 N. W. 753 [*citing* Wells *v.* Elsam, 40 Mich. 218; People *v.* St. Joseph County Cir. Judge, 39 Mich. 21]. See MANDAMUS.

34. *California.*— Code Civ. Proc. § 440 [*cited* in Nash *v.* Kreling, 136 Cal. 627, 69 Pac. 418].

Maine.— New Haven Copper Co. *v.* Brown, 46 Me. 418. See Herrick *v.* Bean, 20 Me. 51.

and from the terms of the statute granting the right, the power of the sheriff to set off executions depends upon the question whether or not judgments are mutual. Plaintiff in one must be defendant in the other.[35] Not only is this so, but the mutuality must exist in another respect: the judgments must in fact belong to and be the property of the respective parties thereto.[36] It is, however, immaterial what may be the nature of the causes of action upon which the judgments have been rendered, as where one is in tort and the other in contract.[37] It has been held that neither the sheriff, the coroner, nor the constable can set off executions unless they are in his possession as an officer authorized and obliged to obey them and unless the writs are directed to him.[38]

C. By Sale of Debtor's Property. When property is levied on and sold under an execution it is a satisfaction of the execution to the extent of the proceeds of the sale.[39] The fact that plaintiff is obliged to refund the amount realized has been held not to destroy the satisfaction of the judgment received from the sale and that no further satisfaction could be had from defendant.[40]

D. Levy Upon Debtor's Property as Satisfaction[41]— **1. Personal Property.** It has often been said by different courts that a levy upon sufficient personal property is a satisfaction of the execution;[42] but it is safe to say that this

Massachusetts.— Borter *v.* Leach, 13 Metc. 482. Early in Massachusetts the Provincial Act of 6 Geo. II, c. 2, provided for setting off cross executions against each other. See Goodenow *v.* Buttrick, 7 Mass. 140, holding that this act was not repealed by Rev. St. (1783) c. 57.

Michigan.— Lyon *v.* Smith, 66 Mich. 676, 33 N. W. 753.

Missouri.— Haseltine *v.* Thrasher, 65 Mo. App. 334.

New Hampshire.—Act Feb. 8, 1791 [*construed* in Shapley *v.* Bellows, 4 N. H. 347].

Vermont.— In an early case it was held that the officer had power to set off one execution against another, both being in his hands at the same time (Culver *v.* Pearl, 1 Tyler 12); but in a later case it was held that the officer was under no obligation to make the set-off, although requested to do so by one of the parties (Anonymous, Brayt. 118).

Payment of balance due.— Under a statute of this character an execution creditor against whom the debtor claims an unsatisfied judgment cannot require payment of the balance due as a condition of allowing the set-off. Nash *v.* Kreling, 136 Cal. 627, 69 Pac. 418 [*citing* Haskins *v.* Jordan, 123 Cal. 157, 55 Pac. 786], construing Code Civ. Proc. § 440.

The extent and limitations of this right of set-off are governed by the statute which creates the right. Bell *v.* Perry, 43 Iowa 368; Haseltine *v.* Thrasher, 65 Mo. App. 334.

35. Bell *v.* Perry, 43 Iowa 368; Shapley *v.* Bellows, 4 N. H. 347.

Mo. Rev. St. § 8160, provides that if any two or more persons are mutually indebted, etc., the debts may be set off against each other. See Haseltine *v.* Thrasher, 65 Mo. App. 334.

36. This is the very essence of mutuality. It must not only exist in form but in substance. Bell *v.* Perry, 43 Iowa 368; Goodenow *v.* Butterick, 7 Mass. 140. But see Lyon *v.* Smith, 66 Mich. 676, 33 N. W. 753.

A return that he had due notice of an assignment of the first execution at the time when it was put into his hands, and therefore could not set off one against the other, is not sufficient to justify the officer in refusing to make the set-off. It should appear by his return or otherwise that the execution first delivered to him had been lawfully and in good faith assigned to another person before the creditor in the second execution became entitled to the sum due thereon. Porter *v.* Leach, 13 Metc. (Mass.) 482.

37. Shapley *v.* Bellows, 4 N. H. 347, 350.

38. Goodenow *v.* Butterick, 7 Mass. 140.

39. Rutledge *v.* Townsend, 38 Ala. 706.

The fact that the sheriff wrongfully applied the money realized by the sale to other claims does not change the rule. Planters' Bank *v.* Spencer, 3 Sm. & M. (Miss.) 305. See also Reynolds *v.* Ingersoll, 11 Sm. & M. (Miss.) 249, 49 Am. Dec. 57.

Where an officer in making a sale gives credit to the purchaser, the sale is good as a satisfaction of the execution to the amount of the sale, especially when done with the concurrence of plaintiff in the execution. McClusky *v.* McNeely, 8 Ill. 578.

40. Jones *v.* Burr, 5 Strobh. (S. C.) 147, 53 Am. Dec. 699; Perry *v.* Williams, Dudley (S. C.) 44. See *infra*, XII, J, 1.

If the purchaser at the sale does not make good his bid, the remedy at the present time is almost always governed by statute. Lewis *v.* Richardson, 6 Rich. (S. C.) 382. In Alabama it has been held that if a sheriff sells land under execution and executes a deed to the purchaser, the execution, unless the sale be set aside, must be considered satisfied to the extent of the sum bid, although the sheriff may not have received the purchase-money, and in such a case the sheriff is liable to plaintiff for not having collected the bill. Moore *v.* Barclay, 18 Ala. 672 [*citing* Kelly *v.* Governor, 14 Ala. 541]. See also *supra*, X, A, 5, e.

41. **Levy as satisfaction of judgment** see Judgments.

42. *Illinois.*— Martin *v.* Charter, 27 Ill. 294.

is nowhere the law. A number of early cases in this country demonstrate the absurdity of such a doctrine.[43] The true rule may be said to be that a levy upon sufficient personal property is, until the disposition of the levy is accounted for, a *prima facie* satisfaction of the debt;[44] and operates, so long as the property remains in legal custody, as a suspension of further remedies on the part of the

Massachusetts.— Ladd *v.* Blunt, 4 Mass. 402.

New York.— Hoyt *v.* Hudson, 12 Johns. 207.

South Carolina.— Mayson *v.* Irby, 1 Rich. 435 note.

Tennessee.— Carroll *v.* Fields, 6 Yerg. 305; Cook *v.* Smith, 1 Yerg. 148; Pigg *v.* Sparrow, 3 Hayw. 144. See Fry *v.* Manlove, 1 Baxt. 256, 25 Am. Rep. 775.

England.— Clark *v.* Withers, 1 Salk. 322.

See 21 Cent. Dig. tit. "Execution," § 1075.

43. **"There are some old cases** in which *dicta* are found, that a levy upon sufficient property to satisfy an execution is a satisfaction, but that doctrine has long since been exploded." Peck *v.* Tiffany, 2 N. Y. 451, 456. "They say a levy is a satisfaction of the debt; but every book they cite, and every case they decide, shew under what qualifications they speak. They all go back to Mountney *v.* Andrews, Cro. Eliz. 237. There the plaintiff brought a scire facias quare executionem non, and the plea was, not simply that the sheriff had levied, but that he had taken divers sheep of the defendant for the debt, and yet detaineth them. The reason given was, that 'the plaintiff has his remedy against the sheriff, and the execution is lawful which the defendant cannot resist.' The value of the sheep was not mentioned; and surely it cannot be pretended that such a step shall be taken as a satisfaction *per se*. Suppose the sheep had been sold, bringing only half the judgment; was the remedy by action, scire facias, or execution gone for the residue? I need not cite authorities to show that such a consequence would not follow. It would be absurd, and contrary to all practice." Green *v.* Burke, 23 Wend. (N. Y.) 490, 497. *Compare* People *v.* Hopson, 1 Den. (N. Y.) 574, 577. See also Waddell *v.* Elmendorf, 5 Den. (N. Y.) 447; Ontario Bank *v.* Hallett, 8 Cow. (N. Y.) 192, opinion of the court by Woodworth, J.

The basis upon which this spurious doctrine rested was said to be that by a lawful seizure the debtor lost his property in the goods and henceforth the remedy was against the sheriff if the creditor did not realize his debt. See Ladd *v.* Blunt, 4 Mass. 402; Clark *v.* Withers, 1 Salk. 322. But this is not true; a mere levy does not divest the title of the property. Biscoe *v.* Sandefur, 14 Ark. 568; Churchill *v.* Warren, 2 N. H. 298, 9 Am. Dec. 73.

44. *Delaware.*— Campbell *v.* Carey, 5 Harr. 427.

Georgia.— Oliver *v.* State, 64 Ga. 480.

Indiana.— McCabe *v.* Goodwine, 65 Ind. 288.

Iowa.— Lucas *v.* Cassaday, 2 Greene 208.

Mississippi.—Shelton *v.* Hamilton, 23 Miss. 496, 57 Am. Dec. 149. *Compare* Dibb *v.* Jones, 7 How. 397.

New York.— Bookstaver *v.* Glenny, 3 Thomps. & C. 248.

Pennsylvania.— Taylor's Appeal, 1 Pa. St. 390, holding that it does not lose plaintiff his lien on the debtor's real estate.

South Carolina.— Gray *v.* Hill, 23 S. C. 604; Davis *v.* Barkley, 1 Bailey 140; Miller *v.* Bagwell, 3 McCord 429.

Tennessee.— Hunn *v.* Hough, 5 Heisk. 708.

Texas.— Garner *v.* Cutler, 28 Tex. 175; Bryan *v.* Bridge, 10 Tex. 149.

Vermont.— Peck *v.* Barney, 12 Vt. 72.

Virginia.— See Walker *v.* Com., 18 Gratt. 13, 98 Am. Dec. 631.

West Virginia.— McKenzie *v.* Wiley, 27 W. Va. 658.

See 21 Cent. Dig. tit. "Execution," § 1074½ *et seq.*

A levy on personal property is prima facie a satisfaction pro tanto; and a surety is bound by the presumptive satisfaction of an execution arising from a previous levy on personal property belonging to the principal, and he cannot recover from the principal any sum which he may afterward pay in satisfaction of the judgment, unless he show an amotion of the levy, or otherwise destroy by sufficient proof the presumption of payment thus created. Brown *v.* Kidd, 34 Miss. 291.

The levy of an execution on personalty is only affirmative evidence of the satisfaction of the execution to the value of the property so seized. It seems a levy on personal property is never deemed a payment except in those cases where, if it were not, defendant would be twice deprived of his property on the same judgment. Banks *v.* Evans, 10 Sm. & M. (Miss.) 35, 48 Am. Dec. 734.

"It is not an open question in this State that the levy of an execution on personal property operates as a satisfaction for the same. To this general proposition two exceptions have been established, viz.: the levy will not operate as a satisfaction if the levy be released, or the defendant himself dispose of the property." Hunn *v.* Hough, 5 Heisk. (Tenn.) 708, 710.

"We are aware of the necessity of guarding this rule carefully. Hence, we state that a levy dismissed by the plaintiff, with the consent of the defendant, is no satisfaction or discharge, so far as he alone is concerned. In that event, it would be a satisfaction, as far as third persons are concerned, as sureties, junior judgment creditors or purchasers from the defendant." Newsom *v.* McLendon, 6 Ga. 392, 396.

A levy which does not show the value of the property does not raise a presumption of satisfaction of the execution. Fuller *v.* Watkins, 11 Heisk. (Tenn.) 489.

creditor to obtain satisfaction.[45] A levy and sale under a subsequent execution on the same judgment and against the same defendant,[46] while the former levy remains, are void and no title passes.[47] If the sheriff allows the property to go to waste or the property is otherwise disposed of so that defendant loses the benefit of it, the presumption of satisfaction becomes conclusive in favor of defendant;[48] and plaintiff must seek his remedy against the sheriff.[49] The presumption also becomes conclusive if, after a great lapse of time, a disposition of the levy is unaccounted for.[50] If the property is left in the possession of defendant, no presumption of satisfaction arises.[51] Nor does any presumption arise when there is a levy of an attachment.[52] When there are several executions in the sheriff's hands and the levy of one of them is made upon sufficient personal property to satisfy all, no presumption of satisfaction of those executions not levied arises.[53] The presumption of satisfaction may be rebutted;[54] as by showing that the property has been restored to defendant,[55] particularly where the property has been

45. Harris *v.* Evans, 81 Ill. 419; Nelson *v.* Rockwell, 14 Ill. 375; Colburn *v.* Barton, 17 Ill. App. 391; People *v.* Hopson, 1 Den. (N. Y.) 574; Green *v.* Burke, 23 Wend. (N. Y.) 490; Rodgers *v.* Kinsey, 8 Ohio Dec. (Reprint) 308, 7 Cinc. L. Bul. 64; Taylor *v.* Dundass, 1 Wash. (Va.) 92. See also Biscoe *v.* Sandefur, 14 Ark. 568.

Estoppel to claim satisfaction.— See Coleman *v.* Mansfield, 1 Miles (Pa.) 56.

Wider scope to presumption.— When an execution is placed in the hands of a sheriff, the presumption of law is that he has levied it and collected the money, and in the absence of evidence that he did not levy it, he and his sureties will be liable for the debt to the creditor. O'Bannon *v.* Saunders, 24 Gratt. (Va.) 138.

46. **"Only the debtor or defendant whose goods are levied on is discharged,** and his co-defendants remain still liable, because the creditor hath had no actual satisfaction of his judgment." Walker *v.* Bradley, 2 Ark. 578, 595. See also McGinnis *v.* Lillard, 4 Bibb (Ky.) 490.

47. Bingaman *v.* Hyatt, Sm. & M. Ch. (Miss.) 437.

A capias ad satisfaciendum, executed four days after the levy of a fieri facias before a sale under it could have been effected, is void. Miller *v.* Bagwell, 3 McCord (S. C.) 429.

When two executions are issued at the same time and one is levied upon land and the other upon personal property, the levy upon personal property is not *prima facie* a satisfaction of the execution, and if the land alone is sold, the purchaser gets a good title. Dowdell *v.* Neal, 10 Ga. 148.

48. Harmon *v.* State, 82 Ind. 197 [*citing* State *v.* Prime, 54 Ind. 450].

"If, however, instead of pursuing the regular mode of sale prescribed, the officer wastes the property, or experiments with modes of sale not recognized by the law, the debt is discharged and the remedy is against the officer. If the plaintiff is a party to the irregular proceeding, his remedy is gone and the judgment is satisfied." Harris *v.* Evans, 81 Ill. 419, 421. So if the sheriff appropriate the property to his own use. Matter of Dawson, 13 N. Y. Civ. Proc. 142, 20 Abb. N. Cas. (N. Y.) 188 [*affirmed* in 110 N. Y. 114, 17 N. E. 668, 6 Am. St. Rep. 346].

49. Peck *v.* Tiffany, 2 N. Y. 451.

50. Buchannan *v.* Rowland, 5 N. J. L. 721; Paine *v.* Tutwiler, 27 Gratt. (Va.) 440; Northwestern Bank *v.* Hays, 37 W. Va. 475, 18 S. E. 561.

51. *Mississippi.*— Wade *v.* Watt, 41 Miss. 248.

New York.— See Peck *v.* Tiffany, 2 N. Y. 451.

South Carolina.— Stone *v.* Tucker, 2 Bailey 495.

Tennessee.— Charlton *v.* Lay, 5 Humphr. 495. *Contra,* Pigg *v.* Sparrow, 3 Hayw. 144.

Texas.— Cravens *v.* Wilson, 48 Tex. 324; Cornelius *v.* Burford, 28 Tex. 203, 91 Am. Dec. 328.

See 21 Cent. Dig. tit. "Execution," § 1074½ *et seq.*

Where goods taken in execution are left in the hands of defendant on a promise to deliver on the day of the sale, and he neglects to deliver them, there is no satisfaction and the officers may institute a subsequent levy under the same execution on the goods of a co-defendant who was surety of the other defendant. Stone *v.* Tucker, 2 Bailey (S. C.) 495.

52. For the writ of attachment merely creates a lien on the property attached, which lien may be lost by a dissolution of the attachment. Cravens *v.* Wilson, 48 Tex. 324.

53. Banks *v.* Evans, 10 Sm. & M. (Miss.) 35, 48 Am. Dec. 734.

54. Hastings First Nat. Bank *v.* Rogers, 15 Minn. 381, 13 Minn. 407, 97 Am. Dec. 239; Bennett *v.* McGrade, 15 Minn. 132; Smith *v.* Doe, 10 Sm. & M. (Miss.) 584.

55. *Alabama.*— Crawford *v.* Mobile Bank, 5 Ala. 55, restoration on delivery bond.

Arkansas.— Walker *v.* Bradley, 2 Ark. 578, restoration on delivery bond.

Illinois.— Chandler *v.* Higgins, 109 Ill. 602; Howard *v.* Bennett, 72 Ill. 297.

Kentucky.— Morrow *v.* Hart, 1 A. K. Marsh. 291.

Missouri.— Williams *v.* Boyce, 11 Mo. 537; Weber *v.* Cummings, 39 Mo. App. 518. See also Young *v.* Schofield, 132 Mo. 650, 669, 34 S. W. 497.

fraudulently withdrawn by defendant from the possession of the officer;[56] that the levy has been removed or nullified by process of law;[57] that the property levied on was exempt,[58] or not subject to execution,[59] or exhausted by satisfying prior executions;[60] that the property did not sell for enough to satisfy the execution;[61] that the property levied on was disposed of to the satisfaction of defendant otherwise than in payment of the execution;[62] or that the property formerly levied on is the identical property levied on and sold in the present proceeding.[63] Any act on the part of defendant in execution which destroys the fruits of the levy will remove its effect as a *prima facie* satisfaction.[64] The issuance of an alias execution which is superseded by a writ of error is not sufficient to destroy the presumption of satisfaction arising from the previous levy on the personal property.[65]

2. **Real Property.** After the statute of Westminster II, Edw. I, c. 18, which allowed execution against land, and before 32 Hen. VIII, it became a principle of the law of England that an extent upon the land of defendant, returned and filed of record, was a full satisfaction and end of the suit;[66] and therefore that

New Hampshire.— Churchill *v.* Warren, 2 N. H. 298, 9 Am. Dec. 73.

New York.— Radde *v.* Whitney, 4 E. D. Smith 378; Ostrander *v.* Walter, 2 Hill 329.

North Carolina.— Douglas *v.* Mitchell, 7 N. C. 239.

Tennessee.— Hunn *v.* Hough, 5 Heisk. 708.

Texas.— See Cornelius *v.* Burford, 28 Tex. 202, 91 Am. Dec. 309.

If the levy is released by agreement and consent of the execution debtor and the property is applied to other purposes, so that the fruits of the levy are lost to the creditor in consequence, there will be no satisfaction of the judgment and execution. Baker *v.* Mansur, etc., Implement Co., 67 Ill. App. 357. If property levied upon is released by a binding agreement to give defendant further time, the presumption is rebutted. Howerton *v.* Sprague, 64 N. C. 451. See also Carns *v.* Pickett, 2 Sneed (Tenn.) 655.

56. Mickles *v.* Haskin, 11 Wend. (N. Y.) 125.

57. Alexander *v.* Polk, 39 Miss. 737; Banks *v.* Evans, 10 Sm. & M. (Miss.) 35, 36, 48 Am. Dec. 734; Walker *v.* McDowell, 4 Sm. & M. (Miss.) 118, 43 Am. Dec. 476; Fry *v.* Manlove, 1 Baxt. (Tenn.) 256, 25 Am. Rep. 775.

58. Piper *v.* Elwood, 4 Den. (N. Y.) 165.

59. Niolin *v.* Hamner, 22 Ala. 578; Groschke *v.* Bardenheimer, 15 Mo. App. 353, holding that a sheriff's return that he levied upon money claimed by a third person, and that plaintiff to whom the money had been paid had given a forthcoming bond, is not a satisfaction of the execution, as the money may be taken from plaintiff.

60. Moody *v.* Harper, 28 Miss. 615; McNutt *v.* Wilcox, Freem. (Miss.) 116. See Bryan *v.* Bridge, 10 Tex. 149.

If the property is sold to satisfy a mortgage, the presumption is rebutted. Young *v.* Schofield, 132 Mo. 650, 34 S. W. 497; Dilling *v.* Foster, 21 S. C. 334.

But the presumption is not rebutted by merely showing that the property was sold at an irregular sale and that the proceeds were applied to higher demands. In such case it must be shown that the property brought its full value, or that when rated at its full value it was not more than sufficient to satisfy such higher demands. Horn *v.* Ross, 20 Ga. 210, 65 Am. Dec. 621.

61. See Bryan *v.* Bridge, 10 Tex. 149.

62. Cornelius *v.* Burford, 28 Tex. 202, 91 Am. Dec. 309.

63. Lawrence *v.* Wofford, 17 S. C. 586.

64. He will not be allowed to insist that the judgment has been satisfied by the levy, the benefits of which he himself has prevented the party from realizing. Montgomery *v.* Wayne, 14 Ill. 373.

65. Brown *v.* Kidd, 34 Miss. 291.

66. "The reason upon which this principle was adopted, was, that the creditor elects to hold the land for so many years till the debt be satisfied out of the rents and profits, and the judgment-roll shews, that it was satisfied by the elegit. This rule was so manifestly unjust, that in the thirty-second year of the reign of Henry VIII. a statute was enacted, for that reason expressed in its preamble, by which it was provided, that where the creditor is lawfully divested of the land so delivered to him on such extent, he may have a writ of scire facias against the defendant; and thereupon, if no sufficient cause, other than the acceptance of said land on the former writ of execution, is shewn, to bar the said suit, a new writ or writs of execution on the judgment, of the like nature and effect as the former, for the residue of the debt unsatisfied by such former execution; and the same provision is reenacted, in similar terms, by the 8 Geo. I. c. 25.; under which provisions the plaintiff, on the new writ of execution, has the same privileges as on the issuing of the original elegit; that is, if the plaintiff can have no fruit of it, he may sue out a scire-facias against the debtor's goods or chattels, or a ca. sa. to take his person in satisfaction of the debt." Cowles *v.* Bacon, 21 Conn. 451, 462, 56 Am. Dec. 371.

Delivery of possession of land by liberari facias is a satisfaction of the execution. "In England, when an elegit is extended upon the land of the defendant, and returned filed, and possession delivered, it is a full satisfaction

plaintiff was not entitled to any further means of satisfaction by writ, action, or execution, and if the tenant by elegit was divested of the land so held under that writ of execution by one having a title paramount to his own, that is, a better title than the debtor's from whom he extended the land, the rule of law that the debt was considered satisfied by the extent remained unchanged and unaffected by this circumstance; and the creditor could not afterward resort to any other writ or have any other remedy for the portion of his debt thus deemed to be satisfied. But this is not the modern rule. Although a number of cases may admit that a levy upon sufficient personalty is a satisfaction of the debt, they all but universally hold that that rule does not prevail in the case of a levy upon realty.[67] The sheriff gets no qualified property in lands levied on, as is the case in a levy upon personalty. The debtor still holds title and possession.[68] A levy upon land does not operate even as a *prima facie* satisfaction and therefore does not extinguish the debt, although the levy is unaccounted for.[69] There can be no satisfaction of an execution levied on real estate until the purchaser gets a good title at the sale.[70] Of course if the sale brings enough to satisfy the debt the judgment is extinguished.[71]

E. Satisfaction by Arrest of Debtor.[72] If the body of the debtor is taken in execution, the taking operates as a *prima facie* discharge of the debt and as a complete suspension of further action on the part of the judgment creditor against the imprisoned debtor to satisfy his judgment[73] during the imprisonment

of the debt. And so far was the doctrine carried, that it was formerly holden that the bare entry of a prayer of an elegit, upon the roll was a bar to all executions. . . It is unnecessary, in this state, to depend upon those principles of the English law, as the sale of land, and proceedings under a liberari facias are regulated by our acts of assembly, and particularly the act of 1705." Barnet *v.* Washebaugh, 16 Serg. & R. (Pa.) 410, 412.

In Massachusetts it has been held that after the land has been set off in satisfaction of the execution, the plaintiff cannot afterward, upon the insolvency of the execution debtor, tender a release of the land to the assignee and claim the right, under Gen. St. c. 118, § 27, to prove his demand in insolvency proceedings. Wareham Sav. Bank *v.* Vaughan, 133 Mass. 534, 535.

67. *Arkansas.*— Trapnall *v.* Richardson, 13 Ark. 543, 58 Am. Dec. 338.

Massachusetts.— Ladd *v.* Blunt, 4 Mass. 402.

North Carolina.— Williams *v.* Bradley, 3 N. C. 363.

Tennessee.— Hogshead *v.* Carruth, 5 Yerg. 227.

Vermont.— Bellows *v.* Sowles, 71 Vt. 214, 44 Atl. 68 [*citing* Freeman Ex. § 282].

See 21 Cent. Dig. tit. "Execution," § 1076.

68. See Shepard *v.* Rowe, 14 Wend. (N. Y.) 260; Deloach *v.* Myrick, 6 Ga. 410.

69. *Georgia.*— Foster *v.* Rutherford, 20 Ga. 676; Hammond *v.* Myrick, 14 Ga. 77; Deloach *v.* Myrick, 6 Ga. 410.

Illinois.— Robinson *v.* Brown, 82 Ill. 279; Gold *v.* Johnson, 59 Ill. 62; Gregory *v.* Stark, 4 Ill. 611.

Mississippi.— Smith *v.* Doe, 10 Sm. & M. 584. See also Beazley *v.* Prentiss, 13 Sm. & M. 97.

Missouri.— Williams *v.* Boyce, 11 Mo. 537.

Texas.— White *v.* Graves, 15 Tex. 183.

See 21 Cent. Dig. tit. "Execution," § 1076.

70. Shepard *v.* Rowe, 14 Wend. (N. Y.) 260; East Greenwich Sav. Inst. *v.* Allen, 22 R. I. 337, 47 Atl. 885. See also Ladd *v.* Blunt, 4 Mass. 402.

Where land is struck off at an execution sale, but no conveyance was made by the officer, or purchase-money paid, the execution was unsatisfied since, to make such sale valid, a memorandum in writing must be made at the time the land was struck off. Chapman *v.* Harwood, 8 Blackf. (Ind.) 82, 44 Am. Dec. 736.

71. State *v.* Salyers, 19 Ind. 432 (holding this to be the rule whether the sheriff make return to the execution or not, or although he make a false return); O'Conner *v.* Stone, 43 S. W. 483, 19 Ky. L. Rep. 1929 (holding that where a judgment has been satisfied on foreclosure of a mortgage, there can be no further judgment or execution in the suit).

72. **Body execution** generally see *infra*, XIV.

Satisfaction of judgment by arrest of debtor see JUDGMENTS.

73. *Massachusetts.*— Kennedy *v.* Duncklee, 1 Gray 65; Brinley *v.* Allen, 3 Mass. 561. See also Dodge *v.* Doane, 3 Cush. 460.

New Hampshire.— Tappan *v.* Evans, 11 N. H. 311. In Morrison *v.* Morrison, 49 N. H. 69, it was held that where, on execution for alimony, the husband was arrested on bond to take the poor debtor's oath within a year, a levy of the same execution on the debtor's real estate within the year was void where the debtor had not taken the oath.

New York.— Sunderland *v.* Loder, 5 Wend. 58; Cooper *v.* Bigalow, 1 Cow. 56; Stilwell *v.* Van Epps, 1 Paige 615. See also Jackson *v.* Benedict, 13 Johns. 533.

Ohio.— See Bowrell *v.* Zigler, 19 Ohio 362.

Pennsylvania.— Sharpe *v.* Speckenable, 3 Serg. & R. 463.

of the debtor. If there are several defendants, a capias against one does not bar plaintiff from taking out execution against the others liable to the same judgment.[74] If the creditor discharges the debtor from his imprisonment, the debt is nevertheless satisfied and any subsequent levy on the debtor's property will be void.[75] If defendant escapes from prison the creditor may have his fieri facias for the debt.[76]

F. Application of Payment or Proceeds. Payment to the sheriff or a sale of sufficient property discharges a defendant, although the sheriff fails to pay it over to plaintiff;[77] and defendant is entitled to have the judgment satisfied of record.[78] And even if the payment is not put on record as by indorsement, the execution is nevertheless satisfied,[79] for as soon as the sheriff recovers money in payment of the execution the law makes the application in satisfaction of the judgment.[80] Of course if defendant consents to the sheriff's misapplication of the money, defendant is estopped to claim that the debt is satisfied.[81] Where there are several executions against a debtor, the proceeds of a sale under one of them should as a general rule be applied by the sheriff to satisfy according to their several priorities the different executions which are in his hands before the completion of the execution of the writ under which the sale was made.[82] It is not only the duty of the sheriff to apply the proceeds to the satisfaction of the oldest

Rhode Island.— McCrillis *v.* Sisson, 1 R. I. 143.

South Carolina.— Stover *v.* Duren, 3 Strobh. 348, 51 Am. Dec. 634.

England.— Taylor *v.* Waters, 2 Chit. 303, 5 M. & S. 504, 18 E. C. L. 648; Burnaby's Case, 1 Str. 653 (where it was held that he who has the body in execution cannot be a petitioning creditor in bankruptcy); 3 Bacon Abr. (Am. ed. 1854) 697; 3 Blackstone Comm. 415.

A bill in chancery to reach defendant's equitable estate cannot be filed as long as defendant is in custody. Tappan *v.* Evans, 11 N. H. 311; Stilwell *v.* Van Epps, 1 Paige (N. Y.) 615.

The arrest of the judgment creditor was a prima facie satisfaction of the execution in the absence of proof that the imprisonment terminated without plaintiff's consent. Stover *v.* Duren, 3 Strobh. (S. C.) 448, 51 Am. Dec. 634.

The imprisonment does not extinguish the debt but bars the remedy against the debtor and precludes a set-off against it. Taylor *v.* Waters, 2 Chit. 303, 5 M. & S. 504, 18 E. C. L. 648.

The imprisonment may be pleaded in bar to an action on a bond given by defendant to stay execution. Sunderland *v.* Loder, 5 Wend. (N. Y.) 58.

The imprisonment suspends the lien of the judgment while the debtor remains in custody. Richbourgh *v.* West, 1 Hill (S. C.) 309.

If defendant has been surrendered by special bail and has given bond to take the benefit of the insolvent laws, plaintiff may issue a fieri facias and levy on defendant's property. Smith *v.* McAffee, 1 Miles (Pa.) 85, holding that the act of March 28, 1820, did not change the rule.

74. Porter *v.* Ingraham, 10 Mass. 88; Blumfield's Case, 5 Coke 86*b* note *a*.

75. Loomis *v.* Storrs, 4 Conn. 440; Nowell *v.* Waitt, 121 Mass. 554 (*citing* Gen. St. c. 124, § 22); Kennedy *v.* Duncklee, 1 Gray (Mass.) 65; King *v.* Goodwin, 16 Mass. 63.

76. Bowrell *v.* Zigler, 19 Ohio 362; Green *v.* Alexander, 1 Hill Eq. (S. C.) 138.

The escape of the debtor revives the lien of the judgment which was suspended during his imprisonment. Richbourgh *v.* West, 1 Hill (S. C.) 309.

If defendant died in jail plaintiff might by 21 Jac. I, c. 24, have execution against his lands or goods in the hands of his representatives, as in other cases. 3 Bacon Abr. (Am. ed. 1854) 697.

77. Plaintiff thenceforth must look to the sheriff and his sureties. O'Neall *v.* Lusk, 1 Bailey (S. C.) 220. See also Hamlin *v.* Boughton, 4 Cow. (N. Y.) 65.

Where part of the money collected by the sheriff was sequestered by the Confederate authorities the execution was held satisfied notwithstanding. Elliott *v.* Higgins, 83 N. C. 459.

78. Beard *v.* Millikan, 68 Ind. 231.

In New York, where the proceeds of a sale of goods were paid to the sheriff, it was held that the court would not order satisfaction to be entered of record until the money is paid to plaintiff, but would stay all proceedings against defendant, leaving plaintiff to his remedy against the sheriff. Hamlin *v.* Boughton, 4 Cow. 65.

79. Jinks *v.* American Mortg. Co., 102 Ga. 694, 28 S. E. 609; Stanley *v.* Nutter, 16 N. H. 22.

80. Motz *v.* Stowe, 83 N. C. 434.

81. Heptinstall *v.* Medlin, 83 N. C. 16.

82. Motz *v.* Stowe, 83 N. C. 434; Lynch *v.* Hannahan, 9 Rich. (S. C.) 186. In Adams *v.* Crimager, 1 McMull. (S. C.) 309, it was held that defendant might, on paying money to the sheriff, direct its application, and the sheriff would be protected. But in McDevitt's Appeal, 70 Pa. St. 373, it was said that a sale of property and receipt by the sheriff are not *per se* satisfaction of any particular

judgment lien, but in contemplation of law it is so applied unless the sheriff, in violation of duty, makes a misapplication of the fund to a junior lien.[83]

G. Release Without Satisfaction. A sheriff cannot discharge an execution if the judgment be not satisfied.[84] If plaintiff for a valuable consideration releases land levied on from the levy, it cannot be subjected to a levy at the instance of subsequent transferees of the execution;[85] but if property subject to execution is released by plaintiff, the execution is satisfied to the extent of the value of the property so released so far as purchasers and creditors are concerned.[86] A lawful tender to the sheriff of the full amount of an execution in his hands discharges the lien on the property levied upon.[87]

H. Motion to Enter Satisfaction and Notice Thereof. Where the debt has been extinguished and satisfaction has not been entered, the debtor should move to have the entry made;[88] his remedy is not in equity.[89] If the creditor purchases at an execution sale of land, he may show, before he has received the conveyance, upon a rule to show cause why satisfaction should not be entered, that the title was not in defendant, and that defendant was guilty of fraud in representing the title in himself.[90] In no case ought satisfaction to be ordered by the court where the evidence of payment is not conclusive.[91] Before a motion

encumbrance, although its lien may be extinguished.

A sale under a junior execution for an amount sufficient to satisfy a senior is to be deemed a payment in satisfaction of the latter, and a subsequent payment by the debtor upon the senior does not authorize the presumption that he consented that the proceeds of the sheriff's sale should be applied to the junior execution. Lawrence *v.* Grambling, 19 S. C. 461. In Davis *v.* Barkley, 1 Bailey (S. C.) 140, plaintiff had distinct judgments against two defendants for the same debt. He levied his execution on the goods of one of them, but directed the proceeds of the levy to be applied to the satisfaction of a junior judgment against the same defendant. It was held that the levy was a satisfaction of the senior judgment, and that the judgment against the other defendant was also thereby extinguished, although funds had been placed in his hands for the payment of the debt by the party ultimately liable, and had not been paid by him over to plaintiff.

If several notes are joined in one suit, and the execution recovered in such suit is satisfied only in part, a surety for some of the notes may insist upon a proportional application for the money for which he is liable. Blackstone Bank *v.* Hill, 10 Pick. (Mass.) 129.

Part payment on one execution before a senior execution comes into sheriff's hands.— See Carter *v.* Cardwell, 49 Ga. 428.

Voluntary payment.— The Mississippi act of 1844 provides that after a sale of any property by the sheriff, he shall apply the proceeds to the elder judgment enrolled against defendant in execution. See Mississippi Cent. R. Co. *v.* Harkness, 32 Miss. 203.

83. Motz *v.* Stowe, 83 N. C. 434.

In Kentucky it was held that where a sheriff applied the proceeds of an execution to the payment of an execution against plaintiff in the first execution by his direction, and there was actually no application, there was no payment of the second execution, especially after the judgment on which it issued had been revived by scire facias. Cosby *v.* Worland, 6 B. Mon. 195.

In Ohio it has been held that a sheriff having in his hands money made on execution, has the right to apply it, in whole or in part, in satisfaction of an execution in his hands against the person for whom the money was collected. Renner *v.* Burke, 11 Ohio Cir. Ct. 268, 5 Ohio Cir. Dec. 361 [*reversing* 1 Ohio S. & C. Pl. Dec. 93, 2 Ohio N. P. 306].

Interpleader.— See Pennypacker's Appeal, 57 Pa. St. 114.

The sheriff may be held liable if he applies a payment from the proceeds of the sale to a junior lien. Furman *v.* Christie, 3 Rich. (S. C.) 1; Davis *v.* Hunt, 2 Bailey (S. C.) 412.

84. Colton *v.* Camp, 1 Wend. (N. Y.) 365.

85. Manley *v.* Ayers, 68 Ga. 507.

86. Williams *v.* Brown, 57 Ga. 304.

87. See Tiffany *v.* St. John, 65 N. Y. 314, 22 Am. Rep. 612 [*affirming* 5 Lans. 153].

Tender generally see TENDER.

If a defendant has paid a part of his debt in settlement of a garnishment and he tenders to the officer the amount due on the execution less the amount paid for the garnishment, the court out of which execution issued will recall it and compel plaintiff to credit the amount which defendant has paid on the garnishment. Sandburg *v.* Papineau, 81 Ill. 446.

Sheriff's fees to be included in tender.— See Joslyn *v.* Tracy, 19 Vt. 569.

Release of debtor taken under a capias see *supra*, XII, E.

88. Planters' Bank *v.* Spencer, 3 Sm. & M. (Miss.) 305.

89. Morrison *v.* Speer, 10 Gratt. (Va.) 228.

90. Herbemont *v.* Sharp, 2 McCord (S. C.) 264.

91. Herbemont *v.* Sharp, 2 McCord (S. C.) 264.

to enter satisfaction of or a credit upon an execution can be made notice must be given plaintiff.[92]

I. Evidence[93] and Presumptions of Satisfaction. Although the sheriff's indorsement of payments on the writ without his signature and the dates is not a legal return,[94] it is nevertheless evidence of payment.[95] The evidence must be confined to the issue.[96] A fieri facias which has not been returned is not evidence that the debt has been satisfied;[97] but a party may prove an execution satisfied, although it has been returned.[98] An admission of payment may sometimes be implied.[99] A receipt "in full" by the sheriff indorsed upon the execution raises a presumption, in the absence of any proof to the contrary, that the whole amount due has been paid, although by actual calculation the aggregate of all the credits indorsed is less than the sum due.[1] The return of "satisfied" on an execution raises the presumption that the money due on it was paid before the return-day[2] and that the right person received the money.[3] As sheriffs are not permitted, without the consent of the judgment creditor, to receive anything but money in payment of an execution,[4] a return declaring the execution to be satisfied by note raises no presumption of payment unless it shows a special authority to take a note in payment.[5] A previous payment and satisfaction of the execution will not be readily presumed as against a purchaser thereunder,[6] but of course it may be shown.[7]

J. Vacating Entry of Satisfaction — 1. When the Right Exists. Satisfaction entered upon a void execution may for sufficient reasons be vacated.[8] If the sale upon which the satisfaction has been entered has proved void on account of an informality of the sheriff, the entry of satisfaction may be vacated.[9] Where property is sold to satisfy an execution and the execution is returned satisfied, the authorities are at variance whether such satisfaction can be vacated when it appears that the title to the property sold is not in defendant. Some jurisdictions allow the right to vacate the satisfaction.[10] Others deny this

92. McKissack *v.* Davis, 18 Ala. 315; Clements *v.* Crawford, 1 Ala. 531; Baylor *v.* McGregor, 1 Stew. & P. (Ala.) 158; Haley *v.* Williams, 8 Sm. & M. (Miss.) 487.

93. Evidence generally see Evidence.

94. See *supra*, XI, C.

95. Slusher *v.* Washington County, 27 Pa. St. 205. *Compare* Dickinson *v.* Solomons, 26 Ga. 684.

Abbreviations.—An entry of payment on an execution issued April 26, 1884, dated "Dec. 22, '88," sufficiently shows that the date of the entry was Dec. 22, 1888. Perdue *v.* Fraley, 92 Ga. 780, 19 S. E. 40.

But a memorandum on an execution: "Exo. paid by E. N. Nickerson. Prove by him,"—without proof that it was written by plaintiff or by some one acting in his behalf, is not sufficient to establish the fact of payment." Bartlett *v.* Sawyer, 46 Me. 317.

96. Edwards *v.* Lewis, 16 Ala. 813. *Compare* Boyd *v.* McFarlin, 58 Ga. 208.

97. Borne *v.* Krumpp, 4 Leg. Gaz. (Pa.) 230.

98. Johnson *v.* Ramsey, 16 Serg. & R. (Pa.) 115.

99. Beardsley *v.* Hall, 9 Tex. 119.

1. The acknowledgment of a receipt in full presupposes that there were other claimants, and, until such is shown not to be the fact, it must be given the effect of a receipt in full. Steel *v.* Atkinson, 14 S. C. 154, 37 Am. Rep. 728.

Receipts in defendant's hands — Credits appearing on executions.— See Boulware *v.* Witherspoon, 7 Rich. Eq. (S. C.) 450.

2. And the mere fact that the date of the officer's return was subsequent to the return-day will not rebut the presumption. "The sheriff will not be permitted to render his return ineffectual, by annexing a date to it, which would render it inoperative." Barton *v.* Lockhart, 2 Stew. & P. (Ala.) 109, 111.

3. Gilmore *v.* Johnson, 29 Ga. 67.

4. See *supra*, XII, B, 4.

5. At least the presumption is not conclusive. See Mitchell *v.* Hackett, 14 Cal. 661. But see Day *v.* Stickney, 14 Allen (Mass.) 255.

Presumption arising from levy on property see *supra*, XII, D.

6. Webb *v.* Camp, 26 Ga. 354.

7. Shelley *v.* Lash, 14 Minn. 498.

8. Smith *v.* Reed, 52 Cal. 345 (where creditor was the purchaser); Stoyel *v.* Cady, 4 Day (Conn.) 222; Arnold *v.* Fuller, 1 Ohio 458.

9. Henry *v.* Keys, 5 Sneed (Tenn.) 488.

As against bona fide purchasers.— After an execution has been partly satisfied, the parties cannot, by canceling the receipt, revive it as to the sum paid, to the prejudice of subsequent execution creditors. Caldwell *v.* Fifield, 24 N. J. L. 150.

10. *Connecticut.*— See Cowles *v.* Bacon, 21 Conn. 451, 56 Am. Dec. 371.

right[11] in the absence of fraud on the part of defendant in his representation of title,[12] and leave the creditor to seek whatever remedies the equities of his case require.[13] Even in those jurisdictions where the vacation of satisfaction is allowed, the right is not extended to cases where defendant really has an interest in the property and the judgment creditor who purchases gets, without any fraud on the part of defendant,[14] a smaller estate than he contemplated.[15]

2. Proceedings to Obtain. Scire facias is or has been a usual method of obtaining a vacation of satisfaction.[16] In the modern practice an order to show cause or a motion would be the proper method.[17] The motion to set aside the entry of satisfaction must be served upon defendant;[18] and the proceeding to set aside the entry of satisfaction must be made with due diligence.[19]

3. Finality of Adjudication. An adjudication that a return of satisfaction should be quashed and that a new execution should issue makes all questions in issue on the hearing of the motion, of which defendant had notice, *res adjudicata*.[20]

XIII. Supplementary Proceedings.[21]

A. Nature and Object of Remedy. For the discovery of assets belonging to a judgment debtor, debts owing to him by third persons and the like, proceedings supplementary to execution may be regarded as a substitute for a creditor's bill,[22]

Kentucky.—Offutt *v.* Commonwealth Bank, 1 Bush 166.

Minnesota.— Osborne *v.* Wilson, 37 Minn. 8, 32 N. W. 786.

Missouri.— Magwire *v.* Marks, 28 Mo. 192, 75 Am. Dec. 121 [*citing* Heath *v.* Daggett, 21 Mo. 69].

Tennessee.— See Swaggerty *v.* Smith, 1 Heisk. 403, by statute. See also Curtis *v.* Bennett, 11 Humphr. 295. *Contra*, Kimbrough *v.* Benton, 3 Humphr. 110.

Texas.— Massie *v.* McKee, (Civ. App. 1900) 56 S. W. 119; Hollon *v.* Hale, (Civ. App. 1899) 51 S. W. 900.

See 21 Cent. Dig. tit. "Execution," § 1089.

11. Vattier *v.* Lytle, 6 Ohio 477; Jones *v.* Burr, 5 Strobh. (S. C.) 147, 53 Am. Dec. 699. See Holcombe *v.* Loudermilk, 48 N. C. 491; Herbemont *v.* Sharp, 2 McCord (S. C.) 264.

12. Poppleton *v.* Bryan, 36 Oreg. 69, 58 Pac. 767 (holding that representations which defendant did not know to be false would not give right to vacate entry of satisfaction); Kimbrough *v.* Benton, 3 Humphr. (Tenn.) 110. See also Freeman Judgm. § 478*a*.

13. See Freeman Judgm. § 478*a*.

14. Representations of defendant's interest in the property made by defendant who did not know them to be false are not fraudulent. Poppleton *v.* Bryan, 36 Oreg. 69, 158 Pac. 767.

15. Poppleton *v.* Bryan, 36 Oreg. 69, 58 Pac. 767. See also Holtzinger *v.* Edwards, 51 Iowa 383, 1 N. W. 600.

Under Shannon Code Tenn. § 4719, see Gonce *v.* McCoy, 101 Tenn. 587, 49 S. W. 754, 70 Am. St. Rep. 714.

16. Stoyel *v.* Cady, 4 Day (Conn.) 222; Arnold *v.* Fuller, 1 Ohio 458; Shannon Code Tenn. § 4719 [*cited* in Gonce *v.* McCoy, 101 Tenn. 587, 49 S. W. 754, 70 Am. St. Rep. 714]. But the Tennessee code does not prevent a court of equity which has original jurisdiction from setting aside satisfaction of an execution on the grounds of mistake of fact as to the state of defendant's title to the land levied upon in granting relief. Swaggerty *v.* Neilson, 8 Baxt. 32. See also Henry *v.* Keys, 5 Sneed 488.

17. See De Witt *v.* Monroe, 20 Tex. 289.

In South Carolina the validity of an entry of satisfaction may be adjudicated under a summons to show cause why the judgment should not be made a lien and a new execution issued thereon. Alsobrook *v.* Watts, 19 S. C. 539.

Prerequisite to motion — "Doing equity." — Baker *v.* Dobyns, 4 Dana (Ky.) 220.

18. De Witt *v.* Monroe, 20 Tex. 289.

19. Thus in Haralson *v.* Holcombe, 10 Sm. & M. (Miss.) 581, the court refused to erase a credit upon an execution upon a motion made five years after the return of the execution and an entry of the credit. See also Mandeville *v.* Bracy, 31 Miss. 460.

20. Defendant cannot subsequently raise those questions while the order remains in force. Saint *v.* Ledyard, 14 Ala. 244. But see Swaggerty *v.* Neilson, 8 Baxt. (Tenn.) 32.

Restitution on setting aside or reversal.— See Weaver *v.* Sheean, (Iowa 1898) 77 N. W. 528; Wallace *v.* Burdell, 105 N. Y. 7, 11 N. E. 274 [*affirming* 41 Hun 444].

21. Creditors' suits in aid of execution generally see Creditors' Suits.

Discovery see, generally, Discovery.

Garnishment see, generally, Garnishment.

Sequestration see, generally, Sequestration.

Supplementary proceedings to collect taxes see, generally, Taxation.

22. *California*.— Pacific Bank *v.* Robinson, 57 Cal. 520, 40 Am. Rep. 120; McCullough *v.* Clark, 41 Cal. 298; Adams *v.* Hackett, 7 Cal. 187.

Dakota.— Feldenheimer *v.* Tressel, 6 Dak. 265, 43 N. W. 94.

Indiana.— Coffin *v.* McClure, 23 Ind. 356; Figg *v.* Snook, 9 Ind. 202.

Minnesota.— Billson *v.* Linderberg, 66 Minn. 66, 68 N. W. 771; Flint *v.* Webb, 25 Minn. 263.

and have been held to exclude a resort to that remedy.[23] But where, as to reach equitable assets or to set aside fraudulent transfers, they provide a less effective or inadequate remedy, and, although in many respects they may be a substitute for a creditor's bill, they are by no means exclusive, but the creditor may still resort to equity.[24] In their essential features the proceedings have been regarded as equivalent to a new or independent suit instituted and conducted for the benefit of all the creditors against additional defendants whose indebtedness it is proposed to subject to the creditors' demands.[25] The better view, however, seems to be that they are new or additional proceedings of a special and equitable nature, ancillary to the original action, and designed to enforce the collection of a judgment recovered therein.[26]

New York.— Faneuil Hall Nat. Bank *v.* Bussing, 147 N. Y. 665, 42 N. E. 345; Lynch *v.* Johnson, 48 N. Y. 27; Bryan *v.* Grant, 87 Hun 68, 33 N. Y. Suppl. 957; Matter of Crane, 81 Hun 96, 30 N. Y. Suppl. 616, 1 N. Y. Annot. Cas. 148; Pope *v.* Cole, 64 Barb. 406 [*affirmed* in 55 N. Y. 124, 14 Am. Rep. 198]; Griffin *v.* Dominguez, 2 Duer 656; Sale *v.* Lawson, 4 Sandf. 718; Smith *v.* Mahony, 3 Daly 285; Driggs *v.* Williams, 15 Abb. Pr. 477; Owen *v.* Dupignac, 9 Abb. Pr. 180, 17 How. Pr. 512; Orr's Case, 2 Abb. Pr. 457; Feelerman's Case, 2 Abb. Pr. 155, 11 How. Pr. 528; Emery *v.* Emery, 9 How. Pr. 130; Davis *v.* Turner, 4 How. Pr. 190.

North Carolina.— Wilson *v.* Chichester, 107 N. C. 386, 12 S. E. 139, 10 L. R. A. 572; Munds *v.* Cassidey, 98 N. C. 558, 4 S. E. 353, 355; Bronson *v.* Wilmington North Carolina L. Ins. Co., 85 N. C. 411; Rand *v.* Rand, 78 N. C. 12; Carson *v.* Oates, 64 N. C. 115.

Washington.— Klepsch *v.* Donald, 18 Wash. 150, 51 Pac. 352.

Wisconsin.— Clark *v.* Bergenthal, 52 Wis. 103, 8 N. W. 865; Kellogg *v.* Coller, 47 Wis. 649, 3 N. W. 433.

United States.— Tomlinson, etc., Mfg. Co. *v.* Shatto, 34 Fed. 380.

See 21 Cent. Dig. tit. "Execution," § 1091, and ACTIONS, 1 Cyc. 726 note 38.

In Minnesota the proceedings not only perform the office of a creditor's bill but have a somewhat enlarged scope and purpose. Flint *v.* Webb, 25 Minn. 263.

The rules relative to proceedings under creditors' bills, unless changed by statute or the practice, control the practice in supplementary proceedings. Sale *v.* Lawson, 4 Sandf. (N. Y.) 718; Smith *v.* Mahony, 3 Daly (N. Y.) 285; Owen *v.* Dupignac, 9 Abb. Pr. (N. Y. 180, 17 How. Pr. (N. Y.) 512; Orr's Case, 2 Abb. Pr. (N. Y.) 457; Fellerman's Case, 2 Abb. Pr. (N. Y.) 155, 11 How. Pr. (N. Y.) 528. See also 12 Cyc. 1 *et seq.*

Substitute for discovery.— See Joyce *v.* Spafard, 9 N. Y. Civ. Proc. 342.

23. Hexter *v.* Clifford, 5 Colo. 168; Seymour *v.* Briggs, 11 Wis. 196; Graham *v.* La Crosse, etc., R. Co., 10 Wis. 459; *In re* Remington, 7 Wis. 643.

Discovery superseded.— See Mason *v.* Weston, 29 Ind. 561.

24. Feldenheimer *v.* Tressel, 6 Dak. 265, 43 N. W. 94; Monroe *v.* Reid, 46 Nebr. 316, 64 N. W. 983; Pope *v.* Cole, 64 Barb. (N. Y.) 406 [*affirmed* in 55 N. Y. 124, 14 Am. Rep. 198]; Catlin *v.* Doughty, 12 How. Pr. (N. Y.) 457. See also Field *v.* Sands, 8 Bosw. (N. Y.) 685; Conger *v.* Sands, 19 How. Pr. (N. Y.) 8; Gasper *v.* Bennett, 12 How. Pr. (N. Y.) 307; Enright *v.* Grant, 5 Utah 334, 15 Pac. 268.

Election of remedies generally see ELECTION OF REMEDIES, 15 Cyc. 251 *et seq.*

Equitable remedy by statute.— The remedy by creditors' bill is available where it is given by a statute which has not been repealed. Catlin *v.* Doughty, 12 How. Pr. (N. Y.) 457.

25. Collins *v.* Angell, 72 Cal. 513, 14 Pac. 135; Sinnott *v.* Hempstead First Nat. Bank, 34 N. Y. App. Div. 161, 54 N. Y. Suppl. 417; Driggs *v.* Williams, 15 Abb. Pr. (N. Y.) 477; Allen *v.* Starring, 26 How. Pr. (N. Y.) 57; Bronson *v.* Wilmington North Carolina L. Ins. Co., 85 N. C. 411; McCaskill *v.* Lancashire, 83 N. C. 393; Rand *v.* Rand, 78 N. C. 12; Carson *v.* Oates, 64 N. C. 115. See also Dresser *v.* Van Pelt, 6 Duer (N. Y.) 687, 15 How. Pr. (N. Y.) 19; Griffin *v.* Dominguez, 2 Duer (N. Y.) 656; Sale *v.* Lawson, 4 Sandf. (N. Y.) 718; Orr's Case, 2 Abb. Pr. (N. Y.) 457; Fellerman's Case, 2 Abb. Pr. (N. Y.) 155, 11 How. Pr. (N. Y.) 528; Davis *v.* Turner, 4 How. Pr. (N. Y.) 190; Hughes *v.* Whitaker, 84 N. C. 640. *Contra,* in Dakota where it is said that the proceedings are in no sense a new suit. Feldenheimer *v.* Dressel, 6 Dak. 265, 43 N. W. 94.

As a substitute for a creditor's bill the proceeding is a new suit. Griffin *v.* Dominguez, 2 Duer (N. Y.) 656.

Affidavit and order as process and pleading see Sinnott *v.* Hempstead First Nat. Bank, 34 N. Y. App. Div. 161, 54 N. Y. Suppl. 417.

A proceeding auxiliary to execution will not be regarded as an equitable action because the parties file proceedings and consent to the taking of testimony in term-time instead of in vacation. Estey *v.* Fuller Imp. Co., 82 Iowa 678, 46 N. W. 1098, 47 N. W. 1025.

Proceedings as civil actions.— In Indiana proceedings supplementary to execution are regarded as civil actions. Baker *v.* State, 109 Ind. 47, 9 N. E. 711; Burkett *v.* Holman, 104 Ind. 6, 3 N. E. 406.

26. Ward *v.* Roy, 69 N. Y. 96; Stiefel *v.* Berlin, 28 N. Y. App. Div. 103, 51 N. Y. Suppl. 147; Bryan *v.* Grant, 87 Hun (N. Y.)

B. Statutory Provisions — 1. Constitutionality. A federal statute authorizing supplementary proceedings in accordance with the state practice for the collection of judgments recovered in common-law actions in the United States courts does not conflict with the provision of the federal constitution which preserves and establishes the distinction between relief at law and in equity.[27] Nor is a statute authorizing a probate judge, when not sitting in court, to entertain supplementary proceedings in aid of an action pending in another court a violation of a constitutional provision prescribing and limiting the jurisdiction of the probate court.[28] But an act which makes no provision that no answer which the debtor may be required to make shall be used against him in any criminal prosecution is in violation of a constitutional provision that no person shall be compelled to give testimony which may incriminate him.[29]

2. Retrospective Effect. Statutes providing for supplementary proceedings are retrospective, and the proceedings are applicable to executions issued before their passage, especially where they expressly or impliedly abolish former remedies of the same kind.[30]

68, 33 N. Y. Suppl. 957; Smith *v.* Tozer, 42 Hun (N. Y.) 22, 3 N. Y. St. 363, 11 N. Y. Civ. Proc. 343 [*affirming* 3 N. Y. St. 164]; Pope *v.* Cole, 64 Barb. (N. Y.) 406 [*affirmed* in 55 N. Y. 124, 14 Am. Rep. 198]; Maass *v.* McEntegart, 20 Misc. (N. Y.) 676, 46 N. Y. Suppl. 534; Hyatt *v.* Dusenbury, 5 N. Y. St. 846, 12 N. Y. Civ. Proc. 152; Graves *v.* Scoville, 12 N. Y. Civ. Proc. 165; Jones *v.* Sherman, 11 N. Y. Civ. Proc. 416, 18 Abb. N. Cas. (N. Y.) 461; Gould *v.* Torrance, 19 How. Pr. (N. Y.) 560; Davis *v.* Turner, 4 How. Pr. (N. Y.) 190; Barker *v.* Dayton, 28 Wis. 367. See also Wright *v.* Nostrand, 94 N. Y. 31 [*reversing* 47 N. Y. Super. Ct. 441]; Milliken *v.* Thompson, 12 N. Y. Civ. Proc. 168.

Additional or equitable executions.— So considered in Gould *v.* Torrance, 19 How. Pr. (N. Y.) 560.

The proceedings are a kind of execution against property which cannot be reached through the intervention of the sheriff. Emery *v.* Emery, 9 How. Pr. (N. Y.) 130.

The purpose of the proceedings is to reach property not collectable by execution. Bryan *v.* Grant, 87 Hun (N. Y.) 68, 33 N. Y. Suppl. 957.

In Missouri the purpose of the statute is to compel defendant in the execution to disclose under oath all the assets of his estate, and after the discovery to leave it to the judge or court to say whether or not he has assets which may be levied on by execution in favor of the judgment creditor. Murphy *v.* Wilson, 84 Mo. App. 178.

The proceedings are in the nature of summary proceedings to ascertain from the debtor on oath, what property he may have, and afford a short proceeding for the application of his property to the payment of judgments against him. Gerton Carriage Co. *v.* Richardson, 6 Misc. (N. Y.) 466, 27 N. Y. Suppl. 625.

Substitute for execution.— Supplementary proceedings do not take the place of an execution in reaching real estate. Moyer *v.* Moyer, 7 N. Y. App. Div. 523, 40 N. Y. Suppl. 258.

Not special proceeding.— See Dresser *v.* Van Pelt, 15 How. Pr. (N. Y.) 19.

27. See, generally, Constitutional Law; Statutes.

U. S. Rev. St. (1878) § 916 [U. S. Comp. St. (1901) p. 684], providing that a party recovering a judgment in a common-law case in a circuit or district court shall be entitled to similar remedies on the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like cases by the laws of the state in which such court is held, does not conflict with U. S. Const. art. 3, § 2, which preserves and establishes the distinction between relief at law and in equity. *Ex p.* Boyd, 105 U. S. 647, 26 L. ed. 1200.

Adoption of state practice by federal courts see Courts, 11 Cyc. 633.

28. Young *v.* Ledrick, 14 Kan. 92.

29. Horstman *v.* Kaufman, 97 Pa. St. 147, 39 Am. Rep. 802.

Admissibility of testimony taken in supplementary proceedings in criminal prosecutions see Criminal Law, 12 Cyc. 70. See also *infra*, XIII, Q, 12, b.

30. Bean *v.* Tonnelle, 24 Hun (N. Y.) 353, 1 N. Y. Civ. Proc. 33; Dickerson *v.* Cook, 16 Barb. (N. Y.) 509; Baldwin *v.* Perry, 1 N. Y. Civ. Proc. 39 note; Folwell *v.* Cambeis, 14 N. Y. Wkly. Dig. 115. See Pardee *v.* Tilton, 20 Hun (N. Y.) 76, 58 How. Pr. (N. Y.) 476. *Contra*, Anonymous, 3 Duer (N. Y.) 673. See also Constitutional Law, 8 Cyc. 695; Statutes; and *infra*, XIII, G.

Personal representatives whose rights have been determined under a former statute may institute proceedings under a subsequent statute without reviving the action. Pardee *v.* Tilton, 20 Hun (N. Y.) 76, 58 How. Pr. (N. Y.) 476.

Execution after enactment.— The provision of Code Proc. tit. 9, c. 2, respecting an order for a discovery by defendants of their property, applies to judgments entered before the code against two joint debtors on the service of process upon one, where the execution has been issued since the code went into effect. Jones *v.* Lawlin, 1 Sandf. (N. Y.) 722.

C. Jurisdiction[31] and Powers — 1. In General. The right to order an examination of a debtor or a third person in proceedings supplementary to execution, or to act in relation to matters incidental to such examination, is statutory, and cannot be exercised except where the authority has been expressly or impliedly conferred,[32] and ordinarily jurisdiction once acquired continues until the termination of the proceeding.[33] Jurisdiction cannot be conferred by the mere appearance of the debtor and his submission to examination without objection.[34]

2. Concurrent Jurisdiction. The jurisdiction may be concurrent or so conferred as to permit the judges of one court on the observance of certain formalities to entertain proceedings on judgments rendered in another court or jurisdiction,[35] and ordinarily the entertainment of the proceedings in one court in

31. Jurisdiction: Generally see Courts, 11 Cyc. 633. To enjoin disposition of property, see *infra*, XIII, M. To appoint referee or conduct examination see *infra*, XIII, H, 2, b, (II), (B). To conduct examination see *infra*, XIII, Q, 1. To vacate or set aside proceedings see *infra*, XIII, P, 2. To require payment of money or delivery of property see *infra*, XIII, S, 4, a. To appoint receiver see XIII, T, 3, a. To entertain proceedings and punish for contempt, see *infra*, XIII, U, 2, a.

32. Schenck *v.* Erwin, 63 Hun (N. Y.) 104, 17 N. Y. Suppl. 616; Smith *v.* Tozer, 42 Hun (N. Y.) 22, 3 N. Y. St. 363, 11 N. Y. Civ. Proc. 343 [*affirming* 3 N. Y. St. 164]; Douglass *v.* Mainzer, 40 Hun (N. Y.) 75; People *v.* Levy, 16 Misc. (N. Y.) 615, 40 N. Y. Suppl. 743, 25 N. Y. Civ. Proc. 390, 11 N. Y. Cr. 356; Graves *v.* Scoville, 12 N. Y. Civ. Proc. 165; Cashman *v.* Johnson, 4 Abb. Pr. (N. Y.) 256, 13 How. Pr. (N. Y.) 495; Terry *v.* Hultz, 8 Abb. Pr. N. S. (N. Y.) 109, 39 How. Pr. (N. Y.) 169; Haurie *v.* Veegtlin, 5 Month. L. Bul. (N. Y.) 38; Amlingmeier *v.* Amlingmeier, 8 Ohio Dec. (Reprint) 713, 9 Cinc. L. Bul. 241; Gouldy *v.* Gillespie, 2 Pa. L. J. Rep. 311, 4 Pa. L. J. 91. See also Maass *v.* McEntegart, 20 Misc. (N. Y.) 676, 46 N. Y. Suppl. 534; Renald *v.* Wyckoff, 52 How. Pr. (N. Y.) 509.

In Kansas a probate judge has jurisdiction in proceedings in aid of actions in the district court. Young *v.* Ledrick, 14 Kan. 92.

In New York any judge of the supreme court has jurisdiction without regard to his residence or location. Gildersleeve *v.* Lester, 69 Hun 344; 23 N. Y. Suppl. 471; Bingham *v.* Disbrow, 37 Barb. 24, 14 Abb. Pr. 25. See Jacobson *v.* Doty Plaster Mfg. Co., 32 Hun 436; Mallory *v.* Gulick, 15 Abb. Pr. 307 note; Gould *v.* Torrance, 19 How. Pr. 560. A judge of the court out of which execution issued has jurisdiction (Baldwin *v.* Perry, 25 Hun 72, 1 N. Y. Civ. Proc. 118, 61 How. Pr. 289 [*affirming* 1 N. Y. Civ. Proc. 39 note]); and so has a county judge of the county to which the execution issued (Miller *v.* Adams, 7 Lans. 131 [*affirmed* in 52 N. Y. 409]; Terry *v.* Hultz, 8 Abb. Pr. N. S. 109, 39 How. Pr. 169). Jurisdiction of the city court of New York see Holbrook *v.* Orgler, 49 How. Pr. 289. And see People *v.* Levy, 16 Misc. 615, 40 N. Y. Suppl. 743, 25 N. Y. Civ. Proc. 390, 11 N. Y. Cr. 356; Laws (1874), c. 545. Jurisdiction of the recorder of the city of Albany see Carroll *v.* Langan, 63 Hun 380, 18 N. Y. Suppl. 290. Jurisdiction of the recorder of the city of Oswego see Ross *v.* Wigg, 36 Hun 107; Laws (1857), c. 96, § 4. Jurisdiction of the surrogate of Steuben county see McIntyre *v.* Allen, 43 Hun 124, 6 N. Y. St. 186.

Courts of equity.— A judgment creditor whose execution has been returned unsatisfied may have the aid of a court of equity to subject to the satisfaction of the judgment debts due to his debtor. Bryans *v.* Taylor, Wright (Ohio) 245. Chancery has not the power, at suit of a judgment creditor, to institute an inquiry into the circumstances of defendant, for the purpose of discovering and compelling him to surrender securities or chattels in his personal possession. Creswell *v.* Smith, 2 Tenn. Ch. 416.

The denial to county courts of jurisdiction in equity cases will not preclude them from entertaining supplementary proceedings. Second Ward Bank *v.* Upmann, 12 Wis. 499.

Title to real estate involved.— The Indiana act providing that, when it appears that title to real estate is in issue in the common pleas court, the cause shall be transferred to the circuit court of the same county does not deprive the court of common pleas of jurisdiction in proceedings supplementary to execution, where title to real estate is incidentally involved. Carpenter *v.* Vanscoten, 20 Ind. 50.

Delinquent taxes cannot be collected by these proceedings — another remedy having been provided by statute. Bassett *v.* Wheeler, 84 N. Y. 466. See, generally, Taxation.

Objections.— The question of jurisdiction to order an examination can be raised at any time. Driggs *v.* Smith, 47 How. Pr. (N. Y.) 215.

Defendant sued by wrong name.— See McGill *v.* Weil, 10 N. Y. Suppl. 246, 19 N. Y. Civ. Proc. 43.

33. Webber *v.* Hobbie, 13 How. Pr. (N. Y.) 382.

34. De Comeau *v.* People, 7 Rob. (N. Y.) 498; Carter *v.* Clarke, 7 Rob. (N. Y.) 490; Sackett *v.* Newton, 10 How. Pr. (N. Y.) 560. *Contra*, Methodist Book Concern *v.* Hudson, 1 How. Pr. N. S. (N. Y.) 517.

35. Jacobson *v.* Doty Plaster Mfg. Co., 32 Hun (N. Y.) 436; *In re* Conklin, 57 N. Y. Suppl. 844.

In Indiana supplementary proceedings may be instituted in a court different from that in which the original judgment was rendered

accordance with the statutory authority will not operate to oust the other court of jurisdiction.[36]

3. Exclusive Jurisdiction. Sometimes the jurisdiction is exclusive,[37] but while as a matter of propriety all proceedings based on the same judgment should be had before the same officer,[38] this rule will not preclude another judge from entertaining proceedings based on the same judgment against other parties.[39]

4. Where Causes Are Transferred. Where causes pending in an existing court are by constitutional provisions transferred to a newly created tribunal, the power to act in supplementary proceedings respecting executions issued out of the court from whence the causes are transferred necessarily follows.[40]

5. Of Court or Judge. Where the power to compel the appearance of the judgment debtor is conferred on the judges of a court, the order should be made by one of them and not by the court;[41] but where the power is vested in

and out of which the execution was issued. Cooke *v.* Ross, 22 Ind. 157.

In Louisiana under the act of March 20, 1839, providing that, where plaintiff has applied for a fieri facias, and has reason to believe that a third person has property of the judgment debtor under his control or is indebted to him, such person may be cited to answer touching such property or debt, the parish court of any parish to which an execution is issued has jurisdiction to issue the citation. Featherstone *v.* Compton, 3 La. Ann. 380.

In New York the judges of county courts (Miller *v.* Adams, 7 Lans. 131; Conway *v.* Hitchins, 9 Barb. 378; People *v.* Mead, 29 How. Pr. 360; Genesee Bank *v.* Spencer, 15 How. Pr. 14), the recorder of the city of Troy (Hayner *v.* James, 17 N. Y. 316) and surrogates (McIntyre *v.* Allen, 43 Hun 124) are vested with such jurisdiction.

Judge of other district.— While an order for the examination of a third person may be made by a judge outside of the district in which the debtor resides, all proceedings subsequent to the examination must be before the judge of the district of the debtor's residence. Gildersleeve *v.* Lester, 69 Hun (N. Y.) 344, 23 N. Y. Suppl. 471.

In Wisconsin the county judges may act in proceedings based on a judgment of the circuit court. Gould *v.* Dodge, 30 Wis. 621.

36. Baldwin *v.* Perry, 25 Hun (N. Y.) 72, 1 N. Y. Civ. Proc. 118, 61 How. Pr. (N. Y.) 289; Gould *v.* Dodge, 30 Wis. 621.

37. Genesee Bank *v.* Spencer, 15 How. Pr. (N. Y.) 14.

A judge at chambers has no power to grant a general stay in proceedings instituted and pending before another judge having exclusive jurisdiction thereof. Genesee Bank *v.* Spencer, 15 How. Pr. (N. Y.) 14.

Judgment of county court.— A supreme court justice has no power to order an examination where the judgment was recovered in the county court. Such an order can only be made by the county judge. Blake *v.* Locy, 6 How. Pr. (N. Y.) 108, Code Rep. N. S. (N. Y.) 406.

In Kansas, after proceedings have been regularly instituted before a probate judge in aid of execution, and a receiver appointed, the jurisdiction of such judge continues until all orders concerning the property of the judgment are fully obeyed. *In re* Morris, 39 Kan. 28, 18 Pac. 171, 7 Am. St. Rep. 512.

The fact that an executor is acting under the direction of a circuit court of one county does not prevent the circuit court of another county from requiring him to answer in supplementary proceedings to reach a legacy of the judgment debtor in the possession of the executor. Murphy *v.* Busick, 22 Ind. App. 247, 53 N. E. 475, 72 Am. St. Rep. 304.

38. Rome First Nat. Bank *v.* Dering, 8 N. Y. Wkly. Dig. 261.

Where proceedings are instituted in a judicial department other than that in which the judgment was recovered, an order appointing a receiver may be made by a judge of the court where the proceedings were commenced. Jacobson *v.* Doty Plaster Mfg. Co., 32 Hun (N. Y.) 436.

In Wisconsin where a court commissioner has acquired jurisdiction he has power to appoint a receiver, and the circuit court in which the judgment was recovered cannot remove the proceedings to itself and appoint a receiver, but can only review the action of the commissioner. Clark *v.* Bergenthal, 52 Wis. 103, 8 N. W. 865.

39. Rome First Nat. Bank *v.* Dering, 8 N. Y. Wkly. Dig. 261.

40. Wegman *v.* Childs, 41 N. Y. 159.

Proceedings pending in a part of one district at the time of its annexation to another district may be transferred to the district in which they originated, although not there made returnable in the first instance. *In re* Conklin, 57 N. Y. Suppl. 844.

41. Spencer *v.* Morris, 67 N. J. L. 500, 51 Atl. 470; Douglass *v.* Mainzer, 40 Hun (N. Y.) 75; Baldwin *v.* Perry, 25 Hun (N. Y.) 72, 1 N. Y. Civ. Proc. 118, 61 How. Pr. (N. Y.) 289 [*reversing* 1 N. Y. Civ. Proc. 32]; Bitting *v.* Vandenburgh, 17 How. Pr. (N. Y.) 80; Miller *v.* Rossman, 15 How. Pr. (N. Y.) 10; Webber *v.* Hobbie, 13 How. Pr. (N. Y.) 382; Hulsaver *v.* Wiles, 11 How. Pr. (N. Y.) 446. See, generally, Judges.

It is immaterial, however, that an order purports to have been made by the court, when in fact it was made by the sole judge thereof. White Sewing Mach. Co. *v.* Wait, 24 Kan. 136.

the court or a judge thereof, any order in the proceeding may be made by either.[42]

6. Dependent on Debtor's Residence or Place of Business.[43] The statutes respecting these proceedings require as a rule that the proceedings shall be instituted in the county where the debtor resides or has a place of business,[44] and that where the debtor is a non-resident the proceedings shall be instituted in the county where the judgment was rendered or the judgment-roll filed.[45]

7. Dependent on Recovery of Judgment, Issue of Execution and Return[46] — **a. In General.** The recovery of a judgment, the issuance of an execution thereon, and its return unsatisfied in whole or in part are prerequisites to the right to examine the judgment debtor or a third person in aid of the execution or after its return for the purpose of discovering property of the debtor.[47]

b. Judgment Necessary. The judgment must be of the kind or character,[48]

42. State *v.* Downing, 40 Oreg. 309, 58 Pac. 863, 66 Pac. 917.

43. Place of examination see *infra*, XIII, H, 2, b, (IV); XIII, Q, 5.

44. Gildersleeve *v.* Lester, 69 Hun (N. Y.) 344, 34 N. Y. Suppl. 471; Schenck *v.* Erwin, 63 Hun (N. Y.) 104, 17 N. Y. Suppl. 616; Merrill *v.* Allin, 46 Hun (N. Y.) 623; Browning *v.* Hayes, 41 Hun (N. Y.) 382; Anway *v.* David, 9 Hun (N. Y.) 296; Bingham *v.* Disbrow, 37 Barb. (N. Y.) 24, 14 Abb. Pr. (N. Y.) 251; Hersenheim *v.* Hooper, 1 Duer (N. Y.) 594; Jurgenson *v.* Hamilton, 5 Abb. N. Cas. (N. Y.) 149; Vredenbergh *v.* Beumont, 2 N. Y. City Ct. 298; Hasty *v.* Simpson, 77 N. C. 69.

General jurisdiction throughout state.—The jurisdiction of a judge of the supreme court to issue an order for the examination of a debtor after the return of an execution unsatisfied is coextensive with the state, without regard to the residence or location of the debtor. Bingham *v.* Disbrow, 37 Barb. (N. Y.) 24, 14 Abb. Pr. (N. Y.) 251.

Change of residence.— Gould *v.* Moore, 51 How. Pr. (N. Y.) 188.

Removal of the debtor subsequent to the institution of the proceedings to another county will not defeat the rights of the creditor. Bingham *v.* Disbrow, 37 Barb. (N. Y.) 24, 14 Abb. Pr. (N. Y.) 251.

What constitutes place of business.— See Belknap *v.* Hasbrouck, 13 Abb. Pr. (N. Y.) 418 note; Burke *v.* Burke, 27 Misc. (N. Y.) 684, 58 N. Y. Suppl. 676; Batcheldor *v.* Nugent, 24 N. Y. Suppl. 828, 23 N. Y. Civ. Proc. 178.

It will be sufficient if the judgment debtor has any place of business in the county where the order is issued, although his residence and principal place of business were in an adjoining county. McEwan *v.* Burgess, 15 Abb. Pr. (N. Y.) 473, 25 How. Pr. (N. Y.) 92.

45. Hutchison *v.* Symons, 67 N. C. 156 [*followed* in Hasty *v.* Simpson, 77 N. C. 69].

46. Authority to make return see *supra*, XI, C, 2; and, generally, Sheriffs and Constables.

Necessity of showing the recovery of a judgment to procure an order for examination see *infra*, XIII, H, 1, b, (V).

Necessity of showing the issue of a valid execution and its return to authorize an order for examination see *infra*, XIII, H, 1, b, (V).

Time of return of execution as affecting the right to institute the proceedings see *infra*, XIII, G, 3.

Validity of judgment see Judgments.

47. Barber *v.* Briscoe, 9 Mont. 341, 23 Pac. 726; Shannon *v.* Steger, 75 N. Y. App. Div. 279, 78 N. Y. Suppl. 163; Moyer *v.* Moyer, 7 N. Y. App. Div. 523, 40 N. Y. Suppl. 258; Canandaigua First Nat. Bank *v.* Martin, 49 Hun (N. Y.) 571, 2 N. Y. Suppl. 315, 15 N. Y. Civ. Proc. 324; Simpson *v.* Hook, 6 Ohio Cir. Ct. 27, 3 Ohio Cir. Dec. 333. See also Bartlett *v.* McNeil, 60 N. Y. 53 [*affirming* 3 Hun 221, 5 Thomps. & C. 675, 49 How. Pr. 55].

Entry of judgment nunc pro tunc.— Where no judgment was entered or filed or execution issued at the time of the institution of the proceedings, the irregularity cannot be cured by a subsequent entry of the judgment *nunc pro tunc.* Barber *v.* Briscoe, 9 Mont. 341, 23 Pac. 726.

Legal remedy is not exhausted where the debtor has real estate. Canandaigua First Nat. Bank *v.* Martin, 49 Hun (N. Y.) 571, 2 N. Y. Suppl. 315, 15 N. Y. Civ. Proc. 324.

Possession of property subject to execution. — Where the debtor has property in his open and notorious possession, and within reach of execution, and he shows no design to remove or fraudulently dispose of it, supplementary proceedings cannot be maintained without return of the execution. It is not enough that the time to levy the execution has expired. Sackett *v.* Newton, 10 How. Pr. (N. Y.) 560.

Objections.— The validity of the judgment cannot be inquired into in these proceedings. People *v.* Oliver, 66 Barb. (N. Y.) 570; Diossy *v.* West, 8 Daly (N. Y.) 298; Courtois *v.* Harrison, 1 Hilt. (N. Y.) 109, 3 Abb. Pr. (N. Y.) 96, 12 How. Pr. (N. Y.) 359; O'Neil *v.* Martin, 1 E. D. Smith (N. Y.) 404; Saunders *v.* Hall, 2 Abb. Pr. (N. Y.) 418; Lederer *v.* Ehrenfeld, 49 How. Pr. (N. Y.) 403.

48. Bailey *v.* Dubuque Western R. Co., 13 Iowa 97.

If a transcript is filed in a county other than that in which judgment was rendered, the court therein has jurisdiction to grant

and for the amount prescribed by the statute authorizing the proceedings,[49] and usually must have been rendered upon defendant's appearance or after personal service of the summons upon him.[50]

the order. Strybing *v.* Hicks, 2 Month. L. Bul. (N. Y.) 6.

A justice's judgment, made a judgment of the county court by filing a transcript thereof in the county clerk's office, has the same dignity as a judgment of a court of record. People *v.* Oliver, 66 Barb. (N. Y.) 570; Conway *v.* Hitchins, 9 Barb. (N. Y.) 378; Bolt *v.* Hauser, 10 N. Y. Suppl. 397. See also Candee *v.* Gundelsheimer, 8 Abb. Pr. (N. Y.) 435, 17 How. Pr. (N. Y.) 434 [*disapproved* in Vulte *v.* Whitehead, 2 Hilt. (N. Y.) 596].

The transcript of the justice's judgment and the docket must correspond. Simpkins *v.* Page, 1 Code Rep. (N. Y.) 107.

A judgment of the supreme court reversing a judgment of the county court affirming a justice's judgment when filed in the office of the proper county clerk becomes a judgment upon which supplementary proceedings may be instituted in the county court. Short *v.* Scutt, 57 N. Y. Suppl. 393.

A judgment for costs will support the proceeding. Felt *v.* Dorr, 29 Hun (N. Y.) 14; Burke *v.* Burke, 27 Misc. (N. Y.) 684, 58 N. Y. Suppl. 676; Matter of Sirrett, 25 Misc. (N. Y.) 89, 54 N. Y. Suppl. 666; Davis *v.* Jones, 8 N. Y. Civ. Proc. 43, 65 How. Pr. (N. Y.) 290; Merchant *v.* Sessions, 5 N. Y. Civ. Proc. 24; Bean *v.* Tonnelle, 24 Hun (N. Y.) 353, 1 N. Y. Civ. Proc. 33. Under a provision requiring the judgment to be for not less than a sum specified exclusive of costs, a judgment for costs alone will not support the proceeding. Armstrong *v.* Cummings, 1 N. Y. Civ. Proc. 38 note, 2 Month. L. Bul. (N. Y.) 94.

A judgment against joint debtors rendered on personal service on one will authorize the examination of both as to the joint property. Jones *v.* Lawlin, 1 Sandf. (N. Y.) 722, 1 Code Rep. (N. Y.) 94; Emery *v.* Emery, 9 How. Pr. (N. Y.) 130.

Judgments against personal representative. — The proceedings are inappropriate to enforce a judgment against an executor, where no provision is made by statute for proceedings upon the judgment or execution, beyond the power to levy upon and sell the property of the estate. Collins *v.* Beebe, 54 Hun (N. Y.) 318, 7 N. Y. Suppl. 442.

A judgment against an administrator as such, on final settlement, is against him individually, and supplementary proceedings may be had thereon. Rhodes *v.* Casey, 20 S. C. 491.

Order directing the payment of the expenses and deficiency occasioned by his omission to complete a purchase at foreclosure sale is such a judgment as will support supplementary proceedings, although the delinquent was not a party to the foreclosure. Lydecker *v.* Smith, 44 Hun (N. Y.) 454.

Order requiring a garnishee to pay over moneys found due from him to the judgment debtor in the garnishment proceedings will support supplementary proceedings. Sperling *v.* Calfee, 7 Mont. 514, 19 Pac. 204.

Proceedings to reach assets of non-resident intestate.— The remedy given by the North Carolina code cannot be invoked on an application by creditors of a non-resident intestate to compel payment from assets within the state. Carson *v.* Oates, 64 N. C. 115.

Docketing a judgment of a court of the United States under N. Y. Code Civ. Proc. § 1271, does not render it a judgment of the state court so as to authorize the institution of supplementary proceedings thereon. Tompkins *v.* Purcell, 12 Hun (N. Y.) 662.

49. Mason *v.* Hackett, 35 Hun (N. Y.) 238; Wolf *v.* Jordan, 22 Hun (N. Y.) 108; Anonymous, 32 Barb. (N. Y.) 201; Vulte *v.* Whitehead, 2 Hilt. (N. Y.) 596; Andrews *v.* Mastin, 22 Misc. (N. Y.) 263, 49 N. Y. Suppl. 1118; Butts *v.* Dickinson, 12 Abb. Pr. (N. Y.) 60, 20 How. Pr. (N. Y.) 230. But see Candee *v.* Gundelsheimer, 8 Abb. Pr. (N. Y.) 435, 17 How. Pr. (N. Y.) 434.

Presumption.— People *v.* Oliver, 66 Barb. (N. Y.) 570.

50. Bartlett *v.* McNeil, 60 N. Y. 53 [*affirming* 3 Hun 221, 5 Thomps. & C. 675, 49 How. Pr. 55]; Hildreth *v.* Seeback, 18 Misc. (N. Y.) 387, 41 N. Y. Suppl. 653.

Appearance means voluntary submission to the jurisdiction, and after entry of judgment on a forfeited recognizance such proceedings may be instituted, although defendant was not served with summons, the signing of the recognizance being equivalent to a voluntary appearance. People *v.* Cowan, 146 N. Y. 348, 41 N. E. 26 [*reversing* 11 Misc. 302, 32 N. Y. Suppl. 162 (*affirming* 10 Misc. 258, 31 N. Y. Suppl. 427, 24 N. Y. Civ. Proc. 146)].

A judgment entered on substituted service is insufficient. Hildreth *v.* Seeback, 18 Misc. (N. Y.) 387, 41 N. Y. Suppl. 653.

Appearance, verification of answer, and affidavit of merits sufficiently show a judgment which will support the proceeding. Diossy *v.* West, 8 Daly (N. Y.) 298.

A suit in rem for forfeiture of property by reason of violation of the internal revenue law is a "common-law cause" within the meaning of U. S. Rev. St. (1878) § 916 [U. S. Comp. St. (1901) p. 684], giving a judgment creditor in such a cause the remedies provided by the state laws to collect the same. *In re* Quantity of Manufactured Tobacco, 20 Fed. Cas. No. 11,499, 10 Ben. 447.

Objections — Waiver.—The provision of the New York code of civil procedure that the proceedings are warranted only where the judgment was rendered on the appearance of, or personal service on defendant is jurisdictional, and if the judgment was otherwise rendered, defendant may avail himself of the objection, although he has submitted

c Execution and Return Necessary. The legal issue, out of the proper court and to the proper officer, of a valid execution[51] and, except where the proceedings are in aid of execution, its return by him unsatisfied in whole or in part[52]

to an examination. Hildreth *v.* Seeback, 18 Misc. 387, 41 N. Y. Suppl. 653.

Who may object — Ex parte order.— An irregularity in directing a personal judgment *ex parte* for alimony against a defendant in divorce proceedings against whom a decree had been made in an action in which he had been personally served cannot be taken advantage of by a third party. Bucki *v.* Bucki, 26 Misc. (N. Y.) 69, 56 N. Y. Suppl. 439.

51. Shannon *v.* Steger, 75 N. Y. App. Div. 279, 78 N. Y. Suppl. 163; Aultman, etc., Co. *v.* Syme, 87 Hun (N. Y.) 295, 34 N. Y. Suppl. 379; Schenck *v.* Erwin, 63 Hun (N. Y.) 104, 17 N. Y. Suppl. 616; Merrill *v.* Allen, 46 Hun (N. Y.) 623, 13 N. Y. St. 20; Merritt *v.* Judd, 9 N. Y. Suppl. 491, 18 N. Y. Civ. Proc. 159; Terry *v.* Hultz, 8 Abb. Pr. N. S. (N. Y.) 109, 39 How. Pr. (N. Y.) 169; Blake *v.* Locy, 6 How. Pr. (N. Y.) 108, Code Rep. N. S. (N. Y.) 406; Gray *v.* Lieben, 8 N. Y. Civ. Proc. 48; Stright *v.* Vose, Code Rep. N. S. (N. Y.) 79 note; *In re* Remington, 7 Wis. 643.

Executions held insufficient to support supplementary proceedings see Dandistel *v.* Kronenberger, 39 Ind. 405; Importers', etc., Nat. Bank *v.* Quackenbush, 144 N. Y. 651, 39 N. E. 77; Felt *v.* Dorr, 29 Hun (N. Y.) 14; Wright *v.* Nostrand, 47 N. Y. Super. Ct. 441 [*affirmed* in 94 N. Y. 31].

Executions held sufficient to support supplementary proceedings see Bareither *v.* Brosche, 13 N. Y. Suppl. 561, 19 N. Y. Civ. Proc. 446; Thompson *v.* Sargent, 15 Abb. Pr. (N. Y.) 452.

Execution to a county where property is expected to be found, and where a third person resides is sufficient to sustain proceedings against a third person. People *v.* Norton, 4 Sandf. (N. Y.) 640.

Issue in one county and return in another. — Where a transcript is filed in one county and a transcript of the judgment so docketed in another, the execution may be issued to the sheriff of the latter county, returnable to the clerk of the former, and supplementary proceedings may be had in the county wherein execution issued. Strybing *v.* Hicks, 2 Month. L. Bul. (N. Y.) 6.

Issue to county of temporary residence.— The execution is properly issued to the sheriff of the county where the debtor has a summer residence, although his permanent residence is elsewhere. Matter of Rowland, 21 N. Y. App. Div. 172, 47 N. Y. Suppl. 493. A debtor hiring lodgings from month to month and occupying them for several years is a resident within the county where he lodges so that the issue of an execution to that county is sufficient to sustain the proceedings, although he has a permanent residence elsewhere. Rose *v.* Durant, 87 N. Y. App. Div. 240, 84 N. Y. Suppl. 276.

Issue of second execution.— Where a second execution can only be issued by leave of the court, an execution issued without such leave will not give the court jurisdiction. Belknap *v.* Hasbrouck, 13 Abb. Pr. (N. Y.) 418. In Owen *v.* Dupignac, 9 Abb. Pr. (N. Y.) 180, 17 How. Pr. (N. Y.) 512, it was held that where one execution had been properly issued an order for examination might issue, although another outstanding execution had not been returned.

In New Jersey a proceeding for a discovery under the statute in aid of execution need not be preceded by an execution *de bonis et terris*. A fieri facias against personalty alone will suffice. Westfall *v.* Dunning, 50 N. J. L. 459, 14 Atl. 486.

In Oregon in proceedings in aid of execution a judgment creditor is not required to levy on and sell tangible property of the judgment debtor before invoking the aid of supplemental proceedings. State *v.* Downing, 40 Oreg. 309, 58 Pac. 863, 66 Pac. 917.

An objection that the execution issued irregularly should be first taken by motion to set it aside, and not by an appeal in the proceedings. Union Bank *v.* Sargeant, 53 Barb. (N. Y.) 422.

52. *Kentucky.*— Farmers' Nat. Bank *v.* Lancaster Nat. Bank, 4 Ky. L. Rep. 451.

Minnesota.— See Flint *v.* Webb, 25 Minn. 263; Kay *v.* Vischers, 9 Minn. 270.

New York.— Importers, etc., Nat. Bank *v.* Quackenbush, 144 N. Y. 651, 39 N. E. 77; Moyer *v.* Moyer, 7 N. Y. App. Div. 523, 40 N. Y. Suppl. 258; Marx *v.* Spaulding, 35 Hun 478, 16 Abb. N. Cas. 309; Dickerson *v.* Cook, 16 Barb. 509; Anonymous, 3 Duer 673; Engle *v.* Bonneau, 2 Sandf. 679; Vulte *v.* Whitehead, 2 Hilt. 596; Jennings *v.* Lancaster, 15 Misc. 444, 37 N. Y. Suppl. 196; Seeley *v.* Garrison, 10 Abb. Pr. 460; Sackett *v.* Newton, 10 How. Pr. 560.

Washington.—Klepsch *v.* Donald, 18 Wash. 150, 51 Pac. 352.

Wisconsin.— *In re* Remington, 7 Wis. 643.

United States.— Tomlinson, etc., Mfg. Co. *v.* Shatto, 34 Fed. 380.

See 21 Cent. Dig. tit. "Execution," § 1093.

Mere mistake as to filing return will not render the proceedings invalid. Jones *v.* Porter, 6 How. Pr. (N. Y.) 286.

Non-prejudicial defective return.— Baker *v.* Herkimer, 43 Hun (N. Y.) 86.

Omission of clerk to file return will not vitiate the proceedings. Barker *v.* Dayton, 28 Wis. 367.

Pending an appeal from the judgment an order for examination should not be made on the return of an execution unsatisfied when the debtor has filed a bond, pending the determination of the appeal. Ritterband *v.* Maryatt, 12 N. Y. Leg. Obs. 158.

Return by unauthorized officer is insufficient. Muldowney *v.* Corney, 3 Daly (N. Y.) 170; Silverman *v.* Henant, 40 How. Pr. (N. Y.) 88.

Waiver of return.— Jennings *v.* Lancaster,

are very generally held to be essential to the institution and maintenance of the proceedings.[53]

8. Loss of Jurisdiction. Loss of jurisdiction will not be presumed from the failure of the record to show a regular adjournment.[54]

D. Who May Maintain.[55] The proceedings may be maintained by the creditor of course,[56] or by an assignee of the judgment,[57] the personal representatives of a deceased judgment creditor,[58] or by the creditor's attorney,[59] having a lien on the judgment,[60] but not by an attorney whose authority has ended with the

15 Misc. (N. Y.) 444, 37 N. Y. Suppl. 196.

Where the object of the proceedings is to reach property which could not be reached by the execution or found by the sheriff, it is absolutely necessary that the execution should have been returned unsatisfied in whole or in part. Shannon *v.* Steger, 75 N. Y. App. Div. 279, 78 N. Y. Suppl. 163.

Sufficiency of return.— A return stating that no personal property was found, and reciting that a levy was made on an equity not subject to execution, sufficiently shows the return of the execution unsatisfied. House *v.* Swanson, 7 Heisk. (Tenn.) 32. Where the sheriff had advertised real estate of the debtor for sale and before the day of sale and after the limitation of the time fixed by law for making the return, he made a return, stated that he had collected nothing, had found no personal property but that he had levied on certain real estate which he had advertised for sale, the return was held insufficient to justify an order of examination. Marx *v.* Spaulding, 35 Hun (N. Y.) 478, 16 Abb. N. Cas. (N. Y.) 309 [*affirmed* in 99 N. Y. 675]. But see Forbes *v.* Spaulding, 52 N. Y. Super. Ct. 166, 8 N. Y. Civ. Proc. 135.

Conclusiveness.— A return *nulla bona* is *prima facie* evidence that the officer has made proper effort to discover property, and of exhaustion of the legal remedies. Flint *v.* Webb, 25 Minn. 263; Wright *v.* Nostrand, 94 N. Y. 31 [*reversing* 47 N. Y. Super. Ct. 441].

53. The execution or return cannot be impeached in these proceedings, but only by a direct proceeding. Union Bank *v.* Sargent, 53 Barb. (N. Y.) 422, 35 How. Pr. (N. Y.) 87; Eleventh Ward Bank *v.* Heather, 22 Misc. (N. Y.) 87, 48 N. Y. Suppl. 449, 27 N. Y. Civ. Proc. 90 [*reversing* 21 Misc. 539, 47 N. Y. Suppl. 718]; Methodist Book Concern *v.* Hudson, 1 How. Pr. N. S. (N. Y.) 517; Fenton *v.* Flagg, 24 How. Pr. (N. Y.) 499; Sandford *v.* Sinclair, 8 Paige (N. Y.) 373.

The propriety of the form of a return cannot be decided upon an affidavit presented for an order of examination. Marx *v.* Spaulding, 35 Hun (N. Y.) 478, 16 Abb. N. Cas. (N. Y.) 309.

54. Robertson *v.* Hay, 12 Misc. (N. Y.) 7, 33 N. Y. Suppl. 31.

55. Necessity of showing authority to institute the proceedings see *infra*, XIII, H, 1, b, (II).

56. See the statutes of the several states; and cases cited *infra*, this and following notes.

A judgment creditor of an estate who has been permitted by the surrogate to issue an execution cannot institute the proceeding. Collins *v.* Beebe, 54 Hun (N. Y.) 318, 7 N. Y. Suppl. 442.

Creditor against himself in representative capacity cannot maintain supplementary proceedings. See *In re* Livingston, 27 Hun (N. Y.) 607.

57. Burns *v.* Bangert, 16 Mo. App. 22; Crill *v.* Kornmeyer, 56 How. Pr. (N. Y.) 276.

An assignee of a judgment assigned after the return of execution unsatisfied may maintain the proceeding (Ross *v.* Clussman, 3 Sandf. (N. Y.) 675, Code Rep. N. S. (N. Y.) 91; Orr's Case, 2 Abb. Pr. (N. Y.) 257; Frederick *v.* Decker, 18 How. Pr. (N. Y.) 96; Hough *v.* Kohlin, Code Rep. N. S. (N. Y.) 232); in the name of the creditor (Ross *v.* Clussman, *supra*), and after the death of a plaintiff (Crill *v.* Kornmeyer, 56 How. Pr. (N. Y.) 276).

58. Collier *v.* De Revere, 7 Hun (N. Y.) 61; Scott *v.* Durfee, 59 Barb. (N. Y.) 390 note; Walker *v.* Donovan, 6 Daly (N. Y.) 552, 53 How. Pr. (N. Y.) 3; Amoré *v.* La Mothe, 5 Abb. N. Cas. (N. Y.) 146.

Necessity of revivor.— Where by statute personal representatives of deceased persons are permitted to enforce a judgment recovered by the decedent, they need not revive the judgment or be made a party thereto before instituting proceedings against the debtor. Pardee *v.* Tilton, 20 Hun (N. Y.) 76, 58 How. Pr. (N. Y.) 476; Walker *v.* Donovan, 6 Daly (N. Y.) 552, 53 How. Pr. (N. Y.) 3.

59. Eden *v.* Everson, 65 Ind. 113; Ward *v.* Roy, 69 N. Y. 96.

Presumption of authority.— If jurisdiction has been properly exercised it is erroneous to dismiss the proceedings for a supposed want of authority in the attorney who instituted them. Kress *v.* Moorehead, 8 N. Y. St. 858.

In Canada a solicitor, whose costs have been taxed on the application of the client and not paid, a fieri facias having been returned *nulla bona*, is entitled to an order for the examination of his client touching his estate and effects. *In re* Blain, 1 Ch. Chamb. 345.

60. Merchant *v.* Sessions, 5 N. Y. Civ. Proc. 24; Russell *v.* Somerville, 10 Abb. N. Cas. (N. Y.) 395.

Effect of general assignment by creditor.— See Merchant *v.* Sessions, 5 N. Y. Civ. Proc. 24.

Title to judgment in receiver.— After the title to the judgment has passed from the client to the receiver, the attorney must pro-

death of plaintiff. Proceedings thereafter must be taken in the name of the personal representatives or successors in interest of deceased plaintiff.[61]

E. Who May Be Examined[62] — **1. As Judgment Debtor — a. In General.** The proceedings may be maintained against joint debtors,[63] a married woman,[64] an infant,[65] a lunatic,[66] a trustee against whom judgment has been recovered as such,[67] and it seems a sheriff against whom execution has issued.[68] But a discharged bankrupt,[69] a stock-holder of a corporation against which judgment has been obtained,[70] or a foreign consul[71] will not be compelled to submit to an examination.

b. Corporations. As to corporations, the decisions are not uniform; thus while it has been held that a corporation may be examined,[72] it has also been held that this right only extends to a foreign corporation having no business or agency within the state,[73] and not to a domestic corporation,[74] or a foreign corporation having a place of business within the state.[75]

2. As a Third Person. With certain exceptions[76] any person indebted to

cure leave of the court to institute the proceedings. Moore *v.* Taylor, 2 How. Pr. N. S. (N. Y.) 343.

61. Amoré *v.* La Mothe, 5 Abb. N. Cas. (N. Y.) 146.

62. Proceedings to procure examination see *infra*, XIII, H.

63. As well before as after return of execution. Weiller *v.* Lawrence, 81 N. C. 65.

Only those several debtors of whom information is desired need be examined. Lewis *v.* Rosen, 19 W. Va. 61.

Where one has been served, he may be examined as to his separate property and both may be examined as to the joint property. Jones *v.* Lawlin, 3 N. Y. Super. Ct. 722, 1 Code Rep. (N. Y.) 94; Emery *v.* Emery, 9 How. Pr. (N. Y.) 130.

Where one partner is served an execution against the joint property of all the partners and its return unsatisfied is sufficient to support the proceedings. Perkins *v.* Kendall, 3 N. Y. Civ. Proc. 240.

Execution against one joint tort-feasor.— See Crossitt *v.* Wiles, 13 N. Y. Civ. Proc. 327.

Objection by debtor not party.— A joint debtor who has not been made a party will not be heard to object on that ground. Emery *v.* Emery, 9 How. Pr. (N. Y.) 130.

64. Thompson *v.* Sargent, 15 Abb. Pr. (N. Y.) 452.

65. Lederer *v.* Ehrenfeld, 49 How. Pr. (N. Y.) 403.

66. Blake *v.* Respass, 77 N. C. 193.

67. Matter of Gough, 31 N. Y. App. Div. 307, 52 N. Y. Suppl. 627.

68. Potts *v.* Davidson, 1 How. Pr. N. S. (N. Y.) 216.

69. Leo *v.* Joseph, 9 N. Y. Suppl. 612; Smith *v.* Paul, 20 How. Pr. (N. Y.) 97. See also Coursen *v.* Dearborn, 7 Rob. (N. Y.) 143; Stuart *v.* Salhinger, 14 Abb. Pr. (N. Y.) 291; Rich *v.* Salinger, 11 Abb. Pr. (N. Y.) 344; Dresser *v.* Shufeldt, 7 How. Pr. (N. Y.) 85.

70. Hentig *v.* James, 22 Kan. 326, a proceeding in aid of execution in which it was sought to treat the stock-holder as a judgment debtor.

71. Griffin *v.* Dominguez, 2 Duer (N. Y.) 656, 11 N. Y. Leg. Obs. 285.

72. Tompkins *v.* Floyd County Agricultural, etc., Assoc., 19 Ind. 197.

73. Logan *v.* McCall Pub. Co., 140 N. Y. 447, 35 N. E. 655, 23 N. Y. Civ. Proc. 246 [*reversing* 6 Misc. 635, 25 N. Y. Suppl. 1142]. But see Stevens *v.* Page, 4 Misc. (N. Y.) 517, 24 N. Y. Suppl. 698, 23 N. Y. Civ. Proc. 191, holding that such a corporation cannot be examined.

74. Levy *v.* Swick Piano Co., 17 Misc. (N. Y.) 145, 39 N. Y. Suppl. 409 [*reversing* 16 Misc. 685, 38 N. Y. Suppl. 1146]; Sherwood *v.* Buffalo, etc., R. Co., 12 How. Pr. (N. Y.) 136; Hammond *v.* Hudson River Iron, etc., Co., 11 How. Pr. (N. Y.) 29; Hinds *v.* Canandaigua, etc., R. Co., 10 How. Pr. (N. Y.) 487.

Corporate property held by third person.— A third party cannot be examined as to property in his possession which is claimed to belong to a corporate debtor. See Fitchburgh Nat. Bank *v.* Bushwick Chemical Works, 13 N. Y. Civ. Proc. 155.

75. Matter of Vietor, 20 Misc. (N. Y.) 289, 45 N. Y. Suppl. 800 [*reversing* 20 Misc. 13, 44 N. Y. Suppl. 603].

76. A receiver of the debtor cannot be examined. Fitchburgh Nat. Bank *v.* Bushwick Chemical Works, 13 N. Y. Civ. Proc. 155.

A receiver of a foreign corporation will not be required to submit to an examination as to moneys due to the debtor. Smith *v.* McNamara, 15 Hun (N. Y.) 447.

An officer of the court having custody of a fund in court cannot be examined. Anonymous, Code Rep. N. S. (N. Y.) 211.

Person indebted to corporation.— Where supplementary proceedings cannot be instituted against a domestic corporation a third party cannot be examined as to property of a judgment debtor, where the debtor is such a corporation. Fitchburgh Nat. Bank *v.* Bushwick Chemical Works, 13 N. Y. Civ. Proc. 155. See *infra*, note 77.

Municipal corporations.— The Indiana statute permitting the examination of any "person or corporation" indebted to the debtor comprehends private but not municipal corporations. Wallace *v.* Lawyer, 54 Ind. 501, 23 Am. Rep. 661.

A bank which is a depository of the bankrupt court cannot be examined in proceedings

or having property of the judgment debtor may be examined as a third person.[77]

F. Property Which May Be Reached[78] **— 1. In General.** Proceedings supplementary to execution operate on all personal property, money, and choses in action whether in possession or under the control of the debtor or in the hands of third persons.[79] Thus it has been held that property which can be reached by

on a judgment against the assignee for a debt of the bankrupt, as a corporation having property of the debtor. Havens *v.* National City Bank, 4 Hun (N. Y.) 131, 6 Thomps. & C. (N. Y.) 346.

Where sufficient property has been discovered by the examination of third persons an order directing the examination of another person will be vacated as unnecessary. Crane *v.* Beecher, 6 N. Y. Suppl. 225.

Agreement to pay claim.— Where on examination of an executor the proceedings are adjourned under a stipulation to pay the claim from the first moneys coming to the executors on the debtor's account, an examination of his coexecutor is unnecessary, and cannot be maintained. Crane *v.* Beecher, 6 N. Y. Suppl. 225.

Effect of receivership.— Where, in sequestration proceedings against a judgment defendant to enforce payment of judgment, a receiver is appointed, a third party, having property formerly belonging to defendant, cannot be examined in supplementary proceedings, since the receiver takes title to the property. Bucki *v.* Bucki, 26 Misc. (N. Y.) 69, 56 N. Y. Suppl. 439.

77. Boice *v.* Turner, 4 How. Pr. (N. Y.) 195; Davis *v.* Turner, 4 How. Pr. (N. Y.) 190.

For example, one who is indebted to the debtor, although the indebtedness is not yet payable (Davis *v.* Herrig, 65 How. Pr. (N. Y.) 290), the wife of the debtor (Lockwood *v.* Woerstell, 15 Abb. Pr. (N. Y.) 430 note), his assignee (Bruce *v.* Crabtree, 116 N. C. 528, 21 S. E. 194), a corporation (Semmes *v.* Noell, 18 N. Y. Civ. Proc. 200 note; Pendergast *v.* Dempsey, 18 N. Y. Civ. Proc. 198. But see *supra*, note 74), persons holding assets of a corporate debtor (Tompkins *v.* Floyd County Agricultural, etc., Assoc., 19 Ind. 197) or indebted to a corporation (McBride *v.* Farmers' Bank, 28 Barb. (N. Y.) 476, 7 Abb. Pr. (N. Y.) 347), the treasurer of a joint-stock company (Courtois *v.* Harrison, 1 Hilt. (N. Y.) 109, 3 Abb. Pr. (N. Y.) 96, 12 How. Pr. (N. Y.) 359), an executor holding a legacy belonging to the debtor (Murphy *v.* Busick, 22 Ind. App. 247, 53 N. E. 745, 72 Am. St. Rep. 304), or the custodian of property attached in the action (Chandler *v.* Fon du Lac, 56 How. Pr. (N. Y.) 449) may be examined.

A municipal officer having funds in his hands belonging to the municipality may be examined at the instance of a creditor of the corporation (Lowber *v.* New York, 5 Abb. Pr. (N. Y.) 268) but not as to surplus moneys on foreclosure *in custodia legis* (Anonymous, Code Rep. N. S. (N. Y.) 211). And see Lowber *v.* New York, 7 Abb. Pr. (N. Y.) 248, apparently *contra* to the first proposition.

Proceedings to examine third parties see *infra*, XIII, J.

78. **Money or property which may be directed to be paid over** or delivered to the creditor, the sheriff, or a receiver see *infra*, X, S, 2.

Money or property which may be appropriated or recovered by the receiver see *infra*, XIII, T, 13.

79. Fowler *v.* Griffin, 83 Ind. 297; Sherman *v.* Carvill, 73 Ind. 126; Butler *v.* Jaffray, 12 Ind. 504; Powell *v.* Waldron, 89 N. Y. 328, 42 Am. Rep. 301; Gillett *v.* Bate, 86 N. Y. 87, 10 Abb. N. Cas. (N. Y.) 88; Jeffres *v.* Cochrane, 48 N. Y. 671; Matter of Weld, 34 N. Y. App. Div. 471, 54 N. Y. Suppl. 253; Gifford *v.* Rising, 55 Hun (N. Y.) 61, 8 N. Y. Suppl. 279; Canandaigua First Nat. Bank *v.* Martin, 49 Hun (N. Y.) 571, 2 N. Y. Suppl. 315, 15 N. Y. Civ. Proc. 324; Smith *v.* Tozer, 42 Hun (N. Y.) 22, 3 N. Y. St. 363, 11 N. Y. Civ. Proc. 343 [*affirming* 3 N. Y. St. 164]; Stevenson *v.* Stevenson, 34 Hun (N. Y.) 157; Barnes *v.* Morgan, 3 Hun (N. Y.) 703, 6 Thomps. & C. (N. Y.) 105; Moak *v.* Coats, 33 Barb. (N. Y.) 498; Stewart *v.* McMartin, 5 Barb. (N. Y.) 438; Davis *v.* Briggs, 1 Silv. Supreme (N. Y.) 326, 5 N. Y. Suppl. 323; Inglehart's Petition, Sheld. (N. Y.) 514; Green *v.* Griswold, 57 N. Y. Super. Ct. 24, 4 N. Y. Suppl. 893; Ritterband *v.* Baggett, 42 N. Y. Super. Ct. 556, 4 Abb. N. Cas. (N. Y.) 67; Clan Ronald *v.* Wyckoff, 41 N. Y. Super. Ct. 527; Beamish *v.* Hoyt, 2 Rob. (N. Y.) 307; Grocers' Bank *v.* Murphy, 10 Daly (N. Y.) 168, 60 How. Pr. (N. Y.) 426; Stewart *v.* Foster, 1 Hilt. (N. Y.) 505; Bucki *v.* Bucki, 26 Misc. (N. Y.) 69, 56 N. Y. Suppl. 439; Serven *v.* Lowerre, 3 Misc. (N. Y.) 113, 23 N. Y. Suppl. 1052; Letorag *v.* Reimann, 53 N. Y. Suppl. 951, 5 N. Y. Annot. Cas. 19; Monolithic Drain, etc., Co. *v.* Dewsnap, 41 N. Y. Suppl. 224, 25 N. Y. Civ. Proc. 380; Roome *v.* Swan, 15 N. Y. Civ. Proc. 344; Albany City Nat. Bank *v.* Gaynor, 67 How. Pr. (N. Y.) 421; Sewell *v.* Ives, 61 How. Pr. (N. Y.) 54; Pfluger *v.* Cornell, 2 N. Y. City Ct. 145; Swartout *v.* Schwester, 5 Redf. Surr. (N. Y.) 497; Thorne *v.* Thomas, 1 Month. L. Bul. (N. Y.) 53; Westminster Nat. Bank *v.* Burns, 109 N. C. 105, 13 S. E. 871.

Whatever can be reached by a creditor's bill can be reached in these proceedings. Barnes *v.* Morgan, 3 Hun (N. Y.) 703, 6 Thomps. & C. (N. Y.) 105.

Alimony.— It seems that alimony may be charged with a debt for necessaries furnished upon reliance that it would be granted. Romaine *v.* Chauncey, 129 N. Y. 566, 29 N. E.

these proceedings includes an indebtedness due to the debtor,[80] a judgment recovered by him,[81] money fraudulently withheld by the debtor,[82] money in the hands of the court,[83] money or effects in the possession of the corporation,[84] property held by a municipality,[85] property retained by the debtor after a general assignment for the benefit of creditors,[86] a seat or membership in an exchange,[87] an interest in the funds of an organization of licensed pilots,[88] dower not admeasured,[89] proceeds of a mortgage taken as security for a legacy and assigned without consideration,[90] property in another state,[91] an annuity,[92] a right of action on contract,[93] or a cause of action for trespass to realty which will survive.[94] On the other hand it has been held that a check not yet delivered to or accepted by the debtor,[95] contingent fees of an attorney in an undetermined case,[96] the interest of a mortgagee in personal property,[97] money deposited by a third person as bail,[98] an unpaid instalment of a pension,[99] public moneys or moneys in the hands of a public officer,[1] property assigned for the benefit of creditors during the life of the execution,[2] or a judgment for the conversion of exempt property,[3] cannot be so reached. And in some jurisdictions, not only may property liable to execution be applied to satisfaction of the judgment, but also equitable interests which cannot be reached by such process;[4] while in others it has been held that such an

826, 26 Am. St. Rep. 544, 14 L. R. A. 712 [*affirming* 60 Hun 477, 15 N. Y. Suppl. 198, 21 N. Y. Civ. Proc. 76].

Life-insurance policies.— While it has been held that the proceedings will reach a policy as to which the insured has a property right and a surrender value (Reynolds *v.* Ætna L. Ins. Co., 6 N. Y. App. Div. 254, 39 N. Y. Suppl. 885), the proceeds of an insurance policy on the life of the debtor's husband (Crosby *v.* Stephan, 32 Hun (N. Y.) 478; Millington *v.* Fox, 13 N. Y. Suppl. 334), yet it has been held that such a policy cannot be reached (Masten *v.* Amerman, 51 Hun (N. Y.) 244, 4 N. Y. Suppl. 681 [*reversing* 20 Abb. N. Cas. 443]), and that a creditor is not entitled to a policy assigned to a third party before the rendition of judgment, where no fraud or other fact invalidating the assignment is shown (Rodwell *v.* Johnston, 152 Ind. 525, 52 N. E. 798).

Where notes are transferred to a debtor's wife in fraud of creditors, and later transferred during supplementary proceedings instituted for the purpose of obtaining control of them, to persons having notice of the pendency of the action, they are bound by the judgment obtained thereunder. Jeffres *v.* Cochrane, 48 N. Y. 671.

Where, on final settlement, a judgment recovered by an administrator is charged to him, the judgment becomes his property, and may be reached by supplementary proceedings by his creditors. Rhodes *v.* Casey, 20 S. C. 491.

80. Dunning *v.* Rogers, 69 Ind. 272. But see West Side Bank *v.* Pugsley, 47 N. Y. 368.

81. Adams *v.* Hackett, 7 Cal. 187; Swartout *v.* Schwester, 5 Redf. Surr. (N. Y.) 497. And see Mahony *v.* Hunter, 30 Ind. 246.

82. Baker *v.* State, 109 Ind. 47, 9 N. E. 711.

83. McDaniel *v.* Stokes, 19 S. C. 60.

84. Ball *v.* Towle Mfg. Co., 67 Ohio St. 306, 65 N. E. 1015, 93 Am. St. Rep. 682.

85. Knight *v.* Nash, 22 Minn. 452.

86. Eastern Nat. Bank *v.* Hulshizer, 2 N. Y. St. 115.

87. Powell *v.* Waldron, 89 N. Y. 328, 42 Am. Rep. 301.

88. Dease *v.* Reese, 39 Misc. (N. Y.) 657, 80 N. Y. Suppl. 590.

89. Payne *v.* Becker, 87 N. Y. 153 [*reversing* 22 Hun 28].

90. Muller *v.* Hall, 49 How. Pr. (N. Y.) 374.

91. Peck *v.* Low, 7 N. J. L. J. 350; Fenner *v.* Sanborn, 37 Barb. (N. Y.) 610.

92. Ten Broeck *v.* Sloo, 2 Abb. Pr. (N. Y.) 234, 13 How. Pr. (N. Y.) 28.

93. Ten Broeck *v.* Sloo, 2 Abb. Pr. (N. Y.) 234, 13 How. Pr. (N. Y.) 28; Swartout *v.* Schwester, 5 Redf. Surr. (N. Y.) 497.

94. Bennett *v.* Wolfolk, 80 Hun (N. Y.) 390, 30 N. Y. Suppl. 328.

95. Cooman *v.* Board of Education, 37 Hun (N. Y.) 96.

96. Gibney *v.* Reilly, 26 Misc. (N. Y.) 275, 56 N. Y. Suppl. 1055.

97. Knowles *v.* Herbert, 11 Oreg. 54, 240, 4 Pac. 126.

98. McShane *v.* Pinkham, 19 N. Y. Suppl. 969, 22 N. Y. Civ. Proc. 173.

99. Nagle *v.* Stagg, 15 Abb. Pr. N. S. (N. Y.) 348.

1. Norcross *v.* Hollingsworth, 83 Hun (N. Y.) 127, 31 N. Y. Suppl. 627; Lowber *v.* New York, 7 Abb. Pr. (N. Y.) 248.

2. Watrous *v.* Lathrop, 4 Sandf. (N. Y.) 700.

3. Andrews *v.* Rowan, 28 How. Pr. (N. Y.) 126.

4. Figg *v.* Snook, 9 Ind. 202; Kiser *v.* Sawyer, 4 Kan. 503; Flint *v.* Webb, 25 Minn. 263; Pope *v.* Cole, 64 Barb. (N. Y.) 406.

In New York the debtor may be examined as to property owned by him at and prior to the time of executing an assignment for the benefit of creditors, although the court has no jurisdiction of an equitable action to reach property fraudulently transferred. Schneider *v.* Altman, 8 N. Y. Civ. Proc. 242.

interest cannot be reached and the doctrine applied in supplementary proceedings to procure foreclosure of a mortgage and subject the proceeds to execution.[5]

2. Ownership. Moneys or property of another in the possession or under the control of the debtor or money or property the title to which is in dispute cannot be reached by proceedings supplementary to execution.[6]

3. Exemptions[7] — a. In General. Property exempt from levy and sale on execution, or its proceeds, cannot be appropriated in supplementary proceedings.[8]

The interest of a debtor in real estate in possession under a contract of purchase, although he has not become vested with the legal title, may be reached. Figg *v.* Snook, 9 Ind. 202.

5. Knowles *v.* Herbert, 11 Oreg. 54, 240, 4 Pac. 126. See also Lee *v.* Harback, 2 Ohio Dec. (Reprint) 361, 2 West. L. Month. 527.

The rule in North Carolina is explained in McCaskill *v.* Lancashire, 83 N. C. 393; Rand *v.* Rand, 78 N. C. 12; Hutchison *v.* Symons, 67 N. C. 156; McKeithan *v.* Walker, 66 N. C. 95.

Right to conveyance.— See McCaskill *v.* Lancashire, 83 N. C. 393.

6. Hagerman *v.* Tong Lee, 12 Nev. 331; Schrauth *v.* Dry Dock Sav. Bank, 86 N. Y. 390 [*reversing* 8 Daly 106]; Barnard *v.* Kobbe, 54 N. Y. 516 [*affirming* 3 Daly 373]; West Side Bank *v.* Pugsley, 47 N. Y. 368; Rodman *v.* Henry, 17 N. Y. 482; Moller *v.* Weiss, 29 Hun (N. Y.) 587; Beebe *v.* Kenyon, 3 Hun (N. Y.) 73; Stewart *v.* Foster, 1 Hilt. (N. Y.) 505; Maas *v.* McEntegart, 21 Misc. (N. Y.) 462, 47 N. Y. Suppl. 673, 4 N. Y. Annot. Cas. 370; Clark *v.* Gallagher, 3 N. Y. Suppl. 312; Frost *v.* Craig, 18 N. Y. Civ. Proc. 296; Joyce *v.* Holbrook, 7 Abb. Pr. (N. Y.) 338; Crounse *v.* Whipple, 34 How. Pr. (N. Y.) 333; Teller *v.* Randall, 40 Barb. (N. Y.) 242, 26 How. Pr. (N. Y.) 155; Gasper *v.* Bennett, 12 How. Pr. (N. Y.) 307; People *v.* King, 9 How. Pr. (N. Y.) 97; Robeson *v.* Ford, 3 Edw. (N. Y.) 441; Miller *v.* Lyons, 17 N. Y. Wkly. Dig. 86; Manice *v.* Smith, 5 N. Y. Wkly. Dig. 255.

A check borrowed for deposit as a guaranty by a bidder for a municipal contract does not become the property of the latter so as to be reached in supplementary proceedings against him. Nathans *v.* Satterlee, 18 Abb. N. Cas. (N. Y.) 310.

After a deposit of money in lieu of bail is forfeited it is improper to order its payment. Hayes *v.* McClelland, 20 N. Y. Wkly. Dig. 393.

Bonds of a corporation in the hands of its agent for negotiation are not its property. Cunningham *v.* Pennsylvania, etc., R. Co., 11 N. Y. St. 663.

Money advanced by one to redeem from execution sale cannot be reached in the hands of the person with whom it is deposited for that purpose. Brookville Nat. Bank *v.* Deitz, 49 Ind. 598; Terry *v.* Deitz, 49 Ind. 293.

Money deposited on an application for a license cannot be reached. Tindall *v.* Rust, 67 N. J. L. 159, 50 Atl. 349.

The property of a wife (Robeson *v.* Ford, 3 Edw. (N. Y.) 441), or of a deceased wife (Bitting *v.* Vandenburgh, 17 How. Pr. (N. Y.) 80), it has been held, could not be reached as the property of the debtor. Where pending the life of the execution the debtor claims specific property to belong to his wife the creditor will be left to his execution. Hall *v.* McMahon, 10 Abb. Pr. (N. Y.) 103; Sackett *v.* Newton, 10 How. Pr. (N. Y.) 560.

Public moneys raised by a municipal corporation through taxation and in the hands of its officers are not the property of the corporation or a debt due it, within Code, § 294, providing for proceedings supplementary to execution, so that the custodian may be required to pay such moneys over in satisfaction of a judgment. Lowber *v.* New York, 7 Abb. Pr. (N. Y.) 248.

7. **Exemptions** generally see Exemptions; Homesteads.

8. Lowry *v.* McAlister, 86 Ind. 543; Remick *v.* Bradley, 119 Mich. 399, 78 N. W. 326; McGivney *v.* Childs, 41 Hun (N. Y.) 607; Finnin *v.* Malloy, 33 N. Y. Super. Ct. 382; Andrews *v.* Rowan, 28 How. Pr. (N. Y.) 126.

Within this rule a watch used by the debtor in his occupation (*In re* Edlunds, 35 Hun (N. Y.) 367; Merriam *v.* Hill, 1 N. Y. Wkly. Dig. 260), a share in a law library held by a lawyer as a working tool (Keiher *v.* Shipherd, 4 N. Y. Civ. Proc. 274), the proceeds of a judgment for the conversion of exempt property (Tillotson *v.* Wolcott, 48 N. Y. 188), and a policy of insurance held by a wife on the life of her husband (Baron *v.* Brummer, 100 N. Y. 372, 3 N. E. 474. And see Masten *v.* Amerman, 51 Hun (N. Y.) 244, 4 N. Y. Suppl. 681 [*reversing* 20 Abb. N. Cas. 443]) has been held to be exempt.

A seat or membership in a stock exchange is not exempt as "working tools" of the debtor. Leggett *v.* Waller, 39 Misc. (N. Y.) 408, 80 N. Y. Suppl. 13.

Note taken for insurance moneys loaned.— Where, by the charter of a mutual benefit insurance society, the fund payable to a member's family on his death was not subject to execution for his debts, where the fund to which defendant was entitled on his death was paid to his wife, and she loaned the amount, and took a promissory note therefor, she can be compelled to transfer and deliver the note to a receiver appointed in proceedings supplementary to an execution issued on a judgment against her. Bolt *v.* Keyhoe, 30 Hun (N. Y.) 619.

Property without the state, belonging to a non-resident debtor, which would be exempt if within the state, cannot be reached. Bunn *v.* Fonda, 2 Code Rep. (N. Y.) 70.

Where a watch is worn merely as an ornament, and used only on special occasions, and

It is doubtful where an exemption is claimed whether the question of its validity can be determined in these proceedings.[9]

b. Earnings[10] — (I) *In General.* In some jurisdictions the earnings of the debtor for his personal services rendered within a specified time[11] next before the institution of the proceedings are exempt when necessary for the use of a family wholly or partly supported by his labor.[12]

(II) *To Become Due.* Future earnings, wages, or salaries to become due, or which become due after service of the order for examination, cannot be reached by supplementary proceedings.[13]

is not necessary to the prosecution of any employment in which he is engaged or by which he earns his livelihood, it may be reached and applied to the satisfaction of the judgment by supplementary proceedings. Peck *v.* Mulvihill, 2 N. Y. City Ct. 424.

9. Dickinson *v.* Onderdonk, 18 Hun (N. Y.) 479.

10. Payment of earnings as a contempt see *infra*, XIII, U.

11. Computation of time.— A statute exempting the personal earnings of a debtor for sixty days "preceding the order" contemplates the order for the application of the debtor's property, and not the order for his examination. Bush *v.* White, 12 Abb. Pr. (N. Y.) 21. See also Tripp *v.* Childs, 14 Barb. (N. Y.) 85; Gerregani *v.* Wheelwright, 3 Abb. Pr. N. S. (N. Y.) 264; Woodman *v.* Goodenough, 18 Abb. Pr. (N. Y.) 265; Potter *v.* Low, 16 How. Pr. (N. Y.) 549.

12. See cases cited *infra*, this note.

In New York and Wisconsin the period is sixty days. See McCullough *v.* Carragan, 24 Hun (N. Y.) 157; Miller *v.* Hooper, 19 Hun (N. Y.) 394; Matter of Board of Publication, etc., 22 Misc. (N. Y.) 645, 50 N. Y. Suppl. 171; Mack *v.* Colleran, 18 N. Y. Suppl. 104; Bush *v.* White, 12 Abb. Pr. (N. Y.) 21; Cummings *v.* Timberman, 49 How. Pr. (N. Y.) 236. In Wisconsin such earnings are exempt, although the statute authorizes the judge to order any property of the judgment debtor not exempt from execution to be applied toward the satisfaction of the judgment. Brown *v.* Hebard, 20 Wis. 326, 91 Am. Dec. 408.

In Ohio the earnings of the debtor for three months next preceding the order for his examination are exempt. See Snook *v.* Snetzer, 25 Ohio St. 516.

The following earnings have been held to be exempt: Earnings of one in charge of others who himself performed some part of the labor (Moran *v.* Darcy, 10 Misc. (N. Y.) 789, 31 N. Y. Suppl. 1130), money due to a husband from his wife for services rendered to her in her separate business (Kingman *v.* Frank, 5 Month. L. Bul. (N. Y.) 34), earnings in a business independently carried on, in which the debtor's services are the chief factor (McSkiman *v.* Knowlton, 14 N. Y. Suppl. 283, 20 N. Y. Civ. Proc. 274; Sandford *v.* Goodwin, 20 N. Y. Civ. Proc. 276 note), and tuition fees, payable to the debtor on the day on which proceedings are commenced against him (Miller *v.* Hooper, 19 Hun (N. Y.) 394). But neither the proceeds of a saloon business (Prince *v.* Brett, 21 N. Y. App. Div. 190, 47 N. Y. Suppl. 402) or a retail ice business, in conducting which two carts and several men are employed (Mulford *v.* Gibbs, 9 N. Y. App. Div. 490, 41 N. Y. Suppl. 273), moneys received in the conduct of a business (Aschemoor *v.* Emmvert, 5 Month. L. Bul. (N. Y.) 80), moneys earned but turned into the business of the employer (Clark *v.* Andrews, 19 N. Y. Suppl. 211), sums due the debtor, a boarding-house keeper, from her boarders (Whalen *v.* Tennison, 1 Month. L. Bul. (N. Y.) 22), the income of an unmarried man derived from boarders (Van Vechten *v.* Hall, 14 How. Pr. (N. Y.) 436), nor the earnings of a debtor whose wife kept a boarding-house, which was self-sustaining, and with which he had nothing to do (Martin *v.* Sheridan, 2 Hilt. (N. Y.) 586) are exempt.

A salary is not exempt as necessary for the support of the debtor's family, when its intended use is for the support of persons as to whom there is no legal liability. Blake *v.* Bolte, 9 Misc. (N. Y.) 714, 30 N. Y. Suppl. 209. To the same effect see White *v.* Koehler, (N. J. Sup. 1904) 57 Atl. 124; Van Vechten *v.* Hall, 14 How. Pr. (N. Y.) 436.

Where a doubt exists as to whether the sum in controversy was earned prior or subsequent to the order, the debtor is entitled to the benefit of the doubt. Potter *v.* Low, 16 How. Pr. (N. Y.) 549.

13. Dubois *v.* Cassidy, 75 N. Y. 298; Kroner *v.* Reilly, 49 N. Y. App. Div. 41, 63 N. Y. Suppl. 527; Caton *v.* Southwell, 13 Barb. (N. Y.) 335; Ireland *v.* Smith, 1 Barb. (N. Y.) 419, 3 How. Pr. (N. Y.) 244; Stewart *v.* Foster, 1 Hilt. (N. Y.) 505; Dease *v.* Reese, 39 Misc. (N. Y.) 657, 80 N. Y. Suppl. 590; Gray *v.* Ashley, 24 Misc. (N. Y.) 396, 53 N. Y. Suppl. 527; Matter of Board of Publication, etc., 22 Misc. (N. Y.) 645, 50 N. Y. Suppl. 171; Columbian Inst. *v.* Cregan, 11 N. Y. Civ. Proc. 87; Albright *v.* Kempton, 4 N. Y. Civ. Proc. 16; Tolles *v.* Wood, 16 Abb. N. Cas. (N. Y.) 1; Gerregani *v.* Wheelwright, 3 Abb. Pr. N. S. (N. Y.) 264; Woodman *v.* Goodenough, 18 Abb. Pr. (N. Y.) 265; Atkinson *v.* Sewine, 43 How. Pr. (N. Y.) 84; Potter *v.* Low, 16 How. Pr. (N. Y.) 549; Campbell *v.* Foster, 16 How. Pr. (N. Y.) 275 [*affirmed* in 35 N. Y. 361]; Auburn First Nat. Bank *v.* Beardsley, 8 N. Y. Wkly. Dig. 7; Merriam *v.* Hill, 1 N. Y. Wkly. Dig. 260. See also Browning *v.* Bettis, 8 Paige (N. Y.) 568; McCoun *v.* Dorsheimer, Clarke (N. Y.) 144; Smith *v.* ——, 4 Edw. (N. Y.) 653. *Compare*

(III) *Of Public Officers.* For reasons of public policy the wages, fees, or salary of a public official, due or to become due from the public authorities, cannot be subjected in their hands to the payment of his debts under proceedings supplementary to execution instituted for that purpose.[14] But salary or earnings of such an official which he has reduced to possession may be subjected to payment of the judgment.[15]

c. Trust Funds or Property. In some jurisdictions money or other property held in trust for the debtor cannot be reached by these proceedings where the trust was created by, or the trust fund proceeded from, a person other than the debtor,[16] unless the trust has been so far performed that the fund is payable directly to the debtor.[17] These provisions apply as well to the income of the fund as to the principal,[18] except that income in excess of what is necessary to

Buchanan *v.* Hunt, 33 Hun (N. Y.) 329 [*reversed* in 98 N. Y. 560].

Attorney's fees.— See Union Bank *v.* Northrop, 19 S. C. 473.

Money earned and payable in the future may be reached. Thompson *v.* Nixon, 3 Edw. (N. Y.) 457.

Wages due on the same day as the order was granted, but thereafter cannot be reached. Auburn First Nat. Bank *v.* Beardsley, 8 N. Y. Wkly. Dig. 7.

Presumption as to time when money earned.— See Matter of Van Ness, 21 Misc. (N. Y.) 249, 47 N. Y. Suppl. 702.

Compelling debtor to exact compensation.— See Osborne *v.* Wilkes, 108 N. C. 651, 13 S. E. 285.

14. *Indiana.*— Wallace *v.* Lawyer, 54 Ind. 501, 23 Am. Rep. 661.

Minnesota.— Roeller *v.* Ames, 33 Minn. 132, 22 N. W. 177.

New Jersey.—Spencer *v.* Morris, 67 N. J. L. 500, 51 Atl. 470.

New York.— Bliss *v.* Lawrence, 58 N. Y. 442, 17 Am. Rep. 273; Gray *v.* Ashley, 34 Misc. 396, 53 N. Y. Suppl. 547; Albright *v.* Kempton, 4 N. Y. Civ. Proc. 16; Columbian Inst. *v.* Cregan, 3 N. Y. St. 287; Waldham *v.* O'Donnell, 57 How. Pr. 215, 1 N. Y. City Ct. 146; Remmey *v.* Gedney, 57 How. Pr. 217, 1 N. Y. City Ct. 28; Auburn First Nat. Bank *v.* Beardsley, 8 N. Y. Wkly. Dig. 7.

North Carolina.— Swepson *v.* Turner, 76 N. C. 115.

See 21 Cent. Dig. tit. "Execution," § 1105.

Moneys in the hands of a police captain who has collected the salary of officers in his precinct as a matter of convenience cannot be reached by a third party order. Gray *v.* Ashley, 24 Misc. (N. Y.) 396, 53 N. Y. Suppl. 547.

15. Blake *v.* Bolte, 10 Misc. (N. Y.) 333, 31 N. Y. Suppl. 124, 24 N. Y. Civ. Proc. 166, 1 N. Y. Annot. Cas. 78.

16. Terry *v.* Deitz, 49 Ind. 293; Hardenburgh *v.* Blair, 30 N. J. Eq. 645 [but see Journeay *v.* Brown, 26 N. J. L. 111]; Matter of Seymour, 76 N. Y. App. Div. 300, 79 N. Y. Suppl. 122; Wetmore *v.* Wetmore, 79 Hun (N. Y.) 268, 29 N. Y. Suppl. 440 [*affirming* 8 Misc. 51, 28 N. Y. Suppl. 377, 31 Abb. N. Cas. 239]; Thompson *v.* Thompson, 52 Hun (N. Y.) 456, 5 N. Y. Suppl. 604; Morgan *v.* Kohnstamm, 9 Daly (N. Y.) 355; Stewart *v.* Foster, 1 Hilt. (N. Y.) 505; Wilder *v.* Clark, 11 N. Y. Suppl. 683; Smith *v.* Barnum, 3 N. Y. Suppl. 476; De Camp *v.* Dempsey, 10 N. Y. Civ. Proc. 210; Sargent *v.* Bennett, 3 How. Pr. N. S. (N. Y.) 515. See, generally, Trusts.

A legacy in the hands of an executor, upon no trust except to pay it over to the legatee, is not a trust created by some person other than the debtor himself. Bacon *v.* Bonham, 27 N. J. Eq. 209.

Property assigned by the debtor for the benefit of his creditors during the life of the execution cannot be reached. Watrous *v.* Lathrop, 4 Sandf. (N. Y.) 700.

Trust created by debtor.— The income of personal property which originally belonged to the debtor and is held under an invalid trust for his support may be reached. Sloan *v.* Birdsall, 58 Hun (N. Y.) 317, 11 N. Y. Suppl. 814. A fund created by the debtor himself from the sale of his own property may be applied to the judgment. Hexter *v.* Clifford, 5 Colo. 168. To the same effect see Sloan *v.* Birdsall, 58 Hun (N. Y.) 317, 11 N. Y. Suppl. 814. Where money is apparently held in trust for the debtor, but in reality it is so held to protect him, it may be reached as property belonging to him. Harvey *v.* Arnold, 84 N. Y. App. Div. 132, 82 N. Y. Suppl. 155.

In Wisconsin money or property in the custody of executors cannot be reached. Williams *v.* Smith, 117 Wis. 142, 93 N. W. 464.

17. Lawrence *v.* Pease, 21 N. Y. Suppl. 223.

Unsettled estate.— See Gerton Carriage Co. *v.* Richardson, 6 Misc. (N. Y.) 466, 27 N. Y. Suppl. 625.

18. Campbell *v.* Foster, 35 N. Y. 361; Graff *v.* Bonnett, 31 N. Y. 9, 88 Am. Dec. 236 [*affirming* 2 Rob. 54]; Locke *v.* Mabbett, 3 Abb. Dec. (N. Y.) 68, 2 Keyes (N. Y.) 457; Levey *v.* Bull, 47 Hun (N. Y.) 350, 28 N. Y. Wkly. Dig. 108; Manning *v.* Evans, 19 Hun (N. Y.) 500; McEwen *v.* Brewster, 17 Hun (N. Y.) 223; Scott *v.* Nevius, 6 Duer (N. Y.) 672; Morgan *v.* Van Kohnstamm, 9 Daly (N. Y.) 355; Stewart *v.* Foster, 1 Hilt. (N. Y.) 505; De Camp *v.* Dempsey, 10 N. Y. Civ. Proc. 210; Genet *v.* Foster, 18 How. Pr. (N. Y.) 50. See also Thompson *v.* Thompson, 52 Hun (N. Y.) 456, 5 N. Y. Suppl. 604.

In Wisconsin the income of personal prop-

satisfy the provisions of the trust may be appropriated by a suit brought for that purpose.[19]

d. After-Acquired Property. The proceedings only affect property which the debtor has at the time the order for his examination is served, and not property thereafter acquired.[20]

G. Time of Institution — 1. During Lien of Judgment.[21] In accordance with the doctrine that the creditor must exhaust his legal remedies before he can resort to these proceedings, they are not available to him after the time the judgment ceases to be a lien on real estate or chattels real.[22]

2. Within Prescribed Time After Return of Execution.[23] Where the time after the return of execution within which the proceedings may be instituted is limited to a time prescribed, the failure to institute the proceedings within the time so limited is a preclusion to the right;[24] and this, although the right accrued under a former statute.[25] The right once lost is not revived by the issuance of a second execution.[26] But if the commencement of the proceedings is not limited to any

erty may be reached. Williams *v.* Smith, 117 Wis. 142, 93 N. W. 464.

19. Manning *v.* Evans, 19 Hun (N. Y.) 500; Morgan *v.* Von Kohnstamm, 9 Daly, (N. Y.) 355.

Remedy by action.— Williams *v.* Thorn, 70 N. Y. 270.

The trustees may be restrained from paying out income until a receiver simultaneously appointed can bring an action. Stewart *v.* Foster, 1 Hilt. (N. Y.) 505.

20. Christensen *v.* Tostevin, 51 Minn. 230, 53 N. W. 461; Locke *v.* Mabbett, 3 Abb. Dec. (N. Y.) 68, 2 Keyes (N. Y.) 457; Norcross *v.* Hollingsworth, 83 Hun (N. Y.) 127, 31 N. Y. Suppl. 627; McGivney *v.* Childs, 41 Hun (N. Y.) 607, 5 N. Y. St. 251; Caton *v.* Southwell, 13 Barb. (N. Y.) 335; Campbell *v.* Genet, 2 Hilt. (N. Y.) 290; Stewart *v.* Foster, 1 Hilt. (N. Y.) 505; Matter of Board of Publication, etc., 22 Misc. (N. Y.) 645, 50 N. Y. Suppl. 171; Rainsford *v.* Temple, 3 Misc. (N. Y.) 294, 22 N. Y. Suppl. 937; Columbian Inst. *v.* Cregan, 3 N. Y. St. 287; Winters *v.* McCarthy, 2 Abb. N. Cas. (N. Y.) 357; Atkinson *v.* Servine, 11 Abb. Pr. N. S. (N. Y.) 384; Hall *v.* McMahon, 10 Abb. Pr. (N. Y.) 103; Sands *v.* Roberts, 8 Abb. Pr. (N. Y.) 343; Peters *v.* Kerr, 22 How. Pr. (N. Y.) 3; Potter *v.* Low, 16 How. Pr. (N. Y.) 549; Gregory *v.* Valentine, 4 Edw. (N. Y.) 282; McCormick *v.* Kehoe, 7 N. Y. Leg. Obs. 184; Thorn *v.* Fellows, 5 N. Y. Wkly. Dig. 473; Merriam *v.* Hill, 1 N. Y. Wkly. Dig. 260.

Rents accruing under an existing lease are not after-acquired property. Lertora *v.* Reimann, 53 N. Y. Suppl. 921, 5 N. Y. Annot. Cas. 19.

21. Necessity of judgment see *supra*, XIII, C, 7, a, b.

22. Importers', etc., Nat. Bank *v.* Quackenbush, 143 N. Y. 567, 38 N. E. 728, 144 N. Y. 651, 39 N. E. 77; Glover *v.* Gargan, 10 N. Y. App. Div. 527, 42 N. Y. Suppl 74; Davidson *v.* Horn, 47 Hun (N. Y.) 51, 27 N. Y. Wkly. Dig. 558.

Proceedings on a justice's judgment which has been duly docketed are not barred by a limitation of the time of bringing an action thereon. Bolt *v.* Hauser, 57 Hun (N. Y.) 567, 11 N. Y. Suppl. 366, 368, 19 N. Y. Civ. Proc. 210 [*affirming* 10 N. Y. Suppl. 397, 19 N. Y. Civ. Proc. 7]; Green *v.* Hauser, 9 N. Y. Suppl. 660, 18 N. Y. Civ. Proc. 354.

Waiver.— That the lien of the judgment has expired is waived by appearing and submitting to an examination, and permitting the appointment of a receiver without objection. Glover *v.* Gargan, 10 N. Y. App. Div. 527, 42 N. Y. Suppl. 74.

23. Necessity of execution and return see *supra*, XIII, C, 7, c.

24. Baumler *v.* Ackerman, 63 Hun (N. Y.) 40, 17 N. Y. Suppl. 436; Cleveland *v.* Johnson, 5 Misc. (N. Y.) 484, 26 N. Y. Suppl. 734; McGuire *v.* Hudson, 16 N. Y. Suppl. 392.

Excusing timely return.— Second Ward Bank *v.* Upmann, 12 Wis. 499.

It will be presumed that the sheriff did his duty by returning the execution within the time limited by law. Bean *v.* Tonnelle, 24 Hun (N. Y.) 353, 1 N. Y. Civ. Proc. 33.

That the debtor was adjudicated a bankrupt, or that proceedings were stayed by the federal court, will not suspend the operation of the limitation, when the debt was not proved in bankruptcy, although proved afterward. Cleveland *v.* Johnson, 5 Misc. (N. Y.) 484, 26 N. Y. Suppl. 734.

Objection to an execution because not issued within the time limited by law must be raised in a direct proceeding for that purpose (U. S. Land, etc., Co. *v.* Pike, 2 Month. L. Bul. (N. Y.) 31); and the proceedings will not be vacated under such circumstances if they were instituted in good faith (Port Jervis Nat. Bank *v.* Hauser, 15 Abb. N. Cas. (N. Y.) 488).

25. Conyngham *v.* Duffy, 125 N. Y. 200, 26 N. E. 142, 20 N. Y. Civ. Proc. 81 [*disapproving* Bean *v.* Tonnelle, 24 Hun (N. Y.) 353, 1 N. Y. Civ. Proc. 33]; Cleveland *v.* Johnson, 5 Misc. (N. Y.) 484, 26 N. Y. Suppl. 734 [*overruling* in effect Bean *v.* Tonnelle, 24 Hun (N. Y.) 353, 1 N. Y. Civ. Proc. 33].

26. Baumler *v.* Ackerman, 63 Hun (N. Y.) 40, 17 N. Y. Suppl. 436.

time after entry of judgment they may be instituted at any time during the life of the judgment.[27]

3. PREMATURE OR COLLUSIVE RETURN.[28] The creditor's remedy by execution must be really exhausted by permitting the officer to take the usual course. If there is collusion, or the return is made prematurely, pursuant to the creditor's instructions, and without any real attempt to effect a levy, the proceedings cannot be sustained.[29]

4. LIMITATION OF TIME.[30] Where the time of instituting the proceedings is limited, the failure to resort to them during the period of limitation will preclude the right to maintain such proceedings.[31] Even though no time is limited the

Where two executions have been issued the limitation applies to the return of the execution first issued. Importers', etc., Nat. Bank *v.* Quackenbush, 143 N. Y. 567, 38 N. E. 728. But see Levy *v.* Kirby, 51 N. Y. Super. Ct. 69, 7 N. Y. Civ. Proc. 98.

27. Especially where the execution was issued within the time limited. Miller *v.* Rossman, 15 How. Pr. (N. Y.) 10. But see Owen *v.* Dupignac, 9 Abb. Pr. (N. Y.) 180, 17 How. Pr. (N. Y.) 512; Currie *v.* Noyes, Code Rep. N. S. (N. Y.) 198.

28. **Necessity of proper return** see *supra*, XIII, C, 7.

29. Spencer *v.* Cuyler, 9 Abb. Pr. (N. Y.) 382, 17 How. Pr. (N. Y.) 157; Nagle *v.* James, 7 Abb. Pr. (N. Y.) 234; Pudney *v.* Griffiths, 6 Abb. Pr. (N. Y.) 211, 15 How. Pr. (N. Y.) 410; Ritterband *v.* Marryatt, 12 N. Y. Leg. Obs. 158. See also Moyer *v.* Moyer, 7 N. Y. App. Div. 523, 40 N. Y. Suppl. 258; Simpkins *v.* Page, 1 Code Rep. (N. Y.) 107; Messenger *v.* Fisk, 1 Code Rep. (N. Y.) 106; Phelps *v.* Brooks, 1 Code Rep. (N. Y.) 85; *In re* Remington, 7 Wis. 643.

There must be a bona fide attempt to find leviable property. Forbes *v.* Waller, 25 N. Y. 430, 25 How. Pr. (N. Y.) 166 [*affirming* 4 Bosw. 475]. See Farquaharson *v.* Kimball, 9 Abb. Pr. (N. Y.) 385 note, 18 How. Pr. (N. Y.) 33.

The mere fact that the premature return was made at the request of the creditor will not invalidate the proceedings where a *bona fide* but unsuccessful attempt has been made to find property of the debtor (Engle *v.* Bonneau, 2 Sandf. (N. Y.) 679, 3 Code Rep. (N. Y.) 205; High Rock Knitting Co. *v.* Bronner, 18 Misc. (N. Y.) 631, 43 N. Y. Suppl. 684; Tyler *v.* Whitney, 12 Abb. Pr. (N. Y.) 465, also reported *sub nom.* Tyler *v.* Willis, 33 Barb. (N. Y.) 327; Sperling *v.* Levy, 10 Abb. Pr. (N. Y.) 426; Farquaharson *v.* Kimball, 9 Abb. Pr. (N. Y.) 385 note, 18 How. Pr. (N. Y.) 33; Forbes *v.* Walter, 25 How. Pr. (N. Y.) 166; Fenton *v.* Flagg, 24 How. Pr. (N. Y.) 499; Livingston *v.* Cleaveland, 5 How Pr. (N. Y.) 396, Code Rep. N. S. (N. Y.) 54; Hart *v.* Stearns, 4 N. Y. Wkly. Dig. 540; Simpkins *v.* Page, 1 Code Rep. (N. Y.) 107; Messenger *v.* Fisk, 1 Code Rep. (N. Y.) 106; Phelps *v.* Brooks, 1 Code Rep. (N. Y.) 85; Tomlinson, etc., Mfg. Co. *v.* Shatto, 34 Fed. 380), and this, it has been held, is so although the sheriff had notice of the existence of property belonging to the debtor (Stoors *v.* Kelsey, 2 Paige (N. Y.) 418).

Where three days after the issue of an execution and a request to the sheriff to try and make it, the latter returned it unsatisfied, with a statement that it was unnecessary to call upon the debtors, as they had nothing, he having had already several executions against them which were returned unsatisfied, an order for the examination of the debtors before the expiration of the sixty days limited for the return was held to have been properly granted. Farquaharson *v.* Kimball, 9 Abb. Pr. (N. Y.) 385 note, 18 How. Pr. (N. Y.) 33.

The debtor may in good faith facilitate proceedings against himself. Lindsley *v.* Van Cortlandt, 67 Hun (N. Y.) 145, 22 N. Y. Suppl. 222.

The remedy for a false return is to move to set it aside. Tyler *v.* Whitney, 12 Abb. Pr. (N. Y.) 465; Sperling *v.* Levy, 10 Abb. Pr. (N. Y.) 426.

30. **Limitation** generally see LIMITATIONS OF ACTIONS.

31. Peck *v.* Disken, 41 Misc. (N. Y.) 473, 84 N. Y. Suppl. 1094; and cases cited *infra*, this note. See also Raboteau *v.* Valeton, 11 Rob. (La.) 218; Simpson *v.* Allain, 7 Rob. (La.) 500.

Computation of time.— N. Y. Code Civ. Proc. § 2435, limits the supplementary proceedings to ten years after the return of the first execution. Importers', etc., Nat. Bank *v.* Quackenbush, 143 N. Y. 567, 38 N. E. 728 [*reversing* 80 Hun 111, 30 N. Y. Suppl. 35]; Baumler *v.* Ackerman, 63 Hun (N. Y.) 40, 17 N. Y. Suppl. 436.

Accrual of right under prior statute.— See Conyngham *v.* Duffy, 125 N. Y. 200, 26 N. E. 142; Cleveland *v.* Johnson, 5 Misc. (N. Y.) 484, 26 N. Y. Suppl. 734. *Contra*, Campbell *v.* Eben, 2 N. Y. Suppl. 615

Justice's judgment.— Supplementary proceedings may be instituted on a justice's judgment which has been docketed in the county clerk's office, within ten years from its rendition. Bolt *v.* Hauser, 10 N. Y. Suppl. 397, 19 N. Y. Civ. Proc. 7 [*affirmed* in 57 Hun 567, 11 N. Y. Suppl. 366, 368, 19 N. Y. Civ. Proc. 210].

Dormant judgment.— A proceeding under Ohio Rev. St. § 5464, in aid of execution, cannot be maintained on a judgment which has become dormant when it is commenced. Simpson *v.* Hook, 6 Ohio Cir. Ct. 27, 3 Ohio Cir. Dec. 333.

proceedings must nevertheless be commenced within a reasonable time after the right accrues [32]

H. Proceedings to Procure Examination [33] — 1. The Affidavit [34] — a. Entitling. The affidavit should be entitled in the court in which the proceedings are instituted,[35] but, if it sufficiently refers to the proceeding, it will not be invalidated by a defective title.[36]

b. Necessary Allegations — (i) *In General.* Ordinarily, to confer jurisdiction to make an order for the examination of the judgment debtor or a third person, an affidavit should be presented [37] which should appropriately set out the requisite facts.[38] An affidavit made on information and belief should disclose the source of information by naming the informant and stating his means of knowledge as well as the affiant's grounds of belief.[39]

Necessity of leave.— See Currie *v.* Noyes, Code Rep. N. S. (N. Y.) 198.

Waiver of objection.— Bolt *v.* Hauser, 10 N. Y. Suppl. 397, 19 N. Y. Civ. Proc. 7.

32. Woodward *v.* Hall, 75 Wis. 406, 44 N. W. 114, where ten years after the return of the execution unsatisfied was held to be too late.

Where commencement of the proceedings is not restricted to any particular period after judgment they should not be set aside because commenced after the lapse of five years from the date of the judgment, especially if the execution was issued within that time. Miller *v.* Rossman, 15 How. Pr. (N. Y.) 10.

33. Proceedings for second examination see *infra*, XIII, I.

Proceedings to examine third parties see *infra*, XIII, J.

34. Forms of affidavits to procure examination of debtor see Bingham *v.* Disbrow, 37 Barb. (N. Y.) 24, 14 Abb. Pr. (N. Y.) 251; Sickels *v.* Hanley, 4 Abb. N. Cas. (N. Y.) 231; Green *v.* Bullard, 8 How. Pr. (N. Y.) 313.

35. See Affidavits, 2 Cyc. 18.

An affidavit to procure an order on a justice's judgment, which by the filing of a transcript is made a judgment of the county court, must be entitled in that court. People *v.* Oliver, 66 Barb. (N. Y.) 370. It is no answer to a proceeding for contempt that the affidavit was entitled in the justice's court, instead of in the county court. People *v.* Oliver, 66 Barb. (N. Y.) 570.

36. Lynch *v.* Riley, 22 N. Y. Wkly. Dig. 357.

Designation of parties.— It is not material that the parties are styled plaintiff and defendant. Davis *v.* Turner, 4 How. Pr. (N. Y.) 190.

Proceedings in probate court.— An application presented to and filed with a probate judge is not defective because entitled in the probate court. White Sewing Mach. Co. *v.* Wait, 24 Kan. 136.

37. Collins *v.* Angell, 72 Cal. 513, 14 Pac. 135; and cases cited *infra*, note 38 *et seq.*

No affidavit is necessary in Nebraska to authorize an order for the examination of the debtor. It is sufficient if it appears that an execution issued and was returned unsatisfied. English *v.* Smith, (Nebr. 1901) 96 N. W. 60. See also Scott *v.* Durfee, 59 Barb. (N. Y.) 390 note, under the New York code of procedure.

38. Conway *v.* Hitchins, 9 Barb. (N. Y.) 378; De Comeau *v.* People, 7 Rob. (N. Y.) 498; Carter *v.* Clarke, 7 Rob. (N. Y.) 490; Eleventh Ward Bank *v.* Heather, 22 Misc. (N. Y.) 87, 48 N. Y. Suppl. 449, 5 N. Y. Annot. Cas. 80 [*reversing* 21 Misc. 539, 47 N. Y. Suppl. 718]; Sackett *v.* Newton, 10 How. Pr. (N. Y.) 560. See *supra*, XIII, C, 1.

Statutory language.— It is not enough to follow the language of the statute. Rome First Nat. Bank *v.* Wilson, 13 Hun (N. Y.) 232.

Alleging jurisdiction.— An affidavit presented in a court of inferior jurisdiction need not state that it is a court of record. Sayer *v.* McDonald, 2 How. Pr. N. S. (N. Y.) 119.

Absence or disqualification of judge.— Where an order can only be made by an officer where the judge whose duty to make it is absent from the county or for any reason unable or disqualified to act to authorize such officer to make an order of examination, the affidavit must show such absence, inability, or disqualification. Shannon *v.* Steger, 75 N. Y. App. Div. 279, 78 N. Y. Suppl. 163.

The nature of the relief sought need not be stated. Knight *v.* Nash, 22 Minn. 452.

Separate prayers for relief.— Where two separate affidavits are filed in which causes therefor are stated, and each of which closes with a separate prayer for relief, the sufficiency of such affidavits is to be considered separately. Abell *v.* Riddle, 75 Ind. 345.

The mere appearance and the examination of the judgment debtor without objection will not confer jurisdiction. Bingham *v.* Disbrow, 37 Barb. (N. Y.) 24, 14 Abb. Pr. (N. Y.) 251; De Comeau *v.* People, 7 Rob. (N. Y.) 498; Carter *v.* Clarke, 7 Rob. (N. Y.) 490; Zelie *v.* Vroman, 22 Misc. (N. Y.) 486, 50 N. Y. Suppl. 836; Driggs *v.* Smith, 47 How. Pr. (N. Y.) 215; Sackett *v.* Newton, 10 How. Pr. (N. Y.) 560.

39. Clarke *v.* Nebraska Nat. Bank, 57 Nebr. 314, 77 N. W. 805, 73 Am. St. Rep. 507; Fraenkel *v.* Miner, 10 N. J. L. J. 341; Levy *v.* Beacham, 64 Hun (N. Y.) 62, 18 N. Y. Suppl. 748; Toronto Gen. Trust Co. *v.* Chicago, etc., R. Co., 64 Hun (N. Y.) 1,

(II) *Of Authority to Institute.*[40] Where the affidavit is made by a person other than the judgment debtor it must show his authority to act on behalf of the creditor.[41] So where the judgment creditor is dead, his personal representatives seeking to enforce the judgment through these proceedings must show their right to do so.[42]

(III) *Of Compliance With Rule of Court.*[43] An affidavit to procure an order of examination need not comply with a rule relative to motions generally, requiring the motion papers to state whether or not any previous application for the order sought was made.[44]

(IV) *Of Recovery of Judgment.*[45] The affidavit should affirmatively show the recovery of a judgment,[46] that it was duly entered or docketed, or, where the judgment was recovered in an inferior or a justice's court, that a transcript thereof

18 N. Y. Suppl. 593; McGuire *v.* Schroeder, 31 Misc. (N. Y.) 179, 63 N. Y. Suppl. 968; Schermerhorn *v.* Owens, 29 Misc. (N. Y.) 674, 62 N. Y. Suppl. 763; Bowery Bank *v.* Widmayer, 9 N. Y. Suppl. 629; People *v.* Jones, 1 Abb. N. Cas. (N. Y.) 172; Manken *v.* Pape, 65 How. Pr. (N. Y.) 453; Horstman *v.* Kaufman, 8 Wkly. Notes Cas. (Pa.) 73. *Contra*, David *v.* Mowbray, 9 Wkly. Notes Cas. (Pa.) 47; Cox *v.* Walton, 8 Wkly. Notes Cas. (Pa.) 360.

Sufficiency of affidavits on information and belief generally see AFFIDAVITS, 2 Cyc. 24.

40. Who may maintain proceedings see *supra*, XIII, D.

41. Brown *v.* Walker, 5 Silv. Supreme (N. Y.) 161, 8 N. Y. Suppl. 59; Lindsay *v.* Sherman, 5 How. Pr. (N. Y.) 308, Code Rep. N. S. (N. Y.) 25.

An affidavit by an agent must state the nature of his agency or authority to act in the premises. Hawes *v.* Barr, 7 Rob. (N. Y.) 452.

An assignee of the judgment must show his right to institute the proceeding. Frederick *v.* Decker, 18 How. Pr. (N. Y.) 98; Lindsay *v.* Sherman, 5 How. Pr. (N. Y.) 308, Code Rep. N. S. (N. Y.) 25. See Hough *v.* Kohlin, Code Rep. N. S. (N. Y.) 232.

An attorney who claims a lien on the judgment must show his status. Merchant *v.* Sessions, 5 N. Y. Civ. Proc. 24; Russell *v.* Sumerville, 4 Month. L. Bul. (N. Y.) 3.

The authority of the attorney of the creditor to institute the proceedings need not be shown. Miller *v.* Adams, 52 N. Y. 409 [*affirming* 7 Lans. 131]; Kress *v.* Morehead, 8 N. Y. St. 858.

Right to require proof of authority.— Where the officer to whom application is made doubts the right of the attorney who applies to act for the judgment creditor, he may require evidence on that point. Kress *v.* Morehead, 8 N. Y. St. 858.

42. The affidavit must state the death of the creditor, the issue of letters to the applicant, his due qualification, and that he has ever since acted as the personal representative of the decedent. Walker *v.* Donovan, 6 Daly (N. Y.) 552, 53 How. Pr. (N. Y.) 3.

Necessity of formal proof.— See Collier *v.* De Revere, 7 Hun (N. Y.) 61; Scott *v.* Durfee, 59 Barb. (N. Y.) 390 note.

43. Rule of court generally see RULES OF COURT.

44. Schanck *v.* Conover, 56 How. Pr. (N. Y.) 437; Sayer *v.* McDonald, 2 How. Pr. N. S. (N. Y.) 119. See Bean *v.* Tonnelle, 24 Hun (N. Y.) 353, 1 N. Y. Civ. Proc. 33.

At most, however, non-compliance with such a rule (Bean *v.* Tonnelle, 24 Hun (N. Y.) 353, 1 N. Y. Civ. Proc. 33), or with a rule requiring the indorsement with the name and address of plaintiff's attorney of all papers required to be filed (Dorsey *v.* Cummings, 48 Hun (N. Y.) 76), are mere irregularities which may be disregarded.

Prior invalid order.— It is not necessary to refer to a previous order which was a nullity. Ludlow *v.* Mead, 3 N. Y. Suppl. 321.

45. Recovery of judgment as a prerequisite to the proceedings see *supra*, XIII, C, 7.

46. Hawes *v.* Barr, 7 Rob. (N. Y.) 452; Walker *v.* Donovan, 6 Daly (N. Y.) 552, 53 How. Pr. (N. Y.) 3.

Jurisdiction of justice.— An affidavit in proceedings on a judgment rendered by a justice need not show that he had jurisdiction. Conway *v.* Hitchins, 9 Barb. (N. Y.) 378. A statement that the judgment was recovered in a justice's court in a certain town named sufficiently states before whom the recovery was had without further particularity. Kress *v.* Morehead, 8 N. Y. St. 858.

Place of recovery.— An affidavit stating that "judgment was rendered and perfected in this action" is sufficient statement that the judgment was recovered in the court in which the affidavit is entitled. Webster *v.* Sawens, 3 How. Pr. N. S. (N. Y.) 320.

In whose favor.— See Kress *v.* Morehead, 8 N. Y. St. 858.

Recovery on personal service or appearance. — It is not necessary to state that the judgment was rendered on personal service of the summons or on the debtor's appearance, when that fact appears by the judgment-roll on file. Sayer *v.* McDonald, 2 How. Pr. N. S. (N. Y.) 119. To the same effect see Bean *v.* Tonnelle, 24 Hun (N. Y.) 353, 1 N. Y. Civ. Proc. 33. Where the execution was returned at the time the statute in effect did not require it to show that the judgment was recovered upon personal service of the summons or an appearance, an application which fails to show that judgment was so rendered is sufficient, although the existing statute

was filed in the proper county.[47] The affidavit should describe the judgment with substantial accuracy,[48] and should show that it was for an amount authorizing the debtor's examination.[49]

(v) *Of Execution and Return.*[50] Unless the proceeding is in aid of execution the regular issuance of an execution on the judgment against the property of the judgment debtor and its return unsatisfied in whole or in part must be appropriately shown.[51]

contains that requirement. Folwell *v.* Cambeis, 14 N. Y. Wkly. Dig. 115.

47. Hawes *v.* Barr, 7 Rob. (N. Y.) 452, holding that a statement that the judgment-roll was filed is insufficient.

A misstatement of the date of entry will not render the order void. Matter of Hatfield, 17 N. Y. App. Div. 430, 45 N. Y. Suppl. 270.

In proceedings on a judgment of a court of record a statement that it was docketed in the county clerk's office is not essential. Kennedy *v.* Thorp, 2 Daly (N. Y.) 258, 3 Abb. Pr. N. S. (N. Y. 131 [*reversed* on other grounds in 51 N. Y. 174].

Sufficiency of allegation of docketing.— See Ludlow *v.* Mead, 3 N. Y. Suppl. 321.

Time of filing transcript.— Hawes *v.* Barr, 7 Rob. (N. Y.) 452.

The affidavit need not state that a transcript was filed except where the judgment was rendered by a justice. Bingham *v.* Disbrow, 37 Barb. (N. Y.) 24, 14 Abb. Pr. (N. Y.) 251; Kennedy *v.* Thorp, 2 Daly (N. Y.) 258, 3 Abb. Pr. N. S. (N. Y.) 131 [*reversed* on other grounds in 51 N. Y. 174].

Filing in another county.— *In re* Stumpp, 32 Misc. (N. Y.) 41, 66 N. Y. Suppl. 172.

48. Kennedy *v.* Weed, 10 Abb. Pr. (N. Y.) 62.

49. Whitlock's Case, 1 Abb. Pr. (N. Y.) 320; Armstrong *v.* Cummings, 1 N. Y. Civ. Proc. 38 note, 2 Month. L. Bul. (N. Y.) 94.

Jurisdictional amount apparent.— The affidavit need not allege that the judgment was for the jurisdictional amount, where the court can see from the amount of it that such must have been the case. Whitlock's Case, 1 Abb. Pr. (N. Y.) 320.

Collateral attack.— Disobedience to an order for examination is not excused, because the affidavit therefor fails to show that the judgment was for the jurisdictional amount. People *v.* Oliver, 66 Barb. (N. Y.) 570.

50. **Issue and return of execution as a prerequisite** to the right to an examination see *supra*, XIII, C, 7.

51. *Indiana.*—Cushman *v.* Gephart, 97 Ind. 46; Mason *v.* Weston, 29 Ind. 561.

Michigan.— Berles *v.* Comstock, 104 Mich. 129, 62 N. W. 148.

Minnesota.— Kay *v.* Vischers, 9 Minn. 270.

New Jersey.— Seyfert *v.* Edison, 47 N. J. L. 428, 1 Atl. 502.

New York.— Moyer *v.* Moyer, 7 N. Y. App. Div. 523, 40 N. Y. Suppl. 258; Schenck *v.* Irwin, 60 Hun 361, 15 N. Y. Suppl. 55, 21 N. Y. Civ. Proc. 96; Hutson *v.* Weld, 38 Hun 142; Felt *v.* Dorr, 29 Hun 14; Conway *v.* Hitchins, 9 Barb. 378; Walker *v.* Donovan, 6 Daly 552, 53 How. Pr. 3; Zelie *v.* Vroman, 22 Misc. 486, 50 N. Y. Suppl. 836; McGuire *v.* Hudson, 16 N. Y. Suppl. 392; Merritt *v.* Judd, 9 N. Y. Suppl. 491, 18 N. Y. Civ. Proc. 159; People *v.* Hulburt, 5 How. Pr. 446, 9 N. Y. Leg. Obs. 245, Code Rep. N. S. 75; Simms *v.* Frier, 2 Month. L. Bul. 97.

North Carolina.— Hinsdale *v.* Sinclair, 83 N. C. 338.

Wisconsin.— Lamonte *v.* Pierce, 34 Wis. 483.

See 21 Cent. Dig. tit. "Execution," § 1111.

Time of issue.— The issue of the execution within the time prescribed by statute must be shown. Hutson *v.* Weld, 38 Hun (N. Y.) 142. Where the affidavit states that a transcript was filed and an execution issued on the same day, it will be presumed that the execution was issued after the transcript was filed. Webster *v.* Sawens, 3 How. Pr. N. S. (N. Y.) 320. A misstatement of the date of issuing the execution is not a jurisdictional defect and may be disregarded. Batcheldor *v.* Nugent, 24 N. Y. Suppl. 828, 23 N. Y. Civ. Proc. 178.

From where issued.— See Merritt *v.* Judd, 9 N. Y. Suppl. 491, 18 N. Y. Civ. Proc. 159.

Issue from court of record.— See Joyce *v.* Spafard, 9 N. Y. Civ. Proc. 342; Webster *v.* Sawens, 3 How. Pr. N. S. (N. Y.) 320.

Necessity where execution issues out of same court.—The affidavit need not state that an execution has been issued, since a judge will take judicial notice that an execution has been issued in his own court. Timm *v.* Stegman, 6 Wash. 13, 32 Pac. 1004.

Issue to what county.— It must appear that the execution issued to the county where the debtor resides when the order is made. Schenck *v.* Irwin, 60 Hun (N. Y.) 361, 15 N. Y. Suppl. 55, 21 N. Y. Civ. Proc. 96.

To authorize the examination of a third person it is sufficient to show that execution issued to the county where the property is expected to be found and where the third person in possession resided. People *v.* Norton, 4 Sandf. (N. Y.) 640.

Alternative allegation.— Zelie *v.* Vroman, 22 Misc. (N. Y.) 486, 50 N. Y. Suppl. 836; Leonard *v.* Bowman, 15 N. Y. Suppl. 822, 21 N. Y. Civ. Proc. 237.

Specification of judgment.— See Lamonte *v.* Pierce, 34 Wis. 483.

Waiver of omission.— Attendance and submission to examination will not cure the failure to show the regular issue of the execution. Schenck *v.* Irwin, 60 Hun (N. Y.) 361, 15 N. Y. Suppl. 55, 21 N. Y. Civ. Proc. 96; Zelie *v.* Vroman, 22 Misc. (N. Y.) 486, 50 N. Y. Suppl. 836.

(VI) *OF DEBTOR'S RESIDENCE OR PLACE OF BUSINESS.*[52] The affidavit must state the residence of the judgment debtor or his place of business[53] at the time of making the affidavit[54] or of the institution of the proceedings.[55] A statement in the alternative is bad[56]

(VII) *AS TO PROPERTY OF DEBTOR.* With respect to the necessity in proceedings instituted after the return of the execution of alleging the existence or non-existence of property belonging to the debtor,[57] the authorities, because of

Admissibility of affidavit in action.— The affidavit cannot be used at the trial to supply a deficiency in the proof as to the issue of an execution. Balz *v.* Benninghof, 5 Ind. App. 522, 32 N. E. 595.

The kind of execution, that is, whether "against property," must be alleged. People *v.* Hulburt, 5 How. Pr. (N. Y.) 446, Code Rep. N. S. (N. Y.) 75, 9 N. Y. Leg. Obs. 245. But see McArthur *v.* Lansburgh, Code Rep. N. S. (N. Y.) 211, holding that if the issue of execution is alleged it will be presumed that it was against property.

Return where the proceedings are in aid of the execution in the hands of the sheriff need not be alleged. Hutson *v.* Weld, 38 Hun (N. Y.) 142.

The return of an alias execution must be shown. Rome First Nat. Bank *v.* Wilson, 13 Hun (N. Y.) 232.

Time of return.— The affidavit must show a return of the execution within the time limited for the institution for the proceedings. McGuire *v.* Hudson, 16 N. Y. Suppl. 392. It is sufficient to show that the time within which it is the sheriff's duty to make the return has expired. Bean *v.* Tonnelle, 24 Hun (N. Y.) 353, 1 N. Y. Civ. Proc. 33. It is immaterial that the return of *nulla bona* was made more than a year before the affidavit. Burkett *v.* Holeman, 119 Ind. 141, 21 N. E. 470; Burkett *v.* Bowen, 118 Ind. 379, 21 N. E. 38.

Waiver of proper return.— Appearance and submission to an examination is a waiver of an objection that a sheriff's return was defective where no prejudice has resulted to the debtor. Baker *v.* Herkimer, 6 N. Y. St. 581.

Proof of the return of the execution unsatisfied may be made by an affidavit of the creditor (Conway *v.* Hitchins, 9 Barb. (N. Y.) 378) or by the sheriff's return (Hinsdale *v.* Sinclair, 83 N. C. 338).

The court is not concluded by the sheriff's return of nulla bona, where it is apparent by the record that the return is false. Moyer *v.* Moyer, 7 N. Y. App. Div. 523, 40 N. Y. Suppl. 258.

52. Jurisdiction dependent on debtor's residence or place of business see *supra,* XIII, C, 6.

53. Franey *v.* Smith, 88 Hun (N. Y.) 215, 34 N. Y. Suppl. 780; Brown *v.* Gump, 59 How. Pr. (N. Y.) 507; Driggs *v.* Smith, 47 How. Pr. (N. Y.) 215. An allegation that the debtor has an "office" for the personal transaction of business sufficiently states that he has a "place" for the transaction of business in person. Batcheldor *v.* Nugent, 24 N. Y. Suppl. 828, 23 N. Y. Civ. Proc. 178.

Non-residence.— An allegation that the debtor resides in another state is insufficient. Driggs *v.* Smith, 47 How. Pr. (N. Y.) 215.

54. The residence or place of business which must be stated is that of the time of making the affidavit and not that of the time the execution was issued. Franey *v.* Smith, 88 Hun (N. Y.) 215, 34 N. Y. Suppl. 780; Zelie *v.* Vroman, 22 Misc. (N. Y.) 486, 50 N. Y. Suppl. 836.

55. Lawyers' Title Ins. Co. *v.* Stanton, 84 N. Y. Suppl. 468.

The affidavit for the examination of a third person must state the residence of the judgment debtor at the time of the institution of the proceeding. Matter of Gagnon, 32 N. Y. App. Div. 22, 52 N. Y. Suppl. 309.

56. Arnot *v.* Wright, 55 Hun (N. Y.) 561, 9 N. Y. Suppl. 15; Zelie *v.* Vroman, 22 Misc. (N. Y.) 486, 50 N. Y. Suppl. 836; Kellogg *v.* Freeman, 2 N. Y. City Ct. 147.

57. In Indiana to reach funds of the judgment debtor in the hands of third parties, the affidavit must show that such debtor has property which he unjustly refuses to apply toward the satisfaction of the judgment. Earl *v.* Skiles, 93 Ind. 178.

In Iowa under a statute requiring an affidavit to show that the debtor has property which he refuses to apply to the satisfaction of the judgment, such affidavit is not necessary on a second examination, which is but the continuation of a former one. McDonnell *v.* Henderson, 74 Iowa 619, 38 N. W. 512.

In New Jersey the petition must state a belief that the judgment debtor has property reserved sufficient to pay the execution. Seyfert *v.* Edison, 47 N. J. L. 428, 1 Atl. 502.

In New York, although there are decisions to the contrary (Engle *v.* Bonneau, 2 Sandf. 679, 3 Code Rep. 205; Jones *v.* Lawlin, 1 Sandf. 722; Tillow *v.* Vere, 1 Code Rep. 130), the rule seems to be that the affidavit need not state that the debtor has property applicable to the debt, which was not reached by the execution (Anonymous, 3 Sandf. 725; Hatch *v.* Weyburn, 8 How. Pr. 163; Hough *v.* Koblin, Code Rep. N. S. 232).

In North Carolina it is necessary to show: (1) The want of property liable to execution, which is proved by the sheriff's return of "unsatisfied;" (2) the non-existence of any equitable estate in land within the lien of the judgment; and (3) the existence of property, choses in action, and things of value unaffected by any lien and incapable of levy. Hackney *v.* Arrington, 99 N. C. 110, 5 S. E. 747; Magruder *v.* Shelton, 98 N. C. 545, 4 S. E. 141, 2 Am. St. Rep. 349; Hinsdale *v.* Sinclair, 83 N. C. 338; Weiller *v.* Lawrence, 81 N. C. 65. A statement that

diverse statutes, are not uniform. And so with the necessity of specifying or describing the property.[58] Where in a proceeding in aid of execution the statute requires it to be shown that the judgment debtor has property which he unjustly refuses to apply to the satisfaction of the judgment, that fact must be duly alleged.[59]

(VIII) *AS TO AMOUNT DUE.* So long as any part of the judgment remains unsatisfied the creditor is entitled to an order requiring the debtor to appear and answer.[60] And it has been held that if the execution has been returned partly

certain persons are indebted to the debtor is sufficient without stating that defendant has no property liable to execution. Hutchison *v.* Symons, 67 N. C. 156. The omission of the proper negative averments as to property in defendant liable to execution, or the existence in him of equitable interests which may be subjected to sale in the nature of execution, may be remedied by amendment at the hearing. Weiller *v.* Lawrence, 81 N. C. 65.

In Oregon a statement that the debtor had property liable to execution which he refused to apply toward the satisfaction of the judgment, if believed by the court or judge, is sufficient to authorize the issuance of orders requiring the judgment debtor to appear for examination and to satisfy the judgment, notwithstanding an attachment of certain tangible property without levy of execution thereon, and the existence of sufficient tangible property to satisfy an execution. State *v.* Downing, 40 Oreg. 309, 58 Pac. 863, 66 Pac. 917.

In Pennsylvania an affidavit for the examination of an alleged fraudulent debtor, which follows the words of the statute, that deponent "had reason to believe" that the judgment debtor had property, rights in action, etc., "which he fraudulently conceals" and refuses to apply to the payment of his debts," etc., is sufficient, although it does not set forth the grounds of belief. Davis *v.* Mowbray, 9 Wkly. Notes Cas. 47; Cox *v.* Walton, 8 Wkly. Notes Cas. 360. *Contra,* Horstman *v.* Kaufman, 8 Wkly. Notes Cas. 73.

58. In New York the property must be described. Manken *v.* Pape, 65 How. Pr. 453.

In North Carolina the property need not be specified. Magruder *v.* Shelton, 98 N. C. 545, 4 S. E. 141, 2 Am. St. Rep. 349.

Allegation of exemption.— Abell *v.* Riddle, 75 Ind. 345.

59. Hutchison *v.* Symons, 67 N. C. 156.

In Indiana, when the execution remains in the sheriff's hands unsatisfied, the affidavit must show that the judgment debtor has no other property than that held by a third party. Balz *v.* Benninghof, 5 Ind. App. 522, 32 N. E. 595. It is sufficient to allege that the debtor has an equitable interest in real estate which he refuses to apply to the judgment. Carpenter *v.* Vanscoten, 20 Ind. 50.

In Iowa it is necessary to show that no property is known to plaintiff or the officer on which execution can be executed, or that there is not enough to satisfy the claim of plaintiff, and further that defendant has property in the state not exempt from execution. Lutz *v.* Aylesworth, 66 Iowa 629, 24 N. W. 245.

In New York a plain case showing that the debtor has property which he unjustly refuses to apply must be shown. Owen *v.* Dupignac, 17 How. Pr. 512. An affidavit which disclosed only that there was a place of business conducted by defendant's son, and that plaintiff was informed that defendant had and still has an interest in the merchandise and stock thereof, does not show that he has any property freed from the claim of third persons which he refuses to apply to the payment of his debts. Owen *v.* Dupignac, 17 How. Pr. (N. Y.) 512.

An affidavit in the language of the statute is sufficient. Rome First Nat. Bank *v.* Wilson, 13 Hun (N. Y.) 232.

An affidavit on information and belief that defendant has property which he unjustly refuses to apply toward the satisfaction of the judgment" is insufficient. The affiant should give the name of his informant, with his means of knowledge, and should describe the property and allege a demand. Manken *v.* Pape, 65 How. Pr. (N. Y.) 453.

Property not subject to levy.— In New York an order in aid of execution can be granted only on a showing that the debtor has property which is not subject to execution, or which cannot be reached by an execution. Sackett *v.* Newton, 10 How. Pr. 560. In North Carolina a statement that defendant has not sufficient property subject to execution to satisfy the judgment but has property "not exempted from execution," which he unjustly refuses to apply to its satisfaction, is sufficient. Farmers', etc., Nat. Bank *v.* Burns, 109 N. C. 105, 13 S. E. 871. In Oregon a statement that the debtor had property liable to execution which he refused to apply toward the satisfaction of the judgment, if believed by the court or judge, if sufficient to authorize the issuance of orders requiring the judgment debtor to appear for examination and to satisfy the judgment, notwithstanding an attachment of certain tangible property without levy of execution thereon, and the existence of sufficient tangible property to satisfy an execution. State *v.* Downing, 40 Oreg. 309, 58 Pac. 863, 66 Pac. 917.

60. Austin *v.* Byrnes, 54 N. Y. Super. Ct. 552, 12 N. Y. Civ. Proc. 332; Johnson *v.* Tuttle, 17 Abb. Pr. (N. Y.) 315.

If the record shows a satisfaction of the judgment the proceedings will be quashed. Davis *v.* Mowbray, 9 Wkly. Notes Cas. (Pa.) 47.

unsatisfied the affidavit must contain a statement showing the amount due on the judgment.[61]

(IX) *Of Demand to Apply Property.* In some jurisdictions where the proceedings are in aid of an execution which has not been returned no demand on the debtor to apply his property in satisfaction of the judgment is necessary or need be shown.[62] In others such a demand and non-compliance therewith has been held necessary to show a refusal of such application.[63]

(X) *Indebtedness or Possession of Property by Third Party*— (A) *In General.* Where to authorize the examination of third persons it must appear that he is indebted to the judgment debtor in a sum exceeding a specified amount, the facts relative thereto must be duly alleged.[64] But such a provision does not apply where the object of the proceeding is to reach property of the debtor in the hands of such third person.[65]

(B) *Necessity of Positive Allegations.* It is not necessary to present positive proof of the indebtedness of the third person, or his possession of property of the debtor, but it is only necessary that the proof should be sufficient to satisfy the judge to whom application is made.[66]

(C) *Alternative Allegations.* An affidavit that such person has property of

61. Douglass *v.* Mainzer, 40 Hun (N. Y.) 75, holding, however, that, while the absence of the statement will require the vacation of the order, it will not deprive the court of jurisdiction.

62. Weiller *v.* Lawrence, 81 N. C. 65; Edgarton *v.* Hanna, 11 Ohio St. 323.

Application for the examination of a third person in aid of an outstanding execution need not allege a demand, as required where the proceeding in aid is to reach money or property in possession of the debtor. Potts *v.* Davidson, 1 How. Pr. N. S. (N. Y.) 216.

63. Levy *v.* Beacham, 64 Hun (N. Y.) 62, 18 N. Y. Suppl. 748; Toronto Gen. Trust Co. *v.* Chicago, etc., R. Co., 64 Hun (N. Y.) 1, 18 N. Y. Suppl. 593; Hutson *v.* Weld, 38 Hun (N. Y.) 142; Rome First Nat. Bank *v.* Wilson, 13 Hun (N. Y.) 232; Bowery Bank *v.* Widmayer, 9 N. Y. Suppl. 629; Manken *v.* Pape, 65 How. Pr. (N. Y.) 453.

The facts and circumstances showing the refusal to be unjust must be stated. A general statement that defendant has certain real estate, which on demand he unjustly refuses to apply toward the satisfaction of the judgment, is insufficient. Matter of Albany First Nat. Bank, 52 N. Y. App. Div. 601, 65 N. Y. Suppl. 439.

64. An affidavit is sufficient which sets forth an indebtedness in the statutory amount, although it appears that it was not due when the affidavit was made. Davis *v.* Jones, 8 N. Y. Civ. Proc. 43; Davis *v.* Herrig, 65 How. Pr. (N. Y.) 290.

As to exemptions.— In Oregon the affidavit must state the indebtedness and that the same together with other property claimed by the debtor as exempt from execution exceeds the amount of the property so exempt. Briscoe *v.* Askey, 12 Ind. 666.

65. Brett *v.* Browne, 1 Abb. Pr. N. S. (N. Y.) 155.

66. Miller *v.* Adams, 52 N. Y. 409 [*affirming* 7 Lans. 131]; Hoorman *v.* Climax Cycle Co., 9 N. Y. App. Div. 579, 41 N. Y. Suppl. 710; Bucki *v.* Bucki, 26 Misc. (N. Y.) 69, 56 N. Y. Suppl. 439; Grinnell *v.* Sherman, 11 N. Y. Suppl. 682, 19 N. Y. Civ. Proc. 139; Tefft *v.* Epstein, 7 N. Y. Suppl. 897, 17 N. Y. Civ. Proc. 168; Carley *v.* Todd, 56 N. Y. App. Div. 170, 67 N. Y. Suppl. 640, where the source of information and grounds of belief were set forth. *Compare* Bruen *v.* Nickels, 30 N. Y. App. Div. 396, 51 N. Y. Suppl. 352.

Information and belief.—An allegation that the third person has property of the debtor or is indebted to him, made on information and belief, is sufficient to confer jurisdiction without positive proof. Miller *v.* Adams, 52 N. Y. 409 [*affirming* 7 Lans. 131]. An order based on an affidavit made on information and belief is effective until vacated. Pierce *v.* Parrish, 28 N. Y. App. Div. 22, 50 N. Y. Suppl. 735; Fleming *v.* Tourgee, 16 N. Y. Suppl. 2, 21 N. Y. Civ. Proc. 297.

A subsequent order made in the proceeding cannot be attacked, because the order for examination was on information and belief. Cooman *v.* Board of Education, 37 Hun (N. Y.) 96.

The better practice seems to require, however, that the allegations should be as positive as the circumstances permit, and that where the affidavit is made on information and belief the sources of the information and grounds of the belief should be appropriately stated. Githens *v.* Mount, 64 N. J. L. 166, 44 Atl. 851; Carley *v.* Tod, 56 N. Y. App. Div. 170, 67 N. Y. Suppl. 640; Pierce *v.* Parrish, 28 N. Y. App. Div. 22, 50 N. Y. Suppl. 735; Matter of Leslie Co., 19 Misc. (N. Y.) 667, 44 N. Y. Suppl. 667; Fleming *v.* Tourgee, 16 N. Y. Suppl. 2, 21 N. Y. Civ. Proc. 297 [*affirmed* without opinion in 136 N. Y. 642, 32 N. E. 1015]; Leonard *v.* Bowman, 15 N. Y. Suppl. 822, 21 N. Y. Civ. Proc. 237; People *v.* Jones, 1 Abb. N. Cas. (N. Y.) 172, 52 How. Pr. (N. Y.) 95.

The relation of the information to the third person should be shown. Lockwood *v.* Sello, 27 Misc. (N. Y.) 826, 57 N. Y. Suppl. 816.

the debtor in excess of the statutory amount or is indebted to him beyond such amount is bad because in the alternative.[67]

c. Verification. The affidavit should be verified by the judgment creditor, or by some other person having knowledge of the facts and authorized to act in that behalf.[68]

d. Filing Affidavits. After satisfaction of the judgment and discontinuance of the proceedings, and subsequent to procuring an order to examine a third party, the debtor may compel the creditor to file the affidavits on which it was granted.[69]

e. Defects — Objections. If the affidavit is defective, the remedy is to set aside the order granted upon it[70] by a motion in which the defects are specified.[71]

2. Order For Examination — a. Entitling. Where the order is made by the judge of a court other than that out of which the execution issued, it is properly entitled as of the latter court.[72] But jurisdiction will not be lost because the order is improperly entitled.[73]

b. Requisites[74] **— (i)** *In General.* If a proper affidavit be presented or filed an order for the debtor's examination is of right.[75] It should set forth or recite

67. Smith *v.* Cutter, 64 N. Y. App. Div. 412, 72 N. Y. Suppl. 99; Collins *v.* Beebe, 54 Hun (N. Y.) 318, 7 N. Y. Suppl. 442; Leonard *v.* Bowman, 15 N. Y. Suppl. 822, 21 N. Y. Civ. Proc. 237; Lee *v.* Heirberger, 2 Edm. Sel. Cas. (N. Y.) 23. But see Miller *v.* Adams, 52 N. Y. 409 [*affirming* 7 Lans. 131].

Character of possession.—An allegation that the third party has property of the debtor, "as receiver or individually," is insufficient. Fitchburg Nat. Bank *v.* Bushwick Chemical Works, 13 N. Y. Civ. Proc. 155.

68. See Affidavits, 2 Cyc. 26.

Verification by agent.— A requirement of verification by plaintiff in execution is not complied with by an affidavit of his agent. Westfall *v.* Dunning, 50 N. J. L. 459, 14 Atl. 486.

Presumption.— An order reciting that the necessary facts were made to appear will be presumed to have been made on a proper showing, although an unverified affidavit indorsed as having been read on the motion is found on the files of the court. Rugg *v.* Spencer, 59 Barb. (N. Y.) 383.

69. Sinnott *v.* Hempstead First Nat. Bank, 34 N. Y. App. Div. 161, 54 N. Y. Suppl. 417.

That it may tend to incriminate the party by whom it was presented will not justify a refusal. Sinnott *v.* Hempstead First Nat. Bank, 34 N. Y. App. Div. 161, 54 N. Y. Suppl. 417.

Waiver of right.— Irregularity, consisting in the failure to file an affidavit, before the report of the referee is filed, is waived by obedience to the order and submission to examination without objection. Collins *v.* Angell, 72 Cal. 513, 14 Pac. 135.

70. Diossy *v.* West, 1 Month. L. Bul. (N. Y.) 23.

An order made on a defective affidavit is good until vacated. Pierce *v.* Parrish, 28 N. Y. App. Div. 22, 50 N. Y. Suppl. 735.

The failure to indorse the affidavit with the name of the attorney and his post-office address is a mere irregularity which does not justify the vacation of the order *ex parte*. Dorsey *v.* Cummings, 48 Hun (N. Y.) 76, 15 N. Y. St. 459.

71. Schnitzer *v.* Willner, 7 Misc. (N. Y.) 497, 27 N. Y. Suppl. 970. *Compare* Hilton *v.* Patterson, 18 Abb. Pr. (N. Y.) 245, holding that the truth of statements cannot be controverted collaterally.

In Indiana the affidavit may be amended as in a civil action. Burkett *v.* Holeman, 119 Ind. 141, 21 N. E. 470; Burkett *v.* Bowen, 118 Ind. 379, 21 N. E. 470; Hutchinson *v.* Trauerman, 112 Ind. 21, 13 N. E. 412.

72. Ackerly, etc., Co. *v.* Partz, 14 N. Y. Suppl. 466, 20 N. Y. Civ. Proc. 282. In Milliken *v.* Thomson, 54 N. Y. Super. Ct. 393, 8 N. Y. St. 106, 12 N. Y. Civ. Proc. 168, it was intimated that the proceedings are no part of the action and that the order for examination should not be entitled therein.

An order in proceedings on a justice's judgment, which by the filing of a transcript becomes a judgment of the county court, must be entitled in that court. People *v.* Oliver, 66 Barb. (N. Y.) 570.

73. Lynch *v.* Riley, 22 N. Y. Wkly. Dig. 357.

Entitling at special term.— It is immaterial that the order is entitled at special term, if it was there made at a time when the judge was not actually sitting as a court. Dresser *v.* Van Pelt, 6 Duer (N. Y.) 687, 15 How. Pr. (N. Y.) 19.

Entitling in court where judgment was rendered instead of in the court where the proceedings are instituted is a mere irregularity. People *v.* Oliver, 66 Barb. (N. Y.) 570.

74. **Form of orders** for the examination of the debtor see White Sewing Mach. Co. *v.* Wait, 24 Kan. 136; Bingham *v.* Disbrow, 37 Barb. (N. Y.) 24; Sickels *v.* Hanley, 4 Abb. N. Cas. (N. Y.) 231; Green *v.* Bullard, 8 How. Pr. (N. Y.) 313.

75. Davis *v.* Mowbray, 9 Wkly. Notes Cas. (Pa.) 47; Cox *v.* Walton, 8 Wkly. Notes Cas. (Pa.) 360. See also Eleventh Ward Bank *r.* Heather, 22 Misc. (N. Y.) 87, 48 N. Y. Suppl. 449, 5 N. Y. Annot. Cas. 80 [*reversing* 21 Misc. 539, 47 N. Y. Suppl. 718].

all the facts necessary to the jurisdiction,[76] and when all the necessary facts to constitute it a regular and valid order are recited it will be so deemed until attacked by a direct proceeding and the contrary is made to appear.[77]

(II) *BEFORE WHOM RETURNABLE*[78] — (A) *Judge.* Except where a referee is appointed the order must require the judgment debtor to appear before the judge who grants the order or before a designated justice before whom the subsequent proceedings are to be had.[79] In New York when the proceedings are instituted in the supreme court within a district where the debtor does not reside, the order must be made returnable to a justice of the district in which the debtor has his residence.[80] It is essential that the officer before whom the proceedings are made returnable should be designated with reasonable particularity.[81] But

If the creditor makes out a prima facie case, his right cannot be defeated by an affidavit interposed by the creditor, denying that the creditor has exhausted his remedies, where no fraud or collusion is shown. Eleventh Ward Bank *v.* Heather, 22 Misc. (N. Y.) 87, 48 N. Y. Suppl. 449, 5 N. Y. Annot. Cas. 80 [*reversing* 21 Misc. 539, 47 N. Y. Suppl. 718].

Necessity of order.— A voluntary appearance and submission to examination confers no jurisdiction where no order was made. De Comeau *v.* People, 7 Rob. (N. Y.) 498; Sackett *v.* Newton, 10 How. Pr. (N. Y.) 560.

Summons as order.— Carpenter *v.* Vanscoten, 20 Ind. 50.

76. Day *v.* Brosnan, 6 Abb. N. Cas. (N. Y.) 312. But see People *v.* Oliver, 66 Barb. (N. Y.) 570.

Inadequacy of execution.— The order must state why the remedy by execution was inadequate. Matter of Albany First Nat. Bank, 52 N. Y. App. Div. 601, 65 N. Y. Suppl. 439.

Residence or business in district.— Jesup *v.* Jones, 32 How. Pr. (N. Y.) 191.

The existence of jurisdictional facts is not waived by appearance and submission to examination without objection. Jennings *v.* Lancaster, 15 Misc. (N. Y.) 444, 37 N. Y. Suppl. 196; Sackett *v.* Newton, 10 How. Pr. (N. Y.) 560. But otherwise as to irregularities or defects which are not jurisdictional. Underwood *v.* Sutcliffe, 10 Hun (N. Y.) 453; Bingham *v.* Disbrow, 37 Barb. (N. Y.) 24, 14 Abb. Pr. (N. Y.) 251; Hobart *v.* Frost, 5 Duer (N. Y.) 672, 3 Abb. Pr. (N. Y.) 119; Ammidon *v.* Wolcott, 15 Abb. Pr. (N. Y.) 314.

77. Wright *v.* Nostrand, 94 N. Y. 31 [*affirming* 47 N. Y. Super. Ct. 441]; Palmer *v.* Co'ville, 63 Hun (N. Y.) 536, 18 N. Y. Suppl. 509; Cooman *v.* Board of Education, 37 Hun (N. Y.) 96; Rugg *v.* Spencer, 59 Barb. (N. Y.) 383; Lisner *v.* Toplitz, 177 N. Y. 559, 69 N. E. 1125 [*affirming* 86 N. Y. App. Div. 1, 83 N. Y. Suppl. 423].

Presumption.— An order reciting that the facts necessary to its issuance were duly made to appear may be sustained on the presumption which the law indulges in support of judicial authority and proceedings. Rugg *v.* Spencer, 59 Barb. (N. Y.) 383.

78. Jurisdiction to make order see *supra*, XIII, C.

79. See Dresser *v.* Van Pelt, 6 Duer (N. Y.) 687, 15 How. Pr. (N. Y.) 19; New York Sav. Bank *v.* Hope, 8 Daly (N. Y.) 316; and cases cited *infra*, this note.

A requirement that "all subsequent proceedings shall be had before me" means all subsequent proceedings under that order but will not preclude proceedings before another judge against a different defendant. Rome First Nat. Bank *v.* Dering, 8 N. Y. Wkly. Dig. 261.

Appearance after examination.— Sickels *v.* Hanley, 4 Abb. N. Cas. (N. Y.) 231.

Order returnable before court.— An order is not irregular because returnable before the court instead of before the judge by whom it was issued. Barrington *v.* Watkins, 36 N. Y. App. Div. 31, 55 N. Y. Suppl. 97.

Waiver of requirement to appear — Wrong justice.— An objection that the order was made returnable before one of the justices of the court, not before the judge making the order, is waived by failure to object on the return-day, and acquiescing in an order denying a motion to set aside the proceedings by failure to appeal (Ammidon *v.* Wolcott, 15 Abb. Pr. (N. Y.) 314), or by voluntarily submitting to examination (Hobart *v.* Frost, 5 Duer (N. Y.) 672, 3 Abb. Pr. (N. Y.) 119).

80. Peck *v.* Baldwin, 131 N. Y. 567, 30 N. E. 64 [*affirming* 58 Hun 308, 11 N. Y. Suppl. 792, 19 N. Y. Civ. Proc. 403]; Gildersleeve *v.* Lester, 69 Hun (N. Y.) 344, 23 N. Y. Suppl. 471; Browning *v.* Hayes, 41 Hun (N. Y.) 382, 11 N. Y. Civ. Proc. 223, 25 N. Y. Wkly. Dig. 26; *In re* Conklin, 57 N. Y. Suppl. 844.

When such an order is made as to a third person, all subsequent proceedings must be had in the district where the debtor resides. Gildersleeve *v.* Lester, 69 Hun (N. Y.) 344, 23 N. Y. Suppl. 471.

Want of authority.— Although the execution issued out of a court having general jurisdiction without the state, in the absence of a statutory provision to that effect, there is no authority in the judge granting an order in one district to make all subsequent proceedings returnable before a judge in another district. Blanchard *v.* Reilly, 11 N. Y. Civ. Proc. 278.

Report of testimony.— See Pardee *v.* Tilton, 20 Hun (N. Y.) 76, 58 How. Pr. (N. Y.) 476.

Waiver of defects.— Hobart *v.* Frost, 5 Duer (N. Y.) 672, 3 Abb. Pr. (N. Y.) 119.

81. Shults *v.* Andrews, 54 How. Pr. (N. Y.) 376.

mere vagueness not amounting to uncertainty will, it has been held, not vitiate the order [82]

(B) *Referee.*[83] A referee may be appointed by the order [84] with [85] or, where so authorized by statute, without the consent of the parties,[86] or where it is apparent that the examination will be protracted and the parties are attended by counsel.[87]

(III) *Time of Examination.* The order should fix the time when the person whose examination is desired is required to appear for that purpose.[88]

(IV) *Place of Examination.*[89] Likewise the place of appearance or where the examination is to be held must be specified in the order.[90] With respect to a third person, a place may be designated with reference to his convenience.[91]

82. Kress *v.* Morehead, 8 N. Y. St. 858.

83. Appointment of referee see *infra*, XIII, H, 2, b, (II), (B).

84. People *v.* Levy, 16 Misc. (N. Y.) 615, 40 N. Y. Suppl. 743, 25 N. Y. Civ. Proc. 390, 11 N. Y. Cr. 356; Sickels *v.* Hanley, 4 Abb. N. Cas. (N. Y.) 231; Hulsaver *v.* Wiles, 11 How. Pr. (N. Y.) 446; Green *v.* Bullard, 8 How. Pr. (N. Y.) 313 [*overruling* Hatch *v.* Weyburn, 8 How. Pr. (N. Y.) 163].

In Kansas a probate judge may appoint a referee. Hunter *v.* Betts, (App. 1898) 53 Pac. 86.

The West Virginia act, providing for the appointment of commissions in supplementary proceedings by the circuit courts instead of by the governor, is a valid enactment. Lewis *v.* Rosler, 19 W. Va. 61.

Conflicting claims to judgment.— Where a judgment is claimed, under assignments by the judgment creditor, both by his attorney and by a third party, the court has no power to refer the matter summarily to a referee to determine the respective rights of the claimants. Hexter *v.* Pennsylvania R. Co., 43 N. Y. App. Div. 113, 59 N. Y. Suppl. 453.

Requiring appearance before referee in other district.— It is irregular to require the debtor to attend before a referee in another district. Browning *v.* Hayes, 41 Hun (N. Y.) 382, 11 N. Y. Civ. Proc. 223, 25 N. Y. Wkly. Dig. 26.

Who may be appointed.— In proceedings on a justice's judgment, it is the practice to appoint the justice who rendered the judgment. Hough *v.* Kohlin, Code Rep. N. S. (N. Y.) 232. In New York it is usual to allow the creditor to name the referee. Gilbert *v.* Frothingham, 13 N. Y. Civ. Proc. 288.

Waiver of irregular appointment.— Rouse *v.* Goodman, 8 Misc. (N. Y.) 691, 28 N. Y. Suppl. 524.

Separate appointment.— Lewis *v.* Penfield, 39 How. Pr. (N. Y.) 490.

Substitution of referee.— Where a referee has been appointed by a judge in one district and further proceedings directed to be had before a judge in another district, the latter may substitute another person as referee. Pardee *v.* Tilton, 83 N. Y. 623. Where an order appointing a referee is still in existence, although repudiated by the creditor, there is no jurisdiction to issue another order naming a different referee. Brockway *v.* Brien, 37 How. Pr. (N. Y.) 270.

Where the referee named is absent at the time fixed for the examination, an order of a judge other than the one who granted the order is irregular. The latter may name another referee or fix another time for the examination. Allen *v.* Starring, 26 How. Pr. (N. Y.) 57.

85. Hollister *v.* Spafford, 3 San. f. (N. Y.) 742; Jones *v.* Lawlin, 1 Sandf. (N. Y.) 722.

86. Howe *v.* Welch, 11 N. Y. Civ. Proc. 444.

87. Hollister *v.* Spafford, 3 Sandf. (N. Y.) 742.

88. See cases cited *infra*, this note.

In Indiana the time for the debtor to answer is fixed by statute as the first day of the term, but a different day, even in term, may be designated. Tompkins *v.* Floyd County Agricultural, etc., Assoc., 19 Ind. 197.

In North Carolina the judge has discretion to fix the time and is not controlled by a statute requiring eight days' notice of motion. Weiller *v.* Lawrence, 81 N. C. 65.

After reinstating an order which has been set aside, and after the expiration of the time appointed for the examination, another date may be set for proceeding under the original order. Joyce *v.* Spafard, 9 N. Y. Civ. Proc. 342.

An objection that the copy of an order served requiring the debtor's appearance on a subsequent day of the same month did not designate the year is frivolous. Barrington *v.* Watkins, 36 N. Y. App. Div. 31, 55 N. Y. Suppl. 97.

On denying a motion to vacate an order the debtor may be required to appear on a day named. Johnson *v.* Tuttle, 17 Abb. Pr. (N. Y.) 315.

An order returnable on Sunday is a nullity and may be disregarded. The debtor is not required to appear on another date, inserted in the order after the error is discovered. Arctic F. Ins. Co. *v.* Hicks, 7 Abb. Pr. (N. Y.) 204.

89. Place of conducting examinations see *infra*, XIII, Q, 5.

90. Kelty *v.* Yerby, 31 How. Pr. (N. Y.) 95.

The "office" of a county judge in a city before whom appearance is required does not necessarily mean his law office. Myers *v.* Janes, 3 Abb. Pr. (N. Y.) 301.

The place designated where defendant shall appear and answer should be within the county where defendant resides. Hasty *v.* Simpson, 77 N. C. 69.

91. Foster *v.* Prince, 8 Abb. Pr. (N. Y.) 407, 18 How. Pr. (N. Y.) 258.

c. Service — (I) *In General.* Timely[92] service of the order and other necessary papers must be made[93] personally.[94] In some jurisdictions service may be made upon the debtor's attorney,[95] or by leaving a copy of the order with his wife,[96] and it has been held that service may be made beyond the jurisdiction of the court in which the judgment was rendered, and even without the state.[97] But the judge issuing the order has no power to dispense with or change the manner of service prescribed by statute.[98]

(II) *Exemptions.* A resident is not exempt from service while in attendance on court,[99] but a non-resident is,[1] and so is a legislator during the time in which he is exempt from arrest on civil process.[2]

(III) *Who May Serve.* Any one may serve the order.[3]

(IV) *Proof of Service.* An order in supplementary proceedings is not process so as to permit proof of service by a sheriff's certificate,[4] and defects in

92. People *v.* Warner, 51 Hun (N. Y.) 53, 3 N. Y. Suppl. 768.

Where the order is not served until after the return-day no jurisdiction is acquired by the subsequent appearance of the debtor to raise objections. Henderson *v.* Stone, 2 Sweeny (N. Y.) 468, 40 How. Pr. (N. Y.) 333.

Arrest for disobedience to order not served in time.— Where a notice of examination has been served on a debtor, which is insufficient in respect to the time allowed before the day of the examination, and, the debtor not appearing, the magistrate has made and annexed to the execution a certificate authorizing the debtor's arrest, and he is arrested accordingly, such arrest is illegal, and the debtor does not waive such illegality by recognizing before another magistrate, and taking the oath before him. Lane *v.* Holman, 145 Mass. 221, 13 N. E. 602.

93. People *v.* Warner, 51 Hun (N. Y.) 53, 3 N. Y. Suppl. 768 [*affirmed* in 125 N. Y. 746, 27 N. E. 407]; Morgan *v.* Van Kohnstamm, 9 Daly (N. Y.) 355.

Copy of the affidavit on which the order is based need not be served with it. Rome First Nat. Bank *v.* Wilson, 13 Hun (N. Y.) 232; Utica City Bank *v.* Buell, 9 Abb. Pr. (N. Y.) 385, 17 How. Pr. (N. Y.) 498; Farquaharson *v.* Kimball, 9 Abb. Pr. (N. Y.) 385 note, 18 How. Pr. (N. Y.) 33; Green *v.* Bullard, 8 How. Pr. (N. Y.) 313. But see National Printing Co. *v.* Patterson, 4 Month. L. Bul. (N. Y.) 64.

Immaterial variances between the copy affidavit served and the original will not vitiate the proceeding. Matter of Wyman, 76 N. Y. App. Div. 292, 78 N. Y. Suppl. 546; Barrington *v.* Watkins, 36 N. Y. App. Div. 31, 55 N. Y. Suppl. 97.

Notice of purpose.— The debtor is not entitled to notice of the purpose of reaching property reserved. Seyfert *v.* Edison, 47 N. J. L. 428, 1 Atl. 502.

Service on third person.— Graves *v.* Scoville, 12 N. Y. Civ. Proc. 165.

Remedy for defective service.— If the service was irregular or invalid, the remedy is by motion to set it aside and it cannot be disregarded. Wilcox *v.* Harris, 59 How. Pr. (N. Y.) 262.

Power of referee to pass on propriety of service.— The propriety of the service cannot be tested before the referee. Wilcox *v.* Harris, 59 How. Pr. (N. Y.) 262.

Due service is waived by appearance and submission to examination (Newell *v.* Cutler, 19 Hun (N. Y.) 74; Billings *v.* Carver, 54 Barb. (N. Y.) 40), or by appearing and adjourning (Utica City Bank *v.* Buell, 9 Abb. Pr. (N. Y.) 385, 17 How. Pr. (N. Y.) 498).

94. Barker *v.* Johnson, 4 Abb. Pr. (N. Y.) 435; People *v.* Hulburt, 5 How. Pr. (N. Y.) 446, Code Rep. N. S. (N. Y.) 75, 9 N. Y. Leg. Obs. 245.

Service without exhibiting the original order to the debtor is merely irregular and cannot be disregarded. Billings *v.* Carver, 54 Barb. (N. Y.) 40.

Substituted service cannot be had. Barker *v.* Johnson, 4 Abb. Pr. (N. Y.) 435.

95. As in the case of non-resident corporate debtor. Bates *v.* Mexico International Co., 84 Fed. 518.

Where the debtor is an attorney, an order extending the time to comply with an order for his examination previously made may be served on him in the manner provided for service on attorneys generally. Johnson *v.* Tuttle, 17 Abb. Pr. (N. Y.) 315.

96. Turner *v.* Holden, 109 N. C. 182, 13 S. E. 731.

97. Seyfert *v.* Edison, 47 N. J. L. 428, 1 Atl. 502.

98. Benjamin *v.* Myers, 3 N. Y. St. 284.

99. Fretcher *v.* Francko, 15 N. Y. Suppl. 674, 21 N. Y. Civ. Proc. 34.

1. Tribune Assoc. *v.* Sleeman, 12 N. Y. Civ. Proc. 20.

2. For obedience to the order can only be enforced by attachment. Everard *v.* Brennan, 2 N. Y. City Ct. 351.

3. Utica City Bank *v.* Buell, 9 Abb. Pr. (N. Y.) 385, 17 How. Pr. (N. Y.) 498.

Under a statute permitting service to be made by any civil officer qualified to serve process, a constable may make service where the amount involved does not exceed that as to which he has authority to serve process generally. French *v.* Goodnow, 175 Mass. 451, 56 N. E. 719.

4. Utica City Bank *v.* Buel, 9 Abb. Pr. (N. Y.) 385, 17 How. Pr. (N. Y.) 498.

the proof must be taken advantage of by moving to set the service aside because improperly made.[5]

d. Filing. The debtor cannot compel the filing of an order for the examination of a third person.[6]

I. Second Examination[7] — **1. In General.** A judgment creditor is entitled to examine his debtor once as fully as may be.[8] A second examination cannot be had where a full and exhaustive examination has been had,[9] or the original order is still in force or outstanding.[10] The creditor will not be permitted to harass the debtor by successive examinations.[11]

2. When Authorized. A second order will not be granted as of course, but only where some good reason is given for again invoking the remedy;[12] as that subsequent to his examination the debtor has acquired property,[13] an alias execu-

5. Hart *v.* Johnson, 43 Hun (N. Y.) 505.

6. Sinnott *v.* Hempstead First Nat. Bank, 34 N. Y. App. Div. 161, 54 N. Y. Suppl. 417.

7. Proceedings for examination generally see *supra*, XIII, H.

8. Canavan *v.* McAndrews, 20 Hun (N. Y.) 46.

More than one judgment.— There can be but one examination where a creditor has more than one judgment at the time of the application. Canavan *v.* McAndrew, 20 Hun (N. Y.) 46.

Two orders on the same judgment cannot be enforced at the same time. Gaylord *v.* Jones, 7 Hun (N. Y.) 480; Allen *v.* Starring, 26 How. Pr. (N. Y.) 57. And see Brockway *v.* Brien, 37 How. Pr. (N. Y.) 270.

9. Clarke *v.* Londrigan, 40 N. J. L. 310; Jurgenson *v.* Hamilton, 5 Abb. N. Cas. (N. Y.) 149.

After a proceeding has been closed by the appointment of a receiver, a new proceeding cannot be had without a new order and due service thereof. Benjamin *v.* Myers, 3 N. Y. St. 284.

10. Walter *v.* Pecare, 57 Hun (N. Y.) 587, 11 N. Y. Suppl. 146; Cromwell *v.* Spofford, 4 N. Y. Civ. Proc. 273; Brockway *v.* Brien, 37 How. Pr. (N. Y.) 270; Allen *v.* Starring, 26 How. Pr. (N. Y.) 57.

The original order is not superseded by a second order obtained to examine the debtor as to property obtained subsequent to the first order. Walter *v.* Pecare, 57 Hun (N. Y.) 587, 11 N. Y. Suppl. 146. *Semble* that the proceedings must be completed or an order terminating them made before new proceedings can be had. Keihen *v.* Shipherd, 4 N. Y. Suppl. 339, 16 N. Y. Civ. Proc. 183.

Failure to enter order dismissing first proceeding.—A second order may issue, where an order has been made, although not formally entered, dismissing the first order for irregularity. Shults *v.* Andrews, 54 How. Pr. (N. Y.) 380.

11. Canavan *v.* McAndrew, 20 Hun (N. Y.) 46; Goodall *v.* Demarest, 2 Hilt. (N. Y.) 534; Weiss *v.* Ashman, 11 Misc. (N. Y.) 377, 32 N. Y. Suppl. 161, 24 N. Y. Civ. Proc. 268, 1 N. Y. Annot. Cas. 314; Marshall *v.* Link, 13 N. Y. Suppl. 224, 20 N. Y. Civ. Proc. 109; Cromwell *v.* Spofford, 4 N. Y. Civ. Proc. 273; Jurgenson *v.* Hamilton, 5 Abb. N. Cas. (N. Y.) 149. See Rallings *v.* Pitman, 49 N. Y. Super. Ct. 307.

Different judgment.—An order for a second examination based on a different judgment will not be regarded as harassing. Methodist Book Concern *v.* Hudson, 1 How. Pr. N. S. (N. Y.) 517.

12. Grocers' Bank *v.* Bayaud, 21 Hun (N. Y.) 203; Canavan *v.* McAndrew, 20 Hun (N. Y.) 46; Goodall *v.* Demarest, 2 Hilt. (N. Y.) 534; Marshall *v.* Link, 13 N. Y. Suppl. 224, 20 N. Y. Civ. Proc. 109.

Discretion of judge.— This principle is not jurisdictional; but the grant of the order is discretionary. Marshall *v.* Link, 13 N. Y. Suppl. 224, 20 N. Y. Civ. Proc. 200.

Refusal of the debtor to verify his deposition furnishes a good ground for a second order. Weiss *v.* Ashman, 11 Misc. (N. Y.) 377, 32 N. Y. Suppl. 161, 24 N. Y. Civ. Proc. 268, 1 N. Y. Annot. Cas. 314.

Where to the creditor's knowledge the debtor has ample property which can be levied on a second order will not be granted. Ritterband *v.* Maryatt, 12 N. Y. Leg. Obs. 158.

Effect of receivership.—Unless special facts justifying a second examination are shown, an order therefor should be vacated where a receiver has been appointed. Grocers' Bank *v.* Bayaud, 21 Hun (N. Y.) 203.

Effect on pending contempt proceedings.— A second order will not supersede the first so as to affect contempt proceedings pending thereon. Walter *v.* Pecare, 57 Hun (N. Y.) 587, 11 N. Y. Suppl. 146.

13. Canavan *v.* McAndrew, 20 Hun (N. Y.) 46; Losee *v.* Allen, 17 Misc. (N. Y.) 275, 40 N. Y. Suppl. 349; Marshall *v.* Link, 13 N. Y. Suppl. 224, 20 N. Y. Civ. Proc. 109; Jurgenson *v.* Hamilton, 5 Abb. N. Cas. (N. Y.) 149.

Different judgment.— It is immaterial that the second application is based on another judgment. Canavan *v.* McAndrew, 20 Hun (N. Y.) 46. See also Irwin *v.* Chambers, 40 N. Y. Super. Ct. 432; Cromwell *v.* Spofford, 4 N. Y. Civ. Proc. 273.

Former examination on judgment recovered on.— This rule applies to a judgment rendered on a judgment on which an examination has been had. Irwin *v.* Chambers, 40 N. Y. Super. Ct. 432.

It is sufficient to show grounds for a belief that the debtor has acquired property since

tion has been issued and returned *nulla bona*,[14] or new facts have come to the knowledge of the creditor.[15] The right to reëxamine the debtor will not be precluded, by a discontinuance of the original proceedings by consent,[16] the vacation of the first order before the conclusion of the debtor's testimony,[17] the failure of the proceedings because of the non-attendance of the referee,[18] the default of the creditor,[19] or the failure of a third party to appear.[20]

3. Affidavit to Procure. The affidavit presented on an application for a second examination must show that a previous order was granted, and what proceedings, if any were had thereunder;[21] but an omission in this respect may be supplied by amendment.[22] In addition the affidavit must specifically show the acquisition of property by the debtor since the former examination, that an alias execution has been issued and returned unsatisfied, or that new facts justifying a new order have come to the knowledge of the applicant.[23]

4. Notice of Application. An order requiring a judgment debtor to submit to a second examination may be granted *ex parte*.[24]

5. Scope of Inquiry. As a rule the new examination should be limited to the time since the former examination was had.[25]

J. Proceedings to Examine Third Persons[26] **— 1. In General.** Generally, in aid of the principal proceeding, the right exists to compel persons indebted or having property of the judgment debtor to submit to an examination in respect thereto.[27] This right is not affected by a provision that no action can be main-

his former examination. Goodall *v.* Demarest, 2 Hilt. (N. Y.) 534.

14. Losee *v.* Allen, 17 Misc. (N. Y.) 275, 40 N. Y. Suppl. 349; Weiss *v.* Ashman, 11 Misc. (N. Y.) 377, 32 N. Y. Suppl. 161, 24 N. Y. Civ. Proc. 268, 1 N. Y. Annot. Cas. 314.

15. Canavan *v.* McAndrew, 20 Hun (N. Y.) 46; Irwin *v.* Chambers, 40 N. Y. Super. Ct. 432; Carter *v.* Clarke, 7 Rob. (N. Y.) 43; Weiss *v.* Ashman, 11 Misc. (N. Y.) 377, 32 N. Y. Suppl. 161, 24 N. Y. Civ. Proc. 268, 1 N. Y. Annot. Cas. 314.

16. Although the new proceeding is based on the same facts. Carter *v.* Clarke, 7 Rob. (N. Y.) 43.

17. Methodist Book Concern *v.* Hudson, 1 How. Pr. N. S. (N. Y.) 517.

Different judgment.— Where the order for the first examination was vacated a further examination founded on another judgment and order will not be considered a second examination. Methodist Book Concern *v.* Hudson, 1 How. Pr. N. S. (N. Y.) 517.

18. Johnson *v.* Tuttle, 17 Abb. Pr. (N. Y.) 315.

19. Weiss *v.* Ashman, 11 Misc. (N. Y.) 377, 32 N. Y. Suppl. 161, 24 N. Y. Civ. Proc. 268, 1 N. Y. Annot. Cas. 314.

20. Schanck *v.* Conover, 56 How. Pr. (N. Y.) 437.

21. Grocers' Bank *v.* Bayaud, 21 Hun (N. Y.) 203; Goodall *v.* Demarest, 2 Hilt. (N. Y.) 534; Cromwell *v.* Spofford, 4 N. Y. Civ. Proc. 273; Orr's Case, 2 Abb. Pr. (N. Y.) 457.

22. Goodall *v.* Demarest, 2 Hilt. (N. Y.) 534.

23. Irwin *v.* Chambers, 40 N. Y. Super. Ct. 432; Carter *v.* Clarke, 7 Rob. (N. Y.) 43; Goodall *v.* Demarest, 2 Hilt. (N. Y.) 534; Losee *v.* Allen, 17 Misc. (N. Y.) 275, 40 N. Y. Suppl. 349; Cromwell *v.* Spofford, 4 N. Y. Civ. Proc. 273; Jurgenson *v.* Hamilton, 5 Abb. N. Cas. (N. Y.) 599; Orr's Case, 2 Abb. Pr. (N. Y.) 457; Sellig *v.* McIntyre, 5 Month. L. Bul. (N. Y.) 69; Hamilton *v.* Morange, 2 Month. L. Bul. (N. Y.) 58. And see Grocers' Bank *v.* Bayaud, 21 Hun (N. Y.) 203.

An affidavit made on information and belief on newly acquired property must state the grounds of the belief. McGuire *v.* Schroeder, 31 Misc. (N. Y.) 179, 63 N. Y. Suppl. 968; Schermerhorn *v.* Owens, 29 Misc. (N. Y.) 674, 62 N. Y. Suppl. 763.

Sufficiency.— An affidavit stating that no property of the debtor was discovered on prior examinations had, but that he has since become possessed of personal property, although conferring jurisdiction, states no sufficient reason for the order. Rallings *v.* Pitman, 49 N. Y. Super. Ct. 307. And *compare* Losee *v.* Allen, 17 Misc. (N. Y.) 275, 40 N. Y. Suppl. 349.

24. Goodall *v.* Demarest, 2 Hilt. (N. Y.) 534.

25. Goodall *v.* Demarest, 2 Hilt. (N. Y.) 534.

The court has no power to limit the examination to an inquiry as to whether defendant had acquired any property, real or personal, since the date of his examination on a former order, where the order made authorized a general examination and the former order proceeding was never terminated by a decision, but was voluntarily abandoned by the consent of both parties. Carter *v.* Clarke, 7 Rob. (N. Y.) 490.

26. Who may be examined as third person see *supra*, XIII, E, 2.

Procedure for examination generally see *supra*, XIII, H.

Form of affidavit and order for the examination of a third party see Seeley *v.* Garrison, 10 Abb. Pr. (N. Y.) 460.

27. Courtois *v.* Harrison, 1 Hilt. (N. Y.) 109, 3 Abb. Pr. (N. Y.) 96, 12 How. Pr.

tained to obtain a discovery in aid of another action,[28] or by a claim by such person of ownership of the property in question;[29] nor will the right be precluded by an attachment of the debtor's property,[30] or by payment to him.[31]

2. Necessity of Proceedings Against Debtor. Proceedings for the examination of third persons are distinct proceedings from those authorizing the debtor's examination and are not dependent upon the institution of proceedings against the latter or his examination.[32]

3. Necessity of Notice to Debtor. Notice to the debtor of an application to examine a third person or of his examination is not essential,[33] but may be required in the discretion of the judge who entertains the application;[34] unless notice has been given to the debtor he cannot appear by counsel,[35] and it has been questioned whether he can move to vacate the proceedings.[36]

k. Simultaneous Proceedings. Ordinarily but one proceeding on the same judgment can be instituted and maintained at the same time.[37] But it is immaterial that other proceedings by other creditors are pending against the same debtor,[38] and a *bona fide* attempt to serve an order for examination will confer

(N. Y.) 359; Holbrook *v.* Orgler, 49 How. Pr. (N. Y.) 289. See also Smith *v.* Cutter, 64 N. Y. App. Div. 412, 72 N. Y. Suppl. 99 (after receiver appointed); Lockwood *v.* Worstill, 15 Abb. Pr. (N. Y.) 430 note (after debtor's examination concluded).

Proceedings against garnishee.— It is sufficient to give jurisdiction of the person of a garnishee who was not a party to the original proceeding, that he was duly served with the order requiring him to appear, and that he appeared in obedience thereto. Bronzan *v.* Drobaz, 93 Cal. 647, 29 Pac. 254.

Effect as to making third person party.— Rochester Union Bank *v.* Sandusky Union Bank, 6 Ohio St. 254.

In Louisiana proceedings to examine a third person cannot be employed as a substitute for a direct revocatory action. Copley *v.* Dosson, 3 La. Ann. 651.

28. Matter of Sickle, 52 Hun (N. Y.) 527, 5 N. Y. Suppl. 703, 17 N. Y. Civ. Proc. 138.

29. Matter of De Leon, 63 N. Y. App. Div. 41, 71 N. Y. Suppl. 380; Barculows *v.* New Jersey Protection Co., 2 Code Rep. (N. Y.) 72.

30. Hanson *v.* Tripler, 3 Sandf. (N. Y.) 733, Code Rep. N. S. (N. Y.) 154.

31. Rochester Union Bank *v.* Sandusky Union Bank, 6 Ohio St. 254.

32. Gibson *v.* Haggerty, 37 N. Y. 555, 97 Am. Dec. 752 [*reversing* 15 Abb. Pr. 406, 23 How. Pr. 260]; Woodman *v.* Goodenough, 18 Abb. Pr. (N. Y.) 265; Lockwood *v.* Worstell, 15 Abb. Pr. (N. Y.) 430 note; Parker *v.* Hunt, 15 Abb. Pr. (N. Y.) 410 note; Holmes *v.* Jordan, 15 Abb. Pr. (N. Y.) 410 note; Lowber *v.* New York, 5 Abb. Pr. (N. Y.) 268; Graves *v.* Lake, 12 How. Pr. (N. Y.) 33. But see Holbrook *v.* Orgler, 49 How. Pr. (N. Y.) 289.

Acquisition of lien.— Billson *v.* Linderberg, 66 Minn. 66, 68 N. W. 771. See *infra*, XIII, W, 2.

33. Lynch *v.* Johnson, 48 N. Y. 27; Gibson *v.* Haggerty, 37 N. Y. 555, 97 Am. Dec. 752 [*reversing* 15 Abb. Pr. 406, 23 How. Pr. 260]; Sinnott *v.* Hempstead First Nat. Bank, 34 N. Y. App. Div. 161, 54 N. Y. Suppl. 417; Ward *v.* Beebe, 15 Abb. Pr. (N. Y.) 372; Seeley *v.* Garrison, 10 Abb. Pr. (N. Y.) 460; Foster *v.* Prince, 8 Abb. Pr. (N. Y.) 407, 18 How. Pr. (N. Y.) 258; Sherwood *v.* Buffalo, etc., R. Co., 12 How. Pr. (N. Y.) 136; Kemp *v.* Harding, 4 How. Pr. (N. Y.) 178; Wilmington *v.* Sprunt, 114 N. C. 310, 19 S. E. 348. *Contra*, Shannon *v.* McMurtrie, 48 N. J. L. 427, 5 Atl. 658.

A creditor who has permitted the proceedings to drop after examining the debtor, and who has not adjourned or extended the proceedings, cannot thereafter take the testimony of a witness, without notice to the debtor. Thomas *v.* Kircher, 15 Abb. Pr. N. S. (N. Y.) 342.

34. Ward *v.* Beebe, 17 Abb. Pr. (N. Y.) 1 [*affirming* 15 Abb. Pr. 372]; Seeley *v.* Garrison, 10 Abb. Pr. (N. Y.) 460.

An order made without notice cannot be disregarded, although it might be vacated by the judge who made it. Ward *v.* Beebe, 15 Abb. Pr. (N. Y.) 372 [*affirmed* in 17 Abb. Pr. 1].

Where a debtor having notice transfers property to a third person in fraud of the creditor he acquires no title, unless he acted in good faith, and there is no proof of notice or of an injunction restraining the transfer. Lynch *v.* Johnson, 46 Barb. (N. Y.) 56 [*affirmed* in 48 N. Y. 27].

35. De Comeau *v.* People, 7 Rob. (N. Y.) 498; Corning *v.* Tooker, 5 How. Pr. (N. Y.) 16.

36. Lingsweiler *v.* Lingsweiler, 57 N. Y. Super. 395, 9 N. Y. Suppl. 305, 18 N. Y. Civ. Proc. 81.

37. Gaylord *v.* Jones, 7 Hun (N. Y.) 480; Weiss *v.* Ashman, 11 Misc. (N. Y.) 377, 32 N. Y. Suppl. 161, 24 N. Y. Civ. Proc. 268, 1 N. Y. Annot. Cas. 314; Keihen *v.* Shipherd, 4 N. Y. Suppl. 339, 16 N. Y. Civ. Proc. 183; Brockway *v.* Brien, 37 How. Pr. (N. Y.) 270; Allen *v.* Starring, 26 How. Pr. (N. Y.) 57. See *supra*, XIII, I.

38. Sparks *v.* Davis, 25 S. C. 381; Kellogg *v.* Coller, 47 Wis. 649, 3 N. W. 433.

In Wisconsin the only restriction on a junior proceeding is that creditors prosecuting prior proceedings shall be notified of the

priority of right as against persons who, being chargeable with notice of the prior proceeding, commenced subsequent proceedings of the same character.[39]

L. Contemporaneous Resort to Other Remedies.[40] The institution and pendency of proceedings supplementary to execution will not preclude the maintenance of a creditor's action by the judgment creditor;[41] nor will the levy of an attachment affect the right to institute the proceedings;[42] nor will the institution of such an action bar the examination of a third party.[43] Neither are pending proceedings affected by the issue of a second execution,[44] or the levy thereof, unless it is clear that such levy will be effectual to satisfy the judgment,[45] in which case the creditor may be compelled to elect which remedy he will pursue.[46]

M. Injunction[47] to Restrain Disposition of Property — 1. In General. To effectuate the object of the proceedings the creditor may procure an injunction restraining any person whether a party to the proceeding or not from disposing or suffering any disposition of or interference with property of the debtor, or any property or debt concerning which any person may be required to be examined until further direction.[48] The service of a restraining order on a third person creates a lien in favor of the creditor as against a similar order subsequently obtained by another creditor, but which was first served.[49]

2. Who May Be Restrained. In some jurisdictions the power to restrain

pendency thereof, and that but one receiver shall be appointed. Kellogg *v.* Coller, 47 Wis. 649, 3 N. W. 433. Should a junior proceeding be instituted before the officer who issued the prior order for the examination of the judgment debtor, such examination should be first had in the prior proceeding, especially if the same is being diligently prosecuted. The same rule should be observed, although the junior proceeding be instituted before another officer. Kellogg *v.* Coller, *supra*.

39. Kellogg *v.* Coller, 47 Wis. 649, 3 N. W. 433.

40. **Election of remedies** generally see Election of Remedies.

Resort to other remedies as a ground for staying the proceedings see *infra*, XIII, R.

41. Estey *v.* Fuller Implement Co., 82 Iowa 678, 46 N. W. 1098, 47 N. W. 1025; Taylor *v.* Persse, 15 How. Pr. (N. Y.) 417.

A judgment creditor will not be stayed in supplementary proceedings because he institutes a suit to make his judgment a lien on certain realty in which he alleges defendant is equitably interested. Gates *v.* Young, 17 N. Y. Wkly. Dig. 551.

The creditor may abandon the proceedings if no receiver has been appointed and commence a creditor's suit. Bennett *v.* McGuire, 58 Barb. (N. Y.) 625.

Election.— Taylor *v.* Persse, 15 How. Pr. (N. Y.) 417.

Proceedings by other creditor.— Although an action in the nature of a judgment creditors' bill is pending, it is error to dismiss proceedings supplementary to execution instituted in behalf of another creditor against the same debtor. Monroe *v.* Lewald, 107 N. C. 655, 12 S. E. 287.

42. Hanson *v.* Tripler, 3 Sandf. (N. Y.) 733, Code Rep. N. S. (N. Y.) 154.

43. *In re* Bashiller De Ponce De Leon, 69 N. Y. Suppl. 242.

44. Lilliendahl *v.* Fellerman, 2 Abb. Pr. (N. Y.) 155, 11 How. Pr. (N. Y.) 528.

Outstanding alias execution.— Where the execution has been returned unsatisfied, the fact that the sheriff has in his hands an alias execution issued on the same judgment is immaterial. Vegelahn *v.* Smith, 95 N. C. 254.

45. Sale *v.* Lawson, 4 Sandf. (N. Y.) 718; Farquaharson *v.* Kimball, 9 Abb. Pr. (N. Y.) 385; Hanson *v.* Tripler, Code Rep. N. S. (N. Y.) 154.

46. Smith *v.* Davis, 63 Hun (N. Y.) 100, 17 N. Y. Suppl. 614.

47. **Injunction** generally see Injunctions.

48. See cases cited *infra* in this and following notes.

The restraining order is no protection to a debtor when required to comply with a judgment in an action to which the creditor is a party. Butler *v.* Niles, 35 How. Pr. (N. Y.) 329. An injunction obtained by a creditor of a corporation restraining its debtor is no defense to an action for the debt brought by the corporation against him. Glenville Woolen Co. *v.* Ripley, 43 N. Y. 206.

Injunction as defense to third party.— In an action by a debtor to recover an alleged indebtedness, the existence of an order restraining plaintiff and defendant from transferring property of the former constitute a relevant defense. Carpenter *v.* Bell, 19 Abb. Pr. (N. Y.) 258.

A bona fide purchaser from a debtor who has been enjoined will be protected. *In re* Clover, 154 N. Y. 443, 48 N. E. 892 [*affirming* 8 N. Y. App. Div. 556, 40 N. Y. Suppl. 886]. See also *In re* Perry, 30 Wis. 268. But *compare* Rose *v.* Baker, 99 N. C. 323, 5 S. E. 919.

49. Bevans *v.* Pierce, 1 N. Y. City Ct. 259. See *infra*, XIII, W.

Priority of injunctions.— See Bevans *v.* Pierce, 1 N. Y. City Ct. 259.

extends only to parties to the proceedings.[50] In others the power is not limited to the restraint of the debtor, but extends to property as to which any person may be required to attend and be examined.[51]

3. Necessity of Order. A valid order made by a court or officer having jurisdiction in the premises is absolutely necessary.[52]

4. Application. The application must show some reason for the injunction,[53] and where an application is made in an action in aid of execution, the complaint must show that plaintiff is entitled to judgment.[54]

5. Property Affected. As regards the property affected, it has been held that the injunction is not operative as to property of the third person, but only as to property of the judgment debtor,[55] owned by, earned before, or due him at the time of the order;[56] and an injunction restraining the disposition of money or property inapplicable to the satisfaction of the judgment is improper and inoperative.[57]

50. Westminster Nat. Bank *v.* Burns, 109 N. C. 105, 13 S. E. 871; Coates *v.* Wilkes, 94 N. C. 174.

51. Strauss *v.* Yorkville Bank, 32 Misc. (N. Y.) 239, 65 N. Y. Suppl. 793; Seeley *v.* Garrison, 10 Abb. Pr. (N. Y.) 460; Globe Phosphate Co. *v.* Pinson, 52 S. C. 185, 29 S. E. 549.

Under the New York code of procedure an order in supplementary proceedings, requiring a third person to appear and answer, was necessary in order to make him a party to the proceedings, and to restrain him from disposing of the property of the debtor. King *v.* Tuska, 1 Duer (N. Y.) 635.

Trustees holding income of the debtor may be enjoined from paying it over. Stewart *v.* Foster, 1 Hilt. (N. Y.) 505.

Executors cannot be restrained from paying over the income to the debtor in accordance with the terms of the will. Morgan *v.* Von Kohnstamm, 9 Daly (N. Y.) 355, 60 How. Pr. (N. Y.) 161.

A commissioner who has no power to require any person other than defendant to answer concerning property in his hands belonging to defendant is not vested with the power to make a preliminary order restraining such party from disposing of such property. Blabon *v.* Gilchrist, 67 Wis. 38, 29 N. W. 220.

52. Benbow *v.* Kellom, 52 Minn. 433, 54 N. W. 482, where an oral order was deemed to be insufficient.

Irregularity in an order, requiring a debtor to appear and be examined, does not affect a subsequent order made by the same judge at the same term, forbidding the debtor to interfere with his property. Wilson *v.* Andrews, 9 How. Pr. (N. Y.) 39.

In Ohio the rule that where a third person has been cited or notified to answer as to property and effects of the judgment debtor held by him the notice will operate as a *lis pendens* does not apply to the case of a judgment debtor as to whom there has been a mere order for his examination, without an order restraining him from disposing of his property. Gregory *v.* Hewson, 10 Fed. Cas. No. 5,801, 1 Bond 277.

53. Green *v.* Bullard, 8 How. Pr. (N. Y.) 313. See, generally, Affidavits.

54. Although such an application does not require a complaint. Kerr *v.* Dildine, 6 N. Y. St. 163.

55. Westminster Nat. Bank *v.* Burns, 109 N. C. 105, 13 S. E. 871.

56. Zimmer *v.* Miller, 8 N. Y. App. Div. 556, 40 N. Y. Suppl. 886; McGivney *v.* Childs, 41 Hun (N. Y.) 607; Rainsford *v.* Temple, 3 Misc. (N. Y.) 294, 22 N. Y. Suppl. 937; Atkinson *v.* Sewine, 43 How. Pr. (N. Y.) 84.

Interests claimed.— Where the co-defendants claim an interest in the property in their hands, the court has power to forbid a disposition of the same. Westminster Nat. Bank *v.* Burns, 109 N. C. 105, 13 S. E. 871.

Money in bank in wife's name.— A bank may be enjoined from paying moneys deposited with it by the debtor in his wife's name. Strauss *v.* Yorkville Bank, 32 Misc. (N. Y.) 239, 65 N. Y. Suppl. 793.

Disposition of rents accruing under an existing lease may be restrained. Lertora *v.* Rennian, 53 N. Y. Suppl. 921, 5 N. Y. Annot. Cas. 19.

The disposition of a debt may be restrained. Ball *v.* Goodenough, 37 How. Pr. (N. Y.) 479.

Wages.— After service of an injunction, the debtor, unless with permission of the court, cannot expend wages received by him for the necessary support of his family. Newell *v.* Cutler, 19 Hun (N. Y.) 74.

Where an indebtedness to the debtor is denied or property sought to be reached is claimed adversely, the creditor may procure an order forbidding any transfer or disposition of the property or debt. Hagerman *v.* Long Lee, 12 Nev. 331.

57. Morgan *v.* Von Kohnstamm, 9 Daly (N. Y.) 355, 60 How. Pr. (N. Y.) 161.

After-acquired property.— The restraining order will not apply to property acquired after its issuance. McGivney *v.* Childs, 41 Hun (N. Y.) 607; Rainsford *v.* Temple, 3 Misc. (N. Y.) 294, 22 N. Y. Suppl. 937.

Disposition of a trust fund created for the benefit of the debtor and in the hands of the trustees cannot be restrained. Morgan *v.* Von Kohnstamm, 9 Daly (N. Y.) 355, 60 How. Pr. (N. Y.) 161.

Money deposited with a city officer by an applicant for a license, and in which the municipality has a qualified right, is not affected by an injunction order served on such

So for reasons which are obvious the injunction will not affect the proceeds of exempt property.[58]

6. KNOWLEDGE OF ORDER. A party may be bound by an injunction order of which he has knowledge, although imperfect service is made on him.[59]

7. ABANDONMENT. The commencement of a creditor's suit will not revive an injunction order granted in supplementary proceedings which have been abandoned.[60]

8. STAY OF INJUNCTION. A stay of all proceedings until the hearing of a motion to vacate the judgment will not stay the operation of an injunction granted on the supplementary proceeding.[61] But the operation of an order restraining a third person from disposing of property until further order in the premises ceases on the making of an order appointing a receiver.[62]

N. Arrest of Debtor.[63] Where a warrant for the arrest of the debtor will issue in these proceedings on proof that he will leave the state or conceal himself, and that there is reason to believe that he has property which he unjustly refuses to apply to the payment of the judgment,[64] the proof must be sufficient to bring the case within the provisions of the statute.[65] The warrant for the arrest may be issued by a judge[66] or the referee appointed to conduct the examination of the debtor,[67] and it is not affected by the vacation of the order for the debtor's examination.[68]

O. Termination — 1. IN GENERAL. Supplementary proceedings are to be

officer. Tindall *v.* Rust, 67 N. J. L. 159, 50 Atl. 349.

Restraining delivery to bankrupt.— An injunction restraining a third person from turning over property to a debtor who has been adjudicated a bankrupt has no validity — the title to the property being vested in the assignee in bankruptcy. Morris *v.* New York First Nat. Bank, 68 N. Y. 362.

58. McGivney *v.* Childs, 41 Hun (N. Y.) 607.

59. Livingston *v.* Swift, 23 How. Pr. (N. Y.) 1.

Ignorance of proceedings.— An injunction which was not directed to the debtor and was issued in the proceeding of which he had no notice is not binding on him, although it was served on him. Edmonston *v.* McLoud, 19 Barb. (N. Y.) 356 [*affirmed* in 16 N. Y. 543].

60. Ballou *v.* Boland, 14 Hun (N. Y.) 355.

61. Woolf *v.* Jacobs, 36 N. Y. Super. Ct. 408.

62. People *v.* Randell, 73 N. Y. 416.

63. **Arrest** generally see ARREST, 3 Cyc. 867; BAIL, 5 Cyc. 1.

Execution against the person see *infra*, XIV.

64. **Non-resident debtors.**— By N. Y. Code Civ. Proc. § 2458, subd. 3, such proceedings are made applicable to non-residents. Denning *v.* Schieffelin, 7 N. Y. Suppl. 98.

Warrant may require the debtor to appear before a referee residing in another county. Wilson *v.* Andrews, 9 How. Pr. (N. Y.) 39.

A debtor who moves to vacate the warrant cannot avail himself of irregularities which are not specified in his notice of motion. Frost *v.* Craig, 16 Daly (N. Y.) 107, 9 N. Y. Suppl. 528, 18 N. Y. Civ. Proc. 296.

Effect of arrest.— The arrest of a debtor who left the jurisdiction to evade an examination, whether illegal or not, will not deprive the court of its jurisdiction to examine him. Teats *v.* Herington Bank, 58 Kan. 721, 51 Pac. 219.

65. It must reasonably appear that the debtor will conceal himself within the state. Rohshand *v.* Waring, 1 Abb. N. Cas. (N. Y.) 311.

An affidavit on information and belief by which the possession of property by the debtor is a mere matter of inference is insufficient. Netzel *v.* Mulford, 59 How. Pr. (N. Y.) 452. An affidavit which alleges that plaintiff has reason to believe that defendant has property, rights in action, stocks, moneys, or evidence thereof, which he fraudulently conceals and refuses to apply to the payment of the judgment, is sufficient, although the reasons for the belief are not stated. Dorff *v.* Matthews, 36 Leg. Int. (Pa.) 382.

Where the debtor is a non-resident the proof must show that he has property and what it consists of. Heller *v.* De Leon, 7 N. Y. Suppl. 97.

66. A warrant for the debtor's arrest may be made by a judge residing in the same district, although in a county other than that of the debtor's residence; but should not be granted where the debtor resides in a distant county unless the circumstances of the case so require. Wilson *v.* Andrews, 9 How. Pr. (N. Y.) 39.

67. Marriage *v.* Woodruff, 77 Iowa 291, 42 N. W. 198.

The fact that the referee has issued notice to the debtor to appear for examination does not preclude him from afterward issuing the warrant for his arrest. Marriage *v.* Woodruff, 77 Iowa 291, 42 N. W. 198.

68. Frost *v.* Craig, 16 Daly (N. Y.) 107, 9 N. Y. Suppl. 528, 18 N. Y. Civ. Proc. 296 [*modifying* 9 N. Y. Suppl. 437] (holding the

deemed pending until satisfaction of the judgment.[69] The vacation of an order for the examination of the debtor will not terminate proceedings under a warrant issued after the order.[70] It has been held, however, that a default by the creditor is of the same effect as the dismissal of a complaint without going into the merits.[71]

2. ABATEMENT.[72] The proceedings will abate by the death of the debtor,[73] or by the issuance of a new execution on which the judgment is collected,[74] but not by such a lapse of time since their institution as will authorize a presumption of payment of the judgment,[75] or by suing out an attachment against the property of the debtor,[76] or an appeal from the judgment taken without a stay of proceedings.[77]

3. ABANDONMENT. The proceedings may be abandoned by the act of the creditor, as by his failure to appear or proceed,[78] or to regularly adjourn or extend the proceedings.[79] But an agreement to discontinue the action,[80] the issue of a second execution after the return of the first unsatisfied,[81] or delay in procuring the appointment of a receiver, will not be deemed an abandonment of the proceedings.[82]

P. Vacating and Setting Aside — 1. GROUNDS. The proceedings may be dismissed or vacated for the insufficiency of the affidavit, by which the proceedings were instituted, to confer jurisdiction,[83] where title to the judgment has

two proceedings to be entirely independent of each other); Wilson *v.* Andrews, 9 How. Pr. (N. Y.) 39.

69. Matter of Crane, 81 Hun (N. Y.) 96, 30 N. Y. Suppl. 616, 1 N. Y. Annot. Cas. 148.

Where there is nothing to collect under the judgment, on motion of the debtor, the proceedings will be dismissed. Cobb *v.* Edson, 84 N. Y. Suppl. 916.

Termination will not result by reason of the absence of the referee at the time to which the proceedings have been adjourned (Keihen *v.* Shipherd, 4 N. Y. Suppl. 339, 16 N. Y. Civ. Proc. 183, also holding that under such circumstances the proceedings may be revived by an order and continued), neither will the non-attendance of either or both parties on an adjourned day (Underwood *v.* Sutcliffe, 10 Hun (N. Y.) 453), or the failure to appear before the referee has reported (Kennedy *v.* Norcott, 54 How. Pr. (N. Y.) 87). Nor can they be discontinued without notice. Kennedy *v.* Norcott, *supra*.

70. Frost *v.* Craig, 16 Daly (N. Y.) 107, 9 N. Y. Suppl. 528, 18 N. Y. Civ. Proc. 296 [*modifying* 9 N. Y. Suppl. 437].

71. Weiss *v.* Ashman, 11 Misc. (N. Y.) 377, 32 N. Y. Suppl. 161, 24 N. Y. Civ. Proc. 268, 1 N. Y. Annot. Cas. 314.

72. Abatement of action generally see ABATEMENT AND REVIVAL.

73. Hasewell *v.* Penman, 2 Abb. Pr. (N. Y.) 230, 13 How. Pr. (N. Y.) 114, a proceeding based on an order for the examination of third persons.

74. Ritter *v.* Greason, 28 Misc. (N. Y.) 656, 59 N. Y. Suppl. 1053. See *supra*, XIII, J.

75. Presumption of payment of a judgment will not abate proceedings commenced before the expiration of the statute of limitations. Driggs *v.* Williams, 15 Abb. Pr. (N. Y.) 477.

76. Hanson *v.* Tripler, 3 Sandf. (N. Y.) 733, Code Rep. N. S. (N. Y.) 154. See *supra*, XIII, J.

77. Arnoux *v.* Homans, 32 How. Pr. (N. Y.) 382.

Effect of appeal from judgment see APPEAL AND ERROR, 2 Cyc. 885 *et seq.*

78. Meyers *v.* Herbert, 64 Hun (N. Y.) 200, 19 N. Y. Suppl. 132, 22 N. Y. Civ. Proc. 216 (where an adjournment was taken to a day to be fixed but nothing further was done for more than three years); Ballou *v.* Boland, 14 Hun (N. Y.) 355 (where nothing was done under the order but to serve it after the return-day); Bennett *v.* McGuire, 58 Barb. (N. Y.) 625 (where the creditor commenced a proceeding in his own name to set aside an alleged fraudulent transfer by the debtor and his assignee); Squire *v.* Young, 1 Bosw. (N. Y.) 690.

An election to commence new proceedings after the failure of a third party to appear on the return-day is an abandonment of the prior proceedings. Schanck *v.* Conover, 56 How. Pr. (N. Y.) 437. See Stanley *v.* Lovett, 14 Hun (N. Y.) 412.

79. Carter *v.* Clarke, 7 Rob. (N. Y.) 490; Thomas *v.* Kircher, 15 Abb. Pr. N. S. (N. Y.) 342; Ammidon *v.* Wolcott, 15 Abb. Pr. (N. Y.) 314.

Jurisdiction of the judge is not lost by the failure to adjourn the proceedings regularly. Wright *v.* Nostrand, 94 N. Y. 31 [*reversing* 47 N. Y. Super. Ct. 441]. See also Rothschild *v.* Gould, 84 N. Y. App. Div. 196, 82 N. Y. Suppl. 558.

Jurisdiction may be regained by the subsequent appearance of the debtor and his failure to object. Hawes *v.* Barr, 7 Rob. (N. Y.) 452. But see *contra*, Carter *v.* Clarke, 7 Rob. (N. Y.) 490.

80. Gardner *v.* Lay, 2 Daly (N. Y.) 113.

81. Fellerman's Case, 2 Abb. Pr. (N. Y.) 155, 11 How. Pr. (N. Y.) 528.

82. Unless the delay is so long as to authorize a presumption of abandonment. Barnett *v.* Moore, 20 Misc. (N. Y.) 518, 46 N. Y. Suppl. 668.

83. Bowery Bank *v.* Widmayer, 9 N. Y. Suppl. 629. See also Douglass *v.* Mainzer, 40 Hun (N. Y.) 75 (failure of affidavit to

vested in a receiver of the creditor,[84] or where the judgment has been paid or satisfied [85] or has ceased to be a lien.[86] So too where the debt has been discharged in insolvency or bankruptcy,[87] or it is made to appear that the order for examination has been improperly or improvidently granted [88] or is unnecessary.[89] But the fact that an execution, since returned was outstanding when the order was served,[90] that an alias execution on the same judgment is outstanding,[91] that a levy sufficient to satisfy the demand has been made,[92] that at the time of the return of the execution unsatisfied the debtor was seized in fee of real property,[93] that an appeal from the judgment is pending,[94] or that payment or satisfaction of the judgment is denied,[95] is insufficient to require the dismissal of the proceedings. Neither will the proceedings be dismissed for a supposed want of authority on the part of an attorney to institute the proceedings,[96] for mere irregularities or informalities which are not prejudicial,[97] or where the affidavits as to service of process in the action are conflicting.[98]

2. **Authority to Vacate.**[99] Where an order for examination is valid and regular on its face, its vacation for extrinsic matters is discretionary.[1]

3. **The Motion.** If the statute specifies the mode of attacking the proceedings that mode is exclusive.[2] An application to vacate or modify the order should be

state amount due); McGuire *v.* Hudson, 41 N. Y. St. 295.

84. Moore *v.* Taylor, 40 Hun (N. Y.) 56.

85. Davis *v.* Mowbray, 9 Wkly. Notes Cas. (Pa.) 47.

If anything is unpaid on the judgment the order cannot be vacated on the ground of payment. Austin *v.* Byrnes, 54 N. Y. Super. Ct. 552, 12 N. Y. Civ. Proc. 332.

86. Glover *v.* Gargan, 10 N. Y. App. Div. 527, 42 N. Y. Suppl. 74.

87. Gibson *v.* Gorman, 44 N. J. L. 325; Robens *v.* Sweet, 48 Hun (N. Y.) 436, 1 N. Y. Suppl. 839; Smith *v.* Paul, 20 How. Pr. (N. Y.) 97.

Opposition to application by discharged insolvent.— Fraud in procuring a discharge in insolvency proceedings cannot be urged as a reason for refusing to dismiss supplementary proceedings because of such discharge. Robens *v.* Sweet, 48 Hun (N. Y.) 436, 1 N. Y. Suppl. 839.

88. Mason *v.* Weston, 29 Ind. 561; Shannon *v.* McMurtrie, 48 N. J. L. 427, 5 Atl. 658; Curtois *v.* Harrison, 1 Hilt. (N. Y.) 109, 3 Abb. Pr. (N. Y.) 96; Bowery Bank *v.* Widmayer, 9 N. Y. Suppl. 629; Lindsay *v.* Sherman, 5 How. Pr. (N. Y.) 308, Code Rep. N. S. (N. Y.) 25.

An order served on a member of the legislature during a time he was exempt from arrest on civil process must be vacated as improvidently made, when there is no means of enforcing obedience to the order except by an attachment for contempt. Everard *v.* Brennan, 2 N. Y. City Ct. 351.

Order unwarranted in part.— An order which directs a discovery by defendant, and also restrains him from collecting moneys due him, is severable; and the fact that the restraining clause in the order was unwarranted does not require the vacation of the order *in toto*. Githens *v.* Mount, 64 N. J. L. 166, 44 Atl. 851.

89. As where sufficient property to satisfy the judgment has been discovered by the examination of other parties. Crane *v.* Beecher, 6 N. Y. Suppl. 225.

90. Lingsweiler *v.* Lingsweiler, 57 N. Y. Super. Ct. 395, 9 N. Y. Suppl. 305, 18 N. Y. Civ. Proc. 81.

91. Vegelahn *v.* Smith, 95 N. C. 254.

92. Willison *v.* Desenberg, 41 Mich. 156, 2 N. W. 201. But see Steinharde *v.* Michalda, 15 N. Y. Civ. Proc. 323.

93. Eleventh Ward Bank *v.* Heather, 22 Misc. (N. Y.) 87, 48 N. Y. Suppl. 449, 27 N. Y. Civ. Proc. 90, 5 N. Y. Annot. Cas. 80 [*reversing* 21 Misc. 539, 47 N. Y. Suppl. 718].

94. Cowdrey *v.* Carpenter, 17 Abb. Pr. (N. Y.) 107.

95. Williams *v.* Irving, 1 Hun (N. Y.) 720, 5 Thomps. & C. (N. Y.) 671 [*modifying* 47 How. Pr. 440].

Conflict as to payment.— See Union Surety, etc., Co. *v.* Sire, 34 Misc. (N. Y.) 221, 68 N. Y. Suppl. 943; Austin *v.* Byrnes, 54 N. Y. Super. Ct. 552, 12 N. Y. Civ. Proc. 332.

96. Kress *v.* Morehead, 8 N. Y. St. 858.

97. Barrington *v.* Watkins, 36 N. Y. App. Div. 31, 55 N. Y. Suppl. 97; Baker *v.* Herkimer, 43 Hun (N. Y.) 86, 6 N. Y. St. 581, 25 N. Y. Wkly. Dig. 573; Dorsey *v.* Cummings, 48 Hun (N. Y.) 76; Bean *v.* Tonnelle, 24 Hun (N. Y.) 353, 1 N. Y. Civ. Proc. 33; Kennedy *v.* Norcott, 54 How. Pr. (N. Y.) 87.

98. Greenhall *v.* Unger, 20 Misc. (N. Y.) 412, 45 N. Y. Suppl. 1035.

99. **A judge whose authority in proceedings cognizant by another court is exhausted** by the appointment of a referee has no power to vacate the order of appointment as improvidently made. Hunter *v.* Betts, (Kan. App. 1898) 53 Pac. 86.

1. Lisner *v.* Toplitz, 177 N. Y. 559, 69 N. E. 1125 [*affirming* 86 N. Y. App. Div. 1, 83 N. Y. Suppl. 423].

2. Lisner *v.* Toplitz, 86 N. Y. App. Div. 1, 83 N. Y. Suppl. 423.

Under the Indiana statute which provides that "the sufficiency of the order and of the

made in the county where the judgment was rendered,[3] and to the judge who granted it.[4] If the proceedings are regular on their face extrinsic matters cannot be considered.[5] Notice of the motion should be given to the judgment creditor,[6] and should point out the error or irregularity complained of,[7] unless the defect is jurisdictional.[8] A second order of examination,[9] obtained for the failure of the debtor to verify his deposition taken in the original proceedings, may be vacated, on condition that he make the required verification.[10]

4. The Order. Unless the proceedings have been abandoned or have been otherwise terminated,[11] an order terminating the proceedings is ordinarily necessary, otherwise the proceedings will be deemed pending.[12] On vacating an order for the examination of a debtor, he may be required to appear for examination on the day named in the original order.[13]

Q. The Examination[14]**— 1. Jurisdiction to Conduct.** If the order of reference is not properly served on the person sought to be examined the referee acquires no jurisdiction.[15] But jurisdiction is not lost by the arrest of a debtor who has evaded examination,[16] or by the absence of the referee at the time and place set for the examination,[17] and voluntary submission to examination will constitute a waiver of want of jurisdiction.[18]

affidavit first filed by the plaintiff may be tested by demurrer or motion to dismiss or strike out," their sufficiency cannot be tested by motion to quash the writ and order. Hutchinson *v.* Trauerman, 112 Ind. 21, 23, 13 N. E. 412.

3. Gould *v.* Torrance, 19 How. Pr. (N. Y.) 560.

4. Conway *v.* Hitchins, 9 Barb. (N. Y.) 378. A county judge before whom a proceeding supplementary to execution is pending and undetermined has no power to make an order staying the proceedings therein. Genesee Bank *v.* Spencer, 15 How. Pr. (N. Y.) 412. In Lingsweiler *v.* Lingsweiler, 57 N. Y. Super. Ct. 395, 9 N. Y. Suppl. 305, 18 N. Y. Civ. Proc. 81, it was questioned whether a debtor who was not notified of third party proceedings could move to vacate them.

5. Saunders *v.* Hall, 2 Abb. Pr. (N. Y.) 418; Lederer *v.* Ehrenfeld, 49 How. Pr. (N. Y.) 403.

The truth of the affidavit on which the proceedings are based must be raised by motion to set them aside. Hilton *v.* Patterson, 18 Abb. Pr. (N. Y.) 245.

Discharge in insolvency.— Where no defect appears on the face of the discharge of an insolvent debtor, its validity cannot be inquired into. Robens *v.* Sweet, 48 Hun (N. Y.) 436, 1 N. Y. Suppl. 839.

6. Dorsey *v.* Cummings, 48 Hun (N. Y.) 76, 15 N. Y. St. 459; Kennedy *v.* Norcott, 54 How. Pr. (N. Y.) 87; Lindsay *v.* Sherman, 5 How. Pr. (N. Y.) 308, 1 Code Rep. N. S. (N. Y.) 25.

7. Schnitzer *v.* Willner, 7 Misc. (N. Y.) 497, 27 N. Y. Suppl. 970. An affidavit stating that the debtor is an agent for an insurance company having an office in the city of New York, and that he has desk and chair room in such office, sufficiently shows that he has a place for the transaction of business in person in the county, within the meaning of the statute. Batcheldor *v.* Nugent, 24 N. Y. Suppl. 828, 23 N. Y. Civ. Proc. 176.

Where the affidavits of both parties establish the right to the order, although on different grounds, the order will be upheld. Vredenbergh *v.* Beumont, 2 N. Y. City Ct. 298.

8. Zelie *v.* Vroman, 22 Misc. (N. Y.) 486, 50 N. Y. Suppl. 836. A motion to set aside the proceedings for irregularities in the return of the execution, not apparent on the face of the return, will be denied, where the motion does not include the setting aside of the return. High Rock Knitting Co. *v.* Bronner, 18 Misc. (N. Y.) 631, 43 N. Y. Suppl. 684.

9. **In resisting the vacation of a second order** the creditor in addition to the affidavits used on the application therefor may prove that there is no intention of harassing the debtor. Marshall *v.* Link, 13 N. Y. Suppl. 224, 20 N. Y. Civ. Proc. 109.

10. Weiss *v.* Ashman, 11 Misc. (N. Y.) 377, 32 N. Y. Suppl. 161, 24 N. Y. Civ. Proc. 268, 1 N. Y. Annot. Cas. 314, opinion of the court delivered by Bookstaver, J.

11. Thomas *v.* Kircher, 15 Abb. Pr. N. S. (N. Y.) 342.

12. Walter *v.* Pecare, 57 Hun (N. Y.) 587, 11 N. Y. Suppl. 146.

13. Joyce *v.* Spafard, 9 N. Y. Civ. Proc. 342.

14. **Appointment of referee** see *supra*, XIII, H, 2, b, (II), (B).

Second examination see *infra*, XIII, I.

15. People *v.* Warner, 51 Hun (N. Y.) 53, 3 N. Y. Suppl. 768 [*affirmed* in 125 N. Y. 746, 27 N. E. 407].

16. Teats *v.* Herington Bank, 58 Kan. 721, 51 Pac. 219.

Arrest of debtor see *supra*, XIII, N.

17. On the return of the order if the judge or the referee is not present the debtor should wait a reasonable time for his arrival. Reynolds *v.* McElhone, 20 How. Pr. (N. Y.) 454.

18. Viburt *v.* Frost, 3 Abb. Pr. (N. Y.) 119.

2. Oath of Referee. The oath need only be administered once. It is unnecessary to again administer it on an adjourned day.[19]

3. Powers and Duties of Referee. In addition to the general powers of the referee to conduct the examination, procure the attendance of witnesses, and the like, he may when so empowered summon the debtor to appear before him.[20] He may also require the creditor to proceed with due diligence,[21] pass on the good faith of a third person in denying any indebtedness to the debtor and direct him to pay the same,[22] and entertain an application for a stay of proceedings;[23] and he may name or suggest a receiver for appointment.[24] But he cannot, except by special order, reopen an examination completed and closed.[25]

4. Removal of Referee. A motion to remove the referee will be denied where the facts are disputed, and the debtor waived objection by submitting to examination.[26]

5. Place of Examination.[27] The place of examination is generally designated by statute or fixed by the order of examination.[28] However, an adjournment may be taken to a place other than that designated in the order,[29] and by submitting to an examination elsewhere the debtor may waive his right to have it conducted at the place designated in the order.[30]

6. Right to Jury. Unless it is so provided by statute,[31] which may be and

19. Hudson *v.* Plets, 11 Paige (N. Y.) 180, 3 N. Y. Leg. Obs. 120. See, generally, Oaths and Affirmations; References.

20. Redmond *v.* Goldsmith, 2 Month. L. Bul. (N. Y.) 19, where the referee was so empowered by the order appointing him, and it was further held that the debtor will be guilty of contempt if he fails to obey the summons.

21. Hudson *v.* Plets, 11 Paige (N. Y.) 180, 3 N. Y. Leg. Obs. 120.

22. Parker *v.* Page, 38 Cal. 522.

23. Mason *v.* Lee, 23 How. Pr. (N. Y.) 466.

24. Jones *v.* Lawlin, 1 Sandf. (N. Y.) 722.

25. Orr's Case, 2 Abb. Pr. (N. Y.) 457.

26. Rouse *v.* Goodman, 8 Misc. (N. Y.) 691, 28 N. Y. Suppl. 524.

27. **Designation of place of examination in** the order see *supra*, XIII, H, 2, b, (IV).

28. In New York and North Carolina the debtor can only be examined in the county where he resides or has a place for the regular transaction of business. Franey *v.* Smith, 88 Hun (N. Y.) 215, 34 N. Y. Suppl. 780; Anway *v.* David, 9 Hun (N. Y.) 296; Bingham *v.* Disbrow, 37 Barb. (N. Y.) 24, 14 Abb. Pr. (N. Y.) 251; Hersenheim *v.* Hooper, 1 Duer (N. Y.) 594, 11 N. Y. Leg. Obs. 222; Bowman *v.* Perine, 7 N. Y. Suppl. 155, 23 Abb. N. Cas. (N. Y.) 236; Jurgenson *v.* Hamilton, 5 Abb. N. Cas. (N. Y.) 149; McEwan *v.* Burgess, 15 Abb. Pr. (N. Y.) 473, 25 How. Pr. (N. Y.) 92; Belknap *v.* Hasbrouck, 13 Abb. Pr. (N. Y.) 418 note; Brown *v.* Gump, 59 How. Pr. (N. Y.) 507; Jesup *v.* Jones, 32 How. Pr. (N. Y.) 191; Hasty *v.* Simpson, 77 N. C. 69. See also Wilson *v.* Andrews, 9 How. Pr. (N. Y.) 39. *Compare* Gould *v.* Moore, 51 How. Pr. (N. Y.) 188.

The debtor need not have his principal place of business in the county. McEwan *v.* Burgess, 15 Abb. Pr. (N. Y.) 473, 25 How. Pr. (N. Y.) 92.

Transaction of business in person.— The debtor must have a place for the regular transaction of business in person, and not through agents. Brown *v.* Gump, 59 How. Pr. (N. Y.) 507.

A non-resident having no place of business within the state can only be examined in the county in which the judgment-roll is filed. Anway *v.* David, 9 Hun (N. Y.) 296.

Examination of third party.— Under the Indiana statute requiring the examination of a non-resident debtor in the county where the judgment was rendered, a third party not a resident thereof must be examined therein. Folsom *v.* Clark, 48 Ind. 414.

Proceedings in aid of execution must be taken in the county of the debtor's residence. Merrill *v.* Allin, 46 Hun (N. Y.) 623, 13 N. Y. St. 20, 28 N. Y. Wkly. Dig. 20.

Convenience of third person.— A third person may be examined at a place convenient to him without reference to the residence of the debtor. Foster *v.* Prince, 8 Abb. Pr. (N. Y.) 407, 18 How. Pr. (N. Y.) 258.

Examination of witness.— The prohibition contained in N. Y. Code Civ. Proc. § 2459, against compelling one examined in supplementary proceedings to attend outside the county of his residence, does not extend to witnesses. Foster *v.* Wilkinson, 37 Hun (N. Y.) 242.

Office of county judge.— An order for examination made returnable to a county judge at his office in a designated city is not complied with by an appearance at his private office without an endeavor to find him at the court-house. Myers *v.* Janes, 3 Abb. Pr. (N. Y.) 301.

29. Weaver *v.* Brydges, 85 Hun (N. Y.) 503, 33 N. Y. Suppl. 132.

30. State *v.* Burrows, 33 Kan. 10, 5 Pac. 449; Union Bank *v.* Northrop, 19 S. C. 473; Green *v.* Bookhart, 19 S. C. 466.

31. **In Indiana** issues of fact may be tried to a jury, when either party demands it. McMahan *v.* Works, 72 Ind. 19.

sometimes is done, there is no right to a jury[32] in proceedings of the character under consideration.

7. Right to Counsel. Participation by counsel in the examination of a witness is not a matter of right,[33] but rests in the discretion of the referee,[34] and although it has been held that the debtor may be cross-examined in his own behalf,[35] it has also been decided that the party examined is limited to the aid of counsel in framing his answers.[36] But parties not to be examined cannot appear by counsel,[37] although on examination of a third party who has a remedy against another the latter may retain counsel to represent the former.[38]

8. Witnesses[39] — a. In General. Witnesses other than the judgment debtor may be compelled to attend and testify as on the trial of an action,[40] but the debtor is entitled to notice of their examination.[41]

b. Procuring Attendance of. The attendance of a witness cannot be enforced by order,[42] but only by the process of subpœna,[43] and he is entitled to witness' fees as a condition of appearing and testifying.[44]

9. Production of Books and Papers. The power to compel the attendance of parties and a witness includes the right to compel the production of necessary books and papers by a subpœna duces tecum, or an order of the referee.[45]

32. Welch *v.* Pittsburg, etc., R. Co., 2 Ohio Dec. (Reprint) 5, 1 West. L. Month. 87; Kennesaw Mills Co. *v.* Walker, 19 S. C. 104.

33. Sandford *v.* Carr, 2 Abb. Pr. (N. Y.) 462.

34. Schwab *v.* Cohen, 13 N. Y. St. 709.

35. Leroy *v.* Halsey, 1 Duer (N. Y.) 589, Code Rep. N. S. (N. Y.) 275.

36. Corning *v.* Tooker, 5 How. Pr. (N. Y.) 16.

37. Corning *v.* Tooker, 5 How. Pr. (N. Y.) 16.

38. Corning *v.* Tooker, 5 How. Pr. (N. Y.) 16.

39. Witness generally see Witnesses.

40. McCullough *v.* Clark, 41 Cal. 298; Lathrop *v.* Clapp, 40 N. Y. 328, 100 Am. Dec. 493 [*affirming* 23 How. Pr. 423]; Foster *v.* Wilkinson, 37 Hun (N. Y.) 242; Millar *v.* Weaver, 23 Misc. (N. Y.) 254, 53 N. Y. Suppl. 259; People *v.* Marston, 18 Abb. Pr. (N. Y.) 257; Lockwood *v.* Worstell, 15 Abb. Pr. (N. Y.) 430 note; Sandford *v.* Carr, 2 Abb. Pr. (N. Y.) 462; Graves *v.* White, 12 How. Pr. (N. Y.) 33.

In Ohio the debtor alone may be examined. Stone *v.* Smith, 4 Ohio Dec. (Reprint) 68. But see Manning *v.* Manning, 9 Ohio Dec. (Reprint) 173, 11 Cinc. L. Bul. 144, holding that the court may order the examination of other witnesses than the judgment debtor, when satisfied, on the application of a party, that additional witnesses should be examined, although power to examine other witnesses than the judgment debtor is not specifically conferred. The referee may examine such witnesses only as are ordered to attend before him. Harman *v.* Waller, 4 Ohio Dec. (Reprint) 97, Clev. L. Rep. 26.

In Oregon either party may examine witnesses in his behalf. State *v.* Downing, (Oreg. 1901) 66 Pac. 917.

Waiver of right.— Matter of Sickle, 52 Hun (N. Y.) 527, 5 N. Y. Suppl. 703, 17 N. Y. Civ. Proc. 138.

41. Shannon *v.* McMurtrie, 48 N. J. L. 427, 5 Atl. 658; Benjamin *v.* Myers, 3 N. Y. St. 284.

42. People *v.* Warner, 51 Hun (N. Y.) 53, 3 N. Y. Suppl. 768.

43. People *v.* Warner, 51 Hun (N. Y.) 53, 3 N. Y. Suppl. 768; People *v.* Ball, 37 Hun (N. Y.) 245, 22 N. Y. Wkly. Dig. 275; Knowles *v.* De Lazare, 8 N. Y. Civ. Proc. 386, 3 How. Pr. N. S. (N. Y.) 35; People *v.* Dutcher, 3 Abb. Pr. N. S. (N. Y.) 151; Tompkins County Bank *v.* Trapp, 21 How. Pr. (N. Y.) 17.

The subpœna should be issued under the hand of the referee before whom witnesses are to testify, and not in the name of the county judge and county clerk, as in an action. People *v.* Ball, 37 Hun (N. Y.) 245, 22 N. Y. Wkly. Dig. 275; Howe *v.* Welch, 11 N. Y. Civ. Proc. 444. See also Knowles *v.* De Lazare, 8 N. Y. Civ. Proc. 386, 3 How. Pr. N. S. (N. Y.) 35.

To procure attendance before a county judge the subpœna should issue out of the court in which judgment was rendered. People *v.* Dutcher, 3 Abb. Pr. N. S. (N. Y.) 151.

Omitting to state the place where the debtor shall attend is a fatal defect. Kelty *v.* Yerby, 31 How. Pr. (N. Y.) 95.

Time of serving.—A witness cannot be subpœnaed by the court, until service of the order for examination or the voluntary appearance of the judgment debtor. People *v.* Warner, 51 Hun (N. Y.) 53, 3 N. Y. Suppl. 768 [*affirmed* in 125 N. Y. 746, 27 N. E. 401]; Benjamin *v.* Myers, 3 N. Y. St. 284.

Appearance without subpœna.— A witness appearing is bound to answer proper questions, whether he has been subpœnaed or not. People *v.* Marston, 18 Abb. Pr. (N. Y.) 257.

44. Davis *v.* Turner, 4 How. Pr. (N. Y.) 190.

A third person required to attend by order is not entitled to witness' fees. Heckman *v.* Bach, 20 Abb. N. Cas. (N. Y.) 401.

45. Pendergast *v.* Dempsey, 10 N. Y. Suppl. 938, 18 N. Y. Civ. Proc. 198; Holmes *v.*

10. Issue of Commission.[46] In the absence of express statutory provision therefor a commission to take the testimony of a non-resident witness cannot issue.[47]

11. Adjournments.[48] A judge or a referee may adjourn the proceedings from time to time,[49] although the debtor refuses to consent.[50] A failure to adjourn the proceedings regularly will not necessarily oust the jurisdiction.[51]

12. Scope of Examination[52]**— a. In General.** The conduct and scope of the examination are largely within the discretion of the officer before whom it is had;[53]

Stietz, 6 N. Y. Civ. Proc. 362; Pruden *v.* Tallman, 6 N. Y. Civ. Proc. 360; Coates *v.* Wilkes, 92 N. C. 376.

A corporation may be required to produce its books, and submit to an examination relative thereto through one of its officers. Pendergast *v.* Dempsey, 10 N. Y. Suppl. 938, 18 N. Y. Civ. Proc. 198; Holmes *v.* Stietz, 6 N. Y. Civ. Proc. 362. The production of the books of a corporation can only be compelled by a subpœna duces tecum, served on an officer who has power to produce them. Service of an order on an employee is insufficient. Wainwright *v.* Tiffiny, 13 N. Y. Civ. Proc. 222.

Leaving books for examination by creditor. — On conclusion or adjournment of the examination the debtor who has produced his books cannot be compelled to leave them with the referee for examination by the creditor. Barnes *v.* Levy, 29 N. Y. Suppl. 1076, 23 N. Y. Civ. Proc. 253.

The propriety of the refusal of a witness to produce papers claimed by him to relate to his private affairs is for the court, on a submission of the papers. Champlin *v.* Stoddart, 17 N. Y. Wkly. Dig. 76.

United States courts.—Where an execution against a corporation has been returned *nulla bona* without any demand having been made upon the officer in charge of the company's books for a list of the names, places or residence, etc., of the stock-holders liable for unpaid balances upon their stock, as required by the state statute, a federal court will not make a peremptory order on such officer to furnish such list. Cleveland Rolling-Mill Co. *v.* Texas, etc., R. Co., 23 Fed. 720.

Waiver of right.— By instituting an action to set aside an assignment, the creditor does not waive his right to have the assignee produce books in his custody belonging to the debtor. Matter of Sickle, 52 Hun (N. Y.) 527, 5 N. Y. Suppl. 703, 17 N. Y. Civ. Proc. 138.

46. Commission to take deposition generally see Depositions.

47. Graham *v.* Colburn, 6 Duer (N. Y.) 678, 14 How. Pr. (N. Y.) 52; Morrell *v.* Hey, 15 Abb. Pr. (N. Y.) 430, 24 How. Pr. (N. Y.) 48; Champlin *v.* Stodart, 64 How. Pr. (N. Y.) 378.

48. Effect of failure to adjourn proceedings see *supra*, XIII, O.

49. Kaufman *v.* Thrasher, 10 Hun (N. Y.) 438; Mason *v.* Lee, 23 How. Pr. (N. Y.) 466. See Allen *v.* Starring, 26 How. Pr. (N. Y.) 57.

If the party fails to appear the proceedings may be continued by an order, or a new order may be obtained. Wright *v.* Nostrand, 94 N. Y. 31, 50 [*reversing* 47 N. Y. Super. Ct. 441]; Schanck *v.* Conover, 54 How. Pr. (N. Y.) 437.

Ill health or extreme mental excitement of the debtor is a good ground for postponement. Mason *v.* Lee, 23 How. Pr. (N. Y.) 466.

Where the referee fails to appear at the time and place fixed for the examination the proceeding may be continued by order. Keihen *v.* Shipherd, 4 N. Y. Suppl. 339, 16 N. Y. Civ. Proc. 183.

Where the examination has been suspended to await the result of a motion to vacate the proceedings after its denial there may be an adjournment to a subsequent day on notice to the debtor's attorney, and if there is no appearance on the adjourned day a new order may be obtained for a further adjournment. Ammidon *v.* Wolcott, 15 Abb. Pr. (N. Y.) 314.

Adjournment to new place.— The examination may be adjourned to a place other than that designated in the order for the examination. Weaver *v.* Brydges, 85 Hun (N. Y.) 503, 33 N. Y. Suppl. 132.

50. Kaufman *v.* Thrasher, 10 Hun (N. Y.) 438.

Indefinite adjournment.— The referee cannot adjourn the examination indefinitely without the debtor's consent. Hudson *v.* Plets, 11 Paige (N. Y.) 180, 3 N. Y. Leg. Obs. 120.

51. Loss of jurisdiction will not be presumed from the failure of the record to show a regular adjournment where the debtor subsequently attends. Robertson *v.* Hay, 12 Misc. (N. Y.) 7, 33 N. Y. Suppl. 31.

52. Scope of inquiry on second examination see *supra*, XIII, I, 5.

53. Leroy *v.* Halsey, 1 Duer (N. Y.) 589, Code Rep. N. S. (N. Y.) 275, 11 N. Y. Leg. Obs. 252.

Two proceedings.—Where no injury can result to the debtor, two proceedings may be entertained by the referee at the same time. Kennesaw Mills Co. *v.* Walker, 19 S. C. 104.

Unless a clear abuse of discretion appears, its exercise will not be interfered with. Heilbronner *v.* Levy, 64 Wis. 636, 26 N. W. 113.

Necessity of examining all debtors.— Under a statute authorizing the creditor to file interrogatories to the "debtor" only such of defendants need be examined as may be necessary to acquire the information wanted. Lewis *v.* Rosler, 19 W. Va. 61.

but he cannot act capriciously or in a partisan spirit.[54] The questions propounded must have a tendency to elicit information as to or discover property belonging to the judgment debtor and applicable to payment of the judgment,[55] and the debtor may be cross-examined in his own behalf and permitted to explain his answers.[56]

b. Privilege of Witness.[57] Where by statute it is provided that the debtor or a witness shall not be excused from answering on the ground that his answer will tend to convict him of the commission of a fraud or to prove his participation in the disposition of property applicable to the judgment, the witness cannot refuse to answer questions having such a tendency, on the ground of privilege.[58] However, to prevent hardship it is also provided that his answer cannot be used as evidence against him in any criminal prosecution or proceeding.[59] A witness will not be excused from answering proper questions on the ground that he claims the property which is sought to be reached.[60]

c. As to Collateral Matters. The merits of the original action cannot be con-

Necessity of oath.—Graves *v.* Lake, 12 How. Pr. (N. Y.) 33.

54. People *v.* Leipzig, 52 How. Pr. (N. Y.) 410.

55. Peck *v.* Low, 7 N. J. L. J. 350; Matter of Sickle, 52 Hun (N. Y.) 527, 5 N. Y. Suppl. 703, 17 N. Y. Civ. Proc. 138; Hart *v.* Johnson, 43 Hun (N. Y.) 505, 7 N. Y. St. 133; Canavan *v.* McAndrew, 20 Hun (N. Y.) 46; Forbes *v.* Willard, 54 Barb. (N. Y.) 520, 37 How. Pr. (N. Y.) 193; Millar *v.* Weaver, 23 Misc. (N. Y.) 254, 54 N. Y. Suppl. 259; Hunt *v.* Enoch, 6 Abb. Pr. (N. Y.) 212; Van Wyck *v.* Bradly, 3 Code Rep. (N. Y.) 157.

Jurisdictional facts.— The New York statute contemplates that all the jurisdictional facts shall be proven by the evidence of the person examined. Gray *v.* Ashley, 24 Misc. 396, 53 N. Y. Suppl. 547.

Subsequently acquired property.— The debtor cannot be questioned as to property acquired since the institution of the proceedings. Gregory *v.* Valentine, 4 Edw. (N. Y.) 282.

Trust funds.— In Campbell *v.* Foster, 35 N. Y. 361 [*affirming* 16 How. Pr. 275], it was said that inquiry could not be made as to whether the surplus of a trust fund was applicable, where there was no accumulation.

Responsiveness.— See Leroy *v.* Halsey, 1 Duer (N. Y.) 589, Code Rep. N. S. (N. Y.) 275, 11 N. Y. Leg. Obs. 252.

Irrelevancy.— Questions as to what property the son of the debtor had other than that he had given him, and as to what the son paid and received in transactions with other persons, are properly excluded. Comstock *v.* Grindle, 121 Ind. 459, 23 N. E. 494.

56. Leroy *v.* Halsey, 1 Duer (N. Y.) 589, Code Rep. N. S. (N. Y.) 275, 11 N. Y. Leg. Obs. 252; Sandford *v.* Carr, 2 Abb. Pr. (N. Y.) 462.

57. Admissibility of testimony taken in supplementary proceedings see CRIMINAL LAW, 12 Cyc. 70.

Privilege of witness generally see WITNESSES.

58. Lathrop *v.* Clapp, 40 N. Y. 328, 100 Am. Dec. 493; Matter of Sickle, 52 Hun (N. Y.) 527, 5 N. Y. Suppl. 703, 17 N. Y. Civ. Proc. 138; Forbes *v.* Willard, 54 Barb. (N. Y.) 520, 37 How. Pr. (N. Y.) 193; Marx *v.* Spaulding, 6 N. Y. St. 530; Steinhart *v.* Farrell, 3 N. Y. St. 292; Clapp *v.* Lathrop, 23 How. Pr. (N. Y.) 423. But see Town *v.* New York, etc., Safeguard Ins. Co., 4 Bosw. (N. Y.) 683.

Fraud.— This provision is not limited to fraud in the disposal of the debtor's property but extends to all frauds. Forbes *v.* Willard, 54 Barb. (N. Y.) 520, 37 How. Pr. (N. Y.) 193.

Gambling transaction.— A debtor who testifies to a loss of money at gaming may be required to further state where and with whom he lost it. Steinhart *v.* Farrell, 3 N. Y. St. 292.

59. Steinhart *v.* Farrell, 3 N. Y. St. 292.

The examination cannot be used as evidence of any fact disclosed. Barber *v.* People, 17 Hun (N. Y.) 366. See also Loomis *v.* People, 19 Hun (N. Y.) 601; Dusenbury *v.* Dusenbury, 63 How. Pr. (N. Y.) 349.

The examination is admissible as an admission of the debtor and to affect his credibility. Wright *v.* Nostrand, 94 N. Y. 31 [*reversing* 47 N. Y. Super. Ct. 441].

Proof by third parties.— Proof of statements made by the debtor on his examination may be made by parties who heard them. Kain *v.* Larkin, 17 N. Y. Suppl. 223.

Examination as to truth of statements.— The attention of the witness may be called to specific statements in his examination, and he may be asked if they were true. Grossman *v.* Walters, 11 N. Y. Suppl. 471.

Retrospective effect of statute.—Testimony inadmissible under the statute in force when given cannot be used after the repeal of the statute. Lapham *v.* Marshall, 51 Hun (N. Y.) 36. See Bush *v.* Preston, 20 N. Y. Wkly. Dig. 190.

Proceedings under the Non-Imprisonment Act are not within the inhibition of the code providing that answers given in supplementary proceedings shall not be used against him in any criminal prosecution or proceeding. People *v.* Speir, 12 Hun (N. Y.) 70, 54 How. Pr. (N. Y.) 54 [*reversed* on other grounds in 77 N. Y. 144, 57 How. Pr. 274].

60. Sandford *v.* Carr, 2 Abb. Pr. (N. Y.) 462.

sidered,[61] or the validity of the judgment,[62] or execution,[63] or the truth of the return of the sheriff thereto called in question.[64] Neither can the validity of an assignment by the debtor[65] or of his discharge as an insolvent be tried or determined in these proceedings.[66] Nor is a general inquiry into his private affairs permissible.[67]

d. As to Disputed Ownership or Indebtedness. There is no jurisdiction to try and determine the title to property to which a claim is made by third parties,[68] or the existence of an indebtedness to the judgment debtor which is denied.[69]

e. As to Property Transferred. Inquiries may be made as to the circumstances attending an assignment or transfer of property by the debtor, for the purpose of ascertaining the *bona fides* of the transaction.[70] But pending an action to set aside an assignment,[71] or where a creditor has proved his claim against

61. O'Neil *v.* Martin, 1 E. D. Smith (N. Y.) 404; Walker *v.* Donovan, 53 How. Pr. (N. Y.) 3.

62. People *v.* Oliver, 66 Barb. (N. Y.) 570; Courtois *v.* Harrison, 1 Hilt (N. Y.) 109; Hyatt *v.* Dusenbury, 12 N. Y. Civ. Proc. 152.

Any defense or answer which the debtor has to the enforcement of the judgment is available to him. Walker *v.* Donovan, 53 How. Pr. (N. Y.) 3.

63. Greenlich *v.* Rose, 2 N. Y. City Ct. 174.

64. Flint *v.* Webb, 25 Minn. 263; Tyler *v.* Willis, 33 Barb. (N. Y.) 327, 12 Abb. Pr. (N. Y.) 465.

65. Beebe *v.* Kenyon, 3 Hun (N. Y.) 73, 5 Thomps. & C. (N. Y.) 271.

66. Coursen *v.* Dearborn, 7 Rob. (N. Y.) 143. See Gardner *v.* Lay, 2 Daly (N. Y.) 113.

67. Bradley *v.* Burk, 81 Minn. 368, 84 N. W. 123.

68. Krone *v.* Klotz, 3 N. Y. App. Div. 587, 38 N. Y. Suppl. 225, 25 N. Y. Civ. Proc. 320, 3 N. Y. Annot. Cas. 36; Teller *v.* Randall, 40 Barb. (N. Y.) 242, 26 How. Pr. (N. Y.) 145; Tompkins County Bank *v.* Trapp, 21 How. Pr. (N. Y.) 17; Carson *v.* Oates, 64 N. C. 115; Stone *v.* Smith, 4 Ohio Dec. (Reprint) 68, Clev. L. Rec. 91. See also Mechanics', etc., Bank *v.* Healy, 14 N. Y. Wkly. Dig. 120.

In California where a third person files a verified answer denying that he holds any property belonging to the judgment debtor, or that any property was conveyed to him for the purpose of shielding it from the judgment as stated in the creditor's affidavit, the judge can only authorize that suit be brought against him to recover the property claimed and cannot further proceed with his examination. Lewis *v.* Chamberlain, 108 Cal. 525, 41 Pac. 413.

In New York a claim by a witness examined in the proceedings terminated the proceedings except that he might be required to state the measure of his claim to ascertain if it extends to the whole property. Van Wyck *v.* Bradly, 3 Code Rep. 157.

69. Waldron *v.* Walker, 18 N. Y. Suppl. 292; Brown *v.* Edmonds, 5 S. D. 508, 59 N. W. 731; Thompson, etc., Mfg. Co. *v.* Guenthner, 5 S. D. 504, 59 N. W. 727.

Particularity.—After denial by a third person that he is indebted to or holds any property of the debtor, he cannot be compelled to answer more specifically. If a more particular examination is desired, he must be made a witness. Tompkins County Bank *v.* Trapp, 21 How. Pr. (N. Y.) 17.

70. Comstock *v.* Grindle, 121 Ind. 459, 23 N. E. 494; Lathrop *v.* Clapp, 40 N. Y. 328, 100 Am. Dec. 493 [*affirming* 23 How. Pr. 423]; Matter of Sickle, 52 Hun (N. Y.) 527, 5 N. Y. Suppl. 703, 17 N. Y. Civ. Proc. 138; Marx *v.* Spaulding, 43 Hun (N. Y.) 365, 6 N. Y. St. 530; Forbes *v.* Willard, 54 Barb. (N. Y.) 520, 37 How. Pr. (N. Y.) 193; Hart *v.* Johnson, 7 N. Y. St. 133; Schneider *v.* Altman, 8 N. Y. Civ. Proc. 242, 16 Abb. N. Cas. (N. Y.) 312, 2 How. Pr. N. S. (N. Y.) 448; Seligman *v.* Wallach, 6 N. Y. Civ. Proc. 232, 16 Abb. N. Cas. (N. Y.) 317, 67 How. Pr. (N. Y.) 514; Mechanics', etc., Bank *v.* Healey, 14 N. Y. Wkly. Dig. 120; Dorff *v.* Matthews, 36 Leg. Int. (Pa.) 382. See Williams *v.* Carroll, 2 Hilt. (N. Y.) 438; Wicker *v.* Dresser, 14 How. Pr. (N. Y.) 465; Van Wyck *v.* Bradly, 3 Code Rep. (N. Y.) 157. See also *supra*, XIII, E; and *infra*, XIII, T.

The debtor may be questioned as to property in another state. Peck *v.* Low, 7 N. J. L. J. 350.

A third party is not to be excused from answering because he sets up a claim to the property which is the subject of examination. Sandford *v.* Carr, 2 Abb. Pr. (N. Y.) 462.

A trustee of the debtor may be questioned to show that the property held by him exceeded in value the consideration for which the debtor claimed to have sold his interest, and also that the purchase-price of said interest had been paid by the alleged trustee instead of by the alleged purchaser. Millar *v.* Weaver, 23 Misc. (N. Y.) 254, 53 N. Y. Suppl. 259.

A debtor who has made a bona fide transfer of property cannot be required to name the transferee; but otherwise if he has reserved the right to redeem by repaying an inadequate consideration. Williams *v.* Carroll, 2 Hilt. (N. Y.) 438. The creditor may show that a transfer was not made in good faith, notwithstanding the claim of a witness that he owns the subject-matter as a *bona fide* purchaser. Mechanics', etc., Bank *v.* Healy, 14 N. Y. Wkly. Dig. 120.

71. Schloss *v.* Wallach, 38 Hun (N. Y.) 638, 16 Abb. N. Cas. (N. Y.) 319 note; Bason *v.* Goldsmith, 1 N. Y. City Ct. 462.

a general assignee of the debtor, the examination will be limited to after-acquired property.[72] A general inquiry into the debtor's private affairs is not permissible, where a reasonable basis for an inquiry to discover a fraudulent transfer of property is not shown.[73]

13. Correcting Testimony. Corrections or explanations of the testimony should be permitted to be made by the party examined.[74]

14. Subscription of Deposition. The testimony of the debtor should be subscribed by him,[75] but it is not necessary that a witness should sign the deposition made by him when the effect will be to subject him to a new legal liability.[76]

15. Reopening Examination. After conclusion of the debtor's examination a further examination should not be permitted unless special circumstances are shown,[77] and then only by an order procured for that purpose.[78]

16. Filing Examination. The examination of the debtor and the witnesses is a record which must be filed with the proper officer.[79]

17. Report of Referee.[80] On the conclusion of the examination, it is the duty of the referee to return to the judge the oath administered to him as to the faithful discharge of his duties, with his report and the testimony.[81]

R. Stay or Suspension of Proceedings. A stay of the proceedings can be granted on application therefor only by the judge before whom they are pending.[82] It is a good reason for staying or suspending the proceedings that the debtor has been discharged as an insolvent[83] or bankrupt[84] or that a levy has been made under a second execution, issued during the pendency of the proceedings,[85]

72. Wilson *v.* Daggett, 9 N. Y. Civ. Proc. 408.

73. Bradley *v.* Burk, 81 Minn. 368, 84 N. W. 123.

74. Sherwood *v.* Dolen, 14 Hun (N. Y.) 191.

In the discretion of the referee, even after the examination has been concluded and signed, the correction should be made by supplemental statements. Corning *v.* Tooker, 5 How. Pr. (N. Y.) 16.

75. Where the testimony of the debtor has been incorrectly taken down, he has a right to have the minutes changed so as to conform to the testimony actually given, and without such changes he cannot be compelled to subscribe his name thereto, even if the errors are corrected by a supplemental entry at the end of the minutes. Sherwood *v.* Dolan, 14 Hun (N. Y.) 191.

76. Marx *v.* Spaulding, 43 Hun (N. Y.) 365, 6 N. Y. St. 530.

77. Orr's Case, 2 Abb. Pr. (N. Y.) 457.

78. Orr's Case, 2 Abb. Pr. (N. Y.) 457. And see Leggett *v.* Sloan, 24 How. Pr. (N. Y.) 479, where a further examination was ordered after the appointment of a receiver.

79. Falkenberg *v.* Frank, 20 Misc. (N. Y.) 692, 46 N. Y. Suppl. 675, 19 Misc. (N. Y.) 418, 43 N. Y. Suppl. 1137.

In New York the examination should be filed with the county clerk. Sinnott *v.* Hempstead First Nat. Bank, 34 N. Y. App. Div. 161, 54 N. Y. Suppl. 417; Fiske *v.* Twigg, 50 N. Y. Super. Ct. 69, 5 N. Y. Civ. Proc. 41; Renner *v.* Meyer, 6 N. Y. Suppl. 535, 22 Abb. N. Cas. 438.

In Ohio the law does not authorize a record to be made of "proceedings in aid of execution;" but the judge, including the probate judge, must file his "orders" and "minute of such proceedings" with the clerk of the court of common pleas, who alone can certify transcripts thereof. Welch *v.* Pittsburg, etc., R. Co., 2 Ohio Dec. (Reprint) 5, 1 West. L. Month. 87.

An incomplete examination should be filed. Falkenberg *v.* Frank, 20 Misc. (N. Y.) 692, 46 N. Y. Suppl. 675.

Employment of stenographer by attorney for creditor.— See Foster *v.* Twigg, 18 N. Y. Wkly. Dig. 563.

The debtor may require the creditor to file the examination. Renner *v.* Meyer, 6 N. Y. Suppl. 535, 22 Abb. N. Cas. (N. Y.) 438.

80. Reports of referees generally see References.

81. Jones *v.* Lawlin, 1 Sandf. (N. Y.) 722.

The facts, not the evidence at large, should be reported. Dorr *v.* Noxon, 5 How. Pr. (N. Y.) 29.

Presumption as to findings.— In the absence of explicit findings it will be presumed that the referee found the facts necessary to support the judgment. Parker *v.* Page, 38 Cal. 522.

Fees of referee.— An application must be made to determine the amount of the referee's fees. Brush *v.* Kelsey, 47 N. Y. App. Div. 270, 62 N. Y. Suppl. 214.

82. Genesee Bank *v.* Spencer, 15 How. Pr. (N. Y.) 14. See, generally, Supersedeas.

An application for a stay of the examination and proceedings should be made to the referee before whom the examination is pending. Mason *v.* Lee, 23 How. Pr. (N. Y.) 466.

83. Coursen *v.* Dearborn, 7 Rob. (N. Y.) 143.

84. World Co. *v.* Brooks, 7 Abb. Pr. N. S. (N. Y.) 212.

85. Steinhardt *v.* Michalda, 15 N. Y. Civ. Proc. 323.

unless it is apparent that the levy will be effectual to satisfy the judgment.[86] But the proceedings will not be stayed because the creditor has availed himself of concurrent remedies,[87] or because an appeal has been taken from the judgment,[88] unless security is given and a stay procured.[89] Nor will a stay of proceedings on an execution preclude the creditor from examining a third party,[90] or a stay pending the decision of a motion affect an existing injunction restraining the disposition of property.[91]

S. Order For Payment or Delivery of Property — 1. In General. In the states where supplementary proceedings are authorized, it is generally provided that, if money or property applicable to the judgment is discovered in the possession or under the control of the debtor or any other person, its application to the satisfaction of the judgment may be directed by payment or transfer to the creditor, to the sheriff holding the execution, or to a receiver appointed in the proceedings.[92] The right so conferred will not be lost by the failure of the debtor to appear for examination,[93] by the fact that the debtor was arrested for evading an examination by leaving the jurisdiction,[94] or by the institution of an action by the receiver to recover other property;[95] but it may be lost by laches.[96]

86. Smith *v.* Davis, 63 Hun (N. Y.) 100, 17 N. Y. Suppl. 614; Sale *v.* Lawson, 4 Sandf. (N. Y.) 718; Hanson *v.* Tripler, 3 Sandf. (N. Y.) 733, Code Rep. N. S. (N. Y.) 154; Port Jervis Nat. Bank *v.* Hansee, 15 Abb. N. Cas. (N. Y.) 488; Farquaharson *v.* Kimball, 9 Abb. Pr. (N. Y.) 385 note, 18 How. Pr. (N. Y.) 33; Fellerman's Case, 2 Abb. Pr. (N. Y.) 155, 11 How. Pr. (N. Y.) 528. See *supra*, XIII, K.

87. See *supra*, XIII, L.

Attachment.— Hanson *v.* Tripler, 3 Sandf. (N. Y.) 733, Code Rep. N. S. (N. Y.) 154.

Establishment of lien on realty.—See Gates *v.* Young, 17 N. Y. Wkly. Dig. 551.

88. Sluyter *v.* Smith, 2 Bosw. (N. Y.) 673; Arnoux *v.* Homans, 32 How. Pr. (N. Y.) 382. See Conway *v.* Hitchins, 9 Barb. (N. Y.) 378.

89. Cowdrey *v.* Carpenter, 2 Rob. (N. Y.) 601, 17 Abb. Pr. (N. Y.) 107; Arnoux *v.* Homans, 32 How. Pr. (N. Y.) 382.

An appeal with security suspends pending proceedings but does not authorize their dismissal. Cowdrey *v.* Carpenter, 2 Rob. (N. Y.) 601, 17 Abb. Pr. (N. Y.) 107.

90. Lowber *v.* New York, 5 Abb. Pr. (N. Y.) 268.

91. Woolf *v.* Jacobs, 36 N. Y. Super. Ct. 408.

92. *California.*— Habenicht *v.* Lissak, 78 Cal. 351, 20 Pac. 874, 12 Am. St. Rep. 63, 5 L. R. A. 713; Collins *v.* Angell, 72 Cal. 513, 14 Pac. 135; Pacific Bank *v.* Robinson, 57 Cal. 520, 40 Am. Rep. 120.

Indiana.— Devan *v.* Ellis, 29 Ind. 72.

Iowa.— *Ex p.* Grace, 12 Iowa 208, 79 Am. Dec. 529.

Minnesota.— Flint *v.* Webb, 25 Minn. 263.

Montana.— Minnesota Bank *v.* Hayes, 11 Mont. 533, 29 Pac. 90.

New Jersey.— Logan *v.* O'Leary, 43 N. J. Eq. 320, 12 Atl. 535.

New York.— Buchanan *v.* Hunt, 98 N. Y. 560 [*reversing* 33 Hun 329]; Matter of Crane, 81 Hun 96, 30 N. Y. Suppl. 616, 1 N. Y. Annot. Cas. 148; Heatherington *v.* Martens, 73 Hun 611, 26 N. Y. Suppl. 115; Barnes *v.* Morgan, 3 Hun 703, 6 Thomps. & C. 105; Fenner *v.* Sanborn, 37 Barb. 610; Davis *v.* Briggs, 1 Silv. Supreme 326, 5 N. Y. Suppl. 323; Clan Ranald *v.* Wyckoff, 41 N. Y. Super. Ct. 527; Serven *v.* Lowerre, 3 Misc. 113, 23 N. Y. Suppl. 1052; Smith *v.* Tozer, 11 N. Y. Civ. Proc. 349; Hall *v.* McMahon, 10 Abb. Pr. 103; Corning *v.* Toker, 5 How. Pr. 16; Bunn *v.* Fonda, 2 Code Rep. 70.

Oregon.— State *v.* Downing, 40 Oreg. 309, 58 Pac. 863, 66 Pac. 917.

West Virginia.— Spang *v.* Robinson, 24 W. Va. 327.

United States.—Tomlinson, etc., Mfg. Co. *v.* Shatto, 34 Fed. 380.

See 21 Cent. Dig. tit. "Execution," § 1156 *et seq.*

An order requiring payment or delivery to the sheriff was not compulsory under the New York code. Calkins *v.* Packer, 21 Barb. 275.

Application of money by sheriff.— Baker *v.* Kenworthy, 41 N. Y. 215; Adams *v.* Welsh, 43 N. Y. Super. Ct. 52.

If there is a misappropriation by the sheriff of moneys paid to him pursuant to an order procured by the creditor the loss falls on the latter. *In re* Dawson, 110 N. Y. 114, 17 N. E. 668, 6 Am. St. Rep. 346.

Restoration of money wrongfully procured to be paid.— See Fowler *v.* Lowenstein, 7 Lans. (N. Y.) 167.

The court may require the expenses of the last illness and the funeral expenses to be paid out of the fund before its application to the judgment. De Loach *v.* Sarratt, 58 S. C. 117, 36 S. E. 532.

The purpose of the Iowa statute is to obtain an order for the payment of the debt, and not alone to settle the right of the creditor to the proceeds of a certain fund. *Ex p.* Grace, 12 Iowa 208, 79 Am. Dec. 529.

93. State *v.* Downing, 40 Oreg. 309, 58 Pac. 863, 66 Pac. 917.

94. It is immaterial whether the arrest was or was not legal. Teats *v.* Herington Bank, 58 Kan. 721, 51 Pac. 219.

95. Matter of Crane, 81 Hun (N. Y.) 96, 30 N. Y. Suppl. 616, 1 N. Y. Annot. Cas. 148.

96. Heatherington *v.* Martens, 73 Hun (N. Y.) 611, 26 N. Y. Suppl. 115.

2. Property Applicable[97] — a. In General. The order may require the payment of money or the delivery of any tangible property not exempt from execution, and within the purview of the statute authorizing orders of this character.[98]

97. Property which may be reached see *supra*, XIII, F.

Right of receiver to property see *infra*, XIII, T, 13.

98. Canandaigua First Nat. Bank *v.* Martin, 49 Hun (N. Y.) 571, 2 N. Y. Suppl. 315, 15 N. Y. Civ. Proc. 324; Matter of Van Ness, 21 Misc. (N. Y.) 249, 47 N. Y. Suppl. 702; Serven *v.* Lowerre, 3 Misc. (N. Y.) 113, 23 N. Y. Suppl. 1052; Ross *v.* Ross, 119 N. C. 109, 25 S. E. 792.

For example it has been held that the debtor or a third person may be compelled to pay over or deliver: A bank account in which the moneys of the debtor and another are commingled. Matter of Weld, 34 N. Y. App. Div. 471, 54 N. Y. Suppl. 253. Alimony. Stevenson *v.* Stevenson, 34 Hun (N. Y.) 157; Bucki *v.* Bucki, 26 Misc. (N. Y.) 69, 56 N. Y. Suppl. 439. But see *contra*, Romaine *v.* Chauncey, 129 N. Y. 566, 29 N. E. 826, 26 Am. St. Rep. 544, 14 L. R. A. 712 [*affirming* 60 Hun 477, 15 N. Y. Suppl. 198, 21 N. Y. Civ. Proc. 76]. A judgment rendered in an action of tort. Mallory *v.* Norton, 21 Barb. (N. Y.) 424. An annuity to the debtor and his wife, which belongs solely to the husband during their joint lives. Gifford *v.* Rising, 55 Hun (N. Y.) 61, 8 N. Y. Suppl. 279. A vested legacy payable on a contingency. Spencer *v.* Greene, 17 R. I. 727, 24 Atl. 742. Moneys actually due to the debtor at the time of the order. Stewart *v.* Foster, 1 Hilt. (N. Y.) 505; Atkinson *v.* Servine, 11 Abb. Pr. N. S. (N. Y.) 384; Potter *v.* Low, 16 How. Pr. (N. Y.) 549. Moneys kept in bank by debtor in wife's name and managed by him under a power of attorney. Matter of Weld, 34 N. Y. App. Div. 471, 54 N. Y. Suppl. 253. Money on deposit in a bank by the debtor in his own name with the words "in trust" added. Green *v.* Griswold, 57 N. Y. Super. Ct. 24, 4 N. Y. Suppl. 8, 893. Money paid into court on a judgment in favor of the debtor. Minnesota Bank *v.* Hayes, 11 Mont. 533, 29 Pac. 90. Moneys paid by debtor for advance board of himself and wife for two years. Davis *v.* Briggs, 1 Silv. Supreme (N. Y.) 326, 5 N. Y. Suppl. 323. Property secreted and withheld from execution. Keepsch *v.* Donald, 18 Wash. 150, 51 Pac. 352. But it has also been held that an order of this character cannot be made with respect to: Account-books of a physician containing matters of a private character respecting his patients. Kelly *v.* Levy, 2 N. Y. Suppl. 849. Accounts exempt from sale or execution without the debtor's consent. Chandler *v.* Caldwell, 17 Ind. 256. A charity fund raised for the benefit of the debtor. Wilder *v.* Clark, 11 N. Y. Suppl. 683. A check borrowed for a specific purpose, and to be returned to the lender if the purpose failed. Nathans *v.* Satterlee, 18 Abb. N. Cas. (N. Y.) 310. A debt to become due on a contingency or for work to be performed. McCormick *v.* Kehoe, 7 N. Y. Leg. Obs. 184. Alimony awarded as incidental to a decree of divorce. Romaine *v.* Chauncey, 129 N. Y. 556, 29 N. E. 826, 26 Am. St. Rep. 544, 14 L. R. A. 712 [*affirming* 60 Hun 477, 15 N. Y. Suppl. 198, 21 N. Y. Civ. Proc. 76]. Choses in action, not contemplated by the statute. Spang *v.* Robinson, 24 W. Va. 327. Debts due, where the proceedings are limited to the application of goods or specific money. West Side Bank *v.* Pugsley, 47 N. Y. 368. Money acquired subsequent to an injunction order. McGivney *v.* Childs, 41 Hun (N. Y.) 607, 5 N. Y. St. 251. Money deposited with sheriff in lieu of bail. Alexander *v.* Creamer, 46 N. Y. App. Div. 211, 61 N. Y. Suppl. 539; Hayes *v.* McClelland, 20 N. Y. Wkly. Dig. 393. Money in the hands of a receiver appointed in another state. Smith *v.* McNamara, 15 Hun (N. Y.) 447. Money not due and payable at the time of service of the order for examination. Albright *v.* Kempton, 4 N. Y. Civ. Proc. 16. Money received by a married woman from her husband for personal services. Broderick *v.* Archibald, 61 N. Y. App. Div. 473, 70 N. Y. Suppl. 617. Money to become, but not yet due. McCormick *v.* Kehoe, 7 N. Y. Leg. Obs. 184. A pension. Sargent *v.* Bennett, 3 How. Pr. N. S. (N. Y.) 515. Property acquired after the order for the debtor's examination. Rainsford *v.* Temple, 3 Misc. (N. Y.) 294, 22 N. Y. Suppl. 937. Property exempt from levy and sale under an execution. Remick *v.* Bradley, 119 Mich. 399, 78 N. W. 326. Property inapplicable to judgment. Lyons *v.* Marcher, 119 Cal. 382, 51 Pac. 559. Property levied on in another action. Griswold *v.* Tompkins, 7 Daly (N. Y.) 214. Property received intermediate the making and service of the order of examination. Atkinson *v.* Servine, 11 Abb. Pr. N. S. (N. Y.) 384. Property subsequently acquired or a debt thereafter arising. Caton *v.* Southwell, 13 Barb. (N. Y.) 335; Sands *v.* Roberts, 8 Abb. Pr. (N. Y.) 343. Property, the disposition of which has been enjoined in another proceeding. Nieuwankamp *v.* Ullman, 47 Wis. 168, 2 N. W. 131. Property which may be reached by an execution. Reardon *v.* Henry, 82 Iowa 134, 47 N. W. 1022; Canandaigua First Nat. Bank *v.* Martin, 49 Hun (N. Y.) 571, 2 N. Y. Suppl. 315, 15 N. Y. Civ. Proc. 324. Real estate (Smith *v.* Tozer, 11 N. Y. Civ. Proc. 343); sold on execution before the receivership (Canandaigua First Nat. Bank *v.* Martin, 49 Hun (N. Y.) 571, 2 N. Y. Suppl. 315, 15 N. Y. Civ. Proc. 324; Albany City Nat. Bank *v.* Gaynor, 67 How. Pr. (N. Y.) 421. A right of action for a tort. Ten Broeck *v.* Sloo, 2 Abb. Pr. (N. Y.) 234, 13 How. Pr. (N. Y.) 28; Andrews *v.* Rowan, 28 How. Pr. (N. Y.) 126; Davenport *v.* Ludlow, 4 How. Pr. (N. Y.) 337, 3 Code Rep. (N. Y.) 66; Hudson *v.* Plets, 11 Paige (N. Y.) 180, 3 N. Y. Leg. Obs. 120. But see Bryan *v.* Grant, 87 Hun (N. Y.) 68, 33 N. Y.

Where the debtor disclaims any interest in the property in question,[99] or it is of such a character that actual delivery cannot be made,[1] or is without the state or beyond the jurisdiction of the court,[2] an assignment or conveyance by the debtor of all his rights, title, and interest therein may be directed,[3] unless the property would be exempt if within the state.[4]

b. Debt or Property in Dispute. Where indebtedness to the debtor or the ownership of the property in question is in dispute, or a doubt exists as to such ownership, there is no power to try and determine the conflicting claims or to

Suppl. 957. The amount of a verdict in an action of tort, not reduced to judgment. Davenport *v.* Ludlow, 4 How. Pr. (N. Y.) 337, 3 Code Rep. (N. Y.) 66. Unpaid salary of the debtor. Waldman *v.* O'Donnell, 1 N. Y. City Ct. 146.

Necessity of receiver.— The creditor cannot sue for the amount directed to be paid over; but a receiver must be appointed. Patten *v.* Cormah, 13 Abb. Pr. (N. Y.) 418.

Necessity of showing applicability to judgment.— Gray *v.* Ashley, 24 Misc. (N. Y.) 396, 53 N. Y. Suppl. 547.

Order directing the delivery of cigars requires that the boxes in which they are packed shall be delivered with them. Richie *v.* Bedell, 22 N. Y. Wkly. Dig. 563.

Officer of a municipal board having in his hands an order or check on the city treasurer in favor of the debtor cannot be directed to pay the amount of the same over, where neither the board nor the city were ordered to or appeared for examination. Cooman *v.* Board of Education, 37 Hun (N. Y.) 96.

Rents and profits of land taken by eminent domain.— Ahlhauser *v.* Doud, 74 Wis. 400, 43 N. W. 169.

Where judgment has been recovered against an assignee in bankruptcy, an order requiring a bank, a depository of the United States funds, to pay over to the judgment creditor money belonging to the estate of the bankrupt deposited by the assignee with it is improper. Havens *v.* Brooklyn Nat. City Bank, 4 Hun (N. Y.) 131.

99. Collins *v.* Angell, 72 Cal. 513, 14 Pac. 135.

1. Pacific Bank *v.* Robinson, 57 Cal. 520, 40 Am. Rep. 120; Canandaigua First Nat. Bank *v.* Martin, 49 Hun (N. Y.) 571, 2 N. Y. Suppl. 315, 15 N. Y. Civ. Proc. 324; Stewart *v.* Foster, 1 Hilt. (N. Y.) 505; Serven *v.* Lowerre, 3 Misc. (N. Y.) 113, 23 N. Y. Suppl. 1052; Bailey *v.* Lane, 15 Abb. Pr. (N. Y.) 373 note.

A legacy which has vested on testator's death, but is not to be paid until the happening of a contingency, passes under an assignment by the legatee of all his property, made in compliance with an order rendered in supplementary proceedings. Spencer *v.* Greene, 17 R. I. 727, 24 Atl. 742.

An interest in a patent should be assigned. Collins *v.* Angell, 72 Cal. 513, 14 Pac. 135; Barnes *v.* Morgan, 3 Hun (N. Y.) 703, 6 Thomps. & C. (N. Y.) 105; Clan Ranald *v.* Wyckoff, 41 N. Y. Super. Ct. 527, 52 How. Pr. (N. Y.) 509; Thorne *v.* Thomas, 1 Month. L. Bul. (N. Y.) 53.

Conveyance of a dower interest may be compelled. Moak *v.* Coats, 33 Barb. (N. Y.) 498.

Interpleading claimants.—Where the debtor has been ordered to assign his interest in certain letters patent, the court may refuse him leave to commence an action to interplead certain other parties, "to compel them to litigate their claims to the said patents." Collins *v.* Angell, 72 Cal. 513, 14 Pac. 135.

Money in the constructive, but not in the actual, possession of the debtor cannot be directed to be applied by the debtor. Welch *v.* Pittsburgh, etc., R. Co., 2 Ohio Dec. (Reprint) 5, 1 West. L. Month. 87, where the money sought was in the hands of a ticket agent of the debtor, a railway company.

Seat or membership in an exchange may be directed to be assigned. Habenicht *v.* Lissak, 78 Cal. 351, 20 Pac. 874, 12 Am. St. Rep. 63, 5 L. R. A. 713; Ritterband *v.* Baggett, 42 N. Y. Super. Ct. 556, 4 Abb. N. Cas. (N. Y.) 67; Londheim *v.* White, 67 How. Pr. (N. Y.) 467. See also Grocers' Bank *v.* Murphy, 10 Daly (N. Y.) 168, 60 How. Pr. (N. Y.) 426.

Transfer of an established claim against the United States is not within U. S. Rev. St. (1878) § 3477 [U. S. Comp. St. (1901) p. 2320], declaring an assignment of such claim void unless made freely and acknowledged, and attested by two witnesses. Forrest *v.* Price, 52 N. J. Eq. 16, 29 Atl. 215.

2. Towne *v.* Campbell, 35 Minn. 231, 28 N. W. 254; Buchanan *v.* Hunt, 98 N. Y. 560 [*reversing* 33 Hun 329]; Bailey *v.* Ryder, 10 N. Y. 363; Fenner *v.* Sanborn, 37 Barb. (N. Y.) 610; Smith *v.* Tozer, 2 N. Y. St. 363, 11 N. Y. Civ. Proc. 343 [*affirming* 3 N. Y. Civ. Proc. 349]; Bunn *v.* Fonda, 2 Code Rep. (N. Y.) 70; Spang *v.* Robinson, 24 W. Va. 327; Tomlinson, etc., Mfg. Co. *v.* Shatto, 34 Fed. 380.

To whom transferred.— In Buchanan *v.* Hunt, 98 N. Y. 560 [*reversing* 33 Hun 329], it appeared that wages paid to the debtor in the state of his residence since the institution of the proceedings and remaining therein could not be required to be paid to the sheriff, but that at most the debtor could only be compelled to transfer title to the money to a receiver.

3. If there is a substantial dispute of the debtor's right to the property, he may be required to assign all his interest therein. Frost *v.* Craig, 16 Daly (N. Y.) 107, 9 N. Y. Suppl. 528, 18 N. Y. Civ. Proc. 296 [*modifying* 9 N. Y. Suppl. 437].

4. Bunn *v.* Fonda, 2 Code Rep. (N. Y.) 70.

direct the application of the money or property to the judgment, but the creditor will be left to his other remedies.[5]

c. Property Transferred. Where property has been transferred by the debtor, and the *bona fides* of the transfer is questioned by the creditor, the court has no authority to pass on the validity of the transfer or to direct application of the property.[6]

d. Mortgaged Property. The debtor cannot be required to deliver mortgaged property,[7] although the mortgage is past due.[8] Nor is the creditor entitled to have property of the debtor encumbered by mortgage sold and the surplus applied to the judgment after payment of the encumbrances.[9]

5. Bradley *v.* Burk, 81 Minn. 368, 84 N. W. 123; Schrauth *v.* Dry Dock Sav. Bank, 86 N. Y. 390 [*reversing* 8 Daly 106]; Barnard *v.* Kobbe, 54 N. Y. 516 [*affirming* 3 Daly 373]; West Side Bank *v.* Pugsley, 47 N. Y. 368, 12 Abb. Pr. N. S. (N. Y.) 28; Rodman *v.* Henry, 17 N. Y. 482; Locke *v.* Mabbett, 3 Abb. Dec. (N. Y.) 68, 2 Keyes (N. Y.) 457; Matter of Weld, 34 N. Y. App. Div. 471, 54 N. Y. Suppl. 253; Krone *v.* Klotz, 3 N. Y. App. Div. 587, 38 N. Y. Suppl. 225, 25 N. Y. Civ. Proc. 320; Moller *v.* Wells, 29 Hun (N. Y.) 587; Havens *v.* National City Bank, 4 Hun (N. Y.) 131; Beebe *v.* Kenyon, 3 Hun (N. Y.) 73; Teller *v.* Randall, 40 Barb. (N. Y.) 242, 26 How. Pr. (N. Y.) 155; Alexander *v.* Richardson, 7 Rob. (N. Y.) 63; Town *v.* Safeguard Ins. Co., 4 Bosw. (N. Y.) 683; King *v.* Tuska, 1 Duer (N. Y.) 635; Frost *v.* Craig, 16 Daly (N. Y.) 107, 9 N. Y. Suppl. 528, 18 N. Y. Civ. Proc. 296; Joyce *v.* Holbrook, 2 Hilt. (N. Y.) 94, 7 Abb. Pr. (N. Y.) 338; Stewart *v.* Foster, 1 Hilt. (N. Y.) 505; Brein *v.* Light, 36 Misc. (N. Y.) 110, 72 N. Y. Suppl. 655 [*affirmed* in 37 Misc. 771, 76 N. Y. Suppl. 935]; Maass *v.* McEntegart, 20 Misc. (N. Y.) 676, 46 N. Y. Suppl. 534; Kennedy *v.* Carrick, 18 Misc. (N. Y.) 38, 40 N. Y. Suppl. 1127; Gerton Carriage Co. *v.* Richardson, 6 Misc. (N. Y.) 466, 27 N. Y. Suppl. 625; Serven *v.* Lowerre, 3 Misc. (N. Y.) 113, 23 N. Y. Suppl. 1052; Waldron *v.* Walker, 18 N. Y. Suppl. 292; Stearns *v.* Eaton, 17 N. Y. Suppl. 687; Clark *v.* Gallagher, 3 N. Y. Suppl. 312; Bauer *v.* Betz, 4 N. Y. St. 92; Stettheimer *v.* Stettheimer, 2 N. Y. St. 358; Nathans *v.* Satterlee, 18 Abb. N. Cas. (N. Y.) 310; Grassmuck *v.* Richards, 2 Abb. N. Cas. (N. Y.) 359; Hall *v.* McMahon, 10 Abb. Pr. (N. Y.) 103; Crounse *v.* Whipple, 34 How. Pr. (N. Y.) 333; Genet *v.* Foster, 18 How. Pr. (N. Y.) 50; Gasper *v.* Bennett, 12 How. Pr. (N. Y.) 307; Sherwood *v.* Buffalo, etc., R. Co., 12 How. Pr. (N. Y.) 136; Sackett *v.* Newton, 10 How. Pr. (N. Y.) 560; People *v.* King, 9 How. Pr. (N. Y.) 97; Goodyear *v.* Betts, 7 How. Pr. (N. Y.) 187; People *v.* Hulbert, 5 How. Pr. (N. Y.) 446, 9 N. Y. Leg. Obs. 245; Corning *v.* Tooker, 5 How. Pr. (N. Y.) 16; McCrea *v.* Cook, 1 N. Y. City Ct. 385; Robeson *v.* Ford, 3 Edw. (N. Y.) 441; Hayes *v.* McClelland, 20 N. Y. Wkly. Dig. 393; Miller *v.* Lyons, 17 N. Y. Wkly. Dig. 86; Manice *v.* Smith, 5 N. Y. Wkly. Dig. 255; Hentz *v.* McGehee, 1 Month. L. Bul. (N. Y.) 3; Edgarton *v.* Hanna, 11 Ohio St. 323.

An assignment of the debtor's interest in the property in dispute may be compelled. Frost *v.* Craig, 16 Daly (N. Y.) 107, 9 N. Y. Suppl. 528, 18 N. Y. Civ. Proc. 296 [*modifying* 9 N. Y. Suppl. 437].

Estoppel to dispute jurisdiction.— A claimant who institutes proceedings to determine the ownership and litigates the question is estopped to dispute the jurisdiction of the court. Gomprecht *v.* Scott, 27 Misc. (N. Y.) 192, 57 N. Y. Suppl. 799 [*affirming* 55 N. Y. Suppl. 239].

Offset to debtor's claim.— A third person will not be required to pay money which he owes to the debtor, but as to which he claims an offset. Grassmuck *v.* Richards, 2 Abb. N. Cas. (N. Y.) 359.

The receiver cannot take forcible possession of property in the hands of a third person claiming the same. Dewey *v.* Finn, 18 N. Y. Wkly. Dig. 558.

6. McKnight *v.* Knisely, 25 Ind. 336, 87 Am. Dec. 364; Shannon *v.* Steger, 75 N. Y. App. Div. 279, 78 N. Y. Suppl. 163; Beebe *v.* Kenyon, 3 Hun (N. Y.) 73; Roy *v.* Baucus, 43 Barb. (N. Y.) 310; Town *v.* Safeguard Ins. Co., 4 Bosw. (N. Y.) 683; Sterns *v.* Eaton, 17 N. Y. Suppl. 687; Hall *v.* McMahon, 10 Abb. Pr. (N. Y.) 103; Rice *v.* Jones, 103 N. C. 226, 9 S. E. 571, 14 Am. St. Rep. 801; Wallace *v.* McLaughlin, 12 Utah 411, 43 Pac. 109. See, generally, FRAUDULENT CONVEYANCES.

A mere suspicion of fraud in the transfer will not be sufficient to justify an order. Hall *v.* McMahon, 10 Abb. Pr. (N. Y.) 103.

Property in the hands of a general assignee not subject to levy and sale under an execution cannot be directed to be applied to the judgment on the ground that an execution issued but not levied before the assignment was a prior lien. Abeel *v.* Anderson, 39 Hun (N. Y.) 514, 3 How. Pr. N. S. (N. Y.) 489. Where a general assignee has made no claim for property retained by the debtor with his assignee's consent, its delivery to the receiver may be required. Eastern Nat. Bank *v.* Hulshizer, 2 N. Y. St. 115.

7. Griswold *v.* Tompkins, 7 Daly (N. Y.) 214; Mayer Brewing Co. *v.* Rizzo, 13 Misc. (N. Y.) 336, 34 N. Y. Suppl. 457.

8. Tinkey *v.* Langdon, 13 N. Y. Wkly. Dig. 384.

9. McKeithan *v.* Walker, 66 N. C. 95.

Foreclosure of the mortgagee's interest and application of the proceeds cannot be di-

3. Application For Order — a. In General. An order to apply money or property to the satisfaction of the judgment can be made only when it is satisfactorily shown that the debtor or a third person has money or property so applicable or has control of the same, and is able at the time of the order to comply with it, as well as such other facts as will authorize the exercise of the power conferred on the court or an officer thereof.[10]

b. Who May Make. The application for the order may be made by a judgment creditor who has assigned his judgment,[11] but not creditors other than those who instituted the proceedings.[12]

c. Notice of. Notice to the judgment debtor,[13] to his debtor,[14] or to one claiming a lien, of the application for an order to pay over money or deliver property[15] is unnecessary, or at least is discretionary. But as to property claimed by a third person, it seems that such person is entitled to be heard.[16]

4. The Order — a. Power to Make. The power to make an order for the payment of money or transfer of property in satisfaction or partial satisfaction of the judgment is usually vested in the court, a judge thereof,[17] or the officer by whom

rected. Knowles *v.* Herbert, 11 Oreg. 54, 240, 4 Pac. 126.

10. *Indiana.*— Mahony *v.* Hunter, 30 Ind. 246.

New Jersey.— Logan *v.* O'Leary, 43 N. J. Eq. 320, 12 Atl. 535.

New York.— Buchanan *v.* Hunt, 98 N. Y. 560 [*reversing* 33 Hun 329]; Locke *v.* Mabbett, 3 Abb. Dec. 68, 2 Keyes 457; Shannon *v.* Steger, 75 N. Y. App. Div. 279, 78 N. Y. Suppl. 163; Fiss *v.* Haag, 75 N. Y. App. Div. 241, 78 N. Y. Suppl. 1; Broderick *v.* Archibald, 61 N. Y. App. Div. 473, 70 N. Y. Suppl. 617; Alexander *v.* Richardson, 7 Rob. 63; Griswold *v.* Tompkins, 7 Daly 214; Rainsford *v.* Temple, 3 Misc. 294, 22 N. Y. Suppl. 937; Smith *v.* Tozer, 3 N. Y. St. 363, 11 N. Y. Civ. Proc. 343; Columbian Inst. *v.* Cregan, 3 N. Y. St. 287, 11 N. Y. Civ. Proc. 87; Winters *v.* McCarthy, 2 Abb. N. Cas. 357; Hall *v.* McMahon, 10 Abb. Pr. 103; Albany City Nat. Bank *v.* Gaynor, 67 How. Pr. 421; Ball *v.* Goodenough, 37 How. Pr. 479; Peters *v.* Kerr, 22 How. Pr. 3; Sandford *v.* Moshier, 13 How. Pr. 137.

Ohio.— Harmon *v.* Walter, 4 Ohio Dec. (Reprint) 455, 2 Clev. L. Rep. 185; Welch *v.* Pittsburg, etc., R. Co., 2 Ohio Dec. (Reprint) 5, 1 West. L. Month. 87.

Oregon.— Hammer *v.* Downing, 41 Oreg. 234, 66 Pac. 916.

South Carolina.— Burdett *v.* McAllister, 42 S. C. 352, 20 S. E. 86.

Utah.— Wallace *v.* McLaughlin, 12 Utah 411, 43 Pac. 109.

West Virginia.— Spang *v.* Robinson, 24 W. Va. 327.

See 21 Cent. Dig. tit. "Execution," § 1156 *et seq.*

A third person cannot be ordered to pay over, until it has first been ascertained by his examination that he has property of the debtor in his hands. Hathaway *v.* Brady, 26 Cal. 581; Woodman *v.* Goodenough, 18 Abb. Pr. (N. Y.) 265. A demand on him and a refusal thereof must be shown. Rome First Nat. Bank *v.* Wilson, 13 Hun (N. Y.) 232. If there is any doubt as to his financial ability to make present payment the order should not be granted. Alexander *v.* Richardson, 7 Rob. (N. Y.) 63.

11. Collins *v.* Angell, 72 Cal. 513, 14 Pac. 135.

12. Righton *v.* Pruden, 73 N. C. 61.

13. Gibson *v.* Haggerty, 37 N. Y. 555, 97 Am. Dec. 752, 5 Transcr. App. 143 [*reversing* 15 Abb. Pr. 406, 23 How. Pr. 260]; Pommerantz *v.* Bloom, 32 Misc. (N. Y.) 754, 65 N. Y. Suppl. 671; Serven *v.* Lowerre, 3 Misc. (N. Y.) 113, 23 N. Y. Suppl. 1052; Ward *v.* Beebe, 15 Abb. Pr. (N. Y.) 372; Seeley *v.* Garrison, 10 Abb. Pr. (N. Y.) 460. *Contra*, Reed *v.* Champagne, 5 N. Y. Wkly. Dig. 227.

An order made without notice to the debtor might be vacated by the judge who made it, if injustice has been done, but it is not void or irregular, and cannot be disregarded in the proceedings against the debtor. Ward *v.* Beebe, 15 Abb. Pr. (N. Y.) 372.

Moneys in hands of constable.— The debtor is entitled to notice, where it is sought to reach money collected for him by a constable. Franey *v.* Smith, 88 Hun (N. Y.) 215, 34 N. Y. Suppl. 780.

Requisite notice.— If notice is given it may be such as the court deems just. Serven *v.* Lowerre, 3 Misc. (N. Y.) 113, 23 N. Y. Suppl. 1052.

14. Adams *v.* Hackett, 7 Cal. 187.

15. Corning *v.* Glenville Woolen Co., 14 Abb. Pr. (N. Y.) 339.

16. Robeson *v.* Ford, 3 Edw. (N. Y.) 441.

17. See cases cited *infra*, this note.

In New York the order must be made by a judge and not by the court. Bitting *v.* Vandenburgh, 17 How. Pr. 80. And it has been doubted whether a county judge is authorized to order a conveyance by the debtor of his property to a receiver or to direct its delivery and possession to that officer. Tinkey *v.* Langdon, 60 How. Pr. (N. Y.) 180. An order of the county judge appointing a receiver in supplementary proceedings does not affect the power of the supreme court in which judgment was recovered to make an order on motion of the judgment creditors for the delivery of property of the debtor to the receiver. Matter of Crane, 81 Hun (N. Y.)

the examination is conducted.[18] If vested with a discretion in the premises, the court instead of making an order for application may appoint a receiver,[19] or where the property may be levied upon, leave the creditor to his execution.[20]

b. Requisites.[21] Possession of money or property of the debtor cannot be acquired without a valid order,[22] which should direct payment or delivery to the party entitled.[23] It must specify the property to be delivered with reasonable certainty[24] and exempt property not liable to levy and sale under an execution.[25] It should not, however, require the payment of money in a specific kind of currency,[26] or be so framed as to require the delivery of property of which a manual delivery cannot be made,[27] or so as to compel its transportation to the person designated to receive it;[28] or, where the debtor's claim is payable in a commodity at a stipulated price, as to order the party liable to deliver to the creditor sufficient of the commodity at the agreed price to satisfy the debt.[29] It has been held that the order may be in the alternative requiring the debtor to apply property or in default that an attachment issue;[30] but it has also been held that an order in the alternative requiring the debtor to pay over money or undergo imprisonment is improper.[31] Mere irregularity in the form of the order will not vitiate it,[32] although an order improvidently or erroneously made may be vacated and the parties placed *in statu quo*.[33]

96, 30 N. Y. Suppl. 616, 1 N. Y. Annot. Cas. 148.

In Oregon an order requiring the debtor to apply property disclosed to the satisfaction of the judgment may be made by the court or a judge thereof. State *v.* Downing, 40 Oreg. 309, 58 Pac. 863, 66 Pac. 917.

Court is vested with a large discretion.— Pommerantz *v.* Bloom, 32 Misc. (N. Y.) 754, 65 N. Y. Suppl. 671.

Premature order is of no validity. Clark *v.* Gallagher, 3 N. Y. Suppl. 312; Benjamin *v.* Myers, 3 N. Y. St. 284.

Loss of jurisdiction.— Where before a third party order is served on one against whom the judgment debtor has recovered a judgment, the debtor has assigned it, the jurisdiction of the court to make any direction for the payment of the judgment under such orders ceases and a person who had procured it has no further lien or claim on the judgment to be enforced in that proceeding. Hexter *v.* Pennsylvania R. Co., 43 N. Y. App. Div. 113, 59 N. Y. Suppl. 453.

18. Parker *v.* Page, 38 Cal. 522; *Ex p.* Grace, 12 Iowa 208, 79 Am. Dec. 529. But *compare* Nieuwankamp *v.* Ullman, 47 Wis. 168, 2 N. W. 131.

19. Corning *v.* Tooker, 5 How. Pr. (N. Y.) 16.

20. Hall *v.* McMahon, 10 Abb. Pr. (N. Y.) 103.

21. **Forms of orders to pay over money** or stand committed see Karney's Case, 13 Abb. Pr. (N. Y.) 459; Reynolds *v.* McElhone, 20 How. Pr. (N. Y.) 454.

22. Edmonston *v.* McLoud, 16 N. Y. 543; Stewart's Estate, 8 N. Y. Civ. Proc. 354. See Grand Lodge K. of P. *v.* Manhattan Sav. Inst., 12 Misc. (N. Y.) 626, 34 N. Y. Suppl. 253.

23. Boelger *v.* Swiere, 1 How. Pr. N. S. (N. Y.) 372.

After the appointment of a receiver an order directing payment to the sheriff is irregular, although the debtor consents to it. Columbia Bank *v.* Ingersoll, 1 N. Y. Suppl. 54, 21 Abb. N. Cas. (N. Y.) 241.

Payment to creditor.— The New York code of civil procedure does not authorize an order directing payment to the judgment creditor (Dickinson *v.* Onderdonk, 18 Hun 479; Boelger *v.* Swivel, 1 How. Pr. N. S. 372; Birnbaum *v.* Thompson, 5 Month. L. Bul. 30) or his attorney (Gray *v.* Ashley, 24 Misc. 396, 53 N. Y. Suppl. 54).

24. Smith *v.* McQuade, 59 Hun (N. Y.) 374, 13 N. Y. Suppl. 62.

25. Moyer *v.* Moyer, 7 N. Y. App. Div. 523, 40 N. Y. Suppl. 258.

26. Hathaway *v.* Brady, 26 Cal. 581.

27. Buchanan *v.* Hunt, 98 N. Y. 560 [*reversing* 33 Hun 329], money without the state.

28. Smith *v.* McQuade, 59 Hun (N. Y.) 374, 13 N. Y. Suppl. 62; Serven *v.* Lowerre, 3 Misc. (N. Y.) 113, 23 N. Y. Suppl. 1052.

29. The proper order is to sell the commodity and apply the proceeds. *In re* Davis, 81 N. C. 72.

30. Crounse *v.* Wheeler, 33 How. Pr. (N. Y.) 337.

31. In South Carolina the debtor must be ruled in to show cause before an order for his imprisonment for the failure to pay over can issue. Kennesaw Mills Co. *v.* Walker, 19 S. C. 104.

32. Grand Lodge K. of P. *v.* Manhattan Sav. Inst., 12 Misc. (N. Y.) 626, 34 N. Y. Suppl. 253, 25 N. Y. Civ. Proc. 44, where the order directed a payment to the sheriff instead of permitting it.

33. Fraser *v.* Ward, 13 Daly (N. Y.) 431.

Failure of judge to read testimony.— Where the debtor testified to the ownership of property stored in his name, but on which he had given a bill of sale to a third person as collateral security, but the judge, without this examination being presented to him,

c. Service. Service on the debtor of an order directing a third person to pay over his indebtedness to the former is discretionary.[34]

d. Objections. Objections to the order must be taken by a motion addressed to the judge who made it.[35] It cannot be attacked for irregularity in granting the original order for examination.[36]

5. Necessity of Demand. Where property is ordered to be delivered to a receiver, it must be demanded by the receiver personally.[37]

6. Compliance With Order — a. Effect in General. While it has been held that payment on delivery by a third person in obedience to an order will protect him against the debtor as to the same demand,[38] it has also been held that payment without notice to the judgment debtor is no defense to an action by him,[39] and that compliance with the order will not defeat the rights of a claimant who has had no opportunity of asserting his claim.[40] Neither is the order an adjudication of the fact of liability to the debtor,[41] or of the extent of such liability.[42]

b. Effect of Assignment. Obedience to an order by a third person is no defense to an action by an assignee or purchaser of the claim in good faith,[43] nor will payment by one who has paid under a notice of attachment relieve him from compliance with an order requiring payment to the sheriff.[44] Payment to the sheriff under a statute permitting such a payment by one indebted to the judgment debtor will not affect the rights of a *bona fide* assignee of the judgment.[45] But obedience to the order will protect a debtor who without knowledge

made an *ex parte* order for delivery of the property to the receiver, the court set aside the order. Shannon *v.* Steger, 75 N. Y. App. Div. 279, 78 N. Y. Suppl. 163.

34. Lynch *v.* Johnson, 46 Barb. (N. Y.) 56 [*affirmed* in 48 N. Y. 27].

35. Matter of Van Ness, 17 N. Y. App. Div. 581, 45 N. Y. Suppl. 576.

The debtor cannot object to an order requiring a third person to pay over. Chandler *v.* Fon du Lac, 56 How. Pr. (N. Y.) 449.

36. Cooman *v.* Board of Education, 37 Hun (N. Y.) 96, defective affidavit.

37. McComb *v.* Weaver, 11 Hun (N. Y.) 271. See *infra*, XIII, T.

38. Lynch *v.* Johnson, 48 N. Y. 27; Calkins *v.* Packer, 21 Barb. (N. Y.) 275; Handley *v.* Greene, 15 Barb. (N. Y.) 601; Schrauth *v.* Dry Dock Sav. Bank, 8 Daly (N. Y.) 106; Westfield *v.* Westfield, 19 S. C. 85.

The order or judgment is a defense, although it has not been complied with. Burkham *v.* Cooper, 2 Ohio Cir. Ct. 77, 1 Ohio Cir. Dec. 371.

How counter-claimed.— Calkins *v.* Packer, 21 Barb. (N. Y.) 275.

Proof of valid payment.— See Handley *v.* Greene, 15 Barb. (N. Y.) 601.

39. Waldheim *v.* Bender, 36 How. Pr. (N. Y.) 181. See also Board of Education *v.* Scoville, 13 Kan. 17.

An order requiring a defendant in an action brought by the debtor to pay over to the creditor is no defense to the action. Glenville Woolen Co. *v.* Ripley, 43 N. Y. 206.

One who falsely asserts ownership of money in his hands, and who pays it under an order directing payment to another than the true owner, is not protected against a claim of the latter. Wright *v.* Cabot, 89 N. Y. 570 [*affirming* 47 N. Y. Super. Ct. 229].

Payment in pursuance of an order made after an action has been instituted to recover the same fund cannot be interposed as a defense, except by leave. Waldheimer *v.* Bender, 36 How. Pr. (N. Y.) 181.

40. Schrauth *v.* Dry Dock Sav. Bank, 86 N. Y. 390, 8 Daly (N. Y.) 106.

41. Board of Education *v.* Scoville, 13 Kan. 17.

42. Hauptman *v.* Catlin, 1 E. D. Smith (N. Y.) 729.

43. Lynch *v.* Johnson, 48 N. Y. 27; Lee *v.* Delehanty, 25 Hun (N. Y.) 197; Huse *v.* Guyot, 3 Thomps. & C. (N. Y.) 790; Roy *v.* Baucus, 43 Barb. (N. Y.) 310; Adams *v.* Walsh, 43 N. Y. Super. Ct. 52; Rice *v.* Jones, 103 N. C. 226, 9 S. E. 571, 14 Am. St. Rep. 801. See also Duffield *v.* Horton, 73 N. Y. 218 [*affirming* 10 Hun 140]; Grand Lodge K. of P. *v.* Manhattan Sav. Inst., 12 Misc. (N. Y.) 626, 34 N. Y. Suppl. 253, 25 N. Y. Civ. Proc. 44.

Assignee not a bona fide purchaser.— That such a payment is a defense against one to whom the judgment debtor has assigned the claim and who was not a *bona fide* purchaser see Lynch *v.* Johnson, 48 N. Y. 27 [*affirming* 46 Barb. 56].

One who with knowledge of an assignment by the debtor of the claim of the latter on him, and who pays it over on an invalid order, does so at his peril. Roy *v.* Baucus, 43 Barb. (N. Y.) 310.

44. Burnett *v.* Riker, 13 N. Y. Civ. Proc. 338.

45. Lyman *v.* Cartwright, 3 E. D. Smith (N. Y.) 117; Richardson *v.* Ainsworth, 20 How. Pr. (N. Y.) 521; Robinson *v.* Weeks, 6 How. Pr. (N. Y.) 161, Code Rep. N. S. (N. Y.) 311; Countryman *v.* Boyer, 3 How. Pr. (N. Y.) 386, 2 Code Rep. (N. Y.) 4.

of an assignment of the judgment has paid or applied the money or property as directed.[46]

7. Disobedience to Order.[47] If the debtor disobeys an order to assign his property to a receiver a further order of sequestration is unnecessary.[48]

T. Receivers[49] **— 1. Right to Receivership — a. In General.** Where the proceedings have been regularly instituted and the conditions exist which entitle the creditor to the appointment of a receiver, such an appointment is usually a matter of course.[50] A receivership is proper as ancillary to an injunction to restrain the disposition of the debtor's property,[51] and to give effect to an order requiring the payment of money or delivery of property,[52] or to bring an action to determine conflicting claims to the debtor's property.[53] But there is no right to a receiver where the judgment has been paid or satisfied.[54]

b. Priority of Right.[55] As between creditors in different proceedings the earlier applicant is presumably entitled to the appointment.[56]

c. Necessity of Execution and Return. A prior exhaustion of legal remedies is a prerequisite to a receivership,[57] hence there is no right to the appointment unless an execution has duly issued;[58] but its return is immaterial if property which cannot be reached thereby has been discovered,[59] or the debtor has property which he refuses to apply.[60]

See also Hall *v.* Olney, 65 Barb. (N. Y.) 27.

46. Gibson *v.* Haggerty, 37 N. Y. 555, 97 Am. Dec. 752, 5 Transcr. App. (N. Y.) 143 [*reversing* 15 Abb. Pr. 406, 23 How. Pr. 260]; Bishop *v.* Garcia, 14 Abb. Pr. N. S. (N. Y.) 69.

47. Disobedience to order as a contempt see *infra*, XIII, U, 1, d.

48. For the reason that the title of the receiver becomes perfect when he gives the requisite bond, and operates by relation from the time that the order for his appointment was made. West *v.* Fraser, 5 Sandf. (N. Y.) 653.

49. Receiver generally see Receivers.

Proceedings for receivership see *infra*, XIII, T, 3.

50. Habenicht *v.* Lissak, 78 Cal. 351, 20 Pac. 874, 12 Am. St. Rep. 63, 5 L. R. A. 713; Hyatt *v.* Dusenbury, 12 N. Y. Civ. Proc. 152.

A receiver of an insolvent corporation cannot be appointed in supplementary proceedings. The proper remedy is by petition to the supreme court. Hammond *v.* Hudson River Iron, etc., Co., 11 How. Pr. (N. Y.) 29.

Receivership of joint stock associations see Bruns *v.* Kane, 12 N. Y. Civ. Proc. 86, where it was questioned whether there could be receivership of a joint stock association.

Right on examination of third party.—Under the New York code of procedure, a receiver could only be appointed in a proceeding to examine the judgment debtor. Morgan *v.* Von Kohnstamm, 9 Daly 355.

The pendency of a creditor's suit in the federal court to which the applicant is not a party will not preclude an appointment in the state court. Dauntless Mfg. Co. *v.* Davis, 22 S. C. 584.

51. Webb *v.* Overmann, 6 Abb. Pr. (N. Y.) 92.

Injunction to restrain disposition of debtor's property see *supra*, XIII, M.

52. Patten *v.* Connah, 13 Abb. Pr. (N. Y.) 418.

Order requiring payment or delivery to receiver see *infra*, XIII, T, 3, e.

53. Hoyt *v.* Mann, 7 N. Y. St. 420; Ormes *v.* Baker, 17 N. Y. Wkly. Dig. 104. See *infra*, XIII, T, 14.

54. See *supra*, XIII, O.

Collection of costs.— After the debtor has paid the judgment, a receiver will not be appointed to enable the creditor's attorney to collect his costs and disbursements, where no costs have been allowed, nor motion therefor made. Paterson *v.* Goorley, 14 Misc. (N. Y.) 56, 35 N. Y. Suppl. 297. Costs of the proceedings see *infra*, XIII, X, 1.

55. Priority of liens see *infra*, XIII, W, 3.

56. Parks *v.* Sprinkle, 64 N. C. 637.

Subsequent proceedings by junior creditor. — See Kellogg *v.* Coller, 47 Wis. 649, 3 N. W. 433.

57. Necessity of an execution and return see *supra*, XIII, C, 7.

Necessity of prior action.— Where the debtor still has possession of a specific fund originally sued for, a receiver should not be appointed until plaintiff has instituted an action to recover it. Ross *v.* Ross, 119 N. C. 109, 25 S. E. 792.

58. Darrow *v.* Lee, 16 Abb. Pr. (N. Y.) 216. *Compare* McDowell *v.* Bell, 86 Cal. 615, 25 Pac. 128.

In South Carolina to authorize the appointment of a receiver for one of two debtors it is unnecessary that the execution returned should have been issued in the county of his residence. Green *v.* Bookhart, 19 S. C. 466.

59. Darrow *v.* Lee, 16 Abb. Pr. (N. Y.) 216. See Holbrook *v.* Orgler, 40 N. Y. Super. Ct. 33, 49 How. Pr. (N. Y.) 289.

In New York a receiver may be appointed before or after return of the execution upon examination of a third person. De Vivier *v.* Smith, 6 N. Y. Civ. Proc. 394, 1 How. Pr. N. S. 48; People *v.* Hulburt, 5 How. Pr. 446, 9 N. Y. Leg. Obs. 245.

60. People *v.* Hulburt, 5 How. Pr. (N. Y.) 446, 9 N. Y. Leg. Obs. 245.

d. Dependent on Disclosure of Property.[61] A receiver of the judgment debtor may be appointed where it appears that he has property applicable to the judgment, either in his own hands and under his control or in the possession or controlled by others, or there is reasonable ground to believe that he has,[62] or even where no property has been discovered,[63] or a third person indebted to the judgment debtor has extinguished his indebtedness.[64] The creditor himself cannot proceed directly to recover the property.[65] But the ownership of exempt property will not authorize a receivership.[66]

e. Existence of Other Remedies.[67] Although where other adequate remedies are available to the creditor a receivership is not a matter of strict right,[68] and he may be required to pursue them,[69] a receivership will not be denied because

61. Necessity of showing the existence of property see *supra*, XIII, H, 1, b, (VII).

62. *California.*— Habernicht *v.* Lissak, 78 Cal. 351, 20 Pac. 874, 12 Am. St. Rep. 63, 5 L. R. A. 713.

Kansas.—Teats *v.* Herington Bank, 58 Kan. 721, 51 Pac. 219.

Minnesota.—Flint *v.* Zimmerman, 70 Minn. 346, 73 N. W. 175; Bean *v.* Heron, 65 Minn. 64, 67 N. W. 805; Towne *v.* Campbell, 35 Minn. 231, 28 N. W. 254.

New Jersey.— Wilkinson *v.* Markert, 65 N. J. L. 518, 47 Atl. 488; Colton *v.* Bigelow, 41 N. J. L. 266; Journeay *v.* Brown, 26 N. J. L. 111; Frazier *v.* Barnum, 19 N. J. Eq. 316, 97 Am. Dec. 666; Johnson *v.* Woodruff, 8 N. J. Eq. 120. See Adler *v.* Turnbull, 57 N. J. L. 62, 30 Atl. 319.

New York.— Matter of Crane, 81 Hun 96, 30 N. Y. Suppl. 616, 1 N. Y. Annot. Cas. 148; State Bank *v.* Gill, 23 Hun 410; Edmonston *v.* McLoud, 19 Barb. 356; Davis *v.* Briggs, 1 Silv. Supreme 326, 5 N. Y. Suppl. 323; Heroy *v.* Gibson, 10 Bosw. 591; Todd *v.* Crooke, 4 Sandf. 694; Hanson *v.* Tripler, 3 Sandf. 733, Code Rep. N. S. 154; Bunacleugh *v.* Poolman, 3 Daly 236; Patten *v.* Connah, 13 Abb. Pr. 418; Webb *v.* Overmann, 6 Abb. Pr. 92.

North Carolina.— Coates *v.* Wilkes, 92 N. C. 376.

South Carolina.— Globe Phosphate Co. *v.* Pinson, 52 S. C. 185, 29 S. E. 549; Burdett *v.* McAllister, 42 S. C. 352, 20 S. E. 86; Dilling *v.* Foster, 21 S. C. 334. See Green *v.* Bookhart, 19 S. C. 466.

United States.— Bates *v.* Mexico International Co., 84 Fed. 518; Tomlinson, etc., Mfg. Co. *v.* Shatto, 34 Fed. 380.

See 21 Cent. Dig. tit. "Execution," § 1160.

Bankruptcy of debtor.— An appointment should not be made where the debtor has been discharged from the debt in bankruptcy. Gibson *v.* Gorman, 44 N. J. L. 325.

Contingent rights.— A receiver will not be appointed to take contingent fees of an attorney in cases undetermined. Gibney *v.* Reilly, 26 Misc. (N. Y.) 275, 56 N. Y. Suppl. 1055.

Equity of redemption.— The appointment is warranted where it appears that the debtor has an equity of redemption in property. Bean *v.* Heron, 65 Minn. 64, 67 N. W. 805; Bunacleugh *v.* Poolman, 3 Daly (N. Y.) 236.

Property attached.— A receiver may be appointed after property in the hands of a third person has been attached. Hanson *v.* Tripler, 3 Sandf. (N. Y.) 733, Code Rep. N. S. (N. Y.) 154.

Real estate without the state.— A receiver may be appointed, although the only property disclosed is an interest in real estate situated in another state. Towne *v.* Campbell, 35 Minn. 231, 28 N. W. 254.

That the debtor's property is so encumbered that it is improbable that an execution could be made out of it in whole or in part furnishes no reason for refusing to appoint a receiver. Baker *v.* Herkimer, 43 Hun (N. Y.) 86.

Offer to set off judgments against creditor. — Where a debtor has no property save judgments for costs, which she was willing to set off against the judgment recovered against her, a receivership was held to have been properly denied. De Camp *v.* Dempsey, 10 N. Y. Civ. Proc. 210.

63. Dease *v.* Reese, 39 Misc. (N. Y.) 657, 80 N. Y. Suppl. 590; De Camp *v.* Dempsey, 10 N. Y. Civ. Proc. 210; Myres' Case, 2 Abb. Pr. (N. Y.) 476. *Contra*, Adler *v.* Turnbull, 57 N. J. L. 62, 30 Atl. 319.

Ownership disclaimed by debtor.— A receivership is proper where ownership of property appears, although it is disclaimed by the debtor (Hoyt *v.* Mann, 7 N. Y. St. 420, 26 N. Y. Wkly. Dig. 249), or the facts disclosed raise a strong presumption as to the existence of property, although the debtor denies it. Journeay *v.* Brown, 26 N. J. L. 111.

64. Globe Phosphate Co. *v.* Pinson, 52 S. C. 185, 29 S. E. 549.

65. As against a third person indebted to or holding property of the judgment debtor. Edmonston *v.* McLoud, 19 Barb. (N. Y.) 356; Patten *v.* Connah, 13 Abb. Pr. (N. Y.) 418.

66. *In re* Edlunds, 35 Hun (N. Y.) 367; Keiher *v.* Shipherd, 4 N. Y. Civ. Proc. 274.

67. Right of the creditor to resort to other remedies see *supra*, XIII, L.

Stay or suspension of proceedings by a resort to other remedies see *supra*, XIII, R.

68. Poppitz *v.* Rognes, 76 Minn. 109, 78 N. W. 964.

69. Poppitz *v.* Rognes, 76 Minn. 109, 78 N. W. 964; Flint *v.* Zimmerman, 70 Minn. 346, 73 N. W. 175; Flint *v.* Webb, 25 Minn. 263; Corning *v.* Tooker, 5 How. Pr. (N. Y.) 16.

If property levied on unquestionably belongs to the debtor, the creditor may be com-

the debtor is willing to have his property sold under an execution,[70] or, although the contrary has been held,[71] it can be taken on a new execution,[72] or the debtor's property is sufficient to pay the judgment;[73] nor is the power of appointment limited by other provisions authorizing an order permitting payment to the sheriff.[74]

2. Nature of Office. The receiver represents not only the creditor at whose instance he was appointed, but also the debtor and such other creditors as may have through his appointment a beneficial interest in the debtor's property.[75]

3. Appointment — a. Jurisdiction to Appoint. The power to appoint a receiver in these proceedings is limited to the court or such of its officers as are designated by statute, and is coextensive with the right to entertain the proceedings.[76]

pelled to elect between the execution and the receivership. Smith *v.* David, 63 Hun (N. Y.) 100, 17 N. Y. Suppl. 614.

70. Bailey *v.* Lane, 15 Abb. Pr. (N. Y.) 373 note.

71. Bunn *v.* Daly, 24 Hun (N. Y.) 526; Second Ward Bank *v.* Upmann, 12 Wis. 499, where it was held that if the debtor appears to have ample property there should be a stay to enable the creditor to sue out a new execution.

72. Heroy *v.* Gibson, 10 Bosw. (N. Y.) 591; Todd *v.* Crooke, 4 Sandf. (N. Y.) 694, Code Rep. N. S. (N. Y.) 324. See also Webb *v.* Overmann, 6 Abb. Pr. (N. Y.) 92.

The remedies by a receivership and execution may be pursued concurrently. Smith *v.* Davis, 63 Hun (N. Y.) 100, 17 N. Y. Suppl. 614.

73. Dilling *v.* Foster, 21 S. C. 334. *Contra*, Second Ward Bank *v.* Upmann, 12 Wis. 499.

74. De Vivier *v.* Smyth, 1 How. Pr. N. S. (N. Y.) 48.

75. Coates *v.* Cunningham, 80 Ill. 467; Stephens *v.* Meriden Britannia Co., 160 N. Y. 178, 54 N. E. 781, 73 Am. St. Rep. 678 [*reversing* 13 N. Y. App. Div. 268, 43 N. Y. Suppl. 226]; Ward *v.* Petrie, 157 N. Y. 301, 51 N. E. 1002, 68 Am. St. Rep. 790; Mandeville *v.* Avery, 124 N. Y. 376, 26 N. E. 951, 21 Am. St. Rep. 678 [*reversing* 57 Hun 78, 10 N. Y. Suppl. 323]; Underwood *v.* Sutcliffe, 77 N. Y. 58 [*reversing* 10 Hun 453]; Bostwick *v.* Mencke, 40 N. Y. 383 [*reversing* 10 Abb. Pr. 197]; Seymour *v.* Wilson, 14 N. Y. 567, 15 How. Pr. (N. Y.) 355 [*reversing* 16 Barb. 194]; Porter *v.* Williams, 9 N. Y. 142, 59 Am. Dec. 519, 12 How. Pr. (N. Y.) 107; Gillet *v.* Moody, 3 N. Y. 479; Osgood *v.* Ogden, 3 Abb. Dec. (N. Y.) 425, 4 Keyes (N. Y.) 170; Donnelly *v.* West, 17 Hun (N. Y.) 564; McHarg *v.* Donnelly, 27 Barb. (N. Y.) 100; Cumming *v.* Egerton, 9 Bosw. (N. Y.) 684; Kennedy *v.* Thorp, 2 Daly (N. Y.) 258, 3 Abb. Pr. N. S. (N. Y.) 131; Garfield Nat. Bank *v.* Bostwick, 14 N. Y. Suppl. 919; Matter of Wilds, 6 Abb. N. Cas. (N. Y.) 307; Palen *v.* Bushnell, 18 Abb. Pr. (N. Y.) 301; Irving Nat. Bank *v.* Kernan, 3 Redf. Surr. (N. Y.) 1.

Analogy to receivership in creditors' suits. — The rights and duties of the receiver are in great measure analogous to those of a receiver appointed in a creditors' suit. Inglehart's Petition, Sheld. (N. Y.) 514.

Funds in custodia legis. — Funds in the hands of a receiver are not to be deemed property of the party at whose instance he was appointed, but are *in custodia legis* for those who shall establish a right to them according to the respective priorities of the parties. Guggenheimer *v.* Stephens, 7 N. Y. Suppl. 263, 17 N. Y. Civ. Proc. 383. See *supra*, V, K.

76. Spaulding *v.* Cœur D'Alene R., etc., Co., 8 Ida. 638, 59 Pac. 426; Hyatt *v.* Dusenbury, 12 N. Y. Civ. Proc. 152; Ball *v.* Goodenough, 37 How. Pr. (N. Y.) 479; Smith *v.* Johnson, 7 How. Pr. (N. Y.) 39.

In New Jersey the judge who orders the discovery can alone appoint. Guild *v.* Meyer, 59 N. J. Eq. 390, 46 Atl. 202.

In New York, North Carolina, and Ohio the power of appointment is vested in the judge of the court (Pool *v.* Safford, 14 Hun (N. Y.) 369; Ferry *v.* Bange, 1 Silv. Supreme (N. Y.) 377, 5 N. Y. Suppl. 330; Hyatt *v.* Dusenbury, 12 N. Y. Civ. Proc. 152; People *v.* Mead, 29 How. Pr. (N. Y.) 360; Parks *v.* Sprinkle, 64 N. C. 637; Welch *v.* Pittsburgh, etc., R. Co., 2 Ohio Dec. (Reprint) 5, 1 West. L. Month. (Ohio) 87)), who granted the order for the examination, and appointed the referee (Ball *v.* Goodenough, 37 How. Pr. (N. Y.) 479; Smith *v.* Johnson, 7 How. Pr. (N. Y.) 39). The receiver should be appointed by the judge before whom the proceedings were instituted and concluded. Jacobson *v.* Doty Plaster Mfg. Co., 32 Hun (N. Y.) 436. See also Darrow *v.* Riley, 5 Misc. (N. Y.) 363, 26 N. Y. Suppl. 91.

In South Carolina a circuit judge may appoint. Dauntless Mfg. Co. *v.* Davis, 22 S. C. 584. The refusal of another judge to appoint a receiver on the application of other creditors will not affect the power of appointment. Dauntless Mfg. Co. *v.* Davis, 22 S. C. 584.

A motion to substitute a person in the stead of a receiver who has resigned should be addressed to the court. Lippincott *v.* Westray, 6 N. Y. Civ. Proc. 74. See *infra*, XIII, T, 9.

On the death of the receiver the trust devolves on the supreme court, although he was appointed by a county judge, and it may appoint an agent to discharge the trust. Smith *v.* Barnum, 59 N. Y. App. Div. 291, 69 N. Y. Suppl. 253. See *infra*, XIII, T, 8.

Waiver of objection to jurisdiction. — By failing to appeal from an order appointing a receiver, objection to the jurisdiction to make

b. Who May Be Appointed. Any competent person may be appointed receiver.[77] Where the appointment of a designated officer of the court can only be made with the written consent of the parties, an appointment made without such consent is a mere irregularity,[78] which cannot be taken advantage of in a collateral proceeding,[79] and a referee may be permitted to nominate a person, whom the judge in his discretion may appoint.[80]

c. Time of Appointment. A receivership cannot be had where no order for examination or warrant to procure the attendance of the debtor has been made[81] or served,[82] but may be had at any time after the return of the order,[83] or after the return-day of the motion for the receivership.[84]

d. The Application — (I) *In General.* All the proceedings preliminary to the application and necessary to confer jurisdiction should be shown.[85] Thus it should appear that a valid judgment was rendered[86] and that execution was duly issued thereon and returned unsatisfied in whole or in part,[87] that an examination of the debtor or others was had,[88] and in some jurisdictions that property was disclosed.[89]

(II) *Notice of Application*[90] — (A) *To Debtor.* Except where an application for a receiver is made on the return-day of the order for examination, or at the close of the examination, the failure to give notice to the debtor as required by statute is an irregularity which will require the order of receivership to be set aside.[91] This rule, however, has been held not to apply in cases where notice has

the appointment is waived. Viburt *v.* Frost, 3 Abb. Pr. (N. Y.) 119.

77. A sheriff is eligible to appointment. Teats *v.* Herington Bank, 58 Kan. 721, 51 Pac. 219.

78. Moore *v.* Taylor, 40 Hun (N. Y.) 56.

79. Moore *v.* Taylor, 40 Hun (N. Y.) 56; Southwick *v.* Moore, 54 N. Y. Super. Ct. 126.

80. Jones *v.* Lawlin, 1 Sandf. (N. Y.) 722.

81. Holbrook *v.* Orgler, 40 N. Y. Super. Ct. 33, 49 How. Pr. (N. Y.) 289.

82. Morgan *v.* Von Kohnstamm, 9 Daly (N. Y.) 355, 60 How. Pr. (N. Y.) 161.

83. People *v.* Mead, 29 How. Pr. (N. Y.) 360; Wilson *v.* Andrews, 9 How. Pr. (N. Y.) 39.

An examination of the debtor is not necessary. Colton *v.* Bigelow, 41 N. J. L. 266.

A receiver may be appointed during the examination (People *v.* Mead, 29 How. Pr. (N. Y.) 360), while the proceedings are pending pursuant to an adjournment (Barnett *v.* Moore, 20 Misc. (N. Y.) 518, 46 N. Y. Suppl. 668), at the conclusion of the debtor's examination (Groot *v.* Greely, 5 Month. L. Bul. (N. Y.) 69), where he has failed to appear as directed by the original order (Sickles *v.* Hanley, 4 Abb. N. Cas. (N. Y.) 231), or on facts disclosed by an examination, the proceedings for which were commenced by a warrant of arrest (Wilson *v.* Andrews, 9 How. Pr. (N. Y.) 39).

84. Where the judge having jurisdiction is absent from the county on the return-day of the motion, he may make the appointment later. Darrow *v.* Riley, 5 Misc. (N. Y.) 363, 26 N. Y. Suppl. 91.

85. See cases cited *infra*, note 49 *et seq.*

86. Davidson *v.* Horn, 47 Hun (N. Y.) 51.

87. Bunn *v.* Daly, 24 Hun (N. Y.) 526; Holbrook *v.* Orgler, 40 N. Y. Super. Ct. 33, 49 How. Pr. (N. Y.) 289; Darrow *v.* Lee, 16 Abb. Pr. (N. Y.) 212.

An affidavit reciting that a judgment was obtained and docketed in New York county, that an execution thereon was issued to the sheriff of the county of New York or Kings, and that the debtor resided in New York county at the time of the commencement of the proceeding, is sufficient. Henry *v.* Furbish, 30 Misc. (N. Y.) 822, 62 N. Y. Suppl. 247.

88. Adler *v.* Turnbull, 57 N. J. L. 62, 30 Atl. 319; Bunn *v.* Daly, 24 Hun (N. Y.) 526; Holbrook *v.* Orgler, 40 N. Y. Super. Ct. 33, 49 How. Pr. (N. Y.) 289.

89. See *supra*, XIII, T, 1, d.

An affidavit by plaintiff's attorney that the value of jewelry and other personal property on the person of defendant "is unknown to deponent, but is certainly worth more than four hundred dollars" is insufficient. Adler *v.* Turnbull, 57 N. J. L. 62, 30 Atl. 319.

90. Necessity of notice to extend receivership see *infra*, XIII, T, 4.

91. Ashley *v.* Turner, 22 Hun (N. Y.) 226; Todd *v.* Crooke, 4 Sandf. (N. Y.) 694, Code Rep. N. S. (N. Y.) 324; Morgan *v.* Von Kohnstamm, 9 Daly (N. Y.) 355, 60 How. Pr. (N. Y.) 161; Henry *v.* Furbish, 30 Misc. (N. Y.) 822, 62 N. Y. Suppl. 247; Catholic University *v.* Conrad, 27 Misc. (N. Y.) 326, 57 N. Y. Suppl. 820; Grace *v.* Curtiss, 3 Misc. (N. Y.) 558, 23 N. Y. Suppl. 321; Sayles *v.* Best, 20 N. Y. Suppl. 951 [*affirmed* in 140 N. Y. 368, 35 N. E. 636]; Benjamin *v.* Myers, 3 N. Y. St. 284; Strohn *v.* Epstein, 6 N. Y. Civ. Proc. 36, 14 Abb. N. Cas. (N. Y.) 322; Whitney *v.* Welch, 2 Abb. N. Cas. (N. Y.) 442; Andrews *v.* Glenville Woolen Co., 11 Abb. Pr. N. S. (N. Y.) 78; Barker *v.* Johnson, 4 Abb. Pr. (N. Y.) 435; Leggitt *v.* Sloan, 24 How. Pr. (N. Y.) 479; Dorr *v.*

been waived,[92] or has been dispensed with by the order of appointment, as provided by statute, because the debtor cannot be found within the state.[93]

(B) *To Other Creditors.* Where other creditors in like proceedings are entitled to notice of the application, notice to them is necessary to the regularity of the appointment.[94] But they are not entitled to a copy of the examination on which the application is based.[95]

(C) *Time of Notice.* The time of notice is usually prescribed by statute, but when it is not a reasonable time must be afforded the debtor,[96] or the other creditors.[97]

(D) *Form of Notice.* The notice need not be specific. A general notice will suffice.[98] But where the examination is before a referee it must be in writing.[99]

(E) *Service.* Service of notice on the debtor must be personal.[1]

e. The Order[2] — (I) *REQUISITES.* The order should vest in the receiver title

Noxon, 5 How. Pr. (N. Y.) 29; Kemp *v.* Harding, 4 How. Pr. (N. Y.) 178; Thayer *v.* Dempsey, 25 N. Y. Wkly. Dig. 457; Vandeburgh *v.* Gaylord, 7 N. Y. Wkly. Dig. 136; Dilling *v.* Foster, 21 S. C. 334. *Contra*, Terry *v.* Bange, 57 N. Y. Super. Ct. 546, 9 N. Y. Suppl. 311, 18 N. Y. Civ. Proc. 288.

A verbal notice of the application given at the close of the examination is insufficient to justify the order. Ashley *v.* Turner, 22 Hun (N. Y.) 226.

No notice is required where an order directed the debtor to appear before the judge at any time subsequent to the disclosure for further proceedings in accordance with the disclosure. Sickles *v.* Hanley, 4 Abb. N. Cas. (N. Y.) 231.

Sufficient notice although in the alternative see Clark *v.* Clark, 11 Abb. N. Cas. (N. Y.) 333.

92. As by appearance of an attorney on behalf of the debtor (Moore *v.* Empie, 17 N. Y. App. Div. 218, 45 N. Y. Suppl. 539), or by a voluntary appearance and examination of the debtor (Bingham *v.* Disbrow, 37 Barb. (N. Y.) 24, 14 Abb. Pr. (N. Y.) 251).

93. O'Connor *v.* Mechanics' Bank, 54 Hun (N. Y.) 272, 7 N. Y. Suppl. 380; Catholic University *v.* Conrad, 27 Misc. (N. Y.) 326, 57 N. Y. Suppl. 820; Grace *v.* Curtiss, 3 Misc. (N. Y.) 558, 23 N. Y. Suppl. 321. But see Whitney *v.* Welch, 2 Abb. N. Cas. (N. Y.) 442, holding that a non-resident debtor is entitled to notice.

A mere statement that notice cannot with due diligence be given is insufficient. Grace *v.* Curtiss, 3 Misc. (N. Y.) 558, 23 N. Y. Suppl. 321.

A recital in the order that it had been brought to the attention of the judge that the debtor resided in another state is sufficient to justify the court in dispensing with notice. O'Connor *v.* Mechanics' Bank, 54 Hun (N. Y.) 272, 7 N. Y. Suppl. 380 [*reversing* 2 N. Y. Suppl. 225].

The court cannot dispense with notice, on affidavits made on information and belief, to the effect that, although searched for, the debtor could not be found and that he was out of the state, no facts being stated as to the attempt to find him, or any grounds for the belief furnished. Henry *v.* Furbish, 30 Misc. (N. Y.) 822, 62 N. Y. Suppl. 247.

94. Todd *v.* Crooke, 4 Sandf. (N. Y.) 694, Code Rep. N. S. (N. Y.) 324; Barnett *v.* Moore, 20 Misc. (N. Y.) 518, 46 N. Y. Suppl. 668; Sheffield Farm Co. *v.* Burr, 11 Misc. (N. Y.) 638, 32 N. Y. Suppl. 1149; Youngs *v.* Klunder, 7 N. Y. Suppl. 498; Leggett *v.* Sloan, 24 How. Pr. (N. Y.) 479; Corbin *v.* Berry, 83 N. C. 27.

Notwithstanding an adjournment taken for a further examination of the debtor, if required, the proceedings are still pending for the purpose of making a final order, and of requiring notice to the judgment creditor of an application for a receiver in other proceedings. Barnett *v.* Moore, 20 Misc. (N. Y.) 518, 46 N. Y. Suppl. 668.

Notice to counsel.— See Darrow *v.* Riley, 5 Misc. (N. Y.) 363, 26 N. Y. Suppl. 91.

Waiver.— See Barnett *v.* Moore, 20 Misc. (N. Y.) 518, 46 N. Y. Suppl. 668; Corbin *v.* Berry, 83 N. C. 27.

95. Todd *v.* Crooke, 4 Sandf. (N. Y.) 694, Code Rep. N. S. (N. Y.) 324.

96. Two days' notice should be given, at least. Strong *v.* Epstein, 14 Abb. N. Cas. (N. Y.) 322.

An appearance by attorney is a waiver of the time of notice prescribed. Moore *v.* Empie, 17 N. Y. App. Div. 218, 45 N. Y. Suppl. 539.

Notice after appointment.— Where proceedings supplementary to execution were instituted against an absent debtor, and, on his return to the state three months after the appointment of a receiver, he was served with the order of appointment without further order, the service was held to be extrajudicial. Billson *v.* Linderberg, 66 Minn. 66, 68 N. W. 771.

97. A creditor in other proceedings is not entitled to the eight days' notice provided for on motions generally. Leggett *v.* Sloan, 24 How. Pr. (N. Y.) 479.

98. Dilling *v.* Foster, 21 S. C. 334.

99. Ashley *v.* Turner, 22 Hun (N. Y.) 226.

1. Sayles *v.* Best, 20 N. Y. Suppl. 951 [*affirmed* in 140 N. Y. 368, 35 N. E. 636].

Service on the attorney of record in the action in which the judgment was recovered is insufficient. Catholic University of America *v.* Conrad, 27 Misc. (N. Y.) 326, 57 N. Y. Suppl. 820.

2. **Forms of orders appointing receiver** see Teats *v.* Herington Bank, 28 Kan. 721, 51 Pac.

to all the property of the judgment debtor not exempt by law.[3] But should not adjudicate the rights to property in the hands of a third person.[4]

(II) *Validity.* An order is not vitiated because of an immaterial erroneous designation of the court in the title,[5] or for the reason that the execution on which the proceedings were based was subsequently countermanded,[6] or erroneous, because of the extinguishment of the debt of a third person to the debtor.[7] But an order conferring on the receiver powers in excess of those prescribed by statute is invalid for want of jurisdiction.[8]

(III) *Effect of Appointment.* The order furnishes no presumption of jurisdiction or regularity,[9] unless made by the judge of an inferior court acting in that behalf for a superior jurisdiction.[10] The judge who grants the order is not deprived of further jurisdiction,[11] nor does the appointment affect the rights of other creditors,[12] or terminate the proceedings.[13] But after the appointment strangers to the proceedings deal with the judgment debtor at their own risk.[14]

(IV) *Objections — Collateral Attack* — (A) *In General.* An order made by a judge having jurisdiction, or reciting the existence of jurisdictional facts, is conclusive on collateral attack. It can only be vacated or set aside by a direct proceeding brought for that purpose.[15]

(B) *Who May Object.* Although the validity of an order appointing a receiver may be attacked by a party claiming title adversely to the debtor,[16] mere irregularities in the appointment can only be taken advantage of by the judgment debtor.[17]

(C) *Waiver.* The rule is well settled that defects or irregularities in the appointment of the receiver or in the prior proceedings may be waived[18] by

219; Leggett *v.* Waller, 39 Misc. (N. Y.) 408, 80 N. Y. Suppl. 13.

3. Smith *v.* Tozer, 11 N. Y. Civ. Proc. 349.

Receivership of particular property.— A receiver cannot be appointed for a particular debt or for a specified part of the debtor's property. Andrews *v.* Glenville Woolen Co., 11 Abb. Pr. N. S. (N. Y.) 78. See Kemp *v.* Harding, 4 How. Pr. (N. Y.) 178.

Exempt property.— See Holcombe *v.* Johnson, 27 Minn. 353, 7 N. W. 364.

4. Manice *v.* Smith, 5 N. Y. Wkly. Dig. 255.

5. Terry *v.* Bange, 57 N. Y. Super. Ct. 546, 9 N. Y. Suppl. 311, 18 N. Y. Civ. Proc. 288.

6. Palmer *v.* Colville, 63 Hun (N. Y.) 536, 18 N. Y. Suppl. 509.

7. Globe Phosphate Co. *v.* Pinson, 52 S. C. 185, 29 S. E. 549, where the order did not determine the amount due on the claim.

8. Spaulding *v.* Cœur D'Alene R., etc., Co., 6 Ida. 638, 59 Pac. 426, where the court ordered that property claimed adversely to the debtor should be taken by the receiver appointed and applied to the satisfaction of the judgment.

Collateral attack see *infra*, XIII, T, 3, e, (IV).

9. Wright *v.* Nostrand, 47 N. Y. Super. Ct. 441 [*affirmed* in 94 N. Y. 31].

10. Teats *v.* Herington Bank, 58 Kan. 721, 51 Pac. 219.

11. Leggett *v.* Sloan, 24 How. Pr. (N. Y.) 479. See also People *v.* Mead, 29 How. Pr. (N. Y.) 360.

12. Weiss *v.* Geyer, 9 N. J. L. J. 312.

13. Smith *v.* Cutter, 64 N. Y. App. Div. 412, 72 N. Y. Suppl. 99; Matter of Crane, 81 Hun (N. Y.) 96, 30 N. Y. Suppl. 616, 1 N. Y. Annot. Cas. 148.

14. Guild *v.* Meyer, 56 N. J. Eq. 183, 38 Atl. 959.

Purchaser at execution sale.— The appointment of a receiver will not preclude a purchaser of the debtor's property on execution sale from pursuing the lessee of the debtor for the rent of the property purchased. Griffith *v.* Burlingame, 18 Wash. 429, 51 Pac. 1059.

15. Wright *v.* Nostrand, 94 N. Y. 31 [*affirming* 47 N. Y. Super. Ct. 441]; Powell *v.* Waldron, 89 N. Y. 328, 42 Am. Rep. 301; Stiefel *v.* Berlin, 28 N. Y. App. Div. 103, 51 N. Y. Suppl. 147; Moore *v.* Taylor, 40 Hun (N. Y.) 56; Underwood *v.* Sutcliffe, 10 Hun (N. Y.) 453; Tyler *v.* Willis, 33 Barb. (N. Y.) 327, 12 Abb. Pr. (N. Y.) 465; Terry *v.* Bange, 57 N. Y. Super. Ct. 546; Gomprecht *v.* Scott, 27 Misc. (N. Y.) 192, 57 N. Y. Suppl. 799 [*affirming* 55 N. Y. Suppl. 239]; Peters *v.* Carr, 2 Dem. Surr. (N. Y.) 22. See also Stanley *v.* National Union Bank, 115 N. Y. 122, 22 N. E. 29.

The absence of a written consent to the appointment of the clerk of the court cannot be urged in a subsequent proceeding, involving the validity of the appointment where an adjudication beneficial to the objectant is made. Southwick *v.* Moore, 54 N. Y. Super. Ct. 126.

16. Guild *v.* Meyer, 59 N. J. Eq. 390, 46 Atl. 202.

17. Baker *v.* Brundage, 79 Hun (N. Y.) 382, 29 N. Y. Suppl. 792; Underwood *v.* Sutcliffe, 10 Hun (N. Y.) 453; Tyler *v.* Willis, 33 Barb. (N. Y.) 327; Richards *v.* Allen, 3 E. D. Smith (N. Y.) 399; Darrow *v.* Riley, 5 Misc. (N. Y.) 363, 26 N. Y. Suppl. 91.

18. Bingham *v.* Disbrow, 37 Barb. (N. Y.) 24; Hobart *v.* Frost, 5 Duer (N. Y.) 672.

consenting to the appointment[19] or by appearing and failing to object when afforded an opportunity.[20]

(v) *FILING ORDER.*[21] An appointment is not complete until the order of appointment has been filed as required by statute.[22]

f. Bond or Security.[23] Except in a case where security may be dispensed with[24] it is incumbent on the receiver to file the bond or security required by law with the proper officer.[25] The sufficiency of the bond cannot be determined in a collateral proceeding.[26] Objections for insufficiency can be urged by the debtor alone[27] in the court which appointed the receiver.[28]

4. EXTENSION OF RECEIVERSHIP — a. In General. As the appointment of a receiver divests the debtor of all his property, where several proceedings are pending against the same debtor there should be but one receiver, and a receivership in one proceeding may be extended to proceedings subsequently instituted or in which subsequent applications are made.[29]

b. Priorities.[30] As between senior and junior creditors the receivership relates

19. Powell *v.* Waldron, 89 N. Y. 328, 42 Am. Rep. 301; Webb *v.* Osborne, 15 Daly (N. Y.) 406, 7 N. Y. Suppl. 762.

20. Underwood *v.* Sutcliffe, 10 Hun (N. Y.) 453; Clark *v.* Clark, 11 Abb. N. Cas. (N. Y.) 333.

21. Filing order to vest title to real estate see *infra*, XIII, T, 13, b.

Filing order extending the receivership see *infra*, XIII, T, 4.

22. Moyer *v.* Moyer, 7 N. Y. App. Div. 523, 40 N. Y. Suppl. 258; Bareither *v.* Brosche, 13 N. Y. Suppl. 561, 19 N. Y. Civ. Proc. 446.

Filing it with testimony taken before the conclusion of the examination will not deprive the judge who made it of jurisdiction of the debtor's person. People *v.* Mead, 29 How. Pr. (N. Y.) 360.

A receiver cannot maintain an action or proceeding to acquire the property of the debtor until the order appointing him has been properly filed. Bareither *v.* Brosche, 13 N. Y. Suppl. 561, 19 N. Y. Civ. Proc. 446.

23. Bonds of receivers see, generally, RECEIVERS.

24. Banks *v.* Potter, 21 How. Pr. (N. Y.) 469.

Additional security.— If satisfactory security has been given, additional security will not be required on an extension of the receivership to other proceedings. Banks *v.* Potter, 21 How. Pr. (N. Y.) 469. But where the security of a receiver who has been substituted for the debtor in an action instituted by the latter is inadequate, it may be directed to be increased. Matter of Wilds, 6 Abb. N. Cas. (N. Y.) 307.

25. Johnson *v.* Martin, 1 Thomps. & C. (N. Y.) 504; National Wall Paper Co. *v.* Gerlach, 15 Misc. (N. Y.) 640, 37 N. Y. Suppl. 428; Banks *v.* Potter, 21 How. Pr. (N. Y.) 469; Conger *v.* Sands, 19 How. Pr. (N. Y.) 8; Peters *v.* Carr, 2 Dem. Surr. (N. Y.) 22. See also Wilson *v.* Allen, 6 Barb. (N. Y.) 542; Lottimer *v.* Lord, 4 E. D. Smith (N. Y.) 183.

A bond not under seal is not void, but only irregular. Morgan *v.* Potter, 17 Hun (N. Y.) 403; Hyatt *v.* Dusenbury, 12 N. Y. Civ. Proc. 152.

The filing of an instrument in the form of a bond, unsealed and with but one surety, is insufficient. Johnson *v.* Martin, 1 Thomps. & C. (N. Y.) 504.

26. Stanley *v.* National Union Bank, 115 N. Y. 122, 22 N. E. 29; Peters *v.* Carr, 2 Dem. Surr. (N. Y.) 22.

27. Morgan *v.* Potter, 17 Hun (N. Y.) 403.

28. Hyatt *v.* Dusenbury, 12 N. Y. Civ. Proc. 152; Peters *v.* Carr, 2 Dem. Surr. (N. Y.) 22.

29. Palmer *v.* Colville, 63 Hun (N. Y.) 536, 18 N. Y. Suppl. 509; Myrick *v.* Selden, 36 Barb. (N. Y.) 15; Webb *v.* Osborne, 15 Daly (N. Y.) 406, 7 N. Y. Suppl. 762; Matter of Pennsylvania Glass Co., 27 Misc. (N. Y.) 815, 57 N. Y. Suppl. 396; Stiefel *v.* Berlin, 51 N. Y. Suppl. 149; Garfield Nat. Bank *v.* Bostwick, 14 N. Y. Suppl. 919; Youngs *v.* Klunder, 7 N. Y. Suppl. 498; Guggenheimer *v.* Stephens, 7 N. Y. Suppl. 263, 17 N. Y. Civ. Proc. 383; Benjamin *v.* Myers, 3 N. Y. St. 284; Sparks *v.* Davis, 25 S. C. 381.

Consent of debtor.— The rule that a creditor must first exhaust his remedy by execution, before proceeding by a receiver, exists for the debtor's benefit and has no application where the receivership is extended with the debtor's consent. Webb *v.* Osborne, 15 Daly (N. Y.) 406, 7 N. Y. Suppl. 762.

Death of debtor.— A receivership cannot be extended after the death of the judgment debtor. Matter of Tribune Assoc., 13 Misc. (N. Y.) 326, 34 N. Y. Suppl. 459.

Vacation.— After the extension of a receivership, it is improper to vacate it and appoint a new receiver. Garfield Nat. Bank *v.* Bostwick, 14 N. Y. Suppl. 919.

Filing order of extension where original order not filed.— An order extending the receivership, when duly filed, will entitle the receiver to all rights resulting from such filing, although the original order was not filed, and will vest in him the title to property then held by the debtor. Webb *v.* Osborne, 15 Daly (N. Y.) 406, 7 N. Y. Suppl. 762. Necessity and effect of filing order of receivership see *supra*, XIII, T, 3, e, (v).

30. Priority of liens generally see *infra*, XIII, W, 3.

back to the commencement of the proceedings on the senior judgment.[31] The filing of the order of extension prior to the filing of the original order will vest in the receiver the title to property then held by the debtor.[32]

5. Appointment in Creditor's Action. The appointment of the same receiver in supplementary proceedings and in a creditor's action is not of right, but is discretionary.[33]

6. Control of Receiver.[34] On appointment of a receiver by a judge the authority of the latter over him ceases. He then becomes an officer of the court in which the judgment was rendered, and is subject to its supervision and control to the same extent as are receivers in other proceedings or actions.[35]

7. Termination[36] of Receivership. The payment of the judgment will terminate the receivership[37] except as to proper claims of the receiver.[38] So it will end by the death of the debtor,[39] or may be vacated because of abandonment of the proceedings.[40] But a continuance of the execution will not affect an extension of the receivership,[41] nor will an appointment be vacated or set aside after a considerable lapse of time, where suit has been commenced by the receiver,[42] because of the appointment of a receiver of a corporate debtor which has become insolvent,[43] or for the reason that the receiver may have difficulty in getting possession of the debtor's property.[44] The order of appointment can only be vacated or modified by the judge who made it.[45]

8. Death of Receiver.[46] On the death of a receiver in supplementary proceedings, appointed by a court of special jurisdiction during the pendency of an action brought by him, the trust devolves on the highest court of the state having

31. Guggenheimer *v.* Stevens, 7 N. Y. Suppl. 263, 17 N. Y. Civ. Proc. 383.

Examination by junior creditor without order.— See Youngs *v.* Klunder, 7 N. Y. Suppl. 498.

32. Webb *v.* Osborne, 15 Daly (N. Y.) 406, 7 N. Y. Suppl. 762.

33. Syracuse State Bank *v.* Gill, 23 Hun (N. Y.) 410, where different receivers were appointed. See, generally, Creditors' Suits.

Rights in fund.— Where a receiver is appointed after setting aside a transfer, another creditor who has the same receiver appointed acquires no lien on the fund in the hands of the latter. Field *v.* Sands, 8 Bosw. (N. Y.) 685; Conger *v.* Sands, 19 How. Pr. (N. Y.) 8. The appointment of a receiver by one court does not vest him with any interest in a fund held by him as receiver in another proceeding to abide the result of an action to determine its application. Genet *v.* Foster, 18 How. Pr. (N. Y.) 50.

34. **Control of receivers** generally see Receivers.

35. Tillotson *v.* Wolcott, 48 N. Y. 188; Smith *v.* Barnum, 59 N. Y. App. Div. 291, 69 N. Y. Suppl. 253; Pool *v.* Safford, 14 Hun (N. Y.) 369; Myrick *v.* Selden, 36 Barb. (N. Y.) 15.

County court has the same control over its receiver as a court of equity and will not permit him to use his powers illegally or oppressively. Tillotson *v.* Wolcott, 48 N. Y. 188.

County judge.— Pool *v.* Safford, 14 Hun (N. Y.) 369.

Probate judge.— Teats *v.* Herington Bank, 58 Kan. 721, 51 Pac. 219.

The receiver cannot be enjoined from taking possession of property. There should be an application to the court for instructions. Van Rensselaer *v.* Emery, 9 How. Pr. (N. Y.) 135. See Lindsley *v.* Van Cortlandt, 67 Hun (N. Y.) 145, 22 N. Y. Suppl. 222; Barnes *v.* Courtright, 37 Misc. (N. Y.) 60, 74 N. Y. Suppl. 203. Nor after obtaining authority from the court to sue can he be restrained by another court of coördinate jurisdiction. Winfield *v.* Bacon, 24 Barb. (N. Y.) 154.

36. **Termination of proceedings** see *supra*, XIII, O.

37. Gifford *v.* Rising, 59 Hun (N. Y.) 42, 12 N. Y. Suppl. 428.

38. Lanigan *v.* New York, 70 N. Y. 454.

To pay the costs of the proceeding the debtor may be compelled to turn over sufficient property to the receiver even after the judgment has been paid. Holton *v.* Robinson, 59 N. Y. App. Div. 45, 69 N. Y. Suppl. 33; Crook *v.* Findley, 60 How. Pr. (N. Y.) 375.

39. Matter of Tribune Assoc., 13 Misc. (N. Y.) 326, 34 N. Y. Suppl. 459.

40. Thayer *v.* Dempsey, 25 N. Y. Wkly. Dig. 457, where it further appeared that no inquiry had been made as to the pendency of other proceedings, and that the appointment was made without notice.

41. Palmer *v.* Colville, 18 N. Y. Suppl. 509.

42. Terry *v.* Bange, 57 N. Y. Super. Ct. 546, 9 N. Y. Suppl. 311, 18 N. Y. Civ. Proc. 288.

43. Wright *v.* Nostrand, 94 N. Y. 31 [*reversing* 47 N. Y. Super. Ct. 441].

44. Teats *v.* Herington Bank, 58 Kan. 721, 58 Pac. 219.

45. Moschell *v.* Boar, 66 Hun (N. Y.) 557, 21 N. Y. Suppl. 683.

46. **Appointment of new receiver** see *supra*, XIII, T, 3.

general jurisdiction, which on a proper application may appoint another agent to represent it.[47]

9. Resignation.[48] In a proper case a receiver may be permitted to resign, and a new appointment may be made.[49]

10. Removal.[50] Where sufficient cause[51] therefor is shown a receiver may be removed and another person substituted;[52] but he should have notice of the charges against him, and be afforded an opportunity of being heard.[53]

11. Rights, Powers, and Duties — a. In General. The rights and powers of a receiver in proceedings supplementary to execution are in the main similar to those of receivers appointed for other purposes.[54] He has no power, however, to issue an execution on a judgment recovered by the debtor,[55] although it has been held that he may issue an execution on a judgment docketed in his favor in an action to which he was not a party,[56] nor can he contest the probate of a will which divests the debtor of all interest in the estate.[57]

b. Power to Sell. When so authorized the receiver may sell the property of the judgment debtor.[58] Thus it has been held that a private sale of personalty may be directed when there is a probability of realizing a better sum than could

47. Smith *v.* Barnum, 59 N. Y. App. Div. 291, 69 N. Y. Suppl. 253.

48. Substitution of receiver see *supra*, XIII, T, 3.

49. Wing *v.* Disse, 15 Hun (N. Y.) 190, where the resignation was accepted by a county judge who appointed a successor.

Setting aside new receivership.— A motion to set aside the appointment of a receiver in place of one who had resigned should be made to the court. Lippincott *v.* Westray, 6 N. Y. Civ. Proc. 74.

50. Substitution of receiver see *supra*, XIII, T, 3.

51. It is a good ground for removal that the receiver was the assignor of the claim on which the judgment was rendered (Gillin *v.* Campbell, 9 N. Y. St. 538); but the employment of the debtor by the receiver to collect a part of the assets is not of itself sufficient to require his removal (Ross *v.* Bridge, 15 Abb. Pr. (N. Y.) 150, 24 How. Pr. (N. Y.) 150).

Discretion of court.— Where an action is brought by a creditor to set aside the proceeding for collusion, it is within the discretion of the court to remove the receiver and appoint another. Connolly *v.* Kretz, 78 N. Y. 620.

52. There should be no removal unless accompanied by a substitution of a qualified person. Terry *v.* Bange, 57 N. Y. Super. Ct. 546, 9 N. Y. Suppl. 311, 18 N. Y. Civ. Proc. 288.

An order substituting a receiver should be made at chambers. Ball *v.* Goodenough, 37 How. Pr. (N. Y.) 479; Smith *v.* Johnson, 7 How. Pr. (N. Y.) 39.

Substitution for receiver of partnership.— See Price *v.* Price, 21 N. Y. App. Div. 597, 47 N. Y. Suppl. 772.

A receiver appointed by a court of general jurisdiction cannot be removed by a judge of an inferior court who subsequently appointed him in proceedings pending before him. Garfield Nat. Bank *v.* Bostwick, 14 N. Y. Suppl. 919.

53. Bruns *v.* Stewart Mfg. Co., 31 Hun (N. Y.) 195; Campbell *v.* Spratt, 5 N. Y. Wkly. Dig. 25.

54. A sheriff duly appointed has the same power and authority as any other receiver. Teats *v.* Herington Bank, 58 Kan. 721, 51 Pac. 219.

55. Hyatt *v.* Dusenbury, 12 N. Y. Civ. Proc. 152.

56. Goodenough *v.* Davids, 4 Month. L. Bul. (N. Y.) 35.

57. *In re* Brown, 47 Hun (N. Y.) 360.

58. Habenicht *v.* Lissak, 78 Cal. 351, 20 Pac. 874, 12 Am. St. Rep. 63, 5 L. R. A. 713; Porter *v.* Williams, 9 N. Y. 142, 59 Am. Dec. 519 [*affirming* 5 How. Pr. 441].

An unliquidated claim for damages should not be sold, but should be prosecuted to judgment. Bryan *v.* Grant, 87 Hun (N. Y.) 68, 33 N. Y. Suppl. 957.

Mortgaged property cannot be sold. The right of sale is limited to the debtor's interest. Manning *v.* Monaghan, 1 Bosw. (N. Y.) 459. A receiver who takes possession of mortgaged property at an unauthorized sale can only sell the mortgagor's right of possession and equity of redemption. Manning *v.* Monaghan, 1 Bosw. (N. Y.) 459 [*reversed* on other grounds in 23 N. Y. 539].

Property held in trust.— The court will not permit a sale of the interest of the debtor in real estate under a will by which the property was devised in trust, to be divided into shares, and the income of one share to be applied to the debtor for life. Scott *v.* Nevins, 6 Duer (N. Y.) 672. The sale of the debtor's interest in a comparatively large trust fund, which becomes payable on the happening of an event, will not be ordered where the judgment is small. People *v.* McAdam, 1 N. Y. City Ct. Suppl. 38 note.

Property greatly in excess of the amount of the judgment may be sold, and the court will restrain him from selling the whole of it at auction. Wardell *v.* Leavenworth, 3 Edw. (N. Y.) 244.

An invalid sale or a sale for a grossly inadequate price may be set aside. Griffith *v.* Hadley, 10 Bosw. (N. Y.) 587, where, in ad-

be procured by a sale at auction.[59] So too a receiver may sell an equitable interest in realty,[60] real estate subject to an inchoate right of dower,[61] or a seat or membership in a stock exchange,[62] but a sale should not be directed where it is doubtful if anything can be realized.[63] Nor should the receiver be authorized to sell real estate or a vested interest therein which may be reached by execution,[64] especially where the effect of the sale would be to cut off or defeat the debtor's statutory right of redemption,[65] or to sell *en masse*, where sufficient can be realized by selling a portion of the property.[66]

c. Disposition of Funds — (I) *In General.* The duties of a receiver in proceedings supplementary to execution are fixed by law. He is bound to apply money or effects in his hands to the payment of debts due to the creditors represented by him according to their legal or equitable priorities, and to restore what remains, if anything, to the debtor or those who have succeeded to his rights.[67] But except on notice to the debtor, the court has no power to direct the receiver to apply moneys in his hands to the payment of anything but the judgment

dition to the inadequacy of the price procured, the attorney for the debtor had no notice of the date of the sale.

Irregular order.— See Lindsley *v.* Van Cortlandt, 67 Hun (N. Y.) 145, 22 N. Y. Suppl. 222.

Sale of property of third person.— The disposition in obedience to an order of the court of property taken as that of the debtor without knowledge of the claim of a third person does not constitute a conversion as to such person. Ochs *v.* Pohly, 87 N. Y. App. Div. 92, 84 N. Y. Suppl. 1.

Consent of debtor to transfer of seat in exchange.— Where the receiver has sold the right and title of a debtor to a seat in an exchange, the latter may be required to sign a consent that the purchaser be vested with all the rights, privileges, and benefits which inure to his membership. Roome *v.* Swan, 2 N. Y. Suppl. 614, 15 N. Y. Civ. Proc. 344.

Who may move to vacate order of sale.— Faneuil Hall Nat. Bank *v.* Bussing, 147 N. Y. 663, 42 N. E. 345.

59. Monolithic Drain, etc., Co. *v.* Dewsnap, 41 N. Y. Suppl. 224, 25 N. Y. Civ. Proc. 380.

60. Kiser *v.* Sawyer, 4 Kan. 503.

Sale of an interest in real property by the receiver without a previous conveyance to him by the debtor, and without an order of the court directing him to sell, will not transfer any interest to his grantee. Scott *v.* Elmore, 10 Hun (N. Y.) 68.

61. But the court has no power to direct payment of the estimated value to the wife. Lowry *v.* Smith, 9 Hun (N. Y.) 514.

A receiver to whom a right of dower has been conveyed may have the same admeasured and applied by a sale of the premises. Payne *v.* Becker, 87 N. Y. 153. The existence of such an interest need not be shown by the examination of the debtor, but may be ascertained by any competent proof. Kiser *v.* Sawyer, 4 Kan. 503.

62. Roome *v.* Swan, 2 N. Y. Suppl. 614, 15 N. Y. Civ. Proc. 344.

63. Matter of Patterson, 12 N. Y. App. Div. 123, 42 N. Y. Suppl. 495.

64. Inglehart's Petition, Sheld. (N. Y.) 514; Monolithic Drain, etc., Co. *v.* Dewsnap, 41 N. Y. Suppl. 224, 25 N. Y. Civ. Proc. 380; Albany City Nat. Bank *v.* Gaynor, 67 How. Pr. (N. Y.) 421; Pfluger *v.* Cornell, 2 N. Y. City Ct. 145.

65. Inglehart's Petition, Sheld. (N. Y.) 514; Pfluger *v.* Cornell, 2 N. Y. City Ct. 145. *Compare* Chadeayne *v.* Gwyer, 83 N. Y. App. Div. 403, 82 N. Y. Suppl. 198.

66. Griffith *v.* Hadley, 10 Beew. (N. Y.) 587; Wardell *v.* Leavenworth, 3 Edw. (N. Y.) 244.

67. Goddard *v.* Stiles, 90 N. Y. 199 [*reversing* 25 Hun 63]; Porter *v.* Williams, 9 N. Y. 142, 59 Am. Dec. 519 [*affirming* 5 How. Pr. 441]; Youngs *v.* Klunder, 7 N. Y. Suppl. 498; Bostwick *v.* Beizer, 10 Abb. Pr. (N. Y.) 197; Phillips *v.* O'Connor, 1 N. Y. City Ct. 372.

Referee's fees may be directed to be paid. Matter of Merry, 11 N. Y. App. Div. 507, 42 N. Y. Suppl. 617.

Rents payable to the debtor, himself a tenant, cannot be distributed until the claim of the debtor's landlord is satisfied. Riggs *v.* Whitney, 15 Abb. Pr. (N. Y.) 388.

Where the debtor has a claim for false imprisonment suffered in an action brought against him in the name of the receiver by the judgment creditors, the court will refuse to order the funds in the receiver's hands distributed, since any damages recovered by the debtor in such a case would be payable from the fund. Morris *v.* Hiler, 57 How. Pr. (N. Y.) 322.

The motion papers to procure an order directing the application of funds in the receiver's hands must show where judgment was originally recovered and out of what court the execution issued. Galster *v.* Syracuse Sav. Bank, 29 Hun (N. Y.) 594.

The New Jersey statute directing the receiver to pay what remains after payment of the judgment, etc., contemplates payment of the excess after such payments are made which may result from one or more collections or suits, and does not authorize the receiver to collect all the debtor's property, and bring it into court, however much it may exceed the amount due the creditor. Shay *v.* Dickson, (Ch. 1888) 15 Atl. 252.

under which he was appointed or such other judgment or judgments as to which his receivership has been extended.[68]

(II) *Claims on Funds Held by Receiver.*[69] The claim of a third party to funds in the hands of the receiver may be determined on a special motion, without notice to the creditor;[70] but a stranger to the action and subsequent proceedings, has no standing to compel the payment to him of moneys collected by the receiver.[71]

d. Employment of Attorney.[72] The court cannot require the receiver to employ any particular attorney,[73] nor need he retain the attorney of the creditor to conduct actions or proceedings.[74] He has been permitted to do so, however,[75] although such an employment has been held to be irregular.[76]

e. Right to Accounting From Personal Representatives.[77] A receiver of a party entitled as beneficiary or otherwise to share in a decedent's estate may require the personal representatives of the decedent to account to him,[78] but has not such an interest in the estate as will entitle him to an accounting by an executor who is the judgment debtor.[79]

12. Liabilities — a. In General. The receiver is liable to the debtor or creditor as the case may be, for wrongful conduct or mismanagement on his part.[80]

b. Accounting by Receiver. The receiver may be required to account for property which may come into his hands.[81] On the death of the debtor his personal representatives may compel an accounting as to the proceeds of real property conveyed to the receiver,[82] and where the receiver assumes to determine as to whom a fund in his hands belongs, and erroneously pays it to persons not entitled, he may be compelled to account and justify his conduct, if he can.[83] But one who questions the accuracy of an account rendered by the receiver to the judge who appointed him is not entitled to an accounting in the court of chancery, but must apply for relief to such judge.[84]

68. Goddard *v.* Stiles, 90 N. Y. 199 [*reversing* 25 Hun 63].

69. Liens on fund generally see *infra*, XIII, W.

70. Brein *v.* Light, 36 Misc. (N. Y.) 110, 72 N. Y. Suppl. 655 [*affirmed* in 37 Misc. 771, 76 N. Y. Suppl. 935].

Entitling motion papers.— See Kellogg *v.* Coller, 47 Wis. 649, 3 N. W. 433.

Right of debtor to appeal.— See Gomprecht *v.* Scott, 55 N. Y. Suppl. 239.

71. Gomprecht *v.* Scott, 55 N. Y. Suppl. 239.

72. Retention of attorney of debtor on substitution of receiver in suit by latter see *infra*, XIII, T, 15.

73. Rondout First Nat. Bank *v.* Navarro, 17 N. Y. Suppl. 900.

74. Moore *v.* Taylor, 40 Hun (N. Y.) 56.

75. Baker *v.* Van Epps, 22 Hun (N. Y.) 460, 60 How. Pr. (N. Y.) 79; Cumming *v.* Egerton, 9 Bosw. (N. Y.) 684.

76. Cumming *v.* Egerton, 9 Bosw. (N. Y.) 684; Baker *v.* Van Epps, 22 Hun (N. Y.) 460, 60 How. Pr. (N. Y.) 79 [*affirming* 58 How. Pr. 401]; Branch *v.* Harrington, 49 How. Pr. (N. Y.) 196.

All defendants must join in an application to set aside the summons and complaint for such irregularity. Baker *v.* Van Epps, 22 Hun (N. Y.) 460, 60 How. Pr. (N. Y.) 79 [*affirming* 58 How. Pr. 401]. But see Cumming *v.* Egerton, 9 Bosw. (N. Y.) 684.

77. Accounting by personal representatives generally see Executors and Administrators.

78. Matter of Beyea, 10 Misc. (N. Y.) 198, 31 N. Y. Suppl. 200; Matter of Sistare, 15 N. Y. Suppl. 709, 27 Abb. N. Cas. (N. Y.) 34, 2 Connoly Surr. (N. Y.) 554; Worrall *v.* Driggs, 1 Redf. Surr. (N. Y.) 449.

Where administrators are also next of kin, a receiver appointed in proceedings against one of the administrators may compel an accounting, and object to improper disbursements. Matter of Rainey, 5 Misc. (N. Y.) 367, 26 N. Y. Suppl. 892.

79. Worrall *v.* Driggs, 1 Redf. Surr. (N. Y.) 449.

80. Dewey *v.* Finn, 18 N. Y. Wkly. Dig. 558.

A receiver is liable for selling exempt property, although it is not excepted by the order appointing him. Finnin *v.* Malloy, 33 N. Y. Super. Ct. 382.

Action in good faith.— See Barnes *v.* Courtright, 37 Misc. (N. Y.) 60, 74 N. Y. Suppl. 203.

Leave to sue.— One wrongfully deprived of his property by the receiver need not obtain leave of the court to sue him. Dewey *v.* Finn, 18 N. Y. Wkly. Dig. 558.

81. Tillotson *v.* Wolcott, 48 N. Y. 188; Webber *v.* Hobbie, 13 How. Pr. (N. Y.) 382.

82. Graham *v.* Lawyers' Title Ins. Co., 20 N. Y. App. Div. 440, 46 N. Y. Suppl. 1055.

83. *In re* Hone, 153 N. Y. 522, 47 N. E. 798.

84. Hackensack Sav. Bank *v.* Terhune, 50 N. J. Eq. 297, 23 Atl. 482.

13. Title to and Rights in Property[85] **— a. Personal Property** — (I) *In General.* The title of the receiver to personal property is dependent largely on statutory provisions. It may vest from the time of the making or filing the order of appointment or the time of qualification, or he may take such title as the debtor had at the institution of the proceedings; in either case no assignment to him is necessary.[86] The title of a receiver to claims on which the debtor had brought suit is superior to that of an assignee of the judgment debtor under an assignment made subsequent to the filing of the order of receivership.[87] How-

85. Property which may be reached see *supra*, XIII, F.

Property which may be required to be delivered by the debtor see *supra*, XIII, S, 2.

86. Harrison *v.* Maxwell, 44 N. J. L. 316; Ward *v.* Petrie, 157 N. Y. 301, 51 N. E. 1002, 68 Am. St. Rep. 790; Mandeville *v.* Avery, 124 N. Y. 376, 26 N. E. 951, 21 Am. St. Rep. 678; Bostwick *v.* Menck, 40 N. Y. 383; Van Alstyne *v.* Cook, 25 N. Y. 489; Porter *v.* Williams, 9 N. Y. 142, 12 How. Pr. (N. Y.) 107, 59 Am. Dec. 519 [*affirming* 5 How. Pr. 441, 9 N. Y. Leg. Obs. 307, Code Rep. N. S. 144]; Clark *v.* Brockway, 1 Abb. Dec. (N. Y.) 351, 3 Keyes (N. Y.) 13; Holton *v.* Robinson, 59 N. Y. App. Div. 45, 69 N. Y. Suppl. 33; Reynolds *v.* Ætna L. Ins. Co., 28 N. Y. App. Div. 591, 51 N. Y. Suppl. 446; Stiefel *v.* Berlin, 28 N. Y. App. Div. 103, 51 N. Y. Suppl. 147; Bryan *v.* Grant, 87 Hun (N. Y.) 68, 33 N. Y. Suppl. 957; Norcross *v.* Hollingsworth, 83 Hun (N. Y.) 127, 31 N. Y. Suppl. 627; Masten *v.* Amerman, 51 Hun (N. Y.) 244, 4 N. Y. Suppl. 681 [*reversing* 20 Abb. N. Cas. 443]; Barnes *v.* Morgan, 3 Hun (N. Y.) 703, 6 Thomps. & C. (N. Y.) 105; Cooney *v.* Cooney, 65 Barb. (N. Y.) 524; Rogers *v.* Corning, 44 Barb. (N. Y.) 229; Higgins *v.* Wright, 43 Barb. (N. Y.) 461; Moak *v.* Coats, 33 Barb. (N. Y.) 498; Voorhees *v.* Seymour, 26 Barb. (N. Y.) 569; Clan Ranald *v.* Wyckoff, 41 N. Y. Super. Ct. 527, 52 How. Pr. (N. Y.) 509; Fessenden *v.* Woods, 3 Bosw. (N. Y.) 500; McCorkle *v.* Herrmann, 5 N. Y. Suppl. 881; Deady *v.* Fink, 5 N. Y. Suppl. 3; Columbian Institute *v.* Cregan, 3 N. Y. St. 287, 11 N. Y. Civ. Proc. 87; Matter of Wilds, 6 Abb. N. Cas. (N. Y.) 307; Hayes *v.* Buckley, 53 How. Pr. (N. Y.) 173; Clarke *v.* Goodridge, 44 How. Pr. (N. Y.) 226; Ball *v.* Goodenough, 37 How. Pr. (N. Y.) 479; Fillmore *v.* Horton, 31 How. Pr. (N. Y.) 424; People *v.* Mead, 29 How. Pr. (N. Y.) 360; Van Rensselaer *v.* Emery, 9 How. Pr. (N. Y.) 135; People *v.* Hulburt, 5 How. Pr. (N. Y.) 446, Code Rep. N. S. (N. Y.) 75, 9 N. Y. Leg. Obs. 245; Tinkey *v.* Langdon, 13 N. Y. Wkly. Dig. 384; Swartout *v.* Schwerter, 5 Redf. Surr. (N. Y.) 497; Wilson *v.* Chichester, 107 N. C. 386, 12 S. E. 139, 10 L. R. A. 572.

The receiver is entitled to: A bank-account in the name of the wife of the debtor, managed by him under a power of attorney. Matter of Weld, 34 N. Y. App. Div. 471, 54 N. Y. Suppl. 253. Alimony falling due in the future under the terms of a decree of separation. Stevenson *v.* Stevenson, 34 Hun (N. Y.) 157. Moneys to become due on a contract partially performed. Boynton *v.* Seibert, 33 Misc. (N. Y.) 310, 68 N. Y. Suppl. 562. Property levied on by other creditors pending the proceeding but before his appointment, subject to the levy. Becker *v.* Torrance, 31 N. Y. 631. Property transferred after filing of receiver's appointment. Fitzpatrick *v.* Moses, 34 N. Y. App. Div. 242, 54 N. Y. Suppl. 426. A seat or membership in an exchange which has a money value and is transferable. Powell *v.* Waldron, 89 N. Y. 328, 42 Am. Rep. 301; Ritterband *v.* Baggett, 4 Abb. N. Cas. (N. Y.) 67. A surplus remaining in the hands of a sheriff, after satisfaction of a prior judgment. Salter *v.* Bowe, 32 Hun (N. Y.) 236. The title to the balance in a bank in which the debtor kept a general account and commingled his funds with those of his principal. Levy *v.* Cavanagh, 2 Bosw. (N. Y.) 100.

Claim against a building contractor existing before and for which a mechanic's lien was filed after the appointment does not vest in the receiver. Deady *v.* Fink, 5 N. Y. Suppl. 3.

Claim for services of debtor not fully performed.— Browning *v.* Bettis, 8 Paige (N. Y.) 568.

Nature of ownership in bills receivable.— A receiver holding a promissory note payable to the debtor is not a *bona fide* holder for value. Briggs *v.* Merrill, 58 Barb. (N. Y.) 389.

Leaving property in debtor's possession see Fessenden *v.* Woods, 3 Bosw. (N. Y.) 550.

87. Fitzpatrick *v.* Moses, 34 N. Y. App. Div. 242, 54 N. Y. Suppl. 426.

After the appointment the debtor has no power to issue execution on a judgment recovered by him. Turner *v.* Holden, 94 N. C. 70.

Payment in good faith to junior creditor.— See Droege *v.* Baxter, 69 N. Y. App. Div. 58, 74 N. Y. Suppl. 585 [*reversing* 36 Misc. 124, 72 N. Y. Suppl. 1045]. See also Fessenden *v.* Woods, 3 Bosw. (N. Y.) 550.

Fund of unincorporated association.—Where the judgment is against self-styled trustees of an unincorporated association, the receiver acquires no title to a fund of the association on which defendants have given an order. Bruns *v.* Kane, 12 N. Y. Civ. Proc. 86.

Disclosure of assets by administrator.— It is the duty of the administrator of a deceased debtor to disclose to the receiver on request assets belonging to the intestate. Reynolds *v.* Ætna L. Ins. Co., 28 N. Y. App. Div. 591, 51 N. Y. Suppl. 446.

ever, the receiver will not become vested with rights not capable of alienation,[88] or those to which no right is given by the statute authorizing the proceedings.[89] Nor is he entitled to property exempt from levy and sale under an execution,[90] or to its proceeds.[91]

(II) *When Title Vests.*[92] While the title of the receiver has been held to become vested as of the date of his appointment, or of the time of filing the order appointing him, and not at the time of his qualification,[93] by statute or by the weight of authority,[94] the rule is that the receiver's title relates back to the institution of the proceedings by service of an order for examination on the debtor or a third party, subject to the exception that the title of a purchaser in good faith without notice and for a valuable consideration, or the payment of a debt in good faith, shall be protected.[95]

(III) *Divestment of Title.* His title will not be divested by the death of

88. Waterman *v.* Shipman, 55 Fed. 982, 5 C. C. A. 371.

89. Howell *v.* McDowell, 47 N. J. L. 359, 1 Atl. 474.

90. Cooney *v.* Cooney, 65 Barb. (N. Y.) 524; Finnin *v.* Malloy, 33 N. Y. Super. Ct. 382; Levy *v.* Cavanagh, 2 Bosw. (N. Y.) 100; Andrews *v.* Rowan, 28 How. Pr. (N. Y.) 126. See also Moyer *v.* Moyer, 7 N. Y. App. Div. 523, 40 N. Y. Suppl. 258.

Failure of the order to except exempt property is immaterial. Finnin *v.* Malloy, 33 N. Y. Super. Ct. 382.

The receiver is not a creditor within the meaning of N. Y. Laws (1870), c. 277, exempting life-insurance policies. Masten *v.* Amerman, 51 Hun (N. Y.) 244, 4 N. Y. Suppl. 681.

91. Bliss *v.* Raynor, 91 Hun (N. Y.) 250, 36 N. Y. Suppl. 156.

A cause of action for the wrongful seizure and sale of exempt property does not pass. Andrews *v.* Rowan, 28 How. Pr. (N. Y.) 126.

92. **Relation back:** By extension of receivership see *supra*, XIII, T, 4. By qualification by giving security see *supra*, XIII, T, 3, f.

93. Fitzpatrick *v.* Moses, 34 N. Y. App. Div. 242, 54 N. Y. Suppl. 426; Gardner *v.* Smith, 29 Barb. (N. Y.) 68; Matter of Wilds, 6 Abb. N. Cas. (N. Y.) 307; Fillmore *v.* Horton, 31 How. Pr. (N. Y.) 424; Peters *v.* Carr, 2 Dem. Surr. (N. Y.) 22.

Effect of filing bond.— Peters *v.* Carr, 2 Dem. Surr. (N. Y.) 22.

Filing order of extension.— See Webb *v.* Osborne, 15 Daly (N. Y.) 406, 7 N. Y. Suppl. 762.

If the appointment is made in a county other than that of the debtor's residence, his property vests only from the time of filing a certified copy of the order of receivership in the county of such residence. Pancoast *v.* Spowers, 105 N. Y. 617, 11 N. E. 141 [*affirming* 52 N. Y. Super. Ct. 23]; Nicoll *v.* Spowers, 105 N. Y. 1, 11 N. E. 138 [*affirming* 52 N. Y. Super. Ct. 559].

94. Ward *v.* Petrie, 157 N. Y. 301, 51 N. E. 1002, 68 Am. St. Rep. 790; McCorkle *v.* Herrman, 117 N. Y. 297, 22 N. E. 948; Van Alstyne *v.* Cook, 25 N. Y. 489; Clark *v.* Brockway, 1 Abb. Dec. (N. Y.) 351, 3 Keyes (N. Y.) 13; Wing *v.* Disse, 15 Hun (N. Y.) 190; Clan Ranald *v.* Wyckoff, 41 N. Y. Super. Ct. 527, 52 How. Pr. (N. Y.) 511; McDonald *v.* Ballston Spa, 34 Misc. (N. Y.) 496, 70 N. Y. Suppl. 279; Clarke *v.* Goodridge, 44 How. Pr. (N. Y.) 226; People *v.* Mead, 29 How. Pr. (N. Y.) 360. And see Fitzpatrick *v.* Moses, 34 N. Y. App. Div. 242, 54 N. Y. Suppl. 426; Zimmer *v.* Miller, 8 N. Y. App. Div. 556, 40 N. Y. Suppl. 886.

Assignment after proceedings.— See Coleman *v.* Roff, 45 N. J. L. 7.

Assignment of interest in decedent's estate. — See Matter of Sistare, 15 N. Y. Suppl. 709, 27 Abb. N. Cas. (N. Y.) 34, 2 Connoly Surr. (N. Y.) 544.

Priorities.— See Matter of Pennsylvania Glass Co., 27 Misc. 815, 57 N. Y. Suppl. 396 [*affirmed* in 28 Misc. 130, 58 N. Y. Suppl. 1067].

95. Fitzpatrick *v.* Moses, 34 N. Y. App. Div. 242, 54 N. Y. Suppl. 426; Zimmer *v.* Miller, 8 N. Y. App. Div. 556, 40 N. Y. Suppl. 886.

A bona fide purchaser from the debtor of past-due negotiable notes is within the exception. *In re* Clover, 154 N. Y. 443, 48 N. E. 892 [*affirming* 8 N. Y. App. Div. 556, 40 N. Y. Suppl. 886].

Sum realized by senior execution.— A receiver has no right to the proceeds realized on an execution issued prior to that on which the proceedings in which he was appointed were based. Sickles *v.* Sullivan, 19 N. Y. Suppl. 749.

The proceeds of property realized on an execution issued by a junior creditor on a judgment obtained after the institution of supplementary proceedings in which a receiver was appointed are within the exception relative to the "payment of a debt in good faith without notice." Droege *v.* Baxter, 69 N. Y. App. Div. 58, 74 N. Y. Suppl. 585 [*reversing* 36 Misc. 124, 72 N. Y. Suppl. 1045].

An assignee of a contract to secure an indebtedness to him who has borne all the expense of performing it is entitled to a payment due thereon as against the receiver. *In re* Hone, 153 N. Y. 522, 47 N. E. 798.

Property permitted by the assignee to remain under the assignor's control may be

the debtor after its acquisition.[96] Nor is the receiver's title affected by an order made in a proceeding to which he is not a party.[97]

b. Real Property and Interests Therein.[98] The receiver is entitled to the real estate of the debtor or his interest therein.[99] The receiver's title to realty is a qualified one in the nature of a security for the creditor.[1] In the absence of legislation, no title to realty vests in the receiver except by a conveyance from the debtor executed by direction of the court.[2] But where so provided, the receiver becomes vested with such title on qualifying by furnishing the required security, filing the order of appointment or a certified copy thereof with the officer designated by statute with the same effect as if the debtor had conveyed to him.[3]

taken possession of by the receiver, no claim being made by the former. Eastern Nat. Bank *v.* Hulshizer, 2 N. Y. St. 115.

96. Reynolds *v.* Ætna L. Ins. Co., 160 N. Y. 635, 55 N. E. 305 [*affirming* 28 N. Y. App. Div. 591, 51 N. Y. Suppl. 446].

If the debtor dies before the making or filing of the order of appointment his property or effects do not vest. Rankin *v.* Minor, 72 N. C. 424.

97. Rogers *v.* Corning, 44 Barb. (N. Y.) 229.

98. Property which may be reached see *supra*, XIII, F.

Property which may be required to be delivered by the debtor see *supra*, XIII, S, 2.

99. Manning *v.* Evans, 19 Hun (N. Y.) 500; Sayles *v.* Naylor, 5 N. Y. St. 816; Hyatt *v.* Dusenbury, 12 N. Y. Civ. Proc. 152. *Contra*, Boid *v.* Dean, 48 N. J. Eq. 193, 21 Atl. 618. *Compare* Chadeayne *v.* Gwyer, 83 N. Y. App. Div. 403, 82 N. Y. Suppl. 198.

The receiver is entitled to: An estate by the curtesy (Beamish *v.* Hoyt, 2 Rob. (N. Y.) 307), or an unmeasured dower right (Payne *v.* Becker, 87 N. Y. 153 [*reversing* 22 Hun 28]; Sayles *v.* Naylor, 5 N. Y. St. 816); and rents of real estate (Vermont Marble Co. *v.* Wilkes, 30 N. Y. Suppl. 381) due at the time of the receiver's appointment and those which thereafter accrue (Beamish *v.* Hoyt, 2 Rob. (N. Y.) 307).

Right of possession.— The debtor will not be required to surrender a mere possession on suffrance. Gardner *v.* Smith, 29 Barb. (N. Y.) 68.

Subject to the result of a pending action in which the *lis pendens* was filed prior to the recovery of judgment, the receiver takes title to real estate. Spencer *v.* Berdell, 45 Hun (N. Y.) 179.

1. The debtor retains the title, and the receiver takes only a right of possession during the statutory period during which the debtor is permitted to retain possession after sale on execution and prior to the execution of the sheriff's deed, and does not acquire any title which he can sell or convey. Faneuil Hall Nat. Bank *v.* Bussing, 147 N. Y. 665, 42 N. E. 345; Chadeayne *v.* Gwyer, 83 N. Y. App. Div. 453, 82 N. Y. Suppl. 198; Moore *v.* Duffy, 74 Hun (N. Y.) 78, 26 N. Y. Suppl. 340.

After setting aside conveyance.—A receiver has no right to realty or its rents, a conveyance of which he has set aside, but his rights are limited to a sale of the property. Whyte *v.* Denike, 53 N. Y. App. Div. 425, 65 N. Y. Suppl. 1081.

2. Boid *v.* Dean, 48 N. J. Eq. 193, 21 Atl. 618. See Miller *v.* Mackenzie, 29 N. J. Eq. 291; Higgins *v.* Gillesheiner, 26 N. J. Eq. 308; Chautauque County Bank *v.* Risley, 19 N. Y. 369, 75 Am. Dec. 347; Scott *v.* Elmore, 10 Hun (N. Y.) 68; Moak *v.* Coats, 33 Barb. (N. Y.) 498; Hayes *v.* Buckley, 53 How. Pr. (N. Y.) 173; People *v.* Hulburt, 5 How Pr. (N. Y.) 446, 9 N. Y. Leg. Obs. 245, Code Rep. N. S. (N. Y.) 75. See Wing *v.* Disse, 15 Hun (N. Y.) 190; Scouton *v.* Bender, 3 How. Pr. (N. Y.) 185.

Equity in mortgaged property.— Graham *v.* Lawyers' Title Ins. Co., 20 N. Y. App. Div. 440, 46 N. Y. Suppl. 1055, 4 N. Y. Annot. Cas. 379.

Property transferred before conveyance.— A purchaser of land in good faith, without notice from the debtor, after proceedings supplementary to execution, but before any conveyance to the trustee has been made and recorded, has a title good against the trustee and the creditors. Moak *v.* Coats, 33 Barb. (N. Y.) 498.

Title to property without the state is not acquired by the appointment. Smith *v.* Tozer, 42 Hun (N. Y.) 322, 3 N. Y. St. 363, 11 N. Y. Civ. Proc. 343, 25 N. Y. Wkly. Dig. 252 [*affirming* 3 N. Y. St. 164]. Necessity of a conveyance of real property without the state see *supra*, XIII, S, 2, a.

3. Chautauque County Bank *v.* Risley, 19 N. Y. 369, 75 Am. Dec. 347 [*following* Hayes *v.* Buckley, 53 How. Pr. (N. Y.) 173, and *overruling* Scott *v.* Elmore, 10 Hun (N. Y.) 68]; Moyer *v.* Moyer, 7 N. Y. App. Div. 523, 40 N. Y. Suppl. 258; Smith *v.* Tozer, 42 Hun (N. Y.) 22, 3 N. Y. St. 363, 11 N. Y. Civ. Proc. 363, 25 N. Y. Wkly. Dig. 252; Fredericks *v.* Niver, 28 Hun (N. Y.) 417; Manning *v.* Evans, 19 Hun (N. Y.) 500; Wing *v.* Disse, 15 Hun (N. Y.) 190; Moak *v.* Coats, 33 Barb. (N. Y.) 498; Kimball *v.* Burrell, 14 N. Y. St. 536; Sayles *v.* Naylor, 5 N. Y. St. 816 [*overruling* Scott *v.* Elmore, 10 Hun (N. Y.) 68]; Hyatt *v.* Dusenbury, 12 N. Y. Civ. Proc. 152; Matter of Wilds, 6 Abb. N. Cas. (N. Y.) 307; Hayes *v.* Buckley, 53 How. Pr. (N. Y.) 173; Pfluger *v.* Cornell, 2 N. Y. City Ct. 145; Tinkey *v.* Langdon, 12 N. Y. Wkly. Dig. 384. See Porter *v.* Williams, 9 N. Y. 142, 59 Am. Dec. 519.

Necessity and sufficiency of filing.— The or-

c. Disputed Indebtedness or Ownership.[4] A receiver has no absolute right to money or property the ownership of which is in dispute.[5]

d. Property Transferred or Mortgaged. A transfer made after the institution of the proceedings[6] or after the receiver's appointment will not affect or divest him of title.[7] The receiver does not become vested with the title to property assigned or transferred prior to the institution of the proceedings or under some statutes to his appointment, but must resort to an action to test the validity of the transfer.[8] The receiver acquires no better or other title than the debtor had.[9]

der should be filed in the office of the clerk of the county where the real estate is situated. Wright *v.* Nostrand, 47 N. Y. Super. Ct. 441. An order appointing a receiver in the county where the proceedings were had should be filed in the county where judgment was recovered and a certified copy thereof filed in the county of the appointment. Staats *v.* Wemple, 2 How. Pr. N. S. (N. Y.) 161. Where the original order is filed in the county where the judgment-roll is filed, the debtor resides, and the real estate is situated, a certified copy need not be filed or recorded. Fredericks *v.* Niver, 28 Hun (N. Y.) 417.

The order need not be recorded in the register's office in addition to filing it. Wright *v.* Nostrand, 47 N. Y. Super. Ct. 441.

Necessity of judgment lien.— A receiver acquires no title to real estate situated in another county by filing the order appointing him or a certified copy thereof in such county as provided by statute, unless the judgment creditor has obtained a lien thereon by docketing the judgment in such county and has exhausted his legal remedy by execution against the property. Faneuil Hall Nat. Bank *v.* Bussing, 147 N. Y. 665, 42 N. E. 345; Importers', etc., Nat. Bank *v.* Quackenbush, 143 N. Y. 567, 38 N. E. 728. Hence a conveyance by debtor of real estate situated in a county other than that in which a receiver has been appointed, after the order of appointment has been filed in such county, will vest a good title in the grantee as against the receiver, unless the judgment has been docketed in that county. Faneuil Hall Nat. Bank *v.* Bussing, 147 N. Y. 665, 42 N. E. 345.

The title passes when an order extending the receivership is filed, although the original was not filed. Webb *v.* Osborne, 15 Daly (N. Y.) 406, 7 N. Y. Suppl. 762.

4. Action to determine disputed ownership see *infra*, XIII, T, 14, b.

5. An order appointing a receiver to take charge of and sell property claimed by a third person is of no effect as against such person. Osborne *v.* Reardon, 79 Iowa 175, 44 N. W. 346.

Restoration of property claimed.—See Dickerson *v.* Van Tine, 1 Sandf. (N. Y.) 724.

6. Fessenden *v.* Woods, 3 Bosw. (N. Y.) 550, an execution sale made subsequent to the judgment.

7. Fitzpatrick *v.* Moses, 34 N. Y. App. Div. 242, 54 N. Y. Suppl. 426.

A receiver has a superior right to policies of insurance on the life of a debtor who has fraudulently assigned the same to a receiver of a corporation subsequently appointed. Reynolds *v.* Ætna L. Ins. Co., 160 N. Y. 635, 55 N. E. 305 [*affirming* 28 N. Y. App. Div. 591, 51 N. Y. Suppl. 446], further holding that the receiver acquired all the rights of the debtor including the legal title to the policies and not merely their surrender value.

Transfer to one entitled.— See Levy *v.* Cavanagh, 2 Bosw. (N. Y.) 100.

8. Bean *v.* Heron, 65 Minn. 64, 67 N. W. 805; Flint *v.* Webb, 25 Minn. 263; Stephens *v.* Meriden Britannia Co., 160 N. Y. 178, 54 N. E. 781, 73 Am. St. Rep. 678 [*reversing* 13 N. Y. App. Div. 268, 43 N. Y. Suppl. 226]; Kennedy *v.* Thorp, 51 N. Y. 174 [*reversing* 2 Daly 258, 3 Abb. Pr. N. S. 131]; Seymour *v.* Wilson, 14 N. Y. 567, 15 How. Pr. (N. Y.) 355 [*reversing* 16 Barb. 194]; Stiefel *v.* Berlin, 28 N. Y. App. Div. 103, 54 N. Y. Suppl. 147, 27 N. Y. Civ. Proc. 216; Alden *v.* Clark, 86 Hun (N. Y.) 357, 33 N. Y. Suppl. 454; Metcalf *v.* Del Valle, 64 Hun (N. Y.) 245, 19 N. Y. Suppl. 16 [*affirmed* in 137 N. Y. 545, 33 N. E. 336]; Hayner *v.* Fowler, 16 Barb. (N. Y.) 300; Davis *v.* Briggs, 1 Silv. Supreme (N. Y.) 326, 5 N. Y. Suppl. 523; Field *v.* Sands, 8 Bosw. (N. Y.) 685; Hedges *v.* Polhemus, 9 Misc. (N. Y.) 680, 30 N. Y. Suppl. 556; Robinson *v.* Wood, 15 N. Y. Suppl. 169; Hoyt *v.* Mann, 7 N. Y. St. 420; Brown *v.* Gilmore, 16 How. Pr. (N. Y.) 527; McCrea *v.* Cook, 1 N. Y. City Ct. 385; Olney *v.* Tanner, 10 Fed. 101 [*affirmed* in 18 Fed. 636, 21 Blatchf. 540]. See, generally, FRAUDULENT CONVEYANCES.

As against creditors seeking the same relief, a receiver has no exclusive or prior right to sue to set aside a transfer by the creditor as fraudulent. Metcalf *v.* Del Valle, 64 Hun (N. Y.) 245, 19 N. Y. Suppl. 16 [*affirmed* in 137 N. Y. 545, 33 N. E. 336].

He has only the right to redeem personal property mortgaged before his appointment and purchased on foreclosure by a mortgagee and in the possession of the latter. Pettibone *v.* Drakeford, 37 Hun (N. Y.) 628; Campbell *v.* Fish, 8 Daly (N. Y.) 162.

9. See Bostwick *v.* Menck, 40 N. Y. 383.

He takes the property subject to all burdens imposed by the debtor (Corey *v.* Harte, 21 N. Y. Wkly. Dig. 247), and subject to *bona fide* claims, liens, and encumbrances thereon (Lynch *v.* Johnson, 48 N. Y. 27 [*affirming* 46 Barb. 56]; Leggett *v.* Waller, 39 Misc. (N. Y.) 408, 80 N. Y. Suppl. 13).

Title to personal property pledged by the debtor will pass to the receiver. Armstrong *v.* McLean, 153 N. Y. 490, 47 N. E. 912.

It has been held that a chattel mortgage executed before but not filed until after the order for examination is void as against the receiver;[10] but the weight of authority is to the effect that in such a case the mortgage being good as between the debtor and the mortgagee is good as to the receiver.[11]

e. Funds or Property Held in Trust.[12] Although ordinarily trust funds or property held in trust cannot be reached in these proceedings,[13] a receiver is entitled to such property or funds where the trust was created by the debtor for his own benefit,[14] and under some circumstances the receiver may reach the income of such a fund.[15]

f. After-Acquired Property.[16] A receiver takes no title to property acquired by the debtor after the institution of the proceedings or as has been held in some cases after his appointment.[17]

14. Actions[18] **— a. Right to Institute.** The receiver cannot institute an action, where the right of action accrued solely to the judgment debtor,[19] but only where the title to the property or money sought to be reached has vested in him, or he has acquired a right or title to it by reason of his appointment,[20] and the creditor

Title to personal property transferred in fraud of creditors vests in a receiver on filing the order of appointment as provided by statute. Holton *v.* Robinson, 59 N. Y. App. Div. 45, 69 N. Y. Suppl. 133. Where the transfer is fraudulent as to creditors, but valid as to the debtor, the receiver is not limited by the interest of the creditor, but succeeds to the debtor's rights. Fox *v.* Hodge, 17 N. Y. Wkly. Dig. 412.

10. Clark *v.* Gilbert, 10 Daly (N. Y.) 316, 14 N. Y. Wkly. Dig. 241. See Chattel Mortgages, 6 Cyc. 1062 *et seq.*

11. Stephens *v.* Meriden Britannia Co., 160 N. Y. 178, 54 N. E. 781, 73 Am. St. Rep. 678; Gardner *v.* Smith, 29 Barb. (N. Y.) 68; Stewart *v.* Cole, 4 N. Y. St. 428.

A purchaser on foreclosure of such a mortgage, who pays value therefor without knowledge of the appointment of the receiver, takes a good title. Merry *v.* Wilcox, 92 Hun (N. Y.) 210, 36 N. Y. Suppl. 1050.

If mortgaged chattels have been reduced to possession by the mortgagee before institution of the proceedings, the receiver takes an equitable right of redemption. Campbell *v.* Fish, 8 Daly (N. Y.) 162.

12. **Property which may be reached** see *supra*, XIII, F.

Property which may be required to be delivered by the debtor see *supra*, XIII, S, 2.

13. See *supra*, XIII, F; XIII, S, 2.

In New Jersey the receiver is entitled to such property. See Journeay *v.* Brown, 26 N. J. L. 111.

Fund apportioned to legatee.— See O'Connor *v.* Mechanics' Bank, 54 Hun (N. Y.) 272, 7 N. Y. Suppl. 380 [*reversing* 2 N. Y. Suppl. 225].

14. Davis *v.* Briggs, 1 Silv. Supreme (N. Y.) 326, 5 N. Y. Suppl. 323.

15. Surplus income of a trust fund which has accumulated in the trustees' hands passes to the receiver. McEwen *v.* Brewster, 19 Hun (N. Y.) 337 [*overruling* 17 Hun 223]. Interest in a trust fund created for the support of the debtor does not vest in his receiver unless there has been an appropriate adjudication, or it is conceded that a portion thereof accrued is unnecessary for the purpose for which the trust was created. Genet *v.* Foster, 18 How. Pr. (N. Y.) 50.

Income in the hands of an agent.— See Campbell *v.* Genet, 2 Hilt. (N. Y.) 290.

Receiver takes no title to the income of the trust fund, present or future. Continental Trust Co. *v.* Witmore, 67 Hun (N. Y.) 9, 21 N. Y. Suppl. 746.

16. **Property which may be reached** see *supra*, XIII, F.

Property which may be required to be delivered by the debtor see *supra*, XIII, S, 2.

17. Guild *v.* Meyer, 56 N. J. Eq. 183, 38 Atl. 959; Dubois *v.* Cassidy, 75 N. Y. 298; Campbell *v.* Genet, 2 Hilt. (N. Y.) 290; Columbian Inst. *v.* Cregan, 3 N. Y. St. 287, 11 N. Y. Civ. Proc. 87; Sands *v.* Roberts, 8 Abb. Pr. (N. Y.) 343; Graff *v.* Bonnett, 25 How. Pr. (N. Y.) 470; Campbell *v.* Foster, 16 How. Pr. (N. Y.) 275; Thorn *v.* Fellows, 5 N. Y. Wkly. Dig. 473. See also Bostwick *v.* Menck, 40 N. Y. 383.

Money to become due.— See Willison *v.* Salmon, 45 N. J. Eq. 257, 17 Atl. 815.

Property rights under a will probated prior to the appointment of a receiver pass to him. Crane *v.* Beecher, 6 N. Y. Suppl. 225.

Descent cast.— Dubois *v.* Cassidy, 75 N. Y. 298.

18. **Action by receiver** generally see Receivers.

19. See, generally, Actions; Receivers.

Action on insurance policy.— A receiver is not a creditor within a statute authorizing creditors to recover on policies of insurance where premiums have been paid out of the debtor's property in excess of the prescribed amount. Masten *v.* Amerman, 51 Hun (N. Y.) 244, 4 N. Y. Suppl. 681 [*reversing* 20 Abb. N. Cas. 443].

20. Gardner *v.* Smith, 29 Barb. (N. Y.) 68.

The receiver may maintain: An action for an accounting as to funds and securities and for their payment and delivery to the receiver. Armstrong *v.* McLean, 153 N. Y. 490, 47 N. E. 912 [*reversing* 92 Hun 397, 36 N. Y. Suppl. 764]. An action for the benefit of the creditor to enforce an equitable lien

might have brought a similar suit.[21] The receiver cannot maintain replevin to recover personal property mortgaged prior to his appointment, and reduced to possession by the mortgagee through foreclosure,[22] nor an action for the conversion of property sold before judgment under a void chattel mortgage.[23] He may, however, maintain such an action against a debtor who has converted property which has vested in him by reason of his appointment.[24] Nor can he maintain an action where the relief can be maintained in the proceedings.[25]

b. Disputed Indebtedness or Ownership.[26] Where the alleged indebtedness of a third person to the debtor is denied, or the ownership of property is disputed, the proper remedy is an action by the receiver to determine the fact of ownership.[27]

c. Property Transferred.[28] A receiver may prosecute an action to annul or set aside a transfer fraudulently made, with the like effect as if the action were instituted by the creditor.[29] His rights in this respect are not confined to the

to which the debtor is entitled. Walsh *v.* Rosso, (N. J. Ch. 1898) 41 Atl. 669. An action for the surplus realized on an execution sale of the debtor's property which remains in the hands of the purchaser. Davenport *v.* McChesney, 86 N. Y. 242. An action to admeasure the dower of the debtor. Payne *v.* Becker, 87 N. Y. 153. An equitable action to recover usurious sums paid by the debtor. Palen *v.* Bushnell, 18 Abb. Pr. (N. Y.) 301 [*reversed* in 46 Barb. 24].

The receiver cannot maintain: An action against the wife of the debtor to recover for the services of her husband rendered in carrying on her separate business where there was no express agreement to pay therefor. Lynn *v.* Smith, 35 Hun (N. Y.) 275. An action to collect attached debts. Andrews *v.* Glenville Woolen Co., 11 Abb. Pr. N. S. (N. Y.) 78.

Action to construe will.— The receiver of a legatee cannot have his claim determined in an action to construe the will under which he is a beneficiary, but only by a direct proceeding. Smith *v.* Edwards, 23 Hun (N. Y.) 223.

New action on extension of receivership.— It seems that where, pending an action by a receiver, he is appointed at the instance and on behalf of other creditors, he may commence a new action in their interest. Bostwick *v.* Menck, 40 N. Y. 383.

21. Stephens *v.* Meriden Britannia Co., 160 N. Y. 178, 54 N. E. 781, 73 Am. St. Rep. 678 [*reversing* 13 N. Y. App. Div. 268, 43 N. Y. Suppl. 226]; Mandeville *v.* Avery, 124 N. Y. 376, 29 N. E. 951, 21 Am. St. Rep. 678 [*reversing* 57 Hun 78, 10 N. Y. Suppl. 323]; Stiefel *v.* Berlin, 28 N. Y. App. Div. 103, 51 N. Y. Suppl. 147.

Preclusion of creditor's right.—The receiver cannot maintain an action where the creditor has precluded himself by resorting to another remedy. Kennedy *v.* Thorp, 51 N. Y. 174 [*reversing* 2 Daly 258, 3 Abb. Pr. N. S. 131].

Waiver of fraud.— Kennedy *v.* Thorp, 51 N. Y. 174 [*reversing* 2 Daly 258, 3 Abb. Pr. N. S. 131].

22. Pettibone *v.* Drakeford, 37 Hun (N. Y.) 628; Campbell *v.* Fish, 8 Daly (N. Y.) 162.

23. Stephens *v.* Meriden Britannia Co., 160 N. Y. 178, 54 N. E. 781, 73 Am. St. Rep. 678.

24. Gardner *v.* Smith, 29 Barb. (N. Y.) 68

25. Richards *v.* Allen, 3 E. D. Smith (N. Y.) 399, where the remedy was by motion to pay over.

Adjudication of ownership.— See Wilson *v.* Chichester, 107 N. C. 386, 12 S. E. 139, 10 L. R. A. 572.

26. Property which may be reached see *supra*, XIII, F.

Property which may be required to be delivered by the debtor see *supra*, XIII, S, 2.

Title of receiver to property in dispute see *supra*, XIII, T, 13, c.

27. Knight *v.* Nash, 22 Minn. 452; Colton *v.* Bigelow, 41 N. J. L. 266; Locke *v.* Mabbett, 3 Abb. Dec. (N. Y.) 68, 2 Keyes (N. Y.) 457; Syracuse State Bank *v.* Gill, 23 Hun (N. Y.) 410; Teller *v.* Randall, 40 Barb. (N. Y.) 242, 26 How. Pr. (N. Y.) 145; Edmonston *v.* McLoud, 19 Barb. (N. Y.) 356 [*affirmed* in 16 N. Y. 543]; Todd *v.* Crooke, 4 Sandf. (N. Y.) 694, Code Rep. N. S. (N. Y.) 324; Matter of Becker, 36 Misc. (N. Y.) 322, 73 N. Y. Suppl. 577; Brein *v.* Light, 36 Misc. (N. Y.) 110, 72 N. Y. Suppl. 655 [*affirmed* in 37 Misc. 771, 76 N. Y. Suppl. 935]; Matter of Castle, 2 N. Y. St. 362; Grassmuck *v.* Richards, 2 Abb. N. Cas. (N. Y.) 359; Ormes *v.* Baker, 17 N. Y. Wkly. Dig. 104; White *v.* Gates, 42 Ohio St. 109; Brown *v.* Edmonds, 5 S. D. 508, 59 N. W. 731; Thompson, etc., Mfg. Co. *v.* Guenthner, 5 S. D. 504, 59 N. W. 727.

Possession of agent.—See Rodman *v.* Henry, 17 N. Y. 482.

28. Property which may be reached see *supra*, XIII, F.

Property which may be required to be delivered by the debtor see *supra*, XIII, S, 2.

Title of receiver to property of the debtor fraudulently transferred see *supra*, XIII, T, 13, d.

29. Bergen *v.* Littell, 41 N. J. Eq. 18, 2 Atl. 614; Miller *v.* Mackenzie, 29 N. J. Eq. 291; Stephens *v.* Meriden Britannia Co., 160 N. Y. 178, 54 N. E. 781, 73 Am. St. Rep. 678; Mandeville *v.* Avery, 124 N. Y. 376, 29 N. E. 951, 21 Am. St. Rep. 678 [*reversing* 57 Hun 78, 10 N. Y. Suppl. 323]; Hayner *v.* James, 17 N. Y. 316; Edmonston *v.* McLoud, 16 N. Y. 543 [*affirming* 19 Barb. 356]; Porter *v.* Williams, 9 N. Y. 142, 12 How. Pr. (N. Y.) 107, 59 Am. Dec. 519 [*affirming* 5 How. Pr. 441, 9 N. Y. Leg. Obs. 307, Code

property transferred, but he can follow the proceeds into the possession of any person who is not a *bona fide* holder or owner thereof.[30] So it has been held that he may recover the proceeds of chattels mortgaged with no change of possession where the mortgage is not filed as required by law[31] or is fraudulent.[32] The death of the judgment creditor will not preclude the receiver from prosecuting such an action, where the deceased has left heirs or next of kin entitled to the moneys collected,[33] but he will be precluded by electing to take a personal judgment against the transferee.[34]

d. Right to Partition.[35] A receiver does not obtain such a title to or interest in the debtor's real estate as will entitle him to bring an action of partition.[36]

e. Right to Reach Trust Property.[37] A receiver has no actionable interest in

Rep. N. S. 144]; Stiefel *v.* Berlin, 28 N. Y. App. Div. 103, 51 N. Y. Suppl. 147; Pettibone *v.* Drakeford, 37 Hun (N. Y.) 628; Bennett *v.* McGuire, 5 Lans. (N. Y.) 183, 58 Barb. (N. Y.) 635; Dollard *v.* Taylor, 33 N. Y. Super. Ct. 496; Brein *v.* Light, 36 Misc. (N. Y.) 110, 72 N. Y. Suppl. 655 [*affirmed* in 37 Misc. 771, 76 N. Y. Suppl. 935]; Herman *v.* Goodson, 18 Misc. (N. Y.) 604, 42 N. Y. Suppl. 696; Hedges *v.* Polhemus, 9 Misc. (N. Y.) 680, 30 N. Y. Suppl. 556; Ward *v.* Petrie, 36 N. Y. Suppl. 940; Hyatt *v.* Dusenbury, 12 N. Y. Civ. Proc. 152; Gere *v.* Dibble, 17 How. Pr. (N. Y.) 31; Brown *v.* Gilmore, 16 How. Pr. (N. Y.) 527; Seymour *v.* Wilson, 15 How. Pr. (N. Y.) 355; Pender *v.* Mallett, 123 N. C. 57, 31 S. E. 351; Hamlin *v.* Wright, 23 Wis. 491. See Charlier *v.* Saginaw Steel Steamship Co., 40 N. Y. Suppl. 278.

N. Y. Laws (1858), c. 314, as amended by Laws (1894), c. 740, conferring on certain receivers the power to disaffirm, treat as void, and resist acts done in fraud of creditors, does not apply to receivers in supplementary proceedings. Stephens *v.* Meriden Britannia Co., 160 N. Y. 178, 54 N. E. 781, 73 Am. St. Rep. 678 [*reversing* 13 N. Y. App. Div. 268, 43 N. Y. Suppl. 226]; Ward *v.* Petrie, 157 N. Y. 301, 51 N. E. 1002, 68 Am. St. Rep. 790 [*reversing* 36 N. Y. Suppl. 940]; Pettibone *v.* Drakeford, 37 Hun (N. Y.) 638.

N. Y. Code Civ. Proc. § 2464, does not invest the receiver with a right of action against the judgment debtor and his fraudulent transferee of chattels for conspiring thus to defeat the judgment creditor, where the transfer of the chattels was complete before the judgment was entered, for that right of action accrues, if at all, to the judgment creditor, and not the judgment debtor. Ward *v.* Petrie, 157 N. Y. 301, 51 N. E. 1002, 68 Am. St. Rep. 790 [*reversing* 36 N. Y. Suppl. 940].

Frauds on third persons.— A receiver cannot set aside an assignment by the debtor because of frauds perpetrated by the latter on third persons. Kennedy *v.* Thorp, 51 N. Y. 174 [*reversing* 3 Abb. Pr. N. S. 131].

That an execution was not properly issued in an action to proceedings in which the receivership has been extended will not affect his right to set aside a preferential transfer. Stiefel *v.* Berlin, 20 Misc. (N. Y.) 194, 45 N. Y. Suppl. 746.

The receiver cannot collaterally attack an assignment expressly authorized by statute. Herman *v.* Goodson, 18 Misc. (N. Y.) 604, 42 N. Y. Suppl. 696.

Valid assignment.— See Seymour *v.* Wilson, 16 Barb. (N. Y.) 294. To the same effect see Hayner *v.* Fowler, 16 Barb. (N. Y.) 300 [*overruled* in Porter *v.* Williams, 9 N. Y. 142, 59 Am. Dec. 519].

30. Mandeville *v.* Avery, 124 N. Y. 376, 29 N. E. 951, 21 Am. St. Rep. 678 [*reversing* 57 Hun 78, 10 N. Y. Suppl. 323]; Pender *v.* Mallett, 123 N. C. 57, 31 S. E. 351.

Surplus on mortgage sale.— A receiver may maintain an action against a mortgagee of a chattel to recover surplus realized on its sale. Davenport *v.* McChesney, 86 N. Y. 242.

31. Stephens *v.* Perrine, 143 N. Y. 476, 39 N. E. 11 [*reversing* 69 Hun 578, 24 N. Y. Suppl. 21]; Steward *v.* Cole, 43 Hun (N. Y.) 164, 4 N. Y. St. 428, 25 N. Y. Wkly. Dig. 489; Havens *v.* Exstein, 9 N. Y. Suppl. 605 [*affirming* 5 N. Y. Suppl. 735]. See also Brunnemer *v.* Cook, etc., Co., 89 N. Y. App. Div. 406, 85 N. Y. Suppl. 954.

Mortgage subsequent to service of order of examination.— See Clark *v.* Gilbert, 10 Daly (N. Y.) 316.

32. Mandeville *v.* Avery, 124 N. Y. 376, 26 N. E. 951, 21 Am. St. Rep. 678 [*reversing* 57 Hun 78, 10 N. Y. Suppl. 323]. See also Hedges *v.* Polhemus, 9 Misc. (N. Y.) 680, 30 N. Y. Suppl. 566.

33. Palen *v.* Bushnell, 13 N. Y. Suppl. 785, 18 N. Y. Civ. Proc. 56.

34. Fitts *v.* Beardsley, 8 N. Y. Suppl. 567.

35. **Partition** generally see PARTITION.

36. Payne *v.* Becker, 87 N. Y. 153 [*reversing* 22 Hun 28]; Dubois *v.* Cassidy, 75 N. Y. 298; Miller *v.* Levy, 46 N. Y. Super. Ct. 207. *Contra*, Powelson *v.* Reeve, 2 N. Y. Wkly. Dig. 375.

A grantee of a receiver to whom no conveyance was made by the debtor, nor directed by the court and who had no authority from the court to sell, has no standing to partition realty in which the debtor had an interest. Scott *v.* Elmore, 10 Hun (N. Y.) 68.

37. **Receiver's right to trust fund** see *supra*, XIII, S, 13, c.

Right to direct the payment or delivery of trust funds or property see *supra*, XIII, S, 2.

Right to reach trust property in these proceedings see *supra*, XIII, F, 3, c.

property or moneys held in trust for the judgment debtor, where the trust was not created by himself, but the creditor himself must proceed by an action in equity,[38] nor can he maintain an action to reach so much of the income of a trust fund as may remain after satisfying the provisions of the trust.[39]

f. Jurisdiction of Actions. In instituting an action the receiver is not confined to the court of his appointment, but may select any tribunal of competent jurisdiction.[40]

g. Necessity of Authority From Creditor.[41] To authorize an action to set aside a conveyance as a cloud on title so as to subject the property to the execution it is necessary that authority should be first obtained from the creditor.[42]

h. Necessity of Leave of Court. While it is the better practice for the receiver to procure the leave of the court to institute an action, and the procurement of such leave is ordinarily necessary,[43] there are decisions to the effect that the receiver has general power to institute actions, and that no leave to do so is necessary.[44]

i. In Whose Name Brought.[45] When so authorized by statute,[46] or by the order appointing him, the receiver may sue in his own name as such.[47]

j. Parties.[48] All persons whose presence is necessary to a determination of the matter in controversy or questions involved are necessary parties to the action.[49] Thus the judgment debtor is a necessary party to an action to set aside

38. Williams *v.* Thorn, 70 N. Y. 270; Masten *v.* Amerman, 51 Hun (N. Y.) 244, 4 N. Y. Suppl. 681; Levey *v.* Bull, 47 Hun (N. Y.) 350, 14 N. Y. St. 596; McEwen *v.* Brewster, 17 Hun (N. Y.) 223; *In re* Beecher, 19 N. Y. Suppl. 971.

Interest in life-insurance policy.— See Masten *v.* Amerman, 51 Hun (N. Y.) 244, 4 N. Y. Suppl. 681.

The receiver has no power to bring an action to enforce a statutory trust created in favor of creditors by the payment by the creditor of the purchase-money of land, title to which is taken in the name of another. Underwood *v.* Sutcliffe, 77 N. Y. 58 [*affirming* 21 Hun 357, and *reversing* 10 Hun 453].

Trusts to convert and distribute.— The rule which precludes a receiver from resorting to a trust fund applies only to a trust to receive the rents and profits and apply them to the use of a beneficiary not to a trust to convert and distribute. *In re* Beecher, 19 N. Y. Suppl. 971.

In New Jersey see Walsh *v.* Rosso, (Ch. 1899) 44 Atl. 708.

39. Campbell *v.* Foster, 35 N. Y. 361; Levey *v.* Bull, 47 Hun (N. Y.) 350; McEwen *v.* Brewster, 17 Hun (N. Y.) 223.

40. Rockwell *v.* Merwin, 45 N. Y. 166 [*affirming* 1 Sweeny 484, 8 Abb. Pr. N. S. 330].

Equity has jurisdiction of an action brought by a receiver to ascertain priorities, where there are conflicting claims to the fund in his hands. Bamberger *v.* Fillebrown, 12 Misc. (N. Y.) 328, 33 N. Y. Suppl. 614.

41. Wright *v.* Nostrand, 94 N. Y. 31 [*reversing* 47 N. Y. Super. Ct. 441].

42. An order made on the application of the creditor authorizing prosecution of an action to set aside a conveyance as a cloud on title is sufficient authority. Wright *v.* Nostrand, 94 N. Y. 31 [*reversing* 47 N. Y. Super. Ct. 441].

43. Leave to sue must be obtained from the court out of which the execution issued. Hyatt *v.* Dusenbury, 5 N. Y. St. 846, 12 N. Y. Civ. Proc. 152.

Authorization by appointment.— A receiver may be appointed as to money or property in controversy with authority to bring an action to determine the proper disposition to be made of it. Welch *v.* Pittsburgh, etc., R. Co., 2 Ohio Dec. (Reprint) 5, 1 West. L. Month. 87.

A judge of an inferior court who is vested with the same powers in supplementary proceedings as a judge of a court of record has authority to order a receiver appointed by him to institute an action to recover real property belonging to the judgment debtor within the state but without the jurisdiction of the court. Hyatt *v.* Dusenbury, 5 N. Y. St. 846, 12 N. Y. Civ. Proc. 152.

44. Rockwell *v.* Merwin, 45 N. Y. 166 [*affirming* 1 Sweeny 484, 3 Abb. Pr. N. S. 330]; Weill *v.* Wilmington First Nat. Bank, 106 N. C. 1, 11 S. E. 277; Wisconsin Trust Co. *v.* Jenkins, 110 Wis. 531, 86 N. W. 153.

45. Parties generally see PARTIES. See also *infra*, XIII, T, 14, j.

46. Hightower *v.* Thornton, 8 Ga. 486, 52 Am. Dec. 412; Manlove *v.* Burger, 38 Ind. 211; Bergen *v.* Littell, 41 N. J. Eq. 18, 2 Atl. 614; Miller *v.* Mackenzie, 29 N. J. Eq. 291; Seymour *v.* Wilson, 16 Barb. (N. Y.) 294.

Where the receiver permits the creditors to use his name, and they employ attorneys and conduct the case, the action will be deemed to have been "brought" by them. Gallation *v.* Smith, 48 How. Pr. (N. Y.) 477.

47. The receiver cannot sue in his own name on a note payable to the debtor unless the order appointing him confers such authority. Garver *v.* Kent, 70 Ind. 428.

48. Parties generally see PARTIES. See also *supra*, XIII, T, 14, i.

49. See cases cited *infra*, note 50 *et seq.*

as fraudulent an assignment[50] or conveyance made by him and to reach the property,[51] an action to set aside alleged fraudulent contracts[52] or to reach an equitable interest in a trust fund;[53] but he is not a necessary party to an action to recover usurious premiums paid by him,[54] or to recover moneys belonging to him in the hands of a third party.[55] Nor is it necessary to make a beneficial membership corporation a party to an action to compel the debtor to transfer his membership therein,[56] or to make all creditors parties in an action to set aside an alleged fraudulent transfer by the debtor.[57] So in an action against the debtor and one who has agreed to indemnify him against liability on the cause of action, the receiver who has possession of the contract of indemnity is a necessary party.[58]

k. Pleading[59] — (i) *Declaration or Complaint.* The declaration or complaint should appropriately allege the appointment of the receiver,[60] also all the jurisdictional facts necessary to a valid appointment.[61] Thus it should set out the judgment on which the proceedings are based,[62] its amount or the sum claimed,[63] the filing of the judgment-roll,[64] the issue of a valid execution to the proper officer and its return by him unsatisfied in whole or in part,[65] that a cause of action

Party in individual or representative capacity.—An answer setting up that the debtor is a proper party sufficiently presents the question whether he is a proper party either individually or in a representative capacity. Miller *v.* Hall, 70 N. Y. 250 [*affirming* 40 N. Y. Super. Ct. 262].

Plea in abatement for defect of parties must set out the names of those whom the defendant insists should be made parties. Stiefel *v.* Berlin, 28 N. Y. App. Div. 103, 51 N. Y. Suppl. 147.

50. Miller *v.* Hall, 70 N. Y. 250 [*affirming* 40 N. Y. Super. Ct. 262].

51. Shaver *v.* Brainard, 29 Barb. (N. Y.) 25.

52. Palen *v.* Bushnell, 18 Abb. Pr. (N. Y.) 301.

53. Vanderpoel *v.* Van Valkenburgh, 6 N. Y. 190.

54. Palen *v.* Bushnell, 18 Abb. Pr. (N. Y.) 301.

55. Wilson *v.* Chichester, 107 N. C. 386, 12 S. E. 139, 10 L. R. A. 572.

56. Londheim *v.* White, 67 How. Pr. (N. Y.) 467.

57. Stiefel *v.* Berlin, 20 Misc. (N. Y.) 194, 45 N. Y. Suppl. 746, transfer by insolvent limited partnership. See also Stiefel *v.* Berlin, 28 N. Y. App. Div. 103, 51 N. Y. Suppl. 147.

However in such an action all the transferees may be made parties, although they hold by separate conveyances as to which each is separately charged with fraud. Hamlin *v.* Wright, 23 Wis. 491.

58. Moore *v.* Los Angeles Iron, etc., Co., 89 Fed. 73.

59. **Pleading** generally see Pleading.

60. Toedt *v.* Mackel, 67 Minn. 24, 69 N. W. 475; Wright *v.* Nostrand, 98 N. Y. 669; Coope *v.* Bowles, 42 Barb. (N. Y.) 87, 18 Abb. Pr. (N. Y.) 442, 28 How. Pr. (N. Y.) 10.

An allegation of due appointment is sufficient. Rockwell *v.* Merwin, 45 N. Y. 166. But see Toedt *v.* Mackel, 67 Minn. 24, 69 N. W. 475, in which case the court held that a general allegation of appointment was insufficient.

An averment of the filing and recording of the order of appointment is unnecessary. Rockwell *v.* Merwin, 45 N. Y. 166; Scroggs *v.* Palmer, 66 Barb. (N. Y.) 505.

Form of sufficient allegation see Manley *v.* Rassiga, 13 Hun (N. Y.) 288.

Reappointment.— See Guild *v.* Meyer, 59 N. J. Eq. 390, 46 Atl. 202.

61. Wegman *v.* Childs, 44 Barb. (N. Y.) 403; Coope *v.* Bowles, 42 Barb. (N. Y.) 87, 18 Abb. Pr. (N. Y.) 442, 28 How. Pr. (N. Y.) 10. See Manley *v.* Rassiga, 13 Hun (N. Y.) 288.

62. Lever *v.* Bailey, 56 N. J. L. 54, 27 Atl. 799; Wegman *v.* Childs, 44 Barb. (N. Y.) 403; Coope *v.* Bowles, 42 Barb. (N. Y.) 87, 18 Abb. Pr. (N. Y.) 442, 28 How. Pr. (N. Y.) 10. But see Rockwell *v.* Merwin, 45 N. Y. 166.

63. Hughes *v.* McKenzie, 14 N. Y. Suppl. 352.

64. Dubois *v.* Cassidy, 75 N. Y. 298.

65. Lever *v.* Bailey, 56 N. J. L. 54, 27 Atl. 799; Wegman *v.* Childs, 44 Barb. (N. Y.) 403.

A complaint is not demurrable for the failure to allege issuance of the execution to the county of the debtor's residence. Campbell *v.* Foster, 35 N. Y. 361 [*affirming* 16 How. Pr. 275].

Where a judgment was recovered against three copartners, and execution issued in the county where one of them had a place of business and where the partnership was located, but it did not appear that execution was issued in the county where either of the defendants resided, it was held that a receiver appointed in proceedings supplementary to execution founded on such judgment could maintain an action to set aside a fraudulent conveyance, and that a *prima facie* case was made out — that the remedy at law had been exhausted. Hyatt *v.* Dusenbury, 12 N. Y. Civ. Proc. 152.

exists in his favor,[66] or in favor of those whom he represents,[67] or that defendants at the time of plaintiff's appointment had money or property in their hands belonging to the debtor,[68] and his right to prosecute the action in a representative capacity.[69] Where real estate is involved it should also appear that the order of appointment or a certified copy thereof was filed in the proper county with the officer designated by statute.[70]

(II) *ANSWER.* To defeat the action the answer must contain averments which if proved will be sufficient to absolve the defendant from liability.[71]

l. Trial[72] — (I) *EVIDENCE.*[73] An allegation of fraud in an assignment must be sustained by competent proof.[74] A debtor claiming that a fund standing in his name in fact belongs to another has the burden of proof.[75] On collateral attack the production and proof of an order of receivership containing a recital of jurisdictional facts is conclusive as to the regularity of the receiver's appointment.[76]

(II) *QUESTIONS OF LAW AND FACT.* The question of fraudulent intent is one of fact,[77] and an answer setting up that the judgment debtor is a proper party presents the question whether or not he is a party individually and in his representative capacity.[78]

(III) *MEASURE OF RECOVERY.*[79] On setting aside a transfer by the debtor the receiver is entitled to receive only so much of the property or its proceeds as may be necessary to satisfy the judgment on which the proceeding is based, or the claims represented by him, and to pay the expenses of the receivership, and the costs of the action.[80]

m. Injunction.[81] In a proper case a receiver may invoke the remedy of injunction, but he must show sufficient facts to entitle him to the relief.[82]

66. Dubois *v.* Cassidy, 75 N. Y. 298. But *compare* Wright *v.* Nostrand, 98 N. Y. 669 [*reversing* 51 N. Y. Super. Ct. 499].

67. Coope *v.* Bowles, 42 Barb. (N. Y.) 87, 18 Abb. Pr. (N. Y.) 442, 28 How. Pr. (N. Y.) 10.

68. Graff *v.* Bonnett, 2 Rob. (N. Y.) 54, 25 How. Pr. (N. Y.) 470 [*affirmed* in 31 N. Y. 9, 88 Am. Dec. 236].

To sustain an action against a third person alleged to be indebted to the judgment debtor, it must be shown that an indebtedness existed at the time of the service of the third party order, sufficient to authorize such party's examinations. O'Connor *v.* Mechanics' Bank, 124 N. Y. 324, 26 N. E. 816 [*reversing* 54 Hun 272, 7 N. Y. Suppl. 380 (*reversing* 2 N. Y. Suppl. 225, 21 Abb. N. Cas. 383)].

69. Coope *v.* Bowles, 42 Barb. (N. Y.) 87, 18 Abb. Pr. (N. Y.) 442, 28 How. Pr. (N. Y.) 10.

In New York by rule of court the receiver cannot institute an action without first filing the written request of the creditor to bring the same, or giving a bond for costs. Millis *v.* Pentelow, 92 Hun 284, 36 N. Y. Suppl. 906. See *supra*, XIII, T, 14, i.

70. Wright *v.* Nostrand, 94 N. Y. 31; Dubois *v.* Cassidy, 75 N. Y. 298.

Recovery of rents and profits.— See Wright *v.* Nostrand, 98 N. Y. 669.

71. See, generally, PLEADING.

Prior mechanics' liens.— See McCorkle *v.* Herman, 117 N. Y. 297, 22 N. E. 948 [*reversing* 5 N. Y. Suppl. 881].

Validity of execution and levy.— See Richards *v.* Allen, 3 E. D. Smith (N. Y.) 399.

72. Trial generally see TRIAL.

73. Evidence generally see EVIDENCE.

74. A verification of the complaint on information and belief is insufficient to establish a positive allegation in the complaint that an assignment was made to hinder, delay, and defraud creditors of the assignee. Bostwick *v.* Elton, 25 How. Pr. (N. Y.) 362. To recover property of the debtor in the hands of a third party proof of a demand of such party and a refusal are necessary. Livingston *v.* Stœssel, 3 Bosw. (N. Y.) 19.

75. Matter of Weld, 34 N. Y. App. Div. 471, 54 N. Y. Suppl. 253.

76. Stiefel *v.* Berlin, 20 Misc. (N. Y.) 194, 45 N. Y. Suppl. 746.

77. Hyatt *v.* Dusenbury, 12 N. Y. Civ. Proc. 152.

78. Miller *v.* Hall, 70 N. Y. 250 [*affirming* 40 N. Y. Super. Ct. 262].

79. Damages generally see DAMAGES.

80. Bostwick *v.* Menck, 40 N. Y. 383 [*reversing* 10 Abb. Pr. 197]; Stiefel *v.* Berlin, 28 N. Y. App. Div. 103, 51 N. Y. Suppl. 147, 27 N. Y. Civ. Proc. 216 [*modifying* 20 Misc. 194, 45 N. Y. Suppl. 746]; Gifford *v.* Rising, 59 Hun (N. Y.) 42, 12 N. Y. Suppl. 428; O'Connor *v.* Mechanics' Bank, 54 Hun (N. Y.) 272, 7 N. Y. Suppl. 380 [*reversing* 2 N. Y. Suppl. 225, 21 Abb. N. Cas. 383].

Recovery of other property.— See Gifford *v.* Rising, 59 Hun (N. Y.) 42, 12 N. Y. Suppl. 428.

81. Injunction generally see INJUNCTIONS.

82. Hughes *v.* McKenzie, 14 N. Y. Suppl. 352.

In an action against partners to recover the interest of one in the partnership, the

n. Defenses. Irregularities in the proceedings upon which the receivership is based are not necessarily fatal to his right to maintain an action;[83] nor can it be urged as a defense where the judgment debtor has consented to the appointment.[84] A defense may be lost by the failure to interpose it in time.[85]

15. Substitution in Pending Action by Debtor. Where an action by the debtor to recover claims of third persons is pending the court in its discretion may substitute the receiver as plaintiff and permit him to prosecute the action for the benefit of the creditor or creditors whom he represents.[86] The order of substitution should be on notice to the debtor,[87] and should protect his attorney, permitting him, if he so elect, to continue in the litigation for the preservation of his rights.[88]

16. Receiver as Party to Creditor's Action.[89] A receiver in whom the debtor's rights of action and property have vested is a proper party to an action to set aside a judgment,[90] an alleged fraudulent mortgage,[91] or an action to apply land to payment of the judgment;[92] to partition land in which the debtor has an interest,[93] or where he has in his possession an instrument indemnifying the debtor against a cause of action sued on.[94] But where neither the receiver nor the creditor are parties to an action, the former cannot be required to pay over moneys received by him as the property of the debtor.[95]

partner not indebted will not be restrained from paying over the profits of the business to the debtor. Guild *v.* Meyer, 38 N. J. Eq. 959, 56 N. J. Eq. 183.

To restrain a debtor from disposing of a trust fund until his interest in it can be ascertained and subjected to the judgment, the complaint must show the amount of the judgment. Hughes *v.* McKenzie, 14 N. Y. Suppl. 352.

Ownership.— Guild *v.* Meyer, 56 N. J. Eq. 183, 38 Atl. 959.

Laches.— An action by a creditor other than the one represented by the receiver will not be restrained where he has been guilty of laches unless special circumstances are shown. Rondout First Nat. Bank *v.* Navarro, 17 N. Y. Suppl. 900.

83. Stiefel *v.* Berlin, 20 Misc. (N. Y.) 194, 45 N. Y. Suppl. 746.

Thus the irregular appointment of the receiver cannot be urged against the revival of an action against the personal representatives of a deceased debtor. Palen *v.* Bushnell, 51 Hun (N. Y.) 423, 4 N. Y. Suppl. 63.

Filing transcript of judgment.— See Kennedy *v.* Thorp, 2 Daly (N. Y.) 258, 3 Abb. Pr. N. S. (N. Y.) 131 [*reversed* on other grounds in 51 N. Y. 174].

84. Powell *v.* Waldron, 89 N. Y. 328, 42 Am. Rep. 301; Tyler *v.* Willis, 33 Barb. (N. Y.) 327.

85. Palen *v.* Bushnell, 13 N. Y. Suppl. 785, 18 N. Y. Civ. Proc. 56.

86. Fitzpatrick *v.* Moses, 34 N. Y. App. Div. 242, 54 N. Y. Suppl. 426; Matter of Patterson, 12 N. Y. App. Div. 123, 42 N. Y. Suppl. 495; Matter of Wilds, 6 Abb. N. Cas. (N. Y.) 307; *In re* Lansing, 17 N. Y. Wkly. Dig. 288.

The substitution is not a matter of right, but rests in the discretion of the court (*In re* Lansing, 17 N. Y. Wkly. Dig. 288), especially where the receiver's interest is small compared with other parties (Fitzpatrick *v.* Moses, 34 N. Y. App. Div. 242, 54 N. Y. Suppl. 496).

Claim assigned by debtor.— See Charlier *v.* Saginaw Steel Steamship Co., 40 N. Y. Suppl. 278.

The assignee of a claim against a debtor is not a necessary party to a motion by the receiver to be substituted for the debtor as plaintiff in an action brought by the latter on the claim. Fitzpatrick *v.* Moses, 34 N. Y. App. Div. 242, 54 N. Y. Suppl. 426.

87. Goddard *v.* Stiles, 90 N. Y. 199.

88. Fitzpatrick *v.* Moses, 34 N. Y. App. Div. 242, 54 N. Y. Suppl. 426.

Employment of attorney by receiver generally see *supra*, XIII, T, 11, d.

Change of attorney.— See Matter of Wilds, 6 Abb. N. Cas. (N. Y.) 307.

In the absence of notice to the debtor an order fixing the compensation of his attorney is not binding on him. Goddard *v.* Stiles, 90 N. Y. 199.

89. Creditors' suits generally see Creditors' Suits.

Parties generally see Parties.

90. Tiffany *v.* Norris, 18 N. Y. Suppl. 428, 28 Abb. N. Cas. (N. Y.) 97.

91. Gere *v.* Dibble, 17 How. Pr. (N. Y.) 31.

92. Moore *v.* Duffy, 74 Hun (N. Y.) 78, 26 N. Y. Suppl. 340.

93. Wood *v.* Powell, 3 N. Y. App. Div. 318, 38 N. Y. Suppl. 196.

94. A receiver in supplementary proceedings of an insolvent corporation, who has in his possession a policy insuring the corporation against liability to its employees for personal injuries, is a necessary party to an action brought by an injured employee against the corporation and the insurance company jointly, to enforce their joint and several liability to him. Moore *v.* Los Angeles Iron, etc., Co., 89 Fed. 73.

95. Gelster *v.* Syracuse Sav. Bank, 17 N. Y. Wkly. Dig. 137.

17. Compensation.[96] The court has power to award to the receiver reasonable compensation for his services and to allow him in addition the expenses of the receivership.[97] And if the expenses of the receivership are improperly refused the receiver has a remedy by appeal.[98] The compensation to which he is entitled is governed by the duties which the position involves and is not limited by statutory provisions as to personal representatives and guardians.[99]

U. Contempt[1] — **1. Acts Constituting — a. In General.** Disregard of an erroneous or irregular order made by a judge having jurisdiction will constitute a contempt. The order must be obeyed or proceedings taken to set it aside.[2]

b. Failure to Appear or Submit to Examination. It is a contempt to refuse to obey an order requiring the appearance of the debtor or another, and submission to an examination, or on such examination to refuse to answer proper questions.[3]

96. Right of receiver to costs see *infra*, XIII, X, 2.

97. Gelster *v.* Syracuse Sav. Bank, 17 N. Y. Wkly. Dig. 137; Rodgers *v.* Forbes, 23 Ohio Cir. Ct. 438.

Allowance in lieu of commissions.— See Holton *v.* Robinson, 59 N. Y. App. Div. 45, 69 N. Y. Suppl. 33.

Costs in bankruptcy proceedings.— Rodgers *v.* Forbes, 23 Ohio Cir. Ct. 438.

Deduction from amount ordered paid over. — A receiver required to pay over moneys should be first allowed to deduct his commissions and expenses. Gelster *v.* Syracuse Sav. Bank, 17 N. Y. Wkly. Dig. 137.

Effect of payment of judgment.— See Holton *v.* Robinson, 59 N. Y. App. Div. 45, 69 N. Y. Suppl. 33.

98. Monahan *v.* Fitzpatrick, 16 Misc. (N. Y.) 508, 39 N. Y. Suppl. 857. See, generally, Appeal and Error.

99. Baldwin *v.* Eazler, 34 N. Y. Super. Ct. 274.

1. Contempt generally see Contempt.

Costs of contempt proceedings see *infra*, XIII, X.

2. *Ex p.* McCullough, 35 Cal. 97; Fleming *v.* Tourgee, 16 N. Y. Suppl. 2, 21 N. Y. Civ. Proc. 297 [*affirmed* in 136 N. Y. 642, 32 N. E. 1015]; Hilton *v.* Patterson, 18 Abb. Pr. (N. Y.) 245; Arctic F. Ins. Co. *v.* Hicks, 7 Abb. Pr. (N. Y.) 204; Wilcox *v.* Harris, 59 How. Pr. (N. Y.) 262; Shults *v.* Andrews, 54 How. Pr. (N. Y.) 378; Keller *v.* Zeigler, 5 Month. L. Bul. (N. Y.) 15; State *v.* Downing, 40 Oreg. 309, 58 Pac. 863, 66 Pac. 917.

The Minnesota statute making disobedience of any lawful order of the court a contempt is constitutional. State *v.* Becht, 23 Minn. 411.

3. *California.*— Page *v.* Randall, 6 Cal. 32.

Illinois.— Berkson *v.* People, 154 Ill. 81, 39 N. E. 1079.

Iowa.— Lutz *v.* Aylesworth, 66 Iowa 629, 24 N. W. 245.

Michigan.— Shepard *v.* Grove, 109 Mich. 606, 68 N. W. 221.

Missouri.— State *v.* Barclay, 86 Mo. 55.

New York.— Lathrop *v.* Clapp, 40 N. Y. 328, 100 Am. Dec. 493 [*affirming* 23 How. Pr. 423]; Isaacs *v.* Calder, 42 N. Y. App. Div. 152, 59 N. Y. Suppl. 21; Kendrick *v.* Wandall, 88 Hun 518, 34 N. Y. Suppl. 976; Hart *v.* Johnson, 43 Hun 505; People *v.* Oliver, 66 Barb. 570; Coursen *v.* Dearborn, 7 Rob. 143; Woods *v.* De Figaniere, 1 Rob. 607, 16 Abb. Pr. 1; Fleming *v.* Tourgee, 16 N. Y. Suppl. 2, 21 N. Y. Civ. Proc. 297 [*affirmed* in 136 N. Y. 642, 32 N. E. 1015]; Perkins *v.* Kendall, 3 N. Y. Civ. Proc. 240; People *v.* Marston, 18 Abb. Pr. 257; Parker *v.* Hunt, 15 Abb. Pr. 410 note; Ammidon *v.* Wolcott, 15 Abb. Pr. 314; Arctic F. Ins. Co. *v.* Hicks, 7 Abb. Pr. 204; Schults *v.* Andrews, 54 How. Pr. 378; Wicker *v.* Dresser, 13 How. Pr. 331; Spaid *v.* Hage, 1 N. Y. Wkly. Dig. 24; Redmond *v.* Goldsmith, 2 Month. L. Bul. 19. See also Matter of Backus, 91 N. Y. App. Div. 266, 86 N. Y. Suppl. 638; People *v.* McCarthy, 41 Misc. (N. Y.) 429, 84 N. Y. Suppl. 1062; Friedman *v.* Newman, 86 N. Y. Suppl. 735.

South Carolina.— Earle *v.* Stokes, 5 S. C. 336.

West Virginia.—Lewis *v.* Rosler, 19 W. Va. 61.

Wisconsin.— Warren *v.* Rosenberg, 94 Wis. 523, 69 N. W. 339; *In re* Rosenberg, 90 Wis. 581, 63 N. W. 1065, 64 N. W. 299; *In re* O'Brien, 24 Wis. 547.

Canada.— Uhrig *v.* Uhrig, 15 Ont. Pr. 53.

See 21 Cent. Dig. tit. "Execution," § 1200.

Non-appearance by a discharged insolvent may be punished as for a contempt. He should appear and produce his discharge. Coursen *v.* Dearborn, 7 Rob. (N. Y.) 143.

The failure of the debtor to appear on an adjourned day may be punished as a contempt, although the adjournment was made in the absence of the party upon the consent of his attorney. Parker *v.* Hunt, 15 Abb. Pr. (N. Y.) 410 note. See also Ammidon *v.* Wolcott, 15 Abb. Pr. (N. Y.) 314.

To refuse to disclose where property is situated or who has possession of it constitutes contempt. State *v.* Barclay, 86 Mo. 55.

A debtor misnamed in the judgment and order for examination is not in contempt for failing to obey the order, although he is the person intended. Muldoon *v.* Pierz, 1 Abb. N. Cas. (N. Y.) 309.

There must be a wilful disobedience of the requirement to answer the questions sub-

c. Violation of Restraining Order. Violation of an order or direction restraining or enjoining the disposition or transfer of money or property constitutes a punishable contempt, where the result is to impair or prejudice the creditor's rights or remedies.[4] Thus it is a contempt to use or withdraw moneys on deposit in a bank, in the name of the debtor,[5] or as trustee;[6] to collect or dispose of earnings;[7] to confess judgment[8] or suffer judgment for a fictitious debt;[9] to assign a debt,[10] an interest in a decedent's estate,[11] or for the benefit of creditors;[12] to transfer or convey property;[13] to use the proceeds of mortgaged property,[14] or to pay rent;[15] to collect and dispose of rents of real estate,[16] or to interfere with the collection of rents by the receiver.[17] But there is no contempt in collecting debts due a firm of which the debtor is a member and using the same in its business,[18] paying over money or delivering property belonging to another,[19] which is inapplicable to payment of the judgment,[20] effectuating a prior

mitted. East River Bank *v.* De Lacy, 37 Misc. (N. Y.) 765, 76 N. Y. Suppl. 927 [*reversing* 36 Misc. 868, 74 N. Y. Suppl. 925].

Inability to answer.—See Wickes *v.* Dresser, 14 How. Pr. (N. Y.) 465.

False swearing as to a transfer of property is not a contempt within N. Y. Code Civ. Proc. § 14, authorizing the punishment of a party to an action for any deceit, abuse of a mandate, or interference with a court proceeding, or where a right or remedy of a party may be defeated, impaired, impeded, or prejudiced by the respondents' conduct. Bernheimer *v.* Kelleher, 31 Misc. (N. Y.) 464, 64 N. Y. Suppl. 409.

Supersession of proceedings.— A second order for examination will not supersede the first so as to affect pending contempt proceedings based thereon. Walter *v.* Pecare, 11 N. Y. Suppl. 146.

4. Crosby *v.* Stephan, 32 Hun (N. Y.) 478; Vermont Marble Co. *v.* Wilkes, 30 N. Y. Suppl. 381; Millington *v.* Fox, 13 N. Y. Suppl. 334; Wynkoop *v.* Myers, 7 N. Y. Suppl. 898, 17 N. Y. Civ. Proc. 443; Lippert *v.* Olejniczak, 3 N. Y. Suppl. 6; Reynolds *v.* McElhone, 20 How. Pr. (N. Y.) 454.

5. Rothschild *v.* Gould, 84 N. Y. App. Div. 196, 82 N. Y. Suppl. 558; Crosby *v.* Stephan, 32 Hun (N. Y.) 478; Rainsford *v.* Temple, 3 Misc. (N. Y.) 294, 22 N. Y. Suppl. 937 [*modifying* 2 Misc. 454, 21 N. Y. Suppl. 1039]. See also Harvey *v.* Arnold, 84 N. Y. App. Div. 132, 82 N. Y. Suppl. 155.

6. People *v.* Kingsland, 3 Abb. Dec. (N. Y.) 526, 3 Keyes (N. Y.) 325, 1 Transcr. App. (N. Y.) 270, 5 Abb. Pr. N. S. (N. Y.) 90.

Equitable title in beneficiary.— See Jackson *v.* Murray, 25 N. Y. App. Div. 140, 49 N. Y. Suppl. 195, 5 N. Y. Annot. Cas. 78.

7. Newell *v.* Cutler, 19 Hun (N. Y.) 74; Taggard *v.* Talcott, 2 Edw. (N. Y.) 628. See Prince *v.* Brett, 21 N. Y. App. Div. 190, 47 N. Y. Suppl. 402; Mulford *v.* Gibbs, 9 N. Y. App. Div. 490, 41 N. Y. Suppl. 273, where the earnings paid were derived from the conduct of business and not from personal services. See also Gillett *v.* Hilton, 11 N. Y. Civ. Proc. 108. But see Hancock *v.* Sears, 93 N. Y. 79, 4 N. Y. Civ. Proc. 255 [*reversing* 29 Hun 96].

8. Ross *v.* Clussman, 3 Sandf. (N. Y.) 676.

9. Fenner *v.* Sanborn, 37 Barb. (N. Y.) 610.

10. *In re* Perry, 30 Wis. 268.

11. Wynkoop *v.* Myers, 7 N. Y. Suppl. 898, 17 N. Y. Civ. Proc. 443.

12. Canda *v.* Gollner, 73 Hun (N. Y.) 493, 26 N. Y. Suppl. 449; National Wall Paper Co. *v.* Gerlach, 15 Misc. (N. Y.) 640, 37 N. Y. Suppl. 428.

13. Pending a motion to vacate the judgment (Woolf *v.* Jacobs, 36 N. Y. Super. Ct. 408) or for the purpose of employing an attorney in the proceedings (Deposit Nat. Bank *v.* Wickham, 44 How. Pr. (N. Y.) 421).

A stay until the decision of a motion suspends pending proceedings but does not affect an injunction restraining the debtor from disposing of his property, notwithstanding the negligence of the creditor to appear on a day to which the proceedings were adjourned; hence a conveyance by the debtor of his property after the grant of a new trial and before the reversal of that decision is such a violation of the injunction as will subject the debtor to punishment as for a contempt. Woolf *v.* Jacobs, 36 N. Y. Super. Ct. 408.

14. As to which the mortgage has been released. Millington *v.* Fox, 13 N. Y. Suppl. 334.

15. Aschemoor *v.* Emmvert, 6 Month. L. Bul. (N. Y.) 81.

16. Stevens *v.* Dewey, 13 N. Y. App. Div. 312, 43 N. Y. Suppl. 130, 4 N. Y. Annot. Cas. 40; Browning *v.* Chadwick, 30 Misc. (N. Y.) 420, 62 N. Y. Suppl. 476 [*affirming* 29 Misc. 607, 61 N. Y. Suppl. 246]; Lertora *v.* Reimann, 53 N. Y. Suppl. 921, 5 N. Y. Annot. Cas. 19.

Credit by payment.— See Lertora *v.* Reimann, 53 N. Y. Suppl. 921, 5 N. Y. Annot. Cas. 19.

17. Vermont Marble Co. *v.* Wilkes, 30 N. Y. Suppl. 381.

18. Joline *v.* Connolly, 24 N. Y. Wkly. Dig. 111.

19. Beard *v.* Snook, 47 Hun (N. Y.) 158; Rhodes *v.* Linderman, 17 N. Y. Suppl. 628; Dean *v.* Hyatt, 5 N. Y. Wkly. Dig. 67. And see Matter of Duryea, 17 N. Y. App. Div. 540, 45 N. Y. Suppl. 703.

20. Wolf *v.* Buttner, 6 Misc. (N. Y.) 119, 26 N. Y. Suppl. 52.

assignment of a right of action,[21] preferring creditors by confessing judgment for a *bona fide* debt,[22] prosecuting to judgment an action pending at the time of the injunction,[23] failing to stop payment on checks drawn and given out before service of the order,[24] substituting a smaller for a larger mortgage,[25] disposing of property acquired after the granting of the restraining order[26] or its service,[27] issuance of execution by another creditor without leave,[28] disposing of property after a receivership where the restraint is until further order in the premises,[29] applying to the support of a family exempt earnings,[30] or selling personal ornaments and jewelry by a destitute debtor abandoned by her husband.[31]

d. Disobedience to Order For Payment or Delivery of Property — (i) *In General.* Disobedience of an order requiring the payment of money, delivery of personal property, or the conveyance of real estate may constitute a contempt.[32] It is not a contempt to refuse to pay or deliver property except as provided by the order,[33] to convey or deliver possession of real estate, the title to which has vested in the receiver by operation of law,[34] or to deliver property the title to which is in dispute.[35] Nor is a party guilty of contempt, where, not having pos-

21. Richardson *v.* Rust, 9 Paige (N. Y.) 243.

22. McCredie *v.* Senior, 4 Paige (N. Y.) 378. But see Ross *v.* Clussman, 3 Sandf. (N. Y.) 676, Code Rep. N. S. (N. Y.) 91; Lansing *v.* Easton, 7 Paige (N. Y.) 364.

23. Parker *v.* Wakeman, 10 Paige (N. Y.) 485.

24. FitzGibbon *v.* Smith, 16 N. Y. Suppl. 410.

25. Duffus *v.* Cole, 15 N. Y. Suppl. 370.

26. Atkinson *v.* Sewine, 11 Abb. Pr. N. S. (N. Y.) 384; Gerrigani *v.* Wheelwright, 3 Abb. Pr. N. S. (N. Y.) 264; Potter *v.* Low, 16 How. Pr. (N. Y.) 549.

Rent accruing under a lease existing at the time of the restraining order is not after-acquired property but an incident of the lease. Stevens *v.* Dewey, 13 N. Y. App. Div. 312, 43 N. Y. Suppl. 130, 4 N. Y. Annot. Cas. 40.

27. McGivney *v.* Childs, 41 Hun (N. Y.) 607, 5 N. Y. St. 251; Rainsford *v.* Temple, 3 Misc. (N. Y.) 294, 22 N. Y. Suppl. 937 [*modifying* 2 Misc. 454, 21 N. Y. Suppl. 1039]; Atkinson *v.* Sewine, 11 Abb. Pr. N. S. (N. Y.) 384. But *compare* Corde *v.* Laughlin, 86 N. Y. Suppl. 795. See Hague *v.* Hayes, 53 Iowa 377, 5 N. W. 541.

28. Cooper *v.* Bailey, 69 N. Y. App. Div. 358, 74 N. Y. Suppl. 667.

29. People *v.* Randall, 73 N. Y. 416.

30. Hancock *v.* Sears, 93 N. Y. 79, 4 N. Y. Civ. Proc. 255 [*reversing* 29 Hun 96].

31. Meyers *v.* Herbert, 64 Hun (N. Y.) 200, 19 N. Y. Suppl. 132, 22 N. Y. Civ. Proc. 216.

32. *Kansas.*— *In re* Burrows, 33 Kan. 675, 7 Pac. 148; State *v.* Burrows, 33 Kan. 10, 5 Pac. 449.

Missouri.— *In re* Knaup, 144 Mo. 653, 46 S. W. 151, 66 Am. St. Rep. 435.

New York.— Brush *v.* Lee, 1 Abb. Dec. 238, 2 Transcr. App. 95, 6 Abb. Pr. N. S. 50; Holmes *v.* O'Regan, 68 N. Y. App. Div. 318, 74 N. Y. Suppl. 10; Matter of Weld, 34 N. Y. App. Div. 471, 54 N. Y. Suppl. 253; Matter of Camerick, 34 N. Y. App. Div. 31, 53 N. Y. Suppl. 1084; Fenner *v.* Sanborn, 37 Barb. 610; Morris *v.* Walsh, 9 Bosw. 636; Fink *v.* Fraenkle, 14 N. Y. Suppl. 140, 20 N. Y. Civ. Proc. 402; Kearney's Case, 13 Abb. Pr. 459, 22 How. Pr. 309; Reynolds *v.* McElhone, 20 How. Pr. 454; People *v.* Rogers, 2 Paige 103; Matter of Pester, 2 Code Rep. 98.

North Carolina.— Bond *v.* Bond, 69 N. C. 97.

Ohio.— Matter of Concklin, 5 Ohio Cir. Ct. 78, 3 Ohio Cir. Dec. 40; Butterfield *v.* O'Connor, 3 Ohio Dec. (Reprint) 14, 2 Wkly. L. Gaz. 177.

See 21 Cent. Dig. tit. "Execution," § 1198.

Substitution of valueless property constitutes contempt. Matter of Blumenthal, 22 Misc. (N. Y.) 704, 50 N. Y. Suppl. 49 [*affirmed* in 22 Misc. 764, 48 N. Y. Suppl. 1101].

A warrant of arrest will not lie against a non-resident debtor served by publication in an action of tort, who did not appear therein, for his refusal to apply property in satisfaction of the judgment. Bartlett *v.* McNeil, 60 N. Y. 53 [*affirming* 3 Hun 221, 5 Thomps. & C. 675, 49 How. Pr. 55].

33. Watson *v.* Fitzsimmons, 5 Duer (N. Y.) 629; Tinkey *v.* Langdon, 60 How. Pr. (N. Y.) 180; People *v.* King, 9 How. Pr. (N. Y.) 97.

The order should specify the property to be delivered. Fromme *v.* Jarecky, 19 Misc. (N. Y.) 483, 43 N. Y. Suppl. 1081. See *supra*, XIII, S, 2.

34. Canandaigua First Nat. Bank *v.* Martin, 49 Hun (N. Y.) 571, 2 N. Y. Suppl. 315, 15 N. Y. Civ. Proc. 324.

35. Estey *v.* Fuller Implement Co., 82 Iowa 678, 46 N. W. 1098, 47 N. W. 1025; Fromme *v.* Jarecky, 19 Misc. (N. Y.) 483, 43 N. Y. Suppl. 1081; Gallagher *v.* O'Neill, 3 N. Y. Suppl. 126; West Side Bank *v.* Pugsley, 12 Abb. Pr. N. S. (N. Y.) 28; Robeson *v.* Ford, 3 Edw. (N. Y.) 441.

Refusal will be treated as an appeal to the court for protection. Robeson *v.* Ford, 3 Edw. (N. Y.) 441.

Taking of property not opposed.—Although claiming the property to belong to another, the debtor is not disobedient if he tells the

session or control of the money or property or for any other reason, he is unable to comply with the order.[36]

(II) *Necessity of Filing and Serving Order.* To punish as for a contempt in refusing to pay over money or deliver property, an order for such delivery or payment must have been duly made, served,[37] and filed with the proper officer,[38] as well as a refusal to comply therewith after a proper demand.[39]

e. Non-Payment of Costs.[40] Although there are decisions to the contrary,[41] it has been held that the refusal to obey an order to pay the costs of the supplemental proceedings may be punished as a contempt, although the costs might have been collected by execution.[42]

f. Suing Receiver Without Leave. The debtor[43] or a third party whose property has been wrongfully taken from him is not punishable as for a contempt in suing the receiver without leave of the court.[44]

2. Proceedings to Punish — a. Jurisdiction of. The power to punish as for a contempt is vested in the judge or officer whose order has been violated or in the court out of which the execution issued and wherein the supplementary proceedings were instituted.[45] Statutory provisions conferring jurisdiction on the

officer he may take it. Reardon *v.* Henry, 82 Iowa 134, 47 N. W. 1022.

36. West Side Bank *v.* Pugsley, 47 N. Y. 368, 12 Abb. Pr. N. S. (N. Y.) 28; Tinker *v.* Crooks, 22 Hun (N. Y.) 579; Richie *v.* Bedell, 22 N. Y. Wkly. Dig. 563; Chappell *v.* Winters, 16 N. Y. Wkly. Dig. 89; Warren *v.* Rosenberg, 94 Wis. 523, 69 N. W. 339. See also Teller *v.* Randall, 40 Barb. (N. Y.) 242, 26 How. Pr. (N. Y.) 155.

37. Holmes *v.* O'Regan, 68 N. Y. App. Div. 318, 74 N. Y. Suppl. 10; Gibbs *v.* Prindle, 9 N. Y. App. Div. 29, 41 N. Y. Suppl. 132; McComb *v.* Weaver, 11 Hun (N. Y.) 271; Watson *v.* Fitzsimons, 5 Duer (N. Y.) 629; Fromme *v.* Jarecky, 19 Misc. (N. Y.) 483, 43 N. Y. Suppl. 1081; Tinkey *v.* Langdon, 60 How. Pr. (N. Y.) 180.

A demand by the receiver accompanied by the order appointing him is insufficient. Fromme *v.* Jarecky, 19 Misc. (N. Y.) 483, 43 N. Y. Suppl. 1081.

38. Moyer *v.* Moyer, 7 N. Y. App. Div. 523, 40 N. Y. Suppl. 258; Bareithers *v.* Brosche, 13 N. Y. Suppl. 561, 19 N. Y. Civ. Proc. 446.

39. McComb *v.* Weaver, 11 Hun (N. Y.) 271.

40. Costs in these proceedings see *infra*, XIII, X, 1.

41. *In re* Thompson, 31 Misc. (N. Y.) 802, 62 N. Y. Suppl. 1033 [*affirmed* in 31 Misc. 832, 65 N. Y. Suppl. 1147]. See Chappell *v.* Winters, 16 N. Y. Wkly. Dig. 89.

Refusal to pay expenses of receivership.— See Monahan *v.* Fitzpatrick, 16 Misc. (N. Y.) 508, 39 N. Y. Suppl. 857.

42. Holton *v.* Robinson, 59 N. Y. App. Div. 45, 69 N. Y. Suppl. 33; Kearney's Case, 13 Abb. Pr. (N. Y.) 459, 22 How. Pr. (N. Y.) 309.

43. Kroner *v.* Reilly, 49 N. Y. App. Div. 41, 63 N. Y. Suppl. 527, where exempt earnings were collected by the receiver.

44. Dewey *v.* Finn, 18 N. Y. Wkly. Dig. 558.

45. Lutz *v.* Aylesworth, 66 Iowa 629, 24 N. W. 245; Lathrop *v.* Clapp, 40 N. Y 328, 100 Am. Dec. 493 [*affirming* 23 How. Pr. 423]; Brush *v.* Lee, 1 Abb. Dec. (N. Y.) 238, 2 Transcr. App. (N. Y.) 95, 6 Abb. Pr. N. S. (N. Y.) 50; Dresser *v.* Van Pelt, 6 Duer (N. Y.) 687, 15 How. Pr. (N. Y.) 19; Matter of Smethurst, 2 Sandf. (N. Y.) 724, 4 How. Pr. (N. Y.) 369, 3 Code Rep. (N. Y.) 55; Kearney's Case, 13 Abb. Pr. (N. Y.) 459, 22 How. Pr. (N. Y.) 309; Shepherd *v.* Dean, 3 Abb. Pr. (N. Y.) 424, 13 How. Pr. (N. Y.) 173; Wicker *v.* Dresser, 13 How. Pr. (N. Y.) 331; *Ex p.* Lilliland, 7 Ohio Dec. (Reprint) 659, 4 Cinc. L. Bul. 733; *In re* Rosenberg, 90 Wis. 581, 63 N. W. 1065, 64 N. W. 299. *Compare Ex p.* Backus, 91 N. Y. App. Div. 266, 86 N. Y. Suppl. 638.

Circuit court can punish for a refusal to appear before a circuit court commissioner. Shepard *v.* Grove, 109 Mich. 606, 68 N. W. 221.

Court commissioner may attach the person of a debtor who refuses to answer interrogatories propounded to him. Lewis *v.* Rosler, 19 W. Va. 61.

Judge at special term has authority to punish disobedience of an order made by him when sitting at the appellate branch of the court. Wickes *v.* Dresser, 4 Abb. Pr. (N. Y.) 93.

Judge of different court.— See People *v.* Dutcher, 3 Abb. Pr. N. S. (N. Y.) 151.

Judge of different district.— See Blanchard *v.* Reilly, 11 N. Y. Civ. Proc. 278.

Probate judge has power to commit for a contempt in refusing to turn over property in pursuance of its order. *Ex p.* Lilliland, 7 Ohio Dec. (Reprint) 659, 4 Cinc. L. Bul 733. But he cannot imprison for contempt in refusing to pay over moneys alleged to have been placed in his hands in fraud of creditors, but the receiver must resort to the ordinary action. White *v.* Gates, 42 Ohio St. 109.

Special surrogate who issued an order in supplementary proceedings may punish for disobedience thereof. Aldrich *v.* Davis, 19 N. Y. Suppl. 765.

Power to punish is derived from the original order, and not from the order to show

judge or on an inferior court will not deprive a court of general jurisdiction of its inherent power to punish for a contempt of its authority.[46] If the term of the judge entitled to entertain the contempt proceedings has expired they may be heard by his successor in office.[47]

b. How Instituted. Institution of proceedings by attachment in the first instance is discretionary.[48] Instead of an attachment an order to show cause may be granted.[49]

c. Entitling. The papers may be entitled in the action[50] or in the name of the people on the relation of the creditor against the debtor or contemner.[51]

d. To Whom Returnable. The proceedings should be made returnable before the judge who issued the attachment.[52]

e. Questions Triable. A controversy as to the title to or ownership of a fund or property cannot be determined in these proceedings.[53]

f. Proof of Disobedience. To authorize a conviction it must appear that the order or direction charged to have been disobeyed was duly made and served,[54]

cause in the contempt proceedings. Myers *v.* Janes, 3 Abb. Pr. (N. Y.) 301.

Jurisdiction is not conferred by appearing and failing to object. Blanchard *v.* Reilly, 11 N. Y. Civ. Proc. 278.

Loss of jurisdiction.— See People *v.* Mead, 29 How. Pr. (N. Y.) 360.

46. Kearney's Case, 13 Abb. Pr. (N. Y.) 459, 22 How. Pr. (N. Y.) 309.

The jurisdiction of a county judge to punish in a case originating in the supreme court does not oust that court of jurisdiction. Tremain *v.* Richardson, 68 N. Y. 617.

47. Gamman *v.* Berry, 34 Hun (N. Y.) 138; Holstein *v.* Rice, 24 How. Pr. (N. Y.) 135.

48. Brush *v.* Lee, 1 Abb. Dec. (N. Y.) 238, 2 Transcr. App. (N. Y.) 95, 6 Abb. Pr. N. S. (N. Y.) 50; Tinker *v.* Crooks, 22 Hun (N. Y.) 579; Matter of Smethurst, 2 Sandf. (N. Y.) 724, 4 How. Pr. (N. Y.) 369, 3 Code Rep. (N. Y.) 55; De Witt *v.* Dennis, 30 How. Pr. (N. Y.) 131.

Precept.— Disobedience of an order requiring the payment of money may be immediately punished by a precept for imprisonment. Brush *v.* Lee, 1 Abb. Dec. (N. Y.) 236, 2 Transcr. App. (N. Y.) 95, 6 Abb. Pr. N. S. (N. Y.) 50; People *v.* King, 9 How. Pr. (N. Y.) 97.

Serving copy affidavits.— If an attachment has issued the debtor should be furnished within a reasonable time before its return with a copy of the affidavits on which it was based. Ward *v.* Arenson, 10 Bosw. (N. Y.) 589; Matter of Smethurst, 2 Sandf. (N. Y.) 724, 4 How. Pr. (N. Y.) 369, 3 Code Rep. (N. Y.) 55.

An affidavit by an attorney presented on the application need not show his authority to act. Miller *v.* Adams, 52 N. Y. 409 [*affirming* 7 Lans. 131].

Interrogatories.— A conviction cannot be sustained where interrogatories were not furnished to defendant, although demanded, and the conviction was had before written answers had been obtained. De Witt *v.* Dennis, 30 How. Pr. (N. Y.) 131.

49. Brush *v.* Lee, 1 Abb. Dec. (N. Y.) 238, 2 Transcr. App. (N. Y.) 95, 6 Abb. Pr. N. S. (N. Y.) 50; Isaacs *v.* Calder, 42 N. Y. App. Div. 152, 59 N. Y. Suppl. 21; Tinker *v.* Crooks, 22 Hun (N. Y.) 579; People *v.* Kenny, 4 Thomps. & C. (N. Y.) 572; Matter of Smethurst, 2 Sandf. (N. Y.) 724, 4 How. Pr. (N. Y.) 369, 3 Code Rep. (N. Y.) 55; Kennesaw Mills Co. *v.* Walker, 19 S. C. 104.

Notice to attorney.— An order to show cause served on the delinquent's attorney is sufficient. Isaacs *v.* Calder, 42 N. Y. App. Div. 152, 59 N. Y. Suppl. 21.

An oral order to answer and show cause against a charge of contempt is sufficient where the offender was present at the time, thereafter filed an affidavit stating his excuse, and was accorded a full and fair hearing. McDonnell *v.* Henderson, 74 Iowa 619, 38 N. W. 512.

Interrogatories as in attachment are not necessary on the return of an order to show cause. Pitt *v.* Davison, 37 N. Y. 235, 4 Transcr. App. (N. Y.) 266, 3 Abb. Pr. N. S. (N. Y.) 398, 34 How. Pr. (N. Y.) 335; Brush *v.* Lee, 1 Abb. Dec. (N. Y.) 238, 2 Transcr. App. (N. Y.) 95, 6 Abb. Pr. N. S. (N. Y.) 50), nor where the facts are not denied (Lathrop *v.* Clapp, 40 N. Y. 328, 100 Am. Dec. 493 [*affirming* 23 How. Pr. 423; Watson *v.* Fitzsimmons, 5 Duer (N. Y.) 629).

50. Stafford *v.* Brown, 4 Paige (N. Y.) 360.

51. People *v.* Craft, 7 Paige (N. Y.) 325.

Amendment.— Proceedings instituted by a private party may be amended by substituting the state in his stead, on his application. State *v.* Downing, 40 Oreg. 309, 58 Pac. 863, 66 Pac. 917.

52. Kelly *v.* McCormick, 28 N. Y. 318 [*affirming* 2 E. D. Smith 503], but an irregularity in that respect may be waived.

53. Holmes *v.* O'Regan, 68 N. Y. App. Div. 318, 74 N. Y. Suppl. 10; Matter of Becker, 36 Misc. (N. Y.) 322, 73 N. Y. Suppl. 577.

54. *In re* O'Connell, 49 Kan. 415, 30 Pac. 456; Holmes *v.* O'Regan, 68 N. Y. App. Div. 318, 74 N. Y. Suppl. 10; Ward *v.* Arenson, 10 Bosw. (N. Y.) 589; De Witt *v.* Dennis, 30 How. Pr. (N. Y.) 131; State *v.* Downing, 40 Oreg. 309, 58 Pac. 863, 66 Pac. 917; Kennesaw Mills Co. *v.* Walker, 19 S. C. 104.

compliance therewith demanded, and refused,[55] the particular misconduct must be specified,[56] and proof made of a wilful disobedience.[57]

g. Proof of Injury. Proof of loss or injury to the creditor or that his rights or remedies have been impeded or impaired is essential,[58] as well as that the proceedings theretofore had were inadequate to maintain and preserve the creditor's rights and remedies.[59]

h. Defenses — (I) *In General.* It is a good defense to an application to punish for a contempt that the judgment was satisfied before service of the motion papers to punish;[60] or that a claim of the debtor directed to be paid by his debtor had been assigned by the former;[61] but a discharge in bankruptcy is not.[62] Nor can the debtor justify his misconduct by setting up a stay, which was vacated before service of the order violated.[63]

(II) *Invalidity of Order of Service.* It is also a good defense to an application to punish for a contempt that the order or direction charged to have been disobeyed or violated was made without authority or jurisdiction,[64] and has been

The omission of such an allegation may be supplied by an answer admitting the issuance of the order. State *v.* Downing, 40 Oreg. 309, 58 Pac. 863, 66 Pac. 917.

55. McComb *v.* Weaver, 11 Hun (N. Y.) 271; State *v.* Downing, 40 Oreg. 309, 58 Pac. 863, 66 Pac. 917.

56. De Witt *v.* Dennis, 30 How. Pr. (N. Y.) 131.

57. Ward *v.* Arenson, 10 Bosw. (N. Y.) 589; Gerregani *v.* Wheelwright, 3 Abb. Pr. N. S. (N. Y.) 264; Dean *v.* Hyatt, 5 N. Y. Wkly. Dig. 67; State *v.* Downing, 40 Oreg. 309, 58 Pac. 863, 66 Pac. 917; Lilienthal *v.* Wallach, 37 Fed. 241.

A certificate of the referee directed to conduct the examination certifying to a default in appearance is not sufficient proof thereof, but must be accompanied by an affidavit setting forth the facts charged. Rinelander *v.* Dunham, 2 N. Y. Civ. Proc. 32.

Judicial knowledge.— Miller *v.* Adams, 52 N. Y. 409 [*affirming* 7 Lans. 131]. And see Ward *v.* Arensen, 10 Bosw. (N. Y.) 589.

Payment of proceeds of judgment by attorney may constitute contempt. Matter of Duryea, 17 N. Y. App. Div. 540, 45 N. Y. Suppl. 703.

The report of the referee may be read. Newell *v.* Cutler, 19 Hun (N. Y.) 74.

The return of the sheriff on the execution is not conclusive evidence. Moyer *v.* Moyer, 7 N. Y. App. Div. 523, 40 N. Y. Suppl. 258.

58. *In re* Knaup, 144 Mo. 653, 46 S. W. 151, 66 Am. St. Rep. 435; Plattsburgh First Nat. Bank *v.* Fitzpatrick, 80 Hun (N. Y.) 75, 30 N. Y. Suppl. 15; Robertson *v.* Hay, 12 Misc. (N. Y.) 7, 33 N. Y. Suppl. 31; Blake *v.* Bolte, 10 Misc. (N. Y.) 333, 31 N. Y. Suppl. 124, 24 N. Y. Civ. Proc. 166, 1 N. Y. Annot. Cas. 78 [*affirmed* in 12 Misc. 405, 33 N. Y. Suppl. 617]; Friedman *v.* Newman, 86 N. Y. Suppl. 735; Duffus *v.* Cole, 15 N. Y. Suppl. 370. See Woods *v.* De Figaniere, 1 Rob. (N. Y.) 607, 16 Abb. Pr. (N. Y.) 1, holding that a statutory provision as to contempts generally, requiring it to be shown that the misconduct was calculated to or did defeat, impair, impede, or prejudice the rights of any party was not applicable to a refusal to appear for examination.

Actual loss.— It is immaterial that the misconduct of the debtor did not cause any actual loss to the creditor, or was calculated to impair or impede his rights. People *v.* Oliver, 66 Barb. (N. Y.) 570.

59. Wolf *v.* Buttner, 6 Misc. (N. Y.) 119, 26 N. Y. Suppl. 52.

60. Avery *v.* Ackart, 20 Misc. (N. Y.) 631, 46 N. Y. Suppl. 1085.

61. Beebe *v.* Kenyon, 5 Hun (N. Y.) 73, 5 Thomps. & C. (N. Y.) 271.

62. Coursen *v.* Dearborn, 7 Rob. (N. Y.) 143; Spaid *v.* Hage, 1 N. Y. Wkly. Dig. 24.

63. Isaacs *v.* Calder, 42 N. Y. App. Div. 152, 59 N. Y. Suppl. 21.

64. *In re* Havlik, 45 Nebr. 747, 64 N. W. 634; Adler *v.* Turnbull, 57 N. J. L. 62, 30 Atl. 319; Bartlett *v.* McNeil, 60 N. Y. 53 [*affirming* 3 Hun 221, 5 Thomps. & C. 675, 49 How. Pr. 55]; Canandaigua First Nat. Bank *v.* Martin, 49 Hun (N. Y.) 571, 2 N. Y. Suppl. 315, 15 N. Y. Civ. Proc. 324; Fromme *v.* Jarecky, 19 Misc. (N. Y.) 483, 43 N. Y. Suppl. 1081; Meyer *v.* Dreyspring, 3 Misc. (N. Y.) 560, 23 N. Y. Suppl. 315; McGill *v.* Weill, 10 N. Y. Suppl. 246, 19 N. Y. Civ. Proc. 43; Gilbert *v.* Frothingham, 13 N. Y. Civ. Proc. 288; Smith *v.* Tozer, 11 N. Y. Civ. Proc. 349; *In re* Crary, 9 N. Y. Civ. Proc. 168; People *v.* Jones, 1 Abb. N. Cas. (N. Y.) 172; West Side Bank *v.* Pugsley, 12 Abb. Pr. N. S. (N. Y.) 28; Everard *v.* Brennan, 2 N. Y. City Ct. 351; Sloan *v.* Higgins, 1 Month. L. Bul. (N. Y.) 59; White *v.* Gates, 42 Ohio St. 109; Edgarton *v.* Hanna, 11 Ohio St. 323; Union Bank *v.* Union Bank, 6 Ohio St. 254.

Misnomer.— The debtor may defend on the ground that he is incorrectly named in the summons in the original action (McGill *v.* Weill, 10 N. Y. Suppl. 246, 19 N. Y. Civ. Proc. 43) and that the misnomer was repeated in the order (Muldoon *v.* Pierz, 1 Abb. N. Cas. (N. Y.) 309).

Misnomer is waived by appearance and examination without objection. Matter of Johns, 1 Month. L. Bul. (N. Y.) 75.

That the debtor was not served with a summons in the action cannot be set up by an affidavit. Keeler *v.* Zeigler, 5 Month. L. Bul. (N. Y.) 15.

superseded,[65] vacated,[66] or reversed.[67] But mere irregularities in the order or immaterial defects[68] or the insufficiency of the affidavit on which it was granted will not relieve the party charged from liability.[69] Nor can the truth of the affidavit be raised in these proceedings.[70] So it is a good answer that the order for examination was improperly or irregularly served.[71]

i. Excuses. Disobedience may be excused in a proper case, where exculpatory facts or circumstances are shown.[72] Inability to pay over money or to deliver property in accordance with the terms of the order constitutes a valid excuse for the failure to comply therewith.[73]

j. Abandonment. Mere delay of a judgment creditor to proceed with contempt proceedings against the debtor for failing to appear for examination does not amount to an abandonment or waiver of such proceedings.[74] And where the

That the proceedings were based on a judgment for costs is immaterial. Brush *v.* Lee, 1 Abb. Dec. (N. Y.) 238, 2 Transcr. App. (N. Y.) 95, 6 Abb. Pr. N. S. (N. Y.) 50.

Witness served with a subpœna before service of the order for examination is not guilty of contempt for his failure to obey it. People *v.* Warner, 51 Hun (N. Y.) 53, 3 N. Y. Suppl. 768 [*affirmed* in 125 N. Y. 746, 27 N. E. 407].

65. Gaylord *v.* Jones, 7 Hun (N. Y.) 480.

The existence of another outstanding order for examination procured by the same creditor on the same judgment is a defense to a charge of disobeying the second order. Brockway *v.* Brien, 37 How. Pr. (N. Y.) 270.

66. Serven *v.* Lowerre, 3 Misc. (N. Y.) 113, 23 N. Y. Suppl. 1052.

67. Smith *v.* McQuade, 13 N. Y. Suppl. 63.

68. Fleming *v.* Tourgee, 16 N. Y. Suppl. 2, 21 N. Y. Civ. Proc. 297 [*affirmed* in 136 N. Y. 642, 32 N. E. 1015]; Arctic F. Ins. Co. *v.* Hicks, 7 Abb. Pr. (N. Y.) 204; State *v.* Downing, 40 Oreg. 309, 58 Pac. 863, 66 Pac. 917.

69. Matter of Hatfield, 17 N. Y. App. Div. 430, 45 N. Y. Suppl. 270 [*affirmed* in 155 N. Y. 628, 49 N. E. 1097]; Lehmaier *v.* Griswold, 46 N. Y. Super. Ct. 11. But see Kennedy *v.* Weed, 10 Abb. Pr. (N. Y.) 62; People *v.* Jones, 1 Abb. N. Cas. (N. Y.) 172, in which cases it was held there was no contempt in disregarding an order based on an affidavit made on information and belief which failed to state the sources of the information.

Informalities in the affidavit are waived by appearance and examination. Lehmaier *v.* Griswold, 46 N. Y. Super. Ct. 11.

70. Hilton *v.* Patterson, 18 Abb. Pr. (N. Y.) 245.

71. Seyfert *v.* Edison, 47 N. J. L. 428, 1 Atl. 502.

That the service was made on a party while attending court as a witness, juror, or litigant constitutes no defense. Page *v.* Randall, 6 Cal. 32.

Time of service.— Defendant is not guilty of contempt in not obeying an order to appear for examination, where the order was served only three and one-half hours before the time fixed for the examination, and while defendant was at home alone, three miles from the place of hearing, without any conveyance, and not strong enough to walk that distance. Gibbs *v.* Prindle, 9 N. Y. App. Div. 29, 41 N. Y. Suppl. 132. But see Schuits *v.* Andrews, 54 How. Pr. (N. Y.) 378, where the debtor was adjudged guilty of contempt for his failure to obey an order requiring his appearance for examination which was served less than twenty-four hours of the time set.

72. Lassere *v.* Stein, 25 Misc. (N. Y.) 423, 54 N. Y. Suppl. 939 [*affirmed* in 27 Misc. 847, 57 N. Y. Suppl. 1140] (good faith); Kress *v.* Morehead, 8 N. Y. St. 858 (vague description designated to conduct examination); Walters *v.* Kenyon, 4 N. Y. St. 398 (illness); Bond *v.* Bond, 69 N. C. 97 (good faith). See also Spafard *v.* Hogan, 22 N. Y. Wkly. Dig. 519.

The disobedience is not excused by the facts that at the time defendant was ordered to execute a lease or conveyance he was in jail (Morris *v.* Walsh, 9 Bosw. (N. Y.) 636), that property ordered to be delivered was commingled with other goods which had been consigned for sale (Matter of Camerick, 34 N. Y. App. Div. 31, 53 N. Y. Suppl. 1084), or that a bond ordered to be delivered was in good faith handed to an attorney for collection (Bond *v.* Bond, 69 N. C. 97). See also *In re* Lewis, 67 Kan. 340, 72 Pac. 788 (denying ownership of debtor); Tremain *v.* Richardson, 68 N. Y. 617 (hostility to referee); People *v.* Kingsland, 3 Abb. Dec. (N. Y.) 526, 3 Keyes (N. Y.) 325, 5 Abb. Pr. N. S. (N. Y.) 90 (applying property of another to support of family); Matter of Weld, 34 N. Y. App. Div. 471, 54 N. Y. Suppl. 253 (replacing money wrongfully withdrawn).

73. West Side Bank *v.* Pugsley, 47 N. Y. 368, 12 Abb. Pr. N. S. (N. Y.) 28; Tinker *v.* Crooks, 22 Hun (N. Y.) 579; Gerton Carriage Co. *v.* Richardson, 6 Misc. (N. Y.) 466, 27 N. Y. Suppl. 625; Richie *v.* Bedell, 22 N. Y. Wkly. Dig. 563; Chappell *v.* Winters, 16 N. Y. Wkly. Dig. 89; Warren *v.* Rosenberg, 94 Wis. 523, 69 N. W. 339. See also Teller *v.* Randall, 40 Barb. (N. Y.) 242, 26 How. Pr. (N. Y.) 155.

Property held under revoked permit.— Chappell *v.* Winters, 16 N. Y. Wkly. Dig. 89.

Partial ability will not excuse compliance with the order. State *v.* Downing, 40 Oreg. 309, 58 Pac. 863, 66 Pac. 917.

74. Putnam *v.* Anthony, 7 N. Y. St. 580.

party charged obeys the order, the court may decline to proceed further with the proceedings.[75]

k. Order of Conviction — (i) *In General.* An oral order made in the absence of the party and without appearance on his behalf or any case made by the moving party is improper.[76]

(ii) *Requisites.* The order convicting of the contempt should specify the particular misconduct constituting it.[77] And where by statute prejudice must have resulted to the creditor, the order must also state that the misconduct defeated, impaired, impeded, or prejudiced his rights or remedies.[78] But an order imposing a fine to indemnify the creditor for costs and disbursements, and the damage and loss sustained by the contempt, need not show that actual loss was sustained, or recite a finding of the facts on which the loss was based.[79]

(iii) *Alternative Order.* An order in the alternative requiring compliance with its directions, or that the party be imprisoned until he obey it,[80] or fully satisfy the judgment, is improper.[81]

(iv) *Conditional Order.* An order relieving the offender from punishment on compliance with certain conditions therein contained is regular and proper.[82]

l. Punishment[83] — (i) *In General.* Where it is fairly made to appear that the creditor has sustained or will sustain loss or damage by reason of the contumacy of the person against whom proceedings have been brought,[84] it may be punished by imposing a fine on the contemner and committing him to jail until payment of the same, or by otherwise complying with the mandate of the court,[85]

75. Hilton *v.* Patterson, 18 Abb. Pr. (N. Y.) 245.

76. Tinkey *v.* Langdon, 60 How. Pr. (N. Y.) 180.

77. De Witt *v.* Dennis, 30 How. Pr. (N. Y.) 131.

Failure to pay over or deliver property.— See *In re* O'Connell, 49 Kan. 415, 30 Pac. 456.

78. Wolf *v.* Buttner, 6 Misc. (N. Y.) 119, 26 N. Y. Suppl. 52.

79. Rugg *v.* Spencer, 59 Barb. (N. Y.) 383. An order which denies the creditor's application as to the excess paid out by the debtor over the fine implies that such excess was paid for necessaries. Kemp *v.* Elliott, 19 Misc. (N. Y.) 710, 43 N. Y. Suppl. 501.

80. Kennesaw Mills Co. *v.* Walker, 19 S. C. 104.

81. *In re* O'Connell, 49 Kan. 415, 30 Pac. 456.

82. Billings *v.* Carver, 54 Barb. (N. Y.) 40; Putnam *v.* Anthony, 7 N. Y. St. 580.

Stipulation not to sue.— People *v.* Sickles, 59 Hun (N. Y.) 342, 13 N. Y. Suppl. 101.

Permitting proof of non-ownership of money ordered paid over.— See Hasse *v.* Matheson, 1 Misc. (N. Y.) 2, 20 N. Y. Suppl. 660.

Reassignment of rights transferred.— A provision that the debtor shall obtain a reassignment of rights transferred by him prior to the judgment is unauthorized. Meyer *v.* Dreyspring, 3 Misc. (N. Y.) 560, 23 N. Y. Suppl. 315.

Security for property in dispute.— See Lilienthal *v.* Wallach, 37 Fed. 241.

83. **Proceedings to discharge offender from custody** see Habeas Corpus. See also, generally, Fines.

Females may be punished for a contempt of this nature. Joyce *v.* Everson, 161 Ind. 440, 69 N. E. 135.

84. Rugg *v.* Spencer, 59 Barb. (N. Y.) 383.

Property of a debtor in custody who persistently refuses to deliver it to a receiver may be sequestered and his servant and agents forbidden to deliver it to him or to apply it to his use on pain of contempt. People *v.* Rogers, 2 Paige (N. Y.) 203.

85. McDonnell *v.* Henderson, 74 Iowa 619, 38 N. W. 512; *In re* Burrows, 33 Kan. 675, 7 Pac. 148; People *v.* Kingsland, 3 Abb. Dec. (N. Y.) 526, 3 Keyes (N. Y.) 320, 5 Abb. Pr. N. S. (N. Y.) 90; Brush *v.* Lee, 1 Abb. Dec. (N. Y.) 238, 2 Transcr. App. (N. Y.) 95. 6 Abb. Pr. N. S. (N. Y.) 50; Isaacs *v.* Calder, 42 N. Y. App. Div. 152, 59 N. Y. Suppl. 21; People *v.* Sickles, 59 Hun (N. Y.) 342, 13 N. Y. Suppl. 101; King *v.* Flynn, 37 Hun (N. Y.) 329; People *v.* Jacobs, 5 Hun (N. Y.) 428; People *v.* Oliver, 66 Barb. (N. Y.) 570; Fenner *v.* Sanborn, 37 Barb. (N. Y.) 610; Ross *v.* Clussman, 3 Sandf. (N. Y.) 676; Kemp *v.* Elliott, 19 Misc. (N. Y.) 710, 43 N. Y. Suppl. 501; Walter *v.* Pecare, 11 N. Y. Suppl. 146; Wynkoop *v.* Myers, 7 N. Y. Suppl. 898; Lippert *v.* Olejniczak, 3 N. Y. Suppl. 6; Waters *v.* Miller, 3 Month. L. Bul. (N. Y.) 101.

Constitutional provisions, abolishing imprisonment for debt, preserving the right of one accused of crime to indictment by a grand jury, and trial by a petit jury and forbidding the deprivation of liberty without due process of law are not violated by commitment for contempt. State *v.* Recht, 23 Minn. 411.

A fine cannot be imposed arbitrarily and capriciously; but it must have a basis upon proof of damages or injury. Tinkey *v.* Langdon, 60 How. Pr. (N. Y.) 180.

Time of imprisonment.— Matter of Pester, 2 Code Rep. (N. Y.) 98.

or until he has been duly discharged according to law, as for instance by release on bail.[86]

(II) *AMOUNT OF FINE.* Contempt in these proceedings is punishable as a civil and not as a criminal contempt, and the fine imposed should be sufficient to indemnify the creditor for his loss and injury, together with costs and expenses.[87] Under a statute providing that, where actual loss has been sustained by the creditor, a fine sufficient to indemnify him may be imposed, but, where no actual damages are shown, a fine not exceeding the costs and disbursements of the injured party and a specified sum in addition may be inflicted. A fine equal to the amount of the judgment and costs is warranted where actual damages are shown,[88] but otherwise the amount of the fine is limited to the costs and disbursements, and the fixed sum designated.[89] An excessive fine imposed may be reduced to the statutory amount.[90]

m. Action on Bond[91] of Debtor Attached. A complaint in an action on a bond given for the appearance of a debtor who has been attached for a contempt need not allege the issue and return of an execution in the original action, or that an order for the attachment was made.[92]

V. Actions in Aid of Execution — 1. IN GENERAL. In some of the states an "action" in aid of execution may be instituted against third parties[93] to remove

Reversal of original judgment.— See State *v.* Downing, 40 Oreg. 309, 58 Pac. 863, 66 Pac. 917.

Presumption on appeal is in favor of the validity of the proceeding. State *v.* Becht, 23 Minn. 411.

86. Walter *v.* Pecare, 11 N. Y. Suppl. 146.

Release on bail.— Valentine *v.* Mandel, 11 N. Y. Suppl. 718, 19 N. Y. Civ. Proc. 155.

87. King *v.* Flynn, 37 Hun (N. Y.) 329; Rhodes *v.* Linderman, 17 N. Y. Suppl. 628; Tinkey *v.* Langdon, 60 How. Pr. (N. Y.) 180.

Amount of loss should not control. Lehmaier *v.* Griswold, 46 N. Y. Super. Ct. 11. See also King *v.* Flynn, 37 Hun (N. Y.) 329.

Amount of money transferred or disposed of.— The fine of one who has transferred money in violation of a restraining order should be limited to the amount transferred (Meyer *v.* Dreyspring, 3 Misc. (N. Y.) 560, 23 N. Y. Suppl. 315) or the value of the property disposed of (Feely *v.* Glennen, 2 Month. L. Bul. (N. Y.) 19). See also People *v.* Kingsland, 3 Abb. Dec. (N. Y.) 526, 3 Keyes (N. Y.) 325, 5 Abb. Pr. (N. Y.) 90.

Costs and expenses.— Leonard *v.* Jacobson, 27 Misc. (N. Y.) 325, 57 N. Y. Suppl. 818. In Matter of Hatfield, 17 N. Y. App. Div. 430, 45 N. Y. Suppl. 270 [*affirmed* in 154 N. Y. 732, 49 N. E. 1097, 155 N. Y. 628, 49 N. E. 1097].

Imposing fixed sum.— In Waters *v.* Miller, 3 Month. L. Bul. (N. Y.) 101, a debtor was fined five hundred dollars for the failure to appear for examination where the judgment exceeded two thousand five hundred dollars.

Proof of the damage must be made by the injured party. Matter of Becker, 36 Misc. (N. Y.) 322, 73 N. Y. Suppl. 577; Luedeke *v.* Coursen, 3 Misc. (N. Y.) 559, 23 N. Y. Suppl. 314. Where no actual damages are proven a fine of a sum less than the statutory amount is authorized, although it is equal to the judgment and costs. Isaacs *v.* Calder, 42 N. Y. App. Div. 152, 59 N. Y. Suppl. 21.

Where the damages cannot be definitely fixed a fine should be imposed to the statutory amount and costs. Wynkoop *v.* Myers, 7 N. Y. Suppl. 898.

88. Walter *v.* Pecare, 57 Hun (N. Y.) 587, 11 N. Y. Suppl. 146; Lippert *v.* Olejniczak, 3 N. Y. Suppl. 6. See also Ross *v.* Clussman, 3 Sandf. (N. Y.) 676; Lippert *v.* Olejniczak, 3 N. Y. Suppl. 6.

Suffering judgment on fictitious debt.— See Fenner *v.* Sanborn, 37 Barb. (N. Y.) 610.

Where a partner of the debtor refuses to answer particular questions, it is erroneous to fine him the amount of the judgment. Foley *v.* Rathbone, 4 N. Y. Wkly. Dig. 71.

89. Devereaux *v.* Clifford, 11 N. Y. App. Div. 401, 42 N. Y. Suppl. 687; Fall Brook Coal Co. *v.* Hecksher, 42 Hun (N. Y.) 534; Reynolds *v.* Gilchrest, 9 Hun (N. Y.) 203; Matter of Becker, 36 Misc. (N. Y.) 322, 73 N. Y. Suppl. 577; People *v.* Oliver, 66 Barb. (N. Y.) 570; Gallagher *v.* O'Neill, 3 N. Y. Suppl. 126.

Good faith of debtor.—See Kreizer *v.* Kitaoka, 35 Misc. (N. Y.) 842, 72 N. Y. Suppl. 1114 [*modified* in 36 Misc. 174, 73 N. Y. Suppl. 164].

90. Luedeke *v.* Coursen, 3 Misc. (N. Y.) 559, 23 N. Y. Suppl. 314.

91. Bond generally see BONDS.

92. Kelly *v.* McCormick, 2 E. D. Smith (N. Y.) 503 [*affirmed* in 28 N. Y. 318].

93. See, generally, ACTIONS.

Existence of remedy by execution.— See Swift *v.* Lucas, 92 Ga. 796, 19 S. E. 758.

Necessity of execution.— In an action to ascertain the interest of a judgment debtor in land sought to be subjected to execution, it is needless that an execution be first returned unsatisfied, if the debtor is wholly insolvent. Taylor *v.* Dunlap Stone, etc., Co., 38 Kan. 547, 16 Pac. 751.

Reaching shares of stock.— See Erwin *v.* Oldham, 6 Yerg. (Tenn.) 185, 27 Am. Dec. 458.

impediments to the enforcement of an execution,[94] or a sale thereunder;[95] to compel the foreclosure of a mortgage on the debtor's land and application of the surplus to payment of the judgment;[96] to set aside sales or assignments by the judgment debtor;[97] to reach property in possession of and claimed by another,[98] or equitable interests of the debtor,[99] or the interest of the debtor in a trust.[1]

2. Parties.[2] Where the proceedings are instituted to reach property held or claimed by a third person or an indebtedness due him to the debtor, such a person as well as the debtor is a necessary party thereto.[3]

3. Notice to Debtor. Unless so required by a statute authorizing an action against one indebted to, or having the possession or control of, the debtor's money or property, no notice of the action need be given to the debtor.[4]

4. The Complaint — a. In General.[5] If the creditor seeks to subject a particular claim to the payment of his judgment he should file a verified complaint at first,[6] or he may compel the debtor to answer under oath and frame his complaint from the information thus obtained.[7]

b. Necessary Allegations. Where an order permitting the institution of proceedings against a person indebted to the judgment debtor is a prerequisite to the complaint, an allegation therein that such an order was duly made is sufficient.[8] The recovery and entry of a judgment should be alleged,[9] also the issuance of an execution thereon to the proper county.[10] That the third party

Attachment in aid of execution see Attachment, 4 Cyc. 444 note 59.

94. Williams *v.* Reynolds, 7 Ind. 622, personalty.

95. A judgment creditor may resort to equity to remove impediments to the sale at its value of an estate which may be reached by a fieri facias. Dargan *v.* Waring, 11 Ala. 988, 46 Am. Dec. 234.

96. Fulghum *v.* Cotton, 6 Lea (Tenn.) 590.

97. Bennett *v.* McGuire, 58 Barb. (N. Y.) 625.

A valid assignment cannot be set aside. Chandler *v.* Caldwell, 17 Ind. 256.

Sale at instance of other creditor.— A statute authorizing the examination of a third party indebted to or having property of the debtor will not authorize an action to set aside as illegal a sale made at the instance of another creditor. Witherow *v.* Higgins, 13 Ind. 440.

98. Ludes *v.* Hood, 29 Kan. 49.

99. Weakley *v.* Cockrill, 2 Tenn. Ch. 316.

1. Schench *v.* Barnes, 25 N. Y. Suppl. 153, 49 N. Y. Suppl. 222.

2. Parties generally see Parties.

3. American White, etc., Bronze Co. *v.* Clark, 123 Ind. 230, 23 N. E. 855; Hoadley *v.* Caywood, 40 Ind. 239; Chandler *v.* Caldwell, 17 Ind. 256; Wall *v.* Whisler, 14 Ind. 228.

Purpose.— In a proceeding supplementary to execution, based upon an affidavit that the judgment defendant owned real estate which he unjustly refused to apply in satisfaction of the judgment, third persons cannot be made defendants for any other purpose than to answer as to any property held by them belonging to the judgment defendant, or as to their indebtedness to him. Burt *v.* Hœttinger, 28 Ind. 214.

Claim after institution of proceedings.— One who did not assert any claim to an indebtedness alleged to be due to the debtor until after institution of the proceedings may properly be made a party. American White Bronze Co. *v.* Clark, 123 Ind. 230, 23 N. E. 855.

Payee of debt.— The statute does not authorize the assignee of a note given to the debtor in payment and extinguishment of a debt to be made a party. McKnight *v.* Kinsley, 25 Ind. 336, 87 Am. Dec. 364.

Residence of debtor.—It is immaterial that the debtor and the third party reside in different counties. O'Brien *v.* Flanders, 41 Ind. 486.

Where the creditor waives an answer by the debtor, the court may refuse to permit him to file an answer and make new parties. Cooke *v.* Ross, 22 Ind. 157.

4. High *v.* Bank of Commerce, 95 Cal. 386, 30 Pac. 556, 29 Am. St. Rep. 121 [*overruling* in effect Bryant *v.* State Bank, (Cal. 1885) 8 Pac. 644]; Hexter *v.* Clifford, 5 Colo. 168.

Such a statute is constitutional.— High *v.* Bank of Commerce, 95 Cal. 386, 30 Pac. 556, 29 Am. St. Rep. 121 [*overruling* in effect Bryant *v.* State Bank, (Cal. 1885) 8 Pac. 644].

5. Complaint generally see Pleading.

6. Banty *v.* Buckles, 68 Ind. 49.

7. Banty *v.* Buckles, 68 Ind. 49.

8. High *v.* Bank of Commerce, 95 Cal. 386, 30 Pac. 556, 29 Am. St. Rep. 121.

9. An allegation that a judgment was recovered, entered (High *v.* Bank of Commerce, 95 Cal. 386, 30 Pac. 556, 29 Am. St. Rep. 121), and docketed (McCutcheon *v.* Weston, 65 Cal. 37, 2 Pac. 727) is equivalent to an allegation that it was duly given.

Exhibition of transcript.— It is not necessary to make a transcript of the judgment, or any part of it, an exhibit in the case. Dunning *v.* Rogers, 69 Ind. 272.

10. McKinney *v.* Snider, 116 Ind. 160, 18 N. E. 526; Pouder *v.* Tate, 111 Ind. 148, 12 N. E. 291; Fowler *v.* Griffin, 83 Ind. 297;

has property of the debtor or is indebted to him,[11] which with other property claimed by him as exempt will exceed the amount exempt by law,[12] that the judgment debtor holds no other property than that sought to be reached in the hands of such third person subject to execution sufficient to satisfy the judgment,[13] that the debtor unjustly refuses to apply the money or property sought to be reached to the satisfaction of the judgment,[14] the nature of the claim sought to be enforced against the third party,[15] and if it is sought to establish fraud or a trust relation between the debtor and the third party, the necessary facts must be stated.[16] But plaintiff need not anticipate or negative matters of defense.[17]

c. Verification. The failure to verify the complaint may be waived by the interposition of an answer to the merits.[18]

5. The Answer[19] — a. In General. Under the Indiana practice, after the making of an order requiring the parties to appear and answer, the proceedings are summary, without further pleadings and therefore no answer is necessary.[20]

b. Verification. The answer must be duly verified or it will be rejected.[21]

c. Conclusiveness. Sworn denials by the debtor and the third person of any indebtedness between them is not conclusive on plaintiff.[22]

6. Defenses. Defendant cannot raise the question of the liability of a third person alleged to be indebted to him.[23]

7. Evidence[24] — a. Necessary Proof. To support a judgment against third persons all the facts necessary to entitle plaintiff to the relief sought must be proved. Thus there must be proof of the issue of execution on the judgment against the debtor where that fact is denied;[25] also evidence sufficiently describing the property sought to be reached,[26] showing that it is subject to execution,[27] and proof of the claim due the judgment debtor,[28] so as to enable the court to direct

Harper *v.* Behagg, 14 Ind. App. 427, 42 N. E. 1115.

Residence of debtor.— It must appear that the execution was issued to the sheriff of the county in which the debtor resides, or that the debtor resides in the county (Pouder *v.* Tate, 111 Ind. 148, 12 N. E. 291), or is a nonresident of the state (Harper *v.* Behagg, 14 Ind. App. 427, 42 N. E. 1115). A bill to subject the debtor's choses in action to satisfaction of a judgment recovered against him in one county and on which execution was issued in another county must allege that the debtor resided in the latter county. Moore *v.* Young, 1 Dana (Ky.) 516.

11. Murphy *v.* Busick, 22 Ind. App. 247, 53 N. E. 475, 72 Am. St. Rep. 304.

Indefiniteness as to the property or its location is waived by an answer to the merits. Fillson *v.* Scott, 15 Ind. 187.

12. McKinney *v.* Snider, 116 Ind. 160, 18 N. E. 526.

A complaint is insufficient which alleges that the property sought to be reached, together with the amount already in the hands of the judgment defendant, subject to be claimed as exempt from execution, exceeds the amount exempt by law. Dillman *v.* Dillman, 90 Ind. 585.

13. Vordermark *v.* Wilkinson, 147 Ind. 56, 46 N. E. 336; Baker *v.* State, 109 Ind. 47, 9 N. E. 711; Cushman *v.* Gephart, 97 Ind. 46.

14. Mitchell *v.* Bray, 106 Ind. 265, 6 N. E. 617; Dandistel *v.* Kronenberger, 39 Ind. 405.

15. Harris *v.* Howe, 2 Ind. App. 419, 28 N. E. 711.

16. Harris *v.* Howe, 2 Ind. App. 419, 28 N. E. 711.

17. Murphy *v.* Busick, 22 Ind. App. 247, 53 N. E. 475, 72 Am. St. Rep. 304.

18. Fillson *v.* Scott, 15 Ind. 187.

19. **Answer** generally see Pleading.

20. Carpenter *v.* Vanscoten, 20 Ind. 50.

Rulings on demurrer to an answer and reply unnecessarily interposed are immaterial and harmless. Wallace *v.* Lawyer, 91 Ind. 128. Where an attaching creditor filed an answer and cross complaint, it is not cause for reversal that the court overruled demurrers thereto, and denied a motion to strike out the same. Kendallville First Nat. Bank *v.* Stanley, 4 Ind. App. 213, 30 N. E. 799.

Striking out.— See Coffin *v.* McClure, 23 Ind. 356.

If plaintiff has waived an answer by the debtor, the court may refuse to permit him to file one. Cooke *v.* Ross, 22 Ind. 157.

21. Routh *v.* Spencer, 30 Ind. 348.

The court may strike out that part of an answer not verified as required by statute, without requiring its sufficiency to be tested by demurrer. Coffin *v.* McClure, 23 Ind. 356.

22. Toledo, etc., R. Co. *v.* Howes, 68 Ind. 458.

23. Cooke *v.* Ross, 22 Ind. 157.

24. **Evidence** generally see Evidence.

25. Chandler *v.* Caldwell, 17 Ind. 256.

Aider by affidavit.— See Balz *v.* Benninghof, 5 Ind. App. 522, 32 N. E. 595.

Presumption.— Fowler *v.* Griffin, 83 Ind. 297.

26. Wallace *v.* Lawyer, 91 Ind. 128.

27. Lowry *v.* McAlister, 86 Ind. 543.

28. Wallace *v.* Lawyer, 91 Ind. 128.

what property shall be levied on and sold[29] and what indebtedness due the debtor shall be applied to the payment of the judgment against him.[30]

b. Admissibility. Evidence in behalf of plaintiff is admissible to overcome evidence of the debtor that he has no property subject to execution;[31] but evidence of the third party is not evidence against the debtor,[32] and written evidence of transactions as to which the facts may be elicited from the debtor is immaterial.[33]

c. Sufficiency. The evidence must be sufficient to show the existence of property or an indebtedness applicable to the judgment.[34] Proof of issuance of an execution in the county where the firm debtor and one partner did business and its return unsatisfied *prima facie* establishes exhaustion of the legal remedy.[35]

d. Burden of Proof. The burden is on the creditor to show the existence of interests sought to be reached,[36] and where the allegations of the petition are taken as *prima facie* true, after a traverse by the debtor he must make sufficient proof to cast on plaintiff the burden of proving such allegations.[37]

8. Trial[38] — a. Questions Triable. Where the person summoned asserts ownership in another the question of ownership is in issue.[39]

b. Examination of Witnesses. The party calling a witness is under no obligation to inform the court as to the testimony he expects to elicit if the witness is permitted to answer the question.[40]

c. Findings. The court is not required to make special findings of fact and to state its conclusions of law thereon.[41]

d. Objections and Exceptions. Where errors occur on the trial objections must be made and exceptions saved and presented in and by the record, in the same manner as in any other civil action.[42] An exception which treats one paragraph of an answer as an entire answer is bad for indefiniteness.[43]

29. Wallace *v.* Lawyer, 91 Ind. 128.

30. Wallace *v.* Lawyer, 91 Ind. 128.

31. Bipus *v.* Deer, 106 Ind. 135, 5 N. E. 894.

32. O'Brien *v.* Flanders, 58 Ind. 22.

33. Comstock *v.* Grindle, 121 Ind. 459, 23 N. E. 494.

34. Hetch *v.* Eherke, 95 Iowa 757, 64 N. W. 650.

Continued existence of bank account.—High *v.* Bank of Commerce, 103 Cal. 525, 37 Pac. 508.

Indebtedness to debtor.— See Pounds *v.* Chatham, 96 Ind. 342; Harris *v.* Howe, 2 Ind. App. 419, 28 N. E. 711.

An averment that the debtor conceals his property and wrongfully refuses to apply it to the judgment is not sustained by proof that he has real estate and that debts are due him. Wallace *v.* Lawyer, 91 Ind. 128.

35. Hyatt *v.* Dusenbury, 12 N. Y. Civ. Proc. 152, where it was held unnecessary to show that execution had also been issued against the individual members in the counties where they respectively resided.

36. Fowler *v.* Hobbs, 86 Ind. 131.

37. Thompson *v.* Muller, 36 La. Ann. 728.

38. Trial generally see Trial.

39. Burkett *v.* Bowen, 118 Ind. 379, 21 N. E. 38.

40. For the reason that the very nature of the proceeding is to obtain information from the adverse party, the character of which is unknown to the party making the examination. Comstock *v.* Grindle, 121 Ind. 459, 23 N. E. 494.

41. Hutchinson *v.* Trauerman, 112 Ind. 21, 13 N. E. 412.

Special findings are not authorized, and if made will be treated as a general finding. Balz *v.* Benninghof, 5 Ind. App. 522, 32 N. E. 595.

Written findings are not necessary. Lyons *v.* Marcher, 119 Cal. 382, 51 Pac. 559.

42. Kissell *v.* Anderson, 73 Ind. 485.

43. Coffin *v.* McClure, 23 Ind. 356.

Liens and claims of third persons.—Defendant was appointed receiver of the holder of a liquor tax certificate in supplementary proceedings, and thereafter demanded and received such certificate from the debtor, without knowledge that plaintiff claimed to own the same by reason of his having advanced the money paid therefor. Under an order of the court appointing such receiver, he surrendered the certificate, and his report disposing of the proceeds thereof was confirmed without any notice of plaintiff's claim. It was held that the receiver's acts done in obedience to the mandate of the court did not constitute a conversion of the certificate as against plaintiff. Ernest Ochs *v.* Pohly, 87 N. Y. App. Div. 92, 84 N. Y. Suppl. 1. Under N. Y. Code Civ. Proc. § 2469, providing that where a receiver's title to personal property has become vested, and an order requiring the judgment debtor to attend and be examined has been served before the appointment of a receiver, his title extends back, so as to include the debtor's personal property at the time of the service of the order, but that this shall not affect the title of a

W. Liens[44] — **1. In General.** The rights of parties in these proceedings with respect to the acquisition of liens are in great measure analogous to the rights of the parties to a creditor's bill.[45]

2. How Acquired — a. By Institution of Proceedings — (I) *In General.* On service on the debtor of an order for his examination, the judgment creditor acquires a lien on the property of the debtor in his hands or under his control,[46] or upon funds or property of the debtor in the hands of a third party with notice or upon whom like service is made.[47]

(II) *Equitable Assets.* While it has been held that no lien on equitable assets of the debtor is acquired by the institution of the proceedings,[48] it has also been held that the commencement of the proceedings gives the creditor the same lien on such assets as he would acquire by filing a creditor's bill.[49]

b. By Appointment of Receiver. A lien is acquired by the appointment of a receiver of the debtor's property,[50] or by proceedings taken by him on behalf of

"purchaser in good faith without notice," etc., the fact that money due the judgment debtors, in the hands of a third person, was assigned in good faith, and for value, after the service of an order in supplementary proceedings upon such third person directing the payment of the money to the receiver, did not necessarily affect the rights of the assignee. Dienst *v.* Gustaveson, 85 N. Y. Suppl. 371. When he is not made a party to the proceedings, the rights of an assignee of money due the judgment debtor, in the hands of a third person, assigned after service of an order in supplementary proceedings on such third person directing the payment of the money to the receiver, are not made greater or less by the order, as against such third person. Dienst *v.* Gustaveson, 85 N. Y. Suppl. 371.

44. Lien generally see Liens.

45. Billson *v.* Linderberg, 66 Minn. 66, 68 N. W. 771; Lynch *v.* Johnson, 48 N. Y. 27 [*affirming* 46 Barb. 56]; Duffy *v.* Dawson, 2 Misc. (N. Y.) 401, 21 N. Y. Suppl. 978; Kellogg *v.* Coller, 47 Wis. 649, 3 N. W. 433; Tomlinson, etc., Mfg. Co. *v.* Shatto, 34 Fed. 380.

46. Cooke *v.* Ross, 22 Ind. 157; Graydon *v.* Barlow, 15 Ind. 197; Billson *v.* Linderberg, 66 Minn. 66, 68 N. W. 771; McCorkle *v.* Herrman, 117 N. Y. 297, 22 N. E. 948; Lynch *v.* Johnson, 48 N. Y. 27 [*affirming* 46 Barb. 56]; Matter of Pennsylvania Glass Co., 25 Misc. (N. Y.) 130, 58 N. Y. Suppl. 1067, 29 N. Y. Civ. Proc. 383; Duffy *v.* Dawson, 2 Misc. (N. Y.) 401, 21 N. Y. Suppl. 978; Guggenheimer *v.* Stephens, 7 N. Y. Suppl. 263, 17 N. Y. Civ. Proc. 383.

Necessity of attachment.—On a proceeding to subject property specifically described after a return of "no property" no attachment is necessary to give a lien. Murphy *v.* Cochran, 80 Ky. 239.

Necessity of scire facias.— In Pennsylvania a bill for discovery in aid of a judgment, which is not accompanied by a scire facias, gives no lien as against the attachment of a third party. People's Nat. Bank *v.* Kern, 193 Pa. St. 59, 44 Atl. 331.

Subject-matter.— A lien is not acquired on moneys to be paid on a contingency. Edmonston *v.* McLoud, 19 Barb. (N. Y.) 356 [*affirmed* in 16 N. Y. 543].

Conveyance in pursuance of contract made before judgment.— Where after service the debtor left the state and no further proceedings were had under the order, the creditor was held not to be entitled to the consideration of a conveyance of land made in pursuance of a contract entered into before recovery of the judgment. Edmonston *v.* McLoud, 16 N. Y. 543 [*affirming* 19 Barb. 356].

Enforcement in surrogate's court.—The lien acquired, unless perfected by the appointment of a receiver, or an order directing the application of property in the debtor's lifetime, cannot be enforced against his estate in the surrogate's court after his death. Stewart's Estate, 8 N. Y. Civ. Proc. 354; Billings *v.* Stewart, 4 Dem. Surr. (N. Y.) 265.

47. Billson *v.* Linderberg, 66 Minn. 66, 68 N. W. 771; Bevans *v.* Pierce, 1 N. Y. City Ct. 259.

Assets in hands of stranger.— By service on a third person no lien is acquired on assets of the debtor in the hands of a stranger to the proceeding. Billson *v.* Linderberg, 66 Minn. 66, 68 N. W. 771.

Shares of stock.— A lien is acquired on stock in a corporation against which proceedings in aid of execution are instituted, from the time of service upon it of the notice required by statute. Ball *v.* Towle Mfg. Co., 67 Ohio St. 306, 65 N. E. 1015, 93 Am. St. Rep. 682.

Sufficiency of service.— See Billson *v.* Linderberg, 66 Minn. 66, 68 N. W. 771.

Where no service is had on the judgment debtor the proceedings against a third person will not give the creditor a general lien on assets of the debtor subsequently discovered by him, but only on assets in the possession or under the control of such person. Billson *v.* Linderberg, 66 Minn. 66, 68 N. W. 771.

48. Voorhees *v.* Seymour, 26 Barb. (N. Y.) 569.

49. Lynch *v.* Johnson, 48 N. Y. 27 [*affirming* 46 Barb. 56]; Duffy *v.* Dawson, 2 Misc. (N. Y.) 401, 21 N. Y. Suppl. 978; Porter *v.* Williams, 5 How. Pr. (N. Y.) 441; Tomlinson, etc., Mfg. Co. *v.* Shatto, 34 Fed. 380.

50. Bevans *v.* Pierce, 1 N. Y. City Ct. 259.

An assignment executed and delivered be-

the creditor,[51] as an action to set aside a transfer by the debtor as fraudulent.[52] But no lien is acquired on assets assigned or transferred by the debtor prior to the institution of the proceedings.[53]

3. Priorities — a. In General. The lien acquired by the institution of the proceedings is superior to that of a senior judgment creditor,[54] but inferior to a levy by another creditor.[55] As between creditors, the one whose order instituting the proceedings is first served acquires a prior lien.[56] The lien acquired by a receiver on setting aside a transfer relates back to the commencement of the action brought for that purpose and will overreach the title of a purchaser *pendente lite*.[57] As between receivers, priority will be determined by the time of the applications for the receiverships, and not by the time of appointment.[58] The priority of judgment liens on land or its proceeds is determinable by the order in which the judgments were entered.[59]

b. Proceedings to Determine. The question of priority is not the subject of action, but should be summarily presented to and disposed of by the court in a proceeding to which the claimants are made parties.[60]

4. Loss of Lien. A lien acquired by the institution of the proceedings may be lost or divested by their abandonment,[61] but not by a subsequent assignment or transfer by the judgment debtor,[62] an amendment of the original affidavit,[63] a subsequent adjudication of bankruptcy against the debtor,[64] or, where the party seeking to subordinate the lien is not acting in good faith, by laches.[65] Nor will the lien be extinguished by the death of the debtor,[66] or in the absence of fraud or collusion by permitting the debtor to retain possession of the property.[67]

X. Costs[68] **— 1. Of the Proceedings — a. Right to.** The statutes authorizing

fore the appointment of the receiver but recorded thereafter confers on the assignee a title superior to that of the receiver. Nicoll *v.* Spowers, 105 N. Y. 1, 11 N. E. 138.

Death of debtor.— See Rankin *v.* Minor, 72 N. C. 424.

Extension of receivership.— See Conger *v.* Sands, 19 How. Pr. (N. Y.) 8.

51. Billson *v.* Linderberg, 66 Minn. 66, 68 N. W. 771.

Contribution to expense of suit by stranger. — See Billson *v.* Linderberg, 66 Minn. 66, 68 N. W. 771.

52. Jeffres *v.* Cochrane, 47 Barb. (N. Y.) 557; Palen *v.* Bushnell, 13 N. Y. Suppl. 785, 18 N. Y. Civ. Proc. 56. See also Field *v.* Sands, 8 Bosw. (N. Y.) 685.

Relation back.— If a fraudulent transfer is set aside the lien will relate back to the commencement of the action. Jeffres *v.* Cochrane, 47 Barb. (N. Y.) 557; Field *v.* Sands, 8 Bosw. (N. Y.) 685.

53. Field *v.* Sands, 8 Bosw. (N. Y.) 685.

54. Duffy *v.* Dawson, 19 N. Y. Suppl. 186, 22 N. Y. Civ. Proc. 235.

55. Becker *v.* Torrance, 31 N. Y. 631.

56. Bevans *v.* Pierce, 1 N. Y. City Ct. 259.

Actual notice of pending proceeding.— See Kellogg *v.* Coller, 47 Wis. 649, 3 N. W. 433.

A priority is not lost by the fact that the debtor aided the creditor in securing service of process. Bevans *v.* Pierce, 1 N. Y. City Ct. 259. The lien of a receiver appointed in proceedings in which the debtor voluntarily appeared is subordinate to that of a senior creditor who before the appointment regularly instituted proceedings, and to whose judgment the receivership was extended. Youngs *v.* Klunder, 7 N. Y. Suppl. 498.

57. Jeffres *v.* Cochrane, 47 Barb. (N. Y.) 557.

A lien acquired by the commencement of a creditor's suit will not relate back to the institution of supplementary proceedings on the same judgment. Edmonston *v.* McLoud, 16 N. Y. 543 [*affirming* 19 Barb. 356].

58. Parks *v.* Sprinkle, 64 N. C. 637.

59. Guggenheimer *v.* Stevens, 7 N. Y. Suppl. 263, 17 N. Y. Civ. Proc. 383; Phillips *v.* O'Connor, 1 N. Y. City Ct. 372.

60. Myrick *v.* Selden, 36 Barb. (N. Y.) 15; Duffy *v.* Dawson, 2 Misc. (N. Y.) 401, 21 N. Y. Suppl. 978 [*affirming* 19 N. Y. Suppl. 186, 22 N. Y. Civ. Proc. 235].

61. Ballou *v.* Borland, 14 Hun (N. Y.) 355, further holding that the lien cannot be restored by a creditor's action.

62. Cooke *v.* Ross, 22 Ind. 157; Graydon *v.* Barlow, 15 Ind. 197.

63. Cooke *v.* Ross, 22 Ind. 157.

64. Palen *v.* Bushnell, 13 N. Y. Suppl. 785, 18 N. Y. Civ. Proc. 56.

65. New York Loan, etc., Co. *v.* De Navarro, 38 Misc. (N. Y.) 436, 77 N. Y. Suppl. 1006.

66. Stewart's Estate, 8 N. Y. Civ. Proc. 354, 4 Dem. Surr. (N. Y.) 265

The lien cannot be enforced in the surrogate's court after the death of the debtor, where no receiver has been appointed or application made to apply the debtor's property. Stewart's Estate, 8 N. Y. Civ. Proc. 354, 4 Dem. Surr. (N. Y.) 265.

67. Fessenden *v.* Woods, 3 Bosw. (N. Y.) 550.

68. Costs generally see Costs.

proceedings supplementary to execution generally provide for the allowance of costs and disbursements of the proceedings or of a fixed sum in lieu of costs. They may be allowed to the judgment creditor,[69] in a proper case to the judgment debtor,[70] a third person whose examination discloses no possession or control of property belonging to the debtor,[71] or one who, although not a party to the action, was made a party to the proceeding.[72] The payment or satisfaction of the judgment will not preclude the right to costs or disbursements.[73]

b. Application For. An application for an allowance of a sum as costs should not be made until the close of the proceeding,[74] and is not too late if made at any time before the final order for the application of the funds in the hands of the receiver.[75] The order directing their payment may be made without notice to the debtor.[76]

c. Taxation. Where the costs are taxable as costs in a special proceeding to be adjusted by the court or a judge thereof as it or he may direct, on appeal from a taxation by the clerk, a judge to whom the appeal is taken may direct a readjustment by the clerk.[77]

d. Collection — (i) *By Execution.* Final costs in the proceeding for which an exclusive mode of collection is provided cannot be collected by execution.[78]

69. Holton *v.* Robinson, 59 N. Y. App. Div. 45, 69 N. Y. Suppl. 33; Grinnel *v.* Sherman, 11 N. Y. Suppl. 682, 19 N. Y. Civ. Proc. 139; Colne *v.* Girard, 19 Abb. N. Cas. (N. Y.) 288; Johnson *v.* Tuttle, 17 Abb. Pr. (N. Y.) 315; Kearney's Case, 13 Abb. Pr. (N. Y.) 459, 22 How. Pr. (N. Y.) 309.

Examination of third person.— The cost of proceedings instituted for the examination of a third person may be awarded in favor of the creditor and against the debtor. Grinnel *v.* Sherman, 11 N. Y. Suppl. 682, 19 N. Y. Civ. Proc. 139.

What may be allowed.— The creditor may be allowed, not only the sum provided for by statute, but also such other costs as may be provided for the civil officers of the court, including the attorney's fees, for any specified service in the action. Dauntless Mfg. Co. *v.* Davis, 24 S. C. 536.

Stenographer's fees and the expense of preparing maps are not a legitimate item of costs. Provost *v.* Farrell, 13 Hun (N. Y.) 303.

Property chargeable.— Payment may be ordered out of any property applicable to the judgment. Holton *v.* Robinson, 59 N. Y. App. Div. 45, 69 N. Y. Suppl. 33; Kearney's Case, 13 Abb. Pr. (N. Y.) 459, 22 How. Pr. (N. Y.) 309.

70. Kress *v.* Morehead, 8 N. Y. St. 858; Boelger *v.* Swivel, 1 How. Pr. N. S. (N Y.) 372; Hulsaver *v.* Wiles, 11 How. Pr. (N. Y.) 446.

Necessity of examination.— Where no good cause for the examination is shown. Anonymous, 3 Sandf. (N. Y.) 725, Code Rep. N. S. (N. Y.) 113.

Costs of a successful motion to dismiss the proceedings may be granted. Hutson *v.* Weld, 38 Hun (N. Y.) 142.

Where the proceedings are dismissed for irregularity, and no examination is had, no costs can be allowed to the debtor, if not provided for by statute. Simms *v.* Frier, 2 Month. L. Bul. (N. Y.) 97. And see Hutson *v.* Weld, 38 Hun (N. Y.) 142.

If no examination was had the debtor is not entitled to costs. Engle *v.* Bonneau, 2 Sandf. (N. Y.) 679, 3 Code Rep. (N. Y.) 205. See also Simms *v.* Frier, 2 Month. L. Bul. (N. Y.) 97.

Where no property is discovered the debtor is held to be entitled to costs. Anonymous, 3 Sandf. (N. Y.) 725, Code Rep. N. S. (N. Y.) 113.

What constitute "costs."— An order allowing a stated sum as counsel fee is an allowance for costs. Hulsaver *v.* Wiles, 11 How. Pr. (N. Y.) 446.

71. Anonymous, 11 Abb. Pr. (N. Y.) 108 (where a long examination was had); Sloane *v.* Higgins, 2 Month. L. Bul. (N. Y.) 11.

Irregular issues.— Where the transferee of a note was required to answer to determine his indebtedness to the payee, and the issue was found in his favor, he was entitled to costs, although the issue of fact was irregularly made and tried. Rice *v.* Jones, 103 N. C. 226, 9 S. E. 571, 14 Am. St. Rep. 801.

72. Davis *v.* Turner, 4 How. Pr. (N. Y.) 190.

A county treasurer served with motion papers and who was represented by counsel may be allowed costs. Stettheimer *v.* Stettheimer, 2 N. Y. St. 358.

73. Holton *v.* Robinson, 59 N. Y. App. Div. 45, 69 N. Y. Suppl. 33; Colne *v.* Girard, 19 Abb. N. Cas. (N. Y.) 288.

Satisfaction of the judgment by a second execution will preclude the right. Ritter *v.* Greason, 28 Misc. (N. Y.) 656, 56 N. Y. Suppl. 1053.

74. Davis *v.* Turner, 4 How. Pr. (N. Y.) 190.

75. Webber *v.* Hobbie, 13 How. Pr. (N. Y.) 382.

76. Serven *v.* Lowerre, 3 Misc. (N. Y.) 113, 23 N. Y. Suppl. 1052.

77. Foley *v.* Rathbone, 12 Hun (N. Y.) 589.

78. Valiente *v.* Bryan, 65 How. Pr. (N. Y.) 203.

And a statute providing that costs shall be recovered in an action, and a separate execution issued therefor, has been held not to be within a general provision respecting the time when executions may issue generally.[79]

(II) *By Deduction From Judgment.* It has been held that costs awarded to the debtor may be credited on the judgment;[80] but it has also been held that, where an adequate and exclusive mode of applying money or property discovered has been provided, a deduction of costs from the judgment is unauthorized.[81]

e. Security For Costs. Unless so provided by statute, the judgment debtor cannot require the creditor to file security for the costs of the proceeding.[82]

2. In Actions by Receivers — a. In General. A receiver is not entitled to costs and disbursements in an action in which he is a nominal defendant against whom no personal claim is made,[83] nor, when made a party to an action by the debtor in which he interposes an answer seeking affirmative relief, is he entitled to costs against his co-defendant.[84] But an unsuccessful appeal will not affect his right to costs, if he was justified and was guilty of no impropriety in taking the appeal,[85] and he may be adjudged to pay costs personally where he has instituted and prosecuted an action without leave of the court,[86] or has inexcusably interfered with property of a third party.[87]

b. Liability of Judgment Creditors. Judgment creditors are not personally liable for the costs of an unsuccessful action brought by a receiver, where they are not parties to the action and have taken no part in its prosecution.[88] But a creditor is so liable if he directs or takes an active part in prosecuting the action in the receiver's name for his own benefit,[89] or procures himself to be appointed receiver before the recovery of judgment, and illegally seizes property.[90]

c. Security For Costs. A receiver may be required to give security for costs.[91] As where he has no funds in his hands applicable to the payment of costs and has obtained leave to sue.[92]

3. In Contempt Proceedings. The judgment creditor is entitled to costs in proceedings to punish for a contempt in which the party charged has been convicted,[93] and in the exercise of its discretion costs may be awarded against him

79. See Stevens *v.* Manson, 87 Me. 436, 32 Atl. 1002.

80. Kress *v.* Morehead, 8 N. Y. St. 858.

81. Boelger *v.* Swivel, 1 How. Pr. N. S. (N. Y.) 372.

82. Newville First Nat. Bank *v.* Yates, 21 Misc. (N. Y.) 373, 47 N. Y. Suppl. 484.

83. Baldwin *v.* Eazler, 34 N. Y. Super. Ct. 274.

84. Arthur *v.* Dalton, 14 N. Y. App. Div. 108, 43 N. Y. Suppl. 583.

85. Matter of Merry, 11 N. Y. App. Div. 597, 42 N. Y. Suppl. 617.

86. Smith *v.* Woodruff, 6 Abb. Pr. (N. Y.) 65.

Amendment of judgment.—A judgment for costs entered against the receiver personally by mistake in supposing him to have brought suit without leave may be amended by directing payment out of the property of the debtor in his hands. Henry *v.* Randall, 15 N. Y. Wkly. Dig. 106.

87. Robinson *v.* Wood, 15 N. Y. Suppl. 169.

88. Cutter *v.* O'Reilly, 31 How. Pr. (N. Y.) 472.

A creditor who was not instrumental in obtaining the appointment of a receiver, and did not direct or authorize an action by the latter is not a "party represented" by him within a statute charging such a party with costs. McHarg *v.* Donnelly, 27 Barb. (N. Y.) 100.

89. Ward *v.* Roy, 69 N. Y. 96; Bourdon *v.* Martin, 84 Hun (N. Y.) 179, 32 N. Y. Suppl. 441; O'Conner *v.* Merchants' Bank, 64 Hun (N. Y.) 624, 19 N. Y. Suppl. 319.

When action deemed "brought" by creditor.— See Gallation *v.* Smith, 48 How. Pr. (N. Y.) 477.

Collection.— The creditor cannot be compelled to pay costs before the judgment therefor is perfected. Fredericks *v.* Niver, 28 Hun (N. Y.) 417.

90. Robinson *v.* Wood, 15 N. Y. Suppl. 169.

91. Gifford *v.* Rising, 55 Hun (N. Y.) 61, 8 N. Y. Suppl. 279; Smith *v.* Clarke, 1 Month. L. Bul. (N. Y.) 83.

In New York, by rule of court, a receiver may be required to give security for costs. See Millis *v.* Pentelow, 92 Hun (N. Y.) 284, 36 N. Y. Suppl. 906.

Indemnification of defendant in action by third persons.— See Gelster *v.* Syracuse Sav. Bank, 29 Hun (N. Y.) 594.

92. Welch *v.* Bogert, 3 N. Y. Wkly. Dig. 402.

93. On granting a motion to commit for contempt the successful party is limited to motion costs and disbursements. Jones *v.* Sherman, 8 N. Y. St. 344, 11 N. Y. Civ. Proc. 416, 18 Abb. N. Cas. (N. Y.) 461.

A reasonable counsel fee may be allowed. National Wall Paper Co. *v.* Gerlach, 15 Misc. (N. Y.) 640, 37 N. Y. Suppl. 428.

by the court when he does not succeed in securing a conviction of the party charged.[94]

Y. Appeal and Review[95] — **1. Determinations Appealable.** An appeal by the party aggrieved will lie from an order or determination affecting a substantial right made in proceedings supplementary to execution[96] to a court having jurisdiction in the premises.[97]

2. Bond or Undertaking. Where it is desired to stay the proceedings a bond or undertaking is required in these proceedings as in other cases,[98] but no security need be given where a stay is not involved.[99]

3. Review. The reviewing court is confined to the consideration of facts appearing in the proceedings and papers on appeal,[1] but may indulge in reason-

Attorney's fees in the original proceedings which accrued prior to the contempt proceedings are not allowable as a part of the expense of the latter. Van Valkenburgh *v.* Doolittle, 4 Abb. N. Cas. (N. Y.) 72.

Contempt waived.— Where because of a misunderstanding there has been no intentional contempt, and the contumacy, if any, has been waived, the creditor will not be awarded costs. Knowles *v.* De Lazare, 8 N. Y. Civ. Proc. 386.

How taxed.— The costs of an attachment to enforce an order in supplementary proceedings are to be taxed as costs of proceedings in the action, and not as costs of special proceedings. Seeley *v.* Black, 35 How. Pr. (N. Y.) 369.

94. In proceedings by a judgment creditor against the debtor for contempt in disobeying an injunction order, an order to show cause and a reference being had on the creditor's application, in both of which he failed, the court properly exercised its discretion in awarding costs against the creditor. Rhodes *v.* Linderman, 17 N. Y. Suppl. 628.

95. Appeal generally see Appeal and Error.

96. An appeal will lie from an order dismissing (Connolly *v.* Kretz, 78 N. Y. 620; Hawes *v.* Barr, 7 Rob. (N. Y.) 452; O'Neil *v.* Martin, 1 E. D. Smith (N. Y.) 404; Holstein *v.* Rice, 15 Abb. Pr. (N. Y.) 307, 24 How. Pr. (N. Y.) 135), or refusing to dismiss or vacate an order or proceedings for the examination of the debtor (Robens *v.* Sweet, 48 Hun (N. Y.) 436, 1 N. Y. Suppl. 839; Conway *v.* Hitchins, 9 Barb. (N. Y.) 378) or a third person (Schenck *v.* Irwin, 60 Hun (N. Y.) 361, 15 N. Y. Suppl. 55); an order directing the payment of money or delivery of property (Crounse *v.* Whipple, 34 How. Pr. (N. Y.) 333; Holstein *v.* Rice, 15 Abb. Pr. (N. Y.) 307, 24 How. Pr. (N. Y.) 135; Hayes *v.* McClelland, 20 N. Y. Wkly. Dig. 393. *Contra*, Joyce *v.* Holbrook, 2 Hilt. (N. Y.) 94, 7 Abb. Pr. (N. Y.) 338. And see Rodman *v.* Henry, 17 N. Y. 482; People *v.* King, 9 How. Pr. (N. Y.) 97); an order appointing (Connolly *v.* Kretz, 78 N. Y. 620; Tinkey *v.* Langdon, 60 How. Pr. (N. Y.) 180) or refusing to appoint a receiver of the debtor's property (Dollard *v.* Taylor, 33 N. Y. Super. Ct. 498), erroneous directions therein (Terry *v.* Bange, 57 N. Y. Super. Ct. 546, 9 N. Y. Suppl. 311), or the refusal to allow him the expenses of the receivership (Monohan *v.* Fitzpatrick, 16 Misc. (N. Y.) 508, 39 N. Y. Suppl. 857); or an order or judgment adjudging the debtor (Weaver *v.* Brydges, 85 Hun (N. Y.) 503, 33 N. Y. Suppl. 132; Finch *v.* Mannering, 46 Hun (N. Y.) 323, 12 N. Y. St. 453) or a witness guilty of contempt (People *v.* Warner, 51 Hun (N. Y.) 53, 3 N. Y. Suppl. 768). See also 2 Cyc. 586 *et seq.*

The debtor cannot appeal from that portion of an order to pay over which enjoins a third person from paying moneys over to any person but the receiver. Globe Phosphate Co. *v.* Pinson, 52 S. C. 185, 29 S. E. 549.

The propriety of questions propounded on the examination is not the subject of appeal. Carter *v.* Clarke, 7 Rob. (N. Y.) 490.

97. Mallory *v.* Gulick, 15 Abb. Pr. (N. Y.) 307 note; Gould *v.* Torrance, 19 How. Pr. (N. Y.) 560.

Appeal from county court.— Finch *v.* Mannering, 46 Hun (N. Y.) 323, 12 N. Y. St. 453; Billington *v.* Billington, 16 N. Y. Civ. Proc. 56; Crounse *v.* Whipple, 34 How. Pr. (N. Y.) 333 [*overruling* in effect Smith *v.* Hart, 11 How. Pr. (N. Y.) 203, which was decided prior to an amendment to the statute].

98. State *v.* Downing, 40 Oreg. 309, 58 Pac. 863, 66 Pac. 917.

An appeal from an order requiring the debtor to satisfy the judgment will not be deemed a stay of such proceedings, in the absence of an undertaking by the judgment debtor for the satisfaction of so much of the order as might be affirmed. State *v.* Downing, 40 Oreg. 309, 58 Pac. 863, 66 Pac. 917.

Amount.— A judgment under La. Rev. St. § 1781, requiring a bond for a forced surrender of a debtor's property, does not condemn him to pay any sum of money, or to deliver either movable or immovable property, and, pending an appeal from such judgment, the creditor may proceed with the execution or garnishment; hence the only bond which can be required of a party appealing suspensively from such judgment is for costs only, and not for the value of the judgment or property. State *v.* Lazarus, 36 La. Ann. 189.

99. O'Neil *v.* Martin, 1 E. D. Smith (N. Y.) 404.

1. Martini *v.* Woodhall, 56 N. Y. Super. Ct. 439, 4 N. Y. Suppl. 539.

On an appeal from an order requiring satisfaction of the judgment the whole proceeding may be looked into. Crouse *v.* Wheeler, 33 How. Pr. (N. Y.) 337.

Insufficiency of papers on appeal.— See

able presumptions.[2] Alleged defects or irregularities to which no objection or exception was taken below cannot be considered,[3] nor is a finding made below binding on the court, where the evidence on which it was made is not a part of the papers on appeal.[4]

XIV. EXECUTION AGAINST THE PERSON.[5]

A. Nature and Purpose. Execution against the person is effected by the writ of capias ad satisfaciendum, under which the sheriff arrests defendant and imprisons him till he satisfies the judgment or is discharged by proceeding of law.[6] Proceedings to procure an execution against the person are a "civil action" within the meaning of codes and statutes.[7] Such an execution is an extraordinary remedy which as a general rule is not to be resorted to if the amount due upon a judgment may be made by an ordinary execution against the property of the judgment debtor.[8] According to some decisions the purpose of such execution is the collection of the amount due,[9] but according to other authorities statutes allowing imprisonment for debt in certain cases have for their object both the enforcement of payment and the punishment of fraudulent debtors.[10]

B. Remedy as Affected by Constitution, Statute, or Agreement — 1. PROHIBITION OF IMPRISONMENT FOR DEBT. Express constitutional prohibitions against imprisonment for debt are found in a great majority, if not in all, of the states of this country,[11] and in England provision to this end is made by what is

Binghamton Trust Co. *v.* Grant, 65 N. Y. App. Div. 178, 72 N. Y. Suppl. 580.

2. Parker *v.* Page, 38 Cal. 522; Menage *v.* Lustfield, 30 Minn. 487, 16 N. W. 398.

Existence of order.— Where, on a motion to punish a judgment debtor for contempt for receiving and refusing to turn over money after the appointment of a receiver in supplementary proceedings, there is no evidence that an injunction restraining him from collecting it was ever made, the existence of such order cannot be assumed on appeal from an order denying such motion. Holmes *v.* O'Regan, 68 N. Y. App. Div. 318, 74 N. Y. Suppl. 10.

3. Matter of Van Ness, 17 N. Y. App. Div. 581, 45 N. Y. Suppl. 576; Palen *v.* Bushnell, 68 Hun (N. Y.) 554, 22 N. Y. Suppl. 1044; People *v.* Oliver, 66 Barb. (N. Y.) 570; Union Bank *v.* Sargent, 53 Barb. (N. Y.) 422, 35 How. Pr. (N. Y.) 87; Tinkey *v.* Langdon, 60 How. Pr. (N. Y.) 180; Welch *v.* Pittsburgh, etc., R. Co., 11 Ohio St. 569.

4. As a finding that defendant's false swearing was prejudicial to plaintiff's rights. Bernheimer *v.* Kelleher, 31 Misc. (N. Y.) 464, 64 N. Y. Suppl. 409.

5. Arrest for non-payment of costs see COSTS, 11 Cyc. 263.

Arrest of debtor in supplementary proceedings see *supra*, XIII, N.

Arrest on judgment of justice of the peace see JUSTICES OF THE PEACE.

Arrest under mesne process see ARREST, 3 Cyc. 898 *et seq.*

Discharge of receiptor by issue of body execution see ATTACHMENT, 4 Cyc. 668.

Imprisonment for debt see CONSTITUTIONAL LAW, 8 Cyc. 878 *et seq.*

6. Bouvier L. Dict. [*quoted* in *In re* Teuscher, 23 Fed. Cas. No. 13,846].

7. Baker *v.* State, 109 Ind. 47, 9 N. E. 711. And see *In re* Frost, 127 Mass. 550.

8. McDonald *v.* Wilkie, 13 Ill. 22, 54 Am. Dec. 423; Baker *v.* State, 109 Ind. 47, 9 N. E. 711; Wendover *v.* Tucker, 4 Ind. 381; Gwinn *v.* Hubbard, 3 Blackf. (Ind.) 14; Scott *v.* Shaw, 13 Johns. (N. Y.) 378; Cutter *v.* Colver, 3 Cow. (N. Y.) 30.

Effect of surrender of land by defendant before execution.— See Smith *v.* Snell, 1 Litt. (Ky.) 35.

Effect upon right to collateral security.—A creditor recovering judgment on a debt, and arresting the body of the debtor thereon, is not thereby precluded from continuing to hold collateral security. Smith *v.* Strout, 63 Me. 205.

Effect upon right to proceed against property.— While a creditor has the body of his debtor in execution his right to proceed against his property by virtue of the judgment is suspended, and consequently it has been held that he cannot therefore file a bill in chancery founded upon the judgment to reach the debtor's equitable estate. Tappan *v.* Evans, 11 N. H. 311; Stilwell *v.* Van Epps, 1 Paige (N. Y.) 615.

9. Hobson *v.* Watson, 34 Me. 20, 56 Am. Dec. 632.

10. Matter of Prime, 1 Barb. (N. Y.) 296, 1 Edm. Sel. Cas. (N. Y.) 479.

The English Debtors' Act, although abolishing imprisonment for debt in the case of an honest debtor, is at the same time intended for the punishment of a fraudulent or dishonest debtor and is in that sense vindictive. Marris *v.* Ingram, 13 Ch. D. 338, 49 L. J. Ch. 123, 41 L. T. Rep. N. S. 613, 28 Wkly. Rep. 434.

11. See CONSTITUTIONAL LAW, 8 Cyc. 878 *et seq.*

known as the "Debtors' Act."[12] In some states executions against the person have been abolished,[13] and in those jurisdictions where it is still permitted the proceeding has been subjected to many modifications and limitations. All modifications, conditions, and restrictions upon imprisonment for debt provided by the laws of any state are by act of congress applicable to process issuing from federal courts to be executed therein.[14]

2. Effect of Foreign Laws Protecting From Execution. A law of a foreign country which protects the party to a contract from execution will, in the courts of the United States, protect the same individual from arrest upon the same contract.[15]

3. Agreements as to Exemption From or Liability to Arrest. A defendant may by agreement be exempted from execution against the person.[16] So also notwithstanding statutory specifications of cases in which an order of arrest may be issued a defendant may consent in writing to the entry of a judgment against him which will authorize an execution against his person.[17]

C. Jurisdiction and Authority to Issue. With regard to the question of jurisdiction and authority to issue a capias ad satisfaciendum or execution against the person on final process, it is difficult to lay down any rule of general application.[18] Imprisonment for debt on process from federal courts having been

Impairment of obligation of contract by statute relating to imprisonment for debt see Arrest, 3 Cyc. 899; Constitutional Law, 8 Cyc. 1010.

12. See Marris *v.* Ingram, 13 Ch. D. 338, 49 L. J. Ch. 123, 41 L. T. Rep. N. S. 613, 28 Wkly. Rep. 434.

13. Kennedy *v.* Rice, 1 Ala. 11 (abolished for civil demand except in case of fraud); Thornhill *v.* Cristmas, 10 Rob. (La.) 543. See, however, Chaffe *v.* Handy, 36 La. Ann. 22 (holding that the Louisiana act of 1840, abolishing imprisonment for debt, has no effect on the act of 1841, providing for imprisonment of delinquent sheriffs, and which is now article 730 of the code of practice); Anderson *v.* Brinkley, 1 La. Ann. 126.

Exception of non-residents from operation of statute.— An act abolishing imprisonment for debt is not unconstitutional because it excepts non-residents from its operation. Frost *v.* Brisbin, 19 Wend. (N. Y.) 11, 32 Am. Dec. 423.

Retrospective operation of statute.— The Alabama act of Feb. 1, 1839, abolishing imprisonment for debt, does not authorize the discharge of a debtor then in actual or constructive custody. Kennedy *v.* Rice, 1 Ala. 11. So the Tennessee act of Dec. 14, 1831, abolishing imprisonment for debt except in cases of fraud, is entirely prospective, and no right existing at the time of its passage is interfered with. Dwyer *v.* Foster, 4 Yerg. 533. See, however, Sommers *v.* Johnson, 4 Vt. 278, 24 Am. Dec. 604.

14. U. S. Rev. St. (1878) 990, 991 [U. S. Comp. St. (1901) p. 709]. See Low *v.* Durfee, 5 Fed. 256, holding that the intent of this statute is that in civil actions for debt defendant shall be subject to imprisonment and be released therefrom precisely as he would be under the law of the state.

By the acts of congress of 1837 and 1839, it was provided that no person should be imprisoned for debt in any state upon process issuing out of a court of the United States, where by the laws of such state imprisonment for debt had been abolished; and that, where by the laws of the state imprisonment for debt should be allowed under certain conditions and restrictions, the same conditions and restrictions should be applicable to the process issuing out of the courts of the United States. Low *v.* Durfee, 5 Fed. 256; Campbell *v.* Hadley, 4 Fed. Cas. No. 2,358, 1 Sprague 470; Curtis *v.* Feste, 6 Fed. Cas. No. 3,502. See also U. S. *v.* Moller, 26 Fed. Cas. No. 15,793, 10 Ben. 189. This law was held to be neither an act abolishing imprisonment for debt, nor one allowing it under certain conditions and restrictions, but one which steered between the two and abolished imprisonment absolutely, but only as to a certain class of persons. Low *v.* Durfee, *supra*; Catherwood *v.* Gapete, 5 Fed. Cas. No. 2,513, 2 Curt. 94.

These acts are not prospective in their operation, but adopt only the state laws then in existence. Campbell *v.* Hadley, 4 Fed. Cas. No. 2,358, 1 Sprague 470.

Distinction between private debtors sued in federal courts and debtors to the government. — See Moore *v.* Wilmarth, 17 Fed. Cas. No. 9,781; Moan *v.* Wilmarth, 17 Fed. Cas. No. 9,686, 3 Woodb. & M. 399.

15. Camfranque *v.* Burnett, 4 Fed. Cas. No. 2,342, 1 Wash. 340.

16. Chickering *v.* Greenleaf, 6 N. H. 51, which was an action on a note containing the words, "My body being at all times exempted from arrest," and the court directed that no execution should issue against the body of defendant.

17. Steinbock *v.* Evans, 122 N. Y. 551, 25 N. E. 929 [*affirming* 55 N. Y. Super. Ct. 278, 18 N. Y. St. 325].

18. *Kansas.*— *In re* Heath, 40 Kan. 333, 19 Pac. 926, in which case the court held that a district judge at chambers has sufficient authority.

abolished by act of congress in all states which have abolished them by law, the federal courts in such states have no jurisdiction of a suit for the enforcement of a state statute, highly penal in its nature, in regard to fraudulent debtors.[19]

D. Cases in Which Execution Is Authorized — 1. In General. The object of prohibitions of imprisonment for debt being to relieve from useless imprisonment honest debtors who may be unable to satisfy judgments against them,[20] it is usually held on the principle that the reason failing the rule fails therewith, that such statutes afford no protection against executions against the person in the case of tort-feasors or debtors who are able to pay but are unwilling to do so, or are guilty of fraud or bad faith;[21] and there would seem to be no question

Massachusetts.— Newmarket Nat. Bank *v.* Cram, 131 Mass. 204.

Nevada.— *Ex p.* Bergman, 18 Nev. 331, 4 Pac. 209, holding that where a resident of the state perpetrates a fraud, but some of the acts are committed during a temporary absence from the state, in contemplation of the law the fraud is committed in the state, and a district court has jurisdiction to imprison the offender in proper proceedings.

New Jersey.—Wire *v.* Browning, 20 N. J. L. 364, holding that commissioners to take bail and affidavits are authorized to make an order for the award of a capias under the New Jersey act of March 9, 1842.

New York.— People *v.* Goodwin, 50 Barb. 562 [*reversing* 7 Rob. 592] (holding that the act of 1848 does not authorize an application to the city judge of New York); Latham *v.* Westervelt, 26 Barb. 256 (construing the New York Non-Imprisonment Act of 1831, providing that a judgment creditor may make application for arrest of the judgment debtor to the judge of the court in which the suit was brought; and the New York act of 1848, authorizing an application for such a warrant to be made to any judge of any court of record in any county in which the judgment has been docketed and in which defendant resides); Wilson *v.* Andrews, 9 How. Pr. 39 (holding under Code, § 292, subs. 3, providing that the judge, on proof by affidavit that there is danger of the debtor leaving the state or concealing himself, and that he has property which he unjustly refuses to apply to the creditor's judgment, may issue a warrant requiring the sheriff of any county where such judgment debtor may be to arrest him and bring him before such judge, a justice of the supreme court has authority to issue a warrant for the arrest of a judgment debtor residing in the same judicial district, but in a different county from that in which the judge resides, and he should be brought before such judge for examination). See also People *v.* Smith, 9 How. Pr. 464.

Ohio.— Milson, etc., Co. *v.* Ronk, 54 Ohio St. 422, 43 N. E. 919, holding that a probate judge has no jurisdiction under Rev. St. § 5449, to allow an execution to be issued against the person upon a judgment rendered in the court of common pleas.

Pennsylvania.— Weber *v.* Goldenberg, 10 Pa. Co. Ct. 72, 73, holding that the provision of the Pennsylvania act of July 8, 1885, with respect to warrants of arrest in civil cases, that they "shall issue only in the county where the cause of action arises or the judgment shall have been entered," must be strictly construed, and a warrant issued in violation thereof is void.

Vermont.— Nichols *v.* Packard, 16 Vt. 147, holding that the motion for a certificate of wilful and malicious acts in an action of slander should be made to the county court, and that if not made there the motion will not be entertained in the supreme court.

Wisconsin.—Medcraft *v.* Dart, 67 Wis. 115, 30 N. W. 223, 31 N. W. 476, holding that execution against the body of a defendant will not be issued out of the supreme court as Rev. St. § 2973, relating to executions against the body, does not apply to the supreme court, and section 2953, providing for executions on judgments for costs, provides only for an execution against property.

England.— Horsnail *v.* Bruce, L. R. 8 C. P. 378, 42 L. J. C. P. 140, 28 L. T. Rep. N. S. 705, 21 Wkly. Rep. 597 (apparently holding that the power of a judge of a county court under 9 & 10 Vict. c. 95, §§ 98, 99, 103, to commit more than once for the non-payment of a judgment debtor is virtually superseded by the Debtors' Act (1869), §§ 4, 5; and that such power is now limited to a single commitment (not to exceed six weeks) for a single default, each neglect where the order is for payment by instalments being deemed to be a fresh default); Washer *v.* Elliott, 1 C. P. D. 169, 45 L. J. C. P. 144, 34 L. T. Rep. N. S. 56, 24 Wkly. Rep. 432 (holding that the power of making an order for payment of a debt due on a judgment of a superior court and of committing the debtor in case of default, which is conferred on inferior courts by the Debtors' Act (1869), § 5, cannot be exercised by the mayor's court of London if the debtor does not reside or carry on business within the city of London at the time he is summoned on such judgment).

See 21 Cent. Dig. tit. "Execution," § 1242.

19. Curtis *v.* Feste, 6 Fed. Cas. No. 3,502.

20. People *v.* Cotton, 14 Ill. 414; Keene, Petitioner, 15 R. I. 294, 3 Atl. 418.

21. McDuffie *v.* Beddoe, 7 Hill (N. Y.) 578; Martins *v.* Ballard, 16 Fed. Cas. No. 9,176, Bee 258 (tort-feasors); Cooley Const. Lim. 341 (4th ed.) 422.

Replevin.—A capias ad satisfaciendum may issue in an action on a replevy or forthcoming bond. Scott *v.* Maupin, Hard. (Ky.) 122. In List *v.* Firth, 15 Wkly. Notes Cas. (Pa.) 548, it was held that in an action of replevin,

as to the constitutionality of statutes allowing executions against the person in such cases.[22] Since, however, such executions are permissible only by virtue of statute, or exceptions in the constitution, in order that they may issue the case must be brought within the provisions of the statutes allowing the same or within the exceptions, in doing which such provisions should not be strained beyond the fair and proper meaning of the terms used.[23]

2. Right as Dependent Upon Nature of Action — a. Actions Ex Contractu. Defendants in actions arising out of or founded upon contracts, express or implied, are usually exempt by statute from imprisonment on executions against the person except as otherwise specially provided,[24] unless the action is one which,

where defendant's claim property bond proves worthless, plaintiff may issue a capias ad satisfaciendum, the action being *ex delicto*. In Tomlin *v.* Fisher, 27 Mich. 524, it was held that imprisonment of a defendant in replevin, although expressly allowed by Mich. Comp. Laws, § 5393, on an execution issued upon the judgment of a justice of the peace, is not allowed on an execution in the same action in the circuit court, and may therefore be avoided by an appeal. See also Fuller *v.* Bowker, 11 Mich. 204; Pomeroy *v.* Crocker, 3 Pinn. (Wis.) 378, 4 Chandl. (Wis.) 174.

22. *Alabama.*— *Ex p.* Hardy, 68 Ala. 303.

Georgia.— Harris *v.* Bridges, 57 Ga. 407, 24 Am. Rep. 495.

New Jersey.— *Ex p.* Clark, 20 N. J. L. 648, 45 Am. Dec. 394.

North Carolina.— Kinney *v.* Laughenour, 97 N. C. 325, 2 S. E. 43; Long *v.* McLeod, 88 N. C. 3; Moore *v.* Mullen, 77 N. C. 327; Moore *v.* Green, 73 N. C. 394, 21 Am. Rep. 470.

Ohio.— *In re* Beall, 26 Ohio St. 195.

Wisconsin.— Cotton *v.* Sharpstein, 14 Wis. 226, 80 Am. Dec. 774.

See Constitutional Law, 8 Cyc. 879 *et seq.*

23. Pam *v.* Vilmar, 52 How. Pr. (N. Y.) 238 (where it was held that a defendant is not liable to arrest on final execution in an equitable suit unless the complaint shows that it is a cause falling within N. Y. Code, § 179, or where on an affidavit of extrinsic facts the court has granted an order of arrest); U. S. *v.* Moller, 26 Fed. Cas. No. 15,793, 10 Ben. 189. *Compare* Greenberg *v.* Laeov, 84 N. Y. Suppl. 930.

24. *Illinois.*— McKindley *v.* Rising, 28 Ill. 337; People *v.* Cotton, 14 Ill. 414.

Indiana.— McCool *v.* State, 23 Ind. 127.

Massachusetts.— Choteau *v.* Richardson, 12 Allen 365.

Nevada.— *Ex p.* Bergman, 18 Nev. 331, 4 Pac. 209.

New York.— Chapin *v.* Foster, 101 N. Y. 1, 3 N. E. 786; People *v.* Spier, 77 N. Y. 144, 57 How. Pr. 274; Goodwin *v.* Griffis, 25 Hun 61; People *v.* Carpenter, 46 Barb. 619; Gottlieb *v.* Glazier, 25 Misc. 765, 54 N. Y. Suppl. 1020; Burkle *v.* Ells, 4 How. Pr. 288, 2 Code Rep. 148; Brown *v.* Treat, 1 Hill 225; Phelps *v.* Barton, 13 Wend. 68; *Ex p.* Beatty, 12 Wend. 229; People *v.* Onondaga C. Pl., 9 Wend. 430; Merrill *v.* Townsend, 5 Paige 80; Prince *v.* Camman, 3 Edw. 413.

North Carolina.—Long *v.* McLean, 88 N. C. 3; Moore *v.* Green, 73 N. C. 394, 21 Am. Rep. 470.

Pennsylvania.— Lang *v.* Finch, 166 Pa. St. 255, 31 Atl. 84; Selden *v.* Cozad, 2 Pa. Dist. 664, holding, however, that this has no application to defendant's obligation to pay the costs in ejectment.

Vermont.— Williams, etc., Fertilizer Co. *v.* Rudd, 68 Vt. 607, 35 Atl. 486; Stoughton *v.* Barrett, 20 Vt. 385 (holding that a liability incurred by one who takes bail for a defendant on mesne process by indorsing his name on the back of the writ is contractual within the statute); Sawyer *v.* Vilas, 19 Vt. 43 (holding that a statute prohibiting the arrest of a citizen under an execution on a judgment founded on a contract made since a certain date includes an execution obtained in an action of debt on a judgment rendered since such date); Witt *v.* Marsh, 14 Vt. 303.

Wisconsin.— *In re* Blair, 4 Wis. 522; Pomeroy *v.* Crocker, 3 Pinn. 378, 4 Chandl. 174.

United States.— U. S. *v.* Walsh, 28 Fed. Cas. No. 16,635, 1 Abb. 66, Deady 281.

See 21 Cent. Dig. tit. "Execution," § 1216.

Application to equitable suits.— Under the New York Non-Imprisonment Act of 1831, no person can lawfully be arrested or imprisoned on any civil process issued out of any court of law or on any execution issued out of any court of equity in any suit or proceeding instituted for the recovery of any money due upon any judgment or decree founded upon contract or due upon any contract express or implied, or for the recovery of any damages for the non-performance of any contract. People *v.* Spier, 57 How. Pr. (N. Y.) 274 [*reversing* 12 Hun 70, 54 How. Pr. 73]. In Georgia, however, a decree in an equity cause for a specific sum of money under the 13th rule of equity practice established by the judges in convention under the authority of the Georgia act of 1821 may be enforced by a capias ad satisfaciendum against defendant. Saunders *v.* Smith, 3 Ga. 121.

A suit not for recovery of money or damages is not within the act abolishing imprisonment for debt, although founded on a contract, and execution against the person may issue therein. Rogers *v.* Dibble, 8 Paige (N. Y.) 9, a suit to reform a deed and confirm plaintiff's title.

Although an action may be in form ex delicto, yet when the testimony shows that it is *ex contractu* defendant will, under the Pennsylvania act of 1842, abolishing impris-

although in form *ex contractu*, in reality arises *ex delicto*,[25] or unless an order of arrest has issued in the action.[26] In some jurisdictions, however, provision is expressly made for the enforcement by a warrant of arrest of judgments on contracts in certain cases.[27]

b. Actions to Recover Fines, Forfeitures, or Penalties. Fines, forfeitures, or penalties imposed by law are not debts,[28] and hence actions for the recovery or collection thereof are not within the purview of constitutional or statutory prohibitions against imprisonment for debt.[29]

onment for debt in the latter class of actions, be released from prison on habeas corpus. Connolly *v.* Decker, Wilcox (Pa.) 133. See also Weissbrod *v.* Geider, 3 Leg. Gaz. (Pa.) 260, 1 Luz. Leg. Reg. (Pa.) 232, holding that where a recovery is on contract, although the action sound in tort, an execution cannot issue against the body.

Rule not changed by allegations of fraud.— Graves *v.* Waite, 59 N. Y. 156 [*affirming* 1 Thomps. & C. addenda 16]. See also Elwood *v.* Gardner, 45 N. Y. 349. And under the Pennsylvania act of July 12, 1842, see Fleming *v.* Maguire, 14 Wkly. Notes Cas. 210.

25. See *infra*, XIV, D, 2, c.

26. Chapin *v.* Foster, 101 N. Y. 1, 3 N. E. 786. And see *infra*, XIV, D, 4.

27. **So in Massachusetts** where the debtor contracted the debt with intent not to pay the same, or where the debtor is one engaged in the business of collecting for another, and the debt upon which the judgment was recovered was for money collected by him for the creditor. May *v.* Hammond, 146 Mass. 439, 15 N. E. 925, in which case it was held that the contingent liability of the indorser of a promissory note is a "debt" within the meaning of this statute. See also Everett *v.* Henderson, 146 Mass. 89, 14 N. E. 932, 4 Am. St. Rep. 284; Way *v.* Brigham, 138 Mass. 384.

So in New York in an action upon contract, express or implied, otherwise than a promise to marry, where it is alleged in the complaint that defendant is guilty of a fraud in contracting or incurring the liability (Hoyt *v.* Godfrey, 88 N. Y. 669; Wright *v.* Brown, 67 N. Y. 1; Morrison *v.* Garner, 4 Abb. Dec. 479, 7 Abb. Pr. 425, 4 Transcr. App. 295; Johnson *v.* Monell, 2 Abb. Dec. 470, 2 Keyes 655; Byrd *v.* Hall, 1 Abb. Dec. 285, 2 Keyes 646; Wheadon *v.* Huntington, 83 Hun 371, 31 N. Y. Suppl. 912; Manning *v.* Solis, 50 Barb. 224; Oatley *v.* Lewin, 47 Barb. 18; Clark *v.* Rankin, 46 Barb. 570; Sharp *v.* Mayor, 40 Barb. 256; Fassett *v.* Tallmadge, 37 Barb. 436, 14 Abb. Pr. 188, 23 How. Pr. 244; Lawrence *v.* Foxwell, 49 N. Y. Super. Ct. 273, 4 N. Y. Civ. Proc. 340; Smith *v.* Jones, 4 Rob. 655; Wilmerding *v.* Cohen, 8 Abb. Pr. N. S. 141; Van Kleek *v.* Leroy, 4 Abb. Pr. N. S. 431; Freeman *v.* Leland, 2 Abb. Pr. 479; Brown *v.* Ashbough, 40 How. Pr. 226; Stewart *v.* Potter, 37 How. Pr. 68; Wallace *v.* Murphy, 22 How. Pr. 414; Harding *v.* Shannon, 20 How. Pr. 25; Scudder *v.* Barnes, 16 How. Pr. 534), or where it is alleged and proved that defendant has since the making of the contract or in contemplation of making the same removed or disposed of his property with intent to defraud his creditors, or is about to remove or dispose of the same with like intent (Graves *v.* Waite, 59 N. Y. 156; Engelhardt Co. *v.* Benjamin, 2 N. Y. App. Div. 91, 37 N. Y. Suppl. 531; Clinton Bank *v.* Callignon, 83 Hun (N. Y.) 467, 31 N. Y. Suppl. 1116; Claflin *v.* Frankel, 29 Hun (N. Y.) 288; Rieben *v.* Francis, 29 Misc. (N. Y.) 676, 62 N. Y. Suppl. 851; Kessler *v.* Levy, 11 Misc. (N. Y.) 275, 32 N. Y. Suppl. 260 [*affirmed* in 147 N. Y. 700, 42 N. E. 723]; How *v.* Frear, 13 Abb. Pr. (N. Y.) 241 note, 21 How. Pr. (N. Y.) 343; Corwin *v.* Freeland, 6 How. Pr. (N. Y.) 241).

The contract, a judgment on which can be enforced by a warrant of arrest under N. Y. Laws (1831), c. 300, must be one resulting from the voluntary arrangement of the parties, and not one implied by law for the purpose of giving a remedy for the wrong. In order to make the implied contract referred to in section 1 a judgment on which can be so enforced, there must be presumptive evidence of the *aggregatio mentium*, essential to a contract at common law. People *v.* Speir, 77 N. Y. 144, 57 How. Pr. (N. Y.) 274.

28. McCool *v.* State, 23 Ind. 127; *Ex p.* Kiburg, 10 Mo. App. 442.

29. *Illinois.*— Kennedy *v.* People, 122 Ill. 649, 13 N. E. 213. See also Boos *v.* White, 64 Ill. App. 177.

Minnesota.— Meyer *v.* Berlandi, 39 Minn. 438, 7 N. W. 513, 12 Am. St. Rep. 663, 1 L. R. A. 777.

Missouri.— *Ex p.* Kiburg, 10 Mo. App. 442.

New York.— Graves *v.* Waite, 59 N. Y. 156; Staub *v.* Myers, 16 N. Y. App. Div. 476, 44 N. Y. Suppl. 954 [*reversing* 18 Misc. 99, 41 N. Y. Suppl. 831]; Broome *v.* Cochran, 31 Misc. 660, 64 N. Y. Suppl. 1043; Glen's Falls Paper Co. *v.* White, 58 How. Pr. 172; Parce *v.* Halbert, 1 How. Pr. 235.

Ohio.— *In re* Beall, 26 Ohio St. 195.

Pennsylvania.— Com. *v.* Kerr, (1895) 32 Atl. 276. But *compare* Com. *v.* Myers, 5 Lanc. Bar No. 2; Com. *v.* Trewetz, 7 Leg. Gaz. 293.

South Dakota.— Deadwood *v.* Allen, 9 S. D. 221, 68 N. W. 333.

United States.— U. S. *v.* Arnold, 69 Fed. 987, 16 C. C. A. 575; U. S. *v.* Moller, 26 Fed. Cas. No. 15,793, 10 Ben. 189.

See 21 Cent. Dig. tit. "Execution," § 1220.

In New Jersey under the charter of the city of Perth Amboy an action brought for the violation of the ordinance in relation to inns and taverns, beer saloons, etc., is a *qui tam* action and therefore a civil suit and not a

c. Actions Ex Delicto. It seems to be well settled that prohibitions of imprisonment for debt apply only to actions arising out of contracts, express or implied, and do not extend to actions *ex delicto*.[30] The proceedings in which executions against the person are allowed vary in the different states. It has been allowed, for example, in actions involving fraud or deceit;[31] actions to recover

criminal proceeding, and a person imprisoned in a county jail by virtue of an execution against the body for such violation is entitled to the benefit of the act for the relief of persons imprisoned on civil process. Brophy *v.* Perth Amboy, 44 N. J. L. 217.

Capias pro fine.— In Com. *v.* Webster, 8 Gratt. (Va.) 702, it was held that the common-law writ of capias pro fine is unrepealed and may be used by the commonwealth, and that when there is a judgment in favor of the commonwealth for the fine and costs of prosecution, the writ may issue for the fine and the costs, but where the judgment is for costs without a fine, the writ is not a proper process to enforce the judgment. "A capias pro fine was not at common law, and is not under our statute, a process for enforcing judgments recovered by individuals. The conditions of confinement under this writ are different from those under a ca. sa., and its substitution for a writ of ca. sa. might result in substantial injury to the defendant; if, indeed, its form would allow it to be so substituted." Leavison *v.* Rosenthal, 5 Ky. L. Rep. 132, 133.

30. *Alabama.*— *Ex p.* Hardy, 68 Ala. 303.

Illinois.— People *v.* Healy, 128 Ill. 9, 20 N. E. 692, 15 Am. St. Rep. 90; McKindley *v.* Rising, 28 Ill. 337; People *v.* Cotton, 14 Ill. 414; Subinn *v.* Isador, 88 Ill. App. 96; Sawyer *v.* Nelson, 44 Ill. App. 184.

Indiana.— McCool *v.* State, 23 Ind. 127.

Maine.— Gooch *v.* Stephenson, 15 Me. 129.

Nevada.— *Ex p.* Bergman, 18 Nev. 331, 4 Pac. 209.

New Hampshire.— Eames *v.* Stevens, 26 N. H. 117.

New Jersey.— Hatfield *v.* Boswell, 25 N. J. L. 85.

New York.— People *v.* Speir, 77 N. Y. 144, 57 How. Pr. 274 [*reversing* 12 Hun 70]; Niver *v.* Niver, 43 Barb. 411, 19 Abb. Pr. 14, 29 How. Pr. 6; People *v.* Willett, 26 Barb. 78; Gallagher *v.* Dolan, 27 Misc. 122, 57 N. Y. Suppl. 334; Lasche *v.* Dearing, 23 Misc. 722, 53 N. Y. Suppl. 58; Ritterman *v.* Ropes, 7 N. Y. Civ. Proc. 392; Dougherty *v.* Gardner, 58 How. Pr. 284; Burkle *v.* Ells, 4 How. Pr. 288, 2 Code Rep. 148; Delamater *v.* Russell, 4 How. Pr. 234, 2 Code Rep. 147.

North Carolina.— Kinney *v.* Laughenour, 97 N. C. 325, 2 S. E. 43; Long *v.* McLean, 88 N. C. 3.

Pennsylvania.— Romberger *v.* Henry, 167 Pa. St. 314, 31 Atl. 634; Kalbfus *v.* Rundell, 134 Pa. St. 102, 19 Atl. 492; Hopkinson *v.* Cooper, 8 Phila. 8.

Rhode Island.— Drury *v.* Merrill, 20 R. I. 2, 36 Atl. 835; Kinnecom *v.* Waterman, 11 R. I. 638.

Vermont.— Mullin *v.* Flanders, 73 Vt. 95, 50 Atl. 813; Hunt *v.* Burdick, 42 Vt. 610; Whiting *v.* Dow, 42 Vt. 262; Sawyer *v.* Vilas, 19 Vt. 43.

Wisconsin.— Medcraft *v.* Dartt, 67 Wis. 115, 30 N. W. 223, 31 N. W. 476; Toal *v.* Clapp, 64 Wis. 223, 24 N. W. 876; Howland *v.* Needham, 10 Wis. 495; Pomeroy *v.* Crocker, 3 Pinn. 378, 4 Chandl. 174.

United States.— Barney *v.* Chapman, 21 Fed. 903.

England.— Marris *v.* Ingram, 13 Ch. D. 338, 49 L. J. Ch. 123, 41 L. T. Rep. N. S. 613, 28 Wkly. Rep. 434.

See 21 Cent. Dig. tit. "Execution," § 1217.

31. *Alabama.*— Morrow *v.* Weaver, 8 Ala. 288; Kennedy *v.* Rice, 1 Ala. 11.

California.— Stewart *v.* Levy, 36 Cal. 159; *Ex p.* Prader, 6 Cal. 239.

Indiana.— Baker *v.* State, 109 Ind. 47, 9 N. E. 711.

Louisiana.— Leland *v.* Rose, 11 La. Ann. 69, holding, however, that an express prayer for imprisonment is necessary.

Nevada.— *Ex p.* Bergman, 18 Nev. 331, 4 Pac. 209.

New Jersey.— *Ex p.* Clark, 20 N. J. L. 648, 45 Am. Dec. 394, including fraud perpetrated after a debt was contracted.

New Mexico.— *In re* Jaramillo, 8 N. M. 598, 45 Pac. 1110.

New York.— Cormier *v.* Hawkins, 69 N. Y. 188; Bruce *v.* Kelly, 5 Hun 229; Ely *v.* Mumford, 47 Barb. 629; Oatley *v.* Lewin, 47 Barb. 18; Fassett *v.* Tallmadge, 37 Barb. 436, 14 Abb. Pr. 188, 23 How. Pr. 244; Barker *v.* Russell, 11 Barb. 303 [*reversing* Code Rep. N. S. 5, 57]; Lawrence *v.* Foxwell, 49 N. Y. Super. Ct. 273, 4 N. Y. Civ. Proc. 340; Faris *v.* Peck, 2 Sweeny 689, 10 Abb. Pr. N. S. 55; Elwood *v.* Gardner, 10 Abb. Pr. N. S. 238; Redfield *v.* Frear, 9 Abb. Pr. N. S. 449; Hazlett *v.* Gill, 19 Abb. Pr. 353; How *v.* Frear, 13 Abb. Pr. 241 note, 21 How. Pr. 343; Sellar *v.* Sage, 13 How. Pr. 230; National Broadway Bank *v.* Miller, 4 N. Y. Wkly. Dig. 31.

North Carolina.— Stewart *v.* Bryan, 121 N. C. 46, 28 S. E. 18.

Ohio.—Spice *v.* Steinruck, 14 Ohio St. 213.

Rhode Island.— Keene, Petitioner, 15 R. I. 294, 3 Atl. 418.

Tennessee.— Dwyer *v.* Foster, 4 Yerg. 533.

United States.— Norman *v.* Manciette, 18 Fed. Cas. No. 10,300, 1 Sawy. 484; U. S. *v.* Moller, 26 Fed. Cas. No. 15,793, 10 Ben. 189.

England.— Reg. *v.* Jones, [1898] 1 Q. B. 119, 67 L. J. Q. B. 41, 77 L. T. Rep. N. S. 503; Reg. *v.* Rowlands, 8 Q. B. D. 530, 15 Cox C. C. 31, 46 J. P. 437, 51 L. J. M. C. 51, 46 L. T. Rep. N. S. 286, 30 Wkly. Rep. 444.

See 21 Cent. Dig. tit. "Execution," § 1218.

An assault and battery is not fraud in the sense in which that term is used in a constitutional provision allowing executions

damages for personal injuries;[32] actions to recover damages for injuries to property,[33] including a wrongful taking, detention, or conversion of personal property;[34] actions for breach of promise to marry,[35] or proceedings for neglect or misconduct in office or professional employment;[36] actions to recover a chattel which it is alleged has been concealed, removed, or disposed of so that it cannot be found and taken by the sheriff, and with intent that it should not be so found or taken, or to deprive plaintiff of the benefit thereof;[37] actions for fraudulent concealment of property generally;[38] actions to recover for money received, or to

against the person in case of fraud. *Ex p.* Prader, 6 Cal. 239.

32. *In re* Jaramillo, 8 N. M. 598, 45 Pac. 1110; Fullerton *v.* Fitzgerald, 18 Barb. (N. Y.) 441, 10 How. Pr. (N. Y.) 37; Ritterman *v.* Ropes, 52 N. Y. Super. Ct. 236, 7 N. Y. Civ. Proc. 392; Gallagher *v.* Dolan, 27 Misc. (N. Y.) 122, 57 N. Y. Suppl. 334 [*disapproving* Lasche *v.* Dearing, 23 Misc. (N. Y.) 722, 53 N. Y. Suppl. 58]; Haines *v.* Jeroloman, 2 McCarty Civ. Proc. (N. Y.) 196 [*distinguishing* Ryall *v.* Kennedy, 52 How. Pr. (N. Y.) 517]; Delamater *v.* Russell, 4 How. Pr. (N. Y.) 234; Judd *v.* Ballard, 66 Vt. 668, 30 Atl. 96; U. S. *v.* Moller, 26 Fed. Cas. No. 15,793, 10 Ben. 189. See also People *v.* Gill, 85 N. Y. App. Div. 192, 83 N. Y. Suppl. 135 [*affirmed* in 176 N. Y. 606, 68 N. E. 1122].

33. Catlin *v.* Adirondack County, 81 N. Y. 639, 11 Abb. N. Cas. (N. Y.) 377 [*reversing* 20 Hun 19] (holding that in an action against a carrier for non-delivery of goods in the form of an action on contract is not an action for the "injury of property"); Niver *v.* Niver, 43 Barb. (N. Y.) 411, 19 Abb. Pr. (N. Y.) 14, 29 How. Pr. (N. Y.) 6; Keeler *v.* Clark, 18 Abb. Pr. (N. Y.) 154; Delamater *v.* Russell, 4 How. Pr. (N. Y.) 234; U. S. *v.* Moller, 26 Fed. Cas. No. 15,793, 10 Ben. 189.

Actions to recover real estate are not within statute as to injuries to property. Merritt *v.* Carpenter, 3 Abb. Dec. (N. Y.) 285, 2 Keyes (N. Y.) 462, 33 How. Pr. (N. Y.) 428 [*reversing* 30 Barb. 61]; Griswold *v.* Sweet, 49 How. Pr. (N. Y.) 171. See, however, Bruce *v.* Kelly, 5 Hun (N. Y.) 229.

The joinder of a request for equitable relief in an action to recover damages for trespass and injury to the freehold, where plaintiff prayed for a permanent injunction restraining future trespasses and obtained judgment, will not prevent him from issuing a body execution to collect his damages and costs. People *v.* Fargo, 4 N. Y. App. Div. 544, 38 N. Y. Suppl. 1004.

34. *New Hampshire.*— Eames *v.* Stevens, 26 N. H. 117.

New York.—Farrelly *v.* Hubbard, 148 N. Y. 592, 43 N. E. 65 [*reversing* 84 Hun 391, 32 N. Y. Suppl. 440]; Richtmeyer *v.* Remsen, 38 N. Y. 206; Matter of Short, 35 N. Y. App. Div. 623, 54 N. Y. Suppl. 1075; Knapp *v.* Murphy, 20 N. Y. App. Div. 83, 46 N. Y. Suppl. 1047; Barry *v.* Calder, 48 Hun 449, 1 N. Y. Suppl. 586, 15 N. Y. Civ. Proc. 14; Blason *v.* Bruno, 33 Barb. 520, 21 How. Pr. 112; People *v.* Willett, 26 Barb. 78; Fullerton *v.* Fitzgerald, 18 Barb. 441, 10 How. Pr. 37; Hovey *v.* McDonald, 45 N. Y. Super. Ct. 606; Cousland *v.* Davis, 4 Bosw. 619; Estell *v.* De Pennevet, 15 Daly 10, 1 N. Y. Suppl. 275, 14 N. Y. Civ. Proc. 366; Searing *v.* Goodstein, 11 Daly 236, 11 Abb. N. Cas. 450, 64 How. Pr. 427; Babcock *v.* Smith, 19 N. Y. Suppl. 817; Wallace *v.* Metcalf, 6 N. Y. Suppl. 711, 22 Abb. N. Cas. 73; Segelken *v.* Meyer, 5 N. Y. Civ. Proc. 1; Bullen *v.* Murphy, 16 Abb. N. Cas. 474; Northern R. Co. *v.* Carpentier, 4 Abb. Pr. 47, 13 How. Pr. 222; Brown *v.* Ashbough, 40 How. Pr. 226; Person *v.* Civer, 29 How. Pr. 432 [*reversing* 28 How. Pr. 139]; Eckert *v.* Belden, 1 Month. L. Bul. 61.

Pennsylvania.— Connolly *v.* Evans, 4 Pa. Co. Ct. 300.

South Dakota.—Hormann *v.* Sherin, 8 S. D. 36, 65 N. W. 434, 59 Am. St. Rep. 744; Winton *v.* Knott, 7 S. D. 179, 63 N. W. 783.

Wisconsin.— *In re* Mowry, 12 Wis. 52.

United States.— U. S. *v.* Moller, 26 Fed. Cas. No. 15,793, 10 Ben. 189.

See 21 Cent. Dig. tit. "Execution," § 1219.

Joinder of demands.— In an action to recover chattels and damages for their detention, under N. Y. Code, §§ 2895, 3026, an execution against the person cannot be issued on either demand unless it can be issued on both. Matter of Short, 35 N. Y. App. Div. 623, 54 N. Y. Suppl. 1075.

35. Graves *v.* Waite, 59 N. Y. 156; Siefke *v.* Tappey, 3 Code Rep. (N. Y.) 23, holding, however, that the statute does not authorize the arrest of a female. *Contra*, Drury *v.* Merrill, 20 R. I. 2, 36 Atl. 835.

36. Bronson *v.* Newberry, 2 Dougl. (Mich.) 38; Peel *v.* Elliott, 28 Barb. (N. Y.) 200, 16 How. Pr. (N. Y.) 485; Gross *v.* Graves, 2 Rob. (N. Y.) 707, 19 Abb. Pr. (N. Y.) 95; People *v.* Clark, 45 How. Pr. (N. Y.) 12; Grant *v.* Chester, 17 How. Pr. (N. Y.) 260; Yates *v.* Blodgett, 8 How. Pr. (N. Y.) 278; Stage *v.* Stevens, 1 Den. (N. Y.) 267.

37. Barnett *v.* Selling, 70 N. Y. 492 [*modifying* 9 Hun 236]; Nichols *v.* Michael, 23 N. Y. 264, 80 Am. Dec. 259; Lehman *v.* Mayer, 68 N. Y. App. Div. 12, 74 N. Y. Suppl. 194; Pike *v.* Lent, 4 Sandf. (N. Y.) 650; Roberts *v.* Randel, 3 Sandf. (N. Y.) 707; Watson *v.* McGuire, 2 Daly (N. Y.) 219, 33 How. Pr. (N. Y.) 87; Tracy *v.* Veeder, 35 How. Pr. (N. Y.) 209; Purchase *v.* Bellows, 23 How. Pr. (N. Y.) 421; Seymour *v.* Van Curen, 18 How. Pr. (N. Y.) 94; Moloughney *v.* Kavanagh, 11 N. Y. Wkly. Dig. 179.

38. Reg. *v.* Rowlands, 8 Q. B. D. 530, 15 Cox C. C. 31, 46 J. P. 437, 51 L. J. M. C. 51, 46 L. T. Rep. N. S. 286, 30 Wkly. Rep. 444.

recover property, or for damages for the conversion or misapplication of property, where it is alleged in the complaint and proved on the trial that such money was received, or such property was embezzled or fraudulently misapplied, by a public officer, or by an attorney, solicitor, or counselor, or by an officer or agent of a corporation or banking association in the course of his employment, or by a factor, agent, broker, or other person in a fiduciary capacity;[39] and in actions to recover money, funds, credits, or property held or owned by the state, or held or owned officially or otherwise for or in behalf of a public or governmental interest by a municipal or other public corporation, board, officer, custodian, agency, or agent of the state, or of any other division or portion of the state, which defendant has without right obtained, received, converted, or disposed of, or to recover

39. Chaffe *v.* Handy, 36 La. Ann. 22; Sherman *v.* Grinnell, 159 N. Y. 50, 53 N. E. 674; Standard Sugar Refinery *v.* Dayton, 70 N. Y. 486; Roberts *v.* Prosser, 53 N. Y. 260 [*reversing* 4 Lans. 369]; Richmond Hill Co. *v.* Seager, 31 N. Y. App. Div. 288, 52 N. Y. Suppl. 985; Panama R. Co. *v.* Johnson, 58 Hun (N. Y.) 557, 12 N. Y. Suppl. 499; Gibbs *v.* Hichborn, 12 Hun (N. Y.) 480; Goodrich *v.* Dunbar, 17 Barb. (N. Y.) 644; Lorillard F. Ins. Co. *v.* Meshural, 7 Rob. (N. Y.) 308; Wolfe *v.* Brouwer, 5 Rob. (N. Y.) 601; Burhans *v.* Casey, 4 Sandf. (N. Y.) 706; Noble *v.* Prescott, 4 E. D. Smith (N. Y.) 139; Casanges *v.* Karam, 26 Misc. (N. Y.) 797, 56 N. Y. Suppl. 212; Turney *v.* Guthrie, 15 N. Y. Suppl. 679; Grinnell *v.* Sherman, 14 N. Y. Suppl. 544; Hirsh *v.* Van der Perren, 10 N. Y. Suppl. 449; Bullen *v.* Murphy, 16 Abb. N. Cas. (N. Y.) 474; Pettengill *v.* Mather, 12 Abb. Pr. (N. Y.) 436; Hall *v.* McMahon, 10 Abb. Pr. (N. Y.) 319; Turner *v.* Thompson, 2 Abb. Pr. (N. Y.) 444; Spence *v.* Baldwin, 59 How. Pr. (N. Y.) 375; Obregon *v.* De Mier, 52 How. Pr. (N. Y.) 356; Dubois *v.* Thompson, 25 How. Pr. (N. Y.) 417; Ostell *v.* Brough, 24 How. Pr. (N. Y.) 274; Robbins *v.* Seithel, 20 How. Pr. (N. Y.) 366; Schudder *v.* Shiells, 17 How. Pr. (N. Y.) 420; Frost *v.* McCarger, 14 How. Pr. (N. Y.) 131; Ridder *v.* Whitlock, 12 How. Pr. (N. Y.) 208; Mexico *v.* De Arrangois, 11 How. Pr. (N. Y.) 1, 576; Stoll *v.* King, 8 How. Pr. (N. Y.) 298; Parker *v.* Parker, 71 Vt. 387, 45 Atl. 756; Williams, etc., Fertilizer Co. *v.* Rudd, 68 Vt. 607, 35 Atl. 486; *In re* Dudley, 12 Q. B. D. 44, 53 L. J. Q. B. 16, 49 L. T. Rep. N. S. 737, 32 Wkly. Rep. 264; Tinnuchi *v.* Smart, 10 P. D. 184, 54 L. J. P. & Adm. 92, 34 Wkly. Rep. 46; Evans *v.* Bear, L. R. 10 Ch. 76, 31 L. T. Rep. N. S. 625, 23 Wkly. Rep. 67; *Ex p.* Hooson, L. R. 8 Ch. 231, 42 L. J. Bankr. 19, 28 L. T. Rep. N. S. 4, 21 Wkly. Rep. 152; *In re* Hope, L. R. 7 Ch. 523, 41 L. J. Ch. 797, 26 L. T. Rep. N. S. 814, 20 Wkly. Rep. 694; Middleton *v.* Chichester, L. R. 6 Ch. 152, 40 L. J. Ch. 237, 24 L. T. Rep. N. S. 173, 19 Wkly. Rep. 299, 369; *In re* Rush, L. R. 9 Eq. 147, 39 L. J. Ch. 159, 21 L. T. Rep. N. S. 692, 18 Wkly. Rep. 331; *In re* Fereday, [1895] 2 Ch. 437, 64 L. J. Ch. 894, 73 L. T. Rep. N. S. 56, 13 Reports 639; Piddocke *v.* Burt, [1894] 1 Ch. 343, 63 L. J. Ch. 246, 70 L. T. Rep. N. S. 553, 8 Reports 104, 42 Wkly. Rep. 248; *In re* Smith, [1893] 2 Ch. 1, 57 J. P. 516, 62 L. J. Ch. 336, 68 L. T. Rep. N. S. 337, 2 Reports 360, 41 Wkly. Rep. 289; *In re* Gent, 40 Ch. D. 190, 58 L. J. Ch. 162, 60 L. T. Rep. N. S. 355, 37 Wkly. Rep. 151; Preston *v.* Etherington, 37 Ch. D. 104, 57 L. J. Ch. 176, 58 L. T. Rep. N. S. 318, 36 Wkly. Rep. 49; Litchfield *v.* Jones, 36 Ch. D. 530, 57 L. J. Ch. 100, 58 L. T. Rep. N. S. 20, 36 Wkly. Rep. 397; *In re* Strong, 32 Ch. D. 342, 51 J. P. 6, 55 L. J. Ch. 553, 55 L. T. Rep. N. S. 3, 34 Wkly. Rep. 614; *In re* Diamond Fuel Co., 13 Ch. D. 815, 49 L. J. Ch. 347, 42 L. T. Rep. N. S. 178, 28 Wkly. Rep. 435; Marris *v.* Ingram, 13 Ch. D. 338, 49 L. J. Ch. 123, 41 L. T. Rep. N. S. 613, 28 Wkly. Rep. 434; Lewes *v.* Barnett, 6 Ch. D. 252, 47 L. J. Ch. 144, 26 Wkly. Rep. 101; *Ex p.* Cuddeford, 45 L. J. Bankr. 127, 34 L. T. Rep. N. S. 666, 24 Wkly. Rep. 931; *In re* Knowles, 52 L. J. Ch. 685, 48 L. T. Rep. N. S. 760; *Re* Firmin, 57 L. T. Rep. N. S. 45; *Re* Hickey, 55 L. T. Rep. N. S. 588, 35 Wkly. Rep. 53; *Ex p.* Sharp, 37 L. T. Rep. N. S. 168; *Re* Barfield, 24 L. T. Rep. N. S. 248, 19 Wkly. Rep. 466; *Re* White, 23 L. T. Rep. N. S. 387, 19 Wkly. Rep. 39; Young *v.* Dallimore, 22 L. T. Rep. N. S. 119, 18 Wkly. Rep. 445; *In re* Apelt, 6 Morr. Bankr. Cas. 102; Phosphate Sewage Co. *v.* Hartmont, 25 Wkly. Rep. 743; *Ex p.* Wood, 21 Wkly. Rep. 71; Taaffe *v.* Fitzsimons, [1894] 1 Ir. R. 63.

Attorneys.— Action to recover moneys received by attorney see Segelken *v.* Meyer, 5 N. Y. Civ. Proc. 258; Wills *v.* Kane, 2 Grant (Pa.) 60.

Auctioneer.—An auctioneer is a person acting in a fiduciary capacity within the meaning of the Debtors' Act (1869), § 4, subs. 3, and if he makes default in payment of the money produced by the sale of goods intrusted to him for sale when ordered to pay it by a court of equity, he is liable to pay whether he still holds the money or has parted with it. Crowther *v.* Elgood, 34 Ch. D. 691, 56 L. J. Ch. 416, 56 L. T. Rep. N. S. 415, 35 Wkly. Rep. 369.

Corporation officer.—Actions for recovery of money received by officer of corporations in the course of his employment see Church *v.* Crawford, 36 N. Y. Super. Ct. 307 [*reversing* 14 Abb. Pr. N. S. 200].

Factor or agent.— See Duguid *v.* Edwards, 50 Barb. (N. Y.) 288; Clark *v.* Pinckney, 50 Barb. (N. Y.) 226; Barret *v.* Gracie, 34 Barb. (N. Y.) 20; Langdon *v.* Bowen, 46 Vt. 512.

damages for so obtaining, receiving, paying, converting, or disposing of the same,[40] where defendant is about to abscond,[41] or where defendant has non-exempt property which he conceals or refuses to apply in satisfaction of the judgment against him.[42]

d. Form of Action as Determining Nature of Cause of Action. Since the form of action adopted will not necessarily determine whether the cause of action be for a tort or breach of contract, the allegations of the declaration or complaint will be looked to in order to ascertain whether the acts complained of constitute a tort within the meaning of statutes allowing imprisonment of a defendant on an execution against the person.[43]

e. Waiver of Right by Joinder of Different Causes of Action.[44] Ordinarily the uniting of a cause of action for which a defendant may be arrested with one for which he may not waives the arrest and execution against the person of defendant and entitles him to have such execution vacated.[45]

f. Effect of Waiver of Tort and Suit Ex Contractu. According to some decisions, where plaintiff elects to rest his action as upon contract and not upon tort, he cannot, after obtaining judgment upon that theory, have an execution against defendant's person.[46]

3. Right as Dependent Partly Upon Extrinsic Facts. A defendant may also be arrested in an action where the judgment demanded requires the perform-

40. N. Y. Code, § 549. See People *v.* Tweed, 5 Hun (N. Y.) 382.

41. Norman *v.* Manciette, 18 Fed. Cas. No. 10,300, 1 Sawy. 484.

Writ of ne exeat regno.— See Drover *v.* Beyer, 13 Ch. D. 242, 49 L. J. Ch. 37, 41 L. T. Rep. N. S. 393, 28 Wkly. Rep. 110. See, generally, Ne Exeat.

42. *Connecticut.*— Fearey *v.* Hotchkiss, 46 Conn. 266 (refusal to disclose rights of action with the intent to prevent same from being taken by foreign attachment); Allen *v.* Gleason, 4 Day 376 (refusal of debtor to turn out property when demanded).

Illinois.— People *v.* Healy, 128 Ill. 9, 20 N. E. 692, 15 Am. St. Rep. 90.

Massachusetts.— May *v.* Hammond, 146 Mass. 439, 15 N. E. 925; *In re* Blake, 106 Mass. 501, holding that the statute has no application to a spendthrift deprived of power over his own property.

New York.— *In re* Prime, 1 Barb. 296, 1 Edm. Sel. Cas. 479; Peters *v.* Kerr, 22 How. Pr. 3; People *v.* Albany, 6 Hill 429 (although time for issuing execution has not arrived); Hall *v.* McKnight, 6 N. Y. Leg. Obs. 348.

Rhode Island.— Keene, Petitioner, 15 R. I. 294, 3 Atl. 418, refusal to apply patent right.

United States.— Barney *v.* Chapman, 21 Fed. 903.

A bona fide intention of an insolvent debtor immediately to assign all his property for the benefit of his creditors generally is a just cause for refusing to apply money or things in action in payment of a judgment within the New York act of 1831 abolishing imprisonment for debt, but providing that an unjust refusal to make such application on the demand of the judgment creditor shall entitle such creditor to a warrant for defendant's arrest. Hall *v.* McKnight, 6 N. Y. Leg. Obs. 348. See, however, *In re* Prime, 1 Barb. (N. Y.) 296, 1 Edm. Sel. Cas. (N. Y.) 479.

43. People *v.* Healy, 128 Ill. 9, 20 N. E. 692, 15 Am. St. Rep. 90. See also Holmes *v.* Leighton, 40 Misc. (N. Y.) 678, 83 N. Y. Suppl. 164.

Purchase of goods on credit.— A verdict and judgment based on a count in a declaration alleging that defendant procured a sale of goods to himself by falsely pretending that he wished to buy on credit and pay for the goods, when in fact he intended not to pay for them will not warrant the issuing of a capias ad satisfaciendum against the body of defendant. Kitson *v.* Ellinger, 35 Ill. App. 55 [*following* People *v.* Healy, 128 Ill. 9, 20 N. E. 692, 15 Am. St. Rep. 90]. See also Brown *v.* Treat, 1 Hill (N. Y.) 225.

44. Joinder of actions generally see Joinder and Splitting of Actions.

45. Lambert *v.* Snow, 9 Abb. Pr. (N. Y.) 91; Pam *v.* Vilmar, 52 How. Pr. (N. Y.) 238; Brown *v.* Ashbough, 40 How. Pr. (N. Y.) 226; Hormann *v.* Sherin, 8 S. D. 36, 65 N. W. 434, 59 Am. St. Rep. 744. See also Hickox *v.* Fay, 36 Barb. (N. Y.) 9.

Counts in contract and in tort.— An execution against the person will not issue where the complaint states a cause of action arising out of a breach of contract and another cause arising out of a tort, the recovery being for all that appears on the one cause as much as on the other. Sherwood *v.* Pierce, 50 N. Y. Super. Ct. 378; Brown *v.* Treet, 1 Hill (N. Y.) 225 [*limited* and *explained* in Suydam *v.* Smith, 7 Hill (N. Y.) 182].

This rule has been held not to apply where the verdict of the jury upon which the judgment is rendered establishes to a certainty that they found against defendant only upon a cause which would support a judgment upon which execution against the person might issue. Hormann *v.* Sherin, 8 S. D. 36, 65 N. W. 434, 59 Am. St. Rep. 744.

46. Fields *v.* Bland, 81 N. Y. 239, 8 Abb. N. Cas. (N. Y.) 221, 59 How. Pr. (N. Y.)

ance of an act, the neglect or refusal to perform which would be punishable by the court as a contempt, where defendant is not a resident of the state, or, being a resident, is about to depart therefrom, by reason of which non-residence or departure there is danger that a judgment and order requiring the performance of the act will be rendered ineffectual.[47]

4. Right as Dependent Upon Previous Order of Arrest in Same Action. As a general rule where the right to arrest depends on the nature of the action and is a part thereof, an execution against the person may issue, although no previous order of arrest has been granted,[48] as in the case of actions *ex delicto*.[49] Where, however, the grounds of arrest are extraneous to the cause of action, an execution against the person may in some jurisdictions issue only after a previous order of arrest has been obtained and served,[50] and it is immaterial that the com-

85; Baker *v.* Baker, 21 N. Y. Wkly. Dig. 64 [*affirmed* in 99 N. Y. 633]. *Contra*, see Barney *v.* Chapman, 21 Fed. 903.

47. Simpson *v.* St. John, 93 N. Y. 363; Graves *v.* Waite, 59 N. Y. 156; Ensign *v.* Nelson, 49 Hun (N. Y.) 215, 1 N. Y. Suppl. 685 (a substitute for the writ of ne exeat, which is abolished); Genesee River Nat. Bank *v.* Mead, 18 Hun (N. Y.) 303; Gordon *v.* Fox, 18 N. Y. Civ. Proc. 291; Smith *v.* Duffy, 8 N. Y. Civ. Proc. 191.

Order for arrest.— In such cases where the right to arrest depends partly upon extrinsic facts, an order of arrest must first have been obtained and served. See *infra*, XIV, D, 4.

48. Sherman *v.* Grinnell, 159 N. Y. 50, 53 N. E. 674 [*affirming* 34 N. Y. Suppl. 1148]; Gross *v.* Graves, 2 Rob. (N. Y.) 707; Roeber *v.* Dawson, 3 N. Y. Suppl. 122, 15 N. Y. Civ. Proc. 417, 22 Abb. N. Cas. (N. Y.) 73; Bullen *v.* Murphy, 8 N. Y. Civ. Proc. 266; Smith *v.* Duffy, 8 N. Y. Civ. Proc. 191; Searing *v.* Goodstein, 2 N. Y. Civ. Proc. 464, 11 Abb. N. Cas. (N. Y.) 450, 64 How. Pr. (N. Y.) 427; Church of Redeemer *v.* Crawford, 14 Abb. Pr. N. S. (N. Y.) 200; Masten *v.* Scovill, 6 How. Pr. (N. Y.) 315.

Where the cause of action is identical with the cause of arrest, an order of arrest may be obtained against a judgment debtor, although no such order was obtained before judgment. Elwood *v.* Gardner, 45 N. Y. 349. See also Wood *v.* Henry, 40 N. Y. 124 [*overruling* Lockwood *v.* Van Slyke, 18 How. Pr. (N. Y.) 45]; Lembke's Case, 11 Abb. Pr. N. S. (N. Y.) 72.

Right dependent upon judgment of court.— Under Vt. Gen. St. c. 121, § 24, the character and effect of the execution is made to depend upon the judgment of the court, as to whether the cause of action arose from the wilful and malicious act or neglect of defendant, and it is wholly immaterial whether the original writ issued against the body or not, or whether the service was made by an arrest of the body or by an attachment of property or by summons. Adams *v.* Wait, 42 Vt. 16 [*followed* in Haskell *v.* Jewell, 59 Vt. 91, 7 Atl. 545].

49. Roeber *v.* Dawson, 3 N. Y. Suppl. 122, 15 N. Y. Civ. Proc. 417, 22 Abb. N. Cas. (N. Y.) 73; Hunt *v.* Burdick, 42 Vt. 610.

An action to recover for injuries caused by negligence is an action to recover for "personal injuries" under N. Y. Code, §§ 549, 3343, giving the right to an execution against the person without an order of arrest. Ritterman *v.* Ropes, 52 N. Y. Super. Ct. 236.

In trover execution may run against the body, although no arrest was made on the mesne process. Eames *v.* Stevens, 26 N. H. 117.

Where plaintiff in an action on a contract so amends his complaint by alleging fraud and deceit as to change the action into one for tort, he acquires the right on recovering judgment to issue an execution against the person of defendant, whether an order of arrest had issued in the action or not. Carrigan *v.* Washburn, 7 N. Y. Suppl. 262, 18 N. Y. Civ. Proc. 77.

50. Chapin *v.* Foster, 101 N. Y. 1, 3 N. E. 786; Neftel *v.* Lightstone, 77 N. Y. 96; Prouty *v.* Swift, 51 N. Y. 594; People *v.* Carpenter, 46 Barb. (N. Y.) 619; Fassett *v.* Tallmadge, 37 Barb. (N. Y.) 436; Broome *v.* Cochran, 31 Misc. (N. Y.) 660, 64 N. Y. Suppl. 1043; Wright *v.* Duffie, 23 Misc. (N. Y.) 338, 51 N. Y. Suppl. 255; Graeffe *v.* Currie, 8 N. Y. Civ. Proc. 187; Whitman *v.* James, 1 N. Y. Civ. Proc. 235, 62 How. Pr. (N. Y.) 132; Elwood *v.* Gardner, 10 Abb. Pr. N. S. (N. Y.) (N. Y.) 238; McKay *v.* Draper, 19 Abb. Pr. (N. Y.) 306 note; Atocha *v.* Garcia, 15 Abb. Pr. (N. Y.) 303, 24 How. Pr. (N. Y.) 186; Purchase *v.* Bellows, 14 Abb. Pr. (N. Y.) 357, 23 How. Pr. (N. Y.) 421; Molenaer *v.* Koerner, 13 Abb. Pr. (N. Y.) 241 note, 22 How. Pr. (N. Y.) 190; How *v.* Frear, 13 Abb. Pr. (N. Y.) 241 note, 21 How. Pr. (N. Y.) 343; Stelle *v.* Palmer, 11 Abb. Pr. (N. Y.) 62; Corwin *v.* Freeland, 6 How. Pr. (N. Y.) 241; Squire *v.* Flynn, 2 Edm. Sel. Cas. (N. Y.) 134; State *v.* Foote, 83 N. C. 102.

In Illinois it was provided that no execution should issue against defendant's body unless the judgment was obtained for a tort, or unless he should have been held to bail upon a writ of "capias ad satisfaciendum." But in People *v.* Hoffman, 97 Ill. 234, it was held that this phrase should be construed to mean "capias ad respondendum" as this was evidently the legislative intent. See also People *v.* Healy, 128 Ill. 9, 20 N. E. 692, 15 Am. St. Rep. 90; Barney *v.* Chapman, 21 Fed. 903.

In South Dakota it is provided that an

plaint states grounds of arrest unless the facts constituting such grounds are necessary to the cause of action.[51]

5. Effect of Release or Discharge From Arrest on Original Process. Where a defendant has been arrested in an action authorizing his arrest, and where upon turning out security to plaintiff's attorney for the claim in suit, he is, by the consent of the latter, released from arrest before judgment, he is still liable to final process against his person on the judgment.[52] After an order of arrest has been discharged on motion, a defendant is not liable to arrest on execution against the person, although on his default at the trial a special verdict has been found stating that he was guilty of the fraud charged in the complaint.[53]

E. Judgments on Which Execution Authorized — 1. In General. A judgment, in order to authorize the issuance of an execution against the person, must have been obtained in an action not within the prohibition of imprisonment for debt, but one in which an order of arrest is proper.[54] The judgment must not be one which has become dormant at the time of the arrest,[55] must be *in per-*

execution shall not issue against the person of a judgment debtor unless an order of arrest has been served, or unless the complaint contains a statement of facts showing one or more causes of arrest. Griffith *v.* Hubbard, 9 S. D. 15, 67 N. W. 850.

Where allegations of fraud have not been proved, nor any order of arrest granted, no execution can properly be issued against the body. Neftel *v.* Lightstone, 77 N. Y. 96.

Where only one of two defendants is taken on a capias ad respondendum and judgment is entered against both, the defendant not originally arrested cannot be arrested on execution. Ballou *v.* Hulbert, 1 Johns. (N. Y.) 62.

Cannot be founded on judge's findings.— Pam *v.* Vilmar, 52 How. Pr. (N. Y.) 238.

Judgment need not show that arrest is authorized.— How *v.* Frear, 13 Abb. Pr. (N. Y.) 241 note, 21 How. Pr. (N. Y.) 343.

Sufficient if order obtained in cause not vacated.— Elwood *v.* Gardner, 45 N. Y. 349, 10 Abb. Pr. N. S. (N. Y.) 238; Smith *v.* Knapp, 30 N. Y. 581; Fake *v.* Edgerton, 5 Duer (N. Y.) 681, 3 Abb. Pr. (N. Y.) 229; Lovee *v.* Carpenter, 3 Abb. Pr. N. S. (N. Y.) 309; Crowell *v.* Brown, 17 How. Pr. (N. Y.) 68; Sellar *v.* Sage, 13 How. Pr. (N. Y.) 230; Cheney *v.* Garbutt, 5 How. Pr. (N. Y.) 467.

Where in an action on contract an arrest has been granted on facts extrinsic to the cause of action, plaintiff need only prove his money demand, and is then entitled to the judgment subjecting defendant to execution against his person. Stern *v.* Moss, 67 How. Pr. (N. Y.) 199.

51. Ætna Ins. Co. *v.* Shuler, 28 Hun (N. Y.) 338; Atocha *v.* Garcia, 15 Abb. Pr. (N. Y.) 303, 24 How. Pr. (N. Y.) 186; State *v.* Foote, 83 N. C. 102.

Under the old New York code to authorize the judgment allowing an execution against the person, the issue of a warrant in the first instance was necessary. Glacius *v.* Moldtz, 61 How. Pr. (N. Y.) 62. See also Kedenburgh *v.* Morgan, 4 Bosw. (N. Y.) 646, 18 How. Pr. (N. Y.) 469; Molenaer *v.* Koerner, 13 Abb. Pr. (N. Y.) 241 note, 22 How. Pr. (N. Y.) 190.

Averments must be essential to cause of action. Ætna Ins. Co. *v.* Shuler, 28 Hun (N. Y.) 338. See also Elwood *v.* Gardner, 45 N. Y. 349, 10 Abb. Pr. N. S. (N. Y.) 238 [*affirming* 9 Abb. Pr. N. S. 99]; Atocha *v.* Garcia, 15 Abb. Pr. (N. Y.) 303, 24 How. Pr. (N. Y.) 186.

52. Meech *v.* Loomis, 14 Abb. Pr. N. S. (N. Y.) 428, 23 How. Pr. (N. Y.) 484, otherwise if order is vacated by court.

Right to imprison terminated by entry of replevin bail.— Dinckerlocker *v.* Marsh, 75 Ind. 548.

53. Stelle *v.* Palmer, 11 Abb. Pr. (N. Y.) 62.

54. Harris *v.* Sheldon, (Pa. 1889) 16 Atl. 828, holding that a capias ad satisfaciendum may issue on a judgment for trust money in the hands of a trustee.

Judgment for mesne profits.— A capias ad satisfaciendum may issue on a judgment for the mesne profits of lands recovered in ejectment. Com. *v.* Bowman, 3 Pa. Dist. 74; Hopkinson *v.* Cooper, 8 Phila. (Pa.) 8. See also Howland *v.* Needham, 10 Wis. 495.

Judgment in action for conversion.— Execution against the person of the judgment debtor may issue on a judgment rendered by the county court in an action for conversion on appeal from a justice's court. Winton *v.* Kirby, 7 S. D. 461, 64 N. W. 528.

After the transcript of a judgment has been filed in a court of record where by statute it is deemed the judgment of the latter court, such transcript of a judgment against a debtor will entitle the creditor to an execution against the person of such debtor, where the action was one in which such execution was proper. See N. Y. Code Proc. § 288. But *compare* Livesey *v.* Sanders, 3 Abb. Pr. (N. Y.) 176; Strouse *v.* Boxmeyer, 6 Pa. Co. Ct. 25. See also *In re* Watson, [1893] 1 Q. B. 21, 62 L. J. Q. B. 85, 67 L. T. Rep. N. S. 519, 4 Reports 90, 41 Wkly. Rep. 34, as to the jurisdiction of English courts on certificate of Irish judgment registered in England.

55. Strawbridge *v.* Mann, 17 Ga. 454.

sonam,[56] and must not be merely a cautionary judgment for a sum which may never become due.[57]

2. Amount of Debt For Which Rendered. In some jurisdictions whether or not an execution will issue against the person of defendant depends upon the amount of the debt.[58]

3. Scire Facias Judgment. The award in an original judgment of the right to a close jail execution does not authorize the clerk to issue such an execution on a scire facias judgment.[59]

4. Judgment For Costs. In actions where executions against the person are proper, and where the costs are but an incident to the debt and are necessarily incurred in order to procure the enforcement of the judgment, imprisonment is authorized for the costs as well as for the amount of the principal debt or demand.[60] In actions where the arrest of defendant is not authorized, plaintiff, if unsuccessful, is not liable to an execution against his person for the costs,[61] as in suits founded on contract;[62] and according to some decisions a judgment for defendant for costs is to be treated, whatever the form of the action, as a judgment for a debt, and plaintiff is not liable to an execution against the person unless about to depart from the state without leaving sufficient to satisfy the judgment, or fraudulently converting or disposing of his property.[63] The weight of authority, however, under modern practice is to the effect that in certain classes of actions in which defendant could have been arrested, the complainant when unsuccessful in his suit becomes the judgment debtor and is liable to arrest and imprisonment on a judgment for the costs in such suit.[64] So also where plaintiff recovers in his action but not a sufficient amount to carry costs.[65]

5. Decree For Alimony. In some jurisdictions execution may be awarded against the person as well as against the property for the enforcement of a decree for alimony upon a divorce;[66] but in others payment of alimony has been held

56. Hill *v.* Bowman, 14 La. 445.

Where defendant is not served with process and does not appear to a suit by attachment, the judgment, upon publication of notice, is a special one, and does not authorize an execution against the body or against any property but that attached. Clark *v.* Holliday, 9 Mo. 711.

57. City Trust Bank *v.* Richards, 20 Wkly. Notes Cas. (Pa.) 53.

58. See Kelley *v.* Morris, 63 Me. 57 (construing Rev. St. c. 113, §§ 2, 19); Hooper *v.* Cox, 117 Mass. 1 (construing Gen. St. c. 124, § 5); Gilman *v.* Perkins, 11 N. H. 343 (construing St. of June 30, 1818); People *v.* Costigan, 54 N. Y. App. Div. 186, 66 N. Y. Suppl. 376 (construing Consol. Act, § 1405).

59. Slayton *v.* Smilie, 66 Vt. 197, 28 Atl. 871.

60. *Ex p.* Bergman, 18 Nev. 331, 4 Pac. 209; Smith *v.* Duffy, 37 Hun (N. Y.) 506, 8 N. Y. Civ. Proc. 191; Finkemaur *v.* Dempsey, 8 N. Y. Civ. Proc. 418. See Gooch *v.* Stephenson, 15 Me. 129. See also Costs, 11 Cyc. 263.

Enforcement of payment under the English Debtors' Act see Hewitson *v.* Sherwin, L. R. 10 Eq. 53, 22 L. T. Rep. N. S. 576, 18 Wkly. Rep. 802.

A married woman without separate property cannot be imprisoned for non-payment of the costs of an action. *In re* Walter, 55 J. P. 551.

The costs follow the judgment or decree for recovery of money, and exemption of the debtor's person from arrest to enforce satisfaction of the debt also applies to costs, and a judgment or decree for costs incidental to a suit upon a cause of action in which the debtor is exempt from imprisonment cannot be enforced against his person. Pierce's Appeal, 103 Pa. St. 27.

61. Merritt *v.* Carpenter, 3 Abb. Dec. (N. Y.) 285, 2 Keyes (N. Y.) 462, 3 Keyes (N. Y.) 142, 33 How. Pr. (N. Y.) 428 [*reversing* order in 30 Barb. 61]; Catlin *v.* Adirondack Co., 11 Abb. N. Cas. (N. Y.) 377 [*reversing* 20 Hun 19].

62. *Ex p.* Beatty, 12 Wend. (N. Y.) 229; People *v.* Onondaga C. Pl., 9 Wend. (N Y.) 430; Merrill *v.* Townsend, 5 Paige (N. Y.) 80; Prince *v.* Camman, 3 Edw. (N. Y.) 413.

63. *Ex p.* Thayer, 11 R. I. 160. See also Meace *v.* Crump, 12 Wkly. Notes Cas. (Pa.) 534.

64. *Ex p.* Bergman, 18 Nev. 331, 4 Pac. 209; Miller *v.* Scherder, 2 N. Y. 262; Miller *v.* Woodhead, 52 Hun (N. Y.) 127, 5 N. Y. Suppl. 88; Philbrook *v.* Kellogg, 21 Hun (N. Y.) 238; Hovey *v.* Starr, 42 Barb. (N. Y.) 435; Kloppenberg *v.* Neefus, 4 Sandf. (N. Y.) 655; Parce *v.* Halbert, 1 How. Pr. (N. Y.) 235; Winton *v.* Knott, 7 S. D. 179, 63 N. W. 782. See also Costs, 11 Cyc. 263.

Necessity for order of arrest against defendant.— Purchase *v.* Bellows, 19 Abb. Pr. (N. Y.) 306.

65. Philbrook *v.* Kellogg, 21 Hun (N. Y.) 238.

66. Sheafe *v.* Laighton, 36 N. H. 240; Sheafe *v.* Sheafe, 36 N. H. 155.

to be enforceable only by fieri facias or attachment and not by a capias ad satisfaciendum.[67]

6. SHOWING LIABILITY TO ARREST. In a number of jurisdictions the judgment in an action must show or state that defendant is subject to arrest and imprisonment in order to authorize an execution thereon against the person.[68]

F. Persons Entitled to Execution — 1. ASSIGNEES. The assignee of a judgment in actions in which imprisonment is allowed is entitled to an execution against the person of the judgment debtor.[69]

2. SURETIES. The sureties on a promissory note who have paid a judgment and fieri facias going against the principal and sureties jointly have no right to return the fieri facias and take out a capias ad satisfaciendum for the arrest of the principal.[70]

G. Against Whom Issuable — 1. PERSONS EXEMPT.[71] Among the classes of persons held to be exempt from arrest and imprisonment on execution against the person are the following: Females;[72] persons sued in representative capacity

Such execution not for "debt or damages" in the sense of the Mass. Gen. St. c. 124, § 5. Chase *v.* Ingalls, 97 Mass. 524.

67. Elmer *v.* Elmer, 150 Pa. St. 205, 24 Atl. 670. See also DIVORCE, 14 Cyc. 769.

Liability of husband for security for wife's costs.— In a wife's petition for judicial separation the husband was ordered to pay a sum of money into court as security for her costs. He made default in payment. It was held that this was not "default in payment of a sum of money" within the Debtors' Act (1869), § 4, and that he was liable to attachment for disobeying the order of the court. Bates *v.* Bates, 14 P. D. 17, 60 L. T. Rep. N. S. 125, 37 Wkly. Rep. 230 [*approving* Lynch *v.* Lynch, 10 P. D. 183, 54 L. J. P. & Adm. 93, 34 Wkly. Rep. 47].

68. Davis *v.* Robinson, 10 Cal. 411; Matoon *v.* Eder, 6 Cal. 57; Blair *v.* Russell, 14 Bush (Ky.) 412; Purdy *v.* Squires, 14 Ky. L. Rep. 271 (only necessary in actions for tort mentioned in such section of the statute); Carpentier *v.* Willett, 31 N. Y. 90 [*affirming* 6 Bosw. 25, 18 How. Pr. 400]; *In re* Rosenzweig, 54 N. Y. App. Div. 186, 66 N. Y. Suppl. 376; *In re* Zeitz, 12 N. Y. Civ. Proc. 423. But see Lovee *v.* Carpenter, 3 Abb. Pr. N. S. (N. Y.) 309.

Subsequent amendment by court.—In Blair *v.* Russell, 14 Bush (Ky.) 412, it was held that failure to note at the foot of the judgment that a capias ad satisfaciendum might issue thereon will not deprive the judgment creditor of his right to a writ where he moves to have the judgment amended in that respect, immediately upon the discovery by him of the defect. But in Purdy *v.* Squires, 14 Ky. L. Rep. 271, it was held that the court had no right at a subsequent term to so amend the judgment as to authorize an additional remedy. See also Leavison *v.* Rosenthal, 5 Ky. L. Rep. 132.

69. King *v.* Kirby, 28 Barb. (N. Y.) 49; Dougherty *v.* Gardner, 58 How. Pr. (N. Y.) 284.

When part of a judgment for a tort is assigned execution against the person may still issue in the name of the assignor for the full amount of the judgment. Dougherty *v.* Gardner, 58 How. Pr. (N. Y.) 284.

The assignment of an account for goods sold does not pass a right of action for tort connected with the sale of the goods; hence an execution will not issue against the person of the debtor at the instance of the assignee based on the tort. Birdsall *v.* Fuller, 11 Hun (N. Y.) 204.

70. Elam *v.* Rawson, 21 Ga. 139.

A surety of a guardian paying the sum which a surrogate's decree requires the guardian to pay is entitled to be subrogated to the ward's rights under the decree, to the extent of the amount paid by him and to issue execution thereunder against the person of the guardian. Rapp *v.* Masten, 4 Redf. Surr. (N. Y.) 76.

71. **Privilege of attorney** from arrest see ATTORNEY AND CLIENT, 4 Cyc. 918.

72. Except in a case where the order can be granted only by the court; or where it appears that the action is to recover damages for the wilful injury to person, character, or property. Duncan *v.* Katen, 6 Hun (N. Y.) 1 [*affirmed* in 64 N. Y. 625]; Wheeler *v.* Hartwell, 4 Bosw. (N. Y.) 684; Solomon *v.* Waas, 2 Hilt. (N. Y.) 179; Hayes *v.* Beard, 13 N. Y. Suppl. 692; Eypert *v.* Bolenius, 2 Abb. N. Cas. (N. Y.) 193; North R. Co. *v.* Carpentier, 3 Abb. Pr. (N. Y.) 259, 4 Abb. Pr. (N. Y.) 47; Siefke *v.* Tappey, 3 Code Rep. (N. Y.) 23; Starr *v.* Kent, 2 Code Rep. (N. Y.) 300. See N. Y. Code Civ. Proc. § 553.

Exemption of married women from arrest in all cases see Hovey *v.* Starr, 42 Barb. (N. Y.) 435; Muser *v.* Miller, 49 N. Y. Super. Ct. 458, 12 Abb. N. Cas. (N. Y.) 305, 65 How. Pr. (N. Y.) 283; Baldwin *v.* Kimmell, 1 Rob. (N. Y.) 109, 16 Abb. Pr. (N. Y.) 353; Anonymous, 1 Duer (N. Y.) 613, 8 How. Pr. (N. Y.) 134; Breiman *v.* Paasch, 7 Abb. N. Cas. (N. Y.) 249; Schaus *v.* Putscher, 16 Abb. Pr. (N. Y.) 353 note, 25 How. Pr. (N. Y.) 463; Robinson *v.* Rivers, 9 Abb. Pr. N. S. (N. Y.) 144; Neville *v.* Neville, 22 How. Pr. (N. Y.) 500.

Commitment to prison of married women under English Debtors' Act (1869), § 5, for non-payment of judgment debts recovered against them payable out of their separate estates see Scott *v.* Morley, 20 Q. B. D. 120,

except for their personal acts;[73] stock-holders of a corporation upon execution issued on a judgment against the corporation;[74] idiots, lunatics, or infants;[75] a spendthrift under guardianship;[76] witnesses during attendance on and while coming to or going from the court;[77] parties attending to their causes in court;[78] members of the legislature while in the execution of their duties;[79] electors while going to or returning from the polls on days of election;[80] and persons enlisting in the army where the debt is less than a certain amount.[81]

2. Joint Debtors. Although where the right to execution against the person depends on the nature of the action, an execution must follow the judgment and be issued and run against all defendants jointly sued or jointly liable,[82] yet, in an action against joint debtors, where an order of arrest has been granted against one of them and execution against all has been returned unsatisfied, the requirement that the execution must follow the judgment does not apply, but an execution running against the person of only the one arrested is regular.[83]

H. Time For Charging Debtor in Execution. At common law the practice seems to have been to sue out a capias ad satisfaciendum or execution against the person at any time within a year from the rendition of the judgment,[84] and if a defendant had been arrested provisionally upon a capias ad respondendum he remained in the custody of the sheriff or his bail until he was charged in execution.[85] The time within which a plaintiff is entitled after judgment to charge the body of defendant in execution is sometimes expressly prescribed by statute;[86] and where this is the case defendant must be charged within

52 J. P. 230, 57 L. J. Q. B. 43, 57 L. T. Rep. N. S. 919, 4 Morr. Bankr. Cas. 286, 36 Wkly. Rep. 67; Draycott *v.* Harrison, 17 Q. B. D. 147, 34 Wkly. Rep. 546; Meager *v.* Pellew, 14 Q. B. D. 973, 53 L. T. Rep. N. S. 67, 33 Wkly. Rep. 573.

73. N. Y. Code Civ. Proc. § 555.

74. *Ex p.* Penniman, 11 R. I. 333.

75. Bush *v.* Pettibone, 4 N. Y. 300, Code Rep. N. S. (N. Y.) 264; Taylor *v.* Van Keuren, 54 How. Pr. (N. Y.) 25; Schuneman *v.* Paradise, 46 How. Pr. (N. Y.) 426. See N. Y. Code Proc. § 550.

76. *In re* Blake, 106 Mass. 501.

77. *In re* Dickenson, 3 Harr. (Del.) 517. *Compare* Jones *v.* Knauss, 31 N. J. Eq. 211.

78. *Ex p.* McNeil, 6 Mass. 245; Broome *v.* Hurst, 4 Yeates (Pa.) 123, 124 note. *Contra*, Hannun *v.* Askew, 1 Yeates (Pa.) 25; Starrett's Case, 1 Dall. (Pa.) 356, 1 L. ed. 174.

79. Corey *v.* Russell, 4 Wend. (N. Y.) 204.

80. Hobbs *v.* Getchell, 8 Me. 187, 23 Am. Dec. 497.

81. Reynolds *v.* Lammond, 3 Johns. (N. Y.) 445, 540; Wright *v.* Quinn, 1 Yeates (Pa.) 163.

82. Whitman *v.* James, 1 N. Y. Civ. Proc. 235, 62 How. Pr. (N. Y.) 132 [*affirmed* in 10 Daly 490 (*affirmed* in 89 N. Y. 635)]; Judson *v.* McLelland, 44 N. C. 262; Howzer *v.* Dellinger, 23 N. C. 475.

Common-law rule modified by statute.— Saunders *v.* Gallaher, 2 Humphr. (Tenn.) 445.

Effect of designation of property of other debtor.— Dooley *v.* Cotton, 3 Gray (Mass.) 496.

When judgment is taken against several partners on service of process on one only, defendant not served cannot be proceeded against under the Non-Imprisonment Act by warrant founded on such judgments, although he is shown to be in possession of partnership property which he refuses to apply to the payment of the judgment, since such a judgment is strictly not against the party, but against his interest in the joint property. Matter of Lowenstein, 7 How. Pr. (N. Y.) 100.

83. Whitman *v.* James, 10 Daly (N. Y.) 490 [*affirmed* in 89 N. Y. 635].

84. Norman *v.* Manciette, 18 Fed. Cas. No. 10,300, 1 Sawy. 484.

85. Norman *v.* Manciette, 18 Fed. Cas. No. 10,300, 1 Sawy. 484.

86. In New York under Code Civ. Proc. § 572, defendant must be charged in execution within ten days after return of execution against the property, or within three months after the entry of judgment. Kelly *v.* Brownlow, 54 N. Y. Super. Ct. 129; Segelke *v.* Finan, 5 N. Y. Suppl. 671, 22 Abb. N. Cas. 458; Hobbs *v.* Bashford, 10 N. Y. St. 389; Gellar *v.* Baer, 12 N. Y. Civ. Proc. 433; Ryan *v.* Crane, 12 N. Y. Civ. Proc. 431; De Silva *v.* Holden, 11 N. Y. Civ. Proc. 404. Prior to Laws (1886), c. 672, amending Code Civ. Proc. § 572, an execution against the person could be set aside where not issued within three months after the entry of judgment, only where defendant was in actual custody; but this amendment abolishes the requirement of actual custody and enables defendant to move to set the execution aside on proof that plaintiff neglected to issue it within the three months. De Silva *v.* Holden, 11 N. Y. Civ. Proc. 404. As to the meaning of the words "in actual custody" see Schmidt *v.* Heitner, 45 N. Y. Super. Ct. 334. Where defendant was in custody he should have been charged within three months after the entry of judgment. Haviland *v.* Kane, 1 Abb. Pr. N. S. (N. Y.) 409; Dusart *v.* Delacroix, 1 Abb. Pr. N. S. (N. Y.) 409 note;

such time or the execution will be vacated unless reasonable cause be shown to the contrary.[87] Where, however, such provision is not made plaintiff must be allowed a reasonable time within which to charge his debtor.[88]

I. Previous Issue and Return of Fieri Facias. At common law a fieri facias and a capias ad satisfaciendum may issue simultaneously,[89] and the fact that a fieri facias has been issued and is at the time in the hands of the sheriff does not preclude the right to the issuance of a capias ad satisfaciendum,[90] although, since the execution of either writ is usually held to operate *prima facie* as a satisfaction of the judgment, the two writs cannot be contemporaneously executed,[91] and if anything is done under a fieri facias a capias ad satisfaciendum cannot be executed if issued until the former execution is returned.[92] The practice is controlled by statute in some states. In a number of states it is expressly provided by statute that an execution against the person cannot issue unless an execution against property has been previously issued and returned,[93]

Lippman *v.* Petersberger, 9 Abb. Pr. (N. Y.) 209, 18 How. Pr. (N. Y.) 270 (time computed from date of actual entry of judgment and not from date when plaintiff might have entered it); Standacher *v.* Pregenzer, 52 How. Pr. (N. Y.) 76 (time computed from actual entry); Bostwick *v.* Wildey, 42 How. Pr. (N. Y.) 245. *Compare* People *v.* Gill, 85 N. Y. App. Div. 192, 83 N. Y. Suppl. 135.

In South Carolina the act of 1815 allowed a body execution to be issued at any time within three years next after the signing and enrolling of judgment, without any revival of the same. Jenkins *v.* Mayrant, 3 McCord 560; Primrose *v.* Becket, 3 McCord 418.

Within thirty days after time when first issuable see Fox *v.* Ames, 6 Barb. (N. Y.) 256, under the New York act of 1842.

87. Segelke *v.* Finan, 5 N. Y. Suppl. 671, 22 Abb. N. Cas. (N. Y.) 458; Hobbs *v.* Bashford, 10 N. Y. St. 389. See also cases cited *supra*, note 86.

Pendency of supplementary proceedings will not justify plaintiff in delaying to issue execution against the person of defendant. Newgas *v.* Solomon, 20 Abb. N. Cas. (N. Y.) 175.

88. Norman *v.* Manciette, 18 Fed. Cas. No. 10,300, 1 Sawy. 484.

89. Dicas *v.* Warne, 10 Bing. 341, 3 Moore & S. 814, 25 E. C. L. 164.

90. Cary *v.* Gregg, 3 Stew. (Ala.) 433; Leavison *v.* Rosenthal, 5 Ky. L. Rep. 132.

91. Leavison *v.* Rosenthal, 5 Ky. L. Rep. 132; McNair *v.* Ragland, 17 N. C. 42, 22 Am. Dec. 728; Mazyck *v.* Coil, 2 Bailey (S. C.) 101; Miller *v.* Bagwell, 3 McCord (S. C.) 429; State *v.* Guignard, 1 McCord (S. C.) 176; Alkin *v.* Bolan, 1 Brev. (S. C.) 537.

Abandonment before execution.— Steele *v.* Murray, 1 Blackf. (Ind.) 179.

Abandonment after levy.— Cutler *v.* Colver, 3 Cow. (N. Y.) 30; State Bank *v.* Latshaw, 9 Serg. & R. (Pa.) 9.

Pending a levy on real estate under a fieri facias, a warrant of arrest under the Pennsylvania act of July 12, 1842, cannot issue against defendant. Hood *v.* Pauley, 2 Leg. Rec. (Pa.) 72.

92. *Kentucky.*— Leavison *v.* Rosenthal, 5 Ky. L. Rep. 132.

Maryland.— Turner *v.* Walker, 3 Gill & J. 377, 22 Am. Dec. 329.

New York.— Cutler *v.* Colver, 3 Cow. 30.

North Carolina.— Wheeler *v.* Bouchelle, 27 N. C. 584; McNair *v.* Ragland, 17 N. C. 42, 22 Am. Dec. 728.

Pennsylvania.— Burk *v.* McFall, 2 Browne 143.

England.— Miller *v.* Parnell, 2 Marsh. 78, 6 Taunt. 370; Andrews *v.* Saunderson, 1 H. & N. 725.

See 21 Cent. Dig. tit. "Execution," § 1211.

93. *Georgia.*— Craig *v.* Adair, 22 Ga. 373.

Louisiana.— Chaffe *v.* Handy, 36 La. Ann. 22.

New York.— Fischer *v.* Langbein, 103 N. Y. 84, 8 N. E. 251; New York Guaranty, etc., Co. *v.* Rogers, 71 N. Y. 377; Hutchinson *v.* Brand, 9 N. Y. 208 [*affirming* 6 How. Pr. 73]; Bergman *v.* Noble, 45 Hun 133; O'Shea *v.* Kohn, 38 Hun 149; Meyers *v.* Becker, 29 Hun 567; Renick *v.* Orser, 4 Bosw. 384; Noe *v.* Christie, 15 Abb. Pr. N. S. 346; New York Guaranty, etc., Co. *v.* Gleason, 53 How. Pr. 122; U. S. Bank *v.* Jenkins, 18 Johns. 305. See also Fisher *v.* Young, 41 Misc. 552, 85 N. Y. Suppl. 115. And *compare* American Surety Co. *v.* Cosgrove, 40 Misc. 262, 81 N. Y. Suppl. 945.

North Carolina.— Carroll *v.* Montgomery, 128 N. C. 278, 38 S. E. 874; Kinney *v.* Laughenour, 97 N. C. 325, 2 S. E. 43.

Pennsylvania.— Burk *v.* McFall, 2 Browne 143.

Virginia.— Smith *v.* Triplett, 4 Leigh 590.

Wisconsin.— *In re* Mowry, 12 Wis. 52.

See 21 Cent. Dig. tit. "Execution," § 1211.

Return must be on sheriff's responsibility. — Huntington *v.* Metzger, 158 Ill. 272, 41 N. E. 881 [*reversing* order 51 Ill. App. 222], under Ill. Rev. St. c. 77, § 62.

Sixty days need not intervene.— Fake *v.* Edgerton, 5 Duer (N. Y.) 681, 3 Abb. Pr. (N. Y.) 229, under N. Y. Code, § 290.

The return may be indorsed nunc pro tunc. — Hall *v.* Ayer, 9 Abb. Pr. (N. Y.) 220, 19 How. Pr. (N. Y.) 91.

Where notice of special bail is not given plaintiff may issue a capias ad satisfaciendum without having first issued a fieri facias. Butterfield *v.* Cooper, 6 Cow. (N. Y.) 608.

unsatisfied in whole or in part.[94] This prohibition, being for the benefit of the judgment debtor, may, however, be waived by him.[95] When a party is entitled to an execution against the property and person of a debtor, the mere taking out of a fieri facias in the first instance without effect, or with only partial success, will not prevent the subsequent resort to the more stringent process of capias ad satisfaciendum.[96]

J. Proceedings to Procure — 1. In General. The statutory provisions as to the proceedings by which an execution against the person may be procured must in all cases be strictly followed before the writ may issue.[97]

2. Notice to Appear For Examination. It is sometimes provided by statute that before an execution against the person can issue in certain cases notice should be given to the debtor to appear for examination under oath touching his estate and effects and the disposal thereof and to show cause why the execution should not issue.[98]

3. Certificate as to Wilful Act or Neglect. In some jurisdictions it is provided by statute[99] that if the cause of action in any action of trespass or trespass on the case has arisen from the wilful and malicious act or neglect of defendant, the court or justice before whom the action is tried shall cause a certificate thereof to be made on the back of the execution issued in such action, and defendant shall not be discharged on giving bond.[1]

4. Contest of Facts Forming Ground of Arrest. Where the facts constituting a cause of action and those constituting the right to arrest defendant are the

94. Huntington *v.* Metzger, 158 Ill. 272, 41 N. E. 881 [*reversing* order 51 Ill. App. 222]; Bergman *v.* Noble, 45 Hun (N. Y.) 133, 12 N. Y. Civ. Proc. 256, 19 Abb. N. Cas. (N. Y.) 62, 26 N. Y. Wkly. Dig. 558.

After levy on property subject to previous execution.—See White *v.* Champenois, 1 Wend. (N. Y.) 92.

Arrest upon refusal to disclose personal property.— Bulkley *v.* Finch, 37 Conn. 71.

Effect of stay as to one joint defendant.— Casson *v.* Cureton, 12 Mart. (La.) 435.

Non-compliance merely an irregularity.— See Renick *v.* Orser, 4 Bosw. (N. Y.) 384.

Return must show demand of parties to point out property.— Conway *v.* Jones, 17 La. 413.

Where goods taken under a fieri facias have been sold for a part of the amount due on the judgment, a capias ad satisfaciendum cannot be legally issued for the residue until the sheriff has made a final return of the fieri facias showing what has been done with the property. This return should be in the term-time, but if made to the clerk's office in recess it is void. Turner *v.* Walker, 3 Gill & J. (Md.) 377, 22 Am. Dec. 329.

95. New York Guaranty, etc., Co. *v.* Rogers, 71 N. Y. 377.

96. The Delaware, 7 Fed. Cas. No. 3,762, Olcott 240. And see also Olcott *v.* Lilly, 4 Johns. (N. Y.) 407; Beacon *v.* Peck, 1 Str. 226.

97. Johnson *v.* Temple, 4 Harr. (Del.) 446; Quinby *v.* Duncan, 4 Harr. (Del.) 383; Von Kettler *v.* Johnson, 57 Ill. 109; Gorton *v.* Frizzell, 20 Ill. 291; Maher *v.* Huette, 10 Ill. App. 56; Williams *v.* Shillaber, 153 Mass. 541, 27 N. E. 767; Burrichter *v.* Cline, 3 Wash. St. 135, 28 Pac. 367. See also Auerbach *v.* Rogin, 40 Misc. (N. Y.) 695, 83 N. Y. Suppl. 154; Huntley *v.* Hasty, 132 N. C. 279, 43 S. E. 844. And *compare* Liederman *v.* Rooner, 82 N. Y. App. Div. 541, 81 N. Y. Suppl. 606.

98. Williams *v.* Shillaber, 153 Mass. 541, 27 N. E. 767; Atwood *v.* Wheeler, 149 Mass 96, 21 N. E. 232; Carleton *v.* Akron Sewer Pipe Co., 129 Mass. 40; *In re* Frost, 127 Mass. 550.

Notice to defendant is not necessary to obtain an execution against the body, under R. I. Pub. St. c. 222, § 14. Keene, Petitioner, 15 R. I. 294, 3 Atl. 418.

Where one charge in an affidavit for an arrest requires notice and another does not, and no notice issues, and the magistrate authorizes the arrest, the certificate must be deemed to refer to the charge not requiring notice. Way *v.* Brigham, 138 Mass. 384.

Summons returnable in ten days.— See Krohn *v.* Templin, 2 Ind. 146.

Hearing of debtor.— An attachment ought not to issue under any of the exceptions in the Debtors' Act (1868), § 4, *ex parte*, but the debtor should have an opportunity of showing that he is not within the exception. Ferguson *v.* Ferguson, L. R. 10 Ch. 661, 44 L. J. Ch. 615.

99. N. H. Gen. St. c. 222, § 12; Vt. Gen. St. c. 124, § 24.

1. Cooley *v.* Eastman, 57 N. H. 503 (holding that a court which refers a cause to a referee for trial, and afterward receives his report and renders judgment upon it, may be said to try the cause, within a statute requiring a certificate to facts warranting execution against the person to be made by the court of justice before whom the action is tried); Stowe *v.* Powell, 46 Vt. 471; Whiting *v.* Dow, 42 Vt. 262 (question of granting to be determined from the consideration of all the facts as disclosed on trial); Adams *v.* Wait, 42 Vt. 16; Soule *v.* Austin, 35 Vt. 515.

same, defendant need not contest the arrest by a motion to set aside the order making it, but may at the trial contest the facts forming a ground therefor, and, in case they are not proven, no execution against the person of defendant can be had.[2] Where an affidavit is filed setting up matters accruing subsequent to the judgment for the issuing of an execution against the body, defendant is entitled to a trial by jury upon such matters.[3]

5. Affidavit or Complaint. Before an execution against the person can issue, an affidavit or complaint must be made, setting out the facts relied upon to justify the arrest of defendant,[4] and a court or judge in allowing an execution against the person of a judgment debtor will only consider such grounds therefor as are included in the affidavit.[5] The affidavit should not be in the alternative,[6] should make out a plain case,[7] and should show such conduct on the part of defendant as brings him within the exceptions to the prohibitions of imprisonment for debt.[8] Where the affidavit is made on information and belief the sources and nature of the information should be set out and the reason given why a positive statement cannot be procured.[9] The affidavit must be made by the person authorized by

2. Elwood *v.* Gardner, 10 Abb. Pr. N. S. (N. Y.) 238.

3. Boos *v.* White, 64 Ill. App. 177.

4. *Alabama.*— Kenan *v.* Carr, 10 Ala. 867; O'Brien *v.* Lewis, 8 Ala. 666.

Delaware.— Fromberger *v.* Karsner, 1 Houst. 290.

Georgia.— Dozier *v.* Dozier, 30 Ga. 523.

Illinois.— Doty *v.* Colton, 90 Ill. 453; Tuttle *v.* Wilson, 24 Ill. 553; Gorton *v.* Frizzell, 20 Ill. 291; Fergus *v.* Hoard, 15 Ill. 357.

Indiana.— Baker *v.* State, 109 Ind. 47, 9 N. E. 711.

Kansas.— *In re* Heath, 40 Kan. 833, 19 Pac. 926; Newton First Nat. Bank *v.* Briggs, 6 Kan. App. 684, 50 Pac. 462.

Maine.— Whiting *v.* Trafton, 16 Me. 398.

Massachusetts.—Bailey *v.* Bailey, 166 Mass. 226, 44 N. E. 143; Kellogg *v.* Leach, 162 Mass. 45, 37 N. E. 767; Stearns *v.* Hemenway, 162 Mass. 17, 37 N. E. 766; Noyes *v.* Manning, 162 Mass. 14, 37 N. E. 768; Williams *v.* Shillaber, 153 Mass. 541, 27 N. E. 767; Atwood *v.* Wheeler, 149 Mass. 96, 21 N. E. 232; *In re* Frost, 127 Mass. 550; Hildreth *v.* Brigham, 12 Allen 71; Abbott *v.* Tucker, 4 Allen 72.

Michigan.—Badger *v.* Reade, 39 Mich. 771; Proctor *v.* Prout, 17 Mich. 472.

New Hampshire.—Janes *v.* Miller, 21 N. H. 371; Naramore *v.* Miller, 21 N. H. 367; Kidder *v.* Farrar, 20 N. H. 320.

New Jersey.— Kipp *v.* Chamberlin, 20 N. J. L. 656; Morgan *v.* Morgan, 28 N. J. Eq. 23.

New York.— People *v.* Speir, 77 N. Y. 144; Wheaton *v.* Fay, 62 N. Y. 275; De Weerth *v.* Feldner, 16 Abb. Pr. 295; Hall *v.* McMahon, 10 Abb. Pr. 103; Sellar *v.* Sage, 13 How. Pr. 230; People *v.* Albany, 6 Hill 429; Hall *v.* McKnight, 6 N. Y. Leg. Obs. 348.

North Carolina.— Magruder *v.* Shelton, 98 N. C. 545, 7 S. E. 141, 2 Am. St. Rep. 349; Brown *v.* Walk, 30 N. C. 517.

Ohio.— Gates *v.* Maxon, 1 Ohio Dec. (Reprint) 132, 2 West. L. Month. 405.

Rhode Island.— Keene, Petitioner, 15 R. I. 294, 3 Atl. 418.

South Carolina.— Woodfolk *v.* Leslie, 2 Nott & M. 585.

Vermont.— Converse *v.* Washburn, 43 Vt. 129; Muzzy *v.* Howard, 42 Vt. 23; Adams *v.* Wait, 42 Vt. 16; Davis *v.* Dorr, 30 Vt. 97; Blood *v.* Crandall, 28 Vt. 396; *Ex p.* Sargeant, 17 Vt. 425.

Washington.— Burrichter *v.* Cline, 3 Wash. St. 135, 28 Pac. 367.

England.— Davis *v.* Simmonds, 14 L. R. Ir. 364.

See 21 Cent. Dig. tit. "Execution," § 1234.

Where order is sought after judgment rendered an affidavit to hold to bail will authorize the issue of a capias ad satisfaciendum without a new affidavit. Stewart *v.* Cunningham, 22 Ala. 626; Converse *v.* Washburn, 43 Vt. 129; Davis *v.* Dorr, 30 Vt. 97. *Contra*, Gates *v.* Maxon, 1 Ohio Dec. (Reprint) 132, 2 West. L. Month. 405. See also Janes *v.* Miller, 21 N. H. 371.

Where order is sought before judgment the affidavit upon which such order is to be founded must show that a sufficient cause of action exists, and also that it is among those specified in N. Y. Code, § 179. Smith *v.* Jones, 4 Rob. (N. Y.) 655; Pindar *v.* Black, 4 How. Pr. (N. Y.) 95, 2 Code Rep. (N. Y.) 53.

Where the cause of arrest set forth in the complaint is essential to plaintiff's claim, no affidavit for the order of arrest is needed. State *v.* Foote, 83 N. C. 102. See also Elwood *v.* Gardner, 45 N. Y. 349.

Where execution issued for costs only.— See *In re* Stone, 129 Mass. 156.

5. Newton First Nat. Bank *v.* Briggs, 6 Kan. App. 684, 50 Pac. 462.

6. Gorton *v.* Frizzell, 20 Ill. 291.

7. People *v.* Albany, 6 Hill (N. Y.) 429.

Averment of personal demand.— Tuttle *v.* Wilson, 24 Ill. 553.

Statement of precise sum due.— Woodfolk *v.* Leslie, 2 Nott & M. (S. C.) 585.

8. Badger *v.* Reed, 39 Mich. 771.

9. De Weerth *v.* Feldner, 16 Abb. Pr. (N. Y.) 295. See also Union Bank *v.* Mott, 9 Abb. Pr. (N. Y.) 106; Cook *v.* Roach, 21 How. Pr. (N. Y.) 152. See Naramore *v.* Miller, 21 N. H. 367.

statute so to do, usually the judgment creditor or his attorney,[10] and may be sworn to before one authorized to administer oaths or affirmations to witnesses and others.[11] Defective grammar, where the sense is apparent, will not invalidate such an affidavit,[12] and a court in its discretion may permit the amendment of the affidavit as to matters of form.[13]

6. Evidence. On application for a writ of capias ad satisfaciendum the facts authorizing the issue of such writ must be proved by legal and competent evidence, and mere statements of conclusions of law will not suffice.[14] The officer making the order for the writ is to decide upon the weight and credibility of the evidence, although its applicability may be reviewed,[15] and his order should show that the proof was to his satisfaction.[16] A statement made by defendant when examined under a trustee act cannot afterward be sworn to as evidence of fraud to procure a capias ad satisfaciendum.[17] Nor can the testimony of a debtor taken upon his examination in supplementary proceedings be used as evidence of his fraud to obtain an order of arrest under the Non-Imprisonment Act, such supplementary proceedings being in the nature of a bill in equity.[18] The magistrate in determining whether the evidence laid before him is sufficient to satisfy him of such a state of facts, as the statute requires, performs a judicial duty, and may therefore be disqualified from the performance thereof by reason of his relations to plaintiff.[19]

7. Demand For Payment. Where demand is required by statute before an execution can issue against the person of a debtor for refusal to deliver up his estate, there must have been a specific demand for property to satisfy the judgment, made in such manner as to give him to understand that he will be liable to arrest for failure to comply, and also a refusal by the debtor.[20]

In Massachusetts before the statutes of 1860 it was not necessary that the affidavit for the arrest of a debtor on execution should state that the person making the affidavit had good cause to believe the facts therein set forth. Abbott *v.* Tucker, 4 Allen 72.

10. *In re* Heath, 40 Kan. 333, 19 Pac. 926, affidavit by an agent who is not an attorney held to be insufficient.

11. Fergus *v.* Hoard, 15 Ill. 357, clerk of the circuit court.

12. Abbott *v.* Tucker, 4 Allen (Mass.) 72.

13. Doty *v.* Colton, 90 Ill. 453, omission of notary's seal or mistake in date of jurat.

14. Titus *v.* Bowne, 30 N. J. L. 340; Kipp *v.* Chamberlin, 20 N. J. L. 656; Wire *v.* Browning, 20 N. J. L. 364; Krauth *v.* Vial, 10 Abb. Pr. (N. Y.) 139.

Affidavit of party insufficient.— See Gates *v.* Maxon, 1 Ohio Dec. (Reprint) 132, 2 West. L. J. 405.

Record of judgment sufficient prima facie evidence.— City Trust Co. *v.* Richards, 20 Wkly. Notes Cas. (Pa.) 53.

The creditor must establish that the debtor has the money or means to comply before the latter can be ordered to pay the judgment or be committed. It is not enough to warrant such an order that defendant's statement gives rise to suspicion that he may be concealing money or property. Peters *v.* Kerr, 22 How. Pr. (N. Y.) 3.

For the purpose of determining whether a judgment debtor has had "the means to pay" the judgment debt with a view of making an order for his committal under the English Debtors' Act (1869), § 5, money derived from a gift may be taken into account. It is not necessary that the "means to pay" should have been derived from the debtor's earnings or from a fixed income. *Ex p.* Koster, 14 Q. B. D. 597, 54 L. J. Q. B. 389, 52 L. T. Rep. N. S. 946, 2 Morr. Bankr. Cas. 35, 33 Wkly. Rep. 606.

Proof of wilful and malicious act.— Robinson *v.* Wilson, 22 Vt. 35, 52 Am. Dec. 77.

15. Wire *v.* Browning, 20 N. J. L. 264.

16. Hunt *v.* Hill, 20 N. J. L. 476.

Certificate of magistrate to be attached to execution under the Massachusetts statute see Bailey *v.* Bailey, 166 Mass. 226, 44 N. E. 143; Manuel *v.* Bates, 104 Mass. 354. See also Webber *v.* Davis, 5 Allen (Mass.) 393.

Specification of means by which fraud committed.— See Titus *v.* Bowne, 30 N. J. L. 340.

17. Titus *v.* Bowne, 30 N. J. L. 340.

18. Keiley *v.* Dusenbury, 2 Abb. N. Cas. (N. Y.) 360.

19. McGregor *v.* Crane, 98 Mass. 530.

20. Maher *v.* Huette, 10 Ill. App. 56, where it was held that merely reading the execution to the debtor and asking him to satisfy it are not enough.

Where a judgment debtor absolutely refuses to apply any of his choses in action in payment of a judgment against him, he cannot after the institution of proceedings against him for unjustly refusing to comply with the demand made upon him, object that no proper person was present at the time of the demand to receive the property demanded. Steward *v.* Biddlecum, 2 N. Y. 103, where it is also held that in order to author-

8. Indorsement of Amount Due and Order to Arrest. The clerk need not indorse on a capias ad satisfaciendum "that the sheriff hold defendant to bail in double the sum sworn to be due" as the writ shows both the amount due and the order to arrest.[21]

9. Leave of Court. It would seem to be well established that an order of court granting leave to issue an execution against the body is unnecessary where a previous order of arrest which has been granted still remains in force,[22] or where plaintiff would have been entitled to an order of arrest from the nature of the action, and from the facts necessarily stated in the complaint.[23] Where, however, an affidavit filed after judgment is the ground of the application, an order of the court is usually held to be necessary.[24]

K. The Writ — 1. Form and Requisites — a. In General. The form of an execution against the person is usually fixed by statute and nothing need be stated therein which is not required by such statute.[25] Where such forms exist they should not be disregarded,[26] although a substantial compliance will be sufficient.[27] And so far as applicable it seems that the rules relating to the form and requisites of executions against property govern the form and requisites of executions against the person.[28]

ize the issuing of a warrant under the Non-Imprisonment Act against a judgment debtor for unjustly refusing to apply his choses in action to the payment of a judgment against him, it is not necessary, in the demand made upon the debtor, to specify particularly what choses in action he is required to appropriate for that purpose.

21. *Ex p.* Cleveland, 36 Ala. 306.

22. Purdy *v.* Squires, 14 Ky. L. Rep. 271; Elwood *v.* Gardner, 45 N. Y. 349; Corwin *v.* Freeland, 6 N. Y. 560; Bull *v.* Melliss, 13 Abb. Pr. (N. Y.) 241; How *v.* Frear, 13 Abb. Pr. (N. Y.) 241 note; Fake *v.* Edgerton, 3 Abb. Pr. (N. Y.) 229; Humphrey *v.* Brown, 17 How. Pr. (N. Y.) 481; Kress *v.* Ellis, 14 How. Pr. (N. Y.) 392.

Under the Ky. Gen. St. c. 92, art. 11, § 18, providing that "upon a judgment . . . a capias pro fine . . . may issue from time to time until the judgment be satisfied," an order of court specially directing such issuance is unnecessary. Long *v.* Wood, 78 Ky. 392.

23. Corwin *v.* Freeland, 6 N. Y. 560; Kloppenburg *v.* Neefus, 4 Sandf. (N. Y.) 655; Ginochio *v.* Figari, 4 E. D. Smith (N. Y.) 227, 2 Abb. Pr. (N. Y.) 185; Lockwood *v.* Van Slyke, 18 How. Pr. (N. Y.) 45; Cooney *v.* Van Rensselaer, 1 Code Rep. (N. Y.) 38; Hormann *v.* Sherin, 8 S. D. 36, 65 N. W. 434, 59 Am. St. Rep. 744.

Execution against guardian ad litem for costs.— See Miller *v.* Woodhead, 52 Hun (N. Y.) 127, 5 N. Y. Suppl. 88, 17 N. Y. Civ. Proc. 102.

24. Stewart *v.* Levy, 36 Cal. 159; Davis *v.* Robinson, 10 Cal. 411; People *v.* Willett, 26 Barb. (N. Y.) 78, 6 Abb. Pr. (N. Y.) 37, 15 How. Pr. (N. Y.) 210; Alden *v.* Sarson, 4 Abb. Pr. (N. Y.) 102; Humphrey *v.* Brown, 17 How. Pr. (N. Y.) 481

25. Hutchinson *v.* Brand, 9 N. Y. 208 [*affirming* 6 How. Pr. 73]; O'Shea *v.* Kohn, 38 Hun (N. Y.) 149.

26. Finley *v.* Smith, 15 N. C. 95.

27. Hutchinson *v.* Brand, 9 N. Y. 208 [*affirming* 6 How. Pr. 73].

28. See *supra*, VI.

In what name should run.— A capias ad satisfaciendum is process within the meaning of a constitutional requirement that all process shall be in the name of the state. Webster *v.* Farley, 6 Blackf. (Ind.) 163. See *supra*, VI, D, 2, b, (VII).

To whom directed.— A capias ad satisfaciendum must be directed to the sheriff of the county in which the venue of the action is laid, although defendant was arrested on mesne process in another county, and gave bail to pay or surrender himself to the sheriff of the county where the arrest was made. Drake *v.* Cochran, 18 N. J. L. 9. And see Dudlow *v.* Watchorn, 16 East 39. See *supra*, VI, D, 2, b, (VI).

To what county directed.—A capias ad satisfaciendum issued on a replevin bond may be directed to the county in which the original judgment was obtained, although the bond was taken in another county. Scott *v.* Maupin, Hard. (Ky.) 122. See *supra*, VI, B.

Laying venue.— An execution against the person, issued and dated in a town within the county where the judgment was rendered is not void because a different venue is laid in the margin. Avery *v.* Lewis, 10 Vt. 332, 33 Am. Dec. 203.

Teste.— Where a capias ad satisfaciendum is issued in vacation it may be tested of the preceding term; if issued in term it should be tested of some day in the same term. Gordon *v.* Valentine, 16 Johns. (N. Y.) 145. Although in England it is not necessary that an execution should be made returnable in the term next after that in which it is tested, yet in some of the states of this country under statute a capias ad satisfaciendum with a term intervening between its teste and return is irregular and a motion to set the same aside will be granted unless plaintiff obtains leave to amend upon paying the costs of the motion. Gibbons *v.* Larcom, 3 Wend.

b. Specification of County to Which Execution Against Property Issued. An execution against the person should specify *eo nomine* the county to which the execution against the property was issued.[29]

c. Recital as to Oath and Affidavit. A capias ad satisfaciendum issued on a judgment is not void on its face, although it does not recite that the oath required by law to be made was made before it issued,[30] nor, in the absence of statutory requirement, is it essential to the validity of a capias ad satisfaciendum that it should recite upon its face that the affidavit required by statute has been made.[31]

d. Conformity to Judgment. Where the right to issue an execution against the person depends upon the nature of the action, the execution must run against all the defendants, but where the right to arrest depends upon extrinsic facts, all the defendants are not necessarily liable to arrest, and plaintiff in such an action may issue an order of arrest against the defendant liable to arrest and after judgment may charge him in execution.[32] Where one of two joint plaintiffs dies after the rendition of the judgment, and no entry of his death is made in court, the execution should be taken out in the name of both the plaintiffs so that it may conform to the judgment.[33] An execution against two persons, in which the name of one only is erroneously stated, is not void as against the other; and a bond given by the latter to procure his release from arrest on such execution is valid.[34] Where the christian names of plaintiffs are not inserted in the warrant or judgment, a capias ad satisfaciendum which properly pursues the judgment gives the officer authority to make the arrest and take bond, although such christian names are not inserted in the writ.[35]

e. Statement of Object of Execution. An execution against the body should recite that it is to pay and satisfy plaintiff in the judgment and not the state or commonwealth.[36]

f. Recital of Judgment and Return of Execution — (I) *In General.* Unless required by statute an execution against the body need not contain a recital that the suit was commenced by warrant or that the judgment was rendered in an action of tort,[37] although it has been held that while not essential it would be well for the execution in connection with its other recitals to briefly refer to the cause of arrest.[38] It need not recite the incidents of the judgment,[39] nor the fact that an execution against property was returned unsatisfied.[40]

(II) *Description of Judgment.* Where a description of the judgment is necessary a capias execution sufficiently describes the judgment by giving its

(N. Y.) 303. It has been held that the teste being a matter of form, and not of substance, where such a writ was erroneously dated so that at the time it was dated the person in whose name it bore teste was not a judge of the court from which it issued, it is not void but only irregular, and a sheriff will not be protected who refuses on this ground to execute it. Jordan *v.* Porterfield, 19 Ga. 139, 63 Am. Dec. 301. And according to some decisions an execution not attested in the name of any court or judge is irregular and may be amended. Douglas *v.* Haberstro, 2 N. Y. Civ. Proc. 186. See *supra*, VI, D, 2, b, (XI).

Seal.— The seal of the court is essential to the validity of a capias ad satisfaciendum running out of the county in which such court sits. Finley *v.* Smith, 15 N. C. 95. See *supra*, VI, D, 2, b, (XIII).

29. O'Shea *v.* Kohn, 38 Hun (N. Y.) 149; People *v.* Reilly, 58 How. Pr. (N. Y.) 218. Otherwise defendant may be discharged on habeas corpus; the mere recital that an execution has been issued to the proper county and returned unsatisfied is insufficient. People *v.* Reilly, 58 How. Pr. (N. Y.) 218.

30. Lattin *v.* Smith, 1 Ill. 361.

31. Street *v.* Vandervoort, 7 Yerg. (Tenn.) 436.

32. Whitman *v.* James, 1 N. Y. Civ. Proc. 235.

33. Stewart *v.* Cunningham, 22 Ala. 626.

34. Blake *v.* Blanchard, 48 Me. 297.

35. Wall *v.* Jarrott, 25 N. C. 42. *Compare* Hammond *v.* People, 32 Ill. 446, 83 Am. Dec. 286.

36. Abbott *v.* Daniel, 3 Metc. (Ky.) 339.

37. Fruitport Tp. *v.* Muskegon County Cir. Judge, 90 Mich. 20, 51 N. W. 109.

38. Kinney *v.* Laughenour, 97 N. C. 325, 2 S. E. 43.

39. Hutchinson *v.* Brand, 9 N. Y. 208 [*affirming* 6 How. Pr. 73].

40. Hutchinson *v.* Brand, 9 N. Y. 208 [*affirming* 6 How. Pr. 73].

amount, the names of the parties, the court in which, and the term when it was rendered, without any more extended recital of the prior proceedings.[41]

(III) *Docketing of Judgment.* Where an execution against a person states a recovery and docketing of judgment in a certain county, and an issue and return unsatisfied of an execution in another county, it is immaterial that it does not recite a docketing in the second county.[42]

(IV) *Amount Due and Costs.* A writ of execution against the body is not void for failure to state the amount due plaintiff and the costs to be paid.[43]

g. Directions to Sheriff. A usual provision is that the writ shall require the sheriff substantially to arrest the debtor and commit him to the jail of the county until he shall pay the judgment or be discharged according to law[44] and to make due return of the execution.[45]

2. Amendment. An execution against the body may be amended[46] so as to cure such irregularities in form as the omission of the testatum clause,[47] a wrong attestation as to the name of the chief justice,[48] failure to direct the time for its return,[49] or erroneous direction as to the place to which returnable.[50] Although mesne process against the person returnable on Sunday, or out of term, is void, a capias ad satisfaciendum, being final process, may in such case be amended.[51]

3. Waiver of Defects[52] — a. In General. Where an affidavit is necessary upon an application for a certificate authorizing the arrest of a debtor, although the debtor appears after he has been defaulted in pursuance of a citation issued without an affidavit, such appearance will not constitute a waiver of the irregularity if he had no actual knowledge of the issuance of the citation before an affidavit had been made.[53] If the judgment of the court below is correct and legal, irregularity in a capias ad satisfaciendum cannot be taken advantage of on error.[54]

b. Waiver by Giving Bond. As a general rule where a person arrested upon a capias ad satisfaciendum gives bond under the insolvent laws, he is held to have thereby waived the privilege of immunity from arrest,[55] as well as his

41. *In re* Banfill, 70 N. H. 132, 46 Atl. 1088.

42. O'Shea *v.* Kohn, 38 Hun (N. Y.) 149.

43. Jernee *v.* Jernee, (N. J. Ch. 1895) 31 Atl. 716. *Compare* Atkinson *v.* Micheaux, 1 Humphr. (Tenn.) 312.

44. Hutchinson *v.* Brand, 9 N. Y. 208 [*affirming* 6 How. Pr. 73]; Kinney *v.* Laughenour, 97 N. C. 325, 2 S. E. 43; Finley *v.* Smith, 15 N. C. 95.

Direction to arrest.— Dyer *v.* Tilton, 71 Me. 413.

Direction to hold to bail.— *Ex p.* Cleveland, 36 Ala. 306.

45. Kinney *v.* Laughenour, 97 N. C. 325, 2 S. E. 43.

Directions as to return.— An execution against the person will not be rendered void by failure to direct the time for its return (Benedict, etc., Mfg. Co. *v.* Thayer, 20 Hun (N. Y.) 547; Fake *v.* Edgerton, 5 Duer (N. Y.) 681, 3 Abb. Pr. (N. Y.) 229; Douglas *v.* Haberstro, 2 N. Y. Civ. Proc. 186), nor by the fact that the place of such return does not appear therein (Fake *v.* Edgerton, *supra*), such omission being a mere irregularity which may be amended or disregarded (Douglas *v.* Haberstro, *supra*).

Surplusage.— Stewart *v.* Cunningham, 22 Ala. 626.

46. **For example** if an action of false imprisonment be brought for taking plaintiff in execution on a capias ad satisfaciendum, in which the costs are by mistake larger than those actually awarded, the court will give leave to amend the execution, and the papers on which the application is made may be entitled as in the suit for false imprisonment. Holmes *v.* Williams, 3 Cai. (N. Y.) 98.

Amendment of execution generally see *supra*, VI, F.

47. McIntyre *v.* Rowan, 3 Johns. (N. Y.) 144.

48. Ross *v.* Luther, 4 Cow. (N. Y.) 158, 15 Am. Dec. 341.

49. Benedict, etc., Co. *v.* Thayer, 20 Hun (N. Y.) 547, 59 How. Pr. (N. Y.) 272; Douglas *v.* Haberstro, 2 N. Y. Civ. Proc. 186.

50. McConkey *v.* Glen, 1 Cow. (N. Y.) 141.

51. Stone *v.* Martin, 2 Den. (N. Y.) 185.

52. **Waiver of right to have execution against property** before issuance of body execution see *supra*, XIV, I.

53. Williams *v.* Shillaber, 153 Mass. 541, 27 N. E. 767; Atwood *v.* Wheeler, 149 Mass. 96, 21 N. E. 232.

The fact that it was customary to issue such citations before the affidavit was made and that this custom was known to the debtor will not make his arrest legal. Williams *v.* Shillaber, 153 Mass. 431, 27 N. E. 767.

54. Dumond *v.* Carpenter, 3 Johns. (N. Y.) 141. See Appeal and Error.

55. Winder *v.* Smith, 6 Watts & S. (Pa.) 424. And see Kelly *v.* McCormick, 28 N. Y. 318 [*affirming* 2 E. D. Smith 503].

objections to the judgment upon which the writ was issued,[56] and his objections to defects in the writ.[57]

4. Alias, Pluries, and Renewed Writs[58] — a. When Issuance Proper. An alias execution against the person may issue where the first is returned "not found,"[59] or uncertified;[60] where the first is found to be so defective as to be invalid;[61] or where the officer suffers the debtor who has been arrested to escape without plaintiff's consent.[62] Where bail have surrendered the principal on a scire facias, plaintiff is entitled to an alias execution against him, notwithstanding more than a year has elapsed since the return of the former execution.[63] An alias execution cannot issue against a debtor who has been discharged from imprisonment,[64] for the neglect of plaintiff to take him in execution within the proper time,[65] or for neglect to pay or give security for prison fees.[66]

b. Proceedings to Obtain. The clerk cannot be required to issue an alias execution upon a debtor's default on his poor debtor's recognizance till the facts entitling plaintiff to it have been found by the court, on plaintiff's application, and entered on the record.[67]

56. Dobbin *v.* Gaster, 26 N. C. 71.

57. Bryan *v.* Brooks, 51 N. C. 580; Nixon *v.* Nunnery, 31 N. C. 28; Freeman *v.* Lisk, 30 N. C. 211.

58. **Alias and pluries writs** generally see *supra*, VI, E.

Reissue.— See Goldis *v.* Gately, 168 Mass. 300, 47 N. E. 96.

59. People *v.* Kehl, 15 Mich. 330.

Effect of scire facias judgment against bail. — See *In re* Potoshinsky, (R. I. 1897) 36 Atl. 878.

Pluries execution for balance of judgment see Kimball *v.* Parker, 7 Metc. (Mass.) 63.

The return of cepi to a capias ad satisfaciendum, plaintiff not proceeding to enforce the writ by having defendant committed, defaulting the sheriff, or having it entered not called, has been held in one decision not to preclude him from taking out a new capias ad satisfaciendum. West *v.* Hyland, 3 Harr. & J. (Md.) 200.

60. Where an execution is returned uncertified the clerk may issue an alias; but he does it at his own peril. McCrillis *v.* Sisson, 1 R. I. 143.

61. Woods *v.* Brzezinski, 57 Conn. 471, 18 Atl. 252.

Issuance without order of court.— See Kinney *v.* Laughenour, 97 N. C. 325, 2 S. E. 43.

62. *Connecticut.*— Munson *v.* Hills, 2 Root 324.

New Hampshire.— Cheever *v.* Merrick, 2 N. H. 376.

New York.—Wesson *v.* Chamberlain, 3 N. Y. 331; Campbell *v.* Clark, 2 How. Pr. 257; Armstrong *v.* Garrow, 6 Cow. 465; Mumford *v.* Armstrong, 4 Cow. 553.

Pennsylvania.— Long *v.* Cherington, 161 Pa. St. 248, 28 Atl. 1086.

Virginia.—Fawkes *v.* Davison, 8 Leigh 554; Windrum *v.* Parker, 2 Leigh 361.

England.— Basset *v.* Salter, 2 Mod. 136; Scott *v.* Peacock, 1 Salk. 271.

See 21 Cent. Dig. tit. "Execution," § 1243.

An alias execution is void where the release of defendant is at the request or with the consent of plaintiff (Long *v.* Cherington, 161 Pa. St. 248, 28 Atl. 1086); or where a defendant in custody on execution gives a bond with surety to take the benefit of the insolvent law and forfeits his bond (Palethorpe *v.* Lesher, 2 Rawle (Pa.) 272).

An instance of surety, where defendant, on his arrest, gave bond to the sheriff under the Insolvent Debtors' Act, an alias capias ad satisfaciendum may be sued out at the instance of the surety on the insolvent bond, who, after forfeiture of the bond, has paid plaintiff and taken an assignment of the judgment. David *v.* Blundell, 40 N. J. L. 372 [*reversing* 39 N. J. L. 612].

Escape continuing to issuance of alias.—A second execution cannot be issued on the ground that defendant has escaped under the first, unless the escape continue till the time of its issuing. Sharp *v.* Caswell, 6 Cow. (N. Y.) 65.

Where a sheriff suffers a defendant to go at large on the undertaking of a third person to pay the debt or surrender the prisoner, plaintiff, unless he consented to the arrangement, may issue a new process and retake defendant. Wesson *v.* Chamberlain, 3 N. Y. 331. And see Ginochio *v.* Figari, 4 E. D. Smith (N. Y.) 227, 2 Abb. Pr. (N. Y.) 185.

63. Bartlet *v.* Falley, 5 Mass. 373.

64. **Where a judgment debtor has been discharged from imprisonment** on a capias ad satisfaciendum, in due form, upon the ground that the process was issued in a case not involving a tort, he cannot again be imprisoned on an alias writ issued in the same cause, and the issue of another writ of capias ad satisfaciendum will not be compelled by mandamus, for the reason that such a writ would be void if issued. People *v.* Healy, 128 Ill. 9, 20 N. E. 692, 15 Am. St. Rep. 90.

65. Masters *v.* Edwards, 1 Cai. (N. Y.) 515; Barnes *v.* Viall, 6 Fed. 661.

66. Barnes *v.* Viall, 6 Fed. 661.

Until judgment revived by scire facias see Scott *v.* Maupin, Hard. (Ky.) 122.

67. For the return of the original execution does not necessarily show a breach of the recognizance, and that fact may not be of record to the court from which the execution

c. Form and Requisites.[68] A second execution is not invalidated by the omission of the statement that it is an alias execution or its failure to refer to the first.[69] If the first writ be returnable *non est* the second may include the costs of issuing both.[70] A writ purporting to be a pluries capias, but without date and signature, is void.[71]

L. Arrest, Custody, and Disposition of Prisoner — 1. Arrest — a. Where Writ Operative. In the absence of statutory restriction a capias ad satisfaciendum is not confined in its operation to the county of defendant's residence,[72] but arrest thereon must be made by the officer within his jurisdiction or the proceedings will be unauthorized and void.[73]

b. Direction to Arrest Without Commitment. If a judgment creditor directs the officer to whom the writ of execution is delivered to arrest the debtor thereon, but not to commit him until further orders, the officer is justified in not arresting the debtor.[74]

c. Discretion of Officer. In executing a precept where he is commanded to arrest the body of an individual, the officer has the right to select such particular time of day as he thinks most expedient under the circumstances, and is authorized to make use of so much force as is necessary to accomplish the object.[75]

d. Duty to Inquire as to Property Before Arrest or Accept Same After Arrest. The diligence required of an officer in searching for property does not, it has been held, require inquiry on the subject by him of defendant before arresting the latter under an execution directing the officer to satisfy the judgment from the personal property of the debtor, and if sufficient is not found, to arrest the debtor, nor after the arrest can the officer be required to accept property in lieu of the debtor's person.[76]

e Mode of Arrest — (i) *In General.* To constitute a legal arrest upon an execution against the person, the officer should lay his hand on defendant or otherwise take possession of his person, so as to make him his prisoner in an unequivocal form.[77] Where, however, the party sought to be charged is a prisoner, the lodging of the capias ad satisfaciendum with the sheriff whose prisoner he is is a sufficient charging in execution.[78]

(ii) *Right of Officer to Break and Enter Dwelling.*[79] An officer in order to be justified under the writ must execute the same in a legal way and if a sheriff, in attempting to execute a writ of execution on civil process which is delivered to him to be levied, break open the outer door of the dwelling-house of the execution debtor, where the debtor then is, with a view of arresting the body of the debtor on the execution, such act is unlawful.[80]

f. Arrest on Alias Execution After Return-Day of First. Where an execution

issued. Thomson *v.* Sleeper, 168 Mass. 373, 47 N. E. 106.

68. See *supra*, VI, E, 5.

69. Woods *v.* Brzezinski, 57 Conn. 471, 18 Atl. 352.

70. Peyton *v.* Brooks, 3 Cranch (U. S.) 92, 2 L. ed. 376.

71. Hickam *v.* Larkey, 6 Gratt. (Va.) 210.

72. *Ex p.* Cleveland, 36 Ala. 306.

73. Emery *v.* Brann, 67 Me. 39. See also Fisher *v.* Young, 41 Misc. (N. Y.) 552, 85 N. Y. Suppl. 115.

Authority of marshal under Greater New York charter see People *v.* Dunn, 54 N. Y. Suppl. 194.

74. Such custody would be in derogation of the rights of the debtor. French *v.* Bancroft, 1 Metc. (Mass.) 502.

75. Wright *v.* Keith, 24 Me. 158.

After sunset.— See *In re* Stone, 129 Mass. 156.

76. Blakely *v.* Weaver, 46 Hun (N. Y.) 174.

77. Lawson *v.* Buzines, 3 Harr. (Del.) 416.

Intention governs.— See Richardson *v.* Rittenhouse, 40 N. J. L. 230; Bissell *v.* Gold, 1 Wend. (N. Y.) 210, 19 Am. Dec. 480; Jones *v.* Jones, 35 N. C. 448, 46 N. C. 491.

78. Robertson *v.* Shannon, 2 Strobh. (S. C.) 419. And see Warner *v.* Lowry, 1 Aik. (Vt.) 55.

Awaiting result of examination.— See Warner *v.* Lowry, 1 Aik. (Vt.) 55.

Delivery of execution to prisoner.— See Matter of Johnson, 21 Abb. N. Cas. 172.

79. See *supra*, VII, B, 5, d.

80. State *v.* Hooker, 17 Vt. 658.

If an arrest has been made, and the person arrested escapes and takes refuge in his dwelling-house, the officer may break open the outer door of the house in pursuit of him after making known his business, demand of

on a judgment in tort is returned unsatisfied before its return-day, and on the same day an alias execution is issued, an arrest on the alias execution made after the return-day of the first execution is legal.[81]

g. Resumption of Original Arrest Suspended by Recognizance. When the service of an execution has been begun before the return-day thereof, it may be completed after the return-day by an arrest of the debtor's person. The taking of the debtor into custody by the officer on the execution after the refusal of the debtor's oath has been annexed to it is not a new or second arrest, but is a resumption or continuance of the original arrest which has been suspended during the proceedings under the recognizance.[82]

2. COMMITMENT.[83] In order to constitute a lawful commitment on an execution against the person, there must be at least a delivery of the prisoner at the jail, to the sheriff or deputy, jailer, or someone authorized to confine in the jail.[84] Where a debtor arrested on execution and carried before a magistrate does not ask to be admitted to take the poor debtor's oath, he may be committed to jail without examination.[85]

3. CUSTODY AND DISPOSITION OF PRISONER — a. In General. It is the duty of the officer to whom the writ is addressed, after arresting the judgment debtor, to incarcerate him and retain him in custody[86] until the judgment has been satisfied or he has been discharged by due process of law.[87]

b. Place of Confinement. In some jurisdictions a person arrested upon an execution against the person should be committed to the jail of the county from which the execution issued;[88] in others, however, it is held to be the duty of the sheriff to commit him to the jail of his own county, although the writ issued from the court of another county.[89]

c. Duration of Imprisonment. In some jurisdictions it is provided that in case of arrest upon execution in certain cases the debtor must be imprisoned for a specific time before he can be discharged.[90] In others it is provided that no person shall be imprisoned on execution beyond a certain designated period,[91] at

admission, and refusal. Allen *v.* Martin, 10 Wend. (N. Y.) 300, 25 Am. Dec. 564.

81. Chesebro *v.* Barme, 163 Mass. 79, 39 N. E. 1033.

82. *In re* Ruberg, 166 Mass. 33, 43 N. E. 911. See also Russell *v.* Goodrich, 8 Allen (Mass.) 150.

83. Commitment on duplicate execution.— See Fulton *v.* Wood, 3 Harr. & M. (Md.) 99.

84. Skinner *v.* White, 9 N. H. 204.

85. Hart *v.* Adams, 7 Gray (Mass.) 581.

Reasonable facilities for procuring a bond are usually allowed the debtor by the officer. U. S. *v.* Hudson, 26 Fed. Cas. No. 15,412, 1 Hask. 527.

86. Close confinement.— In Connecticut the power of the court to order the close confinement of prisoners committed on execution pursuant to the statute is a matter of discretion and may be exercised on application by the creditor. Frisbie *v.* Fowler, 3 Conn. 87.

87. People *v.* Hanchett, 111 Ill. 90; Chaffe *v.* Handy, 36 La. Ann. 22.

In Louisiana see Anderson *v.* Brinkley, 1 La. Ann. 126.

88. Long *v.* Wood, 78 Ky. 392; Kinney *v.* Laughenour, 97 N. C. 325, 2 S. E. 43.

89. Avery *v.* Seely, 3 Watts & S. (Pa.) 494.

90. Com. *v.* Allegheny County, 6 Pa. St. 445 (confinement for sixty days where the action in which the judgment was obtained was for a tort); *In re* Norton, 37 Wkly. Notes Cas. (Pa.) 64.

91. *In re* Fortner, 2 Harr. (Del.) 461 (after five days); Randall's Case, 23 N. H. 255 (after thirty days where no detainer is lodged against the prisoner); Padreshefsky *v.* Walton, 65 N. Y. App. Div. 432, 72 N. Y. Suppl. 979 (after fifteen days under an execution issuing on a judgment for services performed by a working-woman); Ryan *v.* Parr, 16 N. Y. Suppl. 829 (after thirty days if he has a family in the state for which he provides); People *v.* Grant, 10 N. Y. Civ. Proc. 158 (after three months where the judgment is for less than five hundred dollars; or after six months where the amount is five hundred dollars or over); U. S. Bank *v.* Weisiger, 2 Pet. (U. S.) 331, 481, 7 L. ed. 441, 492 (after thirty days upon service of the proper notice on the judgment creditor).

Limitation to imprisonment on final process. — See *In re* Coyne, 13 N. Y. Suppl. 797, 18 N. Y. Civ. Proc. 397.

The words "actual custody" within the meaning of N. Y. Code Civ. Proc. § 111, see Downey *v.* Clute, 12 N. Y. Civ. Proc. 435; People *v.* Grant, 10 N. Y. Civ. Proc. 158, 18 Abb. N. Cas. (N. Y.) 220.

The Delaware act of 183?, directing the discharge of imprisoned debtors after five days, except under certain circumstances, is cumu-

the expiration of which he shall be discharged without any order or proceedings on the prisoner's part.[92]

d. Rights and Liabilities as to Jail Fees — (I) *In General.* It is the duty of the debtor confined under execution to maintain himself so long as he has the means,[93] and if he is unable to do so the jail fees must be paid by the person at whose instance the debtor is confined,[94] which fees are to be lodged with the jailer;[95] nor will the failure of the jailer to take a bond from the creditor for the payment of such fees release the creditor from his liability.[96] This duty of the creditor to provide for the debtor's support is, however, terminated by the release of the latter from custody.[97] In some jurisdictions the fact that a debtor has taken the benefit of prison bounds does not release the creditor from his obligation to pay jail fees if the debtor is unable to do so;[98] and should the judgment creditor refuse to pay the fees in advance when demanded the debtor will not commit a breach of his bond by going out of the prison limits.[99] In others, however, the creditor is liable only while the debtor is actually confined within the walls of the prison.[1]

(II) *Discharge For Failure of Creditor to Pay Jail Fees* — (A) *In General.* Where the creditor at whose instance a prisoner is confined on an execution refuses to discharge the jail fees for which he is responsible, the debtor's imprisonment becomes illegal and the debtor is entitled to his discharge.[2]

(B) *Manner of Discharge.* In some jurisdictions upon the failure of the person at whose instance the debtor is imprisoned to pay or secure the payment of jail fees, after due notice and demand, the sheriff or jailer in whose custody the prisoner is may discharge him from confinement.[3] In other jurisdictions the

lative, and the right to a discharge under it may be waived by the debtor applying for the benefit of the general insolvent law. *In re* Fortner, 2 Harr. 461.

92. Padreshefsky *v.* Walton, 65 N. Y. App. Div. 432, 72 N. Y. Suppl. 979; People *v.* Grant, 10 N. Y. Civ. Proc. 158, 18 Abb. N. Cas. (N. Y.) 220.

Omission of writ to specify or limit time of imprisonment.— See Subim *v.* Isador, 88 Ill. App. 96.

93. *Georgia.*— Haas *v.* Bradley, 23 Ga. 345.

North Carolina.— Turentine *v.* Murphey, 5 N. C. 180.

Ohio.—Wadsworth *v.* Wetmore, 6 Ohio 438.

South Carolina.— Thomasson *v.* Kerr, 2 McMull. 340; Brian *v.* Ellis, Dudley 71.

Virginia.— Rose *v.* Shore, 1 Call 540.

See 21 Cent. Dig. tit. "Execution," § 1251.

94. *Georgia.*—Haas *v.* Bradley, 23 Ga. 345; State *v.* Simpson, R. M. Charlt. 122.

Maine.— Spring *v.* Davis, 36 Me. 399.

Massachusetts.— Blood *v.* Austin, 3 Pick. 259; Chamberlain *v.* Mallard, 2 Pick. 439.

New Jersey.— Potter *v.* Robinson, 40 N. J. L. 114; State *v.* Stiles, 12 N. J. L. 296.

North Carolina.— Veal *v.* Flake, 32 N. C. 417.

South Carolina.— Irving *v.* Robertson, 6 Rich. 228; Furth *v.* Deloach, 2 Speers 400; Hyams *v.* Black, 4 McCord 508; Caldwell *v.* Boyd, 2 Nott & M. 377; Moore *v.* Benbow, 3 Brev. 390.

Virginia.— Rose *v.* Shore, 1 Call 540; Zimmerman *v.* Buzzard, 2 Va. Cas. 406.

See 21 Cent. Dig. tit. "Execution," § 1251.

A demand by a jailer of security for the board of a debtor is sufficient if understood and need not be in any precise form. Blood *v.* Austin, 3 Pick. (Mass.) 259.

If a debtor represent himself to the jailer as a pauper, and claim support, it is a sufficient claim of relief as a pauper, under Mass. St. (1821) c. 22. Blood *v.* Austin, 3 Pick. (Mass.) 259.

The debtor is entitled to food but not lodgings at the expense of the creditor. Buttles *v.* Carlton, 1 Ohio 32.

In Delaware the imprisoning creditor must enter into recognizance under a judge's order to indemnify the county against any charges on account of the prisoner or his family. *In re* Harwood, 4 Harr. 541.

95. Parsons *v.* Whitmore, 1 Root (Conn.) 117.

Recovery by prisoner from jailer.— See Washburn *v.* Thrall, 3 Conn. 499.

96. Haas *v.* Bradley, 23 Ga. 345.

97. Potter *v.* Robinson, 40 N. J. L. 114.

98. Haas *v.* Bradley, 23 Ga. 345.

99. Kirkup *v.* Stickney, 5 Ohio Dec. (Reprint) 499, 6 Am. L. Rec. 300.

1. Phillips *v.* Allen, 35 N. C. 10.

2. State *v.* Simpson, R. M. Charlt. (Ga.) 122; Casey *v.* Viall, 17 R. I. 348, 21 Atl. 911.

3. Field *v.* Slaughter, 1 Bibb (Ky.) 160; Blood *v.* Austin, 3 Pick. (Mass.) 259; Gill *v.* Miner, 13 Ohio St. 182; Kirkup *v.* Stickney, 5 Ohio Dec. (Reprint) 499, 6 Am. L. Rec. 300; Newcomb *v.* Weber, 1 Cinc. Super. Ct. 12.

Duty to keep prisoner for twenty days.— In Webb *v.* Elligood, Jeff. (Va.) 59, it was held that where security for the prison fees is not furnished, the sheriff must keep the

discharge must be upon application to the proper court or magistrate.[4] In the absence of a statutory provision no notice need be given the creditor of an application by the imprisoned debtor for his discharge.[5]

(III) *ACTION TO RECOVER FEES.*[6] In some jurisdictions the jailer is expressly given the right of action against the creditor to recover jail fees[7] upon due notice to the creditor of the debtor's imprisonment,[8] and upon the proper showing as to the insolvency of the prisoner.[9]

M. Supersedeas. The power of the court in the matter of granting a supersedeas is discretionary and may be denied when it appears that the adverse party has been vigilant in asserting his rights.[10] Where a debtor is in custody at the time of the rendition of the judgment against him, the failure of plaintiff

debtor twenty days before he can discharge him.

Inability of debtor and refusal of creditor are necessary. Meredith *v.* Duval, 1 Munf. (Va.) 76.

In Rhode Island Pub. Laws (1882), c. 270, §§ 1, 2, provide that a debtor surrendered by his sureties shall be released from imprisonment unless his creditor shall, within twenty-four hours after notice of such surrender, pay for his board for a week in advance. It was held in Casey *v.* Viall, 17 R. I. 348, 21 Atl. 911, that where the surety, when surrendering the debtor, paid for his board for a week in advance, and served notice on the creditor immediately, such payment not being made for the benefit of the creditor, did not relieve him from the necessity of paying the board within twenty-four hours after receiving the notice; and that in computing the twenty-four hours Sunday is not to be excluded, since the payment of such board on Sunday is not rendered illegal by R. I. Pub. St. c. 244, § 15, which prohibits the doing of labor or business of one's ordinary calling on Sunday.

In South Carolina the debtor was also required to render a schedule of his estate and assign the same. Robinson *v.* Simpson, 3 Strobh. 161; Furth *v.* Deloach, 2 Speers 400.

Where the jailer is willing to trust the creditor for reimbursement it has been held that the failure of the creditor to make the required advances to the jailer for the support of the prisoner does not according to some decisions operate *per se* a discharge of the prisoner if the latter is adequately supported by the jailer. *Ex p.* Lamson, 50 Cal. 306.

4. See cases cited *infra*, this note.

By any three judges to whom the debtor shall present an application showing failure of the creditor to pay the weekly allowance which the statute requires him to pay after taking an assignment from the debtor see State *v.* Stiles, 12 N. J. L. 296, holding that application need not be in writing.

By justices of inferior court see Mason *v.* Carhart, 30 Ga. 917; Field *v.* Putman, 22 Ga. 93; Woodruff *v.* Dean, Dudley (Ga.) 214, justices acting as court and not individually.

Petition by non-resident imprisoned debtor. — See *In re* Harwood, 4 Harr. 541.

No special order of the court is necessary for the discharge of the prisoner under N. Y. Code Civ. Proc. § 111, for failure to pay for the debtor's support. People *v.* McCue, 18 Hun (N. Y.) 53.

Order refused on motion.— See *Ex p.* Wilson, 30 Fed. Cas. No. 17,779, 2 Cranch C. C. 7.

5. State *v.* Stiles, 12 N. J. L. 296.

When defendant in process has given security and has been delivered up by his sureties he cannot be discharged for failure to secure jail fees without due notice to creditors, but no notice is required when the debtor goes to jail as soon as arrested. Mason *v.* Carhart, 30 Ga. 917; Field *v.* Putman, 22 Ga. 93.

6. **Recovery by town from creditor.**— See Solon *v.* Perry, 54 Me. 493.

Recovery by creditor from debtor.—A creditor may maintain assumpsit upon an implied promise to recover of his debtor the amount he has paid the jailer for the board of the latter while imprisoned on the creditor's execution. Solon *v.* Perry, 54 Me. 493; Spring *v.* Davis, 36 Me. 399; Plummer *v.* Sherman, 29 Me. 555. A formal complaint by the debtor to the jailer under Me. Rev. St. c. 113, § 55, is not necessary to render the debtor liable to the creditor for support in jail; but any satisfactory evidence that the debtor knew of the jailer's requirements of payment therefor from the creditor, and that the debtor intended the creditor should pay it, is sufficient to establish an implied promise. Howes *v.* Tolman, 63 Me. 258.

7. Faucet *v.* Adams, 35 N. C. 235; Veal *v.* Flake, 32 N. C. 417; Irving *v.* Robertson, 6 Rich. (S. C.) 228; Love *v.* Lowry, 1 McCord (S. C.) 181; Walker *v.* McMahan, 3 Brev. (S. C.) 251; Zimmerman *v.* Buzzard, 2 Va. Cas. 406.

Action not maintainable by sheriff.— Bunting *v.* McIlhenny, 61 N. C. 579.

Claim lost by escape of prisoner.— Saxon *v.* Boyce, 1 Bailey (S. C.) 66.

Jailer's record not evidence.— Walker *v.* McMahan, 3 Brev. (S. C.) 251.

8. Zimmerman *v.* Buzzard, 2 Va. Cas. 406.

Time allowed for payment.— See Millard *v.* Willard, 3 R. I. 42.

9. Love *v.* Lowry, 1 McCord (S. C.) 181.

10. Longuemare *v.* Nichols, 7 N. Y. Suppl. 157, 17 N. Y. Civ. Proc. 107, 23 Abb. N. Cas. (N. Y.) 221.

Necessity for formal discharge.—See Warne *v.* Constant, 4 Johns. (N. Y.) 32.

upon process in the same suit to charge him in execution within the time prescribed by law will entitle him to a supersedeas,[11] upon application to a judge of the court in which the judgment was rendered.[12] So where the debtor is surrendered in exoneration of bail and plaintiff proceeds to judgment but suffers the prescribed term to elapse without charging defendant in execution, he may obtain a rule to show cause why a supersedeas should not be granted, and the same will be granted unless good cause to the contrary be shown.[13] Although delivering a capias ad satisfaciendum to the sheriff is good cause against a supersedeas, yet if the sheriff return the writ *non est inventus*, a supersedeas will be granted unless it be followed up by an alias, for the issuance of which the court may under special circumstances allow time.[14] So also a supersedeas may be granted where defendant has not been charged in execution within the proper time after the return-day of an execution against his property.[15] Where defendant is discharged, under the act abolishing imprisonment for debt, between the verdict and judgment, the court will order a perpetual stay of the capias ad satisfaciendum, although if the discharge is objected to by plaintiff the court may open the case so as to give him a chance to try the question, the judgment standing as security.[16] It has been held in a number of cases that if plaintiff after service of the rule to show cause why a supersedeas should not issue, and before the time assigned to show cause, charges defendant in execution he may show this for cause and it will be sufficient to prevent a supersedeas;[17] and where a defendant in custody of the sheriff has been regularly charged in execution, after a rule to show cause why a supersedeas should not be granted, notwithstanding he was before supersedible, he is no longer entitled to a supersedeas.[18]

N. Quashing, Vacating, and Setting Aside[19] — **1. When Proper.** An execution against the person may[20] be quashed, vacated, or set aside upon application[21] to the proper court or officer[22] in certain cases.[23] Thus where, under a

11. Smith *v.* Knapp, 30 N. Y. 581; Watt *v.* Healy, 22 Hun (N. Y.) 491; Desisles *v.* Cline, 4 Rob. (N. Y.) 645; People *v.* Grant, 13 N. Y. Civ. Proc. 209.

12. Smith *v.* Knapp, 30 N. Y. 581.

The defendant need not be in actual custody in order to make the application for a supersedeas of the execution. Longuemare *v.* Nichols, 7 N. Y. Suppl. 157, 17 N. Y. Civ. Proc. 107, 23 Abb. N. Cas. (N. Y.) 221. And see De Silver *v.* Holden, 54 N. Y. Super. Ct. 1.

13. Douglass *v.* Manistee County, 42 Mich. 495, 4 N. W. 225; Metcalf *v.* Moore, 128 Mich. 138, 87 N. W. 129; Desisles *v.* Cline, 4 Rob. (N. Y.) 645; Minturn *v.* Phelps, 3 Johns. (N. Y.) 446; Masters *v.* Edwards, 1 Cai. (N. Y.) 516; Manhattan Co. *v.* Smith, 1 Cai. (N. Y.) 67, Col. Cas. (N. Y.) 168, Col. & C. (N. Y.) 99; Brantingham's Case, Col. Cas. (N. Y.) 42, Col. & C. (N. Y.) 28.

14. Gray *v.* Thornber, 5 Cow. (N. Y.) 278.

15. People *v.* Grant, 13 N. Y. Civ. Proc. 209. See also Metcalf *v.* Moore, 128 Mich. 138, 87 N. W. 129.

Appeal.— See People *v.* Grant, 13 N. Y. Civ. Proc. 209.

16. Baker *v.* Taylor, 1 Cow. (N. Y.) 165.

17. Desisles *v.* Cline, 4 Rob. (N. Y.) 645; Minturn *v.* Phelps, 3 Johns. (N. Y.) 446; Manhattan Co. *v.* Smith, 1 Cai. (N. Y.) 67, Col. Cas. (N. Y.) 99, Col. & C. (N. Y.) 168; Brantingham's Case, Col. Cas. (N. Y.) 28, Col. & C. (N. Y.) 48.

18. Robertson *v.* Shannon, 2 Strobh. (S. C.) 419.

19. **Audita querela** to set aside execution see Audita Querela.

20. **Review of decision.**—See Harris *v.* Sheldon, (Pa. 1889) 16 Atl. 828.

21. **Time of application** see *infra*, XIV, N, 3.

22. **Jurisdiction of application** see *infra*, XIV, N, 3.

23. See cases cited *infra*, this note.

For example such an execution may be properly quashed, vacated, or set aside: Where a capias ad satisfaciendum and a fieri facias are both issued after the sheriff has levied the fieri facias, and while he has the property undisposed of he executes the capias ad satisfaciendum. Wheeler *v.* Bouchelle, 27 N. C. 584; Miller *v.* Parnell, 2 Marsh. 78, 6 Taunt. 370. Where a capias ad satisfaciendum against an original defendant has not been issued and delivered to the sheriff, with the proper interval of time before the return-day of the court. Rodney *v.* Hoskins, 2 Miles (Pa.) 465. Where the execution was not issued within the prescribed time after the entry of judgment. De Silver *v.* Holden, 54 N. Y. Super. Ct. 1. Where no execution against defendant's property has been previously issued and returned unsatisfied. Noe *v.* Christie, 15 Abb. Pr. N. S. (N. Y.) 346. Where plaintiff neglects to issue execution within the prescribed time after the return of execution against property, unless reasonable cause is shown why the application should not be granted. Perry *v.* Kent, 157 N. Y. 710, 53 N. E. 1130 [*affirming* 88 Hun

statute providing that no person shall be arrested or imprisoned by virtue of any mesne process which shall issue on any contract made or entered into after a certain date, a judgment creditor took out an execution against the body of defendant on a judgment recovered in an action on a contract entered into subsequent to such date, and the body of the debtor was arrested thereon, such execution will be set aside.[24] So defendant may move to set aside an execution against his person on the ground that it is not warranted by the facts, and it will be no answer to his application to say that he had allowed himself to be arrested by preliminary process.[25] When defendant is arrested on an execution defective enough to be voidable, but not void,[26] or incapable of amendment, defendant's remedy is by motion to have the execution set aside, and not by habeas corpus.[27]

2. When Not Proper. On the other hand it has been held that the court should not interfere upon an application to quash, vacate, or set aside a capias ad satisfaciendum based upon mere irregularities,[28] such as irregularities in the method of obtaining the judgment,[29] in the entry of the judgment,[30] in the recitals of the writ,[31] in the recitals in the indorsement on the writ,[32] in the teste of the writ,[33] or in the manner of the service of the writ;[34] nor should the court interfere for reasons that existed at the time of the trial of the original suit and which might then have been presented by way of defense.[35]

3. Time of Motion. Although if a motion to set aside an order of arrest is not made before judgment, defendant may be imprisoned on a capias ad satisfaciendum issued on the judgment, defendant may nevertheless even after the entry of judgment move to set aside the order of arrest, upon showing to the court that the judgment was recovered on a cause of action for which he was not liable to arrest.[36] A motion to quash a capias ad satisfaciendum is too late after the writ has been returned and defendant discharged on bonds to appear under insolvency

407, 34 N. Y. Suppl. 843]; Gove *v.* Stewart, 60 N. Y. Super. Ct. 110, 17 N. Y. Suppl. 183. Where defendant was a non-resident and it does not appear that the action was one within the jurisdiction of the court. Noe *v.* Christie, 15 Abb. Pr. N. S. (N. Y.) 346. Where a capias ad satisfaciendum was issued by plaintiff pending proceedings under the act to prevent fraudulent trusts and assignments, the two remedies being incompatible. Titus *v.* Bowne, 30 N. J. L. 340. Where defendant had attached the debt due by him to plaintiff with his own hand under an attachment which he shows to have been regularly levied in his hands. Baldwin *v.* Wright, 3 Gill (Md.) 241.

Presence of defendant in court.—Guthers *v.* Langton, 3 Harr. & M. (Md.) 185.

24. Stanley *v.* McClure, 17 Vt. 253.

25. Bridgewater Paint Mfg. Co. *v.* Messmore, 15 How. Pr. (N. Y.) 12.

Motion on affidavits denying fraud.— See Humphrey *v.* Brown, 17 How. Pr. (N. Y.) 481.

26. **Void pluries writ.**— Hickam *v.* Larkey, 6 Gratt. (Va.) 210.

Parol evidence of illegal issuance.— See McAden *v.* Banister, 63 N. C. 478.

27. People *v.* Seaton, 25 Hun (N. Y.) 305. See also Benedict, etc., Mfg. Co. *v.* Thayer, 20 Hun (N. Y.) 547.

28. See cases cited *infra*, note 29 *et seq.*

29. Whiting *v.* Putnam, 16 Abb. Pr. (N. Y.) 382, holding that the remedy in such case is by appeal.

30. The regularity of a judgment entry can be passed on only in a direct application made for that purpose. Crosby *v.* Root, 19 Misc. (N. Y.) 359, 43 N. Y. Suppl. 512; Roeber *v.* Dawson, 3 N. Y. Suppl. 122, 15 N. Y. Civ. Proc. 417.

31. Where a reference to the judgment will show that the execution is regular. Fullerton *v.* Fitzgerald, 18 Barb. (N. Y.) 441.

32. Especially where the irregularity is so slight as to be immaterial. State *v.* Ferguson, 31 N. J. L. 283.

33. The writ cannot be avoided by audita querela, because of the death after its teste, but before its issue, of the one in whose name it was issued. Docura *v.* Henry, 4 Harr. & M. (Md.) 480.

34. Purcell *v.* Richardson, 4 Hen. & M. (Va.) 404.

35. Galena, etc., R. Co. *v.* Ennor, 9 Ill. App. 159.

36. Smith *v.* Knapp, 30 N. Y. 581; Elwood *v.* Gardner, 9 Abb. Pr. N. S. (N. Y.) 99 [*affirmed* in 45 N. Y. 349, 10 Abb. Pr. N. S. 238].

The supreme court having jurisdiction and full control over its own process may set aside an execution against the person, issued on a judgment obtained in that court, even after such execution has been served and the judgment debtor has been arrested and imprisoned under it. Pinckney *v.* Hegeman, 53 N. Y. 31. See also Perry *v.* Kent, 157 N. Y. 710, 53 N. E. 1130 [*affirming* 88 Hun 407, 34 N. Y. Suppl. 843].

laws, and after hearing on his petition in insolvency, and the forfeiture of his bond to appear therein.[37]

4. Necessity of Actual Custody. In some jurisdictions where defendant in execution is at large by virtue of a bond given under the insolvent act, he cannot move to quash the proceedings because the writ is voidable, although he might do so by placing himself again in actual custody.[38]

5. Order Setting Aside. An order setting aside an execution against the person being valid on its face is a justification to the sheriff for releasing the debtor from imprisonment.[39]

O. Return[40] **— 1. Necessity For.** In order to charge the bail of a debtor, a capias ad satisfaciendum must be issued against the principal and returned *non est inventus*[41] within the life of the execution,[42] and the return of *non est inventus* by an officer, after an execution has run out in his hands, with a view to charge bail on mesne process, is a false return.[43] No return of the execution is necessary to justify a commitment of defendant thereunder.[44] Nor does the imprisonment of the debtor end with the return or expiration of the writ.[45]

2. Time For. The provisions of the statutes, if any,[46] must control the time for the return of an execution against the person. For the purpose of charging bail it has been provided in some jurisdictions that the execution against the principal must be returned to the next succeeding term of the court from which it issued,[47] or to the day to which such term is adjourned,[48] in which case no intermediate return is sufficient to fix the bail, nor can it be regarded as the return required by law;[49] in others that there must be a legal return of *non est inventus* within sixty days from the time of rendering final judgment.[50] Still other provisions are to the effect that the execution should have been four days in the hands of the officer before the return thereof[51] or that it shall not be returned in less than fifteen days.[52]

3. Form and Requisites. In returns of *non est inventus* a strict compliance with the forms is unnecessary. If the officer returns the facts it is sufficient.[53] In

37. Stout *v.* Quinn, 9 Pa. Super. Ct. 179, 43 Wkly. Notes Cas. (Pa.) 418.

38. Bryan *v.* Brooks, 51 N. C. 580; Dobbin *v.* Gaster, 26 N. C. 71. *Compare* Mattingly *v.* Smith, 16 Fed. Cas. No. 9,293, 2 Cranch C. C. 158. See also Stout *v.* Quinn, 9 Pa. Super. Ct. 179, 43 Wkly. Notes Cas. (Pa.) 418.

Prior to the amendment of N. Y. Code Civ. Proc. § 572, the debtor might if in custody be discharged for failure to issue execution within three months after judgment. Since this section was amended in June 15, 1886, the debtor need not be in custody to make application. De Silver *v.* Holden, 54 N. Y. Super. Ct. 1.

39. Pinckney *v.* Hegeman, 53 N. Y. 31. See also Perry *v.* Kent, 88 Hun (N. Y.) 407, 34 N. Y. Suppl. 843.

40. Return of execution against property see *supra*, XI.

41. Mathewson *v.* Moore, 2 McCord (S. C.) 315. And see Mahurin *v.* Brackett, 5 N. H. 9.

Return held sufficient after death of sheriff and deputies.— Mathewson *v.* Moore, 2 McCord (S. C.) 315.

42. Cooper *v.* Ingalls, 5 Vt. 508; Turner *v.* Lowry, 2 Aik. (Vt.) 72.

In accordance with the rules of the court of king's bench, it has been held that in order to fix the bail on a recognizance the sheriff may be instructed to return an execution against the person *non est inventus*, although he might have served it on defendant unless the latter be in his custody, in which case he cannot make such return. Van Winkle *v.* Alling, 17 N. J. L. 446.

43. Cooper *v.* Ingalls, 5 Vt. 508.

44. Fulton *v.* Wood, 3 Harr. & M. (Md.) 99.

45. People *v.* Hanchett, 111 Ill. 90.

46. In the absence of statute, what is a reasonable time for the return of the writ is exclusively a question of fact for the jury, dependent for its solution on the circumstances of the case. Edwards *v.* Gunn, 3 Conn. 316.

In an early South Carolina case it was held that a sheriff might return a capias ad satisfaciendum so as to charge the bail so soon as he was satisfied that defendant was not in his district, and after he had made a return of *non est inventus* the court would presume that he had retained the writ a sufficient time to be sure of the truth of his return. Saunders *v.* Hughes, 2 Bailey 504.

47. Lichten *v.* Mott, 10 Ga. 138.

48. Aycock *v.* Leitner, 29 Ga. 197.

49. Lichten *v.* Mott, 10 Ga. 138.

50. Muzzy *v.* Howard, 42 Vt. 23, exclusive of the day on which judgment rendered.

51. Boggs *v.* Chichester, 13 N. J. L. 209.

52. Stimmel *v.* Swan, 17 Misc. (N. Y.) 354, 39 N. Y. Suppl. 1074.

53. Orvis *v.* Isle la Mott, 12 Vt. 195.

some jurisdictions the officer who makes the return of *non est inventus* upon the execution against the principal must state particularly in his return what notice he gave to the bail or the bail cannot be charged.[54] Where the successor of a sheriff lets defendant to bail, against whom a writ had been executed by the former sheriff, before the return-day of the writ, he should state the fact in addition to the former sheriff's return.[55] Although in arrest on mesne process a return of the arrest and of a rescue is a good return, yet in case of arrest on execution against the person such a return is not a good return, since the officer is bound to call to his aid the *posse comitatus*.[56]

4. Amendment. Upon application made to the court within a reasonable time,[57] the officer has been allowed to amend his return so as to show that the commitment was under the capias itself and not pursuant to the order of the magistrate,[58] to supply an omission of a return of *non est inventus* as to the principal,[59] or to correct the return when made under a mistake of fact which from its nature might not have been within the officer's knowledge.[60]

5. Conclusiveness. The return must be considered as a true statement of the facts therein recited until the contrary is made to appear.[61] But the officer's return is not conclusive as to third persons whose interests are not connected with the suit.[62]

P. Discharge[63] — **1. Jurisdiction and Authority to Discharge.** The right of a debtor to obtain his discharge being a right given or created only by statute, it follows that it can be enforced only in the manner prescribed by the statute,[64] and by application to the judge or justice designated in the statute,[65] and not under the provisions of any prior statute.[66] A debtor committed upon a capias ad satisfaciendum issued from a United States court cannot be discharged under

"Cepi."— State *v.* Lawson, 2 Gill (Md.) 62.

"Cepi mortuus est."— See Christie *v.* Goldsborough, 1 Harr. & M. (Md.) 540.

Even though a statute prescribes the form of a return the use of words which are equivalent thereto will be sufficient to charge the bail. Lichfelt *v.* Kopp, 38 Mich. 312.

The return that the debtor is sick must show that he is so sick that it would endanger his life to execute the process. Bramble *v.* Poultney, 12 Vt. 342.

54. Goodwin *v.* Smith, 4 N. H. 29.

55. Richards *v.* Porter, 7 Johns. (N. Y.) 137.

56. Buckminster *v.* Applebee, 8 N. H. 546.

57. After an action brought against him for an escape and issue joined, he will not be permitted so to amend his return to the writ as to relieve himself from liability to plaintiff. Scott *v.* Seiler, 5 Watts (Pa.) 235.

After the life of the execution has expired a return of *non est inventus* cannot be amended. Orvis *v.* Isle la Mott, 12 Vt. 195.

58. Hart *v.* Adams, 7 Gray (Mass.) 581.

59. Mahurin *v.* Brackett, 5 N. H. 9.

60. Scott *v.* Seiler, 5 Watts (Pa.) 235.

61. Holmes *v.* Baldwin, 17 Me. 398, statement as to day of arrest. See also Montgomery *v.* McAlpin, 23 N. C. 463.

"Satisfied" is evidence that such officer had received the money before the return-day, although the writ be not in fact returned and filed till after the return-day. Armstrong *v.* Garrow, 6 Cow. (N. Y.) 465.

Parol evidence is inadmissible to contradict the sheriff's return in an action of debt on a sheriff's bond for an escape on execution (Lines *v.* State, 6 Blackf. (Ind.) 464); but in accordance with the rule that the proof of facts consistent with and not appearing on the face of a return may be heard, where a sheriff has made a return to an execution against the person "proceedings stayed by order of plaintiff's attorney," defendant may on a motion to set aside a subsequent fieri facias founded on the same judgment, prove by parol that he has been arrested by virtue of the capias ad satisfaciendum and afterward discharged, the proof of such facts not being inconsistent with the return (Jordon *v.* Minster, 3 Pa. L. J. Rep. 45, 5 Pa. L. J. 542). See Evidence, *ante*, p. 567 *et seq.*

62. Francis *v.* Wood, 28 Me. 69.

63. Discharge as satisfaction of judgment generally see Judgments.

Discharge from arrest on mesne process see Arrest; Bail.

Discharge on failure to pay jail fees see *supra*, XIV, L, 3, d, (II).

Duration of imprisonment see *supra*, XIV, L, 3, c.

64. Sowle Mfg. Co. *v.* Bernard, 100 Ky. 658, 39 S. W. 239, 18 Ky. L. Rep. 1106. See also Com. *v.* Whitney, 10 Pick. (Mass.) 434; People *v.* Gill, 85 N. Y. App. Div. 192, 83 N. Y. Suppl. 135.

Discharge on Sunday.— King *v.* Strain, 6 Blackf. (Ind.) 447.

65. Sowle Mfg. Co. *v.* Bernard, 100 Ky. 658, 39 S. W. 239, 18 Ky. L. Rep. 1106.

66. People *v.* O'Brien, 54 Barb. (N. Y.) 38.

the provisions of a state law relating to the discharge of persons taken into custody under writs of capias ad satisfaciendum.[67]

2. Discharge on Habeas Corpus[68] — a. In General. Whenever the process under which a person has been committed emanates from a court of competent jurisdiction whose proceedings may be reviewed so that redress may be had by appeal, writ of error, or any other direct means of review, a judge is not justified in giving relief upon habeas corpus, but the party aggrieved will be left to such direct methods of redress;[69] and debtors applying for relief under the acts giving to courts power to discharge debtors on habeas corpus must show in their petition a case over which the courts have jurisdiction, and without this there is no authority for their discharge.[70] A recognizance for defendant's appearance at the trial of the issues framed in a habeas corpus proceeding is void against the sureties.[71]

b. Scope of Inquiry. On habeas corpus the regularity and propriety of the arrest may be inquired into, so far as to determine whether the creditor had any right or authority to issue the process;[72] and the question whether the prisoner was a person of such a description or condition as could be lawfully arrested on proceedings in the form adopted is clearly open to proof.[73] The writ cannot, however, be issued to inquire into a mere matter of temporary privilege by which the applicant was exempted from arrest, his remedy for the violation of such privilege being by an *ex parte* application.[74]

3. Discharge on Payment or Satisfaction of Judgment — a. In General. A debtor is entitled to be discharged on paying the amount of the execution and fees.[75] If, however, an execution be issued against one joint obligor for the costs who on payment of them is discharged this will not be a discharge or release of the other obligor who had been taken on execution for the debt.[76]

67. Knox *v.* Summers, 14 Fed. Cas. No. 7,914, 2 Cranch C. C. 12.

A state judge cannot discharge from arrest, under the insolvent laws of the state, one who is in custody, on capias ad satisfaciendum from the United States court; state laws having no operation *proprio vigore* on the process or proceedings of that court. Duncan *v.* Klinefelter, 5 Watts (Pa.) 141, 30 Am. Dec. 295.

A federal statute which authorizes the president of the United States under certain circumstances to discharge from custody any person imprisoned upon execution for a debt due to the United States merely provides for a release of the person of the debtor and does not affect the debt. U. S. *v.* Beattie, 24 Fed. Cas. No. 14,554, Gilp. 92.

68. **Habeas corpus** generally see Habeas Corpus.

69. Com. *v.* Lecky, 1 Watts (Pa.) 66, 26 Am. Dec. 31; Com. *v.* County Prison, 14 Phila. (Pa.) 396.

An administrator who has been proceeded against by attachment under a statute for a balance due from him to the estate as ascertained by the settlement of his accounts in the probate court, and on judgment rendered has been imprisoned under a certified execution by virtue of a statute, cannot be released on habeas corpus. *In re* Leahey, 58 Vt. 724, 5 Atl. 895.

Commitment after plaintiff's death.— Com. *v.* Whitney, 10 Pick. (Mass.) 434.

Debtor must be in actual custody to authorize the issuance of the writ of habeas corpus and the restraint must be substantial and real and not merely moral. *In re* Lampert, 21 Hun (N. Y.) 154.

70. McKenzie *v.* Hargrove, 22 Ga. 119.

71. Wallace *v.* Prott, 4 Mackey (D. C.) 259.

72. Caldwell's Case, 13 Abb. Pr. (N. Y.) 405; Com. *v.* County Prison, 14 Phila. (Pa.) 396.

If new facts arise before the issuing of an execution, by which the debtor is entitled to have it issue against his goods and chattels only, it has been held that he may pursue his right on habeas corpus. Wright *v.* Hazen, 24 Vt. 143.

73. *In re* Blake, 106 Mass. 501, Gray, J., delivering the opinion.

Where it is found that the debtor was a spendthrift under guardianship at the time of the arrest, and the papers are insufficient on their face to justify the arrest of a person in his condition, he is entitled to be discharged on habeas corpus. *In re* Blake, 106 Mass. 501.

74. *In re* Lampert, 21 Hun (N. Y.) 154.

75. Rogers *v.* McDearmid, 7 N. H. 506; Com. *v.* Webster, 8 Gratt. (Va.) 702.

Cannot be detained for poundage.— Causin *v.* Chubb, 5 Fed. Cas. No. 2,527, 1 Cranch C. C. 267.

Where a debtor entitled to a credit of a certain sum for each day's imprisonment may be discharged at any time on payment of the balance between such credit and the amount of the execution. Hanchett *v.* Weber, 17 Ill. App. 114.

76. McLean *v.* Whiting, 8 Johns. (N. Y.) 339.

b. Upon Giving Note or Draft. The better rule seems to be that, unless otherwise authorized by statute[77] or by the terms of the writ,[78] the sheriff can receive nothing in satisfaction but money or its equivalent.[79]

4. Discharge on Consent of Creditor — a. In General. Plaintiff in a civil action may at any time order the discharge of a debtor confined under execution issued on the judgment,[80] and may make such agreement or take such security as he pleases, on discharging his debtor from arrest, so long as the officer has no beneficial interest therein.[81]

b. By Agent or Attorney. Plaintiff's attorney as such has no power to allow a discharge of defendant without the actual payment of the money.[82] The authority of a person, as special agent of plaintiff to discharge defendant, without satisfaction of the debt must be clearly and fully proved and strictly pursued.[83]

c. Effect. The discharge of the debtor by order of plaintiff constitutes a technical satisfaction of the debt,[84] and is a bar to a subsequent arrest in the same cause;[85] but such discharge is not a payment of the debt so as to release a guarantor.[86] A defendant, discharged at request of plaintiff, is still entitled under a contract to indemnity, to such costs and charges as he has been put to, and such damages as he has sustained by litigation, although the judgment is satisfied by such discharge.[87]

77. In Maine by express statutory provision persons confined for non-payment of a fine and costs may be discharged after a certain time on giving their notes for the amount due with interest, together with a schedule of property. Bates *v.* Butler, 46 Me. 387.

78. McCauley *v.* Kelly, 2 Wkly. Notes Cas. (Pa.) 30.

79. Mumford *v.* Armstrong, 4 Cow. (N. Y.) 553.

In Kentucky it has been held that a sheriff may, after he has committed to the jail a prisoner arrested on execution, receive the money or property to satisfy the execution, and discharge the prisoner. Prather *v.* Beeler, 3 Bibb 375; Field *v.* Slaughter, 1 Bibb 160.

Note of third person when discharged.— See Daggett *v.* Gage, 41 Ill. 465. See also Commercial Paper.

80. *Ex p.* Bergman, 18 Nev. 331, 4 Pac. 209.

Such authorization may be by parol.— Bridge *v.* McLane, 2 Mass. 520.

81. Williams *v.* Evans, 2 N. Y. City Ct. 235.

Poundage must be paid before a discharge authorized upon the payment of the sheriff's fees. Ryle *v.* Falk, 24 Hun (N. Y.) 255, 60 How. Pr. (N. Y.) 516 [*affirmed in* 86 N. Y. 641].

82. Eads *v.* Wynne, 79 Hun (N. Y.) 463, 29 N. Y. Suppl. 983. And see Vidrard *v.* Fradneburg, 53 How. Pr. (N. Y.) 339; Simonton *v.* Barrell, 21 Wend. (N. Y.) 362; Jackson *v.* Bartlett, 8 Johns. (N. Y.) 361; Savory *v.* Chapman, 11 A. & E. 829, 8 Dowl. P. C. 656, 4 Jur. 411, 9 L. J. Q. B. 186, 3 P. & D. 604, 39 E. C. L. 439.

Under an Indiana statute it has been held that defendant may be discharged without prejudice by plaintiff's attorney. Neff *v.* Powell, 6 Blackf. (Ind.) 420.

Since the attorney has full power over a judgment for costs, an officer who retakes into custody a judgment debtor who has been on the limits under an arrest on a body execution on such judgment, after an order for the debtor's discharge by the attorney for the judgment creditor, is liable in damages for false arrest. Davis *v.* Bowe, 3 N. Y. St. 531.

83. Crary *v.* Turner, 6 Johns. (N. Y.) 51.

84. Terrell *v.* Smith, 8 Conn. 426.

85. *Ex p.* Bergman, 18 Nev. 331, 4 Pac. 209; Green *v.* Young, 21 N. Y. Suppl. 255.

A discharge of one of several defendants by the creditor's consent is a discharge of all from liability to arrest on the same judgment. Vidrard *v.* Fradneburg, 53 How. Pr. (N. Y.) 339.

In trespass on judgment against several defendants, if one is arrested on a capias ad satisfaciendum and discharged by plaintiff or by his consent, the court will discharge the other defendants from custody, and order satisfaction to be entered of record, upon their stipulating to bring no action on account of their arrest and imprisonment. Craig *v.* Allen, 14 N. J. L. 102.

Permission to go off the jail limits or at large given by the creditor to the debtor takes away the right to imprison and the debtor cannot be again taken in execution for the same debt. Vidrard *v.* Fradneburg, 53 How. Pr. (N. Y.) 339; Lathrop *v.* Briggs, 8 Cow. (N. Y.) 171; Sweet *v.* Palmer, 16 Johns. (N. Y.) 181; Yates *v.* Van Rensselaer, 5 Johns. (N. Y.) 364; Blackburn *v.* Stupart, 2 East 243.

Where defendant surrenders before the body execution is issued and is discharged, the rule as to no further arrest does not apply. *Ex p.* Bergman, 18 Nev. 331, 4 Pac. 209.

86. Especially where the discharge is effected at the request and with the consent of the debtor. Terrell *v.* Smith, 8 Conn. 426. And see Loomis *v.* Storrs, 4 Conn. 440.

87. Bamford *v.* Keefer, 68 Pa. St. 389.

5. Discharge on Motion — a. Grounds. In some jurisdictions and in certain cases[88] the debtor when imprisoned under an execution against the person may secure his release from imprisonment on motion. But neither the violation on the part of the sheriff of the directions of the statute in respect to the mode of imprisonment,[89] the fact that the prisoner was recaptured in one state, by the sheriff after a negligent escape from his custody in another,[90] nor the inability of the debtor to endure the imprisonment,[91] furnish a ground for granting the prisoner's motion for a discharge from custody.

b. Hearing and Determination. Where the commitment on execution is founded only on the facts alleged as the ground for arrest on the debtor's motion for discharge from commitment, the facts are to be examined in the same manner as if the motion were to discharge from arrest.[92] In a proceeding by a debtor imprisoned for refusing to surrender his estate, where he is charged with fraud, it is sufficient to sustain such charge by a preponderance of the evidence.[93] Petitioner may show that on the trial of the case the evidence was necessarily on a given count which would not warrant the issuing of the execution.[94]

c. Imposition of Terms. In granting a debtor's motion to be discharged from imprisonment the court may under certain circumstances impose terms,[95] such as a stipulation on the debtor's part that he will not bring an action for false imprisonment,[96] or will not bring a suit against plaintiff's attorney.[97] Where, however, the debtor is relieved because the execution issued upon a judgment previously paid or discharged the court cannot impose terms.[98]

6. Discharge on Affidavit of Debtor or Certificate of Magistrate. Under some statutes allowing plaintiff a capias ad satisfaciendum upon making affidavit of certain facts, the debtor may obtain his release from custody by making a counter affidavit denying the facts alleged in plaintiff's affidavit,[99] or by submitting himself to an examination by the magistrate who signed the process[1] and obtaining a certificate as to the non-existence of the facts stated in plaintiff's affidavit.[2]

88. See cases cited *infra*, this note.

For example, release on motion has been held to be proper. Where the judgment was recovered on a cause of action for which he could not have been arrested. Smith *v.* Knapp, 30 N. Y. 581. Where on the same day of the judgment the debtor received a discharge under the insolvency act, and had had no opportunity to plead his discharge. Baker *v.* Judges Ulster C. Pl., 4 Johns. (N. Y.) 191. Where plaintiff delays the enforcement of his remedies for the purpose of allowing the debtor to remain in prison (Hedges *v.* Payne, 85 Hun (N. Y.) 377, 32 N. Y. Suppl. 969), as by neglect to enter judgment or issue execution against his person within a certain time (Hedges *v.* Payne, 85 Hun (N. Y.) 377, 32 N. Y. Suppl. 969; Longuemare *v.* Nichols, 7 N. Y. Suppl. 672, 18 N. Y. Civ. Proc. 93; Sweet *v.* Norris, 19 Abb. N. Cas. (N. Y.) 150). Where the debtor is exempt from arrest. Scofield *v.* Kreiser, 61 Hun (N. Y.) 368, 16 N. Y. Suppl. 126, 21 N. Y. Civ. Proc. 294; Secor *v.* Bell, 18 Johns. (N. Y.) 52.

Bar to second arrest. — A judgment debtor discharged because not taken in execution within the proper time cannot be lawfully arrested again upon an alias execution or upon mesne process in an action on the same judgment. Barnes *v.* Viall, 6 Fed. 661.

89. Lockwood *v.* Mercereau, 6 Abb. Pr. (N. Y.) 206, where the sheriff's liability in such cases is pointed out.

90. Lockwood *v.* Mercereau, 6 Abb. Pr. (N. Y.) 206.

91. Moore *v.* McMahon, 20 Hun (N. Y.) 44.

92. Moore *v.* Calvert, 9 How. Pr. (N. Y.) 474.

Motion to discharge from arrest on mesne process see Arrest, 3 Cyc. 964.

93. First Nat. Bank *v.* Sanford, 83 Ill. App. 58.

94. Kitson *v.* Ellinger, 35 Ill. App. 55.

95. See cases cited *infra*, this note.

96. Deyo *v.* Van Valkenburgh, 5 Hill (N. Y.) 242.

97. Davis *v.* Wiggins, 1 How. Pr. (N. Y.) 159.

98. Deyo *v.* Van Valkenburgh, 5 Hill (N. Y.) 242; Mayer *v.* Rothschild, 59 How. Pr. (N. Y.) 510.

99. Marrow *v.* Weaver, 8 Ala. 288.

1. In Vermont by statute a debtor who has been arrested upon process which issued against his body upon affidavit filed by the creditor as to the debtor's intention to abscond has the right of appearing before the magistrate who signed the process, and submitting himself to examination as to his intention to abscond. *Ex p.* Davis, 18 Vt. 401.

2. The certificate, in order to justify a discharge, must correspond with and meet the affidavit upon which the process issued and negative so much of it as will leave it insufficient to justify an arrest. *In re* Proctor, 27 Vt. 118.

7. Discharge on Bond[3] to Proceed Under Insolvent Laws — a. In General. In a number of states provision is made by statute for the discharge of persons arrested on execution against the person upon their giving bond that they will take the benefit of the insolvent law of the state,[4] and if one legally arrested gives bond, with surety, conditioned for his appearance to take the benefit of the insolvent law, instead of suing out a habeas corpus, the surety will be bound by his obligation.[5]

b. Form and Requisites. The bond should in its form follow the statute authorizing the same, and one materially varying from that presented by the statute will be void.[6] A usual provision is that the bond shall be payable to the party at whose instance the arrest is made,[7] in twice the amount of the debt;[8] but a bond for the appearance of an insolvent in court is good, if it is for double the original debt, exclusive of interest and costs,[9] and it has been held that such a

3. **Bonds** generally see Bonds.

4. *Alabama.*— Briggs *v.* Hobson, 3 Ala. 404; Thompson *v.* Pierce, 3 Stew. 427.

Georgia.— Roberts *v.* Green, 31 Ga. 421; Carhart *v.* Marshall, 23 Ga. 225; Grenville *v.* Trammell, 13 Ga. 280; Colley *v.* Morgan, 5 Ga. 178.

Illinois.— Matson *v.* Swanson, 131 Ill. 255, 23 N. E. 595.

Indiana.— Wendover *v.* Tucker, 4 Ind. 381.

New Jersey.— Louis *v.* Kaskel, 51 N. J. L. 236, 17 Atl. 120; Hatfield *v.* Boswell, 25 N. J. L. 85; Race *v.* Dehart, 24 N. J. L. 37; Hulshizer *v.* Kocker, 20 N. J. L. 390; State *v.* Giberson, 14 N. J. L. 388; Eayre *v.* Earl, 8 N. J. L. 359.

North Carolina.— Osborne *v.* Tooner, 51 N. C. 440; Hardison *v.* Benjamin, 31 N. C. 331; Mooring *v.* James, 13 N. C. 254.

Pennsylvania.— Greenwaldt *v.* Kraus, 148 Pa. St. 517, 24 Atl. 67; Luzerne County's Appeal, 135 Pa. St. 468, 19 Atl. 1063; Power *v.* Graydon, 53 Pa. St. 198; Lilley *v.* Torbet, 8 Watts & S. 89; Doescher's Petition, 18 Pa. Super. Ct. 346; *Ex p.* Mason, 2 Ashm. 239; Walton's Case, 1 Ashm. 94; *In re* Spare, 7 Kulp 525, 16 Pa. Co. Ct. 158; *In re* Craig, 2 Phila. 391.

Tennessee.— Sharp *v.* Nelson, 9 Yerg. 34.

United States.—Russell *v.* Thomas, 21 Fed. Cas. No. 12,162, 10 Phila. 239.

See 21 Cent. Dig. tit. "Execution," § 1287.

A debtor who has been refused his discharge on account of a defect in his bonds, and who thereupon surrenders himself to the custody of the sheriff, has a right to renew his application and file new bonds. Race *v.* Dehart, 24 N. J. L. 37.

The surrender of the debtor, whether voluntarily made or made by his bail, must have been a legal one, and attended with all the forms prescribed by law; and such surrender must be made before the delivery to the officer of the insolvent bond. Hulshizer *v.* Kocker, 20 N. J. L. 390.

The pendency of an application of an insolvent debtor to be discharged relieves him from the necessity of making a second application, pursuant to a bond given to another creditor, upon a subsequent arrest. McClure *v.* Foreman, 4 Watts & S. (Pa.) 279.

5. Johnston *v.* Coleman, 8 Watts & S. (Pa.) 69.

6. McKee *v.* Stannard, 14 Serg. & R. (Pa.) 380.

Following statute substantially.— It would seem to be sufficient if the bond substantially follows the statute and specifies the purpose for which defendant is required to appear (Thompson *v.* Pierce, 3 Stew. (Ala.) 427. And see Sharp *v.* Nelson, 9 Yerg. (Tenn.) 34), and a mere verbal difference or departure from the statute imposing no additional specific obligation will not invalidate it (Thompson *v.* Pierce, 3 Stew. (Ala.) 427. And see Mooring *v.* James, 13 N. C. 254).

If the bond exacts more than the statute requires it cannot be enforced. Power *v.* Graydon, 53 Pa. St. 198.

A recital that the justices appointed the time and place of appearance and surrender is not essential. Thompson *v.* Pierce, 3 Stew. (Ala.) 427.

If, in a bond executed as prepared by the officer, there is a mistake, the officer and not the surety must suffer. Roberts *v.* Green, 31 Ga. 421.

Time and place of objection.— Any objection to the bond by an insolvent debtor must, it has been held, be made at the court to which the bond is returnable and before judgment is rendered on it. Watts *v.* Boyle, 26 N. C. 331.

Waiver of a statutory requirement may be made by the parties for whose benefit the requirement was intended. Hardison *v.* Benjamin, 31 N. C. 331 (debtor waiving his privilege as to time of giving bond); Wells *v.* Bentley, 3 Pa. St. 324 (creditor waiving defect in the approval of the bond).

7. Grenville *v.* Trammell, 13 Ga. 280; Colley *v.* Morgan, 5 Ga. 178.

A bond payable to the sheriff instead of plaintiff is good and the court will compel the officer to assign the same. Tucker *v.* Davidson, 28 Ga. 535.

An objection that the bond was not made to plaintiffs by their christian names is of no avail, where the officer literally pursued the statute in making the bond; the averment of plaintiff's christian names in the motion being equivalent to a similar averment in a declaration in debt on such a bond. Wall *v.* Jarrott, 25 N. C. 42.

8. Colley *v.* Morgan, 5 Ga. 178.

9. Williams *v.* Yarborough, 13 N. C. 12.

bond, although less than twice the amount of the arresting creditor's debt, is a valid bond, and binding on the parties.[10]

c. Performance or Breach. The bond will be forfeited by the failure of the debtor to apply by petition for the benefit of the insolvent laws within the time prescribed by statute,[11] to procure continuance to another term,[12] or to surrender himself into custody if he does not procure his discharge by the court upon his application.[13] But it has been held that the condition of the bond was not broken where the debtor was prevented from complying with the condition by a failure of one of the justices to attend,[14] where the justice refused to permit the debtor to take the oath,[15] or by a transfer of property by the debtor after his arrest and the execution of the bond.[16] In some jurisdictions the appearance of the principal is all for which his sureties on the bond are liable,[17] and a surrender of the debtor discharges his bond, but if he fails to appear his sureties are liable;[18] but in other jurisdictions it has been held that a voluntary surrender by the principal will not relieve his bail from the obligation which is contained in the bond unless he has failed to procure his discharge at the instance of his creditors, or by the act of the court.[19] Where surrender is made impossible by act of the law the debtor's bail are entitled to relief.[20] Where a debtor is arrested in one county under execution issued in another and gives bond for discharge on appearing within a certain time and taking the oath, the appearance is properly made in the county where the debtor was arrested.[21] The bond is not binding after the

10. Colley *v.* Morgan, 5 Ga. 178. And see Thacher *v.* Williams, 14 Gray (Mass.) 324.

11. Rowand *v.* Smiley, 96 Pa. St. 165; *In re* McDonough, 37 Pa. St. 275; Haviland *r.* Hayward, 35 Pa. St. 459; Johnston *v.* Coleman, 8 Watts & S. (Pa.) 69; *In re* Spare, 7 Kulp (Pa.) 525, 16 Pa. Co. Ct. 158; Kindt *v.* McDonald, 12 Phila. (Pa.) 489.

On failure to file petition execution may be issued the moment it can be legally ascertained that he has not complied with the terms of the law. Claxton's Case, 1 Ashm. (Pa.) 102; Simmons *v.* Hoopes, 1 Ashm. (Pa.) 35.

Pending appeal the performance of the obligation under the bond may be suspended, but on final judgment against the debtor his application in insolvency must be made at the next day fixed, and on failure so to do liability attaches to the sureties under the bond. O'Donnell *v.* Gordon, 12 Pa. Super. Ct. 23.

12. Rowand *r.* Smiley, 96 Pa. St. 165; Bartholomew *v.* Bartholomew, 50 Pa. St. 194; *In re* Spare, 7 Kulp (Pa.) 525, 16 Pa. Co. Ct. 158; Kindt *v.* McDonald, 12 Phila. (Pa.) 489.

13. Marks *v.* Drovers' Nat. Bank, 114 Pa. St. 490, 6 Atl. 774; Saunders *r.* Quigg, 112 Pa. St. 546, 3 Atl. 814; Rowand *v.* Smiley, 96 Pa. St. 165; Betz *r.* Greenwaldt, 6 Pa. Cas. 139, 8 Atl. 852; Potter *v.* Norman, 4 Yeates (Pa.) 388.

If the warden refuses to receive him his bond is void, and his sureties are discharged where the debtor surrenders himself upon the refusal of the court to discharge him. Marks *r.* Drovers' Nat. Bank, 114 Pa. St. 490, 6 Atl. 774; Saunders *v.* Quigg, 112 Pa. St. 546, 3 Atl. 814.

Surrender on the day of rejection of his application for discharge is necessary in order to relieve his surety. Frick *v.* Kitchen, 4 Watts & S. (Pa.) 30. But *compare* Bailie *r.* Wallace, 10 Watts (Pa.) 228, as to privilege of surrendering at any time during the session of the court. See also Greenwaldt *v.* Kraus, 148 Pa. St. 517, 24 Atl. 67.

14. Rust *v.* Paine, 16 Ala. 352.

15. Briggs *v.* Hobson, 3 Ala. 404, the creditor having had due notice.

16. Rust *r.* Paine, 16 Ala. 352.

17. Bell *v.* Rawson, 30 Ga. 712. And see Watson *v.* Willis, 24 N. C. 17. And *compare* Woods *v.* Woods, 17 Ga. 293.

18. Bell *r.* Rawson, 30 Ga. 712.

Where both principal and surety fail to appear when the case is called in its order and judgment is taken on the bond, although the debtor be afterward delivered up by the surety, judgment should not be on that account opened and set aside, and the surety exonerated from his bond and the case continued. McKay *v.* Ragan, 27 Ga. 203.

19. Wolfram *v.* Strickhouser, 1 Watts & S. (Pa.) 379. And see Kelly *r.* Stepney, 4 Watts (Pa.) 69.

20. Steelman *v.* Mattix, 38 N. J. L. 247, 20 Am. Rep. 389.

Confinement in the county jail prior to his removal to the state prison to which he had been sentenced for crime will not excuse an actual surrender of the debtor to the sheriff. Steelman *r.* Mattix, 38 N. J. L. 247, 20 Am. Rep. 389.

Sickness of the principal and surety whereby they were both unable to attend the court to which the bond was returnable is no reason for setting aside a judgment rendered against them, as their only course in such circumstances was to have appeared by attorney and obtained a continuance. Osborne *v.* Toomer, 51 N. C. 440.

21. Under such circumstances therefore the debtor is not liable on the bond for not ap-

capias ad satisfaciendum has been set aside; in such case the jailer has not authority to detain the debtor and the surrender would be but nominal.[22] A bond to take the benefit of the insolvent law is not discharged by an act abolishing imprisonment for debt.[23]

d. Effect of Discharge. The discharge of one who gives such bond by a judge or the prothonotary is binding upon the sheriff who has the debtor in custody, whether the bond given be legal or illegal.[24] Where the debtor has given bond in each of two counties conditioned to apply for discharge, his discharge in one county by act of law releases him from the performance of the condition of the bond in the other county.[25]

e. Recommitment. A debtor who has given such bond can only be imprisoned for failure to give notice to creditors,[26] refusal to take the oath, and conviction of fraud.[27]

f. Discharge of Sureties. Death of the debtor before forfeiture,[28] his offer in open court to surrender himself and on the same day going to and remaining in prison,[29] or a declaration of the invalidity of the bond by competent judicial authority [30] operates as a discharge of his sureties. Where defendant, in custody on execution gives a bond, with surety to take the benefit of the insolvent law and a second execution issues on forfeiture of the bond, plaintiff cannot, after discharging the debtor from custody under the second execution without the surety's assent, maintain an action against the surety on the bond.[31]

g. Action on Bond [32] — Pleading.[33] Plaintiff must in his declaration on such a bond so state the breach of the condition as to show clearly the necessity of defendant's appearance within the meaning of the bond.[34] A failure to set out in

pearing in the other county. Avery *v.* Seely, 3 Watts & S. (Pa.) 494.

Place of surrender.— The surrender must be to the court to which the capias ad satisfaciendum is returnable, or to the sheriff of that county. Where the writ issues to another county a surrender to the sheriff of it is a nullity (Mooring *v.* James, 13 N. C. 254), and upon an appeal by a debtor who had been arrested on a capias ad satisfaciendum and given bond under the insolvent debtors' law for his appearance at the county court, from a judgment finding him guilty of fraud and concealment and ordering his imprisonment, the debtor is bound to appear in the superior court, the same as he originally was in the county court (Wilkings *v.* Baugham, 25 N. C. 86).

22. Mason *v.* Benson, 9 Watts (Pa.) 287.

23. McFadden *v.* Dilly, 2 Pa. St. 61.

24. Frick *v.* Kitchen, 4 Watts & S. (Pa.) 30.

Where plaintiff issued a capias ad satisfaciendum and a writ of attachment and delivered them to the sheriff with instructions not to execute the capias ad satisfaciendum, and defendant tendered to the sheriff's clerk and to the officer who had the writ a discharge from the court of common pleas, founded on a bond, voluntarily entered into by defendant, conditioned for his appearance to take the benefit of the insolvent laws, and the clerk received such discharge by mistake the court will set aside the service of the capias ad satisfaciendum. Davies *v.* Scott, 2 Miles (Pa.) 52.

25. Skillman *v.* Baker, 18 N. J. L. 134. But *compare* Walton's Case, 1 Ashm. (Pa.) 94.

26. **The giving of statutory notice** of the time and place at which the debtor would present his application cannot be called in question collaterally in an action on an insolvent bond by assigning the want of such notice on the declaration as a breach of the bond. Louis *v.* Kaskel, 51 N. J. L. 236, 17 Atl. 120.

27. Mims *v.* Lockett, 20 Ga. 474, holding that in proceedings to commit a debtor because of failure to file schedule and make full disclosure of his property, the jury and not the court are the judges of the fulness or good faith of the debtor's schedule of his property. And see Mullen *v.* Wallace, 2 Grant (Pa.) 389.

For form of order of recommitment held to be sufficient see Governor *v.* Kemp, 12 Ga. 466.

28. Johnson *v.* Turner, 2 Ashm. (Pa.) 433.

29. Mullen *v.* Wallace, 2 Grant (Pa.) 389, holding also that his subsequent release from prison will not revive the liability of the surety.

Where the debtor in the prison bounds petitions for the benefit of the Insolvent Debtors' Act and submits his schedule and he is found guilty of fraud and remanded to jail his bail are thereby discharged. Dixon *v.* Vanezara, 1 McCord (S. C.) 373.

30. Johnson *v.* Turner, 2 Ashm. (Pa.) 433.

31. Palethrope *v.* Lesher, 2 Rawle (Pa.) 272.

32. **Actions on bonds** generally see BONDS, 5 Cyc. 311 *et seq.*

33. **Pleading** generally see PLEADING.

34. Louis *v.* Kaskel, 51 N. J. L. 236, 17 Atl. 120.

the declaration the judgment on which the final process was issued is not ground for motion in arrest of judgment.[35]

8. Discharge on Surrender or Disclosure as to Property — a. In General. Under some statutes provision is made for the discharge of execution debtors, upon making disclosure or surrender of all their property, effects, money, etc., in satisfaction of the judgment on which the execution issued.[36]

b. Judgments or Executions Under Which Discharge Obtainable. Construing the provisions of such statutes in the several jurisdictions[37] it has been held that a defendant imprisoned under a capias ad satisfaciendum in an action for assault and battery[38] or for seduction[39] is not entitled to be discharged from arrest. And a discharge from imprisonment has been refused where the process issued upon a judgment in an action of which malice was the gist;[40] also where the judgment was in an action founded on actual force, or on fraud or deceit, or criminal conversation, where the damages found by the jury exceeded one hundred dollars.[41]

c. Grounds For Refusing Discharge. In some jurisdictions a person committed for fraudulently disposing of property[42] will not be discharged from imprisonment on his making an assignment of his property, the statutory provisions for a discharge applying only to cases where there has been no disposal of property with intent to defraud creditors.[43] Where, however, one liable to arrest

35. Matson *v.* Swanson, 131 Ill. 255, 23 N. E. 595 [*reversing* 31 Ill. App. 594].

36. *Georgia.*— Hening *v.* Nelson, 20 Ga. 583.

Illinois.— *In re* Salisbury, 16 Ill. 350.

Louisiana.— State *v.* Judge Fourth Dist. Ct., 45 La. Ann. 948, 13 So. 196.

Maine.— McPheters *v.* Morrill, 66 Me. 123; Dow *v.* True, 19 Me. 46.

Michigan.— Funke *v.* Hurst, 119 Mich. 182, 77 N. W. 695.

New York.— Develin *v.* Cooper, 84 N. Y. 410 [*affirming* 20 Hun 188]; Bullymore *v.* Cooper, 46 N. Y. 236 [*affirming* 2 Lans. 71]; Roswog *v.* Seymour, 7 Rob. 427; Matter of Fitzgerald, 8 Daly 188; Matter of Fitzgerald, 5 Abb. N. Cas. 357, 56 How. Pr. 190; People *v.* O'Brien, 5 Abb. Pr. N. S. 223; Comstock's Case, 16 Abb. Pr. 233, 25 How. Pr. 429; People *v.* Brooks, 40 How. Pr. 165; People *v.* Mullin, 25 Wend. 698.

Ohio.— Walsh *v.* Ringer, 2 Ohio 327, 15 Am. Dec. 555.

Pennsylvania.—Dorr *v.* McClintock, 2 Miles 190; Zeller's Petition, 3 Pa. Dist. 520; Drumm *v.* MacTaggart, 3 Pa. Dist. 367.

South Carolina.— McKenzie *v.* Garrison, 10 Rich. 234; Mack *v.* Garrett, 10 Rich. 79; Bulwinkle *v.* Grube, 5 Rich. 286; Muldow *v.* Bacot, 2 McMull. 359; Thomson *v.* Linam, 2 Bailey 131; Gibson *v.* Steele, 3 McCord 45. See also Hurst *v.* Samuels, 29 S. C. 477, 70 S. E. 822.

Tennessee.— McKenzie *v.* Hackney, 3 Yerg. 417.

Virginia.— Dix *v.* Evans, 3 Munf. 308.

See 21 Cent. Dig. tit. "Execution," § 1292.

37. **In the old chancery court** of New York the statute authorizing the court to discharge defendant was held to apply to execution for the collection of money only. Van Wezel *v.* Van Wezel, 3 Paige 38.

38. Bampfield *v.* Ellard, 2 McCord (S. C.) 182. And see Knight *v.* Braker, 13 McCord (S. C.) 80.

39. People *v.* Greer, 43 Ill. 213.

40. *In re* Mullin, 118 Ill. 551, 9 N. E. 208; *In re* Murphy, 109 Ill. 31; Flora First Nat. Bank *v.* Burkitt, 101 Ill. 391, 40 Am. Rep. 209; People *v.* Greer, 43 Ill. 213; Blattau *v.* Evans, 57 Ill. App. 311; Kitson *v.* Ellinger, 35 Ill. App. 55; Mahler *v.* Sinsheimer, 20 Ill. App. 401.

The burden of proof that malice was "not of the gist of the action," where he was imprisoned within the Insolvent Debtors' Act, lies upon the debtor seeking release from arrest or imprisonment under such act. Mahler *v.* Sinsheimer, 20 Ill. App. 401.

41. Dimmick's Case, 2 Pa. Dist. 842, 13 Pa. Co. Ct. 590 (holding that the words "where the damages found by the jury exceed one hundred dollars," etc., qualify each of the actions specified); Graeff's Petition, 2 Pa. Dist. 369, 12 Pa. Co. Ct. 443.

42. **The fraud which will bar a debtor's discharge** is not fraud of which he may have been guilty in contracting the liability, but fraud in the subsequent disposition of his property to evade such liability. *In re* Pearce, 29 Hun (N. Y.) 270. And *compare* Matter of Fowler, 8 Daly (N. Y.) 548 [*overruling* Matter of Roberts, 8 Daly (N. Y.) 95].

Barred by use of money fraudulently obtained.— *In re* Lowell, 8 N. Y. Civ. Proc. 5.

43. *In re* Brady, 69 N. Y. 215 [*affirming* 8 Hun 437]; Matter of Andriot, 2 Daly (N. Y.) 28; *In re* Haight, 11 N. Y. Civ. Proc. 227; People *v.* White, 14 How. Pr. (N. Y.) 498.

In New Jersey the fact that the debtor has mortgaged his property with the intention of defrauding his creditors will bar his discharge from imprisonment. Iliff *v.* Banghart, 60 N. J. L. 400, 37 Atl. 894.

In Tennessee, under Acts (1811), c. 24, § 3, see Grisham *v.* Grisham, 8 Yerg. 393.

Presumption of good faith and burden of proof.— *In re* Brady, 8 Hun (N. Y.) 437. And see *In re* Boyce, 11 N. Y. Suppl. 624, 19 N. Y. Civ. Proc. 23; *In re* Howes, 9 N. Y. Civ. Proc. 17.

on final process makes an assignment of his property for the benefit of creditors, which would be otherwise valid, before being charged in execution, the fact of his having done so will not bar his discharge,[44] and after his arrest an insolvent debtor may in good faith pay or secure a preëxistent debt or sell his property.[45]

d. Proceedings to Procure — (i) *In General.* The proceedings to procure the discharge are controlled by the statutory provisions or the local practice in the several jurisdictions;[46] and this is true with respect to the proper person to whom the application should be made,[47] the issuing of the order calling in the creditors,[48] as well as to the form and requisites of the application for discharge,[49] to the discontinuance, abandonment, or withdrawal of the application.[50] In some jurisdictions the hearing of the application may be continued from time to time for a period not exceeding the statutory limit, or even longer with the consent of the parties;[51] in others the statute provides for but one adjournment and a recog-

A conveyance of property to his wife seventeen years before would not prevent the debtor's discharge, where the judgment creditor's debt did not then exist. *In re* Haight, 11 N. Y. Civ. Proc. 227.

In South Carolina the provision against fraudulent transfers by debtors was held to apply as well to those applying for the Insolvent Debtors' Act as to application under the Prison-Bounds Act. Dobson *v.* Teasdale, 4 McCord (S. C.) 81.

44. Roswog *v.* Seymour, 7 Rob. (N. Y.) 427.

45. Johnson *v.* Martin, 25 Ga. 268.

46. See cases cited *infra*, note 47 *et seq.*

47. Morrow *v.* Weaver, 8 Ala. 288 (to a judge or to justices of the peace); Wallace *v.* Taylor, 12 Rich. (S. C.) 550 (holding that where the court is sitting and the clerk is engaged in court, he is absent, within the meaning of the statute authorizing a magistrate to hear the application if the clerk be interested, sick, or absent).

Commissioners of bail have power to admit persons to the benefit of the Prison-Bounds Act, but not of the Insolvent Debtors' Act. Spears *v.* Terry, 3 Brev. (S. C.) 408.

In New York it has been held that the application must be made to the court (Hayes *v.* Bowe, 12 Daly 193. And see Mather's Case, 14 Abb. Pr. 45. See also Matter of Roberts, 8 Daly 95, 59 How. Pr. 136), at a regular or special term (Matter of Walker, 2 Duer 655).

Successive applications.— Where an insolvent fails in obtaining a discharge from prison from one officer it is irregular to apply to another. People *v.* Akin, 4 Hill (N. Y.) 606.

48. Betts *v.* Nixon, 1 Strobh. (S. C.) 148.

Notice is usually required to be given to the creditor of the debtor's intention to render the schedule and take the prescribed oath. Morrow *v.* Weaver, 8 Ala. 288; Hecker *v.* Jarret, 3 Binn. (Pa.) 404; Thornton *v.* Ferguson, 2 Bailey (S. C.) 197.

After exceptions have been filed to the schedule of an insolvent debtor and he has been put on his trial, plaintiff has no right to object that legal notice has not been given that defendant would apply for his discharge. Rice *v.* Sims, 3 Hill (S. C.) 5.

Personal service of a petition for discharge on plaintiff who is named therein and who was sole owner of the judgment is sufficient. Goodwin *v.* Griffis, 88 N. Y. 629 [*reversing* 25 Hun 61].

49. Moran *v.* Secord, 15 Fed. 509, holding that the statute authorizing it must be strictly followed in order to give jurisdiction.

In Illinois no formal pleadings are required and objections to the form of the petition for discharge will not be considered. Kitson *v.* Farwell, 132 Ill. 327, 23 N. E. 1024.

In New York it has been held that the petition must show an exact compliance with some one of the conditions in the statute (People *v.* Reed, 5 Den. 554; People *v.* Abel, 3 Hill 109), and must show that the officer to whom it is presented has jurisdiction and state all the facts which it is necessary to prove to entitle the debtor to a decision in his favor (People *v.* Bancker, 5 N. Y. 106). See also Develin *v.* Cooper, 84 N. Y. 410 [*affirming* 20 Hun 188] (sufficient allegation as to imprisonment within the county); Bullymore *v.* Cooper, 46 N. Y. 236 [*affirming* 2 Lans. 71] (fatal omission of the account of the debtor's estate at the time of his imprisonment); *In re* Chappell, 23 Hun 179 (sufficient statement of cause of imprisonment).

50. Cobb *v.* Harmon, 23 N. Y. 148 [*affirming* 29 Barb. 472] (death of the sole prosecuting creditor, after service on him of the debtor's petition and notice does not abate the debtor's proceedings on his application, as after service of the creditor's warrant the debtor becomes the actor); Comstock's Case, 16 Abb. Pr. (N. Y.) 233, 25 How. Pr. (N. Y.) 429 (petitioner's failure to attend or to have the proceedings regularly adjourned discontinues the application); Sleeper *v.* Cohen, 12 Rich. (S. C.) 112; Sherman *v.* Barrett, 1 McMull. (S. C.) 147.

51. People *v.* Hanchett, 111 Ill. 90.

The withdrawal of a debtor's schedule from the clerk's office by his attorney after it had been filed, and its retention by him until the sitting of the court to which it was returnable, where no application was made for it, either at the clerk's office, or to the counsel, is good ground for continuing the cause, if it operates as a surprise when produced; but it is insufficient to authorize the imprisonment of the debtor, no fraudulent intent

nizance conditioned that the debtor shall attend from time to time and from place to place is void.[52]

(II) *Reopening Proceedings.* Where the debtor's petition for discharge has been denied because he concealed some of his property[53] or on the ground that he omitted from his account some claims owned by him,[54] the proceedings may be reopened upon his showing that he acted in good faith, stating facts which explain or justify his conduct.

e. Schedules and Affidavits—(I) *Necessity For.* Upon the application for discharge, the debtor making such application must render a schedule or inventory under oath[55] of all his property.[56]

(II) *Time of Filing.* Where the time of filing the schedule is fixed by law, plaintiff may sue and recover for the breach in not rendering a schedule within the proper time,[57] unless there be a valid excuse for such failure, in which case he will be allowed to file it afterward *nunc pro tunc*.[58]

(III) *Form and Requisites.* The schedule or inventory should set out the estate, choses in action, and money which the debtor has in possession or is entitled to,[59] or show that he has no property or effects of any kind, except such as is exempted in the oath prescribed by law for insolvent debtors.[60] It should con-

being imputed to the parties. Lindsey *v.* Hunter, 18 Ga. 50.

52. People *v.* Locke, 8 N. Y. Leg. Obs. 164.

When an issue has been made up to try the validity of a debtors' schedule and a day appointed by the commissioner of special bail for that purpose and the jury are in attendance the question of postponement or continuance becomes a question of discretion to be addressed to the commissioner who will not grant the motion unless upon the most satisfactory showing. Bently *v.* Page, 2 McMull. (S. C.) 52.

53. Matter of Thomas, 10 Abb. Pr. N. S. (N. Y.) 114.

54. Matter of Rosenberg, 10 Abb. Pr. N. S. (N. Y.) 450.

55. One convicted of rendering a false schedule of his effects under the jail limits acts in the prior action is excluded from all benefit under that act and the Insolvent Debtors' Act. McElmoyle *v.* Florence, 2 McCord (S. C.) 29.

56. *Alabama.*— Wade *v.* Judge, 5 Ala. 130.

Georgia.— Johnson *v.* Martin, 25 Ga. 268; Lindsey *v.* Hunter, 18 Ga. 50.

Illinois.— Stricker *v.* Kubusky, 35 Ill. App. 159.

Kentucky.—Fayette *v.* Buckner, 1 Litt. 126.

New Jersey.— Race *v.* Dehart, 24 N. J. L. 37; Le Chevallier *v.* Hamilton, 18 N. J. L. 260; Davis *v.* Hendrickson, 15 N. J. L. 481.

New York.— Shaffer *v.* Risely, 114 N. Y. 23, 20 N. E. 630, 16 N. Y. Civ. Proc. 369 [*reversing* 44 Hun 6]; *In re* Brown, 39 Hun 27; Richmond *v.* Praim, 24 Hun 578; Matter of Roberts, 8 Daly 95, 59 How. Pr. 136; Matter of Andriot, 2 Daly 28; Matter of Paton, 7 Misc. 467, 27 N. Y. Suppl. 992, 23 N. Y. Civ. Proc. 331; *In re* Haight, 11 N. Y. Civ. Proc. 227; People *v.* Behrman, Lalor 81; Brodie *v.* Stephens, 2 Johns. 289.

North Carolina.— Ballard *v.* Waller, 52 N. C. 84. *Compare* Governor *v.* Harrison, 20 N. C. 599.

Pennsylvania.—Oliver's Case, 1 Ashm. 112; Woodward's Case, 1 Ashm. 107.

South Carolina.— McKenzie *v.* Garrison, 10 Rich. 234; Banks *v.* Ingram, 10 Rich. 28; Robertson *v.* Shannon, 4 Rich. 323; McElwee *v.* White, 2 Rich. 95; Brebard *v.* Wylie, 1 Rich. 38; Clerry *v.* Spears, 2 Speers 686; Muldrow *v.* Bocot, 2 McMull. 359; Sherman *v.* Barrett, 1 McMull. 147; Davis *v.* Ruff, Cheves 17, 34 Am. Dec. 584; Lowden *v.* Moses, 3 McCord 93; Crovat *v.* Coburn, 3 McCord 14; Prescott *v.* Hubbell, 2 McCord 64; McElmoyle *v.* Florence, 2 McCord 29; Bingley *v.* Smart, 1 McCord 29.

See 21 Cent. Dig. tit. "Execution." § 1296.

The burden of proof is upon the debtor to show that the property does not belong to him where he has property in his possession not included in his schedule and pays taxes on it as his own. Walker *v.* Briggs, 1 Hill (S. C.) 118.

57. McElwee *v.* White, 2 Rich. (S. C.) 95, holding that such action will lie, although the prisoner is discharged without opposition.

In computing the forty days' time within which a schedule should be filed, the day of the date of the bond must be executed. McElwee *v.* White, 2 Rich. (S. C.) 95.

58. Crovat *v.* Coburn, 3 McCord (S. C.) 14, holding that the illness of his attorney will excuse the failure to file a schedule within the prescribed time.

59. Wade *v.* Judge, 5 Ala. 130.

A contingent remainder in personal property is included in description of estate, property, and effects and the omission to include such an interest in a schedule is within the penalties of an act requiring such schedule. Clerry *v.* Spears, 2 Speers (S. C.) 686.

Where the petitioner has recently made a general assignment for the payment of his debts, he must set forth in some shape the property which passed by the assignment. Oliver's Case, 1 Ashm. (Pa.) 112; Woodward's Case, 1 Ashm. (Pa.) 107.

60. Lindsey *v.* Hunter, 18 Ga. 50.

In Illinois he must schedule all property, even though it be exempt from execution. Stricker *v.* Kubusky, 35 Ill. App. 159.

tain an account of the applicant's creditors, and the inventory of his estate as existing at the time of his arrest and not as existing at the time of the debtor's imprisonment.[61]

f. Surrender of Property. It has been held that the applicant is bound to make actual delivery of the goods to his assignee, or do that which is equivalent thereto, and that mere readiness and willingness to deliver is not enough.[62] On the other hand it has been held that, when the debtor's schedule shows that he has property in another state, he is not compelled to bring the same into the jurisdiction where he has been discharged.[63]

g. Contest by Creditor — (I) *Right to Contest.* When an insolvent debtor has filed his schedule as provided by law, the creditor may contest his right to be discharged,[64] by traversing the schedule so filed, as by suggesting fraud or concealment of any property, money, or effects not embraced therein;[65] and if issue is found against the debtor he may be imprisoned until he surrenders the property.[66]

(II) *Filing of Suggestions and Proceedings Thereunder* — (A) *In General.* Although it has been held that a creditor has the right to examine the applicant before the judge or commissioner touching on the truth of his schedule,[67] without filing a suggestion of fraud,[68] yet the usual practice is to cause

61. Matter of Andriot, 2 Daly (N. Y.) 28.

If the account be full and intelligible it is sufficient without giving the residence of the creditor, the nature of the debt, consideration, etc., as required by the statute. People *v.* Behrman, Lalor (N. Y.) 81.

In New York the affidavit accompanying the application must in addition to the foregoing requirements state that he has not disposed of or made over any part of the property not exempt for the future benefit of himself or family, or with the intent to injure or defraud any of his creditors. *In re* Brown, 39 Hun 27; *In re* Haight, 11 N. Y. Civ. Proc. 227.

A petitioner may amend the schedule after it is filed except in case of fraud (Bingley *v.* Smart, 1 McCord (S. C.) 29), and may insert therein what he may have omitted from ignorance, or inadvertency (Prescott *v.* Hubbell, 2 McCord (S. C.) 64), or from an honest conviction that the worthlessness of a claim rendered its return useless (Oliver's Case, 1 Ashm. (Pa.) 112).

The omission to insert his debts in the accounts of his estate set forth in his petition will not prevent his discharge, where the omission appears to have arisen from his misapprehension, and not from any fraudulent intent, but the court will permit such debts to be inserted when the debtor is brought up for discharge. Brodie *v.* Stephens, 2 Johns. (N. Y.) 289.

62. Walker *v.* Riley, 10 Rich. (S. C.) 87.

A debtor who since his arrest has removed his property out of the state is not, under the Prison-Bounds Act, entitled to his discharge from confinement until the property contained in his schedule is produced and delivered to his assignee; nor does it vary the case that an action had been commenced on the judgment in the state to which the debtor had removed. Burns *v.* Evans, 3 Hill (S. C.) 294.

If a creditor take an assignment of the debtor's undivided interest in a personal estate such assignment is valid to the amount of his credit, and if he afterward purchase the same interest from the sheriff who sells it under a levy to satisfy executions, senior to his own, the sale is void, but the creditor so purchasing will stand in the place of those senior creditors and be subrogated to all their rights. Bentley *v.* Long, 1 Strobh. Eq. (S. C.) 43, 47 Am. Dec. 523.

The state may be the assignee of the prisoner seeking relief under such act. Atty.-Gen. *v.* Baker, 9 Rich. Eq. (S. C.) 521.

63. Croom *v.* Davis, 6 Ala. 40.

64. People *v.* Henchett, 111 Ill. 90.

65. Coleman *v.* Dickerson, 10 Ga. 551; Houston *v.* Walsh, 79 N. C. 35; State *v.* Carroll, 51 N. C. 458; Freeman *v.* Lisk, 30 N. C. 211; Williams *v.* Floyd, 27 N. C. 649; Adams *v.* Alexander, 23 N. C. 501. See also Hogan *v.* Hutton, 20 N. J. L. 82.

Power of attorney to act for creditors.— Hogan *v.* Hutton, 20 N. J. L. 82.

66. Adams *v.* Alexander, 23 N. C. 501. See also Hassinger's Case, 2 Ashm. (Pa.) 287.

67. Rosser *v.* Moye, 1 Rich. (S. C.) 62; Fleming *v.* Close, 3 Strobh. (S. C.) 362; Hyatt *v.* Hill, 2 McMull. (S. C.) 55.

The creditor, on the trial of any issue, may examine applicant touching on the truth of his schedule before the jury (Fleming *v.* Close, 3 Strobh. (S. C.) 362), and whenever the debtor is permitted to amend his schedule, after specifications have been filed, suggesting fraud, etc., it becomes a new schedule and the creditor has the same right to examine the party as to the amended part of the schedule as he had to the original (Kelly *v.* Johnson, 13 Rich. (S. C.) 35; Hyatt *v.* Hill, 2 McMull. (S. C.) 55; Bentley *v.* Page, 2 McMull. (S. C.) 52).

68. Rosser *v.* Moye, 1 Rich. (S. C.) 62; See Fabre *v.* Zylstra, 2 Bay (S. C.) 147.

a suggestion of fraud to be filed and an issue to be made up so that the matter may be tried by a jury.[69]

(B) *Form and Requisites.* The suggestion must contain the charges and specifications to which the verdict must answer,[70] and charges on the ground of fraud must be clear, distinct, and specific, and not founded on mere hearsay and rumor.[71] It is not, however, necessary to specify the time, place, sum, person, item, and other facts with the same precision required in an ordinary declaration,[72] although advantage may be taken of defects in form or substance.[73] And an objection to the specification on the ground that it is not sufficiently certain is too late after issue joined.[74]

(C) *New Trial With Leave to Amend.* Where the debtor after rendering his schedule amended the same on the filing of suggestion of its falsity in certain particulars, by inserting in it everything which was challenged, defendant may be discharged without submitting the issue to a jury.[75] Where, however, plaintiff desires to file additional objections in the schedule, a new trial may be granted with leave to plaintiff to amend the suggestion.[76]

(D) *Verdict.* A verdict must answer with reference to each charge and specification that it is true or untrue.[77]

h. Order — (I) *In General.* It is the duty of the court hearing the application to make the requisite orders respecting the property, etc., surrendered, and the discharge of the prisoner,[78] if no sufficient cause be shown for disbelieving the prisoner's oath or affirmation and the provisions are just and fair.[79] The judgment of a court holding that the case is not one in which the debtor is entitled to a discharge on schedule and assignment of his property is final and conclusive until reversed or otherwise annulled.[80]

(II) *Form and Requisites.* The order for the prisoner's discharge should show upon its face that the discharge was by the court,[81] and it will not *per se*

69. Kelly *v.* Johnson, 13 Rich. (S. C.) 35; Rosser *v.* Moye, 1 Rich. (S. C.) 62; Fleming *v.* Close, 3 Strobh. (S. C.) 362; Wallace *v.* Craps, 2 Strobh. (S. C.) 452; Gray *v.* Schroder, 2 Strobh. (S. C.) 126; Hutchison *v.* Love, 1 Speers (S. C.) 143; Bentley *v.* Page, 2 McMull. (S. C.) 52; Rice *v.* Sims, 3 Hill (S. C.) 5; Parravicene *v.* Schwart, Harp. (S. C.) 224; Creyton *v.* Dickerson, 3 McCord (S. C.) 438.

70. Haviland *v.* Wolff, 14 Rich. (S. C.) 108; Robinsons *v.* Amy, 1 Rich. (S. C.) 289.

71. *Ex p.* Maffet, 11 Rich. (S. C.) 358.

72. Gray *v.* Schroder, 2 Strobh. (S. C.) 126.

73. Gray *v.* Schroder, 2 Strobh. (S. C.) 126.

74. Nixon *v.* Nunnery, 31 N. C. 28.

Necessity for affidavits.— See Sherman *v.* Barrett, 1 McMull. (S. C.) 147. See Baker *v.* Bushnell, 1 McMull. (S. C.) 66.

75. Craig *v.* Pinson, 2 Speers (S. C.) 176. See also Bowen *v.* Holleyman, 9 Rich. (S. C.) 65.

76. Bowen *v.* Holleyman, 9 Rich. (S. C.) 65.

So where the charges in a suggestion of fraud are not sufficiently specific and the evidence adduced in support thereof is not sufficient to sustain the verdict of the jury, the court may order a new trial with leave to the plaintiff to move to amend. Wallace *v.* Craps, 2 Strobh. (S. C.) 452.

77. Haviland *v.* Wolff, 14 Rich. (S. C.) 108; Hadley *v.* Jordan, 2 Rich. (S. C.) 453. And see Lemon *v.* Moore, 2 Speers (S. C.) 617.

"We find for the defendant, not guilty," is substantially a finding that the schedule is true. Rice *v.* Sims, 3 Hill (S. C.) 5.

Where two suggestions involving the same or similar facts are filed by different creditors against the same debtor and the general issue is pleaded to both, and both are tried by one jury the jury must return two verdicts. Gray *v.* Stroder, 2 Strobh. (S. C.) 126.

78. Morrow *v.* Weaver, 8 Ala. 288; Hayes *v.* Bowe, 65 How. Pr. (N. Y.) 347.

Where the statute only requires the surrender of property sufficient to pay the debt for which he is arrested; of the sufficiency of the property surrendered the judge is to determine in the first instance. Parravicene *v.* Schwart, Harp. (S. C.) 224.

79. Matter of Thomas, 10 Abb. Pr. N. S. (N. Y.) 114; Rosser *v.* Moye, 1 Rich. (S. C.) 62; Carwile *v.* Robinson, Harp. (S. C.) 35.

If the judge is satisfied that the proceedings have not been just and fair, and the limit of the statements in the affidavit is the test for ascertaining such fact the debtor will not be discharged. Matter of Fowler, 8 Daly (N. Y.) 548.

80. People *v.* Hanchett, 111 Ill. 90. And *compare* Matter of S., 85 N. Y. 630.

81. Hayes *v.* Bowe, 65 How. Pr. (N. Y.) 347.

The validity of the order will be presumed if the facts justify the presumption. Good-

protect an officer acting under it, unless it contain recitals of all the facts necessary to give jurisdiction to the court granting it;[82] but if the order fail in these particulars the facts needful to give jurisdiction may be established *aliunde*.[83]

i. Operation and Effect of Discharge. Unless otherwise provided by statute[84] where a debtor surrenders his estate to his creditors and is discharged he is protected from arrest by any creditor to whom he was indebted at the time.[85]

9. Discharge on Prison-Limits Bonds[86] **— a. In General.** In many jurisdictions provision is made for allowing a prisoner on execution for debt the benefit of the prison bounds upon giving bond with proper security,[87] upon complying with the statutory conditions,[88] and where a prisoner desirous of being admitted to the prison bounds applies to the sheriff and offers to prepare a bond with ample security, and the sheriff refuses to take any bond, it is a waiver by the sheriff of any further act to be done by the prisoner.[89]

b. Proceedings in Which Bond May Be Taken. Bonds for the prison limits are allowable to persons in execution under an attachment for costs,[90] a defendant

win *v.* Griffis, 88 N. Y. 629 [*reversing* 25 Hun 61].

The order need not run in the name of the people, which remands the petitioner to the custody of the sheriff, for it is not process strictly speaking. People *v.* Hanchett, 111 Ill. 90.

82. Bullymore *v.* Cooper, 46 N. Y. 236 [*affirming* 2 Lans. 71].

Sufficient showing as to debtor's residence. — Develin *v.* Cooper, 84 N. Y. 410 [*affirming* 20 Hun 188].

83. Bullymore *v.* Cooper, 46 N. Y. 236 [*affirming* 2 Lans. 71]. And to the same effect see Goodwin *v.* Griffis, 88 N. Y. 629 [*reversing* 25 Hun 61; Develin *v.* Cooper, 84 N. Y. 410 [*affirming* 20 Hun 188].

84. A statute declaring void a discharge of a debtor imprisoned for debt if he shall be guilty of fraud refers to fraud in procuring the discharge and not to fraud in contracting the debt. Develin *v.* Cooper, 84 N. Y. 410 [*affirming* 20 Hun 188].

Failure to file and record discharge.— See Mills *v.* Hildreth, 5 Hun (N. Y.) 364.

85. Jordan *v.* James, 10 N. C. 110; Burton *v.* Dickens, 7 N. C. 103.

A bar to action on prison-bounds bond.— Hamilton *v.* Hamilton, 11 Rich. (S. C.) 351.

A discharge under the Prison-Bounds Act is only conclusive of matters put in issue at the time it was granted. McElwee *v.* White, 2 Rich. (S. C.) 95. *Compare* Aiken *v.* Moore, 1 Hill (S. C.) 432.

86. Bonds generally see Bonds.

87. *Georgia.*— Jackson *v.* Cox, 9 Ga. 172.

Kansas.— Doyle *v.* Boyle, 19 Kan. 168.

Kentucky.— Hubbard *v.* Harrison, 1 Bibb 550.

Maine.— Thayer *v.* Minehin, 5 Me. 325.

Massachusetts.— Brown *v.* Bartlett, 5 Gray 461.

Mississippi.— Offutt *v.* Bowen, Walk. 545.

New Hampshire.— Buck *v.* Meserve, 16 N. H. 422.

New Jersey.— Hatfield *v.* Boswell, 25 N. J. L. 85.

New York.— Dougan *v.* Cohen, 13 N. Y. Civ. Proc. 295; Levy *v.* Kain, 55 How. Pr. 136.

South Carolina.— Cantey *v.* Duren, Harp. 434; Spears *v.* Terry, 1 Treadw. 479.

Vermont.— Lowney *v.* Hine, 2 D. Chipm. 59; Warren *v.* Russel, 1 D. Chipm. 193.

United States.— U. S. *v.* Knight, 14 Pet. 301, 10 L. ed. 465 [*affirming* 26 Fed. Cas. No. 15,539]; U. S. *v.* Anderson, 24 Fed. Cas. No. 14,450, 2 Cranch C. C. 157; U. S. *v.* Noah, 27 Fed. Cas. No. 15,894, 1 Paine 368.

Actual confinement in jail is unnecessary. — Doyle *v.* Boyle, 19 Kan. 168. But see Northam *v.* Terry, 30 N. C. 175.

Constructive custody may be sufficient. Carthrae *v.* Clark, 5 Leigh (Va.) 268.

Right may be limited to prisoners not in close jail.— Vermont L. Ins. Co. *v.* Dodge, 48 Vt. 156.

A bond executed prior to the act abolishing imprisonment for debt is not discharged or affected by that act. Croom *v.* Travis, 10 Ala. 237; Mongin *v.* Harrison, 1 Ala. 22. But see *contra*, Cooper *v.* Hodge, 17 La. 476; Parker *v.* Sterling, 10 Ohio 357.

88. McManaman, Petitioner, 16 R. I. 358, 16 Atl. 148, 1 L. R. A. 561. See also Brandin *v.* Gowing, 7 Rich. (S. C.) 459; Fleming *v.* Close, 3 Strobh. (S. C.) 362; Gray *v.* Schroder, 2 Strobh. (S. C.) 126; Yongue *v.* Chambers, 1 Strobh. (S. C.) 67; Sherman *v.* Barrett, 1 McMull. (S. C.) 147; McLure *v.* Vernon, 2 Hill (S. C.) 433; Williams *v.* Jones, 2 Hill (S. C.) 431; Crenshaw *v.* Welsel, 2 Hill (S. C.) 418; Gore *v.* Waters, 2 Bailey (S. C.) 477; Stover *v.* Duren, 2 McCord (S. C.) 266.

A confession of judgment cannot amount to an undue preference under the Prison-Bounds Act. Robinsons *v.* Amy, 1 Rich. (S. C.) 289.

A preference to one creditor to be "undue," within the meaning of the Prison-Bounds Act, must be fraudulent. Robinsons *v.* Amy, 1 Rich. (S. C.) 289.

The limitation of time applies only to a preference and not to a fraudulent transfer, and such a disposition will be a bar, although not made within three months. Branden *v.* Gowing, 7 Rich. (S. C.) 459.

89. Mann *v.* Vick, 8 N. C. 427.

90. Jackson *v.* Billings, 1 Cai. (N. Y.) 252.

in an action for malicious prosecution,[91] or a defendant arrested under an execution issued for damages recovered in an action of trespass *quare clausum fregit*.[92] In some jurisdictions it is expressly provided that a person shall not be entitled to the jail liberties when committed on execution on a judgment in an action the cause of which is certified to have arisen from the wilful or malicious act of defendant,[93] and it has been held that a husband committed for contempt in not paying alimony is not entitled to the jail liberties on giving bonds to the sheriff.[94]

c. To Whom to Be Given. According to some decisions the bond for the prison limits is properly payable to the jailer[95] or to the sheriff,[96] while in others it may be given either to the officer or the creditor.[97]

d. Form, Requisites, and Validity — (i) *In General.* A bond for the prison limits should be made pursuant to the statute in force at the time,[98] but it will suffice if it complies substantially with the statute without pursuing its very words,[99] and a bond for the limits, although insufficient as a statute bond, may be good at common law;[1] but a bond will be void which is taken in terms not

91. Walker *v.* Briggs, 1 Hill (S. C.) 118.

92. Smith *v.* Hogg, 2 Rich. (S. C.) 86.

93. Cooley *v.* Eastman, 57 N. H. 503; Nelson *v.* Ladd, 47 N. H. 343; Sheeran *v.* Rockwood, 67 Vt. 82, 30 Atl. 689; Judd *v.* Ballard, 66 Vt. 668, 30 Atl. 96; Yatter *v.* Miller, 61 Vt. 147, 17 Atl. 850; Haskell *v.* Jewell, 59 Vt. 91, 7 Atl. 545; Hill *v.* Cox, 54 Vt. 537; Smith *v.* Wilcox, 47 Vt. 537; Styles *v.* Shanks, 46 Vt. 612; Langdon *v.* Bowen, 46 Vt. 512; Soule *v.* Austin, 35 Vt. 515; Leonard *v.* Hoit, Brayt. (Vt.) 73.

Where the conversion of personalty is malicious, a certified execution is properly granted. Watson *v.* Goodno, 66 Vt. 229, 28 Atl. 987.

94. *In re* Clark, 20 Hun (N. Y.) 551; Allen *v.* Allen, 58 How. Pr. (N. Y.) 381.

Escape.— A sheriff admitting to the liberties of the prison a debtor imprisoned on an execution founded on a judgment in a proceeding not provided for by statute is guilty of an escape and the bond taken therefor is void. Lowney *v.* Barney, 2 D. Chipm. (Vt.) 11.

95. Barns *v.* Williams, 2 Bibb (Ky.) 562.

96. Prather *v.* Beeler, 3 Bibb (Ky.) 375; Field *v.* Slaughter, 1 Bibb (Ky.) 160; Meredith *v.* Dural, 1 Munf. (Va.) 76.

A bond of a prisoner under United States process for the liberties must be to the marshal. If it is given to the sheriff it is void. Warren *v.* Russell, 1 D. Chipm. (Vt.) 193.

Where the sheriff is committed, the high bailiff may take of him a bond for the liberties, and on breach assign it to the creditor. Denton *v.* Adams, 6 Vt. 40.

97. Pease *v.* Norton, 6 Me. 229. And see Dunbar *v.* Owens, 10 Rob. (La.) 139.

In Mississippi a bond for the prison limits given by a defendant in custody on a capias ad satisfaciendum, payable to the marshal of the United States, is void. The statute requires such bonds to be made payable to plaintiffs in the execution. Winchester *v.* Collins, Walk. 535.

98. Huntress *v.* Wheeler, 16 Me. 290; Gooch *v.* Stephenson, 15 Me. 129.

Where the description of damages and costs in the execution does not agree with the amount thereof as described in the bond, no recovery can be had against a surety on a bond to procure the liberty of the jail to one imprisoned on execution. Avery *v.* Lewis, 10 Vt. 332, 33 Am. Dec. 203.

99. Dunbar *v.* Owens, 10 Rob. (La.) 139; Bryan *v.* Turnbull, 8 Mart. N. S. (La.) 108; Wood *v.* Fitz, 10 Mart. (La.) 196; Camp *v.* Allen, 12 N. J. L. 1; Smith *v.* Allen, 1 N. J. Eq. 43, 21 Am. Dec. 33.

Effect of erroneous recital as to writ.— See Gunn *v.* Geary, 44 Mich. 615, 7 N. W. 235.

Although the condition of the bond does not contain a recital of the matters which led to its execution, and which show a connection between it and the obligee, and thus fails to show consideration, the bond may still be sued on, and the omission be supplied by averments. Spader *v.* Frost, 4 Blackf. (Ind.) 190.

Execution by sureties only.— In some jurisdictions a prison-bounds undertaking to release a debtor from imprisonment, running in the name of the debtor as principal, is a valid obligation when executed by the sureties alone (Hickman *v.* Fargo, 1 Kan. App. 695, 42 Pac. 381), while in others a bond signed by the sureties and not the principal is incomplete and may be repudiated by either party (Curtis *v.* Moss, 2 Rob. (La.) 367).

Where a blank bond for the liberty of the prison was signed by the debtor and his sureties, and all the blanks were afterward filled up by a third person by verbal authority from the obligors, the bond is good. Fullerton *v.* Harris, 8 Me. 393.

1. Spader *v.* Frost, 4 Blackf. (Ind.) 190; Baker *v.* Haley, 5 Me. 240; Winthrop *v.* Dockendorff, 3 Me. 156; Burroughs *v.* Lowder, 8 Mass. 373; Pratt *v.* Gibbs, 9 Cush. (Mass.) 82.

Bond valid under statute or at common law.— See Barker *v.* Ryan, 1 Allen (Mass.) 72.

A written instrument in the form of a bond, but under seal, taken by a sheriff as security for the liberties of the prison will be valid; and the indulgence of the prisoner within such liberties is a sufficient considera-

authorized by statute.[2] A bond for the liberties of the prison, executed by the debtor under duress, is void both as against him and his sureties,[3] and, where a debtor was arrested on an invalid writ, a bond executed by him for prison limits is without consideration.[4] Where a debtor was permitted at his own request to go outside the prison limits in company with the jailer, although it may be a voluntary escape as between the debtor and creditor, yet it does not render a bail-bond afterward given void,[5] nor is a bond invalid because the records of the inferior court did not show at the time that a plan of the bounds had been returned by the sheriff, or that a survey of them had been made under the direction of said court as required by law.[6] A jail bond, executed after commitment but bearing a date prior to the commitment, is not on that account invalid.[7]

(II) *AMOUNT OF BOND.* Although the ordinary rule is that a prison-limits bond should be for double the debt and costs,[8] yet a provision to this effect has been held merely directory,[9] and a bond in a less sum will be sufficient if accepted,[10] so long as it is sufficient to satisfy the judgment in favor of the creditor.[11]

e. Joint Bonds. Where there is a joint judgment and execution against two, who are arrested and committed to prison, they may execute a joint prison-bounds bond.[12]

f. Delivery and Acceptance. Where a bond is given for the prison limits by a debtor in execution, delivery to the jailer is a good delivery to the obligee.[13] And the acceptance of the bond may be implied from the conduct of the creditor.[14]

g. Performance or Breach. The conditions of a bond for the prison limits are broken where the debtor departs from such limits,[15] without the express consent of the obligee in such bond,[16] and this according to some decisions however innocent the departure is, whatever the distance, and however soon he returns.[17] In others, however, it has been held that there will be no forfeiture where such transgression of the limits is unintentional and the debtor returns as soon as he is aware of his fault.[18] A prisoner having the liberties is bound at his peril and at the risk of his sureties to keep within them; and if the lines are in any part vague and indefinite he should confine himself within the places where they are not so.[19] The bond may be forfeited by failure of the debtor to surrender him-

tion to support such instrument. Seymour *v.* Harvey, 8 Conn. 63.

2. Sullivan *v.* Alexander, 19 Johns. (N. Y.) 233; Lyon *v.* Ide, 1 D. Chipm. (Vt.) 46.

3. Hawes *v.* Marchant, 11 Fed. Cas. No. 6,240, 1 Curt. 136. And see Thompson *v.* Lockwood, 15 Johns. (N. Y.) 256; McCrillis *v.* Sisson, 1 R. I. 143.

4. Gresham *v.* Bowen, 7 Blackf. (Ind.) 423.

5. Bulkley *v.* Finch, 37 Conn. 71.

6. Galloway *v.* Camp. 31 Ga. 586.

7. Clark *v.* Kidder, 12 Vt. 689.

8. Croom *v.* Travis, 10 Ala. 237; Pease *v.* Norton, 6 Me. 229; Kimball *v.* Preble, 5 Me. 353; Gordon *v.* Edson, 2 N. H. 152; Smith *v.* Jansen, 8 Johns. (N. Y.) 111.

9. Croom *v.* Travis, 10 Ala. 237.

10. Pease *v.* Norton, 6 Me. 229; Kimball *v.* Preble, 5 Me. 353.

11. Udall *v.* Rice, 1 Tyler (Vt.) 213.

12. McGuire *v.* Pierce, 9 Gratt. (Va.) 167.

13. Kimball *v.* Preble, 5 Me. 353.

14. Coffin *v.* Herrick, 10 Me. 121.

15. *Indiana.*— Cowden *v.* Kerr, 6 Blackf. 280.

Kentucky.— Crump *v.* Bennett, 2 Litt. 209.

Massachusetts.— Shed *v.* Tileston, 8 Gray 244; Farley *v.* Randall, 22 Pick. 146; Spear *v.* Alden, 11 Mass. 444; Patterson *v.* Philbrook, 9 Mass. 151; Trull *v.* Wilson, 9 Mass. 154; Walter *v.* Bacon, 8 Mass. 468; Freeman *v.* Davis, 7 Mass. 200; Clap *v.* Cofran, 7 Mass. 98; Bartlett *v.* Willis, 3 Mass. 86.

Michigan — Smith *v.* Grosslight, 123 Mich. 87, 81 N. W. 975.

New Jersey.—Camp *v.* Allen, 12 N. J. L. 1; Tunison *v.* Cramer, 5 N. J. L. 498; Howard *v.* Blackford, 3 N. J. L. 777.

New York.— Jansen *v.* Hilton, 10 Johns. 549; Kip *v.* Brigham, 7 Johns. 168.

See 21 Cent. Dig. tit. "Execution," § 1282.

16. Smith *v.* Grosslight, 123 Mich. 87, 81 N. W. 975. See also Seymour *v.* Harvey, 11 Conn. 275; Harvey *v.* Richardson, 13 Vt. 549.

17. Crump *v.* Bennett, 2 Litt. (Ky.) 209; Thompson *v.* Blackwell, 5 La. 465; McGuire *v.* Pierce, 9 Gratt. (Va.) 167.

18. Randolph *v.* Simon, 29 Kan. 406; Dole *v.* Moulton, 2 Johns. Cas. (N. Y.) 205.

19. Kip *v.* Brigham, 7 Johns. (N. Y.) 168. See also Perkins *v.* Dana, 19 Vt. 589; Downer *v.* Dana, 19 Vt. 338.

The stay of proceedings against the person of a debtor, upon a petition for the benefit of the law for the relief of insolvent debtors, or upon the continuance of such petition, does

self in accordance with the condition of the bond,[20] or unless he relieves himself from liability on a prison-limits bond, by executing an assignment under the act for the relief of poor debtors within the time prescribed by statute,[21] or if he does not furnish a schedule of his effects within a certain time as required by statute,[22] unless incapacitated by sickness from filing his schedule until after the expiration of the time allowed him.[23] So where the judgment creditor refuses to pay the prison fees in advance for the subsistence of the judgment debtor, it is not a breach of the bond for the debtor to leave the prison limits.[24] The condition of a prison-limits bond is not broken by the prisoner's escape while insane,[25] and an escape made from necessity and without the consent of the debtor, as by being carried out of the jail in a fit of sickness, does not violate the condition of the bond,[26] nor is a prisoner guilty of an escape if he pass the night in a house appropriated by the county to the use of prisoners, although the jailer exercise no control over the house or prisoner,[27] or if he goes into the jail yard in the nighttime for purposes indispensably necessary when there were no accommodations within the jail.[28]

h. Effect. A jail-limits bond is in effect a substitute for the custody of the sheriff.[29]

i. Satisfaction.[30] If one in the limits under a prison-bounds bond to surrender himself at the expiration of sixty days voluntarily surrenders himself before

not affect the condition of a prison-limits bond, or operate in any way to discharge the debtor from the obligation to remain within those limits. Glezen *v.* Farrington, 7 R. I. 49.

Where defendant after being released on bail was required by the jailer to return to the jail, which he did until he escaped, if the requirement was illegal, the prisoner's remedy was in refusing to submit to it and it did not justify his escape. Bulkley *v.* Finch, 37 Conn. 71.

Where defendant, pending an appeal from an order granting him his discharge under the Insolvent Debtors' Act, has left the "prison rules," as soon as the appeal is decided against him, he should return within the rules; otherwise his bond is forfeited. Baker *v.* Bushnell, 1 McMull. (S. C.) 272.

20. Croom *v.* Travis, 10 Ala. 237; Codman *v.* Lowell, 3 Me. 52; Burnett *v.* Small, 7 Gray (Mass.) 548; Church *v.* Proctor, 5 R. I. 20. *Compare* State *v.* Farrow, 9 Rich. (S. C.) 446.

An actual surrender in discharge of the condition of a prison-bounds bond cannot be vitiated by the motive or intention which influenced the surrender into custody. Tait *v.* Parkman, 15 Ala. 253.

A debtor surrendered by his bail and discharged on giving bond, conditioned to surrender himself at the prison on a certain day, commits no breach of such bond by being without the prison limits until that day. Abbott *v.* Bullard, 8 Cush. (Mass.) 141.

The surety cannot surrender his principal who has escaped in discharge of the condition of the bond. Buford *v.* Ganson, 5 Blackf. (Ind.) 585.

21. McManaman, Petitioner, 16 R. I. 358, 16 Atl. 148, 1 L. R. A. 561; Church *v.* Proctor, 5 R. I. 20.

A discharge of a debtor under the insolvent law "from all imprisonment, arrest, and restraint of his person" is a lawful discharge within the condition of a bond given to remain within the prison limits until lawfully discharged. Mason *v.* Haile, 12 Wheat. (U. S.) 370, 6 L. ed. 660.

The condition of a bond for the liberty of the prison limits is satisfied by the debtor's being admitted to take the poor debtors' oath on the ninety-first day from the date of the bond, without any surrender to the jailer either on or before that day. Plummer *v.* Odiorne, 8 Gray (Mass.) 246.

Where a debtor gave a prison-bounds bond, then applied for the benefit of the Honest Debtors' Act, was convicted of fraud, and ordered into custody of the sheriff till he should disclose, etc., this was a new commitment, and his bonds did not provide against a subsequent escape. Lamar *v.* Foley, 26 Ga. 180.

22. Wigfall *v.* Smyth, 2 McCord (S. C.) 135. And see Harley *v.* Neilson, 1 Rich. (S. C.) 483.

23. Blackwell *v.* Wilson, 2 Rich. (S. C.) 322.

24. Kirkup *v.* Stickney, 5 Ohio Dec. (Reprint) 499, 6 Am. L. Rec. 300.

25. Hazard *v.* Hazard, 11 Fed. Cas. No. 6,278, 1 Paine 295.

26. Baxter *v.* Taber, 4 Mass. 361. But see Cargill *v.* Taylor, 10 Mass. 206.

27. Jacobs *v.* Tolman, 8 Mass. 161.

28. Partridge *v.* Emerson, 9 Mass. 122.

29. Smith *v.* Grosslight, 123 Mich. 87, 81 N. W. 975; Kruse *v.* Kingsbury, 102 Mich. 100, 60 N. W. 443; Meredith *v.* Duval, 1 Munf. (Va.) 76.

After a prisoner has been discharged by his bond for the limits, the sheriff can confine him again only on his bail's becoming insufficient. He cannot accept a surrender of him at least after an assignment of the bond. U. S. *v.* Noah, 27 Fed. Cas. No. 15,894, 1 Paine 368.

30. Where by statute the powers of a sheriff who has left office in relation to all pris-

that time it discharges his sureties.[31] So a bond for prison limits is discharged by the creditor's receipt, given to the debtor, in satisfaction of the judgment and execution on an agreement fairly made by the creditor and a third person, although the creditor is not able to obtain any benefit from such agreement.[32]

j. Limits of Jail Liberties[33] — (I) *By Whom Fixed.* In some jurisdictions the power of establishing and altering the jail liberties is conferred on courts of sessions,[34] while in others such power is given to boards of supervisors on recommendation of the county courts.[35]

(II) *Rights of Prisoner.* A prisoner for debt is restricted to the jail limits fixed by law for the time being, although they were more extensive when he gave his bond;[36] but he has a right to go anywhere within the jail limits that other persons have who are not confined to such limits.[37] The establishment of prison bounds coextensive with the county in contemplation of law extends the prison walls to the county line.[38]

k. Assignment of Bond. A prison-limits bond may be legally assigned by the officer to whom it is made to the party for whose benefit it was intended,[39] after breach of such bond,[40] and in some jurisdictions, where a debtor gives the jailer a bond for the prison limits and escapes, it is the jailer's duty to assign the bond to the creditor.[41]

l. Liabilities on Bond or Recognizances — (I) *Form of Remedy* — (A) *Scire Facias.*[42] Where a bond for the jail liberties is taken and duly returned and enrolled the court has jurisdiction of a petition in the nature of a scire facias upon such bond.[43]

oners under his custody cease within a certain time after the service of the new sheriff's certificate, a bond taken by the old sheriff for the liberties from a person imprisoned on execution and not assigned to the new sheriff within the prescribed time is void in the hands of the under sheriff or his assignee. Ridgway *v.* Barnard, 28 Barb. (N. Y.) 613.

31. Unless such surrender is colorable merely and not intended to have that effect. Morrow *v.* Weaver, 8 Ala. 288.

32. Ellenwood *v.* Dickey, 9 Me. 125.

33. Recording.—It is a sufficient compliance with the statute requiring prison boundaries to be recorded, if the boundaries of the prison rules are recorded in the order book of the county court, in the order of the court establishing them. McGuire *v.* Pierce, 9 Gratt. (Va.) 167.

34. Codman *v.* Lowell, 3 Me. 52.

35. Roach *v.* O'Dell, 33 Hun (N. Y.) 320 [*affirmed* in 99 N. Y. 635, 1 N. E. 408].

36. Reed *v.* Fullum, 2 Pick. (Mass.) 158. And see Appleton *v.* Bascom, 3 Metc. (Mass.) 169.

37. Lucky *v.* Brandon, 1 Ohio 49.

38. Kirkup *v.* Stickney, 5 Ohio Dec. (Reprint) 499, 6 Am. L. Rec. 300.

New county formed.— See Kent *v.* Burnett, 10 Ohio 392. *Compare* Guion *v.* Ford, 12 Rob. (La.) 123.

Where commissioners designate the line of a highway as a limit of jail liberties, without providing for any subsequent change in the line of the highway, the limit of jail liberties, in case of such a change, will be the old line. Bolton *v.* Cummings, 25 Conn. 410.

39. *Louisiana.*— Elkins *v.* Zacharie, 6 La. 646.

Michigan.— Kruse *v.* Kingsbury, 102 Mich. 100, 60 N. W. 443.

South Carolina — Richbourgh *v.* West, 1 Hill 309; Miller *v.* Tollison, Harp. 389.

Virginia.— McGuire *v.* Pierce, 9 Gratt. 167; Meredith *v.* Duval, 1 Munf. 76.

United States.—U. S. *v.* Noah, 27 Fed Cas. No. 15,894, 1 Paine 368.

See 21 Cent. Dig. tit. "Execution," § 1284.

Bond can only be assigned to plaintiff in execution, and an assignment to a third person being void may be disregarded and the bond be assigned to the proper party. Wicker *v.* Pope, 12 Rich. (S. C.) 387, 75 Am. Dec. 732.

Bond which does not express the name of plaintiff in execution may be assigned to plaintiff, and he may show that he is such plaintiff by evidence *aliunde.* Swindler *v.* O'Connor, 2 Rich. (S. C.) 24.

Deputy marshal may assign the bond in the name of the chief marshal. Scott *v.* Wise, 21 Fed. Cas. No. 12,548, 1 Cranch C. C. 473.

Successor in office of the sheriff to whom the bond was made payable may assign the same. McElwee *v.* White, 2 Rich. (S. C.) 95.

An indorsement of the name of the sheriff on a prison-bounds bond is a sufficient assignment thereof to enable the creditor to maintain an action on it as assignee. McGuire *v.* Pierce, 9 Gratt. (Va.) 167.

Clerical error.— See Elkins *v.* Zacharie, 6 La. 646.

40. Tunison *v.* Cramer, 5 N. J. L. 498.

41. Barns *v.* Williams, 2 Bibb (Ky.) 562; Kruse *v.* Kingsbury, 102 Mich. 100, 60 N. W. 443.

42. Scire facias generally see SCIRE FACIAS.

43. Campbell *v.* Hadley, 4 Fed. Cas. No. 2,358, 1 Sprague 470.

Scire facias can, however, issue only from the court having the record on which it was founded. Sewall *v.* Sullivan, 108 Mass. 355.

(B) *Summary Proceedings by Motion.*[44] A motion will lie in some jurisdictions for summary judgment on a prison-limits bond where the conditions thereof are in conformity with the requirements of the statute,[45] and where due notice of the pendency of the action for the escape has been given to the prisoner and his sureties.[46]

(C) *Actions.* In some states suits on bonds for the prison-bounds are limited to a year after the breach.[47] A suit on a prison-limits bond may be maintained by the party to whom it was made,[48] or by his assignee.[49] Plaintiff may sue the surety on a prison-bounds bond without joining the principal and before judgment against the latter.[50] According to some decisions bonds given to sheriffs for the prison liberties are for their indemnity only, and neither the sheriff nor his assignee can recover on such bond without showing that he has been injured.[51] According to others, however, the bond is held not merely one for indemnity and the necessity for damage is expressly denied,[52] and plaintiff is only required to show an escape,[53] and is not required to prove any special damage.[54]

(II) *DEFENSES*—(A) *In General.* It has been held that defendant's subsequent voluntary return to the bounds before commencement of suit,[55] that the debtor's property had been sold under a fieri facias,[56] that the debtor's detention was illegal because the jail expenses had not been paid,[57] that the penalty of the

Scire facias in the superior court on a recognizance taken by a magistrate of a poor debtor arrested on execution may be amended to an action of contract under a statute allowing amendments changing the form of action at any time before final judgment. Sewall *v.* Sullivan, 108 Mass. 355.

44. **Motions** generally see MOTIONS.

45. Woodruff *v.* Smith, 6 Yerg. (Tenn.) 510; Sumner *v.* Henry, 4 Yerg. (Tenn.) 155. And see Northam *v.* Terry, 30 N. C. 175.

An action cannot be maintained upon a bond to keep within the limits and rules of the prison, given by a person arrested upon a capias ad satisfaciendum, as under the N. C. Acts (1759), c. 14, such bond in itself has the force of a judgment upon which execution may issue upon mere motion of the creditor. Brown *v.* Frazier, 5 N. C. 421.

In order to entitle the sheriff, in an action brought by him upon an undertaking for the jail liberties to a summary judgment under statute, he must show in addition to the other requirements that a judgment and not merely a verdict has been rendered against him for the escape of his prisoner. Buttling *v.* Hatton, 30 N. Y. App. Div. 191, 51 N. Y. Suppl. 305.

Non est factum.— Where summary judgment is moved for on a bond void as being taken before the prisoner was committed to close custody it is not necessary for defendants to plead *non est factum*, but they may give the whole matter in evidence to the court. Northam *v.* Terry, 30 N. C. 175.

46. Buttling *v.* Hatton, 33 N. Y. App. Div. 551, 53 N. Y. Suppl. 1009.

47. Call *v.* Hagger, 8 Mass. 423.

48. Lowrey *v.* Hine, 2 D. Chipm. (Vt.) 59. Until assignment by him is shown. Weeks *v.* Stevens, 7 Vt. 72.

May retake or sue on bond.—If the prisoner who has given bond to the sheriff for the liberties voluntarily goes beyond the limits his bond is forfeited and the sheriff may retake him on fresh pursuit and recommit him to close custody or bring his action on the bond. Barry *v.* Mandell, 10 Johns. (N. Y.) 563; Jansen *v.* Hilton, 10 Johns. (N. Y.) 549.

49. Wetherbee *v.* Martin, 10 Gray (Mass.) 245; Steedman *v.* Keith, 1 Bailey (S. C.) 476; Meredith *v.* Duval, 1 Munf. (Va.) 76.

After taking an assignment of a bond for the prison bounds which had been entered into by a debtor in execution, the creditor cannot by erasing the assignment without consent of the sheriff restore the title of the latter or support the action in his name. Steedman *v.* Keith, 1 Bailey (S. C.) 476.

50. Wood *v.* Fitz, 10 Mart. (La.) 196.

51. Barry *v.* Mandell, 10 Johns. (N. Y.) 563. And see Sedgwick *v.* Knibloe, 16 Conn. 219.

52. Camp *v.* Allen, 12 N. J. L. 1.

53. Meredith *v.* Duval, 1 Munf. (Va.) 76.

54. Hubbard *v.* Harrison, 1 Bibb (Ky.) 550.

55. Spader *v.* Frost, 4 Blackf. (Ind.) 190; Jameson *v.* Isaacs, 12 Vt. 611; McGuire *v.* Pierce, 9 Gratt. (Va.) 167. *Contra*, Barry *v.* Mandell, 10 Johns. (N. Y.) 563. And see Hinds *v.* Doubleday, 21 Wend. (N. Y.) 223.

In Michigan it is expressly provided by statute that in every suit by the sheriff on a prison-limits bond defendants may give notice of a voluntary return of the prisoner or a recapture by the sheriff before the commencement of the suit and may give evidence thereof in bar of such action. Smith *v.* Grosslight, 123 Mich. 87, 81 N. W. 975.

Surrender with bona fide intention of performing the condition of the bond and of discharging his sureties has been held to constitute a good defense. Morrow *v.* Parkman, 14 Ala. 769. See also Morrow *v.* Weaver, 8 Ala. 288.

56. Miller *v.* Bagwell, 3 McCord (S. C.) 429.

57. Wood *v.* Fitz, 10 Mart. (La.) 196.

bond is more or less than is required by the statute,[58] a valid promise not to arrest defendant on the first execution at law,[59] the subsequent assent of plaintiff to the escape,[60] a promise by the sheriff that if defendant escaped he would not sue him until he had first sued the bail,[61] a mere agreement to waive performance of the condition of the bond,[62] a discharge by the commissioner of special bail,[63] the misinstruction of the sheriff as to the limits,[64] a custom of the jailer to permit prisoners for debt who had the liberty of the yard to keep apartments not appropriated to their use by law,[65] failure to bring action against the sheriff within a year after the escape,[66] or a plea of *non damnificatus*[67] do not constitute a defense upon a forfeited prison-bounds bond; and, if the old sheriff has a right of action on the limit bond, a recovery against the new sheriff for the same escape is no bar.[68] On the other hand it has been held that defendant may interpose a valid defense to an action on a prison-bounds bond by showing that the execution under which the debtor was imprisoned was illegal[69] or has been quashed for irregularity,[70] the subsequent passage of a statute compelling imprisonment for debt,[71] that the debtor left the bounds with the consent and license of creditor,[72] or with the consent of the sheriff,[73] that the debtor had been discharged as an insolvent and presented his discharge to the sheriff who thereupon liberated him,[74] that the debtor had been duly committed to an asylum as a lunatic,[75] or the payment of a debt.[76]

(B) *By Sureties.* A surety in a bond for the liberties, etc., has no equities to entitle him to any other defense than would avail his principal.[77]

(III) *PLEADING*[78] — (A) *Declaration.* In an action on a prison-limits bond, it will be sufficient for the declaration to assign the breach according to the sense

58. Hyatt *v.* Robinson, 15 Ohio 372.

59. Hawes *v.* Marchant, 11 Fed. Cas. No. 6,240, 1 Curt. 136.

60. Slocum *v.* Hathaway, 22 Fed. Cas. No. 12,952, 1 Paine 290. Since the right of action having accrued with the escape a subsequent release without consideration will not defeat it. Sweet *v.* Palmer, 16 Johns. (N. Y.) 181.

61. Rice *v.* Pollard, 1 Tyler (Vt.) 230.

62. Smith *v.* Burlingame, 4 R. I. 45.

63. Williams *v.* Jones, 2 Hill (S. C.) 431.

64. Call *v.* Hagger, 8 Mass. 423.

65. Clap *v.* Cofran, 10 Mass. 373.

66. Hinds *v.* Doubleday, 21 Wend. (N. Y.) 223.

67. In those jurisdictions where the bond is held not to be merely for the indemnity of the sheriff. Camp *v.* Allen, 12 N. J. L. 1; Keith *v.* Ware, 2 Vt. 174. And see Woods *v.* Rowan, 5 Johns. (N. Y.) 42.

68. Hinds *v.* Doubleday, 21 Wend. (N. Y.) 223, where it was also held that a plea that the prisoner escaped after the assignment by the old to the new sheriff is a good bar to an action on a bond for the limits, and that it is an answer to such plea that the prisoner was not assigned by the old sheriff, where no excuse for the omission is offered.

69. Witt *v.* Marsh, 14 Vt. 303. But *compare* Hyatt *v.* Robinson, 15 Ohio 372.

70. Hyatt *v.* Robinson, 15 Ohio 372.

71. Sedgwick *v.* Knibloe, 16 Conn. 219; Thornhill *v.* Cristmas, 10 Rob. (La.) 543. *Contra*, Bowen *v.* Gresham, 6 Blackf. (Ind.) 452. See also Witt *v.* Marsh, 14 Vt. 303.

72. Spader *v.* Frost, 4 Blackf. (Ind.) 190. **The least inducement or even countenance** given by the creditor to the departure of the prisoner from the liberties is a good bar to an action on the bail-bond, when the escape is assigned in breach. Hobbs *v.* Whitney, 2 Tyler (Vt.) 409.

73. **The consent of the sheriff** to an escape discharges both the principal and sureties on the bond. Buttling *v.* Hatton, 18 N. Y. App. Div. 128, 45 N. Y. Suppl. 720; Wemple *v.* Glavin, 5 Abb. N. Cas. (N. Y.) 360. And see Huntington *v.* Williams, 3 Conn. 427.

74. Hayden *v.* Palmer, 2 Hill (N. Y.) 205. **The discharge under the insolvent** laws of another is not a good defense. Offutt *v.* Bowen, Walk. (Miss.) 545.

75. Fuller *v.* Davis, 1 Gray (Mass.) 612.

76. Allen *v.* Ogden, 12 Vt. 9. In this case the payee of a joint and several promissory note sued one of the signers obtained a judgment and committed him to jail. The debtor gave bond for the limits, and the other signer of the note purchased the judgment, and took an assignment of it and of the creditor's interest in the jail bond, and after the purchase the debtor who was imprisoned left the limits. It was held that the purchase was a payment of the debt, and that no action could be maintained upon the jail bond.

77. Paine *v.* Ely, 1 D. Chipm. (Vt.) 37. **A surety is not estopped from alleging the death of the obligee** previous to the institution of the suit where defendant enters into bond with sureties, payable to the nominal plaintiff for the use, etc., as expressed on the face of the process, conditioned that defendant will continue a prisoner within the limits of the prison bounds, in an action brought thereon in the name of the obligor for the benefit of the party shown to be really interested. Tait *v.* Frow, 8 Ala. 543.

78. **Pleading** generally see PLEADING.

and substance of the condition.[79] A declaration averring breach of condition of the bond must also allege the existence of the judgment and execution under which the bond was given.[80] Where the declaration on a prison bond shows that the bond set forth a judgment of a different date from that on which the execution issued the variance is fatal;[81] and where it is pleaded that no such execution issued as was described in the bond, which plea was traversed, a misdescription as to the damages and costs mentioned in the execution is a variance, and if the execution offered varied from the one described in the bond and judgment, it will not support the action.[82]

(B) *Plea or Answer.* In an action of debt on a jail bond taken pursuant to statute a plea of performance in the words of the condition will be sufficient;[83] but it seems that it is not a sufficient answer to a specific breach of a condition to plead generally a performance of the condition.[84] A plea in avoidance of a bond on the ground of a discharge under a statute should show a discharge as provided for by the statute.[85]

(C) *Replication.* A replication setting out the condition of the bond, etc., should aver the existence of a judgment on which the execution issued and it should conclude with a verification.[86] Since the right of action on a jail bond is in the sheriff until shown out of him by assignment, a replication to a plea of a

79. Camp *v.* Allen, 12 N. J. L. 1, although there may be a verbal difference between the condition and the form prescribed by the statute.

That the sureties were approved as required by the act authorizing the giving of the bond, since such requirement is merely for the protection of the sheriff, and is not a part of the bond. Lamborn *v.* Bowen, Tapp. (Ohio) 342.

80. Martin *v.* Kennard, 3 Blackf. (Ind.) 430.

That the execution issued in due form of law and was delivered to the sheriff to levy, serve, and return according to law, and that for want of goods the sheriff by virtue of the execution and according to the precept thereof arrested the body of the debtor, sufficiently imports that the execution was properly directed as a legal officer. Dyer *v.* Cleaveland, 18 Vt. 241.

That the prisoner was confined in jail on mesne or final process, stating the process without alleging the previous proceedings, is a sufficient allegation. U. S. Bank *v.* Tucker, 7 Vt. 134.

That the sheriff committed the debtor to prison until he should pay and satisfy to plaintiff his damages and costs as by said writ he was commanded is sufficient as an allegation that the jailer was properly commanded in the execution to keep the prisoner. Dyer *v.* Cleaveland, 18 Vt. 241.

Where the judgment under which the imprisonment took place was erroneously recited as to date and amount the declaration may describe the condition without noticing the mistake in the recital, and defendants will be estopped from showing the judgment to be different from that recited. Bowen *v.* Gresham, 6 Blackf. (Ind.) 452.

81. Sherwin *v.* Bliss, 4 Vt. 96.

82. Avery *v.* Lewis, 10 Vt. 332, 33 Am. Dec. 203.

83. Fisher *v.* Ellis, 6 Me. 455, although the condition as prescribed in the statute does not include all which by the same statute is necessary to be done for the debtor's enlargement.

84. It should be specifically stated how the condition was performed. Morrow *v.* Parkman, 14 Ala. 769.

Where the breach alleged is the escape of the debtor, it is a good plea that the debtor continued a prisoner within the prison bounds as established by law, according to the term of his bond, until he was discharged by due course of law. Morrow *v.* Parkman, 14 Ala. 769. And see Harlan *v.* Thompson, 20 Ala. 94.

85. Morrow *v.* Weaver, 8 Ala. 288, a discharge under the statutes relating to the discharge of debtors upon rendering schedule, etc.

Jurisdiction of commissioners, etc., to take poor debtor's oath should be shown. In some jurisdictions a plea to an action on a prison-bounds bond setting up the taking of the poor debtor's oath should set up sufficient facts to show the jurisdiction of the commissioners or judges before whom the oath was taken (Hubbell *v.* Dimick, 1 Vt. 253), and a plea to a scire facias against bail, merely averring that the principal has been taken by a capias ad satisfaciendum and availed himself of the statute for the relief of honest debtors, is bad which does not show the jurisdiction of the court that discharged him, nor notice to the creditor (Langley *v.* Lane, 10 N. C. 313); but it has been held that a plea that after the execution of the bond the debtor was discharged by a supreme court commissioner under the insolvent act, and thereby was exempted from imprisonment for debt, need not state all the facts giving jurisdiction to the commissioner it being sufficient to allege the presenting of the petition and schedule required by said act (Hayden *v.* Palmer, 24 Wend. (N. Y.) 364).

86. Spader *v.* Frost, 4 Blackf. (Ind.) 190.

release from him that he had no equitable interest therein has been held to be insufficient.[87]

(D) *Rejoinder.* A rejoinder in an action on a prison-limits bond is bad which departs from the plea.[88]

(IV) *TRIAL*[89]—(A) *Scope of Inquiry.* In an action on a jail bond where the execution issued in pursuance of a rule of court, an inquiry cannot be made whether the execution issued regularly, or whether the rule was complied with.[90]

(B) *Evidence.*[91] In actions for breach of prison-bounds bonds the admissibility of evidence to invalidate a debtor's discharge,[92] or to show the actual limits of the jail liberties,[93] is governed by the general rules of evidence.[94] In an action on a bond given by a judgment debtor for the liberty of the prison limits, plaintiff has the burden of proving a breach.[95]

(C) *Questions For the Jury.* The intention of the debtor in going into the jail and surrendering himself to the sheriff is a matter for the determination of the jury.[96]

(V) *DAMAGES.*[97] In an action on a bond for prison limits where default has been made, the damages must be assessed by a jury.[98] In some jurisdictions the measure of damages in an action on a forfeited bond for the prison limits is the amount of the debt on which defendant was confined,[99] together with interest and costs,[1] or, as it is provided in some jurisdictions, the actual loss suffered by the creditor;[2] but it has been held that the debtor is not liable for the interest accruing on the debt, if he pays the amount due on the execution at the time of the commitment before departing the liberties.[3] In others, however, judgment in actions on bonds given for the liberty of the prison yard shall be rendered for the whole penalty of such bonds.[4] The measure of recovery cannot be reduced below what the statute prescribes by proof of the inability of the principal to have discharged the judgment on which the execution issued, either in whole or in part.[5] Plaintiff cannot, however, recover of the surety therein more than the penalty of the bond.[6] A sheriff may recover the expenses of retaking an escaped prisoner on a bond giving the prisoner the liberties of the prison;[7] but he can recover only nominal damages and costs, where the creditor fraudulently induced

87. Weeks *v.* Stevens, 7 Vt. 72.

88. Walker *v.* Riley, 10 Rich. (S. C.) 87.

89. **Trial** generally see TRIAL.

90. Gibson *v.* Scott, 7 Vt. 147.

91. **Evidence** generally see EVIDENCE.

92. The fact that an insolvent debtor, who had been discharged from imprisonment by making the oath required by law, had a short time previously thereto made a fraudulent disposition of his property, cannot be given in evidence to invalidate his discharge. Morrow *v.* Parkman, 14 Ala. 769.

93. Where the limits of the jail liberties, as described in the map and survey on record, are uncertain and contradictory, it seems that the reputed limits are the best evidence of the actual limits (Trull *v.* Wheeler, 19 Pick. (Mass.) 240); but evidence that the prisoners entitled to the jail liberties had been accustomed from the time when such limits were established to go to certain places as being within the bounds is incompetent to control the construction of a statute and the return of the selectmen, all the proceedings being recent (Ballou *v.* Kip, 7 Johns. (N. Y.) 175).

94. See, generally, EVIDENCE.

95. Thornton *v.* Adams, 11 Gray (Mass.) 391.

96. Morrow *v.* Weaver, 8 Ala. 288.

97. **Damages** generally see DAMAGES.

98. Beatty *v.* Ivens, 3 N. J. L. 628.

99. Spader *v.* Frost, 4 Blackf. (Ind.) 190; Hubbard *v.* Harrison, 1 Bibb (Ky.) 550; McCarley *v.* Davis, 1 McMull. (S. C.) 34.

In an action against a sheriff for taking insufficient bonds of a prisoner committed on execution the creditor is entitled to recover the amount of his debt, in the absence of mitigating circumstances; and hence the sheriff is entitled to recover such sum in an action on the bond. Keith *v.* Ware, 2 Vt. 174.

1. Spader *v.* Frost, 4 Blackf. (Ind.) 190.

The amount of the execution and fees and costs of commitment with interest thereon at twenty-five per cent are the proper measure of damages. Knight *v.* Norton, 15 Me. 337, under the Maine statute.

The debt, interest, and costs are the measure of damages in an action upon a prison-bounds bond. McGuire *v.* Pierce, 9 Gratt. (Va.) 167.

2. Hathaway *v.* Crosby, 17 Me. 448.

3. Allen *v.* Adams, 15 Vt. 16.

4. Smith *v.* Stockbridge, 9 Mass. 221.

5. Croom *v.* Travis, 10 Ala. 237.

6. Tunison *v.* Cramer, 5 N. J. L. 498.

7. Lord *v.* Benton, 2 Root (Conn.) 335.

the escape.[8] The costs of a suggestion made to the court in opposition to an unsuccessful amplication for discharge cannot be recovered in an action on a prison-bounds bond.[9]

(VI) *JUDGMENT AND EXECUTION.*[10] In an action of debt on a jail-limits bond, the whole sum due in equity to the creditor may be recovered in the name of damages;[11] but in such an action, although judgment for plaintiff is for the whole penalty, he cannot have execution for more than the original debt with interest and costs.[12]

(VII) *APPEAL.*[13] An appeal may be prosecuted by bail for the limits in the name of a sheriff on a judgment against him for an escape,[14] and a judgment against a surety on a jail-limits bond will be reversed unless the record affirmatively shows that the debtor has been guilty of an escape by passing beyond the prison bounds.[15]

(VIII) *LIABILITY OF SURETIES*[16] — (A) *In General.* The sureties on a prison-limits bond may stand on the very terms of the undertaking they have executed,[17] but that liability is fixed as soon as plaintiff acquires his right to the bond by assignment.[18] To preserve recourse upon the surety in a prison-limits bond, plaintiff must so conduct his proceedings as to be at all times able to subrogate the former to all his rights against the debtor.[19] The sureties are liable if the debtor escapes before the time is out for charging him in execution.[20]

(B) *Release by Surrender of Principal.* In some jurisdictions sureties on prison-limits bonds cannot release themselves from responsibility by surrendering the debtor,[21] but in others they may surrender their principal at any time before judgment rendered against them on such bond.[22]

(C) *Release by Discharge of Principal.* The sureties to the bond are released where the debtor is discharged by plaintiff,[23] or by a judge in the absence of the sureties,[24] or where the creditor makes a contract with the debtor without the knowledge of the sureties which induces the debtor to depart or escape the liberties.[25] The sureties on a bond given for prison rules are not, however, released

8. Lord *v.* Atwood, 2 Root (Conn.) 336.

9. Brandon *v.* Rogers, 10 Rich. (S. C.) 9.

10. **Judgment** generally see JUDGMENTS.

11. Sinclair *v.* Gadcomb, 1 Vt. 32.

12. Sprague *v.* Seymour, 15 Johns. (N. Y.) 474.

13. **Appeal** generally see APPEAL AND ERROR.

14. People *v.* Judges Monroe C. Pl., 1 Wend. (N. Y.) 19.

15. Stewart *v.* Warfield, 37 Ala. 446.

16. **Sureties** generally see PRINCIPAL AND SURETY.

Where a new bond to the jail limits may be taken in place of an old one, a person who signs such a bond as an additional surety after delivery to, and on requirement of, the sheriff is bound thereby. Kruse *v.* Kingsbury, 102 Mich. 100, 60 N. W. 443.

17. Hickman *v.* Fargo, 1 Kan. App. 695, 42 Pac. 381.

The liberty of the debtor being the consideration of the bond this fails as soon as he is committed to close confinement, and where a prisoner enjoying the jail limits under a bond of surety conditioned that he shall remain a true and lawful prisoner, arrested on a charge of felony and committed to close confinement and while so confined breaks the jail and escapes, the surety is not liable. Bradford *v.* Consaulus, 3 Cow. (N. Y.) 128.

18. McCarley *v.* Davis, 1 McMull. (S. C.) 34.

19. Comstock *v.* Creon, 1 Rob. (La.) 528.

20. Hubbard *v.* Harrison, 1 Bibb (Ky.) 550.

21. Bryan *v.* Turnbull, 8 Mart. N. S. (La.) 108.

22. Betts *v.* Livermore, 1 Sandf. (N. Y.) 684, escape of the principal.

23. Walton *v.* Oswald, 4 McCord (S. C.) 501.

The consent of a plaintiff in execution for whose benefit a prison bond was taken that the debtor might be absent for a certain time is an absolute discharge of the surety. Elkins *v.* Zacharie, 6 La. 646. But the fact that a debtor obtained a license to leave the jail limits from the creditor through fraud does not discharge the bail if he had done nothing on the strength thereof. Hooker *v.* Daniels, Brayt. (Vt.) 32.

24. So held under a statute authorizing a judge of a district court to discharge from imprisonment a debtor held to prison bounds on such terms as are just, where a debtor under arrest gave bond for his release and was thereby confined to prison bounds, and afterward, in the absence of the sureties, but on proper notice, and in presence of all parties to the suit, the judge released the debtor from prison bounds for a certain time. Hickman *v.* Fargo, 1 Kan. App. 695, 42 Pac. 381. **And** see Randolph *v.* Simon, 29 Kan. 406.

25. Conant *v.* Patterson, 7 Vt. 163.

because an escape by the debtor was induced by threats of the creditor to put him in close confinement.[26]

(IX) *RIGHT OF SURETY AGAINST PRINCIPAL.* The surety in a jail bond, paying a sum of money and receiving a discharge with the knowledge of the principal, may recover that amount as well as counsel fees for defending a suit on the bond, even though judgment was entered up for its full amount against the principal.[27]

10. DISCHARGE OF POOR DEBTORS — a. In General. In most of the states[28] express statutory provision is made for the discharge of poor debtors imprisoned on executions against the person upon the institution of proper proceedings and the taking of the prescribed oath, furnishing bond, etc.,[29] where the inability of the debtor to pay is clearly shown.[30]

b. Who May Apply — (I) *IN GENERAL.* Although it has been held that a petitioner cannot have the benefit of the insolvent laws unless he be actually in prison,[31] yet according to some decisions a debtor in the prison limits has the same right to apply for the benefit of such laws as if he were in close confinement.[32] In some of the states a debtor will be excluded from the benefit of the

26. Hubbard *v.* Harrison, 1 Bibb (Ky.) 550.

27. Bancroft *v.* Pierce, 27 Vt. 668.

28. By act of congress, persons imprisoned under execution issuing from a United States court are entitled to their discharge under state insolvent laws in the same manner as if imprisoned on like process of the state courts in the same district. *In re* Laski, 14 Fed. Cas. No. 8,098. See also Lockhurst *v.* West, 7 Metc. (Mass.) 230. It has been held, however, that this act does not authorize the release under a state insolvent debtors' act of one imprisoned under process of a United States circuit court to enforce a judgment of fine in a misdemeanor case. *In re* Laski, 14 Fed. Cas. No. 8,098.

29. *Delaware.*— *In re* Seal, 1 Harr. 347.

Indiana.— Babcock *v.* Cummins, 6 Blackf. 266.

Maine.— City Bank *v.* Norton, 48 Me. 73; Barnard *v.* Bryant, 21 Me. 206; Hastings *v.* Lane, 15 Me. 134; Gooch *v.* Stephenson, 15 Me. 129.

Massachusetts.— Dennis' Case, 110 Mass. 18; Lockhurst *v.* West, 7 Metc. 230; Dyer *v.* Hunnewell, 12 Mass. 271.

Nevada.— Deal *v.* Schlomberg, 20 Nev. 330, 22 Pac. 155.

New Hampshire.— Somersworth Sav. Bank *v.* Wooster, 64 N. H. 57, 5 Atl. 764; *In re* Shannon, 48 N. H. 407.

New Jersey.— Perth Amboy *v.* Brophy, 43 N. J. L. 589; Hogan *v.* Hutton, 20 N. J. L. 82.

New York.— Coman *v.* Storm, 1 Rob. 705, 26 How. Pr. 84; Maass *v.* La Tarre, 6 Abb. Pr. N. S. 219; Nichols *v.* Gregory, 5 Johns. 359.

North Carolina.— Raisin Fertilizer Co. *v.* Grubbs, 114 N. C. 470, 19 S. E. 597; *In re* Huntington, 6 N. C. 369.

Pennsylvania.— Maag's Case, 1 Ashm. 97.

Rhode Island.— *In re* Kimball, 20 R. I. 688, 41 Atl. 230; Barry *v.* Viall, 12 R. I. 18; Jordan *v.* Hall, 9 R. I. 218, 11 Am. Rep. 245; Thompson *v.* Berry, 5 R. I. 95.

South Carolina.— Hurst *v.* Samuels, 29 S. C. 476, 7 S. E. 822; Glenn *v.* Lopez, Harp. 105; Walling *v.* Jennings, 1 McCord 10.

Vermont.— Vermont L. Ins. Co. *v.* Dodge, 48 Vt. 156; Cannon *v.* Norton, 16 Vt. 334; *In re* Wheelock, 13 Vt. 375.

See 21 Cent. Dig. tit. "Execution," § 1306 *et seq.*

Statutes not retrospective.— Gooch *v.* Stephenson, 15 Me. 129. See also Barnard *v.* Bryant, 21 Me. 206.

The National Bankruptcy Act of 1867 did not operate to suspend or supersede the poor debtors' law of the state. Jordan *v.* Hall, 9 R. I. 218, 11 Am. Rep. 245.

A resolution of the general assembly, authorizing a poor tort debtor to take the poor debtor's oath with the same effect as if he had been committed to jail for a contract debt, is not a statute, within the meaning of R. I. Gen. St. c. 22, § 19, which prescribes the time when statutes shall take effect. Barry *v.* Viall, 12 R. I. 18.

30. Heath *v.* Brown, 40 Kan. 33, 19 Pac. 363; Deal *v.* Schlomberg, 20 Nev. 330, 22 Pac. 155; Maass *v.* La Torre, 6 Abb. Pr. N. S. (N. Y.) 219.

31. *In re* Seal, 1 Harr. (Del.) 347; Griffin *v.* Helme, 94 Mich. 494, 54 N. W. 173; Miller *v.* Strabbing, 92 Mich. 300, 52 N. W. 453. See also Rusiewski *v.* Michalski, (Mich. 1904) 98 N. W. 1.

In New Hampshire the statute which provides that a debtor arrested or imprisoned on execution shall be discharged on giving bond that he will within a year take the poor debtor's oath, or surrender himself up to the creditor, in which latter event the creditor may cause him to be recommitted to jail "where he shall remain in close confinement and shall not again be discharged on giving bond as aforesaid" does not prevent a debtor who has so surrendered himself, and who has thereafter been recommitted by his creditor, from being discharged on taking the poor debtor's oath. Somersworth Sav. Bank *v.* Wooster, 64 N. H. 57, 5 Atl. 764.

32. Babcock *v.* Cummins, 6 Blackf. (Ind.) 266; Coman *v.* Storm, 1 Rob. (N. Y.) 705, 26 How. Pr. (N. Y.) 84. Thus where a defendant in execution, within the prison rules, is afterward thrown into prison by another

insolvent laws unless he has resided in the state a designated period before his imprisonment.[33] A prisoner may be brought up from a different county from that in which the supreme court sits, in order to be discharged, under the act for the relief of debtors with respect to imprisonment of their persons.[34]

(II) *Right as Dependent on Nature of Execution.* In the absence of express statutory exceptions,[35] a debtor confined under an execution against the person issued in civil proceedings is entitled to the benefit of a law for the relief of insolvent debtors,[36] but such statutes are not applicable to persons imprisoned under execution issued in proceedings of a criminal character.[37] To entitle one imprisoned under execution in a civil action to the benefit of such a statute it must be shown that he is not in custody on account of any of the causes mentioned in the statute, as excluding from its benefits.[38]

(III) *Bond* — (A) *In General.* In some jurisdictions a poor debtor may obtain his release from arrest upon an execution against his person by giving a bond conditioned to do certain acts named or deliver himself into custody.[39]

creditor, he may be discharged from the walls of the prison under the insolvent laws. *In re* Huntington, 6 N. C. 369. And an act in relation to the disclosure of poor debtors has been held to apply as well to one who has been released from arrest upon giving bond as to one under actual arrest or in imprisonment. City Bank *v.* Norton, 48 Me. 73.

33. Hogan *v.* Hutton, 20 N. J. L. 82.

Under Pa. Laws (1731), § 4, providing that any person who has not been a resident of the state for two years before his imprisonment for debt shall not be entitled to the benefit of the insolvent act, an insolvent debtor who, at the time of his arrest here and of contracting the debt, was an inhabitant of another state, where he had been arrested on the same debt, but which suit was discontinued after his arrest here, was entitled to the benefit of the insolvent act, although he had not resided two years within this state. *Ex p.* McDonald, Add. 268.

Gaming in Massachusetts.— A debtor will be precluded from taking the poor debtor's oath where it is proved that since the debt was contracted he has hazarded and paid a designated sum of money in gaming prohibited by the laws of the state. Bradley *v.* Burton, 151 Mass. 419, 24 N. E. 778, no application to gaming by non-resident in another state.

34. Nichols *v.* Gregory, 5 Johns. (N. Y.) 359.

35. **Such statutory exclusion** from the benfit of insolvent acts have not been uncommon, among them being the denial of the privilege to those who shall be sued, impleaded, or arrested for damages recovered in any action for wilful mayhem, or wilful and malicious trespass (Walling *v.* Jennings, 1 McCord (S. C.) 10); to those against whom damages shall be recovered in an action for voluntary and permissive waste or for damages done to the freehold (Smith *v.* Hogg, 2 Rich. (S. C.) 86; Glenn *v.* Lopez, Harp. (S. C.) 105); or where the court adjudges that the cause of action accrued from a wilful act or neglect of defendant (*In re* Wheelock, 13 Vt. 375; Barber *v.* Chase, 3 Vt. 340; Fisher *v.* Jail Delivery Com'rs, 3 Vt. 328; Hoar *v.* Franklin County, 2 Vt. 402). So it has been held in Massachusetts that a debtor arrested on execution and found guilty and sentenced to imprisonment upon charges of fraud is not entitled to the benefit of the poor debtor's oath, even upon a new application after the expiration of his sentence. Dennis' Case, 110 Mass. 18.

36. *New Hampshire.*— *In re* Shannon, 48 N. H. 407.

New York.— Van Wezel *v.* Van Wezel, 3 Paige 38.

Rhode Island.— *In re* Kimball, 20 R. I. 688, 41 Atl. 230.

Vermont.— Cannon *v.* Norton, 16 Vt. 334; Beckwith *v.* Houghton, 11 Vt. 602.

England.— Rex *v.* Stokes, 1 Cowp. 136; Rex *v.* Pickerill, 4 T. R. 809; Wheldale *v.* Wheldale, 16 Ves. Jr. 376, 33 Eng. Reprint 1027.

See 21 Cent. Dig. tit. "Execution," § 1306 *et seq.*

As for instance a person held in custody on an execution issued for alimony (*In re* Shannon, 48 N. H. 407. And see Van Wezel *v.* Van Wezel, 3 Paige (N. Y.) 38), a person committed on a judgment for a penalty incurred under the military laws (Dyer *v.* Hunnewell, 12 Mass. 271), one imprisoned under an execution in a case of slander Walling *v.* Jennings, 1 McCord (S. C.) 10), or any person imprisoned by virtue of an execution issued on a judgment recovered in any action of debt, detinue, replevin, ejectment, trespass, or trespass on the case (Fisher *v.* Jail Delivery Com'rs, 3 Vt. 328).

Plaintiff in an action of trespass and ejectment against whom a judgment has been rendered for costs may, when liable to be committed to jail on the execution issued upon such judgment, be admitted to the benefit of the poor debtor's oath. Thompson *v.* Berry, 5 R. I. 95.

37. Perth Amboy *v.* Brophy, 43 N. J. L. 589.

38. Glenn *v.* Lopes, Harp. (S. C.) 105; Walling *v.* Jennings, 1 McCord (S. C.) 10.

39. Woodman *v.* Valentine, 24 Me. 551; Boston Wall Paper Co. *v.* Mullen, 163 Mass.

(B) *Form and Requisites*—(1) In General. The bond prescribed to be given to entitle a debtor to release from arrest is not a joint, but a separate bond, to be given by each.[40] A poor debtor's bond or recognizance must be made in conformity with the statute provisions in force at the time, in all its material parts, or it will not be a good statute bond, although it may secure to the creditor equally valuable rights.[41]

(2) Conditions. The most usual conditions of a poor debtor's bond are that within a certain time after its date the debtor will cite the creditor before a designated tribunal, submit himself to examination, and take the poor debtor's oath, or pay the debt, interest, costs, and fees arising in the execution, or deliver himself into the custody of the keeper of the jail into which he is liable to be committed under such execution.[42] Such a bond or recognizance may be further conditioned that the debtor will abide by the order of the examining magistrate.[43]

(3) Designation of Amount. The bond should, in order to be a good statutory bond, be for the sum designated by statute,[44] usually in double the sum for which the debtor was arrested or imprisoned, with the legal cost of the execution;[45]

20, 39 N. E. 415; Cook *v.* Thayer, 121 Mass. 415; Barber *v.* Floyd, 109 Mass. 61; Crissy *v.* Vogt, 9 Pa. Super. Ct. 418, 43 Wkly. Notes Cas. (Pa.) 527.

By whom made.— The bond must be executed by the debtor as well as by the sureties or it will not be a good statute bond. Howard *v.* Brown, 21 Me. 385. Such bond or recognizance may, however, be taken orally. Townsend *v.* Way, 5 Allen (Mass.) 426.

To whom given.— Under a statute providing for the release of a debtor on bond, but not stating to whom the bond was to run, the bond may be given either to the creditor or to the officer. Pease *v.* Norton, 6 Me. 229.

40. Hatch *v.* Norris, 36 Me. 419, holding, however, that such a bond if given, although not a statutory bond, may be good at common law and each principal may be a surety for his coöbligor.

41. Guilford *v.* Delaney, 57 Me. 589; Woodman *v.* Valentine, 24 Me. 551; Fales *v.* Dow, 24 Me. 211; Ware *v.* Jackson, 24 Me. 166; Wallace *v.* Carlisle, 20 Me. 374; Huntress *v.* Wheeler, 16 Me. 290; Brown *v.* Kendall, 8 Allen (Mass.) 209. *Compare* Bert *v.* Stone, 184 Mass. 92, 68 N. E. 46.

If there is a substantial compliance with the law in the conditions of the bond, it will be sufficient, although the form should vary in its language from that of the statute. Hatch *v.* Lawrence, 29 Me. 480. See also Wiggin *v.* Peters, 1 Metc. (Mass.) 127.

"Magistrate" is equivalent to "court or magistrate." Stearns *v.* Hemenway, 162 Mass. 17, 37 N. E. 766 [*followed* in Boston Wall Paper Co. *v.* Mullen, 163 Mass. 20, 39 N. E. 415].

Time of performance.— A poor debtor's bond, conditioned to be performed in a shorter time than is required by statute, is not valid as a statute bond, but is good at common law. Hathaway *v.* Crosby, 17 Me. 448.

The omission of the recognizance to name the magistrate before whom the debtor is to appear does not invalidate the recognizance, where the statute in relation to poor debtor's recognizances does not compel the debtor to accept any particular magistrate but merely requires him to appear before "some magistrate authorized." Cook *v.* Thayer, 121 Mass. 415; Thacher *v.* Williams, 14 Gray (Mass.) 324; Adams *v.* Stone, 13 Gray (Mass.) 396.

42. Ross *v.* Berry, 49 Me. 434; Randall *v.* Bowden, 48 Me. 37; Hatch *v.* Norris, 36 Me. 419; Fales *v.* Dow, 24 Me. 211; Cushman *v.* Waite, 21 Me. 540; Wiggin *v.* Peters, 1 Metc. (Mass.) 127.

In Massachusetts it is provided by statute that where a judgment debtor is arrested under an execution, and desires to take the oath as a poor debtor, but does not wish to have a time fixed for his examination, the magistrate may take his recognizance, conditioned that within thirty days he will deliver himself up for examination, "giving notice of the time and place thereof as herein provided, and appear at the time fixed for his examination, and from time to time until the same is concluded, and not depart without leave of the magistrate, making no default at any time fixed for his examination." Bliss *v.* Kershaw, 180 Mass. 99, 61 N. E. 823. After the judgment debtor has applied to a proper magistrate to have a time and place fixed for his examination and the same has been done and notice given to the creditor, another magistrate has no jurisdiction unless the former application is withdrawn to take a recognizance that the debtor will deliver himself up for examination within thirty days and such a recognizance will be void. Snelling *v.* Coburn, 10 Allen 344.

43. Adams *v.* Brown, 14 Gray (Mass.) 579; Crissy *v.* Vogt, 9 Pa. Super. Ct. 418, 43 Wkly. Notes Cas. (Pa.) 527. And see French *v.* McAllister, 20 Me. 465.

44. Flowers *v.* Flowers, 45 Me. 459; Clark *v.* Metcalf, 38 Me. 122; Howard *v.* Brown, 21 Me. 385; Pease *v.* Norton, 6 Me. 229.

45. Bradley *v.* Pinkham, 63 Me. 164; Flowers *v.* Flowers, 45 Me. 459; Clark *v.* Metcalf, 38 Me. 122; Horn *v.* Nason, 23 Me. 101; Barber *v.* Floyd, 109 Mass. 61; Thacher *v.* Williams, 14 Gray (Mass.) 324.

but a slight variance from this amount will not invalidate the bond,[46] as for instance the fact that the recognizance was taken in a sum less than double the amount of the *ad damnum* in the writ;[47] and it will be no defense to a suit on the recognizance that it does not include the cost of the writ of execution.[48] Unless expressly authorized the interest accruing on the judgment should make no part of the penal sum;[49] but where a statute requires the officer levying an execution to collect lawful interest on the debt from the rendition of judgment, a relief bond in which interest is omitted is not a statutory but a common-law bond.[50]

(c) *Approval.* It is an essential of a valid statutory bond for the release of a poor debtor that such bond be approved in the manner provided by statute,[51] and such bond must show that it was approved in the manner provided by law, or it can only be held good at common law.[52] In some jurisdictions the statute in relation to the approval of bonds given by poor debtors is not imperative and may be waived by the creditor.[53]

(d) *Return and Recording.* In the absence of a statute requiring it, it is not necessary that a poor debtor's recognizance should be returned or recorded in any court of record.[54]

(e) *Validity as Dependent Upon Authority to Arrest.* Where the arrest is unauthorized, a bond given under a statute to obtain release from such arrest is one which the obligor may avoid whenever it is attempted to be enforced,[55] and in some jurisdictions if the arrest is made without authority of law a recognizance entered into in consequence of it is absolutely void.[56] Where, however, a debtor who

The officer's fees for service of an execution by arrest are properly included in "the sum due thereon" which, under Me. Rev. St. c. 113, § 24, is to be doubled to fix the penalty of the poor debtor's bond to be given by the debtor to obtain his release from such arrest. Bradley *v.* Pinkham, 63 Me. 164.

If the officer intentionally includes an illegal item of fees, the bond will be valid only at common law, notwithstanding the officer intended to take it according to the statutory requirements. Call *v.* Foster, 49 Me. 452. Where the officer who takes the bond of an execution debtor includes in it a sum for "dollarage" as an item of his fees, it is thereby invalidated as a statute bond. Ross *v.* Berry, 49 Me. 434. If, however, the officer includes an illegal item under a belief that it was allowable, it has been held that the bond will be protected as a statutory bond. Lambard *v.* Rogers, 31 Me. 350.

46. Keith *v.* Bolier, 92 Me. 550, 43 Atl. 499.

47. Gilmore *v.* Edmunds, 7 Allen (Mass.) 360; Thacher *v.* Williams, 14 Gray (Mass.) 324.

48. Thacher *v.* Williams, 14 Gray (Mass.) 324.

49. Adams *v.* Brown, 14 Gray (Mass.) 579.

50. Clark *v.* Metcalf, 38 Me. 122.

If the bond be valid only at common law, because of error in the penal sum, its condition will be performed if the debtor cite, submit himself to examination, and take the oath, although the proceedings are not according to the requirements of the statute. Ross *v.* Berry, 49 Me. 434.

Sufficient evidence of existence of judgment see Hinds *v.* Stevens, 33 Me. 578.

51. Randall *v.* Bowden, 48 Me. 37. Under a statute providing that the sureties in a poor debtor's bond may be approved in writing by the creditor, an approval by the creditor's attorney of record is a sufficient compliance with the statute. Poor *v.* Knight, 66 Me. 482. In Scribner *v.* Mansfield, 68 Me. 74, a poor debtor's bond, given under Me. Rev. St. c. 113, § 24, was approved of as to the sureties in the following words: "We, the subscribers, approve of the sureties named in the foregoing bond. Scribner & Blossom, creditors, per E. S. Ridlon, their attorney." This was held a statutory approval. And in some states it is provided that the bond may be approved in writing by the creditor, his attorney in the action, or by two disinterested justices of the quorum of the county in which the debtor is arrested. Battle *v.* Knapp, 60 N. H. 361.

52. Gould *v.* Ford, 91 Me. 146, 39 Atl. 480; Smith *v.* Brown, 61 Me. 70; Guilford *v.* Delaney, 57 Me. 589.

53. As where the creditor voluntarily and without objection takes the bond not so approved. Battle *v.* Knapp, 60 N. H. 361. And it has been held that the bringing of suit by a creditor on a poor debtor's bond is an acceptance of it (Pease *v.* Norton, 6 Me. 229), and is an approval of the sureties, and is equivalent to an approval by two justices of the quorum (Pease *v.* Norton, 6 Me. 229; Kimball *v.* Preble, 5 Me. 353).

54. Thacher *v.* Williams, 14 Gray (Mass.) 324.

55. Stearns *v.* Veasey, 33 N. H. 61, opinion of the court by Sawyer, J.

56. Smith *v.* Bean, 130 Mass. 298; Learnard *v.* Bailey, 111 Mass. 160.

Thus a poor debtor's bond is void when it is obvious that there could have been no such judgment, nor any such execution, as is alleged therein, and nothing appears therein to show at what term of the court the judgment

is privileged from arrest, but having the right to waive that privilege, does so, and is taken on execution, the poor debtor's bond given to obtain his release is not void for duress.[57]

(F) *Conclusiveness of Recitals.* If the bond recites the day of arrest and bears date on the same day, the debtor and his sureties are bound by the date of the bond and recital of the day of arrest, and parol evidence is inadmissible to show that the bond was in fact executed on a day subsequent.[58]

(G) *Computation of Time.* The time of performance of the conditions of a poor debtor's bond is computed from the date of the bond and its recital as to the day of arrest, although not in fact executed until a subsequent day.[59] In computing the number of days in which the debtor is to surrender himself according to the terms of his bond, fractions of a day are not to be included,[60] and where the bond is conditioned that the prisoner shall surrender himself if he is not discharged in a certain number of days from the day of his commitment such day of commitment is excluded.[61] So it has been held that where a designated period was allowed the debtor from the date of the bond in which to take the oath or in default thereof surrender himself, the day of the date of the bond should be excluded.[62] Where the condition of the bond is that the debtor if not allowed to take the poor debtor's oath shall surrender himself into custody within a certain number of days, the time does not commence to run until the justices to whom the debtor has applied have disallowed the oath, provided the debtor has done all in his power to take it and in the computation of days the day appointed for taking the oath is excluded.[63]

(H) *Construction.* Courts will adopt liberal constructions to avoid forfeiture of such bonds.[64]

(I) *Performance or Breach* — (1) IN GENERAL. In order to avoid the forfeiture of the conditions of a statutory bond given by a debtor to obtain his release from arrest on execution, he must comply with one of the alternatives contained in the conditions of such bond, within the time fixed by law,[65] unless prevented by the obligee, the law, or the act of God from so doing.[66] In fulfilling the conditions of a poor debtor's bond good only at common law, the debtor is not required to perform any other of the statutory provisions than those named in the bond.[67]

(2) BY FAILURE TO APPEAR. The condition of a poor debtor's bond or recognizance is broken if he fails to appear at the time fixed for his examination.[68]

intended to be recited was obtained. Gibson *v.* Ethridge, 72 Me. 261.

57. Chase *v.* Fish, 16 Me. 132.

58. Cushman *v.* Waite, 21 Me. 540.

59. Scribner *v.* Mansfield, 68 Me. 74; Cushman *v.* Waite, 21 Me. 540; Wing *v.* Kennedy, 21 Me. 430.

60. Clark *v.* Flagg, 11 Cush. (Mass.) 539.

61. Wiggin *v.* Peters, 1 Metc. (Mass.) 127.

62. Scovell *v.* Holbrook, 22 N. H. 269. And see Moore *v.* Bond, 18 Me. 142.

63. Pease *v.* Norton, 6 Me. 229.

64. Moore *v.* Bond, 18 Me. 142; Windsor *v.* China, 4 Me. 298.

The court will always keep in mind the intention of the statutes, which is not to increase the securities or enlarge the rights of the creditor but to promote the benefit of the debtor by indulging him in the enjoyment of his liberty as far as compatible with the previous claims of his creditor. Davis *v.* Cathey, 1 Stew. (Ala.) 402; Simms *v.* Slacum, 3 Cranch (U. S.) 300, 2 L. ed. 446.

65. Hackett *v.* Lane, 61 Me. 31; Guilford *v.* Delaney, 57 Me. 589; Morrison *v.* Corliss, 44 Me. 97; White *v.* Estes, 44 Me. 21; Fales *v.* Goodhue, 25 Me. 423; Rollins *v.* Dow, 24 Me. 123.

Bond as waiver of previous citation to creditor.— See Williams *v.* McDonald, 18 Me. 120.

66. Newton *v.* Newbegin, 43 Me. 293; Fales *v.* Goodhue, 25 Me. 423; Moore *v.* Bond, 18 Me. 142.

Strict performance excused by act of creditor.— Moore *v.* Bond, 18 Me. 142.

67. Gould *v.* Ford, 91 Me. 146, 39 Atl. 480; Smith *v.* Brown, 61 Me. 70; Bell *v.* Furbush, 56 Me. 178; Ross *v.* Berry, 49 Me. 434; Merchants' Bank *v.* Lord, 49 Me. 99; Flowers *v.* Flowers, 45 Me. 459; Clark *v.* Metcalf, 38 Me. 122.

68. Peck *v.* Emery, 1 Allen (Mass.) 463; Horton *v.* Miller, 38 Pa. St. 270. See also Merrill *v.* Roulstone, 14 Allen (Mass.) 511.

Effect of appearance to object to examination.— See Simpson *v.* Trivett, 120 Mass. 147. See also Damon *v.* Carrol, 163 Mass. 404, 40 N. E. 185.

The surety in a bond for the appearance of an insolvent debtor to render his schedule

The condition of a recognizance entered into by a debtor who has been arrested on an execution is fulfilled if the debtor appears and submits himself to examination at the time and place fixed for that purpose, and is discharged and allowed to go at large, by the magistrate without taking the oath, although the magistrate may have erred in the performance of his duty,[69] and he is not bound to surrender himself until the magistrate certifies such refusal upon the execution.[70]

(3) By Failure to Make Disclosure. A refusal by a debtor to make disclosures before a tribunal having authority to act is a breach of his bond;[71] and the disclosure by the debtor if undertaken must be concluded and the oath taken within the time, and it will not relieve from forfeiture that the disclosure was seasonably commenced,[72] unless the delay was at the request of the creditor or the objection is waived by him;[73] and such a breach of his bond by the debtor in refusing to make disclosure is not waived by the creditor's subsequent participation in a disclosure by such debtor.[74] So the bond will be forfeited where the debtor when disclosing his affairs shows that he has money on hand or debts due him which he does not cause to be appraised and set off for his creditor;[75] but it has been held that where a poor debtor, after he had given a relief bond, disclosed that he had a certain sum of money which he afterward paid to the creditor, and it was indorsed on the execution, the creditor could not sustain an action on the bond.[76]

(4) By Failure to Take Oath. To prevent a breach of the conditions of a poor debtor's bond, where the creditor has done no act excusing or waiving the performance within the prescribed time,[77] and such performance has not been rendered impossible by the act of the law or the act of God, the debtor must show to the satisfaction of the justices that he is entitled to take, and must take the oath,[78] in accordance with the provisions of the statute.[79] The certificate of justices of the administration of the poor debtor's oath to one who has given

is not liable if the debtor does appear and obtain his discharge, although it be fraudulently obtained, provided the security is not a party to the fraud. Davis *v.* Cathey, 1 Stew. (Ala.) 402.

By agreement a creditor may waive the terms of his debtor's recognizance as to appearance for examination and notice, and he cannot then on failure or omission to perform set up a breach of the recognizance in these particulars. Andrews *v.* Knowlton, 121 Mass. 316; Mt. Washington Glass Works *v.* Allen, 121 Mass. 283; Lord *v.* Skinner, 9 Allen (Mass.) 376.

69. Willis *v.* Howard, 7 Allen (Mass.) 266. And see Merrill *v.* Roulstone, 14 Allen (Mass.) 511; Skinner *v.* Frost, 6 Allen (Mass.) 285; Doane *v.* Bartlett, 4 Allen (Mass.) 74; Jacot *v.* Wyatt, 10 Gray (Mass.) 236.

70. Stone *v.* Russell, 11 Gray (Mass.) 226; Jacot *v.* Wyatt, 10 Gray (Mass.) 236. And see Peck *v.* Emery, 1 Allen (Mass.) 463.

71. Blake *v.* Peck, 77 Me. 588, 1 Atl. 828.

72. Morrison *v.* Corliss, 44 Me. 97.

Surrender after attempt to disclose.— See White *v.* Estes, 44 Me. 21.

73. Guilford *v.* Delaney, 57 Me. 589.

74. Blake *v.* Peck, 77 Me. 588, 1 Atl. 828.

75. Jewett *v.* Rines, 39 Me. 9; Bray *v.* Kelley, 38 Me. 595; Baldwin *v.* Doe, 36 Me. 494; Remick *v.* Brown, 32 Me. 458; Fessenden *v.* Chesley, 29 Me. 368; Robinson *v.* Barker, 28 Me. 310; Harding *v.* Butler, 21 Me. 191.

The refusal of a poor debtor to deliver up to his creditors the property on which a lien has been declared in his certificate is a breach of the condition of his bond. Nash *v.* Babb, 40 Me. 126. See also Hatch *v.* Lawrence, 29 Me. 480.

Although the oath is allowed by the justices hearing the disclosure if they do not appraise the property disclosed the bond is not fulfilled and the creditor may recover in a suit thereon. Jones *v.* Spencer, 47 Me. 182.

76. Bailey *v.* McIntire, 35 Me. 106.

77. **The appearance of a creditor and his attorney to oppose the taking of the oath** after the expiration of the time designated is not a waiver of such condition as to time. Scovell *v.* Holbrook, 22 N. H. 269.

78. Morrison *v.* Corliss, 44 Me. 97; Newton *v.* Newbegin, 43 Me. 293; Fales *v.* Goodhue, 25 Me. 423; Fales *v.* Dow, 24 Me. 211; Rider *v.* Thompson, 23 Me. 244; Longfellow *v.* Scammon, 21 Me. 108.

Effect of change of jail limits without knowledge of debtor.— See Lewis *v.* Staples, 8 Me. 173.

Effect of taking oath in another county.— When a debtor, arrested in one county, gives bond to take the poor debtor's oath in one year or surrender himself to the creditor, the taking of the oath in another county is not a performance of the condition. Manning *v.* Cogan, 49 N. H. 331; Symonds *v.* Carleton, 43 N. H. 444; Hawley *v.* White, 18 N. H. 67.

79. Head *v.* Clarke, 45 N. H. 287.

bond on arrest conditioned as by law required will not support a plea of performance of the condition of the bond in a suit thereon, if it incorrectly states the amount of the judgment and the date of its rendition.[80]

(5) Surrender to Save Penalty. To save the penalty of his bond by performing its last condition, that of surrender, a poor debtor should seasonably[81] "deliver himself into the custody of the jailer" and be received into jail, or deliver himself to the jailer at the jail in such a manner as will make it the duty of the jailer to receive him into custody in the jail.[82] So also where a statute requires a debtor surrendering himself to remain a designated time at the jail his failure to remain for such time is a breach of the bond.[83] When the debtor has once seasonably surrendered himself into the custody of the jailer, the penalty of the bond is saved and he cannot be made liable thereon by reason of any misconduct or negligence of the jailer;[84] and if the debtor is improperly discharged by the jailer the forfeiture of the bond is nevertheless saved.[85]

(6) Omission to File Certificate of Discharge With Jailer. If the condition of a poor debtor's bond does not expressly require that the certificate of the justice as to the debtor's discharge shall be filed with the keeper of the prison, it is not broken by an omission to file it.[86]

(J) *Liabilities on Bonds*—(1) Actions to Enforce[87]—(a) In General. Where a debtor gives a bond to discharge an attachment of his goods on mesne process, and thereafter to obtain relief from arrest enters into a recognizance and is defaulted thereon, the creditor may sue on both instruments to the extent of obtaining the amount of his judgment with interest and costs.[88] If, during the pendency of a suit on a bond, given under the Poor Debtors' Act, there is another action against the debtor, alleging that he wilfully made false disclosures, it cannot affect the rights of the parties to the suit on the bond.[89]

(b) Defenses. The only bar to an action on a poor debtor's bond is a complete fulfilment on the debtor's part of one of its alternative conditions.[90] Thus performance of conditions has not been excused on account of sickness,[91] or lunacy of the debtor,[92] a discharge of the debtor in bankruptcy after breach of the bond even if the principal is released by such discharge,[93] an oath taken in a different county than the one in which the arrest was made is no defense to an action on the bond to take the poor debtor's oath,[94] that the recognizance was taken in a sum less than double the amount of the execution on which the debtor had been arrested, or that the place fixed for his examination was not inserted in the condition of the recognizance.[95] The erroneous adjudication of the justices before

80. Perry *v.* Plunkett, 74 Me. 328.

81. **To make it the duty of the jailer to receive a debtor** the latter should not only seasonably offer to deliver himself but should at the same time deliver to the jailer a copy of the bond or of the execution and return thereon at the jail. Jones *v.* Emerson, 71 Me. 405.

82. Jones *v.* Emerson, 71 Me. 405.

Duty to inform jailer that he is present for commitment.— Scovell *v.* Holbrook, 22 N. H. 269; French *v.* Wingate, 17 N. H. 264.

Duty to surrender upon failure of court to discharge.—Voorhees *v.* Thorn, 21 N. J. L. 77.

In order to constitute a performance of the alternative condition of delivery into custody, such delivery must be a legal one and the condition will not be performed by commitment of the debtor against his will by a surety under a statute requiring the debtor to deliver himself into custody. Woodman *v.* Valentine, 24 Me. 551.

83. Woodham *v.* Chase, 47 N. H. 58. See also Scovell *v.* Holbrook, 22 N. H. 269.

84. Rollins *v.* Dow, 24 Me. 123.

Sufficient evidence of surrender.—See Strout *v.* Gooch, 8 Me. 126.

85. Blanchard *v.* Blood, 87 Me. 255, 32 Atl. 891; White *v.* Estes, 44 Me. 21.

86. Granite Bank *v.* Treat, 18 Me. 340. See also Murray *v.* Neally, 11 Me. 238; Kendrick *v.* Gregory, 9 Me. 22.

87. **Bond** generally see Bonds.

Limitation as to time.— In some states an action on a poor debtor's bond must be brought within a year. Patten *v.* Kimball, 73 Me. 497.

88. Moore *v.* Loring, 106 Mass. 455.

89. Robinson *v.* Barker, 28 Me. 310.

90. Hackett *v.* Lane, 61 Me. 31.

91. Symonds *v.* Carleton, 43 N. H. 444.

92. Haskell *v.* Green, 15 Me. 33. And see Anderson's Bail, 2 Chit. 104, 18 E. C. L. 532.

93. Claflin *v.* Cogan, 48 N. H. 411.

94. Hawley *v.* White, 18 N. H. 67.

95. Whittier *v.* Way, 6 Allen (Mass.) 288, since neither the debtor nor his sureties can be injured by such facts.

whom the disclosure of the debtor is made that the debtor, having disclosed enough in their opinion to pay the debt, is not bound to answer further, and, having offered the property disclosed that he is entitled to his discharge,[96] or the omission by the officer to return into the clerk's office, during the lifetime of the precept, an execution on which a poor debtor's bond was taken by such officer,[97] or because the debtor was so destitute of property that he might legally have taken the poor debtor's oath,[98] or because the judge was absent from the county and disabled by sickness from hearing the case, at the day fixed for the hearing.[99] Where the sureties on a poor debtor's bond did not read it, but were truly informed of the date of the bond and the time of the arrest of the debtor, although they were misinformed as to the time when the conditions must be performed, they cannot be relieved from liability where there was no fraudulent design;[1] nor does a creditor's participation in the examination of a poor debtor after the expiration of the time limited by statute constitute a waiver of the forfeiture of the bond.[2] Where, subsequent to the commencement of an action on a poor debtor's bond, one half of the original judgment is released by the creditor, the judgment is not thereby vacated but the plaintiff should recover the part remaining.[3] A plea of performance of the condition of a poor debtor's bond according to the statute estops the debtor from claiming it to be by reason of its variance from the requirements of the statute a common-law bond.[4] Where a judgment debtor makes default in appearing for examination, it is no defense to a suit on the recognizance that the execution has not been returned.[5] The failure of the creditor to advance money for the debtor's support, although ordinarily a ground for discharge, will be no defense in an action on a jail-limits bond, where such failure was induced by the debtor's deception which was known to the sureties.[6] On the other hand a release by plaintiff,[7] a certificate of two justices of the peace and quorum that they had seasonably administered the oath to a poor debtor, specifying the mode of their appointment and proceedings, showing that the same complied with the statute,[8] a reversal of execution,[9] or payment and acceptance of the whole amount equitably due on the bond before suit commenced thereon for the penalty[10] has been held to constitute a good defense to an action on a poor debtor's bond for release. And no judgment can be rendered on a bond to appear and render a schedule of property given on executing a capias ad satisfaciendum where such bond fails to recite the capias ad satisfaciendum and parties to a judgment and where the writ shows a fieri facias issued on the judgment and a levy on property which *prima facie* was sufficient to satisfy the judgment.[11] It is competent for the creditor to waive provisions in the recognizance made for his own security, and in such case the debtor will be excused from strict performance by reason of the creditor's acts or agreements.[12]

(c) PLEADING[13] — aa. *Declaration.* It is not necessary for plaintiff in his declara-

96. Stone *v.* Tilson, 19 Me. 265.

97. Robinson *v.* Williams, 80 Me. 267, 14 Atl. 67.

98. Haskell *v.* Green, 15 Me. 33.

Poverty.— See Hathaway *v.* Stone, 33 Me. 500.

99. Cobb *v.* Harmon, 29 Barb. (N. Y.) 472 [*affirmed* in 23 N. Y. 148].

1. Wing *v.* Kennedy, 21 Me. 430. And see Wheaton *v.* Fay, 62 N. Y. 275.

2. Guilford *v.* Delaney, 57 Me. 589.

3. Carr *v.* Mason, 44 Me. 77.

4. Hackett *v.* Lane, 61 Me. 31.

5. Chesebro *v.* Barme, 163 Mass. 79, 39 N. E. 1033.

6. Eldridge *v.* Bush, Smith (N. H.) 288.

7. A release by plaintiff operates not only to discharge the debtor from arrest but also as a consequence to discharge his surety from the recognizance. Bullen *v.* Dresser, 116 Mass. 267.

8. Ayer *v.* Fowler, 30 Me. 347.

No action lies if they actually administered the oath, and if, there being no attachable property, the breach was no damage to the creditor. Sanborn *v.* Keazer, 30 Me. 457.

9. An action cannot be maintained on a recognizance given by a defendant on which the execution issued has been reversed on a review. Whitton *v.* Biknell, 3 Allen (Mass.) 472.

10. Grimes *v.* Turner, 16 Me. 353.

11. McIntyre *v.* Halford, 4 Yerg. (Tenn.) 582.

12. Vinal *v.* Tuttle, 144 Mass. 14, 10 N. E. 489.

13. **Pleading** generally see PLEADING.

Form of declaration where obligees are

tion to count on any other than the penal part of the bond, leaving the condition to be pleaded by defendant if it affords him any defense.[14] The declaration in an action on a recognizance[15] need not aver affirmatively that the execution has not been paid.[16] Where the certificate authorizing the arrest, which recites that the debtor was notified to appear before the court, is annexed to and forms part of the declaration, the declaration shows that such notice was given.[17] A declaration on a bail-bond need not aver the truth of the affidavit on which a capias ad satisfaciendum[18] issued, stating defendant had refused to surrender his land, as the fact cannot be inquired into in such collateral action.[19]

bb. *Plea.* Where a statute makes it a requisite to the discharge of a poor debtor that a certificate be delivered to the jailer, a plea of discharge under the poor debtor's oath must allege such delivery of the certificate to the jailer.[20]

(d) EVIDENCE.[21] In an action on a poor debtor's bond, the admissibility of parol[22] or documentary evidence,[23] or of the statements[24] or conduct of the parties,[25] is subject to the general rules controlling the admissibility of evidence.[26] If the debtor was not legally entitled to take the poor debtor's oath, on the evidence actually produced before the magistrate within the time limited in the bond, testimony is not admissible on the trial of a suit upon the bond to show that evidence might have been introduced which would have authorized the taking of the oath.[27] Likewise the general rules relating to the burden of proof,[28]

wrongly named in the bond see Colton *v.* Stanwood, 68 Me. 482.

14. Colton *v.* Stanwood, 68 Me. 482.

15. **A declaration sufficiently sets forth the authority of a magistrate** to take a recognizance upon an application to take the poor debtor's oath, which alleges that he was a commissioner of insolvency within and for the county where it was taken, and duly authorized to act in such cases. Webber *v.* Davis, 5 Allen (Mass.) 393.

A declaration sufficiently sets forth the authority of a constable to make an arrest on execution where it alleges the recovery of a judgment for a specific amount of damages, the issuing of an execution thereon, the making of the affidavit, and the procuring of the certificate required by the statute, and the delivery of the execution to a constable duly authorized to serve it. Webber *v.* Davis, 5 Allen (Mass.) 393.

16. Webber *v.* Davis, 5 Allen (Mass.) 393.

17. Stearns *v.* Hemenway, 162 Mass. 17, 37 N. E. 766.

18. **Where a bond executed on the execution of a capias ad satisfaciendum is forfeited,** it is not necessary for plaintiff, in his motion for judgment on the bond, to describe, nor need the judgment describe the bond, capias ad satisfaciendum, etc., as these are matters of record already before the court. Hubbard *v.* Cole, 9 Yerg. (Tenn.) 502.

19. Fergus *v.* Hoard, 15 Ill. 357.

20. Staniford *v.* Barry, Brayt. (Vt.) 200.

21. **Evidence** generally see EVIDENCE.

22. Parol evidence of the contents of a written disclosure is inadmissible, unless it be shown that the original or a duly certified copy is unattainable. Winsor *v.* Clark, 39 Me. 428.

23. **The certificate of the justices** who admitted him to take the oath is competent evidence of their proceedings as well as their record or a copy of it (Granite Bank *v.* Treat, 18 Me. 340); and where the official certificate of two justices of the peace and of the quorum as to their doings, in the examination of a poor debtor, had been introduced in evidence, and both justices had been examined as witnesses at the trial, and their testimony in relation to facts stated in the certificate was conflicting it is admissible, as evidence tending to corroborate the statement of one of them (Ayer *v.* Woodman, 24 Me. 196).

The disclosure made, signed, and sworn to by the debtor is admissible in evidence, but statements made by him in relation to the subject-matter of his disclosure before the justice are inadmissible, although made at the time of such disclosure. Jewett *v.* Rines, 39 Me. 9.

24. Where a debtor on execution enters into a recognizance and duly presents himself for examination, but by reason of the absence of the magistrate the examination is not had, statements made by the arresting officer are not admissible, in an action for breach of the recognizance either to relieve the debtor from the penalty or to show that there had been an adjournment of the examination by the magistrate. Morrill *v.* Norton, 116 Mass. 487.

25. Evidence of the acts of plaintiff at the time fixed for the debtor's examination are admissible in an action on the recognizance to show a waiver by him of his right to have the examination in the room disqualified in the notice. Lynde *v.* Richardson, 124 Mass. 557.

26. See, generally, EVIDENCE. See also Bent *v.* Stone, 184 Mass. 92, 68 N. E. 46.

27. Robinson *v.* Barker, 28 Me. 310.

28. **Plaintiff** having assigned various breaches by defendant has the burden of showing such breaches. Blake *v.* Mahan, 2 Allen (Mass.) 75.

The burden may shift to defendant in a proper case. Browne *v.* Hale, 127 Mass. 158.

presumptions,[29] and the weight and sufficiency of the evidence[30] govern in actions of this character.

(e) Damages.[31] The measure of damages on a poor debtor's bond is the actual damage caused by the breach,[32] usually the amount of the debt and costs with interest in the absence of other evidence.[33] When there has been a payment and acceptance of the full amount equitably due on the bond before a suit was commenced thereon, for the penalty, the action cannot be maintained.[34] When prior to breach of any condition of the poor debtor's bond the principal therein has legally notified the creditor and has been allowed by the proper justices to take the oath, the damages are to be assessed by a jury at the request of either party, otherwise by the court, and any legal evidence on that point may be introduced by such party.[35]

(2) Discharge of Sureties — (a) In General. The sureties may be released from liability on the bond by the death of the principal debtor in the time named in the bond,[36] by a valid contract for giving time to the principal,[37] or by the

The production of the magistrate's memorandum and proof of his signature and official station, coupled with evidence of a breach of the recognizance, makes out a *prima facie* case for plaintiff. Damon *v.* Carrol, 163 Mass. 404, 40 N. E. 185.

29. Where the parties to a suit on a poor debtor's bond submitted the case for decision on an agreed statement of facts, such agreement must be presumed to state all the facts material to a correct decision of the case, and if it does not show that an appraisement of the property disclosed was made as required by statute, the court will not presume or imply that any appraisement was made. Harding *v.* Butler, 21 Me. 191.

30. In making up the damages on a breach of a poor debtor's bond by failure to turn over property, the debtor's certificate is not conclusive evidence in his favor of the state of his property. Nash *v.* Babb, 40 Me. 126.

In an action upon a relief bond given by a debtor with sureties, neither the discharge certificate, signed by the justices that the debtor has taken the poor debtor's oath, nor the record of their proceedings, is sufficient evidence of the performance of the condition of the bond unless the date of the execution and the amount of the judgment are specified therein (Hathaway *v.* Stone, 33 Me. 500), but where the certificate of the justices discharging him from arrest on execution is correct in every particular, except the date of the judgment, the record evidence preponderates in favor of the identity of the judgment and plaintiff is not entitled to recover (Warren *v.* Davis, 42 Me. 343).

31. **Damages** generally see Damages.

32. Houghton *v.* Lyford, 39 Me. 267; Barrows *v.* Bridge, 21 Me. 398.

33. Blake *v.* Peck, 77 Me. 588, 1 Atl. 828; Call *v.* Foster, 52 Me. 257; Horn *v.* Nason, 23 Me. 101.

Only nominal damages are recoverable for the technical breach of the condition of a poor debtor's bond for not assigning to the creditor property disclosed on the examination, the title being vested in an assignee in insolvency (Smith *v.* Dutton, 74 Me. 468); but the debtor in order to reduce the damages to a nominal sum must show that during the thirty days following the judgment in the original action he was utterly worthless in property, and that his failure to disclose did not damage plaintiff (Webster *v.* Bailey, 57 Me. 364). So if the conditions of a poor debtor's bond, conditioned to be performed in a shorter time than is required by statute, are performed within the time limited by statute only nominal damages are recoverable. Hathaway *v.* Crosby, 17 Me. 448.

34. Grimes *v.* Turner, 16 Me. 353. *Compare* Daggett *v.* Bartlett, 22 Me. 227.

35. Poor *v.* Knight, 66 Me. 482; Foss *v.* Edwards, 47 Me. 145; Winsor *v.* Clark, 36 Me. 110; Baker *v.* Carleton, 32 Me. 335; Bard *v.* Wood, 30 Me. 155; Robinson *v.* Barker, 28 Me. 310; Ware *v.* Jackson, 24 Me. 166; Neil *v.* Ford, 21 Me. 440.

If a poor debtor discloses certain articles of property liable to attachment and does not deliver them on demand, and no direct evidence of the value of them is offered by either party, in an action on the poor debtor's bond, the jury may render such verdict as from the whole testimony in the case they may believe plaintiff is entitled to recover. Torrey *v.* Berry, 36 Me. 589.

If the breach be caused by the omission to appraise a note disclosed on the examination, the amount of damages is not to be limited to the value of such note; but any legal proof going to show the ability of the debtor to have paid the debt or some part thereof is admissible and should be taken into consideration by the jury in the assessment of damages. Call *v.* Barker, 28 Me. 317.

Justices must have jurisdiction. In an action on a poor debtor's bond, defendant is not entitled to have the actual damages assessed by the jury, unless it appears that the justices who allowed the oath had jurisdiction. Poor *v.* Knight, 66 Me. 482.

36. Lowell *v.* Haskell, 45 Me. 112. And see Craggin *v.* Bailey, 23 Me. 104. But see Olcott *v.* Lilly, 4 Johns. (N. Y.) 407.

37. Abbott *v.* Tucker, 4 Allen (Mass.) 72, holding, however, that a gratuitous written agreement by a creditor that he will discharge a debtor whom he has arrested on execution, on payment by him of certain portions of the sum due thereon at specified times, does

passage of a statute abolishing imprisonment for debt pending appeal from a judgment involving fraud against a poor debtor arrested on execution.[38] But the sureties are not relieved on the ground of obvious clerical errors which are subject to correction,[39] or where the principal, not having attempted to perform any of the conditions of a poor debtor's bond within the prescribed time, it became forfeited, and he afterward filed his petition and obtained his discharge as a bankrupt.[40] Where judgment is against two, and plaintiff takes one in execution and discharges him, the bail of both is exonerated.[41]

(b) By Surrender of Principal. When the principal is called at the term to which his bond is returnable, and answering to his name presents himself to the court, the surety is entitled to his discharge.[42] The right of sureties to release themselves from liability by the surrender of their principal is usually given;[43] but in some jurisdictions under statutes providing for the release of a poor debtor by his giving a bond conditioned to perform certain acts or deliver himself into the custody of the keeper of the jail, the surety of the poor debtor's bond had no authority to surrender the debtor against the latter's will.[44] Where a person arrested on execution gives bond, under the Insolvent Debtors' Act, and is surrendered by his bail according to the condition of the bond, the creditor does not by neglecting to cause the recommitment of the debtor discharge the debt or the sureties therefor.[45]

(iv) *Application For Discharge*—(a) *In General.* The time for making the application[46] and the person or officer to whom the application should be made[47] are governed by the statutory provisions of the particular jurisdiction.

not discharge the surety on a recognizance taken on the arrest, especially if, before the expiration of the time within which, by the condition of the recognizance, the debtor was to deliver himself up for examination, he has failed to make the payments in compliance with the terms of the agreement.

38. Bunting *v.* Wright, 61 N. C. 295, the condition of the bond being to surrender the debtor for imprisonment.

39. Currier *v.* Bartlett, 122 Mass. 133.

40. Craggin *v.* Bailey, 23 Me. 104; Horn *v.* Nason, 23 Me. 101.

41 Bryan *v.* Simonton, 8 N. C. 51.

42 Swinney *v.* Watkins, 22 Ga. 570.

That the surrender by the principal shall discharge his sureties such surrender must be in court as required by law and the condition of the bond so that a legal and valid commitment might be issued by order of the court requiring the sheriff to deliver defendant in prison. Thorn *v.* Delany, 6 Ark. 219.

The surety may set aside a judgment against him on the bond, on motion, by showing that the principal was present and surrendered himself. Swinney *v.* Watkins, 22 Ga. 570.

43. Compton *v.* Williams, 27 Ga. 29; Whipple *v.* People, 40 Ill. App. 301; Bryan *v.* Turnbull, 8 Mart. N. S. (La.) 108; Richmond *v.* De Young, 3 Gill & J. (Md.) 64; Sloan *v.* Bryant, 28 N. H. 67.

Notice to creditors.— See Sloan *v.* Bryant, 28 N. H. 67.

A debtor giving a prison bond cannot be removed out of the jail limits by his bail in another suit for the purpose of surrendering the debtor in discharge of the bail. Steele *v.* Warner, Smith (N. H.) 263.

Surrender by one surety.— And where such surrender of the principal by his sureties is allowed a surrender of the principal by one of the sureties operates to discharge all the sureties. Compton *v.* Williams, 27 Ga. 29.

Constructive surrender.— See Pacific Mut. Ins. Co. *v.* Canterbury, 104 Mass. 433.

Effect of a discharge by the court see Whipple *v.* People, 40 Ill. App. 301.

44. Woodman *v.* Valentine, 24 Me. 551.

45. Hawkins *v.* Hall, 38 N. C. 280.

46. See cases cited *infra*, this note.

Massachusetts.— The provision of a bond or recognizance entered into by a poor debtor within a certain time that he will "deliver himself up for examination before some magistrate authorized to act" does not require him to deliver himself up at such time that the examination may be commenced within the designated time; but it is sufficient if the notice to the creditor is issued by the magistrate before the expiration of the time. Barnes *v.* Ladd, 130 Mass. 557.

New Hampshire.— Under a statute providing that an imprisoned debtor may apply to have the oath administered to him at the expiration of a specified number of days from the time of his commitment the date of commitment is to be included in computing the time. Priest *v.* Tarlton, 3 N. H. 93.

47. See cases cited *infra*, this note. In some jurisdictions the application by a poor debtor for the benefit of the insolvent acts is to be made by the debtor to the jailer having him in custody (Dalton-Ingersoll Co. *v.* Hubbard, 174 Mass. 307, 54 N. E. 862; Davis *v.* Putnam, 5 Gray (Mass.) 321; Bruce *v.* Keogh, 7 Cush. (Mass.) 536; Providence City Bank *v.* Fullerton, 11 Metc. (Mass.) 73; Jenkins *v.* Newell, 9 Metc. (Mass.) 303; Bussey *v.* Briggs, 2 Metc. (Mass.) 132),

(B) *Form and Requisites.* As to the form and requisites of an application or petition by a poor debtor for his discharge, it is as a rule held sufficient if he presents a statement in writing,[48] and signed,[49] showing the necessary facts entitling him to the benefit of the act for the relief of poor debtors and containing apt words to indicate his wish to be admitted to that benefit,[50] as by showing that the petitioner is so under arrest as to be entitled to a discharge,[51] describing the creditor,[52] and showing in substance that the debtor is unable to pay the debt upon which he is committed.[53] It need not describe the statute which contains the provision, and an erroneous description of it may be rejected as surplusage.[54] One application and notice, specifying that the oath is to be taken upon two executions, may be sufficient.[55] It is no objection to the discharge of a poor debtor on his oath that the nature of the action in which the judgment was recovered is wrongly stated in his application, where such mistake is no injury to the creditor.[56]

(C) *Notice* — (1) NECESSITY FOR. Notice to the creditor[57] and proof of service of the same[58] is necessary where a debtor who has been arrested on execution makes application for a discharge under the Poor Debtors' Act.

(2) BY WHOM ISSUED. The justice who issues a citation to the creditor for the debtor's disclosure performs no judicial duties, but acts ministerially, and need not therefore be disinterested,[59] and he cannot refuse to issue the notification when application is properly made to him, but is to act forthwith without any hearing of parties upon the subject.[60] Where two justices of the quorum are required for the examination, one alone cannot issue the notice and fix the time and place for hearing the debtor's application.[61]

who in turn is to make application to the proper magistrate of the county (Dalton-Ingersoll Co. *v.* Hubbard, 174 Mass. 307, 54 N. E. 862; Dunham *v.* Burlingame, 2 Metc. (Mass.) 271. See also Hanson *v.* Dyer, 17 Me. 96). In others the debtor may apply to a justice of the peace in the county where he was arrested, or if he is committed or has delivered himself into the custody of the jailer, he may apply to a justice of the same county, or at his request the jailer may apply in his behalf. Me. Rev. St. c. 113, § 26; Wing *v.* Hussey, 71 Me. 185. In still other jurisdictions the application is to be made by the debtor to the court to which the writ is returnable, or to any justice thereof. Shaw *v.* Silverstein, 21 R. I. 500, 44 Atl. 931.

In Maine it was formerly held that a notice to the creditor, issued by the magistrate on application of the debtor, without any from the prison-keeper, was invalid. Knight *v.* Norton, 15 Me. 337.

On petition to any three justices of the peace of the county in which the prisoner is detained. Winingder *v.* Diffenderffer, 5 Harr. & J. (Md.) 181.

The representation made to the jailer by a debtor committed on execution, of his desire to take the poor debtor's oath, is sufficient if it is addressed to the person who is actually jailer and describes him as "underkeeper of the jail." Davis *v.* Putnam, 5 Gray (Mass.) 321.

48. Fernald *v.* Noyes, 30 N. H. 39. See, however, Keay *v.* Palmer, 5 N. H. 43.

49. Neal *v.* Paine, 35 Me. 158.

50. Fernald *v.* Noyes, 30 N. H. 39; Van Waggoner *v.* Coe, 25 N. J. L. 197.

It may be sufficient to set forth only the facts prescribed by the act. *In re* Millard, 13 R. I. 178.

51. Van Waggoner *v.* Coe, 25 N. J. L. 197; Stagg *v.* Austin, 18 N. J. L. 82.

52. Peck *v.* Wilson, 14 N. H. 587.

53. Webster *v.* French, 11 Cush. (Mass.) 304.

It need not state the amount of the execution on which the debtor was arrested, as the oath is not in satisfaction of the amount, but merely evidence of inability to pay anything. Allen *v.* Bruce, 12 N. H. 418.

Statement of circumstances unnecessary.— See Eaton *v.* Miner, 5 N. H. 542.

54. Ladd *v.* Deming, 20 N. H. 487.

55. Chesley *v.* Welch, 10 N. H. 251.

56. Osgood *v.* Hutchins, 6 N. H. 374.

57. It is the duty of the debtor who has been arrested on execution and has entered into a recognizance to appear at a certain time for examination to cause notice to be served upon the creditor, even though the recognizance does not, as it may, in terms, require him so to do. Gilmore *v.* Edmunds, 9 Allen (Mass.) 379; Whittier *v.* Way, 6 Allen (Mass.) 288. But *compare* Hogan *v.* Hutton, 20 N. J. L. 82.

58. The debtor should furnish to the court or magistrate such evidence of the service as will make it the duty of the tribunal to take jurisdiction and conduct an examination, if the creditor desires, or to administer the oath if there is no examination. Buckley *v.* Mitchell, 165 Mass. 106, 42 N. E. 557.

59. Gray *v.* Douglass, 81 Me. 427, 17 Atl. 320.

60. Haskell *v.* Haven, 3 Pick. (Mass.) 404.

61. Paul *v.* Holden, 14 Allen (Mass.) 29. *Compare* Paine *v.* Ely, 1 D. Chipm. (Vt.) 37.

(3) To Whom Given. The person to whom the notice or citation should be given is the creditor or creditors,[62] and, where the execution is in favor of several, notice must be given to all creditors living in the commonwealth whether they be partners or not.[63] In some states it is provided that the service may also be made on the creditor's agent or attorney of record;[64] and where the creditor is dead or does not reside or have a place of business in the county where the arrest is made and has no agent or attorney therein, the debtor may give notice of his intention to take the poor debtor's oath to the officer making the arrest.[65]

(4) Form and Requisites.[66] Since the notice or citation to the creditor lies at the foundation of the proceedings, it must be substantially according to the requirements of the statutes before the justices proceed to take the debtor's disclosure, and in order that they may have jurisdiction so to do.[67] The subject of which notice is to be given is the representation of the debtor that he is unable to pay the debt and is desirous of taking the benefit of the law for the relief of poor debtors;[68] and all that is required to make the notice effectual is that it shall contain an intelligible statement or recital of the facts which it is necessary or material for the party to be served to know.[69] The notice should inform the creditor of the time and place fixed for the examination,[70] and should give such a description of the judgment and process to which it relates that the person and case may be rightly understood;[71] but a merely verbal vari-

62. Whittier *v.* Way, 6 Allen (Mass.) 288; Putnam *v.* Longley, 11 Pick. (Mass.) 487; Priest *v.* Tarlton, 3 N. H. 93.

Notice to assignee of creditor.— See Cameron *v.* Little, 13 N. H. 23.

Notice to assignee in bankruptcy for benefit of creditors.— Hayes *v.* Kingsbury, 22 Me. 400.

Where suit was brought for the benefit of another.— See Follansbee *v.* Bird, 8 Cush. (Mass.) 289.

63. Putnam *v.* Longley, 11 Pick. (Mass.) 487.

64. Williams *v.* Kimball, 135 Mass. 411; Newcomb *v.* Willcutt, 124 Mass. 178; Harwood *v.* Wiley, 115 Mass. 358; McGurkine *v.* Bates, 113 Mass. 507; Salmon *v.* Nation, 109 Mass. 216; Willard *v.* Gage, 103 Mass. 354; Way *v.* Carlisle, 13 Allen (Mass.) 398; Richardson *v.* Smith, 1 Allen (Mass.) 541; Knight *v.* Fifield, 7 Cush. (Mass.) 263; Madison *v.* Rano, 4 N. H. 79; Priest *v.* Tarlton, 3 N. H. 93; Dean *v.* Lowry, 4 Vt. 481.

Where creditor out of state.— When it is stated in the application for a citation by a poor debtor desirous of taking the oath and also in the citation that the creditor is out of the state, and that A is his attorney of record, service on the attorney is legal and sufficient; there being no evidence that the facts are not as stated. Smith *v.* Bragdon, 48 Me. 101.

In New Jersey the practice is to give such notice not only to creditors residing in the state, but also to the attorney who acts for plaintiffs in the suit in which the debtor was imprisoned. Louis *v.* Kaskel, 49 N. J. L. 592, 9 Atl. 773.

65. Homer *v.* Sinnott, 119 Mass. 191; Way *v.* Carlisle, 13 Allen (Mass.) 398; Hyatt *v.* Felton, 9 Allen (Mass.) 378; Richardson *v.* Smith, 1 Allen (Mass.) 541.

66. **For form of notice** prescribed by statute see Pierce *v.* Phillips, 101 Mass. 313.

67. Perry *v.* Plunkett, 74 Me. 328; Farrington *v.* Farrar, 73 Me. 37.

Where, however, the statute points out no mode by which the debtor shall notify the creditor of the time and place of his submitting himself to examination and a citation is issued from a magistrate on the application of the debtor only and duly served on the creditor, and the notice is adjudged by the justices who administered the oath to have been given according to law, such notice is sufficient. Ware *v.* Ash, 16 Me. 386. And see Agry *v.* Betts, 12 Me. 415.

68. Dunham *v.* Burlingame, 2 Metc. (Mass.) 271.

Omission not cured by attendance of creditor.— Simpson *v.* Bowker, 11 Cush. (Mass.) 306.

69. Hill *v.* Bartlett, 124 Mass. 399; Dana *v.* Carr, 124 Mass. 397.

70. Way *v.* O'Sullivan, 106 Mass. 118. And see Lynde *v.* Richardson, 124 Mass. 557.

The hour of the day should be specified. Sanborn *v.* Piper, 64 N. H. 335, 10 Atl. 680.

Illustration of sufficient notice as to time and place see Danforth *v.* Knowlton, 111 Mass. 76; Salmon *v.* Nation, 109 Mass. 216; Davis *v.* Putnam, 5 Gray (Mass.) 321.

71. Farrington *v.* Farrar, 73 Me. 37.

If a judgment debtor has been arrested on two executions in favor of the same creditor, and upon each arrest has entered into a recognizance, a subsequent notice to the creditor of his desire to take the oath for the relief of poor debtors must specify from which of the two arrests he seeks to be discharged. Merriam *v.* Haskins, 7 Allen (Mass.) 346. In Way *v.* O'Sullivan, 106 Mass. 118, a judgment debtor was arrested at different times on two executions in favor of the same creditor, and upon each arrest entered into a recognizance. Afterward two notices to the creditor, precisely alike, stating that the debtor "arrested on execution in your favor"

ance which cannot mislead the creditor or create a doubt as to the object of the citation will not vitiate the proceedings.[72] The notice or citation should be in writing, signed by the magistrate issuing it, and designating his official capacity,[73] and under seal,[74] and should correctly describe the person to be cited,[75] and the debtor.[76] The citation need not be a warrant commanding an officer to give notice, but may be addressed to the creditor himself,[77] and it need not name the magistrate before whom it is to be returned,[78] nor need it state the amount of the debt, nor describe the execution more particularly than as an execution at the creditor's suit, issued from a certain court of common pleas at a certain date,[79] nor state the date of the judgment or of the execution.[80] An averment in the citation that the bond had not expired is unnecessary, when the citation gave the date of the bond, and the proceedings thereby appeared seasonable.[81]

(5) AMENDMENT. The citation or notice to the creditor will not be deemed incorrect for want of form only, or for circumstantial errors or mistakes where the person and case can be rightly understood, but such errors or defects may be amended.[82]

(6) WAIVER OF OBJECTIONS TO NOTICE. Although a statute prescribes the mode of notifying the creditor of the intention of the debtor, yet such creditor may by himself or attorney waive his right to such statutory notice.[83]

(7) SECOND NOTICE. In some jurisdictions a poor debtor may have any num-

desired to take the poor debtor's oath, and fixing the same time and place of his examination, were served at the same time on the creditor. It was held that the notices were sufficient.

72. Calnan *v.* Toomey, 129 Mass. 451 (error in describing process); Salmon *v.* Nation, 109 Mass. 216 (omission in statement of time); Collins *v.* Douglass, 1 Gray (Mass.) 167 (omission of initial of debtor's name); Green *v.* Wilbur, 10 Cush. (Mass.) 439 (recital as to commitment); Leach *v.* Hill, 3 Metc. (Mass.) 173 (inaccuracy as to damages and costs); Bussey *v.* Briggs, 2 Metc. (Mass.) 132 (verbal inaccuracy in description of statute); Osgood *v.* Hutchins, 6 N. H. 324 (error as to date of hearing).

73. Callaghan *v.* Whitmarsh, 145 Mass. 340, 14 N. E. 149; Nash *v.* Coffey, 105 Mass. 341 (the addition "justice of the peace" not a sufficient designation); Carter *v.* Clohecy, 100 Mass. 299 (not satisfied by suffix of word "magistrate" under his signature). And see as to necessity of a written notice Madison *v.* Rano, 4 N. H. 79; Hogan *v.* Hutton, 20 N. J. L. 82.

Verbal notice by the justice instead of a written notice was allowed by Me. Rev. St. c. 24, § 19. Young *v.* Capen, 7 Metc. (Mass.) 287.

74. Lewis *v.* Brewer, 51 Me. 108; Hanson *v.* Dyer, 17 Me. 96.

75. Slasson *v.* Brown, 20 Pick. (Mass.) 436.

A misnomer of the creditor in the citation to him notifying him of the administration of the oath to a poor debtor to secure the latter's discharge, calling the creditor "Ebenezer B. S.," where his real name was "Edward B. S.," vitiates the citation and the discharge is ineffectual. Slasson *v.* Brown, 20 Pick. (Mass.) 436.

Error in copy may be immaterial. Eastman *v.* Perkins, 10 Cush. (Mass.) 249.

76. Dwyer *v.* Winters, 126 Mass. 186; Collins *v.* Douglass, 1 Gray (Mass.) 167.

"A prisoner in jail."— The notice of a justice of the peace to a judgment creditor that the debtor, committed on execution, desires to take the poor debtor's oath, may describe the debtor as "a prisoner in jail," although he has given bond for the liberty of the prison limits. Davis *v.* Putnam, 5 Gray (Mass.) 321.

Joint judgment debtors may be joined in the same citation in poor debtor proceedings. Stearns *v.* Hemenway, 162 Mass. 17, 37 N. E. 766.

77. Dunham *v.* Burlingame, 2 Metc. (Mass.) 271.

Direction in partnership name.— A notice of an application for the benefit of the act, directed to a firm by their copartnership name, was sufficient. Malendy *v.* Hungerford, 5 Ga. 544.

78. Dunham *v.* Burlingame, 2 Metc. (Mass.) 271.

79. Davis *v.* Putnam, 5 Gray (Mass.) 321.

80. Rand *v.* Tobie, 32 Me. 450.

81. Farrington *v.* Farrar, 73 Me. 37.

82. Perry *v.* Plunkett, 74 Me. 328 (incorrect statement of amount of judgment); Farrington *v.* Farrar, 73 Me. 37.

If the defect in form is discovered before service there is no reason why it should not at once be corrected and served in its amended form. Eames *v.* Rice, 157 Mass. 508, 32 N. E. 905.

If no application for amendment is made before the magistrate it will be too late to move for an amendment in a suit on the bond which has been presented to the court upon an agreed statement of facts. Perry *v.* Plunkett, 74 Me. 328.

83. Page *v.* Plummer, 10 Me. 334; Bunker *v.* Nutter, 9 N. H. 554.

Mere defects or irregularities in the notice will be waived by the appearance of the cred-

ber of citations to his creditor, so long as each citation states a change of circumstances since the preceding hearing, which changes must be proved before the magistrate.[84] In others the rule is that when a debtor has given notice of his desire to take the benefit of the act for the relief of poor debtors, no new notice can be given until after a certain number of days unless the former notice is insufficient in form or service.[85]

(8) SERVICE OF NOTICE — (a) TIME. The time for the service of the notice or citation on the creditor is usually fixed by statute.[86] In Massachusetts it has been held that the condition of a recognizance by a poor debtor that within thirty days from the day of the arrest he will deliver himself up for examination, giving notice of the time and place thereof, does not require him to have the notice served upon the creditor within the thirty days.[87]

(b) PLACE. Notice of the debtor's intention to take the benefit of the act for the relief of poor debtors may be served in another county than that in which the arrest was made,[88] but a discharge upon taking the poor debtor's oath is invalid if the notice was served outside of the officer's precinct.[89]

(c) MANNER AND SUFFICIENCY — aa. *In General.* The statutes of the various states usually require the notice to be served personally[90] upon the creditor or creditors by their agents or attorneys by delivering an attested copy,[91] or leaving

itor at the examination of the debtor without objecting to the notice. Moore *v.* Bond, 18 Me. 142; Bliss *v.* Kershaw, 180 Mass. 99, 61 N. E. 823; Williams *v.* Kimball, 135 Mass. 411; McInerny *v.* Samuels, 125 Mass. 425; Bunker *v.* Nutter, 9 N. H. 554.

A judgment creditor may appear specially before a magistrate at the examination of a poor debtor, and such an appearance is not a waiver of all defects in the notice of the hearing or the service thereof. Williams *v.* Kimball, 132 Mass. 214.

84. Watson *v.* Fairbrother, 7 R. I. 511; Eastwood *v.* Schroeder, 5 R. I. 388; Angell *v.* Robbins, 4 R. I. 493.

Executing an assignment under the Poor Debtors' Act is such a "change of circumstances" as justifies the issuance of a second citation for an imprisoned debtor to his committing creditor. Burdick *v.* Simmons, 9 R. I. 17.

85. Merrill *v.* Kaulback, 158 Mass. 328, 33 N. E. 515; Burt *v.* Geary, 128 Mass. 404; Hastings *v.* Partridge, 124 Mass. 401.

Formerly in Massachusetts a new notice of a desire to take the poor debtor's oath could not be served until the end of seven days, exclusive of the first day from the service of a former legal notice, although the magistrate had adjudged such former notice to be insufficient. Millett *v.* Lemon, 113 Mass. 355. See also Safford *v.* Clark, 105 Mass. 389; Skinner *v.* Frost, 6 Allen 285; Baker *v.* Moffat, 7 Cush. 259.

86. Not less than twenty-four hours before the time fixed for examination, adding one hour for travel for each mile from the place of service to the place of examination, where service is by copy. Central Nat. Bank *v.* O'Connor, 123 Mass. 52; Park *v.* Johnston, 7 Cush. (Mass.) 265.

In case of service by leaving a copy plaintiff or creditor should be allowed not less than twenty-four hours in addition to the time allowed him for travel. Way *v.* Wheeler, 112 Mass. 87.

If the notice is served on the creditor's attorney the time for travel is to be computed from the place of service, and not from the attorney's residence. Carroll *v.* Rogers, 4 Allen (Mass.) 70.

Where the debtor gives to the officer making the arrest notice of his intention to take the poor debtor's oath, the time is to be computed as in case of service upon a plaintiff; and the time for travel is to be determined by the distance between the place of service on the officer and the place of examination, and not by the distance of the creditor's residence or place of business therefrom. Homer *v.* Sinnott, 119 Mass. 191.

Within fifteen days before hearing. — A notice of hearing on application to be allowed to take the poor debtor's oath, required by statute to be served at least fifteen days before the day of hearing, is insufficient if served within that time. Sanborn *v.* Piper, 64 N. H. 335, 10 Atl. 680.

Ten days before term to which case continued. — Where a person has been arrested on a capias ad satisfaciendum and has given bond for his appearance at court to take the insolvent debtor's oath, and the case is continued to the next term of court, a notice served on his creditors ten days before the term to which the cause is continued is a sufficient notice, under the act for the relief of insolvent debtors. Watson *v.* Willis, 24 N. C. 17.

87. Eames *v.* Rice, 157 Mass. 508, 32 N. E. 905; Marple *v.* Burton, 144 Mass. 79, 10 N. E. 467.

88. Carroll *v.* Rogers, 86 Mass. 70.

89. Henshaw *v.* Savil, 114 Mass. 74.

90. **Service by publication.** — In South Carolina it has been held that creditors may be summoned by publication in the manner prescribed by statute. *Ex p.* Cantey, 11 Rich. 520; Mordecai *v.* La Rissey, 1 Rich. 192; Cavan *v.* Dunlap, Cheves 241.

91. Young *v.* Capen, 7 Metc. (Mass.) 287; Hogan *v.* Hutton, 20 N. J. L. 82.

the same at their last and usual place of residence;[92] and where this is the case the reading of the notice by the officer to the creditor is usually held not a legal service thereof.[93] A constable[94] is a competent officer to serve the citation, although the amount due the creditor is in excess of the amount which limits the service of writs by him in a personal action or one in which damages are claimed;[95] and in some jurisdictions a copy of the application and order of the justice fixing a time and place of hearing, delivered to the proper party, is a sufficient notice, although the person attesting and delivering the same, was not an officer.[96]

bb. *Waiver of Defective Service.* In accordance with the rule that the judgment creditor may waive any formalities intended merely for his security, he may personally or through his attorney by accepting the service of notice waive any informality and irregularity therein;[97] and in a suit on a poor debtor's recognizance the question whether plaintiff had waived service of the notice in due form should be submitted to the jury.[98]

(9) RETURN[99] — (a) IN GENERAL. While the return of service of notice on application to take a poor debtor's oath should be returned before the proper officer,[1] be sworn to[2] and contain a recital of the time of service,[3] great liberality is exercised in amendments to supply omissions or to correct palpable errors therein for the purpose of sustaining proceedings when the justice of the case requires it.[4]

(b) CONCLUSIVENESS. The return of the officer[5] as to his service of the citation is conclusive between the parties, and must be taken as true unless it contains some repugnancy.[6]

Service of the original application and order thereon will be sufficient, although the statute directs that the creditor shall be served with a copy of such application and order. Eaton *v.* Miner, 5 N. H. 542. And see Callaghan *v.* Whitmarsh, 145 Mass. 340, 14 N. E. 149.

92. Young *v.* Capen, 7 Metc. (Mass.) 287; Smith *v.* Randall, 1 Allen (Mass.) 456; Madison *v.* Rano, 4 N. H. 79; Hogan *v.* Hutton, 20 N. J. L. 82.

Leaving at place of former residence has been held to be insufficient. Flanders *v.* Thompson, 2 N. H. 421.

Debtor's citation to several joint creditors having the same place of abode may be served by one copy left at that place. Leach *v.* Hill, 3 Metc. (Mass.) 173.

93. Hanson *v.* Dyer, 17 Me. 96; Young *v.* Capen, 7 Metc. (Mass.) 287.

94. **Constable de facto.**— In a suit on a recognizance plaintiff cannot inquire into the regularity of the bond of a constable *de facto*, by whom the notice to him of the debtor's application to take the oath for the relief of poor debtors was served. Elliott *v.* Willis, 1 Allen (Mass.) 461.

95. Bliss *v.* Day, 68 Me. 201.

96. Rankin *v.* Nettleton, 2 N. H. 305.

97. Williams *v.* Kimball, 132 Mass. 214; Mutual Safety F. Ins. Co. *v.* Woodward, 8 Allen (Mass.) 148, oral waiver. And see Page *v.* Plummer, 10 Me. 334.

98. Goldenberg *v.* Blake, 145 Mass. 354, 14 N. E. 171.

99. **Return upon a copy of the notice** has been held to be sufficient where the original notice was delivered by the officer to the creditor. Callaghan *v.* Whitmarsh, 145 Mass. 340, 14 N. E. 149.

1. Smith *v.* Huntington, 2 Day (Conn.) 562.

2. Allen *v.* Bruce, 12 N. H. 418.

3. Under a statute providing for service of notice of an application by a debtor to take the poor debtor's oath by leaving a copy at the place of abode of the creditor to be served, allowing not less than a certain time before the time appointed for the examination, the return of service must state how long before the time set for the application the notice was left at the creditor's abode (Smith *v.* Randall, 1 Allen (Mass.) 456), but where the officer's return is defective, in not allowing time for travel, it has been held that parol evidence is competent to show that the creditor waived such time (Lord *v.* Skinner, 9 Allen (Mass.) 376).

4. Shepherd *v.* Jackson, 16 Gray (Mass.) 599.

Amendment not allowed.— An amendment of the officer's return as to the service of the notice showing any part of the return to be false, and for the purpose of defeating it, will not be allowed (Shepherd *v.* Jackson, 16 Gray (Mass.) 599), and such return cannot be amended, after the discharge of the debtor, so as to show that no legal service thereof was made (Davis *v.* Putnam, 5 Gray (Mass.) 321).

5. **Where notice is served by a sheriff,** his return, reciting such notice, is conclusive evidence thereof. Woods *v.* Blodgett, 15 N. H. 569.

Where notice is served by a private person, the affidavit of such person as to service of such notice is not conclusive. Woods *v.* Blodgett, 15 N. H. 569.

6. If the fact certified may be true, it is to be so taken and considered, and parol tes-

(D) *Successive Applications.* It is sometimes provided by statute[7] that if one magistrate after examination is not satisfied that the debtor is entitled to his discharge and remands him to prison, this will not prevent him from obtaining his discharge upon new notice to the creditor and new proceedings before the same or other magistrates, and that pending an appeal from the judgment of a magistrate finding an applicant for the poor debtor's oath guilty on charges of fraud, another magistrate may entertain another application for the oath.[8]

(E) *Jurisdiction and Authority of Magistrates* — (1) IN GENERAL. The statutes providing for the relief of poor debtors usually designate the magistrate or justice before whom the proceedings, examination, administration of oath, etc., are to be conducted.[9] The presumption is in favor of the jurisdiction and acts of justices administering the poor debtor's oath,[10] and the authority of one acting as commissioner in insolvency to take a debtor's recognizance will be presumed, in the absence of evidence that it was usurped.[11]

(2) NECESSITY FOR OATH.[12] Commissioners appointed under statute to take a defendant's disclosure need not be sworn.[13]

(3) SELECTION — (a) IN GENERAL. Justices, in order to have authority to conduct the examination of a poor debtor, administer the oath, and make the certificate prescribed by law must be selected or appointed in the manner designated by the statute authorizing such proceedings,[14] and, when this right of the creditor

timony to prove its falsity is inadmissible, except in a suit against the officer for a false return. Davis *v.* Putnam, 5 Gray (Mass.) 321; Niles *v.* Hancock, 3 Metc. (Mass.) 568; Leach *v.* Hill, 3 Metc. (Mass.) 173; Hall *v.* Tenney, 11 N. H. 516. Thus where an officer makes a return on a citation issued to two or more joint creditors that he has served the same by leaving an attested copy at their last and usual place of abode, it must be taken as true that they had the same place of abode. Leach *v.* Hill, 3 Metc. (Mass.) 173.

7. **In Pennsylvania,** however, on an application for the benefit of the insolvent laws, where there has once been a full hearing and decision on the merits, the court will not hear another petition made under the same circumstances, and the only mode for a debtor to adopt whose petition has been rejected on a hearing on the merits is to present a special petition, reciting the former proceedings and decision, and ask for a rehearing which the court will grant or refuse in the exercise of a sound legal discretion. Abbot's Case, 1 Ashm. 69.

8. Lockhead *v.* Jones, 137 Mass. 25.

A debtor in prison who has been refused the right to take the poor debtor's oath by a commissioner may afterward be allowed to take it by another commissioner, if in the meantime he has gone into insolvency and surrendered all his property to assignees. Snow's Case, 22 Fed. Cas. No. 13,143, 3 Woodb. & M. 430.

9. Bliss *v.* Kershaw, 180 Mass. 99, 51 N. E. 823 (courts instead of magistrates under the statute of 1889); Stack *v.* O'Brien, 157 Mass. 374, 33 N. E. 351 (special justice of a district court); Cushing *v.* Briggs, 2 R. I. 139 (justice who commenced execution); Vermont L. Ins. Co. *v.* Dodge, 48 Vt. 156 (judge of the supreme court); *Ex p.* Davis, 18 Vt. 401 (clerk of court who signed execution). See also Gibbs *v.* Taylor, 143 Mass. 187, 9 N. E. 976.

Such statutes must be strictly followed. Lang *v.* Bunker, 1 Allen (Mass.) 256; Barker *v.* Ryan, 1 Allen (Mass.) 72.

Place of examination.— One desirous of taking the oath for the relief of poor debtors must be examined before magistrates authorized to act in the county in which the arrest was made, and he cannot cite his creditor and be heard with effect before those of any other county. Houghton *v.* Lyford, 39 Me. 267; Dalton-Ingersoll Co. *v.* Hubbard, 174 Mass. 307, 54 N. E. 862. But when it appears by the bond in suit and by the officer's return on the execution (made a part of plaintiff's case) that the arrest was made in the county in which the disclosure was had, the fact of jurisdiction is established. Fuller *v.* Davis, 73 Me. 556.

Time of taking recognizance.— Cook *v.* Harrington, 139 Mass. 38, 29 N. E. 218.

10. Randall *v.* Bowden, 48 Me. 37.

11. Damon *v.* Carrol, 163 Mass. 404, 40 N. E. 185.

12. **Oath and affirmation** generally see OATHS AND AFFIRMATIONS.

13. Lewis *v.* Foster, 65 Me. 555.

14. Bunker *v.* Hall, 23 Me. 26.

In Maine one of the justices to conduct the examination is to be selected by the debtor and the other by the creditor. Spaulding *v.* Record, 65 Me. 220; Daggett *v.* Bakeman, 33 Me. 382; Ayer *v.* Woodman, 24 Me. 196; Burnham *v.* Howe, 23 Me. 489; Bunker *v.* Hall, 23 Me. 26; Barnard *v.* Bryant, 21 Me. 206. See also Buckley *v.* Page, 4 Fed. Cas. No. 2,094, 1 Cliff. 474.

Selection by non-resident justice was sufficient. Blake *v.* Peck, 77 Me. 588, 1 Atl. 828.

Selection by officer at request of debtor is allowable. Buckley *v.* Page, 4 Fed. Cas. No. 2,094, 1 Cliff. 474.

Revocation of authority.— See Chamberlain

is denied, the justices taking the disclosure have no jurisdiction and their proceedings are void.[15] If the creditor is not present to select a justice, the appointment is to be made for him by an officer.[16]

(b) Selection of Third Justice. If the two justices selected do not agree, they may choose a third justice to act with them, and if they cannot agree on a third, a legally qualified officer may choose him.[17]

(c) Time For Selection. The debtor may select one of the justices to take his disclosure at any time after the citation to the creditor has been prepared, and before the tribunal has been organized.[18]

(4) Disqualification.[19] If the justices who administered the oath to the debtor are not authorized in conformity to the provisions of the statute to act in the matter their certificate of discharge has no validity whatever.[20] In order that their acts may be binding the justices before whom the examination is conducted must be disinterested.[21] The issuing of a citation to a creditor does not, however, disqualify the justice issuing the same from hearing the disclosure, as a justice selected on the part of the debtor,[22] nor will the fact that a justice who heard a disclosure on the part of the debtor was counsel for the debtor in an action subsequently brought on the bond given to procure the release of the debtor from arrest under execution affect the validity of the disclosure.[23]

(f) *Proceedings on Examination and Disclosure*—(1) Time and Place. The time and place of the examination is to be appointed by the magistrate and not fixed by the debtor.[24] The hearing must be had at the time and place stated

v. Sands, 27 Me. 458; Ayer *v.* Woodman, 24 Me. 196.

15. Spaulding *v.* Record, 65 Me. 220.

16. Patterson *v.* Eames, 54 Me. 203; Daggett *v.* Bakeman, 33 Me. 382; Worthen *v.* Hanson, 30 Me. 101; Burnham *v.* Howe, 23 Me. 489. And see Gray *v.* Douglass, 81 Me. 427, 17 Atl. 320.

It is not necessary that the officer have absolute knowledge of the failure of the creditor to make his own selection, but his appointment would be void if the creditor had procured the attendance of a justice of his own selection. Burnham *v.* Howe, 23 Me. 489.

Officer must act in official capacity. Gilligan *v.* Spiller, 29 Me. 107.

17. Ross *v.* Berry, 49 Me. 434; Moody *v.* Clark, 27 Me. 551.

The three justices then constitute the tribunal; and although the concurrence of two only is required all must act in deciding such questions as arise until the final decision is made. Ross *v.* Berry, 49 Me. 434.

Until final decision is made the justice so appointed should act. Moody *v.* Clark, 27 Me. 551.

18. Chamberlain *v.* Sands, 27 Me. 458.

The justices cannot be selected on a day which by statute is dies non juridicus; and, if so selected, in the absence of the creditor, the disclosure, although made on a subsequent day, is invalid, and constitutes no defense to an action on the poor debtor's bond. Poor *v.* Beatty, 78 Me. 580, 7 Atl. 541.

The proceedings will not be invalid merely because a selection of one of the justices and an organization were not had within the hour after the time appointed. Perley *v.* Jewell, 26 Me. 101.

19. **Objection for disqualification.**— Where a magistrate, appointed to determine whether an execution debtor is entitled to take the poor debtor's oath, is disqualified, the objection should be made to the judge who appointed him, so that another magistrate may be seasonably appointed in his stead. Osgood *v.* Thorne, 63 N. H. 375.

20. Hovey *v.* Hamilton, 24 Me. 451. Thus a certificate by two justices of the peace, only one of whom is of the quorum, that the debtor has taken the oath was a nullity, where both are required by statute to be of the quorum. Williams *v.* Turner, 19 Me. 454.

21. Ware *v.* Jackson, 24 Me. 166.

Any relationship to either party within a certain degree will disqualify a justice. Baker *v.* Carleton, 32 Me. 335 (father of debtor); Bard *v.* Wood, 30 Me. 155 (within sixth degree); Ware *v.* Jackson, 24 Me. 166 (brother-in-law of debtor).

A brother to a surety in a poor debtor's bond may act as a magistrate in discharging the debtor. Downer *v.* Hollister, 14 N. H. 122, 40 Am. Dec. 175.

"Two disinterested justices."— Under a statute requiring an application by a debtor to disclose and take the poor debtor's oath to be made before two disinterested justices of the peace, a justice who has heard and adjudicated on one application is not disqualified to hear a second application, under the same execution. McGilvery *v.* Staples, 81 Me. 101, 16 Atl. 404.

22. Cummings *v.* York, 54 Me. 386.

23. Cummings *v.* York, 54 Me. 386.

24. Such time is left to the discretion of the magistrate, the only limitation being that it must be so far ahead as to enable the statutory notice to be given to the creditor. Ithaca First Nat. Bank *v.* Gogin, 148 Mass. 448, 19 N. E. 780.

Administration of oath without prison limits.— The oath may be administered to a poor

in the notice of hearing, unless such hearing is delayed by an adjournment regularly made.[25]

(2) Attendance of Magistrate and Parties — (a) Procuring Attendance of Magistrate. In some jurisdictions the burden of doing the necessary preliminary acts is upon the debtor,[26] including the procuring of the attendance of the magistrate or other officer at the time and place fixed for examination.[27] In other jurisdictions it is held to be the duty of the creditor selecting a justice for the purpose of hearing the disclosure of a poor debtor to procure the attendance of the justice selected by him at the time and place appointed in the citation.[28]

(b) Time For Appearance. The statutes providing for the relief of poor debtors as a rule designate the time within which the magistrate and parties shall appear, a usual allowance being one hour after the time fixed for the examination,[29] or to which such examination is adjourned,[30] and there will be no default until the expiration of the full time.[31]

(c) Failure of Debtor to Appear. The failure of a debtor to appear on the day fixed for his examination will constitute a breach of the recognizance.[32]

(d) Effect of Departure of Debtor. If, having appeared, the debtor departs from the presence of the magistrate with the intent to permanently absent himself before the final order is in some form made, declared, or announced, this will constitute a breach of his recognizance or bond,[33] and where a debtor appears for

debtor outside of the prison-yard. Com. *v.* Alden, 14 Mass. 388.

Effect of appointment of unreasonable time or place.—In Haskell *v.* Haven, 3 Pick. (Mass.) 404, it was held that if it appeared to the justices that an attempt was made to inconvenience them or the creditor by the hour or place appointed in the notification they might refuse to act.

Seven o'clock in the evening, in January, is not an unreasonable hour to fix for the examination. May *v.* Foote, 7 Allen (Mass.) 354.

25. Banks *v.* Johnson, 12 N. H. 445.

26. Morrill *v.* Norton, 116 Mass. 487.

27. Failure to do so will constitute a breach of his recognizance. Bliss *v.* Kershaw, 180 Mass. 99, 61 N. E. 823; Sanford *v.* Quinn, 147 Mass. 69, 16 N. E. 570; Vinal *v.* Tuttle, 144 Mass. 14, 10 N. E. 489; Godfrey *v.* Munyan, 120 Mass. 240; Morrill *v.* Norton, 116 Mass. 487; Adams *v.* Stone, 13 Gray (Mass.) 396.

Duty where justice fails to attend see Chesebro *v.* Barme, 163 Mass. 79, 39 N. E. 1033.

Where the judge becomes physically incapacitated a poor debtor giving bond to prosecute his application for his discharge with effect must take the proper steps to call in another judge. Cobb *v.* Harmon, 23 N. Y. 148 [*affirming* 29 Barb. 472].

28. Stanley *v.* Reed, 28 Me. 458.

29. Hills *v.* Jones, 122 Mass. 412; Thacher *v.* Williams, 14 Gray (Mass.) 324; Adams *v.* Stone, 13 Gray (Mass.) 396; Niles *v.* Hancock, 3 Metc. (Mass.) 568; Downer *v.* Hollister, 14 N. H. 122, 40 Am. Dec. 125.

30. McLeod *v.* Freeman, 122 Mass. 441; Hills *v.* Jones, 122 Mass. 412; Phelps *v.* Davis, 6 Allen (Mass.) 287.

31. Hills *v.* Jones, 122 Mass. 412; Jacot *v.* Wyatt, 10 Gray (Mass.) 236; Downer *v.* Hollister, 14 N. H. 122, 40 Am. Dec. 175.

A certificate of discharge granted before the expiration of an hour from the time appointed in the citation to the creditor, who has given no notice of his intention to appear, but does afterward appear within the hour, is void. Hobbs *v.* Fogg, 6 Gray (Mass.) 251.

However, there is no inflexible rule that every case of this kind shall be proceeded in within the hour appointed, and that at the moment the hour expires there is a discontinuance of all cases not then brought before the consideration of the magistrates. Niles *v.* Hancock, 3 Metc. (Mass.) 568. And see Downer *v.* Hollister, 14 N. H. 122, 40 Am. Dec. 175.

Under statutes giving a magistrate the discretionary power which courts have in civil actions as to adjournment and other incidents of a poor debtor's examination, the magistrate may keep open the hearing after the expiration of the hour to which it has been adjourned; and it is immaterial that, without informing the creditor, he had told the debtor that he need not appear till after the expiration of the hour. Lincoln *v.* Cook, 124 Mass. 383.

32. Driscoll *v.* Hurlburt, 167 Mass. 327, 45 N. E. 754, holding this to be so even though the creditor had agreed to a continuance, where the debtor's counsel was, by the terms of the agreement, required to have it filed, and the order for continuance made but failed so to do.

33. Morgan *v.* Curley, 142 Mass. 107, 7 N. E. 726; Knight *v.* Sampson, 99 Mass. 36; Peck *v.* Enery, 1 Allen (Mass.) 463. And see Turner *v.* Bartlett, 109 Mass. 503.

Necessity for certificate.— The departure of a debtor arrested on execution from the presence of the magistrate before whom he is examined, on the oral refusal of the magistrate to administer the poor debtor's oath, but before a certificate of his refusal has

examination and his counsel enters a general appearance, the fact that the citation is not in court does not justify the debtor in departing without leave.[34] It is competent for the magistrate to suspend the proceedings for a brief period and to resume them again, and where he does so on the return of the debtor he by implication sanctions his absence as being for a legitimate purpose.[35]

(3) HEARING — (a) COURSE AND SCOPE OF EXAMINATION. Any course of examination which would have a tendency to exhibit conduct of the debtor inconsistent with the oath will be pertinent and appropriate,[36] and a debtor will not be allowed to take the oath, if he cannot account for the appropriation of money traced to his hands.[37] The debtor must make a true disclosure of his business affairs and property under oath, and the creditor may propose to the debtor any interrogatories pertinent to the inquiry.[38] The statement exhibited under oath by a petitioner for the benefit of the insolvent laws is taken to be *prima facie* correct; and the burden of proving it to be erroneous lies on the opposing creditors,[39] and whether the statements made by a poor debtor at his examination before the justices are true, and if so whether they are consistent with the oath, are questions for the final decision of the magistrates under the statute.[40]

(b) EVIDENCE.[41] The court must hear any legal and pertinent evidence adduced by the creditor,[42] and opposing creditors have the right to introduce proof upon the subject of the arrest of the debtor.[43] The debtor may prove by his own oath that he has been arrested and given the bond required by the statute in such case.[44]

(c) EFFECT OF SURRENDER. By surrendering himself into the custody of the

been signed by the magistrate as required by the statute, is a breach of the condition of the debtor's recognizance to abide the final order of the magistrate. Fuller *v.* Meehan, 118 Mass. 135; Knight *v.* Sampson, 99 Mass. 36; Lothrop *v.* Bailey, 14 Allen (Mass.) 514. If, however, when the court is ready with its certificate to authorize the debtor's commitment, an officer is not present with the execution, the debtor will not be required to wait, and may depart without a breach of his recognizance. Damon *v.* Carrol, 163 Mass. 404, 40 N. E. 185; Fuller *v.* Meehan, *supra*; Goodall *v.* Myrick, 111 Mass. 484; Lothrop *v.* Bailey, *supra*; Russell *v.* Goodrich, 8 Allen (Mass.) 150; Peck *v.* Emery, 1 Allen (Mass.) 463; Jacot *v.* Wyatt, 10 Gray (Mass.) 236.

34. Manning *v.* Reynolds, 164 Mass. 150, 41 N. E. 62.

35. Toll *v.* Merriam, 11 Allen (Mass.) 395.

Departure by magistrate's permission to consult counsel.— See Cook *v.* Thayer, 121 Mass. 415, 123 Mass. 333.

36. Little *v.* Cochran, 24 Me. 509. And see Jewett *v.* Rines, 39 Me. 9.

Intent to return.— Senior's Case, 2 Ashm. (Pa.) 118.

Requirement to show change of circumstances.— *In re* Ballou, 7 R. I. 466.

The question whether the arrest was for damages recovered for the cause of seduction is properly inquired into and decided by the court, and not on the trial before the jury. Wallace *v.* Coll, 24 N. J. L. 600, holding that the "damages for seduction," intended in the insolvent laws, are damages for the cause of seduction. That which aggravates damages for a particular cause of action is not necessarily a constituent part of such cause.

37. *Ex p.* Bishop, T. U. P. Charlt. (Ga.) 267.

38. Marr *v.* Clark, 56 Me. 542.

On proof of one of two charges, the oath may be refused. Macaig's Case, 137 Mass. 467.

Disclosure as to deed of trust.— It is no objection to one's taking the insolvent debtor's oath that he has conveyed in a deed of trust to satisfy certain creditors an amount of property greater in value than the amount of debts secured by the deed, where he sets forth the deed in his schedule and surrenders all his resulting interests. Adams *v.* Alexander, 23 N. C. 501.

Where the creditor proposes interrogatories to a poor debtor, about to take the oath, relative to the disposition of his property, and the magistrates overrule the same and allow the debtor to take the oath without answering them, the discharge being not in conformity to the statute is invalid. Bunker *v.* Nutter, 9 N. H. 554.

The disposition of his property prior to the contracting of his debt which forms the basis of the proceeding, and the justices may properly refuse to put such inquiry, cannot be inquired into. Ledden *v.* Hanson, 39 Me. 355.

39. Hassinger's Case, 2 Ashm. 287.

40. Ledden *v.* Hanson, 39 Me. 355.

41. Evidence generally see EVIDENCE.

42. Marr *v.* Clark, 56 Me. 542; Smick *v.* *v.* Opdycke, 12 N. J. L. 347.

Clear and conclusive evidence of existing insolvency will be required where a petitioner within a short time prior to his application represented himself under oath as being in solvent circumstances and adequate as bail. Benney's Case, 1 Ashm. (Pa.) 261.

43. Bond *v.* Cox, 30 N. J. L. 381. And see Hassinger's Case, 2 Ashm. (Pa.) 287.

44. Hamilton *v.* Chevallier, 18 N. J. L. 433.

jailer before his disclosure is completed the debtor may terminate the disclosure proceedings and discharge his bond for his appearance for examination.[45]

(d) ADJOURNMENT — aa. *Power to Adjourn.* In proceedings for the examination of poor debtors, the magistrate or justice[46] may postpone or delay the examination from time to time whenever it becomes necessary in the performance of their duty,[47] and for reasons of which they are the proper judges,[48] and the adjournment may be based upon the consent of the parties.[49]

bb. *Further Adjournment.* Where the day to which an examination was adjourned falls on Sunday, or a day which is *dies non juridicus*, it is the duty of the debtor to procure a further adjournment.[50] A further adjournment ordered before the day to which an original adjournment was made is improper.[51]

cc. *Effect of Non-Appearance by Creditor.* Where at the time and place to which the hearing was adjourned, the debtor appears but the creditor does not, this is an abandonment of charges of fraud, and of all opposition to the discharge of the debtor.[52]

(e) THE OATH AND ITS ADMINISTRATION. The person or official by whom the poor debtor's oath should be administered,[53] as well as the form and requisites of the

45. Where the debtor gives a bond and cites the creditor before two justices of the peace, and submits himself to examination as provided by law, but before his disclosure is completed surrenders himself into the custody of the jailer of the county where he was arrested, by such surrender the bond is discharged, and being the basis of the proceeding for such disclosure the disclosure can legally proceed no further. Burnham *v.* Adams, 13 Fed. Cas. No. 2,173, 2 Cliff. 569. And see Garland *v.* Williams, 49 Me. 16. See, however, *Ex p.* Davis, 18 Vt. 401, holding that if the debtor has given the requisite notices under the statute, the hearing before the magistrate may proceed after the debtor has been committed and has given jail bond, if the facts show that the debtor did not by giving the jail bond intend to proceed.

46. Where two justices of the peace and of the quorum must appear at the time and place fixed for the administration of the poor debtor's oath, an adjournment by one justice, not being conformable to the statute, will be invalid, although the attorney of the creditor should assent thereto. Hovey *v.* Hamilton, 24 Me. 451; Williams *v.* Burrill, 23 Me. 144.

47. Chamberlain *v.* Sands, 27 Me. 458; Fales *v.* Goodhue, 25 Me. 423; Manning *v.* Reynolds, 164 Mass. 150, 41 N. E. 62; Barham *v.* Gomez, 149 Mass. 221, 21 N. E. 297; Carleton *v.* Wakefield, 111 Mass. 481; Mann *v.* Mirick, 11 Allen (Mass.) 29; Russell *v.* Goodrich, 8 Allen (Mass.) 150; May *v.* Foote, 7 Allen (Mass.) 354; Johnson's Case, 1 Ashm. (Pa.) 157.

After a magistrate has announced his decision not to administer the poor debtor's oath to one who has been arrested on execution and examined before him, he has no power to adjourn the case. Russell *v.* Goodrich, 8 Allen (Mass.) 150.

The court has no power to adjourn the examination of a judgment debtor to a place and time when there is to be no session of the court, and to leave the case open under a general continuance. Bliss *v.* Kershaw, 180 Mass. 99, 61 N. E. 823.

Attendance of another magistrate at adjourned examination.— Where two magistrates meet at the time and place appointed for the examination and adjourn to a future day, and only one of them is able to attend again on that day, another magistrate may attend instead of him who was absent, and the two who are thus present may lawfully proceed to examine the debtor. Brown *v.* Lakeman, 5 Metc. (Mass.) 347.

48. Stagg *v.* Austin, 18 N. J. L. 82.

49. Although the magistrate cannot of his own motion adjourn for a longer time than that prescribed by statute, yet he may do so by consent of the parties (Leach *v.* Pillsbury, 18 N. H. 525), and a creditor who has consented to such adjournment cannot afterward object to it as irregular (Leach *v.* Pillsbury, 18 N. H. 525); and where the creditor's counsel agrees in writing that the examination shall be postponed, the creditor is concluded from thereafter claiming as a breach of the debtor's recognizance the latter's failure to appear before the magistrate at the time and place appointed (Mt. Washington Glass Works *v.* Allen, 121 Mass. 283).

50. Hooper *v.* Cox, 117 Mass. 1; Morrill *v.* Norton, 116 Mass. 487, although caused by the absence of the magistrate is a breach of the recognizance.

51. A master in chancery who has adjourned the hearing of an application to take the poor debtor's oath to a certain day has no jurisdiction before that day to order a further adjournment; and if he does so, and fails to attend on the day first fixed and no other competent magistrate attends on that day, there is a breach of the recognizance. Sanford *v.* Quinn, 147 Mass. 69, 16 N. E. 570.

52. O'Connell *v.* Hovey, 126 Mass. 310; Doane *v.* Bartlett, 4 Allen (Mass.) 74.

53. In some jurisdictions the poor debtor's oath may be lawfully administered by any justice of the peace within the county. Betts

oath,[54] must depend upon the statutory provisions relating to the proceeding. If, on the examination and hearing of the parties, the magistrate or justice is satisfied that the debtor's disclosure is true and they do not discover anything therein inconsistent with his taking the oath,[55] they may administer the same to him.[56] In some jurisdictions, however, it has been held that the magistrates to whom a debtor applies for the oath of insolvency have no discretion where he has complied with the requisites of the act in relation to notice, schedule, etc., but are bound to administer the oath, although they may be of the opinion that the debtor is about to commit perjury.[57]

(f) Appraisal and Assignment of Property. In Maine, where a debtor shall disclose in his examination that he possesses bank-bills, notes, accounts, bonds, or any property not exempt by law, which cannot be attached, appraisers shall be selected to appraise such property,[58] before the oath can be administered;[59] and a failure to have the appraisal made will prevent the debtor's discharge from his bond.[60] And in several jurisdictions the debtor, as a condition of being admitted to take the oath, may be required to deliver up his property,[61] or assign the same to his creditor.[62]

(g) Costs.[63] The creditor is entitled to recover of the debtor the expense of citing him on the execution to appear and make a disclosure,[64] but the payment of the magistrate's fee is not a condition precedent to the discharge of a poor debtor.[65] A defendant who is discharged by taking the insolvent's oath is not entitled to costs.[66]

(4) Charges of Fraud — (a) In General. In some jurisdictions, where a debtor arrested on execution applies to take the poor debtor's oath, the creditor may file charges of fraud against him[67] at any time before the commencement of

v. Dimon, 3 Conn. 107, holding that the administration of such oath is a ministerial and not a judicial act. In others it may be administered by any justice of the supreme court, or any trial justice in the county where the prisoner is committed. Wilcox *v.* Crowell, 16 R. I. 707, 19 Atl. 329.

54. Little *v.* Cochran, 24 Me. 509.

55. **Where not satisfied that his disclosure is true** or where they discover anything therein inconsistent with his taking said oath (Little *v.* Cochran, 24 Me. 509; Burnham *v.* Adams, 4 Fed. Cas. No. 2,173, 2 Cliff. 569), or where the debtor is found guilty upon the charge of fraud (Noyes *v.* Manning, 159 Mass. 446, 34 N. E. 682), there is no authority to administer the oath. So where after a disclosure the debtor pays out money or disposes of property in which the creditors are given a lien, the magistrates have no authority to administer the oath. Butman *v.* Holbrook, 27 Me. 419.

Action for false disclosure.— By statute in some states, when the debtor authorized or required to disclose on oath wilfully discloses falsely, withholds, or suppresses the truth, the creditor may bring a special action on the case against him. Golder *v.* Fletcher, 71 Me. 76; Dyer *v.* Burnham, 48 Me. 298, to be brought in the name of the judgment creditor.

56. *In re* Ballou, 7 R. I. 466; Burnham *v.* Adams, 4 Fed. Cas. No. 2,175, 2 Cliff. 569.

57. Harrison *v.* Emmerson, 2 Leigh (Va.) 764.

58. Bachelder *v.* Sanborn, 34 Me. 230; Wingate *v.* Leeman, 27 Me. 174; Metcalf *v.* Hilton, 26 Me. 200; Harding *v.* Butler, 21 Me. 191.

The justices of the peace and quorum appointed to hear the disclosure of a debtor have no authority by virtue of that appointment to act as appraisers of the property disclosed. Wingate *v.* Leeman, 27 Me. 174.

59. Harding *v.* Butler, 21 Me. 191. And see Call *v.* Barker, 27 Me. 97.

60. Bachelder *v.* Sanborn, 34 Me. 230.

61. Wade *v.* Judge, 5 Ala. 130.

62. Leighton *v.* Pearson, 49 Me. 100; Clement *v.* Wyman, 31 Me. 50; Call *v.* Barker, 27 Me. 97; Head *v.* Clarke, 45 N. H. 287; Sheafe *v.* Laighton, 36 N. H. 240.

It cannot, however, be held fraud for an insolvent debtor to omit to include in his schedule property assigned to him by commissioners, in allotting an insolvent debtor's provision, although the property in question is such as cannot be legally assigned. Ballard *v.* Waller, 52 N. C. 84.

In Virginia it has been held that where a debtor is discharged as an insolvent debtor his estate in lands at the time of discharge is without any deed by statute so completely vested in the sheriff that an ejectment for such lands cannot afterward be maintained by the debtor where the execution remains unsatisfied. Syrus *v.* Allison, 2 Rob. 200; Ruffners *v.* Lewis, 7 Leigh 720, 30 Am. Dec. 513.

63. **Costs** generally see Costs.

64. Emerson *v.* Lombard, 15 Me. 458.

65. Coleman *v.* Hawkes, 120 Mass. 594.

66. Roberts *v.* Shell, 4 Yerg. (Tenn.) 160.

67. As for instance that he concealed or had disposed of his property. Leonard *v.* Bolton, 153 Mass. 428, 26 N. E. 1118.

the magistrate's decision;[68] and where such charges are sustained[69] the debtor shall not be released but may be subjected to additional punishment.[70]

(b) Form and Sufficiency. Charges of fraud need not be stated with the particularity requisite for an indictment, but only with sufficient clearness to inform the debtor of the nature and particulars of the transaction intended to be proved against him.[71] They may be alleged upon belief without venue, and as "on or about" a day named within the limitation presented by statute,[72] and may be signed and sworn to by one of several partners in behalf of his firm.[73] The question whether the charges of fraud were sufficient in form cannot be raised on motion in arrest of judgment.[74]

(c) Trial[75] — aa. *Nature.* The charges of fraud are in the nature of an action at law, notwithstanding the provision for punishment by imprisonment.[76] They are incidental to the debtor's application to be relieved from imprisonment, by taking the oath, and are set up by way of answer to that application.[77]

bb. *Evidence.*[78] Upon the trial of charges of fraud the creditor has the burden of proof,[79] but the rules of evidence in civil proceedings apply,[80] and such charges need not be proved beyond a reasonable doubt as in strictly criminal cases.[81] The debtor and his wife may be called by the creditor as witnesses on the trial of charges of fraud.[82]

cc. *Motion to Dismiss.* A motion by the debtor to dismiss charges of fraud may be entertained if seasonably made.[83]

(d) Appeal.[84] Upon the trial of charges of fraud, either party has a right of appeal from the decision, and of trial by jury,[85] such appeal being in like manner as in civil actions,[86] and statutes giving this right to the creditor are not unconstitutional as placing the debtor twice in jeopardy.[87] An appeal will not be allowed merely for the purpose of enhancing the punishment.[88] This right of

68. Andrews *v.* Cassidy, 142 Mass. 96, 7 N. E. 545.

69. The proceedings on such charges are not barred by the fact that the creditor preferring them proved his claim against the debtor in bankruptcy proceedings. Morse *v.* Dayton, 125 Mass. 47.

70. Leonard *v.* Bolton, 153 Mass. 428, 26 N. E. 1118; Everett *v.* Henderson, 150 Mass. 411, 23 N. E. 318.

71. Anderson *v.* Edwards, 123 Mass. 273; Stockwell *v.* Silloway, 100 Mass. 287; Chamberlain *v.* Hoogs, 1 Gray (Mass.) 172.

Amendment.— The omission to state in charges of fraud alleged against a debtor on his application to take the poor debtor's oath that the alleged fraud was committed after the debt of the creditor was contracted may be supplied by amendment (Brown *v.* Tobias, 1 Allen (Mass.) 385), and a motion to dismiss because of the insufficiency of the charges of an objecting debtor should be overruled, where the charges and specifications were afterward amended (Lamagdelaine *v.* Tremblay, 162 Mass. 339, 39 N. E. 38).

Insufficient charge of intention not to pay see Chamberlain *v.* Hoogs, 1 Gray (Mass.) 172.

72. Stockwell *v.* Silloway, 100 Mass. 287.

73. Brown *v.* Tobias, 1 Allen (Mass.) 385.

74. Lamagdelaine *v.* Tremblay, 162 Mass. 339, 39 N. E. 38.

75. After default of creditor upon his failure to appear the magistrate has no further jurisdiction except to discharge the debtor and cannot proceed to administer the oath and to render judgment on charges of fraud filed against the debtor. Longley *v.* Cleavland, 133 Mass. 256.

76. Everett *v.* Henderson, 150 Mass. 411, 23 N. E. 318.

77. Everett *v.* Henderson, 150 Mass. 411, 23 N. E. 318; Stockwell *v.* Silloway, 100 Mass. 287.

78. Evidence generally see Evidence.

79. Everett *v.* Henderson, 150 Mass. 411, 23 N. E. 318.

80. Everett *v.* Henderson, 150 Mass. 411, 23 N. E. 318; Anderson *v.* Edwards, 123 Mass. 273.

81. Anderson *v.* Edwards, 123 Mass. 273.

82. Anderson *v.* Edwards, 123 Mass. 273.

83. Clatur *v.* Donegan, 126 Mass. 28.

84. Appeals generally see Appeal and Error.

85. Everett *v.* Henderson, 150 Mass. 411, 23 N. E. 313.

When the creditor is adjudged in default for failure to appear he cannot appeal from a judgment discharging the debtor. Longley *v.* Cleavland, 133 Mass. 256.

86. Everett *v.* Henderson, 150 Mass. 411, 23 N. E. 318.

87. Stockwell *v.* Silloway, 100 Mass. 287.

88. Thus where, upon two charges of fraud, filed by a judgment creditor against his debtor, the latter is convicted on one charge and acquitted on the other and sentenced to jail, the creditor cannot appeal to the superior court. Smith *v.* Dickinson, 140 Mass. 171, 3 N. E. 40.

appeal, although claimed by the creditor does not make it less the duty of the examining magistrates to administer the oath to the debtor and issue the certificate thereof, where they decide that the charges of fraud are not maintained,[89] nor will an appeal taken from the decision of the magistrate, finding the poor debtor guilty upon charges of fraud filed, exempt the debtor from arrest on the execution.[90]

(5) RECORD — (a) IN GENERAL. The authority of the justices before whom the examination and disclosure of a poor debtor took place must appear from the record, and nothing will be presumed in favor of the jurisdiction;[91] but the record of the proceedings of justices administering a poor debtor's oath need not exhibit a compliance with the requirements of a statute when the same are merely directory.[92]

(b) CERTIFICATE — aa. *Necessity For.* It is the duty of the magistrates discharging a debtor to make out a certificate and deliver it to the debtor, this constituting the evidence upon which the prison keeper is required to discharge him and the evidence of his exemption from imprisonment on that or any other execution, to be issued on the same judgment or any other judgment founded thereon;[93] and is all that is required to complete the debtor's discharge.[94]

bb. *Form and Requisites.* Where the statute prescribes the form, a compliance therewith is sufficient and nothing further need be inserted.[95] Should a certificate come to be pleaded, it must, however, appear to apply with requisite certainty to the execution mentioned in the declaration.[96] Where the citation and bond describe the judgment on which the debtor was arrested as rendered at a certain term of court, it is not a misrecital in the discharge to describe it as rendered on a particular day of such term.[97] Where it appears by the justices' certificate to

89. Ingersoll *v.* Strong, 9 Metc. (Mass.) 447.

90. Fletcher *v.* Bartlett, 10 Gray (Mass.) 491.

91. Bowker *v.* Porter, 39 Me. 504; Granite Bank *v.* Treat, 18 Me. 340.

92. Clement *v.* Wyman, 31 Me. 50.

Even if certiorari lies to bring up the record of the proceedings of justices as to the disclosure of a poor debtor before them, only the record of the inferior tribunal can be brought up, and no facts to affect it are admissible. Pike *v.* Herriman, 39 Me. 52. The certificate of a justice that the debtor has taken the oath is not affected by the granting of a writ of certiorari to bring it before the court. Clark *v.* Metcalf, 38 Me. 122.

93. Granite Bank *v.* Treat, 18 Me. 340; Murray *v.* Neally, 11 Me. 238; Thompson *v.* Berry, 5 R. I. 95; Holbrook *v.* Pearce, 15 Vt. 616.

Time of making record and giving certificate see Murray *v.* Neally, 11 Me. 238.

The justices are not required to give the creditor a certificate of attachable interest in real estate disclosed by the debtor, when the creditor is present by his attorney, unless requested to do so by such creditor or attorney, and a failure to do so does not affect the debtor's discharge. Cannon *v.* Seveno, 78 Me. 307, 4 Atl. 789. And see Clement *v.* Wyman, 31 Me. 50.

94. Butler *v.* Fairbanks, 4 Gray (Mass.) 531.

Protection from imprisonment.— A certificate of a magistrate administering the oath to a debtor committed to jail on execution that he has been admitted to the benefit of such oath will protect him from imprisonment on such execution. Thompson *v.* Berry, 5 R. I. 95.

A creditor cannot avail himself, in any shape, of informality in a certificate, which the magistrates give to the jailer that a debtor has taken the oath. Keay *v.* Palmer, 5 N. H. 43.

95. Butler *v.* Fairbanks, 4 Gray (Mass.) 531; Chesley *v.* Welch, 10 N. H. 251, opinion of the court by Upham, J.

If the certificate substantially state the facts entitling the debtor to his discharge it will be sufficient. Garland *v.* Williams, 49 Me. 16. Thus a certificate is not invalidated by the failure of the justices to keep any further record, nor by the omission to state that the justices are disinterested and not related either to the creditor or the debtor (Butler *v.* Fairbanks, 4 Gray (Mass.) 531), nor is it invalidated by the initial letter only of his christian name being given, and all statement of his occupation omitted, in his representation to the jailer, in the application of the jailer to a justice, in the notice by the justice to the creditor, and in the certificate of discharge; if the notice to the creditor accurately states the date of the execution and the court which issued it (Davis *v.* Putnam, 5 Gray (Mass.) 321).

96. Hence a certificate setting forth an execution for a sum different from that on which the debtor is committed will not authorize his discharge, although the proper oath may have been administered to him. Holbrook *v.* Pearce, 15 Vt. 616.

97. Gray *v.* Douglass, 81 Me. 427, 17 Atl. 320.

what debt the proceedings related, their omission to insert the date of the execution on which the arrest was made will not render the proceedings void.[98] The certificate of discharge need not be stamped.[99]

cc. *Amendment.* If seasonably moved for, an amendment of the certificate will be allowed,[1] and where justices duly selected and qualified have administered the poor debtor's oath, after an examination, to a debtor who had been arrested on execution and had given bond, they may amend their certificate conformably to the truth of the case,[2] not only after the commencement of a suit upon the bond but upon the trial thereof,[3] as for instance by adding in accordance with the proof a much fuller statement of the manner in which they were selected,[4] by stating by whom they were selected as justices,[5] and by stating that the debtor was examined on oath.[6]

dd. *Effect as Evidence.* The certificate of justices of their proceedings under an insolvent act is of itself evidence of the facts it contains, and a party claiming under such proceedings is not compelled to prove such facts by evidence *aliunde* the certificate.[7] It is, however, evidence only of the facts required by the statute to be stated in the certificate.[8]

ee. *Record and Delivery to Jailer.* A statutory requirement that the return as to the administration of the oath to the debtor should be made to the court within a certain time has been held to be merely directory.[9] In some jurisdictions the certificate must be delivered to the jailer,[10] or the going at large of the debtor will be a breach of his jail bond.[11] In others, however, where the condition of the bond does not expressly require that the certificate shall be filed with the keeper of the prison, the bond will not be forfeited by the omission to file it,[12] nor is it essential to the defense of a suit on a poor debtor's bond that the certificate should be filed with the prison keeper prior to the commencement of the suit.[13]

ff. *Conclusiveness of Certificate.* In some jurisdictions the doctrine is expressly recognized that a creditor may go behind the certificate of the magistrates and show irregularity in the preliminary proceedings, as for instance in the notice.[14] In

Where there had been an adjournment.— See Bowker *v.* Porter, 39 Me. 504.

98. Burnham *v.* Howe, 23 Me. 489.

99. Angier *v.* Smalley, 58 Me. 425.

1. Scamman *v.* Huff, 51 Me. 194.

2. Burnham *v.* Howe, 23 Me. 489; Ward *v.* Clapp, 4 Metc. (Mass.) 455.

3. Burnham *v.* Howe, 23 Me. 489.

Even after action brought upon such debtor's bond for the liberty of the jail limits; and such amended certificate will avail defendants in such action. Ward *v.* Clapp, 4 Metc. (Mass.) 455.

4. Kimball *v.* Irish, 26 Me. 444; Burnham *v.* Howe, 23 Me. 489.

5. Ayer *v.* Woodman, 24 Me. 196.

6. Kimball *v.* Irish, 26 Me. 444.

7. Winingder *v.* Diffenderffer, 5 Harr. & J. (Md.) 181. And see Chesley *v.* Welch, 10 N. H. 251.

Evidence of service of notice.— A certificate in which it is stated that the attorney of the creditor was duly notified is *prima facie,* if not conclusive, evidence of the service of the notice. Osgood *v.* Hutchins, 6 N. H. 374.

Subject to rebuttal.— Where the certificate of the justices states their own character, the parties to the process, the commitment of the debtor, his desire to take the oath, and that he had caused the creditor to be notified according to law, it is sufficient to make out a *prima facie* case of jurisdiction, subject to rebuttal, however, by proof of a want of it. Granite Bank *v.* Treat, 18 Me. 340.

8. If other facts or matters than those required are incorporated therein, such foreign matter will be treated as surplusage. Winsor *v.* Clark, 39 Me. 428.

9. Allen *v.* Bruce, 12 N. H. 418.

10. Holbrook *v.* Pearce, 15 Vt. 616; Staniford *v.* Barry, Brayt. (Vt.) 200. And see Bryan *v.* Perry, 5 T. B. Mon. (Ky.) 275.

11. Haight *v.* Richards, 3 Vt. 77.

12. Granite Bank *v.* Treat, 18 Me. 340; Murray *v.* Neally, 11 Me. 238; Kendrick *v.* Gregory, 9 Me. 22.

It is not necessary that a jailer should discharge a poor debtor who has given bond for the prison limits under Rev. St. c. 91, and has been duly discharged within the ninety days by two justices. Their certificate is the only authority necessary to his going at large. Green *v.* Wilbur, 10 Cush. (Mass.) 439.

The certificate of the oath is intended merely as a notice to the prison keeper of what has been done that he may set the debtor at liberty, if in his custody; but he may do this upon any other satisfactory information of the fact, taking upon himself the peril of proving it. Kendrick *v.* Gregory, 9 Me. 22.

13. Brown *v.* Watson, 19 Me. 452.

14. Baker *v.* Moffat, 7 Cush. (Mass.) 259 [*overruling* Haskell *v.* Haven, 3 Pick. 404]; Young *v.* Capen, 7 Metc. (Mass.) 287; Niles

others, however, the adjudication of the magistrates respecting the notice and return is conclusive,[15] unless its effect be destroyed by an agreed statement of facts or by a voluntary admission of illegal testimony.[16] The certificate while *prima facie* evidence of jurisdiction of the justices is not conclusive on the point and want of jurisdiction may be shown.[17]

(6) Validity and Effect of Discharge — (a) Validity. A poor debtor's discharge is not rendered invalid by reason of a mistake honestly made,[18] by payment of fees to his attorney and to the justice,[19] or by failure to pay an amount stipulated to be paid by him until the day of adjournment of the proceedings,[20] nor is it rendered less valid by the fact that the oath was unnecessarily administered to him.[21] Where, however, an imprisoned debtor procures a discharge of the execution by false representation or concealment of the truth the discharge will be void;[22] and it has been held that if it does not affirmatively appear from the justice's certificate of discharge of a poor debtor, or from the proofs in the case, that the justices were "disinterested," the certificate will not defeat an action on the bond.[23] The creditor does not waive his right to object to the validity of the discharge by not accepting an offer of assignment of property to him by the debtor.[24]

(b) Effect — aa. *In General.* As a general rule an execution debtor regularly discharged upon examination cannot be again arrested or imprisoned on the same or a subsequent execution issued on the same judgment or one founded thereon,[25] or as it is provided in some jurisdictions from arrest or imprisonment for the same debt, costs, or charges,[26] unless convicted of having wilfully sworn falsely

v. Hancock, 3 Metc. (Mass.) 568; Slasson *v.* Brown, 20 Pick. (Mass.) 436; Putnam *v.* Longley, 11 Pick. (Mass.) 487; Flanders *v.* Thompson, 2 N. H. 421.

In Pennsylvania it has been held that the record of the discharge of an insolvent is in an action on the bond conclusive as to his compliance with all things required by law to entitle him to a discharge. Sheets *v.* Hawk, 14 Serg. & R. 173, 16 Am. Dec. 486. And see McKinney *v.* Crawford, 8 Serg. & R. 351.

15. Gray *v.* Douglass, 81 Me. 427, 17 Atl. 320; Lewis *v.* Brewer, 51 Me. 108; Waterhouse *v.* Cousins, 40 Me. 333; Lowe *v.* Dore, 32 Me. 27; Baker *v.* Holmes, 27 Me. 153; Black *v.* Ballard, 13 Me. 239; Allen *v.* Hall, 8 Vt. 34; Raymond *v.* Southerland, 3 Vt. 494; Smith *v.* Quinton, Brayt. (Vt.) 200; Thornton *v.* Robinson, Brayt. (Vt.) 199.

Qualifications of rule. — This, however, has been held not to forbid the admission of evidence to show that no legal service of the citation was made, although it may contradict the record and certificate of the magistrate who administered the oath. Cannon *v.* Seveno, 78 Me. 307, 4 Atl. 789; Lewis *v.* Brewer, 51 Me. 108; Baldwin *v.* Merrill, 44 Me. 55. And the adjudication that property disclosed was not subject to the creditor's lien, or omitting to do what was required in order to make it available to the creditor when by the disclosure it was clearly liable to be taken on execution, is not conclusive but subject to revision in a suit on the bond. Jewett *v.* Rines, 39 Me. 9.

16. Clement *v.* Wyman, 31 Me. 50.

17. Granite Bank *v.* Treat, 18 Me. 340.

18. Collins *v.* Lambert, 30 Me. 185.

19. Where a poor debtor before beginning his disclosure paid his attorney and also the justice's fees, his discharge is proper notwithstanding the creditor claimed the money. Levett *v.* Jones, 49 Me. 355.

20. Osgood *v.* Kezar, 138 Mass. 357.

21. Hyatt *v.* Felton, 9 Allen (Mass.) 378.

22. Lewis *v.* Gamage, 1 Pick. (Mass.) 347.

23. Scamman *v.* Huff, 51 Me. 194.

24. At least this is true where the creditor did not lead the magistrate into an irregular course of proceeding but merely allowed the debtor to proceed in his own way. Call *v.* Barker, 27 Me. 97.

25. McLaughlin *v.* Whitten, 32 Me. 21; Spencer *v.* Richardson, 7 Johns. (N. Y.) 116. See also *In re* Smith, 4 Harr. (Del.) 554.

After an execution debtor has given a relief bond on the execution, a suit on the judgment cannot be commenced until after the expiration of six months. Rollins *v.* Richards, 36 Me. 485.

Although plaintiff's name is not mentioned in his list a discharge under the insolvent act releases a prisoner. Com. *v.* Cornman, 4 Serg. & R. (Pa.) 2.

Extends to judgments in actions for wrongs. — A discharge under the New York act to abolish imprisonment for debt in certain cases extends to judgments in actions for wrongs. Hayden *v.* Palmer, 24 Wend. (N. Y.) 364; *Ex p.* Smith, 5 Cow. (N. Y.) 276; *Ex p.* Thayer, 4 Cow. (N. Y.) 66; People *v.* Justices Mar. City Ct., 3 Cow. (N. Y.) 366.

Where in close confinement or upon jail limits, the order of liberation for the discharge of an insolvent debtor discharges him from all imprisonment for debt. Howard *v.* Pasteur, 7 N. C. 270.

26. *Ex p.* Batchelder, 96 Cal. 233, 31 Pac. 45; Kellogg *v.* Underwood, 163 Mass. 214, 40

upon his examination,[27] or where he has been guilty of fraud in making his assignment;[28] and an execution can issue only against the estate of such defendant,[29] and if arrested on execution issued in a suit brought on the same judgment is entitled to be discharged on habeas corpus,[30] or in some jurisdictions the second execution will be set aside on motion.[31] This exemption does not extend to another cause which did not exist at the time of the first arrest or imprisonment.[32] It only confers immunity from arrest on account of any debt provable under such proceedings and does not bar a subsequent suit for such a debt.[33] Such discharge of one judgment debtor from imprisonment will not release his co-defendants so as to prevent the subsequent issuance of an execution against their persons or property,[34] and where a wife may be imprisoned on a body execution without her husband, the husband's discharge as a poor debtor will furnish no legal reason for the exoneration of the wife.[35]

bb. *As to What Creditors Operative.* The discharge, is, however, operative only as to those creditors who have been duly notified as required by law.[36]

cc. *Effect of Discharge on Second Application.* Where successive applications are allowed a recognizance will be avoided by the discharge of the debtor by a qualified magistrate after due proceedings within the proper time, notwithstanding another application previously made with the proper time intervening to another magistrate by the debtor, and his failure to appear at the time and place fixed for this examination.[37]

dd. *Effect of Discharge in Another State.* It has been held in a number of cases that a debtor's body will not be exempt from arrest under execution in one state because he has been committed in another state for the same debt and has been there discharged.[38]

ee. *Effect on Prison-Limits Bond.* Subject to certain qualifications, such as change of circumstances since refusal on first citation,[39] the administration of the wrong

N. E. 104; *In re* Davis, 111 Mass. 288; Bannister *v.* Miller, 54 N. J. Eq. 121, 33 Atl. 1066; Taylor *v.* Ames, 5 R. I. 361.

Debts contracted previous to assignment.— An arrest of a person who has received his discharge as an insolvent debtor, by virtue of an execution issued upon a judgment recovered against him while he is applying for the benefit of the acts, and previous to his discharge, is unlawful. State *v.* Ward, 8 N. J. L. 120.

Marshal's fees cannot constitute a ground for a new arrest of a discharged debtor, irrespective of an agreement to that effect. U. S. *v.* Smith, 27 Fed. Cas. No. 16,327, 3 Cranch C. C. 66.

27. *In re* Davis, 111 Mass. 288.

28. Man *v.* Lowden, 4 McCord (S. C.) 485.

29. Trumbull *v.* Smith, 2 Conn. 241; Moore *v.* Wilmarth, 17 Fed. Cas. No. 9,781. And see Miller *v.* Miller, 25 Me. 110.

Equitable remedies against property.— When a debtor has been discharged under the act for the relief of insolvents, so that his body cannot be retaken, any choses in action or other property not subject to an execution at law which he may afterward acquire may be reached in equity; for the statute having declared that no execution shall again issue against his body, but that one may issue against "any estate" which he may subsequently acquire, a court of equity will provide a remedy if it cannot be reached by execution at law. Brown *v.* Long, 22 N. C. 138.

30. *In re* Davis, 111 Mass. 288; State *v.* Ward, 8 N. J. L. 120.

31. *In re* Foord, 5 N. H. 310.

It is unnecessary to plead discharge in bar of an execution against the body in a suit upon the judgment. *In re* Foord, 5 N. H. 310.

32. McLaughlin *v.* Whitten, 32 Me. 21.

33. Bannister *v.* Miller, 54 N. J. Eq. 121, 32 Atl. 1066.

34. Kellogg *v.* Underwood, 163 Mass. 214, 40 N. E. 104.

35. Hall *v.* White, 27 Conn. 488.

36. Williams *v.* Floyd, 27 N. C. 649; Crain *v.* Long, 14 N. C. 371.

Sufficient notice to conclude creditor see Trumbull *v.* Smith, 2 Conn. 241.

37. Sweeney *v.* Gillooly, 103 Mass. 549.

38. This is upon the principle that the *lex loci* applies only to the interpretation of contracts and that the remedy must be prosecuted according to the laws of the country in which the action is brought.

Connecticut.— Woodbridge *v.* Wright, 3 Conn. 523.

Georgia.— Joice *v.* Scales, 18 Ga. 725.

New Hampshire.— Hubbard *v.* Wentworth, 3 N. H. 43.

New Jersey.— Wood *v.* Malin, 10 N. J. L. 208.

Pennsylvania.—James *v.* Allen, 1 Dall. 188, 1 L. ed. 93.

South Carolina.— Ayres *v.* Audubon, 2 Hill 601.

See 21 Cent. Dig. tit. "Execution," § 1360.

39. **Where a change of circumstances is necessary** to entitle a debtor to a second citation to his creditor, if a poor debtor has

oath,[40] want of legal service of notice on the creditor,[41] and the like, the general rule is that a discharge under the poor debtors' acts is a release from and a satisfaction of the jail-limits bond,[42] even though the discharge was obtained by fraud.[43]

Q. Rearrest — 1. In General — Common-Law Rule. It is a general principle of the common law that a man shall not be taken twice in execution for the same cause,[44] the arrest upon execution by order of the creditor and discharge being considered even as a satisfaction.[45]

2. On Same Writ. Although the common-law rule just stated has usually been changed by statute so as to preserve to the creditor all his rights and remedies on the judgment,[46] yet it has been held that the debtor cannot be rearrested on the same execution against his body, where the debtor enters into a recognizance in compliance with the statute[47] and by taking advantage of the provisions of the Poor Debtors' Act either is allowed to take the oath or is excused by the non-appearance of the creditor from doing so;[48] where the jailer

applied in the same action to be admitted to the oath, and after hearing upon the merits been refused, his discharge under a second citation to his committing creditor will be void, unless upon a change of circumstances since the refusal, recited in the citation, and will afford no jurisdiction, in an action against him and sureties upon a prison-limits bond, for an escape from the limits. Eastwood *v.* Schroeder, 5 R. I. 388.

40. Where wrong oath has been administered.— Where, however, a prisoner is liberated from prison by the certificate of two magistrates that he had taken the proper oath, and it appears that they had administered a wrong oath, he will be held guilty of an escape. Little *v.* Hasey, 12 Mass. 319.

41. Want of legal service of notice on creditor.— If a debtor who has given bond for the liberty of the jail limits is admitted to that oath without legal service of notice on the creditor and thereupon goes without those limits, he commits a breach of the condition of his bond. Young *v.* Capen, 7 Metc. (Mass.) 287.

42. *Maine.*— Kendrick *v.* Gregory, 9 Me. 22.

Massachusetts.— Providence City Bank *v.* Fullerton, 11 Metc. 73.

New York.— Hayden *v.* Palmer, 2 Hill 205.

South Carolina.— Hibler *v.* Hammond, 2 Strobh. 105.

Vermont.— Carter *v.* Miller, 12 Vt. 513.

United States.— Ammidon *v.* Smith, 1 Wheat. 447, 4 L. ed. 132.

See 21 Cent. Dig. tit. "Execution," § 1361.

But see Wells *v.* Lindsley, 2 Root (Conn.) 481, holding that if a debtor in prison on execution immediately goes out of jail on taking the poor debtor's oath, although with the consent of the jailer, it is a voluntary escape.

Where the United States prosecute their suits in the state court, they are subject to the state law as to the manner of enforcing their rights; and in such case a discharge from imprisonment of a judgment debtor under a law of the state will bar an action of debt by the United States on a bond given for the jail liberties. Stearns *v.* U. S., 22 Fed. Cas. No. 13,341, 2 Paine 300.

43. Ammidon *v.* Smith, 1 Wheat. (U. S.) 447, 4 L. ed. 132.

44. U. S. *v.* Watkins, 28 Fed. Cas. No. 16,650, 4 Cranch C. C. 271; Vigers *v.* Aldrich, 4 Burr. 2482; Blackburn *v.* Stupart, 2 East 243; Fish's Case, Godb. 372; Jaques *v.* Withy, 1 T. R. 557.

The cases of fraud and of escape are, however, exceptions to the principle that one shall not be twice arrested for the same cause. Little *v.* Newburyport Bank, 14 Mass. 443. See *infra,* XIV, Q, 2, 3. As to voluntary escape, however, see *infra,* XIV, Q, 4. So if the debtor delivers a false schedule of his effects he may be again arrested on the action or execution on which he was discharged. Aiken *v.* Moore, 1 Hill (S. C.) 432. And see Mack *v.* Garrett, 10 Rich. (S. C.) 79.

45. Little *v.* Newburyport Bank, 14 Mass. 443; Aiken *v.* Moore, 1 Hill (S. C.) 432. This principle is as applicable to the United States as to other creditors. U. S. *v.* Watkins, 28 Fed. Cas. No. 16,650, 4 Cranch C. C. 271.

46. The South Carolina act of 1815 alters the common law, so that a plaintiff may discharge a defendant in custody on a capias ad satisfaciendum, for a time, with his consent without impairing his rights, and may retake him. Barnstine *v.* Eggart, 3 McCord 162, 15 Am. Dec. 625.

47. The recognizance takes the place of the execution and the arrest, and remains as security to the creditor, and the power of the execution is suspended until the debtor submits himself to examination, and the magistrate refuses the oath provided for the relief of poor debtors and annexes his certificate to that effect. Morgan *v.* Curley, 142 Mass. 107, 7 N. E. 726. And see Jacot *v.* Wyatt, 10 Gray (Mass.) 236; Lothrop *v.* Bailey, 14 Allen (Mass.) 514.

The remedy of the creditor is upon the recognizance only. Morgan *v.* Curley, 142 Mass. 107, 7 N. E. 726; Kennedy *v.* Duncklee, 1 Gray (Mass.) 65; Coburn *v.* Palmer, 10 Cush. (Mass.) 273. And see Harris *v.* Broyles, 25 Ga. 136.

48. If a debtor who has been arrested on an execution is allowed by the magistrate before whom he is carried, with the consent of

refuses to receive and retain the body of the debtor delivered to his custody by the arresting officer;[49] or where the creditor elects to bring action against the sheriff for escape.[50] Where, however, the debtor illegally escapes,[51] is illegally discharged from arrest,[52] or forfeits his prison-bounds bond by breaking the prison bounds,[53] he may be retaken on the original execution and committed to custody. But it seems that the debtor may sometimes by agreement,[54] or by his acts and conduct,[55] waive his right not to be arrested again on the same writ.

3. On Subsequent Writ. While a debtor is in the custody of the sheriff under an execution against the person, his creditor has no right to issue another execution against the person of defendant on the same judgment to the sheriff of another county,[56] and where, after arrest on an execution against the person, the writ is set aside as void, there cannot on a reversal of the order be a rearrest under the same process; but a new execution against the person will issue on the judgment.[57]

4. After Voluntary Escape. In some jurisdictions the doctrine is well settled that after a voluntary escape of a prisoner on execution the officer who permitted it has no authority to retake the debtor upon the same execution against his will, even within the state in which the escape has taken place,[58] at least without the

the creditor, to go at large from day to day during his examination, and is present at the time and place to which it is adjourned, and waits in readiness to be further examined, and to take the oath, a reasonable time, and until he is informed by the magistrate that the oath will be administered to him, and the creditor does not appear, this is a full performance by the debtor of his duty, although the oath be not administered, and the creditor has not power to arrest him. Doane *v.* Bartlett, 4 Allen (Mass.) 74. And see Little *v.* Newburyport Bank, 14 Mass. 443.

A prisoner under execution discharged and sent to the asylum, under a statute providing that if a person imprisoned on civil process becomes insane the judge may discharge him and order him sent to the asylum, may, it seems, on being restored to sanity be arrested again by his creditors. Bush *v.* Pettibone, 4 N. Y. 300.

49. Houghton *v.* Wilson, 10 Gray (Mass.) 365, holding that a constable who arrests a debtor on execution and commits him to jail, but leaves no copy of the execution with the jailer, who therefore refuses to receive and detain him, cannot arrest him again on the same execution.

50. If a creditor brings an action against a sheriff for the escape of a prisoner in execution, and thereby elects to consider him out of custody he cannot insist on rearresting the prisoner or on his continuance in custody. *Ex p.* Voltz, 37 Ind. 175, 10 Am. Rep. 86. And see Brown *v.* Littlefield, 1 Wend. (N. Y.) 398; McElroy *v.* Mancius, 13 Johns. (N. Y.) 121; Rawson *v.* Turner, 4 Johns. (N. Y.) 469.

51. Murray *v.* Peay, 1 McMull. (S. C.) 10.

If the sheriff on being sued for the escape suffers judgment and pays the amount he may again arrest defendant and hold him in jail in execution on the original judgment. *Ex p.* Voltz, 37 Ind. 237.

52. The illegal discharge of a prisoner arrested on capias ad satisfaciendum amounts only to an escape and defendant may be arrested on the same or another execution. Freeman *v.* Smith, 7 Ind. 582. And see Wendover *v.* Tucker, 4 Ind. 381.

53. Owen *v.* Glover, 18 Fed. Cas. No. 10,629, 10,630, 2 Cranch C. C. 522, 578.

Where a debtor has been out for more than a year upon a prison-limit bond, a recommitment upon the writ is not a breach of his privilege as a witness and party bound, to attend the court. *Ex p.* Bill, 3 Fed. Cas. No. 1,405, 3 Cranch C. C. 117.

54. Little *v.* Newburyport Bank, 14 Mass. 443, holding that where a debtor who has been taken on execution is liberated by the creditor on an agreement that he will return on certain conditions, and the debtor afterward surrenders himself pursuant to the agreement, he may be again imprisoned on the same execution.

55. Houghton *v.* Wilson, 10 Gray (Mass.) 365, holding that if the second arrest and commitment are voluntarily submitted to by the debtor he cannot maintain an action for assault and battery or false imprisonment.

56. Noe *v.* Christie, 15 Abb. Pr. N. S. (N. Y.) 346.

57. Carrigan *v.* Washburn, 9 N. Y. Suppl. 541, 18 N. Y. Civ. Proc. 79.

58. *Massachusetts.*— Doane *v.* Baker, 6 Allen 260; Doane *v.* Bartlett, 4 Allen 74; Brown *v.* Getchell, 11 Mass. 11; Appleby *v.* Clark, 10 Mass. 59; Com. *v.* Drew, 4 Mass. 391.

New Hampshire.— Sherburn *v.* Beattie, 16 N. H. 437.

New York.— Lockwood *v.* Mercereau, 6 Abb. Pr. 206; Clark *v.* Cleveland, 6 Hill 344; Thompson *v.* Lockwood, 15 Johns. 256; Yates *v.* Van Rensselaer, 5 Johns. 364; Lansing *v.* Fleet, 2 Johns. Cas. 3, 1 Am. Dec. 142.

Pennsylvania.— Com. *v.* Sheriff, 1 Grant 187.

England.— Pitcher *v.* Bailey, 8 East 171; Atkinson *v.* Matteson, 2 T. R. 172.

See 21 Cent. Dig. tit. "Execution," § 1363.

permission of the creditor.[59] It is, however, competent for the creditor to procure a second arrest of the party, who had been arrested or imprisoned, notwithstanding the escape voluntarily permitted by the jailer,[60] and it has been held that this right can be assigned to the sheriff by parol or otherwise and the sheriff may then exercise it in a manner as ample as could the creditor himself;[61] but the right to imprison ceases where the creditor gives the debtor permission to go off the jail limits or to go at large.[62] In other jurisdictions, however, where a sheriff permits a person whom he has arrested for debt to escape he may recapture him and hold him as before, as the prisoner of the execution creditor.[63]

XV. WRONGFUL EXECUTION.

A. Nature and Grounds of Liability — 1. WRONGFUL ISSUANCE OF EXECUTION. An execution is wrongful where the writ is issued upon a void judgment,[64] or where the party causing the writ to be issued knows that the judgment has been discharged, either by payment,[65] or by an express agreement,[66] or where the judgment has been extinguished by a valid discharge in bankruptcy.[67] A party issuing an execution on a judgment for a debt which he knew to have been paid before the entry of the judgment is liable in an action for malicious abuse of legal process, whether he caused the judgment to be entered or not.[68]

2. WRONGFUL LEVY.[69] A levy is wrongful if made under a writ which was wrongfully issued,[70] or where events subsequent to the issuance of the writ have made it improper to proceed thereunder.[71] The levy is also wrongful if made in an unauthorized manner,[72] or if it is made upon property of a person other than the judgment debtor,[73] or property of the judgment debtor which is

Where the liberties include the jail yard, permitting a prisoner to go into the yard, from whence he escapes, is not a voluntary escape, so as to preclude the sheriff from retaking the prisoner. Lockwood *v.* Mercereau, 6 Abb. Pr. (N. Y.) 206.

59. Sherburn *v.* Beattie, 16 N. H. 437; Cheever *v.* Mirrick, 2 N. H. 376.

60. Brown *v.* Getchell, 11 Mass. 11; Appleby *v.* Clark, 10 Mass. 59; Cheever *v.* Mirrick, 2 N. H. 376; Wesson *v.* Chamberlain, 3 N. Y. 331. And see Vidrard *v.* Fradenburg, 53 How. Pr. (N. Y.) 339.

61. Cheever *v.* Mirrick, 2 N. H. 376.

62. Vidrard *v.* Fradenburg, 53 How. Pr. (N. Y.) 339.

63. People *v.* Hanchett, 111 Ill. 90.

One ordered into custody to secure the fine and costs in a criminal case having voluntarily escaped from custody may be rearrested. State *v.* McClure, 61 N. C. 491.

64. Inos *v.* Winspear, 18 Cal. 397; Gunz *v.* Heffner, 33 Minn. 215, 22 N. W. 386; Plant *v.* Holtzman, 19 Fed. Cas. No. 11,206, 4 Cranch C. C. 441.

65. Wood *v.* Currey, 57 Cal. 208; Pope *v.* Benster, 42 Nebr. 304, 60 N. W. 561, 47 Am. St. Rep. 703; Brown *v.* Feeter, 7 Wend. (N. Y.) 301.

Where goods levied upon under a second execution issued after the first has been satisfied, the act is a trespass for which the justice issuing the execution and the execution creditor who procured it to be issued are liable. Lewis *v.* Palmer, 6 Wend. (N. Y.) 367.

Suing out an execution for an amount larger than the balance actually due on the judgment does not render the execution creditor liable for the injury caused thereby, unless it is shown that he acted maliciously and without probable cause. Hall *v.* Leaming, 31 N. J. L. 321, 86 Am. Dec. 213.

66. Minus *v.* Stant, 1 Harr. (Del.) 445; Standard Oil Co. *v.* Goodman Drug Co., 1 Nebr. (Unoff.) 443, 95 N. W. 667.

67. Deyo *v.* Van Valkenburgh, 5 Hill (N. Y.) 242. See also Ruckman *v.* Cowell, 1 N. Y. 505.

68. Barnett *v.* Reed, 51 Pa. St. 190, 88 Am. Dec. 574.

69. See, generally, SHERIFFS AND CONSTABLES.

70. Wrongful issuance of execution see *supra*, XV, A, 1.

Where property is levied upon under three executions at the same time, the fact that two of them are valid is no defense to a wrongful levy under the third. Boyd *v.* Merriam, 53 Ga. 561.

71. Breck *v.* Blanchard, 20 N. H. 323, 51 Am. Dec. 222; Vail *v.* Lewis, 4 Johns. (N. Y.) 450, 4 Am. Dec. 300.

72. Hillman *v.* Edwards, (Tex. Civ. App. 1903) 74 S. W. 787.

73. *Kansas.*— Furrow *v.* Chapin, 13 Kan. 107.

Louisiana.— Sandel *v.* Douglass, 27 La. Ann. 628.

New York.— Phillips *v.* Hall, 8 Wend. 610, 24 Am. Dec. 108; Wintringham *v.* Lafoy, 7 Cow. 735.

Pennsylvania.— Hazard *v.* Israel, 1 Binn. 240, 2 Am. Dec. 438.

exempt.[74] A levy is wrongful if made first upon a class of property which the statute provides shall not be taken until another class is disposed of,[75] or, where the judgment debtor is allowed by statute the right to designate the property to be levied on, if he is denied this right,[76] or the levy is afterward made upon other property than that designated.[77] The levy is also wrongful if excessive.[78]

3. **Wrongful Sale.** Where property is sold under execution where the original levy was wrongful,[79] or where after the levy the judgment has been satisfied,[80] or a proper tender made of the amount due thereunder,[81] or where a sale is made under an execution issued upon a judgment which is afterward reversed,[82] the sale is wrongful, and the injured party may recover in an appropriate action for the damages sustained. An unlimited sale of partnership property under an execution against only one of the partners is wrongful,[83] and, where there has been a conditional sale of property, the title to remain in the vendor until payment is made, a sale of such property under execution is wrongful unless made subject to the rights of the vendor in the conditional sale.[84]

4. **Wrongful Arrest.**[85] Causing the arrest of an execution debtor, where he has sufficient property to satisfy the judgment, is a trespass for which the person suing out the execution is liable.[86] An action of trespass will lie in cases where a person has been arrested on a process which was irregularly issued and

Texas.— Pinkard *v.* Willis, 24 Tex. Civ. App. 69, 57 S. W. 891.

See 21 Cent. Dig. tit. "Execution," § 1384.

A subsequent sale is not necessary in order to give a right of action for a wrongful levy upon property of a person other than the judgment debtor. Graham *v.* Lane, 3 Brewst. (Pa.) 92.

Where there is no disturbance of the use and possession of property or other special damage shown, the mere levy of an execution upon such property when it is not subject to the levy is not a trespass for which an action will lie. Ellis *v.* Harrison, 24 Tex. Civ. App. 13, 56 S. W. 592, 57 S. W. 984; Conrady *v.* Bywaters, (Tex. Civ. App. 1893) 24 S. W. 961.

A levy upon property of a vendee under execution against his vendor, where the vendor has remained in possession and apparent ownership, does not render the execution creditor liable for the levy, if it was released upon discovery of the mistake and no damage resulted therefrom. Labat *v.* Waldmeier, 106 La. 53, 30 So. 262.

Where executions are wrongfully levied upon the property of a third person under two different judgments, each levy constitutes a separate tort, although they were both made by the same officer at the same time. Carson *v.* McCormick Harvesting Mach. Co., 18 Tex. Civ. App. 225, 44 S. W. 406.

74. Atkinson *v.* Gatcher, 23 Ark. 101; Parker *v.* Hale, (Tex. Civ. App. 1903) 78 S. W. 555.

Exemptions from levy and sale generally see Exemptions; Homestead; Sheriffs and Constables.

75. Gorham *v.* Hood, 27 Ga. 299.

Where an execution defendant makes no tender of personal property sufficient to satisfy the judgment, he cannot recover damages on the ground that the execution was levied upon his land. Ellis *v.* Harrison, 24 Tex. Civ. App. 13, 56 S. W. 592, 57 S. W. 984.

76. Avindino *v.* Beck, (Tex. Civ. App. 1903) 73 S. W. 539.

77. Beck *v.* Avondino, 82 Tex. 314, 18 S. W. 690.

78. Buchanan *v.* Goeing, 3 Ill. App. 635; Vance *v.* Vanarsdale, 1 Bush (Ky.) 504.

If the property does not sell for the amount of the debt the levy cannot be regarded as excessive, where the sale has been fairly conducted. Lynn *v.* Sisk, 9 B. Mon. (Ky.) 135.

Where the execution defendant is allowed by statute to have land divided and sold in small tracts, he cannot recover damages on the ground of an excessive levy. Ellis *v.* Harrison, 24 Tex. Civ. App. 13, 56 S. W. 592, 57 S. W. 984.

79. Hillman *v.* Edwards, (Tex. Civ. App. 1903) 74 S. W. 787.

Wrongful levy see *supra*, XV, A, 2.

80. Sanders *v.* Brock, (Tex. Civ. App. 1895) 31 S. W. 311.

After the return-day of the writ it is not necessary for an execution creditor to countermand an execution which has been satisfied, as the officer then has no authority to proceed under the execution. Vail *v.* Lewis, 4 Johns. (N. Y.) 450, 4 Am. Dec. 300.

81. Tiffany *v.* St. John, 5 Lans. (N. Y.) 153 [*affirmed* in 65 N. Y. 314, 22 Am. Rep. 612], holding that where the tender is made in the presence of the judgment creditor and he does not prohibit the sale he is liable for conversion of the property.

82. Reynolds *v.* Hosmer, 45 Cal. 616.

83. Bates *v.* James, 3 Duer (N. Y.) 45.

84. Herring *v.* Hoppock, 3 Duer (N. Y.) 20.

85. See, generally, False Imprisonment.

86. Berry *v.* Hamill, 12 Serg. & R. (Pa.) 210; Allison *v.* Rheam, 3 Serg. & R. (Pa.) 139, 8 Am. Dec. 644.

To render an arrest wrongful on the ground that the execution should have been levied upon property, it should appear that the execution debtor was ready to acquiesce in the

therefore void;[87] but where the process is merely voidable, it is, until set aside, a justification for an arrest made thereunder.[88] Where a person is taken on a good and a bad execution at the same time, he can recover only for the damages which were suffered solely on account of the bad process.[89]

B. Persons Liable — 1. In General. The liability for a wrongful execution may rest upon either or several of the following persons: The clerk[90] or justice issuing the writ,[91] the officer who executes it,[92] the execution creditor[93] or his attorney,[94] the obligors on the officer's bond of indemnity,[95] the purchaser at the execution sale,[96] or a person not a party to the writ.[97]

2. Execution Creditor — a. In General. When plaintiff places his execution in the hands of an officer for service, he is presumed to intend that no action shall be taken thereunder not authorized by the terms of the writ,[98] and he will not be liable for a wrongful execution unless he ordered or directed the officer or participated directly or otherwise than by merely suing out the process;[99] but if it is shown that the execution creditor advised, directed, or assisted the commission of the unlawful act, he will be equally liable with the officer for the injury sustained.[1] The liability of the execution creditor, however, will be limited to such damages as may have resulted from the particular act or acts which he has directed

taking of his property. Warner *v.* Stockwell, 9 Vt. 9.

87. Parsons *v.* Loyd, 3 Wils. C. P. 341.

88. Reynolds *v.* Corp, 3 Cai. (N. Y.) 267.

89. Lewis *v.* Avery, 8 Vt. 287, 30 Am. Dec. 469.

90. Coltraine *v.* McCain, 14 N. C. 308, 24 Am. Dec. 256. See also Frankem *v.* Trimble, 5 Pa. St. 520.

91. Inos *v.* Winspear, 18 Cal. 397; Dugan *v.* Melogue, 7 Blackf. (Ind.) 144; Spencer *v.* Perry, 17 Me. 413; Sullivan *v.* Jones, 2 Gray (Mass.) 570. See, generally, Justices of the Peace.

A justice issuing an execution on a void judgment is liable for the injury sustained. Inos *v.* Winspear, 18 Cal. 397; Plant *v.* Holtzman, 19 Fed. Cas. No. 11,206, 4 Cranch C. C. 441.

Where goods are levied upon under a second execution issued after the first has been satisfied, the justice issuing the execution is liable as a trespasser. Lewis *v.* Palmer, 6 Wend. (N. Y.) 367.

92. See, generally, Sheriffs and Constables.

93. See *infra*, XV, B, 2.

94. Bates *v.* Pilling, 6 B. & C. 38, 9 D. & R. 44, 5 L. J. K. B. O. S. 40, 13 E. C. L. 30; Barker *v.* Braham, 3 Wils. C. P. 368, 2 W. Bl. 866.

95. See *infra*, XV, B, 3.

96. See *infra*, XV, B, 4.

97. See *infra*, XV, B, 5.

98. Brock *v.* Berry, 132 Ala. 95, 102, 31 So. 517, 90 Am. St. Rep. 896 [*quoting* 2 Freeman Ex. § 273]. See also Howell *v.* Caryl, 50 Mo. App. 440; Welsh *v.* Cochran, 63 N. Y. 181, 20 Am. Rep. 519 [*reversing* 2 Hun 675]; Draper *v.* Buxton, 90 N. C. 182.

99. *Delaware.*— West *v.* Shockley, 4 Harr. 287.

Kentucky.— Youngs *v.* Moore, 7 J. J. Marsh. 646; Hopkins *v.* Smith, 7 J. J. Marsh. 263.

Louisiana.—Mayes *v.* Schmidt, 11 La. Ann. 476. But see Duperron *v.* Van Wickle, 4 Rob. 39, 39 Am. Dec. 509, where it was held that the officer is a person employed by the execution creditor to make the amount of his judgment, and that, as the execution creditor would be entitled to the benefits of his action if he acted rightly, he must indemnify the injured party for a wrongful act of the officer, although he did not direct the act.

Maryland.— Snively *v.* Fahnestock, 18 Md. 391.

New York.— Averill *v.* Williams, 1 Den. 501.

Ohio.— Coe *v.* Higdon, 1 Disn. 393, 12 Ohio Dec. (Reprint) 691.

Pennsylvania.— Tarr *v.* Voorhees, 1 Phila. 74.

England.— Wilson *v.* Tummon, 1 D. & L. 513, 12 L. J. C. P. 306, 6 M. & G. 236, 6 Scott N. R. 894, 46 E. C. L. 236.

See 21 Cent. Dig. tit. "Execution," §§ 1390, 1391.

1. *Arkansas.*— Atkinson *v.* Gatcher, 23 Ark. 101.

Delaware.— Minus *v.* Stant, 1 Harr. 445.

Georgia.— Waldrop *v.* Almand, 94 Ga. 623, 19 S. E. 994; Gunn *v.* Pattishal, 48 Ga. 405.

Illinois.— McDaniel *v.* Fox, 77 Ill. 343.

Kentucky.— Sanders *v.* Hamilton, 3 Dana 550; Hale *v.* Ames, 2 T. B. Mon. 143, 15 Am. Dec. 150.

Louisiana.— Stroud *v.* Humble, 2 La. Ann. 930.

Missouri.— McNeeley *v.* Hunton, 30 Mo. 332; Kamerick *v.* Castleman, 29 Mo. App. 658.

Nebraska.—Wonderlick *v.* Walker, 41 Nebr. 806, 60 N. W. 103, 33 Nebr. 504, 50 N. W. 445.

Nevada.— Elder *v.* Frevert, 18 Nev. 446, 5 Pac. 69.

New York.— Ball *v.* Loomis, 29 N. Y. 412; Deyo *v.* Van Valkenburgh, 5 Hill 242.

South Carolina.— Mitchell *v.* Dubose, 1 Mill 360; De Bruhl *v.* Parker, 2 Brev. 406.

or authorized.[2] The execution creditor may be liable for a wrongful execution in cases where no action will lie against the officer, for while the officer is protected, if he has proceeded under a writ valid upon its face and issuing out of a court of competent jurisdiction, the execution creditor must show a valid judgment authorizing the execution.[3]

b. For Acts Directed by Attorney. An execution creditor is liable for a wrongful execution directed by an attorney whom he has retained generally to conduct the suit, or to recover the amount of the judgment.[4]

c. For Acts of Officer Subsequently Ratified. An execution creditor who has not authorized or directed an unlawful levy or sale in the first instance may became liable by a subsequent ratification of the act of the officer. If, with knowledge that a sale is wrongfully made, he became a purchaser of the property,[5] or receives the proceeds of the sale it is a ratification of the wrongful act which renders him equally liable with the officer;[6] but he will not be liable where he receives the proceeds in ignorance of the fact that the sale was wrongfully made.[7] The liability of the execution creditor extends only to the injury resulting from the particular act or acts ratified.[8]

3. Obligor on Bond of Indemnity. Where a bond of indemnity is given to an officer to induce him to make a levy upon certain property, the obligors on the bond are jointly liable with the officer in case the levy proves to be illegal.[9]

England.— Jarmain *v.* Hooper, 6 M. & G. 827, 46 E. C. L. 827.

See 21 Cent. Dig. tit. "Execution," §§ 1390, 1391.

2. Buchanan *v.* Goeing, 3 Ill. App. 635. See also Evarts *v.* Hyde, 51 Vt. 183, where it was held that directing an officer to proceed with a sale of property of a person who claimed to have been adjudged a bankrupt did not render the execution creditor liable for any irregular acts of the officer in conducting the sale, which were not directed by him and of which he had no knowledge.

3. Lewis *v.* Palmer, 6 Wend. (N. Y.) 367; Collins *v.* Mann, 15 W. Va. 171; Marks *v.* Wright, 81 Wis. 572, 51 N. W. 882; Barker *v.* Braham, 3 Wils. C. P. 368, 2 W. Bl. 866. And see *infra*, XV, D, 6.

4. *Louisiana.*— Durbridge *v.* Wentzel, 17 La. Ann. 20.

Michigan.— Foster *v.* Wiley, 27 Mich. 244, 15 Am. Rep. 185.

Missouri.— Howell *v.* Caryl, 50 Mo. App. 440.

Pennsylvania.— Gillingham *v.* Clark, 1 Phila. 51.

Texas.— Richardson *v.* Jankofsky, (Civ. App. 1893) 23 S. W. 815.

England.— Bates *v.* Pilling, 6 B. & C. 38, 9 D. & R. 44, 5 L. J. K. B. O. S. 40, 13 E. C. L. 30; Jarmain *v.* Hooper, 6 M. & G. 827, 46 E. C. L. 827; Barker *v.* Braham, 3 Wils. C. P. 368, 2 W. Bl. 866; Parsons *v.* Loyd, 3 Wils. C. P. 341.

See 21 Cent. Dig. tit. "Execution," § 1390; and Attorney and Client, 4 Cyc. 942.

But see Welsh *v.* Cochran, 63 N. Y. 181, 20 Am. Rep. 519 [*reversing* 2 Hun 675], where it was held that in the absence of proof of special authority to an attorney his acts in directing a levy or sale under execution are in excess of his general powers as an attorney and do not subject his client to liability.

An execution creditor who refers an officer to his attorney for instructions is liable for an unlawful levy directed by the attorney. Armstrong *v.* Dubois, 1 Abb. Dec. (N. Y.) 8, 4 Keyes (N. Y.) 291.

The mere presence of the attorney of the execution creditor at the levy or sale will not render the execution creditor liable. Welsh *v.* Cochran, 63 N. Y. 181, 20 Am. Rep. 519 [*reversing* 2 Hun 675].

5. Murphy *v.* Sherman, 25 Minn. 196; Streeter *v.* Johnson, 23 Nev. 194, 44 Pac. 819.

6. Buchanan *v.* Goeing, 3 Ill. App. 635; Brainerd *v.* Dunning, 30 N. Y. 211; Lentz *v.* Chambers, 27 N. C. 587, 44 Am. Dec. 63; McKay *v.* Irion, (Tex. App. 1890) 15 S. W. 123. But see Coe *v.* Higdon, 1 Disn. (Ohio) 393, 12 Ohio Dec. (Reprint) 691, where it was held that an execution creditor who, with knowledge that the property sold did not belong to the execution debtor, received the proceeds of the sale did not become liable for the wrongful levy but merely for the amount of money received by him with interest.

If the execution creditor receives the proceeds of a sale directed by his agent, and does not repudiate the trespass upon learning that the sale was wrongfully made, he is liable as if he had expressly authorized the act. Murray *v.* Bininger, 3 Abb. Dec. (N. Y.) 336, 3 Keyes (N. Y.) 107, 3 How. Pr. (N. Y.) 425.

In England it has been held that the execution creditor who accepts the proceeds of a wrongful sale does not become liable for the trespass of the officer. Wilson *v.* Tummon, 1 D. & L. 513, 12 L. J. C. P. 306, 6 M. & G. 236, 6 Scott N. R. 894, 46 E. C. L. 236.

7. Clark *v.* Woodruff, 83 N. Y. 518 [*affirming* 18 Hun 419], where it was held further that an execution creditor will not be affected by a knowledge on the part of his attorney that the sale was wrongfully made.

8. Buchanan *v.* Goeing, 3 Ill. App. 635.

9. Palmer *v.* Shenkel, 50 Mo. App. 571; Kamerick *v.* Castleman, 29 Mo. App. 658; Luebbering *v.* Oberkoetter, 1 Mo. App. 393;

4. Purchaser at Execution Sale. The purchaser at an execution sale who does nothing more than purchase is not liable in trespass for the act of the officer in making a wrongful levy and sale. His purchase does not make him a trespasser by relation.[10] Neither is the purchaser liable in trespass for subsequently carrying away the goods purchased, provided he received possession of the goods from the officer at the time of the sale;[11] but if the goods are not delivered at the time of the sale he is liable in trespass for subsequently taking and carrying them away.[12]

5. Persons Not Parties to Writ. A stranger or person not a party to the suit who officiously directs an officer in making a wrongful levy,[13] or who accompanies an officer and assists him in the commission of the wrongful act is equally liable with the officer for the injury sustained.[14]

C. Persons Entitled to Recover Damages. Any person having an interest in the property who sustains an injury by the wrongful taking thereof may maintain an action for the damages sustained.[15]

D. Proceedings to Recover For Wrongful Execution[16] **— 1. Nature of Action.** The nature of the action to be resorted to in cases of wrongful executions depends upon the circumstances of the particular injury and the character

Herring *v.* Hoppock, 15 N. Y. 409; Davis *v.* Newkirk, 5 Den. (N. Y.) 92; Martin *v.* Buffaloe, 128 N. C. 305, 38 S. E. 902, 83 Am. St. Rep. 679. But see Weller *v.* Hanaur, 95 Fed. 236; McLeod *v.* Fortune, 19 U. C. Q. B. 98, where it was held that while plaintiff in execution by signing such a bond would become a joint trespasser with the officer, yet the surety on the bond having no control over the writ and receiving no benefit from its execution would not be so liable.

The nature of the liability of an obligor on an indemnity bond as regards the officer arises out of a contract of indemnity, but as regards the person whose property is wrongfully sold the liability is in tort by reason of such obligor being a co-trespasser with the officer. Martin *v.* Buffaloe, 128 N. C. 305, 38 S. E 902, 83 Am. St. Rep. 679.

In construing a bond of indemnity, a construction will not be given which will make the obligors liable for a trespass which they did not direct or authorize, if the bond can reasonably be construed otherwise. Clark *v.* Woodruff, 83 N. Y. 518 [*affirming* 18 Hun 419].

An officer cannot release a surety on an indemnity bond from his liability in tort to the person injured, since the surety is a joint trespasser with the officer. Martin *v.* Buffaloe, 128 N. C. 305, 38 S. E. 902, 83 Am. St. Rep. 679.

The taking of an indemnity bond in the manner provided by statute relieves the officer in some jurisdictions from liability (Brock *v.* Church, 5 Ky. L. Rep. 855; Bradley *v.* Holloway, 28 Mo. 150), but the right of action on the indemnity bond does not preclude an action of trespass against the execution creditor (State *v.* Donnelly, 9 Mo. App. 519).

10. Carter *v.* Clark, 28 Conn. 512; Gloss *v.* *v.* Black, 91 Pa. St. 418; Talmadge *v.* Scudder, 38 Pa. St. 517; Ward *v.* Taylor, 1 Pa. St. 238; Hammon *v.* Fisher, 2 Grant (Pa.) 330; Hoxsie *v.* Nodine, 123 Fed. 379, 61 L. R. A. 223.

The purchaser is liable to the owner in an action of replevin, but not in trespass, although he knew at the time of the purchase that the sale was wrongful. Ward *v.* Taylor, 1 Pa. St. 238.

11. Gloss *v.* Black, 91 Pa. St. 418; Hammon *v.* Fisher, 2 Grant (Pa.) 330.

12. Talmadge *v.* Scudder, 38 Pa. St. 517.

13. Fish *v.* Street, 27 Kan. 270; Youngs *v.* Moore, 7 J. J. Marsh. (Ky.) 646.

14. McElhenny *v.* Wylie, 3 Strobh. (S. C.) 284, 49 Am. Dec. 643.

15. Parker *v.* Hale, (Tex. Civ. App. 1903) 78 S. W. 555, holding that a tenant on shares may maintain an action for the damages caused by a wrongful levy on a crop notwithstanding the lien of the landlord for his share and for supplies furnished.

An assignee in insolvency proceedings is not entitled to recover damages for a wrongful sale of the debtor's property where the sale was made before the adjudication of insolvency. Goss *v.* Cardell, 53 Vt. 447, which case was decided under a statute providing that the title of the debtor shall be vested in the assignee as it existed at the time of the adjudication.

The owner of an ultimate estate in chattels cannot maintain an action on the case for a wrongful sale, although the officer professed to sell the entire property. Holmesley *v.* Hogue, 49 N. C. 481, where it was held that since the execution sale passes only such an interest as the execution debtor has the ultimate estate is not thereby interfered with.

To maintain an action of trespass for a mere wrongful levy upon property, plaintiff must have had either the actual possession or the right of possession at the time of the levy, but in case of a wrongful sale a conditional reversionary right of possession is sufficient to support the action. Dixon *v.* White Sew.-Mach. Co., 128 Pa. St. 397, 18 Atl. 502, 15 Am. St. Rep. 683, 5 L. R. A. 659.

16. As to actions against the officer see, generally, Sheriffs and Constables.

of the relief sought. The owner of property which has been wrongfully taken under execution may maintain replevin to recover it,[17] or he may treat the taking as a conversion and sue for damages.[18] In actions for the recovery of damages, the general rule is that if the injury is the immediate result of the wrongful act complained of, trespass is the proper action, but if merely consequential the remedy should be an action on the case.[19] Trespass is the proper remedy for an arrest under void process,[20] or where the execution debtor has sufficient property to satisfy the judgment,[21] or for a wrongful levy upon property of a person other than the judgment debtor.[22] The owner of property which has been wrongfully seized under execution may, however, waive the trespass and sue in trover for the conversion of the property taken.[23] Case is the proper remedy for taking property under voidable process,[24] or for maliciously suing out an execution upon a voidable judgment.[25] As the relief afforded by the legal remedies in the case of wrongful executions is full and ample, equity will not entertain a bill for this purpose except under extraordinary circumstances.[26]

2. CONDITIONS PRECEDENT.[27] Where an execution debtor is arrested under process issued upon a judgment which has been paid or otherwise discharged, it is not necessary to obtain a rule setting aside the process as a condition precedent to the right to maintain an action for the wrongful arrest,[28] but the rule is otherwise where the process is merely voidable.[29] A person whose property is wrongfully taken under an execution against another person is not bound to notify the officer that the property is his, or to oppose the sale, but may at once seek relief by suit.[30]

3. PARTIES.[31] If property belonging to different persons is wrongfully taken under the same execution, the owner of each parcel should sue separately for the injury sustained.[32] Several defendants cannot be proceeded against jointly for a wrongful execution unless they are jointly liable, and to create such a liability there must have been a concert of action between them.[33] Provision is in some cases made by statute for substituting the execution creditor as a defendant where the action has been brought against the officer.[34]

17. Allen *v.* Crary, 10 Wend. (N. Y.) 349, 25 Am. Dec. 566; Shearick *v.* Huber, 6 Binn. (Pa.) 2. And see, generally, REPLEVIN.

Under the Pennsylvania statute replevin will not lie against the officer but only against his vendee. Shaw *v.* Levy, 17 Serg. & R. 99. See also Shearick *v.* Huber, 6 Binn. 2.

18. Sammis *v.* Sly, 4 Ohio Cir. Dec. 60.

Trover and replevin are concurrent remedies. Alvord *v.* Haynes, 13 Hun (N. Y.) 26.

19. Berry *v.* Hamill, 12 Serg. & R. (Pa.) 210. And see CASE, ACTION ON, 6 Cyc. 684. It should be noted, however, in this connection that the distinctions existing at common law between trespass and case have very generally been abolished or modified by statute. See CASE, ACTION ON, 6 Cyc. 683.

Where the act is done under void process the injury is direct and the action should be in trespass, but if merely voidable, case is the proper remedy. Dixon *v.* Watkins, 9 Ark. 139; Barnett *v.* Reed, 51 Pa. St. 190, 88 Am. Dec. 574; McCool *v.* McCluny, Harp. (S. C.) 486.

20. McCool *v.* McCluny, Harp. (S. C.) 486.

21. Berry *v.* Hamill, 12 Serg. & R. (Pa.) 210; Allison *v.* Rheam, 3 Serg. & R. (Pa.) 139, 8 Am. Dec. 644.

22. Tatum *v.* Morris, 19 Ala. 302; Collins *v.* Waggoner, 1 Ill. 51; Wickliffe *v.* Sanders, 6 T. B. Mon. (Ky.) 296.

23. Christopher *v.* Covington, 2 B. Mon. (Ky.) 357; Sanders *v.* Vance, 7 T. B. Mon. (Ky.) 209, 18 Am. Dec. 167. And see, generally, TROVER AND CONVERSION.

If the action is brought in trover, no damages for the original taking can be recovered. Wickliffe *v.* Sanders, 6 T. B. Mon. (Ky.) 296.

24. Dixon *v.* Watkins, 9 Ark. 139.

25. Barnett *v.* Reed, 51 Pa. St. 190, 88 Am. Dec. 574.

26. McDaniel *v.* Fox, 77 Ill. 343; Farrell *v.* McKee, 36 Ill. 225; Van Norden *v.* Morton, 99 U. S. 378, 25 L. ed. 453.

27. **Conditions precedent** see ACTIONS, 1 Cyc. 692 *et seq.*

28. Deyo *v.* Van Valkenburgh, 5 Hill (N. Y.) 242.

29. Chapman *v.* Dyett, 11 Wend. (N. Y.) 31, 25 Am. Dec. 598; Reynolds *v.* Corp., 3 Cai. (N. Y.) 267. See also Deyo *v.* Van Valkenburgh, 5 Hill (N. Y.) 242.

30. Duperron *v.* Van Wickle, 4 Rob. (La.) 39, 39 Am. Dec. 509.

31. **For matters relating to parties** generally see PARTIES.

32. Weddington *v.* McGuire, 12 Ky. L. Rep. 143.

33. Hoxsie *v.* Nodine, 123 Fed. 379, 61 C. C. A. 223.

34. Gunn *v.* Gudehus, 15 B. Mon. (Ky.) 447, holding that in such cases the indemnifying bond taken by the officer affords the same

4. Pleading.[35] In an action for damages for a wrongful sale under execution, the complaint should state the articles sold and the value of each or show some reason why such statement cannot be given.[36] Where the fact that the act complained of was done maliciously is relied upon, it is not necessary that the word "malice" should be used in the complaint if language describing or defining it is used.[37] In an action of trespass for a wrongful arrest a replication to a plea of justification under legal process does not sufficiently allege a payment of the judgment unless it states facts showing that the payment was made and received in discharge of the debt and so as to extinguish it.[38]

5. Evidence, Presumptions, and Burden of Proof.[39] In an action against an execution creditor for a wrongful execution, it will not be presumed that he intended that the officer should take any action not authorized by the terms of the writ,[40] and no recovery can be had against him without proof that he authorized, directed, or ratified the wrongful act.[41] In such cases the burden of proving the ownership, seizure, and value of the property, as well as that of showing the existence of any circumstances which would warrant the allowance of exemplary damages, is upon plaintiff.[42] When, however, property wrongfully levied upon is in possession of the claimant at the time of the levy, his possession is *prima facie* evidence of ownership, and the burden is upon defendant to show the contrary.[43] Where a sale is made in a manner other than that which the statute directs the presumption is that the price realized is less than if the statute had been complied with.[44] In an action against an execution creditor for wrongfully causing a levy to be made under an execution issued upon a void judgment, the act of the officer in making the levy raises the presumption that the judgment was regular and the burden is upon the plaintiff to show the contrary.[45] A statutory provision making a judgment against a principal on an official or judicial bond presumptive evidence against the surety does not apply to bonds of indemnity.[46] Evidence of the cost price of property levied upon,[47] and also of what the property brought at the execution sale, is admissible for the purpose of showing its actual value.[48] No evidence is of course admissible which is not justified by the allegations of the pleadings.[49]

6. Defenses. When an execution is sued out on a satisfied judgment the fact that the debtor received the surplus of the proceeds of the sale does not deprive him of his right of action,[50] nor does the recovery of property wrongfully taken bar an action for the unlawful seizure and detention.[51] An execution creditor who causes the property of a person other than the execution debtor to be wrongfully taken is not relieved from liability by the fact that he derived no advantage from the levy.[52] It is no defense to an action for a wrongful sale of exempt

protection to the substituted defendant as to the officer.

35. **Pleading** generally see Pleading.

36. Beck *v.* Avondino, 82 Tex. 314, 18 S. W. 690.

37. Gensburg *v.* Field, 104 Iowa 599, 74 N. W. 3.

38. Breck *v.* Blanchard, 22 N. H. 303, 20 N. H. 323, 51 Am. Dec. 222.

39. **Evidence** generally see Evidence.

40. See *supra*, XV, B, 2.

41. Draper *v.* Buxton, 90 N. C. 182.

42. Willis *v.* Hudson, 72 Tex. 598, 10 S. W. 713.

43. Mayer *v.* Wilkins, 37 Fla. 244, 19 So. 632.

44. Gunter *v.* Cobb, 82 Tex. 598, 17 S. W. 848.

45. O'Briant *v.* Wilkerson, 122 N. C. 304, 30 S. E. 126.

46. Martin *v.* Buffaloe, 128 N. C. 305, 38 S. E. 902, 83 Am. St. Rep. 679, holding that in actions against the sureties on indemnity bonds the action is in tort and not upon the bond.

47. McElrath *v.* Kintzing, 5 Pa. St. 336.

48. Montignani *v.* E. V. Crandall Co., 34 N. Y. App. Div. 228, 54 N. Y. Suppl. 517; White *v.* Pease, 15 Utah 170, 49 Pac. 416.

49. Lee *v.* Conard, 1 Whart. (Pa.) 155, holding that, under a complaint alleging that an execution was sued out upon a judgment which had been paid, evidence is not admissible to show the payment of the debt before the judgment was entered.

50. Brown *v.* Feeter, 7 Wend. (N. Y.) 301.

51. Walker *v.* Fuller, 29 Ark. 448; Clark *v.* Dressel, 56 Md. 147.

52. Lawrence *v.* Hozey, 6 Rob. (La.) 385 (where the proceeds of the sale were paid to another creditor); State *v.* Mitchell, 1 Mo. App. 386 (where, pending the proceedings, the

property that the debtor had at the time of the levy and sale other property concealed sufficient to pay the debt.[53] It is no defense to an action for a wrongful execution that defendant was acting in aid of the officer, when the assistance was not rendered at the officer's request.[54] The fact that an officer proceeded under a writ valid on its face and issuing out of a court of competent jurisdiction is a good defense to the liability of the officer for a wrongful execution, but the execution creditor who caused the writ to be issued or directed the levy or sale must show a valid judgment.[55] When plaintiff has an election of remedies, the form of action chosen is open to all the defenses peculiar to that form of action.[56]

7. Limitations.[57] In an action of trover for the taking of goods under an execution which is irregular and void, the statute begins from the date of the original taking of the goods and not from the date that the execution was set aside.[58] Where the action is for wrongfully suing out an execution upon a satisfied judgment the statute begins to run from the time the execution is sued out, and is not suspended by injunction proceedings restraining the enforcement of the execution.[59] The period of limitation depends upon the statutes of the state where the action is brought.[60]

8. Damages[61] **— a. In General.** In the absence of any circumstances which would warrant the allowance of exemplary damages,[62] the recovery in an action for wrongful execution should be such as will compensate the injured party for the actual loss sustained.[63] Where there is merely a wrongful seizure, recovery will be limited to the special damages sustained thereby,[64] and if no such injury is shown the damages will be nominal only.[65] Where the property has been sold or so lost to the owner as to amount to a conversion, it has been variously held that the damages should be the value of the property,[66] or the value at the time

execution debtor became a bankrupt and the property was taken by his assignee).

53. Megehe *v.* Draper, 21 Mo. 510, 60 Am. Dec. 245.

54. Merrill *v.* Near, 5 Wend. (N. Y.) 237.

55. *Arkansas.*— Dixon *v.* Watkins, 9 Ark. 139.

Kansas.— Allen *v.* Corlew, 10 Kan. 70.

New York.— Lewis *v.* Palmer, 6 Wend. 367.

North Carolina.— O'Briant *v.* Wilkerson, 122 N. C. 304, 30 S. E. 126.

West Virginia.—Collins *v.* Mann, 15 W. Va. 171.

Wisconsin.— Marks *v.* Wright, 81 Wis. 572, 15 N. W. 882.

England.— Barker *v.* Braham, 3 Wils. C. P. 368, 2 W. Bl. 866.

See 21 Cent. Dig. tit. "Execution," § 1396.

The protection of a writ regular on its face applies only to the taking of property of the execution debtor and does not justify the taking of property of another person. State *v.* Rucker, 19 Mo. App. 587.

A voidable judgment and execution after they are set aside cannot be pleaded as a defense to anything done under them. Anderson *v.* Sloane, 72 Wis. 566, 40 N. W. 214, 7 Am. St. Rep. 885.

56. Meredith *v.* Richardson, 10 Ala. 828.

57. Limitations generally see Limitations of Actions.

58. Read *v.* Markle, 3 Johns. (N. Y.) 523.

59. Wood *v.* Currey, 57 Cal. 208.

60. In California the action is barred in two years. Wood *v.* Currey, 57 Cal. 208.

In Louisiana the action is governed by the statute relating to quasi-offenses and must be brought within one year. Deliole *v.* Morgan, 2 Mart. N. S. 24.

61. Damages generally see Damages.

62. See *infra*, XV, D, 8, c.

63. Warner *v.* Ostrander, 44 Ill. 356.

64. Phœnix Mut. L. Ins. Co. *v.* Arbuckle, 52 Ill. App. 33.

Damages for wrongful seizure and detention of property may include interest on the value of the property during the period of detention, loss due to any depreciation in value, and the expenses of procuring a return of the property. Anderson *v.* Sloane, 72 Wis. 566, 40 N. W. 214, 7 Am. St. Rep. 885.

65. Presas *v.* Lanata, 11 Rob. (La.) 288.

66. *Iowa.*— Gensburg *v.* Field, 104 Iowa 599, 74 N. W. 3.

Louisiana.—Duperon *v.* Van Wickle, 4 Rob. 39, 39 Am. Dec. 509.

Nebraska.— Pope *v.* Benster, 42 Nebr. 304, 60 N. W. 561, 47 Am. St. Rep. 703.

New Hampshire.— Gibson *v.* Stevens, 7 N. H. 352.

New York.— Lewis *v.* Palmer, 6 Wend. 367.

Pennsylvania.— Rogers *v.* Fales, 5 Pa. St. 154.

See 21 Cent. Dig. tit. "Execution," § 1403.

The value of the property means the actual value and not the price received at the sale. Duperron *v.* Van Wickle, 4 Rob. (La.) 39, 39 Am. Dec. 509; Pozzoni *v.* Henderson, 2 E. D. Smith (N. Y.) 146.

The price for which property is sold is merely evidence to be considered by the jury in determining the true value. Rogers *v.* Fales, 5 Pa. St. 154.

of the conversion with interest to the time of the trial,[67] or with such an allowance as will compensate the owner for the use of the property during this period.[68] Where goods in the possession of a pledgee are wrongfully taken under execution, the pledgee may recover the full value of the property, and not merely the amount of his lien against the pledgor.[69] Where property is sold under an execution issued upon a judgment which is afterward reversed, the measure of damages is the value of the property and not the amount for which it was sold.[70] Where an interest in property is wrongfully sold and the interest has no actual value, only nominal damages can be recovered.[71] The damages must be such as can be ascertained by certain proof and not such as are merely speculative; loss of credit,[72] and a loss of profits from the interruption of business have generally been held to be of the latter character.[73] Attorneys' fees have in some cases been allowed as an element of damages.[74] The amount of damages which may be recovered depends also upon the nature of the action in which the relief is sought.[75]

b. Matters in Mitigation. Where property has been wrongfully taken from the owner under execution, he cannot be compelled to receive back the property,[76] but if it is received the fact will be considered in mitigation of damages.[77] And where the judgment was valid and the property was subject to execution and the wrongful act consists merely in the manner in which the levy and sale were made the amount of the proceeds actually applied to the satisfaction of the judgment should be allowed in mitigation of plaintiff's damages.[78] Where the property is bid in by plaintiff or for his benefit, the measure of damages is not the value of the property but the price paid at the sale with interest and such special damages as may have been sustained by the detention.[79] So also, if a per-

67. *Arkansas.*— Summers *v.* Heard, 66 Ark. 550, 50 S. W. 78, 51 S. W. 1057.

Iowa.— Russell *v.* Huiskamp, 77 Iowa 727, 42 N. W. 525.

Kentucky.— Sanders *v.* Vance, 7 T. B. Mon. 209, 18 Am. Dec. 167.

Minnesota.— Murphy *v.* Sherman, 25 Minn. 196.

Missouri.— Eichelmann *v.* Weiss, 7 Mo. App. 87.

Texas.— Nelson *v.* Ashmore, (Civ. App. 1900) 56 S. W. 938; Richardson *v.* Jankofsky, (Civ. App. 1893) 23 S. W. 815.

See 21 Cent. Dig. tit. "Execution," § 1403.

An action of trespass for a wrongful sale of personal property is to be regarded as an action of trover as regards the measure of damage, and plaintiff should recover the value of the property with interest. Walker *v.* Borland, 21 Mo. 289; Felton *v.* Fuller, 36 N. H. 226.

The true measure of damages for a wrongful sale under execution is the actual value of the property with interest, and not the value in the retail market. State *v.* Smith, 31 Mo. 566.

68. Yancy *v.* Felker, 3 Tex. App. Civ. Cas. § 249.

69. Soule *v.* White, 14 Me. 436.

70. Smith *v.* Zent, 83 Ind. 86, 43 Am. Rep. 61, 83 Ind. 442; Thompson *v.* Thompson, 1 N. J. L. 159.

71. Geisendorff *v.* Eagles, 70 Ind. 418, where it was held that only nominal damages could be recovered for the wrongful sale of a valueless equity of redemption in mortgaged chattels.

72. Neese *v.* Radford, 83 Tex. 585, 19 S. W. 141.

73. Summers *v.* Heard, 66 Ark. 550, 50 S. W. 78, 51 S. W. 1057; Selden *v.* Cashman, 20 Cal. 56, 81 Am. Dec. 93; Anderson *v.* Sloane, 72 Wis. 566, 40 N. W. 214, 7 Am. St. Rep. 885.

Any loss of profits occasioned by the stoppage of business, which is not speculative in character, is a proper element of damage. Chapuis *v.* Waterman, 34 La. Ann. 58. See also Deleshaw *v.* Edelen, 31 Tex. Civ. App. 416, 72 S. W. 413.

74. Chapuis *v.* Waterman, 34 La. Ann. 58.

As an element of exemplary damages, attorneys' fees may be allowed (Neese *v.* Rodford, 83 Tex. 585, 19 S. W. 141; Deleshaw *v.* Edelen, 31 Tex. Civ. App. 416, 72 S. W. 413); but not as an element of actual damages (Neese *v.* Radford, *supra*).

75. Wickliffe *v.* Sanders, 6 T. B. Mon. (Ky.) 296, where it was held that if a plaintiff sues in trover instead of trespass, no damages for the original taking of the property can be recovered.

76. Howell *v.* Caryl, 50 Mo. App. 440.

77. Walker *v.* Fuller, 29 Ark. 448.

Matter in mitigation of damages as to one co-trespasser should extend to the others also. Bowman *v.* Davis, 13 Colo. 297, 22 Pac. 507.

A recaption of goods by a partner of plaintiff is in legal effect a recaption on the joint account of himself and plaintiff, and to this extent will reduce the damages. Nightingale *v.* Scannell, 18 Cal. 315.

78. Hillman *v.* Edwards, (Tex. Civ. App. 1903) 74 S. W. 787. See also Avindino *v.* Beck, (Tex. Civ. App. 1903) 73 S. W. 539.

79. Felton *v.* Fuller, 35 N. H. 226; McInroy *v.* Dyer, 47 Pa. St. 118.

son against whose property an execution is wrongfully issued voluntarily disposes of the property at a reduced price in order to apply the proceeds to the execution, the measure of damages is the amount received for the property and not the actual value.[80]

c. Exemplary Damages. Exemplary damages may be allowed where it is shown that the act complained of was done wantonly, maliciously, or with a reckless disregard of the rights of the injured party.[81] Whether such circumstances exist is a question of fact for the jury,[82] and unless so found by them the damages must be compensatory.[83]

EXECUTIVE.[1] As an adjective, qualifying for, or pertaining to the execution of the laws.[2] As a noun, that department of the government which carries the laws into effect,[3] or secures their due performance;[4] the person who executes the laws.[5] The word is also used as an impersonal designation of the chief execu-

80. Walker *v.* Fuller, 29 Ark. 448.

81. McDaniels *v.* Fox, 77 Ill. 343; Polykranas *v.* Krausz, 73 N. Y. App. Div. 583, 77 N. Y. Suppl. 46; Barnett *v.* Reed, 51 Pa. St. 190, 88 Am. Dec. 574; Nagle *v.* Mullison, 34 Pa. St. 48; McDevitt *v.* Vial, 7 Pa. Cas. 585, 11 Atl. 645; Farr *v.* Swigart, 13 Utah 150, 44 Pac. 711.

One whose property has been sold under execution against a third person after notice of his title may recover exemplary damages. Dutton *v.* Rousseau, 12 Rob. (La.) 534.

82. Pratt *v.* Pond, 42 Conn. 318; Hoxsie *v.* Nodine, 123 Fed. 379, 61 C. C. A. 223.

83. *California.*—Selden *v.* Cashman, 20 Cal. 56, 81 Am. Dec. 93.

Illinois.— Miller *v.* Kirby, 74 Ill. 242; Beveridge *v.* Rawson, 51 Ill. 504.

Louisiana.—Gilkerson-Sloss Commission Co. *v.* Yale, 47 La. Ann. 690, 17 So. 244; Townsend *v.* Fontenot, 42 La. Ann. 890, 8 So. 616.

Pennsylvania.— Gedusky *v.* Rubinsky, 21 Pa. Co. Ct. 549.

Texas.— Willis *v.* Chowning, 18 Tex. Civ. App. 625, 46 S. W. 45.

See 21 Cent. Dig. tit. "Execution," § 1404.

The fact that a suit is brought upon a claim under advice of counsel a few days before the claim is due does not warrant exemplary damages. Fush *v.* Egan, 48 La. Ann. 60, 19 So. 108.

Where an execution creditor acting under advice of counsel merely directs a sale of goods regularly returned as attached, exemplary damages should not be allowed. Gedusky *v.* Rubinsky, 21 Pa. Co. Ct. 549.

Where an execution is levied in ignorance of the filing of a supersedeas bond exemplary damages will not be allowed. Neese *v.* Rodford, 83 Tex. 585, 19 S. W. 141.

The mere fact that a judgment is void, where it is not shown that it was known to be void by the execution creditor, will not warrant the conclusion that a seizure made thereunder was malicious. Selden *v.* Cushman, 20 Cal. 56, 81 Am. Dec. 93.

The fact that property is taken by an officer after being warned that it is not the property of defendant in execution will not warrant a finding that the seizure under the writ was malicious. Beveridge *v.* Rawson, 51 Ill. 504.

Refusal of an officer to investigate the asserted title of the wife of an execution debtor to property levied upon is not conclusive of malice. Pratt *v.* Pond, 42 Conn. 318.

In an action against both the officer and the execution creditor the proof of malice on the part of the execution creditor cannot be made a ground for the recovery of exemplary damages against the officer. Nightingale *v.* Scannell, 18 Cal. 315.

1. Compared with "ministerial" see People *v.* Salsbury, 134 Mich. 537, 549, 96 N. W. 936.

Distinguished from "judicial" and "legislative" see State *v.* Beal, 24 Fla. 293, 316, 4 So. 899, 12 Am. St. Rep. 204; State *v.* Denny, 118 Ind. 382, 388, 21 N. E. 252, 4 L. R. A. 79 [*quoting* Webster Dict.]; Com. *v.* Hall, 9 Gray (Mass.) 262, 267, 69 Am. Dec. 285; Wayman *v.* Southard, 10 Wheat. (U. S.) 1, 46, 6 L. ed. 253.

2. Webster Dict. [*quoted* in State *v.* Denny, 118 Ind. 382, 388, 21 N. E. 252, 4 L. R. A. 79].

"Executive business" includes all acts which an officer is directed to perform by legislative authority, and which he is bound to obey. Altemus *v.* New York, 6 Duer (N. Y.) 446, 455.

"Executive class" includes all persons who have functions in the administration of public affairs, as contradistinguished from legislative and judicial functions. People *v.* Salsbury, 134 Mich. 537, 549, 96 N. W. 936.

"Executive duties" see Orchard *v.* Alexander, 157 U. S. 372, 381, 384, 15 S. Ct. 635, 39 L. ed. 737.

"Executive appointment."—Harman *v.* Harwood, 58 Md. 1, 12.

3. Webster Dict. [*quoted* in People *v.* Salsbury, 134 Mich. 537, 547, 96 N. W. 936; *In re* Railroad Com'rs, 15 Nebr. 679, 682, 50 N. W. 276; Charleston, etc., Bridge Co. *v.* Kanawha County Ct., 41 W. Va. 658, 664, 24 S. E. 1002].

4. Webster Dict. [*quoted* in Charleston, etc., Bridge Co. *v.* Kanawha County Ct., 41 W. Va. 658, 664, 24 S. E. 1002].

5. Wayman *v.* Southard, 10 Wheat. (U. S.) 1, 46, 6 L. ed. 253 [*quoted* in Patton *v.* Brady, 184 U. S. 608, 620, 22 S. Ct. 493, 46 L. ed. 713, and *citing* Cooley Tax. 34].

tive officer of a state or nation.[6] (Executive: Function,[7] see CONSTITUTIONAL LAW. Officer, see STATES; UNITED STATES. Power,[8] see CONSTITUTIONAL LAW.)

EXECUTOR DE SON TORT. See EXECUTORS AND ADMINISTRATORS.

6. Black L. Dict. [*cited* in People *v.* Salsbury, 134 Mich. 537, 550, 96 N. W. 926]. See also Opinion of Justices, 72 Me. 542, 551. *Compare* U. S. *v.* Barnabo, 24 Fed. Cas. No. 14,522, 14 Blatchf. 74, 76.

In a strict sense of the word, it may include only the governor of a state; but in a broader sense it may include all persons who perform administrative or ministerial duties. People *v.* Salsbury, 134 Mich. 537, 549, 96 N. W. 926.

7. See 8 Cyc. 857; State *v.* Hyde, 121 Ind. 20, 30, 22 N. E. 644; State *v.* Denny, 118 Ind. 382, 389, 21 N. E. 252, 4 L. R. A. 79, remarks of Coffey, J.

8. See 8 Cyc. 857.